THE INDIAN LAW REPORTS

M.P. SERIES

CONTAINING-CASES DECIDED BY THE SUPREME COURT OF INDIA AND THE HIGH COURT OF MADHYA PRADESH

Year-6
Vol.4

NOVEMBER 2014 (pp. 2763 to 3066) (Single Copy ₹40)

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2014

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the present case has never been heard finally and decided on merits at any point of time – Therefore, the principles of res-judicata are not attracted – Maintenance has to be paid every month and every month cause of action is arising – Principal Judge, Family Court erred in law and facts while rejecting the applications on technicalities – Impugned order is set aside – Principal Judge is directed to decide the application on merits. [Sona (Mrs.) Vs. Subhash] ...2865

हिन्दू विवाह अधिनियम (1955 का 25), धाराऐं 24 व 26, सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – प्रकरण लंबित रहते भरण-पोषण और कार्यवाही के खर्चे – अधिनियम की धारा 24 व 26 के अंतर्गत बारम्बार आवेदनों को प्रस्तुत किया गया और तीन बार खारिज किया गया – किसी भी आवेदन को अंतिम रुप से न तो सुना गया और न ही गुणदोषों पर न्यायनिर्णीत किया गया – पत्नी को एकपक्षीय मानते हुए प्रथम आवेदन खारिज – पश्चातवर्ती आवेदनों को पूर्वन्याय के सिद्धांतों द्वारा वर्जित मानकर खारिज किया गया – अभिनिर्धारित – वर्तमान प्रकरण में पक्षकारों के बीच का वाद किसी प्रक्रम पर न तो अंतिम रुप से सुना गया और न ही गुणदोषों पर न्यायनिर्णीत किया गया – इसलिए पूर्वन्याय के सिद्धांत आकर्षित नहीं होते – भरण-पोषण प्रत्येक माह अदा किया जाना है और प्रत्येक माह वाद कारण उत्पन्न हो रहा है – प्रधान न्यायाधीश, कुटुम्ब न्यायालय ने तकनीकियों पर आवेदन अस्वीकार करने में विधि और तथ्यों की भूल की है – आक्षेपित आदेश अपास्त – प्रधान न्यायाधीश, कुटुम्ब न्यायालय को आवेदन का निपटारा गुणदोषों पर करने के लिए निदेशित किया गया। (सोना (श्रीमती) वि. सुभाष) ...2865

Housing Board Accounts Rules, M.P. 1991, Rule 5.4 and 5.7.4. – See – Griha Nirman Mandal Adhiniyam, M.P., 1972 (Substituted by M.P. Act No. 4 of 2011 w.e.f. 04.01.2011), Sections 47, 50(b) **[Sudha Jain (Dr.) Vs. M.P. Housing & Infrastructure Development] ...2806**

गृह निर्माण मंडल लेखा नियम म.प्र. 1991, नियम 5.4 व 5.7.4 – देखें – गह निर्माण मंडल अधिनियम, म.प्र., 1972 (04.01.2011 से प्रभावी म.प्र. अधिनियम 2011 का क्र. 4 द्वारा प्रतिस्थापित), धाराऐं 47, 50(बी) (सुधा जैन (डॉ.) वि. एम.पी. हाउसिंग एण्ड इन्फ्रास्ट्रक्चर डव्हेलपमेन्ट) ...2806

Income Tax Act (43 of 1961), Section 220(6) **– Petition against order passed by Deputy Commissioner, Income Tax, refusing to invoke powers u/s 220(6) of the Act rejecting the prayer of stay by observing that since the appeal is pending before Appellate Authority, recovery cannot be stayed – Held – Reason assigned for rejection of the prayer cannot be said to be justified – On the other hand, it runs contrary to the object and spirit of Section 220(6) of the Act – Power u/s 220(6) is**

required to be exercised only when assessee has presented an appeal – Assessing Officer/Dy. Commissioner has misdirected itself in rejecting the prayer – Impugned order is quashed – Dy. Commissioner is directed to reconsider the petitioner's application and pass fresh reasoned order after giving opportunity of hearing to the petitioner. [Kanchanbag A Partnership Firm Vs. Union of India] (DB)...2837

आयकर अधिनियम (1961 का 43), धारा 220(6) – अधिनियम की धारा 220(6) के अंतर्गत शक्तियों का अवलंब लेने से इंकार करते हुए आयकर उपायुक्त द्वारा पारित किया गया आदेश जिसमें रोक की प्रार्थना को यह संविक्षा करते हुए अस्वीकार किया गया कि चूंकि अपीली प्राधिकारी के समक्ष अपील लंबित है, वसूली को रोका नहीं जा सकता, के विरुद्ध याचिका – अभिनिर्धारित – प्रार्थना की अस्वीकृति हेतु दिये गये कारण को न्यायोचित नहीं कहा जा सकता – दूसरी ओर, वह अधिनियम की धारा 220(6) के उद्देश्य और आशय के विपरीत जाता है – धारा 220(6) के अंतर्गत शक्ति का प्रयोग केवल तब अपेक्षित है जब निर्धारिती ने अपील प्रस्तुत की हो – निर्धारण अधिकारी/उपायुक्त ने प्रार्थना अस्वीकार करके स्वयं को दिग्भ्रमित किया है – आक्षेपित आदेश अभिखंडित – उपायुक्त को निदेशित किया गया कि याची के आवेदन पर पुनर्विचार करें और याची को सुनवाई का अवसर देने के पश्चात नया सकारण आदेश पारित करें। (कंचनबाग ए पार्टनरशिप फर्म वि. यूनियन ऑफ इंडिया) (DB)...2837

Industrial Employment (Standing Orders) Act, M.P. (26 of 1961), Clauses 2(i)(vi) **– Petitioner was classified as permanent time keeper w.e.f. 13.10.2006 pursuant to award passed by Labour Court – Subsequently by order dated 18.07.2013, he was regularized as Mason – Petitioner seeks modification of order dated 18.07.2013 to the effect that he be regularized as Time Keeper w.e.f. 13.10.2006 from the date of the award passed by Labour Court – Held – Though the petitioner was granted the benefit of permanent classification w.e.f. 13.10.2006, but he fails to establish that there were clear vacancies of a Time Keeper on 13.10.2006 – Same would only entitle him for difference of wages of daily wage worker and the Time Keeper, however the same will not make him the member of service in the cadre of Time Keeper – Order dated 18.07.2013 cannot be found faulted – No interference is caused. [Ram Kalesh Singh Vs. State of M.P.] ...2801**

औद्योगिक नियोजन (स्थायी आदेश) अधिनियम, म.प्र. (1961 का 26), खंड 2(i)(vi) – याची को श्रम न्यायालय द्वारा पारित किये गये आदेश के अनुसरण में 13.10.2006 से प्रभावी रुप से स्थाई टाईम कीपर के रुप में वर्गीकृत किया गया – तत्पश्चात आदेश दि. 18.07.2013 द्वारा उसे राजमिस्त्री के रुप में नियमित किया गया – याची आदेश दि. 18.07.2013 में इस प्रकार का परिवर्तन चाहता है कि श्रम न्यायालय द्वारा अवार्ड पारित किये जाने की तिथि, 13.10.2006 से प्रभावी रुप से उसे टाईम कीपर

commensurate with minerals removed or consumed by lessee – It is open to the Assessing Officer to reject the claim of the assessee and instead apply a just and reasonable notional conversion factor – Notional conversion factor that for manufacture of 1 tonne of cement 1.6 tonnes of limestone is consumed, has been fixed by impugned circulars – All cement companies have been directed to ensure installation of weighbridge as per specification for ascertaining correct quantity of removed limestone – If licensee has any objection for applying notional factor, can cause to weight the removed limestone for the purpose of computing Royalty – Conversion fact cannot be termed as unrealistic and arbitrary – As lease has been granted by State Government and returns are to be filed before State Govt. therefore, there is no impediment for State Government to issue administrative instructions – Instruction contained in circular that "Whichever is higher" to invoke notional conversion factor is quashed – Matter remitted back to the Assessing authority to re-examine the issue afresh from the stage of filing of returns – Petition disposed off. [Grasim Industries Ltd., Neemuch Vs. State of M.P.] (DB)...2959

खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धारा 9 – रायल्टी – निर्धारण – काल्पनिक रुपांतरण गुणक – काल्पनिक रुपांतरण गुणक को निर्धारण के दौरान लागू किये जाने के संबंध में कोई अभिव्यक्त उपबंध नहीं – रायल्टी की रकम का निर्धारण पट्टाधारक द्वारा निकाले गये या उपभोग किये गये खनिजों के साथ समानुपाती होना चाहिए – निर्धारण अधिकारी, निर्धारिती के दावे को अस्वीकार कर सकता है और उसके बजाये न्यायोचित और युक्तियुक्त काल्पनिक रुपांतरण गुणक लागू कर सकता है – काल्पनिक रुपांतरण गुणक कि 1 टन सीमेंट के उत्पादन हेतु 1.6 टन चूना पत्थर उपयुक्त होता है, को आक्षेपित परिपत्रों द्वारा निश्चित किया गया है – हटाये गये चूना पत्थरों की सही मात्रा सुनिश्चित करने के लिए निर्दिष्टियोंनुसार तौल कांटा संस्थापित किया जाना सुनिश्चित करने के निदेश सभी सीमेंट कम्पनियों को दिये गये हैं – यदि अनुज्ञप्तिधारकों को काल्पनिक गुणक लागू करने के लिये कोई आक्षेप है, वह रायल्टी की संगणना के प्रयोजन हेतु हटाये गये चूना पत्थरों का तौल करवा सकता है – रुपांतरण तत्व को अवास्तविक एवं मनमाना नहीं कहा जा सकता – जैसा कि राज्य सरकार द्वारा पट्टा प्रदान किया गया है और रिटर्न को राज्य सरकार के समक्ष प्रस्तुत करना है इसलिए, प्रशासनिक अनुदेश जारी करने के लिए राज्य सरकार को कोई बाधा नहीं – काल्पनिक रुपांतरण गुणक का अवलंब लेने के लिये परिपत्र में अंतर्विष्ट अनुदेश कि "जो भी उच्चतर हो" अभिखंडित – निर्धारण प्राधिकारी को रिटर्न प्रस्तुत करने के प्रक्रम से नये सिरे से विवाद्यक का पुनः परीक्षण करने हेतु मामला प्रतिप्रेषित – याचिका का निपटारा किया गया। (ग्रासिम इंडस्ट्रीज लि., नीमच वि. म.प्र. राज्य) **(DB)...2959**

Mines and Minerals (Development and Regulation) Act (67 of

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THE INDIAN LAW REPORTS M.P. SERIES, 2014 (VOL-4)

JOURNAL SECTION

IMPORTANT ACTS, AMENDMENTS, CIRCULARS, NOTIFICATIONS AND STANDING ORDERS.

MADHYA PRADESH ACT

NO. 14 OF 2014

THE MADHYA PRADESH EXCISE (AMENDMENT) ACT, 2014

[Received the assent of the Governor on the 12th August, 2014; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 22nd August, 2014, page no. 744]

An Act further to amend the Madhya Pradesh Excise Act, 1915.

Be it enacted by the Madhya Pradesh Legislature in the sixty-fifth year of the Republic of India as follows:—

1. Short title and commencement.– (1) This Act may be called the Madhya Pradesh Excise (Amendment) Act, 2014.

(2) It shall come into force on the date of its publication in the official Gazette.

2. Amendment of Section 48. – In Section 48 of the Madhya Pradesh Excise Act, 1915 (II of 1915) (hereinafter referred to as the Principal Act), in sub-section (1), in clause (a), for the word and figure "Section 37", the words and figures "Section 34 for contravention of any condition of a licence, permit or pass granted under this Act, Section 37" shall be substituted.

3. Amendment of Section 54. – In Section 54 of the Principal Act, for the word "after recording the grounds of his belief", the words "after recording the grounds of his belief and subject to such condition as may be prescribed" shall be substituted.

4. Amendment of Section 61. – In Section 61 of the Principal Act, in sub-section (1), in clause (a), for the word and figure "Section 37", the words and figures "Section 34 for the contravention of any condition of a licence, permit or pass granted under this Act, Section 37" shall be substituted.

MADHYA PRADESH ACT

NO. 16 OF 2014

THE MADHYA PRADESH CIVIL COURTS (AMENDMENT) ACT, 2014

[Received the assent of the Governor on the 3rd September, 2014; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 4th September, 2014, page no. 812]

An Act further to amend the Madhya Pradesh Civil Courts Act, 1958.

Be it enacted by the Madhya Pradesh Legislature in the sixty-fifth year of the Republic of India as follows:—

1. Short title and commencement. – (1) This Act may be called the Madhya Pradesh Civil Courts (Amendment) Act, 2014.

(2) It shall come into force on the date of its publication in the official Gazette.

2. Amendment of section 6. – In section 6 of the Madhya Pradesh Civil Courts Act, 1958 (No. 19 of 1958), in sub-section (1),–

(i) in clause (a), for the word and figures "Rupees 2,50,000", the word and figures "Rupees 5,00,000" shall be substituted;

(ii) in clause (b), for the word and figures "Rupees 10,00,000", the word and figures "Rupees 1,00,00,000" shall be substituted;

MADHYA PRADESH ACT

NO.17 OF 2014

THE MADHYA PRADESH MADHYASTHAM ADHIKARAN (SANSHODHAN) ADHINIYAM, 2014.

[Received the assent of the Governor on the 3rd September, 2014 assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 4th September, 2014, page no. 814 (1).]

An Act further to amend the Madhya Pradesh Madhyastham Adhikaran

Adhiniyam, 1983.

Be it enacted by the Madhya Pradesh Legislature in the sixty-fifth year of the Republic of India as follows :–

1. Short title.– This Act may be called the Madhya Pradesh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 2014.

2. Amendment of Section 2.– In Section 2 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (No. 29 of 1983) (hereinafter referred to as the principal Act) in sub-section (1),–

(i) for clause (a), the following clause shall be substituted, namely :-

"(a) "Arbitration Act" means the Arbitration Act, 1940 (No. 10 of 1940) (repealed Act) or the Arbitration and Conciliation Act, 1996 (No. 26 of 1996), whichever is applicable;";

(ii) for clause (g), the following clause shall be substituted, namely :-

"(g) "public undertaking" means a Government Company within the meaning of clause (45) of Section 2 of the Companies Act, 2013 (No. 18 of 2013) and includes a corporation or other statuory body by whatever name called in each case, wholly or substantially owned or controlled by the State Government.

Explanation.– For the purposes of this Act, societies and authorities controlled by the State Government shall be deemed to have been included in the term "Cor poration";".

3. Amendment of Section 8.– In Section 8 of the principal Act, for sub-section (5), the following sub-section shall be subsituted, namely :-

"(5) The opposite party on or before the date specified in the notice for appearance, may file a reply in writing signed and verified by the opposite party or its authorized agent, along with an affidavit verifying the averments made in the reply. The reply shall be accompanied by such document or other evidence, which the opposite party wants to rely upon.".

MADHYA PRADESH ACT

NO. 18 OF 2014

THE CODE OF CRIMINAL PROCEDURE (MADHYA PRADESH AMENDMENT) ACT, 2013.

[Received the assent of the President on the 23rd September, 2014 assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 1st October, 2014, page nos. 936 (1), 936 (2)]

An Act further to amend the Code of Criminal Procedure, 1973 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Legislature in the sixty-fourth year of the Republic of India as follows :—

1. Short title and Commencement.– (1) This Act may be called the Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2013.

(2) It shall come into, force on the date of its publication in the official Gazette.

2. Amendment of Central Act No. 2 of 1974 in its application to the State of Madhya Pradesh.– The Code of Criminal Procedure, 1973 (No. 2 of 1974) (hereinafter referred to as the principal Act), shall in its application to the State of Madhya Pradesh be amended in the manner hereinafter provided.

3. Substitution of Section 25A.– For Section 25A of the principal Act, the following Section shall be substituted, namely:–

"**25A. Directorate of Prosecution.**– (1) The State Government may establish a Directorate of Prosecution consisting of a Director of Prosecution and as many Additional Directors of Prosecution, Joint Directors of Prosecution, Deputy Directors of Prosecution and Assistant Directors of Prosecution and such other posts as it thinks fit.

(2) The post of Director of Procecution, Additional Directors of Prosecution, Joint Directors of

Prosecution, Deputy Directors of Prosecution and Assistant Directors of Prosecution and other post shall be filled in accordance with the Madhya Pradesh Public Prosecution (Gazetted) Service Recruitment Rules, 1991, as amended from time to time.

(3) The head of the Directorate of Prosecution shall be the Director of Prosecution, who shall function under the administrative control of the head of the Home Department in the State.

(4) Every Additional Director of Prosecution, Joint Director of Prosecution, Deputy Director of Prosecution and Assistant Director of Prosecution and other posts specified in sub-section (2) shall be subordinate to the Director of Prosecution.

(5) Every Public Prosecutor and Additional Public Prosecutor appointed under the Madhya Pradesh Public Prosecution (Gazetted) Service Recruitment rules, 1991, shall be subordinate to the Director of Prosecution and every Public Prosecutor and Additional Public Prosecutor appointed under sub-section (1) of Section 24 and every Special Public Prosecutor appointed under sub-section (8) of Section 24 to conduct cases in the High Court shall be subordinate to the Advocate General.

(6) Every Public Prosecuter and Additional Public Prosecutor appointed under sub-section (3) of Section 24 and every Special Public Prosecutor appointed under sub-section (8) of Section 24 to conduct cases in District Courts shall be subordinate to the District magistrate.

(7) The powers and functions of the Director of Prosecution shall be such as the State Government may, by notification, specify.".

AMENDMENTS IN THE MADHYA PRADESH FAMILY COURTS RULES, 2002

[Notification published in Madhya Pradesh Gazette (Extra-ordinary) dated 4th October, 2014, page no. 943]

F. No. 17(E)-95-2002-XXI-B (One).— In exercise of the power conferred by Section 23 of the Family Courts Act, 1984 (No. 66 of 1984), the State Government, in consultation with the High Court of Madhya Pradesh, hereby, makes the following amendment in the Madhya Pradesh Family Courts Rules, 2002, namely:—

AMENDMENTS

In the said rules, in rule 9, in sub-rule (2),—

(i) for the words, figure and brackets "Rs.150/- (Rupees One Hundred Fifty)", the words figure and brackets "Rs.180/- (Rupees One Hundred Eighty)", shall be substituted;

(ii) for the words, figure and brackets "Rs.600/- (Rupees Six Hundred)", the words figure and brackets "Rs.720/- (Rupees Seven Hundred Twenty)", shall be substituted;

I.L.R. [2014] M.P., 2763
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 17/2009 (Jabalpur) decided on 30 July, 2013

NEELIMA SARAF (KU.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Service Law - Out of turn promotion **- Denial of out of turn promotion to petitioner, who is Vikram Awardee and has also won several Gold and Silver medals in the National and International Championship in power lifting, although respondents have considered and promoted the similarly situated persons - Held - Cause of action for consideration of promotion accrued in 2004 and 2005 - Petitioner was considered in the year 2007 - GOP came in force in the year 2007 does not apply - The case of the petitioner was not properly considered for grant of out of turn promotion - Petitioner was entitled to be considered for promotion to the post of Company Commander - Since petitioner is already promoted to the post of Company Commander, she will get only the benefit of seniority, if found fit by D.P.C. - Matter remitted back to the respondent to consider the claim of the petitioner within a period of 3 months.** **(Paras 5 & 6)**

सेवा विधि – बिना पारी पदोन्नति – याची जो विक्रम अवार्ड से पुरस्कृत है और जिसने राष्ट्रीय एवं अंतर्राष्ट्रीय भारोत्तोलन प्रतियोगिताओं में कई स्वर्ण और रजत पदक भी जीते हैं, को बिना पारी पदोन्नति अस्वीकार की गई, यद्यपि समान रुप से स्थित व्यक्तियों को प्रत्यर्थीगण ने विचार में लिया और पदोन्नत किया है – अभिनिर्धारित – पदोन्नति का विचार किये जाने हेतु वाद कारण 2004 व 2005 में प्रोद्भूत हुआ – याची को वर्ष 2007 में विचार में लिया गया – जी.ओ.पी. जो वर्ष 2007 से प्रभावी हुआ, लागू नहीं होता – बिना पारी पदोन्नति प्रदान किये जाने हेतु, याची के प्रकरण पर उचित रुप से विचार नंहीं किया गया – याची कम्पनी कमांडर के पद पर पदोन्नति हेतु विचार किये जाने का हकदार था – चूंकि याची को पहले ही कम्पनी कमांडर के पद पर पदोन्नत किया गया है, उसे केवल वरिष्ठता का लाभ मिलेगा, यदि डी.पी.सी. द्वारा योग्य पाया जाता है – याची का दावा 3 माह की अवधि के भीतर विचार में लिये जाने हेतु प्रत्यर्थी को मामला प्रतिप्रेषित।

Anoop Nair, for the petitioner.
Rahul Jain, G.A. for the respondents/State.

ORDER

K.K. TRIVEDI, J. :- The petitioner who was at the relevant time working on the post of Platoon Commander in Special Armed Forces of State of M.P. has approached this Court by way of filing this writ petition under Article 226 of the Constitution of India, seeking to challenge the order dated 21/03/2007 and 04/04/2008 whereby it was communicated to the petitioner that after due consideration, the claim of the petitioner for grant of out of turn promotion has been rejected. It is contended by the petitioner that she is a sports person having been awarded Vikram Award in the year 2001 and has won several medals in the National and International Championship in Power Lifting. As per the provisions made under the M.P. Special Armed Forces Rules, 1973 (hereinafter referred to as 'Rules') the petitioner was required to be granted out of turn promotion. Such a request was made which was duly forwarded by the Commandant of Battalion where the petitioner was working but the said request has been rejected by the respondents by the impugned communication, therefore, this writ petition is required to be filed. It is contended by the petitioner that taking part in the National and International Championship of sports, confers a right on the petitioner to claim, consideration for grant of out of turn promotion which could not have been denied in the manner the same has been. This being so, it is contended that the orders impugned are bad in law.

2. The return has been filed by the respondents contending interalia that the provisions are made in Rule 56 of the Rules pursuance to which the claims are to be considered. There are specific instructions issued by the Director General of Police in GOP No. 103/2007 dated 07/03/2007 wherein it is specifically provided that the power lifting is not included as a sports within the recognized list of sports events in the Indian Police Game. This being so, the recommendations made in respect of petitioner by the Commandant of Battalion for grant of out of turn promotion was considered and rejected. The petitioner would not be entitled to any relief as claimed in the writ petition in view of the fact that the sports in which the petitioner has taken part is not recognized as sport activity for the purposes of grant of out of turn promotion.

3. The petitioner has amended the writ petition and has brought on record the fact that after obtaining training the petitioner was granted promotion on the post of Company Commander vide order dated 30th March 2011. The said promotion is granted to the petitioner on her turn in usual course. By way of filing rejoinder it is contended by the petitioner that the respondents have already

considered the case of similarly situated persons as back as in the year 2002 and have promoted one Ms Kamla Rawat who too has taken part in the sports. Yet another lady Sub Inspector was promoted by the order of Director General of Police on account of taking part in some of the sports activities. There were other persons who were promoted. Even before coming into force of the GOP referred to hereinabove Ms. Madhuri Bhagwat was promoted on the post of Platoon Commander only because she has won Gold Medals in Power Lifting Sport by granting her out of turn promotion. The petitioner has been awarded cash prize for taking part in the very same sports and winning Gold Medals but this particular aspect is not considered by the respondents. Further in the Rules made by the Sports Department of Government of M.P., Vikram awardee is granted certain benefits. That being so, saying that only because the sport in which the petitioner has taken part is not included in the GOP or recognized as event in the police meet, it cannot be said that the petitioner would not be entitled to grant of benefit of out of turn promotion.

4. Since after granting opportunities, the respondents have not filed any additional return to meet out these amended pleadings and the pleadings raised in the rejoinder, it has to be held that such are the true facts as have been pointed out by the petitioner. It is further to be seen that there is no description shown as to why the claim of the petitioner was not considered at the relevant time when she had won medals in the year 2003 and 2004 in the very same sports activities. The petitioner has won the Gold Medals in the year 2004 and 2005 again and thus became entitled to be considered for grant o such benefit. The GOP of 2007 would not come in the way for consideration of claim of petitioner for grant of out of turn promotion in view of the fact that the said GOP was not in force at the time when the petitioner has secured the medals in the aforesaid sports activities. Yet another reason to give a finding in this respect is that if the sport is recognised by the State Government in the Rules made by the Sports and Youth Welfare Department, how could it be said by the very same Government in the Home Department that the said sport would not be recognised for the purposes of granting out of turn promotion to an incumbent who has secured Gold Medal in the National and International Championship. That being so, the stand taken by the respondents in their return cannot be accepted.

5. If the communication sent in this respect impugned in the writ petition are examined, it is clear that the case of the petitioner was considered by the committee in the year 2007. The cause of action for such a consideration was accrued in the

year 2004 and 2005 and therefore there was no question of making application of the GOP which came in force in the year 2007. That being so, it is clear that the case of the petitioner was not properly considered by the respondents for grant of out of turn promotion. Consequently it has to be held that the petitioner was entitled to be considered for grant of out of turn promotion on account of securing Gold and Silver medals in the sports activities of power lifting.

6. Consequently the writ petition is allowed. The order impugned dated 21/03/2007 and communication dated 04/04/2008 are hereby quashed. The matter is remitted back to the respondents to consider the claim of the petitioner for grant of out of turn promotion on the post of Company Commander afresh. While considering such claim of the petitioner, the respondents will keep in mind their own order dated 03/03/2004 issued in respect of one Ms Madhuri Bhagwat and will ignore the GOP 103/2007. In case the petitioner is found fit for grant of such out of turn promotion, the benefit of promotion be granted to the petitioner with retrospective effect. However, since now the petitioner is promoted on the post of Company Commander she will get only the benefit of seniority on the post on account of granting out of turn promotion if found fit by the DPC. The aforesaid exercise be completed within a period of three months from the date of receipt of certified copy of the order passed today.

The writ petition is allowed to the extent indicated hereinabove. There shall be no order as to cost.

Petition allowed.

I.L.R. [2014] M.P., 2766
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 22017/2011 (Jabalpur) decided on 7 August, 2013

IDEAL MINERALS (M/S) & anr. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

***Mines and Minerals (Development and Regulation) Act (67 of 1957), Section 11(5) - Mining Lease - Natural Justice* - Petitioner was aware of changed date which was duly communicated by authority - Petitioner did not appear inspite of intimation - No violation of principles of natural justice - Further matter not argued on merits before High Court - As petitioner did not appear before authority therefore, non-**

supply of comments of Central Government do not affect the merits of the case - Petition dismissed. (Paras 23 & 24)

खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धारा 11(5) – खनन पट्टा – नैसर्गिक न्याय – याची बदली गयी तिथि से अवगत था जिसे प्राधिकारी द्वारा सम्यक रुप से संसूचित किया गया था – सूचना के बावजूद याची उपस्थित नहीं हुआ – नैसर्गिक न्याय के सिद्धांतों का उल्लंघन नहीं – इसके अतिरिक्त उच्च न्यायालय के समक्ष गुणदोषों पर मामले में तर्क नहीं किया गया – चूंकि प्राधिकारी के समक्ष याची उपस्थित नहीं हुआ, इसलिए केन्द्र सरकार द्वारा टिप्पणी प्रदाय नहीं किये जाने से प्रकरण के गुणदोषों पर प्रभाव नहीं पड़ता – याचिका खारिज।

Cases referred :

(2003) 9 SCC 731, (2011) 2 SCC 258, 1992 Supp. (3) SCC 26, (2001) 9 SCC 324, AIR 2010 SC 3769, AIR 1973 SC 678, AIR 1919 SC 818.

Manoj Sharma, for the petitioners.
Ashok Chourasia, G.A. for the respondent No.1/State.
Akshay Dharmadhikari, for the respondents No. 2 & 3.

ORDER

U.C. MAHESHWARI, J. :- The petitioners have filed this petition under Article 226 of the Constitution of India, being aggrieved by the order dated 21.01.2011 (Annexure-P-1) passed by the respondent no.5 revisional authority (Constituted under Section 30 of Mines and Minerals (Development and Regulation) Act 1957 (In short 'the Act') in revision application/file No.16/04/2007-RC-II whereby, dismissing their revision filed under Section 30 of the Act read with Rule 54 of Mineral Concession Rules 1960 (in short 'MCR'), the order No. 2-64/05/12 dated 27.10.2006, passed by the respondent no.1 State of M.P., allowing the respective applications of the respondents No.2 & 3 for grant of prospecting lease (In short PL) with respect of the land situated at village Chanotta District Jabalpur, their applications filed in that regard on account of incomplete and insufficient information, were dismissed, has been affirmed.

2. The facts giving rise to this petition in short are that, for grant of PL of the land bearing Khasara Nos.72 and 92 of village Chanoota, District Jabalpur, as many as 12 applications of the different applicants including the petitioners

and respondents herein, were received in the Office of the Collector Jabalpur. Pursuant to it, the Collector Jabalpur vide proposal dated 21.5.2006, intimated to the State authorities that an area of 14.50 Hectare of Khasara No.72 being forest of shrubs and an area of 1.02 Hectare Khasara No.92 being rocky land are situated in the aforesaid village. The area being affected under the Forest Act, the DFO has intimated his inability to issue No Objection Certificate. The petitioners herein submitted their separate applications for grant of PL over an area of 7.25 Hectare each of Khasara No.72. In this regard, the prescribed registration fees and processing fee had also been deposited by them. Besides that, they have also given an undertaking that they are prepared to submit Net Project Value, to carry out the alternate plantation, so also to make compensatory payment of Rs.42 Lacs for grant of Mining Lease. They have further stated that within six months from the date of grant of Mining lease, (hereinafter in short 'ML') they would also establish a Palletization Plant costing Rs.1.5 Crores with a capacity of 600 Metric Tone. Although for the aforesaid area, more than one application were received for consideration but the availability of the minerals was not established in the area. So, in such premises, the application for grant of ML filed by the petitioners and the other applicants were also rejected. The petitioners and some other applicants did not furnish the requisite information regarding experience in the mining work, technical staff etc. Although, some of the applicants stated that they have the capacity of prospecting/mining and would supervise the prospecting work themselves, but during hearing they did not furnish the supporting documents. On which, after extending the opportunity of hearing to all the applicants including the petitioners and the respondents, the applications of both the respondents for grant of PL for 7.25 Hectares of the aforesaid land of Khasara No. 72, to each of them were found fit and was recommended for the same by the authorities of the respondents no.1. Accordingly, each of the respondents No.2 & 3 were found qualified to give said PL and pursuant to it, the decision was taken to give 7.25 Hectare of the aforesaid land Khasara No.72 to each of the respondents on PL while, the applications of the petitioners as well as of other applicants being incomplete and containing insufficient information, were not found fit for grant of PL., consequently the same were rejected. Being dissatisfied with such order, the petitioners have filed the revision before the respondent no.5 revisional authority under Section 30 of the Act. On consideration, the same was dismissed by the impugned order Annexure- P-1 as stated above. On which, the petitioners/applicants of said revision, have come to this Court with this petition.

3. Petitioners' counsel after taking me through the averments of the petition annexed papers along with the impugned order of the revisional authority Annexure-P-1, argued that the petitioner has filed his application on dated 4.5.2005, for grant of PL for the area 15.52 Hectors of the aforesaid land bearing Khasara nos. 72 and 92 of village Chanotta District Jabalpur to find out the prospect of the laterite only, subsequent to this application the petitioners have filed another application on dated 21.6.2006, to give such PL on such land to find out the prospecting of Iron Ore and Blue Dust also. In such premises he said that, the application of the petitioners were first in number and the same had to be considered as prior application for grant of PL. In continuation he also pointed out that, the application of Pradeep Kumar Dubey, was filed prior to petitioners on dated 24.10.2001, for the area 1.02 Hectares of Khasara No.92, but he had applied for the area less than 4.00 Hectares, therefore, by virtue of Rule 22 D of the MCR, his application was not taken in the process for consideration. Besides this, various other applicants including the respondents no.2 & 3 also applied for the same . The respondents no.2 & 3 filed their respective applications on 19.4.2006 for grant of PL regarding Laterite, Iron Ore and blue dust. Each of them applied for grant of 7.25 Hectares of the aforesaid land of Khasara no.92. In continuation by referring sub-section (2) of Section 11 of the Act, he argued that the petitioners being first applicant in comparison of the respondents no.2 & 3, was entitled on priority basis for grant of PL of the aforesaid land as the petitioners have filed their initial application prior to the respondents no.2 and 3, but by ignoring such provision of Section 11 (2) of the Act, by dismissing their applications, the applications of the respondents no.2 & 3 have been allowed by the respondent no.1 vide order dated 27.10.2006 (Copy of such order has not been placed or annexed by any of the parties hence, the record of the revisional Court had been called through Assistant Solicitor General of India). He further said that the aforesaid order was passed by the respondent no.1 without any intimation to the petitioners. They came to know from other source on 25.11.2006, that some decision on the aforesaid applications have been taken by the respondent no.1. On which under the RTI Act, they applied and obtained the copy of such order dated 27.10.2006, on dated 28.11.2006, then he came to know about dismissal of their applications, then he filed the revision (Annexure-P-2) under Section 30 of the Act read with Rule 54 of MCR on 19.1.2007 before the respondent no.5. Subsequent to filing such revision ,the respondent no.5 has directed the respondents no.2 & 3 to file their comments in response of revision memo. He further submits that in response to it, when

he did not receive any copy of the comments from the respondents no.2 & 3, then he sent an application dated 12.4.2007 to the respondent no.5 intimating that within the prescribed period, he did not receive such comments, thereafter he also moved another application dated 29.5.2008 (Annexure-P-5) to decide the revision. On which the revision was fixed on 9.8.2010 for hearing, the same was adjourned for 24.8.2010. Subsequent to that, he received the information on 17.8.2008, from the respondent no.5 through telegram dated 16.8.2010 (part of Annexure-P-6) about postponing such date of hearing from 24.8.2010 to 7.9.2010, thereafter again received a telegram dated 3.9.2010 from respondent no.5 on dated 4.9.2010 about reschedule the date of hearing on 7.9.2010. But subsequent to that the petitioners did not receive any information regarding any other adjournment. He specifically stated that for want of information about fixing the date of hearing on 26.10.2010, on such date no one could appear on behalf of the petitioners before the respondent no.5 On such date, the revisional authority respondent no.5, had heard the revision on merits and decided the same by the impugned order Annexure-P-1. On coming to know about such decision he came to this Court with this petition. He further said that on the aforesaid date i.e. 26.10.2010 before hearing the arguments of the respondents no. 2 & 3, the fair opportunity of hearing under information to the petitioners should have been given to them but due to lack of information of the date they could not appear to get such opportunity and prayed to quash and set aside the impugned order of the revisional Court by admitting and allowing this petition.

4. In the course of aforesaid arguments the petitioners' counsel was repeatedly asked by the Court to argue the case on merits also against the impugned order (Annexure-P-1) on which, he submitted that except on the aforesaid ground that the opportunity of hearing in the aforesaid revision has not been extended to the petitioners in accordance with the principal of natural justice, he does not want to argue the matter on any merits of the matter. Accordingly, he has not made the arguments on merits of the case challenging the impugned order (Annexure-P-1) as well as the aforesaid order of the respondent no.1.

5. Responding the aforesaid arguments, on the first occasion for some time the case was argued on behalf of respondents no.2 & 3 by Shri R.N. Singh, learned Senior Advocate assisted by Shri Akshay Dharmadhikari, but due to Court time was over on 19.6.2013, the case was adjourned and on such adjourned date 19.7.2013, the case was argued by Shri Akshay

Dharmadhikari, Advocate. They after taking me through the impugned order Annexure-P-1, so also the order of the respondent no.1 (which is not made the part of petition) available with the original record of the revisional Court, their return along with annexed papers argued that the recommendation for grant of PL in favour of the respondents no.2 & 3 by the respondent no.1 is in accordance with the procedure prescribed under the law and in such premises, the revisional Court has not committed any error in dismissing the revision by the impugned order. In continuation he said that, undisputedly the petitioner herein filed his initial application on dated 4.5.2005, for grant of PL over an area 15.52 Hectare for mining of Laterite. Subsequent to it, on behalf of the respondents no.2 & 3 their respective applications for grant of PL for mining of Laterite, Iron ore, Manganese and blue dust were filed on 19.4.2006. Subsequent to filing such applications the petitioners herein field another application on 21.7.2006 to add and/or amend his earlier application for grant of PL, in addition to laterite, for Iron Ore and blue dust also. So in such premises, the complete application of the petitioner was not before the authorities of the respondent no.1 before 19.4.2005, the date on which the respondents no.2 & 3, have filed their applications. In such premises, the petitioners' application being completed on 21.7.2006 could not be deemed or held to be prior application in comparison of the respondents no.2 & 3. He also said that, there is no provision under the Act or Rules to amend the earlier application for adding some additional substance, so the applications of the petitioners was deserved to be treated to be subsequent application. In such premises, the applications of the respondents being prior to the application of the petitioners, should be treated first in time under the provision of sub-Section (2) of Section 11 of the Act. He further said that on receiving the notice of the revision, the requisite comments as per provision of 54 MCR, were also submitted on behalf of the respondents no.2 & 3 in the Office of the respondent no.5 i.e. revisional authority on 2.3.2007. He also referred the copy of the same.

6. In continuation he said that for the sake of arguments if it is deemed that the copy of such comments were not sent to the petitioners by the revisional authority, then on behalf of the petitioners the same could have been obtained from the Office of the revisional authority, but for the reasons best known to the petitioners, the same was not obtained by them and now, he has raised such technical ground for setting aside the impugned order of the revisional Court while, the same has been passed by the revisional authority in accordance with the

procedure prescribed. He further said that, the arguments advanced on behalf of the petitioners that they were not intimated about the date of hearing 26.10.2010, on which date the aforesaid revision was heard on merits by the respondent no.5, being contrary to record is not sustainable. In continuation he said that, date of hearing of revision fixed on 24.8.2010 was adjourned for 7.9.2010 for which the information from respondent no.5 was received by the petitioners vide telegram dated 16.8.2010, again the respondent no.5 has intimated through telegram dated 4.9.2010 to change such date of hearing from 7.9.2010 to 29.9.2010. In continuation by referring the copies of telegrams dated 21.9.2010 (The part of Annexure-R-3/4 and R-3/5) given to the petitioners and the respondents no.2 & 3 respectively informing them about adjournment of the date 29.9.2010 with intimation of new date of hearing 26.10.2010. Accordingly the petitioners were duly intimated by the respondent no.5 regarding this date of hearing. Inspite having the knowledge of such date, the petitioners did not appear before the respondent no.5 on 26.10.2010, on which after hearing the respondents the case was reserved for order. But after deciding the revision by respondent no.5 on merits, the petitioners have filed this petition on false pretext. He further said that, according to the arguments of the petitioners counsel, they were under intimation regarding the date of hearing 29.9.2010 through telegram dated 4.9.2010 (Part of Annexure-P-6) then in the absence of intimation regarding date 26.10.2010, the petitioners should have appeared before the respondent no.5 in revision on dated 29.9.2010, as such date was in their knowledge. But on record no explanation has been put forth that why the petitioner did not appear before the revisional authority on such date, if they appeared then could have got information regarding date of hearing 26.10.2010. So in such premises also, it could not be deemed that the impugned order has been passed by the revisional authority without giving any intimation regarding date of hearing to the petitioners or contrary to the principles of natural justice. In continuation he said that, even on examining the impugned order of the respondent no.1 State authorities recommending the name of respondents no.2 & 3 for grant of PL subject to other requisite compliance, in view of the provisions of Section 11 (2) so also the other relavant provisions of the Act and the MCR Rules, the impugned order as well as the order of respondent no.5 being in consonance of the record and in accordance with the procedure prescribed, does not required any interference in this petition. So far as the case law cited on behalf of the petitioners' counsel he said that, the same being distinguishable on facts are not helping to them in the present scenario and prayed for dismissal of this petition.

7. Having heard the counsel at length, keeping in view their arguments, I

have carefully gone through the record of this petition as well as the record received from the revisional Court.

8. As the case has not been argued by the petitioners' counsel on merits of the matter, he advanced his arguments only on the ground that fair opportunity of hearing in accordance with the principle of natural justice has not been extended to them by the revisional authority, thus first I deem fit to consider such question before considering the other merits of the impugned orders.

9. It is undisputed fact on record that the subsequent to allowing the aforesaid applications of the respondents no.2 & 3 by the respondent no.1 for PL with respect of the aforesaid described land vide order dated 27.10.2006, the petitioners herein filed the impugned revision before the respondent no.5. Subsequent to filing such revision in accordance with the procedure, the intimation of the same was given to the respondents no.2 & 3 on which, they have given their appearance in the matter and the revision was remained pending for years together for its adjudication. Undisputedly, as per record of the revisional Court on dated 29.5.2008, the petitioners herein filed an application Annexure-P-5 before the revisional authority to decide the revision on some early date. Subsequent to that the revision was listed for final hearing on 9.8.2010, but the same was adjourned by the respondent no.5 for 24.8.2010 and regarding change of such date, the telegraphic information (part of Annexure-P-6) was sent to the petitioners by the respondent no.5 on 17.8.2010. Again on postponing such date from 24.8.2010 to 7.9.2010, the intimation in that regard was also sent by the respondent no.5 to the petitioners through telegram dated 4.9.2010 (Part of Annexure-P-6). Such date 7.9.2010 was again adjourned for 26.10.2010 and as per case of the petitioners' counsel that any intimation regarding this date 26.10.2010 of hearing either by telegram or through any other mode was not received from the respondent no.5 by the petitioners so they did not appear on such date, while as per case of the respondents' counsel such date was duly intimated by the respondent no.5 to petitioners as well as the respondent no.2 & 3 through telegram dated 21.9.2010 (the part of Annexure-R2/4 and R-2/5) which were sent to the correct address of them.

10. In such situation the Court has to find out the answer, whether the petitioners were under intimation of the date of hearing 26.10.2010 or not. Mere perusal of the copy of the telegram (part of Annexure-R/3-4) duly

attested by official of the Ministry of Mines, it is apparent that the same was sent on behalf of revisional authority respondent no.5 to the petitioners on dated 21.9.2010 intimating the date of hearing i.e. 26.10.2010, the same was sent on the same address on which the earlier telegrams were sent. It is also apparent from the telegram dated 21.9.2010 Annexure-R-3/5 that such intimation of date 26.10.2010 was sent to the respondents no.2 & 3 also. The aforesaid copies of the telegrams being duly attested by the official of respondent no.5 could not be deemed that the same were not sent to the petitioners as well as to the respondents.

11. As per record, the aforesaid telegrams, were sent to the correct addresses of the petitioners, then by virtue of provision of presumption enumerated under Section 114 (e) of the Evidence Act, Court may presume that same were issued by the Office of respondent no.5 and were served by the official of the telegraphic department in performing their official act. Such presumption could also be drawn under the provision of Section 27 of General Clauses Act and of Section 3 of the Post Office Act. Thus, it is presumed that such telegraphic intimation Anenxure-R-3/4 and R-3/5 were duly served on the parties concerned. In such premises, the version stated by the petitioners' counsel that without giving any intimation to the petitioners regarding date of hearing 26.10.2010 by the respondent no.5, the revision was taken up and heard has not appealed me. Even otherwise, it is apparent from the record of the revision that every date of hearing fixed in revision were duly intimated to the petitioners as well as the respondents no.2 & 3. So in such premises, it is held that the date 26.10.2010 was duly intimated to the petitioners through telegram dated 21.9.2010 (Part of Annexure-R-3/4) and inspite that they did not appear before the revisional authority for the reasons best known to them.

12. On going through the available record, it appears that the petitioners was not having the case on merits and due to such reason inspite intimation of the date they did not appear before the revisional authority and after passing the order dated 21.1.2011 (Annexure-P-1) by the respondent no.5, the petitioners have come to this Court with this petition for setting aside the same on the ground that they were not intimated about the date of hearing of the revision. In the course of arguments repeatedly on asking the petitioners' counsel to make the submission on merits of the matter, instead to argue on merits he repeatedly prayed to decide the matter only on the aforesaid question that the petitioners has not been extended the fair opportunity of hearing and thereby, they have been deprived from their right to prosecute the revision.

13. In view of the aforesaid discussions it has been established that the revisional authority had not proceeded to hear the revision under any violation of the principles of natural justice. On the contrary, the petitioners themselves inspite receiving the intimation of hearing did not appear before the revisional authority to assist it to adjudicate the matter on merits and in this premises, there was no option with such authority except to decide the revision on merits after hearing the respondents present and perusing the record.

14. Although the petitioners' counsel in support of his contention has cited as many as four decisions, out of them, in the matter of *State of Maharashtra and others vs. Jalgaon Municipal Council and others* reported in (2003) 9 SCC 731 is concerned, in such case taking into consideration the issue relating to scope of judicial review, it was held as under:-

> "It is a fundamental principle of fair hearing incorporated in the doctrine of natural justice and as a rule of universal obligation that all administrative acts or decisions affecting rights of individuals must comply with the principles of natural justice and the person or persons sought to be affected adversely must be afforded not only an opportunity of hearing but a fair opportunity of hearing".

According to factual matrix of the case at hand, as stated above, the information of every date of hearing for giving the opportunity of hearing was given to the petitioners by the respondent no.5 through telegrams and thereby the fundamental principles of the procedure as well as of natural justice, were complied with hence, the cited case is not helping to the petitioners.

15. In other cited case in the matter of *Automotive Tyre Manufacturers Association vs. Designated Authority and others* reported in (2011) 2 SCC 258, the apex Court has held as under:-

> **"80.** It is thus, well settled that unless a statutory provision, either specially or by necessary implication excludes the application of principles of natural justice, because in that event the Court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences which obviously cover infraction of property,

personal rights and material deprivations for the party affected. The principle holds good irrespective of whether the power conferred on a statutory body or Tribunal is administrative or quasi-judicial. It is equally trite that the concept of natural justice can neither be put in a straitjacket nor is it a general rule of universal application."

16. In the available circumstances of the case at hand, for the reasons, on which the aforesaid earlier decision is held to be not helping to the petitioners this citation is also not helping them. It is apparent as discussed above that inspite intimation of the date of hearing 26.10.2010 no one had appeared on behalf of the petitioners before the revisional authority to prosecute the revision, then there was no option with such authority except to decide the revision after hearing the party present and perusing the record. So in view of the intimation of the date of hearing to the petitioners it could not be assumed that the opportunity of hearing was not extended to the petitioners in accordance with the mandate of the law and the natural justice.

17. In the case of *Muniyallappa vs. B.M. Krishnamurthy and others* reported in 1992 Supp (3) SCC 26 on which also the petitioners' counsel has placed his reliance by saying that if the procedure prescribed under the law has not been adopted by the authority to decide the matter then such order deserves to be set aside. This decision of the apex Court being decided in the matter of landlord and tenant, in distinguishable facts and circumstances, which is not the situation in the case at hand, is not helping to the petitioners. Besides this, in the light of the principle laid down in the cited case on examining the case at hand, I have not found any circumstance showing that any legal right of the petitioners has been violated by the revisional authority in passing the impugned orders. So in such premises also this citation is not helping to the petitioners.

18. The case law in the matter of *Commissioner of Sales Tax, U.P. vs R.P. Dixit Saghidar* reported in (2001) 9 SCC 324 is concerned, the same was decided taking into consideration the circumstance that before passing the assessment order relating to sales tax, no notice was given to the assessee and in such circumstances, the case was remitted back but in the present case, petitioners were duly intimated by the revisional authority through telegrams regarding every date of hearing upto to the date of 26.10.2010. So, in such premises, this citation is also not helping to the petitioners.

19. It is also settled principle of law that under Article 226/227 of the Constitution of India this Court could not interfere in any order of the tribunal unless any jurisdictional error is committed by the tribunal or authority in passing such order because this Court is not sitting as appellate authority against such order. The inherent powers of this Court or power of superintendence could be invoked only if any gross negligence, contrary to any statutory provisions have been committed by any of the subordinate authorities or the Courts, tribunals etc. In view of such principle on examining the present matter, I have not found any circumstance to invoke such jurisdiction of this Court. Thus in such premises also, the impugned order does not require any interference under the writ jurisdiction of this Court.

20. Petitioners counsel has not argued the matter on merits as stated above but the same was argued on behalf of the respondents no.2 & 3. on merits also. In such situation, on examining the case on merits, I have not found any scope in the matter to interfere in the impugned order Annexure-P-1 for setting aside the same and remitted back the matter to the revisional authority to decide afresh.

21. It is apparent fact on record that on behalf of the petitioners their initial application was filed on 4.5.2005 to find out the prospect of mining the lateriate and not for other substance i.e. Iron Ore and blue dust. But subsequent to it, on dated 21.6.2006 with another application the petitioners made the prayer for grant of such PL for Iron Ore and blue dust also which was not prayed in their initial application. In such premises, is it apparent that petitioners application was completed on 21.6.2006 whereas, the application of the respondents no.2 & 3 for PL were filed before the licensing authority on dated 19.4.2006. So, in such premises, the applications of the respondents no.2 & 3 being earlier point of time to the applications of the petitioners had the preference over the applications of the petitioners. The same could be treated to be the first application as per requirement of sub-section (1) of Section 11 of the Act. It is also apparent from the record that the application of the present petitioners and other applicants except the respondents no.2 & 3, were dismissed on account of insufficient information so also in the lack of their experience for such mining activities and such subjective consideration being in consonance with the sub-section (3) of Section 11 of the Act, did not require any interference. Even otherwise on such count, in the lack of experience of the alleged mining activities and insufficient information in the applications of the petitioners, by virtue of sub-section (5) of Section 11 of

the Act, the State Government has a authority to give the PL or ML as the case may be whose application was received subsequent to the earlier application. So in such premises also the impugned order does not require any interference.

22. Apart the aforesaid, petitioners' counsel by referring the rule 55 of MCR 1960, also argued that as per procedure after filing the revision, the copy of the same is sent by the Central Govt. to the impleaded party (respondents no.2 & 3 herein), on which such impleaded party has a right to file the comments within the prescribed period and on submitting such comments by the impleaded party like the respondents no.2 & 3 the copy of the same is supplied to the applicants of the revision. From the record of the revisional authorities it is apparent that such comments were placed on the record on 2.3.2007 and taking into consideration the same along with other record, the revision was decided by the revisional authority. In this connection it was also argued that the copy of such submitted comments were not supplied to the petitioners. But on perusing the record, I have not found any merit or substance in such arguments because as per record of the revisional Court, in response of the revision memo, the comments as per requirement of Rule 55 of MCR were submitted on behalf of the respondents no.2 & 3 before the revisional authority on 2.3.2007. For the sake of arguments if copy of such comments were not supplied to the petitioners even then it does not affect the merits of the impugned matter because on receiving the information regarding date of hearing 24.8.2010 and 7.9.2010 through telegrams dated 16.8.2010 and 3.9.2010 (Anenxure-P/6) collectively on any of such fixed date the petitioners could have approached to the revisional authority and obtain the copy of such comments, but it is apparent on record that inspite intimation of aforesaid both the dates of hearing, on behalf of the petitioners no one had approached to revisional authority in this regard. So in view of such conduct of the petitioners, the impugned order could not be interfered at this stage by allowing the petition.

23. As per case of the petitioners, they did not receive the information after 3.9.2010 regarding rescheduled the date of hearing from 29.9.2010 to 26.10.2010. In that situation in the lack of any information about change of the date of hearing from 29.9.2010 to 26.10.2010 some one had to appear on behalf of the petitioners before the revisional authority on 29.9.2010, but it is apparent that inspite the knowledge of such date, none of the petitioners had approached to the revisional authority. So, in such premises also, there is

no merit in the petition on the ground so raised by the petitioners counsel.

24. Petitioners' counsel argued the case without touching the merits of the matter and only on the technical ground that the copy of the comments were not supplied to him and proper opportunity of hearing was not extended to them, but in view of the aforesaid discussions I am of the considered view that mere on such technical ground specially when otherwise there is no merit in the case of the petitioners, the impugned order Annexure-P-1 could not be interfered by this Court. My such view is fully fortified by the following decisions of the apex Court cited on behalf of the respondents no.2 & 3.

(a). In the matter of *Union of India and ors vs. Bishamber Das Dogra* reported in AIR 2010 SC 3769, it was held as under:-

> **"13.** In *State Bank of Patiala v. S.K. Sharma* (1996) 3 SCC 364, this Court emphasized on the application of doctrine of prejudice and held that unless it is established that non-furnishing the copy of the enquiry report to the delinquent employee has caused prejudice to him, the Court shall not interfere with the order of punishment for the reason that in such an eventuality setting aside the order may not be in the interest of justice rather it may be tantamount to negation thereof. This court held as under:-
>
> "Justice means justice between both the parties. The interests of justice equally demand that the guilty should be punished and that technicalities and irregularities which do not occasion failure of justice are not allowed to defeat the ends of justice. Principles of natural justice are but the means to achieve the ends of justice. They cannot be perverted to achieve the very opposite end. That would be a counter-productive exercise." (Emphasis added).
>
> **15.** In *Aligarh Muslim University v. Mansoor Ali Khan,* (2000) 7 SCC 529, this Court considered the judgment in *M.C. Mehta v. Union of India & Ors.* (1999) 6 SCC 237 wherein it has been held that an order passed in violation of natural justice need not be set aside in exercise of the writ jurisdiction unless it is shown that non observance has caused prejudice to the person concerned for the reason that quashing the order may revive

another order which itself is illegal or unjustified. This Court also considered the judgment in *S.L. Kapoor v. Jagmohan* AIR 1981 SC 136, wherein it has been held that in a peculiar circumstance observance of the principles of natural justice may merely be an empty formality as if no other conclusion may be possible on admitted or indisputable facts. In such a fact-situation, the order does not require to be quashed if passed in violation of natural justice. The Court came to the conclusion that a person complaining non-observance of the principles of natural justice must satisfy that some real prejudice has been caused to him for the reason that there is no such thing as a merely technical infringement of natural justice. "

In the present matter petitioners' counsel has not apprised me with any situation in which on account of non-supplying the copies of comments any prejudice to the rights of the petitioners were caused.

(b) In the matter of *State of Assam and others Om Prakash Mehta and others* reported in AIR 1973 SC 678, it was held as under:-

> **"12.**..... No person can claim any right in any land belonging to Government or in any mines in any land belonging to Government except under and in accordance with the Act and the Rules or any right except those created or conferred by the Act. There is no question of any fundamental right in any person to claim that he should be granted any lease or any prospecting licence or mining lease in any land belonging to the Government. It is necessary to bear this in mind because some sort of vague right was claimed on behalf of the respondents as though there is a right of renewal of the mining lease in question even apart from the rules."

In view of the aforesaid principle on examining the case at hand, in the available circumstances it could not be said that any legal right of the petitioners has been either violated by the revisional authorities or of the authorities of respondent no.1 in passing the impugned orders.

25. Apart the aforesaid, I deem fit to examine the case in view of the provision of sub-section 5 of Section 11 of the Act which reads as under:-

> **"(5).** Notwithstanding anything contained in sub-section (2),

but subject to the provisions of sub-section (1), the State Government may, for any special reasons to be recorded, grant a reconnaissance permit, prospecting licence or mining lease, as the case may be, to an applicant whose application was received later in preference to an applicant whose application was received earlier:

Provided that in respect of minerals specified in the First Schedule, prior approval of the Central Government shall be obtained before passing any order under this sub-section"

In view of the aforesaid provisions, after recording the reasons the State Government may grant permit, PL or ML as the case may be to the applicant whose application was received later in preference to an applicant whose application was received earlier.

Keeping in view said provision on going through the impugned order Annexure-P-1, of the State available in the file of the revision received from the revisional authority I have found that taking into consideration the experience and the proposal of the respondent no.2 and 3 to find out the Laterite, Iron Ore and blue dust so also the available requisite infrastructure for the alleged work with respondents No.2 & 3 which was not found with the petitioners herein or with the other applicants, the application of the respondents were allowed for the alleged PL. So, such approach of the authorities of the State/respondent no.1 so also of the respondent no.5 revisional authority in the impugned order is apparently in consonance with the aforesaid provision of the Act and the same do not require any interference at this stage. My such view is also fortified by the decision of the apex Court in the matter of *Indian Metals and Ferro Alloys Ltd vs. Union of India* reported in AIR 1991 SC 818, it was held as under:-

"16.....It is no doubt true that S. 11(2) of the Act read in isolation gives such an impression which, in reality, is a misleading one. We think that the sooner such an impression is corrected by a statutory amendment the better it would be for all concerned. On a reading of S. 11 as a whole one will realise that the provisions of sub-section(4) completely override those of sub-section (2). This sub-section preserves to the S.G. a right to grant a lease to an applicant out of turn subject to two conditions: (a) recording of special reasons and (b) previous approval of the C.G. It is

manifest, therefore, that the S.G. is not bound to dispose of applications only on a "first come, first served" basis. It will be easily appreciated that this should indeed be so for the interests of national mineral development clearly require in the case of major minerals. that the mining lease should be given to that applicant who can exploit it most efficiently. A grant of ML in order of time will not achieve this result."

26. In view of the principle laid down in the aforesaid cited case, on the technical grounds raised by the petitioners, which have not been found correct in the matter, this petition could neither be entertained nor warranting any interference in the impugned orders passed under the vested discretionary jurisdiction by the revisional authority or in the order passed in vested authority by virtue of Section 11 of the Act, by the respondent no.1/State.

27. In view of the aforesaid discussions, I have not found any perversity, illegality, irregularity or anything against the propriety of law in the order impugned Annexure-P-1 requiring any interference. Consequently, this petition being devoid of any merit deserves to be and is hereby dismissed.

28. Let the record of the revisional Court along with the copy of this order be returned to the Assistant Solicitor General Union of India Jabalpur, to sent back to the revisional authority.

29. There shall be no order as to the costs.

Petition dismissed.

I.L.R. [2014] M.P., 2782
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 10677/2013 (Jabalpur) decided on 3 September, 2013

CHHOTELAL GUPTA ...Petitioner
Vs.
SMT. SEEMA AGRAWAL & anr. ...Respondents

Land Revenue Code, M.P. (20 of 1959), Section 50 - Interlocutory Application **- Locus standi of respondent No. 1 to file appeal was challenged by petitioner by filing application before appellate authority - Appellate authority instead of deciding application directed that the same shall be heard at the time of final hearing - Petitioner filed revision before**

Board of Revenue seeking direction to appellate authority to decide application - Board of Revenue in its turn decided the revision on merits - Held - Board of Revenue did not have authority to ignore the jurisdiction of appellate Court to decide on merits - Board of Revenue ought to have decided objection regarding locus standi only - Order of Board of Revenue set aside - As petitioner does not want to prosecute his revision before Board of Revenue, appellate authority directed to decide objection of locus standi first - Petition allowed. (Paras 1, 7)

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 50 – अंतर्वर्ती आवेदन – याची द्वारा अपीली प्राधिकारी के समक्ष आवेदन प्रस्तुत करके, प्रत्यर्थी क्र. 1 द्वारा अपील प्रस्तुत करने के लिए सुने जाने के अधिकार को चुनौती दी गई – अपीली प्राधिकारी ने आवेदन का विनिश्चय करने की बजाए निदेशित किया कि उसे अंतिम सुनवाई के समय सुना जायेगा – याची ने आवेदन का विनिश्चय करने के लिए अपीली प्राधिकारी को निदेश चाहते हुए राजस्व मंडल के समक्ष पुनरीक्षण प्रस्तुत किया – राजस्व मंडल ने अपनी ओर से पुनरीक्षण को गुणदोषों पर निर्णित किया – अभिनिर्धारित – राजस्व मंडल को गुणदोषों पर निर्णित करने के लिए अपीली प्राधिकारी की अधिकारिता को अनदेखा करने का प्राधिकार नहीं – राजस्व मंडल को केवल सुने जाने के अधिकार के संबंध में आक्षेप को निर्णित करना चाहिए था – राजस्व मंडल का आदेश अपास्त – चूंकि याची अपने पुनरीक्षण का अभियोजन राजस्व मंडल के समक्ष नहीं चाहता, सुने जाने के अधिकार को पहले निर्णित करने के लिए अपीली प्राधिकारी को निदेशित किया गया – याचिका मंजूर।

Case referred :

1986 MPLJ 362.

R.P. Agrawal with *Anuj Agrawal,* for the petitioner.
Mukesh Agrawal, for the respondent No.1.
Vivek Agrawal, G.A. for the respondent No.2.

ORDER

U.C. MAHESHWARI, J. :- The petitioner who was applicant before the initial Court of Superintendent of Land Record Chhatarpur, has filed this petition under Article 226 (the same appears to be under Article 227) of the Constitution of India being aggrieved by the order dated 24.5.2013 (Ann. P.8) passed by the Board of Revenue in Revision No. 3126-II/12, whereby instead to decide the interlocutory question involved in such revision the entire case was decided on merits while such revision was filed only against the interim order dated 31.7.2012 (Ann. P.6) passed by the Additional Collector,

Chhatarpur in revenue appeal No.160/Appeal/A-6-A/2011-12, whereby his application dated 31.7.2012 (Ann. P-5) challenging the *locus standi* of the respondent No.1 to file such appeal was kept pending with a direction that same be considered along with final hearing of such appeal, which was remained pending before the Additional Collector, Chhatarpur till deciding the impugned revision.

2. The facts giving rise to this petition in short are that the petitioner herein has filed an application under Section 109 and 110 of the M. P. Land Revenue Code (In short "the Code"), in the Court of Superintendent of Land Records, Chhatarpur for mutation of his name in the revenue record of disputed land. Undisputedly, respondent No.1 herein has not been impleaded as party before such authority. On consideration by allowing such application by the superintendent of Land Record vide dated 18.11.2009 (Ann. P.1) the name of the petitioner was directed to be mutated in the revenue record of disputed land. On coming to know about such order the respondent No.1 has filed the aforesaid appeal bearing No.160/A-6-A/11-12, under Section 44 (1) of the Code along with an application under Section 5 of Limitation Act for condoning the delay in filing the same in the Court of Additional Collector Chhatarpur. On consideration, such application of Section 5 of Limitation Act was allowed vide order dated 20.6.2012 (Ann. P.3) and the alleged delay was condoned and the appeal was posted for final arguments. Such order was challenged by the petitioner herein before the Board of Revenue by way of Revision No.2005-II/12 but on consideration by affirming the order of the Additional Collector such revision was dismissed vide order dated 10.7.2012 (Ann. P.4).

3. Subsequent to aforesaid on behalf of the present petitioner on 31.7.2012 an application (Ann. P.5) to challenge the *locus-standi* of the respondent No.1 to file the appeal under Section 44 (1) of the Code was filed, as she being not the party before the Superintendent of Land Record could not file the appeal without permission of the appellate Court. But on hearing instead to decide such application on merits the same was kept pending with a direction to hear the same at the time of final hearing of such appeal. Against such order the present petitioner approached the Board of Revenue with impugned revision No.3126/II/12 to set aside such order with appropriate direction to the appellate Court to consider the aforesaid application first and subject to out come of the same on arising the occasion to hear and decide the appeal on merits but on consideration instead to decide such question raised in the revision taking into consideration some earlier decision of this

Court in the matter of *Sudan Singh Vs. State of M. P. and another* reported in 1986 MPLJ 362, the entire case was decided on merits, before deciding the aforesaid pending appeal by the appellate authority the Additional Collector, and pursuant to such order subordinate authorities were directed to score out the name of the petitioner from the revenue record and mention the name of respondent No.1 in such record, on which the petitioner has come to this Court with this petition.

4. Shri R. P. Agrawal, Senior Advocate assisted by Shri Anuj Agrawal, after taking me through the papers placed on record along with the impugned order argued that in pendency of the appeal before the Additional Collector Chhatarpur, against the interlocutory order of such appeal whereby his application filed to decide the *locus-standi* of respondent No.1 to file the appeal instead to decide on merits was kept pending till final hearing of the appeal he approached the Board of Revenue with the impugned revision while dealing with such revision the Board of Revenue did not have any authority contrary to the provision of Section 44 of the Code to decide the entire matter on merits but the Board of Revenue by ignoring the jurisdiction of the appellate Court to decide such appeal first on merits, has entered in the matter like appellate Court and decide the same finally without considering and answering the aforesaid question raised by the petitioner. As such the material question whether such application should be decided by the Additional Collector at the interlocutory stage or the same was rightly kept pending till final hearing of appeal was not answered in the entire order, unless the question regarding locus-standi of respondent No.1 to file such appeal is decided, either the Board of Revenue or the Additional Collector did not have any authority to decide the matter on merits. He further said that if his aforesaid impugned application is allowed then in that circumstance there shall be no necessity to decide the matter on merits and if such application is dismissed and permission is granted to the respondent No.1 to file the appeal then only such appeal could be heard and decided on merits by the Additional Collector. He further said that any Court of law has no authority to decide any proceeding contrary to the procedure prescribed under the law and in such premises unless the appeal is decided finally by the Additional Collector and against such order appropriate proceeding is filed before the Board of Revenue till then Board of Revenue did not have any authority to decide the matter on merits and prayed to set aside the impugned order with further prayer to give appropriate direction to the Additional Collector to decide his application regarding *locus-*

standi of respondent No.1 to file the appeal at the interlocutory stage and subject to out come of such application to proceed to hear and decide the appeal on merits by admitting and allowing this petition.

5. In response of aforesaid arguments Shri Mukesh Kumar Agrawal, learned appearing counsel of the respondent No.1, by referring some papers available on record justified the impugned order and said that same being based on proper appreciation of facts of the case and the decision of this Court in the matter of *Sudan Singh* (Supra) is in accordance with the law, the same does not require any interference at this stage either for setting aside or after setting aside such order to remit back the matter to the Board of Revenue to decide the revision afresh to answer the question raised by the petitioner in such revision. In continuation he said that the Board of Revenue being highest Court of revenue sector has inherent power to consider and decide any case on merits suo-moto even in a proceeding filed against any interim order of subordinate revenue Court. On merits he said that the respondent No.1 being purchaser of the disputed property from its earlier Bhoomiswami through registered sale deed and for one reason or another inspite filing the application for mutation her name was not recorded in the revenue record and contrary to her transaction on filing the application for mutation on behalf of the petitioner without impleading the respondent No.1 Chhotelal the earlier Bhoomiswami and her the Superintendent of Land Record by ignoring the jurisdiction of Tahsil Court vested under Section 109 and 110 of the Code considered and allowed the same and pursuant to that mutated the name of the petitioner in the revenue record of the disputed land. In such premises, the Board of Revenue has not committed any error in deciding the entire case on merits while dealing with the revision filed by the petitioner against the aforesaid interlocutory order of the appellate Court. However, in response of the query of the Court from the counsel of the respondent No.1 asking that before the Additional Collector in pending appeal any application on behalf of the respondent No.1 permitting her to file the appeal has been filed till today, on which he fairly conceded that till today no such application has been filed before the appellate Court on her behalf. With these submissions he prayed for affirming the impugned order by dismissing this petition.

6. Having heard the counsel at length keeping in view their arguments, I have carefully gone through the papers placed on record along with the impugned order. It is settled proposition under the revenue law that initially the case is filed before the initial revenue Court having the territorial jurisdiction

over the matter and if any interlocutory order is passed by such authority in the matter then aggrieved party has a right to challenge such interim order by way of revision before the superior authority of the revenue sector under Section 50 of the Code and if the mutation case is decided by such Court on merits, then the aggrieved party has a right to file the appeal under Section 44 of the Code. The same position is at the appellate stage that against any final order, the affected party has a right to file the second appeal before the superior authority of revenue sector and if such appeal is also finally decided then affected party may file the revision against such order of second appeal before the Board of Revenue. In such premises unless the appeal filed by the respondent No.1 under Section 44 (1) of the Code in the Court of Additional Collector is decided by such authority on merits finally there was no occasion before the Board of Revenue to consider and decide the matter finally on merits. The aforesaid cited case of the matter of *Sudan Singh* (Supra) was not decided directly on such question. Such case does not speak that by ignoring the jurisdiction of the appellate Court the superior authority or the Board of Revenue can decide the matter finally on merits while dealing with the proceeding filed against any interlocutory order, hence such citation was not helping to the respondent No.1, but the same was taken into consideration by the Board of Revenue under the wrong premises to decide the entire case on merits instead to answer the question raised by the petitioner.

7. As per existing legal position the superior Court did not have any authority to ignore the jurisdiction of the subordinate Court and in such premises till deciding the appeal by the Additional Collector on merits the Board of Revenue was not having any authority to enter into merits of the matter. As such the Board of revenue ought to have decided only the question whether the application of the petitioner to challenge the *locus standi* of the respondent No.1 to file the appeal should be considered by appellate Court at interlocutory stage or should be considered and decided along with the appeal at the time of final hearing, as directed by the Additional Collector but it is very unfortunate that instead to answer such question, the Board of Revenue by ignoring the jurisdiction of the appellate Court to decide the appeal, has decided the matter finally.

8. I am of the considered view that in the aforesaid premises subject to hearing and out come of the aforesaid application of the petitioner challenging the *locus-standi* of the respondent No.1 to file the appeal without leave of the Court as she was not party in initial Court on arising the occasion the

appeal should have been heard on merits first by the appellate authority the Additional Collector and subject to his order in appeal and subject to order of second appeal on arising the occasion, on approaching the affected party then only the Board of Revenue could have considered the matter on merits and not prior to that. In such premises the arguments advanced by the counsel of the parties on merits of the matter do not require any consideration before this Court. Parties shall be at liberty to raise all the arguments on merits of the matter before the appellate authority and such authority shall consider the same while deciding the appeal on merits.

9. In view of the aforesaid, I am of the considered view that the impugned order being passed by the Board of Revenue by ignoring the jurisdiction of the appellate Court i. e. Additional Collector is not sustainable and same deserves to be and is hereby set aside. After setting aside such order in normal course this Court has to remit back the matter to the Board of Revenue to hear the revision afresh and decide only the question raised by the petitioner in such revision challenging the *locus standi* of the respondent No.1 to file the appeal without obtaining the leave from the appellate Court to file the appeal as she was not the party before the concerning superintendent of the Land Records. But parties present have requested that instead to remit back the matter to the Board of Revenue to decide the aforesaid question the Additional Collector be directed to hear the aforesaid application of the petitioner and the appeal simultaneously and decide the same on merits on some early date with some time bound schedule.

10. In view of such joint request, it is held that now the petitioner herein who was the revisionist before the Board of Revenue does not want to prosecute his revision further but wants the hearing of his appeal along with the application challenging the *locus-standi* of the respondent No.1 to file the appeal before the Additional Collector in whose Court the appeal of respondent No.1 was pending on the date of passing the impugned order. In such premises there is no bar under any law to direct the Additional Collector to hear the aforesaid application of the petitioner herein first and subject to out come of such application on arising the occasion hear and decide the appeal on merits finally on some early date.

11. In view of the aforesaid discussion by allowing this petition impugned order of the Board of Revenue dated 24.5.2013 (Ann. P.2) is hereby set aside and instead to remit back the matter to the Board of Revenue to decide

the revision afresh with the consent of the parties as stated above, the Additional Collector Chhatarpur is directed to reopen the Revenue Appeal 160/Appeal/A-6-A/11-12 and take an endeavor to expedite the hearing of such appeal and decided the same in accordance with the aforesaid direction on merits on some early date probably on or before 30.11.2013. The petitioner and respondent No.1 are directed to appear before the Court of Additional Collector Chhatarpur firstly on 18.9.2013 so also on such other dates as are fixed by such Court for hearing of aforesaid appeal.

12. It is made clear that this order shall not come in the way of the parties to file any application or proceeding in the aforesaid appeal, if the same is necessary for them. It is further observed that Court of Additional Collector shall decide the aforesaid appeal on its own merits without influencing from any findings and of the observations made by the Board of Revenue in the impugned order (Ann. P.8) or by this Court in the present order.

13. Petition is allowed and the case is remitted back to the appellate Court to decide on merits as indicated above. There shall be no order as to costs.

Petition allowed.

I.L.R. [2014] M.P., 2789
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 8026/2013 (Gwalior) decided on 31 October, 2013

DASHRATH SINGH ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

(and W.P. No. 8040/2013)

***Panchayat Service (Discipline and Appeal) Rules, M.P. 1999, Rule 4(1) - Suspension of Panchayat Secretary by Collector* - Challenged on the ground that C.E.O. is the disciplinary/appointing authority and C.E.O. cannot be treated as sub-ordinate to Collector - Held - C.E.O. must be treated as sub-ordinate to Collector as he is in lower rank/position and class in comparison to the Collector - Collector is competent to place the petitioner under suspension - Impugned orders are appealable - Petitions are dismissed. (Paras 8, 9)**

पंचायत सेवा (अनुशासन और अपील) नियम, म.प्र. 1999, नियम 4(1) –

कलेक्टर द्वारा पंचायत सचिव का निलंबन – इस आधार पर चुनौती दी गई कि मुख्य कार्यपालिक अधिकारी, अनुशासनिक/नियुक्ति प्राधिकारी है तथा मुख्य कार्यपालिक अधिकारी को कलेक्टर के अधीनस्थ नहीं माना जा सकता – अभिनिर्धारित – मुख्य कार्यपालिक अधिकारी को कलेक्टर के अधीनस्थ माना जाना चाहिए क्योंकि कलेक्टर की तुलना में वह निचले पद/ओहदे और श्रेणी में आता है – याची को निलंबन में रखने के लिए कलेक्टर सक्षम है – आक्षेपित आदेश अपीलीय है – याचिकायें खारिज।

Case referred :

AIR 63 SC 550.

D.S. Raghuvanshi, for the petitioner.
B. Raj Pandey, G.A. for the respondent/State.

ORDER

SUJOY PAUL, J. :- Since singular and similar issue is raised by the petitioners against the impugned suspension order, with the consent of parties, matters are analogously heard and decided by this common order.

2. In these cases, the suspension order is called in question. The suspension order is approved / passed by Collector. The common ground is that the disciplinary / appointing authority of the petitioners is CEO. It is further contended that appointing authority as per new Rules of 2011 for Panchayat Secretary is CEO. Thus Collector has no authority to place the petitioner under suspension. It is further contended that CEO cannot be treated as subordinate to Collector.

3. Learned Govt. Advocate submits that this order is appealable and it cannot be said that order is passed by incompetent authority.

4. I have heard learned counsel for the parties and perused the record.

5. Rule 4 (1) of Madhya Pradesh Panchayat Service (Discipline and Appeal) Rules, 1999, reads as under :-

> "4.Suspension -(1) The appointing authority or any authority to which it is subordinate or disciplinary authority in that behalf, may place a member of Panchayat Service under suspension."

A bare perusal of the said rules makes it clear that following authorities can place the panchayat employee under suspension :-

(i) appointing authority

(ii) any authority to which appointing authority is subordinate and

(iii) disciplinary authority.

6. Even if the Collector is not appointing or disciplinary authoirty, question is whether CEO can be said to be a subordinate to the Collector. The contention of the learned counsel for the petitioner is that CEO in the administrative hierarchy is not immediate subordinate to the Collector. It is further contended that Collector is not an appellate authority against the order of CEO.

7. As per Black's Law Dictionary (9th Edition) the word "subordinate" means "1. placed in or belonging to a lower rank, class, or position < a subordinate lien>; 2. Subject to another's authority or control; to place in a lower rank, class, or position; to assign a lower priority to <subordinate the debt to a different class of claims>"

8. In the considered opinion of this Court, the rule making authority has not placed any limitation in the meaning of " subordinate". The dictionary meaning of subordinate is very wide. It means lower rank, position, control and lower layer etc. In the considered opinion of this Court, in absence of putting any embargo or condition with the word "subordinate" it has to be given widest meaning. Thus CEO must be treated as subordinate to the Collector. It cannot be disputed that CEO is in lower rank / position and class in comparison to the Collector. In AIR 63 SC 550 *(R.G. Jacob Vs. Republic of India)* the Apex Court considered the word "subordinate" and opined as under :-

> "When with that intention the legislature has used the word "subordinate" in S.165 without any limitation there is no justification for reading into the word the limitation suggested by the learned Counsel by the words " in respect of those very functions". It is plain that the interpretation suggested by Mr. Kumaramangalam needs the addition of some words in the section, and that is clearly not permissible by the use of the word "subordinate" without any qualifying words, the legislature has expressed its legislative intention of making punishable such subordinates also who have no connection with the functions with which the business or transaction is concerned. To limit the meaning of "subordinate" in the section as suggested by the learned Counsel would be defeating that legislative intention and laying down

a different legislative policy. This the Court has no power to do.

