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भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 4(1), 17(1) व 17 (4) – तथ्य का प्रश्न – याचीगण ने उस भूमि के स्वामित्व का दावा किया है, जिस पर सड़क निर्मित की जा रही है – परंतु प्रत्यर्थीगण ने स्वामित्व से इंकार किया है – क्या याचीगण भूमि के स्वामी हैं अथवा यह शासकीय भूमि है, यह तथ्य का एक ऐसा गंभीर विवादित प्रश्न है, जिसे रिट याचिका में विनिश्चित नहीं किया जा सकता – आदेश एवं प्रश्नगत भूमि के स्वामित्व को विधि अनुसार समुचित फोरम के समक्ष चुनौती देने की स्वतंत्रता के साथ रिट याचिका खारिज। (छाया कोठारी (श्रीमती) वि. उज्जैन म्यूनिसिपल कारपोरेशन, उज्जैन) (DB)...1966

***Limitation Act (36 of 1963), Section 5 and Panchayat Nirvachan Niyam, M.P. 1995, Rule 12(5)* – Undated order passed by Registration Officer – Date of knowledge is 3.12.2014 – Appeal filed on 8.12.2014 before Collector – Limitation period is of 5 days – Held – As the order of the Registration Officer was undated, so the computation of limitation period will be done from the date of knowledge i.e. 3.12.2014 & appeal has been filed on 8.12.2014, so the appeal has been filed within the limitation period of 5 days. [Chandra Prakash Sharma Vs. The State Election Commission, M.P.]** ...*4

परिसीमा अधिनियम (1963 का 36), धारा 5 एवं पंचायत निर्वाचन नियम, म. प्र. 1995, नियम 12(5) – पंजीकरण अधिकारी द्वारा अदिनांकित आदेश पारित – जानकारी की तिथि 03.12.2014 है – दिनांक 08.12.2014 को कलेक्टर के समक्ष अपील प्रस्तुत – परिसीमा अवधि 05 दिवस की है – अभिनिर्धारित – चूंकि पंजीकरण

अधिकारी का आदेश अदिनांकित है, इसलिए परिसीमा अवधि की संगणना जानकारी की तिथि अर्थात् 03.12.2014 से की जावेगी, तथा अपील दिनांक 08.12.2014 को प्रस्तुत की गई है, इसलिए अपील 05 दिवस की परिसीमा अवधि के भीतर प्रस्तुत की गई। (चन्द्रप्रकाश शर्मा वि. द स्टेट इलेक्शन कमीशन, एम.पी.) ...*4

***Limitation Act (36 of 1963), Section 5* – Application for condonation of delay filed on 10.12.2014 and appeal filed on 8.12.2014 – Date of knowledge of order is 3.12.2014 – Limitation period is of 5 days – Whether in such circumstances appeal is barred by time – Held – No, merely because the application for condonation of delay has been submitted on a later date explaining the sufficiency of cause, it shall not render the appeal barred by time itself and the said application will relate back to the date of filing of the Appeal – Appellate Court has not committed any error of law in entertaining the Appeal to be within time. [Chandra Prakash Sharma Vs. The State Election Commission, M.P.]** ...*4

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिए माफी का आवेदन दिनांक 10.12.2014 को प्रस्तुत एवं अपील दिनांक 08.12.2014 को प्रस्तुत – आदेश की जानकारी की तिथि 03.12.2014 है – परिसीमा अवधि 05 दिन की है – क्या इन परिस्थितियों में अपील समय वर्जित है – अभिनिर्धारित – नहीं, मात्र इसलिए कि विलंब के लिए माफी का आवेदन पर्याप्त कारण स्पष्ट करते हुए, पश्चात्वर्ती तिथि को प्रस्तुत किया गया है, यह अपने आप में अपील को समय वर्जित नहीं करेगा, तथा उक्त आवेदन अपील प्रस्तुत करने की तिथि से संबंधित होगा – अपीली न्यायालय ने अपील को अवधि के भीतर मानते हुए विचार में लेने में विधि की कोई त्रुटि कारित नहीं की । (चन्द्रप्रकाश शर्मा वि. द स्टेट इलेक्शन कमीशन, एम.पी.) ...*4

***Limitation Act (36 of 1963), Sections 5 & 29(2) and Panchayat Nirvachan Niyam, M.P. 1995, Rule 12(5) – Exclusionary Clause* – Whether provisions of Sections 4 to 24 are applicable in terms of Section 29(2) of the Limitation Act, 1963, as there is no exclusionary provisions in the Nirvachan Rules, 1995 – Held – Yes. [Chandra Prakash Sharma Vs. The State Election Commission, M.P.]** ...*4

परिसीमा अधिनियम (1963 का 36), धाराएँ 5 व 29(2) एवं पंचायत निर्वाचन नियम, म.प्र. 1995, नियम 12(5) – अपवर्जनात्मक खण्ड – चूंकि निर्वाचन नियम 1995 में कोई अपवर्जनात्मक उपबंध नहीं है, तो क्या परिसीमा अधिनियम 1963 की धारा 29(2) के निबंधनों के अनुसार, धारा 4 से 24 तक के उपबंध प्रयोज्य होंगे – अभिनिर्धारित – हाँ। (चन्द्रप्रकाश शर्मा वि. द स्टेट इलेक्शन कमीशन, एम.पी.) ...*4

पंजीकरण अधिकारी के अदिनांकित आदेश को इस आधार पर अपास्त किया कि सुनवाई हेतु अवसर प्रदान नहीं किया गया था – अभिनिर्धारित – निर्वाचन नियम 1995 के नियम 12(1) के अनुसार, संबंधित मतदाताओं को नोटिस जारी किए जाना आवश्यक था तथा तत्पश्चात् जांच की जाना थी, परंतु पंजीकरण अधिकारी द्वारा कुछ भी नहीं किया गया, जो कि नियम 12(1) के अंतर्गत समाविष्ट उपबंधों के विपरीत है – इस प्रकार पंजीकरण अधिकारी ने प्रत्यर्थीगण क्र. 4 से 36 के नाम विलोपित कर घोर अवैधता कारित की – कलेक्टर द्वारा पारित अपीली आदेश संपुष्ट। (चन्द्रप्रकाश शर्मा वि. द स्टेट इलेक्शन कमीशन, एम.पी.) ...*4

Panchayat Nirvachan Niyam, M.P. 1995, Rule 12(1) & 12(5) – Panchayat Elections – Voter List – Amendment as per Appellate order **– Held – As per Rule 12(5) of the Nirvachan Rules 1995, no amendment to the Voter List as per the Appellate order is to be carried out after the last date & time fixed for nomination in the notice issued under Rule 28 of the Nirvachan Rules 1995 and before completion of elections. [Chandra Prakash Sharma Vs. The State Election Commission, M.P.]** ...*4

पंचायत निर्वाचन नियम, म.प्र. 1995, नियम 12(1) व 12(5) – पंचायत निर्वाचन – मतदाता सूची – अपीली आदेश के अनुसार संशोधन – अभिनिर्धारित – निर्वाचन नियम 1995 के नियम 12(5) के अनुसार, निर्वाचन पूर्ण होने के पूर्व तथा निर्वाचन नियम 1995 के नियम 28 के अंतर्गत नोटिस में नामांकन हेतु नियत अंतिम तिथि एवं समय के पश्चात्, मतदाता सूची में अपीली आदेश के अनुसार संशोधन नहीं किया जा सकता है। (चन्द्रप्रकाश शर्मा वि. द स्टेट इलेक्शन कमीशन, एम.पी.) ...*4

Panchayat Nirvachan Niyam, M.P. 1995, Rule 12(5) – 'Any person Aggrieved' – Appellate proceedings **– Application for intervention by the Petitioner before Collector – Held – 'Any Person Aggrieved' shall be a person either who was party to the decision making process before the Registration Officer or was the person who is adversely affected by the decision of the Registration Officer – Petitioner was neither a party to the proceedings nor was the affected person – Application for intervention rightly rejected. [Chandra Prakash Sharma Vs. The State Election Commission, M.P.]** ...*4

पंचायत निर्वाचन नियम, म.प्र. 1995, नियम 12(5) – 'कोई भी पीड़ित व्यक्ति' – अपीली कार्यवाहियाँ – याची द्वारा कलेक्टर के समक्ष मध्यक्षेप हेतु आवेदन – अभिनिर्धारित – 'कोई भी पीड़ित व्यक्ति' वह व्यक्ति होगा जो या तो पंजीकरण अधिकारी के समक्ष विनिश्चय करने की प्रक्रिया में पक्षकार था अथवा वह व्यक्ति जो पंजीकरण अधिकारी के विनिश्चय से प्रतिकूल रूप से प्रभावित हुआ हो – याची न

Secretary or for that matter withdrawal (de-notified) of such charge given to the Panchayat Karmi, is required to be given by the Competent Authority to the Concerned employee much less who is facing serious criminal case. [Chandrapal Yadav Vs. State of M.P.] (FB)...2425

पंचायत सेवा (अनुशासन और अपील) नियम, म.प्र. 1999, नियम 7 – निलंबन – सुनवाई का अवसर – दाण्डिक प्रकरण – ग्राम पंचायत सचिव का निलंबन – ग्राम पंचायत सचिव के निलंबन के पूर्व अथवा उस मामले के संबंध में पंचायत कर्मी को दिये गये उक्त पदभार को वापस लिये जाने (अधिसूचना वापस लिये जाने) के पूर्व सक्षम प्राधिकारी द्वारा संबंधित कर्मचारी को कोई पूर्व नोटिस अथवा सुनवाई का अवसर दिया जाना अपेक्षित नहीं, ऐसे कर्मचारी को तो बिल्कुल नहीं जो गंभीर आपराधिक प्रकरण का सामना कर रहा है। (चन्द्रपाल यादव वि. म.प्र. राज्य) **(FB)...2425**

***Panchayat (Up-sarpanch, President and Vice President) Nirvachan Niyam, M.P., 1995, Rule 3(6) – Panchayat elections* – Reservation of the post of President, Janpad Panchayat for OBC (women category) – Challenge – Violation of Rule 3(6) – Ground – Seat reserved for a particular category in previous election shall not be included in the drawing lots till all remaining panchayats are not included – Whereas in this case lots not drawn from all Janpad Panchayat but from two Panchayats only – Held – In the instant case all Panchayats by rotation have been reserved for OBC category except Nateran which has been reserved for OBC category in the instant election and the concerned Janpad Panchayat, Basoda has been reserved for OBC category for the first time in 1994, so drawing lots between two Panchayats, Basoda & Vidisha and in turn reserving Basoda constituency for OBC, women category is not at all arbitrary or in violation of Rule 3(6) of the Rules of 1995 – Writ Petition dismissed. [Prahlad Singh Raghuvanshi Vs. State of M.P.] ...2452**

पंचायत (उप सरपंच, अध्यक्ष एवं उपाध्यक्ष) निर्वाचन नियम, म.प्र., 1995, नियम 3(6) – पंचायत निर्वाचन – अध्यक्ष, जनपद पंचायत के पद का अन्य पिछड़ा वर्ग (महिला श्रेणी) हेतु आरक्षण – चुनौती – नियम 3(6) का उल्लंघन – आधार – पूर्व निर्वाचन में किसी श्रेणी विशेष हेतु आरक्षित पद लॉट निकालने की प्रक्रिया में सम्मिलित नहीं किया जायेगा जब तक कि सभी शेष पंचायतों को उसमें सम्मिलित न किया जाये – जबकि इस प्रकरण में सभी जनपद पंचायतों से लॉट न निकाले जाकर मात्र दो पंचायतों से ही लॉट निकाले गये – अभिनिर्धारित – वर्तमान प्रकरण में सभी पंचायतों को चक्रानुक्रम के अंतर्गत अन्य पिछड़ा वर्ग श्रेणी हेतु आरक्षित किया गया था, मात्र नटेरन को छोड़कर, जिसे कि वर्तमान निर्वाचन में अन्य पिछड़ा

author of the entry was not examined, therefore, the same has no evidentiary value – Despite having numerous opportunities, she did not raise an alarm to invite intention of others – She was a consenting party – Held – Since the Trial Court has considered the entire material evidence on record and on a proper appreciation of evidence, has passed a reasoned order of acquittal, impugned order does not suffer from illegality, manifest error or perversity – No interference is warranted. [State of M.P. Vs. Ramratan @ Bablu Loni] (DB)...2633

दण्ड संहिता (1860 का 45), धारा 376 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378(3) – बलात्संग – अपील के लिए अनुमति – अभियोजन यह सिद्ध करने में असफल रहा कि अभियोक्त्री अवयस्क थी – अभियोक्त्री के पिता की मृत्यु हो चुकी है तथा माँ ने उसे छोड़ दिया है, अतएव उनका परीक्षण नहीं किया गया – उसके चाचा ने इस संभावना को स्वीकार किया है कि अभियोक्त्री की आयु 18 वर्ष से अधिक हो सकती है – अभियोक्त्री की अंकसूची में अभिलिखित जन्मतिथि की प्रविष्टि के लेखकर्ता का परीक्षण न कराये जाने से उसका कोई साक्ष्यिक मूल्य नहीं है – अनेक अवसर उपलब्ध होने के बावजूद अभियोक्त्री ने अन्य व्यक्तियों का ध्यान आकर्षित करने हेतु शोर नहीं मचाया – वह सहमत पक्षकार थी – अभिनिर्धारित – चूंकि विचारण न्यायालय ने अभिलेख पर उपलब्ध संपूर्ण सारभूत साक्ष्य पर विचार किया है तथा साक्ष्य के उचित मूल्यांकन उपरांत दोषमुक्ति का सकारण आदेश पारित किया है, प्रश्नगत आदेश अवैधता, प्रकट त्रुटि अथवा प्रतिकूलता से ग्रसित नहीं है – हस्तक्षेप की आवश्यकता नहीं। (म.प्र. राज्य वि. रामरतन उर्फ बबलू लोनी) **(DB)...2633**

Penal Code (45 of 1860), Section 376 and Criminal Procedure Code, 1973 (2 of 1974), Section 378(3) – Rape – Leave to appeal – **Prosecution has failed to prove that the prosecutrix was minor – Version of the prosecutrix recorded u/S 161 differs substantially from the evidence given by her in the Court – Despite having numerous occasions, she did not raise an alarm to invite attention of others – She was a consenting party – Held – The trial Court has considered the entire material evidence on record and on a proper appreciation of evidence has passed a reasoned order of acquittal – Impugned order does not suffer from illegality, manifest error or perversity – No interference is warranted. [State of M.P. Vs. Salman Khan] (DB)...2413**

दण्ड संहिता (1860 का 45), धारा 376 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378(3) – बलात्कार – अपील की अनुमति – अभियोजन यह साबित करने में असफल रहा है कि अभियोक्त्री अवयस्क थी – धारा 161 के अंतर्गत अभिलिखित अभियोक्त्री का कथन उसके द्वारा न्यायालय में दिये गये साक्ष्य से सारतः भिन्न है – अनेक अवसरों के बावजूद उसने अन्य लोगों का ध्यान आकर्षित करने

