From the Desk of Editor

UNDERSTANDING MORAL TURPITUDE: A BREACH OF ETHICAL INTEGRITY

The moment we hear the term "moral turpitude," offenses like molestation, eve-teasing, sexual harassment, and outraging the modesty of women come to mind. However, moral turpitude encompasses much more and can be applied to a broader range of unethical behaviour. In a world where ethical conduct is the foundation of trust, moral turpitude represents a grave stain on individual character and societal integrity.

Convictions for offenses involving moral turpitude, as defined by criminal courts, are typically classified as misconduct in service rules and standing orders. Such convictions can lead to termination of employment. However, the challenge often lies in determining what constitutes moral turpitude, as not every punishable act qualifies under this label. The term lacks a precise legal definition, creating complex situations. Courts, through various judgments, have provided interpretations to clarify the concept based on the cases before them.

What is Moral Turpitude?

Judicial pronouncements describe moral turpitude as conduct that is inherently immoral, dishonest, or corrupt. It goes beyond mere legal violations, reflecting a deeper ethical failure. Crimes involving deceit, fraud, embezzlement, or violence typically fall under this category. Unlike other illegal acts, moral turpitude reveals a person's disregard for the moral codes that underpin society. It suggests a level of depravity or wickedness, exposing a fundamental flaw in character.

Key Features of Crimes Involving Moral Turpitude

Moral turpitude is a classification of actions that involve dishonesty, fraud, or conduct that reflects poorly on an individual's character. Crimes of moral turpitude often:

- ☛ Deceive or defraud others
- ☛ Show blatant disregard for legal or ethical obligations
- ☛ Harm individuals or institutions through unethical actions

Common Examples:

- ✶ **Fraud and Forgery:** Deceptive actions for personal or financial gain, such as falsifying records.
- ✶ **Bribery:** Offering or accepting bribes to manipulate the decisions of officials.
- ✶ **Theft and Embezzlement:** Misappropriating assets, especially in professional settings.
- ✶ **Perjury:** Knowingly lying under oath.
- ✶ **Money Laundering:** Concealing the origins of illegally obtained money.

These offenses are treated with gravity in legal, professional, and societal contexts, often resulting in harsher penalties.

The Situation Varies from case to case

- ✱ **Mixing of Colour in Sweets:** It is prohibited under law to mix colour in sweets. While in a case of mixing colour in sweets, if the motive is detected to be greed, it may be considered immoral but if it is done to make the article look more attractive, it is not an immoral act.

* **Self-defence:** A person is convicted for causing grievous hurt to another and for exceeding the right of self defence but would hardly involve moral turpitude.

* **Misuse of Power for Personal Gain vs. Mistake in Judgment:** An officer misusing their authority to secure personal benefits, such as approving loans to family members without due process, would involve moral turpitude because it reflects a deliberate ethical breach. On the other hand, an officer making a poor business decision without any fraudulent intent may show poor judgment but does not constitute moral turpitude.

* **Fraudulent Documentation vs. Clerical Error:** Falsifying documents to obtain loans or benefits would involve moral turpitude because it is done with intent to deceive. However, an unintentional clerical error, such as misplacing a zero in financial records, though punishable under law, is not an act of moral turpitude as there is no intent to deceive or defraud.

* **Harassment vs. Misunderstanding:** A bank employee engaging in harassment or making inappropriate remarks toward a colleague would be considered an act of moral turpitude, as it reflects a violation of ethical standards and respect. In contrast, a misunderstanding that leads to a workplace disagreement, without any unethical intent, would not involve moral turpitude.

* **Negligence vs. Deliberate Harm:** A bank teller accidentally issuing incorrect amounts of money due to a mistake would not involve moral turpitude. However, if the teller deliberately manipulated accounts to steal money from customers, this would be considered moral turpitude because it shows intentional dishonesty and breach of trust.

* **Tax Evasion vs. Unintentional Non-compliance:** Deliberately evading taxes by falsifying income or hiding assets is an act of moral turpitude due to the deceitful and dishonest nature of the act. However, failing to comply with

a complex tax law due to a lack of understanding, while still legally punishable, does not reflect the same level of unethical behaviour.

* **Accidental Harm vs. Intentional Violence:** If a driver accidentally hits a pedestrian due to bad weather conditions and poor visibility, it would not be considered an act of moral turpitude. However, if the driver intentionally drives recklessly, disregarding the safety of others, and causes harm, this would likely involve moral turpitude, as it shows a blatant disregard for others' well-being.

* **Shoplifting vs. Forgetting to Pay:** A person caught intentionally shoplifting or concealing items to avoid payment would be committing an act of moral turpitude due to the dishonest intent. On the other hand, if someone accidentally walks out of a store without paying for an item they forgot they were carrying, this would not involve moral turpitude, as there was no intent to steal.

* **False Accusations vs. Miscommunication:** If an employee deliberately makes false accusations against a colleague to damage their reputation or career, this is an example of moral turpitude because it involves dishonesty and malicious intent. However, if two employees have a misunderstanding that leads to a disagreement, without any intent to harm, it would not fall under moral turpitude.

* **Cheating on Exams vs. Struggling with a Question:** A student who cheats on an exam by using unauthorized materials or copying from others is engaging in moral turpitude, as it reflects dishonesty and a lack of integrity. However, a student who struggles to answer a question or fails to prepare properly does not commit moral turpitude, even though they may face academic consequences.

* **Bribing an Official vs. Attempting to Expedite a Process:** Offering a bribe to a government official to secure a favourable decision or to bypass legal procedures would involve moral turpitude because it corrupts the system. In

contrast, attempting to expedite a legal process by following proper channels and paying necessary legal fees, even if perceived as favor-seeking, would not involve moral turpitude if done without corrupt intent.

* **Lying Under Oath vs. Misremembering Details:** Deliberately lying under oath in a courtroom to influence the outcome of a case is an act of moral turpitude due to the wilful attempt to mislead and obstruct justice. On the other hand, someone who misremembers or unintentionally provides inaccurate information in court without malicious intent would not be guilty of moral turpitude.

These examples underscore the importance of intent and ethical considerations in determining whether an action constitutes moral turpitude. Acts driven by malice, deceit, or corrupt intent often qualify, while those stemming from mistakes, misunderstandings, or non-malicious errors do not.

Moral Turpitude in the Banking Sector

In the banking industry, trust, integrity, and ethical behaviour form the foundation of client relationships and institutional credibility. When offenses involving moral turpitude occur in this sector, the consequences are particularly severe:

1. **Breach of Trust:** Banks handle sensitive financial information, large sums of money, and customer assets. Crimes like fraud or embezzlement represent a serious breach of this trust, affecting both customers and the institution's reputation.

2. **Regulatory and Legal Consequences:** Banks operate under strict financial and ethical regulations. Employees convicted of crimes involving moral turpitude face legal penalties, including fines, imprisonment, and disqualification from the sector. Such offenses can even result in the revocation of a bank's license.

3. **Impact on Employees and the Institution:** Employees involved in moral turpitude offenses face immediate termination and can be blacklisted from the financial industry. Additionally, a scandal of this nature can damage the institution's standing, eroding public trust and causing financial losses.

Trust and Ethics: The Pillars of Trade Unionism

In the context of trade unionism, moral turpitude significantly endangers the fundamental values and ethical principles that define the movement. Trade unions exist to represent their members, advocating for their rights, fair treatment, and overall welfare. Leaders who are entrusted with this responsibility must uphold the highest standards of integrity, as their conduct directly impacts the reputation of the organization. When leaders engage in unethical behaviour, they betray the trust of their members and damage the union's credibility.

Trade unions are built on fairness, integrity, and justice. Any lapse in moral conduct within leadership undermines the union's role as an advocate for ethical practices and weakens its very foundation. Such actions derail the union's mission of safeguarding and promoting the welfare of its members. Leadership within trade unions is not simply about holding authority—it is a responsibility that demands respect, dignity, and a steadfast commitment to ethical values. Acts of moral turpitude violate the core principles of the union and erode the trust of its members, compromising the collective mission of ensuring just and equitable representation.

The Broader Consequences of Moral Turpitude

Moral turpitude is treated seriously because it reflects a deeper character flaw, suggesting a wilful disregard for trust and ethical conduct. Key implications include:

* **Employment Consequences:** In fields like finance, healthcare, and law, convictions for moral turpitude lead to professional disqualification and hinder future employment.

- **Immigration Law:** In certain countries, like the United States, crimes involving moral turpitude can result in visa denials, deportation, or disqualification from citizenship.

- **Legal Penalties:** Offenses involving moral turpitude are met with harsher sentences due to their ethical and social impact.

Preventing Moral Turpitude in Professional Sectors

To reduce the risks associated with moral turpitude, organizations must implement stringent ethical policies:

- **Ethics and Compliance Training:** Ensuring employees understand ethical expectations and legal boundaries.

- **Internal Audits and Controls:** Detecting and preventing unethical conduct through robust internal mechanisms.

- **Zero Tolerance Policies:** Immediate termination for involvement in criminal or unethical activities.

- **Whistleblowing Mechanisms:** Encouraging employees to report unethical behaviour without fear of retaliation.

Safeguarding Integrity

Moral turpitude, by its nature, represents a breach of the ethical covenant that binds individuals and institutions to society. Its presence erodes trust and threatens the integrity of organizations. In sectors like banking, where ethical conduct is non-negotiable, moral turpitude can have devastating consequences. By cultivating a culture of transparency, accountability, and ethical behaviour, organizations can protect their reputations and maintain the trust of their stakeholders.■

[2024 (182) FLR 732]
(Supreme Court)
B.R. Gavai AND Sandeep Mehta, JJ
Civil appeal No. (s) 6473, 6476 of 2024
May 16, 2024
Between
R.S. MADIREDDY and another etc.,
And
UNION OF INDIA and others etc.

Constitution of India, 1950- article 226-Maintainability of writ petitions-Privatization of 'air India'-division Bench of Bombay High court dismissed the writ petitions on the ground of maintainability on the ground of privatization-Hence, instant appeal-Held, Government of India having transferred its 100% shares to the company Talace India Pvt., Ltd., ceased to have any administrative control or deep pervasive control over the private entity-Once the "All" ceased to be covered under the definition of "State" under Article 12 of the Constitution of India, it could to have been subjected to writ jurisdiction under Article 226 of the constitution of India-The private entity after taking over "All" was not performing any pubic duty ad activities were totally commercial-appellant had a right to raise their claim before appropriate forum- Appeals dismissed. [Paras 32 to 45]

There is no dispute that the Government of India having transferred its 100% share to the company Talac India Pvt Ltd., ceased to have an administrative control or deep pervasive control over the private entity and hence, the company after its disinvestment would not have been treated to be a State anymore after having taken over by the private company. Thus, unquestionably, the respondent No. 3 (AIL) after its disinvestment ceased to be a State or its instrumentality within the meaning of Article 12 of the constitution of India.

Once the respondent No. 3 (Ail) ceased to be covered by the definition of State within the meaning of Article 12 of the constitution of India, it could not have been subjected to writ jurisdiction under Article 226 of the Constitution of India.