The appellant has therefore rightly been held to be "subordinate" to the Joint Chief Controller, even though the appellant had no functions to discharge in connection with the appeal before the Joint Chief controller of Imports and Exports."

(Emphasize supplied)

9. This court in WP No. 7221/2013 has taken similar view.

10. In the light of aforesaid, I am unable to hold that Collector is not competent to place the petitioner under suspension. The impugned orders are appealable. Petitioners may avail the remedy of appeal under the Rules.

Petitions are dismissed with aforesaid liberty.

Petition dismissed.

I.L.R. [2014] M.P., 2792
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 1191/2013 (S) (Gwalior) decided on 31 October, 2013

PRATAP SINGH MANDELIYA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

(and W.P. Nos. 3162/2013 (S), 5419/2013(S))

A. Panchayat (Powers and Functions of Chief Executive Officer), M.P. Rules, 1995 - Transfer - Malicious in Nature **- Entire action of transfer is based on bald complaint of Ex. M.L.A. - Cannot be said to be in administrative exigency or in public interest - Since petitioner was shunted before he could resume charge on irrelevant consideration - Transfer order is malicious in nature.**

(Paras 14, 15, 16 & 17)

क. पंचायत (मुख्य कार्यपालक अधिकारी की शक्तियां और कार्य), म.प्र. नियम, 1995 – स्थानातंरण – विद्वेषपूर्ण स्वरुप का – स्थानांतरण की संपूर्ण कार्यवाही भूतपूर्व विधायक की साधारण शिकायत पर आधारित – प्रशासनिक सुविधा या लोकहित में नहीं कहा जा सकता – चूंकि असंगत बात पर याची को उसके द्वारा पदभार ग्रहण कर सकने से पहले ही रोका गया – स्थानांतरण आदेश विद्वेषपूर्ण

स्वरुप का है।

B. Panchayat (Powers and Functions of Chief Executive Officer), M.P. Rules, 1995 - Withdrawal of Monitoring, Drawing and Disbursing powers - **Held - Once interim order is passed staying the transfer order, it was not proper for the respondent to take away monitoring, drawing and disbursing powers from the petitioner - Attempt is made to nullify the interim order liable to be deprecated. (Para 18)**

ख. पंचायत (मुख्य कार्यपालक अधिकारी की शक्तियां और कार्य), म.प्र. नियम, 1995 – अनुश्रवण, आहरण और संवितरण की शक्तियां वापस ली जाना – अभिनिर्धारित – एक बार स्थानांतरण आदेश पर रोक का अंतरिम आदेश पारित किये जाने पर, प्रत्यर्थी को याची से अनुश्रवण, आहरण और संवितरण की शक्तियां वापस लेना उचित नहीं था – अंतरिम आदेश अकृत करने का प्रयास किया गया, निन्दनीय है।

C. Panchayat (Powers and Functions of Chief Executive Officer), M.P. Rules, 1995 - Change of Service Condition - **Transfer of petitioner to Rajiv Gandhi Watershed Mission cannot be said to be on equivalent post - Petitioner's service conditions are changed - He is deprived to perform statutory duties attached to his post. (Para 21)**

ग. पंचायत (मुख्य कार्यपालक अधिकारी की शक्तियां और कार्य), म.प्र. नियम, 1995 – सेवा शर्त में बदलाव – राजीव गांधी वॉटरशेड मिशन में याची का स्थानातंरण समकक्ष पद पर किया जाना नहीं कहा जा सकता – याची की सेवा शर्तें बदली गई हैं – उसे अपने पद से संलग्न कानूनी कर्तव्यों का पालन करने से वंचित किया गया।

Cases referred :

2003 (11) SCC 740, 1996 (1) Labour Law Journal 26, ILR (2011) M.P. 1720, (2003) 4 SCC 739, (1980) 4 SCC 10, (2005) 6 SCC 776, (2009) 2 SCC 592, (2007) 6 SCC 220, (1986) 2 SCC 7.

Vivek Jain, for the petitioner.
Sangeeta Pachauri, Dy. G.A. for the respondent/State.

ORDER

SUJOY PAUL, J. :- Since the aforesaid petitions are interrelated and involve similar question of facts and law, on the joint request, matters are heard analogously and decided by this common order.

W.P. No. 1191/2013

2. In this petition, the petitioner, Chief Executive Officer, Janpad Panchayat, assailed the transfer order dated 18.02.2013. By this order it is directed that till further orders he is transferred and posted at Sanjay Gandhi Yuva Netratva Vikas Training Centre, Pachmadhi, Distt. Hoshangabad. This order is challenged by the petitioner on the ground that petitioner is subjected to frequent transfers. On 28.05.2012 he was posted at Pahadgarh. On 19.10.2012 he was posted at Sironj, from Sironj he was transferred to Sabalgarh on 06.11.2012 and from Sabalgarh he was transferred by the impugned order on 18.02.2013 to Pachmadhi.

3. Shri Vivek Jain, learned counsel for the petitioner, submits that the petitioner joined at Sabalgarh on 09.11.2012. At the time of joining at Sabalgarh, respondent No.3 was enjoying the current charge of post of CEO. It is contended that he is close associate of respondent No.2, Ex-MLA who belongs to ruling party. The petitioner was actually given charge only on 03.12.2012 nearly after one month from the date of joining. Charge handing over letter is annexed as Annexure P/7.

4. The next attack on the transfer order is on the ground of malafide. It is contended that the respondent No.2, Ex-MLA, on his letter head wrote a letter to the Principal Secretary Panchayat and Rural Development on 12.11.2012 requesting transfer of the petitioner to elsewhere and in lieu thereof, requested to continue respondent No.3 on current charge basis as CEO, Janpad Panchayat. It is contended that on the same date superior officer put a mark on the forehead of the same document Annexure P/8 that "As discussed put up immediately श्री अनिरूद्ध शर्मा यथावत CEO चार्ज में रहेंगे"- Shri Vivek Jain submits that even before petitioner could resume the charge, on 03.12.2012 a complain was made against him which has nothing to do with administrative exigency or public interest. He submits that respondents No.2 and 3 are in good relation and with a view to accommodate respondent No.3, petitioner was shunted. Criticizing the transfer order, it is contended that entire action of transfer is founded upon Annexure P/8. By drawing attention of this Court to Annexure P/5, it is contended that respondents decided to transfer the petitioner and then started searching the place where he could be posted. Attention is drawn to the relevant portion of notesheet dated 12.11.2012. Subsequent portion of said note sheet shows that information was desired from Joint

Director Training Centre, Pachmadhi whether equivalent post is lying vacant because petitioner was proposed to be posted at said training Centre at Pachmadhi. Note sheet further shows that information is received from the training Centre of Pachmadhi that petitioner's salary can be drawn against the post of Lecturer / Reader. Said note sheet was approved and petitioner is transferred. Shri Jain contended that transfer is malicious is nature.

5. The next ground of attack is that the petitioner is appointed to perform duty as Chief Executive Officer, Janpad Panchayat under the relevant recruitment rules. The said rules provide certain nature of duties and responsibilities. Petitioner has statutory, legal and vested right to perform only such duties which are attached to his statutory post, he is under no obligation to be transferred to any other organization / institution. More so, when there is no equivalent post in the said institution. The setup of the Pachmadhi is shown in Annexure P/12 with rejoinder. As per this setup, it is contended that no administrative post is lying vacant and the respondents intend to draw salary of the petitioner from post of Reader / Lecturer which itself shows that relevant or equivalent post is not lying vacant at Pachmadhi Centre.

WP No. 3162/2013

6. The grievance in this petition is that in WP No. 1191/2013 this Court has stayed operation of the transfer order, resultantly, the petitioner had a right to continue as CEO, Janpad Panchayat, Sabalgarh by the impugned order dated 27.04.2013 (Annexure P/1). It is contended that since petitioner has "obtained stay", the monitoring, drawing and disbursing powers of the petitioners are given to respondent No.3, Shri B.R. Jatav, BDO Kailaras. It is contended that this is an attempt to nullify the interim order. Shri Jain submits that if the monitoring, drawing and disbursing powers are taken away, CEO's status is reduced as clerk and in view of interim order, this was impermissible.

WP No. 5419/2013

7. In this case order dated 22.07.2013 is called in question. In WP No. 3162/2013 this Court stayed the operation of the impugned order, thereafter, by order dated 22.07.2013 the petitioner is directed to be posted in Rajiv Gandhi Watershed Mission under Development Commissioner. It is contended that said transfer is impermissible. By placing reliance on the setup, it is contended that there is no such post on which petitioner can work there. No

post is also defined where petitioner could be posted. Said transfer / posting amounts to change of service condition of petitioner which is impermissible.

8. *Per Contra,* the stand of Mrs. Pachauri is that the transfer order dated 18.02.2013 is passed in accordance with law and there is no infirmity in the same. She submits that the employer is the best judge to decide as to where the employee is to be posted . The petitioner has no right to remain posted at particular post. Shri Praveen Visoriya, Advocate for the respondent No.3 in WP No. 5419/2013 submits that he received Govt. order to take over the charge from the petitioner. He has no interest, whatsoever, to take said charge. He only acted as per Govt. order.

9. I have heard learned counsel for the parties and perused the record.

10. The basic order is transfer order dated 18.02.2013. Other orders are subject matter of challenge in WP No. 3162/13 and WP No. 5419/2013 and are passed in continuance of order of transfer.

The petitioner has specifically pleaded in WP No. 1191/2013 that respondent No.3 is close associate of respondent No.2, former MLA. Despite service on the respondent No.2, said respondent has not rebutted the same. This is trite in law that allegations of malafide must be rebutted by filing reply in a specific manner. So far as allegations of malice are concerned, it is apt to reproduce the letter of the respondent No.2 (Annexure P/8)

मेहरवान सिंह रावत
पूर्व विधायक
विधान सभा क्षेत्र कं. 01
सबलगढ़ मुरैना

निवास : ग्राम–खानपुरा मांगरौल
पर. सबलगढ़
जिला मुरैना मध्यप्रदेश
07536. 252552 निवास
0751–5015052 ग्वालियर
मोबा. 94254–57255
90096–41393

प्रति,

प्रमुख सचिव,

पंचायत एवं ग्रामीण विकास

विषयः– श्री पी0 एस0 मण्डेलिया को सबलगढ़ के जनपद CEO पद पर ज्योनिंग ना कराकर CEO सबलगढ़ जनपद का कार्यभार यथावत श्री अनिरूद्ध शर्मा पर

रखने बावत्।

महोदय अनुरोध है कि मण्डेलिया एक पार्टी विशेष जुड़ाव रख कर कार्य करने वाले अधिकारी है पूर्व में भी इसकी शिकायते हुई है।

अतः CEO जनपद सबलगढ़ के पद पर श्री वर्मा को यथावत रखते हुए मण्डेलिया को अन्यत्र पदस्थ करने का कष्ट करें।

भवदीय
मेहरबान सिंह रावत

11. On this letter itself by putting a note it was ordered that respondent No.3 shall continue to work as CEO (In-charge). The note sheet (Annexure P/5) shows that respondents decided to transfer the petitioner and then searched where he could be transferred. After obtaining information from Training Centre, Pachmadhi, the petitioner is directed to be posted there with further direction that his salary will be drawn from the post of lecturer / reader. Question is whether said transfer can be said to be in administrative exigency or in public interest.

12. Transfer order can be passed only in administrative exigency or in public interest. I find substantial force in the contention of the petitioner that even before he could resume charge at Sabalgarh on 03.12.2012, the respondent No.2 wrote a letter for his transfer. Thus the grievance of the respondent No.2 is not that petitioner could not perform properly or his actual functioning is contrary to public interest. The request of transfer is based on the ground that the petitioner has association with some political party. In addition, it is requested that the arrangement of current charge with respondent No.3 be continued. The respondents acted on this communication Annexure P/8, which is clear from the entry mentioned on the forehead of the document which is reproduced in para 4 of this order.

13. In 2003 (11) SCC 740 *(Sarvesh Kumar Awasthi Vs. U.P. jal Nigam and others)* the Apex Court held that the power of transferring an officer cannot be wielded arbitrarily, malafide or an exercise against efficient and independent officer or at the instance of politicians. For better administration, the officers concerned must have freedom from fear of being harassed by repeated transfers or transfers ordered at the instance of someone who has nothing to do with the business of administration.

14. The Allahabad High Court in 1996 (1) Labour Law Journal 26 *(Pawan Kumar Shrivastava Vs. U.P. Electricity Board and others)* held that where the transfer order is on political considerations and complaints and not based on administrative exigencies or public interests, it is bad in law. This Court in ILR (2011) MP 1720 *(K.S. Verma Vs. State of M.P. and others)* opined that note sheet / complaint is taken into consideration by the Minister. It is held that this kind of complaint cannot be a foundation for transferring the employee from one place to another. Except a bald complaint lodged by the district head of a political party, no other material brought on record to justify that the petitioner derelicted in his duty. The Court imposed cost also. This case has similarity with the present matter. The record shows that the entire action of transfer is based on bald complaint of Ex- MLA / Respondent No.2.

15. In the light of aforesaid judgments, the transfer order on the basis of such complaint cannot be said to be a fair exercise of power. Such transfer cannot be said to be in administrative exigency or in public interest. Thus, it is clear that transfer order is passed for reasons which are not germane for passing the valid transfer order. On this score alone transfer order is liable to be interfered with.

16. This is settled in law that exercise of power for an extraneous or ulterior purpose amounts to "malice in law". Legal malice or malice in law means something done without lawful excuse. In other words, it is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill-feeling and spite. It is a deliberate act in disregard of the rights of the other(See: *State of A.P. Vs. Goverdhanlal Pitti* (2003) 4 SCC 739). Where government action is unreasonable or lacking in quality of public interest, though different from that of *mala fides,* it may in a given case furnish evidence of *mala fides* (See :*Kasturi Lal Vs. State of J & K* (1980) 4 SCC 10). Even if an order is found to be not vitiated by malice in fact, but still can be held to be invalid, if the same is passed for unauthorized purpose as it would amount to *malafide* in law [see: (2005) 6 SCC 776 *(Punjab State Electricity Board Vs. Zora Singh)*]. In (2009) 2 SCC 592 *(Somesh Tiwari Vs. Union of India)* it is opined that transfer order will be bad in law, if it is issued not based on any factors germane to the passing of an order of transfer and based on irrelevant grounds.

17. On the basis of aforesaid, it is clear that transfer order dated

18.02.2013 is malacious in nature. Thus, this order is set aside. It needs to be set aside for yet another reason that petitioner was transferred to Sabalgarh only on 06.11.2012 and before he could resume the charge, he is shunted to Pachmadhi on irrelevant consideration. This action of respondents is not appreciable and not in the spirit of democratic principles.

18. So far as WP No. 3162/2013 is concerned, impugned order shows that since the interim order is passed against transfer order dated 18.02.2013, the respondents have decided to take away monitoring, drawing and disbursing power form the petitioner. In the return of this case the respondents have made attempt to justify the transfer order. In the considered opinion of this Court, once interim order is passed staying the order dated 18.02.2013, it was not proper for the respondents to take away the said powers from the petitioners. The petitioner's service conditions are governed by M.P. Panchayat (Powers and Functions of Chief Executive Officer) Rules, 1995. As per these rules, petitioner is entitled to exercise certain statutory powers. There was no justification in not permitting the petitioner to exercise those statutory powers attached to this post. In the opinion of this Court, reasons assigned for taking away those powers from the petitioner is arbitrary and impermissible. Every citizen has a right to approach the Court against any wrong and pray for interim order. If interim order is passed, unless it is vacated or modified, parties are bound to follow it in letter and spirit. In the manner order Annexure P/ 1 is passed, it shows that respondents have made an oblique attempt to overreach the order passed by this Court and made an attempt to nullify the same. This is liable to be depricated. Reasons assigned in order dated 27.04.2013 are totally unsustainable and accordingly this order is also set aside.

19. So far as WP No. 5419/2013 is concerned, by this order, the petitioner is directed to work under Rajiv Gandhi Watershed Mission. It is not clear as to on which post petitioner is transferred. I find force in the contention of the petitioner that the petitioner is not obliged to work on any other post than the post for which he was selected and appointed. The order dated 22.07.2013 is also bad in law because it is issued with a view to nullify the interim protection given to the petitioner. In other two writ petitions, the respondents have made consistent efforts to nullify the orders of this Court which amounts of malice. This also amounts to colourable exercise of power. No material is placed by the respondents either in WP No. 1191/2013 or in WP No. 5419/2013 to

show that the petitioner is transferred to any equivalent post.

20. The Principal Seat in WP No. 112/97 *(Manish Menon Vs. Shri Gujrati Shikshan Sangh Raipur and others)* set aside the transfer order of a Upper Division Teacher whereby he was directed to teach middle school students of the same institution. In the said case the petitioner was appointed as UDT to teach class -XI and XII students. The management transferred him in the same school without reducing salary. Yet, this Court by order dated 01.12.1997 set aside the said order and opined that it amounts to change of service condition. The said order was affirmed by the Division Bench in LPA. This is settled in law that equivalence is not confined to pay scale only. It has relation with nature of duties, responsibilities, powers which are being exercised. These relevant factors have relation with status of the officer. Supreme Court in (2007) 6 SCC 220 *(Tejshree Ghag and others Vs. Prakash Parashuram Patil and others)* has opined as under :-

> "An order of transfer ordinarily should be in terms of the existing rules. Transfer may even be incidental to the conditions of service, but thereby nobody can be deprived on his existing right. Existence of power and exercise thereof are two different concepts. An executive power in absence of any statutory rules cannot be exercised which would result in civil or penal consequences. Such exercise of power must, moreover, be bonafide. It cannot be done for unauthorized purpose. An executive order passed for unauthorized purpose would amount to malice in law. An order of transfer cannot prejudicially affect the status of an employee. If order of transfer substantially affect the status of an employee, the same would be violative of the conditions of service and this illegal."
>
> (Emphasize supplied)

In (1986) 2 SCC 7 *(Vice-Chancellor, L.N. Mithila University Vs. Dayanand Jha)* the Apex court opined as under:-

> "In the present case, although the two posts of Pincipal and Reader are carried on the same scale of pay, the post of Principal has higher duties and responsibilities. Apart from the fact that there are certain privileges and allowances attached to it, the Principal being the

head of the College has many statutory rights. Thus the post of Principal cannot be treated as equivalent to that of Reader for the purposes of Section 10(14)."

21. In the light of aforesaid, in my opinion, petitioner's transfer to Pachmadhi or under Rajiv Gandhi Watershed Mission cannot be said to be on equivalent post. By passing impugned orders, petitioner's service conditions are changed. He is deprived to perform statutory duties attached to his post. The petitioner being a CEO was equipped with statutory powers which includes administrative powers. Same could not have been taken away arbitrarily.

22. As analyzed above, in the opinion of this Court, the impugned orders passed in these writ petitions cannot be permitted to stand. The same are set aside. In the manner respondents have passed impugned orders, I deem it proper to impose a cost of Rs. 5000/- which shall be paid to the petitioner within 30 days. The petitions are allowed.

Petition allowed.

I.L.R. [2014] M.P., 2801
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 9145/2013 (Jabalpur) decided on 11 November, 2013

RAM KALESH SINGH ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

Industrial Employment (Standing Orders) Act, M.P. (26 of 1961), Clauses 2(i)(vi) **- Petitioner was classified as permanent time keeper w.e.f. 13.10.2006 pursuant to award passed by Labour Court - Subsequently by order dated 18.07.2013, he was regularized as Mason - Petitioner seeks modification of order dated 18.07.2013 to the effect that he be regularized as Time Keeper w.e.f. 13.10.2006 from the date of the award passed by Labour Court - Held - Though the petitioner was granted the benefit of permanent classification w.e.f. 13.10.2006, but he fails to establish that there were clear vacancies of a Time Keeper on 13.10.2006 - Same would only entitle him for difference of wages of daily wage worker and the Time Keeper, however the same will not make him the member of service in the**

cadre of Time Keeper - Order dated 18.07.2013 cannot be found faulted - No interference is caused. (Paras 1, 13 & 14)

औद्योगिक नियोजन (स्थायी आदेश) अधिनियम, म.प्र. (1961 का 26), खंड 2(i)(vi) – याची को श्रम न्यायालय द्वारा पारित किये गये आदेश के अनुसरण में 13.10.2006 से प्रभावी रुप से स्थाई टाईम कीपर के रुप में वर्गीकृत किया गया – तत्पश्चात आदेश दि. 18.07.2013 द्वारा उसे राजमिस्त्री के रुप में नियमित किया गया – याची आदेश दि. 18.07.2013 में इस प्रकार का परिवर्तन चाहता है कि श्रम न्यायालय द्वारा अवार्ड पारित किये जाने की तिथि, 13.10.2006 से प्रभावी रुप से उसे टाईम कीपर के रुप में नियमित किया जाये – अभिनिर्धारित – यद्यपि याची को 13.10.2006 से प्रभावी रुप से स्थाई वर्गीकरण का लाभ प्रदान किया गया था, किन्तु वह यह स्थापित करने में असफल रहा कि 13.10.2006 को टाईम कीपर की स्पष्ट रिक्तियां थीं – उक्त से वह केवल दैनिक वेतन कर्मचारी और टाईम कीपर के वेतन के अंतर का हकदार होगा, अपितु उक्त से वह टाईम कीपर के कैडर में सेवा का सदस्य नहीं बनेगा – आदेश दि. 18.07.2013 में त्रुटि नहीं पाई जा सकती – हस्तक्षेप का कारण नहीं।

Cases referred :

(2006) 2 SCC 706, (2006) 1 SCC 584.

Sanjay Verma, for the petitioner.
Vikram Johri, P.L. for the respondent No.1/State.

ORDER

SANJAY YADAV, J. :- Heard.

1. Petitioner seeks modification of the order dated 18.7.2013 and direction to respondents to regularize the petitioner on the post of time keeper with effect from 13.10.2006. (By order dated 18.7.2013, petitioner has been regularized as Mason (work charged) in Scale of Rs. 4400- 7400 + Grade Pay Rs. 1300 P.M.).

2. Initially engaged on daily wages, in the Public Health Engineering Department, petitioner raised an Industrial dispute seeking regularization. The dispute referred for adjudication was :-

> "क्या श्री रामकलेश सिहं पिता श्री द्वारिका सिहं को विभिन्न श्रम अधिनियमों के अतंर्गत नियमितीकरण की पात्रता आती है? यदि हॉ तो इस संबंध में नियोजक को क्या निर्देश दिये जाना चाहिए?"

3. The permanent classification was sought by the petitioner on the basis of the provisions contained in the Standard Standing Orders under M.P.

Industrial Employment (Standing Orders) Act, 1961 (referred to as SSO).

4. The labour Court vide award dated 13.10.2006 directed for permanent classification of the petitioner on the post of time keeper. Consequent whereof, the petitioner has been classified as permanent Time Keeper with effect from 13.10.2006 by order dated 17.12.2007.

5. When the matter stood thus, the petitioner by order dated 18.4.2013 has been regularized in service on post of Mason (work-charged) in grade Rs. 4400-7440 (Grade Pay Rs. 1300 per month) under Madhya Pradesh New work-charged Service Recruitment Rules 2012. The order stipulates :-

> "प्रमुख अभियंता, लोक स्वास्थ्य यांत्रिकी विभाग भोपाल के पत्र कमांक 10638/स्था./अराज./प्र.अ. /भोपाल दिनांक 26.09.2012 द्वारा विभाग में कार्यरत दैनिक वेतन भोगी कर्मचारियों के कार्यभारित स्थापना में अराज्य स्तरीय सीधी भर्ती के रिक्त पदों के विरूद्ध नियमितीकरण हेतु दिये गये निर्देशों के अनुपालन में तथा समय–समय पर जारी दिशा निर्देशों के परिप्रेक्ष्य में नियमितीकरण हेतु परिक्षेत्र स्तरीय गठित विभागीय छानबीन समिति की अनुशंसा के आधार पर परिक्षेत्र के अधीन कार्यरत निम्नांकित दैनिक वेतन भोगी कर्मचारियों को कार्यभारित स्थापना में उनके नाम के सम्मुख कॉलम 4 में दर्शाये गये मेसन (कार्यभारित) के पद पर म.प्र. नवीन कार्यभारित सेवा भर्ती नियम 2012 में दर्शित पुनरीक्षित वेतनमान रू. 4400–7440+ग्रेड वेतन रू. 1300 प्रतिमाह एवं शासन द्वारा समय–समय पर स्वीकृत महंगाई भत्तो सहित उनके द्वारा कार्यभार ग्रहण करने के दिनांक से अस्थाई रूप से कार्यभारित स्थापना में मध्यप्रदेश राजपत्र (असाधारण) कमांक 408 दिनांक 28 सितम्बर 2012 में प्रकाशित (म.प्र. लोक स्वास्थ्य यांत्रिकी विभाग, कार्यभारित तथा आकस्मिक निधि से वेतन पाने वाले कर्मचारी (भर्ती तथा सेवा शर्तें) नियम 2012) में निहित शर्तो के अधीन नियुक्त किया जाता है तथा कॉलम 6 में उल्लेखित कार्यालयों के अधीन पदस्थ किया जाता है।"

6. Being aggrieved, petitioner seeks direction to the respondents to treat him as regular time keeper with effect from 13.10.2006, the date from which he has been classified as permanent.

7. The respondents, however, refutes the contention. It is urged that the permanent classification under SSO is altogether different than regularization on a post in work-charged establishment. It is urged that with regularization, an incumbent become, the member of establishment which is not the case in permanent classification. It is urged that being classified as permanent, the incumbent is entitled for the benefit which accrue under the SSO and does

not become a member of service. It is accordingly urged that the petitioner, on being regularly appointed in service under Rules is from the date when such order is passed and not from a retrospective date.

8. There is considerable force in the submission on behalf of the respondents.

9. Standard Standing Order are framed under M.P. Industrial Employment (Standard Orders) Act, 1961. Clauses 2 (i), (vi) of the standing orders stipulates :-

> "2. (i) A 'permanent' employee is one who has completed six months' satisfactory service in a clear vacancy in one or more posts whether as a probationer or otherwise, or a person whose name has been entered in the muster roll and who is given a ticket of permanent employee ;
>
> * * *
>
> (vi) 'temporary employee' means an employee who has been employed for work which is essentially of a temporary character, or who is temporarily employed as an additional employee in connection with the temporary increase in the work of a permanent nature; provided that in case such employee is required to work continuously for more than six months he shall be deemed to be a permanent employee, within the meaning of caluse (i) above."

10. Taking into consideration the right as would accrue in favour of a daily wager under Standard Standing Order, it has been observed in *M.P. Housing Board and another v. Manoj Shrivastava* (2006) 2 SCC page 706 :-

> "8. A person with a view to obtain the status of a "permanent employee" must be appointed in terms of the statutory rules. It is not the case of the respondent that he was appointed against a vacant post which was duly sanctioned by the statutory authority or his appointment was made upon following the statutory law operating in the field.
>
> 9. The Labour Court unfortunately did not advert to the said question and proceeded to pass its award on the premise that as the respondent had worked for more than six months

satisfactorily in terms of clause 2 (vi) of the Standard Standing Orders, he acquired the right of becoming permanent. For arriving at the said conclusion, the Labour Court relied only upon the oral statement made by the respondent.

10. It is one thing to say that a person was appointed on an ad hoc basis or as a daily-wager but it is another thing to say that he is appointed in a sanctioned post which was lying vacant upon following the due procedure prescribed therefor."

11. It has been further held therein :-

"17. It is now well settled that only because a person had been working for more than 240 days, he does not derive any legal right to be regularised in service. *(See Madhyamik Shiksha Parishad, U.P. v. Anil Kumar Mishra, Executive Engineer, ZP Engineering Divn. v. Digambara Rao, Dhampur Sugar Mills Ltd. v. Bhola Singh, Manager, Reserve Bank of India v. S. Mani and Neeraj Awasthi."*

12. Similarly in *State of Karnataka and others v. KGSD Canteen Employees' Welfare Employees Association and others* (2006) 1 SCC 584 it is held :-

"44. The question which now arises for consideration is as to whether the High Court was justified in directing regularisation of the services of the respondents. It was evidently not. In a large number of decisions, this Court has categorically held that it is not open to a High Court to exercise its discretion under Article 226 of the Constitution either to frame a scheme by itself or to direct the State to frame a scheme for regularising the services of ad hoc employees or daily wage employees who had not been appointed in terms of the extant service rules framed either under a statute or under the proviso to Article 309 of the Constitution. Such a scheme, even if framed by the State, would not meet the requirements of law as the executive order made under Article 162 of the Constitution cannot prevail over a statute or statutory rules framed under proviso to Article 309 thereof. The State is obligated to make appointments only in fulfilment of its constitutional obligation

as laid down in Articles 14, 15 and 16 of the Constitution and not by way of any regularisation scheme. In our constitutional scheme, all eligible persons similarly situated must be given opportunity to apply for and receive considerations for appointments at the hands of the authorities of the State. Denial of such a claim by some officers of the State time and again had been deprecated by this Court. In any view, in our democratic polity, an authority howsoever high it may be cannot act in breach of an existing statute or the rules which hold the field."

13. In the case at hand though granted the benefit of permanent classification under Standard Standing Order the petitioner fails to establish that there were clear vacancies of a time keeper on 13.10.2006. In absence whereof, though the petitioner's classification as permanent time keeper with effect from 13.10.2006 cannot be interfered with. However, the same, in the considered opinion of this Court, would only entitle him for difference of wages of the daily wage worker and the time keeper which, however, will not make him the member of service and in the cadre of time keeper, it can be only after ascertaining the vacancies and appointing the incumbent against such vacancy. In the present case, the petitioner and the like having been brought on work-charged establishment i.e. in service on a clear vacant post of mason by order dated 18.4.2013, the same cannot be found faulted with on the anvil that the petitioner has been classified as permanent time keeper.

14. In view of above, no interference is caused. The petition is dismissed.

Petition dismissed.

I.L.R. [2014] M.P., 2806
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 5692/2013 (Jabalpur) decided on 21 November, 2013

SUDHA JAIN (DR.) & ors. ...Petitioners
Vs.
M.P. HOUSING AND INFRASTRUCTURE DEVELOPMENT & ors. ...Respondents

(and W.P. Nos. 996/2013, 998/2013, 5746/2013, 3170/2013, 3165/2013, 3164/2013, 439/2013, 432/2013, 423/2013, 11716/2013, 995/2013,

11242/2013, 11712/2013, 11713/2013, 11714/2013, 11715/2013, 11317/2013, 11316/2013, 11710/2013, 21789/2012, 5690/2013, 11312/2013, 11789/2013, 11788/2013, 11790/2013, 12595/2013, 13104/2013, 13106/2013, 7147/2013, 11717/2013, 11792/2013, 11791/2013, 11314/2013, 11313/2013, 10740/2013, 10738/2013, 10718/2013, 10717/2013, 10713/2013, 10714/2013, 10715/2013, 9736/2013.

***A. Griha Nirman Mandal Adhiniyam, M.P. (3 of 1972)(Substituted by M.P. Act No. 4 of 2011 w.e.f. 04.01.2011), Sections 47, 50(b), Housing Board Accounts Rules, M.P. 1991, Rule 5.4 and 5.7.4. - Linking of cost price with Collector's guideline* - Petitioners have purchased residential accommodations from M.P. Housing Infrastructure Board under self financing scheme - Issue revolves round the pricing of these residential accommodation - Petitioner have confined their challenge only to linking of cost price of land with Collector's guidelines - Held - Unless established that determination of market value is by the expert Committee constituted under 2000 Guideline, Rules by following with the procedure laid down therein the market value determined by the Collector will not be foolproof determinant for pricing of the residential accommodation under the self-financing scheme - These guidelines are for the purpose of determination of stamp duty and keeps on changing every year. (Para 32)**

क. गृह निर्माण मंडल अधिनियम, म.प्र. (1972 का 3)(04.01.2011 से प्रभावी म.प्र. अधिनियम 2011 का क्र. 4 द्वारा प्रतिस्थापित), धाराऐं 47, 50(बी), गृह निर्माण मंडल लेखा नियम म.प्र. 1991, नियम 5.4 व 5.7.4 – लागत मूल्य को कलेक्टर के दिशानिर्देशों के साथ जोड़ा जाना – याचीगण ने स्व-वित्तीय योजना के अंतर्गत म.प्र. गृह निर्माण अवसंरचना मंडल से आवासीय स्थान क्रय किये – इन आवासीय स्थानों की कीमत पर विवाद्यक केन्द्रित है – याचीगण ने अपनी चुनौती, केवल कलेक्टर के दिशा-निर्देशों से भूमि के लागत मूल्य को संलग्न किये जाने तक सीमित रखी है – अभिनिर्धारित – जब तक कि यह स्थापित नहीं किया जाता कि बाजार मूल्य का निर्धारण, 2000 दिशा-निर्देश नियम के अंतर्गत गठित विशेषज्ञ समिति द्वारा, उसमें प्रतिपादित प्रक्रिया का पालन करके किया गया है, कलेक्टर द्वारा निर्धारित बाजार मूल्य, स्व-वित्तीय योजना के अंतर्गत आवासीय स्थान की कीमत तय करने के लिए दुरुपयोग की संभावना से परे निर्धारक नहीं होगा – यह दिशा-निर्देश, स्टाम्प शुल्क के निर्धारण के प्रयोजन हेतु है और प्रत्येक वर्ष बदलते रहते हैं।

B. Griha Nirman Mandal Adhiniyam, M.P. (3 of 1972)(Substituted by M.P. Act No. 4 of 2011 w.e.f. 04.01.2011), Sections

47, 50(b), Housing Board Accounts Rules, M.P. 1991, Rule 5.4 and 5.7.4. - Date for determining the cost price **- It is the date when after the scrutiny of the applications received in pursuance of the tender when allotment is finalized - Price prevailing on such date is applicable.**
(Paras 33, 34)

ख. गृह निर्माण मंडल अधिनियम, म.प्र. (1972 का 3) (04.01.2011 से प्रभावी म.प्र. अधिनियम 2011 का क्र. 4 द्वारा प्रतिस्थापित), धाराऐं 47, 50(बी), गृह निर्माण मंडल लेखा नियम म.प्र. 1991, नियम 5.4 व 5.7.4 – लागत मूल्य के निर्धारण की तिथि – यह वह तिथि है, जब निविदा के अनुसरण में प्राप्त आवेदनों की संविक्षा के पश्चात, आबंटन को अंतिम रुप दिया गया – उक्त तिथि को विद्यमान कीमत लागू होती है।

C. Griha Nirman Mandal Adhiniyam, M.P. (3 of 1972)(Substituted by M.P. Act No. 4 of 2011 w.e.f. 04.01.2011), Sections 47, 50(b), Housing Board Accounts Rules, M.P. 1991, Rule 5.4 and 5.7.4. -Addition of extra expenditure towards cost price **- Unless it is established that an extra expenditure has been incurred after the allotment of the site the final pricing of the unit by authority is always vulnerable and if found to be irrational and unreasonable is liable to be declared null and void - Board having failed to establish the expenditure added towards cost price of the land after the date of allotment is not justified in adding the same towards cost price of land.**
(Paras 48, 56)

ग. गृह निर्माण मंडल अधिनियम, म.प्र. (1972 का 3)(04.01.2011 से प्रभावी म.प्र. अधिनियम 2011 का क्र. 4 द्वारा प्रतिस्थापित), धाराऐं 47, 50(बी), गृह निर्माण मंडल लेखा नियम म.प्र. 1991, नियम 5.4 व 5.7.4 – लागत मूल्य की ओर अतिरिक्त व्यय जोड़ा जाना – जब तक यह स्थापित नहीं होता कि स्थान के आबंटन पश्चात अतिरिक्त व्यय उपगत हुआ है, प्राधिकारी द्वारा इकाई की अंतिम कीमत सदैव मेद्य है और यदि उसे अनुचित एवं अयुक्तियुक्त पाया जाता है, वह शून्य और अकृत घोषित किये जाने योग्य है – आबंटन की तिथि के पश्चात भूमि के लागत मूल्य की ओर जोड़ा गया व्यय स्थापित करने में मंडल विफल रहा, उसे भूमि के लागत मूल्य की ओर जोड़ा जाना न्यायोचित नहीं है।

Cases referred :

(1999) 5 SCC 62, (2004) 2 SCC 9, (1994) 4 SCC 595, (1995) 1 SCC 717, (1996) 3 SCC 124, (2009) 15 SCC 769, (2009) 4 SCC 193, 1994 Supp.(3) SCC 494, (2005) 10 SCC 796, (2009) 7 SCC 438, (1995) 3 SCC 1, (1989) 2 SCC 116, (1994) Supp.(3) SCC 494, AIR 1996 MP

212, (2011) 6 SCC 714, (2000) 8 SCC 606, (2008) 2 SCC 672, (2008) 13 SCC 597, (1986) 1 SCC 264, (2008) 3 SCC 279, (1986) 3 SCC 156, (2011) 11 SCC 13.

Hemant Shrivastava, for the petitioners.

R.D. Jain, A.G. with *P.K. Kaurav,* Addl. A.G. for the respondent/ State.

Aditya Khandekar, for the respondent MP Housing & Infrastructure Development Board.

ORDER

SANJAY YADAV, J. :- Though these writ petitions are by different income groups having purchased Nice Duplex/Nice Triplex/Nice Duplex Corner/ Senior Higher Income Groups/Higher Income Group/Middle Income Group and the Economically Weaker Sections under Self Financing Scheme from the Madhya Pradesh Housing and Infrastructure Board (hereafter referred to as Board); however, because of the similarity of the controversy raised in these writ petitions, they were heard analogously and decided by this common order.

2. The issue revolves round the pricing of these residential accommodations.

3. Since the same principle of pricing are applied for these residential houses by the Board, the basic facts are retrieved from Writ Petition No. 5692/2013 – Dr. Sudha Jain and 16 others.

4. Inviting offer through advertisement, drawing of lot, allotment thereof by selecting prospective purchasers, various installments payable by these prospective purchasers on the basis of tentative/provisional price fixed by Board by these purchasers (In some EWS cases the fact may vary regarding the payment schedule; however, since pricing of residential houses is the core issue, the variation of payment schedule will not have any bearing on the final outcome), non execution of sale deeds are not in dispute. Therefore, these facts are not gone into.

5. It may also be noticed that this is the second round of litigation. In earlier round the writ petitions were disposed of with direction to Commissioner, Housing Board to decide the representation preferred by respective petitioners by a reasoned and cogent order.

6. The representations came to be decided on 8.3.2013 whereby the decision of Board of enhancing the cost price of respective units have been upheld and following decision has been taken:

"प्रकरण में मण्डल द्वारा संकल्प क्र. –4601–25/223/2/2013 में सर्वसम्मिति से निर्णय लिया गया कि :–

1. अभ्यावेदन स्वीकार योग्य नहीं होने से अमान्य किया जाये।

2. भवन 139 के आवंटि को कारण बताओ सूचना पत्र जारी किया जाये कि क्यों न उन्हें दिये गये भवन का आधिपत्य निरस्त किया जाकर आवास का आधिपत्य मण्डल वापस प्राप्त करें।

3. प्रश्नाधीन 36 आवासों का जो अन्तिम मूल्य निर्धारित किया गया है, उसकी शेष राशि संबंधित आवंटी को दिनांक 31 मार्च 2013 तक जमा करने के लिए अन्तिम अवसर दिया जाये।

4. मण्डल की ओर से पत्र क्र.–514 दिनांक 24.2.2012 के माध्यम से शेष राशि जमा कराने हेतु समय–सीमा दिनांक 31 मार्च, 2012 निर्धारित की गई थी, जिसमें पुनःपत्र दिनांक 11.6.12 द्वारा एवं दि. 30.6.12 तक वृद्धि की गई थी, चूंकि प्रकरण शासन स्तर एवं न्यायालयीन स्तर पर विचाराधीन रहा है। बकाया शेष राशि जमा कराने हेतु आवंटियों को अब दिनांक 31/3/2013 तक अवसर प्रदान किया जावे।

अतः उक्तानुसार संचालक मण्डल के द्वारा मण्डल के प्रचलित परिपत्र, प्रकरण के संबंध में पूर्व में की गयी प्रकिया/कार्यवाही एवं मान. उच्च न्यायालय द्वारा दिये गये निर्देश अनुसार कार्यवाही करते हुए संबंधितों को बोर्ड में सुनवाई का अवसर दिया जाकर समग्र परिस्थितियों के विचारोपरांत पारित संकल्प क्र. –4601/25/223/2/2013 दिनाक 12.2.2013 के अनुसार सर्व संबधितों के अभ्यावेदनों को अंतिम रूप से अमान्य किया जाता है। सर्व संबंधितों को व्यक्तिशः सूचित किया जावे।

7. Before getting into the reasons assigned by the Board, * Comparative Statement will set out the costing pattern of the residential accommodation in question.

COMPARATIVE STATEMENT FOR TENTATIVE COST/TENTATIVE REVISED COST/FINAL COST

36 HOUSES AT "RIVIERA TOWNE" BHOPAL

S. No.	Type of Houses	Tentative cost at the time of booking				Revised tentative cost after acceptance of tender				As per final approval				Diff. In cost
		Plot Cost @12500/- Sqm	Const. Cost @ 9800/- Sqm	Total Advertise-ment	S.C. & Conti. Ch	Plot Cost 15000/ m2	Const. Cost @12450/- m2	S.C & Conti. Ch	Total	Plot Cost @30000/-	Const. Const @ 13000/-	S.C & Conti. Ch	Total	Final approval Cost and Revised Tentative Cost (Col. 14-10)
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
1.	Nice Duplex (Corner) P.A. 223.51 Sqm (or 2405 Sq. Ft) 11.15 X 20 M	27.88	21.91	53.00	3.21	33.45	27.82	4.90	66.17	66.90	29.06	5.06	101.02	Rs.34.85 Lacs or 52.27 %
2.	Nice Duplex P.A. 184.57 Sqm (or 1986 ft 2) Plot Area = 7.50 X 20 m = 150 Sqm (18 Nos.)	18.75	18.09	40.00	3.16	22.50	22.98	4.00	49.53	45.00	23.99	4.18	73.17	Rs.23.64 Lacs or 47.73%
3.	Nice Triplex P.A. 228.25 Sqm (or 2456 ft 2) Plot Area - 7.50X 20 m = (14 Nos.)	18.75	22.37	45.00	3.88	22.50	28.42	4.95	55.87	45.00	29.67	5.17	79.84	Rs.23.97 Lacs or 42.90

8. Now for the reasons which find mention in the order dated 8.3.2013 justifying the enhancement. These are:

> 1. मण्डल परिपत्र क.–21/08 दिनांक 24.10.08 में स्पष्ट प्रावधान है कि जिन प्रकरणों में अंतिम मूल्य निर्धारण नहीं हुआ है उनमें मण्डल द्वारा सम्पत्ति पर किये गये वास्तविक व्यय एवं प्रभारित ब्याज तथा अन्य व्यय के आधार पर गणना किये गये मूल्य तथा भूमि की कलेक्टर गाईड लाईन के अनुसार की गयी गणना की तुलना की जाकर दानों में जो अधिक हो, उसके अनुसार मूल्य निर्धारण किया जाए।
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> 2. परिपत्र क. 21/08 दिनांक 24.10.08 की कंडिका 3 में उल्लेख है कि "ऐसी सम्पत्तियां जिनमें अन्तिम मूल्य निर्धारण किया जा चुका है और अभी विक्रय से शेष है तो ऐसी सम्पत्तियों के भी विज्ञापन पुनः प्रसारित करने के पूर्व उपरोक्त निर्णय के अनुसार ही पुनः मूल्य निर्धारण किया जाए। स्पष्ट है कि केवल ऐसी सम्पत्यिां जिनका विक्रय किया जा चुका है उनका दुबारा मूल्य निर्धारण नहीं होगा" प्रश्नाधीन 36 आवास गृह ऐसी सम्पत्तियों के रूप में Classify नहीं हो सकती जिनका विक्रय किया जा चुका है क्योंकि विक्रय की प्रकिया पूर्ण करने के लिए विक्रय अभिलेख का निष्पादन पूर्ण होना आवश्यक है। यह और भी कि बोर्ड की प्रचलित नीति के अनुसार अगर आवंटिती मूल्य निर्धारण से असंतुष्ट है तो वह उसके द्वारा जमा की गयी राशि निर्धारित ब्याज के साथ वापिस लेने के हकदार होता है । तदोपरान्त संबंधित सम्पत्ति बोर्ड के द्वारा किसी अन्य व्यक्ति को विकीत की जा सकती है। अतः प्रश्नाधीन 36 आवास गृहों को विकीत सम्पत्ति की श्रेणी में नहीं रखा जा सकता। अतः इस आधार पर परिपत्र 21/08 उस पर लागू नहीं होगा, का तर्क मान्य नहीं होगा।
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> 3. अभ्यावेदन के संबंध में उप महाधिवक्ता से प्राप्त अभिमत दिनांक 3.3.2012 का अवलोकन किया जिसमें उनके द्वारा हाउसिंग बोर्ड के पत्र दिनांक 22.2.2012 में उल्लेखित 3 प्रश्नों पर विधिक अभिमत दिया गया है। यह 3 प्रश्न निम्नानुसार हैः–
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> 1. क्या दिनांक 19.5.2008 के पूर्व प्रारम्भ की गई योजनाओं पर मूल्य निर्धारण के वहीं सिद्धांत लागू होंगे, जो योजना प्रारम्भ करने के समय लागू थी?
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> 2. क्या मूल्य निर्धारण में कलेक्टर गाईड लाईन से तुलना करने संबंधी निर्देश दिनांक 30.9.08 के बाद प्रारम्भ की गई योजनाओं पर लागू होंगे?
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> 3. क्या जिस दिनांक को योजना की सार्वजनिक सूचना जारी की जाकर आवास बुकिंग के आवेदन आमंत्रित किय जाते हैं, को योजना के प्रारम्भ का दिनांक माना जावेगा?
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> उप महाधिवक्ता द्वारा उक्त प्रश्नों का उत्तर सकारात्मक दिया गया है। उक्त अभिमत पर विचार किया गया। यह उल्लेखनीय है कि परिपत्र 7/2008 दिनांक 19.5.2008 आर्थिक रूप से कमजोर और अनुसूचित जाति तथा जनजाति वर्ग को

राहत देने के उद्देश्य से पर्यवेक्षण शुल्क यथावत् रखने के संबंध में था। इनमें भूमि की गणना करने के संबंध में कोई नीतिगत सिद्धान्त प्रतिपादित नहीं था। परिपत्र कमांक 1842 दिनांक 30.9.2008 के पृष्ठ 2 पर अन्तिम लागत मूल्य निर्धारित करते समय कृषि भूमि का कलेक्टर गाइडलाइन से तुलना करने का प्रावधान रखा गया था। यह निर्देश सम्पत्ति के अन्तिम लागत मूल्य निर्धारण करते समय प्रस्ताव तैयार किये जाने पर लागू था। स्पष्टता यह निर्देश उन संपत्तियों के लिए है जिनका अन्तिम लागत मूल्य निर्धारित नहीं है। मण्डल के परिपत्र कं. 1842 दि. 30.09.08 एवं परिपत्र कं. 7/08 दि. 19.5.08 के संबंध में मण्डल के संकल्प कं. 4217–26/205/9/2009 से यह स्पष्टीकरण किया गया कि "उपरोक्त परिपत्रों के प्रभावशील होने के दिनांक के पूर्व में जो योजनाएं प्रारम्भ की जाकर पंजीयन विलेख/अनुबंध निष्पादित किये गये जा चुके है उनका मूल्य तत्समय लागू प्रावधानों के अनुसार किया जाए।" उप महाधिवक्ता की विधिक राय से मण्डल द्वारा पूर्व में प्रश्नाधीन सम्पत्तियो के मूल्य निर्धारण के संबंध में लिये गये निर्णय पर कोई विपरीत प्रभाव नहीं पड़ता क्योंकि ऐसा निर्धारण वस्तुतः परिपत्र कं. 21/08 दि. 24.10.2008 के अंतर्गत किया गया है। यह परिपत्र (कं. 21/08 दि. 24.10.2008) कभी संशोधित नहीं हुआ है तथा उसका प्रभाव सम्पत्तियों के मूल्य निर्धारण करने की प्रकिया पर निरन्तर पड़ता रहेगा।

4. मण्डल के 219 वे सम्मिलन में पारित प्रस्ताव के आधार पर जारी परिपत्र कं. –15/2011 दिनांक 16.12.2011 उन आवासीय योजनाओं पर लागू होगा, जिनका पंजीयन आगे आने वाले समय में होगा। उन योजनाओं में भूखण्ड मूल्य की गणना भूमि के वास्तविक व्यय राशि, विकास कार्य की अनुमानित लागत राशि, अन्य देनदारियों सहित मूल्य में पर्यवेक्षण शुल्क एवं अन्य व्यय/प्रभार आदि जोड़कर निकाले गये मूल्य को मूल्य निर्धारण वाले वित्तीय वर्ष में प्रचलित कलेक्टर गाईड लाईन से तुलना की जायेगी और जो मूल्य अधिक हो उस पर भूखण्ड का मूल्य फ्रीज (स्थिर) होगा। मण्डल में पुरानी/प्रचलित योजनाओं के संबंध में तथा बिखरी आवासीय/व्यवसायिक सम्पत्तियों का अंतिम मूल्य निर्धारण मण्डल के वर्तमान प्रचलित परिपत्र क.–1842 दिनांक 30.9.08 एवं 21/08 दिनांक 24.10.08 अनुसार ही किये जाने का प्रावधान संचालक मण्डल द्वारा किया गया है। अर्थात् वर्तमान में कलेक्टर गाईड लाईन से तुलना किये जाने की, मूल्य निर्धारण की नीति लागू है, जो परिवर्तित नहीं हुई है।

5. संबंधितों के अभ्यावेदनों के संबंध में गठित समिति द्वारा प्रस्तुत तथ्यात्मक परीक्षण टीप के अनुसार मान. उच्च न्यायालय द्वारा दिये गये निर्णय में उल्लेखित न्याय दृष्टांत के संबंध में स्थिति निम्नानुसार है :–

(1) मान. उच्चतम न्यायालय के निर्णय *T N Housing Board* (supra) के प्रकरण में मूल्य का अंतिम निर्धारण हो चुका था। इसके संबंध में यह मान्य किया गया था कि अथारिटी या बोर्ड को सामान्यतः मूल्य वृद्धि का अधिकारी है, परन्तु इसे

एक स्टेंडर्ड सर्टिफिकेट से सिद्ध किया जाना चाहिए। इस हेतु आवंटी संबंधित बोर्ड से सर्टिफिकेट प्राप्त कर सकता है।

6. माननीय सर्वोच्च न्यायालय द्वारा *कर्नाटक इण्डस्ट्रीयल डेव्हलपमेंट बोर्ड* के प्रकरण में पारित निर्णय में यह व्यवस्था दी है कि मण्डल को सम्पत्ति का अंतिम मूल्य निर्धारण करने का अपरिभाषित अधिकार तो है किन्तु इस अधिकार का उपयोग "प्रिंसिपल आफ रेश्नालिटी एण्ड रिजनेबलनेस" के अधीन ही किया जाना चाहिए। इस अधिकार की आड़ में आवंटियों पर अनावश्यक व्यय का भार नहीं डाला जाना चाहिए। इस प्रकरण में भूमि का मूल्य भू–अर्जन के मुआवजा में वृद्धि के कारण बढ़ा था, जबकि विचाराधीन 36 रिवेयरा टाउन योजना में सम्पत्ति का मूल्य में मण्डल की प्रचलित नीति के कारण वृद्धि हो रही है। माननीय उच्चतम न्यायालय के उपरोक्त न्याय दृष्टांत प्रकरण में ब्याज दर 14 प्रतिशत अनुबंध के प्रावधान के विपरीत अधिरोपित की गयी थी, जबकि बोर्ड के द्वारा किये गये अनुबंध अनुसार 9 प्रतिशत तक ही ब्याज प्राप्त किया जा सकता था। इस प्रकरण में लीज–कम–सेल एग्रीमेंट हो चुका था। इसी आधार पर यह आक्षेप किया गया था कि किसी भी प्रकार की वृद्धि आवंटन आदेश के विपरीत है। प्रकरण में अंतिम मूल्य निर्धारण में भी बहुत विलंब हुआ था जो अनुबंध के अनुसार 03 वर्ष की सीमा में किया जाना था। इसके विपरीत प्रश्नाधीन रिवेयरा टाउन योजना में ऐसी कोई परिस्थितियां नहीं है और न ही आवंटियों के साथ किसी प्रकार का कोई अनुबंध निष्पादित किया गया है। यह प्रकरण मुख्यतः औद्योगिक क्षेत्र विकास बोर्ड के लिए था, जिसकी परिस्थिति आवासीय योजना से बहुत भिन्न होती है। इसके लीज अनुबंध में यह प्रावधान था कि " As soon as it may be convenient the lessor will fix the price of the demised premises at which it will be sold to the lessee and communicate it to the lessee and the decision of the lessor in this regard will be final and binding on the lessee." इसके विपरीत इस प्रकरण में 13 वर्ष के लंबे समय उपरांत अंतिम मूल्य निर्धारण किया गया था, जबकि रिवेयरा योजना के संबंध में ऐसी कोई स्थिति नहीं है। रिवेयरा के प्रकरण में प्रारंभिक मूल्य निर्धारण एवं उसके उपरांत जारी पत्र/निर्देश में आवंटियों को मण्डल की ओर से स्पष्ट किया जाता रहा है कि अंतिम मूल्य निर्धारण बाद में किया जायेगा। इस प्रकार उक्त न्याय दृष्टांतों के प्रकरणों में निहित तथ्य रिवेयरा टाउनशिप के प्रकरण में भिन्न है, अतः उन्हें स्वमेव इस प्रकरण में लागू करना न्यायोचित प्रतीत नहीं होता।

7. संबधित आवंटी वर्तमान में केवल पंजीकर्ता/आवंटी हैं। उन्हें केवल सम्पत्ति आवंटित की गयी है तथा सम्पत्ति का विक्रय नहीं किया गया है। संबंधितों को जारी निर्देशिका, पंजीयन सूचना पत्र, किश्तों के सूचना–पत्र, मूल्य वृद्धि के संबंध में आवंटियों को जारी विभिन्न पत्रों में स्पष्ट किया गया कि "चूंकि आपका पंजीयन स्वीकार किया गया है अतः निर्धारित अवधि में बढ़े हुए अनुमानित मूल्य पर भवन

क्रय करने की सहमति निर्धारित समय में प्राप्त होने पर ही आपका पंजीयन जारी रखा जायेगा।" इस पर आवंटियों द्वारा लिखित में सहमति भी प्रदान की गयी थी। इसके अतिरिक्त यह भी पूर्व से स्पष्ट था कि अंतिम मूल्य निर्धारण उपरांत भवन का मूल्य देय होगा एवं जमा राशि के अंतर की राशि तथा अन्य प्रभारों की जानकारी अंतिम आवंटन आदेश में दी जायेगी।

8. अभ्यावेदनकर्ताओं द्वारा मुख्य रूप से फेस–1 के 132 आवासगृहों के लीज रेंट के जो प्रावधन है, उन्हे लागू करने का अनुरोध किया गया है। फेस–1 में निर्मित 132 हितग्राहियों से इस आशय का शपथपत्र लिया गया था कि अगर शासन द्वारा लीजरेंट लिया जाएगा तो वही राशि उनसे वसूल की जायेगी। यही नीति अभ्यावेदनकर्ताओं पर भी लागू होगी। सर्विस टैक्स के संबंध में मण्डल के प्रचलित परिपत्र क. 3885/10 दिनांक 4.10.2010 के अनुसार निरन्तर रहेगी।

9. अग्रिम आधिपत्य के संबंध में मान. उच्च न्यायालय द्वारा निर्णय दिनांक 24.9. 202 एवं 28.9.2012 में यह निर्देश दिये गये है कि :–

It is further observed that the respondent authorities may also consider the request of the petitioners to hand over possession of the houses, as an interim measure, as has been done in the case of Dr. Mrs. Krishna Yadav, in case so advised and is permissible and in case such an application is filed by the petitioners subject to the final decision in the mater.

इस संबंध में मण्डल के प्रचलित पत्र क.–1035 दिनांक 15.3.05 एवं जारी निर्देश में स्पष्ट प्रावधान है कि संपत्ति का आधिपत्य विक्रय विलेख के उपरांत ही दिया जायेगा। भवन कमांक–139 के आवंटी को मानवीय आधार पर तथा मण्डल के निर्णय को मान्य करने की शर्त पर आधिपत्य दिया गया था। मण्डल के प्रचलित परिपत्र अनुसार संपत्ति का अग्रिम आधिपत्य दिये जाने का कोई आधार प्रतीत नहीं होता है। अग्रिम आधिपत्य मण्डल के पत्र क. –382/101/ईएम दिनांक 29.1.05 तथा पत्र क.–1035/स.प्र./मंडल/04 भोपाल दिनांक 15.3.05 के द्वारा जारी निर्देशों के विपरीत होगी। अग्रिम आधिपत्य देने से मण्डल को प्राप्त होने वाली राशि में विलम्ब होगा, इससे ब्याज की क्षति होगी एवं मण्डल को सम्पत्ति का अधिपत्य वापस प्राप्त करने में भी अनावश्यक न्यायालयीन विवाद की संभावना बढ़ेगी। अतः बिना विक्रय विलेख के सम्पत्तियों को अग्रिम आधिपत्य दिये जाने का अनुतोष मण्डल के प्रचलित प्रावधानों के विपरीत है तथा भविष्य में इससे उत्पन्न होने वाली परिस्थितियॉ मण्डल के हितों के विपरीत है। अतः अग्रिम आधिपत्य संबंधी मांग मान्य नहीं की जा सकती ।

10. मण्डल का परिपत्र कमांक 21/08 दिनांक 24.10.2008 स्वयं में स्पष्ट है।

इसके अनुसार ही रिवेरा टाउन के 36 आवंटियों को आवंटित सम्पत्ति के संबंध में अन्तिम मूल्य निर्धारण की कार्यवाही की गई है। मण्डल की विभिन्न योजनाओं में इसी नीति के अनुरूप अन्तिम मूल्य निर्धारण किया जाकर सम्पत्तियों का विक्रय–विलेख किया जा रहा है। परिपत्र क्रं. 21/08 के विपरीत विचार की स्थिति में सम्पूर्ण मध्यप्रदेश में इससे कई योजनाये प्रभावित होगी तथा राशि वापसी एवं न्यायालयीन वाद की स्थिति निर्मित होगी जिससे मण्डल का वित्तीय भार बढ़ेगा। अतः मण्डल परिपत्र के विपरीत कार्यवाही मण्डल हित में नहीं होगी।

मण्डल सम्पत्तियों के अंतिम निर्धारण हेतु परिपत्र क्रं. 21/08 दिनांक 24.10.08 मण्डल द्वारा जारी किया गया है। परिपत्र के पैरा क्रं. –3 में यह स्पष्ट उल्लेख है कि जिन प्रकरणों में अंतिम मूल्य निर्धारिण नहीं हुआ है उनमें उपरोक्त निर्णय के अनुरूप ही मण्डल के द्वारा सम्पत्ति पर किए गये वास्तविक तथा प्रभारित ब्याज एवं अन्य के आधार पर गणना किए मूल्य तथा कलेक्टर गाईड लाईन से गणना किए मूल्य की तुलना की जावे तथा दोनों में से जो अधिक हो उसी के अनुसार मूल्य निर्धारिण किया जावे।

रिवेयरा योजना में पंजीयन वर्ष 2007–08 में हुआ एवं भवनों का अंतिम मूल्य निर्धारण वर्ष 2011 में प्रस्तावित हुआ जिस पर आवंटियों द्वारा आपत्ति कर राशि जमा नहीं की। अर्थात् योजना में अप्रत्याशित या अत्यधिक विलंब मण्डल द्वारा नहीं हुआ। वर्ष 2011 में भवन तैयार है एवं 2012–13 की कलेक्टर गाईड लाईन प्रचलन में है। वर्ष 2013–14 की कलेक्टर गाईड लाईन प्रस्तावित है। इस स्थिति में पाया जाता है कि भवनों की कीमतों में अप्रत्याशित वृद्धि हेतु मण्डल जिम्मेदार नहीं हो सकता है।

भूमि के मूल्य में वृद्धि का लाभ मुख्यतः भूमि स्वामि को प्राप्त होगा। सम्पत्ति का वर्तमान कलेक्टर गाईड लाईन की तुलना के आधार पर अंतिम मूल्य निर्धारण का निर्णय न्यायसंगत और प्रकट एवं उपलब्ध आंकड़ों (कलेक्टर गाईड लाईन) के आधार पर संगणित वास्तविक अभिवृद्धि पर आधारित हैं। इसलिए यह नहीं कहा जा सकता कि भवनों में हुई मूल्य वृद्धि वास्तविक मूल्य वृद्धि के सिद्धांत पर आधारित नहीं है। बल्कि वर्तमान मूल्य वृद्धि वास्तविक भूमि के मूल्य में वृद्धि के सुस्थापित सिद्धांत पर आधारित है एवं जिसका वास्तविक लाभ विक्रय विलेख के समय भू–स्वामि प्राप्त करेगा।

परिपत्र दिनांक 24.10.08 मण्डल पर बंधनकारी होने के साथ–साथ मण्डल के हितों को सुरक्षित रखता है। रिवेयरा टाउन के 36 आवंटियों को भवनों का विक्रय नहीं हुआ। ऐसी स्थिति में भवनों का मूल्य निर्धारण परिपत्र क्र.–21/08 के अनुसार अर्थात कलेक्टर गाईड लाईन से तुलना के आधार पर किया जाना न्याय संगत है। इस आधार पर ही अंतिम मूल्य निर्धारण किए जाने

संबंधी प्रावधान किया गया है।

9. The rationality of this cost price system of land is being questioned as also the stage at which it should be made applicable. It is made clear at this stage that the petitioners have confined the challenge only to linking of cost price of land with Collector's guidelines which keeps changing every year.

10. Shri R.N. Singh, learned Senior Counsel with Shri Vijay Shukla, Advocate, Shri Hemant Shrivastava, Advocate, Shri A.K. Singh, Advocate, Shri A. Mukhipadhyay, Advocate, Shri Jaideep Sirpurkar, Advocate and Shri Dipak Raghuvanshi, Advocate for petitioners and Shri R.D. Jain, learned Advocate General with Shri P.K. Kaurav, learned Additional Advocate General, Shri R.K. Samaiya, Advocate, Shri G.P. Dubey, Shri Sanjiv Mishra, Shri Vivekanand Awasthy, Advocate, Shri Rakesh Jain, Advocate, Shri M.S. Bhatti, Advocate and Shri Aditya Khandekar, Advocate for the respondents were heard at length.

11. Four elements which cumulatively determine the pricing of respective residential units under the self financing scheme are the (i) cost of land, (ii) construction cost, (iii) total advertisement cost and (iv) surcharge and contingency charge.

12. The cost of land, besides actual cost incurred would include the development expenditure, probable expenses,better location, capital interest for loan for purchasing the land, enhanced lease rent if any, registration charges of land. Similarly the construction cost would include actual cost incurred in construction, the supervision charges , charges on building permission, contingencies (certain %). The total advertisement costs and surcharging and contingency charges are the certain amount which are incurred to make project saleable before it is allotted to the prospective purchasers under self financing scheme.

13. A careful reading of the order dated 8.3.2013 would reveal that the major role played in the pricing of unit which has led to the hike of cost is the price of land which in turn is linked with the Collector's guideline, i.e., the fixation of price of land by Collector for the purpose of stamp duty has been made the basis for ascertaining the cost price of land. Thereby, the element of variability has been added to the cost price of land, i.e., even when no extra price are being paid for the land in question, yet by linking the pricing with Collector's guideline, the price keeps on changing with the changes in guideline

set by the Collector. The consequence is that from the date of allotment and till the date the saledeed is executed the price of land keeps on changing even if no extra expenses on cost of land is incurred. Thus an uncertainty to the cost price of land is added.

14. As noticed from the order dated 8.3.2013, the Commissioner, Board has relied on the circular 21/2008 dated 24.10.2008 while holding that fixation of price of land as per Collector's guideline prevalent at the time of execution of sale deed and handing over the possession is just and proper.

15. The circular dated 24/10/2008 which has been relied on stipulates;

1. मण्डल के परिपत्र कं. 7/04 दि. 28.07.04 में निर्णय लिया गया था कि जहां कही मण्डल की भूमि को कलेक्टर लाईड लाईन से कम मूल्य पर विकय किया जाना है वहां ऐसी कार्यवाही मण्डल के अनुमोदन के उपरान्त ही किया जाए। इस संदर्भ में मण्डल परिपत्र कं. 16/04 दि. 19.04.2000 को जारी किया गया जिसमें दि. 28.07.2004 के परिपत्र को केवल व्यावसायिक सम्पत्ति पर ही लागू करने का निर्णय सूचित किया गया था।

2. वर्तमान में व्यावसायिक सम्पत्ति में कलेक्टर लाईड लाईन से तुलना की जाती है परन्तु आवासीय सम्पत्ति में पृथक नीति अपनाई जाती है। इस असमन्जस की स्थिति को समाप्त करने के लिए मण्डल के 200वें सम्मिलन के संकल्प कं. 4089–07/200/9/2008 के द्वारा निर्णय लिया गया है कि व्यावसायिक सम्पत्ति एवं आवासीय सम्पत्ति (समस्त अविकित एवं बिखरी सम्पत्ति सहित) के मूल्य निर्धारण में एकरूपता लाने एवं मण्डल की सम्पत्ति को एक ही नीति से मूल्य निर्धारण किया जावे। इसके लिए यदि कलेक्टर गाईड लाईन द्वारा निर्धारित दर से कम मूल्य पर सम्पत्ति दिये जाने/विकय किये जाने का प्रस्ताव है तो ऐसी कार्यवाही मण्डल के अनुमोदन उपरान्त ही की जाए।

3. अतः जिन प्रकरणों में अन्तिम मूल्य निर्धारण नहीं हुआ है उनमें उपरोक्त निर्णय के अनुसार ही मण्डल के द्वारा सम्पत्ति पर किये वास्तविक व्यय एवं प्रभारित ब्याज तथा अन्य व्यय के आधार पर गणना किये मूल्य तथा कलेक्टर लाईड लाईन से गणना किये मूल्य की तुलना की जावे तथा दोनों में जो अधिक हो उसी के अनुसार मूल्य निर्धारण किया जावें। अर्थात मण्डल के अनुमोदन के बिना कलेक्टर लाईड लाईन से कम मूल्य पर मूल्य निर्धारण न किया जावें। ऐसी सम्पत्तियां जिनमें अन्तिम मूल्य निर्धारण किया जा चुका है और अभी विकय के अनुसार ही पुनः मूल्य निर्धारण किया जाए। स्पष्ट है कि केवल ऐसी सम्पत्तियां जिनका विकय किया जा चुका है उनका दुबारा मूल्य निर्धारण नहीं होगा परन्तु ऐसी सम्पत्तियां जो अभी अविकित है उनके विकय

हेतु विज्ञापन देने के पूर्व उपरोक्त निर्णय अनुसार ही मूल्य निर्धारण किया जाए।

उपरोक्त निर्देश तत्काल प्रभावशील होंगे।

16. Respondent Housing Board owes its existence to the Madhya Pradesh Griha Nirman Mandal, 1972, an Act to provide for the incorporating and regulation of Housing Board in the State of Madhya Pradesh for the purpose of taking measures to deal with and satisfying the need of housing accommodation and to undertake development and for matter connected therewith. The Act of 1972 has been substituted by M.P Act No. 4 of 2011w.e.f. 4.1.2011 widening the field of operation of the Housing Board to infrastructure development. Section 3 provides for establishment of Madhya Pradesh Housing and Infrastructure Development Board with power to acquire, hold and dispose of property and to contract. Chapter IV deals with conduct of Business of Board and its committees. Chapter V deals with powers of Board, Chairman and Housing Commissioner to Incur Expenditure on Housing And Infrastructure Development Schemes and to Enter into Contracts. Chapter VI deals with Housing Schemes and Infrastructure Development Schemes. Section 31 stipulates that subject to the provisions of the Act and subject to control of the State Government, the Board may incur expenditure and undertake works in any area to which the Act applies for the framing and execution of such Housing Schemes and/or Infrastructure Development Scheme as it may consider necessary from time to time or as may be entrusted to it by the State Government. Section 33 makes a provision regarding matter/ matters to be provided in the Housing Scheme. Section 34 besides empowering the Board to frame a land development Scheme, empowers the Board to lease out or sell, by outright sale or on hire purchase basis, the building sites in the scheme area. Section 47 stipulates that the Board may include in the cost of any housing or improvement scheme land development scheme or other development scheme framed by it or any other work undertaken by it, supervision and centage charges at such rates as may be fixed by it. The rate so fixed shall not be more than twenty three per cent of the scheme of work.

Section 50 stipulates:

50. Power to dispose of land. (I) Subject to any rules made by the State Government under this Act, the Board may retain or may lease, sell, exchange or otherwise dispose of any land,

building or other property vesting in it and situate in the area comprised in any housing scheme or in any adjoining area.

(2) Whenever the Board decides to lease or sell any land acquired by it under this Act from any person, it -

(a) may give notice by advertisement in one of the leading local newspaper in the State; and

(b) shall offer to the said person, or his heirs, executors or administrators, a prior right to take on lease or to purchase such land for an amount or at a rate to be fixed by the Board, if the Board considers that such an offer can be made without detriment to the carrying out of the purposes of this Act.

(3) If in any case two or more persons claim to have the prior right referred to in clause (b) of subsection (2) preference shall be given to the person who agrees to pay the highest amount or rate for the land, not being less than the amount or rate fixed by the Board under that clause.

17. Apparent it is from clause (b) of sub-section 50 that the offer to sell any land, building or any apartment therein, or other property vesting in it is for an amount or at a rate fixed by the Board with the limitations stipulated under Section 47.

18. Though no Rules/Regulation/Bye-law framed under Section 50 has been brought to the notice laying down the parameters for fixing the amount or rate at which the property is to be sold. However, it is gathered from material on record that the Board from time to time has been fixing the parameters for pricing of its property through its meetings by way of resolutions.

19. That, various decisions have been taken by the Board from time to time in respect of pricing of the units. That, a cost evaluation committee came to be constituted by the Board vide decision dated 14.8.2008 in its 199th meeting for rational price fixation of residential houses (excluding commercial and scattered residential houses).

20. Guidelines were laid down under circular dated 30.9.2008 for the cost evaluation committee to take into consideration the parameters set therein

while ascertaining the offset price/final cost price/expenditure outlay. These were:

(i) अविकीत भूमि के कय मूल्य में पूँजीगत ब्याज की राशि जोड़कर जो मूल्य आता है अथवा कलेक्टर गाईड लाईन पर उस क्षेत्र में कृषि भूमि का जो मूल्य उस वर्ष निर्धारित होता है, में जो भी अधिक हो उसे भूमि के मूल्य की गणना में शामिल किया जावे व भूमि के मूल्य पर निर्धारित सुपरवीजन शुल्क लिया जाये।

(ii) यदि भूमि के बदले में कोई निर्माण कार्य किया जाना आवश्यक है तो निर्माण पर होने वाला व्यय {सुपरविजन एवं कंटनजन्सी} व उस पर ब्याज भार पंजीयन लगने के कारण आने वाले व्यय भार आदि को भी भूमि के मूल्य में शामिल करना होगा।

(iii) योजना के अंतर्गत भूमि के विकास कार्य पर होने वाले व्यय पर भी सुपरवीजन व्यय व कन्टीन्जेंसी व्यय लिया जाये।

(iv) भवन के निर्माण कार्य पर लगने वाले व्यय एवं उस पर लगने वाले सुपरवीजन व कन्टेनजेंसी चार्जेस भारित किये जाये।

(v) भवन निर्माण पूर्ण होने से स्थानीय शासन को हस्तांतरित किये जाने के दौरान संधारित कार्य में लगने वाले व्यय को अनुमानित रूप से आकलन कर गणना में शामिल किया जावे।

(vi) स्थानीय निकाय को कालोनी हस्तांतरण के समय अधोसंरचना में मरम्मत आदि हेतु स्थानीय निकाय को दी जाने वाली राशि के लिए भी उचित पावधान किया जाये।

(vii) यदि कुछ संपत्तियॉ निर्माण पूर्ण होने तक अविकीत रह जाती है तो ऐसी अविकीत सम्पत्ति का विकय लगभग दो वर्ष में संभव हो सकेगा, को ध्यान में रखते हुए अविकीत सम्पत्ति पर लगी पूँजी के अवरूद्ध होने के कारण पूँजीगत ब्याज हानि का भी प्रावधान रखा जाये।

(viii) यदि अन्य कोई मद जिसमें योजना के अंतर्गत कोई व्यय हुआ है तो उसे भी लागत मूल्य निर्धारित करते समय पारित किया जाना सुनिश्चित किया जाये।

(ix) योजना के अंतर्गत आने वाले भविष्य के न्यायालयीन वादों के निराकरण में लगने वाले अथवा अन्य संभावित व्यय एवं परियोजना दायित्वों को दृष्टिकोण रखते हुए आवश्यक प्रावधान किये जाये।

(x) अंतिम लागत मूल्य निर्धारिण का प्रस्ताव तब ही भेजा जावे जबकि भूमि

के विकास एवं भवन निर्माण से संबंधित सभी कार्यों के कार्यादेश जारी कर 75 प्रतिशत से अधिक कार्य पूर्ण हो चुका है तथा आगामी 3 माह के भीतर कार्य पूर्ण हो रहा हो।

(xi) योजना से संबंधित भूमि पर अब तक प्रीमियम/क्रय मूल्य, पंजीकरण व्यय, लीजरेंट, डायवर्जन रेंट, सम्पत्ति कर आदि मे किया गया व्यय व किया जाने वाला संभावित व्यय।

(xii) यदि कार्य पूर्ण हो चुका हो तो मण्डल के परिपत्र क 135, दिनांक 11.4.08 आदेश में आडिट रिपोर्ट की प्रति, किन्तु यदि कार्य अभी निर्माणाधीन ही है तो 50 प्रतिशत कार्य होने के पश्चात् आंतरिक अंकेक्षण द्वारा किया जाने वाला संक्षिप्त अंकेक्षण रिपोर्ट।

21. At this stage the reference can also be had of the Madhya Pradesh Housing Board Accounts Rules, 1991 which are framed by the State Government in exercise of powers conferred by subsection (1) and (2) of Section 102 of Adhiniyam 1972 for regulating Accounting and Financial Management of the Board. These Rules though deals with regulation of accounting and financing, it however, also reflects as to the actual costing and pricing of the projects.

22. Rule 5.0 to 5.11 under Section V of the Rules deals with Project Accounting. Clause (e) of Rule 5.0 stipulates "(e) cost of land acquired and contractor's claims or project account shall be brought to account on accrual and cash basis respectively. Sales on project account shall be brought to account on accrual basis."

23. Rule 5.2 deals with project cost Heads which includes Cost Heads (Works), Cost Escalation (Materials), losses, overheads (Administration) and overheads (Interest).

Rule 5.2.2 stipulates that the group of Cost Heads (Works) shall be sub-divided into suitable number of standard cost heads (e.g. Earth Work, Masonry, RCC) which shall be prescribed by the Housing Commissioner. A separate set of standard cost heads may if necessary, be prescribed for separate categories of projects. (e.g. Land Development Projects and Building Projects). During the progress of work as well as on completion of the project, a variance analysis shall be conducted to the Housing Commissioner the reasons for variation, if any, between estimates and actuals under each standard cost head.

