2015 (0) AIJEL-HC 233419

GUJARAT HIGH COURT

Hon'ble Judges:C.L.Soni, J.

Mihirbhai Ramesh Mehta Versus State Of Gujarat

SPECIAL CIVIL APPLICATION No. 12710 of 2015 ; *J.Date :- NOVEMBER 26, 2015

- CONSTITUTION OF INDIA Article - 226 , 227
- BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948 Section - 74 , 32G , 32 , 29 , 31

Cases Referred to :

1. Atmaram Ranchhodbhai V/s. Gulamhusein Gulam Mohiyaddin And Another, AIR 1973 Guj 113 : 1972 GLR 828 : 1973 AIR Guj 113 : ILR(Guj) 1973 Guj 43 : 1972 RCJ 838
2. L.Chandra Kumar V/s. Union Of India And Ors ., AIR 1997 SC 1125 : 1997 (1) GLH 692 : 1997 (3) GCD 263 : 1997 (228) ITR 725 : 1997 (3) SCC 261
3. Nahar Industrial Enterprises Ltd. V/s. Hong Kong & Shanghai Banking Corporation, 2009 8 SCC 646 : 2009 (9) Scale 360 : JT 2009 (10) 199 : 2009 AIR SC(Supp) 2474 : 2009 AIR SCW 6262
4. S.P. Sampath Kumar V/s. Union Of India, AIR 1987 SC 386
5. Savitri W:o Govind Singh Rawat V/s. Govind Singh Rawat, 1985 4 SCC 337 : 1985 GLH 1184 : 1986 CrLJ 41 : 1985 (2) Scale 697 : 1986 AIR SC 984
6. Shamshad Ahmad V/s. Tilakraj Bajaj, 2008 9 SCC 1
7. Shell Co. Of Australia V/s. Federal Commissioner Of Taxation, 1931 0 AC 275

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2015 JX(Guj) 975 : 2015 AIJEL_HC 233419
JUDGMENT :-

1 Present petition is filed by the Registered Trust and its Trustees under Article 226 /227 of the Constitution of India seeking to quash and set aside the order dated 6.7.2015 passed by the Gujarat Revenue Tribunal ("the Tribunal") in Revision Application No. TEN-BS-173-14 preferred by respondents No.4 to 8 herein against the order dated 2.8.2014 passed by the Deputy Collector City Prant, Surat.

2 By the impugned order, the Tribunal has granted stay of the order of the Deputy Collector and also ordered to maintain status-quo as per the site location and the record of the land in question till the revision application is finally decided.

3 Learned Senior Advocate Mr. Mihir Thakore appearing with Mr. Salil Mr. Thakore, learned advocate for the petitioners and learned Senior Advocate Mr. K.S.Nanavati appearing with Nanavati Associates for contesting respondent No.4 to 8 - original appellants before the

Deputy Collector since agreed to hear the matter for final disposal at the admission stage, the matter is taken up for final hearing and disposal. The other respondents though served with the notice have not appeared. Even otherwise, they are formal parties and their presence shall not be required to finally decide the controversy involved in the petition.

4 The respondents No.4 to 8 filed appeal no.7 of 2013 under section 74 of the Gujarat Tenancy and Agricultural Lands Act, 1948 ("the Act") on 16.3.2013 to declare that order dated 17.5.1962 in Ganot (Tenancy) Case No. 1262 of 1957 of the Mamlatdar and A.L.T. of Panchkayas for taking ex-parte possession since not in existence, is null and void, to declare that entry no. 782 dated 20.5.1962 since got up, is void and nullity, to declare respondent no.4 to 8 as legal tenants of disputed land and to pass order to fix the purchase price under sec. 32G of the Act in Ganot Case No.2 of 2011 pending before the A.L.T. The case of respondent Nos. 4 to 8 in their appeal is that their ancestor named Nandku Jagannath was permanent tenant since 1928 and after his death, his widow Bai Jadi continued to cultivate the land as tenant; that the name of Bai Jadi was recorded in the revenue record as tenant and the entry to that effect was certified on 17.1.1948 and since as on 1.4.1957, the land in question was cultivated by Bai Jadi as permanent tenant, she had become deemed purchaser under section 32 of the Act but only formality of fixation of purchase price was left to be completed. It is their further case that the respondent landlord never made an application under section 29 of the Act for taking possession from the tenant nor even tenancy was ever terminated by issuing any notice to the tenant under section 31 of the Act, that the respondent landlord by utilizing their influence and in collusion with the revenue officers, created a bogus story of taking possession from the tenant in presence of the panchas on 17.5.1962 and got the entry no.782 dated 20.5.1962 recorded in the revenue record, that at no point of time, any notice was served nor any hearing was afforded before taking possession and since there is no provision in the Act to take forcible possession, the whole chapter of taking possession and proceeding of the case appears to be fabricated and bogus, and that by fraudulent, forged and non-est proceedings, their rights as tenant are not affected, and that the record of the Ganot Case No.1262 of 1957 since not in existence, the proceedings of such case and entry No. 782 are nullity,non-est and void, ab-initio.

5 With the appeal, the respondent No.4 to 8 preferred separate application seeking condonation of delay. The Deputy Collector kept preliminary hearing to decide whether the appeal should be registered or not. The Deputy Collector found that after 50 years, respondents No.4 to 8 challenged order passed in 1962 without any evidence to establish their right as tenant. The Deputy Collector, therefore, rejected the application for condonation of delay and ordered to de-register the case (to remove the case from the register) vide order dated 2.8.2014. This order of the Deputy Collector has come to be challenged by respondent Nos. 4 to 8 before the Gujarat Revenue Tribunal ("the Tribunal") by filing Revision Application No. TEN-BS-173-14. With the revision application, respondent Nos. 4 to 8 also preferred separate application to stay the order dated 2.8.2014 passed by the Deputy Collector in tenancy appeal no.7 of 2013 and to grant any other relief which may be deemed fit to be granted in the facts of the case.

6 Learned Senior Advocate Mr. Mihir Thakore submitted that as such, the appeal before the Deputy Collector for the prayers made therein is not maintainable and since the appeal is rejected as time barred, the revision before the Tribunal could be considered on the limited issue as to whether the delay of 50 years in filing appeal before the Deputy Collector could be condoned and the appeal could be heard on merits or not. Mr. Thakore submitted that since the revision application is to be decided only on the issue of delay, there was no question of

entering into the merits of the case by the Tribunal and to issue injunction of status quo. Mr. Thakore submitted that neither before the Deputy Collector nor before the Tribunal, respondent Nos. 4 to 8 ever prayed for interim injunction and, therefore, the Tribunal was not justified in granting interim order of status quo. Mr. Thakore submitted that the Tribunal while exercising power under section 76 of the Act has no jurisdiction to grant injunction. Mr. Thakore submitted that the Tribunal seriously erred in granting interim order of status quo ignoring the conduct of respondent nos. 4 to 8 in filing appeal before the Deputy Collector after gross delay of 50 years. Mr. Thakore submitted that not only on the conduct of respondent nos. 4 to 8 of filing appeal at very belated stage but on the aspect of prima facie case and balance of convenience, the Tribunal ought not to have granted interim order of status quo. Mr. Thakore submitted that simply because the respondent nos.4 to 8 alleged fraud and non availability of the record of Ganot Case No. 1262 of 1957, same would not be a ground for grant of status quo against the petitioners after a long period of 50 years. Mr. Thakore submitted that even as per the case of the respondent nos. 4 to 8, the petitioners have been in possession of the land in question for the last fifty years and under the Town Planning Scheme finalized under the Town Planning Act in the year 1977, the petitioners have been allotted final plots against their original plots to which no objection was raised by respondent No. 4 to 8. Mr. Thakore submitted that the petitioners have been running educational institutions and undertaking different activities on the land with the permission of the Charity Commissioner. Mr. Thakore submitted that the appeal preferred before the Deputy Collector is only by 5 heirs of Bai Jadi out of 13 heirs with oblique purpose as the land in question is in the posh area of Surat city. Mr. Thakore submitted that as per section 88C of the Act, the petitioners' trust was exempted from the Tenancy Law and, therefore, there was no question of breach of the provisions of the Tenancy Law when possession was handed over to the petitioner trust before 50 years. Mr. Thakore submitted that once the rights in the land are finally decided under the Town Planning Scheme, in absence of any objection raised by respondent nos. 4 to 8 or any other heir of Bai Jadi, it is not permissible now for respondent Nos. 4 to 8 to claim any right in the land in question.

7 As against the above arguments, learned Senior Advocate Mr. K.S. Nanavati appearing for respondent Nos. 4 to 8 submitted that the Tribunal has discretionary jurisdiction to grant interim relief to preserve the subject property in exercise of its powers under section 76 of the Act which may not be interfered with by this Court in exercise of its powers under Article 226 /227 of the Constitution of India. Mr. Nanavati submitted that it is not correct to say that there was no prayer before the Tribunal for grant of interim relief. Mr. Nanavati submitted that over and above the prayer for stay of the order passed by the Deputy Collector, the respondent Nos.4 to 8 also prayed to grant any other relief as may be deemed proper to be granted by the Tribunal in the facts of the case, and therefore, it could not be said that the Tribunal granted interim order of status quo without there being any prayer made before it. Mr. Nanavati submitted that indisputably, Bai Jadi was the tenant as on 1.4.1957 and as per the provisions of the Act, Bai Jadi became deemed purchaser of the land in question and her right as tenant could not have been divested by the method unknown to the law. Mr. Nanavati submitted that there is no concept of taking forcible possession under the order of the Mamlatdar from a person who has become deemed purchaser of the land and, therefore, so called order of 1962 under which the possession of the land in question was alleged to have been taken from Bai Jadi was nullity in the eye of law. Mr. Nanavati submitted that to seek declaration that such order was null and void or that the entry made in connection with such void order is also nullity, limitation would not come in the way of respondent nos.4 to 8. Mr. Nanavati submitted that the Tribunal having found prima facie case in favour of respondent nos.4 to 8 and having also found that the so called order passed in Ganot Tenancy Case in the

year 1962 is non- existent, committed no error in entertaining the revision application and granting interim order of status quo to prevent miscarriage of justice. Mr. Nanavati submitted that section 76 of the Act read with regulation 14 of the Gujarat Revenue Tribunal Regulations would take within its sweep grant of status quo for preserving rights of the parties in connection with the subject-matter and, therefore, it cannot be said that the Tribunal has no jurisdiction to grant interim order of status quo. Mr. Nanavati submitted that whether the petitioner trust was exempted under section 88C of the Act from the provisions of the Act is a question to be gone into by making inquiry in the matter and therefore, such contention cannot be accepted at this stage. Mr. Nanavati submitted that the finalization of the Town Planning Scheme under the Town Planning Act would not take away the rights of respondent nos. 4 to 8 as the heirs of Bai Jadi under the Act. Mr. Nanavati submitted that even if the Town Planning Scheme has become final, if the rights of respondent nos. 4 to 8 are recognized under the Act, they will be entitled to the claim the land in possession of the petitioners or at least compensation in lieu of the land in question but it cannot be said that for ever, the rights of respondent nos. 4 to 8 were foreclosed. Mr. Nanavati submitted that the question whether the Ganot Case of 1957 wherein the order dated 17.5.1962 was stated to have been made was the creation of fraudulent and collusive act or whether the Ganot Case and the so called order passed therein are non-existent would be a matter of inquiry and could not be thrown out simply on the ground of delay. Mr. Nanavati submitted that the petition itself is not maintainable before this Court as it is not filed by all the trustees. Mr. Nanavati submitted that in fact, the land was not owned by the trust but it was a company in the name of the petitioner No.1 which held the land and, therefore, the present trust could not get any benefit either of the exemption from the provisions of the Act or as an educational institution so as to destroy the the rights of respondent nos.4 to 8 under the Act.

