

LEGAL FORTNIGHT

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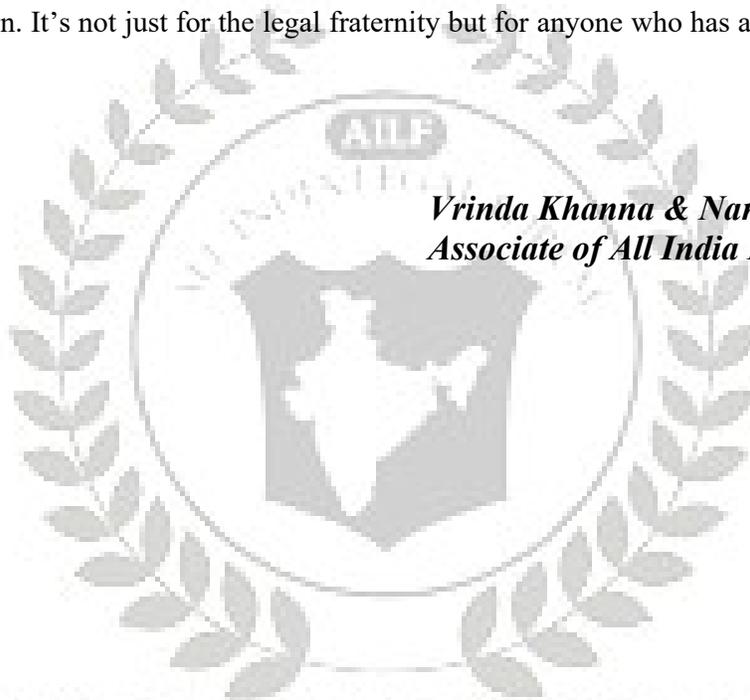


FOREWORD

More has been said about the writing of lawyers and judges than of any other group, except, of course, poets and novelists. The difference is that while the latter has usually been admired for their writing, the public has almost always damned lawyers and judges for theirs. If this state of affairs has changed in recent times, it is only in that many lawyers and judges have now joined the rest of the world is complaining about the quality of legal prose.

My best wishes to all these student contributors, for their future endeavors. My best wishes and assurance to the readers that this will add a lot to the knowledge after reading this perfect case compilation. It's not just for the legal fraternity but for anyone who has an interest in the field of law.

*By
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Associate of All India Legal Forum*



PREFACE

All India Legal Forum is replenished with information to give students a ready reference to the various areas of legal issues and news. All India Legal Forum is a team of more than 400 law students across the country to tackle basic problems which a legal researcher faces in day to day life, putting forward the basic things needed for researching and drafting.

The All India Legal forum strives at providing a valuable contribution to contemporary legal issues and development. The organization seeks to bring out a platform to provide resourceful insights on law-related topics for the ever-growing legal fraternity. All India Legal Forum doesn't just publish blogs but also guides the authors. Determination and dedication are considered as ultimate requisition to be a good researcher by the All India Legal Forum, it also thrives to instill the values.

The reason behind the smoothed running of All India Legal Forum is the official structure of the organization in which different rules are allotted by considering the strengths of the students and giving them roles accordingly through various Boards and Committees incorporated in the Organisation.

The Legal Fort Night subdues about the current legal issues and news happening around. It consists of the summaries of the Supreme Court and High Court Judgements of the 14 days. The Legal Fort Night Team keeps compiling the judgments of the Supreme Court and high court regularly. The Legal Fort Night not only compiles the judgments of the Supreme Court and High Court, but it also deals with the static law. We're glad to be a part of the All India Forum. Here's an introduction to my team:

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WHERE LAW MEETS QUALITY

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SUPREME COURT JUDGMENTS

Unitech Ltd. & Ors. Vs. Telangana State Industrial Infrastructure Corporation (TSIIC) & Ors.



[Civil Appeal No. 317 of 2021 arising out of SLP (C) No. 9019 of 2019]

[Civil Appeal No. 318 of 2021 arising out of SLP (C) No. 10135 of 2019]

[Civil Appeal No. 319 of 2021 arising out of SLP (C) No. 17529 of 2019]

Dr. Dhananjaya Y. Chandrachud, J.

- A. Background
- B. Proceedings before this Court
- C. Salient features of the transaction documents
- D. Submissions of the parties
- E. Analysis
 - E.1. Maintainability of the writ petition under Article 226
 - E.2. Contractual right to compensatory payment
 - E.3. Apportionment of the liabilities between the instrumentalities of the state of Andhra Pradesh and Telangana
- F. Summation

A. Background

1. The appeals arise from a judgment dated 1 April 2019 of a Division Bench of the High Court for the State of Telangana. Three appeals will form the subject matter of these proceedings. The three appeals which arise have been instituted by

- (i) UNITECH Limited ("Unitech");
- (ii) Telangana State Industrial Infrastructure Corporation ("TSIIC"); and
- (iii) State of Telangana.

2. In September 2007, the Andhra Pradesh Industrial Infrastructure Corporation Ltd. ("APIIC") invited bids to "develop, design and construct" an integrated township project / multi services aerospace park in the area of about 350 acres of land in Nadergul Village, Saroornagar Mandal, Ranga Reddy District. In pursuance of its press release, APIIC floated a bid document.

3. On 28 November 2007, the bid submitted by Unitech was accepted upon payment of an earnest money deposit of 20 crores. It was contractually required to pay an amount of Rs 140 crores as project land cost and Rs 5 crores towards project development expenses. A litigation in regard to the land was pending. While issuing a Letter of Award ("LoA"), APIIC made the allotment of the land subject to the outcome of the pending litigation. The LoA stipulated that:

"17. The allotment of said land is subject to the outcome of the Appeal Suit No. 274/2007 in (OS No. 155/05), WP Nos. 19670/07, 20667/07 and 22043/07 pending before the Hon'ble High Court of Andhra Pradesh."

4. Pursuant to accepting the LoA on 3 December 2007, Unitech paid the first installment of Rs 15 crores towards the purchase price of the land. This was followed by the second installment for Rs 20 crores on 4 December 2007. On 27 December 2007, it deposited an amount of Rs 5 crores towards project development expenses. On 1 January 2008, it paid the third installment of Rs 35 crores towards the purchase price of the land.

5. On 5 January 2008, APIIC while acknowledging the receipt of the three installments of Rs 70 crores towards the cost of land directed the Zonal Manager, Shamshabad Zone, Hyderabad

to hand over the project site to enable Unitech to commence survey and planning work. The fourth installment of Rs 35 crores towards the purchase price of the land was paid on 11 January 2008, while the fifth installment for another Rs 35 crores was paid on 25 January 2008. Unitech paid, in the above manner, a total amount of Rs 165 crores: Rs 140 crores towards the cost of land, Rs 20 crores towards earnest money deposit and Rs 5 crores towards project development expenses.

6. On 19 August 2008, a Development Agreement was entered into between APIIC, Unitech and Nacre Gardens Hyderabad Limited, formerly known as (Unitech Hyderabad Township Limited), a special purpose vehicle formed to execute the project.

7. On 29 April 2011, APIIC issued a notice to show cause to Unitech to commence work on the project land. On 11 May 2011, Unitech requested APIIC to intimate, within seven days, the steps being taken to handover the land with reference to the provisions of Article 13.3(b) of the Development Agreement which mandated an encumbrance-free handover. The response to APIIC's show-cause notice dated 29 April 2011 was further re-iterated in Unitech's letter dated 14 May 2011 stating that APIIC would have to first establish its title to the land and to remove the encumbrances, before work could commence.

8. On 21 May 2011, APIIC was informed that a 'political force majeure event' within the meaning of the Development Agreement had taken place. On 19 December 2011, the High Court of Andhra Pradesh in a proceeding titled as "Pratap Karan v Govt. of Andhra Pradesh", held that the Government of Andhra Pradesh did not have title to the project land. Following the decision, Unitech by its communication dated 27 March 2012 requested APIIC to clarify the position and to jointly explore possible solutions to the title dispute over the project site.

9. On 12 July 2012, Unitech addressed a letter to APIIC recording that:

"9. In view of the delay in the commencement of the Project on account of reasons attributable to APIIC alone, the Developer is suffering financial losses and great hardship. You would appreciate that financial institutions are being paid interest on the aggregate amounts paid to APIIC for the Project, and the Developer is considering further appropriate action."

On 8 April 2013, Unitech again called upon APIIC to come forward to execute the sale deed, handover the project site and ensure that the encumbrances on the project land are cleared in terms of the Development Agreement so as to comply with its obligations at the earliest.

10. The State of Andhra Pradesh was re-organized into the successor States of Andhra Pradesh and Telangana with effect from 2 June 2014 under the provisions of the Andhra Pradesh Reorganization Act, 2014. On 12 March 2015, Unitech addressed a letter to the newly-formed TSIIC (as successor of APIIC) seeking its intervention in clarifying the actual status of the extent of the land awarded to them, the cases against the erstwhile APIIC, physical handover of possession with a clear title and compensation for loss of time and opportunity. On 2 April 2015, Unitech sought a release of the earnest money deposit of Rs 20 crores, in light of the full payment of the consideration.

11. On 9 October 2015, a two-judge bench of this Court in its decision in State of Andhra Pradesh through Principal Secretary v. Pratap Karan² upheld the judgment of the High Court. After the decision of this Court, Unitech requested APIIC and TSIIC, on 14 October 2015, to refund all the amounts which have been received in relation to the land together with interest and damages for the loss suffered by them, which included the cost of borrowing capital from banks, expenses for planning and designing, opportunity costs and other costs for development.

12. On 24 December 2015, Unitech sought a refund of an amount of Rs 457 crores towards principal and interest. This was followed by reminders on 31 May 2016 and 7 June 2016. An advocate's notice was also issued on 13 June 2016.

13. Initially, invoking the jurisdiction under Article 32 of the Constitution, Unitech filed proceedings before this Court which were disposed on 1 May 2017³ by granting liberty to move the High Court under Article 226. A Writ Petition under Article 226 was instituted before the High Court for the State of Telangana⁴ seeking a refund of Rs 165 crores together with interest at the SBI Prime Lending Rate ("SBI- PLR") from the date of payments. By a judgment and order dated 23 October 2018, a Single Judge of the High Court allowed Unitech's Writ Petition. The concluding paragraphs 61 to 64 of the judgment are extracted below:

"61. In the instant case, retention of the amounts paid by the petitioners by the respondents is against the fundamental principles of justice, equity and good conscience and clearly amounts to unjust enrichment of the respondents particularly when such a retention is arbitrary and also violates Article 14 and 300-A of the Constitution of India. Therefore, the respondents are bound to make restitution of the amounts claimed by petitioners with interest as per SBI Prime Lending Rate as per Clause 14.3.1 r/w Clause 1.1.(1) of the Development Agreement from the date of receipt of the said amount till payment.

"62. According to the petitioners, as on 30-09-2018, the following amounts are payable:

Interest was calculated compounded annually @ SBI PLR Rate. Counsel for petitioner stated that since SBI PLR was only available till 5th Oct 2015 as per SBI website, post that period, SBI PLR has been taken at same rate as 5th Oct 2015 i.e. 14.05% p.a.

63. The respondents have not disputed either the dates of the payments or the interest at SBI Prime Lending Rate mentioned by the petitioners or placed any material to contradict the same.

64. Therefore I hold that the amount of Rs.660.55 crores is due and payable to the petitioners by respondents, which shall be paid by respondents to petitioner no.3 within 4 weeks from today. However, they are entitled to recover it from the State of Andhra Pradesh and the APIIC, if under law they are entitled to do so. This does not preclude the petitioners from claiming other amounts from respondents towards damages under other heads, if they are entitled to do so under law."

(emphasis supplied)

14. A Writ Appeal was filed before the High Court by TSIIC and the State of Telangana. The Division Bench of the High Court upheld the order of the Single Judge on the liability of TSIIC to refund an amount of Rs 165 crores to Unitech. However, the Division Bench directed a refund of the principal sum of Rs 165 crores with interest from 14 October 2015 at the SBI-PLR, as opposed to the dates of payment of installments, beginning from September 2007.

15. The Division Bench of the High Court has come to the conclusion that in the exercise of the writ jurisdiction under Article 226, the Single Judge's decision had aligned itself with the

line of precedent of this Court; justifiably entertained the writ petition and directed a refund of the consideration. However, the order of the Single Judge directing the payment of interest compounded inter alia at the SBI- PLR from the dates of payment commencing from September 2007 has been modified in terms of the direction requiring the payment of interest at the SBI- PLR from 14 October 2015. In taking this view, the Division Bench held:

(i) Under the LoA dated 28 November 2007, Unitech was put to notice that the award of the contract was subject to the outcome of a litigation which was pending before the High Court;

(ii) Even the advertisement for the award of the contract indicated that it would be subject to the outcome of a first appeal which was pending before the High Court;

(iii) Unitech accepted the award of the contract on 3 December 2007 and made its payments between September 2007 and January 2008;

(iv) The release of the earnest money deposit was sought on 2 April 2015 and a refund of the entire amount paid with interest, was claimed for the first time on 14 October 2015, after the judgment of the High Court attained finality through the decision of this Court dated 9 October 2015; and

(v) Unitech was aware of the pending litigation and was awaiting the outcome of the civil appeal and the tenor of the correspondence indicates that they wished to continue with the project.

On the above premises, the Division Bench of the High Court took a considered view that Unitech's request for a refund on 14 October 2015, after the decision of this Court confirming that the Government of Andhra Pradesh had no title to the land, should mark the commencement of TSIIC's liability to pay interest.

B. Proceedings before this Court

16. Notice was issued by this Court in the Special Leave Petition filed by Unitech on 15 April 2019.

17. On 13 February 2020, this Court recorded that a new Board of Directors had taken charge of the business of Unitech limited. At this stage, it must be noted that the Board of Directors of Unitech has been superseded and replaced by a Board appointed by the Union government.

18. On 5 March 2020, when the proceedings came up before this Court, besides the Special Leave Petition filed by Unitech limited and its subsidiary, the Court was seized with two other Special Leave Petitions filed by TSIIC and the State of Telangana, respectively. This Court noted the submissions which were urged on behalf of TSIIC that following the re-organization of the erstwhile State of Andhra Pradesh, a division of the assets and liabilities was required to be effected by the Central government under Section 71 of the Andhra Pradesh Reorganization Act 2014, in the absence of which TSIIC could not alone be held liable to deposit the entire amount as ordered to be refunded by the High Court.

This Court recorded the submission of TSIIC that it would deposit 42 per cent of the principal sum of Rs 165 crores, amounting to Rs 69.30 crores. It additionally directed that interest commencing from 14 October 2015 must be deposited, at the rate and in the manner directed by the Single Judge of the High Court. The order of this Court dated 5 March 2020 reads thus:

"Mr C S Vaidyanathan, learned senior counsel appearing on behalf of TSIIC contests the liability of TSIIC to meet the liability for the outstanding, if any, that may be due from APIIC. In this context, reliance has been placed on Section 68 of the Andhra Pradesh Reorganisation Act 2014 which provides as follows:

"68. Provisions for various companies and corporations:- (1) The companies and corporations specified in the Ninth Schedule constituted for the existing State of Andhra Pradesh shall, on and from the appointed day, continue to function in those areas in respect of which they were functioning immediately before that day, subject to the provisions of this section.

(2) The assets, rights and liabilities of the companies and corporations referred to in subsection (1) shall be apportioned between the successor States in the manner provided in section 53." Section 71 contains the following provision:

"71. Certain provisions for companies:- Notwithstanding anything in this Part, the Central Government may, for each of the companies specified in the Ninth Schedule to this Act, issue directions-

(a) regarding the division of the interests and shares of the existing State of Andhra Pradesh in the Company between the successor States;

(b) requiring the reconstitution of the Board of Directors of the Company so as to give adequate representation to the successor States."

APIIC has been listed at Entry 17 of the Ninth Schedule to the Act.

The submission of Mr. C S Vaidyanathan is that in the absence of a division by the Central Government between the liability of APIIC and TSIIC, as contemplated in Section 71 of the Act, TSIIC cannot be held liable for the entire amount merely on the ground that the lands fall within the jurisdiction of the successor State of Telangana. The submission is that despite the objections which were raised on behalf of the TSIIC, APIIC was not impleaded as a party to the proceedings before the High Court.

Mr. Tushar Mehta, learned Solicitor General of India has appeared both in support of the Special Leave Petition which has been filed on behalf of Unitech Limited (which is now under the management of a Board of Directors constituted by the Central Government) and to oppose the Special Leave Petitions, which have been filed by TSIIC.

At this stage, we direct that APIIC be impleaded as a party in all the Special Leave Petitions. The amendment be carried out within a period of one week from today. Notice shall be issued to APIIC, the newly impleaded party, returnable in four weeks.

Mr. C.S. Vaidyanathan, learned senior counsel stated that without prejudice to the rights and contentions of TSIIC in these proceedings, it will deposit forty-two per cent of the principal sum of Rs 165 crores before this Court, which works out to Rs 69.30 crores. This amount shall be deposited within a period of four weeks from today. In addition, we are of the view that since there is effectively a money decree, TSIIC should also deposit interest computed on the aforesaid amount of Rs 69.30 crores, computed with reference to 14 October 2015 as the

commencement date, at the rate and in the manner which has been directed in the order of the learned Single Judge of the High Court, by 30 April 2020. All amounts which are deposited by TSIIC shall be subject to the result of the present proceedings and would be without prejudice to its rights and contentions.

The amount, upon deposit, shall be invested in a fixed deposit of a nationalized bank by the Registry of this Court. The newly constituted Board of Directors of Unitech Limited would be at liberty to make an application for withdrawal of the aforesaid amount."

Notice has been issued in the Special Leave Petitions filed by the State of Telangana on 22 July 2019 and by TSIIC on 29 April 2019.

19. The appeals arising out of the three proceedings under Article 136 of the Constitution have been heard together since they arise out of common facts and the same transaction.

C. Salient features of the transaction documents

20. Before dealing with the rival submissions, it is necessary to preface our analysis with a reference to the salient aspects of the transaction, leading to the award of the contract and the execution of the Development Agreement between APIIC and Unitech.

21. On 28 November 2007, the LoA was issued by APIIC to Unitech for the development of an integrated airport township / multi services aerospace park, Hyderabad on a public-private-partnership basis. Clause 3 of the LoA contemplated the payment of an amount of Rs 140 crores towards the value of the land, payable in four tranches each of Rs 35 crores. Clause 3 of the LoA was in the following terms:

"3. Total Purchase Price.

The Total Purchase Price for the Total Land shall be Rs.140 crores (Rupees one hundred and forty crores only). The value of the land is fixed at Rs.40 Lakhs per acre (Rupees Forty Lakhs per acre) and payable to APIIC as follows:

i) Rs.35 Crores (Rs. Thirty Five crores only) within 7 days from the issue of LOA to the Developer.

ii) Rs.35 Crores (Rs. thirty Five Crores only) to be paid within 30 days from the date of 1st instalment by the developer.

iii) Rs.35 Crores (Rs. thirty five Crores only) within 15 days from the date of 2nd instalment by the developer.

iv) Rs.35 Crores to be paid within 15 days from the date of 3rd instalment by the developer.

Sale Deed will be executed by APIIC in favour of Special Purpose Vehicle (SPV) only on receipt of rs.140 Crores from the Successful Bidder/SPV, as per the instalments fixed above.

"All the payments mentioned above need to be strictly adhered to by the Developer/ SPV. In the event of default of any of the instalments mentioned above, APIIC shall forthwith forfeit the respective amounts paid by the Bidder (in addition to EMD) unless APIIC has given any extension of time for any such payment. Any such default in payment by the Developer/ SPV may lead to withdrawal or cancellation of award of the project to the Successful Bidder without any obligation or liability on whatsoever account to APIIC.

APIIC decision to withdraw or cancel award of project in such default circumstances shall be final and binding on the Developer/SPV. The total Purchase Price may be adjusted based on the extent of the land verified during the joint inspection of the respective Developer and APIIC. (illegible) will be handed over to SPV on, "as is where is basis" in parcels to such (illegible)."

Clause 12 contemplated the forfeiture of the Earnest Money Deposit and / or performance security in the event of a "significant event of default" prior to execution of the Development Agreement. Among the default events were:

"(ii) Failure to pay the Total Purchase Price quoted for the land to APIIC within the time as specified in this Letter of Award."

22. Some of the salient provisions regarding transfer of land in the Development Agreement dated 19 August 2008 executed between APIIC and Unitech are set out below: (i) The

recitals to the agreement contained a specific representation that APIIC was authorized to transfer and deliver the project site admeasuring 350 acres:

"D) In terms of a Panchnama dated 8.5.2007 of the Deputy- Collector, Saroornagar Mandal, RR District has transferred Acres 373-22 Guntas in Survey No. 613 (New 119) at Nadergul Village to APIIC, and APIIC is authorised- to transfer (on an outright sale basis) and deliver the Project Site measuring Acres 350-00 Guntas to the Developer."

(ii) APIIC covenanted to transfer and sell the land together with its rights, title and interest free from all encumbrances by executing a sale deed in favour of Unitech:

"G) APIIC shall sell and transfer the Land absolutely, together with all rights, title, interest and benefits belonging thereto/ connected therewith (but free of all Encumbrances), by executing a Sale Deed in favour of the Developer."

23. (i) Article 1 contained definitions inter alia of the following expressions:

"h) "Applicable Rate" means the prime lending rate of the State Bank of India, compounded annually.

l) "Compensatory Payment" with reference to all or any portion of the Project Site (the "Compensated Land") as on a particular date (the "Reference Date") for the purposes of this Agreement including for the purposes of Clauses-14.3.1, 14.3.2, 17.6 and 23.3 hereof shall mean an amount equal to the sum aggregate of the following:

(i) The Total Purchase Price in respect of the Compensated Land until the Reference Date, as per the audited accounts of the Developer;

(ii) Interest-calculated at the rate of SBI PLR ("Interest"), on the Total Purchase Price of the Compensated, Land, from the date on which the first payment of purchase price in respect of the Compensated Land is made (whether by way of an advance or an earnest money deposit) until the Reference Date. All the above payments shall be denominated in Indian rupees."

(ii) Article 1.7 stipulates an order of priorities under which, in the event of a conflict between the agreement and any other document, the former would prevail:

"1.7 In the event of any conflict between the terms of this Agreement and the Schedules or any other document, this Agreement shall prevail. The document forming part of bidding process leading to this Agreement shall be relied upon and interpreted in the following descending order of priority;

(a) This-Agreement (Including any amendment / supplement to this Agreement) and the Detailed Project Report]

(b) The Schedules & Annexures to this Agreement

(c) The Letter of Award issued to the preferred bidder

(d) Preferred bidders bid (e) The RFP"

(iii) Under Article 3.1, APIIC undertook the obligation to transfer the land to the developer free from all encumbrances, upon the developer's payment of the last installment of the total purchase price:

"3.1 APIIC shall, forthwith upon payment of the last instalment of the Total Purchase Price by the Developer sell and transfer the Land together with all rights, title, interest and benefits belonging thereto/ connected therewith (but free of all Encumbrances), by executing a Sale Deed in favour of the Developer, which shall be registered with the concerned Registrar / Sub Registrar of Assurances. The stamp duty and registration fees payable, if any, on the Sale Deed (subject to Article 8.6 below) to be executed in favour of the Developer shall be borne by the Developer;"

(iv) APIIC acknowledged the payment of Rs 140 crores towards the total purchase price and Rs 5 crores towards project development expenses in Article 3.2.

(v) Under Article 4.1, the developer was to have exclusive promotion and advertising rights in respect of the project and under Article 4.2, could enjoy all rights, privileges and benefits as are generally available to an owner of immovable property.

(vi) Simultaneously with the payment of the last installment of the total purchase price, APIIC was required to handover to the developer:

(a) Ownership and title documents to the land;

(b) A certified copy of the government order evidencing its ownership rights over the land together with a possession certificate issued by the revenue department; and

(c) A declaration certifying that APIIC is the rightful owner of the land which was in its possession.

(vii) Article 13.3 provided for the obligations of APIIC in the following terms:

"13.3 Obligations of APIIC: For the purpose of this Agreement, each of the following shall be the "Significant APIIC Obligations" of APIIC;

a) to execute the Sale Deed within' the specified time frame, any contracts / document as may be required in accordance with the terms of this Agreement for raising of any finances in relation to the Project, and other documents with the mutual consent of the parties as may be required to be executed for the Project;

(b) to handover the Land as specified in this Agreement without any Encumbrances and with the right of way for the purpose of Development by the Developer.

(c) to clear any Encumbrances in respect of any portion of the Project Site (other than those created by the Developer) at any point in time in accordance with the provisions of this Agreement;

(d) to facilitate provisions of External infrastructure as contemplated in this Agreement."

(viii) The consequences of default by APIIC were stipulated in Article 14.3. They were envisaged in the following terms:

"14.3.1 In the event APIIC/ GOAP is unable to execute Sale Deed in favour of the Developer in respect of the Land, within the time specified, APIIC shall, if so required by the Developer,

pay Compensatory to the Developers, subject to stay /interim / injunctive / other orders issued by High Court of Andhra Pradesh or any other competent court/ s."

(ix) Article 14.3.4 stipulated that:

"14.3.4 Without prejudice to its rights and remedies the Developer shall in no event be (a) liable for failure to meet any of its obligations under this Agreement in the event such failure could be attributed to (i) a default or delay on the part of APIIC in fulfilment of any their respective obligations under Article 13.3 of this Agreement and/ or (ii) Encumbrances or Title Issues on any portion of the Land, which may have Material Adverse Effect on the Project and/ or (iii) Occurrence of Force Majeure Events, and (b) required to pay any interest or make any payment (including Revenue Share) or provide any performance / bank guarantee or other security to APIIC during (i) the continuance of any default on delay on the part of APIIC in fulfilment of their obligations under Article 13.3 of this Agreement the Project Agreements, and/ or (ii) the period when the development of Project is impacted due to Force Majeure events & Title Issues on the Project Site."

(x) Article 17 of the Development Agreement contains stipulations in regard to force majeure events. Article 17.2(a) defined 'political force majeure events':

"17.2 (a) Political Force Majeure Events, comprising Acts of War, invasions, armed conflicts, terrorism, riots, strikes, lockouts, curfews, restraints, acts of Government (including expropriation or compulsory acquisition of any Project Assets), or Change in Law (such as change in policies of Gol in relation to townships, foreign direct investment), which event/s significantly impact the Project, direct litigation related to APIIC's / GoAP's title to the Project Site), stay/interim/ injunctive/other orders issued by the Court, unlawful or unauthorised or without jurisdiction revocation of or refusal to renew or grant without valid cause any consent or approval required by the Developer or any of the other Person to perform their respective obligations under the Project Agreements (provided that such delay, modification, denial, refusal or revocation did not result from the Developer's or any of its contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such consents or permits), or events of similar nature, in each case which materially affect the implementation of the Project."

(emphasis supplied)

(xi) Article 17.6 stipulates that in the event of a political force majeure event continuously impacting upon the project as a material adverse effect for over nine months, the developer would be entitled to issue a notice of termination. Upon such termination, APIIC was required to pay the 'compensatory payment' to the developer:

"17.6 Termination: Either party to this Agreement may issue a notice of termination of this Agreement if a Non-Political Force Majeure Event (or its direct impact) has resulted in Material Adverse Effect on the Project and has continued for more than Nine (9) months from the date of occurrence thereof. On the other hand Developer shall be solely entitled (but not obligated) to issue notice of Termination of this Agreement if a Political Force Majeure Event (or its direct impact) has resulted in Material Adverse Effect on the Project and has continued for more than Nine (9) months from the date of occurrence thereof. Upon any such termination of this Agreement due to Political Force Majeure event, APIIC will pay the Compensatory Payment (less any insurance proceeds recovered by the Developer), to the Developer simultaneously with the Developer handing back the Unsold Property to APIIC."

D. Submissions of the parties

24. Mr N Venkataraman, learned Additional Solicitor General, appearing on behalf of the management of Unitech (appointed by the Union of India), emphasized the following undisputed facts:

- (i) Title was never conveyed by APIIC to Unitech In terms of the Development Agreement;
- (ii) By the judgment of this Court dated 9 October 2015, the dispute over the title of the Government of Andhra Pradesh over the project land was conclusively set at rest with a negative finding on title;
- (iii) An amount of Rs 165 crores has been deposited by Unitech since September 2007 with the Government of Andhra Pradesh; and
- (iv) The project cannot be implemented in the absence of title to the lands in the State Government.

25. Relying on a line of precedent of this Court, the ASG submitted that:

- (a) The entire project was premised on the conveyance of title to the land, free from all encumbrances by APIIC to Unitech;

(b) A solemn representation was held out in the Development Agreement that APIIC was in a position to convey title and possession to Unitech following the award of the contract to it as a developer;

(c) Unitech fulfilled the peremptory obligation to deposit an amount of Rs 165 crores upfront;

(d) 'Political force majeure events' included litigation relating to the title of APIIC or the Government of Andhra Pradesh. On the coming into being of a political force majeure event which caused a material adverse impact on the project for over nine months, Unitech was entitled to compensatory payment from APIIC;

(e) Upon the failure of title of the Government of Andhra Pradesh resulting from the judgment of this Court dated 9 October 2015, the developer became entitled to a refund of the amounts paid together with interest compounded annually at the SBI-PLR;

(f) The existence of an arbitration clause would not divest the High Court of its jurisdiction under Article 226 of the Constitution to order refund with interest, where a private developer who has entered into an agreement on a solemn representation of the existence of title in the Government is unable to proceed with the project due to a failure of title;

(g) The exercise of the writ jurisdiction under Article 226 in a contractual matter is not ruled out particularly in the present case where there is absolutely no dispute in regard to the basic facts;

(h) The Single Judge of the High Court had justifiably awarded interest from the date of the first payment by Unitech in 2007. The Division Bench erred in restricting the grant of interest from 14 October 2015;

(i) The litigation in regard to the title of the Government of Andhra Pradesh had nothing to do with the moneys paid by Unitech. When the moneys were paid in 2007, the refund of the amount must date back with reference to the date of the initial payment. Therefore, the interest must be computed from the date on which each of the installments were paid; and

(j) When the LoA was issued on 28 November 2007, the judgment dated 23 April 2007 held the field, which was in favour of the Government of Andhra Pradesh. Its subsequent reversal would entitle the developer to a refund with interest, as contracted from the date of the initial payment.

26. Mr C S Vaidyanathan, learned Senior Counsel appeared on behalf of the State of Telangana and TSIIC. At the outset, he has submitted that TSIIC and the State of Telangana do not dispute:

- (i) The maintainability of a writ petition under Article 226 before the High Court; and
- (ii) The fact that the land comprised within the project site is not available for utilization for the project.

The two areas on which the submissions of Mr. C S Vaidyanathan, learned Senior Counsel have been confined are: firstly, whether interest at the SBI-PLR and the date from which interest has been awarded by the Division Bench of the High Court are justified; and secondly, whether the High Court was justified in imposing the entire liability to effect the refund on TSIIC.

27. On the award of interest, the submission is that:

- (i) The LoA dated 28 November 2017 furnished notice to Unitech of the pendency of the litigation;
- (ii) Unitech and its SPV were conscious of the pendency of the appeal before the High Court arising out of the judgment dated 30 April 2007, which had ruled in favour of the title of the Government of Andhra Pradesh;
- (iii) Unitech continued to pursue the project and did not claim political force majeure, until after the decision of this court on 09 October 2015;
- (iv) In any event, the High Court has brought about a just balancing of equities by granting interest from the date of the decision of this Court namely 14 October 2015; and
- (v) The rate of interest should be suitably scaled down from the SBI- PLR. The above submissions in regard to the payment of interest; the date from which interest should be payable and the appropriate rate of interest, were postulated on the liability to refund the principal amount to Unitech. As a matter of fact, it has been expressly stated during the course of the submissions that the liability to refund is not being contested.

28. The second limb of submissions is that the liability to refund the principal amount together with interest cannot be imposed on TSIIC alone. TSIIC argues that the liability to refund the principal sum together with interest to Unitech has to be apportioned between

TSIIC and APIIC in terms of the provisions contained in the Andhra Pradesh Reorganization Act 2014. The submission is elaborated along the following lines:

(i) TSIIC has deposited an amount of Rs.127.53 crores before this Court in pursuance of the interim order dated 5 March 2020, out of which Rs.69.30 crores represents the principal and Rs.58.23 crores is towards interest;

(ii) Section 68 of the Reorganization Act stipulates that the companies specified in the IXth Schedule (including APSIIC) constituted for the erstwhile State of Andhra Pradesh would continue to function in those areas in respect of which they were functioning immediately before the date of re-organization. Under sub-section(2) of Section 68, the assets, rights and liabilities of the companies forming a part of the IXth Schedule are required to be apportioned between the successor states, in the manner indicated in Section 53;

(iii) Under Section 71, the Central Government is empowered to issue directions in respect of the companies specified in the IXth Schedule inter alia for dividing the interest and shares of the existing State of Andhra Pradesh between the successor States;

(iv) Section 65 allows for an apportionment of assets and liabilities by agreement, while Section 66 confers power on the Central government to order an allocation or adjustment in certain cases;

(v) Though the Central government constituted a Committee for the distribution of assets, it has not issued any directions, despite the committee submitting its recommendations, in view of the pendency of a petition under Article 32 of the Constitution before this Court; and

(vi) Section 2(h) of the Re-organization Act provides for a population ratio of 58.32 : 41.68 in relation to the States of Andhra Pradesh and Telangana, based on the 2011 census. On the basis of a population ratio of approximately of 58:42, TSIIC has borne 42 per cent of the liability towards the refund due to Unitech and the balance should be directed to be shared by APIIC representing the successor State of Andhra Pradesh based on the "normal sharing as per the population ratio".

29. During the course of these proceedings, APIIC was directed to be impleaded. APIIC has entered appearance and filed its own counter affidavit. Mr Anuroop Chakravarti, learned Counsel appearing on behalf of the APIIC, has opposed the submissions urged on behalf of the State of Telangana and TSIIC that the liability to refund the principal and interest must be apportioned between TSIIC and APIIC. APIIC has submitted that:

(i) Before the appointed date of 2 June 2014, determined under the Re-organization Act, a final audit was completed on 1 June 2014 and a joint certificate was issued by the Managing Directors of TSIIC/APIIC;

(ii) The certificate issued on behalf of TSIIC and APIIC by its Managing Directors records that all the assets and liabilities having a bearing in the balance sheet as on 1 June 2014 have been audited and included in the demerger scheme and that all assets and liabilities were duly apportioned between Andhra Pradesh and Telangana under the Re-organization Act; and

(iii) Under the scheme of demerger/apportionment, the liability in respect of the dues payable to Unitech has to be borne by TSIIC. This would be evident from the terms and conditions which have been spelt out in Part II of the third Schedule. The Schedule elucidates that the project site which forms the subject matter of the Development Agreement was a part of the area which falls within the jurisdiction of TSIIC. The liability by the terms of the demerger scheme is that of TSIIC.

30. The Special Leave Petition⁶ which was filed before this Court by TSIIC raised several objections to the correctness of the order passed by the High Court. Among the grounds which were urged in support of the Special Leave Petition were the following:

(i) The High Court ought not to have entertained a writ petition under Article 226 of the Constitution "in a pure contractual dispute";

(ii) The Development Agreement contains an arbitration agreement in Article 23.1;

(iii) TSIIC can provide the land to Unitech and hence a direction for refund with interest ought not to have been given;

(iv) There was a violation by Unitech of the terms of the bid document and the LoA and the Development Agreement deviated from the bid and the LoA;

(v) Unitech bid for the project and accepted the LoA with full knowledge of the pending litigation over title to the land forming a part of the agreement, and agreed to await the outcome of the litigation; and

(vi) APIIC entered into the agreement with Unitech and ought to share the liabilities in the population ratio of approximately 58:42, as provided under the Andhra Pradesh Re-organization Act 2014.

31. The State of Telangana, in its submissions before this Court in the Special Leave Petition had similarly assailed the judgment of the High Court on several grounds including the following:

(i) The claim for refund is based on an unregistered Development Agreement which is invalid;

(ii) The land which is comprised in the project site can be made available for the project as the land owners have agreed to transfer the land to the Government of Telangana;

(iii) The terms and conditions of the LoA were not complied with by Unitech;

(iv) In view of the arbitration agreement, a writ petition under Article 226 could not be maintained; and

(v) The liability, if any, has to be shared between the successor states of Andhra Pradesh and Telangana in the ratio of 58:42.

E. Analysis

E.1. Maintainability of the writ petition under Article 226

32. Much of the ground which was sought to be canvassed in the course of the pleadings is now subsumed in the submissions which have been urged before this Court on behalf of the State of Telangana and TSIIC. As we have noted earlier, during the course of the hearing, learned Senior Counsel appearing on behalf of the State of Telangana and TSIIC informed the Court that the entitlement of Unitech to seek a refund is not questioned nor is the availability of the land for carrying out the project being placed in issue.

Learned Senior Counsel also did not agitate the ground that a remedy for the recovery of moneys arising out of a contractual matter cannot be availed of under Article 226 of the Constitution. However, to clear the ground, it is necessary to postulate that recourse to the jurisdiction under Article 226 of the Constitution is not excluded altogether in a contractual matter. A public law remedy is available for enforcing legal rights subject to well-settled parameters.

33. A two judge Bench of this Court in *ABL International Ltd. v. Export Credit Guarantee Corporation of India*⁷ [*ABL International*] analysed a long line of precedent of this Court⁸ to conclude that writs under Article 226 are maintainable for asserting contractual rights against the state, or its instrumentalities, as defined under Article 12 of the Indian Constitution. Speaking through Justice N Santosh Hegde, the Court held:

"27. the following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable."

This exposition has been followed by this Court, and has been adopted by three-judge Bench decisions of this Court in *State of UP v. Sudhir Kumar*⁹ and *Popatrao Vynkatrao Patil v. State of Maharashtra*¹⁰. The decision in *ABL International*, cautions that the plenary power under Article 226 must be used with circumspection when other remedies have been provided

by the contract. But as a statement of principle, the jurisdiction under Article 226 is not excluded in contractual matters.

Article 23.1 of the Development Agreement in the present case mandates the parties to resolve their disputes through an arbitration. However, the presence of an arbitration clause within a contract between a state instrumentality and a private party has not acted as an absolute bar to availing remedies under Article 226.¹¹ If the state instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably, relief under the plenary powers of the Article 226 of the Constitution would lie. This principle was recognized in *ABL International*:

"28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See *Whirlpool Corpn. v. Registrar of Trade Marks* [(1998) 8 SCC 1] .)

And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

(emphasis supplied)

Therefore, while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial.

But equally, it is well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does not oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked.

The jurisdiction under Article 226 was rightly invoked by the Single Judge and the Division Bench of the Andhra Pradesh in this case, when the foundational representation of the contract has failed. TSIIC, a state instrumentality, has not just reneged on its contractual obligation, but hoarded the refund of the principal and interest on the consideration that was paid by Unitech over a decade ago. It does not dispute the entitlement of Unitech to the refund of its principal.

E.2 Contractual right to compensatory payment

34. In the present case, the basic postulate underlying the contract between the parties was the availability of the land which comprised the project site. The LoA dated 28 November 2007, stated that the allotment of land was subject to the outcome of the pending appeal before the High Court of Andhra Pradesh. The dispute over the title of the Government of Andhra Pradesh was the subject of the pending litigation. At the same time, the LoA mandated that Unitech must pay the amount stipulated - including the purchase price of Rs.145 crores for the land as well as the project development expenses.

A failure to do so would constitute a significant event of default resulting in a forfeiture of the earnest money deposit. Acting on the LoA, Unitech did in fact comply with its obligation to pay, having paid a total amount of Rs.165 crores towards the purchase price, besides the earnest money deposit and project development expenses. The Development Agreement which was executed between APIIC and Unitech contains specific representations to the effect that APIIC was authorized to transfer and deliver the project site admeasuring 350 acres on an outright sale basis.

Under the Development Agreement, APIIC was to sell and transfer the land absolutely together with its right, title and interest, free from all encumbrances by executing a sale agreement. The terms of the agreement were to prevail in the event of any conflict with any other document which formed a part of the bidding process. The terms of the agreement were placed on the pedestal of the highest priority for interpretation, as compared to other documents, including the LoA.

Under the terms of the Development Agreement, APIIC was obligated to sell and transfer the land together with its right, title and interest free from all encumbrances "forthwith upon payment of the last installment of the total purchase price by the developer". That Unitech paid the total purchase price is not in dispute. The obligation assumed by APIIC to handover possession together with title upon the payment of the last installment of the purchase price unequivocally emerges from Article 3.1 and Article 4.1 of the Development Agreement.

The fulfilment of the terms of the agreement was postulated on the availability of the land. Apart from the terms of the agreement which have already been emphasized, representations in regard to the title to the land are expressly contained in Annexure 1C of the Development Agreement which reads as follows:

"APIIC hereby represents and warrants to the Developer and Unitech that:

1. APIIC is absolutely seized and possessed of and is otherwise well and sufficiently entitled to the Project site. GOAP has free clear and marketable titled to the Project site, and that no Encumbrance of any nature whatsoever exists in respect of the Project site. APIIC was in possession and occupation of the Project site until the date of execution of the Development Agreement and that peaceful physical vacant possession and occupation of the Project site has been handed over to the Developer in terms of the Development Agreement. APIIC has been duly authorized to enter into the Development Agreement and perform all of its obligations there under."

Annexure-2 to the Development Agreement sets out a list of ownership documents which are tabulated in the following terms.

35. The consequences of default are expressly stipulated in the agreement. Article 17 stipulates force majeure events. Article 17.2 provides for political force majeure events

comprising inter alia "direct litigation related to APIIC's/GoAP's title to the project site, stay/interim/injunctive/ other orders issued by the Court."

36. Article 14.3.4 expressly stipulates that the developer shall not be liable for the failure to meet any of its obligations under the agreement, in the event, that it could be attributed to a default or delay on the part of APIIC in fulfilling its obligations. Similarly, the developer would not be held liable as a result of encumbrances or title issues on any portion of the land which may have a material adverse effect on the project or as a consequence of force majeure events.

Article 14.3.1 stipulates that in the event that APIIC/Government of Andhra Pradesh were unable to execute the sale deed in favour of the developer in respect of the land within the time specified, APIIC shall, if so required for the developer, make compensatory payment subject to court orders. In the event of a political force majeure event, Unitech was, in terms of Article 17.6, solely entitled to issue a notice of termination, if it resulted in a material adverse effect on the project, continuing for more than nine months.

In that event, APIIC was obligated to make the compensatory payment to the developer. Compensatory payment liable to be paid in terms of the agreement is expressly defined, including for the purposes of Article 14.3.1, to mean an amount which is the aggregate of (i) the total purchase price; and (ii) interest calculated at the SBI-PLR on the total purchase price "from the date on which the first payment of purchase price in respect of compensated land is paid". The applicable rate was also defined¹² to mean the Prime Lending Rate of the SBI, compounded annually.

37. The failure of title in the erstwhile APIIC and the Government of Andhra Pradesh attained finality upon the decision of this Court in *State of Andhra Pradesh Through Principal Secretary v. Pratap Karan*¹³. The basic postulate on which the entire contract was founded stood nullified as a consequence of the failure of title. The agreement clearly provides that the ability of the Government of Andhra Pradesh/TSIIC to convey full title to the developer forms the basis of the contract. The failure of title entitles Unitech to claim a full refund together with compensatory payment, as contractually defined.

The claim does not raise a disputed question of fact requiring an evidentiary determination. Both the learned Single Judge and the Division Bench of the High Court have elaborately considered the precedents of this Court and correctly concluded that Unitech is entitled to a refund. The finding in regard to the entitlement of Unitech to a refund is unexceptionable and has correctly not been called into question at the stage of the hearing, despite the grounds which were raised in the pleadings in the proceedings initiated under Article 136 of the Constitution by TSIIC and the State of Telangana.

APIIC, as an instrumentality of the erstwhile Government of Andhra Pradesh, invited bids for a public project. Having invited private entrepreneurs to submit bids on stipulated terms and conditions, it must be held down to make good its representations. The State and its instrumentalities are duty bound to act fairly under Article 14 of the Constitution. They cannot, even in the domain of contract, claim an exemption from the public law duty to act fairly.¹⁴

The State and its instrumentalities do not shed either their character or their obligation to act fairly in their dealings with private parties in the realm of contract. Investors who respond to the representations held out by the State while investing in public projects are legitimately entitled to assert that the representations must be fulfilled and to enforce compliance with duties which have been contractually assumed.

38. The Single Judge of the Andhra Pradesh High Court, in the course of the judgment dated 23 October 2018 computed as on 30 September 2018, an amount of Rs.660.55 crores as due and payable. Interest on the basis of the SBI-PLR was compounded annually in terms of the provisions of the Development Agreement. The Single Judge noted that the respondents to the writ proceedings had not disputed (i) the dates of payment or (ii) interest at the rate of the SBI-PLR and no material to contradict the computation was submitted.

In appeal, the Division Bench however directed that the claim for interest should be computed from 14 October 2015. This was the date on which Unitech addressed a communication seeking a refund of the 'compensatory payment' following the decision of this Court on 9 October 2015 on the absence of title to the land in the Government of Andhra Pradesh. The Division Bench has proceeded on the rationale that

(i) Unitech was placed on notice that the award of the contract was subject to the outcome of the appeal in the High Court; and

(ii) Unitech was aware of the outcome of the first appeal yet, as a developer, it wanted to continue with the project.

The above circumstances have no bearing on whether Unitech is entitled to a refund of moneys from the date of initial payment. The entitlement of Unitech to a refund of the amounts paid is embodied in the terms of the contract which envisage that a default on the part of APIIC in conveying the land or the existence of political force majeure events would furnish a valid basis for the "compensatory payment". Moreover, the date from which compensatory payment has to be made is specifically provided : the Development Agreement provides that it will be "from the date on which the first payment of project price" is made.

The Division Bench was in error in curtailing the right of Unitech to claim a refund with effect from the dates on which the respective payments were made. Obviously, Unitech had entered into the project since it wished to pursue it. Unitech cannot be penalized for wanting to continue with the agreement, as APIIC navigated disputes over its claim to the land. While Unitech was put on notice of the existence of a litigation, the Development Agreement which stipulated an encumbrance-free handover also specified that its covenants would supersede all other understandings and that its terms would rank as the first, in order of interpretive priority.

The judgment of the Division Bench suffers from a clear and patent error in restricting the liability of paying interest with effect from 14 October 2015. The liability must date back, in terms of the Development Agreement, from the date on which the respective payments were made by Unitech. Interest at the contractual SBI-PLR rate has to be paid to Unitech. However, considering the facts and circumstances of this case, the conscionability of Article 14.3.1 read with Article 1(h) of the Development Agreement stipulating compensatory payment at the SBI-PLR, compounded annually, becomes suspect.

Clause 17 of the LoA expressly mentioned that the title of the land is *lis pendens* and subject to the outcome of the proceedings pending before the Andhra Pradesh High Court. Unitech considered this circumstance and consciously entered into the Development Agreement. It continued to liaise with APIIC after an unfavourable judgement of the Andhra Pradesh High

Court and did not issue a termination notice, until the title was conclusively denied by a judgement of this Court. A Constitution Bench of this Court, in the case of Central Bank of India v. Ravindra¹⁵, when considering the question of penal interest rates, had observed:

"39. Pre-suit interest is preferable to substantive law and can be subdivided into two sub-heads: (i) where there is a stipulation for the payment of interest at a fixed rate; and (ii) where there is no such stipulation. If there is a stipulation for the rate of interest, the court must allow that rate up to the date of the suit subject to three exceptions:

(i) any provision of law applicable to moneylending transactions, or usury laws or any other debt law governing the parties and having an overriding effect on any stipulation for payment of interest voluntarily entered into between the parties;

(ii) if the rate is penal, the court must award at such rate as it deems reasonable;

(iii) even if the rate is not penal the court may reduce it if the interest is excessive and the transaction was substantially unfair."

(emphasis supplied)

In a similar vein, in interpreting Section 74 of the Indian Contract Act, 1872, this Court has held that a contractually-stipulated interest rate, if found to be penal, excessive or in terrorem can be reduced to a reasonable rate of compensation.¹⁶ In upholding the reasoning of the Kerala High Court in full, a two judge Bench of this Court in K P Subbarama Sastri v. KS Raghavan¹⁷ held:

"5. "The question whether a particular stipulation in a contractual agreement is in the nature of a penalty has to be determined by the court against the background of various relevant factors, such as the character of the transaction and its special nature, if any, the relative situation of the parties, the rights and obligations accruing from such a transaction under the general law and the intention of the parties in incorporating in the contract the particular stipulation which is contended to be penal in nature. If on such a comprehensive consideration, the court finds that the real purpose for which the stipulation was incorporated in the contract was that by reason of its burdensome or oppressive character it may operate in

terrorem over the promiser so as to drive him to fulfil the contract,, then the provision will be held to be one by way of penalty."

Therefore, considering the position of Unitech-which knowingly entered into the Development Agreement with full knowledge of the pending litigation and with an intention to continue with the project after a delay of over seven years, up until a decision by this Court, we find that the interest rate is payable to Unitech, without compounding.

E.3. Apportionment of the liabilities between the instrumentalities of the state of Andhra Pradesh and Telangana

39. This leaves the court with the last facet which pertains to the dispute inter se between TSIIC and APIIC. The Single Judge has imposed the liability to refund on TSIIC clarifying however, that it is "entitled to recover it from the State of Andhra Pradesh and the APIIC, if under law they are entitled to do so". The Division Bench has not interfered with the above direction.

40. Section 68 of the Re-organization Act is comprised in Part VII which enunciates "Provisions as to Certain Corporations". Section 68 of the Re-organization Act provides as follows:

"68. (1) The companies and corporations specified in the Ninth Schedule constituted for the existing State of Andhra Pradesh shall, on and from the appointed day, continue to function in those areas in respect of which they were functioning immediately before that day, subject to the provision of this section.

(2) The assets, rights and liabilities of the companies and corporations referred to in sub-section (1) shall be apportioned between the successor States in the manner provided in section 53."

The corporations which are listed out in the IXth Schedule include APIIC which appears at Serial No.17. Section 68(2) states that the assets, rights and liabilities of the companies and corporations referred to in sub-Section (1) shall be re-apportioned between the successor states in the manner provided in Section 53. Section 53 is in the following terms:

"53. (1) The assets and liabilities relating to any commercial or industrial undertaking of the existing State of Andhra Pradesh, where such undertaking or part thereof is exclusively located in, or its operations are confined to, a local area, shall pass to the State in which that area is included on the appointed day, irrespective of the location of its headquarters:

Provided that where the operation of such undertaking becomes inter-State by virtue of the provisions of Part II, the assets and liabilities of--

(a) the operational units of the undertaking shall be apportioned between the two successor States on location basis; and

(b) the headquarters of such undertaking shall be apportioned between the two successor States on the basis of population ratio.

(2) Upon apportionment of the assets and liabilities, such assets and liabilities shall be transferred in physical form on mutual agreement or by making payment or adjustment through any other mode as may be agreed to by the successor States."

41. Section 6518 allows for the successor states of Telangana and Andhra Pradesh to agree on the manner in which the benefit or burden of any particular asset or liability can be apportioned. Section 6619 empowers the Central Government on a reference made, within three years from the appointed date, by either of the successor states to order an adjustment or allocation of the liability. Finally, to complete the narration of the statutory scheme, Section 71 is in the following terms:

"71. Notwithstanding anything in this Part, the Central Government may, for each of the companies specified in the Ninth Schedule to this Act, issue directions-

(a) Regarding the division of the interests and shares of the existing State of Andhra Pradesh in the Company between the successor states;

(b) Requiring the reconstitution of the Board of Directors of the Company so as to give adequate representations in the successor States."

Section 71(a) speaks of the interests and shares of the existing State of Andhra Pradesh in the companies specified in the IXth Schedule between the successor States. APIIC has brought on record the certificate issued by the Managing Directors of TSIIC and APIIC recording the auditing of assets and liabilities as on 1 June 2014.

Certificate

"This is to certify that Andhra Pradesh Industrial Infrastructure Corporation Limited (APIIC LTD.), Hyderabad have got its Books of Accounts audited up to 1st June, 2014 by M/s Jawahar and Associates, Hyderabad (Statutory Auditors) and accordingly a) All the Assets and Liabilities as appearing in the Balance Sheet as on 01.06.2014 have been brought on record and have been audited and included in the Demerger Scheme and Demerger Balance Sheet and b) the instructions of the Special Chief Secretary (Industries and Commerce), Government of Andhra Pradesh vide Circular No.3685/INF (SRC)/2014 dated 29.05.2014 have been followed.

All the Assets and Liabilities were duly apportioned between Andhra Pradesh and Telangana States as per the provisions of Andhra Pradesh Reorganisation Act, 2014. Further to certify that all the suggestions and advices given by Expert Committee with respect to Demerger of Assets and Liabilities have been complied with in formulating the final Demerger Scheme.

E.V. Narasimha Reddy

Vice Chairman &

Managing Director (FAC)

TSIIC Ltd. K.V. Satyanarayana, IAS

Vice Chairman &

Managing Director

APIIC Ltd.,"

42. The Scheme for apportionment/demerger has also been produced by APIIC in the course of the pleadings. Para 1 of Section 1 Part II of the Scheme is in the following terms:

"1. Upon the coming into effect of the Scheme and with effect from the Appointed Date and subject to this Scheme, all the operational Units of the Demerged Undertaking (including all the estate, assets, rights, title, interest and authorities including accretions and appurtenances

of the Demerged Undertaking namely Cyberabad Zone, Jeedimetla Zone, Karimnagar Zone, Patancheru Zone, Shamshabad and Moula Ali Zone, Warangal Zone vest with the Transferee Company and shall, subject to the provisions of the scheme in relation to the mode of vesting and pursuant to Section 53 of the Act and without any further act or deed, or be deemed to have been apportioned and transferred to and vested in the Transferee Company as a going concern so as to become as and from the Appointed Date, the estate, assets, rights, title, interest and authorities of the Transferee Company as detailed in the Schedule-I"

Clause 3 provides thus:

"3(a) In respect of such of the assets and liabilities located/held at the Headquarters of the Transferor Company shall be apportioned between the Transferee Company and Transferor Company on the basis of population ratio.

(b) In respect of the investments in public, private or commercial undertaking companies held by APIIC before the appointed date are apportioned on location basis where the projects are located in a specific region.

(c) In respect of investments in projects having multiple units falling within the territories of State of Andhra Pradesh and Telangana shall be apportioned on the basis of population."

Schedule I provides for the Zonal offices pertaining to Telangana region. Serial no.3 refers to the Shamshabad and Mauli Ali region which includes the area covered by the project site. The land which is comprised in the project site falls exclusively within the Telangana region as specified in the demerger scheme.

43. We clarify that following the course of action which has been adopted by the learned Single Judge, we are not adjudicating finally upon the rights inter se between TSIIC and APIIC. TSIIC shall refund the amounts due and payable to Unitech in terms of the present judgment. TSIIC would be at liberty to pursue its rights and remedies in accordance with law over its claim for apportionment on which, we express no final opinion.

Summation

44. TSIIC and the State of Telangana have brought to our notice that the Development Agreement, on the basis of which Unitech has sought to avail its contractual remedy has not been registered or assessed to stamp duty. Under Article 3.1 of the Development Agreement, the obligation of paying registration fees and stamp duty is on Unitech. It is well-settled law that the Stamp Act is a fiscal measure enacted to secure the revenue for the State, and not to arm the opponent with a weapon of technicality.²⁰ Unitech's claim to compensatory payment cannot be defeated on the sole ground of the payment of stamp duty.

The Development Agreement shall have to be impounded and be presented to the Chief Controlling Revenue Authority in the State of Telangana for assessment of stamp duty and to the competent authority for registration. The assessment shall be completed within thirty days. The appropriate stamp duty and registration charges liable to be paid in terms of the determination shall be paid by TSIIC and be deducted from the refund due and payable to Unitech under the terms of this order.

45. For the above reasons, the appeals shall stand disposed of in the following terms:

(i) The Development Agreement stands impounded and shall be forwarded by TSIIC within two weeks to the competent authority for registration and for assessment of stamp duty. The assessment to stamp duty and formalities for registration shall be completed within one month. The amount payable towards stamp duty, penalty (if any) and registration charges shall be paid initially by TSIIC into the account of the competent authority within two weeks of the determination and shall be adjusted against the refund payable by TSIIC to Unitech;

(ii) The appeal filed by Unitech, arising out of SLP(C) No 9019 of 2019 is allowed in part by setting aside the direction of the Division Bench of the High Court which confined the liability to pay interest only with effect from 14 October 2015;

(iii) Unitech shall be entitled to a refund of an amount of Rs.165 crores together with interest at the SBI-PLR commencing from the respective dates of payment, computed in accordance with the provisions of the Development Agreement (except for compounding);

(iv) The amount which has been deposited in the Registry of this Court in pursuance of the interim order shall be disbursed to Unitech together with accrued interest. The balance due

and payable under the terms of this judgment shall be refunded by TSIIC to Unitech within two months from the receipt of a certified copy of this judgment; and

(v) In terms of the directions of the Single Judge of the High Court, TSIIC will be at liberty to pursue its remedies for apportionment in relation to APIIC in accordance with law. No opinion is expressed on the merits or tenability of the claim for apportionment asserted by TSIIC.

46. The appeals arising out of the Special Leave Petitions filed by the State of Telangana and TSIIC shall also stand disposed of in terms of the present judgment. There shall be no order as to costs.

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

.....J. [Dr. Dhananjay Y. Chandra Hud]

.....J. [Mr. Shah]

New Delhi;

February 17, 2021.

1 Appeal Suit No. 274 of 2007 (Andhra Pradesh High Court)

2 (2016) 2 SCC 82

3 Writ Petition (Civil) No. 302 of 2017 (Supreme Court of India)

4 Writ Petition (Civil) No. 29722 of 2017 (Andhra Pradesh High Court)

5 Writ Appeal No. 1594 of 2018 (Andhra Pradesh High Court)

6 SLP (C) No. 10135 of 2019

7 (2004) 3 SCC 553

8 K.N. Guruswamy v. State of Mysore, AIR 1954 SC 592; Gujarat State Financial Corporation. v. Lotus Hotels (P) Ltd, (1983) 3 SCC 379; Gunwant Kaur v. Municipal Committee, Bhatinda, (1969) 3 SCC 769

9 2020 Scconline SC 847

10 Civil Appeal 1600 of 2000 (Supreme Court of India)

11 Harbanslal Sahnia v. Indian Oil Corporation Ltd., (2003) 2 SCC 107; Ram Barai Singh & Co. v. State of Bihar & Ors., (2015) 13 SCC 592

12 "Article 1(h)- 'Applicable Rate' means the prime lending rate of the State Bank of India, compounded-annually."

13 (2016) 2 SCC 82

14 Indsil Hydropower v. State of Kerala, Civil Appeal Nos. 5943-5945 of 2019 (Supreme Court of India), para 33; ABL International Ltd. v. Export Credit Guarantee Corporation of India, (2004) 3 SCC 553, para 23; Central Bank of India v. Devi Ispat Ltd., (2010) 11 SCC 186, para 28

15 (2002) 1 SCC 367

16 Oriental Kuries Ltd. v. Lissa, (2019) 19 SCC 732; Bhubaneshwar Development Authority v. Susanta Kumar Mishra, (2009) 4 SCC 684

17 (1987) 2 SCC 424

18 "65. Where the successor States of Andhra Pradesh and Telangana agree that the benefit or burden of any particular asset or liability should be apportioned between them in a manner other than that provided for in the foregoing provisions of this Part, notwithstanding anything contained therein, the benefit or burden of that asset or liability shall be apportioned in the manner agreed upon."

19 "66. Where, by virtue of any of the provisions of this Part, either of the successor States of Andhra Pradesh and Telangana becomes entitled to any property or obtains any benefits or becomes subject to any liability, and the Central Government is of opinion, on a reference made within a period of three years from the appointed day by either of the States, that it is just and equitable that such property or those benefits should be transferred to, or shared with, the other successor State, or that a contribution towards that liability should be made by the other successor State, the said property or benefits shall be allocated in such manner between the two States, or the other State shall make to the State subject to the liability such contribution in respect thereof, as the Central Government may, after consultation with the two State Governments, by order, determine."

20 Hindustan Steel Limited v. Dilip Construction Company, (1969) 1 SCC 597 para 7

U.A. Basheer through G.P.A. Holder VS. State of Karnataka & Anr.



[Civil Appeal No. 3032 of 2010]

Mohan M. Shantanagoudar, J.

1. This appeal arises out of order and judgment of the Division Bench of the High Court of Karnataka (hereinafter, 'High Court') dated 26.03.2009, dismissing Writ Appeal No. 7758 of 2003 [ULC] filed by the Appellant herein against the order dated 21.10.2003 passed by the learned Single Judge of the High Court in W.P. No. 35449 of 2001.

Factual Background:

2. The facts leading to this appeal are as follows: Five properties/Survey Nos. (533B2, 532A, 537, 533A, 539), totally measuring 3 acres and 11 cents, situated in Ullal village, Mangalore Agglomeration ('joint family property'), originally belonged to the joint family of two sisters, namely, Smt. Korapalu Sapalyathi and Smt. Nemu Sapalyathi. Korapalu Sapalyathi had three children and Smt. Nemu Sapalyathi had seven children. After the death of the two sisters, the Appellant's case is that their ten children benefited through a registered partition deed dated 9.01.1984.

Through the said partition deed, Smt. Leela Sapalyathi, daughter of Smt. Korapalu Sapalyathi, allegedly came to hold a share of 1983 sq. mts. of land, including land to the extent of 30 cents falling under Survey No. 53/3A. Likewise, the other nine children of Smt. Korapalu Sapalyathi and Smt. Nemu Sapalyathi are also said to have got their share of the joint family property through the said partition deed.

3. The Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter, 'Principal Act') came into force in Karnataka on 17.02.1976. Padmanabha, one of the seven children of Smt. Nemu Sapalyathi, filed a statement under Section 6(1) of the Principal Act on 15.06.1984 declaring the particulars of the joint family property.

Thereafter, the Deputy Commissioner and Competent Authority, Mangalore Urban Agglomeration (Respondent No. 2 herein; hereinafter, 'Competent Authority') issued a draft statement under Section 8(1) of the Principal Act to the declarant, i.e., Padmanabha to surrender excess vacant land of 9,489.48 sq. mts, which included land falling within Survey No. 53/3A.

In response to the said notice, Padmanabha filed his objections on 1.07.1985 stating that the property belonged to his late mother and her sister and that after their death, the joint family property had been divided through the aforementioned partition deed. He further stated that the individual share of each of the children subsequent to the partition was within the ceiling limit prescribed under the Principal Act.

4. On 5.12.1994, the Competent Authority passed an order holding that the partition deed having been effected on 9.01.1984, i.e., subsequent to the commencement of the Principal

Act, the same could not be considered as per Section 42 of the Principal Act. Thus, the Competent Authority directed that an extent of 5,210.10 sq. mts. of land in Ullal village held by the declarant be treated as excess vacant land to be surrendered.

Subsequently, on 16.10.1996, the Competent Authority passed an award fixing compensation for the said excess land at Rs.15,630/. In the said award, it was stated that Gazette notification was made in respect of acquisition of the land on 27.10.1995 and 22.1.1996 as per the provisions of Section 10(1) and 10(3) of the Principal Act.

5. It is the Appellant's case that he had executed a sale deed on 26.03.1994 with Smt. Leela Sapalyathi whereby he purchased a portion of Survey No. 53/3A measuring 14 cents comprising an old house D. No. 206 (hereinafter, 'suit property'). The Appellant claims that he took possession of the suit property on the date of purchase and has been in possession till date. The Appellant further contends that after the said purchase, the suit property was mutated in his name. In this regard, he has produced copies of the Record of Rights, Tenancy and Crops ('RTC') for the years 1993/1994 and 1994/1995.

The Appellant states that he was unaware of the Competent Authority's orders dated 5.12.1994 and 16.10.1996 mentioned supra. In April 2001, the Appellant wished to undertake renovation of the house on the suit property and hence, approached the village accountant for the latest copy of the RTC. It was at this stage that he noticed that the Government's name had been entered in the RTC. Upon inquiry, the Appellant was apprised of the proceedings under the Principal Act and the subsequent orders passed by the Competent Authority.

6. On 9.05.2001, the Appellant filed a petition under Sections 4 & 5 of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (hereinafter, 'Repeal Act') praying for his name to be restored in the RTC, inter alia on the grounds that the Competent Authority had not issued notice to the Appellant regarding taking of possession of the suit property.

That, in any case, the Competent Authority had not taken physical possession of the suit property as on the date of commencement of the Repeal Act. Hence, as per the provisions of the Repeal Act, the proceedings would abate and the Competent Authority could not take further action under the Principal Act. The said petition was rejected by the Competent Authority vide order dated 12.06.2001.

7. Thereafter, the Appellant approached the High Court by way of Writ Petition No. 35449/2001 which was dismissed vide order dated 21.10.2003. The Appellant's Writ Appeal No. 7758/2003 [ULC] before the Division Bench of the High Court was also dismissed vide impugned order dated 26.03.2009 with certain observations. Aggrieved, the Appellant has come before this Court.

Appellant's Submissions:

8. We have heard the learned counsel for the Appellant at length. The Appellant's main contentions may be summarised as follows:

(i) That vide partition deed dated 9.01.1984, Smt. Leela Sapalyathi obtained 1983 sq. mts. of land in the joint family property which consisted of a residential house as well. As per Schedule 1, Category D of the Principal Act, a person is entitled to hold 2000 sq. mts. of land.

In such case, the Competent Authority erred in concluding that the declarant Padmanabha holds excess land where in fact Survey No. 53/3A has fallen to the share of Leela Sapalyathi who is the Appellant's vendor. In fact, in light of the partition deed, Padmanabha, has no right to file the declaration under Section 6(1) of the Principal Act in respect of the suit property, and therefore, the entire proceedings are vitiated;

(ii) That the order dated 5.12.1994 was passed by the Competent Authority without issuing notice to the Appellant or his vendor, i.e., Smt. Leela Sapalyathi and that the said proceedings under the Principal Act were carried out behind their backs;

(iii) That the declaration under Section 6(1) of the Principal Act had been filed by Padmanabha way back on 15.06.1984 and his objections were filed on 1.07.1985. However, the Competent Authority passed its order dated 05.12.1994 after 9 years without issuing notice to any of the 10 members of the joint family;

(iv) That it is not the case of the Respondents that compensation had been paid. Since neither compensation had been paid nor possession been taken on the date of coming into force of

the Repeal Act, i.e., on 8.07.1999, the orders passed by the Competent Authority under the Principal Act have abated.

Respondents' Submissions:

9. The Competent Authority's contentions may be summarised as follows:

(i) That an extent of 0.57 acre in Survey No. 53/3A and 0.71¾ acre in Survey No. 53/3B2 of Ullal Village have been declared excess as per Section 10(3) of the Principal Act on the basis of the declaration filed by Padmanabha under Section 6(1) of the Principal Act on 15.06.1984. Hence, all transactions made after the said date, i.e., sale of suit property to the Appellant, without the permission of the Competent Authority are null and void, as per Section 42 of the Principal Act;

(ii) That after the issuance of notification under Section 10(3) of the Principal Act, the suit property vests with the Government free from all encumbrances. Accordingly, the necessary entries were made in the Government's name in the RTC. Hence, the Appellant's contentions are baseless and may be overruled;

(iii) That the declarant Padmanabha was given the opportunity to put forth his objections and the same were considered by the Competent Authority before passing orders under Section 8(4) of the Principal Act. The partition deed was affected on 9.01.1984, i.e., subsequent to the commencement of the Principal Act and the same cannot be considered as per Section 42 of the Principal Act;

(iv) Since the Appellant had not filed the declaration under Section 6(1) of the Principal Act, the question of issue of notice to him does not arise;

(v) The Government had taken possession of the suit property on 12.07.1996 as per Section 10(6) of the Principal Act.

(vi) The order dated 5.12.1994 passed by the Competent Authority is well within jurisdiction. The declaration filed by Padmanabha was enquired into properly and decided on merit.

Proper notices were issued to the declarant at all stages. The Appellant does not have any right over the excess land.

III. This Court's Analysis

10. Having undertaken a thorough perusal of the documents and submissions on record, we find ourselves unable to completely affirm the impugned judgment dated 26.03.2009 of the Division Bench. Before proceeding to lay down our conclusions, it may be useful to first refer to the findings of the learned Single Judge and the learned Division Bench.

11. The learned Single Judge dismissed the Appellant's writ petition on the sole ground that the partition deed dated 9.01.1984, that the Appellant had heavily relied on in furtherance of his submissions, was not produced before the Court. The Single Judge observed as follows:

"4. It is relevant to observe here that the petitioner being the object or before the respondent no.2 did not produce any proof of partition in respect of the subject property fallen to the share of the vendor to succeed to execute the sale deed in the month of March, 1994. He would have done definitely that when he had made out a case before the respondent no.2. Even before this Court, the petitioner had not filed any document as that of the partition deed to show that the subject property was the subject matter of partition. Therefore, it appears to me that the petition fails on that score alone. In view of that, the petition does not merit any consideration. The writ petition is therefore dismissed as the same is devoid of merit; I order accordingly."

12. The Division Bench, on the other hand, while dismissing the Appellant's writ appeal, observed that regardless of whether the declarant Padmanabha and his family members had effected partition after the Principal Act commenced, the concerned land would still be subject to the proceedings initiated under the Principal Act.

The Division Bench further observed that the Appellant has not established that he acquired any interest in the suit property prior to the Principal Act's commencement or to the filing of the declaration by Padmanabha, and thus, there was no obligation on the Competent Authority to issue notice to the Appellant and afford him a hearing before passing the order.

13. At this juncture, it is pertinent to refer to Section 6 of the Principal Act, which requires that a statement be filed before the Competent Authority by 'every person holding vacant land in excess of the ceiling limit at the commencement of the Act.'

(emphasis supplied).

Thus, the determination of 'excess land' is to be made considering the status of the land at the time of commencement of the Principal Act, and not at the time of filing of the declaration. In our considered opinion, since it is an admitted fact that the partition, if any, was only effected after the Principal Act's commencement, the Division Bench was correct in holding that the partition deed dated 9.01.1984 would not affect the validity of the Competent Authority's determination of excess land owned by the joint family at the time of commencement of the Act. Hence, to this limited extent, we concur with the findings of the Division Bench.

14. We have also given due consideration to the provisions of Section 8 and Section 9 of the Principal Act, and in our opinion, the aforementioned Sections make it incumbent on the Competent Authority to issue notice to or provide an opportunity to be heard only to the 'person concerned', i.e., the person who has filed the statement under Section 6 of the Principal Act.

The claims of all other persons interested in the vacant land are to be considered through issuing a Gazetted notification to that effect as per Section 10(1) of the Principal Act. The Competent Authority had duly issued such notification on 27.10.1995.

15. Now, coming to the question of possession, it is the Appellant's contention that, subsequent to the declaration, he acquired the suit property from Smt. Leela Sapalyathi, by sale agreement dated 26.03.1994, and continues to be in possession of it. That Smt. Leela Sapalyathi was competent to sell the suit property, as it was a portion of the 1,983 sq. mts. of the joint family property she acquired by virtue of the partition deed dated 9.01.1984.

We find that this argument is relevant in light of the passage of the Repeal Act, with effect from 8.07.1999. Section 4 of the Repeal Act provides as follows:

"4. All proceedings relating to any order made or purported to be made under the principal Act pending immediately before the commencement of this Act, before any court, tribunal or other authority shall abate:

Provided that this section shall not apply to the proceedings relating to sections 11,12,13 and 14 of the principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority."

Section 3(1)(a) of the Repeal Act, which provides for a savings clause, throws light on this, by stating that the repeal shall not affect the vesting of any vacant land in the State Government by the Principal Act, the possession of which has been taken over by the concerned State Government. This is further qualified in Section 3(2) which states that vacant land vested in the State Government by the Principal Act, the possession for which has not been taken over, shall be restored only once any compensation paid to the landholder has been returned.

16. It is clear from the aforementioned legislative provisions that the question of current possession of the suit property is absolutely material to a full adjudication of the controversy before us. This is because, if the Appellant does enjoy possession, as claimed by him, any proceedings for any excess land under the Principal Act are liable to abate, as per Section 3 and Section 4 of the Repeal Act, and the Appellant would be entitled to ownership and possession over the suit property.

However, neither the partition deed dated 9.01.1984 that is alleged to have conferred title on Smt. Leela Sapalyathi, nor the sale deed dated 26.03.1994 that purportedly passed on the title to the Appellant, have been produced before this Court. There is, thus, nothing on record to establish Appellant's purchase of, possession of, or interest in the suit property.

17. Whereas the Appellant maintains that he has locus standi to pray for abatement of the proceedings which are the subject matter of this appeal, being in possession of the suit property; the Competent Authority's order dated 16.10.1996 declaring the award of compensation for the excess land, states that the Competent Authority had taken over possession of the suit property with effect from 12.07.1996, i.e., before the passage of the Repeal Act.

In our opinion, there is nothing on record, that conclusively establishes possession of the suit property either by the Competent Authority or the Appellant herein. Given the conflicting averments made by the parties, this is a pure question of fact. 18. In this regard, the Division Bench in the impugned order has observed the following:

"5. It is contended that the possession of the land is not taken by the Government in spite of the said order and the appellant continues to be in possession. It is clear from the repealed Act, if the possession has not been taken after the proceedings initiated under the Act, the order is ceased to have any effect and the person in possession is continued to be the owner.

A perusal of the order discloses that 5 Sy. Nos. were involved in the declaration, from the order it is not possible to make out in which survey number the excess land falls. If there is no indication of the said excess land falling within any particular survey number and if the authorities have proceeded to take possession, it would not be in consonance with the order.

If really possession has not yet been taken under the repealed Act, the petitioner is entitled to continue in possession of the land. All these matter cannot be the subject matter of the writ petition filed challenging the order under Section 10 filed by the declarant. Notwithstanding the dismissal of the writ appeal or writ petition, it is open to the appellant/petitioner to work out his remedy in accordance with law."

(emphasis supplied)

19. We find ourselves unable to agree with the Division Bench on this aspect of the matter, and thus set aside the impugned judgment. It was incumbent on the Division Bench to enquire into and settle the questions of fact arising from the present controversy, such as whether the Appellant's claim over the suit property was valid, whether he was in actual physical possession of the suit property, and resultantly, whether he had the locus standi to pray for abatement of the proceedings under the Repeal Act. This would have settled finally the question of abatement of the proceedings, and prevented the inefficient proliferation of further litigation between the parties.

IV. Conclusions and Directions

20. Since the learned Single Judge has already given a definite factual finding as to the question of the Appellant's ownership and possession of the suit property in his judgment dated 21.10.2003 (supra), we do not think it appropriate to remit the matter to the learned Single Judge.

21. Instead, we direct the matter to be remitted to the Division Bench of the Karnataka High Court to consider the case afresh. All questions of fact outlined above are to remain open, and the parties are given liberty to place on record additional evidence not made a part of the proceedings heretofore.

Since the other original owners of the joint family property have accepted the orders of the Competent Authority, in so far as they have not questioned the said orders, the Division Bench will confine its findings only with regard to the issue of possession of the suit property.

22. The appeal stands disposed of accordingly. No order as to costs.

.....J. (Mohan M. Shantanagoudar)

.....J. (Vineet Saran)

New Delhi,

February 17, 2021

Compack Enterprises India Pvt. Ltd. Vs. Beant Singh



[Special Leave Petition (Civil) Nos. 2224-2225 of 2021 arising out of SLP (C) Diary No. 38441 of 2019]

Mohan M. Shantanagoudar, J.:

1. These petitions arise out of judgments of the High Court of Delhi (hereinafter 'High Court') dated 14.02.2019 and 25.07.2019. By the first impugned judgment dated 14.02.2019, the High Court disposed of the regular first appeal RFA No. 253/2018 filed by the Petitioner against judgment and order of the Ld. Additional District Judge, Rohini ('Trial Court') dated 23.09.2017 in Suit No. 58395/2016 filed by the Respondent. Whereas by the second impugned judgment dated 25.7.2019, the High Court disposed of Review Petition No. 177/2019 filed by the Petitioner against the judgment in RFA No. 253/2018.

I. Background Facts

2. These cases concern a suit for possession and mesne profits filed by the Respondent/plaintiff against the Petitioner/defendant, with respect to the ground floor of the property bearing No. B60, Ground Floor, G.T. Karnal Road, Industrial Area, Delhi 110033, admeasuring 608 sq. yards (or, 5,472 sq. ft.) (hereinafter 'suit property').

3. The Respondent, Beant Singh, is the owner of the suit property. He, through M/s Channa Auto Agencies (P) Ltd. (of which he is a Director), executed a license agreement dated 1.11.2000 in respect of a portion of the suit property in favour of M/s Compack Enterprises (the Petitioner's predecessor), for a period of 30 months in consideration for a monthly license fee of Rs. 28,000/(hereinafter, '2000 Agreement'). On 1.04.2003, Compack Enterprises merged with Compack Enterprises India (P) Ltd. (i.e., the Petitioner herein), and the 2000 Agreement continued with mutual consent of parties.

The license arrangement was renewed on 1.07.2003 for another 30 months, with a 10% increase in monthly license fee to Rs.30,800/(hereinafter, '2003 Agreement'). The 2003 Agreement was renewed for the last time effective from 1.04.2006 and expiring on 30.09.2008, with a further 10% increase in monthly license fee to Rs.33,900/(hereinafter, '2006 Agreement').

4. However, even after the expiry of the 2006 Agreement on 30.9.2008, and nonrenewal of the same, the Petitioner continued to occupy the suit property. Consequently, the Respondent brought O.S. No. 58395/2016 against the Petitioner on 13.02.2009 for recovering possession of the entire suit property and mesne profits thereon from 1.10.2008 till the vacation of the suit property.

Petitioner/Defendant's Arguments in Original Suit No. 58395 /2016

5. On the question of vacating possession, the Petitioner admitted to having been in possession of only a portion of the suit property measuring 2,200 sq. ft., averring that it was only this portion, not the entire suit property admeasuring 5,427 sq. ft., that was licensed to them by the Respondent.

6. Petitioner further contended that its continued possession of this portion of the suit property was lawful, since the Respondent had concealed the material fact of having entered into an agreement dated 11.6.2008 to sell the suit property to one Mr. Ajay Gosain for a sum of Rs. 4 crores, of which the Respondent had already received a sum of Rs. 65 lakhs. The suit property was agreed to be sold to, and was thus in lawful possession of, Mr. Gosain before the expiry of the 2006 Agreement on 30.09.2008. Mr. Gosain is the husband of one of the Petitioner's Directors, and also the brother of another Director.

7. On the question of mesne profits, Petitioner contended that it had been in possession of only 2,200 sq. ft. of the suit property and had been paying license fee for it till July, 2015 as per the interim order passed by the Trial Court; and that they vacated the premises in July, 2015 and handed over possession to Mr. Gosain, to whom the Respondent had allegedly transferred possession of the suit property pursuant to the agreement to sell. Thus, the Petitioner claims that it is not liable to pay any further sum to the Respondent.

Trial Court's Judgment dated 23.09.2017

8. On the question of vacating possession, the Trial Court held that the issue had already been decided by the High Court in C.M. (M) No. 193/2013 by judgment dated 12.11.2014, and could not be reopened.

9. The Respondent had earlier filed an application before the Trial Court under Order XII, Rule 6, of the Code of Civil Procedure, 1908 (hereinafter, 'CPC'), praying for a judgment on admission decreeing the suit for possession in favour of the Respondent. Upon the Trial Court's dismissal of this application, the Respondent approached the High Court under Article 227 of the Constitution in C.M.(M) No. 193/2013 praying for the aforesaid relief.

Therein, the High Court by its judgment dated 12.11.2014 reversed the Trial Court's dismissal, and held that the admissions made by the parties justify decreeing the Respondent's suit for possession. It had thus directed that the possession of the entire suit property measuring 5,472 sq. ft. be handed over to the Respondent by the Petitioner.

10. On the question of mesne profits, the Trial Court noted that it is an admitted fact between the parties that the possession of the suit property has still not been handed over to the Respondent despite the High Court's order dated 12.11.2014. Instead, the Petitioner claimed to have handed over possession to Mr. Gosain in July, 2015. The following further observations of the Trial Court are relevant for our purposes:

a. What is the area of the suit property for which Petitioner is liable?

The High Court's order dated 12.11.2014 had settled the dispute qua the area that was in possession of the Petitioner, decreeing the Respondent's suit for possession for the entire suit property area of 5,472 sq. ft (and not only the 2,200 sq. ft. portion claimed to be possessed by the Petitioner). The view taken by the aforesaid order has attained finality as far back as on 12.11.2014 and is binding.

b. What is the quantum of compensation payable?