Rule 5.2.3 provides that all administrative approvals, technical

sanctions, contracts, work-orders and bills shall also contain break-up under standard cost-heads. While project subsidiary account shall also collect expenditure under standard cost heads, they may be done only once on completion of project where a project is executed under a single contract. In such cases, lump-sums amount under the group head "Cost Heads (Works)" may be posted for balancing the account when work is in progress.

Rule 5.4 stipulates the accounting of sale price. It provides for that:

> "5.4 Sale Price.- Sale price of sites and buildings shall be separately determined in accordance with the guidelines issued by the Board. But where yield a sale price for any reason different from cost price determined under Rule 5.3.2 and 5.3.3 (e.g. due to adoption of different rates of overheads for different income groups, charging premium from higher income groups for appreciation in land value, grant of concessions to Board's employees adoption of average expenditure on project instead of yearwise expenditure for calculating over-heads on interest, adoption of uniform rate of interest of the entire construction period instead of varying rates of interest for separate years), sales may be brought to account in the revenue section of project accounts without prejudice to the operation of Rules 5.3.2 and 5.3.3 (These rules deal with account adjustment in the expenditure section of project account upto the stage of recording under the account head "Cost of Sales"). Accordingly account adjustment regarding capitalisation of overheads, transfer of assets from Divisions to Estate Management and incorporation of costs in the account "Cost of Sales" in the ledgers of Estate Management shall be carried out immediately on completion of project and not held up till sale price approved by the Competent Authority."

Rule 5.6 deals with Project Inputs which includes Project Expenditure and Project Revenue. Land as project input is dealt with under Rule 5.7 of 1991 Rules stipulating.

> "5.7 Land.5.7.1 Land acquired shall be brought to account on accrual basis, land made over to the Board free of cost

shall be brought to account at nominal price.

5.7.2 Land account shall be maintained in General Account under prescribed heads of account (see 5.7.3). In addition a subsidiary account in the nature of a numerical accounts shall be maintained. Provision shall be made therein for recording cost price of land and it shall be agreed with the General Accounts.

5.7.3 Land acquired for reserve or for more than one project shall be brought to account under a distinct major head "Land (Reserve)". On commencement of work on a project, cost of the portion covered by the Project shall be transferred to the Project Account.

5.7.4 For the purpose of assessing the cost of a project, i.e., debiting "Cost of Sales" as well for the purpose of valuation of closing stock in Final Accounts, appreciation in land value shall be ignored. The Board may, however, take it into account for the purpose of determination of sale price.

5.7.5 On closure of a Project Account, unutlised virgin land, if any, shall be transferred back to the account "Land (Reserve)".

24. These Rules are being referred to, to gather the methodology adhered to by the Board regarding ascertaining the cost price of land. Stipulations in Rule 5.4 and 5.7.4 are relevant which indicate, the discretion exercised by the Board, adopting different rates of overheads for different income groups, charging premium from higher income groups for appreciation of land value, grant of concessions to Board's employees adoption of average expenditure on project instead of yearwise expenditure for calculating overheads on interest adoption of uniform rate of interest for the entire construction period instead of varying rates of interest for separate years. And that as per Rule 5.7.4 the appreciation in land value may be ignored for the purpose of assessing the cost of a project as well as for the purpose of valuation of closing stocks in final accounts. The Board, however, can take into account the appreciation in land value in determining the sale price. This answers the allegation as to discriminatory treatment in comparison to Member of Parliament and the Member of Legislature Assembly, who are the class separate than these petitioners and are given different treatment, which in the given facts cannot

be treated to be in violation of Article 14 of the Constitution of India.

25. However, one more aspect gets cleared by these very rules, i.e., appreciation of the land value which matters in determination of its cost price.

26. There are various determinant factor to adjudge the increase in land value. The market price is the foremost. The committee constituted by Board as apparent from the resolution is not empowered to determine a market price. Instead it has been resolved that the market price of land shall be the same as determined by the Collector of the Districts.

27. That, Rules framed under Section 47 A of the Indian Stamp Act, 1899 read with Section 75 (Madhya Pradesh Preparation and Revision of Market Value Guidelines Rules, 2000.) lays down detail procedure for preparing Market value guidelines, i.e. set of values of immovable properties in different villages, Municipalities, Corporation and other local area in the State. These rates are revised annually as per Rule 5. That, while working out the values of immovable property, the Committees take into account the established principles of valuation mentioned in Rule 5 of the India Stamp Act (Madhya Pradesh Prevention of Under Valuation of Instruments) Rules, 1975; wherein in case of land, house sites, building and properties other than land, house sites and buildings various factors mentioned therein are taken into consideration while arriving at the market value.

28. The Board has tried to justify the linking of determination of cost price of land with the Collector's guidelines. These guidelines, evident it is, are for the purpose of determination of Stamp Duty and keeps on changing every year. Whether such a volatile flexible and even changing factor can be the foundation for determination of the cost price in respect of self financing scheme. And even if it can be relied whether an application of it can be at the detriment of the purchasers/allottees. When in fact as in the present case where it will be noticed little later that no extra cost has been incurred on the land from the date it is acquired and moreso from the date of allotment of Units in favour of respective purchasers.

29. Is the Board justified? Let us examine this aspect from the angle of Rules framed under Section 47 A of Indian Stamp Act which empowers Collector to fix the market value. The Collector fixes the rates of land in exercise of his powers conferred vide Rules framed under Section 75 read with Section 47 A of the Indian Stamp Act, 1899, i.e., Indian Stamp Act

(Madhya Pradesh Prevention of Under Valuation of Instruments) Rules, 1975. The market rates fixed under these Rules are the rates mentioned in the basic valuation registers maintained for the purpose of detection of under valuation and collection of proper stamp duty. There are another set of Rules framed under Section 75 read with Section 47 A of the Indian Stamp Act, 1899, viz., Madhya Pradesh Preparation and Revision of Market Value Guidelines Rules, 2000. Apparent it is from the provisions contained in the Rules of 1975 and 2000 that the rates fixed by Collector are not final but are prima facie determination of the rate of the area concerned only to give guidance to the registering authority to test prima facie whether the instrument has properly described the value of the property. In *Ramesh Chand Bansal and others v. District Magistrate/Collector Ghaziabad and others* (1999) 5 SCC 62, it has been held :

> "5. ....Reading Section 47A with the aforesaid Rule 340A it is clear that the circle rate fixed by the Collector is not final but is only a prima facie determination of rate of an area concern only to give guidance to the Registering Authority to test prima facie whether the instrument has properly described the value of the property. The circle rate under this Rule is neither final for the authority nor to one subjected to pay the stamp duty. So far sub-sections (1) and (2) it is very limited in its application as it only directs the Registering Authority to refer to the Collector for determination in case property is under valued in such instrument. The circle rate does not take away the right of such person to show that the property in question is correctly valued as he gets an opportunity in case of under valuation to prove it before the Collector after reference is made....."

30. In *R. Sai Bharathi v. J. Jayalalitha and others* [(2004) 2 SCC 9] it has been held: "22 ....The guideline value has relevance only in the context of Section 47A of the Indian Stamp Act (as amended by TN Act 24 of 1967) which provides for dealing with instruments of conveyance which are undervalued. The guideline value is a rate fixed by authorities under the Stamp Act for purposes of determining the true market value of the property disclosed in an instrument requiring payment of stamp duty. Thus the guideline value fixed is not final but only a prima facie rate prevailing in an area. It is open to the registering authority as well as the person seeking registration to prove the

actual market value of property. The authorities cannot regard the guideline valuation as the last word on the subject of market value...."

31. For this reason, the rate determine for the purpose of adjudging an instrument of conveyance is not final, the Supreme Court has retrained from making it the basis for determination of market value under Section 23 of the Land Acquisition Act, 1899 *(See Jawajee Nagnatham v. Revenue Divisional Officer, Adilabad A.P. and others* : [(1994) 4 SCC 595], *Land Acquisition Officer, Eluru and others v. Jasti Rohini (Smt.) and another* : [(1995) 1 SCC 717] and *U.P. Jal Nigam Lucknow through its Chairman and another v. Kalra Properties (P) Ltd., Lucknow and others* : [(1996) 3 SCC 124].

32. Though it is held in *Lal Chand v. Union of India and another* : [(2009) 15 SCC 769] that " 44 One of the recognised methods for determination of market value is with reference to opinion of experts. The estimation of market value by such statutorily constituted expert committees, as expert evidence can therefore form the basis for determining the market value in land acquisition cases, as a relevant piece of evidence. It will be however open to either party to place evidence to dislodge the presumption that may flow from such guideline market value." However, unless established that the determination of market value is by the expert committee constituted under 2000 Guideline Rules, by following the procedures laid down therein, the market value determined by the Collector in the considered opinion of this Court will not be foolproof determinant for pricing of the residential accommodations under the self financing scheme. Even if it is made the basis which the Board has in the instant case. It will be for the Board to establish that with every changing market value of land, they had to incur extra cost for the land with every change from the date of final allotment. And unless established it will be beyond its power to add hypothetically the cost price.

33. The next question is whether it is the date of allotment order or the date when an instrument of transfer is executed should be the date for determining the cost price of land to be included in the final cost price which a buyer has to pay under self financing scheme. Can it be the date when the project is mooted, i.e., when a technical and administrative sanction is granted, or the date when the offer is floated vide advertisement, or when the applications are scrutinized. The answer would be in the negative because, these stages are the floating stage. A stage, however, comes after the scrutiny of application received in pursuance to the tender, when the respective allotees

are determined; i.e., the allotment is finalized. However, at this stage there may be or may not be any execution of instrument conveying the title, but still stage is reached when it is finally determined as to the person who is to be allotted the unit. There is thus accrual of some right in favour of such allottee. Which in future culminates into sale/transfer of the property in question with the execution of instrument of sale or transaction, as the case may be. At this stage one comes to know that he is the actual purchaser of the residential house.

34. Whereas, the contention on behalf of petitioners is that the date on which the allotment order is issued should be the date for determining the cost price of land, subject to adding of any extra price incurred in the cost price of land. The respondent Board, however, has to submit that since there is no accrual of right in favour of the prospective buyers, merely on their registration and the right only accrues when an instrument of transfer is executed, it is the date of such instrument which is the determinant date for the cost of land to be included in the final cost price which in turn is based on he (sic: the) Collector's guidelines. True it may be that the title in property will normally pass to purchaser from the date of execution of saledeed. However, as held in *Kaliaperumal v. Rajagopal and another* [(2009) 4 SCC 193] "the true test is the intention of the parties". It has been held therein "18. Normally, ownership and title to the property will pass to the purchaser on registration of the sale deed with effect from the date of execution of the sale deed. But this is not an invariable rule, as the true test of passing of property is the intention of parties. ...." Though the proposition of law is in the context of different set of facts. However, the principle can be taken aid of in respect of the aspect of pricing of a unit/ residential house under the self financing scheme. The determinant factor would be when it is tacitly agreed, if not expressly, that, the price of land at the time of registration of/or execution of instrument of conveyance would be included in the input price for pricing the unit/residential house, it will the date on which the right to allot the house is determined. It has been held in *Delhi Development Authority v. Pushpendra Kumar Jain* [1994 Supp (3) SCC 494] that "the right to flat arises only on the communication of the letter of allotment, the price or rates prevailing on the date of such communication is applicable unless otherwise provided in the Scheme."

35. As noticed earlier in a Project Accounting under the Rules, 1991, 'Inputs' includes Project Expenditure and Project Revenue. Presently we are concerned with Project Expenditure which accumulates to draw the sale price

of a Unit.

36. Project Expenditure comprises of expenditure on (i) Land, (ii) stock materials, (iii) Contractors Payments, (iv) Wages to Labour employed departmentally and materials consumed on work executed departmentally, (v) Miscellaneous expenditure. To this is added the Project Cost Heads which includes (i) Costs Heads (Works), (ii) cost escalation (materials), (iii) Losses, (iv) Overheads (Admn.) and (Overheads (Interest).

37. The costing is on accrual basis, i.e., actual expenditure meeted out in completion of a Project. There is no cavil to that effect, i.e., of adding actual expenditure to the cost. The dispute is when no expenditure is incurred as in the case of land wherever a construction is raised, whether still the Board would be justified in taking into consideration the Market Value of land as per Collector's guidelines as on the date of execution of instrument of transfer.

38. The self financing scheme has a distinct feature unlike sale of houses.

39. In *M.P. Housing Board v. Anil Kumar Khiwani and another* [(2005) 10 SCC 796] it has been held:

> "17. .... In a self-financing scheme, costing plays an important role. The building in question comprises of various units. These units are self-financed. A buyer of the unit has to fund the cost of construction. A buyer under such a scheme cannot be permitted to buy a unit at a price which is less than the cost of construction. In a self-financing scheme, pricing is generally based on cost of construction unlike sale of houses after they are completed, in which cases pricing is generally market related. In the case of a self-financing scheme, no buyer can claim a right to purchase any unit at a price lower than the actual construction cost, as the board raises its funds in turn from the banks and other financial institutions to whom the board is required to pay interest periodically.... .."

40. The principle culled out from the above verdict is that in case of self financing scheme, the purchaser will have to bear the actual costs of construction which includes the price which the Housing Board has to incur. Thus, the price paid by the Board in construction or in raising the fund becomes the principal factor for pricing of a housing unit which is likely to be different than the price of constructed unit sold at market price. Therefore, it has been

observed in *Anil Kumar Khiwani* (supra) in paragraph 21 "Our observations herein however should not be read to mean that the developer in the present case has an absolute right to increase the cost of flats initially announced as estimated cost. The final cost should be proportionate to the estimated cost mentioned in the offer keeping in mind the rate of inflation, escalation of the prices of inputs, escalation in the prices of the construction material and labour charges".

41. The expression market value is a changing concept as held in *V.N. Devadoss v. Chief Revenue Control, Officer-cum-Inspector and others* [(2009) 7 SCC 438] wherein it has been observed that it would be such as would have fetched or would fetch if sold in the open market on the date of exection (sic: execution) of the instrument of conveyance."

42. Would that mean that in case of self financing scheme wherein the execution of instrument of conveyance is deferred, cost incurred on the land at the initial stage and in absence of cogent material to establish that the Board subsequently thereafter has incurred any cost on said input (i.e., land), the market price of land as determined by Collector, at the time of execution of the instrument of conveyance can be included in pricing.

43. Since the basic feature of pricing under self financing scheme is meeting out the cost of input, if no further cost is shown to have been incurred in the input such as land, the Board is not justified in adding the market price of the land at the time of execution of instrument of conveyance. In case if the Board is allowed to do so, then it is like permitting the Board to earn profit which would be contrary to the object for which the Board has been brought into existence. Unjust enrichment is contrary to justice, equity and good conscience.

44. The question as to whether the Housing Board enjoys absolute laissez faire in the matter of providing of the units/ residential houses there exists catena of decisions which not only curbs the absolute right of enhancement but have also set aside the enhancement on the ground of they being arbitrary, unreasonable and having no nexus with the unjust price.

45. In *Indore Development Authority v. Smt. Sadhna Agrawal* : [(1995) 3 SCC 1], the Supreme Court taking into consideration its earlier decision in *Bareilly Development Authority v. Ajai Pal Singh* : [(1989) 2 SCC 116] and *Delhi Development Authority v. Pushpendra Kumar Jain* [(1994) Supp (3) SCC 494] has laid down that the Authority falling under Article 12 have

no absolute right to enhance the price of its units without establishing the actual cost of inputs. It was held therein:

> "Although, this Court has from time to time taking the special facts and circumstances of the cases in question has upheld the excess charged by the development authorities, over the cost initially announced as estimated cost, but it should not be understood that this Court has held that such development authorities have absolute right to hike the cost of flats, initially announced as approximate or estimated cost for such flats. It is well known that persons belonging to Middle and lower Income Groups, before registering themselves for such flats, have to take their financial capacity into consideration and in some cases it results into great hardship when the development authorities announce an estimated or approximate cost and deliver the same at twice or three of the said amount. The final cost should be proportionate to the approximate or estimated cost mentioned in the offers or agreements With the high rate of inflation, escalation of the' prices of construction materials and labour charges, if the scheme is not ready within the time frame, then it is not possible to deliver the flats or houses in question at the cost so announced. It will be advisable that before offering the flats to the public such development authorities should fix the estimated cost of the flats taking into consideration the escalation of the cost during the period the scheme is to be completed, In the instant case , the estimated cost for the LIG flat was given out at Rs.45,000/. But by the impugned communication, the appellant informed the respondents that the actual cost of the flat shall be Rs. 1,16,000/- i. e. the escalation is more than 100%. The High Court was justified in saying that in such circumstances, the Authority owed a duty to explain and to satisfy the Court, the reasons for such high escalation. We may add that this does not mean that the High Court in such disputes, while exercising the writ jurisdiction, has to examine every detail of the construction with reference to the cost incurred. The High Court has to be satisfied on the materials on record that the. authority has not acted in an arbitrary or erratic manner."

46. Applying the above ratio Division Bench of this Court in *Smt. Nisha Singhal v. M.P. Housing Board, Bhopal and others* (AIR 1996 MP 212) has been pleased to observe:

> "8. .... we find that in this particular case, there was absolutely no justification for the Board to demand any extra price for the plot and for better location. The stand taken in the return that the extra price demanded was due to increase in costs of raw material, labour and supervision charges, has not been substantiated by producing any material or document before the learned single Judge or in this Court. The learned counsel appearing for the Board was also unable to point out the details of various claims mentioned in the demand notice (Annexure-P/ 9). The argument advanced deserves to be outright rejected that since the rights and liabilities between parties are regulated by a contract. No writ could be issued against the Board. This branch of the Administrative Law in India has advanced from the case of *Ramanna Shetty,* AIR 1979 SC 1628 and *Gujarat State Financial Corporation v. Lotus Hotel,* AIR 1983 SC 848 and thereafter that an arbitrary action of an authority falling under Article 12 although falling in a contractual field is open to judicial review under Article 226 if the action is found by the Courts to be wholly unreasonable, arbitrary or discriminatory. The decision of the Supreme Court in *Indore Development Authority's case* (supra) is itself an authority that an arbitrary action of State falling under Article 12 is amenable to writ jurisdiction if the same is found to be wholly arbitrary and unreasonable may be, that; the, "State" is acting in contractual field.

47. In *Karnataka Industrial Area Development Board v. Prakash Dal Mill* : (2011) 6 SCC 714, the Supreme Court while holding that it is within the jurisdiction of the High Court to satisfy itself on the material on record that the authority has not acted in an arbitrary or erratic manner, it has been held by their Lordships:

> 23. The Board being a State within the meaning of Article 12 of the Constitution of India is required to act fairly, reasonably and not arbitrarily or whimsically. The guarantee of equality before

law or equal protection of the law, under Article 14 embraces within its realm exercise of discretionary powers by the State. The High Court examined the entire issue on the touchstone of Article 14 of the Constitution of India. It has been observed that the fixation of price done by the Board has violated the Article 14 of the Constitution of India. It is correctly observed that though Clause 7(b) permits the Board to fix the final price of the demised premises, it cannot be said that where the Board arbitrarily or irrationally fixes the final price of the site without any basis, such fixation of the price could bind the lessee. In such circumstances, the Court will have the jurisdiction to annul the decision, upon declaring the same to be void and non-est.

24. A bare perusal of Clause 7(b) would show that it does not lay down any fixed components of final price. Clause 7(b) also does not speak about the power of the Board to revise or alter the tentative price fixed at the time of allotment. The High Court has correctly observed that Clause 7(b) does not contain any guidelines which would ensure that the Board does not act arbitrarily in fixing the final price of demised premises. Since the validity of the aforesaid Clause was not challenged, the High Court has rightly refrained from expressing any opinion thereon.

25. Even though the Clause gives the Board an undefined power to fix the final price, it would have to be exercised in accordance with the principle of rationality and reasonableness. The Board can and is entitled to take into account the final cost of the demised premises in the event of it incurring extra expenditure after the allotment of the site. But in the garb of exercising the power to fix the final price, it can not be permitted to saddle the earlier allottees with the liability of sharing the burden of expenditure by the Board in developing some other sites subsequent to the allotment of the site to the respondents.

48. Thus, unless established that an extra expenditure after the allotment of site has been incurred, the final pricing of the units by the Authority is always vulnerable. And if found to be irrational and unreasonable is liable to be declared null and void. Though a reliance is placed on the decision of the Supreme Court in *Centre for Public Interest Litigation and another v.*

Union of India and others : (2000) 8 SCC 606 to substantiate the submissions that the price fixation in a contract being a policy matter, no interference ought be caused is noted to be rejected because the observation that the price fixation is a highly technical and complex procedure was in the context of contract under consideration based on the policy decision by Government of India taken in the year 1992 to offer some of its discovered oil fields for development on a joint venture basis to overcome foreign exchange crisis and to augment domestic crude production which led the Government of India to invite bids for 12 medium sized oil Fields and 31 small sized oil fields. Apparently, the fixing of price under said contract was through a complex procedure after taking into consideration various global factors. Whereas, in the case at hand, we are concerned with the Scheme of owing a house through self financing scheme launched by the Authority and the pricing being done through determinant factors, i.e., the input costs. And being a State under Article 12 of the Constitution of India. Therefore, the decision in *Centre for Public Interest Litigation and another* (supra) is of no assistance to the respondents.

49. In *Delhi Development Authority and another v. Joint Action Committee, Allottee of SFS Flats and others* [(2008) 2 SCC 672], it has been observed "69..... Although, the superior courts ordinarily would not interfere in the price fixation but there does not exist any absolute ban. In a case where fixation of price is required to be made in a particular manner and upon taking into consideration the factors prescribed and if price is fixed dehors the statutory provisions, judicial review would be permissible." It is further held "81. It is well settled that a definite price is an essential element of a binding agreement. Although a definite price need not be stated in the contract, but assertion thereof either expressly or impliedly is imperative."

50. In the case at hand, the case of the petitioners is not that they are not bound to pay the actual costs incurred in the construction. Their objection is in respect of the determination of price by including the current rate of the land as determined by the Collector. The objection is based on the contention that it does not add to input cost, therefore, cannot be passed on the petitioner purchasers.

51. The importance of definite price being the bedrock of binding agreement was noted in the following terms in *Delhi Development Authority and another v. Joint Action Committee, Allottee of SFS Flats and others* (supra):

> "80 A definite price is an essential element of binding agreement. A definite price although need not be stated in the contract but it must be worked out on some premise as was laid down in the contract. A contract cannot be uncertain. It must not be vague. Section 29 of the Indian Contract Act reads as under :
>
> "Section 29 Agreements void for uncertainty Agreements; the meaning of which is not certain, or capable of being made certain, are void."
>
> A contract, therefore, must be construed so as to lead to a conclusion that the parties understood the meaning thereof. The terms of agreement cannot be vague or indefinite. No mechanism has been provided for interpretation of the terms of the contract. When a contract has been worked out, a fresh liability cannot thrust upon a contracting party.

52. Much emphasis has been laid by the Board on the impugned circular that the same being statutory in nature has the binding effect. These circulars, however, were not made known to the buyers as would have led them to exercise their discretion on knowing that the land price was volatile and was linked with the rates determined by the Collector from time to time.

53. In *Bharat Sanchar Nigam Limited and another v. BPL Mobile Cellular Limited and others* [(2008) 13 SCC 597], the issue involved was the effect of the internal circulars issued by the Department of Telecommunications in the contracts entered into by and between the parties in respect of/as regards interconnection links provided by it. Placing reliance on its earlier decision in *L.I.C v. Escorts Ltd.* : [(1986) 1 SCC 264], *DDA v. Joint Action Committee, Allottee of SFS Flats* [(2008) 2 SCC 672]; *New India Assurance Co. Ltd. v. Nusli Neville Wadia* : [(2008) 3 SCC 279], it was held:

> "43. In view of the aforementioned law laid down by this Court, there cannot be any doubt whatsoever that the circular letters cannot *ipso facto* be given effect to unless they become part of the contract. We will assume that some of the respondents knew thereabout. We will assume that in one of the meetings, they referred to the said circulars. But, that would not mean that they are bound thereby. Apart from the fact that a finding

of fact has been arrived at by the TDSAT that the said circular letters were not within the knowledge of the respondents herein, even assuming that they were so, they would not prevail over the public documents which are the brochures, commercial information and the tariffs."

54. In *Central Inland Water Transport Corporation Limited and another v. Brojo Nath Ganguly and another* : [(1986) 3 SCC 156, it has been observed " We would like to observe here that as the definition of "the State" in Article 12 is for the purposes of both Part III and Part IV of the Constitution, State actions, including actions of the instrumentalities and agencies of the State, must not only be in conformity with the Fundamental Rights guaranteed by Part III but must also be in accordance with the Directive Principles of State Policy prescribed by Part IV".

55. In *Tamil Nadu Housing Board v. Service Society and another* : [(2011) 11 SCC 13) it has been held:

"34. In view of the complex nature of acquisition, development, construction and allotment, it is necessary to safeguard the interests of the allottees and at the same time ensure that there is no loss to the public exchequer or the authority by making it to bear any part of the cost of development or cost of the plot or cost of construction. Normally a claim by the authority or the board for increase should be accepted if the authority or board certifies that what is claimed is the actual final cost, and supports it by a certificate from an independent chartered accountant or its own Accounts Department showing the break up of the cost.

35. A standard certificate should furnish the following :

(a) break up of the tentative allotment price in regard to the plot, development and construction;

(b) break up of the final cost in regard to the plot, development and construction;

(c) a table showing total area, area used for plots, area used for common/service areas like roads, drains, parks and open spaces;

(d) a table showing the acquisition cost; and

(e) a table showing the construction cost.

It is open to the allottee to apply for the particulars and have it verified independently, before rushing to court."

56. In the case at hand the increase in final cost from the stage of Revised Tentative cost as apparent from the comparative statement is between 42 % to 52 %. The major chunk of this hike in price is contributed by the cost price of land which is almost equal to the total of revised tentative cost. Board having failed to establish the expenditure added towards cost price of the land after the date of allotment, is not justified in adding the same towards cost price of land to which it was on the date of allotment.

57. In view of above analysis the petitions are allowed. The direction that the allottees are liable to pay the land price at the rate as determined by Collector in exercise of his power on the date of execution of sale-deed is quashed. Respondent Board is directed to fix the price of the land as it existed on the date of issuance of allotment letter irrespective of fact whether the instrument of transfer was executed or not.

58. Petitions are allowed to the extent above. There shall be no costs.

Petition allowed.

I.L.R. [2014] M.P., 2837
WRIT PETITION
Before Mr. Justice Shantanu Kemkar & Mr. Justice S.C. Sharma
W.P. No. 8628/2013 (Indore) decided on 26 November, 2013

KANCHANBAG A PARTNERSHIP FIRM & anr. ...Petitioners
Vs.
UNION OF INDIA & ors. ...Respondents

Income Tax Act (43 of 1961), Section 220(6) **- Petition against order passed by Deputy Commissioner, Income Tax, refusing to invoke powers u/s 220(6) of the Act rejecting the prayer of stay by observing that since the appeal is pending before Appellate Authority, recovery cannot be stayed - Held - Reason assigned for rejection of the prayer cannot be said to be justified - On the other hand, it runs contrary to the object and spirit of Section 220(6) of the Act - Power u/s 220(6) is required to be exercised only when assessee has presented an appeal - Assessing Officer/Dy. Commissioner has misdirected itself in rejecting**

the prayer - Impugned order is quashed - Dy. Commissioner is directed to reconsider the petitioner's application and pass fresh reasoned order after giving opportunity of hearing to the petitioner. (Paras 6, 7)

आयकर अधिनियम (1961 का 43), धारा 220(6) – अधिनियम की धारा 220(6) के अंतर्गत शक्तियों का अवलंब लेने से इंकार करते हुए आयकर उपायुक्त द्वारा पारित किया गया आदेश जिसमें रोक की प्रार्थना को यह संविक्षा करते हुए अस्वीकार किया गया कि चूंकि अपीली प्राधिकारी के समक्ष अपील लंबित है, वसूली को रोका नहीं जा सकता, के विरुद्ध याचिका – अभिनिर्धारित – प्रार्थना की अस्वीकृति हेतु दिये गये कारण को न्यायोचित नहीं कहा जा सकता – दूसरी ओर, वह अधिनियम की धारा 220(6) के उद्देश्य और आशय के विपरीत जाता है – धारा 220(6) के अंतर्गत शक्ति का प्रयोग केवल तब अपेक्षित है जब निर्धारिती ने अपील प्रस्तुत की हो – निर्धारण अधिकारी/उपायुक्त ने प्रार्थना अस्वीकार करके स्वयं को दिग्भ्रमित किया है – आक्षेपित आदेश अभिखंडित – उपायुक्त को निदेशित किया गया कि याची के आवेदन पर पुनर्विचार करें और याची को सुनवाई का अवसर देने के पश्चात नया सकारण आदेश पारित करें।

Amol Shriyastava, for the petitioners.

R.L. Jain with *Veena Mandlik,* for the respondent/Income Tax Department.

ORDER

The Order of the Court was delivered by : **SHANTANU KEMKAR, J. :-** By filing this petition under Article 226 / 277 of the Constitution of India, the petitioner has challenged the order dated 24.06.2013 (Annexure P/1) passed by the Deputy Commissioner, Income Tax, Ratlam refusing to invoke the powers under Section 220 (6) of the Income Tax Act, 1961 (for short, the Act) by observing that the appeal against the order of assessment is pending before the Appellate Authority.

2. Briefly stated, the Deputy Commissioner, Income Tax, Ratlam passed an order of assessment dated 28.03.2013; against which, the petitioner preferred an appeal before the Commissioner of Income Tax (Appeals). After filing of the appeal, the petitioner moved a stay application under Section 220 (6) of the Act before the Assessing Officer / Deputy Commissioner making a prayer not to treat him as being in default in respect of the amount in dispute in the appeal. The said application suffered dismissal vide aforesaid order dated 24.06.2013. Aggrieved, the petitioner has filed this petition.

3. We have heard learned counsel for the parties.

4. Section 220 (6) of the Act, which is relevant for deciding the issue involved in this writ petition reads, as under: -

> **"220. When tax payable and when assessee deemed in default.-**
>
> (6) Where an assessee has presented an appeal under Section 246 [or Section 246A], the [Assessing Officer] may, in his discretion and subject to such conditions as he may think fit to impose in the circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired as long as such appeal remains un-disposed of."

5. On going through the impugned order, we find that the Assessing Officer / Deputy Commissioner, Income Tax has rejected the petitioner's application by giving following reason: -

> "क्यों कि प्रकरण में प्रथम अपील लंबित होने से वसुली की कार्यवाही को स्थगित नहीं रखा जा सकता है।"

6. In our considered view, the reason assigned for rejection of the prayer made by the petitioner cannot be said to be justified. On the other hand, it runs contrary to the object and spirit of Section 220 (6) of the Act. It is only when assessee has presented an appeal, the power is required to be exercised under Section 220 (6) of the Act by the Assessing Officer. Thus, in our considered view, the Assessing Officer / Deputy Commissioner has misdirected itself in rejecting the prayer by observing that since the appeal is pending, recovery cannot be stayed.

7. In the circumstances, we quash the impugned order dated 24.06.2013 (Annexure P/1) passed by the Assessing Officer / Deputy Commissioner with a direction to the Assessing Officer to reconsider the petitioner's application and pass a fresh reasoned order, after giving opportunity of hearing to the petitioner.

C. c. tomorrow.

Order accordingly.

I.L.R. [2014] M.P., 2840
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice S.C. Sharma
W.P. [PIL] No. 13345/2013 (Indore) decided on 29 November, 2013

RANCHODLAL ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Constitution - Article 226 **- Petitioner is seeking direction to the respondents to cut-short the Schedule of Panchayat Election so that it can be completed within the shortest duration - He has directly approached the court without making representation to the authority competent to decide the same - Held - As the petitioner has directly filed the petition without approaching the Competent Authority by making a clear, plain and unambiguous demand - Petition dismissed. (Para 1 and 2)**

संविधान –अनुच्छेद 226– याची पंचायत चुनाव की समयसारणी को कम करने के लिए प्रत्यर्थीगण को निदेश चाहता है जिससे कि वह कम से कम समयावधि में पूरा हो सके – उक्त के विनिश्चय हेतु सक्षम प्राधिकारी को अभ्यावेदन दिये बिना वह सीधे न्यायालय आया है – अभिनिर्धारित – चूंकि याची ने सक्षम प्राधिकारी के समक्ष स्पष्ट, सीधी और असंदिग्ध मांग किये बिना सीधे याचिका प्रस्तुत की है – याचिका खारिज।

Case referred :

(2013) 3 MPLJ 591.

Milind Phadke, for the petitioner.

ORDER

The Order of the Court was delivered by : SHANTANU KEMKAR, J. :- By filing this petition, in the nature of "Public Interest Litigation", the petitioner is seeking directions to the respondents to cut-short the Schedule of the Panchayat Elections in such a manner so that it can be completed within the shortest duration from the usual duration, which is being fixed. The petitioner is also seeking direction to the respondents to conduct the elections of Gram Panchayat, Janpad Panchayat and Jila Panchayat on different dates. It is also the prayer of the petitioner to direct the District Election Officers to comply with the directives of the State Election Officer with regard to the preparation of voter list on the basis of the list prepared for

Vidhan Sabha.

2. Having heard learned counsel for the petitioner at length, we find that before seeking the writ of mandamus for the reliefs claimed as above, a detailed, specific and clear representation has not been submitted by the petitioner to the authority competent to decide the same and he has directly approached the Court. Copies of few representations filed with the petition reflects that they are not made to the authorities, who are competent to take decision, but are addressed directly to the Chief Minister and other Ministers. When, according to the learned counsel for the petitioner, the Competent Authority to take decision is the Director / Deputy Director, Panchayat, it was necessary for the petitioner to have submitted the demand to the said authority. As the petitioner has directly filed the petition without approaching the Competent Authority of the respondents for the reliefs claimed by making a clear, plain and unambiguous demand, we are not inclined to interfere into the matter as this stage. Our view finds support from the law laid down by the Supreme Court in the case of *Rajasthan State Industrial Development & Investment Corporation v. Subhash Sindhi Cooperative Housing Society, Jaipur* (2013) 3 MPLJ 591.

3. In the circumstances, the petition fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2014] M.P., 2841
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 3649/2009(S) (Gwalior) decided on 4 December, 2013

SHANTIMAL BHANDARI ... Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Constitution - Article 226 - Alternative Remedy*** **- Despite availability of alternative remedy the petition can be entertained - It is a matter of policy/discretion and is not of a compulsion depends upon the circumstances of each case - One such ingredient for entertaining the petition is violation of principle of natural justice. (Paras 6 & 7)**

क. *संविधान – अनुच्छेद 226 – वैकल्पिक उपचार – वैकल्पिक उपचार* **की उपलब्धता के बावजूद, याचिका ग्रहण की जा सकती है – यह नीति / विवेकाधिकार**

का मामला है और न कि बाध्यता का, यह प्रत्येक प्रकरण की परिस्थितियों पर निर्भर होता है – याचिका ग्रहण करने के लिए एक ऐसा ही घटक है, नैसर्गिक न्याय के सिद्धांत का उल्लंघन।

B. ***Zila Sahkari Kendriya Bank Karmchari Seva Niyojan Nibandhan Tatha Unki Karya Sthiti Niyam, M.P. 1982, Rule 72(1) - Compulsory Retirement*** **- Petitioner compulsorily retired on the basis of certain allegations which amounts to misconduct - Overall service record of the petitioner was not adjudged - Since the order is passed without providing any opportunity principle of natural justice are violated - It is passed to avoid disciplinary proceedings which is impermissible - Same is set aside. (Paras 13,14,15)**

ख. जिला सहकारी केन्द्रीय बैंक कर्मचारी सेवा नियोजन निबंधन तथा उनकी कार्य स्थिति नियम, म.प्र. 1982, नियम 72(1) – अनिवार्य सेवानिवृत्ति – याची को अवचार की कोटि में आने वाले कतिपय आरोपों के आधार पर अनिवार्य रुप से सेवानिवृत्त किया गया – याची के सेवा अभिलेख को समग्र रुप से न्यायनिर्णित नहीं किया गया – चूंकि कोई अवसर प्रदान किये बिना आदेश पारित किया गया है, नैसर्गिक न्याय के सिद्धांत का उल्लंघन हुआ है – अनुशासनिक कार्यवाही से बचने के लिए उसे पारित किया गया, जो अननुज्ञेय है – उक्त को अपास्त किया गया।

Cases referred :

2007(2) MPLJ 152, (1998) 8 SCC 1, (2001) 3 SCC 314.

D.P. Singh, for the petitioner.
Sangeeta Pachauri, Dy. G.A. for the respondents No. 1 & 2/State.
Vishal Mishra, for the respondents No. 3 & 4.

ORDER

Sujoy Paul, J. :- By invoking jurisdiction of this Court under Article, 226 of the Constitution, the petitioner has prayed for setting aside the order dated 24.06.2009 with further direction to reinstate him with all consequential benefits.

2. Facts, as canvassed by the petitioner are that he was appointed as clerk w.e.f. 07.05.1972, thereafter, he was promoted as Cashier in the year 1989. The petitioner was further promoted as Accountant in the year 1995. Thereafter in May, 2003, he was promoted as Branch Manager. In July, 2006, the petitioner was promoted as Assistant Manager. The promotion orders are filed cumulatively as Annexure P/2. The promotion order dated 08.07.2006

was cancelled, against which the petitioner filed WP No. 107/2008. This Court set aside the cancellation of promotion order by order dated 09.05.2008 (Annexure P/4). It is admitted between the parties that against said order of the Writ Court, writ appeal is pending before Division Bench.

3. The petitioner is aggrieved by impugned order Annexure P/1 . By this order the petitioner is compulsorily retired. Shri D.P.Singh, learned counsel for the petitioner submits that in view of satisfactory service of the petitioner, in which no adverse CR is communicated to him and he was given various promotions, order of compulsory retirement is bad in law and is an arbitrary exercise of power. He submits that careful scrutiny of the impugned order would show that it is punitive in nature and not based on entire service record of the petitioner.

4. The respondents have not chosen to file any reply in this matter. On 03.12.2012 learned counsel for the respondents stated that he does not want to file any reply in the matter. However, record / photocopy in the shape of file is produced for the perusal of this Court. Shri Vishal Mishra, learned counsel for the employer heavily relied on 2007 (2) MPLJ 152 *(Triloki Nath Pandey Vs. M.P. Cooperative Dairy Federation Ltd. and others)*. In the said case the petition was not entertained and petitioner was relegated to avail alternative remedy. On the strength of this order, it is contended that this petition be not entertained.

5. I have heard learned counsel for the parties and perused the record.

6. I deem it proper to first deal with the objection of other side about availability of alternative remedy. In *Triloki Nath Pandey* (supra) petition was filed at the end of year 2005 which was decided in 2006. This petition is pending before this Court for about four years. The respondents have not chosen to file reply in this matter. This is settled in law that despite availability of alternative remedy, the petition can be entertained. The question of entertaining a writ petition, despite availability of alternative remedy, is matter of policy / discretion and is not of a compulsion. In given facts and situation, Court may relegate the litigant to avail alternative remedy, whereas in different factual scenario may also entertained it.

7. In the present case, facts are totally different. Merely because there is an alternative remedy, I am not inclined to relegate the petitioner to avail that remedy after four years. The Apex Court in *Whirlpool Corporation Vs.*

Registar of Trace Marks [(1998) 8 SCC 1] opined that despite availability of alternative remedy, petition can be entertained. One such ingredient for entertaining the petition is violation of principle of natural justice. Hence, the judgment in *Triloki Nath* (supra) is of no assistance to the petitioner.

8. Coming to the merits of the case, the contention of the petitioner is that he was appointed in the year1972 and thereafter, he was given various promotions. Only promotion dated 08.07.2006 is presently subject matter of writ appeal. Other promotions, given prior in time, have attained finality. In view of the record and various promotions, it is contended that by no stretch of imagination, the petitioner can be termed as 'dead wood'.

9. The case of the petitioner is that petitioner is compulsorily retired as a measure of punishment by casting stigma. Whereas, the stand of the respondents is that on overall consideration of the record petitioner is held to be 'dead wood'. I deem it proper to reproduced the relevant portion from the impugned order dated 24.06.2009 as under:-

> "संचालक मण्डल द्वारा श्री शान्तिमल मण्डारी शाखा प्रबंधक से संबंधित उपर्युक्त प्रकरण के सम्पूर्ण तथ्य एवं आधारों की विवेचना की गई तथा निष्कर्ष निकाला गया कि श्री भण्डारी किसी ऐसे गंभीर रोग से ग्रसित नहीं थे कि बैंक के महत्वपूर्ण कार्य–सेवा समय में बैंक को अपनी सेवा प्रदान नहीं कर सकते, वे जानबूझकर मेडिकल अवकाश के आधार पर अवैधानिक तौर तरीके से दिनांक 03.05.2008 से दिनांक 10.03.2009 तक के लगभग 310 दिवस तक अपनी हठधर्मिता से कार्य से अनुपस्थित बने रहे। उन्होने बैंक को अनियमित अवकाश आवेदन दिये जिनके साथ उन्होंने कभी मेडीकल प्रमाण पत्र पेश नहीं किये। पूर्व में जो चार प्रमाणपत्र पेश किये थे, वे भी नियम विरूद्ध और त्रुटिपूर्ण थे, बाद में एकजाई प्रमाण पत्र पेश करना सेवानियमों के अन्तर्गत नहीं था, इस कारण उनके प्रत्युत्तर मान्य किये जाने योग्य नहीं है। श्री भण्डारी के पिछले लगभग तीन वर्षीय कार्यकाल का लेखा–जोखा परीक्षण करने पर यह भी पाया गया कि वे उक्त के अतिरिक्त पूर्व में भी अनेक अवसरों पर भिन्न–भिन्न कारण दर्शाकर बैंक के महत्वपूर्ण कार्य समय में अवकाश पर प्रस्थित हो जाते है जो उनकी पदेन जवाबदारियों के विपरीत है। जहॉ तक उनके प्रत्युत्तर दिनांक 20.01.09 एवं 17.02.09 में वर्णित यह स्थिति कि मान्नीय उच्च न्यायालय खंडपीठ ग्वालियर के समक्ष उनके द्वारा प्रस्तुत रिट पिटीशन कमांक 107 दिनांक 04.01.08 के अंतिम आदेश दिनांक 09.05.2008 के पालन में वे अपने सहायक पबंधक के मूलपद पर कार्य करने हेतु तत्पर है, मानने योग्य नहीं है क्योंकि मान्नीय उच्च न्यायालय, खण्डपीठ ग्वालियर के उक्त आदेश के विरूद्ध बैंक द्वारा विधिक समयावधि के भीतर एक अपील प्रकरण कमांक 352/08 मान्नीय

उच्च न्यायालय, खंडपीठ ग्वालियर की डबल बैंच के समक्ष प्रस्तुत की गई। जिसमें मान्नीय उच्च न्यायालय, खंडपीठ ग्वालियर के आदेश दिनांक 24.09.2008 से सिंगल बैंच के आदेश दिनांक 09.05.2008 पर रोक लगाते हुए स्थगन आदेश बैंक के पक्ष में पारित किया गया। उक्त अपील प्रकरण मान्नीय उच्च न्यायालय के समक्ष विचाराधीन है।

अतएव श्री भण्डारी को शाखा प्रबंधक पद सम्बोधन दिया जाना विधि सम्मत है। श्री भण्डारी ने बैंक द्वारा समय–समय पर दिये वैध आदेश / निर्देशों का अवज्ञा की है, उन्होंने मेडीकल बोर्ड के समक्ष उपस्थित होकर स्वास्थय परीक्षण कराने के बैंक के आदेश / निर्देश कमांक 1504 दिनांक 01.06.2008 का पालन तत्समय नहीं किया और न ही उन्होने समय–समय प्रसारित अन्य आदेश पत्रों के अलावा आदेश कामंक 1081 दिनांक 21.05.08 तथा 1264 आदेश दिनांक 27.05.2008 का पालन ही कर्तव्यनिष्ठ कर्मचारी के नाते किया है, अपितु उनकी घोर अवज्ञा करते हुये बैंक के कार्य–व्यवहार को प्रतिकूल रूप से प्रभावित किया है। श्री भण्डारी ने अपने अनियमित आवेदन पत्रों के साथ अपनी बीमारी संबंधी कभी कोई इलाज आदि के पर्चे, जॉच परीक्षण की रिपोर्ट बैंक को पेश नहीं की और न ही हास्पिटलाइजेशन आदि की स्थिति से सआधार सूचित किया अर्थात श्री शान्तिलाल भण्डारी, शाखा प्रबंधक अवैधानिक ढंग से निरंतर 310 दिवस दिनांक 05.05.08 से 10.03.09 तक स्वास्थ्य कारणों से अवकाश संबंधी बहानेबाजी कर मनमर्जी से कार्य और सेवा से अनुपस्थित रहे है तथा बैंक के द्वारा समय–समय पर जारी वैध आदेश / निर्देशों की उन्होंने अनेक अवसरों पर घोर अवहेलना की है। उन्होंने अवज्ञापूर्ण / अनुशासनहीन आचरण अपनाया है। तथा पदेन जवाबदारियों से बचने का कुप्रयास किया है।"

(Emphasize supplied)

10. A careful reading of the aforesaid portion makes it clear that respondents have not seen the entire service record of the petitioner to determine whether he is 'dead wood'. They have seen the last three years record with the intention to examine whether during those three years the petitioner remained absent. In other words, the service record was seen with a view to dig out the shortcomings and misconduct of the petitioner. Overall service record of the petitioner was not adjudged, which is clear from the impugned order. It is not canvassed by the respondents that during the period for which service record is seen the petitioner's ACR is graded as "D" or his services are held to be unsatisfactory. A microscopic reading of the aforesaid portion further shows that respondents have picked up certain incidents and gave categorical finding that the petitioner's conduct amounts to disobedience

/ indiscipline. Thus, question is whether on the basis of these reasons the petitioner can be compulsorily retired. As per Rule 72 of म0प्र0 के जिला सहकारी केन्द्रीय बैंक कर्मचारी सेवा नियोजन, निबंधन तथा उनकी कार्य स्थिति नियमए1982, (for short, "1982 Rules") , which reads as under:-

> 72. सेवा निवृत्ति– (एक) बैंक का प्रत्येक कर्मचारी चौकीदार, जमादार, भृत्य एवं माली को छोड़कर 58 वर्ष की आयु होने पर सेवानिवृत्त हो जाएगा। चौकीदार, जमादार, भृत्य एवं माली के मामले में सेवानिवृत्त कर्मचारी की आयु 60 वर्ष होगी। मंडल किसी भी कर्मचारी का कार्यकाल 2 वर्ष तक बढ़ा सकता है तथा वह स्वास्थ्य की दृष्टि से कार्य करने योग्य हो, किन्तु प्रत्येक ऐसे मामले में सेवा काल में वृद्धि करने हेतु कारणो का विस्तार से लिखित में वर्णन करनो होगा।
>
> आगे यह भी कि कर्मचारी की आयु 55 वर्ष अथवा 25 वर्ष सेवा काल पूर्ण होने पर इनमें जो भी पहले हो बैक के हित में बिना कारण दर्शाए बैंक तीन माह की सूचना नाटिस अथवा उसके बदले तीन माह का वेतन भत्ते देकर, सेवा से निवृत्त कर सकता है, परन्तु प्रतिबंध यह रहेगा कि–
>
> 1. बैंक ऐसे सभी कर्मचारियों के प्रकरणों में उनकी चरित्रावली के आधार पर उनके कार्यों का मूल्यांकन /समीक्षाकरेगी एंव पंजीयक की पूर्व अनुमति प्राप्त करेगीं।
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> 2. ऐसे सेवा निवृत्त कर्मचारियों के रिक्त पदों पर बैंक द्वारा कोई नवीन नियुक्ति सामान्यतः आगामी 2 वर्ष तक नहीं की जावेगी। ऐसे रिक्त हुए पदों पर की जाने वाली नियुक्ति पंजीयक की पूर्वानुमति की जायेंगी।
>
> आगे यह भी कि कर्मचारी स्वेच्छा से 50 वर्ष की आयु होने पर अथवा सेवा काल के 20 वर्ष पूर्ण कर लेने पर, इनमें से जो भी पहले हो, तीन माह की पूर्वसूचना देकर सेवानिवृत्त हो सकता है।

11. This is not in dispute between the parties that the petitioner is compulsorily retired by invoking Rule 72 (1) of the service regulations. The respondents have not issued any show cause notice / charge sheet nor conducted any disciplinary proceedings. There action is based on clause 72 (1) of the by-laws. The pivotal question is whether by invoking clause 72 (1) the petitioner can be retired compulsorily on the basis of aforesaid reasons.

12. Pausing here for a moment, it is apt to rely on the judgment on the Supreme Court in *(State of Gujrat Vs. Umedbhai M. Patel)* (2001) reported in 3 SCC 314. The Apex Court considered the law relating to compulsory retirement and crystallized it into definite principles. Those principles are

broadly summarized as under:-

(i) Whenever the services of a public servant are not longer useful to the general administration, he can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(iii) For better administration, it is necessary to chop off dead wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

(iv) Any adverse entires (sic:entries) made in the confidential record shall be taken note of and be given due weight in passing such order.

(v) Even uncommunicated entries in the confidential record can also be taken into consideration.

(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(vii) If the officer was given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

(viii) Compulsory retirement shall not be imposed as a punitive measure.

(Emphasize supplied)

13. A bare perusal of the law laid down by the Apex Court makes it clear that order of compulsory retirement cannot be passed as short cut to avoid departmental enquiry and when said course is more desirable. In the facts and circumstances of this case, it is clear that the respondents have passed the impugned order on the basis of certain allegations, which amounts to misconduct. Thus, the respondents have made an effort to short circuit the disciplinary proceedings by compulsorily retiring the petitioner. Chapter 11 Rule 56 of 1982 Rules defines the misconduct. Clause 7 reads as under :-

7. बैंक के किसी अधिकारी के किसी भी वैध और उचित आदेश की जानबूझकर अवज्ञा करना, अवहेलना करना या आज्ञा का उल्लंघन करना।

14. Averments of the impugned order, reproduced herein above, shows that the petitioner is compulsorily retired for allegations which, if proved, amounts to misconduct. As per said rules, unauthorized absence is also a misconduct. In view of aforesaid, it is clear that the impugned order is passed in lieu of disciplinary proceedings which is impermissible. Apart from this, the impugned order is passed thereby casting stigma on the petitioner. The petitioner is compulsorily retired due to incidents and allegations which amounts to misconduct. This has been done without providing any opportunity to him. Thus, principles of natural justice are violated. For this reason also, I have not relegated the petitioner to prefer appeal.

15. Thus, I have no doubt that the impugned order is passed to avoid disciplinary proceedings which is impermissible in view of the judgment in *Umed Bhai* (supra). Resultantly, the impugned order cannot be permitted to stand, the same is set aside. Petition is allowed. The petitioner be reinstated within 30 with all consequential benefits. Liberty is reserved to the respondent to take action against the petitioner in accordance with law.

Petition allowed.

I.L.R. [2014] M.P., 2848
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice M.C. Garg

W.P. No. 418/2010 (Indore) decided on 7 December, 2013

KRISHNA OIL EXTRACTION LTD. (M/S) ...Petitioner
Vs.
STATE APPELLATE FORUM ...Respondent

Constitution - Article 226 - Exemption - Industrial Policy of the State of M.P. - Capital Investment **- State Level Committee refused to grant benefit of exemption to the petitioner under Notification No. 43 dated 06.06.1995 in respect of Capital investment made by the petitioner during the period from 01.04.1992 to 31.03.1994 despite conversion of its unit into an exporting unit and there being nothing in the notification to fix such cut-off date - Held - No dispute that the unit of the petitioner has been qualified by a 100% exporting unit within time framed, which has been permitted by the notification, they are entitled to claim benefit of fixed**

Capital assets as prayed for by the petitioner - Order of the State Appellate Forum is modified to the extent that the petitioner shall be entitled to the benefit of exemption towards fixed Capital assets to the tune of Rs. 232.41/ - lacs as claimed by them and to that extent, the order of the State Appellate Forum stands modified. (Paras 25 & 26)

संविधान – अनुच्छेद 226 – छूट – म.प्र. राज्य की औद्योगिक नीति – पूंजी निवेश – याची द्वारा 01.04.1992 से 31.03.1994 तक की अवधि के दौरान किये गये पूंजी निवेश के संबंध में अधिसूचना क्र. 43 दिनांक 06.06.1995 के अंतर्गत छूट का लाभ याची को प्रदान करने से राज्य स्तरीय समिति ने इंकार किया, यद्यपि उसकी इकाई को निर्यात इकाई में परिवर्तित किया गया था और अधिसूचना में उक्त अंतिम तिथि निश्चित करने के लिए कुछ नहीं है – अभिनिर्धारित – कोई विवाद नहीं कि याची की इकाई ने समयावधि के भीतर 100 प्रतिशत निर्यात इकाई द्वारा अर्हता प्राप्त कर ली है, जो अधि सूचना द्वारा अनुज्ञेय है, वे निश्चित पूंजी परिसम्पत्तियों के लाभ का दावा करने के लिए हकदार है, जैसा कि याची द्वारा निवेदन किया गया है – राज्य अपीली फोरम के आदेश को इस सीमा तक परिवर्तित किया गया कि याची निर्धारित पूंजी परिसम्पत्यिों की ओर रु. 232.41/– लाख की छूट के लाभ का हकदार होगा जैसा कि उनके द्वारा दावा किया गया है और उस सीमा तक राज्य अपीली फोरम का आदेश परिवर्तित किया गया।

Case referred :

(2007) 11 STJ 785 (SC).

P.M. Choudhary, for the petitioner.
Mini Ravindran, Dy. G.A. for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : **M.C. GARG, J. :-** Present Writ Petition is directed against the decision taken by the State Appellate Forum (respondent no. 1) in its meeting held on 22th of September, 2009, confirming the decision of State Level Committee, whereby the State Level Committee had refused to grant benefit of exemption to the petitioner under Notification no. 43 dated 6th of June, 1995 in respect of capital investment made by the petitioner during the period from 1st of April, 1992 to 31st of March, 1994 despite conversion of its Unit into an Exporting Unit and there being nothing in the notification to fix such cut-off date.

2 In short, the investment made by the petitioner prior to 01st of April, 1994 was disallowed by fixing a cut-off date into the said notification although no such cut-off date has been specified in the notification. It is submitted by

the petitioner that fixing such cut-off date was arbitrary exercise of power on the part of respondent.

3. It may be appropriate to take note of list of dates and events leading to filing of present Writ Petition, which are as under:

1984	The petitioner company commenced its commercial production at industrial unit in village Ganga Honi, Dist.-Rajgarh, M.P.
01-04-1992	In the process of modernization and sophistication the petitioner company undertock another phase of expansion with a view to convert its unit as an exporting unit. Factual position in this respect not disputed at any stage.
06-10-1994	Notification No. A-3-24-94-ST-V(108) issued by the State Government for implementing the above industrial policy and action plan. **(AnnexureP/3).**
06-06-1995	Notification No.A-3(1)-95-ST-V(43) issued by the State Government provide incentive to 100% Exporting units.**(Annexure P/4).** The notification grants exemption to three categories of dealer- a. The Non resident Indian dealers establishing industrial unit in the State by making specified investment. b. The dealers establishing 100% Export oriented unit or dealers converting their existing units into export oriented units. c. Dealers whose industrial unit is an export oriented unit. The basis of computation of quantum of exemption is the capital investment made by the respective dealers.

13-10-95	Registration certificate granted to the petitioner company registering it as an exporting industrial unit w.e.f 13-10-95 for the purposes of availing exemption under notification dated 06-06-1995 **(Annexure P/5)**
26-02-1999	The petitioner applied for eligibility certificate in terms of notification no.43 dated 06-06-1995. Eligibility certificate issued by SLC. Arbitrary reduction of qualifying capital investment to Rs.104.11 lacs as against actual investment of Rs.232.41 lac. Order passed by SLC- **(Annexure P/6).** Eligibility Certificate- **(Annexure P/7).**
10-10-2001	Appeal filed before State Appellate Forum decided by Forum vide order dated 10-10-2001.SLC order set aside as non speaking order without assigning any reasons in support of its decision matter remanded back to SLC. **(Annnexure P/8).**
31-03-2003	The SLC in remand proceedings maintained its earlier order and refused to grant benefit of exemption in respect of investment made during the period 01-04-1992 to 31-03-1994. - **(Annnexure P/9).**
25-06-2007	Appeal filed before State Appellate Forum against SLC order dated 3 1-03-2003 dismissed.Decision communicated vide communication dated 25-06-2007.- **(Annexure P/10)**
30-06-2009	Aggrieved by such dismissal by State Appellate Forum the petitioner unit filed a Writ Petition before this Hon'ble Court being W.P.N0.5630/ 2007.

	The said WP was disposed of by this Hon'ble Court: vide its order dated 30-06-2008 and quashed the decision of State Appellate Forum as being a Cryptic and non speaking order Case remanded to Appellate Forum for fresh decision **-(Annexure P/11).**
22-09-2009	The petitioner unit appeared before State Appellate Forum in remand proceedings as directed by this Hon'ble Court vide its order dated 30-06-2008 and further submitted a written submission in support of its contentions. **-(Annexue P/12).** The State Appellate Forum vide its order dated 22-09-2009 has again dismissed the appeal of the petitioner unit and held that capital investment made prior to 01-04-1994 has been rightly disregarded/ ignored by the State Level Committee- **(Annexure P/1).**

4. As per the aforesaid eligibility certificate, the exemption of the Tax which was required to be 250 % of the total capital investment was granted only with respect to Additional Capital Investment on fixed assets amounting to-Rs. 104.11/- lacs whereas the claim of the petitioner was to grant exemption by taking into consideration the total investment towards fixed assets as on the date of the eligibility certificate which according to the petitioner was 232.41 lacs.

5. The petitioner therefore, filed an appeal before the State Appellate Forum which was decided on 10th of October, 2001. The Appellate Authority set aside the order of State Level Committee (in short 'SLC') as non-speaking order without assigning any reason and remanded back the matter to SLC vide Annexure-P/8. In the remand proceedings, SLC maintained its earlier order and refused to grant benefit of exemption with respect to investment made during the period from 01st of April, 1992 to 31st of March,1994, which is subject matter of the dispute vide Annexure-P/9. Appeal filed before the State Appellate Forum against the order of SLC was also dismissed vide order dated 25th Of June, 2007 vide Annexure P/10. It is against this order, a

writ petition was filed which was allowed by this Court quashing the decision of the State Appellate Forum as being cryptic and non speaking order and the case was remanded back to the Appellate Forum for fresh decision vide order passed by this Court on 30th of June, 2008 vide Annexure-P/11. The matter was then taken up by the State Appellate Forum as remand proceedings in terms of the order by this Court and vide order dated 22nd September, 2009, the State Appellate Forum dismissed the appeal of the petitioner and held that capital investment prior to 01st of April, 1994 was rightly disregarded / ignored by the State Level Committee. It is this order which is impugned before us in this writ petition.

6. It will be appropriate to take note of the order passed by this Court on 30th of June, 2008 which is Annexure- P/11 and which reads as under:

> An exemption claimed by the petitioner-company from payment of the commercial tax was rejected by the State Level Committee, respondent No. 2, vide an order dated February 6, 2003. The petitioner-company was held not eligible for the said exemption. Under the Industrial Policy issued by the State Government, the order of rejection passed by the State Level Committee was challenged by the petitioner-company by filing an appeal before the State Appellate Forum. The Appellate Forum has also rejected the appeal filed by the petitioner-company vide order dated June 25, 2007 (Annexure P-15). The petitioner-company has challenged the aforesaid orders passed by the State Level Committee as well as by the State Appellate Forum.
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> During the course of arguments, Shri P.M. Choudhary, learned counsel for the petitioner-company, has pointed out that the appellate order Annexure P-15 passed by the Appellate Forum was totally a cryptic and non-speaking order and does not contain any reasons for rejecting the appeal filed by the petitioner-company.
>
> A perusal of the order Annexure P-15 does support the contentions raised by Shri Choudhary. It is apparent that the appeal filed by the petitioner-company has been rejected by a Forum merely by saying that it was not entitled to the exemption, but without discussing the various claims made by

the petitioner-company in the grounds of appeal.

Consequently, without commenting on the claim made by the petitioner-company qua the exemption claimed by it, the present petition is allowed to the extent that the appellate order dated June 25, 2007 passed by the State Appellate Forum shall stand quashed. The appeal filed by the petitioner-company before the Appellate Forum shall stand revived to its original number and shall be decided afresh by the State Appellate Forum, by passing a detailed and speaking order within a period of four months from the date a certified copy of this order is presented by the petitioner-company.

The petitioner-company shall appear before the State Appellate Forum on July 7, 2008 and shall be at liberty to make a request for grant of personal hearing through its representative.

The present petition is disposed of accordingly.

7. Now it will be appropriate to take note of the impugned order passed by the State Appellate Forum after the order of remand. In this regard, it may be observed here that the submission made on behalf of the petitioner seeking exemption with respect to the investment made in fixed assets was in terns of the averments made in paragraphs- 3 of the impugned order which reads as under:

3/ प्रकरण संक्षेप में यह हैं कि राज्य स्तरीय समिति की बैठक दिनांक 26–2–199 एवं दिनांक 06/03/2000 में लिये गये निर्णय के विरूद्ध इकाई द्वारा पूर्व में राज्य अपीलीय फोरम के समक्ष निम्नानुसार दो मुद्दो पर दो अपीलें प्रस्तुत की गई थी –:

(1) इकाई दिनांक 13/10/1995 से निर्यातक इकाई के रूप में परिवर्तित की गई तथा राज्य स्तरीय समिति की बैठक दिनांक 26/02/1999 में निर्यातिक इकाई के आधार पर इकाई को आवेदित राशि रूपये 232.41 लाख के निवेश के विरूद्ध रूपये 104.11 लाख का पात्र निवेश मान्य कर दिनांक 13/10/1995 से 12/10/2006 तक की अवधि के लिये वाणिज्यिक कर सुविधा स्वीकृत की गयी। इकाई द्वारा अपील में उल्लेख किया गया कि समिति द्वारा आवेदित राशि रू. 232.41 लाख के विरूद्ध सिर्फ रू. 104.11 लाख का पूंजी वैष्ठन मान्य किये जाने का कोई कारण नहीं बताया गया है, अतः राज्य स्तरीय समिति को पुर्नविचार कर

स्पष्ट आदेश पारित करने हेतु निर्देशित किया जाये।

(2) इकाई द्वारा निर्यातक इकाई के रूप में परिवर्तन के दिनांक से तीन वर्ष के अंदर किए गए पूंजी वैष्ठन रूपये 237.84 लाख में से रूपये 183.74 लाख राज्य स्तरीय समिति की बैठक दिनांक 06/03/2000 में मान्य किये गये। इकाई ने इस निर्णय के विरूद्ध प्रस्तुत अपील में समिति द्वारा अमान्य की गई राशि का कारण न बताने का उल्लेख करते हुए राज्य स्तरीय समिति को इस निर्णय पर पुर्नविचार करने एवं स्पष्ट आदेश पारित करते हेतु निर्देशित करने का निवेदन किया गया।

8. The order passed by the Appellate Authority after the remand was made by this Court in paragraghs- 8 & 9 reads as under :-

8– फोरम द्वारा विचारोपरांत यह पाया कि इकाई ने निम्नानुसार पंजी निवेश मान्य करने हेतु राज्य स्तरीय समिति से निवेदन किया था :–

(1) निर्यातक इकाई के रूप में परिवर्तन होने के दिनांक 13/10/1995 तक दिनांक (01/04/1992 से) किया गया निवेश रूपये 232.41 लाख।

(2) निर्यातक इकाई के रूप में परिवर्तन होने के पश्चात् दिनांक 13/10/1995 से 3 वर्ष के अंदर (दिनांक 14/10/1995 से 12/10/1998 तक) किया गया निवेश रूपये 237.84 लाख।

राज्य स्तरीय समिति के अपीलाधीन निर्णय अनुसार दिनांक 06/05/1994 या उसके पश्चात् परवर्तित होने वाली इकाइयों को लाभ देने के प्रावधान को ध्यान में रखते हुए अधिकतम दिनांक 01/04/1994 से 31/03/1995 तक किये गये निवेश को मान्य करते हुए रूपये 232.41लाख में से रूपये (128.30+ 7.76)=136.06 लाख मान्य किया गया। इकाई द्वारा क्लेम की गई राशि में से आफिस इक्यूपमेंट, फर्नीचर, वाहन आदि पर किये गये रू. 11.30 लाख निवेश को अमान्य करने पर समिति के समक्ष आपत्ति नहीं की गई, अर्थात विवादित राशि रूपये 106.35 लाख है, जो 01/04/1994 के पूर्व के निवेश से संबंधित है। फोरम द्वारा विचारोपरांत यह पाया गया है कि वर्ष 1994 में घोषित उद्योग नीति अनुसार दिनांक 01/04/1994 के पूर्व के निवेश को समिति द्वारा अमान्य करना तर्कसंगत है, किंतु दिनांक 31/03/1995 तक का ही निवेश मान्य करना तर्कसंगत नहीं हैं, क्योंकि इकाई दिनांक 13/10/1995 को निर्यातक इकाई में परिवर्तित हुई है।

उक्त के अतिरिक्त राज्य स्तरीय समिति के अपीलाधीन निर्णय में परिवर्तन दिनांक 13/10/1995 के पश्चात तीन वर्ष में किये गये निवेश रूपये 237.84 लाख में से रूपये (184.74+14.26) =198.00 लाख मान्य कर शेष राशि रूपये 38.84 लाख आफिस इक्यूपमेंट, फर्नीचर, वाहन, श्रमिक भवन, रेलवे साइडिंग

अप्रोच रोड, वाटर स्टोरेज निर्माण, बोरवेल, डी.ओ.सी. प्लेटफार्म, डी.ओ.सी. ड्राई कूलर वर्कशाप इक्यूपमेंट में निवेशित होने के कारण अमान्य किया गया है। इस संबंध में फोरम द्वारा वाणिज्यिक कर विभाग की अधिसूचना क्रमांक 108 दिनांक 06/10/1994 की कंडिका 11(1) में मान्य स्थायी निवेश संबंधी प्रावधानों के परिप्रेक्ष्य में विश्लेषण करने पर पाया गया कि वाटर स्टोरेज निर्माण, बोरवेल में किया गया व्यय उप कंडिका (a) (i) एवं (ii) में प्रावधानित भूमि एवं भवन के तहत मान्य योग्य है। इसके अलावा डी.ओ.सी. प्लेटफार्म, डी.ओ.सी., ड्राई कूलर वर्कशाप इक्यूपमेंट में किया गया निवेश भी उप कंडिका (a) (i) में उल्लेखित 'प्लांट' के तहत मान्य योग्य हैं।

9/ अतः मेसर्स कृष्णा एक्सट्रेक्शन लिमि., राजगढ़ की विचाराधीन अपील आंशिक रूप से मान्य करते हुए दिनांक 01/04/1994 से निर्यातक इकाई के रूप में परिवर्तित होने तक किये गये निवेश सहित वाणिज्यिक कर विभाग की अधिसूचना क्रमांक 108 दिनांक 06/10/1994 की कंडिका (11) (a) में मान्य स्थाई निवेश संबंधी प्रावधानों की उप कंडिका (i) एवं (ii) में उल्लेखित लेण्ड, बिल्डिंग एवं प्लांट के तहत वाटर स्टोरेज निर्माण, बोरवेल तथा डी.ओ.सी. ड्राई कूलर वर्कशाप इक्यूमेंट में किये गये निवेश कों भी मान्य पूंजी निवेश में नियमानुसार जोड़ने हेतु राज्य स्तरीय समिति को निर्देशित करने का निर्णय लिया जाता है।

9. Perusal of this order goes to show that while upholding that the investment prior to 01st of April, 1994 has not been rightly included in the claim of exemption towards capital assets, the only relief which has been granted to the petitioner is in relation to the investment made by the petitioner after 01/04/1994.

10. According to the petitioner, by the impugned order passed by the Appellate Forum, despite the order of remand by this Court again upholding the version of the State Level Committee in having approved disallowance of the investment of the petitioner towards fixed assets for the period from 01st of April, 1992 to 31st of March, 1994 on the basis of an artificial cut off date fixed by the State Level Committee in their notification dated 06th of June, 1995 even though there is no such date available, is illegal.

11. It has been submitted that the petitioner is entitled to the benefit of exemption with respect to the entire investment made by the petitioner towards fixed assets as on the date of recognition of its Unit as Exporting Unit which according to him is to the tune of Rs. 232.41/- lacs about which there is no dispute. The rejection of the particular claim of the petitioner is only on the basis of artificial Cut-off dates fixed by the State Level Committee for which

there is no basis / justification. It is submitted that the investment was made by the petitioner right from 01st of April, 1992 and such entire investment w.e.f. 01st April, 1992 till the date of recognition, is qualified for exemption. It is submitted that perusal of the notification dated 06th of June, 1995 does not show that there is any cut-off date to calculate the exemption. It is submitted that such notification at the most puts some limits on the investment made after the commencement of commercial production. It is submitted that the notification dated 06th of June, 1995 although specifies various cut-off dates for the reasons of commercial production either after the particular specified date or before the specified date. Such notification does not specify a date as an anterior date for restricting the capital investment. It is submitted that no power is vested either with the State Level Committee or with State Appellate Forum to fix a cut-off date and restrict the claim of a dealer who has in fact invested huge amount for conversion of its Unit into exporting Unit. There is no such express or implied delegation in favour of State Level Committee or the State Appellate Forum. It is thus submitted that bringing a cut-off date by the State Level Committee and its approval from the State Appellate Forum is patently illegal, bad in law and without jurisdiction. Hence this writ petition.

12. Arguments have been heard from both the sides. We have also gone through the written submissions filed on behalf of both the sides.

13. In so far as the averments made in paragraph no. 11 of the writ petition, in reply filed by the respondent, the averments made therein has been denied. They have denied the claim without giving any specific reply to para 11. According to them, the notification no. 43 dated 06th of June, 1995 has its application with effect from 06th of May, 1994. reference has been made to sub-clause (c) of the said notification which reads as under:

> "(c) a dealer whose industrial Unit is an exporting industrial Unit:
>
> (iii) commences commercial production or converts its existing industrial unit into hundred percent export oriented industrial unit or whose existing industrial unit is recognized as an exporting industrial unit on or after 6th May, 1994, but on or before 31st December, 1999 or having taken the following effective steps on or before 31st December, 1999 commences commercial production on or after the said date but on or before 31st December, 2001"

14. It has been submitted that bare perusal of the notification particularly Clause-3 makes it clear that any capital investment made between 06th of May, 1994 to 31st of March, 1999 only is liable for grant of exemption, but if any investment is made prior to the aforesaid date i.e. 06th of June, 1994, it shall not be eligible for such benefit. A bare reading of the notification does not provide for any such limit.

15. It will also be appropriate to take note of the averments made in paragraphs no. 8 and 9 of the reply which reads as under:

> 8. The answering respondents further submit that only condition for being eligible for exemption under Notification in question is that the industrial Unit in question must be recognized as an exporting industrial unit on or after 06/05/94 but before 31/12/1999 and admittedly the petitioner unit has been registered as exporting unit w.e.f. 13/10/1995 and therefore the benefit available to the petitioner on the basis of the investment made by it between that period and no such benefit is available to the petitioner for the capital investment prior to 06/05/1994. the answering respondents further submit that if any capital investment is required to be made for conversion of existing unit into an exporting unit, then exemption in respect of that investment is available to the petitioner only between 06/05/1994 to 31/12/2009.
>
> 9. The answering respondents further submit that the Notification dated 06/05/1995 has been issued by the State Government in exercise of the powers conferred upon it under the provisions of commercial Tax Act. The quantum of exemption has already been strictly determined in accordance with the conditions of the Notification and in light of the aforesaid notification the jurisdiction lies with the respondents either to refuse or to grant the exemption on the basis of the conditions mentioned in the notification including Clause no. 3 which speaks about the cut-off date. However, the petitioner has not challenged the validity of the Notification issued by the State Government, wherein Clause 3 has been specified and cleared the controversy involved in the petition. Therefore, unless and until the validity of the Notification is being

challenged, the present petition is devoid of merit and substance and liable to be dismissed on this ground.

16. It is further submitted that as per the notification dated 06th of June, 1995, Clause - 3 speaks about cut-off date.

17. To appreciate the contentions of both the parties, it would be necessary to take into consideration relevant part of the notification in question which is Annexure-P/ 4 which reads as under:

Notification No.-A-3(I)95-ST-V-(43)dated 06th June, 1995
Unit put up by NRI, 100% EOU & exporting unit

Whereas, the State Government is satisfied that it is necessary so to do in the public interest,

Now, therefore, in exercise of the powers conferred by,

(1).....

(2) .....

(a).....

(b) specified in column (1) of Schedule II below to the extent specified in column (2), for the period specified in column (3), subject to the restrictions and conditions specified in column (4) of the said Schedule

(i) are registered under the Adhiniyam and / or the Central Act;

(ii) [are registered with an certified by the Commerce and Industries Department, Government of Madhya Pradesh on or before 31st December, 1999] to be:-

(a) a non-resident dealer establishing a new industrial Unit wherein his capital investment is atleast [26] percent of the equity invested by the private promoters, hereinafter referred to as the NRI Industrial Unit;

(b) a dealer establishing a hundred percent export oriented industrial unit or converting his existing industrial unit into a hundred percent export oriented industrial unit; or

(c) a dealer whose industrial unit is an exporting industrial unit;

(iii) commences commercial production or converts its existing industrial unit into hundred percent export oriented industrial unit or whose existing industrial unit is recognised as an exporting industrial unit on or after 6th May, 1994 but on or before 31st December, 1999 or having taken the following effective steps on or before 31st December, 1999 commences commercial production on or after the said date but on or before 31st December, 2001,-

(a) has obtain allotment/ possession of land for the factory, and

(b) has applied for finances from a regular financial institution,

SCHEDULE - I

Sr. no.	Class of dealer	Extent of maximum exemption of cumulative quantum of tax under Section 6 and 7 of the repealed Act or Section 9 and 10 of the Adhiniyam and tax under the Central Act	Maximum in period for which quantum of exemption is available	Restrict-ions and conditions subject to which exemption is granted
2.	Dealer who established a hundred percent	250 percent of the capital investment in	11 years	

	export oriented industrial unit or convrts his existing industrial unit into a hundred percent export oriented industrial unit.	fixed assents. (sic:assets)		

SCHEDULE -II

9 (1) For the purpose of determination of the cumulative quantum of tax in respect of dealer specified in serial numbers 1 3 of Schedule 1 and the .dealer specified in serial number 2 of the said Schedule who establishes a hundred percent export oriented unit the capital investment mae (sic:made) by such dealer : -

(i) upto a period of three years from the date of commencement of commercial production in the NRI industrial unit or a hundred percent export oriented industrial unit established by him or in his exporting industrial unit. If his capital investment in such industrial unit upto that date is upto rupees one hundred crores; or

(ii) upto a period of five years from the date of commencement of commercial production in any of his industrial units specified in (i) above, if his capital investment in such industrial unit upto that date is above rupees one hundred crores.,

shall be taken into consideration.

(2) for the purpose of determination of the cumulative quantum of tax in respect of a dealer, specified in serial number 2 of Schedule 1 who converts his existing industrial unit into a hundred percent export oriented industrial unit, the capital investment made by such dealer,

(i) upto a period of three years from the date of such conversion if his capital investment in such industrial unit upto that date is upto rupees one hundred crores; or

(ii) upto a period of five years from the date of such conversion if his capital investment in such industrial unit is above rupees one hundred crores,

shall be taken into consideration.