8 In rejoinder, Mr. Thakore submitted that the respondent nos.4 to 8 having selected the petitioners as parties while filing appeal before the Deputy Collector and while preferring the revision application before the Tribunal, cannot raise objection against the maintainability of the petition on the ground that all the trustees are not joined in the present petition. Mr. Thakore submitted that in any case, when the impugned orders affect the interests of the trust, the trust alone can invoke the writ jurisdiction of this Court. Mr. Thakore submitted that considering the conduct of respondent nos. 4 to 8 in filing the appeal after the period of about 50 years from the date of dispossession of Bai Jadi in the year 1962 and in not raising any objection under the Town Planning Act to claim any interest in the land in question when the Town Planning Scheme was finalized, it could not be said that the respondent no.4 to 8 had made out any prima facie case for grant of injunction in their favour.

9 Having heard learned Advocates for the petitioners and for the contesting respondents, it appears that the preliminary objection against maintainability of the petition on the ground that the petition is not filed by all the Trustees of the Trust is without substance.

10 The respondents No. 4 to 8 when filed the appeal before the Deputy Collector, selected the petitioners as their opponents with the other parties and the parties who select their opponents for the original proceedings at the inception cannot be permitted to raise objection against the maintainability of the petition on the ground of non-joinder of the other parties as petitioners. It is required to note that a party who suffers any order from any court or the authority is entitled to seek the remedy available under law before the higher forum. Non joinder of the other parties as petitioners in the proceedings before the higher forum is no ground to urge that the proceedings before the higher forum are not maintainable. In any case, the petitioners having subsequently joined the other parties who were the opponents and having given

reasons for not joining them as petitioners as they are not presently trustees, the objection raised by Mr. Nanavati should not survive.

11 In the case of Atmaram Ranchhodbhai v. Gulamhusein Gulam Mohiyaddin and another reported in AIR 1973 Gujarat page 113 relied on by Mr. Nanavati, the question was whether one co-trustee can determine the tenancy by giving notice to the tenant or whether it is necessary that all co-trustees must join in giving such notice. Further question was whether all co-trustees must join in the suit from the tenancy after determine of lis. In such fact situation, the Court held in the said case that unless the instrument of the trust otherwise provide, all co-trustees must join in filing the suit to recover the possession of the property from the tenant. Such decision in the facts of the case shall have no application.

12 The revision application filed before the Tribunal is under Section 76 of the Act and against the order passed by the Deputy Collector in appeal preferred by respondent No.4 to 8 under section 74 of the Act. Section 74 and 76 of the Act read as under:

> "Section 74 - Appeals (1) An appeal against the orders of the Mamlatdar and the Tribunal may be filed to the Collector in the following cases-
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> (a) an order under section 4 ,
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> 1. * * *
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> 2. * * *
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> (d) an order under section 9 , [(da) an order under section 9A ,]
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> (e) an order under section 10 ,
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> 4. * * *
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> (g) an order under section 13 .
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> 5. * * *
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> (h) an order under section 17 ,
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> (i) an order under section 19 ,
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> (j) an order under section 20 ,
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> (k) an order under section 23
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> (l) an order under section 25,
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> (m) an order under section 29 ,
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> 6. * * * [(ma) an order under [sub-section (1B) and (2)]of section 32 ,] [(mb) an order under sections 31 , 32F , or an order under section 32G] [(n) an order under sections

*32K & 32M] [(na) a decision under the proviso to sub- section (4) of section 32T or an order under section 32U ,]

(o) an order under section 33 , [(oo) an order under sub-section (5) of section 34 ,]

(p) an order under section 37 ,

(q) an order under section 39 ,

(r) an order under section 41 [(rr) an order made pursuant to a notification issued under sub-section (3) of section 43A ;] [(ra) an order under section 43B ,]

(s) an order under section 64 ,

(t) an order under Chapter V-A, [(u) an order made under sections 84A , 84B or 84C, [(ua) an order under section 84CC ,]

(v) an order under section 85A ,

(w) an order under section 88C] (2) Save as otherwise provided in this Act, the provisions of Chapter XIII of the Bombay Land Revenue Code, 1879, shall apply to appeals to the Collector under this Act, as if the Collector were the immediate superior of the Mamlatdar or the Tribunal. The Collector in appeal shall have power to award costs.

76. Revision.

(1) Notwithstanding anything contained in the Bombay Revenue Tribunal Act, 1957, an application may be made to the Gujarat Revenue Tribunal constituted under the said Act against any order of the Collector except an order under section 32P or an order in appeal against an order under sub- section (4) of section 32G on the following grounds only:-

(a) that the order of the Collector was contrary to law,

(b) that the Collector failed to determine some material issue of law,

(c) that there was substantial defect in following the procedure provided by this Act or that there has been failure to take evidence or error in appreciating important evidence which has resulted in the miscarriage of justice.

(2) In deciding applications under this section, the Gujarat Revenue Tribunal shall follow the procedure which may be prescribed by rules made under this Act after consultation with the Gujarat Revenue Tribunal."

13 It seems from the provisions of section 74 of the Act that the remedy of appeal is available only against the orders passed under different provisions of the Act mentioned therein by the Mamlatdar and ALT and not for general remedy. What was sought for in the appeal by respondent no.4 to 8 before the Deputy Collector was declaratory relief and for an order to fix purchase price in their another tenancy case. When the Tribunal was approached against the

order passed by the Deputy Collector in such appeal, the Tribunal ought to have observed the nature of ultimate relief asked in appeal by respondents no.4 to 8. The Tribunal, however, in disregard of the nature of relief claimed in appeal, proceeded to pass the impugned order.

14 As per the provisions of sec. 76 of the Act, the Tribunal can examine validity of the order of the Collector only on the grounds mentioned therein with an exception that in respect of the order under section 32P or an order in appeal against the order under sub section (4) of section 32G , challenge shall not be restricted on limited grounds. Though the Tribunal can be said to have jurisdiction to decide lis between the parties, when the order under challenge before it concerns to decide the rights of the parties, however, it has certainly no power like the civil court under the Code of Civil Procedure. Therefore, while deciding the revision application or any application filed therein, the Tribunal has to remain within its bounds while considering the nature of matter brought before it.

15 The Tribunal is established under the Bombay Tribunal Act, 1957 ("the Tribunal Act "). Its jurisdiction is defined under section 9 in respect of the cases under the provisions of the enactments specified in the first schedule and for other cases notified by the State Government to be part of the first schedule. The orders or the decisions under the Act do not find place in the first schedule of the Tribunal Act .

16 However, section 12 of the Tribunal Act provides that nothing contained therein shall affect any powers or functions of the Tribunal conferred on it or which may be conferred on it by any other law for the time being in force to entertain and decide any appeal, application for revision or the other proceedings. Thus, the revision application filed before the Tribunal by respondent No.4 to 8 is not by invoking jurisdiction of the Tribunal under the Tribunal Act but as per the powers conferred on it under section 76 of the Act and in deciding such revision application, the Tribunal shall have to follow the procedure prescribed by it and not as per Section 13 of the Tribunal Act. Section 13 of the Act reads as under:

> "13. The Tribunal to have power of a Civil Court. -
>
> (1) In exercising the jurisdiction conferred upon it by or under this Act, the Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath, affirmation or affidavit, of summoning and enforcing the attendance of witnesses, of completing discovery and the production of documents and material objects, requisitioning any public record or any copy thereof from any Court or office, issuing commissions for the examination of witnesses or documents, and for such other purposes as may be prescribed; and the Tribunal shall be deemed to be a Civil Court for all the purposes of sections 195 ,480 and 482 of the Code of Criminal Procedure, 1898 (V of 1898), and its proceedings shall be deemed to be judicial proceedings within the meaning of sections 193 ,219 and 228 of the Indian Penal Code (XLV of 1860).
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> (2) In the case of any affidavit to be filed, any officer appointed by the Tribunal in this behalf may administer the oath to the deponent."

17 The Tribunal therefore may follow the procedural powers available to the civil court to exercise its jurisdiction conferred upon it under the Tribunal Act .

18 In fact, strictly construing provisions of section 13 of the Tribunal Act, it will not have application to the proceedings of revision application filed under sec. 76 of the Act as not covered under sec. 9 of the Tribunal Act , therefore, the Tribunal is to follow its own procedure as would stand governed by the Bombay Revenue Tribunal Regulations, 1958 ("the Regulations"). Regulation 55 of the regulations provide that the Tribunal shall, in any matter not provided for in the regulations, follow the procedure as far as it is applicable, laid down in the Code of Civil Procedure.

19 In the Regulations, various steps to be taken for deciding proceeding by the Tribunal are provided and in furtherance of such steps, Regulation 55 further provides that the Tribunal shall follow the procedure laid down in the Code of Civil Procedure in any matter not provided in Regulations. Therefore, either looking from the angle of section13 of the Tribunal Act or the provisions made in the Regulations, the Tribunal shall be required to follow the procedure akin to the procedure laid down in the Code of Civil Procedure to decide the case brought before it.

20 The Hon'ble Supreme Court, in the case of State of Gujarat versus Gujarat Revenue Tribunal Bar Association and another, reported in 2012 (10) SCC 353 while examining validity of rule 3(1)(iii)(g) of the Gujarat Revenue Tribunal Rules, 1982 which were struck down by this Court, examined the provisions of the Tribunal Act and held and observed in para no. 10 to 32 as under:

> 10. Section 3(2) of the Act 1957, provides for the appointment of the President and Members of the Tribunal. Section 9 thereof, provides for the jurisdiction of the Tribunal to entertain and decide appeals from, and revise decisions and orders in respect of cases arising under the provisions of the enactments specified in the First Schedule. Schedule 1 includes the Bombay Land Revenue Code, 1879, the Bombay Land Revenue Code, 1874 as extended to the Kutch area of State of Bombay, the Indian Forest Act , 1927 etc.
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> 11. Section 9(4) of the Act reads as under:
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> "Notwithstanding anything contained in any other law for the time being in force, when the Tribunal has jurisdiction to entertain and decide appeals from and revise decisions and orders of, any person, officer or authority to any matter aforesaid, no other person, officer or authority shall have jurisdiction to entertain and decide appeals from and revise decisions or orders of such person, officer or authority in that matter."
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> 12. Section 13(1) of the Act reads as under:
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> "13. Tribunal to have power of a civil court. - In exercising the jurisdiction conferred upon it by or under this Act, the Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath, affirmation or affidavit, of summoning and enforcing the attendance of witnesses, of compelling discovery and the production of documents and material objects, requisitioning any public record or any copy thereof from any Court or office, issuing commissions for the examination of witnesses or documents, and for such other purposes as may be prescribed and the Tribunal shall be deemed to be a Civil Court for all the purposes of sections 195 , 480 and 482 of the Code of Criminal Procedure, 1898, and its proceedings shall be deemed to be judicial

proceedings within the meaning of sections 193 , 219 and 229 of the Indian Penal Code."

13. Section 15 empowers the Tribunal to entertain question of interpretation regarding laws of public importance which can only be decided after hearing the State Government on the matter. Section 16 provides that no appeal shall lie to the State Government against the order passed by the Tribunal. Section 17 of the Act confers upon the Tribunal the power to review its own decision, on grounds similar to the ones mentioned in Order 47, Rule 1, CPC. Such review application may be filed before it within a period of 90 days from the date of the said decision of the Tribunal. The Tribunal has further been given the power to condone delay in making applications for review.

14. Section 20 reads as under:

"20(1) The State Government may, by notification in the Official Gazette, make rules consistent with the provisions of this Act for carrying into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing provision, such rules may provide for the following matters, namely:-

(a)the qualifications of the President and other members of the Tribunal;

(b) the period of office and the terms and conditions of service of the President and other members of the Tribunal;

(c) the qualifications of the Registrar and Deputy Registrars;

(d) any other powers of a Civil Court which may be vested in the Tribunal."