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Service Law – Increment – Held **– (A) An employee appointed in accordance with the Recruitment Rules which makes passing of the Hindi Typing Test essential, would be entitled to increment only after passing such test – (B) If the Recruitment Rules are silent with regard to entitlement to the grant of increment on passing the Hindi Typing Test, then in such a case if the requirement of passing Hindi Typing Test is incorporated in the letter of appointment, the employee would be entitled to increment only after passing the Hindi Typing Test – (C) Where the Recruitment Rules provide that preference would be given to the candidate who has passed Hindi Typing Test, in such a case also the employee would not be entitled to grant of increment, if the order of appointment contains such a stipulation. He would be entitled to grant of increment from the date of passing Hindi Typing Test – (D) Where under the policy as well as letter of appointment provide for passing of Hindi Typing Test, in such a case the employee would be entitled to increment only after passing Hindi Typing Test – (E) If an employee has been appointed under the policy either of compassionate appointment or regularization and if policy provides for requirement of passing Hindi Typing Test essential, the concerned employee would be entitled to benefit of increment only after having passed Hindi Typing Test, even in the absence of such a stipulation in the letter of appointment – (F)The decision rendered in the case of State of M.P. Vs. Onkarlal, 2011(3) MPLJ 404 and State of M.P. & ors. Vs. Ku. Ramani Bai Bhagat, 2013(1) MPHT 96 do not lay down correct proposition of law. [Manoj Kumar Purohit Vs. State of M.P.] (FB)...1861**

सेवा विधि – वेतनवृद्धि – अभिनिर्धारित – (क) भर्ती नियम, जो हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करना आवश्यक बनाते हैं, के अनुसार नियुक्त एक कर्मचारी केवल उक्त परीक्षा उत्तीर्ण करने के उपरांत ही वेतनवृद्धि हेतु हकदार होगा – (ख) हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने पर वेतनवृद्धि की पात्रता के संबंध में यदि भर्ती नियम मौन हैं तब उस दशा में यदि हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने की शर्त नियुक्ति पत्र में समाविष्ट है तब कर्मचारी केवल हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने के उपरांत ही वेतनवृद्धि हेतु हकदार होगा – (ग) जहाँ भर्ती नियम यह उपबंध करते हैं कि उस अभ्यर्थी को अधिमान्यता प्रदान की जाएगी जिसने हिंदी मुद्रलेखन परीक्षा उत्तीर्ण कर ली है, तब उस दशा में भी नियुक्ति आदेश में ऐसी शर्त अन्तर्विष्ट होने पर कर्मचारी को वेतनवृद्धि की पात्रता

years preceding the Bid Due Date, have received payments for construction, such that the sum total thereof is more than Rs. 562/- Crores" – Bid Due Date is 24.02.2016 – Value of present project is Rs. 224.82 Crores – Petitioner submitted bid with technical capacity information for the period from 01.04.2011-31.03.2012 to 01.04.2015-15.02.2016 – Petitioner failed to furnish financial information from 01.04.2010 till 31.03.2011 – Held – The words "over the past five years" "preceding the Bid Due Date" would not include the financial information for the period from 01.04.2015 to 15.02.2016, as the Bid due date is 24.02.2016 and non-submission of financial information from 01.04.2010 to 31.03.2011 resulted in violation of the terms in clause 2.2.2.2 of the Tender document & for this reason, the requirement of receipt of Threshold Technical Capacity of Rs. 562/- Crores over the past five years is also not met out – Petition is dismissed notwithstanding the fact that the petitioner has offered the lowest bid. [Bansal Construction Works Pvt. Ltd. (M/s.) Vs. M.P. Road Development Corporation Ltd.] (DB)...2511

निविदा – सड़क का निर्माण – याची – निम्नतर बोली लगाने वाला – बोली का निरस्त किया जाना – आधार – तकनीकी क्षमता से संबंधित निबंधन की पूर्ति न किया जाना – निबंधन – "बोली हेतु नियत तिथि से पूर्ववर्ती विगत पांच वर्षों में बोली लगाने वाला इतनी राशि जिसका कुल योग रू. 562 करोड़ से अधिक हो, निर्माण कार्य के भुगतान हेतु प्राप्त कर चुका हो – बोली की नियत तिथि 24.02.2016 है – वर्तमान परियोजना का मूल्य रू. 224.82 करोड़ है – याची ने 01.04.2011–31.03.2012 की अवधि से लेकर 01.04.2015–15.02.2016 तक की अवधि तक तकनीकी क्षमता की जानकारी के साथ बोली प्रस्तुत की – याची 01.04.2010 से 31.03.2011 तक की अवधि की वित्तीय जानकारी प्रस्तुत करने में विफल रहा – अभिनिर्धारित – शब्दों "बोली हेतु नियत तिथि के पूर्ववर्ती" "विगत पांच वर्ष" के अंतर्गत 01.04.2015 से 15.02.2016 तक की अवधि की वित्तीय जानकारी सम्मिलित नहीं होगी, क्योंकि बोली हेतु नियत तिथि 24.02.2016 है तथा 01.04.2010 से 31.03.2011 की अवधि की वित्तीय जानकारी प्रस्तुत न किये जाने के परिणामतः निविदा दस्तावेज के पद क्र. 2.2.2.2 में उल्लिखित निबंधनों का उल्लंघन हुआ है एवं इस कारण से, विगत पांच वर्षों के दौरान रू. 562 करोड़ की प्रारंभिक तकनीकी क्षमता प्राप्त किये जाने की अपेक्षा की पूर्ति भी नहीं हुई है – इस तथ्य के होते हुए भी कि याची ने न्यूनतम बोली लगाई है, याचिका खारिज की जाती है। (बंसल कंस्ट्रक्शन वर्क्स प्रा.लि. (मे.) वि. एम.पी. रोड डव्हेलपमेन्ट कारपोरेशन लि.) (DB)...2511

Trade Marks Act (47 of 1999), Section 115 (4) **– As per allegation in FIR, applicants committed offence u/S 102 of the Act – Police Officer not below the rank of Deputy Superintendent of Police, shall obtain opinion**

* * * * *

THE INDIAN LAW REPORTS M.P. SERIES, 2016
(VOL-3)
JOURNAL SECTION

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

THE *BENAMI* TRANSACTIONS (PROHIBITION) AMENDMENT ACT, 2016
NO. 43 OF 2016

[Received the assent of the President on the 10th August, 2016 and published in the Gazette of India (Extraordinary) Part II, Section 1, dated 11.08.2016, Page no. 1-22]

An Act further to amend the Benami Transactions (Prohibition) Act, 1988.

Be it enacted by Parliament in the Sixty-seventh Year of the Republic of India as follows:—

1. Short title and commencement *(1)* This Act may be called the *Benami* Transactions (Prohibition) Amendment Act, 2016.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

2. Insertion of new heading before section 1. In the *Benami* Transactions (Prohibition) Act, 1988 (45 of 1988) (hereinafter referred to as the principal Act), before section 1, the following heading shall be inserted, namely:—

"CHAPTER I

PRELIMINARY."

3. Amendment of section 1. In section 1 of the principal Act, for sub-section (*1*), the following sub-section shall be substituted, namely:—

"(*1*) This Act may be called the Prohibition of *Benami* Property Transactions Act, 1988 (45 of 1988).".

4. Substitution of new section for section 2. For section 2 of the principal Act, the following section shall be substituted, namely:—

'2. **Definitions.** In this Act, unless the context otherwise requires,—

(1) "Adjudicating Authority" means the Adjudicating Authority appointed under section 7;

(2) "Administrator" means an Income-tax Officer as defined in clause *(25)* of section 2 of the Income-tax Act, 1961 (43 of 1961);

(3) "Appellate Tribunal" means the Appellate Tribunal established under section 30;

(4) "Approving Authority" means an Additional Commissioner or a Joint Commissioner as defined in clauses *(1C)* and *(28C)* respectively of section 2 of the Income-tax Act, 1961 (43 of 1961);

(5) "attachment" means the prohibition of transfer, conversion, disposition or movement of property, by an order issued under this Act;

(6) "authority" means an authority referred to in sub-section *(1)* of section 18;

(7) "banking company" means a company to which the provisions of the Banking Regulation Act, 1949 (10 of 1949), applies and includes any bank or banking institution referred to in section 51 of that Act;

(8) "*benami* property" means any property which is the subject matter of a *benami* transaction and also includes the proceeds from such property;

(9) "*benami* transaction" means,—

(*A*) a transaction or an arrangement—

(*a*) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(*b*) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by—

(i) a *Karta*, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;

(ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 (22 of 1996) and any other person as may be notified by the Central Government for this purpose;

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

(iv) any person in the name of his brother or

sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or

(B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or

(C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;

(D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;

Explanation.—For the removal of doubts, it is hereby declared that *benami* transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882), if, under any law for the time being in force,—

(i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;

(ii) stamp duty on such transaction or arrangement has been paid; and

(iii) the contract has been registered.

(10) "*benamidar*" means a person or a fictitious person, as the case may be, in whose name the *benami* property is transferred or held and includes a person who lends his name;

(11) "Bench" means a Bench of the Adjudicating Authority or the Appellate Tribunal, as the case may be;

(12) "beneficial owner" means a person, whether his identity is known or not, for whose benefit the *benami* property is held by a *benamidar;*

(13) "Board" means the Central Board of Direct Taxes constituted under the Central Boards of Revenue Act, 1963 (54 of 1963);

(14) "director" shall have the same meaning as assigned to it in clause *(34)* of section 2 of the Companies Act, 2013 (18 of 2013);

(15) "executor" shall have the same meaning as assigned to it in clause *(c)* of section 2 of the Indian Succession Act, 1925 (39 of 1925);

(16) "fair market value", in relation to a property, means—

(i) the price that the property would ordinarily fetch on sale in the open market on the date of the transaction; and

(ii) where the price referred to in sub-clause *(i)* is not ascertainable, such price as may be determined in accordance with such manner as may be prescribed;

(17) "firm" shall have the same meaning as assigned to it in section 4 of the Indian Partnership Act, 1932 (9 of 1932) and shall include a limited liability partnership as defined in the Limited Liability Partnership Act, 2008 (6 of 2009);

(18) "High Court" means—

(i) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and

(ii) where the Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than

one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain;

(19) "Initiating Officer" means an Assistant Commissioner or a Deputy Commissioner as defined in clauses *(9A)* and *(19A)* respectively of section 2 of the Income-tax Act, 1961 (43 of 1961);

(20) "Member" means the Chairperson or the Member of the Adjudicating Authority or the Appellate Tribunal, as the case may be;

(21) "notification" means a notification published in the Official Gazette and the expression "notified" shall be construed accordingly;

(22) "partner" shall have the same meaning as assigned to it in section 4 of the Indian Partnership Act, 1932 (9 of 1932), and shall include,—

(a) any person who, being a minor, has been admitted to the benefits of partnership; and

(b) a partner of a limited liability partnership formed and registered under the Limited Liability Partnership Act, 2008 (6 of 2009);

(23) "partnership" shall have the same meaning as assigned to it in section 4 of the Indian Partnership Act, 1932 (9 of 1932), and shall include a limited liability partnership formed and registered under the Limited Liability Partnership Act, 2008 (6 of 2009);

(24) "person" shall include—

(i) an individual;

(ii) a Hindu undivided family;

(iii) a company;

(iv) a firm;

(v) an association of persons or a body of individuals, whether incorporated or not;

(vi) every artificial juridical person, not falling under sub-clauses *(i)* to *(v);*

(25) "prescribed" means prescribed by rules made under this Act;

(26) "property" means assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes any right or interest or legal documents or instruments evidencing title to or interest in the property and where the property is capable of conversion into some other form, then the property in the converted form and also includes the proceeds from the property;

(27) "public financial institution" shall have the same meaning as assigned to it in clause *(72)* of section 2 of the Companies Act, 2013 (18 of 2013);

(28) "Special Court" means a Court of Session designated as Special Court under sub-section *(1)* of section 50;

(29) "transfer" includes sale, purchase or any other form of transfer of right, title, possession or lien;-

(30) "trustee" means the trustee as defined in the section 3 of the Indian Trusts Act, 1882 (2 of 1882);

(31) words and expressions used herein and not defined in this Act but defined in the Indian Trusts Act, 1882 (2 of 1882), the Indian Succession Act, 1925 (39 of 1925), the Indian Partnership Act, 1932 (9 of 1932), the Income-tax Act, 1961 (43 of 1961), the Depositories Act,1996 (22 of 1996), the Prevention of Money-Laundering Act, 2002 (15 of 2003), the Limited Liability Partnership Act, 2008 (6 of 2009) and the Companies Act, 2013 (18 of 2013), shall have the same meanings respectively assigned to them in those Acts.'.

5. Insertion of new heading before section 3. Before section 3 of the principal Act, the following heading shall be inserted, namely:—

"CHAPTER II

PROHIBITION OF *BENAMI* TRANSACTIONS"

6. Amendment of section 3. In section 3 of the principal Act,—

(a) sub-section *(2)* shall be omitted;

(b) sub-section *(3)* shall be renumbered as sub-section *(2)* thereof;

(c) after sub-section *(2)* as so renumbered, the following sub-section shall be inserted, namely:—

"*(3)* Whoever enters into any *benami* transaction on and after the date of commencement of the *Benami* Transactions (Prohibition) Amendment Act, 2016, shall, notwithstanding anything contained in sub-section *(2)*, be punishable in accordance with the provisions contained in Chapter VII.";

(d) sub-section *(4)* shall be omitted.

7. Amendment of section 4. In section 4 of the principal Act, sub-section *(3)* shall be omitted.

8. Substitution of new sections for sections 5 and 6. For sections 5 and 6 of the principal Act, the following sections shall be substituted, namely:—

"5. **Property held *benami* liable to confiscation.** Any property, which is subject matter of *benami* transaction, shall be liable to be confiscated by the Central Government.

6. **Prohibition on re-transfer of property by *benamidar*.** *(1)* No person, being a *benamidar* shall re-transfer the *benami* property held by him to the beneficial owner or any other person acting on his behalf.

(2) Where any property is re-transferred in contravention of

the provisions of sub-section *(1)*, the transaction of such property shall be deemed to be null and void.

(3) The provisions of sub-sections *(1)* and *(2)* shall not apply to a transfer made in accordance with the provisions of section 190 of the Finance Act, 2016 (28 of 2016).".

9. Insertion of new Chapters III to VII. After section 6 of the principal Act, the following shall be inserted, namely:—

'CHAPTER III

AUTHORITIES

7. **Adjudicating Authority.** The Central Government shall, by notification, appoint one or more Adjudicating Authorities to exercise jurisdiction, powers and authority conferred by or under this Act.

8. **Composition of Authority.** An Adjudicating Authority shall consist of a Chairperson and at least two other Members.

9. **Qualifications for appointment of Chairperson and Members.** *(1)* A person shall not be qualified for appointment as the Chairperson or a Member of the Adjudicating Authority unless he,—

(a) has been a member of the Indian Revenue Service and has held the post of Commissioner of Income-tax or equivalent post in that Service; or

(b) has been a member of the Indian Legal Service and has held the post of Joint Secretary or equivalent post in that Service.

(2) The Chairperson and other Members of the Adjudicating Authority shall be appointed by the Central Government in such manner as may be prescribed.

(3) The Central Government shall appoint the senior most Member to be the Chairperson of the Adjudicating Authority.

10. **Constitution of Benches of Adjudicating Authority.** *(1)* Subject to the provisions of this Act,—

(a) the jurisdiction of the Adjudicating Authority may be exercised by Benches thereof;

(b) a Bench may be constituted by the Chairperson of the Adjudicating Authority with two Members, as the Chairperson may deem fit;

(c) the Benches of the Adjudicating Authority shall ordinarily sit in the National Capital Territory of Delhi and at such other places as the Central Government may, in consultation with the Chairperson, by notification, specify;

(d) the Central Government shall, by notification, specify the areas in relation to which each Bench of the Adjudicating Authority may exercise jurisdiction.