For the period between 1.10.2008 to 27.04.2009, the Respondent is entitled to license fee @ Rs. 37,290/p. m., i.e., the license fee agreed upon in the 2006 Agreement (Rs. 33,900/) with a hike of 10%. For the period of unlawful possession between 28.04.2009 till vacation of possession, Petitioner shall pay mesne profits @ Rs.60,000/p. m. with 10% increase on the 1st April of each alternate year, till the suit property is handed over to Respondent.

11. Aggrieved by the decision on mesne profits, both the Petitioner and Respondent filed crossappeals before the High Court against the judgment of the Trial Court dated 23.09.2017, seeking, respectively, reduction and enhancement in the quantum of mesne profits.

First Impugned Judgment of the High Court dated 14.02.2019 in the above crossappeals

12. The High Court passed a consent decree, directing that the Petitioner shall pay to the Respondent, by way of mesne profits, an enhanced sum of Rs.1,00,000/p. m., with a 10% increase "after every 12 months, i.e. from 1.10.2009, 1.10.2011 etc etc" w.e.f. 1.10.2008 (i.e., the date on which the 2006 Agreement expired) till the date the Petitioner hands over actual possession of the suit property measuring 5,472 sq. ft. to the Respondent.

13. Aggrieved that the terms of the consent decree were recorded incorrectly in the aforesaid order, the Petitioner filed Review Petition No. 177/2019, which was dismissed by the High Court.

Second Impugned Judgment of the High Court in the above review petition dated 25.07.2019

14. The Petitioner contended in its review petition that the High Court in the first appeal had erred in recording the terms of the consent decree agreed to by the Petitioner. First, the judgment records that the mesne profits be increased by 10% every 12 months, instead of recording a 10% increase every 24 months. Second, the judgment erroneously records that the Petitioner will hand over possession of the entire suit property measuring 5,472 sq. ft., when the documents on record would show that the Petitioner was only ever in possession of 2,200 sq. ft.

15. The High Court, rejecting the Petitioner's contentions, held that there was no error apparent on the face of the record to justify its review jurisdiction, and that the Petitioner was dishonestly trying to wriggle out of the consent decree by attempting to overreach the Court. The review petition was dismissed with exemplary costs of Rs.1,00,000/payable by the Petitioner to the Respondent.

II. Submissions made by the Petitioner in the present SLP

16. Shri Mukul Rohatgi, learned senior counsel for the Petitioner, contends that the High Court ought to have, while recording the terms of the consent decree, recorded a 10% increase in mesne profits every 24 months, instead of 12 months. As per him, this typographical error is borne out by the fact that a 10% increase every 24 months closely mirrors the terms of the license agreements where the license fee was increased by 10% every 30 months. The reference to a 10% increase "after every 12 months, i.e. from 1.10.2009, 1.10.2011 etc etc" in the first impugned judgment of the High Court dated 14.02.2019 (supra) also corroborates this.

17. The learned senior counsel for the Petitioner has also contended that the first impugned judgment dated 14.02.2019 erred in recording that the Petitioner has consented to handing over possession of the entire suit property area of 5,472 sq.ft., when the Petitioner has consistently maintained that only 2,200 sq.ft. was licensed to him and in his possession. Both these submissions are vehemently opposed by Shri Basava Prabhu S. Patil, learned senior counsel for respondent.

III. This Court's Analysis

18. Before advertng to the specific contentions raised by the learned senior counsel for the Petitioner, it may be useful to briefly summarise the law governing consent decrees that shall inform our conclusions on the present matter. It is well settled that consent decrees are intended to create estoppels by judgment against the parties, thereby putting an end to further litigation between the parties.

Resultantly, this Court has held that it would be slow to unilaterally interfere in, modify, substitute or modulate the terms of a consent decree, unless it is done with the revised consent of all the parties thereto. (*Gupta Steel Industries v. Jolly Steel Industries Pvt. Ltd. & anr.*, (1996) 11 SCC 678; *Suvaran Rajaram Bandekar & ors. v. Narayan R. Bandekar & ors.*, (1996) 10 SCC 255).

19. However, this formulation is far from absolute and does not apply as a blanket rule in all cases. This Court, in *Byram Pestonji Gariwala v. Union Bank of India & ors.*, (1992) 1 SCC 31, has held that a consent decree would not serve as an estoppel, where the compromise was vitiated by fraud, misrepresentation, or mistake. Further, this Court in the exercise of its

inherent powers may also unilaterally rectify a consent decree suffering from clerical or arithmetical errors, so as to make it conform with the terms of the compromise.

20. The present Petitions thus must be answered in light of the abovestated position of law. It is relevant at this juncture to note that the first impugned judgment of the High Court dated 14.2.2019 recorded the terms of the compromise that the Petitioner had agreed to; and that the same Court has subsequently upheld the validity of that consent decree in the second impugned judgment dated 25.07.2019.

Thus, keeping in line with this Court's jurisprudence, we would be cautious in exercising our inherent power to interfere in this consent decree, except where there is any exceptional or glaring error apparent on the face of the record. We now refer to and answer the specific contentions raised by the parties.

On the question of area of possession:

21. Having undertaken a close perusal of the License Agreements executed between the Petitioner and Respondent, we reject learned senior counsel Mr. Rohatgi's contention that the Petitioner was only in possession of and licensee to a 2,200 sq.ft. portion of the suit property. It is evident that, unlike the 2000 Agreement and 2003 Agreement, the 2006 Agreement, which is the relevant agreement for the present purposes, pertains to the entire suit property, and does not delimit the licensed area to a 2,200 sq. ft. portion.

Thus, the 2006 Agreement effective from 1.04.2006 to 30.09.2008, licensed the total area of 5,472 sq. ft. to Petitioner. Hence, the material on record discloses that the Petitioner is presently in illegal possession of the entire suit property admeasuring 5,472 sq. ft.

22. Further, this question has already been settled by the High Court judgment dated 12.11.2014 (supra) in the earlier litigation between the parties, decreeing the Respondent's suit for possession for the entire area of 5,472 sq. ft (and not only the 2,200 sq. ft. portion claimed to be possessed by the Petitioner). In that order, the High Court had taken note of an admitted document on the record wherein the Petitioner was stated to be in possession of the entire suit property.

The Petitioner's challenge to this judgment dated 12.11.2014 before the Supreme Court has been dismissed in SLP(C) No. 7531/2015, and R.P.(C) No. 1494/2015 in SLP(C) No. 7531/2015, by orders dated 16.03.2015 and 15.07.2015 respectively. Thus, this view has attained finality, and the Petitioner's efforts to reagitate this question in the present proceedings is a waste of this Court's time and an abuse of the process of law.

In any case, since the Petitioner claims no right or interest in the remaining 3,272 sq. ft. of the suit property, there is no prejudice caused to the Petitioner by the order to vacate the entire suit property since he is not the owner of property to that extent also.

23. It is further an admitted position, as recorded by the Trial Court, that the Petitioner has not handed over possession to the Respondent - having claimed to have handed over possession to Mr. Gosain instead in July, 2015. This is despite the High Court's judgment dated 12.11.2014 decreeing the suit for possession in favour of the Respondent. Mr. Gosain's right in the suit property is a question pending in separate specific performance proceedings filed by him.

Thus, at this stage, the Respondent is entitled to get possession of the suit property, pending adjudication of Mr. Gosain's claims. This view attained finality as far back as on 12.11.2014, and it is high time that the Petitioner stops making efforts to circumvent delivering possession of the suit property to the Respondent.

24. Thus, the High Court was correct in upholding the terms of the consent decree directing Petitioner to hand over possession of the entire suit property of 5,472 sq. ft. to the Respondent, and we see no reason to interfere with this part of the consent decree.

On the question of mesne profits:

25. As referred to supra, Shri Mukul Rohatgi, learned senior counsel for the Petitioner has contended that the High Court ought to have, while recording the terms of the consent decree, recorded a 10% increase in mesne profits every alternate year, instead of every year.

26. On the contrary, Shri Basava Prabhu S. Patil, learned senior counsel for the Respondent wants us to construe the observations of the late learned Single Judge appearing in para 1 of

the first impugned judgment dated 14.02.2019 to mean that the mesne profits payable are to be increased by 10% every year.

27. The learned Single Judge, in noting that "this figure of mesne profits of Rs.1 lakh will be increased by 10% after every 12 months, i.e. from 1.10.2009, 1.10.2011 etc etc" (emphasis supplied), has confused not only himself, but also the parties to the litigation. There is an inconsistency in so far there is a gap of every alternate year, i.e. from 2009 to 2011, in the example used by the learned Single Judge even though the decree notes an increase of 10% in mesne profits after every 12 months.

The aforementioned inconsistency in the underlined extract of the consent decree is an error apparent on the face of the record. Hence we find that this is a fit case to exercise inherent the jurisdiction to correct the terms of the consent decree, to bring it in conformity with the intended compromise.

28. At this stage, it is relevant to note that even the judgment dated 23.09.2017 and the final decree dated 15.11.2017 passed by the Trial Court also awards a 10% increase only on each alternative year, i.e. 01.04.2011, 01.04.2013, 01.04.2015 and so on. Further, the original terms of the license agreement between the parties also incorporated a 10% increase in license fee once every 30 months/2.5 years.

Thus, the learned Single Judge's order dated 14.02.2019 has given rise to a lot of confusion. Given this background, and looking at the preponderance of probabilities, we are inclined to give benefit of doubt to the Petitioner. Therefore, we hold that the intention of the compromise between the parties was that there should be a 10% increase in mesne profits every alternate year. The recording of a 10% increase after every 12 months in the consent decree was an inadvertent error, which we have now rectified.

29. To this limited extent, the second impugned judgment dated 25.07.2019 is overturned, and the consent decree recorded by the learned Single Judge's judgment dated 14.02.2019 stands modified.

III. Final Conclusions

30. At this stage, this Bench would like to register its displeasure at the Petitioner's repeated and persistent efforts to reagitate the question of delivery of possession to the Respondent, in an attempt to circumvent complying with the view taken by the High Court in the judgment dated 12.11.2014, which has now attained finality.

Despite the clear direction in that judgment to vacate possession in favour of the Respondent, pending any adjudication on the separate proceedings for possession and specific enforcement initiated by Mr. Gosain, the Petitioner handed over possession to Mr. Gosain in July, 2015. Possession has to this date not been handed over to the Respondent, who has been dragged to the court time and again due to the Petitioner's conduct. This is an instance of blatant disregard for the Court's orders, and an abuse of judicial process.

31. Hence the present petitions are disposed of, with direction to the Petitioner to take steps for handing over possession of the suit property measuring 5,472 sq. ft. to the Respondent within eight weeks from today, without fail. Further, the Registry is directed to expeditiously release the arrears of mesne profits, if any, already deposited by the Petitioner before this Court to the Respondent. The Petitioner is further directed to pay to the Respondent all arrears as directed in order dated 14.2.2019, with the limited modification that the mesne profits are to be treated as increasing by 10% every alternate year, from 2009 till the date of handover of possession.

32. The Petitioner is additionally directed to pay costs of Rs. 1 lakh to the Respondent as stated in the impugned order dated 25.7.2019.

33. The Special Leave Petitions stand disposed of accordingly.

.....J. (Mohan M. Shantanagoudar)

.....J. (Vineet Saran)

New Delhi,

February 17, 2021

The High Court of Judicature at Madras Rep. by its Registrar General

Vs.

M.C. Subramaniam & ors.



[Special Leave Petition (Civil) Nos. 3063-3064 of 2021 Diary No. 3869-2021]

Mohan M. Shantanagoudar, J.

1. These special leave petitions arise out of common order and judgement of the High Court of Madras (hereinafter, 'High Court') dated 8.01.2020. By the impugned judgement, the High Court allowed Civil Miscellaneous Petitions Nos. 26742 & 26743 of 2019 filed by the Respondent No.1 herein praying for refund of the court fees deposited by him in Appeal Suits Nos. 876/2012 and 566/2013 filed by him before the High Court.

2. The facts leading to these petitions are as follows: Respondent No.1 purchased two vehicles from Respondent No. 2 vide two separate hire purchase agreements (hereinafter, 'AgreementI' and 'AgreementII'; collectively, 'the Agreements') dated 10.06.1996, under which Respondent No.1 was the principal debtor/hirer, and Respondents Nos. 3 and 4 were the sureties to the Agreements. As per the terms of the Agreements, Respondent No.1 was to pay a sum of Rs.10,08,000/in stipulated instalments to Respondent No. 2 for each of the two vehicles.

3. It suffices to note for our purposes that Respondent No. 2 brought Original Suits Nos. 66/2003 and 76/2003 against Respondents Nos. 1, 3 and 4 before the Additional District Munsif Court, Coimbatore (hereinafter, 'Munsif Court') and the Additional District and Sessions Court, Coimbatore (hereinafter, 'District Court') respectively.

In the two suits, Respondent No.2 alleged nonpayment of Rs.6,64,000/and Rs.5,97,200/towards the instalments stipulated in AgreementI and AgreementII respectively, and sought recovery of the balance amounts along with interest thereon. Both the Original Suits Nos.66/2003 and 76/2003 were partly decreed by the Munsif Court and District Court, by judgments dated 13.02.2004 and 31.01.2005 respectively.

4. Aggrieved, Respondent No.1 preferred Appeal Suits Nos. 876/2012 and 566/2013 before the High Court, against the judgments in O.S. No. 66/2003 and O.S. No.76/2013, respectively. While the appeals were still pending consideration before the High Court, the parties entered into a private outofcourt settlement, thus resolving the controversy between them.

In view of this, Respondent No. 1 filed a memo before the High Court, seeking permission to withdraw Appeal Suits Nos. 876/2012 and 566/2013. Such permission, along with a direction to refund the court fee deposited by Respondent No.1, was granted by orders dated 16.09.2019 and 18.09.2019 in A.S. Nos.566/2013 and A.S. Nos. 876/2012 respectively.

5. Despite the above stated orders of the High Court, the Registry orally refused Respondent No.1's request for refund of court fees, on the ground that such refund is not authorised by the relevant rules. Left without recourse, on 25.12.2019, Respondent No.1 filed Civil Miscellaneous Petitions Nos. 26742/2019 and 26743/2019 under Section 151, Code of Civil Procedure, 1908 (hereinafter, 'CPC'), praying for refund of the court fees paid by him in A.S. Nos. 876/2012 and 566/2013 respectively, in terms of the orders dated 18.09.2019 and 16.09.2019 therein.

6. By the impugned common judgment and order dated 8.01.2020, the High Court has allowed the aforementioned Civil Miscellaneous Petitions, and directed the Registry to refund the full court fee to Respondent No. 1 herein.

7. In addressing the question of whether the refund of court fee was permissible under the relevant rules, the High Court considered Section 69A of the Tamil Nadu Court Fees and Suit Valuation Act, 1955 (hereinafter, '1955 Act'), which reads as follows:

"69A. Refund on settlement of disputes under section 89 of Code of Civil Procedure.- Where the Court refers the parties to the suit to any of the modes of settlement of dispute referred to in section 89 of the Code of Civil Procedure, 1908 (Central Act V of 1908), the fee paid shall be refunded upon such reference. Such refund need not await for settlement of the dispute."

(emphasis supplied)

Considering, appeal suits to be continuation of original suits, and therefore falling within the ambit of 'suits' as provided in Section 69A, the Court went on to take notice of Section 89, CPC which reads as follows:

"89. Settlement of disputes outside the Court.-

(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after 5 receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for :-

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat: or

(d) mediation.

(2) Where a dispute has been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of subsection (1) of section 20 of the Legal Services Authority Act, 1987 (39 of

1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

8. After giving due consideration to the above provisions, the High Court held that, given their beneficial intent, they must be interpreted liberally, in a manner that would serve their object and purpose. Construing them narrowly would lead to a situation wherein parties who settle their dispute through a Mediation Centre or other centres of alternative judicial settlement under Section 89, CPC would be entitled to claim refund of their court fee, whilst parties who settle the disputes privately by themselves will be left without any means to seek a refund.

Accordingly, the High Court opined that such differential treatment between two similarly situated persons, would constitute a violation of Article 14 of the Constitution. Therefore, in the High Court's view, a constitutional interpretation of Section 89 of the CPC, and resultantly Section 69A of the 1955 Act, would require that these provisions cover all methods of out of court dispute settlement between parties that the Court subsequently finds to have been legally arrived at.

9. Dissatisfied, the Petitioner herein has challenged the impugned judgment of the High Court.

10. The gravamen of the Petitioner's contentions is that Section 69A of the 1955 Act only contemplates refund of court fees in those cases where the Court itself refers the parties to any of the alternative dispute settlement mechanisms listed in Section 89 of the CPC. That hence it does not apply to circumstances such as in the present case, where the parties,

without any reference by the Court, privately agreed to settle their dispute outside the modes contemplated under Section 89 of the CPC.

This Court's Analysis

11. Having heard the petitioner and thoroughly considered the arguments advanced, we find ourselves unimpressed by the Petitioner's contentions, for reasons outlined below.

12. The provisions of Section 89 of CPC must be understood in the backdrop of the longstanding proliferation of litigation in the civil courts, which has placed undue burden on the judicial system, forcing speedy justice to become a casualty. As the Law Commission has observed in its 238th Report on Amendment of Section 89 of the Code of Civil Procedure 1908 and Allied Provisions, Section 89 has now made it incumbent on civil courts to strive towards diverting civil disputes towards alternative dispute resolution processes, and encourage their settlement outside of court (Para 2.3).

These observations make the object and purpose of Section 89 crystal clear - to facilitate private settlements, and enable lightening of the overcrowded docket of the Indian judiciary. This purpose, being sacrosanct and imperative for the effecting of timely justice in Indian courts, also informs Section 69A of the 1955 Act, which further encourages settlements by providing for refund of court fee. This overarching and beneficent object and purpose of the two provisions must, therefore, inform this Court's interpretation thereof.

13. Before expounding further on our interpretation of the aforesaid provisions, regard must be had to the following postulation of this Court's interpretive role in *Directorate of Enforcement v. Deepak Mahajan*, 1994 3 SCC 440 -

"24. Though the function of the Courts is only to expound the law and not to legislate, nonetheless the legislature cannot be asked to sit to resolve the difficulties in the implementation of its intention and the spirit of the law. In such circumstances, it is the duty of the court to mould or creatively interpret the legislation by liberally interpreting the statute.

25. In *Maxwell on Interpretation of Statutes*, Tenth Edn. at page 229, the following passage is found:

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence.

Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

(emphasis supplied)

Therefore, it is well settled that the Courts may, in order to avoid any difficulty or injustice resulting from inadvertent ambiguity in the language of a statute, mould the interpretation of the same so as to achieve the true purpose of the enactment. This may include expanding the scope of the relevant provisions to cover situations which are not strictly encapsulated in the language used therein.

14. This principle of statutory interpretation has been affirmed more recently in the decision in *Shailesh Dhairyawan v. Mohan Balkrishna Lulla*, (2016) 3 SCC 619 -

"33. Though the literal rule of interpretation, till some time ago, was treated as the "golden rule", it is now the doctrine of purposive interpretation which is predominant, particularly in those cases where literal interpretation may not serve the purpose or may lead to absurdity. If it brings about an end which is at variance with the purpose of statute, that cannot be countenanced."

(emphasis supplied)

This was followed in the subsequent decision of this Court in *Anurag Mittal v. Shaily Mishra Mittal*, (2018) 9 SCC 691.

15. In light of these established principles of statutory interpretation, we shall now proceed to advert to the specific provisions that are the subject of the present controversy.

The narrow interpretation of Section 89 of CPC and Section 69A of the 1955 Act sought to be imposed by the Petitioner would lead to an outcome wherein parties who are referred to a Mediation Centre or other centres by the Court will be entitled to a full refund of their court fee; whilst parties who similarly save the Court's time and resources by privately settling their dispute themselves will be deprived of the same benefit, simply because they did not require the Court's interference to seek a settlement.

Such an interpretation, in our opinion, clearly leads to an absurd and unjust outcome, where two classes of parties who are equally facilitating the object and purpose of the aforesaid provisions are treated differentially, with one class being deprived of the benefit of Section 69A of the 1955 Act. A literal or technical interpretation, in this background, would only lead to injustice and render the purpose of the provisions nugatory - and thus, needs to be departed from, in favour of a purposive interpretation of the provisions.

16. It is pertinent to note that the view taken by the High Court in the impugned judgement has been affirmed by the High Courts in other states as well. Reference may be had to the decision of the Karnataka High Court in *Kamalamma & ors. v. Honnali Taluk Agricultural Produce Cooperative Marketing Society Ltd.*, (2010) 1 AIR Kar. R 279, wherein it was held as follows:

"6. Whether the parties to a suit or appeal or any other proceeding get their dispute settled amicably through Arbitration, or mediation or conciliation in the Lok Adalath, by invoking provisions of Section 89, C.P. C. or they get the same settled between themselves without the intervention of any Arbitrator/Mediator/Conciliators in Lokadalath etc., and without invoking the provision of Section 89, C.P.C., the fact remains that they get their dispute settled without the intervention of the Court.

If they get their dispute settled by invoking Section 89, C.P.C., in that event the State may have to incur some expenditure but, if they get their dispute settled between themselves without the intervention of the Court or anyone else, such as arbitrator/mediator etc., the State would not be incurring any expenditure.

This being so, I am of the considered opinion that whether the parties to a litigation get their dispute settled by invoking Section 89, C.P.C. or they get the same settled between themselves without invoking Section 89, C.P.C., the party paying Court Fees in respect thereof should be entitled to the refund of full Court Fees as provided under Section 16 of the CourtFees Act, 1870."

(emphasis supplied)

Section 16 of the CourtFees Act, 1870 is in parimateria with Section 69A of the 1955 Act, and hence the above stated principles are equally applicable to the present case.

17. The holding in Kamalamma (supra) has been followed by the Punjab & Haryana High Court in Pradeep Sonawat v. Satish Prakash, 2015 (1) RCR Civil 955 and Pritam Singh v. Ashok Kumar, 2019 (1) Law Herald (P&H) 721, which in turn were further affirmed in Raj Kumar v. Gainda Devi through LRs & ors., 2019 SCC OnLine P&H 658.

18. The Delhi High Court has also taken a similar view in J.K. Forgings v. Essar Construction India Ltd. & Ors., (2009) 113 DRJ 612:

"11. The laudable object sought to be achieved by inserting and amending these sections seems to be speedy disposal. The policy behind the statute is to reduce the No. of cases by settlement. Section 89 of C.P.C. and Section 16 Court Fee Act are welcome step in that direction, as the No. of cases has increased, it is the duty of court to encourage settlement.

In present scenario of huge pendency of cases in the courts a purposive and progressive interpretation is the requirement of present hour. The intention of the Legislature is primarily to be gathered from the object and the words used in the material provisions. The statute must be interpreted in their plain grammatical meaning.

12. It is very clear that the Legislative intent of Section 16 of Court Fees Act was made broad enough to take cognizance of all situations in which parties arrive at a settlement irrespective of the stage of the proceedings. It is also obvious that the purpose of making this provision was in order to provide some sort of incentive to the party who has approached the court to

resolve the dispute amicably and obtain a full refund of the court fees. Having regard to this position, the present application will have to be allowed.

14. This is not a case where parties to the suit after long drawn trial have come to the court for settlement. Had it been the case of long drawn trial nonrefund of court fees could have been justified but in such like cases courts endeavour should be to encourage the parties and court fees attached with the plaint should be refunded as an incentive to them.

17. Settlement of dispute only through any of the mode prescribed under section 89 of C.P.C is not sine qua none of section 89 C.P.C. rather it prescribes few methods through which settlement can be reached, sine qua non for applicability of section 89 is settlement between the parties outside the court without the intervention of the courts.

18. It is also not the requirement of the section that court must always refer the parties to Dispute Resolution Forum. If parties have arrived at out of court settlement it should be welcomed subject to principles of equity.

19. Court Fees Act is a taxing statute and has to be construed strictly and benefit of any ambiguity if any has to go in favour of the party and not to the state." (emphasis supplied) The view taken in both Kamamma (supra) and J.K. Forgings (supra) has been subsequently relied upon by the Delhi High Court in Inderjeet Kaur Raina v. Harvinder Kaur Anand, 2018 SCC OnLine Del 6557.

19. We find ourselves in agreement with the approach taken by the High Courts in the decisions stated supra. The purpose of Section 69A is to reward parties who have chosen to withdraw their litigations in favour of more conciliatory dispute settlement mechanisms, thus saving the time and resources of the Court, by enabling them to claim refund of the court fees deposited by them.

Such refund of court fee, though it may not be connected to the substance of the dispute between the parties, is certainly an ancillary economic incentive for pushing them towards exploring alternative methods of dispute settlement. As the Karnataka High Court has rightly observed in Kamamma (supra), parties who have agreed to settle their disputes without requiring judicial intervention under Section 89, CPC are even more deserving of this benefit.

This is because by choosing to resolve their claims themselves, they have saved the State of the logistical hassle of arranging for a thirdparty institution to settle the dispute. Though arbitration and mediation are certainly salutary dispute resolution mechanisms, we also find that the importance of private amicable negotiation between the parties cannot be understated. In our view, there is no justifiable reason why Section 69A should only incentivize the methods of outof16 court settlement stated in Section 89, CPC and afford stepbrotherly treatment to other methods availed of by the parties.

Admittedly, there may be situations wherein the parties have after the course of a longdrawn trial, or multiple frivolous litigations, approached the Court seeking refund of court fees in the guise of having settled their disputes. In such cases, the Court may, having regard to the previous conduct of the parties and the principles of equity, refuse to grant relief under the relevant rules pertaining to court fees. However, we do not find the present case as being of such nature.

20. Thus, even though a strict construction of the terms of Section 89, CPC and 69A of the 1955 Act may not encompass such private negotiations and settlements between the parties, we emphasize that the participants in such settlements will be entitled to the same benefits as those who have been referred to explore alternate dispute settlement methods under Section 89, CPC. Indeed, we find it puzzling that the Petitioner should be so vehemently opposed to granting such benefit.

Though the Registry/State Government will be losing a onetime court fee in the short term, they will be saved the expense and opportunity cost of managing an endless cycle of litigation in the long term. It is therefore in their own interest to allow the Respondent No. 1's claim.

21. Thus, in our view, the High Court was correct in holding that Section 89 of the CPC and Section 69A of the 1955 Act be interpreted liberally. In view of this broad purposive construction, we affirm the High Court's conclusion, and hold that Section 89 of CPC shall cover, and the benefit of Section 69A of the 1955 Act shall also extend to, all methods of outofcourt dispute settlement between parties that the Court subsequently finds to have been legally arrived at.

This would, thus, cover the present controversy, wherein a private settlement was arrived at, and a memo to withdraw the appeal was filed before the High Court. In such a case as well, the appellant, i.e., Respondent No. 1 herein would be entitled to refund of court fee.

Conclusions and Directions

22. These petitions are accordingly dismissed, and the impugned judgment of the High Court dated 8.01.2020 is upheld.

23. The petitioners are directed to refund the court fee deposited by Respondent No. 1 for Appeal Suits Nos. 876 of 2012 and 566 of 2013, within a period of six weeks.

.....J. [Mohan M. Shantanagoudar]

.....J. [Vineet Saran]

New Delhi

February 17, 2021

END NOTE:

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**BOMBAY MILK PRODUCERS ASSO. FILE SLP AGAINST BHC
ORDER**



The Bombay Milk Producers Association (BMPA) filed an SLP against orders dated 9.12.2019 and 30/01/2020 of the Bombay High Court in a matter which has been ongoing since the last 15 years. The matter is on the issue whether cattles and milk business is to be shifting from Mumbai to its adjoining areas or outskirts.

The problem initially arose due to a PIL being filed by an NGO (named “Janhit manch”) in the Bombay HC seeking to shift the milk business from Mumbai and its suburbs to ‘Dapchari’ or any other place in the year 2005. Subsequently, in 2006, The Maharashtra government’s Agriculture, Animal Husbandry, Dairy Development, and Fisheries Department issued a notification which declaring the “entire area of Mumbai city up to Mahim Creek and Sion and the entire area of Mumbai Suburban District, being the urban area, to be prohibited area for the purposes of the said Act.” This notification was subsequently challenged in 2007 by the BMPA and even went to the Supreme Court on a specific issue on which the Supreme Court orders the High Court to again look at the matter as it was in a much better position to adjudicate upon the matter.

The petitioner contended that it is not clear how the milk would be “transported from Dapchari to Mumbai city. The minimum time required for a one-way trip (either to or from Dapchari) is about three-and-a-half hours because of traffic and the condition of roads at various places on the way. The members of the petitioner association, being suppliers of fresh milk needed to ensure that the milk reaches the end user within 3 hours of its extraction”. Anyhow, the High Court, based on a “purported” consent of the petitioner’s lawyer, directed the shifting of cattle and cattle sheds to Dapchari on 9th of December 2019 and also approved a phase wise shifting of mil business from Mumbai to dapchari on 30th of January 2020. The instant SLp seeks to challenge the said orders of the High Court. 19th February 2021 was set as the next date of hearing.

SC ISSUES NOTICE ON FACILITATION OF E-VOTING SYSTEM TO ENHANCE THE CITIZEN'S ACCESS



On a petition filed by Mr. K.Sathyan (seeking to strike down S.60(c) of the Representation of People Act, 1951 to the extent it is contended to be unjust, illegal, arbitrary and unconstitutional), the Supreme Court on 18th February issued notices to Election Commission of India and the Central Government. The plea seeks facilitation of e-voting system in order to enhance the citizen's access to voting by decentralizing the voting system. The said plea also prays that a direction may be given to the government to take steps to ensure that access to voting is ensured to every citizen irrespective of his geographical location (those stationed or residing outside their constituency), like the plight of migrant workers and employees, business personal and student. The plea also highlighted the crucial need to ensure "free and fair" elections in a manner which utilizes technological advancements to prevent electoral malpractices.

The petitioner has submitted "that the phrase "ordinarily resident" is defined in Section 20 of the Representation of People Act, 1950 in the context of persons who are entitled to enroll as voters in the electoral roll. The term requires a pragmatic understanding and application in keeping with the current times, to bring out the legislative intent behind the provision. The vast majority of the population who now reside temporarily away from their constituency, for many reasons including profession, occupation, trade, business, education, marriage etc are disentitled from the freedom to cast their vote in violation of their fundamental right of expression under Article 19(1)(a)."

It has thus been submitted that "omission to include the categories of persons stationed outside their constituency, form the category of persons enjoying the right to vote through postal ballots is arbitrary and in violation of their fundamental rights under Article 14, 19(1)(a), 19(1)(d), 19(1)(g) and 21 and the right to vote under Article 326".

**DECREE OF CONSENT WOULD NOT SERVE AS AN ESTOPPEL
WHERE THE COMPROMISE WAS VITIATED BY FRAUD,
MISREPRESENTATION OR MISTAKE**



While shedding light on the question of whether a decree of consent would or would not serve as an estoppel, a two Judge Bench of the Apex Court comprising of Justice Mohan M Shantanagoudar and Justice Vineet Saran in *Compack Enterprises India (P) Ltd vs Beant Singh* [Special Leave Petition (Civil) Nos. 2224-2225 of 2021] delivered on February 17, 2021 has observed that a consent decree would not serve as an estoppel, where the compromise was vitiated by fraud, misrepresentation, or mistake. This case arose out of a suit for possession and mesne profits filed by one Beant Singh against Compack Enterprises with respect to the ground floor of the property owned by the former.

Crux of the case- these petitions arose out of judgments of the High Court of Delhi. By the first impugned judgment dated 14.02.2019, the High Court disposed of the regular first appeal in RFA No. 253/2018 filed by the Petitioner against judgment and order of the Ld. Additional District Judge, Rohini dated 23.09.2017 in Suit filed by the Respondent. Whereas by the second impugned judgment dated 25.7.2019, the High Court disposed of Review Petition filed by the Petitioner against the judgment in RFA No. 253/2018.

Before advertng to the specific contentions raised by the learned senior counsel for the Petitioner, the Court stated that it would be useful to briefly summarize the law governing consent decrees that shall inform our conclusions on the present matter. It is well settled that consent decrees are intended to create estoppels by judgments against the parties, thereby putting an end to further litigation between the parties. Resultantly, this Court has held that it would be slow to unilaterally interfere in, modify, substitute or modulate the terms of a consent decree, unless it is done with the revised consent of all the parties thereto.

The Bench registered its displeasure at the Petitioner's repeated and persistent efforts to reagitate the question of delivery of possession to the Respondent, in an attempt to

circumvent complying with the view taken by the High Court in the judgment which has now attained finality. Despite the clear direction in that judgment to vacate possession in favour of the Respondent, pending any adjudication on the separate proceedings for possession and specific enforcement initiated by Mr. Gosain, the Petitioner handed over possession to Mr. Gosain in July, 2015. Possession has to this date not been handed over to the Respondent, who has been dragged to the court time and again due to the Petitioner's conduct. This was an instance of blatant disregard for the Court's orders, and an abuse of judicial process.

"Hence the present petitions are disposed of, with direction to the Petitioner to take steps for handing over possession of the suit property measuring 5,472 sq. ft. to the Respondent within eight weeks from today, without fail. Further, the Registry is directed to expeditiously release the arrears of mesne profits, if any, already deposited by the Petitioner before this Court to the Respondent. The Petitioner is further directed to pay to the Respondent all arrears as directed in order dated 14.2.2019, with the limited modification that the mesne profits are to be treated as increasing by 10% every alternate year, from 2009 till the date of handover of possession."

SOURCE: [Gold smuggling.pdf - Google Drive](#)

Union Of India v K.A. Najeeb – A Ray Of Hope For UAPA Undertrials?



The Supreme Court (SC) on 1st February 2020 delivered an important judgment, Union of India v KA Najeeb (K.A. Najeeb), related to granting of bail in Unlawful Activities Prevention Act (UAPA) 1967 cases. The Court held that any constitutional court has the power to grant bail to people accused of offences under UAPA irrespective of Section 43-D (5), so as to enforce the right to speedy trial which is guaranteed under Article 21 of the Constitution. The judgment has been hailed as the step in the right direction, given that the stringent provisions of Section 43-D (5) makes it almost impossible for a person to secure a

bail for an offence under UAPA and under-trials languish in jail while the trial drags on for years. In this post I will highlight the importance of the judgment in the context of the operation of UAPA on ground and will try to answer some of the questions which K.A. Najeeb has thrown up. The UAPA creates an alternate criminal justice system where the Code of Criminal Procedure (CrPC) does not apply and there are little safeguards for the accused. Empirical research has shown that two-thirds of the accused end up getting acquitted. However, the criminal trial drags on for years and most of the accused end up serving significant amount of time in jail before the trial concludes. This is primarily because of Section 43(D)-5 of the UAPA. According to Section 43(D)-5 a person accused of an offence under UAPA cannot be released on bail if, on a perusal of case diary or the report made under s. 173 of CrPC, the court is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true. Notice that the standard of prima facie is extremely low. In *NIA v Zahoor Ahmad Shah Watali* held that to satisfy the standard of prima facie no elaborate scrutiny or dissection of the material is required. Simply put, the court merely has to rely on the words of the investigating agency and see whether the allegations fit the offences. In view of such stringent bail provisions and lengthy trials there was no way for undertrials to get bail even though they ultimately they might end up getting acquitted. Thus, an accusation under UAPA becomes as good as conviction and a way for the State to punish people without subjecting them to a fair trial.

The lack of any interim relief paved the way to a particularly odious practice i.e., informal plea bargaining. Since undertrials languished in jails for years and years they end up serving a significant portion of the sentence of the crime they are accused of even before the trial has concluded. This leads to the accused reaching an informal arrangement with the prosecutors wherein the former plead guilty, resulting in a conviction that is usually for the period already served as undertrial or a reduced sentence. It is not unlikely that quite a few accused who were actually innocent pleaded guilty just so that they can get out of prison. The fact that a person is forced to plead guilty for a crime that they did not commit is illustrative of how UAPA is doing grave injustice to the accused and violating their right to liberty. It is in this context that the decision of the SC becomes very important. The court has held that bail can be granted to an undertrial irrespective of Section 43-D (5) of the UAPA if the court finds that right to speedy trial under Article 21 is being violated. In the instant case the accused had spent nearly five years in prison out of maximum 8-10 for which he could potentially get convicted. Moreover, 276 witnesses who were left to be examined when the matter came before the SC. It held Section 43-D (5) is not a bar when right to speedy trial is violated and

accordingly granted bail in this case. The decision of the court is welcome, however the decision itself has opened up a few questions which I will now explore. First, it is not exactly clear what is the standard used by the Court to arrive at the finding that right to speedy trial has been violated. The court seemed to have been led by two considerations – a) the period of time spent in jail and b)- the possibility of early conclusion of trial. With respect to the first condition the accused had spent five out of the maximum of 8-10 years for which he could be convicted.

However, the court stopped short of giving any principled reasoning which could be used in future cases to decide whether the right to speedy trial has been violated. Currently s. 436A of CrPC (which does not apply to UAPA) states that if an accused has spent half the period of time out of the maximum period of punishment specified for that offence, the accused has to be released on bail. This provision was not a part of the original CrPC and was added in 2005. Although the Statement of Object of Reasons to the CrPC amendment does not talk about s. 436A, the rule of giving bail on spending half the time specified for that offence is prison emerges out of the jurisprudence of SC in cases concerning right to speedy trial. In *Hussainara Khatoon v Home Secretary, State of Bihar* (which laid the foundation of right to speedy trial)- the court observed how several undertrial prisoners has spent more than one half of the maximum punishment of which they could be convicted.

The court directed the government to appoint lawyers for such undertrials and file an application for bail. In *Supreme Court Legal Aid Committee v UoI*, another case dealing with right to speedy trial, the court issued a number of directions with respect to pending cases. One such direction was to release those undertrials who were accused of an offence under NDPS Act carrying maximum punishment of five years or less and have spent time in jail which is not less than half the punishment provided. It was only after this line of cases that s. 436A was added to the CrPC. It can be safely be assumed that the legislature was inspired by jurisprudence on right to speedy trial. It is therefore submitted that the rule contained in s. 436A of CrPC i.e., half the maximum punishment as undertrial can be a good standard for UAPA cases where the right to speedy trial is being prayed because the source of this rules itself is jurisprudence on right to speedy trial. If not as a fixed rule, it should at least give a presumption that the right to speedy trial has been violated and then the burden should shift on the state to justify continued detention.

Second, the court also took into consideration the time which it would take to conclude the trial. The court was of the opinion that in the present case since 276 witnesses were yet to be

examined the trial will take long to finish and the accused ought to be released. It will be noticed that in the present case the court is concerned with a particular stage of criminal justice process, i.e., trial. However, it is well settled that right to speedy trial extends to all stages including investigation, inquiry, trial, appeal, revision and re-trial. In the context of UAPA it is important to pay attention to one particular stage i.e., investigation. This is because the NIA which is India's anti-terror agency deliberately slows the investigation to keep the accused in prison for as long as possible. This is done by filing chargesheets and supplementary chargesheets with long gaps, which ensures that the trial is kept in suspended animation and the accused is in prison. This is especially done when the agencies know that their case is weak and will not stand a trial.

This strategy has been adopted by the agencies in Delhi Riots case and Bhima Koregoan case. In both these cases the accused have been mostly denied bail. Since the right to speedy trial includes the stage of investigation the courts in the future will have to take this reality into account and expand the scope of SC's decision in K.A. Najeeb. The SC's jurisprudence on speedy trial and long period of investigation itself does not inspire much hope. In Rahubir Singh v State of Bihar the police of Bihar were accused of delaying the investigation to keep the accused in jail at any cost. The accused were a group of people caught while they were secretly attempting to cross the Indo-Nepal border at the height of Sikh militancy in 1984. It turned out that one of the persons was himself suspended from Indian Police Services for his anti-India activities.

The court observed that the investigative agencies were justified in extending the investigation because the case involved 'suspected conspiracies bristling with all manners of complexities' and therefore even though there were 'lulls' in investigation it cannot be said that right to speedy trial was violated. While these considerations might have been true in that case, it is well known that arguments of 'national security', and 'conspiracies involving complex investigation' are a slippery slope to giving the executive free hand to trample on the liberties of its citizens. This exceptionalism might well play a role in future cases because the UAPA itself deals only with such suspected conspiracies and threats to national security and the Indian judiciary is notorious for buying into such arguments of 'national interest' and 'national security' too easily.

Third, India's bail jurisprudence is notoriously inconsistent and discriminatory. For example, the MP High Court did not even apply the well settled principles of bail law in Munawar Faruqi case and inexplicably relied on Fundamental Duties to deny bail. Similarly, while bail was granted to Arnab Goswami in Article 32 petition because the courts thought the

police was misusing its power, journalist Siddique Kaplan is languishing in jail and his Article 32 petition was rejected and when Arnab Goswami case was cited, it was simply remarked that every case is different. If constitutional courts fail to apply even well settled principles of bail law to regular cases, only time will tell how K.A. Najeeb will be applied in the future especially because the judgment does not even lay down any concrete principle on which bail is to be given and therefore remains susceptible to inconsistent and unprincipled application.

Conclusion

K.A. Najeeb has the potential to remedy injustice that is caused by stringent bail condition under s. 43-D(5) of UAPA. However, this potential can be realized only if there is principled application of the judgment. In K.A. Najeeb the court relied on two considerations the period of time in jail as undertrial and the time left for conclusion of trial in order to determine whether right to speedy trial was violated but failed to specify any principled rule to decide future cases. In this post firstly, I have argued how the law can take shape in the future firstly showing how the rule in s. 436A of the CrPC can be a good indicator if not a brightline rule for violation of right to speedy trial; secondly, I have argued that the courts need to take into account the delaying tactics used by investigative agencies to effectively enforce right to speedy trial. In conclusion it is submitted that only if we have some settled principle based on which bail can be given in UAPA cases can we hope to effectively enforce right to speed trial and remedy the injustice caused by UAPA.

BANKS LIABLE UNDER CONSUMER PROTECTION ACT FOR DEFICIENCIES IN LOCKER SERVICES: SUPREME COURT ISSUES GUIDELINES ON ALLOTING, OPERATING LOCKERS.



The Court also ordered the Reserve Bank of India (RBI) to lay down comprehensive directions mandating the steps to be taken by banks with respect to locker facility/safe deposit facility management.

Banks cannot impose unilateral and unfair terms on the consumers while operating bank lockers, the Supreme Court ruled while cautioning banks against breaking open lockers without adhering to the relevant laws and regulations (*Amitabha Dasgupta v. United Bank of India*).

The Court also made it clear that while any imposition of liability with respect to contents of locker is dependent on appreciation of evidence in civil suit, the remedy under Consumer Protection Act can also be invoked.

“Banks as service providers under the earlier Consumer Protection Act, 1986, as well as the newly enacted Consumer Protection Act, 2019, owe a separate duty of care to exercise due diligence in maintaining and operating their locker or safety deposit systems. This includes ensuring the proper functioning of the locker system, guarding against unauthorized access to the lockers and providing appropriate safeguards against theft and robbery,” the Court reaffirmed.

The judgment came in an appeal against a 2008 judgment of the National Consumer Dispute Redressal Commission (NCDRC).

A Bench of Justices Mohan M Shantanagoudar and Vineet Saran ordered the Reserve Bank of India (RBI) to lay down comprehensive directions mandating the steps to be taken by banks with respect to locker facility/safe deposit facility management.

“The banks cannot wash off their hands and claim that they bear no liability towards their customers for the operation of the locker. The very purpose for which the customer avails of the locker hiring facility is so that they may rest assured that their assets are being properly taken care of,” the Court said.

The RBI had issued clear directions as far back as in 2007 imposing duty of care in respect of protection of the bank lockers and mandating transparency vis-a-vis the locker holder in allotment and breaking open of the lockers, the Court noted.

However, the banking regulator had left it to the discretion of the individual banks to formulate the exact procedures for fulfilling this duty of care, the Court observed.

The Court, therefore, proceeded to issue a slew of guidelines to ensure that proper procedures are followed by banks while allotting and operating the locker facility.

Until the RBI frames guidelines, the guidelines issues by the Court will have to followed by banks which are providing locker or safe deposit facilities.

DEATH ROW CONVICT SHABNAM, CONVICTED OF MURDERING SEVEN FAMILY MEMBERS, FILES SECOND MERCY PETITION.



Even as reports on the potential execution of death row convict Shabnam stream in, she has filed her second mercy petition with Governor of Uttar Pradesh Anandiben Patel and President of India Ramnath Kovind.

The development takes place at a time when Mathura Jail - the only jail in the country where women can be hanged to death - is reportedly preparing to execute Shabnam in what will be the first hanging of a female convict in 70 years.

"Ridiculous reporting on making it seem that Shabnam Ali is going to be executed and that she will be the first woman to be executed. The slightest due diligence would have shown that she (has) important constitutional remedies remaining and that a death warrant cannot be issued," Anup Surendranath, Executive Director, Project 39A at National Law University, Delhi tweeted on the development.

Shabnam, who is currently lodged at District Jail, Mathura, was found guilty of murdering seven of her family members including a 10-month-old infant in 2008 after her lover Saleem was not accepted by her family.

As per the prosecution case, after the murders took place, Shabnam was found crying "Bachao bachao maare maare" (help, help, they've been killed), lying on the terrace. When her neighbour reached the house, it was found locked. He then took the other entrance to reach the roof, where he found an unconscious Shabnam.

Soon thereafter, all seven members of the house were discovered in a pool of blood. Shabnam's father, mother, two brothers, sister-in-law, and a 14-year-old niece were hacked on the head, face and trunk regions with an axe in their sedated sleep. The infant was throttled to death.

A total of 28 witnesses corroborated the chain of events before the trial court. Rais Ahmed, who was one of the prime witness, informed the court that he saw Saleem asking a medical store for intoxicating/sleeping tablets, but the doctor refused to prescribe the medicine. Ahmed said that a fruit seller, Pappu got him the sedatives from Moradabad.

As per the case of the prosecution, the family members were murdered in their sleep by Saleem after Shabnam administered diazepam tablets (sedatives) to the entire family. Shabnam and her lover Saleem were convicted and sentenced to death by a Sessions Court in Amroha back in July 2010. Their death sentences were confirmed by the Allahabad High Court on April 26, 2013. The High Court refused to consider as a mitigating factor the fact that while in jail, Shabnam had given birth to a child who would be orphaned if his parents are executed.

The Supreme Court of India dismissed their criminal appeals filed in May 2015.

Subsequently, a death warrant for the executions of Shabnam and Saleem was issued by the Sessions Court on May 21, 2015. On May 27, the Supreme Court (in Shabnam v. Union of India) quashed the death warrants on the ground that the duo were yet to avail of their constitutional remedies. While doing so, the Court laid down the law on issuance of death warrants in India. The judgment rendered by Justices AK Sikri and UU Lalit reads, "...the convicts have not exhausted their judicial and administrative remedies, which are still open to them even if their appeals in the highest Court have failed affirming the imposition of death penalty. Those appeals were filed via the route of Article 136 of the Constitution. However, law gives such persons another chance, namely, to seek review of the orders so passed, by means of filing of review petition..."

Thereafter, a mercy petition was filed by Shabnam on June 9, 2015 in Moradabad District Jail, which was rejected by the Governor of Uttar Pradesh. The President of India then rejected her mercy plea on August 7, 2016.

On January 23 last year, a Supreme Court Bench headed by Chief Justice of India SA Bobde dismissed the review petition filed by Saleem and Shabnam. The Court found no reason to overturn the death sentence, noting in its order,

"Notably, Shabnam is well educated and was employed as a Shikshamitra (Teacher) in a school. Yet she (with Saleem) had committed the patricide exterminating seven lives including a 10 month-old baby. Saleem had meticulously executed the killing after Shabnam had administered sleeping pills in tea. Saleem had slayed six of them. Subsequently, she had feigned unconsciousness. The devilry was with the desire to see that no legal heir except

Shabnam remains alive. They wanted to grab the property of Shabnam's parents who were against their marriage."

Shabnam's lawyer, Advocate Shreya Rastogi, maintains that there can be no question of issuance of death warrants, since she is yet to avail all her legal remedies.

"Shabnam has very important constitutional remedies that remain to be exercised. These include the right to challenge the rejection of her mercy petition before the Allahabad High Court and the Supreme Court on various grounds and also the right to file a curative petition in the Supreme Court against the decision on the review petition," reads a statement by the lawyer.

Recently, it was reported that Taj (Shabnam's son) appealed to President Kovind to commute the death sentence of his mother. Speaking to ANI, he said,

"I love my mother. I am making an appeal to the President that her death sentence is commuted. It is up to the President to forgive her. But I have faith," he reportedly said.

TATA MOTORS LTD VS. ANONIO PAULO VAZ AND ANOTHER



In **TATA Motors Ltd vs. Anonio Paulo Vaz and Another**, CP No. 574/2021.

The Supreme Court on 18th February, 2021 comprising of a three-judge bench of Justices UU Lalit, Hemant Gupta and Ravindra Bhat observed that a manufacturer will not be liable for the fault of the dealer, unless it is proved that the manufacturer was aware of the deficiency of the dealer, in cases where the relationship between them is on "principal-to-principal" basis. [*Tata Motors Ltd v Anonio Paulo Vaz and Another*]

The bench holding so, absolved Tata Motors Limited of the liability arising out of an unfair trade practice by one of its Goa-based dealers, Vistar Goa(P) Ltd.

Facts of the case

The case arose in 2011 when Vaz bought a car after paying the agreed total consideration price.

At the time of purchase, Vaz availed bank credit. A 2009 model car which had run 622 kilometres was sold to him in place of a new car. Vaz, therefore, requested for refund of the price paid or replacement of the car. The price was, however, not refunded and neither was the car replaced. Vaz refused to take delivery of the 2009 model car.

He preferred a complaint before the Goa District Consumer Redressal Forum (District Forum).

The District Forum's order noted that the car had some defects - the undercarriage of the car was *“fully corrugated and had scratch marks on the body. The alloy wheels were also corrugated inside and the car also travelled almost 622 km. Also some parts such as music system was not provided although agreed.”*

It, therefore, held that there was deficiency in the service committed by the dealer and the manufacturer, and held them jointly and severally liable to replace the car with a new one of the same model or to refund the entire amount of the car with interest at 10 per cent from the date of delivery. Both were also jointly and severally directed to pay Rs. 20,000 to Vaz towards mental stress and agony, in addition to costs of Rs. 5,000.

On appeal, the State Commission rejected the appellant's plea that its relation with the dealer was on a principal-to-principal basis. The claim, it said, was unsubstantiated by any material or documentary evidence. Thus, it rejected the plea that no direct sale was undertaken by the appellant. The Commission concluded that the appellant sold to Vaz the defective car manufactured by it, and the dealer and the appellant were liable for sale of the defective car.

The NCDRC upheld the findings of the State Commission, leading to the appeal before the Supreme Court.

Contention of the parties

The appellant contested the findings in the impugned order, and mainly focused its submissions on the conclusions drawn by the National Commission regarding the absence of a principal-to-principal relationship. It was highlighted that besides impleading the appellant and seeking relief, no allegations against it were made in the complaint by Vaz before the District Forum. The appellant highlighted that the entire drift of the complaint was that the 2009 make car manufactured by it, which had been sold by the dealer, was an old one, and that Vaz was misled into agreeing to purchase it, without being aware of the model, or that the particular car had already been used. The appellant therefore, urged that there was neither averment, nor allegation by Vaz, on the basis of which any liability could be pinned upon it, a

third party to the entire transaction, merely because it was the manufacturer. It was submitted that the complainant never alleged or proved that any one of its employees was privy to the transaction in question, or had led Vaz to purchase the car in question from the dealer.

Refuting the appellant's arguments, it was urged on behalf of Vaz that the impugned order has no error calling for interference, and that this Court should not exercise its discretion to upset the findings conferred by it in exercise of its powers under Article 136 of the Constitution of India. It is reiterated that the consumer, i.e., Vaz was informed at the time of the vehicle's booking that it was fitted in accordance with the specifications required by him. At that time, he was never informed that the vehicle (the car) in question had been used and had been manufactured in 2009 and, was therefore old. After registering the vehicle, the complainant returned to the showroom and then discovered that the car had several defects, including that the undercarriage was fully corrugated and the body had several scratch marks. These flaws were immediately pointed out to the dealer; the dealer was also requested to replace the vehicle. However, they refused to do that.

Court's Observation and judgment

Read also : ['Filing of multiple complaints by spouse ground for Divorce', rules Supreme Court](#)

The Supreme Court, after examining the terms of the dealership agreement, noted that the relationship was on a "principle-to-principle" basis. The Court also noted that there were no pleadings by the complainant that Tata Motors had special knowledge of the deficiencies of the dealer.

"The record establishes the absolute dearth of pleadings by the complainant with regard to the appellant's role, or special knowledge about the two disputed issues, i.e.that the dealer had represented that the car was new, and in fact sold an old, used one,or that the undercarriage appeared to be worn out. This, in the opinion of this court,was fatal to the complaint. No doubt, the absence of the dealer or any explanation on its part, resulted in a finding of deficiency on its part, because the car was in its possession, was a 2009 model and sold in 2011. The findings against the dealer were,in that sense, justified on demurrer. However, the findings against the appellant, the manufacturer, which had not sold the car to Vaz, and was not shown to have made the representations in question, were not justified".

Court further observed that:

"Special knowledge of the allegations made by the dealer, and involvement, in an overt or tacit manner, by the appellant, had to be proved to lay the charge of deficiency of service at its door. In these circumstances, having regard to the nature of the dealer's relationship with

the appellant, the latter's omissions and acts could not have resulted in the appellant's liability".

"Unless the manufacturer's knowledge is proved, a decision fastening liability upon the manufacturer would be untenable, given that its relationship with the dealer, in the facts of this case, were on principal-to-principal basis", observed the bench.

The Supreme Court allowing the appeal, set aside the findings of the Consumer Fora as against Tata Motors.

Criminal Appeal arising out of SLP (Criminal) Diary No. 32585 of 2019



1. Delay condoned. Leave granted.
2. Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the appellant, has made various submissions before us. Suffice it to state that his first submission is that as a moratorium is imposed against the corporate debtor w.e.f. 10.07.2017, the Section 138 complaint that was preferred on 19.09.2017 must be quashed.
3. On the facts of this case, three cheques - for INR 25,00,000/- dated 31.05.2017, for INR 25,00,000/- dated 30.06.2017, and for INR 23,51,408/- dated 31.07.2017 were issued by the appellant in favour of the respondent. Before the cheques could be presented for payment, on 10.07.2017, the Adjudicating Authority admitted a petition by an operational creditor under Section 9 of the IBC and imposed a moratorium under Section 14.
The three cheques were presented for payment, but were returned citing "insufficient funds" as the reason on 04.08.2017. The legal notice to initiate proceedings under Section 138 of the Negotiable Instruments Act was issued by the respondent on 12.08.2017. As no payment was forthcoming within the time specified, the respondent preferred a complaint against the corporate debtor alone on 19.09.2017.
4. The respondent did not dispute the aforesaid dates, only reiterating that the High Court was right in dismissing a quash petition filed by the appellant under Section 482 of the CrPC.

5. Since the complaint that has been filed in the present case is against the corporate debtor alone, without joining any of the persons in charge of and responsible for the conduct of the business of the corporate debtor, the complaint needs to be quashed, given our judgment in Civil Appeal No.10355 of 2018. The judgment under appeal, dated 02.04.2019, is therefore set aside and the appeal is allowed.

**Criminal Appeals arising out of SLP (Criminal) Nos. 10587/2019,
10857/2019, 10550/2019, 10858/2019, 10860/2019, 10861/2019, 10446/2019.**



1. Leave granted.
2. On the facts of these cases, all the complaints filed by different creditors of the same appellant under Section 138 read with Section 141 of the Negotiable Instruments Act were admittedly filed long before the Adjudicating Authority admitted a petition under Section 7 of the IBC and imposed moratorium on 19.03.2019.
3. Given our judgment in Civil Appeal No.10355 of 2018, the said moratorium order would not cover the appellant in these cases, who is not a corporate debtor, but a Director thereof. Thus, the impugned order issuing a proclamation under Section 82 CrPC cannot be faulted with on this ground. The appeals are therefore dismissed.

Criminal Appeal arising out of SLP (Criminal) Nos. 2246-2247 of 2020



1. Leave granted.

2. In this case, the two complaints dated 12.03. 2018 and 14.03.2018 under Section 138 read with Section 141 of the Negotiable Instruments Act were filed by the respondent against the corporate debtor along with persons in charge of and responsible for the conduct of business of the corporate debtor.

On 14.02.2020, the Adjudicating Authority admitted a petition under Section 9 of the IBC against the corporate debtor and imposed a moratorium. The impugned interim order dated 20.02.2020 is for the issuance of non-bailable warrants against two of the accused individuals.

3. Given our judgment in Civil Appeal No.10355 of 2018, the moratorium provision not extending to persons other than the corporate debtor, this appeal also stands dismissed.

Criminal Appeal arising out of SLP (Criminal) Nos. 2496 of 2020



1. Leave granted.

2. In the present case, a complaint under Section 138 read with Section 141 of the Negotiable Instruments Act was filed by Respondent No.1 against the corporate debtor together with its Managing Director and Director on 15.05.2018. It is only thereafter that a petition under Section 9 of the IBC, filed by Respondent No.1, was admitted by the Adjudicating Authority and a moratorium was imposed on 30.10.2018.

The impugned judgment dated 16.10.2019 held that a petition under Section 482, CrPC to quash the said proceeding would be rejected as Section 14 of the IBC did not apply to Section 138 proceedings.

3. The impugned judgment is set aside in view of our judgment in Civil Appeal No.10355 of 2018, and the complaint is directed to be continued against the Managing Director and Director, respectively.

Criminal Appeal arising out of SLP (Criminal) No. 3500 of 2020



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1. Leave granted.
 2. The complaint in the present case was filed by the respondent on 28.07.2016. An application under Section 7, IBC was admitted by the Adjudicating Authority only on 20.02.2018 and moratorium imposed on the same date. The impugned judgment rejected a petition under Section 482 of the CrPC on the ground that Section 138 proceedings are not covered by Section 14 of the IBC.
 3. The impugned judgment is set aside in view of our judgment in Civil Appeal No.10355 of 2018, and the complaint is directed to be continued against the appellant.

Criminal Appeal arising out of SLP (Criminal) No. 5638-5651/2020, 5653-5668/2020



Leave granted.

In these appeals, the appellants have approached us directly from the learned Magistrate's impugned orders. The learned Magistrate has held that Section 14 of the IBC would not cover proceedings under Section 138 of the Negotiable Instruments Act.

As a result, warrants of attachment have been issued under Section 431 read with Section 421 CrPC against various accused persons, including the corporate debtor and persons who are since deceased. While setting aside the impugned judgments, given our judgment in Civil Appeal No.10355 of 2018, we remand these cases to the Magistrate to apply the law laid

down by us in Civil Appeal No.10355 of 2018, and thereafter decide all other points that may arise in these cases in accordance with law.

**Writ Petition (Criminal) Nos. 330/2020, 339/2020,
Writ Petition (Civil) No. 982/2020,
Writ Petition (Criminal) Nos. 297/2020, 342/2020,
Writ Petition (Civil) No. 1417/2020, 1439/2020, 18/2021,
Writ Petition (Criminal) No. 9/2021, 26/2021.**



1. All these writ petitions have been filed under Article 32 of the Constitution of India by erstwhile Directors/persons in charge of and responsible for the conduct of the business of the corporate debtor. They are all premised upon the fact that Section 138 proceedings are covered by Section 14 of the IBC and hence, cannot continue against the corporate debtor and consequently, against the petitioners.

2. Given our judgment in Civil Appeal No.10355 of 2018, all these writ petitions have to be dismissed in view of the fact that such proceedings can continue against erstwhile Directors/persons in charge of and responsible for the conduct of the business of the corporate debtor.

.....J. (Rohinton Fali Nariman)

.....J. (Navin Sinha)

.....J. (K.M. Joseph)

New Delhi;

March 01, 2021.

1 The judgment in *Rajneesh Aggarwal v. Amit J. Bhalla*, (2001) 1 SCC 631 was delivered prior to the 2002 and 2018 Amendment Acts to the Negotiable Instruments Act. The

perceptible shift in the provisions by introducing Sections 143 to 148 has been noticed by this Court hereinabove, as a result of which the observations contained in this judgment would no longer be valid.

2 This judgment was subsequently referred to with approval in *Makwana Mangaldas Tulsidas v. State of Gujarat*, (2020) 4 SCC 695 (at paragraphs 17 and 18).

**CJI BOBDE REMARKED UPON THE LAW STUDENT'S FAUX PAS
"WE ARE NOT THE US SUPREME COURT. DO NOT ADDRESS US
THIS WAY".**



A Supreme Court Bench led by Chief Justice of India **SA Bobde** on Tuesday cautioned a law student against addressing the judges on the Bench as "Your Honour."

"We are not the US Supreme Court. Do not address us this way," CJI Bobde remarked upon the law student's faux pas.

"Apologies. I will address as 'My Lord'", the law student replied.

"Whatever, but no incorrect terms," CJI Bobde added.

The matter concerned the appointment of judges to the subordinate judiciary

The petition before Supreme Court highlights the question of long-standing cases before subordinate courts in India, requesting, inter alia, formal rules and the code of procedure for the selection of judges within a time-limited span of time.

The petition was filed by **Shrikant Prasad**, a final-year law student, alleging that the delay in the administration of justice causes both victims and accused to be mentally harassed and amounts to the deprivation of the right to life guaranteed under Article 21 of the Constitution of India.

Justice V Ramasubramanian chimed in on the merits of the matter before adjourning it for four weeks, "You have not done your homework. You have missed Malik Mazhar Sultan case,"

The petitioner pointed out that in Indian District Courts, about 3.5 crore cases are pending, out of which about 2.5 crore cases are criminal in nature. In addition, some 56,000 lawsuits have been pending for more than thirty years.

"The issue of judicial backlog and delay is widely acknowledged and extensively written about, but it seems to be nowhere close to being resolved. Today, a litigant can be stuck in court corridors for decades...the original litigant may not even be alive by the time the court resolves the issue. It is a stretch to describe any verdict given after decades as 'justice',"states the plea.

The petition claims that the primary reason behind such delays in justice is due to lack of Judges & corresponding Staff in subordinate Courts. The Petitioner submitted that there are only 20 judges per 10 lakh people in the country, as compared to 17 in 2014 by relying on a 2019 report published by the Union Law Ministry.

This result in so many cases being listed on each day before a judge, and it becomes difficult to hear too many cases meaningfully, thereby eventually leading to numerous adjournments, the plea stated.

SUPREME COURT ON DE-FREEZING OF BANK ACCOUNTS UNDER THE PREVENTION OF MONEY LAUNDERING ACT, 2002



A three-judge Bench of the Supreme Court, comprising of Chief Justice of India SA Bobde and Justices AS Bopanna and V Ramasubramanian, on February 3, allowed an appeal filed on behalf of OPTO Circuit India Ltd. challenging an August 2020 order passed by the Karnataka High Court.

While doing so, the Supreme Court quashed the communication issued by the Directorate of Enforcement (ED) and directed the Respondent banks i.e. Axis Bank, IndusInd Bank and State Bank of India, to de-freeze the accounts of the appellants frozen on account of allegations of foreign diversion of funds made.

The Supreme Court refused to interfere in the proceedings instituted under the Prevention of Money Laundering Act, 2002 (PMLA) in the present appeal. The proceedings before the High Court arose out of an action initiated by the Central Bureau of Investigation (CBI), which led the ED to direct the respondent banks to “debit freeze/stop operations” of the accounts of the appellant. The allegations contained in the complaint instituted by the State Bank of India were of foreign diversion of funds to the tune of Rs. 354.32 crore.

The Supreme Court concurred with the observations of the High Court with respect to the scope of parallel proceedings under Section 3 and 4 of the PMLA. However, it observed that the question as to whether the communication directing the freezing of the accounts was legally tenable or not should have been evaluated under the test of “due process” contemplated under the Act.

The Bench while observing the applicability of Section 17(1) of the PMLA, 2002:

It was submitted by the ED that the directions for freezing of the concerned accounts were issued to “stop the layering/diversion and safeguarding the proceeds of crime.” However, it was also submitted that the same was not issued in accordance with Section 17(1) of the Act, which empowers the enforcement authority to order search and seizure of property or records, provided the same is done on the basis of presence of cogent “reasons to believe.”

The Supreme Court reiterated that the powers exercised by the concerned authorities should be in accordance with the provisions of the Act, and since bank accounts fall squarely within the ambit of both “property” and “records”, any order freezing the same must be in line with the procedure laid down under Section 17 of the Act.

The Bench while observing the applicability of Code of Criminal Procedure, 1973 stated that: *“13. The action sought to be sustained should be with reference to the contents of the impugned order/communication and the same cannot be justified by improving the same through the contention raised in the objection statement or affidavit filed before the Court.”*

The decision of the Supreme Court reaffirms the position with respect to the mandatory requirement of presence of “reasons to believe” as well as strict compliance with the procedure contemplated under the Act before depriving any individual or entity of their property. The observations made by the Court are bound to have a far-reaching impact on proceedings under the PMLA, 2002 before the Adjudicatory Authority as well as the

appellate courts, thereby ensuring that the actions of the enforcement authorities are within the letter of the law.

SC: Total waiver of pre-deposit rule in filing appeals before Debt Recovery Appellate Tribunal is not permissible



Through the judgment of the case – **Kotak Mahindra Bank Pvt. Ltd. v. Ambuj A. Kasliwal and Others**, delivered on February 16, 2021, a 3 -judge bench of the **Supreme Court** consisting of the **Chief Justice Sharad A. Bobde, Justice A.S.Bopanna and Justice V. Ramasubramanian**, has made it clear that **total waiver of pre-deposit rule in filing appeals before the Debt Recovery Appellate Tribunal (DRAT) is not permissible.**

The short issue before the Supreme Court for consideration was with regard to the correctness or otherwise of the order passed by the DRAT and the Delhi HC, in the matter relating to pre-deposit before the DRAT.

The pre-deposit rule injuncts the Appellate Tribunal from entertaining an appeal by a person from whom the amount of debt is due to the Bank, unless such person has deposited with the DRAT fifty pc of the amount of debt so due from him as determined by the Tribunal under section 19 of the Act. The proviso to said section, however, grants discretion to the DRAT to reduce the amount to be deposited, for reasons to be recorded in writing, but such reduction shall not be less than 25 pc of the amount of such debt which is due.

Hence, the pendulum of discretion to waive pre-deposit is allowed to swing between 50 pc and 25 pc of the debt due and not below 25 pc, much less not towards total waiver. It is in that background, keeping in perspective the said proviso, the DRAT had in this case ordered deposit of 50 pc of the amount. The respondents 1 and 2 see while seeking waiver of pre-deposit, have essentially projected the case to indicate that the recovery certificate ordered by

the DRT is for the sum of Rs 145 crores with interest at 9 pc per annum and the amount realized by the Bank from the compensation amount payable to respondent No. 3 is itself a sum of Rs 152, 81, 07,159 and as such there is no debt due.

According to the SC, the HC had proceeded at a tangent while adverting to the aspect of recovery made towards the loan amount from the land acquisition compensation payable to respondent- 3..The conclusion appears to be that the receipt of the compensation amount even though was before passing of the decree, would wipe out the amount decree of Rs 145 crores with interest at 9 pc per annum.

Though it was not expressly stated so. Per contra, the DRAT by its order of February 27, 2019 while directing the pre-deposit of 50 pc of the amount had taken note of the fact that if the decretal amount as ordered by the DRT is taken into consideration and the amount received by the Bank towards the compensation amount is credited, the balance of the decretal amount payable by the respondents 1 to 3 would work out to Rs 68, 18, 92,841/-.It is in that view , the DRAT has ordered pre-deposit of the 50 pc of the said amount which still remains to be a debt due.

On that aspect, though the ultimate correctness of the actual amount due is a matter for calculation to be made in the execution proceedings, for the present, for the purpose of pre-deposit if the decree/ recovery certificate issued by the DRT is taken into consideration, the position is clear that even if the amount of compensation is appropriated, either before or after the decree, there would still be outstanding amount payable, which would be the subject matter of the appeal in DRAT, apart from the fact that the appellant- Bank in their appeal is claiming the entire amount which has fallen due since the terms of settlement were not adhered to.

The Supreme Court is of the view that a total waiver would be against the statutory provisions. However, in this case taking note that though the issue relating to the actual amount due is to be considered by the DRAT, keeping in view the fact the DRT has taken into consideration the earlier settlement and has accordingly decreed the claim to that extent and towards such decree since payment of a major portion is made, though by appropriation of the compensation amount and admittedly since the remaining properties belonging to the respondent -3 are available by way of mortgage and the respondents 1 and 2 are personal guarantors , the Court deemed it appropriate that in the peculiar facts and circumstances of this case to permit the pre- deposit of 25 pc of the amount taken note by the DRAT, that is, 25 pc of Rs 68.18, 92, 841/- . To that extent, the order passed by the DRAT is liable to be modified.

The respondent-3, the Hindon River Mills Ltd. had availed financial assistance from the respondent-IFCI Ltd. The respondents 1 and 2 had offered their personal guarantee in respect of the said financial assistance. The respondents 1 to 3 had defaulted in re-payment of the dues and the account having been classified as non-performing asset was thereafter auctioned by the respondent- IFCI Ltd wherein the appellant herein was the successful bidder and accordingly, the unpaid debt-non-performing asset was assigned in their favour.

This assignment as made was challenged by the Respondents 1 to 3 before the HC in a writ petition which was dismissed and as a result a SLP was filed and in the said proceedings the settlement, which was entered into between the parties was recorded and disposed of. The respondents 1 to 3 are stated to have not adhered to the terms of the settlement and there-payment was not made.

The appellant-Bank, therefore, instituted recovery proceedings by filing an application before the DRT, New Delhi. Therein, the Bank had claimed Rs 572,18,77,112, which was due to it, as on December 31, 2014 along with interest and other charges. In the meanwhile a portion of the mortgaged property was acquired from the respondent- Hindon River Mills by the National Highway Authority and its compensation amounting to Rs 152, 81, 07,159/- was deposited on behalf of the Mill and that was credited to the account of the Mill. In this background, the DRT considered the claim application and ordered issue of recovery certificate.

Through its order, the DRT limited the decretal amount to Rs 145 crores with future interest. At 9 pc per annum till realization. In the result, the Supreme Court partly allowed the Bank's appeal setting aside the impugned order passed by the Delhi High Court on July 16, 2019. Further, the SC modified the order passed by the DRAT, Delhi, on February 27, 2019 and permitted the respondents 1 and 2 to deposit 25 pc of Rs 68,18,92,841/- by way of pre-deposit and prosecute its appeal, subject to such deposit being made within 8 weeks, failing which the appeal shall not subsist in the eye of law.

<https://www.latestlaws.com/latest-news/sc-total-waiver-of-pre-deposit-rule-in-filing-appeals-before-debt-recovery-appellate-tribunal-is-not-permissible-read-order/>

Subsequent Purchaser Can Also Challenge Readiness & Willingness Of Plaintiff In A Specific Performance Suit: Supreme Court.



The Supreme Court observed that subsequent purchaser of the suit property can challenge the readiness and willingness on part of the plaintiff in a specific performance suit.

In this case, a suit seeking specific performance was dismissed by the Trial Court holding that the plaintiff had failed to prove the genuineness of the agreement. In appeal, the High Court observed that the subsequent purchasers have got only the right to defend their purchase on the premise that they have no prior knowledge of the agreement of sale with the plaintiff. Though they are necessary parties to the suit, since any decree obtained by the plaintiff would be binding on the subsequent purchasers, the plea that the plaintiff must always be ready and willing to perform his part of the contract must be available only to the vendor or his legal representatives, but not to the subsequent purchasers, it was held by the High court relying on *Jugraj Singh vs. Labh Singh* [(1995) 2 SCC 31].

The Apex Court bench comprising Justices UU Lalit, Indira Banerjee and KM Joseph noted that the principles laid down in the judgment in *Jugraj Singh* were not approved in *Ram Awadh (Dead) vs. Achhaibar Dubey* [(2000) 2 SCC428]. It took note of the following observations made in *Ram Awadh*:

"The obligation imposed by Section 16 is upon the court not to grant specific performance to a plaintiff who has not met the requirements of clauses (a), (b) and (c) thereof. A court may not, therefore, grant to a plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement the specific performance whereof he seeks. There is, therefore, no question of the plea being available to one defendant and not to another. It is open to any defendant to contend and establish that he mandatory requirement of Section 16(c) has not been complied with and it is for the court to determine whether it has or has not been complied with and, depending upon its conclusion, decree or decline to decree the suit. We are of the view that the decision in *Jugraj Singh* case [(1995) 2 SCC 31] is erroneous."

Suspicion, However Strong Cannot Take The Place Of Proof: Supreme Court Upholds Acquittal Of Murder Accused.



Suspicion, however strong cannot take the place of proof, the Supreme court reiterated while upholding the acquittal in a murder case.

In this case, the prosecution case was that the accused had murdered the deceased by applying electric shock to him after administering some poisonous substances to him. The Trial Court acquitted the accused and later the High Court upheld the acquittal.

In appeal, the bench comprising Justices Indira Banerjee and Hemant Gupta, referring to the evidence on record, observed there is a strong possibility that the deceased, who was as per the opinion of the doctor who performed the autopsy, intoxicated with alcohol, might have accidentally touched a live electrical wire, may be while he was asleep.

"It is well settled by a plethora of judicial pronouncement of this Court that suspicion, however strong cannot take the place of proof. An accused is presumed to be innocent unless proved guilty beyond reasonable doubt.", the court observed.

The court added that, before a case against an accused can be said to be fully established on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn must fully be established and the facts so established should be consistent only with the hypothesis of guilt of the accused. There has to be a chain of evidence so complete, as not to leave any reasonable doubt for any conclusion consistent with the innocence of the accused and must show that in all human probability, the act must have been done by the Accused, it said. Referring to *Shanti Devi v. State of Rajasthan* (2012) 12 SCC 158, the bench reiterated the following principles for conviction of the accused based on circumstantial evidence

The circumstances from which an inference of guilt is sought to be proved must be cogently or firmly established.

The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

The circumstances taken cumulatively must form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.

The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence

"The Prosecution miserably failed to establish the guilt of the Accused Respondents. The Trial Court rightly acquitted the Accused Respondents. There is no infirmity in the judgment of the Trial Court, that calls for interference... An appeal against acquittal has always been on an altogether different pedestal from an appeal against conviction. In an appeal against acquittal, where the presumption of innocence in favour of the accused is reinforced, the appellate court would interfere with the order of acquittal only when there is perversity. In this case, it cannot be said that the reasons given by the High Court to reverse the conviction of the accused are flimsy, untenable or bordering on perverse appreciation of evidence", the bench said while dismissing the appeal.

**Selections To Public Employment Should Be On The Basis Of Merit:
Supreme Court.**



The Supreme Court observed that the selections to public employment should be on the basis of merit.

Appointment of persons with lesser merit ignoring those who have secured more marks would be in violation of the Articles 14 and 16 of the Constitution of India, the bench comprising Justices L. Nageswara Rao and Indira Banerjee observed in a judgment passed on Thursday.

In this case, the appointees to the posts of Police Sub-Inspectors, Attendants (Sergeant) and Company Commanders by the Home Department of the Government of Jharkhand were

terminated on the ground that the select list was prepared wrongly by ignoring merit of candidates and by giving undue importance to the preferences given by them. Allowing the writ petition filed by these appointees who were terminated, the Jharkhand High Court observed that they cannot be held responsible for the irregularities committed by the authorities in the matter of their selection and there is no allegation of fraud or misrepresentation on their part. The court observed that they should be appointed against existing/ anticipated or future vacancies, treating them as fresh appointments and placing them at the bottom of the seniority list in the revised merit list. Some other candidates had also filed intervention applications before the High Court contending that they should also get appointment in view of the fact that they have secured more marks than those who were directed to be reinstated. The High Court dismissed these applications.

Agreeing with the High Court view, the Apex Court bench observed that relief granted to Writ Petitioners is mainly on the ground that they have already been appointed and have served the State for some time and they cannot be punished for no fault of theirs. While considering the plea of interveners, the bench observed thus:

There is no doubt that selections to public employment should be on the basis of merit. Appointment of persons with lesser merit ignoring those who have secured more marks would be in violation of the Articles 14 and 16 of the Constitution of India.

The court agreed with the High Court view that the interveners are not similarly situated to the writ petitioners and they cannot seek the same relief. "After cancellation of the appointments of the Writ Petitioners, 43 persons have been appointed from the revised select list. Those 43 persons have secured more marks than the interveners. By the appointment of 43 persons, the number of posts that were advertised i.e. 384 have been filled up. The interveners have no right for appointment to posts beyond those advertised.", the bench observed

HIGH COURT JUDGEMENTS

Is hybrid mode of functioning of courts here to stay?



In adopting a hybrid mode, Courts are taking a big step as it is effectively recognizing the right of parties to appear in physical court through virtual means.

Courts across the country resuming physical hearing, albeit in a phased manner, had evoked mixed reactions from stakeholders.

This is particularly so at the Supreme Court where many lawyers are in favour of continuing with virtual hearing even after pandemic, while a significant other half wants the Court to revert to full physical mode.

This marked difference of opinion among lawyers seems to have played its role in prompting the top court to propose a hybrid mode of functioning where parties/ counsel would be at liberty to choose between appearing physically or virtually. In other words, in the same matter, one party will be at liberty to appear physically while the other will be allowed to appear virtually if they so wish.

This system is expected to kick in from March 2021.

However, this method might not be without its shortcomings as was evident on Wednesday in Karnataka High Court which has already adopted this mode of hearing.

During a hearing before the High Court, Additional Solicitor General Madhavi Divan raised concerns about poor audio quality stating that she was unable to hear the submissions made by the other party, who appeared physically.

Divan, who was addressing the Court via video conference mode informed Justice PS Dinesh Kumar that she could not hear/ understand the submissions made by Senior Counsel Dhyan Chinnappa appearing physically on behalf of Flipkart.

The Court was hearing two petitions moved by Amazon and Flipkart seeking quashing of the probe ordered by the Competition Commission of India (CCI) against them for alleged violations of Competition Law.

As soon as Chinnappa began to make submissions, Divan apprised the Bench that Chinnappa was not audible. Following this, the Bench asked Chinnappa to use a microphone.

Once Chinnappa wrapped up his arguments for the day, Divan informed the Bench that there was a serious issue of audio clarity in his submissions and, therefore, asked if Chinnappa could forward a synopsis of his contentions.

This was readily accepted by Chinnappa.

In adopting a hybrid mode, courts are taking a big step by effectively recognizing the right of parties to appear in physical court through virtual means.

Technical shortcomings might, however, have to be addressed for staking claim to allow such a system to continue post pandemic.

PIL in Madhya Pradesh High Court against noise pollution, waste generated by banquet halls across Indore



It was alleged in the PIL that guideline for disposal of garbage coming out of the marriage gardens in the city has not being followed.

A Public Interest Litigation has been filed in the Indore bench of the Madhya Pradesh High Court on the issue of filth and noise pollution being spread by wedding banquet halls across the city.

The petitioner, Jitendra Badjatya, has filed the PIL through Advocate K.K. Gupta.

It was alleged in the PIL that the guidelines for disposal of garbage from banquet halls the city was not being followed. Rather than disposing the waste, most banquet halls leave food waste in drains leading to blockage in drains.

The petition said that as per the rules, parking at banquet halls should be arranged within the garden, but it is not happening. Visitors park their vehicles on the road and service road, leading to traffic jams.

Moreover, it was claimed in the PIL that on the day when there is any event in banquet halls, the lives of people living next to it becomes difficult, compounded by loud music late at night.

The petitioner has repeatedly complained to the authorities regarding the matter, but no action has been taken by them. Further, a situation of a dispute with the owner of the marriage gardens also arises, the PIL states.

Delhi court acquits Priya Ramani in criminal defamation case by MJ

Akbar



M.J. Akbar had filed the suit against Ramani on October 15, 2018, for allegedly defaming him by accusing him of sexual misconduct decades ago when he was a journalist.

Granting major relief to journalist Priya Ramani in a defamation case filed against her by former Union Minister M.J. Akbar, Delhi's Rouse Avenue Court observed that “right to dignity cannot be protected at the cost of right to life”.

Additional Chief Metropolitan Magistrate Ravindra Kumar Pandey while acquitting Ramani from the defamation case further observed that a woman cannot be punished for raising her voice against sexual abuse.

“Time has come for our society to understand that sometimes a victim may for years not speak up due to the mental trauma. The woman cannot be punished for raising her voice against sexual abuse,” the court said.

It further observed that most women do not speak about harassment for the social stigma attached to it.

“A victim has a right to put her grievance even after years and decades,” the court noted. The court also accepted the contention that Akbar was not a man of stellar and impeccable reputation. “It can’t be ignored that most of the times the offence of sexual harassment takes place inside closed doors and the victim may not understand what is actually happening to them,” the court said.

“Sometimes even the victim does not understand what is happening. Despite going through extreme cruelty, the victim chooses to stay quiet,” the court noted.