The respondent No. 3 (AIL), the erstwhile Government run airline

having been taken over by the private company Talace India Pvt. Ltd., unquestionably is not performing any public duty inasmuch as it has taken over the Government company Air India Limited for the purpose of commercial operations, plain and simple, and thus no writ petition is maintainable against respondent NO. 3(AIL). The question No.1 is decided in the above manner.

JUDGEMENT

SANDEEP MEHTA,J- Leave granted

2. The present appeals are filed challenging the common impugned judgment and order dated 20th September, 2022 passed by the Division Bench of the High Court of Bombay thereby dismissing four writ petitions instituted by the appellants being the former employees of respondent No.3 i.e. Air India Limited(hereinafter referred to as 'AIL') as members of its cabin crew force. Appellants came to be employed in AIL in the late 1980s and all of them retired between 2016 and 2018.

3. Writ Petition Nos. 123 of 20141 and 844 of 20142 were filed for alleged stagnation in pay and non-promotion of the employees. Writ Petition No. 844 of 2014 additionally raised issues of anomalies in the fixation of pay arising out of and for implementation of the report of the Justice Dharmadhikari Committee. Writ Petition Nos. 1770 of 2011 and 1536 of 2013, pertained to the delay in payment of wage revision arrears and the withdrawal of eight out of the seventeen allowances already paid to the employees retrospectively. In each of the writ petitions, violation of Articles 14, 16, and 21 of the Constitution of India, 1950, was pleaded. The Division Bench of Bombay High Court, vide common judgment and order dated 20th September, 2022 disposed of the above writ petitions denying relief as claimed therein on the ground of non-maintainability of the writ petitions owing to the intervening event of privatisation of respondent No. 3(AIL). Nevertheless, liberty was granted to the employee petitioners to seek their remedies in accordance with law.

BRIEF FACTS: -

4. Air India was a statutory body constituted under the Air

Corporations Act, 1953. With the repeal of the Act of 1953 by the Air Corporations(Transfer of Undertakings) Act, 1994, Air India merged with Indian Airlines and upon incorporation, respondent No. 3(AIL) became a wholly Government owned company and, thus, came under the category of 'other authorities' within the meaning of Article 12 of the Constitution of India. This status of Air India continued to subsist on the date when the subject batch of writ petitions (supra) under Article 226 of the Constitution of India were filed before the High Court invoking writ jurisdiction, against respondent No.3(AIL).

5. However, on 08th October, 2021, the Government of India announced that it had accepted the bid of Talace India Pvt Ltd. to purchase its 100% shares in respondent No. 3 (AIL). Subsequently, on 27th January, 2022 pursuant to the share purchase agreement signed with Talace India Pvt. Ltd., 100% equity shares of the Government of India in respondent No. 3(AIL) were purchased by the said private company and respondent No. 3(AIL) was privatised and disinvested. Therefore, the writ petitions were maintainable on the date of institution but the question that arose before the High Court was whether they continued to be maintainable as on the date the same were finally heard.

6. Learned Judges of the Division Bench of the Bombay High Court, while placing reliance upon the decisions of Tarun Kumar Banerjee v. Bharat Aluminium Co. Ltd. and Another6 ; Mahant Pal Singh v. Union of India and Others7 ; Padmavathi Subramaniyan and Others v. Ministry of Civil Aviation Government of India rep by its Secretary and Others 8 ; and few more decisions of the Delhi High Court and Gujarat High Court concluded that with the privatisation of respondent No. 3(AIL), jurisdiction of the High Court under Article 226 of the Constitution of India to issue a writ to respondent No. 3(AIL), particularly in its role as an employer, did not subsist and disposed of the writ petitions vide common impugned judgment dated 20th September 2022, which is assailed in the present appeals by special leave.

Submissions and contentions on behalf of the appellants: -

7. Shri Sanjay Singhvi, learned senior counsel appearing on behalf of the appellants submitted that the right to seek remedy stands

crystallised on the date of institution of proceedings and though subsequent events can be considered, it is a well settled tenet of law that such subsequent events can be looked at only to advance equity rather than to defeat it. Reliance in this regard was placed by learned senior counsel upon Pasupuleti Venkateswarlu v. Motor & General Traders; Beg Raj Singh v.State of U.P. and Ors.10. He urged that different view is permissible only in exceptional circumstances and in no event can a party be divested of its substantive rights on account of such subsequent event as laid down in Rajesh D. Darbar and Others v. Narasingrao Krishnaji Kulkarni and Others11. The relevant extract of Rajesh D. Darbar(supra) as relied upon by the learned senior counsel for the appellants is extracted hereinbelow: -

> "4. The impact of subsequent happenings may now be spelt out. First, its bearing on the right of action, second, on the nature of the relief and third, on its importance to create or destroy substantive rights. Where the nature of the relief, as originally sought, has become obsolete or unserviceable or a new form of relief will be more efficacious on account of developments subsequent to the suit or even during the appellate stage, it is but fair that the relief is moulded, varied or reshaped in the light of updated facts. Patterson v. State of Alabama [294 US 600 : 79 L Ed 1082 (1934)] (US at p. 607) illustrates this position. It is important that the party claiming the relief or change of relief must have the same right from which either the first or the modified remedy may flow. Subsequent events in the course of the case cannot be constitutive of substantive rights enforceable in that very litigation except in a narrow category (later spelt out) but may influence the equitable jurisdiction to mould reliefs. Conversely, where rights have already vested in a party, they cannot be nullified or negated by subsequent events save where there is a change in the law and it is made applicable at any stage. Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri [1940 FCR 84 : AIR 1941 FC 5] falls in this category. Courts of justice may, when the compelling equities of a case oblige them, shape reliefs — cannot deny rights — to make them justly relevant in the updated circumstances. Where the relief is discretionary, courts may exercise this jurisdiction to avoid injustice. Likewise, where the right to the remedy depends, under the statute itself,

> on the presence or absence of certain basic facts at the time the relief is to be ultimately granted, the court, even in appeal, can take note of such supervening facts with fundamental impact. This Court's judgment in Pasupuleti Venkateswarlu v. Motor & General Traders [(1975) 1 SCC 770 : AIR 1975 SC 1409] read in its statutory setting, falls in this category. Where a cause of action is deficient but later events have made up the deficiency, the court may, in order to avoid multiplicity of litigation, permit amendment and continue the proceeding, provided no prejudice is caused to the other side. All these are done only in exceptional situations and just cannot be done if the statute, on which the legal proceeding is based, inhibits, by its scheme or otherwise, such change in the cause of action or relief. The primary concern of the court is to implement the justice of the legislation. Rights vested by virtue of a statute cannot be divested by this equitable doctrine (see V.P.R.V. Chockalingam Chetty v. Seethai Ache)".

8. Reliance was also placed by the learned senior counsel on the judgment of Ashok Kumar Gupta & Others. v. Union of India & Others , wherein the Division Bench of Calcutta High Court, after adverting to the extant principles concerning the maintainability of writ proceedings as on the date of the institution, held that an employer which had been privatised during the pendency of a writ appeal filed against the order rejecting the writ petition would continue to be amenable to writ jurisdiction under Article 226 of the Constitution of India. The relevant portion of Ashok Kumar Gupta(supra) relied upon is extracted hereinbelow: -

> "32. It is nobody's case that the writ petition was not maintainable when it was filed. The cause of action for filing the writ petition crystallized at a point of time when the respondent authority was, admittedly, subject to the writ jurisdiction. The said cause of action confers a vested right to the writ petitioners to have their grievances adjudicated in a writ proceeding. No one can contend that the writ petitioners have brought the present situation by their conduct. The change of circumstances is not attributable to the petitioners.
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> 33. For the aforesaid reasons, we are of the opinion that the

instant appeal is very much maintainable, and the preliminary objection raised on behalf of the respondent company cannot be sustained in the eye of law. Therefore, the said preliminary objection regarding maintainability of this appeal as raised by the respondent company is rejected."

9. Learned senior counsel further contended that the scope of issuing a writ, order, or direction under Article 226 of the Constitution of India is much broader than the high prerogative writs issued by the British Courts and this position has been recognised by this Court in the case of Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Ors. v. V.R. Rudani & Ors.13, and following the said decision, Courts in India have consistently issued writs even to private persons performing public duties and this position has further been reiterated by the recent judgment of this Court in the case of Kaushal Kishor vs. State of Uttar Pradesh and Ors.14. The relevant portions of Andi Mukta(supra) as relied upon by the learned senior counsel are extracted hereinbelow: -

> "16. The law relating to mandamus has made the most spectacular advance. It may be recalled that the remedy by prerogative writs in England started with very limited scope and suffered from many procedural disadvantages. To overcome the difficulties, Lord Gardiner (the Lord Chancellor) in pursuance of Section 3(1)(e) of the Law Commission Act, 1965, requested the Law Commission *"to review the existing remedies for the judicial control of administrative acts and omissions with a view to evolving a simpler and more effective procedure"*. The Law Commission made their report in March 1976 (Law Commission Report No. 73). It was implemented by Rules of Court (Order 53) in 1977 and given statutory force in 1981 by Section 31 of the Supreme Court Act, 1981. It combined all the former remedies into one proceeding called Judicial Review. Lord Denning explains the scope of this ***"judicial review":***
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> "At one stroke the courts could grant whatever relief was appropriate. Not only certiorari and mandamus, but also declaration and injunction. Even damages. The procedure was

> much more simple and expeditious. Just a summons instead of a writ. No formal pleadings. The evidence was given by affidavit. As a rule no cross-examination, no discovery, and so forth. But there were important safeguards. In particular, in order to qualify, the applicant had to get the leave of a judge.
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> The statute is phrased in flexible terms. It gives scope for development. It uses the words ***"having regard to".*** Those words are very indefinite. The result is that the courts are not bound hand and foot by the previous law. They are to "have regard to" it. So the previous law as to who are — and who are not —public authorities, is not absolutely binding. Nor is the previous law as to the matters in respect of which relief may be granted. This means that the judges can develop the public law as they think best. That they have done and are doing." [See The Closing Chapter by Rt. Hon. Lord Denning, p. 122]
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> 17. There, however, the prerogative writ of mandamus is confined only to public authorities to compel performance of public duty. The ***"public authority"*** for them means everybody which is created by statute — and whose powers and duties are defined by statute. So government departments, local authorities, police authorities, and statutory undertakings and corporations, are all "public authorities". But there is no such limitation for our High Courts to issue the writ "in the nature of mandamus". Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to ***"any person or authority".*** It can be issued "for the enforcement of any of the fundamental rights and for any other purpose."

