

**BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH
NEW DELHI**

EXECUTION APPLICATION NO.50 OF 2023

IN

ORIGINAL APPLICATION NO.60 OF 2014

IN THE MATTER OF:

Society for Protection of Culture, Heritage,
Environment, Traditions and Promotion of
National Awareness [Also known as 'CHETNA']

...Applicant

Versus

Union of India & Ors.

...Respondents

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[M/s Jhankar Banquets]
Respondent No.3, through its
Partner - Mr. Mahesh Kapur

Through:



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New Delhi
May 21, 2024

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**Written Submissions on behalf of the
respondent No.3 (M/s Jhankar
Banquets) in opposition to the above-
captioned present Execution
Application of the Applicant**

MOST RESPECTFULLY SHEWETH:

1. The above-captioned present Execution Application of the Applicant was heard by this Hon'ble Tribunal on 15.05.2024, whereupon the matter was reserved for pronouncement of the Orders thereon.
2. Respondent No.3 (M/s Jhankar Banquets) is the Project Proponent in the present matter and is directly affected by the outcome of this case.

3. Respondent No.3, therefore, craves leave of this Hon'ble Tribunal to file its following legal and factual Submissions for the kind consideration of this Hon'ble Tribunal.
4. To this effect, the respondent No.3 respectfully submits the following submissions *qua* the settled position of law:
5. The Court cannot re-write the Contract for the Parties.
 - 5.1 The Constitution Bench of the Hon'ble Supreme Court in General Assurance Society Ltd. vs. Chandumull Jain and Anr., **AIR1966SC1644** observed that, in interpreting documents relating to a contract of insurance, **the duty of the Court is to interpret the words** in which the contract is expressed by the parties because **it is not for the Court to make a new contract**, however reasonable, if the parties have not made it themselves.
 - 5.2 Thereafter, in Rajasthan State Industrial Development & Investment Corporation vs. Diamond & Gem Development Corporation Ltd., reported inter alia, as **(2013)5SCC470**, the Hon'ble Supreme Court reiterated that a contract, being a creature of an agreement between two or more parties, is to be interpreted giving the actual meaning to the words contained in the contract and **it is not permissible for the Court to make a new contract**, however reasonable, if the parties have not made it themselves.
 - 5.3 In Shree Ambica Medical Stores vs. Surat People's Coop. Bank Ltd., reported, inter alia, as **(2020) 13SCC 564**, the Hon'ble Supreme Court observed that, **through its interpretative process, the Court cannot rewrite or create a new contract between the parties** and has to simply apply the terms and conditions of the agreement as agreed between the parties.
 - 5.4 Again, in GMR Warora Energy Ltd. vs. Central Electricity Regulatory Commission, reported, inter alia, as **(2023)10SCC401**, the Hon'ble Supreme Court observed that **Courts cannot substitute their own view of the presumed understanding of commercial terms by the parties**, if the terms are explicitly expressed. It was held that **the explicit terms of a contract are always the final word with regard to the intention of the parties.**

- 5.5 Hon'ble Supreme Court in its recent pronouncement in the case entitled Venkataraman Krishnamurthy and another v. Lodha Crown Buildmart Pvt. Ltd. [Civil Appeal No. 971 of 2023 - **decided on 22.02.2024**], has held as under:

Quote

15. Once the parties committed themselves to a written contract, whereby they reduced the terms and conditions agreed upon by them to writing, the same would be binding upon them. In the event such a written contract provided for the consequences that are to follow in the event of breach of the conditions by one or the other of the parties thereto, such consequences must necessarily follow and if resisted, they would be legally enforceable.... ... **The right of election given thereunder to the appellants to either continue or to terminate the Agreement within ninety days from the expiry of the grace period was absolute and it was not open to the NCDRC to apply its own standards and conclude that, though there was delay in handing over possession of the apartment, such delay was not unreasonable enough to warrant cancellation of the Agreement. It was not for the NCDRC to rewrite the terms and conditions of the contract between the parties and apply its own subjective criteria to determine the course of action to be adopted by either of them.**

xxx xxx xxx

22. On the above analysis, **we have no hesitation in holding that the NCDRC overstepped its power and jurisdiction in ignoring the binding covenants in the Agreement and in introducing its own logic and rationale to decide as to what the future course of action of the parties and more particularly, the appellants, should be.** ...

...

Unquote

- 5.6 Hon'ble Supreme Court, in its recent pronouncement in 'Haryana Power Purchase Centre v. Sasan Power Ltd.', reported as **2023LawPack(SC)68184** (decided on 06.04.2023), has held:

Quote

90. *We are not dealing with a case where the exercise of power of the Commission under Section 63 is under review. In a case where, however, the rates are approved under Section 63 and PPA is entered into, the question would undoubtedly arise as to whether there is a power which can be described in a manner of speaking to be plenary power with the Commission under Section 79? Can there be a power which can be christened as omnibus? **Can the Tribunal, in other words, disregard the express words of the contract? Can it discover a new change in law which the parties have not contemplated as change in law? In short, can the Tribunal rewrite the contract and create a new bargain?***

91. *We are of the view that the **Tribunal cannot indeed make a new bargain for the parties. The Tribunal cannot rewrite a contract solemnly entered into. It cannot ink a new agreement.** Such residuary powers to act which varies the written contract cannot be located in the power to regulate. **The power cannot, at any rate, be exercised in the teeth of express provisions of the contract.***

92. *We notice this for the reason that the first respondent has a case that what is provided in Article 13.2 (a) (since we are dealing with the case of alleged change in law during the construction period) does not do justice to the parties or that it is incapable of producing a fair result and therefore, the Tribunal would necessarily be clothed with power bearing in mind its regulatory nature. **In a matter where the parties have entered into a contract with express provisions, we are unable to agree with the first respondent that the Tribunal would have power to disregard the express provisions of the contract** on the score that as it turns out that with passage of time and even change in circumstances, it is found that the contract cannot be worked except at a loss for the contractor.*

Unquote

6. If the Court adds to the terms of the Contract, it would be exceeding (over-stepping) its jurisdiction. An Order passed

in excess of jurisdiction suffers from the vice of jurisdictional error and would be a nullity, to that extent.

- 6.1 Hon'ble Supreme Court in *S. Kuldeep Singh & Anr. vs. S. Prithpal Singh*, in Civil Appeal No.81 of 2011 (decided on 02.08.2022) has laid down as below:

Quote

30. *In cases where the authority lacked jurisdiction under a special Act and yet exercises powers, without authority of law, any order or decree so passed through such unlawful exercise of power, will be a legal nullity.* The deficiency of jurisdiction of the authority cannot be cured by the consent of the parties. *The challenge to such an incompetent order could be set up wherever it is sought to be enforced or relied upon, even in execution or in collateral proceedings.* Accordingly answering in favour of the defendants, the DC's order in our opinion can have no legal effect as the same was passed during the operation of Suspension Act, 1975. We have found that the compromise being unregistered cannot confer title on the respondent.

Unquote

7. A decree/order which is a nullity on the eyes of law is not executable. An objection that a decree/order is a nullity can be raised – for the first time – in the execution proceedings.

- 7.1 Hon'ble Supreme Court in *S. Kuldeep Singh & Anr. vs. S. Prithpal Singh*, in Civil Appeal No.81 of 2011 (decided on 02.08.2022) has laid down as below:

Quote

30. *In cases where the authority lacked jurisdiction under a special Act and yet exercises powers, without authority of law, any order or decree so passed through such unlawful exercise of power, will be a legal nullity.* The deficiency of jurisdiction of the authority cannot be cured by the consent of the parties. *The challenge to such an incompetent order could be set up wherever it is sought to be enforced or relied upon, even in execution or in collateral proceedings.* Accordingly answering in favour of the defendants, the DC's order in our opinion can have no legal effect as the same was passed during the operation of Suspension Act,

1975. We have found that the compromise being unregistered cannot confer title on the respondent.

Unquote

- 7.2 Hon'ble Supreme Court in Asma Lateef & Anr. vs. Shabbir Ahmad & Ors., in Civil Appeal No.9695 of 2013 (decided on 12.01.2024) has laid down as below:

Quote

29. *The legality of the order of the High Court, together with the order of the Executing Court that the former went on to uphold, has to be tested having regard to the **settled position of law** as noticed above and bearing in mind **that the powers of an executing court, though narrower than an appellate or revisional court, can be exercised to dismiss an execution application if the decree put to execution is unmistakably found to suffer from an inherent lack of jurisdiction of the court that made the same rendering it a nullity in the eye of law.***

Unquote

- 7.3 Such an objection can be raised, even an appeal against the decree/order, under execution, has not been filed.
- 7.4 To this effect, the respondent No.3, refers to, any relies upon, the pronouncement of the Hon'ble High Court of Delhi (Division Bench) in UOI vs. Jagat Ram Trehan & Sons, reported as **MANU/DE/1013/1996**, the relevant portion whereof reads as under:

Quote

15. That question is whether a plea that the award is void can be raised in execution proceedings. On this question respondent contended that the award must have been objected to under Sections 17, 30 and 33 or by appeal against, the order rejecting objections and if that was not done, it was not open to raise the question in execution proceedings. This contention, in our view, is not correct. That Section 47 applies to execution proceedings taken pursuant to a decree making an award a rule of court cannot be doubted. The decided cases, referred to below, also hold it is open to the executing Court under Section 47 to declare that the award is passed without jurisdiction

and that therefore the decree passed thereupon is also null and void and not executable (See in this connection: Ran Singh v. G. A. Co-op. Service Society, AIR 1976 P&H 94; Sabawwa Hanmappi v. Basappa Andanappa, (ILR 1955 Bombay 386) E.D. Sasson and Co. Ltd. v. Shivii fam - Devi Das, (AIR 1929 Lah 228); Gopi Ram Jaithu Ram v. Rami Das Sri Kishan, (AIR 1934 Lah 48) and Donald Graham & Co. v. Kewalram, (AIR 1921 Sind 132). We have therefore no hesitation in holding that this EA is maintainable under Section 47 to declare the award and the consequent decree as nullities.

Unquote

- 7.5 The aforesaid judgement of the Hon'ble High Court of Delhi was upheld by the Hon'ble Supreme Court inasmuch as the Special Leave Petition, filed against the same was dismissed on 28.03.2001. [Refer: Jagat Ram Trehan & Sons v. Union of India, reported as 2002(1)R.A.J. 136(SC)]

Copies of all the above pronouncements are attached herewith for the ease of reference of this Hon'ble Tribunal.

8.1 Even as a specially constituted Statutory Tribunal, this Hon'ble Tribunal cannot re-write a contract, and/or creating a new contract, for the Parties. No such special authority, jurisdiction and/or power is vested in this Hon'ble Tribunal.

8.2 Per Section 14 of the Act of 2010, this Hon'ble Tribunal has jurisdiction over all cases where a '*substantial question relating to environment*' is involved. The expression "*substantial question relating to environment*" has been defiled under the Act, as below:

Quote

- (m) "*substantial question relating to environment*" shall include an instance where,
- (i) *there is a direct violation of a specific statutory environmental obligation by a person by which,—*
- (A) *the community at large other than an individual or group of individuals is affected or likely to be affected by the environmental consequences; or*
- (B) *the gravity of damage to the environment or property is substantial; or*

- (C) *the damage to public health is broadly measurable;*
- (ii) *the environmental consequences relate to a specific activity or a point source of pollution;*

Unquote

8.3 In the present case, there is no such '*substantial question relating to environment*' involved. Indeed, there is nothing on record to that effect, particularly in the light of the fact that the allotment has been held to be in consonance of the MPD.

8.4 As a matter of fact, the respondent No.3 had increased and enhanced the greenery at the said Area/Land. This was admitted by the respondent-DDA and duly accepted, and recorded, by this Hon'ble Tribunal in Para 26 of its Judgement dated 10.07.2015, which has also been reproduced in para 15 of the Order dated 31.07.2017.

9.1 Adverting to the peculiar facts of the present case, it is submitted that this Hon'ble Tribunal had vide its Order dated 10.07.2015, upheld the grant of the License (in respect of the Adjoining Area/Land) by the respondent No.2 to the respondent No.3, as being in accordance with the MPD 1962, 2002 and 2021. [Refer: Para 30 of the Order dated 10.07.2015]

9.2 Indeed, in the subsequent Order dated 31.07.2017, this Hon'ble Tribunal has noted that transaction of the respondent-DDA for grant of license for use of Adjoining Area was upheld in the Judgement dated 10.07.2015. [Refer: Para 17 of the Order dated 31.07.2017]

9.3 Further, this Hon'ble Tribunal also noted that since the transaction (grant of the Lease and/or the License) took place in the year 1997, it (this Hon'ble Tribunal) would not have jurisdiction to consider the validity of the same. [Refer: Para 22 of Order dated 31.07.2017 of this Hon'ble Tribunal]

9.4 By its aforesaid Judgement and Order dated 10.07.2015, however, this Hon'ble Tribunal put a condition that use of the 'Adjoining Area' shall be subject to the condition that the respondent No.3 shall also run the 'Tower Restaurant'.

9.5 The respondent No.3 had previously filed a Review Application No. __ of 2015, seeking review of the Order dated 10.07.2015 of this Hon'ble Tribunal. The said Application was

allowed by this Hon'ble Tribunal vide its Order dated 30.07.2017. The respondent No.3 was permitted "**to utilise the land in terms of the license granted by DDA un-interrupted.**" It may again be submitted that the terms and conditions of the License do not stipulate use of the 'Adjoining Area' subject to the use of the 'Tower Restaurant'.

9.6 The terms and conditions of the License Deed were formulated and settled by the respondent-DDA, much prior to the year 1996. The Tender-bids were invited on the basis of the said Terms & Conditions. The contracts were awarded on the basis of the said Terms and Conditions, way back in the year 1997.

9.7 Since the said Terms & Conditions do not stipulate that use of the 'Adjoining Area' would be subject to the running of the 'Tower Restaurant', such a stipulation could not have been introduced/ added by this Hon'ble Tribunal, in a subsisting and concluded contract between the Parties. This is more so, when the transaction (grant of license for use of Adjoining Area) was upheld by this Hon'ble Tribunal.

9.8 This was extensively submitted and argued before this Hon'ble Tribunal during hearing of the Review Application No.23 of 2015, and, therefore, the said stipulation was whittled down by this Hon'ble Tribunal in its Order dated 31.07.2017.

9.9 The running/ operating the 'Tower Restaurant' was never a condition for use of the 'Adjoining Area'. No such condition/ stipulation was made in the Terms and Conditions, issued by the respondent-DDA at NIT stage, which were issued in the Year 1996.

9.10 Indeed, even before this Hon'ble Tribunal, it was nobody's case that the 'Adjoining Area can only be used if the 'Tower Restaurant' was being operated/run.

9.11 The aforesaid stipulation is, thus, contrary to the commercial terms of a concluded and subsisting Contract [between respondent No.2 (DDA) and respondent No.3 (M/s Jhankar Banquets)] and tends to re-write, and/or creating, a new contract, for the Parties. Such a stipulation, and/or restriction, qua the Use of the 'Adjoining Area' could not have been introduced by this Hon'ble Tribunal.

9.12 The introduction of the said stipulation in a concluded and subsisting Contract was, thus, beyond the jurisdiction of this Hon'ble Tribunal. The Order dated 10.07.2015 of this Hon'ble Tribunal, to that extent, therefore, suffers from jurisdictional error.

9.13 The said contracts (Lease and License) have been operating since the year 1997. This Hon'ble Tribunal came into being in the year 2010 and the present Original Application was filed in the year 2014, namely, about 17 years after the contracts had been operating.

10. The Hon'ble Supreme Court has consistently held and laid down that the courts cannot re-write the Contract or create a new contract between the parties. The court has to simply apply the terms and conditions of the agreement as agreed between the parties.

11. Even from the environmental point of view, it is not conceivable to say that use of the 'Adjoining Area' *subject* to the running/ operation of the 'Tower Restaurant' would NOT be an environmental hazard, but use of the 'Adjoining Area' alone, would be an environmental hazard, if the Tower Restaurant is not being simultaneously operated. No explanation and/or justification and/or reasoning for the same has been given in the Order dated 10.07.2015 of this Hon'ble Tribunal. the Hon'ble Supreme Court in 'Balraj Taneja v. Sunil Madan', reported as (1999)8SCC396 has held as under:

Quote

46. In judicial proceedings, **there cannot be arbitrary orders.** A judge cannot merely say 'suit decreed' or 'suit dismissed'. **The whole process of reasoning has to be set out for deciding the case one way or the other. This infirmity in the present judgement is glaring and for that reason also the judgement cannot be sustained.**

Unquote

12. There is, thus, an error of law, which can be reckoned as jurisdictional. The said error, if allowed to stand, would result in gross miscarriage of justice to the respondent No.3.

13. The present Application is, thus, factually misconceived and legally untenable. In the respectful submission of the respondent

No.3, it is a gross abuse of the process of law and this Hon'ble Tribunal.

14. The Applicant has sought execution of the Order dated 10.07.2015 of this Hon'ble Tribunal, which already stands modified by the Order dated 30.07.2017. Further, prayers (b) to (g) of the present Execution Application were not part of the Original Application of the Applicant-Society, nor a part of the Order dated 10.07.2015 of this Hon'ble Tribunal. Hence, the present Execution Application is not maintainable in its present form.

15. The respondent No.3 respectfully states and submits that its above submissions may kindly be considered by this Hon'ble Tribunal while passing the Orders on the above-captioned present Execution Application of the Applicant.

PRAYER

In the aforesaid premises and in the interest of justice, it is respectfully prayed that this Hon'ble Tribunal may graciously be pleased to **(a)** dismiss the above-captioned present Execution Application of the Applicant; and **(b)** clarify that the stipulation in the Judgement dated 10.07.2015 to the effect that "the use of the Adjoining Area of 18500 sq. mtrs. is subject to the running of the 'Tower Restaurant' by the respondent No.3", stood modified by the Order dated 31.07.2017 of this Hon'ble Tribunal and that the said 'Adjoining Area' is to be used as per the terms and conditions framed by the respondent-DAA for grant of the license of the said Adjoining Area

AND FOR THIS ACT OF KINDNESS, YOUR RESPONDENT NO.3, AS IN DUTY BOUND, SHALL EVER PRAY.

[M/s Jhankar Banquets]

Respondent No.3, through its
Partner - Mr. Mahesh Kapur

Through:



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May 21, 2024

2013 0 Supreme(Raj) 60

2013 1 RLW(RJ) 229

(Supreme Court)

RIICO Vs. Diamond & Gem Development (Dr. Chauhan, J.)

HON'BLE DR. B.S. CHAUHAN, J.

HON'BLE V. GOPALA GOWDA, J.

Rajasthan State Industrial Development & Investment Corporation & Anr.

Versus

Diamond & Gem Development Corporation Ltd. & Anr.

Civil Appeal Nos. 7252-7253 of 2003

WITH

Civil Appeal Nos. 8222-8223 of 2003, decided on 12.02.2013

Subject: CONTRACT DISPUTES - WRIT JURISDICTION

APPROBATE AND REPROBATE - MUTATIS MUTANDIS - CONTRACTUAL DISPUTES AND WRIT JURISDICTION - INTERPRETATION OF TERMS OF CONTRACT - AS-IS-WHERE-IS - AS IF

Act Referred :**RAJASTHAN LAND REVENUE INDUSTRIAL AREAS ALLOTMENT RULES :****R.24(b)(b)(ii), R.24(a)(a), R.11(a)****RAJASTHAN STATE INDUSTRIAL DEVELOPMENT AND INVESTMENT CORPORATION DISPOSAL OF LAND RULES : R.16, R.24**

Rajasthan State Industrial and Investment Corporation Limited (Disposal of Land) Rules, 1979, Rule 16, 24 and Rajasthan Land Revenue (Industrial area Allotment) Rules, 1959, Rule 11-A — Cancellation of allotment — Maintainability of writ petition — Cancellation order passed under Rule 24 of the Rules 1979 — Held — Such order can be challenged by filing a review application before the competent authority under Rule 24 (aa) and in the alternative could have preferred an appeal under Rule 24(bb)(ii) before Infrastructure Development Committee of the Board.

Writ not maintainable. (Paras 31 & 32)

राजस्थान राज्य औद्योगिक विनिवेश निगम लि. (भूमि निस्तारण) नियम, 1979, नियम 16, 24 एवं राजस्थान भूराजस्व (औद्योगिक क्षेत्र आवंटन) नियम, 1959, नियम 11.क — आवंटन का निरस्तीकरण — याचिका की पोषणीयता — निरस्तीकरण आदेश 1979 के नियमों के नियम 24 के तहत पारित किया गया — अभिनिर्धारित — ऐसे आदेश को नियम 24 (कक) के तहत सक्षम प्राधिकारी के समक्ष पुनर्विलोकन आवेदन दायर करके चुनौति दी जा सकती है तथा वैकल्पिक तौर पर मण्डल की आधारभूत विकास समिति के समक्ष नियम 24 (खख) (पप) के तहत अपील दायर की जा सकती थी — याचिका पोषणीय नहीं। (पद संख्या 31 व 32)

अपील स्वीकार की।

Cases Referred:

[Nagubai Ammal & Ors. vs. B. Shama Rao & Ors. \(AIR 1956 SC 593\) 9.](#)

[C.I.T. Madras vs. Mr. P. Firm Muar \(AIR 1965 SC 1216\) 9,](#)
[Ramesh Chandra Sankla etc. vs. Vikram Cement etc. \(AIR 2009 SC 713\) 9,](#)
[Pradeep Oil Corporation vs. Municipal Corporation of Delhi & Anr. \(AIR 2011 SC 1869\) 9,](#)
[Cauvery Coffee Traders, , Mangalore vs. Hornor Resources \(International\) Co. Ltd. \(\(2011\) 10 SCC 420\) 9](#)
 V. Chandrasekaran & Anr. vs. The Administrative Officer & Ors. (JT 2012(9) SC 260) 9,
[M/s. Ashok Service Centre & Anr. vs. State of Orissa \(AIR 1983 SC 394\) 11,](#)
[Prahlad Sharma vs. State of U.P. & Ors. \(\(2004\) 4 SCC 113\) 11,](#)
[Mariyappa & Ors. vs. State of Karnataka & Ors. \(AIR 1998 SC 1334\) 11,](#)
[Janba \(dead\) thr. Lrs. vs. Gopikabai \(Smt.\) \(AIR 2000 SC 1771\) 11,](#)
[Bareilly Development Authority & Anr. vs. Ajay Pal Singh & Ors. \(AIR 1989 SC 1076\) 12,](#)
[State of U.P. & Ors. vs. Bridge & Roof Co. \(I\) Ltd. \(AIR 1996 SC 3515\) 12,](#)
[Kerala State Electricity Board & Anr. vs. Kurien E. Kalathil & Ors. \(AIR 2000 SC 2573\) 13,](#)
[United India Insurance Co. Ltd. vs. Harchand Rai Chandan Lal \(AIR 2004 SC 4794\) 16,](#)
[Polymat India P. Ltd. & Anr. vs. National Insurance Co. Ltd. & Ors. \(AIR 2005 SC 286\) 16,](#)
[DLF Universal Ltd. & Anr. vs. Director, , T. and C. Planning Department Haryana & Ors. \(AIR 2011 SC 1463\) 17](#)
[Punjab Urban Planning & Development Authority & Ors. vs. Raghu Nath Gupta & Ors. \(\(2012\) 8 SCC 197\) 18,](#)
[UT Chandigarh Admn. vs. Amarjeet Singh & Ors. \(\(2009\) 4 SCC 660\) 18,](#)
[Radhakissen Chamria & Ors. vs. Durga Prasad Chamria & Anr. \(AIR 1940 PC 167\) 19,](#)
[Commr. of Income-tax, , Delhi vs. S. Teja Singh \(AIR 1959 SC 352\) 19](#)
[Ram Kishore Sen & Ors. vs. Union of India & Ors. \(AIR 1966 SC 644\) 19,](#)
[Sher Singh vs. Union of India & Ors. \(AIR 1984 SC 200\) 19,](#)
[State of Maharashtra vs. Laljit Rajshi Shah & Ors. \(AIR 2000 SC 937\) 19,](#)
[Paramjeet Singh Patheja vs. ICDS Ltd. \(AIR 2007 SC 168\) 19,](#)
[Commissioner of Income Tax vs. Willamson Financial Services & Ors. \(\(2008\) 2 SCC 202\) 19,](#)
 East End Dwelling Co. Ltd. vs. Finsbury Borough Council (1952 AC 109) 20,
[Industrial Supplies Pvt. Ltd. & Anr. vs. Union of India & Ors. \(AIR 1980 SC 1858\) 21,](#)

Hon'ble Dr. CHAUHAN, J.—These appeals have been preferred against the impugned judgment and order dated 30.7.2002 passed by the High Court of Rajasthan (Jaipur Bench) in Civil Writ Petition Nos. 5481/1994 and 105/1997, by which the High Court has allowed the writ petitions filed by the respondent-Diamond and Gem Development Corporation Ltd. (hereinafter referred to as the 'Company'), for quashing the order of cancellation of allotment of land and directing the appellants for providing the approach/ access road.

2. As these appeals have been preferred against the common impugned judgment, for the sake of convenience, Civil Appeal Nos. 7252-53/2003 are to be taken to be the leading case. The facts and circumstances giving rise to these appeals are :

A. That a huge area of land admeasuring 607 Bighas and 5 Biswas situate in the revenue estate of villages Durgapura, Jhalan Chod, Sanganer and Dhol-ka-Bad in District Jaipur, stood notified under Section 4(1) of the Rajasthan Land Acquisition

Act, 1953 (hereinafter referred to as the 'Act') on 18.7.1979, for a public purpose i.e. industrial development, to be executed by the appellant Rajasthan State Industrial Development and Investment Corporation (in short 'RIICO').

B. Declaration under Section 6 of the Act was made on 22.6.1982 for the land admeasuring 591 Bighas and 17 Biswas. After meeting all requisite statutory requirements contained in the Act, possession of the land, was taken over by the Government and was subsequently handed over to appellant-RIICO, on 18.10.1982 and 17.11.1983. The Land Acquisition Collector assessed the market value of the land and made an award on 14.5.1984. RIICO made allotment of land admeasuring 105 acres vide allotment letter dated 10.3.1988 to the respondent no.1 company, to facilitate the establishment of a Gem Industrial Estate for the manufacturing of Gem stones.

C. In pursuance of the aforesaid allotment letter, a lease deed was executed between the appellant and respondent-company on 22.5.1989, with a clear stipulation that the land was allotted on an "as is-where-is", and that the respondent-company must complete the said project within a period of 5 years, and further that, in the event that the terms and conditions of the lease agreement were not complied with, the appellant would be entitled to recover its possession in addition to which, various other conditions were also incorporated therein.

D. After possession was taken by the respondent-company, construction could be carried only on a portion of the land allotted to it. As the development work was being carried out at an extremely slow pace, the appellant issued various notices from time to time, reminding the respondent-company that it was under an obligation to complete the project within a specified period, owing to which, it must accelerate work. Additionally, there also arose some difficulty with respect to the respondent-company's attempts to sub-lease the said premises, or parts thereof, and in view of this, an amendment dated 4.11.1991 was inserted in Rule 11-A of the Rajasthan Land Revenue (Industrial area Allotment) Rules, 1959 (hereinafter referred to as the 'Rules 1959'), enabling the company to sub-lease the said land.

E. The appellant vide notice dated 4.7.1992, informed the respondent-company, that as per clause 2(n) of the lease deed, all construction had to be completed within a stipulated time period of 5 years. The respondent-company began asking the appellant to provide it accessibility via road, from the Jaipur Tonk main road and, as the same was not provided, the respondent-company filed Writ Petition No. 5481 of 1994 before the High Court, seeking the issuance of a direction to the appellant to provide to it, the aforesaid road. F. During the pendency of the aforesaid writ petition, the appellant expressing its dis-satisfaction with regard to the progress of the development of the said land by the respondent-company, filed a reply to the said writ petition before the High Court stating that it was not under any obligation to provide to the respondent-company the aforementioned approach road, as the lease deed had been executed between them, on the basis of an "as-is-where is" agreement. Further, the appellant issued a show cause notice dated 29.8.1996, to determine the lease in light of the lease agreement, in lieu of the fact that the respondent-company had not made any progress regarding the completion of the project, and even after the expiry of a period of 5 years, only 10% of the total construction stood completed. In pursuance thereof, the lease deed was cancelled vide order dated 1.10.1996, and possession of the land in dispute was taken back by

the appellant on 3.10.1996.

G. The respondent-company filed another Writ Petition No. 105 of 1997, challenging the cancellation order dated 1.10.1996 and the taking over of possession by the appellant on 3.10.1996. The appellant contested the said writ petition on the grounds that it was entitled to restoration of possession, as the respondent-company had failed to ensure compliance with the terms and conditions incorporated in the lease deed, according to which, the company was required to complete the said project within a period of 5 years. However, presently, the extent of development completed by it stood at 10%. Therefore, in light of the aforementioned circumstances, the appellant had no choice but to cancel the lease deed and take back possession. H. The High Court vide its impugned judgment and order, allowed both the writ petitions quashing the order of cancellation, and directed the restoration of possession of the aforesaid land to the respondent-company, and further, also directed the appellant to provide to the respondent-company, the approach/access road demanded by it.

Hence, these appeals.

3. Shri Dhruv Mehta, learned senior counsel appearing on behalf of the appellant-RIICO, and Shri Manish Singhvi, learned Additional Advocate General for the State of Rajasthan have submitted that, as the allotment of the land had been made to the respondent-company on an 'as-is-where-is" basis, there was no obligation on the part of RIICO to provide to it, the said access road. The terms of the contract must be interpreted by court, taking into consideration the intention of the parties and not on the basis of equitable grounds. Moreover, the cancellation of the deed was in accordance with the terms and conditions incorporated in the lease deed, and therefore, in light of the facts and circumstance of the case, the High Court has committed an error, by quashing the order of cancellation and, in issuing a direction for the restoration of possession and for the provision of the access road.

The High Court has mis-interpreted the amendment to Rule 11-A of the Rules 1959, and has thus held that the appellant had no jurisdiction to cancel the said lease, as the respondent-company by virtue of the operation of the amended provision, had become a direct lessee of the State. In such a fact-situation, there was no obligation on the part of the appellant to provide the approach road as it was not the lessor of the respondent-company. In case by virtue of the amendment in Rule 11-A of the Rules 1959, the State Government became the lessor, the appellant-RIICO lost the title/interest over the property which had been acquired by it on making payment of the huge money and that too, without getting any refund. Such an interpretation leads to absurdity. Thus, the appeals deserve to be allowed.

4. Per contra, Shri P.S. Patwalia, learned senior counsel appearing for the respondent-company, has submitted that the judgment and order of the High Court does not require any interference whatsoever, for the reason that the respondent-company had been invited to establish and develop the Gem Stone industrial park at Jaipur. In view of the fact, that the amendment to Rule 11-A of the Rules 1959 was made exclusively to facilitate the respondent-company to sub-lease a part of the developed premises, the High Court has rightly held that the State Government became the lessor and that, RIICO had no concern whatsoever in relation to the said matter, owing to which, it had no competence to cancel the lease. In the light of the fact that RIICO was in possession of other lands surrounding the land in question,

the High Court has directed it to provide to the respondent-company, an access road on equitable grounds, taking into consideration the fact that, in the event that the respondent-company's area remained land locked, it would be impossible for it to develop the project, and has stated that not providing the access road was in fact, the basic reason for delay in **development**. Thus, the appeals lack merit and, are liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

Before proceeding further, it may be pertinent to refer to the relevant statutory provisions, and certain terms of the lease deed.

Rule 11-A of the Rules 1959 read :

“

xx xx xx

Clause (iv) of Rule 11-A.- The **Rajasthan State Industrial Development and Investment Corporation Ltd.** may sublease the leased land or part thereof for **industrial** purpose; including essential welfare and supporting services. Provided that in the case of **Diamond** and **Gem Development Corporation** to whom the land has already been leased out by RIICO for 99 years, the sub-lessee i.e. DGDC may further sublet and the terms and conditions and other provisions contained in the rules in so far as they relate to RIICO shall mutatis mutandis apply to DGDC also as if the land in question has been let out to them by **State** Government under Rule 11-A.”

6. There has been further amendment to Rule 11-A of the Rules 1959 w.e.f. 12.10.2000, and the relevant part thereof reads as under:

“In Rule 11-A of the said rules, after condition (iv) and before condition (v), the following new condition (iv-a) shall be inserted; namely:-

(iv-a) The sub lessee of the **Rajasthan State Industrial Development and Investment Corporation Limited** may further sub-lease the sub-leased land or part thereof on such terms and conditions as may be mutually agreed between such sub-lessee and subsequent sub-lessee. The terms and conditions applicable to sub-lessee shall also mutatis mutandis apply to such subsequent sub-lessee”.

7. **Rajasthan State Industrial & Investment Corporation Limited** (Disposal of Land) Rules, 1979 (hereinafter referred to as `Rules 1979'), deals with the allotment of land by RIICO to entrepreneurs. Relevant rules thereof read as under:

“16. The allottee shall not except with the written consent of the **Corporation**, be allowed to sublet the constructed premises for **industrial** purpose only which can be considered on following conditions:

(i) The sub-letting of vacant and/or unutilized land in the **industrial** areas of the **Corporation** shall not be allowed.

(ii) That consent of the Managing Director be given to the allottee of the plot (owner) to sublet the whole or part of the constructed premises after the allottee has cleared all the outstanding dues of the **Corporation** and started the production at the allotted plot on the following conditions:

(iii) xx xx xx

(iv) Permission for transfer of surplus/unutilized land with the units which have come into commercial production shall be granted on payment of premium as may be decided by the Corporation from time to time which is presently equal to 50% rate of development charges at the time of such transfer of difference amount between the prevailing rates of development charges and the rates of development charges on which the allotment was made whichever is higher.

24. Cancellation- The Corporation shall have the right to cancel the allotment after issuing 30 days show cause notice to the allottee by the concerned Senior Regional Manager/Regional Manager on any breach of any of these rules, condition of allotment letter and terms of lease agreement.”

8. It may also be pertinent to refer the relevant terms and conditions of lease deed dated 22.5.1989, which read as under:

“AND WHEREAS the lessor has agreed to demise and the lessor has agreed to take on lease, the piece of land known as plot no. SP-1 Industrial Area, Sanganer, Phase-II on “as is where is basis”:

xx xx xx

2(b) That the lessee will bear, pay and discharge all service charges as may be decided by the lessor from time to time which for the present would be @ Rs.10.10 (Ten paisa per sq.mtrs.) per year from the date, the lessor provided as pucca links road in this area.

xx xx xx

(d) That the lessee will erect on the demised premisesand will commence such construction within the period of 6 months and will completely finish the same fit for use and start production within the period of 60 months from the date of these presents or within such the case of these presents, or within such the date of these presents or within such extended period of time as may be allowed by the lessor in writing at its discretion.

xx xx xx

(g) That the lessee will provide and maintain in good repair a properly constructed approached road or path alongwith the event across drain to the satisfaction of the lessor/local Municipal Authority leading from the public/cooperation road to the building to be erected on the demises premises.

xx xx xx

(i) The lessee will not without the general prior consent in writing of the lessor transfer, sublet, relinquish, mortgage or assign his interest in the demised premises.....

xx xx xx

(m)That lessee shall construct and complete the said building and put the demised premises with the buildings constructed thereon to use hereinabove

mentioned within 54 calendar months from the date of possession of the said land is handed over to him and in any case within 60 calendar months from the date of this agreement provided that the lessor may at his discretion extend the time hereinbefore provided if in his opinion the delay is caused for reasons beyond the control of the lessee. Provided that utilized land of the allotted plot of land shall revert to the Corporation on the expiry of the prescribed/ extended period for starting production/ expansion of the unit.

xx xx xx

(r) The lessee will in each year within 2 months from the expiry of the account in year supply to the lessor a copy of his profit and loss account pertaining to the accounting year and the business run by him in the demised premises.

3(a) Notwithstanding anything hereinbefore contained if there shall have been in opinion of the lessor any breach by the lessor.... or if the lessee fails to commence and complete the buildings in time and manner it shall be lawful for the lessor ...to reenter without taking recourse to the Court of law up on the demised premises or any part there of his name of whole and there on this demise shall absolutely cease and determine and the money paid by the Lessee by virtue of these preset shall stand forfeited to the lessor without prejudice to rights of the lessor here under with interest thereon at @19% per annum and the Lessee shall not be entitled to any compensation whatsoever.

xx xx xx

3(h) Every dispute, difference or question touching or arising out or in respect of this agreement to the subject matter shall be referred to the sole arbitrator, the Collector of the District wherein the leased plot is situated or a, person appointed by him. The decision of such arbitrator shall be final and binding on the parties.”

Before entering into merits of the case, it is required to deal with the legal issues involved herein:

I. Approbate and Reprobate

9. A party cannot be permitted to “blow hot-blow cold”, “fast and loose” or “approbate and reprobate”. Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner, so as to violate the principles of, what is right and, of good conscience. (Vide: Nagubai Ammal & Ors. vs. B. Shama Rao & Ors., [AIR 1956 SC 593](#); C.I.T. Madras vs. Mr. P. Firm Muar, [AIR 1965 SC 1216](#); Ramesh Chandra Sankla etc. vs. Vikram Cement etc., [AIR 2009 SC 713](#); Pradeep Oil Corporation vs. Municipal Corporation of Delhi & Anr., [AIR 2011 SC 1869](#); Cauvery Coffee Traders, Mangalore vs. Hornor Resources (International) Company Limited, [\(2011\) 10 SCC 420](#); and V. Chandrasekaran & Anr. vs. The Administrative Officer & Ors., JT 2012 (9) SC 260).

10. Thus, it is evident that the doctrine of election is based on the rule of estoppel-the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppels in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way

of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had.

II. Mutatis Mutandis - means

11. In *M/s. Ashok Service Centre & Anr. etc. vs. State* of Orissa, [AIR 1983 SC 394](#), this court held as under:

“Earl Jowitt's 'The Dictionary of English Law 1959' defines 'mutatis mutandis' as 'with the necessary changes in points of detail'. Black's Law Dictionary (Revised 4th Edn.1968) defines 'mutatis mutandis' as 'with the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like...'. Extension of an earlier Act mutatis mutandis to a later Act, brings in the idea of adaptation, but so far only as it is necessary for the purpose, making a change without altering the essential nature of the things changed, subject of course to express provisions made in the later Act....In the circumstances the conclusion reached by the High Court that the two Acts were independent of each other was wrong. We are of the view that, it is necessary to read and to construe the two Acts together as if the two Acts are one, and while doing so to give effect to the provisions of the Act which is a later one in preference to the provisions of the Principal Act wherever the Act has manifested an intention to modify the Principal Act...”

Similarly, in *Prahlad Sharma vs. State* of U.P. & Ors., [\(2004\) 4 SCC 113](#), the phrase ‘mutatis mutandis’ has been explained as under:

“The expression “mutatis mutandis” itself implies applicability of any provision with necessary changes in points of detail....”

(See also: *Mariyappa & Ors. vs. State* of Karnataka & Ors., [AIR 1998 SC 1334](#); and *Janba (dead) thr. Lrs. vs. Gopikabai (Smt.)*, [AIR 2000 SC 1771](#)).

Thus, the phrase “mutatis mutandis” implies that a provision contained in other part of the statute or other statutes would have application as it is with certain changes in points of detail.

III. Contractual disputes and writ jurisdiction

12. There can be no dispute to the settled legal proposition that matters/ disputes relating to contract cannot be agitated nor terms of the contract can be enforced through writ jurisdiction under Article 226 of the Constitution. Thus, writ court cannot be a forum to seek any relief based on terms and conditions incorporated in the agreement by the parties. (Vide: *Bareilly Development Authority & Anr. vs. Ajay Pal Singh & Ors.*, [AIR 1989 SC 1076](#); and *State* of U.P. & Ors. vs. *Bridge & Roof Co. (India) Ltd.*, [AIR 1996 SC 3515](#)).

13. In *Kerala State Electricity Board & Anr. vs. Kurien E. Kalathil & Ors.*, [AIR 2000 SC 2573](#), this Court held that a writ cannot lie to resolve a disputed question of fact, particularly to interpret the disputed terms of a contract observing as under:

“The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition.If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a

statutory contract.....The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract.... The contractor should have relegated to other remedies.”

14. It is evident from the above, that generally the court should not exercise its writ jurisdiction to enforce the contractual obligation. The primary purpose of a writ of mandamus, is to protect and establish rights and to impose a corresponding imperative duty existing in law. It is designed to promote justice (*ex debito justiceiae*). The grant or refusal of the writ is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or to establish a legal right, but to enforce one that is already established. While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, *inter-alia*, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal.

15. Hence, discretion must be exercised by the court on grounds of public policy, public interest and public good. The writ is equitable in nature and thus, its issuance is governed by equitable principles. Refusal of relief must be for reasons which would lead to injustice. The prime consideration for the issuance of the said writ is, whether or not substantial justice will be promoted. Furthermore, while granting such a writ, the court must make every effort to ensure from the averments of the writ petition, whether there exist proper pleadings. In order to maintain the writ of mandamus, the first and foremost requirement is that the petition must not be frivolous, and must be filed in good faith. Additionally, the applicant must make a demand which is clear, plain and unambiguous. It must be made to an officer having the requisite authority to perform the act demanded. Furthermore, the authority against whom mandamus is issued, should have rejected the demand earlier. Therefore, a demand and its subsequent refusal, either by words, or by conduct, are necessary to satisfy the court that the opposite party is determined to ignore the demand of the applicant with respect to the enforcement of his legal right. However, a demand may not be necessary when the same is manifest from the facts of the case, that is, when it is an empty formality, or when it is obvious that the opposite party would not consider the demand.

IV. Interpretation of terms of contract

16. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however is reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be

interpreted without giving any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. (Vide: United India Insurance Co. [Ltd.](#) vs. Harchand Rai Chandan Lal, [AIR 2004 SC 4794](#); Polymat India P. [Ltd.](#) & Anr. vs. National Insurance Co. [Ltd.](#) & Ors., [AIR 2005 SC 286](#)).

17. In DLF Universal [Ltd.](#) & Anr. vs. Director, T. and C. Planning Department Haryana & Ors., [AIR 2011 SC 1463](#), this court held:

“It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. It comprises joint intent of the parties. Every such contract expresses the autonomy of the contractual parties’ private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation. As is stated in Anson's Law of Contract, "a basic principle of the Common Law of Contract is that the parties are free to determine for themselves what primary obligations they will accept...Today, the position is seen in a different light. Freedom of contract is generally regarded as a reasonable, social, ideal only to the extent that equality of bargaining power between the contracting parties can be assumed and no injury is done to the interests of the community at large." The Court assumes "that the parties to the contract are reasonable persons who seek to achieve reasonable results, fairness and efficiency...In a contract between the joint intent of the parties and the intent of the reasonable person, joint intent trumps, and the Judge should interpret the contract accordingly.”

V. “As-is-where-is” – means

18. The phrase, “as is-where-is”, has been explained by this Court in Punjab Urban Planning & [Development](#) Authority & Ors. vs. Raghu Nath Gupta & Ors., [\(2012\) 8 SCC 197](#), holding as under:

“We notice that the respondents had accepted the commercial plots with open eyes, subject to the abovementioned conditions. Evidently, the commercial plots were allotted on “as-is-where-is” basis. The allottees would have ascertained the facilities available at the time of auction and after having accepted the commercial plots on “as-is-where-is” basis, they cannot be heard to contend that PUDA had not provided the basic amenities like parking, lights, roads, water, sewerage, etc. If the allottees were not interested in taking the commercial plots on “as-is-where-is” basis, they should not have accepted the allotment and after having accepted the allotment on “as-is-where-is” basis, they are estopped from contending that the basic amenities like parking, lights, roads, water, sewerage, etc. were not provided by PUDA when the plots were allotted...”

(See also: UT Chandigarh Admn. & Anr. vs. Amarjeet Singh & Ors., [\(2009\) 4 SCC 660](#)).

VI. “As if” – means

19. The expression "as if", is used to make one applicable in respect of the other. The words "as if" create a legal fiction. By it, when a person is "deemed to be" something, the only meaning possible is that, while in reality he is not that something, but for the purposes of the Act of legislature he is required to be treated that something, and not otherwise. It is a well settled rule of interpretation that, in construing the scope of a legal fiction, it would be proper and even necessary, to assume all those facts on the basis of which alone, such fiction can operate. The words "as if", in fact show the distinction between two things and, such words must be used only for a limited purpose. They further show that a legal fiction must be limited to the purpose for which it was created. (Vide: Radhakissen Chamria & Ors. vs. Durga Prasad Chamria & Anr., AIR 1940 PC 167; Commr. of Income-tax, Delhi vs. S. Teja Singh, [AIR 1959 SC 352](#); Ram Kishore Sen & Ors. vs. Union of India & Ors., [AIR 1966 SC 644](#); Sher Singh vs. Union of India & Ors., [AIR 1984 SC 200](#); [State of Maharashtra vs. Laljit Rajshi Shah & Ors](#), [AIR 2000 SC 937](#); Paramjeet Singh Patheja vs. ICDS [Ltd.](#) [AIR 2007 SC 168](#); and Commissioner of Income Tax vs. Williamson Financial Services & Ors. [\(2008\) 2 SCC 202](#)).

20. In East End Dwelling Co. [Ltd.](#) vs. Finsbury Borough Council, 1952 AC 109, this Court approved the approach which stood adopted and followed persistently. It set out as under:

"The statute says that you must imagine a certain [state](#) of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that [state](#) of affairs".

21. In [Industrial Supplies Pvt. Ltd.](#) & Anr. vs. Union of India & Ors., [AIR 1980 SC 1858](#), this Court observed as follows:-

"It is now axiomatic that when a legal fiction is incorporated in a statute, the court has to ascertain for what purpose the fiction is created. After ascertaining the purpose, full effect must be given to the statutory fiction and it should be carried to its logical conclusion. The court has to assume all the facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction. The legal effect of the words 'as if he were' in the definition of owner in Section 3(n) of the Nationalisation Act read with Section 2(1) of the Mines Act is that although the petitioners were not the owners, they being the contractors for the working of the mine in question, were to be treated as such though, in fact, they were not so."

22. The instant case is required to be decided in the light of the aforesaid settled legal propositions.

The terms and conditions incorporated in the lease deed reveal that, the allotment was made on "as-is- where-is" basis. The same was accepted by the respondent-company without any protest, whatsoever. The lease deed further enabled the appellant to collect charges, in case it decided to provide the approach road. Otherwise, it would be the responsibility of the respondent-company to use its own means to develop such road, and there was absolutely no obligation placed upon the appellant to provide to the respondent the access road. As the respondent-company was responsible for the creation of its own infrastructure, it has no legal right to maintain the writ petition, and courts cannot grant relief on the basis of an implied obligation. The order of the High Court is in contravention of clause 2(g) of the lease deed.

23. The State of Rajasthan had acquired the land in exercise of its eminent domain and transferred the same to the appellant-RIICO after receiving the consideration amount and executed the lease deed in its favour. The State exercised its power in transferring the land to RIICO under the Rules 1959. However, further allotment by RIICO to the respondent-company was under the Rules 1979. Therefore, the High Court committed an error treating that the whole case was governed only under the Rules 1959, and that Rules 1979 had no application at all.

