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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INTERIM APPLICATION NO.1014 OF 2022

IN

SUIT NO.114 OF 2022

Chanda Kochhar

...Applicant/
Plaintiff

V/s.

ICICI Bank Ltd.

...Defendant

WITH

INTERIM APPLICATION NO.307 OF 2020

IN

SUIT NO.313 OF 2020

ICICI Bank Ltd.

...Applicant/
Plaintiff

V/s.

Chanda Kochhar

...Defendant

Mr. Aspi Chinoy, Senior Advocate, Mr. Rohaan Cama, Mr. Rohan Dakshini, Mr. Vishesh Malviya, Mrs. Deepa Shetty, Mr. Kyrus Modi, Mr. Samved Pradhan i/b. Rashmikant and Partners for Plaintiff / Applicant in Interim Application No.1014 of 2022 in Suit No.114 of 2022 and Defendant I.A No.307 of 2020 in Suit No.313 of 2020.

Mr. Darius Khambata, Senior Counsel, Dr. Birendra Saraf, Senior Counsel, Mr. Aditya Mehta, Mr. Ali Antulay, Mr. Rahul Dwarkadas, Ms. Silpa Nair, Ms. Juhi Bahirwani and Ms. Sanaya Contractor i/b. Veritas Legal for Plaintiff in Interim Application No.307 of 2020 and Defendant in Interim Application No.1014 of 2022.

CORAM: R.I. CHAGLA, J.

JUDGMENT RESERVED ON

14TH JULY, 2022

JUDGMENT PRONOUNCED ON

10TH NOVEMBER, 2022

J U D G M E N T (Per R.I. Chagla, J.)

1. Both the Interim Applications are connected and have been heard together.

2. The Interim Application No.1014 of 2022 has been filed in Suit No.114 of 2022 by the Plaintiff - Mrs. Chanda Kochhar (“Mrs. Kochhar”) against the Defendant – ICICI Bank Ltd. (“ICICI Bank”). The Interim Application No.307 of 2020 has been filed in Suit No.313 of 2020 by ICICI Bank against Mrs. Kochhar. The narrow issue involved in these proceedings is whether ICICI Bank having accepted Mrs. Kochhar’s request for early retirement could subsequently treat Mrs. Kochhar’s services with ICICI Bank as “termination for cause” with effect from the date of the acceptance of her early retirement. The relief sought by Mrs. Kochhar in the aforementioned proceedings filed by her is with respect to specific performance of the letter dated 4th October, 2018 by which she claims that ICICI Bank accepted her early retirement from its service. Mrs. Kochhar has sought the reinstatement of her Employee Stock Options (“ESOPs”) under the Employee Stock Option Scheme (“ESOS”). As against this ICICI Bank in the proceedings filed by it has sought clawback of bonuses and

revocation of retirement benefits, including vested and unvested ESOPs on the premise that Mrs. Kochhar's services were treated as "termination for cause" with effect from 4th October, 2018.

3. A brief background of facts is necessary.

4. Mrs. Kochhar was employed by ICICI Bank on 17th April, 1984, initially as a Trainee Officer, and subsequently promoted from time to time. Mrs. Kochhar was appointed as Managing Director and Chief Executive Officer of ICICI Bank on 1st May, 2009 and was thereafter reappointed from time to time for a term ending on 31st March, 2019.

5. During her employment with ICICI Bank Mrs. Kochhar had signed in acceptance various policies of ICICI Bank which included Code of Conduct, Framework for dealing with conflict of interest, Deeds for Covenants and Clawback agreement. Mrs. Kochhar was also required to make various disclosures in compliance of the Companies Act, 1956, the Companies Act, 2013, the Banking Regulation Act, 1949, the SEBI (Listing Obligation and Disclosure) Regulations, 2015, RBI Master Circular on Loans and

Advances and RBI Guidelines on Compensation of Whole Time Directors / CEOs.

6. Mrs. Kochhar was granted ESOPs between the period April, 2007 to March, 2017 with each grant being made under the terms of an Award Confirmation Letter read with the ESOS formulated by ICICI Bank in accordance with SEBI guidelines. The vesting of the ESOPs was also subject to Vesting Confirmation Letter issued to Mrs. Kochhar. Each time grant was made to Mrs. Kochhar, the same was based on performance, continued good conduct and the representations / disclosures made by Mrs. Kochhar to ICICI Bank at such time.

7. In July, 2016 there were news articles which contained allegations of nepotism against Mrs. Kochhar with regard to grant of loans to companies affiliated with Videocon Group / Mr. Venugopal Dhoot as a quid pro quo for investments by Mr. Venugopal Dhoot or his affiliates in NuPower Renewables Pvt. Ltd. ("NRPL"), a company promoted by Mr. Deepak Kochhar, the husband of Mrs. Kochhar.

8. On 26th December, 2016, ICICI Bank appointed a reputed law firm to conduct independent enquiry into the allegations appearing in these news articles.

9. Mrs. Kochhar and her husband in the aforementioned enquiry had provided information and documents indicating that there were no investments made by Mr. Dhoot and his affiliates in NRPL. Based on the information submitted by Mr. Kochhar and her husband, the law firm submitted its report with ICICI Bank stating that there was no merit in the allegations.

10. In April, 2018, ICICI Bank received whistleblower letters primarily alleging abuse of position by Mrs. Kochhar and the business dealings between Videocon Group and Mr. Deepak Kochhar.

11. Mrs. Kochhar addressed a letter dated 20th April, 2018 to ICICI Bank wherein it was stated that Mrs. Kochhar had made inquiries with her husband and ascertained that he had business dealings with Mr. Venugopal Dhoot / Videocon Group over many years. She has submitted that in her disclosures to the Bank, she had disclosed the Directorships of her husband.

However, there was no information available with her that either placed her in a position where she ought to have even considered whether there was any scope for a potential conflict of interest or that placed her in any difficulty in carrying out her functions.

12. There was correspondence exchanged between ICICI Bank and Mrs. Kochhar regarding disclosures of Mr. Deepak Kochhar of his business dealings with Mr. Venugopal Dhoot / Videocon Group. This was by exchanged by correspondence between ICICI Bank and Mrs. Kochhar and Mrs. Kochhar had in turn forwarded a letter dated 30th April, 2018 to ICICI Bank from her husband Mr. Deepak Kochhar, wherein he disclosed his business dealings with Mr. Venugopal Dhoot / Videocon Group. This letter referred to a letter dated 25th April, 2018 which was addressed by Mrs.Kochhar to her husband.

13. On 29th May, 2018, the Board of Directors of ICICI Bank decided to conduct an enquiry into the allegations against Mrs. Kochhar in accordance with the Terms of Reference. Relevant filings were also made by ICICI Bank with the stock exchanges. ICICI Bank had also informed the law firm earlier

appointed that in light of the new disclosures made by Mrs. Kochhar, their earlier report will no longer be valid.

14. ICICI Bank had on 30th May, 2018 vide letter intimated to Stock Exchange of its decision to conduct enquiry into the allegations made in 2018 whistleblowers complaint.

15. Mr. Justice B.N. Srikrishna (Retired Judge of the Supreme Court) was appointed on 6th June, 2018 by Audit Committee of ICICI Bank to conduct an independent enquiry into the allegations against Mrs. Kochhar.

16. At a Board meeting of ICICI held on 18th June, 2018 Mrs. Kochhar communicated her decision to go on leave until the said enquiry was completed. The Board in good faith accepted her decision and made necessary disclosures to the Stock Exchange.

17. On 3rd October, 2018, while the enquiry was still pending Mrs. Kochhar addressed a letter requesting the Board of Directors of ICICI Bank to grant her early retirement.