(2) Notwithstanding anything contained in sub-section *(1)*, the Chairperson may transfer a Member from one Bench to another Bench.

11. **Power of Adjudicating Authority to regulate its own procedure.** The Adjudicating Authority shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Authority shall have powers to regulate its own procedure.

12. **Term of office of Chairperson and Members of Adjudicating Authority.** The Chairperson and Members of the Adjudicating Authority shall hold office for a term not exceeding five years from the date on which they enter upon their office, or until they attain the age of sixty-two years, whichever is earlier and shall not be eligible for reappointment.

13. **Terms and conditions of services of Chairperson and Members of Adjudicating Authority.** *(1)* The salary and allowances payable to, and the other terms and conditions of service of the Chairperson and other Members of the Adjudicating Authority shall be such as may be prescribed.

(2) Any vacancy caused to the office of the Chairperson or any other Member shall be filled up within a period of three months from the date on which such vacancy occurs.

14. **Removal of Chairperson and Members of Adjudicating Authority.** *(1)* The Central Government may, by order, remove from office, the Chairperson or other Members of the Adjudicating Authority, if the Chairperson or such other Member, as the case may be,—

(a) has been adjudged as an insolvent; or

(b) has been convicted of an offence, involving moral turpitude; or

(c) has become physically or mentally incapable of acting as a Member; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions; or

(e) has so abused his position as to render his continuance in office is prejudicial to the public interest.

(2) No Chairperson or Member shall be removed from his office under clause *(d)* or clause *(e)* of sub-section *(1)* unless he has been given a reasonable opportunity of being heard in the matter.

15. **Member to act as Chairperson in certain circumstances.** *(1)* In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior most Member shall act as the Chairperson of the Adjudicating Authority until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.

(2) When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

16. **Vacancies, etc., not to invalidate proceedings of Adjudicating Authority.** No act or proceeding of the Adjudicating

Authority shall be invalid merely by reason of—

(a) any vacancy in, or any defect in the constitution of the Authority; or

(b) any defect in the appointment of a person acting as a Member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case.

17. **Officers and employees of Adjudicating Authority.** *(1)* The Central Government shall provide each Adjudicating Authority with such officers and employees as that Government may think fit.

(2) The officers and employees of the Adjudicating Authority shall discharge their functions under the general superintendence of the Chairperson of the Adjudicating Authority.

18. **Authorities and jurisdiction.** *(1)* The following shall be the authorities for the purposes of this Act, namely:—

(a) the Initiating Officer;

(b) the Approving Authority;

(c) the Administrator; and

(d) the Adjudicating Authority.

(2) The authorities shall exercise all or any of the powers and perform all or any of the functions conferred on, or, assigned, as the case may be, to it under this Act or in accordance with such rules as may be prescribed.

19. **Powers of authorities.** *(1)* The authorities shall, for the purposes of this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely:—

(a) discovery and inspection;

(b) enforcing the attendance of any person, including any official of a banking company or a public financial institution or any other intermediary or reporting entity, and examining

him on oath;

(c) compelling the production of books of account and other documents;

(d) issuing commissions;

(e) receiving evidence on affidavits; and

(f) any other matter which may be prescribed.

(2) All the persons summoned under sub-section *(1)* shall be bound to attend in person or through authorised agents, as any authority under this Act may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents as may be required.

(3) Every proceeding under sub-section *(1)* or sub-section *(2)* shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860).

(4) For the purposes of this Act, any authority under this Act may requisition the service of any police officer or of any officer of the Central Government or State Government or of both to assist him for all or any of the purposes specified in sub-section *(1)*, and it shall be the duty of every such officer to comply with the requisition or direction.

(5) For the purposes of this section, "reporting entity" means any intermediary or any authority or of the Central or the State Government or any other person as may be notified in this behalf.

Explanation.—For the purposes of sub-section *(5)*, "intermediary" shall have the same meaning as assigned to it in clause *(n)* of sub-section *(1)* of section 2 of the Prevention of Money-Laundering Act, 2002 (15 of 2003).

20. **Certain officers to assist in inquiry, etc.** The following officers shall assist the authorities in the enforcement of this Act, namely:—

(a) income-tax authorities appointed under sub-section *(1)* of section 117 of the Income- tax Act, 1961 (43 of 1961);

(b) officers of the Customs and Central Excise

Departments;

(c) officers appointed under sub-section *(1)* of section 5 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985);

(d) officers of the stock exchange recognised under section 4 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);

(e) officers of the Reserve Bank of India constituted under sub-section *(1)* of section 3 of the Reserve Bank of India Act, 1934 (2 of 1934);

(f) police;

(g) officers of enforcement appointed under sub-section *(1)* of section 36 of the Foreign Exchange Management Act, 1999 (40 of 1999);

(h) officers of the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992 (15 of 1992);

(i) officers of any other body corporate constituted or established under a Central or a State Act; and

(j) such other officers of the Central Government, State Government, local authorities or banking companies as the Central Government may, by notification, specify, in this behalf.

21. **Power to call for information.** *(1)* The Initiating Officer or the Approving Authority or the Adjudicating Authority shall have power to require any officer of the Central Government or State Government or a local body or any person or officer who is responsible for registering and maintaining books of account or other documents containing a record of any transaction relating to any property or any other person to furnish any information in relation to any person, point or matter as in his opinion shall be useful for or relevant for the purposes of this Act.

(2) Without prejudice to sub-section *(1)*, every officer or person referred to in sub-section *(1)* shall furnish such information to any

authority under this Act in such form and manner as may be prescribed.

22. **Power of authority to impound documents.** *(1)* Where any books of account or other documents are produced before the authority in any proceedings under this Act and the authority in this behalf has reason to believe that any of the books of account or other documents are required to be impounded and retained for any inquiry under this Act, it may impound and retain the books of account or other documents for a period not exceeding three months from the date of order of attachment made by the Adjudicating Authority under sub-section *(3)* of section 26:

Provided that the period for retention of the books of account or other documents may be extended beyond a period exceeding three months from the date of order of attachment made by the Adjudicating Authority under sub-section *(3)* of section 26 where the authority records in writing the reasons for extending the same.

(2) Where the authority impounding and retaining the books of account or other documents, under sub-section *(1)* is the Initiating Officer, he shall obtain approval of the Approving Authority within a period of fifteen days from the date of initial impounding and seek further approval of the Approving Authority for extending the period of initial retention, before the expiry of the period of initial retention, if so required.

(3) The period of retention of the books of account or other documents under sub-section *(1)* shall in no case exceed a period of thirty days from the date of conclusion of all the proceedings under this Act.

(4) The person, from whom the books of account or other documents were impounded under sub-section *(1)*, shall be entitled to obtain copies thereof.

(5) On the expiry of the period specified under sub-section *(1)*, the books of account or other documents shall be returned to the person from whom such books of account or other documents were impounded unless the Approving Authority or the Adjudicating Authority permits their release to any other person.

23. **Power of authority to conduct inquiry, etc.** The Initiating Officer, after obtaining prior approval of the Approving Authority, shall have power to conduct or cause to be conducted any inquiry or investigation in respect of any person, place, property, assets, documents, books of account or other documents, in respect of any other relevant matters under this Act.

CHAPTER IV

ATTACHMENT, ADJUDICATION AND CONFISCATION

24. **Notice and attachment of property involved in *benami* transaction.** *(1)* Where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a *benamidar* in respect of a property, he may, after recording reasons in writing, issue a notice to the person to show cause within such time as may be specified in the notice why the property should not be treated as *benami* property.

(2) Where a notice under sub-section *(1)* specifies any property as being held by a *benamidar* referred to in that sub-section, a copy of the notice shall also be issued to the beneficial owner if his identity is known.

(3) Where the Initiating Officer is of the opinion that the person in possession of the property held *benami* may alienate the property during the period specified in the notice, he may, with the previous approval of the Approving Authority, by order in writing, attach provisionally the property in the manner as may be prescribed, for a period not exceeding ninety days from the date of issue of notice under sub-section *(1)*.

(4) The Initiating Officer, after making such inquires and calling for such reports or evidence as he deems fit and taking into account all relevant materials, shall, within a period of ninety days from the date of issue of notice under sub-section *(1)*,—

(a) where the provisional attachment has been made

under sub-section *(3)*, —

(i) pass an order continuing the provisional attachment of the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority under sub-section *(3)* of section 26; or

(ii) revoke the provisional attachment of the property with the prior approval of the Approving Authority;

(b) where provisional attachment has not been made under sub-section *(3)*,—

(i) pass an order provisionally attaching the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority under sub-section *(3)* of section 26; or

(ii) decide not to attach the property as specified in the notice, with the prior approval of the Approving Authority.

(5) Where the Initiating Officer passes an order continuing the provisional attachment of the property under sub-clause *(i)* of clause *(a)* of sub-section *(4)* or passes an order provisionally attaching the property under sub-clause *(i)* of clause *(b)* of that sub-section, he shall, within fifteen days from the date of the attachment, draw up a statement of the case and refer it to the Adjudicating Authority.

25. **Manner of service of notice.** *(1)* A notice under sub-section *(1)* of section 24 may be served on the person named therein either by post or as if it were a summons issued by a Court under the Code of Civil Procedure, 1908 (5 of 1908).

(2) Any notice referred to in sub-section *(1)* may be addressed—

(i) in case of an individual, to such individual;

(ii) in the case of a firm, to the managing partner or the manager of the firm;

(iii) in the case of a Hindu undivided family, to *Karta* or any member of such family;

(iv) in the case of a company, to the principal officer thereof;

(v) in the case of any other association or body of individuals, to the principal officer or any member thereof;

(vi) in the case of any other person (not being an individual), to the person who manages or controls his affairs.

26. **Adjudication of *benami* property.** *(1)* On receipt of a reference under sub-section *(5)* of section 24, the Adjudicating Authority shall issue notice, to furnish such documents, particulars or evidence as is considered necessary on a date to be specified therein, on the following persons, namely:—

(a) the person specified as a *benamidar* therein;

(b) any person referred to as the beneficial owner therein or identified as such;

(c) any interested party, including a banking company;

(d) any person who has made a claim in respect of the property:

Provided that the Adjudicating Authority shall issue notice within a period of thirty days from the date on which a reference has been received:

Provided further that the notice shall provide a period of not less than thirty days to the person to whom the notice is issued to furnish the information

sought.

(2) Where the property is held jointly by more than one person, the Adjudicating Authority shall make all endeavours to serve notice to all persons holding the property:

Provided that where the notice is served on anyone of the persons, the service of notice shall not be invalid on the ground that the said notice was not served to all the persons holding the property.

(3) The Adjudicating Authority shall, after—

(a) considering the reply, if any, to the notice issued under sub-section *(1)*;

(b) making or causing to be made such inquiries and calling for such reports or evidence as it deems fit; and

(c) taking into account all relevant materials,

provide an opportunity of being heard to the person specified as a *benamidar* therein, the Initiating Officer, and any other person who claims to be the owner of the property, and, thereafter, pass an order—

(i) holding the property not to be a *benami* property and revoking the attachment order; or

(ii) holding the property to be a *benami* property and confirming the attachment order, in all other cases.

(4) Where the Adjudicating Authority is satisfied that some part of the properties in respect of which reference has been made to him is *benami* property, but is not able to specifically identify such part, he shall record a finding to the best of his judgment as to which part of the properties is held *benami.*

(5) Where in the course of proceedings before it, the Adjudicating Authority has reason to believe that a property, other than a property referred to it by the Initiating Officer is *benami*

property, it shall provisionally attach the property and the property shall be deemed to be a property referred to it on the date of receipt of the reference under sub-section *(5)* of section 24.

(6) The Adjudicating Authority may, at any stage of the proceedings, either on the application of any party, or *suo motu*, strike out the name of any party improperly joined or add the name of any person whose presence before the Adjudicating Authority may be necessary to enable him to adjudicate upon and settle all the questions involved in the reference.

(7) No order under sub-section *(3)* shall be passed after the expiry of one year from the end of the month in which the reference under sub-section *(5)* of section 24 was received.

(8) The *benamidar* or any other person who claims to be the owner of the property may either appear in person or take the assistance of an authorized representative of his choice to present his case.

Explanation.—For the purposes of sub-section *(8)*, authorised representative means a person authorised in writing, being—

(i) a person related to the *benamidar* or such other person in any manner, or a person regularly employed by the *benamidar* or such other person as the case may be; or

(ii) any officer of a scheduled bank with which the *benamidar* or such other person maintains an account or has other regular dealings; or

(iii) any legal practitioner who is entitled to practice in any civil court in India; or

(iv) any person who has passed any accountancy examination recognised in this behalf by the Board; or

(v) any person who has acquired such educational qualifications as the Board may prescribe for this purpose.

27. **Confiscation and vesting of *benami* property.** *(1)* Where an order is passed in respect of any property under sub-section *(3)* of section 26 holding such property to be a *benami* property, the

Adjudicating Authority shall, after giving an opportunity of being heard to the person concerned, make an order confiscating the property held to be a *benami* property:

Provided that where an appeal has been filed against the order of the Adjudicating Authority, the confiscation of property shall be made subject to the order passed by the Appellate Tribunal under section 46:

Provided further that the confiscation of the property shall be made in accordance with such procedure as may be prescribed.

(2) Nothing in sub-section *(1)* shall apply to a property held or acquired by a person from the *benamidar* for adequate consideration, prior to the issue of notice under sub-section *(1)* of section 24 without his having knowledge of the *benami* transaction.

(3) Where an order of confiscation has been made under sub-section *(1)*, all the rights and title in such property shall vest absolutely in the Central Government free of all encumbrances and no compensation shall be payable in respect of such confiscation.

(4) Any right of any third person created in such property with a view to defeat the purposes of this Act shall be null and void.

(5) Where no order of confiscation is made upon the proceedings under this Act attaining finality, no claim shall lie against the Government.

28. **Management of properties confiscated.** *(1)* The Administrator shall have the power to receive and manage the property, in relation to which an order of confiscation under sub-section *(1)* of section 27 has been made, in such manner and subject to such conditions, as may be prescribed.

(2) The Central Government may, by order published in the Official Gazette, notify as many of its officers as it thinks fit, to perform the functions of Administrators.

(3) The Administrator shall also take such measures, as the Central Government may direct, to dispose of the property which is vested in the Central Government under sub-section *(3)* of section

27, in such manner and subject to such conditions as may be prescribed.

29. **Possession of the property.** *(1)* Where an order of confiscation in respect of a property under sub-section *(1)* of section 27, has been made, the Administrator shall proceed to take the possession of the property.

(2) The Administrator shall,—

(a) by notice in writing, order within seven days of the date of the service of notice to any person, who may be in possession of the *benami* property, to surrender or deliver possession thereof to the Administrator or any other person duly authorised in writing by him in this behalf;

(b) in the event of non-compliance of the order referred to in clause *(a)*, or if in his opinion, taking over of immediate possession is warranted, for the purpose of forcibly taking over possession, requisition the service of any police officer to assist him and it shall be the duty of the officer to comply with the requisition.

CHAPTER V

APPELLATE TRIBUNAL

30. **Establishment of Appellate Tribunal.** The Central Government shall, by notification, establish an Appellate Tribunal to hear appeals against the orders of the Adjudicating Authority under this Act.

31. **Composition, etc., of Appellate Tribunal.** *(1)* The Appellate Tribunal shall consist of a Chairperson and at least two other Members of which one shall be a Judicial Member and other shall be an Administrative Member.