24. The High Court recorded a finding, as regards the submission made on behalf of the appellant-RIICO, stating that the audit conducted by it showing various irregularities and pointing out the mis-appropriation of public funds by the respondent-company, was a matter entirely unrelated to the allotment and development of the said land. Rule 11-A of the Rules 1959, as amended created a legal fiction by which the respondent-company had become a lessee and the State of Rajasthan, the lessor and therefore the order passed by the appellant-RIICO, was wholly without jurisdiction, as after 4.11.1991, RIICO had no authority whatsoever, to cancel the allotment of land made in favour of the respondent-company, since it was only the State of Rajasthan that had the authority to cancel the said allotment; by not providing for an access road, the purpose for which allotment was made by RIICO stood defeated, and this was what had resulted in the delay of the development of the said land, and in such a fact-situation, cancellation of land was not permissible; there was a constructive obligation on the part of the appellant-RIICO to provide an approach road with respect to the land which was allotted; and that RIICO had failed to co-operate with the respondent-company to accomplish the task it had undertaken, and that the order of cancellation was liable to be set aside for lack of jurisdiction and for want of competence.

25. The aforesaid reasons given by the High Court are mutually inconsistent. When the High Court came to the conclusion that the appellant-RIICO had no competence to deal with the land and to cancel the allotment made in favour of the respondent-company, there was no justification to hold RIICO responsible for providing the approach road. Such a finding could be permissible only if the appellant-RIICO had competence to deal with the land in dispute.

26. The High Court also erred in holding that the provision of providing the access road was an obligation on the part of the appellant-RIICO, deciding this on equitable grounds. The terms of the lease deed clearly stipulated that in case the appellant-RIICO provides the access road, it will be vested with the right to collect the charges incurred by it from the respondent-company, therein, and in the alternative, it would be the obligation of the respondent-company to develop its own infrastructure, and the same would include development of the access road. Therefore, the appellant-RIICO was not under any obligation to provide the said access road.

27. The interpretation given to the amended Rule 11-A of the Rules 1959 by the High Court, takes away the vested right of the appellant-RIICO in the title as well as in the interest that it had acquired in the property, as it had paid the entire amount for the land to the State when possession of land was handed over to it.

Rule 11-A of the Rules 1959 was amended only to facilitate the respondent-company to grant further sub-lease and not to divest RIICO from its rights and title. It was found necessary in wake of difficulties faced by the respondent-company as it was not permissible for it to grant further sub-lease. Thus, the rule provided a deeming

clause/fiction that for the purpose of sub-lease by the respondent-company to further allottees, it would be deemed that the State Government had executed the lease in favour of the respondent-company. The terms "mutatis mutandis", and "as if", used in the amended provisions of Rule 11-A of the Rules 1959 simply facilitated the sub-letting of a part of the premises by the respondent-company, and did not take away the title and rights that the appellant-RIICO had over the land.

The Rule 11-A of the Rules 1959 has further been amended on 12.10.2000 enabling all the allottees of RIICO to sub-lease further. Thus, if the interpretation given by the High Court is accepted, the appellant RIICO loses all its lands and properties and rendered the development authority existing on papers only, without any status/authority.

28. The ultra activist view articulated by the High Court on the basis of supposed intention and imaginative purpose to the amendment act, is uncalled for and ought to have been avoided. It rendered the appellant-RIICO totally insignificant and irrelevant without realising that the appellant-RIICO had autonomous functioning, and the interpretation given by the High Court has devastating effect underlying its status, authority and autonomous functioning. In fact, by interpretation the High Court had conferred an authoritarian role to the State, taking away the right of appellant-RIICO on its property without realising that the amendment to Rule 11-A of the Rules 1959 had specifically been engrafted therein only, for the purpose of facilitating the respondent-company to grant further sub-lease. Thus, it is evident that the High Court decided the case on speculative and hypothetical reasons.

29. The terms incorporated in the lease deed itself provide for timely completion of construction and also for the commencement of production within a stipulated period. Records however, reveal that only 10% of total construction work stood completed by the respondent-company. No proper application was ever filed for seeking extension of time by the respondent-company, as per the Rules. We have been taken through the record.

While providing justification for the non-completion of construction and commencement of production, in very vague terms, it was submitted by the respondent-company that extension of time was sought from statutory authorities. However, the said application did not specify how much more time the company was seeking, and that too, without meeting any requirements provided in the statutory rules.

30. According to clause 2(d) of the lease deed the entire project was to be completed within a period of five years i.e. by 25.5.1994. But it is evident from the material on record that construction was just made on the fraction of the entire land. Clause 2 (i) contemplated that, the lessee will not transfer nor sub-let nor relinquish rights without prior permission from the appellant-RIICO. However, it is evident from the record that the respondent-company had negotiated with a third party for development of the land.

31. The cancellation of allotment was made by appellant- RIICO in exercise of its power under Rule 24 of the Rules 1979 read with the terms of the lease agreement. Such an order of cancellation could have been challenged by filing a review application before the competent authority under Rule 24 (aa) and, in the alternative, the respondent-company could have preferred an appeal under Rule

24(bb)(ii) before Infrastructure Development Committee of the Board. The respondent-company ought to have resorted to the arbitration clause provided in the lease deed in the event of a dispute, and the District Collector, Jaipur would have then, decided the case. However, the respondent-company did not resort to either of the statutory remedy, rather preferred a writ petition which could not have been entertained by the High Court. It is a settled law that writ does not lie merely because it is lawful to do so. A person may be asked to exhaust the statutory/alternative remedy available to him in law.

32. In view of the above, the appeals deserve to be allowed. Thus, the appeals are allowed. Judgment and order impugned are set aside and the order of cancellation of allotment in favour of the respondent-company by the appellant is restored. However, in the facts and circumstances of the case, there shall be no order as to costs.

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2020 1 Supreme 691 ; 2020 0 Supreme(SC) 80

2020 0 AIR(SC) 803 ; 2020 141 AILR 284 ; 2020 3 ApexCJ(SC) 487 ; 2020 1 BBCJ(SC) 619 ;
2020 2 BLJud 25 ; 2020 1 CPJ(SC) 81 ; 2020 1 CPR(SC) 342 ; 2020 0 DNJ 1193 ; 2020 4 GLR
2393 ; 2020 3 JCR(SC) 132 ; 2020 8 JT 535 ; 2020 3 MhLJ 37 ; 2020 3 MPLJ 43 ; 2021 1
RCR(Civ) 842 ; 2021 1 RCR(Civ) 848 ; 2020 2 Scale 671 ; 2020 13 SCC 564 ; 2020 1 UAD 763
; 2020 2 UC 1224

SUPREME COURT OF INDIA

DHANANJAYA Y. CHANDRACHUD, AJAY RASTOGI, JJ.

Shree Ambica Medical Stores & Ors - Appellants

Versus

The Surat People's Co-operative Bank Limited & Ors - Respondents

Civil Appeal No 562 of 2020 (Arising out of SLP(C) No 4362 of 2016)

Decided On : 28-01-2020

IMPORTANT POINTS

(1) Proposal does not conclude contract - A contract postulates an agreement between parties.

(2) Court through its interpretative process cannot rewrite or create a new contract between parties.

Subject: Insurance Law - Policy Interpretation and Coverage

Insurance policy - STFI perils - Renewal - Exclusion of coverage - Premium refund -
Duty of disclosure - Knowledge of policy terms - Estoppel - Commercial decision -
Arbitrary refusal to renew

Act Referred :

INSURANCE ACT : S.64(v)(b), S.64(v)(b)(3)

Insurance Act 1938 - Section 64(VB) - Consumer Protection Act, 1986 -
Section 23 - Insurance - Destruction of goods stored in premises due to flood -
Repudiation of claim by Insurance Company - Claim arose under insurance cover
pertaining to goods hypothecated by appellants with first respondent under a cash
credit facility - This Court, while interpreting contract of insurance must interpret
words of contract by giving effect to meaning and intent which emerges from terms
of agreement - Court through its interpretative process cannot rewrite or create a
new contract between parties - Court has to simply apply terms and conditions of
agreement as agreed between parties - Terms of policy will govern contract
between parties - STFI risks were specifically excluded from coverage of policy -
Extra premium was refunded by Insurer to bank and bank deposited the amount
in appellants' account - No risk can be assumed by Insurer unless premium payable
is received in advance - Proposal does not conclude contract - A contract postulates
an agreement between parties - In present case, Insurer while issuing new policy
at a fresh location specifically excluded STFI perils and refunded premium -
Insured at the time when loss occurred was covered by a policy that excluded
STFI perils - As such, Insurer cannot be held to be liable - To hold

to the contrary would be rewriting agreement between parties and creating a fresh contract to which parties had not agreed - It is not open to appellants to disavow knowledge of exclusion of STFI perils in insurance cover of Rs 60 lakhs which was issued for 2005-06 and renewed for 2006-07 - Change in location of premises in present case led to issuance of a new policy - Appeal dismissed. (Paras 20, 21, 23, 24, 26 and 27)

Facts of the case:

National Consumer Disputes Redressal Commission allowed appeal instituted by the first respondent and set aside the decision of the State Consumer Disputes Redressal Commission of Gujarat². The State Commission found substance in the consumer complaint of the appellants and decreed their claim for compensation in the amount of Rs 53,66,877 with interest at 9 percent per annum. In addition, the State Commission awarded Rs 25,000 towards mental agony and Rs 5,000 towards litigation costs. The claim of the appellants arose under an insurance cover pertaining to goods hypothecated by appellants with the first respondent under a cash credit facility. The insurer, New India Assurance Company Limited, repudiated the claim of the appellants. As a consequence of the order of the National Commission which is challenged in present appeal, claim of appellants stands rejected.

Findings of Court:

The terms and conditions of the new policy specifically excluded STFI perils and evidently there was a change in the obligations of the insurer. There was no renewal but the issuance of a new policy. The change in the location of the premises in the present case led to the issuance of a new policy. It was open to the insurer to specifically exclude STFI perils as a commercial decision. The appellants had knowledge of the exclusion of the STFI perils as they were provided with a copy of the policy and also received the refund of the premium.

Result : Appeal dismissed.

Cases Referred:

[Biman Krishna Bose v United India Insurance Co Ltd., \(2001\) 6 SCC 477 - Distinguished \[Para 16\]](#)

[General Assurance Society Ltd v Chandumull Jain., AIR 1966 SC 1644 - Relied \[Para 20\]](#)

Advocates: Advocates Appeared :

For the Petitioner(s) : Mehul Sharad Shah, Aniruddha P. Mayee, A. Rajarajan, Advocates

For the Respondent(s) : Sukumar Pattjoshi, Sandeep Mahapatra, Abhishek Praharay, J.K. Bodha, Mrinmayee Sahu, K.K. Bhat, Ranjan Kumar Pandey, Advocates

JUDGM ENT

Dr. DhananjayaY. Chandrachud, J.

1. The National Consumer Disputes Redressal Commission [“National Commission”] allowed an appeal instituted by the first respondent and set aside the decision of the

State Consumer Disputes Redressal Commission of Gujarat [“State Commission”]. The State Commission found substance in the consumer complaint of the appellants and decreed their claim for compensation in the amount of Rs 53,66,877 with interest at 9 percent per annum. In addition, the State Commission awarded Rs 25,000 towards mental agony and Rs 5,000 towards litigation costs. The claim of the appellants arose under an insurance cover pertaining to goods hypothecated by the appellants with the first respondent under a cash credit facility. The insurer, New India Assurance Company Limited, repudiated the claim of the appellants. As a consequence of the order of the National Commission which is challenged in the present appeal, the claim of the appellants stands rejected.

2. On 31 May 1998, the appellants and the first respondent entered into an agreement for a cash credit facility. In terms of clause 15 of the agreement, the appellants were under an obligation to insure the goods which were hypothecated to the bank. Clause 15 also contained a stipulation that in the event that the appellants failed to insure the goods, it was open to the bank to secure a cover of insurance for the goods and to recover the expenses incurred along with the premium from the appellants. The clause is extracted below:

“(15) We have to insure the goods given in hypothecation to the Bank against fire etc. at our own costs in favour of the Bank and if we fail to take insurance then the Bank can take the insurance and can recover all the expenses incurred and also the premium amount borne by them from us as the Bank has Right as per this Document.”

3. The first respondent bank has stated that it was acting as a corporate agent of the insurer and, as a matter of routine practice, obtained policies for all its borrowers. As a practice, the first respondent upon receipt of an intimation, would remit the premium payable on behalf of the borrowers. The same course of action was followed by the first respondent under the lending facility granted to the appellants. The first respondent obtained the first insurance policy for the period 1998-99 in the sum of Rs 60 lakhs from the insurer, who is the third respondent to the appeal. The insurance policy covered a specific location of the borrower where the goods were stored, namely:

“12/1123-1124, Basement, Meghdoot Apartment, Surat”

4. The policies of insurance for the succeeding years 1999-2000, 2000-2001 and 2001-02 covered the goods of the borrower stored at the above premises. From 2001, the insurance policy was renamed as a ‘Standard Fire and Special Perils Policy’. The perils insured included those occasioned by storm, tornado, flood and inundation. These together are referred to as “STFI Perils”. In 2001-02 the value of the insurance cover was enhanced by an amount of Rs 25 lakhs so as to increase the total sum insured to Rs 85 lakhs. For 2002-03, the insurer issued a policy covering a sum insured of Rs 25 lakhs in terms of the same location at Meghdoot Apartment, Surat noted above. However, a separate insurance cover in the amount of Rs 60 lakhs was issued in respect of the goods stored at following location:

“B-205, Plot No 17-B, Village Karnaj”

5. Similarly, for 2003-04 and 2004-05 there were two insurance covers; one in the amount of Rs 25 lakhs in respect of the location at Meghdoot Apartment, Surat and

the second in the amount of Rs 60 lakhs covering the location at B- 205, Plot 17-B, Village Karnaj. For 2005-06 and 2006-07, the position of the insurance cover is reflected in an extract from a tabulated chart filed by the insurer:

Year	Policy No	Policy Period	Location	Sum Insured Rs
2005-06	2293	4.8.2005 to 3.8.2006	(A) 12/1123- 1124; Basement, Meghdoot Apartment, Surat	25 lakhs
	2298	1.8.2005 to 31.7.2006	(A) 12/1123-1124; Basement, Meghdoot Apartment, Surat	60 lakhs (Changed to Location A)
2006-07	2537	4.8.2006 to 3.8.2007	(A) 12/1123- 1124; Basement, Meghdoot Apartment, Surat	25 lakhs
	1884	1.8.2006 to 31.7.2007	(A) 12/1123- 1124; Basement, Meghdoot Apartment, Surat	60 lakhs

6. For 2005-06, the location contained in the policy with a sum insured of Rs 60 lakhs was changed from B-295, Plot 17-B, Village Karnaj to 12/1123-1124, Basement, Meghdoot Apartment, **Surat**. Thus, both the policies for 2005-06 covered the same location. For 2006-07, the same position continued for both the insurance covers.

7. On 3 August 2005, the first respondent while filling up the proposal form handed over a cheque of Rs 29,038 to the insurer for a cover which would also extend to STFI perils. On 26 September 2005, the premium of Rs 992 covering STFI perils was refunded by the insurer to the **bank** by a cheque which was deposited by the **bank** in the appellants' account. Hence for 2005-06, the policy cover of Rs 60 lakhs extended to fire and allied perils but specifically excluded STFI perils.

8. On 7 August 2006, the city of **Surat** was hit by floods. The appellants claim that as a result of the floods the goods which were stored in their premises were destroyed. The appellants made a claim to the insurer for an alleged loss of Rs 78,66,857. A surveyor was appointed by the insurer to inspect the extent of damage. The insurer accepted and paid the claim of Rs 23 lakhs under the policy cover of Rs 25 lakhs but repudiated the entire claim under the policy cover of Rs 60 lakhs. There was an exchange of correspondence between the **bank** and the insurer. The **bank**, by its letter dated 11 November 2006, submitted that it was surprised as to how the policy cover of Rs 60 lakhs had contained an exclusion of STFI perils despite the fact that both the policies had been renewed under a common proposal form and through a single cheque. An affidavit dated 6 September 2007 of the Manager of the **bank** was filed stating that the **bank** was a corporate agent and was working on behalf of the

insurer. The insurer repudiated the claim of the appellants on 24 June 2008.

9. A consumer complaint was instituted by the appellants on 26 July 2008 before the State Commission, Gujarat alleging that the insurer had committed an unfair trade practice by repudiating the claim under the insurance cover of Rs 60 lakhs.

10. In its written statement before the State Commission, the **bank** stated that according to the terms of the agreement governing the grant of credit facilities, the primary duty of obtaining a cover of insurance for the hypothecated goods was that of the appellants as borrowers. For 2005-06, the **bank** had renewed the policies of Rs 60 lakhs and Rs 25 lakhs. However, the insurer had excluded STFI perils while issuing a policy cover of Rs 60 lakhs. According to the **bank**, a copy of the policy was given to the appellants from which the exclusion of STFI perils would have been evident. Moreover, a part of the premium which was returned by the insurer was deposited by the **bank** in appellant's account, which should have been in the knowledge of the appellants. The **bank** therefore denied that it was guilty of any deficiency of service. The **bank**, however, stated that it had not been served with any notice by the insurer explaining why the STFI perils were excluded from the policy of Rs 60 lakhs. The **bank** denied that its officers or staff had mistakenly indicated the location of the place of business in the proposal form associated with the policy cover where STFI perils had been excluded.

11. The defence of the insurer was that for the period between 1 August 2005 and 31 July 2006 the policy cover of Rs 60 lakhs specifically excluded STFI perils from the coverage. The insurer stated that upon receiving the claim, it had appointed a surveyor and the claim on account of damage due to flooding had been accepted in respect of the policy cover of Rs 25 lakhs. However, the policy cover of Rs 60 lakhs specifically excluded the STFI perils and the insurer had refunded the premium of Rs 992 paid for an STFI cover by a cheque dated 26 September 2005 which had been accepted and deposited by the **bank** in the appellant's account without any protest. The insurer denied its liability on the ground that the policy cover of Rs 60 lakhs excluded STFI perils.

12. The State Commission, by its order dated 14 February 2019, allowed the complaint only against the **bank** and its manager, who were directed to pay an amount of Rs 55,66,877 together with interest of 9 percent per annum and damages on account of mental agony of Rs 25,000. The State Commission held that the insurer could not be held liable since STFI perils had been excluded from the policy cover of Rs 60 lakhs and the excess premium of Rs 992 had been refunded to the **bank** on 26 September 2005. The **bank** was however, held liable on the ground that it had deposited the cheque of Rs 992 for return of the premium amount without making enquiries from the insurer. The State Commission further held that the **bank** had made an error in filling up the proposal form sent to the insurer and as a consequence the **bank** was liable to compensate the appellant.

13. The National Commission reversed the judgment of the State Commission. It observed that the **bank** had sought an insurance cover to the extent of Rs 85 lakhs which covered STFI perils and had also deposited a cheque of Rs 29,038 towards the premium of the policy. The National Commission observed that though it had been argued by the **bank** as well as the complainant that the insurer could not have excluded the STFI cover while renewing the policy, no rule or regulation mandating the insurer to accept the entire proposal had been brought to its notice. Before the

National Commission, reliance was sought to be placed on the general rules and regulations framed by the Tariff Advisory Committee which came into force on 31 March 2001. The regulations, in so far as is material, provided that it is permissible to exclude STFI perils at the inception of the policy. The National Commission noted that even according to these regulations, deletion of STFI perils from a policy was permissible when a new policy was issued. The National Commission held that since a new address of the location was contained in the proposal form submitted for 2004-05, a fresh policy was issued, and the insurance company was entitled to exclude the STFI cover. The National Commission also noted that the policy of Rs 25 lakhs which at the time of renewal contained the same location, the STFI perils had specifically not been excluded.

14. The National Commission noted that there was no protest either from the bank or the borrower to the exclusion of STFI perils by the insurer. It noted that no loss was sustained in the first year of the exclusion of STFI perils and it was only in the subsequent year that the loss was sustained. Consequently, the National Commission held that having accepted the policy without the STFI cover, both the bank and the borrower were estopped from questioning the terms of the policy. The National Commission held that the bank had specifically stated in its reply before the State Commission that a copy of the insurance policy was given to the borrowers and that the premium amount which was returned back by the insurance company had been credited to their account. It noted that the receipt of the insurance policy had not been specifically denied in the rejoinder filed by the complainants before the State Commission though there was a vague denial of the averments in the corresponding paragraph of the reply. In this background, the National Commission observed that the appellants did not take up the issue of the exclusion of the STFI perils with the insurer nor did they call upon the bank to do so. It was noted that though the appellants received the premium amount in their account, they did not seek any explanation in regard to the refund of the premium. In this view of the matter, the National Commission allowed the appeal filed by the bank and set aside the State Commission's order.

15. Mr Mehul Shah, learned counsel appearing on behalf of the appellants submitted that clauses 3(2) and 4(1) of the notification issued by the Insurance Regulatory and Development Authority on 16 October 2002 provides as follows:

“3(2) An insurer or its agents or other intermediary shall provide all material information in respect of a proposed cover to the prospect to enable the prospect to decide on the best cover that would be in his or her interest.”

“4(1) Except in cases of a marine Insurance cover, where current market practices do not insist on a written proposal form in all cases, a proposal for grant of a cover, either for life business or for general business, must be evident by a written document. It is the duty of an insuree to furnish to the insured free of charge, within 30 days of the acceptance of a proposal, a copy of the proposal form.”

16. Learned counsel submitted that the insurer did not intimate the exclusion of STFI perils at the time of the renewal of the policy either in 2005-06 or 2006-07. Moreover, the proposal form was not remitted either to the bank or to the appellants within a period of 30 days, or at any time. It was urged on behalf of the appellants that the policy issued in 2005-06 was in the nature of a renewal and though the

proposal form indicated that the risk would commence on 3 August 2005 and not on 2 August 2006, the policy of Rs 60 lakhs was issued on 1 August 2005. The grievance of the appellants is that the proposal form for 2005-06 had been signed by the Manager of the bank and the appellants were not aware of the proposal by the bank which was acting as the corporate agent of the insurer. It was urged that the cheque of Rs 29,038 dated 1 August 2005 was duly encashed by the insurer and it was only on 26 September 2005 that an amount of Rs 992 was returned to the bank without a written intimation about the exclusion of STFI perils by the insurer. Learned counsel submitted that the policies for 2005-06 and 2006-07 were not new policies but renewals and hence the insurer could not have excluded the STFI perils. In this context, reliance was placed on the judgment of this Court in *Biman Krishna Bose v United India Insurance Co Ltd.*, [\(2001\) 6 SCC 477](#).

17. On the other hand, Mr Sukumar Pattjoshi, learned Senior Counsel appearing on behalf of the first respondent bank submitted that there was no deficiency of service on the part of the bank. It was argued that under the terms of the hypothecation agreement, the duty of obtaining an insurance cover was primarily that of the appellants as borrowers. Supporting the findings of the National Commission, it was urged that the bank had specifically denied having entered an incorrect address or a different address in the proposal form. Mr Pattjoshi urged that the bank had specifically stated that a copy of the policy had been furnished to the insured. The appellants could not, hence, disavow knowledge of the fact that STFI perils stood excluded from the insurance cover.

18. Mr K K Bhat, learned counsel appearing on behalf of the third respondent urged that the insurance cover of Rs 60 lakhs did not cover STFI perils. Though the bank had remitted the entire premium, the insurer had returned a part of the premium covering STFI perils. The cheque returning the premium amount of Rs 992 was deposited by the bank in the account of the appellants. Mr Bhat submitted that it was a commercial decision of the insurer to exclude STFI perils from the insurance cover of Rs 60 lakhs and therefore, the insurer could not be made liable. It was urged that since the appellants received the policy from the bank, it was not open to them to disclaim knowledge of the exclusion or of the deposit of the premium into their account.

19. The rival submissions fall for consideration.

20. This Court, while interpreting the contract of insurance must interpret the words of the contract by giving effect to the meaning and intent which emerges from the terms of the agreement. In a Constitution Bench decision of this Court in *General Assurance Society Ltd v Chandumull Jain*, [AIR 1966 SC 1644](#) it was observed thus:

“11. ...In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves...”

The court through its interpretative process cannot rewrite or create a new contract between the parties. The court has to simply apply the terms and conditions of the agreement as agreed between the parties.

21. In the present case, the policy of insurance with a cover of Rs 60 lakhs for the

period 2004-05 was issued for the location at B 205, Plot No 17-B, Village Karnaj. The insurance policy for 2005-06 was sought for different premises situated at 12/1123-1124, Basement, Meghdoot Apartment, Surat. The address mentioned in the policy for 2004-05 differs from that of 2005-06. The insurer proceeded on the basis that this was a 'fresh contract of insurance'. The insurance policy for 1 August 2005 to 31 July 2006 was issued with the exclusion of STFI perils. This is clear from the use of words "Warranted that STFI risk is excluded from the risk" in the above insurance policy. The terms of the policy will govern the contract between the parties. The STFI risks were specifically excluded from the coverage of the policy. The extra premium of Rs 992 was refunded by the insurer to bank and the bank deposited the amount in the appellants' account.

22. Section 64(VB) of the Insurance Act 1938 provides as follows:

"64VB. No risk to be assumed unless premium is received in advance.—(1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner.

(2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.

Explanation. —Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the money order is booked or the cheque is posted, as the case may be.

(3) Any refund of premium which may become due to an insured on account of the cancellation of a policy or alteration in its terms and conditions or otherwise shall be paid by the insurer directly to the insured by a crossed or order cheque or by postal money order and a proper receipt shall be obtained by the insurer from the insured, and such refund shall in no case be credited to the account of the agent.

(4) Where an insurance agent collects a premium on a policy of insurance on behalf of an insurer, he shall deposit with, or dispatch by post to, the insurer, the premium so collected in full without deduction of his commission within twenty-four hours of the collection excluding bank and postal holidays.

(5) The Central Government may, by rules, relax the requirements of sub-section (1) in respect of particular categories in insurance policies.

(6) The Authority may, from time to time, specify, by the regulations made by it, the manner of receipt of premium by the insurer."

23. The above provision states that no risk can be assumed by the insurer unless the premium payable is received in advance. Sub-Section (3) of Section 64 (VB) provides for refund of the premium amount to the insured in case of cancellation or alteration of the terms and conditions of the policy. In the present case, the premium of Rs 992 to cover STFI perils was refunded by the insurer to the bank and

the amount was deposited in the insured's account. The proposal does not conclude the contract. A contract postulates an agreement between the parties. In the present case, the insurer while issuing the new policy at a fresh location specifically excluded STFI perils and refunded the premium. The insured at the time when the loss occurred was covered by a policy that excluded STFI perils. Therefore, the insurer cannot be held to be liable. To hold to the contrary would be rewriting the agreement between the parties and creating a fresh contract to which the parties had not agreed.

24. The **bank** in its written statement filed before the State Commission, specifically averred in paragraph 2 that:

"..The real fact is that one copy of the Policy is given to the Complainant and from this the Complainant can know the fact. One copy of the said Policy was given to them. Moreover, the Premium Amount which was returned back was debited in their Account. They could have inquired from this that what this Premium Amount was returned by the Insurance Company."

The appellants in their rejoinder did not specifically deny the averment that they were furnished with a copy of the policy. The appellants have also not denied the fact that the premium on account of STFI perils which was refunded by the insurer was credited to their account. This being the position, it is not open to the appellants to disavow knowledge of the exclusion of the STFI perils in the insurance cover of Rs 60 lakhs which was issued for 2005-06 and renewed for 2006-07.

25. The appellants have placed reliance on the decision of this Court in *Biman Krishna Bose v United India Insurance Co Ltd* , [\(2001\) 6 SCC 477](#) where this court while dealing with a mediclaim policy, observed:

"5. A renewal of an insurance policy means repetition of the original policy. When renewed, the policy is extended and the renewed policy in the identical terms from a different date of its expiration comes into force. In common parlance, by renewal, the old policy is revived and it is sort of a substitution of obligations under the old policy unless such policy provides otherwise. It may be that on renewal, a new contract comes into being, but the said contract is on the same terms and conditions as that of the original policy. Where an insurance company which has exclusive privilege to carry on insurance business has refused to renew the mediclaim policy of an insured on extraneous and irrelevant consideration, any disease which an insured had contracted during the period when the policy was not renewed, such disease cannot be covered under a fresh insurance policy in view of the exclusion clause. The exclusion clause provides that the pre-existing diseases would not be covered under the fresh insurance policy. If we take the view that the mediclaim policy cannot be renewed with retrospective effect, it would give handle to the insurance company to refuse the renewal of the policy on extraneous consideration thereby deprive the claim of insured for treatment of diseases which have appeared during the relevant time and further deprive the insured for all time to come to cover those diseases under an insurance policy by virtue of the exclusion clause. This being the disastrous effect of wrongful refusal of renewal of the insurance policy, the mischief and harm done to the insured must be remedied. We are, therefore, of the view that once it is found that the act of an

insurance company was arbitrary in refusing to renew the policy, the policy is required to be renewed with effect from the date when it fell due for its renewal.”

(Emphasis supplied)

26. The above case, as the extract indicates, dealt with a situation where the act of the insurer in refusing to renew the mediclaim policy was held to be arbitrary. This Court noted the serious consequence flowing out of the arbitrary refusal to renew the contract since it would result in the exclusion of the cover and the rejection of the claim in respect of a disease which the insured had contracted during the period when the policy was not renewed. The situation in the present case is clearly distinguishable. The terms and conditions of the new policy specifically excluded STFI perils and evidently there was a change in the obligations of the insurer. There was no renewal but the issuance of a new policy. The change in the location of the premises in the present case led to the issuance of a new policy. It was open to the insurer to specifically exclude STFI perils as a commercial decision. The appellants had knowledge of the exclusion of the STFI perils as they were provided with a copy of the policy and also received the refund of the premium. Having lodged no protest with the insurer during 2005-06 or in the renewed term of 2006-07, the insured cannot lay a claim that they had no knowledge that the STFI cover was excluded from the insurance cover. Nothing prevented the appellants from either approaching the insurer or any other insurance company for obtaining a policy that covered STFI perils.

27. For the above reasons, we are of the view that there is no merit in the present appeal. The appeal shall, accordingly, stand dismissed but with no order as to costs.

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2024 2 Supreme 584 ; 2024 0 Supreme(SC) 152

2024 0 AIR(SC) 1218 ; 2024 2 BLJ(SC) 307 ; 2024 1 CurCC(SC) 212 ; 2024 0 INSC 132

SUPREME COURT OF INDIA
ANIRUDDHA BOSE, SANJAY KUMAR, JJ.
Venkataraman Krishnamurthy and another - Appellants
Versus
Lodha Crown Buildmart Pvt. Ltd. - Respondent
Civil Appeal No. 971 of 2023
Decided on : 22-02-2024

IMPORTANT POINT

Apartment Buyers Agreement - Once parties committed themselves to a written contract, whereby they reduced terms and conditions agreed upon by them to writing, same would be binding upon them - In the event such a written contract provided for consequences that are to follow in the event of breach of conditions by one or other of parties thereto, such consequences must necessarily follow and if resisted, they would be legally enforceable - NCDRC cannot rewrite terms and conditions of contract between parties and apply its own subjective criteria to determine course of action to be adopted by either of them.

Subject: Civil Law - Property Law

Act Referred :

Development Control Regulations : Reg.6(7)

(A) Consumer Protection Act, 1986 - Section 23 - [Consumer Protection Act, 2019 - Section 67] - Real estate - Apartment Buyers Agreement - Non-delivery of possession within stipulated date - Appellants are claiming termination of agreement and unconditional refund of total amount paid by them with interest thereon - 'Part Occupancy Certificate' obtained by respondent-company cannot be equated to 'Occupancy Certificate' issued under Regulation 6(7) of Development Control Regulations, 1991 - Once parties committed themselves to a written contract, whereby they reduced terms and conditions agreed upon by them to writing, same would be binding upon them - In the event such a written contract provided for consequences that are to follow in the event of breach of conditions by one or other of parties thereto, such consequences must necessarily follow and if resisted, they would be legally enforceable - In case on hand, Agreement stipulated date of delivery of possession of apartment for fit outs with a grace period of one year - Right of election given thereunder to appellants to either continue or to terminate Agreement within ninety days from expiry of grace period was absolute and it was not open to

NCDRC to apply its own standards and conclude that, though there was delay in handing over possession of apartment, such delay was not unreasonable enough to warrant cancellation of Agreement - It was not for NCDRC to rewrite terms and conditions of contract between parties and apply its own subjective criteria to determine course of action to be adopted by either of them - Contract, being a creature of an agreement between two or more parties, is to be interpreted giving actual meaning to words contained in contract and it is not permissible for Court to make a new contract, however reasonable, if parties have not made it themselves. (Paras 12, 15, 16 and 17)

(B) Consumer Protection Act, 1986 - Section 23 - [Consumer Protection Act, 2019 - Section 67] - Real estate - Apartment Buyers Agreement - Non-delivery of possession within stipulated date - Mere exchange of correspondence by and between parties prior to expiry of grace period, when appellants were not even seized of all facts, cannot be held against them by treating it as an act in acceptance of or acquiescence with change impliedly suggested by respondent-company - Fact that appellants were anxious to avoid additional tax liability, owing to introduction of Goods and Service Tax regime, cannot be held against them or be imputed to them as an underhand motive for backing out of Agreement - Avoidance of tax is neither illegal nor equivalent to tax evasion - NCDRC overstepped its power and jurisdiction in ignoring binding covenants in Agreement and in introducing its own logic and rationale to decide as to what future course of action of parties and more particularly, appellants, should be - Respondent-company directed to refund deposited amount alongwith 12% simple interest - Agreement itself provided for interest component on refund amount and stipulated rate thereof as 12% p.a. - That being so, respondent-company cannot seek reduction of rate of interest contrary to agreed rate. (Paras 19, 20, 21 and 22)

Facts of the case:

National Consumer Disputes Redressal **Commission**, New Delhi (NCDRC), decided Consumer Complaint No. 35 of 2018, vide order dated 09.11.2022. Disgruntled with said order, complainants therein preferred this statutory appeal. Appellants assert their right to terminate Agreement and claim unconditional refund of the total amount paid by them with interest thereon.

Findings of Court:

As appellants did not choose to act upon belated offer of the respondent-company, in its letter dated 29.11.2017, and are still intent on terminating Agreement as per Clause 11.3 of Agreement, we set aside the order dated 09.11.2022 passed by the NCDRC and allow Consumer Complaint No. 35 of 2018, directing respondent-company to refund deposited amount of Rs.2,25,31,148/-in twelve equal monthly installments, through post-dated cheques, with simple interest thereon @ 12% p.a., from date of receipt of the said amount or parts thereof till actual repayment. First such installment shall be payable on the 5th of April, 2024, and the succeeding installments shall be payable on the fifth of each calendar month

thereafter, till fully paid.

Result : Appeal allowed.

Advocates: Advocates appeared :

For the Appellant(s) : Mr. Vivek Chib, Sr. Adv. Ms. Anandana H. Wadhwa, Adv. Mr. Anirudh Wadhwa, Adv. Mr. Vipul Kumar, AOR Mr. Shashwat Awasthi, Adv. Ms. Mansi Gupta, Adv. Ms. Unnati Jhunjhunwala, Adv. Ms. Bina Harini G, Adv. Ms. Rithvik Mathur, Adv.

For the Respondent(s) : Mr. Rahul Kripalani, Adv. Ms. Suhasini Sen, Adv. Mr. Ankit Yadav, AOR Ms. Supraja V., Adv. Ms. Prakriti Rastogi, Adv. Mr. Aditya Pratap Singh Chauhan, Adv. Ms. Surbhi Singh, Adv. Ms. Pracheta Kar, Adv. Mr. Aditya Sidhra, Adv. Mr. Nadeem Afroz, Adv.

JUDGMENT :

SANJAY KUMAR, J

1. National Consumer Disputes Redressal **Commission**, New Delhi (in short, 'NCDRC'), decided Consumer Complaint No. 35 of 2018, vide order dated 09.11.2022. Disgruntled with the said order, the complainants therein preferred this statutory appeal.

2. The appellants intended to purchase an apartment in a building to be constructed by the respondent-company at New Cuffe Parade, Wadala, Mumbai. The parties executed Agreement to Sell dated 29.11.2013 (hereinafter, 'the Agreement'), whereby the 4BHK apartment bearing No. B-602, on the sixth floor of the proposed building named 'Lodha Evoq', with a carpet area of 1966 sq. ft. was allotted to the appellants. The sale consideration was fixed at Rs.7,55,50,956/-. As per the payment schedule, this sale consideration was to be paid in four sets of 'application money', viz., Rs.18,00,000/-, Rs.57,55,096/-, Rs.74,79,545/-and Rs.21,62,700/-respectively, and the balance amount, being Rs.5,83,53,615/-, was to be paid on initiation of fit outs. It is not in dispute that the appellants paid Rs.2,25,31,148/-in all to the respondent-company by the date of institution of their consumer complaint before the NCDRC and were not in default. As per the Agreement, possession of the apartment was to be delivered to the appellants for fit outs by 30.06.2016 or, with a grace period of one year, by 30.06.2017. Alleging that the respondent-company had not delivered possession of the apartment for fit outs by the said date and that they had terminated the Agreement, the appellants approached the NCDRC. Their prayer was for refund of the amount paid by them with compound interest thereon @ 18% p.a. along with compensation for the harassment, mental agony and torture suffered by them, apart from litigation costs.

3. By the impugned order dated 09.11.2022, the NCDRC disposed of the appellants' consumer complaint with the following directions:

'i. OP shall deliver the actual physical possession of the unit in question, complete in all respects, as per specifications and with amenities and facilities, including the club house etc. as promised in the brochure and/or ABA within 3 months of date of this order.

ii. OP shall arrange a joint inspection of the unit in question with Complainants/their representative and OP's representative within 15 days of date of this order. If as a result of this inspection, any deficiencies are noticed,

the same shall be rectified by the OP within 30 days from the date of joint inspection. Immediately on rectification of all the defects, OP shall intimate, in writing, to the Complainants about the readiness of the unit in all respects for actual physical possession, giving him 15 days' time from the date of such communication to complete various formalities with respect to taking possession and remitting balance dues, if any, as per the payment plan/terms and conditions of the ABA. OP shall charge EDCs/IDCs, and other charges like car parking, IBMS, club membership etc. strictly as per ABA dated 29/11/2013. No maintenance and/or holding charges shall be payable by Complainants till the date of actual physical possession after issuance of communication about readiness of the unit for physical possession. Complainants shall be liable to pay service tax/other applicable taxes etc. payable to government agencies as per prevailing rates notified by the government and OP shall be bound to duly deposit such amounts to concerned government authorities within 45 days of receipt of such amounts under intimation to the Complainants. However, if government authorities have not raised any demand with respect to VAT etc. and OP considers that it is likely to be raised in future and create a liability which has to be borne by the Complainants, OP may take an indemnity bond from the Complainants in this regard to pay such amount in future, as and when demanded by the Government Authorities.

iii. OP shall pay delay compensation in the form of simple interest @ 6% p.a. on the total amount paid from the committed date of possession as per ABA (30/06/2016) till the date of offer of possession (29/11/2017).

iv. Parties to bear their respective litigation cost.

v. In case the Complainants does not wish to take possession of the unit in question now, for whatsoever reasons, and wishes to seek a refund, as prayed for, he shall make a specific request in this regard, in writing, to the OP within 15 days of this order. In such a situation OP shall be entitled to deductions/forfeiture of earnest money as per provisions of the agreement. OP shall, on receipt of such written request for refund the amount paid by the Complainants after making deductions towards forfeiture of earnest money, as per provisions of the agreement, within two months from the date of request from the complainants.'

The appellants are referred to as 'complainants' in the order extracted above while the respondent-company is 'OP'.

4. Aggrieved by the disposal of their case on the aforesaid lines and more particularly, para 'v' of the directions set out hereinabove, the appellants assert before us their right to terminate the Agreement and claim unconditional refund of the total amount paid by them with interest thereon.

5. It would be appropriate at this stage to note the terms and conditions which were arrived at by and between the parties and reduced to writing in the Agreement executed by them. The relevant definitions, set out in Clause 1, titled 'Definition and Interpretation', read as under:

'1.13 "Date of Offer of Possession (for fit outs)" shall mean the date as specified in Annexure 2 herein on which the Company shall endeavor to make available to the Purchaser the Unit for fit outs subject to the receipt by the Company of

the Total consideration and all other taxes and charges payable under this Agreement. This shall be the date on which the notice for readiness of the Unit for fit outs is issued by the Company plus 15 days.

1.14 "Date of Offer of Possession" shall mean that date on which the occupation certificate is issued (or deemed to be issued as per the relevant provisions of legislation)

6. Clause 11 of the Agreement is most relevant for the purposes of this case. It is titled 'Fit Outs and Possession' and the relevant paragraphs thereof are extracted hereunder: -

'11. Fit Outs and Possession: -

11.1. Subject to the Purchaser not being in breach of any of the terms hereof and the Purchaser having paid all the dues and amounts hereunder including the Total Consideration, the Company shall endeavor to provide the Unit to the Purchaser for fit outs on or before the date as set out in Annexure "2" hereto. The Company shall endeavor to make all necessary submissions to obtain the occupation certificate in respect of the Unit of the Building and make available the key Common Areas and Amenities in respect of the Building within a period of 1 (one) year from the Date of Offer of Possession (for Fit Outs) as set out in Annexure "2" hereto and this shall be deemed to be the final possession of the Unit.

11.2. The Company shall without being liable to the Purchaser, be entitled to a grace period of 1 (One) year beyond the aforesaid dates mentioned in the Clause 11.1. The date on which the occupation certificate is issued (or deemed to be issued as per the relevant provisions of legislation) shall be deemed to be the "Date of Offer of Possession".

11.3. Delay in handover of possession (for fitouts) subject to the provisions of Clause 11.5 hereof and the Purchaser having paid all the amounts due and payable hereunder, in the event the Company fails to offer the possession of the Unit for fit outs by the date stated in Annexure - 2 and the aforesaid grace period, then within 30 (thirty) days of expiry of such grace period, the Company shall inform the Purchaser the revised date by which the Unit is likely to be ready for being offered for possession for fit out. Upon expiry of such grace period, the Purchaser may elect to continue with this Agreement in which case, the date of offer of possession for fit outs mentioned in Annexure-2 shall stand revised to and substituted by the revised date of offer of possession (for fit outs) as communicated by the Company. Alternatively, the Purchaser may by giving notice in writing elect to terminate this Agreement. Provided that such right to terminate shall be exercised by the Purchaser within a period of 90 days from the expiry of the aforesaid grace period. In the event, the letter of termination is not received by the Company within the said period of 90 days or is received after the said period of 90 days, the Purchaser shall, without the Company being liable to the Purchaser be deemed to have elected to continue with the Agreement to Sell and the Purchaser shall deemed to have waived his right to terminate this Agreement. In the event that the termination is done within 90 days from the expiry of the aforesaid grace period, the Company shall refund to the Purchaser the Total Consideration amount or part thereof paid by the Purchaser in 12 equal monthly installments through post dated cheques

together with simple interest thereon at the rate of 12% per annum from the date of receipt of the Total Consideration or part thereof till repayment. The first monthly installment shall commence from the 13th month of the date of receipt of the said letter of termination and ending on the 24th month thereof.

11.5. Notwithstanding the provisions hereof, the Company shall without being liable to the Purchaser be entitled to reasonable extension of time for making available the Unit for fit out or completion of said Building beyond the aforesaid dates mentioned in Clause 11, if the same is delayed for reasons beyond the control of the Company including on account of: -

(i) Non-availability of steel, cement, other building material water or electric supply, or

(ii) Labour problems, shortage of water supply or electric power or by reason of any act of God, or

(iii) non delivery of possession is as a result of any notice, order, rule or notification of the Government and/or any other public or Competent authority or of the court or on account of delay in issuance or non-issuance or receipt of NOC's, in issuance, Occupation Certificate, Approvals etc. or non availability of essential amenities, services and facilities such lifts, **electricity** and water connections or sewage or drainage lines or for any other reason technical or otherwise or for any reason beyond the control of the Company, or Economic Hardship

(iv) Delay in receipt of documents and/or Approvals.'

In keeping with and in continuance of Clause 11.1 set out hereinbefore, Annexure 2 to the Agreement stipulated that the date of offer of possession for fit outs would be 30.06.2016.

7. Clause 21 of the Agreement is titled 'Purchaser's Covenants'. To the extent presently relevant, it reads as under:

'21. PURCHASER'S COVENANTS

The Purchaser for himself with intention to bring all persons into whosoever hands the Unit may come, doth hereby covenant with the Company as follows:

.....u. The Purchaser acknowledges that as on the Date of Offer of Possession (for fit outs) works in the Unit shall be complete and the Unit shall have regular water and **electricity** supply, as well as lift access. There may be certain works which may be ongoing in the Building/ development/Property at such time but all due care shall be taken to ensure that the fit outs of the Unit are not affected in any manner by such works. It is clarified that the Offer of Possession (for fit outs) entitles the Purchaser to carry on interior and other related works in the Unit but does not entitle the said Unit to be occupied till such time that the Occupation Certificate is received in relation to the said Unit.'

8. cursory overview of the above clauses manifests that the respondent-company was to deliver possession of the apartment to the appellants for fit outs by 30.06.2016 but grace period of one year was provided under Clause 11.2, whereby the date for delivery of such possession stood extended till 30.06.2017. Clause 21.u

indicates that the works in the apartment, so far as the respondent-company is concerned, were to be completed by that date and the apartment was to have regular water and electricity supply, apart from lift access, and the appellants could carry on interior and other related works therein. Further, as per Clause 11.1, the respondent-company was required to obtain the Occupation Certificate in respect of the apartment and make available the key common areas and amenities in the building within one year from the date of offer of possession for fit outs. That was deemed to be the final possession of the apartment in terms of Clause 11.2. This date for delivery of final possession was also extendable by one year, i.e., up to 30.06.2018.

9. Significantly, Clause 11.3 makes it clear that delay in delivery of possession of the apartment for fit outs, subject to Clause 11.5 and payment of the sale consideration amounts due and payable, would entail two possible situations. Firstly, the respondent-company could inform the purchaser, within thirty days of the expiry of the grace period, the revised date by which the unit was likely to be ready for being offered for possession for fit outs and if the same is accepted by the purchaser, the contract would stand extended. Secondly, the clause provides that upon expiry of the grace period, the purchaser could elect either to continue with the agreement or, in the alternative, give notice in writing electing to terminate the agreement. The purchaser was required to exercise this right within ninety days from the expiry of the grace period.

10. It was not the case of the respondent-company that Clause 11.5 had a role to play in the case on hand and it was not its claim that any sale consideration amounts payable by the appellants remained outstanding at that point of time. The respondent-company, however, asserted that it had received the Occupation Certificate for the appellants' apartment on 08.06.2017, which was well before the expiry of the grace period, and it had called upon the appellants by e-mail on the very same day to make the balance payment in order to initiate the possession process. It alleged that the appellants had failed to make the balance payment and the default, therefore, lay with them. It relied on Clause 11.2, which provided that the date on which the Occupation Certificate is issued shall be deemed to be the date of offer of possession and contended that the appellants could not claim that it had not offered possession of the apartment before expiry of the grace period. Further, it contended that the appellants wanted to back out of the contract as they did not wish to bear the additional burden of the newly introduced Goods and Service Tax payable by them in relation to the subject transaction.