18. ICICI Bank by its letter dated 4th October, 2018, intimated the Board's approval and referred to benefits under the Early Retirement Scheme ("ERS"). An Undertaking dated 19th July, 2016 signed by Mrs. Kochhar in which she has referred to her contract for employment and the service conditions governing her employment with ICICI Bank including all the Bank's policies as applied to its employees ("collectively referred to as the Contract") was enclosed. In the last paragraph of the Undertaking Mrs. Kochhar has stated that she has recognized and acknowledged that all the above Undertakings and commitments are reasonable and part of her fiduciary duties and obligations to the ICICI group as its senior officer and that it is in the interest of transparency and good governance that the Undertaking is being furnished in writing. Mrs. Kochhar has further stated that she understands that in the event of any breach, ICICI Bank shall be entitled to seek such legal remedies including forfeiture of any benefits she may be entitled to as adjudged in the sole and exclusive discretion of the Bank.

19. In the concluding paragraph of the ICICI Bank's letter dated 4th October, 2018 reference is made to certain ESOP's not yet granted to Mrs. Kochhar and which are pending

approval of RBI. It is stated that such grant of ESOPs would be decided by the Board only upon the conclusion of the Enquiry.

20. Between the period October, 2018 to January, 2019, pending the completion of the Enquiry, Mrs. Kochhar exercised 6,90,000 ESOPs and received other benefits in accordance with the said letter dated 4th October, 2018.

21. Mrs. Kochhar had participated in the Enquiry conducted before Justice Srikrishna (Retired) and in December, 2018 submitted oral and written submissions.

22. Justice Srikrishna (Retired) submitted Enquiry Report on 27th January, 2019 to ICICI Bank wherein the conduct of Mrs. Kochhar has been highlighted. The Enquiry Report has held that Mrs. Kochhar had committed 'Gross / Serious Violations' of the Code of Conduct for extended periods of time.

23. The Board of Directors of ICICI Bank at their meeting considered and deliberated on the findings of the Enquiry Report and conclusion therein. In the light of the findings on serious violations by Mrs. Kochhar having coming to the

knowledge of the Board it was unanimously resolved to treat the separation of Mrs. Kochhar from ICICI Bank as “termination for cause” under the ICICI Bank’s internal policies, schemes and the Code of Conduct with all attendant consequences (including revocation of all her existing and future entitlements such as any unpaid amounts, unpaid bonuses or increments, vested and unvested and unexercised stock options and medical benefits) and claw back all bonuses paid from April, 2009 until March, 2018 and to take further actions as warranted (including notifying or securing regulatory approvals as required). Disclosures to the stock exchanges was also made by ICICI Bank in this regard and the RBI was also immediately informed about the findings.

24. ICICI Bank addressed an email dated 30th January, 2019 to Mrs. Kochhar informing her about the decision taken by the Board of Directors of ICICI Bank on 30th January, 2019. It is stated in the email that communication as regards early retirement benefits to Mrs. Kochhar dated 4th October, 2018 stands revoked with effect from close of business hours on 30th January, 2019. The vested and unvested ESOPs which were earlier allotted to Mrs. Kochhar were revoked and returned to the

common pool of ESOPs in accordance with various policies of ICICI Bank.

25. A letter was addressed by Group Chief Human Resources Officer of ICICI Bank on 1st February, 2019 to Mrs. Kochhar wherein it was reiterated that Mrs. Kochhar's separation from ICICI Bank is treated as 'termination for cause'. The bonuses paid by ICICI Bank to Mrs. Kochhar during the period April, 2009 to March, 2018 was quantified at INR 7,41,36,777/- and which is to clawed back from Mrs. Kochhar on account of such termination for cause.

26. Mrs. Kochhar responded to the email dated 30th January, 2019 and the letter dated 1st February, 2019 addressed by ICICI Bank by her letter dated 4th February, 2019, wherein it was contending that once the Board had accepted her early retirement in October, 2018, the relationship of employer and employee between ICICI Bank and Mrs. Kochhar ended.

27. ICICI Bank addressed letter dated 5th February, 2019 to RBI seeking approval of RBI in terms of Section 35B(1) (b) of the Banking Regulation Act, 1949 to treat the separation of Mrs.

Kochhar from ICICI Bank as 'Termination for Cause' with effect from 30th January, 2019.

28. ICICI Bank on 18th February, 2019 replied to Mrs. Kochhar's letter dated 4th February, 2019 and furnished Mrs. Kochhar with relevant excerpts of the Enquiry Report. Mrs Kochhar was informed that these excerpts were privileged and confidential and were not meant for further circulation.

29. On 13th March, 2019, RBI approved the request of ICICI Bank for 'Termination of Appointment' of Mrs. Kochhar under Section 35B(1) (b) of the Banking Regulation Act, 1949 and directed that it may be noted that the 'Termination of Appointment' would be as on 4th October, 2018 i.e. the last working day of Mrs. Kochhar as MD and CEO of the Bank. It was further advised that ICICI Bank should follow its policies and all applicable laws while dealing with termination of appointment.

30. Thereafter, correspondence was exchanged between Mrs. Kochhar and ICICI Bank on 23rd April, 2019 and 2nd May, 2019 regarding the service of the Enquiry Report on Mrs. Kochhar.

31. Further correspondence was exchanged between Mrs. Kochhar and ICICI Bank from 16th May, 2019 to 23rd September, 2019 wherein ICICI Bank called upon Mrs. Kochhar to pay back bonuses paid to her during the period April, 2009 until March, 2018. Mrs. Kochhar responded to such letters reiterating her stand that seeking restoration of all benefits allegedly granted to her under ICICI Bank's letter dated 4th October, 2018.

32. On 20th November, 2019, Mrs. Kochhar filed Writ Petition No.33151 of 2019 against ICICI Bank and RBI declaring the communication of ICICI Bank dated 4th October, 2018 as valid, subsisting and binding on ICICI Bank and the email dated 30th January, 2019 and the letter dated 1st February, 2019 as illegal, non est, void-ab-initio. Further, declaration was sought for communicated dated 13th March, 2019 issued by RBI as non-est, illegal and void ab-initio. Further consequential relief has been sought in the Writ Petition.

33. During the pendency of the Writ Petition, ICICI Bank filed present Suit No.313 of 2020 against Mrs. Kochhar. The

Writ Petition filed by Mrs. Kochhar was dismissed on 5th March, 2020 by Division Bench of this Court on the ground that the dispute raised by Mrs. Kochhar is a contractual dispute and not amenable to Writ jurisdiction.

34. In February, 2020 Enforcement Directorate had filed a complaint against Mrs. Kochhar and her husband under the Prevention of Money Laundering Act. The Adjudicating Authority, PMLA passed an order dated 6th November, 2020 releasing the provisional attachment of assets and held that there are no proceeds of crime nor money laundering as alleged in the ED's original complaint, thereby rejecting the original complaint.

35. Mrs. Kochhar had filed Special Leave Petition (C) No.13651 of 2020 challenging the order dated 5th March, 2020 by which this Court which had dismissed her Writ Petition as not being maintainable. The SLP was dismissed on 1st December, 2020. The Supreme Court held that they were not inclined to interfere with the impugned order for the reason that the only controversy in the proceedings is whether the resignation of Mrs.

Kochhar having been earlier accepted, the later termination could take place or not. This would fall within realm of contractual relationship between Mrs. Kochhar and the private bank ICICI Bank.

36. In June, 2020 the present Suit No.114 of 2020 was filed and the Interim Application No.1014 of 2022 taken out.

37. Mr. Aspi Chinoy learned Senior Counsel appearing for Mrs. Kochhar has submitted that the Plaintiff's offer of early retirement dated 3rd October, 2018 and ICICI Bank's acceptance thereof by its letter dated 4th October, 2018, resulted in a contract / Agreement for retirement on the terms mentioned therein. This contract of retirement resulted in cessation of the employer - employee relationship of Mrs. Kochhar with ICICI Bank. He has in this context relied upon the decisions of the Supreme Court in *National Textile Corporation (MP) Ltd. Vs. M.R. Jadhav*¹ (paragraph 20) and *HEC Voluntary Retired Employees Welfare Society & Anr. Vs. Heavy Engineering Corporation*² (paragraph 11).

