GUJARAT CIVIL JUDGEMENTS

2024(2)GCJ503

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before A S Supehia; Gita Gopi]

Letters Patent Appeal; Special Civil Application; Civil Application (For Stay) No. 964 of 2017; 20726 of 2015, 13344 of 2015; 1 of 2017; 964 of 2017, 965 of 2017

dated 25/09/2024

Rajkumar Sitaldas Keswani

Versus

General Manager & Ors

MISCONDUCT INQUIRY

Industrial Disputes Act, 1947 Sec. 11A - Misconduct Inquiry - Appellant, a railway employee, challenged the reduction of his punishment ordered by the Industrial Tribunal after being found guilty of one of three charges in a disciplinary inquiry - Tribunal held that charges Nos. 2 and 3 were not proved but reduced the punishment for charge No. 1 from five stages of pay reduction for five years to two stages for one year without future effect - Both employer and employee filed writ petitions - Court found that the Tribunal and the Single Judge erred by making findings in the absence of the inquiry officer's report - Case was remanded to the Tribunal for reconsideration after placing the inquiry report on record - Appeal Allowed

Law Point: Disciplinary decisions must be based on the inquiry officer's report, and findings made without such a report can be remanded for reconsideration to ensure proper evaluation of evidence

ઔદ્યોગિક વિવાદ અધિનિયમ, 1947 કલમ 11A – ગેરવર્તણૂકની તપાસ – અરજદાર, રેલ્વે કર્મચારીએ શિસ્તની તપાસમાં ત્રણમાંથી એક આરોપમાં દોષિત ઠર્યા પછી ઔદ્યોગિક ટ્રિબ્યુનલ દ્વારા આદેશ કરાયેલ તેની સજામાં ઘટાડો કરવાને પડકાર્યો – ટ્રિબ્યુનલે એવું માન્યું કે આરોપો નંબર 2 અને 3 સાબિત થયા ન હતા પરંતુ ઓછા કરવામાં આવ્યા હતા. ચાર્જ નંબર 1 ની સજા પાંચ વર્ષ માટે પગાર ઘટાડાનાં પાંચ તબક્કામાંથી ભાવિ અસર વિના એક વર્ષ માટે બે તબક્કામાં – એમ્પ્લોયર અને કર્મચારી બંનેએ રિટ પિટિશન દાખલ કરી – કોર્ટે શોધી કાઢ્યું કે ટ્રિબ્યુનલ અને સિંગલ જજ ગેરહાજરીમાં તપાસ અધિકારીના અહેવાલના તારણો કરીને ભૂલ કરે છે – તપાસ અહેવાલ રેકોર્ડ પર મૂક્યા પછી કેસને પુનર્વિચારણા માટે ટ્રિબ્યુનલને રિમાન્ડ કરવામાં આવ્યો – અપીલની મંજૂરી.

કાયદાનો મુદ્દો: શિસ્તના નિર્ણયો તપાસ અધિકારીના અહેવાલ પર આધારિત હોવા જોઈએ, અને આવા અહેવાલ વિના કરવામાં આવેલા તારણો પુરાવાનું યોગ્ય મૂલ્યાંકન સુનિશ્ચિત કરવા માટે પુનર્વિચાર માટે રિમાન્ડ કરી શકાય છે.

Acts Referred:

Industrial Disputes Act, 1947 Sec. 11A

Counsel:

Megha Jani, Arjun Joshi, Anal S Shah

JUDGEMENT

A.S. Supehia, J.- [1] The present Letters Patent Appeals filed under Clause 15 of the Letters Patent, 1865, are directed against the common judgment and order dated 26.12.2016 passed by the learned Single Judge, wherein and whereby, the learned Single Judge has allowed the writ petition being Special Civil Application No.13344 of 2015 filed by the employer - Western Railways and rejected the writ petition being Special Civil Application No.20726 of 2015 filed by the employee of the Western Railways. In the captioned writ petitions filed by the railways and the employee of the railways had assailed the judgment and award dated 08.12.2014 passed by the Central Government, Industrial Tribunal cum Labour Court, Ahmedabad (in short, "the Tribunal") in Reference (CGITA) No.142 of 2012.

[2] As recorded by the learned Single Judge, the employer has challenged the part of award whereby the punishment imposed upon the workman came to be reduced after holding that the charge Nos.(ii) and (iii) were not established and the workman assailed the impugned judgment and award on the ground that the Tribunal ought to have exonerated him having regard to the nature of evidence adduced during the inquiry.

[3] The writ petitions were entirely premised on the findings of the inquiry officer and the nature of the evidence adduced during the departmental proceedings.

[4] On a query being raised to the learned advocates appearing for the respective parties to point out the findings of the inquiry officer, which are the part of the inquiry officer's report, it is candidly accepted by both the learned advocates appearing for the respective parties that the report of the inquiry officer was not on record before the Tribunal.

[5] At this stage, we may refer to the issues framed by the Tribunal in Reference (CGITA) No.142 of 2012:-

"(i) Is the reference maintainable?

(ii) Has the 2nd party any valid cause of action?

(iii) Whether the departmental inquiry conducted against the concerned workman Shri Rajkumar Keshwani is fair, valid and proper observing the principles of natural justice? Yes

(iv) Whether the finding of the inquiry officer in its report dated 11.03.2009 is perversed? No.

(v) Whether the punishment awarded to the concerned workman Shri Rajkumar Keshwani by N.I.P dated 31.03.2010 is legal, proper and justified or it is disproportionate to the gravity of misconduct under standard form 5 chargesheet?

(vi) Whether the 2nd party/workman is entitled to relief as claimed vide para 11 of S/c?"

[6] The issue Nos.(iii) and (iv), as noted hereinabove, will disclose that the Tribunal has categorically framed the issues on the departmental inquiry conducted against the workman and whether the findings recorded by the inquiry officer in its report dated 11.03.2009 is perversed. Such issues could have been delved into and answered, only after the examination of the inquiry officer's report dated 11.03.2009. We failed to understand, how the Tribunal could have recorded any findings on such issues in absence of the inquiry officer's report dated 11.03.2009. The Tribunal ultimately has recorded thus: -

"12. Thus, considering the oral and documentary evidence discussed above, I am of the considered view that the punishment imposed upon the concerned workman Shri Rajkumar Keshwani is disproportionate to the gravity of Charge no.1 whereas charge no. 2 and 3 have gone as not proved, so the action of the management of western Railway in imposing the penalty of reduction in the same time scale of pay by five stages below for a period of five years without future effect upon Shri Rajkumar Keshwani FCRC vide order dated 31.03.2010 is not at all legal and justified. So this court is competent to invoke the power u/s. 11-A of the I.D. Act to alter, modify the punishment order so imposed on the concerned workman by the D.A. This issue is answered accordingly.

13. ISSUE NO. I, ii & vi:- In view of the findings to issue no. iii, iv and v in the foregoings, I further find and hold that the reference is maintainable and the Union/2nd party have got valid cause of action to raise this industrial dispute. I, further, find and hold that the delinquent Shri Rajkumar is entitled for part relief as to modification in his punishment order as reduction in the same time scale of pay by two stages below for a period of one year without future effect. Accordingly the penalty imposed upon Shri Rajkumar Keshwani is altered/modified to the extent indicated above."

[7] The Tribunal has, thus, examined the oral and documentary evidence as mentioned and noted in the judgment and award with regard to the alleged misconduct

by the employee. Before arriving at such conclusion in paragraph No.7 of the judgment, the Tribunal has recorded thus: -

> "7. On consideration of the materials as discussed above, I find and hold that the departmental inquiry held against concerned workman Shri Rajkumar Keshwani is fair, valid and proper observing the principle of natural justice. I further find and hold that there is no perversity in the findings of the inquiry officer in its report and so inquiry has not vitiated. Issue No.iii is answered in affirmative and issue no iv in negative."

[8] The Tribunal has categorically recorded that the departmental proceedings held against the concerned workman was fair, valid and proper, after observing principle of natural justice and it does not find and hold that there is any perversity in the "findings of the inquiry officer in its report and so inquiry is not vitiated." Such a finding is misplaced in wake of the fact that no inquiry officer report was on record.

[9] The learned Single Judge has allowed the writ petition filed by the Western Railways assailing the judgment and award passed by the Tribunal, whereas the writ petition filed by the appellant - workman has been rejected by holding as under: -

> "10. Looking to the overall facts and circumstances discussed above, more particularly, when no illegality, perversity or any other infirmity was found by the judicial forums, in the procedure adopted during the inquiry against the workman and in view of positive finding that full opportunity was given to the workman during the inquiry, it was not open for them to reappraise and re-appreciate the evidence on record either for reducing the punishment or reversing the findings of fact recorded during the inquiry on all the three charges."

[10] It is also pertinent to note that the learned Single Judge, in paragraph No.8.4, has in fact held thus: -

> "8.4 Assuming that the scope for interference in the findings rendered in the departmental inquiry as also the punishment was made, this Court fails to understand as to how in absence of the findings of the Inquiry Officer, the judicial forum could have found fault with such factual findings without looking at the inquiry report."

[11] Despite the aforenoted observations, the learned Single Judge has rejected the writ petition filed by the appellant workman. In our opinion, in absence of the findings of the inquiry officer's report, the Tribunal could not have recorded a specific finding with regard to the findings of the inquiry officer in its report, which was not on record and the learned Single Judge has also committed the same error. The learned Single Judge should have remanded the matter to the Tribunal for appreciating the findings of the inquiry officer in his report.

[12] In light of the aforesaid undisputed facts, this Court had opined to the learned advocates appearing for the respective parties that this is a fit case, where the matter has to be remanded to the Tribunal so that the findings of the inquiry officer can be examined, after the inquiry officer's report dated 11.03.2009 is brought on record.

[13] Learned advocate Ms. Megha Jani, on instructions, has submitted that in case, the Court is desirous of remanding the matter, then some time limit may be fixed since the alleged misconduct pertains to the year 2005 and the appellantemployee would be retiring in February, 2025.

[14] On the substratum of the aforesaid analysis and in light of the undisputed fact that the inquiry officer's report was not on record before the Tribunal, and also having noticed such fact, the learned Single Judge ought to have remanded the matter to the Tribunal.

[15] Under the circumstances, both the Letters Patent Appeals stand disposed of. The impugned common judgment and order passed by the learned Single Judge is quashed and set aside. The matter is ordered to be remanded to the Tribunal. Reference (CGITA) No.142 of 2012 is ordered to be listed to its original file.

[16] It will be open for the appellant(s) and for the respondent(s) to bring the report dated 11.03.2006 on the record of the reference proceedings. All the contentions of the respective parties are left open and it will be open for them to raise their submissions with regard to the findings of the inquiry officer's report.

[17] It is clarified that this Court has not examined the merits of the case and the matter is solely remanded on the ground of absence of inquiry officer's report. The Tribunal shall examine the contentions of the respective parties on merits and pass appropriate reasoned order. Since the dispute pertains to the year 2005 and the appellant-employee is retiring in February, 2025, we request the Tribunal to dispose of Reference (CGITA) 142 of 2012, preferably within a period of four months.

[18] All the connected applications stand disposed of accordingly

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2024(2)GCJ507

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Hemant M Prachchhak]

Special Civil Application No 9236 of 2008 **dated 20/09/2024**

Laxman Odarmal Chatvani

Versus

Gandhidham Co Operative Bank Ltd

DISMISSAL FOR MISCONDUCT

Industrial Disputes Act, 1947 Sec. 11A - Bombay Industrial Relations Act, 1946 Sec. 85, Sec. 84 - Dismissal for Misconduct - Petitioner, a bank clerk, was dismissed for misappropriation of funds and challenged the disciplinary proceedings, arguing procedural violations - Labour Court upheld the dismissal, finding the inquiry valid and based on documentary evidence showing misappropriation of customer payments - Petitioner appealed to the Industrial Court, which also upheld the decision, concluding the dismissal was proportionate to the misconduct - Court dismissed the petition, affirming concurrent findings of both courts and holding that no interference was warranted - Petition Dismissed

Law Point: Courts will not interfere with disciplinary proceedings and dismissal for serious misconduct, including misappropriation, when findings are supported by valid inquiry and documentary evidence

ઔદ્યોગિક વિવાદ અધિનિયમ, 1947 કલમ 11A – બોમ્બે ઈન્ડસ્ટ્રીયલ રિલેશન્સ એક્ટ, 1946 કલમ 85, કલમ 84 – ગેરવર્તણૂક માટે બરતરફી – અરજદાર, એક બેંક કારકુન, ભંડોળના દુરુપયોગ માટે બરતરફ કરવામાં આવ્યો હતો અને શિસ્તની કાર્યવાહીને પડકાર્યો હતો, પ્રક્રિયાગત ઉલ્લંઘનની દલીલ કરી હતી – લેબર કોર્ટે બરતરફીને સમર્થન આપ્યું હતું, પૂછપરછને માન્ય ગણાવી હતી અને દસ્તાવેજી પુરાવાના આધારે ગ્રાહકની ચુકવણીની ગેરવ્યવસ્થા દર્શાવતી હતી. ઔદ્યોગિક કોર્ટમાં અપીલ કરી, જેણે નિર્ણયને પણ માન્ય રાખ્યો, બરતરફી ગેરવર્તણૂકના પ્રમાણમાં હોવાનું તારણ કાઢ્યું – કોર્ટે બંને અદાલતોના સહવર્તી તારણોને સમર્થન આપતાં અને કોઈ દખલગીરીની જરૂર ન હોવાનું માનીને અરજી ફગાવી દીધી – પિટિશન ફગાવી દેવામાં આવી.

કાયદા નો મુદ્દો: જ્યારે તારણો માન્ય તપાસ અને દસ્તાવેજી પુરાવાઓ દ્વારા સમર્થિત હોય ત્યારે, ગેરરીતિ સહિત ગંભીર ગેરવર્તણૂક માટે અદાલતો શિસ્તની કાર્યવાહી અને બરતરફીમાં દખલ કરશે નહીં.

Acts Referred:

Industrial Disputes Act, 1947 Sec. 11A

Bombay Industrial Relations Act, 1946 Sec. 85, Sec. 84

Counsel:

T R Mishra, Dakshesh Mehta, Rushang D Mehta

JUDGEMENT

Hemant M. Prachchhak, J.- [1] Present petition is filed by the petitioner-workman under Articles 226 & 227 of the Constitution of India and in the matter of Bombay Industrial Relatinos Act, 1946 now the Gujarat Industrial Relations Act, with the following prayers:-

(A) That Your Lordships be pleased to issue an onder, direction or writ in the nature of certiorari or any other appropriate writ, order or direction, quashing and setting aside the impugned order dated 14.07.2005 marked ANN.B, order dated 14.12.2006 marked ANN.C and final order dated 22.04.2008 marked ANN.E to this petition, being illegal, perverse and contrary to record;

(B) Direct the respondent to reinstate the petitioner with full backwages and continuity of service as his service has never been dismissed;

(C) Any other and such further relief as the Hon'ble Court deems fit and proper in the interest of justice together with costs."

[2] The brief facts of the present case are as under:-

2.1 The petitioner was permanant employee of respondent Bank and was working as a Clerk. The petitioner was dismissed from the services of the Bank vide order dated 17th January, 1992. The petitioner approached the Labour Court under the provisions of Bombay Industrial Relations Act, 1946 and raised an industrial dispute over illegal termination of employment. A preliminary issue was raised about the legality and validity of the inquiry proceeding. The Labour Court vide order dated 14th July, 2005, accepting the application of the employer and holding that the inquiry conducted against the petitioner is legal and valid.

2.2 Thereafter, the matter was proceeded with on merit and the Labour Court vide order dated 14-12-2005 received by the petitioner on 11-3-2006, rejected the application being B.I.R. Application No.2/96 (Old No.18/1992). Thereafter, an Appeal was preferred by the petitioner before the Industrial Court under the provisions of Section 84 and 85 of the B.I.R. Act, 1946. The Industrial Court thereafter proceeded the Appeal on merits and vide order dated 22.04.2008 rejected the Appeal. Hence, the present petition.

[3] Learned advcoate Mr. U.T. Mishra for the petitionerworkman has submitted that the impugned order and judgement passed by the learned judge of the labour court is patently illegal, contrary to record and therefore, the same deserves to be quashed and set aside. It is also submitted that the allegations against the petitioner was that the petitioner has tampered with the record of the money receipt and embezzled the amount of the bank in a dishonest manner. The said allegation is apparantly illegal and has no merit at all and the Labour Court has not looked into the factual aspect of the case and hurriedly decided the issue against the petitioner which is totally perverse and contrary to documentry evidence placed on the record.

3.1 It is further submitted that when the money receipt is prepared accepting the amount from the customer, the said bill is prepared in duplicate. The original copy is handedover to the customer and second, third and fourth copies are retained by the Bank for oficial use. The original money receipt alongwith three duplicate carbon copies have been produced before the Labour Court. It would be seen that three copies

are carbon copies from the original and the amount written on the original receipt book will naturally appear on the second, third and fourth carbon copies. It is further submitted that there is no tampering with any figure in the second, third and fourth copy. The original copies are handedover to the customer and if subsequently the customer tampers with the bank record, the responsibility of the petitioner cannot be fastened alleged to have tampered with the bank record. It is further submitted that the said document contains the original which appears to have been tampered with by the customer but the duplicate copy there is no tampering in the figure of the amount mentioned therein. If a customer with dishonest intention tampers with the original receipt, the petitioner cannot be held responsible as the second. third and fourth copies of the money receipt indicates the original amount without any correction whatsoever.

3.2 It is further submitted that the entire base of allegations is totally illegal and the same is based on conjuncture and surmises. The learned Labour judge has not looked into this vital aspect and held dismissal order as valid and legal.

3.3 It is submitted that the respondent bank has issued showcause notice dated 11.07.1991 which was replied by the petitioner on 15.07.1991. The bank has isseud another show cause notice dated 25.10.1991 asking the petitioner to show cause within 10 day, the petitioner immediately submitted reply vide letter dated 01-11-1991, which indicates that on the basis of so called inquiry report placed before the management, the decision has been taken.

3.4 In support of his contention, learned advocate Mr. Mishra has referred and relied on the judgment of the Hon'ble Apex Court in the case of State of Karnataka Vs. Umesh,2022 Sup1 AIR(SC) 837 and submitted that the disciplinary inquiry in exercise of judicial review the Court does not act an appellate forum for the findings of the disciplinary authority and also as the disciplinary proceedings initiated after almost three years from the date of issuance of show cause notice and charge sheet. Therefore, it is hit by the provisions of Section 11 A of the ID Act and it is delayed and is violative of principle of natural justice. It is submitted that the present petition is deserves to allowed and the impugned order pased by the Labour Court and confirmed by the Industrial Court in appeal deserves to be quashed and set aside.

[4] On the other hand, learned advocate Mr. Mehta, for the respondent- Bank has submitted that the petitioner was working as a Clerk on permanent post. Since the bank is having business of the Gujarat Electricity Board with regard to the collection of electricity bill from the consumers, the said amount was to be collected by the respondent-bank. It is submitted that in the year 1986 the petitioner was on duty, the amount of electricity bill collected by the petitioner has not deposited to the bank and there was deficiency and difference in the amount and the account was not matched. It is also submitted that during the course of inquiry, it was found that though the petitioner collected the said amount, has not deposited the said amount and misappropriated and for such misconduct, the charge sheet came to be issued against

the respondent- workman on 08.07.1986 and the reply was filed by the workman on 12.07.1986. The said amount was collected by the concerned workman, has deposited the amount in the bank and thereafter, he was on leave and during the said period, the petitioner was put under suspension and on 02.06.1990 the departmental proceedings was initiated against the concerned workman, he has also examined the witnessed. It is also submitted that during the course of inquiry proceedings he was found guilty for the alleged misconduct and was dismissed from service.

4.1 It is further submitted that in fact the petitioner has challenged the said inquiry proceedings by way of preferring reference before the Labour Court being B.I.R. Application No. 2 of 1996, wherein the preliminary issue was raised that whether the departmental inquiry was conducted by the respondent-bank was legal and valid. For the preliminary issue, the Court has conducted the inquiry and after considering all the relevant and material documents and after considering the reply has passed the order that the departmental inquiry against the present petitioner is legal and valid. It is further submitted that there is no any infirmity in the said order and reached to the finality and as it was not further challenged and thereafter the reference was proceeded before the Labour Court and after considering all the relevant documents and after considering the provisions of Section 11 A of the I.D. Act, which is discussed by the Labour Court and the Labour Court has considered that the concerned workman i.e. present petitioner found guilty for the serious misconduct of misappropriation and therefore, the punishment imposed by the respondent is inconsonance with the settled principle of law and it was harsh to disproportionate to the charge levelled against the present petitioner and ultimately the Labour Court come to a conclusion that the punishment which is imposed against the present petitioner is inconsonance with the charge levelled against him and therefore, no interference was called for by the Labour Court in the reference and threfore, since it is a concurrent findings recorded by all the concerned authority. It is further submitted that while exercising under Articles 226 & 227 of the Constitution of India, this Court is not sit in the appeal over the findings recorded by the Disciplinary Authority confirmed by the Labour Court and subsequently confirmed by the Appellate Court i.e. Industrial Court, Rajkot. It is further submitted that no interference is required in the present petition. The present petition requires to be dismissed.

4.2 Learned advocate for the respondent has referred and relied on the judgment of the Hon'ble Apex Court in the case of **Regional Manager, RSRTC Vs. Ghanshyam Sharma**, 2002 10 SCC 330, wherein the Hon'ble Apex Court has observed in Para-5 in the said judgment while exercising the jurisdiction under the provisions of Section 11A of the I.D. Act. It is further submitted as the petitioner was facing serious charges of misconduct with regard to misappropriation, under such circumstances, no leniency is to be shown in his case. It is submitted that the order passed by the Labour Court and confirmed by the Industrial Court in appeal deserves to be confirmed and the petition deserves to be dismissed.

[5] I have heard learned advocates for the respective parties. Considering the facts that the petitioner is involved with such a serious misconduct of misappropriation of the amount as he was serving as a clerk in the bank and it was his duty to collect the amount from the consumer towards the electricity bill and the said collection is to be deposited to the electricity board. On the date of the incident, it was found that there was discripency in the account though he has collected the amount of Rs. 4,000/- from the consumer but was not deposited in the account of the electricity board and the fact was come to the knowledge, the disciplinary proceedings was initiated agianst the workman with regard to his serious misconduct of misappropriation. During the course of inquiry, though the sufficient opportunity was given to examine the witnesses and after going through the written explanantion appended by the concerned workman, the Disciplinary Authority has found that he was guilty as the petitioner has also admitted before the concerned authority that in turn he has deposited the said amount and the petitioner was found guilty for the serious such misconduct of misappropriation for that there is no leniency can be shown. Even the order of Disciplinary authority was challenged before the Labour Court by way of preliminary objection and preliminary issued. The said issue was decided by the Labour Court after considering all relevant material and after considering the report of the Inquiry Officer as well as submissions made by the learned advocates, the Labour Court while deciding the application of the priliminary issue with regard to the legality and validity of the inquiry, the Labour Court has referred all the documentary evidence which is produced before the Court in Para-3 and 6, the Labour Court has framed the issue that whether the proceedings of the disciplinary authority is legal and valid and that isued was decided in favour of the respondent. After considering that it was further in reference aslo, the Labour Court has considered all the relevant materials and thereafter in Para-3, the Labour Court has considered the provisions of Section 11 A of the I.D. Act with regard to the quantum of punishment and has recorded the reasonings in Para-8 and ultimately rejected the reference of the concerned workman. Feeling aggrieved and dissatisfied with that, the petitioner has also preferred appeal before the Industrial Court, Rajkot, the Industrial Court after going through the record of the case and after going through the submissions and relevant documents, the Industrial Court in Para-7 has found that the order passed by the Labour Court is inconsonance with the settled principle of law and there is no illegality and irregularity in the order passed by the Labour Court. It was also further discused that while exercvising the powers under the provisions of Section 11 A of the I.D. Act, whether the Labour Court has exeeded its jurisdiction or not. The Appellate Court has also observed in the internal page-24 after referring the judgment of this Court as well as Hon'ble Apex Court, the Appellate Court i.e. Industrial Court has rejected the appeal preferred by the petitioner and therefore, under such circumstances, the present petition deserves to be dismissed.

5.1 This Court has also found that the preliminary issue involved is whether the disciplinary authority who has conducted the disciplinary proceedings was

inconsonance with the provision of Section 11A of the I.D Act and the principle enunciated by the Hon'ble Apex court by observing the principle of natrual justice that if the punishment imposed considering the charge of serious misconduct with regard to misappropriation, whether it is to be disproportionate or not and whether the Labour Court while exercising the jurisdiction under the provisions of Section 11A of the I.D. Act has committed any error while dismssing the reference of the petitioner or not.

[6] After going through the arguments and after going through the records of the present case and after going through the order passed by the Disciplinary Authority and which is referred by the Labour Court and the order passed the while dealing with the preliminary issue with regard to the legality and validity of the disciplinary proceedings and the order passed by the Labour Court and the Appellate Court, there is an undisputed fact that the concerned petitioner was found for the serious alleged misconduct of misappropriation and he was found guilty for the said misconduct as he has admitted this misconduct and deposited the amount of misappropriation whcih he has committed. Therefore, with regard to the basic foundation of that it is found true and correct. Even disciplinary proceedings is initiated by the respondent - bank is ultimately found legal and valid by the Labour Court after going through the records and the submissions convasssed by the learned advoates for the parties, the Labour Court has rightly considered the submissions with regard to the quantum of punishment while exercising the provisons of Section 11 A of the I.D. Act, which is confirmed by the Appellate Court and therefore, while interfereing in the concurrent findings, this Court while exercising the jurisdiction under Articles 226 and 227 of the Constitution of India, this Court finds that it is not proper to interfere with the findings recorded by all the concerned in the concurrent findings of facts. This Court is of the opinion that the present petition devoid of merit and dserves to be dismissed.

[7] In case of misconduct and nature of misappropraition, the Hon'ble Apex Court has time and again from 1976 onwards in the case of **Ruston & Hornsby (I) Ltd. Vs. T.B. Kadam**, 1976 3 SCC 71, the Hon'ble Apex Court has observed in Para-7 & 8, which reads as under.

> "7. Coming now to the other points in the case: the decisions of this Court establish clearly that when a workman is dismissed as a result of a domestic enquiry the only power which the Labour Court has is to consider whether the enquiry was proper and if it was so no further question arises. If the enquiry was not proper the employer and the employee had to be given an opportunity to examine their witnesses. It is not the duty of the Enquiry officer in this case to seek permission of the police constable's superiors. It was the respondent's duty to have him properly summoned. He did not even apply to the Enquiry officer requesting him to seek the permission of the police constable's superiors. It is therefore wrong on the part of the Labour Court to have held that the enquiry against the respondent was not a proper enquiry. Once this

conclusion is reached there was no room for the summoning and examination of the police constable by the Labour Court. The question regarding the jurisdiction exercised by an Industrial Tribunal in respect of a domestic enquiry held by the management against a worker has been elaborately considered by this Court in its decision in D.C.M. v. Ludh Budh Singh(6) and the principles that emerge out of the earlier decisions of this Court have been set out in that decision. The decision of this Court in Workmen v. Firestone Tyre & Rubber Co.(7) also sets out the principles that emerge from the earlier decisions. In Tata Oil Mills Co. Ltd. v. Its Workmen(8) it was argued that where the employee is unable to lead his evidence before the domestic Tribunal for no fault of his own, an opportunity should be given to him to Prove his case in proceedings before the Industrial Tribunal. This Court held that this contention was not well founded. It was pointed out that the Enquiry officer gave the employee ample opportunity to lead his evidence and the enquiry had been fair. It was also pointed out that merely because the witnesses did not appear to give evidence in support of the employee's case it could not be held that he should be allowed to lead such evidence before the Industrial Tribunal and if such a plea was to be upheld no domestic enquiry would be effective and in every case the matter would have to be tried afresh by the Industrial Tribunal. It was pointed out that findings properly recorded at the enquiries fairly conducted were binding on the parties, unless it was shown that the said findings were perverse, or were not based on any evidence. We are not able to agree with the Labour Court in this case that the findings of the domestic enquiry arc either perverse or not based on any evidence.

8. We therefore come to the conclusion that there was no failure on the part of the Enquiry officer to give a reasonable opportunity to the respondent workman, that the enquiry was fair and the Labour Court had, therefore, no right to examine the witness on behalf of the workman and based on that evidence to upset the finding arrived at the domestic enquiry. We also hold that the punishment imposed in the circumstances is one in which the Labour Court cannot interfere. The result is that the appeal will have to be allowed and the award of the Labour Court set aside."

[8] In the case of **Bharat Heavy Electricals Ltd. Vs. M. Chandrasekhar Reddy and others**, 2005 2 SCC 481, this Hon'ble Apex Court has discussed with regard to the powers of the Labour Court while dealing with the provisions of Section 11 A of the I.D. Act the scope and manner of exercise and the judicial review in case of quantum of punishment, theHon'ble Apex Court has observed in Para Nos. 11, 12, 15,16, 17, 18, 22 & 23, which reads as under:-

"11. Question then is whether the misconduct alleged against is so serious or grave as to create a genuine lack of confidence in respondent by the appellant. 12. While considering this question of loss of confidence and the jurisdiction of the Labour Court in interfering with the quantum of punishment the learned Single Judge was of the following opinion:-

"There is any amount of spectrum of discretion vested with the Tribunal in taking into consideration the facts and circumstance of the case"

15. The Labour Court while exercising its discretion recorded that though the confidence of the employer on the respondent is shaken still it gave 3 reasons for exercising its discretion, they are:-

(A) No instance of earlier misconduct are spelt. (B) It appears the respondent is an active participant in the cultural activities and for common cause of the employees.

(C) Therefore, it felt the punishment of dismissal from service is harsh, in the facts and circumstances of the case.

16. These extenuating circumstances recorded by the Labour Court is in the background of the following proved facts:-

(A) Title deeds deposited with the appellant for borrowing money were surreptitiously taken away without the permission of the appellant which act amounts to theft.

(B) The said documents so stolen were admitted to be used for the purpose of selling the property which amounts to fraud.

(C) The documents so taken was sought to be justified by a letter where the signatures are forged amounting to forgery.

17. The question the Labour Court ought to have asked itself while exercising its discretion under Section 11 A should have been whether the reasons given by it that there was no earlier misconduct or that the respondent is an active participant in cultural activities is sufficient to come a reasonable conclusion that a punishment of dismissal was harsh in the background of the finding recorded by itself as to the confidence of the employer on the respondent which according to the Labour Court was shaken by the misconduct.

18. In our opinion with no stretch of imagination either the extenuating circumstances recorded by the Labour Court or the exercise of its discretion could be termed either as reasonable or judicious. In our opinion even the learned Single Judge and the Division Bench erroneously held that the Labour Court had unlimited jurisdiction under Section 11 A of the Act. It is because of the above erroneous legal foundation as to the vastness of power vested with the Labour Court. The High Court accepted the interference by the Labour Court in the award of punishment. Thus, the Labour Court as well as

the High Court fell in error in granting the relief to the respondent which is challenged in this petition.

22. In UPS RTC (supra) this Court held:-

"The employee has been found to be guilty of misappropriation and in such an event, if the appellant-Corporation loses its confidence vis-'- vis the employee, it will be neither proper nor fair on the part of the Court to substitute the finding and confidence of the employer with that of its own in allowing reinstatement. The misconduct stands proved and in such a situation, by reason of the gravity of the offence, the Labour Court cannot exercise its discretion and alter the punishment."

23. With reference to Section 11-A of the Act, in the case of The Workment of Firestone Tyre & Rubber Company Ltd. (supra) this Court held:-

" Once the misconduct is proved, the Tribunal had to sustain the order of punishment unless it was harsh indicating victimisation."

"If a proper enquiry is conducted by an employer and a correct finding arrived at regarding the misconduct, the Tribunal, even though it has now power to differ from the conclusions arrived at by the management, will have to give every cogent reasons for not accepting the view of the employer"

[9] In the case of **Divisional Controller, Karnataka State Road Transport Corporation Vs. M. G. Vittal Rao**, 2012 1 SCC 442, the Hon'ble Apex Court in Head Notes B, C, D, E & F which reads as under:-

"**B.** Labour Law Domestic/Departmental Enquiry Criminal prosecution vis- - vis departmental action Standard of proof Reiterated, in criminal case, proof required is proof beyond reasonable doubt, while in domestic enquiry it is proof on preponderance of probabilities (Paras 11, 13 and 24)

C. Labour Law Reinstatement Loss of confidence in employee Reiterated, once employer has lost confidence in employce and bona fide loss of confidence is affirmed, reinstatement cannot be directed (Paras 25 to 31)

D. Labour Law - Dismissal - Interference by Labour Court/ Tribunal/ Judicial review/Validity- Acquittal in criminal proceedings Effect Held, in absence of any finding by High Court that charges levelled in domestic enquiry and in criminal trial were same, witnesses were same, order of Labour Court upholding punishment of dismissal should not have been interfered with, considering gravity of offenceHowever, order of Single Judge of High Court modifying order of dismissal of delinquent employee to order of termination and granting of terminal benefits not challenged by appellant employer-Hence, delinquent employee entitled to said relief (Paras 33 and 34)

E. Administrative Law Judicial Review- Generally -Nature and scope Held, judicial review is concerned primarily with decision-making process and not decision itself (Para 31)

F. Lavour Law- Dismissal - Misconduct- Held, in case of d misconduct of grave nature like corruption or theft, no punishment other than dismissal is appropriate (Para 31)"

[10] This Court has also passed the judgment in similar facts of the present case in Special Civil Application No. 12390 of 2012 dated 12.07.2024 and in Special Civil Application No. 11143 of 2023 dated 30.07.2024. Considering teh submissions of learned counsel appearing for the respective parties and the decisions cited at the Bar, this Court is of the opinion that while exercising the powers under Articles 226 & 227 of the Constitution of India, this Court can not go into the facts of the case and re-examine the findings recorded by the Labour Court as well as Appellate Court, the present petition is devoid of merits and deserves to be dismissed.

[11] The present petition is dismissed. The impugned order dated 14.07.2005, order dated 14.12.2006 and final order dated 22.04.2008 passed by the Labour Court as well as Appellate Court i.e. Industrial Court are hereby confirmed. Notice is discharged.

There shall be no order as to costs

2024(2)GCJ517

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Hemant M Prachchhak]

Special Civil Application No 11327 of 2020, 11328 of 2020, 11329 of 2020, 11330 of 2020, 15317 of 2019, 15318 of 2019, 15316 of 2019, 15320 of 2019 **dated 20/09/2024**

Valsad District Panchayat Through Its Executive Engineer

Versus

Bhikhabhai Nathubhai Mehta

COMPENSATION AWARD

Industrial Disputes Act, 1947 - Compensation Award - Petitioners, workmen engaged as temporary clerks, challenged their termination in 1986, seeking reinstatement and back wages - Petitioners raised the dispute 26 years later, claiming wrongful termination - Labour Court awarded a lump sum compensation of Rs. 1,25,000 but denied reinstatement - Both parties appealed, with petitioners arguing for back wages and the employer challenging the compensation - Court dismissed both appeals, finding the compensation appropriate given the long delay and lack of continuous employment evidence - Petitions Dismissed

Law Point: Delay in raising an industrial dispute weakens claims for reinstatement, and lump sum compensation may be awarded in lieu of reinstatement where long delays and lack of evidence exist

ઔદ્યોગિક વિવાદ અધિનિયમ, 1947 – વળતર પુરસ્કાર – અરજદારો, કામચલાઉ કારકુન તરીકે રોકાયેલા કામદારો, 1986 માં તેમની સમાપ્તિને પડકાર્યા, પુનઃસ્થાપન અને પાછું વેતન માંગ્યું – અરજદારોએ 26 વર્ષ પછી વિવાદ ઊભો કર્યો, ખોટી રીતે સમાપ્તિનો દાવો કર્યો – શ્રમ અદાલતે એકસાથે રૂ. 1,25,000/- નું વળતર આપ્યું. પરંતુ પુનઃસ્થાપિત કરવાનો ઇનકાર કર્યો – બંને પક્ષકારોએ અપીલ કરી, જેમાં અરજદારોએ બેક વેતન માટે દલીલ કરી અને એમ્પ્લોયર વળતરને પડકારે છે – લાંબા વિલંબ અને સતત રોજગાર પુરાવાના અભાવને કારણે વળતર યોગ્ય માનીને કોર્ટે બંને અપીલો ફગાવી દીધી – અરજીઓ ફગાવી દેવામાં આવી.

કાયદા નો મુદ્દો: ઔદ્યોગિક વિવાદ ઊભો કરવામાં વિલંબ પુનઃસ્થાપન માટેના દાવાઓને નબળો પાડે છે, અને જ્યાં લાંબા વિલંબ અને પુરાવાનો અભાવ હોય ત્યાં પુનઃસ્થાપનના બદલામાં એકસાથે વળતર આપવામાં આવી શકે છે.