11. Perusal of the certificate dated 08.06.2017 relied upon by the respondent-company reflects that it is titled 'Part Occupancy Certificate'. It was issued by the Town & Country Planning Division of the Mumbai Metropolitan Region Development Authority and recorded, under Condition No. 6 thereof, that the respondent-company should complete the unfinished internal works before applying for grant of a Full Occupation Certificate of the building or before handing over physical possession of the premises for habitation, whichever was earlier. Notably, in the State of Maharashtra, 'Occupancy Certificate' is defined under Regulation 6(7) of the Development Control Regulations, 1991, and it reads as follows: -

'6(7). Occupancy Certificate: -On receipt of the acceptance of completion certificate in the form in Appendix XXI, the owner through his licensed surveyor/engineer/structural engineer/supervisor of this architect shall submit

to the **Commissioner** a development completion certificate in the form in Appendix XVIII with three copies of the completion plan, one of which shall be cloth mounted for record. The **Commissioner** may inspect the work and after satisfying himself that there is no deviation from the sanction plans, issue an occupancy certificate in the form in Appendix XXII or refuse to sanction the occupancy certificate within 21 days from the date of receipt of the said completions certificate....'

It is clear from the aforestated definition that the 'Occupancy Certificate' denotes completion of the project in all respects and this is fortified by the format of the 'Occupancy Certificate' in Appendix XXII to the Development Control Regulations, 1991, which reads thus:

'The full development work of a residential building comprising of ___ + ___+___ upper floors on plot bearing C.S. No./CTS No. ___ of Division/Village ___ at ___ is completed under the supervision of Shri. ____, Lic. Architect, Lic. No. ___; Shri ____, Lic. Site Supervisor, Lic. No. ___ and Shri. ____, RCC Consultant Lic. No. ___ and as per completion certificate issued by Chief Fire Officer u/no. ___ dated ____, the same may be occupied and completion certificate submitted by you is hereby accepted.'

12. Significantly, the 'Part Occupancy Certificate' obtained by the respondent-company is not in the aforestated format and states to the effect that a 'Full Occupation Certificate' may still have to be obtained thereafter. The said certificate cannot, therefore, be equated to the 'Occupancy Certificate' issued under Regulation 6(7) of the Development Control Regulations, 1991. The respondent-company's argument that issuance of the aforestated certificate should be construed to mean that there was no delay on its part in delivering possession of the apartment is utterly misconceived. Clauses 1.13 and 1.14 of the Agreement demonstrate, in no uncertain terms, that two separate dates for delivery of possession are contemplated -one being the 'date of offer of possession for fit outs' and the other being the 'date of offer of possession'. The 'date of offer of possession for fit outs', allowing for the grace period of one year, was 30.06.2017 and it is the admitted position that the respondent-company did not offer such possession before that date. Without doing so, it was not open to the respondent-company to proceed directly to the next date, viz., the 'date of offer of possession' under Clause No. 1.14, which is linked with the 'Occupation Certificate' which it did not even have by that date. Further, it is not even its case that it made available the key common areas and amenities, as provided in the Agreement. In effect, expiry of the 'date of delivery of possession for fit outs', with the grace period, being 30.06.2017, the appellants were well within their rights, under Clause 11.3, in getting issued a legal notice on 01.07.2017 stating that they had not received any letter of offer of possession for fit outs and that they had elected to terminate the Agreement. The respondent-company was called upon, in consequence, to refund the monies paid by them with interest thereon. The respondent-company, however, disclaimed liability, by its reply legal notice dated 21.07.2017, constraining the appellants to move the NCDRC.

13. This being the factual backdrop of the case, the NCDRC noted that there was 'some delay' in handing over of possession of the apartment by the respondent-company, but opined that it was not 'unreasonable', whereby the appellants could cancel the Agreement and seek a refund. The NCDRC further opined that in the event they wish to seek a refund, the respondent-company was entitled to

deduction/forfeiture of the earnest money as per the provisions of the Agreement. Having said so, the NCDRC observed that the respondent-company was still bound to provide actual physical possession of the apartment, complete in all respects, and issued the directions set out hereinabove.

14. At this stage, it may also be noted that, by letter dated 29.11.2017, the respondent-company informed the appellants that their apartment was ready for possession and called upon them to make the payment due at the earliest to enable the process to hand over possession being initiated.

15. Once the parties committed themselves to a written contract, whereby they reduced the terms and conditions agreed upon by them to writing, the same would be binding upon them. In the event such a written contract provided for the consequences that are to follow in the event of breach of the conditions by one or the other of the parties thereto, such consequences must necessarily follow and if resisted, they would be legally enforceable. In the case on hand, the Agreement stipulated the date of delivery of possession of the apartment for fit outs with a grace period of one year. In terms thereof, the date for delivery of possession of the apartment for fit outs, with the grace period, was 30.06.2017. Admittedly, the respondent-company did not offer delivery of possession of the apartment for fit outs by that date. The 'date of offer of possession', under Clause 1.14, linked with issuance of the 'Occupation Certificate' was distinct and separate from the 'date of delivery of possession for fit outs' and Clause 11.3 unequivocally provided the consequences in the event of delay in that regard. The right of election given thereunder to the appellants to either continue or to terminate the Agreement within ninety days from the expiry of the grace period was absolute and it was not open to the NCDRC to apply its own standards and conclude that, though there was delay in handing over possession of the apartment, such delay was not unreasonable enough to warrant cancellation of the Agreement. It was not for the NCDRC to rewrite the terms and conditions of the contract between the parties and apply its own subjective criteria to determine the course of action to be adopted by either of them.

16. In this regard, we may refer to the Constitution Bench decision in *General Assurance Society Ltd. vs. Chandumull Jain and another*, [AIR 1966 SC 1644](#), wherein it was observed that, in interpreting documents relating to a contract of insurance, the duty of the Court is to interpret the words in which the contract is expressed by the parties because it is not for the Court to make a new contract, however reasonable, if the parties have not made it themselves. Thereafter, in *Rajasthan State Industrial Development & Investment Corporation vs. Diamond & Gem Development Corporation Ltd.*, [\(2013\) 5 SCC 470](#), this Court reiterated that a contract, being a creature of an agreement between two or more parties, is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the Court to make a new contract, however reasonable, if the parties have not made it themselves.

17. More recently, in *Shree Ambica Medical Stores vs. Surat People's Coop. Bank Ltd.*, [\(2020\) 13 SCC 564](#), it was observed that, through its interpretative process, the Court cannot rewrite or create a new contract between the parties and has to simply apply the terms and conditions of the agreement as agreed between the parties. Again, in *GMR Warora Energy Ltd. vs. Central Electricity Regulatory Commission*,

[\(2023\) 10 SCC 401](#), it was observed that Courts cannot substitute their own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. It was held that the explicit terms of a contract are always the final word with regard to the intention of the parties.

18. Though the respondent-company would argue that the appellants accepted and acquiesced with its proposal to dispense with delivery of possession of the apartment for fit outs, we do not find merit in this contention. According to the respondent-company, the appellants were informed of the change proposed by it on 30.05.2017 and 07.06.2017. However, the response of the appellants on 12.06.2017 discloses that the 'Part Occupancy Certificate' was not even made available to them at that time and the first appellant specifically requested the respondent-company to update him as soon as the 'Occupancy Certificate' was uploaded on its website, so that he could initiate steps for securing a loan. He further stated that his wife and he would like to see the unit before the handing over of possession. It was agreed by and between the parties that the appellants would be permitted to visit the apartment on 14.06.2017 but it is an admitted fact that the apartment was not shown to them on that day. They were informed that they would not be able to see any other similar unit till the end of July, 2017 and that their own apartment would be ready for inspection only in August, 2017 or later.

19. It is not clear as to when the appellants were actually provided with the 'Part Occupancy Certificate' dated 08.06.2017 obtained by the respondent-company, but it is not in dispute that the appellants took steps to terminate the Agreement immediately after expiry of the grace period on 30.06.2017, by getting a legal notice issued on 01.07.2017. As there was no novation of the contract in writing by the parties and as it was not open to one of the parties thereto, viz., the respondent-company, to unilaterally change the agreed terms and conditions, the action of the appellants in terminating the Agreement on the first available date, as provided therein, cannot be found fault with. Mere exchange of correspondence by and between the parties prior to expiry of the grace period, when the appellants were not even seized of all the facts, cannot be held against them by treating it as an act in acceptance of or acquiescence with the change impliedly suggested by the respondent-company.

20. The fact that the appellants were anxious to avoid the additional tax liability, owing to the introduction of the Goods and Service Tax regime, cannot be held against them or be imputed to them as an underhand motive for backing out of the Agreement. Avoidance of tax is neither illegal nor equivalent to tax evasion and, therefore, the urgency shown by the appellants in trying to complete the process quickly so as to avoid an additional tax burden was natural. Further, it cannot be presumed that the appellants, who were willing to spend over Rs.7.5 Crore for the apartment, would back out at the eleventh hour only because the tax component was increasing by Rs.40 lakh or so.

21. Reliance is placed by the respondent-company on the decision of this Court in Ireo Grace Realtech Pvt. [Ltd.](#) v. Abhishek Khanna, [\(2021\) 3 SCC 241](#) in the context of the rate of interest payable on the refund. However, we find that the aforesaid decision is distinguishable on facts. Therein, the contract condition provided for payment of delay compensation and in the event of such delay exceeding twelve months from the end of the grace period, the allottee could opt for termination of

the contract and for refund of the amount paid by him. The contract condition, however, provided that the refund would be made without any interest thereon. It is in this factual scenario that this Court, in equity, decreed that the amount should be refunded with simple interest thereon @ 9% p.a. On the other hand, in the present case the Agreement itself provided for the interest component on the refund amount and stipulated the rate thereof as 12% p.a. That being so, the respondent-company cannot seek reduction of the rate of interest contrary to the agreed rate.

22. On the above analysis, we have no hesitation in holding that the NCDRC overstepped its power and jurisdiction in ignoring the binding covenants in the Agreement and in introducing its own logic and rationale to decide as to what the future course of action of the parties and more particularly, the appellants, should be. As we are informed that the appellants did not choose to act upon the belated offer of the respondent-company, in its letter dated 29.11.2017, and are still intent on terminating the Agreement as per Clause 11.3 of the Agreement, we set aside the order dated 09.11.2022 passed by the NCDRC and allow Consumer Complaint No. 35 of 2018, directing the respondent-company to refund the deposited amount of Rs.2,25,31,148/- in twelve equal monthly installments, through post-dated cheques, with simple interest thereon @ 12% p.a., from the date of receipt of the said amount or parts thereof till actual repayment. The first such installment shall be payable on the 5th of April, 2024, and the succeeding installments shall be payable on the fifth of each calendar month thereafter, till fully paid.

The appeal is allowed to the extent indicated above.

Pending IAs, if any, shall stand closed.

In the circumstances, parties shall bear their own costs.

2023 0 Supreme(SC) 385

2023 0 INSC 398 ; 2023 0 KLT(OnLine) 1339 ; 2023 10 SCC 401

**SUPREME COURT OF INDIA
B.R. GAVAI, VIKRAM NATH, JJ.
GMR Warora Energy Limited - Appellant
VERSUS**

**Central Electricity Regulatory Commission (CERC) & Ors. - Respondents
Civil Appeal No.11095 OF 2018 WITH Civil Appeal Nos.11910-11911 OF 2018 Civil Appeal
Nos.12055-12056 OF 2018, Civil Appeal No.3123 OF 2019, Civil Appeal No.5372 OF 2019,
Civil Appeal No. 6641 OF 2019, Civil Appeal Nos. 2935-2936 OF 2020, Civil Appeal Nos.
4628-4629 OF 2021, Civil Appeal Nos. 5583-5584 OF 2021, Civil Appeal No. 39 OF 2021,
Civil Appeal No. 5005 OF 2022, Civil Appeal No. 4089 OF 2022
Decided On : 20-04-2023**

The term “Law” in the PPAs would include all applicable rules, regulations, orders, Notifications issued by an Indian Governmental Instrumentality and shall also include all rules, regulations, decisions and orders of the CERC and the MERC. Therefore, all additional charges payable on account of orders, directions, Notifications, Regulations, etc., issued by the instrumentalities of the State, after the cut-off date, will have to be considered to be “Change in Law” events. The Generators would be entitled to compensation on the restitutionary principle on such changes occurring after the cut-off date.

Act Referred :

**Chhattisgarh Adhosanrachna Vikas Evam Paryavaran Upkar Adhiniyam :
S.8**

CIVIL PROCEDURE CODE : S.100

CONSTITUTION OF INDIA : Art.268, Art.12, Art.226

ELECTRICITY ACT : S.107, S.125

INCOME TAX ACT : S.115(j)(b)

The judgment deals with the interpretation of the term 'Change in Law' under various Power Purchase Agreements (PPAs) and the entitlement of Generators to compensation for changes in law occurring after the cut-off date. The Court held that all additional charges payable on account of orders, directions, Notifications, Regulations, etc., issued by the instrumentalities of the State, after the cut-off date, will have to be considered to be 'Change in Law' events. The Generators would be entitled to compensation on the restitutionary principle on such changes occurring after the cut-off date.

Fact of the Case:

Numerous cross-appeals were filed challenging the common judgment and order dated 14th August 2018 passed by the learned Appellate Tribunal for

Electricity, New Delhi (hereinafter referred to as "APTEL") in Appeal No. 111 of 2017 & I.A. No.450 of 2018 and in Appeal No.290 of 2017 & I.A. No.519 of 2017. The appeals arose out of long term Power Purchase Agreements ("PPAs") for supply of power to various Distribution Companies ("DISCOMS"). The main issue in the appeals was whether certain changes in law, such as changes in coal prices, railway freight charges, and environmental regulations, constituted "Change in Law" events under the PPAs, entitling the Generators to compensation.

Finding of the Court:

The Court held that all additional charges payable on account of orders, directions, Notifications, Regulations, etc., issued by the instrumentalities of the State, after the cut-off date, will have to be considered to be "Change in Law" events. The Generators would be entitled to compensation on the restitutionary principle on such changes occurring after the cut-off date. The Court further held that the term "Law" in the PPAs would include all applicable rules, regulations, orders, Notifications issued by an Indian Governmental Instrumentality and shall also include all rules, regulations, decisions and orders of the **Central Electricity Regulatory Commission** (CERC) and the MERC.

Issues: 1. Whether 'Change in Law' relief on account of New Coal Distribution Policy, 2013 ("NCDP 2013") should be on 'actuals' viz. as against 100% of normative coal requirement assured in terms of New Coal Distribution Policy, 2007 ("NCDP 2007") OR restricted to trigger levels in NCDP 2013 viz. 65%, 65%, 67% and 75% of ACQ? 2. Whether for computing 'Change in Law' relief, the operating parameters should be considered on 'actuals' OR as per technical information submitted in bid? 3. Whether 'Change in Law' relief compensation is to be granted from 1st April 2013 (start of Financial Year) or 31st July 2013 (date of NCDP 2013)? 4. Whether Busy Season Surcharge and Development Surcharge and Port Congestion Surcharge; MoEF Notification on coal quality; Shortfall in linkage coal due to Change in NCDP; Forest Tax; Add on Premium price; Evacuation Facility Charges (EFC) would amount to 'Change in Law' events? 5. Whether various taxes/charges imposed by various State Governments would also fall under 'Change in Law' events? 6. At what rate the Generators would be entitled to 'carrying cost'.

Ratio Decidendi: The Court held that the term "Law" in the PPAs would include all applicable rules, regulations, orders, Notifications issued by an Indian Governmental Instrumentality and shall also include all rules, regulations, decisions and orders of the CERC and the MERC. Therefore, all additional charges payable on account of orders, directions, Notifications, Regulations, etc., issued by the instrumentalities of the State, after the cut-off date, will have to be considered to be "Change in Law" events. The Generators would be entitled to compensation on the restitutionary principle on such changes occurring after the cut-off date.

Final Decision: The appeals were dismissed.

JUDGMENT :

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III.	ADDITIONAL ISSUES
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	List of abbreviations:
1.	APTEL - Appellate Tribunal for Electricity
2.	CEA - Central Electricity Authority
3.	CERC - Central Electricity Regulatory Commission
4.	CIL - Coal India Limited
5.	COD - Commercial Operation Date
6.	CSA - Coal Supply Agreement
7.	DISCOMS - Distribution Companies
8.	ECL - Eastern Coalfield Limited
9.	EFC - Evacuation Facility Charges
10.	FSA - Fuel Supply Agreement
11.	GCV - Gross Calorific Value
12.	LoA - Letter of Assurance
13.	LPS - Late Payment Surcharge
14.	MAT - Minimum Alternate Tax
15.	MCL - Mahanadi Coalfield Limited
16.	MERC - Maharashtra Electricity Regulatory Commission
17.	MoC - Ministry of Coal

18. MoP - Ministry of Power
19. MSEDCL - Maharashtra State Electricity Distribution Company Limited
20. NCDP - New Coal Distribution Policy
21. PPAs - Power Purchase Agreements
22. RFP - Request for Proposal
23. SBAR - State Bank Advance Rate
24. SECL - South Eastern Coal Limited
25. SHAKTI - Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India
26. SHR - Station Heat Rate
27. TANGEDCO- Tamil Nadu Generation and Distribution Corporation
28. UHV - Useful Heat Value

I. INTRODUCTION

1. When we heard this batch of Electricity appeals, it was agreed between all the parties that this Court should first decide Civil Appeal No. 684 of 2021 (Maharashtra State Electricity Distribution Company Limited v. Adani Power Maharashtra Limited & Ors., 2023 SCC OnLine 233) ["MSEDCL v. APML & Ors." for short] and Civil Appeal No. 6927 of 2021 (Maharashtra State Electricity Distribution Company Limited v. GMR Warora Energy Ltd. & ors.), inasmuch as three of the issues involved in all the appeals in the batch were common. It was submitted that those two appeals could be decided by deciding the three common issues. However, insofar as the other appeals are concerned, it was submitted that, in addition to the three common issues, certain additional issues were also involved and it was agreed that after those two appeals are decided, the other appeals should be heard for considering these additional issues.

2. The said three common issues are thus:

(i) Whether 'Change in Law' relief on account of New Coal Distribution Policy, 2013 ("NCDP 2013" for short) should be on 'actuals' viz. as against 100% of normative coal requirement assured in terms of New Coal Distribution Policy, 2007 ("NCDP 2007" for short) OR restricted to trigger levels in NCDP 2013 viz. 65%, 65%, 67% and 75% of ACQ?

(ii) Whether for computing 'Change in Law' relief, the operating parameters should be considered on 'actuals' OR as per technical information submitted in bid?

(iii) Whether 'Change in Law' relief compensation is to be granted from 1st April 2013 (start of Financial Year) or 31st July 2013 (date of NCDP 2013)?

3. After extensively hearing all the learned counsel for the parties, vide the judgment and order dated 3rd March 2023 in the case of MSEDCL v. APML & Ors. (supra), this Court decided those two appeals after considering the aforesaid three issues.

4. The first issue was answered by this Court, holding that the 'Change in Law' relief for domestic coal shortfall should be on 'actuals', i.e. as against 100% of normative coal requirement assured in terms of the NCDP, 2007. Insofar as the second issue is concerned, it was held that the Station Heat Rate ("SHR" for short) and Auxiliary consumption should be considered as per the Regulations or actuals, whichever is lower. The third issue was answered holding that the Start date for the 'Change in Law' event for the NCDP, 2013 is 1st April 2013.

5. After we decided those appeals, we have heard the present appeals in which some of the issues which were decided by us vide the said judgment in the case of MSEDCL v. APML & Ors. (supra) also arose for consideration along with other issues. However, most of the issues in all these appeals are overlapping and, therefore, we propose to decide these appeals by this common judgment.

II. BRIEF FACTS AND SUBMISSIONS

Civil Appeal No. 11095 of 2018 and Civil Appeal Nos. 11910-11911 of 2018

6. These cross appeals challenge the common judgment and order dated 14th August 2018 passed by the learned Appellate Tribunal for Electricity, New Delhi (hereinafter referred to as "APTEL") in Appeal No. 111 of 2017 & I.A. No.450 of 2018 and in Appeal No.290 of 2017 & I.A. No.519 of 2017.

7. Civil Appeal No.11095 of 2018 is filed by GMR Warora Energy Ltd. (hereinafter referred to as "GWEL"/"Generator") to the extent it was denied compensatory benefits on certain components on the ground of 'Change in Law'.

8. Civil Appeal Nos. 11910-11911 of 2018 have been filed by DNH Power Distribution Co. Ltd. (DPDCL) (hereinafter referred to as "DNH-DISCOM"), being aggrieved by the order of the learned APTEL accepting the claim of GWEL on certain issues and holding the same to be 'Change in Law'.

9. The facts, in brief, giving rise to these appeals are as under:

10. GWEL had set up a Thermal Power Station at Warora, District Chandrapur in the State of Maharashtra with an installed capacity of 600 MW (2 x 300 MW). The Commercial Operation Date ("COD" for short) of Unit 1 was 19th March 2013 and that of Unit 2 was 1st September 2013.

11. GWEL had entered into long term Power Purchase Agreements ("PPAs" for short) with DNH-DISCOM for supply of 200 MW power to Maharashtra State Electricity Distribution Company Limited ("MSEDCL" for short) on 17th March 2010 ["MSEDCL PPA"] and for supply of 200 MW power on 21st March 2013 ("DNH PPA"), after it emerged as the successful bidder for supply of power to MSEDCL/ DNH-DISCOM. The Scheduled delivery date under the MSEDCL PPA was 17th March 2014, whereas under the DNH PPA, it was 1st April 2013. GWEL is also supplying 150 MW power from its power plant to Tamil Nadu Generation and Distribution Corporation ("TANGEDCO" for short) by way of back-to-back arrangement with trading company

GMR Energy Trading Limited, for which purpose, a PPA was signed on 27th November 2013 (“TANGEDCO PPA”).

12. In terms of the PPAs, the cut-off date, which is 7 days prior to the bid deadline, is to be considered for the purpose of claims under ‘Change in Law’. Following are the cut-off dates under the said PPAs.

-	DNH PPA	MSEDCL PPA	TANGEDCO PPA
Cut-off date	1.6.2012	31.7.2009	27.2.2013

13. Certain ‘Change in Law’ events occurred with regard to MSEDCL PPA and DNH PPA after the cut-off date. The same were notified by GWEL to MSEDCL/ DNH-DISCOM.

14. GWEL filed Petition No. 8/MP/2014 before the Central Electricity Regulatory Commission (hereinafter referred to as “CERC”) seeking relief for ‘Change in Law’.

15. Vide Order dated 1st February 2017, certain claims were allowed and certain claims were disallowed by the CERC.

16. The claims which were allowed by the CERC are thus:

- “i. Increase in CVD from 8% to 10% and 10% to 12%;
- ii. Increase in Excise Duty;
- iii. Increase in Service Tax;
- iv. Increase in other taxes [Work Contract Tax (WCT), VAT, CST];
- v. Change in Excise Duty on coal;
- vi. Increase in the rate of Royalty on coal;
- vii. Levy of Clean Energy Cess by Government of India (Gol);
- viii. Increase in service tax on transportation of goods by IR;
- ix. Levy of Swachh Bharat Cess.”

17. The claims which were disallowed by the CERC are thus:

- “i. Withdrawal of deemed export benefit by DGFT;
- ii. Design changes in Coal Handling Plant (CHP);
- iii. Increase in the rate of Minimum Alternate Tax (MAT);
- iv. Increase in Busy Season Surcharge and Development surcharge on transportation of coal by Indian Railways (IR);
- v. Increase in sizing charges and surface transportation charges by Coal India Ltd. (CIL);
- vi. Increase in operating cost on account of specification of coal quality to be used for the TPS;

- vii. Change from UHV to GCV based pricing of coal;
- viii. Incremental increase in Interest on Working Capital (IWC) on account of increase in Project costs.”
18. Being aggrieved by the judgment and order passed by the CERC, cross-appeals were filed by both GWEL and DNH-DISCOM.
19. Vide the impugned judgment, the learned APTEL, while concurring with the view of CERC on the claims allowed by it, further allowed the claims on the ground of ‘Change in Law’ on the following components:
- (i) Busy Season Surcharge and Development Surcharge;
 - (ii) Ministry of Environment and Forest (“MoEF”) Notification on coal quality; and
 - (iii) Change in NCDP and Carrying Cost.
20. However, the rest of the claims were disallowed by the learned APTEL, concurring with the view taken by the CERC. Insofar as the appeal filed by DNH-DISCOM is concerned, the same was dismissed by the learned APTEL. Hence, these cross-appeals.
21. We have heard Mr. Vishrov Mukherjee, learned counsel appearing on behalf of the GWEL and Mr. Samir Malik, learned counsel appearing on behalf of MSEDCL and Mr. M.G. Ramachandran, learned Senior Counsel appearing on behalf of the DNH-DISCOM.
22. Mr. Vishrov Mukherjee submits that the learned APTEL has erred in disallowing the claim on the following items:
- (i) Withdrawal of Deemed Export Benefit by way of Circular dated 28th December 2011 and Notification dated 28th December 2011 issued by the Directorate General of Foreign Trade (“DGFT”) and amendment to the Foreign Trade Policy dated 21st March 2012;
 - (ii) Imposition of Crushing/Sizing charges and Surface Transportation Charges by Notification dated 15th October 2009;
 - (iii) Change in system of classification of coal by Coal India Limited (“CIL” for short) from Useful Heat Value (“UHV” for short) to Gross Calorific Value (“GCV” for short) system of pricing by way of Notification dated 30th December 2011;
 - (iv) Increase in levy of Minimum Alternate Tax (“MAT” for short) pursuant to amendment of Section 115JB of the Income Tax Act, 2012;
 - (v) Design changes in Coal Handling Plant in terms of letter issued by the **Central Electricity** Authority (“CEA” for short) dated 19th April 2011;
 - (vi) Increase in working capital.
23. It is submitted that all these changes have taken place on account of the Notifications/Orders/Circulars issued by the instrumentalities of the State and as such, the learned APTEL ought to have allowed the claim for compensation on account of ‘Change in Law’ on the aforesaid items also.

24. It is submitted that the compensation on account of the 'Change in Law' is based on the principle of restitution so as to put back the party to the same economic position it was in, had the 'Change in Law' event not taken place. However, this has not been considered in the correct perspective by the learned APTEL.

25. Learned counsel appearing on behalf of the DNH-DISCOM and MSEDCL, on the contrary, submit that the learned APTEL has erred in considering the Busy Season Surcharge and Development Surcharge, MoEF Notification on coal quality, Change in NCDP and Carrying Cost as 'Change in Law' events. He submits that when the Generator had submitted its bid, it was aware that there was a likelihood of variations on certain payments to be made and the same were factored in while submitting the bid. It is, therefore, submitted that the learned APTEL erred in granting 'Change in Law' benefits on the said issues.

Civil Appeal Nos. 4628-4629 of 2021

26. These appeals have been filed by Uttar Haryana Bijli Vitran Nigam Limited and Dakshin Haryana Bijli Vitran Nigam Limited (hereinafter referred to as "Haryana Discoms") challenging the common judgment and order dated 7th June 2021 passed by the learned APTEL in Appeal No.158 of 2017 & I.A. No.575 of 2018 and Appeal No. 316 of 2017. Appeal No.158 of 2017 & I.A. No.575 of 2018 were filed by Adani Power (Mundra) Limited (hereinafter referred to as "AP(M)L"), being aggrieved by the order passed by the CERC dated 6th February 2017, whereby the CERC had denied certain claims for compensation on certain components on account of 'Change in Law', whereas Appeal No.316 of 2017 was filed by Haryana Discoms challenging grant of claim of compensation on certain components on the ground of 'Change in Law'.

27. The Chart of claims which were allowed and disallowed by the CERC is as under:

"107. Based on the above analysis and decisions, the summary of our decision under the Change in Law during the operating period of the project is as under:

Components	Change in Law Event
Change in Rate of Royalty	Allowed
Levy of Central Excise Duty subject to directions in para 32 of the order	Allowed
Levy of Clean Energy Cess	Allowed
Levy of Customs Duty on energy removed from SEZ to DTA	Allowed
Increase in Busy Season Surcharge on transportation of coal	Not Allowed

Increase in Development Surcharge on transportation of coal	Not Allowed
Levy of Service Tax on transportation of coal	Allowed
Levy of Green Energy Cess in Gujarat	Liberty granted to approach after Hon`ble Supreme Court's Decision
Increase in Sizing Charges of coal	Not Allowed
Increase in Surface Transportation	Not Allowed
Change in pricing of coal from UHV to GCV basis	Not Allowed
Change in class from 140 to 150 for Railway freight for coal for trainload movement	Not Allowed
Levy of Minimum Alternate Tax on plants situated in SEZ	Not Allowed
Linking railway tariff revision with movement in cost of fuel	Not Allowed
Imposition of Swachh Bharat Cess	Allowed
Payment to National Mineral Exploration Trust	Allowed
Payment to District Mineral Foundation	Allowed
Installation of FGD as per Environmental clearance dated 20.5.2010 Auxiliary consumption due to FGD installation affecting capacity charges Additional operating expenditure on FGD	Not decided and liberty granted
Carrying cost	Not Allowed

28. Being aggrieved by the order of the CERC, cross-appeals were filed by AP(M)L so also by Haryana Discoms before the learned APTEL. The Haryana Discoms challenged that part of the order of the CERC which allowed claim on components

on the ground of 'Change in Law', whereas AP(M)L challenged that part of the order of the CERC which disallowed its claim on various components.

29. Though AP(M)L had sought 'Change in Law' compensation on various components, the same was allowed by the learned APTEL by the impugned order only on the ground of:

- (i) 'Busy Season Surcharge and Developmental Surcharge on transportation of coal', and
- (ii) 'Carrying Cost'.

30. The claim of AP(M)L pertaining to increase in Surface Transportation Charges so also Sizing Charges of coal were denied by the learned APTEL, concurring with the view taken by the CERC.

31. Being aggrieved by the orders passed by the CERC and the learned APTEL allowing 'Change in Law' on certain components, the Haryana Discoms have approached this Court.

32. We have heard Ms. Poorva Saigal, learned counsel appearing on behalf of the Haryana Discoms and Dr. A.M. Singhvi, learned Senior Counsel appearing on behalf of AP(M)L.

33. Ms. Poorva Saigal submits that the learned APTEL grossly erred in reversing the well-reasoned findings of the CERC on the issue of Busy Season Surcharge and Developmental Surcharge on transportation of coal. She, therefore, submits that the finding of the learned APTEL with regard to the same needs to be set aside.

34. Dr. A.M. Singhvi, on the contrary, submits that the Busy Season Surcharge as well as the Developmental Surcharge are revised as per the Notifications/Circulars issued by the Ministry of Railways and as such, they would come within the definition of 'Change in Law'.

Civil Appeal Nos. 12055-12056 of 2018

35. These appeals, filed by Jaipur Vidyut Vitran Nigam Ltd., Ajmer Vidyut Vitaran Nigam Ltd. and Jodhpur Vidhyut Vitaran Nigam Ltd. (hereafter referred to as "Rajasthan Discoms"), challenge the common judgment and order dated 14th August 2018, passed by the learned APTEL in Appeal No. 119 of 2016 & I.A. Nos. 668 and 674 of 2016 and in Appeal No.277 of 2016 & I.A. No.572 of 2016.

36. Appeal No. 119 of 2016 & I.A. Nos. 668 & 674 of 2016 were filed by M/s Adani Power Rajasthan Ltd. ("APRL" for short), being aggrieved by the judgment and order dated 15th March 2016, passed by the Rajasthan Electricity Regulatory Commission (hereinafter referred to as "State Commission") thereby disallowing some of its claims on account of 'Change in Law', whereas Appeal No. 277 of 2016 and I.A. No.572 of 2016 were filed by the Rajasthan Discoms, being aggrieved by the order of the State Commission of the same date vide which some of the 'Change in Law' claims were allowed by the CERC.

37. The 'Change in Law' claims which were allowed by the State Commission are as under:

- i. Change in Rate of Royalty Payable on Domestic Coal;

ii. Levy of Service Tax on Transportation of Goods by Indian Railways (IR); and

iii. Increase in Fee for 'Consent to Operate'.

38. The 'Change in Law' claims which were not allowed by the State Commission are thus:

1.	Change in Pricing Mechanism of Coal from Useful Heat Value (UHV) Basis to Gross Calorific Value Basis (GCV)
2.	Increase in Sizing Charges for coal charged by Coal India Ltd. (CIL)
3.	Increase in Surface Transportation Charges
4.	Increase in Busy Season Surcharge on Transportation of Coal by Indian Railways
5.	Increase in Development Surcharge levied on Transportation of Coal by Railways
6.	Levy of Fuel Adjustment Component
7.	Levy of Port Congestion Surcharge
8.	Levy of Forest Tax
9.	Change in Classification of Coal for Train Load Movement

39. Vide the impugned judgment, the learned APTEL dismissed the appeal of the Rajasthan Discoms and partly allowed the appeal of APRL allowing its claims on the ground of 'Busy Season Surcharge', 'Development Surcharge', 'Port Congestion Surcharge', 'Forest Tax' and 'Carrying Cost'. Being aggrieved thereby, the Rajasthan Discoms have approached this Court.

40. We have heard Mr. V. Giri, learned Senior Counsel appearing on behalf of the Rajasthan Discoms and Dr. A.M. Singhvi, learned Senior Counsel appearing on behalf of the APRL.

41. Mr. V. Giri submits that clause 10 in the PPA is referable only to taxes under Article 268 of the Constitution of India. He submits that the learned APTEL has, therefore, erred in allowing 'Change in Law' benefits on the issues related to Busy Season Surcharge, Development Surcharge, Port Congestion Charges, Forest Tax and Carrying Cost which are not taxes referable to Article 268 of the Constitution.

42. Dr. Singhvi made arguments on similar lines as have been made in the other appeals.

Civil Appeal Nos. 2935-2936 of 2020

43. These appeals have been filed by the Rajasthan Discoms and Rajasthan Urja Vikas Nigam Ltd. challenging the common judgment and order dated 29th January 2020, passed by the learned APTEL in Appeal no.284 of 2017 and Appeal No. 09 of 2018.

44. Appeal No. 284 of 2017 was filed by APRL challenging the order dated 8th June 2017 passed by the State Commission, being aggrieved by the disallowance of its claim on some components on the ground of 'Change in Law' and carrying cost, whereas Appeal No.9 of 2018 was filed by Rajasthan Discoms being aggrieved by the claims which were allowed by the State Commission.

45. The list of the components which were allowed and which were not allowed on the ground of 'Change in Law' is thus:

"Sr. No.	Change in Law's items	Decision of the Commission
A	Levies on Royalty (i) National Mineral Exploration Trust effective from 14.08.2015 (ii) District Mineral Foundation effective from 12.01.2015	Allowed
B	Levy of Swachh Bharat Cess (SBC) along with Service Tax for rail transportation effective from 15.11.2015	Allowed
C	Levy of Swachh Bharat Cess @0.5% along with Service Tax - Operation Period effective from 15.11.2015	Not Allowed
D	Levy of Krishi Kalyan Cess (KKC) along with Service Tax and Swachh Bharat Cess for rail transportation from 1st June 2016	Allowed
E	Levy of Krishi Kalyan Cess @0.5% along with Service Tax and Swachh Bharat Cess - Operation Period from 1st June 2016.	Not Allowed
F	Amendment to Environmental (Protection) Rules 1986	Not Allowed

G	Levy of Coal Terminal Surcharge (CTS) effective from 22.08.2016	Not Allowed
H	Utilization of Fly Ash generated from coal and lignite based thermal power projects	Not Allowed
I	CG Paryavaran Upkar	Not Allowed
J	CG Vikas Upkar	Not Allowed
K	Service Tax on transportation of goods by a vessel from a place outside India up to the custom station of clearance in India	Not Allowed
L	Carrying Cost	Not Allowed"

46. As stated above, being aggrieved by that part of the order which disallowed its claim, APRL preferred the aforesaid Appeal before the learned APTEL, whereas the Rajasthan Discoms, being aggrieved by that part of the order which allowed claims on certain components, also filed an Appeal before the learned APTEL.

47. The learned APTEL, while dismissing the appeal of the Rajasthan Discoms, partly allowed the appeal of the APRL by allowing compensation on certain other components on the ground of 'Change in Law'.

48. The components on which 'Change in Law' benefits were granted by the learned APTEL are thus:

- (i) Coal Terminal Surcharge;
- (ii) Chhattisgarh Paryavaran Upkar;
- (iii) Chhattisgarh Vikas Upkar;
- (iv) Change in Swacch Bharat Cess at the rate of 0.5% on Service Tax for Operation Period;
- (v) Change in Krishi Kalyan Cess at the rate 5% on Service Tax for Operation Period;

49. In addition to grant of relief on the ground of 'Change in Law', the learned APTEL also granted 'Carrying Cost'.

50. Arguments similar to the ones advanced in Civil Appeal No. 12055-12056 of 2018 were advanced by Mr. V. Giri, learned Senior Counsel appearing on behalf of the Rajasthan Discoms, as well as by the learned counsel for the respondents.

Civil Appeal No. 3123 of 2019 and Civil Appeal No.5372 of 2019

51. These are cross appeals. Civil Appeal No.3123 of 2019 has been filed by Bihar State Power (Holding) Company Ltd. (hereinafter referred to as “Bihar Discoms”) and Civil Appeal No.5372 of 2019 has been filed by GMR Kamalanga Energy Limited and GMR Energy Limited (hereinafter referred to as “GKEL”), challenging the judgment and order dated 21st December 2018 passed by the learned APTEL in Appeal No.193 of 2017 & I.A. No. 449 of 2018.

52. Appeal No.193 of 2017 & I.A. No.449 of 2018 were filed by GKEL challenging the order of the CERC dated 7th April 2017, aggrieved by the denial of its claims on certain components on the ground of ‘Change in Law’. The Bihar Discoms have challenged that part of the order of the learned APTEL which allowed claims of GKEL on the ground of ‘Change in Law’.

53. By the impugned order, the learned APTEL granted claims on the ground of:

- (i) Change in NCDP (cancellation of Captive Block vis-à-vis tapering linkage),
- (ii) busy season surcharge and developmental surcharge,
- (iii) carrying cost; and
- (iv) add on premium price.

54. We have heard Mr. Vishrov Mukerjee, learned counsel appearing on behalf of the GKEL/Generator and Ms. Anushree Bardhan, learned Counsel appearing on behalf of the Bihar Discoms.

55. Mr. Vishrov Mukerjee submits that the learned APTEL as well as the CERC have grossly erred in rejecting the claim for compensation on the ground of:

- (i) change in source of coal from Mahanadi Coalfields Ltd. (“MCL” for short) to Eastern Coalfields Ltd. (“ECL” for short) vide Notification dated 26th February 2014 issued by the CIL;
- (ii) change in mode of transportation from rail to road vide Notification dated 29th September 2014 issued by MCL;
- (iii) increase in levy of Minimum Alternate Tax (“MAT” for short); and
- (iv) interest on working capital.

56. Learned counsel submitted that change in source of coal from MCL to ECL was on account of the notification issued by the CIL, which is an instrumentality of the State. Similarly, he submitted that the change in mode of transportation from rail to road was on account of the notification issued by the MCL. Learned counsel submits that, since, on account of these notifications, the cost of transportation of coal increased, applying the restitutionary principle, the CERC as well as the learned APTEL ought to have granted claims on the basis of ‘Change in Law’. He further submits that increase in levy of MAT has also been increased by the Union of India and, as such, the same would also amount to ‘Change in Law’. It is further submitted that interest on working capital was also increased on account of the orders of the instrumentalities of the State and, as such, compensation also ought to have been granted for the same.

57. Learned counsel for the Bihar Discoms submits that the CERC as well as the

learned APTEL have grossly erred in allowing claims on certain components on the ground of 'Change in Law'.

Civil Appeal No. 6641 of 2019

58. This appeal filed by GKEL arises out of the judgment and order dated 27th May 2019, passed by the learned APTEL in Appeal No.195 of 2016, thereby partly allowing the appeal.

59. GKEL filed Petition No.79/MP/2013 before the CERC claiming compensation on various component on the ground of 'Change in Law' events.

60. The CERC, vide order dated 3rd February 2016, disallowed compensation for the following components:

- (a) Change from UHV to GCV based pricing of coal pursuant to notification issued by the Government of India;
- (b) Increase/revision in the railway freight charges pursuant to notifications issued by Ministry of Railways and Ministry of Finance;
- (c) Increase in the rate of Minimum Alternate Tax ("MAT") rates;
- (d) Increase in Value Added Tax in the State of Odisha;
- (e) Increase in water charges pursuant to notifications issued by the Government of Odisha;
- (f) Incremental increase in interest on working capital on account of increase in costs during the operating period.

61. Being aggrieved thereby, Appeal No.195 of 2016. was preferred by GKEL. As stated above, the learned APTEL partly allowed the appeal and held that GKEL was entitled to compensation on following grounds.

- (i) Increase/revision in the railway freight charges in terms of notifications issued by the Ministry of Railways and Ministry of Finance on account of imposition of development surcharge, busy season surcharge and service tax;
- (ii) VAT rate enhancement from 4% to 5% from 30.03.2012 onwards;
- (iii) Carrying cost/interest on compensation on the above items after ascertainment of the same by computation, which shall be assessed from the date of respective notification/circular/order from the concerned Ministry/Department/Governmental instrumentality till payment is made.

62. Appellant-GKEL, being unsatisfied with the same, has approached this Court praying for a direction that it is also entitled to compensation on various other components, viz.,

- (i) Increase in Water Charges;
- (ii) Shift from UHV to GCV methodology of pricing of coal;
- (iii) Increase in rate of MAT; and
- (iv) Interest on working capital.

63. Arguments similar to the ones advanced in Civil Appeal No. 3123 of 2019 and Civil Appeal No.5372 of 2019 were advanced by the learned counsel for the parties.

Civil Appeal Nos. 5583-5584 of 2021

64. These appeals, filed by Bihar Discoms, arise out of the judgment and order dated 6th August 2021, passed by the learned APTEL in Appeal No. 423 of 2019 and in Appeal No.173 of 2021.

65. In the said case, the learned APTEL, vide order dated 21st December 2018, had allowed the following claims as 'Change in Law' and remanded the matter back to the CERC to determine compensation due to GKEL:

- (a) Shortfall in linkage coal and deviation in NCDP;
- (b) Cancellation of captive coal block;
- (c) Imposition of Busy Season Surcharge and Development Surcharge;
- (d) Levy of Add-On Premium over and above the notified price of coal; and
- (e) Carrying Cost.

66. Upon remand, the CERC passed order dated 16th September 2019, thereby granting compensation on certain components on the ground of 'Change in Law' including carrying cost.

67. Contending that the order passed by the CERC did not give effect to the 'Change in Law' components as directed by the learned APTEL, an appeal being Appeal No. 423 of 2019 came to be preferred by GKEL before the learned APTEL.

68. Bihar Discoms had also filed an appeal being Appeal No.173 of 2021, before the learned APTEL, being aggrieved by the benefits which were granted by the CERC.

69. By the impugned order, the learned APTEL held that the GKEL was entitled to recover expenditure involved in procurement of alternate coal due to shortfall in domestic coal supply corresponding to scheduled generation pertaining to the obligations under the Bihar PPA. The learned APTEL held that this was required to be done in order to restore the appellant-GKEL to the same economic position as before as if no 'Change in Law' event had occurred.

70. We have heard Ms. Anushree Bardhan, learned counsel appearing on behalf of the appellant-Bihar Discoms and Mr. Maninder Singh, learned Senior Counsel appearing on behalf of GKEL.

71. Ms. Anushree Bardhan submits that the learned APTEL ought to have granted benefit of 'Change in Law' restricting it to shortfall for only 894.5 MW, which was the amount specified in the PPA, and not for the entire 1050 MW, which is the installed capacity. She further submits that the learned APTEL had also erred in granting add on premium on account of extension of tapering linkage by three years.

72. Shri Maninder Singh, learned Senior Counsel submits that insofar as the first issue with regard to shortfall of coal supply is concerned, the same is squarely covered by the judgments of this Court in the cases of **Energy Watchdog v. Central**

Electricity Regulatory Commission and others, [\(2017\) 14 SCC 80](#), Jaipur Vidyut Vitaran Nigam Ltd. and others v. Adani Power Rajasthan Limited and another, 2020 SCC Online SC 697 (hereinafter referred to as “Adani Rajasthan case”) and MSEDCL v. APML & Ors. (supra).

73. He further submits that the delay in operationalization of the captive mines was not on account of any reason attributable to GKEL. He submits that, since the allotment of coal blocks was cancelled on account of the judgment of this Court in the case of Manohar Lal Sharma v. The Principal Secretary & Ors., [\(2014\) 9 SCC 516](#) and [2014 \(9\) SCC 614](#), GKEL was also entitled for the benefit for the said period.

74. Insofar as Busy Season Surcharge is concerned, he submits that there is a concurrent finding of fact. He submits that, in any case, the said charges are issued by the Railway Board by issuing Notifications/Circulars. He submits that since the Railway is an instrumentality of the State, both the CERC and the learned APTEL have concurrently held that the Generator would be entitled to compensation on the ground of ‘Change in Law’.

Civil Appeal No. 39 of 2021

75. This appeal filed by the DNH-DISCOM arises out of the judgment and order dated 13th October 2020, passed by the learned APTEL in Appeal No.283 of 2019 & I.A. Nos. 2188 & 1229 of 2019, thereby dismissing the said appeal arising out of the judgment and order passed by the CERC dated 16th May 2019.

76. The DNH-DISCOM had initiated a competitive bidding process through issuance of a Request for Proposal (“RFP” for short) in March 2012 for procurement of power on Long Term Basis under Case-1 bidding procedure. As per the RFP, the cut-off date was 1st June 2012.

77. The respondent-GWEL emerged as the successful bidder for supplying Aggregated Contracted Capacity of 200 MW at a levelized tariff of Rs.4.618 per Unit.

78. Accordingly, Letter of Intent (LoI) was issued by DNH-DISCOM on 14th August 2012. An application/petition being Petition No.87/2012 came to be filed before the Joint **Electricity Regulatory Commission** (hereinafter referred to as “Joint **Commission**”) for approval of the PPA and adoption of tariff. GWEL was also joined as a co-petitioner in the said Petition. The Joint **Commission**, vide order dated 19th February 2013, approved the PPA. Accordingly, the PPA came to be executed on 21st March 2013.

79. GWEL filed Petition No. 8/MP/2014 before the CERC seeking compensation on certain components on the ground of ‘Change in Law’. The same was decided by the CERC vide order dated 1st February 2017. Aggrieved thereby, both the appellant-DNH-DISCOM and the respondent-GWEL filed appeals before the learned APTEL. In appeal, the learned APTEL remanded the matter to the CERC vide order dated 14th August 2018 for considering certain issues. Being aggrieved by the order dated 14th August 2018, the appellant-DNH-DISCOM filed an appeal, being Civil Appeal No.11910 of 2018, before this Court. The said appeal is also being decided in the present batch of appeals, by this common judgment.

80. On remand, the CERC passed an order dated 16th May 2019 and allowed the claim of GWEL/Generator on the ground of ‘Change in Law’ occurring on account of

the enforcement of the 'Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India' ("SHAKTI Policy" for short). Being aggrieved thereby, DNH-DISCOM had filed an appeal before the learned APTEL. As stated herein above, the same was dismissed by the learned APTEL vide the impugned judgment.

81. We have heard Mr. C.A. Sundaram, learned Senior Counsel appearing on behalf of the DNH-DISCOM and Mr. Niranjana Reddy, learned Senior Counsel appearing on behalf of the respondent-GWEL.