10 The period of eligibility of a dealer for the facility of exemption from payment of tax under this notification in respect of,-

(a) a dealer specified in serial number 1 of Schedule I and Schedule II and a dealer specified in serial number 2 of the said Schedule who establishes a hundred percent export oriented industrial unit shall commence from the date of commencement of commercial production;

(b) a dealer specified in serial number 2 of Schedule I and Schedule II who converts his existing industrial unit into a hundred percent export oriented industrial unit shall commence from the date of such conversion; and

(c) a dealer specified in serial number 3 Schedule I and Schedule II, shall commence from the date his existing industrial unit is recognized as an exporting industrial unit.

18. Perusal of the aforesaid establishes that the dealer who converts its existing Unit to 100% Exporting Unit is eligible for exemption with respect to entire investment on capital fixed assets at least prior to the date of recognition conversion of its Unit into 100% exporting unit. Admittedly, certificate to the petitioner company registering it as an exporting industrial Unit was given on 13th of October,. 1995 and therefore, the investment which have been made towards capital assets prior to in this period would also qualify for exemption.

19. A bare reading of the aforesaid notification does not show that there is any limit to the claim of exemption on the fixed assets, in as much as it nowhere says that the claim shall be limited to any particular date prior to converting the unit as 100% unit. In so far as the benefit earlier available are concerned,

it is not the case of the respondent that any particular exemption had been availed and that the said exemption is required to be deducted out of the claim for exemption.

20. Learned counsel appearing for the petitioner has relied upon the judgment delivered by the Hon'ble Supreme Court in the case of *State of Orisa and others Vs. Tata Sponge from Ltd* reported in (2007) 11 STJ 785 (SC), wherein notification dated 23rd September, 1992 (Serial No. 44) issued in terms of Orissa Industrial Policy Resolution, 1992 came up for consideration with respect to capital investment in plant initiated. In that case, notification provided deferment of investment to the extent to 75% but did not provide for any limitation or period.

21. It will be appropriate to take note of relevant para no. 18, 21, 22 of the aforesaid judgment.

> 18 It is not in dispute that in the said entry, during which the same would remain operative, no period far less the period of five or seven years had been mentioned. The only limitation prescribed thereby was that only 75% of the additional capital investment in Zone B would be allowed where the unit of the respondent is situate.
>
> 21 A bare perusal of the said notification would clearly show that whenever the period upto which the exemption, could be obtained was required to be stated had specifically been done therein, as for example Sl. Nos. 30A, 41, 42A and 43A etc. We may, furthermore, notice that against the Entry 44, however, what is mentioned is the extent to which such exemption would be granted. No period during which such exemption is to be obtained was stated. In other words, no period of limitation was fixed thereby.
>
> 22 In view of the clear legal provision as also the aforementioned notification dated 23.09.1992, there cannot be any doubt whatsoever that the exemption in respect of deferment of sales tax having been provided for under the Orissa Sales Tax Act as also the notification issued thereunder, the High Court, in our opinion, is correct in taking its view.

22. Learned counsel submits that the benefit of exemption is therefore,

required to be passed on to the petitioner, once the petitioner has complied with the pre-requisite of claiming of such notification i.e. converts its unit to 100% exporting Unit. The period of exemption has been specified in the notification and the exemption will be only for that period. No further limitation can be brought in any notification by the State such as, cut-off date which has been brought by the State Level Committee in this case to refuse exemption from investment done to the period earlier to the date of recognition of the petitioner's Unit as 100 % Exporting Unit.

23. In view of the aforesaid and having gone through the notification dated 06th of June, 1995 and the judgment as stated above, we are satisfied that in this case, there is no cut-off date for the purpose of considering exemption for capital fixed assets prior to the date on which the recognition of conversion of the factory of the petitioner as 100% exporting Unit has been granted, rather perusal of the notification shows that limits, if any, have been fixed for the grant of exemption only in relation to further investment for any exporting Unit after the date of recognition, in as much as for the first year, the limitation provides Rs. 100/-crores whereas for the next three years, it provides exemption only for investment up to Rs.300/- crores, but it is not so for the purpose of qualifying investment prior to tie date of the recognition of the Unit as an Exporting Unit. It is also clear that exemption does not relate to the Unit which was in existence. If new unit is set up then also exemption is to be granted on fixed capital assets which have been invested from the date of installment till the date of recognition of Unit as a 100% exporting Unit. On the same analogy, it can also be said in case the existing unit if on the basis of the efforts made by the incumbent, becomes 100% exporting Unit and as such the fixed capital investment till the recognition took place shall qualify for exemption if other condition which made i.e. the period within which, the Unit must be become 100% exporting unit.

24. We are therefore, satisfied that in this case, the orders of the State Level Committee and the State Appellate Forum are not in accordance with the notification dated 06th of June, 1995 or in accordance with the Industrial Policy of the State of M.P. made by the State for the purpose of incentive to the Units which make their Units 100% exporting unit within the period specified.

25. As there is no dispute that the Unit of the petitioner has been qualified by a 100% exporting unit within time framed, which has been permitted by the notification, they are entitled to claim benefit of fixed capital assets as prayed for by the petitioner.

26. Accordingly, the order of the State Appellate Forum is modified to the extent that the petitioner shall be entitled to the benefit of exemption towards fixed capital assets to the tune of Rs. 232.41/- lacs as claimed by them and to that extent, the order of the State Appellate Forum stands modified.

27. Present writ petition is disposed of accordingly with no order as to costs.

Petition disposed of.

I.L.R. [2014] M.P., 2865
WRIT PETITION
Before Mr. Justice S.C. Sharma
W.P. No. 4463/2013 (Indore) decided on 7 January, 2014

SONA (MRS.) ... Petitioner
Vs.
SUBHASH ...Respondent

Hindu Marriage Act (25 of 1955), Sections 24 & 26, Civil Procedure Code (5 of 1908), Section 11 - Maintenance pendente-lite and expenses of proceedings **- Repeated applications u/s 24 and 26 of the Act have been filed and have been dismissed thrice - None of the applications have been heard finally and decided on merits - First application was dismissed by treating the wife as ex-parte - Subsequent applications have been dismissed as barred by principles of res-judicata - Held - Lis between the parties in the present case has never been heard finally and decided on merits at any point of time - Therefore, the principles of res-judicata are not attracted - Maintenance has to be paid every month and every month cause of action is arising - Principal Judge, Family Court erred in law and facts while rejecting the applications on technicalities - Impugned order is set aside - Principal Judge is directed to decide the application on merits.**
(Para 17,23,27,29 and 30)

हिन्दू विवाह अधिनियम (1955 का 25), धाराऐं 24 व 26, सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – प्रकरण लंबित रहते भरण.पोषण और कार्यवाही के खर्चे – अधिनियम की धारा 24 व 26 के अंतर्गत बारम्बार आवेदनों को प्रस्तुत किया गया और तीन बार खारिज किया गया – किसी भी आवेदन को अंतिम रुप से न तो सुना गया

और न ही गुणदोषों पर न्यायनिर्णीत किया गया – पत्नी को एकपक्षीय मानते हुए प्रथम आवेदन खारिज – पश्चातवर्ती आवेदनों को पूर्वन्याय के सिद्धांतों द्वारा वर्जित मानकर खारिज किया गया – अभिनिर्धारित – वर्तमान प्रकरण में पक्षकारों के बीच का वाद किसी प्रक्रम पर न तो अंतिम रुप से सुना गया और न ही गुणदोषों पर न्यायनिर्णीत किया गया – इसलिए पूर्वन्याय के सिद्धांत आकर्षित नहीं होते – भरण.पोषण प्रत्येक माह अदा किया जाना है और प्रत्येक माह वाद कारण उत्पन्न हो रहा है – प्रधान न्यायाधीश, कुटुम्ब न्यायालय ने तकनीकियों पर आवेदन अस्वीकार करने में विधि और तथ्यों की भूल की है – आक्षेपित आदेश अपास्त – प्रधान न्यायाधीश, कुटुम्ब न्यायालय को आवेदन का निपटारा गुणदोषों पर करने के लिए निदेशित किया गया।

Cases referred :

AIR 2005 SC 626, AIR 1994 SC 853, AIR 2003 SC 649, (2000) 4 SCC 266.

ORDER

S.C. SHARMA, J. :- The petitioner before this Court has filed this present writ petition being aggrieved by the order dt. 21/2/2013 (Annexure P/1) passed by the Principal Judge, Family Court, Indore in Hindu Marriage Case No.652/2009.

2. Facts of the case reveal that a divorce petition has been preferred under the provisions of Hindu Marriage Act, 1955 and the same is pending for adjudication before the Principal Judge, Family Court, Indore. During the pendency of the divorce petition, an application was preferred u/S. 24 read with Sec. 26 of the Hindu Marriage Act, 1955 claiming maintenance and other reliefs and the application has been rejected by the trial Court.

3. The contention of the petitioner is that her application has been rejected on a technical ground and she has not been heard at any point of time on merits. Petitioner has further stated that she is facing a divorce petition and she is looking after two school going children. It has also been stated that her elder minor son Rishabh is studying in 12th Standard in Saint Mary Junior College, ISC Board, Pune and the petitioner has to deposit tuition fee and other fees amounting to Rs.32,000/- per month. It has also been stated that the petitioner is paying a sum of Rs.18,000/- per month towards school fee and tuition fee in respect of her younger son Vardhan who is student of 10th standard at Saint Mary School, Pune, ICSE Board. It has been further stated that she also needs Rs.30,000/- for their school dress, stationary, computer,

internet and petrol expenses. The petitioner has furnished details of the income of the husband and it has been stated on affidavit that her husband is earning about Rs.2.00 crores per month from various businesses and property and, therefore, a sum of Rs.13.00 lacs per month should be granted to her towards maintenance and daily expenses and a sum of Rs.3.00 lacs per month be granted towards maintenance, educational expenses of her children. She also demanded a sum of Rs.40.00 lacs per month as she wants to send her elder son to United Kingdom for higher studies.

4. The petitioner's application dt. 29/1/2013 was taken up by the Principal Judge, Family Court, Indore and the Principal Judge, Family Court, Indore has dismissed the application on the ground that earlier three applications preferred under the same Section ie., Sec. 24 read with Sec. 26, have been dismissed.

5. The petitioner has raised various grounds before this Court and her contention is that her first application suffered deemed dismissal on 5/7/2011 as she was not present before the Principal Judge on 5/7/2011, as her application for condoning her absence was dismissed. She has further stated that an order was passed on the same day to proceed exparte. Petitioner has further stated that thereafter an application was preferred u/S. 24 of the Hindu Marriage Act, 1955 on 28/4/12 along with an application u/S. 151 of the Code of Civil Procedure, 1908 and the same was again dismissed on 28/4/12 on technical grounds. The Principal Judge, Family Court has refused to entertain the application on the ground that earlier the Court has already dismissed the earlier application on 5/7/2011. It has been further stated that being aggrieved by order dt. 28/4/2012, the petitioner came up before this Court by filing a Writ Petition under Article 227 of the Constitution of India and this Court has declined to interfere with the order dt. 28/4/12. The petitioner has thereafter preferred another application u/S. 24 and the same was dismissed on 6/11/2012, again on technical grounds, without considering it on merits. The contention of the petitioner is that her third application was dismissed on 6/11/2012 as she has not provided a translated copy of the application. The contention of the petitioner is that thereafter as she does not have financial means to support herself and her children, again preferred an application on 29/1/13 and the Principal Judge has again dismissed the application on an objection preferred by the husband that earlier applications

u/Ss. 24 and 26 of the Hindu Marriage Act, 1955 have already been dismissed.

6. Learned counsel for the petitioner has vehemently argued before this Court that the petitioner who is facing divorce proceedings since 2006 and who is looking after two grown-up children, does not have enough financial means to support herself and to attend each and every date at Indore and the Principal Judge of the Family Court, instead of deciding the application on merits, has dismissed the application by taking a hypertechnical view of the matter. It has also been stated that the *lis* has never been decided on merits, at any point of time and, therefore, the question of *res-judicata* in the peculiar facts and circumstances of the case does not arise. An attempt has also been made in the Writ Petition to demonstrate that the husband is receiving about 2 crores per month as his income. He is financially a well-off person and a relief in the present Writ Petition has also been prayed to direct the husband to pay a sum of Rs.13.00 lacs towards maintenance of the wife, Rs.3.00 lacs towards maintenance of children and Rs.3.00 lacs towards litigation expenses. However, the fact remains that this Court has to adjudicate whether the order passed by the learned Principal Judge, Family Court, Indore is in accordance with law or not.

7. A detailed and exhaustive reply has been filed on behalf of the respondent – husband by placing heavy reliance upon the Code of Civil Procedure, 1908. It has been argued that the relief claimed by the petitioner is barred by the principles of *res-judicata* and this Court is precluded from deciding the controversy, as applications after applications were preferred u/Ss. 24 and 26 of the Hindu Marriage Act, 1955 and they have been dismissed by the Presiding Officer, Family Court. Other grounds have also been made in respect of misstatement of facts on the point of ownership of property and also in respect of certain statements made in the Writ Petition regarding financial status of the husband, however, as this Court is not deciding any application u/S. 24 read with Sec. 26 of the Hindu Marriage Act, 1955, the question of looking into all those details does not arise.

8. Contention of the learned senior counsel arguing the matter on behalf of the respondent is that the first application preferred by the wife was dismissed by the Presiding Officer, Family Court on 5/7/2011, the second application preferred u/S. 24 of the Hindu Marriage Act, 1955 was dismissed on 28/4/2012. Writ Petition No. 4978/2012, which was arising out of order dt. 28/4/2012 was dismissed by this Court on 28/9/2012. The third application u/S. 24 of the Hindu

Marriage Act, 1955 was dismissed on 6/11/2012 and, therefore, the Presiding Officer, Family Court has rightly dismissed the 4th application dt. 29/1/2013 vide impugned order dated 21/2/2013. Learned senior counsel has vehemently argued before this Court that on account of the principles of *res-judicata,* an issue cannot be taken up again and again and once the applications have been dismissed thrice, the Family Court was justified in dismissing the application vide impugned order. Heavy reliance has been placed upon a judgment delivered by the apex Court in the case of *Bhanu Kumar Jain Vs. Archana Kumar and another* reported in (AIR 2005 SC 626) and contention of the learned senior counsel is that the principles of *res-judicata* applies in different stages of the same proceedings. His contention is that on account of *res-judicata,* in the light of the judgment of the apex Court, the question of entertaining the present Writ Petition does not arise and the Writ Petition deserves to be dismissed. He has also placed heavy reliance upon a judgment delivered in the case of *S. P. Chengalvaraya Naidu Vs. Jagannath* reported in (AIR 1994 SC 853) and his contention is that withholding of vital documents relevant to the litigation is a fraud and in case a litigant commits a fraud, guilty party is liable to be thrown out at any stage. He has vehemently argued before this Court that the petitioner, as she has made incorrect statements in the present Writ Petition about the financial status as well as about other assets of her husband, she is guilty of committing fraud and she deserves to be thrown out. Learned counsel for the respondent has prayed for dismisal of the Writ Petition with heavy costs.

9. Heard learned counsel for the parties at length and perused the record. The matter is being disposed of at the motion stage itself with the consent of the parties.

10. The petitioner before this Court is certainly a respondent in a divorce suit filed by her husband which is pending before the Principal Judge, Family Court, Indore. The suit was filed in the year 2007 at Pune and a petition was preferred before the apex Court u/S. 25 of the Code of Civil Procedure, 1908 read with Article 139 of the Constitution of India for transfer of suit from Pune to the Family Court at Indore. Hon'ble the Apex Court, after hearing the parties at length, has transferred the suit, which was pending before the Family Court, Pune, within the State of Maharashtra to the Family Court, Indore, within the State of Madhya Pradesh, by order dt. 6/7/2009. The following order was passed by the apex Court.

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
TRANSFER PETITION [CIVIL] No. 135 OF 2007

Sona Subhash Talera ... Petitioner(s)

Vs.

Subhash Chandulalji Talera & Anr., ... Respondent(s)

ORDER

Heard learned counsel for parties.

In the facts and circumstances of the case, P.A.No. 975 of 2006, titled as Subhash Chandulal Talera vs. Sona Subhash Talera and P.D. No.6 of 2007, titled as Sumandevi Chandulal Talera & Anr. Vs. Sona Subhash Talera, pending before the Family Court, Pune, within the State of Maharashtra, are transferred to the Family Court, Indore, within the State of Madhya Pradesh.

Transfer petition is, accordingly allowed.

New Delhi,

July 06, 2009.

11. Since then the proceedings are taking place at Indore before the Principal Judge, Family Court, Indore. It is an undisputed fact that the present petitioner has preferred first application u/S. 24 read with Sec. 26 of the Hindu Marriage Act, 1955 on 5/7/2011, an order was passed to proceed ex-parte against the present petitioner (defendant), the following order was passed by the Principal Judge, Family Court, Indore.

एक आवेदन प्रस्तुत किया । इस आवेदन पर सुना गया ।

इस आवेदन के द्वारा प्रतिप्रार्थी की उपस्थिति के लिए चार माह का समय दिए जाने की प्रार्थना इस आधार पर की है कि प्रतिप्रार्थी के ससुर जो उसके साथ रह रहे हैं, अचानक बाहर चले गए है और प्रतिप्रार्थी दोनों बच्चों को छोड़कर न्यायालय के समक्ष उपस्थित नहीं हो सकती है ।

आवेदन पर विचार किया ।

अवयस्क बच्चों की देखरेख करना महिला का कर्त्तव्य है । ऐसी दशा में आवेदन स्वीकार किया जाता है । प्रतिप्रार्थी की उपस्थिति के लिए समय दिया जाता है ।

प्रकरण प्रतिप्रार्थी की उपस्थिति हेतु दिनांक :– 5.7.11 को पेश हो ।

(आर.के.गोस्वामी)
प्रधान न्यायाधीश

प्रार्थी स्वयं उपस्थित ।

प्रतिप्रार्थी अनुपस्थित ।

प्रतिप्रार्थी की ओर से श्री दीपक वर्मा अभिभाषक ने प्रतिप्रार्थी के हस्ताक्षरयुक्त आवेदन पत्र प्रस्तुत किया । प्रार्थी को इस पर आपत्ति है ।

प्रतिप्रार्थी की ओर से न्यायमित्र को अनुमति नहीं दी गई है ।

गत पेशी दिनांक 6.4.11 को प्रतिप्रार्थी के आवेदन पर प्रतिप्रार्थी की उपस्थिति के लिये तीन माह का अवसर दिया गया । अब समय दिया जाना संभव नहीं है।

अतः प्रतिप्रार्थी के अनुपस्थित रहने से उसकी ओर से प्रस्तुत आवेदन पत्र निरस्त किया जाता है । प्रतिप्रार्थी के विरूद्ध एकपक्षीय कार्यवाही की जाती है ।

प्रकरण प्रार्थी की एकपक्षीय साक्ष्य हेतु दिनांक– 19.8.11 को पेश हो

(आर.के.गोस्वामी)
प्रधान न्यायाधीश,
कु. न्यायालय, इंदौर म.प्र.

12. The order reflects that the defendant was not present on 5/7/2011 and she was proceeded ex-parte. However, the order does not mention categorically that her application u/S. 24 read with Sec. 26 of the Hindu Marriage Act, 1955 has also been rejected. The petitioner – wife preferred an application u/S. 151 of the Code of Civil Procedure, 1908 and a prayer was made for recall of order dt. 5/7/2011. It was also explained by her in her application dt. 20/10/2011 as to why she was not able to appear on 5/7/2011, however, the learned Principal Judge, Family Court has passed the following order dt. 28/4/12 and the same reads as under :

न्यायालय– प्रधान न्यायाधीश, कुटुम्ब न्यायालय, इंदौर म.प्र.
(समक्ष–श्रीमती आशा भटनागर)
हिन्दू विवाह अधिनियम प्र.कं. 652/09

सुभाष तलेरा– .....प्रार्थी

बनाम

सोना– .....प्रतिप्रार्थी

(आज दिनांक 28.4.12 को पारित)

1– इस आदेश के द्वारा पत्नि की ओर से प्रस्तुत आवेदन दिनांक 20.10.11 अन्तर्गत धारा 151 सीपीसी का निराकरण होगा ।

2– प्रकरण में यह निर्विवादित है कि पक्षकार पति–पत्नि हैं और पति ने तलाक के लिये यह मामला वर्ष 2006 में प्रस्तुत किया है ।

3– प्रकरण में विचारण के दौरान दिनांक 5.7.11 को पत्नि सोना अनुपस्थित थी और उसकी ओर से पेश धारा 24 हिन्दू विवाह अधिनियम का आवेदन उसी दिन निरस्त किया गया ।

4– विचाराधीन आवेदन का सारांश यह है कि दिनांक 5.7.11 को उसकी अनुपस्थिति सद्भाविक थी और उसके विरूद्ध की गई एकपक्षीय कार्यवाही 18 अक्टूबर 2011 को हटा दी गई है । दिनांक 5.7.11 को उसके द्वारा प्रस्तुत आवेदन धारा 24 हिन्दू विवाह अधिनियम का न्यायालय द्वारा निरस्त कर दिया गया है । चूंकि एकपक्षीय कार्यवाही हटा दी गई है इसलिये उक्त आवेदन पर सुनवाई की जाए । आवेदिका की ओर से प्रार्थना की गई है कि उक्त आवेदन मेन्टेंनेंस के लिये था– उक्त आवेदन पर सुनवाई की जाए और उसे निरस्त करने का आदेश किया जाए ।

5– विपक्षी ने आवेदन का विस्तुत जवाब देतु हुए उसका विरोध किया है और कहा है कि आवेदिका को विचाराधीन आवेदन प्रस्तुत करने का अधिकार नहीं हे । निरस्त आवेदनकों पुनः सुनवाई में लिये जाने का कोई प्रावधान व्य. प्र.सं. के अन्तर्गत नहीं है । यदि आवेदिका उक्त आदेश से व्यथित थी तो उसे विधिवत उपर के न्यायालय के कार्यवाही करना थी । प्रस्तुत आवेदन उसकी लापरवाही व दुर्भावना का परिचायक है तथा अवधि बाधित थी है । दिनांक 5.7.11 को आवेदिका की अनुपस्थिति में, पेश किया गया आवेदन बिना किसी कार्यवाही के तत्काल निरस्त कर दिया गया है ओर उसके विरूद्ध एकपक्षीय कार्यवाही भी की गई है । उसकी अनुपस्थिति का कोई उचित आधार भी नहीं बताया गया है और गोलमोल कथन किये गये हैं । समर्थन में भी पेश नहीं है अतः आवेदन पत्र निरस्त किया जाए ।

6– उभयपक्ष के तर्क सुने गये । प्रकरण एवं प्रावधानों का अवलोकन किया ।

7— आवेदिका ने अपने पक्ष समर्थन में खेमचंद वि. निरंजनलाल ए.आई.आर. 1954 राजस्थान–15, रामकुमार वि.सीताराम ए.आई.आर. 1961 घटना 277, नेमीचंद वि.उम्मेदमल ए.आई.आर. 1962– राजस्थान 107 में प्रतिपादित न्यायिकदृष्टांतों का अवलंबन लेते हुए आवेदन स्वीकार करने का निवेदन किया है ।

8— विपक्षी के अनुसार उक्त न्यायिक दृष्टांतों के पक्षकार को कोई मदद नहीं मिलती, यह निवेदन करते हुए आवेदन पत्र निरस्त करने की प्रार्थना की है ।

9— कुटुम्ब न्यायालय अधिनियम की धारा 13 पक्षकारों की ओर से अधिवक्ता द्वारा पैरवी की अनुमति, न्यायालय की अनुमति के बिना नहीं देता ।

10— आवेदिका पत्नि के अधिवक्ता द्वारा दिनांक 5.7.11 को प्रस्तुत आवेदन के संबंध में अभिवक्ता को अनुमति नहीं दी गई थी । आदेश दिनांक 5.7.11 का उल्लेख प्रकरण की परिस्थितियों में सुसंगत हैं जो निम्नानुसार है:–

"प्रार्थी स्वयं उपस्थित ।

प्रतिप्रार्थी अनुपस्थित ।

प्रतिप्रार्थी की ओर से श्री दीपक वर्मा अभिभाषक ने प्रतिप्रार्थी के हस्ताक्षरयुक्त आवेदन पत्र प्रस्तुत किया । प्रार्थी को इस पर आपत्ति है ।

प्रतिप्रार्थी की ओर से न्यायमित्र को अनुमति नहीं दी गई है ।

गत पेशी दिनांक 6.4.11 को प्रतिप्रार्थी के आवेदन पर प्रति प्रार्थी की उपस्थिति के लिये तीन माह का अवसर दिया गया था । अब समय दिया जाना संभव नहीं है ।

अतः प्रतिप्रार्थी के अनुपस्थित रहने से उसकी ओर से प्रस्तुत आवेदन पत्र निरस्त किया जाता है । प्रतिप्रार्थी कि विरूद्ध एकपक्षीय कार्यवाही की जाती है ।

प्रकरण प्रार्थी की एकपक्षीय साक्ष्य हेतु दिनांक 19.8.11 को पेश हो ।"

11— विचाराधीन मामले में पक्षकार वर्षो से एक दूसरे से अलग रह रहे है । धारा 151 व्य.प्र.सं. के प्रावधान विधि के विपरीत कार्यवाही करने की अनुमति नहीं देता । अतः इसके अन्तर्गत आवेदन प्रस्तुत कर दिनांक 5.7.11 को निरस्त आवेदन, अन्तर्गत धारा 24 हिन्दू विवाह अधिनियम पर पुनः विचार किया जाना विधि सम्मत नहीं है । प्रकरण की परिस्थितियों में विचाराधीन आवेदन कदापी स्वीकार किये जाने योग्य नहीं है । प्रस्तुत न्यायिक दृष्टांत प्रकरणों की परिस्थितियों से भिन्न होने से लागू नहीं होते ।

12— विचारोपरांत धारा 151 व्य.प्र.सं. का आवेदन पत्र दि. 20.10.11 निरस्त किया जाता है ।

आदेश मेरे बोले अनुसार टंकित ।

(श्रीमती आशा भटनागर)
प्र. न्यायाधीश, कुं. न्याया.इंदौर म.प्र

आदेश खुले न्यायालय में हस्ताक्षरित,

दिनांकित कर पारित किया गया ।

(श्रीमती आशा भटनागर)
प्र.न्यायाधीश, कुं. न्याया. इंदौर म.प्र.

13. The learned Presiding Officer has rejected the application preferred by the wife u/S. 151, meaning thereby, the order dt. 5/7/11 was not recalled. The petitioner instead of filing a fresh application u/S. 24 read with Sec. 26 of the Hindu Marriage Act, 1955 came up before this Court by filing a Writ Petition and this Court has dismissed the Writ Petition preferred by the wife by order dt. 28/9/2012 passed in Writ Petition 4978/2012, the following order was passed by this Court :

IN THE HIGH COURT OF MADHYA PRADESH:
BENCH INDORE

(SINGLE BENCH HON'BLE SHRI JUSTICE S.K.SETH)

WRIT PETITION NO. 4978 OF 2012

Petitioner : Sona Talera.

-V E R S U S

Respondent: Subhash Talera.

x-x-x-x-x-x-x-x-x-x-x

O R D E R

(Passed on 28th day of September, 2012)

This petition is by a wife against the Order dated 28.4.2012 passed by the Principal Judge, Family Court Indore rejecting her application dated 20.10.2011.

2. Respondent-husband has filed a petition for divorce. In said proceedings, on 5.7.2011 an application under Section 24 of the Hindu Marriage was filed on behalf of the petitioner/ wife by her Advocate. Learned family Court on the said date proceeded ex-parte against the petitioner as she failed to attend

hearing in person and as no leave was granted till then to appear through an Advocate, the application u/s. 24 Hindu Marriage Act too was rejected.

3. Later on, Family Court on an application made by the wife/petitioner recalled the said exparte order. In view of this, on 20.10.2011 petitioner/wife filed another application u/s. 151 CPC for revival of the application u/s. 24 of the Act of the petitioner. That applicant stands rejected by the order impugned, hence this petition under Article 227 of the Constitution of India.

4. We have heard rival contentions at length. Perused the material placed on record of this case as well as connected writ petition (W.P.No. 6420 OF 2012) filed by the wife against another order of the Family Court in the same divorce proceedings. That writ petition is decided by separate order passed today.

5. Now the question is whether the Family Court Indore committed an illegality in rejecting the application dated 20.10.2011 filed by the wife under section 151 CPC.

6. Respondent-husband filed a divorce petition against the petitioner-wife at Pune. The divorce petition stood transferred to Family Court at Indore by virtue of Orders passed by the Supreme Court at the instance of the wife. Before the Family Court Indore, wife did not attend hearing on 5.7.2011 therefore Court proceeded exparte against her. Later on, Court below recalled that order on 18.10.2011.

7. After order dated 18.10.2011 was passed, the petitioner filed an application on 20.10.2011 for revival of application u/s. 24 of the Hindu Marriage Act since earlier rejection was not on merit.

8. After hearing rival submissions and going through the material on record, we do not find any flaw or infirmity with the impugned order. There is no merit in the contention of the learned counsel for petitioner that once the ex-parte order is recalled, therefore, petitioner would stand relegated to the

position in which she was on the date when Court proceeded ex-parte against her. If this contention on behalf of petitioner is accepted, it would lead to chaos and would not be congenial for judicial discipline.

9. We therefore find no merit in this petition so as to warrant interference with the order impugned. In the result this writ petition fails and is hereby dismissed without any orders as to costs.

10. Ordered accordingly.

14. The petitioner, as she was facing great financial hardships and was managing with great difficulty, as she is looking after two grown-up boys, again preferred an application u/S. 24 of the Hindu Marriage Act and by order dt. 6/11/12, the same was dismissed. The Principal Judge, Family Court has dismissed the application by observing that the petitioner was required to furnish Hindi Translation of certain documents and as she has failed to submit Hindi Translation of certain documents, the application deserves dismissal and the same has been dismissed. The order passed by the Principal Judge, Family Court, dt. 6/11/2012 reads as under :

6.11.12 आवेदक सहित श्री एस.एक मेव अधिवक्ता उप.1 अनावेदिका द्वारा श्री अरशद मिर्जा अधिवक्ता उप.1 अनावेदिका की ओर से एक आवेदन इस आशय का प्रस्तुत किया गया है कि उसके द्वारा प्रकरण में प्रस्तुत समस्त दस्तावेजों की प्रतियां अंग्रजी से हिन्दी में रूपान्तरण कर मांगा गया है, जिसके लिए 80/–रू. प्रति पेज चार्ज किया जा रहा है एवं अनावेदिका इतनी राशि वहन करने में असमर्थ हे, इसलिए अनावेदिका को उक्त दावे के हिन्दी रूपान्तरण करवाने के लिए आवेदक से उचित रकम दिलावाई जाए । आवेदन पत्र की नकल आवेदक अधिवक्ता को प्रदान की गई । उभयपक्षों को सुना कर प्रकरण के रेकार्ड का अवलोकन किया गया ।

दि. 22.6.12 को इस न्यायालय द्वारा स्पष्ट आदेश किया गया है कि अनावेदिका भविष्य में यदि कोई भी आवेदन अंग्रेजी भाषा में प्रस्तुत करती है तो उसी के साथ उसका अधिकृत हिन्दी अनुवाद भी प्रस्तुत किया जाए । दि. 22.6.12 से आज दिनांक तक अनावेदिका की ओर से ऐसा कहीं भी निवेदन नहीं किया गया कि उसे हिन्दी अनुवाद के लिए आवेदक से राशि दिलाई जाए । अनावेदिका द्वारा इस आदेश के संबंध में माननीय मध्यप्रदेश उच्च न्यायालय खण्डपीठ इंदौर के समक्ष रीट याचिका प्रस्तुत की थी, जो निराकृत हो चुकी है, जिसकी प्रति इस न्यायालय को प्राप्त हो चुकी है । उक्त रीट याचिका में माननीय उच्च न्यायालय द्वारा आंशिक रूप से स्वीकार की गई है । जहां तक हिन्दी अनुवाद का प्रश्न है उक्त रीट याचिका में इस न्यायालय के आदेश को स्थिर रखा गया है । इसके बावजूद भी अनावेदिका की ओर से इस न्यायालय द्वारा दिए गए आदेशों का पालन न करते हुए आज पुनः व्यय दिलाए जाने के आधार पर हिन्दी अनुवाद प्रस्तुत नहीं किया गया है, इससे यह स्पष्ट है कि अनावेदिका

लगातार न्यायालय के आदेशों की अवहेलना कर रही है । ऐसी स्थिति में अनावेदिका की ओर से प्रस्तुत आवेदन अंतर्गत् धारा 24 हिन्दू विवाह अधिनियम गुणदोषों पर जाए बगैर सव्यय निरस्त किया जाता है ।

आवेदक की ओर से प्रस्तुत आवेदन अंतर्गत् आदेश 6 नियम 17 सीपीसी का जवाब अनावेदिका की ओर से प्रस्तुत नहीं किया गया । यह भी इस न्यायालय के आदेश की स्पष्ट अवहेलना है । अतः आवेदक अधिवक्ता को उनके द्वारा प्रस्तुत आवेदन पर गुणदोषों के संबंध में सुना गया । अनावेदिका के अधिवक्ता को पूछा गया कि क्या उन्हें इस बारे में कुछ कहना है तो उन्होंने सिर हिलाकर ना का इशारा किया ।

आवेदक की ओर से प्रस्तुत आवेदन अंतर्गत् आदेश 6 नियम 17 सीपीसी में आवेदक ने जिन तथ्यों का अभिकथन संशोधन के माध्यम के करना चाहा है, वह तथ्य प्रकरण के वास्तविक निराकरण एवं विवादित बिन्दूओं के निराकरण के लिए आवश्यक है । अतः आवेदन स्वीकार किया जाता है एवं आदेशित किया जाता है कि तीन दिवस के अंदर आवेदक वांछित संशोधन का समावेश अपने मूल आवेदन में करें । अनावेदिका यदि कोई परिणामजनक संशोधन करना चाहे तो आगामी नियत दिनांक पर इस संबंध में संशोधन हेतु आवेदन हिन्दी भाषा में प्रस्तुत करें । प्रकरण वास्ते परिणामजनक संशोधन एवं अतिरिक्त वादप्रश्न निर्धारण दि0 20.11.12 को पेश हो ।

(आर.के. जैन)

प्रधान न्यायाधीश

पुनस्थ

प्रार्थी की ओर से आदेशनुसार संशोधित कर प्रमाणित कराया ।

15. The petitioner has thereafter submitted Hindi Translation of the document and for the fourth time ie., on 29/1/2013, the petitioner has submitted an application and the Presiding Officer has dismissed the application on the ground that earlier applications u/Ss. 24 and 26 have been dismissed and, therefore, the question of entertaining this 4th application does not arise.

16. This Court has carefully gone through the order dt. 5/7/2011 and 28/4/2012 passed by the Principal Judge, Family Court, Indore and the order dt. 28/9/2012 passed in Writ Petition No. 4978 / 2012 as well as the order dt. 6/12/2012 and the impugned order dt. 21/2/2013. It is really strange that the wife has not been heard on merits at any point of time by the Principal Judge, Family Court, Indore. By adopting a very hypertechnical approach, the Principal Judge has passed the impugned order.

17. In the present case, as already submitted earlier, the wife is facing divorce proceedings since 2007. Her application was treated to be dismissed

on 5/7/2011 as she was proceeded ex-parte. Her second application, an application for recalling of the order dt. 5/7/11 was again dismissed on a technical ground, her third application was dismissed on 6/11/2012 on the ground that she has not submitted a Hindi Translation and earlier in the past two applications have been rejected. The fourth application has been dismissed by taking shelter of the principles of *res-judicata* and by holding that earlier three applications have been dismissed by the Principal Judge, Family Court, meaning thereby, she has never been heard on merits, at any point of time.

18. Section 11 of the Code of Civil Procedure, 1908 reads as under :

> **11. *Res judicata.*** - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.
>
> Explanation I- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.
>
> Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.
>
> Explanation III.- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
>
> Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
>
> Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI- Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

[Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]

19. Section 24 and 26 of the Hindu Marriage Act, 1955 reads as under :

24. Maintenance Pendente lite and expenses of proceedings - Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner' s own income and the income of the respondent, it may seem to the court to be reasonable.

Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.

26. Custody of children - In any proceeding under this Act,

the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such, orders and provisions with respect to the custody, maintenance and education of such children as, might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.

20. Section 11 of the Code of Civil Procedure, 1908 restrains the Court to try any subsequent suit or issue in which the matter is directly and substantially in issue in a former suit between the same parties which has been heard finally and decided by such Court.

21. Sec. 24 of the Hindu Marriage Act, 1955 provides for support to be given by the earning spouse in favour of the spouse facing divorce proceedings during the pendency of the proceedings before the Court. The Courts are required to take into consideration the income of the parties before deciding the quantum of maintenance. The paying capacity and various other factors have to be taken into account while deciding the application on merits u/S. 24. Similarly, Section 26 also empowers the Court to decide the application with respect to the maintenance and education of minor children pending the proceedings for obtaining such a divorce. Thus, in short, the aim and object of the aforesaid statutory provision is to ensure that the application preferred by wife u/S. 24 read with Sec. 26 are to be decided in accordance with law and as early as possible and even the time limit has been framed ie., the time limit of 60 days from the date of service of notice on the wife or the husband.

22. The present case is a shocking example of delay in deciding an

application u/S. 24 and 26 of the Hindu Marriage Act, 1955. None of the applications preferred by the wife have been heard finally and decided on merits by the Family Court, Indore. The first application has been dismissed by treating the wife as ex-parte and the subsequent applications have been dismissed by treating them as barred by the principles of *res-judicata.*

23. This Court has carefully gone through the judgment relied upon by Mr. P. K. Saxena, learned senior counsel and has also carefully gone through paragraph 18 on which heavy reliance was placed upon by the learned senior counsel in the case of *Bhanu Kumar Jain* (supra). It is certainly a well settled proposition of law that principles of *res – judicata* applies in different stages of the same proceedings. However, the fact remains that the *lis* between the parties, in the present case, has never been heard finally and decided on merits at any point of time, and, therefore, this Court is of the considered opinion that the principles of *res-judicata*, are not attracted in the present case, keeping in view the fact that the intent and object of the provisions of Sec. 24 and 26 of the Hindu Marriage Act, 1955 are to provide financial assistance to the spouse facing divorce proceedings and the learned Judge was required to decide the applications u/S. 24 and 26, on merits. It, therefore, inevitably follows that the learned Presiding Officer has erred in law and facts by passing the impugned order dt. 21/2/2013 on the ground that the earlier applications have been dismissed.

24. Learned senior counsel, relying upon the judgment delivered in the case of *S. P. Chengalvaraya Naidu* (supra) has prayed for throwing out the petitioner, at this stage. It has been argued that misstatement of fact has been made by the petitioner.

25. In the case of *S. P. Chengalvaraya Naidu* (supra), a person has relinquished his rights in respect of the property by executing the lease deed and the apex Court has held the non production of and non mentioning of a release deed at the trial was amounting to playing fraud upon the court. Whereas, in the present case, no such contingency is involved, no fraud of any kind has taken place in the matter. The wife has made all possible attempts to furnish all minute details in respect of the property owned by the husband and, therefore, this Court is of the considered opinion that the wife cannot be thrown out, as prayed by the husband in the present case.

26. This Court has also very carefully gone through the judgment delivered

in the case of *C. V. Rajendran and another Vs. N. M. Muhammed Kunhi* reported in (AIR 2003 SD 649). In the aforesaid case it has been held that the principles of *res – judicata* applies at every stage and an issue which has become final, cannot be permitted to be reagitated again and again at the subsequent stage of the suit. In the present case, the issue has never been decided finally. There is no order on merits and therefore, the judgment relied upon is again of no help to the respondents. Not only this, even if it is assumed that earlier application preferred u/ Ss. 24 and 26 of the Hindu Marriage Act, 1955 have been dismissed, the fact remains that maintenance has to be paid every month and every month cause of action is arising in the present case and, therefore, on technicalities by accepting the objection of the husband who is the plaintiff before the trial Court, the Principal Judge, Family Court has erred in law and facts while rejecting the application of the wife preferred u/Ss. 24 read with Sec. 26 of the Hindu Marriage Act, 1955.

27. The Hindu Marriage Act, 1955 provides for maintenance *pendente-lite*. The framers of law have kept in mind the financial status of a spouse facing divorce proceedings. The law relating to matrimonial cases has included all statutory provisions to provide payment of maintenance to the wife and expenses of proceedings by the husband to the wife. The wife cannot be left on street without any income and an application for grant of maintenance has to be decided keeping in view various factors like income of the husband, whether the wife has independent and sufficient income and the Court also exercises a vide discretion in the matter of granting alimony *pendente-lite* but the discretion cannot be arbitrary and whimsical. In this case, the learned Principal Judge, Family Court has failed to exercise his jurisdiction keeping in view Sec. 24 and 26 of the Hindu Marriage Act, 1955. The applications have never been decided on merits by taking into account the rival contentions of the parties. As already stated earlier, hypertechnical view has been adopted, neither interim maintenance to the wife nor the maintenance to the children has been awarded at any point of time.

28. The Hon'ble Supreme Court while deciding a case ie., *Padmja Sharma Vs. Ratan Lal Sharma* reported in (2000) 4 SCC 266, in paragraphs 9 and 10 has held as under :

> 9. Respondent before us has not appeared instead of notice to him. We have heard the arguments of the wife ex parte. On February 28, 2000 an application was filed by the

appellant for placing on record additional documents which are all of the period after filing of this appeal. No notice has been given to the respondent of this application. The purpose of the application appears to be to further enhance the amount of maintenance taking into account the charged circumstances as the salary of the respondent-husband is stated to have increased by passage of time. Various documents like receipts for payment of school fees buying of books school bags etc. have been filed. We are not inclined to permit this application at this stage. If circumstances have changed for enhancement of maintenance appellant can approach the Family Court again as an order under Section 26 of the Act is never final and decree passed thereunder is always subject to modification.

10. Maintenance has not been defined in the Act or between the parents whose duty it is to maintain the children. Hindu Marriage Act, 1955, Hindu Minority and Guardanship Act, 1956, Hindu Adoptions and Maintenance Act, 1956 and Hindu Succession Act, 1956 constitute a law in a coded form for the Hindus. Unless there is anything repugnant to the context definition of a particular word could be lifted from any of the four Acts constituting the law to interpret a certain provision. All these Acts are to be read in conjunction with one another and interpreted accordingly. We can, therefore go to Hindu Adoptions and Maintenance Act, 1956 (for short the 'Maintenance Act') to understand the meaning of the 'maintenance'. In Clause (b) of Section 3 of this Act "maintenance includes (i) in all cases, provisions for food, clothing residence, education and medical attendance and treatment; (ii) in the case of an unmarried daughter also the reasonable expenses of and incident to her marriage." and under Clause (c) "minor means a person who has not completed his or her age of eighteen years." Under Section 18 of Maintenance Act a Hindu wife shall be entitled to be maintained by her husband during her life time. This is of course subject to certain conditions with which we are not concerned. Section 20 provides for maintenance of children and aged parents. Under this Section a Hindu is bound, during his or her life

time, to maintain his or her children. A minor child so long as he is minor can claim maintenance from his or her father or mother. Section 20 is, therefore, to be contrasted with Section 18. Under this Section it is as much the obligation of the father to maintain a minor child as that of the mother. It is not the law that how affluent mother may be it is the obligation only of the father to maintain the minor.

29. The apex Court in the aforesaid case has held that even if a decree has been passed by a Family Court fixing a particular amount in respect of maintenance of children, the spouse is not precluded from filing a fresh application for enhancement of the amount, meaning thereby, in such cases, principles of *res-judicata* will not be attracted and, therefore, this Court is of the considered opinion that by no stretch of imagination, in the present case, the principles of *res-judicata* are applicable.

30. Resultantly, the mpugned (sic: impugned) order dt. 21/2/2013 is set aside. The Principal Judge, Family Court, Indore is directed to decide the application dt. 29/1/2013 on merits in respect of grant of maintenance to the wife as well as in respect of children, as expeditiously as possible, preferably within a period of 60 days from the date of receipt of certified copy of this order. The Writ Petition is allowed with a costs of Rs.10,000/- to be borne by the respondents.

Petition allowed.

I.L.R. [2014] M.P., 2884
WRIT PETITION

Before Mr. A.M. Khanwilkar, Chief Justice & Mr. Justice K.K. Trivedi
W.P. No. 15186/2013 (Jabalpur) decided on 16 April, 2014

AWADHESH PRASAD SHUKLA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

(and W.P. Nos. 15404/2013, 20219/2013, 21251/2013, 21318/2013, 21527/2013, 21543/2013, 21553/2013, 106/2014, 293/2014, 1449/2014, 2232/2014, 2756/2014, 4317/2014)

A. ***Constitution - Article 226 - Transfer of Investigation to CBI*** **- Merely because of immense amount of public interest, public**

outcry and public demand, investigation cannot be transferred to CBI. (Para 18)

क. संविधान – अनुच्छेद 226 – सी.बी.आई. को जांच अंतरित की जाना – मात्र इसलिए कि बहुत अधिक पैमाने का लोक हित, जन आक्रोश एवं सार्वजनिक मांग है, जांच सी.बी.आई. को अंतरित नहीं की जा सकती।

***B. Constitution - Article 226 - VYAPAM Scam* - Investigation transferred by State Govt. to STF headed by ADGP - Merely because STF is one of the wing of State Government, does not mean that it will not carry out investigation independently and impartially or will act on the instructions of the Higher Authorities - After analysis of material produced, the STF is proceeding in right direction and without any bias - However the option of monitoring investigation done by STF by the Court is adopted - Petition disposed off. (Para 44 onwards)**

ख. संविधान – अनुच्छेद 226 – व्यापम घोटाला – जांच को राज्य सरकार द्वारा ए.डी.जी.पी. की अध्यक्षता में एस.टी.एफ. को अंतरित किया गया – मात्र इसलिए कि एस.टी.एफ., राज्य सरकार का एक अंग है, इसका अर्थ यह नहीं होगा कि वह जांच को स्वतंत्र रुप से या निष्पक्ष रुप से नहीं करेगी या उच्च प्राधिकारियों के अनुदेशों पर कार्य करेगी – प्रस्तुत की गई सामग्री का अवलोकन करने के पश्चात, एस.टी.एफ. सही दिशा में और बिना भेदभाव के कार्यवाही कर रही है – किन्तु एस.टी.एफ. द्वारा की गयी जांच पर न्यायालय की निगरानी के विकल्प को अपनाया गया – याचिका का निपटारा किया गया।

Cases referred :

AIR 1966 SC 1418, (1979) 4 SCC 167, (2010) 3 SCC 571, (2011) 14 SCC 770, (2011) 13 SCC 329, (2011) 13 SCC 337, (2011) 5 SCC 79, (2011) 2 SCC 178, (2013) 12 SCC 480, (2014) 2 SCC 532, (2005) 5 SCC 517, (2009) 1 SCC 441, AIR 2002 SC 2225 = (2002) 5 SCC 521, (2007) 4 SCC 380, AIR 1985 SC 195, (1997) 1 SCC 416, (2003) 2 SCC 649, (2006) 8 SCC 1, (2004) 5 SCC 223, (2001) 6 SCC 181, (2014) 2 SCC 1, (2013) 10 SCC 95, (1998) 9 SCC 346, (2010) 2 SCC 200.

R.K. Thakur, for the petitioner.
Uday Lalit with *P.K. Kaurav,* Addl. A.G. for the respondent/State.
Rashid Suhail Siddiqui, for the respondent/Union of India.

ORDER

The Order of the Court was delivered by :

A.M. KHANWILKAR,C.J. :- This judgment will answer one common question raised in all these petitions regarding transfer of investigation of criminal cases registered in connection with the irregularities in the examinations conducted by VYAPAM (M.P. Professional Examination Board). No other argument has been made by counsel for the petitioners in these cases, notwithstanding other reliefs claimed in some of the petitions.

2. We deem it appropriate to reproduce reliefs claimed in the respective Writ Petitions under consideration:-

(A) In W.P. No.15186/2013, the petitioner has prayed for following reliefs:

(i) It is, therefore, prayed that this Hon'ble Court be pleased to issue writ, order, direction and command to the respondents No.1 to 3, to cancel the PMT-2013 Test and be further pleased to direct them to conduct fresh MP PMT-2013 Exam.

(ii) That, the complete process of PMT-2013 for which the examination was held on 7/7/13 including the declaration of results kindly be quashed.

(iii) That, respondents 1 to 5 be directed to conduct fresh PMT-2013 Exam or to complete the admission process for the year 2013 based upon marks/score of NEET-2013.

(iv) The wrong doers be punished in accordance with law of due enquiry by CBI in public interest.

(v) Any other relief which may be deemed fit by this Hon'ble Court may kindly be granted in favour of petitioner.

(vi) That, the respondent No.6 & 7 may kindly be asked to substantiate their media coverage in question in Public Interest to bring the truth before the Nation.

(vii) Petition be allowed with cost.

(B) In W.P. No.15404/2013 the petitioner has prayed for following reliefs:

i. Mandamus commanding the respondents/ concerned authorities to identify the fake students and not to allow them a seat of MBBS course in either Government medical college or in private medical college in the State of Madhya Pradesh.

ii. Mandamus commanding the respondents to prepare and issue a fresh merit list excluding the fake and fictitious students and to conduct counselling on the basis of such fresh merit list and allot the seats of MBBS as per the merit position in the fresh merit list.

iii. Mandamus commanding the Central Bureau of Investigation (CBI) to probe into the matter.

iv. Mandamus commanding the respondents/ concerned authorities to initiate criminal proceedings against fake candidates as well as those students who got selected illegally with aid from such fake candidates.

v. Any other appropriate writ, order, or direction which this Hon'ble Court may deem fit and proper may also be passed.

(C) In W.P. No.20219/2013, the petitioner has prayed for following reliefs:

i. Investigate the matter of fraud in the PMT examination since 1997 and take appropriate act against the illegal beneficiaries, of the said fraud.

ii. Register offence against the invigilators posted at the respective examination centres where the accused students have committed the crime of copying with the help of other co-accused persons engaged in facilitating copying, by the beneficiary students, for monetary benefits.

iii. Register offence against all the members of the examination committee of respondent No.3 and other

officers of the respondent No.3 board responsible for fair conduct of the examinations conducted by it.

iv. Any other relief which the Hon'ble Court deems appropriate in the facts and circumstances of the matter.

(D) In W.P. No.21251/2013, the petitioner has prayed for following reliefs:

(i) To issue a appropriate writ directing the respondents not to transfer Mr. Sudhir Shahi the Chief of S.T.F.

(ii) To issue a appropriate writ directing the respondents to report this matter to the Income Tax Department so that the aforesaid money can be recovered.

(iii) To issue a appropriate writ directing the respondents to involve the C.B.I. to co-ordinate with the S.T.F. to bring in the culprit behind the bars.

(iv) To issue a appropriate writ directing the respondents to enquire into the matter regarding the number of students which is more than 20 in numbers in every private medical colleges that why take admissions, block seats and only on the last date cancelled their admissions and whether the same students are doing it in the previous years also and are their studying in any medical colleges.

(v) To issue a appropriate writ directing the respondents to reduce the equal number of seats from their quota seats and be given to the State quota seats by way of punishment as per the judgment of the Hon'ble Apex Court in *Mradul Dhar's* case.

(vi) To issue a appropriate writ directing the respondents to give admissions in the next academic year to all those students who were deserving their admissions and because of the illegalities of the authorities they were restrained from taking admissions although deserving and meritorious.

(vii) That, it is prayed before this Hon'ble Court to kindly

link this matter along with a case which was pending at the Hon'ble High Court bench at Indore W.P. No.9827/2013 (P.I.L.) (Paras V/s State of M.P. & others) which is now being transfer to the Principal Seat.

(viii) To grant any other relief deemed just and proper in the facts and circumstances of the case.

(E) In W.P. No.21318/2013, the petitioner has prayed for following reliefs:

i. mandamus commanding Central Bureau of Investigation (CBI) to probe into the matter.

ii. mandamus commanding the respondent No.3 to produce entire record of the year 2012 as well as 2013 before this Hon'ble Court to find how many students have been cheated through exchange of OMR Mark-sheets and if it is found that several students like the petitioner have been cheated, then heavy damages be given to those candidates who deserves a seat of MBBS but they have been denied due to corruption prevalent in the State of Madhya Pradesh.

iii. mandamus commanding the respondents to investigate all admissions made in Govt. medical colleges in the year 2012.

iv. Any other appropriate writ, order, or direction which this Hon'ble Court may deem fit and proper may also be passed.

(F) Writ Petition No. 21527/2013 was filed before Bench at Indore on 03/06/2013, which stood transferred by administrative order to the Principal Seat at Jabalpur, to be heard along with companion cases involving similar reliefs. In this petition, the petitioner has prayed for following reliefs:

i. To constitute a High power committee to look in to the entire matter or the present matter be handed over to the Central Investigating Agencies namely CBI or any other Independent Investigating Agency.

ii. And to declare the VYAPAM as blacklisted agency since a large number of cases has come to the fore where it can be gathered that the system has turned corrupt.

iii. And to direct/restrict the Respondent No.4 not to conduct any other examination in the manner and method it had conducted the aforesaid examination.

iv. And/or to cancel the said MPPMT examination and entire procedure and entirely new program for the said examination be prepared and executed upon the fair and transparent policy and norms.

v. Any other relief, which the Hon'ble Court deems fit in the facts and circumstances of the case, be granted to the petitioner.

(G) Writ Petition No.21543/2013 was also filed before Bench at Indore on 13/08/2013, which stood transferred by administrative order to the Principal Seat at Jabalpur, to be heard along with companion cases involving similar reliefs. In this petition, the petitioner has prayed for following reliefs:

i. To direct Central Bureau of Investigation (CBI) to probe into the matter.

ii. To the respondent/ concerned authorities to initiate criminal proceedings against all the culprits involved in the aforesaid racket.

iii. To the respondents/ concerned authorities to initiate criminal proceedings against fake candidates as well as those students who got selected illegally with aid from such fake candidates.

iv. Further to expel those students from, colleges who have got their selection illegally and to disqualify those doctors who were selected on the aforesaid illegal basis and have obtained there degrees and are practicing.

v. To complete the investigation pending since years against the fake candidates as mentioned in aforesaid

annexure.

vi. To cancel the said MPPMT examination, 2013 as the result has not been declared till date and to conduct fresh examination fairly upon transparent policy and norms.

vii. Any other relief, which the Hon'ble Court deems fit in the facts and circumstances of the case, be granted to the petitioner.

(H) Writ Petition No.21553/2013 was filed before Bench at Indore on 12/08/2013, which stood transferred by administrative order to the Principal Seat at Jabalpur, to be heard along with companion cases involving similar reliefs. In this petition, the petitioner has prayed for following reliefs:

i. यह है कि 500 छात्रों नें पी0एम0टी0 परीक्षा में गलत तरीके एवं साठ. गाठ कर अपराधिक षडयंत्र से पास की है । अतः अपराध में विलिप्त ऐसे छात्रों के विरूद्ध राज्य शासन को तुरन्त प्रकरण पंजीबद्व किए जाने के निर्देश दिए जाए ।

ii. यह कि व्यापमं, शासन व पुलिस की आपसी अन्तर संबंधता को देखते तथा अपराध की गंभीरता को देखते हुए राज्य शासन को इस घटना की पूरी जांच सीबीआई से करवाने के निर्देश दिए जाए ।

iii. यह कि घटना में अन्तर्राज्यीय छात्रों के जुडे होने से एवं अन्य राज्यों में भी किए जा रहे फर्जीवाडों की तह तक पहुंचने के लिए उक्त जांच केन्द्रीय ब्यूरो को दिए जाने के निर्देश दिए जाए ।

iv. यह कि घटना में व्याप्त फर्जीवाडें को देखते हुए व्यापमं को परीक्षा रदद कर पुनः परीक्षा लिए जाने के निर्देश दिए जाए ।

v. यह कि व्यापमं के अधिकारियों से साठ.गाठ कर फिंगर प्रिंट, फोटो व अन्य प्रक्रियाओं में जो फर्जीवाडा किया गया है उसकी उच्च स्तरीय जांच की जाए ।

(I) In W.P. No.106/2014, the petitioner has prayed for following reliefs:

(i) By issuance of a writ in the nature of Mandamus, Hon'ble Court may kindly be pleased to direct the respondent No.1 to 3 to conduct CBI investigation against each and every exam conducted by the

Vyapam since 2003.

(ii) By issuance of a writ in the nature of Mandamus, Hon'ble Court may kindly be pleased to direct the respondent No.2 & 3 to arrest the respondent No.5 and each & every persons also who is involve in the selection illegalities & irregularities conducted by the Vyapam.

(iii) Any other writ direction or orders which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(iv) Costs of the proceedings.

(J) Writ Petition No.293/2014 was filed before Bench at Gwalior on 05/12/2013, which stood transferred by administrative order to the Principal Seat at Jabalpur, to be heard along with companion cases involving similar reliefs. In this petition, the petitioner has prayed for following reliefs:

i. यह है कि प्रत्यार्थीगण को आदेशित किया जावे कि संपूर्ण म0प्र0 में विगत 15 वर्षो से पी0एम0टी एवं प्र0पी0जी परीक्षओं में सम्मिलित सभी छात्रों के संबंध में विवेचना केंद्रीय अन्वेषण ब्यूरो को सुपुर्द की जावे ।

ii. यह कि प्रत्यार्थीगण को आदेशित किया जावे कि म0प्र0 की STF द्वारा की जा रही विवेचना को केंद्रीय अन्वेषण ब्यूरो को सुपुर्द की जावे।

iii. यह कि म0प्र0व्यावसायिक परीक्ष मण्डल निष्पक्ष परीक्षा कराने में पूर्णतः असफल रहा है इसलिए व्याससायिक परीक्षओं को सुचारू रूप से आयोजित करने के लिए म0प्र0 शासन को प्रभावी एवं उचित आदेश/निर्देश प्रदान किए जावें ।

iv. यह कि न्यायहित में जो भी उचित हो आदेश/निर्देश जारी किया जावे ।

(K) In W.P. No.1449/2014, the petitioner has prayed for following reliefs:

i. The Hon'ble Court may kindly direct the CBI to investigate the VYAPAM scam in the interest of justice.

ii. That, the Hon'ble Court may kindly issue any other appropriate writ or directions in the interest of justice.

(L) In W.P. No.2232/2014, the petitioner has prayed for following reliefs:

i. This Hon'ble Court may kindly be please to sent for the record pertaining to entire scam and steps taken by the Special Task Force, other Government Departments/agencies of the State of Madhya Pradesh, dealing with the said scam.

ii. This Hon'ble Court may kindly be please to issue a writ in the nature of mandamus directing the respondent no.1 to undertake investigation with respect to Pre-Medical Test entrance examination (PMT) from 2009 till 2013.

iii. Any other relief which this Hon'ble Court deemed just and proper in view of aforesaid facts and grounds may kindly be allowed in favour of petitioner.

(M) In W.P. No.2756/2014, the petitioner has prayed for following reliefs:

i. It is therefore, prayed that this Hon'ble Court may kindly be pleased to direct the Central Bureau of Investigation to investigate into illegal admissions granted in Medical Entrance Test since 2008 till date.

ii. It is therefore, prayed that this Hon'ble Court may kindly be pleased to direct the CBI, to investigate into the appointments given to Samvida Shala Shikshak Grade-I, II and III since 2008 till date.

iii. It is therefore, prayed that this Hon'ble Court may kindly be pleased to direct the CBI to conduct investigation into all government appointments made by VYAPAM.

iv. It is therefore, prayed that this Hon'ble Court may kindly be pleased to direct the State Government to forthwith terminate the services of 1000 persons (as admitted by the Hon'ble Chief Minister) who have been illegally appointed and further action be taken against the guilty officers as well as the guilty persons who

secured forged appointments since 2007 till date.

v. It is therefore, prayed that this Hon'ble Court may kindly be pleased to direct respondent Medical Council of India to forthwith withdraw licences to the Doctors who secured admissions illegally in MBBS Courses and Post Graduation Courses.

vi. That the State Government may kindly be directed to dissolve Vyavasayik Pariksha Mandal (VYAPAM).

vii. Issue any other suitable writ, order or direction which this Hon'ble Court deems fit and proper in the facts and circumstances of this case.

viii. Award costs of this petition in favour of the petitioner.

(N) In W.P. No.4317/2014, the petitioner has prayed for following reliefs:

i. Issue a Writ, order or direction in nature of Mandamus or any other appropriate writ, order or direction directing the C.B.I. to initiate an investigation into the manner Professional Examination Board (VYAPAM) has been deeply involved in this scam by the officials of the VYAPAM, politicians and businessman.

ii. Issue a Writ, order or direction in nature of Mandamus or any other appropriate writ, order or direction to C.B.I. to conduct its inquiry in a time bound manner and also to suggest ways in order to ensure that such scam cannot take place in future.

iii. In the alternative appoint an Independent Commission headed by a Legal Luminary and other experts to investigate into this SCAM.

iv. Any other relief/s, order/s, direction/s, this Hon'ble Court deems fit and proper looking to the facts and circumstances of the case may also be allowed in favour of the petitioner.

3. The prayer for transfer of investigation of concerned criminal cases is

primarily on the basis of apprehension that the Special Task Force (hereinafter referred to as "the STF") constituted by the State Government to investigate these cases is only a farce. The STF will shield the resourceful persons including high officials, Government officials and political leaders.

4. (i) Shri K.T.S. Tulsi, learned Senior Counsel appearing for the petitioner in W.P. No.2756/2014 opened the arguments for the petitioners. He submitted that inspite of copious material on record to indicate commission of offence under the provisions of the Prevention of Corruption Act by the public servants, no offence under that Act has been registered nor any public servant is proceeded in that behalf. This has been done to shield the high officials. On the other hand, the investigation is directed against the students, who have become victims of the alleged conspiracy by the racketeers. This is being done only to pressurize the students so that they may not speak against high officials.

(ii) He submits that the petitioners are not expected to substantiate their apprehension but it is good enough for them to demonstrate from the circumstances emerging from the record that they are justified in entertaining reasonable apprehension, which, by itself, should be a good ground to transfer the investigation to any other independent Agency such as Central Bureau of Investigation (hereinafter referred to as "the CBI").

(iii) He submits that the investigation by the STF so far indicates that senior police officers have been named as accused in some of the FIRs. It also reveals involvement of Officer on Special Duty to Governor of State of Madhya Pradesh and other high officials and member of personal staff of the Chief Minister. It is indisputable, contends learned counsel, that the investigation is also in respect of involvement of daughter of Inspector General of Police. He submits that deliberate flaws are being kept during investigation by STF, firstly of not registering FIR for the relevant offences though clearly made out, coupled with the fact that no stringent action is being taken against the senior police officers named as accused. In that, they have not been arrested so far. Nay, not even interrogated. Moreover, even after material indicating the involvement of Ex- Minister has become available, the STF has not taken any action against him.

(iv) He submits that the students who have been named as accused, at best could be witnesses against the scamsters, but, they are being proceeded

as if they are the principal accused and because of whom the mass scale manipulations in the concerned examinations could happen.

(v) The investigation is only against the lower functionaries and insignificant public servants and not against persons holding high offices. The STF has so far succeeded in its design to not record the statement of such high officials and political leaders for reasons best known to it.

(vi) In the alternative, he submitted that if the Court is of the opinion that the CBI should not be burdened with the investigation of this matter, the Court may consider of constituting special investigating team of independent eminent persons, who will report to the Court. He submits that the thrust of the petitioners is not to cause any embarrassment to STF but request the Court to ensure that truth should not become casualty because of imperfect investigation done by the STF. At the conclusion of the hearing of these matters, we had given opportunity to the counsel for the petitioners to file written submissions within two days, if they so desired. However, no written submission has been filed after the case was reserved for hearing.

(vii) In support of his submissions he placed reliance on the decisions of the Apex Court in the case of *Gurucharan Dass Chadha vs. State of Rajasthan*[1] (para 13), *Maneka Sanjay Gandhi vs. Rani Jethmalani*[2] (para 2 and 5), *State of Maharashtra vs. Farook Mohammed Mapkar and others*[3] (para 68), *State of Punjab vs. Davinder Pal Singh Bhullar*[4] (para 75), *Rajender Singh Pathania and others vs. State (NCT of Delhi) and others*[5] (para 14), *Disha vs. State of Gujarat and others*[6] (para 7, 21 and 25), *Narmada Bai vs. State of Gujarat*[7] (para 27, 63, 64 and 69), *Vikas Kumar Roorkewal vs. State of Uttarakhand and others*[8] (para 23), *Prof. K.V. Rajendran vs. Superintendent of Police, CBCID South Zone, Chennai and others*[9] (para 6, 7 and 10), and *Manohar Lal Sharma vs. Principal Secretary and others*[10] (para 38 to 40, 50, 61 and 94).

5. (i) W.P. No. 21553/2013 was filed by the petitioners in person. The Court, with the consent of the said petitioners, appointed Shri Parag Chaturvedi, learned counsel as *amicus curiae* to espouse their cause. In W.P. No.21543/

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1. AIR 1966 SC 1418
2. (1979) 4 SCC 167
3. (2010) 3 SCC 571
4. (2011) 14 SCC 770
5. (2011) 13 SCC 329
6. (2011) 13 SCC 337
7. (2011) 5 SCC 79
8. (2011) 2 SCC 178
9. (2013) 12 SCC 480
10. (2014) 2 SCC 532

2013, Shri Parag Chaturvedi has instructions to appear from the petitioner therein. Shri Parag Chaturvedi submitted that the petitioners being public representatives are concerned about the manner in which the investigation of such a sensitive matter and having wide ramifications is being handled by the STF.

(ii) He submitted that from the affidavit of Dilraj Singh Baghel, Deputy Superintendent of Police, who is the Investigating Officer of STF, it is evident that he has virtually conceded that it may not be possible to investigate crime committed prior to 2011 on the specious plea that no data has been saved by the VYAPAM. This raises doubt about the competency of the said investigation, if not of credibility. Inasmuch as, the said investigating officer has made no further attempt to untangle the crime committed prior to 2012.

(iii) He further submits that, indisputably, STF is under the control of State Government. That justifies the apprehension of the petitioners that the investigation will not be free and fair. This apprehension is reinforced as the investigation is progressing at a snail's pace, though the FIR has been registered on 7.7.2013.

(iv) Moreover, no attempt whatsoever has been made to investigate the admissions given in private colleges.

(v) He submits that the petitioners verily believe that STF has not even bothered to collect the call details of students, parents or VYAPAM officials so far. This is indicative of the fact that free and fair investigation will be a casualty, resulting in travesty of justice. He reiterated the prayer to transfer the investigation to an independent Agency such as CBI.

6. (i) Shri Aditya Sanghi, learned counsel appeared for the petitioners in W.P. No.21318/2013 and 15404/2013. The former petition pertains to crime committed during the examination conducted by VYAPAM in 2012 and the latter pertains to offences in connection with examination conducted by VYAPAM in 2013.

(ii) He submits that the petitioner had made complaint about the irregularities committed in the said examination, as a result of which the petitioner has become victim in spite of having exceptional academic record. However, no action has been taken on that complaint and that too in spite of this Court's order dated 6th May, 2013.

(iii) In W.P. No.15404/2013 no allegations are found against the present Investigating Team (STF) as this petition was filed before the constitution of STF. He, however, submits that it is necessary to appoint an independent Investigating Agency such as CBI, considering the fact that the crime in question transcends beyond the boundaries of State of Madhya Pradesh. STF may not be in a position to deal with those matters. The same can be effectively dealt with by CBI. Therefore, even these petitioners pray that the investigation be transferred to CBI. He has placed reliance on the decisions of the Apex Court in *Disha* (supra) (para 21) and *Farook Mohammed Mapkar* (supra) (para 16 and 17).

7. (i) Shri Shekhar Sharma, learned counsel appearing in W.P. No.2232/2014, in addition, submitted that from the recently filed FIR (Crime No.19/2013) on 7th December, 2013, the involvement of Ex-Minister in the crime is palpable. He has been named as accused.

(ii) The news item appearing in Times of India dated 21st December, 2013 also reveals involvement of political persons having huge clout in the Government such as Uma Bharti. It also reveals that the Director General of Police, for reasons best known to him, approached Uma Bharti to console her and was found to be very submissive. The Director General of Police is the highest official and if he is seen obliging heavy weight political leaders, it is obvious that STF will act under dictation and not undertake free and fair investigation. This is a strong circumstance why the investigation should be transferred to an independent Agency not under the control of the present Government.

(iii) He has also invited our attention to the news item appeared in Times of India dated 10th February, 2014 mentioning that the Ex-Minister Laxmikant Sharma was likely to be arrested but, contends that that has not happened till date for inexplicable reasons. The news item mentions about involvement of four BJP leaders, including, three Ministers as suspects, but no follow up action has been taken by the STF, which creates serious doubt about their approach.

(iv) Reliance is also placed on the news item in Times of India dated 12th February, 2014 (page 14). It is mentioned that the aide of Ex-Minister has admitted his role and the possibility of involvement of many other political leaders.

(v) Our attention was also invited to news item dated 13th February, 2014 (page 10) to contend that no investigation has been done in respect of the clue given in this news item that 38 forms were submitted online from one common web portal at Kanpur. This news item is based on the information given by a hacker. No explanation is forthcoming as to why STF has not made such attempt on its own so far as it is a crucial information to pin down the offenders and to proceed against them.

(vi) He has placed reliance on the decisions of Apex Court in *Sanjiv Kumar vs. State of Haryana and others*[11] (para 15), *Nirmal Singh Kahlon vs. State of Punjab and others*[12] (para 23 and 34) and *State of West Bengal and others vs. The Committee for Protection of Democratic Rights, West Bengal and others*[13] (para 68 to 70).

(vii) In the rejoinder-reply, however, learned counsel in all fairness submitted that the petitioner was not questioning the credentials of STF as such. Nevertheless, from the circumstances pointed out by him it was evident that the petitioners were justified in entertaining reasonable apprehension that the investigation by STF will not be free and fair. He additionally relied on the decision of Apex Court in *Nirmal Singh Kahlon* (supra) (para 34).

8. (i) Shri Siddharth Seth, learned counsel appearing in W.P. No.4317/2014, in addition, submitted that the role of the State must be that of *parens patriae.* The State must be serious about such criminal activities polluting the entire educational system and having cascading effect on the common man and their aspirations.

(ii) According to him, non-arrest of Laxmikant Sharma, Ex-Minister, in spite of sufficient material to indicate his complicity in the commission of the crime, is inexplicable. That creates doubt about the approach of the STF.

(iii) He submits that the STF consists of only 82 officials who have been made responsible for investigation of a crime which has wide spread tentacles.

(iv) The STF as has been created, is completely under the control of State and, therefore, there is no likelihood of free and fair investigation by

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11. (2005) 5 SCC 517
12. (2009) 1 SCC 441
13. (2010) 3 SCC 571

that Agency.

(v) He invited our attention to the statement of Dr. Jagdish Sagar recorded by the Investigating Agency, which is part of one of the charge-sheet filed against the accused in the crime, to buttress his point, that high officials and heavy weight political persons are kept out of the loop by the STF.

(vi) He submits that although the entire activity resulting in commission of crime was Online and dependent on technology, no attempt has been made by STF to constitute its own team of technical persons having in-depth knowledge of the technology and computer operations. Instead, the STF has opted to outsource that activity. This itself speaks volumes about the competence of the STF and their seriousness of investigation of such a sensitive crime.

(vii) He has relied on the decisions of the Apex Court in *Secretary, Minor Irrigation and Rural Engineering Services, U.P. v. Sahngoo Ram Arya*[14] (para 6) and *Committee for Protection of Democratic Rights* (supra) (para 17) to buttress his prayer for transfer of investigation to CBI.

(viii) In the rejoinder argument he submitted that the petitioner is not required to substantiate his apprehension but it is enough for him to show *prima facie* case from the circumstances already pointed out to justify the prayer for transfer of investigation to CBI. Learned counsel wanted to rely on new facts during the rejoinder argument, which we did not permit as the respondents could not be taken by surprise after their arguments were already over.

(ix) He then submitted that there has been deliberate delay in registration of the FIR. In that, Expert's report was available on 25th October, 2013, whereas the FIR has been registered on 20th November, 2013 and 23rd November, 2013 for reasons best known to the Agency.

(x) He also questioned the timing of registration of FIR on 7th December, 2013. According to him, that was done by the STF to avoid embarrassment to Ex-Minister who was contesting the election and poll was scheduled on 6th December, 2013.

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14. AIR 2002 SC 2225 = (2002) 5 SCC 521

9. Shri Amitabh Gupta, learned counsel appearing in W.P. No.20219/2013, additionally submitted that no case against Invigilators and Supervisors, who were in attendance in the concerned examination centers from where the students are accused of having indulged in unfair means during the examination, has been instituted. Further, no investigation about their involvement has been done. The STF ought to investigate all angles, which the STF has failed to do thus far. Even for this reason, contends learned counsel, it is a fit case to transfer the investigation to CBI.

10. (i) Shri A.M. Trivedi, learned senior counsel appearing in Writ Petition No.1449/2014 submitted that the petitioners were public representatives and were deeply concerned, as much as the concern of common man across the State about the manner of investigation done by the STF.

(ii) He submitted that the Government was fully aware about the problem since at least year 2009. The Government did not take any initiative whatsoever, because it was aware about the involvement of high officials and political leaders, including the Ministers in the Government.

(iii) He invited our attention to letter dated 29th October, 2009 (Annexure P/7) written by Dean, Medical College to the Board mentioning about irregularities committed during the examination conducted by VYAPAM. The Government by executive order decided to constitute Verification Committee to enquire into that complaint, as can be discerned from Annexure P/4. However, no action was taken by this Committee, even against known nine candidates. The first meeting of that Committee, however, was convened only on 25th June, 2010. This was done to cover up the episode which had come to light and as mentioned in the communication sent by the Dean, Medical College. Notably, the issue was also raised in the Legislative Assembly on 31st March, 2011, when the Chief Minister gave his reply admitting the fact that similar irregularities have been committed in the past during the examinations conducted by VYAPAM from 2007 onwards. He misled the Assembly by stating that no student has been identified, which was contrary to the facts emerging from the communication of Dean, Medical College and, in particular, the action of the State in constituting Verification Committee for that very purpose at least against nine candidates.

(iv) He invited our attention to Annexure R/6, being letter dated 4th March, 2014, sent by the Director, Medical Education to A.I.G. (M.P.) with reference to the incidents of 2009 and 2010 in respect of which FIR has been

registered.

(v) Our attention was invited to letter dated 26th July, 2010, and the Minutes of the meeting of the Committee dated 25th June, 2010, 28th January, 2011 and 7th April, 2011 which mention about the possible involvement of 25 and 37 students respectively, because of mismatch of photographs. He submits that no progress has been done in respect of the FIR already registered, thereby causing anguish amongst the public at large and trust deficit about the investigation undertaken by the STF.

(vi) He submits that the FIR registered on 7th July, 2013 at about 9.25 hrs in respect of examination which was to commence at 12.00 noon on the same day reveals the magnitude of the crime and the organized manner of indulging in unfair means during the examination.

(vii) Although the STF was constituted by the State Government on 26th August, 2013 and took over the investigation, initially it did its job properly, but, in due course when disclosure of names of high officials and political leaders came to light, the investigation is being misdirected. He submits that the STF is under complete control of the State Government and for which reason there is reasonable apprehension in the minds of not only the petitioners but also amongst the common public that it will not be able to conduct free and fair investigation.

(viii) He submits that it is not possible for the petitioners to produce direct evidence about the partisan approach of the STF or about their inaction. That will have to be discerned from the circumstances such as involvement of high officials, politicians and the submissive attitude of the Director General of Police noted in the Press reports. No other conclusion is possible except that the investigation by the STF will not be sincere, honest, free and fair.

(ix) He relied on the stand taken by the STF mentioned in the reply affidavit that there is no motivation amongst the Investigating Team of STF. It is only recording statements and not making any other effort to unravel the crime and the manner in which it was planned and successfully executed.

(x) He has invited our attention to the proceedings of the Legislative Assembly to contend that the Government is not sincere in unravelling the truth and taking the investigation to its logical end because of the involvement of members of the political party in power.

