BEFORE THE HON'BLE NATIONAL GREEN TRIBUNAL

PRINCIPAL BENCH AT NEW DELHI

APPEAL NO. 25 OF 2025

IN THE MATTER OF:

JOHNSON MATTHEY CHEMICALS INDIA PRIVATE LIMITED

…APPELLANT

VERSUS

UTTAR PRADESH POLLUTION CONTROL BOARD

…RESPONDENT

INDEX

VOLUME II

N.D.O.H: 12.11.2025

VIII.	***Re: Non-application of mind to evidence produced before a decision-making authority***		
11.	Lasa Supergenerics Ltd. and Anr. v. State of Maharashtra and Ors., ***2021 SCC Online Bom 10540***	6-7	280-282 Relevant Paras @Pgs. 281-282
12.	Hikal Limited v. State of Maharashtra and Ors., ***2022 SCC Online Bom 4884***	6-11	283-287 Relevant Paras @Pg. 284-285
IX.	***Re: Retrospective application of subordinate legislation***		
13.	Assistant Excise Commissioner, Kottayam and Ors. v. Esthappan Cherian and Anr., ***(2021) 10 SCC 210***	16-18	288-297 Relevant Paras @Pgs. 294-295
14.	Mahabir Vegetable Oils (P) Ltd. and Anr. v. State of Haryana and Ors., ***(2006) 3 SCC 620***	41-44	298-315 Relevant Paras @Pgs. 314-315
15.	V. Vincent Velankanni v. Union of India and Ors., ***2024 SCC Online SC 2642***	42-43	316-330 Relevant Paras @Pgs. 326-327
16.	Proof of service		331

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(2022) 8 Supreme Court Cases 162 : (2022) 3 Supreme Court Cases (Cri) 306 : (2022) 4 Supreme Court Cases (Civ) 248 : (2022) 232 Comp Cas 136 : 2022 SCC OnLine SC 210

In the Supreme Court of India

(BEFORE DR D.Y. CHANDRACHUD AND SANJIV KHANNA, JJ.)

T. TAKANO . . Appellant;

Versus

SECURITIES AND EXCHANGE BOARD OF INDIA AND ANOTHER . . Respondents.

Civil Appeals Nos. 487-88 of 2022[†], decided on February 18, 2022

A. **Securities, Markets and Exchanges — SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 — Regns. 9 and 10 r/w Regns. 3(b), (c), (d), 4(1) and 4(2)(e), (f), (k) and (r) — Disclosure of investigation report submitted to SEBI under Regn. 9, to the noticee to whom show-cause is issued — Necessity of, even when SEBI claims it did not rely on the investigation report — Test for determining necessity of disclosure, namely, that material required to be disclosed is relevant for purpose of adjudication — Applicability of — Investigation report under Regn. 9 — Non-consideration of, as merely an internal document**

— A quasi-judicial authority, held, has a duty to disclose the material that has been relied upon at the stage of adjudication — Further, an ipse dixit of the authority that it has not relied on certain material would not exempt it of its liability to disclose such material if it is *relevant* to and has a *nexus* to the action that is taken by the authority — In all reasonable probability, such material would have influenced the decision reached by the authority — Thus, the actual test is whether the material that is required to be disclosed is relevant for purpose of adjudication; if it is, then the principles of natural justice require its due disclosure

— A show-cause notice was issued to the appellant on 19-3-2020 under the provisions of Ss. 11(1), 11(4), 11(4-A), 11-B(1) and 11-B(2) and 15-HA of the SEBI Act and S. 12-A(2) read with S. 23-H of the SCRA, 1956 based on the forensic audit report and investigation conducted by SEBI — Appellant responded to the show-cause notice inter alia contending that he had not received the report of the investigation conducted by SEBI, however, by its communication dt. 13-8-2020, the first respondent stated that the investigation report is an "internal document" which cannot be shared

— Held, in the present case, since the report of the investigating authority under Regn. 9 enters into the calculus of circumstances borne in

mind by the SEBI in arriving at its satisfaction under Regn. 10 for taking actions as specified in Regns. 11 and 12, it would be contrary to the Regulations to assert that the investigation report is merely an internal document of which a disclosure is not warranted — In any event, the language of Regn. 10 makes it clear that the SEBI

Page: 163

forms an opinion regarding the violation of Regulations after considering the investigation report prepared under Regn. 9 — Thus, the investigation report has to be duly disclosed to the noticee, however, the right to disclosure is not absolute and it needs to be determined if the non-disclosure of the investigative report is protected by any of the exceptions to the rule

— Securities and Exchange Board of India Act, 1992 — Ss. 11(1), 11(4), 11(4-A), 11-B(1) & 11-B(2) and 15-HA — Securities Contracts (Regulation) Act, 1956 — S. 12-A(2) r/w S. 23-H

— Administrative Law — Administrative Action — Quasi-Judicial Function — Compliance with Principles of Natural Justice — Natural Justice — Audi Alteram Partem — Right to Hearing — Adverse material, awareness/supply of

(Paras 26 to 54 and 62 to 62.6)

B. **Securities, Markets and Exchanges — SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 — Regns. 9 and 10 r/w Regns. 3(b), (c), (d), 4(1) and 4(2)(e), (f), (k) and (r) — Exceptions to the duty to disclose investigation reports — Scope and ambit of — Right to disclosure is not absolute and the disclosure of information may affect other third-party interests and the stability and orderly functioning of the securities market — SEBI can withhold disclosure of those parts/sections of the report which deal with third-party personal information and strategic information bearing upon the stable and orderly functioning of the securities market**

— Human and Civil Rights — Right to Information vis-à-vis Right to Privacy and Privileged and Confidential Information — Right to Information Act, 2005, Ss. 8(1)(d), (e) and (j)

(Paras 57, 62.5 and 62.6)

C. **Securities, Markets and Exchanges — SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 — Regns. 9 and 10 r/w Regns. 3(b), (c), (d), 4(1) and 4(2)(e), (f), (k) and (r) — Onus of proof, as to non-disclosure of investigative report — Resting of, on SEBI and when shifts from SEBI to noticee — Held, the respondent/SEBI should prima facie establish that the disclosure of the report would affect third-party rights and the stability and orderly**

functioning of the securities market — However, the onus then shifts to the appellant to prove that the information is *necessary* to defend his case appropriately

— In the present case, SEBI, made the following arguments making a prima facie case that the disclosure of the report would violate third-party rights : (*i*) Investigation reports contain information on the volatile nature of the market; (*ii*) The report also contains the personal information of various stakeholders; Disclosure will violate the right to privacy of the third-party individuals; and (*iii*) It includes strategic information

— Held, the appellant/noticee did not sufficiently discharge his burden by proving that the non-disclosure of information would affect his ability to defend himself, however, merely because a few portions of the enquiry

Page: 164

report involve information on third parties or confidential information on the securities market, the respondent does not have a right to withhold the disclosure of the relevant portions of the report — SEBI can only claim non-disclosure of those sections of the report which deal with third-party personal information and strategic information on the functioning of the securities market

(Paras 57, 58, 59 and 62.5)

A fresh show-cause notice was issued to the appellant on 19-3-2020 under the provisions of Sections 11(1), 11(4), 11(4-A), 11-B(1) and 11-B(2) and 15-HA of the Securities and Exchange Board of India Act, 1992 ("the SEBI Act") and Section 12-A(2) read with Section 23-H of the Securities Contracts (Regulation) Act, 1956 ("SCRA") based on the forensic audit report and investigation conducted by SEBI. With regard to the appellant, it was alleged that:

> "... *T*, during whose tenure the business transactions with FDSL started by virtue of his position as MD & CEO of Ricoh during FY 2012-13 to FY 2014-15, was actively involved in committing the fraud and had knowingly restricted the mandate given to PwC to six months so as to succeed in hiding his role in the commission of fraud of publishing untrue financial statements of Ricoh which resulted in misleading the investors about the financial performance of the company and thereby resulted in inducement to trades in the scrip. The said acts of Noticee 2 are alleged to be in violation of Regulations 3(*b*), (*c*), (*d*), 4(1) and 4(2)(*e*), (*f*), (*k*) and (*r*) of the SEBI (PFUTP) Regulations, 2003 and Clause 49(V) read with 41(II)(*a*) of the erstwhile Listing Agreement."

The appellant *T* claimed that he received the show-cause notice by email on 4-8-2020. The appellant responded to the show-cause notice on 6-8-2020 stating that though he had received the forensic audit report submitted by Pipara & Co. LLP, he had not received the report of the investigation conducted by SEBI.

By its communication dated 13-8-2020, the first respondent stated that the

investigation report is an "internal document" which cannot be shared. The appellant was provided time until 9-8-2020 to inspect the other documents. The first respondent enclosed soft copies of the annexures to the forensic report and called upon the appellant to submit a reply. The appellant reiterated the demand to inspect the investigation report. By an email dated 4-9-2020, the appellant was informed that the investigation report of SEBI was not relied on to issue the show-cause notice and hence, would not be provided.

Regulation 9 upon which the controversy in the present case turned is extracted below:

> "**9. *Submission of report to the Board***.—The investigating authority shall, on completion of investigation, after taking into account all relevant facts, submit a report to the appointing authority:
>
> Provided that the investigating authority may submit an interim report pending completion of investigations if he considers necessary in the interest of investors and the securities market or as directed by the appointing authority."

Page: 165

According to Regulation 10:

> "**10. *Enforcement by the SEBI***.—The SEBI may, after consideration of the report referred to in Regulation 9, if satisfied that there is a violation of these regulations and after giving a reasonable opportunity of hearing to the persons concerned, issue such directions or take such action as mentioned in Regulation 11 and Regulation 12."

The issue involved in this appeal was whether an investigation report under Regulation 9 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 2003 ("the PFUTP Regulations") must be disclosed to the person to whom a notice to show cause is issued?

Held :

The language in which Regulation 10 is couched indicates that consideration of the report of the investigating authority which is submitted under Regulation 9 is one of the components guiding the SEBI's satisfaction on the violation of the Regulations. The words of Regulation 10 indicate that the SEBI "after consideration of the report referred to in Regulation 9, if satisfied that there is a violation of these Regulations and after giving a reasonable opportunity of hearing to the persons concerned", takes action under Regulations 11 and 12. As a result of the mandate of Regulation 10, the SEBI has to consider the investigation report as an intrinsic element in arriving at its satisfaction on whether there has been a violation of the Regulations.

(Para 26)

While the respondents have submitted that only materials that have been *relied* on by SEBI need to be disclosed, the appellant has contended that all *relevant* materials need to be disclosed.

(Para 27)

There are three key purposes that disclosure of information serves:

(*1*) *Reliability* : The possession of information by both the parties can aid the courts in determining the truth of the contentions. The role of the court is not restricted to interpreting the provisions of law but also determining the veracity and truth of the allegations made before it. The court would be able to perform this function accurately only if both parties have access to information and possess the opportunity to address arguments and counter-arguments related to the information.

(*2*) *Fair trial* : Since a verdict of the Court has far-reaching repercussions on the life and liberty of an individual, it is only fair that there is a legitimate expectation that the parties are provided all the aid in order for them to effectively participate in the proceedings.

(*3*) *Transparency and accountability* : The investigative agencies and the judicial institution are held accountable through transparency and not opaqueness of proceedings. Opaqueness furthers a culture of prejudice, bias, and impunity—principles that are antithetical to transparency. It is of utmost importance that in a country grounded in the Rule of Law, the institutions adopt those procedures that further the democratic principles of transparency and accountability.

(para 28)

Page: 166

The purpose of disclosure of information is not merely individualistic, that is, to prevent errors in the verdict but is also towards fulfilling the larger institutional purpose of fair trial and transparency. Since the purpose of disclosure of information targets both the *outcome* (reliability) and the *process* (fair trial and transparency), it would be insufficient if only the material relied on is disclosed. Such a rule of disclosure, only holds nexus to the outcome and not the process. Therefore, as a default rule, all relevant material must be disclosed.

(Para 29)

It would be fundamentally contrary to the principles of natural justice if the relevant part of the investigation report which pertains to the appellant is not disclosed. The appellant has to be given a reasonable opportunity of hearing. The requirement of a reasonable opportunity would postulate that such material which has been and has to be taken into account under Regulation 10 must be disclosed to the noticee. If the report of the investigating authority under Regulation 9 has to

be considered by the SEBI before satisfaction is arrived at on a possible violation of the Regulations, the principles of natural justice require due disclosure of the report.

(Para 30)

The consequence of the SEBI arriving at a satisfaction that there has been a violation of the Regulations is that the SEBI can take recourse to the actions specified under Regulations 11 and 12.

(Para 31)

The provisions of Regulations 11 and 12 indicate that the consequences of the satisfaction which is arrived at by the SEBI under Regulation 10, if there is a violation of the Regulations, are grave.

(Para 32)

The High Court in the present case has palpably misconstrued the judgment in *Natwar Singh*, (2010) 13 SCC 255. The High Court has failed to notice that the issue in that case was whether at the stage when the authority decides under Rule 4(1) of the FEMA Rules 2000 whether an enquiry should be held, a disclosure of all documents in the possession of the authority to the noticee is warranted. This was answered in the negative. The Supreme Court distinguished the stage of adjudication as distinct from the initial stage under Rule 4(1). At the stage of adjudication, all documents useful or relevant to the subject-matter have to be disclosed to the noticee, subject to exceptions noticed by the court.

(Para 42)

Natwar Singh v. *Director of Enforcement*, (2010) 13 SCC 255, *clarified* and *distinguished*

Dhakeswari Cotton Mills Ltd. v. *CIT*, (1955) 1 SCR 941 : AIR 1955 SC 65; *R.* v. *Secy. of State for Home Deptt., ex p H*, 1995 QB 43 : (1994) 3 WLR 1110 : (1995) 1 All ER 479 (CA), *cited*

Even if the documents are merely inter-departmental communications, there is a duty to disclose such documents if they have been relied upon by the enquiry officer.

(Para 43)

Krishna Chandra Tandon v. *Union of India*, (1974) 4 SCC 374 : 1974 SCC (L&S) 329, *clarified and relied on*

However, merely because the investigating authority has denied placing reliance on the report would not mean that such material cannot be disclosed to the noticee. The court may look into the relevance of the material to the proposed action and its nexus to the stage of adjudication. Simply put, this entails evaluating whether the material in all reasonable probability would influence the decision of the authority.

(Para 44)

Khudiram Das v. *State of W.B.*, (1975) 2 SCC 81 : 1975 SCC (Cri) 435, *followed*

The material that may influence the decision of a quasi-judicial authority to award a penalty must be disclosed to a delinquent.

(Para 45)

Union of India v. *Mohd. Ramzan Khan*, (1991) 1 SCC 588 : 1991 SCC (L&S) 612; *ECIL* v. *B. Karunakar*, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184, *followed*

If a facet of a rule of natural justice is violated on grounds of preserving public interest, the entire proceeding is not vitiated unless prejudice has been caused to the delinquent.

(Para 47)

State Bank of Patiala v. *S.K. Sharma*, (1996) 3 SCC 364, *followed*

Russell v. *Duke of Norfolk*, (1949) 1 All ER 109 : 65 TLR 225 (CA); *Mohinder Singh Gill* v. *Chief Election Commr.*, (1978) 1 SCC 405; *A.K. Roy* v. *Union of India*, (1982) 1 SCC 271 : 1982 SCC (Cri) 152; *Swadeshi Cotton Mills* v. *Union of India*, (1981) 1 SCC 664; *A.K. Kraipak* v. *Union of India*, (1969) 2 SCC 262; *Council of Civil Service Unions* v. *Minister for the Civil Service*, 1985 AC 374 : (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL); *Liberty Oil Mills* v. *Union of India*, (1984) 3 SCC 465; *Ridge* v. *Baldwin*, 1964 AC 40 : (1963) 2 WLR 935 : (1963) 2 All ER 66 (HL); *Calvin* v. *Carr*, 1980 AC 574 : (1979) 2 WLR 755 : (1979) 2 All ER 440 (PC); *K.L. Tripathi* v. *SBI*, (1984) 1 SCC 43 : 1984 SCC (L&S) 62, *cited*

The duty to disclose is confined only to material and relevant documents which may have been relied upon in support of the charges.

(Para 48)

State of U.P. v. *Ramesh Chandra Mangalik*, (2002) 3 SCC 443 : 2002 SCC (L&S) 413; *Kothari Filaments* v. *Commr. of Customs*, (2009) 2 SCC 192 : (2009) 1 SCC (Cri) 705; *Chandrama Tewari* v. *Union of India*, 1987 Supp SCC 518 : 1988 SCC (L&S) 226; *State of T.N.* v. *Thiru K.V. Perumal*, (1996) 5 SCC 474 : 1996 SCC (L&S) 1280; *State of U.P.* v. *Harendra Arora*, (2001) 6 SCC 392 : 2001 SCC (L&S) 959, *relied on*

Ramesh Chandra Mangalik v. *State of U.P.*, 1999 SCC OnLine All 1580, *cited*

The following principles emerge on the proper exercise of power by quasi-judicial authorities:

(*1*) A quasi-judicial authority has a duty to disclose the material that has been relied upon at the stage of adjudication.

(*2*) An ipse dixit of the authority that it has not relied on certain material would not exempt it of its liability to disclose such material if it is *relevant* to and

has a *nexus* to the action that is taken by the authority. In all reasonable probability, such material would have influenced the decision reached by the authority.

(*3*) Thus, the actual test is whether the material that is required to be disclosed is relevant for purpose of adjudication. If it is, then the principles of natural justice require its due disclosure.

(para 50)

The investigation report forms the material considering which, the SEBI arrives at a satisfaction regarding whether there has been a violation of the Regulations. If it is satisfied that there has been a violation of the Regulations, after giving a reasonable opportunity to be heard, the SEBI is empowered to take action according to Regulations 11 and 12. It would not suffice for the first respondent to claim as it did before the High Court that it did not rely on the investigation report. The ipse dixit of the authority that it was not influenced by certain material would not suffice. If the material is relevant to and has a nexus to the stage at which satisfaction is reached by an authority, such material would be

deemed to be important for the purpose of adjudication. The written submissions of the SEBI clearly state that the findings of the investigation report are important for the authority to decide whether there are any prima facie grounds to initiate enforcement proceedings under Regulation 10.

(Para 51)

Even if it is assumed that the report is an inter-departmental communication, there is a duty to disclose such report if it is relevant for the satisfaction of the enforcement authority for the determination of the alleged violation.

(Para 52)

Krishna Chandra Tandon v. *Union of India*, (1974) 4 SCC 374 : 1974 SCC (L&S) 329, *followed*

The Supreme Court has laid down a two-prong test for the standard of "relevancy"; *firstly*, the material must have nexus with the order and *secondly*, the material *might* have influenced the decision of the authority. The non-disclosure of the relevant information is not in itself sufficient to warrant the setting aside of the order of punishment. In order to set aside the order of punishment, the aggrieved person must be able to prove that prejudice has been caused to him due to non-disclosure. To prove prejudice, he must prove that had the material been disclosed to him the outcome or the punishment would have been different. The test for the extent of disclosure and the corresponding remedy for non-disclosure is dependent on the objective that the disclosure seeks to achieve. Therefore, the impact of non-disclosure on the *reliability* of the verdict must also be determined vis-à-vis, the

overall fairness of the proceeding. While determining the reliability of the verdict and punishment, the court must also look into the possible uses of the undisclosed information for purposes ancillary to the outcome, but that which *might* have impacted the verdict.

(Para 53)

Khudiram Das v. *State of W.B.*, (1975) 2 SCC 81 : 1975 SCC (Cri) 435; *ECIL* v. *B. Karunakar*, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184, *followed*

In the present case, since the report of the investigating authority under Regulation 9 enters into the calculus of circumstances borne in mind by the SEBI in arriving at its satisfaction under Regulation 10 for taking actions as specified in Regulations 11 and 12, it would be contrary to the Regulations to assert that the investigation report is merely an internal document of which a disclosure is not warranted. In any event, the language of Regulation 10 makes it clear that the SEBI forms an opinion regarding the violation of Regulations after considering the investigation report prepared under Regulation 9. Thus, the investigation report has to be duly disclosed to the noticee. However, the right to disclosure is not absolute. It needs to be determined if the non-disclosure of the investigative report is protected by any of the exceptions to the rule.

(Para 54)

Natwar Singh v. *Director of Enforcement*, (2010) 13 SCC 255, *referred to*

Exceptions to the duty to disclose

The report may contain market sensitive information which may impinge upon the interest of investors and the stability of the securities market. The requirement of compliance with the principles of natural justice cannot therefore be read to encompass the right to a roving disclosure on matters unconnected or as regards the dealings of third parties. The investigating authority may acquire information of sensitive nature bearing upon the orderly functioning of the securities market.

The right of the noticee to disclosure must be balanced with a need to preserve any other third-party rights that may be affected.

(Para 56)

There are exceptions to the general rule of disclosing evidentiary material. Such exceptions can be invoked if the disclosure of material causes harm to others, is injurious to public health or breaches confidentiality. One of the crucial objectives of the right to disclosure is securing the transparency of institutions. The claims of third-party rights vis-à-vis the right to disclosure cannot be pitted as an issue of public interest and fair adjudication. The creation of such a binary reduces and limits the purpose that disclosure of information serves. The respondent should prima facie establish that the disclosure of the report would affect third-party rights. The onus

then shifts to the appellant to prove that the information is *necessary* to defend his case appropriately.

(Para 57)

Natwar Singh v. *Director of Enforcement*, (2010) 13 SCC 255, *relied on to this extent*

The appellant *T* is unable to prove that the disclosure of the entire report is necessary for him to defend the case. The first respondent made the following arguments making a prima facie case that the disclosure of the report would violate third-party rights:

(*i*) Investigation reports contain information on the volatile nature of the market;

(*ii*) The report also contains the personal information of various stakeholders. Disclosure will violate the right to privacy of the third-party individuals; and

(*iii*) It includes strategic information.

(para 58)

The appellant *T* did not sufficiently discharge his burden by proving that the non-disclosure of the above information would affect his ability to defend himself. However, merely because a few portions of the enquiry report involve information on third parties or confidential information on the securities market, the respondent does not have a right to withhold the disclosure of the relevant portions of the report. The first respondent can only claim non-disclosure of those sections of the report which deal with third-party personal information and strategic information on the functioning of the securities market.

(Para 59)

Therefore, the SEBI should determine such parts of the investigation report under Regulation 9 which have a bearing on the action which is proposed to be taken against the person to whom the notice to show cause is issued and disclose the same. It can redact information that impinges on the privacy of third parties. It cannot exercise unfettered discretion in redacting information. On the other hand, such parts of the report which are necessary for the appellant to defend his case against the action proposed to be taken against him need to be disclosed. It is needless to say that the investigating authority is duty-bound to disclose such parts of the report to the noticee in good faith. If the investigating authority attempts to circumvent its duty by revealing minimal information, to the prejudice of the appellant, it will be in violation of the principles of natural justice. The court/appellate forum in an appropriate case will be empowered to call for the

investigation report and determine if the duty to disclose has been effectively complied with.

(Para 60)

It is thus concluded as follows:

(*1*) The appellant *T* has a right to disclosure of the material *relevant* to the proceedings initiated against him. A deviation from the general rule of disclosure of relevant information was made in *Natwar Singh case* based on the stage of the proceedings. It is sufficient to disclose the materials *relied* on if it is for the purpose of issuing a show-cause notice for deciding whether to initiate an inquiry. However, all information that is relevant to the proceedings must be disclosed in adjudication proceedings.

(*2*) The SEBI under Regulation 10 considers the investigation report submitted by the investigating authority under Regulation 9, and if it is satisfied with the allegations, it could issue punitive measures under Regulations 11 and 12. Therefore, the investigation report is not merely an internal document. In any event, the language of Regulation 10 makes it clear that the SEBI forms an opinion regarding the violation of Regulations after considering the investigation report prepared under Regulation 9.

(*3*) The disclosure of material serves a threefold purpose of decreasing the error in the verdict, protecting the fairness of the proceedings, and enhancing the transparency of the investigatory bodies and judicial institutions.

(*4*) A focus on the institutional impact of suppression of material prioritises the process as opposed to the outcome. The direction of the Constitution Bench of the Supreme Court in *Karunakar*, (1993) 4 SCC 727 that the non-disclosure of relevant information would render the order of punishment void only if the aggrieved person is able to prove that prejudice has been caused to him due to non-disclosure is founded both on the *outcome* and the *process*.

(*5*) The right to disclosure is not absolute. The disclosure of information may affect other third-party interests and the stability and orderly functioning of the securities market. The respondent should prima facie establish that the disclosure of the report would affect third-party rights and the stability and orderly functioning of the securities market. The onus then shifts to the appellant to prove that the information is *necessary* to defend his case appropriately.

(*6*) Where some portions of the enquiry report involve information on third parties or confidential information on the securities market, the respondent cannot for that reason assert a privilege against disclosing any part of the report. The respondents can withhold disclosure of those sections of the report which deal with third-party personal information and strategic information bearing upon the stable and orderly functioning of the securities market.

(para 62)

T. Takano v. *SEBI*, 2020 SCC OnLine Bom 6204, *reversed*

A.T. Rajan v. *SEBI*, 2020 SCC OnLine SAT 127; *Natwar Singh* v. *Director of Enforcement*, (2010) 13 SCC 255; *ECIL* v. *B. Karunakar*, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184; *T. Takano* v. *SEBI*, 2020 SCC OnLine Bom 7330,

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VN-D/68757/CVR

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16. (1984) 3 SCC 465, *Liberty Oil Mills* v. *Union of India* 196*a*

17. (1984) 1 SCC 43 : 1984 SCC (L&S) 62, *K.L. Tripathi* v. *SBI* 196*d*

18. (1982) 1 SCC 271 : 1982 SCC (Cri) 152, *A.K. Roy* v. *Union of India* 195*d-e*

19. (1981) 1 SCC 664, *Swadeshi Cotton Mills* v. *Union of India* 195*d-e*

20. 1980 AC 574 : (1979) 2 WLR 755 : (1979) 2 All ER 440 (PC), *Calvin* v. *Carr* 196*c-d*

21. (1978) 1 SCC 405, *Mohinder Singh Gill* v. *Chief Election Commr.* 195*d-e*

22. (1975) 2 SCC 81 : 1975 SCC (Cri) 435, *Khudiram Das* v. *State of W.B.* 177*a*, 192*d-e*, 199*d*

23. (1974) 4 SCC 374 : 1974 SCC (L&S) 329, *Krishna Chandra Tandon* v. *Union of India* 178*e*, 191*e-f*, 197*c-d*

24. (1969) 2 SCC 262, *A.K. Kraipak* v. *Union of India* 195*e*

25. 1964 AC 40 : (1963) 2 WLR 935 : (1963) 2 All ER 66 (HL), *Ridge* v. *Baldwin* 196*c*

26. (1955) 1 SCR 941 : AIR 1955 SC 65, *Dhakeswari Cotton Mills Ltd.* v. *CIT* 187*a*

27. (1949) 1 All ER 109 : 65 TLR 225 (CA), *Russell* v. *Duke of Norfolk* 195*c-d*

Page: 172

The Judgment of the Court was delivered by

DR D.Y. CHANDRACHUD, J.—

INDEX

A. *Factual background*

1. By a judgment dated 29-9-2020[1], a Division Bench of the Bombay High Court dismissed the petition instituted by the appellant under Article 226 of the Constitution for challenging a show-cause notice which was issued by the first respondent ("SEBI" or "the Board") alleging a violation of the provisions of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 2003 ("the PFUTP Regulations"). A petition seeking a review of the judgment of the Division Bench was disposed of by an order dated 22-10-2020[2]. The appellant moved a special leave petition against the judgment in the writ petition and the order in review. The principal issue is whether an investigation report under Regulation 9 of the PFUTP Regulations must be disclosed to the person to whom a notice to show cause is issued.

2. The appellant was employed as the Managing Director ("MD") and Chief Executive Officer ("CEO") in Ricoh India Ltd. ("Company"), a public listed company, for Financial Years 2012-13, 2013-14 and 2014-15, till 31-3-2015. In 2016, BSR & Co. were appointed as statutory auditors of the Company. The auditors raised a suspicion regarding the veracity of the financial statements of the Company for the quarters that ended on 30-6-2015 and 30-9-2015. The Audit Committee of the Company appointed Price Water House Coopers (P) Ltd. ("PWC") to carry out a forensic audit. PWC submitted a preliminary audit report on 20-4-2016.

3. The Company addressed a communication to the first respondent on the same day stating that the financial statements for those quarters did not reflect the true affairs of the Company and requested the first respondent to carry out an independent investigation on possible violations of the provisions of the PFUTP Regulations. The final report submitted by PWC was forwarded by the Company to the first respondent on 29-11-2016.

4. The first respondent initiated an investigation. During the course of the investigation, summons was issued to Manoj Kumar (then MD & CEO for the Financial Year of 2015-16), Arvind Singhal (then Chief

Financial Officer) and Anil Saini (then Senior Vice-President and Chief Operating Officer). The Company in its letter dated 8-6-2016 submitted that it suspected Manoj Kumar, Arvind Singhal and Anil Saini for their involvement in misstating the financial affairs. The first respondent in its ex parte interim order-cum-show-cause notice prima facie found two others, including the appellant, responsible for facilitating the misstatements of the financial position. With regard to the role of the appellant, it was noted:

> "On examination of the organisation structure of Ricoh for past years, it is noted that T. Takano was the MD & CEO of the Company till 31-3-2015. It is also noted that the mandate for PwC investigation was restricted to the half-year ended 30-9-2015 and not extended to all the years when the misstatements occurred. If Manoj Kumar, who was MD & CEO in FY 2015-16 was held responsible for the fraud, it is only logical that T. Takano as the previous MD & CEO (during whose tenure the fraud actually started) was also responsible for the misstatements. It appears that by restricting the investigation period mandated to PwC, the Company intended to restrain PwC from examining the transactions of the previous years and thereby ring-fence the earlier MD & CEO, T. Takano."

5. Based on the investigation, it was noted that the financial misstatements commenced from 2012-13 and the Company suffered a loss due to, inter alia, transfers to third parties, write-offs and a sale made to Fourth Dimension Solutions Ltd. ("FDSL") without inventory. It was further noted that the share price of the Company had gone up due to the misstatements. Hence, it was observed that the appellant, along with five others, has prima facie violated the provisions of Sections 12-A(a), 12-A(b) and 12-A(c) of the Securities and Exchange Board of India Act, 1992 ("the SEBI Act") read with Regulations 3(*b*), 3(*c*), 3(*d*), 4(1), 4(2)(*e*), 4(2)(*k*) and 4(2)(*r*) of the PFUTP Regulations. Hence, the first respondent issued the following directions under Sections 11(1), 11(4) and 11-B of the SEBI Act and Regulation 11 of the PFUTP Regulations:

5.1. The appellant and the other five key managerial persons were restrained from accessing the securities market or buying, selling or otherwise dealing in the securities market.

5.2. An independent audit firm was appointed for conducting a detailed forensic audit of the books of accounts of the company from the Financial Year 2012-13.

5.3. The independent audit firm was called upon to submit a report to the first respondent within three months from the date of appointment.

5.4. A show-cause notice for directions under Sections 11, 11(4) and

11-B of the SEBI Act, including directions for restraining/prohibiting him from accessing the securities market and buying, selling or otherwise dealing in securities in any manner.

Page: 174

6. By his letters dated 6-6-2018 and 28-6-2018, and at a personal hearing on 11-6-2018 the appellant submitted that:

6.1. He had no knowledge of the purported transactions and/or the misstatements in the books of account.

6.2. The inclusion of his name in the interim order-cum-show-cause notice was speculative, based on the premise that since the MD and CEO of Financial Year 2015-16 has been held prima facie responsible, the appellant who was the MD and CEO during the previous year must also be held responsible.

6.3. The financial team was solely responsible for preparing financial statements. These statements were then examined by the statutory auditors of the company. The version subsequently prepared was the final version of the financial statement. Therefore, he had no knowledge of the intricacies of the financial statements.

7. By an order dated 16-8-2018 ("Confirmatory order"), the first respondent confirmed the directions issued in the ex parte interim order dated 12-2-2018. The order notes that though the facts indicate large-scale irregularities in business transactions, the time span of the irregularities and the exact role of the noticees are not fully ascertained, and therefore, "it would be premature to give credence to the submissions of the individual noticees". It was also observed that "a clear picture regarding the financial affairs of the company and the role of various noticees in the alleged fraud is yet to emerge pending such investigation". The time for submission of the forensic report by the first respondent was extended to 30-9-2018. SEBI appointed Pipara & Co. LLP on 20-2-2019 to conduct a forensic audit of the books of account of the Company. The report of the forensic auditors was submitted on 25-10-2019.

8. The appellant challenged the confirmatory order before the Securities Appellate Tribunal ("SAT" or "Tribunal"), Mumbai. The appeals were allowed and the order against the appellant was quashed on 29-1-2020[3] on the grounds that:

(*i*) The confirmatory order is based on a suspicion about the role of the appellant;

(*ii*) The submissions of the appellant were not dealt with appropriately;

(*iii*) Since the company is in liquidation, the appellant is not in a position to influence decisions; and

(*iv*) The appellant cannot be prevented from dealing in the securities market when the appellant is held to be vicariously liable due to the position he held as MD/CEO.

The Tribunal, however, directed that the first respondent is at liberty to issue a fresh show-cause notice if the evidence against the appellant is made available through the forensic report or through the first respondent's investigation.

9. A fresh show-cause notice was issued to the appellant on 19-3-2020 under the provisions of Sections 11(1), 11(4), 11(4-A), 11-B(1) and 11-B(2)

Page: 175

and 15-HA of the SEBI Act and Section 12-A(2) read with Section 23-H of the Securities Contracts (Regulation) Act, 1956 ("SCRA") based on the forensic audit report and investigation conducted by the first respondent. With regard to the appellant, it was alleged that:

> "… Mr T. Takano, during whose tenure the business transactions with FDSL started by virtue of his position as MD & CEO of Ricoh during FY 2012-13 to FY 2014-15, was actively involved in committing the fraud and had knowingly restricted the mandate given to PwC to six months so as to succeed in hiding his role in the commission of fraud of publishing untrue financial statements of Ricoh which resulted in misleading the investors about the financial performance of the company and thereby resulted in inducement to trades in the scrip. The said acts of Noticee 2 are alleged to be in violation of Regulations 3(*b*), (*c*), (*d*), 4(1) and 4(2)(*e*), (*f*), (*k*) and (*r*) of the SEBI (PFUTP) Regulations, 2003 and Clause 49(V) read with 41(II)(*a*) of the erstwhile Listing Agreement."

10. The appellant claims that he received the show-cause notice by email on 4-8-2020. The appellant responded to the show-cause notice on 6-8-2020 stating that though he had received the forensic audit report submitted by Pipara & Co. LLP, he had not received the report of the investigation conducted by SEBI. The appellant sought an opportunity to inspect the following records:

> "[…] including but not limited to all material on which reliance was placed Pipara & Co. LLP for the purpose of preparing the forensic audit report, all material on which reliance has been placed while

issuing the show-cause notice, and on which reliance is intended to be placed while making any adjudication on the show-cause notice ("material")."

11. By its communication dated 13-8-2020, the first respondent stated that the investigation report is an "internal document" which cannot be shared. The appellant was provided time until 9-8-2020 to inspect the other documents. The first respondent enclosed soft copies of the annexures to the forensic report and called upon the appellant to submit a reply. The appellant reiterated the demand to inspect the investigation report. By an email dated 4-9-2020, the appellant was informed that the investigation report of SEBI was not relied on to issue the show-cause notice and hence, would not be provided.

12. The appellant filed a writ petition before the Bombay High Court challenging the show-cause notice which was issued on 19-3-2020. In the alternative, inspection of all documents relied on to issue the show-cause notice was sought. The appellant submitted before the High Court that to non-disclosure of all relevant documents relied on to issue the show-cause notice violated the principles of natural justice.

13. By its judgment dated 29-9-2020[1], the High Court held that the investigation report prepared under Regulation 9 of the PFUTP Regulations is solely for internal purposes. In concluding that the investigation report need not be furnished while issuing a show-cause notice, the High Court has relied on

the decision of this Court in *Natwar Singh* v. *Director of Enforcement*[4]. In sum and substance, the High Court has held that the report does not form the basis of the show-cause notice and therefore need not be disclosed. The review petition challenging the judgment of the Division Bench of the High Court was rejected.

B. *Submissions of the counsel*

14. Mr Ashim Sood, learned counsel appearing for the appellant made the following submissions:

14.1. Regulation 10 has two synchronous requirements—(*i*) consideration of the investigation report and satisfaction on such consideration that there is a violation of the PFUTP Regulations; and (*ii*) a hearing. The purpose of the investigation report is to adjudicate whether there has been a contravention of the Regulations. There is no intermediate stage between the consideration of the report and the adjudication of liability. Both stages are synchronous, making the

investigation report the primary material on which the adjudicator relies upon under the PFUTP Regulations.

14.2. The High Court erred in holding that the investigation report is a preliminary report and is to be used for "internal administrative discipline". The investigation report is not a preliminary document and is compiled at the end of a thorough and exhaustive investigation. The proviso to Regulation 9, provides for an "interim report" making it clear that the investigation report is not a preliminary document.

14.3. The investigation report is not a document to be used for internal deliberations, which is a stage that is crossed at Regulation 5. The investigation report is to be used for adjudication of liability in terms of Regulation 10.

14.4. The High Court erred in observing that the investigation report was not used against the appellant and does not form the basis of the show-cause notice. The show-cause notice dated 19-3-2020 contains several references to the investigation carried out by the first respondent. These allegations differ from the ones listed in an earlier show-cause notice, which was issued to the appellant and was set aside by SAT on 29-1-2020[3] in Appeal No. 427 of 2018. Further, the duty to disclose is not contingent on whether the respondent relies on a document; rather the duty is invoked when a request made for a document is found to be reasonable and relevant for the defence to be mounted by the noticee.

14.5. Regulation 10 mandates that the entire investigation report be disclosed to the noticee. This mandate can only be subject to certain well-recognised exceptions. Such exceptions must be invoked with the utmost circumspection by SEBI and for reasons that are recorded in writing.

14.6. The decision of this Court in *Natwar Singh*[4] supports the principle that material relied upon in a quasi-judicial proceeding must be disclosed to the person to whose prejudice such material may be used for taking adverse action.

14.7. In *Khudiram Das* v. *State of W.B.*[5], this Court held that once a statute prescribes reliance on certain material, such material should be disclosed to the opposite party. This principle has been followed in multiple contexts, including proceedings under the Companies Act, 1956 and the Special Courts Act, 1979.

14.8. If the entire investigation report is not provided, it would be difficult to come up with a metric for determining which parts of the report are relevant to the noticee.

14.9. Permitting the respondent to selectively disclose portions of the investigation report carries with it the risk of conferring unfettered discretion upon the first respondent. The first respondent will attempt to disclose the least possible information in an adversarial proceeding, undermining the mandate of Regulation 10.

14.10. Without having access to the entirety of the investigation report, the noticee will be incapable of effectively challenging the decision of the first respondent. It will result in the adoption of an opaque process where SAT or the High Courts would receive the report in sealed covers and make ex parte determinations of whether the redactions made by the first respondent are justified, impacting the transparency of the judicial process.

14.11. Regulation 9 imposes a qualitative requirement in relation to the investigation. If the investigation report is not disclosed, there is no incentive for the investigator to meet that qualitative requirement. There would be no way, therefore, to determine whether the investigation report was properly compiled and whether the investigation was conducted in a regular manner, in accordance with the standards of what a proper investigation entails.

14.12. Redaction of the investigation report can be carried out as an exception for legitimate reasons. To reduce arbitrariness, the redactions should be supported by written reasons indicating the necessity of the measure. The reasons should have a certain degree of specificity.

14.13. The exceptional situations in which redactions can be made are known to law and include business secrets, personal data and third party confidential information.

14.14. Laws in the United States and European Union also adopt the default position that the noticee shall have access to the file subject to certain exceptions relating to business secrets and personal data, amongst others.

15. On behalf of the respondents, Mr C.U. Singh, learned Senior Counsel, made the following submissions:

15.1. The appellant has raised the argument that the investigation has been solely conducted under the PFUTP Regulations and the failure to disclose the investigation report amounts to a violation of Regulations 9 and 10. This is incorrect. The proceedings have been initiated under the provisions of the SEBI Act and the SCRA as well for a violation of the provisions of the PFUTP Regulations and the Listing Agreement. The SEBI Act and the SCRA are wider in scope than the PFUTP Regulations. Additionally, Regulation 11 of the PFUTP

Regulations specifically provides that the actions or directions may be issued without prejudice to the provisions contained in sub-sections (1), (2), (2-A) and (3) of Sections 11 and 11-B of the SEBI Act.

15.2. SEBI conducts an investigation under Section 11-C of the SEBI Act, where, based on the findings arrived at during the investigation, allegations are levelled in the show-cause notice. Together with the show-cause notice all the documents that have been relied upon by the investigator are provided to the noticee. In the present case, all the relevant documents have been provided to the noticee, including the report of Pipara and Co. which formed the basis of the show-cause notice. The appellant is not entitled to any other documents.

15.3. The quasi-judicial proceedings that are initiated by SEBI proceed on the basis of the allegations that are mentioned in the show-cause notice and the documents that are annexed to it. No other material, document or investigation is considered for adjudication by the competent authority. Orders are passed only after an opportunity to file a reply is given and a personal hearing is provided to comply with the principles of natural justice.

15.4. Regulation 9 of the PFUTP Regulations requires the investigating authority to submit the report, after completion of the investigation, to the appointing authority. However, the provision does not require the furnishing of the report to the noticee. The report is only in the nature of an inter-departmental communication between officers investigating the matter and the authority who decides if any enforcement action is to be taken against an entity based on any prima facie grounds. It is not a piece of evidence but is rather a culmination of documents that the investigating authority relies upon or comes across during the investigation.

15.5. This Court in several similar cases has held that internal investigation reports are not required to be shared. (*Krishna Chandra Tandon* v. *Union of India*[6] and *Chandrama Tewari* v. *Union of India*[7].)

15.6. The investigations conducted by SEBI are highly sensitive given the volatile nature of the market. Disclosure of such information may adversely affect the market. Further, the investigation reports also contain the personal information of other stakeholders. They also include information relating to the commercial and business interests of third parties. Sharing such information with the noticee will raise concerns regarding the privacy of third parties and also affect their

competitive position in the market.

15.7. Clauses (*d*), (*e*) and (*h*) of sub-section (1) of Section 8 of the Right to Information Act, 2005 ("the RTI Act") also exempt disclosure of—(*i*) "information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party"; (*ii*) "information available in fiduciary relationship"; and (*iii*) "information which would impede the process of investigation".

