THE INDIAN LAW REPORTS

M.P. SERIES

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

Year-8
Vol.4

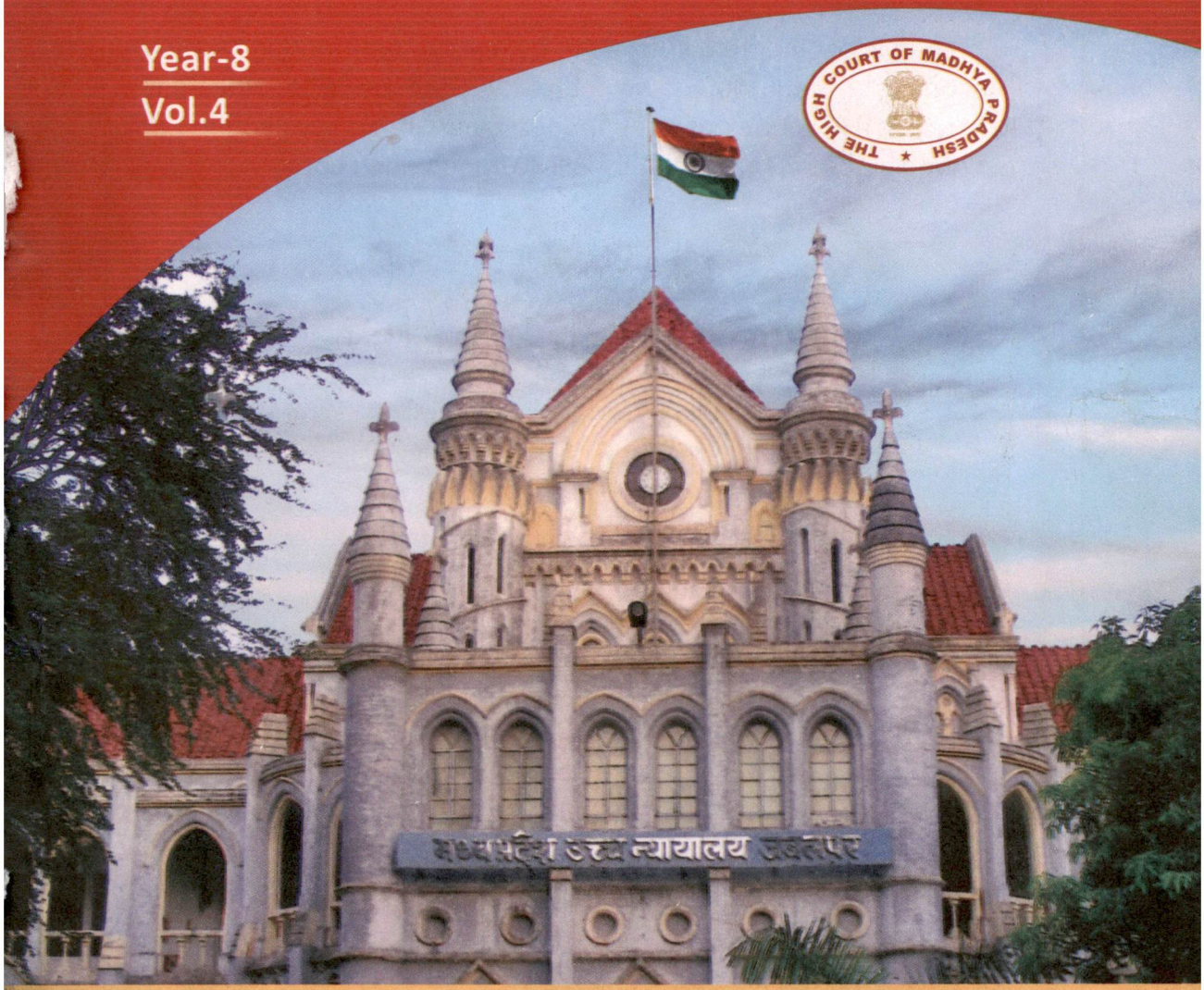

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TABLE OF CASES REPORTED

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THE INDIAN LAW REPORTS M.P. SERIES, 2016

(VOL-4)

JOURNAL SECTION

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

[Published in the "Madhya Pradesh Gazette" dated the 9th September, 2016 page no. 3418]

NOTIFICATION DATED 8TH SEPTEMBER, 2016 NOTIFYING ALL DISTRICT JUDGES (EX-OFFICIO) AS PRESIDING OFFICER AS PER SECTION 64 OF THE RIGHT TO FAIR COMPENSATION AND TRANSPARENCY IN LAND ACQUISITION, REHABILITATION AND RESETTLEMENT ACT, 2013

REVENUE DEPARTMENT

Mantralaya, Vallabh Bhawan, Bhopal
Bhopal, the 8th September, 2016

F-12-2-2014-VII-Sec.2A.- In exercise of the powers conferred by sub-section (1) and (2) of Section 51 read with Section 64 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (No. 30 of 2013), the State Government, hereby, notifies all present District Judges (ex-officio) as Presiding Officer for exercising the jurisdiction, powers and authority conferred on it by or under the said Act within their respective territorial jurisdiction and it shall also exercise jurisdiction for entertaining and deciding the references made to it under Section 64 or applications made by the applicant under second proviso to sub-section (1) of Section 64 of the said Act.

By order and in the name of the Governor of Madhya Pradesh,

K.K. SINGH, Principal Secy.

GUIDELINE SECTION ON THE CLAIMS TRIBUNAL AGREED PROCEDURE

The Claims Tribunal Agreed Procedure has been formulated and approved by the Delhi High Court in the judgment dated 16.12.2009 passed in FAO No. 842 of 2003 in ***Rajesh Tyagi & Ors. v. Jaibir Singh & Ors.*** The Apex Court in ***Jai Prakash v. National Insurance Company Limited and others, (2010) 2 SCC 607*** has directed that until Parliament enacts appropriate law, the procedure would be adopted by all the Motor Accidents Claims Tribunal in India.

THE CLAIMS TRIBUNAL AGREED PROCEDURE

(As approved by Delhi High Court)

CHAPTER 1- SCOPE AND DEFINITIONS

1. **Scope:** This procedure shall be applicable for all claims filed before the Claims Tribunals in the NCT of Delhi.

2. **Definitions.** - (1) In this procedure, unless the context otherwise requires-

(a) "Act" means the Motor Vehicles Act, 1988 (59 of 1988);

(b) "accident" means an accident involving use of motor vehicle at a public place;

(c) "Claims Tribunal" means a Motor Accidents Claims Tribunal constituted under section 165 of the Act;

(d) "Clause" shall refer to the Clauses of this Agreed procedure;

(e) "Form" means a form appended to The Delhi Motor Accident Claims Tribunal Rules, 2008;

(e) "insurance company" means the insurance company with which a motor vehicle involved in an accident was insured on the date of the accident;

(f) "investigating police officer" means the station house officer of a police station within whose jurisdiction an accident involving a motor vehicle occurs, and includes any police officer

subordinate to him entrusted with the investigation of the case;

(g) "legal representative" shall have the same meaning assigned to it under clause (11) of section 2 of the Code of Civil Procedure, 1908 (5 of 1908).

(h) "Rule" or "2008 Rules" shall bear reference to The Delhi Motor Accident Claims Tribunal Rules, 2008.

(2) All other words and expressions used herein but not defined and defined in Motor Vehicles Act, 1988 or The Delhi Motor Accident Claims Tribunal Rules, 2008, shall have the meanings respectively assigned to them in that Act, or the Rules as the case may be.

CHAPTER 2- RECEIPT OF INFORMATION, VERIFICATION AND THE DETAILED ACCIDENT REPORT

3. Receipt of information of an accident and duties of the investigating police officer -

(1) The Investigating Police Officer may receive information from one or more source including but not limited to:

(a) The driver/owner of the vehicle involved in the accident, by way of a report as contemplated under Section 134 of the Act;

(b) The Claimant;

(c) A witness to the accident or any other informant or source of information;

(d) The hospital or medical facility where the Deceased or Injured may have been taken to for medical attention.

(2) On receipt of the above information, it shall be the duty of the investigating police officer, as expeditiously as possible not later than 48 hours to –

(a) Intimate the factum of the accident to the Claims Tribunal within whose territorial jurisdiction the accident

has occurred, which shall be entered in a register for such purpose ;

(b) If the insurance particulars are available by that time, the Investigating Officer shall also send the intimation to the concerned Insurance Company by e-mail.

(c) The factum of the accident shall also be uploaded by Delhi Police on its website.

(d) The intimation of the accident shall contain all relevant particulars including the date, time and place of accident, registration number of the offending vehicle, policy particulars, names and addresses of the owner and driver of the offending vehicle and the name and mobile number of the Investigating Officer.

(e) In terms of Rule 3(1)(a) have the scene of accident photographed from such angles as to clearly depict, the lay-out and width, etc. of the road(s) or place, as the case may be, the position of vehicle(s), or person(s), involved, and such other facts as may be relevant so as to preserve the evidence in this regard, inter-alia for purposes of proceedings before the Claims Tribunal;

(f) Gather full particulars, and seek the following documents from the parties as under:

(A) From the owner/driver, in terms of Section 133/134 and 158 of the Act and Rule 3 of the Rules:

i. The circumstances of the occurrence, including the circumstances if any for not taking reasonable steps to secure medical attention to the injured person in terms of Section 134(a) of the Act;

ii. the date, time and place of the accident;

iii. particulars of the persons injured or

deceased in the accident;

iv. name and address of the driver and the owner, and the driving license of the driver and that of the conductor in the case of a stage carriage, passenger or goods vehicle;

v. the Insurance Policy or in the alternative a valid cover note provided that such cover note should not be more than sixty days old;

vi. the certificate of insurance;

vii. the certificate of registration;

viii. in the case of a transport vehicle, the fitness certificate referred to in Section 56 of the Act and the permit.

(B) From the Claimant(s), victims of an accident or their legal representatives, as the case may be:

(i) In case of death;

(a) Proof of age and a photo- ID of the deceased at the time of accident;

(b) Death certificate and post mortem report;

(c) Proof of income of the deceased at the time of the accident,

a. in the form of pay slip/ salary certificate in the

case of a government/ semi- government employee,

b. certificate of the employer and bank statements of the last six months of the deceased reflecting payment of salary in the case of a private employee,

c. I.T. returns in the case of a self-employed person;

(d) Details of the dependents, i.e. their age, occupation and marital status and proof of dependency in the form of affidavits, address and other contact details;

(e) Details and copies of medical bills and expenses;

(f) A brief statement of the facts surrounding and quantum of compensation intended to be claimed;

(g) Details of the claims tribunal, where the Claimants have preferred an application under Section 163A or Section 166, if any, as on the date of such verification or investigation by the investigating police officer;

(ii) In case of an injury case

(a) Proof of age and a Photo-Insured, address and other contact details of the injured at

the time of accident;

(b) Proof of income of the Injured at the time of the accident,

a. in the form of pay slip/ salary certificate in the case of a government/ semi- government employee,

b. certificate of the employer and bank statements of the last six months of the injured reflecting payment of salary in the case of a private employee,

c. I.T. returns in the case of self-employed person;

(c) Disability certificate issued by a Government Hospital or a recognized private hospital;

(d) MLC/accident register extract of the hospital and MLR

(e) Details and copies of medical bills and expenses; in case of long term treatment the Investigating Police officer shall record the details of the same and the Claimant may furnish such bills before the Claims Tribunal;

(f) Proof of absence from work [where loss of income on

account of injury is being claimed] i.e. certificate from the employer and extracts from the attendance register or log record or like records;

(g) A brief statement of the facts surrounding and quantum of compensation intended to be claimed;

(h) Details of the claims tribunal, where the Claimants have preferred an application under Section 163A or Section 166, if any, as on the date of such verification or investigation by the investigating police officer;

and thereupon the police investigating officer shall either to the above documents in possession against receipt, or retain the photocopies of the same, after attestation thereof by the person producing the same;

(3) The investigating police officer shall verify the genuineness of the documents mentioned in Clause 3(2) by obtaining confirmation in writing from the office or authority or person purporting to have issued the same or by such further investigation or verification as may be necessary for arriving at a conclusion of genuineness of the document or information in question, including but not limited to verifying the license of the driver and permit of the vehicle, where applicable, from the registering authority;

(4) The investigating police officer shall not release and shall impound the vehicle involved in the accident, when:

a. it is found that it is not covered by policy of insurance of third party risks, taken in the name of the registered owner, or

b. when the registered owner fails to furnish copy of such insurance policy, or where the driver fails to furnish the driving license and shall bring this to the notice of the Magistrate having jurisdiction over the area, where the accident occurred. He shall further report to the Magistrate, as to why the registered owner has not been prosecuted for offence punishable under section 196 of the Act, where such prosecution has not been preferred, despite existence of facts constituting such an offence.

(5) In all cases where no driving license has been furnished by the driver, or permit and insurance policy by the owner the investigating police officer shall take a statement in the form of an affidavit from the driver and or the owner, as the case may be as to the details of such driving license including the class and type of vehicle he is licensed to drive, permit and or Insurance Policy in case of the owner and the validity thereof as on the date of the accident. In such cases the investigating police officer shall proceed to investigate into the properties and assets of the owner of the vehicle and append the same to his report.

4. Preparation and forwarding of the Detailed Accident Report (DAR): (1) After completion of the above collection and verification of the documents and investigation as may be required, the investigating police officer shall complete the preparation of a detailed accident report [hereinafter referred to as **DAR]** in Form "A" not later than thirty days from the date of the accident. In terms of Rule 3 (1)(c) such DAR shall be accompanied by requisite documents which shall include copy of the report under section 173 of the Code of Criminal Procedure, 1973(2 of 1974), medico legal certificate, post-mortem report (in case of death), first information report, photographs, site plan, mechanical inspection report, seizure memo, photocopies of documents mentioned in Clause 3(2) above, as also a report regarding confirmation of genuineness thereof, if received, or otherwise action taken.

(2) Immediately on completion of the above DAR, the investigating police officer shall forward a copy of the DAR, under its seal, duly receipted:

(i) To the Claims Tribunal, under a duly attested affidavit of the investigating police officer-

- where a claim has already been preferred by the Claimant to such Claims Tribunal or
- where no such claim has been preferred, then before the Claims Tribunal in whose territorial jurisdiction the accident has occurred.

(ii) To the Claimant(s) or victims of the accident or their legal representative(s), as the case may be at the address supplied by the Claimant to the investigating police officer, free of charge;

(iii) To the owner/driver at the addressed supplied by the owner / driver to the police investigating officer, at a cost of Rs. Five per page;

(iv) To the nodal officer of the concerned Insurance Company at a cost of Rs. ten per page.

(3) The Investigating Officer of the Police shall also furnish a copy of Detailed Accident Report along with complete documents to Secretary, Delhi Legal Services Authority, Central Office, Pre-Fab Building, Patiala House Courts, New Delhi. Delhi Legal Services Authority shall examine each case and assist the Claims Tribunal in determination of the just compensation payable to the claimants in accordance with law.

(4) Where the Investigating Officer is unable to complete the investigation of the case within 30 days for reasons beyond his control, such as cases of hit and run accidents, cases where the parties reside outside the jurisdiction of the Court cases, where the driving licence is issued outside the jurisdiction of the Court, or where the victim has suffered grievous injuries and is undergoing treatment, the Investigating Officer shall approach the Claims Tribunal for extension of time whereupon the Claims Tribunal shall suitably extend the time in the facts of each case.

(5) The Investigating Officer shall produce the driver, owner, claimant and eye- witnesses before the Claims Tribunals along with the Detailed Accident Report. However, if the Police is unable to produce the owner, driver, claimant and eye-witnesses before the Claims Tribunal on the first date of hearing for the reasons beyond its control, the Claims Tribunal shall issue notice to them to be served through the Investigating Officer for a date for appearance not

later than 30 days. The Investigating Officer shall give an advance notice to the concerned Insurance Company about the date of filing of the Detailed Accident Report before the Claims Tribunal so that the nominated counsel for the Insurance Company can remain present on the first date of hearing before the Claims Tribunal.

(6) The duties enumerated in Clause (3) and (4) above shall, as per Rule 3(2) of the 2008 Rules be construed as if they are included in Section 60 of the Delhi Police Act 1978 (34 of 1978) and any breach thereof shall entail consequences envisaged in that law, as provided for under Rule 3(2).

5. Duties of the registering authority.- It shall be the duty of the concerned registering authority to-

(a) submit a detailed report in Form "D" to the Claims Tribunal regarding a motor vehicle involved in an accident or licence of the driver thereof within fifteen days of the receipt of direction in Form "E";

(b) furnish within fifteen days, the requisite information in Form "D" on receiving the application in Form "F", by the person who wishes to make an application for compensation or who is involved in an accident arising out of use or his next of kin, or to the legal representative of the deceased or to the insurance company, as the case may be; Provided that information shall be given to the insurance company on payment of rupees ten only per page.

(c) assist the police in verification process set out in Procedure Clause 3 and 4 above and furnish to the investigating police officer a report in Form 'D' within 15 days of a request from the police investigating officer regarding verification or genuineness of any document regarding a motor vehicle involved in an accident or the license of the driver thereof.

CHAPTER 3 - CLAIMS INSTITUTED ON THE BASIS OF DETAILED ACCIDENT REPORT

6. Procedure on receipt of the detailed accident report: (1) The Claims Tribunals shall examine whether the Detailed Accident Report is complete in all respects and shall pass appropriate order in this regard. If the

Detailed Accident Report is not complete in any particular respect, the Claims Tribunal shall direct the Investigating Officer to complete the same and shall fix a date for the said completion.

(2) The Claims Tribunals shall treat the Detailed Accident Report filed by the Investigating Officer as a claim petition under Section 166(4) of the Motor Vehicles Act. However, where the Police is unable to produce the claimants on the first date of hearing, the Claims Tribunal shall initially register the Detailed Accident Report as a miscellaneous application which shall be registered as a main claim petition after the appearance of the claimants.

(3) The Claims Tribunal shall grant 30 days time to the Insurance Company to examine the Detailed Accident Report and to take a decision as to the quantum of compensation payable to the claimants in accordance with law. The decision shall be taken by the Designated Officer of the Insurance Company in writing and it shall be a reasoned decision. The Designated Officer of the Insurance Company shall place the written reasoned decision before the Claims Tribunal within 30 days of the date of complete Detailed Accident Report.

(4) The compensation assessed by the Designated Officer of the Insurance Company in his written reasoned decision shall constitute a legal offer to the claimants and if the claimants accept the said offer, the Claims Tribunal shall pass a consent award and shall provide 30 days time to the Insurance Company to make the payment of the award amount. However, before passing the consent award, the Claims Tribunal shall ensure that the claimants are awarded just compensation in accordance with law. The Claims Tribunal shall also pass an order with respect to the shares of the claimants and the mode of disbursement.

(5) If the claimants are not in a position to immediately respond to the offer of the Insurance Company, the Claims Tribunals shall grant them time not later than 30 days to respond to the said offer.

(6) If the offer of the Insurance Company is not acceptable to the claimants or if the Insurance Company has any defence available to it under law, the Claims Tribunal shall proceed to conduct an inquiry under Sections 168 and 169 of the Motor Vehicles Act and shall pass an award in accordance with law within a period of 30 days thereafter.

(7) Where the Claims Tribunal finds that the D.A.R. and in particular the report under Section 173, The Criminal Procedure Code, 1974 annexed to such D.A.R. has brought a charge of rash and negligent driving, or the causing of hurt or grievous hurt the Claims Tribunal shall register the claim case under Section 166 of The Motor Vehicles Act,1988. In cases where the DAR does not bring a charge of negligence or despite the charge of negligence the Claimant(s) before the court choose to claim on a no-fault basis, the Claims Tribunal shall register a claim case under Section 163A, The Motor Vehicles Act,1988;

(8) Provided that in cases where the accident in question involves more than one vehicle and persons connected to all such vehicles stake a claim for compensation, the D.A.R. shall be treated as an application for compensation claim case shall be presumed to be a claim case preferred by each of them.

CHAPTER 4 - CLAIMS INSTITUTED BY WAY OF AN APPLICATION BY THE CLAIMANT

7. **Applications for compensation.**- (1) Every application for payment of compensation shall be made in Form "G" and shall be accompanied by as many copies, as may be required, to the Claims Tribunal having jurisdiction to adjudicate upon it, in terms of Section 165 of the Act.

(2) In terms of Rule 8, there shall be appended to every such application:-

(a) an affidavit of the applicant(s) to the effect that the statement of facts contained in the application is true to the best of his/her knowledge/belief, as the case may be, details of previous claims preferred by the applicant(s) with regard to the same cause of action, or any other accident and if so, what was the result thereof;

(b) all the documents and affidavits for the proof thereof, and affidavits in support of all facts on which the applicant relies in context of his/her claim, entered in a properly prepared list of documents and affidavits:

Provided that the Claims Tribunal may not allow the applicant to rely in support of his/her claim, on any document or affidavit not

filed with the application, unless it is satisfied that for good or sufficient cause, he/she was prevented from filing such document or affidavit earlier;

(c) proof of identity of the applicant (s) to the satisfaction of the Claims Tribunal, unless exempted from doing so for reasons to be recorded in writing by it;

(C) passport size photograph(s) of the applicant(s) duly attested;

(D) reports obtained in Form "C" and Form "D" from investigating police officer, and registering authority; and if no such report(s) have been obtained, the reasons thereof;

(E) medical certificate of injuries, or the effect thereof, other than those included in Form "C".

(3) The Claims Tribunal may also require the applicant to furnish the following information to satisfy itself that spurious or a collusive claim has not been preferred:-

(a) full particulars of all earlier accidents in which the applicant or the person deceased, as the case may be, has been involved;

(b) nature of injuries suffered and treatment taken;

(c) the amount of compensation paid in such earlier accidents, name and particulars of the victim, and of the person who paid the damages; and

(d) relationship of the applicant(s), if any, with the persons mentioned in clause (b), and the owner and the driver of the vehicle.

(4) Any application which is found defective on scrutiny may be returned by the Claims Tribunal for being re-submitted after removing the defects within a specified period not exceeding two weeks. Every application for compensation shall be registered separately in appropriate register prescribed as per rule 36.

8. Examination of applicant.- On receipt of an application under Rule 8, the Claims Tribunal may examine the applicant on oath, and the substance of such examination, if any, shall be reduced to writing.

9. Summary disposal of application.- The Claims Tribunal may, after consideration of the application and statement, if any, of the applicant recorded under Rule 10, dismiss the application summarily, if for reasons to be recorded, it is of the opinion that there are no sufficient grounds for proceeding therewith.

10. Notice to parties involved- If the application for claim is found admissible in terms of Clause 6(4) and Clause 9 above , the Claims Tribunal shall send to the opposite parties accompanied by a copy of the application along with all the documents and affidavits filed by applicant under Rule 8 together, with a notice in Form "I" of the date on which it will hear the application, and may call them upon to file on that date a written statement as per Rule 14 in answer to the application.

CHAPTER 5- DUTY OF THE INSURANCE COMPANY ON RECEIPT OF NOTICE AND PRE-TRIAL SETTLEMENT PROCESS AND COSTS

11. Duties of the insurance company: (1) Immediately upon receipt of intimation, the Insurance Company shall appoint a Designated Officer for each case. The Designated Officer shall be responsible for dealing/processing of that case and for taking decision for the amount of compensation payable in accordance with law after the Detailed Accident Report by the police.

(2) Without prejudice to its rights and contentions, where in the opinion of the Insurance Company, a claim is payable it shall confirm the same to the Claims Tribunal within thirty days of the receipt of complete Detailed Accident Report, by way of an offer of settlement of claim, with a supporting computation/calculation, under a duly attested affidavit of the Divisional Officer/ Officer appointed for such purpose.

(3) When on the date of hearing of such application and on receipt of such offer from the Insurance Company, the Claimant(s) agree to the offer of settlement of the Insurance Company, the Claims Tribunal shall record such settlement by way of a consent decree and payment shall be made by the Insurance Company within a maximum period of thirty days from the date of receipt of a copy of the consent decree which shall be made available to the

parties by the Claims Tribunal within a maximum period of seven working days from the passing of such decree.

(4) The Insurance Company shall be at liberty to file an application under Section 170, The Motor Vehicles Act, 1988 at any stage of the proceedings and shall be considered and adjudicated upon by the Claims Tribunal on its own merits.

CHAPTER 6-APPLICATIONS UNDER SECTION 140 OF THE MOTOR VEHICLES ACT, 1988

12. Application for claim on principle of no fault liability:- (1) Every application in case of claim under Chapter X of the Act, shall be made in part II of Form "G". The Claims Tribunal shall, for the purpose of adjudication of the application mentioned in this rule shall follow such summary procedure as it thinks fit.

(2) The Claims Tribunal shall not reject any application made as per the provisions of Chapter X of the Act on ground of any technical flaw, but shall give notice to the applicant and get the defect rectified.

(3) Where the application is not accompanied by reports in Form "A" and Form "D", the Claims Tribunal shall obtain whatever information is necessary from the police, medical and other authorities and proceed to adjudicate upon the claim whether the parties who were given notice appear or not on the appointed date.

(4) Subject to the rights of the Insurance Company to prove breach of the Insurance Policy in terms of Section 149, The Motor Vehicles Act, 1988 the Claims Tribunal shall expeditiously proceed to award the claims on the basis of reports in Form "A" and Form "D" and further documents relating to injuries or treatment, if any filed with affidavit, and report or certificate, if any, issued in compliance with directions under rule 18. The Claims Tribunal in passing an award on such application, shall also issue directions for apportionment, if required and for securing the interests of the claimants, following the provisions of rules 26 and 27.

CHAPTER 7- TRIAL AND AWARD

13. **Framing of issues.**- After considering the application, the written statements, the examination of the parties, if any, and the result of any local inspection, if made, the Claims Tribunal shall proceed to frame and record the issues upon which the decision of the case appears to it to depend.

14. **Determination of issues.**-(1) After framing the issues the Claims Tribunal shall proceed to decide them after allowing both parties to cross examine each other and the deponents, whose affidavits have been filed by the parties, on such affidavits filed with the application and the written statement and in doing so, it shall follow provision of Order XIX of the Code of Civil Procedure, 1908 (5 of 1908). (2) The Claims Tribunal may, if it appears to it to be necessary for just decision of the case, allow the parties to adduce such further evidence as each of them may desire to produce:

Provided that no such further opportunity shall be permitted unless it is shown that the affidavit of the witness sought to be examined at such stage could not be obtained and filed earlier, despite exercise of due diligence by, or that such evidence was not within the knowledge of the party relying on it.

15. **Summoning of witnesses.**- Subject to the provisions of rule 22, if an application is presented by any party to the proceeding for the summoning of witnesses, the Claims Tribunal shall, on payment of the expenses involved, if any, issue summons for the appearance of such witness unless it considers that their appearance is not necessary for a just decision of the case:

Provided that if, in the opinion of the Claims Tribunals, the party is financially poor, it may not insist on the payment of the expenses involved and the same shall be borne by the Government:

Provided further that in case where the party succeeds in whole or in part, the expenses so incurred by the Government shall be directed to be paid to the Government by the judgment debtor and so directed at time of passing of the final award.

16. **Method of recording evidence.**- The Claims Tribunals shall, as examination of witnesses proceeds, make brief memorandum of the substance of the evidence of each witness and such memorandum shall be written and

signed by the Presiding Judge of the Claims Tribunal and shall form part of the evidence.

Provided that evidence of any expert witness shall be taken down, as nearly as may be, word for word.

17. **Obtaining of supplementary information and documents.-** The Claims Tribunal shall obtain whatever supplementary information and documents, which may be found necessary from the police, medical and other authorities and proceed to adjudicate upon the claim whether the parties who were given notice appear or not on the appointed date.

18. **Judgment and award of compensation.-** (1) The Claims Tribunal in passing orders shall record concisely in a judgment, the findings on each of the issues framed and the reasons for such findings and make an award specifying the amount of compensation to be paid by the opposite party or parties and also the person or persons to whom compensation shall be paid.

(2) The procedure of adjudicating the liability and award of compensation may be set apart from the procedure of disbursement of compensation to the legal heirs in a case of death, and where the Claims Tribunal feels that the actual payment to the claimant is likely to take some time because of the identification and determination of legal heirs of the deceased, the Claims Tribunal may call for the amount of compensation awarded to be deposited with it, and, then, proceed with the identification of the legal heirs for disbursing payment of compensation to each of the legal heirs equitably.

(3) Where the Claims Tribunal finds that false or fabricated documents have been filed by or relied upon by the Claimant(s) to support its claim for compensation, the Claims Tribunal shall award costs of Rs.10,000 for every such false or fraudulent document filed and further direct the police to launch a prosecution against such claimant (s) in accordance with the provisions of law.

CHAPTER 8- OTHER PROVISIONS

19. Prohibition against release of motor vehicle involved in accident.-(1) No court shall release a motor vehicle involved in an accident resulting in death or bodily injury or damage to property, when such vehicle is not covered by the policy of insurance against third party risks taken in the name of registered owner or when the registered owner fails to furnish copy of such insurance policy, at the time of seizure, despite demand by investigating police officer, unless and until the registered owner furnishes sufficient security to the satisfaction of the court to pay compensation that may be awarded in a claim case arising out of such accident. Where the owner does not furnish such a copy of the Insurance Policy at the time of seizure, but agrees to furnish it or so furnishes it at a reasonable time thereafter, the release of the vehicle shall be subject to and only after due verification of the said Insurance Policy/ cover note by the Insurance Company.

(2) Where the motor vehicle is not covered by a policy of insurance against third party risks, or when registered owner of the motor vehicle fails to furnish copy of such policy in circumstance mentioned in sub-rule (1), the motor vehicle shall be sold off in public auction by the magistrate having jurisdiction over the area where accident occurred, on expiry of three months of the vehicle being taken in possession by the investigating police officer, and proceeds thereof shall be deposited with the Claims Tribunal having jurisdiction over the area in question, within fifteen days for purpose of satisfying the compensation that may have been awarded, or may be awarded in a claim case arising out of such accident.

20. Presumption about reports.- The contents of reports submitted to the Claims Tribunal in Form "A" and Form "D" by investigating police officer and concerned registering authority respectively, and confirmation under clause (b) of rule 5 by the insurance company shall be presumed to be correct, and shall be read in evidence without formal proof, till proved to the contrary.

21. Transfer of claim cases.- (1) Where two or more claims, arising out of the same cause of action, fall within the jurisdiction of the District Judge, he shall have the power to transfer an application for claim from the file of one Claims Tribunal, before whom the application is pending, to any other Claims Tribunal, if-

(a) the Claims Tribunal before whom the application is pending makes such a request on grounds, personal or otherwise; or

(b) upon consideration of the application for transfer by any party to the application, the District Judge is satisfied, for reasons to be recorded in writing, that there are sufficient grounds to do so.

(2) Where two or more claims arising out of the same cause of action, are pending before different Claims Tribunal in the same State, the High Court of such State may transfer the application from the file of one Claims Tribunal to the other Claims Tribunal for any sufficient reasons, on the application of any party to such proceedings.

(3) Where two or more claims arise before different Claims Tribunals in different States then an application will lie to either of the High Courts of the two states and such High Court may transfer the application from the file of one Claims Tribunal to the other Claims Tribunal for any sufficient reasons.

(4) While considering an application for transfer of a claim, the Claims Tribunal which has first issued notice in point of time shall be deemed to be the appropriate Claims Tribunal for the purpose of such transfer.

22. **Inspection of the vehicle.-** The Claims Tribunal may, if it thinks fit, require the motor vehicle involved in the accident to be produced by the owner for inspection at a particular time and place to be mentioned by it, in consultation with the owner.

23. **Power of summary examination.-** The Claims Tribunal during the local inspection or at any other time at a formal hearing of a case pending before, it may, examine summarily any person likely to be able to give information relating to such case, whether such person has been or is to be called as a witness in the case or not and whether any or all of the parties are present or not.

24. **Power to direct medical examination.-** The Claims Tribunal may, if it considers necessary, direct, in Form "J", any medical officer or any board of medical officers in a government or municipal hospital to examine the injured and issue certificate indicating the degree and extent of the disability, if any,

suffered as a result of the accident, and it shall be the duty of such medical officer or board to submit the report within fifteen days of receipt of direction.

25. Securing the interest of claimants.- (1) Where any lump-sum amount deposited with the Claims Tribunal is payable to a woman or a person under legal disability, such sum may be invested, applied or otherwise dealt with for the benefit of the woman or such person during this disability in such manner as the Claims Tribunal may direct to be paid to any dependent of the injured or heirs of the deceased or to any other person whom the Claims Tribunal thinks best fitted to provide for the welfare of the injured or the heir of the deceased.

(2) Where on application made to the Claims Tribunal in this behalf or otherwise, the Claims Tribunal is satisfied that on account of neglect of the children on the part of the parents, or on account of the variation of the circumstances of any dependent, or for any other sufficient cause, an order of the Claims Tribunal as to the distribution of any sum paid as compensation or as to the manner in which any sum payable to any such dependent is to be invested applied or otherwise dealt with, ought to be varied, the Claims Tribunal may make such further orders for the variation of the former order as it thinks just in the circumstances of the case.

(3) The Claims Tribunal shall, in the case of minor, order that amount of compensation awarded to such minor be invested in fixed deposits till such minor attains majority. The expenses incurred by the guardian or the next friend may be allowed to be withdrawn by such guardian or the next friend from such deposits before it is deposited.

(4) The Claims Tribunal shall, in the case of illiterate claimants, order that the amount of compensation awarded be invested in fixed deposits for a minimum period of three years, but if any amount is required for effecting purchase of any movable or immovable property for improving the income of the claimant, the Claims Tribunal may consider such a request after being satisfied that the amount would be actually spent for the purpose and the demand is not a ruse to withdraw money.

(5) The Claims Tribunal shall, in the case of semi-literate person resort to the procedure for the deposit of award amounts set out in sub-rule(4) unless

it is satisfied, for reasons to be recorded in writing that the whole or part of the amount is required for the expansion of any existing business or for the purchase of some property as specified and mentioned, in sub- rule (4) in which case the Claims Tribunal shall ensure that the amount is invested for the purpose for which it is prayed for and paid.

(6) The Claims Tribunal may in the case of literate persons also resort to the procedure for deposit of awarded amount specified in sub-rule (4) and (5) if having regard to the age, fiscal background and state of society to which the claimant belongs and such other consideration, the Claims Tribunal in the larger interest of the claimant and with a view to ensuring the safety of the compensation awarded, thinks it necessary to order.

(7) The Claims Tribunal, may in personal injury cases, if further treatment is necessary, on being satisfied which shall be recorded in writing, permit the withdrawal of such amount as is necessary for the expenses of such treatment.

(8) The Claims Tribunal shall, in the matter of investment of money, have regard to a maximum return by ways of periodical income to the claimant and make it deposited with public sector undertakings of the State or Central Government which offers higher rate of interest.

(9) The Claims Tribunal shall, in investing money, direct that the interest on the deposits be paid directly to the claimants or the guardian of the minor claimants by the institutions holding the deposits under intimation to the Claims Tribunal.

26. Adjournment of hearing.- If the Claims Tribunal finds that an application cannot be disposed of at one hearing, it shall record the reasons which necessitate the adjournment and also inform the parties present on the date of adjourned hearing.

27. Enforcement of award of the Claims Tribunal.- Subject to the provisions of section 174 of the Act, the Claims Tribunal shall, for the purpose of enforcement of its award, have all the powers of a Civil Court in the execution of a decree under the Code of Civil Procedure, 1908(5 of 1908), as if the award where a decree for the payment of money passed by such court in a civil suit.

28. Vesting of powers of Civil Court in the Claims Tribunal.- Without prejudice to the provisions of section 169 of the Act every Claims Tribunal shall exercise all the powers of a Civil Court, and in doing so for discharging its functions it shall follow the procedure laid down in the Code of Civil Procedure, 1908(5 of 1908).

29. Receipt of compensation paid upon payment.- The Claims Tribunal shall, obtain a receipt from the claimant in duplicate, one copy to be issued to the person who makes the payment and the other to be retained on the record while handing over the payment.

30. Registers.- (1) The Claims Tribunal shall maintain in addition to all registers required to be maintained by a court of Additional District Judge in Delhi, the following registers:-

(i) Register of intimation of factum of accident

(ii) Register for applications for interim award on principle of no fault liability;

(iii) Register for deposit of payments in the Tribunal through cheques, etc.

(2) Claim petitions on the ground of death, permanent disability, injury and damage to property shall be entered in a separate register.

31. Custody and preservation of the records.- The necessary documents and records relating to the cases shall be preserved in the record room for a period of six years of the satisfaction of the award, if any granted, or for a period of twelve years after the judgment and award become final, whichever is earlier.

CHAPTER 9 – APPEAL

32. Appeal against the judgment of the Claims Tribunal.-(1) Subject to the provisions of Section 173, every appeal against the judgment of the Claims Tribunal shall be preferred in the form of a memorandum signed by the applicant or the advocate duly empowered by him in this behalf, and presented

to the High Court and shall be accompanied by a copy of the judgment.

(2) The memorandum shall set forth concisely and under distinct heads, the grounds of objections to the judgment appealed from without any argument or narrative, and such grounds shall be numbered consecutively.

(3) Save as provided in sub-rules (1) and (2), the provisions of Order XLI XXI in the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908) shall mutatis mutandis apply to appeals preferred to High Court under section 173 of the Act.

33. Certified copies.- The rules relating to the issue of certified copy as in force in Delhi for the courts subordinate to the High court shall mutatis mutandis apply in the case of the Claims Tribunal.

NOTES OF CASES SECTION

Short Note

****(23)***

Before Mr. Justice Sushil Kumar Palo

C.R. No. 426/2011 (Jabalpur) decided on 12 April, 2016

A.M. NEMA ...Applicant

Vs.

G.P. PATHAK ...Non-applicant

***Accommodation Control Act, M.P. (41 of 1961), Section 23 (E) - Revision - Order of eviction passed by the Rent Controlling Authority - Challenge by tenant - Ground* - Order of eviction passed by the SDO is null & void, as no notification was published of his appointment as Rent Controlling Authority - Held - The defective appointment of a *de facto* judge may be questioned directly in a proceedings to which he may be a party, but it cannot be permitted to be questioned in a litigation between the two private litigants, as in this case - Revision dismissed.**

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23(ई) – पुनरीक्षण – भाड़ा नियंत्रक प्राधिकारी द्वारा बेदखली का आदेश पारित – किरायेदार द्वारा चुनौती – आधार – अनुविभागीय अधिकारी द्वारा पारित बेदखली का आदेश अकृत एवं शून्य है, क्योंकि भाड़ा नियंत्रक प्राधिकारी के रूप में उसकी नियुक्ति की कोई अधिसूचना प्रकाशित नहीं की गई थी – अभिनिर्धारित – एक वास्तविक न्यायाधीश की त्रुटिपूर्ण नियुक्ति पर प्रश्न उन कार्यवाहियों में ही प्रत्यक्ष रूप से उठाया जा सकता है जिनमें कि वह एक पक्षकार हो, परंतु दो निजी पक्षकारों के मध्य मुकदमे में, जैसा कि इस मामले में है, उक्त प्रश्न उठाने की अनुमति नहीं दी जा सकती – पुनरीक्षण खारिज।

Cases referred:

1981 AIR 1473, 1981 SCR (3) 474, 1987 MPRCJ 365 (SC).

Rakesh Jain, for the applicant.

Rashmi Pathak, for the non-applicant.

Short Note

****(24)***

Before Mr. Justice Ved Prakash Sharma

Cr.R. No. 235/2016 (Indore) decided on 19 August, 2016

BHAGWATIPRASAD ...Applicant

Vs.

RAJESH & anr. ...Non-applicants

***Negotiable Instruments Act (26 of 1881), Section 139 - Presumption in favour of holder* - Non-applicant has not adduced any plausible evidence to rebut the presumption - During cross examination contrary suggestions have been given regarding the liability - Suggestions of bribe and amount in question paid as advance by way of loan on interest were given, which all were denied - Agreements tendered as evidence were not challenged by Non-applicant by way of cross examination - Cheques issued for legally enforceable debt - Petition being bereft of merits - Dismissed.**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 139 – धारक के हित में उपधारणा – अनावेदक ने उक्त उपधारणा का खंडन करने हेतु कोई विश्वसनीय साक्ष्य प्रस्तुत नहीं की है – प्रतिपरीक्षण के दौरान दायित्व के संबंध में प्रतिकूल सुझाव दिये गये हैं – रिश्वत एवं ब्याज पर ऋण के माध्यम से अग्रिम के तौर पर भुगतान की गई प्रश्नगत राशि के संबंध में सुझाव दिए गए, जिन्हें अस्वीकार किया गया – साक्ष्य के तौर पर प्रस्तुत किए गए करारों को अनावेदक द्वारा प्रतिपरीक्षण में चुनौती नहीं दी गई – विधिक रूप से प्रवर्तनीय ऋण हेतु चैक जारी किए गए – याचिका गुणदोष रहित – खारिज।

Cases referred:

(2010) 11 SCC 441, 2009 (I) C.L.D.C. 250, (2007) 6 SCC 555, 2006 AIR SCW 2757.

Ramesh Nihore, for the applicant.
V.K. Varungaonkar, for the non-applicant.

Short Note

****(25)***

Before Mr. Justice Alok Verma

Cr.R. No. 5/2014 (Indore) decided on 30 September, 2015

HEMRAJ ...Applicant

Vs.

SMT. CHANCHAL ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 468 and Protection of Women from Domestic Violence Act (43 of 2005), Section 12* - Section 468 of Cr.P.C. provides for period of limitation for taking cognizance in criminal case - It does not apply on complaint filed u/S 12 of Protection of Women From Domestic Violence Act, 2005 - As it was**

a continuing offence, therefore, no limitation can bar filing of the application, and therefore, provisions of Section 468 of Cr.P.C. do not apply - Relationship as husband and wife continued between the parties and when such relationship continued, allegation of domestic violence also continued by anology as a continuing offence.

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 468 एवं घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 – दं.प्र.सं. की धारा 468, दाण्डिक प्रकरण में संज्ञान लेने हेतु परिसीमा की अवधि उपबंधित करती है – घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, 2005 की धारा 12 के अंतर्गत प्रस्तुत परिवाद पर यह धारा लागू नहीं होती – चूँकि यह एक सतत् अपराध था, इसलिए कोई भी परिसीमा आवेदन पत्र प्रस्तुत किया जाना वर्जित नहीं कर सकती, और इसलिए, दं.प्र.सं. की धारा 468 के उपबंध लागू नहीं होते – पक्षकारों के मध्य पति–पत्नी के संबंध निरंतर थे एवं जब ऐसा संबंध निरंतर था, तब घरेलू हिंसा का आक्षेप भी एक सतत् अपराध के तौर पर सादृश्य रूप से निरंतर था।

Case referred:

2012 Cri.L.J. 309.

Pankaj R. Soni, for the applicant.
None for the non-applicant.

Short Note

****(26)***

Before Mr. Justice S.K. Seth

W.P. No. 19991/2015 (Jabalpur) decided on 29 August, 2016

INDORIYA SECURITY FORCE ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Works Contract - Tender - Outsourcing the Work of House keeping and Security Services for Hospital and Dispensaries - Technical & Financial bid* - Petitioner & Respondent No. 4 qualified the round of Technical bid thereafter, on evaluation of financial bid, petitioner did not qualify - Bids of Respondent No. 4 were accepted - Hence, this petition - Ground - Lowest Bidder - Some of the terms & conditions of the tender are arbitrary - Held -The rate quoted by the petitioner was vague/non-realistic and the remuneration quoted for labourers was not as per the terms & conditions of the tender and**

even otherwise, the scope of Judicial review in contractual matters is limited and there is no illegality in decision making process nor the decision is based on malafide grounds - Petition dismissed with cost of Rs. 2000/-

संकर्म संविदा – निविदा – अस्पताल एवं औषधालयों के लिए गृह–व्यवस्था तथा सुरक्षा सेवाओं की आउटसोर्सिंग – तकनीकी एवं वित्तीय बोली – याची एवं प्रत्यर्थी क्र. 4 ने तकनीकी बोली की प्रक्रिया में अर्हता प्राप्त की तत्पश्चात् वित्तीय बोली के मूल्यांकन में याची को अर्ह नहीं पाया गया – प्रत्यर्थी क्र. 4 की बोलियाँ स्वीकार की गई –अतः यह याचिका प्रस्तुत की गई –आधार – न्यूनतम बोली लगाने वाला – निविदा की कुछ शर्तें एवं दशाएँ मनमानी हैं–अभिनिर्धारित–याची द्वारा उत्कथित दर अस्पष्ट/अवास्तविक थी तथा श्रमिकों हेतु उत्कथित पारिश्रमिक भी निविदा की शर्तों एवं दशाओं के अनुसार नहीं था, एवं अन्यथा भी, संविदीय मामलों में न्यायिक पुनर्विलोकन की व्यापकता सीमित होती है तथा विनिश्चय की प्रक्रिया में कोई अवैधता नहीं है, न ही विनिश्चय असद्भावना के आधारों पर आधारित है– रू. 2,000/– के हर्जाने के साथ याचिका खारिज।

Cases referred:

(2004) 4 SCC 19, (2007) 14 SCC 157, AIR 2012 SC 2915, (2014) 3 SCC 760.

Amit Khatri, for the petitioner.
Piyush Dharmadhikari, G.A. for the respondent/State.
Surendra Verma, for the respondent No. 4.

Short Note

****(27)***

Before Mr. Justice Alok Verma

Cr.R. No. 1170/2015 (Indore) decided on 26 October, 2015

JAGDISH @ NAGINA ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Evidence Act (1 of 1872), Sections 65A & 65B - Electronic Document* - C.D. was prepared from the Memory Chip of a Mobile Phone - Therefore, it was an electronic record, which was secondary in nature and is admissible in evidence - The copy was prepared from the original Memory Chip, which was an electronic device, and therefore, such C.D. is admissible u/S 65 B of Evidence Act.**

साक्ष्य अधिनियम (1872 का 1), धाराएँ 65ए व 65बी – इलैक्ट्रॉनिक

दस्तावेज – सी.डी. एक मोबाईल फोन के मैमोरी चिप से तैयार की गई थी – इसलिए वह एक इलैक्ट्रॉनिक अभिलेख था, जो द्वितीयक प्रकृति का था एवं वह साक्ष्य में ग्राह्य है – उसकी प्रति मूल मैमोरी चिप से तैयार की गई थी, जो कि एक इलैक्ट्रॉनिक उपकरण है, एवं इसलिए उक्त सी.डी. साक्ष्य अधिनियम की धारा 65 बी के अंतर्गत ग्राह्य है।

Case referred:

C.A. No. 4226/2012 decided on 18.09.2014 (SC).

Nilesh Dave, for the applicant.
Romesh Dave, for the non-applicant/State.

Short Note
****(28)***
Before Mr. Justice S.K. Palo
M.Cr.C. No. 5682/2015 (Gwalior) decided on 30 September, 2015

JAIPAL SINGH ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 451, 457 & 482 - Release of tractor **- When a subject matter of an offence is seized by the police, it ought not to be retained in custody of the Court or of the police for any time longer than what is absolutely necessary - The seizure of the property by the police amounts to clear entrustment of the property to a government servant - The idea is that the property should be restored to the original owner after the necessity to retain it ceases - Vehicle directed to be released on Supurdagi on some conditions - Application allowed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 451, 457 व 482 – ट्रैक्टर को छोड़ा जाना – जब किसी अपराध की कोई विषयवस्तु पुलिस द्वारा जप्त की जाती है, तब उसे अभिरक्षा हेतु पूर्णतः आवश्यक अवधि से अधिक समय तक न्यायालय अथवा पुलिस की अभिरक्षा में नहीं रखा जाना चाहिए – पुलिस द्वारा संपत्ति का जप्त किया जाना किसी शासकीय सेवक को संपत्ति स्पष्टतः सौंपे जाने की कोटि में आता है – विचार यह है कि संपत्ति के प्रतिधारण की आवश्यकता समाप्त होने के उपरांत उसे मूल स्वामी को लौटा दिया जाना चाहिए – वाहन को कुछ शर्तों के अधीन छोड़े जाने हेतु निदेशित किया गया – आवेदन मंजूर।

Cases referred:

2003 SCC (Cri) 1943, (1997) 4 SCC 358.

Jitendra Singh, for the applicant.
Rajendra Singh Yadav, P.P. for the non-applicant/State.

Short Note
****(29)***
Before Mr. Justice Sujoy Paul
W.P. No. 5074/2015 (Gwalior) decided on 24 September, 2015

MAJOR SINGH & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

***Land Revenue Code, M.P. (20 of 1959), Sections 131 & 132 - Right of way and penalty for obstruction of way* - Tehsildar passed an interim order - On an application seeking compliance of interim order, Tehsildar imposed fine of Rs. 1000/- and directed Revenue Inspector for opening of road - Held - Section 132 speaks about final decision on merit - Interim order cannot be treated as decision - Existence of decision u/S 131 of M.P. Land Revenue Code is a sine qua non for exercising power u/S 132 of Code - Matter remitted back to Tehsildar to proceed in accordance with law - Petition allowed.**

भू राजस्व संहिता, म.प्र. (1959 का 20), धाराएँ 131 व 132 – मार्ग का अधिकार एवं मार्ग में बाधा हेतु शास्ति – तहसीलदार ने एक अंतरिम आदेश पारित किया – अंतरिम आदेश का पालन कराये जाने हेतु प्रस्तुत आवेदन पर तहसीलदार ने रू. 1000/– का अर्थदण्ड अधिरोपित किया एवं मार्ग खोलने हेतु राजस्व निरीक्षक को निदेशित किया – अभिनिर्धारित – धारा 132 गुणदोष पर अंतिम विनिश्चय की व्याख्या करती है – अंतरिम आदेश को निर्णय नहीं माना जा सकता – संहिता की धारा 132 के अंतर्गत शक्तियों के प्रयोग हेतु म.प्र. भू–राजस्व संहिता की धारा 131 के अंतर्गत विनिश्चय की मौजूदगी अनिवार्य है – मामला तहसीलदार की ओर विधि अनुसार कार्यवाही करने हेतु प्रतिप्रेषित – याचिका मंजूर।

Cases referred:

AIR 1961 SC 1795, (2011) 7 SCC 452, AIR 2002 AP 224, (1978) 19 GLR 85, (1977) 2 SCC 256, (1987) 1 SCC 424, (2013) 3 SCC 489.

N.K. Gupta with *Sanjay Sharma,* for the petitioners.

RBS Tomar, G.A. for the respondents No. 1 & 2.
Raja Sharma, for the respondents No. 3 to 6.

Short Note
****(30)***
Before Mr. Justice S.K.Palo
M.Cr.C. No. 10706/2015 (Gwalior) decided on 29 October, 2015

MONU @ KAUSHAL SINGH BHADORIYA ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Section 19* - Removal of disqualification attaching to conviction - At the time of incidence and conviction by the Juvenile Justice Board, the petitioner was juvenile - As per Section 19(1) of the Act, the disqualification attached to the conviction is removed and it is made clear that conviction of the petitioner will not affect his service career in any manner.**

किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम (2000 का 56), धारा 19 – दोषसिद्धि से संबंधित निरर्हता का हंटाया जाना – किशोर न्यायालय बोर्ड द्वारा दोषसिद्ध किए जाने एवं घटना के समय याची किशोर था – अधिनियम की धारा 19(1) के अनुसार, दोषसिद्धि से संबंधित निरर्हता हटाई गई एवं यह स्पष्ट किया गया कि याची की दोषसिद्धि किसी भी प्रकार से उसके सर्विस कैरियर को प्रभावित नहीं करेगी।

Case referred:

(2010) 3 MPHT 55.

Deependra Singh Kushwaha, for the applicant.
Rajendra Singh Yadav, P.P. for the non-applicant/State.

Short Note
****(31)***
Before Mr. Justice Vivek Agarwal
W.P. No. 2531/2015 (Gwalior) decided on 13 July, 2016

MUNICIPAL COUNCIL GUNA ...Petitioner
Vs.
KRISHNA PAL ...Respondent

Industrial Disputes Act (14 of 1947), Section 2A - Whether retrospective or Prospective - Limitation to file a dispute **- Held - Intention of the legislature to insert the said amendment was to have implication of prospective nature - Prior to 15.09.2010, no limitation was prescribed for filing a dispute, but in view of amended provision, a workman is entitled to file a dispute within three years from the discharge, dismissal, retrenchment or otherwise termination of service or within three years of amendment.**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 2 ए – क्या भूतलक्षी है अथवा भविष्यलक्षी – विवाद प्रस्तुत करने हेतु परिसीमा – अभिनिर्धारित – उक्त संशोधन अन्तःस्थापित करने का विधायिका का आशय भविष्यलक्षी प्रकृति की विवक्षा प्राप्त करना था – 15.09.2010 के पूर्व, विवाद प्रस्तुत करने हेतु कोई परिसीमा विहित नहीं थी, परंतु संशोधित उपबंध की दृष्टि में एक कर्मकार सेवा से उन्मुक्ति, पदच्युति, छंटनी या अन्यथा सेवा से पर्यवसान होने अथवा संशोधन होने से तीन वर्ष के भीतर विवाद प्रस्तुत करने हेतु पात्र है।

Cases referred:

2005(2) Vidhi Bhasvar 123, AIR 1951 SC 128.

S.K. Jain, for the petitioner.
Shishir Saxena, for the respondent.

Short Note
****(32)***
Before Mr. Justice R.S. Jha
W.P. No. 700/2016 (Gwalior) decided on 18 March, 2016

PINKI (SMT.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Constitution - Article 226 - Removal from service **- Respondent No. 6 was removed from service against which she had filed revision - Meanwhile, the petitioner was appointed in place of Respondent No. 6 - Commissioner allowed the revision filed by the Respondent No. 6 and directed for her re-instatement - Order of removal of petitioner consequent to re-instatement of Respondent No. 6 is not bad in law, as the order of Competent Authority cannot be rendered otiose and mere waste of paper.**

संविधान – अनुच्छेद 226 – सेवा से हटाया जाना – प्रत्यर्थी क्र. 6 को सेवा से हटाया गया, जिसके विरूद्ध उसने पुनरीक्षण प्रस्तुत किया – इस दौरान, प्रत्यर्थी क्र. 6 के स्थान पर याची को नियुक्त किया गया – आयुक्त ने प्रत्यर्थी क्र. 6 द्वारा प्रस्तुत पुनरीक्षण को मंजूर किया तथा उसके पुनःस्थापन हेतु निदेशित किया – प्रत्यर्थी क्र. 6 के पुनः स्थापन के परिणामस्वरूप याची को सेवा से हटाने का आदेश विधि की दृष्टि से दोषपूर्ण नहीं है, क्योंकि सक्षम अधिकारी के आदेश को निरर्थक एवं मात्र कागज का दुर्व्यय नहीं ठहराया जा सकता है।

Cases referred:

R.P. No. 380/2012 decided on 16.04.2014 (DB), W.P. No. 423/2001 decided on 15.12.2011 (DB), W.P. No. 12045/2013 decided on 25.07.2013 (DB).

N.S. Kirar, for the petitioner.
T.C. Singhal, for the respondent No. 6.

Short Note

****(33)***

Before Mr. Justice Prakash Shrivastava

W.P. No. 6518/2014 (Indore) decided on 31 March, 2016

PRAKASH NAMKEEN UDHYOG (M/S.) & anr. ...Petitioners
Vs.
AIRPORT AUTHORITY OF INDIA & ors. ...Respondents

Contract - Judicial Review **- Cancellation of tender and re-inviting the same by reviewing minimum required license fee - Held - Scope of interference in such matter is limited unless shown to be arbitrary, discriminatory or suffering from mala fides - On the basis of participation in tender, bidder does not get any right to compel the authority to accept the bid - Bidder is only entitled to a fair, equal and non discriminatory treatment in the process of tender and can come to the court complaining, if government authorities have not acted reasonably & fairly.**

संविदा – न्यायिक पुनर्विलोकन – निविदा का निरस्त किया जाना तथा न्यूनतम अपेक्षित अनुज्ञा शुल्क का पुनर्विलोकन करते हुए निविदा पुनः आमंत्रित की जाना – अभिनिर्धारित – ऐसे मामले में हस्तक्षेप की व्यापकता सीमित होती है, जब तक कि मामला मनमानापूर्ण, भेदभावपूर्ण अथवा असद्भावना से ग्रसित होना न दर्शाया जाए – निविदा में भाग लेने मात्र के आधार पर बोली लगाने वाले को ऐसा कोई अधिकार नहीं मिल जाता कि वह प्राधिकारी को बोली स्वीकार करने हेतु विवश करे – निविदा की

प्रक्रिया में बोली लगाने वाला मात्र निष्पक्ष, समान एवं गैर–भेदभावपूर्ण व्यवहार किए जाने हेतु पात्र है, तथा वह न्यायालय के समक्ष शिकायत लेकर आ सकता है, यदि शासकीय प्राधिकारियों ने युक्तियुक्त एवं निष्पक्ष रूप से कार्य न किया हो।

Cases referred:

AIR 2014 SC 390, 2012 (4) MPHT 236, 2007(1) MPLJ 402.

P.K. Gupta, for the petitioners.
M.A. Mansoori, for the respondents.
Ajay Bagadiya, for the intervener.
Vijay Kumar Soni, Supervisor (HR-Legal) also present in person on behalf of respondent-Devi Ahilya Bai Airport, Indore

Short Note

****(34)***

Before Mr. Justice Sheel Nagu

M.Cr.C. No. 2905/2016 (Gwalior) decided on 27 April, 2016

RAI SINGH JADON ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 438 - **In the offence involving punishment upto 7 years imprisonment, the police may resort to extreme step of arrest only when the same is necessary and the applicant does not co-operate in the investigation - The applicant should first be summoned to co-operate in the investigation - If the applicant co-operates then the occasion of arrest should not arise.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – सात वर्ष तक के कारावास का दण्ड अंतर्ग्रस्त करने वाले अपराध में पुलिस केवल तभी गिरतारी का कठोर कदम उठा सकती है जब ऐसा करना आवश्यक हो तथा आवेदक अन्वेषण में सहयोग न करता हो – अन्वेषण में सहयोग करने हेतु आवेदक को पहले समन जारी किया जाना चाहिए – यदि आवेदक सहयोग करता है तब गिरफ्तारी का अवसर उत्पन्न नहीं होना चाहिए।

Case referred:

(2014) 8 SCC 273.

Pradeep Katare, for the applicant.
Vijay Sundaram, P.P. for the non-applicant/State.

I.L.R. [2016] M.P., 2881
SUPREME COURT OF INDIA
Before Mr. Justice Jagdish Singh Khehar &
Mr. Justice C. Nagappan
Cr.A. No. 185/2016 decided on 2 March, 2016

STATE OF M.P. ...Appellant
Vs.
GOLOO RAIKWAR & anr. ...Respondents

A. ***Penal Code (45 of 1860), Section 302 - Murder*** **- Accused hurled country made bomb on deceased - Accused caused incised injuries to victim, which were intentional and sufficient to cause death in the ordinary course, even if the death was not intended - Offence falls within clause thirdly of Section 300. (Para 10)**

क. *दण्ड संहिता (1860 का 45), धारा 302 – हत्या* – अभियुक्तगण ने मृतक के ऊपर देशी बम फेंका – अभियुक्तगण ने पीड़ित को छिन्न क्षतियाँ कारित कीं, जो कि साशय थी एवं सामान्य तौर पर मृत्यु कारित करने हेतु पर्याप्त थीं यद्यपि मृत्यु आशयित नहीं थी – अपराध धारा 300 के तृतीय खण्ड की परिधि में आता है।

B. ***Penal Code (45 of 1860), Sections 300 & 304 part I*** **- Murder or culpable homicide not amounting to murder - No significant injury inflicted on vital part of the body - Weapons used were sticks - Accused persons had no intention to cause death - Held - "Bodily injury" includes plural injuries - Injuries cumulatively sufficient to cause death in ordinary course of nature, even none of those injuries individually sufficient - If death is caused and injury causing is intentional, the case would fall under clause thirdly of Section 300. (Para 9)**

ख. *दण्ड संहिता (1860 का 45), धाराएँ 300 व 304 भाग I* – हत्या अथवा हत्या की कोटि में न आने वाला सदोष मानववध – शरीर के महत्वपूर्ण भाग पर कोई विशिष्ट क्षति नहीं पहुँचाई गई – हथियार के तौर पर लाठियों को उपयोग किया गया था – मृत्यु कारित करने का अभियुक्तगण का कोई आशय नहीं था – अभिनिर्धारित – "शारीरिक क्षति' में अनेक प्रकार की क्षतियाँ अंतर्विष्ट हैं – क्षतियाँ संयुक्त रूप से सामान्य प्रकृति में मृत्यु कारित करने हेतु पर्याप्त थीं, परंतु उक्त क्षतियों में से कोई भी क्षति मृत्यु कारित करने हेतु पृथक रूप से पर्याप्त नहीं थी – यदि मृत्यु कारित हुई है तथा पहुँचाई गई क्षति साशय है, तब प्रकरण धारा 300 के तृतीय खण्ड की परिधि में आएगा।

Case referred:

(1976) 4 SCC 382.

JUDGMENT

The Judgment of the Court was delivered by : **C.NAGAPPAN, J. :-** Leave granted.

2. This appeal is preferred against the judgment dated 26.9.2012 passed by the High Court of Madhya Pradesh Principal seat at Jabalpur in Criminal Appeal No. 1797 of 2004 whereby the High Court partly allowed the appeal filed by the respondents/accused, by setting aside their conviction under Section 302 IPC and convicted them for the offence under Section 304 Part I IPC and thereby reducing their sentence from life imprisonment to Rigorous Imprisonment for 10 years.

3. Briefly the facts are as follows : Deceased Hari Choudhary is the uncle of PW1 Kallu Choudhary. On 15.8.2000 at about 3.30 p.m. both of them were going to eat betel and on their way they saw respondent no.1/accused Golu, respondent no.2/accused Bhura and three other accused namely Puttu @ Ram Charan, Gabbar and Bedilal armed with weapons, coming and accused Bhura hurled country bomb at them. On explosion they fell down and accused Bhura dealt a blow of sword to PW1 Kallu and the other accused also assaulted him with their weapons. PW1 saw the accused persons assaulting Hari Choudhary with their weapons. He ran and informed PW3 Ram Niwas, brother of Hari and they carried injured Hari to Victoria Hospital, Jabalpur where he was declared dead. On telephonic information PW10 Sub-Inspector R.B. Soni reached the hospital and recorded Exh.P1 complaint given by PW1 Kallu and prepared Exh.P2 Murg Report. He conducted inquest and prepared Exh.P3 Inquest Report and gave requisition for conducting post-mortem. He also sent injured PW1 Kallu for medical examination.

4. Dr. Ashok Kumar Jain conducted the autopsy and found following injuries on the body of Hari:

i) Incised wound 3" x ½" muscle deep on right cheek

ii) Incised wound 4" x ½" x bone deep on left cheek extending up to ear. The pinna of the ear was cut.

iii) Incised wound on right knee joint posteriorly to lateral

aspect. Joint disarticulated. Patella hanging with the help of tendon. Vessels, nerves and other soft tissues severed.

iv) Incised wound 3" x ¾" x bone deep over occipital region obliquely placed. Clotted blood matting the skull hair.

v) Swelling of blue colour on the right shoulder on the back side 6" in length.

vi) Linear abrasion over left side of chest lateral aspect 4" in length, bluish in colour.

Injuries No.1,2,3 and 4 were caused by hard and sharp object. Injuries No.5 and 6 might have been caused by hard and blunt object. All the injuries were *ante mortem* in nature and were sufficient to cause death. In the opinion of Dr. Jain, cause of death was excessive haemorrhage from Injury No.3. The death of deceased was homicidal.

5. PW10 Sub-Inspector Soni, after registering a case under Section 302 IPC and Section 3(2)(v) of Scheduled Caste/Scheduled Tribe (Prevention of Atrocities) Act against the accused persons and after investigation filed the charge-sheet. After committal the Sessions Court framed charges against both the respondents herein and accused Puttu @ Ram Charan. Accused Gabbar and Bedilal were absconding. The trial court convicted the respondents herein for the offence under Section 302 IPC and acquitted them for the offence under Section 3(2)(v) of the SC/ST (P.A.) Act and sentenced each of them to life imprisonment and to pay a fine of Rs.1000/- each in default to undergo one month simple imprisonment for the charge of murder. At the same time the trial court acquitted accused Puttu @ Ram Charan of the charges. Challenging the same, both the respondents herein preferred appeal and the High Court altered the conviction and sentence as mentioned above. Aggrieved by the same the State has preferred the present appeal.

6. The learned counsel for the appellant State submitted that the view taken by the High Court is patently erroneous in law as the offence under Section 302 IPC was clearly made out. It is his further submission that the High Court has committed an error in holding that injury no.3 was not on vital part of the body and the other injuries were not fatal in nature, and therefore,

intention to commit murder of the deceased cannot be held established. According to him the accused attacked the deceased by hard and sharp weapons at the time of occurrence resulting in his death and the offence of murder is clearly made out. Per contra the learned counsel appearing for the respondents supported the view taken by the High Court and submitted that the impugned judgment is sustainable in law.

7. The respondents have not challenged their conviction. The trial court, as already noticed, had convicted the respondents of the offence of murder. The High Court has disagreed with the Trial Court and held the offence was not 'murder' but one under Section 304-I of the Indian Penal Code. The High Court reached this conclusion on the following reasoning:

> "17. On perusal of the evidence of Dr. Ashok Kumar Jain (PW-6) it seems that injuries No.1 and 2, which were caused on right and left cheeks of deceased by sharp edged weapons, were not grievous. Similarly, injury No.4, which was an incised wound on the occipital region of the skull was bone deep. Though there was bleeding from it, but the bone was not found cut. Injuries No.5 and 6 were respectively swelling and abrasions on shoulder and chest. No underneath organ was found damaged. No doubt Dr. Jain stated that injuries found on the body of deceased were sufficient to cause his death, but he did not mention this fact in the postmortem report (Ex.P/10). In Ex.P/10 as well as in court he specifically stated that the cause of death of deceased was excessive haemorrhage from the injury No.3 which was on the knee.
>
> 18. In view of the above medical evidence, in our opinion, it cannot be held established with certainty that appellants intended to commit murder of the deceased, but, since they caused number of injuries by sharp edged weapons to deceased and the injury No.3 proved fatal, it can be held that appellants assaulted deceased with an intention of causing such bodily injuries to him as were likely to cause his death making them liable to be punished under Section 304-I of the Indian Penal Code".

8. We are unable to appreciate and accept this reasoning. When the deceased along with PW1 Kallu Choudhary were going to eat betals (sic:betels) respondents/accused came from the front side and second respondent Bhura

pelted country bomb at them and inflicted blow of sword on Hari and the other accused assaulted Hari with sword, Gupti and Kankur and they also attacked PW1 Kallu Choudhary with weapons. Hari was soiled in blood and was moaning and on being taken to hospital, was declared dead. Injuries no.1 to 4 found on the body of Hari were incised wounds and 3rd and 4th of them were inflicted on the right knee joint and head respectively. Dr. Ashok Kumar Jain who conducted the autopsy has stated that the injuries found on the body were sufficient to cause death. It was pointed out that the cause of death was excessive haemorrhage from injury no.3 which was on the knee.

9. In *State of Andhra Pradesh vs. Rayavarapu Punnayya and Anr.* (1976) 4 SCC 382), this Court had to deal with a similar situation. In that case, the accused 5 in number beat the victim with sticks on the legs and arms of the deceased and when hospitalized the deceased succumbed to his injuries. The medical officer who conducted the autopsy opined that the cause of death was shock and haemorrhage resulting from multiple injuries and said injuries were cumulatively sufficient to cause death in the ordinary course of nature. Question arose whether in such a case when no significant injury had been inflicted on a vital part of the body, and the weapons used were sticks and the accused could not be said to have the intention of causing death, the offence would be 'murder' or merely 'culpable homicide not amounting to murder'. This Court answered the question in these terms:

> "39. ..... . All these acts of the accused were preplanned and intentional, which, considered objectively in the light of the medical evidence, were sufficient in the ordinary course of nature to cause death. The mere fact that the beating was designedly confined by the assailants to the legs and arms, or that none of the multiple injuries inflicted was individually sufficient in the ordinary course of nature to cause death, will not exclude the application of clause thirdly of Section 300. The expression "bodily injury" in clause thirdly includes also its plural, so that the clause would cover a case where all the injuries intentionally caused by the accused are *cumulatively* sufficient to cause the death in the ordinary course of nature, even if none of those injuries in*dividually* measures upto such sufficiency. The sufficiency spoken of in this clause, as already noticed, is the high probability of death in the ordinary course of nature, and if such sufficiency exists and death is caused

and the injury causing it is intentional, the case would fall under clause thirdly of Section 300. All the conditions which are a prerequisite for the applicability of this clause have been established and the offence committed by the accused, in the instant case was 'murder'."

10. In the present case, the fact that the accused hurled country made bombs, has been established. The incised injuries caused to Hari were intentional and were sufficient to cause death in the ordinary course of nature even if it cannot be said that his death was intended. This is sufficient to bring the case within thirdly of Section 300.

11. For the foregoing reasons, we are of the opinion that the High Court was in error in altering the conviction of the respondents/accused from one under Section 302 to that under Section 304-I Indian Penal Code. Accordingly, we allow this appeal and set aside the impugned judgment and restore the judgment of the trial court convicting the respondents/accused for the offence of murder, with a sentence of imprisonment for life. The respondents/accused are directed to surrender before the trial court to serve out the remaining sentence, failing which the trial court would forthwith issue warrants of arrest and send them to jail.

Appeal allowed.

I.L.R. [2016] M.P., 2886
SUPREME COURT OF INDIA
Before Mr. Justice J. Chelameswar &
Mr. Justice Abhay Manohar Sapre
C.A. No. 2697/2016 decided on 15 March, 2016

AJAY ARJUN SINGH ...Appellant
Vs.
SHARADENDU TIWARI & ors. ...Respondents

(Alongwith C.A. No. 2699/2016, C.A. No. 2700/2016 & C.A. No. 2701/2016)

A. ***Representation of the People Act (43 of 1951), Section 80 A and High Court of Madhya Pradesh Rules, 2008, Chapter IV, Rule 13 - Constitution - Article 225 - Election petition*** **- Interlocutory order sent back for clarification to the High Court due to its ambiguous**

nature - Interregnum - Judge who passed the order retired - Clarification order was passed by Single Bench of the High Court - Preliminary objection - Lack of jurisdiction - Held - The requirement of a matter being heard by the Division Bench under Chapter IV, Rule 13(1)(b) of the High Court of M.P. Rules, 2008 is limited to cases of review, clarification or modification of only judgment, decrees and final orders, but not to interlocutory orders such as the order, of which, "Clarification" was sought due to its ambiguous nature, and even otherwise the stipulation under Chapter IV, Rule 13(1)(b) of High Court of M.P. Rules, 2008 is contrary to stipulation of Section 80 A(2) of Representation of the People Act 1951 in view of clear declaration by Article 225 of the Constitution that "any Rule shall be subject to the law made by the appropriate legislature" - Preliminary objection dismissed. (Paras 28 to 31)

क. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 80 ए एवं उच्च न्यायालय मध्यप्रदेश नियम, 2008, अध्याय IV, नियम 13 – संविधान – अनुच्छेद 225 – निर्वाचन याचिका – अंतर्वर्ती आदेश अस्पष्ट प्रकृति के कारण स्पष्टीकरण हेतु उच्च न्यायालय की ओर वापस भेजा गया – इस दौरान – न्यायाधीश जिसने उक्त आदेश पारित किया था सेवानिवृत्त हो गया – उच्च न्यायालय की एकल पीठ ने स्पष्टीकरण आदेश पारित किया था – प्रारंभिक आपत्ति – अधिकारिता का अभाव – अभिनिर्धारित – उच्च न्यायालय मध्यप्रदेश नियम, 2008 के अध्याय IV, नियम 13(1)(बी) के अंतर्गत किसी मामले को खण्डपीठ द्वारा सुने जाने की आवश्यकता केवल निर्णय, डिक्री एवं अंतिम आदेश के पुनरीक्षण, स्पष्टीकरण अथवा उपांतरण के प्रकरणों तक ही सीमित है, न कि अंतर्वर्ती आदेशों में जैसे कि आदेश, जिसका अस्पष्ट प्रकृति का होने के कारण "स्पष्टीकरण" चाहा गया था, तथा अन्यथा भी, संविधान के अनुच्छेद 225 की स्पष्ट घोषणा कि "कोई भी नियम समुचित विधान–मण्डल द्वारा निर्मित विधि के अध्यधीन होगा", के आलोक में उच्च न्यायालय म.प्र. नियम, 2008 के अध्याय IV, नियम 13(1)(बी) का उपबंध लोक प्रतिनिधित्व अधिनियम, 1951 की धारा 80–ए (2) के उपबंध के प्रतिकूल है – प्रारंभिक आपत्ति खारिज।

***B. Representation of the People Act (43 of 1951), Proviso to Section 83(1), Conduct of Election Rules, 1961, Rule 94-A Form 25 and High Court of Madhya Pradesh Rules, 2008, Chapter VII, Rule 6(4) - Election Petition - Affidavit - Objection* - Affidavit filed with the Election Petition does not bear the seal & signature of the Registrar as per Rule 6(4) of Chapter VII of the High Court of M.P. Rules, 2008 - Other pages of the Election Petition bear the seal & signature of the**

Registrar - Inference - Affidavit has been inserted after filing of the Election Petition - High Court - Finding - Lapse occured because nobody pointed out to the Registrar about existence of affidavit at page No. 394-395 - Held - Rule 6(4) of Chapter VII of the High Court of M.P. Rules 2008, casts a mandatory duty on the Registrar to sign & seal on each page of the Election Petition as well as the affidavit and such a mandatory duty must be performed irrespective of the fact whether somebody points out to the Registrar or not. (Para 37(iii))

ख. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 83(1) का परन्तुक, निर्वाचन का संचालन नियम, 1961, नियम 94–ए फॉर्म 25 एवं उच्च न्यायालय मध्यप्रदेश नियम, 2008, अध्याय VII, नियम 6(4) – निर्वाचन याचिका – शपथपत्र – आपत्ति – निर्वाचन याचिका के साथ प्रस्तुत शपथ पत्र पर उच्च न्यायालय मध्यप्रदेश नियम, 2008 के अध्याय VII के नियम 6(4) के अनुसार रजिस्ट्रार के हस्ताक्षर एवं मुद्रा अंकित नहीं है – निर्वाचन याचिका के अन्य पृष्ठों पर रजिस्ट्रार के हस्ताक्षर एवं मुद्रा अंकित है – उपधारणा – शपथ पत्र, निर्वाचन याचिका प्रस्तुत किये जाने के उपरांत उसमें लगाया गया था – उच्च न्यायालय – निष्कर्ष – उक्त गलती इसलिए हुई क्योंकि किसी ने भी पृष्ठ क्रमांक 394–395 पर शपथ पत्र मौजूद होने के बारे में रजिस्ट्रार को नहीं बताया – अभिनिर्धारित – उच्च न्यायालय मध्यप्रदेश नियम, 2008 के अध्याय VII का नियम 6(4) रजिस्ट्रार पर एक आज्ञापक कर्तव्य डालता है कि वह निर्वाचन याचिका के प्रत्येक पृष्ठ एवं शपथ पत्र पर अपने हस्ताक्षर एवं मुद्रा अंकित करे तथा उक्त आज्ञापक कर्तव्य का निर्वहन आवश्यक रूप से बगैर इस तथ्य को विचार में लिए किया जाना चाहिए कि क्या किसी ने भी रजिस्ट्रार को इस कर्तव्य के संबंध में अवगत कराया है अथवा नहीं।

***C. Representation of the People Act (43 of 1951), Proviso to Section 83(1), Conduct of Election Rules 1961, Rule 94-A, Form 25 and Civil Procedure Code (5 of 1908), Order 7 Rule 11 - Election Petition - Affidavit - Objection* - Affidavit not in Form 25 and not filed at the time of presentation of the Election Petition on 20.01.2014 - Affidavit filed between 22.01.2014 and 18.06.2014, after expiry of the limitation period - Held - The Returned Candidate has only objected vide application under Order 7 Rule 11 of C.P.C. to the fact that the affidavit filed alongwith the Election Petition is not in conformity with form 25 of the Conduct Rules, 1961 & has never objected regarding the date of filing of the affidavit. (Paras 38 & 39)**

ग. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 83(1) का परन्तुक, निर्वाचन का संचालन नियम, 1961, नियम 94–ए, फॉर्म 25 एवं सिविल

प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – निर्वाचन याचिका – शपथपत्र – आपत्ति – शपथ पत्र फॉर्म 25 के अनुसार नहीं था तथा दिनांक 20.01.2014 को निर्वाचन याचिका प्रस्तुत करते समय प्रस्तुत नहीं किया गया था – शपथ पत्र दिनांक 22.01.2014 एवं 18.06.2014 के मध्य परिसीमा अवधि के अवसान के पश्चात् प्रस्तुत किया गया – अभिनिर्धारित – निर्वाचित प्रत्याशी ने सि.प्र.सं. के आदेश 7 नियम 11 के अंतर्गत प्रस्तुत आवेदन के माध्यम से केवल इस तथ्य के संबंध में आपत्ति की है कि निर्वाचन याचिका के साथ प्रस्तुत शपथ पत्र निर्वाचन का संचालन नियम, 1961 के फॉर्म 25 के अनुरूप नहीं है एवं शपथ पत्र प्रस्तुत किये जाने की दिनांक के विषय में कभी भी आपत्ति नहीं की।

D. Representation of the People Act (43 of 1951), Proviso to Section 83(1), Conduct of Election Rules, 1961, Rule 94-A, Form 25 and Civil Procedure Code (5 of 1908), Order 7 Rule 11 - Election Petition - Second affidavit **- Returned Candidate - Objection by way of application under Order 7 Rule 11 of C.P.C. that second affidavit filed alongwith Election Petition is not in conformity with Form 25 - Arguments - Filing of second affidavit during pendency of Election Petition by Election Petitioner confirms this fact - Held - The Election Petitioner in his reply to application under Order 7 Rule 11 of C.P.C. has specifically stated that he had filed an affidavit in Form 25 at page no. 394-395 of the Election Petition - Abundant caution - If affidavit is defective - Ready to file further affidavit - Now the Returned Candidate cannot be permitted to raise such a fact in absence of appropriate pleading - Contention turned down - SLP of Election Petitioner allowed and SLP of Returned Candidate dismissed. (Paras 41 to 45)**

घ. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 83(1) का परन्तुक, निर्वाचन का संचालन नियम, 1961, नियम 94–ए, फॉर्म 25 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – निर्वाचन याचिका – द्वितीय शपथपत्र – निर्वाचित प्रत्याशी – सि.प्र.सं. के आदेश 7 नियम 11 के अंतर्गत प्रस्तुत आवेदन के माध्यम से यह आपत्ति कि निर्वाचन याचिका के साथ प्रस्तुत द्वितीय शपथ पत्र फॉर्म 25 के अनुरूप नहीं है – तर्क – निर्वाचन याचिका के लंबित रहने के दौरान निर्वाचन याची द्वारा द्वितीय शपथ पत्र प्रस्तुत किये जाने से यह तथ्य अभिपुष्ट होता है – अभिनिर्धारित – निर्वाचन याची ने सि.प्र.सं. के आदेश 7 नियम 11 के अंतर्गत आवेदन के अपने जवाब में यह विशिष्ट रूप से कहा है कि उसने निर्वाचन याचिका के पृष्ठ क्र. 394–395 पर फॉर्म 25 के प्रारूप में शपथ पत्र प्रस्तुत किया था – अत्यधिक सावधानी – यदि शपथ पत्र दोषपूर्ण है – दूसरा शपथ पत्र प्रस्तुत करने हेतु तैयार – समुचित अभिवचन के अभाव में निर्वाचित प्रत्याशी को अब

उक्त बात उठाने हेतु अनुमति नहीं दी जा सकती – प्रतिवाद अस्वीकार किया गया – निर्वाचन याची की विशेष अनुमति याचिका मंजूर एवं निर्वाचित प्रत्याशी की विशेष अनुमति याचिका खारिज।

Cases referred:

(2012) 5 SCC 511, (2013) 4 SCC 776, (1997) 9 SCC 31, AIR 1917 Cal. 546.

JUDGMENT

The Judgment of the Court was delivered by : **CHELAMESWAR, J. :-** Leave granted.

2. General elections to the legislative assembly of Madhya Pradesh took place in the year 2013. On 8.12.2013, one Shri Ajay Arjun Singh (hereinafter referred to as the RETURNED CANDIDATE) was declared elected as a member of legislative assembly from 76 Churhat Assembly Constituency in the said election. On 20th January, 2014, challenging the declaration of said Ajay Arjun Singh, one of the contesting candidates Sharadendu Tiwari (hereinafter referred to as 'the ELECTION PETITIONER') filed an Election Petition No.1 of 2014 before the High Court of Madhya Pradesh.

3. The election of the RETURNED CANDIDATE was challenged on the grounds that the RETURNED CANDIDATE is guilty of commission of two corrupt practices falling under sub-sections (1) and (6) of Section 123 of the Representation of the People Act, 1951 (hereinafter referred to as 'the RP Act'), i.e. (1) making appeal to the voters in the name of religion and bribery; and (2) incurring expenditure in contravention of Section 77 of the RP Act respectively.

4. Notice to the respondents in the Election Petition was ordered on 10th February, 2014. The RETURNED CANDIDATE was served[1] with the said notice on 18.6.2014. Admittedly, the election petition and all the annexures thereto were served on the RETURNED CANDIDATE on his appearance in the Court on 18.6.2014.

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1. Admittedly the RETURNED CANDIDATE could not be served with the summons in the normal course by the High Court. He appeared in the High Court (admittedly) pursuant to the substituted service (paper publication). The RETURNED CANDIDATE has an explanation for the same. The truth of the explanation is not in issue.

5. On 1st July, 2014, the RETURNED CANDIDATE filed I.A. No.43 of 2014 invoking Order VII Rule 11 of CPC (hereinafter referred to as "OR VII R 11 petition") praying that the Election Petition be dismissed on the ground that it does not disclose a cause of action. The said petition was dismissed by order of the High Court dated 25.8.2014. Aggrieved by the dismissal of OR VII R 11 petition, the RETURNED CANDIDATE filed an application for review (I.A. No.13575/2015 – hereinafter referred to as the "Review Petition"), which was also dismissed by the High Court by an order dated 18.3.2015.

6. Therefore, the RETURNED CANDIDATE filed SLPs No.33933/2014 and 11096/2015 aggrieved by orders dated 25.8.2014 and 18.3.2015 respectively.

7. Aggrieved by certain findings recorded by the High Court (the details of which will be considered later) in the order dated 18.3.2015 in the Review Petition, the ELECTION PETITIONER preferred SLP No.15361/2015.

8. To adjudicate the correctness of the various impugned orders, an examination of the issues which fell for the consideration of the High Court is required to be identified.

9. The prayer in the OR VII R 11 petition filed by the RETURNED CANDIDATE is as follows:

> "It is, therefore, prayed that the present election petition be dismissed."

(i) Para 8 of the OR VII R 11 petition reads as follows:

> "That, besides the above, affidavit sworn and filed along with the petition by the petitioner is not in conformity with Form 25 of the Conduct of Election Rules, 1961. The name of the corrupt practice has not been specified which is required to be specifically stated in the affidavit prescribed under Form No.25. The affidavit which the petitioner has filed is thus defective and, therefore, the petition deserves to be dismissed."