82. Mr. C.A. Sundaram submits that, from the presentation which was given by the GWEL, it was apparent that it was given on the basis that coal supply would be restricted only to 65%. He submits that, as such, the grant of benefit on account of 'Change in Law' on the ground that there was 100% assurance by CIL is not permissible. He, therefore, submits that the judgment and order of the learned APTEL deserves to be set aside to that extent.

83. Mr. Niranjana Reddy, on the contrary, submits that the bid of GWEL was submitted on 8th June 2012, on which date NCDP 2007 was in force. He submits that, subsequently, the NCDP 2007 was modified on 31st July 2013 and thereafter SHAKTI Policy has come into effect on 22nd May 2017 and, as such, judgment and order of the learned APTEL warrants no interference.

Civil Appeal No. 5005 of 2022 and Civil Appeal No. 4089 of 2022

84. These appeals challenge the common judgment and order dated 22nd March 2022 passed by the learned APTEL in Appeal No. 118 of 2021 and 40 of 2022, filed by Rattan India Power Limited (hereinafter referred to as "Rattan India") and Adani Power Maharashtra Limited (for short, "APML") respectively, thereby challenging the orders dated 1st January 2019 and 3rd August 2018, passed by Maharashtra Electricity Regulatory Commission (hereinafter referred to as 'MERC') in Case No. 227 of 2018 and Case No. 124 of 2018 respectively.

85. The facts in brief giving rise to the present appeals are as under:

Rattan India has entered into PPAs dated 22nd April 2010 and 5th June 2010 with MSEDCL for supply of 1200 MW aggregate power at levelized tariff of Rs.3.260 KWH for a period of 25 years. It filed a petition before MERC, being Case No. 227 of 2018, claiming compensation on the ground of 'Change in Law' occurring on account of the circular dated 19th December 2017 issued by CIL, vide which it levied the Evacuation Facility Charges (for short, "EFC"). The same was rejected by MERC, vide order dated 1st January 2019. A similar petition being Case No. 124 of 2018 was also filed by APML, raising a similar claim before MERC, which was also rejected by MERC, vide its earlier order dated 3rd August 2018.

86. Being aggrieved thereby, Rattan India had filed an Appeal No. 118 of 2021 and APML had preferred an Appeal No. 40 of 2022. By the impugned order, the learned APTEL had held EFC imposed by CIL vide Circular dated 19th December 2017 to be a 'Change in Law' event and, accordingly, held the Generators to be entitled to compensation on the said ground. Being aggrieved thereby, the MSEDCL has preferred these appeals.

87. We have heard Shri Balbir Singh, learned Additional Solicitor General (for short, "ASG") and Shri G. Saikumar, learned counsel appearing on behalf of the appellant

and Shri Sajan Poovayya, learned Senior Counsel for the respondents in Civil Appeal No. 5005 of 2022 and Shri Vishrov Mukherjee, learned counsel appearing on behalf of the respondents in Civil Appeal No. 4089 of 2022.

88. Shri Balbir Singh, relying on Clause 9.1 of the Coal Supply Agreement (for short, "CSA") dated 28th December 2012 entered into between Southeastern Coalfields Limited and APML, submitted that CSA defines as to what shall be the base price of coal. He submitted that Clause 9.2 of the said CSA specifically provides for other charges which are permissible. Relying on Clause 9.4 of the CSA, he submitted that in all cases, the entire freight charges, irrespective of the mode of transportation of coal supplied, shall be borne by the purchaser. The learned ASG submitted that the EFC does not partake the character of a statutory levy. However, he submitted that, in any case, it does not have the force of law. He, therefore, submitted that APTEL has grossly erred in holding the circular of CIL dated 19th December 2017 to qualify as 'Change in Law'.

89. Shri Singh further submitted that the direction to pay the carrying cost at the rate provided for Late Payment Surcharge (for short, "LPS") is also not permissible in law. He submitted that this Court, in Adani Rajasthan case (supra), has directed the carrying cost to be paid at the rate of 9% and as such, in the present case, it ought to have been directed to be paid at the same rate.

90. Shri Singh also relies on the judgment of this Court in the case of Ashoka Smokeless Coal India (P) Limited and Others v. Union of India and Others, [\(2007\) 2 SCC 640](#) in support of the proposition that CIL is free to fix the price of coal and that the Union of India has no control over it.

91. Shri Poovayya, on the contrary, submitted that the levy is mandatory in nature. Unless the said levies are paid, the coal would not be supplied. He further submitted that since the CIL is an instrumentality of the Government, the order issued by it would amount to a law within the definition of "Law" as defined in the PPA. He further submitted that insofar as the carrying cost is concerned, there is a specific provision in the PPA in Article 11.8.3, which is binding on the parties. He submitted that on account of non-payment of the dues of the generating companies by DISCOMS, the generating companies are required to borrow the funds at the market rate and as such, applying the restitutionary principle, it is entitled to carrying cost as provided under the agreement.

III. ADDITIONAL ISSUES

92. After hearing the learned counsel for the parties at length, we find that, apart from the three issues that were already decided by this Court in the case of MSEDCL v. APML & Ors. (supra), the issues as to whether the following components could be considered as 'Change in Law' events fall for consideration herein:

- (i) Busy Season Surcharge & Development Surcharge and Port Congestion Surcharge;
- (ii) MoEF Notification on coal quality;
- (iii) Shortfall in linkage coal due to Change in NCDP;
- (iv) Forest Tax;

(v) Add on Premium price.

(vi) Evacuation Facility Charges (EFC).

Apart from that, another question that requires consideration is, as to whether various taxes/charges imposed by various State Governments would also fall under 'Change in Law' events or not.

The other question that requires considerations is, as to whether at what rate the Generators would be entitled to 'carrying cost'.

IV. CONSIDERATION

93. For appreciating the rival submissions, we will have to construe the term "Law", which has been defined in the PPAs, which reads thus:

"“Law” means, in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, Notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, Notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the CERC and the MERC.”

94. Perusal of the definition of the term "Law" itself would clearly show that the term "Law" would mean all laws including Electricity Laws in force in India and any statute, ordinance, regulation, Notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law. It would further reveal that the term "Law" shall also include all applicable rules, regulations, orders, Notifications by an Indian Governmental Instrumentality and shall also include all rules, regulations, decisions and orders of the CERC and the MERC.

95. In any case, the issue as to what would amount to "Law" is no more res integra. This Court, in the case of Energy Watchdog (supra), has observed thus:

"57. Both the letter dated 31-7-2013 and the revised Tariff Policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would."

96. The aforesaid view of this Court taken in the case of Energy Watchdog (supra) has been approved by a Bench of three learned Judges of this Court in Adani

Rajasthan case (supra) and also followed by this Court when the two linked matters out of this batch of appeals were decided by this Court in the case of MSEDCL v. APML & Ors. (supra). It cannot be denied that CIL is an instrumentality of the Government of India and its orders, insofar as price of fuel are concerned, are binding on all its subsidiaries.

97. It will further be relevant to refer to Clause 9.0 of the CSA, which reads thus:

“9.0 PRICE OF COAL:

The “As Delivered Price of Coal” for the Coal supplies pursuant to this Agreement shall be the sum of Base Price, Other Charges and Statutory Charges, as applicable at the time of delivery of Coal.”

It is thus clear that price of coal includes the sum of base price, other charges and statutory charges as applicable at the time of delivery of coal.

98. As discussed herein above, the term ‘Law’ would also include all applicable rules, regulations, orders, Notifications issued by an Indian Governmental Instrumentality.

99. It would thus be clear that all such additional charges which are payable on account of orders, directions, Notifications, Regulations, etc., issued by the instrumentalities of the State, after the cut-off date, will have to be considered to be ‘Change in Law’ events. The Generators would be entitled to compensation on the restitutionary principle on such changes occurring after the cut-off date.

100. Having held thus, we will now consider some of the components which are common in most of these appeals.

Busy Season Surcharge, Development Surcharge And Port Congestion Surcharge

101. Insofar as increase in Busy Season Surcharge, Development Surcharge on transportation of coal, and Port Congestion Surcharge by the Indian Railways are concerned, the learned APTEL had found that the Indian Railways is an instrumentality of the State. It has been found that the Busy Season Surcharge, Development Surcharge and Port Congestion Surcharge were increased from time to time vide Circulars/Notifications issued by the Ministry of Railways, through the Railway Board.

102. A Constitution Bench of this Court, in the case of Railway Board, Government of India v. M/s Observer Publications (P) Ltd., [\(1972\) 2 SCC 266](#), has held the Railway Board to be a State within the meaning of Article 12 of the Constitution of India.

103. As such, no error could be found in the finding of the learned APTEL that the revision of charges to be paid on Busy Season Surcharge, Development Surcharge and Port Congestion Charges from time to time by the ‘Railway Board’ would come within the ambit of ‘Change in Law’.

MoEF Notification on Coal Quality

104. Insofar as MoEF notification on coal quality is concerned, the MoEF, vide Notification dated 2nd January 2014, i.e. subsequent to the particular cut-off date, i.e. 1st June 2012, has mandated power projects to use beneficiated coal with ash

content lower than 34%. The draft notification of MoEF dated 11th July 2012 culminated into the final Notification dated 2nd January 2014. By no stretch of imagination, can it be said that MoEF is not an instrumentality of the State.

105. By the said Notification, MoEF has mandated power projects to use beneficiated coal with ash content lower than 34%. Admittedly, prior to the cut-off date, the same was not a requirement. It is thus clear that the said Notifications dated 11th July 2012 and 2nd January 2014 would amount to "Change in Law". As such, no fault can be found with the finding of the learned APTEL that the same would amount to 'Change in Law'.

Shortfall in Linkage Coal due to Change in NCDP

106. Insofar as shortfall in linkage coal due to changes in the NCDP issued by the Ministry of Coal ("MoC" for short) is concerned, the issue is no more res integra. This Court in the case of **Energy** Watchdog (supra) so also in Adani Rajasthan case (supra) and recently in MSEDCL v. APML & Ors. (Supra) has held that the change in NCDP would amount to 'Change in Law'.

Forest Tax

107. Insofar as Forest Tax is concerned, perusal of the material placed on record would reveal that, as on the cut-off date, there was no Forest Tax applicable on coal mined and transported from South Eastern Coalfields Limited ("SECL" for short) mines located in Forest area. For the first time, vide Notification of the Chhattisgarh State Government, Department of Forest, under the provisions of Chhattisgarh Transit (Forest Produce Rule) 2001, a fee at the rate of Rs.7 per ton was levied. Undisputedly, the said Notification is issued by the Forest Department of the Government of Chhattisgarh, which is an instrumentality of the State. As such, no error can be found with the finding of the learned APTEL in that regard.

Add on Premium Price

108. Insofar as 'Add on premium price' is concerned, undisputedly, 'add on premium' was required to be paid on account of cancellation of captive coal blocks and inordinate delay on account of Go-No-Go policy. As such, it cannot be said that the reasoning adopted by the learned APTEL is perverse and arbitrary.

Evacuation Facility Charges (EFC)

109. Undisputedly, EFC was imposed by CIL vide its Circular dated 19th December 2017.

110. As already discussed herein above, CIL is an instrumentality of the State. It is thus clear that, on the cut-off date, there was no requirement of EFC, which has been brought into effect only on 19th December 2017. As such, the circular of CIL dated 19th December 2017 would also amount to 'Change in Law'.

111. As discussed herein above, it is also not in dispute that EFC has been paid by the generators while paying the base price, other charges and statutory charges at the time of delivery of coal. As such, no interference would be warranted with the said finding.

112. That leaves us with the issue with regard to carrying cost.

Carrying Cost

113. This is the issue on which there is a serious contest between the DISCOMS and the Generators.

114. On one hand, it is the submission of the DISCOMS that since there is no description of the same in the PPAs, the rate for granting carrying cost should be a reasonable rate. On the contrary, it is the submission of the Generators that there is a specific provision in the PPAs, which provides that the carrying cost has to be paid at the rate as per the rate specified for late payment surcharge. It is submitted that this is provided in the PPA so as to give effect to the restitutionary principle.

115. For considering the rival submissions, it will be apposite to refer to the following Articles, which are almost common in most of the PPAs.

“11. Billing and payment.—

11.3. Payment of monthly bills.—

11.3.4. In the event of delay in payment of a monthly bill by any procurer beyond its due date, a late payment surcharge shall be payable by the procurer to the seller at the rate of two (2) per cent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of the delay.

11.8. Payment of supplementary bill.—

11.8.1. Either party may raise a bill on the other party (“supplementary bill”) for payment on account of:

- (i) Adjustments required by the Regional **Energy** Account (if applicable);
- (ii) Tariff payment for change in parameters, pursuant to provisions in Schedule 5; or
- (iii) Change in law as provided in Article 13 and such Bill shall be paid by the other party.

11.8.3. In the event of delay in payment of a supplementary bill by either party beyond one month from the date of billing, a late payment surcharge shall be payable at same terms applicable to the monthly bill in Article 11.3.4.”

116. A perusal of Article 11.3.4 of the PPA would reveal that in the event of delay in payment of a monthly bill by any procurer beyond its due date, a late payment surcharge shall be payable by the procurer to the seller at the rate of 2% in excess of the applicable State Bank Advance Rate (“SBAR” for short) per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of the delay. Article 11.8 of the PPA deals with

Payment of Supplementary Bill. It enables either party to raise a supplementary bill on the other party for payment on account of certain events. Clause (iii) of Article 11.8.1 of the PPA deals with 'Change in Law' as provided in Article 13. It requires the bill to be paid by the other party. Article 11.8.3 of the PPA also provides that in the event of delay in payment of a supplementary bill by either party beyond one month from the date of billing, a late payment surcharge shall be payable at same terms applicable to the monthly bill in Article 11.3.4.

117. This Court in the case of *Uttar Haryana Bijli Vitran Nigam Limited (UNHVNL) and another v. Adani Power Limited and others*, ([2019\) 5 SCC 325](#), after considering the provisions of Article 11, which deals with 'Billing' and Article 13, which deals with 'Change in Law', has observed thus:

"9. It will be seen that Article 13.4.1 makes it clear that adjustment in monthly tariff payment on account of change in law shall be effected from the date of the change in law [see sub-clause (i) of clause 4.1], in case the change in law happens to be by way of adoption, promulgation, amendment, re-enactment or repeal of the law or change in law. As opposed to this, if the change in law is on account of a change in interpretation of law by a judgment of a Court or Tribunal or governmental instrumentality, the case would fall under sub-clause (ii) of clause 4.1, in which case, the monthly tariff payment shall be effected from the date of the said order/judgment of the competent authority/Tribunal or the governmental instrumentality. What is important to notice is that Article 13.4.1 is subject to Article 13.2 of the PPAs.

10. Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party has to be put in the same economic position as if such change in law has not occurred i.e. the party must be given the benefit of restitution as understood in civil law. Article 13.2, however, goes on to divide such restitution into two separate periods. The first period is the "construction period" in which increase/decrease of capital cost of the project in the tariff is to be governed by a certain formula. However, the seller has to provide to the procurer documentary proof of such increase/decrease in capital cost for establishing the impact of such change in law and in the case of dispute as to the same, a dispute resolution mechanism as per Article 17 of the PPA is to be resorted to. It is also made clear that compensation is only payable to either party only with effect from the date on which the total increase/decrease exceeds the amount stated therein.

11. So far as the "operation period" is concerned, compensation for any increase/decrease in revenues or costs to the seller is to be determined and effected from such date as is decided by the appropriate **Commission**. Here again, this compensation is only payable for increase/decrease in revenue or cost to the seller if it is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a contract year. What is clear, therefore, from a reading of Article 13.2, is that restitutionary principles apply in case a certain threshold limit is crossed in both sub-clauses (a) and (b). There is no dispute that the present case is covered by sub-clause (b) and that the aforesaid threshold has

been crossed. The mechanism for claiming a change in law is then set out by Article 13.3 of the PPA.”

118. It could thus be seen that this Court has held that insofar as the “operation period” is concerned, compensation for any increase/decrease in revenues or costs to the seller is to be determined and effected from such date as is decided by the appropriate **Commission**. It has further been held that the compensation is only payable for increase/decrease in revenue or cost to the seller if it is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a contract year. It has been held that restitutionary principles apply in case a certain threshold limit is crossed. It has been held that an in-built restitutionary principle compensates the party affected by such ‘Change in Law’ and the affected party must be restored through monthly tariff payment to the same economic position as if such ‘Change in Law’ had not occurred.

119. From the perusal of paragraph 9, it would also be clear that in case the ‘Change in Law’ happens to be by way of adoption, promulgation, amendment, re-enactment or repeal of the law or ‘Change in Law’, it has to be effected from the date on which such change occurs.

120. In this respect, it will also be apposite to refer to the following observations of this Court in the case of Maharashtra State **Electricity** Distribution Company Limited v. Maharashtra **Electricity** **Regulatory** **Commission** and Others, [\(2022\) 4 SCC 657](#) :

“173. The APTEL correctly found that: (Maharashtra Pradesh **Electricity** **Regulatory** **Commission** case [Maharashtra State **Electricity** Distribution Co. **Ltd.** v. Maharashtra Pradesh **Electricity** **Regulatory** **Commission**, 2021 SCC OnLine APTEL 13], SCC OnLine APTEL para 13)

“13. ... On the contrary, there is a conscious exclusion regarding any suo motu change in the rate to be applied while calculating LPS, it being incorrect to argue on the assumption that the contract permits automatic change in system.”

(emphasis supplied)

174. This Court is unable to accept Mr Singh's submission that the conclusion of APTEL that LPS is not tariff is erroneous. The meaning of the expression tariff has to be considered, and has rightly been considered by APTEL in the context of the relevant provision of the power purchase agreements. The dictionary meaning of tariff may be charge. However, in Article 13 of the Stage 1 and Article 10 of the Stage 2 power purchase agreements, tariff means monthly tariff and tariff adjustment consequential to change in law, is of monthly tariff in respect of supply of **electricity**.

175. As argued by the respondent power generating companies appearing through Mr Rohatgi, Mr Singhvi, Mr Mukherjee and Ms Anand respectively, LPS is only payable when payment against monthly bills is delayed and not otherwise.

176. The object of LPS is to enforce and/or encourage timely payment of charges by the procurer i.e. the appellant. In other words, LPS dissuades the procurer from delaying payment of charges. The rate of LPS has no bearing or

impact on tariff. Changes in the basis of the rates of LPS do not affect the rate at which power was agreed to be sold and purchased under the power purchase agreements. The principle of restitution under the change in law provisions of the power purchase agreements are attracted in respect of tariff.

177. LPS cannot be equated with carrying cost or actual cost incurred for the supply of power. The appellant has a contractual obligation to make timely payment of the invoices raised by the power generating companies, subject, of course, to scrutiny and verification of the same. Mr Mukul Rohatgi has a point that if the funding cost was so much lesser than the rate of LPS, as contended by the appellant, the appellant could have raised funds at a lower rate of interest, made timely payment of the invoices raised by the power generating companies, and avoided LPS.

178. The proposition that courts cannot rewrite a contract mutually executed between the parties, is well settled. The Court cannot, through its interpretative process, rewrite or create a new contract between the parties. The Court has to simply apply the terms and conditions of the agreement as agreed between the parties, as observed by this Court in *Shree Ambica Medical Stores v. Surat People's Coop. Bank* [*Shree Ambica Medical Stores v. Surat People's Coop. Bank Ltd.*, (2020) 13 SCC 564, para 20], cited by Ms Divya Anand. This appeal is an attempt to renegotiate the terms of the PPA, as argued by Ms Divya Anand as also other counsel. It is well settled that courts cannot substitute their own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. The explicit terms of a contract are always the final word with regard to the intention of the parties, as held by this Court in *Nabha Power Ltd. v. Punjab SPCL* [*Nabha Power Ltd. v. Punjab SPCL*, (2018) 11 SCC 508, paras 45 and 72 : (2018) 5 SCC (Civ) 1], cited by Ms Anand.”

121. This Court has clearly held that the DISCOMS have a contractual obligation to make timely payment of the invoices raised by the power generating companies, subject to scrutiny and verification of the same. This Court has rejected the contention that the funding cost was much lesser than the rate of LPS. This Court has reiterated the proposition that the courts cannot rewrite a contract which is executed between the parties. This Court has emphasized that it cannot substitute its own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. It has been held that the explicit terms of a contract are always the final word with regard to the intention of the parties.

122. As already discussed hereinabove, Article 11.8 of the PPA entitles either party to raise a supplementary bill on the other party on account of ‘Change in Law’ as provided in Article 13 and such bills are required to be paid by the either party. Article 11.8.3 of the PPA specifically provides that in the event of delay in payment of a supplementary bill by either party beyond one month from the date of billing, a late payment surcharge shall be payable at the same terms applicable to the monthly bill in Article 11.3.4. Article 11.3.4 of the PPA specifically provides a late payment surcharge to be paid by the procurer to the seller at the rate of 2% in excess of the applicable SBAR per annum on the amount of outstanding payment calculated on day to day basis (and compounded with monthly rest), for each day of the delay.

123. Recently, this Court, in the case of *Uttar Haryana Bijli Vitran Nigam Limited and*

Another v. Adani Power (Mundra) Limited and Another, [\(2023\) 2 SCC 624](#), had an occasion to consider the similar issue. The Court observed thus:

“20. It is clear that the restitutionary principles encapsulated in Article 13.2 would take effect for computing the impact of change in law. We see no reason to interfere with the impugned judgment [Adani Power (Mundra) [Ltd.](#) v. CERC, 2021 SCC OnLine APTEL 67], wherein it has been held by the Appellate Tribunal that Respondent 1 Adani Power had started claiming change in law event compensation in respect of installation of FGD unit along with carrying cost, right from the year 2012 and that it has approached several fora to get this claim settled. Respondent 1 Adani Power finally succeeded in getting compensation towards FGD unit only on 28-3-2018, but the carrying cost claim was denied. The relief relating to carrying cost was granted to Respondent 1 Adani Power by the Appellate Tribunal vide order dated 13-4-2018 [Adani Power [Ltd.](#) v. CERC, 2018 SCC OnLine APTEL 5] which was duly tested by this Court and upheld on 25-2-2019 [Uttar Haryana Bijli Vitran Nigam [Ltd.](#) v. Adani Power [Ltd.](#), [\(2019\) 5 SCC 325](#) : (2019) 2 SCC (Civ) 657] . Once carrying cost has been granted in favour of Respondent 1 Adani Power, it cannot be urged by the appellants that interest on carrying cost should be calculated on simple interest basis instead of compound interest basis. Grant of compound interest on carrying cost and that too from the date of the occurrence of the change in law event is based on sound logic. The idea behind granting interest on carrying cost is not far to see, it is aimed at restituting a party that is adversely affected by a change in law event and restore it to its original economic position as if such a change in law event had not taken place.

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23. We are not persuaded by the submission made on behalf of the appellants that since no fault is attributable to them for the delay caused in determination of the amount, they cannot be saddled with the liability to pay interest on carrying cost; nor is there any substance in the argument sought to be advanced that there is no provision in the PPAs for payment of compound interest from the date when the change in law event had occurred.

24. The entire concept of restitutionary principles engrained in Article 13 of the PPAs has to be read in the correct perspective. The said principle that governs compensating a party for the time value for money, is the very same principle that would be invoked and applied for grant of interest on carrying cost on account of a change in law event. Therefore, reliance on Article 11.3.4 read with Article 11.8.3 on the part of the appellants cannot take their case further. Nor does the decision in Priya Vart case [Priya Vart v. Union of India, [\(1995\) 5 SCC 437](#)] have any application to the facts of the present case as the said case relates to payment of compensation under the Land Acquisition Act and the interest that would be payable in case of delayed payment of compensation.”

124. It is thus clear that this Court has reiterated that once carrying cost has been granted, it cannot be urged that interest on carrying cost should be calculated on simple interest basis instead of compound interest basis. It has been held that grant of compound interest on carrying cost and that too from the date of the occurrence of the ‘Change in Law’ event is based on sound logic. It has been held that it is aimed at restituting a party that is adversely affected by a ‘Change in Law’ event

and restore it to its original economic position as if such a 'Change in Law' event had not taken place.

125. The argument that there is no provision in the PPAs for payment of compound interest from the date when the 'Change in Law' event had occurred, has been specifically rejected by this Court.

126. In view of this consistent position of law and application of restitutionary principles and privity of contractual obligations between the parties as contained in the PPAs, we do not find that the view taken by the learned APTEL with regard to carrying cost warrants interference.

Concurrent Finding of Fact

127. Apart from the aforesaid issues, there is one another common thread in all these appeals. Many of these appeals arise out of concurrent findings recorded by the Central/State Electricity Regulatory Commissions and the learned APTEL.

128. This Court, in the case of MSEDCL v. APML & Ors. (supra), after considering the statutory provisions in the Electricity Act, 2003, held that the CERC, SERCs and the learned APTEL are bodies consisting of experts in the field.

129. This Court, in the said case, observed thus:

“120. It could thus be seen that two expert bodies i.e. the CERC and the learned APTEL have concurrently held, after examining the material on record, that the factors of SHR and GCV should be considered as per the Regulations or actuals, whichever is lower. The CERC as well as the State Regulatory bodies, after extensive consultation with the stakeholders, had specified the SHR norms in respective Tariff Regulations. In addition, insofar as GCV is concerned, the CEA has opined that the margin of 85-100 kcal/kg for a non-pit head station may be considered as a loss of GCV measured at wagon top till the point of firing of coal in boiler.

121. In this respect, we may refer to the following observations of this Court in the case of Reliance Infrastructure Limited v. State of Maharashtra [(2019) 3 SCC 352].

“38. MERC is an expert body which is entrusted with the duty and function to frame regulations, including the terms and conditions for the determination of tariff. The Court, while exercising its power of judicial review, can step in where a case of manifest unreasonableness or arbitrariness is made out. Similarly, where the delegate of the legislature has failed to follow statutory procedures or to take into account factors which it is mandated by the statute to consider or has founded its determination of tariffs on extraneous considerations, the Court in the exercise of its power of judicial review will ensure that the statute is not breached. However, it is no part of the function of the Court to substitute its own determination for a determination which was made by an expert body after due consideration of material circumstances.

39. In Assn. of Industrial Electricity Users v. State of A.P. [Assn. of Industrial Electricity Users v. State of A.P., (2002) 3 SCC 711] a three-Judge Bench of this Court dealt with the fixation of tariffs and held thus : (SCC p. 717, para 11)

“11. We also agree with the High Court [S. Bharat Kumar v. State of A.P., 2000 SCC OnLine AP 565 : (2000) 6 ALD 217] that the judicial review in a matter with regard to fixation of tariff has not to be as that of an appellate authority in exercise of its jurisdiction under Article 226 of the Constitution. All that the High Court has to be satisfied with is that the **Commission** has followed the proper procedure and unless it can be demonstrated that its decision is on the face of it arbitrary or illegal or contrary to the Act, the court will not interfere. Fixing a tariff and providing for cross-subsidy is essentially a matter of policy and normally a court would refrain from interfering with a policy decision unless the power exercised is arbitrary or ex facie bad in law.”

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123. Recently, the Constitution Bench of this Court in the case of Vivek Narayan Sharma v. Union of India [2023 SCC OnLine SC 1] has held that the Courts should be slow in interfering with the decisions taken by the experts in the field and unless it is found that the expert bodies have failed to take into consideration the mandatory statutory provisions or the decisions taken are based on extraneous considerations or they are ex facie arbitrary and illegal, it will not be appropriate for this Court to substitute its views with that of the expert bodies.”

130. As is indicated in the aforesaid judgments, this Court should be slow in interfering with the concurrent findings of fact unless they are found to be perverse, arbitrary and either in ignorance of or contrary to the statutory provisions.

V. CONCLUSION

131. In the light of our aforesaid findings, we will now consider each of the appeals independently.

Civil Appeal No. 11095 of 2018 and Civil Appeal Nos. 11910-11911 of 2018

132. In these batch of appeals, insofar as the appeal of DNH-DISCOM is concerned, they are aggrieved by the order of the learned APTEL allowing Busy Season Surcharge and Development Surcharge, MoEF Notification on coal quality and Change in NCDP. They are also aggrieved by the finding of the learned APTEL with regard to carrying cost.

133. Insofar as the compensation on the ground of Change in NCDP is concerned, as already discussed, the same is squarely covered by the judgment of this Court in the case of MSEDCL v. APML & Ors. (supra)

134. Insofar as the Busy Season Surcharge and Development Surcharge are concerned, they are issued under the Circulars/Notifications of Indian Railways. The notification on coal quality is issued by MoEF. All these are the instrumentalities of the State, and these would, therefore, amount to ‘Change in Law’.

135. Insofar as rest of the claims, which are concurrently allowed and disallowed by both the CERC and the learned APTEL, are concerned, in view of the judgments of this Court on this issue, as stated above, we do not find any reason to interfere with the same, not noticing any perversity, arbitrariness and/or any contravention of the statutory provisions. The appeals of both the Generator and the DNH-DISCOM are,

therefore, liable to be dismissed.

Civil Appeal Nos.4628-4629 of 2021

136. The learned APTEL allowed the claim of the Generator only on the ground of Busy Season Surcharge and Development Surcharge on transportation of coal, and the Carrying Cost.

137. In view of our finding on the issues as above, no error can be found with the finding of the learned APTEL in that regard. We find no merit in the appeals. The appeals are, accordingly, liable to be dismissed.

Civil Appeal Nos. 12055-12056 of 2018

138. The issue of Busy Season Surcharge, Development Surcharge and Port Congestion Surcharge have already been considered by us herein above. All these are charges under the Notifications issued by the Indian Railways, through the Railway Board. As such, no error can be found with the finding of the learned APTEL that they would amount to 'Change in Law' events.

139. Insofar as levy of 'Forest Tax' is concerned, the same is levied by the State Government under the statutory provisions.

140. The issue with regard to 'Carrying Cost' has also been discussed by us herein above.

141. In that view of the matter, we do not find any reason to interfere with the order of the learned APTEL. The appeals are, accordingly, liable to be dismissed.

Civil Appeal Nos. 2935-2936 of 2020

142. In addition to the 'Change in Law' benefits granted by the State Commission, 'Coal Terminal Surcharge', 'Chhattisgarh Paryavaran Upkar' and 'Chhattisgarh Vikas Upkar' were also considered to be 'Change in Law' events by the learned APTEL.

143. The 'Coal Terminal Surcharge' was levied by the Indian Railways subsequent to the cut-off date. Similarly, the Government of Chhattisgarh, under Section 8 of the Chhattisgarh Adhoshanrachna Vikas Evam Paryavaran Upkar Adhiniyam, 2005, vide Notification dated 16th June 2015, which is admittedly after the cut-off date, introduced 'Chhattisgarh Paryavaran Upkar' and 'Chhattisgarh Vikas Upkar'. Even the Change in Swacch Bharat Cess at the rate of 0.5% on Service Tax for Operation Period and Change in Krishi Kalyan Cess at the rate of 5% on Service Tax for Operation Period, which had been granted concurrently by the State Commission and the learned APTEL, were notified by the Union of India after the cut-off date.

144. It could thus be seen that all these additional taxes or cesses were introduced by the instrumentalities of the Government of India or by the Government of Chhattisgarh. The same are issued under the provisions of the concerned statutes, rules, notifications, orders, etc. It is thus clear that they would amount to 'Law' within the meaning of the term 'Law' as defined in the PPAs. As such, no error can be found with the order of the learned APTEL.

145. We, therefore, find no merit in the appeals. The appeals are, accordingly, liable to be dismissed.

Civil Appeal No. 3123 of 2019 and Civil Appeal No.5372 of 2019

146. In the present matter, in addition to the claims granted by the CERC, the learned APTEL also granted the following claims:

- (i) Change in NCDP (cancellation of Captive Block vis-à-vis tapering linkage),
- (ii) Busy Season Surcharge and Developmental Surcharge,
- (iii) Carrying Cost; and
- (iv) Add on Premium Price.

147. Insofar as the issue with regard to change in NCDP is concerned, this Court in the case of **Energy** Watchdog (supra) so also in Adani Rajasthan case (supra) and recently in MSEDCL v. APML & Ors. (Supra) has held that the change in NCDP would amount to 'Change in Law'. As such, the finding in that regard warrants no interference.

148. Insofar as Busy Season Surcharge and Development Surcharge are concerned, we have already discussed hereinabove as to how it would amount to 'Change in Law'.

149. Insofar as 'Add on premium price' is concerned, undisputedly, 'add on premium' was required to be paid on account of cancellation of captive coal blocks and inordinate delay on account of Go-No-Go policy. As such, it cannot be said that the reasoning adopted by the learned APTEL is perverse and arbitrary.

150. Insofar as the issue with regard to 'carrying cost' is concerned, we have already discussed the issue at length in the foregoing paragraphs. As such, no interference is warranted on that finding also.

151. Insofar as other claims which were concurrently allowed and disallowed by the CERC and the learned APTEL are concerned, in view of the concurrent findings, we are not inclined to interfere with the same.

152. The appeals of both DISCOMS as well as Generating Companies are, therefore, liable to be dismissed.

Civil Appeal No. 6641 of 2019

153. This appeal is filed by GKEL, being aggrieved by the concurrent denial of benefits on certain components.

154. As already discussed herein above by us, in view of the concurrent findings recorded by the CERC as well as the learned APTEL for disallowing the claims, we are not inclined to interfere with the same. The appeal is, accordingly, liable to be dismissed.

Civil Appeal Nos. 5583-5584 of 2021

155. In the present case, the benefit is granted on following grounds:

- (i) Shortfall in domestic coal on account of Change in NCDP;
- (ii) Add on premium on account of existing tapering linkage by three years;

(iii) Busy Season Surcharge

156. The first issue stands covered by the judgments of this Court in the cases of **Energy** Watchdog (supra), Adani Rajasthan case (supra) and MSEDCL v. APML & Ors. (supra) and as such, no interference is warranted.

157. Insofar as Busy Season Surcharge is concerned, apart from there being concurrent findings of facts, we have already given reasons herein above as to how the same would amount to 'Change in Law'.

158. We do not find any merit in the appeals. The same are, accordingly, liable to be dismissed.

Civil Appeal No. 39 of 2021

159. The CERC has granted benefit on the following grounds.

- i. Shortfall in linkage coal on account of NCDP 2013 and SHAKTI Policy;
- ii. Change in coal quality pursuant to amendment of the Environment (Protection) Rules, 1986;
- iii. Increase in Busy Season Surcharge and Development Surcharge on transportation of coal by Indian Railways; and
- iv. Carrying cost on allowed 'Change in Law' claims.

160. The view taken by the CERC has been affirmed by the learned APTEL. As such, the appeal arises out of the concurrent findings of fact.

161. Insofar as first issue with regard to benefit of 'Change in Law' event on account of NCDP 2013 is concerned, the same is squarely covered by the judgments of this Court in the cases of **Energy** Watchdog (supra), Adani Rajasthan case (supra) and MSEDCL v. APML & Ors. (supra).

162. Insofar as the benefit of 'Change in Law' on account of SHAKTI Policy is concerned, it is covered by the judgment and order of the even date of this Court in the case of Civil Appeal No. 5684 of 2021¹⁰ [Uttar Haryana Bijli Vitran Nigam Limited and another v. Adana Power (Mundra) Limited and another] and in the case of Civil Appeal Nos. 677-678 of 2021¹¹ [Maharashtra State **Electricity** Distribution Company Limited v. Adani Power Maharashtra Limited and another] .

163. The other components, i.e. change in coal quality pursuant to amendment of the Environment (Protection) Rules, 1986, and increase in Busy Season Surcharge and Development Surcharge on transportation of coal by Indian Railways, have already been considered by us herein to amount to 'Change in Law' events. We have also considered the issue regarding 'Carrying Cost'. As such, no interference is warranted in the concurrent findings by the learned APTEL, especially in view of the judgments of this Court. The appeal is, accordingly, liable to be dismissed.

Civil Appeal No. 5005 of 2022 and Civil Appeal No. 4089 of 2022

164. The appeals are filed being aggrieved by the order of the learned APTEL granting compensation on account of 'EFC' and 'carrying cost'.

165. Undisputedly, the EFC was imposed by CIL vide its Circular dated 19th December 2017.

166. As discussed herein above, it is not in dispute that EFC has been paid by the Generators while paying the base price, other charges and statutory charges at the time of delivery of coal. As such, no interference is warranted with the said finding.

167. Insofar as 'carrying cost' is concerned, we have elaborately discussed the said issue herein above. As such, no interference, therefore, is warranted on the said issue also.

168. We do not find any merit in the appeals. The same are, accordingly, liable to be dismissed.

VI. EPILOGUE

169. Before we part with the judgment, we must note that we have come across several appeals in the present batch which arise out of concurrent findings of fact arrived at by two statutory bodies having expertise in the field. We have also found that in some of the matters, the appeals have been filed only for the sake of filing the same. We also find that several rounds of litigation have taken place in some of the proceedings.

170. Recently, this Court, in the case of MSEDCL v. APML & Ors. (supra), has noted that one of the reasons for enacting the Electricity Act, 2003 was that the performance of the Electricity Boards had deteriorated on account of various factors. The Statement of Objects and Reasons of the Electricity Act, 2003 would reveal that one of the main features for enactment of the Electricity Act was delicensing of generation and freely permitting captive generation. In the said judgment, we have recorded the statement of the learned Attorney General made in the case of Energy Watchdog (supra) that the electricity sector, having been privatized, had largely fulfilled the object sought to be achieved by the Electricity Act. He had stated that delicensed electricity generation resulted in production of far greater electricity than was earlier produced. The learned Attorney General had further urged the Court not to disturb the delicate balance sought to be achieved by the Electricity Act, i.e. that the producers or generators of electricity, in order that they set up power plants, be entitled to a reasonable margin of profit and a reasonable return on their capital, so that they are induced to set up more and more power plants. At the same time, the interests of the end consumers also need to be protected.

171. However, we find that, in spite of this position, litigations after litigations are pursued. Though the concurrent orders of statutory expert bodies cannot be said to be perverse, arbitrary or in violation of the statutory provisions, the same are challenged.

172. It will be relevant to note the following observations of the CERC in its judgment and order dated 16th May 2019, passed in Petition No. 8/MP/2014, which falls for consideration in Civil Appeal No. 39 of 2021 before this Court:

“(d) Approaching the Commission every year for allowance of compensation for such Change in Law is a time-consuming process. Accordingly, the mechanism prescribed above may be adopted for payment of compensation due to Change in Law events allowed as per PPA for the subsequent period as well.”

173. It will also be relevant to refer to some of the observations of the learned APTEL in its order dated 21st December 2021, which falls for consideration in Civil Appeal No.2908 of 2022 before this Court, which read thus:

“115. The Standing Committee of Parliament in its Report (dated 07.03.2018) on **Energy** titled ‘Stressed/ Non-Performing Assets in **Electricity** Sector’ has recognized the financial stress faced by generating companies on account of delay in recovery of Change in Law compensations and has recommended thus:

“The Committee, therefore, recommend that appropriate steps should be taken to ensure that **there should be consistency and uniformity with regard to orders emanating from the status of change in law. Provisions should also be made for certain percentage of payments of regulatory dues to be paid by Discoms in case the orders of regulators are being taken to APTEL/ higher judiciary for their consideration and decision**”

116. The Report lays stress on the obligation of the distribution companies to pay the approved Change in Law compensation even while **Regulatory** Commission’s orders are challenged. **The Policy directive dated 27.08.2018 issued in terms of Section 107 of the **Electricity** Act, 2003 by the Ministry of Power (MoP) to the CERC emphasized on the need to ensure expeditious recovery of Change in Law compensation. The desirability of this was recognized by this tribunal in its judgment dated 14.09.2019 in Jaipur Vidyut Vitran Nigam Limited vs. RERC & Ors, 2019 SCC Online APTEL 98. It is against such backdrop that **Electricity** (Timely Recovery of Costs due to Change in Law) Rules, 2021, notified by MoP on 22.10.2021, providing for timely recovery of compensation on account of occurrence of Change in Law events have been framed.** The MoP, vide notification dated 09.11.2021, put in public domain the policy directive on “Automatic pass through of the fuel and power procurement cost in tariff for ensuring the viability of the power” recognizing that in order to ensure that the power sector does not face any constraints in maintaining assured power supply to meet the demand, all the stakeholders in the value chain of power sector must ensure that there is timely recovery of cost. This involves the cost pass through by the generating companies to the distribution companies.

117. In sharp contrast, it is seen from the factual narrative of the events leading to the appeal at hand that the appellants (Haryana Utilities) have been adopting dilatory tactics which not only defeats the public policy but also has the undesirable fall-out of adding to the burden of the end-consumers they profess to serve on account of increasing Carrying Cost.

118. Concededly, in compliance with the Taxes and Duties Order dated 06.02.2017, the appellants paid to the generator the taxes and duties for certain period but, thereafter, unilaterally withheld such claims, raising issues (found merit-less) regarding IPT of coal for first time in January 2018. It is after the impugned order was passed that the appellants are stated to have started complying, to an extent, by making payments. It is the case of the first respondent that the appellants have withheld past payments including towards taxes and duties its entitlement to recover corresponding Late Payment Surcharge (“LPS”) being over and above the same to be computed after

discharge of the former liability. **We agree that such withholding is in violation of Articles 11.3.2 and 11.6.9 of the PPAs (quoted earlier) which cast a specific mandate on the procurer (Haryana Utilities) to honor the invoices raised, irrespective of dispute, and impose a specific bar against unilateral deductions/setting off.**

119. We find the dilatory conduct of the Haryana Utilities, to delay the implementation of the binding orders concerning compensation on account of coal shortfall and corresponding taxes and duties, detrimental to the interest of end consumers since it burdens the consumers with incremental LPS for delay in making payments to the generator. This cannot be countenanced, given the earlier dispensation on the subject by the statutory regulator and appellate forum(s), since it smacks of approach that is designed to frustrate the legislative command, and extant State policy, as indeed constitutes abject indiscipline infringing the rule of law. Borrowing THE WORDS OF Hon'ble Supreme Court in SEBI vs. Sahara India Real Estate Corpn. [Ltd.](#), [\(2014\) 5 SCC 429](#) "non-compliance with the orders passed ... shakes the very foundation of our judicial system and undermines the rule of law" which this tribunal is also duty-bound to "honour and protect", so essential "to maintain faith and confidence of the people of this country in the judiciary".

[emphasis supplied]

174. It could thus be seen that even the Standing Committee of Parliament, in its report, has recommended that there should be consistency and uniformity with regard to orders emanating from the status of 'Change in Law'. It has also recommended that the provisions should also be made for certain percentage of payments of **regulatory** dues to be paid by DISCOMS in case the orders of regulators are being taken to learned APTEL/higher judiciary for their consideration and decision. The learned APTEL has also referred to the Policy Directive dated 27th August 2018 issued in terms of Section 107 of the **Electricity** Act, 2003 by the MoP to the CERC, where it emphasized the need to ensure expeditious recovery of 'Change in Law' compensation. The learned APTEL has also referred to the **Electricity** (Timely Recovery of Costs due to Change in Law) Rules, 2021, notified by MoP on 22nd October 2021, which provide for timely recovery of compensation on account of occurrence of 'Change in Law' events. The learned APTEL found that the Haryana Utilities have been adopting dilatory tactics, which not only defeat the public policy but also have the undesirable fallout of adding to the burden of the end-consumers they profess to serve on account of increasing 'Carrying Cost'. The learned APTEL further found that withholding of past payments, including towards taxes and duties by the DISCOMS, is in violation of the provisions of the PPAs, which casts a specific mandate on the procurer to honour the invoices raised, irrespective of dispute, and impose a specific bar against unilateral deductions/setting off.

175. It is further to be noted that this Court, in the case of Uttar Haryana Bijli Vitran Nigam Limited (UNHVNL) and another v. Adani Power Limited and others, [\(2019\) 5 SCC 325](#), has specifically observed that the 'Change in Law' events will have to accrue from the date on which Rules, Orders, Notifications are issued by the instrumentalities of the State. Even in spite of this finding, the DISCOMS are pursuing litigations after litigations.

176. We find that, when the PPA itself provides a mechanism for payment of

compensation on the ground of 'Change in Law', unwarranted litigation, which wastes the time of the Court as well as adds to the ultimate cost of electricity consumed by the end consumer, ought to be avoided. Ultimately, the huge cost of litigation on the part of DISCOMS as well as the Generators adds to the cost of electricity that is supplied to the end consumers.

177. We further find that non-quantification of the dues by the Electricity Regulatory Commissions and the untimely payment of the dues by the DISCOMS is also detrimental to the interests of the end consumers. If timely payment is not made by DISCOMS, under the clauses in the PPA, they are required to pay late payment surcharges, which are much higher. Even in case of 'Change in Law' claims, the same procedure is required to be followed.

178. Ultimately, these late payment surcharges are added to the cost of electricity supplied to the end consumers. It is, thus, the end consumers who suffer by paying higher charges on account of the DISCOMS not making timely payment to the Generators.

179. It is further to be noted that the appeal to this Court under Section 125 of the Electricity Act, 2003 is only permissible on any of the grounds as specified in Section 100 of the Code of Civil Procedure, 1908. As such, the appeal to this Court would be permissible only on substantial questions of law. However, as already observed herein, even in cases where well-reasoned concurrent orders are passed by the Electricity Regulatory Commissions and the learned APTEL, the same are challenged by the DISCOMS as well as the Generators. On account of pendency of litigation, which in some of the cases in this batch has been more than 5 years, non-payment of dues would entail paying of heavy carrying cost to the Generators by the DISCOMS, which, in turn, will be passed over to the end consumer. As a result, it will be the end consumer who would be at sufferance. We are of the opinion that such unnecessary and unwarranted litigation needs to be curbed.

180. To a pointed query, the learned counsel for the DISCOMS fairly conceded the position that the prices at which the electricity is purchased from the 'Independent Power Producers' is substantially lesser than the power purchased from the 'State Generating Companies'.

181. We, therefore, appeal to the Union of India through Ministry of Power ("MoP" for short) to evolve a mechanism so as to ensure timely payment by the DISCOMS to the Generating Companies, which would avoid huge carrying cost to be passed over to the end consumers.

182. The Union of India, through MoP, may also evolve a mechanism to avoid unnecessary and unwarranted litigation, the cost of which is also passed on to the ultimate consumer.

183. Before we part with the judgment, we place on record our appreciation for the valuable assistance rendered by Mr. Balbir Singh, learned Additional Solicitor General, Dr. A. M. Singhvi, Mr. V. Giri, Mr. M.G. Ramachandran, Mr. C.A. Sundaram, Mr. Maninder Singh, Mr. Sajan Poovayya and Mr. Niranjan Reddy, learned Senior Counsel, and Mr. Vishrov Mukerjee, Ms. Poorva Saigal, Ms. Anushree Bardhan, and Ms. Poonam Sengupta, learned counsel.