15.8. The US Securities and Exchange Commission conducts its investigations on a confidential basis to maximise their effectiveness and

Page: 179

protect the privacy of those involved. UK Financial Conduct Authority also does not share confidential information even when the same is requested under the Freedom of Information Act stating that a clear confidentiality restriction encourages free flow of information and if confidential information were to be made public, sources would be less willing to give information. Article 54 of Directive 2004/39 of the EU Parliament provides a legal framework for securities market and mandates that information of such nature ought not to be shared. Thus, the refusal of SEBI to furnish the investigation report is in line with established global practices.

C. *Analysis*

C.1. *Regulatory framework of the PFUTP Regulations*

16. The PFUTP Regulations have been notified by SEBI in exercise of powers conferred by Section 30 of the SEBI Act. Regulation 2(*c*) defines the expression "fraud" in the following terms:

> "**2. (*c*)** "**fraud**" includes any act, expression, omission or concealment committed whether in a deceitful manner or not by a person or by any other person with his connivance or by his agent while dealing in securities in order to induce another person or his agent to deal in securities, whether or not there is any wrongful gain or avoidance of any loss, and shall also include—
>
> (1) a knowing misrepresentation of the truth or concealment of material fact in order that another person may act to his detriment;
>
> (2) a suggestion as to a fact which is not true by one who does not believe it to be true;
>
> (3) an active concealment of a fact by a person having knowledge or belief of the fact:

(4) a promise made without any intention of performing it;

(5) a representation made in a reckless and careless manner whether it be true or false;

(6) any such act or omission as any other law specifically declares to be fraudulent;

(7) deceptive behaviour by a person depriving another of informed consent or full participation;

(8) a false statement made without reasonable ground for believing it to be true;

(9) the act of an issuer of securities giving out misinformation that affects the market price of the security, resulting in investors being effectively misled even though they did not rely on the statement itself or anything derived from it other than the market price.

And "fraudulent" shall be construed accordingly;

Nothing contained in this clause shall apply to any general comments made in good faith in regard to—

(*a*) the economic policy of the Government;

(*b*) the economic situation of the country;

Page: 180

(*c*) trends in the securities market;

(*d*) any other matter of a like nature whether such comments are made in public or in private;"

17. Chapter II of the Regulations relates to the prohibition of fraudulent and unfair trade practices relating to the securities market. This includes Regulation 3 which deals with "Prohibition of certain dealings in securities" and Regulation 4 which deals with "Prohibition of manipulative, fraudulent and unfair trade practices". Chapter II pertains to the power of the Board to order an investigation.

18. Regulation 5 is extracted below:

"**5. *Power of the Board to order investigation***.—Where the Board, the Chairman, the member or the Executive Director (hereinafter referred to as "appointing authority") has reasonable ground to believe that—

(*a*) the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market in violation of these regulations;

(*b*) any intermediary or any person associated with the securities market has violated any of the provisions of the Act or the rules or the regulations, it may, at any time by order in writing, direct any officer not below the rank of Division Chief (hereinafter referred to as "the investigating authority") specified in the order to investigate the affairs of such intermediary or persons associated with the securities market or any other person and to report thereon to the Board in the manner provided in Section 11-C of the Act."

19. Regulation 6 enunciates the powers of the investigating authority.[8] The powers of the investigating authority include:

Page: 181

(*i*) Calling for information or records;

(*ii*) Undertaking inspection of books, registers and documents or records of any public company;

(*iii*) Requiring the disclosure of information, documents or records by any person associated with the securities market or by an intermediary;

(*iv*) Reservation and custody of books, registers, documents and records for a stipulated period;

(*v*) Examination of and recording the statement of directors, partners, members or employees; and

(*vi*) Examination on oath.

20. Under Regulation 7[9], the investigating authority may exercise certain specified powers after obtaining the specific approval of the Chairman or

Page: 182

Members of the Board. Regulation 8[10] imposes a duty to cooperate upon every

Page: 183

person in respect of whom an investigation has been ordered under

Regulation 7.

21. Regulation 9 upon which the controversy in the present case turns is extracted below:

> "**9.** ***Submission of report to the Board***.—The investigating authority shall, on completion of investigation, after taking into account all relevant facts, submit a report to the appointing authority:
>
> Provided that the investigating authority may submit an interim report pending completion of investigations if he considers necessary in the interest of investors and the securities market or as directed by the appointing authority."

Regulation 9 envisages that the investigating authority must submit a report to the appointing authority upon the completion of its investigation in the course of which all relevant facts have to be taken into account. The investigating authority may even submit an interim report, if necessary, in the interest of investors and the securities market or, if directed by the appointing authority.

22. Regulation 10 deals with the Board's power of enforcement. According to Regulation 10:

> "**10.** ***Enforcement by the Board***.—The Board may, after consideration of the report referred to in Regulation 9, if satisfied that there is a violation of these regulations and after giving a reasonable opportunity of hearing to the persons concerned, issue such directions or take such action as mentioned in Regulation 11 and Regulation 12:
>
> Provided that the Board may, in the interest of investors and the securities market, pending the receipt of the report of the investigating authority referred to in Regulation 9, issue directions under Regulation 11:
>
> Provided further that the Board may, in the interest of investors and securities market, dispense with the opportunity of pre-decisional hearing by recording reasons in writing and shall give an opportunity of post-decisional hearing to the persons concerned as expeditiously as possible."

23. The directions or measures which can be adopted by the Board are specified in Regulations 11 and 12 which read as follows:

> "**11. (1)** The Board may, without prejudice to the provisions contained in sub-sections (1), (2), (2-A) and (3) of Section 11 and Section 11-B of the Act, by an order, for reasons to be recorded in writing, in the interests of investors and securities market, issue or take any of the following actions or directions, either pending investigation or enquiry or on completion of such investigation or enquiry, namely—

(*a*) suspend the trading of the security found to be or prima facie found to be involved in fraudulent and unfair trade practice in a recognised stock exchange;

(*b*) restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;

(*c*) suspend any office-bearer of any stock exchange or self-regulatory organization from holding such position;

(*d*) impound and retain the proceeds or securities in respect of any transaction which is in violation or prima facie in violation of these regulations;

(*e*) direct and intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of a fraudulent and unfair transaction;

(*f*) require the person concerned to call upon any of its officers, other employees or representatives to refrain from dealing in securities in any particular manner;

(*g*) prohibit the person concerned from disposing of any of the securities acquired in contravention of these regulations;

(*h*) direct the person concerned to dispose of any such securities acquired in contravention of these regulations, in such manner as the Board may deem fit, for restoring the status quo ante.

(2) The Board shall issue a press release in respect of any final order passed under sub-regulation (1) in at least two newspapers of which one shall have nationwide circulation and shall also put the order on the website of the Board.

12. ***Suspension or cancellation of registration***.—(1) The Board may, without prejudice to the provisions contained in sub-sections (1), (2), (2-A) and (3) of Section 11 and Section 11-B of the Act, by an order, for reasons to be recorded in writing, in the interests of investors and securities market take the following action against an intermediary:

(*a*) issue a warning or censure;

(*b*) suspend the registration of the intermediary; or

(*c*) cancel the registration of the intermediary.

Provided that no final order of suspension or cancellation of an

intermediary for violation of these regulations shall be passed unless the procedure specified in the regulations applicable to such intermediary under the Securities and Exchange Board of India (Procedure for Holding Enquiry by enquiry officer and Imposing Penalty) Regulations, 2002 is complied with."

24. Regulation 10 empowers the Board to either issue a direction or take action as is specified in Regulations 11 and 12. Before issuing directions or taking action under Regulations 11 and 12, three steps have to be traversed by the Board. The first stage is the consideration of the report of the investigating authority which has been referred to in Regulation 9. The second is the

Page: 185

furnishing of a reasonable opportunity of being heard. The third is the satisfaction of the Board that there is a violation of the regulations. Regulation 10 indicates in clear terms that the report which has been submitted by the investigating authority under Regulation 9 is an intrinsic component of the Board's satisfaction for determining whether there has been any violation of the regulations. Regulation 10 contains a mandate for the Board to consider the report which is referred to in Regulation 9.

25. The submission which has been urged on behalf of SEBI is to the effect that:

(*i*) the investigation report is a part of the internal administrative deliberations of the Board;

(*ii*) it need not be disclosed; and that

(*iii*) only those materials which are relied on have to be disclosed,

misses a crucial part of Regulation 10.

26. The language in which Regulation 10 is couched indicates that consideration of the report of the investigating authority which is submitted under Regulation 9 is one of the components guiding the Board's satisfaction on the violation of the Regulations. The words of Regulation 10 indicate that the Board "after consideration of the report referred to in Regulation 9, if satisfied that there is a violation of these Regulations and after giving a reasonable opportunity of hearing to the persons concerned", takes action under Regulations 11 and 12. As a result of the mandate of Regulation 10, the Board has to consider the investigation report as an intrinsic element in arriving at its satisfaction on whether there has been a violation of the Regulations.

C.2. ***Duty to disclose investigative material***

27. While the respondents have submitted that only materials that have been *relied* on by the Board need to be disclosed, the appellant has contended that all *relevant* materials need to be disclosed. While trying to answer this issue, we are faced with a multitude of other equally important issues. These issues, all paramount in shaping the jurisprudence surrounding the principles of access to justice and transparency, range from identifying the purpose and extent of disclosure required, to balancing the conflicting claims of access to justice and grounds of public interest such as privacy, confidentiality and market interest.

28. An identification of the *purpose* of disclosure would lead us closer to identifying the extent of required disclosure. There are three key purposes that disclosure of information serves:

28.1. *Reliability* : The possession of information by both the parties can aid the courts in determining the truth of the contentions. The role of the court is not restricted to interpreting the provisions of law but also determining the veracity and truth of the allegations made before it. The court would be able to perform this function accurately only if both parties have access to information and possess the opportunity to address arguments and counter-arguments related to the information.

Page: 186

28.2. *Fair trial* : Since a verdict of the Court has far-reaching repercussions on the life and liberty of an individual, it is only fair that there is a legitimate expectation that the parties are provided all the aid in order for them to effectively participate in the proceedings.

28.3. *Transparency and accountability* : The investigative agencies and the judicial institution are held accountable through transparency and not opaqueness of proceedings. Opaqueness furthers a culture of prejudice, bias, and impunity—principles that are antithetical to transparency. It is of utmost importance that in a country grounded in the Rule of Law, the institutions adopt those procedures that further the democratic principles of transparency and accountability. The principles of fairness and transparency of adjudicatory proceedings are the cornerstones of the principle of open justice. This is the reason why an adjudicatory authority is required to record its reasons for every judgment or order it passes. However, the duty to be transparent in the adjudicatory process does not begin and end at providing a reasoned order. Keeping a party bereft of the information that influenced the decision of an authority undertaking an adjudicatory function also

undermines the transparency of the judicial process. It denies the party concerned and the public at large the ability to effectively scrutinise the decisions of the authority since it creates an information asymmetry.

29. The purpose of disclosure of information is not merely individualistic, that is to prevent errors in the verdict but is also towards fulfilling the larger institutional purpose of fair trial and transparency. Since the purpose of disclosure of information targets both the *outcome* (reliability) and the *process* (fair trial and transparency), it would be insufficient if only the material relied on is disclosed. Such a rule of disclosure, only holds nexus to the outcome and not the process. Therefore, as a default rule, all relevant material must be disclosed.

30. It would be fundamentally contrary to the principles of natural justice if the relevant part of the investigation report which pertains to the appellant is not disclosed. The appellant has to be given a reasonable opportunity of hearing. The requirement of a reasonable opportunity would postulate that such material which has been and has to be taken into account under Regulation 10 must be disclosed to the noticee. If the report of the investigating authority under Regulation 9 has to be considered by the Board before satisfaction is arrived at on a possible violation of the regulations, the principles of natural justice require due disclosure of the report.

31. The consequence of the Board arriving at a satisfaction that there has been a violation of the Regulations is that the Board can take recourse to the actions specified under Regulations 11 and 12. Regulation 11 empowers the Board to:

(*i*) Suspend the trading of the security found to be involved in a fraudulent and unfair trade practice in a recognised stock exchange;

(*ii*) Restraining persons from accessing the securities market and prohibiting any person associated with it from dealing in securities;

(*iii*) Suspending an office-bearer of a recognised stock exchange;

(*iv*) Impounding and retaining the proceeds or securities;

(*v*) Issuing a direction not to dispose of or alienate an asset forming part of a fraudulent and unfair transaction;

(*vi*) Prohibit the disposal of any of the securities acquired in contravention of these Regulations; and

(*vii*) Directing the disposal of any securities in accordance with

the mandate of the Board.

Under Regulation 11(2), a press release has to be issued by the Board in respect of a final order which is passed under Regulation 11(1).

32. Regulation 12 empowers the Board to suspend or cancel the registration of an intermediary among other things. The provisions of Regulations 11 and 12 indicate that the consequences of the satisfaction which is arrived at by the Board under Regulation 10, if there is a violation of the Regulations, are grave.

33. The submission of Mr C.U. Singh, learned Senior Counsel is that only those materials which are relied upon should be disclosed to the first respondent. Regulation 10, as we have noted earlier, stipulates that the satisfaction of the Board whether there has been a violation of the regulations has to be arrived at:

(*i*) after considering the report of the investigating authority referred to in Regulation 9; and

(*ii*) after giving a reasonable opportunity of hearing to the person concerned.

Once the subordinate legislation mandates that the investigating authority's report is an essential ingredient for the Board to arrive at the satisfaction, it requires due disclosure.

34. Now in the above context, it would be material to advert to the decision of this Court in *Natwar Singh*[4]. The issue before the two-Judge Bench of this Court was whether a noticee who is served with a show-cause notice under Rule 4(1) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 ("the FEMA Rules 2000"), is entitled to demand all the documents in the possession of the adjudicating authority including those documents upon which no reliance has been placed while issuing a notice to show cause as to why an enquiry should not be initiated against him.

35. Rule 4 is in the following terms:

"**4. *Holding of inquiry***.—(1) For the purpose of adjudicating under Section 13 of the Act whether any person has committed any contravention as specified in that section of the Act, the adjudicating authority shall, issue a notice to such person requiring him to show cause within such period as may be specified in the notice (being not less than ten days from the date of service thereof) why an inquiry should not be held against him.

(2) Every notice under sub-rule (1) to any such person shall indicate the nature of contravention alleged to have been committed by him.

(3) After considering the cause, if any, shown by such person, the adjudicating authority is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his legal practitioner or a chartered accountant duly authorised by him."

Rule 4(1) of the FEMA Rules 2000 indicates that in the first instance, the adjudicating authority has to issue a notice requiring the person to show cause why an enquiry should not be held against him. The stage of the notice under Rule 4(1) is not for adjudication but is for the purpose of deciding whether an enquiry should be held. If after considering the cause which is shown, the adjudicating authority is of the opinion that an enquiry should be held, thereupon under Rule 4(3), a notice is issued for the appearance of the person. Sub-rule (4) provides that on the date fixed, the adjudicating authority shall explain the contravention alleged to have been committed and under sub-rule (5) an opportunity of producing documents or evidence has to be given. Under sub-rule (8), the adjudicating authority is empowered to impose a penalty if it is satisfied, upon considering the evidence produced that there has been a contravention.

36. Now in this backdrop, B. Sudarshan Reddy, J. speaking for the two-Judge Bench of this Court interpreted Rule 4 as follows : (*Natwar Singh case*[4], SCC p. 267, para 23)

"*23*. The Rules do not provide and empower the adjudicating authority to straightaway make any inquiry into allegations of contravention against any person against whom a complaint has been received by it. Rule 4 of the Rules mandates that for the purpose of adjudication whether any person has committed any contravention, the adjudicating authority shall issue a notice to such person requiring him to show-cause as to why an *inquiry* should not be held against him. It is clear from a bare reading of the rule that show-cause notice to be so issued is not for the purposes of making any adjudication into alleged contravention but only for the purpose of deciding whether an inquiry should be held against him or not. Every such notice is required to indicate the nature of contravention alleged to have been committed by the person concerned. That after taking the cause, if any, shown by such person, the adjudicating authority is required to form an opinion as to whether an inquiry is required to be held into the allegations of contravention. It is only then the real and substantial inquiry into allegations of contravention begins."

(emphasis in original)

The above extract clearly indicates that the show-cause notice under Rule 4(1) is not for the purpose of making an adjudication into the alleged contravention but only for deciding whether an enquiry must be conducted. The stage when an enquiry is held is subsequent to the initial stage contemplated by Rule 4(1).

Page: 189

37. During the course of the adjudication, the fundamental principle is that material which is used against a person must be brought to notice. As this Court observed : (*Natwar Singh case*[4], SCC p. 269, paras 30-31)

> "*30. The right to fair hearing is a guaranteed right. Every person before an authority exercising the adjudicatory powers has a right to know the evidence to be used against him*. This principle is firmly established and recognised by this Court in *Dhakeswari Cotton Mills Ltd.* v. *CIT*[11]. However, disclosure not necessarily involves supply of the material. A person may be allowed to inspect the file and take notes. Whatever mode is used, the fundamental principle remains that nothing should be used against the person which has not been brought to his notice. *If relevant material is not disclosed to a party, there is prima facie unfairness irrespective of whether the material in question arose before, during or after the hearing*. The law is fairly well-settled if prejudicial allegations are to be made against a person, he must be given particulars of that before hearing so that he can prepare his defence. *However, there are various exceptions to this general rule where disclosure of evidential material might inflict serious harm on the person directly concerned or other persons or where disclosure would be breach of confidence or might be injurious to the public interest because it would involve the revelation of official secrets, inhibit frankness of comment and the detection of crime, might make it impossible to obtain certain clauses of essential information at all in the future* (see *R.* v. *Secy. of State for Home Deptt., ex p H*[12]).
>
> *31*. The concept of fairness may require the adjudicating authority to furnish copies of those documents upon which reliance has been placed by him to issue show-cause notice requiring the noticee to explain as to why an inquiry under Section 16 of the Act should not be initiated. To this extent, the principles of natural justice and

concept of fairness are required to be read into Rule 4(1) of the Rules. Fair procedure and the principles of natural justice are in-built into the Rules. *A noticee is always entitled to satisfy the adjudicating authority that those very documents upon which reliance has been placed do not make out even a prima facie case requiring any further inquiry. In such view of the matter, we hold that all such documents relied on by the authority are required to be furnished to the noticee enabling him to show a proper cause as to why an inquiry should not be held against him though the Rules do not provide for the same*. Such a fair reading of the provision would not amount to supplanting the procedure laid down and would in no manner frustrate the apparent purpose of the statute."

(emphasis supplied)

38. The decision of this Court distinguishes between the initial stage under Rule 4(1) which is only for the purpose of deciding whether an enquiry has to be held and the subsequent stage of adjudication into the allegations of

Page: 190

contravention. This Court further held : (*Natwar Singh case*[4], SCC p. 270, para 34)

"*34*. As noticed, a reasonable opportunity of being heard is to be provided by the adjudicating authority in the manner prescribed for the purpose of imposing any penalty as provided for in the Act and not at the stage where the adjudicating authority is required merely to decide as to whether an inquiry at all be held into the matter. Imposing of penalty after the adjudication is fraught with grave and serious consequences and therefore, the requirement of providing a reasonable opportunity of being heard before imposition of any such penalty is to be met. In contradistinction, the opinion formed by the adjudicating authority whether an inquiry should be held into the allegations made in the complaint are not fraught with such grave consequences and therefore the minimum requirement of a show-cause notice and consideration of cause shown would meet the ends of justice. A proper hearing always includes, no doubt, a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view."

39. On the facts of that case, the Court held that the enquiry against the noticee was yet to commence : (*Natwar Singh case*[4], SCC pp. 270-71, para 36)

"*36*. In the present case, the inquiry against the noticee is yet to commence. *The evidence as may be available upon which the adjudicating authority may place reliance, undoubtedly, is required to be furnished to the person proceeded against at the second stage of inquiry into allegations of contravention*. It is at that stage, the adjudicating authority is not only required to give an opportunity to such person to produce such documents as evidence as he may consider relevant to the inquiry, but also enforce attendance of any person acquainted with the facts of the case to give evidence or to produce any document which in its opinion may be useful for or relevant to the subject-matter of the inquiry. *It is no doubt true that natural justice often requires the disclosure of the reports and evidence in the possession of the deciding authority and such reports and evidence relevant to the subject-matter of the inquiry may have to be furnished unless the scheme of the Act specifically prohibits such disclosure*."

(emphasis supplied)

40. This Court further noted that the documents which the appellant wanted were documents upon which no reliance was placed by the authority for setting the law into motion. Consequently, this Court concluded that : (*Natwar Singh case*[4], SCC p. 275, para 48)

"*48*. On a fair reading of the statute and the Rules suggests that there is no duty of disclosure of all the documents in possession of the adjudicating authority before forming an opinion that an inquiry is required to be held into the alleged contraventions by a noticee. Even the principles of natural justice and concept of fairness do not require the statute and the Rules to be so read. Any other interpretation may result in defeat of the very

object of the Act. Concept of fairness is not a one-way street. The principles of natural justice are not intended to operate as roadblocks to obstruct statutory inquiries. Duty of adequate disclosure is only an additional procedural safeguard in order to ensure the attainment of the fairness and it has its own limitations. The extent of its applicability depends upon the statutory framework."

41. The issue in *Natwar Singh*[4] was whether the authority was bound to disclose to the noticee all the documents in its possession before forming an opinion on whether an enquiry is required to be held into the alleged contravention by the noticee. The Court held that at that stage there was no requirement of furnishing all such documents

to the noticee since the only purpose of the notice under Rule 4(1) was for deciding whether an enquiry should be held. Rule 4(1), in other words, was not a final adjudication and consequently the requirement of a disclosure of all materials in the possession of the authority was not attracted. At that stage, it was sufficient that only documents that have been *relied* on are disclosed.

42. The High Court in the present case has palpably misconstrued the judgment in *Natwar Singh*[4]. The High Court has failed to notice that the issue in that case was whether at the stage when the authority decides under Rule 4(1) of the FEMA Rules 2000 whether an enquiry should be held, a disclosure of all documents in the possession of the authority to the noticee is warranted. This was answered in the negative. This Court distinguished the stage of adjudication as distinct from the initial stage under Rule 4(1). At the stage of adjudication, all documents useful or relevant to the subject-matter have to be disclosed to the noticee, subject to exceptions noticed by the court.

43. On behalf of the Board, it has been urged that the investigation report is in the nature of an inter-departmental communication and need not be disclosed. Reliance was placed on the judgment of this Court in *Krishna Chandra Tandon*[6] to buttress the submission. However, it is clear from the judgment that even if the documents are merely inter-departmental communications, there is a duty to disclose such documents if they have been relied upon by the enquiry officer. A two-Judge Bench of this Court observed : (SCC pp. 380-81, para 16)

> "*16*. Mr Hardy next contended that the appellant had really no reasonable opportunity to defend himself and in this connection he invited our attention to some of the points connected with the enquiry with which we have now to deal. It was first contended that inspection of relevant records and copies of documents were not granted to him. The High Court has dealt with the matter and found that there was no substance in the complaint. All that Mr Hardy was able to point out to us was that the reports received by the CIT from his departmental subordinates before the charge-sheet was served on the appellant had not been made available to the

appellant. It appears that on complaints being received about his work the CIT had asked the Inspecting Assistant Commissioner Shri R.N. Srivastava to make a report. He made a report. It is obvious that the appellant was not entitled to a copy of the report made by Mr Srivastava or any other officer unless the enquiry officer relied on these

reports. It is very necessary for an authority which orders an enquiry to be satisfied that there are prima facie grounds for holding a disciplinary enquiry and, therefore, before he makes up his mind he will either himself investigate or direct his subordinates to investigate in the matter and it is only after he receives the result of these investigations that he can decide as to whether disciplinary action is called for or not. *Therefore, these documents of the nature of inter-departmental communications between officers preliminary to the holding of enquiry have really no importance unless the enquiry officer wants to rely on them for his conclusions. In that case it would only be right that copies of the same should be given to the delinquent*. It is not the case here that either the enquiry officer or the CIT relied on the report of Shri R.N. Srivastava or any other officer for his finding against the appellant. Therefore, there is no substance in this submission."

(emphasis supplied)

44. However, merely because the investigating authority has denied placing reliance on the report would not mean that such material cannot be disclosed to the noticee. The court may look into the relevance of the material to the proposed action and its nexus to the stage of adjudication. Simply put, this entails evaluating whether the material in all reasonable probability would influence the decision of the authority. The above position was laid down by this Court in *Khudiram Das* v. *State of W.B.*[5] Ruling in the context of preventive detention, a four-Judge Bench of this Court observed : (SCC p. 97, para 15)

> "*15. Now, the proposition can hardly be disputed that if there is before the District Magistrate material against the detenu which is of a highly damaging character and having nexus and relevancy with the object of detention, and proximity with the time when the subjective satisfaction forming the basis of the detention order was arrived at, it would be legitimate for the Court to infer that such material must have influenced the District Magistrate in arriving at his subjective satisfaction and in such a case the Court would refuse to accept the bald statement of the District Magistrate that he did not take such material into account and excluded it from consideration*. It is elementary that the human mind does not function in compartments. When it receives impressions from different sources, it is the totality of the impressions which goes into the making of the decision and it is not possible to analyse and dissect the impressions and predicate which impressions went into the making of the decision and which did not. Nor is it an easy exercise to erase the impression created by particular circumstances so as to exclude the influence of such impression in the decision-making process. Therefore, in a case where the material before the

District Magistrate is of a character which would in all reasonable

probability be likely to influence the decision of any reasonable human being, the Court would be most reluctant to accept the ipse dixit of the District Magistrate that he was not so influenced and a fortiori, if such material is not disclosed to the detenu, the order of detention would be vitiated, both on the ground that all the basic facts and materials which influenced the subjective satisfaction of the District Magistrate were not communicated to the detenu as also on the ground that the detenu was denied an opportunity of making an effective representation against the order of detention."

(emphasis supplied)

45. The principle that the material that may influence the decision of a quasi-judicial authority to award a penalty must be disclosed to a delinquent was affirmed by this Court in *Union of India* v. *Mohd. Ramzan Khan*[13]. In that case, this Court laid down that a delinquent officer is entitled to receive the report of the enquiry officer which has been furnished to the disciplinary authority. This principle was affirmed by a Constitution Bench of this Court in *ECIL* v. *B. Karunakar*[14]. The rationale behind the right to receive the report of the enquiry officer was explained by this Court in the following terms : (*ECIL case*[14], SCC p. 754, para 26)

> *"26. The reason why the right to receive the report of the enquiry officer is considered an essential part of the reasonable opportunity at the first stage and also a principle of natural justice is that the findings recorded by the enquiry officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the enquiry officer without*

giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the enquiry officer along with the evidence on record. In the circumstances, the findings of the enquiry officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the enquiry officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute any additional material before the disciplinary

Page: 194

authority of which the delinquent employee has no knowledge. However, when the enquiry officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusions. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the enquiry officer's findings. The disciplinary authority is then required to consider the evidence, the report of the enquiry officer and the representation of the employee against it."

(emphasis supplied)

46. For the purpose of determining if prejudice has been caused by a non-disclosure, this Court held that the report must be furnished to the aggrieved person and the employee must shoulder the burden of proving on facts that his case was prejudiced—either the outcome or the punishment—by the non-disclosure : (*ECIL case*[14], SCC pp. 757-58, paras 30-31)

"*30*. … [*v*] The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may

have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. *Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits*. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice.

31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the courts and tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to

Page: 195

the court/tribunal and *give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the court/tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the court/tribunal should not interfere with the order of punishment*. The court/tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present."

(emphasis supplied)

47. In *State Bank of Patiala* v. *S.K. Sharma*[15], this Court noted that if a facet of a rule of natural justice is violated on grounds of preserving public interest, the entire proceeding is not vitiated unless prejudice has been caused to the delinquent. A distinction was made between the complete non-abidance of the principles of natural justice, that is, where no information was disclosed and arguments of insufficient disclosure. It was held that when the latter argument is made, the Court must determine if the insufficient disclosure caused prejudice.

This Court observed : (SCC pp. 385-87, para 28)

> "*28*. The decisions cited above make one thing clear viz. principles of natural justice cannot be reduced to any hard-and-fast formulae. As said in *Russell* v. *Duke of Norfolk*[16] way back in 1949, these principles cannot be put in a straitjacket. Their applicability depends upon the context and the facts and circumstances of each case. (See *Mohinder Singh Gill* v. *Chief Election Commr.*[17]) The objective is to ensure a fair hearing, a fair deal, to the person whose rights are going to be affected. (See *A.K. Roy* v. *Union of India*[18] and *Swadeshi Cotton Mills* v. *Union of India*[19].) As pointed out by this Court in *A.K. Kraipak* v. *Union of India*[20], the dividing line between quasi-judicial function and administrative function (affecting the rights of a party) has become quite thin and almost indistinguishable—a fact also emphasised by the House of Lords in *Council of Civil Service Unions* v. *Minister for the Civil Service*[21] where the principles of natural justice and a fair hearing were treated as synonymous. Whichever the case, it is from the standpoint of fair hearing—applying the test of prejudice, as it may be called—that any and every complaint of violation of the rule of audi alteram partem should be examined. Indeed, there may be situations where observance of the requirement of prior notice/hearing may defeat the very proceeding—which may result in grave prejudice to public interest. It is for this reason that the rule of post-decisional hearing as a sufficient compliance with natural justice was evolved in some of the cases e.g.

Liberty Oil Mills v. *Union of India*[22]. *There may also be cases where the public interest or the interests of the security of State or other similar considerations may make it inadvisable to observe the rule of audi alteram partem altogether [as in the case of situations contemplated by clauses (b) and (c) of the proviso to Article 311(2)] or to disclose the material on which a particular action is being taken*. There may indeed be any number of varying situations which it is not possible for anyone to foresee. In our respectful opinion, the principles emerging from the decided cases can be stated in the following terms in relation to the disciplinary orders and enquiries : a distinction ought to be made between violation of the principle of natural justice, audi alteram partem, as such *and* violation of a facet of the said principle. In other words, distinction is between "no notice"/"no hearing" and "no

adequate hearing" or to put it in different words, "no opportunity" and "no adequate opportunity". To illustrate—take a case where the person is dismissed from service without hearing him altogether (as in *Ridge* v. *Baldwin*[23]). It would be a case falling under the first category and the order of dismissal would be *invalid*—or void, if one chooses to use that expression (*Calvin* v. *Carr*[24]). But where the person is dismissed from service, say, without supplying him a copy of the enquiry officer's report (*ECIL* v. *B. Karunakar*[14]) or without affording him a due opportunity of cross-examining a witness (*K.L. Tripathi*[25]) it would be a case falling in the latter category—violation of a facet of the said rule of natural justice—in which case, the validity of the order has to be tested on the touchstone of prejudice i.e. whether, all in all, the person concerned did or did not have a fair hearing. *It would not be correct—in the light of the above decisions to say that for any and every violation of a facet of natural justice or of a rule incorporating such facet, the order passed is altogether void and ought to be set aside without further enquiry. In our opinion, the approach and test adopted in B. Karunakar*[14] *should govern all cases where the complaint is not that there was no hearing (no notice, no opportunity and no hearing) but one of not affording a proper hearing (i.e. adequate or a full hearing) or of violation of a procedural rule or requirement governing the enquiry; the complaint should be examined on the touchstone of prejudice as aforesaid*."

(emphasis in original and supplied)

48. In *State of U.P.* v. *Ramesh Chandra Mangalik*[26], it was held that the duty to disclose is confined only to material and relevant documents which may have been relied upon in support of the charges. In that case, the personal file of other officers was not supplied to the delinquent officer. It was noted that such documents have not been relied upon by the enquiry officer. The

delinquent officer was not able to prove the relevance of the documents that were suppressed. This Court observed : (SCC pp. 448-49, para 11)

> "*11*. The learned counsel for the appellant has further submitted that particular documents, copies of which are said to have not been supplied are not indicated by the respondent, much less in the order[27] of the High Court nor has their relevance been pointed out. The submission is that the delinquent will also have to show as to in

what manner any particular document was relevant in connection with the inquiry and what prejudice was caused to him by non-furnishing of a copy of the document. In support of this contention, reliance has been placed upon a case reported in *Chandrama Tewari* v. *Union of India*[7]. *It has been observed in this case that the obligation to supply copies of documents is confined only to material and relevant documents which may have been relied upon in support of the charges. It is further observed that if a document even though mentioned in the memo of charges, has no bearing on the charges or if it is not relied upon or it may not be necessary for cross-examination of any witness, non-supply of such a document will not cause any prejudice to the delinquent. The inquiry would not be vitiated in such circumstances*. In *State of T.N.* v. *Thiru K.V. Perumal*[28] relied upon by the appellant, it is held that *it is for the delinquent to show the relevance of a document a copy of which he insists to be supplied to him. Prejudice caused by non-supply of document has also to be seen*. In yet another case relied upon by the learned counsel for the appellant, reported in *State of U.P.* v. *Harendra Arora*[29] it has been held that a delinquent must show the prejudice caused to him by non-supply of a copy of the document where order of punishment is challenged on that ground."

(emphasis supplied)

49. In *Kothari Filaments* v. *Commr. of Customs*[30], this Court held that the Commissioner of Customs in the exercise of its quasi-judicial powers cannot pass an order on the basis of material which is only known to the authorities. This Court held : (SCC pp. 195-96, paras 14-15)

"*14*. The statutory authorities under the Act exercise quasi-judicial function. By reason of the impugned order, the properties could be confiscated, redemption fine and personal fine could be imposed in the event an importer was found guilty of violation of the provisions of the Act. In the event a finding as regards violation of the provisions of the Act is arrived at, several steps resulting in civil or evil consequences may be taken. The principles of natural justice, therefore, were required to be complied with.

15. The Act does not prohibit application of the principles of natural justice. The Commissioner of Customs either could not have

passed the order on the basis of the materials which were known only to them, copies whereof were not supplied or inspection thereto had not been given. He, thus, could not have adverted to the report of the overseas enquiries. A person charged with misdeclaration is entitled to know the ground on the basis whereof he would be penalised. He may have an answer to the charges or may not have. But there cannot be any doubt whatsoever that in law he is entitled to a proper hearing which would include supply of the documents. Only on knowing the contents of the documents, he could furnish an effective reply."

50. The following principles emerge from the above discussion:

50.1. A quasi-judicial authority has a duty to disclose the material that has been relied upon at the stage of adjudication.

50.2. An ipse dixit of the authority that it has not relied on certain material would not exempt it of its liability to disclose such material if it is *relevant* to and has a *nexus* to the action that is taken by the authority. In all reasonable probability, such material would have influenced the decision reached by the authority.

50.3. Thus, the actual test is whether the material that is required to be disclosed is relevant for purpose of adjudication. If it is, then the principles of natural justice require its due disclosure.

51. The investigation report forms the material considering which, the Board arrives at a satisfaction regarding whether there has been a violation of the Regulations. If it is satisfied that there has been a violation of the Regulations, after giving a reasonable opportunity to be heard, the Board is empowered to take action according to Regulations 11 and 12. It would not suffice for the first respondent to claim as it did before the High Court that it did not rely on the investigation report. The ipse dixit of the authority that it was not influenced by certain material would not suffice. If the material is relevant to and has a nexus to the stage at which satisfaction is reached by an authority, such material would be deemed to be important for the purpose of adjudication. The written submissions of the Board clearly state that the findings of the investigation report are important for the authority to decide whether there are any prima facie grounds to initiate enforcement proceedings under Regulation 10. The relevant extract of the submissions is reproduced below:

"It is submitted that Regulation 9 of the PFUTP Regulations require the investigating authority to submit the report after completion of the investigation to the appointing authority. However, the provision does not require furnishing of the report to the noticee. Further, the investigation report is merely a culmination of documents which the investigating authority relies on/comes across while conducting the investigation and is not a piece of evidence in itself. *It is a report*

which is necessary for an authority, who orders an investigation, to decide as to whether there are prima facie grounds to initiate enforcement proceedings or not. Therefore,

Page: 199

before the authority makes up his mind, he will either himself investigate or direct his subordinates to investigate in the matter. It is only after the authority receives the report of the investigation that he can decide as to whether action is called for or not. Therefore, the investigation report is in the nature of inter-departmental communications between officers investigating the matter and authority who can decide any enforcement action against the entity.

....

The findings recorded in the investigation report against the noticee are brought out in the SCN and the copies of all the documents that are relied upon by SEBI, while issuing the SCN are always shared with the concerned. The present case is no exception."

(emphasis supplied)

52. The above extracts indicate that the findings of the investigation report are relevant for the Board to arrive at the satisfaction on whether the Regulations have been violated. Even if it is assumed that the report is an inter-departmental communication, as held in *Krishna Chandra Tandon*[6], there is a duty to disclose such report if it is relevant for the satisfaction of the enforcement authority for the determination of the alleged violation.

53. In *Khudiram Das*[5], a four-Judge Bench of this Court laid down a two-prong test for the standard of "relevancy"; *firstly*, the material must have nexus with the order and *secondly*, the material *might* have influenced the decision of the authority. A Constitution Bench of this Court in *Karunakar*[14] held that the non-disclosure of the relevant information is not in itself sufficient to warrant the setting aside of the order of punishment. It was held that in order to set aside the order of punishment, the aggrieved person must be able to prove that prejudice has been caused to him due to non-disclosure. To prove prejudice, he must prove that had the material been disclosed to him the outcome or the punishment would have been different. The test for the extent of disclosure and the corresponding remedy for non-disclosure is dependent on the objective that the disclosure seeks to achieve. Therefore, the impact of non-disclosure on the *reliability* of the verdict must also be determined vis-à-vis, the overall fairness of the

proceeding. While determining the reliability of the verdict and punishment, the court must also look into the possible uses of the undisclosed information for purposes ancillary to the outcome, but that which *might* have impacted the verdict.

54. In *Natwar Singh*[4], it was held that material which is *relevant* to the subject-matter of the proceedings must be disclosed, unless the scheme of the statute indicates to the contrary. The non-disclosure of such material is prima facie arbitrary. A deviation from this general rule was made based on the stage of the proceedings. It was held that it is sufficient to disclose the materials *relied* on if it is for the purpose of issuing a show-cause notice for initiating

Page: 200

inquiry. However, in the present case, since the report of the investigating authority under Regulation 9 enters into the calculus of circumstances borne in mind by the Board in arriving at its satisfaction under Regulation 10 for taking actions as specified in Regulations 11 and 12, it would be contrary to the Regulations to assert that the investigation report is merely an internal document of which a disclosure is not warranted. In any event, the language of Regulation 10 makes it clear that the Board forms an opinion regarding the violation of Regulations after considering the investigation report prepared under Regulation 9. Thus, the investigation report has to be duly disclosed to the noticee. However, the right to disclosure is not absolute. It needs to be determined if the non-disclosure of the investigative report is protected by any of the exceptions to the rule.

C.3. *Exceptions to the duty to disclose*

55. The contention of the respondents is that since the investigation report under Regulation 9 would also include information on "commercial and business interests, documents involving strategic information, investment strategies, rationale for investments, commercial information and information regarding the business affairs of the entities/persons concerned" affecting the privacy and the competitive position of other entities, it should not be disclosed. Buttressing this argument, the respondent referred to clauses (*d*), (*e*) and (*h*) of sub-section (1) of the RTI Act which states that there shall be no duty to disclose information affecting the commercial confidence or that which could harm the competitive position of a third-party or impede the process of investigation, unless there is a larger public interest in the disclosure of information. The RTI Act attempts to balance the interests of third-party individuals whose information may

be disclosed and public interest in ensuring transparency and accountability. The RTI Act is reflective of the parliamentary intent to facilitate transparency in the administration, which is the rationale for the disclosure of information. This is subject to certain defined exceptions.

56. We cannot be oblivious to the wide range of sensitive information that the investigation report submitted under Regulation 9 may cover, ranging from information on financial transactions and on other entities in the securities market, which might affect third-party rights. The report may contain market sensitive information which may impinge upon the interest of investors and the stability of the securities market. The requirement of compliance with the principles of natural justice cannot therefore be read to encompass the right to a roving disclosure on matters unconnected or as regards the dealings of third parties. The investigating authority may acquire information of sensitive nature bearing upon the orderly functioning of the securities market. The right of the noticee to disclosure must be balanced with a need to preserve any other third-party rights that may be affected.

57. In *Natwar Singh*[4], this Court has observed that there are exceptions to the general rule of disclosing evidentiary material. This Court held that such exceptions can be invoked if the disclosure of material causes harm to others,

Page: 201

is injurious to public health or breaches confidentiality. While identifying the purpose of disclosure, we have held that one of the crucial objectives of the right to disclosure is securing the transparency of institutions. The claims of third-party rights vis-à-vis the right to disclosure cannot be pitted as an issue of public interest and fair adjudication. The creation of such a binary reduces and limits the purpose that disclosure of information serves. The respondent should prima facie establish that the disclosure of the report would affect third -party rights. The onus then shifts to the appellant to prove that the information is *necessary* to defend his case appropriately.

58. Applying this test to the facts, we find that the appellant is unable to prove that the disclosure of the entire report is necessary for him to defend the case. The first respondent made the following arguments making a prima facie case that the disclosure of the report would violate third-party rights:

(*i*) Investigation reports contain information on the volatile nature of the market;

(*ii*) The report also contains the personal information of various stakeholders. Disclosure will violate the right to privacy of the third-party individuals; and

(*iii*) It includes strategic information.

59. The appellant did not sufficiently discharge his burden by proving that the non-disclosure of the above information would affect his ability to defend himself. However, merely because a few portions of the enquiry report involve information on third parties or confidential information on the securities market, the respondent does not have a right to withhold the disclosure of the relevant portions of the report. The first respondent can only claim non-disclosure of those sections of the report which deal with third-party personal information and strategic information on the functioning of the securities market.

60. Therefore, the Board should determine such parts of the investigation report under Regulation 9 which have a bearing on the action which is proposed to be taken against the person to whom the notice to show cause is issued and disclose the same. It can redact information that impinges on the privacy of third parties. It cannot exercise unfettered discretion in redacting information. On the other hand, such parts of the report which are necessary for the appellant to defend his case against the action proposed to be taken against him need to be disclosed. It is needless to say that the investigating authority is duty-bound to disclose such parts of the report to the noticee in good faith. If the investigating authority attempts to circumvent its duty by revealing minimal information, to the prejudice of the appellant, it will be in violation of the principles of natural justice. The court/appellate forum in an appropriate case will be empowered to call for the investigation report and determine if the duty to disclose has been effectively complied with.

61. The notice to show cause issued to the appellant is for violation of the provisions of the SEBI Act, SCRA and the PFUTP Regulations. The show-cause

notice has specifically referred to what was revealed during the course of the investigation and has invoked the provisions of the PFUTP Regulations in the allegations against the appellant. Para 8(2) of the show-cause notice is extracted below:

"(II) It is alleged that Mr T. Takano, during whose tenure the business transactions with FDSL started by virtue of his position as MD & CEO of Ricoh during FY 2012-13 to FY 2014-15, was actively

involved in committing the fraud and had knowingly restricted the mandate given to PwC to six months so as to succeed in hiding his role in the commission of fraud of publishing untrue financial statement of Ricoh which resulted in misleading the investors about the financial performance of the company and thereby resulted in inducement of traders in the scrip. The said acts of Noticee 2 are alleged to be in violation of Regulations 3(*b*), (*c*), (*d*), 4(1) and 4(2)(*e*), (*f*), (*k*) and (*r*) of the SEBI (PFUTP) Regulations, 2003 and clause 49(V) read with 41(II)(*a*) of the erstwhile Listing Agreement."