(ii) Para 13 of the said petition states:

> "That, for the aforesaid reasons, the present election petition is liable to be dismissed as the as do not disclose any cause of

cause of action."

Giving some allowance to the clerical errors, we presume that the RETURNED CANDIDATE prayed that the Election Petition be dismissed on the ground that it does not disclose any cause of action.

In other words, the RETURNED CANDIDATE prayed that the Election petition be dismissed for two reasons:

(i) that the affidavit filed along with the Election petition is not in conformity with Form 25 of the Conduct of Election Rules, 1961; and

(ii) that the Election petition does not disclose any cause of action.

They are two distinct grounds.

10. In response to the said application (OR VII R 11 petition), the ELECTION PETITIONER filed a reply dated 11.07.2014. It is stated in para 6 therein as follows:

> "6. That, the third objection which respondent no.1/returned candidate has raised with respect to the non filing of the affidavit inconformity of the Form 25 of the Conduct of Election Rules, 1961. **The petitioner has filed the said affidavit along with the election petition which is attached at page no.394 and 395 of the election petition** and also found mention at serial no.57-A in the index filed along with the election petition. Since the petitioner has also filed affidavit in support of the election petition and has also filed the affidavit in prescribed format, therefore, there is no defect in this regard. Though, the petitioner respectfully submits that the petition and the affidavit is in proper order but if in the opinion of the court if there is any defect, the election petitioner is willing to cure the same."

11. It can be seen from the above that the ELECTION PETITIONER clearly mentioned about the filing of an affidavit in form 25 which is to be found at page nos.394 and 395 of the election petition and also mentioned at serial no.57-A in the index to the election petition. Though not very elegantly pleaded, the ELECTION PETITIONER did assert the fact that he had filed

two affidavits along with the election petition[2].

12. It can be seen from the above that the ELECTION PETITIONER has also made a submission that "if in the opinion of the Court if there is any defect, the ELECTION PETITIONER is willing to cure the same". Such a statement appears to have been made by way of abundant caution in a bid to save the election petition from being dismissed on the ground of non-compliance with the proviso to Section 83 (1) in the event of the High Court reaching the conclusion that the affidavit filed by the ELECTION PETITIONER along with the election petition is not in fact compliant with the requirement of law.

13. The High Court, by its order dated 25.8.2014 while dismissing OR VII R 11 petition recorded:

> "In the instant case, the petitioner has not filed the affidavit in the prescribed Form 25 in accordance with Rule 94-A of the Conduct of Election Rules, 1961. Since aforesaid defect is curable, same can be cured by filing affidavit in the prescribed Form 25."

The High Court further directed:

"the petitioner is directed to file an affidavit in Form 25 within 15 days from the date of receipt of certified copy of the order."

Pursuant to this order, admittedly an affidavit was filed by the ELECTION PETITIONER on 31.08.2014.

14. To understand the controversy in these appeals, an analysis of the provisions of the RP Act is required. Section 83[3] of the RP Act stipulates

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2. Para 6 of reply to the IA No.43 of 2014

"... Since the petitioner has also filed affidavit in support of the election petition and has also filed an affidavit in the prescribed format, therefore, there is no defect in this regard...."

3. **"Section 83. Contents of petition.—(1)** An election petition—

(a) Shall contain a concise statement of the material facts on which the petitioner relies;

(b) Shall set forth full particulars of any corrupt practice that the

what is required to be contained in an election petition. Section 83(1)(c) requires every election petition to be verified in the manner laid down in the Code of Civil Procedure, 1908. Order VI Rule 15 of the Code deals with the verification of the pleadings[4]. Sub-rule 4[5] stipulates that the person verifying the pleadings shall also furnish an affidavit in support of such pleadings.

15. An election petition challenging the validity of an election can be filed on any one of the various grounds specified under Section 100 of the RP Act. The commission of a corrupt practice either by the "returned candidate or his election agent or by any other person with the consent of either the returned candidate or his agent" is one of the several grounds on which the High Court can declare the result of a returned candidate to be void. The election of a

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petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) Shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings;

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

4. **Order VI Rule 15. Verification of pleadings.**— (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

(4) The person verifying the pleading shall also furnish an affidavit in support of his pleadings.

5 Sub-rule (4) came to be inserted to the Code by Act 46 of 1999

returned candidate can also be set aside on the ground of the commission of corrupt practice "in the interest of the returned candidate by an agent other than his election agent" and by virtue of such corrupt practice "the result of the election, insofar as it concerns a returned candidate, has been materially affected". In either case, in view of the stipulation contained in proviso to Section 83(1) RP Act, the election petition is required to be accompanied by an affidavit in the prescribed form.

16. In exercise of the power under Section 169 of the RP Act, the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956 have been framed by the Government of India. Rule 94A prescribes as follows:

> **"Rule 94A. Form of affidavit to be filed with election petition.**— The affidavit referred to in the proviso to sub-section (1) of section 83 shall be sworn before a magistrate of the first class or a notary or a commissioner of oaths and shall be in Form 25."

Form 25 also indicates the layout of the affidavit. The requirement of giving such affidavit where there are allegations of commission of corrupt practice in an election petition came to be inserted in the Act by virtue of an amendment in the year 1962.

17. The question whether an election petition challenging the election of a returned candidate on the ground of corrupt practice is required to be accompanied either by one affidavit or two affidavits in view of the insertion of clause (4) of Rule 15 of Order VI, fell for consideration of this Court in *P.A. Mohammed Riyas v. M.K. Raghavan & Others,* (2012) 5 SCC 511 and this Court held thus:

> "45. ... We are also unable to accept Mr Venugopal's submission that even in a case where the proviso to Section 83(1) was attracted, a single affidavit would be sufficient to satisfy the requirements of both the provisions."

18. Subsequently, the same question again fell for consideration before a larger bench of this Court in *G.M. Siddeshwar v. Prasanna Kumar*, (2013) 4 SCC 776. The court disapproved the view taken in *Mohammed Riyas* case and held:

> "1. ... The principal question of law raised for our consideration is whether, to maintain an election petition, it is imperative for an election petitioner to file an affidavit in terms of Order 6 Rule 15(4) of the Code of Civil Procedure, 1908 in support of the averments made in the election petition in addition to an affidavit (in a case where resort to corrupt practices have been alleged against the returned candidate) as required by the proviso to Section 83(1) of the Representation of the People Act, 1951. In our opinion, there is no such mandate in the Representation of the People Act, 1951 and a reading of *P.A. Mohammed Riyas v. M.K. Raghavan* which suggests to the contrary, does not lay down correct law to this limited extent.
>
> **30.** In any event, as in the present case, the same result has been achieved by the election petitioner by filing a composite affidavit, both in support of the averments made in the election petition and with regard to the allegations of corrupt practices by the returned candidate. This procedure is not contrary to law and cannot be faulted. Such a composite affidavit would not only be in substantial compliance with the requirements of the Act but would actually be in full compliance thereof. The filing of two affidavits is not warranted by the Act nor is it necessary, especially when a composite affidavit can achieve the desired result."

19. The issue before this Court in this batch of appeals is whether the election petition was accompanied by an affidavit which is compliant with the requirement of statute under the proviso to Section 83(1)(c). For answering the issue, it is incidentally necessary to determine whether the ELECTION PETITIONER filed two affidavits along with the election petition to satisfy the requirement of the law.

20. Unfortunately, the High Court did not examine, when it passed the orders dated 25.08.2014 or 18.03.2015, the question whether there were two affidavits filed by the ELECTION PETITIONER along with the election petition and whether the affidavit said to have been annexed to the election petition at page nos.394-395 is compliant with the requirement of stipulations under proviso to Section 83(1). At para 5 of the order dated 25.08.2014, the

High Court recorded as follows:

> "5. **So far as the contention with respect to verification or affidavit is concerned,** it has been laid down by the Apex Court *G.M. Siddeshwar v. Prasanna Kumar,* AIR 2013 SC 1549 that absolute compliance of format affidavit is not necessary. Substantial compliance with format prescribed is sufficient. In case there is any defect in affidavit or in its verification, the same is curable and the same cannot be a sufficient ground to dismiss the petition *in limine*. **In the instant case, the petitioner has not filed the affidavit in the prescribed Form 25 in accordance with Rule 94-A of the Conduct of Election Rules, 1961. Since the aforesaid defect is curable, same can be cured by filing affidavit in the prescribed Form 25."**

We are sorry to note that the para commences with a clumsy statement "so far as the contention with respect to verification or affidavit" and makes an irrelevant reference to the *G.M. Siddeshwar* case (supra) and ultimately records a conclusion without any discussion of the pleadings or evidence that the ELECTION PETITIONER has not filed an affidavit in Form-25. It was however ordered at para 6 of the order dated 25.08.2014:

> "I do not find any ground for rejection of the petition in limine under Order 7 Rule 11 of the CPC. Accordingly, I.A. No.43/ 2014, filed by the respondent No.1 is hereby dismissed. The petitioner is directed to file affidavit in Form 25 of the Conduct of Election Rules, 1961 within 15 days from the date of receipt of certified copy of the order. Respondent No.1 is also directed to file written statement within two weeks from the date of receipt of certified copy of this order."

It is a wholly unsatisfactory way of dealing with any issue in a judicial proceeding and more so with election petitions. Election petitions deal with the basic rights of the citizenry of this country. Election is a "politically sacred" event and an election dispute is too serious a matter to be dealt with casually. Therefore, the Parliament thought it fit to entrust the adjudication of election disputes to the High Courts. It is unfortunate that the learned Judge chose to deal with the matter so casually. The result is that a finding that there was no

affidavit in the Form No.25 came to be recorded without recording any finding regarding the existence or otherwise of the affidavit which is said to have been annexed in the election petition at page nos.394 and 395 nor its content. Since the Interlocutory Application was dismissed, the ELECTION PETITIONER had neither a reason nor the necessity to challenge the correctness of the findings recorded in the order as the decision is in his favour.

21. Aggrieved by the said order, the RETURNED CANDIDATE filed the Review Petition seeking review of the said order. The application hinged on the finding recorded in the order dated 25.08.2014 that "the petitioner has not filed the affidavit in the prescribed Form No.25". It is, therefore, pleaded in the Review Petition that the direction of the High Court permitting the ELECTION PETITIONER to cure the defect in the affidavit filed along with the election petition is unsustainable and hence the order dated 25.08.2014 is to be reviewed. Interestingly, in the rejoinder dated 24.12.2014 filed by the RETURNED CANDIDATE to the reply of the ELECTION PETITIONER dated 8.11.2014 in the said Review Petition, the RETURNED CANDIDATE stated as follows:

> "Para 4. That, the averments made in the petition were verified by the petitioner as per verification clause; submitted an affidavit in support of the petition and filed another affidavit under Form-25 at pages 394 and 395 of the Election Petition and the third affidavit dated 31.8.2014 pursuant to order of the Hon'ble Court dated 25.8.2014."

22. It is clear from the abovementioned pleading of the RETURNED CANDIDATE that he is clearly aware of the fact that there were two affidavits filed along with the election petition as averred by the ELECTION PETITIONER in his petition. The said review application was dismissed by order dated 18.03.2015. Aggrieved by the same, the RETURNED CANDIDATE filed SLP No.11096 of 2015.

23. It is rather difficult to understand the order dated 18.03.2015. There was an unnecessary examination of various authorities of the Supreme Court without first settling the basic facts and identifying the issues. The High Court extracted the content of an affidavit which according to the ELECTION PETITIONER is an affidavit filed in compliance with the requirement of Section 83(1)(c) but not the affidavit in Form 25 and records a conclusion at para 6

as follows:

> "6. A bare reading of earlier affidavit filed by the petitioner makes it clear that the petitioner had covered all the pleadings in his affidavit and no pleading was left which was not mentioned in the affidavit but what was lacking was that the earlier affidavit was not in the prescribed Form No.25 of the Rule 94-A of the Rules of 1961. Certainly, there was a non-compliance of proviso to Section 83(1) of the Act of 1951 but Section 83(1) of the Act of 1951 is not covered under Section 86 of the Act of 1951."

Interestingly, at para 9, once again the High Court recorded a conclusion:

> "9. As mentioned hereinabove, in the instant case substantial compliance of Section 81(3) of the Act of 1951 has already been done by the petitioner by filing first affidavit along with the petition but only defect was that the affidavit was not in prescribed format, therefore, at the most it was a non-compliance of Section 83(1) of the Act of 1951 and same is curable. ..."

The cryptic conclusions recorded in the order dated 18.03.2015 only add to the existing confusion.

24. However, aggrieved by the conclusion that the affidavit was "not in the prescribed Form-25", the ELECTION PETITIONER preferred SLP No.15361 of 2015 on the ground that such a conclusion came to be recorded on an erroneous identification of the affidavit. Aggrieved by the dismissal of the Review Petition, the RETURNED CANDIDATE filed SLP No.11096 of 2015.

25. When the appeals were argued before this Court on 20.08.2015, the ELECTION PETITIONER made a submission that two separate affidavits were filed along with the election petition and the High Court's observation (supra) are based on an erroneous identification of the affidavit. The RETURNED CANDIDATE took a stand that there was no 2nd affidavit as alleged by the ELECTION PETITIONER in compliance with the proviso to Section 83(1) of the RP Act filed along with the election petition.

26. In view of the abovementioned imprecise findings recorded by the

High Court without any reference to the pleadings or evidence on record and the contradictory stands taken before this Court by the parties, this Court thought it fit to adjourn the matter in order to enable the parties to seek a clarification regarding the true state of facts whether there was one or two affidavits filed along with the election petition[6].

27. Pursuant to the said order, the ELECTION PETITIONER filed I.A. No.11665/2015 seeking clarifications from the Madhya Pradesh High Court. The said I.A. was disposed of by an order dated 29.9.2015[7].

The High Court, recorded;

"37. On the basis of aforesaid discussion, the questions posed by the Supreme Court in order dated 20-08-2015, are answered in the following manner:

Question No. 1: Whether there was one affidavit or two affidavits filed along with the election petition?

Answer: Two affidavits were filed along with election petition.

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6 "The matters were argued at some length before us. Learned counsel appearing for the RETURNED CANDIDATE has proceeded on the basis that there is no affidavit at all as required under Section 83(1)(c) of the Act whereas it is pointed out by learned counsel on behalf of ELECTION PETITIONER that as a matter of fact two separate affidavits were filed along with the election petition. The first being an affidavit in compliance of requirement of the provisions under Order VI Rule 15(4) of Civil Procedure Code and the second an affidavit in compliance with requirement of Section 83(1)(c) of the Act. Xerox copies of both the affidavits are available on record here.

The question whether there was one affidavit or two affidavits filed along with the election petition as mentioned above, the actual date when those affidavits were filed, whether either of the two affidavits is filed in compliance with the requirement of Section 83(1)(c) of the Act or not are matters for examination of the High Court. The High Court is required to record definite findings in the event there is any dispute with respect to the questions mentioned above. Unfortunately, the orders of the High Court are cryptic and the findings recorded by the High Court (extracted earlier in this order) are not clear with regard to the above mentioned questions."

7. Challenging the correctness of the said order, SLP 31051/2015 is filed by the RETURNED CANDIDATE.

Question No. 2: The actual date when those affidavits were filed?

Answer: Both affidavits were filed on 20-01-2014, the date on which the election petition was filed.

Question No. 3: Whether either of the two affidavits is filed in compliance with the requirement of section 83(1)(c) of the Representation of the People Act, 1951?

Answer: The affidavit at page nos. 394 & 395 of the election petition is filed in compliance with the requirement of proviso appended to section 83(1)(c) of the Representation of People Act, 1951.

38. I.A. No. 11665/2015 stands **disposed of** accordingly."

28. The said order is the subject matter of challenge in SLP No.31051 of 2015 filed by the RETURNED CANDIDATE. Apart from the various grounds on which the correctness of the findings recorded by the High Court are challenged, the RETURNED CANDIDATE took a preliminary objection that the order dated 29.9.2015 suffers from lack of jurisdiction and therefore, it is required to be set aside on that ground alone[8].

29. According to the RETURNED CANDIDATE, I.A. No.11665 of 2015 ought to have been heard by a Division Bench because of the stipulation contained in Rule 13(2) of the High Court of Madhya Pradesh Rules, 2008. The said Rule stipulates that any application seeking clarifications of an earlier order of the Court passed by a learned Judge, who retired thereafter, ought to be heard by a Division Bench[9] and Justice Solanki who passed the order in the OR VII R 11 petition retired subsequently.

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8. See Ground No.8 of SLP (C) No.31051 of 2015

"Whether the impugned order has been passed in violation of the provisions of Chapter IV Rule 13 of the Madhya Pradesh High Court Rules, 2008? If yes, whether the impugned order is liable to be set aside on the ground alone?"

9. The relevant portion of Rule 13 reads as follows:-

"13. (1)(a) Save as provided in sub-rule (2), an application for review, clarification or modification of a judgment, decree or final order, passed by a Judge or Judges shall be heard by the same Judge or Judges:

30. In response, it is submitted on behalf of the ELECTION PETITIONER that:

i) such an objection was never raised by the RETURNED CANDIDATE before the High Court when I.A. No.11665 of 2015 was being heard and therefore now cannot be permitted to raise the same;

ii) that, the adjudication of an election petition is governed by Section 81A read with Section 86 of the Representation of the Peoples Act, 1951. Non-compliance, if any, with the Rules of the High Court framed under Article 225 does not render the order one without jurisdiction;

iii) that, I.A. No.11665 of 2015 is "more about clarification of record, not clarification of order in strict sense".

In other words, the clarification sought is not regarding either the interpretation of the earlier orders or the legal implications of the earlier orders but an enquiry into certain facts and the record of the High Court pertaining to the election petition. Therefore, Rule 13 would have no application.

(iv) That the requirement of a matter being heard by a

Provided that such application filed in respect of an interlocutory order in a pending case shall be posted before the regular bench.

(b) **An application for review, clarification or modification of a judgment, decree or final order, passed by a Judge or Judges who or one or more of whom is or are –**

(i) temporarily unavailable and in the opinion of the Chief Justice, the application, looking to the urgency of the matter, cannot wait for such Judge or Judges to resume work or,

(ii) permanently unavailable,

shall be heard

(1) if the decree or order, review of which is applied for, was passed by a Judge sitting alone, by the regular division bench."

Division Bench under Rule 13(1)(b) is limited only to the cases of review, clarification or modification of only judgments, decrees and final orders but not to the interlocutory orders such as the order of which "clarification" was sought.

31. We reject the preliminary objection raised by the RETURNED CANDIDATE:

The Reason:

The adjudication of election petitions including the examination of all incidental questions in interlocutory proceedings arising during the course of the adjudication of the election petition is entrusted by Section 80A of the Representation of People Act, 1951 to the High Court within whose jurisdiction the election dispute arises. Section 80A(2) stipulates that the jurisdiction shall be exercised ordinarily by a Single Judge who is to be designated by the Chief Justice[10].

(a) Though the said Section indicates that the Chief Justice has a discretion to entrust trial of an election petition to a Bench consisting of more than one judges, such a discretion is to be exercised by the Chief Justice alone.

(b) The Rules of the High Court are framed by the High Court pursuant to the power vested in it under Article 225[11]. The exercise of such power is subject to the provisions of the Constitution and the

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10. Sec. 80A(2) – Such jurisdiction shall be exercised ordinarily by a single Judge of the High Court and the Chief Justice, shall, from time to time, assign one or more Judges for that purpose.

Provided that where the High Court consists only of one Judge, he shall try all election petitions presented to that Court.

11. **Article 225. Jurisdiction of existing High Courts.**—Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of

"provisions of any law of the appropriate legislature". Rule 13 mandates the listing of certain matters (nature of which is described therein) before a Division Bench. Such stipulation is contrary to the stipulation of Section 80A(2) that election petitions are to be tried by a single judge of the High Court leaving a discretion in the Chief Justice to decide whether in a given case, an election petition shall be heard by more than one Judge. Such a statutory discretion vested in the Chief Justice of the High Court cannot be curtailed by a rule made as the High Court in view of the clear declaration by the Constitution (in the opening clause of Article 225) that "any rule shall be subject to the law made by the appropriate legislature".

We are, therefore, of the opinion that the objection raised by the RETURNED CANDIDATE is not tenable.

In view of the above conclusion, we do not wish to examine the other defences of the ELECTION PETITIONER in this regard.

32. We now proceed to examine the appeals on their merits. The fate of these appeals would eventually depend upon the answer to the questions:

Whether the ELECTION PETITIONER filed two affidavits on 20.01.2014 at the time of presenting the election petition, the second of which being the affidavit (at page nos.394-395) referred to at Serial No.57A of the Index appended to the election petition purportedly in Form 25 to satisfy the requirement of law flowing from the proviso to Section 83(1); and if such an affidavit was in fact filed on 20.01.2014 as contended by the ELECTION PETITIONER whether such an affidavit satisfies the prescription contained in Form 25.

33. By order dated 29.09.2015 in IA No.11665 of 2015, the High Court

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the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction.

recorded a finding that the ELECTION PETITIONER filed two affidavits along with the election petition on 20.01.2014 (the date on which the election petition was presented to the High Court). The High Court also recorded a finding that the affidavit at page nos.394-395 of the election petition which finds mention at Sr. No.57A in the index is "in compliance with the requirement of proviso appended to section 83(1)(c) of the Representation of People Act, 1951".

34. If the abovementioned two findings are legally tenable, three appeals (arising out of SLP Nos.33933 of 2014, 11096 of 2015 and 31051 of 2015) filed by the RETURNED CANDIDATE are to be dismissed and the appeal (arising out of SLP No.15361 of 2015) filed by the ELECTION PETITIONER would have to be allowed. Therefore, we proceed to examine the correctness of the abovementioned findings recorded by the High Court.

35. The correctness of the said findings is contested by the RETURNED CANDIDATE on the following grounds:

I. That at the earliest point of time, the High Court in its order dated 25.08.2014 recorded a finding that the ELECTION PETITIONER did not file the affidavit in the prescribed Form 25. Therefore, the finding to the contra in the order of the High Court dated 29.09.2015 is unsustainable.

II. In the order dated 25.08.2014, after recording a finding that the ELECTION PETITIONER did not file an affidavit in Form 25, the High Court recorded a further finding that such a defect is curable and, therefore, directed the ELECTION PETITIONER to cure the defect by filing a fresh affidavit in Form 25. The ELECTION PETITIONER without challenging the correctness of the finding that he failed to file an affidavit in Form 25 along with the election petition chose to comply with the consequential direction of filing afresh affidavit. Therefore, the ELECTION PETITIONER is precluded from contending at a later stage that the finding recorded by the High Court in its order dated 25.08.2014 is incorrect.

III. Rule 6(4) of the Rules relating to election petitions in the Madhya Pradesh High Court requires:

> "the Additional Registrar or Deputy Registrar shall affix his full signature to every page of the petition and the affidavit accompanying it."

and the affidavit at page nos.394 and 395 of the election petition does not contain the seal and signature of the Registrar of the High Court. Whereas all the other pages of the election petition contain the seal and signature of the Registrar. The absence of the seal and the signature of the Registrar only on the affidavit at page nos.394-395 must necessarily lead to an inference that such an affidavit must have been inserted in the election petition sometime subsequent to the date of the presentation of the election petition. Such an inference would be further strengthened by the fact that in the index of the election petition, reference to the affidavit at page nos.394-395 is made at Entry No.57-A in the index. The said entry is an addition made in handwriting in an otherwise completely typewritten index.

Hence there is non-compliance with the requirement of the mandate contained in proviso to Section 83(1) warranting the dismissal of the election petition in limine.

36. The ELECTION PETITIONER's response to the above submissions of the RETURNED CANDIDATE is:

(i) the High Court did not record any finding in its order dated 25.08.2014 regarding the existence or otherwise of the affidavit at page nos.394-395 or the content of the said affidavit in spite of the specific plea of the ELECTION PETITIONER. The High Court only recorded a vague finding that the ELECTION PETITIONER "has not filed the affidavit in the prescribed Form 25 in accordance with Rule 94A of the Conduct of Election Rules, 1961". It is not clear from the said order as to which one of the two affidavits was in the mind of the High Court when it recorded such a conclusion. The High Court should have recorded a categoric finding in that regard in view of the specific pleading in the reply of the ELECTION PETITIONER that the ELECTION PETITIONER had in fact filed a separate affidavit to be

found at page nos.394-395 to satisfy the requirement of law under the proviso to Section 83(1)[12]. In the absence of any such categoric finding it cannot be said that the findings recorded by the High Court in its order dated 29.09.2015 are inconsistent with the earlier finding recorded in the order dated 25.08.2014.

(ii) that there was no occasion for the ELECTION PETITIONER to challenge the said finding as the ultimate result of the order was in his favour. It is also submitted that though the ELECTION PETITIONER did not challenge the finding recorded by the High Court in its order dated 25.08.2014, the ELECTION PETITIONER is entitled to dispute the correctness of the finding as and when such a finding is sought to be pressed into service against him.

(iii) Coming to the question of filing a fresh affidavit in obedience of the consequential direction of the High Court, the ELECTION PETITIONER submitted that such a course of action was pursued by him by way of abundant caution.

(iv) It is submitted by the ELECTION PETITIONER with regard to the absence of the signature of the Registrar on the affidavit at page nos.394-395 that though it is the duty of the Registrar of the High Court to sign on each page of the election petition and the affidavit filed alongwith the election petition, if the Registrar failed in his duty the ELECTION PETITIONER cannot be penalized by drawing an inference that the affidavit was not presented along with the election petition. In this regard, the ELECTION PETITIONER relied upon the well-settled principle of law that the act (which includes an omission) of the court shall not prejudice the rights of any party.

37. We reject submissions of the RETURNED CANDIDATE for the following reasons:

(i) The 1st submission of the RETURNED CANDIDATE that the subsequent and conflicting finding is not legally tenable, if at all is based on any legal principle, it is based either on the doctrine of *res judicata* or some

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12. Exact content of reply of the ELECTION PETITIONER in this regard is also extracted at para 10 supra.

principle analogous to it based on public policy that there must be finality to the judicial orders. Even if the principle of *res judicata* is invoked, (we only presume without examining the applicability of the same), what is barred under Section 11 of CPC is the adjudication of an issue which was directly and substantially in issue in a former suit between the same parties and has been heard and finally decided.

(ii) The question whether two affidavits were filed along with the Election petition though was not directly in issue as the RETURNED CANDIDATE never filed a rejoinder (to the reply of the ELECTION PETITIONER wherein it was stated that he had filed two affidavits alongwith the election petition). In deciding the OR VII R 11 petition the High Court never examined the question (it is an issue of fact) whether there were two affidavits as pleaded by the ELECTION PETITIONER in his reply to the said petition. We have already recorded that the order in OR VII R 11 petition is too casual. It does not take note of either the facts in issue or identify the point to be decided. Any finding of fact recorded in such circumstances is required to be set aside if appealed against by the aggrieved party if such an order is an appealable order. Since the learned Judge dismissed the OR VII R 11 petition though the finding is adverse to the ELECTION PETITIONER, he need not have filed an appeal[13].

(iii) Therefore, we do not see any legal principle on the basis of which the

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13. **Hardevinder Singh v. Paramjit Singh, (2013) 9 SCC 261, para 21 at page 268:**

21. After the 1976 Amendment of Order 41 Rule 22, the insertion made in sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference is basically that a respondent may defend himself without taking recourse to file a cross-objection to the extent the decree stands in his favour, but if he intends to assail any part of the decree, it is obligatory on his part to file the cross-objection. In *Banarsi v. Ram Phal,* (2003) 9 SCC 606, it has been observed that the amendment inserted in 1976 is clarificatory and three situations have been adverted to therein. Category 1 deals with the impugned decree which is partly in favour of the appellant and partly in favour of the respondent. Dealing with such a situation, the Bench observed that in such a case, it is necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though he is entitled to support that part of the decree which is in his favour without taking any cross-objection. In respect of two other categories which deal with a decree entirely in favour of the respondent though an issue had been decided against him **or a decree entirely in favour of the respondent where all the issues had been answered in his favour but**

RETURNED CANDIDATE can successfully contend that in view of the finding recorded in the order dated 25.08.2014 the High Court could not have recorded a finding in IA No.11665 of 2015 that two affidavits were filed along with the Election petition.

(iii) We now deal with the submission of the RETURNED CANDIDATE regarding the absence of the seal and signature of the Registrar of the High Court on the affidavit at page nos.394-395.

a) The High Court in its order dated 29.9.2015 in I.A. No.11665 of 2015 recorded a finding:

> "24. ... However, the Registrar, in compliance with sub-rule (4) of rule 8, has affixed his seal and signatures at every page of the election petition and the affidavit at page no.70 and 71. However, no such seal or signature of the Registrar is to be found upon the affidavit at page nos.394 & 395. ..."
>
> **Further, at para 25 of the order, it is recorded:**
>
> "25. In this regard, it has to be kept in mind that all official acts are presumed to be properly done. It is true that affidavit at page nos.394 & 395 does not bear the seal or signatures of the Registrar; however, it appears that it was not sealed and signed by the Registrar because it was annexed almost at the end of the petition. Since, as per rules, documents annexed to an election petition are not required to be signed and sealed by the Registrar, none of the documents filed along with the petition from serial No.72 to Serial No.393 bears his seal and signatures. Probably, nobody pointed out to the Registrar that

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there is a finding in the judgment which goes against him, in the pre-amendment stage, he could not take any cross-objection as he was not a person aggrieved by the decree. But post-amendment, read in the light of the Explanation to sub-rule (1), though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour, yet he may support the decree without cross-objection. It gives him the right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. It is apt to note that after the amendment in the Code, if the appeal stands withdrawn or dismissed for default, the cross-objection taken to a finding by the respondent would still be adjudicated upon on merits which remedy was not available to the respondent under the unamended Code.

there is another affidavit at page no.394; therefore, it was not sealed and signed like other documents."

b) At the outset, it may be mentioned that there is a typographical error in the abovementioned order. The relevant rule of the High Court dealing with the matter is Rule 6(4) but not 8(4). Rule 6 reads as follows:

"Chapter VII
Rules Relating to Election Petitions

Rule 6 (1) Every Election Petition complete in all respects, shall be presented during the Court hours to the Additional Registrar or Deputy Registrar Judicial, at Jabalpur.

(2) The name of the person presenting an Election petition, with a description of the capacity in which he is presenting it, the date and hour of presentation and any other particulars considered necessary shall be endorsed in the margin of first page of the petition by the Additional Registrar or Deputy Registrar under his own signature.

(3) The Additional Registrar or Deputy Registrar shall have the petition examined in order to find out that all the requirements of the Representation of the People Act, 1951, and these rules have been complied with.

(4) The Additional Registrar or Deputy Registrar shall affix his full signature to every page of the petition and the affidavit accompanying it.

(5) The Additional Registrar or Deputy Registrar, after examining the petition, shall record his opinion on the opening order-sheet in the following:—

"Presented on ..... by ..... Properly drawn up, apparently within time and properly stamped."

It can be seen from sub-rule (4) that the concerned Registrar "shall affix his full signature to every page of the petition and the affidavit accompanying it".

c) The failure of the Registrar to comply with the requirement of sub-rule (4) is sought to be explained by the High Court by saying that such a lapse

occurred probably because nobody pointed out to the Registrar regarding the existence of affidavit at page nos.394-395. We are of the opinion that such a conclusion is not tenable. Rule 6(4) casts a mandatory duty on the Registrar to sign on each page of the election petition and also the affidavit filed along with the election petition. Such a mandatory duty must be performed irrespective of the fact whether somebody points out to the Registrar or not regarding the existence of the affidavit.

d) If the existence of the 2nd affidavit at page nos.394- 395 of the ELECTION PETITIONER is not in dispute but the question is whether the non-compliance of the rule by the Registrar is fatal to the election petition, perhaps the answer would be that "it is not". Because it is the settled proposition of law that the act or omission of the Court shall not harm any party.

e) But when the question is whether such an affidavit was filed along with the election petition on 20.01.2014, different considerations arise. The question whether the ELECTION PETITIONER filed the 2nd affidavit is a pure question of fact. The burden of proving such a fact in law is on the ELECTION PETITIONER if such a question is really in issue. Because if he failed, the allegations of the commission of corrupt practices by the RETURNED CANDIDATE cannot be adjudicated in the absence of an affidavit in Form 25. However, such a question was **never in issue** in OR VII R 11 petition.

38. As already noticed at para 10 (supra) at the earliest point during the course of the proceedings of the election petition when the question arose whether an affidavit in Form 25 was filed or not, the ELECTION PETITIONER clearly took a stand that there was an affidavit at page nos.394 and 395. According to him, the said affidavit is in Form 25 contemplated in proviso to Section 83(1). The RETURNED CANDIDATE never disputed the statement (of the ELECTION PETITIONER) by filing a Rejoinder to the above-mentioned stand taken in the ELECTION PETITIONER's reply dated 11.7.2014 in the OR VII R 11 petition. The RETURNED CANDIDATE admits that at least by 18.6.2014 - the date on which he received summons, a copy of the election petition along with Annexures including the affidavit at page nos.394-395 of the election petition was available on record. But his case **NOW** is that such an affidavit was not filed along with the election petition within the period of limitation, but must have been inserted in the election petition sometime in the interregnum period between 22.1.2014 (the date on

which the period of limitation for filing the election petition expired) and 18.6.2014.

39. But the objection of the RETURNED CANDIDATE in OR VII R 11 petition was only that the "affidavit sworn and filed **along with the** petition by the petitioner is not in conformity with Form 25 of the Conduct Rules, 1961." From the language of OR VII R 11 petition, it is clear that the RETURNED CANDIDATE's objection is only regarding the format and content of the affidavit but not regarding the date of the filing of the affidavit, on the other hand, the employment of the expression "along with" clearly indicates that the RETURNED CANDIDATE also at that point of time accepted that the affidavit at page nos.394-395 was presented on the same date i.e. 20.1.2014. Therefore, the question of proof of the fact which was never in issue does not arise much less the question of burden of proof.

40. The fact that the ELECTION PETITIONER chose to file yet another affidavit pursuant to the order dated 25.8.2014 is another circumstance sought to be relied upon by the RETURNED CANDIDATE in support of his submission that there was no second affidavit filed along with the election petition.

41. We are of the opinion that in the circumstances of the case, the inference such as the one suggested by the RETURNED CANDIDATE cannot be drawn because the ELECTION PETITIONER in his reply to the OR VII R 11 petition (specifically stating that he had filed an affidavit in Form 25 along with the election petition) took a stand by way of abundant caution that if the court comes to a conclusion that his affidavit is found to be defective for any reason, he is willing to file further affidavit to cure the defect. Unfortunately, the High Court took a shortcut without examining the question whether the affidavit at page nos.394-395 satisfies the requirement of Form 25 and (without recording a definite finding in that regard) simply recorded a conclusion that the defect is curable and the same can be cured by filing an affidavit in the Form 25".

42. Mr. P.P. Rao, learned senior counsel submitted that the ELECTION PETITIONER having availed the benefit of the order in OR VII R 11 petition by filing another affidavit cannot now question the correctness of the finding that he did not file an affidavit which is compliance with proviso to Section 83(1). In support of the said submission, Mr. P.P. Rao relied on two judgments i.e. *State of Punjab & Others v. Krishan Niwas,* (1997) 9 SCC 31 and *Banku Chandra Bose & Another v. Marium Begum & Another*, AIR 1917

Cal. 546.

43. In our opinion, the principle laid down in the said judgments is of no relevance to the controversy on hand. The dispute on hand is regarding the existence of a fact which was never in issue in OR VII R 11 petition. The RETURNED CANDIDATE cannot shift his case from stage to stage. He cannot now be permitted to raise such a question of fact in the absence of an appropriate pleading and contend that the ELECTION PETITIONER is precluded from arguing that he had filed a 2nd affidavit along with the election petition by pressing into service a rule of estoppel.

44. In view of the foregoing discussion, Civil Appeal arising out of SLP (Civil) No.31051 of 2015 being without any merits is dismissed. As a consequence, Civil Appeals arising out of SLP (Civil) Nos.33933 of 2014 and 11096 of 2015 are also required to be dismissed and they are accordingly dismissed.

45. Coming to the Civil Appeal arising out of SLP (Civil) No.15361 of 2015, the same is required to be allowed in view of the findings recorded by the High Court in I.A. No.11665 of 2015 which has become final by virtue of dismissal of Civil Appeal arising out of SLP (Civil) No.31051 of 2015. The same is accordingly allowed.

46. In the facts and circumstances of the case, there will be no order as to costs.

Order accordingly.

I.L.R. [2016] M.P., 2913
WRIT APPEAL
Before Mr. Justice P.K. Jaiswal & Mr. Justice J.K. Jain
W.A. No. 9/2013 (Indore) decided on 15 February, 2016

OMPRAKASH JAISWAL ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

(Alongwith W.A. No. 120/2013)

***A. Land Acquisition Act (1 of 1894), Section 4 - Publication of preliminary notification and powers of officers thereunder* - At the stage of notification, only locality is required to be mentioned and not**

the survey numbers or the names of the owners of land, as it is not possible to mention the same without entering into the exercise contemplated in Sub-Section 2 of Section 4 of the Act. (Para 27)

क. भूमि अर्जन अधिनियम (1894 का 1), धारा 4 – प्रारंभिक अधिसूचना का प्रकाशन एवं उसके अंतर्गत अधिकारियों की शक्तियाँ – अधिसूचना के प्रक्रम पर केवल परिक्षेत्र का उल्लेख किया जाना अपेक्षित है न कि सर्वे क्रमांक अथवा भू–स्वामियों के नाम उल्लेख किया जाना, क्योंकि अधिनियम की धारा 4 की उपधारा 2 में अनुध्यात प्रक्रिया प्रारंभ किए बगैर उनका उल्लेख करना संभव नहीं है।

***B. Land Acquisition Act (1 of 1894), Sections 4(1) & 5A* - In respect of those, who did not object to Section 4(1) notification by filing objection u/S 5-A, the said notification must be treated as being in force. (Para 47)**

ख. भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 4(1) व 5ए – उन व्यक्तियों के संबंध में जिन्होनें धारा 4(1) की अधिसूचना के संबंध में धारा 5–ए के अंतर्गत आक्षेप प्रस्तुत नहीं किये, उक्त अधिसूचना प्रभावशील मानी जानी चाहिए।

***C. Land Acquisition Act (1 of 1894), Section 5A - Hearing of objections* - The Land Acquisition Collector is duty bound to objectively consider the arguments advanced by the Objector and make recommendations duly supported by brief reasons as to why the particular piece of land should or should not be acquired and whether the plea put forward by the Objector merits acceptance - The recommendations made by the Land Acquisition Collector should reflect objective application of mind to the entire record including the objections filed by the interested persons. (Para 36)**

ग. भूमि अर्जन अधिनियम (1894 का 1), धारा 5 ए – आक्षेपों की सुनवाई – भू–अर्जन कलेक्टर कर्तव्यबद्ध है कि वह आक्षेपकर्ता द्वारा प्रस्तुत तर्कों पर निष्पक्ष रूप से विचार करे एवं संक्षिप्त कारणों द्वारा सम्यक् रूप से समर्थित ऐसी अनुशंसा करे कि क्यों एक विशेष भू–भाग अर्जित किया जाना चाहिए अथवा नहीं किया जाना चाहिए तथा क्या आक्षेपकर्ता द्वारा प्रस्तुत अभिवाक् स्वीकार योग्य है – भू–अर्जन कलेक्टर द्वारा की गई अनुशंसाओं में, हितबद्ध व्यक्तियों द्वारा प्रस्तुत आक्षेपों सहित संपूर्ण अभिलेख में निष्पक्षता से मस्तिष्क का प्रयोग दर्शित होना चाहिए।

***D. Natural justice - Violation* - The very person/officer, who accords the hearing to the Objector, must also submit the report/take decision on the objection and in case his successor decides the case without**

giving a fresh hearing, the order would stand vitiated. (Para 40)

घ. प्राकृतिक न्याय – उल्लंघन – वह व्यक्ति/अधिकारी जो आक्षेपकर्ता की सुनवाई करता है, उसे आक्षेपों पर प्रतिवेदन प्रस्तुत करना चाहिए अथवा विनिश्चय करना चाहिए एवं अगर उसका उत्तराधिकारी प्रकरण का विनिश्चिय नए सिरे से सुनवाई किए बगैर करता है तो वह आदेश दूषित होगा।

Cases referred:

1992 (2) SCC 168, 1970 (1) SCC 125, (2005) 10 SCC 306, 2008 (4) MPLJ 384, (2008) 9 SCC 552, (2010) 10 SCC 282, (2003) 10 SCC 626, (2011) 10 SCC 714, AIR 1960 SC 1203, AIR 1973 SC 552, AIR 1971 SC 306, AIR 1976 MP 76, AIR 1966 SC 1593, AIR 1964 SC 1217, AIR 1959 SC 308, AIR 2010 SC 2275, (2011) 2 SCC 258, (2015) 10 SCC 241, AIR 1997 SC 2564.

A.K. Sethi with *Rahul A. Sethi, K.L. Hardia, Vivek Dalal, Vishal Baheti & Abhyankar,* for the appellants.

Sunil Jain, Addl. A.G. with *Yogesh Mittal,* G.A. for the respondents/State.

ORDER

The Order of the Court was delivered by :

P.K. JAISWAL, J. :- This order shall govern the disposal of W.A. Nos. 4/13, 5/13, 6/13, 7/13, 9/13, 12/13, 14/13, 16/13, 17/13, 18/13, 19/13, 20/13, 25/13, 26/13, 27/13, 28/13, 29/13, 30/13, 31/13, 32/13, 33/13, 34/13, 35/13, 36/13, 37/13, 38/13, 39/13, 40/13, 41/13, 42/13, 43/13, 44/13, 45/13, 46/13, 47/13, 48/13, 49/13, 50/13, 51/13, 52/13, 53/13, 55/13, 56/13, 57/13, 61/13, 62/13, 63/13, 64/13, 65/13, 66/13, 67/13, 68/13, 69/13, 70/13, 71/13, 72/13, 73/13, 74/13, 75/13, 76/13, 77/13, 78/13, 79/13, 80/13, 81/13, 82/13, 83/13, 84/13, 85/13, 86/13, 87/13, 88/13, 89/13, 90/13, 91/13, 92/13, 93/13, 94/13, 95/13, 96/13, 97/13, 98/13, 99/13, 100/13, 101/13, 102/13, 103/13, 104/13, 105/13, 106/13, 107/13, 108/13, 109/13, 110/13, 111/13, 112/13, 113/13, 114/13, 115/13, 116/13, 117/13, 118/13, 120/13, 122/13, 123/13, 124/13, 125/13, 127/13, 128/13, 131/13, 132/13, 133/13, 135/13, 137/13, 138/13, 139/13, 140/13, 141/13, 142/13, 143/13, 144/13, 145/13, 146/13, 147/13, 148/13, 149/13, 150/13, 151/13, 152/13, 153/13, 156/13, 157/13, 158/13, 159/13, 160/13, 161/13, 162/13, 163/13,164/13, 165/13, 166/13, 167/13, 168/13, 169/13, 170/13, 171/13,

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2. These appeals have arisen from the impugned judgment and order dated **W.P. No.9601/2011, passed by the writ court on 6/11/2012 (Omprakash Jaiswal v/s. State of P.P. (sic:M.P.) & Ors.)**, by which and whereunder, the writ court partly allowed the writ petition by holding that notification under Section 4(1) of the Land Acquisition Act, is a valid notification, but quashed the order dated 14.3.11 issued by Collector, Indore under Section 4 of Land Acquisition Act (for short "the Act"), order dated 27/09/2011, passed by the SDO, Depalpur whereby case was recommended to Collector, Indore, Order dated 28/09/2011 passed by Collector, Indore whereby case was recommended to Commissioner, Indore Division, Indore and order dated 1/10/2011 passed by Commissioner, Indore whereby the recommendations of SDO and Collector were approved and, thus, the subsequent proceeding

stand vitiated i.e. notification dated 4/11/2011 under Section 6 of the Act.

3. Both the parties i.e. landowners and State are partly aggrieved by the order of Writ Court and praying for allowing these appeals.

4. For the sake of convenience, the facts are taken from W.A. Nos.9/2013(Omprakash V/s State of M.P. & Ors.) and W.A. No.120/2013(State of M.P. & Ors. V/s Omprakash).

5. Certain extent of land in four villages namely **Kali Billod, Ranmal Billod, Selampur and Ambapur, Tehsil – Depalpur, District-Indore** was sought to be acquired in pursuant to the Notification No.9/Bhu-Arjan/Depalpur/2011, Indore dated 14.03.2011 issued under Section 4(1) of the Act. The said Notification reads thus:-

कार्यालय कलेक्टर, इन्दौर, म0प्र0 एवं पदेन
उप सचिव मध्यप्रदेश शासन, राजस्व विभाग

क्रमांक 9/भू–अर्जन/देपालपुर/ 2011 इंदौर, दिनांक 14.03.2011

अधिसूचना

चूंकि राज्य शासन को यह प्रतीत होता है कि इसके संलग्न अनुसूची के खाने (1) में से (4) में वर्णित भूमि के अनुसूची के खाने (6) में उसके सामने दिये गये सार्वजनिक प्रयोग के लिये आवश्यकता है। अथवा आवश्यकता पड़ने की संभावना है।

अतः भू–अर्जन अधिनियम 1894 (क्रमांक 1 सन् 1994) की उपधारा (1) के उपबंधों के अनुसार उसके द्वारा सभी संबंधित व्यक्तियों को इस आशय की सूचना दी जाती है कि राज्य शासन इसके द्वारा अनुसूची के खाने (5) में उल्लेखित अधिकारी को उक्त भूमि के संबंध में उक्त धारा की उपधारा (2) द्वारा दी गई शक्तियों का प्रयोग करने के लिये प्राधिकृत करता है।

अनुसूची

भूमि का वर्णन

जिला	तहसील	नगर/ग्राम	लगभग क्षेत्रफल हैक्टेयर में	धारा 4 (2) के अंतर्गत प्राधिकृत अधिकारी	सर्वजनिक प्रयोजन का वर्णन
1	2	3	4	5	6
इंदौर	**देपालपुर**	**कालीबिल्लौद**	**Area 434-259**	महाप्रबंधक जिला व्यापार एवं उद्योग केन्द्र इन्दौर	नवीन बेटमा–पीथमपुर इंडस्ट्रियल क्लस्टर हेतु

इंदौर	देपालपुर	रणमल बिल्लौद	**Area 223-448**	महाप्रबंधक जिला व्यापार एवं उद्योग केन्द्र इन्दौर नवीन	नवीन बेटमा–पीथमपुर इंडस्ट्रियल क्लस्टर हेतु
इंदौर	देपालपुर	सलीमपुर	**Area 82-776**	महाप्रबंधक जिला व्यापार एवं उद्योग केन्द्र इन्दौर नवीन	नवीन बेटमा–पीथमपुर इंडस्ट्रियल क्लस्टर हेतु
इंदौर	देपालपुर	अम्बापुर	**Area** 64-147	महाप्रबंधक जिला व्यापार एवं उद्योग केन्द्र इन्दौर नवीन	नवीन बेटमा–पीथमपुर इंडस्ट्रियल क्लस्टर हेतु

भूमि का नक्शा (प्लान) का निरीक्षण अधिकारी एवं भू–अर्जन अधिकारी तहसील देपालपुर जिला इंदौर के कार्यालय में किया जा सकता है।

मध्यप्रदेश के राज्यपाल के नाम
तथा आदेशानुसार
राघवेन्द्रसिंह
कलेक्टर जिला इन्दौर एवं पदेन
उपसचिव म0प्र0 शासन, राजस्व विभाग,

6. The landowners/Bhumiswami's filed writ petitions questioning the validity of this notification alleging that it suffered from a number of infirmities, principal infirmity being that the said notification was totally vague in respect of the lands sought to be acquired. **In that, neither the description of the lands i.e. Survey numbers or khasra numbers were given nor the names of the landowners, whose lands were sought to be acquired in four villages, were given.** The landowners also challenged the order dated 27/09/2011, passed by the SDO, Depalpur whereby the case was recommended to Collector, Indore whereby the case was recommended to the Commissioner Indore Division, Indore. In turn, vide order dated 01/10/2011 Commissioner Indore passed the order whereby recommendations made by Collector and SDO were and on 4/11/2011 notification was issued under Section 6 of the Act.

7. As per impugned order, total 157 writ petitions were filed by Shri Vivek Dalal, Advocate whereas objections were filed in 95 cases only. In 62 cases, no objections were filed as the petitioners of 6 petitions were unaware about the inclusion of their land. Similarly, 26 writ petitions were filed by Shri K.L. Hardia, Advocate on behalf of 76 writ petitioners, but only one writ petitioner filed his objection under Section 5-A of the Act and no objections were filed by 75 writ petitioners. After issuance of Notification under Section

4 of the Act, an objection under Section 5-A of the Act was filed on the ground that the Notification dated 14/03/2011 wherein arguments were heard by the SDO Mr. Jitendra Singh on 24/05/2011 and the case was reserved for recommendations and recommendations were made on 27/09/2011 by Mr. Gautam Singh, SDO, Depalpur, who has not heard the objections. Apart from this, neither Mr. Jitendra Singh who heard the objections on 24/05/2011 nor Mr. Gautam Singh, who has recommended on 27/09/2011 were specifically appointed by appropriate Government to hear the objections and recommend the case. They also pointed out the work distribution memo issued by Collector dated 14/12/2010 wherein work which was allotted to Mr. Jitendra Singh the then Dy. Collector, SDO, has been mentioned, in which he was not authorised to hear and decide the objections relating to Section 5-A of the Act. Mr. Jitendra Singh was posted as SDO, Depalpur upto 24/08/2011. The work was allotted by Collector, Indore relating to land acquisition cases on 15/09/2011. If the SDO, Depalpur was acting as Collector for the purpose of disposal of objections filed by the landowners, then recommendations were directly required to be sent to the Commissioner, Indore, who was appropriate Government and there was no necessity of recommendations which were made by Collector, Indore, who has not heard the objections. This indicates that the recommendations were not made by SDO in the capacity of Collector.

8. Since the objection was that the concerned SDO is having no jurisdiction to entertain the objections inspite of Notifications dated 24/12/83 and 15/02/99 of the State Government as it does not empower the SDO to hear the objections filed under Section 5-A of the Act, therefore, SDO was duty bound to hear and decide the said objections first as it goes to the root of the case. Apart from this, even if it is assumed that SDO, Depalpur was empowered to hear the objections, then too, Mr. Gautam Singh, SDO who was authorised by the Collector vide distribution memo dated 15/09/11 was required to re-hear the objection before making recommendations and was having no authority to recommend the case on 27/09/11 on the basis of hearing on objections, which were heard by his predecessor on 24/05/11. With the aforesaid, they prayed for issuance of writ of certiorari for quashment of the notification issued under Section 4 of the Act and recommendations made by the SDO, Depalpur dated 27/09/2011, recommendations made by the Collector, Indore on 28/09/2011 and order dated 1/10/2011, passed by the Commissioner Indore Division, Indore.

9. The petitioners challenged the validity of notification issued under Section 4 of the Act on the ground that the notification was totally vague in respect of the lands sought to be acquired. In that, neither the description of the lands i.e. Survey numbers or khasra numbers were given nor the names of the landowners, whose lands were sought to be acquired in four villages, were given.

10. As per notification under Section 4 of the Act, the land was proposed to be acquired for the **Delhi Mumbai Industrial Corridor(DMIC) project** which is India's most ambitious infrastructure project. Site was conceived as a symbol of Indo-Japan strategic Partnership during the Hon'ble Prime Minister of India's visit to Tokyo in December, 2006. A MOU was signed between Ministry of Commerce & Industry, Government of India (MOCI) and the Ministry of Economy, Trade and Industry, Government of Japan (METI) on this occasion to promote Japanese investments in India and explore opportunities for mutual co-operation as part of Special Economic Partnership Initiatives(SEPI) under the 'Common Economic Partnership Agreement (CEPA)' to be reached between India and Japan. The DMIC is essentially aimed at the development of 24 futuristic, new, industrial cities in India which can compete with the best manufacturing and investment destinations in the world. For DMIC, the land is sought to be acquired by M.P. Audyogik Kendra Vikas Nigam(for short "MPAKVN"), which is a company fully owned and controlled by Government of Madhya Pradesh.

11. The learned Writ Court after appreciating the decision laid down by the Apex Court and M.P. High Court in the case of *M.P Housing Board Vs. Mohd. Shafi* 1992(2) SCC 168, *Narendrajeet Singh Vs. State of U.P.* 1970(1) SCC 125, *Omprakash Sharma vs. M.P. Audyogik Kendra Vikas Nigam* (2005) 10 SCC 306, *Executive Engineer M.P. Housing Board vs. Shrikant Mishra,* 2008(4) MPLJ 384, *Sooraram Pratap Reddy vs. District Collector, Ranga Reddy District* reported in (2008) 9 SCC 552, *Nand Kishore Gupta vs. State of Uttar Pradesh* (2010) 10 SCC 282 and *Pratibha Nema vs. State of M.P.,* (2003) 10 SCC 626, has held that at the stage of Section 4 of the Act, Government may not in fact possessing all the necessary details which are dependent upon the survey on which it can decide which land in the locality would be suitable for the public purpose. Investigation into necessary data provided under Section 4(2) empowered the entry to carry out various operations mentioned therein on any land in such locality. Only

after such survey is made, Government can decide, which particular land in the locality is adapted or suitable for public purpose and, thus, it is clear that at the stage of notification under Section 4 only locality is required to be mentioned not the survey numbers or the names of the owners of the land, as it is not possible to meet these particulars without entering into the exercise contemplated in sub-section (2) of Section 4 of the Act.

12. On the strength of the above proposition, the learned writ court has held that the notification under Section 4(1) of the Act dated 14.03.2011 is valid notification. But in respect of objections filed under Section 5-A of the Act, the learned writ court held that the decision making process of respondents was not fair and allowed the writ petitions by quashing the recommendations dated 27/09/2011, 28/09/2011 and the order dated 01/10/11, passed by Commissioner, Indore Division Indore with a direction to re-decide the objections after giving an opportunity of being heard by the land owners and permitted all the landowners (including those who have not filed objections under Section 5-A of the Act) to file the objections/additional objections within a period of eight weeks from the date of the order in terms of order passed by the Apex Court in the matter of *J & K Housing Board Vs. Kunwar Sanjay Krishan Kaul,* (2011) 10 SCC 714 and directed the Collector, Indore to deal with the objections raised effectively as it is not empty formality, but forms basis on which State takes final decision on objections of land owners and also quashed all consequential actions.

13. The respondent/State also partly aggrieved by the impugned order whereby the learned writ court quashed the recommendations and directed all the landowners to file their objections under Section 5-A of the Act and quashment of all consequential actions, they challenged the order by filing separate writ appeals vide W.A. Nos.14/13, 64/13, 67/13, 68/13, 69/13, 115/13, 116/13, 117/13, 118/13, 120/13, 122/13, 123/13, 156/13, 185/13, 186/13, 187/13, 188/13, 190/13, 191/13, 192/13, 193/13, 194/13, 195/13, 196/13, 197/13, 198/13, 209/13, 210/13, 211/13, 212/13, 213/13, 214/13, 215/13, 216/13, 217/13, 218/13, 219/13, 220/13, 221/13, 222/13, 223/13, 224/13, 225/13, 226/13, 227/13, 228/13, 229/13, 230/13, 231/13, 232/13, 233/13, 234/13, 235/13, 236/13, 237/13, 238/13, 239/13, 240/13, 241/13, 242/13, 245/13, 246/13, 247/13, 248/13, 249/13, 250/13, 257/13, 258/13, 264/13, 265/13, 266/13, 267/13, 268/13, 269/13, 270/13, 271/13, 272/13, 273/13, 274/13, 275/13, 276/13, 277/13, 278/13, 279/13, 280/13, 281/

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14. Learned Senior Counsel for the appellants submits that on their reading of Section 4 of the Act as interpreted in various judgments of the Apex Court and High Court, it is crystal clear that the purpose and intention to issue notification is to make a person aware that the Government intend to acquire their land. Accordingly, it is minimum and inevitable to show description of the land with precision and accuracy in notification under Section 4 of the Act, so as to enable the effected persons to submit their objections with regard to such acquisition. They submitted that the notification does not contain any such list, and, therefore, the description of the land sought to be acquired is totally absent. Only the name of the village mentioned where land is proposed to be acquired and it is mentioned that the plan of the land is available in the office of Land Acquisition Officer, Indore where it can be seen. They submitted that it does not fulfill the statutory and mandatory requirement of the Act.

15. Per Contra, Shri Sunil Jain, learned Additional Advocate General supported the reasoning recorded by the learned writ court in respect of validity of notification issued under Section 4 (1) of the Act and submitted that once the name of the village is mentioned in the notification itself, it was open for the land owners to pursue the map and submit their objections. He supported the notification under Section 4 (1) of the Act and submits that is it (sic:it is) in consonance with the requirement of Section 4 of the Act and omission to give

particulars of land where the locality was specified did not render the notification invalid under Section 4 (1) of the Act and names of the villages in view of the smallness of those areas as a locality is sufficient compliance of Section 4(1) of the Act.

16. We have heard the arguments of the learned counsel for the parties at length and perused the record of the writ court.

17. Before proceedings with the arguments, it is apt to quote Section 4 (1) and 5-A of the Act which reads as under:-

> **4. Publication of preliminary notification and powers of officers thereupon:**
>
> (1) Whenever it appears to the [appropriate Government] that **land in any locality** [is needed or] is likely to be needed for any public purpose [or for a company] a notification to that effect shall be published in the Official Gazette [and in two daily newspapers circulating in that locality of which at least one shall be in the regional language], and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality [(the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of publication of the notification)].
>
> **5-A Hearing of objections.**
>
> 1) Any person interested in any land which has been notified under section 4, sub-section (1), as being needed or likely to be needed for a public purpose or for a company may, [within thirty days from the date of the publication of the notification], object to the acquisition of the land or of any land in the locality, as the case may be.
>
> Every objection under sub-section (1) shall be made to the Collector in writing and the Collector shall give the object or an opportunity of being heard either in person or by any person authorized by him in this behalf or by counsel and shall, after hearing all such objections and after making such further

enquiry, if any, as he thinks necessary, either make a report in respect of the land, which has been notified under sub-section (1) of section 4 or make different reports in respect of different parcels of such land, to the appropriate Government, containing his recommendations on the objections, together with the record of the proceedings held by him, for the decision of the Government or the Board of Revenue, as the case may be. The decision of the Government or the Board of Revenue, as the case may be shall be final.

For the purpose of this section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under the Act.

18. The plain construction of this provision does not require particulars of the land to be given in the notification under Section 4(1) and it only requires that the locality in which the land is needed should be specified. On a comparison with the words used in Section 6 of the Act, there can be no doubt that the particulars of the land needed are required to be specified only in the declaration made under Section 6 of the Act. If the requirement of a valid notification under Section 4(1) was the same as of that under Section 6, then there was no reason to use different words in these two provisions. This variance in the words used must, ordinarily, be taken as indicating different requirements under these two provisions. The same conclusion is also reached when the object of a notification under Section 4(1) is taken into account. It is settled, that at the stage of Section 4(1) there is only a proposal for acquisition which at the stage of Section 6 becomes the decision of the appropriate Government. One object of the notification under Section 4(1) is to notify the inhabitants of the locality that land from that locality is to be acquired for the specified public purpose and their interests are likely to be affected. Such notice is to enable all persons having any interest in the lands within the locality to object to the proposed acquisition under Section 5A and this right of objection is available under Sub-section (1) of Section 5A of the Act even in respect of 'any land' in the locality. Thus, the right of objection is not confined only to the particular land in which the objector has an interest but extends also to 'any land' in the locality. The reason is obvious. It is open to the inhabitants of the specified locality to show that lands in that locality or any

particular land therein should be excluded from the acquisition proceedings and that the purpose can be fully achieved even by acquiring some other land. This result would be possible only if at that stage the location alone of the specified public purpose is decided and not its exact situation within the locality specified. The locality alone being notified, opinion of suitability can be formed in respect of any land within that locality taking into account the views of the inhabitants therein. This can be done only if a firm decision with respect to particular survey numbers has to be taken after the notification under Section 4(1). Another object of this notification is to permit the officers of the Government under Sub-section (2) of Section 4 to enter upon and survey any land in the locality and to do the other acts necessary. This survey is obviously to collect relevant data in order to decide which particular land in the locality is more suited for the purpose of acquisition. The Collector has then to submit his report as required by Section 5A, taking into consideration all this material and it is then that the appropriate Government takes the final decision which results in the declaration under Section 6 of the Act. It is only at the stage of this final decision of the Government that the land is, therefore, required to be particularised. Viewed from this angle as well, the object of Section 4(1) requires only the locality to be specified in the notification thereunder and it does not require the particulars of land within it to be specified. Thus, the plain construction of the langauge in subsection (1) of Section 4, the setting in which the provision occurs, the subject-matter of the statute and the object of the provision all lead only to this conclusion.

19. We shall now first consider the arguments of the learned counsel for the appellants that Section 4(1) of the Act requires not only the locality where the land is situated, but also the details of the land, survey number, khasra number, residential area have to be specified in the notification.

20. Shri A.K. Sethi, learned Senior Counsel placed reliance on the Division Bench decision of the Apex Court in the case of *Om Prakash Sharma* (supra), the Apex Court relying on the decision of *Narendrajit Singh*(supra) wherein it is stated that the defect of non-mention of the locality where the proposed land was situated in the notification, was a serious defect vitiating the notification, held that the defect in a notification under Section 4(1) cannot be cured by giving full particulars in the notification under Section 6(1) of the Act and allowed the appeal with a direction that the order does not prevent the respondents from initiating the acquisition proceedings afresh in regard to the

very lands in question in accordance with law. Para 5 to 8 of the decision of *Om Prakash Sharma*(supra) are relevant which reads as under:-

> **5.** A Bench of three learned Judges of this Court in the aforementioned judgment, referring to earlier judgments, have held that notification issued under Section 4(1) of the Act, if it suffers from vagueness in regard to public purpose, such a notification cannot be sustained. In this judgment, reference is made to the judgment in *Narendrajit Singh v. State of U.P.* Reported in 1970 1 SCC 125 wherein it is stated that the defect of non-mention of the locality where the proposed land was situated in the notification, was a serious defect vitiating the notification. The notification in that case also did not specify the survey number or Khasra number of the land. In other words, the notification in the present case is as vague, if not more as in that case. In the said judgment, it is observed thus: (SCC pp. 174-75, para 13)
>
> "*13.* In *Narendrajit Singh v. State of U.P.,* while dealing with the requirements of a valid notification under Section 4 of the Act, this Court observed that the defect of non-mention of the locality where the proposed land was situate I the notification was a very serious defect vitiating the notification. In that case, the Schedule attached to the notification issued under Sections 4 (1) and 17(1) of the Act read as follows:

SCHEDULE

District	Pargana	Mauza	Approxi-mate area	For what purpose required	Remarks

Rampur	**Bilaspur**	**Gokal Nagri**	**125 acres**	**For the rehabilitation of East Pakistan displaced families, under the Ministry of Rehabilitation, Governmerit of India.**

This Court opined that though Section 4(1) does not require the identity of the land which may ultimately be acquired to be specified with too many details but it undoubtedly casts upon the Government a duty to ***'specify the locality in which the land is needed'. In Narendrajit Singh*** case, this Court also repelled the argument identical to the one raised by Mr. Thakur that since detailed particulars of the land had been given in the notification issued under Section 6(1) of the Act, the absence of those particulars in Section 4(1) notification was of no consequence. The Court said : (SCC p. 129, para 10).

'In our view the defect in a notification under Section 4 (1) cannot be cured by giving full particulars in the notification under Section 6(1)."

6. No judgment was shown by the learned counsel for respondents either to distinguish or taking contrary view. The learned Single Judge has rightly held that the notification issued under Section 4(1) of the Act could not be sustained. The Division Bench of the High Court was not right in upholding the notification by merely enhancing the compensation.

7. Under the circumstances, the appeals are allowed. The impugned judgments are set aside so far they relate to the appellants.

8. We make it clear that this order of ours does not prevent the respondents from initiating the acquisition proceedings afresh in regard to the very lands in question in

accordance with law. If the authorities decide to proceed with the acquisition proceedings afresh, they may commence the acquisition proceedings within a period of three months. We further direct that the parties shall maintain the *status quo* existing on the lands in question covered by these appeals for a period of three months or till the date the acquisition proceedings commence, whichever is earlier.

21. Shri Vivek Dalal, learned counsel has drawn our attention to the decision of *Executive Engineer, M.P. Housing Board vs. Shrikant Mishra* (supra) and submitted that the Division Bench decision is based on the decision of the Apex Court in the case of *Babu Barkya vs. State of Bombay,* AIR 1960 SC 1203 and *Narendrajit Singh v. Stae of U.P.* (1970) 1 SCC 125 wherein it has been held that Section 4 (1) of the Act does not require the identity of the land which may ultimately be acquired to be specified with too many details but it undoubtedly casts upon the Government a duty to *'specify the locality in which the land is needed'*. Locality does not mean that the particulars of land have to be mentioned whereas the judgment of Narendrajit Singh (supra) has been overruled as is evident from the decision of the Apex Court in the case of *Narinderjit Singh/Ranjit Singh & Others vs. The State of U.P. & Others,* AIR 1973 SC 552 and drawn our attention to the aforesaid judgment of the Apex Court case and submitted that the ratio of *Executive Engineer, M.P. Housing Board vs. Shrikant Mishra's* case (supra) would not be applicable because subsequent judgment of *Narendrajit Singh/Ranjit Singh & Ors. vs. The State of U.P. & Ors.* AIR 1973 SC 552 has not been considered by the Division Bench. In *Executive Engineer, M.P. Housing Board vs. Shrikant Mishra's* case (supra) it has been held that in the notification under Section 4, it is apparent that name of the village "Padara", name of Tehsil- Huzur, name of District Rewa has also been mentioned. Not only that "mohalla" i.e. precise locality where the land is situated in village has also been mentioned as "suarantola". Thus, the mention of Suarantola" in village is for precise locality. The Division bench also held that in the notification under Section 4, the particulars of the locality mentioned under Section 4(1) of the Act, has been mentioned with quite precision in the instant case. It was not possible to give any further details before survey undertaken and finally mind was made up by the State Government before making the survey under Section 4(2) of the Act. Thus, the notification issued under Section 4 in the instant case mentioning the name of the district, tehsil and village and particularly

tola(mohalla) of the village cannot be said to be the vague notification and held that it was not necessary to give the survey numbers and the names of the owners in the notification issued under Section 4 of the Act.

22. In the case in hand, along with the village, no detailed particulars of the locality has been mentioned as is evident from the notification which has been reproduced here in the preceding paras and, therefore, the judgment of *Executive Engineer M.P. Housing Board vs. Shrikant Mishra*(supra) is distinguishable on facts.

23. If we go through the judgment in the case of Civil Appeals No.1192 and 1193 of 1967 filed by *Narendrajit Singh & Ranjit Singh & Ors. vs. The State of U.P & Ors.*, AIR 1971 SC 306, the Division Bench of the Apex Court relied on certain observations in *Babu Barkya vs. State of Bombay* AIR 1960 SC 1203 and held that Section 4 (1) does not require that the identity of the lands which may ultimately be acquired should be specified, but it enjoins upon the Government the duty to specify the locality in which the land is needed. In the case of *Babu Barkya vs. State of Bombay* (supra), the notification merely showed that lands mentioned in the scheduled were needed. The schedule in its turn though it contained the heading District, Pargana, Mausza and Approximate area, gave no particulars of the same and all that was mentioned by way of a note was that the plan of the land might be inspected in the office of the Collector of Rampur. As no details were given, the only indication about the locality of the lands was possibly the District of Rampur inasmuch as the plan of the land was to be found in the office of the Collector of the same district.

24. The Apex Court in that context has held that the defect in a notification under Section 4 (a) cannot be cured by giving full particulars in the notification under Section 6(1). This judgment of *Narendrajit & Ranjt Singh & Ors. vs. State of U.P. & Ors.* [AIR 1971 SC 306 has been set aside on review by the Apex Court and by order dated 24/10/1972 the Civil Appeals were allowed, but on different grounds and, therefore, the appellants/landowners will not get any help from the aforesaid subsequent judgment. In the case of *M.P Housing Board Vs. Mohd. Shafi* 1992(2) SCC 168, the Apex Court has held that the notification under Section 4 is required to give with sufficient clarity not only the "public purpose" for which the acquisition proceedings are being commenced but also the "locality" where the land is situated with as full a description as possible of the land proposed to be acquired to enable

the "interested" persons to know as to which land is being acquired and for what purpose and to take further steps under the Act by filing objections etc., since it is open to such persons to canvass the non-suitability of the land for the alleged "public purpose" also. If notification under Section 4 (1) of the Act is defective and does not comply with the requirements of the Act, it not only vitiates the notification, but also renders all subsequent proceedings connected with the acquisition, bad.

25. In the case of *M.P Housing Board Vs. Mohd. Shafi* 1992(2) SCC 168, in three judges Bench decision of the Supreme Court, the only description about the particulars of 2.298 Hectares of land proposed to be acquired is that the same is situated in District-Mandsaur, Tehsil- Mandsaur and village – Mandsaur is for residential purpose. The "public purpose" for which the land is required has been stated to be "for housing scheme of housing board."

26. The Full Bench of this Court in the case of *Hajari Vs. the State of M.P.*, AIR 1976 MP 76 considering the word "land" in any locality is a reasonably small one, like that of a village, the naming of such village as a 'locality' is a sufficient compliance of Section 4(1). Para 6, 12 and 14 of the aforesaid Full Bench decision are relevant which reads as under:-

> **6.** We shall now consider the main question requiring our decision. The argument of Shri Samvatsar, learned counsel for the petitioner is that Section 4(1) of the Act requires not only the locality where the land is situate but also the land with reference to the Khasra numbers to be specified in the notification. He relies on the decision of the Division Bench in *Deva v. State of M. P.* (Misc. Peta. No. 63 of 1974 (Indore), D/- 29-9-1975), which undoubtedly supports his contention. On the other hand, another Division Bench in *Christian Fellowship (Hospital), Raj-nandgaon v. State of M. P* (1973 MPLJ 18), while dealing with this question held as follows :--
>
> "..... The view taken in Iftikhar Ahmed's case (AIR 1961 Madh Pra 140) in so far as it lays down that in omission to give particulars of land in a notification under Section 4(1) renders the notification invalid and, therefore, vitiates the entire land acquisition proceedings, can no longer be accepted as laying down good law." (Para 3) "If the locality is a reasonably small

one, like that of a village, the naming of such village as a 'locality' is a sufficient compliance of Section 4(1). But this does not necessarily imply that the naming of a city like Bhopal, would amount to a specification of a locality within the meaning of the section. It all, therefore, depends on the nature of the locality where the land is situate in each particular case.

The answer to the first question, therefore, must be that village is a 'locality' within the meaning of Section 4(1) of the Act, having regard to the smalness of the area involved. The naming of a village as a locality in a notification issued under that section, therefore, does not render it invalid in any manner." (Para 8) The above quoted passages from the decision in Christian Fellowship (Hospital), Rajnandgaon v. State of M. P. (supra) occur in the opinion of A. P, Sen, J., who was the third Judge to whom the case was referred on a difference between Naik J. and Shiv Dayal J. (as he then was) who constituted that Division Bench. The opinion of A. P. Sen J. therefore, constitutes the decision of that Division Bench. In this case it was clearly held that omission to give particulars of the land, where locality was specified did not render the notification under Section 4(1) of the Act invalid and naming of the village, in view of the smallness of its area, as a locality is a sufficient compliance of Section 4(1). There is thus a direct conflict on this point between these two Division Bench decisions. It is a matter of regret that the earlier Division Bench decision, which was reported in 1973 MPLJ 18 as also in 1973 Jab LJ 163 was not brought to the notice of the Division Bench deciding Deva's case (supra) much later on 29-9-1975. What is more, the learned Deputy Government Advocate appearing for the State in Deva's case (supra) conceded this point in the petitioner's favour. It is obviously for this reason that the later Division Bench deciding Deva's case (supra) missed the earlier reported decision of another Division Bench and was misled into taking a contrary view on the same point without even referring to the earlier Division Bench decision. We shall now consider the question on its merits.

12. This takes us now to the meaning of the word 'locality' occurring in Section 4(1). In Christian Fellowship (Hospital), Rajnandgaon v. State of M. P. (1973 MPLJ 18) the conclusion reached on this point is quoted in para 6 above. In substance the conclusion is, that a village is a locality having regard to its smallness. This conclusion was reached after referring to the meaning of the word 'locality' given in the ordinary and legal dictionaries. The several meanings as well as the setting in which the word 'locality' occurs indicate that this is substantially the correct meaning. 'Locality' is a place with an area which is reasonably small and compact so that it has come to exist and the treated as one unit, a reference to which sufficiently identifies the area and the persons therein. Orddnarily, the unit has acquired a name by which it is referred and understood.

14. The result is that ordinarily naming the village would amount to specifying the locality unless it is shown in a particular case that the village specified is much too large to be treated as a locality, there being smaller units within that village and having a name, which can be more appropriately called a locality. This would, therefore, be a question of fact in each case and where a village is sepcified in the notification under Section 4(1), it would be presumed to be valid unless the person challenging its validity shows that in fact the village named does not amount to specifying the locality on the facts and in the circumstances of that case. We are, therefore, in agreement with the conclu-sion reached on this point by A. P. Sen J. in Christian Fellowship (Hospital), Rajnandgaon v. State of M. P. (1973 MPLJ 18). We would, however, add thereto what has been said herein by us. We find that substantially the same view has also been taken in Nagar Mahapalika, Varanasi v. Durga Shankar (AIR 1975 All 99) (DB).

27. This question has also been considered by the Apex Court in the case of *State of M.P. vs. Vishnu Prasad,* AIR 1966 SC 1593. From the notification, it is clear that chunk of the four villages namely **Kali Billod, Ranmal Billod, Selampur and Ambapur, Tehsil – Depalpur, District-Indore** has to be acquired in pursuant to the Notification under Section 4 (1) and, therefore,

law laid down by the Apex Court in the decisions cited by the learned counsel for the parties, we are of the view that at the stage of Section 4, the Government may not in fact possess all the necessary details upon which it can be decided which of the land in the locality is suitable for public purpose and at the stage of notification under Section 4 only locality is required to be mentioned nor the survey numbers or the names of owners of the land, as it is not possible to mention the same without entering into the exercise contemplated in sub-section 2 of Section 4 of the Act. Thus, we are of the view that the learned writ court rightly upheld the notification issued under Section 4 by holding that the same is valid and it cannot be said to be vague.

28. In respect of second question that every person likely to be adversely affected by a decision must be granted a meaningful opportunity of being heard. Section 5-A of the Act also mandates that the person who heard and considered the objections can alone decide them; and not even his successor is competent to do so even on the basis of materials collected by his predecessor.

29. Shri Sunil Jain, Learned AAG for the State has submitted that only very few landowners have filed their objections before the office of the Collector and after granting sufficient opportunity, the orders were passed. There is no violation of Section 5-A of the Act and learned writ court has committed an error in setting aside the recommendations of SDO, Collector and order passed by the Commissioner, Indore Division, Indore and also erred in quashing all the actions of the respondents.

30. Section 5-A of the Act mandates that objections must be filed within 30 days of the issuance of the notification. Section 5-A further obligates the Collector to submit a report to the Government in respect of the objections preferred by persons interested in the land, as well as pertaining to any aspect of the nature of the land proposed to be acquired.

31. In *Nandeshwar Prasad v. U.P. Government,* AIR 1964 SC 1217, the Apex Court dealt with the nature of objections under Section 5-A of the Act 1894 observing as under: "13. The right to file objections under Section 5-A is a substantial right when a person's property is being threatened with acquisition and we cannot accept that right can be taken away as if by a side wind..."

32. The rules of natural justice have been ingrained in the scheme of Section

5-A of the Act 1894 with a view to ensure that before any person is deprived of his land by way of compulsory acquisition, he must get an opportunity to oppose the decision of the State Government and/or its agencies/ instrumentalities to acquire the particular parcel of land.

33. Section 5-A(2) of the Act, which represents statutory embodiment of the rule of audi alteram partem, gives an opportunity to the objector to make an endeavour to convince the Collector that his land is not required for the public purpose specified in the notification issued under Section 4(1) of the Act or that there are other valid reasons for not acquiring the same. Thus, section 5-A of the Act embodies a very just and wholesome principle that a person whose property is being or is intended to be acquired should have a proper and reasonable opportunity of persuading the authorities concerned that acquisition of the property belonging to that person should not be made.

34. On the consideration of the said objection, the Collector is required to make a report. The State Government is then required to apply mind to the report of the Collector and take final decision on the objections filed by the landowners and other interested persons. Then and then only, a declaration can be made under Section 6(1) of the Act 1894.

35. Therefore, Section 5-A of the Act 1894 confers a valuable right in favour of a person whose lands are sought to be acquired. It is trite that hearing given to a person must be an effective one and not a mere formality. Formation of opinion as regard the public purpose as also suitability thereof must be preceded by application of mind having due regard to the relevant factors and rejection of irrelevant ones. The State in its decision making process must not commit any misdirection in law. It is also not in dispute that Section 5-A of the Act, 1894 confers a valuable important right and having regard to the provisions, contained in Article 300A of the Constitution of India has been held to be akin to a fundamental right. Thus, the limited right given to an owner/person interested under Section 5-A of the Act, 1894 to object to the acquisition proceedings is not an empty formality and is a substantive right, which can be taken away only for good and valid reason and within the limitations prescribed under Section 17(4) of the Act, 1894.

36. The Land Acquisition Collector is duty-bound to objectively consider the arguments advanced by the objector and make recommendations, duly supported by brief reasons, as to why the particular piece of land should or

should not be acquired and whether the plea put forward by the objector merits acceptance. In other words, the recommendations made by the Land Acquisition Collector should reflect objective application of mind to the entire record including the objections filed by the interested persons.

37. The Apex Court in *Gullapalli Nageswara Rao Vs. APSRTC,* AIR 1959 SC 308, held: "Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality. We therefore hold that the said procedure followed in this case also offends another basic principle of judicial procedure." (Emphasis added)

38. The Apex Court in *Rasid Javed & Ors. v. State of U.P. & Anr.,* AIR 2010 SC 2275 following the judgment in *Gullapalli* (supra), supra held that ***a person who hears must decide and that divided responsibility is destructive of the concept of hearing is too fundamental a proposition to be doubted.***

39. A similar view has been re-iterated by the Apex Court in *Automotive Tyre Manufacturers Association v. Designated Authority & Ors.*, (2011) 2 SCC 258, wherein the Apex Court dealt with a case wherein the Designated Authority (DA) under the relevant Statute passed the final order on the material collected by his predecessor in office who had also accorded the hearing to the parties concerned. The Apex court held that the order stood vitiated as it offended the basic principles of natural justice.

40. In view of the above, the law on the issue can be summarised to the effect that the very person/officer, who accords the hearing to the objector must also submit the report/ take decision on the objection and in case his successor decides the case without giving a fresh hearing, the order would stand vitiated having been passed in violation of the principles of natural justice.

41. Relying on a Full Bench decision of this Court in the matter of *Hajari vs. The State of M.P.* (supra) and law laid by the Apex Court, we are of the view that specifying locality is the only requirement of valid notification and omission to give particulars of land with reference to Khasra numbers in a notification under Section 4(1) does not render the notification invalid.

42. The arguments that the objections filed under Section 5-A of the Act were heard by the then SDO Mr. Jitendra Singh on 24/05/2011 and case was reserved for recommendation and recommendations were made on 27/09/2011 by Mr. Gautam Singh, SDO Depalpur, who has not heard the objections. Thus, the very persons / officers who were hearing to the objections has not submitted the report nor has taken any decision on the objections and his successor decides the objections / recommends the case without giving a fresh hearing, the order would stand vitiated having been passed in violation to the principle of natural justice.

43. The learned writ court rightly quashed the recommendations made by SDO, Depalpur on 27/09/2011, the recommendations made by Collector, Indore on 28/09/2011 and the order dated 1/10/2011 passed by the Commissioner, Indore Division.

44. In the light of law laid down by the Apex Court in the case of *Laxmi Devi vs. State of Bihar & Ors.*, (2015) 10 SCC 241, we are of the view that the landowners who are likely to be adversely affected by the decision must be granted a meaningful opportunity of being heard. This right cannot be taken away by a side – wind, as so powerfully and pellucidly stated in *Nandeshwar Prasad v. State of U.P.*, AIR 1964 SC 1217 and decision on the objections should be available in a self-contained, speaking and reasoned order, reasons cannot be added to it later as that would be akin to putting old wine in new bottles.

45. In connection with the landowners, or persons interested, who have not filed objections, under Section 5-A, in principle, it must be accepted that they had no objection to Section 4 notification operating in respect of their property.

46. On the other hand, in respect of those who filed objections they may have *locus standi* to contend that Section 5-A enquiry was not conducted properly, we therefore, not agree in principle with a view of judgment of three Benches in *Abhey Ram (dead) by Lrs. and Ors. v/s Union of India & Ors.*, AIR 1997 SC 2564 that those who have not filed objections under Section 5-A, could not be allowed to contend that Section – 5-A enquiry was bad and that consequently, Section 6 declaration must be struck down and that then the Section 4 notification would lapse. However, no objections were filed by the landowners, logically Section – 6 declaration must be deemed to be in

force so far as they are concerned.

47. For these reasons, we are of the view that the learned writ court has erred in permitting all the landowners including those who have not filed objections under Section 5-A of the Act. Thus, we are of the view that in respect of those who did not object to Section 4(1) notification by filing objection under Section 5-A, the said notification must be treated as being in force. Those landowners cannot be permitted to contend. In some other cases, the notification was quashed and such quashing would also enure to their benefits. To that extent, we partly **allow** the appeal of the **State** bearing W.A. Nos.64/13, 67/13, 68/13, 69/13, 115/13, 116/13, 117/13, 118/13, 120/13, 122/13, 123/13, 156/13, 185/13, 186/13, 187/13, 188/13, 190/13, 191/13, 192/13, 193/13, 194/13, 195/13, 196/13, 197/13, 198/13, 209/13, 210/13, 211/13, 212/13, 213/13, 214/13, 215/13, 216/13, 217/13, 218/13, 219/13, 220/13, 221/13, 222/13, 223/13, 224/13, 225/13, 226/13, 227/13, 228/13, 229/13, 230/13, 231/13, 232/13, 233/13, 234/13, 235/13, 236/13, 237/13, 238/13, 239/13, 240/13, 241/13, 242/13, 245/13, 246/13, 247/13, 248/13, 249/13, 250/13, 257/13, 258/13, 259/13, 264/13, 265/13, 266/13, 267/13, 268/13, 269/13, 270/13, 271/13, 272/13, 273/13, 274/13, 275/13, 276/13, 277/13, 278/13, 279/13, 280/13, 281/13, 284/13, 285/13, 286/13, 287/13, 288/13, 289/13, 290/13, 291/13, 292/13, 293/13, 294/13, 295/13, 296/13, 297/13, 298/13, 299/13, 300/13, 301/13, 302/13, 303/13, 304/13, 305/13, 306/13, 312/13, 313/13, 314/13, 315/13, 316/13, 317/13, 318/13, 319/13, 320/13, 321/13, 322/13, 323/13, 324/13, 325/13, 326/13, 327/13, 328/13, 329/13, 330/13, 331/13, 332/13, 333/13, 334/13, 335/13, 336/13, 337/13, 338/13, 339/13, 340/13, 345/13, 346/13, 347/13, 348/13, 349/13, 350/13, 351/13, 352/13, 353/13, 354/13, 355/13, 356/13, 357/13, 358/13, 359/13, 360/13, 361/13, 362/13, 363/13, 364/13, 365/13, 366/13, 368/13, 369/13, 370/13, 371/13, 372/13, 373/13, 374/13, 375/13, 376/13, 377/13, 378/13, 379/13, 380/13, 381/13, 382/13, 383/13, 385/13, 386/13, 387/13, 388/13, 389/13, 390/13, 391/13, 392/13, 393/13 and 394/13 and partly **set aside** the order passed by the learned writ court to the extent as indicated herein-before and dismiss the writ appeals of landowners bearing W.A. Nos. 4/13, 5/13, 6/13, 7/13, 9/13, 12/13, 16/13, 17/13, 18/13, 19/13, 20/13, 25/13, 26/13, 27/13, 28/13, 29/13, 30/13, 31/13, 32/13, 33/13, 34/13, 35/13, 36/13, 37/13, 38/13, 39/13, 40/13, 41/13, 42/13, 43/13, 44/13, 45/13, 46/13, 47/13, 48/13, 49/13, 50/13, 51/13, 52/13, 53/13, 55/13, 56/13, 57/13, 61/13, 62/13, 63/13, 65/13, 66/13, 70/13, 71/13, 72/13, 73/13,

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48. In the result, the writ appeals stands disposed of, but without any order as to cost. A copy of this order be retained in other connected writ appeals.