184. In view of the above, all the appeals are dismissed. No costs.

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2022 0 AIR(SC) 3967 ; 2022 0 AIR(SC)(Civ) 2507 ; 2022 4 LawHerald(SC) 2720 ; 2022 4 RCR(Civ) 828 ; 2022 11 Scale 818 ; 2022 13 SCR 100

**SUPREME COURT OF INDIA
K.M. JOSEPH, HRISHIKESH ROY, JJ.
S. Kuldeep Singh and Another - Appellants
Versus
S. Prithpal Singh - Respondent
Civil Appeal No. 81 of 2011
Decided On : 02-08-2022**

IMPORTANT POINTS

- (1) Consent terms creating rights/title or interest for first time, as distinguished from recognition of a right, would require registration if value of property is above Rs. 100/-.**
- (2) Donee cannot claim equity in respect of disposal of self-acquired properties, by a donor.**
- (3) Deficiency of jurisdiction of authority cannot be cured by consent of parties.**

Subject: LAND DISPUTE - TITLE DISPUTE

COMPROMISE - OWNERSHIP - REGISTRATION - JURISDICTION - ESTOPPEL - ADOPTED SON - REVENUE RECORDS - AGRICULTURAL LAND - SUSPENSION ACT - TITLE DEED

Act Referred :

JAMMU AND KASHMIR AGRARIAN REFORMS ACT : S.15, S.17, S.21

JAMMU AND KASHMIR AGRARIAN REFORMS RULES : R.7

JAMMU AND KASHMIR AGRARIAN REFORMS SUSPENSION OF OPERATIONS ACT : S.3

JAMMU AND KASHMIR TRANSFER OF PROPERTY ACT : S.138

REGISTRATION ACT : S.49, S.17(2)(vi)

(A) Jammu and Kashmir Transfer of Property Act, 1920 - Section 138 - Registration Act, 1908 - Section 49 - Suit seeking declaration and possession over property - Ownership claim for plaintiff is founded only on compromise and respondent is not claiming any antecedent title - Compromise was not amongst family members but between plaintiff and tenant (not a family member) - Consent terms creating rights/title or interest for first time, as distinguished from recognition of a right, would require registration if value of property is above Rs. 100/- - Compromise was required to be registered, under Section 49 of Registration Act, 1977 and also under Section 138 of J&K Transfer of Property Act - Without such registration no title can fructify for plaintiff from documents in question - Besides, compromise and DC's consequent Order, was passed in a revenue proceeding and this was definitely not a part of a Court proceeding - That being the case, compromise did not fall under exception category under

Section 17(2)(vi) of Registration Act, 1977 (as applicable to then State of J&K) - Compromise in order to have legal effect needed registration under Registration Act, 1977 - Donor, during his life time, had cancelled two Wills in favour of plaintiff who claims to be adopted son of donor - Donee cannot claim equity in respect of disposal of self-acquired properties, by a donor - Equity is all about balancing competing interests and due weightage must be given to fact that appellants have been in possession and was nurturing their father's land for over four decades and estoppel principle propounded against them by respondent must give way to law set out by statute - Decree in favour of respondent (Plaintiff) set aside. (Paras 23, 24, 25, 26, 32 and 34)

(B) Administrative Law - Void Order - [Jammu & Kashmir Agrarian Reforms Act, 1972 - Sections 15, 17 and 21 - Jammu and Kashmir Agrarian Reforms Rules, 1973 - Rule 7 - Jammu and Kashmir Agrarian Reforms (Suspension of Operations Act), 1975 - Section 3] - In cases where authority lacked jurisdiction under a special Act and yet exercises powers, without authority of law, any order or decree so passed through such unlawful exercise of power, will be a legal nullity - Deficiency of jurisdiction of authority cannot be cured by consent of parties - Challenge to such an incompetent order could be set up wherever it is sought to be enforced or relied upon, even in execution or in collateral proceedings. (Para 30)

Facts of the case:

Present appeal is against the judgment and order dated 28.10.2009 in LPA No.174/2008 where under Division Bench of the High Court of Jammu & Kashmir at Srinagar upheld the decree in favour of respondent-plaintiff rendered on 31.07.2003 by District Judge, Anantnag. The suit was filed seeking declaration and possession in respect of land measuring 11 Kanals and 15 Marlas falling within survey nos.1829 and 1838 situated at Ranbirpora, Anantnag. The appellants are the natural son and daughter of late S. Sucha **Singh** whereas respondent/plaintiff S. **Prithpal Singh** claimed to be adopted son of Sucha **Singh**.

Findings of Court:

Answering in favour of the defendants, DC's order can have no legal effect as the same was passed during the operation of Suspension Act, 1975. Compromise being unregistered cannot confer title on the respondent.

Result : Appeal allowed.

Cases Referred:

[Bhoop Singh v. Ram Singh Major, , \(1995\) 5 SCC 709 - Relied \[Para 16.3\]](#)

[K. Raghunandan & Ors. v. Ali Hussain Sabir & Ors., , \(2008\) 13 SCC 102 - Relied \[Para 16.3\]](#)

[Phool Patti v. Ram Singh, , \(2015\) 3 SCC 465 - Relied \[Para 16.3\]](#)

[Ajudh Raj v. Moti, , \(1991\) 3 SCC 136 - Referred \[Para 16.5\]](#)

[Mohammad Ansari v. Union of India & Ors., , \(2017\) 3 SCC 740 - Referred \[Para 16.5\]](#)

[Sitabai & Anr. V. Ramachandra, , AIR 1970 SC 343 - Referred \[Para 17.3\]](#)

[Om Prakash & Ors. v. R.K. Kalra, , \(1988\) 4 SCC 705 – Referred \[Para 17.3\]](#)

[Kale and Others vs. Deputy Director of Consolidation and Others, , \(1976\) 3 SCC 119 – Referred \[Para 17.5\]](#)

[Ram Charan Das vs. Girija Nandini Devi and Others, , AIR 1966 SC 323 – Referred \[Para 17.5\]](#)

[Maturi Pullaiah and Another vs. Maturi Narasimham and Others, , AIR 1966 SC 1836 – Referred \[Para 17.5\]](#)

[Mr. Bhat relies on K.C. Kappor vs. Smt. Radhika Devi \(Dead\) by LRs. and Others, , \(1981\) 4 SCC 487 – Referred \[Para 17.5\]](#)

[Mehaboob Sahab vs. Syed Ismail and Others, , \(1995\) 3 SCC 693 – Referred \[Para 17.5\]](#)

[Bhagwan Krishan Gupta \(D\) vs. Prabha Gupta and Others, , \(2009\) 11 SCC 33 – Referred \[Para 17.5\]](#)

[Ganeshi \(Dead\) through LRs. and Others vs. Ashok and Another, , \(2011\) 15 SCC 417 – Referred \[Para 17.5\]](#)

[Ajambi \(Dead\) by legal representative vs. Roshanbi and Others, , \(2017\) 11 SCC 544 – Referred \[Para 17.5\]](#)

[Ripudaman Singh vs. Tikka Maheshwar Chand, , \(2021\) 7 SCC 446 – Relied \[Para 25\]](#)

[Raghunath Rai Bareja and another vs. Punjab National Bank and others, \(2007\) 2 SCC 230, , Para. 29 – Relied \[Para 31\]](#)

[Rusoday Securities Ltd. VS National Stock Exchange of India Ltd., , \(2021\) 3 SCC 401 – Relied \[Para 32\]](#)

[Haryana State Industrial Development Corporation vs. Cork Manufacturing Co. \(2007\) 8 SCC 120 – Relied \[Para 33\],](#)

Advocates: Advocates appeared :

For the Appellant(s) : Ms. Kaveeta Wadia, Adv. Ms. Astha Sharma, AOR Ms. Manika Haryani, Adv.

For the Respondent(s) : Mr. S. N. Bhat, Sr. Adv. Mr. Tarun KUMAR Thakur, Adv. Mr. D. P. Chaturvedi, Adv. Ms. Parvati Bhat, Adv. Ms. Anuradha Mutatkar, AOR

JUDGMENT :

HRISHIKESH ROY, J.

1. The present appeal is against the judgment and order dated 28.10.2009 in LPA No. 174/2008 where under the Division Bench of the High Court of Jammu and Kashmir at Srinagar upheld the decree in favour of the respondent-plaintiff rendered on 31.07.2003 by the learned District Judge, Anantnag. The suit was filed seeking declaration and possession in respect of the land measuring 11 Kanals and 15 marlas falling within the survey nos. 1829 and 1838 situated at Ranbirpora, Anantnag. The appellants are the natural son and daughter of late S. Sucha Singh whereas the respondent/plaintiff S. Prithpal Singh claimed to be the adopted son of Sucha Singh.

2. In the suit, Prithpal Singh as the plaintiff claimed that he received gifts of land in his favour from Sucha Singh. But although the suit schedule properties were more, the plaintiff confined his relief to the land measuring 11 kanals and 15 marlas mentioned above and not any other lands of his adoptive father Sucha Singh. In the plaint, Prithpal Singh enclosed certified copy of a compromise deed in between himself and one Abdul Jalil Khan and the claim of the plaintiff centers around the said compromise deed dated 18.12.1975. The terms of the compromise being

relevant are extracted herein-below:

“COMPROMISE PARTIES

Sir, compromise is submitted as under:

1. That in the case entitled above the parties have amicably compromised as under; out of Survey No. 1829 = Four kanals and five marlas and out of Survey No. 1835 Min one Kanal fifteen marlas in total six kanals including trees and houses situated at Ranbirpora Tehsil Anantnag will remain under the ownership of the Appellant in consideration of the Appellant under Survey No. 1829 = 3 Kanals 15 marlas, 1838 min 8 Kanals in total = 11 kanals 15 marlas including trees situated at village Ranbirpora Tehsil Anantnag gives up his tenancy rights and hands over its possession to the Respondent who will be considered its owner, no dispute remains in future.
2. That the parties will bear their own costs of litigation, in light of compromise the land be recorded in the name of parties in the Revenue Registers.
3. It is prayed the compromise be accepted and the appeal decided on the condition mentioned that will do justice.

Respondent	The Parties
Accepted	the Appellant
compromise	Abdul Jalil
Left	Thumb
impression of	Thumb Impression
Pritpal Singh	

I also accept the
Compromise Sardar
Sacha Singh
S/o Amar Singh
Ranibirpora Anantnag
Father of Respondent
Thumb Impression.”

3. As can be seen Sardar Sucha Singh appended his thumb impression to the above compromise deed with the expression “I also accept the compromise.” The Deputy Commissioner, Anantnag (“D.C” for short) thereafter passed an order on 24.12.1975 on the File No. 168/06 recording the presence of both parties and the settlement made amongst them whereunder the tenant Abdul Jalil Khan gave up his tenancy rights over certain parcels of land and for the earlier noted 11 kanals and 15 marlas including the trees situated on the said parcel at village Ranbirpora, the respondent was accepted to be the owner by the tenant. Consequential directions were accordingly issued by the D.C for entering the compromise in the revenue records and as such the order dated 24.08.1974 by the Circle Officer regarding correction of tenancy was disposed of in light of the compromise amongst both parties.

4. Parallely, during the aforesaid proceedings, on 1.5.1972 the Jammu & Kashmir Agrarian Reforms Act, 1972 (hereinafter referred to as “the 1972 Act”) came into force under which new rights and obligations were created and jurisdiction was

conferred on the competent authority for the purpose of correcting the revenue records. Section 2 (6) of this Act gave a wide interpretation to the term "owner" for the purposes of revenue records and included "inferior owners" and those claiming through the proprietor. Similarly, under Section 2(7) "personal cultivation" by a person also included cultivation by owner and his adopted son.

5. On the strength of Section 50 of 1972 Act, the Jammu and Kashmir Agrarian Reforms Rules, 1973 (for short "the 1973 Rules") were notified. Rule 5 provided that the Khasra Girdwari Register for Kharif 1971 upon due verification and authentication, was to be the record of personal cultivation of lands as on 1.9.1971 (cutoff date). The Circle Officers under Rule 7 were required to visit each village within their jurisdiction to verify, amend, and authenticate entries for Kharif Register Girdwari 1971. Rule 15 provided the procedure for amendment of "return" or for collecting information for filing revenue entries under Rule 11. This shows that after the cutoff date of 1.9.1971, the Circle Officers were given new responsibility for verifying and compiling land revenue entries and the procedure for amending entries in case of errors or disputes, were also prescribed.

6. At that stage, Abdul Jalil Khan claiming tenancy rights on the subject land applied for correction of tenancy to the Circle Officer and exercising the power for correction of tenancy, the Circle Officer on 24.8.1974 ordered the application made by the tenant Abdul Jalil Khan. The tenant Abdul Jalil Khan being aggrieved preferred appeal before the DC under the 1972 Act but in the meantime on 25.3.1975, the Jammu & Kashmir Agrarian Reforms (Suspension of Operations Act), 1975 (hereinafter "the Suspension Act 1975") was notified. The suspension was to be in effect initially till 19.12.1975 but was extended later to 30.3.1976. These dates are significant because the compromise dated 18.12.1975 was entered while certain provisions of 1972 Act remained inoperative because of the Suspension Act, 1975.

7. On 1.6.1978 the new Jammu and Kashmir Agrarian Reforms Act, 1976 (hereinafter referred to as "the 1976 Act") came into force with effect from 13.07.1978, replacing the suspended Act of 1972.

8. In course of verifying and correcting the entries in terms of the order passed by the Collector on 24.12.1975 (during the period while the Act of 1972 was under suspension) inquiries were conducted and the competent officer attested mutation no. 4133 whereby the land with trees to the extent of 11 Kanals and 15 Marlas, were re-recorded in the name of late S. Sucha Singh. The appellants, who are the natural son and daughter of the land owner, claimed that since that date till today, they are in possession of the land although in the interregnum, their father S. Sucha Singh died.

9. The civil Suit by the respondent no. 1 was initially instituted before the Jammu and Kashmir High Court, for declaration and possession of land and it was claimed in the Suit by the adopted son that the appellants have forcibly dispossessed him from the land claimed in the Suit. The respondent has founded his claim over Sucha Singh's land on the basis of the compromise dated 18.12.1975 and the subsequent order recording the compromise passed by the DC on 24.12.1975. Although the respondent claimed to be adopted son of Sucha Singh (appellants' father), similar assertion was not made on such basis for other properties of Sucha Singh. The Suit filed before the High Court was transferred in 1995 to the Court of the District Judge, Anantnag where the appellants as the defendant nos. 1 and 2 filed their written

statement stating, inter-alia, that the compromise and the order passed thereon by the D.C on 24.12.1975, was without jurisdiction and the same do not confer any right on the plaintiff. On the given-up claim based on the gift executed by late Sucha Singh, the stand of the appellants/defendants was that the documents were revoked by their father during his life time and the revocation deed executed in September, 1975 was registered on 22.1.1976. Notably the amendments sought by the plaintiff to the plaint was not pressed/rejected and the relief in the suit was confined to 11 Kanals and 15 Marlas of land based on the compromise dated 18.12.1975 and the Deputy Commissioner's order dated 24.12.1975.

10. The learned District Judge took note of the following pedigree table of the parties:

S. Sucha Singh

<p>Mrs. Raj Kaur (Dfdt. 2) (2nd wife)</p>	<p>Mrs. Isher Kaur (1st wife) Mrs. Shant Kaur (Dfdt.5)</p>
<p>Prethipal Singh (Plntf.) (Adopted Son)</p>	<p>Krishna Nasib Kaur Kuar Dfdt. 3 Dfdt. 4 Kuldeep Singh Contesting Dfdt.</p>

11. Framing several issues on the basis of the pleadings of the parties, the learned Judge after considering the materials on record found in favour of the plaintiff that he is the owner of 11 Kanals and 15 Marlas in Survey Nos. 1829 and 1838. This finding was based primarily on the compromise dated 18.12.1975 between the plaintiff and Abdul Jalil Khan and accordingly a decree for possession of land was passed in favour of the plaintiff-respondent and against the defendants-appellants.

12. The Civil First Appeal No. 117 of 2003 was then filed by the appellants and likewise Cross Appeal No. 72 of 2004 was filed by the respondent assailing the District Judge order dated 31.7.2003 but the learned Single Judge under his 24.9.2008 common order, dismissed both appeals and thereby the decree/order dated 31.7.2003 came to be upheld.

13. Thereafter the appellants preferred the LPA No. 174 of 2008 and specifically questioned the jurisdiction of the DC to pass the 24.12.1975 order by contending that the compromise dated 18.12.1975 was a nullity. According to the appellants, their father late Sucha Singh through whom the plaintiff claims, was the owner of the subject land and unless the land owner transferred the land in favour of the plaintiff, through a valid registered instrument, the plaintiff can have no claim over the subject land. It was specifically contended that under Section 49 of the Registration Act, 1908 and Section 138 of the Jammu & Kashmir Transfer of Property Act, 1920 which are applicable to the State, claim for title or of possession of immovable property without a registered instrument, cannot be entertained. Their say was that there is nothing on record that Sucha Singh had transferred any land to

the plaintiff through a valid instrument. On the compromise, which was the basis for plaintiff's claim, the appellants projected that in terms of Section 3 of the Suspension Act, 1975, the operation of the concerned provisions of the 1972 Act and all proceedings thereunder, remained in suspension until 30.3.1976 and therefore the 18.12.1975 compromise and the DC's order dated 24.12.1975 for correction of revenue records based on the compromise are non-est as the same was passed while the 1972 Act was under suspension.

14. Having considered the rival projections, the High Court observed that the only question which requires determination in the appeal is, what is the effect of the compromise. To give the answer, the Court noted that the certified copy of the compromise does not disclose that the same was in connection with a proceeding initiated for resumption of land but noted that the same related to correction of revenue records. According to the Court the plaintiff being an Army personnel, was in a better position to resume the land which was under the tenancy of Abdul Jalil Khan and therefore the plaintiff was authorized to launch the proceeding and enter into compromise with the tenant Abdul Jalil Khan. The Division Bench also noted that the owner of the land Sucha Singh had acknowledged the compromise deed which recorded the respective ownership of the tenant Abdul Jalil Khan and the plaintiff, for the concerned portions of the land of Sucha Singh. On the issue of the transfer of land being without a registered document, the Court observed that the instrument of compromise where a tenant accepts that his landlord is in possession of certain land over which the tenant makes no claim and surrenders his tenancy, would not require registration. The plaintiff's right on the concerned land is also recognized by the Sucha Singh through his endorsement. Moreover, since the appellants had not taken steps to appropriately challenge the 18.12.1975 compromise within the period of limitation, the title of the plaintiff stood perfected. The appeal accordingly was dismissed under the impugned judgment.

15. We have heard Mr. Huzefa A. Ahmadi, learned Senior Counsel appearing for the appellants. Mr. S.N.Bhat, learned Senior Counsel appears for the respondent (plaintiff).

16.1 Explaining the implications of the thumb impression of late Sucha Singh on the compromise deed, Mr. Ahmadi, learned Senior Counsel submits that the same related only to the internal arrangement regarding the tenancy of Jalil Khan and does not in any way transfer any right of ownership to the plaintiff. According to the counsel the endorsement "I accept the compromise" does not in any manner suggest that Sucha Singh had intended to confer title of his land to the plaintiff.

16.2 Focusing on the appellants' challenge to the compromise, Mr. Ahmadi, learned Senior Counsel submits that the compromise was entered in a proceeding for correction of revenue records and the same must therefore be understood in that context. Adverting to the wide definition of "owner" and "personal cultivation" under Section 2 (6) and Section 2 (7) respectively under the 1972 Act, it is argued that the definition is wide and includes persons claiming through the legal owner and also "adopted sons" of the owner. Accordingly, it is argued that acceptance of the plaintiff as an owner, does not imply that Sucha Singh had intended to transfer his ownership right in favour of the plaintiff. Projecting the limited power of the Circle Officer which was confined to compiling and correcting revenue records as they existed on the cutoff date 1.9.1971, it is submitted that the compromise in the

revenue correction proceedings under Chapter III of the Rules, can only relate to revenue records and to possession of land in capacity as personal cultivator. It is therefore argued that the compromise cannot and does not confer title on the plaintiff.

16.3 Highlighting the requirement of mandatory registration under Section 17 of the Registration Act, 1977, it is next argued that the compromise does not comply with the mandate of law and since title is claimed by the plaintiff only on the strength of compromise, the same could not have been granted. The learned senior counsel has relied on Bhoop Singh vs. Ram Singh Major, [\(1995\) 5 SCC 709](#) to argue that the law requires registration of compromise order which creates rights, title or interest in immovable property. The ratio in K. Raghunandan and Others vs. Ali Hussain Sabir and Others, [\(2008\) 13 SCC 102](#) is also cited by the counsel to point out that the Court has held that since the plaintiff claims title from the compromise deed, as distinguished from recognition of pre-existing rights, the same would necessarily require registration. The judgment in Phool Patti vs. Ram Singh, [\(2015\) 3 SCC 465](#) is also pressed home by the counsel to buttress his argument. Appellants question how legal title can be secured on the strength of the compromise arrived at in the proceedings initiated by the tenant Jalil Khan which arose from a change in the entry in the records, during the process of verification under the 1972 Act. The document in question in any case is required to be registered, in terms of Section 49 of the Registration Act and Section 138 of the Jammu & Kashmir Transfer of Property Act and the submission of Mr. Ahmadi is that without such registration, the title rights for the plaintiff do not get crystalized.

16.4 Adverting to the provisions of Section 17 (2) (vi) of the Registration Act, 1977 as applicable to the State of Jammu & Kashmir, it is next argued that the DC's order dated 24.12.1975 was required to be registered as the compromise was in consequence of revenue proceeding and not by a competent Court. Since the DC's order was based on the compromise which also dealt with 6 Kanals land forming part of Survey Nos.1829 and 1838 which was declared in favour of the tenant Jalil Khan, it is argued by Mr. Ahmadi that since the suit of the plaintiff is not restricted only to the 11 Kanals and 15 Marlas claimed by him, the DC's order endorsing the compromise would require registration, in order to legally recognize plaintiff's title, on the strength of these two documents.

16.5 According to the appellants, the DC's order is of no legal effect as the same was passed while the 1972 Act was under suspension and during that period the authority lacked jurisdiction to exercise powers under the 1972 Act. The 1972 Act remained under suspension during 25.3.1975 to 30.3.1976 and it is during this phase, the 18.12.1975 compromise was re-recorded. As such the compromise and the DC's 24.12.1975 order were at a time when the suspended Act was operating. Therefore, it is argued that the DC/Collector lacked jurisdiction and authority to entertain the appeal. In such a situation, the consent of the parties to the lis can have no implication as the Authority lacked jurisdiction by virtue of suspension of the 1972 Act. In support of his contention Mr. Ahmadi, learned Senior Counsel relied on Ajudh Raj vs. Moti, [\(1991\) 3 SCC 136](#):

“5. The principle for deciding the question of limitation in a suit filed after an adverse order under a Special Act is well settled. If the order impugned in the suit is such that it has to be set aside before any relief can be granted to the

plaintiff the provisions of Article 100 will be attracted and if no particular article of the Limitation Act is applicable the suit must be governed by the residuary Article 113, prescribing a period of three years. Therefore, in a suit for title to an immovable property which has been the subject matter of a proceeding under a Special Act if an adverse order comes in the way of the success of the plaintiff, he must get it cleared before proceeding further. On the other hand if the order has been passed without jurisdiction, the same can be ignored as nullity, that is, non-existent in the eye of law and it is not necessary to set it aside; and such a suit will be covered by Article 65. In the present case the controversial facts have been decided in favour of the plaintiff-appellant and the findings were not challenged before the High Court. The position, thus, is that the plaintiff was the owner in cultivating possession of the land and the defendant Moti was merely a labourer without any right of a tenant or a sub-tenant. The question is as to whether in this background it is necessary to set aside the order passed in favour of the respondent under Section 27(4) of the Act before the suit can be decreed or whether the plaintiff can get a decree ignoring the said order as void, in which case the suit undoubtedly will be governed by Article 65.”

The learned senior counsel further relied on *Mohammad Ansari vs. Union of India and Others*, [\(2017\) 3 SCC 740](#):

“35. At this stage, it is necessary to recapitulate that during the pendency of the matter before the High Court, the Central Administrative Tribunal had passed the final order on 5-11-2012 in favour of the appellant. Be that as it may, the Tribunal does not have the jurisdiction to deal with an issue of upgradation or the nature of lis raised by the appellant before it. In the absence of lack of inherent jurisdiction to deal with the issue, the said judgment is a nullity. It has no existence in law. It is well settled in law that the judgment passed is a nullity if it is passed by a court having no inherent jurisdiction. The decree to be called a nullity is to be understood in the sense that it is ultra-vires the powers of the court passing the decree and not merely voidable decree. [See: *Hiralal Moolchand Doshi vs. Barot Raman Lal Ranchhoddas*, (1993) 2 SCC 458].”

16.6 The appellants next contend that the subject matter of the compromise is Orchard land which, under Section 2(4) of the 1972 Act, stood excluded from the definition of land and therefore neither the tenant Jalil Khan nor the plaintiff, could claim any title over such Orchard land. It is therefore argued that the 1972 Act did not allow for any private agreements in furtherance of which, any compromise could be entered.

16.7 On the finding against the defendants that they had not challenged the compromise and therefore the rights over the land for the plaintiff stood crystalized is contended to be an untenable position of law. The decree according to the appellants is a legal nullity as the authority lacked jurisdiction to pass any such order. It is therefore argued that the same can be set aside even in collateral proceedings and the compromise would not obliterate any lawful right of the landowner Sucha Singh, over his own land.

17.1 Per contra, Mr. S.N. Bhat, the learned Senior Counsel for the respondent (plaintiff) would firstly submit that since the appeal arises out of the concurrent

findings of three courts which decreed the suit declaring title and possession in favour of the plaintiff, this Court in exercising power under Article 136, should not upset those findings. Furthermore, in the facts of the present case, this Court should not interfere. It is submitted that the respondent as adopted son would get only 11 Kanals and 15 Marlas. (The appellant has a case that respondent had other properties). This in turn is disputed by the respondent.

17.2 According to the respondent, the right over the land in question is declared on the basis of the 18.12.1975 compromise and the DC's endorsement and since Sucha Singh the landowner had appended his thumb impression on the compromise, the ownership of the plaintiff is acknowledged. Thus, plaintiff's title was rightly protected by the courts. According to Mr. Bhat, the parties to the transaction clearly understood the purport of the compromise and as such confusion must not be created on the issue by adverting to the definition of "owner" under the 1972 Act. It is further submitted that the Sucha Singh by making his endorsement on the compromise obviously intended to give and recognize the right of the plaintiff over the subject land and his act cannot be seen through the definition of "owner" under the 1972 Act.

17.3 On the issue of DC's order dated 24.12.1975 being non est and void for having been passed during the operation of Suspension Act, 1975, the respondent argues that such a contention was raised for the first time in the LPA before the Division Bench of the High Court and since that issue was not raised by the defendants either before the Trial Court or the First Appellate Court, the Division Bench rightly held that the appellants are disentitled to raise such contention. It is further pointed out that the Suspension Act, 1975 did not suspend all proceedings under the 1972 Act in its entirety and certain proceedings were kept alive under Section 4 of the Suspension Act, 1975. Therefore, unless the exact nature of the proceedings initiated before the Circle Officer is brought forth, it cannot be said that Suspended Act, 1975 applies to the compromise and the proceedings before the Deputy Commissioner. Since great prejudice was caused to the respondent-plaintiff by permitting the appellants to raise such contention for the first time in the LPA proceedings, Mr. Bhat, learned senior counsel places reliance on Sitabai and Another vs. Ramachandra, 1970 AIR 343 and Om Prakash and Others vs. R.K. Kalra, [\(1988\) 4 SCC 705](#).

17.4 The plea of estoppel against the appellants is also pressed home by the senior counsel by projecting that the admission of ownership of the respondent-plaintiff was made by Sucha Singh in the compromise and the same being accepted by the DC, the appellants as the legal heirs of Sucha Singh are estopped from raising such contention.

17.5 According to Mr. Bhat, the appellants are wrong in saying that the compromise and the DC's order would require registration. The counsel further argues that the transaction is essentially within the family of Sucha Singh and the respondent herein being the adopted son of Sucha Singh, the transaction should be construed as a family transaction, and it would be an exception to the principles governing transaction amongst strangers. Therefore, placing reliance on Kale and Others vs. Deputy Director of Consolidation and Others, [\(1976\) 3 SCC 119](#), Ram Charan Das vs. Girija Nandini Devi and Others, [AIR 1966 SC 323](#), Maturi Pullaiah and Another vs. Maturi Narasimham and Others, [AIR 1966 SC 1836](#), Mr. Bhat argues that the

principles of estoppel and equity will apply against the appellant on their insistence of formalities like registration for what is nothing but a family arrangement. In order to explain the principles of estoppel in transactions involving families, Mr. Bhat relies on *K.C. Kappor vs. Smt. Radhika Devi (Dead) by LRs. and Others*, [\(1981\) 4 SCC 487](#), *Mehaboob Sahab vs. Syed Ismail and Others*, [\(1995\) 3 SCC 693](#), *Bhagwan Krishan Gupta (D) vs. Prabha Gupta and Others*, [\(2009\) 11 SCC 33](#), *Ganeshi (Dead) through LRs. and Others vs. Ashok and Another*, [\(2011\) 15 SCC 417](#) and *Ajambi (Dead) by legal representative vs. Roshanbi and Others*, [\(2017\) 11 SCC 544](#).

Findings

(A) Whether the compromise dated 18.12.1975 confers title?

18. In order to adjudicate the above issue, we need to look at the compromise in its intent and functioning. The compromise between the Plaintiff and Abdul Jalil Khan (tenant) was recorded in a proceeding for correction of revenue records under the 1972 Act and the Rules. There, the Plaintiff was admitted to be the owner and in possession of land which he personally cultivated. Sucha Singh with his thumb impression endorsed the compromise deed. On this the defendants have contended that the said statement has to be read in the context in which it was made and how the parties to the transaction understood the same. The plaintiff says that his adoptive father Sucha Singh intended to confer title on the Plaintiff and Sucha Singh would not have looked into the definition of "owner" under the 1972 Act, before making the endorsement on the compromise. On this, it cannot be ignored that the parties effectuated the transaction in a proceeding under the 1972 Act. Thus, the compromise exists within the four corners of the 1972 Act and must therefore be read by applying the statutory provisions.

19. Proceeding further, the definitions of 'owner' and 'personal cultivation' under Ss. 2(6) and (7) respectively of the 1972 Act are expansive. The definition of owner is an inclusive one. It includes not only the legal owner/proprietor, but also person claiming through the legal owner. Specifically, the 'adopted sons' of the owner. Hence, the purpose of the compromise decree in the correction proceedings under Chapter III of the Rules pertain only to revenue entries, and the possession of land in capacity of a personal cultivator. This could hardly confer any lawful title on the plaintiff over Sucha Singh's land.

20. The power under the 1973 Rules confers limited power to the circle officer's and it is confined to verifying, amending, and authenticating revenue records as they existed on the cutoff date i.e. 1st September, 1971. Thus, it is clear that a mere affirmation in the context of revenue records and personal cultivation rights cannot be interpreted as an intention of Sucha Singh to confer title upon the Plaintiff. With his endorsement on the compromise, Sucha Singh perhaps intended to give the right of personal cultivation but the same does not in any manner suggest that Sucha Singh had intended to confer title on the plaintiff.

21. It is also important to note that Plaintiff in his own testimony (led before Trial Court, and recorded in the Trial Court judgment) had stated that Sucha Singh prepared "orchards." Albeit, by using the salary of Plaintiff. The land is therefore of the orchard category. In this situation, the land which is the subject matter of the Compromise being an Orchard stood excluded from the definition of land under S. 2(4) of the 1972 Act. As such, the title for such category of land could not vest with

the Plaintiff. This determination of fact is essential to adjudicate the title and the issue was definitely raised in the LPA proceeding before the High Court, apart from being raised in the lower court also. In such a situation this Court is required to keep the 'orchard' aspect in mind and also address the implication of the same on the contesting parties. The upshot of the above persuade us to hold that the compromise (18.12.1975) does not convey any lawful title on the Plaintiff.

(B) Did the compromise require registration?

22. It is contended by the defendants that the compromise did not comply with Section 17 of the Registration Act, 1977 which mandates compulsory registration, and without a registered document, no title or claim or possession can fructify. On the other hand, Plaintiff has argued that the transaction is essentially within the family of Sucha Singh since plaintiff is the adopted son of Sucha Singh. The transaction of the present nature belongs to a different class, and thus, the normal principles governing transaction among strangers, do not apply to this class of transactions.

23. We are however unable to see the compromise as a kind of 'family arrangement'. The compromise was not amongst family members but between the plaintiff and the tenant - Jalil Khan (not a family member). The statement of Sucha Singh "I accept the compromise" is only with regard to the internal arrangement regarding the tenancy of Jalil Khan and this will not make it a family arrangement. Moreover, the plea that compromise is a "Family Arrangement" is raised for the first time before this Court. The Plaintiff significantly had waived his claim to other assets left by Sucha Singh (on the basis that the Plaintiff is his adopted son), before the High Court. He cannot therefore be permitted to raise such a contention for the first time before this Court. Even otherwise, Jalil Khan was not a family member. Thus, he could not have been a party to a so called "family arrangement." Besides, none of the other family members were parties to the said compromise either. Therefore, the documents in question would require registration and it cannot be treated as a family arrangement.

24. It is pertinent to note that the ownership claim for the plaintiff is founded only on the compromise and the respondent is not claiming any antecedent title. The issue whether the compromise decree between parties to a suit proceeding, could vest or transfer title to one of them, was decided in Bhoop Singh vs. Ram Singh Major (supra), where the requirement of registration of such compromise order which create new rights, title, or interest, was upheld in the following manner:

"18. The legal position qua clause (vi) can, on the basis of the aforesaid discussion, be summarised as below:

(1) Compromise decree if bona fide, in the sense that the compromise is not a device to obviate payment of stamp duty and frustrate the law relating to registration, would not require registration. In a converse situation, it would require registration.

(2) If the compromise decree were to create for the first time right, title or interest in immovable property of the value of Rs. 100 or upwards in favour of any party to the suit the decree or order would require registration.

(3) If the decree were not to attract any of the clauses of sub-section (1) of

Section 17, as was the position in the aforesaid Privy Council and this Court's cases, it is apparent that the decree would not require registration.

(4) If the decree were not to embody the terms of compromise, as was the position in Lahore case, benefit from the terms of compromise cannot be derived, even if a suit were to be disposed of because of the compromise in question.

(5) If the property dealt with by the decree be not the "subject-matter of the suit or proceeding" clause (vi) of sub-section (2) would not operate, because of the amendment of this clause by Act 21 of 1929, which has its origin in the aforesaid decision of the Privy Council, according to which the original clause would have been attracted, even if it were to encompass property not litigated."

25. Further, in *K. Raghundandan and Others vs. Ali Hussain Sabir and Others* (supra), while referring to *Bhoop Singh* (supra), the Court held that consent terms creating rights/title or interest for the first time, as distinguished from recognition of a right, would require registration if the value of property is above Rs. 100. This was affirmed by a three Judges bench in *Phool Patti vs. Ram Singh* (supra). Lastly, in *Ripudaman Singh vs. Tikka Maheshwar Chand*, [\(2021\) 7 SCC 446](#) this Court held that where there is no pre-existing right, but right has been created by the compromise alone, such compromise creating new right, title or interest in immovable property of value of Rs. 100 or above, is compulsorily registrable.

26. In the present case, the Appeal filed by the tenant - Jalil Khan arose from the change of the entry in the records during the process of verification under the 1972 Act. It was in this Appeal that the compromise was recorded and endorsed by the DC's Order, recognizing the possession of the Plaintiff for the very first time, as was also admitted by plaintiff in paragraph 6 of the Suit. In circumstances of this kind, we are quite certain that the compromise was required to be registered, under Section 49 of the Registration Act, 1977 and also under Section 138 of the J&K Transfer of Property Act. Without such registration no title can fructify for the plaintiff from the documents in question.

27. Furthermore, the compromise and the DC's consequent Order, was passed in a revenue proceeding and this was definitely not a part of a Court proceeding. That being the case, the compromise did not fall under the exception category under Section 17(2)(vi) of Registration Act, 1977 (as applicable to then State of J&K). The above makes it abundantly clear that the compromise in order to have legal effect needed registration under the Registration Act, 1977.

28. Significantly, the DC's 24.12.1975 order based on the Compromise, also dealt with 6 Kanals land forming part of Survey No. 1829 and 1838 which went to the ownership of the tenant - Jalil Khan. The subject compromise or the DC's order was not restricted only to 11 Kanals and 15 Marlas as claimed by the Plaintiff. These circumstances would imply that the compromise required registration for it to be of any legal effect. Since title is claimed, and the plaintiff founded his entire case on the compromise, it would necessarily require registration. Accordingly, question B is answered in affirmative.

29. The defendants have also unsuccessfully argued before the High Court that the

jurisdiction of the Deputy Commissioner to exercise powers under the J&K Agrarian Reforms Act, 1972 stood suspended on the date of passing the Compromise Decree. Such a question of law has a material bearing on this litigation and the same needs to be considered. The 1972 Act as noted earlier, was suspended during 25.03.1975 to 30.03.1976 and during this period the Compromise was recorded on 18.12.1975 and the 24.12.1975 Order was passed by the DC. The power exercised for these orders are traceable to the suspended provisions of the Act. Of course, the J&K Agrarian Reforms (Suspension of Operations) Act, 1975 did have a proviso which created exceptions for certain sections of the 1972 Act. The relevant part of the proviso reads thus:

“4. Certain provisions of Act No. XXCI not suspended for the time being:

(1) The provisions of Sections 15, 25, 26, 27, 28, and 51 and the provisions of Chapter V of the principal Act in so far as they relate to these sections and any rules, notifications, orders and instructions issued thereunder including any proceedings instituted or actions taken under the said provisions and pending on the date of commencement of this Act, shall be continued and enforced as heretofore.....”

30. The above makes it clear that this case is outside the ambit of any of the exempted sections such as Section 15 (Prohibition on transfer of land), 25 (levy of annual tax), 27 (collection of tax), 28 (Determination of ques-levy of tax related), 51 (repeal & savings) of the 1972 Act. Only such provisions of Chapter V which were relatable to the aforesaid provisions were relevant, and not all sections were within the ambit of exception. Section 31 of the 1972 Act which provided for Appeals and Revisions, was not protected by Section 4 of the Suspension Act, 1975. Thus, the DC, in our mind lacked inherent jurisdiction to either entertain the appeal or endorse the compromise during the suspended phase. In cases where the authority lacked jurisdiction under a special Act and yet exercises powers, without authority of law, any order or decree so passed through such unlawful exercise of power, will be a legal nullity. The deficiency of jurisdiction of the authority cannot be cured by the consent of the parties. The challenge to such an incompetent order could be set up wherever it is sought to be enforced or relied upon, even in execution or in collateral proceedings [(1991) 3 SCC 136 : (2017) 3 SCC 740]. Accordingly answering in favour of the defendants, the DC's order in our opinion can have no legal effect as the same was passed during the operation of Suspension Act, 1975. We have found that the compromise being unregistered cannot confer title on the respondent.

31. The final issue for our consideration is whether estoppel principle would apply against the defendants in their challenge to DCs order. Equity as we know follows the law, and whenever there is a conflict between law and equity, it is the law which must prevail. Here the Latin maxim “dura lex sed lex” which means “the law is hard, but it is the law” would apply. Equity can only supplement the law, but it cannot supplant or override it [(2007) 2 SCC 230] and this would have a bearing against the respondent.

32. The records in the case show that Sucha Singh, during his life time, had cancelled the two Wills in favour of the plaintiff. This indicates that Sucha Singh was not interested to give any part of his property to the plaintiff. Even otherwise, the suit property is self-acquired property of Sucha Singh, and a donee cannot claim equity in respect of the disposal of self-acquired properties, by a donor. Equity is all

about balancing the competing interests and due weightage must be given to the fact that the appellants have been in possession and was nurturing their father's land for over four decades and the estoppel principle propounded against them by the respondent must give way to the law set out by the statute [(2021) 3 SCC 401].

33. Notwithstanding the concurrent finding against them, in a case like this, where the law leans in appellant's favour, the Court has to exercise corrective jurisdiction as the circumstances justify. As such, taking a cue from Haryana State Industrial Development Corporation vs. Cork Manufacturing Co. (2007) 8 SCC 120, the exercise of extraordinary jurisdiction under Article 136 is found to be merited in this matter.

34. Proceeding accordingly, the decree in favour of the respondent (Plaintiff) in respect of the land measuring 11 Kanals and 15 Marlas falling within the survey nos. 1829 and 1838 situated at Ranbirpora, Anantnag, are set aside. The Appeal stands allowed by leaving the parties to bear their own cost.

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555

SUPREME COURT OF INDIA

B.R. Gavai, Dipankar Datta, Aravind Kumar, JJ.

Asma Lateef & Anr. - Appellants

Vs.

Shabbir Ahmad & Ors. - Respondents

Civil Appeal No. 9695 of 2013

Decided On : 12-01-2024

IMPORTANT POINTS

(1) Failure to present written statement - Court is not supposed to pass a mechanical judgment invoking Rule 10 of Order VIII, CPC merely on the basis of plaint, upon failure of a defendant to file a written statement.

(2) An erroneous decision cannot be labelled as having been passed 'without jurisdiction' - Lack of jurisdiction must be patent on face of decree to enable executing court to conclude that decree was a nullity.

(3) Decision rendered by a court on merits of a controversy in favour of plaintiff without first adjudicating on its competence to decide such controversy would amount to a decision being rendered on an illegal and erroneous assumption of jurisdiction.

(4) Judgment and Decree - It is only a "judgment" conforming to provisions of CPC that could lead to a "decree" being drawn up.

Act Referred :

CIVIL PROCEDURE CODE : O.20 R.1, O.20 R.2, O.20 R.3, O.20 R.4, O.20 R.4(2), O.20 R.5, O.20 R.6, O.20 R.7, O.20 R.8, O.8 R.1, O.8 R.10, O.8 R.5, O.8 R.5(2), O.8 R.5(3), O.9 R.11, S.2(2), S.2(9), S.47

CONSTITUTION OF INDIA : Art.227

EVIDENCE ACT : S.58

SPECIFIC RELIEF ACT : S.38, S.41(h)

TRANSFER OF PROPERTY ACT : S.52

UTTAR PRADESH ZAMINDARI ABOLITION AND LAND REFORMS ACT : S.229(b), S.331

(A) Civil Procedure Code, 1908 - Order VIII Rule 10 - Indian Evidence Act, 1872 - Section 58 - Failure to present written statement - Rule 10 is permissive in nature, enabling trial court to exercise, in a given case,

either of two alternatives open to it - Notwithstanding alternative of proceeding to pronounce a judgment, court still has an option not to pronounce judgment and to make such order in relation to suit it considers fit - Court is not supposed to pass a mechanical judgment invoking Rule 10 of Order VIII, CPC merely on the basis of plaint, upon failure of a defendant to file a written statement - Provision of Rule 10 of Order VIII, CPC is by no means mandatory in the sense that court has no alternative but to pass a judgment in favour of plaintiff, if defendant fails or neglects to file his written statement - Plaint in a suit is not akin to a writ petition where not only facts are to be pleaded but also evidence in support of pleaded facts is to be annexed - Since facts are required to be pleaded in plaint and not evidence, which can be adduced in course of examination of witnesses, mere failure or neglect of defendant to file written statement controverting pleaded facts in plaint, in all cases, may not entitle him to judgment in his favour unless by adducing evidence he proves his case/claim. (Paras 15, 16, 17 and 18)

(B) Civil Procedure Code, 1908 - Section 47 - Objection to execution of decree - A decree that follows a judgment or an order would be inexecutable in eyes of law and execution thereof, if sought for, would be open to objection in an application under Section 47, CPC - Court must not only have jurisdiction in respect of subject matter of dispute for the purpose of entertaining and trying claim but also jurisdiction to grant relief that is sought for - Once it is conceded that jurisdiction on both counts is available, it is immaterial if jurisdiction is exercised erroneously - An erroneous decision cannot be labelled as having been passed 'without jurisdiction' - Lack of jurisdiction must be patent on face of decree to enable executing court to conclude that decree was a nullity - All irregular or wrong decrees would not necessarily be void - An erroneous or illegal decision which was not void, could not be objected in execution or incidental proceedings. (Paras 21, 35, 37 and 51)

(C) Civil Procedure Code, 1908 - Section 9 - Jurisdiction of Civil Court - Jurisdiction is entitlement of civil court to embark upon enquiry as to whether cause has been brought before it by plaintiff in a manner prescribed by law and also whether a good case for grant of relief claimed been set up by him - As and when such entitlement is established, any subsequent error till delivery of judgment could be regarded as an error within jurisdiction - Question of jurisdiction has to be determined at commencement and not at conclusion of enquiry - Decision rendered by a court on merits of a controversy in favour of plaintiff without first adjudicating on its competence to decide such controversy would amount to a decision being rendered on an illegal and erroneous assumption of jurisdiction. (Paras 38 and 41)

(D) Civil Procedure Code, 1908 - Order XIV Rule 2 - Preliminary issue - It would be inappropriate for a court to abstain from recording its prima facie satisfaction on question of maintainability, yet, proceed to grant protection pro tem on assumption that question of maintainability has to be decided as a preliminary issue under Rule 2 of Order XIV, CPC - That could amount to an improper exercise of power - If court is of the opinion

at the stage of hearing application for interim relief that suit is barred by law or is otherwise not maintainable, it cannot dismiss it without framing a preliminary issue after written statement is filed but can most certainly assign such opinion for refusing interim relief - However, if an extraordinary situation arises where it could take time to decide point of maintainability of suit and non-grant of protection pro tem pending such decision could lead to irreversible consequences, court may proceed to make appropriate order justifying course of action it adopts. (Para 39)

(E) Civil Procedure Code, 1908 - Section 2(9) - Judgment and Decree - A Judgment, as envisaged in Section 2(9), CPC, should contain process of reasoning by which court arrived at its conclusion to resolve controversy and consequently to decree the suit - A "judgment", if pronounced by a court under Rule 10 of Order VIII, CPC, must satisfy requirements of Rule 4(2) of Order XX, CPC, and thereby conform to its definition provided in Section 2(9) thereof - It is only a "judgment" conforming to provisions of CPC that could lead to a "decree" being drawn up - Any verdict of a competent judicial forum in form of a judgment/order that determines rights and liabilities of parties to proceedings, must inform parties what is outcome and why one party has succeeded and not other. (Paras 43, 44, 45 and 47)

Facts of the case:

Respondents 1 to 3 had filed an objection under section 47 of Code of Civil Procedure, 1908 in an execution application filed before Executing Court by appellants. It was urged, based on the case pleaded therein, that decree put to execution was inexecutable. Executing Court, on 19th March, 2008, allowed objections of the respondents 1 to 3, resulting in dismissal of execution application.

Sole question of law which arises for a decision in this appeal is: -

Whether order dated 5th August, 1991 suffered from a jurisdictional error so grave that decree drawn up subsequently is incapable of execution by Executing Court and an objection that it is inexecutable was available to be raised under Section 47, CPC by respondents 1 to 3?

Findings of Court:

Court Receiver shall provide accounts of income and expenditure in respect of suit property to appellants as well as respondents 1 to 3 within two months and any claim of either of parties would be open to be raised and addressed in accordance with law.

Result : Appeal dismissed.