Acts Referred:
Industrial Disputes Act, 1947

Counsel:
H S Munshaw, Hardik C Rawal, Nirbhay H Rawal, M H Rawal

JUDGEMENT

Hemant M. Prachchhak, J.- [1] The first set of writ petitions being Special Civil Application Nos.11327/2020, 11328/2020, 11329/2020 and 11330/2020 are filed by the petitioner Valsad District Pancahyat, challenging the impugned award of even date i.e. dated 24/05/2019 passed by the Labour Court, Valsad in the respective References, whereby, the Labour Court partly allowed the respective references and directed the petitioner to pay lump sum compensation of Rs.1,25,000/- to the respective workman.

Whereas, the second set of writ petitions being Special Civil Application Nos.15316/2019, 15320/2019, 15318/2019 and 15317/2019 are filed by the respective respondentworkman, challenging the very same award of the even date i.e. dated 24/05/2019 passed by the Labour Court, Valsad in the respective References, whereby, instead of granting full back wages and payment of retirement benefits, only an amount of Rs.1,25,000/- was granted as compensation.

[2] Since all these writ petitions arise from the award of the even date passed by the Labour Court in the respective Reference, they are heard analogously and are being disposed of by this common judgment and order. For the sake of brevity, Special Civil Application No.11327 of 2020 is treated as lead matter.

[3] The brief facts of the case of Special Civil Application No.11327 of 2020 are that, the respondent-workman was engaged on public works depending upon availability of work as well as fund as Work Charge Clerk purely on temporary and adhoc basis. That, the respondent-workman was offered work in accordance with the administrative requirement. That, the respondent-workman was relieved pursuant to the order dated 25/06/1982 alongwith others. That, the respondent-workman was again offered work and relieved with effect from 30/06/1983 through order dated 27/06/1983. That, the employment was offered to the respondent-workman and others in accordance with the administrative requirement and as stated hereinabove, the nature of employment was temporary and adhoc. That, the respondent-workman was again offered work through order dated 01/06/1985 and later on, relieved vide order dated 02/12/1985. That, the respondent-workman was again offered work as Work Charge Clerk along with others and relieved with effect from 30/06/1986 by the Deputy Executive Engineer, Tribal Area Subdivision, Valsad vide order dated 30/06/1986 pursuant to order passed by the petitioner on 27/06/1986.

3.1 It is the case of the petitioner that the respondentworkman approached the Labour Court at Valsad by way of filing Ref. [LCV] No.177/11 praying for a relief of reinstatement with continuity and full back wages on the ground that he was wrongly and illegally terminated with effect from 30/06/1986. That, a detailed written statement was filed on his behalf. That, though the respondent-workman admitted delay of 26 years in filing of reference before the Labour Court at Valsad, his gainful employment throughout the period after 1986, better and higher remuneration, the Labour Court allowed the reference ignoring all the factual and legal aspects and directed to pay a lumpsum compensation of Rs.1,25,000/- vide award dated 24/05/2019.

3.2 Being aggrieved and dissatisfied by the same, the present petitions are preferred by the respective petitioners under Article 226 & 227 of the Constitution of India read with the provisions of Industrial Disputes Act, 1947 (for short "the I.D. Act), challenging the same before this Court.

[4] Heard learned advocate Mr.H.S. Munshaw, appearing on behalf of the petitioner - Valsad District Panchayat and learned advocate Mr.Hardik Rawal, appearing on behalf of the respondent-workman.

[5] Learned advocate Mr.Munshaw has submitted that the impugned award passed by the Labour Court is erroneous, illegal, unjust, arbitrary and contrary to the facts and material on record as well as provisions of the I.D. Act and catena of judgments delivered by the Hon'ble Supreme Court as well as this Court and therefore, is required to be quashed and set aside. He has submitted that the concerned workmen have raised dispute at very belated stage and that too before different authority. He has submitted that the respondentworkmen were required to raise industrial dispute before the Industrial Tribunal or the Labour Court, instead, the respondent-workmen had preferred appeal before the Gujarat Civil Service Tribunal being numbers 278-296 of

1985, which was rejected and therefore, they approached this Court by way of preferring Special Civil Application No.10754 of 1994, wherein, this Court had not granted any relief in favour of the concerned workmen and the petition was disposed of vide order dated 02/12/2005 with a direction to decide the representation of the concerned workmen, the observation made in paragraph 15 is as under:

"15. So far as the present case is concerned, the Service Tribunal has taken care while deciding the appeals of the present petitioners and respondents were directed to follow observations made in the judgment and cases of the appellants and other work-charged employees be considered sympathetically and absorbed in the work-charged employees cadre as per observations of Hon'ble Supreme Court in para No.51 in case of **State of Haryana vs. Piara Singh**, 1992 4 SCC 118 as reproduced in para-37 of the said judgment, if any vacancy arises and if the appellants are willing to be absorbed. The grievance raised on behalf of petitioners is that despite this directions and despite the vacancy arises, the present petitioners were not absorbed. The respondent authorities are, therefore, directed to look into this and see to it that if there is any vacancy and if they are entitled to be absorbed in view of the directions given by the Tribunal and in view of the order passed by this Court, their cases may be considered sympathetically. If the petitioners are still having any grievance against the compliance of the directions of the Tribunal, it is always open for them to approach the appropriate authority for ventilation of their grievance, as it give rise to fresh cause of action."

5.1 Learned advocate Mr.Munshaw has submitted that since the representations of the concerned workmen were not decided, they again approached this Court by way of filing Special Civil Application Nos.22937 to 22940 of 2006, wherein also, this Court disposed of the petitions without granting any relief in favour of the concerned workmen and even this Court had restrained to observe anything on merits and simply directed the authorities to decide the representations of the concerned workmen and therefore, under such circumstances, the respondent-workmen have not approached appropriate forum to raise their dispute and instead, they had filed reference either before the Labour Court or before the Industrial Tribunal and waited for almost 26 years and thus, ultimately, in 2011, they raised industrial dispute before the Labour Court, Valsad and the Labour Court had decided the respective references as aforesaid, which is absolutely erroneous, illegal and unjust. He has also submitted that the respondent-workmen have failed to establish that they have worked with the petitioner from 1982 as Work Charge Clerk till the date of their termination i.e. 30/06/1986 for a period of 4 years getting salary of Rs.1,800/- per month and for that, there was no material produced by the respondent-workmen before the Labour Court, on the contrary, it was proved that they had not worked for 240 days in each calendar year in the presiding year also and therefore, since the respondent-workmen have not proved the said fact, they are not entitled for any relief as prayed for in the reference before the Labour Court, however, without considering all these aspects, the Labour Court while deciding the issue no.2 in favour of the respondent-workmen held that the

petitioner has committed a breach under the provisions of Section 25(B)(1) of the I.D. Act and therefore, the findings recorded by the Labour court is erroneous, illegal and unjust.

5.2 Learned advocate Mr.Munshaw has submitted that the Labour Court, while deciding the issue nos.3 and 4, has further held that in view of the judgments of the Hon'ble Apex Court as well as this Court, the respondent-workmen are entitled to get lumpsum compensation to the tune of Rs.1,25,000/- and it has come to the conclusion that they are not entitled for reinstatement and other consequential relief and thus, while awarding lumpsum compensation in favour of the present respondent-workmen, the Labour Court has committed a serious error while interpreting the provisions of the I.D. Act and also the judgments cited before the Labour court and under such circumstances, the respondent-workmen are not entitled to get any relief. He has submitted that the Labour Court has not considered the fact that the respondentworkmen have approached after almost 26 years from the date of termination of their services by filing the respective reference before the Labour Court, Valsad and the ground of delay was not taken into consideration by the Labour Court and even from the oral evidence of the concerned workmen, they have admitted that they are not having any documents to show that they were earning Rs.1,800/- per month and even they are unable to prove that they are appointed by the petitioner after following due recruitment process. He has submitted that even the respondent-workmen are not having sufficient qualification for the post they were working and therefore, the Labour Court has completely ignored the oral evidence of the respondent-workmen while passing the impugned award. He has also submitted that the respondentworkmen even in their cross-examination have admitted that they are unable to produce any documents to show that they have completed 240 days in each calendar year. Over and above the grounds agitated in the memo of petition, learned advocate Mr.Munshaw has submitted that the impugned awards passed by the Labour Court are erroneous, illegal and unjust and the same are required to be quashed ad set aside and the petitions filed by the petitioner Panchayat are required to be allowed.

[6] Per contra, learned advocate Mr.Hardik Rawal, appearing on behalf of the respondent-workmen, has submitted the respondent-workmen were appointed as work charge class-IV employees after calling the names from the employment and following rules of recruitment for selection and therefore, it cannot be said that the respondent-workmen were irregularly appointed by the petitioner and therefore, they are entitled for the relief as prayed for in the respective reference preferred before the Labour Court as the Labour Court has rightly decided the issue nos.2 and 3 in favour of the respondentworkmen, however, while awarding lumpsum compensation, the Labour Court has committed an error by granting a very meager amount. He has further submitted that in fact, the respondent-workmen have recently approached the Service Tribunal but they have also initiated proceedings against the present petitioner and therefore, the delay caused in the said proceedings shall not come in the way of the

present respondent-workmen and therefore, it cannot be said that the respondent-workmen have approached the Labour Court after almost 26 years, infact, they had initiated proceedings against the petitioner even before this Court also and therefore, they are entitled to get relief of reinstatement and other consequential benefits. However, at this stage, learned advocate Mr.Rawal has vehemently submitted that out of 4 workmen, 3 have passed away and the remaining 1 has also reached the age of superannuation and therefore, so far as the relief of reinstatement is concerned, it cannot be prayed but, at the same time, they are entitled for the other consequential relief in terms of monetary benefits and therefore, learned advocate Mr.Rawal has urged that the case of the respondentworkmen be considered by passing appropriate orders.

[7] I have heard the learned advocates appearing for the respective parties and perused the material placed on record. I have also considered the facts of the case and the submissions advanced by both sides, and after going through the record and proceedings it appears that, the respondent-workmen have worked from 1982 to 1986 and from 1986 their services came to be terminated. It also appears that they had been interviewed by the petitioner, for which, they had produced copy of communication issued by the petitioner and therefore, it cannot be said that it was an illegal appointment, it can only be said that it was an irregular appointment, however, the fact reveals that the respondent-workmen had worked as Work Charge employee and appointed at the clerical post as a Clerk and they had worked at the same time. It is also an undisputed fact that, neither of the parties have produced documentary evidence to prove that the concerned workmen had worked 240 days or they had not completed 240 days. It is also an undisputed fact that the respective references are filed before the Labour Court after almost 26 years, however, under the wrong impression or wrong defence, the concerned workmen had approached wrong forum and filed applications before the Service Tribunal for regularization / absorption in the service and also prayed for regular pay-scale in the said proceedings. It is also an undisputed fact that twice the workmen have approached this Court and did not get any relief in their favour except the order of deciding the representations of the workmen. It is relevant to note herein that the Labour Court has not even discussed the aspect of delay in preferring the respective references, even the Labour Court has not discussed the evidence of the witnesses in its true and proper spirit and therefore, the impugned awards passed by the Labour Court are erroneous, illegal and unjust, however, considering the fact that the concerned workmen had not sat idle after relieving them from service in 1986 and they had necessarily joined the service or under different vocation they had earned their livelihood till their life-time. As either of the parties have not produced any documentary evidence before the Labour Court to prove their case, however, the Labour Court, merely on guess-work, has decided the respective references while passing the impugned awards, which itself is bad in law, erroneous,

illegal and unjust and therefore, this Court is of the opinion that both the set of petitions are required to be dismissed.

[8] Accordingly, the present petitions are hereby dismissed. The amount awarded by the Labour Court, though it was awarded long back but, the petitioner Valsad District Panchayat has not deposited the same till date and therefore, the said amount is to be paid to the respondent-workmen (petitioners in second set of petitions) alongwith simple interest @ 6% per annum from the date of filing of their petitions till actual payment is made. In case of death of the concerned workmen, the amount is to be paid to the legal heirs of the deceased workmen. The petitioner to pay the amount after verifying the Bank details and after following due procedure of law through RTGS/NEFT or any other appropriate mode, within a period of 8 weeks from the date of receipt of order of this Court. Rule is discharged.

Registry to place copy of this order in each connected matter

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2024(2)GCJ523

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Vaibhavi D Nanavati]

Special Civil Application No 8513 of 2014 **dated 19/09/2024**

Tarun Rasiklal Shah

Versus

State of Gujarat & Ors

PENSION FIXATION DISPUTE

Constitution of India Art. 226, Art. 14 - Gujarat Civil Services (Pension) Rules, 2002 Rule 9 - Pension Fixation Dispute - Petitioner challenged fixation of his pension on the basis of a lower pay scale after voluntarily retiring as Registrar - Petitioner argued he was entitled to pension based on the higher pay scale drawn before retirement - State contended that the higher pay was personal pay to prevent financial loss from his previous position - Court upheld the pension fixation, ruling it was correctly based on the sanctioned pay scale for the Registrar position and dismissed the petition

Law Point: Pension must be fixed according to the sanctioned pay scale for the position held at retirement, even if higher pay was granted temporarily as personal pay to avoid financial loss

ભારતનું બંધારણ આર્ટ. 226, આર્ટ. 14 – ગુજરાત સિવિલ સર્વિસીસ (પેન્શન) નિયમો, 2002 નિયમ 9 – પેન્શન ફિક્સેશન વિવાદ – અરજદારે રજિસ્ટ્રાર તરીકે સ્વેચ્છાએ નિવૃત્ત થયા પછી નીચા પગાર ધોરણના આધારે તેના પેન્શનના ફિક્સેશનને પડકાર્યો – અરજદારે દલીલ કરી કે તે ઉચ્ચ પગારના આધારે પેન્શન મેળવવા માટે હકદાર છે. નિવૃત્તિ પહેલાં સ્કેલ દોરવામાં આવ્યો – રાજ્યએ

દલીલ કરી કે ઉચ્ચ પગાર એ તેની અગાઉની સ્થિતિથી નાણાકીય નુકસાન અટકાવવા માટે વ્યક્તિગત પગાર છે – કોર્ટે પેન્શન ફિક્સેશનને સમર્થન આપ્યું, ચુકાદો આપ્યો કે તે રજિસ્ટ્રાર પદ માટે મંજૂર પગાર ધોરણ પર આધારિત છે અને અરજીને બરતરફ કરી.

કાયદાનો મુદ્દો: નિવૃત્તિ સમયે હોદ્દા માટે મંજૂર પગાર ધોરણ મુજબ પેન્શન નક્કી કરવું આવશ્યક છે, ભલેને નાણાકીય નુકસાન ટાળવા માટે વ્યક્તિગત પગાર તરીકે અસ્થાયી રૂપે ઉચ્ચ પગાર આપવામાં આવ્યો હોય.

Acts Referred:

Constitution of India Art. 226, Art. 14

Gujarat Civil Services (Pension) Rules, 2002 Rule 9

Counsel:

Lipee D Dave, Suman Motla, Prerak P Oza

JUDGEMENT

Vaibhavi D Nanavati, J.- [1] Heard Ms. Lipee D. Dave, learned advocate appearing for the petitioner, Ms. Suman Motla, learned Assistant Government Pleader appearing for the respondent State and Mr. Prerak P. Oza, learned advocate appearing for the respondent no.3.

[2] The petitioner herein has filed the present petition for non-fixation of pension upon the last salary drawn by the petitioner, without citing any reason for the same, the same has constituted a cause of action on the part of the present petitioner to institute the present petition invoking Article-226 of the Constitution of India.

[3]

3.1. Briefly stated that, when the petitioner was appointed as Registrar, the petitioner was paid the pay scale, which was made applicable to the Registrar of respondent no.3 Dharamsinh Desai University, as per the government resolution dated 01.10.2005. The petitioner was paid the salary as per the 5th Pay Revision, for the post of Registrar in the pay scale of Rs.16,400-22,400. Thereafter, the 6th Pay Revision was decided to be implemented w.e.f. 01.01.2006. Accordingly, the petitioner was placed in the corresponding pay scale of Registrar under the 6th Pay Revision. On 20.12.2010, an order was passed by the concerned department under the signature of Deputy Director, Technical Education, in pursuance of the Gujarat Higher Education (Revision of Pay) Rules, 2009 and orders issued from time to time in that regard, declaring that the pay scale of the petitioner stands revised as per the 6th Pay Revision of Pay Rules, w.e.f. 01.01.2006. The salary of the petitioner came to be fixed at Rs.42,390/- as applicable to the post of Registrar from 15.01.2007 in the pay band of Rs.37,400-67,000 alongwith grade pay of Rs.10,000/-.

3.2. The petitioner took voluntary retirement from the post of Registrar of the respondent no.3 Dharamsinh Desai University and his pension should have been fixed in the pay band of Rs.37,400-67,000 with grade pay of Rs.10,000/- as per the 6th Pay Revision, for which the petitioner was paid salary since 15.01.2007 till his date of voluntary retirement, i.e. 31.03.2011.

3.3. The petitioner submitted his papers for pension to the concerned department of the respondents, awaiting approval of the same. Shockingly, the petitioner was denied the pension, as per the last drawn salary in the pay scale Rs.37,400-67,000 and was ordered to be paid the pension in the pay scale of Rs.15,600-39,100.

3.4. The said order was issued upon the petitioner, in the form of government resolution dated 23.08.2012, by which it was ruled that the petitioner would not be eligible for pension as per the pay scale of Rs.37,400-67,000 being pay scale of Registrar in the 6th Pay Revision, corresponding to the pay scale of Registrar under 5th Pay Revision, which was given to the petitioner, at the relevant point of time.

3.5. The said government resolution dated 23.08.2012 does not speak about the salary already paid to the petitioner as per the 6th Pay Revision, w.e.f. 01.01.2006, but without citing any reason, while considering the case for pension, fixation of pension is based upon the pay scale of Rs.15,600-39,100 for the post of Registrar and not in for the pay scale of Rs.37,400-67,000 for the post of Registrar, which the petitioner was drawing since 15.01.2007.

3.6. The said government resolution dated 23.08.2012 is not only arbitrary, but also does not explain anything as to how the department came to the conclusion of considering the fixation of pension of the petitioner, on the basis of the pay scale of Rs.15,600-39,100, when actually the petitioner was drawing the salary as per the 6th Pay Revision of the pay scale of Rs.37,400- 67,000 and had actually received the said salary from 15.01.2007 for the post of Registrar, on which the petitioner was serving.

3.7. The petitioner thereafter, preferred several representations to the concerned authorities with respect to the aforesaid discrimination and illegal action meeted out to the petitioner. The Vice Chancellor also addressed a letter to the Principal Secretary, Technical Education on 08.06.2012 stating the details about the case of the petitioner herein and demanded that he should be paid the pension as per the last drawn salary by him as per the 6th Pay Revision in the pay scale of Rs.37,400- 67,000.

3.8. It is further the case of the petitioner that the said government resolution dated 23.08.2012 is not only arbitrary but bad in law and violative of Article-14 of the Constitution of India. As per the said government resolution dated 23.08.2012, the petitioner has been put in a lower pay scale, just because the petitioner opted for voluntary retirement on 31.03.2011. Had the petitioner continued in service till the date of superannuation, instead of taking voluntary retirement on 31.03.2011, the

petitioner would have been eligible for fixation of pension upon his last drawn salary, i.e. in the pay scale of Rs.37,400-67,000 with grade pay of Rs.10,000/-.

3.9. In view of the aforesaid facts, the petitioner herein has approached this Court, seeking the following reliefs:

> "15. Looking to the facts and circumstances of the case, the Petitioner most respectfully prays that;
>
> (A) This Hon'ble Court may kindly be pleased to issue a writ of mandamus and/or any other appropriate writ order or direction commanding the Respondents to annul the Government Resolution dated 23rd August, 2012 annexed at Annexure C to the present petition.
>
> (B) This Hon'ble Court may kindly be pleased to issue a writ of mandamus and/or any other appropriate writ order or direction commanding the Respondents to fix the pension of the petitioner as Registrar in the Pay Band of Rs. 37,400 - Rs. 67,000 with Grade Pay of Rs. 10,000/- as per the 6th Pay Revision, for which he was paid salary since 15th January, 2007 till his date of voluntary retirement i.e. 31st March, 2011 and thereupon, be pleased to command the Respondents to pay to the Petitioner the pension accordingly with effect from the date of his voluntary retirement.
>
> (C) That pending admission, hearing and final disposal of the present petition, this Hon'ble Court be pleased to pass an interim direction, directing the Respondents to fix the pension of the Petitioner on the basis of the last salary drawn in the Pay Band of Rs. 37,400 - Rs. 67,000 with Grade Pay of Rs. 10,000/- as per the 6th Pay Revision.
>
> (D) That Your Lordships may be pleased to award cost of proceedings.
>
> (E) Grant such other and further relief as the nature of the case may require in the interest of justice."

[4]

4.1. Ms. Lipee D. Dave, learned advocate appearing for the petitioner reiterated the contentions and the facts as referred above and submitted that the pension of the petitioner should be fixed upon the last drawn salary in the pay scale of Rs.37,400-67,000 with grade pay of Rs.10,000/-, which was communicated to the respondent no.1 through various communications dated 16.02.2012, 18.04.2012 and 08.06.2012 and also by communication of the respondent no.3 - Dharamsinh Desai University.

4.2. It is submitted that the pension as per the last drawn salary has been denied to the petitioner in the pay scale of Rs.37,400-67,000 and it was ordered that the pension shall be paid in the pay scale of Rs.15,600-39,100 without considering the communications from the Dharamsinh Desai University. The said order directed the change in the pension of the petitioner, and the same was issued upon the petitioner in the form of government resolution dated 23.12.2012, by which it was ruled that the

petitioner would not be eligible for the pension as per the pay scale of Rs.37,400-67,000 being pay scale of Registrar in 6th Pay Revision, corresponding to the pay scale of 5th Pay Revision, which was given to the petitioner at the relevant point of time. The petitioner was denied the benefit of the pay scale of Registrar under 6th Pay Revision and was arbitrarily placed in the pay scale of Rs.15,600-39,100 instead of Rs.37,400-67,000, which was applicable to the post of Registrar under the 6th Pay Revision.

4.3. It is submitted that the aforesaid was done especially, when the petitioner had been receiving the salary as per the 6th Pay Revision from 20.12.2010 and had sought voluntary retirement, on 31.03.2011, having received the salary as per the 6th Pay Revision from 01.01.2006, till 31.03.2011. It is submitted that, the government resolution dated 23.08.2012 does not speak about the salary already paid to the petitioner herein, as per 6th Pay Revision, since 01.01.2006, but without citing any reasons, while considering the petitioner's case for pension, fixation of pension is based on the pay scale of Rs.15,600-39,100 for the post of Registrar and not on the basis of Rs.37,400-67,000 for the post of Registrar, on which the petitioner was joined since 15.01.2007.

4.4. It is submitted that the said government resolution dated 23.08.2012 is not arbitrary but also does not explain anything as to how the department came to the conclusion of considering the fixation of pension of the petitioner, on the basis of the pay scale of Rs.15,600-39,100, when actually the petitioner was drawing the salary as per the 6th Pay Revision of the pay scale of Rs.37,400-67,000 and had actually received the said salary from 15.01.2007 for the post of Registrar, on which the petitioner was serving.

4.5. It is submitted that the respondent State Government is silent with respect to the aforesaid government resolution and has shifted the blame to the Dharamsinh University, although, the petitioner has challenged the validity of the said government resolution. It is submitted to annul the government resolution dated 23.08.2012 and direct the respondents to fix the pension of the petitioner as per the salary drawn by him on 15.01.2007 till the date of voluntary retirement, i.e. 31.03.2011, as per the 6th Pay Revision in the pay scale of Rs.37,400-67,000 with grade pay of Rs.10,000/-.

4.6. Placing reliance on the aforesaid submissions, Ms. Dave, learned advocate submitted that the prayers as prayed for in the present Petition may kindly be allowed.

[5]

5.1. Ms. Suman Motla, learned Assistant Government Pleader appearing for the respondent State submitted that the petitioner herein was appointed as Assistant Lecturer in Dharamsinh Desai Institute of Technology on 16.01.1984 and thereafter was promoted as a Lecturer on 16.01.1987. The said Institute, viz. Dharamsinh Desai Institute of Technology was declared as deemed University by University Grants

Commission (UGC) on 17.02.1995. It is submitted that prior to recommendation of deemed university, the said Institute was a college and after recommendation by the U.G.C., the said Institute was permitted as an University. The petitioner herein was appointed as Controller of Examination and thereafter was appointed as a Registrar on 15.01.2007.

5.2. It is submitted that, as far as the post of Registrar is concerned, the said post was not included in the Education Department resolution dated 05.01.2010. The government resolution dated 23.08.2012 had sanctioned the post of Registrar in the pay scale of Rs.15600-39400 with the grade pay of Rs.7600. It is submitted that as far as pay protection and differential amount is concerned, the petitioner was protected by resolution dated 23.08.2012 and for the purpose of pension, the basic pay, is required to be considered for the fixation of pension, and therefore, the department has rightly fixed the pension of the petitioner as per the pay scale of Rs.15,600-39,400 with the grade pay of Rs.7,600.

5.3. It is submitted that, it is stated by the petitioner that he was put in revised pay scale as Professor not as Registrar, as per the 6th Pay Revision in the pay scale of Rs.37,400-67,000 wherein, the grade pay was considered as Rs.10,000 w.e.f. 15.01.2007 vide respondent's pay fixation order dated 20.12.2010. As far as the pay fixation order dated 20.12.2010 is concerned, it is mentioned about the pay scale of Rs.37,400- 67,000 in the grade pay of Rs.10,000/-, w.e.f. 15.01.2007, but pay fixation order was done by the DD University, Nadiad itself and it was not countersigned by the DTE office on DD University's pay fixation order.

5.4. It is submitted that DD University, Nadiad had forwarded the case of the petitioner for fixation of pension vide their proposal dated 01.04.2011, wherein, the calculation of pension was on the basis of the grade pay of Rs.10,000/- instead of Rs.7,600/-, but it was verified by the respondent and the DD University was asked to send the revised pension proposal.

5.5. It is submitted that, thereafter, DD University, Nadiad had sent the revised the pension proposal, which was sent to the respondent on 01.04.2011 and the said proposal was with the pay scale of Rs.15,600-39,400 and grade pay of Rs.7600/- w.e.f. 15.01.2017 and accordingly the pension came to be fixed.

[6]

6.1. Having heard the learned advocates appearing for the respective parties, it emerges that the petitioner herein came to be appointed as Registrar from 15.01.2007 with the respondent Dharamsinh Desai University, wherein, the petitioner till the date of voluntary retirement, i.e. till 31.03.2011 was receiving the grade pay of Rs.10,000/-, i.e. that of the Professor. The appointment of the petitioner on the post of Registrar was in the pay band of Rs.37,400-67,000 with grade pay of Rs.10,000/- from the post of Professor which was lastly of Rs.37,400-67,000 with grade pay of Rs.9,000/-.

6.2. The education department sanctioned the post of Registrar vide government resolution dated 05.01.2010, which is duly produced at page-38, wherein, the post of Registrar not included. The education department granted the pay scale of sanctioned post of Registrar, which was left out in the government resolution dated 05.01.2010 by issuing government resolution dated 23.08.2012, which is duly produced at Page-50. The said government resolution was specifically published by the education department, Gandhinagar for the petitioner, being appointed as Registrar of the respondent no.3 University. The said government resolution was published to extend the benefit of 6th Pay Revision in the pay scale of Rs.15600-39100, Grade pay of Rs.7600.

6.3. It is pertinent to note that the aforesaid pay fixation of Rs.37,400-67,000 with grade pay of Rs.10,000/- was by the order of the respondent University and the same was not countersigned by the office of the Director of Technical Education on the University's pay fixation order.

6.4. In view of the appointment of the petitioner to the post of Registrar in the pay band of Rs.37,400-67,000, grade pay of Rs.10,000/- from the post of Professor, which was lastly Rs.37,400-67,000/- grade pay of Rs.9,000/-, the pay scale sanctioned to the petitioner on 23.08.2012 as referred above was Rs.15,600-39,100/- with grade pay of Rs.7600/- and in order to avoid financial loss, due to change in post, the said pay given to the post of Registrar being Rs.15,600-39,100/- with grade of pay Rs.7600/-, the pay of Rs.37,400-67,000/- grade pay of Rs.10,000/- was given and the same was termed as 'personal pay'. The entry to the said effect has also been made in the service book of the petitioner. The respondent no.3 University had extended the pay scale of Rs.37,400-67,000/- with grade pay of Rs.10,000/- as per the 6th pay revision to the petitioner from the date of his appointment as Registrar and had considered it as a promotion. The aforesaid was neither intimated nor permission was sought for, from the respondent no.2 and in view thereof, the respondent University, without consulting the parent authority, i.e. the respondent no.2 herein, extended the benefits and therefore, the said fact of the post of Registrar was missed out from the government resolution dated 05.01.2010 and the same did not come to the notice that the pay band granted to the petitioner for the post of Registrar being Rs.37,400-67,000/- with grade pay of Rs.10,000/- from 15.01.2007, till his retirement was Rs.37,400-67,000/- with grade pay of Rs.10,000/-. The eligible band for the post of the petitioner, who voluntarily retired, is the pay scale of Rs.15,600-39,100/- with grade of pay Rs.7600/-. As the petitioner was appointed as Registrar, subsequent to his earlier post and that the petitioner would not face the financial loss, therefore, the same was considered as personal pay.

6.5. It is apposite to refer to the definition under Section 9 (63) of the Gujarat Civil Services (Pension) Rules, 2002, which reads thus:

" ...'personal pay' means additional pay granted to the a Government employee -

(a) to save him from a loss of substantive pay in respect of a permanent post other than a tenure post due to a revision of pay or due to any reduction of such substantive pay otherwise than as a disciplinary measure; or

(b) In exceptional circumstances, on other personal considerations..."

6.6. Upon verification, the respondent University has also sent the revised pension proposal calculating the grade pay of the petitioner, on the basis of the Rs.15,600-39,100 with grade pay of Rs.7,600/-, w.e.f. 15.01.2007 and in view thereof, the pension papers of the petitioner were prepared by the University and accordingly pension was fixed on the said pay scale.

[7] For the foregoing reasons, no case is made to exercise the extraordinary jurisdiction under Article 226 of the Constitution of India and accordingly the petition stands dismissed. Rule discharged. Interim relief, if any, also stands vacated. Pending application/s, if any, also stand/s disposed of

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2024(2)GCJ530

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Biren Vaishnav; Nisha M Thakore]

First Appeal; Civil Application (For Stay) No 2308 of 2018; 1 of 2018

dated 17/09/2024

Tushar Naranbhai Alias Nalinbhai Patel

Versus

Kishorchand Kalidas Parekh & Ors

SUIT DISMISSED

Transfer of Property Act, 1882 Sec. 58 - Suit Dismissed - Appellant challenged the dismissal of his suit for specific performance and declaration regarding a land sale agreement, claiming the seller had legal ownership by virtue of a mortgage by conditional sale - Respondents argued the mortgage was not conditional, but usufructuary, and the seller lacked ownership rights - Trial court dismissed the suit under Order VII Rule XI, holding no cause of action existed based on the mortgage deed - Appellate court upheld the dismissal, confirming the mortgage was usufructuary, not conditional, and no right to sell existed - Appeal Dismissed

Law Point: Mortgage by conditional sale requires explicit provisions for automatic sale; absence of such provisions in a deed leads to its classification as a usufructuary mortgage, invalidating claims of ownership based on the mortgage

મિલકતનું ટ્રાન્સફર એક્ટ, 1882 કલમ 58 – દાવો બરતરફ – અપીલકર્તાએ જમીન વેચાણ કરાર સંબંધિત ચોક્કસ કામગીરી અને ઘોષણા માટે તેના દાવાની બરતરફીને પડકાર્યો હતો, દાવો કર્યો હતો કે શરતી વેચાણ દ્વારા ગીરોના આધારે વિક્રેતાની કાનૂની માલિકી હતી – પ્રતિવાદીઓએ દલીલ કરી હતી કે ગીરો શરતી ન હતો, પરંતુ ફળદાયી હતો, અને વિક્રેતા પાસે માલિકીના અધિકારોનો અભાવ હતો – ટ્રાયલ કોર્ટે ઓર્ડર VII નિયમ XI હેઠળ દાવો ફગાવી દીધો, મોર્ટગેજ ડીડના આધારે કાર્યવાહીનું કોઈ કારણ અસ્તિત્વમાં નહોતું – એપેલેટ કોર્ટે બરતરફીને સમર્થન આપ્યું, પુષ્ટિ કરી કે ગીરો ઉપયોગી છે, શરતી નથી, અને વેચાણ કરવાનો કોઈ અધિકાર અસ્તિત્વમાં નથી – અપીલ બરતરફ

કાયદા નો મુદ્દો : શરતી વેચાણ દ્વારા ગીરો આપોઆપ વેચાણ માટે સ્પષ્ટ જોગવાઈઓ જરૂરી છે; ખતમાં આવી જોગવાઈઓની ગેરહાજરી તેના વર્ગીકરણને ફળદાયી ગીરો તરીકે તરફ દોરી જાય છે, ગીરોના આધારે માલિકીના દાવાઓને અમાન્ય બનાવે છે.

Acts Referred:

Transfer of Property Act, 1882 Sec. 58

Counsel:

Deven Parikh (Senior Advocate), S P Majmudar, H J Karathiya, Aditya R Parikh, Mihir Joshi (Senior Advocate), Amit V Thakkar

JUDGEMENT

Biren Vaishnav, J.- [1] This First Appeal is filed by the original plaintiff. The challenge is to the judgement and decree dated 25.04.2018 passed by the learned Principal Senior Civil Judge, Gandhinagar in Special Civil Suit No.178 of 2017. By the aforesaid judgement, the learned Trial Judge entertained an application under Order VII Rule XI(a) and (d) on behalf of the defendant nos.2 and 3 respondent nos.2 and 3 herein and dismissed the suit of the appellant.

[2] Facts IN BRIEF:

2.1 The appellant filed a Special Civil Suit for specific performance, permanent injunction and declaration. The narrative in the plaint was as under:

(a) The suit was filed for agricultural land at Ahmedabad, sub-district Gandhinagar, Taluka:Gandhinagar, Mouje Gam Zundal, Revenue Khata No.473, Block Survey No.483 admeasuring 10218 square meters.

(b) According to the plaintiff, during the course of negotiations, the defendant no.1 had confirmed that he was the sole and absolute owner of the suit land and therefore competent to sell.

(c) It was decided and agreed that the plaintiff will pay Rs.36,00,000/- in installments to the defendant no.1. Initially payment of the Rs.20,00,000/- in four equal installments and the balance of Rs.16,00,000/- would be paid. The case of the

plaintiff was that four cheques of Rs.5,00,000/- each had duly been received by the defendant no.1.

(d) The parties decided to execute a sale deed for which a visit was made at the office of the sub-registrar where one Ghanshyamji Chamanji, defendant no.3/4 had lodged objections on 13.06.2017.

(e) Having come to know of some disputes pending between defendant no.1 and defendant nos.2 to 5, a Banakhat was thereafter executed on 25.06.2017 between defendant no.1 and the plaintiff.

(f) According to the plaintiff, the Banakhat made a clear disclosure on the part of the defendant no.1 that he had acquired the land as a legal heir of Nathiben who was a mortgagee. Late Ranaji Bhaluji Thakore, a mortgagor had entered into a mortgage by conditional sale on 27.04.1943, inter-alia, one of the conditions being that in the event the mortgagor fails to pay a debt of Rs.475/- within a period of five years then the mortgagee will be entitled to get the ownership of the mortgaged land. By virtue of this conditional sale, the defendant no.1 was the owner.

(g) The plaintiff's case further was that the defendant no.1, in collusion with defendant nos.2 to 5, executed a release deed dated 13.09.2017 on being paid Rs.21,00,000/-. Such a release deed was bad and the defendant No.1 had legal obligation to execute the Banakhat on the payment of remaining consideration of Rs.16,00,000/-.

2.2 The case of the defendant no.2 and 3 in the suit, through the written statement, after listing a chronology of events and dates was that the mortgage was not a mortgage by conditional sale. As the mortgage deed was not a mortgage by conditional sale, the defendant no.1 had no right to execute a Banakhat as he was not the owner of the property, land in question. That revenue entries made as a result of the execution of a mortgage deed did not confer ownership rights on defendant no.1.

2.3 The defendant nos.2 and 3 further stated that the suit filed by defendant no.1 being RCS No.171/2010 for a declaration that he is the owner of the land, was dismissed for want of prosecution on 31.08.2016.

2.4 The deed of 27.04.43 was not a mortgage by conditional sale as per Section 58(c) of the Transfer of Property Act. In fact, after the execution of the mortgage deed, the possession remained with the mortgagor Ranaji and Bai Nathu went abroad and in the year 2010 an amount of Rs.400/- was paid to her relative and as decided, the remaining amount of Rs.75/- would be paid to her on her return to India. Even after her death the disputed revenue entries in favour of the mortgagee were an issue of revenue litigation. The defendants also namely defendants 2 and 4 had filed a Regular Civil Suit No.146 of 2010. For a declaration that the land in question be declared as free from encumbrance and mortgage. That a release deed was signed on 23.08.2017

and therefore the defendant no.1 was no longer and never was the owner of the land in question.