(2) Subject to the provisions of this Act,—

(a) the jurisdiction of the Appellate Tribunal may be exercised by Benches thereof;

(b) a Bench may be constituted by the Chairperson with two Members as the Chairperson may deem fit;

(c) the Benches of the Appellate Tribunal shall ordinarily sit in the National Capital Territory of Delhi and at such other places as the Central Government may, in consultation with the Chairperson, by notification, specify;

(d) the Central Government shall, by notification, specify the areas in relation to which each Bench of the Appellate Tribunal may exercise its jurisdiction.

(3) Notwithstanding anything contained in sub-section *(2)*, the Chairperson may transfer a Member from one Bench to another Bench.

32. **Qualifications for appointment of Chairperson and Members of Appellate Tribunal.** *(1)* A person shall not be qualified for appointment as Chairperson of the Appellate Tribunal unless he is a sitting or retired Judge of a High Court, who has completed not less than five years' of service.

(2) A person shall not be qualified for appointment as a Member unless he—

(a) in the case of a Judicial Member, has been a Member of the Indian Legal Service and has held the post of Additional Secretary or equivalent post in that Service;

(b) in the case of an Administrative Member, has been a Member of the Indian Revenue Service and has held the post of Chief Commissioner of Income-tax or equivalent post in that Service.

(3) No sitting Judge of a High Court shall be appointed under this section except after consultation with the Chief Justice of the High Court.

(4) The Chairperson or a Member holding a post as such in any other Tribunal, established under any law for the time being in force, in addition to his being the Chairperson or a Member of that Tribunal, may be appointed as the Chairperson or a Member, as the case may be, of the Appellate Tribunal under this Act.

33. **Terms and conditions of services of Chairperson and Members of Appellate Tribunal.** *(1)* The salary and allowances payable to, and the other terms and conditions of service of the Chairperson and other Members shall be such as may be prescribed and shall not be varied to their disadvantage during their tenure.

(2) Any vacancy caused to the office of the Chairperson or any other Member shall be filled up within a period of three months from the date on which such vacancy occurs.

34. **Term of office of Chairperson and Members.** The Chairperson and Members of the Appellate Tribunal shall hold office for a term not exceeding five years from the date on which they enter upon their office, or until they attain the age of sixty-five years, whichever is earlier and shall not be eligible for reappointment.

35. **Removal of Chairperson and Member from office in certain circumstances.** *(1)* The Central Government may, in consultation with the Chief Justice of High Court, remove from office of the Chairperson or any Member, who—

(a) has been adjudged as an insolvent; or

(b) has been convicted of an offence which, in the opinion of the Central Government involves moral turpitude; or

(c) has become physically or mentally incapable; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest.

(2) The Chairperson or Judicial Member shall not be removed from his office except by an order made by the Central Government after an inquiry made by Chief Justice of the High Court in which the Chairperson or Judicial Member has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

(3) The Central Government may suspend from office the Chairperson or Judicial Member in respect of whom a reference of conducting an inquiry has been made to the Chief Justice of the High Court under sub-section *(2)*, until the Central Government passes an order on receipt of the report of inquiry made by Chief Justice of the High Court on the reference.

(4) The Central Government may regulate the procedure for inquiry referred to in sub-section *(2)* in the manner as may be prescribed.

(5) The Administrative Member may be removed from his office by an order of the Central Government on the grounds specified in sub-section *(1)* and in accordance with the procedure notified by the Central Government:

Provided that the Administrative Member shall not be removed unless he has been given an opportunity of being heard in the matter.

36. **Vacancies, etc., not to invalidate proceedings of Appellate Tribunal.** No act or proceeding of the Appellate Tribunal shall be invalid merely by reason of—

(a) any vacancy in, or any defect in the constitution of the Tribunal; or

(b) any defect in the appointment of a person acting as a Member of the Tribunal; or

(c) any irregularity in the procedure of the Tribunal not affecting the merits of the case.

37. **Resignation and removal.** The Chairperson or any other Member may, by notice in writing under his hand addressed to the Central Government, resign his office:

Provided that the Chairperson or any other Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of the notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is earlier.

38. **Member to act as Chairperson in certain circumstances.** *(1)* In the event of the occurrence of any vacancy in the office of the Chairperson of the Appellate Tribunal by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.

(2) When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

39. **Staff of Appellate Tribunal.** *(1)* The Central Government shall provide the Appellate Tribunal with such officers and employees as it may thinks fit.

(2) The officers and employees of the Appellate Tribunal shall discharge their functions under the general superintendence of the Chairperson.

(3) The salaries and allowances and other conditions of service of the officers and employees of the Appellate Tribunal shall be such, as may be prescribed.

40. **Procedure and powers of Appellate Tribunal.** *(1)* The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure.

(2) The Appellate Tribunal shall, for the purposes of discharging its functions under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit, in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) reviewing its decisions;

(g) dismissing a representation for default or deciding it *ex parte;*

(h) setting aside any order of dismissal of any representation for default or any order passed by it *ex parte*; and

(i) any other matter, which may be, prescribed by the Central Government.

(3) An order made by the Appellate Tribunal under this Act shall be executable by it as a decree of civil court and, for this purpose, the Appellate Tribunal shall have all the powers of a civil court.

(4) Notwithstanding anything contained in sub-section *(3)*, the Appellate Tribunal may transmit any order made by it to a civil court having jurisdiction and the civil court shall execute the order as if it were a decree made by that court.

(5) All proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860) and the Appellate Tribunal shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974).

41. **Distribution of business amongst Benches of Appellate Tribunal.** Where any Benches are constituted, the Chairperson may, from time to time, by notification, make provision as to the distribution of the business of the Appellate Tribunal amongst the Benches and also provide for the matters which may be dealt with by each Bench.

42. **Power of Chairperson of Appellate Tribunal to transfer cases.** On the application of any of the parties and notice to the parties, and after hearing them, or on his own motion without any notice, the Chairperson of the Appellate Tribunal may transfer any case pending before one Bench, for disposal, to any other Bench.

43. **Decision to be by majority.** If the Members of a Bench consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairperson of the Appellate Tribunal who shall either hear the point or points himself or refer the case for hearing on the point or points by one or more of the other Members and the point or points shall be decided according to the opinion of the majority of the Members of the Appellate Tribunal who have heard the case, including those who first heard it.

44. **Members, etc., to be public servants.** The Chairperson, Members and other officers and employees of the Appellate Tribunal, the Adjudicating Authority, Approving Authority, Initiating Officer, Administrator and the officers subordinate to all of them shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

45. **Bar of jurisdiction of civil courts.** No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which any of the authorities, an Adjudicating Authority or the Appellate Tribunal is empowered by or under this Act to determine, and no injunction shall be granted by any court or other forum in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

46. **Appeals to Appellate Tribunal.** *(1)* Any person, including the Initiating Officer, aggrieved by an order of the Adjudicating Authority may prefer an appeal in such form and along with such fees, as may be prescribed, to the Appellate Tribunal against the order passed by the Adjudicating Authority under sub-section *(3)* of section 26, within a period of forty-five days from the date of the order.

(2) The Appellate Tribunal may entertain any appeal after the said period of forty-five days, if it is satisfied that the appellant was

prevented, by sufficient cause, from filing the appeal in time.

(3) On receipt of an appeal under sub-section *(1)*, the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

(4) An Appellate Tribunal while deciding the appeal shall have the power—

(a) to determine a case finally, where the evidence on record is sufficient;

(b) to take additional evidence or to require any evidence to be taken by the Adjudicating Authority, where the Adjudicating Authority has refused to admit evidence, which ought to have been admitted;

(c) to require any document to be produced or any witness to be examined for the purposes of proceeding before it;

(d) to frame issues which appear to the Appellate Tribunal essential for adjudication of the case and refer them to the Adjudicating Authority for determination;

(e) to pass final order and affirm, vary or reverse an order of adjudication passed by the Adjudicating Authority and pass such other order or orders as may be necessary to meet the ends of justice.

(5) The Appellate Tribunal, as far as possible, may hear and finally decide the appeal within a period of one year from the last date of the month in which the appeal is filed.

47. **Rectification of mistakes.** *(1)* The Appellate Tribunal or the Adjudicating Authority may, in order to rectify any mistake apparent on the face of the record, amend any order made by it under section 26 and section 46 respectively, within a period of one year from the end of the month in which the order was passed.

(2) No amendment shall be made under sub-section *(1)*, if the amendment is likely to affect any person prejudicially, unless he has been given notice of intention to do so and has been given an

opportunity of being heard.

48. **Right to representation.** *(1)* A person preferring an appeal to the Appellate Tribunal under this Act may either appear in person or take the assistance of an authorised representative of his choice to present his case before the Appellate Tribunal.

(2) The Central Government may authorise one or more of its officers to act as presenting officers on its behalf, and every person so authorised may present the case with respect to any appeal before the Appellate Tribunal.

Explanation.—For the purposes of this section, "authorised representative" means a person authorised by the appellant in writing to appear on his behalf, being—

(i) a person related to the appellant in any manner, or a person regularly employed by the appellant; or

(ii) any officer of a scheduled bank with which the appellant maintains an account or has other regular dealings; or

(iii) any legal practitioner who is entitled to practice in any civil court in India; or

(iv) any person who has passed any accountancy examination recognized in this behalf by the Board; or

(v) any person who has acquired such educational qualifications as the Board may prescribe for this purpose.

49. **Appeal to High Court.** *(1)* Any party aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order.

(2) The High Court may entertain any appeal after the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the period specified in sub-section *(1)*.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.

(5) Nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(6) The High Court shall decide the question of law so formulated and deliver the judgment thereon containing the grounds on which any decision is founded and may award any cost as it deems fit.

(7) The High Court may determine any issue which—

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section *(1)*.

(8) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

CHAPTER VI

SPECIAL COURTS

50. **Special Courts.** *(1)* The Central Government, in consultation with the Chief Justice of the High Court, shall, for trial of an offence punishable under this Act, by notification, designate one or more Courts of Session as Special Court or Special Courts for such area or areas or for such case or class or group of cases as may be specified in the notification.

(2) While trying an offence under this Act, a Special Court shall also try an offence other than an offence referred to in sub-section *(1)*, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(3) The Special Court shall not take cognizance of any offence punishable under this Act except upon a complaint in writing made by—

(i) the authority; or

(ii) any officer of the Central Government or State Government authorized in writing by that Government by a general or special order made in this behalf.

(4) Every trial under this section shall be conducted as expeditiously as possible and every endeavour shall be made by the Special Court to conclude the trial within six months from the date of filing of the complaint.

51. **Application of Code of Criminal Procedure, 1973 to proceedings before Special Court.** *(1)* Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall apply to the proceedings before a Special Court and the persons conducting the prosecution before the Special Court, shall be deemed to be Public Prosecutors:

Provided that the Central Government may also appoint for any case or class or group of cases, a Special Public Prosecutor.

(2) A person shall not be qualified to be appointed as a Public Prosecutor or a Special Public Prosecutor under this section unless, the Public Prosecutor has been in practice as an advocate for not less than seven years, and the Special Public Prosecutor has been in practice as an advocate for not less than ten years in any court.

(3) Every person appointed as a Public Prosecutor or a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of clause *(u)* of section 2 of the Code of Criminal Procedure, 1973 (2 of 1974) and the provisions of that Code shall have effect accordingly.

52. **Appeal and revision.** The High Court may exercise, so far as may be applicable, all the powers conferred by Chapter XXIX or Chapter XXX of the Code of Criminal Procedure, 1973 (2 of 1974), on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court.

CHAPTER VII

OFFENCES AND PROSECUTION

53. **Penalty for *benami* transaction.** *(1)* Where any person enters into a *benami* transaction in order to defeat the provisions of any law or to avoid payment of statutory dues or to avoid payment to creditors, the beneficial owner, *benamidar* and any other person who abets or induces any person to enter into the *benami* transaction, shall be guilty of the offence of *benami* transaction.

(2) Whoever is found guilty of the offence of *benami* transaction referred to in sub-section *(1)* shall be punishable with rigorous imprisonment for a term which shall not be less than one year, but which may extend to seven years and shall also be liable to fine which may extend to twenty-five per cent. of the fair market value of the property.

54. **Penalty for false information.** Any person who is required to furnish information under this Act knowingly gives false information to any authority or furnishes any false document in any proceeding under this Act, shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to five years and shall also be liable to fine which may extend to ten per cent. of the fair market value of the property.

55. **Previous sanction.** No prosecution shall be instituted against any person in respect of any offence under sections 3, 53 or section 54 without the previous sanction of the Board.'.

10. Substitution of new Chapter VIII for sections 7 and 8. For sections 7 and 8 of the principal Act, the following shall be substituted, namely:—

'CHAPTER VIII

MISCELLANEOUS

56. **Repeal of provisions of certain Acts.** *(1)* Sections 81, 82 and 94 of the Indian Trusts Act, 1882 (2 of 1882), section 66 of the Code of Civil Procedure, 1908 (5 of 1908) and section 281A of the Income-tax Act, 1961(43 of 1961), are hereby repealed.

(2) For the removal of doubts, it is hereby declared that nothing in sub-section *(1)* shall affect the continued operation of section 281A of the Income-tax Act, 1961 (43 of 1961) in the State of Jammu and Kashmir.

57. **Certain transfers to be null and void.** Notwithstanding anything contained in the Transfer of the Property Act, 1882 (4 of 1882) or any other law for the time being in force, where, after the issue of a notice under section 24, any property referred to in the said notice is transferred by any mode whatsoever, the transfer shall, for the purposes of the proceedings under this Act, be ignored and if the property is subsequently confiscated by the Central Government under section 27, then, the transfer of the property shall be deemed to be null and void.

58. **Exemption.** *(1)* The Central Government may, by notification, exempt any property relating to charitable or religious trusts from the operation of this Act.

(2) Every notification issued under sub-section *(1)* shall be laid before each House of Parliament.

59. **Power of Central Government to issue directions, etc.** *(1)* The Central Government may, from time to time, issue such orders, instructions or directions to the authorities or require any person to furnish information as it may deem fit for the proper administration of this Act and such authorities and all other persons employed in execution of this Act shall observe and follow the orders, instructions and directions of the Central Government.

(2) In issuing the directions or orders referred to in sub-section

(1), the Central Government may have regard to anyone or more of the following criteria, namely:—

(a) territorial area;

(b) classes of persons;

(c) classes of cases; and

(d) any other criterion that may be specified by the Central Government in this behalf.

(3) No orders, instructions or directions under sub-section *(1)* shall be issued so as to—

(a) require any authority to decide a particular case in a particular manner; or

(b) interfere with the discretion of the Adjudicating Authority in the discharge of its functions.

60. **Application of other laws not barred.** The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of any other law for the time being in force.

61. **Offences to be non-cognizable.** Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence under this Act shall be non-cognizable.

62. **Offences by companies.** *(1)* Where a person committing contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention 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 be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

(2) Nothing contained in sub-section *(1)*, shall render any person liable to punishment if he proves that the contravention took place without his knowledge.

(3) Notwithstanding anything contained in sub-section *(1)*, where a contravention of any of the provisions of this Act or of any

rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place 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, the director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

(a) "company" means a body corporate, and includes—

(i) a firm; and

(ii) an association of persons or a body of individuals whether incorporated or not; and

(b) "director", in relation to—

(i) a firm, means a partner in the firm;

(ii) any association of persons or a body of individuals, means any member controlling the affairs thereof.