1 (2008) 7 SCC 29.

2 (2006) 3 SCC 708 page 715.

38. Mr. Chinoy has submitted that upon cessation of the employer - employee relationship (under the Retirement Agreement of 4th October, 2018), ICICI Bank could not thereafter take any disciplinary procedure or action against Mrs. Kochhar, nor purport in January, 2019 to terminate Mrs. Kochhar's employment for cause. He has in this context relied upon decision of the Supreme Court in *C.L. Verma Vs. State of Madhya Pradesh*,³ *paragraph 6*.

39. Mr. Chinoy has further submitted that on the Agreement of Retirement dated 4th October, 2018 being arrived at and Mrs. Kochhar's employment with ICICI Bank having consequently ceased, the preliminary Enquiry by Justice Srikrishna (Retired) i.e. the initial fact finding exercise / internal investigations provided under the Bank's Code of Conduct for enabling the Bank to decide whether to initiate a disciplinary procedure, could not have continued, in as much as ICICI Bank could not, post Mrs. Kochhar's early retirement, have initiated any disciplinary proceedings against Mrs. Kochhar. The only reason for continuing the preliminary Enquiry by Justice Srikrishna (Retired)

3 (1998) 2 Supp SCC 437.

was that in the early Retirement Agreement dated 4th October, 2018 it had been agreed that the two benefits i.e. ESOPs granted in 2018 aggregating 1,435,500 options and bonus amounts for the last two years will be determined by the Board of Directors of the ICICI Bank based on the outcome of the Enquiry constituted by the Board under the aegis of Justice Srikrishna (Retired). This was with regard to this specific agreement and the Enquiry was continued for this limited purpose alone and on this basis Mrs. Kochhar participated in a one on one discussion with the head of Enquiry in December, 2018.

40. Mr. Chinoy has submitted that since the outcome / report of the Enquiry was restricted to these two specific benefits only, it could not affect any other rights or benefits of Mrs. Kochhar under the Retirement Agreement. This has been confirmed by ICICI Bank in its notice to the Stock Exchanges dated 4th October, 2018 wherein it is stated that the Board accepted the request of Mrs. Kochhar to seek early retirement from the Bank at the earliest. The Enquiry instituted by the Board will remain unaffected by this and certain benefits will be subject to the outcome of the Enquiry. This is further confirmed by the ICICI

Bank Board's decision accepting Mrs. Kochhar's request for early retirement which had stipulated that treatment of aforementioned two benefits would be determined by the Board on the outcome of the Enquiry.

41. Mr. Chinoy has submitted that ICICI Bank had not even purported to rescind Mrs. Kochhar's Retirement Agreement dated 4th October, 2018 on grounds available under the Contract Act Sections 17 to 19 which are undue influence, misrepresentation or fraud. There are no such pleadings by ICICI Bank in its Affidavit in Reply. The revocation of the early retirement benefits was only a consequences of and premised on the purported termination for cause. This is made clear from ICICI Bank's letter dated 30th January, 2019 addressed pursuant to receipt of the Enquiry Report and wherein ICICI Bank had purportedly decided to treat the separation from the bank as termination for cause.

42. ICICI Bank has not been able to show any legal basis / justification for their act of purporting on 30th January, 2019 to treat Mrs. Kochhar's retirement from the bank as

“termination for cause”, notwithstanding that Mrs. Kochhar had retired and ceased to be an employee under the Retirement Agreement dated 4th October, 2018.

43. Mr. Chinoy has submitted that ICICI Bank’s purported decision dated 30th January, 2019 to terminate Mrs. Kochhar’s (non existent) employment for cause, with all attendant consequences including revocation of all the retirement benefits to which Mrs. Kochhar was entitled under the Retirement Agreement dated 4th October, 2018 was wrongful and a clear breach by ICICI Bank of the Retirement Agreement dated 4th October, 2018 and ICICI Bank’s obligations thereunder. He has submitted that the reliance by ICICI Bank on the preliminary Enquiry Report to justify its purported decision to treat Mrs. Kochhar’s retirement as ‘termination for cause’ and reliance upon the ‘findings’ of the Enquiry Report in ICICI Bank’s Affidavits is misplaced and unwarranted. The preliminary Enquiry Report could not have been relied upon by ICICI Bank to prejudice any right or entitlement of Mrs. Kochhar.

44. Mr. Chinoy has submitted that the Enquiry conducted by Justice Srikrishna (Retired) was only the 'fact finding exercise / internal investigation' provided for in ICICI Bank's Code of Conduct and the report of such an Enquiry was only to enable the Bank to decide whether to start disciplinary proceedings. Mrs. Kochhar's solitary meeting with the Head of Enquiry in December, 2018, was not as part of an adjudicatory/ disciplinary procedure but was only the 'one on one discussion with the concerned employee' contemplated as part of such initial fact finding exercise / internal investigation, under ICICI Bank's Code of Conduct. The disciplinary action would start upon such Report being received by the HRMG and after the detailed fact finding exercise / internal investigation. Upon the receipt of such communication from HRMG the employees would be required to make their submissions in writing which would be taken into consideration while arriving at a decision. The employee against whom an order is passed by the Disciplinary Authority, may within seven working days from the date of receipt of the order, prefer an Appeal in writing to the Appellate Authority. Such written appeals, if received within the stipulated time, would be disposed of by the Appellate Authority by way of a detailed speaking order.

45. Mr. Chinoy has accordingly submitted that the preliminary fact finding / internal investigation report could not by itself be used to affect any right or benefit of Mrs. Kochhar and could never justify or be the basis for ICICI Bank's terminating Mrs. Kochhar's services / employment for cause or revoking any retirement benefits.

46. ICICI Bank by accepting Mrs. Kochhar's offer for early retirement despite being fully aware of the nature of the allegations / complaints being looked into by the preliminary Enquiry necessarily, gave up its right to use the Enquiry Report to initiate disciplinary procedures / a domestic enquiry against Mrs. Kochhar. Hence ICICI Bank cannot seek to rely on conclusions / observations to justify its wrongful acts. Infact, ICICI Bank has itself confirmed that the Enquiry Report was a privileged and confidential document and was protected by attorney client privilege. The Enquiry Report itself has stated in the Part / Chapter headed 'Qualifications and Limitations' that "Neither the HoE, nor the Firm, assumed the role of an adjudicating body or Court for the purposes of this Enquiry. The Enquiry was not conducted as a

domestic enquiry with a view to take disciplinary action or employment action against the Employee....”

47. Mr. Chinoy has submitted that ICICI Bank has not purported to revoke the retirement benefits and ESOPs de hors or independent of its purported ‘Termination for Cause’. Hence no reliance can be placed, as has been sought to be placed by ICICI Bank in its Affidavits on the ESOS, in particular Section (VIII) (4) thereof on the ground of Mrs. Kochhar’s non-compliance with good conduct. Section VIII (4), does not enable ICICI Bank to revoke Mrs. Kochhar’s retirement benefits / ESOPs on any ground of general ‘non-compliance with good conduct’ during the period when she was in employment. The words used therein refer only to compliance with the ‘Undertaking of Good Conduct’ dated 19th July, 2016, annexed to the Retirement Agreement dated 4th October, 2018 and which cast limited obligations on Mrs. Kochhar’s post retirement. These limited obligations / restrictions on Mrs. Kochhar’s are post retirement and with regard to (i) non solicitation / employment of officers or employees of constituents, as well as clients or service providers for a period of one year from

cessation of services and (ii) non publication of information and non disparagement of the ICICI group or its officers.