In October 2018, Ramani had accused the then Minister of State for External Affairs of sexual harassment. She took to Twitter to allege that Akbar sexually harassed her when she was called to Mumbai’s Oberoi Hotel for a job interview in 1993. After that, Akbar moved a Delhi court with his defamation complaint against Ramani.

Ramani had made allegations of sexual misconduct against Akbar in the wake of the MeToo movement in 2018. Akbar had filed the criminal defamation complaint against Ramani on October 15, 2018 for allegedly defaming him by accusing him of sexual misconduct over two decades ago.

Akbar resigned from his post later that month, denying allegations of sexual harassment against the women who came forward during #MeToo campaign against him. Akbar had earlier told the court that Ramani had defamed him by calling him the media’s biggest predator that harmed his reputation.

Ramani had said that her allegations of sexual misconduct against Akbar were her truth and were made in public good. Advocate Rebecca John, appearing for Ramani, had said that Akbar should not get any relief as he chose to target Ramani and other women.

DISHA RAVI SEEKS RESTRAINING OF DELHI POLICE: DELHI HIGH COURT



Disha Ravi, the infamous climate change activist who was recently arrested in the “ToolKit” case which gained focus after Greta Thunderberg shared it on Twitter, has moved to the Delhi High Court to seek directions to restrain Delhi Police from “*leaking any investigation material* relating to the case filed against her by the Special Cell.” and also seeks directions to them to not “to disclose the contents of her *private chats/communication* to any third party including the media”. The said toolkit was made by Disha Ravi and therefore she was charged with sedition for ‘formulation and dissemination’ of a toolkit to aid protesting farmers.

The plea prayed that Court passes “directions to the Ministry of I&B seeking to take appropriate action against Respondent Nos. 4-6 and all other satellite TV channels including under the Cable Television Networks (Regulation) Act, 1995, and restrain them from publishing the contents and/or extracts of any alleged private chats (including WhatsApp chats) between her and third parties,”

The plea further stated that “*The Petitioner has preferred this Petition as she is severely aggrieved and prejudiced by the media trial surrounding her arrest and the ongoing investigation, where she is being viscerally attacked by the Delhi Police and several media houses, on the basis of leaked investigative matter and prejudicial press briefings, which is grossly violative of her right to a fair trial and presumption of innocence*”.

The Activist also contended that the atrocious and illegal actions on the part of the Media and other Respondents has led to a clear violation of her Fundamental Right to Privacy, reputation and dignity and consequently the right to fair trial also. The Plea stated that “...there is no clarification in any of the tweets or the news reporting to the effect that disclosure statements or ‘admissions’ made whilst in police custody are wholly inadmissible in evidence and have no basis in law. As such, in view of the facts described herein, it is highly likely that the general public will perceive these news items as being conclusive as to the guilt of the Petitioner”.

**OXFORD-ASTRAZENECA VACCINE VOLUNTEER SEEKS
DAMAGES OF RS. 5 CR.**



A 41 yr. old Corona vaccine trial-volunteer filed a petition in the Madras High Court seeking compensation of Rs. 5Cr. and also sought the court to declare the Vaccine as unsafe. Subsequently, on the 18th of Feb, the Madras High Court issued notice to the Central Government in regard to the phase trials of the Oxford AtraZeneca Vaccine, now known as “Covishield”. The volunteer stated that he has severe side effects after taking the vaccine and had to be hospitalized for a few days. He purported that the said event qualifies the incident to be called as “Serious Adverse Event (SAE)” under Rule 2(ff) read with sub-rule (a) of Rule 41 of the New Drugs and Clinical Trials Rules, 2019.

More precisely, the Volunteer stated that the Covishield Vaccine developed by Serum Institute of India, made him go through him trauma through causing an ‘Acute Neuro-Encephalopathy’ which is a Serious Adverse Event according to the Hospital’s summary. The petitioner further said that despite being released from hospital, he is still suffering from neurological issues which have adversely affected his work and creativity.

The said allegations were denied by the Serum Institute of India and the said institute had inturn threatened to sue the man for 100 Cr.

The institute’s statement said that though it was an unfortunate incident but it had nothing to do with the vaccine. The reputed company (Serum Inst.) also sent a legal notice to the person in a bid to safeguard its credibility which is allegedly being “unfairly maligned”. However, it is important to note that despite the ongoing case, the central government is currently running one of the fastest vaccination drives in the world using two Vaccines, namely, AstraZeneca’s Covishield and Bharat BioTech’s Covaxin, after getting emergency approval by Drugs Controller General Of India. It is estimated that more than one crore people have been vaccinated before the 1st of March 2021 and there have been negligible or very few cases of any side effects being reported.

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- <https://www.businesstoday.in/current/economy-politics/delhi-riots-2020-ensure-ex-gratia-to-genuine-victims-says-minority-welfare-committee/story/420207.html>

H.C. looks into whether salaries drawn before the alleged commission of PMLA would amount to "proceeds of crime" or not



The Madras High Court has ruled that the salaries drawn by an employee before the commission of alleged money laundering activities by a company would not constitute the "proceeds of crime" under the Prevention of Money Laundering Act. The Court further stated that this would be the case, particularly if it is not alleged that the accused was employed only for the purpose of criminal activities when the accused has not been named a beneficiary of the alleged proceeds of crime.

The crux of the case- Dilraj was the Vice- President of the company from the tenure of 1996 and 2007. Thereafter in 2007, the Reserve Bank of India conducted an inspection of FLCI and found certain serious irregularities and activities promoting divergence of funds to 15 satellite companies.

FLCI after this news became public, and the company was eventually declared as a non-performing asset in 2013. In 2015, several cases were filed against persons engaged with the company by the Central Bureau of Investigation and the Enforcement Directorate for the offences under Section 120-B read with 420 cheating, 467, 468,471 and 477-A of the Indian Penal Code.

Notably, the Court observed that these funds or the proceeds of the crime were stated to have been gone into the kitty of the FLCI's former Managing director Farouk Irani, its former Chairman AC Muthiah and others. Further, it was observed that Dilliraj, who had resigned from the company in 2007, was not a beneficiary of the proceed of the crime.

The allegation against Dilliraj pertaining to his designation as Vice- President of FLCI from 1996- 2007 he was paid salaries, incentives, and perquisites from the amounts that were borrowed by FLCI from the banks based on fudge records., However, it was stated that "Even according to the ECIR registered by the Enforcement Directorate, FLCI was making due repayment of the credit facilities extended to them by the banks till 13.09.2013.

Thus in the opinion of the Court was that though it is true that Dilliraj is facing the music in the prosecution that has been launched by the CBI against FLCI, A.C. Muthiah, Farouk Irani and the others for the predicated offences of making the banks believe their records and sanction the loans, the present prosecution of Dilliraj for money laundering, in the opinion of this Court, is misconceived.

SOURCE:

[S Dilliraj and anr v The Deputy Director The Directorate of Enforcement.pdf](#) - [Google Drive](#)

H.C.: A man marrying a woman knowing fully that she isn't legally divorced from her earlier marriage can't plead invalidity of marriage in section 125 Cr.P.C. proceedings



Single Judge Bench of the Chhattisgarh High Court consisting of Justice Rajendra Chandra Singh Samant has, on February 10, 2021, in the case of Teras Dongare v. Avinash Dongare

[CRR No. 346 of 2019], held that a man, who marries a woman knowing fully well that her earlier marriage has not ended in a valid divorce, is stopped from raising the plea of invalidity of marriage in maintenance proceedings under Section 125 of Cr. P.C. This observation was made while presiding over a revision filed against the order passed by a Family Court, denying maintenance to the Applicant-wife on the ground that she has not obtained a valid divorce from her first husband and hence, she is not a legally wedded wife of the Respondent (second husband).

The crux of the case - this Petition was brought against the order in MJC (Misc. Criminal Case) by the Family Court Bilaspur, Chhattisgarh dismissing the application of this applicant filed under Section 125 of the Cr.P.C. praying for grant of maintenance.

"Applicant Teras Dongare (AW-1) has stated in examination-in-chief that her first marriage was performed with Rajendra, resident of Village Selar as this marriage could not go on. Therefore, it was dissolved by mutual consent in the presence of some village elders, and as a result of her previous husband, Rajendra, had performed another marriage. It was subsequent to this that the applicant performed marriage with the Respondent. In cross-examination, she has admitted that she has not obtained any divorce from Court and mutual divorce in a customary manner took place and that she has not named the person in the presence of whom the customary divorce has taken place."

It was further observed that Shri Chhedilal (AWhad has made a similar statement in his examination-in-chief. However, in cross-examination he has admitted the suggestion of the respondent side that no divorce has taken place off Terasbai from her previous husband Rajendra. Dujram (AW-3) made similar statement in his examination-in-chief, but in cross-examination he has again admitted the suggestion of the respondent side that he does not know if divorce of the applicant with her previous husband is legal or not."

It was held that the Respondent Avinash Dongare (NAW-1) made a statement in examination-in-chief that the applicant has not been divorced by her previous husband in any lawful manner.

The Court observed that in the case Smt. Motim Bai Borkar Vs. Arjun Singh Borkar (supra) the coordinate Bench of this Court held that the divorce was not strictly in accordance with law. Even so when the second husband married the petitioner knowing fully well that her earlier marriage had not ended in a valid divorce, then he is estopped from raising a plea under Section 125 Cr.P.C. that the second marriage is invalid.

A person cannot approbate and reprobate at the same time. This appears to be a similar case in which looking to the evidence present of performing of marriage of the applicant with the

Respondent in the light of previous history of the applicant, the Respondent could not have raised such plea regarding the invalidity of the marriage according to the view taken by this Court in the case of Smt. Motim Bai Borkar Vs. Arjun Singh Borkar, hence, the conclusion drawn and the finding given by learned family court on this point appears to be erroneous.

After considering on the submissions and on the evidence present in the record of the proceedings the revision petition is allowed. The impugned order is set aside. The application under Section 125 of the Cr.P.C. is allowed. The Respondent is directed to make payment of Rs.2,500/- per month to the applicant as maintenance from the date the application under Section 125 of the Cr.P.C. was filed by the applicant."

SOURCE: [HC: A man marrying woman knowing fully that she isn't legally divorced from her earlier marriage can't plead invalidity of marriage in section 125 Cr.P.C. proceedings \(latestlaws.com\)](#)

Consumer Court directs Doctor to pay ₹5 lakh compensation for botched surgery after 10 years



The Nalgonda Consumer Dispute Redressal Commission has directed a gynecologist to pay Rs. 5 lakhs as compensation to the children of a woman who died in 2009 due to a failed abortion and a failed tubectomy surgery. The complaint was filed in October 2010 in the Nalgonda consumer forum.

Kotla Nikhil was three and Kotla Damodhar was two years old when their mother Suneetha went to the Primary Health Center in Kanagal in Nalgonda district in August 2009 for a tubectomy operation. Dr. Sabavath Dashya Naik conducted the surgery on the same day and issued a certificate to that effect. After the surgery Suneetha, her husband Yadaiah, and their children came to Hyderabad where Suneetha visited a local gynecologist for a medical check-up. She found out that she was pregnant. In October 2009 she went to Dr. Naik's private

nursing home, Sri Sai Nursing Home, in Kanagal where he conducted the surgery to terminate her pregnancy.

After the abortion, Suneetha began suffering severe pains and the doctor treated her for a week. He received an amount of Rs. 10,000 as hospital charges. Suneetha's condition did not improve and she continued to experience severe pains. The doctors then advised her to get admitted to the Government Head Quarters Hospital, Nalgonda, for further treatment. There the doctors found that she had suffered intestinal and uterine perforation. Suneetha was advised to get admitted to Osmania General Hospital (OGH) in Hyderabad. However, she was taken to Kamineni Hospital in the city instead. The Kamineni Hospital estimated the treatment would cost Rs. 4 lakhs. Since the woman's family was unable to pay the sum, Suneetha was admitted to OGH. She died on November 11 2009 while she was undergoing treatment at OGH.

After examining the documents and evidence, the commission said, "Dr. Sabavath Dashya Naik in his chief examination admitted that he conducted tubectomy operation on Suneetha at the Primary Health Centre. Though the family has not filed any record to show that the deceased had an abortion at the private clinic owned by Dr. Naik, Sri Sai Nursing Home in Kanagal, he admitted that he conducted tubectomy as well as an operation to terminate her pregnancy."

The commission further added that Suneetha had suffered from multiple problems after the tubectomy operation and she had to terminate her pregnancy after the opposite party failed to detect her pregnancy for three months. The commission observed that all the documents and the evidence prove to show that there is clear medical negligence by the opposite party in not taking proper care and correctly diagnosing her pregnancy before conducting the tubectomy operation and terminating her pregnancy which led to the untimely death of Suneetha.

The commission directed the doctor and the nursing home to pay Rs. 5 lakhs as compensation to Suneetha's children with interest at 9 per cent per annum from the date of filing of the complaint till its realization and Rs. 10,000 towards medical charges and Rs. 10,000 towards costs of litigation.

SOURCE: [JioNews](#)

State is the best judge to assess the threat to an individual: H.C. denies 'X' category security to BJP Minority Morcha head Jamal Siddiqui



A division bench of the Bombay High Court comprising of Justice Sunil B Shukre and Justice Avinash G Gharote, on February 5, 2021 in the case of Jamal v. State of Maharashtra [Criminal Writ Petition No. 107/2020] dismissed a plea filed by the National President of BJP Minority Morcha – Jamal Anwar Siddiqui seeking 'X' category security. The Court observed that the right to lead a secured life would never include in it any right to lead a specially secured life, unless the special need is assessed and acknowledged by the State. It also rightly held that such special security would not come as a matter of right and matter, of course, rather it would follow the special need of the person and peculiar urgency of the situation.

Factual Background

By this Petition, the petitioner has prayed for issuance of writ of mandamus to the respondents to provide him or continue to provide him 'X' – category security. The Petition was opposed by the respondents.

So far as, granting of 'X' – category security to the petitioner earlier was concerned, the Court observed that there was no dispute about it. It was granted sometime in the year 2017 and it came to be withdrawn on 13.12.2019. The reply filed on record by the State indicates that the withdrawal of 'X' – category security did not take place suddenly and without following any procedure. It shows that the decision was taken by the Intelligence Committee in the confidential review it takes periodically of the security arrangement of different categories made for different important persons. It further shows that after collecting necessary inputs in the matter, the Intelligence Committee, which is in Marathi called 'review committee' took the review of the security arrangement and it was of the view that for the present there was no fresh or special threat to the petitioner and the circumstances had changed which indicated that continuation of 'X' -category security given to the petitioner was no longer required and

therefore, the committee took a decision that 'X' category security given to the petitioner be withdrawn. Accordingly, it came to be withdrawn with effect from 13.12.2019.

A copy of a communication dated 02.03.2020 addressed to the DCP, Special Branch Nagpur City by DCP (VIP) Security State Intelligence Bureau, State of Maharashtra, Mumbai informing about such withdrawal of 'X' – category security is annexed to the reply of the respondents. It stands in support of what is stated in the reply of the respondents. There is no reason for us to disbelieve what is stated in the said communication or the reply of respondents. There is also no doubt expressed by the petitioner about the correctness of the statements made in the reply and the said communication. So, what appears to us is that there was in existence material for Review Committee to consider and review its decision, which it did consider and accordingly reached its subjective satisfaction regarding withdrawal of 'X' category security.

In the result, we find that this Petition is devoid of any merit. The Writ Petition stands dismissed. Rule is discharged."

SOURCE: [ordjud.pdf - Google Drive](#)

H.C.: Gold smuggling with intent to threaten economic security of country a 'Terrorist Act' under UAPA



A single Judge Bench of Justice Satish Kumar Sharma of Rajasthan High Court, has, in the case of Mohammed Aslam v. Union of India and another [S.B. Criminal Miscellaneous (Petition) No. 5139/2020] delivered on February 1, 2021, observed that the offence of gold smuggling with the intent to threaten or likely to threaten the economic security of the country is covered under the definition of 'terrorist act' under Section 15 of the Unlawful Activities Prevention Act, 1967 (UAPA).

The Court said that such an activity will come under Section 15(I)(iiia) of the Act. Section 15(I)(iiia) of UAPA mentions activities with intent to threaten or likely to threaten the economic security of the country causing "damage to, the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency,

coin or of any other material". The Court made this pertinent observation while refusing to quash an FIR under UAPA in a petition filed under Section 482 of the Code of Criminal Procedure.

Crux of the case - the present petition was filed under section 482 of Cr.P.C. for quashing of an FIR registered at Police Station NIA, New Delhi under section 16 of Unlawful Activities (Prevention) Act, 1967 read with Section 120-B of IPC.

The Court held that under Section 15(I)(a)(iiia) of the Act of 1967, the smuggling of gold with intent to threaten or likely to threaten the economic security of the country is very much covered under the smuggling of "any other material". Thus, the Court held that the contention of the petitioner in this regard was not tenable.

It was further observed that the offence under the Customs Act for smuggling of gold and the offence under Section 16 of Act of 1967 are distinct offences, hence, separate prosecutions are maintainable under the law. Therefore, merely on the basis of prosecution under Customs Act, the impugned FIR cannot be said to be violative of the provisions of Article 20 of the Constitution of India and Section 300 of Cr. P.C."

"The offence, herein, is very serious in nature for which stringent provisions for bail have been made to the effect that no bail can be granted unless the Court comes to the conclusion that no case is made out against the accused-petitioner. In the facts of the case, the petitioner is not entitled for any sort of interim protection and the same would have the effect of anticipatory bail which is not permissible."

The Court further noted that it was not desirable to meticulously examine the merits of the case at this stage. Therefore, without expressing any opinion on merits, suffice it to say that the NIA is empowered to register a case under Section 16 of Act of 1967 for the Terrorist act as defined under Section 15 of the Act of 1967.

From the perusal of above provisions, the Court held that it became clear that the "Terrorist act" also includes the act done with intent to threaten or likely to threaten the economic security of the country. Such act has been further qualified under Section 15(I)(a)(iiia) which may cause damage to the monetary stability of India by way of smuggling of any other material.

"The smuggling of any valuable material can cause damage to the monetary stability of the nation which may have impact to threaten or likely to threaten the economic security, therefore, the legislature in its own wisdom appears to have not specified particular material in this provision. The gold is certainly a valuable material, smuggling of which can be done

with intent to threaten or likely to threaten the economic security of the country. Therefore, the contention of the petitioner in this regard is not tenable. It is true that every act of smuggling may not be covered under the definition of Terrorist act and only such smuggling of any material can be termed as Terrorist act which is done with intent to threaten or likely to threaten the economic security and to cause damage to the monetary stability of the country. In this case, the petitioner has been found to be smuggler of huge quantity of gold as well as facilitator to other fellow smugglers. Therefore, it cannot be said that this FIR is a discriminatory act towards him. The offences under the Customs Act and the Act of 1967 are distinct offences prosecution of which can run separately and it would not be violative of Article 20 of the Constitution of India and Section 300 of Cr.P.C. in view of the legal position as expounded in the judgments cited by learned Additional Solicitor General." the Court said. Without mincing any words, it is then also observed forthrightly in the next para by Justice Satish Kumar Sharma of the Rajasthan High Court that, "The legal position as expounded in the judgments by learned counsel for the petitioner cannot be disputed but the facts and circumstances of this case are quite distinguishable. In none of them, FIR under Section 16 of the Act of 1967 has been registered simultaneously to the prosecution under the Customs act and no such FIR in the similar circumstances has been quashed. Thus, the above cited judgments do not help the petitioner."

It was held that the view of above, no case is made out for quashing of FIR or stay of its proceedings, resultantly the present Petition is hereby dismissed. Stay application also stands dismissed.

SOURCE: [Mohd. Aslam.pdf - Google Drive](#)

Rajasthan Govt. amends 'Rajasthan Prison Rules' removing provisions allowing caste/ religion based allocation of labour in jails



The Rajasthan Government on February 2, 2021 issued a notification removing amending provisions allowing caste/religion-based allocation of labour in jails. It must be mentioned

here that these amendments have been introduced after the Rajasthan High Court recently took the decision to ask the State Government to ensure that the prisoners are not forced to indulge in menial jobs like that of cleaning toilets etc. merely on the basis of their caste. Even though this is coming after more than 73 years of independence which is a crying shame but as the famous adage goes that, "It is better to be late than never".

A division bench of Justice Devendra Kachhawaha and Justice Sandeep Mehta of Rajasthan High Court had further directed that,

"Considering the progressive democratic set up of our country and in order to ensure maintenance of proper hygiene in the prisons, it would be expedient in the interest of justice that the State Government considers installation of mechanized/automated cleaning facilities in all the prisons in the State of Rajasthan." the Court said.

The amendments have been done by the State Government in exercise of the power conferred by Section 59 of the Prisons Act, 1894. It must also be stated here that in this significant development, the Rajasthan Prisons (Amendment) Rules, 2021 has amended Rule 67 of Section II of Part 9, Rule 13 of Section I of Part 10 and Rule 27 of Section I of Part 15 [existing clause (d) stands deleted now] of 'Rajasthan Prisons Rules 1951'.

The amended Rule 67 of Section II of Part 9 now states, inter alia that, "No inmate shall be selected for cooking on the basis of his caste or religion." The outgoing provision read thus: "The cooks shall be of the non-habitual class. Any Brahmin or sufficiently high caste Hindu prisoner from this class is eligible for appointment as cook". It would also be pertinent to mention here that the amended Rule 13 of Section I of Part 10 now states, inter alia, that, "No tradesman shall be chosen on the basis of his caste or religion". The outgoing provision read thus: "Sweepers shall be chosen from among those who, by the custom of the district in which they reside or on the account of their having adopted the profession, perform sweepers work when free".

The Court said that the it is also deserving to mention here that earlier, clause (d) of Rule 27 of Section I of Part 15 stated that any member of a criminal tribe subject to the discretion of the Government shall be liable to be classed as habitual criminals. But much to the satisfaction of all of us who believe in equality of all human beings we now see that with this latest amendment, the clause (d) of this Rule now stands deleted. It is high time and now all such shameful discriminatory caste practices prevalent inside prisons across different states in India must be abolished without any further delay not just in Rajasthan alone as we are seeing now but in each and every State of India where we see such raw discrimination still prospering, flourishing and thriving without any check whatsoever! Even a research paper of

the Commonwealth Human Rights Initiative (CHRI) had thrown abundant light in this regard which compelled even the Rajasthan High Court to take note of most seriously!

Taking cognizance of reports published in media also, the Rajasthan High Court in December 2020 had noted that, "As per the report, every person who enters a prison in the State, is asked about his caste and once identified; menial jobs like cleaning toilets, sweeping the prisons etc are assigned to the persons from lowest echelons in the society irrespective of the nature of the offence committed." It is also important to note that the said report also refers to the fact that the Prison Manuals of various states are still plagued by the archaic and the derogatory caste system, which the Constitution of India pledged to eradicate. But what an unbeatable supreme irony that even after more than 73 years of independence it still remains a pipe dream! The Rajasthan High Court also very rightly said that, "We are of the firm view that no under trial prisoner can be assigned such duties in a prison".

SOURCE: [Amendment 2021.pdf - Google Drive](#)

Chhattisgarh HC grants bail to juvenile, says gravity of offence is not ground to reject bail



The petitioner submitted that the juvenile was falsely implicated in this case.

The Chhattisgarh High Court on Tuesday while allowing bail to a juvenile, observed that the gravity of the offence cannot be made a ground for rejection of bail to a juvenile.

A single-judge bench of Justice Rajesh Chandra Singh Samant was hearing a criminal revision petition filed by a juvenile through his father Haldhar Gonda, challenging the order dated 05.01.2021, passed by Additional Sessions Judge (F.T.C.)/Children Court, Bastar at Jagdalpur (C.G.), in Criminal Appeal No.37/2020, whereby the appeal preferred by the juvenile against the order of Principal Magistrate, Juvenile Justice Board, District Bastar in Criminal Case No. 39 of 2020 dated 25.11.2020, in which the juvenile has been denied bail.

In the petition, it was submitted that the juvenile was falsely implicated in this case. The social status report had been in favour of the juvenile despite that the Board and the Appellate Court both have given consideration to the gravity of the offence and rejected the application. Hence, the orders passed by the Board as well as by the Appellate Court are erroneous.

The state counsel opposed the petition, submitting that looking at the gravity of the case, the applicant is not entitled for grant of bail. The Board and the appellate Court have not committed any error in passing the rejection order. Hence, the revision petition be dismissed.

After hearing the counsel for the parties and perusing the documents placed on record, the High Court observed that the gravity of the offence cannot be made a ground for rejection of bail to a juvenile. There are specific circumstances to be made out according to the proviso to Section 12 (1) of Juvenile Justice (Care and Protection of Children) Act.

According to the social status report given by the Probation Officer, there appears to be no such circumstances present. Hence, this Court is of the view that the Board as well as the Appellate Court both have committed error by not appreciating the report of the Probation Officer. Therefore, the orders passed by the Board as well as by the Appellate Court both are not sustainable.”

“The order dated 05.01.2021, passed by learned Additional Sessions Judge (F.T.C.)/Children Court, Bastar at Jagdalpur (C.G.), in Criminal Appeal No.37/2020, is set-aside. It is directed that on furnishing a surety of Rs 25,000 along with a bond of same amount, which is to be of his father to the satisfaction of the concerned Juvenile Justice Board, for his appearance as and when directed, then the applicant shall be given in custody of his natural guardian,” ordered the High Court while allowing the Revision Petition.

Plea challenges Madhya Pradesh Freedom of Religion Ordinance, says it is a fraud on Constitution



The petition filed by Advocate-On-Record Aldanish Rein states that the ordinance passed by the Governor bypassing the legislative process of Assembly, is not only arbitrary and violative of Article 14.

A plea has been filed in the Supreme Court challenging the constitutional validity of the Madhya Pradesh Freedom of Religion Ordinance, passed by the Government of Madhya Pradesh.

The petition filed by Advocate-On-Record Aldanish Rein states that the ordinance passed by the Governor bypassing the legislative process of Assembly, is not only arbitrary and violative of Article 14 of the Constitution of India but is also a fraud on the Constitution itself.

He further states that “...the impugned Ordinance in transgressing upon the freedom to marry, freedom to profess, practice and propagate any religion, and right to privacy, has guillotined the individuals’ personal autonomy, equality under the law, personal liberty and the freedom of choice and expression, in blatant and flagrant violation of the fundamental rights of the individuals as guaranteed under Articles 14, 19, 21 and 25 of the Constitution of India, 1950.”

He points out that the impugned ordinance has adopted its basic structure from the The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020 and The Uttarakhand Freedom of Religion Act, 2018 whose constitutional validity is already under challenge before the Supreme Court.

The petition says;

“...it is unfortunate that the political and communal gimmick of ‘Love Jihad,’ which was earlier solely confined to the ‘Us vs Them’ narrative espoused by fake-propaganda machines (eg. ‘WhatsApp University,’ shady social media outlets, etc.), political rallies and societal fringes, has manifested itself as a legislation.”

“..The impugned Ordinance promulgated by the Respondents is a text book example of blatant abuse of the powers vested under Article 213 of the Constitution. The action of the Respondents in promulgating ordinances, bypassing the legislative process of Assembly, is not only arbitrary and violative of Article 14 of the Constitution but is also a fraud on the Constitution itself.”

The petitioner claims that there is no data available with any government agency or department on ‘love jihad’ and that it was not a fit case for issuing an ordinance. The ordinance was made in haste and with absolute disregard to the impact that it could have on the fundamental rights of affected parties.

The petitioner has cited various case laws pointing out the seemingly illegal provisions that are laid down in the ordinance.

PLEA FILED FOR COMPENSATION FOR ANTI-CAA PROTEST VIOLENCE



Notices were issued in the matter of a plea which seeks the enhancement of compensation to the victims and survivors of the communal violence which occurred during the Anti-Citizenship Amendment Act Protests, in February of 2020. The Delhi High Court's single judge bench has asked for responses from the central government and well as the government of Delhi.

The petitioner, Afsana and Faimuddin, residents of Delhi, submitted that on "24/02/2020, they were at home along with their children and mother-in-law when the riots were taking place in their area and her husband was out for business work. When her husband was returning from work on his motorcycle, he was carrying clothes of worth Rs 50,000. He saw a mob of over 100 to 150 people at the Johripur Mod area who were shouting death threats to the Muslim community. The mobs were carrying lethal weapons in their hands, including sticks, rods and firearms. The angry mob was baying for the blood. Therefore, fearing for his life was forced to leave behind his bike and the pack of clothes he was carrying with him".

The petitioners further added that their mother-in-law was severely injured by a mob because of which she had to abscond from her own home and run for her life, they said that "while running away from Shiv Vihar, the Petitioner's mother-in-law fell down and injured herself. After which it became extremely difficult for her to sit and walk properly as she sustained injuries on her back and hips. Over the time, her condition only worsened with time. On 23.08.2020, Petitioner's mother-in-law was admitted in Dr. Ram Manohar Lohia Hospital. The Petitioner's mother-in-law at present is bedridden and unable to move. It was only due to the urgency that had affected them that she had to abandon her house and run".

The petitioner further prayed that as the said incident caused a huge loss to her due to the loss of livelihood and urgent repairs required to her home, her fundamental Right to Life also includes 'Right to Live with dignity, peace, shelter etc.' and she also contended that while the

Delhi Government announced a compensation of 1Cr to the members of a family of the deceased, where the victim of the communal violence was a public servant, the government announced a meager 10Lakh compensation to those who suffered losses. The court gave 26th April 2021 as the date for next hearing.

Delhi High Court Relies On Ravish Kumar's NDTV Video While Granting Bail To 3 Riots Accused.



A video shown by journalist Ravish Kumar during a prime time show in NDTV news channel came to the rescue of three persons who were jailed in a Delhi riots case.

The Delhi High Court relied on the Ravish Kumar's video while observing that "there is no evidence whatsoever, either direct or circumstantial or forensic", against three persons - Junaid, Chand Mohammed and Irshad- who were accused of killing one Shahid during the Delhi riots of February 2020. The petitioners were under custody since April 1, 2020.

According to the police case, the accused were part of the Muslim group which had taken place at the rooftop of Saptarishi Building at Chand Bagh area of North East Delhi, to attack Hindu groups standing at the rooftops of other buildings through firing and stone-pelting. It was further alleged that in that process, Shahid, who was also present at the top of Saptarishi building, got killed as a result of a gunshot.

The prosecution, in the charge sheet filed against the accused, had referred to the NDTV video. While arguing for bail, the petitioners' lawyer Advocate Salim Malik pointed out that the 3 accused persons are not seen in the NDTV video, which the prosecution itself has relied upon. The lawyer played the NDTV video during the arguments and showed that the faces of the persons involved in rioting are visible when it is enlarged; however, the none of the petitioners were seen in it.

A single bench of Justice Suresh Kumar Kait, after analysing the nature of gunshot wound in Shahid's body, observed that it was a long distance shot and not a close-range shot.

In this connection, the bench referred to the NDTV video which showed that there was gun firing from the rooftop of Mohan Nursing Home building, which was opposite Saptarishi building. From the nature of entry and exit wounds, and also from an analysis of the video, the bench observed that firing was possibly caused by a long range shot from Mohan Nursing Home. Also, since the trajectory of the bullet wound was downwards, the firing must have taken from a height. So, there was possibility of the gun shot originating from Mohan Nursing Home Building, which was having more height than the Saptarishi building.

"It is pertinent to mention here that in the post-mortem report, the direction of the wound in which it has entered the body has been given to be from the left side which is going downwards and exiting from the right side. Which means that the injury was from a height and at a distant range, thus, establishes the possibility that the bullet came from Mohan Nursing home or any building which is on the left side of the Saptarishi building and is at height which is on the front and diagonally left to the Saptarishi building and is on more height than that of Saptarishi building", Justice Kait observed.

The bench further observed that if the bullet was fired from a close range, then it would have gone straight, rather than entering the body from left side and exiting from right side and that too downwards. Further, in case of close range shot gunshot residues like lead, Carbon MonoOxide, Carbon Dioxide are bound to be present at the entry of the wound, but, no such residue was mentioned to be available in the post-mortem report.

NDTV video showed firing from Mohan Nursing Home Building

Next, Justice Kait noted that the NDTV video clearly showed that a man wearing a helmet was firing from the top of Mohan Nursing Home. In that video, firing is shown as taking place only from Mohan Nursing Home Building and not from Saptarishi Building. The bench further observed that the police focused only on buildings of one side in the investigation, ignoring the firing from Mohan Nursing Home side. The relevant observations from the judgment are as follows :

"As submitted by learned counsel for petitioner that in the same video relied upon by police, at exact after running of video for 10 minutes, it is seen that Ravish Kumar, NDTV primetime anchor saying that a person is firing rifle from Mohan Nursing Home Hospital and is wearing helmet, there is another person who is covering the weapon with handkerchief and later on, they can be seen in the videos as well. But the investigating agency seems to have concentrated only on one side of the building, although it is an admitted case of prosecution

that rioters from both the sides were pelting stones at each other and were firing. Further, in this video, the firing is seen to be done only from Mohan Nursing Home and not from Saptarishi building"

The Court also observed that the theory of close-range shot is just a "conjecture of the investigating agency and is not based on scientific fact".

"Simply because copper like pieces were found near the exit wound of the body, as per the post-mortem report, it would not signify a close-range shot. But it was only on this basis, the investigating agency concluded that the "firing was possibly from close proximity", which is not scientifically possible", the Court opined.

Hard to believe that petitioners will kill a person of their own community

The Court also observed that it was hard to believe that the petitioners will kill a person of their own community during riots.

"Neither there was any motive whatsoever either for them or for any other person allegedly present on the roof of Saptarishi building, to commit the offence, nor has the prosecution alleged any motive in the entire case. Thus, it is hard to believe that a communal riot can be used by the petitioners to cause death of the person of their own community", the Court said.

The Court also noted that as per the prosecution case itself, the petitioners had let go off witnesses belonging to Hindu community while entering the Saptarishi building, asking them to leave the building and save their lives. If their actual intention was to indulge in communal rioting, would they have done so, the court wondered.

"Moreover, when it is an admitted case of the prosecution that the petitioners actually let go off the witnesses of the different community and asked them to leave the scene of crime to save their lives, namely, Mukesh, Narayan, Arvind and their families, before climbing on the roof top of Saptarishi building. If, they were really involved in this communal riot and wanted to cause harm to the members of the other community/Hindu community, they would not have tried to save the lives of the above-named members of the other community", the bench observed.

The Court also noted that the police is yet to arrest the main assailant who shot the gunfire which killed Shahid and that no recovery of any firearm or weapon has been made from the petitioners.

The Court ordered the petitioners, who were under custody since April 1, 2020, to be released on bail, after noting that the charges are yet to be framed in the trial, which is likely to take a substantial time.

Plea Seeking Printing Of Nethaji Subash Chandra Bose's Picture On Indian Currency Notes- "Consider The Request": Madras HC To UOI.



We need not say anything about the greatness of Nethaji, apart from the contribution made, which starts from his resignation from the coveted post to the creation of the Indian National Army. His contribution towards the Indian Freedom movement is unparalleled: Madras High Court.

The Madras High Court recently disposed of a plea seeking directions to respondents to print the photo of Nethaji Subash Chandra Bose on the Indian Currencies to satisfy the voices of people.

The Bench of Justice M. M. Sundresh observed,

Though we are of the view that prayer as sought for cannot be granted, one cannot ignore the great sacrifice made by the great leader and the persons, who served along with him.

This order came in a plea filed by one K. K. Ramesh seeking a direction to the respondent No.1 [The State Union of India Rep. by its Principal Secretary to Prime Minister Prime Minister's Office] to take appropriate steps towards the printing of photographs of the Nethaji Subash Chandra Bose on the Indian currencies to make the younger generation to understand and appreciate his humane services rendered in securing the independence of this nation.

The petitioner, who appeared in person, submitted that the representation made dated 20th January 2021 may be directed to be considered accordingly.

On the other hand, G. Thalaimutharasu, the Counsel appearing for the respondents 1 to 4, submitted that prayer as sought for is not maintainable and it is for the respondents to take a call.

Court's observations

The Court remarked,

"We need not say anything on the greatness of Nethaji, apart from the contribution made, which starts from his resignation from the coveted post to the creation of Indian National Army. His contribution towards the Indian Freedom movement is unparalleled."

Lastly, the Court also opined," History of the nation will have to be told and retold again and again for the posterity to remember. Thus, keeping in view of the judicial constrain, we are not in a position to accede to the request made by the petitioner.

**Making unfounded allegations against spouse amounts to mental cruelty:
Bombay High Court upholds divorce granted to wife.**



Making unfounded allegations against the spouse amounts to mental cruelty, the Nagpur Bench of Bombay High Court observed upholding the decree of divorce granted to the wife by the family court.

A Bench of Justices AS Chandurkar and PV Ganediwala took an unfavourable view of the husband's arguments regarding the wife obtaining false caste certificate and suffering from epilepsy which it concluded were without basis.

"This conduct of the husband of not pleading that the wife was suffering from epilepsy and stating the same for the first time in his deposition as well as making wild allegations that the wife and her relatives had secured false caste certificate without attempting to substantiate the said allegations has resulted in causing mental cruelty to the wife, the order reads," the Court held.

Making of unfounded allegations against the spouse or his/her relatives or making complaints with a view to affect the job of the spouse amounts to causing mental cruelty to the said spouse, the Court added.

The wife in this case had moved the family court at Nagpur for divorce on the ground of cruelty and desertion claiming she had been ill-treated by the husband and his family and driven out of the house after they took her gold ornaments and articles.

The husband denied these allegations contending that his wife and her family members had obtained spurious caste certificates belonging to 'Rajput Bhamta' for securing employment. After perusing the evidence, the family court held that the wife was able to prove the allegation of cruelty but not desertion. Accordingly, a decree for divorce was passed on the ground of cruelty.

The husband challenged the decree claiming that the allegation of cruelty was not proved by the wife. Referring to the evidence, he contended "that except normal wear and tear of marital life there was no substantial evidence brought on record by the respondent to prove the ground of cruelty."

The husband further claimed that the wife suffered from epilepsy and this fact was not disclosed by the family members before their marriage. The documentary evidence to that regard was also placed on record.

The wife opposed reiterating that the cruelty meted to her was not merely physical but also mental.

She added that the allegations that she suffered from epilepsy and that her family had procured false caste certificates for securing employment were not proved.

Such unsubstantiated false allegations resulted in mental cruelty and were rightly considered by the family court while allowing divorce, it was argued.

The Court noted that there was no pleading by the husband to the effect that the wife was suffering from epilepsy. This was raised for first time during his deposition, the Court observed.

"In absence of any pleading in this regard by the husband, there was no occasion for the wife to counter this allegation that she was suffering from epilepsy," the Court said.

The Court also noted that during his cross-examination the husband admitted to having filed various complaints about the false caste certificate at the office where the wife was employed. He had made allegations but he had not substantiated those allegations by leading any evidence.

The High Court concluded that based on the unsubstantiated allegations the conduct of the husband caused mental cruelty to his wife.

"It appears from the conduct of the husband that in one way or the other he intended to prejudice the service of the wife. The finding recorded by the learned Judge of the Family Court that the behaviour and the conduct of the husband of making wild and unsubstantiated

allegations resulted in causing mental cruelty to the wife does not deserve to be interfered with," it concluded.

Bombay High Court verdict tomorrow in bail plea by Bhima Koregaon accused Varavara Rao.



The Bombay High Court will pronounce its judgment on Monday at 11 AM in the plea by Telugu poet Dr. Varavara Rao seeking bail on medical grounds.

Besides Rao's plea for bail, the Court will also pronounce its verdict on a plea filed by his wife Pendyala Hemlatha seeking the Court's intervention in view of alleged violation of his "fundamental right to health".

Rao an accused in the Bhima Koregaon case is presently lodged in Nanavati Hospital after Chief Public Prosecutor Deepak Thakare informed the Court that the State Home Minister was willing to shift Rao to the private hospital as a special case.

After fresh set of medical reports were submitted to the Court by the State, the Court proceeded to hear his bail plea on medical grounds.

A Bench of Justices SS Shinde and Manish Pitale requested the lawyers to adopt a humanitarian approach while arguing their case considering Rao's deteriorating health and advanced age.

"You make sure to keep in mind the age and health of Dr. Rao. He is above 80 years old. Ensure your submissions take this into account," Justice Shinde had told both counsel.

Senior Advocates Anand Grover and Indira Jaising had appeared for Rao.

The lawyers expressed apprehension that the medical condition of Rao may relapse to a critical state if he is sent back to Taloja Central Prison, and the decision to do so would be against his fundamental right to health.

Additional Solicitor General Anil Singh appearing for the National Investigation Agency (NIA) advanced two main contentions:

That the jail authorities are capable of providing all medical facilities that were being provided by Nanavati Hospital. On the hypothetical possibility of a medical emergency faced by Rao, bail ought not to be granted.

That while considering bail application, the seriousness of the offence charged against the accused must be considered. His argument was that the State stepped in whenever medical emergencies arose.

Justice Shinde had, however, said that should be the concern of the State and NIA and not the Court. He recollected the incident pertaining to another Bhima Koregaon accused Gautam Navlakha where he was denied spectacles by the jail authorities when it came from his family.

“Now he cannot even see. We are not saying it is ill-intentioned. But it is a mistake of the jail authorities. When it comes to fundamental rights, it is not adversarial litigation, it is the duty of the State.”

The Court also took note of the delay in the trial with Justice Shinde pointing out that considering there are 200 witnesses and that charges are yet to be framed, the trial may take a very long time to even begin. "Mr. Singh, the charges are not yet framed. Speedy trial is also part of fundamental rights," he said.

However, when Grover informed the Court that Rao's relatives have to take leave from their jobs to come look after him in Bombay and hence he should be sent back to Hyderabad, the Court replied that only Rao's health will be considered while releasing Rao from detention and not his relatives' convenience.

Justice Pitale also chimed in saying that the trouble caused to Rao's relatives will no longer continue if Rao is sent to JJ Hospital, where he purportedly will be given a special room in the prison ward. Here, he can be monitored and his relatives can visit him.

Justice Shinde also pointed out that if bail is indeed granted to him, then the other accused may also take undue advantage of such an order. The Court had then reserved its verdict while also extending the interim direction to keep Rao in Nanavati Hospital till the pronouncement of the verdict in the bail plea.

**Writ of Habeas Corpus an extraordinary remedy, not available to husband
"as a matter of course" to regain his wife: Allahabad High Court.**



It is writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown," the Court said.

Issuance of a writ of Habeas copus at the behest of a husband to regain his wife may not be available as a matter of course and the power in this regard may be exercised only when a clear case is made out, the Allahabad High Court held (Soniya v. State of UP).

The writ of habeas corpus is festinum remedium (speedy remedy) and "issuance of a writ of habeas corpus at the behest of a husband to regain his wife" is not entertainable when other remedies are available, Justice Yogendra Kumar Srivastava observed.

"In view of the other remedies available for the purpose under criminal and civil law, issuance of a writ of habeas corpus at the behest of a husband to regain his wife may not be available as a matter of course and the power in this regard may be exercised only when a clear case is made out," the Court said.

It was dealing with a petition moved by a husband contending that his wife was under detention and seeking a writ of Habeas Corpus for her release.

The Government Advocate disputed the husband's case arguing that the petitioner (wife) had left her matrimonial home on her own on account of discord with her husband, for the reason that he was stated to have entered into another marriage and a child was also stated to have been born out of the wedlock.

The Court placed reliance on Mohammad Ikram Hussain v State of UP and Kanu Sanyal v District Magistrate Darjeeling to hold that the writ of Habeas Corpus is a prerogative writ and an extraordinary remedy.

"It is writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown," the order said.

The Court rejected the contentions of the petitioner and observed that the writ of Habeas Corpus has been held as a festinum remedium and "the power would be exercisable only in a clear case, the court observed.

"The remedy of writ of habeas corpus at the instance of a person seeking to obtain possession of someone whom he claims to be his wife would therefore not be available as a matter of course," it said.

Late Filing Of Chargesheets Despite Timely Completion Of Investigation Shakes Confidence Of Citizen In Justice Delivery System": Delhi Court.



A Delhi Court came down heavily on the negligent conduct of Investigating Officers (IOs) for non filing of charge sheet in due time even after being due time even after being duly forwarded by concerned ACPs after completing of investigation. The Court also sought filing status of chargesheets forwarded in the last 3 years i.e. 2018 to 2020 from the concerned IOs.

"It is firmly believed that the same would definitely unearth many hidden ghosts (files) and wake up many souls (IOs) from slumber." The Court remarked

Additional Chief Metropolitan Magistrate Arvind Bansal, in an order dated 16.02.2021, opined that such a negligent conduct of IOs "raises some significant legal issues."

Coming on the first issue, the Court observed that the IOs need to understand and know that investigation of all 'summons cases' generally needs to be concluded within 6 months from the date on which accused was arrested, and failure may result in an order by concerned magistrate stopping further investigation into the offence

Delhi Court Orders Release Of Passports, Mobile Phones And Other Belongings Of 31 Tablighi Jamaat Foreign Nationals, LOCs Closed For All 35 Foreign Nationals, LOCs Closed For All 35 Foreign Nationals.



A Delhi Court on Saturday ordered the release of passports, mobile phones and other belongings of 31 tablighi jamaat foreign nationals who were acquitted on 15th December 2020. Chief Metropolitan Magistrate, Arun Kumar Garg ordered the release while dealing with applications made for the release of their passport, mobile phones and other belongings in the custody of Crime Branch.

Advocates Ashima Mandla and Mandakini Singh appeared for the foreign nationals whereas Additional Public Prosecutor Sanjay Mishra appeared for the State. The tablighi jamaat foreign nationals were acquitted by the Court vide order dated 15.12.2020. However, pursuant to the Supreme Court order dated 13.01.2021, the Apex Court had directed the Government to facilitate the return of the acquitted persons.

In view of this, the DCP Crime Branch had closed the LOC(s) of the said persons on 17th February 2021. Therefore, the release of passport and other belongings was prayed by the applicants.

It is pertinent to note that the LOC has been closed for all the 35 tablighi jamaat foreign nationals, out of which 4 people have already been given passports and other belongings. However, one Bechir Yanes of Tunisia died on 5th January 2021. Remaining people are free to go to their respective countries.

The Investigating Officer in the case however denied the said contention by submitting in the Court that no belongings of the applicants were in custody of the crime branch. He also submitted that no appeal or revision was filed in matter with regard to the acquittal order.

"In view of the aforesaid submissions made on behalf of the parties and considering the facts that the accused have already been acquitted by this Court vide judgment dated 15.12.2020, non filing of any appeal/revision by the State against judgment dated 15.12.2020 of this Court till date and that LOC(s) qua the applicant(s) is disposed off with the direction to release the

original passport(s) of the applicant(s) to the applicant(s) or his/her (their) attorney against proper acknowledgment as per rules, after verification of his/her (their) identity." The Court ordered.

[Elephant Deaths] Man unaware that the nature he destroys is the God he worships: Madras High Court cites Hubert Reeves while directing CBI probe.



Emphasising that there is a need to protect the elephants and forests, the Madurai Bench of the Madras High Court recently directed the Central Bureau of Investigation (CBI) to undertake an investigation into cases of elephant deaths and elephant poaching (S Manoj Immanuel v. Union of India and ors).

On a prima facie assessment of the way in which elephants were being killed, leading to its own adverse impact on forests, the Court quoted Canadian astrophysicist Hubert Reeves in observing,

"Man is the most insane species. He worships an invisible God and destroys a visible Nature, unaware that this Nature he's destroying is this God he's worshipping."

Recalling the words of Thiruvalluvar, the Court added that the "a Man, who shares his belongings with fellow living beings and takes care of them is more virtuous endowed, with wisdom than what the greatest Literatures would teach."

Prima facie, elephant poaching been happening for a while, following demands for ivory, the Court found on the basis of a 2019 Wildlife Crime Control Bureau, Chennai report.

The quantity of ivory recovered also appears to be large, the Bench said, noting that in one case, 300 kilograms of ivory were ordered and handed over, with eight elephants being killed.

"Though the report also suggests that ivories have been removed from the electrocuted Elephants, we are at a loss to understand as to why only the male Elephants could get killed more than the female Elephants and calf also died..."

Forest is protected through the Forest Guards and Forest Watchers. How such deaths escape from their watchful eyes is a mystery", the Court added, while directing a CBI probe into the matter.

The Bench of Justices MM Sundresh and N Sathish Kumar passed the order earlier this month, after taking note of material which indicated that the elephant poaching activities were not confined to Tamil Nadu alone, but involved several players across the country, with demands for elephant ivory coming in from abroad as well.

To illustrate, the Court cited the case of Eagle Rajan, whose statement indicated the involvement of persons, including middlemen, from Kerala and Tamil Nadu. Rajan's statement also showed that he had received payments for ivory statues from Delhi and Kerala. The Court observed, "... it appears that the crime which happened on ground in the forest over a decade prior to 2015, got extended beyond the boundaries of not only the State but also the Country. It further indicates the network involved across such boundaries. Therefore, we are not dealing with a mere case of poaching, but also a demand created by customers, whose names would double up only after investigation, other than the names we have already recorded....The greed of the man could well be seen from the transactions that happened. It is not a mere case of poaching for livelihood, but a trading on wildlife driven by the sadistic pleasure of man. We do not wish to say anything more. The report speaks for itself."

While some arrests may have been made at the bottom levels of the poaching ring, the middlemen and kingpins were left untouched, the Court suspected.

Expressing that it may not be sufficient to leave the investigation in this matter to the State authorities, the Bench remarked, "... even after the report having been addressed, the respondents turned a furtive look feigning ignorance. These cases involve investigation crossing the borders as indicated earlier. Thus, we are not in a position to agree with the submissions made by the learned Additional Advocate General that further investigation would be made with the co-operation of the nearby State. Under the Wildlife (Protection) Act, 1972, not only the poaching but also mere possession is an offence.... despite the fact that it has been brought to the notice by the Wildlife Crime Control Bureau as early as on 23.09.2019, nothing fruitful happened."

The case saw the Bench emphasise that the Universe is sustained by the role played by various living beings, especially when it comes to a forest, where each animal contributes to its subsistence and development. Any interference in the chain of biodiversity would lead to dire consequences, the Court observed.

"Such consequence would not only be felt on the forest, but the World as a whole. The Forest is not only the lung space, but provider of rain water", the Court added.

In this backdrop, the Court remarked that man is refusing to acknowledge the implications of his selfish adventurism.

"Any activity in the name of development sans environmental concern, having a narrow view from the perspective of one specie, certainly would have its own cascading effect", the Bench said.

The elephant, being a gentle giant is rightly called as "Guardian of the Forest", the Court said. However, continuous poaching has affected the elephant population and the male-female ratio of elephants rather adversely, the Court observed.

"For survival, many male Elephants do not develop tusks, a situation brought forth by the credence of man. It is reported in many places, including Sri Lanka that male Elephants called "Magna" are more prevalent recently", the Judges added.

The Court proceeded to direct the CBI to undertake a probe in this case, in response to which the Assistant General of India, L Victoria Gowri, submitted that such a direction would be complied with considering the gravity of the offence and involvement of persons from different parts of the country.

The Bench added that the CBI can undertake investigation both into pending complaints as well as in cases where a complaint is yet to be made. In fresh cases, the CBI is to act in co-ordination with the Wildlife Crime Control Bureau, Chennai, the Bench said. A status report in the matter is to be filed on June 10.

In the course of the hearing, the Court also took note of certain suggestions made by the Wildlife Crime Control Bureau to curb the deaths of elephants due to electrocution. The State informed that these suggestions were accepted and are being implemented at least in respect of the Megamalai Forest Region. Directing the State to do the same with respect to other forest areas as well, the Court has sought for a compliance report on this aspect as well by June 10.

Explainer: Inter-State Arrest, Transit Remand & Right To Legal Representation.



The concepts of 'transit remand' and 'norms for inter-state arrests' are being widely discussed in the wake of the arrest of 21-year old climate activist Disha Ravi by the Delhi Police from her Bengaluru resident in the 'toolkit' case.

Many legal experts have questioned the Ravi's custody saying that it was not accompanied with a 'transit remand order' from Bengaluru and norms for inter-state arrest were violated. The Delhi Commission for Women has taken suo moto cognizance of the issue in the wake of widespread criticism against Ravi's arrest and remand.

From the aforementioned provisions, it is evident that in order to retain an accused in custody for a period exceeding 24 hours, the order of the Jurisdictional Magistrate is required and, for that, the police officer needs to produce the accused as well as copies of the case diary. A good reference point to understand the importance of these requirements is the 2018 Delhi High Court decision in the case *Gautam Navlakha vs Union of India*, in which a bench comprising Justices Dr S Muralidhar and Vinod Goel quashed the transit remand order on the ground that the Magistrate did not follow the requirements of Section 167.

In 2019, a Division Bench of the Delhi High Court had reiterated the detailed suggestions of a Committee constituted by it and had stated that in cases of inter-state arrest, an "endeavour should be made to obtain transit remand after producing the arrestee before the nearest Magistrate unless exigencies of the situation warrant otherwise and the person can be produced before the Magistrate having jurisdiction of the case without infringing the mandate of Sections 56 and 57 of CrPC within 24 hours"(Sandeep Kumar v State, Justices Dr S Muralidhar and Talwant Singh).

The High Court observed that the Gujarat police was bound to produce the accused before the nearest Magistrate who was in Delhi.

Sri Rama Close To The Heart Of Hindus": Madras HC Directs Police To Consider Allowing Ayodhya Ram Temple Campaign.



The Madras High Court (Madurai Bench) on Friday (19th February) allowed a petition that sought permission to conduct an awareness campaign in and around Madurai for the construction of 'Sri Rama Temple in Ayodhya'.

The Bench of Justice R. Hemalatha directed the Commissioner of Police, Madurai City to consider the representation of the petitioner and pass appropriate orders with reasonable restrictions for the free movement of the vehicle in and around Madurai.

It was submitted before the Madras High Court that the petitioner (N. Selvakumar) is holding the office of District Convener of "Sri Rama Jenma Boomi Theertha Kshethra Trust" which is formed for creating awareness among the general public and also for the construction of "Sri Rama Temple in Ayodhya".

His further contention was that the petitioner filed a petition before the Commissioner of Police, Madurai City on 13th February 2021 seeking permission to conduct an awareness campaign through a Van in and around Madurai.

It was alleged that the said representation was rejected by the Assistant Commissioner of Police, Thilagar Thidal (Law and Order) Range, Madurai City citing the present Covid-19 situation and also law and order problem.

His further contention was that though permission was granted by the Government to various political and social organizations to conduct conference and public meetings, he was denied permission.

The APP contended that the second respondent [Assistant Commissioner of Police, Thilagar Thidal] does not have jurisdiction all over the 100 wards of Madurai and that he is not also empowered to grant permission to the petitioner.

It was also argued that the petitioner should have filed a petition before the Commissioner of Police, Madurai City police.

Court's observations

The Court perused the orders passed by the ACP (second respondent) and noted that the petitioner was not granted permission to conduct the awareness campaign in and around Madurai citing the present Covid-19 situation and also law and order problem.

To this, the Court said,

"Nowhere it is stated that the second respondent does not have powers to pass orders and in case, he found so, he should have forwarded the same to the Commissioner of police instead of rejecting the permission."

Significantly, the Court also noted,

"It is pertinent to point out that 'Sri Rama' is very close to the heart of the religious sentiments of Hindus and when people are allowed inside the movie halls, malls and other public places stipulating the basic safety measures like wearing masks and using hands sanitizer, I do not find any reason to validate the official stance taken by the second respondent in this matter."

The Court also remarked,

"It is also not stated in the order passed by the second respondent as to how there will be law and order problem, if the petitioner is permitted to take his van in and around Madurai."

Noting that the concerned authorities should not have restrained the movement of the petitioner's vehicle and this action was "high handed", the Court opined that they should have allowed the procession after imposing certain restrictions.

Therefore, the Commissioner of Police, Madurai City was directed to pass appropriate orders on the representation submitted by the petitioner immediately.

Supreme Court reserves verdict in challenge by former Andhra Pradesh High Court Chief Justice V Eswaraiah against probe into his phone chat

The High Court had ordered an inquiry into the conversation which allegedly disclosed some material about a plot against the Chief Justice of the Andhra Pradesh High Court and a sitting judge of the Supreme Court.

The Supreme Court on Monday reserved its order in a plea by former Chief Justice of the Andhra Pradesh High Court, **V Eswaraiah** challenging an order passed by the Andhra Pradesh High Court calling for a probe into his telephonic conversations with a suspended District Munsif Magistrate (*Justice V Eswaraiah v. Union of India*).

2. Supreme Court on de-freezing of bank accounts under the Prevention of Money Laundering Act, 2002

The Court recently held that the freezing of the accounts of the appellant was legally untenable on account of non-compliance with the procedure established under the Act.

A three-judge Bench of the Supreme Court, comprising Chief Justice of India **SA Bobde** and Justices **AS Bopanna** and **V Ramasubramanian**, on February 3, allowed an appeal filed on behalf of [OPTO Circuit India Ltd.](#) challenging an August 2020 order passed by the [Karnataka High Court](#).

While doing so, the Supreme Court quashed the communication issued by the Directorate of Enforcement (ED) and directed the respondent banks i.e. Axis Bank, IndusInd Bank and State Bank of India, to de-freeze the accounts of the appellants frozen on account of allegations of foreign diversion of funds made.

The primary question before the Court was the legality of the freezing of the accounts of the appellants.

Background Facts

The Supreme Court refused to interfere in the proceedings instituted under the Prevention of Money Laundering Act, 2002 (PMLA) in the present appeal. The proceedings before the High Court arose out of an action initiated by the Central Bureau of Investigation (CBI), which led the ED to direct the respondent banks to “debit freeze/stop operations” of the accounts of the appellant. The allegations contained in the complaint instituted by the State Bank of India were of foreign diversion of funds to the tune of Rs. 354.32 crore.

The Supreme Court concurred with the observations of the High Court with respect to the scope of parallel proceedings under Section 3 and 4 of the PMLA. However, it observed that the question as to whether the communication directing the freezing of the accounts was legally tenable or not should have been evaluated under the test of “due process” contemplated under the Act.

Applicability of Section 17(1) of the PMLA, 2002

It was submitted by the ED that the directions for freezing of the concerned accounts were issued to “stop the layering/diversion and safeguarding the proceeds of crime.” However, it was also submitted that the same was not issued in accordance with Section 17(1) of the Act, which empowers the enforcement authority to order search and seizure of property or records, provided the same is done on the basis of presence of cogent “reasons to believe.”

The Supreme Court reiterated that the powers exercised by the concerned authorities should be in accordance with the provisions of the Act, and since bank accounts fall squarely within the ambit of both “property” and “records”, any order freezing the same must be in line with the procedure laid down under Section 17 of the Act.

The [High Court of Bombay](#) in the case of [Digambar Kamat & Ors v. Joint Director \(PJZO\), Directorate of Enforcement, and Government of India & Ors](#) observed:

“32. On a plain reading of the provisions of Section 5(1) of the PMLA it is apparent that the director or the authorized officer has powers to provisionally attach properties involved in money laundering, however, such power is hedged by the crucial circumstance that the director or the authorized officer must have reason to believe that the two predicates referred to in clauses (a) and (b) as aforesaid exist or are fulfilled. Further, it is not sufficient, that the director or the authorized officer merely entertains such reason to believe in his mind but further, the reasons for such belief are required to be recorded in writing. At least on a plain reading of the provisions of Section 5(1) of the PMLA, it is apparent that the two predicates in clauses (a) and (b) have to be construed conjunctively and not disjunctively as suggested by Mr. Vaze, learned counsel for the ED. This means that the director or the authorized officer before he proceeds to make an order under Section 5(1) of the PMLA, must have reason to believe, on the basis of material in his possession, not only any person is in possession of any proceeds of crime but further, such proceeds of crime are likely to be concealed, transferred or dealt with to frustrate confiscation proceedings under Chapter III of PMLA.”

The [Delhi High Court](#) in the case of [J Sekar & Ors v. Union of India & Ors](#) observed:

“72. Reasons to believe cannot be a rubber stamping of the opinion already formed by someone else. The officer who is supposed to write down his reasons to believe has to independently apply his mind. Further, and more importantly, it cannot be a mechanical reproduction of the words in the statute. When an authority judicially reviewing such a decision peruses such reasons to believe, it must be apparent to the reviewing authority that the officer penning the reasons has applied his mind to the materials available on record and has, on that basis, arrived at his reasons to believe...”

...75. There are two reasons to believe. One recorded by the officer passing the order under Section 5(1) PMLA and the other recorded by the AA under Section 8(1) PMLA. Both these reasons to believe should be made available to the person to whom notice is issued by the AA under Section 8(1) PMLA. The failure to disclose, right at the beginning, the aforementioned reasons to believe to the notice under Section 8(1) PMLA would not be a mere irregularity but an illegality. A violation thereof would vitiate the entire proceedings and cause the order of provisional attachment to be rendered illegal.”

Applicability of the Code of Criminal Procedure, 1973

The Bench rejected the ED's alternative argument that the seizure under challenge is sustainable under Section 102 of the Code of Criminal Procedure ([CrPC](#)), 1973. It reiterated that the PMLA is a special legislation endowed with a scheme which is different from general procedural laws, and which also provides for specific provisions governing the power of seizure and the procedure to effect the same. The Bench also observed that the impugned freeze does not even satisfy the conditions laid down under the provisions of the CrPC.

Compliance under Section 17 of the PMLA held mandatory

The Court emphasized on the importance of drawing a balance between the stated objectives of the Act and protecting an accused person from arbitrary action outside the purview of permissible action. It observed that in the facts of the present case, where an order freezing the accounts of the appellant was made solely on the basis of a communication directed to the Anti-Money Laundering (AML) Officer, such action did not satisfy the "reasons to believe" test as contemplated under the Act.

The Bench observed that the authorities had failed to comply with the mandatory requirements as laid down under Section 17 of the Act, particularly the failure to record "*belief of commission of the act of money laundering*" and of filing an application before the Adjudicatory Authority, PMLA after affecting such seizure.

The Court in this regard also reiterated the principle that if *a statute provides for a thing to be done in a particular manner, then it has to be done in that manner alone*, which reaffirms the position adopted by the Courts in cases under the PMLA, 2002, where the authorities are held to be bound by the procedure employed in the statute in order for their action to be deemed to be legally sustainable.

While analyzing the scope of the powers available to the ED, the Bench observed that even though adequate powers were vested with the authorities, such powers are strictly *circumscribed* by the procedure laid down under the Act. In light of the same, the Bench held that the freezing of the accounts of the appellant was legally untenable on account of non-compliance with the procedure established under the Act.

The way forward

The decision of the Supreme Court reaffirms the position with respect to the mandatory requirement of presence of "*reasons to believe*" as well as strict compliance with the procedure contemplated under the Act before depriving any individual or entity of their property. The observations made by the Court are bound to have a far-reaching impact on proceedings under the PMLA, 2002 before the Adjudicatory Authority as well as the

appellate courts, thereby ensuring that the actions of the enforcement authorities are within the letter of the law.

3. In **Selil Moideen vs. State of Kerala**, WP (c) No. 39431 of 2018.

Inclusion of Land in CRZ as per 2019 notification can be objected even if land is shown CRZ-III as per 2011 notification: Kerala High Court.

The Kerala High Court has observed that the inclusion of a land in Coastal Regulation Zone-III in the Coastal Zone Management Plan (CZMP) prepared as per the 2011 CRZ notification is not a bar against objecting to the inclusion of the said land in a CRZ zone as per the CZMP to be made as per the 2019 CRZ notification.

A Single Bench noted that the CZMP prepared as per 2011 regulations will remain in force only till the CZMP as per 2019 regulations is notified. The bench also noted that steps for finalizing the Coastal Zone Management Plan pursuant to the Coastal Regulation Zone notification, 2019 are underway.

4. We are shocked that pooja is auctioned: Supreme Court praises Delhi High court appointing court receivers for donations in Kalkaji Temple.

5. in **Aparna Purohit vs. State of UP & Anr.**

The Allahabad High Court on Monday directed the Commercial Head of Amazon Prime Video, Aparna Purohit, to cooperate in the ongoing investigation against the web series 'Tandav'.

A Single Bench of **Justice Dinesh Kumar Singh** has ordered Purohit to appear before the investigating officer tomorrow, February 23, and fully cooperate in the ongoing investigation. The order states,

"Considering the aforesaid undertaking, the accused-applicant is directed to appear before the investigating officer tomorrow i.e. 23.02.2021 at 2 p.m. at Police Station Hazratganj, Lucknow.

The investigating officer shall interrogate/investigate and, if it is required, intimate further date for appearance of the accused-applicant.

The accused-applicant is directed to fully cooperate in the ongoing investigation. The accused-applicant will not leave the country without prior permission of the competent Court."

The development comes after the Police authorities informed the Court that Purohit has not been cooperating in the investigation after obtaining interim protection vide [order](#) dated February 11, 2021.

She has been booked for alleged commission of offences under **Sections 66 (Computer related offences), 66F (Punishment for cyber terrorism) and 67 (Transmitting obscene material) IT Act, 2008 (as amended) apart from Sections 153-A (Promoting enmity between different groups), 295 (Defiling place of worship with intent to insult the religion), 505(1)(b) (Public mischief), 505(2) (Statements promoting hatred between classes), 469 (Forgery for purpose of harming reputation) of IPC.**

Earlier, Purohit had argued that all the offences alleged against her carry a maximum sentence of three years. She further submitted that a perusal of the FIR does not indicate commission of any offence under Section 66-F of the IT Act.

On February 4, the Allahabad High Court [granted](#) her protection against coercive pursuant to an FIR registered against her in Gautam Buddha Nagar.

Subsequently, on February 11, the Lucknow Bench of the High Court [extended](#) this protection, vis-à-vis a FIR registered in Hazratganj Kotwali in Lucknow.

On Monday, the High Court extended the protection order until March 9, 2021.

'Tandav', starring actors Saif Ali Khan, Dimple Kapadia, Sunil Grover, Tigmanshu Dhulia, Dino Morea, Kumud Mishra, Mohd Zeeshan Ayyub, Gauhar Khan and Kritika Kamra, premiered on the streaming platform Amazon Prime last month.

The UP Government has alleged that "*the visual and wordings used by certain actors in the said web series contain certain scene portraying 'God' in a very derogatory manner for which the said F.I.R. has been lodged.*"

P. Mohanraj & Ors. Vs. M/s. Shah Brothers Ispat Pvt. Ltd.



Civil Appeal No. 10355 of 2018

R.F. Nariman, J.

1. Steel products were supplied by the respondent to one M/s. Diamond Engineering Pvt. Ltd. ["the company"] from 21.09.2015 to 11.11.2016, as a result of which INR 24,20,91,054/- was due and payable by the company. As many as 51 cheques were issued by the company

in favour of the respondent towards amounts payable for supplies, all of which were returned dishonoured for the reason "funds insufficient" on 03.03.2017.

As a result, on 31.03.2017, the respondent issued a statutory demand notice under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881, calling upon the company and its three Directors, the appellants no.1-3 herein, to pay this amount within 15 days of the receipt of the notice.

2. On 28.04.2017, two cheques for a total amount of INR 80,70,133/- presented by the respondent for encashment were returned dishonoured for the reason "funds insufficient". A second demand notice dated 05.05.2017 was therefore issued under the selfsame Sections by the respondent, calling upon the company and the appellants to pay this amount within 15 days of the receipt of the notice.

3. Since no payment was forthcoming pursuant to the two statutory demand notices, two criminal complaints, being Criminal Complaint No.SS/552/2017 and Criminal Complaint No. SS/690/2017 dated 17.05.2017 and 21.06.2017, respectively, were filed by the respondent against the company and the appellants under Section 138 read with Section 141 of the Negotiable Instruments Act before the Additional Chief Metropolitan Magistrate ["ACMM"], Kurla, Mumbai. On 12.02.2018, summons were issued by the ACMM to the company and the appellants in both the criminal complaints.

4. Meanwhile, as a statutory notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 ["IBC"] had been issued on 21.03.2017 by the respondent to the company, and as an order dated 06.06.2017 was passed by the Adjudicating Authority admitting the application under Section 9 of the IBC and directing commencement of the corporate insolvency resolution process with respect to the company, a moratorium in terms of Section 14 of the IBC was ordered.

Pursuant thereto, on 24.05.2018, the Adjudicating Authority stayed further proceedings in the two criminal complaints pending before the ACMM. In an appeal filed to the National Company Law Appellate Tribunal ["NCLAT"], the NCLAT set aside this order, holding that Section 138, being a criminal law provision, cannot be held to be a "proceeding" within the meaning of Section 14 of the IBC. In an appeal filed before this Court, on 26.10.2018, this Court ordered a stay of further proceedings in the two complaints pending before the learned ACMM.

On 30.09.2019, since a resolution plan submitted by the promoters of the company had been approved by the committee of creditors, the Adjudicating Authority approved such plan as a result of which, the moratorium order dated 06.06.2017 ceased to have effect. It may only be

added that at present, an application for withdrawal of approval of this resolution plan has been filed by the financial creditors of the company before the Adjudicating Authority.

Equally, an application to extend time for implementation of this plan has been filed by the resolution applicant sometime in October 2020 before the Adjudicating Authority. Both these applications have yet to be decided by the Adjudicating Authority, the next date of hearing before such Authority being 08.02.2021.

5. The important question that arises in this appeal is whether the institution or continuation of a proceeding under Section 138/141 of the Negotiable Instruments Act can be said to be covered by the moratorium provision, namely, Section 14 of the IBC.

6. Shri Jayanth Muth Raj, learned Senior Advocate appearing on behalf of the appellants, has painstakingly taken us through various provisions of the IBC and has argued that the object of Section 14 being that the assets of the corporate debtor be preserved during the corporate insolvency resolution process, it would be most incongruous to hold that a Section 138 proceeding, which, although a criminal proceeding, is in essence to recover the amount of the bounced cheque, be kept out of the word "proceedings" contained in Section 14(1)(a) of the IBC.

According to the learned Senior Advocate, given the object of Section 14, there is no reason to curtail the meaning of the expression "proceedings", which would therefore include all proceedings against the corporate debtor, civil or criminal, which would result in "execution" of any judgment for payment of compensation.

He emphasised the fact that Section 14(1)(a) was extremely wide and ought not to be cut down by judicial interpretation given the expression "any" occurring twice in Section 14(1)(a), thus emphasising that so long as there is a judgment by any court of law (which even extends to an order by an authority) which results in coercive steps being taken against the assets of the corporate debtor, all such proceedings are necessarily subsumed within the meaning of Section 14(1)(a).

He also referred to the width of Section 14(1)(b) and the language of Section 14(1)(b) and therefore argued that given the object of Section 14, no rule of construction, be it ejusdem generis or noscitur a sociis can be used to cut down the plain meaning of the words used in Section 14(1)(a). He cited a number of judgments in support of this proposition.

He also argued that in any event, even if criminal proceedings properly so-called are to be excluded from Section 14(1)(a), a Section 138 proceeding being quasi-criminal in nature, whose dominant object is compensation being payable to the person in whose favour a cheque is made, which has bounced, the punitive aspect of Section 138 being

only to act as an in terrorem proceeding to achieve this result, it is clear that in any event, a hybrid proceeding partaking of this nature would certainly be covered. He cited a number of judgments in order to buttress this proposition as well.

7. Shri Jayant Mehta, learned Advocate appearing on behalf of the respondent, rebutted each of these submissions with erudition and grace. He referred to the Report of the Insolvency Law Committee of February 2020 to drive home his point that the object of Section 14 being a limited one, a criminal proceeding could not possibly be included within it.

He further went on to juxtapose the moratorium provisions which would apply in the case of individuals and firms in Sections 85, 96, and 101 of the IBC, emphasising that the language of these provisions being wider would, by way of contrast, include a Section 138 proceeding so far as individuals and firms are concerned, which has been expressly eschewed so far as Section 14's applicability to corporate debtors is concerned.

He relied upon the *ejusdem generis/noscitur a sociis* rules of construction that had, in fact, been applied to Section 14(1)(a) by the Bombay High Court and the Calcutta High Court to press home his point that since the expression "proceedings" takes its colour from the previous expression "suits", such proceedings must necessarily be civil in nature.

He cited judgments which distinguish between civil and criminal proceedings and went on to argue that Section 138 of the Negotiable Instruments Act is a criminal proceeding whose object may be two fold, the primary object being to make what was once a civil wrong punishable by a jail sentence and/or fine. He relied heavily upon judgments which construed like expressions contained in Section 22(1) of the Sick Industrial Companies Act, 1985 ["SICA"], and Section 446(2) of the Companies Act, 1956.

He also was at pains to point out from several judgments that the Delhi High Court had not applied Section 14 of the IBC to stay proceedings under Section 34 of the Arbitration and Conciliation Act, 1996; the Bombay High Court had not applied Section 14 of the IBC to stay prosecution under the Employees' Provident Funds Act, 1952; and that the Delhi High Court had not stayed proceedings covered by the Prevention of Money-Laundering Act, 2002, stating that criminal proceedings were not the subject matter of Section 14 of the IBC.

He thus supported the judgment under appeal, stating that the consistent view of the High Courts has been that Section 138, being a criminal law provision, could not possibly be said to be covered by Section 14 of the IBC. He also relied upon the provision contained in Section 33(5) of the IBC to argue that when a liquidation order is passed, no suit or other legal proceeding can be instituted by or against a corporate debtor, similar to what is

contained in Section 446 of the Companies Act, 1956, and if those decisions are seen, then the expression "or other legal proceeding" obviously cannot include criminal proceedings.

On the other hand, in any case, the expression "or other legal proceeding" should be contrasted with the word "proceedings" in Section 14(1)(a) of the IBC, which cannot possibly include a criminal proceeding, given its object. Lastly, he also relied upon Section 32A of the IBC, which was introduced by the Insolvency and Bankruptcy Code (Amendment) Act, 2020 w.e.f. 28.12.2019, and emphasised the fact that the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease in certain circumstances.

This provision would have been wholly unnecessary if Section 14(1)(a) were to cover criminal offences as well, as they would cease for the period of moratorium. Thus, he argued that this Section throws considerable light on the fact that criminal prosecutions are outside the ken of the expression "proceedings" contained in Section 14(1)(a) of the IBC.

8. Shri Aman Lekhi, learned Additional Solicitor General, appearing on behalf of the Union of India in W.P. (Crl.) No. 297/2020, has comprehensively taken us through Chapter XVII of the Negotiable Instruments Act to argue that a plain reading of the said Chapter would reveal that the offence under Section 138 is a purely criminal offence which results in imposition of a jail sentence or fine or both, being punishments exclusively awardable under Section 53 of the Indian Penal Code, 1860 only in a criminal proceeding, and hence, does not fall within "proceedings" contemplated by Section 14 of the IBC.

He further states that since compounding under criminal law can only take place at the instance of the complainant/injured party, a subordinate criminal court has no inherent power to terminate proceedings under Section 138/141 upon "payment of compensation to the satisfaction of the court".

He then relied upon the rule of *noscitur a sociis* to state that since the expression "proceedings" contained in Section 14(1)(a) of the IBC is preceded by the expression "suits" and followed by the expression "execution", it has to be read in a sense analogous to civil proceedings dealing with private rights of action as contrasted with criminal proceedings which deal with public wrongs.

According to the learned Additional Solicitor General, the intent manifest in Section 14 of the IBC is reinforced by the introduction of Section 32A to the IBC in that if the intent of Section 14 were to prohibit initiation or continuation of criminal proceedings, the legislature would not have contemplated the introduction of Section 32A by way of amendment.

He further states that if the expression "proceedings" contained in Section 14 were to be construed so as to include criminal proceedings, it would render the first proviso to Section 32, which deals with institution of prosecution against a corporate debtor during the corporate insolvency resolution process, and the second proviso, which indicates pendency of criminal prosecution against those in charge of and responsible for the conduct of the corporate debtor, otiose.

He relied on the judgment in *Aneeta Hada v. Godfather Travels & Tours (P) Ltd.*, (2012) 5 SCC 661 ["Aneeta Hada"] to buttress his submission that criminal liability can fall on Directors/persons in charge of and responsible for the conduct of the corporate debtor even where the corporate debtor may not be proceeded against by virtue of Section 14 or Section 32A.

He lastly submits that Sections 81 and 101 of the IBC, in speaking of a moratorium in context of "any debt" also lend support to his contention that moratorium under the IBC only applies to civil proceedings within the realm of private law, and that since Section 138 proceedings are not proceedings for the recovery of a debt, they cannot fall within the moratorium provisions set out by Sections 14 or 81 or 101.

Interpretation of Section 14 of The IBC

9. Having heard learned counsel, it is important at this stage to set out Section 14 of the IBC, which reads as follows:

"14. Moratorium.- (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2-A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to-

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

10. A cursory look at Section 14(1) makes it clear that subject to the exceptions contained in sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall mandatorily, by order, declare a moratorium to prohibit what follows in clauses (a) to (d).

Importantly, under sub-section (4), this order of moratorium does not continue indefinitely, but has effect only from the date of the order declaring moratorium till the completion of the corporate insolvency resolution process which is time bound, either culminating in the order of the Adjudicating Authority approving a resolution plan or in liquidation.

11. The two exceptions to Section 14(1) are contained in sub-sections (2) and (3) of Section 14. Under sub-section (2), the supply of essential goods or services to the corporate debtor during this period cannot be terminated or suspended or even interrupted, as otherwise the corporate debtor would be brought to its knees and would not be able to function as a going concern during this period.

The exception created in sub-section (3) (a) is important as it refers to "transactions" as may be notified by the Central Government in consultation with experts in finance. The expression "financial sector regulator" is defined by Section 3(18) as follows:

"3. Definitions.- In this Code, unless the context otherwise requires,-

(18) "financial sector regulator" means an authority or body constituted under any law for the time being in force to regulate services or transactions of financial sector and includes the Reserve Bank of India, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority of India, the Pension Fund Regulatory Authority and such other regulatory authorities as may be notified by the Central Government;"

12. Thus, the Central Government, in consultation with experts, may state that the moratorium provision will not apply to such transactions as may be notified. This is of some importance as Section 14(1)(a) does not indicate as to what the proceedings contained therein apply to. Sub-section 3(a) provides the answer - that such "proceedings" relate to "transactions" entered into by the corporate debtor pre imposition of the moratorium. Section 3(33) defines "transaction" as follows:

"3. Definitions.- In this Code, unless the context otherwise requires,-

(33) "transaction" includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;"

13. This definition being an inclusive one is extremely wide in nature and would include a transaction evidencing a debt or liability. This is made clear by Section 96(3) and Section 101(3) which contain the same language as Section 14(3)(a), these Sections speaking of 'debts' of the individual or firm.

Equally important is Section 14(3)(b), by which a surety in a contract of guarantee of a debt owed by a corporate debtor cannot avail of the benefit of a moratorium as a result of which a creditor can enforce a guarantee, though not being able to enforce the principal debt during the period of moratorium - see *State Bank of India v. V. Ramakrishnan*, (2018) 17 SCC 394 (at paragraph 20) ["V. Ramakrishnan"].

14. We now come to the language of Section 14(1)(a). It will be noticed that the expression "or" occurs twice in the first part of Section 14(1)(a) - first, between the expressions

"institution of suits" and "continuation of pending suits" and second, between the expressions "continuation of pending suits" and "proceedings against the corporate debtor.". The sweep of the provision is very wide indeed as it includes institution, continuation, judgment and execution of suits and proceedings. It is important to note that an award of an arbitration panel or an order of an authority is also included.

This being the case, it would be incongruous to hold that the expression "the institution of suits or continuation of pending suits" must be read disjunctively as otherwise, the institution of arbitral proceedings and proceedings before authorities cannot be subsumed within the expression institution of "suits" which are proceedings in civil courts instituted by a plaintiff (see Section 26 of the Code of Civil Procedure, 1908).

Therefore, it is clear that the expression "institution of suits or continuation of pending suits" is to be read as one category, and the disjunctive "or" before the word "proceedings" would make it clear that proceedings against the corporate debtor would be a separate category. What throws light on the width of the expression "proceedings" is the expression "any judgment, decree or order" and "any court of law, tribunal, arbitration panel or other authority".

Since criminal proceedings under the Code of Criminal Procedure, 1973 ["CrPC"] are conducted before the courts mentioned in Section 6, CrPC, it is clear that a Section 138 proceeding being conducted before a Magistrate would certainly be a proceeding in a court of law in respect of a transaction which relates to a debt owed by the corporate debtor. Let us now see as to whether the expression "proceedings" can be cut down to mean civil proceedings *stricto sensu* by the use of rules of interpretation such as *eiusdem generis* and *noscitur a sociis*.

Application of The Noscitur A Sociis Rule of Interpretation

15. Shri Aman Lekhi, learned Additional Solicitor General, relied upon the judgment in *State of Assam v. Ranga Mahammad*, (1967) 1 SCR 454. The Court was concerned with the meaning of the expression "posting" which occurs in Article 233 of the Constitution, qua District Judges in a State. Applying the doctrine of *noscitur a sociis*, this Court held that given the fact that the expression "posting" comes in between "appointment" and "promotion" of District Judges, it is clear that a narrower meaning has to be assigned to it, namely, that of assigning someone to a post which would not include "transfer".