63. **Notice, etc., not to be invalid on certain grounds.** No notice, summons, order, document or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid, or shall be deemed to be invalid merely by reason of any mistake, defect or omission in the notice, summons, order, document or other proceeding if the notice, summons, order, document or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act.

64. **Protection of action taken in good faith.** No prosecution, suit or other proceeding shall lie against the Government or any officer of the Government or the Appellate Tribunal or the Adjudicating Authority established under this Act, for anything done or intended to be done in good faith under this Act.

65. **Transfer of pending cases.** *(1)* Every suit or proceeding in respect of a *benami* transaction pending in any Court (other than a

High Court) or Tribunal or before any forum on the date of the commencement of this Act shall stand transferred to the Adjudicating Authority or the Appellate Tribunal, as the case may be, having jurisdiction in the matter.

(2) Where any suit, or other proceeding stands transferred to the Adjudicating Authority or the Appellate Tribunal under sub-section *(1)*,—

(a) the court, Tribunal or other forum shall, as soon as may be, after the transfer, forward the records of the suit, or other proceeding to the Adjudicating Authority or the Appellate Tribunal, as the case may be;

(b) the Adjudicating Authority may, on receipt of the records, proceed to deal with the suit, or other proceeding, so far as may be, in the same manner as in the case of a reference made under sub-section *(5)* of section 24, from the stage which was reached before the transfer or from any earlier stage or *de novo* as the Adjudicating Authority may deem fit.

66. **Proceedings, etc., against legal representative.** *(1)* Where a person dies during the course of any proceeding under this Act, any proceeding taken against the deceased before his death shall be deemed to have been taken against the legal representative and may be continued against the legal representative from the stage at which it stood on the date of the death of the deceased.

(2) Any proceeding which could have been taken against the deceased if he had survived may be taken against the legal representative and all the provisions of this Act, except sub-section *(2)* of section 3 and the provisions of Chapter VII, shall apply accordingly.

(3) Where any property of a person has been held *benami* under sub-section *(3)* of section 26, then, it shall be lawful for the legal representative of the person to prefer an appeal to the Appellate Tribunal, in place of the person and the provisions of section 46 shall, so far as may be, apply, or continue to apply, to the appeal.

67. **Act to have overriding effect.** The provisions of this

Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

68. **Power to make rules.** *(1)* The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) manner of ascertaining the fair market value under clause 16 of section 2;

(b) the manner of appointing the Chairperson and the Member of the Adjudicating Authorities under sub-section *(2)* of section 9;

(c) the salaries and allowances payable to the Chairperson and the Members of the Adjudicating Authority under sub-section *(1)* of section 13;

(d) the powers and functions of the authorities under sub-section *(2)* of section 18;

(e) other powers of the authorities under clause *(f)* of sub-section *(1)* of section 19;

(f) the form and manner of furnishing any information to the authority under sub-section *(2)* of section 21;

(g) the manner of provisional attachment of property under sub-section *(3)* of section 24;

(h) the procedure for confiscation of *benami* property under the second proviso to sub-section *(1)* of section 27;

(i) the manner and conditions to receive and manage the property under sub-section *(1)* of section 28;

(j) the manner and conditions of disposal of property vested in the Central Government under sub-section *(3)* of section 28;

(k) the salaries and allowances payable to and the other

terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal under sub-section *(1)* of section 33;

(l) the manner of prescribing procedure for removal of Chairperson or Member under sub-section *(4)* of section 35;

(m) the salaries and allowances payable to and the other terms and conditions of service of the officers and employees of the Appellate Tribunal under sub-section *(3)* of section 39;

(n) any power of the Appellate Tribunal under clause *(i)* of sub-section *(2)* of section 40;

(o) the form in which appeal shall be filed and the fee for filing the appeal under sub-section *(1)* of section 46;

(p) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be made, by rules.

69. **Laying of rules and notifications before Parliament.** Every rule made and notification issued under this Act shall be laid, as soon as may be after it is made or issued, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rules or notifications, as the case may be, both Houses agree that the rules or notifications, as the case may be, should not be made or issued, the rule or notification, as the case may be, shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or notification, as the case may be.

70. **Power to remove difficulties.** *(1)* If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, published in the Official Gazette, make such provisions

not inconsistent with the provisions of this Act as may appear to be necessary for removing the difficulty.

(2) No order shall be made under this section after the expiry of two years from the commencement of this Act.

(3) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

71. **Transitional provision.** The Central Government may, by notification, provide that until the Adjudicating Authorities are appointed and the Appellate Tribunal is established under this Act, the Adjudicating Authority appointed under sub-section *(1)* of section 6 of the Money-Laundering Act, 2002 (15 of 2003) and the Appellate Tribunal established under section 25 of that Act may discharge the functions of the Adjudicating Authority and Appellate Tribunal, respectively, under this Act.'.

11. Amendment of section 9. Section 9 of the principal Act shall be renumbered as section 72 thereof.

DR. G. NARAYANA RAJU,

Secretary to the Govt. of India.

NOTES OF CASES SECTION

Short Note

**(10)*

Before Mr. Justice S.C. Sharma

M.Cr.C. No. 9175/2013 (Indore) decided on 13 October, 2015

AMRENDRA KUMAR & ors. ...Applicants

Vs.

STATE OF M.P. & ors. ...Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Penal Code (45 of 1860), Sections 406, 420, 467, 468, 471 & 120 – Quashment of complaint – **Applicants having possession & title over the property, they entered into agreement for sale – No ingredients of Sections 467, 468, 469 & 420 of IPC are made out – Criminal proceedings just to pressurize the seller/applicants – Civil dispute converted into criminal case and power under Section 156(3) exercised in mechanical manner – Criminal proceedings deserves to be quashed.**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं दण्ड संहिता (1860 का 45), धाराएँ 406, 420, 467, 468, 471 एवं 120 – परिवाद अभिखण्डित किया जाना – आवेदकगण ने संपत्ति के हकदार एवं आधिपत्यधारी होने के नाते विक्रय का करार किया – भा.दं.सं. की धारा 467, 468, 469 व 420 के कोई अवयव निर्मित नहीं होते हैं – विक्रेता/आवेदकगण पर दबाव मात्र बनाने हेतु आपराधिक कार्यवाहियाँ – सिविल विवाद को आपराधिक प्रकरण में परिवर्तित किया गया एवं धारा 156(3) के अंतर्गत शक्तियों का प्रयोग यांत्रिक रीति से किया गया – आपराधिक कार्यवाहियाँ अभिखण्डित किये जाने योग्य हैं।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 154 – First Information Report – **Two conditions must be satisfied – Firstly – Suspicion of cognizable offence – Secondly – Existence of sufficient ground for investigation – FIR registered in mechanical manner without application of mind – Deserves to be quashed.**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – प्रथम सूचना प्रतिवेदन – दो दशाएँ आवश्यक रूप से तुष्ट की जानी चाहिए – प्रथमतः – संज्ञेय अपराध का संदेह – द्वितीयतः – अन्वेषण हेतु पर्याप्त आधार की मौजूदगी – प्रथम सूचना प्रतिवेदन मस्तिष्क का उपयोग किए बगैर यांत्रिक रीति से दर्ज की गई – अभिखण्डित किये जाने योग्य है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section

***156(3)* – Remedy available is of not routine nature and exercise of power requires application of mind – Magistrate exercising power must remain vigilant to the nature of allegations.**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – उपलब्ध उपचार साधारण प्रकृति का नहीं है एवं शक्तियों के प्रयोग हेतु मस्तिष्क का उपयोग किया जाना अपेक्षित है – शक्तियों का प्रयोग करने वाले दण्डाधिकारी को आक्षेपों की प्रकृति के प्रति सतर्क रहना चाहिए।

Cases referred:

(2009) 15 SCC 429, (2013) 6 SCC 800, (2013) 6 SCC 740, AIR 1992 SC 604, 2013 (III) MPWN 60, (2005) 13 SCC 699, (2015) 1 SCC 513, (2015) 6 SCC 439, 2015 (6) SCC 287, (2011) 3 SCC 351, (2012) 1 SCC 520, 2013(4) MPLJ 192, AIR 1999 SC 3242, 2013 (2) SCC 801, AIR 2000 SC 1869, (2001) 3 SCC 513, (2006) 6 SCC 736, 2013 (13) SCALE 559.

Short Note

****(11)***

Before Mr. Justice Sushil Kumar Gupta

Cr.R. No. 132/2014 (Gwalior) decided on 22 January, 2015

NAWAB KHAN ...Applicant

Vs.

STATE OF M.P. & ors. ...Non-applicants

***Penal Code (45 of 1860), Sections 307, 294 & 323/34 and Criminal Procedure Code, 1973 (2 of 1974), Section 397 r/w Section 401 - Quashing of charges - Allegations* - Petitioner inflicted 'Danda' blow on the abdomen area of prosecutrix and at that time she was pregnant - Co-accused persons had attacked with knife and 'Danda' - MLC report - No external injury found - No USG report on record relating to internal injury or of miscarriage - No opinion of doctor on record - Held - As no external or internal injury was found on the body of prosecutrix, it is very much clear that applicant neither intended to kill prosecutrix nor there was any injury on body of the prosecutrix, so case does not fall within the purview of Section 300 of IPC and no offence u/S 307 of IPC is made out - Revision allowed - Charge u/S 307 of IPC is quashed - Matter remanded back to Trial Court for framing**

of charges afresh.

दण्ड संहिता (1860 का 45), धाराएँ 307, 294 व 323/34 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 सहपठित धारा 401 – आरोपों का अभिखण्डित किया जाना – अभिकथन – याची ने अभियोक्त्री के उदर भाग पर 'डंडे' से वार किया तथा उस समय वह गर्भवती थी – सह अभियुक्तों ने चाकू और 'डंडे' से हमला किया – एम.एल.सी. रिपोर्ट – कोई बाह्य क्षति नहीं पाई गई – आंतरिक क्षति अथवा गर्भपात से संबंधित कोई अल्ट्रा सोनोग्राफी रिपोर्ट अभिलेख पर नहीं – अभिलेख पर चिकित्सक का मत नहीं – अभिनिर्धारित – चूंकि, अभियोक्त्री के शरीर पर कोई बाह्य अथवा आंतरिक क्षति नहीं पाई गई, इससे यह बिल्कुल स्पष्ट है कि आवेदक का आशय न तो अभियोक्त्री को जान से मारने का था एवं न ही अभियोक्त्री के शरीर पर ऐसी कोई क्षति थी, इसलिए, प्रकरण भा.दं.सं. की धारा 300 की परिधि में नहीं आता है तथा भा.दं.सं. की धारा 307 के अंतर्गत कोई अपराध नहीं बनता है – पुनरीक्षण मंजूर – भा.दं.सं. की धारा 307 के अंतर्गत आरोप अभिखण्डित – मामला विचारण न्यायालय की ओर नये सिरे से आरोप विरचित किये जाने हेतु प्रतिप्रेषित।

Amit Lahoti, for the applicant.
Mukund Bharadwaj, P.P. for the non-applicant/State.
Sanjeev Agarwal, for the complainant.

Short Note

****(12)***

Before Mr. Justice Sujoy Paul

W.P. No. 570/2008 (Gwalior) decided on 3 August, 2015

PARMANAND SHARMA ...Petitioner

Vs.

STATE OF M.P. & ors. ...Respondents

Service Law - Departmental Enquiry - First enquiry report dated 01.06.2005 - Challenge as to **- Representation by delinquent employee before Disciplinary Authority - Not afforded opportunity of defence - Disciplinary Authority ordered for re-enquiry - Second Enquiry Report submitted on 24.07.2006 - Challenge as to by prosecution - Grounds - Enquiry Officer did not permit the prosecution to lead evidence and directly recorded the statement of defence - Again Disciplinary Authority ordered for de-novo enquiry - Challenge as to - Petition - Whether in the facts and circumstances of the case, de-novo enquiry is permissible - Held - The Second Enquiry Officer did not**

permit the prosecution to lead evidence and directly recorded the statement of defence - So second enquiry is vitiated from inception because first right of prosecution to establish the charges was taken away - De novo enquiry is permissible on a technical ground or on the ground of procedural infirmity - No fault found in the order impugned - Petition dismissed.

सेवा विधि – विभागीय जाँच – प्रथम जाँच प्रतिवेदन दिनांक 01.06.2005 – चुनौती – अपचारी कर्मचारी द्वारा अनुशासनिक प्राधिकारी के समक्ष अभ्यावेदन प्रस्तुत किया गया – बचाव का अवसर प्रदान नहीं किया गया – अनुशासनिक प्राधिकारी द्वारा पुनः जाँच हेतु आदेश दिया गया – द्वितीय जाँच प्रतिवेदन दिनांक 24.07.2006 को प्रस्तुत – अभियोजन द्वारा चुनौती – आधार – जाँचकर्ता अधिकारी ने अभियोजन को साक्ष्य प्रस्तुत करने की अनुमति नहीं दी और सीधे ही बचाव पक्ष के कथन अभिलिखित कर लिए – अनुशासनिक प्राधिकारी द्वारा पुनः नए सिरे से जाँच हेतु आदेशित किया गया – चुनौती – याचिका – क्या प्रकरण के तथ्यों एवं परिस्थितियों में नए सिरे से जाँच अनुज्ञेय है – अभिनिर्धारित – द्वितीय जाँचकर्ता अधिकारी ने अभियोजन को साक्ष्य प्रस्तुत करने की अनुमति नहीं दी तथा सीधे ही बचाव पक्ष के कथन अभिलिखित कर लिए – अतः द्वितीय जाँच प्रारंभ से ही दूषित थी क्योंकि आरोप सिद्ध करने का अभियोजन का प्रथम अधिकार छीना गया था – तकनीकी आधार अथवा प्रक्रियात्मक निर्बलता के आधार पर नए सिरे से जाँच अनुज्ञेय है – आक्षेपित आदेश में कोई त्रुटि नहीं पाई गई – याचिका खारिज।

Cases referred:

(1997) 10 SCC 178, (2012) 3 SCC 580, (1971) 2 SCC 102.

S.K. Sharma, for the petitioner.
Vishal Mishra, Dy. A.G. for the respondent No. 1/State.
Purushottam Sharma, for the respondent No. 2.