48. Mr. Chinoy has referred to the Affidavit in Reply of ICICI Bank in the Interim Application preferred by Mrs. Kochhar wherein ICICI Bank has referred to the 'Undertaking of Good Conduct' dated 19th July, 2016. The 'Undertaking of Good Conduct' has also been annexed at Exhibit W to the Plaint in ICICI Bank's Suit. Further ICICI bank's letters dated 30th January, 2019 and 1st February, 2019 which purported to treat Mrs Kochhar as being terminated for cause provided that "the Undertaking for Good Conduct shall continue to operate". He has submitted that the statement of Mrs. Kochhar made in the Affidavit of Sur Rejoinder that 'Reference to Good Conduct' qua ICICI Bank must necessarily refer and be restricted only to the 'Good Conduct Undertaking' dated 19th July, 2016 which was in fact annexed and made a part of the early Retirement Agreement letter dated 4th October, 2018, has not been disputed by ICICI Bank.

49. Mr. Chinoy has submitted that the stipulation in the ERS 2005 (as modified in July, 2016) reserving to the Bank the

right to withdraw any benefits given under the ERS on the ground of 'non-compliance with good conduct', mirror the provision made in Section (VIII) (4) of the ESOS and refer only to compliance with the 'Undertaking of Good Conduct' dated 19th July, 2016 which cast limited obligations on Mrs. Kochhar post her retirement. The clause does not enable ICICI Bank to revoke Mrs. Kochhar's retirement benefits on any general ground of non-compliance with good conduct during the period when she was an Employee.

50. Mr. Chinoy has submitted that ICICI Bank's case is that ICICI Bank did not accept Mrs. Kochhar's offer of Early Retirement by referring to any standard terms and conditions of the ICICI Bank's ERS. The Bank's Board resolution / decision dated 4th October, 2018 accepting Mrs. Kochhar's offer of early retirement sets out the 'Terms governing early retirement'. These were not the standard ERS terms nor did they refer to the standard ERS terms and conditions. The stipulation / agreement that Mrs. Kochhar's entitlement to two benefits would be determined by the Board on completion of the Enquiry was clearly not in the standard ERS Terms. These were the terms communicated to Mrs. Kochhar by ICICI Bank in its letter of acceptance of Early Retirement dated

4th October, 2018. There is no mention in the said letter of any condition enabling the Bank to withdraw benefits granted under the ERS on grounds of non compliance with good conduct.

51. Mr. Chinoy has submitted that ICICI Bank has ex facie no real defence to Mrs. Kochhar's claim impugning the purported termination for cause after having agreed to Mrs. Kochhar's retirement and seeking specific performance of the terms of Retirement Agreement and that unless interim orders are made Mrs. Kochhar will be wrongfully deprived of her agreed retirement benefit / entitlement to presently get ESOPs / shares at discounted prices. The interest of justice as well as balance of convenience require that interim relief sought for by Mrs. Kochhar in her Interim Application be granted.

52. Mr. Darius Khambata, learned Senior Counsel appearing for ICICI Bank has submitted that the ESOPs contract and the employment contract are two separate contracts. He has submitted that Mrs. Kochhar's contract of employment for ICICI Bank is governed by her letter of appointment, Board approvals and RBI approvals for appointment as MD and CEO, Deeds of

Covenants and the various policies of ICICI Bank, (i.e. Code of conduct, Framework for managing conflict of interest, etc.) On the other hand, the ESOPs issued to Mrs. Kochhar are governed by a separate and independent contract the terms of which are contained in ICICI Bank's Employee Stock Option Scheme (ESOS) and the various award confirmations and vesting confirmations issued to Mrs. Kochhar from time to time. The fact that ESOPs contract are separate from the contract of employment is evident from ESOS which provides that "neither the scheme, nor Award Confirmation nor Vesting Confirmations shall form part of any contract of employment between the bank and the participant".

53. Mr. Khambata has submitted that ICICI Bank's policies such as its Code of Conduct and Framework for managing conflict of interest and the Deeds of Covenants executed by senior employees from time to time require the employees to maintain good conduct and not to engage in various acts considered to be misconduct. He has further relied upon the Clawback Letter dated 8th December, 2016 signed by Mrs. Kochhar specifically providing for clawback of previously paid performance bonus in the event of an enquiry determining gross negligence or integrity breach by an

employee. The ESOPs contract also requires employees to comply with the Code of Conduct and to ensure good conduct, not only during their employment but also thereafter. He has relied upon the relevant clauses in the ESOS contract. In the ESOS it is provided that if the employment is terminated for 'cause' (defined to include act of willful or gross misconduct) no option shall vest in such employee and the vested options, to the extent then unexercised, shall cease to be exercisable and shall lapse and stand terminated and expire forthwith.

54. Mr. Khambata has then dealt with the submission of Mr. Chinoy that, ICICI Bank's letter dated 4th October, 2018 brought into existence a new contract. He has submitted that for the letter dated 4th October, 2018 to bring into existence a new contract with new rights and obligations between ICICI Bank and Mrs. Kochhar, it is essential that there must be some consideration for the contract. In the circumstances, the letter dated 4th October, 2018 cannot constitute a new contract between the parties.

55. Mr. Khambata has submitted that if the letter dated 4th October, 2018 constitutes a new contract that contract must be in terms of ICICI Bank's ERS. Mr. Khambatta has submitted that the offer dated 3rd October, 2022 is necessarily an offer under the ERS and not independent of it. Consequently, any acceptance by ICICI Bank of this offer is also necessarily on the basis that the offer was on the basis of the terms of the ERS. This is made clear by the said letter dated 4th October, 2018 which itself expressly refers to the ERS as the basis for granting early retirement benefits to Mrs. Kochhar.

56. Mr. Khambata has submitted that, the case relied upon by Mrs. Kochhar in the case of *National Textile Corporation (Supra)* wherein the Supreme Court held that where an offer for voluntary retirement in terms of a scheme of voluntary retirement is accepted, the matter relating to implementation of such offer is governed by the terms and conditions of the scheme. Mr. Khambatta has submitted that it is only for the first time in Sur Rejoinder oral arguments that it was contended on behalf of Mrs. Kochhar that the terms of her early retirement contract are not those in the ERS, but only those set out in Annexure – 1 to the

Board Resolution dated 4th October, 2018. This contention is misconceived and untenable as no case has been pleaded or asserted on Affidavit by Mrs. Kochhar. The Board Resolution itself notes that Mrs. Kochhar was eligible to apply for ERS. Mrs. Kochhar's early retirement would be in line with treatment accorded to other whole-time directors or employees who have availed of ERS. Annexure 1 is only a list of "Benefits on early retirement request being accepted" and cannot be said to override the ERS or be exhaustive of the terms of Mrs. Kochhar's early retirement. The Board Resolution (including Annexure I) was not communicated to Mrs. Kochhar at the time that the letters of 3rd October, 2018 and 4th October, 2018 were exchanged and hence no independent contract based upon Annexure 1 could have come about.

57. Mr. Khambata has submitted that the ERS itself expressly provides that "in the event of non compliance of good conduct the Bank reserves the right to review vesting and exercise of options over the Exercise Period" and "The Bank reserves its right to withdraw any features / benefits given under the ERS at its sole discretion in the event of non compliance with good conduct".

58. Mr. Khambata has submitted that assuming that letter dated 4th October, 2018 brought into existence a new contract, the terms of this contract entitled the ICICI Bank to review and withdraw Mrs. Kochhar's ESOPs and other retirement benefits if she failed to comply with good conduct.

59. Mr. Khambata has submitted that in any event, the 4th October, 2018 letter was issued on account of fraudulent misrepresentation by Mrs. Kochhar by not disclosing her misconduct and suppressing various facts from ICICI Bank and was, therefore, subsequently revoked by the communication dated 30th January, 2019 addressed by ICICI Bank to Mrs. Kochhar.