Since the show-cause notice has specifically relied upon the report of the investigation and invokes, inter alia, a violation of the PFUTP Regulations by the appellant, the mandate of Regulation 10 must be complied with. However, while directing that there should be a disclosure of the investigation report to the appellant, it needs to be clarified that this would not permit the appellant to demand roving inspection of the investigation report which may contain sensitive information as regards unrelated entities and transactions.

D. *Conclusion*

62. The conclusions are summarised below:

62.1. The appellant has a right to disclosure of the material *relevant* to the proceedings initiated against him. A deviation from the general rule of disclosure of relevant information was made in *Natwar Singh*[4] based on the stage of the proceedings. It is sufficient to disclose the materials *relied* on if it is for the purpose of issuing a show-cause notice for deciding whether to initiate an inquiry. However, all information that is relevant to the proceedings must be disclosed in adjudication proceedings.

62.2. The Board under Regulation 10 considers the investigation report submitted by the investigating authority under Regulation 9, and if it is satisfied with the allegations, it could issue punitive measures under Regulations 11 and 12. Therefore, the investigation report is not merely an internal document. In any event, the language of Regulation 10 makes it clear that the Board forms an opinion regarding the violation of Regulations after considering the investigation report prepared under Regulation 9.

62.3. The disclosure of material serves a threefold purpose of decreasing the error in the verdict, protecting the fairness of the proceedings, and enhancing the transparency of the investigatory bodies and judicial institutions.

62.4. A focus on the institutional impact of suppression of material prioritises the process as opposed to the outcome. The direction of the Constitution Bench of this Court in *Karunakar*[14] that the non-disclosure of relevant information would render the order of punishment void only if the aggrieved person is able to prove that prejudice has been caused to him due to non-disclosure is founded both on the *outcome* and the *process*.

62.5. The right to disclosure is not absolute. The disclosure of information may affect other third-party interests and the stability and orderly functioning of the securities market. The respondent should prima facie establish that the disclosure of the report would affect third -party rights and the stability and orderly functioning of the securities market. The onus then shifts to the appellant to prove that the information is *necessary* to defend his case appropriately.

62.6. Where some portions of the enquiry report involve information on third parties or confidential information on the securities market, the respondent cannot for that reason assert a privilege against disclosing any part of the report. The respondents can withhold disclosure of those sections of the report which deal with third-party personal information and strategic information bearing upon the stable and orderly functioning of the securities market.

63. The Board shall be duty-bound to provide copies of such parts of the report which concern the specific allegations which have been levelled against the appellant in the notice to show cause. However, this does not entitle the appellant to receive sensitive information regarding third parties and unrelated transactions that may form part of the investigation report.

64. During the course of the hearing, the Court has been apprised of the fact that though the hearing before the designated officer has been held, no orders have been passed in deference to the pendency of the present proceedings. Having regard to the conclusion which has been arrived at above, we direct that after a due disclosure is made to the appellant in terms as noted above, a reasonable opportunity shall be granted to the appellant of being heard with reference to the matters of disclosure in compliance with the principles of natural justice before a final decision is arrived at.

65. The disclosure in terms of the present judgment shall be communicated to the appellant within one month from the date of this judgment and the appellant shall be given a period of one month to respond. The officer concerned in charge of the enquiry shall fix a date for personal hearing before taking a final decision. The appeals are allowed in the above terms.

66. The judgment of the Division Bench of the High Court of Judicature at Bombay dated 29-9-2020[1] is accordingly set aside. In the circumstances of the case, there shall be no order as to costs.

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

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† Arising from the Judgment and Order in *T. Takano* v. *SEBI*, 2020 SCC OnLine Bom 6204 [Bombay High Court, WP (L) No. 3298 of 2020, dt. 29-9-2020] and *T. Takano* v. *SEBI*, 2020 SCC OnLine Bom 7330 [Bombay High Court, Review Petition (L) No. 4780 of 2020, dt. 22-10-2020] **[Reversed]**

[1] *T. Takano* v. *SEBI*, 2020 SCC OnLine Bom 6204

[2] *T. Takano* v. *SEBI*, 2020 SCC OnLine Bom 7330

[3] *A.T. Rajan* v. *SEBI*, 2020 SCC OnLine SAT 127

[4] *Natwar Singh* v. *Director of Enforcement*, (2010) 13 SCC 255

[5] *Khudiram Das* v. *State of W.B.*, (1975) 2 SCC 81 : 1975 SCC (Cri) 435

[6] *Krishna Chandra Tandon* v. *Union of India*, (1974) 4 SCC 374 : 1974 SCC (L&S) 329

[7] *Chandrama Tewari* v. *Union of India*, 1987 Supp SCC 518 : 1988 SCC (L&S) 226

[8] "**6. *Powers of investigating authority***.—Without prejudice to the powers conferred under the Act, the investigating authority shall have the following powers for the conduct of investigation, namely:

(1) to call for information or records from any person specified in Section 11(2)(i) of the Act;

(2) to undertake inspection of any book, or register, or other document or record of any listed public company or a public company (not being intermediaries referred to in Section 12 of the Act) which intends to get its securities listed on any recognised stock exchange where the investigating authority has reasonable grounds to believe that such company has been conducting in violation of these regulations;

(3) to require any intermediary or any person associated with securities market in any manner to furnish such information to, or produce such books, or registers, or other documents, or record before him or any person authorized by him in this behalf as he may consider necessary if the furnishing of such information or the production of such books, or registers, or other documents, or record is relevant or necessary for the purposes of the investigation;

(4) to keep in his custody any books, registers, other documents and record produced under this regulation for a maximum period of one month which may be extended up to a period of six months by the Board:

Provided that the investigating authority may call for any book, register, other document or

record if the same is needed again:

Provided further that if the person on whose behalf the books, registers, other documents and record are produced requires certified copies of the books, registers, other documents and record produced before the investigating authority, he shall give certified copies of such books, registers, other documents and record to such person or on whose behalf the books, registers, other documents and record were produced;

(5) to examine orally and to record the statement of the person concerned or any Director, partner, member or employee of such person and to take notes of such oral examination to be used as an evidence against such person:

Provided that the said notes shall be read over to, or by, and signed by, the person so examined;

(6) to examine on oath any manager, managing director, officer or other employee of any intermediary or any person associated with securities market in any manner in relation to the affairs of his business and may administer an oath accordingly and for that purpose may require any of those persons to appear before him personally."

[9] "**7. *Power of the investigating authority to be exercised with prior approval***.—The investigating authority may, after obtaining specific approval from the Chairman or Member also exercise all or any of the following powers, namely:

(*a*) to call for information and record from any bank or any other authority or board or corporation established or constituted by or under any Central, State or Provincial Act in respect of any transaction in securities which are under investigation;

(*b*) to make an application to the Judicial Magistrate of the First Class having jurisdiction for an order for the seizure of any books, registers, other documents and record, if in the course of investigation, the investigating authority has reasonable ground to believe that such books, registers, other

documents and record of, or relating to, any intermediary or any person associated with securities market in any manner may be destroyed, mutilated, altered, falsified or secreted;

(*c*) to keep in his custody the books, registers, other documents and record seized under these regulations for such period not later than the conclusion of the investigation as he considers necessary and thereafter to return the same to the person, the company or the other body corporate, or, as the case may be, to the managing director or the manager or any other person from whose custody or power they were seized:

Provided that the investigating authority may, before returning such books, registers, other documents and record as aforesaid, place identification marks on them or any part thereof;

(*d*) save as otherwise provided in this regulation, every search or seizure made under this regulation shall be carried out in accordance with the provisions of the Criminal Procedure Code, 1973 (2 of 1974) relating to searches or seizures made under that Code."

[10] "**8. *Duty to cooperate, etc*.**—(1) It shall be the duty of every person in respect of whom an investigation has been ordered under Regulation 7—

(*a*) to produce to the investigating authority or any person authorized by him such books, accounts and other documents and record in his custody or control and to furnish such statements and information as the investigating authority or the person so authorized by him may reasonably require for the purposes of the investigation;

(*b*) to appear before the investigating authority personally when required to do so by him under Regulation 6 or Regulation 7 to answer any question which is put to him by the investigating authority in pursuance of the powers under the said regulations.

(2) Without prejudice to the provisions of Sections 235 to 241 of the Companies Act, 1956 (1 of 1956), it shall be the duty of every manager, managing director, officer and other employee of the company and every intermediary referred to in Section 12 of the Act or every person associated with the securities market to preserve and to produce to the investigating authority or any person authorized by him in this behalf, all the books, registers, other documents and record of, or relating to, the company or, as the case may be, of or relating to, the intermediary or such person, which are in their custody or power.

(3) Without prejudice to the generality of the provisions of sub-regulations (1) and (2), such person shall—

(*a*) allow the investigating authority to have access to the premises occupied by such person at all reasonable times for the purpose of investigation;

(*b*) extend to the investigating authority reasonable facilities for examining any books, accounts and other documents in his custody or control (whether kept manually or in computer or in any other form) reasonably required for the purposes of the investigation;

(*c*) provide to such investigating authority any such books, accounts and records which, in the opinion of the investigating authority, are relevant to the investigation or, as the case may be, allow him to take out computer outprints thereof."

[11] *Dhakeswari Cotton Mills Ltd.* v. *CIT*, (1955) 1 SCR 941 : AIR 1955 SC 65

[12] *R.* v. *Secy. of State for Home Deptt., ex p H*, 1995 QB 43 : (1994) 3 WLR 1110 : (1995) 1 All ER 479 (CA)

[13] *Union of India* v. *Mohd. Ramzan Khan*, (1991) 1 SCC 588 : 1991 SCC (L&S) 612

[14] *ECIL* v. *B. Karunakar*, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184

[15] *State Bank of Patiala* v. *S.K. Sharma*, (1996) 3 SCC 364

[16] *Russell* v. *Duke of Norfolk*, (1949) 1 All ER 109 : 65 TLR 225 (CA)

[17] *Mohinder Singh Gill* v. *Chief Election Commr.*, (1978) 1 SCC 405

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[18] *A.K. Roy* v. *Union of India*, (1982) 1 SCC 271 : 1982 SCC (Cri) 152

[19] *Swadeshi Cotton Mills* v. *Union of India*, (1981) 1 SCC 664

[20] *A.K. Kraipak* v. *Union of India*, (1969) 2 SCC 262

[21] *Council of Civil Service Unions* v. *Minister for the Civil Service*, 1985 AC 374 : (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL)

[22] *Liberty Oil Mills* v. *Union of India*, (1984) 3 SCC 465

[23] *Ridge* v. *Baldwin*, 1964 AC 40 : (1963) 2 WLR 935 : (1963) 2 All ER 66 (HL)

[24] *Calvin* v. *Carr*, 1980 AC 574 : (1979) 2 WLR 755 : (1979) 2 All ER 440 (PC)

[25] *K.L. Tripathi* v. *SBI*, (1984) 1 SCC 43 : 1984 SCC (L&S) 62

[26] *State of U.P.* v. *Ramesh Chandra Mangalik*, (2002) 3 SCC 443 : 2002 SCC (L&S) 413

[27] *Ramesh Chandra Mangalik* v. *State of U.P.*, 1999 SCC OnLine All 1580

[28] *State of T.N.* v. *Thiru K.V. Perumal*, (1996) 5 SCC 474 : 1996 SCC (L&S) 1280

[29] *State of U.P.* v. *Harendra Arora*, (2001) 6 SCC 392 : 2001 SCC (L&S) 959

[30] *Kothari Filaments* v. *Commr. of Customs*, (2009) 2 SCC 192 : (2009) 1 SCC (Cri) 705

555

BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

APPEAL NO. 37/2024
(I.A. NO.464/2024, I.A. NO.463/2024
AND I.A. NO.22/2025)

IN THE MATTER OF:

1. **M/S. SUMIT KNIT FAB**
Through its Proprietor Rishi Jethi,
3-b, Industrial Area-A Extension,
Ghore Wali Road, Ludhiana,
Punjab-141010

...Appellant

Verses

1. **PUNJAB POLLUTION CONTROL BOARD**
Through its Chairman,
Vatavaran Bhawan, Nabha Road, Patiala

2. **PUNJAB POLLUTION CONTROL BOARD**
Through its Member Secretary,
Vatavaran Bhawan, Nabha Road, Patiala

3. **ADDITIONAL SENIOR ENVIRONMENTAL ENGINEER**
Punjab Pollution Control Board,
Vatavaran Bhawan, Nabha Road, Patiala

4. **REGIONAL ENVIRONMENTAL ENGINEER**
Punjab Pollution Control Board,
Zonal Office-1, E648-B,
Phase-V, Focal Point Ludhiana

TRUE COPY

...Respondent(s)

COUNSELS FOR APPELLANT(S):

COUNSELS FOR RESPONDENT(S):

Ms. Atika Singh and Ms. Richa Kapoor, Advocates for PSPCB

CORAM:

HON'BLE MR. JUSTICE PRAKASH SHRIVASTAVA, CHAIRPERSON
HON'BLE MR. JUSTICE SUDHIR AGARWAL, JUDICIAL MEMBER
HON'BLE DR. A. SENTHIL VEL, EXPERT MEMBER

RESERVED ON: JANUARY 15, 2025
PRONOUNCED ON: APRIL 01, 2025

JUDGMENT

BY HON'BLE MR. JUSTICE SUDHIR AGARWAL, JUDICIAL MEMBER

1. This is an Appeal assailing the order dated 24.07.2024 (at page 103 of paper book) passed by Punjab State Pollution Control Board (hereinafter referred to as **'PSPCB'**) imposing environmental compensation of Rs.6,42,25,000/- upon appellant for the period of violation i.e., from 01.04.2005 to 25.04.2019 and directing appellant to deposit the said amount within 15 days failing which PSPCB shall be constrained to take action for the recovery of the said amount.

2. The appellant has mentioned in the Memo of Appeal that it has been preferred under Section 18(1) read with Sections 14, 15, 16 and 17 of National Green Tribunal Act, 2010 (hereinafter referred to as **'NGT Act, 2010'**) but when we confronted, it could not be disputed by appellant that the appellate power is conferred upon Tribunal only under Section 16 and reference to Secti[illegible] 15, 17 and 18 is an irregularity. Following the law that mere wrong mention of the provisions will not deprive an Adjudicatory Forum of entertaining a matter where the power

is otherwise vested in any other provision, we ignore the irregularity and treat this Appeal under Section 16 of NGT Act, 2010.

3. Impugned order dated 24.07.2024 shows that appellant-M/s. Sumit Knit is a small scale 'Red Category' unit engaged in the process of dyeing and washing of the garments. PSPCB found that the unit in question was running in violation of directions issued under Section 33A of Water (Prevention and Control of Pollution) Act, 1974 (hereinafter referred to as **'Water Act, 1974'**) and Section 31A of Air (Prevention and Control of Pollution) Act, 1981 (hereinafter referred to as **'Air Act, 1981'**) whereupon directions were issued to Punjab State Power Corporation Limited vide PSPCB's letter dated 02.08.2019 for disconnection of electric supply of appellant's unit and electric connection was accordingly disconnected. Later on, the unit was granted consent under Water Act, 1974 and Air Act, 1981, both, valid upto 12.05.2020 and electric connection was also restored.

4. On a complaint received from the office of Monitoring Committee constituted by Tribunal vide letter dated 20.08.2020, a team of the officers of PSPCB was constituted and it visited the unit on 28.10.2020 when Proprietor of the industry could not produce old records, bills and justification regarding bills dated 14.08.2007 to 18.08.2007 for sweater over dyeing washing attached with the complaint.

5. It is mentioned in the impugned order, in para 7, that due to lack of complete record, the exact TRUE COPY dyeing/washing unit of the industry could not be adjudged.

6. The unit was further granted Consent to Operate (hereinafter referred to as **'CTO'**) under Water Act, 1974 valid upto 30.06.2025 for Zero Liquid Discharge.

7. Further, a complaint was received from SL Verma whereupon the Committee was constituted to make enquiry and the said Committee submitted report making observations as under:

> *"1. There is no account of 2026 KL. Whereas, the effluent may either be directly disposed off after the ETP plant to MC sewer without evaporation to save cost of energy involved in evaporation.*
>
> *2. There is possibility of unmetered water source from where the water is taken for processing activities but is not accounted in records.*
>
> *3. RO is not functioning properly and efficiently and there are chances that the industry might be discharging its treated effluent without reusing in the process.*
>
> *4. It is neither feasible not advisable to use treated effluent with such a high TDS of around 1300 ppm for boiler feed or for dyeing/ washing process as it will affect the boiler Infrastructure as well as affect the quality of product being manufactured by the industry.*
>
> *5. The possibility of discharge of effluent through flexible pipe from ETP or RO plant can't be ruled out.*
>
> *6. The industry is not treating whole of the effluent through RO plant and about 2026 KL of effluent was found unaccounted. Hence, the quantities of RO reject will be much more as compare to 658 KL as recorded by the industry.*
>
> *7. The hazardous waste of cat. 33.1 were found scattered here & there and no record was maintained.*
>
> *8. The industry has not provided proper display board outside the hazardous waste storage room as only a computerized paper is pasted there.*

> *9. The industry has failed to submit any record of bills or documents to justify the regular and periodic maintenance of RO plant. Further,*

10. The industry has not complied with the condition of consent for providing automatic dosing arrangement for optimum chemical/coagulants in Its ETP instead of manual system.

11. It has been apprehended that domestic effluent of the industry might be discharged into sewer through toilets.

12. The industry is not complying with the conditions of consent to operate granted to industry under Water Act, 1974 and authorization granted under the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016."

8. PSPCB issued show cause notice dated 19.04.2024 (annexure A/37 at page 261) under Section 33A of Water Act, 1974 for revocation of CTO and revocation of authorisation under Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016 (hereinafter referred to as **'HWMTM Rules, 2016'**). The relevant extract of the show cause notice requiring appellant to reply reads as under:

"And whereas, the matter has been considered by the Competent Authority and it has now decided to revoke consent to operate granted under Water (Prevention & Control of Pollution) Act, 1974, to revoke authorization granted under the Hazardous and other Waste (Management & Transboundary Movement) Rules, 2016, to impose the Environmental Compensation on the industry for degrading the environment and to issue following directions u/s 33-A of the Water (Prevention & Control of Pollution) Act, 1974, to the industry, after giving an opportunity of personal hearing before Chairman of the Board:-

1. *That the industry will dismantle and remove all outlets and stop forthwith discharging its trade effluent into Sewer or drain or through any other mode.*

2. *That the industry will not restart any process unless all necessary water pollution control measures are taken and concentration of obnoxious pollutants in its treated effluent conforms to the standards laid down by the Board.*

3. *That the industry will not restart discharging effluent until*

(Prevention & control of Pollution) Act, 1974 as amended in 1988.

4. *That Punjab State Power Corporation Limited (PSPCL) authorities will be directed to disconnect the supply of electricity available to the industry.*

5. *That the industry shall deposit Environmental Compensation due to environmental damage cause by it.*

As such, ***you are, hereby given an opportunity of personal hearing before the Chairman of the Board at Vatavaran Bhawan, Nabha Road, Patiala on 25.04.2024 at 11:00 am to explain your position with respect to above said violations****, failing which action as deemed fit in the matter shall be taken under the provisions of Water (Prevention & Control of Pollution) Act, 1974 and Hazardous and other Waste (Management & Transboundary Movement) Rules, 2016 and proposed directions shall be confirmed without giving any further opportunity/ notice."*

9. The appellant submitted its reply dated 25.04.2024 (annexure A/39 at page 265) stating that the complaint is totally false. The appellant has got all requisite permissions and No Objection Certificates (hereinafter referred to as **'NOCs'**) from the concerned authorities including PSPCB and there is no violation of environmental laws.

10. Thereafter, it appears that personal hearing was accorded to appellant on 25.04.2024 and proceedings dated 29.04.2024 of personal hearing with regard to notice issued for directions under Section 33A of Water Act, 1974 and revocation of authorisation under HWMTM Rules, 2016 are on record as annexure A/40 at page 266. The proceedings show that after giving opportunity of personal hearing, Chairman of the Board took following decisions: TRUE COPY

"1. The consent to operate granted to the industry under the Water

2. *The directions u/s 33-A of the Water (Prevention & Control of Pollution) Act, 1974 be confirmed for closure of the industry and disconnection of electric connection.*

3. *All the D.G. sets existing in the premises of the industry be sealed.*

4. *A reminder be issued to MCL in continuation to letter no. 163 dated 11.01.2021 and to Assistant Excise and Taxation Commissioner, Excise and Taxation Department, Ludhiana. In continuation to letter no. 165 dated 11.01.2021 to intimate the date & year from which the industry is doing dyeing/washing process.*

5. ***The amount of Environmental Compensation be calculated after receipt of reply from MCL and Excise and Taxation Department, Ludhiana.***

6. *The Environmental Engineer, Regional Office-1, Ludhiana shall verify the year wise installation/addition of machinery by the industry and pursue the matter with MCL and Excise and Taxation Department for early response."*

11. The proceedings of hearing dated 25.04.2024 further show that the appellant was required to ensure compliance of the decision taken during hearing and thereafter, formal order dated 29.04.2024 (Annexure A/40 at page 266) was passed.

12. Learned Counsel appearing for the appellant contended that it was brought to the notice of Chairman, PSPCB that observations of inspection team made during its visit of the unit on 28.10.2020 show spot position as it was on that date. Earlier, industry was engaged in the work of knitting, raising, tabling and fuse printing etc. and tub dyeing was used as per demand and in case during washing, cold dyeing was done in washing milling machines. The industry started its washing and

CTO was granted under Water Act, 1974 vide letter dated 13.05.2019 valid upto 12.11.2019 for trade effluent discharge at the rate of 75 KLD into sewer after treatment through Effluent Treatment Plant (hereinafter referred to as **'ETP'**). CTO under Air Act, 1981 was issued vide letter dated 13.05.2019 and valid upto 12.11.2019. Before expiry of the above CTO, unit applied for renewal of consent on 05.11.2019 and it was granted CTO under Water Act, 1974 and Air Act, 1981 valid upto 12.05.2020. Since the consent period expired on 12.05.2020, electric connection was disconnected on 21.05.2020. The industry again applied for renewal of consent which was granted on 24.07.2020 under Water Act, 1974 and Air Act, 1981 valid upto 23.01.2021.

13. Appellant urged that prior to 2019, there was no washing and dyeing work carried out by the appellant. In the show cause notice, it was clearly mentioned that without complete record of Excise and Sale Tax Department, and bills of all dyeing and washing machinery, exact date of start of dyeing/washing unit by the industry cannot be adjudged. The relevant observations of PSPCB read as under:

> *"And whereas, without complete report of Excise & Sale Tax Department and without complete bill of all dyeing/ washing machinery, the exact date of start of Dyeing/washing unit by the industry cannot be adjudged."*

14. It is thus argued that without there being any material to adjudge that washing and dyeing work was carried out by appellant prior to 2019, PSPCB had no material to TRUE COPY le that the appellant has carried out the work without any consent for the period prior to 2019 and, therefore, the impugned order imposing environmental compensation for the period

15. The appellant's Counsel further submitted that no show cause notice was given to the appellant with regard to quantum of environmental compensation for the period it was to be computed and the environmental compensation has been computed on the recommendations of "Environmental Compensation Verification Committee" which is patently illegal and in utter violation of principles of natural justice.

16. When questioned, the Learned Counsel for PSPCB stated that show cause notice was issued to appellant on 19.04.2024 and, thereafter, personal hearing was also granted on 25.04.2024 and the minutes of the proceedings dated 28.04.2024 regarding personal hearing are on record at page 266.

17. The submissions advanced on behalf of appellant are primarily and substantially on the issue that there is no compliance of principle of natural justice and the principle of "audi alteram partem" has been grossly violated.

18. The power of imposition of environmental compensation has not been conferred specifically upon Pollution Control Boards and Pollution Control Committees but it has been held that the power to give directions for compliance of the provisions of the environmental Statues includes power to apply principles of 'Polluter Pays' and direct the violator to pay environmental compensation. Such power to give directions has been conferred under Section 33 TRUE COPY ter Act, 1974; Section 31A of Air Act, 1981; and, Section 5 of Environment (Protection) Act, 1986 (hereinafter

19. For demanding environmental compensation by applying principle of 'Polluter Pays', the principle of natural justice must be followed. The polluter should be given opportunity.

20. Power to demand environmental compensation by issuing directions is quasi-judicial power. Explaining the meaning of the term 'quasi-judicial', Supreme Court in ***Namit Sharma vs. Union of India, (2013) 1 SCC 745*** has observed that it involves deciding a dispute and ascertaining the facts and any relevant law, but differs in that it depends ultimately on the exercise of an executive discretion rather than the application of law. When law commits to an officer, the duty of looking into certain facts not in a way which it specially directs, but after a discretion in its nature judicial, the function is quasi-judicial.

21. Supreme Court in ***Namit Sharma vs. Union of India (supra)*** refers to the meaning of quasi-judicial in 'Advanced Law Lexicon' (3rd Edn., 2005) by P. Ramanathan Aiyar, wherein it explains the expression 'quasi-judicial' stating that 'of, relating to, or involving an executive or administrative official's adjudicative acts'. Considering the provisions of Right to Information Act, 2005 and the power exercised by Information Commissioner etc., Supreme Court held that Information Commissioner performs adjudicatory functions and a hierarchy of Appeal is also provided. The orders of Information Commission may have the effect of affecting rights of a person and, therefore, it decides a lis also. It thus, can be said that Information Commission is essentially quasi-judicial in nature.

is a term which stands midway a judicial and an administrative function. If an authority has any express statutory duty to act judicially in arriving at the decision in question, it would be deemed to be quasi-judicial. Where the function to determine a dispute is exercised by virtue of an executive discretion rather than the application of law, it is a quasi-judicial function. A quasi-judicial act requires that a decision is to be given not arbitrarily or in mere discretion of the authority but according to the facts and circumstances of the case as determined upon an enquiry held by the authority after giving an opportunity to the affected parties of being heard or wherever necessary of leading evidence in support of their contention.

23. In ***Anjum vs. Uttar Pradesh Pollution Control Board, Appeal No.28/2023,*** decided vide judgment dated 21.02.2024, while considering the power of the authority to issue directions affecting adversely a person, must comply with the principle of natural justice, has been recognized and in para 39 and 42, Tribunal has said as under:

> *"39. The directions issued by Competent Authority under Sections 3 and 5 may be of different nature and characteristics. Some may be for execution of functioning of the concerned proponent and some may have adverse effect upon his right to carry on process/operation including fastening liability, financial or otherwise. The directions which would have adverse effect upon proponent in the matter of running of its process or project or industry or operation or otherwise confer any liability upon it, such directions, in our view, cannot be issued without complying with the principle of natural justice.*
>
> *xxx……xxx……xxx*
>
> *42. In our view, suc* TRUE COPY *ions when are adverse to any person who is to comply the same, such directions are quasi-judicial in nature for the reason that the authority which exercise such power not only*

24. In ***Anjum vs. UPPCB (supra)***, Tribunal in para 47 and 49 has further held as under:

> *"47. Under EP Act 1986, Water Act 1974 and Air Act 1981, while exercising power of issuing directions, Competent Authority may issue such directions which may affect the proponent's right of carrying on business i.e., industry etc. and such directions, therefore, must precede with application of principle of natural justice and whenever such power is exercised, it can be said to be an exercise of quasi-judicial power and to that extent, the authority exercising such power would act as a quasi-judicial authority.*
>
> *xxx……xxx……xxx*
>
> *49. Therefore, we have no manner of doubt that an order passed by respondent imposing environmental compensation and requiring the person to pay the same by applying principle of 'Polluter Pays' is a quasi-judicial order as it imposes financial liability upon it and without giving an opportunity of hearing and complying with the principle of natural justice, such liability cannot be fastened upon it."*

25. It cannot be doubted that whenever a pecuniary liability is thrown on a person, it results in evil consequences and such person cannot be saddled with such monetary liability, without giving any opportunity of hearing and complying with the principle of natural justice.

26. In ***A. K. Kraipak vs. Union of India, (1970) 1 SCR 457***, it was held that rules of natural justice operate in areas not covered by any law. They do not supplant the law of the land but supplement it. They are not embodied rules and their aim is to secure justice or to prevent miscarriage of justice. If that is the purpose, there is no reason why the principles of natural justice be not made applicable to administrative proceedings especially wh[illegible]s not easy to draw the line that demarcates administrative enquiries from quasi-judicial ones. An unjust decision in an administrative inquiry may have a more far reaching effect

27. In ***Institute of Chartered Accountants of India vs. L. K. Ratna & Ors., AIR 1987 SC 71***; ***Charan Lal Sahu vs. Union of India, (1990) 1 SCC 613***; and, ***C. B. Gautam vs. Union of India, (1993) 1 SCC 78***, it was held that the principles of natural justice must be applied in the unoccupied interstices of the Statute unless there is a clear mandate to the contrary.

28. Applying the above principles, we are clearly of the view that whenever any direction is issued by Statutory Regulator for imposition of environmental compensation, it must observe, comply and follow strictly the principles of natural justice. Due opportunity of hearing must be accorded to the affected party. The disclosure of adverse material on which Statutory Regulator intends to form opinion of violation of environmental laws on the part of the defaulter or violator and the manner in which it proposes to impose environmental compensation, all the relevant material in this regard must be disclosed to the person concerned so as to give him adequate opportunity to submit its defence. If any material is relied to form an opinion against the person concerned without disclosing it but will vitiate the principle of natural justice.

29. Therefore, we have no manner of doubt that an order passed by Statutory Regulator imposing environmental compensation and requiring the person to pay the same by applying principle of 'Polluter Pays' is a 'quasi-judicial' order as it imposes financial liability upon it and without giving an opportunity of hearing and complying with the principle of natural justice, such liability cannot be fastened upon it.

natural justice, we have gone through the show cause notice dated 19.04.2024 (annexure A/37 at page 261), and find that appellant was not confronted with the manner, methodology and proposed quantum of environmental compensation. Similarly in the minutes/proceedings of personal hearing, we do not find that any such facts have been disclosed to the appellant and on the contrary, one of the decisions by Chairman of the Board is that the amount of environmental compensation be calculated after receipt of reply from MCL and Excise and Taxation Department.

31. Therefore, with regard to computation of environmental compensation, its methodology, and the period for which it was to be computed and for the reasons it was to be computed, we do not find that the relevant facts were disclosed to the appellant and it was afforded any opportunity consistent with the principle of natural justice before passing the impugned order imposing environmental compensation of Rs.6,42,25,000/-.

32. We also find that in the show cause notice and proceedings of personal hearing, the reference is with regard to proposed revocation of CTO under Water Act, 1974 and authorisation under HWMTM Rules, 2016 but in para 16 of impugned order, for calculation of the environmental compensation, the factor of PI i.e., Pollution Index, has been taken as '80' on the ground that proponent i.e., appellant was violating Water Act, 1974 and Air Act, 1981 and is a 'Red Category' industry though in the show cause notice or in the proceedings, there is no reference of violation of the provisions of Air Act, 1981. Therefore, it

Air Act, 1981 which was not subject matter of show cause notice dated 19.04.2024 or the proceedings of personal hearing dated 25.04.2024 which are filed as annexure A/39 at page 265.

33. Impugned order further shows that after affording personal hearing to appellant on 25.04.2024, the industry of the appellant was visited by the officials of the Board on 30.05.2024 to ensure compliance of the decisions taken in the hearing held on 25.04.2024 and the said team made certain observations which are reproduced in para 13 of the impugned order as under:

> *"1. The Excise and Taxation Department, Ludhiana has submitted its report vide their letter no. 124 dated 13.05.2024 stating that the unit has made purchases from the firms dealing in dyes and chemicals in the year 2005 and is carrying out the dyeing process. The unit is in the business of dyeing of Garments since, 2005.*
>
> *2. The industry was in operation without valid consent to operate under the Water Act, 1974 and Air Act, 1981 from 2004 to 2019 & discharging untreated effluent into sewer.*
>
> *3. The industry was visited by Senior Officers of the Board on 03.01.2019 and observed that the industry had installed the ETP but untreated effluent was being discharged into sewer. The effluent samples were collected and as per analysis report, various parameters were found beyond the prescribed limits of the Board. The industry is still discharging effluent beyond limit since 03.01.2019 and failed to submit fresh sample analysis report till date.*
>
> *4. As per point no. 8 of report of committee, during 01 hour and 30 minutes, 300 ltr of RO reject was evaporated. Hence the evaporator has operational capacity of about 200 ltr/hr. As per record maintained by the industry, total RO reject generated from 01.01.2023 to 01.02.2024 was 658 KL, which is equivalent to 2 KLD of RO reject. Hence, in case, this evaporator would be operated for 10 hrs, it can evaporate about 2000 [illegible] reject and in 24 hrs it can evaporate 4.8 KL. The committee further reported that RO permeate was expected against 75% permeate received as per records maintained. Then, rest of the 25% should be the RO reject, which will be 18.750*

5. The Board Committee verified that the ZLD plant is designed for RO permeate 50 ppm TDS and TDS of re-use water was around 1267 ppm. It seems that the efficiency of RO Is near to 5 % against the consented discharge of 75 KLD."

34. With regard to the above findings of the inspection team recorded during its inspection dated 30.05.2024, we do not find from record that any show cause notice or opportunity, disclosing the facts which were found adverse to the appellant by PSPCB, was ever issued.

35. Therefore, certain material, adverse to the interest of the appellant, which has been taken into consideration by PSPCB while passing the impugned order, was withheld from appellant and it is in utter violation of principles of natural justice.

36. It is also evident from the impugned order that after recording the findings of inspection team, regarding its inspection made on 30.05.2024, immediately thereafter, Chairman of Board decided to refer the matter to Environmental Compensation Verification Committee and upon its recommendations, impugned order has been passed. Therefore, even recommendations of Environmental Compensation Verification Committee were never confronted to appellant while the law is well settled that any material which is considered to be adverse to the person against whom an order is passed by the authority, it must be disclosed to such person before passing any order against its interest.

37. It is well settled that civil rights cannot be affected adversely without disclosing the material found adverse to the person concerned.

39. In the light of the facts discussed above, we are clearly of the view that impugned order dated 24.07.2024 passed by PSPCB is unsustainable, being in violation of principles of natural justice and also having travelled beyond the facts which were disclosed to appellant in the show cause notice and at the time of personal hearing.

40. Appeal is accordingly allowed. The impugned order dated 24.07.2024 is hereby set aside. Pending IAs stand disposed of accordingly.

41. However, this order shall not preclude the respondent PSPCB from passing a fresh order after giving due opportunity of hearing to appellant and in accordance with law including compliance of principles of natural justice and the observations made in this judgment.

PRAKASH SHRIVASTAVA,
CHAIRPERSON

SUDHIR AGARWAL,
JUDICIAL MEMBER

DR. A. SENTHIL VEL,
EXPERT MEMBER

TRUE COPY

April 1, 2025
Appeal No.37/2024
R

2013 SCC OnLine NGT 27

National Green Tribunal New Delhi
Principal Bench

(BEFORE SWATANTER KUMAR, (CHAIRPERSON) AND P. JYOTHIMANI, J.M. AND G.K. PANDEY, E.M., A.R. YOUSUF, E.M. AND R.C. TRIVEDI, E.M.)

In the matter of:

1. M/s. Sesa Goa Limited Sesa Ghor, 20 EDC Complex, Patto Panaji Goa-40300, through Its AVP-iron ore, Goa Mr. Sauvick Mazumdar
2. Mr. Raghav J. Parrikar, Shareholder of M/s Sesa Goa Limited Residing at House No. 602 Sails Wado, Parra' Bardez, Goa … Appellant;

Versus

1. State of Goa, Through the Chief Secretary Government of Goa, Secretariat Porvorim, Bardex, Goa
2. The Goa Costal Zone Management Authority, Through its Member Secretary, C/o Department of Science, Technology and Environment, Government of Goa, Opp. Saligao Seminary, P.O. Saligoa, Bardez, Goa-40351
3. Khemlo Sawant, Resident of Betalwada, Amona, Bicholim, Goa … Respondent.

Application No. 49 of 2012
Decided on April 11, 2013

Counsel for Appellants:

Mr. Mukul Rohatgi, Sr, Advocate and Ms. Kiran Suri Advocate, Mr. Ninad Laud, Advocate, Mr. S.J. Amith, Advocate.

Counsel for Respondents:

Mr. Manish Salkar, Government Advocate, for Respondent No. 1 & Mr. Raj Panjwani, Sr. Advocate with Mr. Rahul Choudary, Advocate, for Respondent No. 3.

ORDER

SWATANTER KUMAR, (Chairperson):—

Challenge

1. The Goa Coastal Zone Management Authority (for short 'Authority') vide its order dated, 4th March, 2011, took the decision and issued the following directions:

14. **Decision of GCZMA**:—

GCZMA members deliberated on the points of reference made in the complaint made by Khemlo Sawant. From the documentation it is seen that, the jetties existed prior to 1991 and the activity of loading is an ongoing process at Amona. Proceeding's to the hearing were referred to. It is observed that, Sesa Goa has proceeded to rapidly expand their jetties without obtaining any prior approval from this Authority and other local Authority. At present the factual position appears that the jetties are more than double in area and this expansion is unauthorized. GCZMA Members also observed that the conveyor system is not authorized at site though there are NOC's or approvals from CoP or GSPCB. It is seen that Sesa Goa has sought to submit a plan with its earlier reply dated 01/12/2009; which appears to be fraudulently generated and hence this document cannot be relied upon. Further

the enquiries by Deputy Collector and SDO (Bicholim) has no finding in its report and the same cannot be relied upon.

15. GCZMA Members after perusing all documents provided, the contents of the complaint, replies to show cause notice issued, replies submitted, documentary evidence produced before the Authority in its hearing and other facts of the case concluded that;

i. The activity of loading iron ore is going on prior to 1991

ii. The jetties in question, exist prior to 1991;

iii. The jetties in question, have been expanded unauthorisedly over double the area of operation over the area beyond 65 sq. mts is illegal and needs to be stopped. Further the unauthorized portion needs to be surveyed and removed forthwith.

16. **Directions**: Therefore, in exercise of the powers conferred under section 5 of the Environment (Protection) Act, 1986; the GCZMA directs:—

i. Sesa Goa to forthwith stop the activity over the illegal portion of the jetties in question and take action to remove the extended unauthorised portion within 15 (Fifteen) days from the date of receipt of these Order failing which the Addl. Collector (North) shall take action to remove the same without any further reference to Sesa Goa and the cost of removal shall be recovered from Sesa Goa.

ii. The Additional Collector (North) to undertake the survey of the jetties in question, mark the area over and above 65 sq. mts and take action to stop the activity over the extended unauthorised portion of the jetties in question.

2. The legality and correctness of the above decision and directions are questioned by the applicants, Sesa Goa & Ors. *inter-alia* but primarily on the following grounds:

1. The impugned order is violative of principles of natural justice. Page 4 of 52
2. The impugned order has been passed upon allegations and considerations which did not form part of the show cause notice issued to the applicants.
3. The Authority in its order has relied upon certain reports and documents which were never furnished to the applicants. Consideration of such reports and documents has caused serious prejudice to the rights of the applicants.
4. Undisputedly and in fact admittedly, the jetties were in existence prior to 1991 and therefore, the conclusions arrived at by the Authority are contrary to record.
5. The Costal Regulation Zone Notification (for short the 'Notification') itself was issued in the year 1991 and cannot, both in fact and in law, have any application to the existing
6. In fact, the Notification itself does not contemplate such retrospective application.

Facts

3. The necessary facts giving rise to the above challenge can in short be noticed at this stage itself. Applicant No. 1 is a company registered under the provisions of the Companies Act, 1956 and is engaged in the business of extraction, sale and export of mineral ore. For the purpose of this business, the applicants used barges for carrying mineral ore from the loading point to the port. These loading points were in the nature of jetties which the applicants use for loading iron ore to the barges. According to the applicants they had constructed 'jetties' in the year 1969 and the plans for the same were approved by the Captain of Ports in the year 1969. Some modifications/repairs were carried out to the jetties and they were extended in the year 1987.

4. According to the applicants, Mr. Khemlo Sawant, Respondent No. 3, is an ex-employee of the company, whose services were terminated on the grounds of misconduct that he committed from time to time during his tenure with the company

respondent No. 3 is nothing but a disgruntled person who had filed a complaint to the Authority with a malafide intention to settle his personal score. On the basis of this complaint the Authority, served a show cause notice, dated 16th November, 2009, upon the applicants. In this show cause notice, it was alleged that there is an illegal construction of the Hopper and Belt System for loading iron ore close to jetty no. 2.

5. This show cause notice was replied to by the applicants vide its communication dated 1st December, 2009. In the reply, applicants stated that, the said system was legally installed and also annexed documents to support such contentions. The applicant company, without prejudice to its contention and as an abundant caution vide letter dated 10th February, 2010, also requested for regularization of the improvised loading facility in the form of the conveyor belting system. Even after submitting all these documents nothing was heard from the Authority which clearly gave an impression to the applicants that the proceedings therefrom had been dropped.

6. However, the Authority again served a show cause notice dated 1st January, 2010, upon the applicants, stating therein, that there has been illegal construction and operation of jetties without Coastal Regulation Zone (for short 'CRZ') and other statutory approvals. In this show cause notice no reference was made to the first show cause notice dated 16th November, 2009. The Applicant submitted a reply to the said show cause notice as well, stating therein, that the jetties in question were legal structures as they were constructed in 1969 and had been operational since then. The Applicants had obtained certain documents including the 'No Objection Certificate' (NOC) on 27th February, 1969 issued by the Captain of Ports, the letter including the payments made to the Captain of Ports towards Port dues, the House Tax Receipt issued by the village Panchayat of Amona and also the 'Consent to Operate' under the Air (Prevention and Control) Act, 1981 and Water (Prevention and Control) Act, 1974, respectively.