Short Note

****(13)***

Before Mr. Justice Sujoy Paul

W.P. No. 5763/2009 (Gwalior) decided on 29 June, 2015

PRATIBHA MOHTA ...Petitioner
Vs.
SANJAY BAORI & ors. ...Respondents

A. ***Civil Procedure Code (5 of 1908), Order 14 Rule 5 &***

Order 8 Rule 1(A)(3) and Succession Act, Indian (39 of 1925), Section 276 - Probate proceedings **- Additional issues and production of documents - Issue relating to competence of the testator to execute a will - Whether the issue of a particular bequest being good or bad, or question of title can be examined in probate proceedings? - Held - No, as the Probate Court has limited jurisdiction, so the issue of particular bequest being good or bad, or the question of title cannot be examined in the probate proceedings, and the Probate Court is only concerned with the question as to whether the document put forward was the last "Will" and it was duly executed and atleast in accordance with law - Application under Order 14 Rule 5 and under Order 8 Rule 1(A)(3) of C.P.C. is rightly rejected - Petition dismissed.**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 14 नियम 5 व आदेश 8 नियम 1(ए)(3) एवं उत्तराधिकार अधिनियम, भारतीय (1925 का 39), धारा 276 – प्रोबेट कार्यवाहियाँ – अतिरिक्त विवाद्यकों एवं दस्तावेजों का प्रस्तुत किया जाना – वसीयत निष्पादित करने की वसीयतकर्ता की सक्षमता से संबंधित विवाद्यक – क्या किसी वसीयत विशेष के अच्छे या बुरे होने के विवाद्यक अथवा हक के प्रश्न का परीक्षण प्रोबेट कार्यवाहियों में किया जा सकता है – अभिनिर्धारित – नहीं, चूंकि प्रोबेट न्यायालय की अधिकारिता सीमित होती है, इसलिए किसी वसीयत विशेष के अच्छे या बुरे होने के विवाद्यक अथवा हक के प्रश्न का परीक्षण प्रोबेट कार्यवाहियों में नहीं किया जा सकता, तथा प्रोबेट न्यायालय का संबंध मात्र इस प्रश्न से है कि क्या प्रस्तुत किया गया दस्तावेज अंतिम "वसीयत" था एवं क्या वह सम्यक् रूप से विधि अनुसार निष्पादित किया गया था – सि.प्र.सं. के आदेश 14 नियम 5 एवं आदेश 8 नियम 1(ए)(3) के अंतर्गत प्रस्तुत आवेदन उचित रूप से निरस्त किए गए हैं – याचिका खारिज।

B. Constitution - Article 227 - Scope - Limited Jurisdiction **- Interference can be made under Article 227 only if order is passed by a Court having no jurisdiction or it suffers from manifest procedural impropriety or perversity - Erroneous order is not required to be corrected under supervisory jurisdiction.**

ख. संविधान – अनुच्छेद 227 – व्यापकता – सीमित अधिकारिता – अनुच्छेद 227 के अंतर्गत हस्तक्षेप केवल तभी किया जा सकता है जब आदेश किसी अधिकारितविहीन न्यायालय द्वारा पारित किया गया हो अथवा आदेश किसी स्पष्ट प्रक्रियात्मक अनौचित्य अथवा दुरूपयोजन से पीड़ित हो – पर्यवेक्षी अधिकारिता के अंतर्गत त्रुटिपूर्ण आदेश में सुधार किया जाना अपेक्षित नहीं।

NOTES OF CASES SECTION

Cases referred:

1996 AIHC 342, C.R. No. 559/1997 order passed on 28.07.1997, (2008) 15 SCC 365, AIR 1954 SC 280, (1993) 2 SCC 507, AIR 1992 MADRAS 136, (2008) 1 SCC 267.

V.K. Bharadwaj with *Anvesh Jain*, for the petitioner.
Sanjiv Jain, for the respondents No. 1 & 2.
Vikas Singhal, for the respondent No. 3.

Short Note
****(14)***
Before Mr. Justice J.K. Maheshwari
W.P. No. 15487/2014 (Jabalpur) decided on 21 August, 2015

RESTAURANT & LOUNGE VYAPARI ASSOCIATION & anr. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 144- Temporary measures*** **- Proceedings under Section 144 of Cr.P.C. are temporary in nature and order under such proceedings cannot be passed to earn the status of permanent or semi-permanent character.**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 144 – अस्थाई उपाय – द.प्र.सं. की धारा 144 के अतंर्गत कार्यवाहियाँ अस्थाई प्रकृति की हैं एवं स्थाई अथवा अर्द्ध–स्थाई रूप अर्जित करने हेतु उक्त कार्यवाहियों के अंतर्गत आदेश पारित नहीं किया जा सकता।

B. ***Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act (34 of 2003), Sections 3, 4, 6 & 21 and Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules 2004, Rule 3, Prohibition of Smoking in Public Places Rules, 2008, Rule 2, 3 & 4 and Criminal Procedure Code, 1973 (2 of 1974), Section 144 - Prohibition of Hookah Lounge Bars*** **- In the hotels having capacity of 30 or more rooms or restaurants having seating capacity of 30 persons or more, smoking may be permitted in the manner prescribed in the Act, 2003 - Without indicating violation**

of provisions of Act, 2003 and the Rules by the particular hotel or restaurants, passing a general order due to giving the bad name to Administration is unsustainable - Petition allowed with following directions - As the sale of tobacco products is strictly prohibited to the persons below the age of eighteen years and upto hundred yards of the educational institutions in the State, as per Section 6 of the COTP Act, however, it is directed that in case of any violation action ought to be taken applying the mandate of law - As per Section 4 of the COTP Act, smoking at a public place is prohibited subject to compliance of Rule 3 and 4 of the Rules of 2008 - However, it is directed that in hotels, restaurants and at other public places smoking can be permitted within the ambit of Rule 4 of the Rules, 2008 - The hotel and restaurant owners cannot be permitted to offer Hookah or use of tobacco products by pipe or by any other instruments on each and every table under the garb of service, in fact it can be permitted in a smoking area or space only - However, it is directed that smoking may be permitted in hotel and restaurants only in the smoking area or places otherwise action may be taken in accordance with law - In view of the discussion made hereinabove and looking to the spirit of Section 144 of Cr.P.C., the District Magistrate may pass the order in case of emergent situation and to check the anticipated action, visualizing danger to human life, health or safety or disturbance of the public tranquility and in other situations as specified - But the repetitive orders seem to be of semiperennial nature which is not permissible in law.

ख. सिगरेट और अन्य तंबाकू उत्पाद (विज्ञापन का प्रतिषेध और व्यापार तथा वाणिज्य, उत्पादन, प्रदाय और वितरण का विनियमन) अधिनियम (2003 का 34), धाराएँ 3, 4, 6 व 21 एवं सिगरेट और अन्य तंबाकू उत्पाद (विज्ञापन का प्रतिषेध और व्यापार तथा वाणिज्य, उत्पादन, प्रदाय और वितरण का विनियमन) नियम, 2004, नियम 3, सार्वजनिक स्थानों पर धूम्रपान का प्रतिषेध नियम, 2008, नियम 2, 3 व 4 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 144 – हुक्का लाउन्ज बार का प्रतिषेध – 30 अथवा अधिक कमरों की क्षमता वाले होटलों एवं 30 अथवा अधिक बैठक क्षमता वाले रेस्टोरेंटों में अधिनियम, 2003 में विहित रीति के अनुरूप धूम्रपान की अनुमति दी जा सकती है – किसी विशिष्ट होटल अथवा रेस्टोरेंट द्वारा अधिनियम, 2003 के उपबंधों का उल्लंघन एवं नियमों को दर्शित किये बगैर प्रशासन का नाम बदनाम करते हुए पारित सामान्य आदेश कायम रखे जाने योग्य नहीं है – अग्रलिखित निदेशों के साथ याचिका मंजूर – चूंकि सिगरेट और अन्य तम्बाकू उत्पाद अधिनियम, 2003 की धारा 6 के अनुसार 18 वर्ष से कम

आयु के व्यक्ति को तथा राज्य में शैक्षणिक संस्थानों से 100 यार्ड की दूरी तक तम्बाकू उत्पादों की बिक्री सर्वथा प्रतिषिद्ध है, तथापि, यह निदेशित किया जाता है कि किसी भी उल्लंघन की दशा में विधि की आज्ञा लागू करते हुए कार्यवाही की जाना चाहिए – सिगरेट और अन्य तम्बाकू उत्पाद अधिनियम की धारा 4 के अनुसार 2008 के नियमों के नियम 3 एवं 4 के अनुपालन के अध्यधीन, किसी सार्वजनिक स्थान पर धूम्रपान प्रतिषिद्ध है – तथापि, यह निदेशित किया जाता है कि होटल, रेस्टॉरेंट एवं अन्य सार्वजनिक स्थानों पर, 2008 के नियमों के नियम 4 की परिधि के अधीन रहते हुए धूम्रपान की अनुमति दी जा सकती है – होटल और रेस्टॉरेंट मालिकों को सेवा प्रदान करने की आड़ में प्रत्येक टेबल पर पाइप अथवा अन्य किसी उपकरण के माध्यम से तम्बाकू उत्पादों का उपयोग करने अथवा हुक्का पेश करने हेतु अनुमति नहीं दी जा सकती, बल्कि केवल धूम्रपान क्षेत्र अथवा स्थान में ही इसकी अनुमति दी जा सकती है – तथापि, यह निदेशित किया जाता है कि होटल एवं रेस्टॉरेंट में धूम्रपान को केवल धूम्रपान क्षेत्र अथवा स्थान में ही अनुमति दी जाये अन्यथा विधि अनुसार कार्यवाही की जा सकेगी – उपरोक्त वर्णित चर्चा के आलोक में एवं दं.प्र.सं. की धारा 144 की भावना को देखते हुए, किसी आपात स्थिति की दशा में तथा प्रत्याशित कृत्य की पड़ताल हेतु मानव जीवन, स्वास्थ्य अथवा सुरक्षा के लिए किसी खतरे अथवा लोक प्रशांति में विघ्न को दृष्टिगोचर करते हुए एवं अन्य विनिर्दिष्ट परिस्थितियों में जिला दण्डाधिकारी आदेश पारित कर सकेगा – परंतु पुनरावर्ती आदेश अर्द्ध–स्थाई प्रकृति के प्रतीत होते हैं जो विधि में अनुज्ञेय नहीं हैं।

Cases referred:

AIR 2015 SC 756, 2012(3) MPHT 212, AIR 1961 SC 884, AIR 1984 SC 51, (1879) ILR 5 Cal 7, 2001 (2) MPLJ 197.

Brain Da Silva with *Rohit Sohgaura*, for the petitioners.
Amit Seth, G.A. for the respondents No. 1 to 5, 7 & 8.

Short Note

****(15)***

Before Mr. Justice S.C. Sharma

W.P. No. 12492/2013(S) (Indore) decided on 30 September, 2015

S. KUMARS LTD. (M/S.) ...Petitioner
Vs.
JAGRAM SINGH ...Respondent

(Alongwith W.P. No. 12495/2013(s), W.P. No. 12498/2013(s), W.P. No. 12600/2013 (s), W.P. No. 12606/2013(s), W.P. No. 12609/2013 (s), W.P. No. 14069/2013(s), W.P. No. 14073/2013(s), W.P. No. 14077/2013(s),

W.P. No. 14078/2013(s), W.P. No. 14081/2013 (s), W.P. No. 14082/2013(s), W.P. No. 14083/2013 (s), W.P. No. 14084/2013(s), W.P. No. 14087/2013(s), W.P. No. 14089/2013(s) & W.P. No. 14091/2013(s))

Industrial Disputes Act (14 of 1947), Section 10 - Maintainability of reference **- Reference by workman in terms of Section 10 of Industrial Disputes Act, 1947 against his alleged discontinuance - Preliminary objections by employer on maintainability - Labour Court held that the resignation/termination of service of workman can only be decided after conclusion of the case - No patent illegality nor any jurisdictional error in the order - Admission declined.**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 10 – निर्देश की पोषणीयता – कर्मकार द्वारा उसकी अभिकथित सेवा समाप्ति के विरूद्ध औद्योगिक विवाद अधिनियम, 1947 की धारा 10 के अनुसार निर्देश लिया गया – नियोक्ता द्वारा पोषणीयता के संबंध में प्रारंभिक आपत्तियाँ – श्रम न्यायालय ने यह अभिनिर्धारित किया कि कर्मकार के त्याग पत्र/सेवा समाप्ति का मामला प्रकरण की समाप्ति के उपरांत ही विनिश्चित किया जा सकता है – आदेश में कोई प्रकट अवैधता अथवा अधिकारिता संबंधी त्रुटि नहीं – ग्राह्यता से इंकार किया गया।

Cases referred:

AIR 1984 SC 153, 2010 (8) SCC 329.

Short Note

****(16)***

Before Mr. Justice Alok Verma

M.Cr.C. No. 3714/2010 (Indore) decided on 15 June, 2015

VISHWA JAGRITI MISSION (REGD) & ors. ...Applicants

Vs.

M.P. MANSINGHKA CHARITIES & anr. ...Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 156(3) & 482, Penal Code (45 of 1860), Sections 406, 420, 463, 464, 467, 468, 471/34 & 120-B and Income Tax Act (43 of 1961), Sections 12-A & 80-G - Quashment of Criminal complaint - Grant of certificate - Charitable activities - Exemption **- Exemption certificate alleged to be forged & fabricated - Inference drawn by the Income Tax Authorities cannot form basis for allowing the application under Section 482 - The Income Tax Authorities are not "Court" in the real senses of the terms**

- They are more like Administrative Tribunal, their main purpose is to ascertain the amount of revenue - Therefore, their inference cannot be utilized for the purpose of a criminal proceeding - Any subsequent development in criminal proceedings cannot absolve a person from his criminal liability - It can be seen only at the relevant time when the offence was allowed to have been committed.

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 156(3) व 482, दण्ड संहिता (1860 का 45), धाराएँ 406, 420, 463, 464, 467, 468, 471/34 व 120–बी एवं आयकर अधिनियम (1961 का 43), धाराएँ 12–ए व 80–जी – दाण्डिक परिवाद को अभिखण्डित किया जाना – प्रमाणपत्र प्रदान किया जाना – पुण्यार्थ क्रियाकलाप – छूट – छूट प्रमाणपत्र के फर्जी एवं कूटरचित होने का अभिकथन किया गया – आयकर प्राधिकारियों द्वारा निकाला गया निष्कर्ष धारा 482 के अंतर्गत प्रस्तुत आवेदन को स्वीकार किये जाने का आधार नहीं हो सकता – आयकर पाधिकारीगण वास्तविक अर्थ में "न्यायालय" नहीं है – वे प्रशासनिक अधिकरण के समान होते हैं, उनका मुख्य उद्देश्य राजस्व राशि का अभिनिश्चय करना है – इसलिए, उनके निष्कर्ष को दाण्डिक कार्यवाहियों के प्रयोजन हेतु उपयोग में नहीं लाया जा सकता – दाण्डिक कार्यवाहियों में हुआ कोई भी पश्चात्वर्ती परिवर्तन किसी व्यक्ति को उसके आपराधिक दायित्व से मुक्त नहीं कर सकता – यह केवल उस सुसंगत समय ही देखा जा सकता है, जब अपराध कारित होने दिया गया था।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Jurisdiction of Trial Court **- This issue is to be decided by the Trial Court itself on the basis of material on the record - High Court cannot substitute itself for the trial Court to decide the point of jurisdiction.**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – विचारण न्यायालय की अधिकारिता – इस विवाद्यक का विनिश्चय विचारण न्यायालय द्वारा स्वयं ही अभिलेख पर उपलब्ध सामग्री के आधार पर किया जाना चाहिए – अधिकारिता के बिंदु के विनिश्चय हेतु उच्च न्यायालय स्वयं को विचारण न्यायालय से प्रतिस्थापित नहीं कर सकता।

C. Evidence Act (1 of 1872), Section 106 **- Burden of proving fact especially within the knowledge - Section 106 - When certain facts are "especially" within the knowledge of any person, burden of proving that fact is upon him.**

ग. साक्ष्य अधिनियम (1872 का 1), धारा 106 – विशेष रूप से जानकारी में होने वाले तथ्य को प्रमाणित करने का भार – धारा 106 – जब कतिपय तथ्य किसी व्यक्ति की जानकारी में "विशेषतः" हों, तब उक्त तथ्य को प्रमाणित

करने का भार उस व्यक्ति पर होता है।

D. ***Practice (Criminal)*** **- Any subsequent development in criminal proceeding cannot absolve a person from his criminal liability - It can be seen only at the relevant time when the offence was allowed to have been committed.**

घ. *प्रेक्टिस (क्रिमिनल)* – दाण्डिक कार्यवाहियों में हुई कोई भी पश्चात्वर्ती परिवर्तन किसी व्यक्ति को उसके आपराधिक दायित्व से मुक्त नहीं कर सकती – यह केवल उस सुसंगत समय ही देखा जा सकता है, जब अपराध कारित होने दिया गया था।

S.C. Bagadiya with *Ramesh Kumar*, for the applicants.
Manohar Dalal, for the non-applicants.