(xi) He placed reliance on the case of *Vishwanath Chaturvedi (3) Vs. Union of India and others*[15] (paragraphs 35 to 38) and *Nirmal Singh Kahlon* (supra) (paragraph 28 and 36) in support of his submission that it is a fit case for transferring the investigation to C.B.I.

(xii) Shri Trivedi during the rejoinder argument while dealing with the recent judgment of the Apex Court in the case of Muzaffarnagar episode, submitted that there was difference in the two situations. In the present case, there is indisputable material on record indicating the involvement of high officials and political leaders, in particular belonging to the party in power, for which reason, to ensure free and fair investigation, the same should be entrusted to an independent Investigating Agency such as C.B.I.

(xiii) He alternatively submitted that, in any case, in the larger public interest, this Court itself should monitor the investigation. In all fairness, he submitted that he was not opposed to investigation by STF, but, in that case the Court ought to monitor the investigation to instil confidence in public about free and fair investigation.

11. Shri R.K. Thakur, learned counsel appearing in Writ Petition No.15186/2013 has adopted the arguments made by the previous advocates. Additionally, he has placed reliance on the case of *State of West Bengal and others vs. Sampat Lal and others*[16] (paragraphs 13 to 15 and 33).

12. In Writ Petition Nos. 21527/2013, 21251/2013, 106/2014 and 293/2014, no counsel addressed us separately. Therefore, we assume that they have adopted the arguments already made on behalf of the petitioners in other matters.

13. (i) Shri Uday Lalit, learned senior counsel, at the outset, submitted that the respondents were not considering this issue as an adversarial litigation. Further, the respondents should not be misunderstood for having responded to the issues raised by the petitioners and taken adversarial position.

(ii) He submitted that apprehensions entertained by the petitioners singularly or, for that matter, taken together, can be no justification to transfer the investigation to any other Agency especially when STF consists of

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15. (2007) 4 SCC 380
16. AIR 1985 SC 195

experienced, impartial and independent police officials who are fully equipped to deal with the organized crimes, such as the present one.

(iii) He submitted that none of the petitioners have doubted the credibility of any official of STF much less of the entire team of STF, except pointing out some circumstances which will have to be considered in the context of the independent structure of STF and the effort already put in by the Investigating Team as a result of which offences committed in the past have also come to light and in respect of which steps have been taken by registration of fresh FIRs and investigating the same.

(iv) He submits that the present STF team is dealing singularly with offences concerning examinations conducted by VYAPAM and is not engaged in any other work. It is a fully dedicated team to investigate those offences.

(v) After its constitution, consequent to investigation, the STF has registered new cases and, including in relation to the possible involvement of high officials and political leaders. Those offences are being investigated in right earnest. If the STF had intention to shield any person, there was no reason to register new offences and to bring on record statements indicating the complicity of high officials and political leaders.

(vi) He submits that in absence of any semblance of material to suggest that even one official of the STF is bias, there is no reason either to doubt the credibility of the STF or for that matter about its sincerity and commitment for the cause for which it has been established.

(vii) He submits that the STF has been constituted in furtherance of Notification envisaging constitution of specialized investigating team in respect of terrorist cases and also organized crimes. The investigation in question entrusted to STF is in respect of organized crime.

(viii) As any other investigating team, STF has power to summon anyone in connection with the investigation. In the present case, the investigation team has taken all measures as are necessary to unravel the crime, but, keeping in mind the magnitude of the crime, the investigation is somewhat complex. The officials of STF are fully capable of dealing with such complex cases, including when the leads of offence transcend beyond the State boundaries.

(ix) As regards the criticism of non-inclusion of any technical person in the investigation team, it was submitted that the STF had taken assistance of

experts and technical persons while taking care that the confidentiality of the contents, for which enquiry has been made, was not shared with anyone. He submitted that even that criticism now stands redressed on account of inclusion of officials who are computer experts and were earlier associated with Cyber Crime Cell. The STF, having taken technical assistance of Cyber Crime Cell in the past, does not in any way belittle their capabilities or for that matter credibility to investigate the offence in question.

(x) Relying on the past service record of the officials who are members of the STF, he submits that the argument of their competency, profile, bias, and credibility cannot be taken forward. Their service record has been unblemished in the past.

(xi) He submitted that although, initially, STF took over the investigation of FIR registered on 7th July, 2013, however, subsequently, it has taken over investigation of nine other cases pertaining to VYAPAM examinations. He assured the Court that even the remaining cases which have been registered and pertaining to previous years, on the basis of report of the Dean or Invigilator, as the case may be, investigation of those cases will also be taken over by STF. He pointed out that out of those cases, in one case charge sheet has already been filed. As regards that case also, the STF is willing to take over further investigation, if the Court so directs. In other words, any criminal case pertaining to examination conducted by VYAPAM will be investigated by STF.

(xii) He submitted that the investigation of all cases by STF will ensure that the investigation thereof is under one roof and by a dedicated force. If need be, STF will submit proposal to State Government for providing additional work force. However, at present, the work force available with the STF is adequate and is performing its duties to the best of their abilities; and since they are not concerned with any other police work or investigation of any other crime, they are fully focused on investigation of offences pertaining to VYAPAM examinations. Further, it may not be advisable to increase the number of work force beyond what is necessary for administrative reasons and to maintain complete confidentiality during investigation. Inasmuch as, because of the sensitivity and magnitude of the crime, sharing of information ought to be between few individuals. In other words, confidentiality cannot be secured with unwieldy work force. For, there is possibility of leakage of information about the line of investigation. Even these aspects have been duly

considered.

(xiii) He then relied on the recent decision of the Apex Court in the case of Muzaffarnagar episode to contend that apprehensions expressed by the petitioners by itself cannot be the basis to transfer the investigation to CBI; and to instil confidence in public the Court may consider of monitoring the investigation done by STF.

(xiv) He submitted that in the Gujarat case, decided by the Apex Court, facts were glaring. It transpired that the State machinery was used by the officials to put up dummy accused on trial, who in turn, were acquitted. The Supreme Court, therefore, had to intervene and direct investigation by CBI. In the present case, however, nobody has even remotely suggested that the accused named in the FIR or challan filed by the police in the respective cases, are dummy accused. On the contrary, high officials, including from Police Department, have been named in the FIR and are being proceeded with. He, therefore, submits that the principle underlying the decision in Muzaffarnagar case be applied to the present case.

(xv) He countered the argument of the petitioners that STF had intentionally not applied the provisions of the Prevention of Corruption Act, by pointing out that the rigours predicated by that Act qua the accused would come into play only after the Court takes cognizance of that offence. In the present case, investigation is still going on. On conclusion of investigation, all offences, as may be applicable to that case, will be applied, including of Prevention of Corruption Act and the procedure prescribed under that Act will be followed. He submitted that in Samvida Shala examination conducted by VYAPAM, the allegation is not of swapping or bracketing of roll numbers but of copying.

(xvi) He also countered the argument of the petitioners that high officials and political leaders are being treated with kid gloves. He pointed out that all the accused against whom corroborative material has become available, have been arrested. The remaining accused will be arrested in due course after such material is collected during the investigation, keeping in mind the principle expounded by the Apex Court in *D.K. Basu vs. State of West Bengal*[17].

(xvii)He relied on the decision in the case of M.C. *Abraham and*

17. (1997) 1 SCC 416

another Vs State of Maharashtra and others[18] (paragraphs 2, 6, 10, 13 and 14) to contend that it is not as if it is imperative to arrest the accused immediately after registration of FIR in connection with cognizable offence. That discretion is of the investigating officer and he may proceed to arrest as soon as there is legal ground available to justify the arrest.

(xviii) He submits that it is not unknown that even in cases investigated by CBI, charge sheets were filed against accused without arrest. It is only after the Court order consequent to filing of charge sheet, arrest was effected. In other words, arrest is not a mechanical matter, but discretion of the investigating officer depending on well established legal principles.

(xix) He then relied on the decision in the case of *Prakash Singh & Ors. vs. Union of India & Ors.*[19] (paragraphs 12 to 22) to contend that the State has ensured that a special dedicated task force is established for investigating the offences concerning VYAPAM examination keeping in mind the sensitivity of the case. He submits that the Head of the STF team is a senior IPS officer holding the rank of A.D.G..P. Even other 07 officers are experienced persons in investigation of such complex cases. They are assisted by 15 other supporting staff. He submitted that the fact that DGP is Head of the Police Department, does not mean that he can influence the investigating team. The ADGP is selected on the basis of recommendation made by UPSC.

(xx) He also explained the circumstances in which successive FIRs have been registered by STF consequent to unravelling of the new information during investigation of the first FIR dated 7th July, 2013. He contended that registration of such successive FIRs is permissible in law. He has placed reliance on the decision of the Apex Court in the case of *State represented by Police, Vigilance & Anti-Corruption, Tiruchirapalli, T.N. vs V. Jayapaul*[20] and *T.T. Antony vs State Of Kerala & Others*[21].

(xxi) He also relied on the decision of the Apex Court in the case of *Lalita Kumari vs. Government of Uttar Pradesh and others*[22] to contend that FIR can be registered at the instance of the police officer who can be an

18. (2003) 2 SCC 649
19. (2006) 8 SCC 1
20. (2004) 5 SCC 223
21. (2001) 6 SCC 181
22. (2014) 2 SCC 1

informant as well.

(xxii)He further submitted that no advantage is passed on to any accused by not applying the provisions of the Prevention of Corruption Act at the time of registration of FIR. On the contrary, because of not invoking those provisions, the STF was able to proceed with the investigation much faster by applying the ordinary offence under IPC. Further, the IPC offences applied are punishable with life imprisonment. There is no special provision regarding grant of bail in respect of offences under the Prevention of Corruption Act, unlike in the case of TADA/POTA. Moreover, the stringent provisions of Prevention of Corruption Act would come into play only after Court takes cognizance of the offence. It necessarily follows that no advantage was passed on to the accused at precognizance stage. For all these reasons, he submits that the grievance of the petitioner that the STF intentionally did not apply provisions of the Prevention of Corruption Act was ill-advised.

(xxiii) He submits that although it is enough for the petitioners to point out that the apprehension entertained by them is reasonable apprehension, in the fact situation of the present case, no interference is warranted much less to transfer the investigation to another agency such as CBI.

(xxiv) He submitted that at best the Court may consider of monitoring the investigation done by STF, which will instil confidence in public.

(xxv) He submitted that no one has even remotely suggested that any political leader has attempted to influence the officials of STF. He concluded by saying that neither the constitution of STF can be questioned nor its credibility and, more particularly, its approach in the investigation of all the offences. For, the STF has thus far made sincere efforts and has investigated all angles which have come to its notice during the investigation. It will continue to do so and the petitioners or any other person having substantive information are free to assist the investigating agency by providing that information, on the basis of which it can proceed further.

14. As regards, the allegation regarding intentional non-arrest of high officials and high profile/important persons, a compilation in sealed cover was furnished for the perusal of the Court to explain the circumstances. That compilation contains all the relevant information about high profile/

important persons who have already been arrested; about those who could not be arrested as they are absconding; and why STF has not arrested some of the high profile/important persons so far. The contents of that compilation were read out to us during the arguments without mentioning the names of the persons. That compilation has been directed to be kept in sealed cover.

15. Counsel appearing for the CBI submitted that the offence in question is neither an interstate dispute nor having any international ramification. Therefore, the CBI on its own may not take initiative to investigate the said crime unless the State Government accords consent therefor. However, as of now the State Government has not decided to give such consent.

16. After having considered the rival submissions the fundamental question as to when the High Court ought to exercise its jurisdiction to transfer the investigation of the case from the local police to an independent Agency such as CBI need not detain us. For, it is well established position that the Court must bear in mind certain self-imposed limitations on the exercise of its Constitutional powers. The Constitution Bench of the Apex Court in a recent decision in the case of *The Committee for Protection of Democratic Rights* (supra) observed thus:

> "70. Before parting with the case, we deem it necessary to emphasize that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise. In so far as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility

and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations.

71. In *Minor Irrigation & Rural Engineering Services, U.P. Vs. Sahngoo Ram Arya* this Court had said that an order directing an enquiry by the CBI should be passed only when the High Court, after considering the material on record, comes to a conclusion that such material does disclose a prima facie case calling for an investigation by the CBI or any other similar agency. We respectfully concur with these observations."

(emphasis supplied)

17. As multiple decisions have been cited across the Bar to buttress the same issue, we may remind ourselves of the exposition of the Apex Court in the case of *Rashmi Metaliks Limited and another Vs. Kolkata Metropolitan Development Authority and others*[23] (paras 7, 10.5) that if innumerable decisions on a particular point of law are cited during the arguments the correct approach for the Court is to predicate arguments on the decision which holds the field. Further, there is little or no advantage to be gained from the manner in which the Court may respond to the factual matrix as other courts may legitimately place emphasis on seemingly similar facts to arrive at a different conclusion. It held that the manner in which a Bench appreciates the factual matrix before it can obviously be of value only if a subsequent case presents identical facts, which remains a rarity. The Court then went on to observe that the *ratio decidendi* of the case has to be followed and for which the Court also noted that the counsel must, therefore, exhibit circumspection in the number of cases they cite. The sheer plethora of precedents makes it essential that the Court should abjure from discussing each and every decision which

23. (2013) 10 SCC 95

has dealt with a similar question of law. Else, it leads to prolixity in judgments which invariably is a consequence of lengthy arguments.

18. Nevertheless, we will advert to the dictum of the Apex Court in some of the decisions which may be relevant to answer the controversy in issue. In the case of *State of Maharashtra and others vs. Sheela Ramesh Kini and others*[24], the Apex Court disapproved the reason weighed with the High Court for transferring the investigation to CBI, namely, because of immense amount of public interest, public outcry and public demand in that behalf. In paragraph 4 of the said decision, the Court observed thus:

> "4. Insofar as the view of the High Court that the crime has generated immense amount of public interest or, in other words, a public outcry and that in a manner a public demand has been made towards transference of the investigation to the CBI, with respect, we do not agree with the High Court. Decisions cannot be made on the verdict of the numbers. A situation of the kind can develop many a time, but courts have to maintain their cool and watch the events with a fair amount of objectivity. And it is not difficult for interested parties sometimes to manipulate mass outcry; highly litigious as our country has emerged tobe....."
>
> (emphasis supplied)

In the fact situation of that case, the Apex Court having agreed with the other findings recorded by the High Court was pleased to reject the appeal filed by the State. To put it differently, we may have to record a clear finding that it has become necessary to provide credibility and instil confidence in the investigation assigned to STF or that the transfer of investigation to some other agency is essential to do complete justice in enforcing the fundamental rights.

19. Keeping in mind the principles expounded by the Apex Court we may first examine the background in which the STF has been constituted. Indisputably, it has been constituted on 26th August, 2013 in connection with FIR (registered on 7th July, 2013) concerning the mass scale irregularities and unfair means resorted

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24. (1998) 9 SCC 346

to during the examinations held by VYAPAM on 7th July, 2013. Soon after the constitution, the STF swung into action and continued with the investigation of that case. The State Government, looking to the gravity of the matter and realizing that the incident was not an isolated incident but offence committed by organized crime syndicate, on its own, in less than seven weeks from registration of FIR on 7th July, 2013, had constituted the Special Task Force, vide order dated 26th August, 2013. The constitution of the STF was to set up a police station by the name of Special Task Force having territorial jurisdiction over whole of the State of Madhya Pradesh for the purposes of investigation in the offence relating to examinations conducted by the VYAPAM. The STF is a separate unit headed by the ADGP. It consists of eight experienced and independent IPS officers, under whose supervision the investigation of the assigned cases is being done. The details of the said officers are as under:

SUPERVISION/ INVESTIGATION OF VYAPAM CASES IS DONE BY FOLLOWING OFFICERS.

S.No.	DESIGNATION	NAME OF OFFICER
1.	ADGP	Shri Sudhir Kumar Sahi, IPS 1998 Batch.Has experience of working in Research and Analysis Wing (RAW) of Govt. Of India as Director.
2.	AIG	Shri Ashish Khare, SPS (2001 Batch) Has done BSc and MSc in Criminology and Forensic Science. He is a Senior Police Officer.
3.	DSP	Shri Dilraj Singh Baghel. He is Senior Police Officer, of 33 years of service and having experience of various types of investigations like fake mark-sheet cases by an

		organised syndicate/ Bhopal Gas Tragedy fake Compensation cases/ Liquor permit conspiracy cases/ issue of fake RTO License by organised syndicate cases.
4.	DSP	Shri Gulab Singh Rajput, He is having more 32 years experience of investigation of various types of Crimes.
5.	DSP	Shri D.K. Tiwari He is also having more than 32 years experience of investigation of various types of Crimes.
6.	Inspector	Shri K.S. Randhawa, He is an experience officer of 15 years of service. He is also having more than 14 years experience of investigation of various types of Crimes.
7.	Inspector	Shri Indresh Tripathi. He is an experience officer of 15 years of service. He is also having more than 14 years experience of investigation of various types of Crimes.
8.	Inspector	Shri Harish Dubey. He belongs to 2004 batch and is having 8 years of investigation into the various kinds of crimes.

It is noticed that this Investigating Team can take assistance of other police branches including from Cyber Crime Cell and CID as and when required.

20. By the time the petitions were taken up for hearing, 10 cases were already assigned to STF for investigation or have been investigated by it. The chart indicating the details of said cases and the status of investigation has been placed on record, which reads thus:

S.No.	P.S./ Cr. No./ Offence Section/ Name of Exam	Complainant/Source of Registration	Date of Regis.	No. of Accused According to FIR	Registering Officer	IO.	Increased Accused during Investigation	Number of arrested accused	Number of accused against whom Charge sheet has been filed	Date of Filing Charge Sheet	Supervising Authority	Remark
1	Rajendra Nagar Indore/539/13, 419, 420, 467, 471, 120-B, 201 IPC 65 IT Act. 25, 27 A, Act 34 Ex. Act, MP Ex. R. Act 1937, Sec. 3 (D-1, 2)/4 [PMT-2013]	K.C. Patidar S.I. Crime Branch Indore By Information of Informer	07.07.2013	2	M.D. Mishra S.I. P.S. Rajendra Nagar	D.S. Baghel DSP, STF	List Received from Vyapam 876 Suspected Candidate & Others	70	64	511/13 04.10.13 511-A 26.12.13	Shri S.K. Sahi ADGP MP STF & Shri Ashish Khare AIG MP STF	173(8) CrPC recently Arrested 6 Accused
2	M.P. Nagar Bhopal/720/13, 409, 420, 120-B, IPC 65, 66 IT Act. Data Manupulation Breach of Trust	Pramod Sharma Asstt. Controller VYAPAM	11.10.2013	4	O.P. Meena S.I. P.S. MP Nagar	D.S. Baghel DSP	List Received from Vyapam 876 Suspected Candidate & Others	4	All Accused	26/14 20.01.2014	Shri S.K. Sahi ADGP MP STF & Shri Ashish Khare AIG MP STF	
3	STF M.P. Bhopal/12/13 420, 467, 468, 471, 120-B, IPC 65, 66 IT Act, MP Ex. R. Act 1937, Sec 3 D(1-1,2)/4 [PMT-2012]	D.S. Baghel D.S.P. STF Investigation Cr: No.539/13, Excel Sheet recovered from Nitin Mohindra Computer	30.10.2013	11	D.S. Baghel DSP, STF	D.S. Baghel DSP	List Received from Vyapam 701Suspected Candidate & Others	26	13	03/14 28.01.14	Shri S.K. Sahi ADGP MP STF & Shri Ashish Khare AIG MP STF	173(8) CrPC Investigation Continue
4	STF M.P. Bhopal/14/13, 409, 420, 120-B, IPC, MP Ex. R. Act 1937,	D.S. Baghel D.S.P. STF Investigation Cr. No.539/13, Excel Sheet	20.11.2013	17	D.S. Baghel DSP	D.S. Baghel DSP		17	17	05/14 20.02.14	Shri S.K. Sahi ADGP MP STF & Shri Ashish Khare	173(8) CrPC Investigation Continue

	Sec 3 D(1-1,2)/4 [Pre PG-2012]	recovered from Nitin Mohindra Computer									AIG MP STF	
5	STF M.P. Bhopal/15/13, 420, 467, 468, 471, 120-B, IPC 65, 66 IT Act, MP Ex. R. Act 1937, Sec 3 D(1-1,2)/4 [Ins. Measurement & Food Inspector - 2012]	D.S. Baghel D.S.P. STF Investigation Cr. No.539/13, Excel Sheet recovered from Nitin Mohindra Computer	22.11.2013	29	D.S. Baghel DSP	G.S. Rajput, DSP, STF		23	8	07/14 20.03.14	Shri S.K. Sahi ADGP MP STF & Shri Ashish Khare AIG MP STF	173(8) CrPC recently Arrested 15 Accused
6	STF M.P. Bhopal/16/13, 420, 467, 468, 471, 120-B, IPC 65, 66 IT Act, MP Ex. R. Act 1937, Sec 3 D(1-1,2)/4 [Dairy Joint Exam-2012]	D.S. Baghel D.S.P. STF Investigation Cr. No.539/13, Excel Sheet recovered from Nitin Mohindra Computer	22.11.2013	19	D.S. Baghel DSP	D.K. Tiwari, DSP, STF		14	14	06/14 05.03.14	Shri S.K. Sahi ADGP MP STF & Shri Ashish Khare AIG MP STF	173(8) CrPC Investigation Continue
7	STF M.P. Bhopal/17/13, 420, 467, 468, 471, 120-B, IPC 65, 66 IT Act, MP Ex. R. Act 1937, Sec 3 D(1-1,2)/4 [Police Sub Ins. Exam-2012]	D.S. Baghel D.S.P. STF Investigation Cr. No.539/13, Excel Sheet recovered from Nitin Mohindra Computer	23.11.2013	25	D.S. Baghel DSP	D.S. Baghel DSP, STF	1	1	Charge Sheet not put up		Shri S.K. Sahi ADGP MP STF & Shri Ashish Khare AIG MP STF	Investigation Continue

8	STF M.P. Bhopal/18/13, 420, 467, 468, 471, 120-B, IPC 65, 66 IT Act, MP Ex. R. Act 1937, Sec 3 D(1-1,2)/4 [Police const. Exam-2012]	D.S. Baghel D.S.P. STF Investigation Cr. No.539/13, Excel Sheet recovered from Nitin Mohindra Computer	23.11.2013	53	D.S. Baghel DSP	D.K. Tiwari DSP, STF		7	Charge Sheet not put up		Shri S.K. Sahi ADGP MP STF & Shri Ashish Khare AIG MP STF	Investigation Continue
8	STF M.P. Bhopal/19/13, 420, 467, 468, 471, 120-B, IPC 65, 66 IT Act, MP Ex. R. Act 1937, Sec 3 D(1-1,2)/4 [Samvida Teacher Grade-3 Exam-2011]	D.S. Baghel D.S.P. STF Investigation Cr. No.539/13, Excel Sheet recovered from Nitin Mohindra Computer	07.12.2013	77	D.S. Baghel DSP	D.S. Baghel, DSP STF		Nil	Charge Sheet not put up		Shri S.K. Sahi ADGP MP STF & Shri Ashish Khare AIG MP STF	Investigation Continue
10	STF M.P. Bhopal/20/13, 420, 467, 468, 471, 120-B, IPC 65, 66 IT Act, MP Ex. R. Act 1937, Sec 3 D(1-1,2)/4 [Samvida Teacher Grade-2 Exam-2011]	D.S. Baghel D.S.P. STF Investigation Cr. No.539/13, Excel Sheet recovered from Nitin Mohindra Computer	09.12.2013	36	D.S. Baghel DSP	D.S. Baghel DSP, STF		1	Charge Sheet not put up		Shri S.K. Sahi ADGP MP STF & Shri Ashish Khare AIG MP STF	Investigation Continue

The FIRs registered after constitution of STF, were at the instance of STF on the basis of the information that became available during the investigation of the FIR No.539/2013.

21. During the hearing it was pointed out to us that in the course of investigation on the basis of material gathered by the Investigating Team, 84 students, 15 racketeers, 4 VYAPAM officials and 26 parents, aggregating to 129 persons have been arrested. Amongst the high profile/important persons arrested by STF are as follows:

Sr.No.	List of High Profile/Important Persons who have been arrested
1.	Dr. Pankaj Trivedi, Controller/Director of VYAPAM
2.	Nitin Mohindra, Principal System Analyst of VYAPAM
3.	Ajay Kumar Sen, Senior System Analyst
4.	Chandrakant Mishra, Assistant Programmer of VYAPAM
5.	Tarang Sharma, Racketeer
6.	O.P. Shukla, OSD of Ex-Minister Laxmikant Sharma
7.	Dr. Vinod Bhandari, Racketeer (Chairman, Aurobindo Hospital)
8.	Dr. Jagdish Sagar, Main Racketeer
9.	Dr. Sanjeev Shilpkar, Racketeer
10.	Sudhir Rai, Racketeer
11.	Santosh Gupta, Racketeer

22. It has also come on record that three persons against whom STF has evidence are absconding and efforts are being made to secure their presence, amongst others, R.K. Shivhare, Deputy Inspector General of Police (under suspension), Bharat Mishra (brother of Inspector General of Police, Sonali Sharma) and Sanjeev Saxena (political leader from opposition party). Information was divulged to the Court that six other persons, who have been named as accused, have not been arrested as more evidence establishing their involvement in the commission of crime was being collected; they are:

1. Laxmikant Sharma, Ex-Cabinet Minister
2. Sudheer Sharma, Businessman
3. Amit Pandey (husband of IAS Officer Smt. Ajita Bajpai Pandey)
4. Premchand Prasad, Ex-P.A. to Chief Minister.
5. Dr. Ajay Mehta, Ex-Vice President of Jan Abhiyan Parishad
6. Dhanraj Singh Yadav, Ex-OSD of Hon'ble Governor

Out of these six persons, Dhanraj Singh Yadav, Ex-OSD of Hon'ble Governor has been granted anticipatory bail by the Court.

23. A chart containing the information, justifying the arrest of the concerned accused, was also placed before us in a sealed cover. Similarly, the reasons for non-arrest of six high profile/ important persons were also brought to our notice, which was produced in sealed cover for the perusal of the Court. As the investigation is already in progress, we would not comment upon those aspects as it may affect the investigation or prejudice the concerned accused.

24. Our attention was also invited to the statements of Dr. Pankaj Trivedi, Director/Controller, Nitin Mohindra, Principal System Analyst, O.P. Shukla, OSD of Minister, Laxmikant Sharma, Ex-Cabinet Minister, Sudheer Sharma, Businessman and Gyanendra Mishra, which are part of the compilation produced in sealed cover for our perusal.

25. Our attention was also invited to order of reward announced qua absconding accused by the STF for securing their arrest. Further, assurance was given that follow up action to secure arrest of absconding accused will be taken with utmost dispatch in due course.

26. After perusal of the information given by the STF we are of the opinion that it is not a case of deliberate non-arrest of high profile/important persons. Beyond this, we need not say anything more for the time being, as assurance has been given that follow up action is being taken by the Investigating Team and depending on the availability of further material indicating their complicity, the Investigating Officer would take steps to arrest even those persons. Assurance is also given that steps are being taken to secure arrest of absconding persons, who have been named as accused and/or are wanted in connection with the pending investigation and that process will be expedited.

27. After having analysed the material made available to us, we may conclude that there is no substance in the grievance of the petitioners that the STF is incapable of handling the investigation of the offences in question or have shown laxity in the investigation in any manner. Further, the STF Officials In-charge of the investigation are able, independent, impartial and experienced police officers; coupled with the fact that there is no material to suggest that any influence has been brought on them from any quarter or that their approach is biased. As a result, the question of considering the relief of transferring the investigation to any other independent agency, at this stage, is ruled out.

28. We are consciously not elaborating on each of the points, raised by the petitioners as any detail discussion in that behalf may either affect the pending investigation or prejudice the accused and is avoidable.

29. We may place on record that before constitution of the STF, 16 cases of impersonation during the examination have been filed since year 2000 on the basis of the report given by the Dean of the Medical College. Out of that only in one case, the local police has filed challan/police report. The chart of those FIRs and status of investigation has also been produced before us, which reads thus:

"पी.एम.टी परीक्षा के संबंध में पंजीबद्ध अपराधों की जानकारी (दिनांक 26.03.2014 तक)
(डीन मेडिकल कॉलेज की रिपोट पर पंजीबद्ध)

क	थाना एवं जिला	अपराध क0 धारा. एवं कायमी दिनांक	शिकायत कर्ता का नाम–पदनाम	एफ0 आई0 आर0 के अभियु क्तों की संख्या	बनाये गये अभियु क्तों की संख्या	कुल अभियु क्तों की संख्या	गिरफ्तार अभियु क्तों की संख्या	प्रकरण की अद्यतन स्थिति
1	2	3	4	5	6	7	8	9
1	झांसी रोड ग्वालियर	136/13 419, 420, 468, 471, 120 बी भादवि, 3/4 परीक्षा अधि0 19-04-2013	अधिष्ठाता जी0आर0 मेडिकल कॉलेज ग्वालियर	15	21	36	11	1. व्यापम से दस्तावेज अप्राप्त । 2. दि0 27.04.13 से 19.03.14 तक कुल–09 नोटिस दस्ता0 उपलब्ध कराने हेतु व्यापम को जारी किये । 3. एफएसएल, सीएफएसएल बफूडी0 से सभी 36 अपराधियों से संबंधित विवादित दस्तावेजों का परीक्षण कराना शेष । 4. 25 अपराधियों की गिरफ्तारी शेष है । 5. प्रकरण की विवे0 जारी है ।
2	झांसी रोड ग्वालियर	449/13 419, 420, 468, 471, 120 बी भादवि, 3/4 परीक्षा अधि0 20-10-2013	अधिष्ठाता जी0आर0 मेडिकल कॉलेज ग्वालियर	81	19	100	17	1. व्यापम से वर्ष 2006 तथा 2007 के संबंधित दस्तावेज, व्यापम द्वारा नष्ट कर दिये जाने से अप्राप्त, वर्ष 2008 तथ 2010 के दस्तावेज प्राप्त । 2. 63 आरोपियों में से 2006 के 29 तथा 2007 के 17 संदेहियों के रिकार्ड मिलना असंभव । 3. वर्ष 2008 के 27 संदेही तथा वर्ष 2010 के 24 संदेहियों के संबंध में

								एफएसएल तथा क्यूडी परीक्षण कराया जा रहा है । 4. साक्ष्य के आधार पर संदेहियों पर आरोप प्रमाणित होना शेष है । 5. प्रकरण की विवे० जारी है ।
3	गोपालगंज सागर	390/11 419, 420, 468, 471, 474 भादवि, 11-11-2011	अधिष्ठाता बुन्देलखंड मेडिकल कॉलेज सागर	03	00	03	01	1. एक आरोपी के विरूद्ध 173-8 जा०फौ० के तहत चालान क्र० 142/13 दि० 19.05.13 पेश किया गया । 2. न्याया० प्रकरण क्र०-1893/13 दि० 21.05.13 माना० जेएमएफसी सागर । 3. एफएसएल तथा सीएफएसएल की रिपोर्ट प्राप्त, परीक्षण जारी । 4. दो आरोपी की गिर० शेष ।
4	गोपालगंज सागर	266/12 419, 420, 468, 471, 474 भादवि, 08-07-2012	अधिष्ठाता बुन्देलखंड मेडिकल कॉलेज सागर	21	00	21	00	1. एफ०एस०एल० रिपोर्ट प्राप्त । 2. अंगुल चिन्ह परीक्षण हेतु ड्राफ्ट दि० 27.03.2014 को डीएसपी अंगुल चिन्ह सागर की ओर भेजा गया है । 3. सभी आरोपियों की गिर० शेष । 4. प्रकरण की विवे० जारी ।
5	गढा जबलपुर	614/11 धारा 420, 467, 468, 471, 120 बी भादवि, 15-07-2011	अधिष्ठाता नेताजी सुभाष चन्द्र बोस मेडिकल कॉलेज जबलपुर	15	00	15	15	विवेचना पूर्ण । प्रकरण माना० न्याया० जेएमएफसी जबलपुर में प्रस्तुत । चालान क्र० 478/13 । प्रकरण क्र० 14111/13 दि० 21.09.13 । न्याया० में इस प्रकरण का विचारण आज दिनांक तक प्रारंभ नहीं हुआ है । आरोप तय नहीं किये गये है । प्रकरण माना० न्याया० में यथावत लंबित है ।
6	गढा जबलपुर	693/13 419, 420, भादवि, 3/4 परीक्षा अधि० 16-11-2013	अधिष्ठाता नेताजी सुभाष चन्द्र बोस मेडिकल कॉलेज जबलपुर	26	03	29	00	1. विवादित दस्तावेजों की जांच हेतु विधिवत ड्राफ्ट एफएसएल सीएफएसएल तथा क्यूडी भेजा जाना शेष । 2. सभी 29 अपराधियों की गिर० होना शेष । 3. प्रकरण अनुसंधान में है ।
7	सिविल लाइन रीवा	268/13 धारा 419, 420, 466, 467, 468, 471, 109, 120 बी भादवि, 3/4 परीक्षा अधि० 28-04-2013	अधिष्ठाता एस०एस० मेडिकल कॉलेज रीवा	16	00	16	16	1. विवादित दस्तावेज एफएसएल तथा क्यूडी जांच हेतु भेजा जाना शेष । 2. 2 आरोपियों की गिर० शेष । 3. प्रकरण अनुसंधान जारी है ।
8	सिविल लाइन रीवा	267/13 धारा 419, 420, 466, 467, 468, 471, 109, 120 बी भादवि, 3/4 परीक्षा अधि० 29-04-2013	अधिष्ठाता एस०एस० मेडिकल कॉलेज रीवा	05	00	05	04	1. एआईपीएमटी दिल्ली से जानकारी प्राप्त । 2. एफएसएल की क्वेरी पूर्ण करने हेतु व्यापम से दस्तावेज प्राप्त करना शेष । 3. विवादित दस्तावेजों के परीक्षण हेतु ड्राफ्ट क्यूडी भेजा जाना शेष । 4. एक अपराधी की गिर०शेष । 5. प्रकरण में अनुसंधान जारी है ।
9	सिविल लाइन रीवा	737/13 धारा 419, 420, 466, 467, 468, 471, 109, 120 बी भादवि, 3/4 परीक्षा अधि० 13-11-2013	अधिष्ठाता एस०एस० मेडिकल कॉलेज रीवा	10	00	10	01	1. 9 अपराधियों की गिर० शेष । 2. 4 अपराधियों से संबंधित एफएसएल रिपोर्ट प्राप्त । 3. 6 अपराधियों से संबंधित विवादित दस्तावेज एफएसएल भेजा जाना शेष । 4. सभी अपराधियों से संबंधित विवादित दस्तावेज जांच हेतु क्यूडी भेजा जाना शेष । 5. प्रकरण में अनुसंधान जारी है ।
10	कोहेफिजा भोपाल	380/12 धारा 420, 467, 468, 471, 120 बी भादवि, 04-07-2012	अधिष्ठाता गांधी मेडिकल कॉलेज भोपाल	28	07	35	26	1. एक आरोपी के विरूद्ध 173(8) द०प्र०स० के तहत चालान न्या० में पेश । 2. चालान क्र० 309/12 दि० 26.11.2012 3. सत्र प्रकरण क्रमांक 65/13 । 4. माना० अपर सत्र न्यायाधीश भोपाल 5. आरोप तय करने हेतु दि० 15.04.2014 नियत।

								6. एफएसएल की रिपोर्ट प्राप्त । 7. क्यूएसडी रिपोर्ट अप्राप्त । ऊफट दि0 28.03.2014 को भेजा गया है । 8. शेष 34 अभियुक्तों के विरुद्ध विचे0 जारी
11	संयोगितागंज इंदौर	1203/09 धारा 420, 468, 471, भादवि, 05-11-2009	अधिष्ठाता महात्मा गांधी स्मृति चिकित्सा महाविद्यालय इन्दौर	02	00	02	00	1. विवादित दस्तावेजों को परीक्षण हेतु एफएसएल तथा ऊफट क्यूडी भेजा जाना शेष । 2. थाना सिविल लाइन जबलपुर से संबंधित दस्तावेज प्राप्त करना शेष । 3. आरोपियों की गिर0 शेष । 4. प्रकरण की विचे0 जारी है ।
12	संयोगितागंज इंदौर	1157/11 धारा 420, 467, 468, 471, भादवि, 10-11-2011	अधिष्ठाता महात्मा गांधी स्मृति चिकित्सा महाविद्यालय इन्दौर	06	00	06	00	फोटो मिलान संबंधी एफएसएल रिपोर्ट प्राप्त आरोपी फरार अतिरिक्त जानकारी सहित दस्तावेज परीक्षण हेतु क्यू डी भेजे गये ।
13	संयोगितागंज इंदौर	1218/12 धारा 420, 417, भादवि, 04-10-2012	अधिष्ठाता महात्मा गांधी स्मृति चिकित्सा महाविद्यालय इन्दौर	01	00	01	00	1.एफएसएल रिपोर्ट प्राप्त । 2. विवादित दस्ता0 क्यूडी भेजना शेष । 3. प्रकरण की विवेचना जारी है ।
14	संयोगितागंज इंदौर	1515/12 धारा 420, 419, 467, 468, 471, भादवि, 28-12-2012	अधीक्षक दंतचिकित्सा महाविद्यालय इन्दौर	01	00	01	01	1. दि0 24.01.2014 को विवादित दस्तावेजों के परीक्षण हेतु क्यूएसडी भोपाल ऊफट भेजा गया । रिपोर्ट अप्राप्त । 2. स्कूटनी पूर्ण विवेचना पूर्ण । 3. चालान कता करना शेष ।
15	संयोगितागंज इंदौर	1346/13 धारा 420, 467, 468, 471, भादवि, 21-12-2013	अधिष्ठाता महात्मा गांधी स्मृति चिकित्सा महाविद्यालय इन्दौर	03	00	03	03	1. व्यापम से दस्तावेज प्राप्त होना शेष । 2. दस्तावेज प्राप्त करने हेतु दि0 27.04.2013 से 22.01.2014 तक कुल 6 स्मरण पत्र व्यापम को भेजे गये । 3. विवादित दस्ता0 जांच हेतु एफएसएल तथा क्यूडी भेजे जाना शेष । 3. प्रकरण में अनुसंधान जारी ।
16	संयोगितागंज इंदौर	38/14 धारा 420, 468, 471, 120 बी 201 भादवि, 15-01-2014	अधिष्ठाता महात्मा गांधी स्मृति चिकित्सा महाविद्यालय इन्दौर	02	00	02	01	1. व्यापम जाकर दस्तावेज चेक्ड करना शेष । 2. विवादित दस्तावेज परीक्षण हेतु क्यूडी तथा एफएसएल भेजना शेष । 3. एक आरोपी की गिर0 शेष । 4. प्रकरण की विचे0 जारी है ।
योग :-				229	50	269	96	

Another chart indicating the status of 16 criminal cases registered since 2000, which was furnished by the respondents for our information reads thus:

पी.एम.टी फर्जीवाड़े से सम्बंधित पंजीबद्व अपराधों की जानकारी (दिनांक 30.03.2014 की स्थिति में)

(अ) –विवेचना उपरान्त न्यायालय में पेश प्रकरणः–

क	थाना एवं जिला	अपराध कमांक एवं धारा कायमी दिनांक	शिकायतकर्ता का नाम तथा व्यवसाय	घालान कमांक एवं दिनांक	न्यायालय का नाम,प्रकरण कमांक एवं दिनांक	न्यायालय में विचारण दिनांक पिछली आगामी		न्यायालय में आरोप तय हुये अथवा नहीं	अद्यतन स्थिति
1	2	3	4	5	6	7	8	9	10
1	कोतवाली खण्डवा खण्डवा	अपराध क 342/04 धारा 420,419,467,468,120 बी भादवि कायमी दिनांक 12.06.2004	एन.एस.डोंगरे पिता लक्ष्मीचंन्द डोंगरे एस.डी.एम खण्डवा	569/06 07.11.06	7660/06 दिनांक 15.11.06 सी.जे. एम. खण्डवा	21.01.14	15.05.14	आरोप तय	गवाही प्रारम्भ होना शेष
2	कोतवाली खण्डवा खण्डवा	अपराध क 343/04 धारा 420,419,468,120 बी भादवि कायमी दिनांक 12.06.2004	एन.एस.डोंगरे पिता लक्ष्मीचंन्द डोंगरे एस.डी. एम खण्डवा	607/05 20.12.05	2361/05 दिनांक 28.12.05 सी.जे. एम.खण्डवा	13.12.13	16.04.14	आरोप तय	गवाही प्रारम्भ होना शेष
3	कोतवाली खण्डवा खण्डवा	अपराध क 344/04 धारा 420,419,467,468,120 बी भादवि कायमी दिनांक 12.06.2004	एन.एस.डोंगरे पिता लक्ष्मीचंन्द डोंगरे एस.डी.एम. खण्डवा	608/05 20.12..05	2363/05 दिनांक 28.12.05 सी.जे. एम. खण्डवा	05.02.14	06.08.14	आरोप तय	गवाही प्रारम्भ होना शेष
4	कोतवाली खण्डवा खण्डवा	अपराध क 345/04 धारा 420,419,467,468,120 बी भादवि कायमी	बलराम पिता लक्ष्मण प्रसाद गांगले डिप्टी	609/05 20.12.05	2360/05 दिनांक 28.12.05 सी.जे. एम. खण्डवा	12.12.13	23.07.14	आरोप तय	गवाही प्रारम्भ होना शेष

		दिनांक 12.06.2004	कलेक्टर खण्डवा						
5	मोघट रोड खण्डवा	अपराध क 243/04 धारा 419,420,466,468,120 बी भादवि दिनांक 11.06.04	श्रीमति संपना शिवाले डिप्टी कलेक्टर खण्डवा	654/31.12.05	390/06 दिनांक 20.01.06 सी.जे. एम. खण्डवा	–	22.04.14	आरोप तय	गवाही प्रारम्भ होना शेष
6	मोघट रोड खण्डवा	अपराध क 244/04 धारा 419,420,466,468,120 बी भादवि दिनांक 11.06.2004	श्रीमति संपना शिवाले डिप्टी कलेक्टर खण्डवा	467/08.09.05	1478/05 दिनांक सी.जे.एम. खण्डवा	20.12.13	12.05.14	आरोप तय	गवाही प्रारम्भ होना शेष
7	मोघट रोड खण्डवा	अपराध क 245/04 धारा 419,420,466,468,120 बी भादवि दिनांक 11.06.2004	श्रीमति संपना शिवाले डिप्टी कलेक्टर खण्डवा	468/08.09.05	1479/05 दिनांक 08.09.05 सी.जे. एम. खण्डवा	12.12.13	22.07.14	आरोप तय	गवाही प्रारम्भ होना शेष
8	छतरपुर कोतवाली	अपराध क 117/2000 धारा 419,ताहि 3/4 परीक्षा अधि.इजाफा धारा 467,468,120 बी ताहि	एस.एन. चौधरी प्रधान अध्यापक छतरपुर	चालान क 359/2000 दिनांक 18.12. 2000	पेश चालन 1226/2000 नया प्र. क–1821/11 सी.जे.एम छतरपुर	10.02.14	02.04.14	नही	गवाही प्रारम्भ होना शेष

9	सिविल लाईन छतरपुर	अपराध क 129/06 धारा 419,420,ताहि 3/4 परीक्षा अधिनियम	श्री बी.पी.एन सक्सेना प्राचार्य स्कूल न 02 छतरपुर	चलान 290/06 11.12.06	पेश चालान 2649/06 सी.जे. एम छतरपुर	19.02.14	16.04.14	नही	गवाही प्रारभ होना शेष
10	सिविल लाईन छतरपुर	अपराध क 130/06 धारा 419,420,ताहि 3/4 परीक्षा अधिनियम	श्री जी.सी.सिंधई प्राध्यापक महाराजा कालेज छतरपुर	चलान क 287/06 11.12.06	पेश चालान 26/06 सी.जे.एम छतरपुर	27.03.14	–	नही	गवाही प्रारभ होना शेष
11	सिविल लाईन छतरपुर	अपराध क 131/06 धारा 1419,420,ताहि 3/4 परीक्षा अधिनियम	श्री. बी.पी.एन सक्सेना प्राचार्य स्कूल न 02 छतरपुर	चालान	पेश चालान 721/09 सी.जे. एम छतरपुर	26.03.14	–	नही	गवाही प्रारभ होना शेष
12	एम.पी नगर भोपाल	728/09 धारा 419,420,. भादवि दिनांक 09.11.09	नितिन मोहेन्द्रा नि. भोपाल	चालान क 398/10 29.10.10	12279/10 दिनांक 18.11. 2011 मुख्य न्यायिक दण्डाधिकारी, भोपाल	–	–	नही	गवाही प्रारभ होना शेष
13	एम.पी.नगर भोपाल	609/10 धारा 419,420, भादवि	मुखबिर/अधिश्ठाता बुर्देलखण्ड चिकित्सा	चालान क 504/13 दिनांक 06.12.13	505/14 दिनांक 24.01.2014 मुख्य न्यायिक	–	–	नही	गवाही प्रारभ होना शेष

			महाविद्यालय, कार्यालय सागर		दण्डाधिकारी, न्यायालय भोपाल				
14	तुकोगंज इन्दौर	523/11 धारा 419,420,465,467, भादवि व धारा 3/4 परीक्षा अधि. 1982 दिनांक 24.07.2011	श्री जावेद अहमद नवाब हसन उप प्रचार्य बाल विनय विद्यालय इन्दौर	381/27.08.2011	16522/11 27.08. 2011 सीजेएम कोर्ट नम्बर 11 न्यायालय इन्दौर बाद में प्रकरण क 723/1 कोर्ट नम्बर 49 पंचम अपर सत्र न्यायाधीश इन्दौर में विचारण हेतु लंबित	–	16.04.14	आरोप तय	15 गवाह के साक्ष्य हो चुके है। 03 की गवाही शेष
15	निशातपुरा भोपाल	508/13 धारा 420,34 भादवि	श्री बाबाराव पिता नामदेव राव नि0 वरूण होम कालोनी जिला अमरावती	526ए/13 दिनांक 28.12.13	3227/14 दिनांक 27.01.2014 माननीय न्यायिक दण्डाधिकारी प्रथम श्रेणी भोपाल	10.02.14	–	आरोप तय	गवाही प्रारंभ होना शेष
16	राजेन्द्र नगर इंदौर	442/09 धारा 419,420, भादवि 3 डी (1) (2) /4 म.प्र. मा.प्रा.प.स.अधि दिनांक 05.07.2009	मुखबिर की सूचना पर, द्वारा तत्कालीन निरीक्षक श्री एस. एस यादव जिला अपराध शाखा इन्दौर	चालान कमांक 457/09 दिनांक 02.09.2009	प्रकरण कमांक 20216/2009 दिनांक 03.09. 2009 जे.एम.एफ. सी इन्दौर	–	–	नहीं	गवाही प्रारंभ होना शेष

In addition to the abovenoted cases, 5 cases are registered since 2012 on the basis of the report given by persons other than Dean of the Medical College. A chart indicating the status of those cases is also furnished, which reads thus:

पी.एम.टी फर्जीवाड़े से सम्बंधित पंजीबद्ध अपराधों की जानकारी (दिनांक 30.03.2014 की स्थिति में)

(अ) विवेचनाधीन प्रकरण (अन्य की रिपोर्ट पर पंजीबद्ध)

क	थाना जिला	अपराध क/धारा कायमी दिनांक	शिकायतकर्ता का नाम तथा व्यवसाय	प्र.सू.प्रके आरोपियों की संख्या	विवेचना में बढ़ाये गये आरोपियों की संख्या	कुल आरोपियों की संख्या	कुल गिरफ्तार आरोपियों की संख्या	विवादित दस्तावेजो के जांच परिक्षण की अद्यतन स्थिति			ऐसे आरोपी जो कॉमन अपराधों में सक्रिय है	क्या विवेचना के दौरान संगठित गिरोह के द्वारा घटना घटित करने का आ य स्पष्ट हुआ है ?	प्रकरण की अद्यतन स्थिति	173 (8) जाफी के तहत किये गये चालान का विवरण अपराधियो की संख्या सहित	कितने अपराधियो के विरुद्ध शेष अनुसंधान जारी है	न्यायालय का नाम प्रकरण कमांक एवं दिनांक
								एफ एस एल	सी एफ एल	व्यू डी						
1	2	3	4	5	6	7	8	9	10	11	13	16	17	18	19	21
1	सांयोगितागंज इंदौर	911/12 धारा 420,मादवि दिनांक 11.07. 2012	डॉ. हेमन्त कुमार कंसल पिता श्री राम कंसल उम्र 47 वर्ष नि. 202 कृष्णा अपार्टमेन्ट 10/01 चशागंज जावरा कम्पाउण्ड इन्दौर	04	निरंक	04	02	भेजना है	निरंक	भेजना है	थाना गोविन्दपुरा भोपाल के अप.क्र. 494/2012 में भी वांछित 1. सेतुराम सिंह उर्फ पिता भौलेन्द्र सिंह 2.	प्रकरण में चार अपराधियों ने फिरयादी के साथ छल करके घटना घटित की	दो आरोपियों की तलाश जारी। विवादित दस्तावेज परीक्षण हेतु व्यू.डी तथा एफ.एस.एल को भेजा जाना तथा बैंक से जानकारी प्राप्त करना शेष ।	–	–	

											प्रवीण कुमार पिता संग्राम सिंह राठौड 3. उमेश पिता रमेशप्रसाद श्रीवास्तव,	है अन्य किसी संस्था के इसमें शामिल होने के साक्ष्य नही मिले है। अतः अभी तक की विवेचना में यह अपराध संगठित गिरोह के द्वारा करना नहीं पाया गया हैं।				
2	निशातपुरा भोपाल	515/13 धारा 420,34 भादवि कायमी दिनांक 03.08.2013	श्री धरम पाल सिंह भूतपूर्व सैनिक, ग्राम तालाब थाना तालाब झज्जर जिला झज्जर हरियाणा	03	निरंक	03	निरंक	–	–	–	सभी तीन आरोपी अज्ञात है	नहीं	अज्ञात अपराधियों की पतारसी व तालाश जारी है	–	–	–
3	कोलार भोपाल	385/13 धारा 420,467,34 120 बी भादवि दिनांक 07.09.2013	डॉ सर्वपल्ली जय चन्दन सहायक संचालक (केहलूर आन्ध्रप्रदेश)	04	03	07	06	–	–	–		नहीं	विवेचना जारी है	–	–	–
4	हबीबगंज	579/13 धारा	डॉ शेखर पिता	04	02	06	03		भेजा		1.जीतू उर्फ	फर्जी तौर	प्रकरण में	तीन	03	सी.जेएम

	भोपाल	420,467,468,471,120 बी 201 भादवि दिनांक 29.09.2013	हरीदास नाईक उम्र 35 साल नि. प्लाट नम्बर 3 फलेट नंबर 201 स्वांन्द अपार्टमेन्ट बजाज नगर विजया चौक नागपुर						गया रिपोर्ट अप्राप्त		जैलेन्द्र सिह सैंगर 2. सुमित सिंह	से एल. एन. मैडिकल कालेज में एडिमिशन करने के नाम पर पैसा लेकर धोखाधडी करने बाबत्	गिरफतार 03 आरोपियो के विरूद्ध चालान पे 1 किया गया है भोश 03 आरोपियो के विरूद्ध धारा 173 (8) के अन्तर्गत पूरक विवेचना जारी है।	आरोपियो के विरूद्ध चालान क 663/13 दिनांक 23.12.13 को तैयार किया गया		भोपाल आर. टी न 11710/13 दिनांक 24.12.13
5	निशातपुरा भोपाल	अप.क 566/12 धारा 420,459,34,भादवि 28.09.13	आदित्य वर्मा पिता पी.एन राजू उम्र 26 साल नि. जनवासा विजय नगर मण्डलाम जिला विजयगरम अन्धाप्रदेश	02	00	02	01	–	–	जांच कराना शेष	1, कोमल पाण्डे	अभी तक की विवेचना में नहीं।	1. एक अपराधी की गिरफतारी शेष 2. ब्यूडी से जांच कराना शेष	एक अपराधी के विरूद्ध धारा 173/8 के तहत चालान कं 193/13 दिनांक 22.04.13	01	जे. एमएफसी भोपाल - 29252/13 दिनांक 22.04.13

30. During the hearing we were assured by the counsel for the respondents that all the aforesaid cases will be immediately transferred to STF, who is already entrusted with the investigation of other cases in connection with examinations conducted by VYAPAM, so that holistic view of all the cases can be taken by the said Investigating Team. As regards the case, arising out of FIR No.523/2011 registered at Police Station Tukoganj, Indore, since charge-sheet has already been filed, STF may consider as to whether further investigation will be necessary and it may do so, if the Court directs. We may accede to this request of the respondents and issue directions accordingly.

31. We were assured during the hearing that if there are any other pending cases in any part of the State of Madhya Pradesh concerning offences relating to examinations conducted by VYAPAM, investigation of all those cases will be entrusted to STF by issuing appropriate orders in that behalf by the concerned Department.

32. After giving our serious consideration to the material placed on record we find that the constitution of the STF by the State Government was without wasting any time soon after realizing the magnitude and complexity of the crime coupled with the fact that it was a case of offence committed by organized crime syndicate. Further, the composition of Special Task Force is of experienced officials with unblemished record. None of the petitioner has attributed any motive to any particular official(s) of STF. It also appears to us that STF has not wasted any time in investigating the crime or has showed any slackness during the investigation. Nonarrest of some of the accused or persons, who are allegedly involved in the offence, till now, by itself, cannot be the basis to assume that the investigation is not free and fair or is being done under dictation of any political leader. No such material is presently noticed from the record.

33. Notably, during the investigation of FIR No.539/2013, the commission of similar offences in the past came to light and soon thereafter STF caused to register subsequent FIRs in that regard. The subsequent FIR mentions about the involvement of high officials and political leaders as well. If, STF was acting under dictation, it would certainly have kept that information under cover to protect the high officials and political leaders. The subsequent FIRs referring to the possible involvement of political leaders belonging to the ruling party, in our opinion, lend credence to the impartiality and independence of STF. All this would not have happened if STF was working under pressure or

on instructions from higher-ups. Any other view would be demoralizing the officials of STF and questioning their sincerity and integrity in absence of any tangible material in that behalf which we must eschew.

34. Reverting to the apprehension of the petitioners of not invoking offences ascribable to the Prevention of Corruption Act with an ulterior purpose to favour the accused, we find force in the argument of the respondents that it would make no difference. Firstly because, the investigation is still on going. In most of the cases challan/charge-sheet is yet to be filed; and when the challan/chargesheet will be filed, depending on the material collected during investigation, even offences under the Prevention of Corruption Act can be invoked by the Investigating Officer. Further, the offences already mentioned in the registered FIRs are punishable with life imprisonment. Hence, no advantage has been passed on to the named accused. Only if the trial were to proceed on the basis of purely Indian Penal Code offences, it would be possible to say that non-inclusion of Prevention of Corruption Act was done to pass on advantage to the accused because of the stringent conditions specified in that enactment. We also find force in the argument of the respondents that non-mentioning of offence under the Prevention of Corruption Act, in fact, facilitated speedy investigation without going through the rigours of procedural formalities. Understood thus, it is the accused who should be making this grievance and not the petitioners. Suffice it to observe that non-mentioning of offence under the Prevention of Corruption Act cannot be the basis to doubt the credibility of the STF investigating the crime nor does it reflect on their ability, efficiency or impartiality.

35. The next point urged is that the investigation reveals involvement of high Government officials including the senior police officials, former Minister and personal staff members in the office of the Chief Minister and the Governor. The fact that involvement of these persons has been revealed and has been honestly recorded in the statements prepared by the STF belies the apprehension founded on these facts. Moreso, from the record, it is indisputable that the Investigation Team has proceeded against one and all involved in the crime and succeeded in arresting officials of VYAPAM as well as personal staff of Ex-Minister. Rewards are announced to facilitate arrest of high placed police officials and including relative of Inspector General of Police, Sonali Mishra. This would lend assurance to the fairness and impartiality in the investigation done by the STF.

36. It was next contended that the STF was focusing more on arrest of students allegedly involved in the offence in question. Further, the students should be, at best, made witnesses against scamsters but not accused. This submission is founded more on morality than legality. If the students are the ultimate beneficiaries, they will inevitably be members of conspiracy and ought to be proceeded on that basis, as accused, along with scamsters. They cannot be mere witnesses, as is suggested. The fact that 84 students have been arrested by the STF so far does not mean that the STF is partial or was not focusing on the racketeers and scamsters. It has already arrested 15 racketeers and four VYAPAM officials as per the record and the process to arrest other high profile/important persons is already in progress. We, therefore, reject the argument that the investigation is biased and is focused against the students and lower functionaries, as contended.

37. It was then argued that proper statements have not been recorded by STF to shield high profile/important persons. Even this submission does not commend to us. For, the investigation already made and steps taken to register new cases upon revelations made during the investigation of FIR No.539/2013, belies this apprehension.

38. We have no difficulty in accepting the argument that truth must not be a casualty because of imperfect investigation. However, at the same time, it is not possible to assume that the investigation done by STF thus far is biased, unfair and under pressure. That plea must be rejected.

39. As a matter of fact, when these matters were posted for hearing on 12th February, 2014, this Court passed the following order:

> "We have heard learned *amicus curiae* in W.P. No.21553/2013.
>
> We wanted to ascertain how the relief claimed in the petition originally filed on 2nd September, 2013 to refer the investigation to CBI is still relevant. We had that doubt because it is noticed from the record that the State Government realising the seriousness of the allegation and the situation deemed it appropriate to constitute Special Task Force (STF), an independent investigating agency on 26th August, 2013. The said investigating agency has continued with the investigation since then and filed police report from time to time before the

concerned Criminal Court. The Criminal Court is already in *sesin* of the said reports and including about the manner of investigation being done by the STF. In the original petition, as filed, there is no allegation of *mala fide* or the case made out in the petition that the State Government intends to appoint STF to give decent burial to entire episode. No allegations of *mala fide* in that behalf are found in the petition or the subsequent proceedings. Similarly, no further affidavit has been filed to specifically point out the inaction of the STF in any area of investigation or for that matter intentional or deliberate attempt to derail the investigation or take the same to its logical end.

Since the learned *amicus curiae* has been appointed only yesterday, as requested by the petitioners, who were appearing in person before us, we deem it appropriate to give some time to learned *amicus curiae* to examine all these aspects to justify the relief, as claimed in the petition. We accordingly defer the hearing of these matters till 11th March, 2014, to be listed under caption "After Notice".

Office to furnish complete set of paperbook of W.P. No.21553/2013 to the learned *amicus curiae* within one week from today.

Registry to ensure that appearance of learned *amicus curiae* is notified on the Board in connection with W.P. No.21553/2013 on future dates."

40. The petitioners were expected to bring some concrete circumstances but during the arguments, have chosen to raise points which are only in the realm of gesticulation. Reliance placed on the affidavit of Dilraj Singh Baghel, who incidentally happens to be the Investigating Officer of STF, to contend that he has virtually conceded that no investigation with regard to 10 registered cases would be possible for want of record with VYAPAM. This averment, in our opinion, is being read out of context. Reply filed by the respondents on 10th January, 2014 in W.P. No.1449/2014 deals with each point urged by the petitioners. No doubt preliminary objection has been raised by the respondents that the present petitions are politically motivated and in support of that argument antecedents of each of the petitioners have been pointed out as

belonging to opponent political parties. The affidavit of Ashish Khare, AIG, STF then deals with the merits of the controversy refuting the apprehension of the petitioners and also highlighting that investigation is still in progress and supplementary challan will be filed in cases where charge-sheet has already been filed. It is also stated that intimation to the concerned Head of the Department against the Government officials, who are found involved in the commission of offence, has already been sent for taking appropriate action. Further, intimation has been given to Director, Enforcement Directorate, Indore to take appropriate steps at their level against the responsible persons having indulged in huge money transactions, which has come to light during the investigation. In other words, multi-pronged approach has been adopted while ensuring that the investigation of cases already entrusted to STF; and the new cases registered on the basis of information divulged during the investigation of the case under investigation will be taken to its logical end with utmost dispatch.

41. It is stated that in PMT scam case, until now, no Minister is accused of his involvement in any crime. Name of Ex-Minister Laxmikant Sharma has come on record in connection with Crime No.19/2013 and Crime No.20/2013, which are concerning Samvida Shala Shikshak Grade-II and III Eligibility Test 2011. He has been named as accused in those cases after his involvement came to light during the investigation of PMT 2013 case (in Crime No.539/2013). For, one hard disk was seized from the Senior System Analyst, Nitin Mohindra. The data of the said hard disk was retrieved from the DST, Gandhi Nagar, Gujarat. That retrieved data is being examined thoroughly by STF. The affidavit mentions that (read till filing of that affidavit), sufficient corroborating evidence for arrest of Laxmikant Sharma was not available, as a result of which his arrest has not been made. As aforesaid, assurance has been given on behalf of the respondents that follow up action will be taken with utmost dispatch in connection with that crime.

42. It is also noted that Dr. Vinod Bhandari, Chairman of Shri Aurobindo Institute of Medical Sciences, Indore, has been arrested in connection with Crime No.12/2013 pertaining to PMT 2012. He is also accused in Pre-P.G. Examination 2012 in Crime No.14/2013. Investigation is also on going in connection with the involvement of other scamsters/racketeers and conspirators on the basis of information divulged during the investigation.

43. Suffice it to observe that the averment in paragraph 12 of the affidavit

of Dilraj Singh Baghel will be of no avail. That cannot be read out of context. The STF is investigating all the crimes concerning examinations conducted by VYAPAM and investigation in each crime will necessarily be independent. It is possible that, as the investigation of these cases progress, a common thread may emerge indicating complicity of some racketeers and conspirators. The factual position stated in the affidavit of Ashish Khare, AIG, STF dated 10th March, 2014, about the steps taken by the Investigating Team, if kept in mind, the criticism or apprehension based on the averment in paragraph 12 of the affidavit of Dilraj Singh Baghel dated 8th February, 2012, will have to be rejected. We, therefore, reject the argument that no attempt is being made by the Investigating Team to gather material in connection with the alleged crimes.

44. It was then contended that the STF is under control of State Government and for that reason no free and fair investigation will be possible. This argument, to say the least, is presumptuous. The fact that STF is one of the wing of the State Government does not mean that it will not carry out investigation independently and impartially or will act on the instructions from higher Authorities. For that matter, even CBI, as of now, is under the control of the Union of India and not an independent or autonomous Agency. The apprehension will have to be tested on the basis of the composition of the STF. As has been noted earlier, no case has been made out even to remotely suggest that any official(s) of STF is under political influence or is taking instructions from higher Authorities. If that had been the case, there was no reason for STF to register new cases and involving high officials and political leaders. It is the investigation of STF which has resulted in unravelling of similar offences committed in the past and in respect of which fresh cases have been registered. The structure of STF nowhere indicates that STF has to report to any other Authority in respect of the investigation of the concerned offences. There is no record even to remotely suggest that information regarding the stage of investigation or the contents of the material are being divulged or reported to the Minister In-charge. Like any other investigation, the Investigating Officer is in complete control of the investigation and the superior officer in the STF would only supervise that the investigation is progressing in right direction. The Head of the STF is an experienced IPS Officer of the rank of A.D.G.P. The fact that the offence has been registered against the relative of I.G. and also against D.I.G. of the Police Department himself, this in itself is indicative of free and fair investigation done by the STF. Hence, this apprehension will have to be negatived.

45. The argument that the investigation done by STF is moving at a snail's pace also does not commend to us. We are inclined to take this view after having gone through the compilation of documents and information produced in sealed cover for our perusal. No doubt, the first FIR was registered on 7th July, 2013, but, having regard to the complexity of the crime and involvement of large number of persons, it is very natural that the investigation of such organized crime may take some time. But, that does not mean that the investigation is not free and fair. Assurance has been given on behalf of STF that if additional work force is required, such requisition will be sent to the State Government and it will be ensured that the investigation of all the cases referred to it are taken to its logical end with utmost dispatch. To ensure that this assurance given by STF is fulfilled, we may consider of monitoring the investigation of STF in respect of each of those cases. This will redress the apprehension of the petitioners and also instil confidence in investigation of public at large.

46. It was then contended that no investigation has been done with regard to admissions in private colleges. This submission is in ignorance of the fact that the investigation assigned to STF is in respect of examinations conducted by VYAPAM in relation to admissions in Government colleges and Government seats in private colleges. The STF is not concerned with the admissions given against the management quota seats by private colleges. Till now nothing has come to light that even in regard to that admission process similar irregularities much less offence has been committed. As and when that question arises, the same will have to be dealt with independently by the Authorities. Suffice it to observe that the scope of investigation assigned to STF is limited to admission/ selection process on the basis of examinations conducted by VYAPAM.

47. It was then contended that STF has not bothered to collect call details of students, parents or VYAPAM officials until now. That material would disclose the culpability of the concerned person. It is not necessary for us to discuss about the details of investigation done so far - as in most of the cases where challan/police report has been filed, further investigation is pending and in remaining cases investigation is still going on. We are not very sure about the intention of the petitioners in calling upon STF to reveal the details of the investigation already done, which, inevitably, may give clue to the accused persons, if discussed in public domain. That is bound to impair the investigation and cannot be countenanced.

48. Reliance was placed on news items appearing in local newspapers. We may hasten to add that the question under consideration cannot be answered on the basis of those news reports much less to accede to the request of transfer of investigation to CBI. On the basis of the said news reports, it was submitted that no action is being taken against high officials/important persons. We have already dealt with this aspect in the earlier part of the judgment and that needs no further elaboration. The fact that the news reports indicate that the D.G.P. had approached the top political leader of the party in power to explain the circumstances in which her name had appeared in the statement, is no reflection on the fairness and impartiality of the STF. It is nobody's case that the said D.G.P. is associated with the investigation done by STF or that any official of STF had contacted any political leader. The D.G.P. is certainly a high official, but, as is noticed earlier, STF in this case has proceeded even against the D.I.G. and the relative of I.G. If such high officials of Police Department could not influence the STF, it would be preposterous to conclude that the investigation by STF is not free and fair.

49. It was argued that the information regarding almost 38 forms of scorers were filled online from one common web portal at Kanpur and that information was made available by some hacker. No attempt has been made by STF to get such information on its own. In response, it has been submitted by the respondents that STF had taken all measures including assistance of computer experts and has now included officials from Cyber Crime Cell who are I.T. experts. Besides, the STF is free to take assistance for the purpose of investigation from other police branches such as Cyber Crime Cell and C.I.D. That does not mean that STF is not well equipped to investigate the offence. Further, the information such as this, if relevant, we have no manner of doubt that the investigating team will ponder over the same and also try to obtain similar information from their own sources. Beyond this, nothing more is required to be said about this contention.

50. It was argued that the State has the duty and must discharge its role of *parens patriae*. We find this argument to be completely misplaced. From the facts on record, it is noticed that the State has taken all steps in right earnest immediately after registration of FIR on 7th July, 2013, realizing the complexity and magnitude of the crime by constituting STF on 26th August, 2013. Besides that, the State Government has shown complete commitment to strengthen the organizational structure of STF and to provide them with adequate logistical

support to ensure free and fair investigation of all the cases entrusted to STF.

51. Similarly, the argument that no case has been registered against Invigilators or Supervisors who were in control of the Examination Centers also deserves to be rejected. From the case made out in the FIR and the material available during the investigation, STF showed sensitivity of registering new FIRs and naming persons involved in the commission of the concerned crime. Moreover, as the investigation is still on going in most of the cases; and also further investigation in some of the cases where challan/police report has been filed, if involvement of any person is disclosed, there is no reason why the investigating officer will leave out such Invigilator or Supervisor, when high officials and political leaders have already been named. There is no reason to assume that the investigation is not done from all angles. It is pertinent to mention that investigation of each crime will have to proceed on the basis of the information disclosed in relation to the commission of that crime. The crimes may pertain to different examinations, different locations and for different years. Each of those cases which are already assigned and to be taken over by the STF, will have to be investigated independently but under one roof.

52. It was argued that the Government was fully aware of the impending problem, but, did not take any measures to prevent the same nor is serious about the investigation of those offences. No doubt, reliance was placed on inter departmental communication and the statements recorded in Legislative Assembly proceedings. We have already found that the STF, as constituted, consists of experienced and impartial officials. STF is already busy with the investigation of the offences registered and during the course of investigation of the registered offence, when it was disclosed that similar offences were committed in the past, immediately registered separate FIRs for those offences as well. According to the respondents, till registration of FIR on 7th July, 2013 and investigation done by the STF, nobody had imagined that mass scale organized crime was being resorted to. The offences, which came to light were considered to be solitary cases of copying or impersonation. On that premise, FIRs were registered in the past. But, it is only in 2013, the entire conspiracy of racketeers came in public domain. Suffice it to observe that the issue under consideration cannot be answered on the basis of said communications or the factual position stated before the Legislative Assembly. We do not deem it necessary nor will it be appropriate to examine the contention that misleading or wrong answers were given before the Legislative

Assembly, as that is not the scope of these petitions.

53. In response to the argument as to the outcome of the FIRs registered in the past, information was placed before us about the status of those FIRs. Assurance has been given that investigation of those FIRs will now stand transferred to STF as it pertains to examinations conducted by VYAPAM and will be taken to its logical end with utmost dispatch.

54. Taking overall view of the matter, we are more than convinced that as of now, the relief as claimed in each of these petitions to transfer the investigation to CBI is devoid of merits.

55. Having said this, we may have to consider one of the two other options available, namely, of appointing Special Investigating Team (SIT) or the Court to monitor the investigation done by STF. From the conclusions reached by us after analysis of the issues raised by the petitioners, as of now, we do not see any reason either to transfer the investigation to CBI or appoint SIT to investigate these offences. For, we are convinced that the STF is investigating with due dispatch. Nevertheless, to instill confidence in the investigation of public at large, we may opt for the third option of monitoring the investigation done by the STF. That would subserve the ends of justice and hopefully also motivate the STF to do its job well, in accordance with law. Merely because these petitions have been filed or some news reports appear in the media, as observed by the Apex Court in the case of *Sheela Ramesh Kini* (supra), that cannot be the basis to transfer the investigation to some other investigating agency. Similarly, in the case of *Committee for Protection of Democratic Rights* (supra), the Constitution Bench of the Apex Court has opined that the very plenitude of the power bestowed in the Court requires great caution in its exercise. Unless, there is some material to doubt, even, *prima facie*, about the credibility of the investigation done by the STF, the question of resorting to transfer of investigation as a matter of routine or merely because petitioner has levelled some allegations against STF would certainly not justify the order of transfer of investigation from STF to some other agency. The material on record and the information shared with us in sealed cover by the STF, does not permit us to hold that the investigation by STF is likely to be influenced, in any manner. Subsequent FIRs registered after taking over of investigation by STF, indisputably, are on the basis of information given by officials of STF. Suffice it to observe that merely because involvement of high officials and including police officials and political leaders has come to light, does not make

the case rare and exceptional case so as to transfer the investigation - without the finding that there is *prima facie* case that the investigation by the STF is influenced by those persons.

56. We may now refer to the decisions on which reliance was placed on behalf of the petitioners. The first decision is in the case of *Prof. K.V. Rajendran* (supra). In paragraph 14, the Apex Court relied on its earlier decision in *Rubabbuddin Sheikh v. State of Gujarat & others*[25] and noted that where the accusation is made against high officials of the police department of the State in respect of killing of persons in a fake encounter and the Gujarat police after the conclusion of the investigation, submitted a charge sheet before the competent criminal court, that investigation done by the State investigating agency was not satisfactory. In order to do justice and instill confidence in the minds of the victims as well as of the public, the State police authority could not be allowed to continue with the investigation when allegations and offences were mostly against top officials. These observations were made in the fact situation of that case. On the other hand, in para 10 of the same judgment, the Apex Court has expounded that it is well settled position that the Court could exercise its Constitutional powers for transferring an investigation from the State investigating agency to any other independent agency like CBI only in rare and exceptional cases. It then went on to observe that where high officials of State Authorities are involved, or the accusation itself is against the top officials of the investigating agency which may influence the investigation, are such matters which should be transferred to CBI. No doubt, in the present case, high officials including from police department have been named as accused, but, there is no convincing material to take the view that the investigation done by the STF, which is a specialized and dedicated team for investigation of organized crime, is unsatisfactory or biased. On the other hand, STF has proceeded against one and all whose name is disclosed and divulged during the investigation.

57. Reliance was then placed on *Davinder Pal Singh Bhullar* (supra). In paragraph 75 the Court observed thus:

> "75. Thus, in view of the above, it is evident that a constitutional court can direct CBI to investigate into the case provided the court after examining the allegations in the complaint reaches

25. (2010) 2 SCC 200

> a conclusion that the complainant could make out *prima facie,* a case against the accused. However, the person against whom the investigation is sought, is to be impleaded as a party and must be given a reasonable opportunity of being heard. CBI cannot be directed to have a roving inquiry as to whether a person was involved in the alleged unlawful activities. The court can direct CBI investigation only in exceptional circumstances where the court is of the view that the accusation is against a person who by virtue of his post could influence the investigation and it may prejudice the cause of the complainant, and it is necessary so to do in order to do complete justice and make the investigation credible."

In the case of *Rajender Singh Pathania* (supra), the Court in paragraph 14 has restated that the court must also be satisfied that the investigation has not been proceeded in a proper direction or it has been biased. In absence of that finding, as observed by the Constitution Bench of the Apex Court in the case of *The Committee for Protection of Democratic Rights* (supra), and in the case of *Sheela Ramesh Kini* (supra), transfer of investigation to CBI merely because of public outcry cannot be sustained.

58. In the case of *Disha* (supra), the Court restated the principle expounded in the case of *Narmada Bai* (supra). In para 21 the Court observed thus:

> "21. Thus, it is evident that this Court has transferred the matter to CBI or any other special agency only when the Court was satisfied that the accused had been a very powerful and influential person or State authorities like high police officials were involved and the investigation had not been proceeded with in a proper direction or it had been biased. In such a case, in order to do complete justice and having belief that it would lend the final outcome of the investigation credibility, such directions have been issued.

59. In the case of *Narmada Bai* (supra), the Court relied on its earlier decision in the case of *Rubabbuddin Sheikh* (supra) and concluded in para 27 as under :

> "27. ..... It is clear that in an appropriate case,

particularly, when the Court feels that the investigation by the State police authorities is not in the proper direction as the high police officials are involved, in order to do complete justice, it is always open to the Court to hand over the investigation to an independent and specialised agency like CBI."

(emphasis supplied)

60. As aforesaid, in the present case, as of now, it is not possible to hold that the investigation done by STF is not in proper direction or it will not go in proper direction because of involvement of high officials and political leaders. That possibility is presently ruled out because STF after taking over the investigation on its own has recorded statements disclosing the culpability of high officials and political leaders. On the basis of those statements - as commission of similar offences in the past came to light, fresh FIRs have been registered against the named high officials. Notably, the STF, constituted by the State Government, consists of experienced and impartial officers with unblemished record. Suffice it to observe that none of the decisions, pressed into service by the petitioners, have taken the view that as soon as involvement of high officials is alleged, those cases must necessarily be transferred to CBI. Further, in most of those cases, the investigation was done by local police of the State and not by high powered Special Task Force as is constituted in the present case. It is well established that the Court must first find that the investigation done by the State Investigating Agency is not proceeding in proper direction and is influenced by high officials/political leaders. Suffice it to observe that the conclusion reached in the case of *Narmada Bai* (supra) was in the fact situation of that case.

61. In the case of *Vikas Kumar Roorkewal vs. State of Uttarakhand* (supra), in paragraph 23 the Apex Court has noted that the apprehension of the party must be reasonable apprehension and not mere allegation that there is apprehension that justice will not be done. That cannot be the basis to transfer the case. In that case, the Court recorded a finding that the petitioner was able to make out *prima facie* case of reasonable apprehension that there would be failure of justice and acquittal of accused because witnesses were being threatened. In other words, the Court is obliged to record a clear finding on the factum of reasonableness of the apprehension entertained by the petitioners.