7. This matter was pending before the Authority when the applicants received 'stop work' notice on 11th October, 2010 from the office of the Deputy Collector and Sub Divisional Officer. It was only later that the applicants came to know that another notice has also been issued in furtherance to the first notice already issued by the said Authority. In that letter to the Deputy Collector, the Authority, stated that illegal construction of jetty 1 and 2 is being carried out in alleged violation of Notification and, therefore, the same should be stopped. In pursuance of the said notice, the officials from the office of the Mamlatdar, Bicholim and the Authority visited the site for an inspection. Since, there was no renovation of jetties, nothing adverse was noticed by the visiting team and there was complete silence on part of the office of the Deputy Collector. Vide letter dated 29th October, 2010, the Authority referred the matter to Deputy Collector and SDO and directed them to conduct a summary inquiry with further directions to provide the company with an opportunity of a personal hearing. The Deputy Collector granted a personal hearing to the applicant company and asked the applicants to produce relevant documents. The applicants filed its reply on 16th November, 2010 and the additional report was also filed on 18th November, 2010. The officers of the Deputy Collector neither dealt with applicants nor did the applicants receive any order or report in conclusion of the proceedings conducted by the Deputy Collector. At that point of time the copy of the report of Deputy Collector was not even furnished to the applicants. However, from the impugned order dated 4th March, 2011, the applicants came to know that some report has been submitted by the Deputy Collector and that report has been made the basis for passing the impugned order vide communication dated 2nd December, 2010. The Authority called upon the applicants to appear for a personal hearing on 16th December, 2010 at 4.00 p.m. This notice referred to the show cause notice dated 1st January, 2010, where it had been alleged that there was an illegal construction and operation of jetties. In this

notice of hearing there was no reference to the show cause notice, dated 16th November, 2009. The applicants also filed additional reply on 15th December, 2010, where they claim to have relied on certain documents that amply demonstrated that jetties in question were legal and constructed in the year 1969 and thereafter modified/repaired in the year 1987. The matter was again called for hearing on 12th January, 2011 and on the date of hearing specific emphasis was laid by the applicants on their part that the show cause notice dated 16th November, 2009, was not the subject matter of the hearing and that the various arguments that were raised on behalf of the applicants were not even considered by the Authority concerned. Thereafter, the applicants received the order dated 4th March, 2011, on 9th March, 2011, which is subject matter of the challenge in the present application. The contentions raised by the applicants were, that despite the fact that in the para 15 of the impugned order, the Authority came to the conclusion that loading of iron ore has been going on prior to the year 1991 and the jetties in question were in existence prior to 1991, still the Authority has erroneously arrived at the conclusion that jetties have been unauthorisedly extended to an area above 65 sq. m. which is illegal. The jetties were constructed in the year 1969 while the Notification came into force in the year 1991 and, thus, has no application. The documents that were filed, including the plan, clearly showed that the jetties had been constructed in the year 1969 after obtaining NOC from Captain of Ports and later obtained consent from the Goa Pollution Control Board when it came into existence. The village panchyats in its Resolution dated 12th August, 2010, have accepted the fact that the jetties were used for loading of iron ore and had been in existence since 1969.

8. It was also the contention of the applicants that the Hopper and Belt system were in question and permission for the same had been obtained from the Captain of Ports and Goa State Pollution Control Board. The applicants in the alternative submitted that even if it is assumed, that too without admitting, that the conveyor belting system was installed in the year 1992, still the CRZ Regulations would be inapplicable inasmuch as the Notification would only be applicable from the date the Coastal Zone Management Plan was finalized, which was in the year 1996 and, thus, the same would have no application in relation to years 1991 and 1992. The documents relied upon, particularly the report of the Collector and the documents annexed to the reply filed by the complainant, Mr. Khemlo Sawant, as mentioned in the order dated 4th March, 2011 had not been furnished to the applicant. All these aspects clearly showed that the impugned order is violative of the principles of natural justice and suffers from the infirmity of non-application of mind.

On behalf of the Authority it was contended that the Notification does not provide for any specific procedure that ought to be adopted by the Authority. The Authority, in fact, in the present case has acted in consonance with the principles of natural justice. It was competent to adopt the procedure that it considered to be proper. The second show cause notice was issued and then, after granting a personal hearing to the applicants, the order dated 4th March, 2011 was passed. During the hearing, or otherwise, no document was asked for and, in fact, some documents which have been relied upon by the Authority while passing the impugned order were the documents filed by the applicants itself.

9. The learned Counsel appearing for the Authority, during the course of argument, fairly stated that the copy of the report submitted by the Collector and some other documents, including the one stated in para 12 of the impugned order, were not furnished to the applicants. He also stated that the Authority or any of its authorized officers have not conducted any inspection of the jetties in question. Even if any benefit is given to the applicants on the basis of documents relied upon, at best, the jetties could be extended to area of 65 sq. m. while at the site they were found to be more than 270 sq. m. and thus, as these jetties are illegal they cannot be used for

transport of mineral ore.

10. We may also notice that the impugned order was challenged by the applicants before the High Court of Bombay, Goa Bench in W.P. 169 of 2011 and vide order dated 14th September, 2012, the High Court of Bombay transferred this matter to this Tribunal.

Legal Analysis

11. From the grounds of challenge as well as the contentions raised, it clearly emerges that the main plank of submission on behalf of the applicants revolves around the non-compliance of the principles of natural justice.

12. The Notification dated 19th February, 1991, was superseded by the Notification dated 15th September, 2010/6th January, 2011, issued by Department of Environment and Forest and Wildlife, Government of India. This Notification deals with 'high tide line' on the landward side along the sea front as well as restriction on the setting up and expansion of industries, operations or processes and the like, in the CRZ (Coastal Regulation Zone). It also declares certain activities as 'prohibited activities' within the CRZ.

13. A plain reading of this Notification clearly shows that it does not by specific language provide for any procedure for taking action against the violators of the restrictions or even the manner in which the Authority will proceed if it finds that any activity, or act or omission has been done in violation to the said Notification. It is a settled cannon of administrative law that if a specific procedure has not been provided for and the authority empowered to perform such functions passes orders which particularly may have severe consequences affecting the rights of others, then it can only do so in compliance with the principles of natural justice and the absence of the same would invite judicial review and would render such action invalid in law. Thus, first and foremost it must be understood as to what is Law of Natural Justice.

14. A Constitution Bench of the Supreme Court in the case of *Swadeshi Cotton Mills* v. *Union of India* (1981) 1 SCC 664 stated that

> "The phrase is not capable of a static and precise definition. It cannot be imprisoned in the straight-jacket of a cast-iron formula. Historically, "natural justice" has been used in a way "which implies the existence of moral principles of self-evident and unarguable truth". In course of time, Judges nurtured in the traditions of British jurisprudence, often invoked it in conjunction with a reference to "equity and good conscience". Legal experts of earlier generations did not draw any distinction between "natural justice" and "natural law". "Natural justice" was considered as "that part of natural law which relates to the administration of justice". Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. But two fundamental maxims of natural justice have now become deeply and indelibly ingrained in the common consciousness of mankind, as pre-eminently necessary to ensure that the law is applied impartially, objectively and fairly. Described in the form of Latin tags these twin principles are: (i) *audi alteram partem and (ii) nemo judex in re sua*"

15. The above two maxims have attained a definite meaning, connotation in law and their contents as well as implications are well-established and firmly understood. These, nevertheless are not statutory rules. Each one of these rules leads to charges with exigencies of different situations. They do not apply in the same manner to situations which are not alike. They are not immutable but flexible. These rules can be adapted and modified by statutes, statutory rules and also by constitution of a Tribunal which is to decide a particular matter and the rules by which such Tribunal is governed. In England the law in this regard is not different from the law in India. In *Norwest Holst Ltd.* v. *Secretary of State for Trade* (1978) 3 All England Reports 280,

Ormond LJ observed:

> "the House of Lords and this Court have repeatedly emphasized that the ordinary principles of natural justice must be kept flexible and must be adapted to the circumstances prevailing in any particular

16. In the case of *Union of India* v. *Tulsiram Patel* (1985) 3 SCC 398, another Constitution Bench of the Supreme Court stated: "that the question whether requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point, the constitution of the Tribunal and the rules under which it functions."

17. It must be noticed that the aim of rules of natural justice is to secure justice, or to put it negatively, to prevent miscarriage of justice. Despite the fact that such rules do not have any statutory character, their adherence is even more important for the compliance of the statutory rules. The violation of the principles of natural justice has the effect of vitiating the action, be it administrative or quasi-judicial, in so far as it affects the rights of a third party. Flexibility in the process of natural justice is an inbuilt feature of this doctrine. Absolute rigidity may not further the cause of justice and therefore adoption of flexibility is important for applying these principles.

18. A Court or a Tribunal has to examine whether the principles of natural justice have been violated or not as a primary consideration, whenever and wherever such an argument is raised. Test of prejudice is an additional aspect. Normally, violation of principles of natural justice, like non-grant of hearing, would vitiate the action unless the theory of 'useless formality' is pressed into service and is shown to have a complete applicability to the facts of the case. We may notice that this theory, though has been accepted by the Courts, but is rarely applied.

19. In the case of *Canara Bank* v. *A.K. Awasthi* (2005) 6 SCC 321, the Supreme Court compared natural justice to common sense justice. It emphasized on the compliance with the principles of natural justice when a quasi-judicial body embarks upon determination of disputes between the parties or when an administrative action involving civil consequences is in issue. The Court held:

> "**9.** The expressions "natural justice" and "legal justice" do not present a watertight classification. It is the substance of justice which is to be secured by both and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigant's defence.
>
> **10.** The adherence to principles of natural justice as recognised by all civilised States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "Magna Carta". The classic exposition of Sir Edward Coke of natural justice

requires to "vocate, interrogate and adjudicate". In the celebrated case of *Cooper* v. *Wandsworth Board of Works* the principle was thus stated: (ER p. 420)

> "Even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God), 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?'
>
> "Since then the principle has been chiselled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concept, like polishing of a diamond.

11. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

12. What is meant by the term "principles of natural justice" is not easy to determine. Lord Summer (then Hamilton, L.J.) in *R.* v. *Local Govt. Board* (KB at p. 199) described the phrase as sadly lacking in precision. In *General Council of Medical Education & Registration of U.K.* v. *Spackman* Lord Wright observed that it was not desirable to attempt "to force it into any Procrustean bed" and mentioned that one essential requirement was that the Tribunal should be impartial and have no personal interest in the controversy and further that it should give "a full and fair opportunity" to every party of being heard."

20. The above findings of the Court puts one matter beyond ambiguity, i.e., the affected party is entitled to a full and fair opportunity and such an opportunity, shall, both in fact and in substance, be granted to ensure that justice is not only done but also seems to have been done.

21. In the present case we are concerned with the application and the various facets of the maxim audi alteram partem. The Courts have consistently emphasized that this is a highly effective rule devised by the Courts to ensure that a statutory authority arrives at a just decision and it is calculated to act as a healthy check on the abuse or misuse of power.

22. The doctrine of *audi alteram partem* has three basic essentials. Firstly, a person against whom an order is required to be passed or whose rights are likely to be affected adversely must be granted an opportunity of being heard. Secondly, the authority concerned should provide a fair and transparent procedure and lastly, the authority concerned must apply its mind and dispose of the matter by a reasoned or speaking order. While referring to this principle in the case of *Assistant Commissioner, Commercial Tax Department, works contract and leasing, Kota* v. *Shukla & Bros.* (2010) 4 SCC 785, the Supreme Court of India stressed upon the need for recording reasons and for the authority to act fairly. The court held as under:

> "**11.** The Supreme Court in *S.N. Mukherjee* v. *Union of India* while referring to the practice adopted and insistence placed by the courts in United States, emphasized the importance of recording of reasons for decisions by the administrative authorities and tribunals. It said "administrative process will best be vindicated by clarity in its exercise". To enable the courts to exercise the power of review in consonance with settled principles, the authorities are advised of the considerations underlining the action under review. This Court with approval stated:
>
> "*11*. … 'the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained'."

12. In exercise of the power of judicial review, the concept of reasoned orders/actions has been enforced equally by the foreign courts as by the courts in India. The administrative authority and tribunals are obliged to give reasons,

absence whereof could render the order liable to judicial chastisement. Thus, it will not be far from an absolute principle of law that the courts should record reasons for their conclusions to enable the appellate or higher courts to exercise their jurisdiction appropriately and in accordance with law. It is the reasoning alone, that can enable a higher or an appellate court to appreciate the controversy in issue in its correct perspective and to hold whether the reasoning recorded by the court whose order is impugned, is sustainable in law and whether it has adopted the correct legal approach. To sub serve the purpose of justice delivery system, therefore, it is essential that the courts should record reasons for their conclusions, whether disposing of the case at admission stage or after regular hearing.

13. At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher court in the event of challenge to that judgment. Now, we may refer to certain judgments of this Court as well as of the High Courts which have taken this view."

24. The recording of reasons by the administrative and quasi-judicial authorities is a well-accepted norm and its compliance has been stated to be mandatory. Of course, reasons recorded by such authorities may not be like judgments of courts, but they should precisely state the reasons for rejecting or accepting a claim which would reflect due application of mind. The Bombay High Court in the case of *Pipe Arts India Pvt. Ltd* v. *Gangadhar Nathuji Golmare*, 2008 (6) MLJ 280 held:

"8. The Supreme Court and different High Courts have taken the view that it is always desirable to record reasons in support of the Government actions whether administrative or quasi-judicial. Even if the statutory rules do not impose an obligation upon the authorities still it is expected of the authorities concerned to act fairly and in consonance with basic rule of law. These concepts would require that any order, particularly, the order which can be subject matter of judicial review, is reasoned one. Even in the case of *Chabungbambohal Singh* v. *Union of India*: 1995 (1) SCALE 857, the Court held as under:

His assessment was, however, recorded as "very good" whereas qua the appellant it had been stated unfit. As the appellant was being superseded by one of his juniors, we do not think if it was enough on the part of the Selection Committee to have merely stated unfit and then to recommend the name of one of his juniors. No reason for unfitness, is reflected in the proceedings, as against what earlier Selection Committees had done to which reference has already been made.

9. The requirement of recording reasons is applicable with greater rigour to judicial proceedings. Judicial order determining the rights of the parties essentially should be an order supported by reasoning. The order must reflect what weighed with the Court in granting or declining the relief claimed by the applicants.

10. In the case of *Jawahar Lal Singh* v. *Naresh Singh*: 1987 CriLJ 698, accepting the plea that absence of examination of reasons by the High Court on the basis of which the trial Court discarded prosecution evidence and recorded the finding of an

acquittal in favour of all the accused was not appropriate, the Supreme Court held that the order should record reasons. Recording of proper reasons would be essential, so that the Appellate Court would have advantage of considering the considered opinion of the High Court on the reasons which had weighed with the trial Court.

11. May be, while entertaining the interim applications, the orders are not expected to be like detailed judgments in final disposal of the matter, but they must contain some reasons which would provide adequate opportunity and ground to the aggrieved party to assail that order in appeal effectively.

12. In the case of *State of Punjab* v. *Surinder Kumar*: [1992] 194 ITR 434 (SC), while noticing the jurisdictional distinction between Article 142 and Article 226 of the Constitution of India, the Supreme Court stated that powers of the Supreme Court under Article 142 are much wider and the Supreme Court would pass orders to do complete justice. The Supreme Court further reiterated the principle with approval that the High Court has the jurisdiction to dismiss petitions or criminal revisions in limini or grant leave asked for by the petitioner but for adequate reasons which should be recorded in the order. The High Court may not pass cryptic order in relation to regularisation of service of the respondents in view of certain directions passed by the Supreme Court under Article 142 of the Constitution of India. Absence of reasoning did not find favour with the Supreme Court. The Supreme Court also stated the principle that powers of the High Court were circumscribed by limitations discussed and declared by judicial decision and it cannot transgress the limits on the basis of whims or subjective opinion varying from Judge to Judge.

13. In the case of *Hindustan Times Ltd.* v. *Union of India*: [1998] 1 SCR 4, the Supreme Court while dealing with the cases under the Labour Laws and Employees' Provident Funds and Miscellaneous Provisions Act, 1952 observed that even when the petition under Article 226 is dismissed in limini, it is expected of the High Court to pass a speaking order, may be briefly.

14. Consistent with the view expressed by the Supreme Court in the afore-referred cases, in the case of *State of U.P.* v. *Battan* (2001) 10 SCC 607, the Supreme Court held as under:

The High Court has not given any reasons for refusing to grant leave to file appeal against acquittal. The manner in which appeal against acquittal has been dealt with by the High Court leaves much to be desired. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order. The absence of reasons has rendered the High Court order not sustainable.

15. Similar view was also taken by the Supreme Court in the case of *Raj Kishore Jha* v. *State of Bihar JT* 2003 (Supp. 2) SC 354.

16. In a very recent judgment, the Supreme Court in the case of *State of Orissa* v. *Dhaniram Luhar* 2004 CriLJ 1385 while dealing with the criminal appeal, insisted that the reasons in support of the decision was a cardinal principle and the High Court should record its reasons while disposing of the matter. The Court held as under:

8. Even in respect of administrative orders Lord Denning, M.R. In *Breen* v. *Amalgamated Engg. Union* observed:

The giving of reasons is one of the fundamentals of good administration." In *Alexander Machinery (Dudley) Ltd.* v. *Crab tree* it was observed: "Failure to give reasons amounts to denial of justice." "Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on

recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The "inscrutable face of the sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance.

17. Following this very view, the Supreme Court in another very recent judgment delivered on February, 22, 2008, in the case of *State of Rajasthan* v. *Rajendra Prasad Jain* Criminal Appeal No. 360/2008 (Arising out of SLP (Cri.) No. 904/2007) stated that "reason is the heartbeat of every conclusion and without the same it becomes lifeless."

18. Providing of reasons in orders is of essence in judicial proceedings. Every litigant who approaches the Court with a prayer is entitled to know the reasons for acceptance or rejection of such request. Either of the parties to the us has a right of appeal and, therefore, it is essential for them to know the considered; opinion of the Court to make the remedy of appeal meaningful. It is the reasoning which ultimately culminates into final decision which may be subject to examination of the appellate or other higher Courts. It is not only desirable; but, in view of the consistent position of law, mandatory for the Court to pass orders while recording reasons in support thereof, however, brief they may be. Brevity in reasoning cannot be understood in legal parlance as absence of; reasons. While no reasoning in support of judicial orders is impermissible, the brief reasoning would suffice to meet the ends of justice at least at the interlocutory stages and would render the remedy of appeal purposeful and meaningful. It is a settled cannon of legal jurisprudence that the Courts are vested with discretionary powers but such powers are to be exercised judiciously, equitably and in consonance with the settled principles of law. Whether or not, such judicial discretion has been exercised in accordance with the accepted norms, can only be reflected by the reasons recorded in the order impugned before the higher Court. Often it is said that absence of reasoning may ipso facto indicate whimsical exercise of judicial discretion. Patricia Wald, Chief Justice of the D.C. Circuit Court of Appeals in the Article, Black robed Bureaucracy or Collegiality under Challenge, (42 M.D.L. REV. 766, 782 (1983), observed as under: My own guiding principle is that virtually every appellate decision requires some statement of reasons. The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the Court that a bare signal of affirmance, dismissal, or reversal does not.

19. The Court cannot lose sight of the fact that a losing litigant has a cause to plead and a right to challenge the order if it is adverse to him. Opinion of the Court alone can explain the cause which led to passing of the final order. Whether an argument was rejected validly or otherwise, reasoning of the order alone can show. To evaluate the submissions is obligation of the Court and to know the reasons for rejection of its contention is a legitimate expectation on the part of the litigant. Another facet of providing reasoning is to give it a value of precedent which can help in reduction of frivolous litigation. Paul D. Carrington, Daniel J. Meador and Maurice Rosenburg, Justice on Appeal 10 (West 1976), observed as under:

When reasons are announced and can be weighed, the public can have assurance that the correcting process is working. Announcing reasons can also provide public understanding of how the numerous decisions of the system are integrated. In a busy Court, the reasons are an essential demonstration that the Court did in fact fix

its mind on the case at hand. An unreasoned decision has very little claim to acceptance by the defeated party and is difficult or impossible to accept as an act reflecting systematic application of legal principles. Moreover, the necessity of stating reasons not infrequently changes the results by forcing the judges to come to grips with nettlesome facts or issues which their normal instincts would otherwise cause them to avoid.

20. The reasoning in the opinion of the Court, thus, can effectively be analysed or scrutinized by the Appellate Court. The reasons indicated by the Court could be accepted by the Appellate Court without presuming what weighed with the Court while coming to the impugned decision. The cause of expeditious and effective disposal would be furthered by such an approach. A right of appeal could be created by a special statute or under the provisions of the Code governing the procedure. In either of them, absence of reasoning may have the effect of negating the purpose or right of appeal and, thus, may not achieve the ends of justice.

21. It will be useful to refer words of Justice Roslyn Atkinson, Supreme Court of Queensland, at AIJA Conference at Brisbane on September 13, 2002 in relation to Judgment Writing. Describing that some judgment could be complex, in distinction to routine judgments, where one requires deeper thoughts and the other could be disposed of easily but in either cases, reasons they must have. While speaking about purpose of the judgment, he said,

The first matter to consider is the purpose of the judgment. To my mind there are four purposes for any judgment that is written:

(1) to clarify your own thoughts;

(2) to explain your decision to the parties;

(3) to communicate the reasons for the decision to the public; and

(4) to provide reasons for an appeal Court to consider.

22. Clarity of thought leads to proper reasoning and proper reasoning is the foundation of a just and fair decision. In *Alexander Machinery (Dudley) Ltd.* v. *Crabtree* 1974 ICR 120, the Court went to the extent of observing that "Failure to give reasons amounts to denial of justice". Reasons are really linchpin to administration of justice. They are link between the mind of the decision taker and the controversy in question. To justify our conclusion, reasons are essential. Absence of reasoning would render the judicial order liable to interference by the higher Court. Reasons is the soul of the decision and its absence would render the order open to judicial chastism."

25. Another Constitution Bench of the Supreme Court, in the case of *S.N. Mukherjee* v. *Union of India* (1990) 4 SCC 594, while referring to the English law as well as the judgments of the Supreme Court, stated that the failure to give reasons amounts to denial of justice. A party appearing before the Tribunal is entitled to know, either expressly or inferentially the reasons stated by the Tribunal and what it is to which the Tribunal is addressing its mind. The decision should be in the form of a reasoned document available to the parties affected and thus, the party should be informed of the reasons. The Apex Court in the case of *Ravi Yashwant Bhoir* v. *Collector* (2012) 4 SCC 407, reiterated that it is a settled preposition of law that even in administrative matters, the reasons should be recorded as it is incumbent upon authorities to pass a speaking and reasoned order. The Court noticed that the expanding horizon of the principles of natural justice provides for the requirement to record reasons unless recording of such reasons is specifically excluded by a Statute.

26. Such a view has been expressed by the Supreme Court consistently in the past. In the case of *Maharashtra State Board of Secondary and Higher Secondary Education* v. *K.S. Gandhi* (1991) 2 SCC 716, the Supreme Court had emphasized that it is implicit that principles of natural justice or fair play do require recording of reasons as

a part of fair procedure. In an administrative decision, its order/decision itself may not contain reasons. Even if it is not the requirement of rules, but at least, the record should disclose reasons. It also held that recording of reasons excludes chances of arbitrariness and ensures a degree of fairness in the process of decision making. The Court also noticed that omission to record reasons may vitiate the order. The Court while noticing that omnipresence and omniscience of the principles of natural justice act as deterrence to arrive at arbitrary decisions in flagrant infraction of fair play, held as under:

> "21. Thus it is settled law that the reasons are harbinger between the minds of the maker of the order to the controversy in question and the decision or conclusion arrived at. It also excludes the chances to reach arbitrary, whimsical or capricious decision or conclusion. The reasons assure an inbuilt support to the conclusion/decision reached. The order when it affects the right of a citizen or a person, irrespective of the fact, whether it is quasi-judicial or administrative fair play requires recording of germane and relevant precise reasons. The recording of reasons is also an assurance that the authority concerned consciously applied its mind to the facts on record. It also aids the appellate or revisional authority or the supervisory jurisdiction of the High Court under Article 226 or the appellate jurisdiction of this Court under Article 136 to see whether the authority concerned acted fairly and justly to mete out justice to the aggrieved person."

27. The consistent view of the courts has been that recording of reasons is an essential feature of the principles of natural justice. Natural justice cannot be understood in isolation. It must be examined while keeping in mind the facts and circumstances of a given case. As already noticed, violation of principles of natural justice and its consequences in law would always be relatable to a situation in a given case. Providing of notice, giving a fair opportunity to put forward its case and to record reasons are the essential features of the doctrine of natural justice. It is neither permissible nor prudent to permit violation of these rules and prejudice, though is a relevant consideration, may not always be an indispensable aspect. The cases in which, ex facie, a serious violation of principles of natural justice is shown, the Court or the Tribunal may declare the action invalid and ineffective, even in absence of proven prejudice.

28. Another very important aspect of recording of reasons by administrative or quasi-judicial authority is that the reasons so recorded must have a nexus and should deal with the grounds which have been raised by the affected party for consideration by such authority. Recording reasons without dealing with such contentions would tantamount to non-recording of reasons. The authority concerned is expected to apply its mind to all aspects of a case but most importantly to the contentions raised by the affected party in relation to the grounds or supporting arguments without which no adverse order could be passed against such party. If such grounds are not dealt with in the order passed by the authority, neither the party nor the appellate authority would be able to comprehend as to why their contentions have been rejected, as the reasons are harbinger between the mind of the maker of the order, to the controversy in question and the decision or conclusion arrived at. This is the acid test for examining fair opportunity and proper application of mind by the authority concerned.

29. The importance of the doctrine of natural justice is evident from the fact that with the development of law it has been treated as an ingredient of Article 14 of the Constitution of India. 'Natural Justice' means a fair process. A fair process essentially must exclude arbitrariness and exclusion of arbitrariness would ensure equality and equal treatment before law. This new dimension of *audi alteram partem* as a facet of natural justice has been noticed by D.D. Basu, Shorter Constitution, 44th Edition 2012:

> "Once it is acknowledged that non-arbitrariness is an ingredient of Art. 14 pervading the entire realm of State action governed by Art. 14, it has come to be established, as a further corollary, that the *audi alteram partem* facet of natural justice is also requirement of Art. 14, for, natural justice is the antithesis of arbitrariness. The right of *audi alteram partem* is a valuable right recognized under the Constitution of India wherein it is held that, the principle of the maxim which mandates that no one should be condemned unheard, is a part of the rules of natural justice. Such right of hearing conferred by a statute cannot be taken away even by Courts."

30. Reference could also be made to the judgments in the case of *DTC Mazdoor Union* v. *DTC*, 1991 Supp (1) SCC 600 : AIR 1991 SC 101 and *Basudeo Tiwari* v. *Sido Kanhu University*, (1998) 8 SCC 194.

31. Now, we may examine whether there has been a violation of principles of natural justice, its extent and consequences. The first and the foremost contention in this regard raised on behalf of the applicants is that the report of the Deputy Collector which was part of the record and which has also been referred to in the impugned order was never furnished to the applicants, though, the applicants had submitted the documents when the enquiry was conducted by the Deputy Collector. According to the applicants, it has caused serious prejudice to them. In the impugned order, it has been, noticed "further, the enquiries by the Deputy Collector and SDO (Bicholim) has no finding in its report and the same cannot be relied upon."

32. As already noticed, no dispute has been raised before us by the learned counsel appearing for the Respondent No. 3 that the copy of the report of the Deputy Collector and that of the SDO had not been furnished to the applicants. However, the contention is that in the facts and circumstances of the case it was not necessary to furnish these documents to the applicants. They had no significance as they were not relied upon by the Authority. This contention does not have any merit. It is clear that the Deputy Collector had acted in furtherance to the letter of the Authority dated 23rd September, 2010. In furtherance to it he had issued the stop work order dated 11th October, 2010 as well as submitted the report.

33. On the one hand, remarks have been recorded to say that reports cannot be relied upon but on the other in paragraph 6 of the order, it has been specifically stated, "the Deputy Collector (Bicholim) conducted a hearing and has submitted a report that the jetties were in existence before 1991. He has not stopped loading/unloading operation at the site. He indicates them to be legal in nature. From the record available in the file, the jetties appear not to be totally legally constructed and the Village Panchayat had ordered for its demolition. Other facts of the case reveal that the claim of jetties existing in 1969 appear to be untrue and the Land Record Survey plans of 1976 do not have the same indicated on their plans."

34. Both the above comments cannot co-exist. Either the report has not been considered and relied upon in its entirety or it has been relied upon partially or otherwise. From the order it is clear that the said reports have been relied upon.

35. The Deputy Collector (Bicholim) had also been asked to conduct an enquiry vide letter of Authority dated 29th October, 2010. The enquiry was conducted by the Deputy Collector in which the applicants had participated and he had submitted his report without furnishing a copy thereof to the applicants. Once the report was called by the Authorities and it formed part of the record, it was expected of the Authorities to furnish a copy of the report to the applicants as well. Furthermore, what remarks have been recorded supra would be of no consequence as the record being part of a quasi-judicial functioning, could not be brushed aside in that fashion. If it recorded findings which were favorable to the applicants, they should have been taken into consideration and judged appropriately. If the remarks were against the petitioner,

similar process should have been followed in the event.

36. It is also contended that a number of other documents which had been filed by the complainant along with his reply or were otherwise collected by the Authorities had not been furnished to the applicants. There is also no dispute to the fact that the documents which had been furnished to the Authorities by the complainant had not been furnished to the applicants on the pretext that they were the documents of the applicants themselves. This argument of Respondent No. 3 cannot advance their case any further. Once the documents were relied upon by the Authority in recording its conclusions, then such documents ought to have been furnished to the applicants. These documents included, reply of the claimant dated 21st December, 2009 and a copy of the Plan dated 29th September, 2005. According to the applicants, the non-furnishing of the report and other documents, as afore-indicated, has caused serious prejudice to their right of defense as they did not know what case is being put up by the Authorities for the purposes of deciding the show cause notice in question.

37. It is also the contention of the applicants before us that the order suffers from non-application of mind as the various documents which had been produced by the applicants have not been considered by the authorities. These included:

a. Application dated 22/1/1969 made by SGL to the Captain of Ports;

b. Permission/NOC from the Captain of Ports dated 27/2/1969;

c. Resolution of the Panchayat dated 12/8/2010 confirming that the Panchayat records indicate existence of Jetties from 1969;

d. Notice/Resolution from the Communidade of Navelim dated 12/9/1968;

e. Affidavits of 11 local and prominent villagers from Amona;

f. Outward Registers of the Panchayat of Amona in relation to the permission for repairs of the jetty granted in the year 1987;

g. Internal communications of SGL dated 9/7/1987; 6/10/1987; 16/10/1987; 3/8/1987; 25/8/1987; and 2/9/1987;

h. Daily Ore Stock Movement Reports dated 7/5/1987 and 8/5/1987 in relation to the two jetties:

i. Topo sheet of the area prepared in the year 1991.

38. Non-consideration of these documents by the authorities again has prejudicial effect on the case of the applicants. Still another contention is that the impugned order suffers from non-application of mind as the various contentions raised by the applicants have not been considered, much less in their correct perspective. *Inter alia*, it is contended that the documents relating to payment of riverine dues could not form the basis for the true and correct determination of the area of the jetties which were in existence prior to 1991. In fact, the area of 65 sq. mtrs. referred to in the document dated 24th October, 1996 relates merely to a 'portion of one of the jetties protruding in the river.'

39. The area of the jetties was in serious dispute as the Captain of Ports had alleged that even the area of the ship which was being used for loading/unloading was part of the area which was chargeable to riverine dues. That dispute itself was pending and as such no reliance could be placed upon such a contention. The impugned order does not consider the contention at all that conveyor belting system was operating only after obtaining the permission from the Captain of Ports and Goa State Pollution Control Board. Furthermore, even if as an argument it is assumed that the conveyor belting system was installed in the year 1992, then it was clear that the CRZ Regulations came into force only upon finalization of the Coastal Zone Management Plan, which in relation to the area in question, was done in the year 1996. This contention has not been dealt with by the Authorities. The hearing had been conducted by the Authority but the impugned order has been passed by the Member

Secretary, which is not permissible in law. Also, the Authority ceased to exist in February, 2009 as its term came to an end and unless a fresh Authority was constituted, no order could be passed in the eyes of law. Non-consideration of these submissions, according to the applicants, has denied him a fair trial and has prejudiced its interest. Non-consideration of the submissions and non-furnishing of these documents clearly violates the doctrine of *audi alteram partem* and would vitiate the impugned order. It is contended that it is not even the case of Respondent No. 3 that this violation at the first stage had ever been corrected at a subsequent hearing or stage. A defect of natural justice in trial body can be cured by the presence of natural justice in the appellate body. This would result in depriving the litigant of his right to appeal from the initial body. To buttress the contention, reliance has been placed upon *Institute of Chartered Accountants* v. *L.K. Ratna* (1986) 4 SCC 537.

39. We may notice that this contention of the applicants has merit, primarily for the reason that there was a clear admission made before us that the report and some other documents had not been furnished to the applicants by the Authority. In fact, during the course of hearing, the matter was also adjourned to find out if the documents have been supplied and the answer to the same was found to be in negative at a subsequent hearing in other words, no attempt has been made to correct the violation of principles of natural justice at the initial stage. Lastly, it is also contended on behalf of the applicants that the impugned order and the directions contained in the order are beyond the purview and scope of the show cause notice. The show cause notice dated 16th November, 2009 was never part of the proceedings that culminated into passing of the impugned order dated 4th March, 2011. The show cause notice dated 1st January, 2010, in fact, was projected as the sole show cause notice for taking action against the applicants. Furthermore, the grounds taken in the show cause notice are different than the ones on the basis of which the impugned order has been passed. In other words, the impugned order is beyond the ambit and scope of the show cause notices issued to the applicants. To that extent the applicants have been taken by surprise and such proceedings are again violative of the principles of natural justice. Reliance in this regard has been placed upon the judgments of the Supreme Court in the case of *Godrej Industries Ltd.* v. *Commissioner of Central Excise* (2008) 17 SCC 471 and *Trilochan Dev Sharma* v. *State of Punjab* (2001) 6 SCC 260.

40. It is true that in the above cases the Supreme Court has clearly stated that an order passed on grounds not taken in the show cause notice is not sustainable. Furthermore, in paragraph 12 of the judgment in the case of *Trilochan Dev Sharma* (supra), the Supreme Court observed: "It follows as a necessary corollary that what has not been provided as a ground providing reasons for proposed removal cannot be relied upon as furnishing basis for the order of removal." The authorities exercising its power of passing orders of civil consequences against parties are expected to apply their minds to all facets. All such factors must be put to the applicant and the applicant have a right to put forward his case on each of such issues. In the present case, even if we assume that both the show cause notices are the foundation, as was recorded in the impugned order, even then, in none of these notices has it been recorded anywhere that the jetties were in excess of 65 sq. meters (area over and above), were unauthorized, illegal and work in that behalf should be stopped. This is a very material allegation which ought to have been made in the show cause notice itself. On the contrary in the show cause notice it has been stated that there was illegal construction/operation of jetties, loading/unloading without approval and the absence of such other statutory approvals. The show cause notice talked of the purpose of reconstruction, construction, development, repair, renovation between 200 meters to 500 meters of the high tide line. These allegations have not been discussed in the impugned order. In fact, the notice clearly stated that the alleged illegal construction was highly detrimental to the coastal ecosystem, riverine ecosystem due

to destruction of sand dunes, coastal vegetation etc. None of these grounds have been dealt with in the impugned.

41. Still another contention raised before the Tribunal is that there was no illegal construction/loading/unloading activities at the jetties. The applicants, vide their letter dated 10th February, 2010, without prejudice to their rights, had requested the office of the Authority to regularize the improvised loading facility in the form of conveyer belting system in Survey No. 32 of village Amona. This application has not been reacted to by the Authority finally, may be in view of the proceedings pending before it in furtherance to the show cause notice. Reliance has been placed upon the provisions of the Notification of 2011 in this regard. The activities which are directly related to the water front or directly need offshore facilities have been made an exception to the prohibited activities within the CRZ. Furthermore Clause 4 of the Notification states about regulation on permissible activities in CRZ area except those prohibited in Para 3 of the Notification, Clause 4(f) reads under: "(f) construction and operation for ports and harbors, jetties, wharves, quays, slipways, ship construction yards, breakwaters, groynes, erosion control measures;"

42. The said Notification while dealing specifically with the CRZ of Goa declares construction of jetties as permissible by the Gram Panchayats. In other words, the claim of regularization needs examination by the competent authority. Certainly, we are not even remotely indicating or should be understood to have indicated whether regularization should or should not be permitted. It is for the concerned authorities to examine the said request of the applicants, in accordance with law and with strict adherence to the prescribed procedure.

43. To put it simply, the impugned order on the one hand dealt with the issues which were not the allegations made in the show cause notice while on the other it does not discuss or appreciate any evidence in regard to the allegations that were made in the show cause notice. This leads clearly to one conclusion, that the Authority has failed to apply its mind to the facts of the case and has not even considered various legal and other submissions that had been raised by the applicants.

44. Another relevant factor is with regard to the inspection of jetties by the competent authority. As is evident from the above factual matrix, the dispute relates to illegal construction/re novation of the jetties and its extent. The extent could have been best determined by conducting an inspection. It is not in dispute before us that the Authority did not conduct any inspection of the site in question. The Deputy Collector had conducted an instant enquiry, the report of which has been mentioned in the impugned order, but at the same time it is stated that it returns no findings. The SDO and some officials had visited the site but no report thereof has been referred to in the proceedings and particularly in the impugned order. The Authority, thus, has ignored certain important aspects on the one hand and on the other, has decided the matter with reference to the events which were not part of the show cause notice.

45. Abuse of power and arbitrariness are two sides of the same coin. One triggers the other. The non-supplying of report, certain documents, non-application of mind, the content of the impugned order being beyond the scope of the show cause notice and non-communication of material relied upon, seen in the light of the background that no inspection was conducted by the Authority concerned, leads us to come to the insuppressible conclusion that there has been denial of fair opportunity to the applicants. The principles of natural justice have been violated. Non-recording of reasons in regard to the grounds and material submissions regarding the same by the Authority further substantiates the view that the impugned order is unsustainable in law. We are unable to hold that the procedure adopted by the Authorities completely eliminates the element of arbitrariness or that of a capricious decision. Adherence to the principles of natural justice, as an indefeasible part of rule of law is of supreme

importance, particularly when an Authority like Respondent No. 2 embarks upon determining the disputes between the parties or passes any administrative order/action involving civil consequences. We have no hesitation in coming to the conclusion that after the service of show cause notices, the proceedings and the impugned order are vitiated for the reasons afore-recorded.

46. Now, we must deal with the contention advanced on behalf of Respondent No. 3 that the Notification of 2011 and for that matter even of 1991 did not provide for any specific procedure to be adopted by the authority while initiating such proceedings under the scheme of the Notification. Thus, the procedure adopted by the Respondent No. 3 while passing the impugned order dated 4th March, 2011 does not call for any interference. The submission is that the Authority was competent to adopt a procedure that it may have deemed fit and proper.

47. The proposition of law advanced on behalf of the Respondent No. 3 to a limited extent, may not be questionable. It is a settled canon of law that wherever the rules do not provide any specific procedure to be followed by the authority concerned while dealing with disputes and passing orders having civil consequences, it can adopt its own procedure. But equally true is that such procedure has to be in consonance with the principles of natural justice and the basic rule of law. The application of any procedure, in absence of specific provision of law, which infringes the principles of natural justice, cannot be sustained in law. Such procedure and the order passed upon such basis shall stand vitiated. As far as the merits of the present case are concerned, we have already returned a definite finding that there has been a serious violation of the principles of natural justice and the impugned order cannot stand the scrutiny of judicial review. The necessary corollary to the above discussion would be as to what will be the procedure that should be followed by the authorities in consonance with the principles of natural justice in absence of the prescription of any procedure in the Notification. Putting the allegations to the applicants by means of a notice, granting an opportunity to the affected party of being heard and recording of reasons while passing the orders are the fundamental essentials of the doctrine of *audi alteram partem*. So the authority must follow the procedure which would satisfy these basic ingredients before it can pass an order having civil consequences. Thus, we direct the authority to follow the following procedure while exercising its power in terms of the Notifications of 1991 and/or 2011:

(1) It must serve a notice to show cause, containing comprehensively all the acts/omissions/commissions which the affected party has committed, rendering it liable for any action in terms of the Notification.

(2) The affected party should submit its reply with complete documents to support the contents thereof, within the time prescribed in the show cause notice.

(3) The authority must furnish to the applicants, complaints, documents and/or any other material that it proposes to rely upon for the purposes of determining the controversy in issue.

(4) Wherever the records are voluminous and it may not be practical to furnish the copies of all such records, in that event the authority must provide an inspection of documents to the applicants and supply copies of such documents as the applicants may ask for, at his cost. Wherever the facts of the case require and the authority is of the view that the controversy can better be resolved by physical inspection of the site, then it must by itself or through such other appropriate high officer get the site in question inspected and furnish the inspection report to the affected party.

(5) The affected party should be provided a fair opportunity to put forward its case before the authority.

(6) After hearing the parties, the authority should pass a reasoned order. The order

should deal, preferably with the grounds which have been raised by the affected party, as precisely as possible.

48. The above directions should be followed by the authority in all cases and with immediate effect.

49. Reverting to the case at hand, while we set aside the order dated 4th March, 2011, we grant liberty to the Authority to commence its proceedings from the stage of show cause notice/notices and proceed in accordance with the directions afore-contained from that stage. It is a settled principle of law that wherever the Courts or Tribunals set aside an order, it could always grant liberty and normally should grant liberty to the authority to commence its proceedings from the stage the defect had occurred in the proceedings. This principle has been well-settled by the Hon'ble Supreme Court in the case of *Managing Director, ECIL, Hyderabad* v. *Karunakaran* (1993) 4 SCC 727 and *Shyam Sunder* v. *State of Haryana* (2001) 3 Recent Service Judgments 371. Applying this principle to the facts of the present case, the Authority shall commence its proceedings from the stage of service of the show cause notices. The show cause notice dated 16th November, 2009 and 1st January, 2010 shall be the basis for proceeding further with the enquiry, however with specific liberty to the authority to make any additional or fresh grounds that it may deem fit, within two weeks from the date of pronouncement of this order. To these show cause notices, the applicants shall submit its additional reply, if any, within two weeks thereafter. The Authority shall then proceed with the matter in light of the above directions and pass the final order within four months from the date of pronouncement of this order.

50. We allow the application and set aside the order dated 4th March, 2011, with the above directions and liberties as granted.

———

2023 SCC OnLine NGT 4839

In the National Green Tribunal[†]

(BEFORE PRAKASH SHRIVASTAVA, CHAIRPERSON AND SUDHIR AGARWAL, MEMBER (JUDICIAL) AND DR. A. SENTHIL VEL, EXPERT MEMBER)

(By Hybrid Mode)

RSA Motors Private Limited … Appellant;

Versus

State Environment Impact Assessment Authority, Chandigarh and Others … Respondent(s).