10. He further submitted that equity should prevail over injustice and since the appellants have diligently pursued their case in the High Court for more than a decade, subsequent events can be accounted for only to support and not undermine equity. It was further contended that a private body that promises the sovereign to fulfill its obligations and liabilities as a public employer towards its employees under Articles 14 & 16, then performs a public duty to the extent of

discharging such liabilities. It is not the form, but the nature of the duty imposed that is relevant for adjudging whether a writ petition would lie against a private body. Reliance in support of this contention was placed upon the following extracts from the decision of this Court in Binny Ltd. and Anr. v. V. Sadasivan and Others:

> "23. The counsel for the respondent in Civil Appeal No. 1976 of 1998 and for the appellant in the civil appeal arising out of SLP (Civil) No. 6016 of 2002 strongly contended that irrespective of the nature of the body, the writ petition under Article 226 is maintainable provided such body is discharging a public function or statutory function and that the decision itself has the flavour of public law element and they relied on the decision of this Court in Shri Anadi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani [(1989) 2 SCC 691] . In this case, the appellant was a Trust running a science college affiliated to the Gujarat University under the Gujarat University Act, 1949. The teachers working in that college were paid in the pay scales recommended by the University Grants Commission and the college was an aided institution. There was some dispute between the University Teachers Association and the University regarding the fixation of their pay scales. Ultimately, the Chancellor passed an award and this award was accepted by the State Government as well as the University and the University directed to pay the teachers as per the award. The appellants refused to implement the award and the respondents filed a writ petition seeking a writ of mandamus and in the writ petition the appellants contended that the college managed by the Trust was not an "authority" coming within the purview of Article 12 of the Constitution and therefore the writ petition was not maintainable. This plea was rejected and this Court held that the writ of mandamus would lie against a private individual and the words "any person or authority" used in Article 226 are not to be confined only to statutory authorities and instrumentalities of the State and they may cover any other person or body performing public duty. The form of the body concerned is not very much relevant.What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists, mandamus cannot be denied."

11. Learned senior counsel further contended that when a private employer steps into the shoes of a public employer i.e. to perform the same functions as had previously been performed to the same end and substantially in the same manner, then its actions are amenable to judicial review. Reliance in support of this contention was placed upon the decision of the United Kingdom Court of Appeal in Regina (Beer (trading as Hammer Trout Farm)) v. Hampshire Farmers' Markets & Ltd.

12. It was further contended that the writ petitions came to be instituted on behalf of the appellants herein way back in the year 2011-2013 and at that point of time unquestionably the employer, i.e. respondent No. 3(AIL) was a 'State' within the ambit and purview of Article 12 of the Constitution of India. The writ petitions were filed with genuine and bona fide service-related issues of the appellant employees based on substantive allegations of infringement of fundamental rights guaranteed under Article 14 and Article 16 of the Constitution of India. However, the writ petitions could not be taken up and decided for over a period of almost 10 years and thus, the appellants cannot be non-suited for the non-disposal of their bona fide lis in a timely manner. He thus urged that appellants herein are entitled to the relief, as claimed for in the writ petitions because the employer i.e. respondent No. 3(AIL), undisputedly was amenable to writ jurisdiction at the time the writ petitions were instituted and that it continues to discharge public duties even after privatisation.

13. On these grounds, learned senior counsel for the appellants implored the Court to accept the appeals; set aside the impugned judgment and remand the writ petitions to the High Court for adjudication on merits.

Submission and contentions on behalf of respondent No. 3- AIL: -

14. Shri Abhishek Manu Singhvi, learned senior counsel appearing on behalf of respondent No. 3(AIL) contended that a bare reading of Article 226 of the Constitution of India, would clearly show that

the 'test of jurisdiction' is to be invoked/applied at the time of issuance of the writ by the High Court. It is at the stage of issuance of a writ that the High Court actually exercises its writ jurisdiction, and therefore, it is at that point of time, the High Court ought to be satisfied that the person to whom it is issuing a writ is amenable to the extraordinary writ jurisdiction.

15. Learned senior counsel placed reliance upon the decision of the High Court of Gujarat in the case of Kalpana Yogesh Dhagat through Legal Heirs v. Reliance Industries Ltd. 17, wherein a writ petition had been filed against Indian Petrochemical Corporation Ltd.("IPCL") in 2002 which came to be decided in the year 2016. In the intervening period, the IPCL was privatized and taken over by Reliance Industries Limited(RIL) in 2007. The pertinent issue that cropped up for consideration was whether the writ petition filed against IPCL was maintainable even after its privatization. Learned Single Judge18 of the Gujarat High Court held that the writ petition was not maintainable. The relevant portion of Kalpana Yogesh Dhagat(supra) as relied upon is extracted hereinbelow:-

> "53. In the case in hand, before the writ application could be taken up for final hearing, the status of I.P.C.L. changed. The I.P.C.L. once a public sector enterprise is no longer in existence, the same has been taken over by the Reliance Industries Limited. At no point of time, the legality and validity of the amalgamation of the I.P.C.L. with the Reliance Industries Limited arose before any Court. In such circumstances, I find it extremely difficult to hold that this writ application is maintainable and that too by applying the provisions of Order 22 Rule 10 of the Code of Civil Procedure. Ultimately, the whole issue boils down as to how a writ can be issued against a private entity."

16. Learned senior counsel further placed reliance upon the decision of the High Court of Delhi in Asulal Loya vs. Union of India and Ors.19, wherein learned Single Judge20 arrived at the same conclusion, while dealing with a writ petition filed against the Bharat Aluminium Company Limited(BALCO) in the year 1991 and decided in 2008 i.e., post-privatization of BALCO in 2001. The relevant portions from the said judgment as relied upon are extracted hereinbelow: -

> "3. It is fairly well settled that a writ petition is not maintainable against a private limited company or a public limited company in which the State does not exercise all pervasive control. In Binny Limited v. V. Sadasivan, reported in (2005) 6 SCC 657, the Supreme Court has held that a writ petition under Article 226 of the Constitution is normally issued against public authorities and can also be issued against private authorities when they are discharging public functions and the decision which is sought to be corrected or enforced must be in discharge of a public function. In the present case, the issues and questions involved do not relate to public functions.
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> 10. In these circumstances, the present writ petition is dismissed without going into the merits of the matter upholding the preliminary objection raised by the respondent company that it is not a State and, therefore, not amenable to writ jurisdiction. It is, however, observed that the petitioner is at liberty to approach any forum for redressal of his grievance, if so advised and the time spent by him in these proceedings shall be taken into consideration for the purpose of limitation. In the facts and circumstances of the case, there will be no order as to costs."

17. Learned senior counsel further submitted that this Court in the case of Kaushal Kishor(supra) has held that a writ cannot be issued against non-state entities that are not performing any 'Public Function'. He further pointed out that it is the conceded case of the appellants that post privatisation, respondent No. 3(AIL) does not perform any 'Public Function' and in any case running a private airline with purely a commercial motive can never be equated to performing a 'Public Duty'.

18. He further submitted that the issue is not that of a 'Right' but of a 'Remedy' i.e. dismissal of a writ petition filed by the appellants on the ground of maintainability would not lead to extinguishment of the rights of the appellants and only the forum for adjudication of their dispute would change. Any alleged violations of Articles 14 or 16 of the Constitution of India are simply grounds for claiming relief

which can well be agitated before any other appropriate forum.

19. Learned senior counsel further submitted that appellants' rights, if any, are protected by the specific liberty granted to them by the High Court vide the impugned judgment and if a Court of competent jurisdiction was to hold in their favour, the same would be enforceable against the employer-respondent No. 3(AIL).

20. He further contended that the appellants employees approached the writ Court after significant delay, since the cause of action arose between 2007 to 2010 and captioned writ petitions came to be filed before the Division Bench of the Bombay High Court between 2011 to 2013 and implored the Court to dismiss the appeals.

21. We have given our thoughtful consideration to the submissions advanced by learned counsel for the parties and have gone through the impugned judgment and the material placed on record.

Questions of law posed for adjudication: -

22. The questions of law presented for adjudication of this Court are:

(i) Whether respondent No.3(AIL) after having been taken over by a private corporate entity could have been subjected to writ jurisdiction of the High Court?

(ii) Whether the appellants herein could have been non-suited on account of the fact that during pendency of their writ petitions, the nature of the employer changed from a Government entity to a private entity?

(iii) Whether the delay in disposal of the writ petition could be treated a valid ground to sustain the claim of the appellants even against the private entity?

Discussion and Conclusion: -

23. The thrust of submissions of learned senior counsel appearing on behalf of the appellants was based on the judgment of the Division

Bench of Calcutta High Court in the case of Ashok Kumar Gupta(supra) wherein, it was held in para 32(reproduced supra) that the cause of action crystallized at a point of time when the authority was subjected to the writ jurisdiction.

24. Ashok Kumar Gupta's case(supra) was distinguished by the learned Single Judge of the Gujarat High Court in the case of Kalpana Yogesh Dhagat(supra). The relevant excerpts from the said judgment are reproduced hereinbelow for the sake of ready reference: -

> "50. There is no doubt that if the dictum, as explained by the Division Bench of the Calcutta High Court (Ashok Kumar Gupta vs. Union of India, (2007) SCC OnLine Cal 264) is applied in the case in hand, then probably, the writ application could be said to be maintainable. However, there are few distinguishing features, which, in my view, are important as they go to the root of the matter. First, in the case before the Calcutta High Court even at the time when the writ application was rejected, the company was a public sector undertaking; Secondly, even when the appeal was filed, the same was a public sector undertaking; and thirdly and most importantly, the issue as regards the propriety and legality of the privatisation was pending before the Larger Bench of the Supreme Court." (emphasis supplied)

25. In the case of Kalpana Yogesh Dhagat(supra), the learned Single Judge of the Gujarat High Court went on to uphold the preliminary objection regarding the maintainability of the writ petition against Reliance Industries Limited(RIL). The relevant excerpts from the said judgment are extracted hereinbelow: -

> "19. .....However, the scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging public function, the pubic law remedy can be enforced. The duty cast upon a public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be a public law element in such action. The respondent Reliance Petro Investment Limited has nothing to do with the public as such.

It is a company engaged in the business of petroleum products. Neither the Union nor the 'State' has any control over the respondent company. Mere issue of a licence by the Union or State Government for the purpose of running the company by itself will not make it an instrumentality of a "State" or an agency of a "State".

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21. The language of Article 226 is no doubt very wide. It states that a writ can be issued "to any person or authority" and "for enforcement of right conferred by Part III and for any other purpose". However, the aforesaid language in Article 226 cannot be interpreted and understood literally. The Court should not apply the literal rule of interpretation while interpreting Article 226. If we take the language of Article 226 literally it will follow that a writ can be issued to any private person or to settle even the private disputes. If we interpret the word "for any other purpose" literally it will mean that a writ can be issued for any purpose whatsoever, e.g. for deciding private disputes, for grant of divorce, succession certificate etc. Similarly, if we interpret the words "to any person" literally it will mean that a writ can even be issued to the private persons.

However, this would not be the correct meaning in view of the various decisions of the Supreme Court in which it has been held that a writ will lie only against the State or instrumentality of the State vide Chander Mohan Khanna v. N.C.E.R.T, (1991) 4 SCC 578, Tekraj Vasandhi v. Union of India, (1988) 1 SCC 236 : AIR 1988 SC 469, General Manager, Kisan Sahkari Chini Mills Ltd. v. Satrughan Nishad, (2003) 8 SCC 639, Federal Bank Ltd. v. Sagar Thomas & Co., (2003) 10 SCC 733, Pradeep Kumar Biswas v. Indian Institute of Chemical Biology ((2002) 5 SCC 111) etc. In General Manager, Kisan Sahkari Chini Mills Ltd. v. Satrughan Nishad (supra), the Supreme Court observed that a writ will lie against a private body only when it performed a public function or discharged a public duty. The 'R.I.L.' is not performing a public function nor discharging a public duty. It is only doing a commercial activity. Hence, no writ lies against it.