Short Note

****(17)***

Before Mr. Justice Alok Verma

M.Cr.C. No. 1078/2013 (Indore) decided on 15 May, 2015

YASH VIDYARTHI ...Applicant
Vs.
CENTRAL BUREAU OF INVESTIGATION,
NEW DELHI ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Penal Code (45 of 1860), Sections 120(B), 419, 420, 467, 468 & 471 and Prevention of Corruption Act (49 of 1988), Section 13(2) r/w 13(1)(d) **- CBI filed charge sheet against applicant (accused) - Applicant is a practicing lawyer and panel advocate for conducting search and preparation of search report - Report was found false - There was a gross negligence on the part of the applicant, but it cannot be said that he was criminally associated with the co-accused or with the bank officials and participated in the criminal conspiracy - It is not only on the basis of his report the property was hypothecated and loan was sanctioned - Criminal proceedings against the applicant are quashed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, दण्ड संहिता (1860 का 45), धाराएँ 120(बी), 419, 420, 467, 468 व 471 एवं भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(2) सहपठित धारा 13(1)(डी) – केन्द्रीय अन्वेषण ब्यूरो ने आवेदक (अभियुक्त) के विरूद्ध अभियोग पत्र प्रस्तुत किया – आवेदक एक व्यवसायरत

अधिवक्ता होकर छानबीन करने एवं छानबीन प्रतिवेदन (सर्च रिपोर्ट) तैयार करने हेतु पैनल अधिवक्ता है – प्रतिवेदन असत्य पाया गया – आवेदक की ओर से घोर लापरवाही की गई, परंतु यह नहीं कहा जा सकता कि वह सह–अभियुक्त अथवा बैंक कर्मचारियों के साथ आपराधिक रूप से मिला हुआ था एवं उसने आपराधिक षड्यंत्र में हिस्सा लिया – ऐसा नहीं है कि मात्र उसके प्रतिवेदन के आधार पर संपत्ति को बंधक रखा जाकर ऋण स्वीकृत किया गया था – आवेदक के विरूद्ध आपराधिक कार्यवाहियाँ अभिखण्डित।

Cases referred:

(2012) 9 SCC 512, M.Cr.C. No. 7954/2013 decided on 16.08.2013 (DB).

Atul Shreedharan, for the applicant.
Rajendra Singh Chouhan, for the non-applicant/CBI.

I.L.R. [2016] M.P., 2425
FULL BENCH
Before Mr. Justice A.M. Khanwilkar, Chief Justice,
Mr. Justice S.K. Gangele & Mr. Justice Alok Aradhe
W.A. No. 651/2013 (Jabalpur) decided on 6 January, 2016

CHANDRAPAL YADAV ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

***Panchayat Service (Gram Panchayat Service Discipline and Appeal) Rules, M.P. 1999, Rule 7 - Suspension - Opportunity of hearing - Criminal Case* - Suspension of the Gram Panchayat Secretary - No prior notice or opportunity of hearing before suspension of the Gram Panchayat Secretary or for that matter withdrawal (de-notified) of such charge given to the Panchayat Karmi, is required to be given by the Competent Authority to the Concerned employee much less who is facing serious criminal case. (Paras 30 & 31)**

पंचायत सेवा (ग्राम पंचायत सेवा अनुशासन और अपील) नियम, म.प्र. 1999, नियम 7 – निलंबन – सुनवाई का अवसर – दाण्डिक प्रकरण – ग्राम पंचायत सचिव का निलंबन – ग्राम पंचायत सचिव के निलंबन के पूर्व अथवा उस मामले के संबंध में पंचायत कर्मी को दिये गये उक्त पदभार को वापस लिये जाने (अधिसूचना वापस लिये जाने) के पूर्व सक्षम प्राधिकारी द्वारा संबंधित कर्मचारी को कोई पूर्व नोटिस अथवा सुनवाई का अवसर दिया जाना अपेक्षित नहीं, ऐसे कर्मचारी को तो बिल्कुल नहीं जो गंभीर आपराधिक प्रकरण का सामना कर रहा है।

Cases referred:

2008(3) MPLJ 394, 2002 (3) MPLJ 204, 2003 (3) MPHT 370, 2006 (4) MPHT 99 (CG), 2007 (1) MPLJ 343, 2008 (4) MPHT 132 (DB), 2007 (4) MPHT 431, 2009 (2) MPHT 372 (DB), AIR 1974 SC 423, AIR 1962 SC 1704, AIR 1958 SC 36, AIR 1958 SC 341, (2006) 4 MPHT 99.

Vivek Ranjan Pandey and *Alok Kumar,* for the appellant.
Samdarshi Tiwari, Dy. A.G. for the respondents/State.

ORDER

The Order of the Court was delivered by : **S.K. GANGELE, J. :-** A Division Bench of this Court vide order dated 05.08.2013 doubted the correctness of the ratio laid down by another Division Bench in the case of *Lalla Prasad Burman vs. State of M.P. and others,* 2008 (3) MPLJ 394 and has referred the following question for consideration of the Full Bench:-

> "In aforesaid circumstances, disagreeing to the judgment of *Lalla Prasad Burman* (supra), we refer it to the Larger Bench to examine the correctness of the aforesaid judgment in the light of circumstances that if a criminal case is registered against a Panchayat Karmi and he has been arrested in the said offence, whether he is still required to be served a show cause notice or an opportunity of hearing before withdrawing the powers of Secretary and whether Hariom still holds the field."

2. Facts leading to passing an order of reference, briefly stated, are that the appellant was appointed as the 'Panchayat Karmi' by Gram Panchayat, Badaua, District Rewa. Thereafter, he was notified as Secretary of the Gram Panchayat. After notification of the appellant as Secretary of the Gram Panchayat, on 14.09.2012 a criminal case for offences under sections 409, 420, 467, 468, 471, 477, 477-A and 120-B of the Indian Penal Code was registered against him. The appellant was taken into custody and thereafter was sent to judicial custody for a period from 14.09.2012 to 02.12.2012. On account of registration of criminal case against the appellant as well as his detention, by order dated 06.10.2012 he was de-notified from the post of Secretary by the Chief Executive Officer, District Panchayat, Rewa. One Chindalal Saket was given the additional charge of Panchayat Secretary by way of an ad hoc arrangement. The aforesaid order was challenged by the appellant before the Collector in revision which was dismissed vide order dated 11.03.2013. The order passed by the Collector was the subject matter of challenge before the Additional Commissioner, who also affirmed the same. The appellant approached this Court by filing the writ petition, *inter alia*, on the ground that the order of de-notification of the appellant from the post of Panchayat Secretary was punitive in nature and it suffered from the procedural irregularity inasmuch as the same was passed de hors the procedure prescribed under the provisions of Madhya Pradesh Panchayat Service (Gram Panchayat

Service Discipline & Appeal) Rules, 1999 [hereinafter after referred to as the "Rules of 1999"]. The learned Single Judge dismissed the writ petition and upheld the order of de-notification on the ground that the same was rightly passed on account of registration of the criminal case as well as detention of the appellant in jail. Being aggrieved, the appellant filed the instant appeal.

3. As stated above, the Division Bench vide order dated 05.8.2013, took note of the decision of the learned Single Judge in the case of *Hariom Singh Rajput vs. State of Madhya Pradesh and others,* 2002 (3) MPLJ 204 and decision rendered by the Division Bench in the case of *Lalla Prasad Burman* (supra), and doubted the correctness of the law laid down by Division Bench in the case of *Lalla Prasad Burman* (supra) and, *inter alia,* observed that when a criminal case is registered against the Panchayat Secretary and allegations of embezzlement of funds are made against him, de-notification of such a 'Panchayat Secretary' is in larger interest of Gram Panchayat and it would be inappropriate to continue such an employee as Panchayat Secretary. However, he may be permitted to continue as Panchayat Karmi and before passing an order of de-notification no opportunity of hearing is required to be given to such an employee. In the aforesaid factual background the order of reference was passed.

4. Learned counsel for the appellant submitted that Rules of 1999 are applicable to Panchayat Secretary and he could neither be de-notified nor be suspended from the post of Panchayat Secretary without following the procedure laid down in the Rules and without compliance of principles of natural justice, even if a criminal case is registered against him. It was further submitted that withdrawal of power of Panchayat Secretary amounts to reduction in rank from the post of Panchayat Secretary to Panchayat Karmi and, therefore, the same being punitive in nature, the procedure prescribed under Rule 7 of 1999 is required to be followed. In support of aforesaid submissions, learned counsel has placed reliance on the decisions in the cases of *Lalla Prasad Burman* (supra), *Kunjan Singh vs. State of M.P. and others,* 2003 (3) MPHT 370, *Rooplal Nayak vs. State of Chhattisgarh,* 2006 (4) MPHT 99 (CG) and *Mool Chand Soni vs. State of M.P. and others,* 2007 (1) MPLJ 343.

5. On the other hand, learned Deputy Advocate General has contended that appointment of Panchayat Secretary is governed by Section 69 of Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (hereinafter

referred to as the "Act of 1993"). It was further submitted that under the aforesaid provision the State Government or the Prescribed Authority has the powers to appoint the Panchayat Secretary for a Gram Panchayat and Rules of 1999 are not applicable to the case of Panchayat Secretary. It was also pointed out that under Rule 6 of 1999 Rules the Disciplinary Authority or any Authority to whom such authority is subordinate can impose penalty specified in Rule 5 to the extent mentioned in the Appendix to the Rules. The Prescribed Authority mentioned in Section 69 of 1993 Act is different than the Disciplinary Authority mentioned in Schedule of the Rules of 1999. However, aforesaid aspect of the matter has not been considered by the Division Bench while deciding the case of *Lalla Prasad Burman* (supra). It was also urged that notification of Panchayat Karmi as Panchayat Secretary is neither promotion nor an upgradation of the post and if the Panchayat Secretary is de-notified as Panchayat Karmi or is restrained to work as such, the same does not amount to reduction in rank. Lastly, it was pointed out that the State Government has framed Madhya Pradesh Panchayat Service (Gram Panchayat Secretary Recruitment and Conditions of Service Rules), 2011 [hereinafter referred to as the "Rules of 2011"] which have come into force and the service conditions of the Secretary of Gram Panchayat are now governed in accordance with the Rules of 2011. In support of aforesaid submissions, reliance has been placed on the decisions in the cases of *Gram Panchayat Bamrol vs. Jagdish Singh Rawat and others,* 2008 (4) MPHT 132 (DB), *Neelesh Dubey vs. State of M.P. and others,* 2007 (4) MPHT 431, *Kamlesh Dubey vs. State of M.P. and others,* 2009 (2) MPHT 372 (DB), *Debesh Chandra Das vs. Union of India and others,* AIR 1970 SC and *State of Uttar Pradesh and others vs. Sughar Singh,* AIR 1974 SC 423.

6. The principal question posed in the reference order is about the correctness of the view taken by the Division Bench in *Lalla Prasad Burman's* case (supra). In that case, the appellant was appointed as Panchayat Karmi on 13.11.1995 under the scheme – Panchayat Karmi Yojna, 1995. He was notified as Secretary of the Gram Panchayat by the Collector on 12.10.1999. That case dealt with the situation 'pre Rules of 2011'. Strictly speaking the principle expounded in the said decision may apply only to cases in which an incumbent is notified as Secretary 'pre Rules of 2011'. After the advent of Rules of 2011, the appointment and service conditions of the Secretary of the Gram Panchayat is governed by the Rules of 2011 read with Madhya Pradesh Panchayat Services (Conduct) Rules, 1998 and Madhya Pradesh Panchayat

Service (Discipline and Appeal) Rules of 1999. It is possible to suggest that the observations made by the Division Bench in *Lalla Prasad's* case (supra) may have some relevance for dealing with cases 'post Rules of 2011'. For which, we may have to consider the correctness of those observations.

7. We propose to examine the question posed in the reference order broadly in two parts. Firstly, the dispensation that must be followed by the Authorities before de-notification of the incumbent from the post of Secretary of the Gram Panchayat, post-Rules of 2011. This issue will have to be answered in further two parts – namely, the dispensation to be followed in respect of incumbent originally appointed as "Panchayat Karmi" and entrusted with the charge of Secretary of Gram Panchayat post-Rules of 2011. The second is about the incumbent having been appointed directly on the post of Secretary of Gram Panchayat post-Rules of 2011. The second broad category will be of cases where the appointment is made on the post of Panchayat Karmi pre-Rules of 2011 under the Panchayat Karmi Yojna, 1995 and that incumbent was notified as Secretary of Gram Panchayat and bestowed with the responsibilities of that office pre-Rules of 2011.

8. Reverting to the second broad category of appointments made on the post of Panchayat Karmi in terms of Panchayat Karmi Yojna, 1995; and thereafter invested with the additional charge of Secretary of Gram Panchayat by issuance of notification in that behalf pre Rules of 2011. The Panchayat and Rural Development Department by notification dated 12th September, 1995 in exercise of powers under Section 71 read with Section 69(1) of Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 formulated Panchayat Karmi Scheme named as Panchayat Karmi Yojna. In accordance with the aforesaid Scheme, the Gram Panchayat was competent to appoint a Panchayat Karmi either on contract basis or temporarily or permanently. The Panchayat Karmi would be eligible to receive honorarium, which was fixed by the Panchayat. In accordance with Clause 7 of the Scheme the Gram Panchayat is the disciplinary authority of the Panchayat Karmi, it is authorized to take disciplinary action against the Panchayat Karmi. The Panchayat Karmi could be removed from his post after issuance of show cause notice by the general body of the Gram Panchayat.

9. Chapter VIII of the Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 prescribes establishment, budget and accounts of Panchayats. Section 69 under that Chapter of the Act of 1993 prescribes appointment of Secretary

of Gram Panchayat. Section 69 as applicable until 23.5.2012 reads thus :-

*"69. **Appointment of Secretary and Chief Executive Officer.**- (1) [The State Government or the prescribed authority may appoint a Secretary for a Gram Panchayat or group of two or more Gram Panchayats, who shall discharge such functions and perform such duties as may Secretary for a Gram Panchayat or group of two or more Gram Panchayats, who shall discharge such functions and perform such duties as may be assigned to them by the State Government or prescribed authority:]*

[Provided that the person holding the charge of a Secretary of Gram Panchayat immediately before the commencement of this Act shall continue to function as such till a Secretary is appointed in accordance with this section."

Provided further that a person shall not hold charge of a [Secretary] of Gram Panchayat, if such a person happens to be relative of any office bearer of the concerned Gram Panchayat.

***Explanation.** – for the purpose of this sub-section the expression "relative" shall mean father, mother, brother, sister, husband, wife, son, daughter, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law.]*

[(2) The State Government shall appoint for every Janpad Panchayat a Chief Executive Officer and may be also appoint one or more Additional Chief Executive Officer, who shall discharge such functions and perform such duties as may be assigned to them by the Chief Executive Officer].

[(3) The State Government shall appoint for every Zila Panchayat a Chief Executive Officer and may also appoint one or more Additional Chief Executive Officers, Deputy Chief Executive Officers and Executive Officers

who shall discharge such functions and perform such duties as may be assigned to them by the Chief Executive Officer].