Appeal No. 23/2023 and (I.A. No. 690/2023) with Caveat Application No. 30/2023

Decided on September 13, 2023, [Decided on : 04.09.2023]

Advocates who appeared in this case:

Appellant : Ms. Anubha Agarwal, Advocate

Respondent : Mr. Shubham Bhalla & Ms. Ragini Sharma, Advocates for SEIAA, Chandigarh

The Order of the Court was delivered by

SUDHIR AGARWAL, MEMBER (JUDICIAL):— M/s RSA Motors Private Limited has filed this Appeal under Section 16 of National Green Tribunal Act, 2010 (hereinafter referred to as '**NGT Act, 2010**') assailing order dated 25.08.2023 passed by State Environment Impact Assessment Authority, Chandigarh (hereinafter referred to as '**SEIAA, Chandigarh**') revoking, with immediate effect, Environmental Clearance (hereinafter referred to as '**EC**') dated 23.01.2015 issued to M/s Berkeley Realtech Limited in respect of its project, 'Berkeley Square' at Plot No. 24, Industrial Area, Phase-1, Chandigarh. SEIAA, Chandigarh has further directed Chandigarh Pollution Control Committee (hereinafter referred to as '**CPCC**') to take appropriate action against M/s Berkeley Realtech Limited in compliance of Office Memorandum dated 07.07.2021 issued by Ministry of Environment, Forest and Climate Change (hereinafter referred to as '**MoEF&CC**'), Government of India.

2. Facts giving rise to the present Appeal, as borne out from record, are that, M/s Berkeley Realtech Limited, a Builder and Developer Company, incorporated under Companies Act, 1956, submitted a building plan in respect of Plot No. 24, Industrial Area, Phase-1, Chandigarh vide memo dated 30.10.2013 to Department of Urban Planning, Chandigarh Administration for its approval. On a query made with regard to built-up area of the project, Chief Architect, Department

of Urban Planning, Chandigarh Administration sent a letter dated 10.03.2014 to SDO (Buildings), Estate Office, UT Chandigarh stating that '**total covered area**' of the proposed building on the above plot is 19920.235 sq. mtrs. Consequently, SDO (Buildings), Estate Office, UT Chandigarh sent letter dated 27.03.2014 to Additional Director, Department of Environment, Chandigarh informing him that '**built up area**' of the building is 19920.235 sq. mtrs. giving reference of Chief Architect's letter dated 10.03.2014.

3. It may be noted that Chief Architect gave measurement of total 'covered area' of the building but SDO (Buildings) mentioned in its letter dated 27.03.2014 that it is 'built up area' and the communication was made to Additional Director, Department of Environment probably in respect of consideration of the question, whether EC under Para 8 (a) of the Schedule appended to Environment Impact Assessment Notification dated 14.09.2006 (hereinafter referred to as '**EIA, 2006**') was required or not. Under EIA, 2006, prior EC is required if built up area is 20,000 sq. mtrs. and above.

4. However, an application for Consent to Establish (hereinafter referred to as 'CTE') was filed in 2012.

5. Subsequently, it appeared that a news item was published in Hindustan Times/Chandigarh Kesri on 05.08.2014 regarding construction of the project in question without EC, reporting that though built-up area was more than 20,000 sq. mtrs yet project has been constructed without EC.

6. Thereupon, M/s Berkeley Realtech Limited filed an application dated 12.08.2014 before SEIAA, Chandigarh for grant of EC. The application in Form 1 and 1A and enclosures (original copy and other record of SEIAA Chandigarh's proceedings) has been placed before us by Punjab State Pollution Control Board (hereinafter referred to as '**PSPCB**') for our perusal.

7. In the application form, built up area was disclosed by M/s Berkeley Realtech Limited as 22019.82 sq. mtrs and land area was 4470.95 sq. mtrs.

8. Record appended to the application also shows that initially M/s '**Berkeley Developer Limited**', was incorporated vide Certificate of Incorporation dated 20.02.2006 issued by Registrar of Companies, Punjab, Himachal Pradesh and Chandigarh. Name of the company was changed to '**M/s Berkeley Realtech Limited**' vide Certification of Incorporation issued by Registrar of Companies on 08.01.2008.

9. It (M/s Berkeley Realtech Limited) entered into a joint venture agreement on 24.09.2010 with M/s '**Oasis Motors Private Limited**' and '**RSA Motors Private Limited**'. In the said agreement, M/s Oasis Motors Private Limited and RSA Motors Private Limited disclosed

themselves as the owners in possession of the land bearing plot no. 24, Industrial Area, Phase-1, Chandigarh, having an area measuring 5347.2 sq. yds., purchased by M/s Oasis Motors Private Limited vide sale deed dated 06.06.2005 and RSA Motors Private Limited vide sale deed dated 05.05.2005. The two owners intended to get a multi-commercial complex constructed on the said land, land use whereof was changed/converted from industrial to commercial vide Chandigarh Housing Board's letter dated 17.03.2010. Exclusive rights to construct and develop the said complex was assigned to M/s Berkeley Realtech Limited.

10. An application dated 10.01.2012 was submitted by M/s Berkeley Realtech Limited to the Government of India, Ministry of Defence for issue of No Objection Certificate (hereinafter refer to as '**NOC**') for construction of commercial complex at industrial area phase-1, Chandigarh. NOC was granted by Government of India, Ministry of Defence vide letter dated 31.07.2012.

11. As per Form I and I-A submitted by M/s. Berkeley Realtech Limited, project is commercial comprising offices and retail buildings comprising three basements, one lower and upper ground floor and six floors on the total land area of 4470.95 sq. mtrs, with built up area 22019.82 sq. mtrs., at the cost of Rs. 20 crores, approximately. The building plan provided parking at minus three basement, lower ground and third floor; source of water supply is Municipal Corporation, Chandigarh; total domestic water requirement as 38.56 KLD and 20 KLD for cooling purposes; 30 KLD treated waste water to be generated out of which 13 KLD will be used for flushing and 17.84 KLD will be used for cooling purposes; net fresh water requirement would be 27.72 KLD; power requirement is 1808 KW, to be supplied by Electricity Department, Chandigarh; two DG sets of 600 KVA each and one DG set of 320 KVA were to be installed; design population of the project area could be, 280 persons in a regular/fix population and 1617 persons in floating population; solid waste generation to be 360 kg per day, to be collected separately as biodegradable and non-biodegradable waste as per Municipal Solid Waste Rules, 2000 (hereinafter referred to as '**MSW Rules, 2000**'); parking of 358 ECS had to be provided; during construction phase Rs. 19.50 lac had to be incurred for implementation of Environmental Management Plan and Rs. 10 lac per annum would be incurred on account of recurring charges; during operation phase Rs. 16.5 lacs would be incurred for implementation of EMP and Rs. 7 lacs per annum would be incurred on account of recurring charges; and, Rs. 5 lacs would be utilized towards CSAR activity which will be the responsibility of Directors of the Government.

12. The proposal for EC was considered by State Environment Appraisal Committee (hereinafter referred to as 'SEAC') and vide letter

dated **24.12.2014**, with certain conditions, it recommended grant of EC.

13. The matter was examined by SEIAA, Chandigarh in 7th meeting held on 13.01.2015 at Chandigarh. It decided to grant EC subject to certain conditions. The resolution of SEIAA reads as under:

> "*That this environmental clearance is* ***subject to obtaining prior clearance from forestry and wildlife angle including clearance from the Standing committee of National Board for Wildlife, as applicable, as the proposed site falls withín 10 K.M. of notified Wildlife Sanctuary (Sukhna Wildlife Sanctuary and City Bird Sanctuary****) and Eco sensitive zone around these sanctuaries have not been notified as yet. It is categorically stated that grant of environmental clearance would not necessarily imply that forestry and wildlife clearance shall be granted to the project and that their proposals for forestry and wildlife clearance shall be considered by the respective authority on merit and decision taken.* ***The investment made in the project, if any, based on environmental clearances so granted, in anticipation of the clearance from forestry and wildlife angle, shall be entirely at the cost and risk of the project proponent*** *and SEAC shall not responsible in this regard, in any manner."*

14. SEIAA, Chandigarh pursuant to its resolution 13.01.2015 granted EC to M/s. Berkeley Realtech Limited through Ranjeev Dahuja, Director vide letter dated 23.01.2015.

15. In the meanwhile, M/s. Berkeley Realtech Limited submitted a letter dated 16.10.2014 addressed to Deputy Conservator of Forest, Chandigarh Administration, Chandigarh for issue of wildlife clearance certificate to the project in question. The forest officials visited the site of the project on 22.11.2014 and found the site sealed by Environment Department since construction work was conducted without prior EC.

16. The M/s. Berkeley Realtech Limited when came to know of this fact, send a letter dated 02.01.2015 to Deputy Conservator of Forest, Chandigarh Administration, Chandigarh, informing that Environment Department had visited the site even when it was sealed, for the purpose of grant of EC. Therefore, for the purpose of issue of 'Wildlife Clearance Certificate', forest department officials may also visit the site. A reminder letter was also sent on 10.11.2015 to Deputy Conservator of Forest, Chandigarh Administration, Chandigarh.

17. M/s Berkeley Realtech Limited got occupancy certificate in 2016, obtained other requisite permissions etc. and have been working since then, submitting six monthly reports and compliances to the authorities with their satisfaction and no objection was raised by any of the authorities at any point of time.

18. CPCC, however, initiated criminal prosecution against M/s Berkeley Realtech Limited and its Directors for raising construction without prior EC and therefore violating provisions of EIA 2006, which is an offence under Section 15 of Environment (Protection) Act, 1986 (hereinafter referred to as '**EP Act, 1986**'). Challenging the said criminal proceedings, M/s Berkeley Realtech Limited and its Directors filed applications before Punjab and Haryana High Court at Chandigarh, registered as CRM No. 24455 of 2015 and 18420 of 2015 wherein further proceedings by the court below were stayed vide order dated 07.01.2016, which reads as under:

CRM No. 24455 of 2015

The prayer in this application is for placing on record the Notifications dated 14.9.2006 and 12.12.2012, issued by the Government of India as Annexures-P-28 and P-29 respectively.

The Notifications dated 14.9.2006 and 12.12.2012, issued by the Government of India as Annexures-P-28 and P-29 respectively, are taken on record.

Application is disposed of.

Main case

Learned counsel for the petitioners contends that the ***petitioners are sought to be prosecuted on the ground that they constructed the building without getting the environment clearance certificate****. It is stated that earlier, there was miscalculation of the area and the petitioners were of the view that no such environment clearance is required. When the exact area was measured, the petitioners applied for the environment clearance and the same has been granted. Therefore, the present complaint is nothing, but misuse of process of law.*

Notice of motion for 10.3.2016.

In the meanwhile, ***further proceedings before the lower Court are stayed.***"

19. CPCC also granted Consent to Operate (hereinafter referred to as '**CTO**') vide letter dated 26.07.2016, for a validity period up to 31.01.2025. CTO was valid for running office complex along with small restaurant/food court. The gross capital investment mentioned in CTO was Rs. 20 crores. Various conditions were imposed in the aforesaid CTO and we shall refer the same wherever necessary. However, it may be mentioned that CTO specifically said that M/s Berkeley Realtech Limited, Plot No. 24, Industrial Area, Phase-I, Chandigarh shall comply the provisions of EP Act, 1986 and the Rules framed thereunder.

20. MoEF&CC, in exercise of powers under Section 3(1)(2)(v) and (xiv) and (3) of EP Act, 1986 read with Rule 5(3) of EP Rules, 1986 issued a Notification dated 18.01.2017 notifying 1050 hectares area

varying from 2 kms to 2.75 kms from the boundary of '**Sukhna Wildlife Sanctuary**' in Union Territory of Chandigarh on the side of Chandigarh as **Sukhna Wildlife Sanctuary Eco-Sensitive Zone**.

21. Regional Director, (NR), under section 233 of Companies Act, 2013, passed confirmation order dated 25.08.2017 confirming scheme of merger/amalgamation between RSA Motors Private Limited (Appellant), Oasis Motors Private Limited and Berkeley Realtech Limited. The order of confirmation dated 25.08.2017 is Annexure A-19 which showed that M/s Oasis Motors Private Limited and M/s Berkeley Realtech Limited were subsidiary companies of RSA Motors Private Limited and these subsidiary companies merged/amalgamated with RSA Motors Private Limited.

22. The issue that the commercial project in question was within Sukhna Wildlife Sanctuary Eco-Sensitive Zone was raised by one Taruni Gandhi in ***O.A. No. 415/2017***, *Taruni Gandhi* v. *Union of India* wherein a reply dated 13.09.2017 was filed on behalf of respondent no. 16 (in that case) i.e. Berkeley Square and it was said that commercial complex is outside the area of Sukhna Wildlife Sanctuary Eco-Sensitive Zone. This Tribunal finally disposed of OA. No. 415/2017 vide order dated 02.08.2018 following its larger bench decision in ***O.A. No. 380/2015***, *Dr. C.V. Singh* v. *Union of India* decided by judgment dated 20.07.2018. In the case of *Dr. C.V. Singh*, a prayer was made for preventing construction within 10 kms radius of Asola Bhatti Wildlife Sanctuary. It was brought to the notice of Tribunal that a draft notification under Section 2(3) of EP Act, 1986 was issued on 11.09.2017 proposing 1 km of Asola Bhatti Wildlife Sanctuary to be Eco -Sensitive Zone and it was stated before Tribunal that final notification shall be issued within one month. In view thereof, Tribunal observed that no further order was required and disposed of **O.A. No. 380/2015**, *Dr. C.V. Singh* v. *Union of India* (Supra). Following this order, O.A. No. 415/2017 was also disposed of with the observation that the matter was squarely covered with the order passed in *Dr. C.V. Singh* v. *Union of India* (Supra). Tribunal's order dated 02.08.2018 passed in OA. No. 415/2017 wherein Commercial Complex in question was a party, reads as under:—

> "*Heard the Learned Counsels for the parties. In this matter the primary relief sought is that illegal and unauthorized construction work have been undertaken by the Developers within a radius of 10 km from Sukhna Wildlife Sanctuary, Chandigarh.*
>
> ***The Learned Counsel for the Respondent State submits that the final Notification under Section 3 has been issued in the instant case on 18th January, 2017.***
>
> *At the outset, it may be mentioned that a similar issue was raised with regard to Asola Bhatti Wildlife Sanctuary in NCT Delhi in the*

case of Dr. C.V. Singh *(No. 380 of 2015) and the same has been decided by the larger Bench of the Tribunal on 20th July, 2018.*

The Learned Counsel for the Applicant has fairly submitted that the issue involved herein is substantially the same as in the case of Asola Bhatti Wildlife Sanctuary.

Therefore, the case of Dr. C.V. Singh *(Supra) squarely covers the present matter.*

Consequently, Original Application No. 415 of 2017 stands disposed of, with no order as to cost."

23. The above order shows that no issue was adjudicated therein.

24. Appellant claims that it was granted 'Consent to Establish' (hereinafter referred to as '**CTE**') under Section 25 of Water (Prevention and Control of Pollution) Act, 1974 (hereinafter referred to as '**Water Act, 1974**') and 21 of Air (Prevention and Control of Pollution) Act, 1981 (hereinafter referred to as '**Air Act, 1981**') as amended from time to time in the category process 'Service Station (expansion)" and type of industry "automobile servicing, repairing and printing (excluding only fuel dispensing) and copy of **CTE dated 07.07.2021** has been filed as Annexure A-24 but we find that the above document has been issued in the name of Om Prakash Sharma, Legal Officer, M/s Berkeley Realtech Limited, Plot No. 24, Industrial Area, Phase-I, Chandigarh.

25. CTO for the above service station was issued by CPCC vide letter dated 18.08.2021 (Annexure A-25, page 146 to the paper book) and the same is also in the name of Om Prakash Sharma, Legal Sharma, M/s Berkeley Realtech Limited, Plot No. 24, Industrial Area, Phase-I, Chandigarh.

26. It is evident from the above documents that CTE dated 07.07.2021 and CTO dated 18.08.2021 are not for the entire commercial complex but for a service station.

27. Appellant has also placed on record on page 150, '**Authorization**' dated 18.08.2021 under Hazardous and Other Waste (Management and Transboundary Movement) Rules, 2016 (hereinafter referred to as '**HOW(MTM) Rules, 2016**') for generation, storage and disposal of hazardous and other waste issued by CPCC in the name of Om Prakash Sharma, M/s Berkeley Realtech Limited in respect of automobile servicing, repairing and printing (excluding only fuel dispensing).

28. CPCC issued a **show cause notice dated 14.07.2023** under Sections 33(A) of Water Act, 1974, 31A of Air Act, 1981 and 5 of EP Act, 1986 to M/s Berkeley Realtech Limited stating that it is running a commercial complex having offices, retail and service station having consents by the orders dated 26.07.2016 and 18.08.2021 and

authorization vide letters dated 26.07.2016 and 18.08.2021 and has installed four numbers of diesel generating sets whereof two are of 320 KVA each and two are of 62.5 KVA each, as found in the surprise inspection dated 14.07.2023. As per CTO dated 18.08.2021, M/s Berkeley Realtech Limited was not entitled to install/use Diesel Generator sets without prior permission from CPCC but it was running DG sets without consent and authorization. There is also violation of conditions mentioned at point no. 10, 5 and 2 by not submitting annual returns properly, non-maintenance of log books and setting up a body shop of four wheelers along with a paint booth and thereby generating hazardous waste without consent. CPCC therefore required M/s Berkeley Realtech Limited to show cause against the following proposed actions:

"*i) That you will close your unit forthwith.*

ii) That the concerned authorities shall disconnect the supply of electricity and water to the unit with immediate effect.

iii) That the concerned authorities shall seal your unit with immediate effect. iv) That the consent issued under Air and Water Act and authorization issued under Hazardous Waste Rules will be revoked/cancelled.

v) That environment compensation shall be imposed on you as per the directions of Hon'ble National Green Tribunal (NGT)."

29. 15 days' time was granted to M/s Berkeley Realtech Limited to submit reply.

30. Another **show cause notice dated 20.07.2023** was issued by Member Secretary, SEIAA Chandigarh, in the name of Ranjeev Dahuja, Director, M/s Berkeley Realtech Limited alleging violation and non-compliance of conditions of EC in respect of a commercial complex in question. Show cause notice mentioned one non-compliance and one violation of EC conditions, as under:

"***Non-Compliance by the Project Proponent***:

1. *"Not obtaining prior Wildlife Clearance before starting operations of the project"*

As per condition mentioned in EC letter under the head 3. Post Construction/Operation Phase" - Sr. No. (i) on Page No. 5" it was clearly stated that EC is subject to obtaining prior clearance from forestry and wildlife angle including clearance from Standing Committee of National Board for wildlife, as applicable, before starting operations of the project.

Violation by the Project Proponent.

1. *Change/enhancement of scope of work than that mentioned in EC letter no. SA-ED-2015/EC/107 dated 23.01.2015, with addition of a Restaurant. Service Station, Paint Booth and placing one more DG Set of capacity 320 KVA in the premises of existing unit i.e. at*

Plot No. 24. Industrial Area, Phase 1. Chandigarh

Whereas EC granted to your project was for "Commercial project comprising of offices and retail" wherein it is clearly stated in the EC letter under the head Condition for entire life of the project" read as "In the case of any change(s) in the scope of project, the project would require a fresh appraisal by this SEIAA."

Hence, it is a violation of conditions of Environmental Clearance granted as mentioned vide letter no SA-ED-2015/EC/107 dated 23.01.2015."

31. Shri O.P. Sharma, Authorized Signatory on behalf of M/s Berkeley Realtech Limited submitted reply dated 24.07.2023 to the show cause notice dated 14.07.2023 stating that he had already applied for CTO of DG sets of 320 KVA and paint booth vide application dated 25.07.2023; hazardous and other waste could not be uplifted by authorized vendors from the premises due to lack of communication and misunderstanding, hence, the same is lying in workshop in containers/drums and would be sold to Authorized Vendors in current financial year; in respect of reply giving information in annual return for the year 01.04.2022 to 31.03.2023 vide company's letter dated 25.04.2023, it was said that the same was sent inadvertently; and log books are being maintained but could not be shown at the time of inspection since the official maintaining logbook was on leave on the date of inspection. With the above explanation, request was made to withdraw show cause notice dated 14.07.2023.

32. Reply dated 31.07.2023 to the show cause notice dated 20.07.2023 was sent by the appellant to Member Secretary, SEIAA Chandigarh stating as under:

"*1. That at the outset the notice issued to us is in derogation of the* ***notification dated 04.01.2017 issued by the Ministry of Environment and Forest****, which clearly reflects that the land of the project proponent would not fall within the Eco-sensitive Zone and therefore the requirement of NOC from the forest and wildlife are not required.*

2. It is further imperative to state here that in response to your office letter dated 03.11.2014, we had provided a copy of the application submitted to the Conservator of Forest along with and undertake that there is no diversion of forest land in the present case. It is further a matter of record that ***no order has been communicated to us, in response to our application submitted for grant of NOC from the Department of Wildlife and Forest.***

3. Furthermore, your kind attention is also invited to the OA no. 415 of 2017 titled as Taruni Gandhi *v.* Union of India, *wherein directions were prayed for stopping entire construction activities*

and demolition of the projects alleging to be within the eco-sensitive zone. We along with the Chandigarh Administration contested the said litigation before the National Green Tribunal and the matter was disposed of in terms of the notification declaring the land to be beyond the eco-sensitive zone. Now, the completely diversion stand in the show cause notice would be wholly permissible. It is therefore submitted that there is no alleged noncompliance before starting operations, as alleged in the show cause notice.

4. *The show cause notice further states that there has been alleged change/enhancement of scope of work, which is also incorrect as the* ***EC granted was for the office and retail services. A restaurant or a service station would again be components of retail service and cannot be stated to be different from the same. Be that as it may, for the paint booth, we have separately applied for NOC*** *and a copy of the application is appended along with the present reply.*
5. *Lastly, the show cause notice alleges that we have placed one more DG set of 320 kVA. It is imperative to state here that* ***for the said DG set also applied for permission*** *and a copy of the application is annexed along with the present reply. In light of the aforementioned facts, it is most humbly submitted that there is no derogation or breach of any of the conditions of the EC, as alleged in the show cause notice and furthermore the* ***show cause notices without jurisdiction, to the extent of the violation of the wildlife clearance****. The project proponent has more than 50 different business establishments and about 500 to 600 employees are engaged. We attract footfall of about 4000 people daily and in case any adverse order is passed with respect to our EC, it would adversely affect all the related parties. It is further submitted that, in case the Department intends to pass any adverse order, the same may not be given effect to/kept in abeyance so that we can avail our remedies against the said order, in accordance with law and day-today business operations are not adversely affected. We further reserve our right to make additional submissions, if required at an appropriate stage."*

33. SEIAA, Chandigarh in continuation of the proceedings arising from show cause notice dated 20.07.2023 gave opportunity of oral hearing to Ranjeev Dahuja, Director, M/s Berkeley Realtech Limited by notice dated 07.08.2023 directing him to appear for oral hearing on 11.08.2023 in the Committee Room of CPCC.

34. Appellant filed writ petition no. 16974/2023 in Punjab and Haryana High Court challenging show cause notice dated 20.07.2023. The matter was considered by High Court on 08.08.2023 and it raises a

question as to how appellant can challenge show cause notice dated 20.07.2023 issued by the authorities to M/s Berkeley Realtech Limited. Counsel for appellant sought short accommodation to assist court on this aspect. Thereafter, it filed an Additional Affidavit dated 11.08.2023 sworn by Shri Om Prakash Sharma, Authorized Representative of appellant stating that M/s Berkeley Realtech Limited merged with Appellant vide confirmation and merger order dated 25.08.2017 and therefore it is entitled to challenge the show cause notice issued to M/s Berkeley Realtech Limited.

35. Writ petition was disposed of vide order dated 17.08.2023 by the High Court accepting request of the Counsel of the appellant that it may be permitted to appear before SEIAA Chandigarh and raise all possible contentions thereat.

36. CPCC issued notice dated 17.08.2023 affording personal hearing to Ranjeev Dahuja, Director, M/s Berkeley Realtech Limited in the proceedings arising from show cause notice dated 14.07.2023 stating that in its reply, it does not give any proof of disposal of hazardous waste generated during past two years in the unit, running DG sets of 320 KVA and paint booth without consent and it has submitted the document of merger/amalgamation of M/s Berkeley Realtech Limited with RSA Motors Private Limited but did not inform CPCC about the said merger before taking consent in the name of M/s Berkeley Realtech Limited, which was again a violation of the consent issued under Water Act, 1974 and Air Act, 1981. Shri Ranjeev Dahuja, Director was required to appear in person on 22.08.2023 to avail remedy of oral hearing and to explain the above violations.

37. Appellant through Shri Rajeev Dahuja submitted letter dated 22.08.2023 in reference to the proceedings initiated with show cause notice dated 14.07.2023 giving reply to the violations mentioned in the letter dated 17.08.2023, and we find it appropriate to reproduce the reply as under:

> *"We have been served with the above mentioned letter and we have further been called for personal hearing. With reference to the contents of the captioned letter and in furtherance of our reply dated 10.08.2023, we submit as under*:—
>
> ***WITH REFERNCE TO DISPOSAL OF OIL AND ETP SLUDGE FOR THE FY 2022-2023 AND EARLIER SUBMITTED REPLY***
>
> 1. *It is submitted that we had submitted our response to the notice to the best of our ability and based on information and record available, till date. We have placed the complete and true facts before Your Goodsell.*
> 2. *Although, the captioned letter alleges that our reply was "unsatisfactory", as we did not submit any proof of the disposal of*

the hazardous waste generated during the past two years. It is further alleged that we did not submit any documentary proof wrt disposal of oil and ETP Sludge for the FY 2022-2023.

3. *Hence, we clarify and reiterate that we* ***had not disposed*** *of the oil and ETP Sludge for the FY 2022-2023 and therefore, we cannot bring on record any documentary proof in support thereof, since the disposal took place later and not in the FY 2022-2023. It is clarified that the* ***disposal of the oil and ETP Sludge has taken place later in time and copies of the disposal proofs for oil and ETP Sludge are annexed hereto as Annexure A.1 and Annexure A.2 respectively****.*
4. *Ergo, the position is clear that* ***no disposal took place prior to FY 2022-2023 and now the disposal has taken place in accordance with law.***

RUNNING A DG SET OF 320 KVA

5. *We may submit and clarify that we have not violated or breached the fundamental capacity of complete KVA load sanctioned to us as per the EC. We have still not utilized the complete load. The capacity permitted to us is 1520 KVA whereas on site we have installed generator sets for less than 800 KVA. However, no violations of any condition was made.*
6. *We have* ***already applied for the approval for additional DG set for 320KVA.*** *Annexure A.3*
7. ***In regard to paint booth, we have given the declaration that same has been dismantled****. The permission applied earlier has been duly withdrawn as per Annexure A.4*

NO INFORMATION ABOUT MERGER

8. *The issued with respect to the merger and change of name had recently cropped up in a litigation filed by RSA Motors Pvt. Ltd. on behalf of M/s Berkeley Realtech Limited, wherein the Chandigarh Administration was a party (Ref : CWP No. 16974 of 2023). On 08.08.2023 when the petition came up for consideration, the Hon'ble High Court was pleased to pass the following order:—*

   "Upon being question, as to how the petitioner (RSA Motors Private Limited) would have a locus to assail the show cause notice dated 20.07.2023 (P-1), issued by the respondent authorities to M/s Berkeley Realtech Limited, Learned Senior counsel for the petitioner prays for a shorter accommodation to assist the Court in this regard."
9. *That thereafter, we had filed an additional affidavit clarifying the position, which is annexed hereto as Annexure A.5, and the said affidavit was taken on record, as depicted from the final order, which is annexed hereto as Annexure A.6. Hence, this issue of*

merger already stands settled.

10. *Even otherwise, the* ***certificate of merger is a conclusive proof of the merger and no legal impediment survives thereafter****. Annexure A7.*

11. *The aforementioned facts clearly reveal that we have not violated any condition of the EC We have as many as 50 business establishments which are working/operational in the public square (project proponent) and as many as 500-600 persons are employed in these establishments. The project attracts a footfall of about 4000 people per day and case any coercive action is taken pursuant to the show cause notice, it would hamper the rights of several persons as well as their livelihood. Furthermore, the consequences of which negative impact on the economic aspect related to the establishment are also writ large.*

12. *That these submissions have been made without prejudice to the rights of the applicant and may not be treated as acquiescence of any right or admission of any liability.*

It is therefore, most respectfully submitted that:—

a) Present Show Cause Notice be ordered to be dropped, being devoid of merit and perverse to the record and law;

b) Permit the applicant audience in-person as well as through counsel;

c) Permit filing of additional documents after the scheduled hearing, if required, with right of hearing.

d) Grant any other relief.

e) In the alternative, in case of any adverse order, it may be ordered to be kept in abeyance for at least 15 ~ so that we can seek legal recourse in accordance with law."

38. In reference to the proceedings initiated by the show cause notice dated 20.07.2023, SEIAA, Chandigarh vide letter dated 22.08.2023 gave opportunity of oral hearing on 24.08.2023 to Ranjeev Dahuja, Director of M/s Berkeley Realtech Limited.

39. In the hearing conducted by CPCC, pursuant to the show cause notice dated 14.07.2023 in its proceedings dated 22.08.2023, it was found that the issue of locus of appellant has to be decided and therefore, it directed Ranjeev Dahuja, Director of the appellant to submit legal and complete documents pertaining to merger and also pertaining to generation of hazardous waste, material stored and disposed of in the previous years, date of incorporation and certificate of incorporation of all the companies involved in merger, pan cards of the companies, income tax returns filed from 2016 to 2022, names and addresses of promotors and Directors of all the three companies, details of relationships subsisting between such companies who are parties of

merger and also copy of the authority letter authorizing Ranjeev Dahuja to represent the case before CPCC.

40. The reply dated 22.08.2023 was filed to SEIAA Chandigarh by Shri Ranjeev Dahuja, Director along with the authorization resolution dated 14.08.2023 in the proceedings pursuant to show cause notice dated 20.07.2023 and in the light of the permission granted by the Punjab and Haryana High Court to raise all issues before the competent authority in the context of show cause notice dated 20.07.2023. Reasons/reply given by appellant, in brief, are as under:

i. Notice is without jurisdiction since issued by Member Secretary, SEIAA.

ii. No condition of EC was violated in as much as application was submitted to the Forest Department for grant of EC, though Eco-Sensitive Zone was not notified at the time when EC was granted and despite submission of letter of grant of NOC and reminders, no such NOC was issued; Department being aware that no requirement of NOC existed as per law.

iii. There is/was no prescribed limitation of 10 Kms (period upto 2015). Supreme Court in *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590 clarified that it has not passed any order to notify area within 10 kms of National Park or Wildlife Sanctuaries etc. prohibiting activities.

iv. No violation of draft notification dated 22.07.2015 and 17.09.2015; Bird Sanctuary was notified vide notification dated 03.10.1998; Wildlife Sanctuary was notified vide notification dated 06.03.1998 but no Eco-Sensitive Zone was declared in 2015 when EC was granted.

v. Final Notification dated 18.01.2017 declaring Eco-Sensitive Zone excluded the project area (2017 onwards) and this issue is already settled with NGT.

vi. The project in question does not fall within the limits of prohibited area under Wildlife Sanctuary Notification or Eco-Sensitive Zone Notification.

vii. Notice is selective and applicant is discriminated.

viii. No condition of EC is violated in as much as commercial project comprising office and retail would include restaurant, service stations and paint booths.

ix. Commercial activities includes shops, offices, banks, hotels, restaurants, training institutions etc.

41. In reference to the proceedings initiated with show cause notice dated 20.07.2023 and in continuation of reply dated 22.08.2023, another reply was submitted by appellant on 24.08.2023 to SEIAA, Chandigarh stating that EC and Clearance from Forest and Wildlife are

independent and separate proceedings.

42. Further, in reference to the proceedings dated 24.08.2023 before CPCC in the context of the show cause notice dated 14.07.2023, a reply dated 25.08.2023 was filed by appellant stating that merger was approved by Regional Director and that document of merger is a conclusive proof of merger and no impediments survives thereafter; there is no provision under Companies Act, 2013 providing fresh permissions to be obtained by the merging company/transferring company if the permissions have been granted to transferor companies. With regard to other requirements, the reply said that no hazardous waste was disposed in 2022-2023; the incorporation certificates, pan cards, income tax returns and list of directors were supplied as Annexures to the said reply.

43. Now, the impugned order dated 25.08.2023 has been passed by SEIAA, Chandigarh which is in furtherance to the show cause notice dated 20.07.2023.

ARGUMENTS:

44. Learned Counsel for the appellant has urged that before passing impugned order, the procedure prescribed in para 8 of EIA 2006 ought to have been followed in as much as first the matter ought to have been considered by SEAC and on its recommendations, decision could have been taken by SEIAA but here Notice has been issued by SEIAA not in respect of the dissenting view to the recommendation of SEAC but on its own; no show cause notice was issued by SEIAA, Chandigarh prior to revocation of EC; no prior Wildlife Clearance was required since the condition of taking prior Wildlife Clearance within 10 kms of Sukhna Wildlife Sanctuary was wrongly formulated on Supreme Court's Order though it was clarified by Supreme Court in *Goa Foundation* v. *Union of India* (Supra) that no such order was passed by it requiring such clearance and insistence by authorities upon appellant to obtain prior Clearance of Wildlife Department for projects/developments activities within 10 kms of Wildlife Sanctuary is unsustainable in law; procedure laid down under Section 3 of EP Act, 1986 read with Rule 5 of EP Rules, 1986 has been violated; restriction in respect of rotation of machines and carrying out processes and operations falls within the scope of Section 3(v) of EP Act, 1986 and can be made operative only in accordance with the procedure laid down in Rule 5 which has not been followed; MoEF&CC has issued Office Memorandum stating that prior clearance from standing Committee of National Board for Wildlife will not be applicable for projects located outside Eco-Sensitive Zone and State Government shall not insist upon Wildlife Clearance for Developmental Projects outside the project protected areas; this Tribunal has already held that condition of 10 kms is inapplicable but still it is being insisted upon; non-transfer of EC in the name of

appellant is not a violation of the provisions of EIA 2006 in as much as para 11 permits transfer during validity of EC and the validity period was five years from the date of issue or till completion of construction of project, whichever is earlier; since five years have expired, construction is also complete, occupancy certificate was granted on 9.04.2016 and it is before merger, hence, no valid EC was operating on the date of merger and the provisions of transfer was inapplicable; for non-obtaining prior EC, there was some mistake with the authorities in respect of total built up area for which appellant is not guilty of any concealment or making a false declaration or not applying for prior EC and there was an indeliberate mistake; no undertaking has been violated as no additional construction has been undertaken; usage of area as restaurant, shop, service station is in conformity with the permission granted as informed by the commercial project or commercial activities; CTE was granted by CPCC on 05.03.2015 to restaurant/food court and CTO was granted on 26.07.2016; in respect of service station CTE was granted on 07.07.2021 and CTO was granted on 18.08.2021 by CPCC and there was no concealment of any information or violation of any undertaking by the appellant; installation of DG sets is not violation of any condition in as much as EC allowed installation of two DG sets of 600 KVA each and one DG set of 320 KVA i.e. total 1520 KVA DG sets could have been installed by the appellant but smaller capacity DG sets were installed i.e. two DG sets of 320 KVA and two DG sets of 62.5 KVA which cumulative capacity is lower than the total permissible capacity; there is a discrimination on the part of the respondent no. 1 for selecting only the appellant for an adverse action; and therefore, order dated 25.08.2023 is incorrect and unsustainable in law and liable to be set aside.

45. Learned Counsel appearing on behalf of respondent no. 1 submitted that there are two proceedings initiated by two different bodies. One pursuant to show cause notice dated 14.07.2023 initiated by CPCC in which final decision is yet to be taken. Another proceeding was initiated by SEIAA, Chandigarh pursuant to show cause notice dated 20.07.2023 which has resulted in impugned order dated 25.08.2023. A conditional EC was granted to M/s Berkeley Realtech Limited. Since the Proponent, M/s Berkeley Realtech Limited had already started construction and substantially completed the same before filing application for grant of EC on 12.08.2014, the conditions required to be observed in pre-construction phase were found not feasible to be applied and therefore, post construction/operation phase conditions in both the categories i.e. specific conditions/generic conditions were mentioned in the EC. Under para B, heading 'General Conditions', para 3, post construction/operation phase, there was following condition specially mentioned in the EC dated 23.01.2015:

"*i. That* ***this environmental clearance is subject to obtaining prior clearance from forestry and wildlife angle including clearance from the Standing committee of National Board for Wildlife, as applicable, as the Proposed site falls within 10 KM of notified Wildlife Sanctuary (Sukhna Wildlife Sanctuary. and City Bird Sanctuary)*** *and Eco sensitive zone around these sanctuaries have not been notified as yet It is categorically stated that grant of environmental clearance would not necessarily imply that forestry and wildlife clearance shall be granted to the project and that their proposals for forestry and wildlife clearance shall be considered by the respective authority on merit and decision taken The investment made in the project. if any based on environmental clearance so granted, in anticipation of the clearance from forestry and wildlife angle, shall be entirely at the cost and risk of the project proponent and SEAC shall not responsible in this regard, in any manner."*

46. Learned Counsel submitted that before allowing any occupancy of the project in question, it was incumbent upon the proponent to whom EC was granted to obtain prior clearance from the standing committee of National Board of Wildlife in view of the above condition which was clearly mentioned in the EC. Proponent had illegally did not obtain any such prior clearance and proceeded to allot land/space to third parties for carrying out commercial activities in the project in question which is a clear violation of the above condition. He further submitted that project was a commercial project comprising offices and retail space. Restaurant, service station, paint booth do not satisfy the test of offices and retail space. An expansion of the project beyond its scope as disclosed in Form I and IA on the basis whereof EC was granted on 23.01.2015 without any permission of SEIAA is clearly illegal and violation of conditions of EC read with provisions of EIA 2006.

47. Learned Counsel appearing for SEIAA Chandigarh also contended that EC further contained certain conditions which were to be observed for entire life of the project which included adherence to the commitments made in Environment Management Plan but that has not been followed. There are apparent violations on the part of the proponent which virtually were admitted in its reply and therefore, action has been taken by respondent no. 1 after giving due opportunity of hearing to the proponent. Lastly, it is submitted that the appeal at the instance of RSA Motors Private Limited i.e. appellant is incompetent, in as much as, EC was granted to M/s Berkeley Realtech Limited, at no point of time either SEIAA, Chandigarh or any other authority dealing with the issue of environment was ever informed or communicated about merger of M/s Berkeley Realtech Limited with the

appellant and no action was taken for change of the consent etc. in the name of the appellant; even after the alleged merger in 2017, the documents have been submitted in respect of the project in the name of M/s Berkeley Realtech Limited as it is evident from the following:—

i. CTE under Section 25 of Water Act, 1974 and 21 of Air Act, 1981 was applied in the name of Om Prakash Sharma, Legal Officer, M/s Berkeley Realtech Limited and CTE order dated 07.07.2021 has been granted in the above name.

ii. CTO under Section 25 of Water Act, 1974 and 21 of Air Act, 1981 for service station was applied in the name of Om Prakash Sharma, Legal Officer M/s Berkeley Realtech Limited and accordingly granted vide letter dated 18.08.2021 in the said name.

iii. Authorization under HOW(MTM) Rules, 2016 for service station was applied in the name of Om Prakash Sharma, Legal Officer M/s Berkeley Realtech Limited and was granted vide letter dated 18.08.2021 in the said name.

48. Before CPCC, pursuant to show cause notice dated 14.07.2023 which was issued to M/s Berkeley Realtech Limited, reply was submitted on 24.07.2023 by Shri O.P. Sharma, Authorized Signatory, M/s Berkeley Realtech Limited.

49. In the reply dated 31.07.2023 given to the show cause notice dated 20.07.2023, appellant did not mention details of the alleged merger or transfer of statutory documents in favour of transferee company i.e. appellant though the letterhead which was printed on which reply was submitted, it was mentioned that M/s Berkeley Realtech Limited has merged with RSA Motors private Limited and this reply was also signed by Shri O.P. Sharma as Legal Officer.

ISSUES:

50. We have heard learned Counsel for the parties, perused record and also relevant statutory provisions. In light of the rival submissions, in our view, following issues have arisen requiring adjudication by this Tribunal:

I. Whether appeal, at the instance of appellant, RSA Motors Private Limited is maintainable?

II. Whether there is any violation of conditions of EC which justify revocation of EC by respondent no. 1?

III. Whether principles of natural justice have been complied with in substance before passing the impugned order dated 25.08.2023, Annexure A-1 to the application?

CONSIDERATION ON MERITS

51. Issue no. I : It cannot be doubted that the procedure of merger of companies in the present case is governed by the provisions of

Companies Act, 2013 which was holding the field in 2017 when appellant claim that merger took place.

52. In the present case, we are informed by Learned Counsel for the appellant that appellant company is a 'holding company' and two other companies namely M/s Berkeley Realtech Limited and Oasis Motors Private Limited are 'subsidiary companies' of the appellant.

53. In order to show that the three companies merged and the merger has attained finality, appellant has placed reliance on the order dated 25.08.2017 issued by Regional Director (NR) under Section 233 of Companies Act, 2013.

54. We have to examine whether the aforesaid order of Regional Director resulted in final merger or amalgamation of the companies including the appellant.

55. In order to understand the concept of 'holding company' and 'subsidiary company', we may refer to the definition of 'Holding Company' under Section 2(46) and 'Subsidiary Company' under Section 2(87) of Companies Act, 2013. The said provisions read as under:

> *"2(46) "**Holding company**", in relation to one or more other companies, means a company of which such companies are subsidiary companies."*
>
> *"2(87) '**subsidiary company**" or" subsidiary", in relation to any other company (that is to say the holding company), means a company in which the holding company—*
>
> *(i) controls the composition of the Board of Directors; or*
>
> *(ii) exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies*:
>
> *Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.*

56. Learned Counsel for the appellant stated that the appellant's company satisfy the definition of 'holding company' under Section 2 (46) and M/s Oasis Motors Private Limited and M/s Berkeley Realtech Limited satisfy the definition of 'subsidiary company' under Section 2 (87) of the said Act.

57. The provisions relating to compromises, arrangement and amalgamation are contained in Chapter XV of Companies Act, 2013. Section 233 is a special provision made for giving effect to the scheme of merger or amalgamation between two or more small companies or between a holding company and its wholly owned subsidiary company or such other class or classes of companies as may be prescribed.

58. Sub-Section 1 of Section 233 deals with the procedure initiated initially to be followed for accepting a scheme of merger or

amalgamation which included objections or suggestions, if any, from Registrar and Official Liquidators where Registered Office of the respective companies are situated; consideration of objections and suggestions by the companies in their respective general meetings and approval by respective Members at general meeting holding at least 90 per cent of the total number of shares; filing of a declaration of solvency in prescribed form by all the companies involved with the Registrar of the place where Registered Office of the companies is situated; approval of the scheme by majority representing 910th in value of the creditors or class of creditors of respective companies; filing of copy of the scheme, so approved, in the prescribed manner by the transferee company with the Central Government, Registrar and Official Liquidator where Registered Office of the Company is situated.