Appeal disposed of.

I.L.R. [2016] M.P., 2938
WRIT APPEAL

Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice J.P. Gupta

W.A. No. 23/2015 (Jabalpur) decided on 9 May, 2016

MUNICIPAL CORPORATION BHOPAL ...Appellant
Vs.
PREM NARAYAN PATIDAR ...Respondent

(Alongwith W.A. No. 24/2015, W.A. No. 25/2015, W.A. No. 26/2015, W.A. No. 27/2015, W.A. No. 28/2015, W.A. No. 29/2015, W.A. No. 30/2015, W.A. No. 31/2015, W.A. No. 32/2015, W.A. No. 33/2015, W.A. No. 34/2015, W.A. No. 35/2015, W.A. No. 36/2015, W.A. No. 37/2015, W.A. No. 38/2015, W.P. No. 3764/2016, W.P. No. 4246/2016, W.P. No. 5682/2016, W.P. No. 7714/2016, W.P. No. 7753/2016 & W.P. No. 7757/2016)

A. Municipal Corporation Act, M.P. (23 of 1956), Sections 305 & 306 and Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013) - Constitution - Entry No. 5 of List II (State list) - Entry No. 42 of List III - **Whether Sections 305 & 306 of the Act of 1956 is repugnant to the Central Act of 2013? - Held - That the Act of 1956 (State Act) would squarely fall under Entry 5 of List II of Seventh Schedule and provisions u/S 305 & 306 are incidental thereto whereas the Act of 2013 (Central Act) is a law regarding acquisition etc. of land and falls under Entry 42 of List III of the Seventh Schedule, so the argument of repugnancy with the provisions of the Act of 2013 is not available, as the Act of 1956 falls under Entry 5 of List II and Act of 2013 falls under Entry 42 of list III and the question of repugnancy arises only when both the Union and State laws relate to a subject in List III - Argument of repugnancy is rejected. (Paras 15 to 17)**

क. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 305 व 306 एवं भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30) – संविधान – सूची II की प्रविष्टि सं. 5 (राज्य सूची) – सूची III की प्रविष्टि सं. 42 – क्या 1956 के अधिनियम की धारा 305 तथा 306, 2013 के केन्द्रीय अधिनियम के प्रतिकूल है? – अभिनिर्धारित – यह कि 1956 का अधिनियम (राज्य अधिनियम) पूर्णतः 7 वीं अनुसूची की दूसरी सूची की प्रविष्टि 5 के अंतर्गत आता है तथा धारा 305 और 306 के अंतर्गत प्रावधान उसके आनुषंगिक होंगे जबकि 2013 का अधिनियम (केन्द्रीय अधिनियम) भूमि के अर्जन इत्यादि संबंधी विधि है और 7 वीं अनुसूची की तीसरी सूची की प्रविष्टि 42 के अंतर्गत आता है, अतः 2013 के अधिनियम के प्रावधान के साथ प्रतिकूलता का तर्क उपलब्ध नहीं है, क्योंकि 1956 का अधिनियम सूची II की प्रविष्टि 5 के अंतर्गत आता है तथा 2013 का अधिनियम तीसरी सूची की प्रविष्टि 42 में आता है और प्रतिकूलता का प्रश्न केवल तभी उठता है जब संघ और राज्य विधि दोनों ही तीसरी सूची के विषय से संबंधित हों – प्रतिकूलता का तर्क अस्वीकार किया जाता है।

B. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973), Section 56 - Acquisition of land under the provisions of 1973 Act - Procedure - **Held - If the "acquisition of land" is resorted to in respect of matters covered by the Act of 1973, procedure specified therefor, in the Act of 1973 read with the Central enactment dealing with determination of compensation amount will have to be observed. (Para 18)**

ख. नगर तथा ग्राम निवेश अधिनियम म.प्र., (1973 का 23), धारा 56 –

1973 के अधिनियम के अंतर्गत भूमि का अर्जन – प्रक्रिया – अभिनिर्धारित – यदि 1973 के अधिनियम द्वारा आच्छादित किए गए मामलों के संबंध में भूमि के अर्जन का सहारा लिया जाए, तब 1973 के अधिनियम में विनिर्दिष्ट प्रक्रिया के कारण, सहपठित केन्द्रीय अधिनियम जो मुआवजे की राशि के निर्धारण से संबंधित है, को देखा जाना चाहिए।

***C. Municipal Corporation Act, M.P. (23 of 1956), Sections 305, 306, 322, 323 & 387, Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973), Section 56 and Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013) - "Acquisition of Land" or "Vesting of Land" - Petitioners - Land owners* - Possession of land/buildings without acquiring the same and payment of compensation - Purpose - Construction/widening of Road/Street - Against it Writ Petition - Relief - Compensation to be paid as per the Act of 2013 or under the provision of the Act of 1956 - Challenge as to by Municipal Corporation - Intra court Appeals - Held - As the possession of Land/buildings is being taken for specified use i.e. Construction/Widening of streets, so it will amount to "vesting of Land" under Section 305 of the Act of 1956 and not as "acquisition of land" - consequent to "vesting", the corporation is empowered to remove all obstructions and encroachments falling within the street by invoking power under Sections 322 and 323 of the Act of 1956 and if any loss or damage is caused to any person due to such act of removal, the owner is entitled for compensation as specified u/S 306 of the Act of 1956 & if owner is dissatisfied with the compensation amount then it can take recourse of Arbitration before District Court under Section 387 of the Act of 1956 - Writ appeals allowed. (Paras 2, 18 & 19)**

ग. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 305, 306, 322, 323 व 387, नगर तथा ग्राम निवेश अधिनियम म.प्र. (1973 का 23), धारा 56 एवं भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30) – "भूमि का अर्जन" या "भूमि का निहित" – याचीगण – भूमि स्वामी हैं – बिना अर्जन किये और मुआवजा दिये बिना भूमि/भवनों का कब्जा – उद्देश्य –सड़क/गली का निर्माण/चौड़ा करना – जिसके विरूद्ध रिट याचिका – अनुतोष – 2013 के अधिनियम या 1956 के अधिनियम के प्रावधानों के अनुसार मुआवजा दिया जाना चाहिए – नगरपालिका द्वारा चुनौती के रूप में – अन्तर्न्यायालयीन अपील – अभिनिर्धारित – चूंकि भूमि/भवनों का कब्जा विनिर्दिष्ट उपयोग के लिए लिया गया है अर्थात गलियों का निर्माण/चौड़ीकरण

के लिए, अतः इसे 1956 के अधिनियम की धारा 305 के अंतर्गत "भूमि का निहित" माना जाएगा न कि "भूमि का अर्जन" – "निहित" के परिणामस्वरूप, निगम 1956 के अधिनियम की धारा 322 तथा 323 के अधीन शक्तियाँ लागू करके गली में आने वाली सारी बाधाएँ तथा अतिक्रमण को हटाने के लिए सशक्त है और यदि, इस हटाए जाने के कृत्य से किसी भी व्यक्ति को हानि या क्षति हो तो, 1956 के अधिनियम की धारा 306 के अंतर्गत स्वामी मुआवजा पाने का हकदार होगा तथा यदि स्वामी मुआवजे की रकम से असंतुष्ट होगा तब वह 1956 के अधिनियम की धारा 387 के अंतर्गत जिला न्यायालय के समक्ष मध्यस्थता का सहारा ले सकता है – रिट अपील मंजूर।

Cases referred:

AIR 1969 SC 579, 2006 (3) MPLJ 412, (2010) 7 SCC 129, (2002) 4 SCC 326, (1996) 3 SCC 709, (2011) 3 SCC 1, AIR 1937 Bom. 432, 2008 (III) MPWN 88, (2007) 8 SCC 705, (2013) 4 SCC 280, 2014 SCC Online MP 7755, (2011) 9 SCC 1, (1973) 1 SCC 500.

Anshuman Singh, for the appellants in W.A. Nos. 23/2015, 24/2015, 25/2015, 26/2015, 27/2015, 28/2015, 29/2015, 30/2015, 31/2015, 32/2015, 33/2015, 34/2015, 35/2015, 36/2015, 37/2015, 38/2015 and respondents in W.P. Nos. 3764/2016, 4246/2016 & 5682/2016.

Siddharth Gupta, for the petitioner in W.P. Nos. 3764/2016, 4246/2016, 5682/2016, 7714/2016 and respondents in W.A. Nos. 23/2015, 24/2015, 25/2015, 26/2015, 27/2015, 28/2015, 29/2015, 30/2015, 31/2015, 32/2015, 33/2015, 34/2015, 35/2015, 36/2015, 37/2015 & 38/2015.

Sanjay Agrawal, for the petitioners in W.P. No. 7753/2016 & 7757/2016.

Amit Seth, G.A. for the respondents/State.

JUDGMENT

The Judgment of the Court was delivered by : **A.M. KHANWILKAR, C.J. :-** These matters can be disposed of by a common judgment, as common questions arise for consideration.

2. The respondents in writ appeals had filed writ petitions to challenge the proposed action of the Municipal Corporation, Bhopal, of allegedly taking possession of lands and buildings owned and possessed by them without acquiring the same much less absent payment of compensation. The learned Single Judge by a common decision dated 28.10.2014, allowed all the writ

petitions. The learned Single Judge was of the opinion that even though portion of land and buildings owned and possessed by the concerned writ petitioners was required for construction of road or road widening of the existing road, the Corporation was not competent to take any action in that regard without acquiring the same and including payment of compensation therefor. Learned Single Judge was of the opinion that acquisition should have proceeded as per the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as the Act of 2013 for short) or under the provisions of Madhya Pradesh Municipal Corporation Act, 1956 (hereinafter referred to as the Act of 1956 for short). The Bhopal Municipal Corporation has, therefore, filed these intra Court writ appeals challenging the common decision.

3. During the pendency of these writ appeals, the writ petitioners, taking clue from the arguments canvased by the respective parties and the observations of the Court during the hearing, initially filed two writ petitions to challenge the validity of Section 305 of the Act of 1956. During the further hearing, as the matter progressed the writ petitioners realized that they may have to also challenge the validity of Section 306 of the Act of 1956 for grant of full, complete and effectual reliefs (as now prayed in the amended writ petitions). The writ petitioners applied for amendments because of the stand taken by the Corporation that it was open to the Corporation to proceed with the proposed action for implementation of the comprehensive mobility plan regarding Bus Rapid Transit System (BRTS) for reducing the congestion of traffic in the city of Bhopal by invoking power derived from Section 305 of the Act of 1956; and which issue has been answered in favour of the Corporation by the Supreme Court in the case of *The Municipal Corporation, Indore Vs. K.N. Palsikar*[1], and followed by the Single Judge of this Court in *Suresh Singh Kushwaha Vs. Municipal Corporation, Gwalior and another*[2].

4. We permitted the writ petitioners to amend the writ petitions as prayed; and to proceed with the hearing of the writ appeals and writ petitions, analogously, on the basis of denial of the respondents – as the questions to be answered are, essentially, questions of law.

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1. AIR 1969 SC 579 2. 2006 (3) MPLJ 412

5. For challenging the validity of provisions of Sections 305 and 306 of the Act of 1956, the writ petitioners would contend that the interpretation given to these provisions, if accepted would inevitably result in repugnancy with the provisions of the Central Act of 2013 and including violative of Article 300A of the Constitution of India. The writ petitioners rely on the scheme of the provisions of M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 (hereinafter referred to as the Act of 1973 for short) and also of the Act of 1956 to assert that the two enactments are independent. Thus, even after the Committee constituted under the provisions of Act 1973 were to draw up a development plan, that would not extricate the Commissioner from the obligation to notify the building line and public street/street. In absence of finalizing and determining the building line and the public street/street, in the plan to be prepared by the Corporation in exercise of power under Section 291 of the Act, no precipitative action could be taken by the Corporation much less resort to taking over physical possession of the land and building and/or to remove or demolish the same in the guise of requirement for construction of public road (public street/ street). It is also asserted by the writ petitioners that going by the scheme of provisions of the Act of 1956, possession of the land and/or removal of building obstructing the street cannot be resorted to until the affected person is paid just and fair compensation in that regard. Further, the compensation amount must be determined by following procedure prescribed in that behalf in the Act of 1956, if not under the Act of 2013; and only upon payment of such compensation, the Corporation could assume authority to proceed further. As regards compensation, it is submitted that any amount offered or determined by the Authority under the Act of 1956 would not be just and fair unless the same is determined on the basis of factors delineated in the Act of 2013. In other words, absent such specified parameters, it results in impinging upon the constitutional rights of the land owners/occupants of the building; and, therefore, Section 306 will have to be struck down being arbitrary and giving unguided and fanciful power to the Authority to determine any amount in the name of reasonable compensation. It is also contended that the land owners/occupants of the building were to be dispossessed and paid compensation under the Act of 1956, the payment under that dispensation, will entail in discrimination. Inasmuch as, for the same purpose, namely, for construction of road or road widening of a national or state highway, the land owners/occupants of the building are paid compensation as per the defined parameters specified in the concerned Act, which, however, is not offered to

the affected persons under the provisions of Act of 1956, albeit the land and building is in the same or contiguous area and is required for the same purpose i.e. public street. These are the broad contentions raised by the writ petitioners.

6. Per contra, the Corporation asserts that Sections 305 and 306 of the Act of 1956, if conjointly read with the other enabling provisions such as Sections 322 and 323 of the Act of 1956; and including Sections 291 and 292 of the Act of 1956, the inevitable conclusion is that the provisions of the Act of 1956 are self-contained code. It is submitted that the argument of the petitioners that there is repugnancy in the provisions of the Act of 1956 is fallacious. It is in ignorance of the fact that the Act of 1956 is ascribable to Entry 5 of List II in the Seventh Schedule of the Constitution, in respect of which only the State legislature is competent to enact law on the subject. Thus, the argument about repugnancy cannot be taken forward. It is also contended that even if some aspects of the State Act resemble with the machinery provisions under the Act of 2013, regarding acquisition and compensation that will be of no avail. According to the Corporation, the fact that the Act of 1973 refers to the provisions of the Act of 2013, that cannot be the basis to answer the matters in issue, in the present proceedings. In that, the Act of 1973 deals with the subject of town planning; and the Act of 1956 deals with matters referable to power and duty of the Municipal Corporation for the purpose of local self-Government or village administration. The two enactments in that sense, operate in different spheres, though may have linkage in respect of certain matters such as town planning. The Act of 1956, in no unambiguous terms recognizes that even though the Commissioner is required to draw up a town planning scheme under Section 291 of the said Act, by virtue of Section 292 of the same Act, which opens with a non-obstante clause, the Commissioner cannot proceed to do so if the town planning scheme is already formulated by the Committee for any area of which scheme has been sanctioned under the Act of 1973. Further, the Commissioner is not required to notify the building line or for that matter, the road line, if the town planning scheme has been sanctioned by the Committee under the Act of 1973 in that regard, but by virtue of mandate of the Act of 1956, is obliged to implement the said scheme and in discharge of that obligation must proceed with the proposed action under Sections 322 and 323, in respect of public street/ street referred to in that plan.

7. It is then contended on behalf of the Corporation that the plea taken

by the writ petitioners that possession of the subject land can be taken by the Corporation for construction of road or road widening of public street, only after acquisition of the affected land/building and upon payment of or offering compensation to the affected persons, is untenable. That is against the scheme of the Act of 1956 as a whole and in particular Section 305 of the Act – which predicates a legal fiction of vesting of the portion of land added to the street by setback or removal, to be deemed to be part of the public street and to have vested in the Corporation. For taking action of removal of obstructions and encroachments in respect of any street, there is no requirement to pay prior compensation. Further, once the portion of land affected by street vests in the Corporation, the Corporation is under legal obligation to remove the obstruction or encroachment thereon with dispatch by resorting to power under Sections 322 and 323 of the same Act.

8. During the argument, however, the Corporation having realised that Section 305 requires certain procedure to be observed before proceeding with the action under Section 322 and 323, in order to invoke the legal fiction, decided to issue notices to the affected persons and now intend to proceed under Sections 322 and 323 of the Act of 1956 for removal of obstruction or encroachment on such land falling within the street line.

9. As regards the issue of quantum of compensation, it is contended by the Corporation that the provision made in Section 306 of the Act of 1956, is not rigid but flexible; and gives ample scope to the Authority to determine reasonable compensation amount to be paid to the owner for the damage or loss sustained in consequence of the restriction, prohibition or for removal of the structure. Reliance is also placed on Rule 61 of the M.P. Bhumi Vikas Rules, 2012 providing for an additional floor area calculated adding twice the area of plot/land surrendered, to contend that this incentive is given in lieu of compensation.

10. As regards the grievance of the petitioners that the compensation amount to be offered to the respective petitioners would not be on the same parameters as in the Act of 2013, it is contended that it is well established position that the State Legislature is competent to enact a law on the subject; and the law so enacted will have to be interpreted on its own and not with reference to the law enacted by the Parliament on some other subject, not covered by Entry 5 of List II. The argument that the provision in Section 306 is arbitrary and irrational, is countered by the Corporation. It is submitted

that the compensation amount to be determined by the Authority under the Act of 1956 is expected to be "reasonable", as predicated in the said provision. That provision bestows very wide power in the Authority and if the affected person is not satisfied with the said computation, is free to resort to remedy of Arbitration under Section 387 of the Act of 1956; and substantiate that the quantum of loss and damage caused to him is higher. In fact, Section 387 (3) envisages to follow procedure provided by Land Acquisition Act, 1894, for determination of compensation. Thus, enough safeguards are provided in the Act of 1956 to ensure that reasonable compensation is paid to the affected persons. Even the plea taken by the writ petitioners that the compensation offered under the Act of 1956 entails in discriminatory treatment being meted out to the land owners and occupants so affected by the action to be taken up by the Corporation, it is submitted that the scheme for determining compensation provided in the Act of 1956 is without reference to the Central enactment. It is a self-contained Code. The fact that it provides for different dispensation for determination and payment of compensation than to the neighbouring land owners whose portion of land is acquired for National Highway or State Highway by resorting to the parameters specified in the Central enactment, that cannot be the basis to question the validity of the provisions of Act of 1956 – being independent and enacted by the State with reference to Entry 5 of List II of the Seventh Schedule of the Constitution. The argument of discrimination, therefore, is untenable. For, it is well established position that the compensation for the affected land can vary depending on the purpose for which the land is taken over, as in the present set of cases is required for municipal area development; and with the development of the road, the land owners would be eventually benefitted.

11. As a matter of fact, as per the scheme of the Act of 1956, it is a case of vesting of land and not of acquisition. The land affected by the street line is vested in the Corporation, for which the procedure for acquisition is completely irrelevant. The vesting takes place upon sanction of development plan by the Committee due to legal fiction in the Act, with requirement of mere issuance of notice in that behalf under Section 305 of the Act of 1956. Upon taking further action under Sections 322 and 323 of the Act to remove obstruction or encroachment of such street line, the affected person, at best, may become entitled for reasonable compensation. There is nothing in the Act of 1956 that the compensation is required to be paid before taking action under Section 322 read with Section 323 of the Act of 1956. According to the Corporation,

therefore, the writ petitions filed to challenge the validity of Sections 305 and 306 of the Act are also devoid of merits.

12. It was also pointed out that the writ petitioners had submitted building plan for development of their plot, which was sanctioned on clear understanding that portion of the area of the concerned plot is required to be set apart for road widening under the master road plan. The land owners acted upon the said sanctioned plan and proceeded to construct the building on that condition. Hence, the writ petitioners cannot be allowed to approbate and reprobate. Further, the master road plan is nothing but replication of the town planning scheme sanctioned by the Committee under the Act of 1973, which has had been notified as back as in the year 1995. None of the petitioners chose to challenge the said town planning scheme in respect of the concerned area; and in particular, the land affected by the said scheme. The said scheme was prepared by following due procedure provided for that purpose in the Act of 1973. Therefore, it is too late in the day for the petitioners to make any grievance about portion of their land and building owned and possessed by them being affected by the proposed action under Section 322 and 323 of the Act of 1956, to remove obstruction and encroachment on the street and more particularly when portion of that land is vested in the Corporation on account of the deeming provision in Section 305 of the Act of 1956.

13. Counsel appearing for the State supported the plea taken by the Corporation in toto.

14. Counsel appearing for the respective parties in support of their arguments made on the above lines have relied on decisions, to which, we shall make reference at the appropriate place.

15. Having considered the rival submissions, the principal issue raised in the writ petitions is about the validity of sections 305 and 306 of the Act of 1956 on the ground of repugnancy with the Central Act of 2013. The argument proceeds that the Act of 1956 also pertains to subject acquisition in respect of which the Parliament has enacted Act of 2013. The dispensation provided in the Act of 2013 is very different and requires the Authority to objectively assess the amount of compensation towards the loss and damage caused to the affected person; and including that without payment of compensation, the land owner cannot be dispossessed from the acquired land which hitherto was owned and possessed by him. Therefore, on the interpretation given by

the Corporation to these provisions, it would not only entail in discrimination regarding compensation – being without any parameters or guidelines specified therefor and bestowing unbridled discretion in the Authority; but, also giving power to the Corporation to dispossess the affected person even without payment of compensation.

16. To analyze this contention, we must dissect the sweep and purport of the Act of 1956 as a whole and in particular, Sections 305 and 306 read with Sections 322 and 323 of that Act. The preamble of the Act 1956 leaves no manner of doubt that it is an Act to provide for establishment of the Municipal Corporation for the cities in the State of Madhya Pradesh. Part-I of the Act deals with preliminary matters, consisting of Chapter I. Part-II of the Act deals with the Constitution and Government. It consists of Chapter-II to VI. Chapter-II deals with the Municipal Authorities; Chapter-III with the conduct of business and transaction of business of the Corporation; Chapter-IV Municipal Officers and Servants – Commissioner; Chapter-V regarding powers, duties and functions of the Municipal Authorities – obligatory and discretionary duties of the Corporation; and Chapter-VI Municipal property and liabilities. Part-III of the Act deals with matters regarding finance. It consists of Chapter-VII to X. Chapter-VII deals with Municipal Funds; Chapter-VIII with budget estimate and Chapter-IX with Loans. Chapter-X with audit and accounts. Part-IV of the Act consists of Chapter-XI and XII. Chapter-XI pertains to Taxation and Chapter-XII with Recovery of Corporation's claim. Part-V of the Act deals with subject of public health, safety and convenience. It consists of Chapter-XIII to Chapter XXII. Chapter-XIII deals with subject of public convenience; Chapter-XIV with conservancy; Chapter-XV with sanitary provisions; Chapter-XVI with water supply, Chapter-XVII with general provisions with reference to drainage, water supply, water and other mains; Chapter-XVIII with public health and safety Chapter-XIX with market and slaughter places; Chapter-XX with food, drink, drugs and dangerous articles; Chapter-XXI with on restraint of infection; Chapter-XXII with disposal of the dead. Part-VI of the Act consists of Chapter-XXIII to XXVII. Chapter-XXIII deals with town planning; Chapter-XXII-A with colonization; Chapter-XXIV with building control; Chapter-XXV with dangerous insanitary building; Chapter-XXVI with streets; and Chapter-XXVII with general provisions as to street and public nuisance. Part-VII of the Act consists of Chapter-XXVIII to XXXIII. Chapter-XXVIII deals with co-operation of police; Chapter-XXIX with prevention of extinction of fire; Chapter-XXX with dangerous

animals; Chapter-XXXI with beggars; Chapter-XXXII with disorderly houses; and Chapter-XXXIV with weights and measures. Part-VIII of the Act consists of Chapter XXXIV and XXXV. Chapter-XXIV deals with genefal provisions for the carrying of municipal administration procedure; and Chapter-XXXV with supplemental provisions. Part-IX of the Act consists of Chapter-XXXVI dealing with control. Part-X consists of Chapter-XXXVII dealing with byelaws. Part-XI consists of Chapter-XXXVIII dealing with punishment of offences. Part-XII consists of Chapter-XXXIX dealing with election petitions; and lastly Part-XIII consists of Chapter-XL and XLI. Chapter-XL deals with transitory provisions and Chapter-XLI with subject of Industrial Township.

17. From the gamut of these provisions in the Act of 1956, there is hardly any doubt that this Act of 1956 has been enacted by the State Legislature with reference to Entry No.5 of List-II – State List, dealing with the subject of local government; that is to say, constitution and powers of Municipal Corporation for the purpose of local self-government or village administration. The provisions such as sections 305 and 306 are incidental thereto and in the nature of enabling provisions to effectuate the objective of the enactment. These two provisions if read in isolation may give an impression of interfering with the rights over the properties, but, by no stretch of imagination, it can be considered as a law enacted on the subject of acquisition of land as such, ascribable to entries in List-III. On this finding, on applying the dictum of the Supreme Court in the case of *Bondu Ramaswamy and others Vs. Bangalore Development Authority and others*[3], pressed into service by the respondents, the argument of repugnancy is unavailable and cannot be countenanced. Paragraph 91 of the said decision reads thus :

> "**91.** The question of repugnancy can arise only where the State law and the existing Central law are with reference to any one of the matters enumerated in the Concurrent List. The question of repugnancy arises only when both the legislatures are competent to legislate in the same field, that is, when both the Union and State laws relate to a subject in List III. Article 254 has no application except where the two laws relate to subjects in List III (see *Hoechst Pharmaceuticals Ltd. v. State of Bihar,* (1983) *4 SCC 45 : 1983 SCC (Tax)*

3. (2010) 7 SCC 129

248). But if the law made by the State Legislature, covered by an entry in the State List, incidentally touches upon any of the matters in the Concurrent List, it is well settled that it will not be considered to be repugnant to an existing Central law with respect to such a matter enumerated in the Concurrent List. In such cases of overlapping between mutually exclusive lists, the doctrine of pith and substance would apply. Article 254(1) will have no application if the State law in pith and substance relates to a matter in List II, even if it may incidentally trench upon some item in List III. (see Hoechst, Megh Raj v. Allah Rakhia, (1946-47) 74 IA 12 : AIR 1947 PC 72 and Lakhi Narayan Das v. Province of Bihar, AIR 1950 FC 59)."

(emphasis supplied)

It may be useful to also advert to paragraph No.92 of the same decision, which has restated the legal principle expounded in *Munithimmaiah Vs. State of Karnataka*[4], that the Development Authority Act (such as the Act of 1956), is intended to provide for the establishment of a Development or a local Authority to facilitate and ensure planned growth and development of the city and areas adjacent thereto, and that acquisition of any lands, for such development, is merely incidental to the main object of the Act, that is, development of Municipal area. The Court noted that in pith and substance, such enactments would squarely fall under Entry 5 of List II of the Seventh Schedule and is not a law regarding acquisition of land like the Land Acquisition Act, traceable to Entry 42 of List III of the Seventh Schedule, the field in respect of which is already occupied by the Central Act, as amended from time to time. It was held that for developmental activities, in substance and effect will constitute a "special law" providing for acquisition for the "special purposes of the Corporation or the local area" and same will not be considered to be part of the Land Acquisition Act. Thus, the argument of repugnancy with the provisions of the Central Act was negatived, as that would not arise at all in the case of an enactment ascribable to Entry 5 of List-II. In the case of *State of A.P. and others Vs. Mcdowell & Co. and others*[5], the abovesaid legal position has been restated as can be discerned from paragraph 36 of the decision. Hence, the argument of repugnancy is rejected.

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4. (2002) 4 SCC 326 5. (1996) 3 SCC 709

18. Significantly, the provisions of the Act of 1973, which is a Code in itself, *inter alia,* also deal with the subject of acquisition of land for town and country development and use of land in the local area. Some of the machinery provisions of the Land Acquisition Act (Central enactment) are telescoped into this Act of 1973, by reference. Thus understood, if the "acquisition of land" is resorted to in respect of matters covered by the Act of 1973, the procedure specified therefor in the Act of 1973 read with Central enactment dealing with determination of compensation amount, will have to be observed. This legal position is well established and restated in the case of *Girnar Traders (3) Vs. State of Maharashtra and others*[6].

19. In the case of Act of 1956, however, it is not a matter of "acquisition of land" or for that matter acquisition under the provisions of the Act of 1973, but, of vesting in the Corporation under Section 305, for specified use i.e., street. Consequent to vesting, the Corporation is obliged to remove all the obstructions and encroachments falling within the street, by invoking power under Sections 322 and 323 of the same Act. If any loss or damage is caused to any person due to such action of removal of obstruction or encroachment, the owner is entitled for compensation specified under Section 306 of the Act; and if dissatisfied with determination of compensation, he can take recourse to statutory remedy of Arbitration under Section 387 of the same Act. In those proceedings, the forum (District Court) so made available is expected to decide the claim by following as far as may be the procedure provided by the Land Acquisition Act, 1894 for determination of the compensation amount. It does not envisage initiation of action for acquisition of the portion of the land/building falling within the street before its removal as such. Thus, the dispensation provided in the Act of 1956 in this regard, is a self-contained Code.

20. That takes us to the argument pressed into service by the writ petitioners that absent Town Planning Scheme drawn up by the Commissioner and, in particular, regarding street line and building line on either side or on both sides of any street existing or proposed, it is not open to the Corporation to take any further action much less invoke power under Section 305 of the Act of 1956. This argument is founded on Section 291 of the Act of 1956, which predicates that the Commissioner is required to draw up a Town Planning

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6. (2011) 3 SCC 1

Scheme, if so directed by the Corporation or by the Government. This argument has been countered by the Corporation by relying on the provisions of the Act of 1973 as also of the Act of 1956 and in particular, Section 292 thereof.

21. Indeed, the Act of 1973 is a special enactment to make provision for planning and development and use of land; to make better provision for the preparation of development plans and zoning plans with a view to ensuring town planning schemes are made in a proper manner and their execution is made effective; to provide for the development and administration of special areas through Special Area Development Authority; to make provision for the compulsory acquisition of land required for the purpose of the development plans and for purposes connected with the matters thereto. For that purpose, a broad based Committee is required to be constituted as per Section 17A of that Act. That committee, amongst others, is expected to ensure that the development plan must consist of matters referred to in Section 17 of that Act, to wit, the land use to be proposed within the planning area, the development plan is to lay down the pattern of National and State Highways connecting the planning area with the rest of the region, ring roads, arterial roads and the major roads within the planning area; and also to lay down the broad-based traffic circulation patterns in a city. In the process, the development plan so finalized and published after following procedure prescribed in the Act of 1973, not only results in prohibition of land use contrary to such plan but in freezing the land use referred to therein. The procedure for finalization of development plan within the planning area, predicates inviting public objections. The Development Town Planning Scheme must be in conformity with the development plan so finalized. The land affected by Town Planning Scheme finalized under the Act of 1973, if required by the local Authority for the State's use (other than for street), must be acquired as per the procedure prescribed in Section 56 of the Act of 1973. In relation to land/building affected by street, however, a completely different regime of vesting of the property in the Corporation is stipulated in the Act of 1956. That is a "special provision", not mandating acquisition procedure. The affected person is entitled only for compensation for the loss or damage caused because of removal of obstruction or encroachment within the street, in terms of Sections 306 and 387 of the Act of 1956.

22. Indubitably, the area earmarked for streets or arterial roads for following traffic circulation pattern in the city as specified in the Town Planning

Scheme published under the Act of 1973, is required to be developed by the local Authority – be it a case of construction of a new road or of road widening of the existing road – the former scheme prevails and it is the obligation of the local Authority to implement the same.

23. Section 292 of the Act of 1956, which opens with a non-obstante clause, stipulates that the local Authority cannot formulate fresh Town Planning Scheme of its own for that purpose by resorting to Section 291 of the Act of 1956. In other words, absent such a Town Planning Scheme under the Act of 1973, the local Authority (Corporation) can and is required to undertake drawing up of a Town Planning Scheme referred to in Section 291 of the Act of 1956. That is the mandate of Section 292 of the Act which reads thus :-

> **"292. Restriction on Corporation's power to undertake town planning scheme.-** Notwithstanding anything contained in section 291, no town planning scheme shall be made by the Corporation for any area for which a scheme has been sanctioned under the provisions of Town Improvement Act."

24. Suffice it to observe that the argument of the writ petitioners based on Section 291, of absence of Town Planning Scheme drawn up by the Commissioner to define a street line or a building line on either side or on both sides of any street existing or proposed the Corporation cannot proceed with the action of removal of obstruction or encroachment, is fallacious. As aforesaid, the need to draw up Town Planning Scheme under the Act of 1956 would arise only in absence of Scheme propounded under the Act of 1973. Once such a Scheme exists, the Commissioner has no power to sit over the said Scheme. The Corporation is bound by the said Scheme in all respects, for all purposes. In that, the Town Planning Scheme formulated by the Committee in terms of provisions of Act of 1973 is final and binding on the local Authority, who is under statutory obligation to implement and execute the same in its letter and spirit albeit by invoking power under the provisions of Act of 1956. In pursuit of that duty, the Commissioner is under obligation to remove all the encroachments and obstructions within the street line delineated in such a Scheme. Action to be taken under section 305 of the Act is, therefore, conditionally linked to Section 291 of the Act of 1956, only if the Town Planning Scheme is drawn up by the Commissioner thereunder in absence of a Scheme prepared under the Act of 1973. This position is

reinforced by the plain language of section 292 of the Act of 1956.

25. It is not the case of the writ petitioners that no Town Planning Scheme has been finalized under the Act of 1973 or is in vogue in respect of Bhopal Corporation limits. Therefore, the writ petitioners can make grievance only if the Corporation intends to proceed in deviation of the Scheme published by the Authority under the Act of 1973, for removal of obstruction and encroachments on the streets so specified. That grievance can certainly be examined by the Commissioner or other appropriate Authority notified for that purpose by the Corporation, on case to case basis. However, the proposed action of removal of encroachments and obstructions within the street line in conformity with that scheme cannot be questioned on the argument of absence of Town Planning Scheme drawn up under Section 291 of the Act of 1956.

26. Reverting to the common decision of the learned Single Judge impugned in the intra Court writ appeals, we have no hesitation in taking the view that the learned Single Judge has completely glossed over the Scheme of the Act of 1956, which is a self-contained Code. The Scheme of the Act of 1956 predicates that the land or building affected by the regular line of a public street and the building or projection thereon in terms of the final Town Planning Scheme prepared under the Act of 1973, by virtue of Section 305 of the Act of 1956 is "deemed to be part of the public street" and vest in the Corporation. Being a case of deeming provision, by legal fiction, nothing more is required to be done by the Corporation, except to issue a notice under Section 305 expressing its intention to remove all the obstructions and encroachments on portion of the land which are projecting beyond the regular line or beyond the front of the immediate adjoining building. On issuance of such notice, the portion of land added to the street by setting back or obstruction and encroachment thereon removed, shall thereafter be deemed to be part of the public street and vest in the Corporation. If such notice has not been issued, it is open to the affected persons to raise that issue before the appropriate Authority of the Corporation. In the present matters before us, admittedly, the Corporation has since issued such notices to the concerned party. Similarly, if there is deviation or variation in the area specified in the notice issued under Section 305 of the Act of 1956, as not being in conformity with the Town Planning Scheme, it is always open to the noticee to raise that issue before the appropriate Authority of the

Corporation in that regard. The appropriate Authority before proceeding with the action of removal of obstructions and encroachments on the street by taking recourse to the power conferred under sections 322 and 323 of the Act of 1956 in that behalf, is obliged to consider such representation and deal with the same by recording a speaking order, so that the person concerned, if aggrieved, can take up the matter further before the competent forum and including by assailing the same before the High Court by way of writ petition.

27. Reverting to the sweep of Section 305 of the Act, it is apposite to reproduce the same. Section 305, reads thus :-

> **"305. Power to regulate line of buildings.-** (1) If any part of a building projects beyond the regular line of a public street, either as existing or as determined for the future or beyond the front of immediately adjoining buildings the Corporation may-
>
> (a) if the projecting part is a verandah, step or some other structure external to the main building, then at any time, or
>
> (b) if the projecting part is not such external structure as aforesaid, then whenever the greater portion of such building or whenever any material portion of such projecting part has been taken down or burned down or has fallen down,
>
> require by notice either that the part of some portion of the part projecting beyond the regular line or beyond the front of the immediate adjoining building, shall be removed, or that such building when being rebuilt shall be set back to or towards the said line or front; and the portion of land added to the street by such setting back or removal shall henceforth be deemed to be part of the public street and shall vest in the Corporation.
>
> Provided that the Corporation shall make reasonable compensation to the owner for any damage or loss he may sustain in consequence of his building or any part thereof being set back.

(2) The Corporation may, on such terms as it thinks fit, allow any building to be set forward for the improvement of the line of the street."

(emphasis supplied)

28. In furtherance of notice, the Corporation is required to initiate action under Sections 322 and 323 of the Act of 1956. The said Sections 322 and 323, read thus:-

"322. Prohibition of obstruction in streets - (1) No person shall, except with the written permission of the Commissioner granted in this behalf and in accordance with such conditions including the payment of rent or fee, as he may impose either generally or specially in this behalf :-

(a) erect or setup any wall, fence, rail, post, step, booth or other structure whether fixed or movable or whether of a permanent or temporary nature, or any fixture in or upon any street so as to form an obstruction to, or an encroachment upon, or a projection over, or to occupy any portion of such street, channel, drain, well or tank.

(b) deposit upon any street or upon any channel, drain or well in any street or upon any public place, any stall, chair, bench box, ladder, bale or other thing whatsoever, so as to form an obstruction there to or encroachment thereon.

(2) Whoever contravenes any provision of sub-section (1) shall be punished with imprisonment for a term which may extend to six months or with fine which may extend to five thousand rupees or with both and with further fine which may extend to one hundred rupees for every day on which such contravention continues after the date of first conviction for such offence.

(3) Without prejudice to the action under sub-section (2), the Commissioner notwithstanding anything contained in this Act, may after giving such notice as may be prescribed, cause to be removed any obstruction or encroachment as described in

clause (a) and (b) of sub-section (1).

(4) Any of the things caused to be removed by the Commissioner under sub-section (3), shall, unless the owner thereof turns up to take back such things and pays to the Commissioner the charges for the removal and storage of such things, be disposed of by the Commissioner by public auction or in such other manner and within such time as the Commissioner thinks fit.

(5) The Police Officer shall not investigate into the offence under this Section except on a report made in writing in this behalf by the Commissioner."

(emphasis supplied)

Section 323 :

"Streets not to be opened or broken up and building materials not to be deposited there in without permission.- (1) Except in such cases as the Government may by general or special order exempt from the operation of this Section, no person shall, except with the permission of the Commissioner and in accordance with such terms and conditions, including payment of rent or otherwise, as the Commissioner may impose either generally or in each special case-

(a) open, break up, displace, take up or make any alteration in or cause any injury to, the soil or pavement, or any wall, fence, post, chain or other material or thing forming part of any street or in any open space vested in the Corporation; or

(b) deposit any building material in any street or in any person space vested in the Corporation; or

(c) set up in any street or in any open space vested in the Corporation any scaffold or any temporary erection for the purpose of any work whatever, or any posts, bars, rails, boards or other things by way of enclosure, for the purpose of making mortar or

depositing bricks, lime, rubbish or other materials.

(2) Any permission granted under clause (b) or (c) of sub-section (1) shall be terminable at the discretion of the Commissioner on his giving not less than twenty four hours' written notice of the termination thereof to the person to whom such permission was granted.

(3) The Commissioner may without notice—

(a) cause the soil or pavement or any wall, fence, post, channel or other material forming part of the street to be restored to the condition it was in before any opening or breaking up or displacement, or alteration or damage made or done without the permission of the authority specified in sub-section (1);

(b) cause to be removed any building materials, any scaffold or any temporary erection, or any posts, bars, rails, boards or other things by way of enclosure, which have been deposited or set up in any street or in any open space vested in the Corporation without any permission of the authority specified in sub-section (1) or which, having been deposited or set up with such permission, have not been removed within the period specified in the notice issued under sub-section (2) and recover the costs of such restoration or removal from the offender."

29. The purport of Section 305 has been considered by the Supreme Court in the case of *K. N. Palsikar* (supra). In paragraph 14 the Supreme Court observed thus:-

"14. Regarding point No. 1, we agree with the High Court that there is no provision in the Act for enabling the Corporation to withdraw from the acquisition proceedings. In fact, it seems to us that there is automatic vesting of the land in the Corporation under Sec. 305 once the requisite conditions are satisfied.

(emphasis supplied)

In paragraph 15 of the same judgment the Supreme Court has left the question open as to when the land affected by a notice vests in the Corporation. It noted, does it vest upon giving of notice or when the part or some portion of the part projecting beyond the regular line or beyond the front of the immediately adjoining building is removed, or when the building being rebuilt is set back ? Notably, this observation has been made in the context of the question about the date of vesting to be reckoned for determination of compensation.

30. This decision is also an authority on the proposition about the method of determining compensation. The Court upheld the principle expounded in the case of *The Borough Municipality of Ahmedabad Vs. Javendra Vajubhai Divatia*[7], in which compensation was determined on the principles underlying Sections 23, 24 and 25 of the Land Acquisition Act, to be "reasonable compensation".

31. The Single Judge of this Court in the case of *Jaswani Bhai Doshi Vs. Indore Municipal Corporation and others*[8] took almost the same view as taken by the learned Single Judge in the present common judgment under appeal – that no person can be deprived by the Corporation of his right to property without acquiring land affected because of the removal of obstructions or encroachments within the street line. This decision relies on the exposition of the Supreme Court in the case of *Chairman Indore Vikas Pradhikaran Vs. Pure Industrial Coke and Chemicals Ltd. and others*[9]. However, on close scrutiny of the judgment in *Jaswani Bhai Doshi* (supra), it is noticed that the scheme of the Act of 1956 has not been analyzed at all, which, as noted by us is a self-contained Code. In our view, no acquisition procedure is necessary for taking action for removal of obstructions or encroachments within the street line delineated in the Town Planning Scheme in vogue. All that the Corporation is expected to do is to express its intention by issuance of notice under Section 305; and thereafter proceed to give notice for invoking action under Sections 322 or 323 of the Act of 1956. The land and building falling within the street line vest in the Corporation after removal of obstruction or encroachment resulting in portion of land added to the street by such setting back, by a legal fiction created in that regard. The person likely to be affected

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7. AIR 1937 Bom. 432
8. 2008 (III) MPWN 88
9. (2007) 8 SCC 705

by such action is entitled only for reasonable compensation payable under Section 306 of the Act of 1956, in the event of removal of obstruction or encroachment within the street line.

32. In our opinion, considering the scheme of the Act of 1956 as a whole, determination of compensation required to be paid under section 306 does not mean that the Corporation is obliged to follow the procedure for acquisition of land to be affected by street line and a building line on either side or on both sides of any street existing or proposed as a precondition, as is contended. For, the portion of the land so earmarked for a street line and a building line in the Town Planning Scheme as per the Scheme of the Act of 1956, automatically vest in the Corporation consequent to removal of obstructions or encroachments on such portion of the land for the stated purpose. The procedure for acquisition of portion of land affected by a street line or a building line on either side or on both sides of any street existing or proposed, is not envisaged in the Act of 1956.

33. The meaning of expression "public street" has been specified in Section 5 (49) of the Act of 1956, which reads thus :-

> "5 (49) – **"public street"** means any street -
>
> (a) over which the public have a sight of way; or
>
> (b) which have been heretofore leveled, paved, metalled, asphalted, channeled, severed or repaired out of municipal or other public funds; or
>
> (c) which under the provisions of the Act becomes a public street, and includes-
>
> (i) the roadway over any public bridge or causeway;
>
> (ii) the footway attached to any such street;
>
> (iii) public bridge or causeway, and the drains attached to any such street, public bridge or causeway;"

It may be useful to advert to the definition of the "street" given in Section 5 (55) of the Act of 1956 which reads thus :-

> "(55) **"street"** means any road, foot-way, square, court alley or passage, accessible, whether permanently or temporarily

to the public, whether a thoroughfare or not;

and shall not include every vacant space, notwithstanding that it may be private property and partly or wholly obstructed by any gate, post chain or other barrier, if houses, shops or other buildings abut thereon, and if it is used by any persons as means of access to or from any public place or thoroughfare, whether such persons be occupiers of such buildings or not;

but shall not include any part of such space which the occupier of any such building has a right at all hours to prevent all other persons from using as aforesaid;

and shall include also the drains on either side and the land whether covered or not by any pavement, verandah or other erection, which lies on either side of the roadway up to the boundaries of the adjacent property, whether that property be private property or property reserved by Government or by the Corporation for any purpose other than a street;

The expression "street line" has been defined in Section 5 (56) which reads thus :-

"(56) **"street line"** means a line dividing the land comprised in and forming part of a street from the adjoining land;"

34. Thus, Section 305 is a provision to invest power in the Corporation to regulate line of building; coupled with a duty to remove the obstruction or encroachment within the street in terms of Section 322 of the Act. Indeed, if the Corporation intends to remove obstructions or encroachments within the street, is obliged to follow the procedure prescribed in Section 322 – of issuing notice in that behalf. Significantly, Section 322 (3) contains a "non-obstante clause", giving full power to the Commissioner to cause to remove any obstruction or encroachment on any part of the street, after giving notice to the person concerned. The person affected by removal of such obstruction or encroachment within the street line as aforesaid may be entitled for compensation, as specified in Section 306 of the Act, which reads thus :-

"306. Compensation – (1) No compensation shall be claimable by an owner for any damage which he may sustain in consequence of the prohibition of the erection of any

building.

(2) The Corporation shall make reasonable compensation to the owner for damage or loss which he may sustain in consequence of the prohibition of the re-erection of any building or part of a building except in so far as the prohibition is necessary under any rule or byelaw:

Provided that the Corporation shall make full compensation to the owner for any damage he may sustain in consequence of his building or any part thereof being set back unless for a period of three years or more immediately preceding such notice the building has by reason of its being in a ruinous or dangerous condition become unfit for human habitation or unless an order of prohibition issued under section 286 has been and still is in force in respect of such building.

(3) The Corporation shall make reasonable compensation to the owner for any damage or loss which he may sustain consequence of the inclusion of his land in a public street but in assessing such compensation, regard shall be had to the benefits accruing to that owner from the development of the land belonging to him and affected by such street."

35. At this stage itself, it will be useful to advert to Section 387 of the Act of 1956, which reads thus :-

"387. Arbitration in cases of compensation, etc.- (1) If an agreement is not arrived at with respect to any compensation or damages which are by this Act directed to be paid, the amount and if necessary the apportionment of the same shall be ascertained and determined by a Panchayat of three persons of whom one shall be appointed by the Corporation, one by the party, to or from whom such compensation or damages may be payable or recoverable, and one, who shall be Sarpanch, shall be selected by the members already appointed as above.

(2) If either party or both parties fail to appoint members within one month from the date of either party receiving written

notice from the other of claim to such compensation or damages, or if the members fail to select a Sarpanch, such members as may be necessary to constitute the Panchayat shall be appointed, at the instance of either party, by the District Court.

(3) In the event of the Panchayat not giving a decision within one month or such other longer period as may be agreed to by both the parties from the date of the selection of the Sarpanch or of the appointment by the District Court of such members as may be necessary to constitute the Panchayat, the matter shall, on application by either party be determined by the District Court which shall, in which the compensation is claimed in respect of land, follow as far as may be the procedure provided by the Land Acquisition Act, 1894, for proceedings in matters referred for the determination of the Court:

Provided that-

(a) no application to the Collector for a reference shall be necessary, and

(b) the court shall have full power to give and apportion the costs of all proceedings in manner it thinks fit.

(4) In any case where the compensation is claimed in respect of land and the Panchayat has given a decision, either party, if dissatisfied with the decision, may within a month of the date thereof apply to the District Court and the matter shall be determined by the District Court in accordance with the provisions of sub-section (3).

(5) In any case where the compensation is claimed in respect of any land or building, the Corporation may after the award has been made by the Panchayat or the District Court, as the case may be, take possession of the land or building after paying the amount of the compensation determined by the Panchayat or the District Court to the party to whom such compensation, may be payable. If such party refuses to accept

such compensation, or if there is no person competent to alienate the land or building, or if there is any dispute as to the title to the compensation or as to the appointment of it, the Corporation shall deposit the amount of the compensation in the District Court, and take possession of such property."

(emphasis supplied)

Section 307 is a general provision empowering the Commissioner to pull down or remove the work not in conformity with the bye-laws or scheme or any other requirement. In our opinion, the dispensation provided in the Act of 1956, to ensure clearance of all the obstructions or encroachments within the street line, is a self-contained Code; and not linked either to the provisions of the Act of 1973 or the Central enactment such as Land Acquisition Act or Act of 2013. The dispensation mandates the Commissioner to remove all the encroachments and obstructions on any part within the street line.

36. The moot question is : whether before initiating any action with reference to section 305 of the Act, is it necessary to first acquire the affected portion of the land or building obstructing or encroaching upon the street line delineated in the Scheme ? From the Scheme of the Act of 1956 and the setting in which Section 305 is placed, it is obvious that the regime of acquisition is not applicable for initiating action under Section 305. Nothing more is required to be done for that purposes. The regime of acquisition is applicable in respect of acquisition of the land for effectuating the other land uses specified in the Scheme, in relation to the concerned land with reference to provisions of Act of 1956 read with Act of 1973. However, when it is a case of requirement of portion of land falling within the street line, the Corporation is free to proceed to remove the obstructions or encroachments thereon, by simply invoking its power under Sections 305 and 322, by expressing its intention to do so by issuance of notice in that behalf. Hence, there is no requirement, in law, to follow procedure of acquisition as is relevant for other uses specified in the Town Planning Scheme in respect of which provision of vesting is absent.

37. Because of the special dispensation envisaged for development and maintenance of streets in the municipal or planning area, this power cannot be unbridled or unguided. It is required to be exercised on the basis of a Scheme which has been finalized by following stipulated procedure under the Act of 1973, by inviting public objections thereto. That exercise having been

completed, the provisions of the Act such as Section 305 of the Act of 1956, cast duty on the Corporation to implement that Scheme by construction of street after removing the obstructions and encroachments within the street line in conformity with the Scheme. The Scheme of the provisions of Act of 1956 regarding development and maintenance of streets by its very nature, is a self-contained Code.

38. Reliance was placed by the counsel for the writ petitioners on the decision of the Supreme Court in the case of *State of Uttar Pradesh Vs. Hari Ram*[10] to buttress the argument about the effect of deeming provision in Section 305 of vesting of the property in the Corporation. The Court has observed that in interpreting the provision of legal fiction, the Court is required to ascertain the purpose for which the fiction is created and after ascertaining the same, assume all those facts and consequences which are incidental or inevitable corollaries to be given effect to the fiction. The meaning of expression "vest" given in the different dictionaries has been referred to in this decision. In paragraph 30, the Court noted as under :-

> "30. Vacant land, it may be noted, is not actually acquired but deemed to have been acquired, in that deeming things to be what they are not. Acquisition, therefore, does not take possession unless there is an indication to the contrary. It is trite law that in construing a deeming provision, it is necessary to bear in mind the legislative purpose. The purpose of the Act is to impose ceiling on vacant land, for the acquisition of land in excess of the ceiling limit thereby to regulate construction on such lands, to prevent concentration of urban lands in the hands of a few persons, so as to bring about equitable distribution. For achieving that object, various procedures have to be followed for acquisition and vesting. When we look at those words in the above setting and the provisions to follow such as sub-section (5) and (6) of Section 10, the words "acquired" and "vested" have different meaning and content. Under Section 10 (3), what is vested is de jure possession not de facto, for more reasons that one because we are testing

10. (2013) 4 SCC 280

the expression on a statutory hypothesis and such an hypothesis can be carried only to the extent necessary to achieve the legislative intent."

39. This decision is also an authority on the proposition that possession does not follow with the vesting of the property due to legal fiction. That aspect has been considered in paragraphs 31 to 39 of the decision. By considering the provisions of the Act under consideration, the Supreme Court opined that vesting is only *de jure* possession and not *de facto* possession. There can be no difficulty in applying this principle to the provisions such as Section 305 of the Act of 1956. However, it is not the case of the Corporation that it wants to take forcible possession of the property so vested in it. The Corporation will have to and must resort to statutory option of additionally issuing notice under Sections 322 or 323 as the case may be, of the Act of 1956, before proceeding with the action of removal of the obstructions and encroachments falling within the street line. That will be permissible, irrespective of the willingness or unwillingness of the person likely to be affected to surrender possession of such property, being procedure established by law – to dispossess or taking over the possession of the property for construction of road or widening of the existing road for development of the area, as per the Town Planning Scheme.

40. The fact that the Corporation has been empowered to remove obstructions and encroachments within the street line without doing anything more in terms of Section 305, does not mean that the person affected by such action can be deprived of his property without payment of any compensation for the damage or loss to his property. That is required to be done in terms of proviso below sub-section (1) of section 305 read with and subject to Section 306 of the Act of 1956. This is the procedure established by law enacted by the State Legislature, who is competent to enact such a law with reference to Entry No.5 of List-II in Schedule-VII of the Constitution. If the procedure prescribed by the provisions of section 305 and 306 of the Act of 1956 for payment of compensation is followed, the person affected by such action cannot complain about deprivation of his property having been done without authority of law, within the meaning of Article 300-A of the Constitution of India.

41. The provisions, such as Sections 305 and 306 of the Act of 1956, are required to be invoked in larger public interest and for implementation of the final Scheme propounded under the Act of 1973. That is the obligation of the

Corporation. The purpose for enacting such provisions is to ensure that the streets which are the life line of the City are indispensable for holistic development of the area and including for free traffic movement. All that the Corporation is expected to do is to offer "reasonable compensation" for any damage or loss caused to the owner of the affected land or building, as per Section 306 of the Act of 1956. Further, if the affected person is not satisfied with the grant/non-grant of compensation or being insufficient, is free to resort to remedy of Arbitration under Section 387 of the Act of 1956.

42. The grievance of the writ petitioners, is that, the persons likely to be affected cannot be uprooted at a short notice and that too without offering them a just and fair compensation for the likely damage or loss caused to them because of the proposed action. The question whether compensation amount must be paid to the affected person before commencing the action under Section 305 read with Section 322 of the Act of 1956, to remove obstructions and encroachments within the street line, is no more *res integra*. In a recent decision of the Division Bench of our High Court in W.A. No.397/2010 dated 30.9.2010, Indore Bench following another decision of the Division Bench dated 29.9.2010, in the Case of *Ravi Kumar Son of Shanti Lal Jain and another Vs. Indore Municipal Corporation and others* in Writ Appeal No.388 of 2010, it has been held that the language of the relevant provision does not suggest or make out that Corporation is obliged to first pay reasonable compensation to the owner for any damage or loss that he may sustain in consequence of the setback and vesting of any portion of the property in the Corporation as observed by the learned Single Judge in *Suresh Singh Kushwaha* (supra). Following the aforesaid decisions, recently, learned Single Judge of our High Court in the case of *Manohar Saraf Vs. Indore Municipal Corporation and others*[11], has answered this proposition against the writ petitioners. We are in agreement with this view.

43. A priori, it is not open to the writ petitioners to raise that argument to question the proposed action of the Corporation on the argument under consideration. Hence, this contention is rejected. For the same reason, the argument of the writ petitioners that the possession is linked to the obligation to pay reasonable compensation, is rejected.

44. It was argued that forcible possession cannot be taken from the owner

11. 2014 SCC Online MP 7755

of the land which is affected or falling within the street line. Action to be taken under Section 305 read with Section 322 of the Act may appear to be a coercive action, but, in law, after issuance of notice expressing intention to invoke powers under Section 305 of the Act of 1956 in relation to the obstruction and encroachment found within the street line, such land and property vest in the Corporation upon removal of obstructions and encroachments found within the street, for implementation of the Town Planning Scheme and to construct public road or for road widening of the existing public road, by taking recourse to Section 322 of the same Act. Issuance of notice for that purpose will be compliance of the procedure established by law.

45. The provisions of the Act of 1956 in no way stipulate that forced action should not be resorted to and the implementation of the Town Planning Scheme regarding construction of road or road widening of the existing road can be done only after the land owner decides to voluntarily surrender possession of portion of the land affected by such street. The law, however, empowers the Corporation coupled with a public duty to proceed to remove all the obstructions and encroachments found within the street line for construction of new road or widening of the existing road, as the case may be.

46. The procedure for removing obstruction within the street is explicitly stipulated in Sections 322 and 323 of the Act of 1956. The writ petitioners have not challenged the said provisions being invalid as such. The Corporation is, therefore, free to resort to that procedure to regulate line of building; and the affected persons at best will become entitled for compensation due to damage or loss caused to him, as per Section 306 of the Act of 1956 with further option to resort to remedy of Arbitration for compensation under section 387 of the same Act. If the argument of the writ petitioners that possession of the vested property can be taken by the Corporation only if the owner voluntarily surrenders the portion of land and building affected by street line is accepted, it would inevitably result in rewriting of the procedure prescribed in section 322/323 of the Act of 1956. That cannot be countenanced.

47. On conjoint reading of Sections 305, 322 and 323 of the Act of 1956, it would mean that if the land within the street line, if is a private property as per the final Town Planning Scheme under the Act of 1973 or section 291 of the Act of 1956 is formulated and adopted, upon issuance of notice in exercise of power under Section 305 of the Act of 1956 by the Corporation expressing

intention to remove obstructions and encroachments falling with such street line and if the owner of the land or occupant of the building fails to remove such obstruction or encroachment, it is the bounden duty of the Corporation under Sections 322 and 323 of the Act of 1956 to remove such obstruction or encroachment on expiry of notice period with utmost dispatch for implementation of the Town Planning Scheme, to pave way for construction of new road or widening of the existing road, as the case may be, in larger public interest.

48. The other ground raised by the writ petitioners, is about the provision regarding compensation. In that, Section 306 does not provide for any method or procedure to be adopted by the Corporation "for determination of reasonable compensation". The argument in this behalf is as follows. Firstly, the Act of 1956 invests unguided and arbitrary power in the officer(s) of the Corporation to determine any fanciful amount to be paid as compensation, in the name of offering reasonable compensation to the affected person. Further, assuming that the power cannot be questioned, the provision of reasonable compensation is not in conformity with the spirit of Article 21 and 300-A of the Constitution.

49. In our view, if a person is to be deprived of his property and also inevitably his right to life, because of forced dispossession, in exercise of power under Sections 322 or 323 of the Act of 1956, his Constitutional right under Article 300-A nor under Article 21 will be abridged. That right is not an absolute right. It can be regulated and modulated by a law made by the Legislature or Parliament. That law must stand the test of legislative competence and of being rational and in larger public interest.

50. As the Act of 1956 not only obligates the Corporation to pay "reasonable compensation", but, also provides for remedy regarding redressal of grievance about its inadequacy, by way of Arbitration, under Section 387 of the same Act. It is thus a complete code in itself to safeguard the interest of right of the affected person.

51. In the case of *K. T. Plantation Private Limited and another Vs. State of Karnataka*[12], the Constitution Bench after analyzing the gamut of decisions on the question of payment of compensation in Paragraph No. 183

12. (2011) 9 SCC 1

has noted that constitutional obligation to pay compensation to a person who is deprived of his property primarily depends upon the terms of the statute and the legislative policy. In Paragraph No.189 the Court noted that requirement of public purpose, for deprivation of a person of his property under Article 300-A, is a precondition, but no compensation or nil compensation or its illusiveness has to be justified by the State on judicially justiciable standards. Further, measures designed to achieve greater social justice, may call for lesser compensation and such a limitation by itself will not make legislation invalid or unconstitutional or confiscatory. It is for the State to justify its stand on justifiable grounds which may depend upon the legislative policy, object and purpose of the statute and host of other factors. In Paragraph No.205 the Court observed thus :-

> "205 – Plea of unreasonableness, arbitrariness, proportionality, etc. always raises an element of subjectivity on which a court cannot strike down a statute or a statutory provision, especially when the right to property is no more a fundamental right. Otherwise the court will be substituting its wisdom to that of the legislature, which is impermissible in our constitutional democracy."

Similarly, in Paragraphs No.217 and 218 the Court observed thus :-

> "217 – Rule of law as a principle contains no explicit substantive component like eminent domain but has many shades and colours. Violation of principle of natural justice may undermine rule of law so also at times arbitrariness, unreasonableness etc., but such violations may not undermine rule of law so as to invalidate a statute. Violation must be of such a serious nature which undermines the very basic structure of our Constitution and our democratic principles. But once the Court finds, a Statute, undermines the rule of law which has the status of a constitutional principle like the basic structure, the above grounds are also available and not vice versa.
>
> Any law which, in the opinion of the court, is not just, fair and reasonable, is not a ground to strike down a statute because such an approach would always be subjective, not the will of the people, because there is always a presumption of

constitutionality for a statute.

> 218 – "The rule of law as a principle, it may be mentioned, is not an absolute means of achieving the equality, human rights, justice, freedom and even democracy and it all depends upon the nature of the legislation and the seriousness of the violation. The rule of law as an overarching principle can be applied by the constitutional courts, in the rarest of rare cases, in situations, we have referred to earlier and can undo laws which are tyrannical, violate the basic structure of our Constitution, and our cherished norms of law and justice."
>
> (emphasis supplied)

52. In the context of Act of 1956 and more so in view of the opinion reached by us that the expression of reasonable compensation used in Section 306 is flexible one with remedy of Arbitration under Section 387 and can also encompass the factors delineated in the Central Act of 2013, the dispensation provided in the Act of 1956 cannot be treated as unconstitutional by any standards.

53. It is then contended that the expression "reasonable compensation" has not been defined in the Act of 1956. Further, the Act of 1956 does not delineate the factors to be reckoned for determining compensation amount, as is predicated in the Act of 2013. Even this argument does not commend to us. The fact that expression "reasonable compensation" has not been defined in the Act does not and cannot permit the Corporation to offer any fanciful amount towards damages. The expression "reasonable compensation" encompasses within its sweep, amount which is realistic and any prudent man would accept it as being in accordance with sound reason – which would mean to be just and proper. The Authority can certainly reckon the factors delineated in the Act of 2013 and also the incentive of additional FAR given in Rule 61 of the M.P. Bhumi Vikas Rules of 2012, for determination of reasonable compensation to be paid to the affected eligible land owner on case to case basis. If the Authority fails to do so, there is statutory remedy provided to the concerned person by way of Arbitration under section 387 of the Act of 1956, in which all issues relevant in that behalf can be analyzed and adjudicated.

54. The writ petitioners heavily relied on the dictum of the Supreme Court in

the case of *Nagpur Improvement Trust and another Vs. Vithal Rao and others*[13] to contend that the dispensation in Section 306 for determination of compensation is unconstitutional being arbitrary as it invests unguided power in the Authority to determine amount of reasonable compensation. Even this decision, in our opinion, will be of no avail to the writ petitioners for the view that we have already taken, that enough safeguards have been provided in the Act of 1956 to ensure that reasonable compensation is paid to the affected persons for the damage or loss caused to him as a consequence of action taken by the Corporation in furtherance of its obligation to remove all the obstructions or encroachments within the street line. As already noted, if the person is not satisfied with the quantum of compensation determined by the appropriate Authority of the Corporation is free to take recourse to statutory remedy of arbitration under Section 387 of the Act and substantiate the fact that the quantum of compensation should be higher than the one determined by the Authority.

55. Merely because section 306, per se, does not refer to factors as are mentioned in the Act of 2013, the provision cannot be labelled as unconstitutional. For, there is inbuilt mechanism to compensate the eligible owner affected on those factors under Section 305 read with Section 306; and with additional option of invoking statutory remedy of Arbitration under section 387 of the Act sub-Section (3) refer to those factors. Considering the above the challenge to the validity of section 306 cannot be taken forward.

56. It is well settled that the validity of the Act cannot be doubted merely by recording a finding that the Legislature should have opted for further option or should have drafted the provision in a different manner so as to provide other matters.

57. That takes us to the last ground urged by the writ petitioners about discriminatory treatment meted out to affected persons within the same locality and whose land is affected for the same purpose of road construction or for widening of the existing road. In that, in the neighbourhood of the writ petitioners, portion of the land is acquired for the purpose of a National or State Highway project and the land affected by the implementation of Town Planning Scheme with reference to the provisions of the Act of 1956 in

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13. (1973) 1 SCC 500

particular, for construction of road or new road or widening of the existing road, the compensation amount to be received would vary and be different. This argument, in our opinion, is completely misplaced. In the first place, for the view taken hitherto, in the preceding paragraph, the argument becomes unavailable. In any case, the argument is in ignorance of the fact that the two sets of persons are governed by two sets of legislations. The purpose underlying the two legislations is markedly different. Understood thus, the two situations are incomparable and, therefore, the argument of discriminatory treatment is fallacious.

58. Counsel for the writ petitioners, no doubt wanted us to examine other issues which, however, are case specific. In our opinion, those issues can be answered by the Competent Authority of the Corporation in the first place, if representation is made by the writ petitioners in that behalf within one week from today. The representation so made be decided by recording reasons for the conclusion arrived at by the concerned Authority expeditiously; and if the decision is adverse to the writ petitioners, they would be free to take recourse to appropriate remedy within one week from the date of communication of the decision of the Competent Authority. This time schedule must be adhered to in the light of the submission made on behalf of appellant Corporation that the proposed work will have to be substantially completed before the onset of the ensuing monsoon.

59. We make it clear that the writ petitioners have raised specific grounds in respect of facts of the respective cases to contend that the land or the area of the land referred to in the notices received by them under Section 305 do not come within the notified street line. These are all matters which need to be examined by the Competent Authority in the first place. All questions in that behalf are left open.

60. The fact that the Court permitted the writ petitioners to pursue that option may not be construed as any direction given by the Court to the Competent Authority to decide the proposed representation in favour of the writ petitioners. Instead, all aspects of the matter may be examined by the Commissioner or any person authorized by the Commissioner competent to answer that grievance. All questions in that behalf are left open.

61. While parting, we wish to place on record about the ill-advised applications taken out by the writ petitioners (filed along with the writ petitions),

without waiting for the decision in these writ petitions. By these applications, the writ petitioners have requested the Court to grant leave to appeal to approach the Supreme Court, under Article 134 of the Constitution. To observe sobriety, we merely record our displeasure – that the writ petitioners have been ill-advised to take out such applications along with the writ petitions itself. Filing of such applications, is reflection on the High Court – that the Court is bound to dismiss the writ petitions. Further, even if the writ petitioners were to file these applications after the pronouncement of the judgment, in our opinion, the grounds urged before us having been found to be fallacious and founded on complete misunderstanding of the settled legal position, deserve to be rejected.

62. Accordingly, we **allow** the writ appeals filed by the Corporation and **dispose of** the writ petitions filed by the owners and occupants of the land and building in relation to which follow up action is likely to be initiated by the Corporation for removal of obstructions or encroachments on the streets, on the above terms, with no orders as to costs.

63. In view of the disposal of writ petitions, companion applications are also **disposed of.**

Order accordingly.

I.L.R. [2016] M.P., 2974
WRIT PETITION
Before Mr. Justice Sheel Nagu
W.P. No. 4483/2009 (Gwalior) decided on 16 July, 2015.

PRADEEP KUMAR & ors. ...Petitioners
Vs.
MAHILA RAMBETI & ors. ...Respondents

A. ***Civil Procedure Code (5 of 1908), Order 8 Rule 1 (Proviso), Section 151 - Written Statement*** **- Right closed to file Written Statement on record - Application u/S 151 for taking Written Statement on record was dismissed by the Trial Court - Defendants are of rural background with little knowledge of law - Suit was never listed for filing of Written Statement between 22.03.2005 to 08.02.2006 - Held - Reason that the suit was never listed for filing of Written Statement cannot be countenanced in law, as the defendants are statutorily obliged to file**

Written Statement within 30 days or within extendable period of 90 days from the date of service of summons, and it does not require any separate order of the Trial Court - As the defendants are of rural background and not aware with technicalities of law, they require sympathetic consideration - Defendants were granted opportunity to file Written Statement within 30 days subject to paying cost of Rs. 5000/- to the plaintiff - In default of the same, the order will become ineffective and the Trial Court shall proceed with the suit - Petition allowed. (Paras 6.3 to 6.5)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 1 (परंतुक), धारा 151 – जवाबदावा – अभिलेख पर जवाबदावा प्रस्तुत करने का अधिकार समाप्त – जवाबदावा को अभिलेख पर लिए जाने हेतु धारा 151 के अंतर्गत प्रस्तुत आवेदन को विचारण न्यायालय ने खारिज कर दिया – प्रतिवादीगण ग्रामीण पृष्ठभूमि के हैं जिन्हें विधि का अल्पज्ञान है – दिनांक 22.03.2005 से 08.02.2006 के मध्य वाद कभी भी जवाबदावा प्रस्तुत किये जाने हेतु सूचीबद्ध नहीं किया गया – अभिनिर्धारित – जवाबदावा प्रस्तुत किये जाने हेतु वाद के सूचीबद्ध न किए जाने का कारण विधि द्वारा समर्थन योग्य नहीं है, क्योंकि प्रतिवादीगण समन की तामीली की दिनांक से 30 दिवस अथवा 90 दिन तक बढ़ाई जा सकने वाली अवधि के भीतर जवाबदावा प्रस्तुत करने के कानूनी दायित्व के अधीन हैं, एवं इस हेतु विचारण न्यायालय का कोई पृथक् आदेश अपेक्षित नहीं है – चूंकि प्रतिवादीगण ग्रामीण पृष्ठभूमि के हैं एवं विधि की बारीकियों के जानकार नहीं हैं, इसलिए सहानुभूतिपूर्वक विचार किया जाना आवश्यक है – वादी को रूपये 5,000/– व्यय के भुगतान की शर्त पर प्रतिवादीगण को 30 दिन के भीतर जवाबदावा प्रस्तुत करने का अवसर प्रदान किया गया – इसके व्यतिक्रम की दशा में, यह आदेश प्रभावहीन हो जाएगा एवं विचारण न्यायालय वाद में आगे कार्यवाही चलाएगा – याचिका स्वीकार।

***B. Civil Procedure Code (5 of 1908), Order 8 Rule 1 - Proviso - Written Statement* - Whether the provisions of Order 8 Rule 1 of C.P.C. relating to filing of Written Statement within 30 days or within extended period of 90 days from the date of service of summons is directory or mandatory - Held - The proviso to Order 8 Rule 1 of C.P.C. ostensibly appears to be mandatory, but it is directory provided the defendants demonstrate reasonable cause for the delay. (Para 6.1)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 1 – परंतुक – जवाबदावा – क्या समन तामीली की दिनांक से 30 दिन अथवा 90 दिन तक बढ़ाई जा सकने वाली अवधि के भीतर जवाबदावा प्रस्तुत करने संबंधी सि.प्र.सं. का आदेश 8 नियम 1 के उपबंध निदेशात्मक हैं अथवा आज्ञापक – अभिनिर्धारित – सि.प्र.सं.

के आदेश 8 नियम 1 का परंतुक दृश्यतः आज्ञापक प्रतीत होता है, परंतु यह निदेशात्मक है बशर्ते कि प्रतिवादीगण विलंब हेतु युक्तियुक्त कारण प्रकट करें।

Cases referred:

(2005) 4 SCC 480, (2014) 2 SCC 302, (2006) 1 SCC 75, (2006) 1 SCC 46.

S.N. Seth, for the petitioner.
N.K. Gupta with *Ravi Gupta*, for the respondents/State.

ORDER

SHEEL NAGU, J. :- The present petition under Article 227 of the Constitution of India assails interlocutory orders dated 05.02.2006 (Annexure P/1) and 07.08.2009 (Annexure P12) passed in Civil Suit No. 62A/2006 by 4th Civil Judge Class-II Bhind and 3rd Civil Judge Class II Bhind respectively whereby the right of the petitioner-defendants No. 1, 2 and 3 to file a written statement was closed and thereafter an application under Section 151 CPC for taking written statement on record was dismissed.

2. The factual background giving rise to the present dispute is that on service of notice of a suit, filed by the respondents-plaintiffs, the petitioner-defendants No. 1, 2 and 3 appeared before the Trial Court for the first time on 22.03.2005.

2.1 Thereafter, the suit continued to be listed on various dates ie. 11.04.2005, 26.04.2005, 03.05.2005, 11.05.2005, 27.06.2005, 30.06.2005, 15.07.2005, 29.07.2005, 05.08.2005, 05.09.2005, 20.09.2005, 01.10.2005, 15.10.2005, 24.10.2005, 16.11.2005, 29.11.2005, 21.12.2005, 16.01.2006 and 29.01.2006. In all these hearings, the suit was adjourned merely for the sake of hearing on the application for temporary injunction under Order 39 Rules 1 & 2 CPC.

2.2 Eventually, on 22.03.2005, the right of petitioners/defendants to file written statement was closed. Thereafter on 19.05.2006 an application under Section 151 CPC was filed for taking WS on record which came to be rejected on 07.08.2009. On the anvil of above said factual matrix the orders dated 22.03.2005 and 07.08.2009 are under challenged herein.

3. Learned counsel for the rival parties are heard.

4. Learned counsel for petitioner/defendants No. 1,2 and 3 relying upon the three Judge Bench decision in the case of *Kailash versus Nanku*, (2005) 4 SCC 480 contends that the Apex Court while considering the scope, extent and sweep of proviso to Order 8 Rule 1 CPC held that the same is not mandatory since it relates to the domain of procedural law and that the question of grant of more time to file WS than prescribed by statute shall depend upon the reasonableness of the cause shown for delay. The Apex Court also held that the inconvenience caused to the other party for delay on the part of the defendants to file WS can very well be compensated by grant of cost. It is further submitted by the learned counsel for petitioners/defendants No. 1, 2 and 3 that right from 22.03.2005 till the passing of the impugned order dated 08.02.2006, the suit was never fixed for the purpose of filing of written statement and, therefore, the trial Court was not justified in closing the right to file WS, for which the suit was never listed till 08.02.2006. It is thus, submitted that the application for taking WS on record filed after expiry of 90 days, should have been allowed.

4.1 Lastly, it is submitted by the learned counsel for petitioner that the maximum time limit of 90 days fixed by the Order 8 Rule 1 CPC came into existence w.e.f. 01.07.2002 and the possibility of the lawyers of the lower Court, who are not very updated, being ignorant about the said amendment in law, cannot be ruled out.

5. Per contra, the learned counsel for respondent-plaintiffs relying upon the decision of this Court in the case of *Sandeep Thapar Vs. SME Technologies (P.) Ltd.*, (2014) 2 SCC 302 (Paras 7, 8 & 9) submits that the right to file WS was rightly closed, in the given facts and circumstances where despite elapse of enough time after service of summons the defendants No. 1, 2 and 3 failed to file WS. In this regard, it is submitted that a period as long as 11 months elapsed between the first appearance of the defendants till their right to file written statement was closed on 08.02.2006. It is further submitted by the respondents/plaintiffs that even the application for taking WS on record was filed with much delay i.e. after nearly two and half months of closing of the right to file WS. It is submitted that the defendants are clearly guilty of delay and latches with no reasonable explanation, and thus the course of closing the right to file WS was rightly adopted by the trial Court which could not have waited for filing of WS till eternity. It is lastly submitted that even if the suit was not listed for the purpose of filing of WS, the statutory provision in

Order 8 Rule 1 CPC obliges the defendants to file WS with in a specified period of time. This time cannot be extended beyond the extendable period of 90 days. It is thus submitted that running of the time period mentioned in the Order 8 Rule 1 CPC and it's proviso is not dependent upon passing any order of the Court requiring the defendants to file WS.

6. For convenience and ready reference, the provision of Order 8 Rule 1 as amended on 01.07.2002 is reproduced below:

> *Written Statement- The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence.*
>
> *Provided that where the defendant falls to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.*

6.1 This Court need not go into the prolixity of interpreting the said provision, as the said exercise has already been undertaken by the Apex Court in the decision of Kailash (Supra), where Order 8 Rule 1 CPC and its proviso which ostensibly appears to be mandatory, was held to be directory provided the defendants demonstrate reasonable cause for delay and also by laying down that inconvenience caused to the opposite side i.e. the plaintiffs, can very well to be compensated by imposing.

6.2 It is settled principle of law that every suit deserves to be decided on its own merits without allowing any of the parties to take advantage of technicalities of law unless, the conduct of defaulting parties compels the Court to render a judgment not on merits but solely on default.

6.3 The reason assigned by the petitioners/defendants No. 1, 2 and 3 in their application under Section 151, CPC filed on 19.05.2006 for taking WS on record, which is annexed herewith as Annexure P/4, assigns dual reasons. First being that the defendants are persons of rural background with little knowledge of technicalities of law, and the other, that the suit was never listed for filing of WS between 22.03.2005 t0 08.02.2006.

6.4 The reason of the suit not being listed for filing of WS cannot be

countenanced in law as the defendants No. 1, 2 and 3 are statutorily obliged to file WS within 30 days or within extendable period of 90 days from the date of service of summons. The running of this period of 30/90 days is not dependent upon the suit being fixed for the purpose of filing of WS. It is the paramount duty of every defendant to file WS within the said prescribed period which does not require any separate order of the trial Court. On failure to do so, the defendants run the risk of their right to file WS being closed.

6.5 As regards the other ground that the defendants No. 1, 2 and 3 are of rural background, the same deserves consideration not merely because the petitioners/defendants belong to rural background but because any litigant irrespective of his social, geographical or financial background is not aware of the technicalities of law and after entrusting his case to a lawyer, the litigant is assured and expects the best and prompt legal service from his counsel. Alas!, the litigant is ignorant of the fact that every lawyer is not equipped with the best and prompt legal acumen and experience. Unfortunately with his limited exposure in the field of legal practice, the litigant is required to undertake the impossible task of engaging the most suitable lawyer from amongst hundreds. His field of choice is limited by various factors e.g. his financial capacity, his level of intelligence to pick the best lawyer his social background which more often than not compels him to rely upon advice by relatives and friends which is seldom correct and often misleading.

6.6 Unfortunately, there is no law or mechanism to appropriately assist a litigant faced with aforesaid disabilities to engage the best quality legal service irrespective of his financial and social disabilities.

6.7 To prevent these disabilities from coming in way of litigant and to secure the ends of justice, provisions of the like of Order 6, Rule 17; Order 7 Rule 14(3); Order 8, Rule 1(proviso); Order 8, Rule 1-A(3); Order 18, Rule 17; etc. are incorporated in CPC.

6.8 Therefore, proviso to Order 8 Rule 1 CPC which is relevant herein, is one of the those provisions which irons out the creases and rigidity of law making it flexible, dynamic and practical.

7. Moreso, Order 8 Rule 1 CPC is a procedural provision, not prescribing any consequence for non-filing of WS within 90 days of receipt of summons. As stated above time period for filing WS is directory and not mandatory.

7.1 The following decisions of the Apex Court are worthy of reference: -

Uday Shankar Triyar v. Ram Kalewar Prasad Singh, (2006) 1 SCC 75 [3 Judges' Bench]

"17. Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well-recognised exceptions to this principle are:

(i) where the statute prescribing the procedure, also prescribes specifically the consequence of non-compliance;

(ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;

(iii) where the non-compliance or violation is proved to be deliberate or mischievous;

(iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court;

(v) in case of memorandum of appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant."

Sk. Salim Haji Abdul Khayumsab v. Kumar, (2006) 1 SCC 46

"13. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. [See, Blyth v. Blyth, (1966) 1 All ER 524.] A procedural law should not ordinarily be construed as

mandatory, the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. [See, Shreenath v. Rajesh (1998) 4 SCC 543.]

14. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

15. It is also to be noted that though the power of the court under the proviso appended to Rule 1 of Order 8 is circumscribed by the words "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided for though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form."

7.2 Viewed from another angle, the time period of 90 days being directory and procedural in character, cannot eclipse the substantive right of defendant to file WS, unless compelling reasons exist for doing otherwise.

8. Thus in all probabilities, the defendants No. 1, 2 and 3 may not even be aware of the fact of the requirement of filing a WS, much less the period of time prescribed by law for doing so.

9. In the recent decision of the Apex Court relied upon by the counsel for respondents/plaintiffs in the case of *Sandeep Thapar* (Supra), the earlier three Judge Bench decision in the case of *Kailash* (Supra) has been relied upon granting opportunity to the defendants therein to file written statement within a certain period of time but by imposing cost.

10. In the given facts and circumstances and the law on the subject, this Court is of the considered view that interest of justice would be served if the defendants No. 1, 2 and 3 are granted opportunity to file written statement

within a certain period of time by imposing cost so that, the respondents/ plaintiffs are compensated for the inconvenience.

11. Accordingly, the impugned orders of the trial Court dated 08.02.2006 (Annexure P/1 and 07.08.2009 (Annexure P/2) are set aside to the extent they close the right of the defendants No. 1, 2 and 3 to file WS denting extension of time for filing WS subject to the defendants No. 1, 2 and 3 paying cost of rupees 5,000/- to the respondents/plaintiffs within a period 30 working days from today. In case, the said cost is not deposited within the period prescribed as aforesaid, then this order shall become ineffective and the trial Court shall proceed with the suit.

12. The petition is, therefore, allowed to the extent indicated above.

Petition allowed.