(Emphasis added)

15. Rule 3 of the Rules 1982 reads as under :

"3.Qualification of President and members of Tribunal-

(1) The President shall be a person who has not attained the age of 65 years, and -

(i) Who is or has been a Judge of a High Court, or

(ii)Who is an advocate qualified to be a Judge of a High Court, or

(iii) Who has, for a period of not less than three years, held the office, or as the case may be, exercised the powers of -

(a)The Secretary to the Government of Gujarat;

(b) The Principal Judge of the City Civil Court, Ahmedabad;

(c) A District Judge;

(d) The Chief Judge, Small Cause Court, Ahmedabad;

(e) A member of the Industrial Court constituted under the Bombay Industrial Relations Act, 1946;

(f) A member of the Industrial Tribunal constituted under the Industrial Disputes Act , 1957; or

(g) A member of the Gujarat Revenue Tribunal constituted under the Bombay Revenue Tribunal Act, 1957." (Emphasis added)

(2) A member shall be a person who has not attained the age of 65 years and-

(a) Who is holding or has held an office not lower in rank than that of-

(i) A Collector;

(ii) A Deputy Secretary to the Government of Gujarat;

(iii) A District Judge;

(iv) An Assistant Judge, or a Civil Judge (Senior Division) appointed under the Bombay Civil Courts Act, 1869, or a Civil Judge holding an equivalent office under any other law for the time being in force; or

(b) Who is an advocate or attorney of the High Court, or a legal practitioner entitled to practice before courts other than the High Court under any law relating to legal practitioners for the time being in force in this State, has practiced for not less than five years in any Civil Courts or before the Tribunal, and is, in the opinion of the State Government, well versed in revenue and tenancy laws." (emphasis supplied)

16. Although, term 'court' has not been defined under the Act, it is indisputable that courts belong to the judicial hierarchy and constitute the country's judiciary as distinct from the executive or legislative branches of the State. Judicial functions involve the decision of rights and liabilities of the parties. An enquiry and investigation into facts is a material part of judicial function. The legislature, in its wisdom has created tribunals and transferred the work which was regularly done by the civil courts to them, as it was found necessary to do so in order to provide efficacious remedy and also to reduce the burden on the civil courts and further, also to save the aggrieved person from bearing the burden of heavy court fees etc. Thus, the system of tribunals was created as a machinery for the speedy disposal of claims arising under a particular Statute/Act. Most of the Tribunals have been given the power to lay down their own procedure. In some cases, the procedure may be adopted by the Tribunal and the same may require the approval of the competent authority/government.However, in each case, the principles of natural justice are required to be observed. Such tribunals therefore, basically perform quasi-judicial functions. The system of tribunals is hence, unlike that of the regularly constituted courts under the hierarchy of judicial system, which are not authorised to devise their own procedure for dealing with cases. Under

certain statutes Tribunals have been authorised to exercise certain powers conferred under some provisions of the Code of Civil Procedure (hereinafter referred to as the 'CPC') or the Code of Criminal Procedure (hereinafter referred to as the 'Cr.P.C .'), but not under the whole Code, be it Civil or Criminal. However, in a regular court, the said Codes, in their entirety, civil as well as criminal, must be strictly adhered to. Therefore, from the above, it is evident that the terms 'court' and 'Tribunal' are not inter-changeable.

17. A Tribunal may not necessarily be a court, in spite of the fact that it may be presided over by a judicial officer, as other qualified persons may also possibly be appointed to perform such duty.One of the tests to determine whether a tribunal is a court or not, is to check whether the High Court has revisional jurisdiction so far as the judgments and orders passed by the Tribunal are concerned. Supervisory or revisional jurisdiction is considered to be a power vesting in any superior court or Tribunal, enabling it to satisfy itself as regards the correctness of the orders of the inferior Tribunal. This is the basic difference between appellate and supervisory jurisdiction. Appellate jurisdiction confers a right upon the aggrieved person to complain in the prescribed manner, to a higher forum whereas, supervisory/revisional power has a different object and purpose altogether as it confers the right and responsibility upon the higher forum to keep the subordinate Tribunals within the limits of the law. It is for this reason that revisional power can be exercised by the competent authority/court suo motu, in order to see that subordinate Tribunals do not transgress the rules of law and are kept within the framework of powers conferred upon them.Such revisional powers have to be exercised sparingly, only as a discretion in order to prevent gross injustice and the same cannot be claimed, as a matter of right by any party. Even if the person heading the Tribunal is otherwise a "judicial officer", he may merely be persona designata, but not a court, despite the fact that he is expected to act in a quasi-judicial manner.In the generic sense, a court is also a Tribunal, however, courts are only such Tribunals as have been created by the concerned statute and belong to the judicial department of the State as opposed to the executive branch of the said State.The expression 'court' is understood in the context of its normally accepted connotation, as an adjudicating body, which performs judicial functions of rendering definitive judgments having a sense of finality and authoritativeness to bind the parties litigating before it. Secondly, it should be in the course of exercise of the sovereign judicial power transferred to it by the State. Any Tribunal or authority therefore, that possesses these attributes, may be categorized as a court.

18. Tribunals have primarily been constituted to deal with cases under special laws and to hence provide for specialised adjudication alongside the courts. Therefore, a particular Act/set of Rules will determine whether the functions of a particular Tribunal are akin to those of the courts, which provide for the basic administration of justice. Where there is a lis between two contesting parties and a statutory authority is required to decide such dispute between them, such an authority may be called as a quasi-judicial authority, i.e., a situation where, (a) a statutory authority is empowered under a statute to do any act (b) the order of such authority would adversely affect the subject and (c) although there is no lis or two contending parties, and the contest is between the authority and the subject and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is a quasi judicial decision. An authority may be described as a quasi-judicial authority when it

possesses certain attributes or trappings of a 'court', but not all. In case certain powers under C.P.C. or Cr.P.C . have been conferred upon an authority, but it has not been entrusted with the judicial powers of the State, it cannot be held to be a court. (See : The Bharat Bank Ltd., v. Employees ; Virindar Kumar Satyawadi v. The State of Punjab ; Engineering Mazdoor Sabha v. Hind Cycles Ltd .,; Associated Cement Companies Ltd. v. P.N. Sharma ; Ramrao and Anr. v. Narayan ; State of Himachal Pradesh and Ors. v. Raja Mahendra Pal ; Keshab Narayan Banerjee v. State of Bihar and Ors.,; Indian National Congress (I) v. Institute of Social Welfare ; K. Shamrao and Ors. v. Assistant Charity Commissioner , ; Trans Mediterranean Airways v. Universal Exports , ; and Namit Sharma v. Union of India ,).

19. In Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjunwala and Ors., Hidayatullah, J . (as His Lordship then was) made a distinction between a "court" and a "Tribunal" as is explained hereunder: '

".....These Tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath,but they are not part of the ordinary Courts of Civil Judicature. They share the exercise of the judicial power of the State, but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law.They are very similar to Courts, but are not Courts. When the Constitution speaks of ' Courts' in Art. 136 , 227 or 228 or in Arts. 233 to 237 or in the Lists, it contemplates Courts of Civil Judicature but not Tribunals other than such Courts. This is the reason for using both the expressions in Arts. 136 and 227.

By "Courts" is meant Courts of Civil Judicature and by "Tribunals", those bodies of menwho are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before Tribunals, and the residue goes before the ordinary Courts of Civil Judicature." (Emphasis added)

20. To explain the distinction between a Court and Tribunal, His Lordship further relied upon the judgment in the case of Shell Co. of Australia v. Federal Commissioner of Taxation, (1931) AC 275, wherein it has been observed as under:

".....In that connection it may be useful to enumerate some negative propositions on this subject:

1. A Tribunal is not necessarily a Court in this strict sense because it gives a final decision.

2. Nor because it hears witnesses on oath.

3. Nor because two or more contending parties appear before it between whom it has to decide.

4. Nor because it gives decisions which affect the rights of subjects.

5. Nor because there is an appeal to a Court.

6. Nor because it is a body to which a matter is referred by another body....."

21. The present case is also required to be examined in the context of Article 227 of the Constitution of India, with specific reference to the 42nd Constitutional Amendment Act, 1976, where the expression 'court' stood by itself, and not in juxtaposition with the other expression used therein, namely, 'Tribunal'.The power of the High Court of judicial superintendence over the Tribunals, under the amended Article 227 stood obliterated. By way of the amendment in the sub- article, the words, "and Tribunals" stood deleted and the words "subject to its appellate jurisdiction" have been substituted after the words, "all courts". In other words, this amendment purports to take away the High Court's power of superintendence over Tribunals. Moreover, the High Court's power has been restricted to have judicial superintendence only over judgments of inferior courts, i.e. judgments in cases where against the same, appeal or revision lies with the High Court.A question does arise as regards whether the expression 'courts' as it appears in the amended Article 227 , is confined only to the regular civil or criminal courts that have been constituted under the hierarchy of courts and whether all Tribunals have in fact been excluded from the purview of the High Court's superintendence. Undoubtedly, all courts are Tribunals but all Tribunals are not courts.

22. The High Court's power of judicial superintendence, even under the amended provisions of Article 227 is applicable, provided that two conditions are fulfilled; firstly, such Tribunal, body or authority must perform judicial functions of rendering definitive judgments having finality, which bind the parties in respect of their rights, in the exercise of the sovereign judicial power transferred to it by the State, and secondly such Tribunal, body or authority should be the subject to the High Court's appellate or revisional jurisdiction.

23. In S.P. Sampath Kumar v. Union of India , AIR 1987 SC 386, this Court held that, in the Central Administrative Tribunal (hereinafter referred to as the 'CAT'), the presence of a judicial member was in fact a requirement of fair procedure of law, and that the administrative Tribunal must be presided over in such a manner, so as to inspire confidence in the minds of the people, to the effect that it is highly competent and an expert body, with judicial approach and objectivity and, thus, this Court held that the persons who preside over the CAT, which is intended to supplant the High Court must have adequate legal training and experience.This Court further observed that it was desirable that a highpowered committee,headed by a sitting Judge of the Supreme Court who has been nominated by the Chief Justice of India to be its Chairman, should select the persons who preside over the CAT, to ensure the selection of proper and competent people to the office of trust and help to build up its reputation and accountability. The Tribunal should consist of one Judicial Member and one Administrative Member on any Bench.

24. In L. Chandra Kumar v. Union of India and Ors ., AIR 1997 SC 1125 : (1997 AIR SCW 1345), this Court held that the power of judicial review of the High Court under Article 226 of the Constitution of India, being a basic feature of the Constitution cannot be excluded. In this context, the Court held:

"....It must not be forgotten that what is permissible to be supplanted by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself??." (emphasis supplied)

The Court further observed that the creation of this Tribunal is founded on the premise that, specialised bodies comprising of both, well trained administrative members and those with judicial experience, would by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. The contention that the said Tribunal should consist only of a judicial member was rejected, and it was held that such a direction would attack the primary grounds of the theory, pursuant to which such Tribunals were constituted.

25. In V.K. Majotra and Ors. v. Union of India and Ors ., this Court reversed the judgment of the Allahabad High Court wherein, direction had been issued that the Vice-Chairman of the CAT could be only a retired Judge of the High Court, i.e., a Judicial Member and that such a post could not be held by a Member of the Administrative Service, observing that such a direction had put at naught/obliterated from the statute book, certain provisions without striking them down.

26. A Constitution Bench of this Court in Statesman (Private) Ltd. v. H.R. Deb and Ors ., examined the provisions of Sections 7(3)(d) and g(1) of the Industrial Disputes Act , 1947, which contain the expression 'judicial office', and held that a person holds 'judicial office' if he is performing judicial functions. The scheme of Chapters V and VI of the Constitution deal with judicial office and judicial service. Judicial service means a separation of the judiciary from the executive in public services. The functions of the labour court are of great public importance and are quasi- judicial in nature, therefore, a man having experience of the civil side of the law is more suitable to preside over it, as compared to a person working on the criminal side. Persons employed performing multifarious duties and, in addition, performing some judicial functions, may not truly fulfil the requirement of the statute. Judicial office thus means, a fixed position for the performance of duties, which are primarily judicial in nature.