Cases Referred:

[Surjit Singh and Others v. Harbans Singh and Others, , \(1995\) 6 SCC 50 \[Para 8\] - Referred.](#)

[Manohar Lal v. Ugrasen, , \(2010\) 11 SCC 557 \[Para 8\] - Referred.](#)

[Balraj Taneja v. Sunil Madan, , \(1999\) 8 SCC 396 \[Para 8\] - Relied.](#)

[Hukam Chand v. Om Chand, , \(2001\) 10 SCC 715 \[Para 10\] - Referred.](#)

[Nagubai Ammal v. B. Shama Rao, , AIR 1956 SC 593 \[Para 10\] – Referred.](#)
[Swaran Lata Ghosh v. H.K. Banerjee, , \(1969\) 1 SCC 709 \[Para 23\] – Relied.](#)
[Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman, , \(1970\) 1 SCC 670 \[Para 27\] – Relied.](#)
[Dhurandhar Prasad Singh v. Jai Prakash University, , \(2001\) 6 SCC 534 \[Para 28\] – Relied.](#)
 Hirday Nath Roy v. Ramachandra Barna Sarma, 1920 SCC OnLine Cal 85 : ILR LXVIII, , Cal 138 [Para 33] – Relied.
[Official Trustee v. Sachindra Nath Chatterjee, , AIR 1969 SC 823 \[Para 34\] – Relied.](#)
[Rafique Bibi v. Sayed Waliuddin \(2004\) 1 SCC 287 \[Para 36\] – Relied..](#)
[Balvant N. Viswamitra v. Yadav Sadashiv Mule, , \(2004\) 8 SCC 706 \[Para 37\] – Relied.](#)

Advocates: Advocates appeared :

For the Appellant(s) : Ms. Meenakshi Arora, Sr. Adv. Mr. Rahul Narayan, AOR Mr. Shashwat Goel, Adv. Ms. Palak Vasishtha, Adv.

For the Respondent(s) : Mr. Abhishek Chaudhary, AOR Mr. Adarsh Upadhyay, AOR

JUDGMENT :

DIPANKAR DATTA, J.

The Challenge

1. Respondents 1 to 3 had filed an objection under section 47 of the Code of Civil Procedure, 1908 (“CPC”, hereafter) in an execution application filed before the Executing Court by the appellants. It was urged, based on the case pleaded therein, that the decree put to execution was inexecutable. The Executing Court, on 19th March, 2008, allowed the objections of the respondents 1 to 3, resulting in dismissal of the execution application.

2. A revision was carried by the appellants from the order dated 19th March, 2008 before the Revisional Court which, vide its order dated 21st February, 2009, dismissed the objection filed by the respondents 1 to 3 and directed the Executing Court to proceed with the execution of the decree whilst treating such objection as non-maintainable.

3. The revisional order dated 21st February, 2009 was challenged by the respondents 1 to 3 in an application under Article 227 of the Constitution¹[Civil Misc. Writ Petition No. 15236 of 2009] before the High Court of Judicature at Allahabad (“High Court”, hereafter). The High Court, by its judgment and order dated 4th February, 2011, quashed the order passed by the Revisional Court and relegated the parties to the remedy of having their rights, in respect of the suit property, adjudicated by the appropriate forum.

4. This appeal, by special leave, registers a challenge to the said judgment and order of the High Court.

Factual Conspectus

5. Having regard to the nature and extent of controversy raised at the stage of execution, a decision on this appeal does not necessitate noting the facts triggering it and the rival contentions in great depth; however, we propose to briefly narrate the essential facts and submissions advanced by learned counsel for the parties

before recording our conclusions.

6. The relevant facts, shorn of unnecessary details, are noticed hereunder:

a. Appellants claimed that their great-grandmother, one Khatoon Jannat Bibi, had orally gifted them a certain property ("suit property", hereafter) on 16th August, 1988 whereafter a memorandum recording the same was also executed before the relevant tehsildar and that they were in peaceful possession of the same continuously.

b. Appellants, as plaintiffs, through their power of attorney holder, instituted a civil suit²[Original Suit No. 58 of 1990] ("Suit", hereafter) before the Trial Court under section 38 of the Specific Relief Act, 1963 ("Specific Relief Act", hereafter) against three defendants - a son of Khatoon Jannat Bibi named Asad Ullah Kazmi [defendant no. 1] ("Kazmi", hereafter), Kazmi's son Samiullah [defendant no. 2] and one purported caretaker, Mr. Ram Chandra Yadav [defendant no. 3] in respect of the suit property, more particularly described in the plaint. Appellants prayed for a permanent injunction against the three defendants from interfering with the appellants' peaceful possession of the suit property.

c. Kazmi, sometime in 1990, initiated proceedings for declaration of rights before the Sub-Divisional Officer under section 229B of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 ("UPZA & LR Act", hereafter); the said proceedings were, however, dismissed on 27th February, 1999 [4 (four) years after his death].

d. In the Suit, an application for interim injunction was filed by the appellants. The Trial Court on 31st May, 1990, allowed the application and directed Kazmi and Samiullah to maintain status quo with regard to the suit property, and directed them not to interfere with the appellants' peaceful possession thereof.

e. Kazmi filed his written statement in the Suit on 5th December, 1990 where he inter alia contended that the Suit was barred by section 331 of the UPZA & LR Act and not maintainable before a civil court since the suit property was bhoomidhari land. It was further averred that the Suit was barred by section 41(h) of the Specific Relief Act; he also contended that his son Samiullah, the defendant no.2, had no concern with the suit property as long as his father (Kazmi) was alive and, hence, Samiullah had been wrongly impleaded as the defendant no.2. Kazmi also denied that Khatoon Jannat Bibi had the right to make any oral gift; inasmuch as she had only a life interest in the property, after her demise, the same devolved upon him exclusively.

f. It is to be noted that no written statement was filed on behalf of the other two defendants.

g. Upon the appellants moving an application under Rules 5 and 10 of Order VIII, CPC for pronouncement of judgment against Samiullah, the same was allowed by the Trial Court by its order dated 5th August, 1991³[The decree was signed on 11th November, 1991], to which we propose to advert in course of our analysis.

h. Subsequently, the Trial Court, on 10th October, 1991, framed 11 (eleven)

issues for consideration in the Suit, of which the very first one was on its competency to try the Suit.

i. Kazmi passed away on 15th July, 1995, after which his sons, Samiullah and Fariduddin [respondents 4 and 5 herein] transferred the suit property to the respondents 1 to 3 ("Purchasers", hereafter) vide a sale deed dated 3rd November, 1997. The Suit against Kazmi remained pending even after his demise, and none of his other heirs or legal representatives were brought on record as substituted defendants. The Suit against Kazmi was finally dismissed as abated on 27th April, 2009.

j. Appellants, as purported decree holders, filed an execution application⁴[Execution Application No. 58 of 1997] before the Executing Court, on 16th December, 1997, praying that respondents 4 and 5 be punished for violating the order dated 5th August, 1991 and that the sale deed dated 3rd November, 1997 in favour of the Purchasers be declared invalid.

k. The Executing Court, vide an interim order passed on 16th January, 1998, restrained the Purchasers from interfering in any manner with the suit property.

l. Thereupon, the Purchasers filed their objection under section 47, CPC wherein they submitted, inter alia, that the order dated 5th August, 1991 was neither a judgment nor a decree and could not be executed.

m. Further, on 7th December, 2004, the appellants filed a contempt petition⁵[Civil Misc Contempt Petition No. 62 of 2004] against the respondents alleging contempt of orders dated 31st May, 1990 and 5th August 1991, and the Executing Court order dated 16th January, 1998 by interfering with the appellants' possession of the suit property.

n. These events were followed by the proceedings and the judgments/orders referred to in paragraphs 1 to 4 hereinabove.

Impugned Judgment

7. The Purchasers invoked the appropriate jurisdiction of the High Court by challenging the order dated 21st February, 2009 of the Revisional Court. The High Court formulated two points for determination, viz. (i) whether the petitioners before it (respondents 1 to 3 herein), who are subsequent purchasers of the suit property, had any right to maintain an objection under section 47, CPC against execution of the decree? and (ii) whether the order dated 5th August, 1991, passed in purported exercise of power under Rule 10 of Order VIII, CPC decreeing the suit against Samiullah alone is without jurisdiction and a nullity which is non est and inexecutable in nature? The High Court also framed an ancillary point as to whether the sale deed dated 23rd November, 1997 made by Samiullah in favour of the Purchasers was null and void.

8. While the two main points were answered in the affirmative, the ancillary point was answered in the negative. In course of rendering its judgment, the High Court held the order dated 5th August, 1991, and consequently the decree drawn on the basis thereof, to be beyond jurisdiction and a nullity. The High Court was also of the opinion that the revisional order dated 21st February, 2009 deserved to be set aside and the writ petition allowed, which it duly ordered. The parties were granted liberty

to take recourse to available legal remedies to have determination of the title to the suit property adjudicated. Certain salient observations made by the High Court in the impugned judgment are summarised below for convenience:

- a. The order dated 5th August 1991, passed by the Trial Court, in the Suit, restrained only the defendant no.2 from interfering with the peaceful enjoyment of the appellants' rights relating to the suit property, but did not restrict the sons of Kazmi from dealing with or transferring the same.
- b. The transfer of the suit property was not in derogation of section 52 of the Transfer of Property Act, 1882 ("ToP Act", hereafter) and that the Purchasers could object to the appellants' execution application.
- c. It is a cardinal principle that to succeed in a suit for permanent prohibitory injunction, the plaintiff must either establish title, proprietary rights over the suit property or prove possession over the same; however, the Trial Court had not found either the title of the plaintiffs or proved their possession in respect of the suit property.
- d. A court need not always pronounce judgment on the facts of a plaint or on those admitted due to non-filing of a written statement or want of specific denial. A court has the option of pronouncing judgment only in cases where it deems it prudent; it also has the option to pass such an appropriate order as it seems fit.
- e. A reading of Rules 1, 5 and 10 of Order VIII, CPC show that they concern themselves with only a single defendant to a suit and not several defendants. The Trial Court, instead, could have proceeded to hear the Suit ex parte under Rule 11 of Order IX, CPC since Kazmi's written statement was on the record. Hence, the Trial Court had no authority in law to decree the Suit against one defendant without adjudicating upon the controversy involved.
- f. The order dated 5th August, 1991 was not a judgment within the scope of section 2(9) read with Rule 4(2) of Order XX, CPC and did not meet the basic requirements of a "judgment" and a decree as per section 2(9) and 2(2), CPC, respectively.

Rival Contentions

9. Ms. Meenakshi Arora, learned senior counsel for the appellants while seeking our interference with the impugned judgment submitted as under:

- a. The High Court fell into error by not appreciating the fact that the Executing Court exceeded its jurisdiction by going behind the order dated 5th August, 1991 and the decree that was drawn up in terms thereof, returning a finding that the same was not executable.
- b. Samiullah had been provided ample opportunity to file his written statement but had failed to do so. In any event, the order dated 5th August, 1991 had not been challenged, and had attained finality.
- c. The Trial Court, vide an interim order dated 31st May, 1990, had directed Kazmi and Samiullah to maintain status quo and not interfere with the peaceful possession of the suit property, by the appellants. The High Court had erroneously held that a perusal of the aforementioned order did not indicate

any rider placed upon the parties from alienating the suit property, and that the sale deed dated 3rd November, 1997 was validly entered into.

d. The Purchasers were purchasers pendente lite and could not have purchased the suit property without leave of the Trial Court. The decisions in *Surjit Singh and Others v. Harbans Singh and Others*, [\(1995\) 6 SCC 50](#) and *Manohar Lal v. Ugrasen*, [\(2010\) 11 SCC 557](#) were referred to in support of the contentions that the transfer of property during pendency of proceedings and also in contravention of the interim order of injunction was impermissible.

e. Further, the Purchasers forcibly dispossessed the appellants of their peaceful possession of the suit property on 10th October, 2004 in gross violation of the injunction order dated 16th January, 1998 passed by the Executing Court.

f. Reliance placed by the High Court on *Balraj Taneja v. Sunil Madan*, [\(1999\) 8 SCC 396](#) was misplaced in the present case as this Court, in *Balraj Taneja (supra)*, while holding that reasons must be given while decreeing a suit under Rule 10 of Order VIII, CPC, was seized of a matter where the decree was challenged in appellate proceedings. In the present case, the decree was sought to be declared inexecutable in execution proceedings, far beyond the reach of such a narrow jurisdiction.

10. Ms. Preetika Dwivedi, learned counsel for the Purchasers (respondents 1 to 3) in support of upholding of the impugned judgment, submitted as under:

a. The order dated 5th August, 1991 passed by the Trial Court is not a judgment within the scope of section 2(9) read with Rule 4 of Order XX, CPC and the principle of law laid down in *Balraj Taneja (supra)* was rightly applied by the High Court.

b. The High Court had rightly granted all the parties liberty to have the title to the suit property adjudicated by the appropriate forum; hence, it could not be said that the appellants were prejudiced in any manner whatsoever. Further, any question relating to the title, and validity of the sale deed in favour of the Purchasers could be determined by the appropriate forum.

c. At the time of purchase, the names of Kazmi's sons, i.e. respondents 4 and 5, were present in the land revenue records pertaining to the suit property, after which the Purchasers' names have been inserted through mutation.

d. As per the law laid down in *Hukam Chand v. Om Chand*, [\(2001\) 10 SCC 715](#) and *Nagubai Ammal v. B. Shama Rao*, [AIR 1956 SC 593](#), the transfer of the suit property was not in violation of section 52, ToP Act since the statute did not put an absolute embargo on the transfer of such property pendente lite.

Analysis

11. We have heard learned counsel for the parties and perused the impugned judgment as well as the other materials on record.

12. The sole question of law which arises for a decision in this appeal is:

Whether the order dated 5th August, 1991 suffered from a jurisdictional error so grave that the decree drawn up subsequently is incapable of execution by the Executing Court and an objection that it is inexecutable was available to be

raised under section 47, CPC by the respondents 1 to 3?

13. Prior to answering the above question, we consider it appropriate to examine the scope and extent of power exercisable under Rule 10 of Order VIII, CPC.

14. Rule 10 of Order VIII, CPC, used as the primary source of power by the Trial Court in passing the order dated 5th August, 1991 against Samiullah, postulates the procedure that could be adopted when a party fails to present its written statement upon the same being called for by the court. Rule 10 reads as follows:

“10. Procedure when party fails to present written statement called for by Court.—

Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.”

15. We have no hesitation to hold that Rule 10 is permissive in nature, enabling the trial court to exercise, in a given case, either of the two alternatives open to it. Notwithstanding the alternative of proceeding to pronounce a judgment, the court still has an option not to pronounce judgment and to make such order in relation to the suit it considers fit. The verb ‘shall’ in Rule 10 [although substituted for the verb ‘may’ by the Amendment Act of 1976] does not elevate the first alternative to the status of a mandatory provision, so much so that in every case where a party from whom a written statement is invited fails to file it, the court must pronounce the judgment against him. If that were the purport, the second alternative to which ‘shall’ equally applies would be rendered otiose.

16. At this stage, we consider it apposite to take a quick look at Balraj Taneja (supra) to examine the scope of Rule 10 of Order VIII. Therein, this Court ruled that a court is not supposed to pass a mechanical judgment invoking Rule 10 of Order VIII, CPC merely on the basis of the plaint, upon the failure of a defendant to file a written statement. The relevant paragraphs of the judgment are reproduced below for convenience:

“29. As pointed out earlier, the court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the court. In a case, specially where a written statement has not been filed by the defendant, the court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression ‘the court may, in

its discretion, require any such fact to be proved' used in sub-rule (2) of Rule 5 of Order 8, or the expression 'may make such order in relation to the suit as it thinks fit' used in Rule 10 of Order 8."

No doubt this decision was rendered considering that the verb used in the provision is 'may', but nothing substantial turns on it.

17. What emerges from a reading of Balraj Taneja (supra), with which we wholeheartedly concur, is that only on being satisfied that there is no fact which need to be proved on account of deemed admission, could the court pass a judgment against the defendant who has not filed the written statement; but if the plaint itself suggests involvement of disputed questions of fact, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts. Balraj Taneja (supra) also lays down the law that provision of Rule 10 of Order VIII, CPC is by no means mandatory in the sense that a court has no alternative but to pass a judgment in favour of the plaintiff, if the defendant fails or neglects to file his written statement.

18. If indeed, in a given case, the defendant defaults in filing written statement and the first alternative were the only course to be adopted, it would tantamount to a plaintiff being altogether relieved of its obligation to prove his case to the satisfaction of the court. Generally, in order to be entitled to a judgment in his favour, what is required of a plaintiff is to prove his pleaded case by adducing evidence. Rule 10, in fact, has to be read together with Rule 5 of Order VIII and the position seems to be clear that a trial court, at its discretion, may require any fact, treated as admitted, to be so proved otherwise than by such admission. Similar is the position with section 58 of the Indian Evidence Act, 1872. It must be remembered that a plaint in a suit is not akin to a writ petition where not only the facts are to be pleaded but also the evidence in support of the pleaded facts is to be annexed, whereafter, upon exchange of affidavits, such petition can be decided on affidavit evidence. Since facts are required to be pleaded in a plaint and not the evidence, which can be adduced in course of examination of witnesses, mere failure or neglect of a defendant to file a written statement controverting the pleaded facts in the plaint, in all cases, may not entitle him to a judgment in his favour unless by adducing evidence he proves his case/claim.

19. Having noted what Rule 10 of Order VIII postulates, the order dated 5th August, 1991 may be examined now since it is the genesis of the present litigation before us. The order made by the Trial Court on 5th August, 1991, reads as below:

"68-C application moved by the plaintiffs under Order-8 Rule-5 (2) & (3) read with Rule 10 CPC. According to the plaintiff, Samiullah son of Asad Ullah Kazmi, defendant no. 1 has been impleaded as defendant no. 1 (sic, defendant no. 2) as he was also threatening to encroach the right of the plaintiff in the disputed property. He appeared through counsel and moved application and has also filed affidavits 50-C & 57-C but he failed to file any written statement. It is clear that so many date has been given for written statement and lastly it was 29.4.91, which was fixed for written statement and for issues, but the defendant has (sic, not) filed written statement and on this ground the plaintiff has moved the above application 68-C.

The learned counsel for the plaintiff has argued that he has appeared through counsel and enough time has been given to him calling upon him to file the written statement, but he failed to file written statement. The case is covered

by Order-8 Rule 10 C.P.C. The defendant no. 2 remained absent. In view of the above, I am of the opinion that it is fit case to proceed under Order-8 Rule 10 C.P.C.

Accordingly, the suit of the plaintiffs is decreed under Order-8 Rule 10 C.P.C. with cost against defendant no. 2. The defendant no. 2 is restrained not to interfere in the peaceful right and enjoyment of the plaintiff in respect of the disputed building, trees and other properties.

Fix 9.9.1991 for Issues.”

20. In the present case, Kazmi had indeed filed his written statement dealing with the appellants' plaint before the order dated 5th August, 1991 was made. There, not only had Kazmi denied the assertions made in the plaint but he had also specifically objected to the maintainability of the suit itself before the Trial Court on the ground noted above. The Trial Court is presumed to be aware of the fact that the written statement of Kazmi was on record or else it would not have fixed the next date for settling 'issues'. In a situation where maintainability of the suit was in question and despite Samiullah not having filed his written statement, it was not a case where the Trial Court could simply pronounce judgment without even recording a satisfaction that it had the jurisdiction to try the suit and adjudicate the contentious issue(s), not to speak of pronouncing its verdict against Samiullah without assigning a single reason by treating the averments in the plaint to be admitted. The High Court rightly observed that even on pronouncement of judgment against Samiullah, the lis remained alive as against Kazmi and decision on the objection as to maintainability could have resulted in a contrary decision.

21. No tribunal, far less a civil court, in exercise of judicial power ought to play ducks and drakes with the rights of the parties. We are left to wonder what would have been the status of the rival claims if Kazmi had not passed away and accepting his objection, the Suit were dismissed on the ground of maintainability. In such a case, could such a dismissal be reconciled with the purported decree drawn up against Samiullah? The answer would have to be in the negative. Or, take the situation that has cropped up here. The suit has been dismissed qua Kazmi on 27th April, 2009 as abated. Although Ms. Arora had submitted in course of hearing that steps have since been successfully taken to set aside abatement and an assurance was given to file additional documents by 12th December, 2023 in support of such a submission, the additional documents e-filed beyond time do not reveal that (i) abatement has been set aside, (ii) the heirs/legal representatives substituted in place of Kazmi and (iii) the suit restored to its original file and number. The result is that the suit stands dismissed as against the principal defendant without any determination by the Trial Court on his objection that such court did not possess the jurisdiction to entertain and try the suit.

22. We are constrained to observe that it is to avoid such a situation of contradictory/inconsistent decrees that power under Rule 10 of Order VIII ought to be invoked with care, caution, and circumspection, only when none of several defendants file their written statements and upon the taking of evidence from the side of the plaintiff, if deemed necessary, the entire suit could be decided. As in the present case, where even one of several defendants had filed a written statement, it would be a judicious exercise of discretion for the court to opt for the second alternative in Rule 10 of Order VIII, CPC unless, of course, extraordinary

circumstances exist warranting recourse to the first alternative. In the matter at hand, the filing of the written statement by Kazmi denying the averments made in the plaint warranted that the appellants' claims be proved by evidence, oral and/or documentary, instead of decreeing the suit against one of the defendants in a most slipshod manner.

23. We find close resemblance of the facts and circumstances under consideration in *Swaran Lata Ghosh v. H.K. Banerjee*, [\(1969\) 1 SCC 709](#). A money suit instituted by the respondent before this Court was tried by the High Court at Calcutta and after taking evidence the learned Single Judge on 17th August, 1962, passed the following order:

“There will be a decree for Rs 15,000 with interest on judgment on Rs 15,000 at 6% per annum and costs. No interim interest allowed.”

Pursuant to that order a decree was drawn up. An appeal carried from the decree before the Division Bench failed. The Division Bench assigned sketchy reasons for the conclusion that the Trial Court “rightly decreed the suit” and disposed of the appeal with certain modification of the decree. While allowing the appeal and setting aside the decree passed by the high court and remanding the suit to the Court of first instance for trial according to law, this Court noted that Rules 1 to 8 of Order XX, CPC are, by the express provision contained in Rule 3(5) of Order XLIX, CPC inapplicable to a Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction and hence, a judge of a Chartered High Court was not obliged to record reasons in a judgment strictly according to the provisions contained in Rules 4(2) and 5 of Order XX, CPC. Notwithstanding such a provision, this Court proceeded to record in paragraph 6 as follows:

“6. Trial of a civil dispute in court is intended to achieve, according to law and the procedure of the court, a judicial determination between the contesting parties of the matter in controversy. Opportunity to the parties interested in the dispute to present their respective cases on questions of law as well as fact, ascertainment of facts by means of evidence tendered by the parties, and adjudication by a reasoned judgment of the dispute upon a finding on the facts in controversy and application of the law to the facts found, are essential attributes of a judicial trial. In a judicial trial, the Judge not only must reach a conclusion which he regards as just, but, unless otherwise permitted, by the practice of the court or by law, he must record the ultimate mental process leading from the dispute to its solution. A judicial determination of a disputed claim where substantial questions of law or fact arise is satisfactorily reached, only if it be supported by the most cogent reasons that suggest themselves to the Judge a mere order deciding the matter in dispute not supported by reasons is no judgment at all. Recording of reasons in support of a decision of a disputed claim serves more purposes than one. It is intended to ensure that the decision is not the result of whim or fancy, but of a judicial approach to the matter in contest: it is also intended to ensure adjudication of the matter according to law and the procedure established by law. A party to the dispute is ordinarily entitled to know the grounds on which the court has decided against him, and more so, when the judgment is subject to appeal. The appellate court will then have adequate material on which it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant

decision is just. It is unfortunate that the learned trial Judge has recorded no reasons in support of his conclusion, and the High Court in appeal merely recorded that they thought that the plaintiff had sufficiently proved the case in the plaint.”

24. However, there, it was an appellate decree which this Court was called upon to examine. We realise that we are not examining the correctness of a judgment/order arising from exercise of appellate jurisdiction by the High Court but a judgment approving an order on an objection under section 47, CPC, scope wherefor is limited.

25. Our real task is to ascertain whether the decree drawn up on the basis of the order dated 5th August, 1991 and put to execution by the appellants could have been objected to by the respondents 1 to 3 as inexecutable under section 47, CPC. Section 47, CPC, being one of the most important provisions relating to execution of decrees, mandates that an executing court shall determine all questions arising between the parties to the suit or their representatives in relation to the execution, discharge, or satisfaction of the decree and that such questions may not be adjudicated in a separate suit.

26. Reference to a couple of authorities on the scope and nature of section 47, CPC, at this stage, would not be inapt.

27. In *Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman*, [\(1970\) 1 SCC 670](#), this Court was considering the scope of objection under section 47 of the CPC in relation to the executability of a decree. Therein, it was laid down that only such a decree could be the subject-matter of objection which is a nullity and not a decree which was erroneous either in law or on facts. Law was laid down in the following terms:

“6. A court executing a decree cannot go behind the decree: between the parties or their representatives it must take the decree according to its tenor and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representative on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a court which has no inherent jurisdiction to make objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction....”

(underlining ours, for emphasis)

28. In *Dhurandhar Prasad Singh v. Jai Prakash University*, [\(2001\) 6 SCC 534](#), this Court further expounded the powers of a court under section 47, CPC in the following words:

“24. The exercise of powers under Section 47 of the Code is microscopic and

lies in a very narrow inspection hole. Thus it is plain that executing court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and a nullity, apart from the ground that the decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing....”

(underlining ours, for emphasis)

29. The legality of the order of the High Court, together with the order of the Executing Court that the former went on to uphold, has to be tested having regard to the settled position of law as noticed above and bearing in mind that the powers of an executing court, though narrower than an appellate or revisional court, can be exercised to dismiss an execution application if the decree put to execution is unmistakably found to suffer from an inherent lack of jurisdiction of the court that made the same rendering it a nullity in the eye of law.

30. For reasons more than one, we propose to hold that the Executing Court and the High Court were right in holding that the objection raised by the respondents 1 to 3 to the executability of the decree was well-founded.

31. What appears to be of significance in the light of the decisions referred to above is the importance of the legal term ‘jurisdiction’, and the question whether the Trial Court did have the jurisdiction to pass the order it did on 5th August, 1991 followed by the decree signed on 11th November, 1991.

32. What does ‘jurisdiction’ mean? In the ensuing discussion, we feel inclined to draw guidance from certain decisions of ancient vintage which have stood the test of time.

33. The wisdom of Sir Ashutosh Mukherjee, A.C.J., speaking for a Full Bench of the High Court at Calcutta in *Hirday Nath Roy v. Ramachandra Barna Sarma*, 1920 SCC OnLine Cal 85 : ILR LXVIII, Cal 138, more than a century back, profitably assists us in understanding what is meant by ‘jurisdiction’, ‘lack of jurisdiction’ and ‘error in the exercise of jurisdiction’. The relevant passage reads as under:

“...An examination of the cases in the books discloses numerous attempts to define the term ‘jurisdiction’, which has been stated to be ‘the power to hear and determine issues of law and fact’; ‘the authority by which judicial officers take cognizance of and decide causes’; ‘the authority to hear and decide a legal controversy’; ‘the power to hear and determine the subjectmatter in controversy between parties to a suit and to adjudicate or exercise any judicial power over them’; ‘the power to hear, determine and pronounce judgment on the issues before the Court’; ‘the power or authority which is conferred upon a Court by the legislature to bear and determine causes between parties and to carry the judgments into effect’; ‘the power to enquire into the facts, to apply the law, to pronounce the judgment and to carry it into execution. ... This jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus, the jurisdiction may have to be considered with reference to place, value, and nature of the subject-matter. ... This classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject-matter is obviously of a fundamental character. Given such jurisdiction, we must be careful to distinguish exercise of jurisdiction from existence of jurisdiction; for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of

jurisdiction. The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction; and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction. The extent to which the conditions essential for creating and raising the jurisdiction of a Court or the restraints attaching to the mode of exercise of that jurisdiction should be included in the conception of jurisdiction itself is sometimes a question of great nicety...But the distinction between existence of jurisdiction and exercise of jurisdiction has not always been borne in mind and this has sometimes led to confusion. ... We must not thus overlook the cardinal position that in order that jurisdiction may be exercised, there must be a case legally before the Court and a hearing as well as a determination. A judgment pronounced by a Court without jurisdiction is void, subject to the well-known reservation that when the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction, though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it.

Besides the cases mentioned therein, reference may particularly be made to the judgment of Srinivas Aiyangar, J., in *Tuljaram v. Gopala* [32 Mad. L.J. 434; 21 Mad. L.J. 220 (1916).], where the true rule was stated to be that if a Court has jurisdiction to try a suit and has authority to pass orders of a particular kind, the fact that it has passed an order which it should not have made in the circumstances of that litigation, does not indicate total want or loss of jurisdiction so as to render the order a nullity."

(underlining ours, for emphasis)

34. *Hirday Nath Roy (supra)* found approval in *Official Trustee v. Sachindra Nath Chatterjee*, [AIR 1969 SC 823](#), a co-ordinate Bench decision of this Court. The relevant observations of this Court in *Sachindra Nath Chatterjee (supra)* are reproduced below:

"12. It is plain that if the learned judge had no jurisdiction to pass the order in question then the order is null and void. It is equally plain that if he had jurisdiction to pronounce on the plea put forward before him the fact that he made an incorrect order or even an illegal order cannot affect its validity. ...

15. *** it is clear that before a Court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject-matter of the suit. Its jurisdiction must include the power to hear and decide the questions at issue, the authority to hear and decide the particular controversy that has arisen between the parties. ..."

(underlining ours, for emphasis)

35. The essence really is that a court must not only have the jurisdiction in respect of the subject matter of dispute for the purpose of entertaining and trying the claim but also the jurisdiction to grant relief that is sought for. Once it is conceded that the jurisdiction on both counts is available, it is immaterial if jurisdiction is exercised erroneously. An erroneous decision cannot be labelled as having been passed 'without jurisdiction'. It is, therefore, imperative that the distinction between a

decision lacking in inherent jurisdiction and a decision which suffers from an error committed in the exercise of jurisdiction is borne in mind.

36. Moving on to decisions of not too distant an origin, we notice that this Court in *Rafique Bibi v. Sayed Waliuddin* ([\(2004\) 1 SCC 287](#)) whilst relying on *Vasudev Dhanjibhai Modi* (supra), has made valuable observations as to the circumstances where an order passed could be regarded as a nullity. The relevant observations made in *Rafique Bibi* (supra) read thus:

“6. What is ‘void’ has to be clearly understood. A decree can be said to be without jurisdiction, and hence a nullity, if the court passing the decree has usurped a jurisdiction which it did not have; a mere wrong exercise of jurisdiction does not result in a nullity. The lack of jurisdiction in the court passing the decree must be patent on its face in order to enable the executing court to take cognizance of such a nullity based on want of jurisdiction, else the normal rule that an executing court cannot go behind the decree must prevail.

7. Two things must be clearly borne in mind. Firstly, ‘the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be ‘a nullity’ and ‘void’ but these terms have no absolute sense: their meaning is relative, depending upon the court's willingness to grant relief in any particular situation. If this principle of illegal relativity is borne in mind, the law can be made to operate justly and reasonably in cases where the doctrine of ultra vires, rigidly applied, would produce unacceptable results.” (Administrative Law, Wade and Forsyth, 8th Edn., 2000, p. 308.) ...

8. A distinction exists between a decree passed by a court having no jurisdiction and consequently being a nullity and not executable and a decree of the court which is merely illegal or not passed in accordance with the procedure laid down by law. A decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable by the executing court; the remedy of a person aggrieved by such a decree is to have it set aside in a duly constituted legal proceedings or by a superior court failing which he must obey the command of the decree. A decree passed by a court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings.”

(underlining ours, for emphasis)

37. Also, a reading of *Rafique Bibi* (supra) makes it clear that the lack of jurisdiction must be patent on the face of the decree to enable an executing court to conclude that the decree was a nullity. Hence, it is clear that all irregular or wrong decrees would not necessarily be void. An erroneous or illegal decision, which was not void, could not be objected in execution or incidental proceedings. This dictum was also affirmed by a Bench of 3 (three) Hon'ble Judges of this Court in *Balvant N. Viswamitra v. Yadav Sadashiv Mule*, ([\(2004\) 8 SCC 706](#)).

38. What follows from a conspectus of all the aforesaid decisions is that jurisdiction is the entitlement of the civil court to embark upon an enquiry as to whether the cause has been brought before it by the plaintiff in a manner prescribed by law and also whether a good case for grant of relief claimed been set up by him. As and when such entitlement is established, any subsequent error till delivery of judgment

could be regarded as an error within the jurisdiction. The enquiry as to whether the civil court is entitled to entertain and try a suit has to be made by it keeping in mind the provision in section 9, CPC and the relevant enactment which, according to the objector, bars a suit. Needless to observe, the question of jurisdiction has to be determined at the commencement and not at the conclusion of the enquiry.

39. Although not directly arising in the present case, we also wish to observe that the question of jurisdiction would assume importance even at the stage a court considers the question of grant of interim relief. Where interim relief is claimed in a suit before a civil court and the party to be affected by grant of such relief, or any other party to the suit, raises a point of maintainability thereof or that it is barred by law and also contends on that basis that interim relief should not to be granted, grant of relief in whatever form, if at all, ought to be preceded by formation and recording of at least a prima facie satisfaction that the suit is maintainable or that it is not barred by law. Such a satisfaction resting on appreciation of the averments in the plaint, the application for interim relief and the written objection thereto, as well as the relevant law that is cited in support of the objection, would be a part of the court's reasoning of a prima facie case having been set up for interim relief, that the balance of convenience is in favour of the grant and non-grant would cause irreparable harm and prejudice. It would be inappropriate for a court to abstain from recording its prima facie satisfaction on the question of maintainability, yet, proceed to grant protection pro tem on the assumption that the question of maintainability has to be decided as a preliminary issue under Rule 2 of Order XIV, CPC. That could amount to an improper exercise of power. If the court is of the opinion at the stage of hearing the application for interim relief that the suit is barred by law or is otherwise not maintainable, it cannot dismiss it without framing a preliminary issue after the written statement is filed but can most certainly assign such opinion for refusing interim relief. However, if an extraordinary situation arises where it could take time to decide the point of maintainability of the suit and non-grant of protection pro tem pending such decision could lead to irreversible consequences, the court may proceed to make an appropriate order in the manner indicated above justifying the course of action it adopts. In other words, such an order may be passed, if at all required, to avoid irreparable harm or injury or undue hardship to the party claiming the relief and/or to ensure that the proceedings are not rendered infructuous by reason of non-interference by the court.

40. Turning to the facts of the present case, Kazmi had challenged the maintainability of the Suit in the written statement filed by him before the Trial Court contending inter alia that the suit property was bhoomidhari land owing to which the Suit was barred by section 331 of UPZA & LR Act as well as it was barred under section 41(h) of the Specific Relief Act and, thus, not maintainable before the civil court. What was required of the Trial Court in such situation was to record a satisfaction, at least prima facie, that the Suit was maintainable and then proceed to pass such orders as it considered proper in the circumstances. A glance at the order dated 5th August, 1991, is sufficient to inform us that the Trial Court, in no words whatsoever, made any decision on whether it was entitled in law to decide the plea before it, prior to decreeing the Suit against Samiullah under Rule 10 of Order VIII, CPC. The question of competence to try the Suit, we have found, was the first of several issues arising for decision in the Suit and despite such looming presence of an important issue before the Trial Court which, if examined and answered in favour of Kazmi, would have ousted jurisdiction, it preferred not to wait and proceeded to

decree the same against Samiullah without a whisper on its competency to do the same.

41. The legal and factual position of the present case having been noted above, we hold that a decision rendered by a court on the merits of a controversy in favour of the plaintiff without first adjudicating on its competence to decide such controversy would amount to a decision being rendered on an illegal and erroneous assumption of jurisdiction and, thus, be assailable as lacking in inherent jurisdiction and be treated as a nullity in the eye of law; as a logical corollary, the order dated 5th August, 1991 is held to be ab initio void and the decree drawn up based thereon is inexecutable.

42. There is one other reason which we wish to assign as a ground for upholding the order of the Executing Court and the High Court.

43. Reference may once again be made to Balram Taneja (supra) where the law has been reiterated succinctly, as follows:

“41. There is yet another infirmity in the case which relates to the ‘judgment’ passed by the Single Judge and upheld by the Division Bench.

42. ‘Judgment’ as defined in Section 2(9) of the Code of Civil Procedure means the statement given by the Judge of the grounds for a decree or order. What a judgment should contain is indicated in Order 20 Rule 4(2) which says that a judgment ‘shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision’. It should be a self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the court and in what manner. The process of reasoning by which the court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment.

43. ***

44. ***

45. Learned counsel for Respondent 1 contended that the provisions of Order 20 Rule 4(2) would apply only to contested cases as it is only in those cases that ‘the points for determination’ as mentioned in this rule will have to be indicated, and not in a case in which the written statement has not been filed by the defendants and the facts set out in the plaint are deemed to have been admitted. We do not agree. Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds ex parte and is ultimately decided as an ex parte case, or is a case in which the written statement is not filed and the case is decided under Order 8 Rule 10, the court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is resolved.

46. *** Even if the definition were not contained in Section 2(9) or the contents thereof were not indicated in Order 20 Rule 4(2) CPC, the judgment would still mean the process of reasoning by which a Judge decides a case in favour of one party and against the other. In judicial proceedings, there cannot be arbitrary orders. A Judge cannot merely say ‘suit decreed’ or ‘suit dismissed’. The whole

process of reasoning has to be set out for deciding the case one way or the other. This infirmity in the present judgment is glaring and for that reason also the judgment cannot be sustained."

(underlining ours, for emphasis)

We concur with the observation that a judgment, as envisaged in section 2(9), CPC, should contain the process of reasoning by which the court arrived at its conclusion to resolve the controversy and consequently to decree the suit.

44. It is indubitable that a "judgment", if pronounced by a court under Rule 10 of Order VIII, CPC, must satisfy the requirements of Rule 4(2) of Order XX, CPC, and thereby conform to its definition provided in section 2(9) thereof.

45. Further, even a cursory reading of Rule 10 of Order VIII, CPC impresses upon us the fundamental mandate that a "decree" shall follow a "judgment" in a case where the court invokes power upon failure of a defendant to file its written statement. It is, therefore, only a "judgment" conforming to the provisions of the CPC that could lead to a "decree" being drawn up. As is manifest on the face of the record of the present case, apart from the ipse dixit of the Trial Court that the case is fit for being proceeded against under Rule 10 of Order VIII and that the suit qua Samiullah ought to be decreed with the injunctive order, no ingredients that a "judgment" should contain as per the CPC appear in the order dated 5th August, 1991.

46. We deem it fit to advert to the fine words of wisdom imparted to us by Hon'ble P.B. Mukharji, C.J., in 'The New Jurisprudence: The Grammar of Modern Law' where the learned author says:

"The supreme requirement of a good judgment is reason. Judgment is of value on the strength of its reason. The weight of a judgment, its binding character or its persuasive character depends on the presentation and articulation of reason. Reason, therefore, is the soul and spirit of a good judgment."

47. It is one of the cardinal principles of the justice delivery system that any verdict of a competent judicial forum in the form of a judgment/order, that determines the rights and liabilities of the parties to the proceedings, must inform the parties what is the outcome and why one party has succeeded and not the other - the 'why' constituting the reasons and 'what' the conclusion. Apart from anything else, insistence of the requirement for the reason(s) to support the conclusion guarantees application of mind by the adjudicator to the materials before it as well as provides an avenue to the unsuccessful party to test the reasons before a higher court.

48. All civil courts in the country have to regulate their judicial work in accordance with the terms of the provisions of the CPC. Any egregious breach or violation of such provisions, including the one noticed here, would be ultra vires.

49. Let us now examine whether there is a 'decree' within the scope of section 2(2), CPC. Section 2(2) is reproduced hereunder:

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include -

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

(b) any order of dismissal for default.

(underlining ours, for emphasis)

50. The decree signed by the Trial Court on 11th November, 1991 is not on record. Nevertheless, at the cost of repetition, we record that examination of the order dated 5th August, 1991 does not reveal any adjudication leading to determination of the rights of the parties in relation to any of the matters in controversy in the suit and, therefore, the decree since drawn up is not a formal expression of an adjudication/determination since there has been no adjudication/determination so as to conform to the requirements of a decree within the meaning of section 2(2). In this regard, we express our concurrence with both the High Court and the Executing Court that there is no decree at all in the eye of law.

51. We, therefore, hold that a decree that follows a judgment or an order (of the present nature) would be inexecutable in the eyes of law and execution thereof, if sought for, would be open to objection in an application under section 47, CPC.

Conclusion

52. For the reasons mentioned above, we conclude that the Trial Court had no authority to decree the suit against Samiullah in exercise of its power under Rule 10 of Order VIII, CPC.

53. There is no reason to interfere with the judgment and order of the High Court under challenge. It is upheld and the appeal, accompanied by any pending applications, stands dismissed. Parties shall bear their own costs.

54. It is, however, made clear that no part of the observations of this Court, or of the High Court or of those below, be treated as an expression of opinion in any particular matter or on any factual aspect whatsoever. Determination of the title to the suit property, adjudication on the validity of the sale deed in favour of the Purchasers, or decision on any other contentious issue are left open for a forum of competent jurisdiction to embark upon, if approached by any of the parties.

55. We are aware that pursuant to Interim Application No. 4 of 2013 moved by the appellants, this Court had appointed one Mr. Suryanarayana Singh as the Court Receiver in respect of the property ("Court Receiver", hereafter) on 14th March, 2014. The Court Receiver already appointed shall stand discharged forthwith. Unpaid remuneration, if any, shall be borne by the appellants.

56. However, the Court Receiver shall provide accounts of income and expenditure in respect of the suit property to the appellants as well as the respondents 1 to 3 within two months and any claim of either of the parties would be open to be raised and addressed in accordance with law.

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1996 2 AD(Del) 479 ; 1996 0 AIR(Del) 191 ; 1996 1 ArbLR 566 ; 1996 61 DLT 779 ; 1996 36 DRJ 466 ; 1996 0 RLR 310

**High Court Of Delhi
UNION OF INDIA - Appellant
Versus
JAGAT RAM TREHAN AND SONS - Respondent
Decided On : 01/01/1996**

Subject: Arbitration - Jurisdiction of Arbitrator

arbitrator - jurisdiction - award - nullity - execution proceedings - Section 47 Civil Procedure Code

Arbitration Act, 1940 - Section 30 & 33 — Award without jurisdiction — Appointment of an arbitrator by designation — Relinquishment of office by the arbitrator — Award rendered after relinquishing the office is without jurisdiction.

Civil Procedure Code 1908 - Section 47 — Execution of decree — Scope of power of executing court to declare the decree null and void and therefore not executable — Award of the arbitrator delivered without jurisdiction and culminated into decree of court — It can be declared nullity by the executing court in the collateral proceedings of execution.

Delhi High Court Act, 1966 - Section 10 — Letters patent appeal — Scope of — Appeal against the order of executing court on an issue that the decree is nullity — Such order amounts to a judgment and, therefore, appeal against it is maintainable.

Cases Referred:

[REFERRED TO : Shah Babulal Khimjis case., AIR 1981 SC 1786](#)

[Radhey Shyam vs. Shyam Behari Singh., AIR 1971 SC 2337](#)

University of Delhi vs. Hafiz, , AIR 1972 Dal 102

Ran Singh vs. G.A. Coop Service Society, , AIR 1976 PandH 94

[Masomat Narmada Davi vs. Ram Nandan Singh., AIR 1987 Pat 33](#)

[Mohammad Aleem vs. Maqsood Alam., AIR 1989 Raj 43](#)

Ram Sarup vs. Food Corporation of India, Patiala and another, , AIR 1979 PandH 116

[Union of India vs. M/s Ajit Mehta and Associates, Puna., AIR 1990 Bom 45](#)

Sabawwa Hanmappa vs. Basappa Andanappa, , 1955 0 ILR(Bom) 386

E.D. Sasson and Co. Ltd. Vs. Shivji Ram Davi Das Judgment debtors, , AIR 1929 Lah 228

Gopi Ram Jaithu Ram vs. Rami Das Sri Kishan, , AIR 1934 Lah 49

Donald Graham and Co. vs. Kawalram, , AIR 1921 Sind 132

[Madan Lal vs. Sunder Lal., AIR 1967 SC 1233](#)

[Guntupalli Rama Subbayya vs. Guntupalli Rajamma., AIR 1988 AP 226](#)

M. Jagannadha Rao, C. J.

(1) THE question raised in the appeal is with regard to the powers of the executing Court under Section 47 Civil Procedure Code to declare the decree as null and void on the ground that the award was null and void.

(2) THIS appeal is filed by the Union of India against the order passed by the learned Single Judge on the Original Side of this Court dismissing Ex. No. 37/94 dated 4. 1. 1994 and directing recovery of the amount covered by the award-decree by way of attachment.

(3) THE facts of the case are as follows:

(4) PURSUANT to a contract entered into by the respondent contractor with the Union of India (appellant- judgment debtor), an arbitrator was appointed on 2. 5. 1988 to adjudicate upon the disputes. The person so appointed was Shri N. H. Chandwani who was then on deputation as Arbitrator in the Ministry of Urban Development. In fact, Shri Chandwani was appointed in place of Shri J. D. Chopra who was working as Arbitrator earlier and who had resigned. Shri Chandwani passed the award on 5. 12. 90 and the award was made a rule of Court on 3. 8. 93 as no objections were filed by the Union of India.

(5) IN the execution proceedings, the Union of India raised objection by filing this EA contending that the award dated 5. 12. 90 and the decree dated 3. 8. 93 were nullities because Shri Chandwani who passed the award had already relinquished his office as Arbitrator on 30. 11. 90 before he passed the award on 5. 12. 90 and that he had no jurisdiction to pass the award.

(6) IT may be noted that a proceeding dated 20. 11. 90 was issued by the Union of India stating that the reference was made to Shri N. H. Chandwani -

"at present on deputation as Arbitrator"

AND he would be released from those duties prospectively w. e. f. 30. 11. 90 AN as per the orders of the Ministry dated 5. 11. 90. He was directed to report to duty thereafter as Appropriate Authority, Income Tax Department, Calcutta. It was also stated that he could dispose of pending cases in 10 days i. e. by 30. 11. 90. In fact, Shri N. H. Chandwani had himself given a certificate to the effect that he had relinquished office as arbitrator on 30. 11. 90.

(7) IF the arbitrator had rendered an award before 30. 11. 90, there would have been no possibility for a contention by the Union of India that he rendered the award on 5. 12. 90, after relinquishment of office as Arbitrator. But inasmuch as the award was given after 30. 11. 1990, the Union of India contends in execution proceedings under Section 47 Civil Procedure Code that the award and decree are nullities.

(8) A preliminary objection was raised by the learned counsel for the contractor-respondent that this appeal is not maintainable under Order 43, Rule I Civil Procedure Code as Section 47 is not included in the definition of decree. Appeal is not maintainable under any other provision, it is contended.

(9) THE following questions arise for consideration:

(1) Whether this appeal under Section 10 of the Delhi High Court Act or Letters Patent (Lahore) is maintainable ?

(2) Whether the reference to Mr. N. H. Chandwani was because of his status and posting as an Arbitrator on deputation in the Urban Development Ministry and if so whether upon ceasing to function as Arbitrator in that post, w. e. f. 30. 11. 90, he could have passed an Award on 5. 12. 90 ?

(3) Whether it was open to the Union of India, as a judgment-debtor, to raise the question that the award and decree were nullities, in an application under Section 47 Civil Procedure Code ?

(4) Whether the fact that the Union of India did not file objections to the award nor filed an appeal nor an application under Sections 17, 30 or 33 is a bar to this application filed under Section 47 ?

(10) BEFORE advertng to the above points, we have to mention that Mr. Chandwani is stated to have passed more than 60 awards after 30. 11. 90 the date on which he ceased to be an arbitrator. The question raised is, therefore, very important so far as the Union of India is concerned.