I.L.R. [2016] M.P., 2982
WRIT PETITION
Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice Sanjay Yadav
W.P. No. 4719/2015 (Jabalpur) decided on 20 October, 2015

ESSARJEE EDUCATION SOCIETY ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

(Alongwith W.P. No. 4719/2015, W.P. No. 5331/2015, W.P. No. 5332/2015, W.P. No. 5752/2015, W.P. No. 5753/2015 & W.P. No. 10320/ 2015)

A. Municipal Corporation Act, M.P. (23 of 1956), Sections 132(1)(c)(d)(e), 132-A & 132(6)(o) and Upkar Adhiniyam, M.P., 1981 (1 of 1982), Section 6, Part II - **Petitioner is an Educational Institution - Imposition of taxes; water cess, education cess and urban development cess - Education cess can be levied as per Section 132(6)(o) of 1956 Act and also the water tax u/S 132-A of 1956 Act, but as far as imposition of urban development cess is concerned, its imposition and recovery cannot be upheld as per second proviso to Section 6 of 1981 Adhiniyam, as amended on 21.05.2007 because of the exemption of the lands or buildings or both from payment of the property tax. (Paras 11 to 20)**

क. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 132(1)(सी)(डी)(ई), 132–ए व 132(6)(ओ) एवं उपकर अधिनियम, म.प्र., 1981 (1982 का 1), धारा 6, भाग– II – याची एक शैक्षणिक संस्थान है – करों का अधिरोपण; जल उपकर, शिक्षा उपकर एवं नगरीय विकास उपकर – अधिनियम 1956 की धारा 132 (6) (ओ) के अनुसार शिक्षा उपकर तथा अधिनियम 1956 की धारा 132–ए के अनुसार जल उपकर भी उद्गृहीत किया जा सकता है, परंतु जहाँ तक नगरीय विकास उपकर के अधिरोपण का प्रश्न है, दिनांक 21.05.2007 को 1981 के अधिनियम की धारा 6 के द्वितीय परन्तुक में किये गये संशोधन के अनुसार, भूमि अथवा भवन अथवा दोनों को ही संपत्ति कर के भुगतान से छूट दिये जाने के कारण, उक्त उपकर के अधिरोपण एवं वसूली को मान्य नहीं ठहराया जा सकता।

B. Municipal Corporation Act, M.P. (23 of 1956), Section 136 and Municipality (Determination of Annual Letting Value of Building/Lands) Rules, M.P. 1997, Rule 10(1) - Educational institution **- Whether exemption from payment of property tax under Section 136(c) of 1956 Act means exemption from filing the return - Held - No, even if an institution is exempted from payment of property tax under Section 136(c) of 1956 Act, then also it is obligatory for the owner to file the return as per Rule 10(1) of the 1997 Rules. (Para 34)**

ख. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 136 एवं नगरपालिका (भवनों/भूमियों के वार्षिक भाड़ा मूल्य का अवधारण) नियम, म.प्र. 1997, नियम 10(1) – शैक्षणिक संस्थान – क्या 1956 के अधिनियम की धारा 136(सी) के अंतर्गत संपत्ति कर के भुगतान में दी गई छूट का आशय विवरणी दाखिल करने में दी गई छूट से है – अभिनिर्धारित – नहीं, अधिनियम 1956 की धारा 136(सी) के अंतर्गत यदि किसी संस्थान को संपत्ति कर के भुगतान से छूट प्रदान भी की जाती है, तब भी 1997 के नियम 10(1) के अनुसार उसके स्वामी के लिए विवरणी प्रस्तुत करना बाध्यकारी है।

C. Municipal Corporation Act, M.P. (23 of 1956), Sections 132(1)(c)(d)(e) & 132(6)(o) **- Whether recovery of tax since 2010 is invalid because of retrospective demand - Held - No, as the taxes and cess are of previous years, and due to its non-payment, the demand of those years has been raised after passing of resolution u/S 133 of 1956 Act, so the plea is misconceived. (Para 37)**

ग. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 132(1)(सी)(डी)(ई) व 132(6)(ओ) – क्या भूतलक्षी माँग के कारण वर्ष 2010 से कर की वसूली अवैध है – अभिनिर्धारित – नहीं, चूँकि कर एवं उपकर पूर्ववर्ती वर्षों के

होने एवं उनका भुगतान न किये जाने के कारण, उक्त वर्षों हेतु उनकी माँग, अधिनियम 1956 की धारा 133 के अंतर्गत प्रस्ताव पारित करने के उपरांत, की गई थी, इसलिए यह अभिवाक् भ्रामक है।

Cases referred:

W.P. No. 3987/2008 decided on 12.03.2015 (DB), 2002 (4) MPHT 252, 2015 (1) MPLJ 600, 2004 (1) MPLJ 390.

Siddharth Gupta, for the petitioner.
Samdarshi Tiwari, Dy. A.G. for the respondent/State.
P.K. Kaurav, for the respondent No. 2.

ORDER

The Order of the Court was delivered by : **SANJAY YADAV, J. :-** Present case concerns itself with the legality of the demand notice dated 27.3.2015 issued under Section 175 of the M.P. Municipal Corporation Act, 1956 (hereinafter referred to as '1956 Act'); whereby, Regional Officer, Regional Office No.3, Municipal Corporation, Bhopal has called upon the petitioner to deposit an amount of Rs.21,69,756/- towards minimum essential consolidated tax, consolidated tax, general water cess, education cess and urban development cess (2%) for the financial year 2010-11 to 2013-14 and 2014-15.

2. Petitioner is a society registered under the provisions of M.P. Societies Registration Act, 1973 and is running a private professional technical institution in the name of Corporate Institute of Science and Technology within the municipal limits of respondent-Municipal Corporation, Bhopal.

3. Present writ petition is filed for declaration of Section 132(6)(o) and Section 132(5)(a) of the Act of 1956 as *ultra vires* the Constitution of India and for quashment of permanent orders no.15/2014 and 2/2013 and the demand notice dated 27.3.2015.

4. At the outset, the petitioner, however, gives up the challenge to the vires of Section 132(6)(o) and Section 132(5) (a) of 1956 Act, in view of decision by a Division Bench of this Court in *Hoarding Advertisement People Welfare v. State of M.P.* W.P. No.3987/2008 on 12.3.2015. In view whereof, the petition so far it relates to the challenge to constitutional validity of Section 132(6)(o) and Section 132(5) (a) of 1956 Act, stands dismissed.

5. In respect of the challenge to the Permanent Orders No.15/2014 and 2/2013 and the demand notice dated 27.3.2015, though an objection is raised on behalf of respondent-Municipal Corporation that the petitioner has an alternative efficacious statutory three tier remedy under Sections 147, 148 and 149 respectively, providing a forum for settlement of dispute relating to valuation and the liability. However, taking into consideration the nature of challenge on the ground of sustainability of the imposition of tax/cess on the touchstone of Section 132 of 1956 Act, we decline to accede to the objection raised on behalf of respondents that the petitioner be relegated to avail the remedy under the statute.

6. It is the contention of the petitioner that being an educational institution and having been exempted from payment of property tax levied under Section 135 of 1956 Act, it is not liable to pay the tax levied under Section 132(1), (c), (d) and (e) unless separately determined under Section 132(5) (a) of 1956 Act. It is further contended that the petitioner is not liable to pay general water cess, educational cess and urban development cess (2%) which has been imposed by the Corporation in purported exercise of power under Section 132(6)(o) either, in absence of prior approval of the State Government, as contemplated therein. It is also the contention that having been exempted from property tax, the respondent- Corporation are not justified in realizing other taxes from retrospective year.

7. As regard to challenge of permanent order No.15/2014, it is contended by learned counsel for the petitioner that vide said order, respondent-Corporation has decided for imposition of various other taxes specified under Section 132(1)(c), (d) and (e) of 1956 Act on the basis of property tax values applicable and determined with reference to commercial properties situated at Bhopal. It is also contended that procedure laid down under Section 132(5)(a) has not been followed specifically for determining the rate of taxation with respect to the buildings and lands of educational institution which are exempted from property tax. Instead, determination of tax levied under Section 132(5)(a) is on the basis of determination of tax under Section 132(5)(b). It is contended that since the Corporation has failed to follow the procedure laid down under Section 132(5)(a) for imposition of tax other than property tax, the impugned permanent order no.15/2014 is bad in the eyes of law.

8. As regard to challenge of imposition of urban development cess,

educational cess and water cess, it is urged that the same fall under Section 132(6)(o) of 1956 Act which mandates prior approval of the State Government before imposition of tax thereunder. And, as no prior approval has been sought by the Municipal Corporation for imposing these cess and taxes, that too at highly exorbitant rate of 20% of the property tax leviable on the building, the same is invalid.

9. As regard to challenge of demand notice dated 27.3.2015, it is the contention of learned counsel for the petitioner that no previous notice having been sent to the petitioner and since it is for the first time that the demand is being raised, it was beyond the authority of the Municipal Corporation to have raised demand of tax and cess prior to 2014-15. It is, accordingly, urged that demand of tax/cess qua financial year 2010-11 to 2013-14 is invalid having no authority of law.

10. Respondent-Corporation, however, contradicted these submissions. It is urged that fixation of rates of tax and cess having been left by the legislature with the Municipal Corporation, it is within its power conferred under Section 132(5) of 1956 Act to levy the rate of tax under clauses (c), (d) and (e) of sub-section (1) of Section 132. As to challenge to the imposition of development cess, education cess and water cess. It is contended that the challenge to imposition of development cess and education cess under Section 132(6)(o) of 1956 Act has been considered in the case of *Madhya Pradesh Housing Society v. State of M.P.* 2002 (4) MPHT 252, wherein the competency of the Municipal Corporation to impose the development cess and education cess has been upheld. As to contention regarding water cess, learned counsel for the respondent has relied upon the provisions contained under Section 132-A inserted vide M.P. Act No.15 of 2010 and the decision in *Confederation of Real Estate Developers Association of India* (CREDAI) v. State of M.P. 2015 (1) MPLJ 600 wherein the constitutional validity of Section 132-A has been upheld. Turning on the submission as to incompetency of the respondent-Corporation in imposing tax by taking into consideration the benchmark fixed for the buildings and lands assessed to property tax at the commercial rate, it is urged that the properties within the Municipal Corporation limits being residential and non-residential and the lands and buildings being nomenclatured as "residential" and "commercial or industrial" under the Madhya Pradesh Municipality (Determination of Annual Letting Value of Building/Lands) Rules, 1997 and the buildings and lands of the petitioner

establishment being not a residential nor any industrial activity is carried out, the rate of property tax applicable to a premises where business activity is carried out has rightly been made applicable for determination of rate of tax/ cess under Section 132(1)(c), (d) and (e) and under Section 132(6)(o) of 1956 Act. With these submissions, the respondents justify their action of subjecting the petitioner-establishment to the taxes vide impugned resolution.

11. After considering the rival submissions, issues which crops up for consideration are -

> (i) whether for levy of various taxes under Section 132(1)(c),(d) and (e) of 1956 Act with respect of premises/ properties exempted from the payment of property tax under Section 136 determination of rate of tax under Section 132(5) (a) would require a separate process than taking the determinant arrived at under Section 132(5)(b).
>
> (ii) Whether imposition of development cess, education cess and water tax is without prior approval of State Government under Section 132(6) (o) and therefore, invalid.
>
> (iii) Whether recovery of tax since 2010 is invalid because of retrospective demand.

12. To take up the issue as to imposition of development cess and the education cess first. The challenge to imposition of these two taxes were subject-matter in *M.P. Co-operative Housing Society* (supra); wherein, dwelling on the challenge to the education cess and urban development cess, it has been held -

> 17. Counsel for respondents has challenged the imposition of education cess on the ground that State Govt. could not issue a mandatory direction for imposition of education cess. Education cess can be levied as per Section 132(6)(o) of the Act, 1956. The State Govt. has directed the maintenance of the Govt. Schools to be made by local bodies, it becomes necessary for such local bodies to have resources, hence education cess has been imposed. It is not in dispute that such cess could be imposed by the State Govt. and whenever any other tax which the State Govt. has power to impose under

the Constitution of India can be imposed by Corporation with the prior approval of the State Govt. The Corporation has taken the decision to impose 1% of the education cess on the Annual Letting Value, it has modified its previous resolution which was for 3%. There is authority conferred on it by the State Govt. as per Rule 7. It has followed the procedure as per Rule 8. Thus it cannot be said that imposition of education cess is illegal or arbitrary in any manner. The Corporation has indicated that it had spent the amount on the maintenance of the schools and the matter connected therewith. Thus, I find no merit in the submission of the Counsel for petitioner that amount collected is not being spent.

(Emphasis supplied)

18. The next submission is about the imposition of the urban development cess, that has been imposed under M.P. Upkar Adhiniyam. Learned Counsel for petitioner submitted that the Corporation is not remitting the urban development cess to the State Govt. The submission cannot be accepted as stand has been taken in the return that amount is being credited in the fund of the State Govt. and respondent No. 1 has not raised any objection that it is not being credited. In any case the imposition and realisation cannot become bad on the ground raised by the petitioner. The realization is a matter between Corporation and State Govt. The Corporation is involved in the urban development activities. The submissions raised by the learned Counsel for the petitioner is devoid of substance.

13. The Rules which are adverted to in this paragraph are M.P. Urban Development Cess (Collection) Rules, 2007, framed by the State Govt. in exercise of the power conferred by sub-section (1) of Section 13 read with sub-section (2) of Section 7 of the Madhya Pradesh Upkar Adhiniyam, 1981; whereunder i.e. under the Act of 1981, the urban development cess under Part II is levied under Section 6 which provides for -

6. **Levy of cess on lands and buildings.** (1) there shall be charged, levied and paid for each year an urban development cess on all lands or buildings or both situated in

municipal area or urban area at the rate of 2 per centum of the annual letting value or annual value :

Provided that where the lands or buildings or both are in occupation of the owner himself, the rate of cess shall be one half of the rate aforesaid :

Provided further that no cess shall be charged, levied and paid in respect of lands or buildings or both, for which property tax is not leviable under the provisions of the law relating to local authority or the Sampatti Kar Adhiniyam, as the case may be..

(2) The cess charged and levied under sub-section (1) shall be in addition to tax charged and levied on lands or buildings or both in respect of annual letting value or annual value thereof under the law relating to local authority or the Sampatti Kar Adhiniyam, as the case may be, and shall be payable by the owner in the same manner as that tax.

(3) Subject to the provisions of this part, the provisions of the law relating to local authority or the Sampatti Kar Adhiniyam, as the case may be, and the rules made thereunder shall apply to the cess as if the cess were a tax levied under the said law or the Sampatti Kar Adhiniyam, as the case may be.

14. The second proviso to Section 6 has been substituted by M.P. Act No.11 of 2007 w.e.f. 21.5.2007.

15. Since the legislature has exempted the lands or buildings or both, for which property tax is not leviable from cess, in our considered opinion, the respondent-Corporation have no authority even under Section 132(6)(o) to impose urban development cess. The imposition of urban development cess and its recovery, therefore, cannot be upheld. The decision in *M.P. Cooperative Housing Society* (supra) so far it upheld the Corporation's power to recover the urban development cess is of no help to the respondents because of insertion of second proviso in sub-section (1) of Section 6 of the M.P. Upkar Adhiniyam, 1981 w.e.f. 21.5.2007.

16. As regard to imposition of education cess, since we are not

commended to any decision by State Government of exempting the lands and buildings or both for which property tax is not leviable, we concur with the findings in *M.P. Cooperative Housing Society* (supra) upholding the power of the respondent-corporation in imposing the education cess.

17. Now, coming to the water charges, we find that Section 132-A was inserted in the Act of 1956 by M.P. Act No.15 of 2010 w.e.f. 19.4.2010. That, clause (a) of sub-section (1) whereof provides that -

> "(1) Notwithstanding anything contained in Section 132, the Corporation shall, subject to any general or special order which the State Government may make in this behalf, impose the user charges for the following services, namely : -
>
> (a) a water charge for provision of water supply in respect of lands and buildings to which a water supply is furnished by Corporation;"

18. That, sub-section (2) of Section 132-A further mandates that : -

> "(2) The user charges in clause (a), (b), (c) and (d) of (1) shall be imposed -
>
> (i) on buildings and lands which are exempted from property tax, at a rate as shall be determined by the Corporation;
>
> (ii) on buildings and lands which are not exempted from property tax, as determined in clause (a), (b), (c) and (d) of sub-section (1) plus such percentage of the property tax, as shall be determined by the Corporation.
>
> Provided that the user charge for water under clause (a) of sub-section (1) shall not levied on building and land owned by freedom fighter during their life time, if they are exempted from Income Tax and the water connection is for domestic purpose and which does not exceed half inch connection."

19. The validity of imposition of 'Narmada Tax' has been upheld by the Division Bench of this Court in *Confederation of Real Estate Developers Association of India (CREDAI)* (supra) holding :-

10. In the present case, a resolution for imposition of `Narmada Tax' was passed by the Municipal Corporation in exercise of its powers under Section 136(6)(o) of the Act of 1956. After passing of the resolution a proposal was sent to the State Government for its approval. The State Government considered the proposal and decided to approve the resolution regarding imposition of `Narmada Tax' on the land in its cabinet meeting.

11. Entry 49 of List-II of the Seventh Schedule provides that a tax can be levied on the lands and buildings. The Supreme Court has held that imposition of tax on the land alone is permissible and it is not that the tax is to be imposable on the lands and buildings together. Interpreting Entry 49 of List-II of the Seventh Schedule regarding lands and building the Supreme Court observed that the State Legislature can enact a law for levying tax in respect of the area beneath the surface of the earth. It has also been observed that the land includes not only the face of the earth, but everything under it or over it. The Supreme Court has also held that the word `land' cannot be assigned a narrow meaning so as to confine it to the surface of the earth. It includes all strata above or below. It also held that under Entry 49 in List-II, the land remains a land without regard to the use to which it is being subjected. It is open for the legislature to ignore the nature of the user and tax the land. At the same time, it is also permissible to identify for the purpose of classification, the land by reference to its user. While taxing the land it is open for the Legislature to consider the land which produces a particular growth or useful for a particular utility and to classify it separately and tax the same. See [Ajoy Kumar Mukherjee Vs. Local Board of Barpeta1, Assistant Commissioner of Urban Land Tax, Madras and others Vs. Buckingham and Carnatic Company Limited 2, The State of Bihar and others Vs. Indian Aluminium Company and others 3 & India Cement Limited and others v. State of Tamil Nadu and others].

12. Having regard to the aforesaid legal propositions, in

our considered view, the challenge of the petitioner about competency of the State Government for levying of 'Narmada Tax' on the lands has no merit and cannot be accepted and, therefore, we hold that the levy of 'Narmada Tax' on the lands is within the competence of the State under Entry 49 of List-II of the Seventh Schedule.

(Emphasis supplied)

20. In view whereof, since the imposition of water charges meets the requirement of law under Section 132(6)(o) of 1956 Act, the challenge to its imposition is negatived.

21. This brings us to the issue as to whether the Municipal Corporation while exercising its power of fixing rates of tax under Section 132(5)(a) of 1956 Act is under an obligation to first draw a separate category of lands and buildings for which property tax is exempted.

22. Section 132(1)(a) of 1956 Act mandates that "for the purpose of said Act, the Corporation shall, subject to any general or special order which the State Government may make in this behalf, impose in the whole or in any part of the Municipal Area, a tax payable by the owners or building or lands situated within the city with reference to the gross annual letting value of the buildings or lands, called the property tax, subject to the provisions of Sections 135, 136 and 138". Thus, the imposition of property tax on the lands and buildings situated within the Municipal Area is a rule and the exception is carved out under Section 136 containing types of the buildings and lands exempted from property tax levied under Section 135.

23. Section 138 which is brought in vogue w.e.f. 21.4.1997 vide M.P. Act 18 of 1997 in its sub-section (1) stipulates : - "Notwithstanding anything contained in this Act or any other law for the time being in force, annual letting value of any building or land, *whether revenue paying or not*, shall be determined as per the resolution of the Corporation adopted in this behalf on the basis of per square meter of the carpet area of a building or land, as the case may be, taking into consideration the area in which the building or land is situate, its location, situation, purpose for which it is used, its capacity for profitable user, quality of construction of the buildings and other relevant factors and subject to such rules as may be made by the State Government in this behalf".

24. Further, sub-section (2) of Section 138 stipulates -

> (2) On the basis of the resolution adopted by the Corporation under sub-section (1), every owner of land or building shall assess the annual letting value of his land or building and deposit the amount of property tax along with a return in this behalf, in the prescribed form, on or before the date fixed by the Corporation, failing which a surcharge at the rate, as may be determined by the Corporation, shall be charged.

25. Thus, Section 138(2) does not make any distinction between the owner of land or building which are residential or non-residential, industrial, commercial or exempted under Section 136. It takes within its fold "every owner of land or building."

26. That, while upholding its validity, a full Bench of this Court in *Sakhi Gopal Agrawal v. State of M.P.* 2004(1) MPLJ 390 held in paragraph 5.4 (vii) that Section 138 of 1956 Act is "not defiant of Article 14 of the Constitution of India and do not suffer the frown of the equality clause or any kind of arbitrariness or irrationality."

27. That, the State Government in exercise of its powers conferred by Section 433 read with Section 138 of 1956 Act has framed Rules for determination of Annual Letting Value, these Rules are : "The Madhya Pradesh Municipality (Determination of Annual Letting Value of Building/Lands) Rules, 1997 (referred to as Rules of 1997)".

28. Rule 2(f) of Rules of 1997 defines 'Residential' to mean "any land reserved for residential purposes which are being used for the residential purposes provided that it shall not include any building which was constructed for the residential purpose but they are being used for commercial purpose."

29. That, Rule 2(g) of Rules of 1997 defines "commercial or industrial" to mean such building or land on which any business is carried out shop is being run, workshop is established, trade, business is being done or any other similar activities are being conducted or reserved for such activities."

(Emphasis supplied)

30. Thus, it is the 'use' or the 'activity' over the land or building or both

which is the basis for classification and a distinction between the residential and commercial or industrial is as per use or the activity carried thereover. This would further be clear from Rule 4 of the Rules of 1997 which classify the buildings and lands in the following terms -

> **"4. Classification of buildings and lands.** - The classification of buildings and lands situated in every zone shall be as follows:-
>
> (a) Quality of construction -
>
> (i) Building having roof made of R.C.C.R.B.C. or stone;
>
> (ii) Buildings having roof made of sheets of cement or iron or tiles;
>
> (iii) Other semi pakka or kuccha buildings which does not fall within sub-clause (1) or (11).
>
> (b) On the basis of use -
>
> (i) Buildings/lands for the purpose of commercial or industrial;
>
> (ii) Buildings/lands for the purpose of residential.
>
> (c) On the basis of location -
>
> (i) Building/land situated at main road;
>
> (ii) Buildings/land situated at main market.

31. Furthermore, Rule 5 of Rules 1997 empowers Municipal Corporation as per criteria prescribed under Rule 4 to fix separate rates for each type of houses and lands situated in each zone on the basis of their quality of construction, use and location for the purpose of determination of their annual letting value. And, as per second proviso to Rule 4 and subject to provisions of Sections 135, 136 and 138, a Municipal Corporation "may also fix separate criteria". This proviso, thus, gives additional power to Municipal Corporation to fix separate criteria for determination of rate of tax.

32. That, Rule 10 of Rules 1997 makes self-assessment of the property tax imperative for every owner of building or land for self assessment of the property tax. It stipulates :

10. Self assessment; of the property tax. - (1) Every owner of the building or land of the municipal area, shall himself calculate the annual letting value of his property and the amount of the property tax as per the rates of annual letting value described in resolution published by the municipality as per provisions of Rule 8 and by adding the amount of water tax and the consolidated amount of general sanitary cess, general lighting tax and general fire tax as determined under sub-sections (4) and (5) of section 132, in case of Municipal Corporation and under sub-sections (4) and (5) of section 127, in case of Municipal Council and Nagar Panchayats, in the amount of property tax payable and after indicating the information in the return appended to these rules, deposit the consolidated amount of the aforesaid taxes in the municipality within the prescribed time along with the return.

(2) If any person is the owner of more than one house or land in the municipal area, then every such owner shall pay the amount along with the separate return for each house or land, provided that the consolidated annual letting value of all his houses or lands or both, shall be deemed to be the basis for purpose of exemption under the provisions of clause (b) of section 136 in ease of Municipal Corporation and clause (b) of sub-section (2) of section 127-A in case of Municipal Council and Nagar Panchayats.

(3) If the owner of building or land finds any mistake in the return filed by him as above, then such owner of building or land may submit the revised return within sixty days from the date on which he had submitted the return and if the amount of property tax exceeds according to the revised return, then he shall deposit such amount in the municipality along with the revised return;

Provided that if the amount of property tax deposited earlier exceeded according to the revised return, then he may demand to refund such excess amount and after scrutinising of the demand is found to be correct, then the municipal officer shall order to refund such excess amount.

33. The "Return For The Self Assessment of Property Tax" appended with the Rules of 1997 prescribes the details which every owner of buildings or lands or both has to give.

RETURN FOR THE SELF-ASSESSMENT OF PROPERTY-TAX

[See Rule 10(1)]

Year .....

1. Name of the owner of the property

   (with Father's/Husband's name and permanent address. Telephone No., if any)

2. Full address of the property, where it is situated.

3. Constructed area : [Rule 2(h)]

4. Whether building is pakka or kachcha 'Rule 4(a)]

5. Property is residential or commercial or industrial [Rule 4(b)]

6. Area of the open land which is in the use only for the commercial or industrial purpose. [Rule 2 (g)]

7. Per square foot annual rate, as determined by the municipality for calculation of annual letting value. [Rule 6(c)]

8. Annual letting value as calculated [Rule 9]

9. Property tax payable on the annual letting value [Rule 10]

[10. Water tax (minimum amount prescribed by the Government + amount of percentage of property tax determined by the municipality)]

Note - If the owner of the building is paying the water tax as per minimum rate fixed on monthly basis then here only the amount as per percentage of the property tax determined by the municipality be indicated)

11. Consolidated amount of general sanitation tax, general

lighting tax and general fire tax (minimum amount prescribed by the Government + the amount of percentage of property tax determined by the municipality).

12. Amount of surcharge, if payable

13. Total amount being paid to the municipal fund

(Total of 9+10+11+12) (In figures and words)

Note. - (1) Fifty percent property tax shall be payable on such property which is in occupation of owner for his residence.

(2) Extracts of the rules as referred to in the return may be seen at the next page.

(3) For each property separate return shall be filed in.

.....

(Signature of the owner of the property)

Verification

I ..... Son of ..... resident of ..... do verify that the information given in the return is true and that I am the owner of the building/land for which I have given the return.

.....

(Signature of the owner of building/land)

Receipt

Received the return alongwith the copy of the receipt of amount paid/challan relating to the year

.....

Signature of the recipient officer/employee

(Indicate full name and designation)

---

34. It is this Return which is the basis for levy of taxes under clause (c),

(d) and (e) of sub-section (1) of Section 132 of 1956 Act. Thus, though there may be an exemption from levy of property tax in respect of buildings and lands or portions thereof used exclusively for educational purposes including schools, boarding houses, hostels and libraries if such buildings and lands or portions thereof are either owned by the educational institutions concerned or have been placed at the disposal of such educational institutions without payment of any rent under Section 136(c). But, obligatory it is for the owner to file the Return under the Rules of 1997.

35. A situation may arise that an owner of buildings or lands in Municipal Area has failed to file return under Rules of 1997 may be on an assumption that property tax is not leviable under Section 136. In that event, it will still be within the competence of the Municipal Corporation as empowered vide second proviso to Rule 5 of Rules of 1997 to adopt the criteria applicable to lands or buildings used for commercial activities for fixing rate of tax.

36. The contention on behalf of petitioner that in absence of separate determination of rate of taxes under clauses (c), (d) and (e) of sub-section (1) of Section 132 under sub-section (5) (a) of Section 132 of 1956 Act the levy is invalid; therefore, must fail and accordingly, negatived.

37. This brings us to the contention that the taxes leviable under Section 132(1)(c), (d) and (e) and under Section 132(6) (o) of 1956 Act cannot be levied from retrospectivity is taken note of and is rejected at the outset. That, being not exempted from these taxes, the tax or the cess is payable with the passing of resolution under Section 133 of 1956 Act in respect of relevant financial year. It being not the case of the petitioner that it is by virtue of resolution passed in the year 2013 or 2014 that the taxes are levied from retrospective financial year. In other words, the petitioner having failed to establish from the Permanent Order No.2/2013 that the taxes and cess are levied for the first time, the contention that the petitioner has been subjected to levy of tax from retrospective year, being misconceived, is rejected. Rather, it is non-payment of taxes and cess of previous years that the demand of those years have been raised.

38. In the result, the levy of taxes under Section 132(1)(c), (d) & (e) and levy of educational cess under Section 132(6)(o) and water cess under Section 132-A of 1956 Act is upheld. Whereas, the levy of urban development cess being exempted by virtue of second proviso appended to Section 6 of M.P.

Upkar Adhiniyam, 1981 is set aside.

39. The petition is **disposed of** finally in above terms. Parties to bear their respective costs.

Petition disposed of.

I.L.R. [2016] M.P., 2999
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 5641/2015 (Indore) decided on 16 November, 2015

POONAM MANSHARAMANI (SMT.) ...Petitioner
Vs.
AJIT MANSHARAMANI ...Respondent

Civil Procedure Code (5 of 1908), Order 11 Rules 1 & 2, Order 14 Rule 3(b) - Interrogatories **- Petitioner's application under Order 11 Rules 1 & 4 rejected in a suit for possession filed by her, on the ground that suit cannot be decided on the basis of interrogatories - Held - Issues can be framed on the basis of interrogatories - Trial Court was required to examine whether the interrogatories have reasonable close connection with "matter in question" - Order set aside - Matter remanded back for rehearing. (Paras 2, 7, 9 & 14)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 11 नियम 1 व 2, आदेश 14 नियम 3(बी) – परिप्रश्न – याची द्वारा प्रस्तुत कब्जे के वाद में उसके द्वारा प्रस्तुत आवेदन अंतर्गत आदेश 11 नियम 1 एवं 4 को इस आधार पर निरस्त किया गया कि वाद को परिप्रश्नों के आधार पर विनिश्चित नहीं किया जा सकता – अभिनिर्धारित – विवाद्यकों की विरचना परिप्रश्नों के आधार पर की जा सकती है – विचारण न्यायालय द्वारा यह परीक्षण किया जाना अपेक्षित था कि क्या उक्त परिप्रश्नों का "प्रश्नगत मामले" से युक्तियुक्त निकट संबंध है – आदेश अपास्त – मामला पुनः सुनवाई हेतु प्रतिप्रेषित।

Cases referred:

AIR 1960 CALCUTTA 536, AIR 1952 NAGPUR 135, AIR 2000 DELHI 354, AIR 1991 ORISSA 319, AIR 1983 JK 65, AIR 1978 Ori. 179, AIR 1988 Bom 222, AIR 1967 Ori. 19, AIR 1986 Ori 42, AIR 1977 Pat. 233, AIR 1984 DELHI 286, 1972 SCR (3) 841.

R.S. Chhabra, for the petitioner.

Vishal Baheti, for the respondent.

ORDER

SUJOY PAUL, J. :- The parties are at loggerheads on the validity of the order dated 31.7.2015, passed by the Sixteenth Additional District Judge, Indore in Civil Suit No.6A/2014.

2. Draped in brevity, the facts are that the petitioner/ plaintiff filed a suit for possession based on title and mesne profit against the respondent/defendant. The respondent filed his written statement and contested the suit. The petitioner then filed an application under Order 11 Rules 1 and 4 of the Code of Civil Procedure (CPC) dated 29.4.2015 (Annexure P/7). Along with the said application, the petitioner enclosed interrogatories. In turn, the respondent filed his reply on 1.7.2015 (Annexure P/8). The court below rejected the aforesaid application (Annexure P/7) by impugned order dated 31.7.2015. This order is called in question in this petition filed under Article 227 of the Constitution.

3. Shri Chhabra, learned counsel for the petitioner criticized the said order by contending that the application (Annexure P/7) was filed in order to elicit the admission from the defendant to avoid the lengthy evidence and with a view to get expeditious disposal of the suit. The court below has erred in rejecting the application by giving an incorrect finding that the suit cannot be decided on the basis of the interrogatories, without appreciating the fact that purpose of furnishing interrogatories was not to have the disposal of suit based on such interrogatories but to expedite the trial of the suit by avoiding unnecessary procedural rigmarole. He submits that the court below has rejected the application on irrelevant considerations. In support of his contention, he relied on AIR 1960 CALCUTTA 536 *(Jamaitrai Bishansarup v. Rai Bahadur Motilal Chamaria)* and AIR 1952 NAGPUR 135 *(Ramlalsao v. Tansingh Lalsingh).*

4. *Per Contra*, Shri Baheti, learned counsel for the respondent supported the order. He contended that the petitioner filed lengthy interrogatories. In a suit for possession, the interrogatories proposed were not relevant and, therefore, the court below has not committed any legal error. In support of his submission, he relied on AIR 2000 DELHI 354 *(M/s. AFL Developers Pvt. Ltd. and another vs. Smt. Veena Trivedi).*

5. Learned counsel for the parties confined their contentions to the extent indicated above.

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

7. Before dealing with rival contentions advanced by the parties, I deem it apposite to quote Order 11 Rules 1 and 2, CPC, which reads as under:-

> *"1. Discovery by interrogatories.-- In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer:*
>
> *Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose:*
>
> *Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness."*
>
> (Emphasis Supplied)

A plain reading of Order 11 Rule 1 CPC shows that interrogatories may be delivered for examination of opposite party. A combined reading of various clauses of this Order will make it clear that it is not necessary that by way of interrogatories itself the suit must be decided. Order 14 Rule 3(b) reads as under:-

> *"3. Materials from which issues may be framed.- The Court may frame the issues from all or any of the following materials:-*
>
> *(a) xxx xxx xxx*
>
> *(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit."*

This provision makes it clear that the issues can be framed on the basis of answers to the interrogatories submitted by the other side. This itself makes it clear like noon day that if issues can be framed on the basis of interrogatories, it is not necessary that entire suit needs to be decided on the basis of interrogatories itself. The court below in its finding opined that the interrogatories suggested by the plaintiff are related with the case. However, in the ultimate conclusion, the court below opined that the suit cannot be decided on the basis of interrogatories only. Hence, the defendant cannot be compelled to file response to the said interrogatories.

8. In *Ramlalsao* (supra), a Division Bench of Nagpur High Court opined that the right of a party to deliver interrogatories and get answers from the other side is a valuable right and a party should not be deprived of it. The court opined that the interrogatories often shortens litigation and save expenses. In *Jamaitrai Bishansarup* (supra), the Calcutta High Court opined that administering of interrogatories is to be encouraged because they not infrequently bring an action to an end at an earlier stage to the advantage of all parties concerned. The scope and ambit of Order 11 Rule 1 CPC was considered by various High Courts. It is apt to quote certain judgments.

In *Bhakta Charan Mallik v. Nataorar Mallik* (AIR 1991 ORISSA 319), the Orissa High Court held thus:

> *"As a general rule, interrogatories are to be allowed whenever the answer to them will serve either to maintain the case of the party administering them or to destroy the case of the adversary. The power to serve interrogatories as it appears is not meant to be confined within narrow technical limits. It should be used liberally whenever it can shorten the litigation and serve the interest of justice. However, this can be exercised within limits. The power to order interrogatories to be served and answer should be used with considerable care and caution, so that it is not abused by any party. A party entitled to interrogate his opponent with a view to ascertain what case he has to meet and the facts relied on and to limit the generality of the pleadings and find out what is really is in issue. At the same time interrogatories must be confined to facts which are relevant to the matters in question in the suit.*

Interrogatories which are really in nature of cross-examination will not be allowed."

In *Delhi Vansapati Syndicate v. K.C. Chawala* (AIR 1983 JK 65), it is held as follows:

"It is true that a party is not entitled to require its adversary to answer interrogatories, the effect whereof would be to enable it to know the facts, which exclusively constitute the evidence of his opponent's case. But, it is equally true that it can administer interrogatories to its opponent, to obtain admissions from him to everything that on the pleadings of the parties is material for the decision of the case, with the object of facilitating the proof of its own case, as also saving the costs which it may otherwise have to incur on adducing evidence to prove the necessary facts. As observed by their Lordships in Raj Narain v. Indira Gandhi A.I.R. 7972 S.C. 1302. The interrogatories must have reasonably close connection with matters in question."

In *Tata Iron And Steel Co. v. Rajarishi Exports,* (A.I.R. 1978 Ori. 179), it is observed as follows:

"A party seeking answers to his interrogatories from the other party cannot direct the latter to answer the questions in a particular manner so as to suit the former's liking or convenience.... Any party to the suit or the court may use any portion thereof as provided in Rule 22 of Order 11 or the court may ultimately reject any portion of the same by declaring the same as irrelevant or may ignore the same for all intents and purposes.... On serving interrogatories on a party under Order 11, Rule 1, C.P.C. one cannot compel that party to make discovery on oath of any document."

In *Nishi Prem v. Javed Akhtar* (AIR 1988 Bom 222), the following is the extract of the observations made by the Division Bench of Bombay High Court:

"This rule is enacted to enable the parties to know the nature of the opponent's case, but the rule does not entitle the party to ascertain the facts which constitute exclusively the evidence of the other side, the reason being that it would enable unscrupulous parties to tamper with the witnesses of the other side and to manufacture evidence in contradiction and so shape his case as to defeat justice. In cases where the plaint or written statement does not necessarily disclose the nature of the case, then interrogatories are administered to make good the deficiency. Interrogatories can also be administered to obtain admissions from other parties to facilitate the proof of the claim. Order 11, Rule 6 of the Code of Civil Procedure provides that the interrogatories may be objected on the ground that it is scandalous or irrelevant or not exhibited bona fide for the purpose of the suit or that the matters inquired into are not sufficiently material at that stage. It is well-settled that the parties are not entitled to administer interrogatories for obtaining discoveries of facts which constitutes evidence of its adversary's case or title."

In *Ganga Devi v. Krishna Prasad Sharma* (A.I.R. 1967 Ori. 19), the Orissa High Court would observe thus:

"The main object of interrogatories is to save expenses by enabling a party to obtain an admission from his opponent which makes the burden of proof easier. The interrogatories are permissible with regard to matters which are relevant to the facts directly in issue and would not be extended to prying into the evidence where with the opposite party intends to support his case."

In *Ashok Kumar v. Dalmia Institute of Scientific and Industrial Research* (AIR 1986 Ori 42), the gist of the observations made by the Orissa High Court is as follows:

"Though the administering of interrogatories is to be encouraged because they not frequently bring an action to an end at an earlier stage to the advantage of all parties

concerned, it shall be seen that the interrogatories must be confined to matters which are in issue or sufficiently material at the particular stage of the action at which they are sought to be delivered, or to the relief claimed. The interrogatories should be confined to obtaining from the party interrogated admissions of facts which it is necessary for the party interrogating to prove in order to establish his case."

In *Thakur Prasad v. Md. Sohayal* (A.I.R. 1977 Pat. 233), the Patna High Court would held thus:

"The main object of interrogatories is to save expenses and time by enabling a party to obtain from the opponent information as to facts material to the question in dispute between them and to obtain admissions of any facts which he has to prove on any issue which is raised between them. An admission of the adversary will serve to maintain the case of the party administering the interrogatory or the answer might be destructive of his own."

In *Rajasthan Golden Transport Co. (Pvt.) Ltd. v. Avon F.I. Pvt. Ltd.* (AIR 1984 DELHI 286), the Delhi High Court would observe as follows:

"The main object of delivering interrogatories by a party is to discover facts in order to facilitate the proof of his own case. However, the power to allow interrogatories to be administered by one party to another is always subject to the discretion of the court....It is well-settled that interrogatories must be confined to the matters which are in issue or sufficiently material at the particular stage of the action at which they are sought to be delivered or to the relief claimed. The proviso to Order 11, Rule 1 in terms states that the interrogatories which do not relate to any matter in question in the suit shall be deemed irrelevant notwithstanding that they must be admissible on the oral cross-examination of a witness....They must not be unreasonable, vexatious, prolix, oppressive or

scandalous. Further, they must not be of fishing nature."

While explaining the scope of Order 11, Rule 1, C.P.C., the Supreme Court in *Raj Narain v. Smt. Indira Gandhi* (1972 scr (3) 841) , would observe as follows:

> *"Questions that may be relevant during cross-examination are not necessarily relevant as interrogatories. The only questions that are relevant as interrogatories are those relating to "any matters in question". The interrogatories served must have reasonably close connection with "matters in question". Viewed thus, interrogatories 1 to 18 as well as 31 must be held to be irrelevant."*

9. The common string as per the aforesaid judgment is that the administering of interrogatories is to be encouraged because they may be in aid to bring an action to an end at an earlier stage to the advantage of all parties concerned. Therefore, interrogatories are required to be examined on the anvil of Order 11 of CPC. The trial court is required to examine whether the interrogatories have any reasonable close connection with "matter in question".

10. The core issue is whether the court below was justified in rejecting the interrogatories on the sole ground that on the basis of interrogatories alone the suit cannot be decided. No doubt, Delhi High Court in *M/s AFL Developers Pvt. Ltd.* (supra), opined that it is incumbent upon the court to examine the interrogatories broadly to find out whether the same related to any matter in question in the suit.

11. In the opinion of this Court, the court below has not given a finding that the interrogatories were not relevant as per Order 11 Rule 1 CPC. The aspect of relevance has not been gone into in detail. In the para in which conclusion is drawn, the court below has almost reproduced the language of Order 11 Rule 1 CPC and then opined that suit cannot be decided on the basis of interrogatories only.

12. There is no quarrel on the principles laid down in *M/s AFL Developers* (supra). The same is in consonance with the clear language of Order 11 Rule 1 CPC. However, it is seen that the court below has not applied mind on the relevance of the documents and rejected the application on the singular ground

that whole suit cannot be decided on the basis of interrogatories.

13. As analyzed above, it is clear that the court below has rejected the application on incorrect and irrelevant consideration. Thus, order is not in consonance with the mandate of Order 11 Rule 1 CPC. The court below should have applied mind on the relevance of the interrogatories and then should have passed appropriate order. In the impugned order, the court below has not dealt with the aforesaid aspect.

14. Resultantly, the impugned order dated 31.7.2015 is set aside. The matter is remitted back to the court below to rehear the parties on the application (Annexure P/7) and decide the same in accordance with law. It is made clear that this Court has not expressed any view on merits.

15. Petition is allowed to the extent indicated above.

Petition allowed.

I.L.R. [2016] M.P., 3007
WRIT PETITION
Before Mr. Justice P.K. Jaiswal & Mr. Justice Alok Verma
W.P. No. 5553/2015 (Indore) decided on 14 March, 2016

MODERN DENTAL COLLEGE
& RESEARCH CENTRE INDORE ...Petitioner
Vs.
GOVERNMENT OF INDIA & ors. ...Respondents

***A. Constitution - Article 226* - The jurisdiction is extraordinary, equitable and discretionary and it is imperative - The petitioner approaching the Writ Court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. (Para 23)**

क. संविधान – अनुच्छेद 226 – अधिकारिता असाधारण, साम्यापूर्ण एवं वैवेकिक है तथा यह अनिवार्य है – याची को रिट न्यायालय के समक्ष आते समय स्वच्छ अंतःकरण के साथ आना चाहिए एवं कोई तथ्य छिपाए अथवा दबाए बगैर न्यायालय के समक्ष सभी तथ्य रखने चाहिए तथा उचित अनुतोष मांगना चाहिए।

***B. Dentists Act (16 of 1948), Sections 39 & 55 (2) (h) (i)* - Dental Council of India regulation makes it very clear that the Petitioner Dental College is statutory obliged to have requisite infrastructure and facilities**

as per DCI norms and also to apply to the Dental Council of India for such renewal well in advance for the next academic session. (Para 24)

ख. दंत–चिकित्सक अधिनियम (1948 का 16), धाराएँ 39 व 55 (2) (एच) (i) – भारतीय दंत परिषद् विनियम यह बिल्कुल स्पष्ट करते हैं कि याची दंत चिकित्सा महाविद्यालय, भारतीय दंत परिषद् मानकों के अनुरूप अपेक्षित अवसंरचना एवं सुविधाएँ धारित करने तथा आगामी शैक्षणिक सत्र के लिए उनका नवीकरण किए जाने हेतु, भारतीय दंत परिषद् को अग्रिम रूप से आवेदन करने के वैधानिक दायित्व के अधीन है।

C. Dentists Act (16 of 1948), Sections 10 A (1) (b) & 10 A (4) and Dentists Amendment Act (30 of 1993), Sections 10 (A) (1) (b) (II) & 10 B (3) - Prior Approval - Increase in Admission **- Dental Council of India Regulation 2006 - Renewal of permission for admitting 4th Batch of Students - Application of the petitioner was incomplete due to non submission of the University affiliation within time schedule prescribed in the regulations for the academic year 2015-16 - Also petitioner admitted three illegal admissions in the specialty of Orthodontics and Paedodontics for the academic year 2015-16 without prior approval of Union of India u/S 10 A (4) of the Dentists Act 1948 - Petition dismissed. (Paras 24 to 28)**

ग. दंत–चिकित्सक अधिनियम (1948 का 16), धाराएँ 10 ए (1) (बी) व 10 ए (4) एवं दंत चिकित्सक संशोधन अधिनियम (1993 का 30), धाराएँ 10 ए (1) (बी) (II) व 10 बी (3) – पूर्व अनुमोदन – प्रवेश संख्या में वृद्धि – भारतीय दंत परिषद् विनियम, 2006 – छात्रों के चौथे संमूह को प्रवेश देने हेतु अनुमति का नवीकरण – विनियमों में विहित समय सीमा के अंदर विश्वविद्यालय की संबद्धता प्रस्तुत न करने के कारण शैक्षणिक सत्र 2015–16 हेतु प्रस्तुत याची का आवेदन अपूर्ण था – इसके अतिरिक्त, दंत चिकित्सक अधिनियम, 1948 की धारा 10 ए (4) के अंतर्गत भारत सरकार की पूर्व अनुमति लिए बगैर याची ने शैक्षणिक सत्र 2015–16 हेतु ऑर्थोडॉन्टिक्स एवं पीडोडॉन्टिक्स संकाय में तीन अवैध प्रवेश भी दिए – याचिका खारिज।

Cases referred:

W.P. (s) (Civil) No. 76/2015 order passed on 24.03.2015 (SC), 2011(4) SCC 623, 2005 (2) SCC 65, (1984) 1 SCC 307, 2015 (10) SCC 51.

Vijay Assudani, for the petitioner.
Anand Soni, for the respondent No. 1.
Vivek Sharan, for the respondent No. 2.

None for the respondents No. 3 & 4, though served.

ORDER

The Order of the Court was delivered by : **P.K. JAISWAL, J. :-** The Petitioner Dental College has filed this writ petition, as a second round of litigation, challenging the order dated 31.7.2015 (Annexure P/36), passed by the respondent No.1 whereby, the respondent No.1, rejected the renewal of permission for admitting 4th Batch of students in the specialty of **Orthodontics** and **Dentofacial Orthopedics** from 3 to 6 and Paedodontics and Preventive Dentistry from **4 to 6 seats** for the Academic Year 2015-16 on account of non – furnishing of a University Affiliation issued by respondent No.4 – Medical University within the time framed prescribed by Dental Council of India Regulation, 2006.

2. In the earlier round of litigation, the petitioner – Dental College aggrieved by the recommendation dated 28.2.2015 of the respondent No.2 and consequent decision dated 31.3.2015 taken by the respondent No.1, filed a Writ Petition No.2398/2015 before this Court. The Division Bench of this Court vide it's order dated 7.5.2016, disposed of the writ petition. The operative para 22 of the order dated 7.5.2012 reads as under :-

> *"22. From the aforesaid, in our considered view, the impugned order passed by respondents No.1 and 2 on 31.03.2015 (Annexure P/28) and 28.02.2015 (Annexure P/22) cannot be sustained. Therefore, the same are hereby quashed; however, with liberty to the Central Government to pass a fresh order, after giving opportunity of being heard to the petitioner. Dental Council of India is also directed to consider the case of the petitioner and submit its recommendations, in accordance with law, to the Central Government. The Competent Authority of the Central Government shall give an opportunity of hearing to the petitioner and then shall take appropriate decision regarding renewal of permission of fourth batch for MDS Course in Orthodontics and Paedodontics, as early as possible, within a period of four weeks from the date of filing of the certified copy of this order."*

3. The BDS degree and the MDS degree in various specialities in respect of the students of the petitioner – Dental College awarded by Devi Ahilya Vishwavidhyalaya, Indore is recognized under Section 10(2) of the Dentists Act, 1948 and the petitioner dental college is under statutory obligation to have full complement of staff, equipment and other infrastructure facilities including University affiliation prescribed for under – graduate training programme and also to have additional requirements in respect of funds or allocation of finances, staff and other infrastructure facilities as per the norms prescribed by the Council and approved by the Central Government under Section 20 of the Dentists Act, 1948, in the revised MDS Course Regulations, 2007, Post Graduate Diploma Course Regulations, 2008 and policy framed and declared from time to time. The last date of sending the recommendation by the DCI to the Government of India was **28.2.2015.** The petitioner – Dental College furnished its University affiliation dated 27.2.2014 issued by the respondent No.4 – Medical University to Union of India only on **18.3.2015,** by that time, the last date for sending appropriate recommendation by the DCI was already over.

4. For the academic year 2015 – 16, Hon'ble the Supreme Court in Writ Petition (s) (Civil) No.76/2015 *Ashish Ranjan & others v. Union of India & others* has extended the time for admission in PG Medical / DE Course till 10 th June, 2015. Relevant part of the order dated 24.03.2015 reads as follows: -

> "In course of hearing a chart has been given indicating the time schedule for the medical / dental admission for the academic year 2015-16. It reads as follows:

"Proposed Postgraduate Medical / Dental Admission Schedule (For Academic Year 2015-16)

Schedule for admission		**Postgraduate Courses**
	State Quota	**All India Quota**
Conduct of entrance examination		Between 1st December, 2014 to 6th December, 2014

Declaration of result of qualifying examination / entrance examination		By 15th January
1st round of counseling / (sic:counselling) admission	To be over by 5th April	Between 1st March to 4th March
Last date for joining the allotted college and course	8th April	By 15th March
2nd round of counselling for allotment of seats from waiting list	Between 29th April to 3rd May	Between 10th April to 16th April
Last date for joining for candidates allotted seats in 2nd round of counselling	8th May	27th April
3rd round of Counselling (for filling up of seats reverted from All India Quota / other vacant seats from State Quota	Between 31st May to 4th June	Between 9th May to 19th May
Last date for joining for candidates allotted seats in 3rd round of counseling (sic:counselling)	8th June	30th May
Commencement of academic session	30th May	30th May
Last date up to which students can be admitted against vacancies arising due to any reason from the waiting list	10 th June	

This chart is accepted by all. In view of the aforesaid, it is directed that it shall be treated as order of this Court fixing the time schedule and all the States shall obey it in letter and spirit.

Learned counsel who are appearing for the States are requested to send a copy of the same to the concerned authorities of the State. Mr. Gaurav Sharma, learned counsel appearing for the Medical Council of India shall also send a copy of the order passed today by appropriate process to the concerned authorities of the States by a forwarding letter so that there should be no deviation by any authority.

Though we have fixed the time schedule for 2015-16 after quite a long deliberation with the counsel for the petitioners, the States and the Medical Council of India, we think a time has come where the Medical Council of India and the Director General Health Services of Union of India should frame a time schedule for the next academic session 2016-17 and thereafter so that a specific time schedule is followed in letter and spirit and controversies of this nature do not travel to the Court every year. All the States are bound to cooperate with the aforesaid authorities failing which serious view shall be taken. We are compelled to say so, as Mr. Gaurav Sharma, learned counsel for the Medical Council of India, submitted that there is non-cooperation by the States in this regard. Let the matter be listed on 05.05.2015."

5. From perusal of the order passed by the Apex Court, it is not in dispute that the last date upto 10th June, 2015, was extended **to which students can be admitted against vacancies arising due to any reason from the waiting list.**

6. The Dental Council of India vide circular dated 18.6.2015 (Annexure R-2/3) directed all the Dental Colleges running P.G. Course in the country that the last date up to which students can be admitted against the vacancies arising due to any reason from the waiting list was **10 th June, 2015** for State quota and the last date for joining for candidates allotted seats in third round of counselling was **30 th May, 2015** for All India Quota for the academic session 2015-16 and accordingly, directed all the dental colleges running PG Courses are under statutory obligation to furnish the list of the students admitted by them in MDS Course(s)/PG Diploma Course(s) (Both under Govt. & Management Quotas) to the DCI, and in case any admission are made in violation of this Time Schedule as well as in violation of the provision of the

Dentists Act and Regulations made thereunder, the provisions of the Section 10B of the Dentists (Amendment) Act, 1993 providing for non-recognition of dental qualification in respect of such students or the provisions of Section 16A for withdrawal of recognition for violation of conditions of admission, as the case may be, would be initiated against such erring dental college(s).

7. The petitioner – Dental College sent the list of its students to the DCI on 29.7.2015 (Annexure R-2/7). As per note appended in the list of admitted students in MDS Course in the academic Session 2015-16 of petitioner – Dental College two students were admitted in MDS (Orthodontics) and one in MDS (Pedodontics), pursuant to the order dated 7.5.2015 passed by this Court in W.P.No.2398/2015. Copy of note appended along with the writ petition, which is at page No.128 filed by DCI is relevant which reads as under :-

> ***"These two students were admitted in MDS (Orthodontics) and one in MDS (Pedodontics), pursuant to order dated 7.5.2015 passed by Hon'ble High Court in W.P.No.2398/2015, whereby Hon'ble High Court was pleased to quash and set aside order dated 31.5.2015 passed by Govt. of India, Ministry of Health & Family Welfare advising us not to admit students in enhances seats of MDS (Orthodontics) and MDS (Pedodontics) for academic session 2015 -16."***

8. The said note is contrary to the order dated 7.5.2015 passed in W.P.No.2398/2015. By the aforesaid order, no direction was ever issued to the petitioner – Dental College to grant admission to the students. The DCI on coming to know about the aforesaid, issued show cause notice to the petitioner – Dental College on 21.9.2015 (Annexure R2/8) asking as to why they have admitted two excess students in the speciality Orthodontics and Dentofacial Orthopedics from 3 to 5 seats for increase of seats for the academic year 2015-16 without the prior approval of the Government of India under Section 10(A) of the Dentists Act. On 21.9.2015, the DCI also directed the petitioner – College to fulfill the following deficiencies and furnish the compliance report to the Council for furtherance in the matter. Relevant para of the notice reads as under :-

> ***"In the first instance, the college authority be asked to***

show cause as to why they have admitted 2 excess student in the specialty (sic:speciality) Orthodontics and Dentofacial Orthopedics from 3 to 5 seats for increase of seats for the academic year 2015-16 without the prior approval of the Govt. of India under Section 10(A) of the Dentists Act."

9. The petitioner – College submitted its reply vide Annexure R-2/9, dated 12.10.2015. Relevant part of the reply reads as under :-

"3. That the said order was challenged by us before the Hon'ble High court of M.P. Bench at Indore by filing W.P.No.2398/2015, which was allowed vide order dated 7.5.2015 and said order dated 31.3.2015 passed by Union of India as well as order dated 28.2.2015 passed by Dental Council of India was quahsed and set aside. Thus, after 7.5.2015, the order dated 31.3.2015 passed by Government of India directing us not to admit the students lost it efficacy and therefore, after 7.5.2015, there was no restriction on us from admitting students hence we have admitted five students in MDS Paedodonitcs & Preventive Dentistry (not six as alleged by you in show cause notice) and have admitted five students in MDS Orthodontics and Dentofacial Orthopedics."

10. As per Annexure P/6 dated 28.3.2013 and Annexure P/7, dated 30.4.2013, the respondent No.1 directed the petitioner not to admit any student for increase of seats in the speciality of Paedodontics and Preventive Dentistry from 4 to 6 seats at Modern Dental College and Research Centre, Indore, for the academic session 2013-14. The admission in the next batch of students in MDS Course for increase of seats in the above specialities for the academic year 2014-15 will be made only after obtaining the renewal permission from the Central Government. In case any admissions are made in violation of the above condition, the same will be treated as irregular and action under Section 10B of the Dentists (Amendment) Act, 1993 will be initiated. Similar letter dated 30.4.2013, was issued by the Government of India vide Annexure P/7, which reads as under :-

"In continuation of this Ministry's letter of even number

dated 31.3.2012 and 28.3.2013, I am directed to convey the approval of the Central Government for renewal of permission for 2nd year admissions for increase of seats in MDS courses in the specialities of Paedodontics and Preventive Dentistry from 4 to 6 seats at Modern Dental College and Research Centre, Indore for the academic session 2013-14.

2. The next batch of students in MDS course in the above specialities for the academic year 2014-15 will be made only after obtaining the renewal permission from the Central Government.

3. Admissions made in violation of the above stipulations will attract the provisions of Section 10B of the Dentists (Amendment) Act, 1993."

11. Similarly, for the academic year 2015-16, similar letter was issued by the Government of India on 15.4.2015 vide Annexure P/10, which reads as under : -

"In continuation of this Ministry's letter of even number dated 28.3.2013 & 30.4.2013, I am directed to convey the approval of Central Government for renewal of permission for 3rd year MDS course for increase of seats in the specialties of (I) Paedodontics and Preventive Dentistry from 4 to 6 seats (ii) Orthodontics & Dentofacial Orthopedics from 3 to 5 seats at Modern Dental College and Research Centre, Indore for the academic year 2014-15.

2. The Admission of next batch of students in MDS Course for increase of seats in the above specialties for the academic years 2015-16 will be made only after recognition of MDS Degree by the Central Government.

3. In case any admissions are made in violation of this condition, such admissions would be treated as irregular and action under 10B of the Dentists (Amendment) Act, 1933 would be initiated.

4. Discrepancies, if any, may be brought to the Notice of DCI and State/Central Government."

12. In pursuance to the order passed by this Court on 7.5.2015 in W.P.No.2398/2015, the Government of India by order dated 31.7.2015 (Annexure P/36), rejected the prayer on the ground that, the last date of DCI to make a recommendation to the Ministry of Health & Family Welfare, Government of India was 28.2.2015. Similarly, the last date for Government of India approval was 31.3.2015. As per Schedule, the petitioner – Dental College was required to submit the consent of University affiliation by 30th June, 2014. The concerned institution has not submitted its letter of affiliation till 28.2.2015, which was the last date for DCI to make a recommendation to the Ministry of Health & Family Welfare, Government of India. Accordingly, the DCI vide its letter dated 27.3.2015 and 21.5.2015, maintained its disapproval of renewal permission in respect to said MDS Courses run by the institution. As per the time schedule course in DCI Regulation 2006, the last date for Government of India to either approve or disapprove a case was 31.3.2015. As the petitioner – Dental College failed to submit the document within the time schedule as framed by the DCI in terms of the direction issued by Hon'ble the Supreme Court in its various judgments, the request of the petitioner for grant of renewal permission for admitting 4th Batch of students in MDS course with increase of seats in the speciality of (i) Orthodontics and Dentofacial Orthopedics from 3 to 5 seats and (ii) Paedodontics and Preventive Dentistry from 4 to 6 seats for the academic year 2015-16 was rejected.

13. Learned counsel for the petitioner has drawn our attention to the decision of the Apex Court in the case of *Prayadarshini Dental College & Hospital v/s. Union of India & Ors.*, reported as 2011 (4) SCC 623, para 18 to 21, 23, 24, 25 and 27 and submits that the impugned order be quashed and the respondents No.1 and 2 be directed to grant renewal of permission for admitting 4th Batch of students in MDS course with increase of seats in the speciality of (i) Orthodontics and Dentofacial Orthopedics from 3 to 5 seats and (ii) Paedodontics and Preventive Dentistry from 4 to 6 seats for the academic year 2015-16.

14. Per contra, Shri V. Sharan, learned counsel for the respondent No.2 – DCI has submitted that the direction sought by the petitioner is contrary to Dentists Act, 1948 and statutory regulations framed by the DCI with the prior approval of the Central Government under Section 20 of the Dentists Act,

1948 and the law laid down by the Apex Court from time to time. He submits that the initial permission of Union of India is granted only for a period of one year and the same is subject to its yearly renewal after physical inspection by the DCI till the dental qualification awarded by the Affiliating University in respect of the students of such dental institutions is recognized in accordance with the provisions of Section 10(2) of the Dentists Act, 1948.

15. That the petitioner dental college, in response to the letter dated 10th & 11.12.2014 of the answering respondent, furnished its compliance report vide their letter dated 19.1.2015 which was considered by the Executive Committee of the DCI in its meeting held on 19th January, 2015 and taking its lenient view, decided to recommend to the General Body of the DCI to renew its permission for admitting 4th batch of Students in MDS Course for increase of seat in the speciality of Orthodontics & Dentofacial Orthopedics from 3 to 5 seats and in the speciality of Paedodontics and Preventive Dentistry from 4 to 6 seats at petitioner dental college for the academic session 2015-16 but subject to submission of University affiliation for 2014-15 by 28.2.2015.

16. In respect of furnishing of the university affiliation from the affiliating university, the petitioner dental college has averred in the writ petition that a copy of the university affiliation was handed over to the Council's Inspectors at the time of inspection but it is incorrect, the petitioner dental college did not have any university affiliation with them even upto 27.2.2015. The petitioner dental college in its compliance report dated 19.1.2015 again tried to mislead the respondent No.2 by stating that the Registrar, Devi Ahilya Vishwidalaya (sic:Vishwavidyalaya), Indore as university affiliation, which was in-fact merely a certificate to the effect that the petitioner dental college had deposited the renewal fee for BDS and MDS courses for the academic session 2014-15. Therefore, the certificate date 6.3.2014 issued by respondent No.3, is not an university affiliation by any stretch of imagination. The petitioner dental college, further annexed with their compliance report dated 19.1.2015, a copy of letter dated 19.12.2014 issued by respondent No.4 University stating therein that the matter of issuance of university affiliation to the petitioner dental college for the academic session 2014-15 was under process with them. This certificate of respondent No.4 University also cannot be termed as university affiliation. However, the respondent No.2, taking its lenient view and keeping in view the interest of the students pursuing their study at the petitioner dental college, recommended for renewal of permission subject to fulfillment of

statutory requirement of the university affiliation, but the petitioner dental college has, admittedly, miserably failed to furnish any university affiliation by 28.2.2015.

17. That the General Body of the answering respondent, DCI, in its meeting held on 21 & 22.2.2015 considered the recommendations dated 19.1.2015 of the Executive Committee for renewing the permission for admitting 4th batch of the students in the specialties of Orthodontics and Pedodontics for increase of seats at petitioner dental college for the academic session 2015-16 subject to furnishing of university affiliation by the petitioner dental college by 28.2.2015 and after discussion and deliberation at length, recommended to respondent No.1 UOI to not to allow admissions for increase of seat in the specialties of Orthodontics from 3 to 5 seats & Dentofacial Orthopedics & Pedodontics from 4 to 6 seats at petitioner dental college for the academic session 2015-16 on account of not submission of university affiliation. The answering respondent No.2 vide its letters both dated 26.2.2015, a copy whereof is annexed and marked as **Annexure R.2/3,** communicated its decision to respondent No.1 UOI to take its decision u/s 10 A(4) of the Dentists Act.

18. The respondent No.1, UOI, after receipt of the recommendations dated 28.2.2015 of the respondent No.2, afforded Personal Hearing on 18.3.2015 by a Committee of Experts, constituted by it, to the petitioner dental college and after considering the submission and documents furnished by the petitioner dental college to them, decided to again refer the case of the petitioner dental college to the respondent No.2 to review its recommendations in respect of the 16 dental colleges including petitioner dental college. Accordingly, the respondent No.1 UOI, vide its letter dated 19.3.2015 **(Annexure R2/4)** requested the respondent No.2, inter-alia, the review/assess the schemes in light of the documents submitted by the colleges/petitioner in compliance and the recommendations of the Committee with the request to take appropriate necessary action (s) for review and furnish its recommendations accordingly to this Ministry, immediately and also stipulated therein that last date for issuance of letter of permission by them is 31.3.2015.

19. That the Executive Committee of respondent No.2, DCI, at its meeting held on 26th March, 2015 considered letter No. V.12025/7/2015-DE dated 19.3.2015 from UOI and categorically observed that since as per Time Schedule annexed with DCI Regulation, 2006 and law laid down by the

Hon'ble Supreme Court of India in catena of cases including *Madhu Singh, Mriduldhar* and *Priya Gupta* case, the respondent No.2 was mandated to sent its recommendation to UOI on or before the cut off dated i.e. 28.2.2015. Accordingly, the respondent No.2, inter-alia, decided, qua, the petitioner dental college all among other concerned dental colleges, to not to renew its permission for admitting 4th batch of Students in MDS Course and not to allow admissions for increase of seat in the specialties of Orthodontics & Dentofacial Orthopedics from 3 to 5 seats and in Pedodontics from 4 to 6 at petitioner dental college for the academic session 2015-16 due to non submission of university affiliation within the Time Schedule prescribed in the Regulations. However, the answering respondent in its letter dated 27.3.2015 **(Annexure R2/5)** in the last paragraph thereof has specifically, mentioned, inter-alia, that in cases where university affiliation is required and college authority submitted the same to respondent No.1, UOI before 31.3.2015, the UOI was free to take its own independent decision under Section 10(A) 4 of the Dentists Amendment Act 1933 in such cases.

20. The time schedule annexed to the DCI Regulations 2006 mandates the DCI to send its appropriate recommendations by 28.2.2015, for the academic session 2015-16 and the Union of India was to convey its appropriate decision by 31.3.2015. This time schedule is to be strictly adhered by all concerned. The Hon'ble Supreme Court in the case of *Mridul Dhar (Minor) & Anr. V/s Union of India & Ors.* reported as 2005 (2) SCC 65 has also directed as under:-

> ***"15. Time Schedule provided in Regulations shall be strictly adhered to by all concerned failing which defaulting party would be liable to be personally proceed with."***

21. It is well settled that the High Courts, while exercising jurisdiction under Article 226 of the Constitution of India would not be empowered to substitute its own opinion over the opinion of the expert authorities created under the statues framed by the Parliament. In the case of *Krishna Priya Ganguli Vs. University of Lucknow* reported as (1984) 1 SCC 307 wherein, certain Writ Petitions were entertained by the Hon'ble Allahabad High Court, which were filed by the unsuccessful candidates who could not get admissions in the PG medicine course, by ignoring, relaxing or dispensing with statutory rules and Govt. orders and by giving ex-parte directions for admission of

candidates, the Hon'ble Supreme Court, inter-alia, observed as under:-

> ***".....The High Court under Article 226 cannot ignore the rules framed by the Admissions Committee; nor can it device its own ceriterion for admission. It is a matter for decision of the academic body. If the academic body applied the rules in a bonafide manner to all the candidates equally, the High Court has no jurisdiction to interfere with the internal working of the academic institutions. The High Court can neither relax or rewrite the rules nor grant admission to a person who is appreciably below the required merit on ground of his having a diploma....."***

22. Provisions of Section 10-A of the Dentists Act, 1948, are pari materia with Section 10-A of the Indian Medical Council Act.

23. In the instant case, the application of the petitioner was in-complete due to non-submission of the University affiliation within the time schedule prescribed in the regulations for the academic year 2015-16. It is also not in dispute that the petitioner – Dental College admitted three illegal admissions in the speciality of Orthodontics and Paedodontics for the academic year 2015-16, without the prior approval of Union of India under Section 10A (4) of the Dentists Act, 1948. The factum of admission has not been disclosed by the petitioner in it's writ petition. The stand of the petitioner that he in terms of order dated 7.5.2015 passed W.P. No.2898/2015, granted admission to three students. As per operative para of the order dated 7.5.2015, this Court only quashed the order dated 31.3.2015 passed by the Union of India, which does not make entitled the petitioner – Dental College to admit any student to the extent increase admission capacity in each speciality merely on the ground of quashing and setting aside the order, particularly when the Division Bench directed the respondent No.2 and respondent No.1 – Union of India to take their further decision and to pass an appropriate orders. This shows that the petitioner – Dental College has not approached this Court with its clear heart, mind and hands. The jurisdiction under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the writ court must come clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief.

24. The Dentists Act, 1948 and DCI Regulations makes it very clear that the petitioner – Dental College is statutory obliged to have requisite infrastructure and facilities as per DCI norms, and also to apply to the Dental Council of India for such renewal well in advance for the next academic session. As per the provisions of Section 10A (1) (b) (ii) of the Dentists (Amendment) Act, 1993, no persons, no authority and institutions can increase its admission capacity in any course of study or training (including a post-graduate course of study or training).

25. The Union of India on 15.4.2014 (Annexure P/10) while conveying its approval for renewal of permission for 3rd year MDS Courses in the speciality of Orthodontics and Paedodontics for the last academic year 2014-15 categorically, inter-alia, stipulated that the admission of next batch of students in MDS Course for increase of seats for the academic year 2015-16 would be made only after recognition of MDS Degree with increase of seats and also that in case any admissions are made in violation of any condition stipulated by respondent No.1 – Union of India was to be treated as irregular admission and action under Section 10B (3) of the Dentist (Amendment) Act, 1993 was to be initiated against the petitioner – Dental College.

26. The respondent No.2 initiated proceedings for withdrawal of recognition because the petitioner – Dental College has admitted three admissions, (2) two in Orthodontics and (1) one in Paedodontics for the academic session 2015-16 in contravention of Section 10A (1) (b) (3) and contrary to the impugned order dated 31.7.2015, we are of the view that the petitioner is not entitled for any discretionary relief nor impugned order dated 31.7.2015 is liable to be quashed / set aside.

27. In view of the law laid down by the Apex Court in the case of *D.Y. Patil Medical College V/s. Medical Council of India & Anr.* reported as 2015 (10) SCC 51 it is crystal clear that time schedule is required to be strictly observed. Considering the statutory time schedule and that the same is already over, hence, it would not be appropriate to issue any direction for consideration of the petitioner's college case for the ongoing admission session 2015-16, as that would be breach of law laid down in various decisions of the Apex Court, which is binding. Thus, we direct the petitioner – College to apply a fresh for renewal of permission for admitting 4th Batch of students in the specialty of Orthodontics and Dentofacial Orthopedics from 3 to 6 and Paedodontics and Preventive Dentistry from 4 to 6 seats for the next Academic

Year 2016-17, subject to furnishing of University affiliation from the medical University within the time framed prescribed by the DCI Regulations 2006 and fulfillment of other requisite formalities, as may be necessary and completion of the proceedings initiated by the respondents for cancellation of recognition because three admissions were made in violation of the Dentists Act, 1948 and DCI Regulations.

28. No case for quashment of order dated 31.7.2015 (Annexure P/36) passed by respondent No.1, as prayed by the petitioner is made out. W.P. No.5553/2015, is dismissed with the aforesaid.

29. Cost Rs.25,000/- is awarded to each of the respondents.

Petition dismissed.

I.L.R. [2016] M.P., 3022
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 16506/2015 (Jabalpur) decided on 21 March, 2016

M.P. POWER GENERATION CO.PVT.LTD. & anr. ...Petitioners
Vs.
ANSALDO ENERGIA SPS ...Respondent

***Stamp Act (2 of 1899), Section 47 r/w Sections 33, 35 & 38* - Impounding of the Arbitral Award as the same is insufficiently stamped - Held - Merely by appointment of an Arbitrator by the Supreme Court u/S 11(6) of 1996 Act, on 25.02.2002, it can not be said that the dispute stood referred to the Arbitrator - In the instant case, on the day when the Supreme Court appointed Arbitrator for the petitioners, the Arbitral Tribunal was not appointed in terms of arbitration agreement - If the decree is not duly stamped, it has to be impounded - Impugned order suffers from an error apparent on the face of the record - Same is quashed - Executing Court is directed to examine the question as to whether the award dated 23.09.2004 bears adequate stamp duty or not and to proceed accordingly. (Paras 19, 20 & 21)**

स्टाम्प अधिनियम (1899 का 2), धारा 47 सहपठित धाराएँ 33, 35 व 38 – अपर्याप्त स्टाम्प लगाए जाने के कारण माध्यस्थम् अवार्ड का परिबद्ध किया जाना – अभिनिर्धारित – 1996 के अधिनियम की धारा 11(6) के अंतर्गत दिनांक 25.02.2002 को सर्वोच्च न्यायालय द्वारा मध्यस्थ की नियुक्ति किए जाने मात्र के आधार पर,

विवाद को मध्यस्थता हेतु निर्देशित किया जाना नहीं कहा जा सकता – वर्तमान प्रकरण में, जिस दिन सर्वोच्च न्यायालय ने याचीगण हेतु मध्यस्थ की नियुक्ति की, माध्यस्थम् करार की शर्तों के अनुसार माध्यस्थम् अधिकरण की नियुक्ति नहीं की गई – यदि डिक्री पर सम्यक् रूप से स्टाम्प नहीं लगाए गए हैं तो उसे परिबद्ध किया जाना चाहिए – आक्षेपित आदेश अभिलेख पर प्रकट त्रुटि से ग्रसित है – उसे अभिखण्डित किया गया – निष्पादन न्यायालय को, इस प्रश्न का परीक्षण करने कि क्या अवार्ड दिनांक 23.09.2004 पर पर्याप्त स्टाम्प शुल्क चस्पा है अथवा नहीं तथा तद्नुसार कार्यवाही करने हेतु निदेशित किया गया।

Cases referred:

AIR 1984 Delhi 140, (2000) 4 SCC 543, (2012) 12 SCC 581, AIR 1955 SC 468, AIR 1958 Cal. 490, AIR 1975 Del. 54, AIR 1979 Bom. 214, AIR 1962 SC 78, AIR 1963 MP 143, AIR 1971 MP 140, AIR 1988 Raj. 223, (2005) 8 SCC 618, 1974 (2) Kar.L.J. 41, (1953) 24 ITR 375 (Bom.), (2008) 14 SCC 283, (2005) 10 SCC 746, (2009) ILR 1 Delhi 282, (2011) 14 SCC 66, (1999) 4 ALL ER 705, (2000) 4 SCC 539, (1969) 1 SCC 579, AIR 1964 SC 669, AIR 1979 SC 289, (2002) 10 SCC 427.

Ravish Agrawal with *Arpan J. Pawar,* for the petitioners.

S.U. Kamdar with *N.P. Shah, Manoj Sharma & Y.S. Kamdar,* for the respondent.

ORDER

ALOK ARADHE, J. :- In this petition under Article 227 of the Constitution of India the petitioners have assailed the validity of the order dated 21.09.2015 passed by the Executing Court, by which, the application preferred by the petitioners for impounding the award dated 23.09.2004 has been dismissed. The factual background, which leads to filing of the instant petition, is narrated hereinafter.

2. The petitioner No.1, namely, M.P. Power Generation Company Pvt. Ltd., is the successor of petitioner No.2, namely, M.P. State Electricity Board, which entered into four agreements dated 24.08.1999 with the respondent for refurburishment (sic:refurbishment) of two units of Thermal Power Plant in Amarkantak. However, since the dispute had arisen between the parties, the agreements dated 24.8.1999 were terminated by the petitioners. Clause 15.2 of the Agreement contains an arbitration clause. The respondent initially appointed Mr.Justice M.N.Chandurkar (Retd.) as it's Arbitrator in accordance

with the Arbitration Clause, who was later on replaced by Mr.Justice S.P.Barucha (Retd.). The petitioners did not appoint their Arbitrator, therefore, the respondent approached the Supreme Court by filing an Arbitration Petition, which was decided vide order dated 25.2.2002, and Mr.Justice S.C.Aggarwal was appointed as Second Arbitrator for the petitioners. The Arbitrator of the respondent and the Second Arbitrator appointed for the petitioners by the Supreme Court proceeded to appoint an Umpire, namely, Mr.Justice Y.B.Chandrachud (Retd.). Thus, three-member Arbitral Tribunal was constituted.

3. The Tribunal passed an award on 23.09.2004 on which stamp duty of Rs.7 lacs was paid. The award passed by the Arbitral Tribunal was challenged under section 34 of the Arbitration and Reconciliation (sic:Conciliation) Act, 1996 [hereinafter referred to as "the 1996 Act"] before the Court of Seventh Additional District Judge, Jabalpur. The trial Court by an order dated 04.10.2008 set aside the arbitral award against which an appeal was preferred by the respondent which was allowed vide order dated 20.8.2013. The aforesaid order has been challenged by the petitioner No.1 in Special Leave Petition, which is pending adjudication before the Supreme Court.

4. The respondent initiated execution proceeding sometime in the month of November, 2013 for execution of the award dated 23.9.2004 passed by the Arbitral Tribunal. The petitioner No.1 entered appearance before the Executing Court on 13.1.2015. Thereafter, the petitioner No.1 filed an application under section 47 read with sections 33, 35 and 38 of the Stamp Act, 1899 [for short "the 1899 Act"] for impounding of the award on the ground that the same is insufficiently stamped. The respondent filed its reply to the application, in which, *inter alia*, it was contended that adequate stamp duty of Rs.7 lacs has been paid as per the instructions of one of the Arbitrators. The Executing Court vide order dated 21.9.2015 rejected the application preferred by the petitioner for impounding the award by placing reliance on decision rendered in the case of *Darshan Singh vs. Forward India Finance (P) Ltd. and others*, AIR 1984 Delhi 140 and held that no stamp duty is required to be paid in respect of the award in question.

5. Learned senior counsel for the petitioners while inviting the attention of this Court to Article 11 of Schedule 1A of the 1899 Act submitted that award in question has not been made on a reference or order of the Court in the course of suit and, therefore, Article 11 of the 1899 Act applies to the

award in question and requisite stamp duty has not been paid on the award. In this connection, learned senior counsel has also referred to Rule 372(41) of M.P. Civil Court Rules, 1961. It is further submitted that expression "reference" has not been defined under the 1996 Act and the expression "in the course of suit" referred to in Article 11 of Schedule 1A of 1899 Act is referable to Sections 21 to 25 contained in Chapter 4 of the Arbitration Act, 1940 [for brevity the "1940 Act"] and there is no *pari materia* provision in the 1996 Act. It is urged that award has not been passed in exercise of power under section 8 of the 1996 Act, and under the 1996 Act the Court is not required to make a reference of the dispute as no reference is contemplated under the 1996 Act. It is also urged that reference can only be made to the existing Tribunal. In support of aforesaid submission reliance has been placed on the decisions of the Supreme Court in the cases of *Tamil Nadu Electricity Board vs. Sumathi and others,* (2000) 4 SCC 543 and *State of Goa vs. Praveen Enterprises,* (2012) 12 SCC 581. It is argued that decision relied upon by the trial Court in the case of *Darshan Singh* (supra) has no application to the facts of the present case as the same deals with the provisions of Arbitration Act, 1940. It is also pointed out that in the reply filed by the respondent to the objection preferred by the petitioner No.1, it is admitted that arbitral Tribunal itself directed the stamp duty is payable by the respondent on the arbitration award in accordance with the provisions of the 1899 Act.

6. On the other hand, learned senior counsel for the respondent has submitted that though the 1996 Act does not define the expression "reference", however, the same has been the subject matter of interpretation in the decisions of various Courts and the expression "reference" means the reference of dispute between the parties to arbitration in accordance with the arbitration agreement between the parties. A reference, thus, can be made to an arbitrator contemplated under the agreement and not necessarily to a pre-constituted arbitral tribunal. It is further submitted that an aribtrator (sic:arbitrator) can be appointed simultaneously while making a reference as contemplated under section 20(4) of the 1940 Act and as now provided for by section 11 of the 1996 Act. It is also submitted that it is not *sine qua non* for making a reference that there must pre-exist a constituted arbitral tribunal. In this connnection reference has been made to the decisions in the cases of *Thawardas v. Union of India,* AIR 1955 SC 468, *Barnagore Jute Factory Co. v. Husalchand,* AIR 1958 Cal. 490, *P.C. Agarwal v. K.N. Khosla,* AIR 1975 Del. 54 and *Jolly Steel Industries v. Union of India,* AIR 1979 Bom. 214. It is argued

that in the present case, reference to arbitration of the dispute between the parties was made while appointing an Arbitrator under section 11 of 1996 Act. In this connection reference has been made to decisions in the case of *Hari Shankar Lal vs. Shambu Nath*, AIR 1962 SC 78 and *Ramasahai Sheduram v. Harishchandra*, AIR 1963 M.P. 143. It is urged that the distinction between arbitration commenced pursuant to a reference by a Court and arbitration commenced pursuant to a private reference, is well established and this distinction has been kept in mind by the Parliament while enacting Article 12 of the 1899 Act which has been adopted verbatim by the State Legislature in the form of Article 11 in Schedule 1A of Stamp Act, 1899 as amended by the State Legislature. It is also urged that term "suit" in itself is capable of wide definition and it is well settled that proceeding under section 20 of the Arbitration Act, 1940 which is to be filed and registered as a suit, is not a suit as contemplated by section 9 of the Code of Civil Procedure. In this connection reference has been made to decisions in the cases of *Hayat khan and others vs. Mangilal and others*, AIR 1971 MP 140 and *Usha Rani and others vs. Indermal & Sons and others*, AIR 1988 Raj 223.

7. It is contended that power under section 11 of the 1996 Act is a judicial power, as has been held by the Supreme Court in the case of *SBP & Co. v. Patel Engineering Ltd. and another* (2005) 8 SCC 618. Learned senior counsel has referred to section 8 of the 1996 Act and has submitted that where in a pending suit instituted under Section 9 of the Civil Procedure Code, the court can refer the parties to the suit to arbitration for determination of the disputes. However, the aforesaid power can be exercised only if there exists an arbitration agreement and under section 8 of the 1996 Act the court refers the parties to arbitration in relation to the pending judicial proceeding and an order under section 8 is held to be a reference. It is argued that intention of Legislature is only to grant exemption from payment of stamp duty wherever the award is rendered pursuant to a reference by the Court i.e. with intervention of the Court, irrespective of the fact whether it is in a suit as contemplated by section 9 of the Code or any proceeding made in a court of competent jurisdiction. In this connection, reference has been made to *Darshan Singh* (supra) and *Govindaswamy and others vs. Lakkanna and others*, 1974 (2) Kar. L.J. 41. It is also argued that expression "in the course of suit" does not control the interpretation of Article but only intends to convey that it should be a proceeding in a Court of Law from where the arbitration proceeding has commenced, meaning thereby with the intervention of the Court. It is urged

that where there is an interpretation of a central legislation by a High Court, then ordinarily and as far as possible, another High Court would lean toward such interpretation unless the same is found to be erroneous, perverse or in ignorance of an earlier contradictory view taken. In this connection reliance is placed on the decision in the case of *Mankelal Chunilal & sons vs. Commssioner of Income Tax (Central) Bombay*, (1953) 24 ITR 375 (Bom.). It is also urged that it is equally settled legal position that when a High Court interprets a provision of law, and similar and *pari materia* provisions exist in the statute of another State, then oridinarily (sic:ordinarily) and as far as possible the High Court would lean towards such an interpretation, unless it is erroneous, perverse or is in ignorance of an earlier contradictory view taken. [*Pradip J. Mehta v. CIT* (2008) 14 SCC 283] It is contended that constituting an arbitral tribunal and referring the dispute to be determined under the 1996 Act amounts to an implied reference. In this conenction (sic:connection) learned senior counsel has referred to the decision in *Praveen Enterprises* (supra). It is further contended that award in question falls within the exception carved out in Article 11 of Schedule 1A of the Stamp Act, 1899. It is also contended that payment of stamp duty is a *lis* between the state and the party liable to make such payment and it cannot be used as a weapon of offence by a judgment debtor to frustrate an attempt of executing an award against him. In this connection reference has been made in the cases of *Dr. Chiranji Lal v. Hari Das*, (2005) 10 SCC 746 and *Jitender Mohan Malik v. Ravi Bhushan Malik*, (2009) ILR 1 Delhi 282.

8. Alternatively, it is argued that in case this court comes to the conclusion that stamp duty is payable on the award in question, the execution proceeding should not be stayed as per the decision of the Supreme Court in *SMS Tea Estates Pvt Ltd. v. Chandmari Tea Co. Pvt. Ltd.* (2011) 14 SCC 66 and the respondent should be allowed to pay the deficit stamp duty and penalty, and in case the respondent makes payment of deficit stamp duty and penalty, the defect with regard to deficit stamp duty is cured, the court may treat the document as duly stamped and proceed to act upon the same.

9. I have considered the rival submissions made at the Bar. Admittedly, in the instant case the award has been passed under the provisions of the 1996 Act. The moot question which arises for consideration is whether in a proceeding under section 11(6) of the 1996 Act, the appointment of an Arbitrator on behalf of the petitioners by the Court itself would amount to

reference of a dispute to the Arbitration.