2.5 The defendant nos.2 and 3 also filed an application under Order VII Rule XI(a) and (d) that in light of the fact that as the defendant no.2 and 5 had already entered into a release deed and even otherwise there was no mortgage by conditional sale, on reading the very document of 1943, no course of action was available to the plaintiff and moreover the deed of mortgage itself when read suggested otherwise. Not being the owner of land, the defendant no.1 had no right to sell and therefore the plaintiff could not seek specific performance and therefore the suit had an illusionary cause of action.

2.6 After exchange of arguments, the Trial Court, by the order under challenge, held that the deed of mortgage could not be read to be a mortgage by conditional sale but a usufructuary mortgage and accordingly allowed the defendant nos.2 and 3's application under Order VII Rule XI and dismissed the suit.

[3] Mr.Devan Parikh learned Senior Advocate assisted by Mr.S.P.Majmudar learned advocate with Mr.H.J.Karathia made the following submissions:

3.1 Mr.Parikh would submit that originally the land was owned by one Ranaji Bhaluji Thakore. He had mortgaged the land in question to the mother of the defendant no.1 Bai Nathi. This was done by mortgage deed dated 27.04.1943. Reading the mortgage deed, Mr.Parikh would submit that it was a mortgage by conditional sale for a period of five years. The period of five years and its meaning and the document in question was a subject matter of interpretation. The Trial Court therefore could not have entertained an application under Order VII Rule XI when the issue was triable.

3.2 Mr.Parikh would submit that the limitation would start running from the prescribed period of five years as so stipulated in the mortgage deed. Once the period of five years came to an end, the mortgagor gave up his right to redeem and therefore the original defendant no.1 became an owner of the property with full possession.

3.3 Mr.Parikh would submit that reading of the plaint would indicate that it is the case of the appellant plaintiff that the defendant no.1 had confirmed to the appellant plaintiff that he was the sole and absolute owner of the suit land and therefore, competent to sell and/or deal with the suit land. Even in the revenue records the name of the defendant no.1 was entered which would indicate the ownership of the defendant no.1. It was in light of this situation that the defendant no.1 as owner entered into a sale deed on 23.06.2016 only when one Ghanshyamji Chamanji, one of the legal heirs of the mortgagor M/s.Ranaji Bhaluji Thakore filed his written objection on 13.06.2017 that the sale deed could not be registered. It was on this count that a banakhat was entered into between the plaintiff and the defendant no.1 on 25.06.2017.

3.4 Mr.Devan Parikh would extensively refer to the recitals in the sale deed and submit that all these recitals would go to show that it was beyond doubt that the

defendant no.1, the seller was the owner of the property. Once it was shown that proceedings under the revenue laws and including the Inam Act vested the title, the title in the defendant no.1's mother, the ownership and therefore the right to deal with the property could not be disputed. 3.5 Mr.Parikh would submit that even the subsequent conduct of the defendants viz. that of the defendant no.1 and 2 to enter into a release deed within two months on 23.08.2017 was a mala-fide conduct which was a triable issue. It was a case where the conduct of the defendant no.1 was one where after the sale deed the money was pocketed by the defendant citing the release deed with original owner. It was a clearly collusive act which can be inferred from the fact that the Civil Suit filed by the mortgagee for a declaration that the mortgagor had no right, title or interest was a suit being Regular Civil Suit No.171 of 2009 which was dismissed for non-prosecution. Civil Suit No.146 of 2010 filed by the mortgagor against the mortgagee was also settled. This obviously indicated a collusion between the defendant no.1 and 2 which was a triable issue and could not have been summarily dealt with in an Order VII Rule XI application.

3.6 Taking us through the plaint of Regular Civil Suit No.146 of 2010 filed by the mortgagor, Mr.Parikh would submit that when the averments in the plaint are read, it would be preposterous to believe that for the land which was mortgaged for a loan of Rs.475/- would be redeemed on a condition that Rs.75/- would be paid later when Bai Nathi would return from abroad. The contents of the suit are completely different from the contents of the release deed. The release deed in fact was a sale. From the averments in the plaint filed by the appellant, it was clear that whether the release deed was in fact a sale and whether it defeated the rights of the appellant to enter into a sale was a triable issue as the documents in question has to be interpreted by leading evidence.

3.7 Mr.Parikh would submit that reading para 2 of the suit being Regular Civil Suit No.170 of 2010 filed by the mortgagee would indicate that there was a telltale evidence to suggest that the mortgagee was the owner post ending of the five year period stipulated in the mortgage deed. The suit of the year 2010 was clearly time barred and the defendant no.1 having acquired possession even by the principle of adverse possession and the conduct of the defendants to withdrew the RTS proceedings and the first suit would have to be issues which need to be gone into without shortcut under Order VII Rule XI.

3.8 Inviting our attention to the contents of the present suit and the prayers therein, Mr.Parikh would submit that apart from the prayers based on the mortgage deed, the prayers also were for specific performance and cancellation of the release deed which according to the appellantplaintiff was collusive. The prayer of specific performance could have been decreed under the discretion given to the Court under Section 19 of the Specific Relief Act. He would submit that the suit was not only based on the mortgage deed and the Trial Court in passing the impugned order has misconstrued the

entire issue of holding that the deed was a deed by mortgage by conditional sale. That was only one of the issue. There was a complete wrong appreciation of the purported suit. The interpretation and nature of the mortgage deed could not have been done because it involves merit which could be decided only at the stage of trial.

3.9 Relying on the provisions of Section 41 of the Transfer of Property Act, Mr.Parikh would submit that, it was a transfer of property by an ostensible owner since the mortgagee was in possession and therefore an ostensible owner.

3.10 Relying on the provisions of Article 61(a) of the Limitation Act, Mr.Parikh would submit that the mortgage deed was of the year 1943 and the subsequent suit filed in the year 2010 for redemption was too late in the day as the suit was time barred. 3.11 Mr.Parikh would rely on the following decisions:

(I) In case of Shirpur Power Private Limited v. State Bank of India,2020 3 GLR 2266 to submit that as held in the aforesaid decision, interpretation of documents is a mixed question of fact and law.

(II) In case of Krishnakant Manuprasad Trivedi v. Urvashiben W/o Chaitaniyabhai Chandulal Patel,2018 0 JX(Guj) 313 to submit that though a plaint may be cleverly drafted, it cannot be dismissed under Order VII Rule XI if the plaint has averments which can be established during the trial.

(III) In case of Mohd Ali Saraf Ali v. Jasabhai Lakhabhai Bharwad,2018 0 JX(Guj) 295 to submit that when the suit has multiple prayers as was the case on hand, there cannot be a part rejection of the plaint.

[4] Mr.Mihir Joshi learned Senior Advocate appearing with Mr.Amit Thakkar learned advocate for respondent nos.3.1 to 3.5 would make the following submissions:

4.1 Mr.Joshi would submit that the learned Senior Advocate for the appellant has gone much beyond the case pleaded in the plaint. He would take us through the plaint and submit that the plaintiff sought specific performance of the agreement to sell dated 25.06.2017. The principal prayer therefore was for specific performance. The other prayers being consequential directly be dependent on the principal prayer.

4.2 Mr.Joshi would submit that while deciding an application under Order VII Rule XI, only plaint has to be seen. He would take us through the contention raised in the plaint and submit that on the scrutiny thereof, it was apparent that it did not disclose a cause of action. Applying therefore the statutory provisions, the Trial Court committed no error in rejecting the plaint.

4.3 Mr.Joshi would further submit that reading the entire plaint would indicate that it was the case of the defendant no.1 that he was the sole and independent owner on account of the fact that he had acquired the suit land as a legal heir in lieu of a mortgage by conditional sale dated 27.04.1943. The case of the plaintiff therefore was that he was an ostensible owner by virtue of the mortgage by conditional sale. He would submit that the submission of the learned counsel for the appellant based on

Section 41 of the Transfer of Property Act was misconceived. The reading of the plaint and the cause of action based on a misconstruction of a document did not make him an owner as averred in para 11 of the plaint and on the plain reading of the document, it was evident that there was no automatic sale so as to make the plaintiff an owner.

4.4 Mr.Joshi learned Senior Advocate would submit that reading the provisions of Section 58(c) of the Transfer of Property Act, makes it clear that the ingredients of conditional sale were not satisfied. There was no ostensible sale which was apparent on reading the mortgage deed of 1943. Mr.Joshi would read the relevant portions of the deed and submit that it was beyond doubt a usufructuary mortgage as defined under Section 58(d) of the Transfer of Property Act. Reading the provisions of Section 60 of the Transfer of Property Act, Mr.Joshi would submit that a right to redeem a mortgage is available to a mortgagor at any time and such a right can only be extinguished by act of parties or by decree of Court. The Right to Redemption therefore in a given case can be foreclose by executing a registered instrument which was not the case. The argument of the learned counsel for the appellant therefore that the defendant no.1 was the owner either by virtue of the proceedings under the Inami Act and the Tenancy Law and/or by adverse possession or by expiry of period of limitation are misconceived. The contention that the period of five years having come to an end would foreclose the right was therefore misconceived. The foundation of the plaint for specific performance in the plaint on the basis that the defendant was the owner of the property was misconceived.

4.5 On the contention of the learned counsel for the appellant that the issue of interpretation of the documents was a triable issue is misconceived as under the provisions of Section 91 of the Evidence Act, the document itself proves its character and no other evidence is required except the document itself, Mr.Joshi would take us through the contents of the order impugned and submit that the Trial Court committed no error in determining the type of mortgage as on a plain reading of the mortgage deed it clearly revealed that the deed was not one of mortgage by conditional sale by usufructuary mortgage. A plain reading of the plaint along with the documents produced along with it indicated that the mortgagors were owners of the land and the facts stated in the plaint itself so made it evident. In support of his submissions, Mr.Joshi would rely on the following decisions:

(I) In case of **Narandas Karsondas v. S.A. Kamtam and another**, 1977 3 SCC 247, in support of his submission that the mortgagor has a right to redeem which will survive until there has been a completion of sale by a registered document.

(II) In case of **Achaldas Durgaji Oswal (DEAD) THROUGH LRS. v. Ramvilas Gangabisan Heda (DEAD) THROUGH LRS. And others**, 2003 3 SCC 614 in support of his submission that the right of redemption of a mortgagor is a statutory right which can only be taken away in terms of the proviso appended to Section 60 of

the Transfer of Property Act which is extinguished either by a decree or by act of parties viz. by a registered document of sale.

(III) In case of **Maharaj Shri Manvendrasinhji Jadeja v. Rajmata Vijaykunverba Wd/o Late Maharaja Mahendrasinhji**, 1999 1 GLR 261 in support of his submission that the provisions of Order VII Rule XI(a) is mandatory in nature and Courts are under obligation to reject plaint which does not disclose a real cause of action. Considering scope of Order VII Rule XI(a), the Court held that the Courts have to decide with reference to the averments made in the plaint and clever drafting creating illusions of cause of action are not permitted in law as clear right to sue has to be demonstrated in the plaint.

(IV) In case of **Dahiben v. Arvindbhai Kalyanji Bhanusali (Gajra) (DEAD) THROUGH LEGAL REPRESENTATIVES And others** in support of his submission that a plaintiff by clever drafting attempted to make out a illusory cause of action. Reliance was placed on a decision in case of in the case of **T. Arivandandam v. T.V.Satyapal & Ors.**, 1977 4 SCC 467 to submit that interpretation of a nature of document is a question of law. In support of this submission reliance was also placed on the decision in case of **ITC Limited v. DRAT**, 1998 2 SCC 70.

[5] Mr.Devan Parikh in the rejoinder would submit that it was a case of claiming title under adverse possession. He would rely on a decision in case of Karupaathal and others v. Muthusami,2013 SCCOnLine(Mad) 2163 and submit that in a case where a time limit is fixed on the expiry of limitation of 30 years, the right to extinguishment shall expire. He also relied on a decision in case of **Singh Ram (D) Through L.R.S. v. Sheo Ram & Ors.**, 2014 9 SCC 185, wherein answering the issue the Court held that a usufructuary mortgagee is not entitled to file a suit for declaration that he had become owner merely on expiry of 30 years from the date of the mortgage. Mr.Joshi therefore prayed to dismiss the appeal.

ANALYSIS

[6] Having considered the submissions made by the learned counsels for the respective parties, the issue for consideration before us is, whether the Trial Court was right in entertaining an application under Order VII Rule XII and dismissing the plaint at threshold on the ground that it did not disclose a cause of action and whether the Trial Court was right in its perception that on reading of the plaint and without adding and/or subtracting anything, the documents produced and relied upon by the plaintiff itself suggested that the deed in question was a deed of usufructuary mortgage. According to the Trial Court, once that was established, the defendant no.1 being mortgagee had no right or ownership over the suit land.

6.1 Reading of the plaint would indicate that it was the case of the appellant-plaintiff that the land in question was of the sole and absolute ownership of the defendant no.1. That, it was so confirmed by the defendant No.1 during the

negotiations. Accordingly, a final sale deed was entered into for a sale consideration of Rs.36 lakhs of which Rs.20 lakhs was already paid through cheques. The sale deed could not be executed as the defendant no.3/4, legal heir of the mortgagor filed written objections on 13.06.2017 as being the land owner. Based on this objection, the defendant No.1 executed an agreement to sell dated 25.06.2017. That the defendant no.1 was the sole and independent owner of the land and was holding possession based on an averment which was the foundation of the plaint in para 11 of the plaint. Paras 11 to 17 read as under:

"11. It is pertinent to mention that the terms of the said Banakhat are very clear and discloses the fact that the Defendant No.1 had acquired the Suit land as a legal heir through his mother namely Late Nathiben wife of Kalidas Gopaldas Parekh. It is also stated that the Suit land was acquired by the mother of the Defendant No.1 from the Late Ranaji Bhaluji Thakore in lieu of a Mortgage by Conditional Sale Deed dated 27.04.1943 and one of the conditions enumerated therein is that in the event, the mortgagor fails to pay the debt of Rs.475/- within a period of five years, then the mortgagee shall be entitled to get, the ownership of the mortgaged land. The said Mortgage by Conditional Sale Deed dated 27.04.1943 which is in Gujarati, is reproduced herein below for ready reference of this Hon'ble Court:

Mortgage Deed of Rs.475/- for
the Farm at Moje: Zundal

The Party of the Second Part – Bai Nathi Raat w/o Kalidas Luhar, Age about – 28 years, Residing at -_____, Moje Zundal.

The Party of the First Part – Thakor Ranaji Bhaluji, Age about – 45 years, Caste – Thakarda, Occupation – Agricultre, Residing at – the said farm under our ownership and possession, which is located in the outskirt of Moje: Zundal, District, Sub-district – Ahmedabad and is under our possession from the beginning till this date. Details of its boundaries are as below.

Survey No.	Acre Guntha	Assess ment	…..	…..	East	West	North	South
483	2-22	9-0-03 8-4-0 0-12-0	…..	With Jujube tree	Maneklal Chunilal	……	Small Rivulet	Barhmar Kaaram

We have mortgaged our farm with the aforesaid boundaries along with its trees, grass, hedge etc. with its original boundaries for Rs.475/- (Four Hundred Seventy Five only) received in cash without the interest and rent on the farm given in your possession for the term of 5 years. On completion of the said term, if we pay the mortgage amount, we will be released from the mortgage, and if we do not pay the same, you can recover it from the said farm, from us or from any other property, thus, we will not raise any objection if you sow or get sown, cultivate or

get cultivated or submortgage it to anyone. We enter your name into the government record for the said farm, the government tax should be paid by you henceforth, the Taccavi loan has not been taken on this farm, further, there is no debt or right of any person on this farm. In this regard, I execute this mortgage deed willingly and with wisdom. Samvat 1999, Chaitra Vad – 7, Tuesday, 27 April, 1943. Das Shantilal Motilal Bhau, Shahpur, Ahmedabad, Mangal Parghi No Khancho.

Signature	**Witness**
Thakor Ranaji Bhaluji Lallubhai	Bhaluji RaatNathibai Res. of Zundal.

*For the benefit of this order the above paragraph is translated into English.

The photocopy and the typed copy of the said Mortgage by Conditional Sale Deed dated 27.04.1943 are produced herewith by a separate list at Item No. 5 colly. The photocopy of the Banakhat dated 25.06.2017 executed by and between the plaintiff and the Defendant No.1 is produced herewith by way of separate list of document as Item No. 6. The Plaintiff craves the leave to refer to and rely upon the contents of the said Banakhat dated 25.06.2017 as and when the need be, in the interest of justice.

12. The Plaintiff further states that thereafter the Plaintiff was enquiring with the Defendant No.1 about the date to execute the Sale Deed but the Defendant No.1, under one pretext or the other, was avoiding to execute the Sale Deed. During the pendency, the Plaintiff, through his sources, had enquired about the status-title of the Suit land in the concerned Revenue Office at Gandhinagar. During the search, it was found that Ghanshyamji Chamanji (Defendant No.3/4), the legal heir of the prior owner, had filed some revenue litigation with the concerned Revenue Officer being RTS Appeal Case 210 of 2017. During the search in the Revenue Department, and having obtained the certified copy of Village Form No.6, it was found that the Entry No.8454 and 8456 both dated 13.07.2017 with regards to the suit land. The Plaintiff craves the leave to produce on record the photocopy of RTS Appeal-Case No.210/2017 and the Entry Nos. 8454 and 8456 by way of separate list of document as Item No.7, 8 and 9 respectively. Thereafter, the Plaintiff has also learnt from the sources that the said RTS Appeal No. 210/2017 (Entry No.8521 dated 12.09.2017) had been withdrawn by the Defendant No.3/4 being the original Applicant in the said RTS proceeding. The photocopy of the application for the withdrawal of the RTS Appeal No. 210 of 2017 is produced by a separate list at Item No. 10.

13. The Plaintiff further submits that during the course of an enquiry, it was found that the Defendant No.1 had executed some documents in favour of the Defendant No.2 to Defendant No.3/5, the legal heirs of the prior owner. Having made the search with concerned Revenue Office, it was found that the Entry No. 8525 (Kachi) dated 16.09.2017 came to be recorded on the basis of Giro Mukti (of Suit land) as per

revenue record whereby the mortgage of late Ranaji Bhaluji Thakore was got released by the Defendant No.1 being the son of Late Nathiben widow of Kalidas Gopaldas Parekh, to which the Plaintiff has also filed its Objection dated 12.10.2017 in respect to the said Entry No. 8525 pending before the Mamlatdar Shree, at Gandhinagar for its necessary adjudication. The photocopy of Entry No. 8525 and the objection dated 12.10.2017 filed by the Plaintiff in respect of Suit land are produced herewith by way of separate list of documents as Item No.11 and 12. deed

14. The Plaintiff further states that the Plaintiff thereafter had made a preliminary enquiry with the Sub-Registrar's Office, at Gandhinagar and it was found that a Release Deed dated 13/09.2017 (hereinafter referred to as alleged Release Deed) for the Suit land was executed by the Defendant No.1 in favour of the Defendant No.2 to Defendant No.3/5 in hand in gloves to cheat the Plaintiff. It was found that the Defendant No.3/4 has paid an amount of Rs. 21,00,000/- to the Defendant No.1 (as per paragraph no.6 of release deed) whereby the Defendant No.1 had released all his rights from the Suit land. The Plaintiff begs to produce on record of this Hon'ble Court the certified copy along with the photocopy of the alleged Release Deed dated 13.09.2017 by way of separate list of document as Item No.13 (Colly).

15. The Plaintiff submits the alleged release deed is null and void-ab-initio in the eye of law. Further, in view of the above referred Mortgage by Conditional Sale Deed dated 27.04.1943 and also in respect of said Banakhat dated 25.06.2017 executed by and between the Defendant No.1 and the Plaintiff, the Defendant No.1 has fraudulently, to deprive the legal rights and to defraud the Plaintiff has executed the alleged Release Deed in favour of the other Defendants. It is stated that the Defendant No.1 has failed to perform his part of obligation and has clandestinely executed alleged Release Deed in favour of the Defendant No.2 to 3/5. In view of the said Mortgage by Conditional Sale Deed and Banakhat, the Defendant No.1 is under the legal obligation to execute the Sale Deed in favour of the Plaintiff, for which the Plaintiff is ready and willing to perform his part of contract and is ready and willing to pay the remaining amount of Rs. 16,00,000/- at the time of execution of the Sale Deed to the Defendant No. 1 and is also ready to deposit the remaining amount of Rs. 16,00,000/- in this Hon'ble Court.

16. The Plaintiff state and submits that the present Defendant No.2, 3/1 & 3/4 have filed suit before the Hon'ble Principal Senior Civil Judge Court (S.D.) at Gandhinagar bearing Regular Civil Suit No. 146 of 2010 (RCS 146 of 2010) against the present Defendant No.1 for declaration and injunction valued at Rs.600/- seeking various reliefs for suit land which is pending till date for its necessary adjudication. The photocopy of the RCS 146 of 2010 proceeding is produced herewith by way of separate list of document at Item No. 14.

17. The Plaintiff further submits that after filing of the above RCS 146 of 2010 by and between the Defendant No.2, 3/1 and 3/4 against the present Defendant No.1., the

present Defendant No.1 had filed suit before the Hon'ble Principal Senior Civil Judge Court (S.D.) at Gandhinagar bearing Regular Civil Suit No. 171 of 2010 (RCS 171 of 2010) against the present Defendant No.3/1 and 3/4 for declaration and permanent injunction, seeking various reliefs for property lying and being at Moje: Zundal Gam, of Revenue Survey No. 483 (present Suit land), 359/2, 359/5 & 359/8. During the ongoing proceeding in the said RCS 171 of 2010, the present Defendant No. I had filed a Pursis dated 23.08.2011 not pressing all his prayers against the present Defendant No.3/1 and 3/4 in regards to the other survey number property except the Suit land and subsequently the said suit came to be dismissed for default for want of prosecution on 31.08.2016. The photocopy of the RCS 171 of 2010 proceeding is produced herewith by way of separate list of document at Item No. 15."

6.2 Reading of the aforesaid averments from the plaint would indicate that (i) it is the case of the plaintiff that a registered mortgage deed dated 27.04.1943 was executed by predecessors of the defendant nos.3/1 to 3/5 in favour of the plaintiff's mother Nathiben Kalidas. (ii) The defendants viz. the heirs of the mortgagor filed a Regular Civil Suit No.146 of 2010 against the mortgagee defendant no.1 for declaration and redemption of mortgage. (iii) The mortgagee - defendant no.1 filed Regular Civil Suit No.171 of 2010 against the mortgagors-defendant no.3.1 to 3.4 for declaration and injunction. That suit was dismissed for default. (iv) Oral agreement was made between the plaintiff and the defendant no.1 for purchase of the property in September 2016. (v) Written objections were filed on 13.06.2017 by defendant no.3.4 before the subregistrar objecting to the registration for the sell deed. Despite this, an agreement to sale was executed by the plaintiff on 25.06.2017. (vi) Reading of the mortgage deed which is produced in the plaint would indicate that it was not a case where an automatic sale was contemplated. The deed only gave a right to recover the amount. In case of the failure to repay the amount after completion of the mortgage period.

6.3 The true translation of the mortgage deed reads as under:

Mortgage Deed of Rs.475/- for
the Farm at Moje: Zundal

The Party of the Second Part – Bai Nathi Raat w/o Kalidas Luhar, Age about – 28 years, Residing at -_____, Moje Zundal.

The Party of the First Part – Thakor Ranaji Bhaluji, Age about – 45 years, Caste – Thakarda, Occupation – Agricultre, Residing at – the said farm under our ownership and possession, which is located in the outskirt of Moje: Zundal, District, Sub-district – Ahmedabad and is under our possession from the beginning till this date. Details of its boundaries are as below.

Survey No.	**Acre Guntha**	**Assessment**	**…..**	**…..**	**East**	**West**	**North**	**South**
483	2-22	9-0-03 8-4-0	…..	With Jujube	Maneklal Chunilal	……	Small Rivulet	Barhmar Kaaram

0-12-0 tree

We have mortgaged our farm with the aforesaid boundaries along with its trees, grass, hedge etc. with its original boundaries for Rs.475/- (Four Hundred Seventy Five only) received in cash without the interest and rent on the farm given in your possession for the term of 5 years. On completion of the said term, if we pay the mortgage amount, we will be released from the mortgage, and if we do not pay the same, you can recover it from the said farm, from us or from any other property, thus, we will not raise any objection if you sow or get sown, cultivate or get cultivated or submortgage it to anyone. We enter your name into the government record for the said farm, the government tax should be paid by you henceforth, the Taccavi loan has not been taken on this farm, further, there is no debt or right of any person on this farm. In this regard, I execute this mortgage deed willingly and with wisdom. Samvat 1999, Chaitra Vad – 7, Tuesday, 27 April, 1943. Das Shantilal Motilal Bhau, Shahpur, Ahmedabad, Mangal Parghi No Khancho.

Signature	**Witness**
Thakor Ranaji Bhaluji	Bhaluji RaatNathibai
Lallubhai	Res. of Zundal.

6.4 Essentially therefore, on reading of the plaint, as it stands, indicates that it was the case of the plaintiff that the mortgage deed dated 27.04.1943 revealed an automatic sale. That therefore it was a mortgage by a conditional sale. Added support for the plaintiff on his reading of the deed was that on the expiry of a period of five years the mortgagee became the owner of the property. This, in the perception of the plaintiff, gave the defendant no.1 the right to sell the land in question to the plaintiff and therefore a legal right to him to seek specific performance of the agreement. Essentially therefore, if the plaint and the reliefs sought for are perused, apart from a declaration sought in the suit to grant permanent injunction restraining the defendant nos.2 to 3/1 to 3/5 from making any construction on the land or selling the land, a relief was sought to declare the alleged release deed dated 13.09.2017 by the defendant no.1 in the favour of defendant nos.2 to 3/1 to 3/5 as illegal and a decree of specific performance of Banakhat dated 25.06.2017 was pressed.

6.5 All these reliefs would revolve around the interpretation of mortgage deed dated 27.04.1943.

6.6 Coming to the submissions of learned counsel for the respective parties on whether the Trial Court was right in its perception in rejecting the plaint at the threshold based on holding whether the document was a document of mortgage by conditional sale or a usufructuary mortgage, the submission of the learned counsel of the appellant that the interpretation of a document is a mixed question of law and facts relying on the decision in case of **Shirpur** (supra), is misconceived. The decision in case of **Shirpur** (supra) was on the question whether there was any privity of contract

between the banks and the borrower. So the question was whether a preliminary issue could be decided, it was a case where since the personal guarantees are executed between the borrowers and trustees and not in favour of the bank, the question of locus-standi of the banks to file such an application was under consideration. It was in these set of facts that the contents of the documents had to be looked into for ascertainment of facts and then determine the rights of the parties and therefore it was held to be a mixed question of law and facts.

6.7 Perusal of the order of the Trial Court impugned before us, when read in context of the provisions of Sections 58(c) and 58(d) of the Transfer of Property Act, indicate that it is apparent on the plain reading of the document that it was a transaction of usufructuary mortgage. In other words therefore, in light of the decision in the case of **Maharaj Shri Manvendrasinhji Jadeja** (supra) where the issue was whether succession was governed by any rule or primogeniture, this Court opined that to find out whether a plaint discloses a cause of action or not can be looked into based on the averments made in the plaint. When a plaint is based on a document filed in it, the Court can consider whether based on such document the plaint discloses any cause of action and on such document being fully and meaningfully scrutinized if the Trial Court finds based on statutory provisions that the suit does not disclose a cause of action, Order VII Rule XI can be resorted to. Paras 19 and 20 of the decision read as under:

> "19. The learned Judge, after considering the provisions of the Constitution of India, the Hindu Succession Act, 1956 and the law declared by the Supreme Court, has come to the conclusion that rule of primogeniture, as pleaded by the appellant in the plaint, stands abrogated and therefore the plaint is liable to be rejected, as it does not disclose any cause of action. Though in the reply to Exh.191, which was filed under the provisions of Order 7, R.11(a) of the CPC by the respondent, the appellant had pleaded that rule of primogeniture is applicable and though in the memorandum of first appeal, it is asserted that the learned Judge has committed an error in holding that rule of primogeniture came to an end in view of the provisions of Section 5(ii) of the Hindu Succession Act, no attempt was made on behalf of the appellant to submit before us that rule of primogeniture has not ceased to apply to the facts of the present case. The plea was not raised, on the ground that deciding the said question amounts to going into the merits of the case which is not permissible while hearing an application submitted under Order 7, R.11(a) of the CPC.
>
> 20. In our view, considering the question whether rule of primogeniture has ceased to apply or not cannot be termed as going into the merits of the case at all. On careful scrutiny of the plaint, it becomes evident that the whole case of the appellant in the plaint is based on the footing that deceased

> Mayurdhvajsinhji having expired intestate, the appellant is entitled to inherit all the properties left by him under the rule of primogeniture. Therefore, in order to find out whether the plaint discloses a cause of action or not, it becomes relevant to consider whether the rule of primogeniture still subsists or not. In fact, rule of primogeniture is the sole and entire basis of the plaint and therefore if the Court addresses itself to the question whether the said rule of primogeniture subsists or not, it cannot be said that the Court is deciding the matter on merits. As observed earlier, while deciding application filed under Order 7, R.11(a) of the CPC, the Court has to apply the statutory law as well as case-law to the facts pleaded in the plaint and find out whether any cause of action is disclosed or not. If such an attempt is made, it can hardly be said that merits of the case are taken into consideration while deciding application for rejection of the plaint as not disclosing any cause of action."

6.8 Reading the ingredients of Sections 58(c) and 41 of the Transfer of Property Act, what is evident is that a mortgage deed which is to satisfy the test of being (I) as a mortgage by conditional sale, there has to be an ostensible sale in the document. Reading of the document would indicate that it nowhere reveals automatic sale nor does it suggest that the defendant no.1 become an owner after a period of five years. On a clear and an unambiguous reading of the document it was clear that the mortgage deed only indicated that in case of a failure to pay the debt after five years, the mortgagee will have a right to recover the amount. In light of the terms of the documents being evidently clear, there was no need for the parties to lead evidence. The plaint itself based on the nature of the document and on the law that can be applied to it would obviously make the suit frivolous and as held by the Supreme Court in the case of **T. Arivandandam** (supra) in para 5 as under:

> "5. We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentantly resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now, pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsif must remember that if on a meaningful-not formal-reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, be should exercise his power under Or. VII r. 1 1 C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clever, drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X C.P.C. An activist Judge is the answer to irresponsible law suits. The trial court should insist imperatively on examining the party at the first bearing so that bogus litigation can be shot down at the earliest stage. The Penal Code (Ch. XI) is also resourceful enough to meet such men, and must be triggered

against them. In this case, the learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi:

"It is dangerous to be too good."

6.9 In case of ITC Limited (supra), the Court held as under:

"16. The question is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 C.P.C. Clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint. (See T. Arivandandam vs. T.V. Satyapal.)

25. Learned counsel for the respondent Bank contended that the case before us Page 45 of 60

which is concerned with an application under Order 7 Rule 11(a) CPC for rejecting a plaint on the basis of "absence of cause of action from a reading of the plaint" was identical with the Sztejn case and hence what Megarry, J. stated Discount Records Ltd. directly applies.

26. It is true, we are also dealing with a question whether the plaint disclosed a cause of action. But here the allegation in the plaint is only one relating to absence of movement of goods by the seller. As pointed in the decided cases and in particular in the U.P. Cooperative Federation Case and other cases decided by this Court and also Courts elsewhere, mere absence of movement has never been, in this branch of law, treated as amounting to fraud, Such non- movement, even if the allegation is to be treated as true, could be for goods reasons or for reasons which were not good. But that is not 'fraud'. In Sztejn (See law relating to commercial credit by A.G. Davis (2nd Ed, 1954) (p160-61 for facts of this case) the position was different. There the complaint was that the sellers who were to ship complaint was that the sellers who were to ship 'bristles' deliberately placed 50 cases of material on board a steamship, procured a bill of loading from a steamship company and obtained customary invoices. The documents described the goods as bristles as per the letter of credit. In fact, the Indian sellers had filled the 50 crates with 'Cowhair' and other worthless material and rubbish with intent to simulate genuine merchandise and so 'defraud' the plaintiff, the buyers - who has instructed the defendants to issue the letter of credit. The sellers then drew a draft under the letter of credit to the order of the Chartered bank of India, Australia and China and delivered the draft and the 'fraudulent documents' to the chartered Bank at Cawnpore for collection on account of the sellers. The buyer brought the action which succeeded, to restrain the defendants from paying the draft. The Learned Judge said (p.634):

"It must be assumed that the seller has intentionally failed to ship any gods ordered by the buyer. In such a situation, where the seller's fraud has been

called to the bank's attention before the draft and documents have been presented for payment, the principle of the independence of the bank's obligation under the letter of credit should not be extended to protect the unscrupulous seller. It is true that even though the documents are forged or fraudulent, if the issuing bank has already paid the draft before receiving notice of the seller's fraud, it will be protected if it exercised reasonable diligence before making such payment. However, in the instant action Schroder had received notice of Transea's active fraud before it accepted or paid the draft. The Chartered Bank, which stands in no better position than Transea, should not be heard to complain because Schroder is not forced to pay the draft accompanied by documents covering a transaction which it has reasons to believe is fraudulent"

It will be noticed that Sztejn was a case where 'fraudulent documents' were presented which simulated shipping of goods which were not only not shipped but on the other hand the seller shipped some rubbish deliberately. Therefore the allegations in the complaint filed by the buyers in that case were based upon the above facts - which as per the legal position in this branch of law - i.e. presentation of 'fraudulent document's where goods were deliberately not shipped and an attempt was made to pass off 'rubbish' as the goods ordered for - amounted to 'fraud'.

27. As stated above non-movement of goods by the seller could be due to a variety of tenable or untenable reasons, the seller may be in breach of the contract but that by itself does not permit a plaintiff to use the word "fraud" in the plaint and get over any objections that may be raised by way of filing an application under Order 7 Rule 11 CPC. As pointed out by Krishna Iyer,J. In T.Arivandandam's case, the ritual of repeating a word or creation of an illusion in the plaint can certainly be unravelled and exposed by the Court while dealing with an application under Order 7 Rule 11(a). Inasmuch as the mere allegation of drawal of monies without movement of goods does not amount to a cause of action based on 'fraud', the Bank cannot take shelter under the words 'fraud' or 'misrepresentation' used in the plaint."

6.10 The above would suggest that the plaint really pointed out that the cause of action that was set out in the plaint was purely illusory. The document not being one of the conditional sale but being a usufructuary mortgage would render the averments in the plaint with regard to the right and title and the ownership of the defendant no.1 being illusory as no ownership vested in the defendant no.1-mortgagee. Consequentially therefore, when the owner had no right to sell, the appellant-plaintiff had no right to a specific performance and admittedly therefore, the contention raised by the learned counsel for the appellant relying on section 19(c) of the Specific Relief Act would also be of no avail.

6.11 That brings us to decide on the issue of right to redemption in context of the prayer made in the plaint that the release deed dated 13.09.2017 was clearly barred against the defendant no.1 mortgagor since he had no right of redemption. According to the submission of the learned counsel for the appellant relying on the provisions of Articles 61(a) of the Limitation Act, 1963, it was submitted that since there was no right exercised by the mortgagee within five years from the year 1943, by virtue of adverse possession, the mortgagee became absolute owner of the property. It was submitted by the learned counsel for the appellant that the right to redeem had been extinguished after a period of five years based on the condition of the deed.

6.12 We would therefore consider this argument in light of Section 60 of the Transfer of Property Act which deals with the right of the mortgagor to redeem. Section 60 reads as under:

> **"60. Right of mortgagor to redeem.** At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a Court. The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption. Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.
>
> **Redemption of portion of mortgaged property.** Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

6.13 Reading of the Section would indicate that the mortgagor has a right to redeem at any time provided his right is so extinguished by act of parties. The act of parties means that the parties have to foreclose such a right of redemption by execution

of a registered document. We agree to the submission of learned Senior Advocate Mr.Mihir Joshi to the principle that "Once a mortgage always a mortgage" and the right to redemption would subsists as long as the mortgage subsists. It will be in the fitness of things to reproduce paras 34 to 38 of **Narandas Karsondas** (supra) which read as under:

> "34. The right of redemption which is embodied in section 60 of the Transfer of Property Act is available to the Mortgagor unless it has been extinguished by the Act of parties. The combined effect of section 54 of the Transfer of Property Act and section 17 of the Indian Registration Act is that a contract for sale in respect of immovable property of the value of more than one hundred rupees without registration cannot extinguish the equity of redemption. In India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished. The conferment of power to sell without intervention of the Court in a Mortgage Deed by itself will not deprive the mortgagor of his right to redemption. The extinction of the right of redemption has to be subsequent to the deed conferring such power. The right of redemption is not extinguished at the expiry of the period. The equity of redemption is not extinguished by mere contract for sale.
>
> 35. The mortgagor's right to redeem will survive until there has been completion of sale by the mortagee by a registered deed. In England a sale of property takes place by agreement but it is not so in our country. The power to sell shall not be exercised unless and until notice in writing requiring payment of the principal money has been served on the mortgagor. Further section 69(3) of the Transfer of Property Act shows that when a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale. Therefore, until the sale is complete by registration the mortgagor does not lose right of redemption.
>
> 36. It is erroneous to suggest that the mortgagee is acting as the agent of the mortgagor in selling the property. The mortgagor exercises his right under a different claim. The mortgagee's right isdifferent from, the mortgagor's. The mortgagee exercises his right under a totally superior claim which is not under the mortgagor, but against him. In other words, the sale is against the mortgagor's wishes. Rights and interests of the mortgagor and the mortgagee in regard to sale are conflicting.
>
> 37. In view of the fact that only on execution of conveyance, ownership passes from one party to another it cannot be held that the mortgagor lost the right of redemption just because the property was put to auction. The

mortgagor has a right to redeem unless the sale of the property was complete by registration in accordance with the provisions of the Registration Act.