59. Thereafter, sub-Section 3 of Section 233 provides that on the receipt of the scheme, if Registrar or Official Liquidator has no objections/suggestions to the scheme, Central Government shall register the same and issue a confirmation thereof, to the companies. Sub-Section 4, 5 and 6 provide the procedure where any objection or suggestion is made and sub-Section 7 provides confirmation of scheme after disposal of such objections/suggestions, if any. Thereafter, sub-Section 8 of Section 233 says that the Registration of scheme under sub-Section 3 or sub-Section 7 shall be deemed to have the effect of dissolution of transferor companies without process of winding up.

60. In the present case, *M/s Oasis Motors Private Limited and M/s Berkeley Realtech Limited* are 'transferor companies' as both have merged/amalgamated with appellant's company which is a 'transferee company'.

61. In view of Section 233(8), it cannot be doubted that the dissolution of transferor companies had taken place when confirmation order was issued under Section 233 and the transferor companies merged/amalgamated with transferee company.

62. The effect of registration of scheme is provided in section 233(9) which reads as under:

> "*233. (9) The registration of the scheme shall have the following effects, namely—*
>
> *(a) transfer of property or liabilities of the transferor company to the transferee company so that the property becomes the property of the transferee company and the liabilities become the liabilities of the transferee company*;
>
> *(b) the charges, if any, on the property of the transferor company shall be applicable and enforceable as if the charges were on the property of the transferee company*;
>
> *(c) legal proceedings by or against the transferor company pending*

before any court of law shall be continued by or against the transferee company; and

(d) where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of debt due to dissenting creditors, such amount, to the extent it is unpaid, shall become the liability of the transferee company."

63. It is not the case of respondent no. 1 that the procedure of merger under Companies Act, 2013 has not been followed or anything is wanting to complete the process of merger.

64. The confirmation order of scheme of merger or amalgamation between three companies issued by Regional Director (NR) pursuant to Section 233 of Companies Act, 2013 has become effective from the date as per Clause 1.5 of part 1 of the scheme or 30th day from the date of confirmation order, whichever is earlier. Clause 1.5 of the scheme reads as under:—

"*1.5 "Effective Date" means the last of the dates on which the conditions specified in Clause 16 are complied with respect to a particular part of the Scheme."*

65. Clause 16 as referred in Clause 1.5 reads as under:

16. ***CONDITIONALITY OF THE SCHEME***

16.1 This Scheme is and shall be conditional upon and subject to:

(i) The Scheme being approved by the requisite majority in number and value of such classes of persons including the respective members and/or creditors of RSA, Oasis and BRL, as may be directed by the Central Government.

(ii) The sanction of the Central Government under Section 233 of the Act in favour RSA, Oasis, and BRL under the said provisions and to the necessary Order under Section 233 of the Act being obtained:

(ii) Certified or authenticated copy of the Order of the Central Government sanctioning the Scheme being filed with the jurisdictional Registrar of Companies.

16.2 The Scheme shall be effective upon sanction of the Central Government and filing of the certified or authenticated copy of the sanctioned Scheme with the jurisdictional Registrar of Companies. However, failure of any one part of one Section for lack of necessary approval from the shareholders/creditors/statutory regulatory authorities or for any other reason that the Board of Directors may deem fit than this shall not result in the whole Scheme failing. It shall be open to the concerned Board of Directors to consent to sever such Pan(s) of the Scheme and implement the rest of the Scheme with such modification."

66. The conditions of Clause 16 since are not attracted in the case in

hand, the scheme having been confirmed become operative and that being so, M/s Berkeley Realtech Limited having merged with the appellant's company cannot claim its separate identify, on and after, the date of such merger/amalgamation by the confirmation order dated 25.08.2017.

67. It is mentioned in para 4.3 of the scheme that with effect from appointed date the scheme becoming effective, statutory licenses, permissions or approvals or consents held by transferor companies shall stand vested and transferred to transferee company. Para 4.3 of the scheme is reproduced as under:—

> "*4.3. With effect from the Appointed Date and upon the Scheme becoming effective. any statutory licenses, permissions or approvals or consents held by Oasis and BRL shall stand vested in or transferred to RSA without any further act or deed, and shall be appropriately mutated by the statutory authorities concerned therewith in favour of RSA and the benefit of all statutory and regulatory permissions, environmental approvals and consents, registration or other licenses, and consents shall vest in and become available to RSA us it they were originally obtained by RSA. In so far as the various incentives, subsidies, rehabilitation schemes, special status and other benefits or privileges enjoyed, granted by any Government body. local authority or by any other person, or availed of by Oasis and BRL, are concerned, the same shall vest with and be available to RSA on the same terms 4 and conditions as applicable to Oasis and BRL, as if the same had been allotted and/or granted and/or sanctioned and/or allowed to RSA.*"

68. Communication or non-communication of merger or transfer of any statutory document in the name of transferring company in terms of other statutory provisions is one thing that it will not change the effect of merger carried out in accordance with the procedure of Companies Act, 2013. We therefore answer issue I in favour of the appellant that in respect of anything connected with M/s Berkeley Realtech Limited, legal proceedings at the instance of appellant are maintainable.

69. Issue I can be considered and answered from another angle also. Section 16 of NGT Act, 2010 confers appellate jurisdiction upon Tribunal. It confers right to appeal to 'any person aggrieved' from order or decision or direction etc. mentioned in Clauses a to j of Section 16. The term aggrieved person is not confined to a person in whose name, the order is passed or decision is taken or determination is made but if an order or direction has adverse effect on anyone, such person is an 'aggrieved person' and can file appeal under Section 16.

70. In the present case, appellant is a joint owner of the commercial

complex and has certain properties in the said complex. The impugned order cancelling EC invalidating the construction activities of complex, is bound to effect adversely appellant also. Therefore, appellant is an aggrieved person from the impugned order and in our view, can validly prosecute this appeal.

71. We accordingly **answer issue I in favour of the appellant** holding the present appeal maintainable at the instance of the appellant.

72. Issues II and III : Both the issues can be considered together since both are overlapping and interconnected.

73. The impugned order has been passed by respondent no. 1 firstly on the ground that prior wildlife clearance was not obtained before operating the project and thereby, condition no. 3 (1) of part B of EC dated 23.01.2015 has been violated. Secondly, under para 11, no transfer has been sought under para 11 of EIA 2006 and therefore, EC granted to M/s Berkeley Realtech Limited is deemed to be null and void. Thirdly, the project was started without prior EC by misleading the concerned Department that the built up is less than 20,000 sq. mtrs., deliberately, to avoid EC. Fourthly, though an undertaking was submitted pursuant to resolution dated 26.11.2014 of the Board of Directors of M/s Berkeley Realtech Limited that no violation shall be repeated in future, still proponent has changed scope of work by adding a restaurant, service station and paint booth, which is a willful violation of submission of undertaking and deliberate concealment of information to statutory authorities. And lastly, though EC was granted for installation of two DG set of 600 KVA and one DG set of 320 KVA but actually proponent has installed two DG sets of 320 KVA and two DG sets of 62.5 KVA, increasing number of sources of emission and consequent increase in pollution.

74. We find that the non-compliances and violations on which impugned order has been passed are not the same on which show cause notice dated 20.07.2023 was issued.

75. There is only one non-compliance and one violation mentioned in the show cause notice dated 20.07.2023. Regarding non-compliance, notice says that prior Wildlife Clearance has not been obtained before operating the project and in respect of violation, it is said that restaurant, service station, paint booth and a DG set has been added which amounts to change/enhancement of scope of work for which fresh appraisal by SEIAA was necessary. The ground of violation of para 11 of EIA, 2006 rendering EC null and void and concealment of built up area are added in the impugned order, though in respect thereof, no show cause notice was given to the appellant.

76. The principles of natural justice require that the grounds on

which an adverse action is proposed must be disclosed to the person likely to be effected and an opportunity of explanation should be given to such person.

77. Disclosure of adverse material as also the reasons which are considered to be objectionable by an authority for passing an adverse order against a person must be disclosed to said person before any adverse order is passed against him. This is a facit of fair hearing, transparency, and accountability. (See *Managing Director, ECIL* v. *B. Karunakar*, (1993) 4 SCC 727; *Natwar Singh* v. *D.E.*, (2010) 13 SCC 255; *Dharampal Satyapal Ltd.* v. *Dy. CCE* C.A. No. 4458-4459 of 2015 decided on14.05.2015; *Deepak Ananda Patil* v. *State of Mah.* C.A. No. 88-89 of 2023 decided on 04.01.2023). The principle of *audi alteram partem* includes this basic concept and any violation thereof, would render the action to be illegal being in violation of the principle of natural justice. Since, additional grounds have been taken in passing the impugned order, not disclosed to the appellant in the show cause notice dated 20.07.2023, in other view, the impugned order is vitiated in law being in violation of principle of natural justice.

78. Respondent no. 1 issued notice to one Director of M/s Berkeley Realtech Limited but the same was replied by appellant. Thereafter, respondent no. 1 formulated a question for itself as to whether appellant has locus to persue the matter on behalf of M/s Berkeley Realtech Limited. That issue has not been decided because that would have required examination of the question, whether there is a legal merger/amalgamation of appellant and M/s Berkeley Realtech Limited merging the later company with the former i.e. the appellant. Instead, respondent no. 1 has found out a new ground with regard to transfer under para 11 of EIA 2006 which was not a ground on which show cause notice dated 20.07.2023 was issued.

79. Learned Counsel for the appellant has also argued that transfer under para 11 was admissible only till the EC was operated i.e. five years from the date of issue or till the project is completed. She argued that the construction of project was already complete when EC was applied and even occupancy certificate was issued in 2016. Therefore, in 2017 when merger took place, appellant had no occasion to seek transfer under para 11 of EIA 2006 and the same was inapplicable.

80. This argument of appellant, in our view, lacks substance.

81. With regard to completion of project, we may mention that no completion certificate issued by the competent authority has been placed on record. The Counsel for appellant drew our attention to Annexure A-17, page 96 of the paper book, which is a document issued in Form F (Rule 18) from the office of Chief Administrator, Union Territory, Chandigarh dated 29.04.2016 on a notice of completion given by M/s RSA Motors Private Limited and Oasis Motors Private Limited.

Admittedly, on 29.04.2016, M/s Berkeley Realtech Limited was operating and in existence, since merger took place in August/September, 2017. The said document pertains to M/s RSA Motors Private Limited and Oasis Motors Private Limited issued on 29.04.2016 which means that it may be of some property of above two companies. This document cannot be read to be in respect of m/s Berkley Realtech Ltd.

82. Further this document says that it grants permission for sewerage connection and for left and right block upto third block and rear block upto sixth floor with mumty and triple basement along with stilled parking. It does not talk about the completetion of the project. It cannot be read to be a completion certificate by any logic or interpretation of what has been stated therein.

83. It is true that there is a description of building at Plot No. 24, Industrial Area, Phase 1, Chandigarh but it is difficult to relate the document with the construction and development carried out by M/s Berkley Realtech Limited at the same plot particularly considering the fact that the total area of the plot is 5347.2 sq. yds. as per the joint venture agreement dated 24.09.2010 but the project in dispute which was to be developed by M/s Berkeley Square was on a total length area of 4470.95 sq. mtrs. Thus, it cannot be accepted that the project completed in 2016 and therefore, EC seized to be operative or its validity period expired in 2016.

84. Further, validity period of EC is governed by para 9 of EIA 2006. In the present case, EC was granted for construction project, therefore it is referable to para 8 of the Schedule to EIA 2006 and for the purpose of validity period, we have to go by para 9 of EIA 2006. The existing para 9 of EIA 2006 as enacted on14.09.2006, read as under:—

> "***9. Validity of Environmental Clearance (EC)***:
>
> *The "Validity of Environmental Clearance" is meant* ***the period from*** *which a prior environmental clearance is granted by the regulatory authority, or may be presumed by the applicant to have been granted under sub paragraph (iv) of paragraph 7 above,* ***to the start of production operations by the project or activity, or completion of all construction operations in case of construction projects (item 8 of the Schedule), to which the application for prior environmental clearance refers****. The prior environmental clearance granted for a project or activity shall be valid for a period of ten years in the case of* River Valley projects *(item 1(c) of the Schedule), project life as estimated by Expert Appraisal Committee or State Level Expert Appraisal Committee subject to a maximum of thirty years for mining projects and five years in the case of all other projects and activities. However, in the case of* Area Development projects and Townships *[item 8(b)], the*

validity period shall be limited only to such activities as may be the responsibility of the applicant as a developer. This period of validity may be extended by the regulatory authority concemed by a maximum period of five years provided an application is made to the regulatory authority by the applicant within the validity period, together with an updated Form 1, and Supplementary Form IA, for Construction projects or activities (item 8 of the Schedule). In this regard the regulatory authority may also consult the Expert Appraisal Committee or State Level Expert Appraisal Committee as the case may be."

85. By Notification dated 29.04.2015, published in Gazette of India Extraordinary on 30.04.2015, the said para 9 was re-numbered as sub-para (i) and some amendments were made and re-numbered para 9 and sub para (ii) and (iii) were inserted by amendment notification dated 29.04.2015 published in Gazette of India Extraordinary dated 30.04.2015. The amendment provision read as under:—

"*a) Hereby* ***existing paragraph 9 was renumbered as sub-paragraph (i) with certain amendments of the words therein*** *and the amended sub-paragraph (i) reads as under*:

(i) Validity of Environmental Clearance (EC):

*The "****Validity of Environmental Clearance" is meant the period*** *from which a prior environmental clearance is granted by the regulatory authority, or may be presumed by the applicant to have been granted under sub paragraph (iv) of paragraph 7 above, to the start of production operations by the project or activity,* ***or completion of all construction operations in case of construction projects (item 8 of the Schedule), to which the application for prior environmental clearance refers****. The prior environmental clearance granted for a project or activity shall be valid for a period of ten years in the case of* River Valley projects *(item 1(c) of the Schedule), project life as estimated by Expert Appraisal Committee or State Level Expert Appraisal Committee subject to a maximum of thirty years for mining projects* ***and seven years in the case of all other projects and activities.***

(Emphasis added)

b) Further, ***sub-paragraph (ii) was inserted*** *as under*:

"*(ii) In the case of* Area Development projects and Townships *[item 8 (b), the validity period shall be limited only to such activities as may be the responsibility of the applicant as a developer*:

Provided that this period of validity may be extended by the regulatory authority concerned by a maximum period of seven

years if an application is made to the regulatory authority by the applicant within the validity period, together with an updated Form I, and Supplementary Form IA, for Construction projects or activities (item 8 of the Schedule):

Provided further that the ***regulatory authority may also consult the Expert Appraisal Committee or State Level Expert Appraisal Committee, as the case may be, for grant of such extension.***

(iii) Where the application for extension under sub-paragraph (ii) has been filed—

(a) within ***one month after the validity period of EC****, such cases shall be referred to concerned Expert Appraisal Committee (EAC) or State Level Expert Appraisal committee (SEAC) and based on their recommendations, the delay shall be condoned at the level of the Joint Secretary in the Ministry of Environment, Forest and Climate Change or Member Secretary, SEIAA, as the case may be*;

(b) ***more than one month after the validity period of EC*** *but less than three months after such validity period, then, based on the recommendations of the EAC or the SEAC, the delay shall be condoned with the approval of the Minister in charge of Environment Forest and Climate Change or Chairman, as the case may be*:"

86. Further amendment was made in para 9 by the Notification dated 31.08.2015 published in Gazette of India Extraordinary dated 18.09.2015 and thereby in para 9 (ii) in the first proviso, the period of seven years were substituted by the words period of three years. The amended proviso reads as under:—

"*Provided that this period of validity may be extended by the regulatory authority concerned by a maximum* ***period of three years*** *if an application is made to the regulatory authority by the applicant within the validity period, together with an updated Form I, and Supplementary Form IA, for Construction projects or activities (item 8 of the Schedule)*:"

(Emphasis added)

87. Again amendment was made in para 9 of EIA 2006 as amended in 2015 discussed above, was amended by substitution of Notification dated 14.09.2016 published in Gazette of India Extraordinary on 15.09.2016. The substituted para 9 reads as under:—

"***9. Validity of Environmental Clearance (EC)***:

(i) The "Validity of Environmental Clearance" is meant the period from which a prior environmental clearance is granted by the regulatory authority, or may be presumed by the applicant to

have been granted under sub-paragraph (iii) of paragraph 8, to the start of production operations by the project or activity, or ***completion of all construction operations in case of construction projects (item 8 of the Schedule)****, to which the application for prior environmental clearance refers. The prior environmental clearance granted for a project or activity shall be valid for a period of ten years in the case of* River Valley projects *[item 1(c) of the Schedule], project life as estimated by the Expert Appraisal Committee or State Level Expert Appraisal Committee or District Level Expert Appraisal Committee subject to a maximum of thirty years for mining projects and seven years in the case of all other projects and activities.*

(ii) ***In the case of Area Development projects and Townships [item 8(b)], the validity period of seven years shall be limited only to such activities as may be the responsibility of the applicant as a developer***:

Provided that this ***period of validity*** *with respect to sub-paragraphs (i) and (ii) above* ***may be extended by the regulatory authority concerned by a maximum period of three years if an application is made to the regulatory authority by the applicant within the validity period, together with an updated Form I, and Supplementary Form IA, for Construction projects or activities (item 8 of the Schedule)***:

Provided further that the regulatory authority may also consult the Expert Appraisal Committee or State Level Expert Appraisal Committee or District Level Expert Appraisal Committee, as the case may be, for grant of such extension.

(iii) Where the application for extension under sub-paragraphs (i) and (ii) above has been filed—

(a) within thirty days after the validity period of Environmental Clearance, such cases shall be referred to concerned Expert Appraisal Committee or State Level Expert Appraisal Committee or District Level Expert Appraisal Committee and based on their recommendations, the delay shall be condoned at the level of the Joint Secretary in the Ministry of Environment, Forest and Climate Change or Member Secretary, State Level Expert Appraisal Committee or Member Secretary, District Level Expert Appraisal Committee, as the case may be;"

88. The validity period where it was expiring during lock down period due to COVID-19 situation in the financial year 2020-2021, the period was extended by insertion of para 9A by the Notification dated 27.11.2020 published in the Gazette of India Extraordinary of the same date and it was declared that validity period where it is expiring in the

financial year 2020-2021 shall be deemed to be extended till 31.03.2021 or six months from the date of expiry of validity, whichever is later. This, pare 9A was further amended by substitution by Notification dated 18.01.2021 published in Gazette of India Extraordinary of the same date declaring that the period of 01.04.2020 to 31.03.2021 shall not be considered for the purpose of calculation of the period of validity of prior EC granted under EIA 2006 in view of COVID-19 situation and subsequent lock down.

89. Thus, for the construction projects, the period of validity of EC would be read in para 9 of EIA 2006. It is the date of completion of the project and since in the present case, no document has been brought on record to show that the above project, in all aspects, was completed as per the application submitted in Form I and IA for grant of EC, it cannot be said that the period of validity has expired. The contention of learned Counsel for the appellant, therefore, on this aspect are not accepted.

90. However, coming again to the question of correctness of impugned order dated 25.08.2023, as we have already observed that the grounds on which show cause notice dated 20.07.2023 was issued and which are the basis of passing the impugned order, certain further grounds have been added, in respect whereof, appellant was not confronted specifically and had no opportunity to place its submission before the respondent no. 1.

91. In these circumstances, we find it appropriate not to take any final decision on other aspects since the impugned order in our view requires to be reconsidered in the light of the observations made above. If the authorities wanted to act against appellant on any other ground, as not mentioned in the show cause notice dated 20.07.2023, it is incumbent upon them to first apprise the appellant of such grounds and give an opportunity of explanation to the appellant and thereafter, pass a fresh order. Hence, we are refraining from considering other aspects on merit at this stage and find it appropriate to remand the matter to respondent no. 1.

92. Issues II and III are answered accordingly.

93. In view of the above discussion, since we are of the view that principles of natural justice have not been complied with in passing the impugned order dated 25.08.2023, the same cannot be sustained. Impugned order dated 25.08.2023 is hereby set aside.

94. Now, it shall be open to respondent no. 1 to give a fresh or supplementary notice to the appellant referring to the alleged violations/non-compliances on the part of the appellant, which according to respondent no. 1 have been breached or non-observed by the appellant, give a reasonable opportunity of placing its defence on

those grounds and thereafter, pass a fresh order in accordance with law. This exercise shall be completed by respondent no. 1 within three months.

95. Before parting, we may also observe that proceedings pursuant to show cause notice dated 14.07.2023 are pending before CPCC and till date no final decision has been taken. In our view it would be appropriate for respondent no. 2 i.e. CPCC to finalize the proceedings pursuant to show cause notice dated 14.07.2023 expeditiously and in any case within three months from the date of communication of this order.

96. The appeal is allowed in the manner as stated above. There shall be no order as to cost.

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† Principal Bench at New Delhi

2021 SCC OnLine Bom 10540

In the High Court of Bombay

(BEFORE DIPANKAR DATTA, C.J. AND M.S. KARNIK, J.)

Lasa Supergenerics Ltd. and Another … Petitioner;

Versus

State of Maharashtra and Others … Respondents.

Writ Petition No. 7877 of 2021

Decided on November 23, 2021

Advocates who appeared in this case:

Dr. Milind Sathe, Senior Advocate with Mr. Bhushan Deshmukh and Ms. Savita Nangare for the petitioners.

Ms. R.A. Salunke, AGP for State.

Mr. Jitendra Jagtap, Advocate for respondent nos. 2 and 3 (MPCB).

P.C.

1. The Regional Officer, Kolhapur of the Maharashtra Pollution Control Board, respondent no. 3, by a notice dated 29th October 2020 called upon the petitioner to show cause as to why appropriate action shall not be initiated against it for causing grave injury to the surrounding environment by violating environmental rules. The petitioner responded to the show-cause notice by its reply dated 24th December 2020. According to it, the deficiencies that were pointed out in the show-cause notice having since been removed, no adverse action was called for. Almost 9 (nine) months after the reply was forwarded by the petitioner, by a communication dated 15th September 2021, the respondent no. 3 directed closure of the petitioner's unit under section 33A of the Water (Prevention and Control of Pollution) Act, 1974, section 31A of the Air (Prevention and Control of Pollution) Act, 1981 and the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008. Pursuant to such order of closure, supply of water to the petitioner's unit has been disconnected.

2. This writ petition is directed against the closure order dated 15th September 2021 as well as disconnection of water supply to the petitioner's unit.

3. Mr. Jagtap, learned advocate for the respondent no. 3 raises a preliminary objection to the maintainability of the writ petition by submitting that the petitioner has an alternative remedy before the National Green Tribunal under section 16 of the National Green Tribunal Act, 2010 (hereafter "the NGT Act", for short) and that he ought to be

relegated to such tribunal.

4. No doubt, section 16 of the NGT Act provides a remedy of appeal; however, existence of such remedy does not oust the jurisdiction of the writ court. The rule of exhaustion of alternative remedy is a rule of convenience and discretion rather than a rule of law. Having regard to the limited nature of relief prayed for by Dr. Sathe, learned senior counsel appearing for the petitioner, we propose to consider the same for the reason that follows.

5. Dr. Sathe has brought to our notice that the impugned order dated 15th September 2021 refers to a complaint received from a "VIP", who happens to be none other than a Member of the Legislative Council. According to Dr. Sathe, copy of the complaint, which might have triggered the order of closure, was never served on the petitioner. Further, the order of closure does not deal with any of the points raised in the reply dated 24th December 2020 to the show-cause notice dated 29th October 2020. These infirmities, it has been contended, constitute violation of principles of natural justice. It is the submission of Dr. Sathe that there are good reasons for quashing the impugned order of closure but since the closure order had been given effect, the petitioner proceeded to remove the deficiencies pointed out therein and thereafter submitted a representation dated 23rd September 2021 before the respondent no. 3 seeking that such order be revoked. Dr. Sathe also submits that the petitioner would be satisfied if, for the present, the respondent no. 3 is directed to proceed to consider the prayer for revocation of the closure order in the light of removal of deficiencies by the petitioner and in accordance with law.

6. The contention of violation of principles of natural justice, *prima facie*, does not appear to be without any substance. The closure order does not record that copy of the complaint of the "VIP" was served on the petitioner. Such order also does not reveal consideration of the pointwise reply submitted by the petitioner. In view thereof, entertainment of the writ petition would not be contrary to any decision of the Supreme Court. Also, bearing in mind the limited prayer of Dr. Sathe, we dispose of this writ petition with a direction upon the respondent no. 3 to take an appropriate decision on the representation dated 23rd September 2021 in accordance with law upon affording an opportunity of hearing to the petitioner's authorized representative, within a period of 6 (six) weeks from date of receipt of a copy of this order.

7. Prior to taking a decision on the petitioner's representation dated 23rd September 2021, it shall be open to the respondent no. 3 to conduct such surprise inspection/visit at the petitioner's unit to

ascertain whether the deficiencies pointed out in the order dated 15th September 2021 stand removed or not. Should the petitioner be found to have complied with all the statutory requirements and removed the deficiencies, the closure order may be revoked with such conditions that may be imposed by the respondent no. 3. If, upon inspection and hearing the petitioner, the respondent no. 3 is of the view that the closure order should be continued, he shall pass a reasoned order and intimate the same to the petitioner. All contentions are left open.

8. With the aforesaid directions, the writ petition stands disposed of. There shall be no order as to costs.

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2022 SCC OnLine Bom 4884

In the High Court of Bombay

(BEFORE DIPANKAR DATTA, C.J. AND M.S. KARNIK, J.)

Hikal Limited … Petitioner;

Versus

State of Maharashtra and Others … Respondents.

Writ Petition No. 1659 of 2022

Decided on February 21, 2022

Advocates who appeared in this case :

Mr. Janak Dwarkadas, Senior Advocate, Mr. Amit Desai, Senior Advocate a/w. Mr. Akshay Patil a/w. Mr. Jarin Doshi i/b. Malvi Ranchoddas & Co. for petitioner.

Mrs. M.P. Thakur, AGP for respondent no. 1 - State. Ms. Sharmila U. Deshmukh for respondent nos. 2 to 4.

P.C.

1. This writ petition is directed against an order dated February 15, 2022 issued by the Regional Officer-Navi Mumbai, of the Maharashtra Pollution Control Board (hereafter "the Board", for short). The impugned order is a 'closure' order of the petitioner's chemical factory at Taloja, district Raigad, under section 33A of the Water (Prevention and Control of Pollution) Act, 1974 and under section 31A of the Air (Prevention and Control of Pollution), Act, 1981. The petitioner was granted 72 hours' time to shut activities.

2. It is not in dispute that the impugned order was preceded by a show-cause notice dated January 14, 2022 issued by the Board as well as grant of personal hearing to the petitioner on February 14, 2022. Violation of natural justice in the sense that the petitioner was denied opportunity of defence and/or hearing is not alleged. Mr. Dwarkadas, learned senior advocate for the petitioner, however, assails the impugned order on diverse other grounds.

3. Mr. Dwarkadas contends that the Board by the order under challenge has brushed aside the contentions raised by the petitioner in its response to the show-cause notice as well as those advanced in course of personal hearing by simply observing that the same were 'unsatisfactory'. Such observation, though, is followed by several findings, but the same do not contain any independent reason in support of formation of opinion that the allegations levelled against the petitioner stand established. It is further contended that non-application of mind of the decision maker is patent, which has vitiated

the decision-making process. Not a single evidence produced by the petitioner has been considered by the Board. Next, he contends that the Board proceeded to pass the 'closure' order with great haste without even waiting for the inquiry report of the duly constituted committee in terms of the order dated 18th January, 2022 of the National Green Tribunal, Principal bench, New Delhi (hereafter "the NGT", for short) in O.A. No. 05/2022 and O.A. No. 05/2022 (WZ) together with I.A. No. 8 of 2022. He also contends that shutting down the factory of the petitioner within 3 days is practically impossible having regard to the nature of its production activities. A sudden shut down of production activities and non-disposal of the stock within such time could be detrimental to public interest and the Board at least ought to have granted 15 days' time. Accordingly, it is prayed that the order under challenge be stayed.

4. Ms. Sharmila Deshmukh, learned advocate appearing for the Board raises a preliminary objection to the maintainability of the writ petition. According to her, an incident of gas leak from a tanker in Surat, Gujarat led to the death of 6 people and 23 others suffering injuries. The NGT took *suo motu* cognizance and the petitioner's involvement can be gathered upon reading of the order passed by the NGT on 18th January, 2022. If at all the petitioner is aggrieved by the closure order dated February 15, 2022, it is her submission that the petitioner ought to move the NGT for relief having regard to the terms of the order dated 18th January, 2022 passed by it. On merits, she submits that the petitioner was granted opportunity to respond to the allegation levelled against it and was also heard, whereupon the order under challenge came to be made. It being an appropriate order in the circumstances, she submits that no interference is warranted.

5. We have heard the parties. It is proposed to dispose of the writ petition at the admission stage, since a reply-affidavit cannot improve the case of the Board.

6. Law is well-settled that a writ Court does not sit in appeal over a decision made by a statutory authority; however, the Court would be justified in examining whether the process leading to the impugned decision stands vitiated by any illegality or procedural impropriety or irrationality. If any of these vices is found to exist, such decision could be invalidated.

7. The order under challenge is spread over 11 unnumbered paragraphs. In paragraph 4, the Board has recorded that the replies/contentions of the petitioner were 'unsatisfactory'. Thereafter, the Board found the petitioner to be guilty of four specific violations, which are recorded in paragraphs 5 to 8. Paragraph 10 directs 'closure' and the last paragraph records that the order is issued with the

competent authority's approval.

8. Insofar as the first violation dealt with at paragraph 5 is concerned, we find that the petitioner, despite having admitted production of 'Fenamidone' in excess of the quantity permitted by the "Consent to Operate" issued by the Board, had put forward an explanation in its response. This explanation, we presume, was not accepted on the ground of being 'unsatisfactory', as recorded in paragraph 4 of the order under challenge. We shall advert to this aspect of the violation a little later.

9. Paragraphs 6 and 7 recording the Board's conclusions that the relevant allegations levelled against the petitioner were proved and that the petitioner has violated the terms of Condition Nos. 13 and 14 of the 'Consent to Operate' do not, however, show either application of mind to the evidence produced by the petitioner, to which our attention has been invited by Mr. Dwarkadas, or any reason for discarding such evidence as irrelevant. Non-consideration of the documentary evidence by the Board leads us to form the opinion that the procedure adopted was flawed and the resultant order is perverse.

10. Also, the order under challenge (except paragraph 5) stands vitiated because of the Board's failure to assign reasons and, thus, do not bear the fundamentals of an order visiting any party with civil consequences.

11. Moving forward, we find that the finding at paragraph 8 too suffers from a brazen illegality. The petitioner has been found guilty of violation of certain requirements contained in the 'Consent to Operate' without such allegation being levelled in the show-cause notice. The petitioner was not called upon to meet this particular allegation and this has not been disputed by Ms. Deshmukh. It is, therefore, clear that a finding in respect of an act of omission/commission was returned although the petitioner had no opportunity to meet it. Accordingly, such finding cannot be pressed into service to the detriment of the petitioner.

12. We are conscious that the proceedings initiated by the Board against the petitioner have been triggered because of the unfortunate incident, which the NGT is seized of. From one of the applications before the NGT, the name of the petitioner transpired; yet, the NGT was of the view that the matter ought to be further verified. The NGT constituted a committee with terms of reference including, *inter alia*, for fixing responsibility. There can be no two opinions that precious lives having been lost for no fault of the deceased and near about two dozen of individuals having suffered injuries, those who are responsible for such unfortunate deaths and injuries must be adequately punished in accordance with law. However, at the same time, a Court of law cannot be blind and ignore non-adherence to due procedure prescribed

by law for the purpose of taking punitive action. The duty that the law enjoins has to be scrupulously followed. The oft-quoted words of Frankfurter, J. in *Vitarelli* v. *Seaton*[1] are worth recalling:

> ".. .if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed…. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword."

13. The aforesaid dictum has been approved by the Supreme Court in number of decisions. We may only refer to the Constitution Bench decision in *Ramana Dayaram Shetty* v. *The Intentional Airport Authority of India*[2].

14. The submission of Ms. Deshmukh that the petitioner ought to move the NGT does not appear to be well-founded. The order of closure, in its entirety, cannot be carried in appeal before the NGT in view of the provisions of section 16 of the National Green Tribunal Act, 2010. No appeal is available against an order under the Air Act. Mr. Dwarkadas is right that the NGT cannot confer jurisdiction upon itself, which the statute does not confer.

15. Having found that three of the four findings of violation are susceptible to interference for the reasons assigned above, we now revert to the first finding of violation returned by the Board in paragraph 5 of its order. That the petitioner produced 'Fenamidone' in excess of the quantity permitted by the 'Consent to Operate', has been admitted by the petitioner. The order under challenge is the result of the cumulative effect of four violations allegedly committed by the petitioner. The findings in respect of three of the violations being unsustainable in law, whether violation of only one particular term of the 'Consent to Operate' automatically can lead to the harshest order of 'closure' being passed is a matter which, we are inclined to think, needs to be considered by the Board particularly when the explanation proffered by the petitioner, for whatever it is worth, is not rejected by a reasoned order.

16. This being pointed out to Ms. Deshmukh, she has obtained instructions from the officers of the Board present in Court. Ms. Deshmukh has informed us that the Board is willing to give fresh personal hearing to the petitioner based on the allegations leveled in the show-cause notice dated January 14, 2022.

17. In such view of the matter as well as for the reasons assigned above, we are of the considered opinion that the order of 'closure' dated February 15, 2022 is indefensible and cannot be sustained in law. The same stands set aside.

18. The Board is directed to grant fresh personal hearing to the petitioner. To obviate any further delay in the matter, we direct the Board to offer such hearing to the petitioner on Tuesday week (March 1, 2022), at 12.30 p.m. No further notice need be served on the petitioner.

19. The Board may proceed to pass an appropriate reasoned order after considering all the contentions raised by the petitioner in course of the personal hearing and/or in a written note of argument that may be filed.

20. The Board is also directed to bear in mind the contents of sub-para (xxii) of paragraph 3 of the writ petition while passing the final order.

21. All contentions are left open.

22. The writ petition is disposed of. No costs.

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[1] 359 US 535 (1959)

[2] (1979) 3 SCC 489 : AIR 1979 SC 1628

(2021) 10 Supreme Court Cases 210 : 2021 SCC OnLine SC 664

In the Supreme Court of India

(BEFORE L. NAGESWARA RAO AND S. RAVINDRA BHAT, JJ.)

ASSISTANT EXCISE COMMISSIONER, KOTTAYAM AND OTHERS . . Appellants;

Versus

ESTHAPPAN CHERIAN AND ANOTHER . . Respondents.

Civil Appeal No. 5815 of 2009[†], decided on September 6, 2021

A. **Entertainment, Amusement, Leisure and Sports — Liquor — Kerala Abkari Shops Departmental Management Rules, 1972 — R. 13 r/w R. 10 of 1974 Rules — R. 13 as amended, held, is prospective — Amount collected as departmental management fee to be given as credit towards dues from licensee — Cancellation of country liquor licence for not replenishing security in timely manner — Contracts entered into before amendment of R. 13 of 1972 Rules, which is prospective in nature — Therefore licensee, held, was liable to pay only actual loss suffered by Government, in realisation of rentals and excise duty — Hence, amounts calculated as departmental management fees had to be adjusted thereagainst**

— Licensee, a successful bidder for arrack shops for the year 1993-1994, had entered into an agreement with State — Alleging that licensee committed default in payment of bid amount, in not replenishing security in a timely manner, State issued a show-cause notice — Later, alleging that licensee failed to replenish security amount, licence was cancelled by an order of State — When State initiated recovery proceedings it did not give credit of amounts collected under head of department management fee, as was required under pre-existing R. 13 of 1972 Rules — Main contention was that amounts collected as departmental management fee were not adjustable — However in present case, contracts in question were entered into before amendment of R. 13 of 1972 Rules — Hence, they were not to be treated as those transactions for which amounts were non-adjustable

— There is no indication that amended R. 13 of 1972 Rules applied retrospectively — There is profusion of judicial authority on proposition that a rule or law cannot be construed as retrospective unless it expresses a clear or manifest intention, to the contrary — Another equally important principle applies, that in the absence of express statutory authorisation, delegated legislation in form of rules or regulations, cannot operate retrospectively — In these circumstances, amounts calculated by the State as departmental management fees for period in question, when it actually was in charge of vend, and carried out transactions, had to be adjusted — In other words, amounts collected could not be again recovered as department management

Page: 211

fees — Kerala Abkari Shops (Disposal in Auction) Rules, 1974 — R. 10 — Administrative Law — Subordinate/Delegated Legislation — Retrospective/Retroactive Operation/Retrospectivity — Delegated legislation when may have retrospective operation — Principles reiterated

B. **Entertainment, Amusement, Leisure and Sports — Liquor — Trade, Sale, Supply and Taxation of Liquor — Kerala Abkari Shops Departmental Management Rules, 1972 — R. 13 r/w R. 10 of 1974 Rules — Cancellation of country liquor licence for not replenishing security in timely manner — Department management fee — Adjustment of amount in Amnesty Scheme introduced by State — Rejection of, by State on ground that department management fee could not be adjusted against arrears — Validity**

— Supreme Court had permitted to deposit 50% of amount payable to Government, in terms of a subsequent Amnesty Scheme, framed in 2011 — Upon payment of 50% of amount licensee permitted to deposit balance amount in two months — State directed to release property of licensees from attachment — Liquor — Trade, Sale, Supply and Taxation of Liquor — Kerala Abkari Shops (Disposal in Auction) Rules, 1974, R. 10

The licensee entered into an agreement with the State on 1-4-1993. Alleging that the licensee committed default in the payment of the bid amount, in not replenishing the security in a timely manner, the State issued a show-cause notice on 23-7-1993 eliciting a response as to why action should not be taken. Later, alleging that the licensee failed to replenish the security amount, the licence was cancelled by an Order dated 19-8-1993, of the State.

The licensee preferred a writ petition for a declaration that the cancellation of the licensee for sale of country liquor for the period 1-4-1993 to 31-3-1994 was illegal and void and that its liability with respect to Group-II arrack shops for the year 1993-1994 ended upon the cancellation taking place. It sought to limit its liability for the period April 1993 to 19-8-1994. The petition was dismissed by the Single Judge. Aggrieved with this, the licensee preferred an appeal to the Division Bench of the High Court. The Division Bench of the High Court by a short order, impugned in the present appeal, followed its previous decision and held that since the contracts were entered into before the amendment of Rule 13 of the Kerala Abkari Shops Departmental Management Rules, 1972, the licensee was liable to pay only the actual loss suffered by the Government, in realisation of rentals and excise duty.

Held :

There cannot be any dispute that contracts entered into before amendment of Rule 13 of 1972 Rules, as in this case, were not to be treated as those transactions for which amounts were non-adjustable. There is no indication that Rule 13 of the 1972 Rules applied retrospectively.

(Paras 15 to 19)

Lucka v. *State of Kerala*, OP No. 8271 of 1994, Order dated 11-8-2000 (Ker), *approved*

State of Kerala v. *K.E. Bhaskaran*, 2008 SCC OnLine SC 1957, *referred to*

Page: 212

Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. A rule or law cannot be construed as retrospective unless it expresses a clear or manifest intention, to the contrary. Further, in the absence of express statutory authorisation, delegated legislation in the form of rules or regulations, cannot operate retrospectively.

(Paras 16 to 18)

CIT v. *Vatika Township (P) Ltd.*, (2015) 1 SCC 1; *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.*, (1994) 1 AC 486 : (1994) 2 WLR 39 (HL); *CIT* v. *M.C. Ponnoose*, (1969) 2 SCC 351; *Hukam Chand* v. *Union of India*, (1972) 2 SCC 601; *RTO* v. *Associated Transport Madras (P) Ltd.*, (1980) 4 SCC 597 : 1981 SCC (Tax) 9; *Federation of Indian Mineral Industries* v. *Union of India*, (2017) 16 SCC 186; *Union of India* v. *G.S. Chatha Rice Mills*, (2021) 2 SCC 209, *applied*

Phillips v. *Eyre*, (1870) LR 6 QB 1, *approved*

In these circumstances, the amounts calculated by the State as departmental management fees for the period September 1993 to March 1994, when it actually was in charge of the vend, and carried out transactions, had to be adjusted. In other words, the amounts collected could not be again recovered as department management fees.

(Para 19)

An Amnesty Scheme was introduced by the State (by an Order dated 26-5-2008), in 2008. The respondent sought to deposit amounts in terms of the said scheme. However, the State rejected this request by its Letter dated 25-8-2008, contending that the department management fee could not be adjusted against arrears. Supreme Court permitted the respondent to deposit 50% of the amount it claimed as payable to the Government, in terms of a subsequent Amnesty Scheme, framed in 2011. By the Order dated 8-12-2008 Supreme Court clarified the previous Order dated 29-3-2011, regarding deposit of amounts under the Amnesty Scheme, and it was directed that the light of the fact that Amnesty Scheme was extended up to 31-3-2011, that the petitioner may deposit 50% of the amount due within one week from today, and the balance into monthly instalments in court.

(Para 20)

Excise Commr. v. *Esthappan Cherian*, 2011 SCC OnLine SC 1584; *Excise Commr.* v. *Esthappan Cherian*, 2008 SCC OnLine SC 1958, *considered*

In view of the above the following direction is passed in the present case : upon payment of 50% of the amount i.e. 50% of Rs 40,51,288 within two months from today, the respondent's liabilities towards the arrears of dues for the liquor vend in issue which was cancelled by the appellant State's Order dated 30-9-1993 shall stand discharged. The State is hereby directed to release the respondent's property attached and sought to be sold, towards satisfaction of the above liability, upon receiving the said balance 50% of the amount within two months or latest within four weeks of receipt of the amount.

(Para 24)

Esthappan Cherian v. *Excise Commr.*, 2008 SCC OnLine Ker 750, *affirmed with directions*

Esthappan Cherian v. *Excise Commr.*, OP No. 8318 of 1994, order dated 1-2-2002 (Ker), *reversed*

Excise Commr. v. *Esthappan Cherian*, 2014 SCC OnLine SC 1824, *referred to*

Appeal dismissed RM-D/67979/C

Chronological list of cases cited ***on page(s)***

11. (1994) 1 AC 486 : (1994) 2 WLR 39 (HL), *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.* 218f

12. (1980) 4 SCC 597 : 1981 SCC (Tax) 9, *RTO* v. *Associated Transport Madras (P) Ltd.* 219a

13. (1972) 2 SCC 601, *Hukam Chand* v. *Union of India* 219a

14. (1969) 2 SCC 351, *CIT* v. *M.C. Ponnoose* 219a

15. (1870) LR 6 QB 1, *Phillips* v. *Eyre* 218e

The Judgment of the Court was delivered by

S. RAVINDRA BHAT, J.— The State of Kerala is aggrieved by the judgment of the Kerala High Court, which allowed[1] the respondent's (hereafter called "the licensee") writ petition whereby he claimed for an order quashing a demand in respect of a certain amount towards the balance sought to be recovered after a country liquor licence was cancelled.