Quite apart from the positioning of the word "posting" in between "appointment" and "promotion", from which it took its colour, even otherwise, Articles 234 and 235 of the

Constitution would make it clear that since "transfer" of District Judges is with the High Court and not with the State Government, quite obviously, the expression "posting" could not be used in its wider sense - see pages 460 and 461. This judgment is an early application of the rule of *noscitur a sociis*, given the position of a wider word between two narrow words, and more importantly, the reading of other allied provisions in the Constitution.

16. In *Jagdish Chander Gupta v. Kajaria Traders (India) Ltd.*, (1964) 8 SCR 50, a five-Judge Bench of this Court had to decide as to whether the expression "or other proceeding" occurring in Section 69(3) of the Indian Partnership Act, 1932 would include a proceeding to appoint an arbitrator under Section 8(2) of the Arbitration Act, 1940. This Court held:

"It remains, however, to consider whether by reason of the fact that the words "other proceeding" stand opposed to the words "a claim of set-off" any limitation in their meaning was contemplated. It is on this aspect of the case that the learned Judges have seriously differed. When in a statute particular classes are mentioned by name and then are followed by general words, the general words are sometimes construed *eiusdem generis* i.e. limited to the same category or genus comprehended by the particular words but it is not necessary that this rule must always apply.

The nature of the special words and the general words must be considered before the rule is applied. In *Allen v. Emersons* [(1944) 1 KB 362] Asquith, J., gave interesting examples of particular words followed by general words where the principle of *eiusdem generis* might or might not apply. We think that the following illustration will clear any difficulty. In the expression "books, pamphlets, newspapers and other documents" private letters may not be held included if "other documents" be interpreted *eiusdem generis* with what goes before.

But in a provision which reads "newspapers or other document likely to convey secrets to the enemy", the words "other document" would include document of any kind and would not take their colour from "newspapers". It follows, therefore, that interpretation *eiusdem generis* or *noscitur a sociis* need not always be made when words showing particular classes are followed by general words.

Before the general words can be so interpreted there must be a genus constituted or a category disclosed with reference to which the general words can and are intended to be restricted. Here the expression "claim of set-off" does not disclose a category or a genus. Set-offs are of two kinds - legal and equitable - and both are already comprehended and it is difficult to think of any right "arising from a contract" which is of the same nature as a claim of set-off and can be raised by a defendant in a suit.

Mr B.C. Misra, whom we invited to give us examples, admitted frankly that it was impossible for him to think of any proceeding of the nature of a claim of set-off other than a claim of set-off which could be raised in a suit such as is described in the second sub-section. In respect of the first sub-section he could give only two examples. They are (i) a claim by a pledger of goods-with an unregistered firm whose good are attached and who has to make an objection under Order 21 Rule 58 of the Code of Civil Procedure and (ii) proving a debt before a liquidator.

The latter is not raised as a defence and cannot belong to the same genus as a "claim of set-off". The former can be made to fit but by a stretch of some considerable imagination. It is difficult for us to accept that the legislature was thinking of such far-fetched things when it spoke of "other proceeding" ejusdem generis with a claim of set-off."

(at pages 56-57)

"In our judgment, the words "other proceeding" in subsection (3) must receive their full meaning untrammelled by the words "a claim of set-off". The latter words neither intend nor can be construed to cut down the generality of the words "other proceeding". The sub-section provides for the application of the provisions of sub-sections (1) and (2) to claims of set-off and also to other proceedings of any kind which can properly be said to be for enforcement of any right arising from contract except those expressly mentioned as exceptions in sub-section (3) and sub-section (4)."

(at page 60)

17. Likewise, in *Rajasthan State Electricity Board v. Mohan Lal*, (1967) 3 SCR 377, this Court had to decide whether the expression "other authorities" in Article 12 of the Constitution of India took its colour from the preceding expressions used in the said Article, making such authorities only those authorities who exercised governmental power. This was emphatically turned down by a Constitution Bench of this Court, stating:

"In our opinion, the High Courts fell into an error in applying the principle of ejusdem generis when interpreting the expression "other authorities" in Article 12 of the Constitution, as they overlooked the basic principle of interpretation that, to invoke the application of ejusdem generis rule, there must be a distinct genus or category running through the bodies already named. Craies on, Statute Law summarises the principle as follows:

"The ejusdem generis rule is one to be applied with caution and not pushed too far. To invoke the application of the ejusdem generis rule there must be a distinct genus or category. The specific words must apply not to different objects of a widely differing character but to

something which can be called a class or kind of objects. Where this is lacking, the rule cannot apply, but the mention of a single species does not constitute a genus [Craies on Statute Law, 6th Edn, p 181]."

Maxwell in his book on 'Interpretation of Statutes' explained the principle by saying: "But the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words. Unless there is a genus or category, there is no room for the application of the ejusdem generis doctrine [Maxwell on Interpretation of Statutes, 11th Edn pp. 326, 327]".

In *United Towns Electric Co., Ltd. v. Attorney-General for Newfoundland* [(1939) 1 AER 423], the Privy Council held that, in their opinion, there is no room for the application of the principle of ejusdem generis in the absence of any mention of a genus, since the mention of a single species - for example, water rates - does not constitute a genus. In Article 12 of the Constitution, the bodies specifically named are the Executive Governments of the Union and the States, the Legislatures of the Union and the States, and local authorities.

We are unable to find any common genus running through these named bodies, nor can these bodies be placed in one single category on any rational basis. The doctrine of ejusdem generis could not, therefore, be applied to the interpretation of the expression "other authorities" in this article. The meaning of the word "authority" given in Webster's Third New International Dictionary, which can be applicable, is a public administrative agency or corporation having quasigovernmental powers and authorised to administer a revenueproducing public enterprise.

This dictionary meaning of the word "authority" is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions. The expression "other authorities" is wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Government of India; and we do not see any reason to narrow down this meaning in the context in which the words "other authorities" are used in Article 12 of the Constitution."

(at pages 384-385)

18. In *CBI v. Braj Bhushan Prasad*, (2001) 9 SCC 432, this Court was asked to construe Section 89 of the Bihar Reorganisation Act with reference to *noscitur a sociis*. In turning this down, this Court held:

"26. We pointed out the above different shades of meanings in order to determine as to which among them has to be chosen for interpreting the said word falling in Section 89 of the Act.

The doctrine of *noscitur a sociis* (meaning of a word should be known from its accompanying or associating words) has much relevance in understanding the import of words in a statutory provision.

The said doctrine has been resorted to with advantage by this Court in a number of cases *vide* Bangalore Water Supply & Sewerage Board v. A. Rajappa [(1978) 2 SCC 213 : 1978 SCC (L&S) 215], Rohit Pulp and Paper Mills Ltd. v. CCE [(1990) 3 SCC 447], Oswal Agro Mills Ltd. v. CCE [1993 Supp (3) SCC 716], K. Bhagirathi G. Shenoy v. K.P. Ballakuraya [(1999) 4 SCC 135] and Lokmat Newspapers (P) Ltd. v. Shankarprasad [(1999) 6 SCC 275 : 1999 SCC (L&S) 1090].

27. If so, we have to gauge the implication of the words "proceeding relating exclusively to the territory" from the surrounding context. Section 89 of the Act says that proceeding pending prior to the appointed day before "a court (other than the High Court), tribunal, authority or officer" shall stand transferred to the "corresponding court, tribunal, authority or officer" of Jharkhand State. A very useful index is provided in the Section by defining the words "corresponding court, tribunal, authority or officer in the State of Jharkhand" as this: [Section 89(3)(b)(i)]

"The court, tribunal, authority or officer in which, or before whom, the proceeding would have laid if it had been instituted after the appointed day;"

28. Look at the words "would have laid if it had been instituted after the appointed day". In considering the question as to where the proceeding relating to the 36 cases involved in these appeals would have laid, had they been instituted after the appointed day, we have absolutely no doubt that the meaning of the word "exclusively" should be understood as "substantially all or for the greater part or principally".

29. We cannot overlook the main object of Section 89 of the Act. It must not be forgotten that transfer of criminal cases is not the only subject covered by the Section. The provision seeks to allocate the files or records relating to all proceedings, after the bifurcation if they were to be instituted after the appointed day. Any interpretation should be one which achieves that object and not that which might create confusion or perplexity or even bewilderment to the officers of the respective States.

In other words, the interpretation should be made with pragmatism, not pedantically or in a stilted manner. For the purpose of criminal cases, we should bear in mind the subject-matter of the case to be transferred. When so considering, we have to take into account further that all the 36 cases are primarily for the offences under the PC Act and hence they are

all triable before the Courts of Special Judges. Hence, the present question can be determined by reference to the provisions of the PC Act."

19. In *Godfrey Phillips India Ltd. v. State of U.P.*, (2005) 2 SCC 515, a Constitution Bench of this Court had to construe the meaning of the expression "luxury" in Entry 62 of List 2 of the Seventh Schedule to the Constitution of India. In this context, the rule of *noscitur a sociis* was applied by the Court, the Court also pointing out how a court must be careful before blindly applying the principle, as follows:

"77. In the present context the general meaning of "luxury" has been explained or clarified and must be understood in a sense analogous to that of the less general words such as entertainments, amusements, gambling and betting, which are clubbed with it. This principle of interpretation known as "*noscitur a sociis*" has received approval in *Rainbow Steels Ltd. v. CST* [(1981) 2 SCC 141 : 1981 SCC (Tax) 90] , SCC at p. 145 although doubted in its indiscriminate application in *State of Bombay v. Hospital Mazdoor Sabha* [(1960) 2 SCR 866 : AIR 1960 SC 610] . In the latter case this Court was required to construe Section 2(j) of the Industrial Disputes Act which read:

"2(j) 'industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen."

78. It was found that the words in the definition were of very wide and definite import. It was suggested that these words should be read in a restricted sense having regard to the included items on the principle of "*noscitur a sociis*". The suggestion was rejected in the following language: (*Hospital Mazdoor Sabha* case [(1960) 2 SCR 866 : AIR 1960 SC 610] , SCR p. 874)

"It must be borne in mind that *noscitur a sociis* is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the present rule of construction can be usefully applied.

It can also be applied where the meaning of the words of wider import is doubtful; but, where the object of the legislature in using wider words is clear and free of ambiguity, the rule of construction in question cannot be pressed into service." (AIR p. 614, para 9)

(emphasis in original)

79. We do not read this passage as excluding the application of the principle of *noscitur a sociis* to the present case since it has been amply demonstrated with reference to

authority that the meaning of the word "luxury" in Entry 62 is doubtful and has been defined and construed in different senses.

81. We are aware that the maxim of *noscitur a sociis* may be a treacherous one unless the "societas" to which the "socii" belong, are known. The risk may be present when there is no other factor except contiguity to suggest the "societas". But where there is, as here, a term of wide denotation which is not free from ambiguity, the addition of the words such as "including" is sufficiently indicative of the societas. As we have said, the word "includes" in the present context indicates a commonality or shared features or attributes of the including word with the included.

83. Hence on an application of general principles of interpretation, we would hold that the word "luxuries" in Entry 62 of List II means the activity of enjoyment of or indulgence in that which is costly or which is generally recognised as being beyond the necessary requirements of an average member of society and not articles of luxury."

20. In *Vikram Singh v. Union of India*, (2015) 9 SCC 502, this Court was asked to construe the expression "government or any other person" contained in Section 364-A of the Indian Penal Code, 1860 with reference to *eiusdem generis*. This Court, in repelling the contention, went on to hold:

"**26.** We may before parting with this aspect of the matter also deal with the argument that the expression "any other person" appearing in Section 364-A IPC ought to be read *eiusdem generis* with the expression preceding the said words. The argument needs notice only to be rejected. The rule of *eiusdem generis* is a rule of construction and not a rule of law. Courts have to be very careful in applying the rule while interpreting statutory provisions.

Having said that the rule applies in situations where specific words forming a distinct genus class or category are followed by general words. The first stage of any forensic application of the rule, therefore, has to be to find out whether the preceding words constitute a genus class or category so that the general words that follow them can be given the same colour as the words preceding. In cases where it is not possible to find the genus in the use of the words preceding the general words, the rule of *eiusdem generis* will have no application.

27. In *Siddeshwari Cotton Mills (P) Ltd. v. Union of India* [(1989) 2 SCC 458 : 1989 SCC (Tax) 297] M.N. Venkatachaliah, J., as His Lordship then was, examined the rationale underlying *eiusdem generis* as a rule of construction and observed: (SCC p. 463, para 14)

"14. The principle underlying this approach to statutory construction is that the subsequent general words were only intended to guard against some accidental omission in the objects of

the kind mentioned earlier and were not intended to extend to objects of a wholly different kind. This is a presumption and operates unless there is some contrary indication.

But the preceding words or expressions of restricted meaning must be susceptible of the import that they represent a class. If no class can be found, ejusdem generis rule is not attracted and such broad construction as the subsequent words may admit will be favoured.

As a learned author puts it:

'if a class can be found, but the specific words exhaust the class, then rejection of the rule may be favoured because its adoption would make the general words unnecessary; if, however, the specific words do not exhaust the class, then adoption of the rule may be favoured because its rejection would make the specific words unnecessary.' [See: Construction of Statutes by E.A. Driedger p. 95 quoted by Francis Bennion in his Statutory Construction, pp. 829 and 830.]"

28. Relying upon the observations made by Francis Bennion in his Statutory Construction and English decision in *Magnhild v. McIntyre Bros. & Co.* [(1920) 3 KB 321] and those rendered by this Court in *Tribhuban Parkash Nayyar v. Union of India* [(1969) 3 SCC 99], *U.P. SEB v. Hari Shankar Jain* [(1978) 4 SCC 16 : 1978 SCC (L&S) 481], His Lordship summed up the legal principle in the following words: (*Siddeshwari Cotton Mills case* [(1989) 2 SCC 458 : 1989 SCC (Tax) 297], SCC p. 464, para 19)

"19. The preceding words in the statutory provision which, under this particular rule of construction, control and limit the meaning of the subsequent words must represent a genus or a family which admits of a number of species or members. If there is only one species it cannot supply the idea of a genus."

29. Applying the above to the case at hand, we find that Section 364-A added to IPC made use of only two expressions viz. "Government" or "any other person". Parliament did not use multiple expressions in the provision constituting a distinct genus class or category. It used only one single expression viz. "Government" which does not constitute a genus, even when it may be a specie. The situation, at hand, is somewhat similar to what has been enunciated in *Craies on Statute Law* (7th Edn.) at pp. 181-82 in the following passage:

"The modern tendency of the law, it was said [by Asquith, J. in *Allen v. Emerson* (1944 KB 362 : (1944) 1 All ER 344)], is 'to attenuate the application of the rule of ejusdem generis'. To invoke the application of the ejusdem generis rule there must be a distinct genus or category. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects.

Where this is lacking, the rule cannot apply (*Hood-Barrs v. IRC* [(1946) 2 All ER 768 (CA)]), but the mention of a single species does not constitute a genus. (Per Lord Thankerton in *United Towns Electric Co. Ltd. v. Attorney General for Newfoundland* [(1939) 1 All ER 423 (PC)].) 'Unless you can find a category', said Farwell L.J. (*Tillmanns and Co. v. S.S. Knutsford Ltd.* [(1908) 2 KB 385 (CA)]), 'there is no room for the application of the *eiusdem generis* doctrine', and where the words are clearly wide in their meaning they ought not to be qualified on the ground of their association with other words.

For instance, where a local Act required that 'theatres and other places of public entertainment' should be licensed, the question arose whether a 'fun-fair' for which no fee was charged for admission was within the Act. It was held to be so, and that the *eiusdem generis* rule did not apply to confine the words 'other places' to places of the same kind as theatres. So the insertion of such words as 'or things of whatever description' would exclude the rule. (*Attorney General v. Leicester Corpn.* [(1910) 2 Ch 359 : (1908-10) All ER Rep Ext 1002])

In *National Assn. of Local Govt. Officers v. Bolton Corpn.* [1943 AC 166 : (1942) 2 All ER 425 (HL)] Lord Simon L.C. referred to a definition of 'workman' as any person who has entered into a works under a contract with an employer whether the contract be by way of manual labour, clerical work 'or otherwise' and said:

'The use of the words "or otherwise" does not bring into play the *eiusdem generis* principle: for "manual labour" and "clerical work" do not belong to a single limited genus' and Lord Wright in the same case said:

'The *eiusdem generis* rule is often useful or convenient, but it is merely a rule of construction, not a rule of law. In the present case it is entirely inapt. It presupposes a "genus" but here the only "genus" is a contract with an employer'.

(emphasis supplied)

30. The above passage was quoted with approval by this Court in *Grasim Industries Ltd. v. Collector of Customs* [(2002) 4 SCC 297] holding that Note 1(a) of Chapter 84 relevant to that case was clear and unambiguous. It did not speak of a class, category or genus followed by general words making the rule of *eiusdem generis* inapplicable."

32. This would mean that the term "person" appearing in Section 364-A IPC would include a company or association or body of persons whether incorporated or not, apart from natural persons. The tenor of the provision, the context and the statutory definition of the expression "person" all militate against any attempt to restrict the meaning of the term "person" to the "Government" or "foreign State" or "international inter-governmental organisations" only."

21. In *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*, (2019) 8 SCC 416, this Court laid down the limits of the application of the rule of construction that is contained in the expression "noscitur a sociis" as follows:

"84. It was then argued, relying on a large number of judgments that Section 5(8)(f) must be construed noscitur a sociis with clauses (a) to (e) and (g) to (i), and so construed would only refer to loans or other financial transactions which would involve money at both ends.

This, again, is not correct in view of the fact that Section 5(8)(f) is clearly a residuary "catch all" provision, taking within it matters which are not subsumed within the other sub-clauses. Even otherwise, in *CED v. Kantilal Trikamlal* [*CED v. Kantilal Trikamlal*, (1976) 4 SCC 643 : 1977 SCC (Tax) 90] , this Court has held that when an expression is a residuary one, ejusdem generis will not apply. It was thus held: (SCC p. 655, para 21)

"21. We have also to stress the expression "other right" in the explanation which is of the widest import and cannot be constricted by reading it ejusdem generis with "debt". "Other right", in the context, is expressly meant considerably to widen the concept and therefore suggests a somewhat contrary intention to the application of the ejusdem generis rule. We may derive instruction from Green's construction of the identical expression in the English Act. [Section 45(2)]. The learned author writes:

'A disclaimer is an extinguishment of a right for this purpose. Although in the event the person disclaiming never has any right in the property, he has the right to obtain it, this inchoate right is a "right" for the purposes of Section 45(2). The ejusdem generis rule does not apply to the words "a debt or other right" and the word "right" is a word of the widest import. Moreover, the expression "at the expense of the deceased" is used in an ordinary and natural manner; and is apt to cover not only cases where the extinguishment involves a loss to the deceased of a benefit he already enjoyed, but also those where it prevents him from acquiring the benefit.'

85. Also, in *Subramanian Swamy v. Union of India* [*Subramanian Swamy v. Union of India*, (2016) 7 SCC 221 : (2016) 3 SCC (Cri) 1], this Court held: (SCC pp. 291-93, paras 70-74)

"70. The other aspect that is being highlighted in the context of Article 19(2) is that defamation even if conceived of to include a criminal offence, it must have the potentiality to "incite to cause an offence". To elaborate, the submission is the words "incite to cause an offence" should be read to give attributes and characteristics of criminality to the word "defamation". It must have the potentiality to lead to breach of peace and public order.

It has been urged that the intention of clause (2) of Article 19 is to include a public law remedy in respect of a grievance that has a collective impact but not as an actionable claim

under the common law by an individual and, therefore, the word "defamation" has to be understood in that context, as the associate words are "incitement to an offence" would so warrant.

Mr Rao, learned Senior Counsel, astutely canvassed that unless the word "defamation" is understood in this manner applying the principle of *noscitur a sociis*, the cherished and natural right of freedom of speech and expression which has been recognised under Article 19(1)(a) would be absolutely at peril. Mr Narasimha, learned ASG would contend that the said rule of construction would not be applicable to understand the meaning of the term "defamation".

Be it noted, while construing the provision of Article 19(2), it is the duty of the Court to keep in view the exalted spirit, essential aspects, the value and philosophy of the Constitution. There is no doubt that the principle of *noscitur a sociis* can be taken recourse to in order to understand and interpret the Constitution but while applying the principle, one has to keep in mind the contours and scope of applicability of the said principle.

71. In *State of Bombay v. Hospital Mazdoor Sabha* [*State of Bombay v. Hospital Mazdoor Sabha*, AIR 1960 SC 610 : (1960) 2 SCR 866] , it has been held that it must be borne in mind that *noscitur a sociis* is merely a rule of construction and it cannot prevail in cases where it is clear that wider words have been deliberately used in order to make the scope of the defined word correspondingly wider.

It is only where the intention of the legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the said rule of construction can be usefully applied. It can also be applied where the meaning of the words of wider import is doubtful; but, where the object of the legislature in using wider words is clear and free of ambiguity, the rule of construction in question cannot be pressed into service.

72. In *Bank of India v. Vijay Transport* [*Bank of India v. Vijay Transport*, 1988 Supp SCC 47] , the Court was dealing with the contention that a literal interpretation is not always the only interpretation of a provision in a statute and the court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something implicit behind the words actually used which would control the literal meaning of the words used.

For the said purpose, reliance was placed on *R.L. Arora v. State of U.P.* [*R.L. Arora v. State of U.P.*, (1964) 6 SCR 784 : AIR 1964 SC 1230] Dealing with the said aspect, the Court has observed thus: (*Vijay Transport case* [*Bank of India v. Vijay Transport*, 1988 Supp SCC 47], SCC p. 51, para 11)

'11. It may be that in interpreting the words of the provision of a statute, the setting in which such words are placed may be taken into consideration, but that does not mean that even though the words which are to be interpreted convey a clear meaning, still a different interpretation or meaning should be given to them because of the setting. In other words, while the setting of the words may sometimes be necessary for the interpretation of the words of the statute, but that has not been ruled by this Court to be the only and the surest method of interpretation.'

73. The Constitution Bench, in *Godfrey Phillips (India) Ltd. v. State of U.P.* [*Godfrey Phillips (India) Ltd. v. State of U.P.*, (2005) 2 SCC 515], while expressing its opinion on the aforesaid rule of construction, opined: (SCC pp. 550 & 551, paras 81 & 83)

'81. We are aware that the maxim of *noscitur a sociis* may be a treacherous one unless the "societas" to which the "socii" belong, are known. The risk may be present when there is no other factor except contiguity to suggest the "societas". But where there is, as here, a term of wide denotation which is not free from ambiguity, the addition of the words such as "including" is sufficiently indicative of the societas. As we have said, the word "includes" in the present context indicates a commonality or shared features or attributes of the including word with the included.

83. Hence on an application of general principles of interpretation, we would hold that the word "luxuries" in Entry 62 of List II means the activity of enjoyment of or indulgence in that which is costly or which is generally recognised as being beyond the necessary requirements of an average member of society and not articles of luxury.'

74. At this juncture, we may note that in *Ahmedabad Private Primary Teachers' Assn. v. Administrative Officer* [*Ahmedabad Private Primary Teachers' Assn. v. Administrative Officer*, (2004) 1 SCC 755 : 2004 SCC (L&S) 306], it has been stated that *noscitur a sociis* is a legitimate rule of construction to construe the words in an Act of Parliament with reference to the words found in immediate connection with them. In this regard, we may refer to a passage from Justice G.P. Singh, *Principles of Statutory Interpretation* [(13th Edn., 2012) 509.] where the learned author has referred to the lucid explanation given by Gajendragadkar, J. We think it appropriate to reproduce the passage:

'It is a rule wider than the rule of *eiusdem generis*; rather the latter rule is only an application of the former. The rule has been lucidly explained by Gajendragadkar, J. in the following words: "This rule, according to Maxwell [*Maxwell, Interpretation of Statutes* (11th Edn., 1962) 321.] , means that when two or more words which are susceptible of

analogous meaning are coupled together, they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general."

The learned author on further discussion has expressed the view that meaning of a word is to be judged from the company it keeps i.e. reference to words found in immediate connection with them. It applies when two or more words are susceptible of analogous meanings are coupled together, to be read and understood in their cognate sense. [G.P. Singh, Principles of Statutory Interpretation (8th Edn.) 379.]

Noscitur a sociis is merely a rule of construction and cannot prevail where it is clear that wider and diverse etymology is intentionally and deliberately used in the provision. It is only when and where the intention of the legislature in associating wider words with words of narrowest significance is doubtful or otherwise not clear, that the rule of noscitur a sociis is useful."

86. It is clear from a reading of these judgments that noscitur a sociis being a mere rule of construction cannot be applied in the present case as it is clear that wider words have been deliberately used in a residuary provision, to make the scope of the definition of "financial debt" subsume matters which are not found in the other sub-clauses of Section 5(8). This contention must also, therefore, be rejected."

22. A reading of these judgments would show that ejusdem generis and noscitur a sociis, being rules as to the construction of statutes, cannot be exalted to nullify the plain meaning of words used in a statute if they are designedly used in a wide sense. Importantly, where a residuary phrase is used as a catch-all expression to take within its scope what may reasonably be comprehended by a provision, regard being had to its object and setting, noscitur a sociis cannot be used to colour an otherwise wide expression so as to whittle it down and stultify the object of a statutory provision.

Object of Section 14 of The IBC

23. This then brings us to the object sought to be achieved by Section 14 of the IBC. The Report of the Insolvency Law Committee of February, 2020 throws some light on Section 14. Paragraphs 8.2 and 8.11 thereof read as follows:

"8.2. The moratorium under Section 14 is intended to keep the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default.

Keeping the corporate debtor running as a going concern during the CIRP helps in achieving resolution as a going concern as well, which is likely to maximize value for all stakeholders.

In other jurisdictions too, a moratorium may be put in place on the advent of formal insolvency proceedings, including liquidation and reorganization proceedings. The UNCITRAL Guide notes that a moratorium is critical during reorganization proceedings since it facilitates the continued operation of the business and allows the debtor a breathing space to organize its affairs, time for preparation and approval of a reorganization plan and for other steps such as shedding unprofitable activities and onerous contracts, where appropriate."

"8.11. Further, the purpose of the moratorium is to keep the assets of the debtor together for successful insolvency resolution, and it does not bar all actions, especially where countervailing public policy concerns are involved. For instance, criminal proceedings are not considered to be barred by the moratorium, since they do not constitute "money claims or recovery" proceedings.

In this regard, the Committee also noted that in some jurisdictions, laws allow regulatory claims, such as those which are not designed to collect money for the estate but to protect vital and urgent public interests, restraining activities causing environmental damage or activities that are detrimental to public health and safety to be continued during the moratorium period."

It can be seen that paragraph 8.11 refers to the very judgment under appeal before us, and cannot therefore be said to throw any light on the correct position in law which has only to be finally settled by this Court. However, paragraph 8.2 is important in that the object of a moratorium provision such as Section 14 is to see that there is no depletion of a corporate debtor's assets during the insolvency resolution process so that it can be kept running as a going concern during this time, thus maximising value for all stakeholders.

The idea is that it facilitates the continued operation of the business of the corporate debtor to allow it breathing space to organise its affairs so that a new management may ultimately take over and bring the corporate debtor out of financial sickness, thus benefitting all stakeholders, which would include workmen of the corporate debtor. Also, the judgment of this Court in *Swiss Ribbons (P) Ltd. v. Union of India*, (2019) 4 SCC 17 states the *raison d'être* for Section 14 in paragraph 28 as follows:

"28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial

legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.

The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process.

The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

24. It can thus be seen that regard being had to the object sought to be achieved by the IBC in imposing this moratorium, a quasi-criminal proceeding which would result in the assets of the corporate debtor being depleted as a result of having to pay compensation which can amount to twice the amount of the cheque that has bounced would directly impact the corporate insolvency resolution process in the same manner as the institution, continuation, or execution of a decree in such suit in a civil court for the amount of debt or other liability.

Judged from the point of view of this objective, it is impossible to discern any difference between the impact of a suit and a Section 138 proceeding, insofar as the corporate debtor is concerned, on its getting the necessary breathing space to get back on its feet during the corporate insolvency resolution process. Given this fact, it is difficult to accept that *noscitur a sociis* or *eiusdem generis* should be used to cut down the width of the expression "proceedings" so as to make such proceedings analogous to civil suits.

25. Viewed from another point of view, clause (b) of Section 14(1) also makes it clear that during the moratorium period, any transfer, encumbrance, alienation, or disposal by the corporate debtor of any of its assets or any legal right or beneficial interest therein being also interdicted, yet a liability in the form of compensation payable under Section 138 would somehow escape the dragnet of Section 14(1).

While Section 14(1)(a) refers to monetary liabilities of the corporate debtor, Section 14(1)(b) refers to the corporate debtor's assets, and together, these two clauses form a scheme which shields the corporate debtor from pecuniary attacks against it in the moratorium period so that the corporate debtor gets breathing space to continue as a going concern in order to ultimately rehabilitate itself. Any crack in this shield is bound to have adverse consequences, given the object of Section 14, and cannot, by any process of interpretation, be allowed to occur.

Section 14 in Relation to other Moratorium Sections in The IBC

26. Even otherwise, when some of the other provisions as to moratorium are seen in the context of individuals and firms, the provisions of Section 14 become even clearer. Thus, in Part III of the IBC, which deals with insolvency resolution and bankruptcy for individuals and partnership firms, Section 81, which occurs in Chapter II thereof, entitled "Fresh Start Process", an interim moratorium is imposed thus:

"81. Application for fresh start order.- (1) When an application is filed under Section 80 by a debtor, an interimmoratorium shall commence on the date of filing of said application in relation to all the debts and shall cease to have effect on the date of admission or rejection of such application, as the case may be.

(2) During the interim-moratorium period,-

(i) any legal action or legal proceeding pending in respect of any of his debts shall be deemed to have been stayed; and

(ii) no creditor shall initiate any legal action or proceedings in respect of such debt.

(3) The application under Section 80 shall be in such form and manner and accompanied by such fee, as may be prescribed.

(4) The application under sub-section (3) shall contain the following information supported by an affidavit, namely-7

(a) a list of all debts owed by the debtor as on the date of the said application along with details relating to the amount of each debt, interest payable thereon and the names of the creditors to whom each debt is owed;

(b) the interest payable on the debts and the rate thereof stipulated in the contract;

(c) a list of security held in respect of any of the debts;

(d) the financial information of the debtor and his immediate family up to two years prior to the date of the application;

(e) the particulars of the debtor's personal details, as may be prescribed;

(f) the reasons for making the application;

(g) the particulars of any legal proceedings which, to the debtor's knowledge has been commenced against him;

(h) the confirmation that no previous fresh start order under this Chapter has been made in respect of the qualifying debts of the debtor in the preceding twelve months of the date of the application."

Similarly, in Section 85, which also occurs in Chapter II in Part III of the IBC, a moratorium is imposed thus:

"85. Effect of admission of application.-

(1) On the date of admission of the application, the moratorium period shall commence in respect of all the debts.

(2) During the moratorium period-

(a) any pending legal action or legal proceeding in respect of any debt shall be deemed to have been stayed; and

(b) subject to the provisions of Section 86, the creditors shall not initiate any legal action or proceedings in respect of any debt.

(3) During the moratorium period, the debtor shall-

(a) not act as a director of any company, or directly or indirectly take part in or be concerned in the promotion, formation or management of a company;

(b) not dispose of or alienate any of his assets;

(c) inform his business partners that he is undergoing a fresh start process;

(d) be required to inform prior to entering into any financial or commercial transaction of such value as may be notified by the Central Government, either individually or jointly, that he is undergoing a fresh start process;

(e) disclose the name under which he enters into business transactions, if it is different from the name in the application admitted under Section 84;

(f) not travel outside India except with the permission of the Adjudicating Authority.

(4) The moratorium ceases to have effect at the end of the period of one hundred and eighty days beginning with the date of admission unless the order admitting the application is revoked under sub-section (2) of Section 91."

27. When the language of Section 14 and Section 85 are contrasted, it becomes clear that though the language of Section 85 is only in respect of debts, the moratorium contained in Section 14 is not subject specific. The only light thrown on the subject is by the exception provision contained in Section 14(3)(a) which is that "transactions" are the subject matter of Section 14(1). "Transaction" is, as we have seen, a much wider expression than "debt", and subsumes it.

Also, the expression "proceedings" used by the legislature in Section 14(1)(a) is not trammelled by the word "legal" as a prefix that is contained in the moratorium provisions qua individuals and firms. Likewise, the provisions of Section 96 and Section 101 are moratorium provisions in Chapter III of Part III dealing with the insolvency resolution

process of individuals and firms, the same expression, namely, "debts" is used as is used in Section 85. Sections 96 and 101 read as follows:

"96. Interim-moratorium.- (1) When an application is filed under Section 94 or Section 95-

- (a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and
- (b) during the interim-moratorium period-
 - (i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and
 - (ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.
- (2) Where the application has been made in relation to a firm, the interim-moratorium under sub-section (1) shall operate against all the partners of the firm as on the date of the application.
- (3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator."

"101. Moratorium.- (1) When the application is admitted under Section 100, a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under Section 114, whichever is earlier.

(2) During the moratorium period-

- (a) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;
- (b) the creditors shall not initiate any legal action or legal proceedings in respect of any debt; and
- (c) the debtor shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein;

(3) Where an order admitting the application under Section 96 has been made in relation to a firm, the moratorium under sub-section (1) shall operate against all the partners of the firm.

(4) The provisions of this Section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator."

A legal action or proceeding in respect of any debt would, on its plain language, include a Section 138 proceeding. This is for the reason that a Section 138 proceeding would be a legal

proceeding "in respect of" a debt. "In respect of" is a phrase which is wide and includes anything done directly or indirectly - see *Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd.*, (2018) 2 SCC 674 (at page 709) and *Giriraj Garg v. Coal India Ltd.*, (2019) 5 SCC 192 (at pages 202-203).

This, coupled with the fact that the Section is not limited to 'recovery' of any debt, would indicate that any legal proceeding even indirectly relatable to recovery of any debt would be covered.

28. When the language of these Sections is juxtaposed against the language of Section 14, it is clear that the width of Section 14 is even greater, given that Section 14 declares a moratorium prohibiting what is mentioned in clauses (a) to (d) thereof in respect of transactions entered into by the corporate debtor, inclusive of transactions relating to debts, as is contained in Sections 81, 85, 96, and 101. Also, Section 14(1)(d) is conspicuous by its absence in any of these Sections.

Thus, where individuals or firms are concerned, the recovery of any property by an owner or lessor, where such property is occupied by or in possession of the individual or firm can be recovered during the moratorium period, unlike the property of a corporate debtor. For all these reasons, therefore, given the object and context of Section 14, the expression "proceedings" cannot be cut down by any rule of construction and must be given a fair meaning consonant with the object and context.

It is conceded before us that criminal proceedings which are not directly related to transactions evidencing debt or liability of the corporate debtor would be outside the scope of this expression.

29. *V. Ramakrishnan* (supra) looked at and contrasted Section 14 with Sections 96 and 101 from the point of view of a guarantor to a debt, and in this context, held:

"26. We are also of the opinion that Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to a personal guarantor. When an application is filed under Part III, an interim-moratorium or a moratorium is applicable in respect of any debt due. First and foremost, this is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III.

Secondly, the protection of the moratorium under these Sections is far greater than that of Section 14 in that pending legal proceedings in respect of the debt and not the debtor are stayed. The difference in language between Sections 14 and 101 is for a reason.

26.1. Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them.

However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor - often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor."

These observations, when viewed in context, are correct. However, this case is distinguishable in that the difference between these provisions and Section 14 was not examined qua moratorium provisions as a whole in relation to corporate debtors vis-à-vis individuals/firms.

The Interplay between Section 14 and Section 32A of The IBC

30. Shri Mehta, however, strongly relied upon Section 32A(1) of the IBC, which was introduced by the Insolvency and Bankruptcy Code (Amendment) Act, 2020, to argue that the first proviso to Section 32A(1) would make it clear that "prosecutions" that had been instituted during the corporate insolvency resolution process against a corporate debtor will result in a discharge of the corporate debtor from the prosecution, subject to the other requirements of sub-section (1) having been fulfilled.

According to him, therefore, a prosecution of the corporate debtor under Section 138/141 of the Negotiable Instruments Act can be instituted during the corporate insolvency resolution process, making it clear that such prosecutions are, therefore, outside the ken of the moratorium provisions contained in Section 14 of the IBC. Section 32A(1) of the IBC reads as follows:

"32A. Liability for prior offences, etc.- (1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under Section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not-

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who was a "designated partner" as defined in clause (j) of Section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an "officer who is in default", as defined in clause (60) of Section 2 of the Companies Act, 2013 (18 of 2013), or was in any manner in charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section."

31. The raison d'être for the enactment of Section 32A has been stated by the Report of the Insolvency Law Committee of February, 2020, which is as follows:

"17. Liability of Corporate Debtor for Offences Committed Prior to Initiation of CIRP

17.1. Section 17 of the Code provides that on commencement of the CIRP, the powers of management of the corporate debtor vest with the interim resolution professional. Further, the powers of the Board of Directors or partners of the corporate debtor stand suspended, and are to be exercised by the interim resolution professional. Thereafter, Section 29A, read with Section 35(1)(f), places restrictions on related parties of the corporate debtor from proposing a resolution plan and purchasing the property of the corporate debtor in the CIRP and liquidation process, respectively.

Thus, in most cases, the provisions of the Code effectuate a change in control of the corporate debtor that results in a clean break of the corporate debtor from its erstwhile management. However, the legal form of the corporate debtor continues in the CIRP, and may be preserved in the resolution plan. Additionally, while the property of the corporate debtor may also

change hands upon resolution or liquidation, such property also continues to exist, either as property of the corporate debtor, or in the hands of the purchaser.

17.2. However, even after commencement of CIRP or after its successful resolution or liquidation, the corporate debtor, along with its property, would be susceptible to investigations or proceedings related to criminal offences committed by it prior to the commencement of a CIRP, leading to the imposition of certain liabilities and restrictions on the corporate debtor and its properties even after they were lawfully acquired by a resolution applicant or a successful bidder, respectively.

Liability where a Resolution Plan has been Approved

17.3. It was brought to the Committee that this had created apprehension amongst potential resolution applicants, who did not want to take on the liability for any offences committed prior to commencement of CIRP. In one case, JSW Steel had specifically sought certain reliefs and concessions, within an annexure to the resolution plan it had submitted for approval of the Adjudicating Authority. Without relief from imposition of the such liability, the Committee noted that in the long run, potential resolution applicants could be disincentivised from proposing a resolution plan.

The Committee was also concerned that resolution plans could be priced lower on an average, even where the corporate debtor did not commit any offence and was not subject to investigation, due to adverse selection by resolution applicants who might be apprehensive that they might be held liable for offences that they have not been able to detect due to information asymmetry. Thus, the threat of liability falling on bona fide persons who acquire the legal entity, could substantially lower the chances of its successful takeover by potential resolution applicants.

17.4. This could have substantially hampered the Code's goal of value maximisation, and lowered recoveries to creditors, including financial institutions who take recourse to the Code for resolution of the NPAs on their balance sheet. At the same time, the Committee was also conscious that authorities are duty bound to penalise the commission of any offence, especially in cases involving substantial public interest. Thus, two competing concerns need to be balanced.

17.6. Given this, the Committee felt that a distinction must be drawn between the corporate debtor which may have committed offences under the control of its previous management, prior to the CIRP, and the corporate debtor that is resolved, and taken over by an unconnected resolution applicant. While the corporate debtor's actions prior to the commencement of the

CIRP must be investigated and penalised, the liability must be affixed only upon those who were responsible for the corporate debtor's actions in this period.

However, the new management of the corporate debtor, which has nothing to do with such past offences, should not be penalised for the actions of the erstwhile management of the corporate debtor, unless they themselves were involved in the commission of the offence, or were related parties, promoters or other persons in management and control of the corporate debtor at the time of or any time following the commission of the offence, and could acquire the corporate debtor, notwithstanding the prohibition under Section 29A.

17.7. Thus, the Committee agreed that a new Section should be inserted to provide that where the corporate debtor is successfully resolved, it should not be held liable for any offence committed prior to the commencement of the CIRP, unless the successful resolution applicant was also involved in the commission of the offence, or was a related party, promoter or other person in management and control of the corporate debtor at the time of or any time following the commission of the offence.

17.8. Notwithstanding this, those persons who were responsible to the corporate debtor for the conduct of its business at the time of the commission of such offence, should continue to be liable for such an offence, vicariously or otherwise, regardless of the fact that the corporate debtor's liability has ceased."

(emphasis supplied)

32. This Court, in *Manish Kumar v. Union of India*, 2021 SCC OnLine SC 30, upheld the constitutional validity of this provision. This Court observed:

"280. We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32A. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of the working of the code, the interests of all stakeholders including most importantly the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property, it hardly furnishes a ground for this this Court to interfere.

The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate. We must also not overlook the principle that the impugned provision is part of

an economic measure. The reverence courts justifiably hold such laws in cannot but be applicable in the instant case as well.

The provision deals with reference to offences committed prior to the commencement of the CIRP. With the admission of the application the management of the corporate debtor passes into the hands of the Interim Resolution Professional and thereafter into the hands of the Resolution Professional subject undoubtedly to the control by the Committee of Creditors. As far as protection afforded to the property is concerned there is clearly a rationale behind it. Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision."

33. Section 32A cannot possibly be said to throw any light on the true interpretation of Section 14(1)(a) as the reason for introducing Section 32A had nothing whatsoever to do with any moratorium provision. At the heart of the Section is the extinguishment of criminal liability of the corporate debtor, from the date the resolution plan has been approved by the Adjudicating Authority, so that the new management may make a clean break with the past and start on a clean slate.

A moratorium provision, on the other hand, does not extinguish any liability, civil or criminal, but only casts a shadow on proceedings already initiated and on proceedings to be initiated, which shadow is lifted when the moratorium period comes to an end. Also, Section 32A(1) operates only after the moratorium comes to an end. At the heart of Section 32A is the IBC's goal of value maximisation and the need to obviate lower recoveries to creditors as a result of the corporate debtor continuing to be exposed to criminal liability. Unfortunately, the Section is inelegantly drafted.

The second proviso to Section 32A(1) speaks of persons who are in any manner in charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor and who are, directly or indirectly, involved in the commission of "such offence", i.e., the offence referred to in sub-section (1), "as per the report submitted or complaint filed by the investigating authority.". The report submitted here refers to a police report under Section 173 of the CrPC, and complaints filed by investigating authorities under special Acts, as opposed to private complaints.

If the language of the second proviso is taken to interpret the language of Section 32A(1) in that the "offence committed" under Section 32A(1) would not include offences based upon complaints under Section 2(d) of the CrPC, the width of the language would be cut down and the object of Section 32A(1) would not be achieved as all prosecutions emanating from private complaints would be excluded.

Obviously, Section 32A(1) cannot be read in this fashion and clearly includes the liability of the corporate debtor for all offences committed prior to the commencement of the corporate insolvency resolution process. Doubtless, a Section 138 proceeding would be included, and would, after the moratorium period comes to an end with a resolution plan by a new management being approved by the Adjudicating Authority, cease to be an offence qua the corporate debtor.

34. A section which has been introduced by an amendment into an Act with its focus on cesser of liability for offences committed by the corporate debtor prior to the commencement of the corporate insolvency resolution process cannot be so construed so as to limit, by a sidewind as it were, the moratorium provision contained in Section 14, with which it is not at all concerned.

If the first proviso to Section 32A(1) is read in the manner suggested by Shri Mehta, it will impact Section 14 by taking out of its ken Section 138/141 proceedings, which is not the object of Section 32A(1) at all. Assuming, therefore, that there is a clash between Section 14 of the IBC and the first proviso of Section 32A(1), this clash is best resolved by applying the doctrine of harmonious construction so that the objects of both the provisions get subserved in the process, without damaging or limiting one provision at the expense of the other.

If, therefore, the expression "prosecution" in the first proviso of Section 32A(1) refers to criminal proceedings properly so-called either through the medium of a First Information Report or complaint filed by an investigating authority or complaint and not to quasi-criminal proceedings that are instituted under Sections 138/141 of the Negotiable Instruments Act against the corporate debtor, the object of Section 14(1) of the IBC gets subserved, as does the object of Section 32A, which does away with criminal prosecutions in all cases against the corporate debtor, thus absolving the corporate debtor from the same after a new management comes in.

The Nature of Proceedings under Chapter XVII of The Negotiable Instruments Act

35. This brings us to the nature of proceedings under Chapter XVII of the Negotiable Instruments Act. Sections 138 to 142 of the Negotiable Instruments Act were added by Chapter XVII by an Amendment Act of 1988. Section 138 reads as follows:

"138. Dishonour of cheque for insufficiency, etc., of funds in the account.-

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the

discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this Section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation.-For the purposes of this Section, "debt or other liability" means a legally enforceable debt or other liability."

36. Section 138 contains within it the ingredients of the offence made out. The deeming provision is important in that the legislature is cognizant of the fact that what is otherwise a civil liability is now also deemed to be an offence, since this liability is made punishable by law. It is important to note that the transaction spoken of is a commercial transaction between two parties which involves payment of money for a debt or liability. The explanation to Section 138 makes it clear that such debt or other liability means a legally enforceable debt or other liability.

Thus, a debt or other liability barred by the law of limitation would be outside the scope of Section 138. This, coupled with fine that may extend to twice the amount of the cheque that is payable as compensation to the aggrieved party to cover both the amount of the cheque and the interest and costs thereupon, would show that it is really a hybrid provision to enforce payment under a bounced cheque if it is otherwise enforceable in civil law.

Further, though the ingredients of the offence are contained in the first part of Section 138 when the cheque is returned by the bank unpaid for the reasons given in the Section, the proviso gives an opportunity to the drawer of the cheque, stating that the drawer must fail to

make payment of the amount within 15 days of the receipt of a notice, again making it clear that the real object of the provision is not to penalise the wrongdoer for an offence that is already made out, but to compensate the victim.

37. Likewise, under Section 139, a presumption is raised that the holder of a cheque received the cheque for the discharge, in whole or in part, of any debt or other liability. To rebut this presumption, facts must be adduced which, on a preponderance of probability (not beyond reasonable doubt as in the case of criminal offences), must then be proved.

Section 140 is also important, in that it shall not be a defence in a prosecution for an offence under Section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that Section, thus making it clear that strict liability will attach, mens rea being no ingredient of the offence.

Section 141 then makes Directors and other persons statutorily liable, provided the ingredients of the section are met. Interestingly, for the purposes of this Section, explanation (a) defines "company" as meaning any body corporate and includes a firm or other association of individuals.

38. We have already seen how the language of Sections 96 and 101 would include a Section 138/141 proceeding against a firm so that the moratorium stated therein would apply to such proceedings. If Shri Mehta's arguments were to be accepted, under the same Section, namely, Section 141, two different results would ensue - so far as bodies corporate, which include limited liability partnerships, are concerned, the moratorium provision contained in Section 14 of the IBC would not apply, but so far as a partnership firm is concerned, being covered by Sections 96 and 101 of the IBC, a Section 138/141 proceeding would be stopped in its tracks by virtue of the moratorium imposed by these Sections.

Thus, under Section 141(1), whereas a Section 138 proceeding against a corporate body would continue after initiation of the corporate insolvency resolution process, yet, the same proceeding against a firm, being interdicted by Sections 96 and 101, would not so continue.

This startling result is one of the consequences of accepting the argument of Shri Mehta, which again leads to the position that inelegant drafting alone cannot lead to such startling results, the object of Sections 14 and 96 and 101 being the same, namely, to see that during the insolvency resolution process for corporate persons/individuals and firms, the corporate body/firm/individual should be given breathing space to recuperate for a successful resolution of its debts - in the case of a corporate debtor, through a new management coming in; and in the case of individuals and firms, through resolution plans which are accepted by a committee of creditors, by which the debtor is given breathing space in which to pay back his/its debts,

which would result in creditors getting more than they would in a bankruptcy proceeding against an individual or a firm.

39. Section 142 is important and is set out hereunder:

"142. Cognizance of offences.- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138:

Provided that the cognizance of a complaint may be taken by the court after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period.

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138.

(2) The offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction,-

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.-For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account."

40. A cursory reading of Section 142 will again make it clear that the procedure under the CrPC has been departed from. First and foremost, no court is to take cognizance of an offence punishable under Section 138 except on a complaint made in writing by the payee or the holder in due course of the cheque - the victim. Further, the language of Section 142(1) (b) would again show the hybrid nature of these provisions inasmuch as a complaint must be made within one month of the date on which the "cause of action" under clause (c) of the proviso to Section 138 arises.

The expression "cause of action" is a foreigner to criminal jurisprudence, and would apply only in civil cases to recover money. Chapter XIII of the CrPC, consisting of Sections 177 to 189, is a chapter dealing with the jurisdiction of the criminal courts in inquiries and trials. When the jurisdiction of a criminal court is spoken of by these Sections, the expression "cause of action" is conspicuous by its absence.

41. By an Amendment Act of 2002, various other sections were added to this Chapter. Thus, under Section 143, it is lawful for a Magistrate to pass a sentence of imprisonment for a term not exceeding one year and a fine exceeding INR 5,000/- summarily. This provision is again an important pointer to the fact that the payment of compensation is at the heart of the provision in that a fine exceeding INR 5000/-, the sky being the limit, can be imposed by way of a summary trial which, after application of Section 357 of the CrPC, results in compensating the victim up to twice the amount of the bounced cheque.

Under Section 144, the mode of service of summons is done as in civil cases, eschewing the mode contained in Sections 62 to 64 of the CrPC. Likewise, under Section 145, evidence is to be given by the complainant on affidavit, as it is given in civil proceedings, notwithstanding anything contained in the CrPC. Most importantly, by Section 147, offences under this Act are compoundable without any intervention of the court, as is required by Section 320(2) of the CrPC.

42. By another amendment made in 2018, the hybrid nature of these provisions gets a further tilt towards a civil proceeding, by the power to direct interim compensation under Sections 143A and 148 which are set out hereinbelow:

"143-A. Power to direct interim compensation.- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Court trying an offence under Section 138 may order the drawer of the cheque to pay interim compensation to the complainant-

(a) in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and

(b) in any other case, upon framing of charge.

(2) The interim compensation under sub-section (1) shall not exceed twenty per cent of the amount of the cheque.

(3) The interim compensation shall be paid within sixty days from the date of the order under sub-section (1), or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.

(4) If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by

the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

(5) The interim compensation payable under this Section may be recovered as if it were a fine under Section 421 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) The amount of fine imposed under Section 138 or the amount of compensation awarded under Section 357 of the Code of Criminal Procedure, 1973 (2 of 1974), shall be reduced by the amount paid or recovered as interim compensation under this Section."

"148. Power of Appellate Court to order payment pending appeal against conviction.-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), in an appeal by the drawer against conviction under Section 138, the Appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty per cent of the fine or compensation awarded by the trial Court:

Provided that the amount payable under this sub-section shall be in addition to any interim compensation paid by the appellant under Section 143-A.

(2) The amount referred to in sub-section (1) shall be deposited within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant.

(3) The Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal:

Provided that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant."

43. With this analysis of Chapter XVII, let us look at some of the decided cases. In *CIT v. Ishwarlal Bhagwandas*, (1966) 1 SCR 190, this Court distinguished between civil proceedings and criminal proceedings in the context of Article 132 of the Constitution thus:

"The expression "civil proceeding" is not defined in the Constitution, nor in the General Clauses Act. The expression in our judgment covers all proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof. A criminal proceeding on the other hand is ordinarily one in which if carried

to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property.

It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended breach of the peace, orders to bind down persons who are a danger to the maintenance of peace and order, or orders aimed at preventing vagrancy are contemplated to be passed. But the whole area of proceedings, which reach the High Courts is not exhausted by classifying the proceedings as civil and criminal.

There are certain proceedings which may be regarded as neither civil nor criminal. For instance, proceeding for contempt of court, and for exercise of disciplinary jurisdiction against lawyers or other professionals, such as Chartered Accountants may not fall within the classification of proceedings, civil or criminal.

But there is no warrant for the view that from the category of civil proceedings, it was intended to exclude proceedings relating to or which seek relief against enforcement of taxation laws of the State. The primary object of a taxation statute is to collect revenue for the governance of the State or for providing specific services and such laws directly affect the civil rights of the tax-payer.

If a person is called upon to pay tax which the State is not competent to levy, or which is not imposed in accordance with the law which permits imposition of the tax, or in the levy, assessment and collection of which rights of the tax-payer are infringed in a manner not warranted by the statute, a proceeding to obtain relief whether it is from the tribunal set up by the taxing statute, or from the civil court would be regarded as a civil proceeding.

The character of the proceeding, in our judgment, depends not upon the nature of the tribunal which is invested with authority to grant relief, but upon the nature of the right violated and the appropriate relief which may be claimed. A civil proceeding is, therefore, one in which a person seeks to enforce by appropriate relief the alleged infringement of his civil rights against another person or the State, and which if the claim is proved would result in the declaration express or implied of the right claimed and relief such as payment of debt, damages, compensation, delivery of specific property, enforcement of personal rights, determination of status etc."

(at pages 196-197)

"A large number of cases have arisen before the High Courts in India in which conflicting views about the meaning of the expression "civil proceeding" were pressed. In some cases it was held that the expression "civil proceeding" excludes a proceeding instituted in the High Court for the issue of a writ whatever may be the nature of the right infringed and the relief

claimed in other cases it has been held that a proceeding resulting from an application for a writ under Article 226 of the Constitution may in certain cases be deemed to be a "civil proceeding", if the claim made, the right infringed and the relief sought warrant that inference: in still another set of cases it has been held that even if a proceeding commenced by a petition for a writ be generally categorised as a civil proceeding, where the jurisdiction which the High Court exercises relates to revenue, the proceeding is not civil.

A perusal of the reasons given in the cases prompt the following observations. There are two preliminary conditions to the exercise of the power to grant certificate:

(a) there must be a judgment, decree or final order, and that judgment, decree or final order must be made in a civil proceeding. An advisory opinion in a tax reference may not be appealed from with certificate under Article 133 because the opinion is not a judgment, decree or final order, and

(b) a proceeding does not cease to be civil, when relief is claimed for enforcement of civil rights merely because the proceeding is not tried as a civil suit.

In a large majority of the cases in which the jurisdiction of the High Court to certify a case under Article 133(1) was negated it appears to have been assumed that the expression "other proceeding" used in Article 132 of the Constitution is or includes a proceeding of the nature of a revenue proceeding, and therefore the expression "civil proceeding" in Article 133(1) does not include a revenue proceeding. This assumption for reasons already set out is erroneous."

(at page 199)

A perusal of this judgment would show that a civil proceeding is not necessarily a proceeding which begins with the filing of a suit and culminates in execution of a decree. It would include a revenue proceeding as well as a writ petition filed under Article 226 of the Constitution, if the reliefs therein are to enforce rights of a civil nature. Interestingly, criminal proceedings are stated to be proceedings in which the larger interest of the State is concerned. Given these tests, it is clear that a Section 138 proceeding can be said to be a "civil sheep" in a "criminal wolf's" clothing, as it is the interest of the victim that is sought to be protected, the larger interest of the State being subsumed in the victim alone moving a court in cheque bouncing cases, as has been seen by us in the analysis made hereinabove of Chapter XVII of the Negotiable Instruments Act.

44. In *Goaplast (P) Ltd. v. Chico Ursula D'Souza*, (2003) 3 SCC 232, the object sought to be achieved by Section 138 is succinctly set out in paragraph 3 thereof:

"3. The learned counsel for the appellant has submitted that mere writing of letter to the bank stopping payment of the post-dated cheques does not take the case out of the purview of the Act. He has invited our attention to the object behind the provision contained in Chapter XVII of the Act. For appreciating the issue involved in the present case, it is necessary to refer to the object behind introduction of Chapter XVII containing Sections 138 to 142.

This chapter was introduced in the Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (Act 66 of 1988) with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions and in order to promote efficacy of banking operations. With the policy of liberalisation adopted by the country which brought about increase in international trade and commerce, it became necessary to inculcate faith in banking.

World trade is carried through banking operations rather than cash transactions. The amendment was intended to create an atmosphere of faith and reliance on banking system. Therefore, while considering the question of applicability of Section 138 of the Act to a situation presented by the facts of the present case, it is necessary to keep the objects of the legislation in mind.

If a party is allowed to use a cheque as a mode of deferred payment and the payee of the cheque on the faith that he will get his payment on the due date accepts such deferred payment by way of cheque, he should not normally suffer on account of non-payment. The faith, which the legislature has desired that such instruments should inspire in commercial transactions would be completely lost if parties are as a matter of routine allowed to interdict payment by issuing instruction to banks to stop payment of cheques.

In today's world where use of cash in day-to-day life is almost getting extinct and people are using negotiable instruments in commercial transactions and plastic money for their daily needs as consumers, it is all the more necessary that people's faith in such instruments should be strengthened rather than weakened. Provisions contained in Sections 138 to 142 of the Act are intended to discourage people from not honouring their commitments by way of payment through cheques.

It is desirable that the court should lean in favour of an interpretation which serves the object of the statute. The penal provisions contained in Sections 138 to 142 of the Act are intended to ensure that obligations undertaken by issuing cheques as a mode of payment are honoured. A post-dated cheque will lose its credibility and acceptability if its payment can be stopped routinely. A cheque is a well-recognized mode of payment and post-dated cheques are often used in various transactions in daily life.

The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of a post-dated cheque. If stoppage of payment of a post-dated cheque is permitted to take the case out of the purview of Section 138 of the Act, it will amount to allowing the party to take advantage of his own wrong."

45. In *Vinay Devanna Nayak v. Ryot Sewa Sahakari Bank Ltd.*, (2008) 2 SCC 305, a Division Bench of this Court referred to the object of Section 138 thus:

"16. Section 138 of the Act was inserted by the Banking, Public Financial Institutions and Negotiable Instruments Law (Amendment) Act, 1988 (Act 66 of 1988) to regulate financial promises in growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters.

The incorporation of the provision is designed to safeguard the faith of the creditor in the drawer of the cheque, which is essential to the economic life of a developing country like India. The provision has been introduced with a view to curb cases of issuing cheques indiscriminately by making stringent provisions and safeguarding interest of creditors.

17. As observed by this Court in *Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd.* [(1996) 2 SCC 739 : 1996 SCC (Cri) 454] the object of bringing Section 138 in the statute book is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. The provision is intended to prevent dishonesty on the part of the drawer of negotiable instruments in issuing cheques without sufficient funds or with a view to inducing the payee or holder in due course to act upon it.

It thus seeks to promote the efficacy of bank operations and ensures credibility in transacting business through cheques. In such matters, therefore, normally compounding of offences should not be denied. Presumably, Parliament also realised this aspect and inserted Section 147 by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 (Act 55 of 2002). The said Section reads thus:

"147. Offences to be compoundable.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."

46. *Damodar S. Prabhu v. Sayed Babalal H.*, (2010) 5 SCC 663 is an important judgment of three Hon'ble Judges of this Court. This judgment dealt, in particular, with the compounding

provision contained in Section 147 of the Negotiable Instruments Act. Setting out the provision, the Court held:

"10. At present, we are of course concerned with Section 147 of the Act, which reads as follows:

"147. Offences to be compoundable.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."

At this point, it would be apt to clarify that in view of the non obstante clause, the compounding of offences under the Negotiable Instruments Act, 1881 is controlled by Section 147 and the scheme contemplated by Section 320 of the Code of Criminal Procedure (hereinafter "CrPC") will not be applicable in the strict sense since the latter is meant for the specified offences under the Penal Code, 1860.

11. So far as CrPC is concerned, Section 320 deals with offences which are compoundable, either by the parties without the leave of the court or by the parties but only with the leave of the court. Sub-section (1) of Section 320 enumerates the offences which are compoundable without the leave of the court, while sub-section (2) of the said Section specifies the offences which are compoundable with the leave of the court.

12. Section 147 of the Negotiable Instruments Act, 1881 is in the nature of an enabling provision which provides for the compounding of offences prescribed under the same Act, thereby serving as an exception to the general rule incorporated in sub-section (9) of Section 320 CrPC which states that "No offence shall be compounded except as provided by this Section".

A bare reading of this provision would lead us to the inference that offences punishable under laws other than the Penal Code also cannot be compounded. However, since Section 147 was inserted by way of an amendment to a special law, the same will override the effect of Section 320(9) CrPC, especially keeping in mind that Section 147 carries a non obstante clause."

"15. The compounding of the offence at later stages of litigation in cheque bouncing cases has also been held to be permissible in a recent decision of this Court, reported as K.M. Ibrahim v. K.P. Mohammed [(2010) 1 SCC 798 : (2010) 1 SCC (Cri) 921 : (2009) 14 Scale 262] wherein Kabir, J. has noted (at SCC p. 802, paras 13-14):

"13. As far as the non obstante clause included in Section 147 of the 1881 Act is concerned, the 1881 Act being a special statute, the provisions of Section 147 will have an overriding effect over the provisions of the Code relating to compounding of offences.

14. It is true that the application under Section 147 of the Negotiable Instruments Act was made by the parties after the proceedings had been concluded before the appellate forum. However, Section 147 of the aforesaid Act does not bar the parties from compounding an offence under Section 138 even at the appellate stage of the proceedings. Accordingly, we find no reason to reject the application under Section 147 of the aforesaid Act even in a proceeding under Article 136 of the Constitution."

16. It is evident that the permissibility of the compounding of an offence is linked to the perceived seriousness of the offence and the nature of the remedy provided. On this point we can refer to the following extracts from an academic commentary [cited from: K.N.C. Pillai, R.V. Kelkar's Criminal Procedure, Fifth Edn. (Lucknow: Eastern Book Company, 2008) at p. 444]:

"17.2. Compounding of offences.- A crime is essentially a wrong against the society and the State. Therefore any compromise between the accused person and the individual victim of the crime should not absolve the accused from criminal responsibility. However, where the offences are essentially of a private nature and relatively not quite serious, the Code considers it expedient to recognise some of them as compoundable offences and some others as compoundable only with the permission of the court."

17. In a recently published commentary, the following observations have been made with regard to the offence punishable under Section 138 of the Act [cited from: Arun Mohan, Some thoughts towards law reforms on the topic of Section 138, Negotiable Instruments Act- Tackling an avalanche of cases (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2009) at p. 5]:

"Unlike that for other forms of crime, the punishment here (insofar as the complainant is concerned) is not a means of seeking retribution, but is more a means to ensure payment of money. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery.

As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque. If we were to examine the number of complaints filed which were 'compromised' or 'settled' before the final judgment on one side and the cases which proceeded to judgment and conviction on the other, we will find that the bulk was settled and only a miniscule number continued."

18. It is quite obvious that with respect to the offence of dishonour of cheques, it is the compensatory aspect of the remedy which should be given priority over the punitive aspect."
(emphasis supplied)

This judgment was followed by a Division Bench of this Court in *JIK Industries Ltd. v. Amarlal V. Jumani*, (2012) 3 SCC 255, stating:

"**68.** It is clear from a perusal of the aforesaid Statement of Objects and Reasons that offence under the NI Act, which was previously non-compoundable in view of Section 320 subsection (9) of the Code has now become compoundable. That does not mean that the effect of Section 147 is to obliterate all statutory provisions of Section 320 of the Code relating to the mode and manner of compounding of an offence.

Section 147 will only override Section 320(9) of the Code insofar as offence under Section 147 of the NI Act is concerned. This is also the ratio in *Damodar* [(2010) 5 SCC 663 : (2010) 2 SCC (Civ) 520 : (2010) 2 SCC (Cri) 1328] (see para 12). Therefore, the submission of the learned counsel for the appellant to the contrary cannot be accepted."

The Court then went into the history of compounding in criminal law as follows:

"**78.** Compounding as codified in Section 320 of the Code has a historical background. In common law compounding was considered a misdemeanour. In *Kenny's Outlines of Criminal Law* (19th Edn., 1966) the concept of compounding has been traced as follows: (p. 407, para 422)

"422. Mercy should be shown, not sold.-It is a misdemeanour at common law to 'compound' a felony (and perhaps also to compound a misdemeanour); i.e. to bargain, for value, to abstain from prosecuting the offender who has committed a crime. You commit this offence if you promise a thief not to prosecute him if only he will return the goods he stole from you; but you may lawfully take them back if you make no such promise.

You may show mercy, but must not sell mercy. This offence of compounding is committed by the bare act of agreement; even though the compounder afterwards breaks his agreement and prosecutes the criminal. And inasmuch as the law permits not merely the person injured by a crime, but also all other members of the community, to prosecute, it is criminal for anyone to make such a composition; even though he suffered no injury and indeed has no concern with the crime."

(emphasis in original)

79. *Russell on Crime* (12th Edn.) also describes: "Agreements not to prosecute or to stifle a prosecution for a criminal offence are in certain cases criminal."

(Ch. 22 - Compounding Offences, p. 339.)

80. Later on compounding was permitted in certain categories of cases where the rights of the public in general are not affected but in all cases such compounding is permissible with the consent of the injured party.

81. In our country also when the Criminal Procedure Code, 1861 was enacted it was silent about the compounding of offence. Subsequently, when the next Code of 1872 was introduced it mentioned about compounding in Section 188 by providing the mode of compounding. However, it did not contain any provision declaring what offences were compoundable. The decision as to what offences were compoundable was governed by reference to the exception to Section 214 of the Penal Code.

The subsequent Code of 1898 provided Section 345 indicating the offences which were compoundable but the said section was only made applicable to compounding of offences defined and permissible under the Penal code. The present Code, which repealed the 1898 Code, contains Section 320 containing comprehensive provisions for compounding.

82. A perusal of Section 320 makes it clear that the provisions contained in Section 320 and the various sub-sections is a code by itself relating to compounding of offence. It provides for the various parameters and procedures and guidelines in the matter of compounding.

If this Court upholds the contention of the appellant that as a result of incorporation of Section 147 in the NI Act, the entire gamut of procedure of Section 320 of the Code are made inapplicable to compounding of an offence under the NI Act, in that case the compounding of offence under the NI Act will be left totally unguided or uncontrolled. Such an interpretation apart from being an absurd or unreasonable one will also be contrary to the provisions of Section 4(2) of the Code, which has been discussed above.

There is no other statutory procedure for compounding of offence under the NI Act. Therefore, Section 147 of the NI Act must be reasonably construed to mean that as a result of the said section the offences under the NI Act are made compoundable, but the main principle of such compounding, namely, the consent of the person aggrieved or the person injured or the complainant cannot be wished away nor can the same be substituted by virtue of Section 147 of the NI Act."

47. In *Kaushalya Devi Massand v. Roopkishore Khore*, (2011) 4 SCC 593, a Division Bench of this Court succinctly stated:

"11. Having considered the submissions made on behalf of the parties, we are of the view that the gravity of a complaint under the Negotiable Instruments Act cannot be equated with an offence under the provisions of the Penal Code, 1860 or other criminal offences. An offence under Section 138 of the Negotiable Instruments Act, 1881, is almost in the nature of a civil wrong which has been given criminal overtones."

(emphasis supplied)

(This is the clearest enunciation of a Section 138 proceeding being a "civil sheep" in a "criminal wolf's" clothing.)

48. In *R. Vijayan v. Baby*, (2012) 1 SCC 260, this Court referred to the provisions of Chapter XVII of the Negotiable Instruments Act, observing that Chapter XVII is a unique exercise which blurs the dividing line between civil and criminal jurisdictions. The Court held:

"16. We propose to address an aspect of the cases under Section 138 of the Act, which is not dealt with in *Damodar S. Prabhu* [(2010) 5 SCC 663 : (2010) 2 SCC (Cri) 1328 : (2010) 2 SCC (Civ) 520] . It is sometimes said that cases arising under Section 138 of the Act are really civil cases masquerading as criminal cases. The avowed object of Chapter XVII of the Act is to "encourage the culture of use of cheques and enhance the credibility of the instrument". In effect, its object appears to be both punitive as also compensatory and restitutive, in regard to cheque dishonour cases.

Chapter XVII of the Act is a unique exercise which blurs the dividing line between civil and criminal jurisdictions. It provides a single forum and single proceeding, for enforcement of criminal liability (for dishonouring the cheque) and for enforcement of the civil liability (for realisation of the cheque amount) thereby obviating the need for the creditor to move two different fora for relief. This is evident from the following provisions of Chapter XVII of the Act:

(i) The provision for levy of fine which is linked to the cheque amount and may extend to twice the amount of the cheque (Section 138) thereby rendering Section 357(3) virtually infructuous insofar as cheque dishonour cases are concerned.

(ii) The provision enabling a First Class Magistrate to levy fine exceeding Rs 5000 (Section 143) notwithstanding the ceiling to the fine, as Rs 5000 imposed by Section 29(2) of the Code.

(iii) The provision relating to mode of service of summons (Section 144) as contrasted from the mode prescribed for criminal cases in Section 62 of the Code.

(iv) The provision for taking evidence of the complainant by affidavit (Section 145) which is more prevalent in civil proceedings, as contrasted from the procedure for recording evidence in the Code.

(v) The provision making all offences punishable under Section 138 of the Act compoundable.

17. The apparent intention is to ensure that not only the offender is punished, but also ensure that the complainant invariably receives the amount of the cheque by way of compensation under Section 357(1)(b) of the Code. Though a complaint under Section 138 of the Act is in

regard to criminal liability for the offence of dishonouring the cheque and not for the recovery of the cheque amount (which strictly speaking, has to be enforced by a civil suit), in practice once the criminal complaint is lodged under Section 138 of the Act, a civil suit is seldom filed to recover the amount of the cheque.

This is because of the provision enabling the court to levy a fine linked to the cheque amount and the usual direction in such cases is for payment as compensation, the cheque amount, as loss incurred by the complainant on account of dishonour of cheque, under Section 357(1)(b) of the Code and the provision for compounding the offences under Section 138 of the Act. Most of the cases (except those where liability is denied) get compounded at one stage or the other by payment of the cheque amount with or without interest.

Even where the offence is not compounded, the courts tend to direct payment of compensation equal to the cheque amount (or even something more towards interest) by levying a fine commensurate with the cheque amount. A stage has reached when most of the complainants, in particular the financing institutions (particularly private financiers) view the proceedings under Section 138 of the Act, as a proceeding for the recovery of the cheque amount, the punishment of the drawer of the cheque for the offence of dishonour, becoming secondary."

(emphasis supplied)

49. In *Dashrath Rupsingh Rathod v. State of Maharashtra*, (2014) 9 SCC 129, a three-Judge Bench of this Court answered the question as to whether the territorial jurisdiction for filing of cheque dishonour complaints is restricted to the court within whose territorial jurisdiction the offence is committed, which is the location where the cheque is dishonoured, i.e., returned unpaid by the bank on which it is drawn.

This judgment has been legislatively overruled by Section 142(2) of the Negotiable Instruments Act set out hereinabove. However, Shri Mehta relied upon paragraphs 15.2 and 17 of the judgment of Vikramjit Sen, J., which states as follows:

"**15.2.** We have undertaken this succinct study mindful of the fact that Parliamentary debates have a limited part to play in interpretation of statutes, the presumption being that legislators have the experience, expertise and language skills to draft laws which unambiguously convey their intentions and expectations for the enactments.

What is palpably clear is that Parliament was aware that they were converting civil liability into criminal content inter alia by the deeming fiction of culpability in terms of the pandect comprising Section 138 and the succeeding sections, which severely curtail defences to

prosecution. Parliament was also aware that the offence of cheating, etc. already envisaged in IPC, continued to be available."

"17. The marginal note of Section 138 of the NI Act explicitly defines the offence as being the dishonour of cheques for insufficiency, etc. of funds in the account. Of course, the headings, captions or opening words of a piece of legislation are normally not strictly or comprehensively determinative of the sweep of the actual Section itself, but it does presage its intendment. See *Frick India Ltd. v. Union of India* [(1990) 1 SCC 400 : 1990 SCC (Tax) 185] and *Forage & Co. v. Municipal Corpn. of Greater Bombay* [(1999) 8 SCC 577].

Accordingly, unless the provisions of the section clearly point to the contrary, the offence is concerned with the dishonour of a cheque; and in the conundrum before us the body of this provision speaks in the same timbre since it refers to a cheque being "returned by the bank unpaid". None of the provisions of IPC have been rendered nugatory by Section 138 of the NI Act and both operate on their own. It is trite that mens rea is the quintessential of every crime. The objective of Parliament was to strengthen the use of cheques, distinct from other negotiable instruments, as mercantile tender and therefore it became essential for Section 138 of the NI Act offence to be freed from the requirement of proving mens rea. This has been achieved by deeming the commission of an offence de hors mens rea not only under Section 138 but also by virtue of the succeeding two sections.

Section 139 carves out the presumption that the holder of a cheque has received it for the discharge of any liability. Section 140 clarifies that it will not be available as a defence to the drawer that he had no reason to believe, when he issued the cheque, that it would be dishonoured. Section 138 unequivocally states that the offence is committed no sooner the drawee bank returns the cheque unpaid."

The focus in this case was on the court within whose jurisdiction the offence under Section 138 can be said to have taken place. This case, therefore, has no direct relevance to the point that has been urged before us.

50. In *Lafarge Aggregates & Concrete India (P) Ltd. v. Sukarsh Azad*, (2014) 13 SCC 779, this Court, continuing the trend of the earlier judgments in describing the hybrid nature of these provisions, held:

"6. The respondents have agreed to pay the said amount but the appellant has refused to accept the payment and insisted that the appeal against rejection of the recall application should be allowed by this Court. The counsel for the appellant submitted that merely because the accused has offered to make the payment at a later stage, the same cannot compel the complainant appellant to accept it and the complainant appellant would be justified in

pursuing the complaint which was lodged under the Negotiable Instruments Act, 1881. In support of his submission, the counsel for the appellant also relied on *Rajneesh Aggarwal v. Amit J. Bhalla* [(2001) 1 SCC 631 : 2001 SCC (Cri) 229].¹

7. However, we do not feel persuaded to accept this submission as the appellant has to apprise himself that the primary object and reason of the Negotiable Instruments Act, 1881, is not merely penal in nature but is to maintain the efficiency and value of a negotiable instrument by making the accused honour the negotiable instrument and paying the amount for which the instrument had been executed.

8. The object of bringing Sections 138 to 142 of the Negotiable Instruments Act on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business of negotiable instruments. Despite several remedies, Section 138 of the Act is intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induces the payee or holder in due course to act upon it.

Therefore, once a cheque is drawn by a person of an account maintained by him for payment of any amount or discharge of liability or debt or is returned by a bank with endorsement like (i) refer to drawer, (ii) exceeds arrangements, and (iii) instruction for stop payment and like other usual endorsement, it amounts to dishonour within the meaning of Section 138 of the Act. Therefore, even after issuance of notice if the payee or holder does not make the payment within the stipulated period, the statutory presumption would be of dishonest intention exposing to criminal liability."

"10. However, in the interest of equity, justice and fair play, we deem it appropriate to direct the respondents to make the payment to the appellant by issuing a demand draft in their favour for a sum of Rs 5 lakhs, which would be treated as an overall amount including interest and compensation towards the cheque for which stop-payment instructions had been issued. If the same is not acceptable to the appellant, it is their choice but that would not allow them to prosecute the respondents herein in pursuance to the complaint which they have lodged implicating these two respondents."

51. In *Meters and Instruments (P) Ltd. v. Kanchan Mehta*, (2018) 1 SCC 560, this Court noticed the object of Section 138 and the amendments made to Chapter XVII, and summarised the case law as follows:

"6. The object of introducing Section 138 and other provisions of Chapter XVII in the Act in the year 1988 [Vide the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988] was to enhance the acceptability of cheques in the settlement

of liabilities. The drawer of cheque is made liable to prosecution on dishonour of cheque with safeguards to prevent harassment of honest drawers.

The Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 to amend the Act was brought in, inter alia, to simplify the procedure to deal with such matters. The amendment includes provision for service of summons by speed post/courier, summary trial and making the offence compoundable.

7. This Court has noted that the object of the statute was to facilitate smooth functioning of business transactions. The provision is necessary as in many transactions cheques were issued merely as a device to defraud the creditors.

Dishonour of cheque causes incalculable loss, injury and inconvenience to the payee and credibility of business transactions suffers a setback. [Goaplast (P) Ltd. v. Chico Ursula D'Souza, (2004) 2 SCC 235, p. 248, para 26 : 2004 SCC (Cri) 499] At the same time, it was also noted that nature of offence under Section 138 primarily related to a civil wrong and the 2002 Amendment specifically made it compoundable. [Vinay Devanna Nayak v. Ryot Sewa Sahakari Bank Ltd., (2008) 2 SCC 305 : (2008) 1 SCC (Civ) 542 : (2008) 1 SCC (Cri) 351]

The offence was also described as "regulatory offence". The burden of proof was on the accused in view of presumption under Section 139 and the standard of proof was of "preponderance of probabilities". [Rangappa v. Sri Mohan, (2010) 11 SCC 441, p. 454, para 28 : (2010) 4 SCC (Civ) 477 : (2011) 1 SCC (Cri) 184] The object of the provision was described as both punitive as well as compensatory. The intention of the provision was to ensure that the complainant received the amount of cheque by way of compensation.

Though proceedings under Section 138 could not be treated as civil suits for recovery, the scheme of the provision, providing for punishment with imprisonment or with fine which could extend to twice the amount of the cheque or to both, made the intention of law clear. The complainant could be given not only the cheque amount but double the amount so as to cover interest and costs. Section 357(1)(b) CrPC provides for payment of compensation for the loss caused by the offence out of the fine. [R. Vijayan v. Baby, (2012) 1 SCC 260, p. 264, para 9 : (2012) 1 SCC (Civ) 79 : (2012) 1 SCC (Cri) 520]

Where fine is not imposed, compensation can be awarded under Section 357(3) CrPC to the person who suffered loss. Sentence in default can also be imposed. The object of the provision is not merely penal but to make the accused honour the negotiable instruments. [Lafarge Aggregates & Concrete India (P) Ltd. v. Sukarsh Azad, (2014) 13 SCC 779, p. 781, para 7 : (2014) 5 SCC (Cri) 818]"

The Court then concluded:

"18. From the above discussion the following aspects emerge:

18.1. Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on the accused in view of presumption under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under CrPC but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 CrPC will apply and the court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

18.2. The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the court.

18.3. Though compounding requires consent of both parties, even in absence of such consent, the court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

18.4. Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the court has jurisdiction under Section 357(3) CrPC to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 CrPC. With this approach, prison sentence of more than one year may not be required in all cases.

18.5. Since evidence of the complaint can be given on affidavit, subject to the court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonour of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings.

The manner of examination of the person giving affidavit can be as per Section 264 CrPC. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to

the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances."2

(emphasis supplied)

52. In a recent judgment in *M. Abbas Haji v. T.N. Channakeshava*, (2019) 9 SCC 606, this Court held:

"6. It is urged before us that the High Court overstepped the limits which the appellate court is bound by criminal cases setting aside an order of acquittal. Proceedings under Section 138 of the Act are quasi-criminal proceedings. The principles, which apply to acquittal in other criminal cases, cannot apply to these cases."

(emphasis supplied)

Likewise, in *H.N. Jagadeesh v. R. Rajeshwari*, (2019) 16 SCC 730, this Court again alluded to the quasi-criminal nature of the offence as follows:

"7. The learned counsel for the respondent has submitted that in order to advance the cause of justice, such an approach is permissible and for this purpose he has relied upon the judgment of this Court in *Zahira Habibulla H. Sheikh v. State of Gujarat* [*Zahira Habibulla H. Sheikh v. State of Gujarat*, (2004) 4 SCC 158 : 2004 SCC (Cri) 999] .

We are afraid that the ratio of the aforesaid judgment cannot be extended to the facts of this case, particularly when we find that the present case is a complaint case filed by the respondent under Section 138 of the Act and where the proceedings are also of quasi-criminal nature."

(emphasis supplied)

53. A conspectus of these judgments would show that the gravamen of a proceeding under Section 138, though couched in language making the act complained of an offence, is really in order to get back through a summary proceeding, the amount contained in the dishonoured cheque together with interest and costs, expeditiously and cheaply.

We have already seen how it is the victim alone who can file the complaint which ordinarily culminates in the payment of fine as compensation which may extend to twice the amount of the cheque which would include the amount of the cheque and the interest and costs thereupon.

Given our analysis of Chapter XVII of the Negotiable Instruments Act together with the amendments made thereto and the case law cited hereinabove, it is clear that a quasi-criminal proceeding that is contained in Chapter XVII of the Negotiable Instruments Act would, given the object and context of Section 14 of the IBC, amount to a "proceeding" within the meaning of Section 14(1)(a), the moratorium therefore attaching to such proceeding.

Quasi-Criminal Proceedings

54. Shri Lekhi, learned Additional Solicitor General, took strong objection to the use of the expression "quasi-criminal" to describe proceedings under Section 138 of the Negotiable Instruments Act, which, according to him, can only be described as criminal proceedings. This is for the reason that these proceedings result in imprisonment or fine or both, which are punishments that can be imposed only in criminal proceedings as stated by Section 53 of the Indian Penal Code.