62. Reliance was placed on observations in paragraphs 2 and 5 in the case of *Mrs. Maneka Sanjay Gandhi* (supra). We may usefully reproduce para 2 of the said decision. The same reads thus:

> "2. Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances."
>
> (emphasis supplied)

We may also advert to para 5 of that decision. This decision is relied to buttress the point as to what must be considered as reasonable apprehension. We fail to understand as to how this decision will be of any avail to the petitioners and, more so, in the fact situation of the present case. Firstly, that decision is in the context of provisions contained in Section 406 of the Criminal Procedure Code. Secondly, we have already dealt with the apprehensions of the petitioners and found that the same are devoid of merits. Moreover, the direct judgment on the point is of the Constitution Bench of the Apex Court in the case of *The Committee for Protection of Democratic Rights* (supra), which ought to govern the present case.

63. Reliance placed on the decision in the case of *Gurcharan Dass Chadha vs. State of Rajasthan* (supra), which is also dealing with Section 527 of the old Code of Criminal Procedure, is inapplicable to the present case, for the same reasons noted while dealing with the earlier judgment in *Mrs. Maneka Sanjay Gandhi's* case.

64. Reliance was also placed on the recent decision of the Apex Court in the case of *Manohar Lal Sharma* (supra) to contend that the scope of monitoring of investigation by the Court will be limited. Emphasis was placed on paragraphs 38 to 40 of the said decision, which reads thus:

> "38. The monitoring of investigations/ inquiries by the Court is intended to ensure that proper progress takes place without directing or channeling the mode or manner of investigation. The whole idea is to retain public confidence in the impartial inquiry/ investigation into the alleged crime; that inquiry/ investigation into every accusation is made on a reasonable basis irrespective of the position and status of that person and the inquiry/investigation is taken to the logical conclusion in accordance with law. The monitoring by the Court aims to lend credence to the inquiry/investigation being conducted by the CBI as premier investigating agency and to eliminate any impression of bias, lack of fairness and objectivity therein.
>
> 39. However, the investigation/inquiry monitored by the court does not mean that the court supervises such investigation/ inquiry. To supervise would mean to observe and direct the execution of a task whereas to monitor would only mean to maintain surveillance. The concern and interest of the court in such 'court directed' or 'court monitored' cases is that there is no undue delay in the investigation, and the investigation is conducted in a free and fair manner with no external interference. In such a process, the people acquainted with facts and circumstances of the case would also have a sense of security and they would cooperate with the investigation given that the superior courts are seized of the matter. We find that in some cases, the expression 'court monitored' has been interchangeably used with 'court supervised investigation'. Once the court supervises an investigation, there is hardly anything left in the trial. Under the Code, the investigating officer is only to form an opinion and it is for the court to ultimately try the case based on the opinion formed by the investigating officer and see whether any offence has been made out. If a superior court supervises the investigation and thus facilitates

the formulation of such opinion in the form of a report under Section 173(2) of the Code, it will be difficult if not impossible for the trial court to not to be influenced or bound by such opinion. Then trial becomes a farce. Therefore, supervision of investigation by any court is a contradiction in terms. The Code does not envisage such a procedure, and it cannot either. In the rare and compelling circumstances referred to above, the superior courts may monitor an investigation to ensure that the investigating agency conducts the investigation in a free, fair and time-bound manner without any external interference.

40. The Court is of the view that a fair, proper and full investigation by the CBI into every accusation by the CBI in respect of allocation of coal blocks shall help in retaining public confidence in the conduct of inquiry/investigation. Moreover, the Court-monitoring in a matter of huge magnitude such as this shall help in moving the machinery of inquiry/investigation at appropriate pace and its conclusion with utmost expedition without fear or favour."

(emphasis supplied)

Reliance was also placed on the concurring view in paragraphs 50, 61 and 94 on the scope of monitoring, which reads thus :

"50. When Court monitors the investigation, there is already departure inasmuch as the investigating agency informs the Court about the progress of the investigation. Once the constitutional court monitors the inquiry/investigation which is only done in extraordinary circumstances and in exceptional situation having regard to the larger public interest, the inquiry/ investigation into the crime under the PC Act against public servants by the CBI must be allowed to have its course unhindered and uninfluenced and the procedure contemplated by Section 6A cannot be put at the level which impedes exercise of constitutional power by the Supreme Court under Articles 32, 136 and 142 of the Constitution. Any other view in this regard will be directly inconsistent with the power conferred on the highest constitutional court.

61. At the outset, one must appreciate that a constitutional court monitors an investigation by the State police or the Central Bureau of Investigation (for short the CBI) only and only in public interest. That is the leitmotif of a constitutional court monitored investigation. No constitutional court 'desires' to monitor an inquiry or an investigation (compendiously referred to hereafter as an investigation) nor does it encourage the monitoring of any investigation by a police authority, be it the State police or the CBI. Public interest is the sole consideration and a constitutional court monitors an investigation only when circumstances compel it to do so, such as (illustratively) a lack of enthusiasm by the investigating officer or agency (due to 'pressures' on it) in conducting a proper investigation, or a lack of enthusiasm by the concerned Government in assisting the investigating authority to arrive at the truth, or a lack of interest by the investigating authority or the concerned Government to take the investigation to its logical conclusion for whatever reason, or in extreme cases, to hinder the investigation.

94. Finally, a constitutional court monitored investigation is nothing but the adoption of a procedure of a 'continuing mandamus' which traces its origin, like public interest litigation, to Article 32 of the Constitution and is our contribution to jurisprudence. This has been sufficiently discussed in *Vineet Narain vs: Union of India,* (1998) 1 SCC 226 and there is no present necessity of any further discussions on this. In *M.C. Mehta v. Union of India,* (2008) 1 SCC 407 this Court referred, in the context of ongoing investigations, to a 'continuous mandamus' and observed that: (*M.C. Mehta* case, SCC p. 412, para 9)

> "9..... The jurisdiction of the Court to issue a writ of continuous mandamus is only to see that proper investigation is carried out. Once the Court satisfies itself that a proper investigation has been carried out, it would not venture to take over the functions of the Magistrate or pass any order which would interfere

with his judicial functions."

65. In the case of *Sanjiv Kumar* (supra), cited by Shri Shekhar Sharma, Advocate, the stand of the State was to allow it to entrust the inquiry into the allegation to a Commission of Inquiry, assisted by a special Investigating Task Force. The Apex Court rejected that plea and considering the facts of that case in paragraph 15 noted thus:

> "15. In the peculiar facts and circumstances of the case, looking at the nature of the allegations made and the mighty people who are alleged to be involved, we are of the opinion, that the better option of the two is to entrust the matter to investigation by CBI. We are well aware, as was also told to us during the course of hearing, that the hands of CBI are full and the present one would be an additional load on their head to carry. Yet, the fact remains that CBI as a Central investigating agency enjoys independence and confidence of the people. It can fix its priorities and programme the progress of investigation suitably so as to see that any inevitable delay does not prejudice the investigation of the present case. They can think of acting fast for the purpose of collecting such vital evidence, oral and documentary, which runs the risk of being obliterated by lapse of time. The rest can afford to wait for a while. We hope that the investigation would be entrusted by the Director, CBI to an officer of unquestioned independence and then monitored so as to reach a successful conclusion; the truth is discovered and the guilty dragged into the net of law. Little people of this country, have high hopes from CBI, the prime investigating agency which works and gives results. We hope and trust the sentinels in CBI would justify the confidence of the people and this Court reposed in them."

However, in view of the opinion already recorded by us, in the fact situation of the present case, monitoring of the investigation by this Court may instill confidence in investigation of common man.

66. Another decision relied by Shri Shekhar Sharma, Advocate and Shri A.M. Trivedi, Senior Advocate, is the case of *Nirmal Singh Kahlon* (supra). The Court observed thus:

> "28. An accused is entitled to a fair investigation. Fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India. But the State has a larger obligation i.e. to maintain law and order, public order and preservation of peace and harmony in the society. A victim of a crime, thus, is equally entitled to a fair investigation. When serious allegations were made against a former Minister of the State, save and except the cases of political revenge amounting to malice, it is for the State to entrust one or the other agency for the purpose of investigating into the matter. The State for achieving the said object at any point of time may consider handing over of investigation to any other agency including a central agency which has acquired specialization in such cases.
>
> 36. In an ordinary case, we might have accepted the submission of Mr. Rao that the High Court should not direct Central Bureau of Investigation to investigate into a particular offence. The offence, however, is not ordinary in nature. It involved investigation into the allegations of commission of fraud in a systematic manner. It had a wide ramification as a former Minister of the State is said to be involved."

The observations in this decision will have to be understood in the fact situation of that case where the State Government wanted CBI to enquire into the matter but the CBI was unwilling to take up that responsibility. In the present case, the investigation is entrusted by the State to a specialized and dedicated team of experienced and impartial police officials constituting Special Task Force.

67. In the case of *Secretary, Minor Irrigation & Rural Engineering Services, U.P. and others* (supra), relied by Shri Siddharth Seth, Advocate, in paragraph 6 the Court, in fact, restated the principle that transferring of case to CBI should not be done mechanically and in routine manner because of some allegations found in the petition. The Court has held that a definite conclusion must be reached about prima facie case. The Court cannot proceed on the basis of "ifs" and "buts". This decision would in our view, help the respondents in the facts of the present case.

68. We have already adverted to the recent Constitution Bench decision

of the Apex Court in the case of *The Committee for Protection of Democratic Rights* (supra) which has restated this very principle and we have analyzed the matter keeping in mind that principle.

69. In the case of *Vishwanath Chaturvedi (3)* (supra), cited by Shri Trivedi, Senior Advocate, in paragraphs 37 and 38, the Apex Court observed thus:

> "37. The ultimate test, in our view, therefore, is whether the allegations have any substance. An enquiry should not be shut out at the threshold because a political opponent of a person with political difference raises an allegation of commission of offence. Therefore, we mould the prayer in the writ petition and direct the CBI to enquire into alleged acquisition of wealth by respondent Nos. 2-5 and find out as to whether the allegations made by the petitioner in regard to disproportionate assets to the known source of income of respondent Nos. 2-5 is correct or not and submit a report to the Union of India and on receipt of such report, the Union of India may take further steps depending upon the outcome of the preliminary enquiry into the assets of respondent Nos. 2-5.
>
> 38. In the instant case, it needs to be noted that we are concerned in this case not with the merits of the allegations. The present petition is filed on acquisition of alleged wealth."

This observation was in the fact situation of that case, as the Court accepted the plea that the statements recorded would require expertise in the field of accounting and in the valuation and that investigation ought to be entrusted to independent agency such as CBI.

70. In the case of *Sampat Lal* (supra), reliance was placed on paragraphs 13, 14 and 15, which read thus:

> "13. Before we proceed to closely examine the submissions advanced by counsel for the parties, it is proper to clear the ground and formulate the exact points which require examination. It is certainly not for this Court at the present stage to examine and come to a conclusion as to whether this was a case of suicide or murder. If as a result of investigation,

evidence is gathered and a trial takes place the Sessions Judge will decide that controversy and it may be that in due course such controversy may be canvassed before this Court in some form or the other. It would, therefore, be wholly inappropriate at this stage to enter such a question. One of the controversies which loomed large before the Division Bench of the Calcutta High Court was as to the appointment of the DIG, CBI to inquire into the matter in the absence of proper consent of the State Government. That question has not been recanvassed before us and it has been accepted by counsel for all the parties including the Additional Solicitor General that while section 6 of the Delhi Special Police Establishment Act, 1916 ('Act' for short) would require the consent of the State Government before jurisdiction under s. 5 of that Act is exercised by officers of that establishment, when a direction is given by the Court in an appropriate case, consent envisaged under s. 6 of the Act would not be a condition precedent to compliance with the Court's direction. In our considered opinion, s. 6 of the Act does not apply when the Court gives a direction to the CBI to conduct an investigation and counsel for the parties rightly did not dispute this position. In this view, the impugned order of the learned single judge and the appellate decision of the Division Bench appointing DIG, CBI to inquire into the matter would not be open to attack for want of sanction under s. 6 of the Act.

Four questions appear to survive for examination:

(1) Effect of violation of the Rules of Natural Justice on the order:-

This can be sub-divided into two aspects:

(i) Whether the order of the single judge is vitiated having been made in violation of rules of natural justice ?

(ii) Whether that order is also bad as the learned single judge had not cared to inform himself as to the stage of investigation and if there was any lacuna therein ?

(2) What exactly is the role meant to be played by the Special officer and whether the inquiry contemplated to be carried on by him would affect the investigation which was being conducted by the local police authorities?

(3) Is it open to the Court to interfere with the investigation which is still proceeding and what are the circumstances in which such interference, if any, is possible, and the guidelines to be followed in such matter?

(4) Whether in the facts and circumstances of this case the direction given by the single judge and upheld with certain modifications by the Division Bench was proper?

14. As already point out, power vests in the police authorities of the State Government for conducting investigation into allegations relating to an offence. However, the stand taken by the respondents was that the State Government and the police authorities had not acted properly and the investigation was not being conducted as required by law. As appears from the order of June 7, 1983, Borooah, J. directed notice to issue to the State of West Bengal as also to the other authorities concerned to show cause against the issue of a writ. No hearing was, however, afforded to the State Government or its officers when direction to appoint the Special officer in whom power of inquiry was to be vested, was made. There could be no scope for appointing a special officer unless the statutory channel of investigation was found not to have functioned properly. There was no basis at that stage to assume that the contents of the letters as also the facts stated in the columns of the newspaper had not been contradicted. It was the State Government or its officers who alone could have authoritatively indicated the facts showing whether the allegations contained in the letters or the newspaper reports were true and if so, to what extent, or how the investigation was being carried on and what stage it had reached so as to enable the Court to come to a prima facie conclusion that the State Government and the police authorities were not discharging properly their statutory obligation to carry out an investigation. But when no notice

was given to the State Government and no opportunity was offered to them, it is difficult to see how an ex-parte order could be made on such an assumption When we say this, we do not wish to be understood to say that in no case an ex-parte order can be made by the Court If the faces stated in the letter or the writ petition are credible and there is such urgency that the ends of justice might be defeated by not making an ex - parte order or giving of notice without ex-parte order might lead to aggravation of oppression or exploitation or removal or elimination of evidence, the Court would certainly be justified in making an ex-parte order. But here there were no such circumstances at all and the Court could have very well issued notice to the Respondents and tried to find out whether there was any necessity for directing the appointment of DIG, CBI to act as A a Special officer and requiring the police authorities of the State to extend all possible help as may be required by him. We are of the view that Borooah, J. should have issued notice to the State Government, afforded a reasonable opportunity to it and its officers who were already in session of the investigation to make a report in regard to the action taken by them and after making an overall judicial assessment of the situation, the need for appointing a Special officer should have been considered.

15. The appointment of a Special officer with a direction to inquire into the commission of an offence can only be on the basis that there has not been a proper investigation. There is a well defined hierarchical administrative set up of the police in the State of West Bengal as in all other States and to have created a new channel of inquiry or investigation is likely to create an impression that everything is not well with the statutory agency and it is likely to cast a stigma on the regular policy hierarchy. We are inclined to agree with Mr. Chatterjee for the appellant that in the facts and circumstances of the case and keeping the nature of the order made in view, the direction to appoint a Special officer with powers to inquire should not have been made until the appellants had been given a hearing and the Court had the papers of investigation laid before it for

being prima facie satisfied that the investigation had either not been proper or adequate."

(emphasis supplied)

The principle underlying the exposition in this decision, however, must assist the respondents.

71. The respondents have relied on the recent decision of the Apex Court in the case of *Muzaffarnagar,* decided on 26th March, 2014 (being Writ Petition No.155/2013 and other companion cases). The question as to whether investigation should be transferred to SIT/CBI has been considered from paragraph 72 of this decision. After having analyzed the relevant aspects of that case and, in particular, that the State itself had constituted a Special Investigation Cell (SIC), in paragraph 88 the Court concluded that there was no need to either constitute SIT or entrust the investigation to the CBI, at that juncture. But, for effective and stringent measures, the Court issued direction that the investigation by the SIC shall be monitored by the Court. In this decision, the Apex Court had adverted to earlier Constitution Bench decision and restated that there can be no inflexible rule as to in which matters the Court may transfer the investigation to independent agency. At the same time, observed that the extraordinary power must be exercised sparingly, cautiously and in exceptional situation; such as, (i) where it becomes necessary to provide credibility and instill confidence in investigation; (ii) where the incident may have national and international ramification; and (iii) where such an order may be necessary for doing complete justice in enforcing the fundamental rights. In the present case, after analysis of the material produced before us, we are of the opinion that the investigation done by STF, as of now, is proceeding in right direction and without any bias. Having said this, the petitions could be disposed of accordingly.

72. Nevertheless, we deem it appropriate to adopt the option of monitoring investigation done by STF. That would not only instill confidence in that investigation, but, also motivate the investigating team as their actions and performance will be under constant gaze of the Court.

73. The decision in *Muzaffarnagar* case, was sought to be distinguished by the counsel for the petitioners on the argument that, in the present case the officials - be it VYAPAM or from the police department - themselves are involved in the commission of the crime. We have already dealt with this aspect

in the earlier part of this judgment and negatived the same.

74. The respondents have justly placed reliance on the decision of the Apex Court in the case of *M.C. Abraham* (supra) to contend that arrest of an accused is not to be done in a routine and mechanical manner. The investigating officer cannot mechanically arrest the accused as soon as the report is lodged. He can do that only after some investigation to make up his mind whether it is necessary to arrest that accused. Keeping in mind this exposition, the argument of the petitioners to find fault with the investigation by STF on this count cannot be countenanced.

75. The respondents relying on the dictum of the Apex Court in the case of *Prakash Singh* (supra) have justly contended that the constitution of STF by the State Government, keeping in mind the magnitude, sensitivity and complexity of the crime in question, can be seen as fulfilment of the observation of the Apex Court. Inasmuch as, a special dedicated investigating team consisting of experienced, independent and impartial senior police officers has been constituted whose commitment, devotion and accountability would be only to the rule of law and they would serve the people without any regard, whatsoever, to the status and position of any person while investigating a crime or taking preventive measures. The approach of the officials of STF would be service oriented and to bring all guilty persons to book with utmost despatch, including high officials in the Government set up and political leaders. The STF officials are not entrusted with any other work, but, are dedicated exclusively to investigate the crime concerning the examinations conducted by VYAPAM.

76. Relying on para 97 in the case of *Lalita Kumari* (supra), *V. Jayapaul* (supra) and *T.T. Antony* (supra), it was contended by the respondents that second FIR registered in connection with the same offence is not unknown nor impermissible in law. Moreover, FIR can be registered by the police itself on any information received by it or on the information furnished by the informant.

77. Taking overall view of the matter, therefore, as of now, we are not inclined to accept the prayer for transfer of investigation to other investigating agency. At the same time, in larger public interest, and to instill confidence in the investigation by STF, we deem it appropriate to monitor the investigation done by STF periodically. That will meet the ends of justice.

78. As a result, we now proceed to examine the reliefs claimed in the respective petitions:

(I) (a) In W.P. No.15186/2013, as regards prayer clause No.(i) to (iii), no argument was addressed and further we had occasion to deal with similar plea in Writ Petition No.20342/2013 and other companion matters, decided on 11th April, 2014, hence this prayer clause cannot be taken forward.

(b) As regards prayer clause (iv) for entrusting investigation to CBI, for the reasons recorded hitherto, the same will have to be rejected.

(c) Prayer clause No.(vi) was not pursued during the argument. Moreover, respondents 6 and 7 against whom relief was sought, have been deleted from the array of respondents. Hence, we need not elaborate on this relief any further.

(d) Accordingly, this petition deserves to be dismissed.

(II) (a) As regards Writ Petition No.15404/2013, relief in terms of prayer clause (i) and (ii) is worked out as the Board has already taken action against the concerned candidates and is in the process of identifying other left over candidates, which aspect has been dealt with in the recently decided group of cases, being Writ Petition No.20342/2013 and other companion matters, decided on 11th April, 2014.

(b) As regards prayer clause (iii) and (iv), for transfer of investigation to CBI, for the reasons recorded hitherto, the same will have to be rejected.

(c) Accordingly, even this petition deserves to be dismissed.

(III) Reverting to Writ Petition No.20219/2013, for the reasons recorded in the judgment and keeping in mind that FIRs regarding concerned examinations have been registered on the basis of information available to the police and the same are being taken to its logical end coupled with the fact that all criminal cases, henceforth, will be investigated by STF, even this petition deserves to be disposed of.

(IV) (a) In W.P. No.21251/2013, as regards prayer clause No.(i) and (ii), it was not pursued during the argument. Therefore, the same need

not be examined any further.

(b) By prayer clause (iii) in substance direction is sought to transfer investigation to CBI. For the reasons already recorded hitherto, this prayer deserves to be rejected.

(c) In prayer clause (iv) direction is sought against the respondents to inquire into the episode of cancellation of admission of students enblock whereas allowing other students of the previous year to continue their medical course. In the first place, no argument was advanced before us in connection with this relief. Moreover, the incidental issues have already been dealt with in our recent decision in Writ Petition No.20342/2013 and other companion matters, decided on 11th April, 2014. Accordingly, this relief cannot be taken forward.

(d) In prayer clause (v) direction is sought against the respondents to reduce equal number of seats from their quota seats and to provide them in State quota seats. Even with regard to this relief, no argument was canvassed before us. The argument that after cancellation of admissions, the vacated seats be treated as State quota, similar plea has been dealt with in our recent decision. Suffice it to observe that even this relief will have to be negatived.

(e) In prayer clause (vi) direction is sought against the respondents to give admission to the students in the next academic year. Even in respect of this relief, no argument was canvassed before us. Hence, the same need not be considered any further.

(f) As regards prayer clause (vii), the same is worked out as this petition has been heard along with companion cases.

(g) Accordingly, even this petition deserves to be dismissed.

(V) (a) In Writ Petition No.21318/2013, besides the relief of transferring investigation of criminal cases to CBI in respect of pre-medical examinations conducted by VYAPAM in the year 2012, it is further prayed that heavy damages be given to the genuine candidates who deserved seats to MBBS course, but, were denied because of the irregularities committed during the concerned examination.

(b) As regards the claim for damages, it will be open to the petitioner and similarly placed persons to pursue the same by taking

recourse to other appropriate proceedings. We keep that question open. As has been noticed, at the outset, only one issue regarding transfer of investigation of criminal cases to CBI was argued by the counsel for the petitioners. Even for that reason, we are not inclined to examine prayer clause (ii) and keep that relief open.

(c) This petition, therefore, will have to be disposed of accordingly.

(VI) (a) In W.P. No.21527/2013, the first relief claimed is essentially to transfer the investigation to CBI. That will have to be negatived for the reasons recorded hitherto.

(b) The second relief claimed is to declare VYAPAM as black-listed agency. No argument was addressed before us in this behalf. Hence, we do not wish to examine this relief any further.

(c) Prayer clause (iii) is in the nature of issuing mandamus against respondent No.4 refraining it from conducting other examinations. This relief is dependent on the relief claimed in prayer clause (ii). Even with regard to this relief, no argument was canvassed before us. Hence, we do not deem it necessary to examine this prayer clause any further.

(d) In prayer clause (iv), direction is sought to cancel MPPMT examination and for preparing new programme for examination in a fair and transparent manner. Even with regard to this relief, no argument was canvassed before us. Moreover, similar plea has been negatived by us in the recently decided Writ Petition No.20342/2013 and other companion matters on 11th April, 2014.

(e) Accordingly, even this petition deserves to be dismissed.

(VII) As regards Writ Petition No.21543/2013, for the reasons recorded hitherto, the reliefs claimed in this petition for transfer of investigation to CBI will also have to be rejected. Hence, this petition is being dismissed.

(VIII) (a) In W.P. No.21553/2013, prayer clause (i) and (v) does not survive for consideration in view of the fact that FIRs have been registered in connection with offences concerning the examinations conducted by VYAPAM and the same are being taken to its logical end.

(b) As regards prayer clauses (ii) and (iii), the same deserve to be

rejected for the reasons already recorded hitherto. For, we are not inclined to transfer the investigation to CBI.

(c) As regards prayer clause (iv) to issue direction to VYAPAM to conduct fresh examinations, we had occasion to deal with similar plea in Writ Petition No.20342/2013 and other companion matters, decided on 11th April, 2014, hence this prayer clause is also rejected.

(d) Accordingly, this writ petition should fail and the same is being dismissed.

(IX) In Writ Petition No.106/2014, in substance, direction is sought to transfer the investigation to CBI and further to arrest respondent No.5 and all other persons involved in the commission of offence. For the reasons already recorded hitherto, this petition ought to fail and the same deserves to be dismissed.

(X) In Writ Petition No.293/2014, more or less similar reliefs have been claimed as in Writ Petition No.21251/2013. Firstly, to direct the transfer of investigation to CBI, and secondly to direct the Board to conduct fresh examination. For the reasons recorded hitherto, even this petition deserves to be dismissed.

(XI) As regards Writ Petition No.1449/2014, only one relief is to direct the CBI to investigate the VYAPAM cases. That prayer will have to be rejected for the reasons recorded hitherto and as a consequence, this writ petition is disposed of.

(XII) As regards Writ Petition No.2232/2014, in substances, the relief is to transfer the investigation to CBI. For the reasons recorded hitherto, even this petition ought to be dismissed and disposed of accordingly.

(XIII) (a) As regards Writ Petition No.2756/2014, prayer clause (i), (ii) and (iii) are essentially to direct transfer of investigation of criminal cases, concerning examinations conducted by VYAPAM since 2008, to CBI. As aforesaid, this relief will have to be rejected for the reasons recorded hitherto. In fact, all criminal cases pertaining to examinations conducted by VYAPAM, already registered and pending investigation as also to be registered hereafter on the basis of new information disclosed, will be dealt with by STF.

(b) As regards prayer clause (iv), the relief prayed is to direct the

State Government to forthwith terminate the services of 1000 persons illegally appointed on the basis of examinations conducted by VYAPAM since 2007 till date. No argument was advanced in that behalf before us. The only argument canvassed by Shri K.T.S. Tulsi, learned Senior Advocate for this petitioner, was for issuing direction to transfer the investigation to CBI.

(c) Even relief clause (vi), which is independent relief to dissolve VYAPAM was not pursued during the argument. We, therefore, do not deem it necessary to deal with this prayer clause except to mention that the issue regarding the legality, status and authority of the existing Board has already been dealt with in the recent decision, being Writ Petition No.20342/2013 and other companion matters, decided on 11th April, 2014. Accordingly, even this petition deserves to be disposed of.

(XIV) The Writ Petition No.4317/2014 is, essentially, for issuing direction to transfer the investigation to CBI; and further direct the CBI to complete the investigation expeditiously. For the reasons recorded hitherto, even this petition deserves to be dismissed.

79. Since we are disposing of all the writ petitions in terms of this judgment, we deem it appropriate to treat the question regarding Court monitoring of investigation by STF of all the offences pertaining to examinations conducted by VYAPAM from time to time, as *suo motu* proceedings, and direct the Registry to number the said proceedings accordingly, to be listed on 25th April, 2014, under Caption "Direction", for passing appropriate orders.

80. In view of above, we proceed to pass the following order:

(i) The abovementioned writ petitions are disposed of on the above terms.

(ii) Registry is directed to forthwith register *suo motu* proceedings for Court monitoring of investigation done by STF in respect of all criminal cases pertaining to examinations conducted by VYAPAM from time to time. That matter be listed on 25th April, 2014 under caption "Direction".

(iii) Copy of this order and the documents, which were tendered before us by the respondents during hearing and kept in sealed cover, will remain in sealed cover and as part of the said *suo*

motu proceedings. Besides, the affidavits filed by the respondents in the respective writ petitions from time to time, be kept in suo motu proceedings, as a separate compilation, arranged chronologically date-wise and properly paginated.

(iv) In the larger public interest, we direct that "further investigation" of FIR No.523/2011 registered with Police Station Tukoganj, Indore in which police report/challan has already been filed by the local police, shall now be transferred with immediate effect to the Special Task Force constituted by the State Government vide Notification dated 26th August, 2013, so that STF can have complete control over all the pending criminal cases pertaining to examinations conducted by VYAPAM. This direction be brought to the notice of concerned Criminal Court where the trial in respect of FIR No.523/2011 is pending, forthwith, for information and compliance.

(v) We accept the assurance given by the respondent/State that all criminal cases already registered and to be registered hereafter in connection with examinations conducted by VYAPAM up to 2013 shall be entrusted to Special Task Force, constituted in terms of Notification dated 26th August, 2013. Compliance report, in this behalf be submitted in the *suo motu* proceedings to be listed on 25th April, 2014.

(vi) All interlocutory applications in the respective writ petitions stand disposed of, in terms of this order.

Petition disposed of.

I.L.R. [2014] M.P., 2959
WRIT PETITION

Before Mr. A.M. Khanwilkar, Chief Justice & Mr. Justice K.K. Trivedi
W.P.No. 6909/2002 (Jabalpur) decided on 8 July, 2014

GRASIM INDUSTRIES LIMITED, NEEMUCH ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

(and W.P. No. 880/2004, W.A. Nos. 1107/2006, 1108/2006, 978/2007, 439/2008, 440/2008, 441/2008, 1189/2008, 169/2009, 231/2009,

485/2009, W.P. Nos. 7860/2009, 14378/2009, 3616/2010, 6439/2010, 12690/2010, 1886/2012, 5090/2012, 15740/2012, 15840/2012, M.C.C. Nos. 1209/2012, 1210/2012, 1211/2012, 1212/2012, W.P. Nos. 1913/2013, 4182/2013, 4081/2014, 4815/2014.)

Mines and Minerals (Development and Regulation) Act (67 of 1957), Section 9 - Royalty - Assessment - Notional Conversion Factor **- There is no express provision regarding notional conversion factor to be applied during assessment - Assessment of Royalty amount must be commensurate with minerals removed or consumed by lessee - It is open to the Assessing Officer to reject the claim of the assessee and instead apply a just and reasonable notional conversion factor - Notional conversion factor that for manufacture of 1 tonne of cement 1.6 tonnes of limestone is consumed, has been fixed by impugned circulars - All cement companies have been directed to ensure installation of weighbridge as per specification for ascertaining correct quantity of removed limestone - If licensee has any objection for applying notional factor, can cause to weight the removed limestone for the purpose of computing Royalty - Conversion fact cannot be termed as unrealistic and arbitrary - As lease has been granted by State Government and returns are to be filed before State Govt. therefore, there is no impediment for State Government to issue administrative instructions - Instruction contained in circular that "Whichever is higher" to invoke notional conversion factor is quashed - Matter remitted back to the Assessing authority to re-examine the issue afresh from the stage of filing of returns - Petition disposed off. (Paras 45 to 52)**

खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धारा 9 – रायल्टी – निर्धारण – काल्पनिक रुपांतरण गुणक – काल्पनिक रुपांतरण गुणक को निर्धारण के दौरान लागू किये जाने के संबंध में कोई अभिव्यक्त उपबंध नहीं – रायल्टी की रकम का निर्धारण पट्टाधारक द्वारा निकाले गये या उपभोग किये गये खनिजों के साथ समानुपाती होना चाहिए – निर्धारण अधिकारी, निर्धारिती के दावे को अस्वीकार कर सकता है और उसके बजाये न्यायोचित और युक्तियुक्त काल्पनिक रुपांतरण गुणक लागू कर सकता है – काल्पनिक रुपांतरण गुणक कि 1 टन सीमेंट के उत्पादन हेतु 1.6 टन चूना पत्थर उपयुक्त होता है, को आक्षेपित परिपत्रों द्वारा निश्चित किया गया है – हटाये गये चूना पत्थरों की सही मात्रा सुनिश्चित करने के लिए निर्दिष्टियोंनुसार तौल कांटा संस्थापित किया जाना सुनिश्चित करने के निदेश सभी सीमेंट कम्पनियों को दिये गये हैं – यदि अनुज्ञप्तिधारकों को काल्पनिक गुणक लागू करने के लिये कोई आक्षेप है, वह रायल्टी की संगणना के प्रयोजन हेतु हटाये

गये चूना पत्थरों का तौल करवा सकता है – रुपांतरण तत्व को अवास्तविक एवं मनमाना नहीं कहा जा सकता – जैसा कि राज्य सरकार द्वारा पट्टा प्रदान किया गया है और रिटर्न को राज्य सरकार के समक्ष प्रस्तुत करना है इसलिए, प्रशासनिक अनुदेश जारी करने के लिए राज्य सरकार को कोई बाधा नहीं – काल्पनिक रुपांतरण गुणक का अवलंब लेने के लिये परिपत्र में अंतर्विष्ट अनुदेश कि "जो भी उच्चतर हो" अभिखंडित – निर्धारण प्राधिकारी को रिटर्न प्रस्तुत करने के प्रक्रम से नये सिरे से विवाद्यक का पुनः परीक्षण करने हेतु मामला प्रतिप्रेषित – याचिका का निपटारा किया गया।

Cases referred :

(1969) 3 SCC 838, AIR 1990 SC 85, (1995) Supp.(1) SCC 642 = AIR 1995 SC 2213, AIR 1961 SC 552, 1954 SC 282, (2004) 5 SCC 155, AIR 1963 SC 395, AIR 1967 SC 1895, (1989) 4 SCC 683, (2000) 3 SCC 40, (2003) 5 SCC 756, AIR 1972 SC 2563, (2006) 7 SCC 642, AIR 1973 SC 2266, AIR 1957 SC 810, (1971) 3 SCC 52, AIR 1964 SC 1013, AIR 2006 SC 1383, (1997) 6 SCC 538, (2006) 1 SCC 275, (1996) 11 SCC 157, AIR 1962 SC 1006, (1970) 3 SSC 76, (1990) 4 SCC 557, (2010) 13 SCC 1, (2000) 1 SCC 600, AIR 1998 (MP) 117, (2011) 4 SCC 450, (2005) 4 SCC 245, (2006) 7 SCC 241, (1993) 1 SCC 364.

A.K. Chitley with *Vijay Tulsiyan & Aditya Adhikari,* for the petitioner.

Samdarshi Tiwari, G.A. with *Swapnil Ganguly,* Dy. G.A. for the respondents/State.

JUDGMENT

The Judgment of the Court was delivered by : **A.M. KHANWILKAR, C.J. :-** In all these petitions, the challenge is, essentially, to the Circulars dated 19th December, 1992, and 11th August, 1993, respectively, in so far as it purport to provide for the mode of computation of royalty amount in respect of extracted Limestone by applying conversion factor of 1.6:1 metric tonne. As a consequence of these Circulars, each of the petitioners have been called upon to pay the royalty amount at an uniform rate on the assumption that they have removed and consumed 1.6 Metric Tonne Limestone for manufacturing of 1 Metric Tonne of Cement/Clinker.

2. For the nature of controversy, brought before this Court, it may not be necessary to advert to the factual position, in detail, in each of these writ petitions. Suffice it to observe that the petitioners are manufacturers of Cement

(Ordinary Portland Cement and Pozzolana Portland Cement) and Clinker. The Limestone is the basic ingredient for manufacture of these products. The petitioners claim that they have subsisting mining lease. Some of the petitioners are engaged in the stated business for quite some time, in the concerned area. After expiry of the lease period and coming into force of the Mines and Minerals (Development and Regulation) Act, 1957 (herein after referred to as the **"Act of 1957"**), the lessees are required to execute lease deed as prescribed in Form-K, as specified under the Mineral Concession Rules, 1960 (herein after referred to as **"the Rules of 1960"**).

3. The gravamen of the petitioners' case is that the two Circulars issued by the State Government dated 19th December, 1992, and 11th August, 1993, are repugnant to the legislative scheme governing the payment of royalty amount in relation to the excavated Limestone which is a major mineral. The Parliament has exclusive power to enact law providing for royalty amount therefor. By issuing the two Circulars, the State Government has encroached upon that field. Moreover, the conversion factor, propounded by the State Government, is unrealistic, unscientific and discriminatory. For, the intake of Limestone for manufacture of Cement/Clinker would largely depend upon the efficiency and performance of the Unit, on case to case basis. Resultantly, by applying the uniform notional conversion factor, the petitioners would be made liable to pay royalty amount on assumption and in respect of Limestone which has not been excavated or, in fact, wined away by them. Further, the State Government by issuance of Circulars, which, assuming are executive order or administrative instructions, had no power to propound on the matter of conversion factor for determining royalty amount payable by the lessee. According to the petitioners, the said conversion factor, as specified in the impugned Circulars, can be applied only in cases where the petitioners have not installed Weighing Machine/ Beltometer, as required in terms of Clause 13 of the mining lease deed.

4. These are the core issues agitated by the respective petitioners. In addition, the grievance of the petitioners other than Associated Cement Company Limited (in short "ACC Limited"), is that, the Authorities cannot apply the conversion factor of 1.6:1 qua them relying on the decision in ACC's case. For, that decision was not binding on them and also it cannot be cited as a binding precedent.

5. As regards ACC Limited, it is urged that the decision in earlier

proceedings was in respect of different assessment period and, more so, because in the present proceedings, the challenge is essentially to the impugned Circulars. The impugned Circular has been issued by the State Government after culmination of earlier round of proceedings, bearing M.P. No.1225/1993. In other words, it is open even to ACC Limited to challenge the said Circulars which have been made the basis for assessment for the subsequent assessment period.

6. The petitioners are also challenging the demand towards interest on the royalty amount founded on the conversion factor specified in the impugned Circulars. According to the petitioners, the question of paying such interest would arise only if the petitioners had admitted their liability to pay royalty on the quantity of Limestone as per the impugned conversion factor or if the Assessing Authority were to adjudicate the liability of the respective petitioners and concerned petitioner had failed to pay the demanded amount within the specified time. On the other hand, the petitioners have paid the amount as per their admitted liability and have disputed their liability to pay royalty in respect of excess assumed quantity arrived at by the Assessing Authority on the basis of impugned conversion factor.

7. For examining the above stated broad issues, we may usefully refer to the brief facts of the leading Writ Petition No.6909/2002.

(i) This petitioner established a cement factory and obtained three Limestone mining leases for captive consumption in its Cement Factory under separate lease deeds dated 30th November, 1984, 1983 and 7th May, 1994. Clause 13 of the lease deeds stipulated provision of Weighing Machine at or near the pithead of the mine. The said clause reads thus:

> "13. To provide weighing machine
>
> Unless specifically exempted by the State Government the lessee/lessees shall provide and at all times keep at or near the pit head or each of the pit heads at which the said minerals shall be brought to bank a property constructed and efficient weighing machine and shall weigh or cause to be weighed thereon all the said minerals from time to time brought to bank, sold exported and converted and also the converted products and shall at the close of each day cause the total weight ascertained by such means of the said minerals areas

products raised sold exported and converted during the previous twenty four hours to be entered in the aforesaid books of accounts. The lessee/lessees shall permit the State Government at all times during the said term to employ any person or persons to be present at the weighing of the said minerals as aforesaid and to keep accounts thereof and to check the accounts kept by the lessee/lessees. The lessee/lessees shall give 15 days previous notice in writing to the Deputy Commissioner/Collector of every such measuring or weighing in order that some officer on his behalf may be present thereat."

(ii) Notwithstanding this stipulation, the petitioner-company did not install any Weighing Machine on the site. Instead, it asserted that it was not possible to install Weighing Machine due to wide spread out mining activity in the area. Representation in this behalf was made by the petitioner as well as the Federation of Madhya Pradesh Chambers of Commerce & Industries, of which Cement Manufacturers Association is a member, to the State Government to dispense with the requirement of installation of weighbridge. The Collector, however, issued demand notice regarding royalty amount to the petitioner based on 1.6 conversion factor for June, 1985. This demand was presumably founded on the Circulars in force at the relevant time issued by the State Government. To wit, the State Government had issued Circular on 25th September, 1963, in the name of the Governor of Madhya Pradesh, suggesting that those mining lease holders whose annual turnover is up to 3000 tonne or less, they shall not be forced to install Weighing Machine. The said Circular reads thus:

"No.7050-5110/XII

Government of Madhya Pradesh, Natural

Resources Department,

Bhopal dated the 25th September 1963

Bhadra, 1885

To,

All Collectors,
Madhya Pradesh,

Sub:- Provision of weighing machine by the lessees over the pits head.

The State Government have carefully considered the question of the provision of weighing machines by the lessees over the pits head and have decided that lessees whose annual extraction is or below 3000 tons need not be pressed to keep weighing machine over pits head, and they may keep ordinary weighing balances for weighment of minerals extracted by them. Lessees whose output is 3000 tons or more per annum will however have to keep weighing machine over that pits head. In exercise of powers conferred under Rule 27(1)(2) of the Mineral Concession Rules 1960 the State Government hereby order that lessees whose annual output is 3000 tons or more must provide weighing machines over the pits head and those whose out put is below 3000 tons per annum may keep ordinary weighing balance in place of weighing machines.

It may therefore, be ensured that an ordinary weighing balance or a weighing machine as per criteria laid above is kept by the assesses over the pits heads for proper weighment of the mineral extracted by them from the areas held under mineral concessions.

By order and in the name of the
Governor of Madhya Pradesh,
Sd/- B.C. Joshi,
Under Secretary to Government,
Madhya Pradesh,
Natural Resources Department"

(iii) Another circular relevant on the subject issued by the Under Secretary to the Government of Madhya Pradesh, in the name of the Governor, dated 2nd May, 1967, superseding the earlier memo dated 9th April, 1964, reads thus :

"No.2283-4899 (II)
GOVERNMENT OF MADHYA PRADESH
MINERAL RESOURCES DEPARTMENT

Bhopal, dated the 2nd May, 1967

To,

All Collectors,

Madhya Pradesh

Sub:- Provision of weighing machine by the lessees over the pits head.

Ref:- This deptt. Memo No.3378-2157/KII dt. 9th April, 1964.

The State Government had vide this department circular memo No.7950-5115/KII dated 25th September 1963 made it obligatory on the lessees to maintain weighing scales at pit sight. On a representation received from the lessee the operation of these orders were stayed vide this deptt. memo No.3378-2157/KII dated 9th April, 1964.

The Government have after considering the representations received in this connection decided that the condition of maintaining weighing scales by lessee may be relaxed as under:

(1) In case of those lessees:-

a) Who removed the entire ore by rail only.

b) Where such ore is weighed at the time of removal or the scales provided by the railway.

c) If the Mine owners put down the source of the ore in the challans, and

d) If they send such monthly statement of the exports to the DGM and the Collector concerned.

(2) In special cases where the entire ore is used for internal consumption as raw material, the quantity used in this case be assessed from the quantity and quality of finished product.

This supersede memo No.3378-2157/KII dated 9th April 1964.

By order and in the name of the
Governor of Madhya Pradesh
Sd/-
(K.S. Mehta)
Under Secretary to Government
Madhya Pradesh"

(iv) On 24th August, 1974, the Officer In-charge, Directorate of Geology and Mining sent Letter, which reads thus:

"कार्यालय प्रभारी अधिकारी
संचालनालय भौमिकी तथा खनिकर्म, मध्यप्रदेश
उपकार्यालय, जबलपुर

कमांक 1595/खनि/न.क.22/70, जबलपुर, दिनांक 24.08.74

प्रति,

भौमिकी तथा खनिकर्म, म. प्र.
डागा, बिल्डिंग, रायपुर ।

विषय :– ए0 सी0 सी0 कैमोर की रायल्टी एवं असेसमेंट बाबत।

संदर्भ :– आपका ज्ञापन कमांक 1818/खनि/2, दिनांक 29.7.74.

–0–

उपरोक्त विषय में सूचित किया जाता है कि इस संबंध में मैं खुद कैमोर गया था और स्थिति का अवलोकन किया। स्लरी के रसायनिक परिक्षण करने से कोई तथ्य नहीं होगा। क्योंकि स्लरी के बसाने के पूर्व ही लाइमस्टोन के साथ मिट्टी व लेटराइट मिला ली जाती है। जिससे लाइमस्टोन का ग्रेड बहुत कम हो जाता है। स्लरी में इसको तथ्य मानकर कोई कार्यवाही करना उचित नहीं होगा।

चूंकि कंपनी को रायल्टी लाइमस्टोन पर देना है। अतः उन्हें चाहिये कि खदान से कुल निकाले गये पत्थर की मात्रा दर्शाये एवं उसके साथ ही उसका ग्रेडिंग भी रखे। यदि कंपनी ये रिकार्ड नहीं उपलब्ध करा सकेगी तो उचित होगा कि पिछले लीज के तरह ही सीमेंट पर रायल्टी ली जाये। और एक टन सीमेंट पर 1.6 टन लाइमस्टोन काम में लाया ऐसा माना जाये।

उचित आदेशार्थ प्रेषित।

सही/–
प्रभारी अधिकारी

संचालनालय भौमिकी तथा खनिकर्म,
म. प्र. उपकार्यालय, जबलपुर"

(emphasis supplied)

This Letter provided guideline for assessment and determination of royalty amount with the conversion factor of 1.6:1. Another circular issued by the Directorate of Mining and Geology dated 29th December, 1977, reads thus:

"कार्यालय संचालक भौमिकी तथा खनिकर्म

मध्यप्रदेश

ज्ञा प न

कमांक 5098/खनिज/न.क. 36/77/रायपुर दिनांक 29, दिसंबर, 1977

प्रति,

सचिव,
मध्य प्रदेश शासन,
खनिज साधन विभाग,
भोपाल (म0प्र0)

विषय :– ए0 सी0 सी0 कैमोर से चूना पत्थर पर रायल्टी वसूली बाबत।

संदर्भ :– खनिज साधन विभाग/पृ.क. 1907/2913/12, दिनांक 24.5.77.

संदर्भित पृष्ठांकन का कृपया अवलोकन हो।

विभाग द्वारा परीक्षण के बाद यह निर्धारित किया गया है कि सामान्यतः एक टन सीमेंट के उत्पादन हेतु 1–60 टन चूना पत्थर का उपयोग में आता है। संपूर्ण प्रदेश में यही मापदण्ड निर्धारित किया गया है, इसी के आधार पर रायल्टी ली जाती है।

यदि पट्टेदार कम्पनी को इस मापदण्ड पर आपत्ति हो तो वह खनिज को तौलकर उपयोग में लाये एवं उसी आधार पर रायल्टी का भुगतान कर सकता है।

हस्ता0
प्रभारी अधिकारी
संचालक भौमिकी तथा खनिकर्म,
मध्यप्रदेश"

(emphasis supplied)

(v) The said petitioner had challenged the demand made by the Collector towards the royalty amount on the basis of conversion factor of 1.6:1 by filing revision under Section 30 of the Act of 1957 read with rule 55 of the Rules of 1960. That revision application (No.2 /MP-86/91-M.V/RC-II) was disposed of by the Tribunal directing the State Government to grant hearing to the petitioner on the question of requirement of weighbridge and conversion factor. The State Government was further directed to give reasonable opportunity to the petitioner-company to present their case regarding their claim for waiving the installation of Weighbridge as also their claim that the actual quantity of Limestone required for the manufacture of 1 Tonne of cement is 1.5 tonne and not 1.6 tonne.

(vi) The said petitioner had also filed Writ Petition in the High Court, being M.P. No.2175/1993. The said writ petition was disposed of by directing the Assessing Officer to give a proper and adequate hearing to the petitioner-company, including opportunity to produce the evidence in support of their case to substantiate their contention that the actual quantity of Limestone required for manufacture of 1 tonne cement in their plant was not 1.6 tonnes but 1.5 tonne or lesser. The Assessing Officer was directed to decide the case on the basis of the material brought on record by both the sides and without being influenced by the observations made by the Government of India vide final order dated 23rd August, 1993, whilst remanding the case to the State Government. The petitioner-company was asked to appear before the Assessing Officer who, in turn, was expected to re-assess the quantity of Limestone extracted by the petitioner-company afresh.

(vii) As aforesaid, the said petitioner had made representation to the State Government to dispense with the requirement of weighbridge and had raised objection to the conversion formula of 1.6:1. In response to the said representation, the Principal Secretary, Government of Madhya Pradesh after hearing the petitioner thought it appropriate to refer the matter to the Cement Research Institute (CRI) of India, Faridabad (later on became "National Council for Cement and Building Materials"). The petitioner is relying on the two reports of the said National Council for Cement and Building Materials, which dealt with the factors contributing to Limestone consumption and on which basis the average Limestone consumption per tonne of Clinker can be determined. The conclusions in the said report can be summed up thus:

"CONCLUSIONS

1. Limestone consumption factor was determined on the basis as explained in para 7.0 and found to be :

(i) **1.44** tonne per tonne of clinker on the samples collected by the NCB for a period of three days.

(ii) **1.42** tonne per tonne of clinker based on the chemical analysis data provided by the plant.

(iii) **1.42** tonne per tonne of clinker based on actual kiln food consumed and the kiln dust losses through stack.

(iv) **1.43** tonne per tonne of clinker when kiln dust stack losses and cooler stack losses together taken into account."

(viii) As regards the necessity of installation of weighbridge, the observations of the report of National Council for Cement and Building Materials reads thus:

"Hence, in case a weighbridge is installed, it will lead to lower productivity, higher equipment cost in the form of additional dumper, higher operational cost for the same leading to increased production costs of cement, higher fuel consumption which is scarce national resource.

In view of the above study it is recommended that the limestone booking on the basis of number of dumpers is adequate and there is no need to install any weighbridge for the same."

(ix) The said petitioners paid royalty from 1985 to 1999 based on National Council's reports. According to the petitioners, the Department did not raise any objection in that behalf. However, surprisingly, on 17th June, 1999, the petitioner received a show-cause notice from the Under Secretary as to why the stay order granted to the petitioner by the Principal Secretary dated 12th July, 1994 should not be vacated on the ground that a weighbridge has not been installed by the petitioner. The petitioner submitted reply to the said show-cause notice. After submission of the response, the petitioner came across the report of Taparia Committee which supported the claim of the petitioner about the conversion factor of 1.6 being excessive. The petitioner,

therefore, filed additional submissions relying on the Taparia Committee's report. The Under Secretary vide order dated 24th January, 2000, decided the matter rejecting the claim of the petitioner notwithstanding the fact that the hearing on the show cause notice was held before the Principal Secretary.

(x) The petitioner, therefore, challenged the decision by way of revision before the Tribunal constituted by the Central Government under the Act of 1957.

(xi) During the pendency of the said revision, the petitioner received demand notices on the basis of conversion factor of 1.6 which have also been challenged by the petitioner.

(xii) According to the said petitioner, the National Council for Cement and Building Materials submitted its report while the representation filed by the petitioner was pending. On the basis of the analysis done by the National Council, the Government of India issued a letter dated 20th March, 2002, under the signature of Joint Secretary regarding fixation of norms to determine the requirement of Limestone for manufacture of cement as 1:1.43 qua the petitioner. The petitioner, therefore, placed this communication along with an affidavit before the Revisional Authority. The said letter reads thus:

"File No.13(11)2002-Cem.
Dated the 20th March, 2002

To

The Principal Secretary,
Department of Mineral Resources,
Government of Madhya Pradesh.

Sub:- Fixation of norms for determining the requirement of Limestone for manufacture of cement.

Sir,

It has been brought to the notice of this Ministry that your Department vide circular letter dated 11.8.1993 has fixed consumption norm of 1.6 tonnes of limestone for manufacture of 1 tonne of cement and have provided for installation of weighing machines at the mines to monitor the quantity of limestone mined.

In this connection, it is stated that on the basis of requests of State Governments/other Government Departments, the National Council for Cement and Building Materials a premier R&D organization under the administrative control of this Ministry has conducted various fields studies for determining the norms of consumption of limestone for production of cement. The result of studies conducted by it in respect of Cement plants in the State of Madhya Pradesh is enclosed and indicates consumption norm of 1.43 in respect of Vikram Cement Plant. Since this norm has been arrived at after detailed scientific analysis carried out by the Council it would be desirable if the State Government could also consider the possibility of adopting the same.

At the same time, you are requested to review the condition of installation of weighing machines at the mines for the reason that heavy dust in the mining area hampers the correct working of the weighing machine. However, it is learnt that most of the cement companies are already using Beltometres for determining the quantity of the mined limestone.

Yours faithfully,
Sd/-
(S.JAGADEESAN)
Joint Secretary (Cement)"

(emphasis supplied)

(xiii) Notwithstanding the material produced by the said petitioner before the Revisional Authority, the Revisional Authority dismissed the revision application preferred by the said petitioner. The Revisional Authority, essentially, followed the decision in ACC's case decided on 10th April, 1992, by the Tribunal and affirmed by the High Court on 28th June, 1993, in M.P. No.1225/1993.

(xiv) Further, the decision of the Under Secretary vide order dated 24th January, 2000, was non-est in law, as being opposed to the principles of natural justice. Inasmuch as, the hearing of the proceeding was conducted before the Principal Secretary whereas the order has been passed by the Under Secretary. Moreover, the decision is founded on ACC's case,

notwithstanding the directions of the High Court to decide the matter afresh both on the question of waiving the requirement of installation of weighbridge as also on the fact that only 1.5 Metric Tonne or lesser quantity of Limestone was consumed for manufacture of 1 Tonne of cement in the plant operated by the said petitioner-company and not 1.6 Tonne as assumed.

(xv) However, considering the fact that other petitions are pending in this Court, which, in turn, have questioned the authority of the State Government to issue circulars dated 19th December, 1992 and 11th August, 1993, we may have to examine the other issues raised before us.

8. Reverting to the chronology of other relevant events, on 25th May, 1987, the State Government issued order for installation of weighbridges in the mining area by all cement industries to whom mining lease for captive consumption was granted. ACC Limited, inter alia, challenged that decision as also the conversion factor of 1.6 being excessive. The said Company had relied on its mining lease deed for Limestone and Clay executed prior to issuance of Circular (for conversion factor) by the Department. The relevant portion of Part-VI of the said mining lease reads thus:

"Part VI
PROVISIONS RELATING TO THE RENTS AND ROYALTIES

1. The rent, water rate and royalties mentioned in Part V of this Schedule shall be paid free from any deductions to the State Government at Jabalpur and in such manner as the State Government may from time to time prescribe PROVIDED ALWAYS and it is hereby agreed that Rs._____ the balance standing to the credit of the lessee on account of the deposit made by him as a licensee over an area which included the said lands shall be retained and accepted by the State Government in satisfaction of the rents and royalties mentioned in Part V until they reach that amount provided that the report required under Mineral Concession Rule 25 has already been submitted.

2. For the purpose of computing the said royalties, the lessee should keep correct accounts of the minerals produced and the products thereof manufactured and dispatched. The

accounts of the said minerals and the products thereof in stock or in process of export may be checked by the Officer authorized by the Central or State Government. For the purpose of assessing royalty------- hereinbefore -------the lessee shall submit to the State Government or such officer/officers of the State Government as may be specified in that behalf, half-yearly on the 15th day of March/September and on the 15th day of September/March a statement showing the quantity of clinker and cement manufactured and the quantity of both carried away or exported from the said lands during the period, along with the pit's mouth raising cost of limestone, as properly audited. The lessee shall also at all times submit audited books of account showing the quantity of limestone and clay used for manufacture of cement and the pit's mouth raising costs of the said minerals, and other particulars as may be demanded from time to time and in such form as may be prescribed to enable the State Government to assess and compute royalty payable according to these presents.

IT IS HEREBY AGREED that the sale value of the limestone as pit's mouth shall be arrived at by adding to the pit's mouth raising cost (as arrived at after proper audit and including overhead charges) twenty-five per cent thereof as profit and IT IS FURTHER AGREED that for the sake of convenience royalty shall be computed on the cement manufactured and sold and or exported or used by the lessee at the rate of 7 annas per ton of cement, so dispatched consumed, sold (reckoning that approximately 1.5 tons of limestone and certain amount of clay royalty on which at the present rate amounts to one anna are required in the manufacture of one ton of cement) so long as the pit's mouth raising cost of limestone does not exceed Rs.4/- per ton. For every increase of one rupee or fraction thereof in the said pit's mouth raising cost, there should be a corresponding increase of one anna six pies per ton of cement on which the royalty is computed.

3. Should the royalty and/or rent reserved and made payable by the lease be not paid within a space of two calendar

months next after the date fixed in the lease for the payment of the same, the State Government may enter upon the premises and distram all or any of the mineral or beneficiated products or movable property therein and may order the sale of the property so distrained or of so much of it as will suffice for the satisfaction of the rent and/or royalties due, and all costs and expenses occasioned by the non-payment thereof. -------- -- -- per annum on all arrears of the royalties and rents reserved and made payable by this lease from the date fixed for the payment of the same to the date of payment or recovery thereof."

(emphasis supplied)

9. The Tribunal, however, rejected the claim of ACC Limited vide decision dated 10th April, 1992. It may be useful to reproduce the relevant part of this decision containing the discussion/analysis which indeed has been pressed into service by the respondent-State for justifying the conversion factor of 1.6. The same reads thus:

"9. The crucial issue, therefore, is whether the State Government are right in applying a factor of 1.6 in the instant case because of the failure of petitioner to install a weighbridge.

10. It is admitted by the petitioner that he has not installed a weighbridge. The petitioner's argument that a weighbridge would be of no avail as both limestone and clay, which get mixed up during mining operation, cannot be weighed separately and weighing these two minerals together will not help in assessing the quantity of limestone used for manufacture of cement. The petitioner has also stated that since the State Government did not insist on such a condition in case of other lessees they should not have insisted on the petitioner to install a weighbridge. The State Government on the other hand has stated that it is possible to weigh limestone and clay separately as they occur in different horizons and an be mined separately. It was open to the petitioner to transport these two minerals in separate trucks and measure the trucks in the weighbridge. We find it difficult to accept the argument of the petitioner as clay and limestone being two different minerals have two

different rates of royalty and proper accounts of minerals used are required to be kept for computation of royalty.

11. In this regard it will be worthwhile to refer to the lease agreement between the petitioner and the State Government when the lease was renewed in 1969. Clause 2 of Part VI deals with mode of computation of royalty. It reads as follows:

> "For the purpose of computing the said royalties, the lessee shall keep a correct account of minerals, minerals produced and the products thereof manufactured and dispatched. The accounts of the said minerals and the products thereof in stock or in process of export may be checked by the officer authorized"

12. Part VIII clause 15 of the agreement requires the lessee to install a weighbridge. This is with the intention of calculating the quantity of minerals produced and dispatched. From the plain reading of the lease agreement it is abundantly clear that it is incumbent on the lessee to keep proper account of minerals produced and dispatched. In the instant case the lessee did not install the weighbridge which could have enabled him to keep proper account of the minerals dispatched. The lessee also did not evolve any alternate method of keeping accounts of minerals produced and dispatched. His argument is that in the absence of any alternate method the State Government should have followed the ratio of 1.5 which was adopted upto 1969. We are unable to accept this argument as though the previous agreement deed had specifically provided for such a ratio, the agreement at the time of renewal in 1969 had deleted such a provision; on the contrary, it was visualized that the lessee would set up a weighbridge. Had the lessee installed a weighbridge as contemplated, calculation of royalty would have been smooth and easy. Only when the lessee defaulted in installing the weighbridge instead of repeated reminders from the State Government, the State Government had no other option but to adopt a fresh factor for computing royalty; it was the same method, but a different factor.

13. The State Government have submitted that when on a

previous occasion a factor of 1.6 was followed it was because they were satisfied that it was the proper ratio of limestone to cement. That is why there was an express provision in the lease deed that a factor of 1.5 will be adopted. However in the '70s the State Government had noticed that the consumption ratio had changed and by and large 1.6 tonnes of limestone was used for manufacture of 1 tonne of cement. Therefore, a factor of 1.6 was used while calculating royalty. When the petitioner objected to this revised factor of 1.6, the State Government had got the matter checked by referring to various cement manufacturers. The State Government submitted replies received from several such manufacturers in the mid-'80s to how that a factor of 1.6 is more rational and realistic than a factor of 1.5.

14. We have perused the replies received from various cement companies. Satna Cement Works in its letter dated 9th May, 1984 has stated that 1.6 tonnes of limestone is required to manufacture 1 tonne of Portland cement based on its chemical composition. The figure calculated by Cement Corporation of India, Akaltara Cement factory in its letter dated 14th May, 1984 is also 1.6. M/s Raymond Cement Works, Gopalnagar, have also confirmed in their letter dated 7th May, 1984 that 1.6 M.T. of limestone is required to produce 1 tonne of cement. The Cement Corporation of India, Mandhar Cement Factory has given a range of 1.55 to 1.68 in its letter dated 5th June, 1984. Jamul Cement Works of the Associated Cement Companies Limited, i.e. another factory of the petitioner company, in letter dated 8th June, 1984 has quoted the figure of 1.58 tonnes. Century Cement in Baikunt district of Madhya Pradesh in its letter dated 5th June, 1984 mentioned that for 1 tonne Clinker 1.57 tonnes of ground limestone is required. Dalla cement factory of Uttar Pradesh State Cement Corporation Limited in its letter dated 4th April, 1987 has indicated that approximately 1.6 M.T. of average grade limestone is required for manufacture of 1 MT of Portland cement clinker. Orissa Cement Limited, Rajgangpur, Orissa has quoted the figure 1.55 in its letter dated 7th April, 1987.

This would show that different cement plants mostly in Madhya Pradesh and two outside Madhya Pradesh, have indicated that the requirement of limestone for one tonne of clinker would vary from 1.55 to 1.68 depending on the quality of limestone. Most of them have indicated that the requirement would be approximately 1.6 MT. In the face of this evidence, the action of the State Government in adopting a factor of 1.6 does not appear to be arbitrary or unjust. On the other hand, the petitioner company has not produced any evidence or document before us to prove that it would have been more reasonable to adopt a factor of 1.5. Its only argument is that a factor of 1.5 which had been used between 1959 to 169 should also have been used for the subsequent period. According to the petitioner company this particular factor has no sanctity as such. It has to be based on rational and reasonable considerations. In the instant case the State Government adopted a factor of 1.6 after taking into consideration the consumption of limestone by cement plants similarly situated. They have also been guided by the representation of cement manufacturers before Tariff Commission wherein they had represented for the necessity of using higher usage ratio of the order of 2.2 as against 1.55 between limestone and Clinker (para 18.2.4 of the Tariff Commission on the Comprehensive Review of the Cement Industry and Revision of Fair Ex-works Prices Payable to the Producers, Bombay, 1974).

15. The next question is whether the State Government had given adequate and reasonable opportunity of hearing to the petitioner company before passing the impugned order. The petitioner has accused the State Government that no opportunity was given to it before the order was passed. On the other hand, the State Government have stated that on the representation of the petitioner, the demands raised by the Additional Collector, Katni were stayed. The petitioner was given a number of opportunities to represent its case. It was given dates on 19th December, 1988, 21st December, 1989 and also 30th April, 1990 and finally on 18th May, 1990. The petitioner company had filed written submissions on 4.1.9. On

18th May, 1990 the State Government after hearing the petitioner's representative and considering the petitioner's written submissions passed the impugned order. The State Government was satisfied under the facts and circumstances of the case that a factor of 1.5 was most appropriate and reasonable. It was also the conscious decision on the part of the State Government to defer consideration of other points mentioned in the Additional Collector's notice as the petitioner's application for renewal of mining lease was pending. According to the State Government such deferment of consideration of other points should in no way vitiate the decision of the State Government regarding additional royalty to be paid by the petitioner company based on a factor of 1.6.

16. After considering the written and oral submissions made and the fact and evidence on record, we are satisfied that the State Government had afforded due opportunity to the petitioner of personal hearing before they decided about the additional royalty etc. payable by the petitioner. It was incumbent on the petitioner to maintain correct and proper accounts of minerals produced and dispatched which the petitioner has failed to do. Under the circumstances, therefore, the State Government adopted the next best course open to them for computation of royalty by applying a usage ratio or a conversion factor between limestone and cement. While arriving at the factor, it appears that the State Government was guided, interalia, by the experience of other cement factories in and outside Madhya Pradesh. Since the State Government have adopted a factor of 1.6 which is followed by many other cement plants as well, before applying such a factor the State Government had given reasonable opportunity of personal hearing to the petitioner, we find the action of the State government just, fair and reasonable under the facts and circumstances of the case. We, therefore, do not find any valid ground or justification to interfering with the impugned order of State Government."

(emphasis supplied)

10. After this decision of the Tribunal, ACC Limited installed weighbridge and made it operational from 23rd April, 1992. That fact was communicated to the Authorities on 7th August, 1992.

11. Be that as it may, the Under Secretary of the Mineral Resources Department, Government of Madhya Pradesh issued the impugned circular on 19th December, 1992, which reads thus:

"मध्यप्रदेश शासन
खनिज साधन विभाग

—0—

कमांक एफ. 19—10/87/12/2पी.एफ. दिनांक 19—12—1992

प्रति,

कलेक्टर,
जिला————,
मध्यप्रदेश ।

विषय :— भारत के नियंत्रक महालेखा परीक्षक की रिपोर्ट वर्ष 87—88 तौल मशीन के स्थापना के विकल्प के रूप में परिवर्तन सूत्र के आधार पर रायल्टी का निर्धारण।

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खान रियायत नियमावली 1960 के तहत खनिपट्टा अनुबंध के फार्म "के" के भाग सात की कण्डिका 13 के अनुसार प्रत्येक पट्टेदार को खान क्षेत्र से खनिज/खनिजों की निकासी के तौल हेतु तौलमशीन स्थापित करनी आवश्यक है, लेकिन यह देखा गया है कि कई पट्टेदारों द्वारा तौल मशील नहीं लगाई गई है। इस संबंध में पट्टेदारों को नोटिस देने पर उनके द्वारा अपनी कठिनाईयां बताई गई है जिस पर विचार करने हेतु समिति का गठन किया गया है।

उद्योगों द्वारा तौल मशीन न लगाने से उनके द्वारा खपत किये गये सही खनिज का आंकलन करना कठिन हो रहा है जिससे कर निर्धारण करने में कठिनाईयां आ रही है। अतः यह निर्णय लिया गया है कि सीमेन्ट संयंत्रों हेतु स्वीकृत खनिपट्टा क्षेत्र में पट्टेदारों द्वारा तौल मशीन नहीं लगाई गई है तो उनका कर निर्धारण एक टन सीमेन्ट बनाने हेतु 1.6 टन चूना पत्थर को आधार मान कर किया जावे। इसकी सूचना संबंधित पट्टेदारों को भी दी जावे।

हस्ता0

(एन. के. देसाई)
अवर सचिव
मध्यप्रदेश शासन
खनिज साधन विभाग"

(emphasis supplied)

12. Being aggrieved by the decision of the Tribunal dated 10th April, 1992, ACC Limited had preferred writ petition in this Court, being M.P. No.1225/1993. The Division Bench of this Court summarily dismissed the said writ petition vide order dated 28th June, 1993, with the following observations:

> "Shri Y.S. Dharmadhikaree, Adv., for the petitioners, heard on the question of admission.
>
> The petitioners hold quarry lease for extraction of limestone for manufacturing cement. It appears that in the process of extraction, the petitioner extracted not only the limestone but also some clay, which was found embedded in layers of lime-stone. Admittedly, the petitioner did not keep any account of quantity of clay extracted in this process and hence the question arose as to how much actual limestone was extracted so as to subject the said quantity to payment of royalty. The respondents, with the help of experts devised a formula based on consumption of limestone per ton, in manufacture of cement and on that basis fixed the quantity chargeable to royalty. It is this decision, which is under challenge in this petition. The fact that the petitioners have themselves not kept any account of the quantity of clay extracted by them, is enough to justify adopting a formula for determining the royalty payable limestone. The basis for determining this quantity being the cement, per ton in manufacture of cement, cannot be said to be unreasonable or arbitrary. This Court does not have expertise to devise a better formula for the purpose. Since this Court finds the formula justified, no case for entertaining the petition exists, which fails and is dismissed summarily."

(emphasis supplied)

13. After the decision of the High Court, the State Government issued

another impugned Circular on 11th August, 1993, under the signature of the Under Secretary, Mineral Resources Department, Government of Madhya Pradesh, which reads thus:

"मध्यप्रदेश शासन
खनिज साधन विभाग

एन. के. देसाई
अवर सचिव

भोपाल, दिनांक 11/08/1993

विषय :– सीमेंट संयंत्रों द्वारा चूना पत्थर की खपत पर कर निर्धारण।

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कृपया उपरोक्त विषय पर दिनांक 19.12.1992 को जारी किए गए निर्देशों का कृपया अवलोकन करें। उनके अनुसार यह आदेशित किया गया था कि जिन सीमेंट संयंत्रों द्वारा स्वीकृत खनिपट्टा क्षेत्र में तौल मशील नहीं लगाई है उनका कर निर्धारण 1.6 टन चूना पत्थर प्रतिटन सीमेंट के आधार पर किया जाये।

यह ज्ञात हुआ है कि उपरोक्तानुसार कार्यवाही नहीं की जा रही है एवं कुछ सीमेंट संयंत्रों द्वारा जिन्होंने तौल मशीनों से तौल करके हिसाब रखा है, **चूना पत्थर की खपत की मात्रा इतनी कम बताई जा रही है कि उसके आधार पर सीमेंट बनाना संभव ही नहीं है।** अतः सीमेंट संयंत्रों द्वारा खपत किए गए चूने पत्थर का कर निर्धारण करते समय यह ध्यान में रखना आवश्यक है कि उनके द्वारा कितने, सीमेंट का उत्पादन किया गया एवं उसमें प्रतिटन सीमेंट बनाने हेतु 1.6 टन से कम चूना पत्थर की खपत बताई गयी है **तो यह स्पष्ट है कि पट्टेदार द्वारा चूने पत्थर की खपत का सही हिसाब नहीं रखा जा रहा है।** अतः ऐसे सभी प्रकरणों में कर निर्धारण के समय सीमेंट के उत्पादन एवं चूना पत्थर की खपत का तुलनात्मक अध्ययन कर, कर निर्धारण करना अत्यंत आवश्यक है। कर निर्धारण का आधार वास्तविक तौल या 1.6 टन प्रति टन सीमेंट **जो भी अधिक हो,** का मापदंड अपनाया जाये। कृपया इसका कड़ाई से पालन किया जाने तथा इस संबंध में की गयी कार्यवाही से मुझे अवगत कराया जाये।

(प्रमुख सचिव द्वारा अनुमोदित)

हस्ता0
(एन. के. देसाई)
अवर सचिव,

मध्यप्रदेश शासन
खनिज साधन विभाग"

(emphasis supplied)

14. Although ACC Limited had installed Weighing Machine, but, according to the Authorities, it was not possible for them to manufacture cement on the basis of consumption of Limestone shown by them. For that reason, the Appropriate Authority issued demand towards royalty amount on the basis of conversion factor of 1.6:1. Being aggrieved by the said demand, ACC Limited filed writ petition in this Court being Writ Petition No.516/1996. That writ petition was heard along with other companion petitions, in all 17 petitions, by the learned Single Judge. The learned Single Judge on the basis of rival submissions formulated 13 points for consideration as under:

> "26. The following points arise for consideration in these petitions:-
>
> (1) Whether circular Annexure R/2 amount to imposition of tax on major mineral by State Government; hence beyond state legislative and executive power and State has imposed royalty on unused quantity of lime stone;
>
> (2) Whether Annexure R/2 violates section 9 of Mines & Mineral Development Act, Mineral Concession Rules, 1960 and condition of lease deed;
>
> (3) Whether petitioners are violating the condition of not establishing the "weigh bridges" at each of pithead; if yes, whether State could only take the action to determine lease;
>
> (4) Whether State has imposed royalty on processed material thus have changed the taxing event;
>
> (5) Whether action of State as per Annexure R/2 by prescribing minimum consumption ratio of limestone in manufacture of 1 ton of cement is a step towards making grant of right to make assessment of royalty effective and to prevent evasion of royalty;
>
> (6) Whether Beltometer is an effective measure hence conversion factor is bad in law;

(7) Whether condition to establish weigh bridge is bad in law;

(8) Whether Rule 64B and 64C of Rules are declaratory and have retrospective operation and supersede Annexure R/2 of 37 Aug.11, 1993;

(9) Whether conversion factor is not reasonable and is based on assumption and could not be applied uniformly to all cement manufacturers;

(10) Whether conversion factor has been imposed without hearing; thus, bad in law;

(11) Whether State has acted in violation of Article 14 in picking up only cement manufacturers for application of formula;

(12) Whether conversion factor could not be imposed with retrospective effect in WP124/96;

(13) Whether decision of Division Bench of this Court in MP No.1225/93 holding that conversion factor of 1.6 is proper is binding; if yes, to what extent?"

After analyzing the rival submissions and keeping in mind the legal precedents, the learned Single Judge answered the aforesaid issues against the petitioners and consequently dismissed their writ petitions by a common judgment dated 15th May, 2002.

15. Against that decision, writ appeals have been filed which were heard together along with other writ petitions forming part of this group of cases. It may be noted that during the pendency of the said appeals, the Letters Patent Appeal was abolished. However, subsequently due to enactment of Madhya Pradesh Uchcha Nyayalaya (Khandpeeth Ko Appeal) Adhiniyam, 2005, the said Appeals stood revived and are, therefore, being heard together. As a matter of fact, the said writ appeals were disposed of by common judgment dated 4th August, 2009 with a direction to the State Government to constitute a Technical Committee and afford an opportunity of hearing to each of the appellants and thereafter the Committee to pass reasoned and cogent order. The Technical Committee was expected to deal with the matters regard being

had to the product and technology involved in each case and facts which are peculiar to that case. The Committee was directed to take final decision in the matter within four months from the date of commencement of hearing. However, later on, the Committee was not constituted. Therefore, review petitions came to be filed and those petitions were allowed by recalling the order dated 4th August, 2009, on 20th November, 2009. As a result, the writ appeals have been restored back to the file to its original number for being heard afresh on merits. This is how the writ appeals have come back for hearing before us along with the writ petitions filed by different petitioners from time to time questioning the conversion factor of 1.6:1 applied by the Authorities.

16. Some of these petitions have been filed by the petitioners who have already installed Weighing Machine as in the case of ACC Limited. Another set of petitions have been filed by the petitioners who have installed Beltometer instead of Weighing Machine. The third set of petitions are filed by those who have failed to install Weighing Machine as well as Beltometer. In the first two categories, it is possible that the Weighing Machine/Beltometer installed by the concerned petitioner is not as per the technical specifications or may have become defective. In either case, it will be of no use for computing the accurate quantity of Limestone excavated by the concerned Unit which in turn has been utilized for manufacture of Cement/Clinker. We will advert to this aspect a little later.