27. In Shri Kumar Padma Prasad v. Union of India and Ors ., this Court held that the expression, 'judicial office' in the generic sense, may include a wide variety of offices which are connected with the administration of justice in one way or another. The holder of a judicial office under Article 217(2)(a), means a person who exercises only judicial functions, determines cases inter se parties and renders decisions in purely judicial capacity. He must belong to the judicial services which is a class in itself, is free from executive control, and is disciplined to hold the dignity, integrity and independence of the judiciary. The Court held that 'judicial office' means a subsisting office with a substantive position, which has an existence independence from its holder.

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

29. The present Writ Petition was filed on the premise, that the post of the President of the Gujarat Revenue Tribunal was covered by the expression 'District Judge, as has been defined under Article 236 of the Constitution, the definition being an exclusive

one, and thus, in view of the provisions of Article 233 of the Constitution, the appointment of the President of the Tribunal can be made only upon consultation with the High Court. In the alternative it was suggested, that the said Tribunal is a court and that the post of the President is one of judicial service, and in view of the provisions of Article 234 of the Constitution, the appointment of the President can be made only upon consultation with the High Court, as well as the Gujarat Public Services Commission. Even otherwise, having regard to the functions, powers and duties vested in the President, a person with legal qualification and long judicial experience should alone be appointed as President. Reference to the Bombay Legislative Assembly debate dated 18.4.1939, as expressed by the then Revenue Minister, revealed that the intention of the legislature had been that the post be filled by a retired High Court Judge, or a District Judge of not less than ten years standing. Further, the Tribunal dealing with various cases under the Gujarat Agriculture and Land Ceiling Act , 1961, Gujarat Private Forest Act, Bombay Public Trust Act, Bombay Tenancy and Agricultural Lands Act, Bombay Jagirdari and Other Tenure Abolition Act, and with questions of title under Section 37(2) of the Bombay Land Revenue Code has to deal with large number of civil disputes between the citizens, as well as between the Government and citizens and, it is pertinent to note that at the relevant time of filing of this Writ Petition, 6500 cases were pending before the Tribunal. With these assertions, the prayers made by the writ petitioners were mainly to declare Sections 4 and 20 of the Act, 1958 as ultra vires and unconstitutional on the grounds that they gave absolute unguided power to the State Government in relation to the appointment of the President, and further, to declare Rule 3(1) so far as it authorises the appointment of the Secretary, as ultra vires and void, and also to quash the appointment of the respondent as the President.

30. The State Government contested the case, contending that the provisions of Article 236 of the Constitution have no application. Further, the Act as well as the Rules provide that a person having long standing experience in the area of revenue law, and under Rule 3(2) an advocate who is qualified to be a Judge of the High Court, is eligible for the post of the President of the Tribunal. The Administrative Officer has long and vast experience in revenue matters, being posted as Special Divisional Magistrate, Collector, Deputy Secretary and Secretary dealing with laws pertaining to revenue and was hence, competent enough to deal with any subject assigned under the said Act and the Rules. Thus, the Secretary to the Government of Gujarat was competent/eligible to be selected to the post of the President of the Tribunal.

31. The High Court examined the functions and powers of the Tribunal. Section :

31.1 Section 117KK of the Bombay Land Revenue Code provides for reference of certain matters to the Tribunal for its opinion. Section 117L provides that the opinion of the Tribunal, along with settlement report, be laid on the table of the State Legislature and a copy thereof, be sent to every Member and the said report is liable to be discussed by way of a resolution moved in the State Legislature.

31.2 The Tribunal has also been conferred with the power to adjudicate disputes, which may arise from the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948. Section 75(1) of the said Act provides that an appeal against the award of the Collector, made under Section 66 may be filed before the Tribunal. Sub-section

(2) of Section 75 , provides that in deciding appeals preferred under sub-section (1), the Tribunal shall exercise all the powers which a court has and subject to the regulations framed by the Tribunal under the Act, 1957, follow the same procedurewhich a court follows in deciding appeals from the decree or order of an original court under the CPC.

Section 76(1) of the Act provides that notwithstanding anything contained in the Act, 1957, an application for revision may be made to the Tribunal against any order of the Collector, except an order under Section 32P , or an order in appeal against an order under sub-section (4) of Section 32G . Section 80 provides that all inquiries and proceedings before the Tribunalshall be deemed to be judicial proceedingswithin the meaning of Sections 193 , 219 and 228 of the IPC. Section 85 deals with bar of jurisdiction. It further provides that no Civil Court shall have the jurisdiction to settle, decide or deal with, any question which is by or under this Act, required to be settled, decided or dealt with, by the Tribunal in appeal or revision. It is also provided in sub-section (2) of Section 85 that no order of the Tribunal shall be questioned in any civil or criminal court.

31.3 The Gujarat Agricultural Lands Ceiling Act, 1960, was enacted to fix a ceiling on holdings of agricultural lands, and to provide for the acquisition and disposal of surplus agricultural lands. Chapter VI of the said Act deals with procedure, appeals and revision. Section 36 provides that any person aggrieved by an award made by the Tribunal under Section 24 , or by the Collector under Section 28 , may appeal to the Tribunal. Sub-section (3) of Section 36 provides that in deciding such appeal the Tribunalshall exercise all the powers which a Court has and follow the same procedure which the Court follows in deciding appeals from the decree or order of the original court under the CPC. Section 38 provides that notwithstanding anything contained in the Act, 1957, an application for revision may be made to the Tribunal constituted under the said Act, against any order passed by the Collector. Section 47 deals with bar of jurisdiction, as it provides that no civil court shall have the jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the Tribunal. Section 48 provides that all inquiries and proceedings before the Tribunal shall be deemed to be 'judicial proceedings', within the meaning of Sections 193 , 219 and 228 of the IPC.

31.4 The Bombay Public Trust Act, l950, has been enacted to regulate, and to make better provision for the administration of public religious and charitable trusts in the State of Bombay, which also extends to the State of Gujarat. In exercise of powers conferred under Section 84 of the said Act, the Government of Bombay has framed the Bombay Public Trusts (Gujarat) Rules, 1961. Section 51 of the Act provides for consent of the Charity Commissioner for the institution of a suit. Sub- section (2) of Section 51 says that if the Charity Commissioner refuses his consent for the institution of a suit under sub-section (1) of Section 51 , the concerned person may file an appeal to the Tribunal. References made to the Tribunal have been dealt with in Chapter Xl of the Act. Section 71 deals with appeals to the Tribunal, and provides that an appeal to the Tribunal under sub- section (2) of Section 51 , against the decision of the Charity Commissioner, refusing consent for the institution of a suit, shall be filed within 60 days from the date of such decision, in such form and shall be accompanied by such fee, as may be prescribed, and that the decision of the Tribunal shall be final and conclusive. Section 74 provides that all inquiries and appeals shall

be deemed to be judicial proceedings within the meaning of Sections 193 , 219 and 228 of the IPC. Section 76 provides that, save, insofar as they may be inconsistent with anything contained in the Act,the provisions of the CPC will apply to all proceedings before the court under this Act. Section 80 deals with bar of jurisdiction of civil courts, as it provides that no civil court can deal with any question which is by, or under the Act, to be decided or dealt with, by any officer or authority under the Act in respect of which, the decision or order of such officer or authority has been made final and conclusive.

31.5 Section 13(1) of the Act, 1957, provides that in exercising the jurisdiction conferred upon the Tribunal, the Tribunal shall have all the powers of a civil court as enumerated therein and shall be deemed to be a civil court for the purposes of Sections 195 , 480 and 482 of the Cr.P.C., and that its proceedings shall be deemed to be judicial proceedings, within the meaning of Sections 193 , 219 and 228 of the IPC.

32. The aforesaid observations made by the High Court, taking into consideration various statutes dealing with not only the revenue matters, but also covering other subjects, make it crystal clear that the Tribunal does not deal only with revenue matters provided under the Schedule I, but has also been conferred appellate/revisional powers under various other statutes. Most of those statutes provide that the Tribunal, while dealing with appeals, references, revisions, would act giving strict adherence to the procedure prescribed in the CPC, for deciding a matter as followed by the Civil Court and certain powers have also been conferred upon it, as provided in the Cr.P.C . and IPC . Thus, we do not have any hesitation in concurring with the finding recorded by the High Court that the Tribunal is akin to a court and performs similar functions.

21 However, the question still remains to be considered is that even if the Tribunal have powers like the Civil Court to decide the proceedings before it, does it have powers to grant injunction. Mr. Nanavati pointed out that as per regulation 14, the Tribunal has power to grant stay. Regulation 14 of the Regulations reads as under:

"14. Stay of execution of award or order - (1) Pending a decision on an appeal or an application for revision, the Tribunal may direct the execution of any award or order against which the appeal or application is made to be stayed on such conditions as may be deemed fit.

31. An order made under sub-regulation (1) may be vacated or modified by the Tribunal provided that prior notice is given to the party in whose favour such order has been made to show cause why it should not be so vacated or modified."

22 The Tribunal is, thus, not expressly conferred with the powers to grant interim injunction. The only provision brought to the notice of the Court is regulation 14 which provides for grant of stay of execution of the award or order pending the decision on the appeal or an application for review before the Tribunal.

23 In the case of Nahar Industrial Enterprises Ltd. v. Hong Kong & Shanghai Banking Corporation , reported in (2009) 8 SCC page 646, the Hon'ble Supreme Court while examining the question whether the Debt Recovery Tribunal is civil court, has observe din para 67, 69, 88 and 123 as under:

"67. The terms "Tribunal", "court" and the "civil court" have been used in the Code differently. All "courts" are "Tribunals" but all "Tribunals" are not "courts". Similarly all "civil courts" are "courts" but all "courts" are not "civil courts." It is not much in dispute that the broad distinction between a "court" and a "Tribunal" is whereas the decision of the "court" is final the decision of the "Tribunal" may not be. The "Tribunal", however, which is authorized to take evidence of witnesses would ordinarily be held to be a "court" within the meaning of Section 3 of the Evidence Act, 1872. It includes not only Judges and Magistrates but also persons, except Arbitrators, legally authorized to take evidence. It is an inclusive definition. There may be other forums which would also come within the purview of the said definition.

69. Civil court is a body established by law for administration of justice. Different kinds of law, however exists, constituting different kinds of courts. Which courts would come within the definition of the civil court have been laid down under the Code of Civil Procedure itself. Civil Courts contemplated under Section 9 of Code of Civil Procedure find mentioned in Section 4 and thereof. Some suits may lie before the Revenue Court, some suits may lie before the Presidency Small Causes Courts. The Code of Civil Procedure itself lays down that the Revenue Courts would not be courts subordinate to the High Court.

88. We have noticed hereinbefore that Civil Courts are created under different Acts. They have their own hierarchy. They necessarily are subordinate to the High Court. The appeals from their judgment will lie before a superior court. The High Court is entitled to exercise its power of revision as also superintendence over the said courts. For the aforementioned purpose, we must bear in mind the distinction between two types of courts, viz., civil courts and the courts trying disputes of civil nature. Only because a court or a tribunal is entitled to determine an issue involving civil nature, the same by itself would not lead to the conclusion that it is a civil court. For the said purpose, as noticed hereinbefore, a legal fiction is required to be created before it would have all attributes of a civil court. 123. Sub-section (3) raises a legal fiction that the proceeding before the Tribunal or the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for all the purposes of section 196 of the Indian Penal Code, 1860. The very fact that a legal fiction has been created and the Tribunal or the Appellate Tribunal shall be deemed to be a civil court for purposes of sec. 195 and Chapter XXVI of the Code of Civil Procedure, 1973, itself suggests that the Parliament did not intend to take away the jurisdiction of the civil court. In any event, the said legal faction has a limited application. Its scope and ambit cannot be extended. In Bharat Bank Ltd. (supra) it has clearly been held that although the labour court may have all the trappings of a court, but it is still not a court."