60. Mr. Khambata has thereafter made submissions on reference to good conduct in the contract is not a reference to the Undertaking dated 19th July, 2016. He has placed reliance upon the plain meaning of words used in the ESOS wherein the words are 'undertaking of continued good conduct' and wherein no specific reference is made to 'the Undertaking dated 19th July, 2016'. It would be contrary to the object of the ESOS to say that 'good conduct' must be given a restricted meaning such that if

misconduct of an employee (including by suppression of such misconduct) is discovered after his / her retirement, such an employee would nevertheless be entitled to retain his / her ESOPs.

61. Mr. Khambata has submitted that in the 'Undertaking of Good Conduct' itself there is reference to the behaviour of an employee during the course of its employment as can be seen from the paragraphs (c), (d) and (e) of the Undertaking which clearly shows that the Undertaking itself applies to conduct of employees during and after their employment. Accordingly, there is no merit in the contention on behalf of Mrs. Kochhar that 'good conduct' only refers to the Undertaking which provides for post retirement undertakings. He has also relied upon the first paragraph of the Undertaking wherein it is stated that these 'undertakings and commitments' would include 'all the Bank's policies as applied to its employees (collectively referred to as the 'Contract')'. Accordingly, the obligations in the Undertaking are not restricted only to the clauses stated in the Undertaking but would also include the obligations under ICICI Bank's policies applicable to its employees.

62. Mr. Khambata has submitted that the 4th October, 2018 letter cannot and does not put to an end the rights and obligations of the parties under the Employment Contract and ESOPs contract. Mrs Kochhar in the pleadings in her Suit sought to make out a case akin to waiver as she contends that by accepting her request of early retirement, the Bank was precluded in law from purporting to terminate the services of Mrs Kochhar and from resiling from its contractual commitments flowing from the 4th October, 2018 letter. He has submitted that ICICI Bank had never waived its rights by initial acceptance of Mrs. Kochhar's early retirement. There can be no waiver unless the person against whom the waiver is claimed had full knowledge not only of his rights but also of the facts enabling him to take effectual action for the enforcement of such rights and therefore, waiver must be unequivocal after having knowledge of all the rights. In this context Mr. Khambatta relied upon decisions of the Supreme Court Case in *Associated Hotels of India Ltd. Vs. S.B. Sardar Ranjit Singh*⁴ paragraphs 2 and 14, *P. Dasa Muni Reddy Vs. P. Appa Rao*⁵

4 AIR 1968 SC 933

5 (1974) 2 SCC 725.

*at paragraph 13 and Kalpraj Dharamshi V. Kotak Investment Advisors Ltd.*⁶ *at paragraphs 125 to 129.*

63. Mr. Khambata has submitted that at the time when ICICI Bank accepted Mrs. Kochhar's request for early retirement it did not have knowledge of all the facts regarding Mrs. Kochhar's misconduct and breaches. Accordingly, there could have been no waiver by ICICI Bank of its rights under the employment contract and the ESOPs contract.

64. Mr. Khambata has submitted that it has been held by the Supreme Court in *United Bank of India Vs. Bachan Prasad Lal*⁷, *paragraph 11* that merely because an employee stood superannuated that would not absolve him from the misconduct committed by him in the discharge of his duties. The Bank employee always holds the position of trust where honesty and integrity are the sine qua non but it would never be advisable to deal with such matters leniently.

65. Mr. Khambata has submitted that it is clear from the ESOPs contract that it is a separate contract which governs the

6 2021 (10) SCC 401.

7 2022 SCC Online 173.

employee to whom the ESOP is issued even after the employment comes to an end, whether by termination or by retirement. Thus even if an employee commits a violation / misconduct during his employment, but the same is only discovered by ICICI Bank after the employee's retirement, the ESOPs contract allows ICICI Bank to forfeit such an employee's ESOPs.

66. Mr. Khambata has thereafter made submissions on the circumstances in which the ICICI Bank had accepted Mrs. Kochhar's request for early retirement. He has referred to Section 10B(1) of the Banking Regulation Act, 1949 which requires a banking company with a chairman appointed on a part time basis to entrust the management of the whole of the affairs of the banking company to a managing director. Section 10B(9) of the Banking Regulation Act begins with a non-obstante clause and provides that where a managing director "dies or resigns or is by infirmity or otherwise rendered incapable of carrying out his duties or is absent on leave or otherwise in circumstances not involving the vacation of his office", then the banking company may, with the approval of the RBI, make interim arrangements for carrying

out the duties of the Managing Director only for a maximum period of four months.

67. In the present case, Mrs. Kochhar went on leave from 18th June, 2018 i.e. after ICICI Bank's Board of Directors initiated Enquiry headed by Justice Srikrishna (Retired) to look into the matter of the whistleblower complaint made against Mrs. Kochhar in 2018. ICICI Bank had made interim arrangement for her duties to be carried out during Mrs. Kochhar's absence and obtained RBI's approval for such interim arrangement with effect from 18th June, 2018. As per the terms of Section 10B(9) of the Banking Regulation Act, the maximum permissible four months period for such an interim arrangement was to expire on 17th October, 2018. The Board would, therefore, not have been in a position to accept any further extension of Mrs. Kochhar's leave beyond 17th October, 2018. However, at the beginning of October, 2018, the Enquiry of Justice Srikrishna (Retired) was still in process. On 3rd October, 2018 i.e. shortly prior to the expiry of the four months period, the Board received a request from Mrs. Kochhar for early retirement under the ERS. The Board accepted her request on 4th October, 2018.

68. Mrs. Kochhar has herself relied on the statutory requirements of the Banking Regulation Act, as the purported reason for her decision to seek early retirement. Considering that the Enquiry was ongoing and likely to continue beyond 18th October, 2018, the ICICI Bank could not have asked Mrs. Kochhar to resume her duties as MD and CEO pending the Enquiry. Equally ICICI Bank could not have terminated / removed Mrs. Kochhar as MD and CEO pending the Enquiry. Accordingly, at the relevant time only option available to ICICI Bank was to accept Mrs. Kochhar's request for early retirement.

69. Further at the time when ICICI Bank accepted Mrs. Kochhar's request for early retirement, full facts regarding Mrs. Kochhar's conduct and her non compliance with good conduct, were not known to ICICI Bank at the time of issuance of the letter dated 4th October, 2018. There could, therefore, have been no waiver on the part of ICICI Bank. He has placed reliance upon the decision of the Supreme Court in *Dhanukdhari Singh V/s. Nathima Sahu*⁸ in support of his submission that burden of proof of knowledge is on one who relies upon a waiver and such

8 1907 (6) CLJ 62

knowledge must be plainly made to appear. Mrs. Kochhar has not been able to prove that ICICI Bank had knowledge of all the facts regarding her breaches and misconducts on 4th October, 2018. Therefore, there could have been no waiver on the part of ICICI Bank.

70. Mr. Khambata has submitted that reliance placed by Mrs. Kochhar in this regard on the last paragraph of the 4th October, 2018 letter is incorrect in as much as the benefits mentioned therein were awaiting approval from the RBI and till then had not even been granted to Mrs. Kochhar. Such benefits were unlike the other ESOPs which had all been granted to Mrs. Kochhar in the past. It was clarified therein that even if the RBI approves such benefits, the Board would not proceed with making any determination on the same pending the Enquiry by Justice Srikrishna (Retired).