(11) POINT 1 This appeal is filed under Section 10 of the Delhi High Court. The Letters Patent (Lah) is also applicable.

(12) QUESTION is whether this appeal is maintainable against an order by the executing court refusing to declare that the award and decree are nullities on the ground that the arbitrator, Mr. N. H. Chandwani ceased to be an arbitrator by 30. 11. 90 and that he had no jurisdiction to pass the award on 5. 12. 1990. In other words, the appeal is against an order overruling objections to execution and directing recovery of the decretal amount.

(13) IN our opinion, the preliminary objection in regard to maintainability of the appeal has no force. A contention that on the dale when the award was passed on 5. 12. 90, Mr. Chandwani was no longer an arbitrator, he having admittedly relinquished office on 30. 11. 90 and consequently the decree passed on the basis of such an award is a nullity, goes to the root of the matter. It is true that an adjudication by the learned Single Judge on such an issue in the present EA may not amount to a decree because of the deletion of Section 47 from the definition of decree in Section 2 (2) CPC. But the real question is whether the order passed by the learned Single Judge in this EA amounts to a judgment within the meaning of Section 10 of the Delhi High Court and also judgment under the Letters Patent (Lahore) as applicable to Delhi High Court. The matter before us has arisen from the Original Side of this Court.

(14) THE leading judgment of the Supreme Court in this behalf is the one in Shah Babulal Khimji s case ([AIR 1981 SC 1786](#) == [1981 \(4\) SCC 8](#)). It was laid down therein that the internal appeals within the High Court are not restricted to Order 43 Rule I Civil Procedure Code and that the remedies provided by the provisions of Letters Patent do apply. The Supreme Court in that case laid down various principles. In our view, clause (14) of para 120 of Shah Babulal s Khimji s case is a complete answer to the preliminary objection raised by the respondent. It was there clearly observed that even an order refusing stay of execution of decree and directing recovery of decretal amount is a judgment" and appealable. We hold, therefore, that the impugned order overruling the objection to the execution of the decree and ordering execution is clearly a judgment and this appeal is

maintainable. It is also to be noticed that in *Radhey Shyam vs. Shyam Behari Singh* ([AIR 1971 SC 2337](#)) it was held that an order passed under Order 21 Rule 90 Civil Procedure Code amounted to a judgment as it touched upon valuable rights of parties. As regards position under Section 10, Delhi High Court Act and Letters Patent (Lahore), in *Jugal Kishore s case* ([1984 \(1\) SCC 358](#)), the Supreme Court had occasion to apply *Shah Babulal s case* to this Court and it overruled an earlier Full Bench decision of this Court in *University of Delhi vs. Hafiz* ([AIR 1972 Del 102](#) (FB)). Hence this appeal is clearly maintainable. Point I is held accordingly.

(15) POINT 2 It is not in dispute that Mr. Chandwani was brought on deputation and appointed in a specified post called arbitrator in the Ministry of Urban Development. This is clear from the order dated 20. 11. 90 prospectively releasing him as arbitrator w. e. f. 30. 11. 90. The office order reads as follows:

"in pursuance of the orders issued in this Ministry office order No. 150112/50 Ed.) dated 5th November,1990. Shri N. H. Chandwani at present on deputation as Arbitrator in this Ministry is released on his duties on the afternoon of 30th November,1990 with instructions to report for duty as Member, Appropriate Authority, Income Tax Department, Calcutta immediately. "

2. It has also been decided that in respect of arbitration cases which have been heard and are ripe for giving award Shri Chandwani should give awards within 10 days. In respect of cases where such awards cannot be given within 10 days and other cases, Shri Chandwani should resign as Arbitrator immediately under intimation to all concerned. "

(16) MR. Chandwani had also given a certificate and that is on record. He clearly says, he relinquished office on 30. 11. 1990.

(17) THE arbitration clause in the contract also says that the arbitration shall cease upon the person (who is appointed arbitrator) "being transferred or vacating his office"

(18) THESE provisions of the arbitration clause also show that the arbitration is by a person holding office as arbitrator in the department.

(19) IN the face of the above factual position, we are clearly of the opinion that upon relinquishment of office on 30. 11. 90, as arbitrator Mr. Chandwani could not have passed any award as he did on 5. 12. 90. We are of the view that the award was null and void as he lacked inherent jurisdiction.

(20) A contention was no doubt raised by the respondents counsel that there is a difference between want of jurisdiction and exercise of jurisdiction vested. It is true there is in law such a distinction but the case in hand clearly falls in the former category. Point 2 is held accordingly.

(21) POINTS 3,4 That question is whether a plea that the award is void can be raised in execution proceedings. On this question respondent contended that the award must have been objected to under Sections 17,30 and 33 or by appeal against the Order rejecting objections and if that was not done, it was not open to raise the question in execution proceedings. This contention, in our view, is not correct. That Section 47 applies to execution proceedings taken pursuant to a decree making an award a rule of Court cannot be doubted. The decided cases,

REFERRED TO to below, also hold it is open to the executing court under Section 47 to declare that the award is passed without jurisdiction and that therefore the decree passed thereupon is also null and void and not executable. (See in this connection: Ran Singh vs. G. A. Coop Service Society (AIR 1976 P and H 94 (FB); Sabawwa Hanmappa vs. Basappa Andemappa (1955 0 ILR (Bom) 386); E. D. Sasson and Co. Ltd.- Shivji Ram - Devi Das - Judgment-debtors (AIR 1929 Lahore 228); Gopi Ram Jaithu Ram vs. Rami DOS Sri Kishan (AIR 1934 Lah. 49) and Donald Graham and Co. vs. Kewalram and others (AIR 1921 Sind 132). We have therefore no hesitation in holding that this EA is maintainable under Section 47 to declare the award and the consequent decree as nullities.

(22) LEARNED counsel for the respondent has cited certain rulings - Madan Lal vs. Sunder Lal (AIR 1967 S. C. 1233); Guntupalli Rama Subbayya vs. Guntupalli Rajamma (AIR 1988 A. P. 226); Masomat Narmada Devi and another vs. Ram Nandan Singh and others ([AIR 1987 Pat 33](#)); Mohammad Aleem vs. Maqsnod Alam and others ([AIR 1989 Raj 43](#)); Ram Samp vs. Food Corporation of India,patiala and another (AIR 1979 Pandh 116); and Union of India vs. M/s Ajit Mehta and Associates,pune and others ([AIR 1990 Bom 45](#)) but we find that they do not deal with this question. The rulings relied upon by us, on the other hand, are direct.

(23) THE other objection that there was a remedy for direct attack by means of objections under Sections 17,30 or 33 is or by an appeal against the order rejection objection, in our view, is not tenable. A judgment and decree can be directly attacked by the procedure prescribed, namely, by filing objections thereto or by appealing against the order rejecting the objections. But that does not preclude a collateral attack of the award and decree in execution proceedings. The proposition that a Judgment debtor may claim the decree to be a nullity in execution proceedings and that the decree is void is too well settled. A collateral attack is not barred because an opportunity to raise the same question by direct attack was not availed. This is a well settled principle applicable to civil Courts executing decrees.

(24) FOR the aforesaid reasons, the appeal by the Union of India is allowed, the award passed by Mr. Chandwani on 5. 12. 90 after he relinquished office as Arbitrator on 30. 11. 90 is declared void and consequently the decree is also declared void. It will be open to the Competent authority to refer the matter to any other person as per clause 25 of the contract between the parties.

(25) WE have gone into the matter in detail because the same person Mr. Chandwani has, it appears, passed more than 60 awards after he relinquished office as arbitrator on 30. 11. 90.

(26) APPEAL allowed and disposed of accordingly.

1999 8 Supreme 27 ; 1999 0 Supreme(SC) 983

**1999 0 AIR(SC) 3381 ; 1999 0 AIR(SCW) 3345 ; 1999 6 ALD(SC) 21 ; 2000 40 AILLR 494 ;
2000 1 AndhWR(SC) 41 ; 1999 4 CivCC 1 ; 1999 Supp CivCC 1 ; 1999 81 DLT 779 ; 1999 0
DNJ 385 ; 1999 4 ICC 1 ; 1999 6 JT 473 ; 1999 3 KLT(SN) 78 1 ; 2002 20 LCD 1382 ; 1999 4
RCR(Civ) 438 ; 1999 90 RD 600 ; 1999 5 Scale 400 ; 1999 8 SCC 396 ; 1999 Supp2 SCR 258 ;
2000 0 WBLR 52**

1999(7) Supreme 27

Supreme Court of India

(From Delhi High Court)

S. Saghir Ahmad & D.P. Mohapatra, JJ.

Balraj Taneja & Anr. -Appellants

versus

Sunil Madan & Anr. -Respondents

Civil Appeal No. 4968 of 1999

(Arising out of SLP (C) No. 14483 of 1998)

Decided on 8-9-1999

Counsel for the Parties :

**For the Appellants : Rakesh Dwivedi, Sr. Advocate, Ashwani Bhardwaj, S.P. Sharma,
Advocates.**

For the Respondents : Kailash Vasdev, Advocate.

Important Points

1. Court should not proceed to pass judgment, under Order 8, Rule 10 of C.P.C., blindly merely because written statement has not been filed. Only on being satisfied that there is no fact which need to be proved on account of deemed admission Court can pass

Subject: JUDGEMENT - ORDER 8 RULE 10

WRITTEN STATEMENT - ADMISSION - JUDGMENT - DISCRETION - PROOF - FACTS -
SPECIFIC PERFORMANCE - DEFAULT - REASONING - CONTROVERSY - DEFENDANT -
PLAINTIFF - COURT - PROCEEDINGS - ADJOURNMENT - DELAY - NEGLIGENCE -
CERTIFICATE - INCOME TAX - CONTRACT - SALE DEED - SPECIFIC RELIEF ACT -
EVIDENCE ACT - CIVIL PROCEDURE CODE - DELHI HIGH COURT ACT

Act Referred :

**CIVIL PROCEDURE CODE : S.2(9), O.8 R.5(2), O.8 R.9, O.6 R.4, O.8 R.4(2),
O.8 R.1, O.6 R.2, O.7 R.1(e), O.8 R.10, O.12 R.6, O.20 R.4**

CONSTITUTION OF INDIA : Art.136, Art.141

DELHI HIGH COURT ACT : S.5(2), S.7

EVIDENCE ACT : S.58

SPECIFIC RELIEF ACT : S.16

(i) Code of Civil Procedure, 1908-Order 8 Rule 10-Decree on failure of defendant to file written statement-Condition precedent-Court should not proceed to pass judgment blindly merely because written statement has not been filed-Only on being satisfied that there is no fact which need to be proved on account of deemed admission Court can pass judgment-Court

has to write a judgment which must be in conformity with Order 20, Rule 1.

Held : Rule 10, was amended by the Code of Civil Procedure (Amendment) Act, 1976 (Act No. 104 of 1976). Prior to its amendment, it was held in a number of decisions that the rule can be invoked only in those situations where the Court has required the defendant to file the Written Statement in terms of Rule 9 of Order 8. A few other High Courts had taken the view that this Rule would be applicable even to those cases where a Written Statement was required to be filed under [Order 8 Rule 1 CPC](#). The conflict of decisions has been set at rest by providing specifically under this rule that where a party from whom a Written Statement is required either under Rule 1 or Rule 9 of Order 8 fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him or make such order in relation to the suit as it thinks fit. Rule 10 thus governs both the situations where a Written Statement is required under Rule 1 of Order 8 as also where it has been demanded under Rule 9. In both the situations, if the Written Statement has not been filed by the defendant, it will be open to the Court to pronounce judgment against him or make such order in relation to the suit as it thinks fit. It is to be noticed that if the Written Statement is not filed, the Court is required to pronounce judgment against the defendant. The words “against him” are to be found in Rule 10 of Order 9 which obviously means that the judgment will be pronounced against the defendant. This rule also gives a discretion either to pronounce judgment against the defendant or “make such order in relation to the suit as it thinks fit.” These words are of immense significance, inasmuch as they give a discretion to the Court not to pronounce judgment against the defendant and instead pass such order as it may think fit in relation to the suit. There are thus two separate and distinct provisions under which the Court can pronounce judgment on the failure of the defendant to file Written Statement. The failure may be either under Order 8 Rule [5\(2\)](#) under which the Court may either pronounce judgment on the basis of the facts set out in the plaint or require the plaintiff to prove any such fact; or the failure may be under [Order 8 Rule 10 CPC](#) under which the Court is required to pronounce judgment against the defendant or to pass such order in relation to the suit as it thinks fit. (Paras 13 & 14)

Under Order 12 Rule 6, the Court can, at an interlocutory stage of the proceedings, pass a judgment on the basis of admissions made by the defendant. But before the Court can act upon the admission, it has to be shown that the admission is unequivocal, clear and positive. This Rule empowers the Court to pass judgment and decree in respect of admitted claims pending adjudication of the disputed claims in the suit. In spite of admission of a fact having been made by a party to the suit, the Court may still require the plaintiff to prove the fact which has been admitted by the defendant. This is also in consonance with the provisions of Section [58](#) of the [Evidence Act](#). The Proviso to this Section specifically gives a discretion to the Court to require the facts admitted to be proved otherwise than by such admission. The Proviso corresponds to the Proviso to Rule [5\(1\)](#) Order 8 [CPC](#). (Paras 19 & 20)

The Court, at no stage, can act blindly or mechanically. While enabling the Court to pronounce judgment in a situation where no Written Statement is filed by the defendant, the Court has also been given the discretion to pass such order as it may think fit as an alternative. This is also the position under [Order 8 Rule 10 CPC](#) where the Court can either pronounce judgment against the defendant or pass such order as it may think fit. (Para 21)

The Court has not to act blindly upon the admission of a fact made by the defendant in his Written Statement nor the Court should proceed to pass judgment blindly merely because a Written Statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a Written Statement has not been filed by the defendant, the Court should be a little cautious in proceeding under [Order 8 Rule 10 CPC](#). Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the Written Statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the Court may, in its discretion, require any such fact to be proved" used in sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8. (Para 23)

Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds ex-parte and is ultimately decided as an ex-parte case, or is a case in which the written statement is not filed and the case is decided under Order 8 Rule 10, the Court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is resolved. (Para 36)

In the instant case the averment in suit for specific performance was that the defendant was to get income tax clearance certificate upon which the plaintiff would pay the balance amount of sale consideration and get the sale deed executed and registered. The case of respondent No. 1 (plaintiff), as set out in the plaint itself, was that while defendants, namely, the present appellants as also respondent No. 2 maintained that they had obtained the necessary permission from the Income Tax Department and had sent the same to him, respondent No. 1, disputed that fact and maintained that this was not correct and no Certificate (Permission) of the Income Tax Department was ever sent to him by the appellants or respondent No. 2. The trial Court passed judgment in favour

of the plaintiff on ground that the defendants, despite repeated adjournments, failed file written statement.

Held : The plaint itself showed a serious disputed question of fact involved between the parties with regard to the obtaining of Certificate (permission) from the Income Tax Department and its communication by the defendants to the plaintiff (Respondent No. 1). Since this question of fact was reflective of the attitude of the plaintiff, whether he was ready and willing to perform his part of the contract, it had to be proved as a fact that the Certificate (permission) from the Income Tax Department had not been obtained by the defendants and, therefore, there was no occasion of sending it to him. If the pleadings of respondent No. 1 were limited in character that he had pleaded only this much that the defendants had not obtained the Certificate (permission) from the Income Tax Department and had not sent it to him, this fact would have stood admitted on account of non-filing of the Written Statement by the defendants. But Respondent No. 1, as plaintiff, himself pleaded that “defendants insisted that they had obtained the Certificate (permission) from the Income Tax Department and sent it to him”. He denied its having been obtained or sent to him. Non-filing of the Written Statement would not resolve this controversy. The plaint allegations, even if treated as admitted, would keep the controversy alive. This fact, therefore, had to be proved by the plaintiff and the Court could not have legally proceeded to pass a judgment unless it was established clearly that the defendants had committed default in not obtaining the Certificate (permission) from the Income Tax Department and sending the same to the plaintiff. The High Court did not consider this fact and proceeded almost blindly to pass a decree in favour of the plaintiff merely because Written Statement had not been filed in the case. The Judgment was set aside and the case was remanded back to the High Court for fresh decision. (Paras 21, 29 and 31)

(ii) [Specific Relief Act, 1963-Section 10-Code of Civil Procedure, 1908-Order 8, Rule 10](#)- Suit for specific performance of sale agreement-Plaintiff’s case was that defendant was to get income tax clearance certificate but failed to do so-Plaint itself stated that defendants took the stand that they had obtained income tax clearance certificate and sent same to plaintiff which was false-Court passing judgment in favour of plaintiff on ground of defendants failure to file written statement within time-Not sustainable-Plaint itself indicates disputed question of fact which required to be proved-High Court not correct in invoking Order 8 Rule 10.

Held : In a suit for specific performance it is mandatorily required by Section 16 of the Specific Relief Act to plead readiness and willingness of the plaintiff to perform his part of the contract. The Court, before acting under Order 8 Rule 10 has to scrutinise the facts set out in the plaint to find out whether all the requirements, specially those indicated in Section 16 of the [Specific Relief Act](#), have been complied with or not. Readiness and willingness of the plaintiff to perform his part of the contract is a condition precedent to the passing of a decree for specific performance in favour of the plaintiff. (Para 24)

On the own pleadings of respondent No. 1, as set out in his plaint, there was a dispute between the parties, namely, plaintiff and defendants, whether permission from the Income Tax Department had been obtained by the defendants (the present appellants and respondent No. 2) and sent to plaintiff (present respondent No. 1) or the said permission was, at no time, obtained by the defendants nor had the defendants sent it to the plaintiff (respondent No. 1). This was a vital fact which had an important bearing upon the conduct of respondent No. 1. That is to say, if it was established that the Certificate (permission) from the Income Tax Department had already been obtained by the defendants and sent to him, the denial of the plaintiff would be reflective of his attitude that he was not ready and willing to perform his part of the contract. On the contrary, if it was found that defendants had not obtained the Certificate, the question whether specific performance could still be decreed would have immediately arisen particularly because of the relevant provisions of the [Income Tax Act](#). Now, the agreement in question stipulated that the defendants would obtain permission from the Income Tax Department and send the same to the plaintiff whereupon the plaintiff would pay a sum of Rs. 2.25 lakhs to the defendants and the balance amount of Rs. 75,000/- would be paid at the time of the registration of the sale deed. Since, on the own showing of the plaintiff, as set out in the plaint, the defendants had been asserting that they had obtained the permission and sent the same to the plaintiff, which was not accepted by the plaintiff, there arose between the parties a disputed question of fact which had to be investigated and decided particularly as it was likely to reflect upon the conduct of the plaintiff whether he was willing to perform his part of the contract or not. It had, therefore, to be proved as a fact that permission of the Income Tax Department had not been obtained by the defendants nor had that Certificate (permission) been sent to the plaintiff. The judgment was, therefore, set aside and the case was remanded back to the High Court for fresh decision (Paras 26 & 39)

(iii) [Code of Civil Procedure](#), 1908-Section 2(9) r/w [Order 20, Rule 1\(2\)](#)-Judgment-What should contained in-Applicability of Order 20 Rule 4(2) to judgment passed under Order 8, Rule 10.

Held : "Judgment" as defined in Section 2(9) of the Code of Civil Procedure means the statement given by the Judge of the grounds for a decree or order. What a judgment should contain is indicated in Order 20, Rule 4(2). It should be a self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the Court and in what manner. The process of reasoning by which the Court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment. (Para 33)

Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds ex-parte and is ultimately decided as an ex-parte case, or is a case in which the written statement is not filed and the case is decided under Order 8 Rule 10, the Court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is

resolved. (Para 36)

Even if the definition were not contained in Section 2(9) or the contents thereof were not indicated in [Order 20 Rule 1\(2\) CPC](#), the judgment would still mean the process of reasoning by which a Judge decides a case in favour of one party and against the other. In judicial proceedings, there cannot be arbitrary orders. A Judge cannot merely say "Suit decreed" or "Suit dismissed". The whole process of reasoning has to be set out for deciding the case one way or the other. (Para 37)

(iv) [Constitution of India](#)-Article 136-SLP - Discretion of Supreme Court-Scope and ambit.

Held : It is true that the jurisdiction under Article 136 of the Constitution is a discretionary jurisdiction and notwithstanding that a judgment may not be wholly correct or in accordance with law, this Court is not bound to interfere in exercise of its discretionary jurisdiction. But in the instant case, as we have already seen above, it is not merely a matter of the defendants' conduct in not filing the Written Statement but the question of law as to what the Court should do in a case where Written Statement is not filed, is involved, and this question has to be decided so as to provide for all the lower courts as to how the court should proceed in a situation of this nature. (Para 38)

Cases Referred:

Chuni Lal Chowdhry v. Bank of Baroda & Ors., , AIR 1982 J & K 93. (Para 15)

State of U.P. & Anr. v. Dharam Singh Mahra, , AIR 1983 Allahabad 130 : Approved. (Para 16)

[Rosario Santana Vaz v. Smt. Joaquina Natividate Fernandes, , AIR 1981 Goa 61. \(Para 17\)](#)

Dineshwar Prasad Bakshi v. Parmeshwar Prasad Sinha, , AIR 1989 Patna 139: Approved. (Para 35)

Dharam Pal Gupta v. District Judge, Etah, , 1982 All Rent Cases 562 : Approved. (Para 16)

Nanhe v. Saiyad Tasadduq Husain, , (1912) 15 Oudh Cases 78 : Approved. (Para 34)

Thippaiah & Others v. Kuri Obaiah, , ILR 1980(2) Karnataka 1028 : Approved. (Para 35)

[Sangram Singh v. Election Tribunal, Kotah & Anr., , AIR 1955 SC 425 : 1955\(1\) SCR 1. \(Para 15\)](#)

[Razia Begum v. Sahebzadi Anwar Begum & Ors., , AIR 1958 SC 886 : 1959 SCR 1111. \(Para 20\)](#)

[Smt. Sushila Jain v. Rajasthan Financial Corporation Jaipur, , AIR 1979 Raj. 215. \(Para 17\)](#)

judgment.

2. The judgment pronounced under Order 8 Rule 10 must satisfy the requirements of "judgment" as defined in Section 2(9) of the Code.

Judgment

S. Saghir Ahmad, J.-Leave granted.

2. Respondent No. 1, **Sunil Madan**, filed a suit in the Delhi High Court against the appellants and respondent No. 2 for specific performance of an agreement for sale in respect of property No. W-118, First Floor, Greater Kailash-II, New Delhi. The suit was filed in May, 1996. Summons which were issued to the appellants and respondent No.2 were duly served upon them and in response thereto, they put in appearance before the Court on 20th September, 1996 and prayed for eight weeks' time to file written statement which was allowed and the suit was adjourned to 22nd of January, 1997. Written Statement was not filed even on that date and an application was filed for further time to file the written statement which was allowed as a last chance and the written statement was directed to be filed by 7th of February, 1997. The suit was fixed for 10th of February, 1997.

3. Since the written statement was still not filed, the Court decreed the suit for specific performance in favour of respondent No. 1 under Order 8 Rule 10 C.P.C. Respondent No. 1 was directed to deposit a sum of Rs. 3 lakhs, being the balance amount of sale consideration, within six weeks and on the amount being so deposited, he was given the liberty to apply to the court for appointment of a Commissioner for executing the sale deed in his favour. The review application filed by the appellants including respondent No. 2 was dismissed by the High Court on 13th of May, 1997. An appeal, which was filed by the appellants, including respondent No. 2, thereafter, before the Division Bench (R.F.A. (OS) NO. 36/97) was dismissed on 29.4.1998. It is in these circumstances that the present appeal has been filed in this Court.

4. Mr. Rakesh Dwivedi, Sr. Advocate, appearing on behalf of the appellants has contended that having regard to the circumstances of the case, the High Court was not justified in passing the decree against the appellants, including respondent No. 2, for specific performance merely on the ground that written statement was not filed by them on the date fixed for that purpose. It is also contended that the High Court had rejected the application for time to file written statement on the ground that there was a change of counsel appearing on behalf of the appellants and no reason was indicated by them for not filing the written statement by 7th of February, 1997 or even on 10th of February, 1997 when the suit was decreed under Order 8 Rule 10 C.P.C., which indicates that the attitude adopted by the High Court in decreeing the suit under Order 8 Rule 10 C.P.C. was wholly punitive in nature resulting in serious miscarriage of justice. Mr. Rakesh Dwivedi also contended that even if the Court had decreed the suit under Order 8 Rule 10 C.P.C., it ought to have written a "judgment" by stating clearly the facts of the case and the reasons for decreeing the suit. The suit, it is contended, could not have been decreed merely for not filing of the written statement unless facts set out in the plaint were found proved by the High Court.

5. Learned counsel appearing on behalf of respondent No. 1 has contended that the appellants, including respondent No. 2, had adopted dilatory tactics and their intention, from the very beginning, was to delay the disposal of the suit so as to harass respondent No. 1 who had agreed to purchase the property in question and had also paid substantial amount by way of earnest money. It is also contended that the conduct of the appellants and respondent No. 2 was not proper and they were negligent throughout, inasmuch as not only that they did not file the written statement, they filed an appeal before the Division Bench which also was beyond time. It is also contended that while applying for time for written statement as also

for review of the judgment passed by the Court under Order 8 Rule 10 C.P.C., the appellants and respondent No. 2 had not given any reason for not filing the written statement on the dates fixed by the High Court and, therefore, having regard to the conduct of the appellants as also the vital fact that the owner of the property, namely, respondent No. 2, had not come up in Special Leave Petition, this Court should not exercise its discretion under Article 136 of the Constitution in favour of the appellants.

6. Since the suit has been decreed by the High Court under Order 8 Rule 10 C.P.C., we will first examine the provisions contained in various Rules of Order 8 to find out whether the jurisdiction was properly exercised by the High Court in decreeing the suit under Order 8 Rule 10 C.P.C.

7. Order 8 Rule 1 provides that the defendant shall file a Written Statement of his defence. It is further provided by Rule 3 of Order 8 that it shall not be sufficient for a defendant in his Written Statement to deny generally the grounds alleged by the plaintiff, but defendant must deal specifically with each allegation of fact of which he does not admit the truth. The further requirement as set out in Rule 4 is that if the allegation made in the plaint is denied by the defendant, the denial must not be evasive. It is, inter alia, provided in Rule 5 of Order 8 that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the written statement, shall be taken to be admitted.

This Rule provides as under :

“Order 8 Rule 5-Specific denial

(1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.”

8. The scheme of this Rule is largely dependent upon the filing or non-filing of the pleading by the defendant. Sub-rule (1) of Rule 5 provides that any fact stated in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be treated as admitted. Under Rule 3 of Order 8, it is provided that the denial by the defendant in his written statement must be specific with reference to each allegation of fact made in the plaint. A

general denial or an evasive denial is not treated as sufficient denial and, therefore, the denial, if it is not definite, positive and unambiguous, the allegations of facts made in the plaint shall be treated as admitted under this Rule.

9. The proviso appended to this Rule is important in the sense that though a fact stated in the plaint may be treated as admitted, the Court may, in its discretion, still require such "admitted fact" to be proved otherwise than by such admission. This is an exception to the general rule of evidence that a fact which is admitted need not be proved.

10. Sub-rule (2) provides that if the defendant has not filed his written statement, it would be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint. The rule further proceeds to say that notwithstanding that the facts stated in the plaint are treated as admitted, the Court, though it can lawfully pass the judgment, may before passing the judgment require such fact to be proved. The rule is thus in consonance with the Proviso which also requires the fact, even though treated as admitted, to be proved. Thus, the Proviso and Sub-rule (2) read together indicate that where

- (i) an allegation of fact made in the plaint is not denied specifically, or
- (ii) by necessary implication, or
- (iii) stated to be "not admitted" in the pleading of the defendant, or
- (iv) the defendant has not filed the written statement,

such allegations of facts shall be treated as admitted. The Court in this situation can either proceed to pronounce judgment on such admitted facts or may require the plaintiff, in spite of such admission, to prove such facts.

11. Sub-rule (2) quoted above is thus an enabling provision which enables the Court to pronounce judgment on the basis of the facts contained in the plaint, if the defendant has not filed a Written Statement. What is important to note is that even though a Written Statement is not filed by the defendant, the court may still require a fact pleaded in the plaint to be proved.

12. We may now consider the provisions of Order 8 Rule 9 as also the provisions contained in the other Rule, namely Rule 10, under which the instant suit has been decreed by the High Court. These Rules are quoted below :

"Rule 9. Subsequent pleadings.-No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

Rule 10. Procedure when party fails to present written statement called for by Court.-Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment, a decree shall be drawn up."

13. This Rule, namely Rule 10, was also amended by the Code of Civil Procedure (Amendment) Act, 1976 (Act No. 104 of 1976). Prior to its amendment, it was held in a number of decisions that the rule can be invoked only in those situations where the Court has required the defendant to file the Written Statement in terms of Rule 9 of Order 8. A few other High Courts had taken the view that this Rule would be applicable even to those cases where a Written Statement was required to be filed under Order 8 Rule 1 CPC. The conflict of decisions has been set at rest by providing specifically under this rule that where a party from whom a Written Statement is required either under Rule 1 or Rule 9 of Order 8 fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him or make such order in relation to the suit as it thinks fit. Rule 10 thus governs both the situations where a Written Statement is required under Rule 1 of Order 8 as also where it has been demanded under Rule 9. In both the situations, if the Written Statement has not been filed by the defendant, it will be open to the Court to pronounce judgment against him or make such order in relation to the suit as it thinks fit. It is to be noticed that if the Written Statement is not filed, the Court is required to pronounce judgment against the defendant. The words "against him" are to be found in Rule 10 of Order 9 which obviously means that the judgment will be pronounced against the defendant. This rule also gives a discretion either to pronounce judgment against the defendant or "make such order in relation to the suit as it thinks fit." These words are of immense significance, inasmuch as they give a discretion to the Court not to pronounce judgment against the defendant and instead pass such order as it may think fit in relation to the suit.

14. There are thus two separate and distinct provisions under which the Court can pronounce judgment on the failure of the defendant to file Written Statement. The failure may be either under Order 8 Rule 5(2) under which the Court may either pronounce judgment on the basis of the facts set out in the plaint or require the plaintiff to prove any such fact; or the failure may be under Order 8 Rule 10 CPC under which the Court is required to pronounce judgment against the defendant or to pass such order in relation to the suit as it thinks fit.

15. This Court, in Sangram Singh v. Election Tribunal, Kotah & Anr.1, observed on page 432 of the report as under :

"(32) We have already seen that when a summons is issued to the defendant it must state whether the hearing is for the settlement of issues only or for the final disposal of the suit (O. 5, R. 5). In either event, O. 8, R. 1 comes into play and if the defendant does not present a written statement of his defence, the Court can insist that he shall; and if, on being required to do so, he fails to comply-

"the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit." (O. 8, R. 10).

This invests the Court with the widest possible discretion and enables it to see that justice is done to 'both' sides; and also to witnesses if they are present: a matter on which we shall dwell later.

(33) We have seen that if the defendant does not appear at the first hearing, the Court can proceed 'ex parte', which means that it can proceed without a written statement; and O. 9, R. 7 makes it clear that unless good cause is shown the defendant cannot be relegated to the position that he would have occupied if he had

appeared. That means that he cannot put in a written statement unless he is allowed to do so, and if the case is one in which the Court considers a written statement should have been put in, the consequences entailed by O. 8, R. 10 must be suffered.

What those consequences should be in a given case is for the Court, in the exercise of its judicial discretion, to determine. No hard and fast rule can be laid down. In some cases, an order awarding costs to the plaintiff would meet the ends of justice : an adjournment can be granted or a written statement can be considered on the spot and issues framed. In other cases, the ends of justice may call for more drastic action.”

This decision was followed by the J & K High Court in *Chuni Lal Chowdhry v. Bank of Baroda and Ors.*², in which it was laid down as under :

“On the authority of these observations, Rule 10 can be taken to relate to Rule 1 of Order 8 and on the defendant’s failure to file written statement of his defence, when so required, the court has the power, either to pronounce the judgment against him or make such order in relation to the suit as it thinks fit depending upon whether the suit was for the final disposal or for the settlement of the issues only. In the latter case, the court has ample discretion to grant more time for filing the written statement or to proceed to hearing of the suit without such written statement. The discretion cannot, however, be exercised arbitrarily. In determining which course to adopt, the court will always be guided by the facts and circumstances of each case. Where the court decides to proceed to hearing of the suit without the written statement, that would not debar the defendant from taking part in further proceedings of the case. His participation would, however, be hedged in by several limitations. He will not be able either to cross-examine the plaintiff’s witnesses or to produce his own evidence with regard to any questions of fact which he could have pleaded in the written statement. He will, however, be competent to cross-examine the plaintiff’s witnesses in order to demolish their version of the plaintiff’s case.

To the same effect is the decision of the Patna High Court in *Siai Sinha v. Shivadhari Sinha*, [AIR 1972 Pat. 81.](#)”

16. In *Dharam Pal Gupta v. District Judge, Etah*³, the Allahabad High Court held as under :

“Therefore, reading Order VIII, R. 10, C.P.C. along with O. VIII, R. 5, C.P.C., it seems that even though the filing of written statement has been made obligatory and the Court has now been empowered to pass a judgment on the basis of the plaint on the ground that no written statement has been filed by the defendant still, the discretion of the Court has been preserved and despite the non-filing of the written statement the Court may pass any other order as it may think fit (as laid down in O. VII R. 10) or the Court may in its discretion require any particular fact mentioned in the plaint to be proved as laid down in Order VIII, R. 5 sub-rule (2) C.P.C.”

This decision was followed in *State of U.P. & Anr. v. Dharam Singh Mahra*⁴.

17. In *Smt. Sushila Jain v. Rajasthan Financial Corporation Jaipur*⁵ and also in *Rosario Santana Vaz v. Smt. Joaquina Natividade Fernandes*⁶, it was laid down that if the defendant was deliberately delaying the proceedings and had failed to assign good and sufficient cause for not filing the Written Statement, the Court could forfeit his

right of defence.

19. There is yet another provision under which it is possible for the Court to pronounce judgment on admission. This is contained in Rule 6 of Order 12 which provides as under:

“R. 6. Judgment on admissions.

(1) Where admissions of fact have been made either in the pleadings or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

(2) Whenever a judgment is pronounced under sub-rule (1), a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced.”

This Rule was substituted in place of the old Rule by the Code of Civil Procedure (Amendment) Act, 1976. The objects and reasons for this amendment are given below:-

“Under rule 6, where a claim is admitted, the Court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on the admitted claim. The object of the rule is to enable a party to obtain a speedy judgment at least to the extent of the relief to which, according to the admission of the defendant, the plaintiff is entitled. The rule is wide enough to cover oral admissions. The rule is being amended to clarify that oral admissions are also covered by the rule.”

Under this Rule, the Court can, at an interlocutory stage of the proceedings, pass a judgment on the basis of admissions made by the defendant. But before the Court can act upon the admission, it has to be shown that the admission is unequivocal, clear and positive. This Rule empowers the Court to pass judgment and decree in respect of admitted claims pending adjudication of the disputed claims in the suit.

20. In *Razia Begum v. Sahebzadi Anwar Begum & Ors.*⁷, it was held that Order 12 Rule 6 has to be read along with Proviso to Rule 5 of Order 8. That is to say, notwithstanding the admission made by the defendant in his pleading, the Court may still require the plaintiff to prove the facts pleaded by him in the plaint.

Thus, in spite of admission of a fact having been made by a party to the suit, the Court may still require the plaintiff to prove the fact which has been admitted by the defendant. This is also in consonance with the provisions of Section 58 of the Evidence Act which provides as under :

“58. Facts admitted need not be proved.-No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings :

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.”

The Proviso to this Section specifically gives a discretion to the Court to require the facts admitted to be proved otherwise than by such admission. The Proviso corresponds to the Proviso to Rule 5(1) Order 8 CPC.

21. In view of the above, it is clear that the Court, at no stage, can act blindly or mechanically. While enabling the Court to pronounce judgment in a situation where no Written Statement is filed by the defendant, the Court has also been given the discretion to pass such order as it may think fit as an alternative. This is also the position under Order 8 Rule 10 CPC where the Court can either pronounce judgment against the defendant or pass such order as it may think fit.

22. Having regard to the provisions of Order 12 Rule 6; Order 5 Rule 8, specially Proviso thereto; as also Section 58 of the Evidence Act, this Court in Razia Begum's case (supra) observed as under :

"In this connection, our attention was called to the provisions of Rule 6 of Order 12 of the Code of Civil Procedure, which lays down that, upon such admissions as have been made by the Prince in this case, the Court would give judgment for the plaintiff. These provisions have got to be read along with Rule 5 of Order 8 of the Code with particular reference to the proviso which is in these terms :

"Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission".

The proviso quoted above, is identical with the proviso to S. 58 of the Evidence Act, which lays down that facts admitted need not be proved. Reading all these provisions together, it is manifest that the Court is not bound to grant the declarations prayed for, even though the facts alleged in the plaint, may have been admitted."

The Court further observed :-

"Hence, if the Court, in all the circumstances of a particular case, takes the view that it would insist upon the burden of the issue being fully discharged, and if the Court, in pursuance of the terms of S. 42 of the Specific Relief Act, decides, in a given case, to insist upon clear proof of even admitted facts, the Court could not be said to have exceeded its judicial powers."

23. As pointed out earlier, the Court has not to act blindly upon the admission of a fact made by the defendant in his Written Statement nor the Court should proceed to pass judgment blindly merely because a Written Statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a Written Statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the Written Statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a

judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression “the Court may, in its discretion, require any such fact to be proved” used in sub-rule (2) of Rule 5 of Order 8, or the expression “may make such order in relation to the suit as it thinks fit” used in Rule 10 of Order 8.

24. Applying these tests to the instant case, it will be noticed that in a suit for specific performance it is mandatorily required by Section 16 of the Specific Relief Act to plead readiness and willingness of the plaintiff to perform his part of the contract. The Court, before acting under Order 8 Rule 10 has to scrutinise the facts set out in the plaint to find out whether all the requirements, specially those indicated in Section 16 of the Specific Relief Act, have been complied with or not. Readiness and willingness of the plaintiff to perform his part of the contract is a condition precedent to the passing of a decree for specific performance in favour of the plaintiff.

25. We may now examine the facts of this case.

A copy of the plaint which is on record indicates that respondent No. 1 had entered into an agreement on 6.8.1992 with respondent No. 2 as also the present appellants for the sale of property bearing No. W-118, Greater Kailash, Part-II, New Delhi, on the first floor (rear portion consisting of one drawing room, two bed rooms, one kitchen, two bath rooms and one servant quarter with toilet along with impartible and indivisible proportionate rights in the land underneath) for a sum of Rs. 7 lakhs out of which a sum of Rs. 4 lakhs was paid at the time of the signing of the agreement with the stipulation that a further sum of Rs. 2.25 lakhs would be paid by respondent No. 1 on receipt of permission from the Income Tax Department and Rs. 75,000/- would be paid at the time of the registration of sale deed. It was further pleaded in the plaint that possession of the flat was delivered to respondent No. 1 in pursuance of the agreement dated 6th of August, 1992 in which it was further set out that all expenses for execution and registration of the sale deed would be borne exclusively by respondent No. 1. The plaint further recites that till February 19, 1996, respondent No. 1 was not informed by any of the defendants about permission, if any, taken from the Income Tax Department in spite of several requests made by him from time to time. It was also pleaded as follows :-

“Even the permission under the Income Tax Act to enable the agreement to sell and execution of the sale deed in favour of the Plaintiff was to be obtained not only by Defendant No. 1 but also by Defendant Nos. 2 and 3 as mentioned in Clause 12 of the agreement to sell.”

In respect of the permission of the Income Tax Department, referred to above, para 12 of the plaint mentioned as follows:-

“That vide letter/reply dated 1st of March 1996, the Defendant No. 1 had replied to the notice of the Plaintiff dated 13th February 1996, wherein a vague and evasive denial was made by the Defendant No. 1 to the contents of the notice dated 13th February 1996 of the Plaintiff. The Plaintiff was informed for the first time about the income tax certificate alongwith the said reply by Defendant No. 1 which was obtained by the Defendant No. 1. However, no certificate was obtained by the Defendant Nos. 2 and 3 as was requisite under the terms and conditions of agreement to sell dated 6th of August, 1992.”

In para 16 of the plaint, it was further pleaded as under :-

“That vide reply dated 16th March, 1996, the Plaintiff had brought it to the notice of the Defendants that the copy of certificate alleged to have been obtained in December 1995 was never given or sent to the Plaintiff by the Defendants. The Plaintiff had called upon the Defendants to send forward the original certificate obtained by them in December 1995 to enable the Plaintiff to proceed further in the matter. The Plaintiff had also called upon the Defendant Nos. 2 and 3 to obtain requisite certificate under the Income Tax Act as per terms of agreement to sell dated 6th August 1992.”

26. The case of respondent No. 1, as set out in the plaint itself, was that while defendants, namely, the present appellants as also respondent No. 2 maintained that they had obtained the necessary permission from the Income Tax Department and had sent the same to him, respondent No. 1, disputed that fact and maintained that this was not correct and no Certificate (Permission) of the Income Tax Department was ever sent to him by the appellants or respondent No. 2. On the own pleadings of respondent No. 1, as set out in his plaint, there was a dispute between the parties, namely, plaintiff and defendants, whether permission from the Income Tax Department had been obtained by the defendants (the present appellants and respondent No. 2) and sent to plaintiff (present respondent No. 1) or the said permission was, at no time, obtained by the defendants nor had the defendants sent it to the plaintiff (respondent No. 1). This was a vital fact which had an important bearing upon the conduct of respondent No. 1. That is to say, if it was established that the Certificate (permission) from the Income Tax Department had already been obtained by the defendants and sent to him, the denial of the plaintiff would be reflective of his attitude that he was not ready and willing to perform his part of the contract. On the contrary, if it was found that defendants had not obtained the Certificate, the question whether specific performance could still be decreed would have immediately arisen particularly because of the relevant provisions of the Income Tax Act. Now, the agreement in question stipulated that the defendants would obtain permission from the Income Tax Department and send the same to the plaintiff whereupon the plaintiff would pay a sum of Rs. 2.25 lakhs to the defendants and the balance amount of Rs. 75,000/- would be paid at the time of the registration of the sale deed. Since, on the own showing of the plaintiff, as set out in the plaint, the defendants had been asserting that they had obtained the permission and sent the same to the plaintiff, which was not accepted by the plaintiff, there arose between the parties a disputed question of fact which had to be investigated and decided particularly as it was likely to reflect upon the conduct of the plaintiff whether he was willing to perform his part of the contract or not. It had, therefore, to be proved as a fact that permission of the Income Tax Department had not been obtained by the defendants nor had that Certificate (permission) been sent to the plaintiff. If the said Certificate had been obtained and sent to the plaintiff, the latter, namely, the plaintiff should have immediately paid the stipulated amount of Rs. 2.25 lakhs to the defendants and required them to execute the sale deed in his favour. The plaintiff, according to facts set out in the plaint, waited till February 19, 1996 which is quite evident from the exchange of notices between the parties which indicated the existence of a serious dispute whether the Income Tax Certificate (permission) had been obtained by the defendants from the Income Tax Department and sent to the plaintiff as alleged by defendants in their notices or it was wrong as asserted by the plaintiff in his notices or the replies to defendants' notices.

27. This suit has been decreed by the Delhi High Court by the following judgment:-

“Suit No. 1124/96 & I.A. No. 4303/96.

On the 20th of September, 1996, Mr. Lalit Kumar, learned counsel for defendant 1 to 3 sought time to file written statement and reply. Time was granted but the written statement and reply have not been filed. On the 22nd of January, 1997, Mr. Aseem Mohar for counsel for defendant appeared and sought time to file vakalatnama and written statement/reply and the matter had been adjourned to this date. Today Mr. Kamal Mehta putting in appearance on behalf of defendant No. 2 and 3 and represents that Mr. Rajiv Nayar has been engaged by the second and third defendants this morning and he seeks time to file written statement/ reply.

The defendants are adopting this tactic only to protract the proceedings and have not filed the written statement and reply to the application inspite of sufficient opportunity having been given.

Accordingly, the suit is decreed for specific performance in favour of the plaintiff and against the defendants with the directions to the plaintiff to deposit the balance amount of Rs. 3,00,000/- (Rupees Three Lakhs) in this Court within six weeks from today. If the amount is deposited within six weeks, it will be open for the plaintiff to apply for the appointment of a Commissioner for the execution of the sale deed. The defendants are also directed to pay the cost of the suit.

February 10, 1997

Sd/-

Judge.”

28. A perusal of the above judgment will indicate that the suit had been decreed only because of the failure of the defendants in filing the written statement. This exhibits the annoyance of the Court which is natural as no Court would allow the proceedings to be delayed or procrastinated. But this should not disturb the judicial composure which unfortunately is apparent in the instant case as the judgment neither sets out the facts of the case nor does it record the process of reasoning by which the Court felt that the case of the plaintiff was true and stood proved.

29. As will be evident from the facts set out above, the plaint itself showed a serious disputed question of fact involved between the parties with regard to the obtaining of Certificate (permission) from the Income Tax Department and its communication by the defendants to the plaintiff (Respondent No. 1). Since this question of fact was reflective of the attitude of the plaintiff, whether he was ready and willing to perform his part of the contract, it had to be proved as a fact that the Certificate (permission) from the Income Tax Department had not been obtained by the defendants and, therefore, there was no occasion of sending it to him. If the pleadings of respondent No. 1 were limited in character that he had pleaded only this much that the defendants had not obtained the Certificate (permission) from the Income Tax Department and had not sent it to him, this fact would have stood admitted on account of non-filing of the Written Statement by the defendants. But Respondent No. 1, as plaintiff, himself pleaded that “defendants insisted that they had obtained the Certificate (permission) from the Income Tax Department and sent it to him”. He denied its having been obtained or sent to him. Non-filing of the

Written Statement would not resolve this controversy. The plaintiff allegations, even if treated as admitted, would keep the controversy alive. This fact, therefore, had to be proved by the plaintiff and the Court could not have legally proceeded to pass a judgment unless it was established clearly that the defendants had committed default in not obtaining the Certificate (permission) from the Income Tax Department and sending the same to the plaintiff.

30. The agreement between the parties was entered into in 1992 and for four years the plaintiff had kept quiet and not insisted for the execution of the sale deed in his favour. When he did raise that question, the defendants informed him that the certificate had already been obtained from the Income Tax Authorities and sent to him.

31. Unfortunately, the High Court did not consider this fact and proceeded almost blindly to pass a decree in favour of the plaintiff merely because Written Statement had not been filed in the case. Learned Single Judge, who passed the decree, did not consider any fact other than the conduct of the defendants in seeking adjournments of the case for purposes of filing Written Statement. So also, the Division Bench did not consider any fact other than the fact that the defendants had been trying to prolong the proceedings by seeking adjournments, and that too, by changing their counsel. The Division Bench also took into consideration the fact that the appeal filed by the defendants against the decree passed by the Single Judge was beyond time which again indicated their negligence. No other fact was taken into consideration and the decree passed by the Single Judge was affirmed.

32. There is yet another infirmity in the case which relates to the "judgment" passed by the Single Judge and upheld by the Division Bench.

33. "Judgment" as defined in Section 2(9) of the Code of Civil Procedure means the statement given by the Judge of the grounds for a decree or order. What a judgment should contain is indicated in Order 20, Rule 4(2) which says that a judgment :

"shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."

It should be a self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the Court and in what manner. The process of reasoning by which the Court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment.