38. The decision in **Abraham Ezra Issac Mansoor v. Abdul Latiff Usman**, 1967 1 SCR 293. is correct law that the right to redeem a mortgage given to a mortgagor under section 60 of the Transfer of Property Act, is not extinguished by a contract of sale of the mortgaged property entered into by a mortgagee in exercise of the power of sale given to him under the mortgage deed. Until the. sale is completed by a registered instrument, the mortgagor can redeem the mortgage on payment of the requisite amount."

6.14 It will also be in the fitness of things to reproduce paras 12, 15 and 22 of Achaldas Durgaji Oswal (supra) which read as under:

"12. A right of redemption, thus, was statutorily recognized as a right of a mortgagor as an incident of mortgage which subsists so long as the mortgage itself subsists. The proviso appended to Section 60, as noticed hereinbefore, however, confines that said right so long as the same is not extinguished by act of the parties or by decree of court.

15. In 'Fisher and Lightwood's Law of Mortgage', the nature of the right of redemption is stated thus:-

"The rights of redemption. The right to redeem a mortgage was formerly conferred on the mortgagor by a proviso or condition in the mortgage to the effect that, if the mortgagor or his representative should pay to the mortgagee the principal sum, with interest at the rate fixed, on a certain day, the mortgagee, or the person in whom the estate was vested, would, at the cost of the person redeeming, reconvey to him or as should direct (a). This is still the practice in the case of a mortgage effected by an assignment of the mortgagor's interest (b). A proviso for reconveyance was no longer appropriate after 1925 for a legal mortgage of land (which has to be made by demise (c)), and it is not necessary to have a proviso for surrender of the term in such a mortgage, since the term ceases on repayment (d). Nevertheless, in order to define the rights to the mortgagor and the mortgagee, a proviso is inserted expressly stating that the term will ceased the date fixed (e).

It has been seen (f) that, at law, whatever, form the mortgage took, upon non-payment by the appointed time, the estate of the mortgagee became absolute and irredeemable, but that equity intervened to enable the mortgagor to redeem after the date of repayment.

There are, therefore, two distinct rights of redemption-the legal or contractual right to redeem on the appointed day and the equitable right to redeem thereafter (g). The equitable right to redeem, which only arises after the contractual date of redemption has passed, must be distinguished from the equity of redemption, which arises when the mortgage is made (g)."

> 22. The right of redemption of mortgagor being a statutory right, the same can be taken away only in terms of the proviso appended to Section 60 of the Act which is extinguished either by a decree or by act of parties. Admittedly, in the instant case, no decree has been passed extinguishing the right of the mortgagor nor such right has come to an end by act of the parties."

6.15 In context of Order 34 Rule 7 and 8 of the Code of Civil Procedure would indicate that a right to redemption of a mortgagor is a statutory right and can be taken away only in terms of a proviso appended to Section 60 of the Act. In the facts of the case, in absence of a positive act of parties by a registered instrument in extinguishing the right of a mortgagor, the limitation shall not begin to run. Therefore, the argument of the learned counsel for the appellant that under Article 61(a) of the Limitation Act by virtue of adverse possession, the defendant no.1 would become an owner is an argument that has to be shelved at the threshold.

6.16 It is in light of these findings, if we assess the order under challenge passed by the Civil Court entertaining application under Order VII Rule XI of the Code of Civil Procedure, we find that on the interpretation of the provisions of Transfer of Property Act, the Trial Court observed thus;

> "On a plain reading of the deed in question, it is absolutely clear that the mortgagee had no right or ownership either at the time of execution of the deed or on some future date. Moreover, even if mortgagor failed to repay the mortgage money, mortgagee had right to recover money only.
>
> The defendant no.1 does not seem to be an absolute owner of a suit land on strength of the fact that the mortgage deed at mark 3/5 is not established to be a "mortgage by conditional sale" by which the original mortgagee, or her legal heir shall become an absolute owner of the suit land. It requires to be recorded here that the instrument of mortgage on the face of it must appear to be a sale."

6.17 Since the Trial Court in our opinion rightly interpreted the document in light of the provisions of the Transfer of Property Act when the document on the face of it was not a mortgage by conditional sale, we are of the opinion that the Trial Court committed no error.

6.18 To conclude, we summarize that in the Special Civil Suit, the principal prayer of the plaintiff-appellant of specific performance which was based on the perception of the appellant plaintiff that the deed of mortgage was a mortgage by conditional sale and there was an ostensible sale was misconceived. That was a specific case made in the plaint in para 11 which was the entire foundation of the plaint for specific performance against a person claiming to be the owner of such land. Reading of the mortgage deed dated 27.04.1943 when read reveals that there is nothing in the deed to suggest the automatic sale. In fact, it is a clear case of a document of mortgage being that a one which can be termed as usufructuary mortgage.

[7] In light of the aforesaid reasons, we find no merit in the appeal and the same is accordingly dismissed

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2024(2)GCJ551

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Bhargav D Karia; Niral R Mehta]

Special Civil Application No 16172 of 2021, 3711 of 2024, 7107 of 2022, 7114 of 2022, 8502 of 2022, 8504 of 2022 **dated 11/09/2024**

J K Papad Industries & Anr

Versus

Union of India & Ors

GST CLASSIFICATION ON FRYUMS

Constitution of India Art. 227 - Art. 279A - Gujarat Goods and Services Tax Act, 2017 Sec. 103 - Sec. 74 - GST Classification on Fryums - Petitioners challenged the show cause notice under GST Act levying 18% tax on unfried fryums - Claimed product classified under HSN 19059040 as 'Papad' with Nil GST - Authority classified under HSN 19059030 with 18% GST - Petitioners argued based on Appellate Authority ruling exempting 'Papad' from GST - GST Council's recommendation later reduced tax rate for snack pellets to 5% - Court held that returns filed at Nil GST must be accepted and past period regularized - Show cause notices quashed and past returns to be regularized on 'as is' basis. - Petitions Allowed

Law Point: Classification under GST for unfried fryums raised disputes over applicable tax rate - Binding advance ruling classified the product as 'Papad' under HSN 19059040 with Nil GST rate - GST Council later reduced tax to 5%.

ભારતનું બંધારણ આર્ટી. ૨૨૭ - આર્ટી. ૨૭૯એ - ગુજરાત ગુડ્સ એન્ડ સર્વિસ ટેક્સ એક્ટ, ૨૦૧૭ સેક. ૧૦૩ - સેક. ૭૪ - ફાયમ્સ પર જીએસટી વર્ગીકરણ - અરજદારોએ જીએસટી કાયદા હેઠળ તણ્યા વિનાના ફાયમ્સ પર ૧૮% ટેક્સ વસૂલતી કારણ બતાવતી નોટિસને પડકારી - HSN 19059040 હેઠળ ઉત્પાદન શૂન્ય જીએસટી સાથે 'પાપડ' તરીકે વર્ગીકૃત કરાયેલ દાવો કરેલ - ૧૮% જીએસટી સાથે HSN 19059030 હેઠળ વર્ગીકૃત થયેલ સત્તા - અરજદારોએ 'પાપડ'ને જીએસટીમાંથી મુક્તિ આપતા એપેલેટ ઓથોરિટીના ચુકાદાના આધારે દલીલ કરી - જીએસટી કાઉન્સિલની ભલામણ બાદમાં નાસ્તાની બાબતોઓ માટે ટેક્સ રેટ ઘટાડીને ૫% કર્યો - કોર્ટે જણાવ્યું હતું કે શૂન્ય જીએસટી પર ફાઇલ કરેલા રિટર્ન સ્વીકારવા જોઈએ અને પાછલા સમયગાળાને

નિયમિત કરવું જોઈએ - કારણ બતાવી નોટિસ રદ કરવામાં આવી છે અને ભૂતકાળના રિટર્ન 'જેમ છે તેમ' ધોરણે નિયમિત કરવામાં આવશે. - અરજીઓ મંજૂર

કાયદાનો મુદ્દો: અનફ્રાઈડ ફ્રાઈમ્સ માટે જીએસટી હેઠળ વર્ગીકરણ લાગુ કરના દર પર વિવાદો ઉભા કર્યા - બંધનકર્તા એડવાન્સ ચુકાદાએ HSN 19059040 હેઠળ ઉત્પાદનને 'પાપડ' તરીકે શૂન્ય જીએસટી દર સાથે વર્ગીકૃત કર્યું - જીએસટી કાઉન્સિલે પાછળથી ટેક્સ ઘટાડીને ૫% કર્યો.

Acts Referred:

Constitution of India Art. 227, Art. 279A

Gujarat Goods and Services Tax Act, 2017 Sec. 103, Sec. 74

Counsel:

Uchit N Sheth, Hetvi Sancheti

JUDGEMENT

Bhargav D. Karia, J.- [1] Heard learned advocate Mr. Uchit Sheth for the petitioner and learned advocate Ms. Hetvi Sancheti for the respondent.

[2] By these petitions under Article 227 of the Constitution of India, the petitioners have challenged the show cause notice dated 07.02.2024 under section 74 of the Central/Gujarat Goods and Services Tax Act, 2017 (for short "the GST Act") as being wholly without jurisdiction.

[3] The impugned show cause notice is issued to levy GST at the rate of 18% as the petitioner is engaged in manufacture of un-fried or un-cooked snack pellets through the process of extrusion and supplying the same without payment of GST by classifying it under HSN 19059040 instead of HSN 19059030.

[4] These petitions are raising the similar issue of classification of the product manufactured by the petitioner under HSN 19059040 instead of HSN 19059030.

[5] Having regard to the controversy involved in these petitions which is in a very narrow compass, with the consent of the learned advocates for the respective parties, matters are taken up for hearing.

[6] Rule returnable forthwith. Learned advocate Ms. Sancheti waives service of notice of rule on behalf of respondent.

[7] For the sake of convenience, Special Civil Application No.3711 of 2024 is treated as the the lead matter.

[8] Facts of Special Civil Application No.3711 of 2024 are as under:

1) The petitioner is a private limited company and is engaged in the business of edible food products and is duly registered under the GST Acts.

2) One of the products manufactured and sold by the petitioners are unfried fryums. The manufacturing process involves different cereals and pulses like wheat, adad, rice etc. added with edible starch, salt preservatives and water. The same are then packaged in retail packs for onward supply. Pre-formulated mix of raw materials are weighted separately and mixed well. Mixed formulation is cooked and mixed by steam cooker or extruder machine to prepare dough of desired consistency. Dough is then passed through the sheeting machine/dye to give it desired shape. These products of different shape are directly fed into drying machine to be dried. Thereafter they are cooled by passing through cooling conveyor. The finished products are packed in bag or carton and then sold.

3) It is the case of the petitioner that prior to 1.7.2017 the 'Fryums' were covered under the entry for 'Papad' under the Gujarat Value Added Tax act, 2003 as per the judgment of the Gujarat Value Added Tax Tribunal in case of **Avadh Food Products v. State of Gujarat** (judgment dated 26.02.2015 rendered in First Appeal No.1 of 2015) which was followed by the Tribunal in case of Swethin Food Products v. State of Gujarat,2016 GSTB 296.

4) It is the case of the petitioner that when the GST regime was implemented with effect from 1.7.2017, there was confusion prevailing in the State of Gujarat with regard to classification of 'Fryums', however, a manufacturing unit by the name of M/s Sonal Product filed an application for advance ruling under section 97 of the GST Act seeking ruling on applicable rate of tax on supply of 'Papad' of different shapes and sizes which were commonly known as unfried fryums wherein it was held that unfried fryums are not 'papad' and therefore, exempt from tax and further it was held that unfried fryums are taxable at the rate of 18% under the GST Act.

5) The petitioner also filed application in the year 2019 for advance ruling in respect of applicable tax rate on unfried fryums.

6) It is the case of the petitioner that the Advance Ruling Authority vide order dated 17.09.2020 adopted the same line of reasoning as in the case of M/s. Sonal Products and took a view that unfried fryums attracted tax rate of 18%.

7) The petitioner therefore, filed an appeal challenging the advance ruling order. The Advance Ruling Appellate Authority vide order dated 28.06.2021 allowed the appeal and held that 'papad' of different shapes and sizes are classifiable under heading 1905 which is covered by Entry no. 96 of the exemption notification and therefore, chargeable to Nil rate of tax.

8) It is the case of the petitioner that while the issue of classification was settled in case of the petitioners, the Central Board of Indirect Taxes and Customs issued impugned circular dated 13.01.2023 wherein it was clarified in para 5 that snack

pellets such as fryums would be classifiable under Custom Tariff Heading 19059030 and they would be taxable at the rate of 18%.

9) It is the case of the petitioner that the authorities of Central GST department conducted audit of the returns of the books of accounts of the petitioner under the GST Act on different dates from February to April 2023 and the issue of classification of unfried fryums was raised in audit and it was alleged that tax was payable under the GST Act on supply of unfried fryums at the rate of 18% by relying upon the impugned circular dated 13.01.2023.

10) The petitioner objected to such classification and proposed demand by relying upon the advance ruling appellate order passed in case of the petitioner.

11) The audit authority however vide audit report dated 24.04.2023 rejected the objection by relying upon the impugned circular dated 13.01.2023 and initiated process of demand on sales of unfried fryums by the petitioner.

12) Thereafter in the 50th Council meeting held on 11.07.2023 it was decided to recommend that the tax rate for uncooked/unfried snack pellets manufactured through extrusion process was to be fixed at 5% and it was recommended that the issue for past period was to be regularised on 'as is where is' basis.

13) Pursuant to such recommendation of Central Board of Indirect Taxes and Customs issued circular dated 1st August, 2023.

14) It is the case of the petitioner that despite such express clarification and direction by GST Council as well as Central Board of Indirect Taxes and customs, the respondent authority issued intimation in Form GST DRC-01A proposing to demand tax on unfried fryums for the past period from 1.7.2017 to 31.3.2020.

15) The petitioner therefore, vide reply dated 27.9.2023 relying upon the circular dated 1st August, 2023 requested for closure of the proceedings.

16) The respondent authority however, issued the impugned show cause notice dated 7.2.2024 proposing to demand tax with interest and penalty on supply of unfried fryums at the rate of 18% for the past period i.e. from 1.7.2017 to 31.3.2019.

17) Being aggrieved by the impugned notice, the petitioner has preferred the present petition.

[9] Learned advocate Mr. Uchit Sheth for the petitioners submitted that in view of the circular dated 1st August, 2023, the controversy which was prevailing has now been reduced to payment of GST @ 5% instead of 18% as sought to be levied by the impugned show cause notice.

[10] It was submitted that para 2.2 of the Circular No.18/2023 clearly stipulates that in view of prevailing genuine doubts regarding applicability of GST rate on the product manufactured by the petitioners for the past period upto 27.07.2023 is regularised on "as is" basis. It was therefore, submitted that in case of the petitioners

"as is" basis criteria is required to be applied and the petitioner may be subjected to levy of Nil rate of GST as per the returns filed by the petitioners classifying the product under HSN 19059040.

[11] In the alternative it was further submitted that Gujarat Appellate Authority for Advance Ruling while considering the issue of taxability of product 'Papad' manufactured by the petitioners has held to be classifiable under HSN 19059040 of the Customs Tariff Act, 1975 after considering the ingredients, the manufacturing process as well as its understanding in common parlance.

[12] It was submitted that as per section 103 of the GST Act, Advance Ruling Appellate order is binding on the petitioners as well as jurisdictional officer and therefore, the product 'Papad' manufactured by the petitioners is liable to GST at Nil rate. It was therefore, submitted that the impugned notice is without any jurisdiction wherein it is alleged that correct manufacturing process was not pointed out by the petitioners before the Advance Ruling Authority, however, in fact the manufacturing process submitted before the Advance Ruling Appellate Authority and the process which was observed by the Audit authority is the same and therefore, the respondent authority are bound to follow the binding judgment of Advance Ruling Appellate Authority.

[13] Reliance was placed on the decision of this Court in case of **West Coast Waterbase Pvt. Ltd. v. State of Gujarat**, 2016 95 VST 370 (Guj.), wherein it is held that an assessment order passed contrary to the biding determination order under the Gujarat Value Added Tax Act, 2003 which is akin to the advance ruling order under the GST Acts, is wholly without jurisdiction and illegal. It was pointed out that the decision of this Court was subsequently confirmed by the Hon'ble Supreme Court.

[14] Reliance was also placed on the decision of the Gujarat Value Added Tax Tribunal in case of **Avadh Food Products v. State of Gujarat** (judgment dated 26.02.2015 rendered in First Appeal No.1 of 2015) and in case of Swethin Food Products v. State of Gujarat,2016 GSTB 296 in context of VAT Act to contend that fryums are classifiable under the entry of 'Papad' and such judgments were accepted and had attained finality. It was therefore, submitted that even though both the judgments were rendered in context of VAT Act, dispute was identical inasmuch as whether fryums can be considered as 'Papad' or not. It was further submitted that such binding judgments are required to be followed and applied in territorial jurisdiction and contrary view sought to be taken by the adjudicating authority by issuing the impugned notification is without jurisdiction.

[15] It was submitted that reliance placed on para no. 5 of circular dated 13.01.2023 issued by the Central Board of Indirect Taxes and Customs in the impugned notice is contrary to Entry No.96 of Notification No.2/2017-Central Tax (Rate) dated 28.06.2017 as the Board has ignored the specific entry for "Papad by whatever name it is known" qua HSN 1905 in Entry 96 of Notification No.2/2017

Central Tax (Rate) and its interpretation by orders of the Gujarat Advance Ruling Appellate Authority in various cases relating to unfried fryums. It was therefore, submitted that the petitioners are not liable to pay any GST on the product 'Papad' till 27.07.2023 and the returns filed by the petitioners are required to be regularised on "as is" basis. It was further submitted that the impugned notice is also without jurisdiction as there is no intention on part of the petitioners of committing any fraud, willful suppression, misstatement of facts or evasion as there was a pure dispute of legal interpretation as the petitioners bonafide believe that their products were exempt from tax under the GST Act which is fortified by further issuance of the notification by the Board on the basis of Minutes of GST Council which has accepted that there were genuine doubts which existed with respect to classification of the product manufactured by the petitioners in addition to Advance Ruling of the Appellate Authority holding that the goods were exempt from tax. It was therefore, submitted that the impugned notice is liable to be quashed and set aside.

[16] On the other hand, learned advocate Ms. Hetvi Sancheti for the respondent submitted that the petitioners could not have challenged the vires of para no. 5 of CBIC Circular No.189/09/2023-GST dated 13.01.2023 in view of Article 279A of the Constitution of India which provides for constitution of GST council for recommending the rate and exemptions and issuance of classification on any matter relating to GST Act.

[17] It was submitted that Circular dated 13.01.2023 was issued on recommendation of GST Council and it is only a clarificatory circular.

[18] It was further submitted that the petitioners did not mention the stage of extrusion process in manufacturing process chart furnished by them before the Gujarat Appellate Authority for Advance Ruling and as such, the petitioners suppressed such facts regarding the fryums manufactured and supplied by them through extrusion process. It was submitted that by suppressing such material facts, the petitioners obtained Advance Ruling of classifying the product manufactured by them under the Tariff Heading 19059040 instead of correct classification of product under Tariff Heading 19059030 attracting GST rate at the rate of 18% as per Serial No.16 of Schedule-III to Notification No.1/2017-Integrated Tax (Rate) dated 28.06.2017.

[19] It was further submitted that the decisions relied upon by the petitioners are not applicable in facts of the case inasmuch as the same were rendered under the provisions of the VAT Act on different parameters which cannot be applied to the provisions under the GST Act wherein the product in question has more specific classification entry under Tariff item no. 19059030 which is for extruded or expanded product.

[20] Learned advocate Ms. Hetavi Sancheti further submitted that the petitioners have misinterpreted the Notification dated 1 st August, 2023 for regularizing the past transaction on "as is" basis. It was further submitted that phrase "as is" has to be read

in the context of the facts of the case of classifying the product manufactured by the petitioners under Tariff Item No. 19059030 attracting GST at 18% had the petitioners mentioned correctly in the extrusion process before the Appellate Authority. It was therefore, submitted that the petitioners have misled the Appellate Authority of Advance Ruling by suppressing that the product in question had gone through extrusion process and that they had extrusion machines installed in their factory and therefore, the product manufactured by them would be covered by Tariff Item No. 19059030 attracting GST @ 18%.

[21] Learned advocate Ms. Sancheti also referred to decision of Kerala VAT Tribunal under Kerala Value Added Tax, 2003 wherein it is held that 'Papad' and 'Fryums' are both different product and 'Fryums' cannot be classified or treated as 'Papad'. It was therefore, submitted that as per the manufacturing process explained by the petitioners before the Appellate Authority, it clearly shows that there is extrusion process involved for manufacturing 'Fryums' and therefore, the impugned show cause notice has been issued invoking jurisdiction under section 74 of the GST Act calling upon the petitioners as to why GST at the rate of 18% should not be levied classifying the product manufactured by the petitioners under Tariff Item no. 19059030 till 27.07.2023.

[22] Learned advocate Ms. Sancheti relied upon the decision of the Apex Court in case of **Commissioner of Customs(Import) Mumbai v. Dilip Kumar & Company**, 2018 361 ELT 577(SC) wherein it is held that Tariff notifications are to be strictly interpreted and the Courts cannot expand the scope of any tax concession.

[23] Reliance was also placed on the circular No.200/12/2023-GST issued with the approval of the Board on the recommendation of the GST Council in its 50th meeting held on 11th July, 2023 clarifying that GST rate on un-fried or un-cooked snack pellets by whatever name called, manufactured through process of extrusion, the issue for past period upto 27.07.2023 in view of the prevailing genuine doubt, is to be reguarlised on 'as is' basis.

[24] It was therefore, submitted that upto 27.07.2023 the petitioners are liable to pay GST at the rate of 18% on the product manufactured by them instead of Nil rate as claimed by the petitioners.

[25] Having heard the learned advocates for the respective parties and having perused the documents placed on record, it would be germane to refer to the observations made by the Gujarat Appellate Authority for Advance Ruling in case of M/s. Jayant Snacks and Beverages Pvt. Ltd. vide order dated 28.06.2021 classifying the product manufactured by them under Tariff Heading 19059040 instead of Tariff Heading 19059030 as under:

"42.1 The appellant has submitted that main ingredients of their products 'different shape and size Papad' are wheat flour, superfine wheat flour, rice flour, starch, corn

flour, cereal flour, potato starch, chana, potato lentils, papad khar, bicarb, vegetables like tomato, salt, water, food, colour etc. The main ingredient of PAPAD and impugned products of the appellant (different shape and size Papad) are more or less similar.

42.2 The manufacturing process of the products under consideration has been submitted by the appellant. It has been submitted that ingredients are mixed in machine with water and oil, dough is prepared and passed through die of different shapes and size to manufacture different shapes and size of papad and then dried through various stages. The product of the appellant, thus prepared, is thin and wafer like product. At this stage, the product is not ready for consumption. Though, traditionally Papad has been prepared manually, in round shape. However, when ingredients and process are similar in case of PAPAD and impugned product, then the product in question is nothing but a kind of PAPAD irrespective of their shape and sizes.

42.3 As submitted by the appellant, when the consumer desires to eat the said products of the appellant, the said products are required to be fried or roasted before consumption. Thus, these products are not meant to be eaten without frying or roasting.

42.4 The products under consideration become crispy when these products are fried or roasted.

42.5 The products of the appellant has found its use as an alternative to regular round shaped Papad or as an additional variety of Papad in the Indian meal, especially the meals served during the community functions. The caterers, who prepare the meals for the community functions, as well as the people in general, consider such products as a different type or variety of Papad only.

42.6 Therefore, we are of the view that applicant's products of different shapes and sizes of papad, whose pictures are reproduced above, are nothing but Papad, classifiable under Tariff Item 1905 90 40 of the Customs Tariff Act, 1975.

43. Now, the question which arises is, would it be judicious to stick that the product which are having Round shape, manufactured by using ingredient of cereal flour only are PAPAD and the products having the same characteristic and uses but shape and size is different cannot be termed as "PAPAD". We find that for classification of product, the ingredient, uses and common parlance test is decisive factor and not the name. The appellant has relied upon the decision of the various courts in their support.

(a) Hon'ble Supreme Court of India in case of **Shiv Shakti Gold Finger Vs. Assisstant Commissioner Commercial Tax Jaipur**, 1996 9 SCC 514wherein Honourable Supreme Court has clearly observed and held that irrespective of the shape of PAPAD and irrespective of ingredients used, the PAPAD still remains PAPAD

(b) In the case of **State of Karnataka Vs. Vasavamba Stores**, 2013 60 VST 19 (Karn.), Honourable Karnataka High Court has clearly dealt with the issue whether Fryums in an uncooked/unfried form sold would qualify as PAPAD and it has been held by Honourable Karnataka High Court that FRYUMS fall under the entry of PAPAD irrespective of their shapes and sizes and irrespective of the ingredients used.

(c) In M/s. Avadh Food Products Vs. State of Gujarat-First Appeal No. 1/2015 read with Rectification Application No. 31/2015 in First Appeal No. 1/2015 Dr;-03/07/2015 reported in 2015 GSTB-11-405 and in M/s. Swethin Food Products Vs. State of Gujarat,2016 GSTB 1296, Honourable Tribunal has clearly held that Fryums are nothing but PAPAD falling under entry 9(2) in schedule 1 to the GVAT Act and exempt from payment of tax.

44. The above decisions are squarely applicable in the instant case as such the impugned product having different shapes and size PAPAD as compared to round shape Papad however are similar to Papad in respect of the ingredient, manufacturing process and use.

45. Further, in entry No. 96 of Notification No. 02/2017-CT (Rate) dated 28.06.2017, the description of the product is "PAPAD by whatever name called". To understand the term "whatever name called" the principle of "Noscitur a sociis" is to be applied. As per the said principle, the meaning of an unclear word or phrase must be determined by the words that surround it. In other terms, the meaning of a word must be judged by the company that it keeps. Therefore, in this entry, only a product called by name of PAPAD would not be covered but all types of product which are similar to PAPAD in respect of ingredient, manufacturing process, use and common parlance would be covered irrespective of their shape and size and even name. As such, the appellant's product is similar to the traditional round shaped Papad in all respect, therefore, we are of the view that the impugned product i.e. different shapes and sizes of papad is eligible to be covered under entry No. 96 of Notification No. 02/2017-CT (Rate) dated 28.06.2017.

46. Gujarat Authority of Advance Ruling in their ruling has ruled that the product in question 'different shapes and size Papad merit classifiable under CTH No. 21069099 of Customs Tariff Act, 1975 on the grounds that PAPAD is a thing entirely different and distinct from FRYUMS. Therefore, in common parlance or in market, Fryums are not sold as "PAPAD" instead of "PAPAD" sold as papad and Fryums are sold as Fryums. Both the products are different and have their individual identity. Accordingly, in common parlance test, the applicant's products i.e. "different shapes and sizes of Papad" is not "Papad" but is "Un-fried Fryums". In the aforementioned paras, we have already discussed that the Fryums is a brand name and not a generic name of the product therefore, impugned product "different shapes and size of papad", known as Fryums, is nothing but Papad.

47. We find that CTH No. 2106 of Customs Tariff Act, 1975 covers the Food preparations not elsewhere specified or included means under this heading all types of foods preparation are covered which are not covered under the specific heading of tariff. It is important to refer to Chapter Notes of Heading #21 wherein under clause 5 (b) it is stated that Heading 2106 includes preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk or other liquids), for human consumption and under clause 6 it has been stated that Tariff item 2106 90 99 includes sweet meats commonly known as "Misthans" or "Mithai" or called by any other name. They also include products commonly known as "Namkeens", "mixtures", "Bhujia", "Chabena" or called by any other name. Such products remain classified in these sub-headings irrespective of the nature of their ingredients. We find that Rule 3(a) of General Rule of Interpretation of the first schedule of Tariff states that the heading which provides the most specific description shall be preferred to heading providing a more general description. Hence the rule of interpretation for classification is that when a product is eligible to be classified under specific entry then classification under general entry should not be preferred. We find that in the case at hand, the product "different shapes and sizes Papad" is "Papad" of different shapes and size and find specific entry at CTH No. 19059040, therefore as per rule of interpretation, the product is to be classified under CTH No. 19059040 only and not under CTH No. 21069099 of the Customs Tariff Act, 1975 as classified by the GAAR.

48. Taking all these aspects into consideration as discussed above, we hold that the product 'different shapes and sizes Papad' involved in the present case merit classification under Tariff heading No. 19059040 of the Customs Tariff Act, 1975. As we have already held that the product in question is classifiable under CTH No. 1905 of the Customs Tariff Act, 1975, the said CTH No. 1905 is covered under entry No. 96 of Notification No. 02/20178-CT (Rate) dated 28.06.2017 and accordingly chargeable to NIL rate of Goods and Services Tax."

[26] It appears that in case of other petitioners, the Appellate Authority of Advance Ruling has arrived at a contrary decision and therefore, the petitions were filed before this Court in the years 2021 and 2022.

[27] Be that as it may, in the 48th meeting of GST council, it was clarified that the snack pellets such as 'fryums' which are manufactured through the process of extrusion, are appropriately classifiable under Tariff Item No. 19059030 which covers the goods with description 'Extruded or expanded products, savoury or salted' and thereby attract GST at the rate of 18% vide Sr. No.16 of Schedule-III of Notification No.1/2017-Central Tax (Rate), dated the 28th June, 2017.

[28] Thereafter, in view of recommendation of GST Council in its 50th meeting, supply of un-cooked/un-fried extruded snack pellets by whatever name called, falling under CTH 1905 it was decided to reduce the rate from 18% to 5% by observing as under:

"5.5 The first issue pertained to tax rate change on uncooked/unfried snack pellets manufactured through extrusion process where the Fitment Committee recommended to reduce GST to 5% on uncooked/unfried extruded products by whatever name called. Fitment Committee also recommended to regularize for past period on 'as is where is basis due to genuine doubts. She further informed that the said issue was also discussed in detail in the Officer's Meeting on 10.07.2023 and no objections were raised."

[29] On the basis of the above minutes of the meeting dated 11th July, 2023 of GST Council in its 50th meeting, CBIC issued Circular No. 200/12/2023-GST dated 1st August, 2023 wherein it is stated as under with regard to product in question:

"2. Applicability of GST on unfried or un-cooked snack pellets, by whatever name called, manufactured through process of extrusion:

2.1 In the 48th meeting of the GST Council, it was clarified that the snack pellets (such 'fryums'), which are manufactured through the process of extrusion, are appropi ately classifiable under tariff item 1905 90 30, which covers goods with description 'Extruded or expanded products, savoury or salted', and thereby attract GST at the rate of 18% vide S. No. 16 of Schedule-III of notification no. 1/2017-Central Tax (Rate), dated the 28th June, 2017.

2.2 In view of the recommendation of the GST Council in the 50th meeting, supply of un- cooked/unfried extruded snack pellets, by whatever name called, falling under CTH 1905 will attract GST rate of 5% vide S. No. 99B of Schedule I of notification no. 1/2017-Central Tax (Rate), dated the 28th June, 2017 with effect from 27th July, 2023. Extruded snack pellets in ready-to-eat form will continue to attract 18% GST under S. No. 16 of Schedule III of notification no. 1/2017-Central Tax (Rate), dated the 28th June, 2017.

2.2 Further, in view of the prevailing genuine doubts regarding the applicability of GST rate on the un-fried or un-cooked snack pellets, by whatever name called, manufactured through process of extrusion, the issue for past period upto 27.7.2023 is hereby regularized on "as is" basis."

[30] In view of above minutes of the meeting of GST Council and circular dated 1st August, 2023, question arises at to what rate the GST is payable by the petitioners upto 22.07.2023 as both the GST Council as well as the Board were of the opinion to regularise the issue for the past period on 'as is where is' basis meaning thereby whatever situation was prevailing with regard to the status of payment of GST by the petitioners shall continue to prevail upto 22.07.2023 and the petitioners have claimed their product to be exempt from GST, therefore, the petitioners cannot be subjected to levy of GST in order to regularise their returns which have been filed at Nil rate of GST.

[31] It appears that the respondents have misinterpreted the words "as is" basis by issuing the impugned notices to levy GST at 18% on applicability of Tariff Item No.

19059030 ignoring the binding decision of Gujarat Appellate Authority for Advance Ruling under section 103 of the GST Act.

[32] Therefore, when the petitioners have claimed exemption under the Tariff Item no. 19059040 by claiming exemption to pay GST on the product manufactured by them, the same is required to be regularised on 'as is' basis as per the minutes of the meeting of GST Council as well as the notification issued by the Board on 1st August, 2023 coupled with binding ruling of appellate authority of advance ruling.

[33] In view of the foregoing reasons, all these petitions succeed and are accordingly allowed. The impugned notice dated 7.02.2024 issued under section 74 of the GST Act are hereby quashed and set aside. The respondents are directed to regularise the past returns filed by the petitioners on 'as is' basis accepting the same as it is filed at Nil rate upto 22.07.2023.

[34] Petitions are accordingly disposed of. Rule is made absolute to the aforesaid extent. No order as to cost

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2024(2)GCJ562

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Sunita Agarwal; Pranav Trivedi]

Special Civil Application No 16075 of 2023 **dated 09/09/2024**

Lilaben Wd/o Chimanbhai Zinabhai & Ors

Versus

Competent Authority & Ors

COMPENSATION DISPUTE

National Highways Act, 1956 Sec. 3H - Compensation Dispute - Petitioners, co-owners of land acquired under National Highways Act, sought equal distribution of compensation - Dispute arose among co-owners regarding the division of compensation, as no clear delineation existed of which co-owner's land was acquired - Compensation for structures was disbursed based on occupancy, but land compensation was withheld due to lack of consensus - Court directed competent authority to notify all 16 co-owners and determine equal shares unless disagreement exists, in which case the matter should be referred to the Civil Court - Petition disposed with instructions to resolve within four weeks - Petition Disposed

Law Point: When co-owners of land under acquisition disagree on compensation distribution, the competent authority must either apportion shares equally or refer the dispute to Civil Court

નેશનલ હાઈવે એક્ટ, 1956 કલમ 3H – વળતર વિવાદ – અરજીકર્તાઓ, રાષ્ટ્રીય ધોરીમાર્ગ અધિનિયમ હેઠળ સંપાદિત જમીનના સહ-માલિકોએ વળતરની સમાન વહેંચણીની માંગણી કરી – વળતરના વિભાજન અંગે સહ-માલિકો વચ્ચે વિવાદ ઊભો થયો, કારણ કે સહ-માલિકની જમીન સંપાદિત કરવામાં આવી હતી તે અંગે કોઈ સ્પષ્ટ વર્ણન અસ્તિત્વમાં નથી – બાંધકામ માટે વળતર ભોગવટાના આધારે વિતરિત કરવામાં આવ્યું હતું, પરંતુ સર્વસંમતિના અભાવે જમીનનું વળતર રોકી દેવામાં આવ્યું હતું – કોર્ટે સક્ષમ સત્તાધિકારીને તમામ 16 સહ-માલિકોને સૂચિત કરવા અને અસંમતિ ન હોય ત્યાં સુધી સમાન શેર નક્કી કરવા નિર્દેશ આપ્યો હતો, આ કિસ્સામાં આ બાબત સિવિલને મોકલવી જોઈએ. કોર્ટ – પિટિશનનો નિકાલ ચાર અઠવાડિયામાં ઉકેલવાની સૂચના સાથે – પિટિશનનો નિકાલ.

કાયદા નો મુદ્દો : જ્યારે સંપાદન હેઠળની જમીનના સહ-માલિકો વળતરની વહેંચણી પર અસંમત હોય, ત્યારે સક્ષમ અધિકારીએ કાં તો સમાનરૂપે વહેંચણી કરવી જોઈએ અથવા વિવાદને સિવિલ કોર્ટમાં મોકલવો જોઈએ.