2. The licensee was the successful bidder for arrack shops in the State of Kerala for the year 1993-1994; the bid amount it offered was Rs 60 lakhs. A permit for import of 13,00,920 litres of rectified spirit was awarded. The excise duty payable for the designated quantity, monthly was Rs 3,58,162. The licensee entered into an agreement with the State on 1-4-1993. Alleging that the licensee committed default in the payment of the bid amount, in not replenishing the security in a timely manner, the State issued a show-cause notice on 23-7-1993 eliciting a response as to why action should not be taken. Later, alleging that the licensee failed to replenish the security amount, the licence was cancelled by an Order dated 19-8-1993, of the State.

3. The licensed shops were put up for re-auction on seven different dates. However, the re-auction was unsuccessful as there were no bidders. As a consequence, the shops were managed by the Department of Excise in terms of the Kerala Abkari Shops Departmental Management Rules, 1972 (hereafter "the Management Rules"). A sum of Rs 14,94,570 was collected as departmental management fee and Rs 16,50,971 was collected as duty on rectified spirit for the period 13-9-1993 to 31-3-1994. The State argued that had the licensee continued operating the shop, it would have gained revenues to the tune of Rs 1,09,87,989. It accordingly demanded dues, from the licensee.

4. The licensee preferred a writ petition for a declaration that the cancellation of the licensee for sale of country liquor for the period 1-4-1993 to 31-3-1994 was illegal and void and that its liability with respect to Group-II arrack shops for the year 1993-1994 ended upon the cancellation taking place. It sought to limit its liability for the period April 1993 to 19-8-1994. The petition was dismissed[2] by the Single Judge. Aggrieved with this, the licensee preferred an appeal to the Division Bench. The Division Bench by a short order -impugned[1] in the present appeal-followed its previous decision[3] and held that since the contracts were entered into before the amendment of Rule 13, the licensee was liable to pay only the actual loss suffered by the Government, in realisation of rentals and excise duty. The Court directed the Government to issue fresh demands in accordance with the

rules and agreements executed with the licensee covering only the actual loss.

5. It is argued on behalf of the State that there was no challenge to Rule 13 of the Management Rules, and as a result, the impugned order[1] was not justified in holding that the licensee was liable only for a limited period. Pointing to the language of Rule 13, it is submitted that with effect from 23-12-1993 an amendment was made in terms of which the question of adjustment of any liability did not arise. The learned counsel contrasted this with the pre-existing or old Rule 13, which permitted credit of departmental management fee and other amounts realised during the currency of the term of management by the State, as against the overall liability of the previous licensee.

6. It was submitted by the State that the Division Bench fell into error in relying upon its previous judgment[3] which had declared that licenses entered into prior to 23-12-1993 were not covered by the amendment. Urging that the decision of the State was based upon its policy not to give credit, the learned counsel highlighted that this was premised on its understanding of the statute. The learned counsel also submitted that it is only where resale licensees had entered the picture that the department management fee collected from the date of confirmation of the resale (of the vend or particular shop) could be given credit to reduce from resale purchases if the latter completed the security. However, the departmental management fee that could be given credit to the original contractor would be forfeited if he had not completed the security.

Page: 215

Relying upon this condition in the old Rule, the learned counsel sought to argue that in the present case, the licensee had in fact not replenished the security; the security that he originally deposited was adjusted towards the amounts due for the three months payable after the auction. Thus, in August, the security had not been replenished and in these circumstances, having regard to the express terminology of the old rule, there was no question of giving any credit to the licensee. It was argued that rather the entire liability sought to be recovered, was justifiably so. In the case of the licensee it worked out to over Rs 77,65,189 with interest @ 18% p.a.

7. Mr Roy Abraham, learned counsel appearing for the licensee urged this Court not to interfere with the findings and order of the High Court. He relied upon the circumstance that the contract in the present case was entered into on 1-4-1993. It was submitted that, therefore, the question of the new rule (which came into force on 23-12-1993) applying to deny the adjustment of the amounts which were directly recovered by the Department as management fees from the overall liability, did not arise. It was emphasised that importantly, the rules were brought into force after the termination of the licence, which occurred on 19-8-1993. However, the rules were amended on 23-12-1993. Therefore, the amendments were inapplicable to a past event i.e. the respondent, whose licence had been terminated earlier. It was argued that even otherwise, the licensee cannot be made liable for non-payment of dues for the entire period, since the department itself ran the outlets and recovered departmental management fee as well as excise duties.

8. It was also argued that the Division Bench correctly relied on its previous ruling in *Lucka* v. *State of Kerala*[3] where the amended Rule 13 was held inapplicable to contracts awarded or entered into previously. It was also urged that the State had issued Amnesty Policies in 2008 and later in 2011. Despite the judgment of the High Court, the respondent's application for relief under the Amnesty Scheme of 2008 was rejected without rhyme or reason. It was also pointed out that this Court permitted[4] the respondent to deposit 50% of the admitted amount, under interim orders[5], in terms of the 2011 scheme. The learned counsel stated that such amounts were deposited but by then the State apparently had used its powers and taken over immovable property belonging to the respondent, which was put to auction to realise the arrears in terms of the demands,

which had been quashed. The State itself bid Rs 1 and sought to appropriate the property. However, when the respondent applied for interim relief, this Court directed[6] the State to maintain status quo.

Analysis and Conclusions

9. The facts stated shows that the licensee was a successful bidder in an auction held by the State of Kerala and had deposited a security amount, to ensure the timely payment of the amounts (kist) due in terms of the contract entered into. Alleging that the licensee did not remit the kist due to the State in a timely manner, a show-cause notice was issued and eventually the licence was cancelled. Indisputably the licence entered into was effective for the period, commencing from 1-4-1993. The cancellation of licence occurred by an Order dated 19-8-1993. The State repeatedly put up the shops in question for auction-seven times, but was unsuccessful in securing the proper bids. Therefore, it had to manage the shops—which it did. The shops appear to have been re-auctioned subsequently and given out in the next financial year. For the period 13-9-1993 (when the State took over the possession) to 31-3-1994 the State collected Rs 14,94,570 as departmental management fee and Rs 16,59,771 as excise duty on rectified spirit. The State contended, that had the licensee continued, it would have obtained Rs 1,09,87,989.

10. The state's case is that the licensee had deposited Rs 18,00,000 as security and Rs 7,16,324 by way of excise duty and Rs 6,39,800 as kist dues for April (total amount of Rs 31,56,124). The relevant rule before its amendment, is extracted below:

> "**13.** ***Departmental management fee to be given credit of***.—The amount collected as departmental management fee may be given credit towards the dues from the original contractor provided he had completed the security and such credit shall be given only up to the date of confirmation of the resale, if any. In the case of resale purchasers, the departmental management fee collected from the date of confirmation of the resale may be given credit towards the dues from the resale purchaser, if he completes the security. The departmental management fee that may be given credit to the Original, contractor shall be forfeited if he had not completed the security. Similarly, the departmental management fee that may be given credit to the resale purchaser shall be forfeited if he fails to complete the security."

11. The rule was amended with effect from 23-12-1993. The amended Rule 13 is as under:

> "**13.** ***Departmental management fee to be given credit of***.—The departmental management fee collected from a shop while it was under departmental management due to default of payment of security, kist, excise duty, etc. shall be liable to forfeiture:
>
> Provided that where the licensee dies during the currency of a licence, the amount collected as departmental management fee may be credited towards his kist amount."

12. The petitioner deposited Rs 31,81,800 being 30% of the bid amount as security deposit in terms of Rule 10 of Chapter IV of Abkari (Disposal in Auction) Rules. This constituted the cash security for due performance of the

conditions of the licence. The amount was to be credited towards kist dues for "*the last two or more instalments as the case may be of the contract unless previously appropriated under the rules as per Rule 5(19) of the Abkari Shops (Disposal in Auction) Rules*". There are 10 instalments of kist. Each kist fell due on the 10th day of each and every

subsequent month. A period of 15 days is allowed, from 10th onwards as the grace period to remit the kist instalment under Rule 6(28) of the Abkari (Disposal in Auction) Rules. The petitioner was to pay seven instalments of kist up to 10-10-1992, leaving three instalments to be adjusted from security deposit, provided he had fulfilled all the conditions of the licence.

13. This court notices that the impugned judgment[1] relied on a previous Division Bench[3] ruling of the High Court, which dealt with the applicability of the amended Rule 13 to pre-existing contracts, and held that the condition of non-adjustability was inapplicable for contracts entered into, and vends auctioned, before it came into force. In that judgment, *Lucka* v. *State of Kerala*[3] the High Court had to deal with a similar situation i.e. the rules applicable in the event of cancellation of an excise liquor vend. The Court held that:

> "On combined reading of the provisions of the Act and the Rules, especially Section 8 of the Act and Rules 5, 10, 15 and 16 of the Abkari Shops Disposal Rules and Rule 13 of the Abkari Shops Departmental Management Rules, shows that due to the cancellation of the contract of the licensees any losses suffered by the revenue loss has to be reimbursed by the licensees. While calculating the loss amount obtained by the departmental management also should be taken into account and given credit as to that amount was received by the Government and only after deducting the same actual loss can be found out. The words "at the risk" shows that only the actual loss suffered can be recovered from the licensees. This is apart from imposing any damages by the Government, according to law or passing a discretionary or order by the Excise Commissioner regarding the future of departmental fee for valid reasons after issuing show-cause notice at the time when the licences were cancelled."

14. The Division Bench also held that:

> "With regard to Abkari contracts entered in 1992-93, there is not a question for dispute at all, as the contract period was over on 31-3-1993, before the amendment of rules and admittedly amended rules are not applicable and if no damages by way of kist ordered at the time of cancellation on the basis of amended Rule 13, no recovery steps can be issued with legal contracts and licensees for the Abkari year 1992-93. Other contracts and licence under question in these original petitions were also entered before the amendment of the rules with effect from 1-4-1993. The amendment of Rules 13 was made on in December 1993. Therefore, contracts, executed after the amendment of rules may be bound by it if the

rules are valid. But contracts covered in these years were executed prior to the amendment of the above rule."

15. In this case, it is evident that when the State initiated recovery proceedings it did not give credit of the amounts collected under the head of department management fee-as was required under pre-existing Rule 13. Its main contention before this Court is that amounts collected as departmental management fee were not adjustable. In view of the decision in *Lucka*[3], there cannot be any dispute that contracts entered into before amendment of Rule 13—as in this case—were not to be treated as those transactions for which amounts were non-adjustable. There is no indication that Rule 13 applied retrospectively.

16. There is profusion of judicial authority on the proposition that a rule or law cannot be construed as retrospective unless it expresses a clear or manifest intention, to the contrary. In *CIT* v. *Vatika Township (P) Ltd.*[7] this Court, speaking through a Constitution Bench, observed as follows : (SCC pp. 21-22, paras 28-29)

"*28*. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in *Phillips* v. *Eyre*[8], a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.*[9] Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law

available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."

17. Another equally important principle applies : in the absence of express statutory authorisation, delegated legislation in the form of rules or regulations, cannot operate retrospectively. In *CIT* v. *M.C. Ponnoose*[10] this rule was spelt out in the following terms : (SCC p. 354, para 5)

"*5*. … The courts will not, therefore, ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature. Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the courts that the persons or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect."

18. The principle has been affirmed in many decisions such as *Hukam Chand* v. *Union of India*[11], *RTO* v. *Associated Transport Madras (P) Ltd.*[12]; *Federation of Indian Mineral Industries* v. *Union of India*[13] and recently, in *Union of India* v. *G.S. Chatha Rice Mills*[14].

19. The decision in *Lucka*[3], therefore, correctly stated the law. In these circumstances, the amounts calculated by the State as departmental management fees for the period September 1993 to March 1994, when it actually was in charge of the vend, and carried out transactions, had to be adjusted. In other words, the amounts collected could not be again recovered as department management fees. Likewise, it is not in dispute that during the same period, the State was able to collect revenue i.e. excise duty, as well of Rs 16

lakhs.

20. It appears that an Amnesty Scheme was introduced by the State (by an Order dated 26-5-2008), in 2008. The respondent sought to deposit amounts in terms of the said scheme. However, the State rejected this request by its Letter dated 25-8-2008, contending that the department management fee could not be adjusted against arrears. This court permitted[4] the respondent to deposit 50% of

Page: 220

the amount it claimed as payable to the Government, in terms of a subsequent Amnesty Scheme, framed in 2011. By the Order dated 8-12-2008[5] this Court clarified the previous Order dated 29-3-2011[4], regarding deposit of amounts under the Amnesty Scheme : (*Esthappan Cherian*[4], SCC OnLine SC para 2)

> "*2.* We accordingly direct in the light of the fact that Amnesty Scheme has been extended up to 31-3-2011, that the petitioner may deposit 50% of the amount due within one week from today, and the balance amount in two monthly instalments in court."

21. According to the respondent, the reduced arrears are Rs 40,51,288 in terms of Amnesty Scheme issued on 26-5-2008. The licensee respondent had applied under the scheme; however, the appellant State refused to process it on the ground that since the licence was cancelled due to non-replenishment of security, the departmental management fee collected could not be adjusted.

22. This court had noticed that the Division Bench in *Lucka*[3], correctly reasoned that the amended Rule 13 was inapplicable to contracts previously awarded or entered into. The sequitur is that departmental management fee collected by the State, for the period the vend (or outlet) was in its direct management, could not be recovered again, and had to be adjusted. Apparently, the State had preferred appeals, by special leave from the common judgment in *Lucka*[3]. Those appeals were ultimately dismissed on 19-2-2008[15]. In these circumstances, and having regard to the principle that retrospectivity cannot be presumed, unless there is clear intention in the new rule or amendment, it is held that there is no infirmity with the judgment of the High Court.

23. The findings and conclusions previously recorded would have been dispositive of the issues arising in this appeal. However, this Court is mindful of the fact that the respondent had succeeded before the High Court and was thus entitled to claim adjustment of the departmental management fees, for the period after its contract was terminated. The respondent was also entitled to claim relief under the Amnesty Scheme, which was denied to it despite having succeeded before the High Court. Eventually, when the Scheme was announced afresh in 2011, this Court permitted the respondent to deposit 50% of the admitted amount[16]. Having regard to the overall circumstances, it would be in the fitness of things if the respondent is permitted to deposit the balance — for which it is hereby granted two months to do so. This shall be considered as closure and discharge of this liability so far as payment of amounts under the contract cancelled on 13-9-1993, are concerned. Since the respondent had approached this Court complaining that the State had sought to auction his properties, a status quo order was made, binding the parties not to take fresh

Page: 221

steps. In view of the findings recorded, the State has to ensure that the property of the respondent is released from attachment and due possession is handed back to the latter

within the same period of two months.

24. In the light of the above discussion, following directions are hereby given:

24.1. Upon payment of 50% of the amount i.e. 50% of Rs 40,51,288 within two months from today, the respondent's liabilities towards the arrears of dues for the liquor vend in issue which was cancelled by the appellant State's Order dated 30-9-1993 shall stand discharged.

24.2. The State is hereby directed to release the respondent's property attached and sought to be sold, towards satisfaction of the above liability, upon receiving the said balance 50% of the amount within two months or latest within four weeks of receipt of the amount.

24.3. The respondent shall not be liable to pay any interest for the upheld payment or for any other reason whatsoever, on the principal amount i.e. Rs 40,51,288. The State shall refrain from initiating any proceedings for its recovery towards arrears for the said period the contract was to be in operation i.e. 1993-1994.

25. The impugned judgment[1] is accordingly upheld. The appeal is dismissed but in terms of the directions contained in the preceding paragraph. The parties are left to bear their own costs.

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† Arising from the Judgment and Order in *Esthappan Cherian* v. *Excise Commr.*, 2008 SCC OnLine Ker 750 (Kerala High Court, Writ Appeal No. 1260 of 2002, dt. 6-6-2008)

[1] *Esthappan Cherian* v. *Excise Commr.*, 2008 SCC OnLine Ker 750

[2] *Esthappan Cherian* v. *Excise Commr.*, OP No. 8318 of 1994, order dated 1-2-2002 (Ker)

[3] *Lucka* v. *State of Kerala*, OP No. 8271 of 1994, order dated 11-8-2000 (Ker)

[4] *Excise Commr.* v. *Esthappan Cherian*, 2011 SCC OnLine SC 1584

[5] *Excise Commr.* v. *Esthappan Cherian*, 2008 SCC OnLine SC 1958

[6] *Excise Commr.* v. *Esthappan Cherian*, 2014 SCC OnLine SC 1824

[7] *CIT* v. *Vatika Township (P) Ltd.*, (2015) 1 SCC 1

[8] *Phillips* v. *Eyre*, (1870) LR 6 QB 1

[9] *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.*, (1994) 1 AC 486 : (1994) 2 WLR 39 (HL)

[10] *CIT* v. *M.C. Ponnoose*, (1969) 2 SCC 351 : (1970) 1 SCR 678

[11] *Hukam Chand* v. *Union of India*, (1972) 2 SCC 601 : (1973) 1 SCR 896

[12] *RTO* v. *Associated Transport Madras (P) Ltd.*, (1980) 4 SCC 597 : 1981 SCC (Tax) 9

[13] *Federation of Indian Mineral Industries* v. *Union of India*, (2017) 16 SCC 186

[14] *Union of India* v. *G.S. Chatha Rice Mills*, (2021) 2 SCC 209

[15] *State of Kerala* v. *K.E. Bhaskaran*, 2008 SCC OnLine SC 1957

[16] The admitted amount being Rs 40,51,288

(2006) 3 Supreme Court Cases 620 : (2006) 145 STC 350 : 2006 SCC OnLine SC 294

(BEFORE S.B. SINHA AND P.K. BALASUBRAMANYAN, JJ.)

MAHABIR VEGETABLE OILS (P) LTD. AND ANOTHER . . Appellants;

Versus

STATE OF HARYANA AND OTHERS . . Respondents.

Civil Appeal No. 1635 of 2006[†] with WP (C) No. 489 of 2004 and CA No. 1636 of 2006[‡], decided on March 10, 2006

A. Administrative Law — Subordinate/Delegated Legislation — Retrospective/Retroactive operation/Retrospectivity — Legality — Held, a subordinate legislation can be given retrospective effect if power in that behalf is contained in the main Act — Moreover, a statute cannot be construed to have a retrospective operation unless such construction appears very clearly in terms thereof or arises by necessary and distinct implication — In the present case R. 28-A and Note 2 to Sch. III, Haryana General Sales Tax Rules, 1975 read with Haryana Industrial Policy, 1988-97, entitling solvent extraction plants to partial exemption — Pursuant thereto, the appellant investing during the operative period huge amounts, satisfying the norms for exemption, to set up a new solvent extraction unit — At this stage, but prior to introduction of S. 64(2-A), the State Government notifying its intention to amend the Rules and inviting objections to the draft amendments — Thereafter, the State Government issuing notifications with retrospective effect omitting Note 2 to Sch. III to the Rules and also amending R. 28-A(2)(a) and thereby disentitling the appellant to the benefit of exemption — In the absence of an enabling provision in the parent Act at the relevant time, such retrospective amendment of the Rules, held,

Page: 621

attracted the doctrine of promissory estoppel — Mere publication of draft rules at the pre-amendment stage could not prevent the operation of the said doctrine — Promissory estoppel — Sales Tax — Haryana General Sales Tax Rules, 1975, Rr. 28-A(2)(a), (c) & (o) and Sch. III Note 2 — Haryana General Sales Tax Act, 1973 (20 of 1973), Ss. 64 and 13-B

B. Administrative Law — Subordinate/Delegated Legislation — Concept,

nature and scope — Delegated legislation, held, cannot take away a right, be it accrued or vested

C. Administrative Law — Subordinate/Delegated Legislation — Concept, nature and scope — Held, a delegatee can make rules only within the four corners of the rule-making power

D. Administrative Law — Subordinate/Delegated Legislation — Rules — Draft rules — If and when can be invoked

E. Administrative Law — Promissory estoppel — Held, operates even in the legislative field

The appellants were the owner of solvent extraction plants. The State of Haryana announced an industrial policy for the period 1-4-1988 to 31-3-1997 wherein incentive by way of sales tax exemption was to be given for the industries set up in backward areas in the State. Solvent at that time was not included in the "negative list" in the Rules. In August 1995 the appellants purchased land to set up a new unit. By 12-12-1996 they invested a huge amount in construction work, erection of plant and completion of legal formalities. The amount so invested, constituted 45% of the total investment. On 26-3-1997, the appellants started trial production and commercial production commenced on 29-3-1997. They applied for grant of exemption from payment of sales tax as on 16-12-1996. On 3-1-1996, the State notified its intention to amend the Haryana General Sales Tax Rules, 1975 (for short "the Rules") and invited objections against the draft of the proposed amendments. Pursuant thereto, it issued notification dated 16-12-1996 which included solvent extraction plants in the negative list but Note 2 appended to that list provided that the industrial units which had made investment up to 25% of the anticipated cost of the project and which had been included in the negative list for the first time would be entitled to the sales tax benefits related to the extent of investment made up to 3-1-1996. On 28-5-1997 Note 2 was omitted deeming the same to have always been omitted. Rule 28-A initially defined "new industrial unit" as one which was set up and commenced commercial production during the operative period. "Operative period" was defined to mean the period 1-4-1988 to 31-3-1997. On 3-6-1997 that rule was amended and in place of "31-3-1997" the words "date on which new policy for incentive to industry is announced by the Government of Haryana in Industries Department" was substituted. Moreover, Section 13-B, the Haryana General Sales Tax Act, 1973 (for short "the Act"), which empowered the State Government to grant exemption, was amended to enable the grant of exemption "either prospectively or retrospectively". Noticing the exclusion thereof from, the negative list and the fact that the cases like the appellants' were not covered by the extant notifications, the Department rejected the appellants' claim. The appellants then challenged the validity of the said notifications dated 16-12-1996 and 28-5-1997 before the P&H High Court but were unsuccessful. The appellants then by special leave, filed the present appeal, which is in turn heard together with another appeal in a similar case and a writ petition.

Before the Supreme Court, the appellants contended that : (*i*) it had made investments pursuant to or in furtherance of the representation made by the State in making Rule 28-A and as on the date when Rule 28-A was amended i.e. on 16-12-1996, the appellants had substantially complied with the provisions of the said rule, (*ii*) as in Schedule III to the Rules, solvent extraction plant was not included, the appellants invested a large amount and, thus, reached an irretrievable position, and (*iii*) the State Government, without assigning any reason, withdrew the exemption provision with retrospective effect at the end of the operative period. That, therefore, such retrospective withdrawal of the exemption provision was bad in law. The appellants further contended that the State did not have any competence to amend the Rules by deleting Note 2 with retrospective effect as Section 64(2-A) came into force in the year 2001.

On the other hand, the State contended that the daft rules having been published, all the prospective entrepreneurs were aware that the Rules might be amended. That the State Government had the requisite jurisdiction to make the amendments with retrospective effect.

Allowing the appeals, the Supreme Court

Held :

Undisputedly, when the appellants started making investments, Rule 28-A was operative. Representation indisputably was made in terms of the said Rules. The relevant provisions of the Act and the Rules framed thereunder indisputably were made keeping in view the industrial policy of the State.

(Paras 22 and 24)

Doctrine of promissory estoppel operates even in the legislative field.

(Para 25)

Central London Property Trust Ltd. v. *High Trees House Ltd.*, (1947) 1 KB 130 : (1956) 1 All ER 256 (note); *Collector of Bombay* v. *Municipal Corpn. of the City of Bombay*, 1951 SCC 987 : 1952 SCR 43 : AIR 1951 SC 469; *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, (1979) 2 SCC 409 : 1979 SCC (Tax) 144; *Pournami Oil Mills* v. *State of Kerala*, 1986 Supp SCC 728 : 1987 SCC (Tax) 134; *CCT* v. *Dharmendra Trading Co.*, (1988) 3 SCC 570 : 1988 SCC (Tax) 432; *Mangalore Chemicals and Fertilisers Ltd.* v. *Dy. CCT*, 1992 Supp (1) SCC 21; *Pawan Alloys & Casting (P) Ltd.* v. *U.P. SEB*, (1997) 7 SCC 251; *State of Punjab* v. *Nestle India Ltd.*, (2004) 6 SCC 465; *Bannari Amman Sugars Ltd.* v. *CTO*, (2005) 1 SCC 625, *relied on*

State of Rajasthan v. *J.K. Udaipur Udyog Ltd.*, (2004) 7 SCC 673, *distinguished*

Bakul Cashew Co. v. *STO*, (1986) 2 SCC 365 : 1986 SCC (Tax) 385; *STO* v. *Shree Durga Oil Mills*, (1998) 1 SCC 572, *referred to*

The State did issue a notification on or about 3-1-1996 expressing its intention to amend the Rules. By reason thereof, however, the State neither stated nor could it expressly state, that the Rules would stand amended. It is well settled that the draft rules can be invoked only when no rule is operative in the field.

(Para 37)

Union of India v. *V. Ramakrishnan*, (2005) 8 SCC 394 : 2005 SCC (L&S) 1150, *relied on*

The promises/representations made by way of a statute, therefore, continued to operate in the field. It may be true that the appellants altered their position only from August 1996 but during the relevant period, namely, August 1996 to 16-12-1996 not only had they invested huge amounts but also the authorities of the State sanctioned benefits and granted permissions. Parties had also taken other steps which could be taken only for the purpose of setting up of a new industrial unit. An entrepreneur who sets up an industry in a backward area

Page: 623

unless otherwise prohibited, is entitled to alter his position pursuant to or in furtherance of the promises or representations made by the State.

(Para 38)

Both the provisions contained in Schedule III and Note 2 formed part of subordinate legislation. By reason of the said note, the State did not deviate from its professed object. It was in conformity with the purport for which original Rule 28-A was enacted.

(Para 39)

As regards the effect of the omission of the said note, it is held that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main Act. The rule-making power is a species of delegated legislation. A delegatee therefor can make rules only within the four corners thereof. A retrospective effect to the amendment by way of a delegated legislation could be given only after coming into force of Section 64(2-A) of the Act and not prior thereto. By reason of Note 2, certain rights were conferred. Although there lies a distinction between vested rights and accrued rights as by reason of a delegated legislation, a right cannot be taken away. The amendments carried out in 1996 as also the subsequent amendments made prior to 2001, could not, thus, have taken away the rights of the appellant with retrospective effect.

(Para 44)

West v. *Gwynne*, (1911) 2 Ch 1 : 104 LT 759 (CA), *relied on*

H-M/TZ/33955/C

Advocates who appeared in this case:

S. Ganesh and Mahabir Singh, Senior Advocates (S.P. Singh Chauhan, Ms Madhusmita Bora, S. Srinivasan, Nikhil Nayyar and Ankit Singhal, Advocates, with them) for the Appellants;

Manjeet Singh, Ms Vivekta Singh, Harikesh Singh, Harikishan Kataria and Ms Kavita Wadia, Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2005) 8 SCC 394 : 2005 SCC (L&S) 1150, *Union of India* v. *V. Ramakrishnan* 632*g*
2. (2005) 1 SCC 625, *Bannari Amman Sugars Ltd.* v. *CTO* 632*d*
3. (2004) 7 SCC 673, *State of Rajasthan* v. *J.K. Udaipur Udyog Ltd.* 631*f-g*
4. (2004) 6 SCC 465, *State of Punjab* v. *Nestle India Ltd.* 631*e*
5. (1998) 1 SCC 572, *STO* v. *Shree Durga Oil Mills* 632*b*
6. (1997) 7 SCC 251, *Pawan Alloys & Casting (P) Ltd.* v. *U.P. SEB* 631*c*
7. 1992 Supp (1) SCC 21, *Mangalore Chemicals and Fertilisers Ltd.* v. *Dy. CCT* 631*b*
8. (1988) 3 SCC 570 : 1988 SCC (Tax) 432, *CCT* v. *Dharmendra Trading Co.* 630*f-g*
9. (1986) 2 SCC 365 : 1986 SCC (Tax) 385, *Bakul Cashew Co.* v. *STO* 630*d*
10. 1986 Supp SCC 728 : 1987 SCC (Tax) 134, *Pournami Oil Mills* v. *State of Kerala* 630*a-b*
11. (1979) 2 SCC 409 : 1979 SCC (Tax) 144, *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.* 629*g*, 630*c-d*, 630*f*

12. 1951 SCC 987 : 1952 SCR 43 : AIR 1951 SC 469, *Collector of Bombay* v. *Municipal Corpn. of the City of Bombay* 629*e-f*

13. (1947) 1 KB 130 : (1956) 1 All ER 256 (note), *Central London Property Trust Ltd.* v. *High Trees House Ltd.* 629*e-f*

14. (1911) 2 Ch 1 : 104 LT 759 (CA), *West* v. *Gwynne* 633*e*

The Judgment of the Court was delivered by

S.B. SINHA, J.— Leave granted in SLPs.

2. Applicability of promissory estoppel and/or the extent thereof is in question in these appeals which arise out of a judgment and order dated 22-4-2005 passed by a Division Bench of the High Court of Punjab and Haryana in amended Civil Petition No. 15025 of 1997.

3. The basic facts are not in dispute.

4. The appellants are owners of solvent extraction plants. The State of Haryana announced an industrial policy for the period 1-4-1988 to 31-3-1997 wherein inter alia incentive by way of sales tax exemption was to be given for the industries set up in backward areas in the State.

5. The State enacted the Haryana General Sales Tax Act, 1973 (for short "the Act"). Section 64 of the Act provides for rule-making power. The said provision was amended by inserting sub-section (2-A) therein which reads as under:

> "64. (2-A) The power to make rules under sub-sections (1) and (2) with respect to clauses (*ff*) and (*oo*) of sub-section (2) shall include the power to give retrospective effect to such rules i.e. from the date on which policy for incentives to industry is announced by the State and for this purpose Rules 28-A, 28-B and 28-C of the Haryana General Sales Tax Rules, 1975, shall have retrospective effect i.e. with effect from 1st April, 1988, 1st August, 1997 and 15th November, 1999 respectively, but such retrospective operation

shall not prejudicially affect the interest of any person to whom such rules may be applicable."

6. Clause (*ff*) of sub-section (2) of Section 64 of the Act provides for the class of industries, period of exemption and conditions of such exemption, under Section 13-B; whereas clause (*oo*) thereof provides for class of industries, period of deferment and the conditions to be imposed for such deferment under Section 25-A.

7. Section 13-B of the Act was inserted on 8-9-1988.

8. Pursuant to or in furtherance of the said rule-making power, the State made rules known as the Haryana General Sales Tax Rules, 1975 (for short "the Rules"). Rule 28-A occurring in Chapter IV-A of the Rules provide for the class of industries, period and other conditions for exemption/deferment from payment of tax as envisaged both under Sections 13-B and 25-A of the Act. "Operative period" has been defined in sub-rule (2)(*a*) of Rule 28-A of the Rules to mean "the period starting from the 1st day of April, 1988 and ending on the 31st day of March, 1997". Sub-rule (2)(*c*) thereof defines "New industrial unit" to mean

> "a unit which is or has been set up in the State of Haryana and comes or has come into commercial production for the first time during the operative period and has not been or is not formed as a result of purchase or transfer of old machinery except when purchased in the course of import into the territory of India, or when the cost of old machinery does not exceed 25% of the total cost of machinery re-establishment, amalgamation, change of lease,

change of ownership, change in constitution, transfer of business, reconstruction or revival of the existing unit".

"Negative list" has been defined in sub-rule (2)(*o*) to mean "a list of class of industries as specified in Schedule III appended to these Rules".

9. Schedule III appended to the Rules provides for a negative list of the industries and/or class of industries which were not to be included therein. Solvent extraction plant was admittedly not included in the list.

10. On or about 3-1-1996, notice was given as regards the intention of the State to amend the Rules in respect whereof a draft was circulated for information of persons likely to be affected thereby so as to enable them to file objections and suggestions thereto. Amendments in the terms of the said draft rules were notified on 16-12-1996 substituting Schedule III appended to the Rules whereby and

whereunder the solvent extraction plant was included therein. Note 2 appended thereto reads as under:

> "The industrial units in which investment has been made up to 25% of the anticipated cost of the project and which have been included in the above list for the first time shall be entitled to the sales tax benefits related to the extent of investment made up to 3-1-1996. Only those assets will be included in the fixed capital investment which have been installed or erected at site and have been paid for. The anticipated cost of the project will be taken on the basis of documents furnished to a financial institution or banks for drawing a loan and which have been accepted by the financial institution or bank concerned for sanction of loan."

11. On or about 28-5-1997 the said Rules were amended inter alia by omitting Note 2 deeming to have always been omitted.

12. Yet again on 3-6-1997 in clause (*a*) of sub-rule (2) of Rule 28-A of the Rules instead and in place of "31-3-1997" the words "date on which new policy for incentive to industry is announced by the Government of Haryana in Industries Department" was substituted.

13. On 26-6-2001 in Section 13-B after the words "for such period", the words "either prospectively or retrospectively" were inserted.

14. Mahabir Vegetable Oils (P) Limited [the appellant in civil appeal arising out of SLP (C) No. 17730 of 2004] purchased land measuring 30 kanals 17 marlas in the month of August 1995 to set up the unit. It also obtained registration under the provisions of the Act and the Central Sales Tax Act, 1956 on 6-9-1995. On 13-8-1996 it applied for a no-objection certificate from the Haryana State Pollution Control Board which is a condition precedent for setting up a solvent extraction plant. On 15-8-1996, the appellant entered into an agreement with M/s Saratech Consultants and Engineers, Karnal for supply and erection of the plant for a sum of Rs 55,55,000 and Rs 22,75,000 respectively and advances were paid on different dates. Furthermore, on 6-9-1996, civil construction work started at site. Plans submitted by the appellant for getting permission for storage of hexane were sanctioned by the Explosives Department on 19-9-1996 and

licence was finally given on 11-3-1997. On 26-9-1996, process of installation of the plant started at the site. On or about 18-11-1996, a 250 kVA power-generating set costing Rs 9,91,000 was installed, no-objection certificate wherefor was granted on 22-11-1996. The appellant applied to the Haryana State Electricity Board for release of

the power connection vide application dated 12-12-1996 and also deposited the security of Rs 68,700 for the same. On 26-3-1997, the appellant started the trial production and commercial production commenced on 29-3-1997.

15. Bharat Rasayan Ltd. [the appellant in civil appeal arising out of SLP (C) No. 23361 of 2004] set up on or about 17-1-1991 its unit to manufacture pesticides at Village Makhara, Madina-Makhara Road, District Rohtak with an investment of Rs 252.70 lakhs. Commercial production commenced on and from 17-1-1991. The unit of the appellant falls in a backward area. On 7-8-1993, the appellant carried out expansion with an additional investment of Rs 181.83 lakhs and added another 250 MT in the production capacity in its unit wherefor eligibility certification/exemption certification was issued in its favour. The appellant also got itself registered with the Sales Tax Department for the expanded unit under the Act and under the Central Sales Tax Act, 1956 with effect from 4-12-1993. On 16-11-1995, the appellant also applied for additional licence which was required for the product manufactured by it. On 3-2-1997, the appellant was registered with the Government of India. Furthermore, on 7-9-1997, an additional licence was granted to it by the Central Insecticides Board. After receipt of the same, the appellant applied to the Director of Agriculture, Haryana for addition of new items in the manufacturing licence and the appellant commenced its commercial production in its expanded unit on 28-4-1998.

16. By 16-12-1996, they had invested about 80% of the total project cost. The appellants had applied for grant of exemption from payment of sales tax as on 16-12-1996 which was rejected in *Mahabir Vegetable Oils (P) Ltd. case* in the following terms:

> "... The solvent extraction plants were included in the negative list with effect from 16-12-1996. The industrial unit has made 45% of total investment. In the notification it was stipulated that the industrial unit in which investment has been made up to 25% of the anticipated cost of the project which has been included in the negative list for the first time shall be entitled to sales tax benefit, however, this condition has been deleted vide notification dated 28-5-1997. The Committee was of the view that this condition has already been deleted and certain parties have challenged it in the Punjab and Haryana High Court. The Director of Industries was of the view that in case a particular industry is put in the negative list, benefit on account of investment made before the date of putting the unit in the negative list should be available to the unit for sales tax exemption/deferment. Though the Higher Level Screening Committee broadly agreed with this view, yet in view of the fact that

such cases were not covered in the existing notification of the

Commercial Taxation Department, it was decided to reject the claim of the party."

17. The writ petition filed by Mahabir Vegetable Oils (P) Ltd. before the High Court was dismissed holding:

(*i*) "The power to grant exemption from the payment of sales tax is an exercise of the powers conferred by the statute on the State Government and is, thus, a delegated legislative function. The delegated legislation can be struck down if it is established that there is manifest arbitrariness. It must be shown that it was not reasonable or manifestly arbitrary."

(*ii*) "As per the records made available, a Standing Committee was constituted by the State of Haryana for revising the negative list periodically keeping in view the industrial scheme of the State and its neighbourhood. Such Standing Committee considered the revision of negative list in its meeting held on 15-9-1995 wherein it was decided to include highly polluting industries, power-intensive industries, conventional type of industries where sufficient capacity has already come up and any further increase in the capacity would jeopardise the health of existing industry in the negative list. There is no challenge to the decision or proceedings of such Committee on any ground indicating arbitrariness, bias, mala fide or any such like reason."

(*iii*) In view of certain decisions of this Court, the benefit of exemption can be withdrawn in public interest.

(*iv*) "... There is no allegation of exercise of such power to include solvent extraction plant which is actuated by any mala fides, fraud or lack of bona fides. It is a matter of fiscal policy of the State Government as to which industries should be granted exemption."

(*v*) Mahabir Vegetable Oils (P) Ltd. only invested Rs 4,44,000 in the land and purchased machinery worth Rs 16,90,000 on 14-12-1996.

(*vi*) "Thus, we hold that there is no representation on behalf of the State Government that the scheme of granting incentives by way of exemption or deferment will not be modified, amended or varied during the operative period. There cannot be any restraint on the State Government to exercise the delegated legislative functions within the parameters laid down by the statute...."

18. In *Bharat Rasayan Ltd. case*, the judgment rendered in *Mahabir*

Vegetable Oils (P) Ltd. was followed without considering the factual aspect therein.

19. In the writ petition filed before this Court, it has been prayed:

"(*a*) issue an appropriate writ, order or direction especially in the nature of certiorari quashing the draft notification dated 3-1-1996, final notification dated 16-12-1996 modifying the industrial policy of 1988 and the notification dated 28-5-1997 modifying the Haryana Sales Tax Rules, 1975 as ultra vires the Constitution being arbitrary, mala fide,

Page: 628

unjust, unreasonable, unworkable, illegal and against the principles of public policy;

(*b*) issue an appropriate writ, order or direction especially in the nature of mandamus directing the respondents to grant the benefit of sales tax exemption to the petitioners as per the State's industrial policy of 1988;

(*c*) pass any such further order or orders as this Hon'ble Court may deem fit and proper under the facts and circumstances of the case."

20. Mr S. Ganesh, learned Senior Counsel appearing on behalf of the appellants submitted that:

(*i*) The appellants had made investments pursuant to or in furtherance of the representation made by the State in making Rule 28-A and as on the date when Rule 28-A was amended i.e. on 16-12 -1996, the appellant had substantially complied with the provisions of the said rule.

(*ii*) As in Schedule III appended to the Rules, the solvent extraction plant was not included, the appellant invested a large amount as would appear from the letter dated 4-9-1997 of the Director of Industries that it had invested 45% of the total project cost and, thus, reached an irretrievable position.

(*iii*) No reason has been assigned by the State as to why amendment had been made at the end of the operative period.

(*iv*) Withdrawal of such exemption provision with retrospective effect is otherwise bad in law.

(*v*) The Director committed a manifest error in rejecting the application for grant of exemption of the appellants on a wrong premise and despite the fact that the provisions of the statute have rightly been construed by the higher authorities, the High Court also

committed a manifest error in holding that no right came into existence before commercial production started.

(*vi*) Note 2 appended to the notification dated 16-12-1996 recognises equity and in that view of the matter the representation was also made in terms thereof.

(*vii*) The State did not have any competence to amend the Rules by deleting Note 2 with retrospective effect as sub-section (2-A) of Section 64 came into force in the year 2001.

(*viii*) The State in its return filed in the High Court did not raise any contention that there existed a larger public interest in withdrawing the exemption notification.

21. Mr Manjeet Singh, learned counsel appearing on behalf of the State, on the other hand, submitted that:

(*a*) Draft rules having been published by the State by way of a notification dated 3-1-1996 all the prospective entrepreneurs were aware that the said Rules may be amended.

Page: 629

(*b*) There was no reason for the appellants being misled by reason of the existing Rules.

(*c*) As on the date of final notification, the appellants did not commence commercial production, they did not acquire any legal right to obtain any exemption.

(*d*) The State has the requisite jurisdiction to make amendments with retrospective effect.

(*e*) In any event, the right of the entrepreneurs being not an indefeasible right, the same could be withdrawn before commencement of production.

22. It is not in dispute that when the appellants herein started making investments, Rule 28-A was operative. Representation indisputably was made in terms of the said Rules. The State, as noticed hereinbefore, made a long-term industrial policy. From time to time it makes changes in the policy keeping in view the situational change.

23. The State intended inter alia to grant incentive to include industrial units by way of waiver and/or deferment of payment of sales tax wherefor Rule 28-A was made. The sales tax laws enacted by the State, as noticed hereinbefore, contain a provision empowering the State to grant such exemption.

24. The relevant provisions of the Act and the Rules framed

thereunder indisputably were made keeping in view the industrial policy of the State. Such industrial policies by way of legislation or otherwise, subject, of course, to the provisions of the statute have been framed by several other States.

25. It is beyond any cavil that the doctrine of promissory estoppel operates even in the legislative field. Whereas in England the development and growth of promissory estoppel can be traced from *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[1] in India the same can be traced from the decision of this Court in *Collector of Bombay* v. *Municipal Corpn. of the City of Bombay*[2]. In that case the Government made a grant of land (which did not fulfil requisite statutory formalities) rent free. It, however, claimed rent after 70 years. The Government, it was opined, could not do so as they were estopped. It was further held therein that there was no overriding public interest which would make it inequitable to enforce estoppel against the State as it was well within the power of the State to grant such exemption.

26. In *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*[3] this Court rejected the plea of the State to the effect that in the absence of any notification issued under Section 4-A of the U.P. Sales Tax Act, the State was entitled to enforce the liability to sales tax imposed on the petitioners thereof under the provisions of the Sales Tax Act and there could be no promissory

estoppel against the State so as to inhibit it from formulating and implementing its policy in public interest.