10. Before proceeding further it is apposite to notice relevant provisons (sic:provisions)of the 1899 Act, 1940 Act and the 1996 Act. The relevant clause of Article 11 of Schedule 1-A of 1899 Act is as under:

Description of instrument	Proper stamp duty
Award, that is to say, any decision in writing by an arbitrator or umpire, on a reference made otherwise than by an order of the Court in the course of a suit, being an award made as a result of a written agreement to submit present or future differences to arbitration and not being an award directing a partition.	Twenty rupees for every one thousand rupees or part thereof, of the amount of value of the value of which the award relates.

11. Section 2(a) of the 1940 Act defines "reference" which means a reference to arbitration. Chapter II thereof deals with arbitration without intervention of a court, whereas Chapter III deals with arbitration with intervention of a court where there is no suit pending. Section 20 of the Arbitration Act, 1940 reads as under :-

> *"20. (1) - Where any persons have entered into an arbitration agreement before the institution of any suit with respect to it subject matter of the agreement or any part of it and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in court.*
>
> *(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants if the application has been presented by all the parties, or if otherwise, between the applicant as plaintiff and the other parties as defendants.*

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by the other provisions of this Act so far as they can be made applicable."

Thus, from perusal of Section 20 of the 1940 Act, it is evident that under section 20(1) the Court had the power to record an agreement between the parties to a suit and to refer the dispute to an arbitration. However, the Court did not have any inherent power to refer the dispute to an abrbitration (sic:arbitration) in the absence of an agreement. Section 20(4) of the 1940 Act empowers the Court to refer the dispute to the arbitration even if the some of the parties do not agree to refer the dispute to the arbitration. Thus, under sections 20(1) to 20(4) of the 1940 Act, a dispute in a suit could be referred to arbitration only if there was an agreement between the parties to refer such dispute to arbitration. Such agreement has to be recorded by the court in the suit itself.

12. Chapter IV deals with Arbitration in suit. Sections 21 to 24 of 1940 Act read as under:

*"21. **Parties to an suit may apply for order of reference.** Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference.*

*22. **Appointment of arbitrator.** The arbitrator shall be*

appointed in such manner as may be agreed upon between the parties.

23. Orders of reference reasonable for the making of the award. *(1) The court shall, by order refer to the arbitrator the matter in difference which he is required to determine, and shall in the order specify such time as it thinks reasonable for the making of the award.*

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Act, deal with such matter in the suit.

24. Where some only of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by section 21, the Court may, if it thinks fit, so refer such matters to arbitration (provided that the same can be separated from the rest of the subject-matter of the suit) in the manner provided in that section, but the suit shall continue so far as it relates to the parties who hae (sic:have) not joined in teh (sic:the) said application and to matters not contained in the said reference as if no such appilcation (sic:application) had been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joinded (sic:joined) in the application."

13. Section 8 of 1996 Act reads as under :-

"8. Power to refer parties to arbitration where there is an arbitration agreement

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

Thus, it is evident that under section 8 of the 1996 Act, the Court can refer the parties to an Arbitration.

14. Section 11(6) of 1996 Act is quoted below for the facility of reference:

*"11. **Appointment of arbitrators***

(6) Where, under an appointment procedure agreed upon by the parties, -

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an insitution (sic:institution), fails to perform any function entursted (sic:entrusted) to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

From perusal of aforesaid provision it is clear that section 11(6) confers the power on the Court to appoint an Arbitrator in case parties fail to act as required under the procedure for appointment or the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure.

15. It is pertinent to mention that there is no *pari materia* provision in the 1996 Act like section 20 and sections 21 to 24 of the 1940 Act. The provisions of Code of Civil Procedure, 1908 were amended by Code of Civil Procedure (Amendment) Act, 1999 with effect from 01.7.2002. Section 89 of the Code has been inserted in the Code of Civil Procedure. The aforesaid amendment,

provides for settlement of dispute outside the Court. Section 89, *inter alia,* provides that where it appears to the Court that there exists an element of settlement which can be acceptable to the parties, the Court shall formulate the terms of such possible settlement upon taking views of the parties, and shall refer the same for arbitration. If the dispute is referred to an Arbitration under Section 89 of the Code of Civil Procedure, then provisions of the 1996 Act will apply to such arbitration proceeding. Under section 89 of the Code of Civil Procedure, the Court may refer the terms of possible settlement, *inter alia,* to an arbitration even in the absence of arbitration agreement. However, under section 8 of the 1996 Act the Court can refer the parties to arbitration only if there is an arbitration agreement and the reference can be made strictly as per terms of the agreement. Thus, section 89 of the Code of Civil Procedure confers wider powers to the Court to refer the dispute for arbitration.

16. The expression "reference" has admittedly been not defined under the 1996 Act. The Stamp Act is a fiscal enactment, on the basis of which, stamp duties are levied on transactions in the shape of stamp on instruments, leviable with stamp duties on them. The Stamp Act, 1899 is a fiscal measure which has been enacted with an object to secure revenue for the State. The question whether an old statute can apply to new state of affairs not in contemplation when the statute was enacted, is no longer *res integra*. It has been held in *Fitzpatrick v. Sterling Housing Association Ltd.* (1999) 4 All ER 705 that in interpreting an Act of Parliament, it is proper, and indeed necessary, to have regard to the State of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case when a new state of affairs, or a fresh set of facts bearing on policy, come into existence, the courts have to consider whether they fall within the parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend on the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. [See: *Principles of Statutory Interpretation, 13th Edition by Justice G.P.Singh,* Pg.251]. In the backdrop of aforesaid well settled legal position the word "reference" has to be interpreted bearing in mind that intention of legislature has been to ensure that bogus awards

obtained with an intention to avoid payment of stamp duty are identified and charged with duty, and exclusion from payment of duty is to be granted only to genuine awards which determine the dispute between the parties on the basis of reference made by the court of competent jurisdiction.

17. The Supreme Court in *P. Anand Gajapathi Raju vs. P.V.G. Raju,* (2000) 4 SCC 539 has held that there is no provision in the new Act for referring the matter to an arbitrator by an intervention of the court. Similar view has been taken in the case of *T.N.Electricity Board* (supra). Both the parties have placed reliance on the decision of the Supreme Court in the case of *Praveen Enterprises* (supra), which deals with the expression "Reference to arbitration". Therefore, a careful scrutiny of the same in the context of well settled legal position referred to in the preceding paragraph is required. The Supreme Court in the aforesaid decision while dealing with the question whether the respondent in arbitration proceeding is precluded from making the counter claim in the circumstances referred thereto also dealt with the expression "Reference to arbitration" in paragraph 10 of the judgment which is reproduced below for the facility of reference:-

> *"10. "Reference to arbitration" describes various acts. Reference to arbitration can be by paties (sic:parties) themselves or by an appointing authority named in the arbitration agreement or by a court on an application by a party to the arbitration agreement. We may elaborate:*
>
> *(a) If an arbitration agreement provides that all disputes between the parties relating to the contract (some agreements may refer to some exceptions) shall be referred to arbitration and that the decision of the arbitrator shall be final and binding, the "reference" contemplated is the act of parties to the arbitration agreement, referring their disputes to an agreed arbitrator to settle the disputes.*
>
> *(b) If an arbitration agreement provides that in the event of any dispute between the parties, an authority named therein shall nominate the arbitrator and refer the disputes which required to be settled by arbitration, the "reference" contemplated is an act of the appointing authority referring the disputes to the arbitrator appointed*

by him.

(c) Where the parties fail to concur in the appointment of the arbitrator(s) as required by the arbitration agreement, or the authority named in the arbitration agreement failing to nominate the arbitrator and refer the disputes raised to arbitration as required by the arbitration agreement, on an application by an aggrieved party, the court can appoint the arbitrator and on such appointment, the disputes between the parties stand referred to such arbitrator in terms of the arbitration agreement."

18. Paragraphs 25 and 41 of the said judgment, which-are relevant for the purpose of controversy involved in the petition, are reproduced below for the facility of reference:

'25. Section 20 of the old Act required the court while ordering the arbitration agreement to be filed, to make an order of reference to the arbitrator. The scheme of the new Act requires minimal judicial intervention. Section 11 of the new Act, on the other hand, contemplates the Chief Justice or his designate appointing the arbitrator <u>but does not contain any provision for the court to refer the disputes to the arbitrator.</u> Sub-sections (4), (5) and (9) of Section 11 of the Act require the Chief Justice or his designate to appoint the arbitrator(s). Sub-section (6) requires the Chief Justice or his designate to "take the necessary measure" when an application is filed by a party complaining that the other party has failed to act as required under the appointment procedure. All these sub-sections contemplate an appilcant (sic:applicant) filing the application under Section 11, only after he has raised the disputes and only when the respondent fails to cooperate/concur in regard to appointment of arbitrator.

41. The position emerging from the above discussion may be summed up as follows:-

(a) Section 11 of the Act requires the Chief Justice or his designate to either appoint the arbitrator(s) or take

necessary measures in accordance with the appointment procedure contained in the arbitration agreement. The Chief Justice or the designate is not requried (sic:required) to draw up the list of disputes and refer them to arbitration. The appointment of the Arbitral Tribunal is an implied reference in terms of the arbitration agreement.

(b) Where the arbitration agreement provides for referring all disputes between the parties (whether without any exceptions or subject to exceptions), the arbitrator will have jurisdiction to entertain any counterclaim, even though it wsa (sic:was) not raised at a stage earlier to the stage of pleadings before the arbitrator.

(c) Where however the arbitration agreement requires specific disputes to be referred to arbitration and provides that the arbitrator will have the jurisdiction to decide only the disputes so referred, the arbitrator's jurisdiction is controlled by the specific reference and he cannot travel beyond the reference, nor entertain any additional claims or counterclaim which are not part of the disputes specifically referred to arbitration."

19. The Supreme Court in the cases of *Gajapathi Raju* (supra), *TN. Electricity Board* (supra) and *Praveen Enterprises* (supra) has held that the 1996 Act does not contain any provision for the court to refer the dispute to the Arbitrator. Even if the submission of the respondent that appiontment (sic:appointment) of arbitral tribunal is an implied reference in terms of arbitration agreement as held by the Supreme Court in para 41 of the decision in the case of *Praveen Enterprises* (supra) is accepted, then also in the instant case, on the day when the Supreme Court appointed arbitrator for the petitioners, the arbitral tribunal was not appointed in terms of arbitration agreement, which would be evident from the facts stated hereinafter. In the instant case, admittedly, arbitration agreement provides that both the parties have to appoint their arbitrators, and the arbtirators (sic:arbitrators) appointed by the parties, in turn, would appoint an Umpire which is necesssary (sic:necessary) for the constitution of the Arbitration Tribunal. The respondent appointed Justice Chandurkar as its arbitrator, whereas the petitioners failed to appoint their arbitrator and, therefore, in a proceeding under section 11(6) of 1996 Act by order dated 25.2.2002 Justice S.C. Agarwal

was appointed as Arbitrator for the petitioners. Two arbitrators, in turn, appointed Umpire on 08.3.2002. The award in question is not an outcome of section 8 of 1996 Act. Merely by appointment of an Arbitrator by the Supreme Court for the petitioners under section 11(6) of 1996 Act on 25.2.2002, it cannot be said that dipsute (sic:dispute) stood referred to the Arbitrator, because as per arbitration agreement the dispute was to be adjudicated by two arbitrators and one umpire. Therefore, award in question does not fall in exception carved out by Article 11 of Schedule 1A of Stamp Act, 1899 and the stamp duty has to be paid as required by Article 11 of Schedule 1A of the Stamp Act, 1899. Presumably, for this reason, one of the Arbitrator has already directed the respondent to affix the stamp duty. An award is an instrument within the meaning of the Stamp Act and has to be duly stamped before it is available for any purpose. [See: *Hindustan Steel Ltd. vs. Messers Dilip Construction Company,* (1969) 1 SCC 579 and *SMS Tea Estates Pvt. Ltd.* (supra)]. The Court is duty bound to impound an insufficiently stamped award under section 33 of the 1899 Act.

20. At this stage, it is appropriate to advert to the submissions made by learned senior counsel for the respondent. It is well settled legal proposition that when there is no ambiguity in the statute, it may not be permissible to refer to, for purposes of its construction, any previous legislation or decisions rendered thereunder. [See: *State of Punjab v. Okara Grain Buyers Syndicate Ltd. Okara*, AIR 1964 SC 669 and *Board of Muslim Waks (sic:Wakfs), Rajasthan v. Radha Kishan,* AIR 1979 SC 289]. Therefore, the definition of expression "reference" under the 1940 Act as well as decisions rendered dealing with the previous 1940 Act have no relevance in the fact situation of the case. Therefore, reliance placed by learned senior counsel on the decisions in the cases of *Thawardas* (supra), *Barnagore Jute Factory Co.* (supra), *P.C.Agarwal* (supra), and *Jolly Steel Industries* (supra), *Hari Shankar Lal* (supra), *Ramasahai Sheduram* (supra), *Hayat Khan* (supra) and *Usha Rani* (supra) are of no assistance to the respondent. This Court has already recorded a conclusion that award in question is not passed on a reference by the Court, therefore, the question whether the proceeding under section 11(6) of the 1996 Act can be termed as a suit or not, need not be dealt with. So far as the reliance placed by the learned senior counsel for the respondent in the cases of *Dr.Chiranji Lal* (supra) and *Jitender Mohan Malik* (supra) is concerned, it has been held in the aforesaid cases that provisions of Stamp Act have not been enacted to arm the litigant with a weapon of technicality to a case of his

opponent. It has further been held in the aforesaid decision that if the decree is not duly stamped, it has to be impounded and if requisite stamp duty and penalty are paid, decree can be acted upon. Therefore, reliance placed on the aforesaid decision also does not help the respondent.

21. In view of the preceding analysis, the impugned order passed by the executing Court suffers from an error apparent on the face of record. Accordingly, it is quashed. The Executing Court is directed to examine the question whether the award dated 23.09.2004 bears adequate stamp duty. In case, it comes to the conclusion that the Award is not duly stamped, it shall take action in light of decision of the Supreme Court in *Peteti Subba Rao Vs. Anumala S. Narendra,* (2002) 10 SCC 427 and after payment of deficit stamp duty and penalty, if any, shall treat the document in question as duly stamped and shall proceed to act upon the same expeditiously.

22. With the aforesaid directions the writ petition is disposed of.

Petition disposed of.

I.L.R. [2016] M.P., 3037
WRIT PETITION
Before Mr. Justice Rohit Arya
W.P. No. 1266/2010 (Gwalior) decided on 25 April, 2016

PUSHPA BAI (SMT.) & ors. ...Petitioners
Vs.
BOARD OF REVENUE, M.P. & ors. ...Respondents

*A. **Constitution - Article 226 & 227 - Territorial Jurisdiction - Facts involved** -* **Main case originated from the orders of the Tehsildar, Nazul Jabalpur and that of SLR Jabalpur, and after travelling through appellate proceedings and culminated into rejection of revision by the Board of Revenue at Gwalior - Held - Since the genesis of the cause of action has arisen within the Revenue District of Jabalpur, falling within the territorial jurisdiction of Principal Bench, Writ Petition would be maintainable at Jabalpur and not at Gwalior Bench merely for the reason of rejection of revision by the Board of Revenue, Gwalior. (Para 4)**

क. संविधान – अनुच्छेद 226 व 227 – क्षेत्रीय अधिकारिता – अंतर्ग्रस्त तथ्य – मुख्य प्रकरण तहसीलदार, नजूल जबलपुर एवं अधीक्षक भू–अभिलेख,

जबलपुर के आदेशों से उद्धृत होकर अपीलीय कार्यवाहियाँ तय करने के उपरांत राजस्व मण्डल, ग्वालियर से पुनरीक्षण में खारिज होकर अंतिम हुआ – अभिनिर्धारित – चूंकि वाद कारण की उत्पत्ति मुख्यपीठ की क्षेत्रीय अधिकारिता के अंतर्गत आने वाले राजस्व जिला जबलपुर के भीतर हुई है, इसलिए, राजस्व मण्डल, ग्वालियर द्वारा पुनरीक्षण खारिज किए जाने के कारण मात्र से, यह याचिका खण्डपीठ ग्वालियर में पोषणीय नहीं होगी, बल्कि यह जबलपुर में पोषणीय होगी।

B. *Constitution - Article 226 & 227* - Duty of Court while examining question as to Territorial Jurisdiction - While addressing on the question whether the High Court has jurisdiction to entertain Writ Petition, the Court is required to carefully peruse the averments made in the petition irrespective of the fact, truth or otherwise thereof - In other words, the Court must take into consideration all facts pleaded in the context of cause of action. **(Para 4)**

ख. संविधान – अनुच्छेद 226 व 227 – क्षेत्रीय अधिकारिता के प्रश्न का परीक्षण करते समय न्यायालय का कर्तव्य – इस प्रश्न को संबोधित करते समय कि क्या उच्च न्यायालय को रिट याचिका ग्रहण करने की अधिकारिता है, न्यायालय द्वारा याचिका में किए गए प्रकथनों का, तथ्य, सत्य अथवा अन्यथा को विचार में लिए बगैर सावधानीपूर्वक अवलोकन किया जाना अपेक्षित है – दूसरे शब्दों में, न्यायालय को वाद कारण के संदर्भ में अभिव्यक्त किए गए समस्त तथ्यों को आवश्यक रूप से विचार में लेना चाहिए।

C. *Constitution - Article 226 & 227 - High Court Rules & Orders, M.P., Chapter III Rule 4 - Doctrine of Forum Conveniens* - The Court is obliged to ensure convenience of all the parties before it, expenses involved, requirement of verification of facts, requisitioning of records, factors necessary for the just adjudication of the controversy and the Court may, while striking the balance of convenience, decline to exercise jurisdiction, though part of cause of action had arisen within the territorial jurisdiction of that court - Held - If a Bench, either sitting at the Principal Seat at Jabalpur or Bench at Gwalior or Indore, is of the opinion that the main case had arisen from the Revenue District falling within the territorial jurisdiction of some other Bench or the Principal Seat, it may record its reason and return the case for presentation at proper place. **(Para 4)**

ग. संविधान – अनुच्छेद 226 व 227 – उच्च न्यायालय नियम एवं आदेश, म.प्र., अध्याय III नियम 4 – उपयुक्त न्यायालय का सिद्धांत – यह न्यायालय

का दायित्व है कि वह उसके समक्ष सभी पक्षकारों की सुविधा, अंतर्ग्रस्त व्ययों, तथ्यों के प्रमाणीकरण की आवश्यकता, अभिलेखों की मांग हेतु एवं विवाद के उचित न्यायनिर्णयन हेतु आवश्यक कारकों को सुनिश्चित करे, एवं यद्यपि, वाद कारण अंशतः उस न्यायालय की क्षेत्रीय अधिकारिता के अंतर्गत उत्पन्न हुआ था, परंतु फिर भी सुविधा का संतुलन बनाते समय, न्यायालय अधिकारिता का प्रयोग करने से इंकार कर सकता है – अभिनिर्धारित – मुख्यपीठ जबलपुर अथवा खण्डपीठ ग्वालियर अथवा इंदौर में सुनवाई कर रही किसी न्याय पीठ का यदि ऐसा मत है कि मुख्य प्रकरण किसी अन्य खण्डपीठ अथवा मुख्यपीठ की क्षेत्रीय अधिकारिता के अंतर्गत आने वाले राजस्व जिले से उत्पन्न हुआ है, तब वह अपने कारण अभिलिखित करें, प्रकरण को उचित स्थान पर प्रस्तुत किए जाने हेतु वापस लौटा सकता है।

Cases referred:

(1873) 8 CP 107, ILR (1889) 16 Cal. 98, 102, (1989) 2 SCC 163, AIR 1953 SC 210, AIR 1961 SC 532, (1984) SC 646, (1985) 3 SCC 217, (1994) 4 SCC 711, (1999) 4 SCC 656, (2002) 1 SCC 567, (2004) 6 SCC 254, (2007) 11 SCC 335, 1987 JLJ 341, (2010) 1 SCC 457, 2000 (2) MPLJ 50, 2006 (2) MPLJ 530, (2014) 9 SCC 129, 1991 RN 2.

S.K. Bajpai, for the petitioners.
Sarvesh Sharma, for the respondent No. 3.

ORDER

Rohit Arya, J. :- The issue related to territorial jurisdiction of High Court and/or benches thereof exercising power under Article 226 of the Constitution of India, i.e. the territories within which the **cause of action, wholly or in part, arises,** as involved in this case, is considered to be of public importance.

The incidental question related to concept of forum conveniens or forum non-conveniens also is of significant importance connected with the aforesaid issue.

This Court proposes to answer both issues in the factual backdrop of the case in hand.

2. Relevant facts are to the effect that the land admeasuring 12182.6 sqft., plot No.691/2, sheet No.155-D falling in Subhash Nagar (Subhadra Kumari Chauhan Ward) **Jabalpur** (hereinafter referred to as "the land in question") was of the ownership and in possession of one Ramesh Singh

Thakur-respondent no.2. The competent authority under the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as "the Act of 1976") in case No.1045/Aa-90-Ba-9/76-77 vide its order dated 24/5/1988 declared the land in question as surplus land and accordingly corresponding changes were made in the land records. During pendency of ceiling proceedings and after declaration of the land as surplus land respondent no.2 had disposed of the land by four different sale deeds viz. dated 2/8/1988 in favour of petitioner no.2, dated 2/8/1988 in favour of Late Gulabchand Jain-husband of petitioner no.1 and father of petitioners no.2 to 4, dated 3/3/1988 in favour of petitioner no.3 and dated 31/3/1988 in favour of petitioner no.4. Petitioners claim that the parcels of land, so transferred, were duly recorded in the land records on 2/11/1991. Being aggrieved by the order dated 24/5/1988 passed by the competent authority (supra) one Smt. Veerabai, Sardar Sulochan Singh and Smt. Ravindra Kaur preferred an appeal before the Additional Commissioner, **Jabalpur** vide Appeal No.228/Aa-90(Ba-9)/93-94. The appellate authority vide its order dated 15/5/1996 set aside the order dated 25/4/1988 and remanded the case back to the competent authority for spot inspection of the land in question and thereafter with due opportunity to the affected parties, passed necessary orders. Likewise, one Kanhaiyalal Chaurasiya filed Writ Petition No.5079/1996 and Buddhalal, Kujilal, Gulabchand and Lallaprasad filed Writ Petition No.2691/1994 at the Principal Seat of the High Court of Madhya Pradesh at **Jabalpur** challenging the order dated 24/5/1988. The Writ Petition was also disposed of in the light of the order passed by the Commissioner, **Jabalpur** dated 15/5/1996 (supra) with similar directions. During this period the Act of 1976 was repealed and consequently the ceiling proceedings stood lapsed. Thereafter, respondent no.3-Sobha Agrawal filed an application before the Tahsildar, Nazul, **Jabalpur** under Sections 115 and 116 of the M.P. Land Revenue Code for recording of her name in the revenue records. The Tahsildar, Nazul, **Jabalpur** vide his order dated 3/7/2001 in case No.20-Aa-6(Aa)-2000-2001 ordered for mutation of the name of respondent no.3 in the revenue records of the land admeasuring 12182.6 sqft. falling in plot No.691/2, Subhash Nagar (Subhadra Kumari Chauhan Ward), **Jabalpur**. Thereafter, respondent no.3 out of the aforesaid land in question transferred 3362.6 sqft. land in favour of petitioners by registered sale deed dated 9/7/2001. The names of petitioners were accordingly mutated in the revenue records to the extent of aforesaid area of land by orders of the Superintendent Land Records, **Jabalpur** dated 28/7/2001.

Petitioners challenged the order of the Tahsildar, **Jabalpur** dated 3/7/2001 as well as that of the SLR, **Jabalpur** dated 28/7/2001 by way of appeal before the SDO (Urban), **Jabalpur**. The appeal was allowed vide order dated 16/5/2005 setting aside the order dated 3/7/2001 with further direction to correct the land records in favour of petitioners in respect of the land admeasuring 2236 sqft., i.e. total area of four sale deeds executed by respondent no.3 in favour of petitioners in the year 1988, detailed above. Being aggrieved by the aforesaid order, appeal was preferred before the Commissioner (Appeals), **Jabalpur** by respondent no.2. The order dated 16/5/2005 was set aside and the order passed by the Tahsildar, **Jabalpur** on 3/7/2001 and that of the SLR, **Jabalpur** dated 28/7/2001 was restored by appellate order dated 25/4/2006. Being aggrieved by the aforesaid order, petitioners challenged the same before the Board of Revenue invoking revisional jurisdiction under Section 50 of the M.P. Land Revenue Code. The Board of Revenue has dismissed the revision petition on the premise that the subject matter of dispute since related to land in urban agglomeration and subject matter of proceedings before the Nazul Officer, **Jabalpur**, SDO (Urban) **Jabalpur** and Commissioner, Jabalpur Division, **Jabalpur**, therefore, the revisional jurisdiction was not available to the Board of Revenue under Section 50 of the M.P. Land Revenue Code and closed the case, however, liberty was granted to the applicant to approach the competent authority, i.e. the Secretary, Revenue Department, State of M.P.

3. Challenging the legality, validity and propriety of the order passed by the Board of Revenue the instant writ petition has been filed in this Court, i.e. Gwalior Bench of High Court of M.P.

The present State of Madhya Pradesh was constituted under Section 9 of the State Reorganization Act, 1956, w.e.f. the appointed day i.e.1/11/1956. The Presidential Order dated 28-11-1968 reads as follows-

> "In exercise of the powers conferred by sub-s. (2) of S.51 of the States Reorganization Act, 1956 (37 of 1956), I, Zakir Husain, President of India, after consultation with the Governor of Madhya Pradesh and the Chief Justice of the High Court of Madhya Pradesh, hereby establish a permanent Bench of the Madhya Pradesh High Court at Gwalior and further direct that such Judges of the High Court of Madhya Pradesh, being not

> less than two in number, as the Chief Justice may from time to time nominate, shall sit at Gwalior in order to exercise the jurisdiction and power for the time being vested in that High Court in respect of cases arising in the revenue districts of Gwalior, Shivpuri, Datia, Guna, Vidihsa (Bhilsa), Bhind and Morena:" (Emphasis supplied)

The expression "in respect of cases arising in the revenue districts of Gwalior, Shivpuri, Datia, Guna, Vidisha, Bhind and Morena means the place or places within the specified revenue districts where the whole or part of cause of action arises". If the cause of action arises wholly or in part at a place or places within the specified revenue districts, the Gwalior Bench of the High Court of M.P. will have the jurisdiction.

Further, in exercise of powers under Article 225 of the Constitution of India, Section 54 of the State Reorganization Act, 1956, Clause 27 and 28 of the Letters Patent and Section 3 of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005, the High Court of M.P. has made rules regulating practice and procedure of the High Court known as Madhya Pradesh High Court Rules & Orders (hereinafter referred to as "the High Court Rules"). Chapter III of the High Court Rules deal with **territorial jurisdiction of the Principal Seat and the Benches** and Rule 4 thereof provides as under:-

> **"4.** Where a bench, in the Principal Seat at Jabalpur or the Benches at Indore or Gwalior, on an objection taken by the Registry or otherwise, is of the opinion that a main case posted before it, had arisen from a revenue district falling within the territorial jurisdiction of some other Bench or the Principal Seat, it may record its opinion and return the main case for its presentation at proper place for orders, after retaining one complete set of the main case."

Therefore, if a Bench either sitting at the Principal Seat at **Jabalpur** or Bench at Indore or Gwalior is of the opinion that the main case had arisen from the revenue district falling within the territorial jurisdiction of some other Bench or the Principal Seat, as the case may be, it may record its opinion and return the main case for presentation at proper place for orders etc. Factual matrix of the case in hand suggests that the main case originated from the orders of the

Tahsildar, Nazul, **Jabalpur** dated 3/7/2001 and that of the SLR, **Jabalpur** dated 28/7/2001 in exercise of powers under Sections 115 and 116 of the M.P. Land Revenue Code travelled through appellate proceedings before the SDO (Urban) **Jabalpur** and Commissioner (Appeals), **Jabalpur** though culminated into rejection of revisional proceedings by the Board of Revenue at Gwalior. Therefore, in view of Rule 4 of the High Court Rules jurisdiction of the bench sitting at Principal Bench of the High Court of M.P. at **Jabalpur** shall have jurisdiction to entertain writ petition. However, in the light of Article 226 (2) of the Constitution of India, which provides that the High Court shall exercise the jurisdiction under Article 226 (1) in relation to the territories within which the **cause of action, wholly or in part, arises**, learned counsel for the petitioners contends that as the revisional order is passed by the Board of Revenue at Gwalior, therefore, part of cause of action has arisen at Gwalior and, therefore, the Gwalior Bench of the High Court of M.P. shall have jurisdiction to entertain the writ jurisdiction under Article 226 (1) of the Constitution of India and Rule 4 of the High Court Rules shall give way to the mandate contained under Article 226 (2) of the Constitution of India.

4. The crux of the controversy, therefore, revolves around the concept, meaning and dimensions of words **"cause of action, wholly or in part"**. Effect of Rule 4 of the High Court Rules shall be considered a little later.

The expression "cause of action" has not been defined either in the Constitution of India or in the Code of Civil Procedure. The **cause of action** is often described as a bundle of essential facts necessary for plaintiff to prove if disputed or traversed by defendant to succeed in the suit. Failure to prove such facts shall entitle the defendant a right to judgment in his favour, therefore, cause of action gives occasion for and forms the foundation of the suit. The comprehensive definition of expression **"cause of action"** by Lord Brett in the case of *Cooke Vs. Gill,* (1873) 8 CP 107 is that "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. In the case of *Chand Kour v. Partab Singh,* ILR (1889) 16 Cal. 98, 102 Lord Watson explained the concept of cause of action, which reads as under:-

> *"...the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the*

plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

In the case of *A.B.C. Laminart (P) Ltd. v. A.P. Agencies,* (1989) 2 SCC 163 the Hon'ble Supreme Court has made the following observations:-

"12. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

In catena of decisions of the Supreme Court scope of territorial jurisdiction of the High Court in its writ jurisdiction under Article 226 of the Constitution of India pre & post Constitution (Fifteenth Amendment Act) 1963 and Constitution (Fourty-second Amendment Act) 1976 when Article 226 (2) was incorporated in the Constitution renumbering clause (1-A) of Article 226 (1-A) incorporated by Constitution (Fifteenth Amendment Act) 1963, which reads as under:-

"226. (1-A) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within

> *which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories."*

ranging from *Election Commission v. Saka Venkata Rao,* AIR 1953 SC 210; *Lt. Col. Khajoor Singh v. Union of India,* AIR 1961 SC 532; *A.B.C. Laminart (P) Ltd. v. A.P. Agencies*, (1989) 2 SCC 163; *Union of India v. Oswal Woolen Mills Ltd.,* (1984) SC 646; *State of Rajasthan v. Swaika Properties,* (1985) 3 SCC 217; *ONGC v. Utpal Kumar Basu*, (1994) 4 SCC 711; CBI, *Anti-Corruption Branch v. Narayan Diwakar,* (1999) 4 SCC 656, *Union of India v. Adani Exports Ltd.*, (2002) 1 SCC 567; and, *Kusum Ingots & Alloys Ltd. v. Union of India,* (2004) 6 SCC 254 has been dealt with exhaustively and, therefore, this Court does not intend to burden the judgment reiterating enunciation of laws in various judgments. There is a detailed review of all such judgments by the Hon'ble Supreme Court in the case of *Alchemist Ltd. And another vs. State Bank of Sikkim and others,* (2007) 11 SCC 335, wherein upon critical evaluation of ratio of various judgments the Hon'ble Supreme Court lucidly laid down the following principle of law in the context of meaning of words "part of cause of action", which reads as under:-

> ***"From the aforesaid discussion and keeping in view the ratio laid down in a catena of decisions by this Court, it is clear that for the purpose of deciding whether facts averred by the appellant-petitioner would or would not constitute a part of cause of action, one has to consider whether such fact constitutes a material, essential, or integral part of the cause of action. It is no doubt true that even if a small fraction of the cause of action arises within the jurisdiction of the Court, the Court would have territorial jurisdiction to entertain the suit/petition. Nevertheless it must be a 'part of cause of action', nothing less than."***
>
> (Emphasis supplied)

Therefore, while addressing on the question whether a High Court has territorial jurisdiction to entertain the writ petition, the Court is required to carefully

peruse the averments made in the petition irrespective of the fact, truth or otherwise thereof. In other words the Court must take into consideration all facts pleaded in the context of cause of action.

Now on the bedrock of aforesaid enunciation of law if the factual matrix of the case in hand is examined, it is clear as noon day that the genesis of the cause of action had arisen when the Tahsildar, **Jabalpur** vide order dated 3/7/2001 and SLR, **Jabalpur** vide order dated 28/7/2001 had ordered for mutation of the land admeasuring 12182.6 sqft. falling in plot No.691/2, Subhash Nagar (Subhadra Kumari Chauhan Ward), **Jabalpur** followed by orders of the SDO (Urban) **Jabalpur** and that of the Commissioner (Appeals), Jabalpur Division, **Jabalpur**, hence, all aforesaid facts are material, essential and in fact are integral part of the cause of action questioning the action of the Tahsildar, **Jabalpur** and SLR, **Jabalpur**. Therefore, the main case arises within the revenue district of Jabalpur falling in territorial jurisdiction of Bench sitting at Principal Seat. Rejection of revision by the Board of Revenue under Section 50 of the M.P. Land Revenue Code as not maintainable by no stretch of imagination can be construed to be a fact being material or integral part of the cause of action for the purpose of maintainability of the writ petition under Article 226 of the Constitution of India at the Bench at Gwalior of the High of M.P.

Moreover, the concept of forum conveniens or forum non-conveniens also assumes importance in the midst of the controversy involved and, therefore, the same is also required to be dealt with. The Black's Law Dictionary defines forum conveniens as follows:-

> *"The Court in which an action is most appropriately brought, considering the best interests and convenience of the parties and witnesses."*

Therefore, the Court is obliged to ensure convenience of all the parties before it, expenses involved, requirement of verification of facts, requisitioning of records, factors necessary for just adjudication of the controversy and the Court while striking balance of convenience may decline to exercise jurisdiction though part of cause of action had arisen within the territorial jurisdiction of that Court. The Hon'ble Supreme Court in the case of *Kusum Ingots* (supra) while critically evaluating the concept of cause of action has reiterated meaning and dimensions of forum nonconveniens and observed that in a given facts

situation the Court is entitled to decline to exercise jurisdiction under Article 226 of the Constitution of India on the principle of forum conveniens or forum non-conveniens. Relevant para 30 thereof reads as under:-

> *"30. We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens".*

Therefore, in the light of the provisions under Rule 4 of the High Court Rules based on the concept of forum conveniens also, in the considered opinion of this Court, the writ petition at Gwalior Bench of the High Court of M.P. is not maintainable. In view of the concept, meaning and dimensions of cause of action or part of cause of action, as propounded in catena of Supreme Court judgments reviewed in the case of *Alchemist* (supra) and provisions contained in Rule 4 of the High Court Rules, the judgments cited by learned counsel for the petitioner viz. *K.P. Govil v. Jawaharlal Nehru Krishi Vishwa Vidyalya, Jabalpur and another,* 1987 JLJ 341, *Rajendran Chingaravelu v. R.K. Mishra, Additional Commissioner of Income Tax and others,* (2010) 1 SCC 457, *Gajendra Singh Arya and another vs. State of M.P. and others,* 2000 (2) MPLJ 50, *G.S. Gyani and Company, Bhopal vs. Oriental Electric and Engineering Co., Calcutta and another,* 2006 (2) MPLJ 530, *Dashrath Rupsingh Rathod v. State of Maharashtra and another,* (2014) 9 SCC 129, *M.P. Co-operative Marketing Federation, Bhopal v. Bhojraj Ghanshyamdas and another*, 1991 RN 2 are distinguishable on facts and of no assistance to the petitioner. In no way, these decisions are in conflict with law laid down in the case of *Alchemist* (supra).

Accordingly, the writ petition is dismissed as not maintainable. However, petitioner is set at liberty to file appropriate writ petition or any other proceedings falling within the territorial jurisdiction of the High Court of M.P. at Principal Seat **Jabalpur.**

Petition dismissed.

I.L.R. [2016] M.P., 3048
WRIT PETITION
Before Mr. Justice P.K. Jaiswal & Mr. Justice Vivek Rusia
W.P. No. 2117/2015 (Indore) decided on 15 June, 2016

YASHWANT AGRAWAL & CO. (M/S) ...Petitioner
Vs.
UNION OF INDIA & ors. ...Respondents

A. ***Finance Act (32 of 1994), Section 106*** **- Petitioner submitted a declaration form in which he had wrongly declared that no inquiry or investigation or audit is pending against him, which is a basic disqualification to avail the benefit of the Service Tax Voluntary Compliance Encouragement Scheme - If the issue of entitlement to avail the benefit of Scheme is to be decided, then provisions of Section 106 would apply - In the present case, Respondents/Authority has rightly exercised the powers u/S 106. (Para 11)**

क. *वित्त अधिनियम (1994 का 32), धारा 106* – याची ने एक घोषणा पत्र प्रस्तुत किया जिसमें उसने गलत रूप से यह घोषित किया कि उसके विरूद्ध कोई जाँच अथवा अन्वेषण अथवा संपरीक्षा लंबित नहीं है, जो कि सेवाकर स्वैच्छिक अनुपालन प्रोत्साहन योजना का लाभ प्राप्त करने हेतु एक आधारभूत अयोग्यता होती – यदि उक्त योजना का लाभ प्राप्त करने हेतु पात्रता के प्रश्न का विनिश्चय किया जाना है, तब धारा 106 के उपबंध लागू होंगे – वर्तमान प्रकरण में प्रत्यर्थी/प्राधिकारी ने धारा 106 के अंतर्गत शक्तियों का उचित रूप से प्रयोग किया है।

B. ***Finance Act (32 of 1994), Section 106 Sub-Section (1)*** **- If there is a notice or an order of determination, which has been issued to the assessee in respect of any period, no declaration shall be made with regard to the tax dues on the same issue for any subsequent period. (Para 11)**

ख. *वित्त अधिनियम (1994 का 32), धारा 106 उपधारा (1)* – यदि निधारिती को किसी अवधि के संबंध में कोई नोटिस अथवा निर्धारण आदेश जारी किया गया है, तब समान विषय पर देय कर के संबंध में किसी पश्चात्वर्ती अवधि हेतु घोषणा नहीं की जावेगी।

C. ***Finance Act (32 of 1994), Section 106 Sub-Section (2)*** **- Section 106(2) envisages a situation under which a declaration submitted by an assessee can be rejected, if under Sub-Section (1) he**

is entitled to declare his tax dues. (Para 11)

ग. वित्त अधिनियम (1994 का 32), धारा 106 उपधारा (2) – धारा 106(2) एक ऐसी स्थिति परिकल्पित करती है जिसके अंतर्गत एक निर्धारिती द्वारा प्रस्तुत की गई घोषणा को निरस्त किया जा सकता है यदि वह उपधारा (1) के अंतर्गत उसके देय कर की घोषणा करने हेतु पात्र है।

Case referred:

2014 (34) S.T.R. 165 (Del.).

Vivek Dalal, for the petitioner.
Prasanna Prasad, for the respondents.

ORDER

The Order of the Court was delivered by : **VIVEK RUSIA, J. :-** Facts of the case are as under.

Petitioner is engaged in the business of construction of petrol pumps for various oil companies and in addition to this they also worked for construction of road for MPAKVN. The petitioner till 31.05.2007 was registered with the Service Tax Department under the category of Commercial and Industrial Construction Services.

2. That the Central Government has introduced Service Tax Voluntary Compliance Encouragement Scheme, 2013 (for short 'VCES') w.e.f. 10.05.2013 by way of amendments in the Finance Act, 1994. Under the said Scheme any person may declare his tax dues in respect of which no notice or an order for determination under sections 72, 73 or 73A of the Chapter has been issued or made before the 1st day of March, 2013. The procedure has been prescribed for availing the Scheme. With the intention to avail the benefit under the VCES petitioner submitted a declaration in form VCES-1 declaring the tax dues amounting to Rs.7,19,490/- on 21.06.2013 for the period April, 2010 to December, 2012 under the category of "Works Contract". Along with the declaration petitioner has deposited 50% of the tax dues i.e. Rs.4,56,973/- vide Challan dated 26.06.2013. Petitioner was also issued acknowledgment under the provisions of sub-section (2) of section 107 of the Finance Act, 1994 under Form VCES-2 on 01.07.2013. Thereafter petitioner further deposited 50% of the tax dues i.e. Rs.4,56,973/- vide Challan dated 26.06.2013. That a show cause notice was issued by the respondents

on 17.09.2014 as to why the declaration given by the petitioner under VCES be not rejected on the ground that the show cause notice has already been issued to the petitioner on 16.04.2012 under the same category "Works Contract" for the period from 01.06.2007 to 31.03.2010.

3. Pursuant to the said show cause notice petitioner submitted a reply that for the said period from 01.06.2007 to 31.03.2010 petitioner has already deposited tax along with interest on 15.06.2011 and the show cause notice has already been adjudicated on 16.06.2014 and now the final order is under challenge before the Commissioner (Appeal) and the same is pending. Petitioner has also challenged the show cause notice as the same cannot be issued beyond the normal period of one year from the date of declaration.

4. The Deputy Commissioner, Service Tax Division, Indore after considering the reply of the petitioner vide order dated 16.10.2014 has passed the final order and rejected the entire claim of Rs.7,19,490/- on the ground that the noticee i.e. the petitioner filed the VCES declaration despite knowing the fact that the show cause notice to them has been issued for the Works Contract service and by virtue of section 106 (1) of the Finance Act, 2013.

5. Being dissatisfied by the order dated 16.10.2014 (Annexure P/1) petitioner filed the present petition before this Court. After notice respondent/ Department filed the return denying the averments made in the petition and justifying the impugned order. Thereafter rejoinder and additional return were also filed.

6. We have heard the parties at length.

7. Shri Vivek Dalal, learned counsel for the petitioner submits that VCES was introduced on 10.05.2013 and under which the petitioner submitted declaration on 21.06.2013 and the Challan has also been issued after payment of the tax, therefore, by virtue of section 111(1) of the Finance Act no notice or action can be taken after the expiry of one year from the date of declaration. The impugned order is without jurisdiction and contrary to the VCES, hence the same is liable to be set aside and the declaration given by the petitioner is liable to be accepted. In support of his contentions, counsel for the petitioner has placed reliance over the decision in the matter of *Frankfinn Aviation Services P.Ltd. Vs. Asstt. Commr., Designated Authority, VCES, Service* Tax reported in 2014 (34) S.T.R 165 (Del.) in which in similar facts and circumstances the Court has held that Department cannot reject the declaration

under section 106 (1) of the Finance Act, 2013.

8. Per contra Shri Prasanna Prasad, learned counsel for the Department submitted that by virtue of section 106(2) an enquiry/investigation/audit is pending against the petitioner as on 01.03.2013, therefore, the designated authority has rightly rejected the said declaration. He has further submitted that the petitioner is having an alternative efficacious remedy by way of appeal to challenge the impugned order dated 16.10.2014 and the present writ petition under Article 226 of the Constitution of India is not maintainable and the same is liable to be dismissed.

9. That it is not disputed that the petitioner was registered with the Service Tax Department till 31.05.2007. It is also not disputed that a show cause notice was issued to the petitioner for the period from 01.01.2007 to 31.03.2010 under the construction service and for the period from 01.06.2007 to 31.03.2010 under the Works Contract Service and the petitioner submitted the reply to the said show cause notice and the same was adjudicated by the competent authority and against which appeal is still pending.

10. That the Central Government introduced the VCE Scheme w.e.f 10.05.2013. For ready reference, relevant extract of provisions of the VCE Scheme are reproduced herein below:-

> This Scheme may be called the Service Tax Voluntary Compliance Encouragement Scheme, 2013.
>
> 95. (1) In this Scheme, unless the context otherwise requires-
>
> (a)"Chapter" means Chapter V of the Finance Act, 1994;
>
> (b)"declarant" means any person who makes a declaration under sub-section (1) of section 97;
>
> (c)"designated authority" means an officer not below the rank of Assistant Commissioner of Central Excise as notified by the Commissioner of Central Excise for the purposes of this Scheme;
>
> (d)"prescribed" means prescribed by rules made under this Scheme;
>
> (e)"tax dues" means the service tax due or payable under the

Chapter or any other amount due or payable under section 73A thereof, for the period beginning from the 1st day of October, 2007 and ending on the 31st day of December, 2012 including a cess leviable thereon under any other Act for the time being in force, but not paid as on the 1st day of March, 2013.

(2) Words and expressions used herein and not defined but defined in the Chapter or the rules made thereunder shall have the meaning respectively assigned to them in the Chapter or the rules made thereunder.

96. (1) Any person may declare his tax dues in respect of which no notice or an order of determination under section 72 or section 73 or section 73A of the Chapter has been issued or made before the 1st day of March, 2013: Provided that any person who has furnished return under section 70 of the Chapter and disclosed his true liability, but has not paid the disclosed amount of service tax or any part thereof, shall not be eligible to make declaration for the period covered by the said return: Provided further that where a notice or an order of determination has been issued to a person in respect of any period on any issue, no declaration shall be made of his tax dues on the same issue for any subsequent period.

(2) Where a declaration has been made by a person against whom,--

(a) an inquiry or investigation in respect of a service tax not levied or not paid or short-levied or short paid has been initiated by way of--

(i) search of premises under section 82 of the Chapter; or

(ii) issuance of summons under section 14 of the Central Excise Act, 1944, as made applicable to the Chapter under section 83 thereof; or

(iii) requiring production of accounts, documents or other evidence under the Chapter or the rules made thereunder; or

(b) an audit has been initiated, and such inquiry, investigation or audit is pending as on the 1st day of March, 2013, then the designated authority shall, by an order, and for reasons to be recorded in writing, reject such declaration.

97. (1) Subject to the provisions of this Scheme, a person may make a declaration to the designated authority or (sic:on) or before the 31st day of December, 2013 in such form and in such manner as may be prescribed.

(2) The designated authority shall acknowledge the declaration in such form and in such manner as may be prescribed.

(3) The declarant shall, or (sic:on) or before the 31st day of December, 2013, pay not less than fifty percent of the tax dues so declared under sub-section (1) and submit proof of such payment to the designated authority.

(4) The tax dues or part thereof remaining to be paid after the payment made under sub-section(3) shall be paid by the declarant on or before the 30th day of June, 2014: Provided that where the declarant fails to pay said tax dues or part thereof on or before the said date, he shall pay the same on or before the 31st day of December, 2014 along with interest thereon at such rate as is fixed under section 75 or, as the case may be, section 73B of the Chapter for the period of delay starting from the 1st day of July, 2014.

(5) Notwithstanding anything contained in sub-section (3) and sub-section (4), any service tax which becomes due or payable by the declarant for the month of January, 2013 and subsequent months shall be paid by him in accordance with the provisions of the Chapter and accordingly, interest for delay in payment thereof, shall also be payable under the Chapter.

(6) The declarant shall furnish to the designated authority details of payment made from time to time under this Scheme along with a copy of acknowledgment issued to him under sub-section (2).

(7) On furnishing the details of full payment of declared tax

dues and the interest, if any, payable under the proviso to sub-section (4) the designated authority shall issue an acknowledgment of discharge of such dues to the declarant in such form and in such manner as may be prescribed.

98. (1) Notwithstanding anything contained in any provision of the Chapter, the declarant, upon payment of the tax dues declared by him under sub-section (1) of section 97 and the interest payable under the proviso to sub-section (4) thereof, shall get immunity from penalty, interest or any other proceedings under the Chapter.

(2) Subject to the provisions of section 101, a declaration made under sub-section (1) of section 97 shall become conclusive upon issuance of acknowledgment of discharge under section (7) of section 97 and no matter shall be reopened thereafter in any proceedings under the Chapter before any authority or court relating to the period covered by such declaration.

99. Any amount paid in pursuance of a declaration made under sub-section (1) of section 97 shall not be refundable under any circumstances.

100. Where the declarant fails to pay the tax dues, either fully or in part, as declared by him, such dues alongwith interest thereon shall be recovered under the provisions of section 87 of the Chapter.

101.(1)Where the Commissioner of Central Excise has reasons to believe that the declaration made by a declarant under this Scheme was substantially false, he may, for reasons to be recorded in writing, serve notice on the declarant in respect of such declaration requiring him to show cause why he should not pay the tax dues not paid or short-paid.

(2) No action shall be taken under sub-section (1) after the expiry of one year from the date of declaration.

(3) The show cause notice issued under sub-section (1) shall be deemed to have been issued under section 73, or as the

case may be, under section 73A of the Chapter and the provisions of the Chapter shall accordingly apply.

106. (1) Any person may declare his tax dues in respect of which no notice or an order of determination under Section 72 or Section 73 or Section 73A of the Chapter has been issued or made before the 1st day of March, 2013:

Provided that any person who has furnished return under Section 70 of the Chapter and disclosed his true liability, but has not paid the disclosed amount of Service Tax or any part thereof, shall not be eligible to make declaration for the period covered by the said return.

Provided further that where a notice or an order of determination has been issued to a person in respect of any period on any issue, no declaration shall be made of his tax dues on the same issue for any subsequent period.

(2)Where a declaration has been made by a person against whom (a) an inquiry or investigation in respect of a Service Tax not levied or not paid or short-levied or short-paid has been initiated by way of

(i) search of premises under Section 82 of the Chapter; or

(ii) issuance of summons under Section 14 of the Central Excise Act, 1944, as made applicable to the Chapter under Section 83 thereof; or

(iii) requiring production of accounts, documents or other evidence under the Chapter or the rules made thereunder; or

(b) an audit has been initiated and such inquiry, investigation or audit is pending as on the 1st day of March, 2013, then, the designated authority shall, by an order, and for reasons to be recorded in writing reject such declaration.

"Procedure for making declaration and payment of tax dues."

107.(1) Subject to the provisions of this Scheme, a person may make a declaration to the designated authority on or before the 31st day of December, 2013 in such form and in such manner as may be prescribed.

(2) The designated authority shall acknowledge the declaration in such form and in such manner as may be prescribed.

(3) The declarant shall, on or before the 31st day of December, 2013 pay not less than fifty percent of the tax dues so declared under sub-section (1) and submit proof of such payment to the designated authority.

(4) The tax dues or part thereof remaining to be paid after the payment made under sub-section (3) shall be paid by the declarant on or before the 30th day of June, 2014.

Provided that where the declarant fails to pay said tax dues or part thereof on or before the said date, he shall pay the same on or before the 31st day of December, 2014 along with interest thereon, at such rate as is fixed under Section 75 or, as the case may be, Section 73B of the Chapter for the period of delay starting from the 1st day of July, 2014.

(5) Notwithstanding anything contained in sub-section (3) and sub-section (4), any Service Tax which becomes due or payable by the declarant for the month of January, 2013 and subsequent months shall be paid by him in accordance with the provisions of the Chapter and accordingly, interest for delay in payment thereof shall also be payable under the Chapter.

(6) The declarant shall furnish to the designated authority details of payment made from time to time under this Scheme along with a copy of acknowledgment issued to him under sub-section (2).

(7) On furnishing the details of full payment of declared tax dues and the interest, if any, payable under the proviso to sub-section (4), the designated authority shall issue an acknowledgment of discharge of such dues to the declarant in such form and in such manner as may be prescribed. "Immunity

from penalty, interest and other proceeding."

> 108:(1) Notwithstanding anything contained in any provision of the Chapter, the declarant, upon payment of the tax dues declared by him under sub-section (1) of Section 107 and the interest payable under the proviso to sub-section (4) thereof, shall get immunity from penalty, interest or any other proceeding under the Chapter.
>
> (2) Subject to the provision of Section 111, a declaration made under sub-section (1) of Section 107 shall become conclusive upon issuance of acknowledgment of discharge under sub-section (7) of Section 107 and no matter shall be reopened thereafter in any proceedings under the Chapter before any authority/or Court relating to the period covered by such declaration.

11. That sub-section (2) of section 106 of the Finance Act, 2013 envisages a situation under which a declaration submitted by an assesse (sic:assessee) can be rejected if under sub-section (1) he is entitled to declare his tax dues. In this regard the present case falls under the second proviso of sub-section (1) of section 106 which states that if there is a notice or an order of determination which has been issued to the assesse (sic:assessee) in respect of any period no declaration shall be made with regard to the tax dues on the same issue for any subsequent period. So far as the contention of Shri Dalal, learned counsel for the petitioner that under sub-section (2) of section 101 no action shall be taken after expiry of one year from the date of declaration is concerned there is no force in it because section 101 deals with the situation where the Commissioner of Central Excise has reasons to believe that the declaration made by the assesse (sic:assessee) under the Scheme was substantially false then after issuing a notice he may direct the assesse to pay the dues not-paid or short-paid and the show cause notice issued deemed to have been issued under section 73 or 73A as the case may be. So far as section 106 is concerned which is an enabling provision which deals in a situation where a particular class of assesse (sic:assessee) are liable to take advantage of the Scheme and submit a declaration. Under section 106 any person may declare his tax dues in respect of which no notice or an order of determination under section 72 or 73 or 73A of the Chapter has been issued or made before the 1st day of March, 2013. Further provided that where a

notice or an order of determination has been issued to any person, therefore, section 106 debars that person to avail the benefit of the Scheme against whom an order of determination has been issued. In the present case, petitioner submitted a declaration form in which he had wrongly declared that no inquiry or investigation or audit is pending against him which is a basic disqualification to avail the benefit of the Scheme, therefore, by virtue of section 106 the declaration submitted by the petitioner was liable to be rejected. Section 101 is applicable to a situation where the assesse (sic:assessee) is entitled for availing the benefit of the Scheme, however, the issue in respect of tax dues not paid or short-paid is involved and in such a situation the limitation period of one year is provided. If the issue of entitlement to avail the Scheme is to be decided then provisions of section 106 would apply and in the present case respondents/ authority has rightly exercised the powers under section 106 by passing the impugned order dated 16.10.2014.

12. In view of the aforesaid discussion, we do not find any substance in this writ petition. It is accordingly dismissed.

Petition dismissed.

I.L.R. [2016] M.P., 3058
WRIT PETITION
Before Mr. Justice P.K. Jaiswal & Mr. Justice Vivek Rusia
W.P. No. 3663/2016 (Indore) decided on 17 June, 2016

IRFAN KHAN ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Constitution - Article 226 - Writ of Habeas Corpus **- Petitioner challenged the order passed by Bal Kalyan Samiti seeking production of respondent No. 5 before the Court, contending that she is his newly wedded wife - Offence u/S 363 & 366 A of IPC is registered against the petitioner - Respondent No. 5, who is minor girl, is in custody of Balika-Grah under the order passed by the Judicial Magistrate First Class - Held - Writ of habeas corpus lies only when corpus is in illegal custody - Respondent No. 5, who is minor girl, has been sent to Balika-Grah by judicial order, which is not illegal - Petitioner, who is facing trial u/S 363 & 366 A of IPC, cannot be given custody of a minor girl, because he is not 'fit person' under Juvenile Justice (Care & Protection of Children) Act 2015 - No substance in writ**

petition, hence dismissed. **(Para 7)**

संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण याचिका – याची ने प्रत्यर्थी क्र. 5 को अपनी नवविवाहिता पत्नी होने का दावा करते हुए उसे न्यायालय के समक्ष प्रस्तुत किये जाने हेतु बाल कल्याण समिति द्वारा पारित आदेश को चुनौती दी – याची के विरूद्ध भा.दं.सं. की धारा 363 एवं 366–ए के अंतर्गत अपराध दर्ज है – प्रत्यर्थी क्र. 5, जो कि एक अवयस्क बालिका है, न्यायिक दण्डाधिकारी प्रथम श्रेणी द्वारा पारित आदेश के अंतर्गत बालिका–गृह की अभिरक्षा में है – अभिनिर्धारित – बंदी प्रत्यक्षीकरण याचिका केवल तभी प्रस्तुत की जाती है जब बंदी अवैध अभिरक्षा में हो – प्रत्यर्थी क्र. 5, जो एक अवयस्क बालिका है, को न्यायिक आदेश के द्वारा बालिका–गृह भेजा गया है, जो कि अवैध नहीं है – याची, जो कि भा.दं.सं. की धारा 363 एवं 366–ए के अंतर्गत विचारण का सामना कर रहा है, को एक अवयस्क बालिका की अभिरक्षा नहीं दी जा सकती है, क्योंकि किशोर न्याय (बालकों की देखरेख एवं संरक्षण) अधिनियम, 2015 के अंतर्गत वह 'उपयुक्त व्यक्ति' नहीं है – रिट याचिका में कोई सार नहीं, अतः खारिज।

Cases referred:

1980 CRI.L.J. 764, 2014 (3) MPHT 268, 2015 SCC Online Cal 1172, 1993 Mh.L.J. 1437.

Akhil Godha, for the petitioner.
Rohit Mangal, G.A., for the respondent/State.

ORDER

The Order of the Court was delivered by :
VIVEK RUSIA, J. :- Petitioner has filed the present petition seeking the relief in the nature of Habeas Corpus for production of respondent No.5 before this Court.

2. The contention of the petitioner is that petitioner and respondent No.5 belong to the Muslim community and they are governed by the Personal Law i.e. Muslim Law. Petitioner and respondent No.5 performed the marriage by way of joint agreement in the office of Anjuman Nikahul Muslemin, Bhopal. The Kazi of the Anjuman Nikahul Muslemin, Bhopal after verification, performed the marriage between them. At the time of marriage, petitioner was aged about 22 years and the respondent No.5 was aged about 19 years.

3. On 13.02.2016 Police registered a case against the petitioner for the offences punishable under sections 363 & 366-A of the IPC at the instance

of respondent No.6 who is the brother of respondent No.5. Petitioner was arrested and sent to jail. Family members of the respondent No.5 filed an application before the Magistrate for custody of respondent No.5. Since she is a minor girl and refused to go with her family members, she was sent to Balika Grah, Police Line, Kotra, Bhopal vide order dated 24.02.2016 passed by the Judicial Magistrate, First Class, Sarangpur, district Rajgarh. Thereafter, petitioner moved an application under section 98 of the Cr.P.C seeking custody of the girl. Vide order dated 08.03.2016, the said application was rejected by the J.M.F.C, Sarangpur against which petitioner preferred a revision under section 397 of the Cr.P.C before the Sessions Court, Rajgarh. Vide order dated 05.05.2016 the said revision was also dismissed. Vide order dated 22.03.2016 Bal Kalyan Samiti, district Rajgarh has rejected the application of the petitioner seeking custody of respondent No.5 on the ground that she is minor. Being aggrieved by the order dated 22.03.2016, petitioner filed the present petition seeking a writ in the nature of habeas corpus to send the respondent No.5 in the company of the petitioner. In support of his contentions counsel for the petitioner has placed reliance over a judgment passed by the Patna High Court in the case of *Md. Idris Vs. State of Bihar and others* reported in 1980 CRI.L.J 764 in which the custody of Mahomedan girl aged about 15 years was given to the husband. He has also placed reliance over the judgment of this High Court in the case of *Rashid Khan Vs. State of M.P and others* decided on 13.02.2014 reported in 2014 (3) MPHT 268 in which also the writ petition in the nature of habeas corpus was allowed and the custody of wife aged about 15 years was given to the husband. In the light of the aforesaid judgments, Shri Godha, counsel for the petitioner submits that under the Muslim Law, a minor girl can perform marriage, therefore, the marriage between the petitioner and respondent No.5 is valid and he is entitled for the custody of respondent No.5.

4. After notice, respondents filed return submitting that respondent No.5 is a minor as her date of birth is 12.08.1999 and by order of the Judicial Magistrate First Class she was sent to Balika Grah. Under the provisions of Juvenile Justice (Care & Protection of Child) Act, 2015 a person who has not completed the age of 18 years is a child and he/she needs care and protection. Since respondent No.5 is minor she cannot be sent along with the petitioner who is not a "fit person" as per section 2(28) of the Act of 2015 because petitioner is facing trial under sections 363 & 366-A of the IPC.

5. Shri Rohit Mangal, learned GA for the respondent/State has placed reliance over the judgment passed by the Calcutta High Court in the case of *Rahul Amin Sekh Vs. State of W.B* reported in 2015 SCC Online Cal 1172 and a judgment of the Division Bench of the Bombay High Court in the case of *Daud Hasan Mhalungkar and another Vs. State of Maharashtra* reported in 1993 Mh.L.J 1437.

6. We have heard learned counsel for the parties.

7. After hearing learned counsel for the parties, we are of the view that the present writ petition is liable to be dismissed as it is not disputed at the time of performance of marriage that respondent No.5 was minor. She was sent to Balika Grah by the order of the Judicial Magistrate First Class vide dated 24.02.2016 which the petitioner has not challenged by way of appropriate proceedings. Later on petitioner filed an application under section 98 of the Cr.P.C which was also dismissed and against which a revision petition has also been dismissed by the Sessions Court. Petitioner has further not challenged the order of J.M.F.C dated 03.08.2016 as well as the order passed in the revision but he directly filed the present petition challenging the order dated 22.03.2016 issued by the Bal Kalyan Samiti, district Rajgarh. A writ of Habeas Corpus lies only when the corpus is in a custody which is said to be illegal. In the present case respondent No.5 being a minor girl was sent to Bal Kalyan Samiti by a judicial order and at present she is residing in the Balika Grah, therefore, it cannot be said that she is in illegal custody. On this ground alone present writ petition is liable to be dismissed. So far as the reliance over the judgment given by this Court in the case of *Rashid Khan* (supra) is concerned the facts of the said case are different from the present case as the petitioner Rashid Khan was not facing any trial under sections 363 and 366A of the IPC, however, the present petitioner is facing criminal trial. Another distinguishable feature is that the said judgment was passed on 13.02.2014 i.e. before the Juvenile Justice (Care & Protection of Child), Act of 2015 came into force. Under the said Act, the custody of a minor girl cannot be given to a person who is not "fit person." In the present case the petitioner who is facing trial under sections 363 & 366A of the IPC cannot said to be a "fit person" to whom the custody of respondent No.5 can be given because as on today respondent No.5 is a minor girl. Calcutta High Court has considered this issue in its judgment in the matter of *Ruhul Amin Sekh* (supra) which is reproduced below:-

"Having considered the submissions of the parties by this writ petition the petitioner sought for issuance of a writ of habeas corpus for production of the missing daughter Manisha Khatoon, Bishnupur P.S Case No.1288 dated 6th October 2014 was initiated on the basis of a complaint filed by the petitioner under Sections 363/366/ 34 IPC. As the whereabouts of Manisha, the missing girl was not known and the investigation did not yield any fruitful result, this petition was filed. A report was filed by the I.C Bishnupur P.S before this Court. But it was pursuant to an order, whereby the parents of Arman were directed to be present in Court, that both Arman and Manisha presented themselves in Court and to a query put by Court it was submitted that the missing girl, Manisha was 16 years of age and Arman was 17 years of age. Under the statutory law admittedly both are minors. But according to Counsel for Arman, a Mohammedan girl or boy can contract a marriage on attaining puberty and according to Mulla puberty would mean 15 years of age. It is only ascertain whether Personal Law would prevail over the Statutory Law that Mr.Bikash Ranjan Bhattacharya, Senior Advocate was appointed as amicus curiae and it has been submitted by him that with the enactment of the Prohibition of Child Marriage Act 2006 Statutory Law would prevail over Personal Law in view of the enactments and decisions. The Muslim Personal Law (Shariat) Application Act, 1937 in Section 2 has specifically stated that where both parties are Muslim in case of mariage (sic:marriage) the Muslim Personal Law shall prevail. It is true that various enactments, namely, the Child Marriage Restraint Act, 1929, the Special Marriage Act and the Prohibition of Child Marriage Act 2006 has fixed the age of a male attaining majority at 21 years and a female at 18 years. A minor is a person of either sex under 18 years of age. The Guardian and Wards Act in Section 4 (1) defioned (sic:defined) a minor to mean a person who under the Indian Majority Act 1875

has not attained majority. The Indian Majority Act 1875 in Section 391 (sic:3(1)) has categorically stated that a person of India shall attain the age of majority on completing 18 years. Therefore, under the statute 18 years can be accepted as the minimum age for a person to attain kanority (sic:majority.). In 2006 the Prohibition of Child Marriage Act was introduced and in Section 2 (a) a child in case of "male" attained majority at 21 years of age and "female" at 18 years of age. Section 2(b) defined a "child marriage" to mean a marriage to which either of the contracting parties is a child and Section 2(f) defined the "minor" to be a person under the Majority Act of 1875. The said enactment was applicable to all citizens of India without and beyond India. Therefore, what has to be considered is that when the statutory law is contra to the Personal Law or vice versa which law shall prevail.

Ameer Ali in his commentaries on Mohammedan Law while dealing with the age of a Mohammedan to enter into a valid contract of marriage has stated that the person must be possessed of understanding this is because the Mohammedan Law does not fix any particular age. Puberty and discretion constitute according to Ameer Ali the essential conditions for a Mohammedan to enter into a valid contract of marriage. A person who is an infant in the eye of law is disqualified from entering into any legal transaction so also contract of marriage. Under the Hanafi and Shia School of Muslim Law 15 years is the age of majority for both male and female. But for Muslim or Mohammedans other than those belinging (sic:belonging) to the Hanafi School of law or Shia School of law discretion and puberty are the guiding factors. Therefore, a person though a minor under the General Law of the land but who possesses understanding and has reached the age of discretion and can comprehend the consequences of the act will be entitled to contract a marriage and in the event they are

not able to do so, the marriage will be nothing but a mere nullity. In the instant case Arman is 17 years old and Manisha is 16 years of age. Both of them have admittedly reached puberty and the age of discretion. It cannot be said that they do not understand or comprehend the consequences of their act.

Mulla in his principles of Mohammedan Law while dealing with the issue of marriage has categorically stated that a Mohammedan boy or girl who has attained puberty is at liberty to marry anyone he/she likes and has explained that the marriage of two Mohammedans of sound mind and who have attained puberty is a valid marriage. Mulla has further fixed puberty to completion of 15 years in the absence of evidence. While dealing with the issue of guardians, Mulla in the same book in Chapter XVIII has stated that the minority for male or female under Mohammedan Law terminates when he/she attains puberty according to Islamic Law and while under the Majority Act of 1875 the age of a minor is fixed at 18 or 21 years, the said statutory age will guide a Mohammedan except in matters of marriage, dower and divorce. This also finds support in the Majority Act of 1875 as amended. Section 2(a) and 2(b) whereof reads as follows:

"2.Saving -Nothing herein contained shall affect –

(a) the capacity of any persons to act in the following matters (namely),-marriage, dower, divorce and adoption;

(b) the religion or religious rites and usages of any class of (citizens of India);

(c) xxxxxxxxxxxxxxxxxxxxxxxxxxxxx"

Therefore in cases of marriage, dower and divorce an exception has been culled out.

But in 2006 the Prohibition of Child Marriage Act was promulgated. Section 2(f) defines a "minor" to mean a person who is deemed not to have attained majority under the Majority Act, 1875. Section 12 deals with instances of a void marriage but none of these instances is applicable to the instant case. On the contrary it is Section 3 which will be applicable and such a child marriage is voidable at the option of the contracting party. Therefore, the marriage of Arma (sic:Arman) and Manisha is not a nullity in the eye of law but is volidable (sic:voidable) at the option of the contracting party, and till one of such contracting party initiates a proceeding for annulment of the marriage, the marriage of Mohammedan cannot be nullified.

The said petitioner also sought for Manisha being handed over to them. This was another reason for considering the issue. From a consideration of the Mohammedan Law so aslo (sic:also) the enactments of Parliament, the 1929 Act has been repealed by the 2006 Act. The 2006 Act does not prohibit a child marriage but has recognized a child marriage and in case it does take place, the same may be void under Section 12 of the 2006 Act or voidable under Section 3 of the 2006 Act. In the instant case Arman and Manisha as epr (sic:per) the Mohammedan Law applicable to them are married. All that the petitioner sought is issuance of a writ of Habeas Corpus and that Manisha be produced. Manisha was produced. It is when custody was sought that the question arose whether the marriage of Arman and Manisha was any marriage in the eye of law and from the above discussion the marriage as per Mohammedan Law, prima facie, cannot be brushed aside. Therefore, the custody of Manisha cannot be given to the petitioner till such time that proceedings are filed under Section 3 of the 2006 Act by either of the contracting parites (sic:parties).

In view of the aforesaid this application merits no further order and is disposed off.

In view of the above, we do not find any substance in the writ petition. Accordingly, it is dismissed.

Petition dismissed.

I.L.R. [2016] M.P., 3066
WRIT PETITION
Before Mr. Justice J.K. Maheshwari
W.P. No. 12450/2015 (Jabalpur) decided on 26 July, 2016

KIRTI KUMAR GUPTA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Whistle Blowers Protection Act, 2011 (17 of 2014), Section 11 - Petition for declaring as Whistle Blower and for protection under the Act **- Petitioner is District Labour Officer - Petitioner submitted complaint regarding financial irregularities in the matter of disbursement of scholarship by staff of his own department under the Scheme "Shiksha Protsahan Rashi Yojna & Medhavi Chhatra Chhatraon Ko Nagad Puraskar Yojna" - FIR was registered - Enquiry under the Scheme was conducted by the Collector - Petitioner himself was found involved in the said fraud relating to disbursement of scholarship under the Scheme - FIR against petitioner was registered - Petitioner was declared absconding - Reward of Rs. 5000/- was notified as per proclamation- Present petition filed after the proclamation - Anticipatory Bail Application - Dismissed - Held - In the said sequel of facts & in the context to the object & spirit of the Act of 2011, Petitioner cannot be treated to be Whistle Blower giving protection & safeguards u/S 11 of the Act - Petitioner not acted in good faith - Petition is devoid of merit and dismissed with cost. (Paras 8 to 10)**

क. ध्यानाकर्षक संरक्षण अधिनियम, 2011 (2014 का 17), धारा 11 – ध्यानाकर्षक घोषित किए जाने एवं अधिनियम के अंतर्गत संरक्षण प्रदान किए जाने हेतु याचिका – याची जिला श्रम अधिकारी है – याची ने "शिक्षा प्रोत्साहन राशि योजना एवं मेधावी छात्र छात्राओं को नगद पुरस्कार योजना" के अंतर्गत छात्रवृत्ति संवितरण के मामले में उसके स्वयं के विभाग के कर्मचारियों द्वारा की गई वित्तीय

अनियमितताओं के संबंध में शिकायत प्रस्तुत की – प्रथम सूचना प्रतिवेदन दर्ज किया गया – उक्त योजना के अंतर्गत कलेक्टर द्वारा जांच की गई थी – योजना के अंतर्गत छात्रवृत्ति संवितरण से संबंधित उक्त कपट में याची स्वयं भी संलिप्त होना पाया गया – याची के विरूद्ध प्रथम सूचना प्रतिवेदन दर्ज किया गया – याची को फरार घोषित किया गया – रू0 5,000/– का पुरस्कार घोषणा के अनुसार अधिसूचित किया गया – वर्तमान याचिका उक्त घोषणा के बाद प्रस्तुत की गई – अग्रिम जमानत हेतु आवेदन – खारिज – अभिनिर्धारित – उपरोक्त तथ्यों के अनुक्रम में तथा अधिनियम, 2011 की भावना एवं उद्देश्य के संदर्भ में, याची को ध्यानाकर्षक नहीं माना जा सकता, एवं अधिनियम की धारा 11 के अंतर्गत उसे संरक्षण एवं सुरक्षा प्रदान नहीं की जा सकती – याची ने सद्भावनापूर्वक कार्य नहीं किया – याचिका गुणदोष रहित होने से खर्च सहित खारिज।

***B. Whistle Blowers Protection Act, 2011 (17 of 2014), Section 11* - Safeguards against victimization - Scope & Ambit. (Para 9)**

ख. ध्यानाकर्षक संरक्षण अधिनियम, 2011 (2014 का 17), धारा 11 – उत्पीड़न के विरूद्ध सुरक्षा – व्यापकता एवं परिधि।

A.P. Singh, for the petitioner.
Sanjay Dwivedi, Dy. A.G. for the respondents/State.

ORDER

J.K. MAHESHWARI, J. :- This petition under Article 226 of the Constitution of India has been filed seeking writ in the nature of mandamus against the respondents for giving protection to the petitioner under The Whistle Blowers Protection Act, 2011 declaring him as the Whistle Blower and to quash the impugned orders. The command has also been sought against the respondents not to harass the petitioner for exposing the corruption and such other relief, may deem fit in the facts of the case.

2. It is not in dispute, at the time of commission of the incident, the petitioner was posted as District Labour Officer, Chhatarpur. It is also not in dispute that the petitioner submitted a complaint regarding the financial irregularities in the matter of disbursement of scholarship. It is also not disputed that under the instructions of the Collector, petitioner submitted a complaint to Police Station Civil Lines, Chhatarpur whereupon the FIR was registered. It is also not in dispute that a Public Interest Litigation bearing W.P. No. 4287/2015 was filed before this Court wherein directions were sought to initiate disciplinary action and conduct proper investigation in the matter of

financial irregularities committed by petitioner in the matter of disbursement of scholarship under the schemes known as "Shiksha Protsahan Rashi Yojna" and "Medhavi Chhatra Chhatraon Ko Nagad Puraskar Yojna". It is also not in dispute that the State Government has issued Policies prescribing the procedure for disbursement of the amount under both the schemes, which is required to be followed. It is also not in dispute, while considering the anticipatory bail applications bearing Nos. M.Cr.C. 3986/2015 and 4200/2015 of the co-accused persons namely Pawan Prakash Khare, Rajendra Saxena and Indresh Babu Kushwaha on 22.4.2015, this Court found that in disbursement of the govt. money under Shiksha Protsahan Rashi and Medhavi Chhatraon Ko Puraskar Yojna, were made without following the procedure prescribed misappropriating the same, therefore, directions were issued, which are reproduced as under :-

> 1. As per the scheme of the government to grant financial assistance under "Shiksha Protsahan Rashi Yojna" & "Medhavi Chhatra Chhatraon Ko Nagad Puraskar Yojna", how many schools have applied for such grant in the State of Madhya Pradesh to which the amount is released.
>
> 2. The demand made by the school concerned is as per the procedure prescribed in the scheme and it is processed in accordance with procedure issuing cheques to them, or it is misutilized alike in Chhatarpur district.
>
> 3. If it is found that the procedure has not been duly followed and it is merely the irregularity, which is not amounting to commission of an offence then the police officials may recommend the matter for taking a departmental action against delinquent officers but if in investigation, it is found that it is amounting to commission of an offence then appropriate action be taken registering an offence against erring persons(s) for breach of trust and of committing forgery.
>
> 4. On perusal of the present case, it appears that the demand was made for "Shiksha Protsahan Rashi Yojna" & "Medhavi Chhatra Chhatraon Ko Nagad Puraskar Yojna" from Government Higher Secondary School, Hatwara and Maharani Laxmi Bai Kanya Uchchatar Madhyamik Vidyalaya, Chhatarpur, but along with the demand verification of registration of the workers and other relevant documents

after perusal of the original were not made and no such material is available in the investigation. In this regard, who are at fault and whether their act is amounting to irregularity or commission of the offence, is to be examined.

5. On submitting the said demand, the labour officer and its official staff have followed the procedure prescribed in accepting the said recommendation and delivered the cheques to the right persons extending benefit of scheme or breach of trust and forgery is committed by them having connivance with the school staff.

6. It is further to be examined that as per the guidelines, the cheques have been duly issued and delivered to the institution or students concerned. If some fault is found then the person responsible for it ought to be dealt with in accordance with law as observed hereinabove.

7. It is seen that the cheques were issued in the name of two institutions but cheques have been delivered by hand to Kailash & Mukesh merely knowing to them by applicant Indresh Babu Kushwaha in M.Cr.C. No. 3986/2015, which is not permissible under the scheme, however, the responsibility of the erring persons be determined and they ought to be dealt with in accordance with law.

8. It is further to be seen that those cheques have not been encashed in the regular accounts of the aforesaid two instituions but the cheques have been encashed in the accounts of Sadbhavna Nagrik Sahkari Bank, which is not in the name of the institution(s) then how such encashment has been made, also requires a deeper probe in a similar manner & fashion as directed hereinabove.

9. It is further to be examined that after commencement of the scheme in the year 2004, account No. 710/9 and account No. 1190/21 have been opened in Sadbhavna Nagrik Sahkari Bank in 2006 not in the name of the institution and number of cheques have been transacted in the said account whether it is a part of racket to withdraw the govt. money through it be utilized by the needy or poor persons, and if anyone is found involved therein then he/she/they should be dealt with in accordance with law as directed above.

10. As per the instructions of Shri A.P. Singh, Advocate, the labour officer, who is the complainant in the case, has lodged the first information report. He came to be posted there in june, 2012. However, during his period as well as prior to the said period and after commencement of the scheme, how many cheques were issued by him and processed by his office and the said amount has been delivered to the appropriate institution or in the right hand, be also examined by them and if anyone is found at fault, he/she/they should be dealt with in accordance with law.

It is relevant to point out here that on account of initiating the criminal action in furtherance to the aforesaid direction, writ petition No. 4287/2015 (PIL) was disposed of by this Court on 1.9.2015 holding that the criminal action against respondent No. 7 (petitioner herein) has already been initiated, however, with respect to departmental action, the Court observed as under:-

4. We are of the considered view that once the Police Authority have already initiated criminal action against the respondent No. 7, now if any consequent action is to be taken, it is for the Disciplinary Authority to consider the question and take departmental action in accordance with the terms and conditions of the service and the discipline and appeal rules with regard to conduct of the respondent No. 7 in discharge of his official duty and it is the discretion of the disciplinary authority to take action in accordance with rules in case so advised. For the same, we see no reason to issue any Mandamus at the instance of the petitioner. Accordingly, granting liberty to respondent No. 1 and 2 to proceed departmentally in the light of the circumstance which have come on record and permitting them to exercising their discretion in accordance with law in the matter of taking disciplinary action, we dispose of the writ petition as no further directions are required in the light of the action already initiated by the Police authority.

5. It is also pointed by Shri A.P.Singh, that respondent No. 7 himself is the complainant and it is at his instance that Crime No. 2/2015 has been registered by the Police of Police Station Civil Lines, Chhatarpur. For the present, it is not necessary for us to go into all these aspects. It is for the competent authority

to look into various aspects in the matter and proceed in accordance to law.

6. With the aforesaid, this petition stands disposed off.

3. On issuing the said directions, investigation was conducted under the supervision of the Superintendent of Police, Chhatarpur wherein it was found that with effect from the date of posting of petitioner i.e. June, 2012 till lodging the FIR without following the procedure as prescribed in schemes, petitioner himself has issued various cheques disbursing the amount under both the schemes in the name of institutions, one of them is not in existence. In fact as per scheme, the amount ought to be disbursed in the accounts of beneficiaries; thus, Govt. money has been misutilized and misappropriated and the real beneficiaries (students) could not realize the benefit. In the said sequel of fact, petitioner himself has been made accused in the police case. The application (M.Cr.C. No. 13791/2015) seeking anticipatory bail filed by petitioner has been rejected by this Court vide order dated 23.2.2016. Thus, in view of the aforementioned facts and circumstances, the issue regarding declaration of petitioner as the Whistle Blower requires consideration.

4. The Central Government has promulgated the legislation known as The Whistle Blowers Protection Act, 2011 (hereinafter referred to as the Act of 2011) with an object to provide a mechanism, on receiving the complaint relating to disclosure on any allegation of corruption or willful misuse of power or willful misuse of discretion against any public servant and to inquire or cause to inquire into such disclosure and to provide adequate safeguards against victimization of the persons making such complaint. **Section 3(b)** defines **'Competent Authority'** to whom the complaint or disclosure can be made. **Section 3(c)** defines **'complainant'** to mean that any person who makes a complaint relating to disclosure under this Act. **Section 3(d)** defines **'disclosure'** to mean that the complaint made relating to an attempt or commission of offence under Prevention of Corruption Act; wilful misuse of power or wilful misuse of discretion by virtue of which demonstrable loss is caused to the Government or demonstrable wrongful gain accrues to the public servant or to any third party; attempt to commit or commission of a criminal offence by a public servant, in writing or by electronics mail or electronic mail message, against the public servant and includes public interest disclosure.

5. Section 4(2) of the Act of 2011 makes it clear that any disclosure

made under this Act shall be treated as public interest disclosure for the purposes of this Act and shall be made before the Competent Authority and the complaint making the disclosure shall, on behalf of the Competent authority be received by such authority as may be specified by the regulations made by the Competent Authority. In Section 4(3) it has also been clarified that disclosure should be made in good faith and the person making disclosure shall make a personal declaration stating that he has reasonable believe that the information disclosed by him and allegation contained therein is substantially true. If the disclosure does not indicate the identity of the complainant or public servant making public interest disclosure and on finding it incorrect or the identity is found incorrect or false, the action is not required to be taken. Section 5 specifies the powers and functions of Competent authority on receipt of public interest disclosure. Competent Authority for disclosure of the facts would be State Vigilance Commission or any officer of the State Government or any other authority as the State Government may by notification in the official gazette specify in this behalf under this Act. Section 6 specifies the matters which are not to be inquired by Competent Authority. Section 7 specifies the powers of the Competent Authority, how to collect further information and what procedure ought to be followed. Section 8 clarifies the matters to be exempted from disclosure. Section 9 confers power of superintendence to the Competent Authority over appropriate machinery. Section 10 gives powers to the Competent Authority to take assistance of the police authority in certain cases.

6. Section 11 of the Act provides safeguards against victimization, which is relevant for the purpose of the relief sought in this case. As specified, it is the duty of the Government to ensure that any person or public servant, who made disclosure under the Act, should not be victimized by initiating the proceedings or on the ground that such person or public servant had made a disclosure or rendered assistance in inquiry of any disclosure under this Act. It has also been made clear that if such person is being victimized or likely to be victimized on the ground that he filed a complaint or made a disclosure or rendered assistance in inquiry under this Act, however on filing an application before the Competent Authority seeking redressal, such authority shall take such action as may be deemed fit and may give suitable direction to the concerned public servant or public authority to protect such person from victimization or avoid of being victimized. As per proviso, the Competent

Authority prior to giving direction to the public authority or public servant shall given an opportunity of hearing to the complainant and the public authority or public servant. The second proviso makes it clear that burden of proof that the action on the part of the authority is not amounting to victimization shall lie on such authority. Thus, after hearing if any direction is issued by the competent authority, it would be binding. As per Section 12, similar protection has been provided to the witnesses and other persons rendering assistance in inquiry. In addition, the protection of identity of the complainant has also been specified in the Act. The violation of any provision of the Act would amount to commission of offence to which the penalty has also been specified as per Sections 15, 16, 17, 18 and 19 of the Act. Thus, the act of 2011 is the complete code to deal with the complaint or to provide protection to whistle blower.

7. On perusal of the aforesaid and looking to the spirit of the Act, it is clear that on making any disclosure or disclosure in public interest or any complaint under this Act, the Competent Authority shall make an inquiry in relation to the said disclosure exercising the power and following the procedure as prescribed under Section 7 of the Act but the disclosure must be in good faith and along with declaration of the disclosure stating that he has reason to believe that information supplied is substantially true. It further clarifies that the persons who is making the disclosure or a complainant and also the witnesses and other persons incidental to the said complaint or disclosure, are being victimized or likely to be victimized because he has filed complaint or made disclosure or rendering assistance in inquiry, on receiving such application by competent authority, after affording an opportunity of hearing to the public servant, appropriate direction may be issued to Public servant or Public authority to protect from being victimized or avoid his victimization.