24 In the case of Rikhabsao Nathusao Jain versus Corporation of the City of Nagpur and others, reported in 2009 (1) SCC 240, in the context of the jurisdiction and scope of exercise of powers of injunction by the District Judge under the provisions of City of Nagpur Corporation Act 1948 and in the context of Order 39 of the Code of Civil Procedure, the Hon'ble Court held and observed in para 25 and 28 as under:

"25. The Court indisputably has all incidental powers so as to enable it to proceed in accordance with law. It is, however, difficult to conceive that its jurisdiction is

plenary in nature. The jurisdiction of the civil court in terms of sec. 287 of the Act is barred. If the contention that the District Judge has all the powers, whether incidental or supplemental, as has been 17 advanced by Mr. Rao is correct, it is difficult to comprehend as to why the legislature has barred the jurisdiction of the civil court. Keeping in view the nature of jurisdiction conferred upon the District Judge as also in view of the fact that the Civil Court's jurisdiction has been excluded in determining the said question, we have no other option but to hold that the jurisdiction of the District Judge is limited. If a jurisdiction is confined to grant of mandatory injunction, the court may in a given case also exercise its power to pass prohibitory injunction. We would also assume that if an order of injunction can be passed in favour of the applicant, in a given case, it may be passed in favour of the non-applicant also. But, such a power must be exercised whether in favour of the applicant or non-applicant, having regard to the scope of the limited jurisdiction to be exercised by the District Judge in terms of section. 286(5) of the Act. It is, therefore, difficult to comprehend that it has an implied power to grant mandatory injunction and that too suo motu.

28. It is one thing to say that the learned District Judge could direct respondent No. 1 to point out as to the provisions of the building bye- laws which are said to have been violated so as to consider the merit of the application filed by appellant but it would be another thing to say that it had the jurisdiction to direct it to reconsider the matter of granting sanction of building plan without the defect pointed out by it rectified. We may, furthermore assume that even that was within the purview of the jurisdiction of the learned District Judge. For the said purpose, we may notice the nature of implied power, which the civil court is entitled to exercise. An implied power on the part of civil court is conceived of having regard to the interest of the parties, as for example, power to admit appeal includes power to stay [see : ITO v. MK Mohammed Kunhi0or power to grant maintenance includes power to grant interim maintenance [See Savitri w/o Govind Singh Rawat v. Govind Singh Rawat [(1985) 4 SCC 337], but we should not also be unmindful of the fact that the power to grant injunction is a special power which may be found to be absent in certain jurisdictions, as for example, the provisions of the Consumer Protection Act [See Morgan Stanley Mutual Fund v. Kartick Das]."

25 Thus, when the Tribunal is not conferred with the express powers to grant injunction, it is difficult to trace the powers to grant injunction in all matters before the Tribunal under section 76 of the Act. Such powers to issue temporary injunction are however specifically conferred to the Mamlatdar by section 70(nb) of the Act. Section 70 provides for duties and functions to be performed by the Mamlatdar for the purposes of the Act. The order passed by the Mamlatdar either under clause (b) or clause (nb) of section 70 of the Act is appealable before the Collector under section 74 of the Act and the other orders passed by the Mamlatdar in performance of his duties and functions under section 70 of the Act are also appealable before the Collector. Therefore, at the best, it could be said that in connection with the matters for which the Mamlatdar is conferred with express power to issue temporary injunction when are brought before the Tribunal by way of revision application under section 76 after the order of the Collector passed in appeal under section 74 , the Tribunal may have jurisdiction to grant temporary injunction.

26 In the case on hand, appeal preferred before the Deputy Collector by respondent Nos. 4 to 8 was not against the order passed by the Mamlatdar for the matters covered under section 70

of the Act, and therefore, the Tribunal could be said to have no jurisdiction to grant interim injunction in the revision application preferred by respondent Nos. 4 to 8.

27 Irrespective of the above aspects of jurisdiction, the Court finds that the respondent No.4 to 8 did not deserve grant of any interim relief on account of their conduct. Any party who remains idle for a long time to claim any right in the property may not be entitled to claim equitable relief especially when such party is just onlooker of the happenings of events-developments during such long time. It may be that such party may allege that he is deprived of his right in property in fraudulent manner and urge that on account of fraud, delay, howsoever long may be, shall not come in his way to seek annulment of invalid and void order. However, such allegation of fraud may not be the only consideration to grant equitable relief of injunction. His conduct in not taking timely remedy cannot be ignored while considering his plea for interim relief. In the case on hand, respondent No.4 to 8 have averred in their application for condonation of delay occurred in filing the appeal before the Deputy Collector that after they received information under the Right to Information Act , 2005, they came to know that the record of the Ganot Case and the order dated 17.5.1962 alleged to have been passed therein were not available and, therefore, the panchanama for taking possession based on above such order and entry for such possession in the revenue record was forged, fraudulent, nullity and void. The petitioners have filed their reply to such application stating that for 50 years, entry is not challenged and conspiracy is planned against the trust to snatch away the trust property. It is also stated that the lands were included in the TP Scheme and the final plots were given under the TP Scheme to the petitioners and the petitioners have been running schools and colleges on the land in question with open ground and the open ground is being used as play ground and for other social activities with the permission of the Charity Commissioner for raising income for the trust.

28 Time period of 50 years is more than half century in life expectancy of every human being. Though there are allegations that the record of Ganot case, and the order of Panchkayas for taking possession are non-existent and that the possession was shown to have been taken from Bai Jadi in fraudulent manner, such allegations themselves are not sufficient to ignore conduct of respondent No. 4 to 8 in remaining dormant or indolent for their alleged right. The petitioners have placed on record with their petition the copy of re-distribution and valuation statement issued under the Town Planning Act, 1954 on finalizaiton of the T.P. Scheme. As could be seen from the copy of such statement at Annexure-I, Vanita Vishram Trustee Gokuldas Kahandas Parekh and others are shown to be the owners of the land and the FP No.601 against the OP No. 601 constituted of the survey numbers of the lands in question is shown to have been allotted to them.

29 The TP Scheme was sanctioned under the Bombay Town Planning Act, 1954 in the year 1977 as found mentioned at the bottom of document at Annexure E. The present Town Planning Act, 1976 came into force thereafter on 30.1.1978. Section 19 of the Bombay Town Planning Act, 1954 reads as under:

> "19.(1) Where there is a disputed claim as to the ownership of any piece of land included in an area in respect of which the local authority has declared under section 2 its intention to make a town planning scheme and any entry in the record of rights or mutation register relevant to such disputed claim is inaccurate or inconclusive, an inquiry may be held on an application being made by the local authority or the Town Planning Officer at any time prior to the date on which the Town Planning Officer draws up the final scheme under sub-section (1) of section 32 , by such officer as the

State Government may appoint for the purpose of deciding who shall be deemed to be the owner for the purposes of this Act.

(2) Such decision shall not be subject to appeal but it shall not operate as a bar to a regular suit.

(3) Such decision shall, in the event of a Civil Court passing a decree which is inconsistent therewith, be corrected, modified or rescinded in accordance with such decree as soon as practicable after such decree has been brought to the notice of the local authority either by the Civil Court or by some person affected by such decree."

30 As per the above provisions, for the dispute as to the ownership of any piece of land included in the TP Scheme or in respect of any entry in record of rights or mutation register claiming to be inaccurate or inconclusive, the remedy was available to either Bai Jadi or to any other heirs of Bai Jadi including respondent No.4 to 8. It is not the case of respondent No.4 to 8 that any objection or dispute was raised before the Town Planning Scheme was finalized. Though it can be said that the rights of the tenants protected under the Act were not affected, however, the conduct of respondent No.4 to 8 in not lodging any claim before the TP Authority and thereafter sitting idle for their rights for a further period of more than forty years would certainly disentitle them to claim equitable relief. But, the Tribunal observed on merits of the case to find prima facie case for grant of injunction to respondent No.4 to 8. The Tribunal took strain to observe that the ancestors of respondent No.4 to 8 appeared to be in possession as on 1.4.1957 and thereafter, their names continued in revenue record till 1970 and as submitted that no proceedings under sec.31 to terminate the tenancy were taken nor the petitioners made any application under sec.29 of the Act the procedure adopted for taking possession on the basis of the order dated 17.5.1962 appeared to be suspicious. Such observations of the Tribunal on merits would be slashed by the conduct of respondent No.4 to 8 of not making any complaint or grievance for long time of 50 years at the time of considering their application for interim relief. It is required to note that out of 22 heirs of Bai Jadi as per pedigree at page 216 (though Mr. Thakore stated that the total heirs were 13), only 5 heirs - respondent No.4 to 8 had chosen to file appeal before the Deputy Collector for the land situated in the posh area of the city of Surat where the price of the land is sky rocketing.

31 The Court finds that considering the conduct of respondent No.4 to 8 in approaching the Deputy Collector after a period of 50 years seeking declaratory relief and on account of intervening events of sanctioning of TP Scheme in the year 1977 and use of the land by the petitioner for educational purposes and for other social activities permitted on the open land by the Charity Commissioner, the respondent No.4 to 8 did not deserve grant of any interim relief in their favour. The respondent No.4 to 8 who have allowed the petitioner trust to enjoy the land for such a long time cannot be made entitled to interim relief of status quo against the petitioners. Not only this but the stay against the order made by the Deputy Collector will have nil effect and will be of no fruitful purpose in as much as the order of Deputy Collector under challenge before the Tribunal is of rejection of application for condonation of delay preferred by respondent No.4 to 8 and stay of such order will serve no purpose.

32 The other points raised as regards exemption available under sec. 88C of the Act to the petitioner trust are not required to be considered. Mr. Nanavati however relied on the decision in the case of Shamshad Ahmad v. Tilakraj Bajaj reported in (2008) 9 SCC 1 as regards powers of the High Court under Article 226 /227 of the Constitution of India. In the said decision, Hon'ble Supreme Court has held and observed in para 38 and 42 as under:

"38. Though powers of a High Court under Articles 226 and 227 are very wide and extensive over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction, such powers must be exercised within the limits of law. The power is supervisory in nature. The High Court does not act as a Court of Appeal or a Court of Error. It can neither review nor reappreciate, nor reweigh the evidence upon which determination of a subordinate Court or inferior Tribunal purports to be based or to correct errors of fact or even of law and to substitute its own decision for that of the inferior Court or Tribunal. The powers are required to be exercised most sparingly and only in appropriate cases in order to keep the subordinate Courts and inferior Tribunals within the limits of law.

42. In State v. Nayjot Sandhu , (SCC pp. 656-57 para 28), this Court reiterated;

"Thus the law is that Article 227 of the Constitution of India gives the High Court the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. This jurisdiction cannot be limited or fettered by any Act of the State Legislature. The supervisory jurisdiction extends to keeping the subordinate tribunals within the limits of their authority and to seeing that they obey the law. The powers under Article 227 are wide and can be used, to meet the ends of justice. They can be used to interfere even with an interlocutory order. However the power under Article 227 is a discretionary power and it is difficult to attribute to an order of the High Court, such a source of power, when the High Court itself does not in terms purport to exercise any such discretionary power. It is settled law that this power of judicial superintendence, under Article 227 , must be exercised sparingly and only to keep subordinate courts and tribunals within the bounds of their authority and not to correct mere errors. Further, where the statute bans the exercise of revisional powers it would require very exceptional circumstances to warrant interference under Article 227 of the Constitution of India since the power of superintendence was not meant to circumvent statutory law. It is settled law that the jurisdiction under Article 227 could not be exercised 'as the cloak of an appeal in disguise'." (Emphasis supplied)"

33 The High Court thus while exercising the powers under Article 226 /227 of the Constitution of India though not acting as appellate court, however, when it finds that the subordinate court or the tribunal acted beyond the bounds of their authority and in ignorance of the settled principles for considering conduct of the parties seeking equitable relief, it can certainly interfere with the order made by the subordinate Court or Tribunal in exercise of the powers under Article 226 /227 of the Constitution of India. In the present case, as stated above, this Court finds that the Tribunal has gone beyond the bounds of its authority in granting impugned order in favour of respondent No.4 to 8 and ignoring conduct of respondent no.4 to 8 in seeking equitable relief, and therefore, interference with the order made by the Tribunal is called for in exercise of the powers under Article 226 /227 of the Constitution of India.