27. The question came up for consideration before this Court in *Pournami Oil Mills* v. *State of Kerala*[4] wherein it was held: (SCC p. 732, para 7)

> "*7.* Under the order dated 11-4-1979, new small-scale units were invited to set up their industries in the State of Kerala and with a view to boosting of industrialisation, exemption from sales tax and purchase tax for a period of five years was extended as a concession and the five-year period was to run from the date of commencement of production. If in response to such an order and in consideration of the concession made available, promoters of any small-scale concern have set up their industries within the State of Kerala, they would certainly be entitled to plead the rule of estoppel in their favour when the State of Kerala purports to act differently. Several

decisions of this Court were cited in support of the stand of the appellants that in similar circumstances the plea of estoppel can be and has been applied and the leading authority on this point is the case of *M.P. Sugar Mills*[3]. On the other hand, reliance has been placed on behalf of the State on a judgment of this Court in *Bakul Cashew Co.* v. *STO*[5]. In *Bakul Cashew Co. case*[5] this Court found that there was no clear material to show that any definite or certain promise had been made by the Minister to the persons concerned and there was no clear material also in support of the stand that the parties had altered their position by acting upon the representations and suffered any prejudice. On facts, therefore, no case for raising the plea of estoppel was held to have been made out. This Court proceeded on the footing that the notification granting exemption retrospectively was not in accordance with Section 10 of the State Sales Tax Act as it then stood, as there was no power to grant exemption retrospectively. By an amendment that power has been subsequently conferred. In these appeals there is no question of retrospective exemption. We also find that no reference was made by the High Court to the decision in *M.P. Sugar Mills case*[3]. In our view, to the facts of the present case, the ratio of *M.P. Sugar Mills case*[3] directly applies and the plea of estoppel is unanswerable."

28. Yet again in *CCT* v. *Dharmendra Trading Co.*[6] this Court, on the fact situation obtaining therein, rejected the contention of the State that any misuse was committed by the respondent therein and thus the State cannot go back on its promise.

29. It was observed: (SCC p. 573, para 5)

"*5*. The next submission of learned counsel for the appellants was that the concessions granted by the said order dated 30-6-1969 were of no legal effect as there is no statutory provision under which such concessions could be granted and the order of 30-6-1969 was ultra vires

and bad in law. We totally fail to see how an Assistant Commissioner or Deputy Commissioner of Sales Tax who are functionaries of a State can say that a concession granted by the State itself was beyond the powers of the State or how the State can say so either. Moreover, if the said argument of learned counsel is correct, the result would be that even the second order of 12-1-1977 would be equally invalid as it also grants concessions by way of refunds, although in a more limited

manner and that is not even the case of the appellants."

30. *Mangalore Chemicals and Fertilisers Ltd.* v. *Dy. CCT*[7] is a case where this Court had the occasion to consider as to whether subsequent change in the eligibility criteria can undo the eligibility for the condition stipulated in the earlier notification and answered the same in the negative.

31. This Court reaffirmed the legal position in *Pawan Alloys & Casting (P) Ltd.* v. *U.P. SEB*[8] holding: (SCC p. 294, para 62)

> "*62*. As a result of the aforesaid discussion on these points the conclusion becomes inevitable that the appellants are entitled to succeed. It must be held that the impugned notification of 31-7-1986 will have no adverse effect on the right of the appellant new industries to get the development rebate of 10% for the unexpired period of three years from the respective dates of commencement of electricity supply at their units from the Board with effect from 1-8-1986 onwards till the entire three years' period for each of them got exhausted. This result logically follows for the appellants who have admittedly entered into supply agreements with the Board as new industries prior to 1-8-1986."

32. The question came up for consideration before this Court recently in *State of Punjab* v. *Nestle India Ltd.*[9] wherein this Court surveyed the growth of the said doctrine.

33. In that case the State, pursuant to its promise, did not issue any notification. The High Court, in the writ petition filed by the respondent therein was of the opinion that the State was bound by its promise to abolish purchase tax and as the respondent acted on the representation made, absence of a formal notification which was no more than a ministerial act would not make the respondents therein to pay purchase tax with effect from 1-4-1996 to 3-6-1997.

34. The learned counsel appearing on behalf of the State, however, has placed strong reliance on the judgment of this Court in *State of Rajasthan* v. *J.K. Udaipur Udyog Ltd.*[10] wherein the question which fell for consideration was as to whether in the absence of any specific promise, the scheme of grant of exemption of sales tax payable by all the existing units as also the new industrial units would constitute a promise. It was held: (SCC p. 689, para 26)

"*26*. In this case the Scheme being notified under the power in the

State Government to grant exemptions both under Section 15 of the RST Act and Section 8(5) of the CST Act in the public interest, the State Government was competent to modify or revoke the grant for the same reason. *Thus what is granted can be withdrawn unless the Government is precluded from doing so on the ground of promissory estoppel, which principle is itself subject to considerations of equity and public interest*. (See *STO* v. *Shree Durga Oil Mills*[11].) The vesting of a defeasible right is therefore, a contradiction in terms. There being no indefeasible right to the continued grant of an exemption (absent the exception of promissory estoppel), the question of the respondent Companies having an indefeasible right to any facet of such exemption such as the rate, period, etc. does not arise."

(emphasis supplied)

35. The said decision itself is an authority for the proposition that what is granted can be withdrawn by the Government except in the case where the doctrine of promissory estoppel applies. The said decision is also an authority for the proposition that the promissory estoppel operates on equity and public interest.

36. In *Bannari Amman Sugars Ltd.* v. *CTO*[12] it was stated: (SCC p. 637, para 19)

> "*19*. In order to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and bald expressions without any supporting material to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. The courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present in the mind of the court."

37. It is true that the State issued a notification on or about 3-1-1996 expressing its intention to amend the Rules. By reason thereof, however, the State neither stated nor could it expressly state, that the Rules shall stand amended. It is now well-settled principle of law that the draft rules can be invoked only when no rule is operative in the field. Recourse to the draft rules for the purpose of taking a decision in certain matters can also be taken subject to certain conditions. (See *Union of India* v. *V. Ramakrishnan*[13], SCC paras 23 and 24.)

38. The promises/representations made by way of a statute, therefore, continued to operate in the field. It may be true that the

appellants altered their position only from August 1996 but it has neither been denied nor

disputed that during the relevant period, namely, August 1996 to 16-12-1996 not only have they invested huge amounts but also the authorities of the State sanctioned benefits, granted permissions. Parties had also taken other steps which could be taken only for the purpose of setting up of a new industrial unit. An entrepreneur who sets up an industry in a backward area unless otherwise prohibited, is entitled to alter his position pursuant to or in furtherance of the promises or representations made by the State. The State accepted that equity operated in favour of the entrepreneurs by issuing Note 2 to the notification dated 16-12-1996 whereby and whereunder solvent extraction plant was for the first time inserted in Schedule III i.e. in the negative list.

39. Both the provisions contained in Schedule III and Note 2 formed part of subordinate legislation. By reason of the said note, the State did not deviate from its professed object. It was in conformity with the purport for which original Rule 28-A was enacted.

40. We, in this case, are not concerned with the quantum of exemption to which the appellants may be entitled to, but only with the interpretation of the relevant provisions which arise for consideration before us.

41. We may at this stage consider the effect of omission of the said note. It is beyond any cavil that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main Act. The rule-making power is a species of delegated legislation. A delegatee therefore can make rules only within the four corners thereof.

42. It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. (See *West* v. *Gwynne*[14].)

43. A retrospective effect to an amendment by way of a delegated legislation could be given, thus, only after coming into force of sub-section (2-A) of Section 64 of the Act and not prior thereto.

44. By reason of Note 2, certain rights were conferred. Although there lies a distinction between vested rights and accrued rights as by reason of a delegated legislation, a right cannot be taken away. The amendments carried out in 1996 as also the subsequent amendments

made prior to 2001, could not, thus, have taken away the rights of the appellant with retrospective effect.

45. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The appeals are allowed and the matter is remitted to the Director of Industries to consider the matter afresh.

46. In view of our findings aforementioned no direction is required to be issued in the writ petition filed by the appellants. The writ petition is disposed of accordingly.

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† Arising out of SLP (C) No. 17730 of 2004. From the Judgment and Order dated 22-4-2004 of the Punjab and Haryana High Court in amended CWP No. 15025 of 1997

‡ Arising out of SLP (C) No. 23361 of 2004

[1] (1947) 1 KB 130 : (1956) 1 All ER 256 (note)

[2] 1951 SCC 987 : 1952 SCR 43 : AIR 1951 SC 469

[3] (1979) 2 SCC 409 : 1979 SCC (Tax) 144

[4] 1986 Supp SCC 728 : 1987 SCC (Tax) 134

[5] (1986) 2 SCC 365 : 1986 SCC (Tax) 385

[6] (1988) 3 SCC 570 : 1988 SCC (Tax) 432

[7] 1992 Supp (1) SCC 21

[8] (1997) 7 SCC 251

[9] (2004) 6 SCC 465

[10] (2004) 7 SCC 673

[11] (1998) 1 SCC 572

[12] (2005) 1 SCC 625

[13] (2005) 8 SCC 394 : 2005 SCC (L&S) 1150

[14] (1911) 2 Ch 1 : 104 LT 759 (CA)

2024 SCC OnLine SC 2642

In the Supreme Court of India

(BEFORE SANDEEP MEHTA AND R. MAHADEVAN, JJ.)

Civil Appeal No(s). 8617 of 2013

V. Vincent Velankanni … Appellant(s);

Versus

Union of India and Others … Respondent(s).

With

Civil Appeal No(s). 010944-010946 of 2024

(Arising out of SLP(Civil) No(s). 023121-023123 of 2024)

CC No. 3704-3706/2012

Civil Appeal No(s). 8617 of 2013, Civil Appeal No(s). 010944-010946 of 2024 (Arising out of SLP(Civil) No(s). 023121-023123 of 2024) and CC No. 3704-3706/2012

Decided on September 30, 2024

Advocates who appeared in this case :

For Appellant(s) Mr. Vijay Kumar, AOR

Mr. Prashant Bhushan, AOR

Mr. Anurag Tiwary, Adv.

For Respondent(s) Mr. Mukesh Kumar Maroria, AOR

Mr. Abid Ali Beeran P, AOR

The Judgment of the Court was delivered by

SANDEEP MEHTA, J.:—

Civil Appeal No(s). 8617 of 2013

1. The instant appeal by special leave takes exception to the judgment dated 10th October, 2011 passed by the High Court of Judicature at Madras in Writ Petition[1], whereby the Division Bench of the High Court accepted the writ petition[2] preferred by the private respondents herein[3] and reversed the judgment dated 24th December, 2010 passed by the Central Administrative Tribunal, Madras Bench[4] in Original Application[5] preferred by the private respondents herein. The CAT had rejected the Original Application[6], challenging the proposed action of revision and fixation of their seniority in the Engine Factory, Avadi, Chennai[7].

2. The brief facts in a nutshell, relevant and essential for the disposal of the instant appeal are noted hereinbelow.

3. The appellant and the private respondents were engaged on semi-skilled posts such as Fitters and Machinists in respondent No. 2-Factory. A common select list of candidates based on merit was issued by the General Manager of respondent No. 2-Factory in the year 1995 wherein the appellant herein was placed at a higher position than the private respondents. An appointment order dated 17th January, 1996 was

issued in the favour of the appellant for the post of 'Fitter General(semi-skilled)' in respondent No. 2-Factory. He was initially placed on probation for a period of two years which was further extended for a period of six months w.e.f. 17th January, 1998. The appellant satisfactorily completed the probation period on 16th July, 1998. Thereafter, he was promoted to the 'Skilled' grade on 6th January, 1999.

4. A draft seniority list dated 28th July, 2006 was issued by respondent No. 2-Factory, whereby the seniority of 'Fitters' was fixed as per their respective dates of promotion to the skilled grade and the appellant was placed at a lower position than the private respondents.

5. Aggrieved of the draft seniority list[8], the appellant submitted a representation dated 13th November, 2006 to the General Manager of respondent No. 2-Factory seeking necessary amendments in the draft seniority list and to fix his position appropriately and thereafter, to publish a final seniority list. The General Manager rejected the aforesaid representation submitted by the appellant *vide* communication dated 9th July, 2007, observing that his seniority had been fixed from the date of holding the skilled grade, and thus the position of the appellant in the seniority list was not liable to be altered.

6. Being aggrieved, the appellant preferred Original Application No. 821 of 2007 before the CAT challenging the draft seniority list dated 28th July, 2006.

7. Another employee, namely, Mr. P. Kumaresan who was appointed as a Mechanist in respondent No. 2-Factory in January 1996, also filed Original Application No. 831 of 2007, before the CAT, wherein Mr. P. Kumaresan also claimed that he had to be placed at the 6th position instead of the 27th position as set out in the draft seniority list. Original Application[9] preferred by Mr. P. Kumaresan came to be allowed by the CAT holding that the seniority fixed in the draft list was incorrect. The CAT noted that respondent No. 2-Factory had allowed the promotion to the juniors of Mr. P. Kumaresan on the ground that he was still undergoing the extended period of probation. The CAT held that it is settled law that once the extended period of probation is completed, the employee should be confirmed in service from the date of initial selection and should be assigned the original rank in the seniority list. Thus, once the extended period of probation came to an end and the employee was found suitable, he had to be confirmed in service, promoted with seniority and all consequential benefits to the next grade with reference to the date of initial appointment.

8. The CAT allowed Original Application No. 821 of 2007 preferred by the appellant herein *vide* order dated 23rd January, 2009, basing its decision on the order passed in Original Application No. 831 of 2007 considering the fact that both the workers were identically employed in respondent No. 2-Factory and directed that the appellant was entitled to be considered for his claim of seniority and directed the respondents[10] to revise the seniority list accordingly.

9. The private respondents herein filed Original Application No. 318 of 2009 before CAT against the proposed action of revision of seniority list and promotions in accordance with the order dated 23rd January, 2009 passed in the Original Application No. 821 of 2007 filed by the appellant. The said Original Application[11] was dismissed

by CAT *vide* order dated 24th December, 2010 while granting the liberty to the applicants therein(private respondents herein) to file a review application for assailing the orders passed in Original Application No. 831 of 2007 and Original Application No. 821 of 2007.

10. However, private respondents herein rather than filing a review application, chose to assail the orders passed by the CAT by preferring a Writ Petition[12] before the Madras High Court which came to be allowed *vide* order dated 10th October, 2011. The Union of India[13] and respondent No. 2-Factory were directed by the High Court to restore the seniority of the writ petitioners(private respondents herein), holding that the writ petitioners are senior to the appellant herein, both as per the date of initial appointment and also in the promotional post of skilled grade. The High Court held that an employee selected in the semi-skilled grade is required to complete the probation period satisfactorily and has to pass the requisite trade test prescribed for the post before he can be confirmed and promoted to the skilled grade. Due to the extension of the probation period of the respondents in the Writ Petition No. 583 of 2011 (including the appellant herein), they were required to be placed below the persons who were promoted to the skilled grade earlier to them. The High Court held that in the skilled grade, the writ petitioners(private respondents herein) were senior to the third respondent(appellant herein). It was also held that the promotions to the skilled grade and the highly skilled grade were carried out in the years 1998 and 2003, respectively but the third respondent (appellant herein) chose to file the Original Application[14] in the year 2007 and no reason was forthcoming for the gross delay. The relevant extract from the High Court's judgment dated 10th October, 2011 is reproduced hereinbelow:—

> "7. A mere reading of the counter affidavit would show that the probation of the third respondent in W.P. No. 583 of 2011 was extended by six months and for the third respondent in W.P. No. 584 of 2011, it was extended by three months by virtue of their failure to complete probation of two years and to pass the required trade test prescribed for the posts. Accordingly, the third respondent in W.P. No. 583 of 2011 was placed in the skilled grade only with effect from 6.1.1999 and third respondent in W.P. No. 584 of 2011 was promoted only with effect from 5.10.1998 whereas the petitioners in both the petitions were promoted to the skilled grade on 3.7.1998.
>
> 8. It is not in dispute that the Semi-Skilled grade is only has to complete the probation period satisfactorily and pass the requisite trade tests prescribed for the posts. In the present case, it is clear that due to extension of the probation period, the respondents were placed below the persons who were promoted to Skilled grade earlier than them. Even if the date of appointment is taken into consideration, the petitioners are seniors to the third respondent in these petitions.
>
> 9. That apart, the petitioners were promoted to the skilled grade in the year 1998 and to the highly skilled grade in the year 2003. But the third respondent in these petitions have chosen to file the original applications only in the year 2007 and no reason is forthcoming for the delay.
>
> 10. In view of the counter affidavit filed by the Department which is in favour of the petitioners and the fact that the petitioners are seniors to the third respondent in these petitions both as per the date of initial appointment and also the date of

promotion to the skilled grade, we are of the view that revising the seniority list at the instance of the third respondent in the Writ Petitions in the guise of implementing the order of the Tribunal, is illegal. Therefore, in our considered opinion, the order of the Tribunal is to be interfered with.

11. For the aforesaid reasons, the writ petitions are allowed and the order of the Tribunal is set aside. The respondents 1 and 2 are directed to restore the seniority of the petitioners confirming their original date of promotion to the Highly Skilled Grade. After revising the seniority, the respondents are further directed to consider the case of the petitioners for subsequent promotion on par with their juniors."

(quoted verbatim from the paper book)

The judgment dated 10th October, 2011 passed by the Division Bench of the High Court is the subject matter of challenge in the instant appeal.

Submissions on behalf of the appellant:

11. Learned counsel appearing for the appellant urged that the High Court premised its findings on a totally erroneous reasoning that the challenge laid by the appellant to the draft seniority list was delayed and that the private respondents herein(writ petitioners) were senior to the appellant as on the date of initial appointment.

12. Learned counsel contended that the draft seniority list in the appellant's cadre was published in the year 2006 for the first time after the appointment of the appellant as well as the private respondents. Immediately on receiving the draft seniority list, the appellant herein made a representation against the same and when a favourable decision was not forthcoming, he approached the CAT for challenging the validity thereof. He submitted that the finding of the High Court that the private respondents herein(writ petitioners) were senior to the appellant as on the date of initial appointment is totally against the record.

13. He further urged that the extant rules do not provide that the promotion from Fitter(semi-skilled) to Fitter(skilled) would be dependent on passing the trade test. Thus, as soon as the appellant completed the probation period, his services would have to be confirmed and reckoned from the date of initial appointment, and by virtue thereof, the appellant would be entitled to be placed above the private respondents in the order of seniority.

14. Learned counsel submitted that the period spent during training/probation has to be reckoned for computation of length of service and the same cannot be excluded while assigning seniority to an employee. In support of his arguments, learned counsel placed reliance on the judgment of this Court in the case of *L. Chandrakishore Singh* v. *State of Haryana*[15].

15. He further submitted that the movement of the employee from semi-skilled to skilled grade tantamounts to confirmation/upgradation and not a promotion. In support of this contention, reliance was placed on the judgment of this Court in the case of *BSNL* v. *R. Santhakumari Velusamy*[16].

16. Learned counsel also placed reliance on the Office Memorandum[17] dated 4th November, 1992, issued by the Government of India, Department of Personnel and Training, which was in force at the time when the appellant and the private respondents were appointed, wherein, it is provided:—

"Seniority for Promotion

Order effective from 4th November, 1992

[Government of India, Department of Personnel and Training, Office Memorandum No. 20011/5/90-Estt. (D), dated the 4th November, 1992]

Seniority to be determined by the order of merit indicated at the time of initial appointment.- The seniority of Government servants is determined in accordance with the general principles of seniority contained in M.H.A., O.M. No. 9/11155-RPS, dated the 22nd December, 1959 (See Section II). One of the basic principles enunciated in the said OM is that, seniority follows confirmation and consequently permanent officers in each grade shall rank senior to those who are officiating in that grade.

2. This principle has been coming under judicial scrutiny in a number of cases in the past; the last important judgment being the one delivered by the Supreme Court on 2-5-1990, in the case of *Class II Direct Recruits Engineering Officers' Association* v. *State of Maharashtra*. In Para. 47(A) of the said judgment, the Supreme Court has held that once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not-according to the date of his confirmation.

3. The general principle of seniority mentioned above has been examined in the light of the judicial pronouncement referred to above and it has been decided that seniority may be delinked from confirmation as per the directive of the Supreme Court in Para, 47(A) of its judgment, dated 2-5- 1990. **Accordingly, in modification of the General Principle 3, proviso to General Principle 4 and proviso to General Principle 5(i) contained in O.M. No. 9/11155-RPS, dated the 22nd December, 1959 and Para. 2.3 of O.M., dated the 3rd July, 1986, it has been decided that the seniority of a person regularly appointed to a post according to rule would be determined by the order of merit indicated at the time of initial appointment and not according to the date of confirmation**.

4. These orders shall take effect from the date of issue of this Office Memorandum. Seniority already determined according to the existing principles on the date of issue of these orders will not be reopened even if in some cases seniority has already been challenged or is in dispute and it will continue to be determined on the basis of the principles already existing prior to the date of issue of these orders."

(emphasis supplied)

He thus urged that the seniority of a person regularly appointed would have to be reckoned based on the merit indicated at the time of the initial appointment and not as per the date of confirmation. To support this submission, he also placed reliance on the Constitution Bench decision of this Court in *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra*[18].

He thus implored the Court to accept the appeal, set aside the impugned judgment rendered by the High Court, and restore the judgment of the CAT.

Submissions on behalf of the respondents:

17. *Per contra*, learned counsel appearing for respondent Nos. 1 and 2 submitted that the appellant was appointed as Fitter General(semi-skilled) on 17th January, 1996. The semi-skilled grade is only a trainee grade and in order to be confirmed in service and for being promoted to the skilled grade, the employee would have to complete the probation period satisfactorily and pass the requisite trade test prescribed for

promotion to the skilled grade. Only on passing the trade test, the employee would qualify for a permanent status and promotion to the skilled grade.

18. He further submitted that it is a settled law that in cases where there are no rules governing the field, it is the placement in the initial merit list that will decide the seniority, however, if the rules are in vogue, then the same will prevail. In this regard, he placed reliance on *Suresh Chandra Jha* v. *State of Bihar*[19].

19. Learned counsel for the respondents placed reliance on Statutory Regulatory Order[20] No. 185 of 1994 dated 1st November, 1994 to urge that any appointment in the industrial establishment is done against the skilled grade and hence, the period spent in the semi-skilled grade till completion of probation period and qualifying the prescribed trade test for promotion to the skilled grade is considered only as a trainee grade. Resultantly, the seniority/merit position at the time of induction in the trainee grade would have no bearing on the *inter se* seniority of the employees which would have to be reckoned from the date the employee is confirmed and promoted to the skilled grade upon completing the probation period and clearing the trade test.

20. He further placed reliance upon the Government Order[21] dated 24th December, 2002 issued by the Ordinance Factory Board, Ministry of Defence, Government of India, which was issued to clarify the counting of seniority in trades mentioned in SRO No. 185 of 1994 applicable to the Industrial Establishments and urged that the said GO clarifies beyond the pale of doubt that the semi-skilled grade is a trainee grade and the seniority will be counted from the date of promotion to the skilled grade and not from the date of induction/entry in the semi-skilled grade.

21. Learned counsel pointed out that the two years' probation period of the appellant was extended by six months w.e.f. 17th January, 1998, and the appellant could complete the probation period only on 16th July, 1998. Subsequently, upon passing the trade test, he was promoted to the skilled grade w.e.f. 6th January, 1999. The appellant lost the seniority on account of his failure to complete probation in the period of two years and clearing the trade test whereas, the private respondents herein had completed probation in time and were found to be fit in the trade test and therefore, they were promoted to the skilled grade much before the appellant. Consequently, these employees i.e. private respondents herein were placed higher in seniority, as per clarification issued by Ordinance Factory Board *vide* GO dated 24th December, 2002.

On these grounds, learned counsel for the respondents implored the Court to dismiss the appeal and affirm the order passed by the High Court.

22. Learned counsel for the private respondents herein[22] adopted the submissions advanced by learned counsel for respondent Nos. 1 and 2.

23. We have given our thoughtful consideration to the submissions advanced at the bar by learned counsel for the parties and have gone through the impugned judgment and the material placed on record.

Discussion and Conclusion:

24. The fact that the appellant and private respondents were inducted as semi-skilled grade employees in respondent No. 2-Factory in the year 1996 is not in dispute. The common select list dated 22nd November, 1995 is not placed on record by the

parties. However, appellant filed an RTI[23], and the reply thereto dated 29th December, 2011 clearly shows that at the time of initial induction, appellant was placed at the 7th position, whereas the private respondents[24] were placed at the 30th, 31st and 32nd positions, respectively in the select list based on merit.

25. The Division Bench of the High Court in the impugned judgment dated 10th October, 2011 has recorded a categoric finding that even if the date of appointment is taken into consideration, the writ petitioners(private respondents herein) are senior to respondent No. 3(appellant herein). This finding seems to be *prima facie* erroneous because admittedly, the appellant herein was placed at 7th position and the private respondents were placed at the 30th, 31st and 32nd positions in the order of merit, as borne out from the record. Further, in writ petition[25] filed by the private respondents before the High Court and the counter affidavit filed by the respondents herein before this Court, there is no averment that these respondents were placed above to the appellant at the time of initial appointment. Rather the sole ground taken by the writ petitioners(private respondents herein) to oppose the prayer of the appellant was that the appellant was not able to complete his probation period and pass the trade test on time and thus, he was placed below the private respondents in the draft seniority list.

26. Before we adjudicate upon the issue of *inter se* seniority amongst the litigating parties, we find it necessary to comment on the appellant's approach towards filing his claim concerning his promotion in the highly skilled grade.

27. The appellant and the private respondents faced a common selection process and were appointed in the semi-skilled grade in the year 1996. The private respondents herein were promoted to the skilled grade on 11th January, 1998 and further promoted to the highly skilled grade on 20th May, 2003. On the other hand, the appellant was promoted to the skilled grade on 17th July, 1998 (after completing his extended probation period of 6 months and clearing the mandatory trade test). Considering that the private respondents were promoted to highly skilled grade in May, 2003, the appellant in the normal course should also have been promoted to highly skilled grade by the end of the year 2003. However, as per the factual matrix, he was promoted to the highly skilled grade after around 5 years i.e. on 26th March, 2008. A tabular chart depicting the date of appointment and the date of promotion to skilled and highly skilled grade is placed below:—

Name	**Date of appointment in the Semi Skilled grade**	**Extension of probation**	**Effective date of satisfactory completion of probation**	**Date of promotion to Skilled grade**	**Date of promotion to the Highly skilled grade**
V. Sivaraman **(Respondent No. 3)**	11.01.1996	NA	11.01.1998	03.07.1998	20.05.2003
G. Sudhakar **(Respondent No. 4)**	11.01.1996	NA	11.01.1998	03.07.1998	20.05.2003

P. Ramesh **(Respondent No. 5)**	11.01.1996	NA	11.01.1998	03.07.1998	20.05.2003
V. Vincent Velankanni **(Appellant)**	**17.01.1996**	**By 6 months w.e.f. 17.1.1998 by order dated 5.2.1998**	**17.07.1988**	**06.01.1999**	**26.03.2008**

28. The draft seniority list was published on 28th July, 2006. The appellant never questioned the denial of promotion to the highly skilled grade, till much after the publication of the draft seniority list. Admittedly, co-employees who were below the appellant in the select list of the year 1996 were promoted in the intervening period without any objection being raised by the appellant. After the publication of the draft seniority list in the year 2006, he chose to challenge the same and to consider his promotion to highly skilled grade with effect from 20th May, 2003 by filing an Original Application[26] before CAT only in the year 2007. Thus, it was the first time in 2007 that the appellant claimed his promotion with retrospective effect. However, this benefit of retrospective promotion was neither granted by the CAT nor by the High Court and thus, there is no need to delve into this aspect further.

29. The primary issue which requires adjudication is as to whether the seniority of the appellant is to be reckoned from the date of induction/initial appointment or as per the date of promotion/confirmation in the skilled grade.

30. It is a well-settled proposition that once an incumbent is appointed to a post according to the rules, his seniority has to be reckoned from the date of the initial appointment and not according to the date of confirmation, unless the rules provide otherwise.

31. In the case of *L. Chandrakishore Singh* v. *State of Manipur*[27], this Court held that in cases of probationary or officiating appointments which are followed by a confirmation, unless a contrary rule is shown, the services rendered as the officiating appointment or on probation cannot be ignored while reckoning the length of service for determining the position in the seniority list. This view has been reiterated in the case of *Ajit Kumar Rath* v. *State of Orissa*[28].

32. The Constitution Bench of this Court in *Direct Recruit Class II Engg Officers' Assn.* (supra) stated the legal position with regard to *inter se* seniority of direct recruits and promotees and while doing so, *inter alia*, it was held that once an incumbent is appointed to a post according to rules, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

33. This Court summarised the legal principles with regard to the determination of seniority in *Pawan Pratap Singh* v. *Reevan Singh*[29] in the following terms:

> 45. From the above, the legal position with regard to determination of seniority in service can be summarised as follows:
>
> (*i*) The effective date of selection has to be understood in the context of the

service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.

(*ii*) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

(*iii*) Ordinarily, notional seniority may not be granted from the backdate and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules.

(*iv*) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime.

34. Thus, it is trite that when an employee completes the probation period and is confirmed in service *albeit* with some delay, the confirmation in service shall relate back to the date of the initial appointment. Any departure from this principle in the form of statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution of India.

35. In the backdrop of the above legal and factual background, let us now examine if whether the extant rules/regulations/circulars prevailing in the establishment[30] contained any stipulation that the completion of the probation period and the passing of the trade test is *sin qua non* for being promoted to the skilled grade and if so, whether the seniority of the employees selected on the same date would have to be reckoned from the date of confirmation/passing the trade test or from the date of initial appointment.

36. A pertinent averment is made in the counter affidavit filed by the respondents emphasizing their stand that the semi-skilled grade is only a trainee grade and in order to place an employee in the skilled grade, he would have to complete the probation period satisfactorily and also clear the trade test as laid down in the SRO No. 185 of 1994. The relevant extract from SRO No. 185 of 1994 dated 1st November, 1994 is reproduced hereinbelow for the sake of ready reference. Note 6 of the said SRO reads as below:—

> "Note 6. Wherever "Trade Test" is laid down in Column 12 of this Schedule such trade test shall be prescribed by the General manager of the factory or the Ordnance Factory Board. The term "Trade Test" will include written, oral and practical examination and aptitude test and interview and also statutory qualification test where applicable."

37. The GO dated 24th December, 2002 issued by the Ordinance Factory Board placed on record clarifies the position regarding counting of seniority in the trades of SRO No. 185 of 1994 for the industrial establishments. The language of this GO is

considered germane to the controversy and hence, the relevant portion thereof is extracted hereinbelow:—

> "With a view to overcome doubts in counting of seniority in respect of industrial employees who are working in trades listed at Annexure 'A' of SRO 185/1994 it has been decided to interpret rules relating to seniority in consonance with existing SRO provisions. Accordingly, the following rules for determining seniority may be followed in all OFs with immediate effect.
>
> **1) Semi-skilled posts are training post for skilled posts of trades listed at Annexure 'A' of SRO 185/1994.**
>
> 2) Educational Qualification/Technical Qualification will not be deciding factor while counting seniority for trades listed at Annexure 'A' of SRO 185/1994.
>
> **However, where passing of trade test/competency test or any other statutory certificate is required, the same must be adhered to and cannot be done away with.**
>
> **3) Seniority will be counted from the date of promotion to Skilled grade and not from the date of induction/entry/promotion in semi-skilled grade.**
>
> 4) .....
>
> 5) .....
>
> 6) The above orders are in consonance with the existing SRO provisions and various court orders on the subject."

(emphasis supplied)

38. The validity of this GO[31] was never assailed by the appellant at any stage either before the CAT or the High Court. A conjoint reading of SRO No. 185 of 1994 and the GO dated 24th December, 2002, which indisputably were applicable to the cadre of semi-skilled and skilled fitters in the respondent establishment[32] at the relevant point of time would make it clear that the seniority in the skilled grade would have to be reckoned from the date of promotion to the skilled grade and not from the date of induction/entry in the semi-skilled grade and the candidate joining service in the semi-skilled grade would be mandatorily required to complete the probation period and also to clear the trade test for being promoted to the skilled grade. In the event of either of the two conditions not being met, the employee concerned would not be entitled to be promoted to the skilled grade.

39. The appellant, in support of his plea, has placed reliance on a GO dated 4th August, 2015, whereby the GO dated 24th December, 2002 has been superseded and it has been decided by the Competent Authority that "henceforth", the seniority in respect of Industrial Establishments would be governed by the relevant clause of OM dated 4th November, 1992 (reproduced *supra*). The said GO dated 4th August, 2015 is reproduced hereinbelow for the sake of ready reference:—

"No. Per/I/Seniority/2015-16

Date : 04-08-2015

To

The Sr. General Managers/General Managers

All Ordnance & Ordnance Equipment Factories

Sub : Determination of Seniority in connection with direct Recruitment in the

Industrial Establishment.

Ref : (i) OFB Circular No. 590/OFBOL/A/I dated 24.12.2002

(ii) OFB Circular No. 590/OFBOL/A/I dated 13.01.2003

In connection with counting of Seniority in Annexure-A trades of SRO 185/1994 in the Industrial Establishment, above referred OFB Circulars clarified and directed that seniority in respect of Industrial Employees will be counted from the date of up-gradation to Skilled Grade and not from the date of induction/entry/promotion in the Semi-skilled grade.

Several references in this regard have been received at OFB and after due examination, it has been observed that the OFB Circulars under reference are not in line with the principles of seniority as laid down by DOPT from time to time.

Therefore, the Competent Authority has decided that in supersession of the above referred OFB Circulars dated 24.12.2002 and 13.01.2003, **henceforth**, seniority in respect of IEs will be governed by the relevant clause of DOPT OM No. 20011/5/90-Estt(D) dated 4th November, 1992 and OM No. 22011/7/86-Estt(D) dated 3rd July, 1986. Accordingly, promotion from Skilled to Highly Skilled Grade-II will be made as per the seniority fixed for Semi-skilled grade (entry grade) which will be arrived at as per merit of the select panel, without making any linkage to the date of up-gradation to the Skilled Grade.

It may so happen that a person lower in the merit list of recruitment (in Semi-skilled grade) joins earlier due to early clearance of PVR. In such case, the person lower in the merit list will complete his/her qualifying service and be up-graded to Skilled Grade on earlier date as compared to a person higher in the merit list. However, person higher in the merit list will not lose his seniority and will be placed above the person lower in the merit list after getting up-gradation to Skilled Grade.

(S.K. Singh)
Director/IR
For Director General, Ordnance Factories"
(emphasis supplied)

40. By virtue of the above GO[33], the rule position *qua* the fixation of seniority has been restored to be governed by OM dated 4th November, 1992 (*reproduced supra*), according to which the relevant date for fixation of seniority would be the date of initial appointment and not the date of upgradation/promotion to the skilled grade. The OM dated 4th August, 2015 further clarifies that the person higher in the merit list will not lose his seniority and will be placed above the person lower in the merit list after getting upgradation to the skilled grade.

41. However, the clarification issued *vide* GO dated 4th August, 2015 does not operate retrospectively as it is specifically provided in the said GO that "**henceforth**", the seniority in respect of Industrial Establishments will be governed by the relevant clause of OM dated 4th November, 1992.

42. It is trite law that an Office Memorandum/Government Order cannot have a retrospective effect unless and until there is an express provision to make its effect retrospective or that the operation thereof is retrospective by necessary implication. In this regard, we are benefitted by the observations of this Court in *Sonia* v. *Oriental*

Insurance Co. Ltd.[34], wherein it was held that:

> "**11.** ….In any view of the matter, law is well settled that an Office Memorandum cannot have a retrospective effect unless and until intention of the authorities to make it as such is revealed expressly or by necessary implication in the Office Memorandum."

43. If a Government Order is treated to be in the nature of a clarification of an earlier Government Order, it may be made applicable retrospectively. Conversely, if a subsequent Government Order is held to be a modification/amendment of the earlier Government Order, its application would be prospective as retrospective application thereof would result in withdrawal of vested rights which is impermissible in law and the same may also entail recoveries to be made. The principles in this regard were culled out by this Court in a recent judgment of *Sree Sankaracharya University of Sanskrit* v. *Dr. Manu*[35], in the following terms:—

> **"52.** From the aforesaid authorities, the following principles could be culled out:
>
> i) If a statute is curative or merely clarificatory of the previous law, retrospective operation thereof may be permitted.
>
> ii) In order for a subsequent order/provision/amendment to be considered as clarificatory of the previous law, the pre-amended law ought to have been vague or ambiguous. It is only when it would be impossible to reasonably interpret a provision unless an amendment is read into it, that the amendment is considered to be a clarification or a declaration of the previous law and therefore applied retrospectively.
>
> iii) An explanation/clarification may not expand or alter the scope of the original provision.
>
> iv) Merely because a provision is described as a clarification/explanation, the Court is not bound by the said statement in the statute itself, but must proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is a substantive amendment which is intended to change the law and which would apply prospectively."

44. Applying these principles to the case at hand, we are of the view that the subsequent GO dated 4th August, 2015 cannot be read simply as a clarification and therefore cannot be made applicable retrospectively. The said GO has substantively modified the position governing seniority in the Industrial Establishments by reviving the earlier OM dated 4th November, 1992, and supersedes the orders/circulars dated 24th December, 2002 and 13th January, 2003, which were holding the field over more than a decade. Therefore, giving retrospective effect to the GO dated 4th August, 2015 would have catastrophic effect on the seniority of the entire cadre.

45. This Court has time and again dealt with the effect of altering the seniority list at a belated stage and how it may adversely affect the employees whose seniority and rank has been determined in the meantime. In this connection, reference may be made to *Malcom Lawrence Cecil D'Souza* v. *Union of India*[36], wherein this Court held that:—

> **"9.** Although security of service cannot be used as a shield against administrative action for lapses of a public servant, by and large one of the essential requirements of contentment and efficiency in public services is a feeling of security. It is difficult

no doubt to guarantee such security in all its varied aspects, it should at least be possible to ensure that matters like one's position in the seniority list after having been settled for once should not be liable to be reopened after lapse of many years….. Raking up old matters like seniority after a long time is likely to result in administrative complications and difficulties. It would, therefore, appear to be in the interest of smoothness and efficiency of service that such matters should be given a quietus after lapse of some time."

46. In *R.S. Makashi* v. *I.M. Menon*[37], this Court observed as follows:—

"33. …. We must administer justice in accordance with law and principles of equity, justice and good conscience. It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years. …."

47. In *K.R. Mudgal* v. *R.P. Singh*[38], this Court observed in the following terms:—

"2. … A government servant who is appointed to any post ordinarily should at least after a period of 3 or 4 years of his appointment be allowed to attend to the duties attached to his post peacefully and without any sense of insecurity."

48. In *B.S. Bajwa* v. *State of Punjab*[39], this Court held that the seniority list should not be reopened after a lapse of reasonable period as it would disturb the settled position which is unjustifiable. The relevant extract is as follows:—

"7. … It is well settled that in service matters the question of seniority should not be reopened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable…."

49. It can easily be inferred that in the intervening period, before the GO dated 4th August, 2015 came to be issued, seniority of multitudes of employees must have been fixed according to the GO dated 24th December, 2002, which is according to the date of promotion to skilled grade and not from the date of induction/entry in semi-skilled grade. As a matter of fact, respondent Nos. 3, 4 and 5 who were below the appellant in the order of merit at the time of induction in the semi-skilled grade, have been promoted to the skilled grade and the highly skilled grade much before the appellant by application of the GO dated 24th December, 2002. The appellant did not question their promotions before any Court or Tribunal at any stage.

50. Thus, much water has flown under the bridge and retrospective application of the GO issued in 2015 would open floodgates of litigation and would disturb the seniority of many employees causing them grave prejudice and heartburn as it would disturb the crystallized rights regarding seniority, rank and promotion which would have accrued to them during the intervening period. To alter a seniority list after such a long period would be totally unjust to the multitudes of employees who could get caught in the labyrinth of uncertainty for no fault of theirs and may suffer loss of their seniority rights retrospectively.

51. Keeping in mind the afore-stated principles, we are of the view that applicability of the Government Order dated 4th August, 2015 cannot enure to the benefit of the appellant as its operation is clearly prospective.

52. In wake of the above discussion, we find that the impugned judgment of the

High Court does not suffer from any infirmity warranting interference.

53. This appeal is dismissed as being devoid of merit. No order as to costs.

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

CIVIL APPEAL @ SLP(Civil) D. No. 3704-3706 of 2012)

55. Delay condoned.

56. Leave granted.

57. In terms of the judgment passed in Civil Appeal No(s). 8617 of 2013, the present appeals are disposed of. No order as to costs.

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

———

[1] Writ Petition No. 583 of 2011

[2] *Ibid*

[3] Respondent Nos. 3, 4 and 5

[4] 'CAT', hereafter

[5] Original Application No. 318 of 2009

[6] *Ibid*

[7] 'respondent No. 2-Factory', hereafter

[8] Dated 28th July, 2006

[9] Original Application No. 831 of 2007

[10] Respondent Nos. 1 and 2

[11] Original Application No. 318 of 2009

[12] Writ Petition No. 583 of 2011

[13] Respondent No. 1

[14] Original Application No. 821 of 2007

[15] (1999) 8 SCC 287 : AIR 1999 SC 3616

[16] (2011) 9 SCC 510

[17] 'OM', hereafter

[18] (1990) 2 SCC 715

[19] (2007) 1 SCC 405

[20] 'SRO', hereafter

[21] 'GO', hereafter

[22] Respondent Nos. 3, 4, and 5

[23] Right to Information

[24] Respondent Nos. 3, 4 and 5

[25] Writ Petition No. 583 of 2011

[26] Original Application No. 821 of 2007

[27] (1999) 8 SCC 287

[28] (1999) 9 SCC 596

[29] (2011) 3 SCC 267

[30] respondent No. 2-Factory

[31] Dated 24th December, 2002

[32] Engine Factory, Avadi, Chennai

[33] Dated 4th August, 2015

[34] (2007) 10 SCC 627

[35] 2023 SCC OnLine SC 640

[36] (1976) 1 SCC 599

[37] (1982) 1 SCC 379

[38] (1986) 4 SCC 531

[39] (1998) 2 SCC 523

From: Dev Chand
Sent: Monday, November 10, 2025 7:23 PM
To: CLO UPPCB; pradeepmisra@yahoo.com
Cc: Rajat Jariwal; Akanksha Wadhawan; Manish Barrua
Subject: Appeal No. 25 of 2025 | In the matter of Johnson Matthey Chemicals India Private Limited v. Union of India
Attachments: Final Compilation Volume I.pdf; Final Compilation Volume II.pdf

Dear Sir,

We are concerned for the Appellant, i.e., Johnson Matthey Chemicals India Private Limited, in Appeal No. 25 of 2025, in the captioned matter, pending before the Principal Bench of the Hon'ble National Green Tribunal.

Please see attached herewith a copy of the Judgment Compilation to be filed before the Hon'ble Tribunal on behalf of the Appellant, which is in two volumes. Kindly treat this email as service and acknowledge the receipt of the same.

Best Regards,

Dev Chand
Associate

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