71. Mr. Khambata has thereafter made submissions on the findings of gross and serious misconduct by Mrs. Kochhar coming to the knowledge of ICICI Bank only in January, 2019 upon receipt of the Enquiry Report of Justice Srikrishna (Retired). He

has referred to certain findings in the Enquiry Report including non disclosure of Mrs. Kochhar's husband Mr. Deepak Kochhar's involvement in Credential Finance Limited, a company in which the Videocon group was a substantial shareholder along with Mr. Kochhar and his brother. He has submitted that though Mrs. Kochhar has contended that the Enquiry Report was marked as privileged / confidential / private, this does not change the fact that it was from a perusal of the Enquiry Report that ICICI Bank for the first time became aware of the gross and serious misconduct committed by Mrs. Kochhar whilst she was the MD and CEO of ICICI Bank. Mr. Khambatta has submitted that it is unacceptable that Mrs. Kochhar was not aware of the involvement of her husband in dealings with the Videocon group and that correspondence was exchanged between them to ascertain this position. There has been selective disclosures by Mrs. Kochhar of some of Mr. Kochhar's directorships, which demonstrates that she was aware of his business dealings and consciously chose not to make disclosures regarding his directorships in Credential Finance Limited and Quality Techno Advisers Private Limited, Companies in which Videocon group was substantial shareholder and / or which was part of the Videocon group.

72. Mr. Khambata has submitted that the Order dated 6th November, 2020 of the Adjudicating Authority (“AO Order”) under the Prevention of Money Laundering Act, 2002 (“PMLA”) cannot be relied upon by Mrs. Kochhar to contend that she has been exonerated of any misconduct. The PMLA proceedings were restricted to allegations of money laundering which is distinct from the issue of non-disclosure of conflict of interests by Mrs. Kochhar. In fact the AO order itself notes that the questions of conflict of interest, disclosure obligations and compliance with fiduciary duties are beyond the scope of adjudication under the PMLA and are therefore, not required to be dealt with in the order. Further, the AO order states that the proceedings before the Adjudicating Authority was not a trial but only a prima facie determination of whether a case existed demonstrating that Mrs. Kochhar had committed an offence under PMLA. This is irrelevant to the issues arising in these suits. He has relied upon the order passed by the Appellate Authority under PMLA wherein a prima facie case has been found in favour of the Enforcement Directorate and a status quo has been directed to be maintained with respect to the relevant assets of Mrs. Kochhar and it has been specifically stated that the findings in the AO order

dated 6th November, 2020 should not be considered final pending the appeal.

73. Mr. Khambata has thereafter dealt with the contention on behalf of Mrs. Kochhar that the disciplinary procedure under the Code of Conduct was not followed in the acceptance by ICICI Bank of the Enquiry report of Justice Srikrishna (Retired). He has submitted that this contention is misconceived as there was no pleaded case in Mrs. Kochhar's suit or in the several Affidavits filed by her making such a contention. Mrs. Kochhar's Leave Petition under Order II Rule 2 only indicates that she intends to challenge the "process and the findings" of the Enquiry conducted by Justice Srikrishna (Retired). Further from the Code of Conduct, it is evident that procedure of disciplinary action set out therein only deal with employees up to the level of Senior General Manager. In fact the highest appellate authority under such procedure is the MD and CEO of the ICICI Bank i.e. the position held by Mrs. Kochhar. The Code of Conduct only contains an 'indicative guidance' for formulating disciplinary procedures and ICICI Bank has the flexibility to formulate the appropriate procedure to be followed without taking action against an

employee, including omitting any or all levels of action under the Code of Conduct. He has submitted that in fact, taking account the fact that allegations were made against the MD and CEO of ICICI Bank, in order to ensure a fair and independent process, the Board of Directors appointed Justice Srikrishna (Retired) to conduct the enquiry.

74. Mr. Khambata has made submissions with regard to Mrs. Kochhar not being entitled to reliefs as she had sought to mislead this Court by making false statements with respect to ERS and with respect to the Vesting Confirmation. He has submitted that Mrs Kochhar contended that the copy of the ERS produced by ICICI Bank was 'false and incorrect'. She had submitted that the document issued to her viz letter dated 24th September, 2018 provided her with the 'ERS – 2005' and the benefits she would be entitled thereunder. She had submitted that this document did not contain the clause "The bank reserves the right to withdraw any features / benefits given under ERS at its sole discretion in the event of non-compliance with good conduct". It was then that ICICI Bank placed on record the ERS as amended in 2016 which was approved by Mrs. Kochhar as ICICI Bank's MD

and CEO which contained the above clause. Mr. Khambata has submitted that the document demonstrates the falsity of Mrs. Kochhar's statements made on oath before this Court.

75. Regarding the false statements with respect to the Vesting Confirmation, Mr. Khambata has submitted that Mrs. Kochhar had not produced the ESOS, Award Confirmations and her Vesting Confirmations along with the Suit. ICICI Bank had initially produced only a sample Vesting Confirmation to show that they contained terms which entitled ICICI Bank to review vesting and exercise of ESOPs over the Exercise Period in the event of non-compliance with good conduct. Mrs. Kochhar has in fact in her Affidavit in Sur Rejoinder filed on 30th June, 2022 falsely stated that the sample Vesting Confirmation was 'false / incorrect' and that 'no such letter containing any such stipulation was ever issued to or received' by Mrs. Kochhar. Accordingly, ICICI Bank produced copies of emails addressed to Mrs. Kochhar enclosing the Vesting Confirmation which contained the said term. These emails demonstrate the false statement made by Mrs. Kochhar on oath to mislead this Court. He has submitted that Mrs. Kochhar has thus not approached this Court with clean hands. He has relied upon

*S.P. Chengalvaraya Naidu (Dead) by L.Rs V/s. Jagannath (Dead) by LR's and Ors.*⁹ at paragraph 6 and *Oswal Fats and Oils Limited V/s. Additional Commissioner (Administration) Bareilly Division & Ors.*¹⁰ at paragraphs 19-25 in this context.

76. Mr. Khambata has submitted that in the light of the aforesaid submissions made on behalf of ICICI Bank and in particular their entitlement to revoke the acceptance of early retirement by terminating the services of Mrs. Kochhar 'with cause' on account of the findings in the Enquiry Report filed by Justice Srikrishna (Retired) which ICICI Bank was not aware of when they initially accepted the early retirement, the relief sought for in the Interim Application filed by ICICI Bank requires to be granted. Further Mrs. Kochhar is not entitled to any reliefs in the Interim Application filed by her in her Suit as she has not approached this Court with clean hands. In any event, ESOPs claimed by Mrs. Kochhar have already lapsed and added to the common pool of ESOPs from which the same has been distributed to other eligible employees of ICICI Bank. Further no prejudice would be caused to Mrs. Kochhar if such interim reliefs are refused since ICICI Bank is

9 AIR 1994 SC 853.

10 (2010) 4 SCC 728.

a listed Company and in the event Mrs. Kochhar succeeds in her Suit, equivalent shares could be granted to her along with any monetary loss suffered by her on account of any fall in share prices. Further the relief sought for by Mrs. Kochhar is in the nature of final relief and would be equivalent to a decree at the interim stage. Further, it would cause huge prejudice to ICICI Bank since it would be impossible for ICICI Bank to cancel such shares and recover the same from Mrs. Kochhar, if Mrs. Kochhar sells the shares in the interim period in the event ICICI Bank ultimately succeeds in its Suit.

77. Having considered the rival submissions, it would be necessary to note the circumstances in which ICICI Bank had accepted the offer of early retirement made by Mrs. Kochhar. At the time when the ICICI Bank had accepted Mrs. Kochhar's offer of early retirement, the Enquiry initiated by ICICI Bank's Board of Directors on 6th June, 2018 was ongoing and which Enquiry was headed by Justice Srikrishna (Retired).

78. ICICI Bank had a case before it where a news article raising various allegations against Mrs. Kochhar had

previously appeared in July, 2016. Pursuant to which a reputed law firm conducted an independent enquiry and found no merit in the allegations in the news article. However, two years later ICICI Bank received a whistleblower complaint with similar allegations as in the 2016 news articles. This then led to initiation of the Enquiry headed by Justice Srikrishna (Retired).