Acts Referred:
National Highways Act, 1956 Sec. 3H

Counsel:
Zubin F Bharda, Krutik Parikh

JUDGEMENT

Sunita Agarwal, C. J.- [1] The present petition has been filed by six persons who claim to be co-owners of the land in question along with remaining 10 persons who are impleaded as private respondents No. 2 to 11 in the writ petition.

[2] The prayer made in the writ petition is to issue directions to the respondent authority, namely, the competent authority of the National Highways Act to complete the process of releasing and depositing the compensation amount with respect to the land in question bearing Block / Survey No.1648 admeasuring 10599 sq. meters situated in Village - Talavchora, Taluka - Chikhli, District - Navsari in the bank accounts of all four land owners (16 in number) and not to select few of the co-owners to deposit the compensation in their bank account, as against the guidelines for release when there are more than one co-owner of the land acquired.

[3] When the matter was taken up, it was brought before the Court that there was a dispute between the co-owners about their share in the land in question and a civil suit for partition was pending between the parties. However, it was noted from the order dated 09.10.2023 passed by the Deputy Collector that the civil suit has already been withdrawn and as such, there was no impediment in disbursement of compensation. The petitioners, are claiming one-forth share in the compensation amount. The petitioners, six in number, would further state that the respondents are bent upon to

disburse the compensation to the other co-owners of the land in question of their choice.

[4] In the written instructions supplied by Mr. Krutik Parik, learned Assistant Government Pleader appearing on behalf of the State, in compliance of order dated 18.09.2023 it is stated that the land admeasuring 01.-05-99 sq. meters has been acquired out of total area of 02-74-18 sq. meters and thus, only a part of the total land parcel has been acquired. There are 16 co-owners of the land in question and only 11 were present in the hearing but they could not arrive at a consensus regarding which co-owner's land was being acquired and how much area of each co-owner was being acquired. The revenue records shows the entire land parcel as undivided share of all 16 coowners and it is, thus, not clear from the revenue record as to whose land out of the 16 co-owners is being acquired and in what proportion. It is further stated that the petitioners and the private respondents did not produce relevant measurement sheets from the office of District Inspector of the Land Records (DILR), outlining the shares of each co-owner and delineating which co-owner's share was being acquired, nor did they show willingness to produce consent affidavits declaring which coowner's land was being acquired and who should get how much compensation.

[5] It is further stated that compensation for the structures (houses, sheds, wells etc.) and trees erected on the land in question was disbursed to the current occupants of the land amongst the co-owners as per the panchnama and the affidavits. However, no compensation for the land has been disbursed to this date because of lack of consensus amongst all co-owners as to their share in their ownership of the land and consequently the apportionment of their share of compensation.

[6] It is, thus, an admitted fact of the matter that the statement made on behalf of the State respondent that the revenue records show the entire land parcel as undivided share of all 16 co-owners could not be disputed by learned advocate for the petitioners (who are six in number).

[7] It is, thus, evident that the compensation for the land has to be divided to the share of 16 co-owners, who would be the coowners for each and every parcel of the land. However, for the compensation for the structures etc. which has already been released amongst the co-owners as per the panchnama and affidavit filed amongst them, we do not find any reason to express our opinion upon the same.

[8] With this, we have come to the conclusion that the competent authority is required to issue notice to bring all 16 co-owners of the land in question and communicate them that they are entitled for one-sixteenth share in the compensation determined for an acquired area of the parcel of the land of their undivided share. In case of disagreement between the coowners as to the proposal for National Highways Act of the coowners, the appropriate course of action for the competent authority to refer the dispute to the decision of the Principal Civil Court of original jurisdiction. In essence, the competent authority is required to decide the dispute at its end strictly in

accordance with the provisions of sub sections (3) and (4) of Section 3H of the National Highways Act, 1956. Meaning thereby that if there is a consensus amongst 16 co-owners for division of compensation for the land in the share of onesixteenth for each of them, the compensation amount payable to each of them shall be determined by the competent authority and the payment be disbursed in accordance with of sub section (3) of Section 3H. However, in case of dispute as to the apportionment of the amount or any part thereof to any person or to whom the compensation or any part thereof is payable, the competent authority shall refer the dispute to the decision of the Principal Civil Court of original jurisdiction within the limits of whose jurisdiction the land is situated strictly in accordance with sub section (4) of Section 3H.

[9] With this, we dispose of present petition with the observation that the competent authority shall issue notice to all 16 co-owners of the land in question to appear before it on a given date and decide the dispute at its own end by passing a reasoned speaking order strictly in according with the directions given hereinabove, as expeditiously as possible, preferably within a period of four weeks. The petitioners herein are directed to co-operate in the proceeding. As no notice has been issued to private respondents No. 2 to 11 in the present petition because of the nature of being order passed hereinabove, the competent authority is required to issue notice to all the co-owners

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2024(2)GCJ565

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before A S Supehia; Mauna M Bhatt]

Special Civil Application No 12487 of 2024 **dated 05/09/2024**

Lallooji and Sons Through Its Partner Nikhil Jagdishkumar Agarwal

Versus

Tourism Corporation of Gujarat Limited & Anr

BID REJECTION

Companies Act, 1956 Sec. 2 - Bid Rejection - Petitioner challenged the acceptance of respondent's bid for a tender concerning Rann Utsav, alleging that respondent modified the financial bid after submission, which violated tender terms - Petitioner pointed out discrepancies in respondent's financial submission, particularly Annexure-4, which was resubmitted after respondent No.1 requested clarification - Petitioner argued resubmission was not permissible under the tender's terms - Held that resubmission of Annexure-4 amounted to altering the financial bid, which violated the tender process - Respondent's bid declared non-responsive quashed -Petition Allowed

Law Point: Resubmission of a financial bid after discrepancies is impermissible if it violates tender process rules and renders the bid non-responsive

કંપની એક્ટ, 1956 કલમ 2 – બિડ અસ્વીકાર – અરજદારે રણ ઉત્સવ સંબંધિત ટેન્ડર માટે પ્રતિવાદીની બિડની સ્વીકૃતિને પડકારી હતી, એવો આક્ષેપ કર્યો હતો કે પ્રતિવાદીએ સબમિશન પછી નાણાકીય બિડમાં ફેરફાર કર્યો હતો, જેણે ટેન્ડરની શરતોનું ઉલ્લંઘન કર્યું હતું – અરજદારે પ્રતિવાદીની નાણાકીય રજૂઆતમાં વિસંગતતા દર્શાવી હતી, ખાસ કરીને પરિશિષ્ટ-4, જે પ્રતિવાદી નંબર 1 એ સ્પષ્ટતાની વિનંતી કર્યા પછી ફરીથી સબમિટ કર્યું – અરજદારે દલીલ કરી હતી કે ટેન્ડરની શરતો હેઠળ ફરીથી સબમિશન માન્ય નથી – એવું માનવામાં આવે છે કે પરિશિષ્ટ-4 નું ફરીથી સબમિશન નાણાકીય બિડમાં ફેરફાર કરવા માટેનું પ્રમાણ હતું, જેણે ટેન્ડર પ્રક્રિયાનું ઉલ્લંઘન કર્યું હતું – પ્રતિવાદીની બિડ બિન-પ્રતિભાવશીલ જાહેર કરવામાં આવી હતી – પીટીશન રદ કરવામાં આવી હતી.

કાયદા નો મુદ્દો: વિસંગતતાઓ પછી નાણાકીય બિડને ફરીથી સબમિટ કરવાની મંજૂરી નથી. જો તે ટેન્ડર પ્રક્રિયાના નિયમોનું ઉલ્લંઘન કરે છે અને બિડ બિન-પ્રતિભાવ આપતી હોય છે

Acts Referred:

Companies Act, 1956 Sec. 2

Counsel:

Shalin Mehta (Senior Advocate), Dhaval D Vyas (Senior Advocate), Aaditya P Dave, Premal R Joshi, Mihir Joshi (Senior Advocate), Aishvarya, Mihir Thakore (Senior Advocate), Archit P Jani

JUDGEMENT

A.S. Supehia, J.- [1] Rule. Learned advocates appearing for the respective respondents waive service of notice of Rule.

[2] Since extreme urgency is cited by the learned senior advocates, the matter has been taken up for final hearing.

[3] By way of the present writ petition, the petitioner has prayed for the following prayers: -

> "A. Your lordships be pleased to issue a writ of mandamus or any other writ in the nature of mandamus to restrain the respondent 1 to accept the bid of respondent 2 as the same does not meet the tender requirements;
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> B. Your lordships be pleased to declare that the bid of respondent 2 is not valid and the same is liable to be rejected as not meeting tender requirements.
>
> C. Pending admission and final disposal of this petition, Your Lordships will be pleased to stay the further proceedings and awarding of the Tender being "Overall Development, Operation and Management of Rann Utsav Destination at Dhordo, Kutch, Gujarat"
>
> D. Such other and further relief that is just, fit and expedient in the facts and circumstances of the case may be granted."

BRIEF FACTS:

[4] The petitioner is organizing large-scale public events, exhibitions, trade fairs, cultural and sports festivals etc. including Rann Utsav at Dhordo Tent City, Kachchh since 2013.

[5] The respondent No.1 Tourism Corporation of Gujarat Limited is incorporated under the Companies Act, 1956 and 100% subsidiary owned by the Government of Gujarat. It is organizing "Rann Utsav" at the White Salt Desert near Village Dhordo, Kachchh by employing contractors and agencies.

[6] Since the tenure of the petitioner had ended, the respondent No.1 invited bids from the interested builders for Overall Development, Operation and Management of Rann Utsav Destination at Dhordo, Kachchh, Gujarat.

[7] The respondent No.2, is a bidder along with the petitioner herein, who had bid for the present Tender. The writ petition pertains to the component for deployment of electric / diesel buses and other support infrastructure for ferrying visitors to White Rann from parking developed by Respondent No. 1.

[8] The writ petition pertains to the component pursuant to the Request for Proposal (RFP), the bidders had placed their bids. The present dispute arises out of the bids placed for the sub-project, titled as "Electric Buses and other support infrastructure". By way of the said project, the Agency (Contractor) was to provide for buses to commute from the bus station till, the White Salt Desert.

[9] It is the case of the petitioner that the respondent No.2, on the suggestion made by the respondent No.1, modified the financial bid, more particularly Annexure-4, which pertains to inviting the service Buses (Diesel and Electric) and other support infrastructure from parking to White Rann.

SUBMISSIONS ON BEHALF OF THE PETITIONER

[10] Learned senior advocate Mr.Shalin Mehta, appearing for the petitioner has submitted that the petitioner and the respondent No.2 submitted their financial bids to the respondent No.1 for all the sub-projects of the present contract. He has further pointed out the RFP, more particularly, Stage 4 Evaluation of Financial Bids. While inviting the attention of this Court to Clause 4.4.4 of the RFP, which pertains to the electric buses read with the Annexure-I and Annexure-4 of the Financial Bid, it is submitted that the respondent No.2 had filled in two Annexures-4, which is impermissible. It is pointed out that the petitioner had sent an Email on 14.08.2024 at 5:30 p.m., to the respondent No.1 pointing out the discrepancy in filling up the Financial Bid, more particularly Annexure-4. It is submitted that as soon as such discrepancy was pointed out by the petitioner, the respondent No.1 on the very same day at 9:13 p.m., asked the respondent No.2 to submit the modified Annexure-4, which pertains to detailed breakup of price bid for bus services and accordingly, the

respondent No.2 re-submitted the Annexure-4, which forms the part of the Financial Bid.

[11] It is submitted that this is impermissible in terms of RFP, since the action of the respondent No.1 inviting the respondent No.2 to resubmit the Annexure-4 would amount to violation of the terms of the RFP. Learned senior advocate Mr.Mehta, in this regard, has pointed out Clauses 1.5, 1.5.9, 1.5.10 and 1.5.11 of the RFP and has submitted that Clause 1.5.10 permits the bidder to seek clarification, whereas Clause 1.5.11 does not envisage any clarification, as the same pertains to the Financial Bid. Learned senior advocate Mr.Mehta, has further referred to the Corrigendum-6, which provides modified Annexure-I to Financial Bid Submission Form and the conditions mentioned therein. It is submitted that the terms and conditions mentioned below the modified Annexure-I, which prescribes Financial Bids Submission Form, clearly mandates that the bidders have to compulsory upload the detailed breakup of the cost of items mentioned therein as per the format and in case, there is any error or omission whether accidental or otherwise, the bid response is to be treated as non-responsive.

[12] Further, it is contended by the learned senior advocate Mr.Mehta that as per the said Corrigendum-6 and in response to pre-bid queries, more particularly to the Clause No.2.3.2 and point No.4, he has submitted that the bidders were advised to provide the detailed breakup as per the modified Annexure-4 and since the respondent No.2 did not comply and fill up the Annexure-4 as per the prescribed format and submitted two Annexure-4, the same would be in violation of the tender document. It is submitted that the Annexure-4, which was initially submitted by the respondent No.2, no annual payments for seven years are reflected therein and hence, his Bid ought to have been declared as non-responsive by the respondent No.1.

[13] Learned senior advocate Mr.Mehta has also attempted to satisfy the calculation of the number of the buses vis-a-vis the distance, the timings and number of passengers before us and has submitted that the amount and the number of buses, which have been suggested in the modified annexures, by the respondent No.2, do not reconcile with each other.

[14] In support of his submissions, learned senior advocate Mr.Mehta has placed reliance on the judgment of the Supreme Court in the case of **West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and others**, 2001 2 SCC 451 By placing reliance on the said judgment, it is submitted that even if it is assumed that the respondent No.2 has committed mistake, the same could not have been permitted to be rectified by the respondent No.1. Reliance is also placed by learned senior advocate Mr.Mehta on the decision of High Court of Delhi in the case of Larsen and Toubro Limited and others Vs. Union of India (UOI) and others,2010 DHC 4402 - DB.

[15] Finally, learned senior advocate Mr.Mehta has submitted that in fact, by the present writ petition, the petitioner is not seeking to award it the contract, but it is urged that it was always open for the respondent No.1 to scrap the tender since there

are only two bidders. Thus, it is urged that the petition may be allowed in terms of the prayers.

SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.1-(TCGL)

[16] In response to the aforesaid submissions, learned senior advocate Mr.Mihir Joshi, while placing reliance on the judgment of Supreme Court in the case of **National High Speed Rail Corporation Limited vs. Mentecarlo Limited and another**, 2022 6 SCC 401, has submitted that the High Court should be extremely circumspect in exercise of its jurisdiction, while entertaining petition in the matters of contract, such as the present one. It is submitted that the judicial review for examination of the tender process is very restricted. Learned senior advocate Mr.Joshi, has further submitted that the respondent No.1 has neither acted mala fidely nor has intended to favour anyone and has acted reasonably in accordance with law and hence, the tender process cannot be set aside on the grounds urged before this Court by the petitioner. It is submitted that all the essential conditions are adhered to by the respondent No.1 and since, it was noticed by the respondent No.1 that there was some discrepancy in the Annexure-4 submitted by the respondent No.2, it was called upon to rectify the error. He has however, submitted that there is no difference in the final amount submitted by the respondent No.2, even after the submission of fresh Annexure4 and the same would remain as such. Learned senior advocate Mr.Joshi has further placed reliance on the judgment of the Delhi High Court in the case of **Batra Medicos and others Vs. Union of India and others**, 2023 DHC 5869 -DB, in support of his submissions, wherein the Delhi High Court has reiterated the scope of the judicial review.

[17] Learned senior advocate Mr.Joshi has also placed reliance on the Clause 1.7.1 of the RFP and has submitted that the respondent No.1 has the authority to seek clarification from any of the bidder and hence accordingly it has sought clarification and has advised the respondent No.2 to resubmit the Annexure-4, which pertains to Financial Bid. It is however, admitted by the learned senior advocate Mr.Joshi that the Annexure-4 is compulsory and is part of the Financial Bid and cannot be read separately from Annexure-I. Thus, it is urged that the tender process may not be interfered with. **SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.2 -**

[18] Learned senior advocate Mr.Mihir Thakore, appearing for the respondent No.2 while opposing the present writ petition has submitted that the bid of the respondent No.2 cannot be held unresponsive in view of the re-submission of Annexure-4. While placing reliance on the Corrigendum-6 and the Clause 2.3.2 and the Point No.4, which is issued in response to pre-bid queries, it is submitted that the respondent No.1, who is the authority, can always assume the values, at his discretion, in case there is found mismatch or discrepancy between the value filled in the detailed breakup and hence, since this provision empowers the respondent No.1 to ultimate assume the values, the re-submissions of the Annexure-4 clarifying the computation of

the detailed break-up of price bid for bus services cannot be held to be detrimental to the bid of respondent No.2. It is submitted that the respondent no.2 was unaware of the method of submitting the break up hence, a minor error occurred at its end.

[19] Learned senior advocate Mr.Thakore, has endeavored to satisfy us by comparing the computation values filled in by the respondent No.2 in the initial 'Annexures-4' and the modified 'Annexure-4 and has submitted that in fact, the final amount remains unchanged and hence, the minor discrepancy, which had occurred by submitting two annexures earlier, cannot impact the bid of the respondent No.2. Thus, it is urged that the present writ petition may not be entertained. Learned senior advocate Mr.Thakore, in support of his submission has placed reliance on the judgments of the Supreme Court in the cases of BTL EPC Ltd. vs. Macawber Beekay Pvt. Ltd., and others,2023 SCCOnLine(SC) 1223, and TATA Motors Ltd. Vs. Brihan Mumbai Electic Supply & Tansport Undertaking (BEST) and Ors.,2023 SCC OnLine(SC) 671, reiterating the submissions advanced by learned senior advocate Mr. Joshi with regard to the scope of judicial review in tender matters.

ANALYSIS AND CONCLUSION:-

[20] We have examined the RFP and the Financial Bids Submission Forms of the petitioner as well as the respondent No.2. The Financial Bid submitted by the petitioner is Rs.(-) 9.98,86,659.5 and the Bid submitted of the respondent No.2 is of Rs.(+)8,03,41,720.73.

[21] The case of the petitioner is that the respondent No.1 has allowed the respondent No.2 to resubmit a modified Financial Bid, which is impermissible in view of the specific clauses of the RFP. The relevant clauses for consideration are as under: -

> **"1.5.9 The Technical Bid must not include any financial information.**
>
> 1.5.10 During evaluation of Bids, TCGL may, at its discretion, ask a Bidder for further clarifications and or information. The request for clarification and the response thereto shall only be in writing The Bidder shall have to reply to the clarification within the period as specified from the date of receipt of the request failing which the Bid of such a Bidder shall be rejected and TCGL shall have the right to forfeit the EMD of such Bidder
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> **Part 3 - Financial Bid-to be strictly submitted online only**
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> 1.5.11 In preparing the Financial Bid, Bidders are expected to take into account the requirements and conditions of the RFP documents. Considering the multiple tourist attractions in the site, and the Rann Utsav being an establish tourist destination in the State, the Bidders are expected to estimate the revenue potential from various heads as mentioned in Annexure 1: Financial Bid Submission Form prior to filling up the Financial Bid."

[22] The petitioner on noticing the discrepancies in the Bid submitted by the respondent No.2 M/s.Praveg Ltd., sent an Email on 14.08.2024 at 5:36 p.m., to the respondent No.1, pointing out that the respondent No.2 has altered the Financial Bid, more particularly Annexure-4 by submitting the costs on a per-unit basis for each bus instead of providing lump-sum annual amount or annual figure for entire scope of bus services as required by the RFP. The petitioner has further pointed out the calculation vis-a-vis the number of buses engaged during the tourist flow.

[23] On the very same day i.e. on 14.08.2024 at 9:13 p.m., the respondent No.1 informed the respondent No.2 to resubmit the modified Annexure-4 with detailed breakup of price Bid for Buses Services, Event Management and Branding Work, specifically for the sub-component of "Annual payment being sought for providing services of electric Buses and other support infrastructure from parking of White Rann." It is specifically mentioned by the respondent No.1 that the details should match with the modified Annexure-I i.e. the Financial Bid Submission Form as submitted by the respondent No.2 in his original Bid, strictly as per the format of RFP and relevant corrigendum. Thus, the respondent No.1 at the first instance did not find the details of modified Annexure-4 filled-in by the respondent No.2 relating to the breakup of price list for Bus Services and other heads in accordance with RFP and the respondent No.2 was called upon to resubmit the modified Annexure-4.

[24] Accordingly on 15.08.2024, the respondent No.2 informed the respondent No.1 that they would be resubmitting the details as demanded by the respondent No.1 along with affidavit-cum-declaration. The affidavit-cum-declaration dated 15.08.2024 filed by the respondent No.2 specifically mentions that they are re-submitting the modified Annexure-4 and it is also ensured by them that the values will now match with the modified Annexure-I i.e. the Financial Bid Submission Form.

ISSUES: -

[25] The issues, which fall for deliberation of this Court is, whether the details which were required to be filled in as per the requirement of the tender document and as per the format of the Annexure-4, which the respondent No.2, at the initial stage while filling up the Bid, has committed an error will be fatal for his Bid and the same can be held as non-responsive or not, and whether it was permissible for the respondent No.1 to call upon the respondent No.1 to re-submit the Annexure-4 of Financial Bid.

[26] At this stage, it would be apposite to refer to the Corrigendum-6, which is issued in response to the pre-bid queries.

[27] In response to the pre-bid queries, the Clause No.2.3.2 and point No.4 of the marketing table, which pertains to the discretion of the authority to seek breakup of the Financial Bid from the preferred bidder as per Annexure-1(B), it is declared that the same may be read as "**modified Annexure-4: Detailed breakup of price bid for Bus**

Services, Event Management and Branding Work." The bidders shall be required to compulsorily fill the same, and reflect the annual payments for 07 years, for each sub-project as mentioned above in the Financial Bid format. The detailed breakup shall form the ground for negotiations and Bidders are advised to take note that in an event of any computational mistakes, mismatch or discrepancy between the values filled in the detailed breakup, the authority, shall assume the values, at its discretion and the same shall be binding on the Bidder. Thus, the respondent no.2 cannot plead ignorance and contend that he was not aware as to how the actual breakup was to be tendered and hence, a discrepancy has occurred.

[28] The Annexure-1 and Annexure-4 refer to the Financial Bid Submission Forms. So far as the Financial Bid Submission Form at Annexure-1 is concerned, there is no dispute in this regard. The modified Annexure-4, which provides for detailed breakup of price bid for Bus Services, Event Management and Branding Work, is interlaced with Annexure-1 under the sub-head "B", which prescribes "Sub-projects where Authority shall pay to the Agency",. There are three Items prescribed, which pertain to first - ("6") Annual payment being sought for providing services of "Electric Buses and other support infrastructure from parking to White Rann" - second ("7") Annual payment being sought towards "Even Management Services including erection of Temporary Infrastructures and third - ("8") Annual payment being sought towards "Undertake Brancking work on Bhuj to While Rann road." Below the statement and under the Head of Annexure-1, the bidders are put to notice that **"Bidders will be compulsorily required to upload the detailed break-up of the cost for items under S.No.6, 7 and 8 above, as per the format enclosed herewith Format is "Annexure-4",** in which, the discrepancy or mistake has been committed by the respondent No.2. The respondent No.2 filled in two Annexure-4 under this component.

[29] At this stage, we may refer to the specific conditions mentioned below Financial Bid, the same are as under: -

> "Note: The financial bid shall be calculated based on the difference between the "Subtotal of Payment to be made by the Agency to the Authority for all seven years and Subtotal of Payments to be made by the Authority to the Agency for all seven years.
>
> I hereby certify and accept the following:
>
> 1. The Agreement shall be for a period of 7 years.
>
> 2. I, as a Bidder, have inspected the existing premises and acquainted myself before Bidding for the said Project
>
> 3. I certify that I have gone through the Tender document, and I have understood and agree to the terms and conditions as mentioned in this Document. We declare that the information stated above and enclosed is complete and absolutely correct and any error or omission therein, accidental or otherwise, as a result of which our Bid is found to be non-responsive, will

be sufficient for TCGL to reject our Bid and forfeit our EMD in full. I abide by the above offer/quote and terms & conditions of the tender document and the LOA if TCGL selects us as the Preferred Bidder."

[30] The aforesaid declaration specifically mandates that if any error or omission, accidental or otherwise in the information is found, as a result of which the Bid is found to be non-responsive, the same will be sufficient for the TCGL to reject the Bid. Both the petitioner as well as the respondent No.2 is bound by the declaration of the tender document as per aforenoted conditions / declaration. The respondent No.1 has admitted that the details provided under the Annexure-4, is compulsory and integral part of Annexure-I of the Financial Bid and it has been erroneously filled in by the respondent No.2, and was not in the prescribed format. After coming to know about the irregularity as pointed out by the petitioner, the respondent No.1 ought to have invoked the aforesaid declaration, and should have held the Bid of the respondent no.2 as non-responsive.

[31] We have perused the Annexure-4, in which the detailed break-up was required to be given by the respondent No.2. As per the conditions of the tender document, the details were given in lump-sum however, the respondent No.2 has filled in two Annexure-4 Forms; one is at page No.232 and another is at page No.233. First Annexure-4 refers to the "Annual payment with regard to the Electric Buses", whereas another Annexure 4 refers to "Annual payment for providing services of the Diesel Buses." Nothing is pointed out from the tender document, whether it is permissible to fill up two Annexure forms without annual payment details. It is also not in dispute that no annual payments are reflected in the Annexure-4, which is an important facet of the Financial Bid. Hence, the respondent No.1 cannot contend that the re-submissions of the details of the Annexure-4 is permissible, since it would only amount only to the breakup of price Bid for Bus Services, and will not make any difference in the final amount. If such an approach is permitted, the same will be an anathema to the sanctity of the tender document and any bidder can be allowed to resubmit his Financial Bid, if it is found to be inaccurate, in first place. The tender document under the Financial Bid Submission Form contains a stringent condition that the bidders have to compulsorily upload the detailed breakup of the cost for items mentioned therein as per the "format" enclosed i.e. Annexure-4. Unquestionably, the respondent No.1 did not follow the instruction / condition of the Financial Bid.

[32] It is interesting to note that such discrepancy has been pointed out by the petitioner to the respondent No.1 vide his Emails dated 14.08.2024 at 5:36 p.m.; at 9:30 p.m., and reacting the email, the respondent No.1 informed the respondent No.2 to re-submit the modified Annexure-4. Thus, in fact, by calling upon the respondent No.2 to re-submit a modified Annexure-4, the respondent No.1 in fact, has allowed the re-submission of the Financial Bid. The respondent No.2 is very well aware about the details to be filled in the "format" in response to the pre-bid queries in Corrigendum-6,

the bidders are specifically clarified about providing the details of estimate relating to the requirement of buses based on the tourists footfalls and they are also advised to take note of the modified clauses 4.4.1, which includes in Section 2 of the said corrigendum. The respondent No.2 cannot contend that he was unable to understand the requirements of the Financial Bid comprising of Annexure-1 and Annexure-4. It is also an admitted fact by the respondent No.1 that initially there was discrepancy between the final amount suggested in Annexure-I and the breakup given by the respondent No.2 in two Annexures of Annexure-4. It is not the case of the respondent No.1 that both the amounts of Annexure-1 and two Annexures of Annexure-4, which are initially submitted, were same and only a clarification was sought explaining the details as mandated by the Annexure-4. There was difference of amount between the Annexure-I and two Annexures of Annexure-4, which were filled in initially by the respondent No.2. Thus, in fact the respondent No.1 has suggested the respondent No.2 to resubmit a modified Annexure-4, in order to reconcile with the amount of the Annexure-1 (Financial Bid Submissions Form).

[33] Accordingly, as directed by the respondent no.1, the respondent No.2 immediately re-submits his modified Annexure-4, which falls in line with the amount in Annexure-I. The action of the respondent Nos.1 and 2 cannot fall within category of clarification, but it would amount to re-submission of the Financial Bid by altering the amounts and formats by replacing the two Annexure-4 format, with a single Annexure-4 format.

[34] It is also admitted by the respondent No.1 that as per the clauses mentioned hereinabove, relating to Technical Bid and Financial Bid, no power is reserved in the tender document for seeking clarification so far as the Financial Bid is concerned. If the Clauses 1.5.9 and 1.5.10 of the RFP, which relate to the technical bid is read in juxtaposition with Clause 1.5.11, which relates to the Financial Bid, it is evident that no request for clarification on the part of the bidder has been stipulated, so far as the Financial Bid is concerned.

[35] The respondent No.1 in order to justify its action of calling upon the respondent No.2 to resubmit the modified Annexure-4 has placed reliance on the Clause 1.7.1 of the RFP. A fair reading of the said clause, does not in any manner, gives any right to the respondent No.1 to call upon any of the bidder to re-submit the Financial Bid.

[36] Keeping in mind the aforementioned analysis, we shall now deal with the judgment cited by the learned senior advocates appearing for the respective parties.

[37] The judgments, which are cited before us are repetitive hence, we are not inclined to deal with each of them.

[38] The Supreme Court in case of **National High Speed Rail Corporation Limited (supra)**, has considered all the judgments, which are cited before us. The

Supreme Court in the said case has summarized array of the decisions referred therein in paragraph No.29 of the said judgment.

> "29. Thus, from the aforesaid decisions, it can be seen that a Court before interfering in a contract matter in exercise of powers of judicial review should pose to itself the following questions:-
>
> (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"? And
>
> (ii) Whether the public interest is affected? If the answers to the above questions are in negative, then there should be no interference under Article 226."
>
> 30. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and when a conscious decision was taken by the JICC/JICA holding the Bid submitted by the original writ petitioner as non-responsive/ non-compliant to the technical requirements of the Bidding Documents and suffering from material deviation, we are of the opinion that the High Court has erred in interfering with the tender process and interfering with the decision of the JICC/JICA rejecting the Bid submitted by the original writ petitioner at technical stage.

[39] In fact, in the said case before the Supreme Court, the authority rejected the bid of the original writ petitioner as nonresponsive / non-compliant to the technical requirements of the Bidding Documents, which suffered from material deviation and the High Court had interfered with the tender process hence, the Supreme Court has cautioned the High Courts to exercise its jurisdiction in exceptional cases. In the present case, the facts establish that the respondent No.1 has not acted in a fair manner by calling upon the respondent No.2 to re-submit the Financial Bids in format Annexure-4.

[40] In fact, in the case of **Central Coalfields Ltd., Vs. SLL-SML (Joint Venture Consortium)**, 2016 8 SCC 622, the Supreme Court has upheld the decision of the authority "Central Coalfields Ltd.," of treating the bid as non-responsive only because the bank guarantee was not accompanied as per the format prescribed in the bid document. It was held thus: -

> "32. The core issue in these appeals is not of judicial review of the administrative action of CCL in adhering to the terms of NIT and the GTC prescribed by it while dealing with bids furnished by participants in the bidding process. The core issue is whether CCL acted perversely enough in rejecting the bank guarantee of JVC on the ground that it was not in the

prescribed format, thereby calling for judicial review by a constitutional court and interfering with CCL's decision.

37. For JVC to say that its bank guarantee was in terms stricter than the prescribed format is neither here nor there. It is not for the employer or this Court to scrutinise every bank guarantee to determine whether it is stricter than the prescribed format or less rigorous. The fact is that a format was prescribed and there was no reason not to adhere to it. The goalposts cannot be rearranged or asked to be rearranged during the bidding process to affect the right of some or deny a privilege to some.

49. Again, looked at from the point of view of the employer if the courts take over the decision-making function of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby rewrite the arrangement, it could lead to all sorts of problems including the one that we are grappling with. For example, the GTC that we are concerned with specifically states in Clause 15.2 that "Any bid not accompanied by an acceptable Bid Security/EMD shall be rejected by the employer as non-responsive". Surely, CCL ex facie intended this term to be mandatory, yet the High Court held that the bank guarantee in a format not prescribed by it ought to be accepted since that requirement was a non-essential term of the GTC. From the point of view of CCL, the GTC has been impermissibly rewritten by the High Court.

55. On the basis of the available case law, we are of the view that since CCL had not relaxed or deviated from the requirement of furnishing a bank guarantee in the prescribed format, insofar as the present appeals are concerned every bidder was obliged to adhere to the prescribed format of the bank guarantee. Consequently, the failure of JVC to furnish the bank guarantee in the prescribed format was sufficient reason for CCL to reject its bid.

56. There is nothing to indicate that the process by which the decision was taken by CCL that the bank guarantee furnished by JVC ought to be rejected was flawed in any manner whatsoever. Similarly, there is nothing to indicate that the decision taken by CCL to reject the bank guarantee furnished by JVC and to adhere to the requirements of NIT and the GTC was arbitrary or unreasonable or perverse in any manner whatsoever."

[41] Thus, as held by the Supreme Court, the format which is prescribed in the tender document has to strictly adhered. It is held that there was no reason not to adhere to it and the goal posts cannot be rearranged or asked to be rearranged during the bidding process to affect the right of someone or deny a privilege to someone. In the present case also, the respondent No.2 did not adhere to the specific format provided in the tender document and on the contrary, the respondent No.1 has tried to

re-arrange the goal posts by permitting the respondent No.2 to re-submit the Financial Bid "Annexure-4", by actually adhering to the format, which was prescribed in the tender document, which it did not do in the first instance. Such a decision of the respondent No.1 would, in fact, be arbitrary and partisan and it will not amount to correction of a clerical error, which is sought to be canvassed by placing reliance on the decision in the case of **Tata Motors Limited (supra).**

[42] It is sought to be canvassed by the respondent No.1 before us that they had only sought clarification from the respondent No.2, which would align with the principle of fairness and transparency in the tendering process and they were fulfilling the duty to ensure the authenticity of the tender process but also safeguarding the public interest.

[43] As we have already held that the approach, which has been adopted by the respondent No.1 would not align with the principle of fairness and transparency in the tendering process, but the respondent No.1 has in fact, breached its fairness by calling upon the respondent No.2 to re-submit the Financial Bid in the form of Annexure-4 immediately when the petitioner had drawn the attention to irregularity. It is not the case of the respondent No.1 that the Annexure-4 to the Financial Bid has a different entity and is not connected with the Financial Bid. The Annexure-1 and Annexure-4 are interlaced with each other and both cannot be read separately under the head of Financial Bid but are the integral part of financial Bid. The Clauses of the RFP also mandate the bidders to compulsorily follow the prescribed format by placing their Financial Bids. Hence, it was not open for the respondent No.1 to jump to the aid of the respondent No.2, immediately after receipt of the objection of the petitioner by an Email on 14.08.2024 at 5:36 p.m. Immediately on receipt of the said Email, on the very same day at 9:13 p.m., the respondent No.1 informs the respondent No.2 to re-submit the modified part of the Financial Bid in the form of Annexure-4. The respondent No.1 has attempted to give a "cloak of fairness" to its arbitrary decision.

[44] Before us, in fact, it was contended on behalf of the petitioner that they are only seeking that entire tender process may be scraped and they are not seeking that tender may be awarded to them by accepting the bid. When the discrepancy about the respondent No.2 in filling up the Financial Bid was pointed out, the respondent No.1 should have shown its magnanimity by considering the error committed by the respondent No.2 in the Financial Bid and the respondent No.2 should have in all fairness scraped the tender process.

[45]

[46] On The Substratum Of The Foregoing Analysis, We Find That The Writ Petition Merits Acceptance. Hence, The Same Is **Allowed.** We Declare The Bid Of The Respondent No.2 As Nonresponsive And Not Valid As The Same Does Not Meet The Tender Requirement. It Was Not Open For The Respondent No.1 To Call Upon

The Respondent No2 To Resubmit The Annexure-4 Of Financial Bid. Rule Is Made Absolute Accordingly.

46. Learned Senior Advocate Mr.Thakore, Appearing For The Respondent No.2 Has Requested For Staying Of The Present Judgment And Order.

[47] The request is not acceded to, as all the respective parties had shown extreme urgency in the matter.

[48] For the foregoing reasons also, we are not inclined to stay the present judgment and order

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2024(2)GCJ578

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Sangeeta K Vishen]

Special Civil Application No 11807 of 2024 **dated 04/09/2024**

Devabhai Punabhai Jograna

Versus

State of Gujarat & Anr

VEHICLE SEIZURE

Gujarat Mineral (Prevention of Illegal Mining, Transportation and Storage) Rules, 2017 Rule 12 - Vehicle Seizure - Petitioner sought release of his seized vehicle, arguing that authorities failed to file a complaint within 45 days as required by Rule 12 of Gujarat Mineral Rules - Vehicle was seized on suspicion of illegal mining - Respondent admitted complaint was filed late - Court held that vehicle must be released since delay in filing complaint violated statutory provisions - Petitioner required to file undertaking to produce vehicle during proceedings. - Petition Allowed

Law Point: If authorities fail to file a complaint within the stipulated period after vehicle seizure, the vehicle must be released without insisting on a bank guarantee.