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58. Even if the aforesaid dictum of the Supreme Court is applied in the case in hand, it is difficult for this Court to take the view that as the writ applicant is not responsible for the change of circumstances and the writ application was maintainable at the time when it was filed, a writ can be issued to a private entity for the purpose of enforcing the fundamental rights of the writ applicant alleged to have been infringed by a company, a public sector undertaking at a point of time and now no longer in existence. It is also not legally permissible to take the view that since the I.P.C.L. was a Government of India undertaking, a writ could be issued against the Union of India. An employee of a public sector undertaking by itself will not be a civil servant or an employee of the Union of India. At best, he could be termed as an employee of a company owned by the Government. Therefore, even ignoring the I.P.C.L., no liability could be fastened even on the Government of India at this stage.

59. I am not impressed by the submission of Mr. Bhatt that the writ applicant has no other alternative remedy, except invoking the writ jurisdiction of this Court. According to Mr. Bhatt, since the original writ applicant i.e. the employee has passed away, it will be legally impermissible for the legal heirs to file a civil suit for declaration for the purpose of challenging the order of dismissal from service. The legal heirs on record can definitely file a civil suit for declaration that the departmental inquiry was not conducted in a fair and transparent manner and the consequential order of dismissal is illegal. Section 14 of the Limitation Act would also save the situation. Section 14 of the Limitation Act itself is meant for the suits." (emphasis supplied)

26. The same controversy was also considered by a learned Single Judge of the Delhi High Court in the case of Asulal Loya(supra) which was a case involving the termination of services of the writ petitioner-employee by the company Bharat Aluminium Company Limited(BALCO) which was previously a Government of India Undertaking and was privatized pursuant to the tripartite share purchase agreement. The employee-writ petitioner filed a writ petition

before the Delhi High Court to challenge his termination wherein, a preliminary objection was raised regarding maintainability of the writ petition on the ground that during pendency of the proceedings, the company had changed hands and no longer retained the characteristic of a 'State' or 'Other authority' as defined under Article 12 of the Constitution of India. The assertion of the writ petitioner was that the petition was maintainable against the respondent on the date it was filed. As per the writ petitioner, the rights and obligations of the parties stood crystallized on the date of commencement of litigation and thus, the reliefs should be decided with reference to the date on which the party entered the portals of the Court. The learned Single Judge in para 10(reproduced supra) upheld the preliminary objection raised against the maintainability of the writ petition and relegated the writ petitioner therein to approach the civil Court for ventilating the grievances raised in the writ petition.

27. The Division Bench of the Bombay High Court in the case of Tarun Kumar Banerjee(supra) also took a similar view observing as below: -

> "1. Both the petitions were filed against Bharat Aluminium Co. Ltd. when the petitions were filed, it was a Government of India enterprise. We are told by the Respondent that they had filed an affidavit on 22-3-1996 thereby pointing out that Bharat Aluminium Co. Ltd. has been privatized and share of more than 50% have been transferred to Sterlit Industries India Ltd. and as a consequence Bharat Aluminium Company Ltd. is not a state and is not amenable to writ jurisdiction of this Court.
>
> 2. In view of this submission we dispose of both the petitions while granting the petitioner liberty to approach any other forum for redressal of their grievance if so advised. The time spent by the petitioners in prosecuting these proceeding shall be taken into consideration for the purpose of limitation in case the petitioner choose any such remedy where the question of limitation would be relevant." (Emphasis supplied)

28. Further, in the case of Beg Raj Singh (supra), this Court observed as below: -

> "7. …. A petitioner, though entitled to relief in law, may yet be denied relief in equity because of subsequent or intervening events, i.e. the events between the commencement of litigation and the date of decision. The relief to which the petitioner is held entitled may have been rendered redundant by lapse of time or may have been rendered incapable of being granted by change in law. There may be other circumstances which render it inequitable to grant the petitioner any relief over the respondents because of the balance tilting against the petitioner on weighing inequities pitted against equities on the date of judgment…." (Emphasis supplied)

29. It is thus, seen that various High Courts across the country have taken a consistent view over a period of time on the pertinent question presented for consideration that the subsequent event i.e. the disinvestment of the Government company and its devolution into a private company would make the company immune from being subjected to writ jurisdiction under Article 226 of the Constitution of India, even if the litigant had entered the portals of the Court while the employer was the Government. The only exception is the solitary judgment of the Division Bench of Calcutta High Court in Ashok Kumar Gupta(supra), which was distinguished by the learned Single Judge of the Gujarat High Court in the case of Kalpana Yogesh Dhagat(supra) and rightly so, in our opinion, we have no hesitation in holding that the view taken in the judgments of Kalpana Yogesh Dhagat(supra)(by the High Court of Gujarat); Asulal Loya(supra)(by the High Court of Delhi) and Tarun Kumar Banerjee(supra)(by the High Court of Bombay) is the correct exposition on this legal issue and we grant full imprimatur to the said proposition of law.

30. We would like to answer the three questions of law enumerated above as follows.

31. In order to be declared as "State" or "other authority" within the meaning of Article 12 of the Constitution of India, it would have to fall within the well-recognised parameters laid down in a number of judgments of this Court. In this regard, we may refer to the case of Pradeep Kumar Biswas v. Indian Institute of Chemical Biology21 wherein this Court after taking into consideration the previous judgments on this point, observed as follows:

"27.Ramana [(1979) 3 SCC 489 : AIR 1979 SC 1628] was noted and quoted with approval in extenso and the tests propounded for determining as to when a corporation can be said to be an instrumentality or agency of the Government therein were culled out and summarised as follows : (SCC p. 737, para 9)

"(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. (SCC p. 507, para 14)

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character. (SCC p. 508, para 15)

(3) It may also be a relevant factor … whether the corporation enjoys monopoly status which is State-conferred or State-protected. (SCC p. 508, para 15)

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality. (SCC p. 508, para 15

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. (SCC p. 509, para 16)

(6) 'Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference' of the corporation being an instrumentality or agency of Government. (SCC p. 510, para 18)"

40. The picture that ultimately emerges is that the tests formulated in Ajay Hasia [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] are not a rigid set of principles so that if a body falls within any one of them it must,

ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be — whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State." (Emphasis supplied)

32. There is no dispute that the Government of India having transferred its 100% share to the company Talace India Pvt Ltd., ceased to have any administrative control or deep pervasive control over the private entity and hence, the company after its disinvestment could not have been treated to be a State anymore after having taken over by the private company. Thus, unquestionably, the respondent No.3(AIL) after its disinvestment ceased to be a State or its instrumentality within the meaning of Article 12 of the Constitution of India.

33. Once the respondent No.3(AIL) ceased to be covered by the definition of State within the meaning of Article 12 of the Constitution of India, it could not have been subjected to writ jurisdiction under Article 226 of the Constitution of India.

34. A plain reading of Article 226 of the Constitution of India would make it clear that the High Court has the power to issue the directions, orders or writs including writs in the nature of Habeas Corpus, Mandamus, Certiorari, Quo Warranto and Prohibition to any person or authority, including in appropriate cases, any Government within its territorial jurisdiction for the enforcement of rights conferred by Part-III of the Constitution of India and for any other purpose.

35. This Court has interpreted the term 'authority' used in Article 226 in the case of Andi Mukta(supra), wherein it was held as follows:

"17. There, however, the prerogative writ of mandamus is confined only to public authorities to compel performance of public duty. The 'public authority' for them means everybody

which is created by statute—and whose powers and duties are defined by statute. So government departments, local authorities, police authorities, and statutory undertakings and corporations, are all 'public authorities'. But there is no such limitation for our High Courts to issue the writ 'in the nature of mandamus'. Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to 'any person or authority'. It can be issued 'for the enforcement of any of the fundamental rights and for any other purpose'.

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20. The term 'authority' used in Article 226, in the context, must receive a liberal meaning like the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words 'any person or authority' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied." (Emphasis supplied)

36. Further, in the case of Federal Bank Ltd. v. Sagar Thomas 22, this Court culled out the categories of body/persons who would be amenable to writ jurisdiction of the High Court which are as follows: "18. From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State (Government); (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State;

(vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function."

37. The respondent No.3(AIL), the erstwhile Government run airline having been taken over by the private company Talace India Pvt. Ltd., unquestionably, is not performing any public duty inasmuch as it has taken over the Government company Air India Limited for the purpose of commercial operations, plain and simple, and thus no writ petition is maintainable against respondent No.3(AIL). The question No. 1 is decided in the above manner.

38. The question of issuing a writ would only arise when the writ petition is being decided. Thus, the issue about exercise of extra ordinary writ jurisdiction under Article 226 of the Constitution of India would arise only on the date when the writ petitions were taken up for consideration and decision. The respondent No.3(AIL)- employer was a government entity on the date of filing of the writ petitions, which came to be decided after a significant delay by which time, the company had been disinvested and taken over by a private player. Since, respondent No.3 employer had been disinvested and had assumed the character of a private entity not performing any public function, the High Court could not have exercised the extra ordinary writ jurisdiction to issue a writ to such private entity. The learned Division Bench has taken care to protect the rights of the appellants to seek remedy and thus, it cannot be said that the appellants have been non-suited in the case. It is only that the appellants would have to approach another forum for seeking their remedy. Thus, the question No.2 is decided against the appellants.

39. By no stretch of imagination, the delay in disposal of the writ petitions could have been a ground to continue with and maintain the writ petitions because the forum that is the High Court where the writ petitions were instituted could not have issued a writ to the private respondent which had changed hands in the intervening period. Hence, the question No.3 is also decided against the appellants.

40. Resultantly, the view taken by the Division Bench of the Bombay High Court in denying equitable relief to the appellants herein and relegating them to approach the appropriate forum for ventilating their grievances is the only just and permissible view.

41. We may also note that the appellants raised grievances by way of filing the captioned writ petitions between 2011 and 2013 regarding various service-related issues which cropped up between the appellants and the erstwhile employer between 2007 and 2010. Therefore, it is clear that the writ petitions came to be instituted with substantial delay from the time when the cause of action had accrued to the appellants.

42. It may further be noted that the Division Bench of Bombay High Court, only denied equitable relief under Article 226 of the Constitution of India to the appellants but at the same time, rights of the appellants to claim relief in law before the appropriate forum have been protected.

43. We may further observe that in case the appellants choose to approach the appropriate forum for ventilating their grievances as per law in light of the observations made by the Division Bench of the Bombay High Court, Section 14 of the Limitation Act, 1963 shall come to the rescue insofar as the issue of limitation is concerned.

44. In wake of the discussion made hereinabove, we do not find any reason to take a different view from the one taken by the Division Bench of the Bombay High Court in sustaining the preliminary objection qua maintainability of the writ petitions preferred by the appellants and rejecting the same as being not maintainable.45. With the above observations, the appeals are dismissed. No order as to costs.

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

Appeal Dismissed.