79. The contention on behalf of Mrs. Kochhar is that the ICICI Bank in accepting Mrs. Kochhar's offer of early retirement resulted in a contract / Agreement for Retirement on terms mentioned therein which could only be rescinded on the grounds available under Section 17 to 19 of Contract Act i.e. for undue influence, misrepresentation or fraud. This is on the premise that the contract / Agreement for Retirement had put to an end the rights and contentions of the parties under the pre-existing employment contract and ESOPs contract. Thus, it is the case of Mrs. Kochhar that the acceptance of early retirement by ICICI Bank vide its letter dated 4th October, 2018 constituted novatio and brought to an end the employment contract and ESOPs contract. This contention on behalf of Mrs. Kochhar cannot be accepted as in my prima facie view the contention of Mr. Khambata on behalf of

ICICI Bank that the ESOPs contract and the employment contract are two separate contracts requires acceptance. The ESOPs issued to Mrs. Kochhar are governed by the terms contained in ESOS and Award Confirmations as well as Vesting Confirmations issued to Mrs. Kochhar from time to time.

80. In the ICICI Bank Employees Stock Option Scheme – 2000 (“ESOS”) certain terms and conditions governing Mrs. Kochhar’s ESOPs are relevant to note and which are as follows:-

(i) In Section III (z) ‘vesting confirmation’ has been defined to mean “a written communication by the bank to the participant, evidencing vesting of options”.

(ii) Under Section VIII [2(b)], it is provided that “no option or any part thereof shall vest.

(a)

(b) if the participant’s employment is terminated by the Bank for cause”.

(iii) Under Section VIII (4) it is provided as under:-

“If the participant employment terminates due to retirement (including pursuant to in early / voluntary retirement scheme), the Options shall vest by such period as stipulated in the Award Confirmation, subject to the participant demonstrating compliance with the Code of Conduct including undertaking of continued good conduct”.

(iv) In Section X(3), Exercise of Options has been provided which is as under

“if the participant’s employment is terminated by the Bank for the cause the Participant’s vested options, to the extent then unexercised, shall thereupon cease to be exercisable and shall lapse and stand terminated and expired forthwith”.

(v) In Section XI (8), it is provided as under:

“The grant of an Option shall not be construed as giving a Participant the right to be retained in the employment of the Bank. Neither the scheme nor Award Confirmation nor Vesting Confirmation shall form part of any contract of employment between the Bank and the Participant....”

(vii) In Section XII Award Confirmation provides as under:

“The grant of options hereunder shall be evidenced by an Award Confirmation which shall be delivered to the Participant and shall specify the number of Options granted and the terms and conditions of the grant of Options and rules applicable thereto”.

(viii) In Section XIII Vesting Confirmation provides as under:-

“The vesting of Options hereunder, shall be evidenced by a Vesting Confirmation which shall be delivered to the Participant and shall specify the number of Options vested and the terms and conditions of the vesting of Options and rules applicable thereto.”

81. The sample Award Confirmation Letter which is annexed at Exhibit 8 of the Affidavit in Rejoinder in Interim Application No.307 of 2020, states as under:-

“... Please note that the Bank reserves the right to review vesting of the Options over the Exercise Period in the event of non-compliance with good conduct”

82. Further the Statement of Risks – 4 which is part of the Sample Award Confirmation letters reads as under:-

Vesting : The options will lapse if the employment is terminated prior to vesting. Even after the options are vested, the unexercised options may be forfeited if the employee is terminated for gross misconduct.

83. In the Sample Vesting Confirmation Letter which is annexed at Exhibit 9 of the Affidavit in Rejoinder in Interim Application No.307 of 2020,it is provided as under:-

“You may note that vesting and subsequent exercise of the Options is subject to the terms and conditions specified in the Scheme. Please note that the bank reserves right to review vesting and exercise of the options over the Exercise Period in the event of non-compliance with good conduct”.

84. Thus, it is clear from the above extracted provisions of ESOS as well as the Sample Award Confirmation Letter and Sample Vesting Confirmation Letters that, the grant of options to the employee was treated as a separate contract and not to be construed as giving the Participant the right to be retained in the employment of the Bank. Further, neither the ESOS nor Award Confirmation nor Vesting Confirmation shall form the part of any contract of employment between the Bank and the Participant. The compliance with the Code of Conduct i.e. good conduct was mandatory and non-compliance thereof would result in the review by the Bank of the vesting and exercise of the options over the Exercise Period which was not to exceed the tenth anniversary from the date of vesting (Annexure to Award Confirmation i.e. Vesting Schedule). Accordingly, in my prima face view, the mere acceptance of the early retirement of Mrs. Kochhar cannot result in wiping out the rights and obligations of the parties under the ESOS and / or ESOPs Contract.

85. In contending on behalf of Mrs. Kochhar that the acceptance of Mrs. Kochhar's request for early retirement, the ICICI bank was precluded in law from terminating the services of Mrs Kochhar and from resiling from its contractual commitments flowing from the 4th October, 2018 letter is concerned, a case akin to waiver of rights by ICICI Bank is sought to be made out. It is well settled that a case of waiver can only be claimed against the person provided he had full knowledge not only of his rights but also of the facts enabling him to take effectual action for the enforcement of such rights. Thus, waiver must be unequivocal. The decisions of the Supreme Court relied upon by Mr. Khambata viz. *Associated Hotels of India Ltd. (Supra)*, *P. Dasa Muni Reddy (Supra)* and *Kalpraj Dharamshi (Supra)* are apposite. In view of the aforementioned circumstances when the early retirement offer was accepted and in particular, considering that ICICI Bank did not have benefit of the findings in the Enquiry Report of Justice Srikrishna (Retired), there can be no waiver by ICICI Bank of its rights under the employment contract and ESOS as contended. This is apart from my prima facie finding that the ESOPs issued to the employee continued to be governed by the ESOS and / or

ESOPs contract even after employment of the employer would come to an end, whether by termination or retirement.

86. It is necessary to note that Mrs. Kochhar herself had proceeded on leave from 18th June, 2018. This was subsequent to ICICI Bank's Board of Directors initiating the Enquiry headed by Justice Srikrishna (Retired). Under Section 10B(9) of the Banking Regulation Act, a maximum permissible period of four months is provided for an interim arrangement to be made for carrying out the duties of Managing Director. The period of four months of interim arrangement in the present case expired on 17th October, 2018. The Board was thus not in a position to accept any further extension of Mrs. Kochhar's leave beyond the maximum period. When the offer of early retirement was made by Mrs. Kochhar, Justice Srikrishna (Retired) was still in the process of conducting Enquiry and upon ICICI Bank receiving the request from Mrs. Kochhar for early retirement, the Board considering the aforementioned provision of the Banking Regulation Act accepted her request on 4th October, 2018. Mrs. Kochhar has herself admitted and relied upon the statutory requirements of the

Banking Regulation Act as the reason for her decision to seek early retirement.