ગુજરાત મિનરલ (ગેરકાયદેસર ખાણકામ, પરિવહન અને સંગ્રહ અટકાવવા) નિયમો, ૨૦૧૭ નિયમ ૧૨ - વાહન જપ્તી - અરજદારે ગુજરાત મિનરલ રૂલ્સના નિયમ ૧૨ મુજબ જરૂરીયાત મુજબ ૪૫ દિવસની અંદર ફરિયાદ દાખલ કરવામાં નિષ્ફળ રહી હોવાની દલીલ કરીને પોતાનું જપ્ત કરાયેલ વાહન છોડાવવાની માંગ કરી હતી. - ગેરકાયદે ખોદકામની શંકાના આધારે વાહન જપ્ત કરવામાં આવ્યું હતું - પ્રતિવાદીએ કબૂલ કરેલી ફરિયાદ મોડેથી દાખલ કરવામાં આવી હતી - કોર્ટે જણાવ્યું હતું કે ફરિયાદ દાખલ કરવામાં વિલંબથી

વૈધાનિક જોગવાઈઓનું ઉલ્લંઘન થતું હોવાથી વાહન છોડવું જોઈએ - અરજદારે કાર્યવાહી દરમિયાન વાહનનું રજુ કરવા માટે બાંહેધરી ફાઇલ કરવી જરૂરી છે. - અરજી મંજૂર

કાયદાનો મુદ્દો: જો સત્તાવાળાઓ વાહન જપ્ત કર્યા પછી નિર્ધારિત સમયગાળામાં ફરિયાદ દાખલ કરવામાં નિષ્ફળ જાય, તો બેંક ગેરંટીનો આગ્રહ રાખ્યા વિના વાહનને મુક્ત કરવું આવશ્યક છે.

Acts Referred:
Gujarat Mineral (Prevention of Illegal Mining, Transportation and Storage) Rules, 2017 Rule 12

Counsel:
Jigar L Patel, Foram Trivedi

JUDGEMENT

Sangeeta K Vishen, J.- [1] With the consent of the learned advocates appearing for the respective parties and upon instructions being available, the captioned writ petition is taken up for final disposal.

[2] Issue Rule, returnable forthwith. Ms Foram U. Trivedi, learned Assistant Government Pleader waives service of notice of Rule on behalf of the respondent-State.

[3] By way of captioned writ petition, the petitioner, inter alia, has prayed for quashing and setting aside the action of the respondent authorities of seizing the vehicle of the petitioner being Truck bearing registration no.GJ-13-AX-0666 with further direction to respondent authorities to release the vehicle of the petitioner.

[4] Mr Jigar L. Patel, learned advocate for the petitioner submitted that on 09.06.2024, inspection was carried out and the vehicle of the petitioner was seized by the team of respondent no.2. It is submitted that Rule 12 of the Gujarat Mineral (Prevention of Illegal Mining, Storage and Transportation) Rules, 2017 (hereinafter referred to as the "Rules of 2017"), obligates the respondent authorities to file a complaint within a period of 45 days and to the information of the petitioner, no complaint has been filed within 45 days. It is therefore submitted that in absence of any complaint filed within 45 days, the action of the respondent authorities to continue to detain the vehicle, would be against the principle laid down by this Court in the case of Nathubhai Jinabhai Gamara vs. State of Gujarat passed in Special Civil Application no.9203 of 2020. It is submitted that the captioned writ petition is restricted only qua release of the vehicle. So far as the order passed by the authority is concerned, the petitioner shall take out the appropriate proceedings before the appropriate forum.

[5] Ms Foram U. Trivedi, learned Assistant Government Pleader, was required to take instructions. Upon instructions, it is fairly conceded that the complaint has not

been filed within stipulated period of 45 days; however, on 15.07.2024, the competent authority has passed an order and thereafter, on 30.07.2024, complaint has been filed. It is therefore, submitted that so far as the order is concerned, the petitioner may be relegated to avail of the alternative remedy.

[6] Heard the learned advocates appearing for the respective parties.

[7] Pertinently, the writ petition has been filed seeking release of the vehicle mainly on the ground that Rule 12 of the Rules of 2017, obligates the authorities to file a complaint within 45 days. It is not in dispute that on 09.06.2024, inspection was carried out by the team of respondent authorities and the vehicle was seized. According to the case of the petitioner, within 45 days, no complaint has been filed. Since the vehicle was not released, the petitioner being aggrieved has filed the captioned writ petition.

[8] Learned Assistant Government Pleader has fairly conceded that the complaint has not been filed within 45 days but, has been filed on 30.07.2024. There is no denial to the fact that complaint has not been filed within the stipulated period and therefore, the case of the petitioner stands squarely covered by the judgment in the case of Nathubhai Jinabhai Gamara (supra). In paragraphs 7, 10 and 11, this Court has held and observed thus:

> "7. Pertinently the competent authority under Rule 12 is only authorized to seize the property investigate the offence and compound it; the penalty can be imposed and confiscation of the property can be done only by order of the court. Imposition of penalties and other punishments under Rule 21 is thus the domain of the court and not the competent authority. Needless to say therefore that for the purpose of confiscation of the property it will have to be produced with the sessions court and the custody would remain as indicated in sub-rule 7 of Rule 12. Thus where the offence is not compounded or not compoundable it would be obligatory for the investigator to approach the court of sessions with a written complaint and produce the seized properties with the court on expiry of the specified period. In absence of this exercise, the purpose of seizure and the bank guarantee would stand frustrated; resultantly the property will have to be released in favour of the person from whom it was seized, without insisting for the bank guarantee.
>
> 10. The bank guarantee is contemplated to be furnished in three eventualities: (i) for the release of the seized property and (ii) for compounding of the offence and recovery of compounded amount, if it remains unpaid on expiry of the specified period of 30 days; (iii) for recovery of unpaid penalty. Merely because that is so, it cannot be said that the investigator would be absolved from its duty of instituting the case on failure of compounding of the offence. Infact offence can be compounded at two stages being (1) at a notice stage, within 45 days of the seizure of the vehicle; (2) during the prosecution but

> before the order of confiscation. Needless to say that for compounding the offence during the prosecution, prosecution must be lodged and it is only then that on the application for compounding, the bank guarantee could be insisted upon. In absence of prosecution, the question of bank guarantee would not arise; nor would the question of compounding of offence.
>
> 11. The deponent of the affidavit appears to have turned a blind eye on Rule 12 when he contends that application for compounding has been dispensed with by the amended rules inasmuch as; even the amended Rule 12(b)(i) clearly uses the word "subject to receipt of compounding application". Thus the said contention deserve no merits. Thus, in absence of the complaint, the competent authority will have no option but to release the seized vehicle without insisting for bank guarantee. There is thus a huge misconception on the part of the authority to assert that even in absence of the complaint it would have a dominance over the seized property and that it can insist for a bank guarantee for its."

It has been held that it would be obligatory for the investigator to approach the Court of Sessions with a written complaint and produce the seized properties with the Court on expiry of the specified period. In absence of such exercise, the purpose of seizure and the bank guarantee would stand frustrated; resultantly, the property will have to be released in favour of the person from whom it was seized, without insisting for the bank guarantee.

[9] In view of the vehicle in question being seized on 09.06.2024 and the complaint was filed on 30.07.2024 and not within the stipulated period, in the opinion of this Court, the vehicle shall be released on following conditions:

(i) The petitioner shall file an undertaking on oath before the competent authority that the writ-applicant shall not transfer, alienate, part with the possession of vehicle being Truck bearing registration no. GJ-13-AX-0666 or create any charge over the vehicle in question till the conclusion of the trial.

(iii) The petitioner shall produce the vehicle being Truck bearing registration no. GJ-13-AX-0666 as and when the Authority or the Court concerned directs him to do so.

[10] Needless to clarify that this Court, has not examined the merits of the matter. It is directed that the Court below shall proceed with the complaint, if any, filed by the respondent authority independently and in accordance with law.

[11] In view of the aforementioned discussion, captioned writ petition succeeds and is accordingly allowed. Rule is made absolute to the aforesaid extent. No order as to costs

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2024(2)GCJ582

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Sunita Agarwal; Aniruddha P Mayee]

First Appeal No 1632 of 2019 **dated 12/07/2024**

Babasaheb Ambedkar Open University

Versus

Abhinav Knowledge Services Private Limited

JURISDICTION CHALLENGE

Code of Civil Procedure, 1908 Or. 2 R. 2 - Arbitration and Conciliation Act, 1996 Sec. 19, Sec. 34, Sec. 29A, Sec. 16, Sec. 21, Sec. 37, Sec. 17, Sec. 5, Sec. 8, Sec. 11 - Jurisdiction Challenge - Appeal under Sec. 37 of Arbitration and Conciliation Act, 1996 against the order of Commercial Court - Order passed under Sec. 34 challenging Arbitrator's decision under Sec. 16 - Arbitrator's competence to arbitrate questioned on grounds of res judicata and Or. 2 R. 2 CPC - Arbitrator rejected preliminary objection - Commercial Court held challenge under Sec. 34 premature as no final award was passed - Court observed that jurisdictional issues under Sec. 16 to be challenged post-final award under Sec. 34 - Appeal dismissed.

Law Point: Jurisdictional challenges under Sec. 16 of the Arbitration and Conciliation Act, 1996 should be raised at the time of challenging the final award under Sec. 34.

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Acts Referred:

Code of Civil Procedure, 1908 Or. 2R. 2

Arbitration and Conciliation Act, 1996 Sec. 19, Sec. 34, Sec. 29A, Sec. 16, Sec. 21, Sec. 37, Sec. 17, Sec. 5, Sec. 8, Sec. 11

Counsel:

Kamal B Trivedi (Senior Advocate), Mitul K Shelat, Disha N Nanavaty, Nirav C Thakkar

JUDGEMENT

Sunita Agarwal, C.J.- [1] The instant appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (in short as "the Act' 1996") is directed against the judgement and order dated 01.04.2019 passed by the Judge, Commercial Court, in the proceedings under Section 34 of the Act' 1996 wherein the order dated 03.08.2018 passed by the learned Arbitrator in arbitration proceeding between the parties herein, had been challenged.

[2] The order impugned dated 03.08.2018 had been passed by the learned Arbitrator under Section 16 of the Act' 1996 wherein the competence of the Arbitrator to enter into the reference to proceed for arbitration was challenged on the ground that the claim of the respondent-claimant, viz. Abhinav Knowledge Services Private Ltd. was barred by the principles of res judicata as well as under the provisions of Order 2 Rule 2 CPC.

[3] The said application Exhibit 7 was rejected by the learned Arbitrator holding that the issues raised in the arbitral proceedings before it were not subject matter of inquiry in the earlier proceedings. The counter claim filed by the respondent-claimant was not considered on merits in the previous proceedings, inasmuch as, it was not entertained in view of the limited reference made to the learned Arbitrator.

[4] The order of rejection of the preliminary objection filed by the Appellant herein had been subjected to challenge in the proceedings under Section 34 of the Act' 1996 on the premise that the order of rejection of the application under Section 16 of the Act' 1996 being an interim award, is amenable to Section 34 of the Act' 1996. It was argued that the dispute between the parties had been settled with the award dated 02.07.2014 rendered in previous proceedings between the parties pertaining to the same contract. The second proceeding in the same matter is not permissible.

[5] The learned Judge, Commercial Court, noticing the contentions of the learned counsels for the parties, had recorded that in view of the judgment of the Apex Court in **SBP & Co. v. Patel Engineering Limited**, 2005 8 SCC 618, the order passed under Section 16 is amenable under Section 34 of the Act' 1996, at the time of challenging the final award. In the present case, no final award had been passed. The application challenging the order dated 03.08.2018 is premature and not entertainable.

[6] The main issue before us is about the maintainability of the application under Section 34 of the Act' 1996 challenging the order passed under Section 16 of the said Act. The consequential question would be as to whether the learned Commercial Court

has erred in holding that the appropriate stage to challenge the order passed under Section 16 pertaining to the jurisdiction of arbitral tribunal would be after passing of the final award by invoking the provisions of Section 34 of the Act' 1996.

[7] We may note that, in the instant case, the jurisdiction of the learned Arbitrator was challenged under Section 16 of the Act' 1996 on the ground that pertaining to the agreement dated 24.10.2011, executed between the parties, the matter was earlier referred to the learned Arbitrator by mutual consent of the parties. The learned Arbitrator made an Award dated 02.07.2014 and the said Award has been implemented. The payment made to the respondent-claimant under the Award had been received by it without demur. No further dispute pertaining to the agreement dated 24.10.2011 would, thus, be maintainable. It was urged that the respondent-claimant ought to have raised all disputes at the relevant point of time in one proceeding before the Arbitrator. Having not done so, the dispute now raised was barred by the principles of constructive res judicata and principles of multiplicity of litigation under Order 2 Rule 2 CPC. The respondent--claimant did not raise any dispute pertaining to termination of the agreement and agreed to the said situation. No cause of action, thus, survives for fresh proceedings, inasmuch as, all rights and obligations under the aforesaid agreement had been discharged. The respondent-claimant has no surviving claim against the appellant University.

[8] The learned Arbitrator has rejected the preliminary objection raised by the appellant University, noticing that there is nothing on record to even remotely suggest that while agreeing for termination of agreement under the letter dated 19.06.2014, the respondent-claimant had foregone any claim arising out of the said agreement. The conclusion is that the respondent-claimant is not barred from raising the dispute, inasmuch as, the issues raised before the Arbitrator were not subject matter of inquiry in the earlier proceeding.

[9] It was argued by Mr. Kamal B. Trivedi, learned Senior Advocate appearing for the appellant that the dispute arose between the parties as a result of Public Private Partnership Agreement (PPP Agreement) which was executed between the appellant University and the respondent Company wherein the respondent Company had agreed for providing Globally Competitive Information and Communication Technology (ICT) enabled educational courses to be offered to the students within the State of Gujarat through a centralised establishment and run by the appellant University. As per clause 9 of the Agreement, providing for "shared arrangement", the respondent Company was to be paid at the rate of 35% of basic fee of Rs. 4,000/- per student, i.e. Rs. 1,400/- per student as under:-

Sr. No. Particulars Percentage 1. University Fees 25% 2. University Fee for payment to Centre 40% 3. AKS i.e. Respondent Company 35% Page 5 of 42 Downloaded on: Sat Jul 20 12:27:09 IST 2024 undefined NEUTRAL CITATION C/FA/1632/2019 CAV JUDGMENT DATED: 12/07/2024

[10] The appellant University paid the share of fees agreed for the services rendered by the respondent Company under the PPP Agreement for the period of 24.10.2011 till 15.02.2014. The submission is that the said Agreement was discharged by mutual consent on account of the objections raised by the faculties of Computer department of the appellant University that the study material supplied by the respondent University was plagiarized.

[11] On 12.03.2014, an undertaking was given by the respondent Company taking responsibility of liabilities arising in connection with usage of plagiarized study material and for meeting the financial liability, if any, resulting from the use of Microsoft material, while reserving its right to claim for ICT-U, if needed.

[12] On 18.06.2014, the appellant University addressed a communication to the respondent Company terminating the PPP Agreement for the above-noted reasons. It was expressed therein that once the respondent Company accepts the discontinuance of PPP Agreement, the appellant University wished to resolve the issue of the share of fees of the respondent Company through arbitration.

[13] Vide communication dated 19.06.2014, the respondent Company gave consent for discontinuance of the PPP Agreement and reference of the matter pertaining to the fee payment to the Arbitrator. A proposal was given by the appellant University to initiate arbitration proceedings recommending the name of the Arbitrator, which was accepted by the respondent Company. The arbitration proceedings initiated on 26.06.2014 had been brought to its logical conclusion with the making of the Award dated 02.07.2014 by the sole arbitrator wherein a direction was given to the appellant University to make payment of Rs. 1,200/- per student to the respondent Company (after deduction of Rs.200/- per student) for the term of February, 2014, as against the demand of the respondent Company for full share, i.e. Rs.1,400/- per student supported by execution of an undertaking/indemnity bond against any apprehended action against the appellant University. The submission is that the aforesaid award virtually granted full claim of the respondent Company, while rejecting the counter claim of the respondent Company holding that it was not subject matter of reference.

[14] Pursuant to the said Award, payment of the awarded amount, had been duly made by the appellant University which was accepted by the respondent Company without protest while submitting the requisite undertaking/indemnity bond.

[15] It was urged that after two years of the aforesaid award, a legal notice dated 09.03.2016 was served upon the appellant University, as an afterthought by the respondent Company demanding the reference of the issue of its claim of Rs.7.25 crores against the appellant University towards compensation under the heads of illegal discontinuance, unpaid services for August 2012 batch, damages for loss of business, legal and other expenses.

[16] On a petition filed under Section 11 of the Act' 1996, this Court passed an order dated 07.07.2017 for appointment of Arbitrator observing that the principle of res judicata which would apply to arbitration proceedings, essentially being a question of fact, was required to be examined by the Arbitrator, as the said task was not envisaged at the stage of Section 11 while deciding the application seeking reference of the dispute to the Arbitrator.

[17] Placing the judgment of the Apex Court in **M/s Indian Farmers Fertilizer Co. vs M/S Bhadra Products**, 2018 2 SCC 534 , it was argued by the learned Senior Counsel for the appellant that the Apex Court has held therein that the issue of limitation decided by the arbitrator is an interim award, and being an arbitral award, can be challenged separately and independently under Section 34 of the Act. The Apex Court has observed that the plea of limitation or the plea of res judicata is a plea of law, which concerns the jurisdiction of the Court which tries the proceeding. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the Court, and hence an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction. The submission is that the issue of limitation framed by the Arbitrator therein having been decided separately as a preliminary issue first, on the basis of evidence of the parties, was held to be an interim award, the challenge to which has been held maintainable under Section 34 of the Arbitration Act, 1996.

[18] Reference has been made to the interim order dated 08.07.2019 passed by the Division Bench in the instant appeal wherein a prima facie opinion has been drawn about the maintainability of the application under Section 34 of the Act' 1996 holding that the order passed on the application Exhibit 7 is an interim award as defined under the Act, as it has concluded the aspect of res judicata/constructive res judicata finally.

[19] The judgment of the Apex Court in **K.V. George vs. Secretary to Govt., Water And Power Department, Trivandrum**, 1989 4 SCC 595 has been placed to assert on the question of maintainability of the arbitration claim being barred under the provisions of Order 2 Rule 2 of the Code of Civil Procedure, as also on the issues raised in the second claim petition before the Arbitrator, arising out of the same cause of action. The submission is that all the issues including the claim of compensation raised in the second claim petition arose out of the termination of the contract and the action of the appellant in terminating the contract has been adjudicated in the first claim petition filed before the arbitrator.

[20] The principle of res judicata as provided in Section 11 of the ivil Procedure Code and the provisions contained in Order 2 Rule 2 of the Code of Civil Procedure are applicable in the arbitral proceedings though the Arbitral Tribunal is not bound by the Code of Civil Procedure, inasmuch as, the principle of res judicata and Order 2 Rule 2 CPC are based on the principle that there shall be no multiplicity of the proceedings and there shall be finality of the proceedings.

[21] With reference to Section 41 of the Arbitration Act, 1940, it has been held by the Apex Court in **K.V. George (supra)** that the principles of res judicata and for that matter, the principles of constructive res judicata apply to the arbitration proceedings.

[22] Reliance has further been made to the observation of the Apex Court in **National Thermal Power Corp. Vs. Siemens Atkeingesellschaft**, 2007 4 SCC 451 to reiterate that the plea of limitation or the plea of res judicata is a plea of law which concerns jurisdiction of the arbitral tribunal and any erroneous decision on the said plea would go to the root of the arbitral proceedings. Resultantly, the adjudication by the Tribunal on the plea of res judicata, being an interim award, the appellant was well within its right to take recourse to Section 34 of the Act' 1996. The Commercial Court has committed an illegality in rejecting the application under Section 34 by holding that the plea regarding as to whether the principle of res judicata or the provisions of Order 2 Rule 2 of CPC are applicable or not in the facts of the present case, can be considered only at the time of challenging the final award.

[23] Reference to the judgment of the Apex Court in **SBP & Co. (supra)** has been made to submit that Section 16 is based on the principle of Kompetenz-Kompetenz. As per the settled principle, the Arbitral Tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, which means that when such issue arises before it, the Tribunal ought to decide the same. The jurisdictional issue of competence of the Tribunal to rule on its own jurisdiction goes to the root of the arbitration proceedings. With the rejection of the application raising the claim being barred by the plea of res judicata as well as Order 2 Rule 2 CPC, would result in the arbitral tribunal conferring jurisdiction on its own. The submission is that there is no justification to wait till the outcome of the arbitral proceeding to challenge the order of rejection of the plea of res judicata under Order 2 Rule 2 CPC.

[24] Mr. Nirav C. Thakkar, learned advocate appearing for the respondent-claimant, in rebuttal, relies on two latest decisions of the Apex Court in **M/s Deep Industries Ltd. vs Oil And Natural Gas Corporation Ltd.**, 2020 15 SCC 706 and **Chintels India Ltd. v. Bhayana Builders Pvt. Ltd**, 2021 4 SCC 602 to submit that by reading of Section 16 of the Act' 1996, the Apex Court has held that where a Section 16 application is dismissed, no appeal being provided under the Act, the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34. It was held that where a preliminary ground of the arbitrator not having jurisdiction to continue with the proceeding is made out, an appeal lies under Section 37(2)(a) of the Act' 1996 for the reason that the termination is final in nature as it brings the arbitral proceedings to end whereas if converse is held by the Arbitrator, i.e. if the Arbitrator decides having jurisdiction, then the proceedings before the Arbitrator are to carry on and the decision on the preliminary ground is amenable to challenge under Section 34 after the award is made, inasmuch as, no appeal is provided under Section 37 (2)(a) against such orders.

[25] To appreciate the submissions of the learned counsels for the parties, we find it apt to first go to the provisions of Sections 5, 16, 17, 19, 21, 29A, 34 and 37 of the Arbitration Act, 1996, which read as under:-

"**5. Extent of judicial intervention.**-Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

16. Competence of arbitral tribunal to rule on its jurisdiction. -(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

17. Interim measures ordered by arbitral tribunal.-(1) A party may, during the arbitral proceedings, apply to the arbitral tribunal-

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question

may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure,1908 (5 of 1908), in the same manner as if it were an order of the Court."

"**19. Determination of rules of procedure.**-(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

"**21. Commencement of arbitral proceedings.**-Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

"**29A. Time limit for arbitral award.**- (1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23: Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavor may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period: Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay:

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application: Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

34. Application for setting aside arbitral award.-(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application establishes on the basis of the record of the arbitral tribunal that-

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part;

or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1.-For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.-For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section

(5) is served upon the other party."

"**37. Appealable orders.**-(1) Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) Appeal shall also lie to a court from an order of the arbitral tribunal-

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or takeaway any right to appeal to the Supreme Court."

[26] The Arbitration and Conciliation Act, 1996 has been enacted to consolidate and amend the laws relating to arbitration. The United Nations Commission on International Trade Law (UNCITRAL) was adopted in 1985 on the recommendation of the General Assembly of the United Nations in view of the desirability of uniformity of law of Arbitrator, Arbitral procedures. The Statement of Objects and Reasons of the Arbitration Act, 1996 states that the Bill sought to consolidate and amend the laws relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the UNCITRAL Model Law and Rules. One of the main objects of the Bill as provided therein is to minimise the supervisory role of the Courts in the arbitral process.

[27] Section 5 of the Act' 1996, which commences with a non-obstante clause restricts the intervention by judicial authority except where it is provided in Part - I of the Act' 1996. Section 16 as contained in Chapter - IV in Part- I empowers the Arbitral Tribunal to rule on its own jurisdiction, including decision on any objections with regard to existence or validity of the arbitration agreement. Sub-section (2) states that the plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the Statement of defence. Sub-section (3) states that a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope is raised during the arbitral proceedings. Sub-section (5) states that where arbitral tribunal decides to reject a plea referred to in Sub-section (2) or Sub-Section (3), it shall continue with the arbitral proceedings and make an arbitral award. Section 16(6) further states that a party aggrieved by such an arbitral award may make an application for setting aside the same in accordance with Section 34.

[28] It is observed by the Apex Court in **SBP & Co. (supra)** that Section 16 of the Act only makes explicit what is even otherwise implicit, viz. that the arbitral tribunal constituted under the Act has the jurisdiction to rule on its own jurisdiction, including ruling on objections with respect to the existence or validity of the arbitration agreement. Section 16 is said to be the recognition of the principle of Kompetenz - Kompetenz and enable a party to raise the plea of jurisdiction including a plea that the arbitral tribunal is exceeding the scope of its authority. Sub-section (2) of Section 16 clarifies that the party shall not be precluded from raising a plea of jurisdiction merely because he has appointed or participated in the appointment of arbitrator. When the Tribunal decides these two questions, namely, the question of jurisdiction and the question of exceeding the scope of authority or either of them, the same is open to immediate challenge in an appeal, when the objection is upheld and only in an appeal

against the final award, when the objection is over-ruled. It was further observed that sub-section (5) enjoins that if the arbitral tribunal overrules the objections under sub-sections (2) or (3), it should continue with the arbitral proceedings and make an arbitral award. Sub-section (6) further provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and the exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Section 34 of the Act' 1996.

[29] In **M/s Deep Industries Ltd. (supra)**, the Apex Court was dealing with the preliminary objection as to the maintainability of the petition filed under Article 227 of the Constitution of India. The question was about the maintainability of the petition under Article 227 of the Constitution of India challenging the order passed by the City Civil Court under Section 17 of the Act' 1996, however, an issue with regard to the scope of Section 16 of the Act' 1996 was considered by the Apex Court. It was noted that "serious disputes" as to jurisdiction seem to have cropped up is not the same thing as the Arbitral Tribunal lacked inherent jurisdiction in going into and deciding the Section 17 application. The Arbitral Tribunal was well within its jurisdiction in applying the law and finally issuing the stay order. The issue of infraction of the principles laid down by Section 41(e) of the Specific Relief Act in granting injunction is a mere error of law and not an error of jurisdiction, much less an error of inherent jurisdiction going to the root of the matter.

[30] It was further noted that the policy of the Act' 1996 is speedy disposal of the arbitration cases. The Arbitration Act is Special Act and a self contained code dealing with the arbitration. Under the scheme of the Act, in Sections 5, 29A and 37, the time limit is not only set down for disposal of the arbitral proceedings themselves, but also for Section 34 applications by insertion of Section 34(6) by way of amendment. The most significant of all is the non-obstantive clause contained in Section 5, which restricts intervention by the judicial authority except where it is provided in Part I of the Constitution of India.

[31] In **Chintels India Ltd. (supra)**, the Apex Court was dealing with the question whether the High Court's order refusing to condone the delay in filing an application under Section 34 of the Arbitration and Conciliation Act, 1996, is an appealable order under Section 37(1) (c) of the Act' 1996. While interpreting the language employed in Section 37(1) (c) "setting aside or refusing to set aside an arbitral award", the Apex Court has applied "effect doctrine" propounded in **Essar Constructions v. N.P. Rama Krishna Reddy**, 2000 6 SCC 94 . The phrase "refusing to set aside the award" has been considered in light of the observation in **Essar Constructions (supra)** case, wherein it was noted that the outcome of the order in effect was that the prayer for setting aside the award was refused on the ground of delay.

[32] The Apex Court in **Chintels India Ltd. (supra)**, has relied on the reasoning in **Essar Constructions (supra)** to hold that the "effect doctrine" referred to in **Essar Constructions (supra)** is statutorily inbuilt in Section 37 of the Act' 1996 itself.

[33] Referring to Section 37(1)(a) and 37(2)(a), it was observed that so far as Section 37(1)(a) is concerned, where a party has referred to arbitration under Section 8, no appeal lies. The reason being that the effect of such order is that the parties must go to arbitration. Similarly, it is left to the Arbitrator to decide the preliminary points of its competence or jurisdiction under Section 16 of the Act' 1996, which then becomes the subject matter of appeal under Section 37(2)(a) or the subject matter of grounds to set aside under Section 34 an arbitral award ultimately made depends upon whether the preliminary points are accepted or rejected by the Arbitrator.

[34] It was noted that an order refusing to refer the parties to arbitration under Section 8 may be made on a prima facie finding that no valid arbitration agreement exists, or on the ground that the original arbitration agreement, or a duly certified copy thereof is not annexed with the application under Section 8. In either case, i.e., whether the preliminary ground for moving the Court under Section is not made out, either by not annexing the original arbitration agreement or a duly certified copy or on merits, the Court finding that prima facie no valid agreement exist, an appeal lies under Section 37(1)(a).

[35] Further, likewise, under Section 37(2)(a) where a preliminary ground of the arbitrator not having the jurisdiction to continue with the proceedings is made out, an appeal lies under the said provision, as such determination is final in nature as it brings the arbitral proceedings to an end. However, if the converse is held by the Arbitrator, then the proceedings before the Arbitrator is to carry on and the aforesaid decision on the preliminary ground is amenable to challenge under Section 34 after the award is made, no appeal is provided. Reference has further been made to Section 16(5) and (6) of the Arbitration Act, 1996, which clearly provides that where the arbitral tribunal takes a decision rejecting the plea on its own jurisdiction or competence or with respect to the acceptance or validity of the Arbitration Agreement, it shall continue with the arbitral proceedings and make an award. Sub-section (6) of Section 16 further makes clear that the final arbitral award so made by the Arbitrator may be challenged by a party aggrieved in accordance with Section 34, observing that the "effect doctrine" is part and parcel of the statutory provision for appeal under Section 37 and in view of the express language of Section 37(1) (c), the arguments of the learned counsel for the respondents therein about the maintainability of appeal against under Section 37(1)(c) against the order refusing to condone the delay in filing application under Section 34 of the Act, 1996, has been rejected. The contention that the words employed in Section 37(1)(c) of setting aside or refusing to set aside the arbitral award under Section 34 has to be read in a manner that the refusal to set aside the award can only be on merits and not on some preliminary ground, which would then lead to a

refusal to set aside the award, was rejected in light of the observations noted hereinabove. The question of law that an appeal under Section 37(1)(c) of the Arbitration Act, 1996 would be maintainable against an order refusing to condone the delay in filing an application under Section 34 of the Arbitration Act, 1996 to set aside the award, has been answered in affirmative.

[36] Taking clue from the principles propounded by the Apex Court in **Chintels India Ltd. (supra)**, relying on the "effect doctrine" referred to in **Essar Constructions (supra)**, we may further record that against an order passed by the Arbitral Tribunal, accepting the plea referred to in sub-section(2) or sub-section (3) of Section 16, an appeal lies to a Court authorised by law to hear appeals from the original decree of the Court passing the order as per Section 37(2)(a). No appeal has been provided in the statute against the order of rejection of the application under Section 16 raising plea of lack of jurisdiction of the Arbitral Tribunal.

[37] Sub-Section (5) of Section 16 is categorically providing that the Arbitral Tribunal shall continue with the arbitral proceedings to make the arbitral award, where it takes a decision to reject the plea of lack of its jurisdiction. Meaning thereby, where the arbitral tribunal rules on its competence or jurisdiction or rejects any objection with respect to existence or validity of the arbitration agreement, it shall continue with the arbitral proceeding. Sub-section (6) of Section 16 makes it further clear that any party aggrieved by the arbitral award may challenge it under Section 34.

[38] The effect is that the challenge to the order passed by the Arbitral Tribunal on its competence or jurisdiction or the preliminary point as to the existence or validity of the arbitration agreement, which goes to the root of the matter, can very well be raised at the time of challenge to the final arbitral award. At the interim stage, where the Arbitral Tribunal or the Arbitrator decides that it has jurisdiction to proceed with the arbitration, no application under Section 34 can be maintained.

[39] The submission of the appellant is that the order under Section 16 of the Act' 1996 is an interim award within the meaning of Section 2(1)(c) of the Act' 1996, and being subsumed with the expression "arbitral award could be challenged under Section 34 of the Act' 1996", is a result of misreading and misinterpretation of the judgment of the Apex Court in **M/s Indian Farmers Fertilizer Co. (supra)**.

[40] Having exhaustively read the judgment in **M/s Indian Farmers Fertilizer Co. (supra)**, we may note that the Apex Court has dealt with two issues; first one is whether an award on the issue of limitation can be said to be an interim award and, second, as to whether a decision on the point of limitation would go to jurisdiction and, therefore, be covered by Section 16 of the Act' 1996. It was noted by the Apex Court that Section 2(c) and Section 31(6), except for stating that an arbitral award includes an interim award, the Act is silent and does not define what an interim award is. Section 31(6), which delineates the scope of interim arbitral awards, states that the Arbitral Tribunal may, at any time during the arbitral proceedings, make an interim

arbitral award on any matter with respect to which it may make a final arbitral award. In the facts of the said case, it was noted that the Arbitral Tribunal had framed several issues, but thought it fit to take up the issue of limitation first, inasmuch as, the counsels appearing for both the parties submitted that the said issue could be decided on the basis of documentary evidence alone. The issue of limitation was then decided in favour of the claimant stating that their claims had not become time barred.

[41] This has resulted in filing application under Section 34 stating the aforesaid award as interim award or the "First Partial Award". The application under Section 34 was rejected by the Court stating that the aforesaid award could not be said to be an interim award and that therefore, the Court lacked jurisdiction to proceed further under Section 34 of the Act. The matter travelled to the High Court, which has concurred with the order of the competent court in rejecting the application under Section 34. The occasion for filing the appeal before the Apex Court had then arisen.

[42] In this factual context of the matter, the argument of the learned counsel for the respondent therein was that the award on the issue of limitation being a ruling on the arbitral tribunal's jurisdiction would fall within Section 16 of the Act and, inasmuch as, the plea taken on the point of limitation was rejected, the drill of Section 16 must be followed. Resultantly, it is only after all other issues have been decided by the Arbitral Tribunal that such an award can be challenged under Section 34 of the Act' 1996.

[43] Dealing with the above submission of the learned counsel for the respondent, the Apex Court has considered the principle on which Section 16 has been formulated. It was noted that at one point of time, the law was that the arbitrator, being a creature of the contract, could not rule on the existence or validity of the arbitration clause contained in the contract. This, however, gave way to the Kompetenz principle which was adopted by the UNCITRAL Model Law. Section 16 of the Act' 1996 is based on UNCITRAL Model Law, which lays down that an arbitral tribunal may rule on its own jurisdiction, often stated to be Kompetenz-Kompetenz principle. It was further noted that the Kompetenz principle deals with the arbitral tribunal's jurisdiction in the narrow sense of ruling on objections with respect to the existence or validity of the arbitration agreement. The Court has further proceeded to examine whether in light of the language of Section 16 (1), the arbitral tribunal which is required to rule on its own jurisdiction, may embark upon an inquiry upon the issues framed by the parties to the dispute. It was, thus, observed in paragraphs '18 to 20' as under:-

> "18. It may be noticed that Section 16(1) to (4) are based on Article 16 of the UNCITRAL Model Law. The Kompetenz principle deals with the arbitral tribunal's jurisdiction in the narrow sense of ruling on objections with respect to the existence or validity of the arbitration agreement. What is important to notice in the language of Section 16(1) is the fact that the arbitral tribunal may rule on its own jurisdiction, which makes it clear that it refers to whether

the arbitral tribunal may embark upon an inquiry into the issues raised by parties to the dispute.

19. Here again, the English Arbitration Act of 1996 throws some light on the problem before us. Sections 30 and 31 of the said Act read as under:

"30 Competence of tribunal to rule on its own jurisdiction. - (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

31 Objection to substantive jurisdiction of tribunal.

- (1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.

A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

(2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

(3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.

(4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may -

(a) rule on the matter in an award as to jurisdiction, or

(b) deal with the objection in its award on the merits. If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

(5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction)."

20. These sections make it clear that the Kompetenz principle, which is also followed by the English Arbitration Act of 1996, is that the "jurisdiction" mentioned in Section 16 has reference to three things: (1) as to whether there is the existence of a valid arbitration agreement; (2) whether the arbitral

tribunal is properly constituted; and (3) matters submitted to arbitration should be in accordance with the arbitration agreement."

[44] A careful reading of the said observation makes it clear that the jurisdiction of the arbitral tribunal in Section 16 is confined to three aspects:-

(1) As to whether there is a valid arbitration agreement;

(2) Whether the tribunal is properly constituted, and

(3) Matters submitted to arbitration pertain to arbitration agreement.