WPA 10195 of 2023
Anirban Pal
Vs.
Punjab National Bank and others
Mr. Srijib Chakraborty
Ms. Rupsa Sreemani ... for the petitioner
Ms. Parna Roy Chowdhury
Ms. Payel Ghosh ... for the Respondent-Bank.

1. The petitioner seeks mandamus from this Court canceling the order dated 30th May, 2020 by which the respondent Bank refused to restore the petitioner's promotion from Scale-III to Scale-IV.

FACTS OF THE CASE

2. The brief facts relevant in the instant case are that the writ petitioner suffered a motor accident sometime in the year 2015 and sustained serious injuries. He has a disability of 70% as per certificate issued by the appropriate authorities. At the relevant point of time the writ petitioner was Scale-III Officer posted at United Bank of India, Calcutta now known as Punjab National Bank.

3. In the year 2016 there was a promotion process in the bank in which the petitioner did not participate for the likelihood of transfer. He however found two of his colleagues, Anubhav Verma and Ajit Srivastav, with physical disabilities were promoted to Scale-IV but not transferred out of Kolkata.

4. The petitioner sometime in February 2018 participated in the promotion process to Scale-IV grade in the Bank being confident that like the said two colleagues, he would not be transferred from Kolkata. The petitioner was successful, result of the process whereof was declared in October, 2018.

5. The writ petitioner continued to suffer from 70% disability needed special help to discharge his functions. Upon promotion he was issued transfer orders to the Bank's Zonal Office at Patna from Calcutta. The petitioner immediately on 8th October, 2018,

represented to the Bank for reconsideration of his transfer, on the ground that he has no other caregiver if he leaves the City of Calcutta. It was also stated that his parents and father-in-law were unwell and he was the sole overseer of their wellbeing.

6. By a communication dated 15th October, 2018, the Bank declined the request of the petitioner for retaining him in Calcutta and insisted on his going to Patna. No special or pressing administrative exigencies have been cited by the Bank in the refusal. The petitioner joined at Patna on 12th November, 2018 and proceeded on leave because of extreme discomfort and pain. He applied for sick leave from 15th November, 2018 to 21st December, 2018.

7. By an e-mail dated 17th November, 2018 the bank threatened the petitioner with coercive action if he did not report back to his duties at Patna. The said letter was followed up by another letter dated 6th December, 2018 in which the petitioner reiterated the request for repatriation to Calcutta in the promoted post or alternatively to revert him to the original post in Scale-III for being accommodated in Calcutta. The request for reversion was essentially based on the fact that the petitioner was in acute distress to stay away from Calcutta in view of his physical condition.

8. The petitioner on 24th November, 2018 reiterated his request for being repatriated back to Calcutta inter alia, for difficulties he was facing while staying in hotel at Patna. In the alternative the petitioner once again sought reversion to Scale III foregoing his promotions.

9. Prior thereto on 26th October, 2018, the petitioner filed a complaint with the Chief Commissioner of Persons with Disabilities under the Rights of Persons with Disabilities Act of 2016, against the refusal of the Bank to accommodate him in Calcutta, after promotion.

10. At all material times since 2012 the Bank had a policy for accommodating and/or exempting persons with disabilities from transfer, subject to the administrative exigencies. Exemptions and Special Rules for Transfer of Persons like the petitioner are contained in Clauses 16 and 17 of the Bank's Transfer Policy. Sub-Clause (ii) of Clause 16 describes as follows :-

16. TRANSFER OF PHYSICALLY HANDICAPPED OFFICERS:

i. In terms of the Government guidelines, subject to administrative exigencies, a Physically Handicapped Employee in the Bank, in all cadres, whose relevant disability is to the extent of minimum 40% and who has been given disability Certificate by the competent authority, shall normally be exempt from routine periodic outstation transfers. Competent Authority to issue disability certificate, as per Government guidelines is a Medical Board duly constituted by the central or State Government. The Central/ State Government may constitute Medical Board(s) consisting of at least 3 members, out of which at least one shall be a specialist in the particular field for assessing locomotor/ cerebral/visual/hearing diability, as the case may be. Such medical certificate should specifically contain the nature of disability i.e. permanent. Where the Medical Board has indicated the period of validity of the certificate, in cases where there are chances of variation in the degree of disability, it must be ensured that the certificate held on record is within this validity period.

ii. Such Officers shall not normally be transferred even on promotion if a vacancy exists in the same Branch/Office/ Town/City. If the transfer of a physically handicapped employee becomes inevitable on promotion to a place other than his original place of appointment due to non-availability of vacancy, it shall be ensured that such employee is kept close to his original place of posting and in no case is transferred to far off/remote places.

iii. This concession would not be available to such of the handicapped employees who are transferred on grounds of disciplinary action or are involved in fraudulent transactions.

iv. The Managing Director and Chief Executive Officer of the Bank ay grant exemption in individual cases of Physically Handicapped Officers if the handicap is of such a nature that it is not possible for the officer to serve in a rural/semi-

urban branch. In case of such officers the complete case shall be sent to Personnel Administration Division, HO through Circle Head/Field General Manager stating therewith details of handicap and their recommendations.

17. TRANSFER OF OFFICERS WHO HAVE DIFFERENTLY ABLED DEPENDENTS:

The Government of India, Ministry of Finance, has issued OM No.42011/3/2014-Esst.(Res.) dated 06.06.2014 in the matter of posting of Officers/employees who is a care giver of disabled child. The word 'disabled' includes:-

(i) blindness or low vision
(ii) hearing impairment
(iii) locomotor disability or cerebral palsy
(iv) leprocy cured
(v) mental retardation
(vi) mental illness and
(vii) multiple disabilities.

Such Officers will be exempted from the routine exercise of transfer/ rotational transfers. The following guidelines shall be kept in view while affecting the transfers of those officers who have such differently abled children.

i. As far as possible Bank may consider on merit of each case, posting of the parent at a place which will facilitate special medical care, education and rehabilitation of his /her child;

ii. Such posting may not be claimed as a matter of right. Banks may decide each case after being satisfied from an examination of medical records/reports from competent medical authority that the child would need special medical and educational support beyond the scope of normal/ ordinary medical and educational systems. No special consideration would be necessary if the disability is mild and the normal educational system will settle with extra coaching;

iii. The posting of the employee parent to a place having facilities for treatment and training of such differently abled

children would be subject to availability of vacancy/ post at the place of choice, corresponding to his/her cadre, grade and specialization. The rules regarding rural/ semi-urban service, however, would be relaxed in such cases; and iv. If the posting/transfer is necessitated on account of promotion/ re-categorization of post, effort may be made to post the officer to a place closest to the centre where appropriate medical and educational facility would be available to the child.

11. On the day by a letter dated 6th December, 2018, the Chief Commissioner of Persons with Disabilities directed the Bank to exempt him from transfer by referring to a DOPT Guidelines dated 31st March, 2014 and Section 20(3) of the Rights of Persons with Disabilities Act, 2016. Reference is also made to Section 75(1) of the said Act of 2016. An action taken report was sought from the Bank.

12. It is not clear before this Court as to when the said request from the petitioner and orders of the Chief Commissioner both dated 6th December, 2018 were actually received by the Bank.

13. The Bank before responding to the letter of the Chief Commissioner of Persons with Disabilities chose to respond to the electronic mail request of the petitioner, inter alia, for reversion to Scale-III on 29th December, 2018 and posted him back to Calcutta. The Bank consequently on the same day also replied to the Chief Commissioner of Persons with Disabilities indicating that the petitioner's request for reversion has been accepted.

14. The petitioner joined the Bank in Calcutta on 1st January, 2019. After the writ petitioner made a representation to the Bank on 19th March, 2020 for restoration of his promotion to Scale-IV, the same was declined by the Bank on 30th May, 2020. The writ petition was filed on 9th April, 2023.

PETITIONER'S ARGUMENTS

15. Mr. Chakraborty, learned Counsel for the petitioner has argued that the petitioner was prevented from coming to Court against the

order of the Bank refusing to restore his promotion to Scale-IV due to COVID, Pandemic, his health condition and bereavement on account of the death of his father, mother and father-in-law.

16. On the question of delay Mr. Chakraborty has argued that given inhuman conduct of the bank, the delay on the part of the petitioner of about three years in approaching Court should not stand in the way of grating equitable relief.

17. On facts and the rules of the bank Mr. Chakraborty has annexed to pleadings, documents showing several vacancies were available in the bank at Calcutta in between October and December 2018 where the petitioner could have been accommodated in Scale IV grade.

18. The transfer policy of the Bank and the exemption from transfer of disabled persons is also placed in detail.

19. On the question of delay Mr. Chakraborty relies upon the decision of Bhag Singh & Ors. vs. Union Territory of Chandigarh reported in (1985) 3 SCC 737 particularly Para 3 thereof. It is argued that technical pleas should not be taken by the State to deny bonafide relief or to cover up their improprieties. On the same proposition, reliance is also placed on the decision of the Supreme Court in the case of Tukaram Kana Joshi & Ors. vs. Maharashtra Industrial Development Corporation & Ors. reported in (2013) 1 SCC 353 particularly Para 12 thereof.

20. It is submitted by Mr. Chakraborty that the cause of action of the petitioner for restoration of his promotion and the relief against the illegal action of the bank is a continuing one.

21. Reliance is also placed on a Single Bench decision of Gujrat High Court in the case of Dipika Kantilal Shukla vs. State of Gujarat & Ors. reported in (2006) SCC OnLine Guj 447 particularly Para 3, 5, 7 to 10 thereof. It is submitted that the bank should be compelled to follow its guidelines and rules. In essence Mr. Chakraborty argues that exemption from transfer for disabled persons contained in the Transfer Policy of the bank has been completely ignored and the bank must be compelled to follow the same.

22. On the same proposition is a decision of the Delhi High Court in the case of V. K. Bhasin vs. State Bank of Patiala & Ors. being LPA 74 of 2005 and decided on 03.08.2005. On the principles to be followed in respect of service benefits to persons with disability, reliance is placed on Para 21 to 31 of the decision of the Supreme Court in the case of Net Ram Yadav vs. State of Rajasthan & Ors. reported in (2022) 15 SCC 81.

23. Insofar as the pleadings of the bank that there was no vacancy in the last part of 2018 in Scale IV, reliance is placed on the decision of the Supreme Court in the case of Bharat Singh & Ors. vs. State of Haryana & Ors. reported in (1988) 4 SCC 534. It is argued by reference to Para 13 that pleadings of the bank bereft of supporting documents cannot be given credence, inter alia, in proceedings where there is no trial in evidence.

ARGUMENTS OF THE BANK

24. Mr. Roychowdhury, Learned counsel for the bank, however, opposes the submissions of Mr. Chakraborty.

25. The petitioner's request for reversion was already available with the bank before the orders of the Commissioner of Persons with Disability dated 6th December, 2018 was received. When a person himself seeks reversion and forgoes the benefit of promotion he cannot turn around and blame the authorities for being deprived. He must be deemed to have consciously waived any benefits he may have derived from his promotion or under the Service Rules. Reliance is placed on the decision of the Supreme Court in the case of Union of India & Ors. vs. Manju Arora & Anr. Reported in (2022) 2 SCC 151 particularly paragraph 17 and 18 thereof.