87. Much has been said about the Undertaking of Good Conduct. Mr. Chinoy has contended that the reference in the ESOS to 'Good Conduct' is to the 'Undertaking of Good Conduct dated 19th July, 2016'. Further, he has contended that the said Undertaking is also referred to in the ERS and is made applicable as one of the conditions for acceptance of the early retirement offer made by Mrs. Kochhar. Thus, the contention is that whether in the employment contract or the ESOPs contract, the words 'Good Conduct' necessarily refers to the 'Undertaking dated 19th July, 2016 of Good Conduct' and which is made part of the acceptance of early retirement letter dated 4th October, 2018. The Undertaking of Good Conduct is sought to be limited to obligations / restriction of Mrs. Kochhar's post retirement namely (i) non solicitation / employment of officers or employees of constituents, as well as clients or service providers for a period of one year from cessation of services and (ii) non publication of information and non disparagement of the ICICI Group or its officers. I am not inclined to accept these contentions, in view of the fact that apart

from the prima facie view arrived at that ESOPs Contract and Employment Contract are two separate contracts, there is no reference made in the ESOS, in particular Section VIII (4) thereof that “the undertaking of continuing good conduct” is referable to the Undertaking of Good Conduct dated 19th July, 2016 annexed to the ICICI Bank’s letter of acceptance of early retirement offer dated 4th October, 2018. Further, in Section VIII (4) of the ESOS the words are “subject to the Participant demonstrating compliance with the Code of Conduct including Undertaking of Continuing Good Conduct”. Thus, the demonstration of compliance with the Code of Conduct cannot be limited to the Undertaking dated 19th July, 2016. It is a well settled position of law that the Court is not to explore the undisclosed intention behind the words of a contract but only to take the plain meaning of words used with reference to the object of the whole of the terms of the contract. This has been held by the Supreme Court in *Bangalore Electricity Supply Co. Ltd. Vs. E.S. Solar Power Pvt. Ltd.*¹¹. In my view there is much merit in the submission of Mr. Khambata that the whole purpose and object of ESOS was to reward good performance of employees and to give them a stake in the future success of the Company. It would be

11 2021 6 SCC 718.

contract to the object of ESOS to say that “Good Conduct” is given a restricted meaning such that, if the misconduct of an employee is discovered after his / her retirement, such an employee would nevertheless be entitled to retain his / her ESOPs.

88. The first paragraph of the Undertaking of Good Conduct dated 19th July, 2016 states that these “undertaking and commitments” would include “all the Bank’s policies as applied to its employees (collectively referred to as the ‘contract’)”. Thus the Undertaking necessarily included the obligations under ICICI Bank’s policies applicable to the employees which would include the Code of Conduct and ESOS. Further, Paragraphs (c), (d) and (e) of the Undertaking itself has references to the behaviour of the employee during the course of his employment which clearly shows that the Undertaking itself applies to conduct of employees during and after the employment. Thus, I find no merit in Mrs. Kochhar’s contention that “Good Conduct” is limited to post retirement.

89. I do not find any merit in the submission of Mr. Chinoy that the Enquiry headed by Justice Srikrishna (Retired) was

only allowed to proceed, even after acceptance of the early retirement by ICICI Bank, in view of the last paragraph of the said letter dated 4th October, 2018 which refers to certain specific benefits of early retirement which was made subject to the Enquiry by Justice Srikrishna (Retired). The benefits referred to in the last paragraph of the letter appears to be those benefits yet to be granted and for which approval was awaited from RBI. These benefits are unlike the other ESOPs benefits which had been granted in the past to Mrs. Kochhar. Thus, it was clarified that if RBI approved such benefits, the Board would not proceed with making any determination on the same pending enquiry by Justice Srikrishna (Retired).

90. It appears from the findings of the Enquiry Report submitted by Justice Srikrishna(Retired) that there is non disclosure by Mrs. Kochhar of certain directorships of her husband Mr. Deepak Kochhar in Companies where Videocon Group was either a substantial shareholder or which were part of the Videocon group. Further, Mrs. Kochhar had sat on various committees of ICICI Bank which sanctioned loans to Videocon Group and the Essar Group of which Mr. Deepak Kochhar had

direct or indirect business dealings without disclosing the actual / potential conflicts of interest. Knowledge of these facts came to ICICI Bank upon receipt of the Enquiry Report on 27th January, 2019. Thus ICICI Bank had immediately thereafter taken steps to revoke the acceptance of early retirement benefits with immediate effect by its letter dated 30th January, 2019 and thereafter seek RBI's approval to treat the separation of Mrs. Kochhar "as termination for cause". This approval of RBI came on 13th March, 2019 with effect from 4th October, 2018.

91. Prima facie, I find that the revocation of the early retirement acceptance is valid and do not find, given the facts in the present case, any merit in the contention on behalf of Mrs. Kochhar that once there is cessation of employer and employee relationship, then acceptance of early retirement cannot be revoked. The decisions relied upon by Mr. Chinoy in *National Textile Corporation (MP) Ltd. (Supra)*, and *HEC Voluntary Retired Employees Welfare Society (Supra)* are inapplicable to the facts of the present case.

92. I do not find any merit in the submission that the Enquiry was a preliminary Enquiry headed by Justice Srikrishna (Retired) and that such preliminary Enquiry could not result in disciplinary procedure or action taken against Mrs. Kochhar after cessation of employer and employee relationship by acceptance of early retirement on 4th October, 2018. The disciplinary action set out in the Code of Conduct only deal with employees up to the level of Senior General Manager and in fact the highest appellate authority under such procedure is the MD and CEO of the ICICI Bank i.e. the position held by Mrs. Kochhar. The Code of Conduct only contains an indicative guidance for formulating disciplinary procedures. Undoubtedly, ICICI Bank has the flexibility to formulate the appropriate procedure to be followed when taking action against an employee, including omitting any or all levels of action under the Code of Conduct. Further, taking into account the fact that for allegations of misconduct against the MD and CEO, I find that there is no specific procedure identified under the Code of Conduct. I further find no fault in the Enquiry headed by Justice Srikrishna (Retired), which is with the view to ensure a fair and independent process,

particularly with regard to the allegations of misconduct made against MD and CEO of the ICICI Bank.

93. It is an admitted position that Mrs. Kochhar had provided both oral and written submissions during the Enquiry upon the opportunity given to her and it is not now open for Mrs. Kochhar to contend that the Enquiry was in breach of principles of natural justice. Further, Mrs. Kochhar does not seem to have indicated the prejudice caused to her by her not being given a second hearing as contended and as to what additional material she would have placed before Justice Srikrishna (Retired), if she was given a second hearing.

94. Having considered that the acceptance of early retirement by ICICI Bank was on account of its not having complete knowledge of the facts, including non disclosure by Mrs. Kochhar of various facts which were only learnt of upon receipt of the Enquiry report by Justice Srikrishna (Retired), in my prima facie view, ICICI Bank was justified in revoking acceptance of early retirement vide communication dated 30th January, 2019.

95. I find that Mrs. Kochhar has not come with clean hands in that she had feigned ignorance of the ERS (amended in 2016) by placing reliance upon letter dated 24th September, 2018 issued by the Board of ICICI Bank to her which provided the benefits she would be entitled to under the ERS, 2005. Thereafter ICICI Bank had placed on record the ERS 2005 (as amended in 2016) which was approved by Mrs. Kochhar as ICICI Bank's MD and CEO which contained the clause that ICICI Bank had reserved its right to withdraw any features / benefits given under ERS in the event the employee did not comply with good conduct. Mrs. Kochhar had contended that this clause was not contained in the said letter dated 24th September, 2018 which had been issued to her. Mrs. Kochhar has thus suppressed the ERS amended in 2016 which she herself had approved.

96. Further, I find that Mrs. Kochhar had made an incorrect statement that the Sample Vesting Confirmation was never issued or received by Mrs. Kochhar. ICICI Bank had thereafter produced the emails addressed to Mrs. Kochhar enclosing the Vesting Confirmations which contains the term that ICICI Bank reserves the right to review vesting and exercise of

ESOPs over the Exercise Period in the event of non-compliance with good conduct.

97. In view of the above prima facie findings, as well as Mrs. Kochhar not coming to Court with clean hands, the Interim Application No.1014 of 2022 filed by Mrs. Kochhar is dismissed.

98. In so far as the Interim Application No.307 of 2020 filed by ICICI Bank is concerned, the following order is passed:-

(i) Mrs. Kochhar is restrained by an order of injunction from dealing with any of the 690,000 ESOPs already exercised by her during the period from 4th October, 2018 to 30th January, 2019.

(ii) Mrs. Kochhar shall disclose if she has sold or dealt with any of such shares as well as disclose her gain from such sale which shall be by way of Affidavit of Disclosure to be filed by her within six weeks from uploading of this Order.

99. The Interim Application No.1014 of 2022 and Interim Application No307 of 2020 are accordingly disposed of. There shall be no order as to costs.

(R. I. CHAGLA J.)