8. Thus, in the facts of the present case, it is to be seen whether the relief as claimed by the petitioner may be allowed declaring him to be the Whistle Blower. As per discussion to the provisions of The Act of 2011 made hereinabove, the facts of the present case are required to be analyzed. In the present case, indeed it is true that a memorandum was submitted by the petitioner to the Collector on 18.12.2014 complaining the action of the subordinate staff in the matter of disbursement of the scholarship to the Principal, Government Uchchatar Madhyamik Vidyalaya, Hatwara, Chhatarpur and Government Maharani Lakshmi Bai Kanya Uchchatar Madhyamik Vidyalaya, Chhatarpur. He has also submitted the same complaint

to the SHO, Police Station Civil Lines, Chhatarpur with a copy to Superintendent of Police, Labour Commissioner and other authorities. On the basis of said complaint, the FIR was registered on 3.1.2015 by the P.S. Civil Lines, Chhatarpur. With a view to find the bonafides of petitioner, on registering the offence, during investigation Pawan Prakash Khare, Rajendra Saxena, Indresh Babu Kushwaha, Narendra Chourasia, Ram Prakash Sharma, Manoj Sahu, Brajesh Gupta, Kaurav Pathak and Atmaram Pandey were found in collusion with the petitioner, in the matter of disbursement of the scholarship to the institution. The State Government in its return has clarified that the scheme in relation to distribution of scholarship to the children of registered labour was pronounced under the provisions of the *Building And Other Constructions Workers (Regulation of Requirement of Condition of Service) Act, 1996* and the rules made for this purpose by the State Government namely *M.P. Building and other Constructions Workers (Regulation of Employment and of Condition of Service) Rules, 2000*. The Government promulgated a scheme known as *"Madhya Pradesh Bhawan Evam Anya Sannirman Karmkar Ke Bachcho Ke liye Shiksha Hetu Protsahan Rashi Yojna, 2004"*, which was notified on 10.7.2008 as *"Shiksha Hetu Protsahan Rashi Yojna"*. The said scheme was formulated specifying the eligibility, procedure to submit application, authority to grant and procedure for sanction and its disbursement. It is further submitted that after making the complaint by the petitioner, an enquiry was conducted by the Collector, District Chhatapur by a committee comprising of the Chief Executive Officer, Jila Panchayat, District Treasury Officer and Accounts Officer of the District Panchayat. In the said report, it was found that the petitioner posted as the Labour Officer, Chhatarpur and competent to issue cheques, has not verified the contents of the demand made by the institutions and without following the procedure, issued the cheques signed by him, to one Kailash and Mukesh, who were not having any authority to receive those cheques. In fact the amount of Protsahan Rashi under the scheme ought to be transacted directly in the accounts of the beneficiaries (students) and the cheques should not be given to the Institution heads. It is required to observe while considering the anticipatory bail application of Rajendra Saxena and Indresh Babu Kushwaha, this Court issued certain directions (which are quoted hereinabove in Para-2). After such direction, during investigation Police found involvement of petitioner in commission of the offence prior to the date of registration of the FIR and has not surrendered to the custody, however declared abscond, to which reward

of Rs.5,000/- was notified as per proclamation dated 27.7.2015. After such proclamation this petition has been filed on 29.7.2015. In the report dated 14.9.2015 submitted by the SHO to the Additional S.P., the commission of offence by petitioner has been reported taking action under Section 82 of the Cr.P.C. The petitioner filed the application seeking anticipatory bail (M.Cr.C.No:13791/2015), which has also been dismissed vide order dated 23.3.2016. In the rejoinder filed by petitioner challenge to the enquiry report of three members' committee explaining his conduct has been set forth *inter alia* contending that he is not at all involved in disbursement of the amount of *Shiksha Protsahan Rashi Yojna and Medhavi Chhatra Chhatraon Ko Nagad Puraskar Yojna* but he is unable to dispute the factum of issuing of cheques in favour of institutions contrary to the procedure prescribed in the schemes, though one of the school was not in existence. However, in the said sequel of facts and in the context to the object and spirit of the Act of 2011 as discussed, petitioner cannot be treated to be the Whistle Blower giving protection and safeguards under Section 11 of the Act.

9. In view of the foregoing and on analyzing the provisions of the Act of 2011, it remained undisputed that petitioner has joined as Labour Officer, Chhatarpur on 25.6.2012 and issued more than 40 cheques signed by him under Shiksha Protsahan Rashi Yojna and Medhavi Chhatra Chhatraon Ko Nagad Puraskar Yojna during the period 18.7.2012 till 20.10.2014 without having proper vigil and observing the procedure prescribed in the schemes to grant scholarship to the students. It is to be noted here that the amount so disbursed through the cheques, were signed by the petitioner and the said amount has not been received by the beneficiaries and those cheques were transacted in the forged or inactive accounts with the connivance of the management of the school and also the bank officers without following the procedure prescribed in the schemes. However, in the said context, it cannot be accepted that disclosure made by petitioner was under the Act of 2011 or in good faith, along with the declaration making him entitled to the benefit of Section 11 of the Act of 2011. It is to be observed here that the protection of Section 11 is available only to those persons who has acted bonafidely in good faith with intent to save the misutilization of government money and such disclosure was in public interest with a declaration that he has reason to believe on it. It is to further observe that such protection is not available to the person, who himself is hand in glove with the other staff members and to save his own skin with lack of bonafides applied for protection. In addition to the aforesaid

in Public Interest Litigation, the Division Bench of this Court has observed that as criminal action has already been initiated against the petitioner, however, if any consequent disciplinary action is to be taken, it is with disciplinary authority to consider and to take departmental action in accordance with the terms and conditions of the service. In the present case, on registration of the offence, petitioner himself was found involved in commission of the offence and the departmental authorities have also directed to take action, however, this Court has reason to believe that action taken by the petitioner is not under the Act of 2011 and not in good faith but with lack of bonafide, however, not entitled to seek protection under Section 11 of the Act of 2011 or to declare him whistle blower.

10. In view of the foregoing discussion, in my considered opinion, the petition filed by the petitioner seeking protection of Section 11 of the Act of 2011 is based on lack of bonafides and on frivolous grounds, therefore, dismissed being devoid of merit with cost.

Petition dismissed.

I.L.R. [2016] M.P., 3076
APPELLATE CIVIL
Before Mr. Justice Anand Pathak
S.A. No. 365/2006 (Gwalior) decided on 24 June, 2016

NANDU & anr. ...Appellants
Vs.
SMT. JAMUNA BAI & ors. ...Respondents

***Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2* - Scope of seeking injunction by the defendants under the provision - Question involved - Whether the defendants have any legal right available to move application under Order 39 Rule 1 & 2 of C.P.C. or not - Held - Rule 1(a) provides remedy to any party in respect of any property in dispute in a suit, if the same is in danger or being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of decree - In such a case, defendant also can move an application for injunction under Order 39 Rule 1 & 2 of C.P.C. - Further Held - Even otherwise, there is no provision in Section 94 expressly prohibiting issuance of temporary injunction in cases not covered by the Order 39 C.P.C. or any rules made thereunder - The Courts have inherent jurisdiction to issue temporary**

injunction in such cases, if the Court is of the opinion that the interest of justice so requires. (Paras 4, 10 & 16)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – प्रतिवादीगण द्वारा उक्त उपबंध के अंतर्गत व्यादेश की सहायता चाहे जाने की व्यापकता – अंतर्ग्रस्त प्रश्न – क्या प्रतिवादीगण को सि.प्र.सं. के आदेश 39 नियम 1 एवं 2 के अंतर्गत आवेदन प्रस्तुत करने का कोई विधिक अधिकार उपलब्ध है अथवा नहीं – अभिनिर्धारित – नियम 1(ए) किसी वाद में विवादग्रस्त संपत्ति के संबंध में किसी भी पक्षकार को यह उपचार प्रदान करता है, यदि ऐसी संपत्ति खतरे में हो अथवा वाद के किसी पक्षकार द्वारा उसका दुर्व्यय या नुकसान या अन्य संक्रामण किया जा रहा हो अथवा डिक्री के निष्पादन में उसे गलत तरीके से बेचा गया हो – ऐसे प्रकरण में प्रतिवादी भी सि.प्र.सं. के आदेश 39 नियम 1 एवं 2 के अंतर्गत व्यादेश हेतु आवेदन प्रस्तुत कर सकता है – आगे यह भी अभिनिर्धारित – यहाँ तक कि अन्यथा भी धारा 94 में ऐसा कोई उपबंध नहीं है जो सि.प्र.सं. के आदेश 39 अथवा उसके अंतर्गत निर्मित किन्हीं नियमों से आच्छादित न होने वाले मामलों में अस्थाई व्यादेश जारी किये जाने को स्पष्टतया प्रतिषिद्ध करता हो – न्यायालयों को ऐसे मामलों में अस्थाई व्यादेश जारी करने की अंतर्निहित अधिकारिता है, यदि न्यायालय का यह मत है कि न्याय हित में ऐसा करना अपेक्षित है।

Cases referred:

1991 MPLJ 311, 1981 JLJ 487, 1980 JLJ 496, 1997 MPWN 34, AIR 1939 Madras 495, AIR 1962 SC 527, (2004) 8 SCC 488.

N.K. Gupta with *Ravi Gupta*, for the appellants.
J.P. Mishra with *Gaurav Mishra*, for the respondents.

(Supplied: Paragraph numbers)

ORDER

ANAND PATHAK, J. :- This appeal under Section 100 of the Code of Civil Procedure, 1908 has been preferred by the appellants/defendants against the judgment and decree dated 16-01-2006 passed by learned 8th Additional District Judge Gwalior in Civil Appeal No.37-A/2005 confirming the judgment and decree dated 22-12-2004 passed by learned 8th Civil Judge Class -II, Gwalior in Civil Suit No.42-A/2001.

2. The appeal has been admitted by this Court vide order dated 17-04-2013 on the substantial questions of law. Since then the appeal is pending consideration for final hearing.

3. The respondents/plaintiffs have filed a suit for declaration and injunction against the appellants / defendants in respect of the suit property as mentioned in the appeal memo. The respondents/plaintiffs have recently started some construction over the disputed site, therefore, the appellants/defendants had move an application (I.A.No.2399/2016) under Order XXXIX Rule 1 and 2 read with Section 151 of CPC seeking the injunctions against the respondents/ plaintiffs. The respondents/plaintiffs filed reply to the said application and while contesting the claim of appellants/defendants raised the legal question regarding maintainability of the application preferred by the defendants. According to the counsel for the respondents /defendants, the appellants/defendants had no right to move an application for injunction under Order XXXIX Rule 1 and 2 of CPC because the injunction is always available to the plaintiffs and the defendants cannot seek any injunction. The plaintiffs also submitted that renovation work of the residential area over the disputed site has already been completed and annexed the photographs in this regard.

4. Now the moot question for consideration of this injunction application (I.A.No.2399/2016) is whether the defendants have any legal right available to move an application under Order XXXIX Rule 1 and 2 of CPC or not.

5. Learned counsel for the appellants/defendants submitted that the defendants can claim injunction as per the provisions of Order XXXIX Rule 1 and 2 of CPC because here in the present case the defendants are not seeking any injunction regarding dispossession but against the construction of house by the plaintiffs and therefore, he is entitled to seek injunction in respect of property if nature of the property is attempted to be changed by the plaintiffs through damage or alienation. The appellants/defendants relied upon the judgment rendered by the Division Bench of this Court in the matter of *Churamani and another Vs. Ramadhar and others* 1991 MPLJ 311.

6. On the other hand, learned counsel for the respondents/plaintiffs vehemently argued that the defendants have no right to seek injunction in the present case because the provisions of Order XXXIX Rule 1 and 2 of CPC do not mandate so. According to the respondents/plaintiffs, the said remedy is only available to the plaintiffs and defendants cannot invoke it. Similarly, the respondents/plaintiffs have further averred that the construction of house has already been completed by the plaintiffs till now. Therefore, no injunction can be granted.

7. Learned counsel for the respondents/plaintiffs relied upon the judgments

rendered in the case of *Chhitoo and others Vs. Sakharam and others,* 1981 JLJ 487, *Sushila Singh (Smt.) Vs. Vijay Shanker Shukul,* 1980 JLJ 496 and *Ram Narayan Singh Vs. Rikhraj Singh,* 1997 MPWN 34.

8. Heard learned counsel for the parties on the application under Order XXXIX Rule 1 and 2 of CPC (I.A.No.2399/2016) and with their assistance perused the record.

9. The moot question in controversy is scope of seeking injunction by the defendants under the provisions of Order XXXIX Rule 1 and 2 of CPC. Before adverting to the controversy it is imperative to discuss the legal provisions in this regard. The Order XXXIX of CPC deals in respect of temporary injunction and interlocutory orders. Order XXXIX Rule 1 and 2 of CPC 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 wasted, damaged or alienated by any party to the suit, or wrongfully sold in a 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 be (sic: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. **Injunction to restrain repetition or continuance of**

breach— (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained, of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may be (sic:by) order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit."

10. From perusal of Rule 1 and 2 of CPC, it is clear that that Rule 1 (a) provides remedy to **"any party"** in respect of any property in dispute in a suit if is in danger or being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of decree. Therefore, the meaning of Waste, Damage or Alienate gains importance in the present context. As per the Black's Law Dictionary, the definition of Waste, Damage and Alienate is as under:

Alienate:	to transfer or convey (property or a property right) to another.
Damage:	loss or injury to person or property.
Waste:	Permanent harm to real property committed by a tenant (for life or for years) to the prejudice of the heir, the reversioner, or the remainderman. In the law of mortgages., any of the following acts by the mortgagor may constitute.

11. As per Webster Comprehensive Dictionary to the English Language, the definition of Waste, Damage and Alienate is as under:

Alienate:	to make over, transfer, as property to the ownership of another.
Damage:	destruction or impairment to value; injury; harm.
Damaged :	to impair the usefulness or value of.

Waste:	make desolate , ruined, dismal, slummy. causing site as worthless or or (sic:on) no practical value, use or worn out, discarded.
Wasted:	to cause to lose strength, vigor or bulk, make weak or feeble.

12. Therefore, if the property is in danger of being wasted, damaged or alienated then in that condition certainly, any party (or defendant in the present case) can move an application for injunction under Order XXXIX Rule 1(a) of the CPC.

13. The Madras High Court in the matter of *Sivakami Achi Vs. Narayana Chettiar,* AIR 1939 Madras 495 has held that an application under Order XXXIX Rule 1(a) of the CPC can be made on behalf of defendant. Later on, the said judgment has been considered by the Division Bench of this Court in the matter; *Churamani and another* (supra) and held that the defendant has right to move application under Order XXXIX Rule 1 (a) of CPC if any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to a suit or wrongfully sold in execution of a decree.

14. Learned counsel for the respondents/defendants has relied upon the judgment of this Court rendered in *Chhitoo and others* (supra) also deals in respect of scope of Order XXXIX Rule 1 and 2 of CPC in respect of defendants and concluded that use of the expression 'any party' is certainly wide enough to cover the plaintiff as well as defendant. Similarly, the judgment rendered in the case of *Sushila Singh* (supra) deals in realm of possession which is the scope of Order XXXIX Rule 1(b) and (c) of the CPC and not of Order XXXIX Rule 1 (a) of the CPC. Same analogy can be advanced in respect of judgment rendered in the case of *Ram Narayan Singh* (supra).

15. Here, the question is whether in the facts and circumstances of the case, defendants are seeking injunction in respect of possession or in respect of property being wasted, damaged or alienated. The contention of the defendants is that the plaintiffs are making construction over the suit property and therefore, in this way is causing damage to the suit property and would alter the nature of the property. Definition of word **Waste** (wasted) and **Damage** (damaged) do give substance to the submissions of the defendants because raising of construction over the suit property would not only alter the nature of the suit property but may cause damage to the suit property or

render it as wasted. Definitions as given in the Black's Law Dictionary as well as Websters Comprehensive Dictionary make it sufficiently clear that the loss in the nature of the property is imminent by the construction of the plaintiffs.

16. Even otherwise, there being no such expression in Section 94 of CPC which expressly prohibits the issue of a temporary injunction in circumstances not covered by Order XXXIX of CPC or by any Rules made under the Code, the Courts have inherent jurisdiction to issue temporary injunction in circumstances which are covered by the provision of XXXIX of CPC, if the Court is of the opinion that the interest of justice requires the issue of such temporary injunction. The inherent power has not been conferred upon the Court. It is a power inherent in the Court by virtue of its duties to do justice between the parties before it. {See: AIR 1962 SC 527 *(Manoharlal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal)}*. Here, in the present case, there is no need to resort to Section 94 or 151 of CPC because the Order XXXIX Rule 1(a) of CPC itself provides the remedy to the defendant to seek injunction as per the parameters prescribed.

17. Therefore, it is concluded that the defendant can file an application under Order XXXIX Rule 1 (a) of CPC for injunction and the same is maintainable if the exigencies as provided under Order XXXIX Rule 1(a) of CPC exists. Therefore, defendants are entitled to get injunction.

18. Looking to the verdict of Hon'ble Supreme Court in the matter of *Maharwal Khewaji Trust (Regd.) Faridkot Vs. Baldev Dass* as reported in (2004) 8 SCC 488 to prevent appellants to suffer irreparable loss in the hands of respondents in respect of property in question being alienated, damaged or wasted, injunction is granted in favour of defendants. In the present case, the defendants have sufficiently made out a case for grant of injunction.

19. The respondents/plaintiffs have demonstrated through photographs and pleadings that the construction is over by now. Thus, the injunction application preferred by the appellants/defendants is allowed to the extent that the respondents/plaintiffs are temporarily injuncted not to damage or waste the property further, nor the respondents/plaintiffs would alienate the property to the disadvantage of the appellants/defendants, during pendency of this appeal.

20. I.A. stands disposed off.

Order accordingly.

I.L.R. [2016] M.P., 3083
APPELLATE CIVIL
Before Mr. Justice D.K. Paliwal
F.A. No. 209/2003 (Gwalior) decided on 8 September, 2016

STATE OF M.P. ...Appellant
Vs.
SMT. PUSHPA ...Respondent

Civil Procedure Code (5 of 1908), Section 96 - Appeal against the order of compensation **- Respondent/plaintiff undergoes sterilization operation, but she again got pregnant - Liability of the doctor - Prior to the operation it was explained that there is some possibility of failure of operation, and for failure, the concerning doctor shall not be held liable - Held - A doctor does not give a contractual warranty - He is not an insurer against all possible risks - He or she does not provide insurance that there would be no pregnancy after sterilization operation - There is a chance of sterile being turned into fertile even after the operation was done with due care and caution - A doctor is not liable for negligence. (Paras 19 & 21)**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 96 – क्षतिपूर्ति के आदेश के विरूद्ध अपील – प्रत्यर्थी/वादिनी का नसबंदी ऑपरेशन हुआ, परंतु फिर भी वह गर्भवती हो गई – चिकित्सक का दायित्व – ऑपरेशन के पूर्व यह स्पष्ट किया गया था कि ऑपरेशन के विफल रहने की कुछ संभावना होती है तथा विफलता के लिए संबंधित चिकित्सक को जिम्मेदार नहीं ठहराया जाएगा – अभिनिर्धारित – एक चिकित्सक संविदात्मक वारंटी नहीं देता है – वह सभी संभावित जोखिमों के विरूद्ध बीमाकर्ता नहीं है – वह ऐसा बीमा प्रदान नहीं करता/करती कि नसबंदी ऑपरेशन के बाद गर्भधारण नहीं होगा – सम्यक् देखभाल एवं सावधानी के साथ ऑपरेशन किए जाने के बावजूद किसी बंध्या महिला के गर्भवती हो जाने की संभावना रहती है – चिकित्सक लापरवाही हेतु जिम्मेदार नहीं।

Cases referred:

AIR 1969 SC 128, (2001) 8 SCC 731, (2005) 6 SCC 1, 2000 (5) SCC 182.

A.S. Rathore, P.L. for the appellant/State.
Sarvesh Sharma, for the respondent.

JUDGMENT

D.K. PALIWAL, J. :- This appeal has been preferred under Section 96 of CPC, being aggrieved with judgment and decree dated 15.05.2003 passed by 10th Additional Judge, (Fast Track Court) Gwalior in Civil Suit No.10-B/2003, whereby the suit preferred by the respondent for awarding the compensation has been partly decreed.

2. Brief facts of the case are that the respondent/plaintiff filed a civil suit pleading that she was having two sons. She consulted Dr. Smt Pradeep Saxena who advised her to undergo sterilization operation. On her advise the respondent/plaintiff was operated on 26.05.1999 at Government Hospital, Fort Road, Gwalior. Certificate has been issued in favour of the plaintiff. It is further pleaded that the respondent/plaintiff has undergone operation because her husband is receiving salary which is not enough to maintain her two sons. It is further pleaded that due to negligence of doctor in the operation, she suspected that she is pregnant then again she consulted doctor on 10.06.1999. On 13.10.1999 when she had gone for checkup it was found that she is pregnant. It is further pleaded that on 10.05.2000 the respondent/plaintiff gave birth to a male child. The respondent/plaintiff suffered physical and mental agony to have a third issue because she was already having two male issue and she would have to bear the expenses of third issue. The respondent/plaintiff is a poor lady and her husband income is very low hence it is very difficult to maintain third child. Respondent/plaintiff gave a notice under Section 80 of CPC for the payment of compensation of Rs.1,50,000/-. Thereafter, the suit has been filed claiming compensation of Rs.1,50,000/-.

3. The appellants/defendant in their written statement stated that the operation was done with the consent of the respondent/plaintiff. It is further stated that respondent/plaintiff was well aware that there is a possibility of failure of operation and if it is failed then concerning doctor shall not be held responsible. It is further stated that after operation, respondent/plaintiff was advised to have regular checkup but she has not complied with. Appellants/defendant have not committed any negligence, hence, prayed for dismissal of the suit.

4. On the basis of the pleading of the party, learned Trial court has framed the following issues :

वाद प्रश्न	उपपत्तियां
1 क्या वादी ने दिनांक 26.5.99 को शासकीय चिकित्सालय फोर्ट रोड, ग्वालियर में प्रतिवादी कमांक–3 से परिवार नियोजन के अंतर्गत नसबंदी का ऑपरेशन कराया था?	हां
2 क्या प्रतिवादी क.3 के द्वारा नसबंदी का ऑपरेशन लापरवाही ढंग से करने के कारण वादी गर्भवती होकर उसे बालक उत्पन्न हुआ ?	हां
3 क्या नसबंदी ऑपरेशन के बावजूद पुनः वादी का बच्चा होने से वादिनी व उसके पति को मानसिक, शारीरिक व आर्थिक नुकसान हुआ है?	हां
4 क्या वादी बिना धारा 80 सी0पी0सी0 का नोटिस दिये दावा प्रस्तुत किया? प्रभाव?	सूचना पत्र दिया है।
5 क्या दावे मे चाही गई क्षतिपूर्ति धनराशि पर एडवोलेरम न्यायशुल्क देय है?	अंतिम अनुच्छेदानुसार निराकृत।
6 क्या वादी द्वारा चाही गई क्षतिपूर्ति धनराशि कितनी व किसे प्राप्त करने की अधिकारी है?	रू0 साठ हजार क्षतिपूर्ति स्वीकृत।
7 सहायता एवं व्यय?	अंतिम परेच्छेदानुसार डिक्री।

5. After scanning the evidence, learned Trial Court answered the issue No.1 to 4 affirmatively and partly decreed the suit. Rs.60,000/- has been awarded as compensation. Being aggrieved, the appellants/defendant preferred this appeal.

6. It is submitted by appellants/defendant that learned Trial Court has not properly appreciated the evidence and material available on record. The finding recorded by the Trial Court with regard to issue No.1 to 3 is illegal. There is no material to hold the negligence of the appellant. It is submitted that respondent/plaintiff was aware that there is a possibility of failure of operation and she has given her consent in writing that she will not hold responsible to any one for failure of operation. Learned Trial Court also erred in holding that plaintiff is entitled for compensation of Rs.60,000/-. Hence, prayed for setting aside the decree.

7. Learned counsel appearing on behalf of the respondent/plaintiff supported the finding and preyed that appeal be dismissed. Respondent has also filed cross-objection. It is stated that respondent/plaintiff claimed the award to the tune of Rs.1,50,000/- and learned Trial Court awarded only

Rs.60,000/-. Learned Trial Court has not assigned any reason for granting only Rs.60,000/-. It is prayed that compensation of Rs.1,50,000/- be awarded.

8. Learned counsel for the appellants/defendant submitted that respondent/plaintiff is not entitled for any compensation. Learned Trial Court erred in granting compensation of Rs.60,000/-. Hence preyed for dismissal of cross objections.

9. Before proceeding to examine the issue involved in this appeal it would be appropriate to refer the settled principles for holding negligence of doctors. Hon'ble Supreme Court in the matter of *Laxman Balkrishna Joshi v. Trimbak Bapu Godbole,* [AIR 1969 SC 128] observed as under :-

> "11. The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties viz. a duty of care in deciding whether to undertakes the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case.

10. In *Vinitha Ashok v. Lakshmi Hospital,* (2001) 8 SCC 731, the entire case law has been dealt with and it has been concluded that the doctor is not liable for negligence if the course adopted by him is "reasonable" and his view is not "illogical".

11. Hon'ble Apex Court in the case of *Jacob Mathew vs. State of Punjab and Another* [2005 (6) SCC 1] observed as under :

> "**19.** An ofquoted passage defining negligence by professionals generally and not necessarily confined to doctors, is to be found in the opinion of McNair, J. in *Bolam v. Friern Hospital Management Committee* WLR at p. 586 in the following words: (All ER p. 121 DF)"[W]here you get a situation which involves the use of some special skill or competence, then the

test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill ..... It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art." (Charlesworth & Percy. ibid... para 8.02)

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"**45.** *Spring Meadows Hospital v. Harjol Ahluwalia* is again a case of liability for negligence by a medical professional in civil law. It was held that an error or judgment is not necessarily negligence. The Court referred to the decision in *Whitehouse v. Jordan* and cited with approval (at SCC p.47, para 9) the following statement of law contained in the opinion of Lord Fraser determining when an error of judgment can be termed as negligence: (All ER p. 281 b-c)

"The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that a man, acting with ordinary care, might have made, then it is not negligence."

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"**48- (2)** Negligence in the context of the medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable

for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, which assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

"**48-(3)** A professional may be held liable for negligence on one of the two findings, either he was not possessed of the requisite skill which the professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence."

12. Smt. Pushpa (PW-1) deposed that after giving birth two issues she consulted Dr. Smt. Pradeep Saxena she advised for operation. She further deposed that on 26.05.1999 Dr. Smt. Pradeep Saxena has operated her for sterilization and gave a certificate Ex.P-1 to Ex.P-8. She further deposed that due to negligence of Dr. Smt. Pradeep Saxena in sterilization she became ill. When she consulted the doctor on 10.08.1999 she started treatment on 13.10.1999. She got checkup at Jayarogya Hospital, where she was informed

that she is pregnant. When she informed about her pregnancy to Dr. Smt. Pradeep Saxena she expressed inability to do something. Despite sterilization operation she gave birth to a male child on 10.05.2000. Her husband is in service and earn low salary. She has already two issues and it is very difficult to maintain third issue. She and her husband shocked after the birth of third child despite of sterilization operation.

13. Ashok Kumar (PW-2),husband of Smt. Pushpa, stated that he consulted his wife who advice for sterilization on 26.05.1999. Dr. Smt. Pradeep Saxena has operated his wife. He further deposed that after operation his wife became pregnant and gave birth to a male child. Due to birth of third child he has been deprived of benefit of green card.

14. Dr. Smt. Pradeep Saxena deposed that on 26.05.1999 she did sterilization operation of Smt. Pushpa and prior to the operation Pushpa has given her consent and filled up the application form which was read over her. She was apprised the possibility of failure of operation. Application form Ex.P-1 which was signed "A" to "A" and signature of Pushpa "B" to "B". She further deposed that after sterilization operation she advised for checkup but after pregnancy Pushpa has not contacted her. She has not committed any negligence during operation. Hence, she could not be held responsible.

15. Smt. Aliamma (DW-1) stated that she was posted as nurse on 26.05.1999. She has read over the form and Pushpa has signed the form after giving her consent. She further deposed that after sterilization operation Pushpa was advised for checkup from time to time but neither she has not visited the hospital after operation nor made any complaint.

16. On behalf of the respondent/plaintiff, no doctor has been examined to prove the negligence of Dr. Smt. Pradeep Saxena. Ashok Kumar (PW-2) denied that before operation a form was read over to his wife, wherein it was mentioned that there are some chances of failure of operation and if operation fails then doctor can not be held responsible.

17. Smt. Pushpa (PW-1) has admitted in her cross-examination that prior to operation, application form was signed by her and she has given her consent for operation. She further denied that the lady doctor told her prior to operation that there is some possibility of failure of operation.

18. On perusal of the Ex.P-1, it appears that it has clearly been mentioned that there is some possibility of failure of operation. Hence, she or her relatives

cannot held the doctor responsible.

19. Thus, prior to operation, it was explained to the respondent/plaintiff that there is some possibility of failure of operation and for the failure, the concerning doctor shall not be held responsible.

20. Smt. Pushpa (PW-1) in para-11 could not point out that what negligence committed by lady doctor during sterilization operation. According to her, even after operation she gave birth to a child itself shows the negligence of the lady doctor.

21. A doctor does not give a contractual warranty. He is not an insurer against all possible risks. He or she does not provide insurance that there would he no pregnancy after sterilization operation. As demonstrated above there is a chance of sterile being turned into fertile even after the operation has been done with due care and caution. A doctor is not liable in negligence because someone of grater skill and knowledge would have prescribed different treatment or "operated in a different way". She has to show only a reasonable standard of care. She cannot be held guilty for error of judgment. Considerable deference is paid to the practices of the professions (particularly medical profession) as established by expert evidence and the Court should not attempt to put itself in the shoes of the surgeon or other professional man.

22. As regards sterilization AWilliam's Obstetrics 21st Edition Pages 1556 to 1560 deal with "sterilization". It is stated at page 1559 of 1997 Edition : "No method of tubal sterilization is without failure". "Soderstrom (1985) concluded that most sterilization failures were not preventable. A similar conclusion was reached by the American College of Obstetricians and Gynecologists (1996), which stated, "pregnancies after sterilization may occur without any technical errors. Finally, the lifetime increased cumulative failure rates overtime are supportive that failure after one year are not likely due to technical errors". Thus, according to this authoritative book the failure of tubal sterilization is not necessarily on account of negligence of the doctor.

23. Learned Counsel appearing on behalf of the respondent has placed reliance in the decision of Hon'ble Supreme Court in the case of *State of Haryana Vs. Smt. Santara* reported in 2000 (5) SCC 182.

24. In the case of *Santara* (supra), the plaintiff having seven children and undergone for sterilization operation. It was found that right Fallopian tube was operated and left Fallopian tube was untouched. On this basis, it was

held that doctor was negligent because he has operated only one Fallopian tube while he was required to operate both the Fallopian tube to avoid further pregnancy. Due to negligence of the doctor, damage was awarded to *Santara.*

25. In the instant case, no specific act of negligence on the part of the lady doctor has been pointed out. Therefore,in the facts and circumstances of this case the decision in the *Santra* Case(supra) is not applicable in the present case. The lady doctor who operated the respondent/plaintiff cannot be held negligent.

26. In view of aforesaid discussion, in the opinion of this Court, learned Trial Court has not appreciated the evidence and material in its proper perspective and erred in holding the appellant negligent for sterilization operation. In the opinion of this Court the respondent/plaintiff failed to prove the negligence on the part of the doctor. The impugned judgment and decree deserves to be set aside.

27. In view of above discussion, this appeal deserves to be allowed and the cross objection deserves to be dismissed.

28. Consequently, the appeal is allowed and judgment and decree passed by learned Trial Court is set aside and suit filed on behalf of the respondent is hereby dismissed. Cross objection filed by respondent is dismissed. Parties to bear their own cost. Decree be drawn up accordingly.

Appeal allowed.

I.L.R. [2016] M.P., 3091
APPELLATE CRIMINAL
Before Mr. Justice N.K. Gupta & Mr. Justice G.S. Ahluwalia
Cr.A. No. 323/2003 (Gwalior) decided on 27 October, 2016.

GABBAR SINGH ...Appellant
Vs.
STATE OF M.P. ...Respondent

(Alongwith Cr.R. No. 284/2003)

A. Penal Code (45 of 1860), Section 302 - Appeal Against Conviction **- Deceased along with other witnesses sitting on a platform and they were talking to each other - At that time, the appellant and other co-accused came there and started abusing - When the deceased**

merely asked the appellant not to abuse, after hearing this the appellant got aggressive, took out a country-made pistol and without there being any retaliation or overt act on the part of either the deceased or any of the witnesses and without any provocation, he fired at the deceased causing injury on his chest - Death of the deceased was due to gun shot injury - Held - Merely because only one gunshot injury was caused to the deceased would not *ipso facto* take out the case from the purview of murder - Trial Court rightly convicted the appellant. (Para 22)

क. दण्ड संहिता (1860 का 45), धारा 302 – दोषसिद्धि के विरूद्ध अपील – मृतक अन्य साक्षीगण के साथ एक चबूतरे पर बैठे थे तथा वे लोग एक दूसरे से बात कर रहे थे – उस समय अपीलार्थी एवं अन्य सह अभियुक्त वहाँ आए और गाली देने लगे – जब मृतक ने अपीलार्थी को केवल गाली न बकने बावत् कहा, तो यह सुनकर अपीलार्थी आक्रामक हो गया, उसने एक देशी पिस्तौल निकाल लिया और मृतक अथवा साक्षीगण की ओर से बिना किसी प्रतिकार या किसी भी प्रकार के आपराधिक कृत्य एवं प्रकोपन के उसने मृतक पर गोली चला दी जिससे उसकी छाती में चोट कारित हुई – गोली से उत्पन्न चोट के कारण मृतक की मृत्यु हुई – अभिनिर्धारित – मात्र इस कारण से कि मृतक को बंदूक की गोली से केवल एक चोट कारित की गई थी, मामला स्वतः ही हत्या की परिधि से बाहर नहीं आएगा – विचारण न्यायालय ने अपीलार्थी को उचित रूप से दोषसिद्ध किया।

***B. Penal Code (45 of 1860), Section 302 - General Exception - Right of Private defence* - It is not necessary for the appellant to take specific defence, but from the circumstances he can establish that he had acted in exercise of his right of private defence - To claim the right, the accused must show the circumstances available on record to establish that there was reasonable ground for the appellant to apprehend that either death or grievous hurt would be caused to him. (Para 16)**

ख. दण्ड संहिता (1860 का 45), धारा 302 – सामान्य अपवाद – निजी प्रतिरक्षा का अधिकार – अपीलार्थी द्वारा विशिष्ट प्रतिरक्षा का सहारा लिया जाना आवश्यक नहीं है, परंतु परिस्थितियों से वह यह सिद्ध कर सकता है कि उसने निजी प्रतिरक्षा के अधिकार का प्रयोग करते हुए उक्त कृत्य किया था – ऐसे अधिकार का दावा करने के लिए अभियुक्त को अभिलेख पर उपलब्ध परिस्थितियों को दर्शाना चाहिए, जिससे यह सिद्ध हो सके कि अपीलार्थी को ऐसी आशंका होने का युक्तियुक्त आधार था कि या तो उसकी मृत्यु हो जाएगी अथवा उसे घोर उपहति कारित की जाएगी।

C. Penal Code (45 of 1860), Section 504 - Conviction u/S

504 **- In absence of the charge, the appellant could not be convicted of that offence. (Para 24)**

ग. दण्ड संहिता (1860 का 45), धारा 504 – धारा 504 के अंतर्गत दोषसिद्धि – किसी आरोप की अनुपस्थिति में, अपीलार्थी को उक्त अपराध के अंतर्गत दोषसिद्ध नहीं किया जा सकता।

D. Against acquittal **- If two views are possible, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused is to be adopted. (Para 25)**

घ. दोषमुक्ति के विरूद्ध – यदि मामले में दो दृष्टिकोण संभव हो, जिनमें से एक अभियुक्त के दोषी होने एवं दूसरा उसके निर्दोष होने की ओर इशारा करता हो, तब वह दृष्टिकोण अपनाया जाना चाहिए जो अभियुक्त के पक्ष में हो।

Cases referred:

(2012) 5 SCC 530, AIR 2008 SC 1823, AIR 2006 SC 2531, (2009) 3 SCC (Cri) 966, (2009) 3 SCC (Cri) 1446, (2014) 10 SCC 366, (1978) 3 SCC 330, (2004) 12 SCC 398.

Prem Singh Bhadoriya, *R.P. Singh* and *Sushil Goswami,* for the appellant in Cr.A. No. 323/2003.

Kamal Jain, P.P. for the respondent/State in Cr.A. No. 323/2003 and for the non-applicant No. 4/State in Cr.R. No. 284/2003.

Sunil Soni, for the applicant in Cr.R. No. 284/2003.
Sushil Goswami, for the non-applicants No. 1 to 3.

J U D G M E N T

The Judgment of the Court was delivered by : **G.S. AHLUWALIA, J. :-** Since both the matters are related with the common judgment dated 5.4.2003, hereby they are disposed off with present one judgment.

2. By this appeal the appellant has called in question the correctness of judgment dated 05.04.2003 passed in S.T. No. 71/2002 by the First Additional Sessions Judge Dabra, District Gwalior by which the appellant has been convicted for offences punishable under Sections 302 and 504 of IPC and has been directed to undergo Life Imprisonment with fine of Rs. 1000/- and Rigorous Imprisonment of seven days respectively. Both the sentences have

been directed to run concurrently.

3. A criminal revision No.284/2003 has been filed by the complainant Ramkali challenging the correctness of the part of the same judgment by which the respondents Mantram, Bheem Singh and Sanjay Singh have been acquitted for offences punishable under Section 302 r/w Section 120-B of IPC. Both the cases are being considered and decided by this judgment.

4. The prosecution story in short is that on 29.09.2001 at about 20:30-20:45 the complainant Ajab Singh, Gopal, Mahesh, Rajvir, Purshottam and deceased Gyan Singh were sitting on a platform outside the Mata Mandir in village Antri and were talking to each other. At that time the appellant Gabbar Singh and Mantram (acquitted accused) came there. Appellant Gabbar Singh started abusing Gyan Singh. When the deceased objected to it and asked the appellant Gabbar Singh not to abuse, at that time the appellant Gabbar Singh fired at Gyan Singh by means of a country made pistol causing injury to him on the chest. Thereafter, the appellant Gabbar Singh and Mantram ran away from the spot. It was alleged that the acquitted accused persons Bheekam, Mantram and Sanjay had conspired with appellant Gabbar Singh to kill Gyan Singh. FIR was lodged by Ajab Singh (PW-3) in police Station Antri, District Gwalior on 29.09.2001 itself at 21:15. The appellant was arrested on 29.11.2001 and his memorandum under Section 27 of Evidence Act was recorded on 29.11.2001 itself and in pursuance to the information given by the appellant in his memorandum recorded under Section 27 of Evidence Act, a country made pistol and two live cartridges were recovered from the house of the appellant Gabbar Singh. The country made pistol was sent to the armorer to find out that whether the same is a fire arm and also in a working condition or not. The police after completing the investigation filed charge sheet against the appellant Gabbar Singh, Bheekam Singh (acquitted accused), Sanjay (acquitted accused) and Mantram (acquitted accused).

5. The trial court framed charge under Sections 302 and 294 of IPC against the appellant Gabbar Singh and framed charge under Section 302 r/w Section 120-B of IPC against the acquitted accused Mantram, Sanjay and Bheekam Singh.

6. The accused persons abjured their guilt and pleaded not guilty.

7. The trial court after considering the evidence adduced by the prosecution as well as defence evidence, convicted and sentenced the appellant

Gabbar Singh as mentioned above.

8. We have heard the learned counsel for the parties.

9. The prosecution in support of its case examined Raghunath Singh (PW-1), Gopal S/o Nandram (PW-2), Ajab Singh (PW-3), Veer Singh (PW-4), Rajveer Singh (PW-5), Raj Kumar (PW-6), Gopal S/o Jagram (PW-7), Ramswaroop (PW-8), Mahesh Jogi (PW-9), Ranvir (PW-10), Balvir Singh (PW-11), Jaibhanu Tiwari (PW-12), Ashok Singh (PW-13), Dr. Surendra Singh Jadon (PW-14), Santosh Singh Head Constable (PW-15), Harvilas (PW-16), Mahesh Singh (PW-17), Ajay Chanana (PW-18), Roop Singh Chauhan (PW-19), Rajendra Singh Kushwah (PW-20). The appellant Gabbar Singh examined Ramdas Kadam, Head Constable (DW-1) as his defence witness.

10. In order to prove the nature of the death, the prosecution has examined Dr. Surendra Singh Jadon (PW-14) who had conducted postmortem of the deceased Gyan Singh. Dr. Surendra Singh Jadon (PW-14) has stated before the trial court that on 13.09.2001 he was posted in JAH Gwalior on the post of Medical Officer. He had conducted the postmortem of the deceased Gyan Singh. On examination of the body, he had found the following injuries:-

> (1) One lacerated wound at chin whose dimension was 3x0.5x0.5 cm.
>
> (2) One gunshot entry wound which was of 0.8 cm diameter and was 11 cm. below the suprasternal notch and was right to mid-line and the wound was surrounded by the mark of charring which was spread over the area of 5 cm. on each side and there was a corresponding wound in the cloths of the deceased. The exit wound was not visible.

On internal examination, vital organs including heart and left lung were found penetrated and the bullet was recovered from the chest wall. As per the information of the doctor, the cause of death was due to shock and excessive bleeding because of injuries caused to the heart and left lung. Also, it was sufficient to cause death in natural course of life. The death was homicidal in nature and had occurred within a period of 6 to 24 hours prior to the time of postmortem. The postmortem report is Ex.P15.

11. The learned counsel for the appellant in the arguments have not

challenged the evidence of Dr. Surendra Singh Jadon (PW-14) as well as the postmortem report Ex.P15. Accordingly, it is held that the death of the deceased Gyan Singh was homicidal in nature and was caused due to the gunshot injury.

12. The next question for consideration is that who has caused the solitary injury to the deceased Gyan Singh. Gopal S/o Nandram (PW-2), Gopal S/o Jagram (PW-7), Mahesh Jogi (PW-9), Ranvir (PW-10), Ashok Singh (PW-13) and Rajendra Singh Kushwah (PW-20) have not supported the prosecution case and were declared hostile.

13. Raghunath Singh (PW-1) has stated that on 29.09.2001 he was in his house when Veer Singh, Mahesh etc. were bringing Gyan Singh who was unconscious. When these persons were passing in front of his house he enquired from Veer Singh, Mahesh etc. that what has happened, then Veer Singh informed this witness that the appellant Gabbar Singh has shot the deceased Gyan Singh. It is further stated by this witness that he also went to the police station along with these persons and the FIR was lodged by Veer Singh. Gyan Singh was taken to Gwalior and this witness also accompanied him. However, Gyan Singh expired on the way. Even then, the deceased Gyan Singh was taken to Gwalior Hospital. When the dead body was brought back to Antri the postmortem was conducted. This witness was cross-examined by the counsel for the appellant who specifically denied the suggestion that he did not have any talks with Veer Singh or Mahesh Singh and he also specifically denied the suggestion that Veer Singh, Mahesh Singh had not met with him. It was submitted by the counsel for the appellant that in the examination-in-chief itself this witness has stated that the FIR was lodged by Veer Singh and whereas the prosecution has filed the FIR Ex.P/4 which is alleged to have been lodged by Ajab Singh, therefore, it was contended by the counsel for the appellant that the prosecution has suppressed the FIR lodged by Veer Singh and, therefore, an adverse inference should be drawn.

14. Ajab Singh (PW-3) has specifically stated that after the incident took place he along with Veer Singh (PW-4), Rajvir Singh (PW-5), Purshottam took the deceased Gyan Singh to the police station and he had lodged the FIR against the appellant Gabbar Singh. No suggestion has been given by this witness that any other FIR was lodged by Veer Singh. Even otherwise, when the witnesses have specifically stated that Veer Singh had also gone to the police station along with other prosecution witnesses including the complainant Ajab Singh (PW-3), therefore, it cannot be held that the police has suppressed

any other FIR. Further Veer Singh has admitted in his cross-examination that FIR was lodged and signed by Ajab Singh. Furthermore, no suggestion in this regard has been given to Ajay Chanana Sub Inspector (PW-18) who had recorded the FIR Ex.P/4 on the complaint of complainant Ajab Singh Kirar (PW-3). When the appellant has not challenged the incident, then the contention of the counsel for the appellant that the police has suppressed any FIR is misconceived.

15. In order to prove the incident, Ajab Singh (PW-3) and Rajveer Singh (PW-5) have stated specifically that on 29.09.2001 at about 8:30 in the night, Purshottam, Gopal, Mahesh, Rajveer, Parsu and deceased were sitting on platform outside the Pandaji temple and they were talking about the agricultural activities. At that time, the appellant Gabbar Singh and Mantram (acquitted accused) came there and the appellant and Mantram (acquitted accused) abused the deceased Gyan Singh. When the deceased Gyan Singh objected and asked them not to abuse, then the appellant Gabbar Singh once again started abusing him and said that you cannot scold me and took out a country made pistol and fired at him from a close range, causing injury to the deceased Gyan Singh on his chest. Thereafter, the appellant Gabbar Singh and Mantram (acquitted accused) ran away from the spot. The deceased Gyan Singh after walking for 20-22 steps fell down. He was taken to the police station by these witnesses, where the FIR was lodged by Ajab Singh (PW-3). As already mentioned above, the appellant Gabbar Singh has not challenged the manner in which incident is alleged to have taken place by the prosecution witnesses, therefore, it is held that the deceased along with the other prosecution witnesses were sitting on platform outside the temple and were talking about the agricultural activities, when the appellant Gabbar Singh came there and without any provocation or any overt act on the part of the deceased or any of the prosecution witnesses started abusing the deceased Gyan Singh and when the deceased objected to such an act of appellant Gabbar Singh, the appellant Gabbar Singh took out a country made pistol and without any provocation fired at the deceased causing injury on his chest which resulted in the death of the deceased.

16. It is then submitted by the counsel for the appellant Gabbar Singh that if the entire incident is considered in a proper perspective then it would be clear that the appellant Gabbar Singh had acted in his private defence. It is well established principle of law that in order to set up the plea of private

defence, it is not necessary for the appellant to take specific defence but from the surrounding circumstances he can establish that he had acted in exercise of his right of private defence. However, to claim the right of private defence to the extent of causing death, the accused must show the circumstances available on record to establish that there was reasonable ground for the appellant to apprehend that either death or grievous hurt would be caused to him. However, it is also clear that no right of private defence accrues when there is no apprehension of the danger and there should be a necessity of avoiding an impending danger either clear or apparent. However, the right of private defence is not available to a person who himself is an aggressor. Further, Section 99 of IPC clearly provides that the injury which is caused by the accused exercising the right of private defence should commensurate with injury with which he is threatened. View of the court is fortified by the judgment of the Supreme Court in the case of *Arjun vs. State of Maharashtra* reported in (2012) 5 SCC 530 in which it is held as under:-

> "22. The law clearly spells out that the right of private defence is available only when there is a reasonable apprehension of receiving injury. Section 99 IPC explains that the injury which is inflicted by a person exercising the right should commensurate with the injury with which he is threatened. True, that the accused need not prove the existence of the right of private defence beyond reasonable doubt and it is enough for him to show as in a civil case that preponderance of probabilities is in favour of his plea. The right of private defence cannot be used to do away with a wrongdoer unless the person concerned has a reasonable cause to fear that otherwise death or grievous hurt might ensure in which case that person would have full measure of right to private defence.
>
> 23. It is for the accused claiming the right of private defence to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution, if a plea of private defence is raised. *(Munshi Ram v. Delhi Admn, State of Gujarat v. Bai Fatima, State of U.P. v. Mohd. Musheer Khan, Mohinder Pal Jolly v. State of Punjab and Salim Zia v. State of U.P.)*

> 24. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find out whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting."

17. It is contended by the counsel for the appellant that from the evidence of Ajay Chanana (PW-18) and Ramdas Kadam (DW-1) it is clear that the deceased had a criminal record. It is further submitted that when the appellant Gabbar Singh noticed that Gyan Singh was sitting along with other prosecution witnesses then it gave a reasonable apprehension in his mind that the deceased might cause harm or injury to him, as a result of which, the right of private defence accrued in favour of the appellant Gabbar Singh.

18. The submission made by the counsel for the appellant is misconceived and contrary to law. If the facts of the present case are considered in the light of the well established principle of law with regard to the right of private defence, it is clear that the appellant himself was aggressor. It is not a case of the appellant Gabbar Singh that any of the prosecution witnesses or the deceased were armed with any weapon. Neither any suggestion has been given to any of the prosecution witnesses nor there is any material available on record to show that after noticing the appellant Gabbar Singh either any of the prosecution witness or the deceased reacted in any manner. No overt act on their part has been suggested or pointed out by the counsel for the appellant. On the contrary, he has fairly admitted that there is nothing on record to show that any of the prosecution witness or the deceased reacted in any manner after noticing the appellant Gabbar Singh. It is submitted by the counsel for the appellant that since the deceased had a criminal record, therefore, that itself is sufficient to raise reasonable apprehension in the mind of the appellant Gabbar Singh to the effect that the deceased may cause injury to him. Here it is not out of place to mention here that Ramdas Kadam (DW-1) in paragraph 4 of his deposition has admitted that the appellant Gabbar Singh is also registered as ante social element in the police station. This admission on the part of the defence witnesses clearly shows that the appellant Gabbar Singh himself has a criminal record, therefore, the contention of the counsel for the appellant that merely because the deceased had a criminal past is sufficient to

raise a reasonable apprehension of receiving injury in the mind of the appellant Gabbar Singh is misconceived. Apart from this, it is clear that the prosecution witnesses and the deceased were sitting on a platform out side the temple. If the appellant Gabbar Singh was having any apprehension of the deceased then he should have avoided in going towards that direction. In fact, from the facts and circumstances of the case, it is clear that the appellant Gabbar Singh voluntarily went towards the place where the deceased along with the prosecution witnesses were sitting. Another important aspect is that the appellant Gabbar Singh was carrying a country made pistol with him whereas all the prosecution witnesses and the deceased were unarmed. Thus, it is clear that the appellant Gabbar Singh himself was an aggressor and there was no reaction from the side of any of the prosecution witnesses or the deceased which may have given a reasonable apprehension of receiving injury in the mind of the appellant Gabbar Singh and thus it is held that no right of private defence had accrued in favour of the appellant Gabbar Singh. The contention of the counsel for the appellant that the appellant Gabbar Singh had acted in exercise of his right of private defence is misconceived and rejected.

19. It is further submitted by the counsel for the appellant that considering the manner in which the incident is alleged to have taken place, the act of the appellant Gabbar Singh would fall in Exception 4 of Section 300 and, therefore, the offence would fall under Section 304 Part-I and not under Section 302 of IPC.

20. To buttress his contention, the counsel for the appellant has relied upon the judgments of Supreme Court passed in the case of *Daya Nand vs. State of Haryana* reported in AIR 2008 SC 1823 and *Bunnilal Chaudhary vs. State of Bihar* reported in AIR 2006 SC 2531. It is submitted by the counsel for the appellant that a single gunshot injury was caused to the deceased and, therefore, it should be held that there was no intention on the part of the appellant Gabbar Singh to cause death of the deceased.

21. In the considered view of this Court the manner in which the offence has been committed, the contention of the appellant is misconceived and liable to be rejected. The Supreme Court in the case of *Mohd. Rafique @ Chachu vs. State of West Bengal* reported in (2009) 3 SCC (Cri) 966 has considered the distinction between Section 299 and 300 and has held as under:-

"20. Thus, according to the rule laid down in *Virsa Singh* case

even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.

21. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons- being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid."

Similarly, in the case of *Joginder Singh vs. State of Punjab* reported in (2009) 3 SCC (Cri) 1446, the Supreme Court has held as under:-

"11. In this case though one pallet was recovered and there was only one injury but that does not on the facts of the case take the offence out of the purview of Section 302 of IPC. It cannot be laid down as a rule of universal application that when there is one shot fired, Section 302 IPC is ruled out. It would depend upon the factual scenario, more particularly, the nature of weapon, the place where the injury is caused and the nature of the injury."

In the case of *State of Madhya Pradesh vs. Shivshankar* reported in (2014) 10 SCC 366, it has been held by the Supreme Court as under:-

"9. After due consideration of the rival submissions, we are of the view that the High Court has clearly erred in holding that the offence falls under Section 304 Part-I, IPC. It is clear from the case of the prosecution mentioned above that the accused first slapped the complainant which was followed by

verbal abuses and thereafter the accused brought the licensed gun and fired at the deceased, who died. It was, thus, a voluntary and intentional act of the accused which caused the death. Intention is a matter of inference and when death is as a result of intentional firing, intention to cause death is patent unless the case falls under any of the exceptions. We are unable to hold that the case falls under Exception 4 of Section 300, IPC as submitted by learned counsel for the respondent. Exception 4 is attracted only when there is a fight or quarrel which requires mutual provocation and blows by both sides in which the offender does not take undue advantage. In the present case, there is no giving of any blow by the complainant side. The complainant side did not have any weapon. The accused went to his house and brought a gun. There is neither sudden fight nor a case where the accused has not taken undue advantage."

In the case of *Bhagwan Munjaji Pawade vs. State of Maharashtra* reported in (1978) 3 SCC 330 has held as under:-

"6. We do not think much can be made out of the stray observation of the High Court 'that the appellant had far exceeded his right of private defence'. The circumstances of the case disclose that no right of private defence, either of person or of property, had ever accrued to the appellant. The deceased was unarmed. Exception 2 can have no application. It is true that some of the conditions for the applicability of Exception 4 to Section 300 exist here, but not all. The quarrel had broken out suddenly, but there was no sudden fight between the deceased and the appellant. 'Fight' postulates a bilateral transaction in which blows are exchanged. The deceased was unarmed. He did not cause any injury to the appellant or his companions. Furthermore, no less than three fatal injuries were inflicted by the appellant with an axe, which is a formidable weapon on the unarmed victim. Appellant, is therefore, not entitled to the benefit of Exception 4, either."

22. If the facts and circumstances of the case are considered in the light of Sections 299 and 300, it would be clear that the deceased and the prosecution

witnesses were sitting together and talking to each other with regard to agricultural activities. They were not armed with any weapon. They did not react after noticing the appellant Gabbar Singh. In fact, Gabbar Singh came to them and started abusing the deceased. The deceased merely asked the appellant Gabbar Singh not to abuse. After hearing this, the appellant Gabbar Singh got aggressive, took out a country made pistol and without there being any retaliation or overt act on the part of either the deceased or any of the prosecution witnesses and without any provocation he fired at the deceased causing injury on his chest. It is also clear that merely because only one gunshot injury was caused to the deceased would not ipso facto took out the case from the purview of murder.

23. Considering the facts and circumstances of the case, this Court do not find any perversity in the findings recorded by the trial court in holding the appellant Gabbar Singh guilty for offence punishable under Section 302 and hence findings are confirmed and it is held that the appellant is guilty of committing murder of Gyan Singh.

24. So far as the offence committed under Section 504 of IPC is concerned, the trial court did not frame the charge of that offence and in absence of that charge, the appellant could not be convicted of that offence. The trial court has framed the charge under Section 294 of IPC. Offence under Section 294 and 504 of IPC are different in nature. On uttering obscene words any of the citizen present at the spot may feel annoyance but for offence under Section 504 of IPC a particular victim is required to be provoked by abusing him. Hence when both the offences have no similarity, the appellant could not be convicted of offence under Section 504 of IPC within the head of charge under Section 294 of IPC. Hence, the trial court has committed an error of law in convicting the appellant for offence under Section 504 of IPC.

25. Now the next question for consideration is that whether the acquittal of the respondents in Criminal Revision No. 284/2003 was in accordance with law or not. With regard to the role attributed to Mantram, it is submitted by the counsel for the complainant that the respondent Mantram had come along with Gabbar Singh and had also abused the deceased, therefore, it is clear that he had conspired with the appellant Gabbar Singh to kill the deceased Gyan Singh. In this context the FIR Ex.P/4 is important. There is a complete omission of the fact that Mantram had also abused the deceased Veer Singh. Similarly in the police case diary statement recorded under Section 161 of

Cr.P.C. of Ajab Singh (PW-3) which has been marked as Ex.D/1, there is a complete omission to the effect that Mantram had also abused the deceased. So far as the presence of Veer Singh (PW-4) is concerned the trial court has found to be doubtful at the time of incident. As regards the evidence of Rajveer Singh (PW-5) to the effect that Mantram had also abused the deceased is concerned, on perusal of his police statement recorded under Section 161 of Cr.P.C. which has been marked as Ex.D/3 it is clear that there is complete omission in this regard. The prosecution has failed to prove that Mantram had participated in the commission of offence either physically or orally. Merely on the basis of presence of Mantram on the spot at the time of incident it cannot be held that he had conspired with appellant Gabbar Singh to kill Gyan Singh. The Supreme Court in the case of *Chanakya Dhibar vs. State of WB* reported in (2004) 12 SCC 398 has held as under:-

> "18 There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. [See *Bhagwan Singh and Ors. v. State of M.P.* (2002) 2 Supreme 567. The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for

interference. These aspects were highlighted by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* AIR 1973 SC 2622, *Ramesh Babulal Doshi v. State of Gujarat* (1996) 4 Supreme 167, *Jaswant Singh v. State of Haryana* (2000) 3 Supreme 320, *Raj Kishore Jha v. State of Bihar* (2003) 7 Supreme 152, *State of Punjab v. Karnail Singh* (2003) 5 Supreme 508, *State of Punjab v. Pohla Singh* (2003) 7 Supreme 17 and *Suchand Pal v. Phani Pal JT* (2003) 9 SC 17.

The learned counsel for the applicant could not point out any perversity in the finding of the trial court. Further when two views are possible, the one pointing to the guilt of the accused and other to his innocence, the view which is favourable to the deceased is to be adopted.

26. So far as the culpability of Sanjay and Bheekm (both acquitted accused persons) against whom the charge was under Section 302 r/w 120-B of IPC is concerned, there is no evidence on record to show that at any point of time these acquitted accused persons had conspired with the appellant Gabbar Singh to kill the deceased Gyan Singh.

27. Having considered the evidence available on record against the accused persons Mantram, Sanjay and Bheekam, this Court is of the considered view that they have been rightly acquitted by the trial court and the finding of the trial court in this regard cannot be said to be perverse, hence the criminal revision filed on behalf of the complainant against the judgment dated 5.4.2003 by which the respondents in Criminal Revision No. 284/2003 have been acquitted of the charge punishable under Section 302 r/w Section 120-B of IPC is dismissed. The respondents in Criminal Revision are on bail, their bail bonds and surety bonds are discharged.

28. On the basis of aforesaid discussion appeal filed by the appellant is hereby partly allowed, his conviction as well as the sentence of offence under Section 504 of IPC is set aside. However, conviction and sentence of offence under Section 302 of IPC is maintained.

29. A copy of the judgment be sent to the trial court along with the record for necessary information.

Appeal partly allowed.

I.L.R. [2016] M.P., 3106
APPELLATE CRIMINAL
Before Mr. Justice S.K. Gangele & Mr. Justice Subodh Abhyankar
Cr.A. No. 915/1995 (Jabalpur) decided on 7 November, 2016

REHMAN ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 302 - Murder - Appellant - Conviction **- Other accused persons acquitted - FIR - Allegations - Appellant alongwith other accused persons assaulted one Haseeb - Counter FIR by appellant - Section 307 - Appeal - Grounds - Evidence not appreciated in proper perspective - Suppression of material facts by prosecution - Non-seizure of weapons from the appellant - Held - As there is material omission and contradiction in the statements of prosecution witnesses, prosecution has not brought on record the 'Dehati Nalishi' lodged by the present appellant nor medical record of injuries suffered by the appellant, non-seizure of weapons from the appellant etc., so the appellant is liable to be acquitted - Conviction & sentence imposed by the Trial Court set aside - Appeal allowed.** **(Paras 7 to 14)**

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – अपीलार्थी – दोषसिद्धि – अन्य अभियुक्तगण को दोषमुक्त किया गया – प्रथम सूचना प्रतिवेदन – आक्षेप – अपीलार्थी ने अन्य अभियुक्तगण के साथ मिलकर हसीब पर हमला किया – अपीलार्थी द्वारा जवाबी प्रथम सूचना प्रतिवेदन – धारा 307 – अपील – आधार – साक्ष्य का मूल्यांकन उचित परिप्रेक्ष्य में नहीं किया गया – अभियोजन द्वारा सारवान् तथ्यों का छिपाव – अपीलार्थी से हथियारों की जप्ती न होना – अभिनिर्धारित – चूंकि अभियोजन साक्षीगण के कथनों में सारभूत लोप एवं विरोधाभास है, वर्तमान अपीलार्थी द्वारा दर्ज कराई गई 'देहाती नालिशी', अपीलार्थी को आई चोटों का चिकित्सा अभिलेख, अपीलार्थी से हथियारों की जप्ती न होना इत्यादि को अभियोजन द्वारा अभिलेख पर नहीं लाया गया है, इसलिए अपीलार्थी दोषमुक्त किए जाने योग्य है – विचारण न्यायालय द्वारा अधिरोपित दोषसिद्धि एवं दण्डादेश अपास्त – अपील मंजूर।

Cases referred:

(2009) 16 SCC 649, (2008) 3 SCC 709, AIR 1976 SC 2263, AIR 1968 SC 1281.

Amit Dubey, for the appellant.
Vivek Lakhera, P.L. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by :

SUBODH ABHYANKAR, J. :- This criminal appeal under Section 374 (2) of the Code of Criminal Procedure has been preferred by the appellant being aggrieved by the judgment dated 20/06/1995 passed by the Second Additional Sessions Judge, Bhopal in S.T.No.123/1994, whereby the appellant has been convicted under Section 302 of IPC and sentenced for life imprisonment.

2. The prosecution case in short is that on 23.09.1993 at about 4:00 PM the incident took place in which appellant Rehman s/o. Babukhan along with other co-accused person namely Rizwan @ Riyaz, Mohd. Rafiques, Gullu Khan, Sher Khan, Abdul Rehman s/o. Mohd. Hasan and Ramjani assaulted one Haseeb, who succumbed to the injuries before he could be taken to the hospital. It is said that an intimation of this incident was given by one Azhar (PW-3) to Mohd. Aziz (PW- 1), the father of the deceased, who immediately went to the spot, and saw that the accused persons were assaulting his son Haseeb and when he intervened, he was also attacked and received injuries. Thereafter an FIR (Ex. P-1) was lodged by Mohd. Aziz (PW- 1) at GRP Police Station, Bhopal on 23.9.1993 at 8:30 PM in the evening. After completing the investigation, the charge-sheet was filed against the accused persons, and the learned Second Additional Sessions Judge, Bhopal after recording the evidence convicted the appellant under Section 302 of IPC. It is pertinent to mention here that other accused persons except Rafiq have been acquitted by the trial Court whereas Rafique has been convicted under Section 324 of IPC and sentenced to the period already undergone by him.

3. Being aggrieved by the impugned judgment, finding and sentence the instant appeal has been preferred by the appellant.

4. Shri Amit Dubey, learned counsel for the appellant has submitted that the learned trial Court has committed a grave error in convicting the present appellant, only on the ground that the present appellant is said to have himself lodged a report of the incident wherein he had also received injuries and only because of this reason the learned trial Court has held that his presence on the spot cannot be disputed, although on the same set of evidence, the other accused persons have been let off. It is submitted by the learned counsel that the prosecution has failed to establish the case against the present appellant beyond reasonable doubt, hence finding of guilt is erroneous, which deserves to be set aside and the appellant is entitled to acquittal.

5. On the other hand, Shri Vivek Lakhera, learned counsel appearing on behalf of the respondent/State supported the impugned judgment, finding and sentence mainly contending that the prosecution has established the guilt beyond reasonable doubt against the present appellant, hence it does not call for any interference.

6. We have heard the learned counsel for the parties.

7. After considering the submissions made by the learned counsel for the parties and going through the evidence on record as well as the judgment rendered by the learned trial Court, this Court is of the opinion that the present appellant has wrongly been convicted by the learned trial Court, as the evidence has not been appreciated in its proper perspective.

8. There has been a categorical finding of the learned trial Court that the eye-witnesses namely Mohd. Aziz (PW1), Mohd. Rafique (PW-2), Azhar (PW-3) and Ashfaque (PW-4) cannot be relied upon because there are material omissions and contradictions in their statements which has led to the acquittal of other co-accused persons namely Rizwan @ Riyaz, Mohd, Gullu Khan, Sher Khan, Abdul Rehman s/o.Mohd.Hasan and Ramjani. Whereas the present appellant has been convicted only on the ground that his presence on the spot is established because he also received some injuries and lodged a report of the same incident. On close scrutiny of the evidence, it is revealed that appellant Rehman s/o.Babukhan had also received some grievous injuries on his person, which is also confirmed by Mohd. Aziz (PW-1), who in para 13 of his deposition has clearly stated that he is also facing a counter case for commission of offence punishable under Section 307 of IPC arising out of the same incident. Similarly, Mohd. Rafique (PW-2) in para 6 of his statement has also admitted the fact that he is also facing a counter case for commission of offence punishable under Section 307 of IPC arising of the same incident.

Surprisingly, the prosecution has not brought on record the *Dehati Nalishi* lodged by present appellant Rehman as is admitted by A.K.Shukla (PW- 10), the Investigation Officer to have been lodged by Rehman in para 7 of his deposition nor his medical record is brought on record which could provide some explanation of the injuries sustained by Rehman and why he was hospitalized and his room was also guarded. These facts could certainly throw some light on the injuries received by the appellant and the report lodged by him. This, according to us amounts to suppression of material facts by the prosecution. At this juncture, it would be useful to refer the following judgments

of the Hon'ble Apex Court wherein the Apex Court has emphasized the importance of bringing the material on record and the consequences of the suppression of the same:

(i) *Amarjit Singh Vs. State of Haryana,* (2009) 16 SCC 649.

(ii) *Baburam and others Vs. State of Punjab*, (2008) 3 SCC 709.

(iii) *Lakshmi Singh and others Vs. State of Bihar,* AIR 1976 SC 2263.

(iv) *Mohar Rai & another Vs. State of Bihar*, AIR 1968 SC 1281.

In the case of *Amarjit Singh* (supra), the Hon'ble Apex court, while relying on an earlier judgement rendered in the case of *Lakshmi Singh and others Vs. State of Bihar* (supra) has observed as under :

> "22. In assessing a similar situation, this Court has said in *Lakshmi Singh:* (SCC pp.401-02, para 12)
>
> "12... .It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about ; the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:'
>
> (1) that the prosecution has suppressed the genesis and the origin of the occurence and has thus not presented the true version;
>
> (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;
>
> (3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.
>
> The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. In the instant case, when it is held, as it must be, that the appellant Dasrath

> Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the court to rely on the evidence of PWs 1 to 4 and 6, more particularly, when some of these witnesses have lied by stating that they did not see any injuries on the person of the accused. Thus neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court in *State of Gujarat v. Bai Fatima* (supra) there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweights the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error in brushing aside this serious infirmity in the prosecution case on unconvincing premises.'

Needless to say, the present case also falls under the same category and its ratio can certainly be applied to the facts of the present case.

9. The learned trial Court in its judgment has lightly brushed aside the factum of non-production of material documents on record by the prosecution viz. the medical report of appellant Rehman and the complaint-*Dehati Nalishi* lodged by him. The learned trial Court has held that since there was no grievous injury caused to the appellant, hence it cannot be said that non-production of documents would seriously prejudice the appellant. This finding of the trial Court is erroneous, as the learned trial Court has completely overlooked the fact that the prosecution witnesses Mohd. Aziz (PW-1) and Mohd. Rafique (PW-2) have admitted that they are facing a counter case for commission of offence punishable under Section 307 of IPC arising out of the same incident, which clearly leads to the conclusion that the present appellant had also received the grievous injuries. This fact is also substantiated by the evidence of both these witnesses PW-1 and PW-2, who have clearly admitted that when they reached to the spot, they found that both, deceased Haseeb and the-present appellant Rehman were lying on the ground, and both of them were drenched

in blood. Mohd. Yusuf (PW-6) who claims to have seen the incident has also stated that when he reached the spot, he saw Haseeb and Rehman fighting with each other and both of them were injured. He does not say that at that time the appellant Rehman was having any weapon. Head Constable Ram Sevak Mishra (PW-7), who prepared the Naksa Mokha, has also admitted in para 4 of his deposition that when he reached the spot, he saw Haseeb, Ajju and Rehman lying on the ground. Hence, the learned judge of the trial court has drawn a wrong conclusion of the evidence on record, and it cannot be said that the injuries sustained by the appellant were minor in nature. The fact of appellant also receiving injuries is also clear from the Spot Map Ex.P/7 prepared by Pw/5 Head Constable Nirvikanand wherein it is mentioned and demonstrated by drawing sketches of bodies of three persons at serial no.2,3 and 4 that the deceased Haseeb, appellant Rehaman and Ajju @ Mohd. Aziz(Pw/ 1) respectively are lying on the ground and are drenched in blood (Khoon se lath-path hokar). It is also noted that behind the back of Ex.P/7, there is an endorsement by the Pw/ 5 that, the crimes relating to this Spot Map are registered as Crime No.1030/1993 which is under ss.302, 147, 148, 149 and 323 of IPC and the other Crime No.1031/1993 is registered u/s.307/34 of IPC which is also admitted by the Pw/5 in his cross examination.

10. Mohd. Aziz (PW- 1) has also admitted that he had filed an affidavit before the trial Court wherein he had given a clean chit to the accused Rafiq by saying that he had not caused any injury to the deceased and the injuries were caused by other co-accused persons including the present appellant. This affidavit clearly demonstrates that this witness, despite being a highly interested and inimical witness has tried to cover up the tracks of accused Rafiq, at the cost of appellant.

11. Apart from the aforesaid witnesses, there are other witnesses also about whom the learned trial Court has not even bothered to reflect. Dr. Ashok Sharma (PW-5), who performed the postmortem of the deceased Haseeb, has stated that deceased Haseeb had received as many as nine injuries and all of them were incised wounds, as their edges were sharp. On the other hand no weapon is said to be recovered at the instance of the appellant Rahman. It is further pertinent to mention here that the Investigating Officer has not even bothered to make a query to the Doctor conducting the postmortem that whether such injuries can be caused by the weapons seized from the other accused persons, absence of such query only gives a rise to a reasonable apprehension that other accused persons have been accorded

undue favors by the investigating officer and under the aforesaid circumstances, the appellant is entitled to get the benefit of doubt.

12. That apart, the incident took place on 23.9.1993 at about 4:00 PM, whereas the FIR (Ex.P-1) was lodged by the PW-1 Mohd. Aziz at around 8:30 PM in the night, the reason for such delay is said to be because from hospital he went back to his home and then came to Police Station to lodge the FIR this is despite the fact that he himself admitted that he was taken from the spot to the hospital by the police only. Thus under the circumstances there was delay in lodging the FIR specially when the father of the deceased, who himself claims to be an injured witness was in contact with police till he reached the hospital, and could have lodged the FIR immediately. Thus the possibility of embellishment to falsely implicate the present appellant cannot be ruled out. The benefit of doubt in such circumstances has to be given to the appellant.

13. In the facts and circumstances of the case, owing to the aforesaid infirmities in the prosecution case, there is no hesitation in our minds to hold that the learned Trial Judge wrongly recorded a finding of conviction against the present appellant Rehman, hence the present appeal filed by the appellant deserves to be allowed and is hereby allowed.

14. In the result, the present appeal filed by the appellant is allowed, the conviction and sentence imposed by the trial Court for the offence under Section 302 of IPC are hereby set aside and the appellant is acquitted.

15. At presesnt the appellant is in jail, therefore he be released forthwith by issuing a release warrant without any delay.

Appeal allowed.

I.L.R. [2016] M.P., 3112

CRIMINAL REVISION

Before Mr. Justice C.V. Sirpurkar

Cr.R. No. 1811/2014 (Jabalpur) decided on 11 July, 2015

VASEEM BAKSH & ors. ...Applicants

Vs.

STATE OF M.P. ...Non-applicant.

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 320 (6) & 482 - Compounding of non-compoundable offence*** **- Whether**

conviction & sentence recorded by the Trial Court, which is affirmed in appeal, can be set aside by the High Court u/S 482 - Held - No.
(Paras 3 & 14)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 320(6) व 482 – अशमनीय अपराध का शमन किया जाना – क्या विचारण न्यायालय द्वारा अभिलिखित दोषसिद्धि एवं दंडादेश, जिसे अपील में अभिपुष्ट रखा गया हो, को उच्च न्यायालय द्वारा धारा 482 के अंतर्गत अपास्त किया जा सकता है – अभिनिर्धारित – नहीं।

***B. Criminal Procedure Code, 1973 (2 of 1974), Sections 320 (6) & 482 - Inherent Powers for compounding of non-compoundable offence* - Accused convicted and sentenced - Exercise of powers u/S 482 of Cr.P.C. at appellate/revisional stage should not be made.**
(Paras 3 & 14)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 320(6) व 482 – अशमनीय अपराध के शमन हेतु अंतर्निहित शक्तियाँ – अभियुक्त को दोषसिद्ध किया जाकर दण्डादेश दिया गया – दं.प्र.सं. की धारा 482 के अंतर्गत शक्तियों का प्रयोग अपीलीय/पुनरीक्षण प्रक्रम पर नहीं किया जाना चाहिए।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 320 (6) & 482* - Compromise in criminal offence, if conviction is upheld, can be considered on the question of nature and quantum of sentence.**
(Paras 15 & 16)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 320(6) व 482 – दाण्डिक अपराध में यदि दोषसिद्धि को संपुष्ट रखा गया है, तब दण्डादेश की प्रकृति एवं परिमाण के प्रश्न पर ही समझौते में विचार किया जा सकता है।

Cases referred:

2005 (1) MPLJ 177, 2005 (2) MPLJ 502, (2014) 15 SCC 235, (2014) 13 SCC 75, (2013) 4 SCC 58, (2012) 10 SCC 303, (2008) 16 SCC 1, (2003) 4 SCC 675, 2014 AIR SCW 2065, (2008) 1 SCC 184, AIR 1999 SC 895, 1999 Cr.LJ 3496 (SC), AIR 1973 SC 2418.

Pramod Thakre, for the applicant.
D.K. Mishra, for the first informant.
Y.D. Yadav, P.L. for the non-applicant/State.

ORDER

C.V. SIRPURKAR, J. :- I.A.Nos.7993/2016 and 7995/2016 have been filed on behalf of the parties for permission to compound the matter and for quashing the conviction and sentence of the petitioners/accused persons recorded by the Court of Chief Judicial Magistrate First Class, Laudi, District Chhatarpur under Section 498-A of the I.P.C. and section 4 of the Dowry Prohibition Act and affirmed in appeal by the Second Additional Sessions Judge, Chhatarpur.

2. The judgment passed by the Second Additional Sessions Judge, Chhatarpur in Criminal Appeal No.516/2012 dated 25.8.2014 has been challenged in this criminal revision on behalf of the petitioners/accused persons. The petitioners, along with aggrieved wife Rizwana have moved an application under Section 320 (6) of the I.P.C. for permission to compound the offences. The compromise was verified by the Registrar (J-III) of the High Court on 15.6.2016. The Registrar (J-III) has recorded his satisfaction that the aggrieved wife has entered into a compromise with the petitioners voluntarily and without any undue influence or pressure. In aforesaid circumstances, it has been prayed that the conviction and sentence of the petitioners/accused persons be quashed.

3. The question before this Court is whether conviction and sentence recorded by the trial Court and affirmed by the appellate Court can be set aside by the High Court in exercise of powers under Section 482 of the Cr.P.C. in a non-compoundable case?

4. During the course of arguments, learned counsel for the petitioner has placed reliance upon the judgments rendered by Co-ordinate Benches of this Court in the cases of *Kamlakar Mahdevrao Patil and another Vs. State of M.P.,* 2005 (1) M.P.L.J. 177 and *Hemraj Vs. State of M.P.* 2005 (2) M.P.L.J. 502, wherein this Court had, in exercise of powers under Section 482 of the Code of Criminal Procedure allowed compromise between the parties and had quashed the entire proceedings of criminal revision before the High Court as well as the proceedings before the Courts below even after the conviction and had acquitted the accused persons.

5. In addition to aforesaid two judgments, learned counsel for the petitioner has invited attention of the Court to the judgments rendered by the Supreme Court in the cases of *Gold Quest International Private Limited*

vs. State of Tamil Nadu and Others (2014) 15 SCC 235, *Manohar Singh Vs. State of M.P.* (2014) 13 SCC 75, *Jitendra Raghuwanshi Vs. Babita Raghuwanshi* (2013) 4 SCC 58, *Gian Singh Vs. State of Punjab* (2012) 10 SCC 303, *Manoj Sharma Vs. State* (2008) 16 SCC 1 and *B.S. Joshi Vs. State of Haryana* (2003) 4 SCC 675.

6. A perusal of aforesaid judgments rendered by the Supreme Court reveals that none of them is an authority for the proposition that the High Court can quash the conviction and sentence or proceedings after conviction has been recorded, in exercise of inherent powers reserved to the High Court by Section 482 of the Cr.P.C..

7. In the case of *Gold Quest International Private Limited* (supra), the Supreme Court has clearly observed that in the disputes which are matrimonial in nature, if the parties have entered into a settlement, there are clearly no chances of conviction. As such, there would be no illegality in quashing the proceedings under Section 482 of the Cr.P.C.

8. In the case of *Manohar Singh Vs. State of M.P.* (supra), it was reiterated that where a charge is proved under a non-compoundable offence and the conviction is recorded by the trial Court for a heinous crime and the matter is at appellate stage, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of offender, who has already been convicted by the trial Court. In such cases, there is no question of sparing a convict found guilty of a non-compoundable offence.

9. In the case of *Jitendra Raghuwanshi Vs. Babita Raghuwanshi* (supra), the Supreme Court observed that FIR and complaint can be quashed under Section 482 of the Cr.P.C. in appropriate cases in order to meet ends of justice on the basis of compromise between the parties in matrimonial disputes. However, in this case also the question was not whether the proceedings can be quashed even after conviction has been recorded by a competent Court.

10. Likewise, in the case of *Gian Singh Vs. State of Punjab* (supra) the Supreme Court has held that the offences relating to matrimonial disputes, dowry etc. or family disputes where the wrong is basically private or personal in nature, can be quashed on the basis of compromise as the possibility of conviction would be remote and bleak and continuation of criminal proceedings would put the accused to great oppression and prejudice. However, aforesaid

principle would not apply where conviction has already been recorded.

11. Likewise, in the case of *Manoj Sharma* (supra) the powers were exercised for quashing the proceedings before conviction and not after conviction had been recorded.

12. In the case of *B.S. Joshi* (supra) also, the consideration that weighed with Supreme Court while quashing the proceedings under Sections 498-A, 323, and 406 of the I.P.C. on the basis of compromise was that since, the wife had supported quashing of criminal proceedings, there was almost no chance of conviction; therefore, it would be improper to decline the exercise of powers of quashing on the ground that it would amount to permitting the parties to compound non-compoundable offences in exercise of inherent powers.

13. That apart, the Supreme Court has also held in the case of *Narendra Singh Vs. State of Punjab,* 2014 AIR SCW 2065; though, with reference to Section 307 of the I.P.C. that where the prosecution evidence is almost complete or after the conclusion of evidence the matter is at the stage of arguments, normally the High Court should refrain from exercising its power under Section 482 of the Code of Criminal Procedure, as in such cases, the trial Court would be in a position to decide the case finally on merits and to come to the conclusion as to whether the offence under Section 307 of the I.P.C. is committed or not. Similarly, in those cases where the conviction is already recorded by the trial Court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial Court. Where, charge is proved under Section 307 of the I.P.C. and conviction is already recorded of a heinous crime, there is no question of sparing a convict found guilty of such a crime.

14. In view of aforesaid authoritative pronouncement of the Supreme Court, this Court is of the view that where a conviction has already been recorded by a competent Court, the argument that chances of proving the guilt of the accused would be remote because the aggrieved persons herself would not support the prosecution case, is not available. Thus, it would not be a case where exercise of powers under Section 482 of the Code of Criminal Procedure would be necessary to prevent abuse of process of Court. Thus, in the case where conviction has already been recorded, the powers under Section 482

of the Code of Criminal Procedure should not be used to quash the conviction and sentence imposed by a competent Court.

15. Consequently, the prayer for quashing the conviction and sentence on the basis of compromise entered into by the parties is rejected.

16. However, it is settled position of law that the factum of compromise can be considered by the Court on the question of nature and quantum of sentence, in case the conviction is upheld. (Please see) *Hasimohan Barman Vs. State of Assam* (2008) 1 S.C.C. 184, *Ramlal Vs. State of Jammu and Kashmir* AIR 1999 S.C. 895, *Surindra Nath Mohanthy Vs. State of Orrissa,* 1999 Cr.LJ 3496 (S.C.) and *Rampujan Vs. State of Uttar Pradesh* AIR 1973 S.C. 2418 etc. So the factum of compromise between the parties may be considered by the Court on the question of sentence, if the conviction is upheld.

Order accordingly.

I.L.R. [2016] M.P., 3117
CRIMINAL REVISION
Before Mr. Justice Ashok Kumar Joshi
Cr.R. No. 95/2016 (Jabalpur) decided on 2 May, 2016

SITARAM CHOURASIYA ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228 - Framing of charge **- At this stage, truth, veracity and effect of the evidence are not meticulously judged. (Para 7)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227 व 228 — आरोप विरचित किया जाना — इस प्रक्रम पर, साक्ष्य के प्रभाव, सत्यता एवं वास्तविकता को सूक्ष्मता से नहीं आंका जा सकता है।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228 - Framing of charge **- Requirement - To evaluate the material and documents on record with a view to find out if the facts of the matter discloses the existence of all the ingredients constituting the alleged offence, charge can be framed. (Para 7)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227 व 228 —

आरोप विरचित किया जाना – आवश्यकता – अभिलेख पर उपलब्ध सामग्री एवं दस्तावेजों का यह पता लगाने की दृष्टि से मूल्यांकन करना यदि मामले के तथ्य आरोपित अपराध का गठन करने वाले समस्त अवयवों को प्रकट करते हैं, आरोप विरचित किया जा सकता है।

C. Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228 - Framing of charge - **If there is strong suspicion which leads the Court to think that there is ground for presumption of commission of offence, charge can be framed. (Para 8)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227 व 228 – आरोप विरचित किया जाना – यदि ऐसा प्रबल संदेह मौजूद है जो न्यायालय को इस विचार की ओर अग्रसर करता है कि अपराध कारित होने की उपधारणा हेतु आधार मौजूद है, तब आरोप विरचित किया जा सकता है।

Case referred:

2012 AIR SCW 5139.

Sushil Kumar Sharma, for the applicant.
B.P. Pandey, G.A. for the non-applicant/State.

ORDER

ASHOK KUMAR JOSHI, J. :- This criminal revision has been preferred on behalf of the applicant/accused under Section 397/401 of the Code of Criminal Procedure against the order dated 22.9.2015 passed in Special Case No.1/2015 by the Special Judge (N.D.P.S.Act), Panna thereby framing charge for the offence punishable under Section 8(a)/20 of the Narcotic Drug and Psychotropic Substances Act, 1985 (for short 'the Act').