[45] Noticing the above, the Court has further delved upon the meaning of the expression "jurisdiction" and noted that "jurisdiction" is a word of many hues. Its colour is to be discerned from the setting in which it is mentioned. The Constitution Bench's decision in **Ittavira Mathai v. Varkey Varkey**, 1964 1 SCR 495 was considered wherein a distinction has been drawn between an erroneous decision on limitation being an error of law which is within the jurisdiction of the Court, and a decision where the Court acts without jurisdiction. The observation in paragraph '22' in this regard are relevant to be extracted hereinunder:-

"22. A Constitution Bench of this Court in **Ittavira Mathai v. Varkey Varkey**, 1964 1 SCR 495 at 501-503, made a distinction between an erroneous decision on limitation being an error of law which is within the jurisdiction of the Court, and a decision where the Court acts without jurisdiction in the following terms:

"The first point raised by Paikedy for the appellant is that the decree in OS No. 59 of 1093 obtained by Anantha Iyer and his brother in the suit on the hypothecation bond executed by Ittiyavira in favour of Ramalinga Iyer was a nullity because the suit was barred by time. In assuming that the suit was barred by time, it is difficult to appreciate the contention of learned counsel that the decree can be treated as a nullity and ignored in subsequent litigation. If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject-matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities. Learned counsel, however, referred us to the decision of the Privy Council in **Maqbul Ahmad**

v. Onkar Pratap Narain Singh, 1935 AIR(PC) 85 and contended that since the court is bound under the provisions of Section 3 of the Limitation Act to ascertain for itself whether the suit before it was within time, it would act without jurisdiction if it fails to do so. All that the decision relied upon says is that Section 3 of the Limitation Act is peremptory and that it is the duty of the court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings. The Privy Council has not said that where the court fails to perform its duty, it acts without jurisdiction. If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Civil Procedure Code. If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity."

[46] While understanding the sense of the term "jurisdiction" used in Section 16 of the Act' 1996, reliance is placed therein upon the decision of the Apex Court in **National Thermal Power Corp. (supra)**, in paragraphs '23' and '24' as under:-

"23. It is in this sense of the term that "jurisdiction" has been used in Section 16 of the Act. Indeed, in NTPC (supra) at 460-461, a Division Bench of this Court, after setting out Sections 16 and 37 held: "10. Now, the only question that remains to be decided in the present case is whether against the order of partial award an appeal is maintainable directly under Section 37 of the Act or not. We have considered the submissions of learned counsel for the appellant and after going through the counterclaim and the partial award, we are of the opinion that no question of jurisdiction arises in the matter so as to enable the appellant to file a direct appeal under Section 37 of the Act before the High Court. As already mentioned above, an appeal under sub-section (2) of Section 37 only lies if there is an order passed under Sections 16(2) and (3) of the Act. Sections 16(2) and (3) deal with the exercise of jurisdiction. The plea of jurisdiction was not taken by the appellant. It was taken by the respondent in order to meet their counterclaim. But it was not in the context of the fact that the Tribunal had no jurisdiction, it was in the context that this question of counterclaim was no more open to be decided for the simple reason that all the issues which had been raised in Counterclaims 1 to 10 had already been settled in the minutes of meeting dated 6-4-2000/7-4-2000 and it was recorded that no other issues were to be resolved in first and third contracts.

24. Interestingly, in a separate concurring judgment, P.K. Balasubramanyan, J., held (NTPC Case, SCC pp.463-64, paras 17-19):

"17. In the larger sense, any refusal to go into the merits of a claim may be in the realm of jurisdiction. Even the dismissal of the claim as barred by limitation may in a sense touch on the jurisdiction of the court or tribunal.

When a claim is dismissed on the ground of it being barred by limitation, it will be, in a sense, a case of the court or tribunal refusing to exercise jurisdiction to go into the merits of the claim. In Pandurang Dhoni Chougule v. Maruti Hari Jadhav this Court observed that: (SCR p. 107: AIR p. 155, para 10)

"10.....It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code."

In a particular sense, therefore, any declining to go into the merits of a claim could be said to be a case of refusal to exercise jurisdiction.

18. The expression "jurisdiction" is a word of many hues. Its colour is to be discerned from the setting in which it is used. When we look at Section 16 of the Act, we find that the said provision is one, which deals with the competence of the Arbitral Tribunal to rule on its own jurisdiction. SBP & Co. v. Patel Engg. Ltd. in a sense confined the operation of Section 16 to cases where the Arbitral Tribunal was constituted at the instance of the parties to the contract without reference to the Chief Justice under Section 11(6) of the Act. In a case where the parties had thus constituted the Arbitral Tribunal without recourse to Section 11(6) of the Act, they still have the right to question the jurisdiction of the Arbitral Tribunal including the right to invite a ruling on any objection with respect to the existence or validity of the arbitration agreement. It could therefore rule that there existed no arbitration agreement, that the arbitration agreement was not valid, or that the arbitration agreement did not confer jurisdiction on the Tribunal to adjudicate upon the particular claim that is put forward before it. Under sub-section (5), it has the obligation to decide the plea and where it rejects the plea, it could continue with the arbitral proceedings and make the award. Under sub-section (6), a party aggrieved by such an arbitral award may make an application for setting aside such arbitral award in accordance with Section 34. In other words, in the challenge to the award, the party aggrieved could raise the contention that the Tribunal had no jurisdiction to pass it or that it had exceeded its authority, in passing it. This happens when the Tribunal proceeds to pass an award. It is in the context of the various sub-sections of Section 16 that one has to understand the content of the expression "jurisdiction" and the scope of the appeal provision. In a case where the Arbitral Tribunal proceeds to pass an award after overruling the objection relating to jurisdiction, it is clear from sub-section (6) of Section 16 that the parties have to resort to Section 34 of the Act to get rid of that award, if possible. But, if the Tribunal declines

jurisdiction or declines to pass an award and dismisses the arbitral proceedings, the party aggrieved is not without a remedy. Section 37(2) deals with such a situation. Where the plea of absence of jurisdiction or a claim being in excess of jurisdiction is accepted by the Arbitral Tribunal and it refuses to go into the merits of the claim by declining jurisdiction, a direct appeal is provided. In the context of Section 16 and the specific wording of Section 37(2)(a) of the Act, it would be appropriate to hold that what is made directly appealable by Section 37(2)(a) of the Act is only an acceptance of a plea of absence of jurisdiction, or of excessive exercise of jurisdiction and the refusal to proceed further either wholly or partly.

19. In a case where a counterclaim is referred to and dealt with and a plea that the counterclaim does not survive in view of the settlement of disputes between the parties earlier arrived at is accepted, it could not be held to be a case of refusal to exercise jurisdiction by the Arbitral Tribunal. Same is the position when an Arbitral Tribunal finds that a claim was dead and was not available to be made at the relevant time or that the claim was not maintainable for other valid reasons or that the claim was barred by limitation. They are all adjudications by the Tribunal on the merits of the claim and in such a case the aggrieved party can have recourse only to Section 34 of the Act and will have to succeed on establishing any of the grounds available under that provision. It would not be open to that party to take up the position that by refusing to go into the merits of his claim, the Arbitral Tribunal had upheld a plea that it does not have jurisdiction to entertain the claim and hence the award or order made by it, comes within the purview of Section 16(2) of the Act and consequently is appealable under Section 37(2) (a) of the Act."

With the above discussion, it was observed in paragraph '25 that the judgment in **NTPC (supra)** is determinative of the issue at hand and has the respectful concurrence of the Bench.

[47] The answer to the question as to whether a decision on the point of limitation would be covered by Section 16 of the Act' 1996, thus, has been answered in negative.

[48] We may reiterate that in the context of Section 16, the specific word of Section 37(2) of the Act, it would be appropriate to hold that what is made directly appealable by Section 37(2)(a) of the Act is only an acceptance of a plea of absence of jurisdiction, or of excessive exercise of jurisdiction and the refusal to proceed further either wholly or partly.

[49] On the first issue as to whether the award on the issue of limitation can be said to be an interim award, holding that the decision on the point of res judicata and limitation being the question of jurisdiction, is an interim award and being an arbitral award, can be challenged separately and independently under Section 34 of the Act

has, thus, been answered in affirmative. However, it was further concluded that such an award, which does not relate to the arbitral tribunal's own jurisdiction under Section 16, does not have to follow the drill of Section 16(5) and (6) of the Act. Meaning thereby, the decision taken on the point of limitation can be challenged under Section 34 as an interim award and the party aggrieved is not required to wait till all issues are decided to challenge the order of the arbitrator on the issue of limitation under Section 34 of the Act.

[50] In view of the above discussion, we do not find substance in the submission of the learned senior advocate for the appellant in challenging the order of rejection of Section 34 application by the competent court stating that the issue pertaining to res judicata and bar of Order 2 Rule 2 CPC can be raised by the appellant at the time of challenging the final award.

[51] The reliance placed on the decision of the Apex Court in **M/s Indian Farmers Fertilizer Co. (supra)**, to support the submission that the order under Section 16 of the Act' 1996 is an interim award is, therefore, of no help to the appellant. The order dated 03.08.2018 passed by the arbitral tribunal under Section 16 of the Act' 1996 cannot be said to be an interim award, within the meaning assigned to the said term in the judgment of the Apex Court in **M/s Indian Farmers Fertilizer Co. (supra)**, heavily relied by the learned Senior Counsel for the appellant.

[52] In view of the scheme of Section 16 and Section 37(2)(a), the application under Section 34 of the Act' 1996 was not maintainable against the order of rejection of the application under Section 16, challenging the jurisdiction of the learned Arbitrator on the plea of res judicata and bar under Order 2 Rule 2 CPC.

[53] We may further clarify that the question of bar under Section 11, Explanation 4 or under Order 2 Rule 2 CPC cannot be permitted to be raised within the scope of Section 16, which has been enacted on the Kompetenz-Kompetenz principle to rule on its own jurisdiction and the preliminary issue such as existence or validity of the arbitration agreement and matters submitted to arbitration being within the realm of the arbitration agreement. The issues such as res judicate and bar of Order 2 Rule 2 CPC though are the plea of law, which concerns the jurisdiction of the arbitrator, but they can very well be raised in the arbitration proceedings and issues have to be framed on the same by the Arbitrator, which may be decided as preliminary issues, but such plea cannot be said to fall within the scope and context of the expression "jurisdiction" in various sub-sections of Section 16.

[54] Taking clue from the decision of the Apex Court in **M/s Indian Farmers Fertilizer Co. (supra)**, we hold that the plea of res judicata and bar of Order 2 Rule 2 CPC could not have been raised within the scope of Section 16 and the order rejecting the application under Section 16 cannot be said to be an interim award, which can be challenged separately and independently under Section 34 of the Act, being arbitral award within the meaning of Section 2(1)(c) and Section 31(6) of the Act' 1996.

[55] In view of the above discussion, no infirmity could be found in the decision of the arbitral tribunal and the Commercial Court under Section 34 of the Act, 1996. The appeal is dismissed being devoid of merits.

[56] As clarified above, the issue of res judicata and bar of Order 2 Rule 2 CPC can very well be raised by the appellant before the arbitral tribunal, which would be required to frame issue(s) on the said plea, if so raised, and decide the same in accordance with law, independent of any observations made by the arbitral tribunal in the order impugned.

FURTHER ORDER

The prayer made by the learned counsel for the appellant to stay the effect and operation of the judgment is hereby rejected

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2024(2)GCJ604

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before J C Doshi]

Special Civil Application; Civil Application (For Direction) No 23710 of 2022; 1 of 2024 **dated 01/07/2024**

Dinbandhu Dinanath Prajapati

Versus

Devenbhai Mafatlal Patel & Anr

LAND SALE DISPUTE

Code of Civil Procedure, 1908 Sec. 96 - Or. 20R 18 - Sec. 54 - Sec. 151 - Code of Civil Procedure, 1882 Sec. 265 - Land Sale Dispute - Petition under Article 227 of Constitution seeks to quash order in application Civil Misc. Application No.208 - Sale agreement executed in 1979 between petitioner's father and Samubhal Kanjibhai Patel for sale of land - Sale deed in 1980 with noted measurement mistake - Land possession given to petitioner's father - Mutation entry made after father's death - Respondent No.2 (sister) challenged the will and sought property partition - Court passed preliminary decree allowing 1/3rd share to respondent No.2 and directed Collector to execute partition - Respondent No.1 sought recall of preliminary decree under Section 151 CPC - Trial Court granted status quo order - Appellant contends trial court's lack of jurisdiction under Section 151 CPC to recall decree at instance of non-party - Court held inherent powers under Section 151 limited to procedural justice and cannot reopen settled matters or stay preliminary decree at instance of third party - Trial court's order quashed Petition allowed

Law Point: Civil Court becomes functus officio after passing a preliminary decree for partition of revenue-assessed estate, and such decree is final; any objections or

claims must be addressed through appeal, not recall applications under Section 151 CPC.

સિવિલ પ્રોસિજર કોડ, 1908 કલમ 96 ઓર્ડર 20 રુલ 18 – કલમ 54, કલમ 151 - સિવિલ પ્રોસિજર કોડ, 1882 કલમ 265 - જમીન વેચાણ વિવાદ- બંધારણના અનુચ્છેદ 227 હેઠળની દિવાની પરચુરણ અરજી નં. 208માં ઓર્ડર રદ કરવવાનો પ્રયાસ કરે છે. – જમીનના વેચાણ માટે અરજદરના પિતા અને સમુભાલ કાનજીભાઈ પટેલ વચ્ચે વર્ષ 1979 માં વેચાણ કરાર થયેલ – વર્ષ 1980માં માપણીની ભૂલ સાથે વેચાણ ખત નોંધાયેલ - અરજદારના પિતાને જમીનનો કબજો – પિતાના અવસાન બાદ કરાયેલી મ્યુટેશન એન્ટ્રી – પ્રતિવાદી નં.2 (બહેન) એ વસીયતને પડકારી અને મિલકતના વિભાજનની માંગણી કરી - કોર્ટે પ્રતિવાદી નંબર 2 ને 1/3 ભાગની મંજૂરી આપતો પ્રારંભિક હુકમનામું પસાર કર્યું – પ્રતિવાદી નંબર 1 એ કલમ 151 સી. પી. સી. હેઠળ પ્રારંભિક હુકમનામું પરત માંગ્યું - ટ્રાયલ કોર્ટે યથાસ્થિતિ મંજૂર કરી – અરજદાર બિન-પક્ષના કિસ્સામાં હુકમનામું રિકોલ કરવા કલમ 151 સી. પી. સી. હેઠળ ટ્રાયલ કોર્ટના અધિકાર ક્ષેત્રના અભાવની દલીલ કરે છે - કોર્ટ કલમ 151 હેઠળ અંતર્ગત સતાઓ ધરાવે છે જે પ્રક્રિયાગત ન્યાય સુધી મર્યાદિત છે અને તૃતીય પક્ષના દાખલા પર પતાવટની બાબતોને ફરીથી ખોલી શકતી નથી અથવા પ્રારંભિક હુકમનામું રોકી શકતી નથી – ટ્રાયલ કોર્ટના આદેશે અરજીની મંજૂરી રદ કરી.

કાયદા નો મુદ્દો: મહેસૂલ-મિલ્કતોના વિભાજન માટે પ્રારંભિક હુકમનામું પસાર કર્યા પછી સિવિલ કોર્ટ કાર્યકારી અધિકારી બની જાય છે. કોઈપણ વાંધા અથવા દાવાઓને અપીલ દ્વારા સંબોધવામાં આવવું જોઈએ, કલમ 151 સી.પી.સી હેઠળ અરજીઓને યાદ ન કરવી.

Acts Referred:

Code of Civil Procedure, 1908 Sec. 96, Or. 20R 18, Sec. 54, Sec. 151
Code of Civil Procedure, 1882 Sec. 265

Counsel:

Dipen Desai, Dr Shailesh R Patel, Rainish S Sikligar, Viral K Shah

JUDGEMENT

J. C. Doshi. J.- [1] The instant petition under Article 227 of the Constitution of India is filed seeking following reliefs:

"(A) The Hon'ble Court may be pleased to quash and set aside the impugned order dated 04.11.2022 passed in application below Exh.5 in Civil Misc. Application No.208 of 2022, annexed at Annexure-A to the petition.

(B) Pending final hearing and disposal of this petition, the Hon'ble Court be pleased to stay the execution, operation and implementation of the impugned order dated 04.11.2022 passed in application below. Exh.5 in Civil Misc. Application No.208 of 2022, annexed at Annexure-A to the petition."

[2] Brief facts of the case are as under:

2.1 That an agreement to sale dated 27.07.1979 was executed between the petitioner's father Dinanath Poonamchand Prajapati and Samubhal Kanjibhai Patel whereby Samubhal Kanjibhai Patel agreed to sale land bearing survey No.497 admeasuring 6 Acres and 37 Gunthas and land bearing survey No.499 admeasuring 3 Acres and 00 Gunthas to the father of the petitioner. thereafter registered sale deed no. 1965 dated 31.03.1980 was executed by Samubhal Kanjibhal with respect to land bearing survey no. 497 admeasuring Acre 4.24 guntha with old survey no. 464 admeasuring Acre 10.00 guntha paiki Acre 6.37 guntha and survey no. 499 admeasuring Acre 3.00 gunthas in favour of Dinanath Poonamchand. However, it is stated in the sale deed that there is a mistake in the measurement of survey no. 497 and process is going on for correcting the same. Therefore, the seller allotted the full and actual possession of the land admeasuring Acre 6.37 gunthas of land bearing survey no. 497 to the father of the present petitioner. In view of the re-survey taking place in the year 1992-93, old survey no. 499 and 497 merged to form new survey no. 320.

2.2 That Dinanath Poonamchand passed away on 07.04.2000. Mutation entry no. 2390 dated 03.05.2000 whereby the name of legal heirs of Dinanath Poonamchand namely; Pravinaben wd/o Dinanath Poonamchand, Dinbandhu Dinanath (petitioner herein) and Deepikaben Dimpleben Dinanath was entered. Pravinaben wd/o Dinanath Poonamchand passed away on 22.04.2011. It is required to be stated that before she passed away, Pravinaben executed a registered will dated 31.08.2010, whereby she bequeathed her share in favour of the petitioner

2.3 That the respondent No.2 herein i.e. the sister of the petitioner challenged the aforesaid Will by way of Regular Civil Suit No.210 of 2012 before the Additional Senior Civil Judge, Surat and also sought partition of the suit property. That in the meantime, Legal Heirs of Lakhiben wd/o Gandabhal Devabhal executed a registered sale deed dated 05.05.2017 in favour of respondent no.1 Devanbhai Mafatial Patel allegedly with respect to some portion of survey no. 320.

2.4 In the meantime, Regular Civil Suit No.210 of 2012 came to be finally heard and vide judgment and order dated 29.04.2022, after hearing both the parties, learned 19th Additional Senior Civil Judge, Surat was pleased to partly allow the suit and was pleased to pass the preliminary decree holding that the respondent No.2- Dipikaben is entitled to 1/3rd share and necessary effect of the order of the trial Court is to be given effect and 1/3rd share is required to be earmarked and separated and possession of the said 1/3rd share is given to the respondent No.2-Dipikaben. It was also directed that for the implementation of the preliminary decree and copy of the order be sent to the Collector as per Section 54 of the Act read with Order XX Rule 18 of the Code of Civil Procedure and the Collector shall depute authorized officer for implementation of the preliminary decree. Accordingly, preliminary decree was drawn for its implementation.

2.5 Respondent No.1 preferred an application for recall of the judgment and order dated 29.04.2022 passed in Regular Civil Suit No.210 of 2012 being Civil Misc. Application No. 208 of 2022. The respondent No.1 herein also filed application below Exh.5 seeking injunction/stay against the implementation of the judgment and decree.

2.6 Petitioner, as well as, the respondent No.2 herein objected to the grant of any relief in the said recall application by filing replies, inter alia, pointing out the correct factual position and also pointing out that the said application is not all maintainable and only remedy for the respondent No.1 is to prefer substantive suit seeking his title over the land.

2.7 However, the learned trial Court vide impugned order dated 04.11.2022 has partly allowed the injunction application and has directed to maintain 'status quo' in respect of the land in question bearing revenue survey No.320 paiki admeasuring 5463.24 Sq.Meters. On an application filed by the petitioner, the said order has been stayed upto 24.11.2022 to enable the petitioner to challenge the same before higher forum.

2.8 Thus, in background of the above facts, the present petition is filed.

[3] Heard learned Advocate Mr.Dipen Desai for the petitioner and learned Advocate Mr.Viral K Shah, for the respondents.

[4] Submission of learned Advocate Mr.Desai for the petitioner is to the effect that the learned trial Court has no jurisdiction to entertain the recall application under Section 151 of the Code of Civil Procedure, 1908 (for short "CPC"). He would further submit that the respondent No.2 is not party to the proceedings of RCS No.210 of 2012 which was taken place between the plaintiff against his brother. He would further submit that in the said suit which was for the partition of the disputed properties, trial court has passed the preliminary decree of declaring one-third share of the plaintiff and two-third share of the defendant and in exercise of jurisdiction vested under Section 54 read with O.20 R.18 of the CPC has referred the preliminary decree to the Collector for giving effect to the partition decided at between the parties.

4.1 Learned Advocate Mr.Desai would further submit that respondent filed application under Section 151 of the CPC invoking inherent jurisdiction of civil court to recall the preliminary decree passed between the plaintiff and defendant. This procedure is completely foreign to the CPC. He would further submit that the Court cannot exercise any jurisdiction under Section 151 of the CPC to recall the preliminary decree that to at the instance of the third party which is not party to the suit proceedings and therefore serious error has been committed by the trial court. He would further submit that trial court has not only entertained the recall application by separately registering it as a recall application no.208 of 2022; but has also entertained the application at Exh.5 in the said recall application and granted status-quo order and thereby stayed its own hand after passing the preliminary decree; this is somewhat

unusual and uncalled for. He would submit that the trial court after passing the preliminary decree cannot re-look at the decree under the guise of exercise of power under Section 151.

4.2 Learned Advocate Mr.Desai would further submit that Section 151 of the CPC is not the substantive provision conferring the right to get any relief of any kind. It is a mere procedural provision which enables a party to have the proceedings of a pending suit conducted in a manner that is consistent with justice and equity. He would submit that if the suit is pending for hearing, the Court can exercise the power under Section 151 to do justice but such power cannot be exercised to reopen the preliminary decree which is already passed and sent to the Collector for partition. He would further submit that inherent power under Section 151 is a power limited in that regard. He would further submit that the Court can exercise power at the most under Section 151 to do justice only between the parties unless same is expressly provided; it cannot exercise power under Section 151 at the instance of the third party to stay the preliminary decree.

4.3 Learned Advocate Mr.Desai would further submit that there is no provision in the CPC which permits the Court to stay its own decree. He would submit that in the present case the Court who has passed the preliminary decree exercised power available with the appellate Court and stayed its own decree as if he is an appellate court to his own judgment and decree. This is impermissible in law.

4.4 Learned Advocate Mr.Desai would further submit that if it is believed by the present respondent that some fraud has been played upon him; and the preliminary decree passed in suit is affecting his right, he can prefer appeal under Section 96 of the CPC; but filing of application under Section 151 of CPC before the same Court to recall the preliminary decree at the instance of the third party is totally a procedure unknown to the CPC. He would therefore submit that trial court has committed serious, patent and jurisdictional illegality in entertaining the recall application under Section 151 of the CPC as well as passing the interim order restraining its own hand from execution of the preliminary decree.

4.5 In support of his submissions, learned advocate Mr.Desai would rely upon the following case law.

(01) **Ram Prakash Agarwal & Anr. vs. Gopi Krishan Dead Through Lrs.**, 2013 11 SCC 296

(02) My Palace Mutually Aided Co operative Society vs. B. Mahesh & Ors.,2022 SCCOnline(SC) 1063.

4.6 By making above submissions, he would submit to allow this petition and to quash and set aside the impugned order.

[5] On the other hand, learned Advocate Mr.Viral K Shah for the respondent would submit that the plaintiff and defendant of RCS No.210 of 2012 have not only

played fraud upon the respondent; but also upon the Court and obtained the preliminary decree. He would further submit, respondents, who are parties to the suit before learned trial court have suppressed material facts before the court and pleaded that their father were holding 40200 square meters of land being a disputed land. However, father of respondent was holding 30755 sq mtr of land means father of respondent was holding his land less than what is pleaded.

5.1 Learned Advocate Mr.Shah would further submit that in other words, the disputed land also include the land belongs to and owned by respondent; but in order to grab the land of the respondent, the parties without putting proper and correct pleading and documentary evidence obtained the preliminary decree for partition of the land which also include the land admeasuring 5463.25 square meters belongs to and owned by the respondent. Since this preliminary decree comes to the knowledge of the present petitioner, they preferred the recall application before the trial court under Section 151 of the CPC and the trial court has heard both the parties on the issue and believed that some fraud has been played and therefore restrained the execution of the preliminary decree. So, there is no illegality in the impugned order.

5.2 Learned Advocate Mr.Shah would further submit that at earlier point of time Mr.Dinbandhu Dinanath who is defendant in the suit had filed RCS No.112 of 2017 claiming the ownership about the immovable property against various defendants. The said suit was rejected. Another suit being Suit No.5962 of 2021 is moved by Mr.Dinbandhu against the respondent and other person claiming that he is the owner of the entire disputed land and the said suit is also pending for hearing. In this circumstances, learned Advocate Mr.Shah submits that, sister and brother respondent herein played fraud and obtained the preliminary decree in collusion with each other. Thus, it is a fraudulent decree. The court can stay such fraudulent decree in any subsequent proceedings. He would further submit that in view of provision of O.23 R.3, 3(a), Section 96(3) of the CPC and O.43 R.1(2) and 2, the same Court can entertain the recall application. In support of his submissions, learned Advocate would rely upon the decision in case of **Late Chhotabhai Nathabhai Patel vs. Dilipbhai Shantilal Thanki**, 2024 1 GLH 114.

5.3 He would further submit that fraud avoids all judicial acts. He would further submit that in the present case the brother-sister duo has played fraud upon the Court to get advantage to their credit. He would further submit that once the fraud is established, it can be set to nullity in any subsequent proceedings. He would refer to the decision in case of **S.P. Chengalvarya Naidu (Dead) by L.R.s vs. Jagannath (Dead) by L.R.s & Ors.**, 1994 1 GLH 81. He would also refer to the decision in case of **United India Insurance Company Limited vs. Rajendra Singh**, 2000 3 SCC 581 to submit that no court or tribunal can be regarded as powerless to recall its order that it was obtained by committing fraud or misrepresentation. Remedy to move for recalling the order on the basis of only discovered facts amounting to fraud cannot be

foreclosed in any such situation. Thus, he would submit that the recall application is maintainable. The trial court has rightly exercised the power to restrain the execution of the preliminary decree and no interference is warranted in the impugned order.

5.4 By making the above submissions, he would urge to dismiss this petition.

[6] Regard being had to the rival submissions made by learned advocates for both the sides, the centric issue arises as to whether the non-party to the suit can prefer an application under Section 151 of the CPC and that too after passing of a preliminary decree to recall the decree?

[7] Let refer section 151 of the CPC as under:-

"151. Saving of inherent powers of Court .-

Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court."

[8] The CPC is not exhaustive, the simple reason being that the legislature is incapable of contemplating of all the possible circumstances, which may arise in future litigation, and consequently, for providing the procedure for them. The principle is well-established that when the CPC is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act ex debite justitite for doing real and substantial justice between the parties. Thus, the court has in many cases where the circumstances so require acted upon the assumption of the possession of an inherent power to act ex debito justitiae, and to do real and substantial justice for the administration, for which alone, it exists. Albeit, the power, under section 151 of CPC relates to matters of procedure, it does not give any special rights to the party. If the ordinary rules of procedure either resulted in injustice or lack of remedy in a procedure, they can be broken in order to achieve the ends of justice. All inconveniences which may arise during the administration of justice cannot have a remedy under the procedural law. It is, therefore, the duty of a Court to apply Section 151 of CPC.

[9] Section 151 of the CPC however does not confer any power, but only indicates that there is a power to make such order as may be necessary for achieving the ends of justice and also to prevent an abuse of the process of the court. "The inherent power," as observed by the Supreme Court in **Raj Bahadur Ras Raja v Seth Hiralal**, 1962 AIR(SC) 527 has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it".

[10] In case of **Durgesh Sharma vs Jayshree**, 2009 AIR(SC) 285, the Apex Court emphasized that inherent power under CPC should not be used in violation of specific permission.

[11] Yet, in another decision in case of **Mahendra Manilal Nanavati vs Sushila Mahendra Nanavati**, 1965 AIR(SC) 364, the Apex Court explained that CPC is

designed to address procedural matters in civil trials. It grants court certain hidden power to deal with unforeseen situation during proceedings, but this inherent power of the court can only be invoked when no specific or explicit provision in the CPC. If there is specific provision, the court cannot use its inherent power.

[12] The court has sufficient power under section 151 of the CPC to make such orders as may be necessary for the ends of justice, but the power must be exercised with caution and due diligence with the object to prevent miscarriage of justice or to prevent the abuse of the process of court. The limits within which this power is to be exercised has been summed up by the Hon'ble Supreme Court in the case of Nawabganj Sugar Mills Co Ltd v UOI,1976 AIR(SC) 1154. In paragraph 6 of the judgment, His Lordship Krishna Iyer, J (as he then was) approvingly quoted a passage from Benjamin Cardozo's, the nature of the judicial process, which is as under:

> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in social life. Wide enough in all conscience is the field of discretion that remains."

[13] This Court in case of **Indian Oil Corporation Limited vs. Prakash Trading Company**, 2014 3 GLR 1990 has laid down the principle for exercising the inherent power under Section 151 of the CPC. Relevant observations made in paragraph 10 reads thus:

> "10. Recently, Section 151 of CPC was considered by the Supreme Court in the case of Ram **Prakash Agarwal & Anr. v. Gopi Krishan (Dead Through LRs.) and Ors.**, 2013 11 SCC 296. In that case, party had applied under Order 9 Rule 13 read with Section 151 of CPC for setting aside the judgment and decree passed earlier by the trial court. That application was rejected by the trial court. Against that, party had filed a writ petition before the High Court which came to be allowed. The party, who had applied for setting aside the decree passed by the trial court, was a third party and not the party to the suit, his writ petition allowed by the High Court. In further appeal before the Supreme Court, the Supreme Court had considered the earlier cases and was pleased to allow the said appeal. Relying on Ram Prakash Agarwals case (supra), following principles can be laid down for considering an application under Section 151 of CPC:
>
> (1) Section 151 is not a substantive provision. That being so, it does not confer any right to any person to get relief of any kind.
>
> (2) It is procedural provision.

(3) Its importance lay in the fact that it would be activated when complaint is about conducting of cases inconsistent to or in violation of principles of justice and equity. In all those cases, none of the gaps or any kind of deficiency in the procedural provision would come in the way of the Court.

(4) Save in cases of fraud committed upon the Court, two conditions may be taken note of (1) Section 151 can be invoked in a pending suit and it cannot be invoked in dispose of suit and (II) Invocation should not be by the third party and it should be the party to the proceedings.

(5) Inherent powers cannot be used to re-open the settled matters.

(6) To that extent Le. inability of Court to re-open the settled matters, it can be said that Legislature has abrogated the powers of the Court.

(7) Inherent powers cannot be invoked or exercised in contravention of or in conflict with or upon ignoring the express and specific provisions of law.

(8) It should be consistent with general principles of law and with the intention of the Legislature.

(9) In exceptional cases, it can be invoked while exercising powers under Order 9 Rule 13.

(10) Fraud vitiates everything and no technical procedural barrier would come in the way of the Court when it is a case of practicing fraud upon the Court. Inherent powers may be exercised to undo the result achieved by practicing fraud upon the Court. In those cases, length and breadth of power knows no limit.

(11) Similarly, the Court can resort to inherent powers to rectify any mistake committed by Court.

(12) Similar to the original jurisdiction of the trial court, the appellate court can also exercise power under Section 151 of the CPC.

(13) If it is a case of committing fraud upon the party - as distinct from practicing fraud upon the Court - then proper and correct course for the aggrieved party is to file an appeal or to challenge such order or decree in independent and separate suit, and not application under Section 151."

[14] In **Ram Prakash Agarwal & Anr. vs. Gopi Krishan (Dead Through Lrs.,) & Ors.**, 2013 11 SCC 296, the Hon'ble Apex Court in regards to the scope and applicability of Section 151 of the CPC has observed in paragraph 13 and 28.2 thus.

"13. Section 151 CPC is not a substantive provision that confers the right to get any relief of any kind. It is a mere procedural provision which enables a party to have the proceedings of a pending suit conducted in a manner that is consistent with justice and equity. The court can do justice between the parties before it. Similarly, inherent powers cannot be used to re-open settled matters. The inherent powers of the Court must, to that extent, be regarded as

abrogated by the legislature. A provision barring the exercise of inherent power need not be express, it may even be implied. Inherent power cannot be used to restrain the execution of a decree at the instance of one who was not a party to suit. Such power is absolutely essential for securing the ends of justice, and to overcome the failure of justice. The Court under Section 151 CPC may adopt any procedure to do justice, unless the same is expressly prohibited.

XXX XXX XXX

28.2 Inherent powers under Section 151 CPC can be exercised by the Court to redress only such a grievance, for which no remedy is provided for under CPC;"

[15] Another Judgment which could be pressed into service is in case of **My Palace Mutually Aided Co - operative Society vs. B. Mahesh & Ors., (supra).** Relevant observations made in paragraph 24 to 29 reads thus:

"24. We have heard the learned Senior counsel on either side, perused the entire material on record. Though several grounds have been raised, the first ground taken is that the High Court erred in exercising jurisdiction under Section 151 of the CPC, when alternate remedies exist under the CPC. Second ground is that the Senior Judge on the Bench, who appeared for one of the parties, ought not to have heard the matter.

25. In response to the first leg of challenge, i.e., on the procedural aspect, we may note that the recall application was filed under Section 151 of the CPC against the final decree dated 19.09.2013. It is in this context that we must ascertain whether a third party to a final decree can be allowed to file such applications, by invoking the inherent powers of the Court under Section 151 of the CPC.

26. Section 151 of the CPC provides for Civil Courts to invoke their inherent jurisdiction and utilize the same to meet the ends of justice or to prevent abuse of process. Although such a provision is worded broadly, this Court has tempered the provision to limit its ambit to only those circumstances where certain procedural gaps exist, to ensure that substantive justice is not obliterated by hyper technicalities. As far back as in 1961, this Court in **Padam Sen v. State of U.P.**, 1961 AIR(SC) 218, observed as under:

"8. ...The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. It is also well recognized that the inherent power is not to be exercised in a

manner which will be contrary to or different from the procedure expressly provided in the Code." (emphasis supplied)

27. In exercising powers under Section 151 of the CPC, it cannot be said that the civil courts can exercise substantive jurisdiction to unsettle already decided issues. A Court having jurisdiction over the relevant subject matter has the power to decide and may come either to a right or a wrong conclusion. Even if a wrong conclusion is arrived at or an incorrect decree is passed by the jurisdictional court, the same is binding on the parties until it is set aside by an appellate court or through other remedies provided in law.

28. Section 151 of the CPC can only be applicable if there is no alternate remedy available in accordance with the existing provisions of law. Such inherent power cannot override statutory prohibitions or create remedies which are not contemplated under the Code. Section 151 cannot be invoked as an alternative to filing fresh suits, appeals, revisions, or reviews. A party cannot find solace in Section 151 to allege and rectify historic wrongs and bypass procedural safeguards inbuilt in the CPC.

29. The respondents in the present case had access to recourse under Section 96 of the CPC, which allows for appeals from an original decree. It must be remembered that the present matter was being heard by the High Court exercising its original jurisdiction. The High Court was in effect conducting a trial, and the final decree passed by the High Court on 19.09.2013 was in effect a decree in an original suit. As such, there existed a right of appeal under Section 96 of the CPC, for the respondents. Though they were not parties to the suit, they could have filed an appeal with the leave of the Court as an affected party. Section 96 of the CPC reads as under:

96. Appeal from original decree .(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject matter of the original suit does not exceed [ten thousand rupees.]"