It is difficult to agree with Shri Lekhi. There are many instances of acts which are punishable by imprisonment or fine or both which have been described as quasi-criminal. One instance is the infraction of Section 630 of the Companies Act, 1956. This section reads as follows:

"630. Penalty for wrongful withholding of property.- (1) If any officer or employee of a company-

(a) wrongfully obtains possession of any property of a company; or
(b) having any such property in his possession, wrongfully withholds it or knowingly applies it to purposes other than those expressed or directed in the articles and authorised by this Act; he shall, on the complaint of the company or any creditor or contributory thereof, be punishable with fine which may extend to ten thousand rupees.

(2) The Court trying the offence may also order such officer or employee to deliver up or refund, within a time to be fixed by the Court, any such property wrongfully obtained or wrongfully withheld or knowingly misapplied or in default, to suffer imprisonment for a term which may extend to two years."

In *Abhilash Vinodkumar Jain v. Cox & Kings (India) Ltd.*, (1995) 3 SCC 732, this Court examined whether a petition under Section 630 of the Companies Act, 1956 is maintainable against the legal heirs of a deceased officer or employee for retrieval of the company's property. In holding that it was so retrievable, this Court held:

"15. Even though Section 630 of the Act falls in Part XIII of the Companies Act and provides for penal consequences for wrongful withholding of the property of the company, the provisions strictly speaking are not penal in the sense as understood under the penal law. The provisions are quasicriminal.

They have been enacted with the main object of providing speedy relief to a company when its property is wrongfully obtained or wrongfully withheld by an employee or officer or an ex-employee or ex-officer or anyone claiming under them. In our opinion, a proper construction of the section would be that the term "officer or employee" of a company in Section 630 of the Act would by a deeming fiction include the legal heirs and representatives

of the employee or the officer concerned continuing in occupation of the property of the company after the death of the employee or the officer.

16. Under sub-section (1) of Section 630 for the wrongful obtaining of the possession of the property of the company or wrongfully withholding it or knowingly applying it to a purpose other than that authorised by the company, the employee or the officer concerned is "punishable with fine which may extend to one thousand rupees". The 'fine' under this subsection is to be understood in the nature of 'compensation' for wrongful withholding of the property of the company.

Under sub-section (2) what is made punishable is the disobedience of the order of the Court, directing the person, continuing in occupation, after the right of the employee or the officer to occupation has extinguished, to deliver up or refund within a time to be fixed by the court, the property of the company obtained or wrongfully withheld or knowingly misapplied.

Thus, it is in the event of the disobedience of the order of the court, that imprisonment for a term which may extend to two years has been prescribed. The provision makes the defaulter, whether an employee or a past employee or the legal heir of the employee, who disobeys the order of the court to hand back the property to the company within the prescribed time liable for punishment."

(emphasis supplied)

Having so held, the Court did not construe the provision strictly, which it would have been bound to do had it been a purely criminal one, but instead gave it a broad, liberal, and purposeful construction as follows:

"18. Section 630 of the Act provides speedy relief to the company where its property is wrongfully obtained or wrongfully withheld by an "employee or an officer" or a "past employee or an officer" or "legal heirs and representatives" deriving their colour and content from such an employee or officer insofar as the occupation and possession of the property belonging to the company is concerned. The failure to deliver property back to the employer on the termination, resignation, superannuation or death of an employee would render the 'holding' of that property wrongful and actionable under Section 630 of the Act.

To hold that the "legal heirs" would not be covered by the provisions of Section 630 of the Act would be unrealistic and illogical. It would defeat the 'beneficent' provision and ignore the factual realities that the legal heirs or family members who are continuing in possession of the allotted property had obtained the right of occupancy with the employee concerned in the property of the employer only by virtue of their relationship with the employee/officer

and had not obtained or acquired the right to possession of the property in any other capacity, status or right.

The legislature, which is supposed to know and appreciate the needs of the people, by enacting Section 630 of the Act manifested that it was conscious of the position that today in the corporate sector - private or public enterprise - the employees/officers are often provided residential accommodation by the employer for the "use and occupation" of the employee concerned during the course of his employment. More often than not, it is a part of the service conditions of the employee that the employer shall provide him residential accommodation during the course of his employment.

If an employee or a past employee or anyone claiming the right of occupancy under them, were to continue to 'hold' the property belonging to the company after the right to be in occupation has ceased for one reason or the other, it would not only create difficulties for the company, which shall not be able to allot that property to its other employees, but would also cause hardship for the employee awaiting allotment and defeat the intention of the legislature. The courts are therefore obliged to place a broader, liberal and purposeful construction on the provisions of Section 630 of the Act in furtherance of the object and purpose of the legislation and construe it in a wider sense to effectuate the intendment of the provision.

The "heirs and legal representatives" of the deceased employee have no independent capacity or status to continue in occupation and possession of the property, which stood allotted to the employee or the officer concerned or resist the return of the property to the employer in the absence of any express agreement to the contrary entered with them by the employer.

The court, when approached by the employer for taking action under Section 630 of the Act, can examine the basis on which the petition/complaint is filed and if it is found that the company's right to retrieve its property is quite explicit and the stand of the employee, or anyone claiming through him, to continue in possession is baseless, it shall proceed to act under Section 630 of the Act and pass appropriate orders.

Only an independent valid right, not only to occupation but also to possession of the property belonging to the company, unconnected with the employment of the deceased employee can defeat an action under Section 630 of the Act if it can be established that the deceased employee concerned had not wrongfully nor knowingly applied it for purposes other than those authorised by the employer. In interpreting a beneficent provision, the court must be forever alive to the principle that it is the duty of the court to defend the law from clever evasion and defeat and prevent perpetration of a legal fraud."

55. Likewise, contempt of court proceedings have been described as "quasi-criminal" in a long series of judgments. We may point out that the predecessor to the Contempt of Courts Act, 1971, namely, the Contempt of Courts Act, 1952 did not contain any definition of the expression "contempt of court". A Committee was appointed by the Government of India, referred to as the Sanyal Committee, which then went into whether this expression needs to be defined. The Sanyal Committee Report, 1963 then broadly divided contempts into two kinds - civil and criminal contempt - as follows:

2.1. Broadly speaking, the classification follows the method of dividing contempt into criminal and civil contempts. The Shawcross Committee adopted the same classification on the grounds of convenience. Broadly speaking, civil contempts are contempts which involve a private injury occasioned by disobedience to the judgment, order or other process of the court. On the other hand, criminal contempts are right from their inception in the nature of offences. In *Legal Remembrancer v. Matilal Ghose*, I.L.R. 41 Cal. 173 at 252, Mukerji J. observed thus:

"A criminal contempt is conduct that is directed against the dignity and authority of the court. A civil contempt is failure to do something ordered to be done by a court in a civil action for the benefit of the opposing party therein.

Consequently, in the case of a civil contempt, the proceeding for its punishment is at the instance of the party interested and is civil in its character; in the case of a criminal contempt, the proceeding is for punishment of an act committed against the majesty of the law, and, as the primary purpose of the punishment is the vindication of the public authority, the proceedings conform as nearly as possible to proceedings in criminal cases.

It is conceivable that the dividing line between the acts constituting criminal and those constituting civil contempts may become indistinct in those cases where the two gradually merge into each other."

2.2. Notwithstanding the existence of a broad distinction between civil and criminal contempts, a large number of cases have shown that the dividing line between the two is almost imperceptible. For instance, in *Dulal Chandra v. Sukumar*, A.I.R. 1958 Cal. 474 at 476, 477, the following observations occur:

"The line between civil and criminal contempt can be broad as well as thin. Where the contempt consists in mere failure to comply with or carry out an order of a court made for the benefit of a private party, it is plainly civil contempt and it has been said that when the party, in whose interest the order was made, moves the court for action to be taken in contempt

against the contemner with a view to an enforcement of his right, the proceeding is only a form of execution.

In such a case, there is no criminality in the disobedience, and the contempt, such as it is, is not criminal. If, however, the contemner adds defiance of the court to disobedience of the order and conducts himself in a manner which amounts to obstruction or interference with the course of justice, the contempt committed by him is of a mixed character, partaking as between him and his opponent of the nature of a civil contempt and as between him and the court or the State, of the nature of a criminal contempt.

In cases of this type, no clear distinction between civil and criminal contempt can be drawn and the contempt committed cannot be broadly classed as either civil or criminal contempt. To put the matter in other words, a contempt is merely a civil wrong where there has been disobedience of an order made for the benefit of a particular party, but where it has consisted in setting the authority of the courts at naught and has had a tendency to invade the efficacy of the machinery maintained by the State for the administration of justice, it is a public wrong and consequently criminal in nature."

2.3. In other words, the question whether a contempt is civil or criminal is not to be judged with reference to the penalty which may be inflicted but with reference to the cause for which the penalty has been inflicted."

(at pages

21-22)

(emphasis supplied)

56. The Statement of Objects and Reasons for the Contempt of Courts Act, 1971 expressly states that the said Act was in pursuance of the Sanyal Committee Report as follows:

"Statement of Objects and Reasons.- It is generally felt that the existing law relating to contempt of courts is somewhat uncertain, undefined and unsatisfactory. The jurisdiction to punish for contempt touches upon two important fundamental rights of the citizen, namely, the right to personal liberty and the right to freedom of expression. It was, therefore, considered advisable to have the entire law on the subject scrutinised by a special committee.

In pursuance of this, a Committee was set up in 1961 under the Chairmanship of the late Shri H. N. Sanyal the then Additional Solicitor General. The Committee made a comprehensive examination of the law and problems relating to contempt of Court in the light of the position obtaining in our own country and various foreign countries. The recommendations which the Committee made took note of the importance given to freedom of speech in the Constitution and of the need for safeguarding the status and dignity of Courts and interests of administration of justice.

The recommendations of the Committee have been generally accepted by Government after considering the views expressed on those recommendations by the State Governments, Union Territory Administrations the Supreme Court, the High Courts and the Judicial Commissioners. The Bill seeks to give effect to the accepted recommendations of the Sanyal Committee."

57. The Contempt of Courts Act, 1971 defines "civil contempt" and "criminal contempt" as follows:

"2. Definitions.- In this Act, unless the context otherwise requires,-

(b) "civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;

(c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which-

(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court; or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;"

58. Whether the contempt committed is civil or criminal, the High Court is empowered to try such "offences" whether the person allegedly guilty is within or outside its territorial jurisdiction. Thus, Section 11 of the Contempt of Courts Act, states:

"11. Power of High Court to try offences committed or offenders found outside jurisdiction.- A High Court shall have jurisdiction to inquire into or try a contempt of itself or of any court subordinate to it, whether the contempt is alleged to have been committed within or outside the local limits of its jurisdiction, and whether the person alleged to be guilty of contempt is within or outside such limits." Punishments awarded for contempt of court, whether civil or criminal, are then dealt with by Section 12 of the Act, which states:

"12. Punishment for contempt of court.- (1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both: Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.

Explanation.-An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.

(2) Notwithstanding anything contained in any law for the time being in force, no court shall impose a sentence in excess of that specified in sub-section(1) for any contempt either in respect of itself or of a court subordinate to it.

(3) Notwithstanding anything contained in this section, where a person is found guilty of a civil contempt, the court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary shall, instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period not exceeding six months as it may think fit.

(4) Where the person found guilty of contempt of court in respect of any undertaking given to a court is a company, every person who, at the time the contempt was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contempt and the punishment may be enforced with the leave of the court, by the detention in civil prison of each such person:

Provided that nothing contained in this sub-section shall render any such person liable to such punishment if he proves that the contempt was committed without his knowledge or that he exercised all due diligence to prevent its commission.

(5) Notwithstanding anything contained in sub-section (4), where the contempt of court referred to therein has been committed by a company and it is proved that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of such director, manager, secretary or other officer.

Explanation.-For the purpose of sub-sections (4) and (5),-

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

59. In criminal contempt cases, "cognizance" in contempts other than those referred to in Section 14 of the Act is taken by the Supreme Court or the High Court in the manner provided by Section 15. Section 17 then lays down the procedure that is to be followed after cognizance is taken. Finally, by Section 23, the Supreme Court and the High Courts are given the power to make rules, not inconsistent with the provisions of the Act, providing for any

matter relating to its procedure. 60. This Court, in *Niaz Mohd. v. State of Haryana*, (1994) 6 SCC 332, spoke of the hybrid nature of a civil contempt as follows:

"9. Section 2(b) of the Contempt of Courts Act, 1971 (hereinafter referred to as 'the Act') defines "civil contempt" to mean "wilful disobedience to any judgment, decree, direction, order, writ or other process of a court.". Where the contempt consists in failure to comply with or carry out an order of a court made in favour of a party, it is a civil contempt. The person or persons in whose favour such order or direction has been made can move the court for initiating proceeding for contempt against the alleged contemner, with a view to enforce the right flowing from the order or direction in question.

10. In *Halsbury's Laws of England*, 4th Edn., Vol. 9, para 53, p. 34, it has been said:

"Although contempt may be committed in the absence of wilful disobedience on the part of the contemner, committal or sequestration will not be order unless the contempt involves a degree of fault or misconduct."

It has been further stated:

"In circumstances involving misconduct, civil contempt bears a twofold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the State, a penal or disciplinary jurisdiction to be exercised by the court in the public interest."

(emphasis supplied)

In *T.N. Godavarman Thirumulpad (102) v. Ashok Khot*, (2006) 5 SCC 1, this Court held:

"33. Proceedings for contempt are essentially personal and punitive. This does not mean that it is not open to the court, as a matter of law to make a finding of contempt against any official of the Government say, Home Secretary or a Minister.

34. While contempt proceedings usually have these characteristics and contempt proceedings against a government department or a Minister in an official capacity would not be either personal or punitive (it would clearly not be appropriate to fine or sequester the assets of the Crown or a government department or an officer of the Crown acting in his official capacity), this does not mean that a finding of contempt against a government department or Minister would be pointless.

The very fact of making such a finding would vindicate the requirements of justice. In addition, an order for costs could be made to underline the significance of a contempt. A purpose of the court's powers to make findings of contempt is to ensure that the orders of the court are obeyed. This jurisdiction is required to be coextensive with the court's jurisdiction

to make orders which need the protection which the jurisdiction to make findings of contempt provides.

In civil proceedings the court can now make orders (other than injunctions or for specific performance) against authorised government departments or the Attorney General. On applications for judicial review orders can be made against Ministers. In consequence such orders must be taken not to offend the theory that the Crown can supposedly do no wrong.

Equally, if such orders are made and not obeyed, the body against whom the orders were made can be found guilty of contempt without offending that theory, which could be the only justifiable impediment against making a finding of contempt. (See *M. v. Home Office* [(1993) 3 All ER 537 : (1994) 1 AC 377 : (1993) 3 WLR 433 (HL)].)"

(emphasis supplied)

61. The description of contempt proceedings being "quasi-criminal" in nature has its origin in the celebrated Privy Council judgment of *Andre Paul Terence Ambard v. Attorney-General of Trinidad and Tobago*, AIR 1936 PC 141 in which Lord Atkin referred to contempt of court proceedings as quasi-criminal (see page 143).

62. In *Sahdeo v. State of U.P.*, (2010) 3 SCC 705, this Court again referred to the "quasi-criminal" nature of contempt proceedings as follows:

"**15.** The proceedings of contempt are quasi-criminal in nature. In a case where the order passed by the court is not complied with by mistake, inadvertence or by misunderstanding of the meaning and purport of the order, unless it is intentional, no charge of contempt can be brought home. There may possibly be a case where disobedience is accidental. If that is so, there would be no contempt. [Vide *B.K. Kar v. Chief Justice and Justices of the Orissa High Court* [AIR 1961 SC 1367 : (1961) 2 Cri LJ 438] (AIR p. 1370, para 7).]

18. In *Sukhdev Singh v. Teja Singh* [AIR 1954 SC 186 : 1954 Cri LJ 460] this Court placing reliance upon the judgment of the Privy Council in *Andre Paul Terence Ambard v. Attorney General of Trinidad and Tabago* [AIR 1936 PC 141] , held that the proceedings under the Contempt of Courts Act are quasicriminal in nature and orders passed in those proceedings are to be treated as orders passed in criminal cases. 19.

In *S. Abdul Karim v. M.K. Prakash* [(1976) 1 SCC 975 : 1976 SCC (Cri) 217 : AIR 1976 SC 859] , *Chhotu Ram v. Urvashi Gulati* [(2001) 7 SCC 530 : 2001 SCC (L&S) 1196] , *Anil Ratan Sarkar v. Hirak Ghosh* [(2002) 4 SCC 21 : AIR 2002 SC 1405] , *Daroga Singh v. B.K. Pandey* [(2004) 5 SCC 26 : 2004 SCC (Cri) 1521] and *All India Anna Dravida Munnetra Kazhagam v. L.K. Tripathi* [(2009) 5 SCC 417 : (2009) 2 SCC (Cri) 673 : AIR 2009 SC 1314] , this Court held that burden and standard of proof in contempt

proceedings, being quasi-criminal in nature, is the standard of proof required in criminal proceedings, for the reason that contempt proceedings are quasi-criminal in nature.

20. Similarly, in *Mrityunjoy Das v. Sayed Hasibur Rahaman* [(2001) 3 SCC 739 : (2006) 1 SCC (Cri) 296 : AIR 2001 SC 1293] this Court placing reliance upon a large number of its earlier judgments, including *V.G. Nigam v. Kedar Nath Gupta* [(1992) 4 SCC 697 : 1993 SCC (L&S) 202 : (1993) 23 ATC 400 : AIR 1992 SC 2153] and *Murray & Co. v. Ashok Kumar Newatia* [(2000) 2 SCC 367 : 2000 SCC (Cri) 473 : AIR 2000 SC 833], held that jurisdiction of contempt has been conferred on the Court to punish an offender for his contemptuous conduct or obstruction to the majesty of law, but in the case of quasi-criminal in nature, charges have to be proved beyond reasonable doubt and the alleged contemnor becomes entitled to the benefit of doubt.

It would be very hazardous to impose sentence in contempt proceedings on some probabilities.

27. In view of the above, the law can be summarised that the High Court has a power to initiate the contempt proceedings suo motu for ensuring the compliance with the orders passed by the Court. However, contempt proceedings being quasicriminal in nature, the same standard of proof is required in the same manner as in other criminal cases. The alleged contemnor is entitled to the protection of all safeguards/rights which are provided in the criminal jurisprudence, including the benefit of doubt.

There must be a clear-cut case of obstruction of administration of justice by a party intentionally to bring the matter within the ambit of the said provision. The alleged contemnor is to be informed as to what is the charge, he has to meet. Thus, specific charge has to be framed in precision. The alleged contemnor may ask the Court to permit him to cross-examine the witnesses i.e. the deponents of affidavits, who have deposed against him.

In spite of the fact that contempt proceedings are quasi-criminal in nature, provisions of the Code of Criminal Procedure, 1973 (hereinafter called "CrPC") and the Evidence Act are not attracted for the reason that proceedings have to be concluded expeditiously. Thus, the trial has to be concluded as early as possible. The case should not rest only on surmises and conjectures. There must be clear and reliable evidence to substantiate the allegations against the alleged contemnor. The proceedings must be concluded giving strict adherence to the statutory rules framed for the purpose."

In *Maninderjit Singh Bitta v. Union of India*, (2012) 1 SCC 273, this Court again referred to "civil" and "criminal" contempt as follows:

"17. Section 12 of the 1971 Act deals with the contempt of court and its punishment while Section 15 deals with cognizance of criminal contempt. Civil contempt would be wilful breach of an undertaking given to the court or wilful disobedience of any judgment or order of the court, while criminal contempt would deal with the cases where by words, spoken or written, signs or any matter or doing of any act which scandalises, prejudices or interferes, obstructs or even tends to obstruct the due course of any judicial proceedings, any court and the administration of justice in any other manner.

Under the English law, the distinction between criminal and civil contempt is stated to be very little and that too of academic significance. However, under both the English and Indian law these are proceedings sui generis.

19. Under the Indian law the conduct of the parties, the act of disobedience and the attendant circumstances are relevant to consider whether a case would fall under civil contempt or criminal contempt.

For example, disobedience of an order of a court simpliciter would be civil contempt but when it is coupled with conduct of the parties which is contemptuous, prejudicial and is in flagrant violation of the law of the land, it may be treated as a criminal contempt. Even under the English law, the courts have the power to enforce its judgment and orders against the recalcitrant parties."

That contempt proceedings are "quasi-criminal" is also stated in *Kanwar Singh Saini v. High Court of Delhi*, (2012) 4 SCC 307 (at paragraph 38) and in *T.C. Gupta v. Bimal Kumar Dutta*, (2014) 14 SCC 446 (at paragraph 10).

63. What is clear from the aforesaid is that though there may not be any watertight distinction between civil and criminal contempt, yet, an analysis of the aforesaid authorities would make it clear that civil contempt is essentially an action which is moved by the party in whose interest an order was made with a view to enforce its personal right, where contumacious disregard for such order results in punishment of the offender in public interest, whereas a criminal contempt is, in essence, a proceeding which relates to the public interest in seeing that the administration of justice remains unpolluted.

What is of importance is to note that even in cases of civil contempt, fine or imprisonment or both may be imposed. The mere fact that punishments that are awardable relate to Section 53 of the Indian Penal Code would not, therefore, render a civil contempt proceeding a criminal proceeding. There is a great deal of wisdom in the finding of the Sanyal Committee Report that the question whether a contempt is civil or criminal is not to be judged with reference to

the penalty which may be inflicted but with reference to the cause for which the penalty has been inflicted.

64. Clearly, therefore, given the hybrid nature of a civil contempt proceeding, described as "quasi-criminal" by several judgments of this Court, there is nothing wrong with the same appellation "quasi-criminal" being applied to a Section 138 proceeding for the reasons given by us on an analysis of Chapter XVII of the Negotiable Instruments Act. We, therefore, reject the learned Additional Solicitor General's strenuous argument that the appellation "quasi-criminal" is a misnomer when it comes to Section 138 proceedings and that therefore some of the cases cited in this judgment should be given a fresh look.

Other Sections of The IBC in Relation To Section 14 of The IBC

65. Shri Mehta then argued that Section 33(5) of the IBC may also be seen, as it is a provision analogous to Section 14(1)(a). Section 33(5) states as follows:

"33. Initiation of liquidation.-

(5) Subject to Section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority."

It will be noted that under this Section, the expression "no suit or other legal proceeding" occurs both in the enacting part as well as the proviso. Going by the proviso first, given the object that the liquidator now has to act on behalf of the company after a winding-up order is passed, which includes filing of suits and other legal proceedings on behalf of the company, there is no earthly reason as to why a Section 138/141 proceeding would be outside the ken of the proviso.

On the contrary, as the liquidator alone now represents the company, it is obvious that whatever the company could do pre-liquidation is now vested in the liquidator, and in order to realise monies that are due to the company, there is no reason why the liquidator cannot institute a Section 138/141 proceeding against a defaulting debtor of the company.

Obviously, this language needs to be construed in the widest possible form as there cannot be any residuary category of "other legal proceedings" which can be instituted against some person other than the liquidator or by the liquidator who now alone represents the company. Given the object of this provision also, what has been said earlier with regard to the nonapplication of the doctrines of ejusdem generis and noscitur a sociis would apply with all force to this provision as well.

66. In fact, several other provisions of the IBC may also be looked at in this context. Thus, when it comes to the duties of a resolution professional who takes over the management of the company during the corporate insolvency resolution process, Section 25(2)(b) states as follows:

"25. Duties of resolution professional.-

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely-

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasijudicial or arbitration proceedings;"

Here again, given the fact that it is the resolution professional alone who is now to preserve and protect the assets of the corporate debtor in this interregnum, the resolution professional therefore is to represent and act on behalf of the corporate debtor in all judicial, quasi-judicial, or arbitration proceedings, which would include criminal proceedings.

Here again, the word "judicial" cannot be construed noscitur a sociis so as to cut down its plain meaning, as otherwise, quasi-judicial or arbitration proceedings, not being criminal proceedings, the word "judicial" would then take colour from them. This would stultify the object sought to be achieved by Section 25 and result in an absurdity, namely, that during this interregnum, nobody can represent or act on behalf of the corporate debtor in criminal proceedings.

Likewise, if a corporate debtor cannot be taken over by a new management and has to be condemned to liquidation, the powers and duties of the liquidator, while representing the corporate debtor, are enumerated in Section 35. Section 35(1)(k), in particular, states as follows:

"35. Powers and duties of liquidator.-

(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:-

(k) to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of on behalf of the corporate debtor;"

This provision specifically speaks of "prosecution" and "criminal proceedings". Contrasted with Section 25(2)(b) and Section 33(5), an argument could be made that the absence of the expressions "prosecution" and "criminal proceedings" in Section 25(2)(b) and Section 33(5) would show that they were designedly eschewed by the legislature. We have seen how inelegant drafting cannot lead to absurd results or results which stultify the object of a

provision, given its otherwise wide language. Thus, nothing can be gained by juxtaposing various provisions against each other and arriving at conclusions that are plainly untenable in law.

Case Law under Provisions of other Statutes

67. Shri Mehta then relied strongly upon judgments under Section 22(1) of the SICA and under Section 446(2) of the Companies Act, 1956. He relied upon *BSI Ltd. v. Gift Holdings (P) Ltd.*, (2000) 2 SCC 737, which judgment held that the expression "suit" in Section 22(1) of the SICA would not include a Section 138 proceeding. The Court was directly concerned with only this expression and, therefore, held:

"19. The said contention is also devoid of merits. The word "suit" envisaged in Section 22(1) cannot be stretched to criminal prosecutions. The suit mentioned therein is restricted to "recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company". As the suit is clearly delineated in the provision itself, the context would not admit of any other stretching process.

20. A criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the NI Act is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in duly conducted criminal proceedings. Once the offence under Section 138 is completed the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to penal liability.

What was considered in *Maharashtra Tubes Ltd.* [(1993) 2 SCC 144] is whether the remedy provided in Section 29 or Section 31 of the State Finance Corporation Act, 1951 could be pursued notwithstanding the ban contained in Section 22 of SICA. Hence the legal principle adumbrated in the said decision is of no avail to the appellants.

21. In the above context it is pertinent to point out that Section 138 of the NI Act was introduced in 1988 when SICA was already in vogue. Even when the amplitude of the word "company" mentioned in Section 141 of the NI Act was widened through the explanation added to the Section, Parliament did not think it necessary to exclude companies falling under Section 22 of SICA from the operation thereof.

If Parliament intended to exempt sick companies from prosecution proceedings, necessary provision would have been included in Section 141 of the NI Act. More significantly, when Section 22(1) of SICA was amended in 1994 by inserting the words "and no suit for the

recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company"

Parliament did not specifically include prosecution proceedings within the ambit of the said ban."

This case is wholly distinguishable as the word "proceedings" did not come up for consideration at all. Further, given the object of Section 22(1) of the SICA, which was amended in 1994 by inserting the words that were interpreted by this Court, parliament restricted proceedings only to suits for recovery of money etc., thereby expressly not including prosecution proceedings, as was held by this Court.

The observations contained in paragraph 20, that Section 138 of the Negotiable Instruments Act is a penal provision in a criminal proceeding cannot now be said to be good law given the march of events, in particular, the amendments of 2002 and 2018 to the Negotiable Instruments Act, as pointed out hereinabove, and the later judgments of this Court interpreting Chapter XVII of the Negotiable Instruments Act.

68. The next decision relied upon by Shri Mehta is the judgment in *Kusum Ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd.*, (2000) 2 SCC 745, which merely followed this judgment (see paragraphs 15-18).

69. Likewise, all the judgments cited under Section 446(2) of the Companies Act, 1956 are distinguishable. Section 446(2) states as follows:

"446. Suits stayed on winding up order.-

(2) The Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of-

- (a) any suit or proceeding by or against the company;
- (b) any claim made by or against the company (including claims by or against any of its branches in India);
- (c) any application made under Section 391 by or in respect of the company;
- (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

whether such suit or proceeding has been instituted or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960."

70. In *S.V. Kandeekar v. V.M. Deshpande*, (1972) 1 SCC 438 ["S.V. Kandeekar"], this Court explained why income tax proceedings would be outside the purview of Section 446(2) as follows:

"17. Turning now to the Income Tax Act it is noteworthy that Section 148 occurs in Chapter XIV which beginning with Section 139 prescribes the procedure for assessment and Section 147 provides for assessment or reassessment of income escaping assessment. This Section empowers the Income Tax Officer concerned subject to the provisions of Sections 148 to 153 to assess or re-assess escaped income. While holding these assessment proceedings the Income Tax Officer does not, in our view, perform the functions of a Court as contemplated by Section 446(2) of the Act.

Looking at the legislative history and the scheme of the Indian Companies Act, particularly the language of Section 446, read as a whole, it appears to us that the expression "other legal proceeding" in sub-section (1) and the expression "legal proceeding" in subsection (2) convey the same sense and the proceedings in both the sub-sections must be such as can appropriately be dealt with by the winding up court. The Income Tax Act is, in our opinion, a complete code and it is particularly so with respect to the assessment and re-assessment of income tax with which alone we are concerned in the present case.

The fact that after the amount of tax payable by an assessee has been determined or quantified its realisation from a company in liquidation is governed by the Act because the income tax payable also being a debt has to rank *pari passu* with other debts due from the company does not mean that the assessment proceedings for computing the amount of tax must be held to be such other legal proceedings as can only be started or continued with the leave of the liquidation court under Section 446 of the Act.

The liquidation court, in our opinion, cannot perform the functions of Income Tax Officers while assessing the amount of tax payable by the assessee even if the assessee be the company which is being wound up by the Court. The orders made by the Income Tax Officer in the course of assessment or re-assessment proceedings are subject to appeal to the higher hierarchy under the Income Tax Act.

There are also provisions for reference to the High Court and for appeals from the decisions of the High Court to the Supreme Court and then there are provisions for revision by the Commissioner of Income Tax. It would lead to anomalous consequences if the winding up court were to be held empowered to transfer the assessment proceedings to itself and assess the company to income tax.

The argument on behalf of the appellant by Shri Desai is that the winding up court is empowered in its discretion to decline to transfer the assessment proceedings in a given case but the power on the plain language of Section 446 of the Act must be held to vest in that court to be exercised only if considered expedient.

We are not impressed by this argument. The language of Section 446 must be so construed as to eliminate such startling consequences as investing the winding up court with the powers of an Income Tax Officer conferred on him by the Income Tax Act, because in our view the legislature could not have intended such a result.

18. The argument that the proceedings for assessment or reassessment of a company which is being wound up can only be started or continued with the leave of the liquidation court is also, on the scheme both of the Act and of the Income Tax Act, unacceptable. We have not been shown any principle on which the liquidation court should be vested with the power to stop assessment proceedings for determining the amount of tax payable by the company which is being wound up.

The liquidation court would have full power to scrutinise the claim of the revenue after income tax has been determined and its payment demanded from the liquidator. It would be open to the liquidation court then to decide how far under the law the amount of income tax determined by the Department should be accepted as a lawful liability on the funds of the company in liquidation. At that stage the winding up court can fully safeguard the interests of the company and its creditors under the Act.

Incidentally, it may be pointed out that at the Bar no English decision was brought to our notice under which the assessment proceedings were held to be controlled by the winding up court. On the view that we have taken, the decisions in the case of Seth Spinning Mills Ltd., (In Liquidation) and the Mysore Spun Silk Mills Ltd., (In Liquidation) do not seem to lay down the correct rule of law that the Income Tax Officers must obtain leave of the winding up court for commencing or continuing assessment or reassessment proceedings."

From this judgment, what becomes clear is the fact that the winding-up court under Section 446(2) is to take up all matters which the company court itself can conveniently dispose of rather than exposing a company which is under winding up to expensive litigation in other courts.

This being the object of Section 446(2), the expression "proceeding" was given a limited meaning as it is obvious that a company court cannot dispose of an assessment proceeding in income tax or a criminal proceeding. This is further made clear in *Sudarshan Chits (I) Ltd. v.*

O. Sukumaran Pillai, (1984) 4 SCC 657 (at paragraph 8) and in Central Bank of India v. Elmot Engineering Co., (1994) 4 SCC 159 (at paragraph 14).

71. Shri Mehta also relied upon D.K. Kapur v. Reserve Bank of India, 2001 SCC OnLine Del 67 : (2001) 58 DRJ 424 (DB). This judgment referred to Section 446(1) and (2) of the Companies Act, 1956 and contrasted the language contained therein with the language contained in Section 457 of the same Act, which made it clear that the liquidator in a winding up by the court shall have power, with the sanction of the court, to institute or defend any suit, prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company. Thus, the Delhi High Court held:

"12. Mere look at the aforesaid provisions would show that on the one hand, in Section 457 of the Act, the legislature has empowered the liquidator to institute or defend any 'suit' or 'prosecution' or 'other legal proceedings' civil or criminal in the name and on behalf of company after permission from the court; and by Section 454 (5A) of the Act the legislature has empowered the Company Court itself to take cognizance of the offence under sub-section (5) of Section 454 of the Act and to try such offenders as per the procedure provided for trial of summons cases under the Code of Criminal Procedure, 1974; but on the other hand in Sections 442 and 446 of the Act the legislature has used only the expression "suit or other legal proceedings".

The words "prosecution" or "criminal case" are conspicuously missing in these Sections. It appears quite logical as purpose and object of Sections 442 and 446 of the Act is to enable the Company Court to oversee the affairs of the company and to avoid wasteful expenditure. Therefore the intention of the legislature under these Sections does not appear to provide jurisdiction to the Company Court over criminal proceedings either against the company or against its directors. Wherever legislature thought it necessary to provide such jurisdiction it has used the appropriate expressions."

It then set out the judgment in S.V. Kandeekar (supra) in paragraph 14, and concluded:

"15. The reasoning adopted by the Supreme Court in the above case would be fully applicable to the facts at hand. Complaints under the penal provisions of other statutes against the company or its directors, (except those provided under the Companies Act) cannot be appropriately dealt with by the Company Court. Orders passed by the criminal court are subject to the appeal and revision etc. under the Code of Criminal Procedure. If the winding up court is held to be empowered to transfer these criminal proceedings to itself it would lead to anomalous consequences."

It was in this context that the Court therefore ultimately held:

"20. The expression "other legal proceedings" must be read in ejusdem generis with the expression "suit" in Section 446 of the Act. If so read it can only refer to any civil proceedings and criminal proceedings have to be excluded. Therefore, no permission was required to be taken from Company Court for filing criminal complaint either against the company or against its directors."

72. Shri Mehta's reliance on *Indorama Synthetics (I) Ltd. v. State of Maharashtra*, 2016 SCC OnLine Bom 2611 : (2016) 4 Mah LJ 249, is also misplaced, for the reason that the finding of the Bombay High Court that Section 138 proceedings were not included in Section 446 of the Companies Act only follows the reasoning of the earlier judgments on the scope of Section 446 of the Companies Act.

Significantly, given the object of Section 446 of the Companies Act, it was held that a Section 138 proceeding is not a proceeding which has a direct bearing on the collection or distribution of assets in the winding up of a company. The ultimate conclusion of the court is contained in paragraph 30, which reads as follows:

"30. Thus, there is a long line of decisions making the position clear that the expression 'suit or legal proceedings', used in Section 446(1) of the Companies Act, can mean only those proceedings which can have a bearing on the assets of the companies in winding-up or have some relation with the issue in winding-up. It does not mean each and every civil proceedings, which has no bearing on the winding-up proceedings, or criminal offences where the Director of the Company is presently liable for penal action."

73. As the language, object, and context of Section 22(1) of the SICA and Section 446(2) of the Companies Act are far removed from Section 14(1) of the IBC, none of the aforesaid judgments have any application to Section 14 of the IBC and are therefore distinguishable.

74. Shri Mehta then relied upon *Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd.*, 2017 SCC OnLine Del 12189 : (2018) 246 DLT 485, in which the Delhi High Court held that a Section 34 application to set aside an award under the Arbitration and Conciliation Act, 1996 would not be covered by Section 14 of the IBC.

This judgment does not state the law correctly as it is clear that a Section 34 proceeding is certainly a proceeding against the corporate debtor which may result in an arbitral award against the corporate debtor being upheld, as a result of which, monies would then be payable by the corporate debtor.

A Section 34 proceeding is a proceeding against the corporate debtor in a court of law pertaining to a challenge to an arbitral award and would be covered just as an appellate

proceeding in a decree from a suit would be covered. This judgment does not, therefore, state the law correctly.

75. Shri Mehta then relied upon *Inderjit C. Parekh v. V.K. Bhatt*, (1974) 4 SCC 313. This judgment dealt with a moratorium provision contained in the Bombay Relief Undertakings (Special Provisions) Act, 1958. In the context of a prosecution under paragraph 76(a) of the Employees' Provident Fund Scheme, 1952 this Court held:

"6. The object of Section 4(1)(a)(iv) is to declare, so to say, a moratorium on actions against the undertaking during the currency of the notification declaring it to be a relief undertaking. By sub-clause (iv), any remedy for the enforcement of an obligation or liability against the relief undertaking is suspended and proceedings which are already commenced are to be stayed during the operation of the notification.

Under Section 4(b), on the notification ceasing to have force, such obligations and liabilities revive and become enforceable and the proceedings which are stayed can be continued. These provisions are aimed at resurrecting and rehabilitating industrial undertakings brought by inefficiency or mismanagement to the brink of dissolution, posing thereby the grave threat of unemployment of industrial workers.

"Relief undertaking" means under Section 2(2) an industrial undertaking in respect of which a declaration under Section 3 is in force. By Section 3, power is conferred on the State Government to declare an industrial undertaking as a relief undertaking, "as a measure of preventing unemployment or of unemployment relief".

Relief undertakings, so long as they continue as such, are given immunity from legal actions so as to render their working smooth and effective. Such undertakings can be run more effectively as a measure of unemployment relief, if the conduct of their affairs is unhampered by legal proceedings or the threat of such proceedings. That is the genesis and justification of Section 4(1)(a)(iv) of the Act.

7. Thus, neither the language of the statute nor its object would justify the extension of the immunity so as to cover the individual obligations and liabilities of the directors and other officers of the undertaking. If they have incurred such obligations or liabilities, as distinct from the obligations or liabilities of the undertaking, they are liable to be proceeded against for their personal acts of commission and omission. The remedy in that behalf cannot be suspended nor can a proceeding already commenced against them in their individual capacity be stayed.

Indeed, it would be strange if any such thing was within the contemplation of law. Normally, the occasion for declaring an industry as a relief undertaking would arise out of causes

connected with defaults on the part of its directors and other officers. To declare a moratorium on legal actions against persons whose activities have necessitated the issuance of a notification in the interest of unemployment relief is to give to such persons the benefit of their own wrong.

Section 4(1)(a)(iv) therefore advisedly limits the power of the State Government to direct suspension of remedies and stay of proceedings involving the obligations and liabilities in relation to a relief undertaking and which were incurred before the undertaking was declared a relief undertaking.

8. Para 38(1) of the Employees' Provident Funds Scheme, 1952 imposes an obligation on "The employer" to pay the provident fund contribution to the Fund within 15 days of the close of every month. The Scheme does not define "Employee" but para 2(m) says that words and expressions which are not defined by the Scheme shall have the meaning assigned to them in the Employees' Provident Funds Act.

Section 2(e)(ii) of that Act defines an "Employer", to the extent material, as the person who, or the authority which, has the ultimate control over the affairs of an establishment and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent.

Thus the responsibility to pay the contributions to the Fund was of the appellants and if they have defaulted in paying the amount, they are liable to be prosecuted under para 76(a) of the Scheme which says that if any person fails to pay any contribution which he is liable to pay under the Scheme, he shall be punishable with six months' imprisonment or with fine which may extend to one thousand rupees or with both. Such a personal liability does not fall within the scope of Section 4(1)(a)(iv) of the Act."

Significantly, this Court did not hold that the moratorium provision would not extend to criminal liability. On the contrary, on the assumption that it would so extend, a distinction was made between personal liability of the Directors of the undertaking and the undertaking itself, stating that as the "employer" under the Employees' Provident Fund Scheme would only refer to those individuals managing the relief undertaking and not the relief undertaking itself, the personal liability of such persons would not fall within the scope of the moratorium provision. This judgment also, therefore, does not, in any manner, support Shri Mehta.

76. Lastly, Shri Mehta relied upon Deputy Director, Directorate of Enforcement Delhi v. Axis Bank, 2019 SCC OnLine Del 7854 : (2019) 259 DLT 500, and in particular, on paragraphs 127, 128, and 146 to 148 for the proposition that an offence under the Prevention

of Money- Laundering Act could not be covered under Section 14(1)(a). The Delhi High Court's reasoning is contained in paragraphs 139 and 141, which are set out hereinbelow:

"139. From the above discussion, it is clear that the objects and reasons of enactment of the four legislations are distinct, each operating in different field. There is no overlap. While RDBA has been enacted to provide for speedier remedy for banks and financial institutions to recover their dues, SARFAESI Act (with added chapter on registration of secured creditor) aims at facilitating the secured creditors to expeditiously and effectively enforce their security interest.

In each case, the amount to be recovered is "due" to the claimant i.e. the banks or the financial institutions or the secured creditor, as the case may be, the claim being against the debtor (or his guarantor). The Insolvency Code, in contrast, seeks to primarily protect the interest of creditors by entrusting them with the responsibility to seek resolution through a professional (RP), failure on his part leading eventually to the liquidation process."

"141. This court finds it difficult to accept the proposition that the jurisdiction conferred on the State by PMLA to confiscate the "proceeds of crime" concerns a property the value whereof is "debt" due or payable to the Government (Central or State) or local authority. The Government, when it exercises its power under PMLA to seek attachment leading to confiscation of proceeds of crime, does not stand as a creditor, the person alleged to be complicit in the offence of money-laundering similarly not acquiring the status of a debtor.

The State is not claiming the prerogative to deprive such offender of ill-gotten assets so as to be perceived to be sharing the loot, not the least so as to levy tax thereupon such as to give it a colour of legitimacy or lawful earning, the idea being to take away what has been illegitimately secured by proscribed criminal activity." This raison d'être is completely different from what has been advocated by Shri Mehta. The confiscation of the proceeds of crime is by the government acting statutorily and not as a creditor. This judgment, again, does not further his case.

Whether Natural Persons are Covered by Section 14 of The IBC

77. As far as the Directors/persons in management or control of the corporate debtor are concerned, a Section 138/141 proceeding against them cannot be initiated or continued without the corporate debtor - see Aneeta Hada (supra). This is because Section 141 of the Negotiable Instruments Act speaks of persons in charge of, and responsible to the company for the conduct of the business of the company, as well as the company. The Court, therefore, in Aneeta Hada (supra) held as under:

"51. We have already opined that the decision in Sheoratan Agarwal [(1984) 4 SCC 352 : 1984 SCC (Cri) 620] runs counter to the ratio laid down in C.V. Parekh [(1970) 3 SCC 491 : 1971 SCC (Cri) 97] which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in Anil Hada [(2000) 1 SCC 1 : 2001 SCC (Cri) 174] has to be treated as not laying down the correct law as far as it states that the Director or any other officer can be prosecuted without impleadment of the company. Needless to emphasise, the matter would stand on a different footing where there is some legal impediment and the doctrine of *lex non cogit ad impossibilia* gets attracted."

"56. We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons, whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company.

The learned counsel for the respondents have vehemently urged that the use of the term "as well as" in the Section is of immense significance and, in its tentacle, it brings in the company as well as the Director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the Directors or other officers is tenable even if the company is not arraigned as an accused. The words "as well as" have to be understood in the context.

"58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof.

One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself.

We say so on the basis of the ratio laid down in C.V. Parekh [(1970) 3 SCC 491 : 1971 SCC (Cri) 97] which is a three-Judge Bench decision.

Thus, the view expressed in Sheoratan Agarwal [(1984) 4 SCC 352 : 1984 SCC (Cri) 620] does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada [(2000) 1 SCC 1 : 2001 SCC (Cri) 174] is overruled with the qualifier as stated in para 51. The decision in Modi Distillery [(1987) 3 SCC 684 : 1987 SCC (Cri) 632] has to be treated to be restricted to its own facts as has been explained by us hereinabove."

Since the corporate debtor would be covered by the moratorium provision contained in Section 14 of the IBC, by which continuation of Section 138/141 proceedings against the corporate debtor and initiation of Section 138/141 proceedings against the said debtor during the corporate insolvency resolution process are interdicted, what is stated in paragraphs 51 and 59 in Aneeta Hada (supra) would then become applicable. The legal impediment contained in Section 14 of the IBC would make it impossible for such proceeding to continue or be instituted against the corporate debtor.

Thus, for the period of moratorium, since no Section 138/141 proceeding can continue or be initiated against the corporate debtor because of a statutory bar, such proceedings can be initiated or continued against the persons mentioned in Section 141(1) and (2) of the Negotiable Instruments Act. This being the case, it is clear that the moratorium provision contained in Section 14 of the IBC would apply only to the corporate debtor, the natural persons mentioned in Section 141 continuing to be statutorily liable under Chapter XVII of the Negotiable Instruments Act.

Conclusion

78. In conclusion, disagreeing with the Bombay High Court and the Calcutta High Court judgments in Tayal Cotton Pvt. Ltd. v. State of Maharashtra, 2018 SCC OnLine Bom 2069 : (2019) 1 Mah LJ 312 and M/s MBL Infrastructure Ltd. v. Manik Chand Somani, CRR 3456/2018 (Calcutta High Court; decided on 16.04.2019), respectively, we hold that a Section 138/141 proceeding against a corporate debtor is covered by Section 14(1)(a) of the IBC.

79. Resultantly, the civil appeal is allowed and the judgment under appeal is set aside. However, the Section 138/141 proceedings in this case will continue both against the company as well as the appellants for the reason given by us in paragraph 77 above as well as the fact that the insolvency resolution process does not involve a new management taking over. We may also note that the moratorium period has come to an end in this case.

IMPORTANT AND PATH-BREAKING JUDGMENT IN VIKASH KUMAR V. UPSC



The Supreme Court, through Justice DY Chandrachud recently dealt with this issue in *Vikash Kumar v. UPSC*. He has very categorically stated that the Indian Constitution does not envisage a society inclined to favour the majority. Rather, he has emphasized on creation and nurturance of a more egalitarian society. In this backdrop, let me identify some of the USPs which can be drawn from this important and path-breaking judgment.

Generally, it is assumed that for its effective implementation, law must be in conformity and in consonance with social consensus. But what if social consensus is in favour of discrimination, or in favour of exclusion of an entire section of society or What if the social consensus is in favour of perpetuating the stereotypes and myths about a particular section of society. We must think about it deeply.

In such circumstances, should the judiciary of a civilized state remain a passive onlooker, and should we wait for social transformation from within or call for some proactive steps!

A befitting burial to Mohan

Culturally in India, every entity deserves a decent burial when it is out of use. Justice Chandrachud did the same with regard to *V Surendra Mohan v. State of Tamil Nadu* (Mohan), in which the Supreme Court upheld the State's policy of restricting the eligibility of blind and deaf candidates. Justice Chandrachud states: ***“In light of the fact that the view of this court in Mohan was rendered in a case under the 1995 Act which has now been replaced by the RPwD Act 2016 and in light of the absence of a reasonable accommodation analysis by this Court, the Mohan judgment stands on a legally vulnerable footing. It would not be a binding precedent, after enforcement of the RPwD Act 2016”.***

Inclusive equality

Another extraordinary contribution of this judgment is to break new ground for the interpretation of the concept of equality. Echoing Michael Walzer's notion of complex equality, Justice Chandrachud very rightly cautions against adoption of a 'one size fits all' approach and urges the Central government to scrupulously observe its individualized duty to provide reasonable accommodation to persons with disability. Articulating the notion of reasonable accommodation in the context of equality, the learned judge very tellingly observes:

“Specifically, the relevant question, under the reasonable accommodation analysis, is not whether complications will be caused by the grant of a reasonable accommodation. By definition, reasonable accommodation demands departure from the status quo and hence ‘avoidable complications’ are inevitable. The relevant question is whether such accommodations would give rise to a disproportionate or undue burden. The two tests are entirely different.”

Implicit in this observation is a very vital point. Only in an ableist environment is interaction with people with disabilities perceived as an avoidable complication. Because by default, the environment is exclusionary, and does not even take cognizance of diversity, leave alone demonstrating any sensitivity to the special needs of a particular individual. By this pronouncement, Justice Chandrachud has categorically conveyed a legal message to policy makers to regard reasonable accommodation as one of the in-built elements of inclusive inequality.

“As the Committee on the Rights of Persons with Disabilities noted in General Comment 6, reasonable accommodation is a component of the principle of inclusive equality. It is a substantive equality facilitator. The establishment of this linkage between reasonable accommodation and non-discrimination thus creates an obligation of immediate effect.”

Abandoning of medical model of disability

Through a very careful analysis, the Court articulates the conception of the *Rights of Persons with Disabilities Act, 2016 (RPwD Act)*, and demonstrates how compared to its 1995 counterpart, its present conception is away from medical model of disability.

“The RPwD Act 2016 has a more inclusive definition of “persons with disability” evidencing a shift from a stigmatizing medical model of disability under the 1995 Act to a social model of disability which recognizes that it is the societal and physical constraint that are at the heart of exclusion of persons with disabilities from full and effective participation in society. (See for detailed reasoning, paras 20 to 28).”

Distinction between persons with benchmark disabilities and persons with disabilities

A remarkable aspect of this judgment is to confine the notion of persons with benchmark disabilities to its particular context i.e. Chapter VI and VII of RPwD Act 2016, thereby enabling the transformative potential of Section 2(s) of the RPwD Act 2016 (defining persons with disability).

“The fundamental postulate upon which the RPwD Act 2016 is based is the principle of equality and non-discrimination. Section 3 casts an affirmative obligation on the government to ensure that persons with disabilities enjoy (i) the right to equality; (ii) a life with dignity; and (iii) respect for their integrity equally with others. Section 3 is an affirmative declaration of the intent of the legislature that the fundamental postulate of equality and non-discrimination is made available to persons with disabilities without constraining it with the notion of a benchmark disability.”

Implicit in this observation is the idea that the notion of reasonable accommodation, being inherent to the concept of equality under Indian Public Law, can be availed by every person with disability, irrespective of whether she is covered by the label of benchmark disabilities.

Dignitary constitutionalism

Demonstrating the adverse impact of an ableist environment as the default, the learned judge observes,

“There is a critical qualitative difference between the barriers faced by persons with disabilities and other marginalized groups. In order to enable persons with disabilities to lead a life of equal dignity and worth, it is not enough to mandate that discrimination against them is impermissible. That is necessary, but not sufficient. We must equally ensure, as a society, that we provide them the additional support and facilities that are necessary for them to offset the impact of their disability.”

Implicit in this observation is the endeavour of the Court to translate one of the vital constitutional values i.e. value of human dignity enshrined in the Preamble, into the legal regime put in place for recognition and enforcement of rights of persons with disability. Even the explicit absence of physical and mental disability as a ground of non-discrimination in Article 15 or 16 does not deter or inhibit the creative thinking of the Court, which observes,

“Part III of our Constitution does not explicitly include persons with disabilities within its protective fold. However, much like their able-bodied counterparts, the golden triangle of Articles 14, 19 and 21 applies with full force and vigour to the disabled. The RPwD Act 2016 seeks to operationalize and give concrete shape to the promise of full and equal

citizenship held out by the Constitution to the disabled and to execute its ethos of inclusion and acceptance.”

TEN REASONS WHY DISHA RAVI WAS GRANTED BAIL



A Delhi Sessions Court today granted bail to 22-year-old climate change activist Disha Ravi in connection with the farmers protests toolkit FIR.

The order was passed by Judge **Dharmender Rana** in relation to an FIR registered for offences under Section 124A (sedition) and 153A (promoting enmity between different groups on grounds of religion, race, place of birth, residence, language) of Indian Penal Code. The Court gave the following reasons to grant bail to Ravi.

Mere engagement with persons of dubious credentials not indictable

One of the main arguments advanced by the government was that a pro-Khalistani secessionist group namely 'Poetic Justice Foundation' (PJF) and people associated with it were behind the creation of the 'Toolkit' document.

It was the prosecution's case that two of Ravi's associates, Nikita Jacob and Shantanu Muluk, attended a Zoom meeting in which two pro-Khalistani activists of PJF also participated apart along with 60 to 70 other persons from across the world.

Based on this, it was argued that Ravi, along with the founders of PJF, used social media to peddle support for the secessionist Khalistan narrative under the guise of the farmers' protests.

However, the Court noted that there was nothing on record to establish any direct link between the applicant/accused and the two PJF activists.

The Court stated that: *“In my considered opinion, it is not mere engagement with persons of dubious credentials which is indictable rather it is the purpose of engagement which is relevant for the purpose of deciding culpability,”*

No evidence connecting Disha Ravi to Republic Day violence

The argument by the prosecution was that the actions of Ravi had led to the violence that rocked the national capital on January 26.

The Court, however, took a dim view of this argument, stating that there was nothing on record to suggest that there was any call, incitement, instigation or exhortation on the part of the applicant/accused or organizations like PJJ and its associates to foment violence on January 26.

Merely sharing platform with people who oppose a law is not secessionist tendency

Without any other evidence, the mere sharing of a platform with a group of persons opposing the farm laws cannot lead to presumption that she supported the secessionist tendencies, the Court noted that:

“In the absence of any evidence to the effect that the applicant/accused agreed or shared a common purpose to cause violence on January 26 with the founders of PJJ, it cannot be presumed by resorting to surmises or conjectures that she also supported the secessionist tendencies or the violence caused on January 26, simply because she shared a platform with people, who have gathered to oppose the legislation,” the order said.

Toolkit does not make out any call for violence

Importantly, the Court reproduced the relevant portion of the much-hyped toolkit and said that perusal of the same revealed that any call for any kind of violence was conspicuously absent.

Citizens cannot be put behind bars simply because they disagree with the government

The Court observed that citizens are the conscience keepers of the government in any democratic nation. They cannot be put behind the bars simply because they choose to disagree with the State policies.

Our civilisation was never averse to varied ideas

The Court quoted a Line from the Rig Veda to state that Indian civilisation has always accorded respect to divergent opinions.

“This 5000 years old civilization of ours has never been averse to ideas from varied quarters. The following couplet in Rig Veda embodies our cultural ethos expressing our respect for divergent opinions.

आ नो भद्राः कतवो यनतु विश्वतोऽदबधासो अपरीतास उिददः।

(Let noble thoughts come to me from all directions).”

Right to dissent firmly enshrined in Article 19, freedom of speech includes right to seek global audience

The Court also said that our founding fathers accorded due respect to the divergence of opinion by recognising the freedom of speech and expression as an inviolable fundamental right.

“The right to dissent is firmly enshrined under Article 19 of The Constitution of India,” the Court said.

Creation of WhatsApp group, editing innocuous Toolkit not an offence

It was contended that Ravi created a WhatsApp group by the name of “Intl farmers strike” and added certain persons to the group. It was also submitted that she deleted the group chat from her phone in an attempt to destroy crucial evidence linking her with the toolkit and PJJ. She was alleged to be one of the editors of the toolkit.

No evidence of vandalising Indian embassies

Another allegation by the prosecution was that Ravi along with her associates under the pretext of protesting against the farm laws had resolved to vandalize Indian Embassies, and specifically attack symbols of India i.e. Yoga and Chai.

“Except for a bare assertion, no evidence has been brought to my notice to support the contention that any violence took place at any of the Indian Embassies pursuant to the sinister designs of the applicant/accused and her co-conspirators,” the Court said.

The resistance to the bail plea seems to be more ornamental in nature, the Court added.

“Considering the scanty and sketchy evidence available on record, I do not find any palpable reasons to breach the general rule of ‘Bail’ against a 22-year-old young lady, with absolutely blemish free criminal antecedents and having firm roots in the society, and send her to jail,” the Court concluded.

BOMBAY HIGH COURT UPHOLDS BAIL GRANTED TO PERSON ACCUSED OF JOINING ISIS



The Bombay High Court has upheld the bail granted to **Areeb Majeed**, who is accused of joining global terror outfit ISIS.

While doing so, the Court set aside on merits the findings of the Special Court in Mumbai hearing cases being investigated by the National Investigation Agency (NIA).

The National Investigation Agency (“NIA”) has filed the present appeal challenging order dated 17/03/2020 passed by the Additional Sessions Judge and Special Judge under the National Investigation Agency Court, Greater Mumbai (“NIA Court”) whereby the bail application filed by the respondent was allowed and the respondent was directed to be released on bail subject to specific conditions. The NIA Court granted stay of its own order till 27/03/2020. The NIA immediately approached this court by filing the present appeal. On 26/03/2020, this court continued the stay of the aforesaid impugned order passed by the NIA Court, as a consequence of which, the respondent has continued in custody.

The facts, in brief, leading to filing of the present appeal are that on 28/11/2014, a First Information Report (“FIR”) was registered at the behest of the NIA against the respondent for offences punishable under Section 125 of the Indian Penal Code (“IPC”) and Sections 16, 18 and 20 of the Unlawful Activities (Prevention) Act, 1967 (“UAPA”).

It was the case of the NIA that the respondent along with three absconding accused persons had visited Iraq ostensibly for pilgrimage along with other persons, who were on pilgrimage but, the accused persons including the respondent never visited the sites of pilgrimage and, instead, escaped into Iraq and Syria with the intention of indulging in jihadi activities by joining Islamic State for Iraq and Levant (“ISIL”). According to the NIA, the said accused persons including the respondent herein formed an unlawful association with an intention to promote terrorism in Iraq, Syria and India. They also participated in terrorist activities in Syria and Iraq and they were likely to commit such acts in India also. The respondent had allegedly returned to India with the intention of carrying out such terrorist acts in India, including blowing up the Police Headquarter at Mumbai.

The Bench of Justices **SS Shinde** and **Manish Pitale** passed the verdict in an appeal by the NIA against the Special Court’s order which granted bail to Majeed on merits.

The Court opined the observations of the Special Court that no *prima facie* case is made out by the NIA in light of witnesses examined is based on flawed logic.

“It is strange that the NIA Court had held that “at this stage” the prosecution had not succeeded to prove prima facie case on the basis of examination of 49 witnesses and that the prosecution had failed to give a specific direction.” the order states.

The Court noted that the accusations against Majeed had been rendered twice over against Majeed when the earlier bail applications were rejected on merits, which was not considered in the impugned order.

Having held so, the Court proceeded to add that considering Majeed was facing trial for serious and heinous offences, the Court was required to "*perform a balancing act, so as to ensure that a golden mean is reached between the rights of the individual and those of the society at large.*"

Majeed, arguing in-person, contended that the trial was being conducted for offences which were neither within Indian borders nor against India. He claimed that the evidence collected by NIA could not *prima facie* prove the offences charged by them.

He further submitted that the offences for which he has been charged with entail punishment of only up to five years' imprisonment since he has not caused any injury or killed anyone. The charge sheet itself discloses these facts, he contended.

He highlighted that he has already spent more than six years in jail as an under trial and that in itself is a ground for grant of bail. In this regard, he placed reliance upon the recent judgment of the Supreme Court in the Union of India v. KA Najeeb.

It was also his argument that he had gone abroad to help people there and not for any terrorist activities.

The Court at this point questioned why a 21-year-old boy would think of going to Iraq leaving his parents and family in grief. It also remarked that if Majeed would have utilised his abilities to the best at the age of 21, it would have been a matter of joy for the family and for the country.

SUPREME COURT SAID MARRIED WOMAN'S HEIRS ON HER PARENTAL SIDE SHALL NOT BE STRANGERS FOR THE PURPOSES OF SUCCESSION UNDER HINDU SUCCESSION ACT



A Bench of Justices **Ashok Bhushan** and **R Subhash Reddy** ruled that as per Section 15(1)(d) of the Hindu Succession Act, the heirs of the father of a Hindu female are covered under persons entitled to intestate succession of property of a female Hindu.

The Supreme Court has ruled that when heirs of father of a female are included as persons who can possibly succeed under Hindu Succession Act, then it cannot be held that they are strangers and not the members of the family with respect to the female (*Khushi Ram & ors vs Nawal Singh & ors*).

The Court stated that: "A perusal of Section 15(1)(d) indicates that heirs of the father are covered in the heirs, who could succeed. When heirs of father of a female are included as person who can possibly succeed, it cannot be held that they are strangers and not the members of the family qua (sic) the female,"

The ruling came in a case related to the property inherited by a woman, Jagno after her husband passed away without any children. Jagno, after enforcement of the Hindu Succession Act, 1956 by virtue of Section 14 became the absolute owner of the half share of the suit property.

She then entered into a family settlement and settled the land in favour of her brothers' sons. Her brother's sons filed a civil suit in 1991 before the court of Sub-Judge, Gurgaon claiming decree of declaration as owners in possession of the land in question.

Jagno did not contest this claim and filed a written statement accepting the case of her brother's sons. The trial court, therefore, passed a consent decree in favour of Jagno's brother's sons on August 19, 1991.

However, her late husband's brother's children (plaintiff-appellants) disapproved of such a transfer.

They challenged the same but their suit was dismissed by the trial court, district court and the High Court resulting in the present appeal before the Supreme Court.

They contended that a Hindu widow cannot constitute a Joint Hindu Family with the descendants of her brother, i.e., her parental side.

It was submitted that a family settlement can take place only between members, who have antecedent title or pre-existing right in the property proposed to be settled.

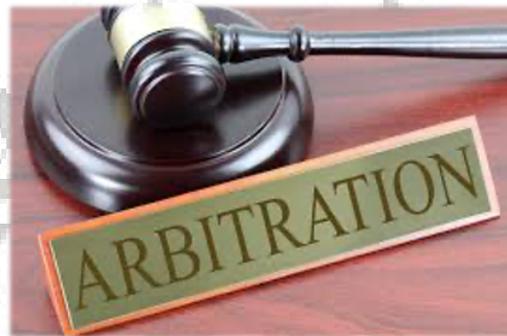
The respondents argued that expression "family" for the purpose of family settlement is not to be given any narrow meaning and that it should be given a wide meaning to cover the members, who are by any means related.

The Court placed reliance on Section 15(1)(d) of the Hindu Succession Act to hold that heirs of father of a Hindu female are not strangers but are 'family'.

Then Court concluded that:

"In the present case, Smt. Jagno, who as a widow of Sher Singh, who had died in 1953, had succeeded to half share in the agricultural land and she was the absolute owner when she entered into settlement. We, thus, do not find any merit in the submission of learned counsel for the appellants that the defendants-respondents were strangers to the family,"

MADRAS HIGH COURT SLAMS ARBITRATION COURT FOR CONFIRMING UNREASONED ARBITRAL AWARD, SAID THAT NOT WORTH PAPER IT IS PRINTED ON



In the matter of *Hindustan Petroleum Corporation Ltd v. Banu Constructions* an arbitral award and an order passed by an arbitration court to confirm such an award recently drew the ire of the Madras High Court.

The High Court said while referring to the order which confirmed the challenged arbitral award is: "***This is a classic example of what cannot be done by Arbitration Court,***"

The arbitration court's exercise of *rewriting the arbitration award* by ascribing reasons in support of the claims allowed or quantum awarded is *not the business of the Arbitration Court*, it added.

The Bench of Chief Justice **Sanjib Banerjee** and Justice **Senthilkumar Ramamoorthy** did not mince any words when it came to the arbitral award itself, while observing said:

"While it is not necessary for an arbitral award to justify every paisa or a rupee awarded to the claimant, the broad premise on which the quantum is founded has to be discernible from award itself for the award to be meaningful or even intelligible in legal terms."

The Court noted that the last few pages of the arbitral award, which records its operative portion, only mentions by 6-7 lines of "an excuse for reasons" while dealing one of three claim-heads.

"It is tempting to set out what appears at pages 119 and 120 of the appeal papers except that it may not be worth the paper it is printed on for its abject lack of reasons...There is not an alphabet expended by way of reasons in respect of the first and second heads of claim."

The Court emphasised that there is a statutory mandate to pass reasoned orders in civil litigation as well as under the Arbitration Act, 1996.

The Court emphasised on that: *"It is imperative – as has been statutorily mandated by the Act of 1996 – that reasons be furnished in support of an award unless the parties dispense therewith by agreement,"*

Referring to the arbitration court's observation that the arbitral award does contain some reasons for its passage, the Bench further added that:

"In the light of what appears clearly from the face of the award, the above observation of the Arbitration Court is exceptionable and not acceptable. The complete lack of reasons cannot be glossed over in the manner it has been in the judgment and order impugned."

The High Court went on to opine that the both the arbitral award and the affirming judgment *"go against the most rudimentary tenets of the governing law and the jurisprudential philosophy established in this branch over the years."*

Therefore, both were set aside and, with the consent of both parties, retired District Judge C Manickam was appointed to conduct the arbitration afresh.

JAMMU & KASHMIR HIGH COURT DIRECTS GOVT TO EVICT FORMER MINISTERS, LEGISLATORS WHO ARE IN ILLEGAL OCCUPATION OF GOVT BUNGALOWS



In a matter of (*Court on its own motion V/s Union Territory of JK & Ors*), Jammu and Kashmir High Court has directed the Government of Jammu and Kashmir (J&K) to take all necessary steps to evict all the former ministers, legislators, retired officers and politicians from government accommodations and ministerial bungalows.

A Division Bench comprising of Justice **Ali Mohammad Magrey** and Justice **Vinod Chatterji Koul** took exception to the fact that some of the former ministers, law makers and politicians are continuing to illegally occupy government accommodations despite no longer being entitled to the same.

The Court said: *“It is very unfortunate that some former ministers, legislators, retired officers and politicians have illegal and unauthorised managed to continue to stay in the residential accommodations provided to them by the Government of Jammu and Kashmir, though they are no longer entitled to such accommodation”* .

The observations and directions came in a suo motu case initiated by the Court to deal with the issue.

The bench observed that the unauthorized occupants must realize that rights and duties go correlative to each other, inasmuch as the rights of one person entail the duties of another person, whereas, the duties of one person entail the rights of another person.

In this context, the unauthorized occupants must appreciate that their act of overstaying in the premises directly infringes the right of another. No law or direction can entirely control this act of disobedience, but for self-realization among the unauthorized occupants, it added.

The Court, therefore, proceeded to direct the Chief Secretary and Secretary Estates Department to take all possible steps to ensure eviction of all illegal occupants from government accommodations including ministerial bungalows and special houses.

The Court while pronouncing his order stated that:

“The Chief Secretary of the Government of Jammu and Kashmir and the Secretary to Government of Jammu and Kashmir, Estates Department, shall take all possible steps for ensuring eviction of the illegal/unauthorized occupants including former Ministers, Legislators, Retired officers, Politicians, Political persons from Government accommodation comprising Ministerial Bungalows and Special Houses in tune with the mandate of law provided by the Supreme Court in the two Judgments in case titled SD Bandi v. Divisional Traffic Officer, Karnakata (2013) and Lok Prahari v. State of Uttar Pradesh & Ors. (2016),”

Apart from that, the Court also directed both the departments to ensure recovery of rental/arrears of rent as land revenue from the occupants of the accommodation for the period for which they were in authorized/unauthorized occupation of such accommodation.

**THE MADRAS HIGH COURT SAID: IT IS A SHAMEFUL ACT IF AN
ADVOCATE-TENANT REFUSES TO VACATE RENTED PREMISES
ON TIME**



The Madras High Court recently censured an advocate for failing to vacate rented premises on time and for having attempted to protract the matter under the pretext of filing review applications in a legal dispute initiated in the case.

The Bench remarked that it was shameful on the advocate's part to refuse to vacate the premises despite the landlord's request. The Court further remarked that the lawyer has proved himself to be a dishonest, wicked and unprincipled person.

Hon'ble Court further stated that the lawyer should act as a gentleman and vacate the premises within thirty days after the landlord requests. The Court further stated that due to the lawyer's conduct in question, society thinks that advocates were thorn rate criminals and rowdies.

In the instant case, the Bench recounted that they had ordered the lawyer to vacate the premises by 19.02.2020. However, the Court was informed that he vacated the premises after one year.

The Court noted that the case was dragged by filing review petitions and that the lawyer was not present in the Court during the hearing of the case. He even wrote a letter to the chief justice two days before Justice Vaidyanathan pronounced his order.

Hon'ble Court also stated that advocates should refrain from defending tenants to safeguard the profession's reputation.

Lastly, the Court directed the Bar Council of Tamil Nadu and Puducherry to take action against the erring advocate.

[False Rape Accusation] HC directed the Police to take Legal action for making False Complaint against a man



The Kerala High Court on Monday directed the police to take expeditious legal action against a woman for making a false rape complaint against a man after having consensual sex with him.

The allegation towards the Petitioner is that he committed rape on a lady when she approached him for getting a certificate for COVID-19 negative. She stated that both hands were tied at her back and the mouth was blocked with a dothi. Thereafter there was a forceful rape.

Brief Facts of the Case

The petitioner in is a Junior Health Inspector. FIR was registered against him under Sections 323, 506(i), 376, 376(2)(n), 376C(b) of IPC based on a complaint from a lady aged 44. The petitioner was arrested on 7.9.2020 and he was in custody for 77 days.

Subsequently, the defacto complainant took U-turn and filed an affidavit before this Court saying that it was consensual sexual intercourse.

The court allowed the bail.

Bail Applications

The Petitioner filed the two bail applications, and both were withdrawn due to the seriousness of the offence.

Affidavit

The petitioner produced an Affidavit of the victim before the Court attested by the Notary in which it was stated that,

“I gave a statement to the police because I was pressurized by my relatives and it was a consensual sexual intercourse”

Court Findings & Order

The Court in its findings stated that,

“I am surprised, after reading this affidavit. The registration of the above case was widely covered by the media in the State. Almost all the people in Kerala knows about this case. The allegation is that a Health Inspector committed rape on a lady when she approached him for getting certificate for Covid-19 negative. After reading the first information statement given by the victim, this Court also refused bail to the petitioner because the allegation in the statement was so serious. She even stated that her both hands were tied at her back and the mouth was blocked with a dothi. Thereafter there was a forceful rape. Now this victim is deposing before this Court in a notary attested affidavit that there is no such incident and it was a consensual sexual intercourse. It is stated in the affidavit that she gave such a statement to the police because of the pressure from her relatives.”

It is an admitted fact that the petitioner is in custody for the last 77 days. If the averments in the affidavit of the victim is accepted, the petitioner is in illegal custody for the last 77 days.

The Court after reading of the enquiry report revealed that it is a false case and the police decided to take legal action against the defacto complainant under Section 182 IPC.

Lastly, the Court stated that the,

“But in the light of the enquiry report no criminal offence will attract because the lady is aged 44 years and she says that she had sex with the petitioner and it was with her consent. But the damage caused to the poor health workers in the State who were working day and night against the Covid 19 pandemic is irreparable.

Further, the Court closed the proceedings

<https://www.latestlaws.com/latest-news/false-rape-accusation-hc-directed-the-police-to-take-legal-action-for-making-false-complaint-against-a-man-read-order/>

**[Tandav Highlights] HC directs Aprna Purohit to appear
before investigation officer**



The Allahabad High Court has directed Amazon content head Aprna Purohit to appear before the investigating officer on 23.02.2021 at 2 p.m. in connection to investigation of matter related web series “Tandav.”

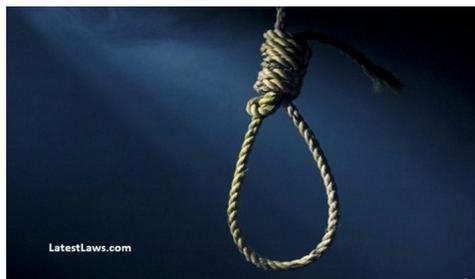
The **Single Bench of Justice Dinesh Kumar Singh** while dealing with anticipatory bail filed by Aprna Purohit has passed direction for applicant to fully cooperate in the ongoing investigation. The court has directed that,

“Considering the aforesaid undertaking, the accused-applicant is directed to appear before the investigating officer tomorrow i.e. 23.02.2021 at 2 p.m. at Police Station Hazratganj, Lucknow. The investigating officer shall interrogate/investigate and, if it is required, intimate further date for appearance of the accused-applicant.”

The court has extended the protection order till next date and listed the present on 9 th March, 2021 for next hearing.

<https://www.latestlaws.com/latest-news/tandav-highlights-hc-directs-aprna-purohit-to-appear-before-investigation-officer-read-order/>

HC: Hunger strike cannot be viewed as a suicide attempt, hence cannot invoke offence under Section 309 IPC



The Madras High Court in a recent ruling held that sitting on hunger strike would not amount to an attempt to commit suicide and certainly cannot be viewed as an offence under Section 309 of the Indian penal Section 309 which criminalizes suicide attempt.

Background of the Case

A criminal case was registered against the petitioner alleging him of the offence under Section 309, IPC after he participated in hunger strike from August 15, 2013 to August 24, 2013. In 2016, after a charge sheet was filed, the trial court took cognizance of the case.

Case of the Petitioner

The petitioner contended that going on hunger strike cannot be construed to mean that it is an attempt to suicide. Moreover it was also stated by the petitioner that the trial court was barred from taking cognizance of the 2013 FIR in 2016 as per the Section 468 of the Code of Criminal Procedure.

Section 468 pertains to the bar of taking cognizance after lapse of the period of limitation. In this case, it was stated that Section 309 only prescribes a 1 year penalty; it took 3 years to take cognizance of the final report.

Observation of the Court

"The Court below ought to have taken cognizance within a period of one year since the offence is punishable for a maximum period of one year. However, the Court below has taken cognizance after nearly three years without assigning any reasons. Therefore, taking cognizance of the final report by the Court below is barred by law and stands vitiated".

Thus, the petition was allowed and the criminal proceedings were set aside by the Hon'ble Court.

<https://www.latestlaws.com/latest-news/hc-hunger-strike-cannot-be-viewed-as-a-suicide-attempt-hence-cannot-invoke-offence-under-section-309-ipc-read-order/>

HC questions Centre: Is there any unified policy on penalty of Programme Code, Advertising Code, under Cable TV Rules



The Delhi High Court questions Centre as to whether there is any unified policy on penalty of Programme Code, Advertising Code, under Cable TV Rules.

The order was passed by the Court after observing that while the Cable Television Network Rules provide for the two codes, however the penalty for violating the same was not present. The Delhi High Court has directed Central government to file an affidavit specially stating that whether or not there is any structural policy framed and followed by it for imposing penalties when there is sheer violation of the “Programme Code” or “Advertising Code” under the Cable Television Network Rules, 1994.

Case of the Petitioner

The Court was dealing with a petition instituted by TV Today against an order passed by the I& B Ministry, Government of India. In reference with the impugned order, the petitioner had been directed to run “an apology scroll in bold legible font at the bottom of the screen for two days continuously” for running an advertisement of “All Seasons” Club Soda which was a surrogate advertisement for “All Seasons” Whisky.

The L-shaped advertisement was telecast on Aaj Tak TV channel during the LIVE coverage of the Independence Day event. Finding the advertisement objectionable with respect to provisions of the Cable Television Networks Act, 1995, a show cause was issued to the petitioner.

Submissions of I& B

After hearing the petitioner, I& B Ministry came to the conclusion that the color and layout of the bottle being the same as the whisky bottle of the advertiser, the advertisement was nothing but surrogate advertising and hence, the direction to issue an apology was imposed. Centre defended the order on the ground that its timing was inappropriate.

Observation of the Court

The Court observed that there was absence of a structural framework stating the imposition of penalties on the violation of the Cable Television Network Rules. The Court further proceeded to deal with interim relief in the petition. The Court observed that prima facie it can be observed that the Whisky bottle and the Club Soda bottle have apparently the same look and feel/ trade dress, which raises questions with respect to “surrogate advertising”.

Taking into consideration the reasonableness of the measure imposed and the apology, the Court decided to reduce the frequency of the apology that was suppose to flash on the screen.

In the words of the Court:

“Accordingly, at this stage, the Petitioner is directed to run a 10 second apology every hour between 8 am to 8 pm on two days.”

The matter was listed for further hearing in July, the Court added further “In the counter affidavit, the I& B Ministry shall specifically state if there is any uniform policy followed by it in imposing penalties for violation of the “Programme Code” or “Advertising Code”.

<https://www.latestlaws.com/latest-news/hc-questions-centre-is-there-any-unified-policy-on-penalty-of-programme-code-advertising-code-under-cable-tv-rules-read-order/>

Chhattisgarh HC moved against opening of schools by state govt without Covid vaccination.



A petition has been filed in the Chhattisgarh High Court against the opening of the school by the state government without proper vaccination of students.

The petition has been filed by Palak Sangh state president Nazrul Khan through advocate T.K. Jha.

The petitioner challenged the order of the Chhattisgarh Government to open the school for a month. He alleged that this decision has been taken to collect fees by intimidating parents. After studying online for 11 months, now it is the nexus of education ministers and education mafia of the state to open the school for just one month.

The state government issued an order to open schools for students from 9th to 12th standard without getting students vaccinated. It is completely wrong to force children to come to school by opening schools during an pandemic, alleged the petitioner.

In the petition, it was stated that the way the online education was imparted to the students was of such a low and poor level that if the offline examination is taken on the basis of that education, then surely a large section of students would fail. There is a probability that because of such a poor result, a large number of students can come under stress and potentially turn suicidal.

A single-judge bench of Justice Gautam Bhaduri heard the case and asked the state government to submit a reply in this matter in a week.

It is pertinent to note that the state government has issued an order to open the school from February 15. Since then, students from Class 9 to 12 are being forced to attend school. During this period, in many schools of the state, there has also been a large number of coronavirus infections among students and teachers.

PIL in Chhattisgarh HC wants higher allowance allocation for witnesses.



A PIL has been filed in the Chhattisgarh High Court over the meagre allowance being paid to people who come to testify in court.

The PIL has been filed by retired District Judge Surendra Tiwari through advocate Manay Nath Thakur. According to the PIL, in any criminal case, there is a provision to give

allowance to the witness by the government. Government officials like doctors, policemen are also included along with the private witnesses.

The petition alleged that the allowance given by the government is very low. At present, an allowance of only Rs 100 is being given to the witness, because these witnesses are not interested in giving testimony in court. It was further alleged that a witness, who lives on daily wages, has to bear a loss of income, since the witness has to pay rent, coming from a far-flung village leaving their daily work, for deposing as a witness.

In the petition, it was also pointed out that most of the witnesses do not even know that there is a provision of giving allowance to witnesses in criminal cases, due to this, the cases are not able to testify properly and there is a possibility of cases being affected.

Due to the apathy of the witnesses, there is difficulty in getting the convicts punished because of the delay in the disposal of cases. On such grounds, the petition has demanded adequate allowance be given to witnesses. So that in any case the witness does not get into trouble.

In this case, the Court has issued notice to the respondents, including the state government, to submit their reply.

Punjab and Haryana HC imposes Rs 1 lakh fine on Panjab University, UILS.



The Punjab and Haryana High Court has recently imposed Rs 1 lakh fine on Panjab University for the cancellation of the internship programme of a meritorious student due to a minor mistake.

The petitioner, Ishita Uppal, who topped the 10+2 examination (2014-15) in the Union Territory of Chandigarh, got admission in the 5-year B.A., LL.B. course offered by the University Institute of Legal Studies (UILS), Panjab University, Chandigarh. She belongs to an Economically Weaker Section (EWS). The petitioner was provided an EWS scholarship from the very beginning; but due to her illness on 12.05.2018, she could not appear in one

paper (French III) of 6th Semester scheduled to be held on 14.05.2018. Petitioner was advised 5-days bed rest by the doctor w.e.f. 12.05.2018 to 16.05.2018.

Uppal was granted the benefit of the EWS scholarship which she continued for two years. As a result, thereof, University used to refund her fee which she had already paid; but in the fourth year, when she asked for the refund of the 3rd year fee, the University did not agree on the premise that the petitioner has not produced her Detailed Marks Card (DMC) of 6th Semester. Petitioner tried to convince the University that she could not appear in her French-III paper on account of her illness, but no positive response was received in the matter for a period of a year.

After this, UILS removed her from their rolls and also cancelled the internship. The petitioner approached the director of the department, but she did not get any help. After this, the Vice-Chancellor was also requested but her request was rejected without a chance of hearing.

Subhash Ahuja, counsel for Panjab University, submitted that it is not an EWS scholarship; rather merely a free ship for tuition fee and lab charges. Participation in the internship programme is permissible only to those students who are on the rolls of the institute; but the name of the petitioner was not on the role of the Department as she neither deposited the fee for 8th Semester; nor got admission in 9th Semester, thus, disentitled herself to participate in the internship programme.

A single-judge bench of Justice Mahabir Singh Sidhu, while considering the facts and circumstances of the case held that the petitioner is having good talent, but she has been forced to suffer great trauma on account of the wholly unacceptable approach adopted by the University. She is being harassed by the University for the last two and a half years; thus, obviously, her study has also been affected. Consequently, there is no hesitation to observe that the actions of the University have not only caused great prejudice to the petitioner but also resulted in a miscarriage of justice.