2. The facts of the case in brief are that on 19.10.2014, Shri V.V.Karkare, SHO of Police Station Saleha of District Panna received information by informer (Mukhbeer) that the petitioner/accused Sitaram S/o Makkhu Chourasiya R/o Nayagaon has cultivated green plants of ganja in his betel (Pan) Bareja (rows of betel peppers) in Chamarha of village Nayagaon. The above mentioned police official after completing formalities arranged raid on the betel (Pan) Bareja of the petitioner in presence of two panch witnesses Ramraj and Ramesh. The petitioner/accused fled away from the spot on seeing the police party. After performing required formalties (sic:formalities) from petitioner's betel (Pan) Bareja, 9 green plants of ganja weighing 21 Kgs and 100 grams

were plucked and seized on the spot. The samples were taken for its chemical examination. On completing formalities of making various memos (Panchnamas) on the spot with sealed material, above mentioned police officer returned to the Police Station where FIR was lodged by him on the same day, on which Crime No.177/2014 under Section 8/20 of the Act was registered at Police Station Saleha against the petitioner. Thereafter, investigation was conducted by the investigating officer. After completing the investigation, a charge-sheet was filed in the Court concerned.

3. The learned Special Judge, Panna after hearing both parties framed charge under Section 8(a)/20 of the Act by the impugned order, which is under challenge.

4. Learned counsel for the petitioner submits that the learned trial Court has not considered the material available on record before framing the charge against the petitioner. Prima facie no charge has been made out against the petitioner. Ingredients of offence under Section 8(a)/20 of the Act are not available. Shri S.K.Sharma, learned counsel for the petitioner submitted that there is no evidence that the petitioner/accused was the owner/recorded Bhoomiswami of the land concerned, from where the green plants of ganja are said to have been collected. Relying on Nazri Naksha of the land prepared by the Halka Patwari, it was contended that the Survey No.318 is owned by Jumme Bariyan and Survey No.234 of the same village Nayagaon is owned by Maganlal and other. Thus, it is clear that accused Sitaram Chourasiya was not the owner or Bhoomiswi of the land concerned. Thus, in absence of the legal evidence, the charge should not have been framed against him.

5. Learned Government Advocate has supported the impugned order passed by the learned trial Court submitting that prima facie there is material disclosing commission of offence punishable under Section 8(a)/20 of the Act.

6. I have considered the submissions of the learned counsel for the parties and perused the record.

7. At the stage of framing of the charge, the truth, veracity and effect of the evidence, which the prosecutor proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of sections 227 or 228 of Code of Criminal Procedure.

The Court at the stage of framing of charge is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence charge can be framed.

8. In the case of *Central Bureau of Investigation, Hyderabad Vs. K.Narayana Rao* (2012 AIR SCW 5139), the Apex Court considered the scope of Sections 227 and 228 of the Cr.P.C. and held that for framing of charge, a roving enquiry in pros and cons of matter and weighing of evidence as is done in trial is not permissible at this stage. The charge has to be framed if Court feels that there is strong suspicion that accused has committed offence. Thus, even if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence, a charge can be framed.

9. It is true that copies of revenue record have not been filed with the charge-sheet about Bhoomiswami of Survey No.318 and 234 of village Nayagaon and in the Nazri Naksha prepared by Patwari concerned, it is recorded that these lands are recorded in the revenue record in names of Jumme Bariyan and Maganlal and others respectively. It is common experience that the agriculture lands do not remain always in the possession of recorded Bhoomiswamis or owners because the land concerned could be given in cultivation by the Bhoomiswami to other farmers on Batai or Sajhedari on a fixed rent or partnership in crop. On many times, the agriculture lands remain in possession of adverse possession holders. With the charge-sheet, police statements of panch witnesses Ramraj S/o Makkhu and Ramesh S/o Jawahar have been filed. These both witnesses are the residents of the same village Katra, where the petitioner also resides. Both of these witnesses have categorically stated in their statements recorded under section 161 of the Cr.P.C. that each of them is very well known that the betel (Pan) Bareja from where 9 green plants of ganja were seized after plucking is in possession of Sitaram Chourasiya for last many years. It is significant to mention here that Ramraj has stated in his police statement that his betel (Pan) Bareja is also situated near the betel (Pan) Bareja of the petitioner/accused. The name of father of Ramraj is Makkhu Chourasiya which is also the name of father of the petitioner. Thus, Ramraj Chourasiya is real brother of the petitioner. From the facts and circumstances of the case, prima facie it could not be inferred that there is no evidence about petitioner's possession over the land from where 9

green plants of the ganja were plucked and seized. Under charged offence, cultivation of cannabis is punishable. It appears that there was prima facie material in the charge-sheet against the petitioner/accused and the learned Special Judge (N.D.P.S. Act), Panna has not committed any illegality or irregularity in framing above mentioned charge against the petitioner. The revision appears to be devoid of substance and is liable to be dismissed.

10. In the result, the revision petition filed by petitioner Sitaram Chourasiya is dismissed.

A copy of this order be sent to the trial Court for information.

Revision dismissed.

I.L.R. [2016] M.P., 3121
CRIMINAL REVISION
Before Mr. Justice U.C. Maheshwari &
Mr. Justice Sushil Kumar Gupta
Cr.R. No. 922/2015 (Gwalior) decided on 10 May, 2016

JAGDISH PRASAD SHARMA ...Applicant
Vs.
STATE OF M.P. & anr. ...Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228 - Consideration of documents produced by accused - **Held - Documents produced by accused cannot be considered at the time of framing of charge - Court declined to consider the Enquiry Report given by the Administrative Officer. (Para 12)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227 व 228 – अभियुक्त द्वारा प्रस्तुत दस्तावेजों को विचार में लिया जाना – अभिनिर्धारित – अभियुक्त द्वारा प्रस्तुत दस्तावेजों पर आरोप विरचित किए जाते समय विचार नहीं किया जा सकता – न्यायालय ने प्रशासनिक अधिकारी द्वारा दिए गए जाँच प्रतिवेदन पर विचार करने से इंकार कर दिया।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 397 & 401 - Quashing of Charge - **Held - As per FIR, the allegation against the applicant Sub-Engineer is that he prepared false muster roll and on the basis of which payment has been made by Sarpanch and Secretary of Panchayat - The applicant is the first person, who is**

responsible for preparing false muster roll, on the basis of which, criminal misappropriation of Government money was done - He is the main accused, who issued false report for valuation of work - There is no perversity, illegality, irregularity or impropriety in the impugned order of framing of charge - Revision dismissed. (Paras 10 & 14)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 व 401 – आरोप अभिखण्डित किया जाना – अभिनिर्धारित – प्रथम सूचना प्रतिवेदन के अनुसार, आवेदक उपयंत्री के विरूद्ध आक्षेप यह है कि उसने झूठा मस्टर रोल तैयार किया, जिसके आधार पर पंचायत के सरपंच और सचिव द्वारा भुगतान किया गया – आवेदक वह प्रथम व्यक्ति है जो झूठा मस्टर रोल तैयार करने हेतु उत्तरदायी है, जिसके आधार पर शासकीय निधि का दुर्विनियोजन किया गया – वह मुख्य अभियुक्त है, जिसने कार्य के मूल्यांकन हेतु असत्य प्रतिवेदन जारी किया – आरोप विरचित करने के प्रश्नगत आदेश में कोई विपर्यस्तता, अवैधता, अनियमितता अथवा अनौचित्य नहीं – पुनरीक्षण खारिज।

Cases referred:

2015 CRI.L.J. 2455, 2015 (III) MPWN 27, (2003) 2 SCC 711.

Vinod Kumar Bharadwaj with *Anvesh Jain,* for the applicant.
J.M. Sahani, P.L. for the non-applicant No. 1/State.

ORDER

The Order of the Court was delivered by : SUSHIL KUMAR GUPTA, J. :- By this criminal revision under section 397 read with section 401 of the Code of Criminal Procedure 1973 (in short "the Code") applicant has challenged the order/judgment dated 26.8.2015 passed by Second Additional Session Judge, Shivpuri in S.T. No.205/2010 whereby the charges of offence punishable under Sections 409 of IPC, Section 467, 468, 471 read with Section 120 (b) of IPC and Section 5 & 6 of the M.P. Vinirdhist Brashta Acharan Nivaran Adhiniyam, 1982 have been framed against the applicant.

2. The prosecution case, in short, is that the police has registered a case under Section 409, 467 read with section 120 (b), Section 468 read with Section 120 (b), Section 471 read with section 120 (b) of IPC and under Section 5 & 6 of the M.P. Vinirdhist Brashta Acharan Nivaran Adhiniyam, 1982 against the applicant and one another stating that on 1.3.2008 forged muster roll has been created in respect of the newly constructed pond in Village

Mohrai and the applicant was entrusted with amount and wheat and the same has not been paid and thus misappropriated 100.42 quintals of wheat and Rs.1,11,884/- and also created forged muster roll showing false entries in muster roll. Thus, they have forged the valuable security and used those documents as genuine documents knowingly the document is forged and committed corruption.

3. The police after completing the investigation submitted challan before the Court below and during the investigation the prosecution recorded statements of the witnesses. The case was committed to the Session Court and thereafter the Session Court after considering the evidence collected by the prosecution, framed the charges against the applicant under Sections 409 of IPC, Section 467, 468, 471 read with Section 120 (b) of IPC and also framed charges under Section 5 & 6 of the M.P. Vinirdhist Brashta Acharan Nivaran Adhiniyam, 1982 vide order/judgment dated 26.8.2015.

4. Learned Senior counsel appearing for the applicant submitted that there is no evidence available on record against the applicant for framing of charge under Sections 409 of IPC, Section 467, 468, 471 read with Section 120 (b) of IPC and under Section 5 & 6 of the M.P. Vinirdhist Brashta Acharan Nivaran Adhiniyam, 1982. Learned counsel aruged (sic:argued) that the applicant has no concerned with the distribution of the wheat to the labour and also he has no concern with the payment of the labour. Learned counsel further submits that the Collector, Shivpuri has conducted the enquiry and vide order dated 4.3.2008 the authority held that the applicant cannot be held guilty and it is further submitted that during the departmental enquiry the statement of M.C. Sonkal was recorded, who admitted that the payment has been made by the Sarpanch or member of Panchayat. And also in the revaluation report it has been mentioned that the valuation done by the applicant is correct. Learned counsel further submits that along with challan the original documents were not filed and in the ordersheet dated 9.10.2012 the Session Court observed on the basis of report that the related cash book and other original documents were not on record. Learned counsel for the applicant further submits that the learned Court below failed to consider the nature of the evidence recorded by the police and documents produced before the Court below and mere suspicion alone without anything else cannot form basis of charge against the applicant, and therefore, is not sufficient to frame the charges. Learned counsel submits that the additional papers filed by the

applicant were not considered by the Court below. Learned counsel further submits that no *prima facie* case to frame the charge is made out against the applicant and also there is no legal evidence available against the applicant. To Bolster his submissions learned counsel relied on the judgments in the case of *Vesa Holding P. Ltd and another Vs. State of Kerala and others,* 2015 CRI. L.J. 2455 and *Umesh Mandloi Vs. State of M.P.,* 2015 (III) MPWN 27.

5. Per contra the learned Panel Lawyer for the respondent contended that there is no merit in the contention of the learned counsel for the applicant and has fully supported the impugned order passed by the Court below and submitted that there is *prima facie* evidence available on record against the applicant for framing the charges under Section 409 of IPC, Section 467, 468, 471 read with Section 120 (b) of IPC and Section 5 & 6 of the M.P. Vinirdhist Brashta Acharan Nivaran Adhiniyam, 1982.

6. Learned Panel Lawyer for the respondent/State also submitted that at the stage of framing of charge documents produced by the accused cannot be considered. Learned counsel relied on the judgment in the case of *State of Orissa Vs. Devendra Nath Padhi,* (2003) 2 SCC 711.

7. Having heard the learned counsel for the parties, perused the entire record and considered the arguments advanced by the learned counsel for the parties.

8. Applicant is a Sub-Engineer, who is posted at Janpad Kolaras.

9. It has to be seen that what are the duties and responsibilities of the Sub-Engineer. The duties and responsibilities of the Sub Engineer has been given in Madhya Pradesh Karya Vibhag Manual, which is applicable in all technical departments of the Madhya Pradesh. As per the Appendix 1.28 of Madhya Pradesh Karya Vibhag Manual, the following duties and responsibilities of the Sub-Engineer are given:-

"(1) उप–यंत्री/एस.ओ (अनुभाग अधिकारी) (Section Officer) कार्य स्थल पर उपस्थित अधिकारी एवं कार्य विभाग का प्राथमिक निष्पादन अधिकारी होता है। सिंचाई राजस्व के मामलों में वह सिंचाई निरीक्षक के/सी.डी. सी. के नियंत्रण में आता है, अन्य मामलों में जिसमें जल का वंटन सम्मिलित हो वह एस.डी.ओ. का अधीनस्थ होता है ।

(2) वह देखगा व करेगा–

(अ) आकड़ों का एकत्रीकरण, सर्वेक्षण किया जाना, अन्वेषण व प्राक्कलन व रूपांकनों की तैयारी, जहां भी कार्य हेतु उनकी आवश्यकता पड़े। (अपने वरिष्ठों के शिक्षणों अनुसार)।

(ब) .....

(स) यह विनिश्च्यन करना कि उसको भार दिये गये कार्यों को विशिष्टियों अनुसार विभाग के अन्य तकनीकी व अन्य शिक्षणों अनुसार एवं संविदा के शर्तों अनुसार ही किया जा रहा है।

(द) विहित सामयिक प्रगति विवरणों को तैयार कर प्रस्तुत करना।

(इ) कार्यों कां सही रखरखाव, प्रायः किये जाने वाले निरीक्षणों द्वारा विनिश्च्यत करे, एवं जन (लोक) को विहित लोक सेवाएं समय पर उपलब्ध करावे।

(फ) .....

(ग) .....

(ह) .....

(ई) .....

(ज) .....

(क) .....

(ल) .....

(म) .....

(ल) .....

(ओ) .....

(प) अपने आपको मस्टर तालिका से संबंधित नियमों से पूर्णरूप में परिचित रखना, मापन पुस्तकों, भंडारण हिसाब, एम.ए.एस. हिसाब, टी एवं सी हिसाब, सड़क धातु वापसी, सर्किट हाऊसों एवं विश्राम गृहों के असबाब, चीनी बर्तन इत्यादि के संबंध में परिचित होना व उनका परिपालन करना।"

According to the aforesaid duties and responsibilities of Sub- Engineer, it is clear that the Sub-Engineer is the primary execution officer of the work.

10. As per the FIR the allegation against the Sub Engineer Jagdish Prasad Sharma is that he has prepared false muster roll and on the basis of false

muster roll the payment has been made by the Sarpanch and the Secretary of the Gram Panchayat, Mohrai. Learned counsel for the applicant submits that applicant has not made the payment to the labourers even he was not authorized to make the payment and payment has been made by the Sarpanch as well as Secretary of the Gram Panchayat and there is no evidence against the applicant. Therefore, there is no evidence for criminal misappropriation of the government money, but there is no substance in this arguments advanced by the learned counsel for the applicant because Sub- Engineer is a first person who has authorized to prepare the muster roll and it is his duty to prepare the proper muster roll, therefore, he is the first person who is responsible for preparing false muster roll and on that basis criminal misappropriation of the Government money was done. It is also pertinent to mention here that he is the main accused who had issued a false report for valuation of the work. Therefore, it could not be said that he is not responsible for preparation of any false muster roll or payment. So far as enquiry report given by the administrative officer that cannot be considered at this stage, where after investigation it was found that he was the first person who has made the false muster roll and on that basis payment was made by the Sarpanch and Secretary. One enquiry report was given by the Chief Executive Officer of Janpad Panchayat, Kolaras dated 01.03.2006, it is apparent that Sub-Engineer Jagdish Prasad Sharma who is applicant is also involved in criminal misappropriation of Rs. One Lac along with the Sarpanch Raghuraj Singh and Secretary Sardar Singh Rawat for making a false valuation report. From the statement of Ram Singh Kushwaha, Executive Engineer, Rural Engineer Service, Shivpuri. Applicant-Sub-Engineer is also involved in making the false muster roll as well as making false valuation report.

11. It is pertinent to mention here that co-accused Raghuraj Singh has filed a bail application under Section 438 of CrPC which was registered as M.Cr.C.No.1458/2008 and in that application order has been passed on 31.03.2008, in which, it was argued that the present applicant Jagdish Prasad Sharma, Sub Engineer had issued the false report for valuation of the work and only allegation against the applicant Jagdish Prasad Sharma has been levelled. Although, it is not binding in this case but even after perusal of the entire record, it is also apparent that the applicant is the person, who has prepared the false muster roll on which payments has been made by the Sarpanch and Secretary of the Panchayat.

12. So far as the documents produced by the learned counsel for the applicant at the time of framing of the charges against the applicant in the light

of the judgment of Hon'ble Apex Court *Debendra Nath Padhi* (supra) the same cannot be considered at the time of framing of charge.

13. In view of the aforesaid reasons and the findings so also the cited case in *Debendra Nath Padhi* (supra), the case laws cited on behalf of the applicant in the matter of *Vesa Holding P. Ltd* (supra) and *Umesh Mandloi* (supra) being distinguishable on facts with the case at hand are neither applicable to the case nor helping to the applicant herein. So far as the principle laid down in such cases, this Court did not have any dispute.

14. In view of the aforesaid, we have not found any perversity, illegality, irregularity or anything against the proprietary of law in the order impugned framing the charges against the applicant. Consequently, this revision being devoid of any merit deserves to be and is hereby dismissed.

Revision dismissed.

I.L.R. [2016] M.P., 3127
CRIMINAL REVISION
Before Mr. Justice Atul Sreedharan
Cr. R. No. 608/2016 (Jabalpur) decided on 14 June, 2016

RAMNARESH & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 397 & 401 and Penal Code (45 of 1860), Section 306 **- Quashing of charges sought on the ground that there is no evidence at all - Umadeo, lodger of the FIR, disclosed ignorance as to the cause that compelled the deceased to commit suicide and material on record never made out a *prima facie* case - Held - There is no evidence to show that the applicants were proximate cause or that the applicants had goaded, instigated or assisted the deceased in committing suicide - To be charged u/S 306 of Indian Penal Code, it would be essential for the prosecution to establish *prima facie* that the actions of the accused were directly responsible for instigating the deceased to commit suicide - Trial Court erred in framing charges - Applicants discharged. (Paras 22, 23 & 24)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 व 401 एवं दण्ड संहिता (1860 का 45), धारा 306 – किसी भी साक्ष्य के मौजूद न होने के आधार

पर आरोपों का अभिखण्डन चाहा गया – प्रथम सूचना प्रतिवेदन दर्ज कराने वाले उमादेव ने उस कारण के विषय में अनभिज्ञता प्रकट की जिसने मृतक को आत्महत्या कारित करने हेतु विवश किया एवं अभिलेख पर उपलब्ध सामग्री से कभी भी प्रथम दृष्ट्या प्रकरण निर्मित नहीं हुआ – अभिनिर्धारित – ऐसा कोई साक्ष्य मौजूद नहीं है जिससे यह प्रकट होता हो कि आवेदकगण ने मृतक को आत्महत्या करने हेतु उकसाया, उत्प्रेरित किया या सहायता की अथवा आवेदकगण उसकी आत्महत्या हेतु आसन्न कारण थे – भा.दं.सं. की धारा 306 का आरोप अधिरोपित किये जाने हेतु अभियोजन के लिए यह आवश्यक है कि वह प्रथम दृष्ट्या यह सिद्ध करे कि अभियुक्त के कृत्य मृतक को आत्महत्या करने के लिए उकसाने हेतु प्रत्यक्ष रूप से उत्तरदायी थे – विचारण न्यायालय ने आरोप विरचित करने में त्रुटि कारित की – आवेदकगण आरोपमुक्त।

Cases referred:

(1979) 3 SCC 4, AIR 1979 SC 376, (2007) 1 SCC 49, (2000) 1 SCC 722: 2000 SCC (Cri) 303, (1996) 4 SCC 659, (2012) 3 SCC 117.

Amit Kumar Sharma, for the applicants.
K.S. Patel, P.L. for the non-applicant/State.

ORDER

ATUL SREEDHARAN, J. :- The Petitioners have preferred the instant Criminal Revision being aggrieved by the order dated 13/01/16 passed by the Ld. Additional Sessions Judge, Rehli, District Sagar, in Sessions Trial No. 304/2015, wherein the Trial Court was pleased to frame charges against the Petitioners for an offence under section 306 IPC. The certified copy of the impugned order has been annexed to the petition as Annexure A/1 at page 12 of the revision petition. The Ld. Trial Court has noted that it has gone through the records of the case and heard both the sides and thereafter has come to the conclusion that there is prima facie material available on record to frame a charge u/s. 306 IPC against the Petitioners herein. The order further records that the charges have been framed and the accused persons (the Petitioners herein) have been informed about the charge against them which they have denied and demanded a trial.

2. The Petitioners have filed an interlocutory application being I.A No. 5671/2016 for taking additional documents on record which is a copy of the charge sheet and all the documents annexed therewith which, according to the Ld. Counsel for the Petitioners, are relevant for a just decision in this case. A

copy of the same has been handed over to the office of the Advocate General prior to filing. For the reasons stated in paragraph 2 of the said application, I.A. No. 5671/2016 is allowed and the copy of the charge sheet and the documents filed therewith is taken on record.

3. According to the Ld. Counsel for the Petitioners, the genesis of the incident occurred on the night of 27-28/04/15 at village Chandpur where both, the Complainant and the Petitioners reside. The Counsel further states, that as per the FIR dated 03/05/15 of P.S. Rehli, District Sagar, the Petitioners are alleged to have put the deceased under undue duress and compelled him to commit suicide on account of enmity due to which the deceased Sahadev Setia, S/o. Bhagwandas Setia, committed suicide by hanging at his home.

4. It is further contended by the Ld. Counsel for the Petitioners that, in the Inquest Proceedings u/s. 174 Cr.P.C, information was given to the police by the members of the family of the deceased in which the reason for the deceased to have committed suicide is stated to be 'not known'.

5. The Post Mortem that was done on 28/04/15, gave the cause of death as 'cardio respiratory arrest as a result of asphyxia due to hanging'. As regards the external appearance of the dead body, the doctor notes 'No any injury on body present'.

6. Thereafter, the Ld. Counsel for the Petitioner has drawn the attention of this Court to the statements of the witnesses u/s. 161 Cr.P.C which, according to the Petitioner's Counsel was done after substantial and deliberate delay in order to tailor the statements of the witnesses so as to falsely implicate the Petitioners. The first statement is that of Dinesh, a resident of Chandpur village who on the night of 27/04/15 was standing at the Pan Shop of one Bhure, when around 10-11 in the night, in front of the temple of Radha Krishna, the Petitioners are alleged to have assaulted Vasudev and Umadev, the brothers of the deceased with kicks and blows and are also alleged to have hurled abuses at the two persons and threatened to kill them if they reported the case to the police. The witness further says that he and another witness Bhure interceded and broke up the fight. The Petitioners while leaving are alleged to have said that the deceased, brother of the Vasudev and Umadev, is not to be seen, lets find him and beat him too. The statement of this witness was recorded on 04/05/15.

7. The second statement under section 161 Cr.P.C is ~~that of~~ Bhure,

who runs a Pan Shop for his livelihood at the Bus Stand. He also, like Dinesh, has stated about the alleged fight between the brothers of the deceased and the Petitioners herein on 27/04/15. He further states that he along with Dinesh had interceded and broke up the fight and as the Petitioners were leaving, they are alleged to have said that they will find the deceased and beat him also. The statement of this witness was also recorded by the police on 04/05/15.

8. The third statement under section 161 Cr.P.C is that of Gulab Bai, the mother of the deceased. She states that on the night of 27/04/15, she and the deceased Sahdev were at home when Vasudev and Umadev arrived there in an injured condition and upon being asked by her, Vasudev informed her that the Petitioners were plucking mangoes from their garden upon which Vasudev and Umadev objected and in retaliation, the Petitioners are alleged to have beaten Vasudev and Umadev with lathis, kicks and blows and that the Petitioners also said that the deceased, upon being found will also be beaten. Thereafter, this witness states that she along with Vasudev and Umadev went to the police station to register a complaint and the deceased was left behind at home. She states that on their way to the police station, she is said to have seen the Petitioners herein who were saying that 'search for Sahadev and beat him also'. Upon returning from the police station, this witness states that she saw the deceased hanging. She further states that the Petitioners herein abused the deceased and assaulted him and brought to bear undue pressure upon him and on account of such harassment, the deceased Sahadev is said to have committed suicide. The statement of this witness was also recorded on 04/05/15.

9. The fourth statement is that of Umadev S/o. Bhagwandas Setia, the brother of the deceased. The opening part of his statement under section 161 Cr.P.C is a description of his family and the number of brothers and sisters he has. Thereafter, he describes the events of the night of 27/04/15, when between 10 and 11 pm, he is said to have objected to the Petitioners herein plucking mangoes from his grove when the Petitioners herein namely Ram Naresh Tiwari, Rohit@Juju, Mahendra Tiwari, Lalu Tiwari, Golu Tiwari and Arvind Mishra are said to have attacked Vasudev, the brother of the witness, with lathis and showered kicks and blows and abusing him at the same time. The witness further states that when he interceded to save his brother Vasudev from the alleged combined attack of all the Petitioners herein, the Petitioners

are said to have attacked the witness and beat him up too. This witness then says that the Petitioners are said to have told each other that "lets search for their brother (the deceased) and beat him also". Thereafter, this witness states that he along with his brother Vasudev and mother Gulab Bai went to the police station to lodge a report after leaving the deceased alone at home. After lodging the report, when this witness along with his brother and mother returned home later that night, he found his brother hanging on a rope. This witness lastly says that the Petitioners herein abused the deceased and brought pressure to bear upon him on account of which the deceased is said to have committed suicide. It is relevant to mention here that the last allegation is not based on this witness having seen such abuses being hurled on the deceased by the Petitioners or any such pressure being brought to bear upon the deceased by the Petitioners herein on account of which the deceased is said to have committed suicide.

10. The fifth statement under section 161 Cr.P.C is of Vasudev Setia S/o. Bhagwandas Setia, the other brother of the deceased. This witness also states that in the evening of 27/04/15 between 6 and 6.30 pm, Ram Naresh was plucking mangoes from the trees in his grove and when objected to by this witness, the Petitioner No. 1 and 2 abused him and the Petitioner No.1 is said to have beaten the witness with a lathi which is said to have hit this witness on the left leg. Further, this witness states that around 10-11 pm, the Petitioners are alleged to have abused and beaten this witness and his brother Umadev near the bus stand next to the Radha Krishna temple. This witness also states that the Petitioner said amongst themselves that they would beat Sahdev (the deceased) wherever and whenever they meet him. Thereafter, the rest of the narrative of this witness is identical to that of his brother Umadev relating to the omnibus allegation/opinion that the Petitioners herein had threatened and compelled the deceased to commit suicide.

11. Ld. Counsel for Petitioners, after taking this Court through the statements of witnesses as mentioned above, stated that there is no credible material against the Petitioners. In order to point out to the lacuna in the inquest proceedings and the statements under section 161 Cr.P.C of the witnesses, the Ld. Counsel for the Petitioners stated that after intimation to the police, the police arrived at the scene and commenced inquest proceedings under section 174 Cr.P.C being Inquest Case No. 26/15. The informant, on whose statement the Inquest Proceedings were commenced was Umadev, the brother

of the deceased. In the narrative of the Inquest Proceedings, the story stated above is reiterated and as to how the mother of the deceased saw the deceased hanging as she entered the house after she along with the Umadev and Vasudev returned home after having registered the FIR against the Petitioners herein arising from the altercation over the plucking of mangoes. Interestingly, Umadev says that he does not know the reason why his brother committed suicide by hanging, in the course of the Inquest Proceedings which is the first document written on 28/04/15. The Dehati Nalish (FIR recorded outside the Police Station, at the scene of crime) recorded on 28/04/15 upon the facts given by the witness Umadev discloses ignorance as to the cause that compelled the deceased to commit suicide. The Post Mortem report (hereinafter referred to as the "PMR") of the deceased prepared on 28/04/15 gives the cause of death as Cardio Respiratory Arrest as a result of asphyxia due to hanging. The PMR clearly states that there are no external injuries on the body.

12. It has been argued by the Ld. Counsel for the Petitioners that there is no evidence at all against the Petitioners and that the material on record never made out a prima facie case for the framing of charges against the Petitioners herein. He has stated that even if the entire material of the prosecution is taken and accepted as gospel truth, even then the case would not pass muster of the standard required for framing charges against the Petitioners. The Ld. Counsel for the Petitioners has forcefully stated that the case against the Petitioners is one of no evidence and that they have been made accused on the basis of surmises and conjectures arising from the allaged (sic:alleged) altercation that they had earlier with the brothers of the deceased over the plucking of mangoes.

13. The Ld. Panel Advocate for the State on the other hand has vehemently argued that there is no defect in the order passed by the Ld. Trial Court and that the said order cannot be deemed to be bad only on the ground that the same has not discussed the material against the Petitioners. He further stated that at the stage of framing charges, the Court below has to only see if a prima facie case is made out against the accused and no reasons need to be cited for framing charges and that the Ld. Trial Court was only called upon to give reasons where it was discharging the accused persons. However, where the Trial Court felt that there existed enough material to frame charges against the accused, no elaborate reasons need to be given by it and neither is there a requirement under the law for discussing the material on which the charges are framed. According to him, the statements of all the witnesses taken

holistically, make out a triable issue against the Petitioners. Under the circumstances, the Ld. Panel Advocate for the State has prayed that this Revision be dismissed.

14. Heard the parties to the petition and perused the copy of the charge sheet and material therewith. The impugned order dated 13/01/16 (Annexure A/1 to the petition from page 7 to 20), includes the record of proceedings of the Trial Court dated 13/01/16 (page 8 of the petition) which states that the Ld. Trial Court has heard the two sides and seen the records of the case and thereafter arrived at the opinion that there is adequate material to frame charge against the Petitioners herein under section 306 of the Indian Penal Code. The formal statement of charge dated 13/01/16 against each Petitioner herein, charges them of having abetted Sahdev to commit suicide, on account of which the deceased is said to have committed suicide, making the Petitioners punishable for an offence u/s. 306 IPC (pages 9 to 20 of the petition).

15. From a plain reading of the impugned order, it is evident that there is no discussion by the Ld. Trial Court on the material, based on which the Ld. Trial Court is said to have arrived at the opinion that the case is fit for trial. The contentions of the Prosecution and the Defence are also not recorded, but for the bare assertion that both sides have been heard. The Ld. Counsel for the Petitioners has indicted the said order for being perfunctory and pedestrian. He has stated that the order smacks of non-application of mind and has been passed in a very casual and routine manner without even perusing the statements of the witnesses u/s. 161 Cr.P.C and also without examining if the allegations, even if taken to be true for the sake of an argument, satisfy the ingredients of section 107 IPC in the wake of the judgements of the Supreme Court on this point, thus making out a prima facie case against the Petitioners.

16. The Ld. Trial Court has failed to appreciate that at the stage of framing of charges, though a meticulous examination of the material on record is not called for, it could not abdicate its function of at least examining the record for the purpose of ascertaining the existence of a prima facie case against the Petitioners. Though in this case, the Ld. Trial Court has recorded in the impugned order that it had heard both the sides and perused the case material, it did not even fleetingly refer to the material which disclosed the fact that the accused may have committed the offence they are charged with. It should have borne in mind the law laid down by the Supreme Court in *Union of*

India Vs. Prafulla Kumar Samal & Anr – (1979) 3 SCC 4 and AIR 1979 Supreme Court 376 wherein the Supreme Court laid down that the Trial Court, at the stage of framing charges, would sift and weigh the evidence only for the limited purpose of concluding that there existed a prima facie case against the accused and that the Trial Court was well within its powers to discharge an accused if the material on record only raised "some suspicion" against the accused person as opposed to "grave suspicion" which would warrant the framing of charges. It also cautioned that the nature of suspicion would also depend upon the facts of each case and that there was no universal rule of thumb which could be applied across the board in all case. Most importantly the Supreme Court sought to evoke in the Trial Court, a sense of responsibility by explaining that the Trial Court should never consider itself as a "Post Officer or a mouth piece of the Prosecution". The emphasis here is unmistakable. The mere filing of a charge sheet by the police does not justify the framing of charges by the Trial Court. Section 227 and 228 of the Cr.P.C make it incumbent upon the Session Court to consider the record of the case and the documents submitted therewith and thereafter having heard the accused and the prosecution, decide whether the accused shall be charged for the offence or discharged. Likewise, the duty on the Judicial Magistrate First Class under sections 239 and 240 Cr.P.C. However, if the Court is inclined to discharge the accused, be it the Court of Sessions under section 227 or the Court of the Magistrate under 239 Cr.P.C, the Court passing such an order shall record its reasons for doing so. No such reason is to be given if the Court frames charges U/S. 228 or 240 Cr.P.C where all that the Trial Court has to do is mention that in its OPINION there exists sufficient material to frame a charge.

17. The abovestated position was examined by a Two Judge Bench of the Supreme Court in *Kanti Bhadra Shah Vs. State of W.B* - (2000) 1 SCC 722, wherein at paragraph 8 it was held **"We wish to point out that if the trial court decides to frame a charge there is no legal requirement that he should pass an order specifying the reasons as to why he opts to do so. Framing of charge itself is prima facie order that the trial Judge has formed the opinion, upon considering the police report and other documents and after hearing both sides, that there is ground for presuming that the accused has committed the offence concerned".** *Kanti Bhadra Shah's* case was referred to by another Two Judge Bench of the Supreme Court in *Lalu Prasad Yadav Vs. State of Bihar* – (2007) 1

SCC 49, wherein at paragraph 15, the Supreme Court held "In *Kanti Bhadra Shah v. State of W.B.* [(2000) 1 SCC 722 : 2000 SCC (Cri) 303] **again the question was examined. It was held that the moment the order of discharge is passed it is imperative to record the reasons. But for framing of charge the court is required to form an opinion that there is ground for presuming that the accused has committed the offence. In case of discharge of the accused the use of the expression "reasons" has been inserted in Sections 227, 239 and 245 of the Code. At the stage of framing of a charge the expression used is "opinion". The reason is obvious. If the reasons are recorded in case of framing of charge, there is likelihood of prejudicing the case of the accused put on trial"**. From the above it is clear that the Trial Court is only bound to record its reasons if it discharges the accused. But where, the Trial Court frames charges after forming an opinion about the existence of a prima facie case, no reasons are to be given by the Trial Court.

18. However, a Three Judge Bench of the Supreme Court in *State of Maharashtra Vs. Som Nath Thapa* - (1996) 4 SCC 659, in a case examining the legality of the order framing charges against certain accused persons by the Special Court (TADA) in the Bombay Blast Case of 1993, the Supreme Court held in paragraph 35 that **"The legal question having been examined, we may advert to the facts of each appellant to decide whether a prima facie case against him exists, requiring framing of a charge, as has been ordered. Before we undertake this exercise, it may be pointed out that the learned Designated Court in his impugned judgment, instead of examining the merits of the prosecution case qua the charged accused, has given reasons as to why he discharged 26 accused. A grievance has, therefore, been made by all the learned counsel appearing for the accused that this was not the legal approach to be adopted. We find merit in this grievance inasmuch as the impugned order ought to have shown that the Designated Court applied its judicial mind to the materials placed on record against the charged accused. This was necessary because framing of charge substantially affects the liberty of the person concerned. Because of the large number of accused in the case (and this number being large as regards charged accused also), the court below might have adopted the approach he had chosen. But we do not think it was right in doing so. Be that as it may, now that we have been apprised by the prosecution regarding all**

the materials which were placed before the Designated Court against each of the appealing accused, we propose to examine, whether on the basis of such materials, it can reasonably be held that a case of charge exists. We would do so separately for each of the appellants". From the above, the proposition that at the stage of framing of charges, (a) the Trial Court should apply its judicial mind to the materials placed on record as (b) framing of charges substantially affects the liberty of the person concerned, become clear.

19. From the above, it is clear that at the stage of framing charges, the Trial Court has to apply its "Judicial Mind to the Materials Placed on Record" as mandated by the Three Judge Bench of the Supreme Court in *Som Nath Thapa's* case. The question therefore arises as to how a Superior Court, sitting in Revision over the order framing charges passed by the Trial Court, can ascertain such "Application of Judicial Mind to the Materials Placed on Record" by the Trial Court, where the Trial Court does not have to give any reasons for framing charges, as has been laid down by the Supreme Court in *Kanti Bhadra Shah's* case? The answer in my humble view lies in S. 228(1) of the Cr.P.C which reads as hereunder;

> **228. Framing of charge.- (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which –**
>
> **(a) .....**
>
> **(b) .....**
>
> **(2) .....**

Section 228(1) Cr.P.C makes it essential for the Trial Court to arrive at the "opinion" that there is ground for presuming that the accused has committed an offence. The dictionary meaning of the word "Opinion" is "feelings or thoughts about somebody or something, rather than a fact" (Oxford Advanced Learner's Dictionary). An opinion is formed on the "basis" of the existence of certain facts or circumstances. "Reason", on the other hand has been defined as "a cause or an explanation for something that has happened or that somebody has done" (Oxford Advanced Learner's Dictionary). In *Kanti Bhadra Shah's* case, it is only the giving of "Reason" that the Supreme

Court has held as being unnecessary, where the Trial Court frames charges against the accused. Therefore, an opinion in terms of section 228(1) can only be formed by the Trial Court, on the "basis" of the material on record. Therefore, it is absolutely essential for the Trial Court to summarily state the "basis" on which it forms an opinion justifying the framing of charges against an accused. This can be done without giving "Reasons", elaborate or otherwise and it would suffice if the Trial Court refers to the evidence on record without any elaboration of its contents. Statements of witnesses can be referred to by the name of the witness without discussing the contents of the statements or how the same prima facie implicates the accused. This way, the Superior Court sitting in Revision over the order framing charges, when such orders are challenged, would at least be in a position to refer to the material adverted to by the Trial Court and assess if the same does indeed reveal a case against the accused. Thus briefly giving the "basis" for the "opinion" arrived at by the Trial Court at the stage of framing charges, will ensure compliance with the judgements of the Supreme Court in *Kanti Bhadra Shah* and in *Som Nath Thapa's* case. Thus, the impugned order is deficient in not having given the basis for the opinion as to why charges u/s. 306 IPC ought to be framed against the Petitioners and therefore bad in law.

20. In assisting the Trial Court at the stage of framing of charges, the pivotal role of the Public Prosecutor can never be adequately underscored. Speaking in glowing terms about the role of the Prosecutor in *Centre for Public Interest Litigation Vs. Union of India* – (2012) 3 SCC 117, the Supreme Court, in paragraph 23 of its judgement, extracted the words of a Senior Prosecutor of Britain named Christmas Humphreys from the 1955 Criminal Law Review wherein the Ld. Prosecutor observed about the role of the Prosecutor by saying **"The Prosecutor has a duty to the State, to the accused and to the court.** The Prosecutor is at all times a minister of justice, though seldom so described. **It is *not* the duty of the prosecuting counsel to secure a conviction, nor should any prosecutor even feel pride or satisfaction in the mere fact of success"**. In an Adversarial System of Criminal Justice Administration, it is not for the Trial Court to ferret out material against the accused from the charge sheet, the Court being a neutral arbiter. Section 226 Cr.P.C reserves this honour singularly for the Public Prosecutor and the same reads as hereunder;

226. Opening case for prosecution. - When the accused

appears or is brought before the Court in pursuance of a commitment of the case under section 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused.

The provisions of section 226 above makes it mandatory for the Prosecutor to open the case against the accused. It is for the Prosecutor to lead the Trial Court through the evidence against the accused and assist the Court in the formation of its opinion that charges ought to be framed against the accused. The Prosecutor is present to assist the Trial Court in dispensing justice and not just to secure a conviction, come what may. If the Prosecutor is convinced that the material on record fail to establish a prima facie case, then the Prosecutor must assist the Court accordingly. The Prosecutor cannot take the stand that his case is whatever has been stated in the charge sheet filed by the police. Instead, the mandate of section 226 is that the Prosecutor would have to lead the Trial Court through the evidence on record on the basis of which the Prosecutor seeks to establish the guilt of the accused and thereby assist the Court in forming its opinion based on evidence on record with regard to framing of charges against the accused.

21. On facts specific to the case at hand, the Ld. Trial Court has failed to appreciate that the undisputed case as per the prosecution is (a) that earlier on the night of the incident, there was an altercation between the brothers of the deceased and the Petitioners herein relating to the plucking of mangoes from the grove of the deceased and his brothers in which the brothers of the deceased were allegedly beaten up by the Petitioners. (b) That there is no reference by any of the witnesses to the presence of the deceased at the scene of the altercation or that he was ever assaulted or beaten by the Petitioners. (c) That the Petitioners are alleged to have said that they would search for the deceased and beat him also whenever and wherever they find him. (d) That the brothers and the mother of the deceased went to the police station to report the assault on the brothers of the deceased allegedly by the Petitioners herein and (e) That the brothers and mother of the deceased found the deceased hanging at home when they returned.

22. None of the witnesses state that they had seen the Petitioners herein threatening the deceased with assault. None of the witnesses in fact state that they had ever seen the Petitioners anywhere near the deceased on that day.

There is no suicide note left behind by the deceased which has imputed any role to the Petitioners herein. In fact, there is no evidence to show that the Petitioners were the proximate cause or that the Petitioners had goaded, instigated or assisted the deceased in committing suicide. Besides the glaring paucity of evidence to connect the Petitioners as the cause of the deceased committing suicide, the Ld. Trial Court also failed to appreciate that the statements of the brother of the deceased in the Inquest Proceedings and the Dehati Nalish, the two earliest documents of the prosecution, clearly state that the reason for the deceased having taken the drastic step is not known.

23. The evidence on record, even if the same is accepted as true and correct, only reflects that the Petitioners were allegedly searching for the deceased in order to give him a beating. Evidence is not suggestive whether the Petitioner actually ever found the deceased and beat him, as threatened by them. The PMR also does not reveal any external injuries on the body of the deceased which may have raised a slight suspicion that the Petitioners may have beaten the deceased.

24. There are a number of judgements of the Supreme Court wherein it is clearly laid down that to be charged for an offence u/s. 306 IPC, it would be essential for the prosecution to establish prima facie, that the actions of the accused were directly responsible for instigating that deceased to commit suicide. Such actions must satisfy the ingredients of S. 107 IPC whereby it should evident that the accused had instigated the deceased to commit suicide, or that the actions of the accused were of such nature that the victim had no other option but to commit suicide. In the instant case there is no evidence at all, let alone prima facie evidence that the Petitioners had even met the deceased prior to his committing suicide. The Ld. Trial Court failed to examine the statements of the witnesses in the backdrop of the law laid down by the Supreme Court for an offence u/s. 306 IPC and therefore erred in framing charges against the Petitioners herein u/s. 306 IPC. In the facts and circumstances of the instant case, it can be said that the Ld. Trial Court did become the mouth piece of the prosecution.

25. On the basis of the aforementioned, I allow the Criminal Revision filed by the Petitioners herein and set aside the impugned order dated 13/01/16 passed by the Court of the Ld. Additional Sessions Judge, Rehli, District Sagar, in Sessions Trial No. 304/2015, and discharge the Petitioners.

Revision allowed.

I.L.R. [2016] M.P., 3140
CRIMINAL REVISION
Before Mr. Justice H.P. Singh
Cr.R. No. 1074/2011 (Jabalpur) decided on 15 June, 2016

SURAJ DHANAK ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Penal Code (45 of 1860), Section 324 and Criminal Procedure Code, 1973 (2 of 1974), Section 320 - Compromise* - Application u/S 320 (2) (5) & (8) of Cr.P.C. for compounding of offence u/S 324 of I.P.C. - Offence u/S 324 of I.P.C. is now non-compoundable as per the Code of Criminal Procedure (Amendment) Act, 2009 w.e.f. 31.12.2009 - Incident has taken place prior to 31.12.2009 - Held - Offence u/S 324 of I.P.C. was compoundable prior to 31.12.2009 as per the provisions enshrined u/S 320 (2) & 320 (5) of Cr.P.C. - Applicant is acquitted from the offence u/S 324 of I.P.C. - Revision stands disposed off. (Paras 5 & 6)**

दण्ड संहिता (1860 का 45), धारा 324 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 320 – समझौता – भा.दं.सं. की धारा 324 के अंतर्गत अपराध का शमन किए जाने हेतु दं.प्र.सं. की धारा 320(2)(5) एवं (8) के अंतर्गत आवेदन – दण्ड प्रक्रिया संहिता (संशोधन) अधिनियम, 2009 के अनुसार दिनांक 31.12.2009 से भा.दं.सं. की धारा 324 के अंतर्गत अपराध अशमनीय है–घटना दिनांक 31.12.2009 से पूर्व घटित हुई थी – अभिनिर्धारित – दं.प्र.सं. की धारा 320(2) एवं 320(5) के अंतर्गत प्रतिष्ठापित उपबंधों के अनुसार भा.दं.सं. की धारा 324 के अंतर्गत अपराध दिनाँक 31.12.2009 के पूर्व शमनीय था – आवेदक को भा.दं.सं. की धारा 324 के अंतर्गत अपराध से दोषमुक्त किया गया – पुंनरीक्षण निराकृत की गई।

Sourabh Bhushan Shrivastava, for the applicant.
Bhaskar Pandey, for the complainant.
Satyapal Chadhar, P.L. for the non-applicant/State.

O R D E R

H.P. Singh, J. :- This revision filed by the applicant under Section 397 read with Section 401 of the Code of Criminal Procedure (hereinafter referred to as the Code for short), assailing the order dated 20.6.2011 passed by the Ist Addl. Sessions Judge, Gadarwara, in Cr.A. No.145/2010, whereby the judgment dated 26.8.2010 passed in Cr. Case No.1621/2008, by the

learned Judicial Magistrate First Class, Gadarwara, convicting the applicant under Section 324 of I.P.C., and sentencing him to undergo R.I. for one year and fine of Rs.500/-, in default of payment of fine amount, has been affirmed.

2. This case is listed today in compliance of order dated 25.4.2016 for consideration of the compromise application being I.A.No.7463/2016 filed under Section 320 of the (2), (5) & (8) of the Code of Criminal Procedure.

3. The applicant-Suraj Dhanak and complainant-Shivraj Kirar present before the Court and expressed their willingness to compromise in the matter. Applicant-Suraj Dhanak has been duly identified by his counsel Shri S.B. Shrivastava and complainant-Shivraj Kirar has been identified by his counsel B. Pandey.

4. Complainant has submitted before the Court that he himself got agreed for compounding the offence under Section 324 of I.P.C., with intention to maintain harmony without any fear or coercion, because good relations have been developed between the applicant and complainant. He and applicant are belong to the same place and they are living peacefully and due to that they want to settle their disputes.

5. The offence under Section 324 of I.P.C., was compoundable, but by the amendment in Criminal Procedure Code, 1973, by Amendment Act No.25/2005, is made non-compoundable. By Notification dated 21.6.2006, Central Government in exercise of power conferred by sub-section (2) of Section 1 of Criminal Procedure Code (Amendment) Act, 2005 (No.25/2005) (for short "the Code") appointed the 23rd June 2006 as the date, on which provisions of said Act, except the provisions of Sections, 16, 25, 28(a), 28(b), 38, 42(a), 42(b), 42(f) (III), (IV) and 44(a), shall come into force. It is clear from this notification and Act 5 of 2009, Sec 23(i) for the table (w.e.f. 31.12.2009), that the amendment making the offence under Section 324 of the I.P.C., non-compoundable, has come into force on 31.12.2009. Therefore, in the considered opinion of this Court, in view of the aforesaid amendment, present provision, which came after 31.12.2009 would not be applicable in the instant case, because the incident occurred prior to 31.12.2009.

6. In view of the foregoing discussions, this offence of Section 324 of I.P.C., is compoundable with the permission of this Court, as per provision of Section 320(2) read with Section (5) of Cr.P.C., and this Court does not find any reason for refusing the prayer of the complainant as well as applicant for

granting permission to compound the offence. Hence, permission is granted. In consequence thereof, **I.A.No.7463/2016** is allowed and applicant is acquitted from the offence under Section 324 of the I.P.C., as per provision under Sub-section (8) of Section 320 of Cr.P.C.

7. Since, the applicant is on bail, his bail bond and surety bond stand discharged. Fine amount, if deposited by the applicant, be refunded to him.

8. Office is directed to send a copy of this order along with the records to the trial Court for compliance.

9. Accordingly, the revision stands disposed of.

Revision disposed of.

I.L.R. [2016] M.P., 3142

CRIMINAL REFERENCE

Before Mr. Justice Rajendra Menon, Acting Chief Justice & Mr. Justice Anurag Shrivastava

Cr.Ref. No. 01/2015 (Jabalpur) decided on 19 July, 2016

IN REFERENCES ...Applicant

Vs.

STATE OF M.P. ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 395 (1) - Criminal Reference* - Question arises that whether Special Court is competent to try the counter cases not involving the offence under the Special Act, committed by Magistrate directly to it even with the restriction u/S 193 of Cr.P.C. - Held - (i) Magistrate can not commit a case, arising out of the same incident, cross to the case pending before the Special Court (SC/ST) directly to Special Court - (ii) In those cross cases the Special Court (SC/ST) is even with the restriction u/S 193 of Cr.P.C., is not competent to take cognizance directly without the case being committed. (Paras 12 & 26)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 395 (1) – दाण्डिक निर्देश – यह प्रश्न उत्पन्न होता है कि क्या विशेष न्यायालय, दं.प्र.सं. की धारा 193 के अंतर्गत निर्बंधन के होते हुए भी, उसके समक्ष दण्डाधिकारी द्वारा सीधे तौर पर उपार्पित किए गए ऐसे काउंटर प्रकरणों का, जिनमें विशेष अधिनियम के अंतर्गत अपराध अंतर्ग्रस्त नहीं है विचारण करने हेतु सक्षम है – अभिनिर्धारित – (i)

दण्डाधिकारी, विशेष न्यायालय (एस सी/एस टी) के समक्ष लंबित किसी मामले की समान घटना से उत्पन्न क्रॉस प्रकरण को सीधे तौर पर ही उस विशेष न्यायालय को उपार्पित नहीं कर सकता – (ii) ऐसे क्रॉस प्रकरणों में, दं.प्र.सं. की धारा 193 के अंतर्गत निर्बंधन के होते हुए भी, विशेष न्यायालय (एस सी/एस टी) उक्त प्रकरण का उसके समक्ष उपार्पण के बिना सीधे तौर पर संज्ञान नहीं ले सकता।

Cases referred:

1990 (Supp) SCC 145, (2000) 2 SCC 504, (2001) 2 SCC 688, (2012) 4 SCC 516, AIR 2008 SC 1213, (2008) 2 SCC 492.

Kishwar Khan, appears as Amicus Curiae in the matter.
S.S. Chouhan, G.A. for the non-applicant/State.

ORDER

The Order of the Court was delivered by : **ANURAG SHRIVASTAVA, J. :-** The learned Special Judge, Schedule Caste and Schedule Tribe (Prevention of Atrocities) Act, 1989, Raisen vide letter dated 18.06.2015 has preferred three references under Section 395(1) of Code of Criminal Procedure, 1973 (hereinafter referred as Code) pertaining to common question of law.

2. The relevant facts leading to the reference are that a Special Case No.118/2014 (State of M.P. Vs. Sunny @ Sandeep and others) under Section 294, 323/34, 324/34, 506(II) of IPC and Section 3(1) (X) Schedule Caste and Schedule Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred as SC/ST Act) is pending before the Special Court. A Criminal Case No.676/2014 under Section 294, 323 and 506 of IPC arising out of the same incident was presented before the JMFC, Raisen. Finding the case as counter case the Magistrate vide order dated 11.03.2015 has committed the criminal case to Special Judge, under Section 323 of Cr.P.C.

3. The facts of the second reference is that the Special Case No.106/24 (State Vs. Halke and others) under Section 294, 323/34, 506 (II) of IPC and Section 3(1) (X) SC/ST Act is pending before the Special Court. A criminal case No.367/2014 under Section 294, 323, and 506 of IPC arising out of the same incident was presented before the JMFC, Begumganj, District-Raisen. Finding the case as counter case the Magistrate vide order dated 18.03.2015 has committed the criminal case to Special Judge, under Section 323 of Cr.P.C.

4. The facts of the third reference is that the Special Case No.11/24 (State Vs. Komal Singh and others) under Section 294, 323/34, 506 (II) of IPC and Section 3(1) (X) SC/ST Act is pending before the Special Court. A criminal case No.594/2013 under Section 294, 323, and 506 of IPC arising out of the same incident was presented before the JMFC, Gairatganj, District-Raisen. Finding the case as counter case the Magistrate vide order dated 09.02.2015 has committed the criminal case to Special Judge, under Section 323 of Cr.P.C.

5. Learned Special Judge finding the committal of all three cases by Magistrate directly to Special Court as irregular and not lawful in view of Section 193 and 194 of the Code referred the matter to Session Judge with a request to exercise suo-motto power of revision for setting aside the order of committal and directing the Magistrate to commit the cases to Session Judge.

6. Learned Session Judge by order dated 28.05.2015 holding that since the cases committed by the Magistrate were counter cases of Special Cases which were already pending before the Special Court, therefore, the Special Court is competent to take cognizance of counter cases, which are directly committed under Section 323 of Cr.P.C. and the prayer of Special Court was rejected.

7. However, the learned Special Judge was of the view that under the provision of Section 193 of the Code, the Special Court is not competent to take cognizance of the cross-cases, which are not registered under SC/ST Act and if such a cognizance is taken then in that situation the whole proceeding will be void as per provisions of Section 461(K) and (L) of the Code.

8. The learned Special Judge while referring the matter has framed the following questions:-

> (1) Whether the Magistrate can commit a case, arising out the same incident, cross to the case pending before the Special Court (SC/ST) directly to Special Court?
>
> (2) Whether in those cross cases the Special Court (SC/ ST) is even with the restriction under Section 193 of Cr.P.C. competent to take cognizance directly without the case being committed?

9. We have heard Ms. Kishwar Khan, Amicus Curiae.

10. Before adverting to consider the questions referred to, we have to consider the procedure, which ought to be followed in cross cases. Hon'ble Supreme Court in *Nathi Lal and Others Vs. State of U.P and Others,* reported in 1990 (Supp) SCC 145 has described the procedure in para-2, which is as under:-

> *"We think that the fair procedure to adopt in a matter like the present where there are cross-cases, it to direct that the same learned Judge must try both the cross-cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross-case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross-case cannot be looked into. Nor can the Judge be influenced by whatever is argued in the cross-case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross-case. But both the judgments must be pronounced by the same learned Judge one after the other."*

11. Therefore, it is clear that in such a situation both, the cross case and the main case have to be tried by the same Court. That being so, the counter-case, which was pending before the Magistrate ought to be tried by Special Court alongwith special case, which is pending for trial under SC/ST Act.

12. The Special Court is established by the State Government with the concurrence of Chief Justice of High Court under Section 14 of SC/ST Act, for speedy trial of the offences under the Act. The Special Court has power to directly take cognizance of the offences under the Act. Since, counter-cases pending before the Magistrate was not for an offences under SC/ST

Act, therefore, Special Court may not directly take cognizance of the offences under Section 14 of the Act. Here the question arises whether Special Court is competent to try the counter-cases not involving the offence under Special Act.

13. It is not disputed that the Additional Sessions Judges are posted and given powers to preside over the Special Courts constituted under SC/ST Act. Hon'ble Supreme Court in *Gangula Ashok and another Vs. State of A.P.* (2000) 2 SCC 504 while considering the old Section 14 of SC/ST Act held that:-

> *"It is clear from Section 14 and 2 (1) (d) of the SC/ST Act that it is for trial of the offences under the Act that a particular Court of Session in each district is sought to be specified as a Special Court. Though the word "trial" is not defined either in the Code or in the Act it is clearly distinguishable from inquiry. Inquiry must always be a forerunner to the trial. Thus the Court of Session is specified to conduct a trial and no other court can conduct the trial of offences under the Act. Evidently the legislature wanted the Special Court to be a Court of Session. Hence, the particular Court of Session, even after being specified as a Special Court, would continue to be essentially a Court of Session and designation of it as a Special Court would not denude it of its character or even powers as a Court of Session. The trial in such a Court can be conducted only in the manner provided in Chapter XVIII of the Code which contains a fasciculus of provisions for "trial before a Court of Session".*
>
> *(Paras 8 & 9)*

14. Therefore, it is clear that even after being specified as Special Court, the Additional Sessions Judge would continue to be essentially a Court of Session and can exercise powers as a Court of Sessions.

Although a new Section 14 in SC/ST Act has been substituted vide Amendment Act 1 of 2016 w.e.f 18th January, 2016 giving power to directly take cognizance of offence under this Act, but still for the offences which are not involving offences under SC/ST Act, 1989 the trial can be conducted by

Special Court exercising jurisdiction as Additional Sessions Judge in the manner provided in Chapter XVIII of the Cr.P.C. under provisions for "trial before the Court of Sessions."

15. Now we will consider the procedure, which has to be followed in a situation where in a counter/cross-cases, that Magistrate finds that one case arising out of the same incident is exclusively triable by Court of Sessions and second one is not involving the offences exclusively triable by the Court of Sessions like in the present cases. The provisions for committal of cases to Court of Sessions are given in Sections 209 and 323 of Cr.P.C., which reads as under:-

> *"Section. 209. - When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Sessions, he shall:-*
>
> *(a) commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;*
>
> *(b).....*
>
> *(c).....*
>
> *(d).....*
>
> *Section 323. - If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is on which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained."*

16. Therefore, in cases where it appears that the offence is one triable exclusively by the Court of Sessions the Magistrate shall commit it to Court of Sessions. But, in cases where the offence is not exclusively triable by the Court of Sessions the Magistrate has to follow the procedure under Section

323 of Cr.P.C for its committal to the Court of Sessions. Hon'ble Supreme Court in the case of *Sudhir Vs. State of M.P.* reported in (2001) 2 SCC 688 held that as under:-

> *"Where one of the two cases (relating to the same incident) is charge-sheeted or complained of, involves offences or offence exclusively triable by a Court of Session, but none of the offences involved in the other case is exclusively triable by the Sessions Court as provided in Section 209 Cr.P.C. Though, the next case cannot be committed in accordance with Section 209 of the Code, the Magistrate has, nevertheless, power to commit the case to the Court of Session. Section 323 is incorporated in Cr.P.C. to meet similar cases also." (Para 12)*

17. It is also evident that in both under Sections 209 and 323 of Cr.P.C the cases are committed to the Court of Sessions but after committal both cases either are to be exclusively tried by the Court of Sessions or otherwise has to be tried following the provisions contained in Chapter- XVIII of Cr.P.C. Hon'ble Supreme Court in the case of *Sudhir* (supra) explained that:-

> *"Section 323 Cr.P.C. does not make an inroad into Section 209 because the former is intended to cover cases to which Section 209 does not apply. When a Magistrate has committed a case on account of the legislative compulsion by Section 209, its cross-case, having no offence exclusively triable by the Sessions Court, must appear to the Magistrate as on which ought to be tried by the same Court of Session. Commitment under Section 209 and 323 might be through two different channels, but once they are committed their subsequent flow could only be through the stream channelized by the provisions contained in Chapter XVIII. (Para 13)"*

18. A Sessions Judge has power to try any offence under IPC, it is not necessary for the Sessions Court that the offence should be one exclusively triable by a Court of Sessions. This power of Sessions Court is given in Section 26 of Cr.P.C.

19. Here the question arises whether a Magistrate can commit the cross-case, which is not exclusively triable by the Court of Sessions directly to the Additional Sessions Judge or Assistant Sessions Judge where the counter-case is pending or he has to commit it to the Court of Sessions Judge. For this we have to consider the difference between Sessions Judge and Additional Sessions Judge.

20. Section 6 of Cr.P.C has classified only a Court of Session, there is no other Additional Court of Sessions. Section 9 of Cr.P.C which reads as under:-

"Section 9. (1) The State Government shall establish a Court of Sessions for every sessions division.

(2) Every Court of Session shall be presided over by a Judge, to be appointed by the High Court.

(3) The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session."

(4) .....

(5) .....

(6) .....

21. A Court of Session for every session division is established by the State Government, which has to be presided over by a Sessions Judge. Sub Section (3) of Section 9 enables the High Court to appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in Court of Sessions. This provision has been made for appointment of Judges in addition to the Sessions Judge in a Session division to man the work of the Court of Sessions, which could not be handled by the Sessions Judge alone. The Sessions Judge has power to transfer the cases to the Court of Additional Sessions Judge. As per Section 381 (2) and Section 400 of Cr.P.C a Additional Sessions Judge can hear only such appeals and revision which are make over to them by Sessions Judge. Rule 574 of Criminal Rules and Orders provides a Register of Cases tried by Court of Sessions to be maintained only in Court

of Sessions Judge. Therefore, it becomes clear that while the Sessions Judge presides over the session division, an Assistant Sessions Judge merely exercises jurisdiction in that session division. Ordinarily the expression Court of Sessions would include not only the Sessions Judge, but also Additional or Assistant Judge, the expression Sessions Judge cannot be treated to include an Additional Sessions Judge unless otherwise provided by law.

22. The power of taking cognizance of an offence by Sessions Court has been described in Sections 193 and 194 of Cr.P.C. Section 193 of Cr.P.C restricts a Sessions Court from taking cognizance of any offence except in certain cases, unless the case has been committed to it by a Magistrate. Sections 193 and 194 of Cr.P.C reads as under:-

> *"Section 193. Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court or Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.*
>
> *Section 194. An Additional Sessions Judge or Assistant Sessions Judge shall try such cases as the Sessions Judge of the division may, by general or special order, make over to him for trial or as the High Court may, by special order, direct him to try."*

Section 194 is newly incorporated by the legislature by amending section 193 (2) of old Cr.P.C 1898. The words "only as a State Government by the general or special order may direct that to try or" appearing in the Section 193 of old Cr.P.C 1898 have been omitted. Further in sub section (2) the words "or as the High Court may by a special order direct him to try have been added." This change has been brought about to give power of distribution of work among the Courts in a district to Sessions Judge and High Court.

23. The expression "cognizance" used in Section 193 of Cr.P.C indicates the point when a Court or a Magistrate takes judicial notice of an offence with a view to initiate proceeding in respect of such offence (See *S.K. Sinha, Chief Enforcement Officer Vs. Videocon International* AIR 2008 SC 1213,

(2008) 2 SCC 492). Therefore, by conjoint reading of Sections 193 and 194 of Cr.P.C it appears that the Sessions Judge is competent to take cognizance and initiate trial of a case exercising original jurisdiction after being committed by the Magistrate under Section 193 of Cr.P.C. but, Additional Sessions and Assistant Sessions Judge derives no jurisdiction, as a Court of original jurisdiction, to take cognizance of an offence exclusively triable by a Court of Sessions unless the Sessions Judge of that division by general or special order makes over to him such a cases for trial or unless the High Court, by a special order directs him to try. Therefore, the cases involving offences exclusively triable by Court of Sessions or ought to be tried by Court of Sessions should be committed to Court of Sessions Judge because Additional Sessions Judge/ Assistant Sessions Judge lacks jurisdiction to try the same without it is made over by Sessions Judge.

24. In the present case the Special Court constituted under SC/ST Act, 1989 is a Court of Additional Sessions Judge. The counter-cases have to be tried and decided separately and there will be no joint trial. In the present case all the counter-cases which are pending before the Magistrate are relating to offences under Sections 294, 323, 324, 506-B of IPC. These cases are triable by Judicial Magistrate First Class but being counter-cases of special cases registered under SC/ST Act, 1989 they have to be tried and decided by the Court of Special Judge. The Special Judge has to try above cases as Additional Sessions Judge following procedure envisaged under chapter XVIII of the Cr.P.C. Simply a case is being tried by the Special Court as counter-case it does not become a special case under SC/ST Act. The Special Judge is competent to take cognizance of offences under SC/ST Act, but not competent to take cognizance of offences other than SC/ST Act, 1989 or offences under Penal Code, unless it is made over to him by Sessions Judge under Section 194 of Cr.P.C. Therefore, the counter-cases pending before the Magistrate ought to be committed to the Court of Sessions Judge with a request for their transfer to Special Court for trial.

25. Applying the above principle we arrive to following conclusion:-

i. If a counter-case involves offences not exclusively triable by Sessions Court then it will be committed to the Court of Sessions Judge under Sections 209 or 323 of Cr.P.C as the case may be, who can then transfer the case (i.e the counter-case) to the Court of Additional Sessions Judge/Special Court

where the other case is pending for trial.

ii. The special Court under SC/ST Act, 1989 is not competent to take cognizance and initiate trial of the case not involving the offence under the special Act unless it is made over to it by Sessions Judge under Section 194 of Cr.P.C.

iii. The cases involving offences under Special Act can be committed directly to a Special Court if no special provision for taking cognizance of offence is provided in a Special Act or it is not otherwise directed by High Court.

26. Therefore, we answer the reference as under:-

(i) Magistrate cannot commit a case, arising out the same incident, cross to the case pending before the Special Court (SC/ST) directly to Special Court.

(ii) In those cross cases the Special Court (SC/ST) is even with the restriction under Section 193 of Cr.P.C., is not competent to take cognizance directly without the case being committed.

27. Here a question arises as to whether trial of a case not involving offences under the Special Act, which has been directly committed to Special Court (being a Court of Additional Sessions Judge) by Magistrate gets vitiated.

28. Section 465 of Cr.P.C reads as under:-

"(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity if any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity if any proceeding under this Code, or any error,

or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

29. Since, Additional Sessions Judge is competent to exercise jurisdiction in Court of Sessions, therefore, it is a Court of competent jurisdiction to try the offences under Penal Code. Ordinarily a case cannot be tried by an Additional Sessions Judge unless the same has been made over to him by Sessions Judge or has been directed to be tried by him by the High Court. But, a trial of case by Additional Sessions Judge on direct committal by Magistrate to him is not a illegality but would be an irregularity or an error and it may attract Section 465 of Cr.P.C. Hon'ble Supreme Court in the case of *Rattiram and Others Vs. State of Madhya Pradesh,* reported in (2012) 4 SCC 516 held that cognizance taken by a Sessions Court directly without commitment of case by Magistrate in accordance with Section 193 of Cr.P.C, the trial will not automatically vitiated. The trial would only be vitiated if failure of justice has in fact been occasioned thereby or accused can established that he has been prejudiced thereby.

30. Therefore, it becomes clear that Magistrate shall not commit any case triable by the Court of Sessions or ought to be tried by the Court of Sessions (cross case) to an Additional or Assistant Sessions Judge and if it is so committed then such an error must be objected too at the earliest possible opportunity or else error may not be made a ground for interference with the finding of guilt etc., if no failure of justice is shown to have been occasioned by such an error.

31. Before parting we would like to express our gratitude to Ms. Kishwar Khan, Amicus curiae for the able assistance render during hearing of the matter.

32. In the light of the above discussion the impugned orders passed by the Magistrates committing the cross cases to Special Judge are hereby set-aside and all three cross-cases be remanded to respective Magistrates for its committal to the Court of Sessions Judge by following due procedure.

Order accordingly.

I.L.R. [2016] M.P., 3154
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Sujoy Paul
M.Cr.C. No. 1354/2012 (Gwalior) decided on 8 September, 2015

MANAV SHARMA ...Applicant
Vs.
UMASHANKAR TIWARI ...Non-applicant

Negotiable Instruments Act (26 of 1881), Sections 138 & 142 - Dishonour of cheque - Complaint - Delay of more than one month **- Application for condonation of delay u/S 142 of Negotiable Instruments Act not filed - Cognizance taken and notices issued - Condonation application filed at the stage of final hearing - Whether in a case u/S 138 of Negotiable Instruments Act, 1881, a complaint, filed with delay, is entertainable, when after taking cognizance of the complaint, application for condonation of delay has been filed - Held - The proceedings of the Court below upto the stage of taking cognizance of complaint are set aside - Entire complaint cannot be dismissed - Liberty given to the Complainant to file application u/S 142 of Negotiable Instruments Act for condonation of delay, and the Court below to decide the application in accordance with law.**
(Paras 6 to 11)

परक्राम्य लिखत अधिनियम (1881 का 26), धाराएँ 138 व 142 – चैक का अनादरण – परिवाद – एक माह से अधिक का विलंब – परक्राम्य लिखत अधिनियम की धारा 142 के अंतर्गत विलंब माफी हेतु आवेदन प्रस्तुत नहीं – संज्ञान लिया जाकर नोटिस जारी किए गए – विलंब माफी हेतु आवेदन अंतिम सुनवाई के प्रक्रम पर प्रस्तुत किया गया – क्या परक्राम्य लिखत अधिनियम, 1881 की धारा 138 के अंतर्गत मामले में विलंब से प्रस्तुत परिवाद सुनवाई योग्य है, वह भी तब जब विलंब माफी हेतु आवेदन परिवाद में संज्ञान लिए जाने के उपरांत प्रस्तुत किया गया है – अभिनिर्धारित – परिवाद का संज्ञान लिए जाने तक के प्रक्रम की निचले न्यायालय की कार्यवाही अपास्त की गई – संपूर्ण परिवाद को खारिज नहीं किया जा सकता – परिवादी को परक्राम्य लिखत अधिनियम की धारा 142 के अंतर्गत विलंब माफी हेतु आवेदन प्रस्तुत करने की स्वतंत्रता दी गई एवं निचला न्यायालय उक्त आवेदन को विधि अनुसार विनिश्चित करेगा।

Cases referred:

2006 CRLJ 193, Cr. OP No. 12167/2005 and Cr. MP. No. 4089/

2005 decided on 20.07.2009 (Madras High Court), (1987) 3 SCC 684, (2014) 4 SCC 704.

Rajesh Shukla, for the applicant.
H.K. Shukla, for the non-applicant/complainant.

ORDER

Sujoy Paul, J. :- This petition filed under Section 482 Cr.P.C. is directed against the order dated 24.01.2012, whereby the criminal revision of the petitioner against the order dated 19.07.2011 is dismissed.

2. The respondent filed a complaint under Section 138 of Negotiable Instruments Act against the petitioner. The said complaint was filed on 18.07.2005, whereas the last date of limitation was 17.07.2005. The court below took cognizance on the said complaint and issued notices to the other side. Shri Rajesh Shukla, learned counsel for the petitioner submits that complainant filed similar complaints which were barred by time. His similar complaint registered as Criminal Case No.2784/2011 was dismissed by court below on 25.4.2011. On dismissal of similar complaint, the complainant became vigilant and filed an application under Section 142 of Negotiable Instruments Act. The said application was allowed by the court below and delay of one day was condoned by order dated 19.07.2011. This order was called in question in Criminal Revision No.336/2011 which was decided on 24.01.2012. Shri Rajesh Shukla advanced singular contention by placing reliance on Section 142 of Negotiable Instruments Act, that complaint could have been entertained and cognizance could have been taken provided complainant satisfied the court at that stage that he had sufficient cause for not making a complaint within the prescribed time. It is urged that when complaint was preferred and cognizance was taken, there was no application for condonation of delay. Hence, cognizance could not have been taken. The said application cannot be entertained at the fag end of trial. The revisional court has erred in not considering the aforesaid statutory provision.

3. Shri H.K. Shukla, learned counsel for the complainant, on the other hand submits that the order by which cognizance was taken was not challenged. Thus, the said order has attained finality. The Court below has not committed any error which warrants interference by this Court. He submits that the first revision of the petitioner has already been dismissed. This is another revision by the petitioner under the garb of the petition under Section

482 Cr.P.C. Hence, it is not maintainable. Shri H.K. Shukla, relied on 2006 CRLJ 193 *(R.K. Chawla and another Vs. M/s Goa Antibiotics and Pharmaceuticals Ltd. and another)*.

4. No other point is pressed by learned counsel for the parties.

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

6. Before dealing with rival contentions, it is apt to quote Section 142 of NI Act.

> *"142. Cognizance of offence.-- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)–*
>
> *(a) no court shall take cognizance of any offence punishable in writing, made by the payee or, as the case may be, the holder in due course of the cheque;*
>
> *(b) such complaint is made within one month of the date on which the cause-of-action arises under clause (c) of the proviso to Section 138 :*
>
> *Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period."*
>
> *(Emphasis Supplied)*

6. Admittedly, when the court below took cognizance on the complaint and issued notices to the other side, the application for condonation of delay under Section 142 was not filed. It was filed almost at the stage of final hearing. A simple reading of proviso to Section 142 (b) shows that the court can take cognizance of a complaint provided the complainant satisfies the court that he had sufficient cause for not making a complaint within such period. Thus, the complainant needs to satisfy the court by explaining the delay before cognizance is taken. Showing of sufficient cause for not making a complaint within prescribed period is precondition of taking cognizance of a complaint. I find support in my view from the judgment of Madras High Court in the case of *S.Janaki vs. R.Thiagarajan* (Cri.OP No.12167/2005 and Cr.MP.

No.4089/2005, decided on 20.7.2009). In the said case, it is held that Section 142 is a substantive provision and complaint being filed beyond the period of limitation, cannot be entertained by allowing the respondent to file an application after cognizance has been taken by the Magistrate. That being the position, cognizance taken by Judicial Magistrate is without any sanction of law and, therefore, same must be quashed and set aside.

7. I respectfully agree with the said judgment of Madras High Court to the extent it is held that the application under Section 142 of NI Act cannot be entertained after taking cognizance of the complaint. However, the ancillary question is whether in such cases the entire complaint should be set aside or the said defect can be permitted to be cured. In my view, if application for condonation of delay is filed after taking cognizance of the complaint, the proceedings up to the stage of taking cognizance are bad in law and can be interfered with to that extent. The entire complaint should not be dismissed on that ground. The complainant can be given liberty to file application under Section 142 of NI Act from that stage. Putting it differently, if cognizance is taken without there being any application under section 142 of NI Act, the proceedings up to that stage when cognizance was taken must be set aside.

8. The Apex Court in (1987) 3 SCC 684 *(U.P.Pollution Control Board vs. M/s Modi Distilleries and others)*, opined that infirmity which could easily be removed by having the matter remitted back to the Magistrate to call upon the appellant to make a formal application, the permission to this extent can be granted, otherwise it would be a travesty of justice to defeat the prosecution on technical grounds.

9. In (2014) 4 SCC 704 *(Haryana State Cooperative Supply and Marketing Federation Ltd.)*, the Apex Court considered various provisions of NI Act and opined that procedural defects and irregularities which are curable should not be allowed to defeat substantive right or to cause injustice. The procedure, a handmaid to justice, should never be made a tool to deny justice or perpetuate injustice.

10. In view of aforesaid, in my view, the entire complaint cannot be dismissed. Liberty needs to be given to the complainant to file application under Section 142 of NI Act and satisfy the court.

11. Resultantly, the proceedings of court below up to the stage of taking cognizance of complaint is set aside. Respondent is given liberty to file

application under section 142 of NI Act. The court below may decide that application in accordance with law. It is made clear that this Court has not expressed any view on merits.

12. Petition is partly allowed.

Application partly allowed.

I.L.R. [2016] M.P., 3158

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.C. Sharma

M.Cr.C. No. 1366/2015 (Indore) decided on 4 November, 2015

VISHNU SHASTRI & ors. ...Applicants

Vs.

DEEPAK SURYAVANSHI & ors. ...Non-applicants

(Alongwith M.Cr.C. No. 1586/2015, M.Cr.C. No. 1617/2015 & M.Cr.C. No. 2651/2015)

A. Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Penal Code (45 of 1860), Sections 420, 467, 468, 471, 474 & 120-B **- Complaint filed against the applicants, who had purchased the land through registered sale deed - Complainant/Respondent No. 1 claiming himself to be in possession of the property on the basis of pending suit for specific performance of contract filed on the basis of oral agreement - Trial Court ordered for police report - Instead of the police report, FIR submitted by police authorities, which was lodged on the advice of Advocate General - Held - Mere pendency of a suit for specific performance of contract does not make a person to be the title holder of the property - Complaint itself was vague and filed to place pressure on bonafide purchasers - Police authorities lodged FIR without following prescribed procedure. (Paras 3 & 9)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं दण्ड संहिता (1860 का 45), धाराएँ 420, 467, 468, 471, 474 एवं 120–बी – आवेदकगण, जिन्होनें पंजीकृत विक्रय पत्र द्वारा भूमि क्रय की थी, के विरूद्ध परिवाद प्रस्तुत किया गया – परिवादी/प्रत्यर्थी क्र. 1 ने मौखिक करार के आधार पर प्रस्तुत संविदा के विनिर्दिष्ट अनुपालन हेतु लंबित वाद को आधार बनाते हुए संपत्ति पर कब्जे का दावा किया – विचारण न्यायालय ने पुलिस प्रतिवेदन हेतु आदेशित किया – पुलिस प्राधिकारियों द्वारा पुलिस प्रतिवेदन के स्थान पर प्रथम सूचना प्रतिवेदन प्रस्तुत की गई, जो कि महाधिवक्ता

के परामर्श पर दर्ज की गई थी – अभिनिर्धारित – संविदा के विनिर्दिष्ट अनुपालन हेतु वाद के लंबित होने मात्र से कोई व्यक्ति संपत्ति का स्वत्वधारी नहीं बनता – परिवाद अपने आप में अस्पष्ट है तथा सद्भाविक क्रेताओं पर दबाव निर्मित करने के लिए प्रस्तुत किया गया है – पुलिस प्राधिकारियों ने विहित प्रक्रिया का पालन किए बगैर प्रथम सूचना प्रतिवेदन दर्ज किया।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 **- Applicants purchased the property through registered sale deed from title holder - No sale deed in favour of Respondent No. 1 - Mere breach of oral agreement by title holder does not amount to cheating, and intention of the purchaser was never dishonest - Allegations made in the complaint do not constitute an offence - Dispute is purely of civil nature - Criminal proceedings amount to abuse of the process of law - Complaint and FIR quashed. (Paras 14, 23 & 25)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – आवेदकगण ने पंजीकृत विक्रय पत्र द्वारा स्वत्वधारी से संपत्ति क्रय की – प्रत्यर्थी क्र. 1 के पक्ष में कोई विक्रय पत्र नहीं – स्वत्वधारी द्वारा मात्र मौखिक करार भंग किया जाना छल की कोटि में नहीं आता, एवं क्रेता का आशय कभी भी बेईमानीपूर्ण नहीं था – परिवाद में लगाए गए आक्षेप अपराध का गठन नहीं करते हैं – विवाद पूर्णतः सिविल प्रकृति का है – दाण्डिक कार्यवाहियाँ, विधि के दुरूपयोग की परिधि में आती हैं – परिवाद एवं प्रथम सूचना प्रतिवेदन अभिखण्डित।

Cases referred:

(2012) 10 SCC 155, (2009) 4 SCC 439, 2009 (1) MPLJ 163, AIR 1997 SCC 3104, (2008) 1 SCC (Cri.) 259, 2015 AIR SCW 5432, 2008 (3) SCC 920, (2006) 3 SCC (Cri.) 188, (2013) 3 SCC (Cri.) 891.

Manoj Munshi, for the applicants in M.Cr.C. No. 1366/2015.
Vivek Singh, for the applicant in M.Cr.C. No. 1586/2015.
Yogesh Gupta, for the applicants in M.Cr.C. Nos. 1617/2015 & 2651/2015.
S.C. Agrawal, for the non-applicant No. 1 in M.Cr.C. No. 1366/2015, for the non-applicant No. 2 in M.Cr.C. No. 1586/2015 and for the non-applicant No. 3 in M.Cr.C. No. 1617/2015 & M.Cr.C. No. 2651/2015.
Bhuwan Deshmukh, for the non-applicant No. 2 & 3/State in M.Cr.C. No. 1366/2015, for the non-applicant No. 1/State in M.Cr.C. No. 1586/2015 and for the non-applicant No. 1/State & 2 in M.Cr.C. No. 1617/2015 & M.Cr.C. No. 2651/2015.

(Supplied: Paragraph numbers)

ORDER

S.C. SHARMA, J. :- Regard being had to the similar controversy involved in above cases, they have been heard analogously together with the consent of the parties and a common order is being passed in the matter. Facts of MCRC No.1366/2015 are narrated as under:-

2. The applicants before this court have filed this present application for quashment of FIR No. 913/2014 dated 11-10-2014 registered at Police Station Kotwali, District Dhar. The applicants has also prayed for quashment of a complaint case, which is pending against them.