ANALYSIS OF THIS COURT

26. This Court has carefully heard the rival contentions urged by the parties. This Court has also carefully considered the entire pleadings on record and each of the decisions cited by the parties. The decisions cited by Mr. Chakraborty clearly apply to the facts of the case. This Court finds that as many as four, if not more officers in the Scale IV category, upon promotion in October 2018, have

been transferred to Calcutta by the bank from different parts of the country and the State. Therefore, the bank's pleading that there was no vacancy in Calcutta to accommodate the petitioner on promotion in Scale-IV apart from being specious, is false and dishonest.

27. The petitioner could easily have been accommodated in Calcutta by invoking and applying, Clause 16(ii) of its transfer policy which has already been set out hereinabove.

28. It is quite possible that the petitioner must have been suffering substantial difficulties living alone even for a brief period in Patna. He must have been compelled to seek reversion to come back to Calcutta for better care and comfort. The bank has admittedly violated its own transfer policy in particular and the provisions of the Act of 2016 in generally morefully described and set out by the Commissioner of Persons with Disabilities. The conduct of the bank was totally inhuman, in violation of its own Transfer Policy and defeated the object and purpose of the Act of 2016.

29. Reference in this regard may be maid to Para 23 and 24 of the V.K. Bhasin decision (supra).

> "23. In the written synopsis filed by the appellant, an endeavor has been made to once again raise the issue of the medical certificate like an appellate authority which is not permissible. A perusal of the certificate even otherwise does not show any a parent mistake. In fact, the plea raised is that the Bank should be permitted to take the nature of disability into account, while observing the guidelines. It has to be appreciated that once a person is certified with permanent disability of more than 40% and is, thus, covered under the provisions of the said Act, this aspect is not germane. There is no doubt that the appellant is only to be considered for transfer to a proximate place to his native place, but the guidelines of 1988 make it clear that such request is to be accepted unless in case of administrative exigency otherwise.
>
> 24. The written synopsis also goes on to raise the issue of scope of judicial review. In matters of transfer, this Court does not sit as a court of appeal. However, where the very basis is erroneous, this Court is entitled to intervene. Totally irrelevant factors have been taken into account as stated above and the provisions of statutory enactment like the said Act, the said Rules and the Office Memorandum issued in furtherance thereof are sought to be defeated. One cannot lose sight of the fact that the legislation is in furtherance of international commitments and to give an equal treatment to persons with disability. All this has been given a go-bye while rejecting the request of the appellant and the Bank insists on implementing the erroneous decision. In such a case, this Court cannot be powerless to remedy the situation."

30. The difficulties faced by disabled persons and the consequence of denial of special rules to them has been dealt with by the Supreme Court in Para 28 and 29 of the Net Ram Yadav decision (supra).

> "28. Even otherwise, human rights are rights inherent in civilised society, from the very inception of civilisation, even though such rights may have been identified and enumerated in international instruments such as the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10-12-1948, or other international conventions and instruments including UNCRPD. Furthermore, the disabled are entitled to the fundamental right of equality enshrined in Articles 14 to 16 of the Constitution of India, the fundamental freedoms guaranteed under Article 19 including the right to carry out any occupation, profession, the right to life under Article 21, which has now been interpreted to mean the right to live with dignity, which has to be interpreted liberally in relation to the disabled.
>
> 29.One of the hindrances/disadvantages faced by the physically disabled persons is the inability to move freely and easily. In consideration of the obstacles encountered by persons with disabilities, the State has issued the said Notification/Circular dated 20-7-2000 for posting disabled persons to places of their choice, to the extent feasible. The object of this benefit to the physically disabled is to, inter alia, enable the physically disabled to be posted at a place

where assistance may readily be available. The distance from the residence may be a relevant consideration to avoid commuting long distances. The benefit which has been given to the disabled through the Circular/Government Order cannot be taken away by subjecting the exercise of the right to avail of the benefit on such terms and conditions, as would render the benefit otiose."

31. In so far as the timing of receipt of the order of the Commissioner of Persons with Disabilities dated 06.12.2018 and the petitioner's second request for reversion for reconsideration of his post at Patna and/or reversion.

32. There are serious doubts in the mind of this Court as regards the bona fides of the Bank's conduct in accepting and allowing the petitioner's prayer for reversion first.

33. The Bank did not need any order of the Chief Commissioner of Persons with Disabilities, since it had its own guidelines against transfer of persons with disabilities even on promotion.

34. This Court's mind is also not therefore, fully free from doubt that the petitioner's continuous request for reposting at Calcutta may have ruffled misplaced egoistic feathers of his superiors. This is an unfortunate malaise that festers in hierarchies of Public Sector Bank and other bodies which has and continues to severely impact the man resources and impede the growth and wellbeing of an organization and its employees. Any special request from an employee out of the ordinary, even if supported by the Bank's rules is look at with contempt and discomfort.

35. The petitioner made a representation for restoration of his promotion only on 19.03.2020. His prayer was rejected on 30.05.2020. The writ petitioner continued to accept and act upon such refusal by the Bank. In addition thereto, this Court notes that there was at least two promotional processes from 2020 till the date of filing of the writ petition and another process thereafter as on date. He did not participate in the same. The delay of three years in approaching court has extinguished the petitioner's challenge to the refusal by the Bank to restore his promotion to Scale IV.

36. In view of the above, this Court is not inclined to interefere the impugned order refusing to restore the petitioner's promotion to Scale IV after a gap of nearly six years as on date.

37. However, given the reprehensible conduct on the part of the Bank as discussed hereinabove this Court is inclined to impose exemplary and penal costs on the Punjab National Bank formerly known as United Bank of India of a sum of ₹ 3,00,000/- which shall be paid by the Bank to the writ petitioner within a period of three weeks from date.

38. By reason of seeking reversion the petitioner in terms of rules of the bank has forfeited any increments for a period from the date of his actual reversion.

39. In the facts and circumstances of the case, this Court is inclined to restore to the petitioner all increments with effect from December, 2018 till date. Let all arrears be paid to the petitioner and his salary and pay will be suitably revised by the Bank within three weeks from date, as if none of his increments were curtailed or withheld by reason of the reversal sought by him.

40. Let a copy of this order be sent by the petitioner and the Registrar General of this Court to the Chairman of the Punjab National Bank, Chief Commissioner of Persons Disabilities, under the Act of 2016, the Secretary, Ministry of Finance, Banking Division, Secretary, Ministry of HRD and the Chief Vigilance Commissioner, Central Government, for fixing accountability, taking appropriate Disciplinary Action, against the persons responsible for the omissions indicated hereinabove. Let appropriate measures be taken to sensitise the Officials of all the Public Sector Banks in respect of the "Persons with Disabilities Act of 2016" and the Special Rules of the bank in that regard.

41. The writ petition is disposed of.

42. All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)

IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 1635 OF 2013

JAGDISH PRASAD SINGH ....APPELLANT(S)

VERSUS

STATE OF BIHAR AND OTHERS

....RESPONDENT(S)

J U D G M E N T

Mehta, J.

1. Heard.

2. This appeal by special leave is directed against the final judgment dated 27th August, 2012 passed by the Division Bench of the High Court of Judicature at Patna in Letters Patent Appeal No. 1254 of 2011, whereby the said appeal preferred by the appellant herein was dismissed and the judgment dated 23rd February, 2010 passed by the learned Single Judge of the High Court in Civil Writ Jurisdiction Case(CWJC) No. 18542 of 2009 and so also the judgment dated 23rd March, 2011 passed by the learned Single Judge in Civil Review No. 82 of 2010 were upheld.

3. Facts in a nutshell are that the appellant herein was appointed to the post of Supply Inspector in the Government of Bihar in the year 1966. After serving for 15 years, he received his first time bound promotion as Marketing Officer and was put in Junior Selection Grade w.e.f. 1st April, 1981. Upon completing 25 years in service, the appellant was further promoted to the post of Senior Selection Grade, Marketing Officer-cum-Assistant District Supply Officer(in short 'ADSO') w.e.f. 10th, March 1991 in the pay scale of ₹ 2000-3800.

4. The Government of Bihar issued a Resolution dated 8th February, 1999 revising the pay scale of Marketing Officer from ₹ 1640-2900 to ₹ 5500-9000 and that of ADSO, from ₹ 2000- 3800 to ₹ 6500-10500 w.e.f. 1st January, 1996. Since the appellant had been

promoted as ADSO w.e.f. 10th March, 1991, his pay scale was revised to ₹ 6500-10500 in accordance with the Resolution dated 8th February, 1999 which is quoted below for ready reference: -

> "11. The State Government have decided to abolish the existing facilities of Time Bound Promotions and Selection Grades, discussed in paras 10 and 12 of F.D. Resolution No.6021 dated 18th December, 1989 and they shall cease to be applicable with effect from 1st January, 1996 and thereafter in the existing pay scales. If any such promotion, however, is due under the Rules before 1st January, 1996, it shall be given and the payment of arrears in the existing scale shall be made only upto 31st December, 1995 after which the promotion would be deemed to have been automatically terminated. While fixing pay in the revised scales, such promotions given after 31st December, 1995 will not be taken into consideration. If such promotions have been given after 31st December, 1995 then the question of adjustment of such additional emoluments obtained in the process, will be decided after the Fitment Committee submits its recommendations on promotion Policy. Promotion to any vacancy of a post identified as need based post would be admissible. The procedure for identification of such need based posts has been set out in paragraph 12." (Emphasis supplied)

5. The appellant superannuated from the post of ADSO on 31st January, 2001. At the time of retirement, the last pay drawn by the appellant was ₹10500 in the pay scale of ₹ 6500-10500 with admissible emoluments. As per the Bihar Pension Rules of 1950, his pension was calculated at 50% of the average emoluments and was quantified at ₹ 5247 per month. Accordingly, the pension as above was disbursed to the appellant from the date of his retirement.

6. It seems that the Accountant General, State of Bihar, raised an objection dated 28th January, 2003, regarding the promotion accorded to the appellant on 10th March, 1991 with a further remark that the promotion given to the appellant on 10th March, 1991 would become ineffective after 1st January, 1996 in view of the Government

Resolution dated 8th February, 1999 and, thus, the pay scale of the appellant would have to be revised and reduced to match that of the lower post, i.e., the Marketing Officer.