Panjab University and UILS while taking drastic steps in the matter, did not realize that “student is not created for the university, but the university exists for the student”. It seems that instead of encouraging a brilliant student from EWS category, university tried to debar her to complete the B.A., LL.B. course for few thousands of rupees which she was not able to pay on account of financial incapacity. University remained oblivious of the fact that they are not running a private establishment; rather manning the University having glorious past, which produced many great personalities including former Chief Justices of India as well as the Prime Ministers of the Country, apart from other scientists of repute, said the Judge.

The Court while allowing the Petition ordered,” Since the respondents (Panjab University and UILS) have not only acted in an arbitrary manner but also taken most unreasonable stand while defending the present writ petition with full vigor just to harass a female student belonging to EWS category; therefore, the petitioner would be entitled to costs of Rs 1 lakh (Rupees One lac), as a suitable compensation. At the first instance, costs shall be paid by Panjab University and UILS in the equal share i.e., Rs.50,000/- each; however, they would be at liberty to recover the same from the erring official/officer.”

Jaipur Blasts Case- Rajasthan HC Expresses Surprise At Police Arresting An Accused Soon After His Release From 12 Yrs Custody & Acquittal In 8 Other Similar Cases



The ordeal of Shahbaz Ahmad, who was denied freedom from prison despite his acquittal in cases related to Jaipur blasts of 2008, makes a mockery of the cherished fundamental right to personal liberty guaranteed under our Constitution.

Recently, the Rajasthan High Court was shocked to learn that Shahbaz Ahmad(48), who has been under custody since 2008, was arrested again in a case related to Jaipur blasts, although he was found innocent in 8 other similar cases registered in relation to the blasts.

It was on December 18, 2019 that a Special Court at Jaipur designated to try Jaipur blast cases acquitted Ahmad in eight cases, saying that the prosecution "totally failed" to prove the accusations against him. The Special Court sentenced four other accused persons to death after finding them guilty for the 2008 blasts which killed 71 persons and injured over 200 persons.

The only allegation made by the Prosecution to link Ahmad - originally a native of Lucknow- to the blasts was that he had sent an email from a cyber cafe on behalf of Indian Mujahideen

to TV channels about the incident. However, the Trial Court rejected the Prosecution case against Ahmad and held that he had no links with the other accused and that no e-mail was proved to have been sent by him.

In June 2020, the police submitted chargesheet in this FIR. Ahmad filed an application in the trial court seeking discharge from the case on the ground of 'double jeopardy' under Article 20(2), Section 300 CrPC and 71 IPC, saying that the allegations were same and identical as the other cases in which he was acquitted after trial.

On January 27, 2020, the Rajasthan High Court denied him bail. Following that, he approached the Supreme Court.

On January 8, 2021, the Supreme Court observed that the peculiar facts and circumstances of the instant case, particularly the fact that the Petitioner had suffered 11 injuries in custody, justified the grant of bail to him.

Not stopping there, the SC bench comprising Justices NV Ramana, Surya Kant and Aniruddha Bose directed the State Government to conduct a fact-finding inquiry by a Senior IAS Officer of the State cadre into Aman's complaint of prison torture and to take appropriate action against the jail/police officers/officials who would be found guilty in such inquiry.

Recently, the Supreme Court in the case **Arnab Manoranjan Goswami v Union of India** had observed that "deprivation of liberty even for a single day is a day too many" and that "criminal law should not become a weapon for selective harassment of citizens".

However, cases such as Shahbaz Ahmad show that an ordinary citizen will have to fight long and strenuous legal battles to secure the basic freedom of personal liberty.

If investigator is charged with filing false case whenever there is acquittal, investigating authority's independence will be affected: Madras HC



The Madras High Court recently had occasion to observe that the independence of the investigating officer would be affected if in every case of an accused being acquitted, the investigating officer is exposed to allegations of filing false charges under Section 211 of the IPC (A Radhika v Wilson Sundaram).

The Court made the observation while quashing a summons issued to a CBCID officer who was accused of committing the offence under Section 211 (false charge of offence made with intent to injure) of the Indian Penal Code (IPC) after the complainant was acquitted in a case that was investigated by the officer.

Justice N Anand Venkatesh observed that the complainant's grievance was that he was made to unnecessarily undergo the agony of a malicious prosecution. Since the prosecution was investigated by the CBCID officer, the complainant wanted rope her as well as if the said officer prosecuted the false charge, the Court further noted.

The Court reiterated that a case for filing of a false charge with intent to injure would only lie against the person who initiated the criminal proceedings.

"The language used under Section 211, I.P.C. regarding false charge can only relate to the original or initial accusation through which the criminal law was set in motion. Admittedly, it was not the Petitioner who had set the criminal law in motion," stated the order.

In the case at hand, the Judge opined that the complainant may file a civil suit claiming damages for malicious prosecution. However, a criminal complaint under Section 340 of the Code of Criminal Procedure (CrPC) would not lie against the investigating officer, the Judge ruled.

Therefore, the Court quashed the summons issued to the CBCID officer.

"...the offence under Section 211, I.P.C. has not been made out against the Petitioner. The Respondent cannot pick and choose certain observations made by the trial court and this Court, and make it a basis for filing an application under Section 340, Cr.P.C. to punish the Petitioner under Section 211, I.P.C....The grounds for maintaining a suit for malicious prosecution cannot form the basis for filing a petition under Section 340, Cr.P.C. since it has to independently satisfy the requirements of Section 195(1)(b), CrPC," it observed.

Is it routine for Delhi Police to accompany bank receivers to enforce arbitral order against borrower without approaching court: Delhi High Court



The Delhi High Court has asked the Delhi Police to clarify if it is commonplace for it to accompany bank receivers for enforcing orders passed by arbitrators against loan borrower, without approaching an executing court (Tarun Krishnan Aggarwal vs SHO PS Hauz Qazi). If so, how many such actions have been taken in the last two months," a single-judge Bench of Justice Prathiba Singh asked.

The Court also put the same query to Kotak Mahindra Bank and directed it to state if its receivers take police help straightaway by visiting the residences/premises of borrowers along with the officers, without approaching the executing court.

The Court was dealing with a petition wherein the petitioners had availed of a loan facility with Kotak Mahindra Bank. However, in view of outstanding payment, arbitration was initiated by the Bank.

The arbitrator purportedly passed an order appointing an officer of the bank as receiver to take possession and custody of the movable properties of the petitioners.

The petitioners alleged that this officer, along with the Delhi Police, reached their residence one day and forcibly entered the premises.

It was inter alia claimed that the petitioners were forced to make an NEFT transfer of Rs 59,205 to the Bank and also give the Bank a cheque of Rs 1,18,410. Further, the petitioners alleged that they were threatened and continued to be harassed.

After perusing the record, the Court opined that the manner in which the order under Section 17 of the Arbitration & Conciliation Act, 1996 was sought to be enforced through the police and the receiver was contrary to law.

"..any order passed under Section 17 can only be enforced in accordance with law. Thus the party in whose favour an order under Section 17 is passed ought to approach the executing court in the concerned area for appropriate orders. The manner in which the Id. Arbitrator has directed appointment of a receiver and passed an order permitting the bank to take police aid is prima facie not tenable," the Court said.

The Court stated that the authority allegedly exercised by the police for enforcement of the order passed by the arbitrator was clearly questionable.

It thus directed the ACP of the concerned area to file a status report on the the facts pleaded in the present case. The Bank was asked to "confirm the contents of the petition".

Considering the nature of the matter, the Court stayed the proceedings before the Arbitrator subject to the petitioners depositing a sum Rs 5,00,000.

Courts of law should not be carried away by sentimentalities, conjunctures, surmises or "habitual offender" status of accused: Madras High Court



Courts of law should not be carried away by sentimentalities, conjectures or the status of an accused as a habitual offender, the Madras High Court recently had occasion to caution (R Marimuthu @ Samikannu and anr. v The State and ors.).

Justice K Murali Shankar made the observation while acquitting two men accused of snatching a gold chain, after finding various loopholes in the police investigation and inconsistencies in witness statements

"Generally, the Courts of law shall not be carried away by mere sentimentalities or the conjunctures or surmises or the status of the accused as habitual offender, but bound to proceed on the basis of legal evidence alone," Justice Shankar said.
police stations.

The two were convicted by the trial court, following which their conviction and sentence under Section 379 of the Indian Penal Code (IPC) were confirmed by a Sessions Court. The two accused, thereafter, challenged both lower court orders by way of a criminal revision petition.

The High Court, in turn, acknowledged that a revision case is not the same as an appeal case, and that the Court's role in this matter was confined to examining the legality, propriety and correctness of the concurrent findings of the lower courts in convicting and sentencing the accused.

"There is absolutely no scope for re-appreciation of entire evidence once again. But at the same time, if the appreciation of evidence is tainted with the perversity, that can be interfered with," Justice Shankar observed.

The Court eventually found that this was a fit case to interfere, given that there was material to indicate that the police may have colluded to implicate the accused.

The Court was told that the two accused had already been acquitted in two other cases foisted on them on the basis of the confession;

The Judge found, on perusing these documents, that the confession statement and the seizure mahazars for the recoveries made for cases in two different police stations were all authored by the same person, stated to be the Sub-Inspector of Police at Velliyanai Police Station;

Whereas four occurrence witnesses were cited by the police, only two were examined in court. The testimony of these two witnesses also contained inconsistencies;

It is settled law that confession statement cannot be marked or exhibited in toto and that only the particular portion, which discloses a new fact alone can be admitted in evidence under the Evidence Act. The remaining portion is legally inadmissible in evidence. In this case, however, the entire confession statement was marked as evidence;

Even assuming that the alleged recovery of the gold chain was made, there is no material to connect the accused with such recovery as the confession alleged to have been made by the first accused was not proved in accordance with law.

Therefore, the Court concluded that the prosecution had failed miserably in proving their case. Justice Shankar further opined that the trial court and the appellate court had not appreciated the evidence available in this case in its proper legal perspective.

The Judge proceeded to allow the criminal revision plea and acquitted both the accused of all charges.

**[Physical Hearing] Bombay High Court refuses to hear case
after lawyer removes mask**



Justice Prithviraj K Chavan of the Bombay High Court refused to hear a case listed for physical hearing before him on Monday after the counsel appearing in that matter removed his mask despite strict guidelines to the contrary.

Justice Chavan was hearing an appeal from a testamentary matter in which Advocates Nikhil Wadikar and Nandu Pawar appeared for the appellants.

Noticing that the counsel Wadikar had removed his mask, the Court refused to hear the matter, and removed it from the board even before it was called out.

"Learned Counsel for the appellant has removed the mask despite guidelines. ...The matter be removed from the board," the order passed by Justice Chavan said.

The Bombay High Court had on January 11, 2021 issued a Standard Operating Procedure (SOP) setting out guidelines for social distancing to be followed by lawyers/ litigants while appearing for physical hearings in the High Court.

Justice Chavan referred to the SOP as per which individual courtrooms are expected to observe the social distancing norms by allowing only limited people inside the court room.

The guidelines also mandate everyone to wear a mask at all times with lawyers required to wear them even while arguing.

The matter was removed from the board after the same was violated.

References

<https://www.barandbench.com>

<https://www.livelaw.in/>

Calcutta High Court On West Bengal Assembly Polls directed the Election Commission To Ensure Free & Fair Elections



The Calcutta High Court on Monday (01st March) dismissed a PIL that raised questions about the conduct of free and fair elections in West Bengal, based on the Election Commission's statement that it will ensure that the elections are conducted in a free and fair manner.

The Bench of Chief Justice Thottathil B. Radhakrishnan and Justice Shampa Sarkar noted in its order that it is within the domain of the Election Commission India to ensure a free and fair election in the constituencies, where a notification has been issued by the Election Commission of India.

The matter before the Court

The pith and substance of the writ petition was essentially sounding apprehension regarding the conduct of free and fair election in the State of West Bengal, where notification has been issued to conduct the election of Bidhan Sabha.

Court's observations

At the outset the Court observed that Free and fair elections are part of the democratic rights of the citizenry as a whole.

The Court dismissed the writ petition by recording the Election Commission of India's submissions that it would ensure free and fair elections in the State of West Bengal and

would do anything possible for that reason in connection with the election of the Bidhan Sabha, which had been notified earlier.

Source: <https://www.livelaw.in/news-updates/calcutta-high-court-on-west-bengal-assembly-polls-election-commission-to-ensure-free-fair-elections-170562>

The Allahabad High Court has reprimanded the government for failing to consider commuting the sentences of deserving convicts.



The UP government was recently chastised by the Allahabad High Court for failing to comply with Sections 432 (Power to suspend or remit sentences) and 433 (Power to commute sentence) of the CrPC.

The provisions are obligatory in nature, according to a Division Bench consisting of Justices Dr. Kaushal Jayendra Thaker and Gautam Chowdhary, and the government has a bounden obligation to recognise them under Section 432/ commuting sentence after 14 years under section 433 and 434 of the code.

Source : <https://www.livelaw.in/news-updates/remission-commuting-sentence-of-eligible-convicts-allahabad-high-court-1705>

The Karnataka High Court is awaiting a response from the state in the case of a sweeper who committed suicide after being forced to clean a manhole with his bare hands and no safety equipment.



The order was passed after the Court's attention was drawn to the suicide note left behind by the deceased narrating his ordeal.

On Monday, the Karnataka High Court ordered the state government to respond to an incident in which a sweeper allegedly committed suicide months after being forced to clean a manhole with his bare hands.

After petitioner advocate Clifton D Rozario filed a memo highlighting the incident, a Division Bench headed by Chief Justice Abhay Shreeniwas Oka issued the order.

The deceased had left behind a suicide note narrating his ordeal. The note revealed that he was forced to enter a manhole to clean it without safety gear or even a pair of gloves, the Court was told.

Accordingly, the Court asked the State to respond to the memo.

The Court was hearing a a batch of petitions seeking the abolition of the practice of manual scavenging in the State. During the hearing, the bench also discussed the death of two manual scavengers, who had suffocated in a manhole in Karnataka's Kalaburagi on January 28.

The State government had been ordered by the High Court to produce a report on the investigation into the January 28 incident that resulted in the deaths of two manual scavengers. The Executive Engineer had filed a report as a result of this.

The Court concluded after reviewing the report that it appeared to have been submitted without any investigation.

Source: <https://www.barandbench.com/news/litigation/karnataka-high-court-state-suicide-sweeper-forced-clean-manhole-bare-hands>

While refusing to transfer the case from Thane Sessions Judge, the Bombay High Court clarified that the court cannot be interpreted as being biased against the accused or victims.



The trial in the case had been previously transferred from the Principal District & Sessions Judge to another judge, on account of the former being over-burdened.

While refusing to transfer a pending trial from one Sessions Judge to another, the Bombay High Court recently observed that courts cannot be perceived to be biased towards the accused or the victim (*Sandeep Lahoriya v. State of Maharashtra*).

The Bench of Justices SS Shinde and Manish Pitale made the observation while disposing of a plea filed by one Sandeep Lahoriya seeking a direction from the High Court to transfer his case from Sessions Judge RR Vaishnav to any other court.

The Court refused to grant the directions prayed for by the petitioner, opining,

“We are of the opinion that the role of the court presided over by the learned Judge and that of the Public Prosecutor is to ensure that the accused are brought to book and that proceedings are conducted in a fair manner so as to ensure that justice is done, both to the accused as well as to the victim.

The endeavour of the proceedings is to ascertain as to who is guilty of the alleged crime and it can neither be an approach giving an impression that there is a bias, either in favour of the accused or the victim. Neither can a Court be perceived to be accused centric nor can it be perceived to be victim centric in its approach.”

The Court further held that transfer of a criminal trial from one court to another cannot be routinely ordered. The apprehension expressed by the parties has to be reasonable and based on sufficient material on record, the Bench reiterated.

The petitioner was the son of late Sunil Lahoriya, who was murdered in front of his office pursuant to which an FIR was registered, chargesheets were filed, accused were arrested and trial commenced.

During the pendency of the trial before the Sessions Court at Thane, Maharashtra in 2018, an order was passed by the Division Bench of High Court to expedite the proceedings of the trial court.

After this order, a writ petition came to be filed in the High Court arising out of certain orders passed by the Sessions Court wherein prayers were also made for grant of bail to the accused persons, considering the slow pace at which the trial was being conducted.

The High Court was not inclined to grant any relief in this petition, considering its earlier order directing the trial to be conducted on a day-to-day basis. However, after it was found that the Presiding Judge was over-burdened with other work, the Division Bench directed the transfer of the trial to Judge Vaishnav.

One of the accused in this case challenged this order before the Supreme Court, which upheld the transfer of the case in August 2019.

Pursuant to the transfer of the proceedings, the trial was undertaken and 52 witnesses stood examined. At this stage, Lahoriya moved an application before the Principal District and Sessions Judge at Thane under Section 408 of the Code of Criminal Procedure (CrPC) seeking transfer of the trial from Judge Vaishnav to another Sessions Judge.

The Principal Judge of the Sessions Court, Thane subsequently passed an order recording that the petitioner was required to satisfy his locus to file such an application. Since a transfer had already been granted, any further transfer would amount to “judicial indiscipline”, the judge had held.

Aggrieved by the order, the present plea was filed before the High Court, which issued notice and stayed the proceedings before the trial court. Due to the COVID-19 pandemic, the matter was not taken up for hearing until this year.

The principal ground raised by Lahoriya was the manner in which Judge Vaishnav has been conducting the trial. Lahoriya claimed that the judge’s conduct was creating an apprehension that he is in a hurry to wrap up the trial, due to which procedural and substantive errors had allegedly been committed while conducting the trial.

Senior Advocate Rajeev Chavan, appearing for the co-accused, opposed the contentions raised on behalf of the petitioner, terming them “imaginary and fanciful”. He submitted that these contentions were raised with an intention to delay the proceedings before the Sessions Court.

Upon considering the submissions of the parties, the Court opined,
“...acceding to the prayers made on behalf of the petitioner in this writ petition would amount to reopening the consideration on the basis of which the order dated 9th August, 2019 was passed by the Division Bench of this Court, which significantly stood confirmed by the Hon’ble Supreme Court also. It is only if glaring circumstances are demonstrated by the petitioner that such an exercise can perhaps be undertaken.”

While refusing to transfer the case, the Court passed certain directions to the Sessions Judge and the public prosecutor appearing in the case.

“This Court expects the SPP representing the prosecution in the court below as well as the learned Judge conducting the trial to ensure that the trial is conducted in a manner, which is fair and proper. The role of the counsel representing the accused is also crucial because they are expected to perform their duties as officers of the Court.”

Source: <https://www.barandbench.com/news/litigation/court-cannot-be-perceived-to-be-accused-or-victim-centric-bombay-high-court>

The Madras High Court has given a notice in the DMK’s contempt suit about OBC reservation in state-surrendered medical seats.



In July, the High Court had ordered the formation of a Committee to decide on the manner in which reservation for OBCs can be implemented for State-surrendered medical seats.

The Madras High Court has issued notice in a contempt petition moved by the Dravida Munnetra Kazhagam (DMK) over the authorities’ failure to comply with the High Court’s

judgment concerning the implementation of Other Backward Classes (OBC) reservation in medical colleges in Tamil Nadu.

A Bench of Chief Justice Sanjib Banerjee and Justice Senthilkumar Ramamoorthy issued notice in the contempt petition on Monday after hearing arguments made by Senior Advocate P Wilson for DMK. The matter will be taken up next on April 26.

In July last year, the High Court had ordered the formation of a committee to decide on the manner in which reservations for OBCs can be implemented for State-surrendered medical seats in the All India Quota (AIQ) in non-Central medical colleges.

Improper constitution of the Committee: The DMK recounted that the High Court had directed the inclusion of the Health Secretary of the Government of Tamil Nadu and the Director General of Health Services (DGHS) in the Committee. However, the Committee formed by the Centre omitted these two functionaries. It was noted that the Committee formed by the Centre comprises the DGHS Chairman, the Assistant Director General of the DGHS, a Corporation member of the Tamil Nadu Medical Services and members of the Medical Council of India (MCI) and the Dental Council of India (DCI). Pertinently, it was pointed out that instead of the State's Health Secretary, a Corporation Member was nominated to the Committee by the State government's Chief Secretary. In view of the same, the Chief Secretary was also impleaded as a respondent in the contempt case.

The Committee's Terms of Reference (ToR) have been modified to deal only with OBC reservations rather than look into reservations of candidates of the Scheduled Caste/Scheduled Tribe categories. This modified ToR, which is confined only to the OBC students, leaves the interests of Scheduled Caste students in the lurch, and will ultimately also drag the issue beyond 3 months, the DMK said. Notably, in Tamil Nadu a total of 69% reservation has been provided for OBCs, SC and ST, of which OBC (BC and MBC) reservations are to an extent of 50%. The 69% reservation is rooted in the Tamil Nadu Backward Classes, Schedules Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993.

The High Court's direction that the decision of the Committee should be made preferably within three months has also been willfully and blatantly violated with all impunity.

Due to the indecisiveness, the purpose for the formation of the Committee and the decision to grant 69% reservation in the All India Quota in the State-contributed seats stands defeated.

In this backdrop, the DMK argued that the Centre is deliberately delaying the implementation of the High Court's orders. It was also pointed out that the prospectus for 2021-22 postgraduate admissions has been issued without factoring in the reservation.

Source: <https://www.barandbench.com/news/litigation/obc-reservation-state-surrendered-medical-seats-madras-high-court-notice-dmk-contempt>



WHERE LAW MEETS QUALITY

NEWS

AIBE XVI POSTPONED TO APRIL 25, 2021

Schedule – AIBE –XVI

Activity	Important Dates
Online registration begins from	26 th December, 2020*
Bank payment through challan starts from	26 th December, 2020*
Online registration close	22 nd March, 2021*
Last date for payment	26 th March, 2021*
Last date for completion of online form	31 st March, 2021*
Online release of admit cards	10 th April, 2021*
Date of Examination	25 th April, 2021*

The Bar Council of India (BCI) issued a notification on Sunday giving a revised schedule for the exam. As per the new schedule, the last date for online registration has been extended to March 22, 2021.

The last date for payment is March 26 and the last date for completion of online forms is March 31. Online release of admit cards will happen on April 10. Earlier, the BCI had held AIBE XV on January 24, 2021

INTRODUCING A SETTLEMENT AND COMMITMENT REGIME IN INDIA BY TURBO-CHARGING MARKET CORRECTION



Addressing market failures has assumed a central place in public policy. A market failure may emanate from a variety of sources including monopoly power and other variants of anti-competitive conduct, where a firm controls the market and can set higher prices. A market

failure, whether emanating from structure or conduct, exerts tremendous cost on the economy and on consumers.

Competitive dynamics add an angle to market failures. In new age markets such as digital platforms, high-tech markets like pharma, the speed of market dynamics may warrant a swift correction. The speed of correction or remedy of a given market failure defines the efficacy of the intervention in many cases. Hence, the speed of correction or remedy of a given market failure assumes great significance especially in today's fast-changing economy.

Competition distortions are primarily remedied under the Competition Act, 2002. A remedy typically has two components: time taken to correct a market failure and efficacy of the remedy including penalties. In the absence of any summary statistics, one can reasonably state that a matter which merits due investigations and an order by **Competition Commission of India** (CCI) may take anywhere between one and five years before it is appealed at National Company Law Appellate Tribunal (NCLAT) and/or the Supreme Court. As per the Competition Commission of India (CCI) Annual Report 2018-19, between 2011 and 2019, only 0.4 percent (net) of the total penalties awarded could be realized. Approximately 35 per cent of CCI orders are appealed at NCLAT. Therefore, long legal proceedings and minimal market correction yielded by penalties or other remedies are at odds with the dynamic nature of market competition. In simple words, by the time a remedy is offered by the legal apparatus, it may have partly or fully lost its usefulness to consumers.

The EU and the US experience

Use of a settlement mechanism is quite revealing, internationally. Regulation 1/2003 introduced settlement decisions as a new enforcement instrument at the European Union (EU) level. In 2008, settlements were introduced for cartel cases. The EU as well as national competition authorities like Germany Federal Cartel Office (FCO) have extensively used settlement mechanisms since their introduction.

Similarly, the US has a longstanding practice of settling a large number of cartel cases through the 'settlement track'. Such timeliness introduced through a settlement mechanism yields twin benefits: firstly, it allows a competition authority to conserve resources for cases which merit detailed investigations, and secondly, consumers may receive the benefits quickly once a market failure is corrected.

The Indian experience

In India, there are favourable precedents of using the settlement mechanisms. The Securities and Exchange Board of India (SEBI) has brought the SEBI Settlement Regulation, 2014

under the SEBI Act, 1992 for settlement of specific violations of various laws in relation to the securities market by payment of fees without admitting guilt.

Similarly, to settle matters pertaining to income tax, the Settlement Commission was constituted in 1976 under the Income Tax Act, 1961 and the Wealth Tax Act, 1957. An assessee can approach the Settlement Commission at any stage of the proceedings for assessment pending before an Assessing Officer, subject to certain prescribed conditions. The Commission has the power to grant immunity from prosecution from any offence and also from imposition of penalty in cases where the applicants make a full and true disclosure of their income or wealth. The orders passed by the Settlement Commission are conclusive as to the matters stated therein and no appeal lies to any authority against these orders.

Making Settlements Work

- If acceptance of settlement by a party leads to a finding of contravention of the Competition Act, the settlement should be made on a “without prejudice” basis, so that the party may still defend itself against any subsequent legal actions. There should be a protection from follow on compensation claims. This is critical since there is no possibility of an appeal against the settlement order under the current wording of the Draft Bill.
- If the settlement process fails, the party offering the settlement should be protected from any prejudice. Information and materials from settlement negotiations should not be used in any subsequent investigation or for any other purpose.
- If the settlement proposal is accepted by the CCI, the settlement order must state that no proceedings shall be initiated against the applicant in the future by the CCI arising from the “same conduct”.
- In the Draft Bill, if the CCI and the party or parties concerned do not reach an agreement on the terms of the settlement, the CCI can reject the application for settlement. The legislation should clarify who are the “parties concerned” to the settlement. Involved parties should be allowed to settle the case amongst themselves prior to the CCI directing an investigation, allowing the informant to withdraw its complaint, or to settle the case at a later stage. The CCI can be subsequently notified of such settlement or withdrawal of information.
- The Draft Bill refers to payment of a “sum” further to settlement. The deposit of a monetary sum may not be justified if the settlement terms are on a without

prejudice basis. Payments should not be mandatory, but only when required by the CCI.

- Settlement provisions should be extended to all ongoing inquiries, since the objective is to ‘restore competition’ and save time and resources for the CCI and the investigated party.

Turbocharging Settlements and Commitments

- Elsewhere, at Stanford University, competition experts are figuring out how competition authorities can make use of machine learning to address information asymmetries and use computational tools to process data more efficiently and understand practices better. Such adoption of computational tools is bringing the “law time” closer to “market time.”
- The Competition Act seeks to promote and protect competition in markets. In the current economic context, when post-COVID recovery is on top of the policy agenda, competition law can provide the economic stimulus needed. Instead of the CCI entangling itself with long legal proceedings, an effective settlement and commitment regime, augmented by computational abilities, can not only scrub “anti-competitive rust” away from our markets, but also unleash healthy entrepreneurship and its consequent benefits to consumers and employees. Therefore, settlement and commitment provisions should be implemented in India at the earliest opportunity.

NHAI draws a line to stop Queues from forming at Toll Plazas due to glitches in reading of FASTags



The National Highways Authority of India (NHAI) will draw a distinct coloured line at every toll lane on National Highways & once the queue of vehicles touches that line, the toll operator will have to open the gate for all vehicles on that particular lane to travel free.

Sources said the plan is being prepared & this has started after the road transport ministry started real time monitoring of toll plazas and queues in its response to reports of congestion despite increased use of FASTag for paying toll charges. “There is strict live monitoring at the top level & we have been directed to take all necessary steps to ensure commuters pass through toll plazas smoothly since the government has promised seamless travel through plazas with the use of FASTag to pay toll, which has been made mandatory,” said a senior NHAI official.

For the past few days, senior officials including the regional officers, general managers and chief general managers have been supervising the traffic management at toll plazas. One of them said, “The number of transactions through FASTag has increased to 90% from merely 60-70% even at toll plazas in remote areas. So, now we can’t hide behind any excuse for congestion at toll plazas. Strict monitoring of live data through an IT platform has brought huge change in the past few days,” he added.

Meanwhile, officials said the distance at which the coloured line will be put will differ from plaza to plaza depending on the traffic flow & the number of toll lanes available at particular sites.

They also claimed that all toll operators have been strictly instructed to allow people to cross the plaza for free, if their system doesn’t work or fail to read the smart tag. The notification issued by the road transport ministry on May 7, 2018 specifies, “If a vehicle user with a valid, functional FASTag or any such device with sufficient balance in the linked account crossing a fee plaza installed with electronic toll collection infrastructure, is not able to pay user fee through FASTag or any such device owing to malfunctioning of electronic toll collection infrastructure, the vehicle user shall be permitted to pass the fee plaza without payment of any user fee. An appropriate zero transaction receipt shall be issued mandatorily for all such transactions.”

Complaints of no discount for return journey: There have been some complaints of commuters of not receiving the discount for return journey within 24 hours & they are ending up paying full toll both ways. The discount for return journey is allowed as per NHAI rules on public funded stretches where the toll is collected for NHAI. This rule doesn’t apply to most of the tolled stretches under private players because of specific contract conditions. However, NHAI officials said they will look into the issue & fix it soon.

<https://www.latestlaws.com/did-you-know/nhai-draws-a-line-to-stop-queues-from-forming-at-toll-plazas-due-to-glitches-in-reading-of-fastags/>

ARTICLES

THE TRADE UNION ACT, 1926



INTRODUCTION:

It is an act to provide for the registration of Trade Unions and in certain aspects to define the law relating to registered trade unions. It also confers on a registered trade union for certain protection and privileges.

This act extends to the whole of India and applies to all kinds of unions of workers and employers, which aim at regularizing labour management relations.

Under this act “Trade Union” is described as any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between employers and workmen and workmen and workmen, employers and employers, or for the imposing restrictive conditions on the conduct of any trade or business, and also includes any federation of two or more Trade Unions:

Provided that this act shall not affect:

- Any agreement between partners as their own business.
- Any agreement between those employed by the employers and him as to such employment.
- Any agreement related to the consideration of the sale of goodwill of a business or of instruction in any trade, profession and handicraft.

Formation and registration of Trade Unions

❖ Appointment of Registrars:

The government shall appoint a person to become the registrar of Trade Unions for each state. The government can also appoint as many additional and deputy registrars of trade unions as it thinks fit for the purpose of exercising and discharging, under the superintendence and direction of the registrar.

Such powers of the registrar under this act as it may by order, define and specify the local limits within which any such additional or deputy registrar shall be deemed to be the registrar in relation to the Trade union can exercise and discharge the powers and functions so specified for the purpose of this act.

❖ **Mode of Registration:**

Any seven or more members of the trade union, by subscribing their names to the rules of the trade union and by otherwise by assent with the provisions of this act with respect to apply for registration of trade union under this act.

Where an application has been made under subsection (1) of this act for the registration of the trade union, such an application will not become invalid merely because of the fact that at any time after the date of the application, but prior to the registration of the trade union, some applicants but not exceeding more than half of the total number of persons who made the application, have become or ceased to be members of trade union or have given notice to the registrar in written for dissociating themselves from the applicants.

❖ **Applications for Registration:**

Every application for the registration of the trade union shall be made to the registrar. Accompanied with a copy of the rules of the trade union and the statement of the following particulars mentioned below:

- The names, occupation and address of the applicants making the application.
- Name of the Trade Union with the address of its head office.
- The Titles, names, address, occupation and age of the office bearers of the trade unions.

In case of trade union that has been in existence for more than one year, shall deliver a general statement of assets and liabilities of trade union prepared in such form and containing details as may be described to the registrar together with the application.

❖ **Provisions to be included in the trade union:**

A Trade Union cannot be entitled to registration under this act, unless the executive is made according to the provisions of this Act. Some of the provisions are as follows:

- Trade union name.
- Objectives behind the establishment of the Trade Union.
- List of members of the trade unions.
- The manner in which the rules shall be amended and etc.

❖ **Power to call for further particulars and to request for the alterations of names:**

The registrar can call for further information for the purpose of satisfying himself that any application submit by the applicant complies with the provision of the Trade Union Act, 1962 under section 5, or the trade union is entitled to registration under section 6.

If in the opinion of the registrar, the trade union name which is going to be registered is identical to the existing trade union which is already registered under this act and is likely to deceive the members of that trade union and the public in general than the person applying for the registration of the trade union must change or alter the name of the trade union as stated in the application.

❖ **Registration:**

If the registrar is satisfied that the trade union has met with the requirements which are required for the registration under this act shall register the trade union by entering in a register and should be maintained in a form as prescribed.

❖ **Certificate of Registration:**

At the time of registering a trade union the registrar shall issue a certificate of registration in the prescribed form which shall be conclusive evidence that the trade union has been duly registered under this act.

❖ **Cancellation of Registration:**

A certificate of registration of the trade union may be cancelled or withdrawn by the registrar after the verification if the registrar is satisfied that the certificate is obtained by mistake or fraud or the trade union already exists.

The registrar must provide not less than two months before the notice in writing to the trade union specifying the ground on which it is proposed to cancel or withdraw the certificate.

Rights and liabilities of the Registered Trade Unions

❖ Objects on which the General Funds may be spent:

The general funds of the trade unions shall only be spent on the payment of the salaries, expenses and allowance to the office bearers of the trade union, expenses for the presentation of any legal proceedings to which any member of the trade union is the party, for the conduct of trade disputes among the members of the trade or the following losses arise from the disputes.

❖ Constitution of Separate Funds for Political Purpose:

A registered trade union can constitute a separate fund by contributing for that fund, and from that fund the payments for the promotion of political interest of its members can be made, or for any other objects such as payment for expenses which has incurred either directly or indirectly, or for holding any political meetings like the selection of a candidate for any legislative body under any local authority.

❖ Criminal Conspiracy in Trade Disputes:

No member of the trade union is liable for the punishment under sub section (2) of section 120B of the Indian Penal Code, 1860 with respect to an agreement made between the members for the purpose of furthering an object of the trade union as specified in section unless the agreement is an agreement to commit an offence.

❖ Immunity from civil suits in certain cases:

No suit in any civil court shall be maintainable against any registered trade union or member for any act done in contemplation of a trade dispute to which a member of the trade union is the party, merely because that such act induces other person to break a contract of employment which is in the interference of trade, business or employment of other person or with the right of some other person to dispose his/her capital or labour. A trade union also cannot be made liable for any civil proceedings with respect to the fortuitous act done in contemplation of a trade dispute by the agent of that trade union if proved that such person acted without the knowledge of any executive of the trade unions.

❖ Enforceability of the Agreements:

Notwithstanding anything contained in any other law for the time being in force, an agreement between the registered members of the trade union shall not be void or voidable merely by reason of fact that any to the subjects of the agreement are in restraint of trade.

❖ Right to Inspect Books of Trade Unions:

The books of account and the list of the members of the registered trade union shall be open for inspection by the members or the office bearers of the trade union at the time provided in the rules of the trade union.

❖ **Rights of Minors for the Membership of Trade Unions:**

A person who has attained the age of 18 years can be eligible to become a member of a registered trade union and can enjoy all the rights of the members and can also execute all instruments given under the rules.

Effects of change of name and amalgamation

At the time of change in the name of the registered trade union shall not affect any rights of the trade union. And at the time of the amalgamation of two or more trade unions it shall not affect any rights of any trade unions or any rights of a creditor of any of the trade unions.

Objects and Scope of Trade Union

- To protect workers against exploitation by employers.
- To ensure the security of the workers.
- For the representation of the grievances of employees on their behalf to the management.
- Secure power to influence management.
- Secure the rights of labours under the labour laws.
- Secure power to influence the government.
- Increase participation in management in decision making.
- Safeguarding organizational health and interest of the industry.
- Regulates the conditions governing the registration of trade unions.
- It confers on legal and corporate status on registered trade unions.

Functions of the Trade Union

• **Militant Function:**

The one of the activities performed by the trade unions is for the betterment of position of their members in respect to their employment. The goal of such activities is to make sure that all the clauses of the hiring contract are respected. When the trade union fails to accomplish

these goals through collective negotiation and bargaining, in extreme conditions they take on rigorous measures in the form of strike, boycott, go-slow etc.

- **Fraternal Function:**

Another function performed by trade unions is to support its members when needed and help to improve their efficiency. Trade unions try to foster a spirit of cooperation and promote friendly relationships among their colleagues. They also organize legal assistance in some cases. Rather than this, they also handle many kinds of welfare measures for the members, like school for the education of children, indoor and outdoor games, etc.

- **Other Functions**

Trade unions have many other functions as well likewise:

- 1) Representative Functions
- 2) Service Functions
- 3) Regulatory Functions
- 4) Government Function
- 5) Public Administration Function

CASE LAWS

- **Karur Vysya Bank Retirees' Association Vs Deputy Commissioner of Labour, 2019.**

Facts: This Appeal has been documented to put aside the request dated 26.10.2016 passed in O.M.A3/5794/16 by the Respondent, specifically, Deputy Commissioner of Labor I, Chennai, who is the Authority under the Trade Unions Act, by which, the solicitation of the Appellant Affiliation (hereinafter alluded to as 'the Association') to enlist its Association was negated by the Authority on the ground that the individuals from the Association are not in administration.

It isn't in contest that none of the individuals from the Association are in work of the Bank, however they were ex-representatives of the Bank. It is the situation of the Affiliation that the individuals from the Association had chosen to shape an Association to uphold their complaints, identifying with annuity and different advantages, as the current Trade Union isn't generally drawing out their complaints. It is the further instance of the Association that the issue with respect to the qualification time frame for the reason benefits can be brought up

in the structure an Industrial Dispute and it is impossible by an individual or he can't approach the Civil Court for the alleviation. It is presented that the individual is additionally banned from moving toward this Court via Writ Petition, as the Court may close the entryways on the ground that the contested inquiry of reality can't be gone under the watchful eye of this High Court.

Held: The words utilized in Section 2(g) of the Trade Union Act, 1926 are that the contest among businesses and representatives, which implies that even the previous workers, for example representatives stopped to be in business are likewise qualified for be a piece of Trade Union to raise a debate. That being the situation, the Authority was wrong in declining to enlist the Trade Union and the request for dismissal is erroneous.

The word utilized under the Trade Union Act, 1926 is "people really drew in or utilized in an industry with which the Trade Union is associated" and it very well may be including all people regardless of whether they are in help or resigned. At the point when the actual Act accommodates an all-encompassing importance/definition, the Authority concerned can't restricted the definition to just oddball the application, as it would be against the actual object of the Trade Unions Act itself and is likewise violative of Article 19(1)(c) of the Constitution of India."

The Court anyway explained that the resigned representatives would not be allowed to "hold hands" with the Association of current workers. It was held that the idea of complaints looked at by both workers was on an alternate way and both couldn't be blended to uphold the equivalent to the business with which they are really associated.

- **All India Bank Employees vs National Industrial Tribunal & Others on 28 August, 1961.**

Facts: The appealing party under the steady gaze of this Court is the All-India Bank Employee's Association which is a worker's guild association of Bank Employees of a few banks working in India. The Punjab National Bank Employee's Union, which is a worker's guild with comparative items has been allowed to intercede in this allure on the side of the appealing party association. The three other Writ Petitions are by other Bank Employees' Unions and every one of these cases has been heard together on the grounds that in the writ petitions the point raised is indistinguishable, viz.

The one of the issues raised in this case was that the upbraided enactment contradicted the central right ensured to "trade union" by the arrangement contained in sub-clause (c) of

clause (1) of Article 19; and that it violated the freedom of equality guaranteed by Article 14 of the Constitution.

Held: The case held that the unions formed for ensuring the interests of work will accomplish the reason for which they were brought into reality, to such an extent that any impedance, to such accomplishment by-the rule that everyone must follow would be unlawful except if the equivalent could be defended as considering a legitimate concern for public request or ethical quality. As we would like to think, the privilege ensured under sub-clause (c) of clause (1) of Article 19 reaches out to the arrangement of an association and to the extent that the exercises of the association are concerned or as respects the means which the union may take to accomplish the motivation behind its creation, they are dependent upon such laws as may be outlined and that the legitimacy of such laws isn't to be tried by reference to the models to be found in clause (4) of Article 19 of the Constitution.

- **Balmer Lawrie Workers' Union vs Balmer Lawrie And Co. Ltd. And Ors, 1984.**

Issues: 1. On the off chance that a law identifying with managing industrial relations among business and worker accommodates a sole bartering specialist like the perceived association and all the while denies to the individual laborer the option to show up or to be addressed in any procedure under the Industrial Disputes Act, 1947, would it contradict the key opportunities ensured under Articles 19(1)(a) and 19(1)(c)?

2. Regardless of whether a mandatory duty under Section 20(2)(b) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labor Practices Act, 1971, is established entirely or to some degree as it is an extraction to help the delegate association in particular?

Held: On the first issue:

Court neglected to perceive how the restriction on the option to show up and take an interest in a procedure under the ID Act who isn't set up to be addressed by the recognized unions denies him the privilege to the right to freedom of speech and expression and freedom to form an association.

Presenting the situation with a recognized union on the union fulfilling certain pre-essentials doesn't deny the right to form association.

The non-recognized Appellant union has been enlisted under the Trade Unions Act and the individuals have formed their associations without impediment to anybody.

Forming an association is autonomous from its acknowledgment. The acknowledgment of a unions gives rights, duties and obligations. The individuals from a non-recognized

association can fully enjoy their fundamental freedom of speech and expression as also as forming the association.

The governing body has likewise represented this wonder where there would be unions professing to address laborers in an industry other than the recognized union. Section 22 of the 1971 Act presents some rights to such non-recognized union, including the option to meet and talk about with the business the complaints of individual workers.

On the second issue:

As individuals and non-individuals are qualified for equivalent treatment under the settlement both can be asked as a condition to the settlement to leave behind a segment of the advantages of union exercises. Such derivations cannot be a necessary extraction or assessment.

Hence, such an arrangement of allowance would not be ill-advised nor impermissible nor illicit.

Advantages and liabilities should be shared similarly among unions. If under a settlement with the agent association a few advantages build to the workers, and upon a genuine understanding of 20(2)(b), all the advantages would be accessible to the workers who are not individuals from the delegate union and who may have framed an adversary union. On the off chance that these workers couldn't be denied the advantages they would appreciate an out of line advantage if from the bundle bargain covered by the settlement, they draw benefits and renounce liabilities.

Thus, provision 17 must be perceived with regard to reinforcing worker's organization development and to liberate it from monetary limitations. Workers who are individuals from an union may pay expense for enrollment and appreciate the upside of participation yet on the off chance that by the activity of the delegate union all laborers obtain advantage or financial favorable position, the individuals and non-individuals the same can be made to make normal penance in the bigger interest of worker's organization development.

Conclusion:

Trade unionism India experiences an assortment of issues, like politicization of the unions, variety of unions multiplicity and intra-union rivalry, little size and low participation, monetary weakness, and absence of government assistance offices for individuals, weak bargaining power, dependence on case and strikes, and reliance on external initiative. This endless loop has antagonistically influenced their status and bartering power and should be broken at however many focuses as could be expected under the circumstances. In this setting

two measures ought to get due consideration. One, the improvement of a sound worker's guild instruction, which would make a group of well-equipped, well-trained and full-trade union leaders. Two associations need to play an essential and productive part in improving the personal satisfaction of the workers. They ought to manifest more noteworthy interest in such government assistance programs for their members, as education, including proficiency, wellbeing and family arranging, and sporting and social exercises. They can likewise advance individual and natural cleanliness and a sense of thrift. The public authority can consider some monetary guide to those workers' guilds which take up such government assistance activities. Such involvement in constructive activities would help trade unions in furthering the interests of their members.

The variables that make a trade union strong and healthy are unflinching adherence to the unions constitution and rules, regular installment of dues, fully agent character of the union, co-operation with sister unions and sound leadership. A methodological organization with an edified workforce is fundamental.

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WHERE LAW MEETS QUALITY

THE RELEVANCY OF FACTS SECTION 5-55 EVIDENCE



Indian Evidence Act (Introduction)

Meaning of Certain Key Terms

Facts

Law of evidence is all about the facts. Therefore, we must begin with the meaning of facts. Facts are defined by s. 3 of the Indian Evidence Act, 1872. According to s. 3, The expressions ‘relevancy’ and ‘admissibility’ are often taken to be synonymous. But they are not the same. Their legal implications are different. All admissible evidence is relevant but all relevant evidence is not admissible. Relevancy is the genus of which admissibility is the species.

Before going to further discussion in detail, we need to ascertain properly what is fact, what is fact in issue and what is relevant fact and also the related aspects thereof in view of the law of evidence.

Fact means and includes:

Fact’ means an existing thing, event or action. The event or fact which is likely to occur in future and which neither occurred in the past nor is occurring at present, do not amount to ‘fact’ within the meaning of I.E.Act.

As per I.E.Act, the fact is divided into two categories as following:-

Fact

Physical Facts (External facts) Psychological facts (Internal facts)

[they can be perceived by five senses] [they are subject to consciousness]

Positive facts Negative facts

As per Sec.2 of Indian Evidence Act, Fact means and includes ----

(i) Any thing, state of things or relation of things, capable of being perceived by the senses.

[Physical fact]

For example----

a) A, a man, saw something, it is a fact

b) B, a woman, said some words, it is fact.

c) C, a man, is riding on a horse, it is a fact.

d) Some chairs are arranged in a certain order in a certain place, it is a fact.

Ø These facts have their seat in some inanimate being or animate being, but such animate being should not be constituted by virtue of qualities.

(ii) Any Mental condition of which any person is conscious [Psychological fact].

For example-

a) A has a good reputation in his locality.

b) A fraudulently sold his car to B.

c) A has a bad opinion about B.

The feelings, opinions etc. can't be perceived by the senses but can be felt by the mind, so these are psychological facts.

Ø These facts have their seat in an animate being by virtue of the qualities which constituted it as animate.

Psychological facts can further be divided into two categories, namely, positive facts and negative facts.

Positive or affirmative facts:- These facts are those facts whose existence are positive or affirmative. For example,

a) A killed B. There are blood strains on the floor. There is a knife in the hand of A.

b) Parliament of India is situated at New Delhi.

Negative facts:- These facts mean non-existence of positive facts. For example,

- a) A and B are not seen together since last 30 days.
- b) Nothing is heard from B.
- c) No weapon is found in the house of A.
- d) A, the complainant, failed to identify B, the accused, due to lack of light.

It is pertinent to mention that in the law of evidence 'Facts' include-

- (i) the factum probandum (i.e. principal fact to be proved) and
- (ii) the factum probans (i.e. the evidentiary fact from which the principal fact follows immediately or by inference)

(2) What is 'Fact in issue'?

As per Sec.2 of Indian Evidence Act, the expression 'fact in issue' means and includes-----

Any fact from which ---

- (i) By itself or
- (ii) In connection with other facts

the existence, non-existence, nature or extent of -

- a) any right or
- b) any liability or
- c) any disability

whether asserted or denied in any suit or proceeding, necessarily follows.

Illustration:-

A is accused of the murder of B.

At his trial the following facts may be in issue:—

- a) That A caused B's death;
- b) That A intended to cause B's death;
- c) That A had received grave and sudden provocation from B;

d) That A at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

Ø Fact in issue means the matters which are in dispute or which form the subject of investigation.

Ø When a case comes before the court, it is most important that the facts in controversy should first be determined as because the evidence tendered must be relevant and pertinent to the points in issue. Evidence of collateral facts which have no connection with the principal transaction must be excluded.

Ø Facts in issue are those facts which are---

- a) alleged by one party and denied by the other in the pleadings in a civil case or
- b) alleged by the prosecution and denied by the accused in a criminal case.

Ø Facts in issue are those facts out of which some legal right, liability or disability involved in the enquiry, necessarily arises and upon which a decision must be arrived at.

Ø What facts are facts in issue in a particular case, is a question to be determined by the substantive law or by the branch of law of procedure which regulates the law of pleadings, civil or criminal.

Ø It is the main fact which controls the case and its proof often depends on the relevant facts.

Ø In civil cases the matters in dispute are sorted out and framed into issues. They become facts in issue in civil suits. So the facts in issue are determined by the process of framing of issues.

Ø In criminal cases, the ingredients of the offences become the facts in issue as they are alleged by the prosecution and denied by the accused. The charge constitutes and includes facts in issue.

For example -

A, a cashier in a factory. It is his duty to bring money from the bank and distribute it among the labourers. One day A has brought Rs.2 lakhs from the bank and misappropriated Rs.1 lakh out of the money. He is prosecuted u/s-409 of I.P.C. for committing criminal breach of trust.

A pleaded in his defence that he brought the cash from the bank, but on that particular day he was to go on leave and as such he asked the Manager of the Company for handing over the cash to some other staff. Finally, as per the direction of the Manager of the company he handed over the same to B, the Asstt. Cashier.

Now the question is whether A is liable for criminal breach of trust. According to the definition of criminal breach of trust U/s-405 of I.P.C. the following ingredients may be found before a person is held guilty----

- a) That he has been entrusted with some property.
- b) That he has dishonestly misappropriated that property.

Now, in the instant case, it may be found that the court holds A liable for criminal breach of trust, it has to decide---

- (i) Whether A handed over Rs.2 lakhs to B.
- (ii) Whether A worked on the day in office.
- (iii) Whether B worked on the day and distributed the money to the labourers.

- From
- a) The fact that A handed over the amount of Rs.2 lakhs to B.
 - b) The fact that A did not work in the office on that day
 - c) The fact that B worked and distributed the money to the labourers on that day.

The guilt or innocence of A follows and so these are facts in issue in the trial of A for criminal breach of trust.

1. Anything, state of things, or relation of things, capable of being perceived by the senses;
2. Any mental condition of which any person is conscious.

- That there are certain objects arranged in a certain order in a certain place, is a fact.
- That a man heard or saw something, is a fact.
- That a man said certain words, is a fact.
- That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is, or was at a specified time conscious of a particular sensation, is a fact.

- That a man has a certain reputation, is a fact.

From the reading of s. 3, it is clear that fact is anything which can be perceived by senses. Thus, anything which is claimed to be in existence will not be treated a fact within the meaning of s. 3 if it cannot be perceived by senses. S. 3 in defining a fact adopts a scientific approach as anything which cannot be seen, heard, touched or perceived by any other senses will not be treated as a fact. The true meaning is that if the existence of anything cannot be publicly verified will not be treated as fact. Since, in a sense, evidence is nothing but a fact which is presented before a court in order to prove or disprove a fact in issue.

A further point to note in this context is that the definition of fact as given above does not only include physical facts but also mental conditions. Illustrations (d) & (e) are about psychological facts while illustration (a) to (c) are about physical facts. Under s. 3, the meaning of fact is not limited to physical facts i.e. tangible or visible things but also any mental condition of which any person is conscious.

What is 'Relevant fact'?

"Every fact that is legally relevant is also logically relevant but every logically relevant fact may not be necessarily legally relevant."

The Indian Evidence Act is very unique in nature. This is because it was introduced some 141 years ago. The mere fact that it was introduced so many years ago does not make it unique, it is unique because in such a long time it has not been amended many times. To stay unchanged for such a long time is a very special achievement indeed because it is not considered obsolete by any means. It was introduced by Sir James Stephen who was vested with this responsibility back in the year 1871. The Indian Evidence is very important for our country. This is because our country follows the Due Process Model, which opposite of the crime control model where the police and court play an active role in solving the veracity of the allegations made. In the Due Process Model, it is the parties of the suit on whom the burden of proof is vested. Thus it is very important to have a guideline for the submission of evidence.

The Act not only regulates the procedure for the admission of the evidence it also looks after which evidence will not be admissible under Indian Evidence Act. The fact that India follows the due process model means that theoretically the discretionary powers of the judge is very

large. To prevent the judge from being arbitrary in nature while admitting evidence of a case, it is imperative that the judge is made subject to a standard set of guidelines which is to be followed across the board. This fact of denying the judge the misuse of his discretionary powers is all the more important in the present times when corruption is rampant in our country. This Indian Evidence Act is objectively used to give true justice and so that corrupt elements cannot subvert the justice system.

As per Sec.2 of Indian Evidence Act, One fact is said to be relevant to another when one is connected with the other in any of the ways referred to in the provisions of I.E.Act relating to relevancy of facts.

I.E.Act does not give any specific definition of 'relevancy' or 'relevant fact'. It simply describes when one fact becomes relevant to another fact.

Sec.5 to Sec.55 of Indian Evidence Act provides several ways in which one fact may be connected with the other fact and therefrom the concept of relevant fact can be meted out. One fact is relevant to another fact if they are connected with each other in any of the ways as described in Sec.5 to Sec.55. If a fact is not so connected, it is not a relevant fact.

All facts are relevant which are capable of affording any reasonable presumption as to fact in issue or the principal matter in dispute.

Ø Sir Stephen opines that the 'relevancy' means connection of events as cause and effect.

Ø Generally the facts relevant to an issue are those facts which are necessary for proof or disproof of a fact in issue. Such facts may be given in evidence directly or inferentially.

Ø What is really meant by 'relevant fact' is a fact that has a certain degree of probative force. They themselves are not facts in issue but may affect the probability of fact in issue.

Ø Relevant facts are subsidiary or collateral in nature, but pertinent or probable in giving rise to an inference of right or liability by a process of reasoning.

A fact may be relevant as it has connection with the fact in issue, but still it may not be admissible. For example, communication made by spouses during marriage or professional communication, communication made in official capacity relating to affairs of state etc. are not admissible though they may be relevant.

On the basis of logic and not of law it can be ascertained whether a particular fact is reasonably connected with the main issue or not. So logical relevancy signifies reasonable connection between facts. But logical relevancy is not the sole test of admitting such fact on the record of a court. Admissibility is founded on law not on logic. Many facts which are relied as probable and relevant, are rejected by law as irrelevant on the ground of public policy, precedent, remote relation or slight probative value. For examples,

- a) Communication made between advocate and client under certain circumstances
- b) Communication made by one spouse legally wedded to another
- c) Confession made to a police officer
- d) Insufficiently stamped document

The above facts are not legally relevant though they are reasonably connected with or logically relevant to the main issue.

On the other hand, there are certain facts which are logically irrelevant, but are admissible in record by the court under I.E.Act. For example,

- a) Communication made between advocate and client under certain circumstances
- b) Communication made by one spouse legally wedded to another
- c) Confession made to a police officer
- d) Insufficiently stamped document

The above facts are not legally relevant though they are reasonably connected with or logically relevant to the main issue.

On the other hand, there are certain facts which are logically irrelevant, but are admissible in record by the court under I.E.Act. For example,

- a) The facts or questions permitted to be asked in cross examination to test the veracity or impeach the credit of a witness,
- b) The facts which corroborate the evidence of a witness.

The above facts may not be relevant but admissible.

The relevancy of facts in a case of circumstantial evidence can be explained by illustration of **Rv. Richardson**. In this case, a young woman of weak intellect was alone in the cottage when her parents had gone to harvest the field. On their return, a little after mid-day, they found murdered with a throat cut. The circumstances excluded the possibility of suicide. According to the surgeon who examined the wound, the throat was cut by a sharp edged weapon by left hand. On opening the body, the deceased was found to be pregnant for some months. On the ground, there were marks of footsteps of a person who might have run hastily through indirect way with confusion and slipped into a quagmire or bog which had stepping stones and he must have been wet till his middle of leg. The impression of footsteps were taken and measured. It appeared that the impression of the footsteps were of the person who must have worn shoes and were newly mended. The shoes appeared to be with iron knobs or nails. Along the tracks of the footsteps with certain drops of blood were found. At this stage, there was neither any suspicion on any person murdering the woman nor was any suspicion on the man by whom she was impregnated. At the funeral, a number of persons assembled and the steward thought it a fit occasion to detect the criminal as he might not be absent to avoid any kind of suspicion. There were about sixty men at that time and after interment, the steward called one by one and asked them to take off their shoes, measured and found one of them had pretty of same impression as measured nearby the cottage. The person who wore the shoes was a schoolmaster and it was suspected that he might have been the father of the child and would have murdered the woman to save his character. On a closer examination, the shoes corresponded exactly with the impression the shoes were on ground near the cottage. On a closer examination, the shoes were found to be pointed at the toe but the impression of the shoes at the place of incident were round in shape. Rest of shoes corresponded exactly with the impression in dimension, shape, sole and the position of nails. On a closer examination, the shoes were found to be pointed at the toe but the impression of the shoes at the place of incident were round in shape. Rest of shoes corresponded exactly with the impression in dimension, shape, sole and the position of nails. On being questioned as to where he was on the day of the murder, he without any embarrassment replied that he was employed whole day in his master's work. His statement was confirmed by his master and fellow servant present there. A few days there-after, he was apprehended. On the examination, he acknowledged to be left-handed man. On being asked regarding some

scratches on his cheek, he told that he got scratches while pulling the nuts in the wood. He adhered to his previous statement of being employed that day in his master's work. In course of inquiry, it appeared that on the day of murder he had been absent from the work for half an hour in the forenoon; he called at a smith's shop in the way of cottage of deceased. A young girl about hundred yards away from the cottage saw a man exactly with the dress and appearance of Richardson running hastily towards the cottage at about the same time when the deceased was murdered but she did not see his return as he might have gone by a small eminence to avoid being viewed by her. It was the very track on which footprints were found. The fellow servants of Richardson recollected that on that day they and Richardson were driving master's cart. While passing a wood, Richardson left the cart saying that he must run to smith shop and told fellow that he would come back in half an hour but he took longer time. On being asked by a fellow servant, he told that he had stopped in the wood to gather some nuts. One of his stockings was wet and soiled. He told that he had stepped into a marsh which he named also. His fellow servants remarked that that he must have been either mad or drunk as there was a foot path by the side of the marsh. The time of absence from the cart and the distance of the cottage from there appeared from the cart and the distance of the cottage from there appeared that he might have gone there, committed the crime and returned. On the search, his stockings were found concealed in the tatch of his apartment. The stockings were much soiled and some blood stains were also found on them. He first told that he had bleeding in the nose a few days back and then he said that he had assisted a horse in bleeding but it proved that he had not assisted. The soil on examination was found to correspond with that of more the puddle adjoining the cottage and was of a particular kind found in the neighbourhood. The shoe-maker who had mended his shoes a short while ago, was discovered. On the shoes being exhibited to the shoe-maker, he told that he had mended the shoes which were of prisoner. It came out that he was acquainted with deceased and was on one occasion seen with her in such situation as to give rise to suspicion that he had criminal intercourse with her. On being taunted with such connection with one in her situation, he felt ashamed and greatly hurt. The man sitting next to him at the time, the shoes were measured, he appeared to be a good deal agitated. Between that time and his apprehension he was advised to fly but he answered, "Where can I fly to?" the prisoner was convicted, confessed and hanged.

According to Woodroffe and Amair Ali, this is a case of illustration of method of agreement as described by Mill excluding the supposition of chance. Thus –

- 1."the murderer had a motive- Richardson had a motive.
- 2.The murdered had an opportunity at a certain hour of certain day in a certain place- Richardson had an opportunity on that hour of that day at that place.
- 3.The murderer was left-handed – Richardson was left- handed.
- 4.The murderer wore shoes which made certain marks- Richardson wore shoes which made exactly similar marks.
- 5.If Richardson was the murderer and wore stockings, they must have been soiled with a peculiar kind of sand- he did wear stockings which were soiled with that kind of sand.
- 6.If Richardson was the murderer, he would naturally conceal his stockings- he did conceal his stockings.
- 7.The murderer would probably get blood on his clothes- Richardson got blood on his clothes.
- 8.If Richardson was the murderer, he would probably tell lies about the blood – he did tell lies about the blood.
- 9.If Richardson was the murderer, he must have been at the place at the time in question- a man very like him was seen running towards the place at the time.
- 10.If Richardson was the murderer, he would probably tell lies about his proceedings during the time when the murder was committed- he told such lies

Here are ten separate marks, five of which must have been found in the murderer, one of which must have been found on the murderer if he wore stockings, whilst others probably would be found in him.

All ten were found in Richardson. Four of them were so distinctive that they could hardly have met more than one man. It is hardly imaginable that two left-handed men, wearing precisely similar shoes and closely resembling each other, should have put the same leg into same hole of the same marsh at the same time, the one of them should have committed a murder, and that the other should have causelessly hidden the stocking which had got soiled in the marsh. Yet this would be the only possible supposition consistent with Richardson's innocence."

Relevant under the act

This act does not give any definition of word "relevant". It only lays down that a fact becomes relevant only when it is connected with other facts in any of the ways referred to, in this Act relating to the relevancy of facts. Under Chapter II, section 5 to 55 deal with the

relevancy of facts. A fact in order to be relevant fact must be connected with the fact in issue or with any other relevant fact in any of the ways referred to in Sections 5 to 55. A fact not so connected is not a relevant fact. The scheme of the Act seems to make all relevant facts admissible.

In **Wazir Chand v. State of Haryana** in which Court observed pakala ruling & said, 'applying these to the facts of the case their Lordships pointed out that the transaction in the case was one in which the deceased was murdered on 21st March & his body was found in a trunk proved to be bought on behalf of the accused. The statement made by the deceased on 20th March that he was setting out to the place where the accused was living, appeared clearly to be a statement as to some of the circumstances of the transaction which resulted in his death. Thus the statement was rightly admitted.

In the case of **R. v. Jenkins** the accused was charged with the murder of a lady. He attacked her at midnight but she had recognized her because there were sufficient light to identify him. When magistrate's clerk asked her about the accused to record her statement, she told that he was Jenkins who had done the crime. The clerk asked her that, did she make the statement with no hope of her recovery then, she replied that she was making that statement with no hope of recovery. But when the clerk read that statement over to her, before her signing, she told her to add the word 'at present' in that statement.

It was held by the court that the statement was not a dying declaration as her insistence upon the words "at present" showed that she had some, however faint hope of recovery.

Binay Kumar Singh vs The State of Bihar, (1997)

We must bear in mind that alibi, not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognized in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant.

(a) When the defence of alibi fails-Failure on the part of accused to establish plea of alibi does not help the prosecution and it cannot be held that the accused was present at the scene of occurrence, the prosecution must prove it by positive evidence. Thus the mere failure on the part of the accused to establish the plea of alibi, shall not lead to an inference that the accused was present at the scene of occurrence.

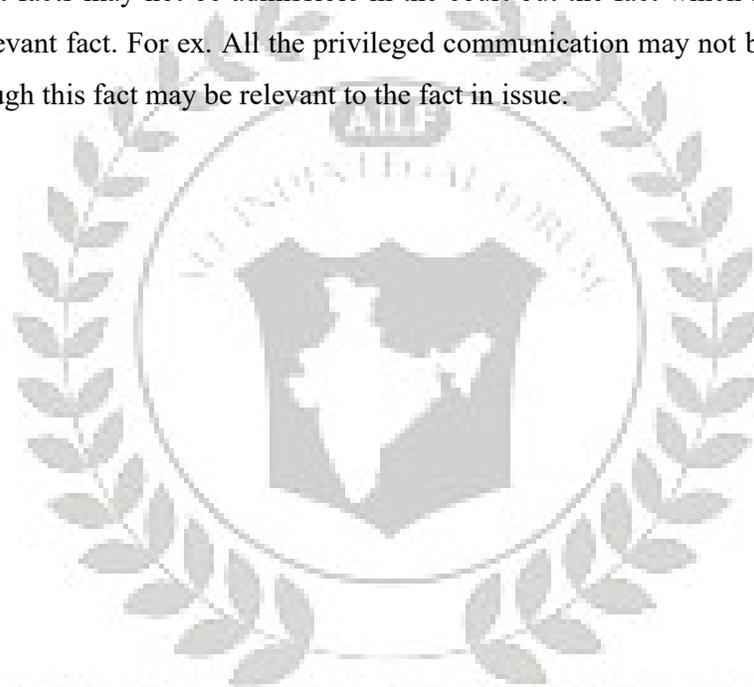
(b) Non access of husband to show illegitimacy of the child:

Since legitimacy of the child implies a cohabitation between husband and wife. For disproving the legitimacy the husband has to prove that he had no cohabitation with his wife during the probable time of begetting as he was in abroad.

CONCLUSION

Relevancy of facts means the fact which is relevant to prove the other fact. The relevancy of fact defined under sec. 5 to 55 of I.E.Act.All the fact which will fall under the sec. 5 to 55 of I.E.Act will be a relevant fact.

All the relevant facts may not be admissible in the court but the fact which is admissible in court is the relevant fact. For ex. All the privileged communication may not be admissible in the court although this fact may be relevant to the fact in issue.



SYSTEM OF BANKING



Introduction:

In India Banks and Banking have been functioning in the different groups. Each group has their own sort of function, benefits and limitations in their operations. They have their own dedicated targeted area of market. Some are concentrated their working areas in rural sector while others in both rural as well as urban. Most of them are only catering in cities and major towns as per their demands and interests.

There are mainly 3 Financial regulators in India, as follows:

1. Reserve Bank of India: Banking Sector
2. Securities Exchange Board of India (SEBI): Capital Markets
3. Insurance Regulatory and Development Authority (IRDA): Insurance Companies

Origin of Banking in India

Banking in India is indeed as old as the Himalayas. But the banking functions became an effective force only after the first decade of 20th century. Banking is an ancient business in India with some of oldest references in the writings of Manu. Bankers played an important role during the Mogul period. During the early part of East India Company era, agency houses were involved in banking. Modern banking (i.e. in the form of joint-stock companies) may be said to have had its beginnings in India as far back as in 1786, with the establishment of the General Bank of India.

Banking System

The structure of banking system differs from country to country depending upon their economic conditions, political structure, and financial system. Banks can be classified on the

basis of the volume of operations, business pattern and areas of operations. They are termed as a system of banking.

Structure of Banking System in India:

Banking system generally is classified into various sub-categories as follows:

1) Public sector banks in India:

Currently India has 12 Public sector banks and RBI is the central authority that manages all the banking operations in India. In the backdrop of banking sector reform in India and to stipulate the economic growth, the Finance Minister of India announced the merger of ten banks into four and on 1st April 2020 this announcement has come into effect. After this massive amalgamation, the total number of Public Sector Banks (PSBs) in India has come down from 27 banks in 2017 to 12 in 2020.

- Contributes to about 75% of the total deposits;
- Contributes about 70% of total advances of all commercial banks in India;
- Most have a very large branch network spread over all parts of the country;
- Have a Large deposits and assets base;
- Perform all kinds of core and modern banking functions.

2) Scheduled banks:

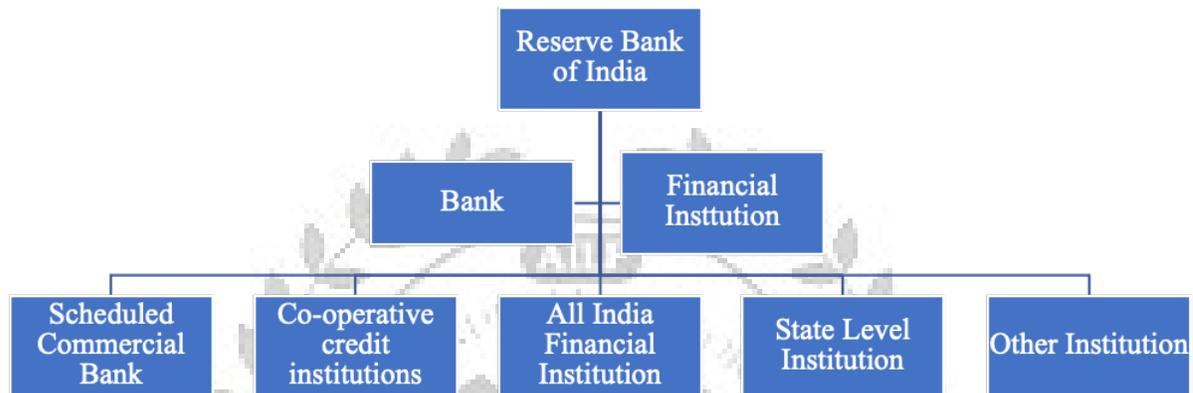
The Reserve Bank of India (RBI) is the highest banking regulatory authority in India. It was established by the RBI Act, 1934. Indian banks are basically divided into two groups; schedule banks and non-Schedule banks.

- **Scheduled banks** are those banks that are included in the second schedule of the RBI Act, 1934. On the basis of ownership;
- These banks are required to maintain certain amounts with RBI and, in return, they enjoy the facility of financial accommodation and remittance facilities at concessionary rates from RBI. Which also includes State Co-operative Banks and Commercial Banks.

The banking system plays an important role in promoting economic growth not only by channeling savings into investments but also by improving allocative efficiency of resources. The recent empirical evidence, in fact, suggests that banking system contributes to economic growth more by improving the allocative efficiency of resources than by channeling of

resources from savers to investors. An efficient banking system is now regarded as a necessary pre-condition for growth.

The banking system of India consists of the central bank (Reserve Bank of India - RBI), commercial banks, cooperative banks and development banks (development finance institutions). These institutions, which provide a meeting ground for the savers and the investors, form the core of India's financial sector. Through mobilization of resources and their better allocation, banks play an important role in the development process of underdeveloped countries.



Scheduled Commercial Bank:

- **Public Sector Bank**
- **Private Sector Bank**
- **Foreign Banks**

Co-operative credit institutions

- **Regional Rural Banks**
- **Urban Co-operative**
- **Rural Co-operative Credit Institutions**

Unit Banking System in India:

Unit Banking is a system of banking wherein a bank operates in a limited area, does not open any branches in other places and is more responsive to local needs. These independent and isolated units have to take care of the entire banking operations and maintain good health. They thus have to raise their capital and deposits locally. They are more efficient as they have a limited scale and lack of any gap between decision-makers and executives.

Unlike, branch banking, where policies are framed taking a larger context in mind, decisions are quicker and more suitable to the customers. These bankers focus on development of the

local area and better community service. These banks have their own board of directors and stockholders. The concept originated in USA.

Branch Banking System in India:

Bank operates through branches connected to each other. Each branch provides usual banking services but the control is done by the head office or central office. Branch Banking is more stable and resilient to ups and downs in the local economy because of backing by other branches and head office. Whereas Unit banks are vulnerable to failure and are subject to heavy risk in case of failure of local economy. Branch Banking has less operational freedom. Branch banking has more financial resources at its disposal. Since decision making is controlled by the head office, the process is slow in branch banking. Further, Branch banking involves higher costs of supervision. Branch banking goes hand in hand with the division of labour. Some branches may offer specialized services.

Chain Banking:

It is a form of banking when a small group of individuals control three or more banks which are independently chartered. Individuals secure enough stocks to get the controlling interest in the banking corporations involved. The management can also be established via a board of directors that can effectively create a network and undertake supervision of banking activities. Chain banking systems took shape in USA around 1925 when 33 chains were co-existing having ownership of 933 banks. The purpose was to maximise profit and goodwill in the market. The banks which entered into chains within a community, had little scope of competition from other banks operating in the same area. The investors ensured that each bank in the chain catered to the interests of different segments in the market so that there was no overlapping of interests and the returns were not compromised. There is generally no holding company to control the interests of banks. Thus, the underlying principles of chain banking are:

- 1) A small group of persons own and control a number of independent banks
- 2) Each bank carries its operations independently without any external interference by any holding company.
- 3) Every member of the chain retains its independent identity.

Group Banking:

Group Banking is the system in which two or more independently incorporated banks are brought under the control of a holding company. The holding company may or may not be a

banking company. Under group banking, the individual banks may be unit banks, or banks operating branches or a combination of the two.

Pure Banking and Mixed Banking:

On the basis of lending operations of the bank, banking is classified into:

(a) Pure Banking: Under pure Banking, the commercial banks give only short-term loans to industry, trade, and commerce. They specialize in short-term finance only. This type Of banking is popular in U.K.

(b) Mixed Banking: Mixed banking is that system of banking under which the commercial banks perform the dual function of commercial banking and investment banking. Commercial banks usually offer both short-term as well as medium-term loans. The German banking system is the best example of mixed Banking.

CHALLENGES FACED BY INDIAN BANKING INDUSTRY:

Developing countries like India, still has a huge number of people who do not have access to banking services due to scattered and fragmented locations. But if we talk about those people who are availing banking services, their expectations are raising as the level of services are increasing due to the emergence of Information Technology and competition. Since, foreign banks are playing in Indian market, the number of services offered has increased and banks have laid emphasis on meeting the customer expectations. Now, the existing situation has created various challenges and opportunity for Indian Commercial Banks. In order to encounter the general scenario of banking industry we need to understand the challenges and opportunities lying with banking industry of India.

Rural Market Banking in India is generally fairly mature in terms of supply, product range and reach, even though reach in rural India still remains a challenge for the private sector and foreign banks. In terms of quality of assets and capital adequacy, Indian banks are considered to have clean, strong and transparent balance sheets relative to other banks in comparable economies in its region. Consequently, we have seen some examples of inorganic growth strategy adopted by some nationalized and private sector banks to face upcoming challenges in banking industry of India. For example, recently, ICICI Bank Ltd. merged the Bank of Rajasthan Ltd. in order to increase its reach in rural market and market share significantly. State Bank of India (SBI), the largest public sector bank in India has also adopted the same strategy to retain its position. It is in the process of acquiring its associates. Recently, many banks merged by the Reserve Bank of India to effectively resolve the challenges faced by them.

- **Management of Risks:**

The growing competition increases the competitiveness among banks. But existing global banking scenario is seriously posing threats for Indian banking industry. We have already witnessed the bankruptcy of some foreign banks. According to Shrieves (1992), there is a positive association between changes in risk and capital. Research studied the large sample of banks and results reveal that regulation was partially effective during the period covered. Moreover, it was concluded that changes in bank capital over the period studied was risk-based.

- **Growth of Banking:**

It was found in the study of Goyal and Joshi that small and local banks face difficulty in bearing the impact of global economy therefore, they need support and it is one of the reasons for merger. Some private banks used mergers as a strategic tool for expanding their horizons. There is huge potential in rural markets of India, which is not yet explored by the major banks. Therefore, ICICI Bank Ltd. has used mergers as their expansion strategy in rural market. They are successful in making their presence in rural India. It strengthens their network across geographical boundary, improves customer base and market share.

- **Market Discipline and Transparency:**

According to Fernando (2011) transparency and disclosure norms as part of internationally accepted corporate governance practices are assuming greater importance in the emerging environment. Banks are expected to be more responsive and accountable to the investors. Banks have to disclose in their balance sheets a plethora of information on the maturity profiles of assets and liabilities, lending to sensitive sectors, movements in NPAs, capital, provisions, shareholdings of the government, value of investment in India and abroad, operating and profitability indicators, the total investments made in the equity share, units of mutual funds, bonds, debentures, aggregate advances against shares and so on.

- **Human Resource Management**

Gelade and Ivery (2003) examined relationships between human resource management (HRM), work climate, and organizational performance in the branch network of a retail bank. Significant correlations were found between work climate, human resource practices, and business performance. The results showed that the correlations between climate and performance cannot be explained by their common dependence on HRM factors, and that the

data are consistent with a mediation model in which the effects of HRM practices on business performance are partially mediated by work climate.

- **Global Banking:**

It is practically and fundamentally impossible for any nation to exclude itself from world economy. Therefore, for sustainable development, one has to adopt integration process in the form of liberalization and globalization as India spread the red carpet for foreign firms in 1991. The impact of globalization becomes challenges for the domestic enterprises as they are bound to compete with global players.

If we look at the Indian Banking Industry, then we find that there are 36 foreign banks operating in India, which becomes a major challenge for Nationalized and private sector banks. These foreign banks are large in size, technically advanced and having presence in global market, which gives more and better options and services to Indian traders.

- **Financial Inclusion:** Financial inclusion has become a necessity in today's business environment. Whatever is produced by business houses, that has to be under the check from various perspectives like environmental concerns, corporate governance, social and ethical issues. Apart from it to bridge the gap between rich and poor, the poor people of the country should be given proper attention to improve their economic condition. Dev (2006) stated that financial inclusion is significant from the point of view of living conditions of poor people, farmers, rural non-farm enterprises and other vulnerable groups. Financial inclusion, in terms of access to credit from formal institutions to various social groups. Apart from formal banking institutions, which should look at inclusion both as a business opportunity and social responsibility, the author conclude that role of the self-help group movement and microfinance institutions is important to improve financial inclusion. The study suggested that this requires new regulatory procedures and de-politicization of the financial system.

- **Employees' Retention:**

The banking industry has transformed rapidly in the last ten years, shifting from transactional and customer service-oriented to an increasingly aggressive environment, where competition for revenue is on top priority. Long-time banking employees are becoming disenchanted with the industry and are often resistant to perform up to new expectations. The diminishing employee morale results in decreased revenue. Due to the intrinsically close ties between

staff and clients, losing those employees completely can mean the loss of valuable customer relationships. The retail banking industry is concerned about employee retention from all levels: from tellers to executives to customer service representatives because competition is always moving in to hire them away.

The competition to retain key employees is intense. Top-level executives and HR departments spend large amounts of time, effort, and money trying to figure out how to keep their people from leaving.

Sekaran, U. (1989) studied a sample of 267 bank employees, this study traced the paths to the job satisfaction of employees at the workplace through the quality-of-life factors of job involvement and sense of competence. Results indicated that personal, job, and organizational climate factors influenced the ego investment or job involvement of people in their jobs, which in turn influenced the intra-psychic reward of sense of competence that they experienced, which then directly influenced employees' job satisfaction.

Mitchell, Holtom, Lee and Graske (2001) asserted in their study that people often leave for reasons unrelated to their jobs. In many cases, unexpected events or shocks are the cause. Employees also often stay because of attachments and their sense of fit, both on the job and in their community.

Saxena and Monika (2010) studied a case of 5 companies out of 1000 organizations and 8752 respondents surveyed across 800 cities in India by Business Today. The survey was on nine basic parameters like career and personal growth, company prestige, training, financial compensation and benefits and merit-based performance evaluation. It was concluded that the biggest challenge for organizations is that when new employees appointed, it is difficult to merge them in organizational culture. Each organization has its own unique culture and most often, when brought together, these cultures clash. When there is no retention, employees point to issues such as identity, communication problems, human resources problems, ego clashes, and intergroup conflicts, which all fall under the category of “cultural differences”.

Nationalization of Commercial Banks:

It was a mixed blessing. After nationalization there was a shift of emphasis from industry to agriculture. The country witnessed rapid expansion in bank branches, even in rural areas.

However, bank nationalization created its own problems like excessive bureaucratization, red-tapism and disruptive tactics of trade unions of bank employees. It was in this backdrop that wide-ranging banking sector reforms were introduced as an integral part of the economic reforms program started in early 1990s and which is still under way.

The Indian banking sector has witnessed wide ranging changes under the influence of the financial sector reforms initiated during the early 1990s. The approach to such reforms in India has been one of gradual and non-disruptive progress through a consultative process. The emphasis has been on deregulation and opening up the banking sector to market forces. The Reserve Bank has been consistently working towards the establishment of an enabling regulatory framework with prompt and effective supervision as well as the development of technological and institutional infrastructure.

Persistent efforts have been made towards adoption of international benchmarks as appropriate to Indian conditions. While certain changes in the legal infrastructure are yet to be effective, the developments so far have brought the Indian financial system closer to global standards.

Private banks are today increasingly displacing nationalized banks from their positions of pre-eminence. Though the nationalized State Bank of India (SBI) remains the largest bank in the country by far, private banks like ICICI Bank, Axis Bank and HDFC Bank have emerged as important players in the retail banking sector. Though spawned by government-backed financial institutions in each case, they are profit-driven professional enterprises.

As we know very well that, Financial Sector in India consists of three main segments:

- 1) Financial institutions -banks, mutual funds, insurance companies
- 2) Financial markets -money market, debt market, capital market, forex market
- 3) Financial products -loans, deposits, bonds, equities

Conclusion:

The banking system plays an important role in promoting economic growth not only by channeling savings into investments but also by improving allocative efficiency of resources. The recent empirical evidence, in fact, suggests that banking system contributes to economic growth more by improving the allocative efficiency of resources than by channeling of

resources from savers to investors. An efficient banking system is now regarded as a necessary pre-condition for growth.

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WHERE LAW MEETS QUALITY

SEBI ACT 1992



SEBI plays an important role in regulating all the players operating in the Indian capital markets. It attempts to protect the interest of investors and aims at developing the capital

HARSHAD MEHTA SCAM AND EVOLUTION OF SEBI

“**Harshad Mehta**” Scam is India’s one of the biggest financial scam of the value worth Rs.49.99 Billion. He was a stock broker but in its initial years of career he was Insurance agent with a company. Later, on his interest developed in the stock market, resultant he joined a brokerage firm. In the later years of his career i.e., 1984, he become the member of BSE and established his own brokerage firm called “Grow More Research and Asset Management”.



What was the Scam?