34 In the case of Mandali Ranganna and others versus T. Ramchandra and others reported in (2008) 11 SCC page 1, on the aspects of conduct of parties to be considered for grant of equitable relief of injunction, the Hon'ble Supreme Court has held and observed in para 21 and 22 as under:

"21. While considering an application for grant of injunction, the Court will not only take into consideration the basic elements in relation thereto, viz., existence of a prima facie case, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties.

22. Grant of injunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. The Court will not interfere only because the property is a very valuable one. We are not however, oblivious of the fact that grant or refusal of injunction has serious consequence depending upon the nature thereof. The Courts dealing with such matters must make all endeavours to protect the interest of the parties. For the said purpose, application of mind on the part of the Courts is imperative. Contentions raised by the parties must be determined objectively."

35 In light of above and for the reasons stated above, the impugned order is quashed and set aside. The petition stands finally disposed of accordingly.

36 After the pronouncement of the judgment, learned Senior advocate Mr. Nanavati requested to stay the present judgment. Learned Senior advocate Mr. Thakore has objected to such request.

37 In the facts of the case, the request to stay the present judgment is refused.

Shri K. S. Nanavati
Sr. Advocate

2015 (0) AIJEL-HC 234666

GUJARAT HIGH COURT

Hon'ble Judges:H.N.Devani, J.

M/s.Shree Corporation Versus M.D.Overseas Ltd

SPECIAL CIVIL APPLICATION No. 8601 of 2013 ;
SPECIAL CIVIL APPLICATION No. 17153 of 2013 ; *J.Date :- SEPTEMBER 18, 2015

- CODE OF CIVIL PROCEDURE, 1908 Order - 37R.1(2)

CODE OF CIVIL PROCEDURE, 1908 - OR.37R.1(2) - COURTS AND CLASSES OF SUITS TO WHICH THE ORDER IS TO APPLY.

Cases Referred To :

1. Chlochem Limited V/s. Lifeline Industries Limited, Special Civil Application No.13041:2012, On 1st August, 2014
2. Ficom Organics Ltd. V/s. Laffans Petrochemicals Ltd., 2000 99 CC 471 : 1999 (20) SCL 266 : 1998 (5) CompLJ 24 : 1998 AIJEL_HC 218779
3. Mechelec Engineers And Manufacturers V/s. Basic Equipment Corporation, AIR 1977 SC 577
4. National Textile Corporation, Ahmedabad V/s. Shri Rajendra Sankalchand & Parikh, 1982 0 GLH(UJ) 7 : 1981 GLHEL_HC 214377
5. S. Kiranmoyee Dassi V/s. Dr. J. Chatterjee, 1945 49 CalWN 246
6. Sicom Ltd. V/s. Prashant S. Tanna, AIR 2004 Bom 186
7. Union Of India V/s. Dhanwanti Devi, 1996 6 SCC 44
8. Union Of India V/s. S.K. Kapoor, 2011 4 SCC 589
9. Zonal Manager V/s. Akhilbhai B. Mehta, 2002 2 GCD(UJ) 71 : 2001 GLHEL_HC 214015

Equivalent Citation(s):

2015 JX(Guj) 1537 : 2015 AIJEL_HC 234666
JUDGMENT :-

1 Since the order dated 14th March, 2013 passed by the learned Aux. Chamber Judge - Court No.19, City Civil Court, Ahmedabad, below Exhibit-8 in Summary Suit No.5402/1998 is subject matter of challenge in both these petitions and the parties are also common, the same were taken up for hearing together and are disposed of by this common judgment.

2 The petitioners in Special Civil Application No.8601/2013 are the original defendants and the petitioner in Special Civil Application No.17153/2013 is the original plaintiff and shall hereinafter be referred to as per their nomenclature before the trial court.

Shri K. S. Nanavati
Sr. Advocate

3 The plaintiff company filed a summary suit in the City Civil Court at Ahmedabad being Summary Suit No.5402/1998 stating that the plaintiff company is inter alia engaged in the sale of silver and gold bullion. The defendant No.1 is a partnership firm and the defendants No.2 to 4 are its active partners who are actively engaged in the day to day affairs of the defendant No.1 firm. That the plaintiff company was selling silver and gold bullion to the defendant No.1 firm acting through the defendants No.2 to 4 - partners and raised bills against the respective supply of which part payment was also made by the defendants. The defendants vide Bill No.44 dated 8th October, 1996 purchased 51 bars of silver weighing 1516.55 kilograms valued at Rs.1,05,61,405/- and issued cheques for Rs.25,61,405/- and Rs.26,00,000/-. Both the cheques were cleared and thus, the outstanding amount against Bill No.44 on 10th October, 1996 was Rs.54,00,000/-. The defendants had issued three post-dated cheques towards the balance amount of Rs.54,00,000/- against Bill No.44, one for Rs.9,00,000/-, the second for Rs.25,00,000/- and the third for Rs.20,00,000/-. Out of these three cheques, two cheques were deposited on 12th October, 1996 and one cheque was deposited on 14th October, 1996 and all the cheques were cleared, and therefore, there was no outstanding amount against Bill No.44.

4 The defendants purchased silver bars (48 pieces) from the plaintiff company vide Bill No.47 dated 11th October, 1996 valued at Rs.1,04,71,325/-. Against the said bill, the defendants issued cheques for Rs.30,00,000/-, Rs.34,00,000/-, Rs.22,00,000/-, Rs.18,00,000/- and Rs.71,325/-. Out of the cheques, two cheques of Rs.30,00,000/- and Rs.34,00,000/- came to be realised. Thus, against Bill No.47, Rs.64,00,000/- came to be realised and after crediting the amount received from the defendants, there was an outstanding balance of Rs.40,71,325/- legally recoverable by the plaintiff company as on 16th October, 1996. The remaining three cheques of Rs.22,00,000/-, Rs.18,00,000/- and Rs.71,325/- were deposited on 17th October, 1996 against the outstanding balance of Rs.40,71,325/-. The cheque for a sum of Rs.71,325/- was realised, however, two cheques bearing No.122262 and 122261 for Rs.22,00,000/- and Rs.18,00,000/- respectively, were dishonoured. Thus, an amount of Rs.40,00,000/- was outstanding against Bill No.47. On 16th October, 1996, the defendants purchased silver bars (31 pieces) vide Bill No.49 valued at Rs.68,43,766/-. Thus, a sum of Rs.1,08,43,766/- became legally due and payable by the defendants towards the price of silver purchased and delivered by the plaintiff company to the defendants. Against the outstanding dues, three post-dated cheques came to be issued against Bill No.49, details whereof are as follows:-

Cheque No.	**Date**	**Amount Rs.**	**Drawn on**
122303	18/10/96	28,43,766	Manek Chowk Co-op. Bank
122304	19/10/96	22,00,000	-do-
122305	19/10/96	18,00,000	-do-
	Total Rs.	68,43,766/-	

The said three cheques on presentation by the plaintiff company were not honoured by the bankers of the defendants and came to be returned with the remarks "funds insufficient". It is the case of the plaintiff that on account of the five dishonoured

cheques and on account of balance dues towards the goods supplied, an amount of Rs.1,08,43,766/- remained outstanding as on 24th October, 1996 which was legally payable by the defendants to the plaintiff company for the goods supplied by the plaintiff company. It appears that pursuant to efforts made by the plaintiff, two cheques for a sum of Rs.2,40,000/- and Rs.10,00,000/- dated 30th October, 1996 came to be issued by the defendants, which upon presentation, came to be cleared. Therefore, an amount of Rs.96,03,766/- remained due and payable as on 30th October, 1996 besides the interest thereon from the due date till its realisation. It appears that the plaintiff thereafter once again presented all the above five cheques before the bank, however, the same came to be returned on 13th November, 1996 with the remarks "funds insufficient". The plaintiff company, therefore, issued legal notice under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the NI Act") on 27th November, 1996 by registered post A.D. as well as by speed post which was duly served upon the defendants, but the amount was not paid. It is the case of the plaintiff that on the contrary, a reply dated 10th December, 1996 came to be sent creating a false defence in order to wriggle out of their obligation to make payment. The plaintiff company, therefore, filed five criminal complaints in the court of the learned Metropolitan Magistrate, Ahmedabad. Since a huge amount of Rs.96,03,766/- was due and payable since 30th October, 1996, the plaintiff instituted the above referred civil suit praying for a decree for an amount of Rs.96,03,766/- towards principal amount in favour of the plaintiff company as well as for a decree of Rs.44,76,502/- towards the interest calculated in paragraph 17 of the plaint along with interest and to award 24% on the decretal amount from the date of the suit till its realisation. In the said proceedings, the defendants submitted their leave to defend vide Exhibit-10. The trial court by the impugned order dated 14th March, 2013 passed below the summons for judgment (Exhibit-8) granted conditional leave to defend to file written statement to the defendants subject to the condition that the defendants deposit Rs.50,00,000/- within a period of two months from the date of the order and also file a written statement within the said period of two months. Being aggrieved, both the plaintiff and the defendants have preferred petitions before this court challenging the order dated 14th March, 2013. The plaintiff has challenged the impugned order on the ground that the trial court was not justified in granting leave to appeal upon depositing Rs.50,00,000/-, inasmuch as, the defendants had admitted dues of Rs.96,03,766/- and, therefore, the entire amount ought to have been directed to be deposited; whereas the defendants have challenged the impugned order on the ground that triable issues arise in the case and that the trial court was not justified in granting conditional leave to defend.

5 Mr. K.S. Nanavati, senior advocate, learned counsel for the petitioners in Special Civil Application No.8601/2013 (original defendants) invited the attention of the court to the reliefs claimed in the summary suit to point out that the plaintiff in addition to the principal amount of Rs.96,03,766/- has also claimed interest at the rate of 24% per annum. It was submitted that the suit claim, therefore, does not fall within the ambit of Order XXXVII of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code"). Reference was made to the provisions of sub-rule (2) of rule 1 of Order XXXVII of the Code which provides that subject to the provisions of sub-rule (1), the order applies to the classes of suits enumerated thereunder, namely,

(a) suits upon bills of exchange, hundies and promissory notes;

(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,-

(i) on a written contract; or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt or other penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated amount only;

(iv) suit for recovery of receivables instituted by any assignee of a receivable.

It was submitted that in view of the above provisions, suits which can be filed under rule 1(2)(b) of Order XXXVII are those which arise out of a written contract whereas, the plaintiff apart from the principal amount has also claimed interest thereon, in respect of which there is no written contract. Therefore, the claim of the plaintiff is not based on a written contract. Reference was made to rule 2 of Order XXXVII of the Code to point out that a plaint in respect of a suit to which Order XXXVII applies, should contain a specific averment that no relief, which does not fall within the ambit of that rule has been claimed in the plaint. It was submitted that though in the case at hand, the relief in respect of the interest clearly does not fall within the ambit of Order XXXVII yet no such specific averment has been made. It was argued that since the claim of interest does not fall within the ambit of sub-rule (2) of rule 1 of Order XXXVII, the relief claimed in the present case also does not fall within the ambit of Order XXXVII of the Code. The attention of the court was invited to the findings recorded by the trial court to point out that the trial court has recorded a finding to the effect that the plaintiff has not produced any agreement entered into by the parties in respect of the issue of interest. Reliance was placed upon the decision of this court in the case of Zonal Manager v. Akhilbhai B. Mehta, 2002 (2) GCD (UJ) 71, wherein the court placed reliance upon an earlier decision of this court in the case of National Textile Corporation, Ahmedabad v. Shri Rajendra Sankalchand & Parikh, 1982 G.L.H. (U.J.) 7, wherein the court in unequivocal terms ruled that in order to succeed in getting the amount of interest, the opponent plaintiff will have to prove his case by evidence and this cannot be permitted in a summary suit and, therefore, in view of the claim of interest amount made by the plaintiff in the suit, the suit cannot be said to be a summary suit and consequently, not triable as a summary suit.