3. The contention of the applicants is that the applicants have purchased a land through a registered sale deed from late Maharani Mrunalini Devi Puar, widow of late Maharaja Anandrao Puar on 20-08-2008, through a registered sale deed. It has also been stated that consideration was paid to Maharani Mrunalini Devi Puar and the sale deed was executed. Applicants have further stated that they now the title holder of the property in question by virtue of the sale deed. However, the respondent No.1 claiming himself to be in possession of the property has filed a complaint against the applicants for an offence u/s 420, 467, 468, 471, 474 and 120-B of the Indian Penal Code and in the complaint it has been stated that on the basis of some oral agreement, the complainant was placed in possession of the property in question and, therefore, respondent No.1 is claiming possession on account of some oral agreement with late Maharani Mrunalini Devi Puar and it is alleged that the applicants have committed an offence u/s 420, 467, 468, 471, 474 and 120-B of the Indian Penal Code. The complaint was filed in the year 2014 and the trial court by order dated 30-07-2014 has called for a police report. The matter was fixed on 13-10-2014 and the police authorities instead of submitting a report have submitted a first information report before the trial court and the reasons assigned by the police authorities was that they have contacted the learned Additional Advocate General and on his instruction First Information Report was lodged and, therefore, First Information Report was brought to the notice of the trial court. Order sheet dated 30-07-2014 and order sheet dated 13-10-2014 reads as under :-

30/07/2014

परिवादी द्वारा श्री जी.एस. चौहान अभि.उप. ।
प्रकरण धारा 156 (3) द.प्र.स. पर आदेश हेतु नियत है ।

परिवादी द्वारा प्रस्तुत परिवाद पत्र के तथ्य एवं परिवादी के विद्वान अभिभाषक द्वारा प्रस्तुत तर्कों के आलोक में प्रस्तुत परिवाद पर पुलिस प्रतिवेदन बुलाया जाना न्यायोचित प्रतीत होता है ।

थाना प्रभारी धार को परिवाद पत्र की प्रतिलिपि भेजी जाकर निर्देशित किया जाता है कि वह आगामी तिथि पर प्रतिवेदन प्रस्तुत करें ।

प्रकरण प्रतिवेदन प्रस्तुति हेतु दिनांक 13.10.2014 को पेश हो ।

13.10.2014

परिवादी द्वारा श्री एस.सी. अग्रवाल अभिभाषक उपस्थित ।

परिवादी अनुपस्थित उसकी ओर से श्री अग्रवाल अभि0 द्वारा हाजरी माफी आवेदन इस आधार पर प्रस्तुत किया गया कि परिवादी बीमार है इसलिए न्यायालय में आने में असमर्थ है दर्शित कारण उचित प्रतीत होने से आवेदन बाद विचार स्वीकार किया गया ।

प्रकरण पुलिस द्वारा जॉच प्रतिवेदन प्रस्तुति हेतु नियत है ।

पुलिस थाना धार की ओर से आरक्षक कैलाश कटारा ने उपस्थित होकर परिवाद पत्र के आधार पर थाना कोतवाली धार के अपराध कमांक 913/2014 पर धारा 420,467,468,471,474 व 120 बी दिनांक 11.10.2014 को अभियुक्तगण के विरूद्ध अपराध पंजीबद्ध कर एफ आय आर की छाया प्रति प्रस्तुत की है ।

परिवादी के विद्वान अभि0 श्री एस.सी. अग्रवाल ने निवेदन किया कि प्रकरण में अभियुक्तगण के विरूद्ध थाना कोतवाली धार द्वारा प्रथम सूचना रिपोर्ट पंजीबद्ध की जा चुकी है । अतः अनुसंधान अधिकारी को निर्देशित किया जावे कि अभियुक्तगण को तुरंत गिरफ्तार कर तथा सम्पूर्ण अनुसंधान पूर्ण कर 15–20 दिन के अंदर अंतिम प्रतिवेदन न्यायालय में प्रस्तुत करें ।

सुना गया प्रकरण का अवलोकन किया गया । परिवादी द्वारा दिनांक 15–07–2014 को यह परिवादी माननीय मुख्य न्यायिक मजि0 महोदय धार के न्यायालय में प्रस्तुत किया गया था । जो इस न्यायालय को दिनांक 18–07–2014 को माननीय मुख्य न्यायिक मजि0 के अंतरण आदेश से प्राप्त हुआ था। उक्त दिनांक को प्रकरण में आगामी तिथि 30–07–2014 दं0प्र0सं0 की धारा 156 (3) पर आदेश न करते हुए थाना प्रभारी धार को जॉच प्रतिवेदन प्रस्तुत करने हेतु निर्देशित किया गया था किंतु थाना धार द्वारा जॉच प्रतिवेदन प्रस्तुत न करते हुए एडवोकेट जनरल माननीय उच्च न्यायालय खण्डपीठ इन्दौर से अभिमत प्राप्त कर अभियुक्तगण के विरूद्ध थाना धार के अपराध कं. 913/14 पर दिनांक 11.10.2014 को भा0दं0 सा0 की धारा 420,467,468,471,474 व 120 बी के अंतर्गत प्रथम सूचना रिपोर्ट लेखबद्ध की गई

है ।

न्यायालय द्वारा थाना प्रभारी धार को जॉच प्रतिवेदन प्रस्तुत करने हेतु निर्देशित किया गया था न कि अभियुक्तगण के विरूद्ध अपराध पंजीबद्ध करने हेतु । चूंकि थाना धार द्वारा अभियुक्तगण के विरूद्ध एडवोकेट जनरल म0प्र0 उच्च न्यायालय खण्डपीठ इन्दौर से अभिमत प्राप्त कर उनकी अनुसंशा पर प्रथम सूचना रिपोर्ट लेखबद्ध कर अनुसंधान प्रारंभ किया जा चुका है । ऐसी स्थिति में अभियुक्तगण को तुरंत गिरफ्तार किये जाने एवं अभियुक्तगण के विरूद्ध अंतिम प्रतिवेदन प्रस्तुत किये जाने का अनुसंधान अधिकारी को आदेश दिया जाना अनुसंधान में हस्तक्षेप होगा जो न्यायोचित प्रतीत नहीं होता है ।

न्यायादृष्टांत रामरतन विरूद्ध स्टेट ऑफ हरियाणा 2004 सी आर एल जे 3617, थानचंद्र विरूद्ध स्टेट ऑफ राजस्थान, 1998 सी आर एल जे 3700, वीरेन्द्र कुमार शर्मा विरूद्ध स्टेट ऑफ बिहार 2000, सी आर एल जे 145 में माननीय न्यायालय द्वारा यह अभिमत दिया है कि धारा 210 दं0प्र0सं0 के प्रावधान आज्ञापक है, जहॉ मजिस्ट्रेट को यह पता लग जाये कि अपराध में पुलिस अनुसंधान हो रहा है तब उसके लिये यह आवश्यक है कि वह परिवाद प्रकरण की कार्यवाही रोक ले ।

प्रस्तुत परिवाद में थाना कोतवाली धार द्वारा अभियुक्तगण के विरूद्ध अपराध पंजीबद्ध कर अनुसंधान प्रारंभ किया जा चुका है । अतः उक्त न्यायदृष्टांत के आलोक में प्रस्तुत परिवाद थाना कोतवाली धार द्वारा अंतिम प्रतिवेदन प्रस्तुत किये जाने तक सीगित किया जाता है ।

प्रकरण अंतिम प्रतिवेदन प्रस्तुति हेतु नियत किया जाता है ।

प्रकरण अंतिम प्रतिवेदन प्रस्तुति हेतु दिनांक 11.02.2015 को पेश हो ।

4. Learned counsel for the applicants have vehemently argued before this court that they are bona-fide purchaser of the property. They have purchased the property through a registered sale deed and the present case is nothing only a sheer abuse of the process of law under the Code of Criminal Procedure, 1973 on the part of the respondent No.1 as well as on the part of the respondent State. He has also argued that the police authorities were simply directed to submit a report in the matter and they should have submitted a report by investigating the matter as provided u/s 156 of the Code of Criminal Procedure, 1973, however, instead of investigating the matter a First Information Report was registered u/s 156 of the Code of Criminal Procedure, 1973. Learned counsel for the applicants have prayed for quashment of the complaint as well as quashment of all further proceedings including the First Information Report.

5. On the other hand, learned counsel for the respondent No.1 Mr S.C. Agrawal has argued before this court that the respondent No.1 has entered

into an oral agreement with Maharani Mrunalini Devi Puar and he was placed in possession of the property in question. It has also been argued that the respondent No.1 has filed a suit for specific performance of contract and the present applicants were aware of the aforesaid fact and, therefore, in connivance with late Maharani Mrunalini Devi Puar a sale deed was executed and have certainly committed an offence u/s 420, 467, 468, 471, 474 and 120-B of the Indian Penal Code.

6. Learned counsel for the respondent No.1 Mr S.C. Agrawal has placed heavy reliance upon a judgments passed by the Apex court in the case of *State of Madhya Pradesh Vs. Surendra Kori* reported in (2012) 10 SCC 155, *Vijayander Kumar and others Vs. State of Rajasthan and another* reported in (2014) SCC 389, *Mahesh Chaudhary Vs. State of Rajasthan and another* reported in (2009) 4 SCC 439, V.C. *Raam Sukaesh and others Vs. State of M.P. and others* reported in 2009(1) MPLJ 163 and lastly upon the judgment delivered by the Hon'ble Supreme Court in *Madhu Bala Vs. Suresh Kumar and others* reported in AIR 1997 SCC 3104.

7. Heard learned counsel for the parties and perused the record.

8. In the present case it is an undisputed fact that late Maharani Mrunalini Devi Puar has executed a sale deed on 20-02-2008. It has not been disputed by the other side. It is also an undisputed fact that respondent No.1 is claiming title on the basis of some oral agreement as stated before this court as also in the complaint filed before the trial court. It is again an admitted fact that complaint was preferred in the year 2014 alleging commission of offence u/s 420, 467, 468, 471, 474 and 120-B of the Indian Penal Code. The learned trial judge vide order dated 30-07-2014 has arrived at a conclusion that a police report is required in the matter as provided u/s 156 of the Code of Criminal Procedure, 1973. The Station House Officer was directed to submit a report and matter was fixed for 13-10-2014. On 13-10-2014 it was brought to the notice of the learned Judge that First Information Report was registered on 11-10-2014 for an offence u/s 420, 467, 468, 471, 474 and 120-B of the Indian Penal Code. The same order sheet reflects that trial court has observed that at no point of time police authorities were directed to register a First Information Report straightaway. Section 156 of the Code of Criminal Procedure, 1973 reads as under :-

"156. **Police officer' s power to investigate cognizable**

case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned.

9. In the considered opinion of this court, the Magistrate was certainly competent to direct the Station House Officer to enquire into the matter and a report was called for. The police authorities on the basis of some opinion which is not before this court given by the office of the Advocate General has straightaway lodged a First Information Report. In the present case it is not the case of the respondent No.1, that a registered sale deed was executed in his favour in respect of the property in question, on the contrary he has filed a suit for specific performance of contract and the same is still pending. It is an undisputed fact that late Maharani Mrunalini Devi Puar was the exclusive owner of the property in question and during her lifetime through a sale deed she has sold the property to the present applicants. In the considered opinion of this court unless and until its a decree of specific performance of contract granted to the plaintiff, he does not become a title holder of the property, that too unless and until the sale deed is executed in his favour. Mere pendency of a suit of specific performance of contract does not make a person to be the title holder of the property and, therefore, in the considered opinion of this court compliant itself was a vague complaint and it was filed to place pressure upon the applicants, who are the bonafide purchasers. This court fails to understand as how the police authorities without following the prescribed procedure have lodged a First Information Report and, therefore, the First Information Report has to pave the path of extension.

10. Learned counsel for the respondent No.1 Mr S.C. Agrawal has placed reliance upon a judgment delivered in the case of *State of Madhya Pradesh*

Vs. Surendra Kori (supra).

11. In the aforesaid case, it has been held that High Court should normally refrain from giving prima facie decision and from quashing the proceedings in a case where facts are incomplete and hazy.

12. In the considered opinion of this court the facts in the present case are certainly not at all hazy nor incomplete. The facts of the present case reflects that sale deed was executed in accordance with law in favour of the applicants and there is no sale deed in existence in respect of the respondent No.1. Therefore, the judgment relied upon by the learned counsel for the respondent No.1 is of no help to the respondent No.1.

13. In the case of *Vijayander Kumar and others* (supra), the Apex court has held that in a given set of facts a case for civil proceedings can be made and also a criminal offence can be made out and only because a civil remedy is available, the complaint cannot be quashed. It has also been observed that real test is whether allegations in complaint disclose a criminal offence or not.

14. This court has carefully gone through the compliant and is of the considered opinion that the allegations made in the complaints if they are accepted as per the face-value does not constitute an offence as stated in the complaint. The present applicants have purchased a property through a sale deed from the title holder late Maharani Mrunalini Devi Puar and, there is no sale deed in favour of the respondent No.1 and therefore the complaint and First Information Report deserves to be set aside and the judgment relied upon by the learned counsel for the respondent No.1 is of no help to the respondent No.1.

15. In the case of *Mahesh Chaudhary Vs. State of Rajasthan* (supra) a similar view has been taken by the Apex court. In the present case, the dispute is primarily of civil nature and if there is any civil dispute between the parties the question of proceeding ahead against the applicants for alleged forgery and fraud as there is no element of criminality involved in the present case, does not arise and, therefore, the judgment delivered in the case of *Mahesh Chaudhary Vs. State of Rajasthan* (supra) is also of no help to the respondent No.1.

16. In the case of *V.C. Raam Sukaesh Vs. State of M.P.* (supra), it has been held by this court that criminal proceeding cannot be quashed only on

the ground that a civil remedy is available.

17. This court has carefully gone through complaint and the proceedings and as no criminal case is made out against the present applicants, the judgment delivered in the case of V.C. Raam Sukaesh Vs. State of M.P. (supra), is also of no help to the respondent No.1.

18. Learned counsel for the respondent No.1 has lastly placed reliance upon a judgment passed by the Apex court in the case of *Madhu Bala Vs. Suresh Kumar* (supra).

19. In the aforesaid case, there was a direction of Magistrate asking the police to register a case, whereas in the present case there was no such direction given to the police to register a case. The impugned order itself reflects that based upon some opinion of office of the Advocate General, the case was registered and therefore the judgment delivered in the case of *Madhu Bala Vs. Suresh Kumar* (supra) , too is also of no help to the respondent No.1, as it is distinguishable on facts.

20. The Apex court while dealing with issue in respect of inherent powers u/s 482 in *Inder Mohan Goswami and another Vs. State of Uttaranchal and others* reported in (2008) 1 SCC (Cri.) 259 in paragraphs 23, 24 and 46 held as under :-

> "23. This court in a number of cases has laid down the scope and ambit of courts powers under section 482 Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under section 482 Cr.P.C. can be exercised:
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> (i) to give effect to an order under the Code;
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> (ii) to prevent abuse of the process of court, and
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> (iii) to otherwise secure the ends of justice.
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> 24. Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading

to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute.

46. The court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressure the accused. On analysis of the aforementioned cases, we are of the opinion that it is neither possible nor desirable to lay down an inflexible rule that would govern the exercise of inherent jurisdiction. Inherent jurisdiction of the High Courts under Section 482 Cr.P.C. though wide has to be exercised sparingly, carefully and with caution and only when it is justified by the tests specifically laid down in the Statute itself and in the aforementioned cases. In view of the settled legal position, the impugned judgment cannot be sustained. "

21. In the present case there is a sheer abuse of the process of law which is resulting in injustice and the criminal prosecution is being used as an instrument of harassment by respondent No.1 and therefore the first information report and the proceedings pending before the trial court deserves to be quashed.

22. The Apex court in the case of *International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI) and others Vs. NIMRA Cerglass Technics (P) Ltd. and another* reported in 2015 AIR SCW 5432 in paragraph-25 held as under :-

"25. As per the terms of the technology transfer agreement, ARCI has to conduct performance guarantee tests and in those tests when ARCI was unsuccessful in achieving the targeted specifications, ARCI cannot be said to have acted with dishonest intention to cheat the respondent. Appellants- ARCI is a structure of Scientists, Team Leader and Associate Director and it is the team leader who actually executes the project, the job of Associate Director and Director is to monitor/review progress of the project. Appellants No.2 and 3 who were the Associate Director and Director of ARCI respectively were only monitoring the progress of the project

cannot be said to have committed the offence of cheating. In the facts of the present case, in our view, the allegations in the complaint do not constitute the offence alleged and continuation of the criminal proceeding is not just and proper and in the interest of the justice, the same is liable to be quashed."

23. Keeping in view the aforesaid, in the present case, even if there was some oral agreement between late Maharani Mrunalini Devi Puar and the respondent No.1 on mere breach of contract by Maharani Mrunalini Devi Puar will not amount to cheating and the intention of the applicant was never dishonest and the ingredients of Section 491 and 420 are not made out and, therefore, the complainant's proceedings and the F.I.R. deserves to be quashed.

24. In the case of *Suneet Gupta Vs. Anil Triloknath Sharma and others* reported in 2008(3) SCC 920, the Apex court in paragraphs 15, 18, 25 and 26 held as under :-

"15. Having heard the learned counsel for the parties and having considered the rival contentions, in our opinion, it cannot be said that the High Court was wrong in quashing criminal proceedings. It is clear from the case put forward by the appellant himself that virtually the proceedings were 'civil' in nature.

18. The High Court, in our opinion, rightly considered the facts in their proper perspective and observed that the dispute related to settlement of accounts between principal and its agent; the principal being M/s Johnson & Johnson Ltd. and the agent being M/s K.M. Agencies (earlier) and M/s Mangla Agencies (later). The High Court also noted that it was M/s K.M. Agencies which informed the principal i.e. M/s Johnson & Johnson Ltd. that M/s K.M. Agencies had closed its business and the business was thereafter continued by M/s Mangla Agencies and all drafts be issued in favour of M/s Mangla Agencies. The High Court took note of the fact that even the complainant had informed the principal that there was dispute between the partners of M/s K.M. Agencies and hence no payment should be made to M/s Mangla Agencies till the dispute was finally resolved between the parties. That,

however, does not give rise to criminal liability and entitle the complainant to initiate criminal proceedings, particularly when M/s Johnson & Johnson Ltd. substituted in the Company record name of M/s Mangla Agencies in place of M/s K.M. Agencies. The resultant effect of substitution of name was that whatever sums were due to M/s K.M. Agencies were considered to be due to M/s Mangla Agencies.

25. In the case on hand, the High Court was right in coming to the conclusion that a civil dispute pure and simple - between the parties was sought to be converted into a criminal offence only by resorting to pressure tactics and by taking police help which was indeed abuse of process of law and has been rightly prevented by the High Court.

26. For the foregoing reasons, in our view, the order passed by the High Court is in consonance with law and requires no interference. The appeals deserve to be dismissed and are, accordingly, dismissed. "

25. This court has carefully gone through the complaint. The dispute between the parties if any is purely of a civil nature and therefore as the dispute is of civil nature, the criminal proceedings initiated by complainant amounts to abuse of process of law and, therefore, deserves to be quashed.

26. In the case of *Indian Oil Corporation Vs. NEPC India Ltd. and others* reported in (2006) 3 SCC (Cri.) 188. The Apex court in Paragraph-12, 13, 14, 16 and 17 held as under :-

"12. The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few - Madhavrao Jiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre [1988 (1) SCC 692], State of Haryana vs. Bhajanlal [1992 Supp (1) SCC 335], Rupan Deol Bajaj vs. Kanwar Pal Singh Gill [1995 (6) SCC 194], Central Bureau of Investigation v. Duncans Agro Industries Ltd., [1996 (5) SCC 591], State of Bihar vs. Rajendra Agrawalla [1996 (8) SCC 164], Rajesh Bajaj v. State NCT of Delhi, [1999 (3) SCC

259], Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. [2000 (3) SCC 269], Hridaya Ranjan Prasad Verma v. State of Bihar [2000 (4) SCC 168], M. Krishnan vs Vijay Kumar [2001 (8) SCC 645], and Zandu Phamaceutical Works Ltd. v. Mohd. Sharaful Haque [2005 (1) SCC 122]. The principles, relevant to our purpose are :

(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with malafides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out : (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual

dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceedings are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged. In G. Sagar Suri vs. State of UP [2000 (2) SCC 636], this Court observed :

"It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution,

being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under section 250 Cr.P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may.

16. The respondents, no doubt, have stated that they had no intention to cheat or dishonestly divert or misappropriate the hypothecated aircraft or any parts thereof. They have taken pains to point out that the aircrafts are continued to be stationed at Chennai and Coimbatore Airports; that the two engines of VT-NEK though removed from the aircraft, are still lying at Madras Airport; that the two DART 552 TR engines of VT-NEJ were dismantled for the purpose of overhauling/repairing; that they were fitted to another Aircraft (VT- NEH) which had been taken on lease from 'M/s Aircraft Financing and Trading BV' and that the said Aircraft (VT-NEH) has been detained by the lessor for its dues; that the two engines which were meant to be fitted to VT-NEJ (in places of the removed engines), when sent for overhauling to M/s Hunting Aeromotive, U.K., were detained by them on account of a dispute relating to their bills; and that in these peculiar circumstances beyond their control, no dishonest intent could be attributed to them. But these are defences that will have to be put forth and considered during the trial. Defences that may be available, or facts/aspects when established during the trial, may lead to acquittal, are not grounds for quashing the complaint at the threshold. At this stage, we are only concerned with the question whether the averments in the complaint spell out the ingredients of a criminal offence or not.

17. The High Court was, therefore, justified in rejecting the contention of the respondents that the criminal proceedings should be quashed in view of the pendency of several civil

proceedings."

27. The complaint in the present case purely makes out a case of civil litigation. The allegations in the complaint not at all disclose a criminal offence, the complainant, proceeding and FIR deserves to be quashed and it is accordingly quashed.

28. In the case of *Ravinder Singh Vs. Sukhbir Singh and others* reported in (2013) 3 SCC (Cri) 891 in Paragraphs-33 and 34 held as under :-

> "33. The High Court has dealt with the issue involved herein and the matter stood closed at the instance of Respondent 1 himself. Therefore, there can be no justification whatsoever to launch criminal prosecution on that basis afresh. The inherent power of the court in dealing with an extraordinary situation is in the larger interest of administration of justice and for preventing manifest injustice being done. Thus, it is a judicial obligation on the court to undo a wrong in course of administration of justice and to prevent continuation of unnecessary judicial process. It may be so necessary to curb the menace of criminal prosecution as an instrument of operation of needless harassment. A person cannot be permitted to unleash vendetta to harass any persons needlessly. *Ex debilto justitiae* is inbuilt in the inherent power of the court and the whole idea is to do real, complete and substantial justice for which the courts exist. Thus, it becomes the paramount duty of the court to protect an apparently innocent person, not to be subjected to prosecution on the basis of wholly untenable complaint.
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> 34. In view of the above, the judgment of the High Court impugned herein dated 14-12-11 as well as of the Revisional Court is set aside. The order of the Metropolitan Magistrate dated 13-08-2009 is restored. The complaint filed by respondent 1 under the provisions of Section 3 (1) (viii) of the 1989 Act is hereby quashed. The appeal is thus allowed."

29. Keeping in view the aforesaid judgment as the present complainant does not disclose any offence, it is an attempt to prosecute an innocent person, that too on account of civil litigation, deserves to be quashed.

30. In the considered opinion of this court, the applicants are bonafide purchaser. They have purchased the property from the title holder of the property and infact the respondent No.1 is claiming title on the basis of some oral agreement before the trial court in a civil suit. In the complaint itself a statement has been made in Paragraph-3 of the complaint that some oral agreement took place between the respondent No.1 and late Maharani Mirnalini Dev Paur (sic:Mrunalini Devi Puar).

31. Resultantly, in the considered opinion of this court, the present applicants have not committed any offence of any kind under the Indian Penal Code nor under the any other statutory provisions of law and the complaint appears to be a sheer abuse of the process of law, as provided under the Code of Criminal Procedure, 1973 and, therefore, it is accordingly quashed and other subsequent proceedings including the First Information Report is also accordingly quashed.

32. No order as to costs.

33. Certified copy as per rules.

Order accordingly.

I.L.R. [2016] M.P., 3174

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Alok Verma

M.Cr.C. No. 9148/2012 (Indore) decided on 16 November, 2015

ANKIT NEEMA & ors. ...Applicants

Vs.

STATE OF M.P. & anr. ...Non-applicants

A. Penal Code (45 of 1860), Section 498-A - **When the offence is alleged to have taken place, Non-applicant No. 2 was wedded wife of Applicant No. 1 - Therefore, he cannot now be heard to say that after divorce, no case is made out against him.** **(Para 8)**

क. दण्ड संहिता (1860 का 45), धारा 498–ए – जिस समय अपराध घटित होना अभिकथित है, तब अनावेदिका क्र. 2 आवेदक क्र. 1 की विवाहिता पत्नी थी – इसलिए आवेदक की कही इस बात पर अब सुनवाई नहीं हो सकती कि तलाक के उपरांत उसके विरूद्ध कोई मामला नहीं बनता।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 188

- For the particular offence, which taken place out-side India, sanction of the Central Government is required, which can be obtained after taking of cognizance by the Magistrate. (Para 10)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 188 – भारत के बाहर घटित किसी अपराध विशेष के लिए केन्द्र सरकार की मंजूरी अपेक्षित है, जिसे मजिस्ट्रेट द्वारा संज्ञान लिये जाने के पश्चात् अभिप्राप्त किया जा सकता है।

Cases referred:

(1991) 3 SCC 451, 2001 (4) Crimes 19 (SC), AIR 1992 SC 604, AIR 2010 SC 3363.

Gaurav Chhabra, for the applicants.
Mini Ravindran, for the non-applicant No. 1/State.
Nilesh Dave, for the non-applicant No.2.

ORDER

ALOK VERMA, **J. :-** This application under section 482 of Cr.P.C. is filed for quashment of the FIR filed at Police Station – Annapurna, District - Indore in Crime No.664/2012 under section 498-A of IPC.

2. As per the facts stated in the FIR, the complainant and respondent No.2 here, lodged a report at Police Station – Annapurna, District – Indore on 11.11.2012 stating therein that she was married to applicant No.1 on 27.06.2010 at Ujjain. After marriage, she came to her matrimonial house at 81, Siddhi Vinayak Vinay Nagar, Kesharbag Road, Indore. After 15 days of marriage, applicant No.1 went back to America. Even before her husband left India for America, respondent No.2 and 3, father-in-law and mother-in-law started harassing her and committed cruelty on her for bringing more dowry from her parents. They also beat her and used to say that they spent money on the education of the applicant No.1, that they will recover from father of respondent No.2. After insisting on many times, her parent-in-laws took her to America on 20.07.2012 after two years of her marriage and there, all the three applicants committed cruelty on her and also got many papers signed by her. On 05.10.2012, she was driven away from her home at Boston, America. Thereafter, her father arranged her stay with Avinash Gupta at Columbus, America. She lived with him till 03.11.2012. On 02.11.2013, her father died and thereafter, she came back to India and lodged report on 11.11.2012.

3. This application under section 482 of Cr.P.C. is filed on the ground that applicant No.1 has been serving in USA and he is a Chartered Accountant by profession. On 27.06.2010, he married respondent No.2 at Ujjain. After 15 days of marriage, he left India for USA and respondent No.2 remained with applicant No.2 and 3. For two years, she mostly lived with her parents at Ujjain and occasionally she used to live with respondents No.2 and 3 at Indore on various festivals. Respondents No.2 and 3 always wanted that she should go to America and live with her husband. However, whenever, she applied for visa, she intentionally gave wrong answers to the questions put to her during interview. Therefore, visa was rejected. Finally, she went to USA on 20.07.2012 to live with her husband. After living there together for some time, they reached to the conclusion that it was not possible for them to live together, therefore, they filed a joint petition before the Court of Commonwealth of Massachusetts in USA. The said petition was allowed and decree of divorce was passed by the Court in USA. After the divorce, she left house of applicant No.1 and went to live in her relatives house. All the documents filed before the Court were signed by respondent No.2 voluntarily. After coming back to India, she lodged FIR in question.

4. According to the averments made in the application, applicant No.1 always lived in USA and, therefore, he could not commit any cruelty on her. The allegations against applicants No.2 and 3 are omnibus in nature. No specific date and time was stated in the FIR. Therefore, this application is liable to be allowed.

5. Respondent No.2 filed a joint petition of divorce, therefore, it is clear that no dispute was left between applicant No.1 and respondent No.2, therefore, lodging of FIR is melafide. It is also averted that under section 188 of Cr.P.C., for enquiry of trial of the offence, which is committed outside India, sanction of Central Government is required but no such sanction was obtained before proceeding investigation in this case.

6. Counsel for the applicants submits that when the FIR was lodged by respondent No.2, their marriage was already annulled and the applicant No.1 was not her husband. However, in the present case, it is submitted by the applicants that joint application was filed before the foreign court alongwith affidavit etc in which it was mentioned that marriage was irretrievably broken and divorce be granted according to the provision of Massachusetts General Laws Chapter 208(1-a).

7. The first question arises for consideration is whether, this decree can be recognized in this country. On this point, the principle laid down by Hon'ble the Supreme Court in the case of *N. Narasimha Rao and others Vs. Y. Venkata Lakshmi and another* reported in (1991) 3 SCC 451 may be referred to. In paragraphs 20 and 21, Hon'ble the Supreme Court observed thus:-

> 20. From the aforesaid discussion the following rule can be deduced for recognizing foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.
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> 21. The aforesaid rule with its stated exceptions has the merit of being just and equitable. It does no injustice to any of the parties. The parties do and ought to know their rights and obligations when they marry under a particular law. They cannot be heard to make a grievance about it later or allowed to bypass it by subterfuges as in the present case. The rule also has an advantage of rescuing the institution of marriage from the uncertain maze of the rules of the Private International Law of the different countries with regard to jurisdiction and merits based variously on domicile, nationality, residence-permanent or temporary or ad hoc forum, proper law etc. and ensuring certainty in the most vital field of national life and conformity with public policy. The rule further takes account of the needs

> of modern life and makes due allowance to accommodate them. Above all, it gives protection to women, the most vulnerable section of our society, whatever the strata to which they may belong. In particular it frees them from the bondage of the tyrannical and servile rule that wife's domicile follows that of her husband and that it is the husband's domicilliary law which determines the jurisdiction and judges the merits of the case.

8. Applying the principle laid down by Hon'ble the Supreme Court, prima facie, it appears that decree is not recognizable in India. This apart, when the offence is alleged to have taken place, respondent No.2 was wedded wife of applicant No.1, therefore, he cannot now be heard to say that after divorce, no case is made out against him.

9. Next comes the question is whether, the investigation can be carried out without sanction of Central Government as mandated by section 188 of Cr.P.C. On this point, judgment of Hon'ble the Supreme Court in the case of *Thota Venkateshwarlu Vs. State of A.P. Tr. Princl. Sec. and Anr.* reported in 2001(4) Crimes 19 (SC) may be referred to. In this judgment, Hon'ble the Supreme Court held that upto taking cognizance, no previous sanction would be required from the Central Government in terms of proviso to section 188 of Cr.P.C. However, trial cannot proceed beyond cognizance stage without sanction of the Central Government. It was further held that the Magistrate may proceed with the trial regarding to the offence alleged to have been committed in India. However, in respect of offence alleged to have been committed outside India, Magistrate would not proceed with the trial without sanction of Central Government as envisaged in the proviso to section 188 of Cr.P.C.

10. Accordingly, at this stage, when the investigation is going on, no sanction of Central Government is required. However, for particular offence which is taken place outside India, sanction of the Central Government is required which can be obtained after taking of cognizance by the Magistrate. Accordingly, at this stage, the investigation can go on and the arguments putforth by counsel for the applicants in respect of application of section 188 of Cr.P.C. are not applicable in this case.

11. Coming to the merits of the case, counsel for the applicants placed reliance on the judgment of Hon'ble the Supreme Court in the case of *State of Haryana Vs. Bhajanlal* reported in AIR 1992 SC 604 where, Hon'ble the

Supreme Court laid down the guidelines and gave list of the circumstances under which the powers granted under section 482 of Cr.P.C. can be exercised. Some of them are whether, the allegations made in the FIR or complaint and other evidence collected in respect of the same do not disclose commission of offence against the accused.It is also laid down by Hon'ble the Supreme Court that allegations made in the FIR are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there are grounds for proceeding against the accused. When there is legal bar under the provision of the Code or in other law which is applicable. When criminal proceedings are melafide (sic:malafide) or whether, they are instituted for wreaking vengeance on the accused.

12. Applying these principles on the facts of the present case, the allegations were made in the FIR that applicants No.2 and 3 demanded dowry and committed atrocity and harassment. The details may be given by the complainant in her statement under section 161 of Cr.P.C. and also before the Court, there is no need to give every minute detail in the FIR itself. Similarly, so far as the applicant No.1 is concerned, arguments of counsel for the applicants is that he was not present in India for two years, therefore, no case is made out against him for which he placed reliance on the judgment of Hon'ble the Supreme Court in the case of *Preeti Gupta and another Vs. State of Jharkhand and another* reported in AIR 2010 SC 3363 in which it was held that married sister-in-law, who is living with her husband and unmarried brother-in-law, who is living separately from the married couple cannot be implicated under section 498-A of IPC. In that particular case, couple was living at Bombay and immediately after the marriage, complainant moved to Bombay to live with her husband where, dispute arose between the couple. However, in the present case, applicant No.1 is husband and this principle laid down in the case of *Preeti Gupta* (supra) cannot be applied in the present case.

13. In this view of the matter, no case is made out for interference under the extra ordinary jurisdiction conferred to this Court under section 482 of Cr.P.C. The application is devoid of merit, liable to be dismissed and is hereby, dismissed.

C.c. as per rules.

Application dismissed.

I.L.R. [2016] M.P., 3180
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Sheel Nagu
M.Cr.C. No. 13107/2015 (Gwalior) decided on 20 June, 2016

MANU ANAND MANAGING DIRECTOR ...Applicant
Vs.
M.P. POLLUTION CONTROL BOARD ...Non-applicant

Water (Prevention and Control of Pollution) Act, (6 of 1974), Sections 43, 44 & 49 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Inherent powers - Quashing the complaint - Liability of the officers of the Company **- Petitioner is the Managing Director of the Company - He is not responsible for the day to day control of the affairs of the factory of the Company from where the industrial effluent is alleged to have been discharged - Section 47 (1) of the Act mentions that a person shall not be liable to be proceeded against if he is able to establish that the offence was committed without his knowledge or that the same was committed despite the said person exercising due diligence to prevent the offence - Petition allowed. (Paras 5.3 & 8)**

जल (प्रदूषण निवारण तथा नियंत्रण) अधिनियम, (1974 का 6), धाराएँ 43, 44 व 49 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अंतर्निहित शक्तियाँ – परिवाद का अभिखण्डित किया जाना – कंपनी के अधिकारियों का दायित्व – याची कंपनी का प्रबंध संचालक है – वह कंपनी के कारखाने, जहाँ से औद्योगिक बहिःस्त्राव का निस्सारण किया जाना अभिकथित है, के मामलों के दिन प्रतिदिन नियंत्रण हेतु उत्तरदायी नहीं है – अधिनियम की धारा 47(1) यह उल्लेख करती है कि कोई व्यक्ति उसके विरूद्ध कार्यवाही किये जाने हेतु दायी नहीं होगा यदि वह यह सिद्ध कर पाता है कि अपराध उसकी जानकारी के बिना कारित किया गया था अथवा उस व्यक्ति द्वारा अपराध को रोकने हेतु सम्यक् तत्परता दिखाने के बावजूद अपराध कारित किया गया था – याचिका मंजूर।

Cases referred:

(2011) 1 SCC 176, AIR 1971 SC 2162, AIR 2015 SC 675.

Surendra Singh with *Saurabh Agrawal,* for the applicant.
Harish Dixit, for the non-applicant/Pollution Control Board.

ORDER

SHEEL NAGU, J. :- Inherent powers of this court under Section 482 of Cr.P.C. are invoked for quashment of criminal complaint alleging offences under Sections 43, 44 and 49 of Water (Prevention and Control of Pollution), Act, 1974 (for brevity the Act), cognizance of which has been taken by order dated 3/7/2015 (Annexure-P/2) passed in Cri. Case No. 434/15 by JMFC Gohad, district Bhind (M.P.) against the petitioner,who happens to be the Managing Director of the Cadbury India Ltd. (now known as Mondelez India Foods Private Limited), which is a company registered under the Companies Act having its headquarters at Mumbai and factory at Malanpur Industrial Area, district Bhind.

2. The respondents by the complaint in question alleged offences punishable under Sections 43, 44 and 49 of the Act on the allegation of contravention of sections 24,25 and 26 of the Act of exuding untreated industrial effluent. The court of competent criminal jurisdiction has taken cognizance by issuing summons against three persons including the petitioner herein, impleaded as accused of the said complaint.

2.1 Pertinently, other two accused impleaded in the complaint were Company itself and one Jai Kumar Nair, Vice President of the said company.

3. Shri Surendra Singh, learned Senior Advocate alongwith Shri Saurabh Agrawal, counsel for the petitioner has raised singular ground of challenge to the said complaint by contending that the petitioner being Managing Director of the said company was not the person in day-to-day control of the affairs of the factory of the company from where the industrial effluent is alleged to have been discharged. In continuation, it is alleged that when one of the accused namely Jai Kumar Nair, Vice President of the said company had been appointed as Factory Manager w.e.f. 1/4/2014 by resolution vide Annexure-P/7 of the Board of Directors of the said company dated 23/5/2014 then, there was neither any occasion nor any lawful authority with the respondents to implead the petitioner as an accused in the complaint. In support of his submission, learned counsel placed reliance on the decisions in the cases of *Pepsico India Holdings (P) Ltd. v. Food Inspector & another* (2011) 1 SCC 176 (para 50), *Girdhari Lal Gupta v. D.H. Mehta & Another* (AIR 1971 SC 2162) (para 6) and *Puja Ravinder Devidasani v. State of Maharashtra & another* (AIR 2015 SC 675 (paras 18, 19 and 20).

3.1 Shri Harish Dixit, learned counsel for the respondent on the other hand contends that the petitioner being Managing Director of the company was very much in charge and responsible for day-to- day affairs of the company and its business and therefore he cannot wriggle out of the clutches of section 47 by shifting liability to any other person.

4. Learned counsel for the rival parties are head (sic:heard).

5. In the present case, the factual matrix discloses that the incident is said to have taken place on 14/8/14. The impugned complaint, Annexure-P/1, filed by the respondent describes the said company in para 1 followed by para 2 containing the factum that the company was issued environmental clearance under sections 25 and 26 of the said Act vide letter dated 22/8/2013 subject to fulfillment of two conditions mentioned therein. Thereafter para 3 describes facts which gave rise to the cause of action to the effect that on 14/8/2014 the employees of Water Pollution Control Board on inspection found industrial untreated effluent flowing from the drains and also detected food oil and polluted water including chemicals in the tank, which impelled the inspecting team to take samples and send them to laboratory for examination. Paras 4 and 5 relate to chemical examination by the laboratory which found the effluents to be polluted. Finally, para 7 of the complaint alleges that in view of above cause of action, offence under sections 43, 44 and 49 of the Act has been committed by the accused-petitioner which is endorsed by the prayer to the JMFC to punish the accused.

5.1 Noticeably, there is not even a whisper in the complaint that the alleged offence has been committed with the consent or connivance and/or due to neglect of the Director, Manager and Secretary or any other persons of the company.

5.2 At this stage, it would be appropriate to reproduce the provisions of section 47 of the Act as under:-

> **"47. OFFENCES BY COMPANIES.**
>
> (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed **was in charge of, and was responsible to the company for the conduct of, the business of the company, as well as the company,** shall be deemed to the guilty of the

offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge for that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the **offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director**, manager, secretary or other officer of the company, **such director**, manager, secretary or other officer **shall also be deemed to be** guilty of that offence and shall be **liable** to be proceeded against and punished accordingly."

5.3 Bare reading of section 47(1) of the Act indicates that the person who is in charge of and responsible to the company for the conduct of the business of the company, as well as company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against for the contravention of the provision of the said Act. The said section carves out an exception by way of proviso that the said person mentioned in Section 47(1) shall not be liable to be proceeded against if he is able to establish that the offence was committed without his knowledge or that the same was committed despite the said person exercising due diligence to prevent the offence.

5.4 Sub-section (2) of section 47 qualifies sub-section (1) by employing a non-obstinate clause providing that the penal provision nonetheless shall be attracted if consent, connivance or neglect is attributed to the Director, Manager, Secretary or any other officer of the company

5.5 In the instant case, the company by its resolution dated 23/5/14 (Annexure-P/7) has appointed Mr. Jai Kumar Nair as Factory Manager w.e.f. 1/4/14 and has expressly conferred upon said Shri Jai Kumar Nair *inter alia* the powers to comply with provisions of different enactments including the provisions of the Act. The relevant portion of the said resolution dated 23/5/14,

Annexure-P/7 is reproduced below:-

"AN EXTRACT OF THE MINUTES OF THE MEETING OF THE BOARD OF DIRECTORS OF MONDELEZ INDIA FOODS LIMITED (FORMERLY CADBURY INDIA LIMITED) HELD ON FRIDAY, 23RD MAY, 2014 AT BOARD ROOM, CADBURY HOUSE, BHULABHAI DESAI ROAD, MUMBAI 400 026.

Appointment of Factory Manager for Malanpur Factory:

"RESOLVED THAT in supersession to all earlier resolutio (sic:resolution), Mr. Jai Kumar Nair is hereby appointed as Factory Manager for the Malanpur Factory effective 1st April 2014.

RESOLVED FURTHER THAT without prejudice to the generality of the Powers of Attorney granted or to be granted to the Factory Manager in respect of the Malanpur Factory ("Factory"), the Factory Manager is hereby expressly conferred with the following powers in respect of the Factory:

(i) The power to comply with various provisions of the Factories Act, the Environmental (Protection) Act, the Water (Prevention and Control of Pollution) Act, the Water (Prevention and Control of Pollution) Cess Act, the Air (Prevention and Control and Pollution) Act, the industrial Disputes Act and other State and Central Legislations, and the Rules framed thereunder, with regard to labour and factory administration and the products manufactured at the Factory;

(ii) to (xxxiv) ....

RESOLVED FURTHER THAT Mr. Jai Kumar Nair being the person who has the ultimate control over the affairs of the Factory shall continue to be in ultimate control over the affairs of the said Factory and as such shall continue to perform and

> discharge all duties, obligations and responsibilities under the Factories Act, 1948 and the Rules framed thereunder as amended to date and from time to time, in respect of the Factories under his charge and he is hereby authorized and vested with full powers to do all such acts, deeds, matters and things as may be necessary or expedient for the aforesaid purposes. "

5.6 From the above, it is crystal clear that Mr. Jai Kumar Nair w.e.f. 1/4/14 was in charge and in control of the day-to-day affairs of the factory belonging to the company.

5.7 The power vested upon Mr. Jai Kumar Nair was that of an "occupier" as defined in section 2(d) of the said Act. Section 2(d) being relevant is reproduced below:-

> "2[(d) "occupier", in relation to any factory or premises, means the person who has control over the affairs of the factory or the premises, and includes, in relation to any substance, the person in possession of the substance."

5.8 The liability upon any person apart from the persons mentioned in section 47(1) of the Act can be fastened only when the complaint contains express allegation of presence of ingredients of element of consent, connivance or neglect on the part of Director, Manager, Secretary or other officer of the company. In the instant case, the impugned complaint in question is bereft of any such allegations against the petitioner who is Managing Director of the company. Moreover, the complaint further does not allege that the petitioner being Managing Director was in charge of day-to-day affairs of the factory/ company in question.

5.9 Thus, arraying of the petitioner as an accused in the complaint is uncalled for and unlawful. This court in this respect draws support from the law laid down by the Apex Court in the case of *Pepsi Food India Ltd.* (supra) which in para 50 observed thus:

> **"50.** As mentioned hereinbefore, the High Court erred in giving its own interpretation to the decision of this Court in S.M.S. Pharmaceuticals Ltd.'s case (supra), which was reiterated subsequently in several judgments, some of which have been

indicated hereinabove, and relying instead on the decision of Rangachari's case (supra), the facts of which were entirely different from the facts of this case. It is now well established that in a complaint against a Company and its Directors, the Complainant has to indicate in the complaint itself as to whether the Directors concerned were either in charge of or responsible to the Company for its day-to-day management, or whether they were responsible to the Company for the conduct of its business. A mere bald statement that a person was a Director of the Company against which certain allegations had been made is not sufficient to make such Director liable in the absence of any specific allegations regarding his role in the management of the Company."

5.10 Further assistance can be drawn from the observations made by the Apex Court in para 6 in the case of *Girdhari Lal Gupta* (supra). Para 6 reads thus:-

> **"6.** What then does the expression "a person in-charge and responsible for the conduct of the affairs of a company mean"? It will be noticed that the word 'company' includes a firm or other association and the same test must apply to a director in-charge and a partner of a firm in-charge of a business. It seems to us that in the context a person 'in-charge' must mean that the person should be in over all control of the day to day business of the company or firm. This inference follows from the wording of Section 23C(2). It mentions director, who may be a party to the policy being followed by a company and yet not be in-charge of the business of the company. Further it mentions manager, who usually is in charge of the business but not in over-all-charge. Similarly the other officers may be in charge of only some part of business."

5.11 Further inspiration may also be drawn from observations made in paras 18, 19 and 20 by the Apex court in the case of *Puja Ravinder Devidasani* (supra), which read thus:

> **"18.** In Girdhari Lal Gupta Vs. D.H. Mehta & Anr. (1971) 3 SCC 189, this Court observed that a person 'in charge of a

business' means that the person should be in overall control of the day to day business of the Company.

19. A Director of a Company is liable to be convicted for an offence committed by the Company if he/she was in charge of and was responsible to the Company for the conduct of its business or if it is proved that the offence was committed with the consent or connivance of, or was attributable to any negligence on the part of the Director concerned [See: State of Karnataka Vs. Pratap Chand & Ors. (1981) 2 SCC 335].

20. In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by the Company under Section 141 of the N.I. Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company."

6. From the above, it is evident that the petitioner who is Managing Director of the Factory as per allegation made in the complaint neither falls within the term "every person" mentioned in section 47(1) nor can be made an accused under Section 47(2) in the absence of any allegation of consent,connivance or neglect.

7. Before parting, it would not be out of place to mention that the prosecution is not remedy-less. It is always open to the prosecution to initiate proceedings under the Act against Mr. Jai Kumar Nair who being occupier has control over the affairs of the factory as per resolution, Annexure-P/7.

8. Consequently, the present petition is allowed. The impugned order dated 3/7/2015 passed in Cri. Case No. 434/15 by JMFC Gohad, district Bhind (M.P.) taking cognizance of the offence against the petitioner is quashed.

9. Copy of this order be sent to the concerning Court for information and compliance.

10. No cost.

Application allowed.

I.L.R. [2016] M.P., 3188
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice J.P. Gupta
M.Cr.C. No. 14708/2013 (Jabalpur) decided on 30 June, 2016

STATE OF M.P. ...Applicant
Vs.
RAMPAL & anr. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 378 (3) & 393 - **Application against acquittal whether maintainable in view of the fact that the appeal filed by victims before the Sessions Court, in which the State was not made party, has already been dismissed on merits on 06.03.2014 - Held - The order passed by the Sessions Court upon an appeal is final - No further appeal by the State would lie against the impugned order of acquittal - However, if the State is having any grievance against the final order of the appellate Court on account of not impleading the State as a party, the State may file revision or may invoke the provisions of Section 482 of Cr.P.C. or Article 226/227 of the Constitution of India - Application dismissed - All criminal Appellate Courts of State were directed to ensure compliance of provisions of Section 385 of Cr.P.C. with regard to issuance of notice to the State in such matters.** **(Paras 9, 10 & 11)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 378 (3) व 393 – क्या दोषमुक्ति के विरूद्ध प्रस्तुत आवेदन इस तथ्य की दृष्टि में पोषणीय है कि पीड़ित व्यक्तियों द्वारा सत्र न्यायालय के समक्ष प्रस्तुत अपील, जिसमें राज्य को पक्षकार नहीं बनाया गया था, को पूर्व में ही दिनांक 06.03.2014 को गुणदोष पर खारिज किया जा चुका है – अभिनिर्धारित – सत्र न्यायालय द्वारा अपील में पारित आदेश अंतिम है – दोषमुक्ति के आक्षेपित आदेश के विरूद्ध राज्य की ओर से अब आगे अपील नहीं होगी – तथापि, राज्य को पक्षकार न बनाये जाने के आधार पर यदि राज्य को अपीलीय न्यायालय के अंतिम आदेश के विरूद्ध कोई शिकायत है, तब राज्य पुनरीक्षण प्रस्तुत कर सकता है अथवा दं.प्र.सं. की धारा 482 के उपबंधों अथवा भारत के संविधान के अनुच्छेद 226/227 का अवलंब ले सकता है – आवेदन खारिज – राज्य के समस्त दाण्डिक अपीलीय न्यायालयों को ऐसे मामलों में दं.प्र.सं. की धारा 385 के अंतर्गत राज्य को नोटिस जारी करने संबंधी उपबंधों का पालन सुनिश्चित करने हेतु निदेशित किया गया।

Akhilesh Singh, P.L. for the applicant.
A.L. Gupta, for the non-applicants.

ORDER

J.P. GUPTA, J. :- This application is filed under section 378(3) of the Cr.P.C. on 28.10.2013 against the order of acquittal of the respondents passed by the Judicial Magistrate Class I, Satna, on 26.6.2013 in Criminal Case No.4403/2011 whereby the respondents have been acquitted of the charge under sections 325/34, 324/34 and 323/34 of the I.P.C.

2. During the course of hearing on admission, on perusal of record it is noticed that against the impugned judgment of acquittal private parties as victims had filed an appeal under the amended provision of section 372 Cr.P.C., which was registered as Criminal Appeal No.8/2014 before the Sessions Court, Satna, on 16.8.2013 in which the State was not made party and the said criminal appeal was dismissed on merit on 6.3.2014 affirming the impugned order of acquittal. Now, the question is whether this application filed by the State under section 378(3) Cr.P.C. is maintainable or has become infructuous.

3. Under the provisions of the Cr.P.C. in State case, the State has a right to file an appeal against the order of acquittal under section 378(1)(b) subject to provisions of sub-section (3). In exercising this power the State has filed this Application for leave to appeal.

4. Similarly, under section 372 Cr.P.C. after the amendment made by the Code of Criminal Procedure Amendment Act (No.5 of 2009) section 29, victim also has a right to file appeal against the order of acquittal in the Court where an appeal ordinarily lie against the order of conviction of such court. The amended provision of section 372 reads as under :-

> 372. **No appeal to lie unless otherwise provided.-** No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.
>
> **Provided** that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate

compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.

5. The word "victim" has also been defined by the same Amendment Act inserting provision of clause 'wa' in section 2 of the Cr.P.C. which reads as under :-

(wa) "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir;

6. In the present case, on perusal of record of the lower court, it is evident that the applicants who filed the appeal before the Sessions Judge, were injured person in the incident, hence they come within the purview of the victims. Therefore, they have rightly exercised their right to appeal given by the amended provision of section 372 Cr.P.C.

7. Learned Panel Lawyer appearing for the State has contended that in the appeal before the Sessions Court, the State was not made party and, hence, right of the State to file appeal against the order of acquittal cannot be considered to be extinguished, therefore, this application under section 378(3) Cr.P.C. is not infructuous and it is maintainable in law.

8. The aforesaid contention of learned Panel lawyer is not acceptable as the provision of section 393 Cr.P.C. makes it clear that the order passed by the appellate court upon an appeal shall be final except some exceptions. In this regard it would be appropriate to reproduce the provisions of section 393 Cr.P.C. in *toto* :-

393. Finality of judgments and orders on appeal.- Judgments and orders passed by an Appellate Court upon an appeal shall be final, except in the case provided for in section 377, section 378, Sub-Section (4) of section 384 or Chapter XXX:

Provided that notwithstanding the final disposal of an appeal against conviction in any case, the Appellate Court may hear and dispose of, on the merits.

1. an appeal against acquittal under section 378, arising out of the same case, or

2. an appeal for the enhancement of sentence under section 377, arising out of the same case.

9. The facts and circumstances of the case do not come in the purview of any exceptions mentioned in the provision of section 393 Cr.P.C. In such circumstances, the order passed by the appellate court, i.e. sessions court, is final in this case. In such circumstances, no further appeal by the State would lie against the impugned order of acquittal.

10. In the circumstances of this case, if the State is not agree and having grievance against the final order of the appellate court on account of not impleading the State as a party and giving any opportunity to support its case or for any other reason, the State may file revision or may also invoke the provision of section 482 Cr.P.C. or Article 226 and 227 of the Constitution of India according to its grievance. But, the State cannot claim that even the appeal against the impugned order is dismissed by the Sessions Judge and has become final, the State shall be given an opportunity to pursue its application for leave to appeal under section 378(3) Cr.P.C. Hence, it is held that in the aforesaid circumstances, the application of the State has become infructuous and is accordingly dismissed.

11. Before parting with this case with a view to avoid such situation in future, I would like to record a note of caution to bring into the notice of all criminal appellate courts below in the State that without failing they shall follow the provisions of section 385 Cr.P.C. which imposes duty on the appellate courts to issue notice to the State, in case State is not party as appellant. Therefore, the Registrar General is requested to send a copy of this order to all the Sessions Court of the State for strict compliance of the provision of Section 385 Cr.P.C. with regard to issuance of notice to the State notwithstanding the fact that the State is a party or not as a respondent.

12. With the aforesaid, this application stands dismissed.

Application dismissed.

I.L.R. [2016] M.P., 3192
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.A. Dharmadhikari
M.Cr.C. No. 1498/2016 (Gwalior) decided on 9 August, 2016

SANTRAM & ors. ...Applicants
Vs.
STATE OF M.P. & ors. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482 **- When exercise of inherent powers is justified to quash the criminal proceedings - Held - To invoke the inherent jurisdiction, the Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that the defence is based on sound, reasonable and indubitable facts and that it would clearly reject and overrule the veracity of the allegations - Further, it should be sufficient to rule out, reject and discard the accusations levelled by the prosecution without the necessity of recording any evidence - For this, material relied upon by the defence should not have been refuted or alternatively being material of sterling and impeccable quality.** **(Para 13)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – दाण्डिक कार्यवाहियों को अभिखण्डित किए जाने हेतु अंतर्निहित शक्तियों का प्रयोग कब न्यायोचित है – अभिनिर्धारित – अंतर्निहित अधिकारिता का अवलंब लेने हेतु न्यायालय को पूर्णतः संतुष्ट होना चाहिए कि अभियुक्त द्वारा प्रस्तुत सामग्री उसे इस निष्कर्ष की ओर ले जाती हो कि अभियुक्त का बचाव ठोस, युक्तियुक्त एवं संशयहीन तथ्यों पर आधारित है तथा यह स्पष्ट रूप से अभिकथनों की सत्यता को खारिज एवं नामंजूर करता है – आगे यह भी कि उक्त बचाव अभियोजन द्वारा लगाए गए अभियोगों को, कोई भी साक्ष्य अभिलिखित करने की आवश्यकता के बगैर, नामंजूर, खारिज एवं रद्द करने हेतु पर्याप्त होना चाहिए – इस हेतु, बचाव पक्ष द्वारा विश्वास की गई सामग्री खंडित की गई नहीं होना चाहिए अथवा वैकल्पिक रूप से ऐसी सामग्री प्रामाणिक एवं त्रुटिहीन गुणवत्ता की होना चाहिए।

Cases referred:

AIR 1992 SCC 604, (2008) 14 SCC 1, {2013 (2) M.P.L.J. (Cri.) 1}.

S.K. Shrivastava, for the applicants.
R.B.S. Tomar, G.A. for the non-applicants/State.

JUDGMENT

S.A. DHARMADHIKARI, J. :- This petition under section 482 of Code of Criminal Procedure, 1973 has been filed by the petitioners being aggrieved with the order dated 20/01/2016 (Annexure P-1) passed by Additional Sessions Judge, Datia in criminal revision No. 66/2015, whereby, the order dated 21/08/2015 (Annexure P-2) passed by the learned Chief Judicial Magistrate, Datia in criminal case No. 1017/2015 has been affirmed. The petitioners have further prayed that they may be discharged from the offences leveled against them.

2. Briefly stated facts giving rise to filing of this present petition are that on 20/06/2015 the police got information that the truck bearing registration No. UP-93 E-9147 was carrying liquor without having any valid license / permission. As per prosecution case, when the truck was searched, it was found that there were total 11988 bottles of silver whiskey amounting to approximately Rs. 38 Lakhs which was being transported, therefore, the case under section 34 (2) of M.P. Excise Act, 1915 (herein after referred to as 'Excise Act') was registered against the petitioners. While registering the case, the petitioners had informed the concerned police officer that they have a valid licence / permission issued by the office of Excise Department, Gwalior for transporting the liquor. Instead of making enquiry with regard to validity and genuineness of the license from the District Excise Officer, the police authorities without conducting any investigation filed the charge sheet against the petitioners under section 34 (2) of Excise Act. After completion of due investigation, charge sheet was filed before the competent court.

3. Learned Chief Judicial Magistrate framed charges against the petitioners under section 34 (2) of Excise Act. Again, at the time of framing of charges, petitioners produced the license / permission, but the same was not considered.

4. Aggrieved by the order dated 21/08/2015 (Annexure P-2) passed by learned Chief Judicial Magistrate, Datia in criminal case No. 1017/2015, the petitioners preferred a criminal revision bearing No. 66/2015. Vide order dated 20/01/2016 (Annexure P-1), the revision was allowed and the order passed by the learned Chief Judicial Magistrate was affirmed.

5. The learned counsel for the petitioner, Shri S.K. Shrivastava submitted that the petitioners have been deliberately implicated in the matter inspite of

the fact that they were transporting liquor under a valid licence, the FIR was lodged. Subsequently, after completion of investigation, charge-sheet was filed before the competent Court. Charges were also framed under Section 34 (2) of the Excise Act. The police is not having jurisdiction to register the case under section 34(2) of Excise Act. The Revisional Court without going through the provisions of law and without appreciating the facts and the mischief played by the Police Authorities, confirmed the order framing charges.

6. The learned counsel for the petitioner further contended that the evidence which they produced (A valid Licence issued by the Excise Department) is sufficient to rule out, reject and discard the accusation leveled by the prosecution, without the necessity of recording evidence. In the factual backdrop, the proceedings needs to be quashed and the petitioners are liable to be discharged from the offences leveled against them.

7. The learned counsel for the respondents has supported the impugned order and submitted that no error has been committed by the trial Court. He further contended that if the impugned orders are set aside and the petitioners are discharged, it would have far reaching consequences inasmuch as it would negate the prosecution/complainant's case without allowing them to lead evidence, therefore, this Court may not like to exercise inherent jurisdiction under Section 482 of the Code of Criminal Procedure before commencement of the actual trial.

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

9. This Court before entertaining the petition had directed the respondent-State to get the licence and the permit verified (produced by the petitioners) from the competent authority and submit the verification report. The report was submitted in which it has been categorically stated that no objection certificate No. N/GWAL/FWH/FL/ 2015/55221 dated 16.06.2015 has been issued and on the basis of which a transport permit was granted to the petitioners for the purpose of transporting Indian Made Foreign Liquor (IMFL) vide T.P. No. T/GWAL/FWH/2015-16/16892 dated 18.06.2015. The said permit and licence was found to be valid on the date of incident.

10. The learned Judicial Magistrate First Class vide order dated 21.08.2015 framed the charges and posted the matter for recording evidence of prosecution witness. The learned Revisional Court affirmed the order of learned Judicial Magistrate First Class on the ground that when the police

authorities demanded for the papers i.e licence and the permit, it was stated that the documents are not available. The record reveals that there has been overwriting on the dates mentioned as 18.06.2015 and those do not bear the counter signatures, therefore, the Court below has rightly framed the charges under Section 34(2) of the Excise Act.

11. The Hon'ble Supreme Court in the matter of *State of Haryana and others Vs. Ch. Bhajan Lal & others* reported in AIR 1992 SCC 604 has held that the High Court may in exercise of powers under Article 226 or under Section 482 of Cr.P.C may interfere in proceedings relating to cognizable offences to prevent abuse of the process of any court or otherwise to secure the ends of justice. However, power should be exercised sparingly and that too in the rarest of rare cases:-

1. *where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;*

2. *where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;*

3. *where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;*

4. *where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;*

5. *where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;*

6. *where there is an express legal bar engrafted in any of the*

provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

7. *where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.*

12. The supreme Court in the matter of *Rukmini Narvekar vs. Vijaya Satardekar* reported in (2008) 14 SCC 1 has held that :-

"It is well settled that a judgment of the Court has not to be treated as Elucid's formula. While it is true that ordinarily defence material cannot be looked into by the Court while framing of the charge in view of Debendra Nath Padhi case, (2005) 1 SCC 568 there may be some very rare and exceptional cases where some defence material when shown to the trial court would convincingly demonstrate that the prosecution version is totally absurd or preposterous, and in such very rare cases the defence material can be looked into by the Court at the time of framing of the charges or taking cognizance. It cannot be said as an absolute proposition that under no circumstances can the court look into the material produced by the defence at the time of framing of the charges, though this should be done in very rare cases i.e. where the defence produces some material which convincingly demonstrates that the whole prosecution case is totally absurd or totally concocted."

13. The Supreme Court in the matter of *Rajiv Thapar and Ors. vs. Madanlal Kapoor* {2013 (2) M.P.L.J. (Cri.) 1} has exhaustively dealt with the power vested in the High Court under section 482 of the Criminal Procedure Code with regard to quashing the prosecution against the accused before commencement of trial. To invoke the inherent jurisdiction, this Court has to be fully satisfied that the material produced by the accused is such that would

lead to the conclusion that the defence is based on sound, reasonable and indubitable facts. The material produced is such as would clearly reject and overrule the veracity of the allegations. Further it should be sufficient to rule out, reject and discard the accusations levelled by the prosecution without the necessity of recording any evidence. For this, the material relied upon by the defence should not have been refuted, or alternatively being material of sterling and impeccable quality. In such situation, the judicial conscience of the High Court would persuade it to exercise its power under section 482 of Cr.P.C. to quash such criminal proceedings, which would prevent abuse of process of the court, and secure the ends of justice.

14. The Hon'ble Supreme Court in para 23 of the judgment delivered in the case of *Rajiv Thapar* (supra) has laid down the steps to determine the veracity of a prayer for quashing by invoking the power vested in the High Court under section 482 of Cr.P.C.

> *"23. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Criminal Procedure Code:-*
>
> *(i) step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e the material is sterling and impeccable quality?*
>
> *(ii) step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused i.e. material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e. the material is such, and would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.*
>
> *(iii) step three, whether the material relied upon by the accused, has not been refuted by the prosecution/ complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/ complainant?*
>
> *(iv) step four, whether proceeding with the trial would*

result in an abuse of process of the Court, and would not serve the ends of Justice? If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under section 482 of the Criminal Procedure Code. Such exercise of power, besides doing justice to the accused, would save precious Court time, which would otherwise be wasted in holding such trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."

15. On critical analysis of the facts and circumstances of the case, it is as clear as a day light that the petitioner having produced the valid license permit to transport the IMFL goes beyond doubt that would lead to the conclusion that the defence is based on sound, reasonable and indubitable facts.

16. The material relied upon by the accused, particularly when the same has not been refuted by the prosecution, but in fact the same is admitted by filing an additional reply clearly goes to show that the material is sufficient to reject and overrule the factual assertions contained in the complaint.

17. In view of the fact and circumstances mentioned hereinabove, this Court is of the considered opinion that the facts of the present case fully satisfy the conditions/steps laid down in the case of *Bhajanlal* (Supra) as well as *Rajiv Thapar* (Supra) in the affirmative on the basis of material relied by the accused more particularly the same was got verified and report having been placed on record.

18. In the result, order dated 20.01.2016 (Annexure P/1) passed by learned Additional Sessions Judge, Datia and order dated 21.08.2015 (Annexure P/2) passed by learned Chief Judicial Magistrate, Datia are hereby quashed and the petitioner is acquitted of all the charges. As a consequence, the proceedings pending before the Chief Judicial Magistrate, Datia in Criminal Case No. 1017/2015 are also hereby quashed.

19. No order as to costs.

Order accordingly.

I.L.R. [2016] M.P., 3199
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.K. Gangele & Mr. Justice H.P. Singh
M.Cr.C. No. 5206/2016 (Jabalpur) decided on 24 August, 2016

STATE OF M.P. ...Applicant
Vs.
KOMAL PRASAD VISHWAKARMA & ors. ...Non-applicants

A. Penal Code (45 of 1860), Sections 498 (A), 304 (B), 302/302 r/w Section 34, 306/306 r/w Section 34, Dowry Prohibition Act (28 of 1961), Section 4 and Criminal Procedure Code, 1973 (2 of 1974), Section 378 (3) - Dowry Death/Murder/Abetment to commit suicide - **Facts - Deceased was married in the year 2010 - Accused grand father & grand mother - Allegations - Cruelty - Demand of dowry - Ousted from house - After two years, deceased alongwith her husband was called back by the grand parents - Again demand of dowry - Deceased, daughter-in-law burnt herself - No one was present in the house - Hospitalisation - Dying declaration - Trial Court acquitted - Appeal against acquittal - Leave to appeal - Held - None present at the time of incident in the house nor any previous complaint of cruelty was there before the incident nor the deceased has stated in her dying declaration that she was subjected to cruelty or was set fire by the accused/non-applicants or has herself set fire - She has specifically stated in her dying declaration that while putting off the pulse from furnace, her saree caught fire - So the death of deceased was neither homicidal nor suicidal, but it was accidental - Application for leave to appeal against acquittal dismissed - Judgment of Trial Court upheld.**

(Paras 11 to 13 & 16)

क. दण्ड संहिता (1860 का 45), धाराएँ 498(ए), 304(बी), 302/302 सहपठित धारा 34, 306/306 सहपठित धारा 34, दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 4 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378(3) – दहेज मृत्यु/हत्या/आत्महत्या करने हेतु दुष्प्रेरण – तथ्य – मृतिका का विवाह वर्ष 2010 में हुआ था – अभियुक्त दादा एवं दादी – अभिकथन – क्रूरता – दहेज की माँग – घर से बेदखली – दो वर्ष पश्चात् दादा–दादी ने मृतिका को उसके पति के साथ वापस बुला लिया – पुनः दहेज की माँग – मृतिका बहू ने स्वयं को जला लिया – घर में कोई भी मौजूद नहीं था – अस्पताल में भर्ती किया गया – मृत्युकालिक

कथन – विचारण न्यायालय ने दोषमुक्त किया – दोषमुक्ति के विरूद्ध अपील – अपील की अनुमति – अभिनिर्धारित – घटना के समय घर पर कोई भी मौजूद नहीं था, न ही घटना के पहले क्रूरता किये जाने की कोई पूर्व शिकायत थी एवं न ही मृतिका ने अपने मृत्युकालिक कथन में ऐसा कहा कि उसके साथ क्रूरता की गई थी अथवा उसे अभियुक्त/अनावेदकों द्वारा आग लगाई गई थी अथवा उसने स्वयं को आग लगाई थी – उसने अपने मृत्युकालिक कथन में यह विनिर्दिष्ट रूप से कहा है कि चूल्हे से दाल उतारते समय उसकी साड़ी ने आग पकड़ ली – अतः मृतिका की मृत्यु न तो मानव वध थी और न ही आत्महत्या थी, बल्कि वह एक दुर्घटना थी – दोषमुक्ति के विरूद्ध अपील की अनुमति हेतु प्रस्तुत आवेदन खारिज – विचारण न्यायालय द्वारा पारित निर्णय की पुष्टि की गई।

B. ***Interpretation of statute - Appeal against acquittal -*** **Judgment of acquittal by the Trial Court ought not to be interfered in appeal by the High Court if the evaluation of evidence by the trial court does not suffer from illegality, manifest error or perversity and the maingrounds on which it has based its judgment are reasonable and plausible. (Para 14)**

ख. कानून का निर्वचन – दोषमुक्ति के विरूद्ध अपील – 'विचारण न्यायालय द्वारा पारित दोषमुक्ति के निर्णय में उच्च न्यायालय द्वारा, अपील में हस्तक्षेप नहीं किया जाना चाहिए, यदि विचारण न्यायालय द्वारा किया गया साक्ष्य का मूल्यांकन अवैधता, प्रकट त्रुटि या विपर्यस्तता से ग्रसित न हो तथा वे मुख्य आधार जिन पर उसने निर्णय आधारित किया है वे युक्तियुक्त एवं संभाव्य हों।

C. ***Legal Maxim -*** **"Nemo moriturus praesumitur mentire" i.e. a man will not meet his Maker with a lie in his mouth - The principle on which dying declarations are admitted in evidence. (Para 11)**

ग. विधिक सूत्र – कोई भी मनुष्य मृत्यु के समय असत्य नहीं बोलता – सिद्धांत, जिसके आधार पर मृत्युकालिक कथनों को साक्ष्य में ग्राह्य किया जाता है।

Prakash Gupta, P.L. for the applicant/State.
S.P. Sharma, for the non-applicants.

ORDER

The Order of the Court was delivered by : **H.P. Singh, J. :-** This is an application filed under Section 378(3) of Cr.P.C., seeking leave to present an appeal against the impugned judgement of acquittal dated 19.09.2015, passed by the Ist Additional Sessions Judge, Anuppur,

District Anuppur (MP), in Special S.T.No.115/2013, acquitting the accused/ respondents for offences punishable under Sections 498(A), 304(B), in alternate 302, in further alternate under Section 302 read with Section 34, further in alternate under Section 306 and in further alternate 306 read with Section 34 of Indian Penal Code (hereinafter referred to as the 'Code' for short) and under Section 4 of Dowry Prohibition Act (hereinafter referred to as the 'Act' for short).

2. Briefly stated, the case of prosecution is that marriage of deceased was solemnized with Lakhanlal in the year 2010. The accused/ respondents being grand father and grand mother of deceased, treated the deceased with cruelty by making demand of dowry and ousted the deceased as well as her husband from the house. Thereafter, they lived together at Chachai for two years to earn their livelihood. In January 2013, the accused/respondents had called them back, but thereafter the accused/respondents used to taunt for demand of dowry continuously, due to which the deceased was unhappy. It is alleged that when husband of the deceased was not present at home, the deceased burnt herself. Thereafter, her husband Lakhanlal reached home and taken her to the District hospital Anuppur for treatment. She was, thereafter taken to the hospital at Shahdol, where her dying declaration was recorded by Executive Magistrate/Naib Tehsildar Sohagpur. During admission in the hospital for treatment, she died on 28.3.2013. After doing all formalities and completing investigation charge sheet against the accused/respondents has been filed before the concerned Magistrate.

3. After committal of the case, on the basis of the charge-sheet, learned trial Court framed charges against the accused/respondents for aforesaid offences accused/ respondents abjured the guilt.

4. The trial Court after considering the plea of the accused/respondents, disbelieved the testimony of various prosecution witnesses and acquitted the accused/respondents for all charges levelled against them.

5. Learned Panel Lawyer for the State submitted that impugned judgement passed by the learned trial Court is wholly erroneous in law as well as on facts. Learned trial Court committed grave error in holding that the prosecution had failed to prove the allegations without proper appreciation of the material available on record in its true perspective. He further contended that if the prosecution evidence is analysed in right perspective, then prosecution case

could have been proved. Therefore, it is a fit case for grant of leave to appeal against the impugned judgment.

6. Now the question that arises for consideration before this Court is, whether the evaluation of the evidence by the trial Court suffers from illegality, manifest error or perversity?

7. It is settled law that in an appeal against acquittal, the appellate Court has full power to review, re-appreciate and reconsider the evidence. There is no limitation, restriction or condition for the exercise of such powers and the appellate Court may draw its own conclusion on all questions of fact and law. However, the reversal of acquittal can be made only if the conclusions recorded by the trial Court did not reflect a possible view, that is to say a view which can reasonably be arrived at. In the case of acquittal, the judgement of the trial Court may be interfered with only where there is absolute assurance of guilt of the accused/respondents on the basis of evidence on record and not merely because the High Court can take another possible or a different view.

8. The prosecution has examined as many as 16 witnesses. Out of whom, uncle of the deceased Kamlesh Vishwakarma (PW/1), father of deceased Ramnath Vishwakarma (PW/2), her husband Lakhan Vishwakarma (PW/10) and her mother Krishna Bai (PW/15) are the witnesses of the incident. Other witnesses are related to the investigation.

9. On the basis of evidence adduced by the prosecution during trial, it becomes undisputed that on the relevant date i.e. 8.2.2013, deceased burnt and after that she was shifted to hospital at Anuppur. She was medically examined by Dr. N.P. Manjhi (PW/3). He found burn injuries at the face, chest, stomach, back, hands, legs on the body of deceased. She was found to be burnt about 68%. She was admitted for treatment at District Hospital Anuppur and thereafter referred to District Hospital Shahdol for treatment. The deceased was then referred to Jabalpur and at Jabalpur during admission for treatment, she succumbed to the injuries on 28.3.2013. Inquest memo was prepared and autopsy of dead body of deceased was done by Dr. S.R. Patle (PW/12). On perusal of all these evidence, it is proved that deceased died on account of burn injuries sustained by her.

10. Now question arises for consideration, whether deceased had committed suicide or she has been murdered by accused/respondents ?

11. The main prosecution witnesses, namely, Ramnath Vishwakarma (PW/2) father of the deceased, Smt. Krishna Bai (PW/13) mother of the deceased and uncle Kamlesh Vishwakarma (PW/1) have not deposed anything about presence of any witness at the time of incident. As per deposition of Lakhan Vishwakarma (PW/10) husband of the deceased, it reveals that he and his wife (deceased) were living with accused/respondents, being his grand father & grand mother. He has stated that at the time of incident, except deceased none was present at home. He further stated that after the incident, he reached at home and then took her to the hospital. It is pertinent to note here that soon after reaching the deceased at District Hospital Anuppur, her dying declaration was recorded by Executive Magistrate, but the same had not been produced and proved by the prosecution. During the cross-examination, the Executive Magistrate, Smt. Bhawna Dahariya (PW/4), who had also prepared the inquest memo of the dead body of the deceased and has been examined by prosecution to prove that inquest memo Ex.P/2, has admitted that she had recorded the dying declaration of the deceased on 8.2.2013 in the presence of Dr. N.P. Manjhi (PW/3). She has further stated that after recording of dying declaration, she had taken the thumb impression of the deceased. During recording of dying declaration, she was in conscious condition and was able to give the statement. Dr. N.P. Manjhi (PW/3) has also stated in his cross-examination that in his presence dying declaration of deceased was recorded by Executive Magistrate. He further deposed that at that time of recording of dying declaration, deceased was fully conscious and he certified the dying declaration is Ex.D/1, mentioning that during recording of dying declaration deceased was conscious. The dying declaration reads thus :-

" मृत्यु पूर्व कथन

स्थान – जिला अस्पताल अनूपपूर

नाम – देवकी दिनांक – 8/2/2013

पिता/पति का नाम – लखन विश्वकर्मा समय – 2:39 पी.एम

निवासी – अनूपपूर

उम्र – 25 वर्ष

व्यवसाय – घरेलू कामकाज

मरीज वयान देने योग्य है हस्ताक्षर 2:40 पी.एम

प्रश्न	उत्तर
क्या हुआ है तुमको ?	जल गई हूँ ।
कैसे हो गया ?	खाना बना रही थी दाल चुल्हे से उतारते समय ऑचल गिर गया तो उसमे आग लग गई
कब की बात है ?	आज सुबह 11:00 बजे लगभग
फिर क्या हुआ ?	बाद मे सब लोग मुझे अस्पताल ले आए ।
और कौन था वहॉ ?	धर पर और कोई नही था ।
किसी से झगडा तो नही हुआ था ।	नही हुआ ।
और कुछ कहना है ?	नही ।
अभी तुम कहां पर हो ?	अनूपपूर अस्पताल मे ।

बयान मेरे द्वारा लिए गए ।

देवकी

दाऐ हाथ का अंगूठा निशानी — हस्ताक्षर 2:49 पी.एम.

क्या देते समय मरीज पूरी तरह होश हवास में थी ।

हस्ताक्षर 2:50 पी.एम. "

Thus, there is no reason to disbelieve the above dying declaration of the deceased. The principle on which the dying declarations are admitted in evidence is indicated in *legal maxim* :-

"Nemo moriturus praesumitur mentire" i.e. a man will not meet his Maker with a lie in his mouth."

12. Accordingly, deceased in her dying declaration has not stated that she has been subjected to cruelty or set fire on her by accused/respondents, or she set fire on herself. But, when she was putting off the pulse from the furnace,

her Aanchal (the corner piece of Sari) fell down and caught fire. Thereafter, she was brought to the hospital. She has further stated that no one was present at home and there was no scuffle from anyone. Thus, as per her dying declaration, her death was neither homicidal nor suicidal, but it was accidental. Consequently, no one is liable for causing her death.

13. So far as the fact regarding cruel treatment to the deceased is concerned, her mother Krishna Bai (PW/15), her father Ramnath Vishwakarma (PW/2) have stated that accused/respondents subjected her to cruelty for demand of dowry, but no complaint whatsoever was made before the incident. They have not specifically stated that when and where the alleged demand of dowry was made by them. Her uncle Kamlesh Vishwakarma (PW/1), has deposed that deceased when came to her paternal uncle stated that accused/ respondents made demand of dowry and subjected her to cruelty, but in the cross-examination, he has stated that he had not told about the cruel treatment to anyone and had not seen that the accused/respondents subjected her to cruelty. As discussed above, the deceased herself has not stated about cruel treatment by accused/respondents in her dying declaration. Thus, it is not proved that the deceased was subjected to cruelty by the accused/respondents or they had made any demand of dowry.

14. In the aforesaid circumstances, in the considered opinion of this Court, trial Court has considered the entire material evidence on record against accused/respondents in its entirety and on a proper appreciation of evidence and after assigning detailed and cogent reasons, has acquitted the respondents. Unless the judgement of acquittal is palpably wrong and grossly unreasonable, interference in a case against acquittal is not called for in view of the law settled by the Supreme Court in the catena of decisions. Hon'ble the Supreme Court held that if the evaluation of the evidence by the trial Court does not suffer from illegality, manifest error or perversity and the main grounds on which it has based its order are reasonable and plausible, the High Court should not disturb the order of acquittal even if another view is possible. Therefore, no interference by this Court with impugned judgement is warranted.

15. In view of aforesaid, learned trial Court has committed no error in acquitting the accused/respondents. Thus, the charges levelled against the accused/respondents for offence punishable under Sections 498(A), 304(B),

in alternate 302, in further alternate under Section 302 read with Section 34, further in alternate under Section 306 and in further alternate 306 read with Section 34 of Indian Code and under Section 4 of Act, have not been proved and rightly held so by the trial Court.

16. The application for leave to appeal against acquittal of the accused/ respondents has no merit and substance and accordingly is hereby dismissed in *limine* at the stage of admission itself.

17. Let record of the trial Court be sent back with a copy of this order without delay.

Application dismissed.

I.L.R. [2016] M.P., 3206
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.K. Awasthi
M.Cr.C. No. 5284/2014 (Gwalior) decided on 26 October, 2016

DINA & ors. ...Applicants
Vs.
STATE OF M.P. & anr. ...Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Quashment of FIR* - Facts involved - FIR was registered against applicants u/S 379 of I.P.C. - Applicants were in possession of the land in question, which fact is corroborated by the report of Revenue Inspector - Acknowledgement by revenue authorities of proceeds deposited by the applicant no.1 is on record - Non-applicant no. 2 also filed suit where his possession was not *prima-facie* found proved - Held - It is a fit case for quashing the FIR. (Paras 1, 7 & 11)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – प्रथम सूचना प्रतिवेदन को अभिखण्डित किया जाना – अंतर्ग्रस्त तथ्य – आवेदकगण के विरूद्ध भा.दं.सं. की धारा 379 के अंतर्गत प्रथम सूचना प्रतिवेदन दर्ज किया गया था – प्रश्नाधीन भूमि आवेदकगण के आधिपत्य में थी, एवं यह तथ्य राजस्व निरीक्षक के प्रतिवेदन से संपुष्ट है – आवेदक क्र. 1 द्वारा जमा किए गए आगम की राजस्व प्राधिकारियों द्वारा अभिस्वीकृति अभिलेख पर है – अनावेदक क्र. 2 द्वारा वाद भी प्रस्तुत किया गया जहाँ उसका आधिपत्य *प्रथम दृष्ट्या* सिद्ध नहीं पाया गया – अभिनिर्धारित – प्रथम सूचना प्रतिवेदन को अभिखण्डित किए जाने हेतु यह एक उपयुक्त मामला है।

Case referred:

(2013) 3 SCC 330.

Bhupendra Singh Dhakad, for the applicants.
Sudha Shrivastava, P.L. for the non-applicant No.1/State.
None for the non-applicant No. 2 though represented.

ORDER

S.K. AWASTHI, J. :- The applicants have invoked the extraordinary jurisdiction of this Court under Section 482 of the Code of Criminal Procedure (for brevity, the 'CrPC'), for quashing the First Information Report (FIR) dated 19.12.2013, registered at Crime No.136/2013 by Police Station Chinnoni, District Morena, for the offence under Section 379 of Indian Penal Code, 1860 (for brevity, the 'IPC'), and also for quashing of subsequent charge sheet No. 18 of 2014 filed before the Court of Judicial Magistrate First Class, Sabalgarh, District Morena.

2. The agriculrual (sic:agricultural) land bearing survey No.28, situated at village Jarena (Mangarh), Tahsil Kailaras, District Morena is the root for initiation of criminal prosecution. As per the prosecution case, the allegation levelled against the applicants is that on 5.7.2013 they entered into the agricultural field belonging to respondent No.2 and took away crops by force without consent of respondent No.2, thereupon, FIR for commission of offence under Section 379, IPC, was registered against the applicants. The respondent No.1 concluded the investigation and filed the charge sheet before the Court of Judicial Magistrate First Class, Sabalgarh, District Morena.

3. The contentions, which have been canvassed by the learned counsel for the applicants are that they have been falsely implicated in the instant case on account of previous enmity with the respondent No.2. In fact, for the land in question three murders have been caused and lodging of the FIR is a counterblast by the respondent No.2. In order to support this contention, learned counsel for the applicants has brought on record the antecedent of the dispute with respect to survey No.28 (supra). It appears that the said survey number was subject matter of transfer in favour of respondent No.2, however, due to some dispute with respect to entitlement of executor of sale deed, relative of respondent No.2 caused death of the father and uncle of applicant No.1, since then the main accused Lalaram is absconding and the

police initiated proceeding under Section 82 of CrPC to declare him as absconder/proclaimed offender. Therefore, in order to avoid attachment of property in the name of Lalaram, the sale deed dated 18.3.2011 was executed without there being any right available to him. The respondent No.2 submitted an application for mutation of land in question in his favour before the Court of Tahsildar, before whom the applicant No.1 appeared as an objector. However, the application was allowed vide order dated 29.4.2013 (Annexure A-3). This order was challenged by filing an appeal before the Sub- Divisional Officer (Revenue), which was also rejected vide order dated 18.11.2013. Accordingly, another appeal before the Commissioner (Revenue) has been filed by the applicant No.1, which is still pending for consideration.

4. The applicant No.1 has further contended that while the proceeding with respect to ownership of land is pending before the court of competent jurisdiction, the possession of the land in question has remained with him (applicant No.1). In order to substantiate this contention with regard to possession of the applicant No.1, it is submitted that the respondent No.2 had filed an application under Section 145 CrPC, due to the fact that the present applicants were allegedly interfering with the peaceful possession of the respondent No.2. In the said proceeding before the Sub-Divisional Magistrate, Sabalgarh, the Revenue Inspector was directed to submit a report regarding status of the land and its possession. The Revenue Inspector prepared the Panchnama, in which it was observed that on account of the land in question, there is a possibility that the peace and tranquility of the village may be disturbed, therefore, it was recommended that an appropriate order for maintaining peace may be passed. While preparing the report, the Revenue Inspector reduced in writing the statement of respondent No.2, according to which respondent No.2 has himself admitted the fact that the applicant No.1 is in possession of the land in question. Accordingly, it is submitted that the Court of S.D.M. directed the applicant No.1 to continue with cultivation of the land in question and after deduction of expenses, the remaining proceeds from the cultivation be deposited with the Tahsildar, Kailaras. Further, it has been emphasized by learned counsel for the applicants that the correspondence issued by the Tahsildar, Kailaras dated 13.5.2014 (Annexure A-8) and letter dated 21.5.2014 (Annexure A-10) by Sub-Divisional Magistrate, Sabalgarh, clearly reveal that the applicant No.1 had deposited the proceeds received from the crop cultivated on the land

in question and the SDM, Sabalgarh had allowed release of the money to the applicant No.1. It is pointed out that on the date of alleged incident, i.e., 5.7.2013, the applicant No.1 was in possession of the land and the allegation relating to commission of offence under Section 379 IPC is false and frivolous.

5. Per Contra, learned State Counsel has submitted that the registration of FIR is on account of actual incident and the application deserves to be dismissed.

6. I have considered the rival contentions advanced on behalf of the parties.

7. It is pertinent to highlight that the applicants have been able to bring on record the documents discussed above, which clearly show that the applicants were in possession of the land in question. This fact finds corroboration by the report prepared by the Revenue Inspector that the respondent No.2, in his statement, has admitted the possession of applicant No.1 over the land in question. Moreover, the documents, Annexures A/8 and A/10, clearly show the acknowledgment by the revenue authorities of the proceeds deposited by the applicant No.1. It is also worth mention that the respondent No.2 had filed civil suit before the Second Civil Judge Class-2, Sabalgarh, who after due consideration observed that the possession of respondent No.2 over the land in question is not prima facie proved.

8. Further in terms of the order passed by the Sub-Divisional Magistrate, Sabalgarh, the possession of the land is with the Sarpanch of the village, under whose supervision the applicant is cultivating the land and depositing the proceeds with the Tahsildar, Kailaras.

9. Learned counsel for the applicants has placed reliance on the decision of Supreme Court in the case of *Rajiv Thapar and others vs. Madan Lal Kapoor* (2013) 3 SCC 330, to submit that the facts of the present case fulfill the criteria laid down by the Hon'ble Apex Court for quashing of FIR or criminal proceeding.

10. In my opinion, the contention of learned counsel for the applicants deserves acceptance in the light of the discussion made herein above.

11. Taking into consideration the fact and circumstances of the present case and the discussion made herein above, this Court is of the considered

opinion that it is a fit case for quashment of FIR on the basis of material brought on record by the applicants. Consequently, the present application under Section 482 CrPC is allowed and the FIR bearing Crime No.136/2013 as well as subsequent charge sheet No.18/2014 before the Court of Judicial Magistrate First Class, Sabalgarh, for the offence under Section 379 IPC, are hereby quashed.

A copy of this order be sent to the concerned court below.

Application allowed.