17. (i) Shri Kishore Shrivastava, learned Senior Counsel invited our attention to the provisions of the Act of 1957 and Rules of 1960. He submitted that the entire field regarding major mineral is occupied by List-I of the VII Schedule of the Constitution. As a result, the State Legislature much less the State Government is not competent to prescribe mode of assessment/ computation. He relies on the decision of the Apex Court in the case of *Baijnath Kadio vs State Of Bihar & 40 Others* [1] (para 13 to 17, 19 and 21); *The India Cement Ltd etc. etc. vs State of Tamil Nadu etc*[2] (para 32 to 34); *State of M.P. vs Mahalaxmi Fabric Mills Ltd. and others*[3] (para 8 to 14). He then submits that if the State Legislature could not deal with the matter of mode of assessment/computation, the State Government cannot be allowed to exercise executive powers relating to that subject or for that matter issue administrative instructions. In that case, it is not open to the State

1. (1969) 3 SCC 838
2. AIR 1990 SC 85
3. (1995) Supp (1) SCC 642 = AIR 1995 SC 2213

Government to invoke Article 162 of the Constitution. He relied on Article 246 of the Constitution and would contend that the prescription of mode of assessment/computation can be only by way of legislation on that subject by the Parliament. Reliance is placed on the decisions of the Apex Court in the case of *Kunnathat Thathunni Moopil Nair etc vs State of Kerala and another* [4] (para 7) which has taken the view that tax can be imposed only by law made by the Parliament or State Legislature. Reliance is also placed on the Apex Court decisions in the case of *The Commissioner, Hindu Religious Endowments, Madras vs Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [5](para 43); and *State of Gujarat and others vs. Akhil Gujarat Pravasi V.S. Mahamandal and others*[6] (para 11) to point out the distinctive features to constitute tax. As a matter of fact, contends learned counsel that the impugned circulars ex facie are not executive orders. For, the same are not issued in the name of Governor. For that reason, the Circulars do not have the force of law. Reliance is also placed on the decisions of the Apex Court in the case of *Bachhittar Singh vs State of Punjab and another*[7] (para 9); *M/s Devi Das Gopal Krishnan, etc. vs State of Punjab & others* [8] (para 16); *A.N. Parasuraman and others vs State of Tamil Nadu*[9] (para 5); and *Kunj Behari Lal Butail and others vs State of Himachal Pradesh and others*[10] (para 14). He further submits that so far as the petitioners for whom he is appearing, the Circulars will have no application having regard to the fact that the said petitioners have already installed Weighing Machine as per the specifications. The question of invoking notional conversion factor qua those Units would be impermissible in law. According to him, the actual consumption of Limestone for manufacture of Cement by the Units represented by him is much less than the notional conversion factor of 1.6:1. As a necessary corollary, the amount demanded and to be collected by the State would be in the nature of collection of tax and not royalty as such. He further submits that unless the Authorities were to record a positive finding about improper maintenance of accounts and record maintained by the concerned Unit or for that matter about the installation of Weighing Machine not in accordance with the specifications or about its improper functioning, it is not open to the Authority to invoke notional

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4. AIR 1961 SC 552
5. 1954 SC 282
6. (2004) 5 SCC 155
7. AIR 1963 SC 395
8. AIR 1967 SC 1895
9. (1989) 4 SCC 683
10. (2000) 3 SCC 40

conversion factor. Such finding is the quintessence for resorting to assessment on the basis of conversion factor. Learned counsel also invited our attention to clause 13 of Form- K. He submits that on plain language of the said provision, the Weighing Machine is expected to be installed at or near the pit head. The expression "pit-head" has not been defined in the Act or the Rules nor in the lease deed. He relied on the decision of the Apex Court in the case of *Panyam Cements and Minerals Ltd. Vs. Union of India and others*[11] (para 7, 8 and 13), which throws light on this exposition.

(ii) He has relied on the provisions of rule 51 of the Rules of 1960 to point out that the assessment must be based on the return filed under that provision and, therefore, cannot be made on notional basis, more so, in absence of any finding by the Authority about the inaccuracy and misleading contents of the said returns. He has placed reliance on the decision of the Apex Court in the case of *Assistant Collector of Central Excise, Calcutta vs National Tobacco Co. of India Ltd* [12] (para 20),which expounds about the term "assessment". Reliance is also placed on the decision of the Apex Court in the case of *Duncans Agro Industries Ltd. Calcutta V. Commissioner of Central Excise, New Delhi* [13] (para 21) to contend that there cannot be two assessments for the same period. Our attention is also invited to the decision of the Apex Court in the case of *The Commissioner of Sales Tax, Madhya Pradesh v. M/s H.M. Esufali*[14] (para 8) to contend that before resorting to best judgment assessment, the returns submitted must be considered and rejected as untrue or false after examining the records. In absence thereof, the Authority cannot assume jurisdiction to hold to the contrary much less invoke notional conversion factor. He has also placed reliance on the decision of the Apex Court in the case of *M/s Raghubar Mandal Harihar Mandal vs State Of Bihar*[15] (para 5) and *State of Orissa vs Maharaja Shri B.P. Singh Deo*[16] (para 4) to contend that after rejecting the return, exercise of best judgment assessment can be resorted to by the Assessing Officer. He submits that the earlier decision in the case of petitioner (ACC Limited) will be no impediment - either on the principle of *res judicata* or binding precedent. In the earlier proceedings, the lease condition specified royalty amount on the basis of conversion factor of 1.5:1. Moreover, the two Circulars which are

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11. (2003) 5 SCC 756
12. AIR 1972 SC 2563
13. (2006) 7 SCC 642
14. AIR 1973 SC 2266
15. AIR 1957 SC 810
16. (1971) 3 SCC 52

impugned in the present proceedings were not the subject matter of challenge. He relied on the decisions of the Apex Court in the case of *Amalgamated Coalfields Ltd. and another v. Janapada Sabha Chindwara and others*[17] (para 24); and *Bharat Sanchar Ltd. and another v. Union of India and others* [18] (para 20 and 21) to contend that if the demand impugned is for the different period, principle of *res judicata* has no application. Besides, if the challenge raised in the present proceedings to the impugned circulars was not and could not be raised in the earlier petition, *res judicata* will have no application. He has then relied on the decisions of the Apex Court in the case of *Jagdish Lal and others v. State of Haryana and others*[19] (para 17); and *State of Orissa and others vs. MD. Illiyas*[20] (para 12) to contend that the judgment in the previous proceedings cannot be cited as precedent much less a binding precedent. For, it has decided matters in issue and is a precedent for those facts. He further submits that in any case, the claim of interest by the Assessing Officer is without authority of law. Inasmuch as, interest is payable only in respect of admitted liability or adjudicated liability. In the present case, the petitioners have not admitted their liability on the basis of conversion factor of 1.6 nor there was any adjudication by the Assessing Officer in conformity with the procedure established by law. The Assessing Officer without scrutiny of the returns has proceeded to apply the notional conversion factor. Until such adjudication is done, the question of fastening of liability of interest on the petitioners will not arise.

(iii) In response to the reply given by the respondents, he submits that the fact that the petitioners have been paying royalty amount as per the lease deed on the basis of conversion factor of 1.5 can be no impediment in challenging the demand if it is not in conformity with the provisions of law. There can be no estoppel against law. He submits that the lease deed in favour of the concerned petitioner was executed before the Act of 1957. That gets validated by virtue of Section 33 of the Act of 1957. According to the learned counsel, the Department had issued Circulars requiring the lessee to install Weighing Machine and the conversion factor of 1.6 could be applied only in cases where the Companies had failed to install the Weighing Machine. The impugned Circular dated 11th August, 1993, will have to be understood and conjointly read along with the earlier Circulars. No other meaning is conveyed on conjoint

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17. AIR 1964 SC 1013
18. AIR 2006 SC 1383
19. (1997) 6 SCC 538
20. (2006) 1 SCC 275

reading of the said Circulars. He further submits that the decision of the Tribunal which has been upheld by the High Court in the earlier proceedings with regard to the justness and reasonableness of the conversion factor of 1.6 cannot denude the said petitioner (ACC Limited) from contending that the Assessing Officer has to undertake scrutiny of the returns filed by the Assessee and record finding about inaccuracy or untruthfulness of that record, before invoking the notional basis of conversion factor of 1.6. Taking any other view would entail in supplanting of Section 9 of the Act of 1957 and rule 27 of the Rules of 1960. As a matter of fact, while doing scrutiny, the Assessing Officer is obliged to examine several factors including the quality of finished product as is expounded in the Circular dated 2nd May, 1967. He submits that the Circular dated 11th August, 1993, in that sense is a departure from the earlier stand of the Department which aspect can be agitated by the ACC Limited notwithstanding the decision of the Tribunal in the previous proceedings. He contends that the decision in the case of *Guman Singh Vs. State of Rajasthan and others*[21], in fact, supports the argument of the petitioners that notional basis can be invoked only in exceptional cases. He submits that the said decision is not in respect of provisions governing the best judgment assessment as is applicable to the case on hand; and more so that matter pertained to minor mineral unlike major minerals in the present case. He further submits that Section 15 of the Act of 1957 can be invoked by the State only by making Rules on the subject and not by issuing Circulars or administrative instructions.

18. Shri A.K. Chitley, learned senior counsel besides adopting the above arguments, in addition, submitted that Section 15 of the Act is a rule making power. Section 23-A of the Act of 1957 deals with compounding of offences and including refers to rule made under the Act to deal with subject of illegal mining. In the context of these provisions, he submits that if the Authority was of the opinion that the disclosure made by the Company in its return was not honest, it could resort to other remedy, provided by the statute itself. However, on that opinion, it is not open to straightway invoke the notional conversion factor. He submits that, in any case, it is impermissible to apply uniform conversion formula to all the Factories/Cement Industries. Such notional basis is not applied to any other Industry excavating Limestone. He submits that the Circulars are not only arbitrary but discriminatory. He has placed reliance

21. (1996) 11 SCC 157

on the decisions of the Apex Court in the case of *Kunnathat Thathunni Moopil Nair* (supra) (para 7); and *M/s Chhotabhai Jethabhai Patel and Co vs Union of India and another*[22] (para 33). It is held that Article 265 mandates that all taxation - the imposition, levy and collection shall be by law; and that the Article beyond excluding purely administrative action does not by itself lay down any criterion for determining the validity of such a law to justify any contention that the criteria laid down exclude others to be found elsewhere in the Constitution for laws in general. Accordingly, he submits that it was not open to the State to introduce notional criteria for the mode of assessment by issuing Circulars or communications. Inasmuch as, the impugned Circulars provide for the mechanism of assessment which can be prescribed only by a law made by the Parliament or the Rules made thereunder. He submits that the factors influencing the consumption of Limestone during the manufacture of cement or Clinker would be materially different. It would also further depend on the technology used by the Unit and the method of processing employed by the concerned Unit. The outcome would depend on several variables and cannot be applied as a straight-jacket formula as is the attempt in the impugned Circulars. To buttress this contention, he has relied on the formula devised by the Taparia Committee constituted by the State Government to ascertain the conversion factor. Even the said Committee assumed the conversion factor to maximum 1.516 for Clinker and 1.444 for Cement. Similarly, the National Council has recommended average Limestone consumption per tone of Clinker as 1.44 and the letter issued by the Government of India dated 20th March, 2002 as 1.43:1 for manufacture of cement. He submits that the conversion factor determined by the State Government referred to in the impugned Circulars is, therefore, unrealistic and arbitrary. Further, the State Government has taken factor on the higher side and not the lowest factor mentioned by the concerned experts. Even for that reason, the notional conversion factor specified in the impugned Circulars is unsustainable. He submits that the said factor has been devised behind the back of the Cement Industry and without giving any opportunity to them by the State Government. Thus, the formula specified by the State Government is artificial, unrealistic and without application of mind. He submits that assuming that the notional conversion factor can be permitted, it cannot be applied Industry-wise, but, should be determined Unit-wise on the basis of past performance of the concerned Unit.

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22. AIR 1962 SC 1006

He submits that assessment of royalty is a quasi judicial function and there can be no mandate to decide it in a particular manner. The impugned circulars inevitably result in issuing direction to the Assessing Officers to complete the assessment proceeding in a particular manner irrespective of the record placed before the Assessing Officer. That cannot be countenanced. He has placed reliance on the decision of the Apex Court in the case of *Orient Paper Mills Ltd. Vs Union of India*[23] (para 4 & 5). He further submits that the petitioners for whom he was appearing have installed Beltometer. That discharges the same function as that of Weighing Machines installed at the pit head for weighing the Limestone consumed for manufacture of Cement. According to him, unless the record of the Beltometer presented by the concerned petitioner was found to be incorrect or untruthful, the question of invoking notional conversion factor will not arise. He submits that the assessment must be made keeping in mind the provisions of Section 9 (2) of the Act read with Rules 27 and 51 of the Rules of 1960. He further submits that the amount towards interest demanded by the Assessing Officer is without authority of law. The question of paying interest, in the fact situation of the present case, did not arise at all as the petitioner has neither admitted its liability nor any adjudication has been done in that regard.

19. Shri M.L. Jaiswal, and Shri R.S. Jaiswal, learned Senior Advocates appearing in respective petitions/appeals have adopted the above arguments but would additionally contend that as regards Limestone, the same is mentioned in the Second Schedule of the Act against Serial No.24. That does not provide for ad valorem rate of royalty unlike in all other cases. Instead, rate of royalty is prescribed as Seventy-two rupees per tonne and Sixty-three rupees per tonne respectively. The same position applies to Lime Kankar and Limeshell. They submit that the percentage of silica is the quintessence for determining the liability towards royalty. They submit that Calcium Carbonate contents are bound to be different. Further, a common conversion formula cannot be applied as cement is broadly of three types (a) Stag-lime Cement (b) Portland Cement (c) Pozzolana Portland Cement. Each type contains different specifications. This crucial aspect has been glossed over while prescribing the uniform conversion formula. In other words, the said formula is irrational, unscientific and arbitrary. They further submit that going by the provisions of the Act and the Rules and including the covenants in the lease

23. (1970) 3 SSC 76

deeds, the liability to pay the royalty arises only upon removal and consumption of Limestone and not otherwise. That factum cannot be assumed. They have invited our attention to the provisions of Standards of Weights and Measures Act, 1976; Legal Metrology Act, 2009; and the Rules framed under the respective enactment to contend that Beltometer/Conveyor Weighing Machine is a recognized devise for recording weights. They submit that since the field is already occupied by the concerned Central enactments which are a self-contained code, it is not open for the State Government to expound to the contrary. Reliance is placed on the decision *Bharat Coking Coal Ltd. and others vs State of Bihar and others* [24] to point out that the State executive power is co-extensive with its legislative power and the State is denuded of its legislative competence on a subject in respect of which Parliament is exclusively competent to legislate. They submit that the Act of 1957 and the Rules of 1960 framed thereunder including Form- K in the Rules are complete Code in itself. It not only contains charging provision but also provide for the mode of assessment. They submit that the royalty amount must be uniform throughout the country. By virtue of impugned circulars, different mode of assessment is introduced with regard to the Cement Companies in the state of Madhya Pradesh, although the liability to pay the royalty arises under the Central Act. He has placed reliance on the decision of the Apex Court in the case of *Sandur Manganese and Iron Ores Limited vs. State of Karnataka and others*[25] which has taken the view that it is not open to the State Government to justify grant based on criteria that are *dehors* the Act of 1957 and the Rules of 1960. Reliance is also placed on the decision of the Apex Court in the case of *Mahalaxmi Fabric Mills Limited and others* (supra) (para 15 to 17) to contend that the fixation of royalty should have a direct nexus with the minerals throughout the country on uniform pattern so that activity of winning the minerals for the benefit of the lessees of such mining leases in the first instance and ultimately for the economy as a whole should not get in any way frustrated. They submitted that each of the petitioners had filed returns and have paid royalty on the basis of actual consumption of Limestone for manufacture of Cement in their Units. The quantity of Limestone has been worked out on the basis of the record of Beltometer operated in the concerned Units. As per the report, Annexure P/13, in Writ petitions, for whom the learned counsel were appearing, actual consumption factor was 1.463 and 1.491 respectively which

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24. (1990) 4 SCC 557

25. (2010) 13 SCC 1

was far below the notional conversion factor of 1.6.

20. Per contra, Shri Samdarshi Tiwari, learned counsel for the State has prayed for dismissal of all the petitions and appeals. According to him, the issues raised by the petitioners during the hearing have already been answered by the learned Single Judge. Besides placing reliance on the decision of the learned Single Judge, he has countered the arguments of the petitioners/ appellants. He, primarily, argued that the two Circulars which are subject matter of challenge are in the nature of administrative instructions. There was no impediment for issuing such Circulars concerning the mode of assessment and more so when the Act of 1957 nor the Rules of 1960 prescribe any mode of assessment to the contrary. As a matter of fact, the said Act and the Rules make no provision regarding the mode of assessment. As a result, the State Government in public interest directed to resort to the mode of assessment specified in the impugned Circulars. The basis mentioned in the said Circulars was in the backdrop of the past experience and the information derived by the Authorities from the Industry before issuing the said Circulars. According to him, the conversion factor mentioned in the Circular is founded on tangible basis. In fact, none of the lessees ever disputed their liability to pay royalty in respect of Limestone consumed by them on the conversion factor of 1.5:1. They paid the royalty amount on that basis without any demurrer. However, it is only when the conversion factor was changed to 1.6:1 after due consideration of all aspects, dispute has been raised by the cement companies. That dispute was taken up to the Central Tribunal as well as this Court at the instance of ACC Limited and it has been held that the conversion factor of 1.6 is just, reasonable and proper. That decision has attained finality. That is not only binding on the company at whose instance it has been rendered, but, also on this Court as a binding precedent. The learned Single Judge after considering all aspects of the matter has reiterated that the notional conversion factor of 1.6:1 does not warrant any interference. As a matter of fact, under the statutory lease, the lessees are obliged to provide Weighing Machine and comply with the specifications therefor. Even if such Weighing Machines have been provided by some of the petitioners, it has been found that the same do not reveal the accurate position regarding the quantity of Limestone excavated. Further, these very cement companies have contended that it is impossible to install Weighing Machine as provided in the statutory lease. Considering the above, in the larger public interest, it was decided to specify conversion factor which could be made the basis for assessment. In other words, even if the

Weighing Machine is installed, that would not denude the Authorities from resorting to notional conversion factor of 1.6 which has been arrived at on the basis of past experience. He further submits that, in any case, the question of doubting the validity of the two Circulars does not arise. In that, the State Government was competent to issue such Circulars providing for mode of assessment. In the alternative, he submits that the said Circulars are only administrative instructions and guideline given to the Assessing Officers. He submits that the impugned Circulars are ascribable to rule 64 read with rule 54 of the Rules of 1960. In support of his submissions, reliance is placed on the decisions of the Apex Court in the case of *A.P. Aggarwal vs. Govt. of NCT of Delhi and another* [26] (para 10 & 11); *Guman Singh* (supra) and of this Court in the case of *M/s Neogy & Sons. and others vs. State of M.P. and others*[27] (para 6 & 8 to 10).

21. The counsel appearing for the petitioners in Writ Petition Nos.4182/2013; 5090/2012 and connected matters; and, 7860/2009 and connected matters, respectively, have filed written submissions on record at the conclusion of the oral argument reiterating the points mentioned hitherto. We may also place on record that Shri Kishore Shrivastava, Shri A.K.Chitley, Shri M.L. Jaiswal and Shri R.S.Jaiswal, learned senior Advocates and Shri Samdarshi Tiwari, learned Government Advocate respectively had submitted compilation of judgments, but, during the arguments pressed into service only those judgments which are noted hitherto.

22. (i) We shall now revert to the decision of the learned Single Judge which is the subject matter of appeals under consideration. The learned Single Judge has found that the State has not attempted to impose tax as such. Under the Rules, the State has power to collect the rent and the royalty. The mode of assessment of royalty is within the purview of the State Government. The Circulars provide for mode of assessment and conversion factor of 1.6 to assess the quantity of Limestone used in manufacture of 1 tonne of Cement. Further, the State has attempted to control the large scale evasion of royalty by specifying uniform conversion factor of 1.6 for all cement industries within the State and thus obviate violation of the provisions of the Act, Rules and various clauses of the Agreement. That conversion factor has co-relation with the quantity of mineral extracted, which is the essence of Section 9 of the Act

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26. (2000) 1 SCC 600

27. AIR 1998 (M.P.) 117 (D.B.)

of 1957. The royalty is in respect of mining lease on the minerals removed or consumed. That formula is based on sound scientific data. It is not harsh to either party. The State has not departed from the basic principle "removed or consumed". Therefore, it could prescribe the conversion factor which does not amount to legislation, but, is intended to ensure that the royalty is paid as per the provisions of the law.

(ii) It is further held that by prescribing the conversion formula, the object and purpose of the Act is furthered and not defeated in any manner as the conversion formula is based on the quantity removed or consumed. It is further held that the installation of Weighbridges is not rendered redundant. The obligation to weigh the extracted and consumed mineral would continue and would be relevant if it is found that the consumption is more than the conversion factor. In that case, higher weighment will be reckoned for charging the royalty amount.

(iii) The argument that the State Government has exercised the power exclusively within the domain of Parliament has been rejected. Similarly, the argument that the State Government by introducing conversion factor of 1.6 has enhanced the rate of royalty has also been rejected on the finding that the conversion factor has been deduced by applying scientific principles.

(iv) The argument of the petitioners that it is open to the Authorities to resort to other option in case of filing of inaccurate or untrue returns, has been negatived on the finding that availability of such option does not denude the State from prescribing mode of assessment and uniform conversion factor which is founded on scientific principles. Even the option of cancellation of lease is the last option and in any case that would not extricate the licensee/ lessee from paying proper royalty amount in respect of the mineral removed or consumed by him.

(v) The learned Single Judge has also found that the State has issued impugned Circulars after due deliberation/consultation with the cement manufacturers, petitioners and other expert bodies. It is held that the past experience of the State necessitated issuance of those Circulars providing for conversion factor due to large scale of evasion of royalty and incorrect disclosures made by the licensee/lessee. The conversion formula is not based on presumption, but, it is founded on actual data collected from the petitioners. In other words, it is not arbitrary or hit by Article 14 of the Constitution of India.

(vi) In paragraph 58 of the judgment, the learned Single Judge has adverted to the letters of the concerned Companies admitting the correctness of the conversion factor which was around 1.6 tonne and thus rejected the argument that the conversion formula was arbitrary, unscientific or hypothetical. On the other hand, the formula was reasonable one and co-related with the actual happening of the taxing event. Further, the petitioners were unable to point out the actual data maintained by them as required by clause 13 of Part- VII of the Lease Deed. No material was placed on record to show that proper entries have been effected with regard to the minerals removed and consumed. Whereas, the respondents had placed on record material to show that proper Weighbridges have not been installed by the concerned Companies (except in few cases) and that generally the entries regarding the quantity of mineral was not accurate and in conformity with the requirement of clause 13 of Part-VII of the Lease Deed. It is found that the petitioners have not pleaded that their actual figures of consumption of Limestone was very different than the conversion factor.

(vii) In paragraph 59 of the judgment, the learned Single Judge has dealt with the submissions of the petitioners that the Limestone is initially converted into Clinker, thereafter Limestone loses its identity in the process of manufacture of cement and certain other adhesives like gypsum etc. are added. Thus, conversion of Limestone into other material in the process of manufacture of cement such as clinker etc. cannot have the effect of wiping out the conversion factor of Limestone vis-à-vis. cement.

(viii) The learned Single Judge then rejected the grievance of the petitioners that the conversion factor was specified without hearing the cement companies concerned. It is held that High Power Committee of Experts was constituted.

(ix) The learned Single Judge also negatived the argument that only cement manufacturers have been picked up for payment of royalty on conversion factor on the finding that cement manufactures are a separate class. Resultantly, the plea of discrimination has been negatived.

(x) On the above analysis, all the writ petitions came to be dismissed by the learned Single Judge which decision is the subject matter of challenge before us by way of writ appeals.

23. Having considered the rival submissions, in our opinion, the following broad points arise for consideration:

i. Whether the decision in ACC Limited would operate as *res judicata* qua ACC Limited?

ii. Whether the said decision is a binding precedent?

iii. What is the purport of the impugned Circulars dated 19/12/1992 and 11/8/1993 respectively?

iv. Whether the said Circulars provide for the mode of assessment of royalty or otherwise?

v. Whether the State Government has power to prescribe such mode of assessment of royalty for the mineral removed and consumed?

vi. Whether the conversion factor determined as 1.6:1 is just and proper or arbitrary and unreasonable?

vii. Whether the notional conversion factor can be applied uniformly to all the cement factories in the State and even though they have installed Weighing Machine in compliance with the requirements specified in Clause 13 of Part-VII of the Lease Deed?

viii. Whether the weighment by Beltometer can be considered as accurate and could be made the basis for assessment of royalty?

ix. What order?

24. In the present set of cases each of the petitioners/appellants are engaged in manufacture of Cement/Clinker. The main ingredient of the said product is Limestone. It is indisputable that Limestone is a major mineral. It is well established position that power to enact law on the subject of major mineral is within the exclusive domain of the Parliament. The Parliament has already enacted law to deal with the subject of major minerals, being the Act of 1957. Section 9 of the said Act deals with the Royalties in respect of Mining Lease. The same reads thus:-

> **"9. Royalties in respect of mining leases** (1) The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay

royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area after such commencement, at the rate for the time being specified in the Second Schedule in respect of that mineral.

(2) The holder of a mining lease granted on or after the commencement of this Act shall pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral.

(2A) The holder of a mining lease, whether granted before or after the commencement of Mines and Minerals (Regulation and Development) Amendment Act, 1972, shall not be liable to pay any royalty in respect of any coal consumed by a workman engaged in a colliery provided that such consumption by the workman does not exceed one-third of a tonne per month.

(3) The Central Government may, by notification in the Official Gazette, amend the Second Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from such date as may be specified in the notification:

Provided that the Central Government shall not enhance the rate of royalty in respect of any mineral more than once during any period of three years."

25. Section 9A deals with the subject of Dead rent to be paid by the lessee. The same reads thus:-

"9A. (1) The holder of a mining lease, whether granted before or after the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972, shall notwithstanding anything contained in the instrument of lease or in any other law for the time being in force, pay to the State Government, every year, dead rent at such rate as may be

specified, for the time being, in the Third Schedule, for all the areas included in the instrument of lease:

Provided that where the holder of such mining lease becomes liable, under section 9, to pay royalty for any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area, he shall be liable to pay either such royalty, or the dead rent in respect of that area, whichever is greater.

(2) The Central Government may, by notification in the Official Gazette, amend the Third Schedule so as to enhance or reduce the rate at which the dead rent shall be payable in respect of any area covered by a mining lease and such enhancement or reduction shall take effect from such date as may be specified in the notification:

Provided that the Central Government shall not enhance the rate of the dead rent in respect of any such area more than once during any period of three years."

26. Section 13(1) of the Act empowers the Central Government to frame Rules governing grant of reconnaissance permits, prospecting licences and mining leases in respect of minerals and for the purposes connected therewith. Subsection (2) of Section 13 delineates the subjects on which Rules can be framed. Sub-clause (i) thereof specifically deals with fixing of fees for specified activities and the manner in which the dead rent or royalty shall be payable. It necessarily follows that the field regarding Royalty is covered by the Act made by the Parliament.

27. In exercise of powers under Section 13 of the Act, the Central Government has framed the Rules of 1960. Rule 22 provides for the manner of making an application for grant of mining lease in respect of land in which the mineral vest in the Government. That application is required to be made to the State Government in Form "I" along with specified information. Rule 24 deals with the procedure for disposal of application for mining lease and Rule 24A provides for the procedure regarding renewal of mining lease. Rule 24B deals with the renewal of mining lease in favour of person using the mineral in his own Industry.

Rule 27 stipulates the condition with which every mining lease is expected to be governed. The same reads thus:-

> **"27. Conditions.** – (1) Every mining lease shall be subject to the following conditions :
>
> (a) the lessee shall report to the State Government the discovery in the leased area of any mineral not specified in the lease, within sixty days of such discovery;
>
> (b) if any mineral not specified in the lease is discovered in the leased area, the lessee shall not win and dispose of such mineral unless such mineral is included in the lease or a separate lease is obtained therefor ;
>
> (c) the lessee shall pay, for every year, except the first year of the lease, such yearly dead rent [at the rate specified in the Third Schedule of the Act] and if the lease permits the working of more than one mineral in the same area [the State Government shall not charge separate dead rent in respect of each mineral]:
>
> Provided that the lessee shall be liable to pay the dead rent or royalty in respect of each mineral whichever be higher in amount but not both ;
>
> (d) the lessee shall also pay, for the surface area used by him for the purposes of mining operations, surface rent and water rate at such rate, not exceeding the land revenue, water and cesses assessable on the land, as may be specified by the State Government in the lease ;
>
> (e) Omitted
>
> (f) the lessee shall commence mining operations within one year from the date of execution of the lease and shall thereafter conduct such operations in a proper, skillful and workman-like manner
>
> *Explanation.*- For the purpose of this clause, mining operations shall include the erection of machinery, laying of a tramway or construction of a road in connection with the working of the

mine;

(g) the lessee shall at his own expenses erect and at all times maintain and keep in good repair boundary marks and pillars necessary to indicate the demarcation shown in the plan annexed to the lease ;

(h) the lessee shall not carry on, or allow to be carried on, any mining operations at any point within a distance of fifty metres from any railway line, except under and in accordance with the written permission of the railway administration concerned [or under or beneath any ropeway or ropeway trestle or station, except under and in accordance with the written permission of the authority owning the ropeway] or from any reservoir, canal or other public works, or buildings, except under and in accordance with the previous permission of the State Government ;

(i) the lessee shall keep [accurate and faithful] accounts showing the quantity and other particulars of all minerals obtained and dispatched from the mine, the number and nationality of the persons employed therein, and complete plans of the mine, and shall allow any officer authorized by the Central Government or the State Government in this behalf to examine at any time any accounts, plans and records maintained by him and shall furnish the Central or the State Government with such information and returns as it or any officer authorized by it in this behalf may require ;

(j) the lessee shall keep accurate records of all trenches, pits and drillings made by him in the course of mining operations carried on by him under the lease, and shall allow any officer authorised by the Central or the State Government to inspect the same. Such reports shall contain the following particulars, namely :-

(a) the subsoil and strata through which such trenches, pits or drillings pass ;

(b) any mineral encountered ;

(c) such other particulars as the Central or the State Government may from time to time require ;

(k) the lessee shall strengthen and support, to the satisfaction of the railway administration concerned or the State Government, as the case may be, any part of the mine which in its opinion requires such strengthening or support for the safety of any railway, reservoir, canal, roads or any other public works or buildings ;

(l) the lessee shall allow any officer authorized by the Central or the State Government to enter upon any building, excavation or land comprised in the lease for the purpose of inspecting the same ;

(m) the State Government shall at all times have the right of pre-emption of the minerals won from the land in respect of which the lease has been granted ;

Provided that the fair market price prevailing at the time of pre-emption shall be paid to the lessee for all such minerals.

(n) The lessee shall store properly the unutilized or non-saleable sub-grade ores or minerals for future beneficiation;

(o) in respect of any mineral which in relation to its use for certain purposes is classified as a major mineral and in relation to its use for other purposes as a minor mineral, the lessee who holds a lease for extraction of such mineral under these rules whether or not it is specified as a major mineral in the lease deed, shall not use or sell the mineral or deal with it in whatsoever manner or knowingly allow anyone to use or sell the mineral or deal with it in whatsoever manner as a minor mineral :

Provided that if on an application made to it in this behalf by the lessee, the State Government is satisfied that having regard to the inferior quality of such mineral, it cannot be used for any of the purposes by reason of which use it can be called a major mineral or that there is no market for such mineral as a major mineral, the State Government may by order permit the lessee

to dispose of the mineral in such quantity and in such manner as may be specified therein as a minor mineral;]

[(p) the lessee shall, in the matter of employment, give preference to the tribals and to the persons who become displaced because of the taking up of mining operations ;]

[(q) the lessee shall not pay a wage less than the minimum wage prescribed by the Central or State Government from time to time under the Minimum Wages Act, 1948 ;

(r) the lessee shall observe the provisions of the Mines Act, 1952 [(35 of 1952) and of the Atomic Energy Act, 1962 (33 of 1962) in so far as they relate to atomic minerals included in Part B of the First Schedule to the Act;]

(s) the lessee shall –

(i) take immediate measures for planting in the same area or any other area selected by the Central or State Government not less than twice the number of trees destroyed by reasons of any mining operations ;

(ii) look after them during the subsistence of the lease after which these trees shall be handed over to the State Forest Department or any other authority nominated by the Central or State Government ;

(iii) restore, to the extent possible other flora destroyed by the mining operations .

(t) the lessee shall pay to the occupier of the surface of the land such compensation as may become payable under these rules ;

(u) the lessee shall comply with the Mineral Conservation and Development Rules framed under section 18.]

(2) A mining lease may contain such other conditions as the State Government may deem necessary in regard of the following, namely :-

(a) the time-limit, mode and place of payment of rents

and royalties ;

(b) the compensation for damage to the land covered by the lease;

(c) the felling of trees ;

(d) the restrictions of surface operations in any area prohibited by any authority ;

(e) the notice by lessee for surface occupation ;

(f) the provision for proper weighing machines;

(g) the facilities to be given by the lessee for working other minerals in the leased area or adjacent area;

(h) the entering or working in a reserved or protected forest;

(i) the securing of pits and shafts ;

(j) the reporting of accidents ;

(k) the indemnity to Government against claims of third parties;

(l) the delivery of possession of land and mines on the surrender, expiration or determination of the lease ;

[(la) the time limit for removal of mineral, ore, plant, machinery and other properties from the lease hold area after expiration, or sooner determination or surrender or abandonment of the mining lease];

(m) the forfeiture of property left after determination of lease ;

(n) the power to take possession of plant, machinery, premises and mines in the event of war or emergency ;

(o) filing of civil suits or petitions relating to disputes arising out of the area under lease.

[(3) The State Government may, either with the previous

approval of the Central Government or at the instance of the Central Government, impose such further conditions as may be necessary in the interests of mineral development, including development of atomic minerals.]

(4) If the lessee does not allow entry or inspection under clause (i),(j) of (l) of sub-rule (1), the State Government shall give notice in writing to the lessee requiring him to show cause within such time as may be specified in the notice why the lease should not be determined and his security deposit forfeited; and if the lessee fails to show cause within the aforesaid time to the satisfaction of the State Government, the State Government may determine the lease and forfeit the whole or part of the security deposit.

[(4A) If the lessee holding a mining lease or a licencee holding a prospecting licence, is convicted of illegal mining and there are no interim orders of any court of law suspending the operation of the order of such conviction in appeals pending against such conviction in any court of law, the State Government may, without prejudice to any other proceedings that may be taken under the Act or the rules framed thereunder, after giving such lessee or licencee an opportunity of being heard and for reasons to be recorded in writing and communicated to the lessee or licencee, determine such mining lease or, as the case may be, cancel such prospecting licence and forfeit whole or part of the security deposit

(5) If the lessee makes any default in the payment of royalty as required under section 9 or payment of dead rent as required under Section 9A or commits a breach of any of the conditions specified in subrules (1),(2) and (3), except the condition referred to in clause (f) of sub-rule (1), the State Government shall give notice to the lessee requiring him to pay the royalty or dead rent or remedy the breach, as the case may be, within sixty days from the date of the receipt of the notice and if the royalty or dead rent is not paid or the breach is not remedied within the said period, the State Government may, without prejudice to any other proceedings that may be

taken against him, determine the lease and forfeit the whole or part of the security deposit."

(emphasis supplied)

28. We deem it apposite to also advert to Rule 51 which provides for Returns and Statements required to be filed by the holder of a prospecting licence or a mining lease. The same reads thus:-

> **"51. Returns and Statements :** - The holder of a prospecting licence or a mining lease shall furnish to the State Government such returns and statements and within such period as may be specified by it."

The other provisions in the Rules of 1960 relevant for considering matters in issue are Rule 64 to 64D. The same reads thus:-

> "64. How the fees and deposit to be made – Any amount payable under the Act or these rules except that payable in respect of revision petition under sub-rule (1) of rule 54, shall be paid in such manner as the State Government may specify in this behalf.
>
> 64A. The State Government may, without prejudice to the provisions contained in the Act or any other rule in these rules, charge simple interest at the rate of twenty four percent per annum on any rent, royalty or fee (other than the fee payable under sub-rule (1) of rule 54) or other sum due to that Government under the Act or these rules or under the terms and conditions of any prospecting licence or mining lease from the sixtieth day of the expiry of the date fixed by that Government for payment of such royalty, rent, fee or other sum and until payment of such royalty, rent, fee or other sum is made.]
>
> [64B.Charging of Royalty in case of minerals subjected to processing:
>
> (1) In case processing of run-of-mine mineral is carried out within the leased area, then , royalty shall be chargeable on the processed mineral removed from the leased area.

(2) In case run-of-mine mineral is removed from the leased area to a processing plant which is located outside the leased area, then, royalty shall be chargeable on the unprocessed run-of-mine mineral and not on the processed product.]

[64C. Royalty on tailings or rejects :- On removal of tailings or rejects from the leased area for dumping and not for sale or consumption, outside leased area such tailings or rejects shall not be liable for payment of royalty:

Provided that in case so dumped tailings or rejects are used for sale or consumption on any later date after the date of such dumping, then, such tailings or rejects shall be liable for payment of royalty.]

[64D. Manner of payment of royalty on minerals on ad valorem basis:

(1) Every mine owner, his agent, manager, employee, contractor or sub-lessee shall compute the amount of royalty on minerals where such royalty is charged on ad valorem basis as follows:

(i) for all non-atomic and non fuel minerals sold in the domestic market or consumed in captive plants or exported by the mine owners (other than bauxite and laterite despatched for use in alumina and metallurgical industries, copper, lead, zinc, tin, nickel, gold, silver and minerals specified under Atomic Energy Act), the State-wise sale prices for different minerals as published by Indian Bureau of Mines shall be the sale price for computation of royalty in respect of any mineral produced any time during a month in any mine in that State, and the royalty shall be computed as per the formula given below:

Royalty = Sale price of mineral (grade wise and State-wise) published by IBM X Rate of royalty (in percentage) X Total quantity of mineral grade produced/ dispatched:"

(emphasis supplied)

29. Having considered the provisions in the Act made by the Parliament

and the Rules framed thereunder by the Central Government, we find that there is no express provision either in the Act or in the Rules regarding notional conversion factor to be applied during assessment by the Assessing Officer, in a suitable case. The manner in which the Return must be filed is specified. Indeed, the assessment of Royalty amount must be commensurate with the minerals removed or consumed by the lessee in conformity with the above quoted provisions. Ordinarily, it must be on the basis of "actual quantity" of minerals removed or consumed by the lessee. The Royalty tariff is specified in the second schedule to the Act. However, there is no express provision in the Act or the Rules as to what should be the mode of assessment in the event the Assessing Officer forms opinion that the Returns filed by the lessee or the record maintained and submitted are incorrect or untruthful. In that case, in law, it is open to the Assessing Officer to reject the claim of the assessee and instead apply a just and reasonable notional conversion factor keeping in mind the past experience and performance of the concerned Industry(assessee).

30. The question is: whether it was open to the State Government to issue the impugned Circulars specifying the mode of assessment of royalty and to uniformly apply it to all the cement companies across the State. Indeed, the Apex Court in the case of *Baijnath Kadio* (supra) has expounded on the question of legislative competence of the State Legislature. However, for recording finding that the two Circulars trench upon the Legislative field already occupied, it must be demonstrated that the purport of the instructions would result in inconsistency and will be in conflict with the provisions of the Act made by the Parliament and/or the Rules made thereunder. As aforesaid, there is nothing in the Act made by the Parliament or for that matter the Rules made thereunder to even remotely indicate the mode of assessment to be followed by the Assessing Officer and, in particular, in cases where the Assessing Officer finds that the Returns filed by the assessee and/or the record maintained and submitted are incorrect or untruthful. Nor does the Act made by the Parliament or the Rules made thereunder expressly provide that it is not open to the Assessing Officer to apply uniform notional conversion factor which is just and reasonable to complete the assessment. In the result, the decisions of the Apex Court pressed into service [*Baijnath Kadio* (supra); *The India Cement Ltd* (supra); *Mahalaxmi Fabric Mills Ltd.* (supra)] will be of no avail to the petitioners.

31. In the case of *The India Cement Ltd* (supra), the contention was that the Cess on royalty cannot be levied. The Apex Court while noticing that the

royalty is a tax and having found that the Cess on royalty would result in imposing tax on royalty proceeded to hold that the legislation in that regard is beyond the competence of the State Legislature because the field was occupied by Section 9 of the Central Act. Thus, it was held that Cess on royalty imposed by virtue of State Legislature cannot be sustained. However, it does not follow that the Assessing Officer is not competent to invoke notional conversion factor on case to case basis if and when such occasion arises, on account of rejection of the Assessee's claim and the Returns filed in that behalf. For the same reason, the administrative instructions contained in the two impugned Circulars on this subject, cannot be treated as trenching upon the occupied legislative field or to doubt the competence of the State Government to issue the same. On the other hand, if uniform notional conversion formula specified by the State Government is found to be just and reasonable, applying the same to all the cement companies across the State as and when such occasion arises, may obviate the possibility of uncertainty, inconsistency and exercise of unguided discretion by the Assessing Officer on case to case basis. That logic and approach would inevitably further the larger public interest and also obviate loss to public exchequer.

32. But, a word of caution may have to be expressed that invocation of uniform notional conversion factor must meet the test of necessity to do so - on account of rejection of the Assessee's claim and the Return as filed in that behalf. Royalty is payable on the quantum of minerals extracted, as it is relatable thereto. At the same time, applying a just and reasonable conversion factor does not necessarily entail in demand of royalty from the Assessee in respect of non-extracted minerals as such. On the other hand, on finding that the notional conversion factor is just and reasonable and in conformity with the past experience of the concerned Cement Company or Industry as a whole, it can be safely assumed that the Assessee Unit has had extracted and consumed the quantity equivalent to the notional conversion factor of Limestone for manufacture of cement. However, that would be a rebuttable fact. The concerned cement company/ assessee will then have to substantiate that it has extracted or removed lesser quantity of Limestone than determined as per the conversion factor and that the records maintained by it are truthful. Suffice it to observe that application of such notional conversion factor in a given case would be a matter of mode of assessment and nothing more. Resultantly, the administrative instruction issued in that regard cannot be considered as ultra vires or impinging upon the occupied legislative field or

for that matter arbitrary and discriminatory.

33. Our attention was invited to the order of the Apex Court reported in the case of *Mineral Area Development Authority Vs. Steel Authority of India Ltd.*[28] to point out that the question whether royalty determined under the Act of 1956 is in the nature of tax has been referred to a larger coram than the Bench whose decision requires reconsideration. It is well established position that the High Court is bound by the prevailing view of the Apex Court and would be justified in deciding the matter on hand by applying the same.

34. The counsel for the petitioners had relied on the decisions of the Apex Court in the case of *The Commissioner, Hindu Religious Endowments, Madras* (supra); *Akhil Gujarat Pravasi V.S. Mahamandal* (supra); *Calcutta Municipal Corpn. and others vs. Shrey Mercantile (P) Ltd. and others* [29]; *Jindal Stainless Ltd. (2) and another vs. State of Haryana and others* [30], to point out as to what would constitute tax. However, in view of the Constitution Bench judgment directly on the point, it may not be necessary for us to dilate on this aspect any further. For the reasons already recorded, the decision of the Apex Court in the case of *Kunnathat Thathunni Moopil Nair etc* (supra) will be of no avail to the petitioners - which has taken the view that the tax can be imposed only by law made by the Parliament or the State Legislature.

35. Reliance was also placed on the decisions of the Apex Court in the case of *A.N. Parasuraman and others* (supra); *Kunj Behari Lal Butail and others* (supra); and *M/s Devi Das Gopal Krishnan, etc.* (supra) in support of the argument that the Legislature must authorize the Assessing Officer with adequate guidelines. Indeed, it is well established that determination of legislative policy and formulation of rule of conduct are essential legislative functions which cannot bedelegated. Further, what is permissible is to leave it to the delegated Authority the task of implementing the object of the Act after Legislature lays down adequate guidelines for the exercise of power.

36. As has been noticed earlier, neither the Act made by the Parliament nor the Rules framed thereunder, explicitly or tacitly, provide for the mode of assessment and guidelines as to the course of action to be followed by the

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28. (2011) 4 SCC 450

29. (2005) 4 SCC 245

30. (2006) 7 SCC 241

Assessing Officer on rejection of the claim of the assessee in the return. That matter is left to the judgment of the Assessing Officer who, in turn, has to complete the assessment on the basis of well established principles.

37. The background in which the two impugned circulars have been issued by the State Government has already been noted in the earlier part of the judgment. The Officer-in-charge, Directorate of Geology and Mining, issued a communication addressed to Director, Geology and Mining, State of M.P. on 24/8/1974 mentioning that the conversion factor of 1.6:1 should be reckoned for the purposes of assessment, for the reasons stated in the said communication. Lateron, another circular came to be issued by the State Government on 29/12/1977 under the signature of Director, Geology and Mining, State of M.P. mentioning that the Department, after due consideration, has found that, ordinarily, for manufacture of 1 tonne cement, 1.6 tonnes of limestone is consumed. Notably, option is given to the licensee that if it has any objection for applying notional factor, can cause to weigh the removed limestone for the purpose of computing Royalty amount.

38. The State Government by Circular dated 25/5/1987 issued direction to all the cement companies in the State, to ensure installation of weighbridge as per the specifications for ascertaining the correct quantity of removed limestone. In spite of insistence of the Department, most of the cement companies failed to do so. As a result, impugned Circular was issued under the signature of Under Secretary, Mineral Resource Department, Government of M.P. on 19/12/1992, addressed to all the Collectors in the State that while assessing the Returns filed by such cement companies, the assessment should be done by applying notional conversion factor of 1.6 tonnne limestone for processed 1 tonne of cement. The second impugned circular issued under the signature of Under Secretary, Mineral Resource Department, Government of M.P. dated 11/8/1993 restates that in spite of insistence, most of the cement companies have failed to install Weighbridges. It further mentions that, it has also been noticed that Companies who have installed Weighbridges are not providing correct information. Inasmuch as, it is not possible to manufacture 1 tonne cement by consuming less than 1.6 tonne of limestone. As a result, comparative study was directed. The said Circular further predicates that computation of Royalty amount should be on the basis of actual quantity of limestone removed/consumed or 1.6 tonne per 1 tonne cement, "whichever is higher".

39. The first question is: whether the State Government has power to provide such mode of assessment. As aforesaid, neither the provisions of the Act nor the Rules framed thereunder expressly provide for the mode of assessment in case the Assessing Officer rejects the claim of the assessee being incorrect or untruthful. As per the said provisions, Returns are required to be filed before the State Authorities and the State Authorities are expected to analyze and undertake scrutiny of those Returns. In the event of incorrect or untrue information furnished in the Returns, the Assessing Officer, who is the employee of the State, is obliged to apply some tangible, just and reasonable yardstick for finalizing the assessment. To overcome this difficulty and keeping in mind the past experience of the Authorities that incorrect or untrue information was being furnished in the Returns, the Authorities had sought information from all the licencees, as well as, from other sources, on the basis of which it was decided to specify the conversion factor of 1.6:1 tonne. The conversion factor so determined, therefore, cannot be termed as unrealistic and arbitrary. We agree with the said view taken by the Tribunal in paragraph 14 of its decision (reproduced in paragraph 9 above) and confirmed by the learned Single Judge in paragraph 58 of the impugned judgment. Further, the impugned circulars are only in the nature of administrative instructions issued in larger public interest to obviate any inconsistent approach by the officials of the Department concerned. Instructions contained in the impugned circulars, therefore, merely delineate the mode of assessment and nothing more. It does not impinge upon the subject of levy of Royalty or the quantum thereof, which is within the exclusive domain of the Parliament. No doubt, it was open to the Parliament to even legislate on the mode of assessment, but the Parliament having chosen not to do so, does not denude the State Authorities to apply notional conversion factor in a suitable case.

40. As is noticed earlier, even though the assessment and computation of Royalty is in respect of major mineral under the Central enactment, but the lease is granted by the State Government. Further, Returns are required to be filed before the State Government. The Returns are assessed by the authorized officers of the State Government. Thus understood, there can be no impediment for the State Government to issue administrative instructions in respect of mode of assessment on which no provision is found in the Act or the Rules – so long as the instructions are not derogatory to or inconsistent therewith. Even in absence of such instructions the Assessing Officer, during the scrutiny of Returns is competent nay, obliged to take recourse to notional conversion

factor on the basis of past record and performance of the assessee.

41. Be that as it may, on a bare reading of the two circulars, it is evident that option is available to the assessee to produce record for substantiating its claim that the consumption of limestone has been lesser than the notional conversion factor of 1.6:1. Indeed, the Circular dated 11.8.93 does give an impression that even if the Assesse was able to substantiate of having utilized lesser quantity of limestone for manufacture of Cement/Clinker, there is no option but to compute the Royalty by applying notional conversion factor, "being higher".

42. It may be useful to advert to the exposition of the Apex Court in the case of *M/s Gannon Dunkerlay and Co. and others V. State of Rajasthan and others* [31]. In paragraph 49, the Court observed that :

> "49. Normally, the contractor will be in a position to furnish the necessary material to establish the expenses that were incurred under the aforesaid heads of deduction for labour and services. But there may be cases where the contractor has not maintained proper accounts or the accounts maintained by him are not found to be worthy of credence by the assessing authority. In that event, a question would arise as to how the deduction towards the aforesaid heads may be made. On behalf of the States, it has been urged that it would be permissible for the State to prescribe a formula on the basis of a fixed percentage of the value of the contract as expenses towards labour and services and the same may be deducted from the value of the works contract and that the said formula need not be uniform for all works contracts and may depend on the nature of the works contract. We find merit in this submission. In cases where the contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence it would, in our view, be permissible for the State legislation to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the

31. (1993) 1 SCC 364

works contract for the purpose of determining the value of the goods involved in the execution of the works contract. It must, however, be ensured that the amount deductible under the formula that is prescribed for deduction towards charges for labour and services does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. Since the expenses for labour and services would depend on the nature of the works contract and would not be the same for all types of works contracts, it would be permissible, indeed necessary, to prescribe varying scales for deduction on account of cost of labour and services for various types of works contracts."

(emphasis supplied)

43. Here, it may be useful to reproduce paragraphs 2 and 3 of the decision of the Apex Court in the case of *Guman Singh* (supra). The same reads thus:

"2. Shri Mahabir Singh, learned counsel appearing for the petitioner, contended that the circular cannot run counter to Rules. In the Rules, assessment has to be made as per Rule 38 read with Rule 18(1)(b) and Schedule I. The assessment of more than 100% cannot be assessed by the authority. We find no force in the contention.

3. It is true that the Schedule regulates the payment at the rates of the royalty required to be paid. The circular indicates only uniform policy in the best judgment assessment. It is provided in clause 2(a) that in respect of the minerals from the mines carried for local use and the roads or the significant ways are not bitumens, the minimum weight should be assessed at 150% of similar vehicles carrying the maximum safe weight. Normally, the assessing officials can make assessment on the basis of the circular for more weight under the power vested in them. As it would indicate, it does not prescribe rate of payment of the royalty, but prescribes the mode of assessment of the total quantum of the minerals carried by the licensee under the Rules; but they failed to produce slips of the actual weighment from the mouth of the mines. On his failure to do

so, an opportunity has been given; the weighment check was made at random. On the basis thereof, he assessed 150% as indicated in the circular. The method can be adopted only when the person has avoided payment of the royalty and avoidance of correct and true weighment of the minerals winnover and carried away by the licensee. Under these circumstances, we do not think that the circular runs counter to the statutory rules. It is true that the penalty by way of punishment has been provided in the Rules for contravention. The assessment is different from the prosecution for contravention. In making the assessment, in particular when best judgment assessment is sought to be made, uniform instructions have been given in the above Circular by the Government to make the best judgment assessment so that there may not be any difference in the procedure to be adopted by different assessing authorities and uniform basis provided is always just, fair and reasonable so that the assessing authority will have a uniform and satisfied principle or procedure in that behalf."

(emphasis supplied)

44. No doubt, this case was in respect of minor mineral, but, the principle underlying is applicable to the case on hand. Indeed, notional conversion factor can be made applicable only in cases where the Assessing Officer is not satisfied with the disclosures made in the return filed by the Assessee, being incorrect or untrue and where the Assessee is unable to substantiate his claim. This decision is also an authority on the principle that the method of best judgment assessment can be adopted only when the person has avoided payment of royalty and avoidance of correct and true weighment of the minerals win over and carried away by him. Suffice it to observe that there is nothing wrong if the State were to issue administrative instructions in that behalf in larger public interest for the guidance of the officials of the concerned Department.

45. Be that as it may, the impugned Circular dated 11th August, 1993, will have to be held as excessive to the extent it directs the Assessing Officer to compute the liability on the basis of weighment record or conversion factor of 1.6, "whichever is higher". In cases, where the Licensee/Assessee is able to satisfy the Assessing Authority that the removal or consumption of Limestone

is much below the notional conversion factor of 1.6, the question of invoking the notional conversion factor of 1.6 will not arise nor can be countenanced. Inasmuch as, the royalty is payable on the removed or consumed minerals. To that extent, the instructions contained in the aforesaid Circular cannot be sustained.

46. Having said this and considering the fact that in all these matters the concerned Assessing Officers have mechanically followed the instruction "whichever is higher", the appropriate course would be to relegate the petitioners/appellants before the Assessing Officer for re-examination of the entire matter afresh from the stage of filing of the returns. In the event, the Assessing Officer disapproves the claim of the assessee, may have to give notice to the assesse and give him opportunity to substantiate his claim. If the Assessing Officer is not satisfied with the explanation offered by the assesse; and the assesse fails to substantiate the claim of having utilized less than 1.6 Metric Tonnes of Limestone for production of 1 Metric Tonne of cement, will be free to apply the notional conversion factor of 1.6:1 as predicated in the impugned circulars.

47. Indeed, it will be open to the assessee to substantiate on the basis of record relating to its past performance that the conversion factor in the case of a given Unit is lesser than 1.6:1 because of special production protocol followed by the assessee. To put it differently, the assessment will have to be done on case to case basis and only if the assessee fails to substantiate its claim in the Return filed before the Authorities or for that matter of lesser conversion factor to be applied because of special production protocol followed by it, the Assessing Officer will be free to apply the uniform notional conversion factor predicated in the impugned circulars.

48. We may mention that to obviate the complexity of the processes to finalize the assessment, it will be open to the State Government to consider the efficacy of the recent communication issued under the signature of Joint Secretary (Cement), Government of India, Ministry of Commerce & Industry Department of Industrial Policy and Promotion dated 20th March, 2002. It mentions that the result of studies conducted by the Central Government in respect of "Vikram Cement Plant" in the State of Madhya Pradesh has disclosed that the consumption factor is 1.43:1, which was arrived at after detailed scientific analysis carried out by the Council. The Government of India has recommended to the State Government to consider the possibility

of adopting the said norm. Notably, this communication was placed on record before the Revisional Authority in the revision filed by the petitioners in the leading writ petition. However, the Tribunal and the Revisional Authority chose to follow the decision in the case of ACC Limited (the judgment of the learned Single Judge of this Court against which writ appeal is under consideration). On the other hand, if the State Government were to accept the said recommendation of the Government of India, then the entire controversy would come to an end as that conversion factor is broadly acceptable to all the petitioners/appellants. We, however, clarify that we may not be understood to have examined the justness of the position stated in the said communication dated 20th March, 2002. That is a matter for the State Government, to examine. We are not expressing any opinion either way on that matter. The State Government may consider the same expeditiously.

49. Since we are inclined to relegate the petitioners before the Assessing Authority for re-examining the entire matter afresh, in the light of the foregoing discussion, we do not wish to deal with other issues which may influence the said proceedings. We wish to reiterate that the Assessing Authority will have to examine the entire matter afresh on case to case basis - keeping in mind that it is not open to mechanically apply notional conversion factor even if the Assessee is able to substantiate the fact that he had in fact removed and consumed Limestone of lesser quantity. In other words, the instruction contained in the Circular dated 11th August, 1993, to apply the norm "whichever is higher", that part of the instruction **stands quashed and set aside** in terms of this judgment. That does not mean that in a given case, the Assessing Officer is not free to reject the claim of the Assessee and instead invoke best judgment assessment.

50. We make it clear that during the fresh assessment, it will be open to the Assessing Authority to consider whether the weighbridges installed by the concerned Unit are and were in conformity with the specifications in clause 13 of Part-VII of the Lease Deed and also displayed the correct weights of removed Limestone. We are conscious of the fact that at this distance of time, it may be difficult for the Assessee to provide those details and equally difficult for the Assessing Authority to verify the position. However, if the Assessing Officer is not convinced with the stand of the Assessee and if the Assessee in spite of opportunity is unable to substantiate his claim or rebut the basis enunciated in the impugned circular regarding the notional conversion factor, it would be open to the Assessing Officer to invoke the notional conversion

factor as specified by the State Government.

51. In case of assessees who have installed Beltometer, the same logic and approach ought to apply. Inasmuch as, if the Assessing Officer was to opine that the Beltometer had not recorded accurate weights or could not have done so and including because it was not installed as per the specifications or were to disapprove the returns submitted by the assessee on the finding that the claim set up by the assessee in the Returns is improbable and unacceptable, may call upon the assessee to substantiate the fact that the notional conversion factor to be applied in his case would be lesser than 1.6:1. If the assessee is unable to substantiate that position, the Assessing Officer could legitimately invoke the notional conversion factor specified in the impugned circulars.

52. As regards assessees who have neither installed Weighing Machines or Beltometer, such assessee may have to substantiate the claim made in the Returns, failing which the Assessing Officer would be justified in applying the notional conversion factor as specified by the State Government.

53. Reverting to the factual matrix in the leading writ petition, we have noted that the revision filed by the said petitioner against the decision of the Assessing Officer was heard by the Principal Secretary whereas the same has been decided by the Under Secretary. This is clearly against the principles of natural justice. Moreover, the decision of the Revisional Authority proceeds on the basis of the decision in the case of ACC Limited disregarding the direction contained in the order of the High Court passed in the case of the said petitioner dated 23rd November, 1993, whereby the respondent was directed to provide opportunity to the Company to produce evidence in support of its case that the actual quantity of Limestone required for manufacture of 1 tonne cement in their plant was not 1.6 tonne but 1.5 tonne or lesser. Therefore, it may be proper to set aside the earlier decision of the Assessing Officer and to relegate the matter before the Assessing Officer for re-consideration of the entire case in the light of the observations made hitherto.

54. The question as to whether the earlier decision in the case of ACC Limited in the earlier proceeding would operate as *res judicata* qua ACC Limited is concerned, even this will have to be answered against the Department. Inasmuch as, the decision of the Tribunal against ACC Limited, as upheld by the High Court, was because the said Company had not installed Weighbridges. However, after the decision went against the Company, the

Company took steps to install Weighbridges and informed the Authorities in that behalf. The decision in the previous proceedings by the Tribunal dated 10th April, 1992, and of the High Court dated 28th June, 1993, will govern the period anterior to the installation of Weighbridges by ACC. Notably, the period of assessment which is the subject matter of this proceeding, is different. Further, the assessment will have to be done on the basis of changed situation of installation of Weighbridges by the Company. Besides, the Company in the present proceedings has challenged the Circular issued after the decision of the High Court dated 11th August, 1993. The challenge to that Circular was not and could not have been made subject matter of earlier proceedings. Taking any view of the matter, therefore, ACC Limited cannot be non-suited on the ground of *res judicata*, as is contended.

55. The next question is: whether the decision in ACC Limited, which in turn affirms the finding recorded by the Tribunal in so far as the notional conversion factor of 1.6 being just and proper, can be treated as a binding precedent. Even this issue need not detain us. The fact that the State Government had specified the notional conversion factor of 1.6 does not mean that the Assessing Officer was not required to undertake scrutiny of the returns. He could not mechanically pass assessment order only on the basis of stated conversion factor irrespective of the substantiated factual position by the assessee that it had consumed lesser quantity of Limestone.

56. As aforesaid, unless the Assessing Officer were to record his opinion that the disclosures made by the Assessee in the return were incorrect or untrue, it is not open to the Assessing Officer to straightway apply the principle of best judgment assessment by invoking notional conversion factor. Suffice it to observe that the decision of the Tribunal, as has been confirmed by the High Court, therefore, will be of no avail. As a matter of fact, the said decision of the High Court is one of not interfering in exercise of writ jurisdiction and summarily dismissing the writ petition at admission stage. Further, the High Court was not called upon to examine the controversy answered in this judgment about the justness of the direction given to the Assessing Officer to complete the assessment by invoking notional conversion factor of 1.6 even if the Assessee was able to substantiate that the actual Limestone consumed was of lesser quantity than 1.6.

57. Taking over all view of the matter, therefore, we are inclined to dispose of all the writ petitions and writ appeals by **quashing and setting aside** the

instruction contained in the Circular dated 11th August, 1993 ("whichever is higher"), to invoke notional conversion factor of 1.6 even in cases where the Assessee was able to substantiate the fact that the actual quantity of Limestone consumed was lesser than 1.6. Besides quashing that part of the instruction, we are inclined to **quash and set aside** the decision of the Tribunal and the Revisional Authority as also of the Assessing Authority in respect of every petitioner(s)/ appellant(s) and including all consequential actions and demand notices based on the order of the Assessing Authority; and instead relegate them before the concerned Assessing Authority to re-examine the issue afresh from the stage of filing of Returns in the light of the observations made hitherto. We also **set aside** the operative order of the learned Single Judge dismissing the writ petitions filed by the Appellants and instead grant same relief even to those writ petitioners by relegating them before the Assessing Officer.

58. Accordingly, all writ petitions and writ appeals are disposed of on the above terms.

59. All the MCCs are disposed of in terms of this order.

60. No order as to costs.

Order accordingly.

I.L.R. [2014] M.P., 3020
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 9307/2012 (Gwalior) decided on 11 July, 2014

RAMBETI JAIN (SMT.) & ors. ...Petitioners
Vs.
SMT. MEENA DEVI TOMAR ...Respondent

Civil Procedure Code (5 of 1908), Order 20 Rule 11 - Payment by Instalments **- Executing Court on application of judgment debtors fixed four monthly instalments of Rs. 50,000/- each and last instalment of Rs. 40,000/- - Order challenged by judgment debtor on the ground of inability to pay instalment, so fixed by Executing Court - Held - In absence of providing minimum factual foundation relating to inability to satisfy the decretal amount, no enquiry needs to be ordered - No fault can be found in the order of the court below who in its discretion**

has fixed the instalments. **(Paras 1 & 8)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 20 नियम 11 – किश्तों द्वारा भुगतान – निष्पादन न्यायालय ने निर्णित ऋणी के आवेदन पर रु. 50,000/– प्रत्येक की चार मासिक किश्तें निश्चित की और अंतिम किश्त रु. 40,000/– – निष्पादन न्यायालय द्वारा इस तरह निश्चित की गई किश्त का भुगतान करने के लिये अक्षमता के आधार पर निर्णित ऋणी द्वारा आदेश को चुनौती दी गई – अभिनिर्धारित – डिक्रीत रकम की संतुष्टि की अक्षमता से संबंधित न्यूनतम तथ्यात्मक आधार प्रस्तुत किये जाने के अभाव में, जांच आदेशित करने की आवश्यकता नहीं – निचले न्यायालय के आदेश में कोई दोष नहीं पाया जा सकता, जिसने अपने विवेकाधिकार में किश्तें निश्चित की।

Cases referred :

1982 MPWN 501, AIR (36) 1949 Calcutta 427, 1976 JLJ 412,

S.N. Seth, for the petitioners.

N.K. Gupta, for the respondent.

ORDER

Sujoy Paul, J. :- This petition filed under Article 227 of the Constitution is directed against the order dated 17.10.2012, whereby the petitioner/judgment debtor's application preferred under Section 151 C.P.C. (Annexure P-3) is decided by the Court below. This is admitted between the parties that a judgment and decree was passed on 15.10.2010 (Annexure P-2). Since it was not implemented, the decree holder filed execution proceedings in the year 2012. In the execution proceedings, the present petitioners filed application under Section 151 C.P.C. (Annexure P-3) by praying that small installments be fixed so that the decreed amount can be satisfied by the judgment debtors. On the said application the Court below passed the order dated 17.10.2012 and directed the judgment debtors to pay Rs.50,000/- per month upto four months and thereafter pay the remaining Rs.40,000/- in the last month. The petitioners have filed this petition feeling aggrieved by the said order.

2. Shri S.N.Seth, learned counsel for the petitioners submits that all the petitioners are labourers who are not in a position to even pay Rs.50,000/- per month. He relied on 1982 MPWN 501 *(Mayaram Vs. Mst. Khudavaliwari).* Shri Seth submits that as per Order 20 Rule 11 C.P.C., the Court below was required to conduct an enquiry which has not been

conducted, hence the order is bad in law.

3. Prayer is opposed by Shri N.K.Gupta, learned counsel for the respondent. He submits that the the Court in its discretion has fixed the installments. The petitioner has not disclosed about the occupation in their application Annexure P-3. Not a single penny is paid after the judgment. The application is not bonafide, yet the Court below in its discretion has fixed the installment. Hence, no interference is required.

4. I have heard the learned counsel for the parties and perused the record.

5. No doubt Order 20 Rule 11 enables the Court to fix instalment in such terms as it things fit. The judgment in *Mayaram* (supra) is not reported in toto. In absence of examining the facts of that matter it will not be proper to rely on the said judgment. However, even in the said judgment the Court opined that "the learned trial Court should have decided the application after making due enquiry into the facts on which the judgment debtor claimed payment by instalments". The key words are "into the facts on which the judgment debtor claimed payment". If application of judgment debtor in the present case is examined, it will be clear that he has merely stated that he is unable to pay the decretal amount in one instalment. The reason of this inability is not disclosed. In other words, petitioners have not disclosed as to why they are not able to satisfy the decree. Thus, the basic facts on which judgment debtor claimed payment by instalment are not pleaded. Enquiry, in my opinion, is required when the judgment debtor shows his inability by impleading necessary facts and those facts are required to be examined. In absence of showing the same, mechanically no enquiry is required. In other words, the enquiry is required only when one party narrates some necessary facts and other party disputes it. When necessary factual foundation is not pleaded, no enquiry needs to be ordered mechanically.

6. A Division Bench of Calcutta High Court in AIR (36) 1949 Calcutta 427 *(Jagdish Chandra Chakravarti and others Vs. Brojendra Mohan Maitra and others)* held as under:-

> "We think desirable to state for the guidance of lower Courts generally that where instalments are prayed for by the debtors, the Court should see that the facts relating to means and circumstances of the debtor as also of the creditor are brought in before the Court. If a debtor simply says that he

would not be able to pay money if a certain number of instalments is not granted to him that is not sufficient. Strictly speaking, it would be his own opinion and would not be admissible in evidence".

7. In 1976 JLJ 412 *(Parmanand Jain Vs. Babulal Brijendra Kumar (Firm) and another),* a Division Bench of this Court opined that learned counsel for the defendants prayed before us for grant of instalments under sub-rule (1) of Order 20 rule 11, C.P.C. There is, however, no material to know as to what is the present financial position of the defendants. In the absence of any material on that point we are not in a position to examine the merits of the prayer for instalments made by the learned counsel.

8. In view of aforesaid analysis, in my opinion, in absence of providing minimum factual foundation relating to inability to satisfy the decretal amount, no enquiry needs to be ordered. More-so, when the petitioners have not paid any amount from the date of judgment/decree. The Court below in its discretion has fixed the instalment. No fault can be found in the said order. No case is made out for interference under Article 227 of the Constitution.

9. Petition fails and is hereby dismissed. No cost.

Petition dismissed.

I.L.R. [2014] M.P., 3023
APPELLATE CIVIL
Before Mr. Justice M.C. Garg
M. A. No. 1967/2006 (Indore) decided on 16 April, 2013

NATIONAL INSURANCE COMPANY LIMITED ...Appellant
Vs.
SANTOSH & ors. ...Respondent

Motor Vehicles Act (59 of 1988), Section 166 - Claim Petition - Entitlement **- Delay of 266 days in filing F.I.R. after alleged accident - Number of vehicle not given to the police - Named insured vehicle not proved to be involved in that accident - Insurer not liable for giving any compensation - Direction for paying back the claim amount to the insurer alongwith interest 6% from the date of this judgment.**

(Paras 9, 17 & 18)

मोटर यान अधिनियम (1988 का 59), धारा 166 – दावा याचिका – हकदारी – अभिकथित दुर्घटना के पश्चात प्रथम सूचना रिपोर्ट प्रस्तुत करने में 266 दिनों का विलम्ब – वाहन का नम्बर पुलिस को नहीं दिया गया – नामित बीमित वाहन उस दुर्घटना में शामिल होना साबित नहीं – बीमाकर्ता कोई प्रतिकर देने के लिए दायित्वाधीन नहीं – बीमाकर्ता को इस निर्णय की तिथि से 6 प्रतिशत ब्याज के साथ दावा रकम वापस अदा करने का निदेश।

S.V. Dandwate, for the appellant.
None for the respondents.

ORDER

M.C. GARG, J. :- By this appeal filed under Section 173 of the Motor Vehicles Act, the appellant-Insurance Company has assailed the award of claim granted by the Motor Accident Claims Tribunal to the respondent in a petition filed by the respondent under Section 166 of the Motor Vehicle Act claiming compensation in an accident allegedly held on 29.01.2004 with a motor cycle bearing No.MP-11-BC-0452 in which the respondent sustained fracture in his left leg as well as the injuries on other part of the body.

2. According to the allegations, the respondent who suffered permanent disability, the appellant was made a party in that petition as insurer of the vehicle. The owner and driver did not contest the proceedings and were proceeded ex-parte. However, the claim was contested by the appellant.

3. The Motor Accident Claims Tribunal awarded a sum of Rs.1,20,000/- in favour of the respondent and against the appellant as well as respondents no.1 and 2, who were arrayed as party in that accident claim because the liability was fixed jointly and severally. However, the award was met by the appellant the insurer of the offending vehicle. Even though the accident is dated 29.01.2004, the claim was filed by the respondent on 16.11.2004, i.e. after a period of 11 months. In the accident claim petition, the - number of the offending vehicle was not mentioned. Infact theparticulars of the FIR was also not mentioned.

4. The appellant contested the proceedings in their written statement. The appellant denied the liability as well as the involvement of the offending vehicle. It was submitted that

> यह कि प्रतिकर आवदेन–पत्र चरण कमांक असत्य होने से स्वीकार नहीं है। इस चरण में दशार्ये अनुसार कथित दुर्घटना दिनांक 29.01.2004 को

समय 7.45 बजे स्थान गंधवानी चिकली मण्डी रोड असत्य रूप से दर्शाकर कथित दुर्घटना होने के संबंध में असत्य कथन किये हैं। जबकि इस स्थान व समय एवं दिनांक को वाहन M.P.-11 B.C.-0452 से कोई दुर्घटना घटित नहीं हुई है। ऐसी स्थिति में प्रार्थी को चोटें आने, स्थाई अयोग्यता कारित होने एवं संबंधित अस्पताल में उपचार होने एवं उपचार में व्यय लगने तथा प्रार्थी को क्षति पहुंचने का प्रश्न ही पैदा नहीं होता है।

वास्तव में प्रार्थी स्वयं ही किसी अज्ञात वाहन को तेजगति व लापरवाही से चला रहा होने के कारण स्वयं ही वाहन से गिर जाने से उसे मात्र साधारण स्वरूप की चोट आने के पश्चात् प्रार्थी व गोपाल पिता उदाजी व राकेश पिता मांगीलाल व रमेश पिता कन्हैयालाल व प्रार्थी के अन्य सहयोगी व्यक्तियों ने प्रार्थी के मित्र एवं परिचित व्यक्ति विपक्षी कमांक 1 व 2 से दुरभीसंधि करके कथित दुर्घटना दिनांक 29.01.2004 के लगभग 8 माह पश्चात दिनांक 21.10.2004 को असत्य कायमी विपक्षी कमांक 1 के खिलाफ करवाकर मात्र विपक्षी कमांक 3 की बीमा कंपनी से षड़यंत्रपूर्वक असत्य क्षति पूर्ति धन राशि प्राप्त करने के दुर्भाव दृष्टिकोण से असत्य प्रतिकर आवेदन पेश किया है। तथा प्रार्थी को उक्त वाहन मोटर सायकल से कोई चोटें या फेक्चर नहीं आया है और प्रार्थी वर्तमान में स्वस्थ है।

उपरोक्त परिस्थिति में प्रार्थी के प्रतिकर आवेदन–पत्र के लिये विपक्षी कमांक 3 बीमा कंपनी क्षति पूर्ति धनराशि के भुगतान हेतु किसी भी रूप में उत्तरदायी नहीं होकर मात्र अज्ञात वाहन स्वामी एवं बीमा कंपनी उत्तरदायी है जिनके खिलाफ प्रार्थी ने प्रतिकर आवेदन पत्र पेश करना चाहिए अथवा अज्ञात वाहन मोटरयान अधिनियम के तहत् श्रीमान् जिलाधीश (श्रीमान् कलेक्टर महोदय) के समक्ष प्रतिकर आवेदन पेश कर सहायता की मांग करना चाहिए। इस कारण प्रार्थी द्वारा प्रस्तुत प्रतिकर आवेदन–पत्र प्रथम दृष्टिया विपक्षी कमांक 3 बीमा के खिलाफ निरस्तनीय हैं। तथा प्रार्थी ने किसी भी स्वतंत्र साक्षीगण के शपथपत्र पेश नहीं किये हैं।

5. The Accident Claims Tribunal on the pleadings of the parties, framed the following issues:-

क.	वाद विषय	निष्कर्ष
1.	क्या घटना दिनांक 29.01.04 को 7.45 बजे गंधवानी चिकली मण्डी रोड पर अनावेदक 1 ने अनावेदक क.2 के स्वामित्व का व अनावेदन 3 के यहां बीमित वाहन मोटर सायकल क्र M.P.-11 B.C.-0452 को तेजी व लापरवाहीपूर्वक	

	चलाकर आवेदन को दुर्घटनाग्रस्त किया ?	प्रमाणित
2.	क्या उक्त दुर्घटना में आवेदक स्थाई रूप से निर्योग्य हो गया ?	प्रमाणित
3.	क्या उक्त वाहन का चालन बीमा पालिसी की शर्तों के विपरीत किया गया ?	नहीं
4.	क्या आवेदक, अनावेदकगण से संयुक्तः व पृथक–पृथक रूप से कुल प्रतिपूर्ति राशि रू. सात लाख पाने का अधिकारी है ?	मात्र 1 लाख 20 हजार
5.	सहायता एवं वाद व्यय।	संविदा एक लाख बीस हजार की सीमा तक स्वीकृत

6. Issue no.1 was decided as having been proved by the claimant i.e. the respondent, based upon the statement made by the driver of the vehicle in criminal proceedings which were initiated against him and the statement made by the respondent and one Rakesh. One of the reason given by the Tribunal was that since the owner and driver of the vehicle has not contested the claim and rather admitted the involvement of the vehicle in their defence in Criminal Court, the involvement of the vehicle in this accident was established and therefore, the appellant being insurer of the said vehicle they were liable to compensate the respondent/ claimant. The relevant observations made by the Tribunal while awarding the claim in favour of the respondent and against the appellant with respect to issue no.1 which is based upon awarding compensation is reproduced hereunder:-

> आवदेक की ओर से उपरोक्त प्रकरण में हुये निर्णय की प्रमाणित प्रतिलिपि प्र. पी.–28 की प्रस्तुत की गई जिसके अवलोकन से अनावेदक क.–1 ने दुर्घटना दिनांक को अपना वाहन M.P.-11 B.C.-0452 को तेंजी एवं लापरवाहीपूर्वक चलाकर गंधवानी में आवेदक संतोष को गंभीर चोट पहुंचाने का अपराध स्वीकार कर लिया, जिस पर से न्या.दण्डा.प्र.श्रे. मनावर द्वारा उसे दंडित भी किया गया। प्रकरण में प्र.पी.–29 की आवेदक संतोष की एम.एल.सी. तथा प्र.पी.–6 का एक्सरा प्रस्तुत किया गया, जो कि घटना दिनांक 29.01.04 का है और शासकीय चिकित्सालय गंधवानी का है, जिसका अवलोकन किया गया अवलोकन से आवेदक के टीबियाफीबूला हड्डी का अस्थिभंग होना उल्लेखित किया गया है।

प्रकरण में प्र.पी.–5 के जप्ती पंचनामे की प्रमाणित प्रतिलिपि प्रस्तुत की गई जिसके अवलोकन से वाहन कमांक M.P.-11 B.C.-0452 अनावेदक–3 के यहां दिनांक 25–1–03 से 24–10–04 की अवधि के लिए बीमित है जबकि इस प्रकरण की घटना दिनांक 29.01.04 की है। इस तरह दुर्घटना दिनांक को उपरोक्त वाहन मोटर सायकल नंबर M.P.-11 B.C.-0452 अनावेदक क. 3 के यहां बीमित होना भी पाया जाता है।

जहां तक अनावेदक–3 के साक्षी मुकेश (अना.सा. –1) का कथन है कि घटना की रिपोर्ट घटना के 266 दिन बाद थाने पर की गई। परन्तु प्र.पी. –2 की प्र.सू.रि के अवलोकन से अनावेदक क.–3 के साक्षी मुकेश का कथन स्वीकार किया नहीं जा सकता। क्योंकि दुर्घटना में आवेदक को चोटें आईं, इस बाबत् की सूचना थाना गंधवानी पर घटना दिनांक 29.01.04 को ही दी गई तथा घटना दिनांक को ही आवेदक संतोष की एम.एलसी. तथा एक्सरा सामु. स्वा.केन्द्र गंधवानी के हैं। इसके अलावा भी घटना का चक्षुदर्शी साक्षी राकेश भी आवेदक के कथन का समर्थन अपने कथन में करता है। इसके उपरांत प्रदर्श पी–28 के निर्णय द्वारा अनावेदक क.1 ने अपना वाहन तेजी तथा लापरवाहीपूर्वक चलाकर आवेदक को गंभीर उपहित पहुंचाये जाने का अपराध भी न्या. दण्डा.प्र. मनावर के न्यायालय में स्वीकार कर लिया तो ऐसी स्थिति में यह नहीं कहा जा सकता कि घटना की कोई सूचना घटना दिनांक को थाना गंधवानी पर दी गई नहीं। घटना दिनांक को ही सूचना दी गई, जिसके आधार पर पुलिस ने बाद जांच यद्यपि अनावेदक क.–1 के विरूद्ध देर से कायमी की हो तो ऐसी स्थिति में यह नहीं कहा जा सकता कि आवेदक को दुर्घटना में चोटें आईं नहीं। क्योंकि एम.एल.सी., एक्सरे आवेदक के घटना दिनांक के ही हैं, जिनमें भी मोटरसायकल से एक्सीडेंट होने बाबत् के तथ्य उल्लेखित है तो ऐसी स्थिति में अनावेदक 3 के उपरोक्त साक्षी के कथन को स्वीकार किया नहीं जा सकता। इसके अलावा भी माननीय उच्च न्यायालय म. प्र. द्वारा विधि भास्वर–2003 पेज नं.–8 में यह प्रतिपादित किया गया है कि "उल्लंघनकारी यान के चालक तथा स्वामी दुर्घटना का वर्णन स्पष्ट करने हेतु न्यायालय में उपस्थित हुये नहीं ..... दावेदार का वर्णन स्वीकार किया जायेगा।" इस प्रकरण में भी ऐसी ही परिस्थितियां हैं। अनावेदक क. 1, 2 प्रकरण में उपस्थित हुये नहीं तथा दांडिक प्रकरण में अनावेदक क.–1 की अपराध स्वीकारोक्ति को देखते हुये, तथा आवेदक के कथन की पुष्टि उसके द्वारा दांडिक प्रकरण से ली गई प्रमाणित प्रतियों से भी होती है तथा साक्षी राकेश भी आवेदक के कथन का समर्थन करता है।

7. Thus, the Tribunal clearly overlooked the testimony of the witnesses produced on behalf of the appellant by holding that since the driver had admitted his liability in the criminal prosecution, the testimony of the witnesses produced

by the appellant was of no consequence.