7. After more than eight years from his retirement, the appellant received a letter dated 15th April, 2009 from the Government of Bihar conveying that an error had been committed in his pay fixation and, therefore, a sum of ₹ 63,765/- had to be recovered from him as the same had been paid in excess beyond his entitlement. The letter directed the appellant to refund the aforesaid amount in one go or instalments. Language of the said letter is extracted below :-

> "With reference to the above mentioned subject it is submitted that after receiving the enquiry report from the enquiry officer of the departmental enquiry done against you and the analysis of the department, it has been decided that a sum of ₹ 63,765/- has been paid to you in excess due to mistake in fixation of pay which is recoverable from you.
>
> Kindly make it clear whether you will pay the said amount in one go or in instalments. Kindly submit your report in this regard within 15 days to ensure further action." (Emphasis supplied)

8. Being aggrieved by the recovery notice and the reduction of his pension, the appellant made several representations to the Government of Bihar protesting against the reduction of his pension and the proposed recovery. However, when such representations were not responded to by the concerned authority, the appellant preferred a petition under Article 226 of the Constitution of India, being Writ Petition No. 6714 of 2009 before the High Court. The High Court, vide order dated 20th July, 2009 directed the State of Bihar to consider the appellant's representation. Pursuant thereto, on 4th September 2009, the appellant filed another detailed representation to the Government of Bihar, pointing out that paragraph 11(supra) of the Government Resolution dated 8th February, 1999 had been misinterpreted in the letter dated 15th April, 2009, to deny the benefit of the admissible pay scale to the appellant as per his entitlement, which led to the unjust reduction of his pensionary benefits. A pertinent plea was taken in the representation that the paragraph 11(supra) could not be interpreted to the prejudice of the appellant as he had

been given time bound promotion much before 31st December, 1995 and that the said Resolution specifically protected the promotions made prior to the said date. Therefore, the appellant was entitled to seek protection of his pay scale fixed in the bracket of ₹ 6500-10500 on the promotional post of ADSO.

9. The Secretary, Food and Consumer Protection Department, Government of Bihar issued a communication dated 8th October, 2009 rejecting the appellant's representation observing that the promotion granted to the appellant would automatically come to an end after 31st December, 1995 by virtue of the Government Resolution dated 8th February, 1999 and hence, his pay scale would have to be revised and reduced to ₹ 5500-9000, by treating the appellant on the post of Marketing Officer instead of ADSO at the time of retirement.

10. The appellant preferred CWJC No. 18542 of 2009 before the High Court of Patna assailing the said order. The learned Single Judge, vide order dated 23rd February, 2010 dismissed the said writ petition.

11. Asserting that his grievances had not been properly addressed by the learned Single Judge, the appellant filed a Review Petition No. 82 of 2010 before the High Court which was rejected vide order dated 23rd March, 2011.

12. Being aggrieved by the aforesaid orders, the appellant filed two Letters Patent Appeals being Letters Patent Appeal No. 1254 of 2011, challenging the order dated 23rd February, 2010 and Letters Patent Appeal No. 815 of 2011 challenging the order dated 23rd March, 2011. Learned Division Bench, rejected the LPA No. 815 of 2011 as not maintainable vide order dated 24th August, 2012, whereas the LPA No. 1254 of 2011 was rejected vide orderdated 27th August, 2012, holding that the revision and consequent reduction in pay fixation of the appellant had been done in accordance with the paragraph 11(supra) of the Government Resolution dated 8th February, 1999 as per which, the appellant was not entitled to the higher pay scale which had wrongly been accorded to him. The said order is assailed in this appeal by special leave.

Submissions on behalf of the appellant: -

13. Learned counsel for the appellant urged that the impugned orders are ex facie bad in the eyes of law because the Government Resolution dated 8th February 1999, was misinterpreted by the authorities as well as by the High Court. He urged that paragraph 11(supra) of the Government Resolution dated 8th February 1999, clearly postulates that the same would not have any adverse effect on the employees who had received the time bound promotions prior to 31st December 1995. Admittedly, the appellant had been given time bound promotion as Senior Selection Grade, Marketing Officer-cum-Assistant District Supply Officer on 10th March, 1991, which was long before the cut off date fixed under the said Government Resolution, i.e., 31st December, 1995 and thus, he was rightfully conferred the benefit of the revised pay scale i.e.₹ 6500-10500 under the recommendations of the 5th Pay Commission. The Government Resolution dated 8th February, 1999 having clearly indicated the cut-off date as 31st December, 1995, the appellant would be protected from the adverse effects thereof and was entitled to protect his promotion and pay scale.

He thus, urged that the impugned orders are grossly illegal and cannot be sustained.

14. He further contended that the reduction in the pay scale of the appellant and the direction to effect recovery eight years after his retirement, that too, without adhering to the principles of natural justice, is even otherwise illegal, arbitrary and violative of Articles 14 and 16 of the Constitution of India and thus, the same cannot be sustained. He urged that the learned Single Judge as well as the Division Bench of the High Court clearly fell in error while interpreting the Government Resolution dated 8th February, 1999 because paragraph 11(supra) thereof protects the time bound promotion offered to the appellant as per his entitlement on 10th March, 1991 and so also the revised pay scale applicable to the said post under the 5th Pay Commission.

15. On these grounds, learned counsel for the appellant implored the Court to set aside the impugned orders and the proposed recovery

from the appellant and so also the consequential reduction in his future pensionary benefits. Submissions on behalf of the respondent:

16. Per contra, learned counsel representing the State of Bihar, vehemently and fervently opposed the submissions advanced by the learned counsel for the appellant. It was contended that the Government Resolution dated 8th February, 1999 was made uniformly applicable to all employees in the State of Bihar. The appellant has not been singled out for the impugned action and thus, there is no question of any discrimination being meted out to the appellant. The Office of the Accountant General had noticed the manifest error/irregularity in grant of revised pay scale to the appellant and thus, a letter dated 15th April, 2009 was issued thereby, requiring the appellant to refund the excess amount which he had received on account of wrong pay scale having been conferred to him. He submitted that the learned Single Judge as well as the Division Bench of the High Court rightly interpreted the Government Resolution dated 8th February, 1999 and recorded concurrent findings of fact denying relief to the appellant and thus, the appellant is not entitled to seek indulgence from this Court inthis appeal under Article 136 of the Constitution of India. He urged that the appeal should be dismissed.

Discussions and Conclusion: -

17. We have given our thoughtful consideration to submissions advanced at bar and have gone through the material available on record.

18. At the outset, we may note that the fact regarding the appellant having been accorded time bound promotion from the post of Marketing Officer in Junior Selection Grade to Senior Selection Grade, Marketing Officer-cum-Assistant District Supply Officer(ADSO) as per his entitlement on 10th March 1991 is not in dispute. It is not the case of the respondents that the said promotion suffered from any irregularity or was given against the rules and regulations. The Resolution dated 19th January, 1991 placed on record as Annexure P-1 indicates that the next promotional channel from the post of the Lower Senior Grade(Marketing Officer) was to the post of Upper

Senior Grade(Upper Marketing Officer). Earlier, the pay scale for the post of Lower Senior Grade(Marketing Officer) was fixed at ₹ 1800-3330 whereas for the promotional post i.e. Upper Senior Grade(Marketing Officer), the applicable pay scale was fixed atRs.2000-3800. The appellant having been duly promoted to the post of Upper Senior Grade(Upper Marketing Officer) w.e.f. 10th March, 1991 was entitled to and was rightly given the pay scale of the promotional post. Pursuant to the 5th Pay Commission being applied, the Government of Bihar issued a Resolution dated 8th February, 1999, whereby the pay scale applicable to the post of Upper Senior Grade(Upper Marketing Officer) was revised from ₹2000-3800 to ₹ 6500-10500. The paragraph 11(supra) of the said Government Resolution specifically protects the promotions granted to the employees prior to 31st December, 1995. Only those employees who were not promoted by the cut off date, i.e., 31 st December, 1995 would get a notional promotion and consequent rise in pay scale which would come to an end w.e.f. 31st December, 1995. Apparently thus, the appellant could not have been put to a disadvantage and his pay scale could not have been reduced prospectively by virtue of the said Resolution. Even if paragraph 11(supra) was not in existence, the appellant could not have been subjected to eight years after his retirement because there was no illegality in conferment of the revised pay scale to the appellant which was an action taken by the State Government as per the applicable rules and regulations.

19. The order dated 15th April, 2009 whereby it was communicated to the appellant that it had been decided to recover a sum of ₹63,765/- paid in excess due to mistake in fixation of pay, also indicates that a departmental inquiry was conducted against the appellant which had led to the impugned action. On a pertinent query being made in this regard, the learned counsel candidly conceded that no such departmental inquiry was ever conducted against the appellant.

20. Without prejudice to the above findings, we are of the view that no departmental action could have been initiated by the State against the appellant after eight years following his superannuation because the employer employee relationship had come to an end after the appellant's superannuation. The order directing reduction in pay scale and recovery from the appellant was manifestly not preceded

by any show cause notice and was thus, passed in gross violation of the principles of natural justice. Pursuant to the order dated 20th July, 2009 passed in the Writ Petition No. 6714 of 2009 filed by the appellant, he submitted a representation to the Secretary, Food and Consumer Protection Department, Government of Bihar, which vide order dated 8th October, 2009 was rejected, preceded by a personal hearing. A perusal of the said order would indicate that the Secretary took a view that as per paragraph 11(supra) of the Government Resolution, the first/second time bound promotion of the appellant had come to an end automatically w.e.f. on 1st January, 1996 and thus, the appellant was required to be redesignated to the post of Marketing Officer and would be entitled to the revised pay of ₹ 5500-9000 w.e.f. 1st January, 1996 as recommended by the Fitment Committee. Thus, even in this order, the promotion conferred to the appellant to the post of ADSO on 10th March, 1991 is not doubted.

21. We firmly believe that any decision taken by the State Government to reduce an employee's pay scale and recover the excess amount cannot be applied retrospectively and that too after a long time gap. In the case of Syed Abdul Qadir and Others v. State of Bihar and Others1, this Court held that when the excess unauthorised payment is detected within a short period of time, it would be open for the employer to recover the same. Conversely, if the payment had been made for a long duration of time, it would be iniquitous to make any recovery. The relevant paras of the Syed Abdul Qadir(supra) are extracted hereinbelow: -

> 1 (2009) 3 SCC 475 "57. This Court, in a catena of decisions, has granted relief against recovery of excess payment of emoluments/allowances if (a) the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee, and (b) if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.
>
> 58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is

proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess.

59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter-affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the Rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made." (emphasis supplied)

22. Similarly, this Court in ITC Limited v. State of Uttar Pradesh and Others2, held as under: -

2 (2011) 7 SCC 493 "108. We may give an example from service jurisprudence, where a principle of equity is frequently invoked to give relief to an employee in somewhat similar circumstances. Where the pay or other emoluments due to an employee is determined and paid by the employer, and subsequently the employer finds, (usually on audit verification) that on account of wrong understanding of the applicable rules by the officers implementing the rules, excess payment is made, courts have recognised the need to give limited relief in regard to recovery of past excess payments, to reduce hardship

to the innocent employees, who benefited from such wrong interpretation." (emphasis supplied)

23. In the case of State of Punjab and Others v. Rafiq Masih (White Washer) and Others3, this Court held as under: -

"18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

3 (2015) 4 SCC 334 (v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover." (emphasis supplied)

24. Recently, this Court in Thomas Daniel v. State of Kerala and Others4, held that the State cannot recover excess amount paid to the ex-employee after the delay of 10 years.

25. The Government Resolution dated 8th February, 1999 to be

specific, the highlighted portion supra is amenable to the interpretation that it protects the status and pay of those employees who had received their time bound promotions prior to 31st December, 1995. As a consequence, the Secretary concerned, while rejecting the representation clearly misinterpreted and misapplied the said Resolution to the detriment of the appellant.