[16] In background of the above settled proposition of law, if we go through the application filed by the respondent herein before the trial Court, the pleadings therein

indicate that petitioner has not filed the application by citing provisional paucity or insufficiency of procedural provision to get substantial justice. The relief claimed by the petitioner in the said petition could be read as under:

> "(a) The respondents herein, in collusion with each other, by filing Regular Civil Suit No.210/2012 and mentioning falsely therein that the land admeasuring 40200.00 Sq. Mts. is under their ownership and thereby, hiding crucial facts before the Hon'ble Court in the preliminary decree and hiding the order passed by the revenue authority having competent jurisdiction regarding the area, committed breach and fraud with the Hon'ble Court, therefore, by modifying the said order and preliminary decree, kindly declare that the said decree is executable only for the land admeasuring 34736.75 Sq. Mts. of the original plaintiff - respondents herein.
>
> (b) Kindly declare that the land admeasuring 5463.25 Sq. Mts. out of 40200.00 Sq. Mts. of New Revenue Survey No.320, Old Revenue Survey No.497 and 499 of Moje Village: Vesu belongs to the applicant and the applicant is the legitimate owner and actual occupier of the said land and therefore, no one is entitled or having right to part with the land admeasuring 5463.25 Sq. Mts. of the applicant.
>
> (c) Kindly declare that the preliminary decree passed in the matter of Regular Civil Suit No.210/2012 does not apply to any part or portion of land admeasuring 5463.25 Sq. Mts. of the applicant. Moreover, kindly declare that the order and preliminary decree passed in the matter of Regular Civil Suit No.210/2012 is not binding to the applicant in any manner and it does not create any lacuna in the ownership and possession of land admeasuring 5463.25 Sq. Mts. of the applicant.
>
> (d) The respondents herein, in collusion with each other, by filing Regular Civil Suit No.210/2012 and mentioning falsely therein that the land admeasuring 40200.00 Sq. Mts. is under their ownership and thereby, hiding crucial facts before the Hon'ble Court in the preliminary decree and hiding the order passed by the revenue authority having competent jurisdiction regarding the area, committed breach and fraud with the Hon'ble Court, therefore, kindly restrain the respondents that either themselves or through their persons, they shall not create interruption or obstruction regarding the land admeasuring 5463.25 Sq. Mts. belongs to the applicant and as there is no right, title or interest of respondents or any other person in the land admeasuring 5463.25 Sq. Mts. of the applicant, they shall not deal with or manage the said land or part or portion thereof in any manner or shall not create any third party right, title or interest or shall not enter into any agreement, document, transaction or deed with any third party or shall not execute any document with the third party alienating possession thereof or

shall not act in a manner frustrating the rights or ownership / possession of the land admeasuring 5463.25 Sq. Mts. of the applicant and original plaintiffs - the respondents herein themselves or through their persons shall not create any interruption or obstruction to enter the name of applicant as an absolute and exclusive owner and occupier in any record regarding the land admeasuring 5463.25 Sq. Mts. or to deal with the same or to obtain any kind of permission thereof or to make construction thereon or to cultivate the same. Further, kindly pass permanent injunction order against the respondents that they shall not make any change or mutation except to enter the names of the applicant in any records of the land admeasuring 5463.25 Sq. Mts. belongs to the applicant or they shall not get the names of the respondents or any third party mutated in any manner on the basis of order or decree obtained fraudulently in Regular Civil Suit No.210/2012 by way of cheating and fraud with the Hon'ble Court or they shall not take any action including partition on the basis of the decree or shall not take any action to obtain final decree. Moreover, kindly pass an order to send a yadi of this order to the Collector, Surat and the Deputy Collector, City Prant or the concerned officer for implementation thereof.

(e) Kindly pass any other and further relief you may deem fit in view of the facts of this recall application.

(f) Kindly grant the cost of this recall application from the respondents."

[17] What could be discerned that the recall application under Section 151 of the CPC essentially filed for reopening of the preliminary decree and send the party prior to the stage of passing of preliminary decree. Respondent has asked relief of Declaration and permanent injunction. These remedy can be asked under provision of Specific Relief Act by filing appropriate proceedings. It could be noticed that in fact by filing application under Section 151 of CPC, respondent has asked relief akin to relief which can be asked in suit.

[18] It is undisputed that by passing preliminary decree, the court has settled the dispute between the party to the suit. In present case, the recall application is filed by the person who is not party to the suit. The recall application is moved with the averments of fraud. There is no cavil that fraud vitiate all acts, technical provision would not come in way of court to set a naught the relief obtained by fraud, when the case of practicing fraud upon the court is settled or set. In that circumstances, the inherent power may be exercised to undo the result achieved by practicing fraud upon the court. But, if fraud is played upon the party, they have to resort to the provisions available under the law to challenge same. They cannot invoke the inherent power of court. Going through the record, it clearly indicates that RCS No.210 of 2012 filed between the brother and sister was tried by the concerned court on merits. Both the parties were at variance in the dispute. The trial court had framed the issue at Exh.46.

As many as 06 issues were framed upon the pleadings of the party and after permitting both the party to lead the evidence and after appreciating the evidence on record in context of the judgment of the Higher court, learned civil judge has passed the preliminary decree in the said suit after almost ten years declaring the shares of the party in disputed property and sent it for partition in view of Section 54 read with O.20 R.18 of the CPC to the Collector. In no sense, the judgment and decree passed in suit can be termed as result of fraud played upon Court. In recall application, the petitioner pleaded that subject matter of the Regular Civil Suit No.210 of 2012 is agricultural land, it also includes the agricultural land held and possessed by the respondent. This material fact has been suppressed during the proceedings of the suit to obtain preliminary decree. Hence, preliminary decree seems to be obtained by playing fraud; it is legally and factually incorrect. Recall application has been moved with this contention. Thus, it indicates that petitioner to the recall application indicates that fraud was played upon him. To challenge such fraud, recourse under Section 96 of the CPC is available to the respondent petitioner. Section 96 of the CPC reads as under:

> **"96. Appeal from original decree .-**
>
> (1)Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.
>
> (2)An appeal may lie from an original decree passed ex parte .
>
> (3)No appeal shall lie from a decree passed by the Court with the consent of parties.
>
> (4)No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed [ten thousand rupees.]"

[19] Phrase "any party" used in section 96 of the CPC give recourse to the respondent - petitioner to challenge preliminary decree passed in RCS No.210 of 2012 if, such preliminary decree affects his right or interest; but recall application under the guise of section 151 is not maintainable. In considered opinion of this court, learned trial court, failed to understand its inherent power under section 151 of CPC by entertaining recall application which is essentially filed with motive to adjudicate right. The learned trial court's approach to entertain recall application and also to pass stay order in interim application is patently illegal proceedings. Doubtless that, learned trial court has committed jurisdictional error.

[20] Another issue arises is that can a civil court entertain any such application after sending the preliminary decree for partition of the agricultural land assessed for

Land Revenue under Section 54 read with O.20 R.18 of the CPC to the Collector. Section 54 of the CPC reads thus:

> **"54. Partition of estate or separation of share .-**
>
> Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates."

[21] Section 54 is parimateria or a reproduction of section 265 of the Code of Civil Procedure, 1882 with a verbal alterations. Where a decree has been passed for partition or for of a share of an estate of the description mentioned in this section, the proper authority to effect partition or to deliver the possession of the share is the Collector. The Court passing preliminary decree in a subject matter which is assessed for payment of land revenue become functus officio. Section 54 does not talk about a final decree. All that is required of a civil court in a case for partition or to deliver possession case for partition of an undivided estate assessed to payment of land revenue of government or for the separate possession of a share in such an estate is to pass a preliminary decree and to declare a right of the party and to give direction for such partition or separation to be made by the collector. Thereafter, the execution is to be effected by the Collector. The civil court, after passing such decree for partition, becomes functus officio and has no jurisdiction to act in any manner thereafter so as to pass a final decree or deliver possession to a party in passing such accordance with preliminary decree but the partition intended to be left to the Collector has some impact upon the revenue and the revenue records.

[22] The court after drawing the preliminary decree becomes functus officio in relation to the decree for partition passed by it and all further proceedings for execution of such decree have to be carried out by the concerned revenue officer. The court is prevented from acting as an executing court for the purpose of execution of decree for partition. Not only, once the preliminary decree is drawn, the rights of the parties are settled, it cannot be unsettled by the same court, allowing the recall application on record. Once becomes functus officio at the most, the civil court can direct the Collector to execute the decree and to make partition if the revenue officer are not proceeding further. The civil court can also act if the petitioner do not want to reopen the decree; but they are expecting the decree as it is and they only want to equity to be settled in their favour.

[23] The Madhya Pradesh High Court had an occasion to examine this issue in case of **Bhagwansingh vs. Babu Shiv Prasad & Anr.**, 1974 AIR(MP) 12 wherein

after surveying the authorities on record in paragraph 5 to 8 has vividly discussed, issue as under:

> "5. Having heard learned counsel for both the parties, we are of the opinion that the contention advanced by the learned counsel for the appellant has substance and as such must be accepted. We shall first like to refer to the relevant provisions of the Code of Civil Procedure before dealing with the point involved in the present case. Rule 18(1) of Order XX of the Code reads as under "R. 18. Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then, (1) if and in so far as the decree relates to an estate assessed, to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54."
>
> Section 54 of the Code reads as under:
>
> "54. Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares of such estates."
>
> A perusal of the aforesaid two provisions make it clear that the rule does not contemplate passing of a final decree. All that is required of a civil Court in a case for partition of an undivided estate assessed to the payment of land revenue to the Government , or for the separate possession of a share of such an estate, is to only pass a preliminary decree and declare the rights of the several parties who are interested in the property and nothing more and give direction for such partition or separation to be made by the Collector or any gazetted officer subordinate to the Collector deputed by him in this behalf in accordance with such declaration and with the provisions of Section 54 of the Code. Thereafter, the execution has to be effected by the Collector. The reason is that the revenue authorities are more conversant and better qualified to deal with such matters than the Civil Court and interest of the Government with regard to the revenue assessed on the assets would be better safeguarded by the Collector executing the decree than by the Court. The partition contemplated by Section 54 is not confined to mere division of lands but includes also the delivery of the shares of the respective allottees. Thus, the Collector or his subordinate would be completely carrying out the partition.

The civil Court after passing of the preliminary decree for partition of an undivided estate assessed to the payment of land revenue becomes functus officio and it would have no jurisdiction to act in any manner thereafter so as to pass a final decree or deliver possession to a party in accordance with the said decree.

6. We are supported in our view by a series of decisions of this Court as well as of other High Courts also. In Munawarali v. Taiyabali,1920 AIR(Nag) 204, it has been held that under Section 54 of the Code the Collector has not only to make allotment of shares but to complete the partition by delivery of possession. In **Mohamad Abdul Rahim v. Parashram**, 1927 AIR(Nag) 300 it has been held that the Collector when partitioning the estate in accordance with Section 54 of the Code has power to give the shares to the respective allottees. Parbhudas Lakhmidas v. Shankarbhai,1887 11 ILR(Bom) 662, has been relied upon. In Lachhiram Jasram v. Nanba Dhanaji,1946 AIR(Nag) 353 it was held as under:

".....Sec. 54, read with O. 20, R. 18, authorises the civil Court only to declare the rights of the several parties interested in the property and places the execution of the decree entirely in the hands of the Collector. How the partition is to be made lies wholly within the authority of the Collector. The Civil Court is functus officio after it declares the shares of the parties and beyond that it is not concerned with the property. In fact the suit terminates so far as the civil Court is concerned on the passing of the preliminary decree affecting any estate assessed to the payment of revenue to the Crown as has been held in numerous cases, such as Shrinivas Hanmant v. Gurunath Shrinivas.,1891 ILR(Bom) 15 527; **Bhimanguada v. Hanmant Rungappa**, 1918 AIR(Bom) 206; **Jacinto v. Fernandes**, 1939 AIR(Bom) 454; **Ramabai Govind v. Anant Daji**, 1945 AIR(Bom) 338 and Sher Bahadur Singh v. Ram Narain Singh,1945 AIR(Oudh) 1."

In **Dharam Singh Satawansingh v. Densingh Sitaram**, 1950 AIR(Nag) 102 it has been held as under:

"Partition of land revenue paying estate has to be made by a Collector under Section 54, Civil P.C., or by a revenue officer under Chap. 11, C.P. Land Revenue Act, 1917. A Civil Court has no jurisdiction or power to effect a partition of land revenue paying estate or to reopen a partition already made by a Collector or revenue officer. The duty of a Civil Court is to give effect to the partition made by a Collector or a revenue officer in exercise of the cowers vested in him. The power to deliver possession in accordance with the partition made is quite distinct from the power to effect a partition. A Collector or a revenue officer effecting a partition has the power to deliver

possession in pursuance of the partition. The existence of the power is necessary to complete the partition.

"These provisions have been the subject of numerous decisions. A reference may be made to some of the decided cases. In (1891) ILR 15 Bom 527 and ILR 42 Bom 689: (AIR 1918 Bom 206) it was held that a civil Court has no jurisdiction to re- open a partition made by the Collector and has no power to examine his work or to direct him to make a fresh partition. In AIR 1939 Bom 454: (186 Ind Cas 119) it was held that when an order is made for partition of lands assessed to Government revenue, the Court makes an order decreeing partition and directing the parties to be put in possession and, referring it to the Collector to carry out the partition. It was further held that when an order in that form is made, the Court"s duties are finished, and it is for the Collector to partition the property and put the parties into possession. To the same effect are the decisions in **Chandumal v. Haaz**, 1943 AIR(Sind) 7, AIR 1945 Oudh 1: (1944 OWN 416) and AIR 1946 Nag 353: (224 Ind Cas 353). In AIR 1943 Sind 7: (ILR (1942) Kar 162). it was held that the Court is bound by the terms of the Civil P.C., and has no power so to fetter the discretion of the Collector as to overrule the powers that are conferred upon him under Section 54 and Order 20, Rule 18 of the Code, in AIR 1945 Oudh 1: (1944 OWN 416), it was held that where a civil Court passes a decree for partition, it should be presumed that the procedure, prescribed in Order 20. Rule 18, has, been adopted and that in the case of immovable property assessed to land revenue, the civil Court has no further jurisdiction in the matter. In Lachhiram Jasram v. Nanba Dhanaji,1946 AIR(Nag) 353: (224 Ind Cas 353) it was held that Section 54, read with Order 20. Rule 18, authorises the civil Court only to declare the rights of the several parties interested in the property and places the execution of the decree entirely in the hands of the Collector; how the partition is to be made lies wholly within the authority of the Collector; and the civil Court is functus officio after it declares the shares of the parties and beyond that it is not concerned with the property. In a recent case, nkataraghaya Rao v. Venkata Hanumantha Rao,1946 ILR(Mad) 10: (AIR 1945 Mad 336) (FB), it was held that a Court which has passed a decree for partition to which Section 54, Civil P.C., applies and has sent it to the Collector for the purposes of effecting the partition has no power to hear objections to the partition made by the Collector or his subordinate or to modify the partition; the Collector when acting under Section 54 has a statutory duty to perform and, in performing it he is not under the control of the Court; he is not even required to report to the Court what he has done; when he has made the partition no order of the Court is necessary, and once the Court has sent the decree to the Collector for action under Section 54, the matter passes entirely out of its hands."

In Mst. Hironda v. Mst. Anti,1970 MPLJ 91 (SN) Civil Revn. No. 820 of 1969, D/- 8-7-1970 it has been held that the Civil Court, when disposing of a suit for partition relating to revenue paying lands, has only to declare the shares of the parties and has no other power in the matter. That power having been exercised and the papers having been sent to the Collector for effecting actual partition, the Court becomes functus officio. The Court thereafter could not entertain any application in relation to that matter either for ascertainment of mesne profits or for delivery of possession etc. In AIR 1945 Bom 338, it has been held as under:

".....When making partition the Collector does not purport to make a final decree. He proceeds from division by metes and bounds to delivery of possession as in one proceeding, and not as if he was conducting two distinct proceedings, one equivalent to a proceeding in suit, and the other to, a proceeding in execution. See: (1887) ILR 11 Bom 662. In my opinion, therefore, the decree made in the form of Order 20, Rule 18(1), technically must be classified as a final decree." In **Ningappa Balappa v. Abashkhan Goushkhan**, 1956 AIR(Bom) 354, relying upon AIR 1945 Bom 338 (UB), it has been held that after a decree for partition of lands assessed to revenue has been passed, the Court has nothing further to do with the decree. The decree is to be executed and the partition is to be effected by the Collector. There cannot, therefore, be any execution proceedings before the Court in the case of such a decree. The present applications, which are said to have been made under Section 47, Civil Procedure Code, were, therefore, not maintainable. In **Muppanna v. Channappa**, 1964 AIR(Mys) 169, it has been held that the powers and functions of the Collector under Section 54 are analogous to the powers and functions of the civil Court in the final decree proceedings for partition of properties other than an estate. Thus, it is clear that in the present case the Civil Court had no jurisdiction to pass a final decree after the partition was effected by the Collector and to execute the decree so far as the revenue paying lands are concerned.

7. The learned counsel for the respondent on the other hand relied upon **Tikaram Khupchand v. Hansraj Hazarimal**, 1954 AIR(Nag) 241 for his contention that the jurisdiction of the civil Court is not ousted. But the decision in that case cannot be made applicable to the facts of the present case and as such the said authority is not relevant at all. In that case, the matter was referred to arbitration regarding the partition of revenue paying lands and it was open to the arbitrators to divide the estate in such a way that the payment of revenue is not divided, i.e., by allotting the entire items of land to one party or the other. In those circumstances, all that the Court had to do in such cases is to hear the objections to the award and either to set it aside or to pass a judgement of the award. The arbitrators are not governed by Section 54

of the Code of Civil Procedure which is a section binding on the Court. In passing judgement on award, the Court does not pass a decree of partition of an undivided estate. That has been achieved by the award itself and all that the Court does is that the Court passes judgement in terms thereof. The other case relied upon by the learned counsel for the respondent is **Kanhaiya v. Mst. Lilabai**, 1970 MPLJ 76. In that case, the Court was required to consider whether under Section 178 of the M.P. Land Revenue Code, 1939 the jurisdiction of the civil Court is ousted and it was held that under Section 178 of the M.P. Land Revenue Code, the Tahsildar can divide the holding physically and partition the land but he has no right to allot the holding to one party and direct payment of compensation to other. That function is that of the Civil Court. From this point of view also, the proper interpretation is that it is an enabling provision and has not the effect of ousting the jurisdiction of the civil Court. Thus, the above citation is not at all relevant as interpretation of Order XX, Rule 18, read with Section 54 of the Code of Civil Procedure was not involved at all in that case.

8. From the aforesaid discussion we come to the conclusion that although in the instant case a final decree was actually passed and even though it was not challenged by the appellant, that would not in any way preclude the appellant from raising the present objection that the civil Court had no jurisdiction to pass the final decree and execute the same after the matter was referred to the Collector under Order XX, Rule 18 read with Section 54 of the Code. The civil Court had become functus officio and it was not competent to pass a final decree which it did in terms of the partition effected by the Collector."

[24] This Court in **Ravatsinh Ranubha Versus V.S.Sinha Or His Successor**, 2001 2 GLR 1679 also decided this issue and held in paragraph 9 to 13 as under:

"9. In the case on hand, a preliminary decree for partition of the properties both agricultural lands and other properties came to be passed by the then learned Civil Judge (SD) at Bhavnagar. The copy of the decree was then sent to the Collector, Bhavnagar for effecting the partition of the agricultural lands subject to assessment of land revenue and putting the parties into the possession of the land fallen to their respective share. This has been done because of the provision of Sec. 54 of the Civil Procedure Code. In view of the rival contentions, the questions (1) whether the decree passed is in the eye of law the preliminary decree or the final decree so far as it relates to the division of the property (land) subject to assessment of revenue, (2) whether the Collector is the revenue officer and against his decision qua partition of the land subject to assessment of land revenue appeal or revision would lie before the Revenue Authority in hierarchical set-up under the Code or before the Civil Court passing the decree under C.P.Code, (3) what is the control of

the Civil Court passing the decree, and (4) whether the Collector to whom the decree is sent u/S. 54 C.P.Code for partitioning the agricultural land subject to land revenue has to pass final decree or make any report to the Court arise for determination. In order to decide the questions, firstly relevant provisions of C.P.Code may be stated.

["54. Partition of estate or separation of share ["Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates."]

One should not miss to note, Rule 18 of Order 20, C.P.Code helpful to decide whether the decree passed for partition of the agricultural lands subject to assessment of land revenue is the final decree or a preliminary decree, and that provision is couched in the words as under:

["18. Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,-

[(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Sec. 54;] [(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required."]

It may be mentioned here, that one must not overlook the definition of the decree given vide Sec. 2(2) Civil Procedure Code which runs as under:

["2.(2) "decree" means the formal expression of an adjudication which, so far as

[regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Sec. 144, but shall not include -

[(a) any adjudication from which an appeal lies as an appeal from an order, or

[(b) any order of dismissal for default.

[Explanation: - A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.]

In view of such provisions and especially explanation to Sec. 2(2) and sub-Rule (2) to Rule 18, Order 20 which provide to pass preliminary decree qua the properties other than properties assessed to the payment of revenue to Government, the decree passed directing to partition the agricultural land will be the final decree as the Civil Court has nothing further to do in the matter, which is required to be done when properties other than agricultural land are ordered to be partitioned. After the decree directing the Collector to partition the agricultural lands subject to land revenue is passed, the Civil Court has even not to execute the decree; the Collector has to partition and put the concerned parties into the possession of the portions fallen to their share. The Civil Court has then not to even adjudicate any issue. Hence by passing the decree qua agricultural lands the suit is finally and completely disposed of. The decree passed ordering to partition the properties both agricultural as well as non-agricultural properties, will be the final decree so far as it relates to agricultural lands subject to land revenue, while it will be the preliminary decree so far as it relates to the properties, not assessed to the payment of revenue to Government.

10. Necessary case laws, some of which are cited by the parties, throwing light on the proposition may be referred to though in view of above clear provisions no case-law is required to be referred to. The Bombay High Court had an occasion to deal with the question in **D. M. Jacinto & Anr. V/s. J.D.B. Fernandes**, 1939 41 BLR 921 = 1939 Bombay 454 Keeping Rule 20, Order 18, Civil Procedure Code in mind, it is held that when the decree is sent to the Collector for carrying out the partition of the agricultural land and subsequently the application is filed by the parties to the Court to send the decree and papers to the Collector, the same does not amount to execution. In that regard, it is further observed that when the decree is passed by the Court, its duties are finished and it is for the Collector to partition the property and put the parties into possession. When decree, may be a preliminary decree, is passed in a partition suit but agricultural lands are to be divided, the same would be a final decree as the actual partition of the agricultural lands is to be carried out by the Collector and nothing further in this regard is required to be done by the Court. In the case of Ramabai Govind V/s. Anant Daji,1945 32 AIR(Bom) 338, the question was relating to limitation. In that connection, it is held that after the decree for partition of revenue paying land is passed, the application to send the papers to the Collector is not governed by Art. 181 or

182 of the Limitation Act. In that decision, it is observed at page 340 that the decree passed will not fall within the definition of a preliminary decree as given in the Explanation to Sec. 2, subsec. (2), Civil Procedure Code and referring to a decision of the Calcutta High Court in 57 Calcutta 1013, it is observed that in fact no other final decree is ever passed after decree is once passed under Rule 18)1 Order 20, C.P. Code. A preliminary decree cannot for ever remain a preliminary decree, but contemplates a final decree upon which the decree-holder may take out execution. The Collector cannot make a final or first decree in a Civil Suit for partition, and yet the Civil Court is not required by the Code to pass any further decree or to make its decree final at any stage. Upon this footing the first and final decree to be passed by the Court would be a final decree. In **Ramagouda Rudregouda Patil & Ors. V/s. Smt. Lagmavva & Ors.**, 1985 AIR(Kar) 82, it is made clear that after the decree is passed for effecting the partition of the estate subject to assessment of land revenue and the decree is sent to the Collector for effecting the partition and handing over the possession to the concerned parties, the jurisdiction of the Collector remains confined only to the partition of the lands, i.e. actual division by metes and bounds and handing over the possession of a share. Whether the concerned land is partible or impartible can be determined by the Court and not the Collector. It is also made clear that the decree so far it relates to the agricultural land would remain to be a preliminary decree and not a final decree.

11. Out of these three authorities first two support the view I have taken hereinabove. Whenever in a partition suit the decree for division of the agricultural lands subject to land revenue is passed, the same would be the final decree as the actual partition is to be carried out by the Collector and nothing further is required to be done by the Civil Court, and no direction remains to be issued. As discussed herein below the Civil Court may have a limited control over the Collector, but that does not relate to basic feature of partition of the land as per decree and putting the parties into the possession of the land falling to their share. Such control will not therefore make the decree preliminary. In the decision of Ramagouda Rudregouda (supra), the Karnataka High Court does state that once the decree declaring the shares of the parties is passed, the Civil Court has nothing more to do, meaning thereby the case has come to an end. The decree viewing from such angle will be final for the Civil Court is the observation made referring its earlier decision in Raojirao Desai's case wherein it is held that so far as Civil Court is concerned, the decree passed under Rule 18(1), Order 20, C.P. Code directing partition by the Collector is final and not preliminary; but to negative the contention raised that the period of limitation qua execution would begin to run in the case of a final decree, it is held that for the Civil Court after a decree is passed

it has nothing further to do in the matter and the case comes to an end; however the decree cannot be termed a final decree. It is not elucidated how it cannot be termed to be the final, and would remain to be preliminary though the Court has nothing further to do. It is therefore not possible to assign dissenting reasons. However, it may be stated that it is not made clear when the Court will have to pass final decree if the decree passed declaring the shares of the parties and sent to Collector under Sec. 54, C.P. Code for partition and delivery of possession qua the estate assessed to the payment of revenue to the Government is the preliminary decree. In my view, when C.P. Code does not in such case provide for a final decree, the decree passed under Rule 18(1), Order 20 C.P. Code should be treated to be final. With respect therefore the view taken by the Karnataka High Court cannot be accepted. Even otherwise also, the view of the Karnataka High Court being contrary to the Bombay High Court's view in abovestated two decisions cannot be accepted. It may be stated that the decisions of the Bombay High Court, rendered prior to 1-5- 60, the day on which Guj. State & High Court of Guj. came into being, owing to bifurcation of then bilingual State of Bombay are to be treated to be the decisions of this Court and the same have to be, keeping the law of binding precedent in mind esteemed. The decisions of the Bombay High Court show correct position of law and there is no justifiable reason to differ and refer the issue to a larger Bench. As per the Bombay decisions, the contrary view cannot prevail. The Court has, after passing the decree, a little control over the Collector's performing his function after the receipt of the decree and that also shows that the decree passed must be treated to be the final decree. I may refer the decision regarding Courts' control over the Collector after the decree is passed, and sent to Collector under Sec. 54, C.P. Code for partition and delivery of possession.

12. The High Court of Bombay in the case of **Bhimangauda Konapgauda Patil V/s. Hanmant Rangappa Patil**, 1918 AIR(Bom) 206= 20 Bom. L.R. 411 = 42 Bombay 689, has held qua Sec. 54 of the Civil Procedure Code that when the Collector acting under Sec. 54 of the Civil Procedure Code effects partition, it is not open to the Civil Court to entertain any application seeking reopening of the partition because the policy of Sec. 54 is that the Legislature thought that the Collector would be better qualified than the Court to carry out such partition. The policy would be defeated if the appeal is allowed permitting to reopen the partition made by the Collector. Regarding execution of the decree qua the agricultural land subject to the land revenue the Bombay High Court in **Timmanna Parmeshwar Bhat V/s. Govind Ganpati Bhat & Ors.**, 1926 AIR(Bom) 258 has laid down that once the Collector executes the partition, the Court cannot send the case again to the Collector for repartition. It is also held that the Collector must follow the terms of the decree. If he

disregards the terms of the decree and divides the property not in conformity with the terms of the decree, the Court is entitled to interfere. The Collector has no power to read the decree together with the judgment so that he can partition the land in a manner which is not contemplated by the decree. The High Court of Sind had an occasion to deal with the question in the case of Chandulal Jasumal & Ors. V/s. Hafiz s/o. Din Muhammad & Ors.,1943 30 AIR(Sind) 7. What is held therein is that the act of effecting the partition under Sec. 54, and Rule 18, Order 20 C.P. Code is a ministerial work of the Court. The Collector therefore cannot disregard the terms of the decree. He cannot divide the property in contravention of the terms of the decree, and if he does so the Court is entitled to refer the case back to the Collector, to partition the property in accordance with the terms of the decree. The Collector cannot alter the decree. The Court cannot dictate to the Collector the manner in which the estate shall be partitioned or divided. The Collector must divide the estate in accordance with the rights declared in the decree, but in the manner he thinks best bearing in mind the need and the convenience of the land as a revenue paying entity. So far as shares are concerned, the Collector is bound by declaration of the rights of the parties. The Collector has also to esteem the preferential right declared qua particular piece of property. The Court has no power to fetter the discretion of the Collector to overrule the powers conferred upon the Collector under Sec. 54 and Order 20, Rule 18, C.P. Code. The High Court of Madras in Sree Rajah Mantripragada Venkataraghava Rao Bahadur, Zamindar Garu & Ors. V/s. Sri Rajah Mantripragada Venkata Hanumantha Rao Bahadur, Zamindar Garu (deceased) & Ors.,1945 32 AIR(Mad) 336, has when occasion arose laid down that when the Collector under Sec. 54 of the Civil Procedure Code partitions the agricultural lands subject to the Government revenue, the Civil Court has no power to hear the objection because once the Court sends the decree to the Collector for action under Sec. 54, the matter passes entirely out of its hands and Court has no right to interfere. The Court has no power to examine his work or direct him to make a fresh partition and even cannot direct to modify the partition. In the case of Dharam Singh Satawansingh V/s. Deosingh Sitaram,1950 37 AIR(Nag) 102, what is observed is that the partition of land revenue paying estate has to be made by the Collector under Sec. 54 of the Civil Procedure Code or by any other Revenue Officer, the Civil Court has no jurisdiction or power to effect the partition of the land revenue paying estate or reopen the partition already made by the Collector or the Revenue Officer. The duty of the Court is to give effect to the partition made by the Collector or the Revenue Officer, but the power to deliver the possession in accordance with partition made is quite distinct from a power to effect the partition. The Collector effecting the partition has the power to

deliver the possession so as to complete the partition, but if that is not done a party can approach the Civil Court with a suit to recover the possession in accordance with the partition effected by the Collector or the Revenue Officer. The High Court of Bombay, in Ningappa Balappa & Ors. (supra) has laid down that after the decree for partition of the land assessed to land revenue has been passed, the Court has nothing further to do with the decree. The decree is to be executed and the partition is to be effected by the Collector. There cannot be therefore any execution proceeding before the Court. However, the Court is not entirely deprived of controlling the action taken by the Collector, but this control is very limited. The Court has to exercise with limited control only if the Collector contravenes the decretal order or transgresses the law relating to partition or refuses to execute the decree. The duty of the Court comes to an end when it passes the decree and when no execution proceeding can lie before the Civil Court, it is not open to the Court to entertain an application under Sec. 47 and give direction to the Collector qua the manner in which the decree is to be executed. The High Court of Madhya Pradesh, in **Bhagwansingh V/s. Babu Shiv Prasad & Anr.**, 1974 AIR(MP) 12, while dealing with the issue has held that when the Court passes the preliminary decree for partition and transfers the decreeto the Collector for effecting the partition, the Civil Court becomes functus officio, and if subsequently final decree is passed by the Court it is without jurisdiction and not enforceable. The Supreme Court, in the case of **Khemchand Shankar Choudhary & Anr. V/s. Vishnu Hari Patil & Ors.**, 1983 AIR(SC) 124 has held that once the decree for partition is passed and the same is sent to the Collector for effecting the partition of the agricultural land and thereafter the property is transferred, the transferees during the pendency of the partition can appear and claim equitable partition even though they were not the parties to the suit in the Civil Court. The Collector has not to in that case fold the hands and return the papers to the Civil Court. If there is no dispute regarding the transferees, the Court may proceed to make allotment of the property in an equitable manner instead of rejecting their claim for such equitable partition on the ground that they had no locus standi. Where there is no dispute in such a case and the Collector makes an equitable partition he would neither be violating a decree nor transgressing any law. The High Court of Bombay, in the case of Dev Gopal Savant V/s. Vasudev Vithal Savant, 12 Bom 372, has held that when the preliminary decree is passed with regard to the estate subject to land revenue the execution thereof is entirely in Collector's hand, but that does not deprive the Court of a judicial control of its decree, as for instance, if it should appear to have been obtained by fraud or surprise, or if the Collector acts in a bad faith or contravenes the command of the Court or transgresses the law. If it is

alleged that the Collector made objectionable partition, it would not be a ground for the Court to interfere. In the case of Shrinivas Hanmant V/s. Gurunath Shrinivass - 15 Bombay 527, it is held that the Collector is not subject to Superintendence of the Court or revisional jurisdiction of the Court. The Court has no power to examine the work of the Collector or direct him to make fresh partition. It is also made clear that the Collector cannot refuse to carry out the decree. In the case of Purushottam V/s. Balkrishna - 28 Bombay 238, it is made clear that the Court has the power to set aside wholly or partly a partition made by the Collector, in execution of a decree sent to him under Sec. 265, C. P. Code, 1882 (now Sec. 54) if it is found that the Collector has contravened the decretal command or has acted ultra vires because action of the Collector is subject to the control and correction of the Court. In the case of **Ramachandra Dinkar V/s. Krishnaji Sakharam**, 1915 AIR(Bom) 279 = 40 Bombay 118 what is made clear is that the Collector should be treated to be the agent of the Civil Court and therefore the Court has a power to correct the mistake made by the Collector in carrying out partition. In Ningappa Balappa's case (supra), it is made clear that after the decree for partition of land assessed to revenue is passed, the Court has nothing further to do with the decree. The decree is to be executed and partition is to be effected by the Collector. Execution proceedings can never be before the Court. It is also made clear that the Court has a limited control which is to be exercised only if the Collector contravenes the decretal order or transgresses the law relating to partition, or refuses to execute the decree.

13. A perusal of Secs. 54 & 2(2), as well as Rule 18, Order 20 Civil Procedure Code, and the above stated pronouncements or these provisions, make it clear that whenever a preliminary decree in the partition suit is passed and the copy thereof is sent to the Collector under Sec. 54 of the Civil Procedure Code for effecting the partition of the properties assessed to land revenue, nothing further is required to be done by the Civil Court in the matter. The Civil Court cannot direct to reopen the partition, or after partition is effected the Court cannot send the case again to the Collector. The Court can neither dictate how to partition the estate assessed to the payment of revenue to the Government, nor hear objections qua partition and possession to be given. The Collector is also not under the superintendence of the Court. However, the Court is not powerless; it has limited control over the Collector to whom the decree is sent for effecting partition under Sec. 54 C.P. Code and put the parties into the possession of the land fallen to their respective shares. If the Collector disregards the decree, or alters the decree or alters the rights and obligations of the parties under decree, or does not divide the estate in confirmity with the decree, or refuses to esteem the decree, or acts in bad faith, or acts as the Appellate Authority over the Civil Court, or decides the

question determinable only by the Civil Court, the Civil Court on being moved can pass appropriate order, correct the mistake made relating to the subject falling within limited control and issue appropriate direction. It may be stated that if the Collector is acting contrary to the direction of a decree or is not putting the sharers in the possession or there is a confusion and correct interpretation of the decree is not possible and some explanatory note is necessary or the properties in the meanwhile are sold and transferees are not heard by the Collector, or their claim is also not considered by the Collector or a question regarding devolution or any other issue arises for which the Collector is not competent to decide, the Civil Court will have the power to dispose of the application in that regard and give to the Collector an appropriate direction. Such limited control indicates that the decree in partition suit passed relating to the estate assessed to the payment of revenue to Government is the final decree, and not the preliminary decree. The view taken in Ramagouda Rudregouda's case (supra) is for the above-stated provisions and reasons is with respect not appealing."

[25] What appears in the present case is that respondent who is non-party to the suit or not a party to the suit, preferred the recall application to the civil court which has passed the preliminary decree with a prayer to recall the preliminary decree. As stated herein above, the civil court after passing the preliminary decree in RCS No.210 of 2012 and sent it for partition to the Collector in view of Section 54 read with O.20 R.18 of the CPC becomes functus officio, to entertain the application. The trial court has committed serious error not only in entertaining the recall application; but passing status quo order staying its own preliminary decree from the execution which is serious jurisdictional error committed by the court below. The court having become functus officio cannot entertain any further application against the preliminary decree and set the clock back prior to the preliminary decree. Hence, the petition deserves merits.

[26] As far as the decision on which learned advocate Mr.Viral Shah has relied upon in case of **S.P. Chengalvarya Naidu (Dead) by L.R.s (supra)** which holds that when fraud is played upon the court, it can be challenged in any court in collateral proceedings. No assistance is received from the said proposition of law. In the present case, the respondent has failed to prove that fraud was played upon the court.

[27] The decision in case of **United India Insurance Company Limited vs. Rajendra Singh (supra)** is concerned it was a case where fraud was played upon the court in MACP. The petitioner though had not received any injury had produced false certificate on record to obtain award. Since it was a plaint fraud on the tribunal it was held that recall petition is maintainable. The fact of that case is different.

[28] The decision in case of **Late Chhotabhai Nathabhai Patel vs. Dilipbhai Shantilal Thanki (supra)** relied upon by learned advocate Mr.Viral Shah to contend

that the petitioner had no other legal provision / remedy available except to approach the same court for reopening of the preliminary decree. This judgment was delivered in context of O.23 R.3 read with O.23 R.3A read with O.43 R.1A(2) of CPC in regards to challenge of consent decree. In the present case, there is no consent decree. The court has adjudged the issue and passed the preliminary decree. If it is adversely affecting the respondent, the remedy is available by way of an appeal under Section 96 of the CPC.

[29] For the foregoing reasons, the petition succeeds. Impugned order is quashed and set aside. The respondent is given liberty to seek appropriate remedy as may be permissible under the law. This court clarifies that merits and de-merits of the recall application has not been examined.

[30] Connected CA does not survive and stands disposed of accordingly. R & P be sent back to the court below.

FURTHER ORDER

After pronouncement of the judgment, learned advocate Mr. VK Shah requests to stay the order for a further period of four weeks so as to enable him to approach the higher forum. In view of the fact that the learned trial Court is considered as coram non judice to pass interim order as well as opportunity is granted to the respondents to conduct the appropriate proceedings before appropriate forum, the request is declined

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