8. The Tribunal completely over looked the plea taken by the appellant that whole case was concocted. It was a collusion matter in which the owner and driver mixed up with the respondent for the purpose of fastening the liability on the Insurance Company even though, the offending vehicle was not involved in the accident and it is for that reason neither the number of the vehicle was mentioned by the claimant in any of the medical document nor they lodged any FIR of the accident. The Tribunal has also failed to appreciate that the FIR was belated by atleast 266 days. It was against one Feroz, the driver who was neighbour of the claimant and as such possibility of collusion could not have been ruled out.

9. The appellant has submitted that First Information Report of the alleged incident has been lodged almost after 266 days of the alleged incident and respondent nos.2 and 3 who are known to respondent no.1 and are residing in the same area have colluded to fasten the liability on the appellant for the accident which was caused otherwise, which is evident from the fact that alleged accident is dated 29.01.2004 and on 29.01.2004, the applicant respondent no.1 goes to the hospital from where intimation is given to the police in which it has only been mentioned that respondent No.1 came to the hospital in an accident involving motorcycle and has suffered fracture of tibia fibula bone. Meaning thereby, that immediately after the accident intimation was given to the police and if insured vehicle had caused the accident then there was no reason for the police not to have registered offence immediately. Even in report there is no disclosure of number of the offending vehicle.

10. It is also the case of the appellant that :-

(1) alleged accident being dated 29/01/2004, offence was registered on 21.10.2004 and after completing all the formalities final challan was also filed on 31/10/2004. On 01/11/2004 driver appears before the Criminal Court accepts its guilt and conveniently proceeded ex-parte before the learned Tribunal, the conduct of the driver further confirms that accident which was caused by some unknown motorcycle was converted into an accident in which duly insured motorcycle has been implicated. Alleged eye witness if had seen the accident then there was no reason for him not to have disclosed the number of the offending vehicle before the learned Tribunal.

(2) The appellant also proved that driver driving the motorcycle

was not holding a valid and effective driving license for driving the motorcycle and further the witness who investigated into the case was examined and he had submitted his report showing false implication of the insured vehicle.

(3) That the learned Tribunal merely based upon the admission made by the driver before the Criminal Court has held the accident involving the insured vehicle but has not considered collusion between the applicant that of the owner and driver implicating the insured vehicle and has even not discussed the evidence minutely justifying registration of FIR late by 266 days as no explanation has been offered for such a late FIR.

11. During the course of submission made on behalf of the appellant, it is also stated that the appellant was a third respondent in this case. Since respondents no.1 and 2 did not contest the proceedings of the defence available with the respondents no.1 and 2, was available with the third respondent. It is not a case that during the accident claim proceedings, the liability was admitted by the owner which may have some binding affect on the stand of the appellant. In fact, the very fact that respondent no.1 and 2 did not take any care to contest the proceedings, the appellant became entitled to take all the defence including the defence of collusion, but opposed the claim. Infact to prove his collusion of noninvolvement of the offending vehicle in this case, the appellant examined their investigator, who appeared in the witness box and deposed as under:-

> मैं नेशनल इन्श्योरेन्स कंपनी इंदौर में नियुक्ति पर क्लेम प्र.क. 177/04 में अनुसंधान कार्य मेरे द्वारा किया गया था।
>
> इस प्रकरण का अनुसंधान मेरे द्वारा किया गया है। मेरी अनुसंधान रिपोर्ट घटना से संबंधित फौजदारी पेपर, और प्राप्त जानकारी के आधार पर मेरे द्वारा पेश की गई है। मैंने उपरोक्त प्रकरण अना.क.–1 फिरोज पिता सुलेमान के लायसेंस का सत्यापन आवेदन देकर आर.टीओ. कार्यालय धार से किया था। अना.क.–1 का जारी लायसेंस में सिर्फ हल्का मोटर यान चलाने की पात्रता है। अना.क.–1 को मोटरसायकल चलाने की पात्रता नहीं है। मैंने प्रार्थी संतोष पिता कन्हैयालाल शर्मा के बयान लिये थे। मैंने अपनी अनुसंधान रिपोर्ट प्र.डी.–1 की इस प्रकरण पेश की है जिस पर ए से ए भाग पर मेरे हस्ताक्षर हैं। लायसेंस सत्यापन की रिपोर्ट भी मेरे द्वारा पेश की गयी है जो प्र. डी.–2 की है जिस पर भी ए से ए भाग पर मेरे हस्ताक्षर हैं। आर.टी.ओ. कार्यालय में पैसे जमा किये थे उसकी रसीद प्र.डी.–3 की है। अना.क.–1 के लायसेंस का सत्यापन प्र.डी.–4 का पेश है। लायसेंस वेरीफिकेशन का आवेदन

प्र.डी.–5 का है। आवेदक संतोष पिता कन्हैयालाल के कथन मेरे द्वारा लिये गये थे जिसके कथन मेरे द्वारा पेश किये गये हैं वह प्र.डी.–6 है। मेरे अनुसंधान के अनुसार घटना की पुलिस रिपोर्ट दुर्घटना के 266 दिन बाद की गयी है। बाकी जो अन्य सभी निष्कर्ष पुलिस द्वारा बनाये गये फौजदारी प्रकरण पर आधारित हैं। मेरे मतानुसार आवेदक ने जिस मोटरसायकल से दुर्घटना होना बताया है उससे नहीं होकर अन्य किसी घटना में आवेदक को चोट आयी है।

प्रतिपरीक्षण आवेदक की ओर से श्री खण्डेलवाल एड. द्वारा :–

यह कहना सही नहीं है कि मैं सिर्फ नेशनल इन्श्योरेन्स कंपनी का अनुसंधान करता हूं। यह बात सही है कि सर्वे करने की हमको फीस मिलती है। इस केस में मेरे को अभी फीस नहीं मिली है। स्वतः कहा कि अनुसंधान करने की लगभग 500/– रूपये फीस मिलती है। सभी मिलाकर एक केस के लगभग 1200–1300/–रू. मिल जाते हैं। इन्दोर से गंधवानी लगभग 160 किलोमीटर है। मैं अनुसंधान के लिये मोटर सायकल से जाता हूं। आवेदक गंधवानी में सरकारी अस्पताल के पास रहता है। हम कंपनी में अन्वेषण रिपोर्ट दो प्रति में पेश करते हैं व प्रकरण में जो प्रतियां पेश की गयी हैं वह इस प्रकरण से संबंधित अन्वेषण रिपोर्ट की प्रति है। यह बात सही है कि मेरे अन्वेषण रिपोर्ट में अंतिम पेरा पर मेरे हस्ताक्षर हैं यह कहना गलत है कि मैंने संतोष आवेदक के कथन नहीं लिये थे। यह बात सही है कि इस प्रकरण में मेरे द्वारा आवेदक के कथन की फोटो कापी पेश की गयी है। यह कहना गलत है कि आर.टी. ओ. आफिस में अन्वेषण लायसेंस का नहीं करवाया। यह कहना गलत है कि लाईट मोटर व्हीकल एवं मोटरसायकल का एक लायसेंस बनता है। यह कहना गलत है कि लाईट मोटर व्हीकल लायसेंस के द्वारा मोटर सायकल व कार दोनों चला सकता है। यह कहना गलत है कि मेरे द्वारा केस का कोई अनुसंधान नहीं किया था। यह कहना गलत है कि मेरे द्वारा जो रिपोर्ट अन्वेषण संबंधो पेश की है वह गलत पेश की है।

12. There is no cross examination of this witness which may contradict his statement or prove him to be false witness. Now coming to the document placed on record by the third respondent, I find that despite the appellant having gone through atleast 3 medical institutions in none of the MLC/Discharge certificate prepared by the medical doctors there is mention of the number of the offending vehicle.

13. Coming to the statement of the first respondent, even in his statement recorded by the Tribunal, the claimant has not given the number of the motor cycle which caused accident. He further stated that the motor cycle was driven by Feroz who admitted was neighbour, yet neither his name was given to the

medical authorities nor to the police, when the accident took place or immediately thereafter. Paragraph 7 of his cross examination is relevant which is reproduced hereunder:-

> फिरोज मेरे घर से एक किलोमीटर की दूरी पर रहता है। यह कहना गलत है कि फिरोज मेरे ही मोहल्ले में ही रहता है। यह कहना गलत है कि फिरोज मेरे घर के तीन–चार घर छोड़कर रहता है। यह सही है कि मैं फिरोज को पहले से जानता हूं क्योंकि वह गांव का रहने वाला है। यह कहना गलत है कि फिरोज ने मेरे को कोई टककर नहीं मारी थी। गोपाल मेरे घर से 15–20 घर छोड़कर रहता है। स्वतः कहा कि उसका खेत भी उधर ही है। जिस समय घटना हुई थी तो मेरे को थाने पर नहीं ले गये थे। मैंने डाक्टर को यह बात दिया था कि मेरे को फिरोज ने मोटर सायकल से टक्कर मारी है। यह बात सही है कि मेरे घर वाले मेरे पुत्र अस्पताल आ गये थे। डाक्टर को सूचना दे दी थी कि यह एक्सीडेन्ट हुआ है जो मोटर सायकल से हुआ है। हमने फिरोज की मोटर सायकल का नंबर भी गोपाल और डाक्टर को बता दिया था।

14. In the light of the aforesaid deposition of the respondent, it becomes doubtful as to why the number of the vehicle which was being driven by the neighbour was not given at the time of informing about the accident to the police. The only irresistible conclusion which comes to the mind of anyone would be that the vehicle was not involved in the accident.

15. Dr. Mahesh Agrawal is the second witness on behalf of the appellant, who has treated the respondent for the fracture injury caused on his person and infact he also operated the respondent by inception of rod because of the fracture. The important aspect of his statement is his cross examination. Before referring to it, it may be seen that the respondent had approached this doctor after about four months of the accident. Now I may refer to his cross examination. Paragraph 5 is important which is reproduced hereunder:-

> 5. यह बात सही है कि संतोष/आवेदक को चलने–फिरने में ही तकलीफ थी, देखने सुनने में कोई तकलीफ नहीं थी। यह बात सही है कि मेरे यहां पर आवेदक का ईलाज दि. 14.04.04 तक चला था तब तक आवेदक मेरे यहां पर आता जाता रहा। यह बात सही है कि आवेदक को जिस प्रकार का फेक्चर है इस प्रकार का फेक्चर मोटर सायकल से गिरने से आना संभव है। एम.एल. सी. होने के बाद आवेदक का ईलाज मेरे द्वारा ही किया गया था। यह बात सही है कि आवेदक जिस समय मेरे पास आया था उस समय उसने मुझको एक्सीडेंट होना बताया था। **यह बात सही है कि आवेदक ने मेरे को यह नहीं बताया था कि वह स्वयं मोटर सायकल से गिरा है या अन्य मोटर सायकल से एक्सीडेंट हुआ था।** मेरे पास आवेदक दिनांक

29.01.04 से 02.02.04 तक भर्ती रहा जिसमें स्क्रू निकाला गया और ड्रेसिंग की गयी। यह कहना गलत है कि आवेदक जिस समय मेरे पास ईलाज के लिये आया था उस समय उसे शुगर थी, व हार्ट का पेशेन्ट था।

16. One more witness of whose testimony the respondent relied upon and whose statement has been taken in support of conclusion drawn by the Claims Tribunal fastening the liability of compensation upon the appellant is the deposition of Rakesh again a neighbour of the respondent as well as Feroz, the driver. His entire statement is relevant, which is reproduced hereunder:-

मैं आवेदक संतोष एवं ड्रायवर अना.क.–1 फिरोज को पहचानता हूं। घटना आज से लगभग दो साल पहले की है। मैं सुबह–सुबह घूमने के लिये जाता हूं। मैं जब घूम कर वापिस आ रहा था तो गंधवानी चिकली मण्डी रोड पर आवेदक संतोष को अना.क.–1 ने मोटरसायकल को तेज एवं लापरवाहीपूर्वक चलाकर टककर सामने से मार दी थी। जिससे संतोष वहां पर नीचे गिर गया था और चोट लगने से उसका पैर फेक्चर हो गया था। चोट लगने से शरीर में अन्य जगह पर भी आवेदक को चोट आयी थी। उसके बाद मैं वहां पर अपने घर पर चला गया था। उसके बाद मुझको कुछ भी मालूम नहीं।

प्रतिपरीक्षण अनावेदक क.–3 की ओर से श्री विजय गुप्ता अधि. द्वारा :–

मैं आवेदक को अच्छी तरह से जानता हूं। मैं भारत पिता रमेशचन्द्र अना.क.–2 को भी जानता हूं। यह बात सही है कि संतोष के मकान के पास ही सरकारी दवाखाना और थाना है। स्वतः कहा कि थोड़ी दूर पर है। मेरे को यह पता नहीं है दुर्घटना के दिन कौन सा दिन था। मेरे को गाड़ी का नंबर नहीं मालूम है। स्वतः कहा कि गाड़ी बाक्सर थी। आवेदक संतोष मेरा कुछ नहीं लगता है। स्वतः कहा कि मैं लोहार हूं। मेरा आवेदक से कोई लेन–देन नहीं है। मैं दो चार साल से घूमने जाता हूं। दुर्घटना के समय लगभग 20 फिट की दूरी पर था। यह कहना गलत है कि फिरोज को वहीं पर पकड़ लिया था। स्वतः कहा कि फिरोज टक्कर मारकर वहां से भाग गया था। दुर्घटना के बाद मैं संतोष के पास गया था। उसके पश्चात् मैं वहां से चला गया था और संतोष वहीं पर पड़ा हुआ था। मैंने दुर्घटना के बाद थाने पर कोई रिपोर्ट दर्ज नहीं करवायी थी।

दुर्घटना के कितने दिन बाद पुलिस ने मेरे बयान लिये थे यह मेरे को मालूम नहीं है। मेरे को यह भी मालूम नहीं है कि कितने माह व कितने साल बाद पुलिस ने मेरे बयान लिये थे। दुर्घटना के बाद भी पुलिस को मेरे द्वारा कोई सूचना नहीं दी गयी थी।

आज गवाह के लिये मैं स्वयं ही न्यायालय में आया हूं। मेरे को आवेदक बोलने आया था कि मनावर गवाह देने जाना है तो मैं आया हूं।

यह कहना गलत है कि मैंने कोई घटना नहीं देखी थी और आवेदक के कहने से आज असत्य कथन देने आया हूं।

17. In view of the evidence which has come on record and applying the theory of the preponderance probabilities, the conclusion drawn by the Motor Accident Claims Tribunal in holding that the accident occurred because of the involvement of the offending vehicle cannot be sustained. The logic that since the owner and driver was ex-parte, the statement given by the witnesses on behalf of the Insurance Company could not have been accepted is again wrong on law because if the owner decide not to contest the proceedings, it cannot be said that the defence available with the owner cannot be taken up by the insurer.

18. In these circumstances, I hold that the award given by the Tribunal against the appellant cannot be sustained. Accordingly, the appeal is allowed with a direction to the respondent to pay back the claim amount to the appellant alongwith interest @ 6% from the date of this judgment.

C.C.as per rules.

Appeal allowed.

I.L.R. [2014] M.P., 3033
APPELLATE CIVIL
Before Mr. Justice S.C. Sharma
M.A. No. 1724/2012 (Indore) decided on 9 January, 2014

SINGH COLD STORAGE PRIVATE LIMITED, UJJAIN ...Appellant
Vs.
PARLE BISCUITS PRIVATE LIMITED,
MUMBAI & ors. ... Respondents

Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 - Grant of Injunction **- Appellant has entered into an agreement with respondent No.1 - Pursuant to the agreement they have also executed two Bank Guarantees amounting to Rs. 96/- lacs - There was outstanding of Rs. 184/- lacs against the appellant which was not disputed - Appellant has also offered a payment schedule to respondent No. 1 - Bank Guarantees are certainly less than the admitted amount - Held - The Bank Guarantee is an independent contract between the Bank and respondent No. 1 - It is unconditional irrevocable one - The**

balance of convenience is in fact in encashment of the Bank Guarantees - There is no jurisdictional error nor the order suffers from any patent illegality - No interference is warranted - Bank is directed to encash the Bank Guarantees forthwith. (Paras 14, 22, 23)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – व्यादेश प्रदान किया जाना – अपीलार्थी ने प्रत्यर्थी क्र. 1 से करार किया – करार के अनुसरण में उन्होंने रु. 96/– लाख की रकम की दो बैंक गारंटियां भी निष्पादित की – अपीलार्थी के विरुद्ध रु. 184/– लाख का बकाया था, जिसे विवादित नहीं किया गया – अपीलार्थी ने प्रत्यर्थी क्र. 1 को भुगतान की समयसारणी भी प्रस्तावित की है – बैंक गारंटियां निश्चित रुप से स्वीकृत रकम से कम है – अभिनिर्धारित – बैंक गारंटी, बैंक और प्रत्यर्थी क्र. 1 के बीच की एक स्वतंत्र संविदा है – यह बिना शर्त अपरिवर्तनीय है – वास्तव में सुविधा का भार बैंक गारंटियों को भुनाने में है – अधिकारिता की त्रुटि नहीं और न ही आदेश किसी प्रत्यक्ष अवैधता से ग्रसित है – हस्तक्षेप की आवश्यकता नहीं – बैंक गारंटियों को अविलम्ब भुनाने के लिए बैंक को निदेशित किया गया।

Cases referred :

2012(I) MPJR 123, (1999) 8 SCC 436, 1997 (6) SCC 450, 1979 MPLJ 284, (2006) 6 SCC 293, (2008) 1 SCC 544.

A.K. Sethi with *Manoj Manav,* for the appellant.
A.K. Chitale with *B.A. Chitale,* for the respondent No.1.
Nitin Bhati, for the respondents No. 2 & 3.

ORDER

S.C. SHARMA, J. :- The present appeal has been filed under Order 43 Rule 1 of the Code of Civil Procedure, 1908 by the appellant being aggrieved by the order dated 11-09-2012 passed by the learned District Judge, Ujjain M.P. in Civil Suit No.04-A/2012, by which the trial court has dismissed the application under Order 39 Rule 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908 for grant of temporary injunction.

2. Appellant's contention is that the appellant has entered into an agreement with the respondent No.1 Parle Biscuits Private Ltd., on 11-02-2011 and thereafter pursuant to the aforesaid agreement they have also executed two bank guarantees of Rs 50 lacs and 42.44 lacs, respectively. It has been further stated that after completion of the agreement as there was some outstanding amount against the appellant, the appellant has offered a payment

schedule to respondent No.1 and even one installment has been paid to the defendant No.1/respondent No.1. It has been further stated that after receiving the first installment the respondent No.1 submitted the bank guarantee for encashment and the present appellant being aggrieved by the action of the respondent No.1, in encashing the bank guarantees preferred a writ petition before this court and the same was registered as WP No. 4361/2012.

3. This court on 01-05-2012 has granted an interim order. However, the writ petition was withdrawn on 20-07-2012 with a liberty to take appropriate steps, in accordance with law. The petitioner Company has further stated that after the withdrawal of the writ petition, a suit for declaration and permanent injunction was filed before the learned District Judge, Ujjain on 23-07-2012, alongwith an application under Order 39 Rule 1 and 2 read with section 151 of CPC claiming injunction and also an application was preferred for grant of ex-parte injunction. Interim injunction was granted on 24-07-2012. However, after hearing both the parties, the injunction application has been turned down by an order dated 11-09-2012. The order dated 11-09-2012 is impugned in the present Miscellaneous Appeal.

4. The contention of the learned senior counsel appearing for the appellant Company is that the trial court has erred in law in fact in rejecting the injunction application. It has been further stated that balance of convenience has not been seen by the trial court while rejecting the application for grant of injunction. It is also been stated that the defendant No.1/respondent No.1 has raised a demand of Rs. 184 lacs approximately and the same has never been disputed till date though the demand was illegal and against the contract. It has been further contended that against the demand of Rs. 184 lacs, repayment schedule was also submitted by the present petitioner and all the aforesaid explanations have not been considered by the trial court and, therefore, the impugned order deserves to be set-aside. It has been further contended that the bank guarantee has to be read along with clause 10.4 of the agreement, which is a very relevant clause and by reading the clause 10.4 of the agreement, the bank guarantee becomes a conditional bank guarantee and, therefore, the respondent No.1 cannot be permitted to revoke the bank guarantee till the matter is finally decided by the trial court.

5. Learned counsel has placed reliance upon a judgment delivered by this court in the case of *Devi Shakuntala Thakral Vs. Wig Brothers (India) Pvt. Ltd., and another* reported in 2012 (I) MPJR 123 and the contention

of the learned senior counsel is that once a bank guarantee is conditional, it cannot be revoked as held by this court in the aforesaid case. He has placed reliance on another judgment delivered by the apex court in the case of *Hindustan Construction Company Ltd., vs. State of Bihar and others* reported in (1999) 8 SCC 436 and he has placed heavy reliance upon paragraph-8 of the aforesaid judgment. His contention is that a Bank guarantee which is not un-conditional and unequivocal in terms, cannot be revoked. He has prayed for quashment of the order dated 11-09-2012.

6. On the other hand learned senior counsel arguing the matter on behalf of the respondent No.1 has vehemently argued before this court that the bank guarantee in question is an unconditional bank guarantee and in light of clause 2 of the bank guarantee as and when the Bank is called upon to encash the bank guarantee, which is unequivocal and unconditional, the bank is left with no other choice except to encash the bank guarantee. His contention is that merely because in first bank guarantee it has been mentioned that the parties have entered into an agreement dated 02-02-2010, it does not mean it is a conditional bank guarantee. His further contention is that the clause 10.4 of the agreement empowers respondent No.1 Company to recover damages and it does not mean that other dues cannot be recovered by the Company by encashing the bank guarantee. He has further stated that besides recovery of the dues by encashing the bank guarantee, the respondent No.1 is also claiming damages by virtue of clause 10.4 from the petitioner Company. Learned counsel has placed reliance upon various judgment delivered by the apex court from time to time and his contention is that the judgment relied upon by learned counsel for the appellant in the case of *Hindustan Construction Company Ltd.*, (supra) has already been distinguished by the apex court in the case of *Dwarikesh Sugar Vs. Prem Heavy Engg.* reported in 1997(6) SCC 450. He has also argued before this court that the outstanding liability excluding the damages has been admitted by the appellant Company and, therefore, the trial court keeping in view the various factors, which are necessary for grant of an injunction has rightly turned down the prayer for grant of an injunction. He prays for dismissal of the Miscellaneous Appeal.

7. Heard learned counsel for the parties and perused the record. The matter is being disposed of finally with the consent of all parties.

8. In the present case, it is an undisputed fact that the present appellant has initially filed a writ petition before this court restraining the respondent

No.1 from encashing the bank guarantee in question. This court has initially granted interim order on 01-05-2012 passed in Writ petition No. 42361/ 2012. However on 20-07-2012, the writ petition was withdrawn with a liberty to take appropriate steps ,in accordance with law.

9. The present appellant after withdrawal of the writ petition filed a civil suit for declaration and for grant of permanent injunction before the District Judge, Ujjain on 23-07-2012 and initially ex-parte injunction was granted on 24-07-2012.

10. A detailed and exhaustive reply has been filed on behalf of the respondent No.1/defendant No.1 and the trial court has finally dismissed the application for grant of temporary injunction, by an order dated 11-09-2012. The Bank guarantee in question is on record. Clauses- 1, 2, 3, 4, 5 and 6-A and 6-B of the Bank guarantee reads as under :-

> "1. "PARLE" has agreed to pay Rs. 1.25 crore (Rupees Once Crore Twenty five lacs only) to M/s Singh Cold Storage Pvt. Ltd., Ujjain (MP) towards purchase of potatoes, as per the potato purchase agreement.
>
> 2. We Bank of India, Branch Feeganj, Ujjain (hereinafter referred to as the Bank) at the request of M/s Singh Cold Storage Pvt. Ltd., Ujjain (MP), hereby irrevocably and unconditionally guarantee to "PARLE" that the Bank shall pay without demur all the amount of the dues under the raw sugar processing arrangement whenever called upon to pay by "PARLE".
>
> 3). We, the BANK, hereby further undertake to pay as primary obligor and not merely a surety but to pay such sums not exceeding Rs. 50.00 lacs Rupees (Fifty Lacs Only) to Parle immediately without demur and objections and without reference to and without questioning the right of PARLE to make such demand or the propriety or legality of the demand merely on demand of Parle upon its first demand in the format as per appendix-1 hereto.
>
> 4). We, BANK, hereby undertake to pay the PARLE an amount not exceeding Rs. 50.00 lacs (Rupees Fifty lacs only) to the PARLE immediately on demand in writing and without

demur.

5). We, the BANK, do hereby declare and agree that the decision of Parle as whether any amount or any part thereof is payable under the said arrangement and as to the amount payabale by Bank to the PARLE hereunder shall be final and binding on us.

6). We, the BANK, do hereby declare and agree that:-

a). That the a bank guarantee shall not exceed Rs. 50.00 lacs (Rupees Fifty lacs only).

b). That PARLE shall have the fullest liberty without our consent and without affecting in any manner our obligations hereunder to vary any of the terms and conditions of the said arrangement or to extend or to allow time for payment related performance of any obligation of the said arrangement from time to time or to postpone for any time or from time to time any of the powers exercisable by Parle against the said arrangement and to forbear or to enforce any of the terms and conditions relating to the said arrangement and we shall not be relieved from our liability by reason of any variation or extension being granted to the said M/s Singh Cold Storage Pvt. Ltd., Ujjain (MP) or forbearance act or omission on part of Parle or any indulgence by Parle to M/s Singh Cold Storage Pvt. Ltd., Ujjain or to give such matter of thing whatsoever which under the law relating to sureties would be for this provision, have effect of so relieving us."

11. The aforesaid bank guarantee is for a sum of Rs. 50.00 lacs. There is another bank guarantee of the year 2010 with similar clauses and it is for a sum of Rs. 42,44,000.00, they are dated 12-04-2010 and 15-04-2010, respectively. It is certainly true that the parties have entered into a processing agreement on 02-02-2010, but the terms and conditions of the agreement, are certainly not a part of the bank guarantee.

12. This court has also carefully gone through the agreement executed between the parties and clause 10.4 of the agreement (page-48) provides that in case the supplier fails to procure/to supply goods and the Company is

required to purchase the goods from open market, the Company shall have a right to terminate the agreement for non-supply and in addition shall be entitled of refund all the amount paid by way of advance and shall also be entitled to recover damages from the supplier. The aforesaid clause nowhere mentions that the Company will not be able to encash the bank guarantee and will not be able to recover other dues. The aforesaid clause makes it very clear that the respondent No.1 Company can recover damages also in addition to other recoveries.

13. This court is of the considered opinion that the bank guarantee in the present case taking into account the specific clause i.e Clauses 2 and 3 is irrecoverable and unconditional bank guarantee. Not only this, paragraph-2 of the memo of appeal, paragraph- 7 and 9, (grounds) of the appeal reads as under :-

> "Paragraph -2 (Memo of Appeal) :- That, after the completion of agreement, some outstanding has been shown on the name of appellant and same was accepted by the appellant/plaintiff and sent a schedule of payment and same was accepted by the respondent NO.1/defendant and according first installment was paid and received by the defendant No.1.
>
> Paragraphs 7 and 9 (Grounds of Appeal) :-
>
> "7. That, the learned Trial Court has considered this aspect that, in case of damage the defendant No.1 having liberty to encash the bank guarantee, but such damage has never been raised by the defendant No.1 and the appellant has never denied their any damage, contrary to this, the amount demanded by the defendant No.1 has been accepted by the appellant and the payment of the demand is under process.
>
> 9. That, the conducts of the defendant No.1 has never been considered by which, initially they have accepted the reschedule of payment and accepted the first part of the payment and after the accepting of the first installment, without any knowledge of the appellant, the bank guarantee has been produced in the Bank with a malafide intention, which shows that, the defendant No.1 is not willing to follow the repayment schedule and he is in hurry to grab the amount from both the

side."

14. The aforesaid paragraphs makes it very clear that the plaintiff/the present appellant has accepted the outstanding liability. Plaintiff has also mentioned in ground No.4 that the defendant No.1 has raised demand of Rs. 184 lacs, approximately and the same has not been disputed by the plaintiff till date and keeping in view the demand of Rs. 184 lacs, a repayment schedule was also submitted to the respondent No.1 Company by the plaintiff. As per repayment schedule the last date to clear the entire outstanding dues was 30th of September, 2013. However,it has not been done by the plaintiff.

15. Order 39 Rule 1 and 2 of the Code of Civil Procedure, 1908 reads as under :-

> "1. **Cases in which temporary injunction may be granted.-** Where in any suit it is proved by affidavit or otherwise-
>
> (a) that any property in dispute in a suit is in danger of being waster, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
>
> (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to [defrauding] his creditors,
>
> (c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property [or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until the disposal of the suit or until further orders.
>
> "(2) In case of disobedience of any order passed under sub-rule (1) the Court granting injunction may proceed against the

person guilty of such disobedience under sub-rule (3) and (4) of rule 2 of this Order"

Orissa.- Same as in Patna.

Patna.- In Order XXXIX, in rule 1, at the end, insert the following provisos, namely:- "Provided that no such temporary injunction shall be granted if it would contravene the provisions of section 56 of the Specific Relief Act (Act 1 of 1877):

Provided further that an injunction to restrain a sale, or confirmation of a sale, or to restrain delivery of possession, shall not be granted except in a case where the applicant cannot lawfully prefer, and could not lawfully have preferred, a claim to the property or objection to the sale, or to the attachment preceding it, before the Court executing the decree."

16. Learned District Judge after taking into account the aforesaid statutory provision of law and the law laid down by the apex court in various cases has rejected the application for grant of injunction preferred by the plaintiff. It has been observed that the plaintiff has not been able to establish the irreparable loss nor has established the balance of conveniences enabling the court to grant an injunction. The matter relating to grant of injunction has been considered by the apex court in various cases and the apex court in the case of *Dwarikesh Sugar Vs. Prem Heavy Engg.* (supra) in paragraphs -29, 30, 31, 32 and 33 held as under :-

"29. It is unfortunate that the High Court did not consider it necessary to refer to various judicial pronouncements of this Court in which the principles which have to be followed while examining an application for grant of interim relief have been clearly laid down. The observation of the High Court that reference to judicial decisions will not be of much importance was clearly a melhod (sic:method) adopted by it in avoiding to follow and apply the law as laid down by this Court. Yet another serious for which was committed by the High Court, in the present case, was not to examine the terms of the bank guarantee and consider the letters of invocation which had been written by the

appellant. If the High Court had trail the trouble of examining the documents on record, which had been referred to by the trial court, in its order refusing to grant injunction, the court would not have granted the interim injunction. We also do not find any justification for the High Court in invoking the alleged principle of adjust enrichment to the facts of the present case and then deny the appellant the right to encash the bank guarantee. If the High Court had taken the trouble to see the law on the point it would have been clear that in encashment of bank guarantee the applicability of the principle of undue enrichment has no application.

30. We are constrained to make these observation with regard to the manner in which the High Court had dealt with this case because this is not an isolated case where the courts, while disobeying or not complying with the law laid down by this Court, have at time been liberal in granting injunction restraining encashment of bank guarantees.

31. It is unfortunate, that notwithstanding the authoritative the pronouncements of this Court, the High Courts and the courts subordinate thereto, still seem intent on affording to this Court innumerable opportunities for dealing with this area of law, thought by this Court to be well settled.

32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops.

33. Before concluding we think it appropriate to mention about the conduct of the respondent - bank which has chosen not to

> be in this case. From the facts stated hereinabove it appears to us that the respondent bank has not shown professional efficiency, to say the least, and has acted in a partisan manner with a view to help and assist respondent no. 1. At the time when there was no restraint order from any Court, the bank was under a legal and moral obligation to honour its commitments. It, however, failed to do so. It appears that the bank deliberately dragged its feet so as to enable respondent no.1 to secure favourable order of injunction from the Court. Such conduct of a bank is difficult to appreciate We do not wish to say anything more but it may feel that it will be prejudicial in the event of the appellant taking action against it."

17. Keeping in view the aforesaid judgment delivered by the apex court and also keeping in view the fact that the bank guarantee it is unconditional and irrecoverable, this court is of the considered opinion that the learned District Judge has rightly rejected the injunction application, keeping in view the judgment delivered in the case of *Dwarikesh Sugar Vs. Prem Heavy Engg* (supra), it is not a case where a fraud has taken place or a bank guarantee was obtained by coercion and, therefore, in absence of established fraud and keeping in view the bank guarantee, the trial court has rightly declined prayer for grant of injunction and from restraining the respondents from encashment of the bank guarantee.

18. This court in the case of *Gopal Narayan Vs. State of M.P.* reported in 1979 MPLJ 284 while again dealing with the factors for grant of interim injunction in paragraph-7 has held as under :-

> "7. Even on merits, there is no prima-facie case in favour of the plaintiff-appellant. Mere institution of a suit challenging vires of provisions of law and an assessment order passed by a competent authority cannot entitle a plaintiff to claim as of right issuance of interim injunction to restrain recovery of tax-imposed and assessed on him. Three factors have to be shown to co-exist by a plaintiff to claim and / or sustain a grant of interim injunction viz., (a) prima-facie case, (b) balance of convenience and (c) irreparable injury, if any of the aforesaid factors is not shown to exist then interim injunction cannot be

issued."

19. Keeping in view the aforesaid, as no prima facie case was established before the trial court nor balance of convenience was established before the trial court and no irreparable damages was established before the trial court, the trial court has rightly declined to grant injunction in the matter.

20. The apex court in the case of *State Bank of India Vs. Mula Sahakari* reported in (2006) 6 SCC 293 in paragraphs 24 to 28 has held as under :-

> "24. The said document, in our opinion, constitutes a document of indemnity and not a document of guarantee as is clear from the fact that by reason thereof the Appellant was to indemnify the cooperative society against all losses, claims, damages, actions and costs which may be suffered by it. The document does not contain the usual words found in a bank guarantee furnished by a Bank as, for example, "unequivocal condition", "the cooperative society would be entitled to claim the damages without any delay or demur" or the guarantee was "unconditional and absolute" as was held by the High Court.
>
> 25. The High Court, thus, misread and misinterpreted the document as on scrutiny thereof, it had opined that it was a contract of guarantee and not a contract of indemnity.
>
> 26. The document was executed by the Bank in favour of the cooperative society. The said document indisputably was executed at the instance of Pentagon.
>
> 27. We have hereinbefore noticed the surrounding circumstances as pointed out by Mr. Naphade as contained in Clauses 15.2.4 and 15.2.5 of the contract vis-`-vis the letters exchanged between the parties dated 6.4.1985, 11.4.1985, 16.4.1985 leading to execution of the document dated 07.09.1985 by the First Appellant in favour of the cooperative society.
>
> 28. We are, however, unable to accept the submissions of the learned Senior Counsel that the bank guarantee must be construed in the light of other purported contemporaneous documents. A contract indisputably may be contained in more

> than one document. Such a document, however, must be a subject matter of contract by and between the parties. The correspondences referred to hereinbefore were between the cooperative society and Pentagon. The said correspondences were not exchanged between the parties hereto as a part of the same transaction. The Appellant understood that it would stand as a surety and not as a guarantor."

21. Keeping in view the aforesaid this court is of the considered opinion that merely because parties have entered into an agreement and later on Bank guarantees have been furnished, it does not mean that its a conditional bank guarantee. The bank guarantee, whether it is conditional bank guarantee or unconditional bank guarantee ? whether it is a revocable or irrevocable ? has to be seen by going through the relevant clause mentioned in the bank guarantee itself and, therefore, in the present case as the bank guarantees are not conditional nor revocable, the question of restraining the respondents from encashing the bank guarantees does not arise. Not only this, it is a well settled proposition of law that a bank guarantee is a contract between the bank and beneficiaries as held by the apex court in the case of *Vinitec Electronics (P) Ltd., Vs. HCL Infosystems Ltd.*,reported in (2008) 1 SCC 544. The apex court in the aforesaid case has held as under :-

> "12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour it guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In *BSES Ltd. V. Fenner India Ltd.* this Court held :(SCC pp. 733-34, para 10)
>
> "10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or

"irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in U.P. State Sugar Corpn. V. Sumac International Ltd. (hereinafter 'U.P. State Sugar Corpn.) this Court, correctly declared that the law was 'settled'."

22. This court is of the considered opinion that in the present case also the bank guarantee is an independent contract between the Bank and the respondent No.1. It is unconditional irrevocable one and therefore the learned District Judge was justified in dismissing the injunction application. Not only this, this is a case wherein the present appellant has categorically stated in the memo of appeal as well as at various other places that the outstanding amount of Rs. 182 crores has to be paid to the respondent No.1. It has also been stated that they have not disputed the amount, though it is an illegal demand. The bank guarantees are amounting to only about 96 lacs only, which is certainly less than the admitted amount. The balance of convenience is infact in encashment of the bank guarantees. The learned District Judge has not committed any jurisdictional error nor the order suffers from any patent illegality and therefore this court does not find any reason to interfere with the order passed by the learned District Judge.

23. Before closing the matter, this court would like to observe that in the present case a caveat has been filed by the respondent No.1. The noting made by the Registry reflects that the caveat was on record. However, the respondent No.1 against whom injunction has been sought has not been heard while passing an interim order. However, as matter has now been finally decided by dismissing the present appeal, the respondent Bank is directed to encash the bank guarantees forthwith..

24. Learned counsel appearing for the respondent No.2 Bank, Mr Nitin Bhati, who is present in court and as order has been dictated in open court undertakes to inform the Bank about the order passed today.

The appeal stands dismissed.

No order as to costs.

c.c. as per rules.

Appeal dismissed.

I.L.R. [2014] M.P., 3047
CRIMINAL REVISION

Before Mr. Justice U.C. Maheshwari & Mrs. Justice Vimla Jain

Cr. Rev. No. 674/2013 (Jabalpur) decided on 18 July, 2013

SANTOSH KUMAR ...Applicant
Vs.
C.B.I. ... Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Sections 397/401* - Rejection of application for returning original warehouse's receipt - Held - Original warehouse's receipt seized in connection of the impugned offence have been sent to authorized expert for its examination - Report is still awaited - Discretion to return the same lies only with such court which is not possible at this stage - However, the applicant shall be at liberty to file application after receiving the expert report, same shall be considered in accordance with law - Revision dismissed. (Para 5)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397/401 – मालगोदाम की मूल रसीद की वापिसी हेतु आवेदन को अस्वीकार किया जाना – अभिनिर्धारित – आक्षेपित अपराध से संबंधित जब्त की गई मालगोदाम की मूल रसीद को उसके परीक्षण हेतु प्राधिकृत विशेषज्ञ को भेजा गया – प्रतिवेदन अभी अप्राप्त है – उक्त को वापिस करने का विवेकाधिकार केवल उक्त न्यायालय को है जो कि इस प्रक्रम पर संभव नहीं – किन्तु, विशेषज्ञ प्रतिवेदन प्राप्त करने के पश्चात आवेदन प्रस्तुत करने के लिए आवेदक स्वतंत्र होगा और उक्त को विधि अनुसार विचार में लिया जायेगा – पुनरीक्षण खारिज।

Wajid Hyder, for the applicant.
R.S. Siddiqui, Assistant Solicitor General for the non-applicant/C.B.I..

O R D E R

The Order of the Court was delivered by :
U.C. MAHESHWARI, J. :- This case is listed today for further orders but in the available circumstances with the consent of the parties the same is heard finally.

1. Petitioner/ accused No.3 has filed this revision under Section 397/ 401 of Cr. P. C. being aggrieved by the order dated 19.3.2013 passed by the Special Judge, (CBI), Jabalpur in Misc. Criminal Case No.05/2012, whereby his application dated 7.3.2013 (Ann. P.3) for returning the original warehouse's

receipt of 360 bags of Chana has been dismissed.

2. The applicant's counsel after taking us through the averments of revision memo along with the application and the impugned order argued that in the lack of such original receipt the applicant is not in a position to get back his goods from the concerning warehouse and if such receipt is not made available to him then not only the applicant but the nation may also suffer the loss. He further said that inspite making such document as part and partial of the charge sheet original receipt of the same was not placed with the charge sheet. However, he fairly submits that photo copy of such original receipt has been supplied to him but on the basis of such photo copy he is not in a position to get back his goods (Chana) from the warehouse. In such premises the impugned order passed by the trial Court rejecting his application is apparently perverse and under the error of jurisdiction vested in such Court and prayed to set aside the impugned order and allow such application by admitting and allowing the revision.

3. On the other hand Assistant Solicitor General argued that during investigation such receipt was seized, the same was made the part of the charge sheet and after supplying photo copy of such receipt to the applicant the charge sheet was filed and in order to prove the case, the same has been sent to Government Examiner of Questioned Documents, Calcutta for obtaining the requisite expert report to verify its veracity and hand writing etc., the expert report is still awaited, unless such report along with the receipt is received same could not be made available on the record of the trial Court. He further said that the impugned order has been passed under the vested discretionary jurisdiction by the trial Court, therefore under the revisional jurisdiction the same could not be interfered by this Court. He further argued that there is catena of decisions in which it is held that if any order is passed by any subordinate Court under its vested jurisdiction then under the revisional jurisdiction the same could not be interfered and prayed for dismissal of the revision.

4. Having heard the counsel, keeping in view their arguments, we have carefully gone through the papers placed on record along with the revision memo. It is apparent that the impugned application (Ann. P.3) has been dismissed by the trial Court under it's vested jurisdiction and not committed any error of jurisdiction, so in such premises the impugned order could not be interfered by this Court under Section 397/401 of Cr. P. C. It is also apparent that in passing the impugned order no irregularity or any thing against the propriety of law has been committed by the subordinate Court. In such premises also the impugned order does not

require any interference at this stage.

5. Apart the aforesaid, on examining the case on merits it is apparent fact that aforesaid receipt of the warehouse was seized in connection of the impugned offence during the course of the investigation, same has been sent to the aforesaid expert for its examination and obtaining the report and unless such report is received along with the original document either the trial Court or this Court cannot pass any order to return the original document to the petitioner. In any case such original receipt is part of the charge sheet of the impugned case, the trial Court has a discretion to return the same and that question may be considered by such Court only after receiving the expert report in that regard, which is not possible at this stage because such report is still awaited. However, it is observed that after receiving the report and the original receipt, the applicant shall be at liberty to file appropriate application to get back the aforesaid original receipt and pursuant to that trial Court is directed that if any such application is preferred on behalf of the applicant after receiving the aforesaid report along with the original document then same shall be considered in accordance with the procedure prescribed under the law.

6. The revision is dismissed accordingly.

Revision dismissed.

I.L.R. [2014] M.P., 3049
CRIMINAL REVISION
Before Mr. Justice Subhash Kakade
Cr. Rev. No. 536/2014 (Jabalpur) decided on 29 October, 2014

RAYEES KHAN ...Applicant
Vs.
SMT. JAHIDA BI & ors. ...Non-applicants

A. ***Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401 - Grant of Interim maintenance u/s 125, Cr.P.C. - Award from the date of application*** **- Order granting interim maintenance challenged on the ground that respondent No.3 being major is not entitle for the same and it should not have been awarded from the date of application - Applicant being Bhopal Gas affected person incurred huge amount on his own treatment - Held - Applicant divorced respondent No.1 and also turned out his children, neglected to maintain them and married with another woman - Reply to application was filed after lapse of more than 10 months - He adopted delaying tactics - Sufficient ground for awarding maintenance**

from the date of application. **(Paras 15, 16 & 17)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 397, 401 – द.प्र.सं. की धारा 125 के अंतर्गत अंतरिम भरण–पोषण का प्रदान – आवेदन की तिथि से अवार्ड – अंतरिम भरण–पोषण प्रदान करने के आदेश को, इस आधार पर चुनौती दी गई कि प्रत्यर्थी क्र. 3 वयस्क होने के नाते उक्त का हकदार नहीं है और आवेदन की तिथि से उसे प्रदान नहीं किया जाना चाहिए था – आवेदक भोपाल गैस प्रभावित व्यक्ति होने से उसने स्वयं के उपचार पर विशाल रकम खर्च की है – अभिनिर्धारित – आवेदक ने प्रत्यर्थी क्र. 1 को तलाक दिया और उसके बच्चों को बाहर निकाल दिया, उनके पालन–पोषण की उपेक्षा की और अन्य महिला से विवाह किया – आवेदन का जवाब 10 माह से अधिक अवधि व्यपगत होने के पश्चात प्रस्तुत किया गया – उसने विलंब की युक्ति अपनाई – आवेदन की तिथि से भरण–पोषण अवार्ड करने का पर्याप्त आधार।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401 - Entitlement on account of age **- Age of respondent No. 3 is mentioned as 16 years in the main application therefore Family Court is directed to decide the issue of entitlement after giving fair opportunity to both the parties regarding age of respondent No. 3.** **(Paras 20, 21, 22)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 397, 401 – आयु के कारण हकदारी – मुख्य आवेदन में प्रत्यर्थी क्र. 3 की आयु 16 वर्ष उल्लिखित है इसलिए कुटुम्ब न्यायालय को निदेशित किया गया कि प्रत्यर्थी क्र. 3 की आयु के संबंध में दोनों पक्षकारों को निष्पक्ष सुनवाई का अवसर देने के पश्चात हकदारी के विवाद्यक का विनिश्चय करें।

C. Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401 - Expenses incurred towards treatment **- Civilian of Bhopal city who are affected from Gas Tragedy are getting appropriate medical facility and compensation so if he is expending huge amount on his own treatment is not justified - Family court has awarded a reasonable amount - Revision dismissed.** **(Para 23)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 397, 401 – उपचार के लिए वहन किये गये खर्चे – भोपाल शहर के सिविलियन जो गैस त्रासदी से प्रभावित हुए हैं, उन्हें समुचित चिकित्सीय सुविधा और प्रतिकर मिल रहा है, अतः यदि वह स्वयं के उपचार पर विशाल रकम खर्च कर रहा है, यह न्यायोचित नहीं – कुटुम्ब न्यायालय ने युक्तियुक्त रकम अवार्ड की है – पुनरीक्षण खारिज।

Cases referred :

AIR 1978 SC 1807, 2005(2) SCC 503, (2008) 2 SCC 316, AIR

1986 SC 984, (1985) 4 SCC 337, 1985 SCC (Cr.) 556, (1985) 2 Crimes 872, 2009(1) MPLJ (Cri.)11.

Ashish Tiwari, for the applicant.
S.D. Khan, for the non-applicants.

ORDER

SUBHASH KAKADE, J. :- This revision under Section 397/401 of the Code of Criminal Procedure 1973, here-in-after in short as Code, read with Section 19 (4) of the Family Courts Act, 1984 has been filed against the order dated 02.01.2014, passed in MJC No.568/2012, by which learned Principal Judge, Family Court, Bhopal awarded interim maintenance to the tune of Rs.3,500/- per month to the respondent no.1, Rs.3,000/- each to respondents no.3 and 4 and Rs.2,500/- to respondent no.5.

2. After perusal of the impugned order and other documents available on record following facts are not disputed by the parties; hence detailed pleadings are not required to be discussed: -

That, the respondent No.1 is legally wedded wife of the applicant.

That, the respondents No.2 to 5 are children of this couple.

That the applicant is posted as Security Officer in the Municipal Corporation, Bhopal.

That as per his salary slip for the month of October 2012 as against total emolument 40,318/- he get salary of Rs. 29,983/- as cash in hand.

3. On the above facts and circumstances learned Family Court allowed interim maintenance allowance to the respondent No.01 and 03 to 05 as mentioned above.

4. Shri Ashish Tiwari, learned counsel for the applicant submits that the respondent no.1 is divorced wife of the applicant and he has performed second marriage with the consent of the respondent no.1 resultantly changed nomination in the record of employer i.e. Nagar Nigam, Bhopal. The applicant is also having two children from his second wife. The respondents are residing at the house allotted to the applicant by the employer, therefore the rent of the said house is deducted from his salary directly. On the other hand, the applicant is residing in a rented house paying rent of Rs.4,000/- per month. Learned counsel for the applicant has strenuously contended that the respondent No.1 and

other respondents are capable of maintaining themselves, respondent No.4 & 5 and the respondent no.3/daughter is major, hence, not entitled for any maintenance. It is also pointed out that the applicant has incurred huge expenses on his own treatment as he was affected by the Bhopal Gas Tragedy and was suspended also. Hence, prays for dismissal of the order passed by the learned Family Court. Learned counsel for the applicant finally argued that learned Family Court awarded interim maintenance amount from the date of filing of application which is against the settled principal of law, hence, erroneous, requires modification.

5. Shri S.D. Khan, learned counsel for the respondent vehemently opposed the arguments advanced by the learned counsel for the applicant and further submitted that looking to the salary receiving by the applicant interim maintenance award passed by the learned Family Court warrants no interference, hence, this revision deserves to be dismissed.

6. Heard learned counsel for the parties at length, perused the material made available by the parties and also perused the impugned order. After reflecting over the matter, I am implicitly satisfied that on merits, the impugned order, warrants no interference.

7. Section 125 of the Code is a measure of social justice and is specially enacted to protect women and children and as noted by the Apex Court in *Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and Ors.* reported in (AIR 1978 SC 1807) falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India, 1950.

8. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted by the Apex Court in the case of *Savitaben Somabhai Bhatiya vs. State of Gujarat and Ors.* reported in [2005(2) SCC 503].

9. In *Chaturbhuj vs. Sita Bai* (2008) 2 SCC 316, the Apex Court observed as follows:-

"The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have

a moral claim to support.

10. In the light of above discussed legal position the object of the maintenance proceedings is clear that it is a measure of social justice to give effect to natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves.

11. It is also held by the Apex Court that interim maintenance *pendente lite* can be granted – Please see- *Savitri vs. Govind,* reported in [AIR 1986 SC 984: (1985) 4 SCC 337; 1985 SCC (Cr) 556; (1985) 2 Crimes 872].

12. It is well settled that the wife and children are entitled to maintain standard of living, which is neither luxurious nor penurious and also be lived in decent life yet, as per with the dignity of husband/father.

13. In the case of *Shail Kumari Devi and another vs. Krishan Bhagwan Pathak,* 2009(1) M.P.L.J. (Cri.) 11 it is held by the Hon'ble Supreme Court that in absence of any express bar or prohibition the Court by necessary implication could make interim order of maintenance subject to final outcome of the application. It is further held that before amendment of 2001 ceiling of maintenance amount was Rs.500/- only and after an amendment it is open to a Court under amended law to fix such amount as it thinks fit.

14. While deciding an application under Section 125 of the Code, the Court is required to record reasons for granting maintenance to wife, children or parents. Such maintenance can be awarded from the date of order, or if so ordered, from the date of filing of application for the maintenance, as the case may be. For awarding maintenance, from the date of application, express order is necessary, but, no special reasons, however, are required to be recorded by the Court.

15. In present case, the applicant divorced the respondent No.1 and also turned out his children, neglected to maintain them and married with another woman, these are sufficient grounds that interim maintenance shall be ordered from the date of application.

16. The Court is not required to give special reasons while awarding maintenance from the date of petition in respect of children, i.e., for minor respondent No.4 and 5.

17. It is pertinent to mention here that this maintenance petition was filed by the respondents before the learned Family Court Bhopal on dated 12.12.2012

and the applicant filed reply on dated 20.11.2013 as this date is mentioned on the reply after receiving the copy of the same. It goes to show that the applicant filed the reply after lapse of more than 10 months. Delaying tactics adopted by the husband is sufficient ground for awarding maintenance from the date of application.

18. In such premises learned Family Court ordered to pay the interim maintenance after filing reply by the applicant from the date of filing of the petition, i.e., 21.12.2012 is justified.

19. Looking to the entire circumstances of the case, status of the parties and salary certificate of the applicant at the most the prayer of the applicant can be considered that the applicant will pay the accumulated amount of maintenance for preceding 12 months of year 2013 in four equal installments, i.e., first three months January, February, and March 2013 on or before 01.12.2014; second installment April, May and June 2013 on or before 01.02.2015; third installment July, August and September 2013 on or before 01.04.2015 and fourth installment October, November and December 2013 on or before 01.06.2015. And for this payment, the conditions enumerated in the impugned order shall apply in toto.

20. Maintenance allowance is not allowed for respondent No.2 Ku. Amrin Jahan because at the time of filing application for maintenance she was major as 20 years old. Respondent No.3 Ku. Afreen Jahan's age is mentioned 16 years in main application. But, it is contended by learned counsel for the applicant that she is also major as she has attained the age of 18 years.

21. For deciding the matter of respondent No.3 Afreen Jahan, it would be appropriate to reproduce relevant exception to the Section 125 of the Code, which reads as under:

Explanation – for the purpose of this Chapter:-

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1975 (9 of 1975) is deemed not to have attained his majority.

22. It is directed that learned Family Court after giving fair opportunity to both the parties regarding age of respondent No.2 Ku. Afreen Jahan shall decide the matter on its merits. However, it is made clear that learned Family Court will not be governed by this order in any manner with regard to age of respondent No.3.

23. It is pertinent to mention here that civilian of Bhopal City, who are

affected from Gas Tragedy are getting appropriate medical treatment facility and appropriate compensation amount also,therefore, on the ground that the applicant is affected by Bhopal Gas Tragedy and expending huge expenses on his own treatment is not justified.

24. For the purpose of Section 125 of the Code suspension of husband or father cannot be a ground to disallow the maintenance amount to the wife or children because, during the suspension period, he definitely gets suspension allowance equal to 75% of last paid salary amount.

25. Considering the above enunciation of law it transpires that looking to the social and economic status of parties and facts and circumstances of the case concerned, the Court has affixed a reasonable amount of interim maintenance. Hence order passed by the Family Court is impeccable and does not warrant any interference by this Court.

26. Accordingly, this revision is hereby dismissed.

Revision dismissed.

I.L.R. [2014] M.P., 3055
CRIMINAL REVISION
Before Mr. Justice M.C. Garg
Cr. Rev. No. 853/2013 (Gwalior) decided on 31 October, 2014

RANI (SMT.) & ors. ...Applicants
Vs.
STATE OF M.P. & anr. ...Non-applicants

***Penal Code (45 of 1860), Sections 304-B, 302/34 & Criminal Procedure Code, 1973 (2 of 1974), Section 228 - Framing of Charges - Murder* - No evidence which may go to show that either the applicants caused any injury upon the deceased or caused the same with an intention to cause her death or even with knowledge that the injury would result in death - Nothing on record to show that death was culpable homicide in nature - Applicants cannot be said to be responsible for causing any injury leading to death of deceased - Hence, charge u/s 302 or 302/34 are set aside. (Paras 9,10 & 11)**

दण्ड संहिता (1860 का 45), धाराऐं 304बी, 302/34 व दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 228 – आरोप विरचित किये जाना – हत्या – कोई साक्ष्य नहीं जो यह दर्शा सकता हो कि या तो आवेदकगण ने मृतक को कोई चोट कारित की या

उसकी मृत्यु कारित करने के आशय से उक्त को कारित किया या यह ज्ञात होते हुए भी कि उस चोट से मृत्यु कारित होगी – यह दर्शाने के लिये अभिलेख पर कुछ नहीं कि मृत्यु, आपराधिक मानववध के स्वरुप की थी – मृतिका की मृत्यु का कारण बनने वाली किसी चोट को कारित करने के लिये आवेदकगण को उत्तरदायी नहीं कहा जा सकता – अतः धारा 302 या 302/34 के अंतर्गत आरोप अपास्त।

D.R. Sharma, for the applicants.
Pramod Pachouri, P.P. for the non-applicant No.1/State.
Suresh Agarwal, for the non-applicant No.2.

ORDER

M.C. GARG, J. :- 1. This order shall dispose of the aforesaid revision petition filed by the petitioners aggrieved by the order dated 20.09.13 passed by the Sessions Judge Gwalior in Sessions Trial No.474/11, wherein the trial Court has amended the charges by adding charges under Section 302/34 and in alternative under Section 304-B of IPC against the petitioners.

2. As per the case of the prosecution, the informant Rohit gave an information at Police Station Indarganj on 2.5.11, when the petitioner No.4-Rohit was living with his wife Sana alias Nisha in Khallasipura, Shinde Ki Chawani and after his mother Smt. Rani left for Agra at about 9.00 pm, he also left his wife at about 1.00 pm alone and went to Bada Lashkar.

3. As per the impugned order, the trial Judge amended the charges already framed against the petitioners who are the husband, mother-in-law and other family members of the deceased/wife of the petitioner-Rohit who is her husband under Section 306 of IPC to offence under Section 302 and in the alternative under Section 302/34 of IPC and in the alternative under Section 304-B of IPC. The relevant discussion which appears in the impugned order while framing the aforesaid charges are as under:-

> "यह सुनिर्धारित विधि है कि जहां ससुराल में घर के अन्दर मृतिका की असामान्य मृत्यु हुई हो और उसके शरीर पर फांसी की चोट के अलावा भी अन्य चोटें पाई गई हों वहां मृत्यु के कारण और चोट के स्पष्टीकरण का भार घर में रहने वाले सदस्यों पर होता है । मृतिका की शादी उक्त असामान्य मृत्यु के सात वर्ष के अन्दर होने की स्थिति भी प्रस्तुत साक्ष्य से इंगित होती है तथा अभियोजन साक्षियों ने दहेज प्रताडना पर से मारपीट की जाने की स्थिति भी प्रकट की है । अतः उपलब्ध साक्ष्य और प्रकरण की समस्त परिस्थितियों को देखते हुए यद्यपि धारा 306 भा0दं0वि0 में ही अभियोग पत्र प्रस्तुत किये जाने से उक्त आरोप ही प्रकरण में पूर्व

अधिकारी द्वारा विरचित किये गये थे किन्तु उक्त विवेचना अनुसार अभियुक्तगण का विचारण धारा 302 या 302 सहपठित धारा 34 भा0दं0वि0 एवं धारा 304बी भा0दं0 वि0 में भी करने हेतु प्रथम दृष्टया आधार प्रतीत होते है ।

अतः उक्त अतिरिक्त आरोप विरचित कर अभियुक्तगण को सुनाये व समझाये गये उनके द्वारा दोषी नहीं होने का अभिवाक् किया गया । अभियोजन जिन साक्षियों के कथन पूर्व में हो चुके हैं उनमें से अतिरिक्त आरोप के संबध में किस किस को प्रस्तुत करना है यह सूचित करने हेतु संक्षिप्त अवसर चाहता है। बचाव पक्ष द्वारा किन किन साक्षियों का अतिरिक्त परीक्षण किया जाना आवश्यक है यह प्रकट करने हेतु समय चाहता है । अतः न्याय हित में समय दिया जाता है । आगामी पेशी पर अभियोजन और बचाव पक्ष किन साक्षियों का अतिरिक्त परीक्षण अतिरिक्त आरोप के सबंध में कराना चाहते है सूचित करें।

प्रकरण दिनांक 18.10.2013 को प्रस्तुत हो ।"

4. It has been submitted on behalf of the petitioners that even though on account of the death of the deceased having been taken place within seven years of her marriage and also allegations of treating with her cruelty on account of demand of dowry charges under section 304-B and Section 304-B/34 IPC are made out, it is stated that in the absence of any evidence to the fact that the petitioners were responsible for causing death of the deceased, charges under section 302 of IPC are not made out.

5. I have heard the learned counsel for the petitioners as well as State counsel.

6. At the outset, I may observed that since learned counsel for the petitioners has not disputed framing of the charges under section 304-B and section 304-B/34 of IPC against the petitioners in the facts of this case, the impugned order to that extent is upheld.

7. Now the question arises whether the evidence available on record makes of the case against the petitioners also under section 302/34 of IPC.

8. In this case there is absolutely no evidence which may go to show that any of the petitioners in any way either caused any physical injury upon the person of the deceased which might have resulted in her death or had knowledge that any such injury caused by them is likely to cause death of the deceased. In fact, there is no allegation available on record that any of the petitioner caused any physical injury to the deceased. It is a case of suicide.

9. Even otherwise for the purpose of framing charge under section 302

of IPC, it is necessary for the prosecution to prove that it is a case of culpable homicide. Section 299 & 300 of IPC which reads as under:-

"299. Culpable homicide.- Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Explanation 1. A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2. Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3. - The causing of the death of child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

300. Murder.-Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

Secondly.-If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

Thirdly.- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

Fourthly.- If the person committing the act knows that is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of

causing death or such injury as aforesaid."

A bare reading of Section 299 and 300 IPC shows that the charges under section 302 of IPC can only be framed against the accused, if the case is covered by the aforesaid provisions and the death has been caused by the accused of the deceased by inflicting injury which is likely to cause death or with the knowledge by such act the accused is likely to cause death, however in the present case, there is no evidence which may go to show that either the petitioners caused any injury upon the deceased or caused the same with an intention to cause her death or even with a knowledge that any such injury on the person of the deceased would certainly resulted in her death.

10. In the present case no such situation arises in fact the death is unnatural death and the petitioners cannot be said to be responsible for causing any injury leading to the death of the deceased. It seems it is a case of committing suicide.

11. In view of the aforesaid in the order dated 20.9.13 to the extent that the charges framed by the trial court against the petitioners under Section 302 or under section 302/34 of IPC are set aside while maintaining amendment of charge under section 304-B and section 304-B/34 of IPC. The trial court will frame the charges as per the aforesaid directions and will proceed with the same.

A copy of this order be sent to the court concerned for information and compliance.

Order accordingly.

I.L.R. [2014] M.P., 3059

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice U.C. Maheshwari & Mrs. Justice Vimla Jain

M.Cr.C. No. 144/2013 (Jabalpur) decided on 17 July, 2013

GUMAN SINGH ...Applicant

Vs.

STATE OF M.P. ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 207 & 482 - **Supply of image copy of electronic documents pending trial - When the prosecution itself has not relied on such articles or implements then mere on the request or the whims of the applicant contrary to the provisions of**

Section 173(5) and Section 207 of the Code, the prosecution agency could not have been directed to supply the mirror copy, image copy or any such type of documents, which is not the part of the charge sheet and its record - No interference could be drawn in the matter by invoking the inherent power of this court enumerated u/s 482 of Cr.P.C. - Petition dismissed.

(Paras 2, 6 & 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 207 व 482 – विचारण लंबित रहते इलेक्ट्रॉनिक दस्तावेज की ईमेज प्रति को प्रदाय किया जाना – जब अभियोजन ने स्वयं उक्त वस्तुओं या साधनों पर विश्वास नहीं किया है, तब संहिता की धारा 173(5) व धारा 207 के उपबंधों के विपरीत आवेदक के मात्र निवेदन या सनक पर, प्रतिबिंब प्रति, ईमेज प्रति या ऐसे किसी प्रकार का दस्तावेज जो आरोप पत्र एवं उसके अभिलेख का हिस्सा नहीं है, को प्रदाय किये जाने के लिये अभियोजन एजेंसी को निदेशित नहीं किया जा सकता था – द.प्र.सं. की धारा 482 के अंतर्गत इस न्यायालय की अंतर्निहित शक्ति का अवलंब लेकर मामले में हस्तक्षेप नहीं किया जा सकता – याचिका खारिज।

Case referred :

148 (2008) DLT 289,

Kunal Dubey, for the applicant.
Vikram Singh, for the non-applicant/C.B.I..

ORDER

The Order of the Court was delivered by :
U.C. MAHESHWARI, J. :- The applicant/ accused has preferred this petition under Section 482 of Criminal Procedure Code (For short "the Code"), being aggrieved by the order dated 27.11.2012 passed by Special Judge, CBI Jabalpur in Special Case No.13/2009, whereby his application filed under Section 207 of the Code for appropriate direction to the respondent/ prosecution to provide him mirror copy of the electronic documents has been dismissed.

2. The applicant's counsel after taking us through the averments of the petition as well as the papers placed on record and the copy of the aforesaid application dated 31.10.2012 (Ann. A.2), argued that according to the charge sheet submitted by the prosecution the impugned case is based on number of computer/electronic documents, in such premises the prosecution was duty

bound to supply the image copy of such electronic documents, but the same was not given to him. In this regard some prayer was also made to the Court, inspite that same has not been made available to the petitioner in last four years. In the lack of mirror copy of such electronic documents, being related with the computer or laptop and key board, he could not defend his case properly and in such premises his right to defend the case may be prejudiced and prayed for allowing the aforesaid application by setting aside the impugned order by admitting and allowing this petition. He also placed his reliance on a decision of the Single Bench of Delhi High Court in the matter of *Dharmbir Vs. Central Bureau of Investigation* delivered on 11th March, 2013. Copy of such judgment referred by the applicant's counsel is taken on record. According to this copy such decision is reported in 148 (2008) DLT 289.

3. Having heard the counsel at length keeping in view his arguments we have carefully gone through the petition along with annexed papers, so also the impugned order.

4. It is apparent from the papers placed on record that whatsoever documents on which the prosecution has relied on to prosecute the applicant, the copies of the same have been made available to the applicant along with the police report filed under Section 173 of the Code at the initial stage on filing the charge sheet. It is apparent that prosecution has not relied on any keyboard, computer, laptop or any hard-disc. Although according to charge sheet some computer generated copy of the documents have been placed along with the charge sheet and copies of the same have been supplied to the applicant. So, in such premises it is apparent that prosecution has not relied on any of such documents or instruments like hard disc etc. So, in such premises, this Court has to consider the question whether the applicant is entitled to get the electronic copies, mirror copies or the image copies of the documents on which the prosecution has not placed his reliance.

5. Before giving answer of aforesaid question we would like to reproduce the corresponding part of Section 173 and 207 of the Code here in as ready reference. The same is read as under :

173. Report of police officer on completion of investigation.

(1) .....

(2) (i) .....

(a) .....

(b) .....

(c) .....

(d) .....

(e) .....

(f) .....

(g) .....

(ii) .....

(3) .....

(4) .....

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate alongwith the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements- recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

207. Supply to the accused the copy of police report and other documents.

In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub- section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub- section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section

164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub- section (5) of section 173: Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused: Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

6. In view of aforesaid existing provision of the Code on examining the case at hand, it is apparent that copies of the police report filed under Section 173 of the Code, copy of the FIR recorded under Section 154 of the Code, copy of interrogatory statements of the witnesses recorded under Section 161 of the Code, so also the copies of the other relevant documents, on which the prosecution has placed its reliance and submitted before the Court have been supplied to the applicant at the time of filing the charge sheet. It is also apparent from the impugned order, annexed papers available on record and the averments of the petition that the prosecution has neither placed his reliance on any computer, keyboard, laptop or any hard disc nor stated the same in the list of documents or articles in the aforesaid police report of Section 173 of the Code. So, in such premises in compliance of the provision of Section 207 of the Code the prosecution was bound to supply only the copies of the documents as per requirement in the aforesaid sub-section 5 of Section 173 of the Code and the same have been supplied to the applicant by the prosecution. We have not found any papers on record to show that any such laptop, computer, keyboard or other such instruments either have been seized or sent to the Forensic Science Laboratory to get examine and obtain the report. So, in such a situation when the prosecution itself has not relied on such articles or implements then mere on the request or the whims of the applicant contrary to the provisions of Section 173 (5) and 207 of the Code the prosecution agency could not have been directed to supply the mirror copy, image copy or any such type of documents, which is not the part of the charge sheet and it's record. So, in such premises we are of the considered view that the trial Court

has not committed any error in passing the impugned order and it does not require any interference under the inherent jurisdiction of this Court enumerated under Section 482 of the Code.

7. So far the case law in the matter of *"Dharmbir"* (Supra), decided by the Single Bench of Delhi High Court is concerned, it is suffice to say that in such case some hard disc along with CDs were seized and sent to the Andhra Pradesh Forensic Science Laboratory for its examination to obtain its report, as the prosecution has either placed or wanted to place his reliance on such documents for prosecution of the concerning applicant/ accused, which is not the situation in the case at hand, as stated above then in such distinguishable circumstances aforesaid cited case is not helping to the applicant. Even otherwise such decision of the Single Bench of Delhi High Court in the aforesaid available circumstances is not binding to the Division Bench of this Court.

8. In view of the aforesaid, we have not found any error, illegality, irregularity or anything against the propriety of law in the impugned order, which requires any interference under the inherent jurisdiction of this Court enumerated under Section 482 of the Code. Consequently, this petition being devoid of any merits deserves to be and is hereby dismissed at the stage of motion hearing.

Petition dismissed.

I.L.R. [2014] M.P., 3064

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice M.C. Garg

M.Cr.C. No. 5388/2013 (Gwalior) decided on 31 October, 2014

BANWARI SINGH GURJAR ...Applicant

Vs.

STATE OF M.P. & anr. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Inherent Power **- Quashing of FIR and Criminal Proceedings - Petitioner was not named in the FIR - Implicated as an accused on the basis of statements of other u/s 27 Evidence Act - Petition allowed to the extent that proceedings initiated against the applicant are quashed. (Paras 6, 10)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अंतर्निहित शक्ति – प्रथम सूचना रिपोर्ट और दाण्डिक कार्यवाही अभिखंडित की जाना – प्रथम सूचना

रिपोर्ट में याची का नाम नहीं – साक्ष्य अधिनियम की धारा 27 के अंतर्गत अन्य के कथनों के आधार पर अभियुक्त के रुप में आलिप्त किया गया – याचिका इस सीमा तक मंजूर कि आवेदक के विरुद्ध आरंभ की गयी कार्यवाही अभिखंडित।

Rajmani Bansal, for the applicant.
Prabal Solanki, for the non-applicant/State.

JUDGMENT

M.C. GARG, J. :- By this petition filed under Section 482 of Cr.P.C, the petitioner has prayed for quashing of the First Information report as Crime No.268 of 2013 against the petitioner under Section 34(1) (2) and 47 (A) of the Excise Act and also for quashing of the charge-sheet as well as criminal proceedings initiated on the aforesaid crime number. Copy of the FIR has been filed along with the petition which is annexure P/1.

2. It is a case of the petitioner that on the basis of some information during patrolling, the police has recovered country made liquor from the possession of the other co-accused namely Shailendra Singh and Ravindra Singh. Since the aforesaid liquor was recovered from the possession of other co-accused the case was registered against other co-accused except the petitioner at Crime No.268 of 2013 under section 34 (1) (2) of the Excise Act. On the basis of the statement made by one of the co-accused under section 27 of the Evidence Act, the present petitioner was also made one of the accused of the case.

3. It is submitted that except the confessional statement of co-accused, there is no evidence available on record against the petitioner so as to implicate him in this case. It is also submitted that the petitioner has nothing to do with the seized liquor or with the vehicle from which, the liquor was seized.

4. I have heard learned counsel for petitioner and also gone through the FIR as well as the documents filed in this regard by the prosecution.

5. The First Information Report of this case reads as under :

'मैं थाना अपठित मुरैना में उप. अधीक्षक के पद पर पदस्थ हूँ मैने दिनांक 26.5.2012 को थाना पर जर्ये मुखबिर सूचना मिली कि सुमावली की ओर से ग्राम खनेता के रास्ते एक अपठित गाडी पेरियो गाडी जिसमें अवैध शराब भी है आ रही है। इस सूचना पर मैं डी.आर. पी0 वर्मा एएस आई एवं आर. अपठित पूरन सिंह, एच.सी. 292 जयप्रकाश, आरक्षक 648 गजेद्र सिंह आरक्षक अपठित सिंह के मय गवाहान केशव सिी, शासकीय वाहन एम.पी. 07/8629 के मुखबिर

के बताये अनुसार ग्राम खनेता गांव निकलकर अपठित रोड पर पहुचा तो एक गाडी सफेद रंग की नबर एमपी06 बी.ए.0121 है आती दिखी जिसको रोका गया तो आगे से दो व्यक्ति गाडी की खिडकी खोलकर भाग पडे एक व्यक्ति को पकड लिया गाडी में देखा तो देशी लाल 31 अपठित वाले का नाम पूछा तो अपना नाम शैलेन्द्र सिंह गुर्जर निवासी ग्राम सेवडा का बताया अपने वाले व्यक्ति के नाम रविन्द्र सिंह गुर्जर, सुरेशउपाध्याय पुत्र नामालुम हुआ आरोपी शैलेन्द्र सिंह गुर्जर मय गाडी के भरी शराब का लाइसेंस मांगा गया तो कोई लाइसेंस होना नहीं ताया। जांच पर मौके पर अपठित जप्त कर कब्जा पुलिस की गई। मौके पर जप्ती पंचनामा बनायागया गिरफ्त पंचनामा प्रथक से बनाये गये। वाद मय आरोपी व जप्तशुदा शराब अपठित।"

6. From the FIR, it is clear that the present petitioner was not named in the FIR. I have also seen the challan. As per the challan, present petitioner has been implicated as an accused only on the basis of the statement made by Shailendra Singh who has stated in his statement under Section 27 of the Evidence Act that the liquor seized from the petitioner belonged to the petitioner.

7. Except the aforesaid statement, there is no other evidence which may establish that the petitioner had nothing to do with the alleged crime. It is also not the case of the prosecution that the vehicle in which, the liquor was transported was that of the petitioner.

8. I gave opportunity to both the parties to file written submission.

9. The petitioner has filed written submission and has reiterated the facts as detailed above. However, there is no contrary written submission on behalf of the respondent.

10. In view of the aforesaid and considering the law of the land that the statement of the co-accused will not prove the guilt of the petitioner, I allow this petition to the extent that while the proceedings initiated against the petitioner in this case are quashed but the prayer made for quashing of the FIR and the charge sheet against coaccused persons is declined.

Order accordingly.