The court observed that claiming of the amount in the said case at the rate of 24% took the dispute outside the scope of summary suit and, therefore, the learned Judge committed a jurisdictional error in granting conditional leave. Not only that, neither the dispute could be termed as one for liquidated demands as envisaged by Order XXXVII rule 1(2) but the claim of interest was also a triable issue and took the suit out of the ambit of a summary suit. It was submitted that the said decision would be squarely applicable to the facts of the present case. Reliance was also placed upon an unreported decision of this court in the case of Chlochem Limited v. Lifeline Industries Limited rendered on 1st August, 2014 in Special Civil Application No.13041/2012, wherein the court placed reliance upon the above referred decision of this court in the case of Zonal Manager v. Akhilbhai B. Mehta and observed that a perusal of Order XXXVII rule 1 sub-rule (2) of the Code makes it clear that the

dispute does not fall in any of the sub-clauses of sub-rule (2) in view of the claim of interest made by the petitioner, which alone raises a triable issue. The court, accordingly, held that in view thereof, unconditional leave to defend had rightly been granted by the City Civil Court. It was, accordingly, urged that the reliefs claimed in the summary suit being beyond the scope of Order XXXVII rule 1 (2) of the Code, the trial court was not justified in granting conditional leave to defend and directing the defendants to deposit Rs.50,00,000/-.

5.1 Reference was made to the decision of this court in Ficom Organics Ltd. v. Laffans Petrochemicals Ltd., 2000 (99) CC 471, wherein it was submitted by the learned counsel by placing reliance upon two decisions of this court reported in 1992 G.L.H. (U.J.) 7 and 1985 G.L.H. (U.J.) 2, that if there is no agreement for interest and interest is claimed on the basis of custom or trade, the defendant would be granted unconditional leave to defend a summary suit as a suit for a claim inclusive of interest without any contract for such interest or without any such legal liability would not be maintainable as a summary suit. The court observed that the said decisions were based on a previous decision which was rendered on the basis of provisions of order XXXVII, rule 1 of the Code before its amendment. However, after amendment, order XXXVII, rule 1, specifically provides that the summary suit is maintainable, inter alia, where the plaintiff seeks to recover a debt or a liquidity demand in money payable by the defendant, with or without interest, arising on a written contract. The court held that hence, the said decisions rendered without considering the amended provisions of order XXXVII, rule 1 have to be treated as per incuriam. The court further observed that in any case the said decisions cannot be relied upon to oust the jurisdiction of the company court in admitting the winding up petition when the company s defence to a substantial portion of the petitioner s claim is found to be not bona fide. It was submitted that, therefore, in the said decision the court was not concerned with Order XXXVII, as otherwise, it would have made a reference to a larger bench if it did not agree with the view adopted in the previous decisions of this court. It was further submitted that the fact remains that there is a judgment of this court after the amendment in the Code whereby it is held that if it is a suit for interest with a claim for liquidated amount but not supported by a written contract, it would fall outside the scope of rule (1) of Order XXXVII. Whether such suit is maintainable would turn on the statutory provisions and if the court is inclined to take a different view, the only option is to refer the question to a larger bench. In support of his submissions, the learned counsel placed reliance upon the decision of the Supreme Court in Union of India v. Dhanwanti Devi, (1996) 6 SCC 44, for the proposition that if a coordinate Bench disagrees with the view of an earlier coordinate Bench, the only course open to the former is to refer the matter to the Larger Bench; as well as for the proposition that the enunciation of the reason or the principle on which a question before a court has been decided is alone the binding precedent. The concrete decision alone is binding to the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. Reliance was also placed upon the decision of the Supreme Court in Union of India v. S.K. Kapoor, (2011) 4 SCC 589, for the proposition that it is well settled that if a subsequent coordinate Bench of equal strength wants to take a different view, it can only refer the matter to a larger Bench, otherwise the prior decision of a coordinate Bench is binding upon the subsequent Bench of equal strength. It was, accordingly,

submitted that the trial court was not justified in not granting unconditional leave to defend.

6 Opposing the petition filed by the defendants as well as appearing in the petition filed by the plaintiff, Mr. P.A. Medh, learned advocate for the plaintiff invited the attention of the court to the facts of the case to submit that each claim is based on a bill; therefore, each bill would constitute a written contract. Reference was made to the averments made in the memorandum of the petition filed by the defendants and more particularly paragraph 6 thereof, to point out it is an admitted fact that the amount due could not be repaid to the plaintiff. It was submitted that the cheques issued in respect of such amount came to be dishonoured and therefore, this suit is based upon a negotiable instrument as contemplated in clause (a) of sub-rule (2) of rule I of Order XXXVII of the Code. Reliance was placed upon the decision of a Full Bench of the Bombay High Court in SICOM Ltd. v. Prashant S. Tanna, AIR 2004 Bombay 186, and more particularly paragraphs 10 to 13 and 23, 25 and 26 thereof. It was submitted that under the provisions of the NI Act, the plaintiff is entitled to interest on the outstanding amount and accordingly, filed the summary suit against the defendants for an amount of Rs.96,03,766/- being the principal amount outstanding along with Rs.44,76,502/- towards interest and also for further interest at the rate of 24% p.a. from the date of the suit till realisation. It was pointed out that in their petition, the defendants have admitted that the outstanding principal amount due as on 30th October, 1996 came to Rs.96,03,766/- and also that at the relevant point of time, the defendants could not pay the said amount due to financial crisis, which fact remains undisputed throughout the proceedings. It was submitted that it is a settled position of law that in case of a summary suit, even if leave to defend is being granted, the amount admitted to be due from the defendants to the plaintiff ought to be ordered to be deposited as a pre-condition to such leave being granted. It was urged that in the present case, instead of the amount of Rs.96,03,766/- being the principal amount which is admittedly due from the defendant, the trial court has merely directed that an amount of Rs.50,00,000/- be deposited. Referring to the affidavit-in-rejoinder filed by the defendants in their petition, it was pointed out that according to the defendants, the sole ground on which they have challenged the impugned order is that under rule 35 of the Code, the court cannot impose the interest amount and that since there is no agreement between the parties with regard to interest being payable, while granting leave to defend the suit, the court cannot impose the interest on the principal amount as a condition. It was pointed out that the trial court has, after considering the evidence on record and the pleadings of the parties, in paragraph 8 of the order, recorded that the defence taken out by the defendants is moonshine and sham. Reliance was placed upon the decision of the Supreme Court in Mechelec Engineers and Manufacturers v. Basic Equipment Corporation, AIR 1977 SC 577, wherein the court has reiterated the principles enunciated in the case of S. Kiranmoyee Dassi v. Dr. J. Chatterjee, (1945) 49 Cal WN 246, for the proposition that if the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence. Reference was also made to the second proviso to rule 3(5) of Order XXXVII of the Code which provides that where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in court. It was pointed out that in the subsequent judgment, this court has not taken into consideration the aspect of amendment as well as the decision of this court in the case of Ficom Organics Ltd. v. Laffans Petrochemicals Ltd. (supra), and therefore, the issue regarding the amendment

was never considered by the Benches. It was submitted that Ficom Organics Ltd. v. Laffans Petrochemicals Ltd. (supra) holds that the 1982 decision is per incuriam and it being the correct judgment, it should be followed. It was submitted that a claim with interest is not unheard of under order XXXVII of the Code. In this regard reference was made to the latter part of the decision of the Bombay High Court in SICOM Ltd. v. Prashant S. Tanna (supra) to submit that under the NI Act, the defendants have to pay interest on the cheque amount. It was accordingly submitted that the defendants have no reason to be aggrieved and that no cause has been made out for grant of the reliefs prayed for in their petition, which deserves to be dismissed. As regards, the petition filed by the plaintiff, it was submitted that when the defendants had admitted the principal as being outstanding, the entire amount ought to have been decreed with the issue of interest going for trial as long cause case.

7 In rejoinder, Mr. K. S. Nanavati, learned counsel for the defendants submitted that insofar as the contention that the plaintiff is entitled to interest under the provisions of the NI Act is concerned, there are no pleadings to that effect. It was submitted that in any case, the civil court has the power to award interest at the statutory rate, whereas the plaintiff has claimed interest beyond the statutory rate. With reference to the decision of the Bombay High Court in the case of SICOM Ltd. v. Prashant S. Tanna (supra), on which reliance has been placed by the learned counsel for the plaintiff, it was submitted that in the said case, the claim of interest was supported by written documents but the demand was higher and the court drew a distinction between the sustainability of a claim and maintainability of a summary suit. It was submitted that the facts of the said case are different from the facts of the present case as the claim of interest is not based on a contract and the claim is totally unsustainable and not that a quantum of the claim is not maintainable. Referring to paragraph 14 of the judgment, it was submitted that in the facts of the present case, the plaintiff has not abandoned his claim for interest. It was submitted that the suit claim cannot be bifurcated into summary and long cause and that the entire suit would go as long cause suit, whether it falls within the scope of Order XXXVII or not. It was submitted that in Chlochem Ltd. v. Lifeline Industries Ltd. (supra), this court has taken a view in paragraph 22 that in view of the claim of interest, the dispute does not fall in any of the sub-clauses of sub-rule 2 of Order XXXVII rule 1 of the Code and that this alone raises a triable issue warranting grant of unconditional leave to defend. It was submitted that the view adopted by the Bombay High Court is not the view of this court, and that the law as laid down by this court is required to be followed by this court.

8 The facts as emerging from the record reveal that it is an admitted fact that the principal amount of Rs.96,03,766/- is due and payable by the defendants to the plaintiff. In connection with such amount, five cheques were issued by the defendants which came to be dishonoured, pursuant to which, the plaintiff has filed the summary suit for the principal amount of Rs.96,03,766/- together with a claim of interest of Rs.44,76,502/- at the rate of 24% per annum. Before the trial court, the defence raised on behalf of the defendants was that an MOU had been entered by the parties to the suit along with other creditors of the defendants company and it is only if the terms and conditions of the MOU are not fulfilled that the plaintiff can initiate legal proceedings. It was also the case of the defendants that no contract or agreement has been entered into between the parties to the effect that in the event of non-payment of the amount of the alleged transaction, the plaintiff will be entitled to recover the sum along with interest at the rate of 24% per annum and that to decide whether the plaintiff is entitled to recover the amount of interest as per the provisions of section 80 of the Negotiable Instruments Act, it is necessary to record the evidence in detail.

9 A perusal of the leave to defend application filed by the defendants, shows that no defence has been taken except that a compromise had been arrived at between the parties and that an MOU has been entered into and hence, a suit of this kind is not maintainable. Before this court, in the memorandum of petition, there is a specific admission that as on 30th October, 1996, the total outstanding dues were Rs.96,03,766/-, however, at the relevant time, due to certain reasons beyond the control of the defendants and financial crisis, the accounts could not be reconciled and the amount due could not be repaid to the respondent.