26. The learned Single Judge as well as the Division Bench of the High Court of Patna also seem to have fallen in the same error. In addition thereto, we are of the view that any step of reduction in the pay scale and recovery from a Government employee would tantamount to a punitive action because the same has drastic civil as well as evil consequences. Thus, no such action could have been taken against the appellant, more particularly, because he 4 2022 SCC OnLine SC 536 had been promoted as an ADSO, while drawing the pay scale of ₹ 6500-10500 applicable to the post, way back on 10th March, 1991 and had also superannuated eight years ago before the recovery notice dated 15th April, 2009 was issued. The impugned action directing reduction of pay scale and recovery of the excess amount is grossly arbitrary and illegal and also suffers from the vice of non-adherence to the principles of natural justice and hence, the same cannot be sustained.

27. The order dated 8th October, 2009 passed by the State Government directing reduction in the pay scale of the appellant from ₹ 6500-10500 to ₹ 5500-9000 w.e.f. 1st January, 1996 and directing recovery of the excess amount from him is grossly illegal and arbitrary and is hereby quashed and set aside. The impugned order dated 27th August, 2012 passed by the Division Bench of the High Court does not stand to scrutiny and is hereby quashed. Therefore, the appellant shall continue to receive the pension in accordance with the pay scale of ₹ 6500-10500.

28. In case, if any reduction in pension and consequential recovery was effected on account of the impugned orders, the appellant shall be entitled to the restoration/reimbursement thereof with interest as applicable.29. The appeal is allowed in these terms. No order as to costs.

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

[2024 (181) FLR 980]

(GAUHATI HIGH COURT)

DEVASHIS BARUAH.J.

W.P.(C) No.4432 OF 2015,

Between

ASSAM KHADI AND VILLAGE INDUSTRIES BOARD

AND EMPLOYEES' PROVIDENT FUND ORGANIZATION and others

Employees' Provident Funds and Miscellaneous Provisions Act, 1952- Section 16(1) – Assam Khadi and V.I. Board Contributory Provident Fund Rules, 1962-Rules 3(ii) and (iii)- Default in contribution –Amount determined to be paid –Bankers of petitioner were directed to credit the amount within 3 days in favour of Regional Provident Fund Commissioner –Hence, instant petition –Claim of exemption by the petitioner was not considered by Respondents- Orders impugned quashed – Authorises however would not be precluded to initiate de novo proceedings in respect of the period for which the impugned order was passed- Writ petition disposed of. [Para 4 to 6]

A perusal of the said impugned order categorically show that the contention of the petitioner was duly noted to the effect that in view of the Rules of 1962, the petitioner would not come within the ambit of the Act of 1962. However, the findings which have been arrived at is that the PF Scheme of the petitioner have not been found to extend social security benefits to the employees and such benefits as a whole are neither at part, not more beneficial than the beneficial provided under the Act of 1952.

The impugned order, however does not, in any manner, deal as to whether in view of the Rules 4(3)(ii) & (iii) of the Rules of 1962, Section 16(1)© of the Act of 1952 would to be applicable in so

far as the petitioenr is concerned Rather, the findings arrived at by the impugned order are on the comparison of the benefits. The said findings upon a reading of Section 16(1) © of the Act of 1952, in the opinion of this Court, is not in consonance of the Act of 1952. The rationale behind this opinion of this Court is that a reading of Section 16© of the Act of 1952 mandates that the provision of the Act of 1952 shall not be applicable to any other establishment set up under the Central, Provisncial of State Act and whose employees are entitled to the benefits of contributory provident fund r old age pension in accordance with any scheme or rules framed under such Act governing such benefits.

Counsel for the Petitioner : I. Kalita

Counsel for the Respondents: S.C. Assam Khadi and Village Industrials Board.

JUDGMENT

Devashis Baruah, J:- The instant writ petition has been filed by the petitioner challenging the order dated 29.05.2015 whereby the petitioner was directed to pay an amount of Rs. 9,46,13,316.00. The petitioner has also challenged the order dated 28.07.2015, issued by the Assistant P.F. Commissioner (Compliance) whereby the bankers of the petitioner were directed to credit the amount of Rs. 9, 46, 13,316.00 within 3 (three) days in favour of the Regional Provident Fund Commissioner (NER), Guwahati.

2. This Court heard the learned counsel appearing on behalf of the petitioner, Mr. PK Munir as well as Mr. PK Roy, learned Senior Counsel for the respondent authorities. The challenge in the instant proceedings is on the ground that the said impugned order was passed without taking into consideration of Section 16 (1)(c) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (for short, "the Act of 1952") in the proper

prospective in as much as the petitioner had framed a set of Rules, known as the Assam Khadi and V.I. Board Contributory Provident Fund Rules, 1962 (for short, "the Rules of 1962") and the said Rules provide for contributory provident fund in favour of its employees for which the Act of 1952 could not be applied.

3. Mr. P.K. Roy, the learned senior counsel for the respondent authorities per contra had submitted that though the Rules of 1962 provide for a contributory provident fund but the said Rules are not applicable to various categories of staff of Page No.# 3/ 7 the petitioner as it would be apparent from a perusal of Rule 4(3)(ii) & (iii) which stipulates that the daily wage employees of the Board as well employees whose terms of employment are governed by special contracts cannot subscribe to the fund. The learned counsel for the Respondents further drew the attention of this Court to Section 2(f) of the Act of 1952 wherein the term "employee" has been defined and submitted that within the ambit of the said definition employees who are employed by or through a contractor with the works of the establishment would come and therefore the exclusion made by the Rules of 1962 in respect to those contractual employees as well for daily wage employee brings the petitioner within the ambit of the Act of 1952. The learned senior counsel draw the attention of this Court to the judgment of the Supreme Court in the case of Pawan Hans Limited and others versus Aviation Karmachari Sanghanata and others, reported in (2020) 13 SCC 506 and specifically referred to paragraph Nos. 10.2, 10.3, 10.3.1,10.3.2 as well as 10.5. Taking into account the relevance of those paragraphs so cited, the same are reproduced herein under:

> "10.2. Sub-section (1) of Section 16 reads as:
>
> "16. Act not to apply to certain establishments.-(1) This Act shall not apply-

(a) to any establishment registered under the Cooperative

Societies Act, 1912 (2 of 1912), or under any other law for the time being in force in any State relating to cooperative societies employing less than fifty persons and working without aid of power; or

(b) to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits; or

(c) to any other establishment set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits;

(2) If the Central Government is of opinion that having regard to the financial position of any class of establishments or other circumstances of the cases, it is necessary or expedient so to do, it may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt whether prospectively or retrospectively, that class of establishments from the operation of this Act for such period as may be specified in the notification."

10.3. This Court in Provident Fund Commr. V. Sanatan Dharma Girls Secondary School laid down in twin-test for an establishment to seek exemption from the provisions of the EPF Act, 1952. The twin conditions are:

10.3.1. First, the establishment must be either "belonging to" or "under the control of" the Central or the State Government. The phrase "belonging to"

would signify "ownership" of the Government, whereas the phrase "under the control of" would imply superintendence, management or authority to direct, restrict or regulate.

10.3.2. Second, the employees of such an establishment should be entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits.

10.5. With respect to the second test, it is relevant to note that the Company had its own Scheme viz. The Pawan Hans Employees Provident Fund Trust Regulations in force. The Company however restricted the application of the PF Trust Regulations to only the "regular" employees. The PF Trust Regulations of the Company were not framed by the Central or the State Government, nor were they applicable to all the employees of the Company, so as to satisfy the second test."

4. In the backdrop of the above, this Court have also perused the impugned order dated 29.05.2015. A perusal of the said impugned order categorically shows that the contention of the petitioner was duly noted to the effect that in view of the Rules of 1962, the petitioner would not come within the ambit of the Act of 1962. However, the findings which have been arrived at is that the PF Scheme of the petitioner have not been found to extend social security benefits to the employees and such benefits as a whole are neither at part, nor more beneficial than the benefit provided under the Act of 1952. The impugned order, however does not, in any manner, deal as to whether in view of the Rule 4(3) (ii) & (iii) of the Rules of 1962, Section 16(1)(c) of the Act of 1952 would not be applicable in so far as the petitioner is concerned. Rather, the findings arrived at by the impugned order are on the comparison of the benefits. The said findings upon a reading of Section 16(1)(c) of the Act of 1952, in the opinion of this Court, is not in consonance of the Act of Page No.# 5/7 1952. The rationale behind this opinion of this Court is that a reading

of Section 16(1)(c) of the Act of 1952 mandates that the provision of the Act of 1952 shall not be applicable to any other establishment set up under the Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rules framed under such Act governing such benefits. The said provision does not deal with the question of comparative benefits in terms with the Act of 1952 vis-a vis the benefits so accrued upon the employees of an establishment set up by any Central, Provincial or State Act in scheme or Rule framed. Therefore, this Court set aside the impugned order dated 29.05.2015 for the reason above mentioned.

5. This Court had duly taken note of the submissions of Mr. PK Roy, the learned senior counsel to the effect that the Rules of 1962 do not provide benefits of the contributory provident fund to daily wage employees as well as the contractual appointees as such employees cannot subscribe to the fund. This Court had also take a note of the judgment of the Supreme Court in the case of Pawan Hans Limited and others (supra) and particularly to paragraph 10.5 as quoted above. However, these aspect which has been argued by the learned counsel appearing on behalf of the respondents though seems to be attractive but are not the basis on which the impugned order was passed. In this regard, this Court finds it relevant to refer to the judgment of the Supreme Court in a case of Gordhandas Bhanji Vs. Commissioner of Police, Bombay reported in AIR 1952 SC 16 wherein it was duly observed that the public orders made publicly has construed objectively with reference to language used in the order itself and not in the explanation queue subsequently. The said principles have also been reiterated in the judgment of the Page No.# 6/7 Constitution Bench of the Supreme Court in the case of Mohinder Sing Gill and another Vs. The Chief Election Commissioner New Delhi and others , reported in (1978) 1 SCC 405 more particularly in paragraph No. 8, which is reproduced herein under:

> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. In Gordhandas Banji (AIR 1952 SC 16) at P. 18) :
>
> "Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public Orders made by the public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

6. Taking account the above, this Court therefore set aside the impugned order dated 29.05.2015 as well the consequential order dated 28.07.2015 for the reasons above mentioned. Before parting with the record, this Court however, makes it clear that the above observations and the instant decision of setting aside the impugned order dated 29.05.2015 as well as the consequential order would not preclude the respondent authorities to initiate de novo proceedings against the petitioner in respect to the period for which the impugned order was passed. It is however, observed that if such proceedings are initiated the same should be done so in accordance with prescription of law.

7. With above directions and observations, the instant writ petition therefore stands disposed of.

Petition Disposed Of.

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Edited by,

Shri Deepak Kumar Sharma

B.Sc.(Medical) M.A.(Hindi) CAIIB-both Parts

General Secretary - AISBOF

State Bank Buildings,

St.Mark's Road, Bangalore - 560 001.

☎ 22211006 / Fax: 22214956/22214959

Email: aisbofbangalore@gmail.com

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