34. In an old case, namely, *Nanhe v. Saiyad Tasadduq Husain*⁸, it was held that passing of a mere decree was material irregularity within the meaning of Section 115 of the Code and that even if the judgment was passed on the basis of the admission made by the defendant, other requirements which go to constitute "judgment" should be complied with.

35. In *Thippaiah and Ors. v. Kuri Obaiah*⁹, it was laid down that the Court must state the grounds for its conclusion in the judgment and the judgment should be in conformity with the provisions of Section 2(9) of the Code of Civil Procedure. In *Dineshwar Prasad Bakshi v. Parmeshwar Prasad Sinha*¹⁰, it was held that the judgment pronounced under Order 8 Rule 10 must satisfy the requirements of "judgment" as defined in Section 2(9) of the Code.

36. Learned counsel for respondent No. 1 contended that the provisions of Order 20, Rule 1(2) would apply only to contested cases as it is only in those cases that “the points for determination” as mentioned in this Rule will have to be indicated, and not in a case in which the written statement has not been filed by the defendants and the facts set out in the plaint are deemed to have been admitted. We do not agree. Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds ex-parte and is ultimately decided as an ex-parte case, or is a case in which the written statement is not filed and the case is decided under Order 8 Rule 10, the Court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is resolved.

37. An attempt was made to contend that the definition of judgment as set out in Section 2(9) of the Code would not be applicable to the judgment passed by the Delhi High Court in its original jurisdiction wherein the proceedings are regulated by the provisions of the Delhi High Court Act, 1966. It is contended that the word “judgment” used in the Delhi High Court Act, 1966 would not take its colour from the definition of “judgment” contained in Section 2(9) of the Code of Civil Procedure. We do not intend to enter into this controversy, fortunately as it is not contended that the Code of Civil Procedure does not apply, but we cannot refrain from expressing that even if it were so, the Delhi High Court is not absolved of its obligation to write a judgment as understood in common parlance. Even if the definition were not contained in Section 2(9) or the contents thereof were not indicated in Order 20 Rule 1(2) CPC, the judgment would still mean the process of reasoning by which a Judge decides a case in favour of one party and against the other. In judicial proceedings, there cannot be arbitrary orders. A Judge cannot merely say “Suit decreed” or “Suit dismissed”. The whole process of reasoning has to be set out for deciding the case one way or the other. This infirmity in the present judgment is glaring and for that reason also the judgment cannot be sustained.

38. Learned counsel for respondent No. 1 then tried to invoke our discretionary jurisdiction under Article 136 of the Constitution and contended that on account of the conduct of the appellants as also respondent No. 2, we should not grant leave in this case, particularly as the sale-deed has already been executed in his favour by the Commissioner appointed by the High Court. It is true that the jurisdiction under Article 136 of the Constitution is a discretionary jurisdiction and notwithstanding that a judgment may not be wholly correct or in accordance with law, this Court is not bound to interfere in exercise of its discretionary jurisdiction. But in the instant case, as we have already seen above, it is not merely a matter of the defendants’ conduct in not filing the Written Statement but the question of law as to what the Court should do in a case where Written Statement is not filed, is involved, and this question has to be decided so as to provide for all the lower courts as to how the court should proceed in a situation of this nature.

39. We, therefore, allow the appeal, set aside the judgment dated 10.2.1997 passed by the Single Judge as also the judgment dated 29.4.1998 passed by the Division Bench of the Delhi High Court and remand the case back to the Delhi High Court for a fresh decision. We allow the appellants and Respondent No. 2 to file their Written Statement by 15th of October, 1999, with a clear stipulation that if the Written Statement is not filed by that date, the decree passed by the High Court shall stand.

(C.R.) Appeal allowed.

MANU/GT/0118/2015

**BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Original Application No. 60 of 2014

Decided On: 10.07.2015

Society for Protection of Culture, Heritage, Environment, Tradition and Ors. **Vs.** Union of India and Ors.

Hon'ble Judges/Coram:

Dr. P. Jyothimani, J. (Member (J)) and Bikram Singh Sajwan, Member (E)

Counsels:

For Appellant/Petitioner/Plaintiff: M.L. Lahoty, Sr. Advocate, Garghi Bhatta, Rahul Dhawan and Leeza Grower, Advocates

For Respondents/Defendant: Vivek Chib and Kushal Gupta, Advocates

Case Note:

Environment - Use of land - Determination thereof - Present application filed for direction against 2nd respondent to take possession of land and restore area to its natural state and maintain as green for purpose of District Park - Whether letter would confer any right of license on third Respondent in respect of green area and third Respondent was entitled to exclusive use area for marriages parties or green area was liable to be used by public - Held, merely because extent of green area thus permitted was not mentioned correctly in lease deed, license would not become unauthorised - Letter would confer right of license on third Respondent in green area for use for marriages, parties etc - Earlier judgment on same issue did not create any bar on part of Applicant to issue about alleged license - Although third Respondent licensee was entitled to use of green area, Applicant society or public at large could not be prevented from access to this area - However it will be open to second Respondent, being owner and custodian of green area to regulate access by public to green area in accordance with its general policy - Application disposed off. [19],[28],[30] and[31]

ORDER

Dr. P. Jyothimani, J. (Member (J))

1. The applicant, which is a Non-Government and non-profit organization is a Society registered under the Societies Registration Act 1860, working for the protection of culture, heritage environment, traditions and promotion of national awareness and has initiated various programmes for the protection of environment like highlighting rampant deforestation causing global warming, exposed the collapse of drainage system in Delhi, parking mafia in Delhi, protecting ridges in and around Delhi etc., has filed the present application for a direction against the 2nd respondent to take possession of the land around the Asiad Tower situated adjacent to Siri fort complex measuring 18500 sq. mtrs along with the remaining area and restore the area to its natural state and maintain as green for the purpose of District Park and allow the general public to use the same and to quash the letter dated 18-12-1997 along with the site plan wherein the green

area/land measuring 18500 sq. mtrs around the Asiad Tower was handed over by the second respondent to the third respondent.

2. The applicant is stated to have been aggrieved by the commercial activities like the marriages, parties etc. arranged by the third respondent under the shade of the second respondent in the above area which is to be maintained as green area as per MPD 1962, 2001 and 2021 Zonal Development Plan under which the area is to be treated as a District Park. In the year 1996, the second respondent has granted lease for thirty years the restaurant in the Asiad Tower along with land measuring 916.43 sq. mtrs to the third respondent under a lease deed dated 24th December 1999. Under a deed of conveyance executed on the same date, the second respondent has conveyed the restaurant in the tower along with the building, construction structure with sanitary, electrical and other fittings and fixtures and land to the extent of 916.43 sq. mtrs. According to the applicant, the lease deed itself was executed nearly two years after handing over of possession. It is the further case of the applicant that, in addition to the above, the second respondent has illegally handed over to the third respondent, green land to the extent of 13491.16 sq. mtrs in and around Asiad Tower for holding marriages etc. on an annual licence fees fixed by the DDA. It is stated that in addition to the said illegal act, a further extent of 5008.84 sq.mtrs, totalling an extent of 18500 sq. mtrs was handed over on 18-12-1999. These are the green lands.

3. The Tower is situated in green park and the same was used as a public park by all people. According to the applicant, after the lands were handed over, the third respondent has indulged in raising unauthorised construction in the green area apart from raising permanent and temporary constructions for conducting marriages etc. in violation of the MPD and preventing public from using the park. The commercial use of the green area results in noise and air pollution. The applicant's grievance is only in respect of the area around the Tower to the extent of 18500 sq. mtrs. The application is filed on various grounds including, that the same is in violation of MPD 1962, 2001 and 2021 and the Zonal Development Plan which categorised the area as a designated District Park, that it is well established by the judicial precedent that the land use in Delhi has to conform to the Zonal Development Plan prepared under section 8 of the DDA Act 1957 and it has the force of law as held by the High Court of Delhi in, Friend' s Colony Residential Association v. Lt. Governor of Delhi, that section 14 of the Delhi Development Act 1957 prohibits any person from using the land prescribed in a zone not to be used for any other purpose and therefore the land that is categorised as green area cannot be used for different purpose, that the running of recreational club is not authorised by the authority competent, that the public trust principle has been breached by the second respondent in granting licence to the third respondent, that by the unauthorised construction in the green area, green character is ruined, that the Asiad Tower which is in the South Zone meant for District Park and not earmarked for marriages etc. that continued violation of law will render legal Provisions nugatory as held by the Hon'ble Supreme Court in Indian Council for Enviro Legal Action v. Union of India and others, that right to clean environment is right to life guaranteed under Article 21 of the Constitution of India as held by the Hon'ble Supreme Court in Intellectual Forum, Tirupathi v. State Of Andhra Pradesh, that the Hon'ble Supreme Court in Dr. G.N. Khajuria v. Delhi development Authority has held that a land allotted for a park area cannot be carved out for a nursery school, that the it is well settled that parks provide for certain lung space, apart from other contentions.

4. The second respondent DDA, in its reply has raised a preliminary objection about the maintainability of the application on the ground that the applicant has suppressed the material fact. The applicant has proceeded as if the land is a public park which is not

true. It is not a public park but the land is part of district park and there are permissible uses under the master plan 2001 and 2021. Therefore, the land which has been given on lease for 30 years have been put to use for the purpose mentioned in the plan. Moreover for the same relief various complaints and writ petitions have been filed and the same have been dismissed by the Division Bench of the Hon'ble High Court of Delhi. Further, an inspection conducted in 2000 has revealed that greenery has increased in the area by the growth of more trees over the years by the third respondent. When the issue has become final, the present application is filed only with a malafide intention. While dealing with the facts of the case, the second respondent states that the Asiad Village was constructed in 1982, when Asian Games were conducted in Delhi, that when large number of people were to be accommodated and in order to meet the water requirement it was decided to build a over head water tank to supply water to Asiad Village. Accordingly, the Project Board setup by the DDA under the Chairmanship of the Vice-Chairman of the DDA to oversee the activities of the project of Asian Games Village, had accepted the proposal for building a over head tank-cum viewing gallery-cum-restaurant and that the restaurant then came to be called as Tower Restaurant, built by the DDA at the cost of 72 lakhs on a plot of land which was then earmarked in the Master Plan- Delhi 1962 for recreational use like outdoor games, restaurant etc subject to the permission of the DDA. It was in 1984, that the Tower Restaurant was allotted on a monthly licence fees of Rs. 50000 or 5% of gross sales whichever was higher initially for a period of 5 years which was subsequently extended to another 5 years. The allotment was, however, surrendered in July 1988 and it was decided to dispose of the Tower Restaurant through tender at a reserve price of Rs. 87.1 lakhs, but there was no bidder. It was in April 1990 it was again decided to put auction at a reserved price of Rs. 98 lakhs and a bid of Rs. 1 crore was received which was not accepted as it was only marginally higher than the reserved price. Steps taken to give to Public Sector Tourism Corporation of various States also failed as the seating capacity of the restaurant was only 100 and, therefore, it was finally decided to auction the Tower Restaurant on leasehold basis for 30 years with the surrounding land on licence fees basis. The Asiad Society filed a case in Delhi High Court against the proposed allotment in 1993 and the High Court, after extensive hearing refused to grant stay and it was in 1996 that it was decided to proceed with the tender. The area surrounding the tower was reassessed and the Horticultural Department confirmed the surrounding area as 16784 sq. mtrs or 4.15 acres and in the meeting held on 17-06-1996, it was decided to modify the earlier agenda and add certain additional facilities like, disposal of the Tower Restaurant along with the green area measuring 16784.50 sq mtrs or 4.15 acres around the restaurant, water body under the complex and the fountain on lease basis and the remaining area around the tower on annual licence fees basis, exit-entry route will be developed by the DDA, entry leading through the Asian Games Village and exit towards Siri Fort Sports Complex, providing car parking space measuring 1450.0 sq. mtrs approximately for 30 cars in the area over and above the said 4.15 acres, permitting to put temporary structures which are removable for catering on the upper portion of the green area on condition that the green area in and around fountains of both the sides of the stairs to be kept permanently open and even temporary structure not to be permitted therein and the mode of disposal through sealed tenders. Pursuant to the above decision, tenders were invited clearly stating that the DDA will allow 13491.16 sq.mtrs for marriage, parties etc on annual licence fees as fixed by it, temporary tents are permissible, no permanent construction will be permitted etc., The tenders were opened and found two bids received, one from M/S Jhankar Banquet for Rs. 2.20 crores against the reserved price of Rs. 1.88 crores and another from Cottage Industries Exposition Ltd. The bid of the former being highest was accepted of Rs. 2.20 crores for the Tower Restaurant apart from Rs. 31 lakhs per year as annual licence fees

to be enhanced at 20% every three years as against the reserve price of Rs. 25.50 lakhs per annum for the green area around the Tower Restaurant, after taking approval of the Lt. Governor. Accordingly, conveyance deed and lease deed were executed on 24-12-99, however, licence deed could not be executed as various cases were instituted.

5. As, there has been some deviation committed by the allottee, in respect of whom many complaints were received, a show cause notice was issued. The allottee has approached the civil court by filing a suit and obtained an order of status quo regarding the construction put up by him which was ultimately vacated, against which an appeal was filed which was also dismissed and while the revision was pending, the allottee has agreed to remove the unauthorised construction put up by him. Thereafter the structures were removed. However after recommendation of a committee, the DDA has granted approval for certain additional construction including the area for DG set and storing of furniture, toilets, kitchen and dish wash area, ETP, garbage bin area, U.G. tank for fire fighting and landscape features etc. In the meantime W.P. No. 1657 of 93 was filed in the High Court, while another Writ Petition in the name of V.P. Singh v. Union of India and others, was filed before the High Court of Delhi alleging that the lease and licence of the Tower Restaurant and adjoining land are in violation of the Master Plan apart from raising the existence of Siri Fort Wall and applicability of the notification dated 16-06-1992 under the Ancient Monuments and Archaeological Sites and Remains Act. After perusal of all the records produced and referring to all the relevant provisions of law, the High Court has held that the Tower Restaurant was built before 1992 notification and in as much as the place belongs to the DDA, no fault can be found with and hence dismissed the Writ Petitions. However regarding the applicability of the Ancient Monuments and Archaeological Sites and Remains Act, the High Court in the order dated 25-09-2002, has referred the matter to the ASI directing it to pass appropriate orders after examining the existence of Siri Fort Wall. The Director General of ASI has passed an order on 10-07-2003, directing the lessee/licensee to remove the construction mentioned in the order, against which the lessee filed a suit in the High Court in Suit No. 1576/2003 and the High Court has stayed the demolition and the same is pending. According to the second respondent, the High Court in its final judgment dated 08-02-2011 and passed in CWP No. 1657/93 reiterated its earlier judgment dated 25-09-2002 and also held against the contention of the petitioner resident association that it has an exclusive right of maintenance over the land or any of the portion of the complex.

6. The Lt. Governor, based on the repeated complaints from the occupants of the Asiad village has sought a report from Air Vice Marshal (Retd). V.K. Dayalu, Advisor (SA&GR), who in his report dated 01-04-2009, has recommended that the Banquet owner of M/S Jhankar must be cautioned to pay his dues promptly, that there shall be no compromise on the lease agreement and dues must be recovered promptly, that a police force must be considered during marriage seasons and large get together and that the lease agreement for green areas has to be resolved. According to the DDA, as in the meantime, the premises of the Tower Restaurant were sealed in June/July 2010, the recommendation of Dayalu's report could not be pursued. It is stated that the matter is pending before the Hon'ble Supreme Court. However it is stated that the issue of allotment for commercial activities has been settled in the High Court and the execution of the licence deed is now under consideration. After the Monitoring Committee appointed by the Hon'ble Supreme Court directed sealing of the restaurant, a show cause notice was issued to the said M/S Jhankar Bonquets on 04-06-2010 which was replied on 14-06-2010, but in the meantime the Monitoring Committee has directed sealing of the entire premises. M/S Jhankar Banquet had filed an application before the Hon'ble Supreme Court for de-sealing the premises and an order came to be passed on

05-05-2011, permitting the Restaurant based on its undertaking to demolish the objectionable structures and to do the same the premises was directed to be de-sealed.

7. After the lessee filed a report, the premises was inspected on 06-07-2011 and DDA filed an affidavit before the Hon'ble Supreme Court along with its report in July 2011. The Monitoring Committee also filed a report highlighting that the structures reported by the DDA are to be demolished, that the Municipal Corporation has restricted to convert the dismantled area to green and the same is required to be maintained by the DDA and that the boundary wall alleged to have been raised by the licensee should be removed to enable public to have access to the park, that the construction permitted by the DDA on 05-12-2001 are unauthorised and violates the AMASR Act 1958, that the Director General ASI in July 2003 has stated that all the temporary/permanent erections are liable to be removed, that Dayalu's report has shown many irregularities, that it was reported that there is a huge un-authorized construction on the ground floor of the Tower Restaurant, that there has been complaints from the residents regarding the conducting of marriages and other functions in the park and that the Hon'ble Supreme Court has already held that in the designated parks, there cannot be functions for more than ten days. The DDA has filed the relevant provisions of the Master Plan 2001, before the Hon'ble Supreme Court and stated that the Plan not only permits the banqueting including the marriages etc., but also permits parking, public convenience and temporary structures.

8. It is the further case of the DDA that the allegation that the place where the Tower Restaurant is situated is a public park is not correct. It is also stated that ever since M/S Jhankar Banquet has taken charge of the restaurant, it has not operated due to strictures from the Delhi Fire Service and additional staircase suggested by the DFS was not possible due to the reason of restraint from DUAC and ASI under AMASR Act as reported by the architects. The staircase issue was resolved in the Hon'ble High Court in the Writ Petition No. 11984/2009 filed by the lessee and by the time the work could be taken up, the Monitoring Committee of the Supreme Court has sealed the premises. According to the DDA, the Hon'ble Supreme Court has questioned it as to why lease deed has not been executed even though amounts have been received. The lessee was directed to approach the DDA for execution of lease deed. It was thereafter that lease deed and conveyance has been executed, however licence deed could not be finalised due to the reason of pendency of certain court cases and the representations. The party has already deposited licence fees up to 2011-2012. It is the case of the DDA that the initial allotment of the tower was for 5 years from 1982-83, litigations were pending till 1997 and the authority has taken a decision in 1996 to allot the restaurant on lease and its surrounding areas on license basis for 30 years. The horticulture department in 2000 conducted an inspection and found that the lessee has increased the greeneries by growing more trees. It is stated that the Hon'ble Supreme Court has transferred all cases pertaining to sealing by Monitoring Committee to Appellate Court and on direction of the Appellate Court of MCD the premises was de-sealed on 21-02-2014.

9. While denying all the averments made by the applicant, the second respondent has stated that the Asiad Tower adjacent to Siri Fort measuring 18500 sq mtrs forms part of the district park which can be utilised for conducting marriages etc. It is the further case of the second respondent that it was as per the advertisement in the newspaper in the year 1996, the Tower Restaurant along with the lawn was given to the third respondent and it was by the process of tender, and the lease deed could not be executed for nearly two years because of the pendency of certain litigations and representations. It is also stated that no extra lands were handed over to the third respondent and everything was done as per the contents of the tender. It is stated that the area was not a green belt

but is only green area and is being maintained as such. The area was already fenced from the beginning. The Appellate Tribunal MCD to which the matter was referred by the Hon'ble Supreme Court, by an order dated 03-02-2014 has directed the DDA to completely demolish the enclosure of the ground floor of the Tower Restaurant and the solar system installed near the kitchen and permanently de-seal the premises by the DDA after receiving the affidavit of unconditional undertaking.

10. It is stated by the second respondent that after de-sealing of the premises, no activity has taken place in the area and the DDA has been regularly monitoring the area. Apart from stating that it is not a public park, it is the case of the second respondent that a part of the district park is designated for the use of marriages etc. even before the allotment was made to the third respondent. The allotment to the third respondent for conducting of marriages etc., has been the subject matter of various court cases and ultimately the matter has attained a finality after the Hon'ble High Court has upheld the same. Master plan being a statutory document, any amendment by the judicial process, of a statute is not permissible in law. That apart, the various legal grounds raised by the applicant are denied. It is reiterated that it is the part of the district park which is meant for recreational purposes and permissible usage area under the Master Plan. With the above averments the second respondent has prayed for the dismissal of the application.

11. The third respondent, in its reply while concurring with the reply filed by the second respondent, has stated that the filing of the application is an abuse of the process of law. The third respondent would reiterate that the lease and licence given to the third respondent has been upheld by the Hon'ble High Court, twice, one in W.P.(C) No. 1657/1993, *Asiad Village Society v. Union of India and others* reported in MANU/DE/0253/2011 : 2011 III AD (Del) 402 and another in W.P.(C) No. 3319/2002, *Vishwanath Prathap Singh v. Union of India and others* reported in 102 (2003) DLT 72(DB). According to the third respondent, all the issues raised in this application have been specifically raised in the above said two cases extensively and answered by the Hon'ble High Court which have become final and this short ground the application is liable to be dismissed. Further the applicant has deliberately suppressed about the above said material fact. The third respondent has elicited some of the paragraphs of the judgment of the Hon'ble High Court to substantiate its contention that the issues have been settled finally and there is no reason to reopen the same.

12. It is also stated that in an yet another Civil Writ Application No. 4677/1985, filed before the Hon'ble Supreme Court in *M.C. Mehta & others v. Union of India and others*, the Hon'ble Supreme Court has appointed a Monitoring Committee and on the recommendation of the said Committee, the Tower Restaurant was sealed on 28-05-2010, 16-06-2010 and 17-06-2010. It was on the application moved by the third respondent seeking for a direction to de-seal the premises, the Hon'ble Supreme Court in the order dated 30-04-2013 gave liberty to the parties to move the MCD Appellate Tribunal and also to seek de-sealing of the premises. It was based on the said observation, the third respondent has moved the Appellate Tribunal, and the Tribunal taking note of the decisions of the Hon'ble High Court and various reports of the Monitoring Committee, has directed the authorities to de-seal the premises and directed to act as per the lease deed. According to the third respondent, the applicant having lost in the earlier rounds of litigation through its persons has chosen to file the present application to which it has no locus standi. Even otherwise it cannot be disputed by the applicant that in the past ten years the green area in the disputed place has been developed by the third respondent and, therefore, it cannot be said that there is any environmental degradation.

13. While dealing with the merits of the case, while reiterating its preliminary objections to the maintainability of the application, it is denied by the third respondent that the lease has been granted in its favour against the provisions of MPD 1962, 2001 and 2021. It is also denied by the third respondent that the green belt area was ever used as public park and goes on to further deny that after allotment the third respondent has been using the place for any illegal purposes or raised any unauthorised constructions. He further, stresses that the area is neither a designated park nor is it meant for public purposes. There is no noise pollution created by the third respondent or anyone acting on its behalf or under its permission. The legal grounds raised by the applicant are also denied. While it is not denied that the place allotted to the third respondent forms part of the district park as per the Zonal plan, the activities permitted are in accordance with the provisions contained in MPD 2001. It is also stated that MPD 2021 does not apply to the facts of the case, as the land and the surrounding areas were leased out to the third respondent prior to 2001. It is also reiterated that while granting the lease, the DDA has followed all the legal procedure. It is also denied by the third respondent that large green area has been concretized but on the contrary in the past years large number of trees and shrubs have been grown. While it is not denied by the third respondent that the green area around the Tower Restaurant is part of the district park, it is denied that the area is not meant for holding marriages and other functions. Therefore, the third respondent prays for the dismissal of the application.

14. Mr. Lahoti, the learned senior counsel appearing for the applicant has raised the following three points:

"1. He has made it very clear that the applicant is not objecting to the lease of 916.43 sq. mtrs wherein the Tower Restaurant is situated. He submits that except the above said extent, the remaining portions in occupation of the third respondent are to be treated as encroachment of the public lands. It is his submission that the decisions of the Hon'ble High Court have not dealt with the excess lands in unauthorised occupation of the third respondent and, therefore, it is still open to the applicant to raise the same before this forum. As the encroachment is a continuing conduct, there is no question of any limitation and the respondents have no manner of right whatsoever to raise objection relating to the maintainability of the application. He has raised objection that while lease was given by way of a deed on 24-12-1999, a letter dated 18-12-1997 by the DDA has permitted the third respondent to use 13491.16 sq. mtrs which is illegal. Public land cannot be given by a letter for commercial exploitation. Therefore, the permission is prior in time and has nothing to do with the lease of the Tower Restaurant and in any event the excess land permitted must remain as green area. He has also submitted that when a portion in the earmarked park, as per the Master Plan, is to be permitted for using recreational purposes, the DDA Act requires a public notice to be issued for conversion of land user, which has not been done in this case. He has also extensively referred to the decisions of the Hon'ble High Court referred to by the respondents to say that the above issues were never the subject matter in the two cases. Moreover, the applicant was never a party in those cases.

2. His next contention is about the noise pollution caused by the third respondent while conducting of marriages and other functions in the park frequently affecting the public at large. He has also referred to the judgment of the Hon'ble Supreme Court reported in MANU/SC/0415/2005 : (2005) 5 SCC 733, not only to substantiate his contention that to raise the issue of noise pollution no locus standi is required but also to insist about the importance of

noise free surroundings and various directions issued by the Hon'ble Supreme Court in that regard.

3. He finally submitted that it is preposterous to think that the green public land can be conveyed."

15. Per contra, it is the contention of Mr. Ravi Gupta, the learned Senior Counsel appearing for third respondent that the DDA maintained parks are different from the public parks. He has also referred to the historical events leading to the grant of lease and also the licence and payment of all necessary charges by the third respondent and various decisions of the court referred to above. It is his submission that the same issue have been raised earlier in the names of various persons in which finality has been arrived at and the present application is filed by a person who is living in Vasanth Kunj, which is nearly 10 Km away from the area in question and according to him, that itself would show the malafide intention of the applicant and others. He has specifically submitted that 18500 sq. mtrs. was the subject matter of discussion in V.P. Singh's case. He has submitted that under the First Master Plan of Delhi-1962, district park meant green area and recreational area and the said usage was permissible. The Second Master Plan 1990 has approved the Tower Restaurant. The district park is not considered as an entire green area but it included green area and recreation area. He has also narrated as to how in spite of efforts taken by the DDA there was no offer forthcoming and ultimately the third respondent was the successful bidder. He also submitted that the DDA has not violated any law or procedure.

16. Mr. Rajiv Bansal, the learned counsel appearing for the second respondent, DDA would vehemently contend that the filing of the present application is an abuse of process of law when especially the issue has been finally settled in the higher courts. According to him in a district park, if a place is denoted as recreational purpose, no one can as a matter of right claim to enter, especially when the DDA has followed the transparent method in inviting public tender with wide publicity. He would also submit that while the cause of action for this application filed under section 14 of the National Green Tribunal Act arose 17 years ago, this application is filed now and the same is liable to be dismissed on the point of limitation. He also submits that the pendency of the other cases was not a bar for the applicant to raise the issue of environment at the appropriate time. This is only a tactics played by the applicant in collusion with the prior litigants who fought and lost case throughout and it is at their instigation the present application is filed and is liable to be dismissed. Mr. Bansal has also taken us to the various portions of the earlier judgments of the Hon'ble Supreme Court to contend that the entire issue raised in this case have been dealt with and final decision rendered and in such circumstances it may not be proper to reopen the case again. Therefore he prayed for the dismissal of the case.

17. We have also heard the leaned counsel appearing for the South Delhi Municipal Corporation M/s. Puja Kalra and the Delhi Pollution Control Committee Mr. Narender Pal Singh, who were directed to be issued notice at the request of the learned counsel for the applicant and who have also made their submissions in the line of the DDA.

18. We have heard all the learned counsel appearing for the parties, carefully considered the pleading and all the documents filed and applied our mind to the issues involved in this case. On an overall analysis, it has become necessary for this Tribunal to address and decide the following issues:

"1. Whether the letter dated 18-12-1997 would confer any right of license on

the third respondent in respect of the green area in the district park to the extent of 18500 sq. mtrs:

2. Whether the issue raised in this case has already attained finality:

3. Whether the third respondent is entitled to exclusive use of 18500 sq. mtrs around Asiad Tower Restaurant for the marriages and parties or the green area is liable to be used by public for recreation also:

4. To what other relief the parties are entitled to?"

19. Taking note of the comprehensive nature of the issues, all the issues can be dealt with in a combined manner. At the outset, we have to assert that there are no much dispute relating to the factual aspects. It is the admitted case of the applicant society, as submitted by the learned senior counsel appearing for it, that so far as the grant of lease in respect of the Tower Restaurant, situated in the extent of 916.43 sq. mtrs is concerned, there is no dispute. The applicant questions only the license granted to the third respondent in respect of 18500 sq. mtrs of the land which form part of the green area surrounding the Restaurant. The question is as to whether such license is permissible in law. Admittedly the DDA has executed a lease deed for 30 years in respect of the Tower Restaurant on 24-12-1999 following the tender process. The lease deed no doubt contains a clause that the open green ground or around in front of the Tower Restaurant measuring around 2000 sq. yards as lineated in the schedule may be allotted to the lessee on an annual licence basis payable in advance which may be increased by 20% once in three years. This was in furtherance to the resolution of the DDA dated 23-03-1993. But by a subsequent resolution dated 17-06-1996, the DDA, took note of the fact that there was no proper response due to the reason that the seating capacity of the hotel was very minimal and, therefore, decided to give additional facilities to the hotel by providing the green area surrounding the Tower measuring an extent of 16784.50 sq. mtrs on annual license basis. Accordingly, fresh tenders were called for denoting last date for receipt of tender as 20-11-1996. It was in accordance with the tender notification, when the third respondent requested for the allotment of the open space on license basis, the Dy. Director (CE) of the DDA, in his letter dated 18-02-1997, has allowed the third respondent to use 13491.16 sq. mtrs of green area for holding marriages, parties etc. Merely because the extent of the green area thus permitted is not mentioned correctly in the lease deed, which is totally different and distinct, in our view the license will not become unauthorised.

20. The next question is as to whether the issue involved in this case has already been finally decided by the competent courts and therefore it would not be open to the applicant to raise the issue once again. In Vishwanath Pratap Singh v. Union of India and others, even though, the prayer in the Writ Petition before the Hon'ble High Court was to cancel the lease of 4.7 acres granted to the third respondent herein, the area was never a subject matter of lease dated 24-12-1999 wherein it was a lease relating to the Tower Restaurant situated in an extent of 916.43 sq. mtrs, the Hon'ble High Court has made it very clear that the arguments were restricted only to the construction activity in the vicinity by the present third respondent. It was by an elaborate judgment rendered on 26-09-2002, held that the Tower Restaurant was in existence for more than 20 years, the land in question belongs the DDA and, therefore, no fault could be found with DDA in giving lease of the Tower Restaurant to M/S Jhankar Banquet but held that any construction activity by the lessee against 1992 notification cannot be permitted. Therefore, it is clear that in that case there was no decision relating to the license granted to the present third respondent relating to the surrounding green area.

Therefore, the judgment does not create any bar on the part of the applicant to the issue about the alleged license.

21. Again, in *Asiad Village Society v. Union of India and others*, the Hon'ble High Court was dealing with a prayer in the Writ Petition made by the petitioner society consisting the residents, for a direction against the DDA not to handover Asiad Village complex or to grant lease of the Tower and appurtenant thereto either to the third respondent herein or any other person. The Hon'ble High Court has considered the argument that the resident association and its members being the beneficiaries to enjoy the open green land are also entitled to maintain the same for their benefit. After referring to various provisions of the DDA (Management and Disposal of Housing Estate) Regulations 1968, it was held that the petitioner society has no right of exclusive control or to administer the complex. It was also held that the residents of the dwelling houses who are the members of the petitioner society would hardly be in a position to maintain services such as water supply etc. Therefore, the issue raised in this case was not decided in both the cases, even though the third respondent was a party in both the cases.

22. The Delhi Development Act 1957, which came into force on 30-12-1957, the Central Act, enacted with the object of providing development of Delhi, has created the Delhi Development Authority (DDA), a body corporate, apart from Advisory Council and committees to carry out the object of the Act. Section 7 of the said Act mandates the DDA, immediately after the Act or as soon as possible, to carry out a civic survey and prepare a Master Plan for Delhi, defining the various zones into which Delhi may be divided for the purpose of development and also to indicate the manner in which the land in each zone is proposed to be used and the stage by which the development to be carried out, which shall also serve the basic pattern of frame work within which the zonal development plans of various zones may be prepared.

23. Section 8, again imposes a responsibility on the DDA, to prepare simultaneously or as soon as it may be possible, a zonal development plan for each zones into which Delhi may be divided and such zonal plan may contain a site plan and use plan for the development of the zone and the approximate locations and extent of land use as public buildings and other public work and other utilities, roads, housing, recreation, industry, business, markets, schools, hospitals and public and private open spaces etc. After preparation of such Master Plan and Zonal Development Plan, the same is to be placed by the DDA, to Central Government for approval. Before submitting the said plans for approval, the DDA shall publish a draft plan as may be prescribed by the rules by making the copy of the draft rules available for inspection and invite objections and suggestions from any person giving specific date. The DDA shall also give opportunity to the local authorities to give representations. It is after considering all the objections, representations and suggestions, the final plan must be prepared and submitted to the Central Government for approval. The Central Government while considering such plans for approval may direct the DDA to furnish any further information that may be deemed necessary. On approval of the plans by the Central Government, the DDA shall publish the plan/plans as prescribed by the regulation and also inform the place where the plan can be inspected. Section 11A, enables both the DDA as well as the Central Government to modify the Master Plan as well as the Zonal Development Plan by following the procedure contained therein.

24. Therefore, after following all the above said legal formalities when once the Master Plan or the Zone Development Plan is published, it acquires the statutory character. Following the above said procedure, the DDA has promulgated the Master Plan of Delhi

in 1962 (MPD-62). In the said Plan, by and large, a scheme for Large Scale Acquisition and Development of Land was formulated. The MPD-62, while mentioning about the term 'Recreational', in paragraph 23, states under 'uses permitted',

"All public and semi-public recreational uses including parks, play grounds, parkways and boulevards; special recreation areas and special educational and recreational areas; bus and railway passenger terminals and car parking area. Parking area requirements must be approved in all cases."

Subsequently, in the Master Plan for Delhi 2001 (MPD-2001), the DDA has substantially reiterated the planning process which was outlined in MPD-62, as could be seen mainly as land use plan in three levels namely, Master Plan, Zonal Plans and Layout Plans for specific development schemes within each zone. The MPD-2001, which was notified on 01-08-1990, has visualised the permitted uses in the district parks. The use premises permitted in the district park are stated as, ' District park, Residential Flat, Play Ground, Swimming Pool, Recreational Club, Children Traffic Park, Specialised Park/Ground, National Memorial, Bird Sanctuary, National Garden and Zoological Garden.' Uses/use activities permitted in use premises are stated as follows: 'Recreational Club, Multipurpose Hall, Restaurant/Cafeteria/Snack Bar, (only for Public Recreational Clubs) Residential Component (15% of the total area and to the max of 300sqm), Indoor Games including Gymnasium and Health Clubs, Library, Outdoor Games and Swimming Pool'.

25. While dealing with environment, while formulating MPD-2021, wherein the quantitative and qualitative shortages and deficiencies were observed with a need for redevelopment and densification of the existing urban areas and city improvement, the Plan provides for agricultural land as Green Belt along the border of NCT of Delhi. Table 9.4, which speaks about Permission of Use Premises in Sub Use Zones states as follows:

Sl No	Use Zone	Activities Permitted
1.	Green Belt	Forest, Agriculture Use, Vegetation belt, Dairy Farms, Piggery, Poultry farms, Farm house, Wild life sanctuary, Bird sanctuary, Biodiversity Park, Veterinary Centre, Police Post, Fire Post, Smriti Van, Plant Nursery, Orchard, Area for water-harvesting, Floriculture farm, Open Playground, Agro forestry, Amenity structures (as per list). Existing village shadis, already Regularised Unauthorised Colonies and already approved Motels may continue.
2.	Regional Park	Ridge, Residential Flat (for watch & ward), Picnic Hut, Park, Shooting Range, Zoological Garden, Bird Sanctuary, Botanical Garden, Local Government Office (Maintenance)

	Open Air Theatre, Police Post, Fire Post, Orchard, Plant Nursery and forest.
	Approved Farm House sanctioned prior to 01-08-90 may Continue.
3. City Park	Aqua park/water sports park, Arboretum, Botanical Garden, National Memorial (approved by Cabinet/ Govt. of India), Amphitheatre, Open Playground, Aquarium, Other activities Same as permitted in District Park. 30% of the area shall be developed with plantation of native species.
4. District Park	District Park, Theme Park, Recreational Club, National Memorial, Open- air food court, Children Park, Orchard, Plant Nursery, Area for water harvesting, Archaeological Park, Specialised Park, Amusement Park, Children Traffic Park, Sports Activity, Playground, Amenity structures. Restaurant in a District Park having an area about 25 Ha. Subject to following: <ul style="list-style-type: none"> a. Area of the restaurant plots shall not be more than 0.8 Ha. Or 1% of the District Park, whichever is less. b. Restaurant plots shall have no physical segregation from the rest of the District Park area. c. The building shall be a single storey structure with max. FAR of 5 and height not more than 4m without any residential facility and to harmonize with the surroundings. d. In case there is no parking lot in the vicinity, parking should be provided at a reasonable distance from the restaurant. Parking area should not form part of the restaurant complex/ greens. e. 30% of the area shall be developed as dense plantation.
5. Community Park	Park, Children Park, Open- air food court, Playground etc.
6. Multipurpose Ground	Public meeting ground, Public address podium, Social Functions, Soft drink and snack stalls etc.

26. It is not in dispute that the Tower Restaurant and the adjacent area are forming part the District Park. While so, the statutory rules under the Delhi Development Act in the form of Master Plan 1962, 2001 and 2021 governs the field. As elicited above, the District Park can include within itself not only the restaurant but also recreational activities, however subject to certain restrictions contained in the Master Plan like the extent of the area etc. It is nobody's case that the restrictions of the Master Plan has been violated by the third respondent. In any event if such violations are effected it is the statutory duty of the second respondent either as a lessor or licensor to take appropriate action As long as the statutory nature of the Master Plan remains operative and unchallenged in an appropriate manner in the appropriate forum, it is not for this Tribunal to hold that the second respondent is either not entitled to lease or give on license either the Tower Restaurant or the surrounding areas. Moreover, there has been a specific finding that during these years, the third respondent has taken steps to make the green area by planting more trees. Therefore looking into any angle, we are unable to accept the contentions of the learned senior counsel for the applicant in this regard.

27. The third respondent, in addition to the use of Tower Restaurant and the land under it measuring 916.43 sqt. Mtrs, on 30 years lease basis, has also been permitted to use

13491.16sq. mtrs of green area around the Restaurant under a letter dated 18-12-1997 for holding marriages, parties etc., on an annual license fees as may be fixed by the DDA. The letter however states that the use of the land has to be maintained green and to be used by temporary tents for marriage etc., and that permanent structure shall not be put up. By an affidavit filed by the DDA it is stated that the license fees has been fixed as 31 lakhs per year to be enhanced at the rate of 20% every 3 years. A reading of the said letter which is the only document available to show that the third respondent has been given license to use the large extent of green area around the Tower Restaurant which shows that there are no other specific terms and conditions of license. It is also relevant to note that the tender called for by the DDA itself relates to the Tower Restaurant at Asian Games Village Complex along with the green area. Therefore both the lease of Tower Restaurant and license of green area are inseparable and cannot be given individually to different persons. To be precise, the green area as per the tender notification was intended to be given on license only to the person who is a successful bidder as lessee of Tower Restaurant. Consequently it is clear that if the lessee fails to use the Tower Restaurant, he cannot independently use the green area for recreation. In the absence of any details regarding terms and conditions of license in the letter date 18-12-1997, no presumption can be drawn that other users of green area are precluded from using the same during the time when there are no marriages, parties etc., in other words the license granted to the third respondent does not by any term permanently preclude public from using the green area as lung space for walking and other purposes, of course whenever the marriage and other functions are not conducted by the third respondent. It is relevant to note that the order of the Appellate Tribunal MCD dated 3-02-2014 has also directed the DDA to completely demolish the enclosure the put up by the third respondent.

28. The DDA is a public authority and ownership of the lands in Delhi are vested on it. Therefore it is the custodian of the all the lands vested which includes open spaces, parks, gardens which are public property and in respect of those lands the public trust doctrine will apply against DDA in respect of usage. Because the MPD allows portion of District Park to be used for recreational purposes, it does not mean that such portion can be put to the exclusive domain of such licensees preventing public from using the green area during the other times when the recreational activities does not takes place. Therefore in our considered view, the license to third respondent does not give it the right of exclusive usage for all times to come but only during the time of marriages, parties etc.

29. Delhi being the national capital is one of the most populated cities in the world, with its population as per 2011 standing at 110 lakhs and is estimated to have increased to 182 lakhs in 2015. The population of the city is growing continuously due to migration and entry of people for employment and various other opportunities. Consequently, there is increasing pressure on the limited open areas, parks and gardens. Equally important is the fact that the growth of the population and consequent growth in number of vehicles is also leading to higher level of air pollution. The quality of air is one of the worst among all the mega cities of the world. The levels of PM 2.5, PM 10, NOx, SO2 etc are dangerously high. The open spaces, parks and garden and the trees provide as a pollution mitigation measure working as sink for the carbon and thereby ameliorate harsh climatic conditions. The air pollution is also impacting the health of the people and increasing number of cases related to respiratory and even cardio-vascular diseases. It is therefore critical that green spaces are protected and people given access to such areas preferably in their neighbourhood. Privatising and commercialising such green areas will not only deny people using these areas for recreation and health benefits but will also go against the public trust doctrine and

precautionary principles as enunciated by the Hon'ble Supreme Court in M C Mehta v. Kamal Nath MANU/SC/1007/1997 : (1997)1 SCC 388. Further, in Bangalore Medical Trust v. B.S. Muddappa and Others MANU/SC/0426/1991 : (1991) 4 SCC 54 the Supreme Court has held as follows,

"24. Protection of the environment, open spaces for recreation and fresh air, play grounds for children, promenade for the residents, and other conveniences or amenities are matters of great public concern and of vital interest to be taken care of in a development scheme. It is that public interest which is sought to be promoted by the act by establishing BDA. The public interest in the reservation and preservation of open spaces for parks and play grounds cannot be sacrifice by leasing or selling such sites to private persons for conversion to some other user. Any such act would be contrary to the legislative intent and inconsistent with the statutory requirements. Furthermore, it would be in direct conflict with the constitutional mandate to ensure that any state action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of a quality of life which makes guaranteed rights a reality for all the citizens.

25. Reservation of open spaces for parks and play grounds is universally recognized as a legitimate exercise of statutory power rationally related to the protection of the residents of the locality from the ill effects of urbanisation."

30. While appreciating that the recreational and aesthetic uses of the park cannot be curtailed, the Hon'ble Supreme Court, in MC Mehta v. Union of India and Others (2009)17 SCC 683 held as follows.

"6. We agree with Mr. Mehta that the recreational and other aesthetic uses of the parks cannot be curtailed. Mr. Mehta is also correct that the permitted use of the parks being recreation under the Master plan, it cannot be permitted for any other use. But in the same time, keeping in view the need of the society, it is necessary to bring the parks back to their normal use in a sustained manner.

7. We are of the view that MCD, NDMC and DDA shall in phased manner stop the granting of permission for the use of the parks for commercial/marriage purposes, etc., The material placed on record shows that MCD has permitted such use in 1023 parks, DDA in 146 parks and NDMC in 51 parks.

8. After hearing learned Counsel for the parties, we direct as under:

1 . The use of parks by MCD, NDMC and DDA for the purposes mentioned above shall not be permitted more that 10 days in a month. In other words, when any of the designated parks is used for such purposes 10 days in a month, no function thereafter shall be permitted during the remaining 20/21 days.

2. MCD, DDA and NDMC shall make endeavour to construct community halls for the purposes of marriages, etc

3 . The number of parks indicated by three authorities used for marriages, etc., shall be reduced by 30% by 30-06-1997. It shall be reduced by further 20% by 31-12-1997. In other words, by the end of December 1997, the use of the parks for marriages, etc., shall be reduced for 50%. The authorities concerned shall file an affidavit stating the progress in the projects for the construction of community

halls and also stopping the use of the parks for marriages, etc., by the end of December 1997."

We, therefore hold that although the third respondent licensee is entitled to the use of green area around the Tower Restaurant, the applicant society or public at large cannot be prevented from access to this area for recreation, leisure and usage as lung space during the time when the third respondent is not using for marriages etc., However it will be open to the second respondent, being the owner and custodian of the green area to regulate access by public to the green area in accordance with its general policy.

31. For the reasons stated above we answer issue No. 1 in the affirmative and against the applicant holding that the letter 18-12-1997 would confer a right of license on third respondent in respect of 18500 sq mtrs in the green area for use for marriages, parties etc., Issue No. 2 is held in favour of applicant holding that the issue relating to the use of 18500 sq mtrs in the green area around Tower Restaurant has not attained finality. In respect of issue No. 3, we hold that the third respondent is not entitled to exclusive use of 18500sq mtrs around Asiad Tower Restaurant but entitled to use for conducting marriages not more than 10 days in a month as held by the Hon'ble Supreme Court of India and on the remaining days the public shall be allowed to use the green area, however subject to the policies of the DDA in this regard.

32. Accordingly while partly allowing the application, we issue the following directions which are to be scrupulously followed by the second and third respondents apart from the SDMC and DPCC and ensure that proper and continuous compliance is carried out and take appropriate actions whenever there are violations and giving liberty to the applicant to move appropriate applications before the Tribunal.

"1. The third respondent shall be entitled to use the green area to the extent of 18500 sq mtrs around the Tower restaurant for marriages, parties, etc., not more that 10 days in a month and subject to the condition that it shall also run the Tower Restaurant and pay all necessary lease and license charges in accordance with the terms and conditions of lease and license to be executed.

2. It will be open to the second respondent to execute the necessary license deed in favour of the third respondent regarding the use of 18500 sq mtrs of green area around Tower restaurant subject to the above conditions and other conditions as may be stipulated by it.

3. The second respondent shall ensure that the third respondent complies with all the conditions of lease/license and take appropriate action on violation of the same.

4 . The third respondent shall be responsible for the conduct of anyone permitted by it to use the green area for any recreational activities regarding the adherence of standards of noise level as prescribed by DPCC both during day and night hours. In the event of the limit being exceeded either by loud speakers or by use of crackers, the SDMC, DPCC and local police shall take immediate action including criminal prosecution. This direction is needed to protect the interest of senior citizens, children and unhealthy persons undergoing medical treatments, as right to life includes decent living with peaceful conditions guaranteed under the constitution of India and repeatedly insisted by the Hon'ble Supreme Court of India.

5. The third respondent shall not be permitted to put any permanent structures

in the green area and even the temporary structures erected for recreation shall be removed immediately and while doing so ensure that no damages are caused to trees, green area or land in the surrounding area.

6 . The second respondent shall permit public including the members of applicant association in the remaining 20/21 days to be used as lung space however with usual conditions as may be imposed by it as the policy.

7 . The third respondent shall ensure that vehicular parking is regulated properly on the roads adjoining the green area and in the surrounding areas during the times of marriages and parties.

8 . In the event of failure of the third respondent in ensuring any of the above conditions the second respondent shall take all appropriate legal actions in accordance with the terms of lease and license and in accordance with the law."

With the above directions the application stands disposed of. There shall be no order as to cost.

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