Suppose Mr.H Borrows Rs. 1,00,000 from Mr. B at 8 Percent and later on he approached Mr.C and gave him a loan of Rs. 1,00,000 at 18% P.A. ‘H’ recovered an amount of Rs.

118000 from C and paid 108000 to B. So, from all this transaction H made a profit of Rs.10k, without even investment of his capital.

Similarly, Harshad Mehta Raised money from Banks and invested the same into stock market, which was against the rules of market. Basically, he acted as broker between two banks and issued fake securities. It was at this time that he began trading heavily in the shares of Associated Cement Company (ACC). The price of shares in the cement company eventually rose from Rs. 200 to nearly 9000 due to a massive spate of buying from a set of brokers including Mehta. Exploiting several loopholes in the banking system, Mehta and his associates siphoned off funds from inter-bank transactions and bought shares heavily at a premium across many segments, triggering a rise in the BSE SENSEX. When the scheme was exposed, banks started demanding their money back, causing the collapse. He was later charged with 72 criminal offences, and more than 600 civil action suits were filed against him.

He was arrested and banished from the stock market with investors holding him responsible for causing a loss to various entities. Mehta and his brothers were arrested by the CBI on 9 November 1992 for allegedly misappropriating more than 2.8 million shares (2.8 million) of about 90 companies, including ACC and [Hindalco](#), through forged share transfer forms. He was under Criminal custody in the Thane prison. Mehta complained of chest pain late at night and was admitted to the Thane civil Hospital. He died following a brief heart ailment, at the age of 47 in December 2001.

Birth of SEBI

The SEBI comes into existence on 12th of April, 1992 to regulate the securities in India. The Harshad Mehta scam raised a serious concern with regard to transparency in the securities market in India. Controller of Capital Issues was the regulatory authority before SEBI came into existence; its derived authority from the Capital Issues (Control) Act, 1947. initially SEBI was a non-statutory body without any statutory power. However, in 1995, the SEBI was given additional statutory power by the Government of India through an amendment to the Securities and Exchange Board of India Act, 1992. In April 1988 the SEBI was constituted as the regulator of capital markets in India under a resolution of the Government of India. The Preamble of the Securities and Exchange Board of India describes the basic functions of the Securities and Exchange Board of India as “...to protect the interests of investors in securities and to promote the development of, and to regulate the securities market and for matters connected there with or incidental there to”.

SEBI has to be responsive to the needs of three groups, which constitute the market:

- the issuers of securities
- the investors
- the market intermediaries.

SEBI has three functions rolled into one body: [quasi-legislative](#), [quasi-judicial](#) and quasi-executive. It drafts regulations in its legislative capacity, it conducts investigation and enforcement action in its executive function and it passes rulings and orders in its judicial capacity. Though this makes it very powerful, there is an appeal process to create accountability. There is a Securities Appellate Tribunal which is a three-member tribunal and is headed by Mr. Justice J P Devadhar, a former judge of the Bombay High Court. A second appeal lies directly to the Supreme Court. SEBI has taken a very proactive role in streamlining disclosure requirements to international standards.

Section 24 of the companies acts 2013, seeks to provide that issue and transfer of securities and non-payment of dividend by listed companies or those intend to get their securities listed shall be managed by the SEBI. Further any public issue has to strictly implement and follow the rules and procedure guided by the SEBI.

SEBI is the key body which is regulating the securities market in India and securing the justice and transparency for all stockholders.

Purpose of SEBI

SEBI was established to keep a check on unfair and malpractices and protect the investors from such malpractices. The organization was created to meet the requirements of the following three groups:

- **Issuers:** SEBI works toward providing a marketplace to the investors where they can efficiently and fairly raise their funds.
- **Intermediaries:** SEBI works towards providing a professional and competitive market to the intermediaries
- **Investors:** SEBI protects and supplies accurate information to investors.

SEBI Bhavan

Objectives of SEBI

The fundamental objective of SEBI is to safeguard the interest of all the parties involved in trading. It also regulates the functioning of the stock market. SEBI's objectives are:

- To monitor the activities of the stock exchange.
- To safeguard the rights of the investors

- To curb fraudulent practices by maintaining a balance between statutory regulations and self-regulation.
- To define the code of conduct for the brokers, underwriters, and other intermediaries.

Board Members



Shri Ajay Tyagi
Chairman, SEBI



Shri G. Mahalingam
Whole-Time Member, SEBI
Under Section 4(1)(d) of the SEBI Act, 1992,



Ms. Madhabi Puri Buch
Whole-Time Member, SEBI
Under Section 4(1)(d) of the SEBI Act, 1992,



Shri. S. K. Mohanty
Whole-Time Member, SEBI
Under Section 4(1)(d) of the SEBI Act, 1992,



Shri Ananta Barua
Whole-Time Member, SEBI
Under Section 4(1)(d) of the SEBI Act, 1992,



Shri Tarun Bajaj
Part-Time Member, SEBI
Under Section 4(1)(b) of the SEBI Act, 1992,
Secretary, Department of Economic Affairs,
Ministry of Finance, Government of India.



Shri M. Rajeshwar Rao
Part-Time Member, SEBI
Under Section 4(1)(c) of the SEBI Act, 1992,
Deputy Governor, Reserve Bank of India



Shri K.V.R.Murty
Part-Time Member, SEBI
Under Section 4(1)(b) of the SEBI Act, 1992,
Joint Secretary, Ministry of Corporate Affairs,
Government of India



Dr. V. Ravi Anshuman
Part-Time Member, SEBI
Under Section 4(1)(d) of the SEBI Act, 1992,
Professor, Indian Institute of Management,

Structure of SEBI

The Board of SEBI comprises of nine members. The Board is an aggregate of the following:

1. One Chairman of the board – appointed by the Central Government of India
2. One Board member – appointed by the Central Bank, that is, the RBI
3. Two Board members – hailing from the Union Ministry of Finance
4. Five Board members – elected by the Central Government of India

The Chairman of SEBI, in addition to overseeing the Board, also looks over the Communications, Vigilance, and Internal Inspection Department.

There are four whole-time members in the organizational structure. The whole-time members are allocated a number of departments that they have to oversee. Each department is individually headed by an executive director. The executive directors report to specific whole-time members.

The organizational structure of SEBI consists of more than 25 departments, such as Foreign Portfolio Investors and Custodians (FPI&C), Corporation Finance Department (CFD), Information Technology Department (ITD), Department of Economic and Policy Analysis (DEPA-I, II, & III), Investment Management Department, Legal Affair Department, Treasury and Accounts Divisions (T&A), and National Institute of Securities Market (NISM).

Functions of SEBI

The functions of SEBI can be categorized into three parts

The **Protective Functions of SEBI** are as followed:

1. **Prohibits Insider Trading:** Insider trading is the buying or selling of securities by the insiders like directors, promoters or employees working in the company, having access to confidential price or information that affects the prices of securities. To prevent insider trading, SEBI has barred Trust of listed companies and employee welfare schemes from purchasing markets. It also keeps a strict check on insider trading and takes strict action in case of malpractices.
2. **Checks Price Rigging:** Price rigging refers to malpractices relating to securities, with the objective of causing unnatural fluctuations in the price of stocks leading to huge losses for investors or traders. SEBI keeps strict surveillance to prevent such price rigging.
3. **Promotes Fair Trade Practices:** SEBI prohibits fraudulent and unfair trade practices and promotes fair trading of securities by establishing regulations and code of conduct in the securities market.
4. **Provides Financial Education to Investors:** SEBI educates investors by conducting online and offline seminars that help investors get insights on financial market and money management.

Developmental Functions:

The developmental functions mean the initiative taken by SEBI to upgrade the initiative taken by SEBI to upgrade the security market with the help of technological innovations.

They are as follows:

- By training the intermediaries of the securities markets.
- Introducing electronic/internet trading through registered stock brokers.
- Introducing the DEMAT format.
- By making underwriting optional to reduce the coast of the issue.
- By the introduction of discount brokerage.

Regulatory Functions:

This refers to the establishment of regulations for financial intermediaries and corporates to make sure the market runs efficiently:

- SEBI has framed guidelines and code of conduct that are enforced to financial intermediaries and corporates.
- These intermediaries have been brought under the regulatory preview and private placement has been made more restrictive.

- SEBI regulates the working of the mutual funds.
- Regulates takeover of companies.
- Conduct enquiries and audit of stock exchanges.

SEBI committees

- Technical Advisory Committee
- Committee for review of structure of infrastructure institutions
- Advisory Committee for the SEBI Investor Protection and Education Fund
- Takeover Regulations Advisory Committee
- Primary Market Advisory Committee (PMAC)
- Secondary Market Advisory Committee (SMAC)
- Mutual Fund Advisory Committee
- Corporate Bonds & Securitisation Advisory Committee

◆ There are two **types** of brokers:

- Discount brokers
- Merchant brokers

Authority and Power of SEBI

The SEBI has **three main** powers:

- i. Quasi-Judicial:** SEBI has the authority to deliver judgements related to fraud and other unethical practices in terms of the securities market. This helps to ensure fairness, transparency, and accountability in the securities market.
- ii. Quasi-Executive:** SEBI is empowered to implement the regulations and judgements made and to take legal action against the violators. It is also authorised to inspect Books of accounts and other documents if it comes across any violation of the regulations.
- iii. Quasi-Legislative:** SEBI reserves the right to frame rules and regulations to protect the interests of the investors. Some of its regulations consist of insider trading regulations, listing obligation, and disclosure requirements. These have been formulated to keep malpractices at bay.

Despite the powers, the results of SEBI's functions still have to go through the Securities Appellate Tribunal and the Supreme Court of India.

Mutual Fund Regulations by SEBI

Some of the regulations for mutual funds laid down by SEBI are:

1. A sponsor of a mutual fund, an associate or a group company, which includes the asset management company of a fund, through the schemes of the mutual fund in any

form cannot hold:

(a) 10% or more of the shareholding and voting rights in the asset management company or any other mutual fund.

(b) An asset management company cannot have representation on a board of any other mutual fund.

2. A shareholder cannot hold 10% or more of the shareholding directly or indirectly in the asset management company of a mutual fund.
3. No single stock can have more than 35% weight in the index for a sectoral or thematic index; the cap is 25% for other indices.
4. The cumulative weight of the top three constituents of the index cannot exceed 65%.
5. An individual constituent of the index should have a trading frequency of a minimum of 80%.
6. Funds must evaluate and ensure compliance to the norms at the end of every calendar quarter. The constituents of the indices must be made public by publishing it on their website.
7. New funds must submit their compliance status to SEBI before being launched.
8. All liquid schemes must hold a minimum of 20% in liquid assets such as government securities (G-Secs), repo on G-Secs, cash, and treasury bills.
9. A debt mutual fund can invest up to only 20% of its assets in one sector; previously the cap was 25%. The additional exposure to housing finance companies (HFCs) is updated to 15% from 10% and a 5% exposure on securitised debt based on retail housing loan and affordable housing loan portfolios.
10. As per SEBI's recommendation, the amortisation is not the only method for evaluating debt and money market instruments. The market-to-market methodology is also used.
11. An exit penalty will be levied on investors of liquid schemes who exit the scheme within a period of seven days.
12. Mutual funds schemes must invest only in the listed non-convertible debentures (NCD). Any fresh investment in commercial papers (CPs) and equity shares are allowed in listed securities as per the guidelines issued by the regulator.
13. Liquid and overnight schemes are no longer allowed to invest in short-term deposits, debt, and money market instruments that have structured obligations or credit enhancements.

14. When investing in debt securities having credit enhancements, a minimum of four times security cover is mandatory for investing in mutual funds schemes. A prudential limit of 10% is prescribed on total investment by such schemes in debt and money market instruments.

Mutual Funds and SEBI

Mutual funds are managed by Asset Management Companies (AMC), which need to be approved by SEBI. A Custodian who is registered with SEBI holds the securities of various schemes of the fund. The trustees of the AMC monitor the performance of the mutual fund and ensure that it works in compliance with SEBI Regulations.

The firm must be established as a separate AMC to offer mutual funds. The net worth of such parent firm or AMC must be Rs.50,000,000. Mutual funds dealing exclusively with money markets must register with the Reserve Bank of India (RBI); all other mutual funds must register with SEBI. Recently, a self-regulation agency for mutual funds has been set up called Association of Mutual Funds of India (AMFI).

The AMFI is focused on developing the Indian mutual fund industry with professional and ethical qualities. The AMFI aims to enhance the operational standards in all areas with a view to protect and promote mutual funds and its stakeholders.

Till date, there are 44 Asset Management Companies that are registered with SEBI and are members of AMFI. Some of them are Aditya Birla Sun Life AMC Limited, BNP Paribas Asset Management India Private Limited, Edelweiss Asset Management Limited, and Quant Money Managers Limited.

A sponsor of a mutual fund scheme, a group of the company or an associate, which involves AMC of the fund, cannot hold the following in any form:

- 1) 10% or above of the voting rights and shareholding in the AMC or any other mutual fund scheme.
- 2) An AMC cannot have representation on the board of any other mutual fund.
- 3) Shareholders can't hold more than 10% of the shares both directly and indirectly in AMC of the mutual fund.

SEBI Guidelines on Mutual Funds Reclassification

- Funds must be named based on the core intent of the fund and asset mix. It should specify the risk associated clearly.
- SEBI has suggested 16 for debt funds, 10 classifications for equity funds, 6 classifications for hybrid, 2 for solution funds, and 2 for index funds.

- SEBI has reclassified large-cap, mid-cap, and small-cap based on market cap relative rankings rather than absolute market cap cut-offs.
- The debt fund classification is prescribed based on the duration of the fund and the asset quality mix. All categories except index funds can only have one fund per classification, i.e., an AMC can have a maximum of 34 funds other than index funds.

SEBI Guidelines

SEBI has brought out a number of guidelines separately, from time to time, for primary market, secondary market, mutual funds, merchant bankers, foreign institutional investors, investor protection etc.

1. Guidelines for Primary Market

- (a) **New Company:** A new company is one, which has not completed 12 months commercial production and does not have results. And the promoters do not have a track record. These companies have to issue shares only **at par**.
- (b) **New Company set-up by Existing Companies:** When a new company is being set-up by existing companies with a five-year track record of consistent profitability and a contribution of at least 50% in the equity of new company, it can issue its shares at **premium**.
- (c) **Private and closely held companies:** These having a track record of consistent profitability for at least three years, shall be permitted at price their issues freely. The issue price shall be determined only by issues in consultation with lead managers on the issue.
- (d) **Existing Listed Companies:** It will be allowed to raise fresh pricing expanded capital provided the promoter's contribution is 50% on first Rs.100crores of issue, 40% on next Rs.200 crores, 30% on next Rs.300 crores and 15% on balance issue amount.

2. Guidelines for Secondary Market:

I. Stock Exchange:

- (a) Board of Directors of stock exchange has to be reconstituted so as to include non-members, public representatives, government representative to the extent of 50% of total number of members.
- (b) Capital adequacy norms have been laid down for members of various stock exchanges depending upon their turnover of trade and other factors.
- (c) Working hours for all stock exchanges have been fixed uniformly.

(d) All the recognized stock exchanges will have to inform about the transactions within 24 hours.

II. Brokers:

- (a) Registration of brokers and sub-brokers is made compulsory.
- (b) Compulsory audit of broker's book and filling of audit report with SEBI have been made mandatory.
- (c) In order to ensure that brokers are professionally qualified and financially solvent, capital adequacy norm for registration of brokers have been evolved.
- (d) To bring about greater transparency and accountability in the broker-client relationship, SEBI has made it mandatory for brokers to disclose transaction price and brokerage separately in the contract notes issued to client.
- (e) No broker is allowed to underwrite more than 5% of public issue.

III. Foreign Institutional Investor(s):

- (a) **Allowed to invest:** Allowed institutional investors have been allowed to invest in all securities traded in primary and secondary markets.
- (b) **Restriction on volume:** There would be no restriction on the volume of investment for the purpose of entry of FIIs.

Holding of single FII will not exceed the ceiling of 5% of equity capital Tax rate – 10% on large capital gain, 30% on short term capital gains 20% on dividend.

IV. Guidelines to issue of Bonus Shares:

- (a) **Provisions in the Articles of Association:** There should be a provision in the Articles of Association of the company for issue of bonus shares.
- (b) **The bonus is made out of free reserves:** The bonus is made out of free reserves built out of genuine profits or share premiums collected in cash only.
- (c) **Time period of Bonus shares:** No bonus issues can be made within 12 months of any public issue/rights issue.

V. Guidelines for Companies Act:

- (a) **Free Pricing of Issues:** A new issue can be priced freely provided it is backed by promoters with good track record of at least 5 years.
- (b) **Underwriting made mandatory:** The new guidelines issued by SEBI have directed full underwriting of public issues.
- (c) **Issues of shares at par:** A new company with no previous track record will be permitted to issue capital only at par.

VI. Investor Protection:

- (a) **New issues:** SEBI has introduced a code of advertisement for public issues for ensuring fair and truthful disclosure. In order to reduce the cost of issue, the underwriting is made optional on certain terms.
- (b) **Investors education:** SEBI is aware that investor education is important for his protection. It encourages the formation of investors associations that disseminate information through newsletters.
- (c) **Stock invests:** SEBI has introduced stock invest as a new instrument useful while submitting application for shares. This new instrument introduced through application for shares. This new instrument introduced through the co-operation of banks gives protection to investors as they get interest on application money till the allotment of shares.

SEBI LODR regulations 2015

Listing Obligations and Disclosure Requirements (LODR) regulations for SEBI form one of the most important mandates. The regulation covers the extent of transparency and disclosures that listed companies have to abide by. In addition to the compulsory disclosure norms, the regulation also refines the listing agreement, which has to be entered between the stock exchange and the companies being listed.

The agreement consists of terms and conditions on governance, disclosures, and terms to maintain the listing status of the company. However, the new regulation in 2015 on LODR intends to consolidate all the previous amendments into one single document, making the document uniform across different segments of the capital market.

The SEBI (LODR) Regulations, 2015 entails the following:

- Disclosures and obligations that have to be acknowledged by the compliance officers of the listed company
- Listing down obligations uniform to all listed companies
- Distinct obligations for certain types of securities
- Segregating initial issuance and post-IPO norms
- Communication of the companies' fundraising activities
- Establishing timelines for notifying the exchanges of certain events
- Bringing SMEs under the ambit of the SEBI (LODR) Regulations

SEBI New Margin Rules

In September 2020, SEBI implemented new rules on margin pledge. The rule is expected to bring transparency and prevent misuse of clients' securities by brokerage firms. The new

margin rules were directed to come into effect from June 1, but were delayed due to pandemic pushing the implementation date to September 1.

The new margin rules by SEBI mandate the following:

- The stock, being pledged, is to remain in the investor's de-mat account. As the stock is not changing accounts, the benefits from corporate events accrue directly to the investors
- Upfront collection of margins by brokers for any purchase or sale of securities, penalizing any sort of failure to do so. Clients could meet the margin requirements by the end of the day, which is now changed to the beginning of the day
- Power of Attorney (POA) cannot be assigned in the favour of the brokers for pledging. As under the old system, brokers could demand POA from the investors to execute decisions on their behalf
- Margin pledge created separately for investors requiring margin
- Buy Today Sell Tomorrow (BTST) not allowed anymore for shares bought on margin. Investors are required to honour the delivery of share (T+2 days is the usual settlement period). Typically, investors would use intraday realized profits to meet the margin requirements, which is now amended by the new regulations. For a BTST trade, it can be initiated only if the net available margin is equal to or greater than 20 percent of the transaction value.

Major Achievements

SEBI has enjoyed success as a regulator by pushing systematic reforms aggressively and successively. SEBI is credited for quick movement towards making the markets electronic and paperless by introducing T+5 rolling cycle from July 2001 and T+3 in April 2002 and further to T+2 in April 2003. The rolling cycle of T+2 means, Settlement is done in 2 days after Trade date. SEBI has been active in setting up the regulations as required under law. SEBI did away with physical certificates that were prone to postal delays, theft and forgery, apart from making the settlement process slow and cumbersome by-passing Depositories Act, 1996.

SEBI has also been instrumental in taking quick and effective steps in light of the global meltdown and the Satyam fiasco. In October 2011, it increased the extent and quantity of disclosures to be made by Indian corporate promoters. In light of the global meltdown, it liberalised the takeover code to facilitate investments by removing regulatory structures. In

one such move, SEBI has increased the application limit for retail investors to ₹ 200,000, from ₹ 100,000 at present.

Landmark Judgements

The Supreme Court of India has recently passed a landmark judgment in [Adjudicating Officer \(“AO”\), SEBI v. Bhavesh Pabari](#) by which it has overruled its previous judgment in [SEBI v. Roofit Industries Ltd.](#) and explained the relevance of section 15J of the Securities and Exchange Board of India Act, 1992. The Securities and Exchange Board of India (SEBI) is empowered to initiate adjudicatory proceedings against an entity in terms of section 15I and has the power to levy penalty as prescribed under sections 15A to 15HB of the SEBI Act. Section 15J, however, states three factors which an adjudicating officer (AO) has to consider while adjudging the quantum of penalty.

Roofit Judgment

Section 15A(a) of the SEBI Act prescribes the penalty for not furnishing documents, returns or reports to SEBI. Prior to 2002, the penalty prescribed for the same was not to exceed one lakh and fifty thousand rupees for each such failure. The provision was amended in 2002 and the penalty was prescribed as one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less. The provision was again amended in 2014 and the penalty was prescribed as an amount which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.

The Supreme Court in the *Roofit Judgment* dealt with the issue whether section 15J was applicable in respect of section 15A(a) post the amendment in 2002 until it was amended in 2014. The Court observed that prior to 2002 and post 2014, the AO had discretion to decide the amount of penalty to be levied as the provision provided for a maximum penalty which can be levied by the AO. However, the provision as it stood subsequent to the amendment in 2002 until the amendment in 2014 did not give discretion to AO in deciding the quantum of penalty as it states that the minimum penalty to be imposed as one crore rupees if the failure continued for more than 100 days. This means that the minimum mandatory penalty for failure over 100 days to provide information to SEBI under section 15A(a) had been fixed by the statute to be one crore rupees and the same could not be reduced even after applying the factors stated in section 15J of the Act. Therefore, it was held by the Court that section 15J was not applicable in deciding the quantum of penalty under section 15A(a) of the SEBI Act.

Siddharth Chaturvedi Judgment

The same issue was again dealt by the Supreme Court in [Siddharth Chaturvedi v. SEBI](#) in which a division bench observed that the interpretation of sections 15A(a) and 15J adopted by the Court in *Roofit* was incorrect and was arbitrary in infringing the fundamental rights. However, as *Roofit* was decided by a division bench of the Supreme Court, the bench in *Siddharth Chaturvedi case* referred the matter to the larger bench.

Bhavesh Pabari Judgment

Recently, a three-judge bench in *Bhavesh Pabari* overruled *Roofit* and held that section 15J continued to apply to the defaults under section 15A(a) as it stood subsequent to the amendment in 2002 until the amendment in 2014. It observed that sections 15A(a) to 15HA have to be harmoniously read along with section 15J in such a manner as to avoid any inconsistency; the provision of one section cannot nullify the another unless it is impossible to reconcile the two. The bench agreed with the observation made in the reference order of *Siddharth Chaturvedi* and further observed that the insertion of an ‘explanation’ in section 15J would reflect that the legislative intent was not to curtail the discretion of AO by prescribing the minimum mandatory penalty in section 15A(a).

Most importantly, it has been categorically held by the Supreme Court in the judgment that normally the expression ‘whichever is less’ would connote the absence of discretion by minimum mandatory penalty, however the intention of the legislature was not to prescribe the minimum penalty of one lakh rupees per day during which the default and failure had continued under section 15A(a), as the same is read along with the explanation in section 15J of the Act. Moreover, it has been held that the three factors stated in section 15J are not exhaustive in nature and the AO has discretion to consider any other factor in deciding the quantum of penalty.

This judgment has made the penalty provisions under SEBI Act just and reasonable as now the AO will have power to levy lesser penalty than the prescribed minimum mandatory penalty under the penalty provisions of SEBI Act for technical defaults of smaller amounts.

IPO Scam (2003-2005): With special reference to NSDL v. SEBI Case

The settlement system on Indian stock exchanges before the depositories were established, was inefficient and embedded with high risk, due to the time that elapsed before trades were settled. The transfer was mainly governed by physical movement of papers. The physical delivery of securities was a process having fraught with delays and resultant risks. This brings theft, forgery, mutilation of certificates and other irregularities. All this added to costs and delays in settlement. This also restricted liquidity and made investor grievance redressed time consuming.



The IPO Scam in the year 2005-2006 made us aware of the abuse and misuse of the IPO allotment process. The buying and sharing process in the shares allotted through IPOs to nearly 21 companies in the year 2003, 2004 and 2005. It involved manipulation of the initial public offers (IPOs) by financiers and market players by using fictitious or benaami DEMAT Accounts. In the year 2005, the IPO scam came to light when the private 'Yes Bank' launched its initial public offering. Roopalben Panchal, a resident of Ahmedabad, had allegedly opened several fake DEMAT accounts and subsequently she raised finances on the shares allotted to her through Bharat Overseas Bank branches. After detecting the irregularities in the buying of shares of YES BANK's IPO, the SEBI started a broad investigation. SEBI decided to release the orders of a sub-committee looking into NSDL's role in the IPO scam and case of irregularities in dematerialisation of the shares of a company. Thus, the case comes up as **NSDL v. SEBI case appealed to Securities Appellate Tribunal.**

Role of SEBI in regulating NSDL

It was the SEBI's policy to start up a system of paperless trading where everything became digitalized and the physical securities got removed with the introduction of dematerialization process. In order to get the feedback of the dematerialization process, SEBI established some depository units like NSDL and CSDL.

NSDL gets governed by the Depositories Act-1996, which provided for the Dematerialization Rules to book entry-based transfer of securities in settlement of securities trade. NSDL is a Public Limited Company under the Companies Act, 1956 and performs its functions for the profit of its shareholders. The depositories in India are regulated under:

- The Depositories Act, 1996.
- SEBI (Depositories and Participants) Regulations, 1996.
- Companies Act, 1956.
- Securities and Exchange Board of India Act, 1992.
- Prevention of Money Laundering Act, 2002.

SEBI Regulations has a far bearing impact on the depositories. Chapter II of the Securities and Exchange Board of India (Depositories and Participants) Regulations 1996 deals with regulations in terms of registration of Depositories. Within a year of registration, the depositories are required to apply for certificates. Chapter III deals with the certificate for commencement of business. If the issuer or the investors wants to go for holding the securities in a DEMAT format then there is an agreement between the issuer and the depository. However, such agreement is not necessary if the depository is the issuer of the security or if the central or state government is the issuer of the securities.

IPO Scam: 2003-2006

The Scam came to the limelight when the primary market got manipulated by financiers and market players with the use of benaami DEMAT accounts. Certain entities obtained the IPO shares which was reserved for retail applicants through thousands of benaami DEMAT account. Then the shares got transferred to the financiers on the first day of listing. This brings them a huge profit by the price difference between IPO price and Listing price.

In the year 2005, 'YES BANK', a private entity launched its initial public offering. One of the scammers 'Roopalben Panchal' opened the fake DEMAT account and then raised finances on the shares allotted to her through Bharat Overseas Bank branch. On October, 2012 it was found that Purushottam Budhwani, was controlling over 5,000 demat accounts.

Himani Patel, funded 61 benami applicant and had 635 different DEMAT Account and they made 645 multiple application for 96 shares amounting Rs. 48960/-. The money for the same was routed through 22 different bank accounts in which Himani Patel was the first holder. Thus, on the basis of the allotment each application got 16 shares total numbering 10160 shares of Suzlon. These shares were off market transferred to Himani Patel's DEMAT a/c prior to listing. The shares were sold for more than Rs.839/- compared to the IPO price of

Rs.510/-. Therefore, Rs. 33,52,636/- amount was illegally earned by her.

Similarly there was fraud in Jet Airways IPO, NTPC IPO and Tata Consultancy IPO, where more than 10,000 fake DEMAT Account was found by the SEBI and thus there was a complete scam.

On 12th January, 2006 SEBI issued an ad-interim order wherein it stated that NSDL, and Depository participants being in an agent-principal relationship in terms of the Depositories Act, 1996 are liable for the conduct of their Depository Participants. Also, the Depositories are the intermediaries of SEBI so they have the responsibility of protecting the interest of the investors. Thus, SEBI had indicted NSDL as far back as in 2006 for being responsible for not properly monitoring the Depository Participants and thus being responsible for this huge scam. With this the SEBI issued ex-parte ad-interim order under Section 19 of the Depositories Act, 1996 read with Section 11,11B of the Securities and Exchange Board of India Act, for completing the inquiry. The SEBI initiated adjudication proceedings against NSDL under section 15 H of the SEBI Act, 1992 and section 19 H of the Depositories Act, 1996. Thus, the SEBI levied a monetary penalty of Rs. 5 Crores on NSDL.

**The irregularities by NSDL during the Scam
Role of DPs:**

Numerous DEMAT accounts were opened by the DPs on a single day with all the account holders having the same address. Even the addresses of the BO account holders were that of the sub-brokers of the DPs who procured DEMAT clients for the DPs. The genuineness of such DEMAT clients were not get ascertained by the DPs. Some of the DPs were found to have not only opened DEMAT accounts in fictitious / benami names but had also provided IPO financing to such fictitious / benami account holders thereby facilitating the cornering of retail portion of IPOs. There was also violation of KYC (Know Your Customer) norms applicable for opening of bank accounts and there was violation of guidelines relating to the IPO financing schemes of the banks. SEBI found in case of **Karvy Stock Broking Ltd.** (Karvey DP), that Karvy had an arrangement with BhOB and through that Karvy opened several DEMAT accounts in the name of people introduced by sub-brokers. However, in reality none of the DEMAT accounts were actually introduced through sub-brokers. While moving through investigation procedures, it was found that actually Karvy DP played a dubious role by forging the bank

letters and opening the forged DEMAT account.

Role of Depositories:

There existed a principal-agent relationship between depositories and depository participants. This means that the depositories are liable for the acts of their participants. It was said by the SEBI that there existed error in the part of the depository. For example, the DEMAT account was opened without obtaining adequate proof of identity or address. Even though the audit reports showed that there existed some problems for inspection of depository participants, but no steps were taken. The laws of NSDL say that there should a Disciplinary Action Committee to have a control over these depositories' participants. However, there were no such steps taken by the NSDL.

While inspecting the procedures taken by NSDL while punishing DPs, it was found that NSDL does not impose penalties for violations which got rectified immediately after inspection. Also, the penalties were mainly based on monetary terms and also waive the penalties imposed, if the DP reports rectification of deficiencies. This shows that in reality no penalty was imposed on the DPs by the NSDL. The investigation suggests that the DPs had failed to comply with the provisions of the SEBI regulations and it was repeated several times. There was continuous infringement of the provisions of the depositories act but there was no one to cross-check the same. This shows that there was contributory negligence of NSDL on its part. The entire scheme for cornering the retail portion of IPOs has succeeded because of the active involvement of both the Depository Participants and the Depositories.

Controversies Related

The controversy basically started with the appointment of CB Bhave as the Chairperson of the SEBI at a time when SEBI was investigating the propriety of the actions of the NSDL. CB Bhave had been the CMD of NSDL prior to his appointment as Chairman of SEBI. This led to an obvious conflict of interests. Thus, in order to avoid this conflict, it was decided that the investigation be carried out by an independent Committee. The committee was mainly formed to dispose of quasi-judicial proceedings pending against the NSDL. However, the committee held that the SEBI has failed to regulate the matters of IPO irregularities.

Thus basically two issues arise in the case, whether SEBI has power to declare the order of

special committee as ultra vires? And whether the order is required to be declared as void? The SEBI declared the orders of the Special Committee ultra vires because instead of focusing on NSDL, it was largely concentrating on the role of SEBI. On 22.6.2010, The Securities Appellate Tribunal, Mumbai, disposed of Appeal No. 21 of 2010 filed by NSDL challenging the order passé by the committee under Section 15T of the SEBI Act, 1992. The Tribunal held that all the observations against NSDL in the said order will be expunged. Thus, as a result of the orders dated 9.11.2009, 2.2.2010 and 22.6.2010 all the culprits of this major scam have managed to go scot free and escaped all accountability.

Orders

and

Analysis

Special committee's report found that National Securities Depository (NSDL) was at fault for the alleged irregularities related to the IPO scam during 2003-06. Under the chairmanship of C B Bhawe, the board on 2010 set aside the special committee report and had cleared NSDL with mismanagement charges on the IPO scam. A committee consisting of then Sebi board members G Mohan Gopal, and V Leeladhar on December 2008 had passed three orders and found that NSDL had failed in its duty of supervising, investigating, monitoring data and directed it to conduct an independent inquiry to establish individual responsibility.

The committee was not satisfied over the manner in which SEBI was functioning and looking into the entire scam. The committee held that SEBI had failed to carry out its' regulatory role adequately and recommended it to make a Code of Conduct for depositories. However, SEBI held that the findings of the committee were "outside the confines of delegation" and were without the authority of law. Thus, the orders were held to be 'null, void' and so decided to look into the matter afresh. However, on 2009, the NDSL won an appeal before the Securities Appellate Tribunal, a court designated to hear appeals against SEBI's rulings.

The order of SEBI states that Pravin Ratilal Shares and Stock Brokers Ltd., Depository Participant of National Services Depository Limited prima facie appeared to have grossly failed in adhering to the "Know Your Client" ("KYC") norms laid down by SEBI, thereby facilitating opening of DEMAT accounts in fictitious /benami names and cornering the retail portion of shares in Initial Public Offerings. Also, orders were passed by the SEBI to Karvy Stock Broking Ltd., Depository Participants was prohibited from opening fresh DEMAT account till 2007.

In the issue of Yes Bank, SEBI directed NSDL to ensure that the 6315 demate a/c of Roopalben and 1315 demate a/c of Sugandh must not be utilized for manipulation of IPO in future. The Securities & Exchange Board of India barred 13 investors from trading in the shares of Yes Bank Ltd and participating in future public issues.

Conclusion

Thus, it can be concluded that the IPO Scams held in the market during 2003-2006 was one of the biggest scams which Indian market received. The market analysts believe that retail allotments were not only fixed to the Yes Bank and IDFC cases but it was more than that. This obviously has brought the role of Depository System mainly NSDL in question. Many provisions which were required to be followed by the depository were not followed according to the SEBI guidelines. Fake DEMAT accounts in such a huge number have put us to a need of revisiting the applicable laws governing the depositories and the depository participants.

Even if clean chit has been given by the SEBI to the NSDL in terms of its involvement in the scam, the Supreme Court has still asked the SEBI to keep a stand on either of the side of NSDL. The need of the hour is to have a check and balance on the scheme of both NSDL and SEBI. The special committee which was appointed to find out the liability of the NSDL in the scam also put on some liability to the SEBI. So, there is some sort of amendment which is required to be led down in the provisions governing the SEBI and NSDL. The need of the hour is to impose a criminal penalty against the scamsters. Section 68A of the Companies Act says that public issue in the name of a fictitious title is a crime and so an imprisonment up to 5 years can be imposed on them. Small investors have incurred a heavy loss so their share prices are required to get recovered by these scamsters.

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Regulation of Monetary System



What is monetary system.

A Monetary System is defined as a set of policies, frameworks, and institutions by which the government creates money in an economy. Such institutions include the mint, the central bank, treasury, and other financial institutions. There are three common types of monetary systems – commodity money, commodity-based money, and fiat money. Currently, fiat money is the most common type of monetary system in the world. monetary system the assets which make up a country's MONEY SUPPLY and the institutions involved in deposit-taking, money transmission and the provision of credit facilities, together constitute the monetary side of the ECONOMY. The money supply consists of a number of assets (banknotes, coins etc.), denominated in terms of MONETARY UNITS (pounds and pence in the case of the UK). The institutions involved in handling money include various BANKS, FINANCE HOUSES, BUILDING SOCIETIES etc.

The monetary system of a country is controlled by its CENTRAL BANK which uses a number of techniques to regulate the supply of money and interest rates (see MONETARY POLICY). The monetary system also has an external dimension in that participation by countries in INTERNATIONAL TRADE and FOREIGN INVESTMENT requires the establishment of interactive mechanisms such as EXCHANGE RATES and INTERNATIONAL RESERVES. monetary system the policies and instruments employed by a country to regulate its MONEY SUPPLY. The physical form of the money supply (bank notes, coins, etc.), the denomination of the values of monetary units (pounds and pence, etc.) and the total size of the money supply are basic policy issues. The instruments that can be used to control the money supply include OPEN MARKET OPERATIONS, SPECIAL DEPOSITS, DIRECTIVES and INTEREST RATES. The monetary system also has an external dimension insofar as countries engage in international trade and investment, which

involve interactive mechanisms such as the EXCHANGE RATE, CONVERTIBILITY and INTERNATIONAL RESERVES. For example, the US Dollar is fiat money.

The Three Types of Monetary Systems:-

- Commodity Money:-

This is made up of precious metals or other commodities that have intrinsic value. In other words, the monetary system uses the commodity physically in terms of currency. This form of money retains its value even if it's melted down. It is not just a token or representative of monetary value like banknotes. Its worth remains intact even after it is melted. Gold and silver coins are the perfect example of commodity money. For example, gold and silver coins have been commonly used throughout history as a form of money.

- Commodity-based Money:-

This draws its value from a commodity but doesn't involve handling the commodity regularly. The notes don't have tangible value but can be exchanged for the commodity it is backed by. For example, the US Dollar used to draw its value on gold. This was known as the Gold Standard. This type of monetary system can also be addressed as representative money. This type of currencies are mostly like physical bank-notes with no financial value but can be exchanged with precious metals like gold and silver.

- Fiat Money:-

In this monetary system the currency, which by government decree is legal tender, i.e., that the government guarantees the value of the currency. Today, most monetary systems are fiat money because people use notes or bank balances to make purchases. Fiat money is made up of paper currency or a base metal coin. However, today, most of fiat money is in the form of bank balances and records of credit or debit card purchases. In modern economies or current phase, it mainly exists as data such as bank balances and records of credit or debit card purchases.

Uses of Money:-

- Medium:-

Money is used as a means of payment or a medium of exchange and therefore eliminates the coincidence of needs problem that is created by a barter system. The coincidence of needs requires that two parties want what the other person is willing to trade, and thus makes it difficult to trade.

- Measurement:-

It is also a standard unit of measurement that can be used to price things and to compare value. For example, a book costs \$150, a meal costs \$5, and a long-distance call costs \$0.10/min. To compare their value, we can say one book = 30 meals = 1500 minutes on a long-distance call.

- Value:-

Money can be used to store value, and thus it becomes an asset itself. However, money may not be a good store of value since it loses value over time due to inflation.

Types of Monetary Standards:-

Overall there can be two main kinds of monetary standards – metallic standards or paper standard. Metallic standards themselves can be of two types – monometallism and bimetalism. Let us take a more detailed look at the types of monetary standards.

Metallic Standard:

Under metallic standard, the monetary unit is determined in terms of some metal like gold, silver, etc. Standard coins are made out of the metal. Standard coins are full-bodied legal tender and their value is equal to their intrinsic metallic worth. The important thing to note is that to be on a metallic standard a country must keep – (a) its monetary unit at a constant value in terms of the selected metal, and (b) its various types of money convertible into the selected metal at constant values.

- Monometallism:-

Also known as Single Standard, here only one metal is adopted as the standard currency/money. The monetary system is made up of and relies entirely on one metal, like say the gold standard or the silver standard. So coins are made up of one metal only. This

means these coins are the legal tender for all day to day transactions. There is unlimited manufacture of coins.

Essential features of monometallic standard are given below:

- Standard coins are defined in terms of only one metal.
- These coins are accepted as unlimited legal tender in the discharge of day-to-day obligations.
- There is free coinage (i.e., manufacture of coins) of the metal.
- There are no restrictions on the export and import of metal to be used as money.
- Paper money also circulates, but it is convertible into standard metallic coins.

- Bimetallism:-

As the name suggests, in the double standard or bimetallism system, two metals are adopted as standard money. There is a fixed legal ratio between the value of the two metals to facilitate exchange. Usually, the two metals are gold and silver. So two types of standard coins are minted (gold and silver). So under bimetallism, two types of metal coins are in circulation simultaneously in the economy. Both have free coinage. And using the legal ratio of exchange both are convertible into each other. One main advantage of this system is that the economy has a full-bodied currency. Silver can be used for the smaller transactions and gold for the bigger ones.

Features of Bimetallism:-

- A bimetallic standard is based on two metals; it is the simultaneous maintenance of both gold and silver standards.
- There is free and unlimited coinage of both metals.
- The mint ratio of the values of gold and silver at the mint is fixed by the government.
- Two types of standard coins (i.e., gold coins and silver coins) are in circulation at the same time.
- Both the coins are full-bodied coins. In other words, the face value and the intrinsic value of both the coins are equal
- Both the coins are unlimited legal tenders. They are also convertible into each other.
- There is free import and export of both the metals.

- Paper Currency Standard:-

Under this monetary standard, the currency prevailing in the economy will be paper currency. In most cases, this currency system is managed by the Central Bank of the country, RBI in the case of India, and so we can also call it Managed Currency Standard. The currency consists of bank notes and government notes. Most countries of the world follow this monetary standard. This is because it is a managed and controlled system. So an authority will monitor the quantity of money supply keeping in mind the stability in prices and income in the economy. It is also very economical in terms of production (currency notes). And they are far more convenient than metallic standards.

The Impact of Regulation on Monetary system:-

The Federal Open Market Committee (FOMC) currently expects to raise the target range for short-term funds in 2015.¹ However, recent and proposed changes in bank regulations will likely raise the cost and potentially impair the effectiveness of the Federal Reserve's primary tool for raising rates. The Federal Reserve's tools for raising rates are discussed in the FOMC document "Policy Normalization Principles and Plans." That document states that the Federal Reserve "intends to move the federal funds rate into the target range set by the FOMC primarily by adjusting the interest rate it pays on excess reserve balances."²

The theory behind the FOMC's plan is that changes in the interest on excess reserves (IOER) will affect other short-term interest rates through its effect on the rate banks are willing to pay for additional funds. For example, an increase in IOER increases the profitability to a bank of buying short-term funds and holding the proceeds as excess reserves (hereafter, called IOER arbitrage). Banks would respond to the increased profitability by increasing their demand for short-term funds, which would put upward pressure on short-term rates. The incentive to demand more funds would continue until bank funding costs increased to the point where IOER arbitrage is no longer profitable. As a result, if IOER arbitrage were costless, banks would bid up short-term rates until they almost equalled IOER.

However, IOER arbitrage is not costless due in part to regulatory policies, and these regulatory costs will increase if a pending regulation is adopted in its current form.³ The Federal Deposit Insurance Corporation (FDIC) insurance premiums paid on banks' reserves impose one such cost. The pending regulation is the Federal Reserve proposal to incorporate wholesale funding into the capital surcharge required of global systemically important banks

(GSIBs). When binding, the wholesale funding surcharge would impose higher capital requirements to the extent that banks use wholesale funding in IOER arbitrage.

This post analyses the merits of exempting IOER arbitrage from FDIC assessments and capital requirements. IOER arbitrage could be exempted from these costs by excluding all excess reserves and an equal amount of overnight wholesale funding from the assessments and capital requirements. I begin with a brief discussion of the mechanics of the Federal Reserve's plans for raising rates. The next section explains the regulatory costs in more detail. The following two sections discuss the potential benefits and costs of imposing regulatory costs on IOER arbitrage. The post ends with some concluding remarks.

Monetary policy normalization:-

The Federal Reserve's primary tool for conducting monetary policy prior to the financial crisis was to raise or lower the federal funds rate via open market operations that changed the amount of reserves outstanding. However, this mechanism became inadequate during the Great Recession, as both employment and inflation remained below targets even though the FOMC had reduced the federal funds rate to near zero (0.25 percent). To stimulate the economy further, the FOMC sought to lower longer-term interest rates by engaging in large-scale asset purchases, buying quantities of U.S. Treasury and Agency obligations.⁴ As a result, the Federal Reserve's portfolio grew from \$775 billion at the start of 2007 to \$4.2 trillion at the end of 2014, with reserve balances over that period increasing from \$44 billion to \$2.7 trillion.

Given the large increase in total reserves, the Federal Reserve's precrisis approach of controlling the funds rate with small changes in reserves would not be effective. To clarify its plans for controlling short-term interest rates, the FOMC issued its statement on normalization principles in September 2014. That statement not only indicated that rates would be controlled primarily via changes in IOER but also specified that the FOMC is prepared to use supplementary tools such as overnight reverse repurchase agreements (ON RRP)—discussed in greater detail below), to control the federal funds rate as needed.

When the Federal Reserve Board first announced the payment of interest on reserves in October 2008, the expectation was that doing so "should help to establish a lower bound on the federal funds rate." In practice, that was not the case with the federal funds recently trading around 12 basis points whereas the Federal Reserve pays 25 basis points for excess

reserves. The discrepancy is due in part to the inability of government-sponsored enterprises to earn IOER but also due to the presence of regulatory costs that lower the net benefit of holding reserves.

Regulatory costs:-

The imposition of FDIC insurance premiums on reserves is a relatively recent event. Prior to the crisis, these premiums were only levied on domestic deposits, and were not applied to foreign deposits and nondeposit wholesale borrowing. Section 331 of the Dodd-Frank Wall Street Reform and Consumer Protection Act changed the assessment base so that premiums are now levied on a bank's average total assets less its tangible capital. Given that excess reserves are part of total assets, these premiums lower the net benefit of holding reserves by the FDIC assessment rate. The assessment rate varies across banks from 2.5 to 45 basis points based on each bank's size and perceived risk to the FDIC; the average assessment rate in 2013 was 7.8 basis points (Financial Section of the FDIC's 2013 Annual Report).⁶

The proposed increase in capital requirements on GSIBs' short-term wholesale funding is also a response to the crisis and is intended to help reduce these banks' vulnerability to the sudden loss of funding (runs). This cost would affect IOER arbitrage because the natural supplier of huge amounts of short-term funding to banks are large institutions, such as money market funds, that seek to invest their liquid assets in short-term wholesale markets.⁷ Although this capital charge would apply only to the eight very large U.S. banks that are categorized as global systemically important banks, the wholesale funding charge could nevertheless have a major impact on IOER arbitrage.⁸ Available data are not sufficient to indicate exactly how big a fraction of U.S. domestic banks' borrowing is accounted for by the GSIBs. However, a lower bound on their importance is seen by the fact that these banks as a group hold about 43 percent of the total banking assets held by all domestic U.S. banks (as of September 30, 2014), and GSIBs are far more active in wholesale financial markets than other domestic banks.

Potential financial stability benefits:-

As the change in the FDIC's assessment base and the proposed GSIB capital regulations are both in response to the financial crisis, the potential for exempting IOER arbitrage raises important financial stability questions. However, whatever the overall merits of these regulations, their application to IOER arbitrage will not enhance financial stability because

IOER arbitrage really is an arbitrage transaction—that is, it allows participating banks to earn positive profits with no financial risk. A bank engaged in IOER arbitrage does not face any credit risk from its investment in excess reserves, as reserves held at the Federal Reserve have no credit risk. The bank faces no interest rate risk if it borrows in the overnight market to fund increased excess reserves, as the borrowings and excess reserves are for the same period. Finally, the bank faces no liquidity risk, as the excess reserves can be used to repay the purchased funds at any time.

The base of the monetary system:-

The base of the monetary system refers to two strong related notions: the monetary standard and the monetary unit.

The monetary standard is the material representation of money or the value beyond the money and is used in defining the monetary unit. Depending on the monetary standard adopted we can identify three types of monetary systems:

- monetary systems based on monetary metals: the monometallic system (silver standard system, gold standard system) and the bimetallic system (silver and gold).
- monetary systems based on a combined standard called gold exchange standard which was a mixed system consisting of a reserve currency standard and a gold standard.
- purchasing-power-based monetary system was set up in 1976 at the Conference in Kingston when the gold was removed from the base of the monetary system.

Most monetary systems of the world at the present time are fiat systems. In the current system money is intrinsically useless. The value of the money is set by the supply and demand for money and by the supply and demand for other goods and services in the country. The price for those goods and services, including gold and silver, are allowed to fluctuate based on market forces.

Categories of money:-

Banknotes:-

Banknotes originated in two forms: drafts which were the receipts attesting the value held in an account and bills which were issued with a promise to convert at a later date.

The perception of banknotes as money has evolved over time. Originally, money was based on precious metal. When banknotes appeared they were seen as essentially promissory notes and as they became more widely used, they were accepted as equivalent to precious metals.

With the gradual removal of precious metals from the monetary system, banknotes evolved to represent fiat money. Convertibility represents the ability to exchange a note for some other kind of value (gold or other currencies). If a note is payable on demand for a fixed unit, it is said to be fully convertible to that unit.

Limited convertibility occurs when there are restrictions in the time, place, manner or amount of exchange. Under the gold standard, banknotes were payable in gold coins. Similarly, under the silver standard, banknotes were payable in silver coins. Under the bimetallic standard, banknotes were payable in either gold or silver coins at the option of the debtor (issuing bank). Under the gold exchange standard, banks of issue were obliged to redeem their currencies in gold bullion or in US Dollars, which in turn were redeemable in gold bullion at the rate of \$35/ounce. The US abandoned the gold standard, and thus bullion convertibility, in 1971.

In a broad sense, convertibility represents the legal feature of a currency to be freely exchanged on market in other currencies without restrictions regarding the purpose, the solicitor, and the amount of exchange. The IMF statute groups the member countries' currencies in:

- Convertible currencies: Each member shall buy balances of its currency held by another member if the latter, in requesting the purchase, demonstrates that the balances to be bought have been recently acquired as a result of current transactions; or their conversion is needed for making payments for current transactions. The buying member shall have the option to pay either in special drawing rights, or in the currency of the member making the request.
- Inconvertible currencies: currencies of the countries which maintain restrictions on payments and transfers for current international transactions.
- Freely usable currencies: a freely usable currency means a currency that 1) is widely used to make payments for international transactions, and 2) is widely traded in the principal exchange markets.

Credit money:-

Credit money is any future claim against a physical or legal person that can be used for the purchase of goods and services. In terms of the money supply credit money is generally associated with that part of M2 which is not M0 and it is the most important component of money supply. Credit money is reflected in liabilities of the bank's balance sheet. Credit

money can be used for the payment of the goods and services or for the settlement of debts through the banking transfer.

Types of accounts

Banks offer customers three major types of accounts: checking accounts, saving accounts and loan (credit) accounts.

A checking account (transactional account in North America, current account in other countries) is a deposit account held at a bank or other financial institutions for the purpose of securely and quickly providing frequent access to funds on demand, through a variety of different channels. Because money is available on demand these accounts are also referred to as demand accounts or demand deposit accounts. Checking accounts are primarily meant for businessmen, firms, companies, public enterprises etc. that have numerous daily banking transactions. They are opened for convenience of the business, hence they are non-interest bearing accounts. In a checking account, a customer can deposit any amount of money. These accounts allow unlimited number of withdrawals subjected to availability of funds. Even if checking accounts have usually credit balance, they can have debit balance in the case of overdrafts.

An overdraft occurs when withdrawals from a checking account exceed the available balance, which gives the account a negative balance. If there is a prior agreement with the account provider for an overdraft protection plan, and the amount overdrawn is within this authorized overdraft, then interest is normally charged at the agreed rate. If the balance exceeds the agreed terms, then fees may be charged and higher interest rate might apply.

A checking account can be linked to another account, such as a savings account, or to an existing line of credit such as a credit card. Once the link is established, when an item is presented to the account that would result in an overdraft, funds are transferred from the linked savings account or linked credit account to cover the overdraft. A nominal fee is usually charged for each overdraft transfer, and if the linked account is a credit card or other line of credit, the consumer may be required to pay interest under the terms of that account.

A saving account is an account mainly used for savings, the interest being earned on the amount deposited. The interest is normally higher than on a current account. A saving account is reflected in the liabilities of the bank's balance sheet. There can be different types of saving accounts: saving account for demand deposits; saving account for time deposits; saving accounts for collateral deposits: for letters of credit, bank letters of guarantee, certificate cheques, etc.

A loan account is an account which is set up for a customer once her/his loan is approved. Such an account is used for the loan granted for precise purposes (a car, a house, an investment, etc.). It is reflected in the assets of a bank's balance sheet.

Monetary policy tools.

Transactions by the central bank can have a significant effect on the economy. These transactions always change the central bank's balance sheet and will often change the supply of money. The economy can be expanded or contracted by monetary policy, changing either the money supply or the interest rate. The term monetary policy refers to the actions undertaken by a central bank to influence the availability and cost of money and credit as a means of helping to promote national economic goals.

There are 3 fundamental types of transactions that change the supply of money:

- open-market operations, where the central bank buys or sells securities, usually government bonds.
- foreign exchange interventions, where a central bank exchanges domestic currency for foreign currency.
- discount loans to commercial banks.

Monetary Policy Objectives

The ECB has adopted several principles by which monetary policy is guided:

- operational efficiency, which is the capacity of a operational framework to enable monetary policy decisions to effect changes as precisely and as quickly as possible to short-term money market rates.
- equal treatment of financial institutions, regardless of their size or location within the euro area.
- decentralized implementation whereby the ECB coordinates the operations and the national central banks actually carry out the policy.

Monetary policy of India:-

Monetary policy is the process by which the monetary authority of a country, generally the central bank, controls the supply of money in the economy by its control over interest rates in

order to maintain price stability and achieve high economic growth. In India, the central monetary authority is the Reserve Bank of India (RBI).

It is designed to maintain the price stability in the economy. Other objectives of the monetary policy of India, as stated by RBI, are:

Price stability:-

Price stability implies promoting economic development with considerable emphasis on price stability. The centre of focus is to facilitate the environment which is favourable to the architecture that enables the developmental projects to run swiftly while also maintaining reasonable price stability.

Controlled expansion of bank credit:-

One of the important functions of RBI is the controlled expansion of bank credit and money supply with special attention to seasonal requirement for credit without affecting the output.

Promotion of fixed investment:-

The aim here is to increase the productivity of investment by restraining non essential fixed investment.

Restriction of inventories and stocks:-

Overfilling of stocks and products becoming outdated due to excess of stock often results in sickness of the unit. To avoid this problem, the central monetary authority carries out this essential function of restricting the inventories. The main objective of this policy is to avoid over-stocking and idle money in the organisation.

Promoting efficiency:-

It tries to increase the efficiency in the financial system and tries to incorporate structural changes such as deregulating interest rates, easing operational constraints in the credit delivery system, introducing new money market instruments, etc.

Reducing rigidity:-

RBI tries to bring about flexibilities in operations which provide a considerable autonomy. It encourages more competitive environment and diversification. It maintains its control over

financial system whenever and wherever necessary to maintain the discipline and prudence in operations of the financial system.

Instruments of monetary policy:-

Open market operations:-

An open market operation is an instrument of monetary policy which involves buying or selling of government securities like government bonds from or to the public and banks. This mechanism influences the reserve position of the banks, yield on government securities and cost of bank credit. The RBI sells government securities to control the flow of credit and buys government securities to increase credit flow. Open market operation makes bank rate policy effective and maintains stability in government securities market.

Cash reserve ratio (CRR):-

Cash reserve ratio is a certain percentage of bank deposits which banks are required to keep with RBI in the form of reserves or balances. The higher the CRR with the RBI, the lower will be the liquidity in the system, and vice versa. RBI is empowered to vary CRR between 15 percent and 3 percent. Per the suggestion by the Narasimham Committee report, the CRR was reduced from 15% in 1990 to 5 percent in 2002. As of 9th October 2020, the CRR is 3.00 percent.

Statutory liquidity ratio (SLR):-

Every financial institution has to maintain a certain quantity of liquid assets with themselves at any point of time of their total time and demand liabilities. These assets have to be kept in non cash form such as G-secs precious metals, approved securities like bonds. The ratio of the liquid assets to time and demand liabilities is termed as the Statutory liquidity ratio. There was a reduction of SLR from 38.5% to 25% because of the suggestion by Narsimham Committee. As on 9th October 2020, the SLR stands at 18%.

Bank rate policy:-

The bank rate, also known as the discount rate, is the rate of interest charged by the RBI for providing funds or loans to the banking system. This banking system involves commercial and co-operative banks, Industrial Development Bank of India, IFC, EXIM Bank, and other approved financial institutions. Funds are provided either through lending directly or

discounting or buying money market instruments like commercial bills and treasury bills. Increase in bank rate increases the cost of borrowing by commercial banks which results in the reduction in credit volume to the banks and hence the supply of money declines. Increase in the bank rate is the symbol of tightening of RBI monetary policy. As of 9th October 2020, the bank rate is 4.25 percent.

Credit ceiling:-

In this operation, RBI issues prior information or direction that loans to the commercial banks will be given up to a certain limit. In this case, commercial bank will be tight in advancing loans to the public. They will allocate loans to limited sectors. A few examples of credit ceiling are agriculture sector advances and priority sector lending.

Credit authorisation scheme:-

Credit authorisation scheme was introduced in November, 1965 when P C Bhattacharya was the chairman of RBI. Under this instrument of credit regulation, RBI, as per the guideline, authorise the banks to advance loans to desired sectors.

Moral suasion:-

Moral suasion is just as a request by the RBI to the commercial banks to take certain actions and measures in certain trends of the economy. RBI may request commercial banks not to give loans for unproductive purposes which do not add to economic growth but increase inflation.

Repo rate and reverse repo rate:-

Repo rate is the rate at which RBI lends to its clients generally against government securities. Reduction in repo rate helps the commercial banks to get money at a cheaper rate and increase in repo rate discourages the commercial banks to get money as the rate increases and becomes expensive. The reverse repo rate is the rate at which RBI borrows money from the commercial banks. The increase in the repo rate will increase the cost of borrowing and lending of the banks which will discourage the public to borrow money and will encourage them to deposit. As the rates are high the availability of credit and demand decreases resulting to decrease in inflation. This increase in repo rate and reverse repo rate is a symbol of tightening of the policy. As of May 2020, the repo rate is 4.00% and the reverse repo rate is 3.35%.

How Monetary Policy Works:-

The Fed can use four tools to achieve its monetary policy goals: the discount rate, reserve requirements, open market operations, and interest on reserves. All four affect the amount of funds in the banking system.

- The discount rate is the interest rate Reserve Banks charge commercial banks for short-term loans. Federal Reserve lending at the discount rate complements open market operations in achieving the target federal funds rate and serves as a backup source of liquidity for commercial banks. Lowering the discount rate is expansionary because the discount rate influences other interest rates. Lower rates encourage lending and spending by consumers and businesses. Likewise, raising the discount rate is contractionary because the discount rate influences other interest rates. Higher rates discourage lending and spending by consumers and businesses. Discount rate changes are made by Reserve Banks and the Board of Governors.

- Reserve requirements are the portions of deposits that banks must hold in cash, either in their vaults or on deposit at a Reserve Bank. A decrease in reserve requirements is expansionary because it increases the funds available in the banking system to lend to consumers and businesses. An increase in reserve requirements is contractionary because it reduces the funds available in the banking system to lend to consumers and businesses. The Board of Governors has sole authority over changes to reserve requirements. The Fed rarely changes reserve requirements.

- Open market operations, the buying and selling of U.S. government securities, has been a reliable tool. As we learned earlier, this tool is directed by the FOMC and carried out by the Federal Reserve Bank of New York.

- Interest on Reserves is the newest and most frequently used tool given to the Fed by Congress after the Financial Crisis of 2007-2009. Interest on reserves is paid on excess reserves held at Reserve Banks. Remember that the Fed requires banks to hold a percentage of their deposits on reserve. In addition to these reserves banks hold extra funds on reserve. The current policy of paying interest on reserves allows the Fed to use interest as a monetary policy tool to influence bank lending. For example, if the FOMC wanted to create a greater

incentive for banks to lend their excess reserves, it could lower the interest rate it pays on excess reserves. Banks are more likely to lend money rather than hold it in reserve (so they can make more money) creating expansionary policy. In turn, if the FOMC wanted to create an incentive for banks to hold more excess reserves and decrease lending, the FOMC could increase the interest rate paid on reserves, which is contractionary policy.

Tools of Monetary Policy:-

Central banks use various tools to implement monetary policies. The widely utilized policy tools include

Interest rate adjustment:-

A central bank can influence interest rates by changing the discount rate. The discount rate (base rate) is an interest rate charged by a central bank to banks for short-term loans. For example, if a central bank increases the discount rate, the cost of borrowing for the banks increases. Subsequently, the banks will increase the interest rate they charge their customers. Thus, the cost of borrowing in the economy will increase, and the money supply will decrease.

Change reserve requirements:-

Central banks usually set up the minimum amount of reserves that must be held by a commercial bank. By changing the required amount, the central bank can influence the money supply in the economy. If monetary authorities increase the required reserve amount, commercial banks find less money available to lend to their clients and thus, money supply decreases.

Commercial banks can't use the reserves to make loans or fund investments into new businesses. Since it constitutes a lost opportunity for the commercial banks, central banks pay them interest on the reserves. The interest is known as IOR or IORR (interest on reserves or interest on required reserves).

Open market operations:-

The central bank can either purchase or sell securities issued by the government to affect the money supply. For example, central banks can purchase government bonds. As a result,

banks will obtain more money to increase the lending and money supply in the whole market and bank supply.

Case laws.

Farrukhabad Gramin Bank vs Assistant Commissioner Of Income ... on 23 February, 2006.

1. This is an appeal filed by the assessee against the order dt. 24th April, 2004 of CIT(A), Ghaziabad pertaining to 2001-02 assessment year.
2. The grounds raised in the present appeal read as under:
 1. That the authorities below have erred on facts and in law by holding that the deduction under Section 80P(2)(a)(i) of the IT Act, 1961 is not allowable in respect of the income of the bank-assessed as AOP deemed co-operative society.
 2. That the authorities below have erred on facts and in law in not following the order passed by Tribunal, Agra Bench, Agra in assessee's own case for asst. yr. 1998-99 in which the Tribunal held that income of the bank was exempt under Section 80P(2)(a)(i).
 3. That the authorities below have erred on facts and in law in holding that the decision of the Hon'ble Supreme Court being in the case of co-operative bank are not applicable to the Regional Rural Bank.
 4. That the authorities below have erred on facts and in law in stating that the investments mentioned in the assessment order are not in accordance with the provisions of RRB Act, 1976.
 5. That the authorities below have erred on facts and in law in taxing the income from SLR investments and non-SLR investments ignoring the various decisions of Hon'ble Supreme Court, High Courts and Tribunal.
 6. Your appellant submits that in view of the definition of the banking business as contained in the banking business as contained in the Banking Regulation Act, 1949, which defines that "banking means the accepting, for the purpose of lending or investments, of deposits of money from public", the income of the appellant bank from its investment is its income from the banking business and hence, eligible for deduction under Section 80P(2)(a)(i) of the IT Act, 1961.
 7. That the orders passed by both the lower authorities below are without appreciating the facts, various submissions, explanation and information submitted by the appellant from time to time which ought to have been considered before passing the impugned orders.

8. That the authorities below have erred on facts and in law in not following the instruction of the Government that the entire income of the rural bank is exempt under Section 80P(2)(a)(i) of the IT Act, 1961.

9. That the authorities below have erred on facts and in law in holding that the interest on SLR and non-SLR investments are not income from banking business inasmuch the investment were made in the course of banking business as per provisions of the statutory relevant provisions and guidelines of the RBI.

10. Because in any view of the case the additions made are highly excessive and liable to be deleted.

11. That the authorities below have erred on facts and in law in treating receipt in the previous year relevant to asst. yr. 1996-97 of Rs. 4,58,76,000 as share contribution by the Government of India, U.P. Government and sponsor bank, Bank of India, as income for the asst. yr. 2001-02 on protective basis, the addition made is liable to be deleted.

12. That the authorities below have erred on facts and in law and have ignored that equity capital of Rs. 4,58,76,000 was sanctioned and provided by Central Government, sponsor bank and State Government concerned in the ratio of 50:35:15 as per letters already on file.

The bank was established mainly with a view to provide basic banking facilities in the remote rural areas and to mobilize savings from rural masses, who were not adequately served by the commercial banks as the branch net work of these banks was limited to urban and semi urban centers only. The bank's objective was to discharge the responsibilities under Section 18(2)(a) and (b) of RRB Act, 1976 by extending credit facilities through implementation of various Government sponsored schemes for social and economic upliftment of the weaker sections of the society and to small and marginal farmers, village artisans, landless labourers for purpose of agriculture and allied activities, trade, commerce, etc. 3.3 In the course of the assessment proceedings the AO took note of the fact that the directors' report also states that the Government of India has decided under their new policy to extend the scope of business activities of RRBs to make them financially sound/viable and self-dependent units w.e.f. 1994-95. Accordingly, the RRBs have been allowed to lend upto 60 per cent of the budgeted amount to the non-target group. Thus, according to the AO, besides the normal banking business fund, the following investments were also made by the assessee bank:

On a perusal of the facts of the case before him and the judgment of the Supreme Court and the High Courts in conjunction, he was of the opinion that they do not help the assessee. Referring to the judgment of the Hon'ble Madras High Court in the case of CIT v. Lakshmi Vilas Bank Ltd. , wherein their Lordships were considering the "Interest-tax Act", he was of

the view that their Lordships therein held investments in Government securities/T-bills to the "investments" not "working-capital" or "stock-in-trade".

Accordingly, on account of the fact that the banks neither have discretion nor any control over these funds and which are designed to fulfil objectives not of the RRB and thus would not be an essential part of banking activity of RRB inasmuch as there is no provisions for their withdrawals, they are effectively out of the purview of the bank business of RRB.

Thus on account of this reasoning, he was of the view that such "investments" being outside the pale of banking-activity and not available to the bank, as per its discretion accordingly the income thereon would not qualify for deduction under Section 80P(2)(a).

Apex Urban Co Op Bank Of Mharashtra ... vs Assessee.

This appeal filed by the assessee on 18.4.2013 is against the order of CIT (A)- 1, Mumbai dated 31.1.2013 for the assessment year 2005-2006.

2. In this appeal, assessee raised the following grounds which read as under:

"Ground No.1 In the facts and in the circumstances of the case and in law the CIT (A) erred in confirming the penalty levied u/s 271(1)(c). The assessee submits that,-

All the primary facts in regard to the income earned were placed on record.

ii) Throughout the assessment and appeal proceedings no addition was made so as to infer much less to conclude that particulars of income were not correctly filed.

iii) Explanations were given in penalty proceedings and AO did not find that any of the explanations was false or not bona fide.

The appellant therefore contends that the provision of section 271(1)(c) were not at all attracted.

Ground no.II The CIT (A) misdirected himself in the fact and circumstances of the case and in holding that the assessee has failed to prove that its explanation is bona fide.

The CIT (A) failed to appreciate that,-

i) The assessee was entitled to deduction u/s 80P(2)(a)(i) in respect of income from providing credit facilities to members.

ii) In respect of his other income from investments etc he was entitled to such deduction by virtue of the deeming provision of section 176 (3A).

The assessee, therefore contends that its claims for deduction were bona fide, within the frame work of law and therefore the CIT (A)'s observation to the contrary was perverse and does not flow from the fact of the case.

Ground No.III The Ld CIT (A) has erred in fact and in law, in not accepting the assessee's submissions that,-

- a) The assessee has not concealed any income.
- b) The assessee has not submitted any inaccurate particulars of income.
- c) AO has failed to establish that the assessee has furnished inaccurate particulars of income.
- d) AO has not found that all the facts relating to the income and material to the computation of its total income were duly disclosed by the assessee.
- e) That the assessee has fully cooperated in all proceedings before the AO and CIT (A) and all material facts were duly disclosed before these authorities.

Ground No.IV Both authorities below have failed to appreciate that mere fact that a legal claim is not accepted, does not attract penal provisions under section 271(1)(c).

Ground No.V The Ld CIT (A) ought to have held that issues involved were purely contested legal issues to be decided on interpretation of the provisions of the Act & merely because claims were not accepted cannot attract penal provisions."

3. Briefly stated, assessee was registered under Multi State Cooperative Societies Act, 1984 and was subsequently notified by Government of Maharashtra as a State Cooperative Bank. The Reserve Bank of India also gave the assessee license under the Banking Regulations Act, 1949. The said notification of the State Government of Maharashtra and the said license issued by the Reserve Bank of India were challenged by the Maharashtra State Cooperative Bank Ltd in a writ petition before the Hon'ble Bombay High Court. The Bombay High Court quashed the notification of the Government and directed the RBI to review its decision granting license to assessee. The assessee challenged this decision before the Hon'ble Supreme Court. The Supreme Court upheld the order of the Bombay High Court. The RBI cancelled the license w.e.f. 30.10.2003. Thus, the assessee is neither a State Cooperative Society nor it is a Bank under the Banking Regulation Act, 1949. We shall now discuss various developments during the assessment and appellate proceedings relating to quantum additions in the assessment and the other events leading to the levy of penalty u/s 271(1)(c) of the Act.

Assessment Proceedings- Denial of Deduction u/s 80P(2)(a)(i) of the Act:

4. Assessee filed the return of income declaring the total income "NIL" after making claim of deduction u/s 80P(2)(a)(i) of the Act. During the assessment proceedings u/s 143(2) of the

Act, AO noticed that the RBI cancelled the assessee's license w.e.f. 30.10.2003 and the assessee was not permitted to carry on banking business under Banking Regulation Act (B.R Act), 1949, and he proposed to the assessee to disallow the claim of deduction under section 80P(2)(a)(i) of the Act. The assessee explained before the Assessing Officer that banking business was carried on special circumstances i.e. in the process of winding up the Bank. The Bank which carried banking business till 29.10.2003 cannot be suddenly said to be not carrying banking business on 30.10.2003. The business is to be carried on for some time for the sake of closure of the said banking activity. The nature of business i.e. banking, cannot change by mere cancellation of license by the RBI. The process of closing down or liquidating of business is natural to any de-licensed organization. The bank cannot stop making income which will continue to come by way of interest on investment already made or interest on loan/advances already given and outstanding as on the date of cancellation of the license. The assessee further submitted that the RBI cancelled the license and only denied the assessee from transacting business as mentioned under section 5(b) of the B.R. Act. The assessee was not barred from doing any form of business activities as mentioned in section.6 of the B.R. Act. AO rejected the said submissions of the assessee. Since the assessee has been barred from transacting banking business, benefit under section 5(b) is not available and as such benefit under section 6 will also not be available too.

5. AO further observed that Section 22 of the B.R. Act states that no company shall carry on a banking business in India unless it holds a license issued on that behalf by the RBI. The right to carry on activities mentioned in Section 6(a) to 6(o) of the B.R. Act, 1949 flows from the issue of license to any company. Section 80P of the I.T. Act states that the income earned from the banking business by cooperative society will qualify for deduction. Since the assessee is not a banking company during the year under consideration, income earned from such activity will not qualify for exemption under section 80P(2)(a)(i) of the Act. The Assessing Officer further observed that the assessee's existence as a State Co-Operative Bank has ended as the relevant notification has been already struck down by the Bombay High Court. Since the assessee is not a banking company and also not a cooperative bank, the income earned from certain activities do not qualify for deduction under section 80(P)(2)(a)(i). Accordingly, he held the following income of the assessee as taxable.

**Surat District Co-Operative Bank vs Income Tax Officer And Ors. on 20
November, 2002.**

1. The Hon'ble President, ITAT, has constituted this Special Bench to dispose of these cases of co-operative banks involving the point relating to grant of deduction, under Section 80P of the IT Act, 1961.

A. Surat District co-op. Bank Ltd., Surat, in their appeal being ITA No. 3675/AM/1997 for asst. yr. 1994-95 have raised the following grounds :

(1) The learned CIT(A)-II, Surat, has erred in law and on facts in confirming the disallowance of deduction under Section 80P of the IT Act made by the ITO, Surat, relying on the decision of the Supreme Court in the case of M.P. Co-operative Bank Ltd v. Addl. CIT (1996) 218 ITR 438 (SC). As a matter of fact the decision of the Hon'ble Supreme Court cannot be applied in the case of the appellant as the facts of both the cases are not identical and clearly distinguishable.

(2) Both the lower authorities have failed to adjudicate upon the alternate contention raised by the appellant of allowing deduction under Section 80P(2)(d) of the IT Act as the impugned income is from the investment of the reserve fund and almost the entire reserve fund was invested in other co-operative banks/societies.

(3) Alternatively and without prejudice to whatever is stated above the learned CIT(A) has erred in not considering the fact that the free statutory reserve is only Rs. 5,42,24,743 and not Rs. 35,81,03,752. If at all any disallowance of deduction under Section 80P(2)(a)(i) of the IT Act has to be made then only figure of free-reserve i.e., Rs. 5,42,24,743 can be taken into account and not that of the whole reserve i.e., Rs. 35,81,03,752.

(4) The orders passed by both the lower authorities are without properly appreciating the facts and both of them have blindly followed the decision of the Hon'ble Supreme Court in the case of M.P. Co-op. Bank Ltd. (supra) without properly appreciating the distinguishable facts of the appellant's case. Various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned orders have been grossly ignored.

B. The Kalupur Commercial Co-op. Bank Ltd. in their appeal being ITA No. 2562/Ahd/97 for asst. yr. 1993-94 have raised the following grounds :

(1) The learned CIT(A) has erred in law and on facts in not granting exemption under Section 80P(2)(a)(i) on locker rent and interest-tax collected, treating it as income which does not form part of banking business.

(2) Assuming, while denying that deduction under Section 80P was not available in respect of locker rent income, the learned CIT(A) has erred in not appreciating that as a matter of fact, considering the expenses incurred by the appellant, there was no income or negligible income from locker rent and, therefore, the whole receipt could not be brought to tax.

C. Unnati Co-op. Bank Ltd. in their appeal being ITA No. 522/Ahd/1998 for asst. yr. 1995-96 have raised the following grounds :

(1) The learned CIT(A)-III, Baroda has erred in law and on the facts by relying on his own appellate orders in appeal No. CAB/III-24/97-98 and No. CAB/III-368/97-98 in case of Baroda Central Co-op. Bank Ltd. through the same are not applicable to the facts of the case of the appellant.

(2) The learned CIT(A)-III, Baroda has erred in law and on the facts of the case by upholding the contention of the learned AO that income of the appellant-bank of Rs. 14,12,363 being interest on investments cannot be considered as income of the appellant from its banking business.

(3) Your appellant submits that in view of the definition of the banking business as contained in the Banking Regulation Act, 1949, which defines that "banking means the accepting, for the purpose of lending or investments, of deposits of money from public", the income of the appellant-bank from its investments is its income from the banking business and hence eligible for deduction under Section 80P(2)(a)(i) of the IT act, 1961.

(4) The learned CIT(A)-III, Baroda has further erred in law and on the facts of the case by holding that deduction under Section 80P(2)(a)(i) of the IT Act, 1961, is not allowable in respect of income of interest on investments amounting to Rs. 14,12,363 in view of the judgment of the Hon'ble Supreme Court in case of M.P. Co-op. Bank Ltd. v. Addl. CIT (1996) 134 (SC) 92 : (1996) 218 ITR 438 (SC).

(5) Your appellant submits that considering the provisions of the Gujarat State Co-operative Societies Act, 1961, which are substantially different from that of the Madhya Pradesh State Co-op. Societies Act, the judgment of the Hon'ble Supreme Court in case of MP Co-op. Bank Ltd. is not applicable to the facts and circumstances of the appellant-bank.

M/S. Transstroy India Limited., vs M/S. Andhra Bank, on 18 December, 2018.

Cit vs Nedungadi Bank Ltd. on 7 November, 2002.

M/S. Transstroy India Limited., vs M/S. Canara Bank, on 18 December, 2018.

The Acit, Trichur vs The Irinjalakkuda Town Co-Op Bank on 31 May, 2018.

Greater Bombay Co-Op. Bank Ltd vs M/S United Yarn Tex. Pvt. Ltd. & Ors on 4 April, 2007.

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WHERE LAW MEETS QUALITY

Negotiable Instrument Act



Negotiable Instruments Act, 1881 is an act in India dating from the British colonial rule that is still in force largely unchanged.

Introduction to Negotiable Instruments Act, 1881

The Negotiable Instruments Act was enacted, in India, in 1881. Preceding its institution, the arrangement of the English Negotiable Instrument Act was pertinent in India, and the current Act is additionally founded on the English Act with specific changes. It stretches out to the entire of India. As per educator Goode, an instrument is portrayed as a record of title of cash. Therefore an instrument is a report that truly communicates the installment commitment. An instrument will be in the deliverable state just in the event that it is endorsed by the holder or it ought to be with the authority of that individual. The instrument obviously expresses the authoritative right to installment and the correct will be moved exclusively after the total conveyance. The individual who has that privilege and has the instrument is viewed as the genuine proprietor.

History

The historical backdrop of the current Act is a long one. The Act was initially drafted in 1866 by the third Indian Law Commission and presented in December 1867 in the Council and it was alluded to a Select Committee. Complaints were raised by the commercial local area to the various deviations from the English Law in which it contained. The Bill must be redrafted in 1877. After the slip by of an adequate period for analysis by the Local Governments, the High Courts, and the offices of trade, the Bill was reexamined by a Select Committee. Notwithstanding this Bill couldn't arrive at the last stage. In 1880 by the Order of the Secretary of State, the Bill must be alluded to another Law Commission. On the proposal of

the new Law Commission, the Bill was re-drafted and again it was shipped off a Select Committee which embraced the greater part of the increases suggested by the new Law Commission. The draft hence ready for the fourth time was presented in the Council and was passed into law in 1881 being the Negotiable Instruments Act, 1881 (Act No.26 of 1881).

The most important class of Credit Instruments that evolved in India were termed [Hundi](#). Their use was most widespread in the twelfth century and has continued till today. In a sense, they represent the oldest surviving form of credit instrument. These were used in trade and credit transactions; they were used as remittance instruments for the purpose of transfer of funds from one place to another. In Modern era [Hundi](#) served as [traveller's cheques](#).

Modern day

We like to convey a little piece of paper known as Check as opposed to conveying the cash worth the estimation of the Check. Before 1988 there being no arrangement to limit the individual giving the Check without having adequate assets in his record. Obviously on Dishonored check there is a common responsibility accumulated. To guarantee promptitude and cure against the defaulters of the Negotiable Instrument a criminal cure of punishment was embedded in Negotiable Instruments Act, 1881 by revising it with Negotiable Instruments Act, 1988.

With the inclusion of these arrangements in the Act the circumstance absolutely improved and the examples of shame have generally descended yet by virtue of use of various interpretative strategies by various High Courts on various arrangements of the Act it further compounded and confounded the circumstance albeit on disrespect of checks the patterns of the decisions of the Supreme Court of India

Parliament sanctioned the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 (55 of 2002), which is expected to plug the provisos. This correction Act embeds five new areas from 143 to 147 contacting different appendages of the parent Act and Check truncation through carefully were likewise included and the change Act has been as of late brought into power on Feb. 6, 2003.

Negotiable Instruments (Amendment) Bill, 2017

- Aims to amend the Negotiable Instruments Act, 1881, asking the drawer of a cheque that has been dishonoured to pay interim compensation to the complainant.
- The interim compensation will, however, not exceed 20% of the amount of the cheque that was dishonoured.

- The drawer of the cheque has to pay interim compensation within 60 days from the date of the order. If the court is satisfied, it can grant an extension of a further 30 days but not beyond that.
- The drawer of the cheque has to pay interim compensation within 60 days from the date of the order. If the court is satisfied, it can grant an extension of a further 30 days but not beyond that.

Recent amendment

The **Negotiable Instruments (Amendment) Act, 2018** which came into effect from September 1, 2018 allows the Court trying an offence related to cheque bouncing, to direct the drawer to pay interim compensation not exceeding 20% of the cheque amount to the complainant within 60 days of the trial court's order to pay such compensation. This interim compensation may be paid either in a summary trial or a summons case where the drawer pleads not guilty to the accusation made in the complaint; or upon framing of charge in any other case. Furthermore, the Amendment also empowers the Appellate Court, hearing appeals against conviction under s. 138, to direct the appellant to deposit a minimum 20 % of the fine/compensation awarded, in addition to interim compensation.

What are Negotiable Instruments?

Documents of a certain type, used in commercial transactions and monetary dealings, are called Negotiable instruments. The word 'negotiable' means transferable from one person to another and the term 'instrument' means 'any written doc. by which a right is created in favor of some person.' Thus, the negotiable instrument is a doc. by which rights vested in a person can be transferred to another person in accordance with the provisions of the Negotiable Instruments Act, 1881.

The maxim of law *nemo dat quod non-habet* (no one can transfer a better title than he himself has). This is the general principle relating to transfer of property is that no one can become the owner of any property unless he purchases it from the true owner or with his authority.

Definition:

According to section 13 of Negotiable Instruments Act, 1881- A 'negotiable instrument' means a promissory note, bill of exchange or cheque payable either to order or to bearer.

Negotiable Instruments can be of two kinds:

1) **Negotiable by Statute:** The Act mentions only three kinds of instruments by Law, i.e. Promissory Note, Bill of Exchange and Cheque.