10 The trial court, after considering the material on record found that the defendants have not produced the original MOU and was, therefore, of the view that at this stage, the say of the plaintiff that he is not a signatory to the alleged MOU, is believable at this juncture, and that the defendants have impliedly admitted the alleged transaction and the outstanding amount payable to the plaintiff. The trial court has further noted that no proof is produced to show that a bungalow has been transferred to repay the dues in dispute as submitted on behalf of the defendants and has, accordingly, found the defence taken out by the defendants to be moonshine and sham. The trial court has also noted that while the plaintiff has claimed interest at the rate of 24% per annum, it has not produced the agreement entered into by the parties as regards the issue of interest. In the light of the findings recorded by it, the trial court has granted conditional leave to defend subject to the defendants depositing Rs.50,00,000/- (Rupees fifty lakhs) and has transferred the suit to the list of long cause.

11 Two questions arise for consideration in the backdrop of the facts and contentions noted hereinabove: firstly, whether the trial court was justified in granting conditional leave to defend when the claim for interest was not backed by any written contract; and secondly, whether the trial court was justified in directing the defendants to deposit only Rs.50,00,000/- when the entire principal amount of Rs.96,03,766/- had been admitted by them. It is only if the first question is answered in the negative, that the second question would be required to be answered.

12 As noticed hereinabove, the principal amount of Rs.96,03,766/- claimed in the summary suit has not been disputed by the defendants. The sole ground raised in the petition filed by the defendants is that the claim of interest, not being based upon a written contract, could not have been made in a summary suit. Placing reliance upon the decision of this court in the case of Zonal Manager v. Akhilbhai B. Mehta (supra), it has been contended that the claim of the amount of interest at the rate of 24% per annum takes the dispute out of the scope of summary suit and, therefore, the trial court committed a jurisdictional error in granting conditional leave to defend. In Zonal Manager v. Akhilbhai B. Mehta (supra), this court observed that it was not the plaintiff s case that there was an agreement with the defendant to charge interest on the amount due and payable by the defendant, interest was claimed on the ground that there was a custom of the trade to charge such interest. The court placed reliance upon the decision of this court in the case of National Textile Corporation v. Shri Rajendra Sankalchand & Parikh, 1982 G.L.H. (U.J.) 7, wherein the court had placed reliance upon an earlier decision in the case of Jamnadas Keshavji v. The Indian Mercantile Insurance Company Limited rendered on 5th November, 1954, wherein it was held that in order to succeed in getting the amount of interest, the opponent plaintiff must prove his case by evidence. This cannot be permitted in a summary suit. The court held that claiming of the amount in the said case with interest at the rate of 24% takes the dispute out of the scope of the summary suit. On merits, the court found that the dispute could not be termed as liquidated damage as envisaged by Order XXXII rule 1(2) but the claim of interest is also a triable issue and takes the suit out of the ambit of summary suit.

13 In Chlochem Limited v. Lifeline Industries Limited (supra), the petitioner claimed interest along with the amount due and further interest at the rate of 6% per annum over the total amount of Rs.75,73,512/-, which included the principal amount plus the interest. The court held that the principles of law enunciated in Zonal Manager v. Akhilbhai B. Mehta (supra) would be squarely applicable to the facts of the said case. The court further observed that the learned advocate for the petitioner had not chosen to distinguish this judgment or make any submissions regarding the aspect of charging interest. The court recorded that there is no material to show that there is an agreement between the parties regarding claim of interest and was of the view that the claim of interest cannot be said to be a liquidated demand. The court made reference to sub-rule (2) of rule 1 of Order XXXVII and recorded that the dispute does not fall in any of the subclauses of sub-rule (2), in view of the claim of interest made by the petitioner. The court in paragraph 26 of the decision, recorded that there was no admission of liability that any amount was outstanding from the respondent to the petitioner as had been held by the City Civil Court.

14 In Ficom Organics Ltd. v. Laffans Petrochemicals Ltd. (supra), this court has clearly held that the two decisions of this court in 1992 G.L.H. (U.J.) 7 (sic.1982) and 1985 G.L.H. (U.J.) 2, on which reliance had been placed for contending that if there is no agreement for interest and interest is claimed on the basis of custom or trade, the defendant would be granted unconditional leave to defend a summary suit as a suit for a claim of interest without any contract for interest or without any such legal liability would not be maintainable as a summary suit, are per incuriam having been rendered without noticing the amendment in Order XXXVII rule 1 whereby the words "with or without interest" came to be inserted. It may be noted that in neither of the latter decisions, the decision of this court in the case of Ficom Organics Ltd. v. Laffans Petrochemicals Ltd. (supra) holding that the decision in the case of National Textile Corporation v. Shri Rajendra Sankalchand & Parikh (supra) is per incuriam has been cited or considered. It is this decision in the case of National Textile Corporation v. Shri Rajendra Sankalchand & Parikh (supra) which forms the basis of the decisions rendered in the case of Zonal Manager v. Akhilbhai B. Mehta as well as in the case of Chlochem Industries v. Lifeline Industries Limited (supra).

15 In the aforesaid background, it may be pertinent to notice certain other facts.

16 In paragraph 18 of the plaint, which is the cause of action paragraph, it has been stated that the cause of action for filing the suit arose on the date when the defendants issued various cheques, on the date when the cheques were returned, and on 30th October, 1996, when the defendants failed to make the remaining payment of Rs.96,03,766/- on 27th November, 1996 when the notice was served to the defendants, on 10th December, 1996, when the defendants replied the notice and that the same cause of action is continuous. The notice dated 27th November, 1996 referred to in the above paragraph is the notice issued under section 138 of the Negotiable Instruments Act upon dishonour of the cheques in question. Evidently, therefore, as rightly contended by the learned counsel for the plaintiff, the suit has been instituted on a negotiable instrument. Sub-rule (2) of rule 1 of Order XXXVII of the Code provides that rule 1 applies to all the classes of suits mentioned therein, which includes (a) suits upon bills of exchange, hundies and promissory notes. In terms of section 6 of the NI Act, as it stood at the relevant time, a cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand. Therefore, the present suit which has been filed pursuant to dishonour of the cheques issued by the defendants is a suit instituted upon bills of exchange. At this juncture, it may be apposite to refer to the provisions of section 80 of the NI Act which provides for "interest when no rate specified"

and postulates that when no rate of interest is specified in the instrument, interest on the amount due thereon shall, notwithstanding any agreement relating to interest between any parties to the instrument, be calculated at the rate of eighteen per centum per annum, from the date at which the same ought to have been paid by the party charged, until tender or realisation of the amount due thereon, or until such date after the institution of a suit to recover such amount as the court directs. Therefore, the statute itself provides for the grant of interest and hence, when a suit is instituted on a negotiable instrument, a claim for interest can be made in view of section 80 of the Act and does not need a written contract in that regard. Besides, in the opinion of this court, where the interest claimed by the plaintiff is on the amount in respect of which cheques have been issued by the defendants, such claim is governed by section 80 of the Negotiable Instruments Act and consequently, the claim of interest made by the plaintiff is a claim of interest under an enactment, therefore, such claim can also be said to be governed by the provisions of Order XXXVII rule 1(2)(b)(ii) of the Code. Accordingly, no relief which does not fall within the ambit of rule 2 of Order XXXVII of the Code can be said to have been claimed in the plaint. Therefore, having regard to the facts of the present case, it cannot be said that the claim of interest is beyond the scope of Order XXXVII of the Code. While it is true that the claim of interest is higher than that provided under the statute, however, that by itself, would not take the suit outside the scope of Order XXXVII of the Code. The requirement under sub-rule (2)(a) for the purpose of maintaining a summary suit under sub-rule (1) of rule 1 of Order XXXVII of the Code is that it should be a suit upon a bill of exchange, hundi or promissory note. Therefore, once such condition is satisfied, and interest on the cheque amount is statutorily payable under section 80 of the Negotiable Instruments Act, it cannot be said that the relief claimed in the suit falls outside the ambit of the sub-clauses of sub-rule (2) of rule 1 of Order XXXVII of the Code. This court is in agreement with the view taken by the Bombay High Court in Sicom Limited v. Prashant S. Tanna (supra) to the extent it has been held that a distinction must be drawn between the sustainability of a claim and maintainability of the action as a summary suit. The negation of the former does not entail negation of the latter. A suit can be said to fall outside the ambit of Order XXXVII only if the relief claimed therein is based on an action the nature of which does not fall within the classes specified in Order XXXVII rule 1(2). The relief cannot be said to fall outside the ambit of Order XXXVII rule 2 merely because the quantum thereof is excessive, so long as the nature of the relief falls within the clause specified in Order XXXVII rule 1(2) of the Code.

17 As regards the decisions of this court in the case of Zonal Manager v. Akhilbhai B. Mehta and Chlochem Limited v. Lifeline Industries Limited (supra), the same were rendered in the peculiar facts of the said cases which were not based upon negotiable instruments and even the claim for the principal amount was disputed. Besides, as categorically noted in the case of Chlochem Limited v. Lifeline Industries Limited (supra), the learned advocate for the petitioner had not chosen to distinguish the judgment in the case of Zonal Manager v. Akhilbhai B. Mehta or to make any suggestion regarding the aspect regarding charging of interest. It is in these circumstances, that the court observed that there was no material between the parties regarding claim of interest and that claim of interest cannot be said to be a liquidated demand. The said decision would, therefore, not be applicable to the facts of the present case. Under the circumstances, the submission advanced by the learned counsel for the defendants that in case the court is not inclined to follow the view adopted in the case of Zonal Manager v. Akhilbhai B. Parikh and Chlochem Limited v. Lifeline Industries Limited (supra), the only option left to this court is to refer the matter to a Larger Bench, does not merit acceptance.

18 In the light of the above discussion, the first question which arises out of the petition filed by the defendants is, therefore, required to be answered in the affirmative namely, that the trial court was justified in granting conditional leave to defend to the defendants when the claim for interest was not backed by any written contract in view of the fact that the claim of the plaintiff was based upon bills of exchange (cheques).

19 Proceeding to the next question which arises out of the petition filed by the plaintiff, it may be noted that insofar as the liability to pay the principal amount of Rs.96,03,766/- is concerned, the same is not in dispute. In this regard, it may be germane to refer to the second proviso to sub-rule (5) of rule 3 of Order XXXVII of the Code which provides that where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in court. Thus, from the language employed in the said proviso, it is mandatory for the defendant to deposit the admitted amount as a pre-condition for grant of leave to defend the suit. Under the circumstances, having regard to the fact that the principal amount is admitted as due from them by the defendants, the trial court was not justified in directing the defendants to deposit only Rs.50,00,000/- and ought to have directed them to deposit the entire amount admitted by them.

20 For the foregoing reasons, it is held that the summary suit for the claim of interest in the facts and circumstances of the present case is maintainable. Special Civil Application No.8601/2013 filed by the original defendants, therefore, fails and is accordingly dismissed. Rule is discharged with no order as to costs.

21 By an order dated 12th June, 2013 made in Special Civil Application No.8601/2013, ad-interim relief had been granted subject to the defendants depositing an amount of Rs.25,00,000/- before the registry of this court. Pursuant to the said order, the petitioners/defendants have deposited such amount with the registry. The registry is hereby directed to forthwith transfer the said amount to the trial court.

22 For the reasons recorded hereinabove, Special Civil Application No.17153/2013 filed by the plaintiff hereby succeeds and is, accordingly, allowed. Conditional leave to defend is granted to the defendants and shall be subject to depositing the entire principal amount of Rs.96,03,766/-. The rest of the order of the trial court is hereby maintained. Rule is made absolute accordingly with no order as to costs.

23 At this juncture, the learned counsel for the petitioners in Special Civil Application No.8601/2013 prays for staying the operation of this judgment for a reasonable period so as to enable the petitioners to avail of the remedy before the higher forum. Having regard to the fact that interim relief had been granted in favour of the petitioners and has continued to operate till today, the request is granted. The operation of this judgment shall remain stayed for a period of ten weeks from today.

Shri K. S. Nanavati
Sr. Advocate