2) **Negotiable by Custom or Usage:** Other than above three, all other custom and usage based locally negotiable instruments belong to this type. Example- Hundis, Bankers Draft, Treasury Bill.Etc.

Objectives of the Act

Main purpose of negotiable instruments is to avoid the carriage of higher amount of money and to reducing the risk of theft; robbery etc. To give legal effect to negotiable instruments there is legislation and the name of that legislation is The Negotiable Instruments Act, 1881.

- It facilitates the settlement of payments in business as they pass freely from holder to holder due to easy transferability of value of instrument.
- It provides legal protection to different mercantile instruments.
- It presents orderly and authoritative statement of leading rules of law relating to negotiable instrument.
- It provides for the special procedure in case the obligations which have to discharge under the instruments.
- It regulates the different types of negotiable instruments which include Promissory notes, Bills of Exchange and Cheques.
- It explains the capacity and liabilities of the parties to the instrument.
- It provides the understanding of different topics under the Act that are negotiation, assignment, endorsement etc.
- It inculcates faith in the efficacy of banking operations and credibility in transacting business on the negotiable instruments.

Section 138 of Negotiable Instrument Act

Section 138 of the act talks about punishment for dishonoring of cheques. Section 138 was introduced as a criminal offence in 1989 by way of an amendment to the Negotiable Instruments Act, 1881. The main objective of introduction of this section was to encourage the use of cheques and increasing the credibility of transactions through cheques by making the dishonoring of the cheques as an offence.

Section 138 provides that when the cheque is dishonored for insufficiency of funds or for any of the prescribed reasons, the one who is at defaulter can be punished with imprisonment for

a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or both. This is also a non-cognizable offence.



Six of the offence under Section 138

It is manifest that to constitute an offence under Section 138 of the Act, the following ingredients are required to be fulfilled:

- a must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account
- the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;
- that cheque has been presented to bank within a period of three months from the date on which it is drawn or within the period of its validity whichever is earlier: that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;
- the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;
- the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice;

Decriminalizing section 138

On 8 June, 2020 the Ministry of Finance proposed decriminalizing various minor offences “*for improving business sentiment and unclogging court processes*”, which also include Section 138 of Negotiable Instruments Act, 1881.

The main reason for this proposal is to increase the foreign investment in our country and will help in boosting the economy of the country during this condition.

The objective of section 138 of negotiable instruments Act is to promote the efficiency of banking operations and to ensure credibility in transacting business through cheques with the corona virus outbreak in the country, the economy is going down and to curb this situation it is proposed to decriminalize section 138 of Negotiable Instruments Act. There are heavy debates and discussions going on decriminalizing section 138 or not because this section affects the public at large. The main idea behind the proposal is the ease of business and attracting investors. In the report the following principles were propounded and certain things are to be kept in mind.

- Decriminalizing will decrease the burden on businesses man and will attract confidence among the investors.
- Increase in the economic growth, public interest and national security.
- *Mens rea* plays an important role in attracting criminal liability. Therefore it is important to evaluate the nature of the non-compliance.
- The habitual nature of non-compliance has to be kept in mind. Negligence must be differentiated with the non-compliance on regular basis.

Major features of negotiable instruments are:

- **Easy Transferability-** A negotiable instrument is freely transferable. Usually, when we transfer any property to somebody, we are required to make a transfer deed, get it registered, pay stamp duty, etc. But, such formalities are not required while transferring a negotiable instrument. The ownership is changed by mere delivery (when payable to the bearer) or by valid endorsement and delivery (when payable to order). Further, while transferring it is also not required to give a notice to the previous holder.
- **Title-** Negotiability confers absolute and good title on the transferee. It means that a person who receives a negotiable instrument has a clear and undisputable title to the instrument. However, the title of the receiver will be absolute, only if he has got the instrument in good faith and for a consideration. Also the receiver should have no

knowledge of the previous holder having any defect in his title. Such a person is known as holder in due course.

- **Must be in writing-** A negotiable instrument must be in writing. This includes handwriting, typing, computer printout and engraving, etc.
- **Unconditional Order-** In every negotiable instrument there must be an unconditional order or promise for payment.
- **Payment-** The instrument must involve payment of a certain sum of money only and nothing else. For example, one cannot make a [promissory note](#) on assets, securities, or goods.
- **The time of payment must be certain-** It means that the instrument must be payable at a time which is certain to arrive. If the time is mentioned as 'when convenient' it is not a negotiable instrument. However, if the time of payment is linked to the death of a person, it is nevertheless a negotiable instrument as death is certain, though the time thereof is not.
- **The payee must be a certain person-** It means that the person in whose favor the instrument is made must be named or described with reasonable certainty. The term 'person' includes individual, body corporate, trade unions, even secretary, director or chairman of an institution. The payee can also be more than one person.
- **Signature-** A negotiable instrument must bear the signature of its maker. Without the signature of the drawer or the maker, the instrument shall not be a valid one.
- **Delivery-** Delivery of the instrument is essential. Any negotiable instrument like a cheque or a promissory note is not complete till it is delivered to its payee. For example, you may issue a cheque in your brother's name but it is not a negotiable instrument till it is given to your brother.
- **Stamping-** Stamping of [Bills of Exchange](#) and [Promissory Notes](#) is mandatory. This is required as per the Indian Stamp Act, 1899. The value of stamp depends upon the value of the pronote or bill and the time of their payment.
- **Right to file suit-** The transferee of a negotiable instrument is entitled to file a suit in his own name for enforcing any right or claim on the basis of the instrument.
- **Notice of transfer-** It is not necessary to give notice of transfer of a [negotiable instrument](#) to the party liable to pay.
- **Presumptions-** Certain presumptions apply to all negotiable instruments, for example consideration is presumed to have passed between the transferor and the transferee.

- **Procedure for suits-** In India a special procedure is provided for suits on promissory notes and bills of exchange.
- **Number of transfer-** These instruments can be transferred indefinitely till they are at maturity.
- **Rule of evidence-** These instruments are in writing and signed by the parties, they are used as evidence of the fact of indebtedness because they have special rules of evidence.
- **Exchange-** These instruments relate to payment of certain money in legal tender, they are considered as substitutes for money and are accepted in exchange of goods because cash can be obtained at any moment by paying a small commission.

Presumptions

Section 118 and 119 lay down the following presumptions:

- **Consideration:** It shall be presumed that every negotiable instrument was made drawn, accepted or endorsed for consideration. It is presumed that, consideration is present in every negotiable instrument until the contrary is proved. The presumption of consideration, however may be rebutted by proof that the instrument had been obtained from, its lawful owner by means of fraud or undue influence.
- **Date:** Where a negotiable instrument is dated, the presumption is that it has been made or drawn on such date, unless the contrary is proved.
- **Time of acceptance:** Unless the contrary is proved, every accepted bill of exchange is presumed to have been accepted within a reasonable time after its issue and before its maturity. This presumption only applies when the acceptance is not dated; if the acceptance bears a date, it will prima facie be taken as evidence of the date on which it was made.
- **Time of transfer:** Unless the contrary is proved it shall be presumed that every transfer of a negotiable instrument was made before its maturity.
- **Order of endorsement:** Until the contrary is proved it shall be presumed that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon.
- **Stamp:** Unless the contrary is proved, it shall be presumed that a lost promissory note, bill of exchange or cheque was duly stamped.
- **Holder in due course:** Until the contrary is proved, it shall be presumed that the holder of a negotiable instrument is the holder in due course. Every holder of a negotiable instrument is presumed to have paid consideration for it and to have taken it in good faith.

But if the instrument was obtained from its lawful owner by means of an offence or fraud, the holder has to prove that he is a holder in due course. 8. Proof of protest: Section 119 lays down that in a suit upon an instrument which has been dishonored, the court shall on proof of the protest, presume the fact of dishonour, unless and until such fact is disproved.

Classification of Negotiable Instruments

We can study negotiable instruments under the following broad classifications. These classifications depend on various features like transferability, negotiability, rights of holders, etc

- **Bearer Instruments**-There are two important conditions for negotiable instruments to become payable to bearers. Firstly, parties to the transactions must express it to be so payable. Secondly, the only endorsement for it should be an endorsement in blank. These two requirements basically imply that any holder of such instruments can obtain payment for them. For example, a bill of exchange is payable to any person who holds it. These bearer instruments include cheques, bills of exchange and promissory notes.

Under Section 46, where an instrument is made payable to bearer it is transferable merely by delivery, i.e., without any further endorsement thereon. This character of the instrument, however, can be altered subsequently. For Section 49 provides that a holder of negotiable instrument endorsed in blank (i.e., bearer) may, without signing his own name, by writing above the endorser's signatures, direct that the payment of the instrument be made to another person. An endorsee thus, can convert an endorsement in blank into an endorsement in full. In such a case, the holder of the instrument would not be able to negotiate the instrument by mere delivery. He will be required to endorse the instrument before delivering it. In the case of a cheque, however the law is a little different from the one stated above. According to the provisions of Section 85(2) where a cheque is originally expressed to be payable to bearer, the drawee is discharged by payment in due course to the bearer thereof, despite any endorsement whether in blank or full appearing thereon notwithstanding that any such instrument purported to restrict or exclude further negotiation. In other words, the original character of the cheque is not altered so far as the paying bank is concerned, provided the payment is made in due course. Hence, the proposition that —once a bearer instrument always a bearer instrument.

- **Order Instruments**- Negotiable instruments can often be payable to order in certain cases. They are payable when the instruments expressly state them to be so.

Furthermore, they may be payable to order only to a specific person. The only requirement is that there should be no prohibition on their transferability. When an instrument, either originally or by endorsement, is made payable to the order of a specified person and not to him or his order, it is payable to him or his order, at his option. (Section 13). When an instrument is not payable to bearer, the payee must be indicated with reasonable certainty.

- **Inland Instruments-** Section 11 of the NI Act deals with inland instruments. This provision basically regulates instruments that are drawn and made payable in India. Alternatively, they may be payable outside India but only if they are drawn upon by an Indian resident. Examples: (i) A promissory note made in Chennai and payable in Delhi. A bill drawn in Pune on a person resident in Jaipur (although it is stated to be payable in London)
- **Foreign Instruments-** Every instrument that is not inland automatically becomes a foreign instrument. These instruments are drawn in a foreign country but may be payable within or outside India. They may even originate in India but only for payment to a person who resides abroad. Any such instrument, not so drawn, made or payable shall be deemed to be a foreign instrument. Examples: (i) A promissory note made in India but made payable in England. (ii) A bill drawn in England and payable in Paris although it may have been endorsed in India.

Thus foreign instruments are: (i) bills drawn outside India and made payable in or drawn upon any person resident in any country outside India; (ii) bills drawn outside India and made payable in India, or drawn upon any person resident in India; (iii) bills drawn in India made payable outside India or drawn upon any resident outside India, but not made payable in India.

The distinction between inland and foreign bills is of importance in connection with Sections 104 and 134 of the Act. Inland bills need not be protested for dishonour; protest in this case is optional. But foreign bills must be protested when law of the place of making or drawing them requires such protest. The question by what law are the contracts on negotiable instruments governed is also important. Principle of *Lex loci contractus* governs the liabilities of the drawer or maker and the form of the instrument.

- **Demand Instruments-** Sometimes, an instrument may not specify a time period during which it remains payable. Such instruments are generally payable whenever

the bearer demands. Examples of such instruments include promissory notes and bills of exchange.

- **Time Instruments**-Unlike demand instruments, time instruments carry a fixed future date for payment. For example, a promissory note may carry a maturity date arising after 24 months of its issue. Such instruments may even become payable upon the happening of a specific future event.
- **Ambiguous Instruments**-An ambiguous instrument is basically one that may be either a bill or a note for its holder. Such situations arise in peculiar circumstances only. For example, sometimes the drawee may be a fictitious person or he may be incompetent to contract. Under such circumstances, the holder of such instruments may treat them either as bills of exchange or as promissory notes. Section 17 of the Negotiable Instruments Act deals with such situations. The law on the point is that the holder of such a bill is at liberty to treat the instrument as bill or a promissory note. The nature of the instrument will be as determined by the holder.

In the following cases an instrument may be treated as an ambiguous instrument, where the holder may treat the instrument either as a bill of exchange or as a promissory note:

- Where the drawer and the drawee of a bill are the same person
 - Where the drawee of a bill is a fictitious person.
 - Where the drawee of a bill is a person not having capacity to contract.
 - Where an instrument is made in terms or in form so ambiguous that it is doubtful whether it is a bill of exchange or a promissory note.
- **Incomplete instruments**- Incomplete instruments lack certain essential requirements of typical negotiable instruments. In such cases, the holder of the instrument has the authority to complete it up to the amount mentioned therein. This, in turn, results in the creation of legally binding negotiable instrument payable by law. Not only the first holder but also any subsequent holder who procures such instruments can complete them.

Promissory Note (Section 4):

Definition According to section 13 of Negotiable Instruments Act, 1881- A promissory note is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker to pay a certain sum of money to, or to the order of, a certain person or to the bearer of the instrument.

A promissory note is a promise in writing by a person to pay a sum of money to a specified person or to his order.

There are primarily two parties involved in a promissory note. They are:

- The Maker or Drawer: The person who makes the note and promises to pay the amount stated therein.

- The Payee – the person to whom the amount is payable. In course of transfer of a promissory note by payee and others, the parties involved may be –

- a) The Endorser – the person who endorses the note in favour of another person

- b) The Endorsee – the person in whose favour the note is negotiated by endorsement

Essentials of Promissory Note

- It must be in writing: A promissory note has to be in writing. An oral promise to pay does not become a promissory note. The writing may be on any paper or book

Illustrations: A signs the instruments in the following terms:

- a) —I promise to pay B or order Rs. 500

- b) —I acknowledge myself to be indebted to B in Rs. 1, 000 to be paid on demand, for value received

Both the above instruments are valid promissory notes.

- It must contain a promise or undertaking to pay: There must be a promise or an undertaking to pay. The undertaking to pay may be gathered either from express words or by necessary implication. A mere acknowledgement of indebtedness is not a promissory note, although it is valid as an agreement and may be sued upon as such.

Illustrations: A signs the instruments in the following terms:

“Mr. B I owe you Rs. 1,000” — “I am liable to pay to B Rs. 500.”

The above instruments are not promissory notes as there is no undertaking or promise to pay. There is only an acknowledgement of indebtedness. Where A signs the instrument in the following terms: “I acknowledge myself to be indebted to B in Rs. 1, 000, to be paid on demand, for value received,” there is a valid promissory note.

- The promise to pay must be unconditional: A promissory note must contain an unconditional promise to pay. The promise to pay must not depend upon the

happening of some uncertain event, i.e., a contingency or the fulfillment of a condition.

Illustrations: A signs the instruments in the following terms:

- “I promise to pay B Rs. 500 seven days after my marriage with C”
- “I promise to pay B Rs. 500 as soon as I can”

The above instruments are not valid promissory notes as the payment is made depending upon the happening of an uncertain event which may never happen and as a result the sum may never become payable.

- It must be signed by the maker: It is imperative that the promissory note should be duly authenticated by the signature of the maker.

Signature means the writing or otherwise affixing a person's name or a mark to represent his name, by himself or by his authority with the intention of authenticating a document.

- The maker must be a certain person: The instrument must itself indicate with certainty who is the person or are the persons engaging himself or themselves to pay. Alternative promisors are not permitted in law because of the general rule that —where liability lies no ambiguity must lie.
- The payee must be certain: Like the maker the payee of a pro-note must also be certain on the face of the instrument. A note in favour of fictitious person is illegal and void. A pronote made payable to the maker himself is a nullity, the reason being the same person is both the promisor and the promisee.
- The sum payable must be certain: For a valid pronote it is also essential that the sum of money promised to be payable must be certain and definite. The amount payable must not be capable of contingent additions or subtractions.

Illustrations: A signs the instruments in the following terms:

“I promise to pay B Rs. 500 and all other sums which shall be due to him”

“I promise to pay B Rs. 500, first deducting there out any money which he may owe me”

The above instruments are invalid as promissory notes because the exact amount to be paid by A is not certain.

Bill of exchange (Section 5):

According to section 5 of Negotiable Instruments Act, 1881- A 'bill of exchange' is an instrument in writing, containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to or to the order of a certain person, or to the bearer of the instrument. It is also called a Draft.

There are three parties involved in a bill of exchange-

- *The Drawer* – The person who makes the order for making payment.
- *The Drawee* – The person to whom the order to pay is made. He is generally a debtor of the drawer.
- *The Payee* – The person to whom the payment is to be made.

Characteristic Features of a bill of exchange:

- It must be in writing.
- It must contain an order to pay and not a promise or request.
- The order must be unconditional.
- There must be three parties, viz., drawer, drawee and payee.
- The parties must be certain.
- It must be signed by the drawer.
- The sum payable must be certain or capable of being made certain.
- The order must be to pay money and money alone.
- It must be duly stamped as per the Indian Stamp Act.
- Number, date and place are not essential.

Distinction between “Bill of Exchange” and Promissory Note

- Number of parties: In a promissory note there are only two parties – the maker (debtor) and the payee (creditor). In a bill of exchange, there are three parties; drawer, drawee and payee; although any two out of the three may be filled by one and the same person.
- Payment to the maker: A promissory note cannot be made payable the maker himself, while in a bill of exchange to the drawer and payee or drawee and payee may be same person.

- Unconditional promise: A promissory note contains an unconditional promise by the maker to pay to the payee or his order, whereas in a bill of exchange, there is an unconditional order to the drawee to pay according to the direction of the drawer.
- Prior acceptance: A note is presented for payment without any prior acceptance by the maker. A bill of exchange is payable after sight must be accepted by the drawee or someone else on his behalf, before it can be presented for payment.
- Primary or absolute liability: The liability of the maker of a promissory note is primary and absolute, but the liability of the drawer of a bill of exchange is secondary and conditional.
- Relation: The maker of the promissory note stands in immediate relation with the payee, while the maker or drawer of an accepted bill stands in immediate relations with the acceptor and not the payee.
- Protest for dishonour: Foreign bill of exchange must be protested for dishonour when such protest is required to be made by the law of the country where they are drawn, but no such protest is needed in the case of a promissory note.
- Notice of dishonour: When a bill is dishonoured, due notice of dishonour is to be given by the holder to the drawer and the intermediate endorsers, but no such notice need be given in the case of a note.

Classification of bills:

- Inland bill: A bill is, named as an inland bill if:
 - it is drawn in India on a person residing in India, whether payable in or outside India,
 - it is drawn in India on a person residing outside India but payable in India. The following are the Inland bills
 - A bill is drawn by a merchant in Delhi on a merchant in Madras. It is payable in Bombay. The bill is an inland bill.
 - A bill is drawn by a Delhi merchant on a person in London, but is made payable in India. This is an inland bill.
 - A bill is drawn by a merchant in Delhi on a merchant in Madras. It is accepted for payment in Japan. The bill is an inland bill.
- Foreign Bill: A bill which is not an inland bill is a foreign bill. The following are the foreign bills:
 - A bill had drawn outside India and made payable in India.

- A bill drawn outside India on any person residing outside India.
- A bill drawn in India on a person residing outside India and made payable outside India.
- A bill drawn outside India on a person residing in India.
- A bill drawn outside India and made payable outside India.
- **Time bill:** A bill payable after a fixed time is termed as a time bill. In other words, bill payable “after date” is a time bill.
- **Demand bill:** A bill payable at sight or on demand is termed as a demand bill.
- **Trade and Accommodation Bill Trade bill:** A bill drawn and accepted for a genuine trade transaction is termed as a “trade bill”.
- **Accommodation bill:** A bill drawn and accepted not for a genuine trade transaction but only to provide financial help to some party is termed as an “accommodation bill”.

Example: A, is in need of money for three months. He induces his friend B to accept a bill of exchange drawn on him for Rs. 1,000 for three months. The bill is drawn and accepted. The bill is an —accommodation bill. A may get the bill discounted from his bankers immediately, paying a small sum as discount. Thus, he can use the funds for three months and then just before maturity he may remit the money to B, who will meet the bill on maturity. In the above example A is the —accommodated party while B is the —accommodating party. It is to be noted that a recommendation bill may be for accommodation of both the drawer and acceptor. In such a case, they share the proceeds of the discounted bill.

Cheque (Section 6)

According to section 6 of Negotiable Instruments Act, 1881- A cheque is defined as 'a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.

Thus, a cheque is a bill of exchange with two added features, viz.:

- it is always drawn on a specified banker
- It is always payable on demand and not otherwise.

Essentials of Cheque:

- In Writing: The cheque must be in writing. It cannot be oral.
- Unconditional: The language used in a cheque should be such as to convey an unconditional order.
- Signature of the Drawer: It must be signed by the maker.
- Certain Sum of Money: The amount in the cheque must be certain.
- Payees Must be certain: It must be payable to specified person.
- Only Money: The payment should be of money only.
- Payable on Demand: It must be payable on demand.
- Upon a Bank: It is an order of a depositor on a bank.

Types of cheque

- Bearer Cheque
 - The words —or bearer printed on the cheque, & it is not cancelled, then the cheque is called a bearer cheque.
 - A bearer cheque is made payable to the bearer i.e. it is payable to the person who presents it to the bank for encashment.
 - In simple words a cheque which is payable to any person who presents it for payment at the bank counter is called ‘Bearer cheque’
- Order Cheque
 - The word "or order" is written on the face of the cheque, the cheque is called an order cheque.
 - Such a cheque is payable to the person specified therein as the payee, or to any one else to whom it is endorsed (transferred).
- Open Cheque
 - When a cheque is not crossed, it is known as an “Open Cheque” or an “Uncrossed Cheque.
 - These cheques may be cashed at any bank and the payment of these cheques can be obtained at the counter of the bank or transferred to the bank account of the bearer.
 - An open cheque may be a bearer cheque or an order cheque.
- Crossed Cheque
 - Crossed cheque means drawing two parallel lines on the left corner of the cheque with or without additional words like “Account Payee Only” or “Not Negotiable”.

- A crossed cheque cannot be en-cashed at the cash counter of a bank but it can only be credited to the payee's account. This is a safer way of transferring money than an Uncrossed or open cheque.
- Anti-Dated Cheque
 - Cheque in which the drawer mentions the date earlier than the date on which it is presented to the bank, it is called as "anti-dated cheque".
- Post-Dated Cheque
 - Cheque on which drawer mentions a date which is yet to come (future date) to the date on which it is presented, is called post-dated cheque.
 - For example-If a cheque presented on 10th Jan 2012 bears a date of 25th Jan 2012, it is a post-dated cheque. The bank will make payment only on or after 25th Jan 2012.
- Mutilated Cheque:When a cheque is torn into two or more pieces and presented for payment, such a cheque is called a mutilated cheque. The bank will not make payment against such a cheque without getting confirmation of the drawer.
- Crossing of Cheque
 - Crossing of a cheque means "Drawing Two Parallel Lines" across the face of the cheque. Thus, crossing is necessary in order to have safety.
 - Crossed cheques must be presented through the bank only because they are not paid at the counter.
 - Crossing is a popular device for protecting the drawer and payee of a cheque.

Distinction between Bills of Exchange and Cheque

- A bill of exchange is usually drawn on some person or firm, while a cheque is always drawn on a bank.
- It is essential that a bill of exchange must be accepted before its payment can be claimed A cheque does not require any such acceptance.
- A cheque can only be drawn payable on demand; a bill may be also drawn payable on demand, or on the expiry of a certain period after date or sight.
- A grace of three days is allowed in the case of time bills while no grace is given in the case of a cheque.
- The drawer of the bill is discharged from his liability, if it is not presented for payment, but the drawer of a cheque is discharged only if he suffers any damage by delay in presenting the cheque for payment.

- Notice of dishonour of a bill is necessary, but no such notice is necessary in the case of cheque. A cheque may be crossed, but not needed in the case of bill.
- A bill of exchange must be properly stamped, while a cheque does not require any stamp.
- A cheque drawn to bearer payable on demand shall be valid but a bill payable on demand can never be drawn to bearer.
- Unlike cheques, the payment of a bill cannot be countermanded by the drawer.

Endorsement

"Endorsement" in its strict sense implies, composing on the rear of an instrument. Be that as it may, under the Negotiable Instruments Act section 15, it implies, the composition of one's name on the rear of the instrument or any paper joined to it with the goal of moving the rights in that. In this manner, underwriting is marking a debatable instrument with the end goal of exchange. The individual who impacts an underwriting is called an "endorser", and the individual to whom debatable instrument is moved by support is known as the "endorsee".

The Requisites of Valid Endorsement

The essentials for a valid endorsement are listed below:

- The endorsement must be done either on the back or face of the instrument and if there is no space then it must be made on a separate paper attached to it.
- The endorsement must be done in ink, any endorsement done in pencil or rubber stamp is considered to be invalid.
- The stranger cannot endorse, it is necessary to be done by the maker or holder of the instrument.
- The endorser must sign it.
- It must be completed by the delivery of the instrument.
- The endorsement must be of the entire bill, the partial endorsement is not operated as a valid endorsement.



Kinds of Endorsement

- **Endorsement in Blank:**

When the endorser just signs his name then, the endorsement is called “in Blank.” The endorsement does not show the name of endorsee with the effect that an instrument which is endorsed in blank becomes payable to the bearer even though originally payable to order and no further endorsement is required for its negotiation.

e.g. If a cheque is payable to “Z” or order and “Z” merely signs on its back, such endorsement is known as an endorsement in blank.

- **The endorsement in Full:**

If the endorser signs and also mention the name of the person to whom or to whose order the payment is to be made.

e.g. If a cheque is payable to “Z” or order and “Z” adds the words Pay to “X” or pay to “X or order”, such endorsement is known as an endorsement in full.

- **Conditional Endorsement:**

The conditional endorsement is dependent on the happening of a specified event, although such an event may or may never happen. It does not make the instruments non-transferable. Section 52 of the Negotiable Instrument Act 1881 provides- The endorser of a negotiable instrument may, by express words in the endorsement, exclude his own liability thereon, or make such liability or the right of the endorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen.

e.g. “Pay Z if he returns from America.” Thus, Z will receive the payment only if he returns from America. If the event does not take place, the endorsee cannot sue any of the parties.

- **Restrictive Endorsement:**

In general, an endorsee is fully competent to negotiate in negotiable instruments. But Section 50 permits restrictive endorsement which can easily take away the negotiability of such instruments.

Illustration

If Z endorses an instrument payable to the bearer as follows. The rights of X to further negotiate are excluded:

- (a) Pay the contain to X only
- (b) Pay X for my use.
- (c) Pay X or order for the account of Z
- (d) The within must be created X

But the following endorsements are not restrictive endorsements:

- (a) Pay X
- (b) Pay X value in account of A Bank,

Because the endorser has not specifically restricted the negotiability of the instrument.

- Endorsement 'Sans Recourse':

Sans Recourse means without reference. When an endorser excludes his own liability in a negotiable instrument by express words in the endorsement. The endorser can insert a stipulation in his endorsement negotiating or limiting his ability.

Illustration:

- (a) Pay Z or order without recourse to me
- (b) Pay Z or order Sans Recourse.
- (c) Pay Z or order at your own risk.

These words will exclude the liability of the endorser altogether.

- Partial Endorsement:

It is defined under Section 56 which explains that an instrument cant indorsed for a part of its amount. Example: If the endorsement is for Rs. 200, it cannot be indorsed for Rs. 100 only. But if the amount due has already been partly paid, a note to that effect may be endorsed on the instrument and it may then be negotiated for the balance.

Recent Supreme Court rulings for speedy disposal of cases under Section 138 of the Act:

In 2017, Delhi High Court in Dayawati v. Yogesh Kumar Gosain took into account the question whether an offence under Section 138, which is a criminally compoundable case, could be settled by mediation.² The Court held that even though an express statutory provision enabling the criminal court to refer the complainant and accused persons to alternate dispute redressal mechanisms has not been specifically provided by the Legislature. The Code of Criminal Procedure ("Cr.P.C.") does permit and recognize settlement without stipulating or restricting the process by which it may be reached. Thus, there is no bar to utilizing the alternate dispute mechanisms including arbitration, mediation, conciliation (recognized under Section 89 of Civil Procedure Code, 1908³) for the purposes of settling disputes which are the subject matter of offences covered under Section 320 of the Cr.P.C. It also stated the proceedings under Section 138 of the Act is distinct from other criminal cases and are really in the nature of a civil wrong which has been given criminal overtones.

Meters and Instruments (P) Ltd. v. Kanchan Mehta

Observations made by the court in this case:

1. The offence under Section 138 of the Negotiable Instruments Act is primarily a civil wrong. The burden of proof is on accused in view presumption under Section 139 (Negotiable Instruments Act) but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, the principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.
2. The object of the provision being primarily compensatory, the punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at a later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.
3. Though compounding requires the consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.
4. Procedure for the trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C. to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.
5. Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonour of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 CrPC The scheme is to follow summary procedure except where exercise of power under the second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered

inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

Held that:

Where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers under Section 143 of the Act read with Section 258 CrPC

Conclusion

It is well observed from the above context that, Negotiable Instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer, various provisions of Negotiable Instrument Act are being enumerated above regarding the dishonor of the cheque and liability of an director, company and an individual as with the context to section 138 of Negotiable Instrument Act. Landmark judgments have been stated for the better understanding regarding the procedure and liability and of the compounding.

This article is created with an initiative of providing a ground work for further research and highlights the Negotiable Instrument Act major provisions for better and clear understanding.

Source:

- <https://www.latestlaws.com/latest-news/the-negotiable-instrument-act-1881-an-analysis-of-section-138/>
- <http://lawtimesjournal.in/endorsement/>
- <https://www.lexology.com/library/detail.aspx?g=c1f86808-e817-4ed7-ab7a-b6361d5c3c64#:~:text=Negotiable%20Instruments%20Act%201881%20regulates,to%20order%20or%20to%20bearer>
- https://en.wikipedia.org/wiki/Negotiable_Instruments_Act,_1881
- <https://www.mondaq.com/india/financial-services/812822/section-138-of-negotiable-instruments-act-overview>

FTDR 1992

(FOREIGN TRADE (DEVELOPMENT AND REGULATION) ACT,1992)



1) INTRODUCTION

The Foreign Trade (Development & Regulation) Act, 1992 is the fundamental legislature governing and regulating Foreign Trade and its development in India. Foreign Trade also has a significant role in the growth of a nation's economy at large too. Keeping in mind the complexity of the area, the FTDR Act established multi-level frameworks and procedures needed for smooth and efficient foreign trade which could be managed and regulated by the government. It states that the Central Government has to issue Foreign Trade Policy, on the basis of which, foreign trade would be regulated on.

The primary department of government dealing in matters of foreign trade is the Ministry of Commerce and Industry. However, many other departments, such as the Ministry of Finance; Export Inspection Council are also intrinsically connected and engaged in matters of Foreign Trade. With the Act of 1992, an Office of the Directorate General of Foreign Trade was established as “an attached office” of the Min. of Commerce and Industry and has been given wide ranging powers and responsibilities such as formulating Foreign Trade Policies, making specified rules and issuing orders as and when required.

The FTDR 1992 was passed on 7th of August 1992 and replaced the then prevailing “Import and Export (Control) Act of 1947. The basic objective of the new Act is “to provide a framework for development and regulation of foreign trade by facilitating imports into the

country and taking measures to increase exports from India and any other related matters”. The central government is vested with powers to make “any provisions” in order to achieve the said objective. The FTDR Act, 1992 is a short Act constituting of only 20 sections, which confers powers on various authorities to make orders and the Foreign Trade Policy and provides for pre-requirements for Import and Export along with conferring powers of search and seizure, as well as provides for appeal and revision. The FTDR Rules passed in 1993 supplement the said Act and states the procedure and conditions for Licensing and its related matters (which is mandatory for Importing and Exporting in India).

2) BRIEF OVERVIEW

The FTDR 1992 essentially lays down the following:

- Establishes an office of Director General of Foreign Trade and confers powers on the Government to produce the Foreign Trade Policy. The government has the power to issue orders for effectively facilitating and developing imports and exports and also the power to “prohibit, restrict or otherwise, regulate” in all cases the import and export of goods.
- Section 5 confers the power on the Central Government to formulate, announce and amend *Import and Export policies* “by notification in the official gazette”.
- Section 6 of the Act confers powers on the Central government to appoint any person any person to be the Director General of Foreign Trade. The said DGFT would have to advise the central Government in matters of formulating policies for import and export and would be responsible of materializing and carrying out the policy.
- A *Foreign Trade Policy* is a set of a number of documents which, in concordance with each other, lay out a specific and detailed procedure, rules and compliances needed to be followed for the import and export of any item. The three main documents which constitute a proper FTP are, the broad and general Import and Export Policy (Foreign Trade Policy) issued/ rolled out by the Central Government; Handbook of Procedures and ITC (HS) Classification which further provide for more detailed procedures and conditions necessary for importing and exporting items in India, the Handbook and Classification is, however, issued by the office of the DGFT.
- India has a five year Foreign Trade Policy which contains broad and general objectives, strategies and schemes that the government seeks to rollout and fulfill in

the coming years. Based on the FTP, each and every item which could be imported and exported in the country is put under the category of free, restricted or prohibited and certain items are permitted under exceptional circumstances, the same is provided under the FTDR Rules 1993 and subsequent handbooks. An item-wise import and export policy is then provided under the ITC (HS) Classification. Simply put, the FTP frames policies and the latter two documents provides for procedures for its execution.

- The Act also provides for setting up of an adjudicating authority for cases of violation of the FTP and also an appellate body for the same.

3) COMPONENTS OF FOREIGN TRADE POLICY

A comprehensive Foreign Trade Policy mainly has three components and a few other sub-components. The primary components of an FTP is the “*Foreign Trade Policy Statement/ Import and Export Policy*” issued by the central government (by virtue of S.5 of the FTDR Act), the *Handbook of Procedures* and an *Item-wise Import and Export Policy [ITC (HS) Classification]* based on and for the execution of the said five year Policy Statement (both of which are issued by the Directorate General of Foreign Trade by virtue of the powers conferred by Policy Statement itself).

a) Foreign Trade Policy

A foreign trade policy statement/document contains the objectives, strategies and schemes that the central government plans to fulfill in the five year period that the Policy is formulated for. For instance, the current FTP (2015-2020) focuses on “exploring new markets and new products as well as on increasing India’s share in the traditional markets and products, leveraging benefits of GST by exporters, increasing ease of trading across borders; increasing the realisations from Indian agriculture based exports and promoting exports from MSMEs and labour intensive sectors to increase employment opportunities for youth.” The approach taken for the current FTP is a “whole of government” one which aims at establishing coordinating mechanisms and efficient regulating of trade. The present FTP also highlight and aims to resolve the biggest barriers to development of international trade, such as “infrastructure bottlenecks, high transaction costs, complex procedures, constraints in manufacturing and inadequate diversification in our services exports. These domestic issues are being addressed on priority, notwithstanding some of the volatile external factors that are beyond control”. Another recent development is the commencement of GST since 2017 which is “a part of the initiative to streamline the taxation regime and reduce costs for

businesses”. India also became a signatory of WTO’s Trade Facilitation Agreement and therefore has to bring it’s trading procedures in consonance with the International standards, hence, they require significant simplification and reduction in the transactional costs.

b) Handbook of Procedures & SION

The Foreign Trade Policy formulated under S.5 of the FTDR 1992 by the Central Government contains, in the very beginning, provisions which direct the Director General of Foreign Trade (DGFT) to issue and notify “the procedures procedure to be followed by an exporter or importer or by the licensing/Regional Authority or by any other authority for purpose of implementing the provisions of FTDR Act, the Rules/orders made thereunder and the provisions of Foreign Trade Policy”. The said procedures are mainly notified through the publication of three documents, (a) Hand Book of Procedures (b) Appendices & Aayat Niryat Forms and (c) Standard Input Output Norms (SION). The Handbook contains the various procedural steps and requirements to be completed along with appendices and forms which are required to be complied by. For instance, the procedures relate to filing of applications for seeking authorizing for trading in restricted goods, the various schemes under which items can be imported and the requisite fees to be submitted for a successful application and acceptance. The Appendices contain detailed provisions for clarifying fees and other requirements. The [Standard Input Output Norms](#) (SION) defines the “amount of input/inputs required to manufacture unit of output for export purpose” The said norms are applicable on certain items only, such as “**electronics, engineering, chemical, food products including fish and marine products, handicraft, plastic and leather products** etc”. The DGFT has the power to modify and issue notifications for fixation or addition of SION for various export/import items.

c) Indian Trade Clarification based on Harmonized System [ITC (HS)]

The Government, in pursuance of its “Digital India” scheme recently digitized the entire classification of all items for Import and Export based on a “Harmonized system” of Coding. All items are given an 8 digit HS Codes and are put in different categories based on the restrictions and conditions on their trading by the DGFT. The ITC (HS) has been divided into two schedules and supplemented by a few appendices. The first schedule states the “rules and guidelines” for Import of items and has 21 sections. The second schedule provides for “rules and guidelines” for Export of items and has 97 chapters.

4) TYPES OF ITEMS COVERED UNDER FOREIGN TRADE

Nearly all items which are allowed for import and export in India are divided into different categories based on the restrictions and conditions on its trade. The items are categorized into Free, Restricted and Prohibited and Conditional.

a) Free Items

Items under “Free” category do not require any license or permission to be taken for import and export Each Item is listed below is issued by virtue of para 2.01 of the FTP 2015-2020 (“Exports and Imports ‘Free’ Unless, Regulated”). Some examples of Free items for import are : teak wood (ITC HS- 44034910), Marine and Aircraft Plywood (44123330), parachutes (88040010), electric wrist watches (91011100), ‘kollapuri chappals’ (64032040), golf clubs (95063100) dictionaries (49019100) etc

b) Restricted Items and Conditional Items

Some articles/items are permitted only after a license or permission is granted. Such items are separately provided in both the Schedules of the ITC (HS) Classification. Some examples of items under the restricted category are: Horses (restricted for import- 01012100), Industrial explosives(Restricted for Import- 36020010), Paper for security printing, currency paper, stamp paper (Restricted for import -48025770). Such items require a prior permission for import and export. There are many items which require the satisfaction of a certain conditions or the permission to trade is subject to specific provisions of a complimentary Act or law in force, these are called conditional items. They include: Radio broadcast transmitter (Import Conditionally Restricted- Not permitted to be imported *except* against a license to be issued by the WPC wing of Ministry of Communication and Information Technology – 85255010); All dutiable articles, imported by a passenger or a member of a crew in his baggage [Import Restricted subject to restrictions under Customs and Baggage Rules by saving clause 3(1)(h) of Foreign Trade (Exemption from Application of Rules in Certain Cases) Order, 1993; ITC HS- 98030000]; Natural Uranium (restricted for import- 28441000). However, the DGFT has been given the power (under para 2.08) to give permission or an authorization for importing or exporting a ‘Restricted’ article/item.

c) Prohibited Articles

There are many articles which are not allowed to be imported at all, these articles are known as Prohibited articles. Some examples are: Fish tails (05119120), Skin and Bones of Wild Animals, Ostriches (01063300).



5) FEATURES OF CURRENT FTP, VIOLATION & REGULATING AUTHORITIES

a) Current Foreign Trade Policy

The government in consultation with the DGFT by virtue of Section 5 of the FTDR Act 1992 issued a revised foreign trade policy in the year 2017. The said policy has a few amendments when compared to the previous policy but they do not affect the basic structure of the Country's foreign policy. The government has started several facilities to make import & export in India, as efficient and technologically at par with the global standard in foreign Trade.

A number of new features added to India's Foreign Trade Policy of 2015-20, under para 1.06 "*Trade Facilitation and Ease of Doing Business*" are facilities such as *Single window scheme under online filing, 24x7 clearance facilities to all Bills of Entry, ie. 29 sea ports and 17 Air Cargo Complexes, e-governance initiatives, Free passage of Export Consignment, development of "Towns of Export Excellence"*

Under General Provisions of Import and Export, the government has also set certain rules, guidelines and restrictions to be adhered to while dealing in Import and Export in India. One example of exercise of such concept is the "*Principles of Restriction*" under para 2.07 gives the DGFT the power to impose restrictions on trade in "the interest of Public Morales,

Protection of human animal plant life and their health, protection of patents, trademark and copyrights and related violations, protection of national treasury of Artistic, historic or archaeological valuables (gems and statues) etc”, therefore

b) Grievance Redressal and Trade Disputes

If a person is facing genuine hardship and the same is adversely impacting his/her business, then he/she may file an application for relaxation of ‘Policy and Procedures’. The said matter is referred by the DGFT to a committee (Policy Relaxation Committee – para 2.58) . The DGFT, in consultation and/or on the basis of the report has the discretion to give exemption and/or impose restrictions. If a person (whether an importer or exporter) is aggrieved “by any decision taken by Policy Relaxation Committee (PRC), or a decision/order by any authority in the Directorate General of Foreign Trade, a specific request for Personal Hearing (PH) along with the prescribed application fee” . After this, the DGFT in consultation with other committees has the final and binding decision pursuant to the personal hearing.

The FTDR act 1992 and the FTR Rules 1993 confer the necessary powers on to the DGFT to take action against erring exporters/importers. By the following provisions :

(a) Section 8 of the Act “empowers the Director General of Foreign Trade or any other person authorized by him to suspend or cancel the Importer Exporter Code Number for the reasons as given therein”.

(b) Section 9 (2) of the Act “empowers the Director General of Foreign Trade or an officer authorised by him to refuse to grant or renew a license, certificate, scrip or any other instrument bestowing financial or fiscal benefit granted under the Act”.

(c) Section 9(4) “empowers the Director General of Foreign Trade or the officer authorized by him to suspend or cancel any License, certificate, scrip or any instrument bestowing financial or fiscal benefit granted under the Act”.

(d) Section 11(2) of the Act provides “for imposition of fiscal penalty in cases where a person makes or abets or attempts to make any import or export in contravention of any provision of the Act, any Rules or Orders made there under or the Foreign Trade Policy”.

c) Regulating Authorities

The Regional Authorities set up for implementing the provisions of the FTDR Act, 1992 would also have a “Committee on Quality complaints and Trade Disputes (CQCTD)” in order to deal with the ever-growing disputes and complaints among importers/exporters.

The said committee will be “responsible for enquiring and investigating into all Quality related complaints and other trade related complaints falling under the jurisdiction of the respective RAs. It will take prompt and effective steps to redress and resolve the grievances of the importers, exporters and overseas buyers, preferably within three months of receipt of the complaint. Wherever required, the Committee (CQCTD) may take the assistance of the Export Promotion Councils/FIEO/Commodity Boards or any other agency as considered appropriate for settlement of these disputes.”

However, it is important to note that the proceeding and decision by the CQCTD are only “reconciliatory in nature” and therefore, the aggrieved person is free to take legal recourse against the violating party. The detailed procedure for “making an application for such complaints or trade disputes and the procedure to deal with such quality complaints and disputes is given in the Handbook of Procedures”. “The Committee at RA level can authorize the Export Inspection Agency or any technical authority to assess whether there has been any technical failure of not meeting the standards, manufacturing/ design defects”, etc. for which complaints have been received.

6) CONCLUSION

The Foreign Trade (Development and Regulation) Act is essentially the backbone of India’s Foreign Trade and also of the Indian Economy to a certain extent. The fundamental objective of the FTDR Act was to provide a structural framework in the area of Foreign Trade and its regulation, the Act seeks to facilitate and ease imports into the country and promote or take measures to increase the exports from the country as well. The said Act replaced the erstwhile Import and Export Act, 1947. Under the new Act, various provisions have been made which give the government sufficient powers to issue a Foreign Trade Policy by notifications, orders and rules and other publications. The FTDR Act 1992 basically confers the power on the central government to roll out a Foreign Trade Policy and also sets up an attached office with the Ministry of Commerce and Industry, named as the office of the Director General of Foreign Trade (DGFT). The FTP contains the broad and general import and export policy whereas the detailed procedural requirements, conditions and restrictions are stated in the Handbook of Procedures. A much more intricate, specific and detailed Item-wise import and export policy is given in the ITC (HS) Classification and is easily accessible on government websites. The Handbook and ITC (HS) Classification is issued by the DGFT.

The previous FTP was issued in 2015 and was to remain in force till 31st March 2020, but due to the unforeseen pandemic, the government is yet to roll out a new Foreign Trade Policy (by virtue of S.5 of the FTDR). The 2015-20 FTP rolled out many new facilities and schemes for the development and growth of Foreign Trade such as principles “digitalization” and “e-governance” being implemented in matters of foreign trade, from filing an application for license/authorization to a single window facility for the whole subsequent process, making ‘exporter/importer profile’, “reduction in mandatory documents required for export and import, providing free passage of export consignment with no seizure of export related stock along with 24 x 7 customs clearance and self-assessment of customs duty”. The government has also aimed at setting up “towns of export excellence” and also establishes a national committee on trade facilitation. The said initiatives, along with many new schemes, have played a crucial role in India’s growth in Foreign Trade in the past 5 years and have also pushed India’s Ease of Doing Business rank much higher than it was before. However, there is much anticipation for a new Foreign Trade Policy for the year 2021 to 2026 and is soon expected to be rolled out by the Central Government.

Documentary Evidence

The provisions related to the documentary evidence are provided under Chapter-V of the Indian Evidence Act, 1872. Section 3 of the Act defines the term “document”. Any matter which is expressed or described on any substance by means of letters, figures or remarks or by more than one means and which can be used for recording the matter is considered as a “document”.

Generally, the most common document which we have to deal with is described by letters. The documents are written in any language of communication such as Hindi, English, Urdu etc.

The documents produced before the court as evidence are the documentary evidence and there must primary or secondary evidence to prove the contents of the documents. Primary evidence has been defined under section 62 of the Indian Evidence Act and it means the original document when itself produced before the court for the inspection.

The secondary evidence has been defined under section 63 of the Act. The secondary evidence is the certified copy of the evidence or copy of original documents. Secondary

evidence also includes the oral accounts given by a person about the contents of the document who has himself seen it.

Difference between Oral Evidence and Documentary Evidence

1.Oral evidence means the statements which are given by a witness before the court.

When a document is produced before the court then such document is considered as documentary evidence.

2.It is the statement of a witness in oral form.

It is a statement submitted through the documents.

3.In the oral evidence are stated through voice, speech or symbols for its recording before the court.

The documents are composed of words, signs, letters, figures and remarks and submitted before the court.

4.The oral evidence is discussed under section 59 and section 60 of the Indian Evidence Act.

The provisions related to the documentary evidence has been discussed under section 61 to section 66 of the Indian Evidence Act.

5.The oral evidence is required to be direct and it becomes doubtful if the statement contradicts with the previous statement.

The contents of the documentary evidence need to be supported by primary or secondary evidence.

Types of documentary evidence.

1. Official documents

These are things like, powers of attorney, birth and marriage certificates, grants of probate, land certificates and contracts. They have legal authority and are highly reliable (provided they're not fake).

2. Witness statements

Witness statements from witnesses who can confirm all or a part of what you're alleging are very important.

A witness statement is a document laid out in a specified way, setting out the evidence of the person writing the statement and ending with a statement of truth. By signing the document the author confirms it is true. A witness statement should be factual and state what was seen

or heard by the person writing the statement. These statements need to be shared with all of the people involved in the court hearing as well as the court.

3. Photographs and videos

It is important that the date of all photos or videos evidence is clear and available. ONRECORD precisely records the date and time of any uploaded evidence. The time and location of photos or videos you make using your mobile device can be proved from its Exchangeable Image File (EXIF) as long as you have allowed your camera to save locations.

4. Correspondence

Save all letters and emails between you and your opponent and any others such as a Local Authority department or a regulator together with their replies.

5. Notes of meetings

Write notes during, or as soon as possible after, all the meetings with the people involved in your case (stating who was present and when and where it happened). Send all attendees a copy and ask them to agree and sign the notes. These notes should include what was agreed and, if a course of action was agreed, what the action is and the time by which it's expected to be done. If there's been a note taker provided at the meeting, make sure you get a copy and then read the notes carefully. If you disagree with them, put your corrections in a letter or email and be clear you don't accept what's been provided. If you do agree them say so. If you don't get the notes provided to you although you know they were taken, chase them up and make sure it's clear you weren't given them.

6. Medical reports

If you have suffered physical harm, a medical record made by a GP or consultant, setting out such things as the injuries which you have sustained, how long they are likely to last, what impact there has been on you and your way of life. Ideally there should be a letter of instruction to the doctor asking specific questions. Make sure everything you need to know is included in the letter and that the report answers all the questions. If something has been missed out, ask for that to be rectified before any hearing.

7. Reports by other experts

Reports by other experts such a planning expert, an engineer or an accountant can also be very useful but may be expensive. Always ask for a quote before work starts so you know the expense you're incurring.

Documentary Evidence and Presumptions as to Documents

INTRODUCTION

As per section 3 of the Indian Evidence Act, 'all documents produced for the inspection of the court; such documents are called documentary evidence.' These also include electronic records and Chapter V of the Indian Evidence act deals with documentary evidence and presumptions regarding them.

Section related with the Documentary Evidence Of Indian Evidence Act

SECTION 61

This section states that if a document is produced before a court, it may either be produced by primary evidence or by secondary evidence.

SECTION 62

This section defines primary evidence whereas; section 63 deals with secondary evidence. Primary evidence means that the original document is itself presented before the court. If the document is executed in several parts, each part is primary evidence of the document and where a document is executed in counterparts, each counterpart is primary evidence against the party signing it. In the case of lithography or photography, or where a number of documents are made from one uniform process, each serves as primary evidence as to the contents of the document.

SECTION 63

Secondary evidence includes:

- *Certified copies of the original document.
- *Copies made by mechanical processes.
- *Copies made from or compared with the original.
- *Counterpart of a document is secondary evidence against the party who did not sign it.
- *Oral account of the contents of the document by a person who has himself seen it.

The list is not exhaustive and all the secondary evidence stand equal in ranking, i.e., it is not required that the evidence of succeeding category can only be given when the preceding category is not available; the rule is that if the original is not available, its certified copies can be produced.

How are Documents to be proved?

SECTION 64 provides that documents must be proved by primary evidence except in the cases hereinafter mentioned, i.e., the cases provided in section 65

SECTION 65 provides when secondary evidence can be given [clauses (a) to (g)]:

*When the original is shown or appears to be in the possession of someone against whom it is to be produced or who is out of reach or not subject to the court or is not legally bound to produce it or if he is, does not produce it to the court even after being sent a notice.

*When the existence, conditions or content of the document have been proved to be admitted in writing by the party against whom it will be produced or by his representative.

* When the original is destroyed or loss or for some reason, other than party's own neglect, it cannot be produced before the court in reasonable time.

*If the documents are bulky and cannot be moved.

*When the original is a public document.

*When the original's certified copies can be given as evidence, as provided under evidence law or any other law of the country.

*When the original consists of a lot of accounts or documents which cannot be conveniently examined by the court and the fact to be provided is a general result of the whole collection.

After meeting the necessary circumstances, if secondary evidence has been admitted by the court without any objection by the other party, the other party cannot object over it at a later stage. In **Ranvir Singh v UoI (AIR 2005 SC 3467)**, Xerox copies of sale deeds were marked as the exhibit without any objection, the Supreme Court did not permit any objections to it, at a later stage.

Section 65A, says that the contents of electronic records may be proved in accordance with the provisions of Section 65B:

*The computer output containing the information is produced by the computer which was used to process or store the information in the regular course of action by a person having lawful control over the use of a computer.

*The information is of the kind which was regularly fed into the computer in the ordinary course of activities.

*The computer must have been operating properly when the record in question was fed to it.

*The information in the record was derived or reproduced from the information fed into the computer in the ordinary course of activities.

Here, a computer output is anything that is printed on a paper, stored, recorded or copied to a computer. If the information was processed or fed to a number of inter-linked computers or to successive computers or a combination of both, they shall be treated as a single computer **[Section 65B (3)]**.

The record has to be produced with a certificate explaining the contents and the manner in which it was produced and should be signed by a person occupying a position in relation to the management of the device **[Section 65B(4)]**.

SECTION 66

As per section 66, if a person does not produce the required document, even on notice, secondary evidence regarding the document becomes admissible. There are, however, certain cases where secondary evidence can be given without notice.

*When the document is itself a notice.

*When the nature of the case is such that the party in possession is required to produce it.

*When it is clear that the party has obtained the original document with fraud or force.

*When the adverse party or his agent has the original in court.

*When the adverse party has admitted that the original is lost.

*When the person in possession is out of reach or not subject to the court.

In Doed Thomson v Hodgson (1860, 9 LJQB 327), the learned judge held that when demanded, the opposite party fails to produce the original and secondary evidence has been submitted, the opposite party cannot submit the original as evidence.

Proof of Signature

SECTION 67 says that if it is alleged that a document is signed or written, wholly or partly, by a person, the same has to be proved by the party alleging it.

SECTION 67A states that if it is alleged, that a subscriber's electronic signature is affixed to an electronic record, the same shall be proved by the party alleging it.

SECTION 68

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness, at least, has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. Provided, it shall not be necessary to call a witness in proof of execution of a document, not being a will, which has been registered as per the Indian registration act, unless, the executor specifically denies it.

SECTION 69 provides that if none of the witnesses is available or if the document was executed in the United Kingdom, it must be proved that the executor's and one of the attesting witnesses' sign is in their own handwriting. In **Babu Singh v Ram Sahai (AIR 2008 SC 3485)**, only the counsel of the party stated that the witness had been won over by the other side and no other proof as to whether the party took steps to compel the witness for attendance was shown. The Supreme Court did not consider it to obtain the benefit of relaxation of Section 69.

SECTION 70

It says that when an executant himself admits the execution of the document, there is no need to call for an attesting witness.

SECTION 71

If the attesting witness denies or does not remember execution of the document, the document can be proven by other methods.

SECTION 72

It states that an attested document which was not required by law to be attested shall be proved as it was not attested.

SECTION 73

In order to ascertain whether a sign, writing or seal was made by a person, the court may compare it with a sign, writing or seal proved to be made by that person. The court may also direct any person present in the court to write any words or figures for the purpose of this section and this section also applies to fingerprints.

SECTION 73A

To prove a digital signature, the court may direct the person, by whom it purports to be made, or the controller or the certifying authority to produce the digital signature certificate. It may also direct any other person to apply the public key listed in the certificate and verify the digital signature.

PUBLIC DOCUMENTS AND THEIR PROOF

SECTION 74

This section defines public documents as documents forming the acts or record of the acts:

- *Of the sovereign authority;
- *Of official bodies and tribunal;
- *Of public officers, legislative, judicial and executive, of India or of a commonwealth or of a foreign country.
- *By clause (2), public records kept in any State of private documents, such as, memorandum of article of a company with the Registrar of companies.

SECTION 75

This section defines private documents as those which are not public documents.

SECTION 76

This section defines certified copies of a public document. When, on being asked by a competent person who has paid the legal fees, a public officer, in custody of the required public document, provides the person with a certified copy of it, such copies so certified will be called certified copies. If the law requires the officer to use his seal, the copy will have to be sealed.

SECTION 77

This section states that the certified copies may be produced as proof of the contents of the public document or a part of them of which they purport to be copies.

SECTION 78

This section provides for proof of other public documents. For acts, order or notifications by central or state government, it should be certified by the respective head of the department.

For legislature proceedings, proof by their journal or by published acts or abstracts. For the municipalities, the copy should be certified by the legal keeper. In the case of public documents of foreign countries, by the original or it should either be signed by a legal keeper, or an Indian diplomatic agent or an officer having legal custody of the original document.

PRESUMPTIONS AS TO DOCUMENT

SECTION 79

This section states that the court shall presume a document to be genuine if it is a certificate or a certified copy. Also, any document, which is by law, declared to be admissible as evidence and has been certified by an officer of the central or the state government or of Jammu and Kashmir and is authorized by the centre. Provided, that the document is executed in the form as prescribed by the law.

SECTION 80

This section states that when a person has appeared before a court and has recorded a testimony or confession and his statement being relevant in another case, a certified copy is produced; the court shall presume it to be genuine.

SECTION 81

Under this section, official gazettes, newspapers or journals and copies of the acts of parliament are presumed to be genuine. In **State of Rajasthan v UoI (1977, 3 SCC 592)** the Supreme Court held that news reports do not constitute admissible evidence of their truth.

SECTION 81A

The court presumes the genuineness of any electronic record purporting to be the official gazette or any other record directed by law to be kept by any person, in a prescribed form and which is produced from proper custody.

SECTION 82

When any document is admissible by any court of England or Ireland for any particular purpose without proving the sign or stamp or seal authenticating it, the same is admissible for the same purpose, in India and is deemed to be genuine.

SECTION 83

The Court presumes that map or plans purporting to be made by the Central or any State Government, are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

SECTION 84

The court presumes every book published or printed under the authority of the government of any country to be genuine which lay down the laws of that country or the reports of the such country.

SECTION 85

A power of attorney, executed and authorized by a Notary, or any court, Judge Magistrate, Indian Consul or Vice Consul, or representative of the Central Government is presumed to be genuine.

SECTION 85A

The court shall presume that every electronic agreement concluded by affixing electronic signatures of the parties shall be genuine.

SECTION 85B

The court presumes electronic records to be genuine and electronic signatures to be made by the subscriber with the intention of approving electronic record until the contrary is provided.

SECTION 85C

The court presumes that the information listed in an electronic signature certificate is correct, except for the subscriber information, if the certificate was accepted by the subscriber.

SECTION 86

In this section, the court is given a judicial discretion to presume that certified copies of foreign judicial records are genuine.

SECTION 87

The court may presume that the information provided through books, or maps or charts to prove some fact in issue is genuine and is written or made by the author so named and published by the publication so mentioned.

SECTION 88

This section is a presumption as to the telegraphic message. The court may presume that the message sent to the post office was the message forwarded through telegram and it was received by the person who was purported to receive it.

SECTION 88A

The court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee corresponds with the message as fed into his computer for transmission. In both, section 88 & 88A, the court cannot make a presumption as to the person by whom such message was delivered.

SECTION 89

It is a compulsory presumption on behalf of the court that a document called for and not produced after a notice for production, was attested, stamped and executed in the manner required by the law.

SECTION 90

The court may presume a document, which is thirty years old and is produced from custody which appears to be proper to be genuine. The date on the evidence is the prima facie evidence of its age and the parties are not required to prove the age of the evidence (**Anderson v Weston, 1840 9 LJCP 194**).

MISCELLANEOUS PRESUMPTIONS

It is presumed that if a document is altered, it was made before its execution, whereas in case of a will, it is altered after its execution.

SECTION 90A provides that a court shall presume any electronic record, which is five years old and is produced from proper custody to be genuine.

Case law:-

Bhima Tima Dhotre vs The Pioneer Chemical Co. on 23 June, 1967

Equivalent citations: (1968) 70 BOMLR 683

After Mr. Poonawalla had examined all his witnesses but before he closed his case, Mr. Poonawalla applied that the post-card dated August 22, 1958, which had been marked X for identification, be admitted in evidence as an exhibit, as the same has been duly proved by the Evidence of plaintiff No. 2 who has deposed to its handwriting as well as signature. In support of that application, Mr. Poonawalla has not relied upon any authority, but has advanced the simple contention that once a document is proved it must be admitted in evidence, and that once it is admitted in evidence he is entitled to rely on its contents. As the question is, however, of considerable importance and occurs very frequently in the course of trials in Courts, I am bound to consider all the authorities on the same.

Mr. Poonawalla's application was opposed by Mr. B. J. Kapadia on behalf of the defendants who relied in support of his objection on the decision in the case of Madholal Sindhu v. Asian Assu. Co. Ltd. (1945) 56 Bom. L.R. 147 In that case, Bhagwati J. held that a document could not be admitted in evidence without calling the signatory or the writer thereof, if what was sought to be proved was the contents of that document. Bhagwati J. took the view (at p. 148) that proof of the signature or the handwriting in respect of a document in accordance with Section 67 of the Evidence Act would be "sufficient in those cases where the issue between the parties was whether a document was signed or written wholly or in part by that person." The decision of Bhagwati J. was considered by Coyajee J. in an unreported ruling on admissibility given by him on August 12, 1952, in Jiyajirao Cotton Mills v. Gill & Co. (1952) O.C.J. Suit No. 834 of 1951, decided by Coyajee J., on August 12, 1952 (Unrep.). In that ruling, Coyajee J. has differed from the view taken by Bhagwati J. and has held that the mere fact that a party might be unable to call the author of the document as a witness does not affect its admissibility, although it may considerably damage the probative value of such a document. He, therefore, allowed the document in question which was a letter to be admitted in evidence on proof of the signatures thereon. It was observed by Coyajee J. in the said ruling that the admission of a document only means that the contents of the document are produced before the Court in the form of evidence. It is at that stage that the Court applies its mind to see whether it is a reliable document and what is the probative value of that document. He observed that the statements in a document admitted in evidence are not, and certainly not, admitted as true statements, because, like any other evidence, it would have to be weighed, its probative value ascertained, and either accepted or rejected. In the case of Mobarik Ali v. State of B'bay (1957) 61 Bom. L.R. 58, at p. 66-67, S.C. the Supreme Court held that proof of the authorship of a document is proof of a fact, like that of any other fact, and the evidence relating thereto may be direct or circumstantial. It was further observed in

the judgment in the said case that proof of the handwriting of the contents, or of the signature, by one of the modes provided in Sections 45 and 47 of the Evidence Act was not the only mode, and that a document may also be proved by the internal evidence afforded by the contents of the document itself. The last mode of proof would be of considerable value where the disputed document purports to be a link in a chain of correspondence, some links in which are proved to the satisfaction of the Court, This question came up again for consideration very recently before a Division Bench of this Court in the case of In the matter of Mr. D. and Mr. S. (1961) 68 Bom. L. R. 228, in which their Lordships approved of the decision of Bhagwati, J. in the case of Madholal Kindhu v. Asian Assu. Co. Ltd. cited above and held as follows (at pp. 232-233) :

...To conclude this part of the discussion, we hold, in the first place, that what has been formally proved is the signature of Abreo and not the writing of the body of the document at exh. 28 and secondly, that even if the entire document is held formally proved, that does not amount to a proof of the truth of the contents of the document. The only person competent to give evidence on the truthfulness of the contents of the document was Abreo.

Their Lordships distinguished "Mobarik Ali's case on the ground that the only question that arose before the Supreme Court in that case related to formal proof of the document, and the further question about proof of the contents of the document did not arise in that case.

I agree with the construction which the Division Bench in the case of In the matter of Mr. D. and Mr. S., has placed on the judgment of the Supreme Court in Mobarik Ali's case, but I do not agree with the view which the Division Bench has taken in regard to the admissibility of documentary evidence. I am, however, bound by that decision which is the decision of a Division Bench and, following the same, I must uphold the objection taken by Mr. Kapadia with regard to the admissibility of the document in question before me. Even so, I feel that as the point is of considerable importance, I must express my own views with regard to the same. In my opinion, to hold that a document is not admissible for proof of its contents unless the writer is called, is to denude documentary evidence of all its value and is clearly contrary to certain express statutory provisions to be found in the Evidence Act to which I will presently refer. Documentary evidence becomes meaningless if the writer has to be called in every case to give oral evidence of its contents. If that were the position, it would mean that, in the ultimate analysis, all evidence must be oral and that oral evidence would virtually be the only kind of evidence recognised by law. That, however, is not the position under the Evidence Act. The definition of the term "evidence" in Section 3 of the Evidence Act lays down that evidence means and includes statements made by witnesses, which are called oral

evidence, and documents produced before the Court, which are called documentary evidence. Section 59 of the said Act enacts that all facts, except the "contents" of documents, may be proved by oral evidence. This provision would clearly indicate that to prove the contents of a document by means of oral evidence would be a violation of that section, and Section 91 expressly prohibits that being done in the case of contracts, grants or other dispositions of property which have been effected in writing. That, however, is not all. Section 61 of the said Act lays down in unambiguous terms: 'The contents of documents may be proved either by primary or by secondary evidence', and Section 62 makes it clear that primary evidence means the document itself produced for the inspection of the Court. Needless to say, in view of the provisions of Section 67 of the Evidence Act, a document must, however, be proved in the manner provided by Sections 45, 47 or 73 of the said Act, or by the internal proof afforded by its own contents as laid down in Mobarik Ali's case. What is important to note is the use of the word "contents", both in Sections 59 and 61 of the Evidence Act, which leaves no room for doubt that when a document is proved in the manner laid down by the Evidence Act, the contents of that document are also proved. Of course, as Coyajee J. has observed, if the writer is not called and the matter merely rests on proof of the document, it will be for the Court to consider, on the facts of each case, what probative value should be attached to the statements contained in the document. The view taken with regard to admissibility of documentary evidence in Madkolal Sindhu's case as well as in the case of In the matter of Mr. D. and Mr. S., is based largely on the assumption that oral evidence is always superior to documentary evidence because it is on oath and can be subjected to cross-examination. What is, however, overlooked is that a contemporaneous record is often much safer and has more probative value than oral evidence led at the trial, even though that oral evidence may have been given on the most solemn oath and subjected to the most rigorous cross-examination. It is for that reason that the Evidence Act advisedly lays down that the contents of a document can be proved by proving the document in the usual manner, a proposition that emerges unequivocally from a combined reading of Sections 59, 61 and 62 of that Act. To require that the writer of the document should be called is, in my opinion, to import in regard to documentary evidence the rule laid down in Section 60 of the Evidence Act which, in terms, applies only to oral evidence, and to ignore the several statutory provisions set out above. There can be no doubt that a statement contained in a document may also be hearsay evidence, as when the writer says in a letter, "X told me that Y had died". Such a statement not being within the knowledge of the writer himself and being based on what he heard from somebody else, would be written hearsay. The contents of a document, duly proved, are

received in evidence as statements made by the writer. What somebody else told the writer does not, however, become his statement merely because he reproduces it in the document and cannot be said to be the "contents" of the document in which his statements are recorded. The passage from Halsbury, 3rd edn., Vol. 15, para. 533 at p. 294, cited in the Division Bench judgment in the case of In the matter of Mr. D. and Mr. S., if properly construed, in my opinion, lays down nothing more than that proposition, In fact, it states that the contents of counsel's opinion would be admissible for the purpose of proving what the opinion was, but would not be admissible to prove the truth of any statement of fact made by counsel in his opinion, which would be a matter which he has only heard from somebody else. Statements in a document are admissible to the same extent to which they would be admissible if the writer had made those statements from the witness-box-no less and no more. Legal propositions, such as that proof of a document does not amount to proof of "the truth" or "the correctness" of its contents, or that proof of a document is no "guarantee of the truth or correctness" of its contents, are, in my opinion, entirely out of place in regard to the question of admissibility of documentary evidence. The question that arises at that stage is only this: "On execution being proved, can the document be used for the purpose of proving its contents?" The answer must be: "Yes, to the same extent as oral evidence to that effect". The object of proving a document is, no doubt, to prove the truth or correctness of those contents, but whether it amounts to proof of "the truth" of the contents of the document is purely a question of probative value and not of admissibility. There is no guarantee of the truth of the contents of a document merely by reason of the proof of that document, but neither would there be any guarantee of the truth of oral evidence merely by reason of the fact that the deponent has stated the same on oath, and has subjected himself to cross-examination.

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puts it “Even within a particular national system, the goals of competition law may evolve and transmogrify, often depending upon the state of industrialisation of the economy, the strength of the political democracy, the power of the judiciary and the bureaucrats, and the exposure of the domestic firms to global competition.” Competition laws have a long history. Some authors claim that the first laws against anti-competitive practices date as far back as the middle ages, when cartels, the so-called guilds, were formed in most European cities. The first prohibition of contracts that restrain trade can be traced to English common law of the early fifteenth century.

The first modern body of competition law can be traced back to the enactment of the **Sherman Act of 1890** and the **Clayton Act of 1914** in the United States. In the second half of the nineteenth century, the United States and Canada experienced a turbulent process of economic change. Railroads and steamships expanded the scope of many markets, and managerial innovations led to larger corporations and trusts.

At the same time, agricultural prices fell as a consequence of monetary stringency associated with the gold standard. Farmers and small business owners discovered that they had to pay high prices for the inputs charged by the trusts while receiving lower prices for their own outputs. They subsequently lobbied for legislation to limit the trusts’ power. Their movement was successful and led to the adoption of competition laws in Canada (1889) and the United States (1890).^[3]

The turn of the century also saw the formation of many cartels in Germany and other parts of Europe. Cartels steadily expanded their economic importance in countries such as Austria, Switzerland, Italy, France, the Scandinavian countries and were even recorded in Japan. With the practice of cartelization reaching its peak during the great recession of the 1930s, European countries began to follow the United States’ lead in enacting competition laws.

After World War II, the Allies, led by the United States, introduced tight regulation of cartels and monopolies in occupied Germany and Japan. In Germany, despite the existence of laws against unfair competition passed in 1909 (Gesetz Gegen Den Unlauteren Wettbewerb or UWB), the industry was dominated by a few large cartels. Similarly, in Japan, business was organized along family and nepotistic ties, and a few business houses controlled much of the industry. Thus after the end of the World War II more strict competition laws based on the US legislations were introduced in these countries.

Further developments in competition law, however, were considerably overshadowed by the move towards nationalization and industry wide planning in many countries. Making the economy and industry democratically accountable through direct government action became

a priority. Coal industry, railroads, steel, electricity, water, health care and many other sectors were targeted for their special qualities of being natural monopolies. In contrast, Commonwealth countries were slow in enacting statutory competition law provisions. The United Kingdom introduced the (considerably less stringent) Restrictive Practices Act in 1956. Australia introduced its current Trade Practices Act in 1974.

Competition laws have been adopted more recently in developing countries compared to the more developed counterparts. Argentina and Mexico, were the early entrants amongst the developing countries, and adopted competition laws in 1923 and 1917 respectively. Competition laws were introduced in Chile, Brazil and Colombia in the 1960s. In the early 1990s, there were only about 35 developing countries with a competition law in place, but with rapid industrialization and integration into the world market, several other developing countries have taken steps to introduce competition laws and presently the number of developing countries with competition related statutes is estimated to exceed 100, with several more in the process of adopting a competition legislation very soon.

Evolution and Development of Competition Law in India

India adopted its first competition law way back in 1969 in the form of **Monopolies and Restrictive Trade Practices Act (MRTP)**. The Monopolies and Restrictive Trade Practices Bill was introduced in the Parliament in the year 1967 and the same was referred to the Joint Select Committee. The MRTP Act, 1969 came into force, with effect from, 1 June, 1970. However, with the changing nature of business, market, economy on the whole within and outside India, there was felt a necessity to replace the obsolete law by the new competition law and hence the MRTP Act was replaced with the Competition Act of 2002.

The enactment of MRTP Act, 1969 was based on the socio – economic philosophy enshrined in the Directive Principles of State Policy contained in the Constitution of India. The MRTP Act, 1969 underwent amendments in 1974, 1980, 1982, 1984, 1986, 1988 and 1991. The amendments introduced in the year 1982 and 1984 were based on the recommendations of the Sachar Committee, which was constituted by the Govt. of India under the **Chairmanship of Justice Rajinder Sachar** in the year 1977.

The Sachar Committee pointed out that advertisements and sales promotions having become well established modes of modern business techniques, representations through such advertisements to the consumer should not become deceptive. The Committee also noted that fictitious bargain was another common form of deception and many devices were used to lure buyers into believing that they were getting something for nothing or at a nominal value for their money. The Committee recommended that an obligation is to be cast on the seller to

speaking the truth when he advertises and also to avoid half-truth, the purpose being preventing false or misleading advertisements.

However, as the times changed, the need was felt for a new competition law. With introduction of new economic policy and opening up of the Indian market to the world, there was a need to shift focus from curbing monopolies to promoting competition in the Indian market. As pointed out by the then Finance Minister in his budget speech in February, 1999–
“The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine this range of issues and propose a modern competition law suitable for our conditions.”

In October 1999, the Government of India constituted a High Level Committee under the Chairmanship of Mr. SVS Raghavan [**‘Raghavan Committee’**] to advise a modern competition law for the country in line with international developments and to suggest legislative framework, which may entail a new law or suitable amendments in the MRTP Act, 1969. The Raghavan Committee presented its report to the Government in May 2000.

The committee inter alia noted: In conditions of effective competition, rivals have equal opportunities to compete for business on the basis and quality of their outputs, and resource deployment follows market success in meeting consumers’ demand at the lowest possible cost.

On the basis of the recommendations of the Raghavan Committee, a draft competition law was prepared and presented in November 2000 to the Government and the Competition Bill was introduced in the Parliament, which referred the Bill to its Standing Committee. After considering the recommendations of the Standing Committee, the Parliament passed December 2002 the Competition Act, 2002.

Hence, the Monopolies and Restrictive Trade Practices Act, 1969 [MRTP Act] was repealed and was replaced by the Competition Act, 2002, with effect from 1 September, 2009.

Salient Features of Competition Act, 2002

The Competition Act provides for establishment of a Competition Commission of India which will be a quasi-judicial body bound by principles of rule of law (i.e. predictability in reasoning and uniform and consistent application of law) in giving decisions and the doctrine of precedents. The CCI has all the powers of a civil court for gathering evidence.

There are **three major elements** in the Competition Act

- Anti-competitive Agreements (Section 3)

- Abuse of Dominant Position (Section 4)
- Combinations (Section 5 and 6)

Anti-competitive Agreements:

Anti-competitive Agreements are prohibited under the Competition Act. The following agreements entered into by enterprise, association or persons are considered as anti-competitive:

Agreement having appreciable adverse effect on competition(AAEC) – no one shall enter into any agreement in respect of production, supply, distribution storage, acquisition or control of goods or provision of services which causes or is likely to cause appreciable adverse effect on competition within India. Following factors are to be considered by the Commission to determine whether an agreement has appreciable adverse effect on competition in India:

- Creation of barriers to new entrants in the market
- Driving existing competitors out of the market
- Foreclosure of competition by hindering entry into the market
- Accrual of benefits to the consumers
- Improvements in production or distribution of goods or provision of services.
- Any agreement entered into, including cartels engaged in identical or similar trade of goods or provision of services, which:
 - Determines purchase or sale prices
 - Limits or controls production, supply, markets, technical development, investment or provision of services
 - Shares the market of source of production or the provision of services by way of allocation of geographical area of the market, or type of goods or services, or number of customers in the market or any other similar way
- Results in bid rigging or collusive bidding having AAEC in India.

Agreement at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including:

- Tie-in arrangement
- Exclusive supply agreement
- Exclusive distribution agreement
- Refusal to deal

- Resale price maintenance
- If the aforesaid agreement causes an AAEC in India, then such agreements will be considered as anti-competitive agreements and such agreements are prohibited under the Act.
- Remedies available against Anti-competitive Agreements

Section 27: Competition Commission of India has the following powers in this regard:

- Passing an interim order during the pendency of inquiry
- Serve a cease and desist notice directing the offending parties to a cartel to discontinue and not to repeat such agreements in future
- Order the offending parties to modify the agreement
- Impose on each member of the cartel a hefty pecuniary penalty

Abuse of Dominant Position:

The Act defines dominant position (dominance) in terms of a position of strength enjoyed by an enterprise, in the relevant market in India, which enables it to: a operate independently of the competitive forces prevailing in the relevant market; or an affect its competitors or consumers or the relevant market in its favor.

- The *relevant market* (Section 2(r)) means “the market that may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets”.

Factors that Determine Dominant Position:

Section 19(4) of the act mentions the factors that help in determining dominant position in the market.

Dominance has been traditionally defined in terms of market share of the enterprise or group of enterprises concerned. However, a number of other factors play a role in determining the influence of an enterprise or a group of enterprises in the market. These include: a market share, a the size and resources of the enterprise; a size and importance of competitors; a economic power of the enterprise; a vertical integration; a dependence of consumers on the enterprise; a extent of entry and exit barriers in the market; countervailing buying power; a market structure and size of the market; source of dominant position viz. whether obtained due to statute etc.; a social costs and obligations and contribution of enterprise enjoying dominant position to economic development. The Commission is also authorized to take into account any other factor which it may consider relevant for the determination of dominance.

Abuse of Dominance:

Dominance is not considered bad per se but its abuse is. Abuse is stated to occur when an enterprise or a group of enterprises uses its dominant position in the relevant market in an exclusionary or/ and an exploitative manner.

SECTION 4 (2) OF THE ACT SPECIFIES THE FOLLOWING PRACTICES BY A DOMINANT ENTERPRISES OR GROUP OF ENTERPRISES AS ABUSES

- directly or indirectly imposing unfair or discriminatory condition in purchase or sale of goods or service;
- directly or indirectly imposing unfair or discriminatory price in purchase or sale (including predatory price) of goods or service;
- limiting or restricting production of goods or provision of services or market;
- limiting or restricting technical or scientific development relating to goods or services to the prejudice of consumers;
- denying market access in any manner;
- making 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 contracts;
- using its dominant position in one relevant market to enter into, or protect, other relevant markets.

Abuses as specified in the Act fall into two broad categories:

- Exploitative (excessive or discriminatory pricing) and
- Exclusionary (for example, denial of market access).
- Predatory Pricing

The “predatory price” under the Act 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 goods or provision of services, with a view to reduce competition or eliminate the competitors”

[Explanation (b) of Section 4] Predation is exclusionary behaviour and can be indulged in only by enterprises(s) having dominant position in the concerned relevant market.

The major elements involved in the determination of predatory behaviour are:

- Establishment of dominant position of the enterprise in the relevant market
- Pricing below cost for the relevant product in the relevant market by the dominant enterprise [‘Cost’, for this purpose, has been defined in the Competition Commission

of India (Determination of Cost of Production) Regulations, 2009 as notified by the Commission.]

- Intention to reduce competition or eliminate competitors This is traditionally known as the predatory intent test

Powers of the Commission:

After inquiry the Commission may pass inter- alia any or all of the following orders

Under **section 27** the Commission may direct the parties to discontinue and not to re-enter such agreement; direct the enterprise concerned to modify the agreement. direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and pass such other orders or issue such directions as it may deem fit.

The Commission can impose such penalty as it may deem fit. The penalty can be up to 10% of the average turnover for the last three preceding financial years upon each of such persons or enterprises which are parties to bid-rigging or collusive bidding.

Section 28 empowers the Commission to direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.

Under **section 33** of the Act, during the pendency of an inquiry into abuse of dominant position, the Commission may temporarily restrain any party from continuance with the alleged offending act until conclusion of the inquiry or until further orders, without giving notice to such party, where it deems necessary.

Regulation of Combinations:

As per the Competition Act, Combinations include Mergers, Acquisitions, and Amalgamations. The term combination according to the Act means:

- Section 5(a): Acquisition of control, voting rights or assets;
- Section 5(b): Acquisition of control by a person over an enterprise where such person has control over another enterprise in similar or identical business;
- Section 5(c): Mergers and Acquisitions.
- Section 6 provides for regulation of combinations so that they do not have an adverse effect on competition. As per this section, No enterprise should enter into any combination that is likely to cause an AAEC. When any enterprise enters into a combinations and if the value of assets or turnover increases beyond a threshold declared by the government such enterprise shall give notice to the Commission in the prescribed form by disclosing the details of the proposed combination and any such

combination shall not come into effect until 210 days have passed from the date on which the notice has been given to the Commission.

Investigation of Combinations:

- The CCI can either by itself or through a Director General conduct an investigation to determine the proposed combination is likely to cause appreciable adverse effect on competition within India.
- If the CCI is of the opinion that a combination is likely to have an AAEC then it will issue show cause notice to the parties and they have to respond within 30 days of receipt of the notice.
- After receipt of the reply to show cause notice, the CCI can call for the report from the Director General.
- Within 7 days of receipt of reply from the parties or of the receipt of the report from the Director General, the CCI will direct the parties to publish the details of the combination to the public.
- CCI can invite affected or likely to be affected parties or members of the public to file written objections to the combinations.
- CCI can call for additional information from the parties to the combination within 15 working days of the expiry of the time for filing objections from the affected parties or the members of the public.
- Additional documents are to be filed by the parties within further 15 days.
- On receipt of the requested information the CCI must deal with the case within 45 days.
- Final decision can be taken by the CCI to accept, reject or modify the combination within an additional 180 working days. If the CCI does not give its final decision then the combination is deemed to be approved.

Conclusion:

India and the world was going through a new phase of globalisation, liberalisation and privatisation and these changing times were bringing newer challenges and the existing MRTP Act had become obsolete in the modern era. Hence the new Competition Act came into being in order to suit the need of the hour. The new act is based on the regulation of conduct or behaviour of the players in the market and is result oriented rather than being procedure oriented like the MRTP Act.

Further its main purpose is to protect and promote competition in the market. Competition is very essential as it benefits: the *Consumers* as they get wider choice of goods and services, better quality and improved value for money; it benefits the *Businesses* as a level playing field is created and a redressal of anti-competitive practices is available, the inputs are competitive priced, they tend to have greater productivity and ability to compete in global markets and finally it also benefits the state as there is optimal realisation from sale of assets and there is enhanced availability of resources for social sector. Thus, by protecting competition in the market the competition law helps benefit all the players in the market which in turn is beneficial for the economy as a whole.

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