(4) During the absence of a Secretary of Gram Panchayat or [Chief Executive Officer of Janpad Panchayat or Zila Panchayat] due to leave, retirement, death, resignation or otherwise the prescribed authority shall, as soon as possible, make such arrangements as he deems fit, for carrying on the office of Secretary of Gram Panchayat or [Chief Executive Officer of Janpad Panchayat or Zila Panchayat] as the case may be. A person while carrying on such office shall exercise all powers conferred by this Act or rules made thereunder on the Secretary of Gram Panchayat or [Chief Executive Officer of Janpad Panchayat or Zila Panchayats] as the case may be.

(5) The Secretary of the Gram Panchayat, the [Chief Executive Officer of the Janpad Panchayat and Zila Panchayat] shall be responsible for keeping and maintaining the records of the Gram Panchayat, Janapad Panchayat or Zila Panchayat as the case may be."

After amendment vide M.P. Act No.26 of 2012 [23-5-2012], the opening para of sub-Section (1) of Section 69 was substituted and in the second proviso thereunder, the word "Secretary" was substituted. The opening part of sub-Section (1) of Section 69 as applicable to the present case, now reads thus :-

"69. Appointment of Secretary and Chief Executive Officer.- *(1) [The State Government or the prescribed authority may appoint a Secretary and one or more Assistant Secretaries for a Gram Panchayat, who shall discharge such functions and perform such duties as may Secretary and one or more Assistant Secretaries for a Gram Panchayat, who shall discharge such functions and perform such duties as may be assigned to them by the State Government or prescribed authority:]"*

Rest of the Section has been retained as it is, except the substitution of word "Secretary" in the second proviso below sub-Section (1) of Section 69, which now reads as "Secretary or Assistant Secretary".

10. Be that as it may, from the aforesaid provision it is clear that Section 69 of the Act of 1993 gives an independent power to the State Government or the prescribed Authority to appoint Secretary and one or more Assistant Secretaries for a Gram Panchayat. This power is an independent power given to the State Government or the prescribed Authority in addition to the power vested in it under the Panchayat Karmi Yojna, which was introduced by the Government on 12th September, 1995.

11. The State Government has made Rules named as Madhya Pradesh Panchayat Service (Discipline and Appeal) Rules, 1999 in exercise of powers conferred by sub-section (1) of Section 95 read with sub-section (2) of Section 70 of the Act of 1993. Rule 1 (3) of the aforesaid Rules prescribes that the Rules shall apply to all persons employed in connection with the affairs of Gram Panchayat. The Rule 1 (3) reads as under :

> *"(3) Except as otherwise provided by or under these rules, they apply to all persons employed in connection with the affairs of Zila Panchayats, Janpad Panchayats and the Gram Panchayats, and discharging the functions of Zila Panchayat, Janpad Panchayat and Gram Panchayat.*
>
> *Provided that nothing in these rules shall apply to officers and servants of the state service who are posted under the Panchayats under Section 69 or are on lone service to the panchayats under section 71 of the Act."*

Rule 2 provides for definition *inter-alia* of 'Appointing Authority', 'Disciplinary Authority', 'Member of Panchayat Service or a Panchayat Servant' and 'Panchayat Service' which read thus :-

> **"2. Definitions.-** In these rules, unless the context otherwise requires :-
>
> (a) .....
>
> (b) "Appointing authority" in relation to a person appointed in

the Panchayat service means :-

(1) Such officer, who in that service in which he hold the post at that time, empowered to make appointments or such officer to whom the powers of appointment is delegated to the service of that class or grade to which he is a member at that time.

(2) Such officer, who at that time, hold the post in substantive or temporary capacity in that service in which he is appointed.

(c) "Disciplinary Authority" in relation to the imposition of penalty on a member of the Panchayat service means the authority declared to be the disciplinary authority under the Appendix appended to these Rules;

(d) .....

(e) .....

(f) "Member of Panchayat Service or a Panchayat Servant" means any person appointed to the Panchayat Service and includes an officer or servant allocated to the panchayat service;

(g) .....

(h) .....

(i) .....

(j) "Panchayat Service" means any Panchayat Service."

Part II of the Rules of 1999 makes provision for suspension. Rule 4 reads thus :-

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

(a) Where a disciplinary proceeding against him is contemplated, or is pending or

(b) Where a case against him in respect of any criminal offence involving moral turpitude is under investigation inquiry or trial:

Provided that where the order of suspension is made by an authority subordinate to or lower in rank than the appointing authority, such authority shall forth with report to the appointing authority the circumstances in which the order was made.

(2) A member of Panchayat Service shall be deemed to have been placed under suspension by an order of appointing authority :-

(a) With effect from the date of his detention, on a criminal charge or otherwise, for a period exceeding forty eight hours,

(b) With effect from the date of his conviction, if the event of a conviction for an offence, he is sentenced to a term of imprisonment exceeding forty eight hours and is not forthwith dismissed or removed or compulsorily retired consequent upon such conviction.

Explanation. – The period of forty eight hours referred to in clause (b) of this sub-rule shall be computed from the commencement of the imprisonment after the conviction and for this purpose, intermittent periods of imprisonment if any, shall be taken into account.

(3) When a penalty of dismissal, removal or compulsory retirement from service imposed upon a member of panchayat service under suspension is set aside in appeal or on review under these rules and the case is remitted for further inquiry of or action or with any other directions, the order of his suspension shall be deemed to have continued in force with effect on and from the date of the original order of dismissal, removal or compulsory retirement and shall remain in force until further orders.

(4) Whether a penalty of dismissal, removal or compulsory

retirement from service imposed upon a member of panchayat service is set aside or declared or rendered void in consequence of or, by a decision of a court of law, and the Disciplinary Authority on a consideration of the circumstances of the case, decides to hold a further inquiry against him on the allegations on which the penalty of dismissal, removal or compulsory retirement was originally imposed, the member of panchayat service shall be deemed to have been placed under suspension by the appointing authority from the date of the original order of dismissal, removal, compulsory retirement and shall continue to remain under suspension until further orders.

(5) (a) An order suspension made or deemed to have been made under this rule shall continue to remain in force until it is modified or revoked by the authority competent to do so.

(b) Where a member of Panchayat Service is suspended or is deemed to have been suspended in connection with any disciplinary proceeding or otherwise and any other disciplinary proceeding is commenced against him during the continuance of such suspension, the authority competent to place him under suspension may, for reasons to be recorded by him in writing, direct that the member of Panchayat Service shall continue to be under suspension until the termination of all or any of such proceedings.

(c) An order of suspension made or deemed to have been made under this rule, may at any time be modified or revoked by the authority which made or is deemed to have made it or by any authority to which, that authority is subordinate."

Part III of the Rules of 1999 prescribes discipline and Rule 5 prescribes penalties, minor penalties and major penalties. One major penalty in accordance with the Rule 5-(b) (iv) is reduction in rank. The Rule reads as under :

"(b) Major penalties –

(iv) Reduction in rank including reduction to a lower post or time-scale or to a lower stage in a time-

scale."

12. Rule 7 prescribes procedure imposing major penalties. Rule 6 prescribes authority to impose penalties. It reads as under :

> ***"6. Authority to impose penalties.-*** *Subject to the provisions of these rules, the disciplinary authority or any authority to whom such authority is subordinate, may impose any of the penalties specified in rule 5 on any servant of the panchayat service to the extent shown against in the Appendix appended to these rules."*

13. In accordance with the aforesaid Rules, Disciplinary Authority or any prescribed Authority is empowered to impose the penalty to the extent shown against the Appendix to the Rules. In accordance with the Appendix appended to the Rules in relation to Gram Panchayat Secretary the General Administration Committee is empowered to impose minor and major penalty. The relevant provision reads as under :

S. No.	Class of Panchayats	Class of Service	Disciplinary Authority	Kind of penalty referred to in rule 5 which may be imposed	Appellate Authority
(1)	(2)	(3)	(4)	(5)	(6)
5.	Gram Panchayat	Class IV	Secretary	Minor Penalty	Gram Panchayat
			General Administration Committee	Major Penalty	General Body
		Class III	General Administration Committee	Minor Penalty	General Body
			General Body	Major Penalty	Sub Divisional Officer (Revenue)

14. On a bare reading of the first proviso below sub-Section (1) of Section 69, it is clear that a person holding the charge of Secretary of Gram Panchayat immediately before the commencement of the Act of 1993 was allowed to be continued to function as such till the Secretary was appointed in accordance with this section. This proviso clearly points out that the appointment of a person must be on the post of Secretary. Whereas, person appointed as Panchayat Karmi and called upon to discharge the duties of the Secretary by issuance of notification in that behalf by itself, does not result in making substantive appointment of such person on the post of Secretary of Gram Panchayat as such. Only that person who was directly appointed as Secretary of Gram Panchayat and by denotifying him later on is appointed or posted as Panchayat Karmi, could at best make a grievance of being reduced in rank. But, on the other hand, if the person is initially appointed as Panchayat Karmi which is his substantive appointment against that substantive post, is asked to discharge the duties of Secretary, by virtue of de-notification would not result in reduction of his rank or demotion; but would result only in withdrawal of his powers of Secretary which he was asked to discharge as per the notification issued for that purpose. For doing so, there would be no need to give opportunity of being heard to such person as he could not have claimed any vested right in the post of Secretary of Gram panchayat, being appointed against the substantive post of Panchayat Karmi only.

15. The fact that it is open for the Appropriate Authority to give charge of the Secretary to any employee of the Gram Panchayat is reinforced from sub-Section (4) of Section 69. It postulates that during the absence of Secretary of Gram Panchayat (means directly appointed on the post of Secretary), it is open to the prescribed Authority to make such arrangements as he deems fit for carrying on the office of Secretary of Gram Panchayat; and the person so nominated would be competent to exercise all powers conferred by the Act of 1993 and Rules made thereunder as the Secretary of Gram Panchayat. This power to nominate any employee of the Gram Panchayat to discharge the duties and functions of the Secretary of Gram Panchayat during the absence of directly appointed Secretary, would include power to withdraw that arrangement, if the situation so warrants. For withdrawing that arrangement, the Authority is not required to give prior opportunity to the person to whom such charge of Secretary has been invested as a temporary measure. For, the person discharging the additional duties cannot claim right to continue in the said post unless the reason for withdrawal visits him with civil consequences.

Withdrawal of nomination of additional charge of Secretary, cannot be equated with suspension from the post as such. There is marked difference between withdrawing the additional charge given to an officer and of suspending him from the office held by him as a substantive post. As regards suspension, the Discipline and Appeal Rules of 1999 postulates two situations - when the member of Panchayat service can be placed under suspension. None of the two situations referred to in Rule 4 of the Rules of 1999 are relevant, when it is a case of withdrawal of additional power of Secretary invested in the person appointed as Panchayat Karmi of the Gram Panchayat. The suspension necessarily means, suspension from the substantive post held by that person. In case of withdrawal of additional power of Secretary, the person would continue to occupy the post of Panchayat Karmi substantively held by him and can avail all the benefits thereunder until placed under suspension *qua* that post, in terms of Rule 4 of the Rules of 1999. Further, as there is no provision in the schedule appended to the Rules of 1999 in regard to imposition of penalty on a Panchayat Secretary, if a Panchayat Karmi is de-notified or prohibited to work as Panchayat Secretary for a particular period, it would not amount to reduction in rank or removal from service because he would still continue to work as Panchayat Karmi and he would be able to get the honorarium fixed by the Panchayat. No additional benefit of pay has been prescribed to a Panchayat Karmi after his notification as Panchayat Secretary. He is assigned certain duties to be performed by Panchayat Secretary after his notification in accordance with the provisions of Section 69 of the Act of 1993.

16. The Division Bench of this Court in the matter of *Lalla Prasad Burman* (supra) has observed as under in regard to withdrawal of charge of Secretary of Gram Panchayat by way of making a de-notification under Section 69 (1) of the Act of 1993. The Division Bench held as under :

> *5. After hearing learned counsel for the parties, we find that the Collector, Shahdol has lost sight of the Madhya Pradesh Panchayat Service (Discipline and Appeal) Rules, 1999 (for short 'the Rules, 1999) while passing the order dated 29.06.2007 denotifying the appellant as Panchayat Secretary under Section 69 (1) of the Act. Sub-rule (3) of Rule 1 of the Rules, 1999 states that except otherwise provided by or under these rules,*

they apply to all persons employed in connection with the affairs of inter alia the Gram Panchayat and discharging the functions of Gram Panchayat. Secretary of Gram Panchayat is employed in connection with the affairs of Gram Panchayat and discharging the functions of Gram Panchayat. Hence, the Rules, 1999 are applicable to him. It is not disputed that the appellant was notified as Panchayat Secretary as far back as on 12.10.1999 and is working as such Panchayat Secretary for about eight years. Hence, any action against the appellant for misconduct could only be taken in accordance with the Rules, 1999 and not otherwise.

6. Part III of the Rules, 1999 provides for penalties. Rule 5 categorized the minor penalties and the major penalties which can be imposed on a member of the Panchayat Service. Under clause (b) major penalties which can be imposed on a member of a Panchayat Service have been enumerated and reduction in rank and removal from service have been categorized as major penalties. When a Secretary of a Gram Panchayat is either reverted to the rank of Panchayat Karmi or removed from the post of Secretary, he suffers a major penalty mentioned under clause (b) of Rule 5 of the Rules, 1999.

7. Rule 7 of the Rules, 1999 provides that no order imposing on a member of the Panchayat Service; any of the major penalties shall be passed except after a formal inquiry is held as far as may be in the manner provided therein. Hence, unless the procedure laid down in the Rule 7 of the Rules, 1999 is followed, the Secretary of the Gram Panchayat cannot be removed or reverted from the post of Secretary, Gram Panchayat. Therefore, the stand taken by the appellant that he could not have been removed from the post of Secretary, Gram Panchayat or could not have been reverted to a lower post of Panchayat Karmi without any inquiry appears to be correct.

17. The Division Bench has placed reliance on Sub-rule (3) of Rule 1 and held that the provisions of Rule of 1999 are applicable to Panchayat Secretary. The Division Bench further held that the Secretary of Gram Panchayat could not have been reverted to a lower post of Panchayat Karmi without an inquiry. The Division Bench has not considered the aspect that whether the nomination as Panchayat Secretary amounts to promotion from the post of Panchayat Karmi or the post of Panchayat Karmi is lower to the post of Panchayat Secretary, as the case may be. As stated earlier, there was no difference between the salary of Panchayat Secretary and Panchayat Karmi because no additional allowance was paid to the Panchayat Karmi after his notification as Panchayat Secretary before coming into force the Rules of 2011.

18. The Supreme Court in the matter of *The High Court, Calcutta and another vs Amal Kumar Roy and others* reported AIR 1962 Supreme Court 1704 has held as under in regard to reduction in rank.

> *"The plaintiff sought to argue that "rank", in accordance with dictionary meaning, signifies "relative position or status or place", according to Oxford English Dictionary. The word "rank" can be and has been used in different senses in different contexts. The expression "rank" in Art. 311(2) has reference to a persons's classification and not his particular place in the same cadre in the hierarchy of the service to which he belongs. Hence, in the context of the Judicial Service of West Bengal, "reduction in rank" would imply that a person who is already holding the post of a Subordinate Judge has been reduced to the position of a Munsif, the rank of a Subordinate Judge being higher than that of a Munsif. But Subordinate Judges in the same cadre hold the same rank, though they have to be listed in order of seniority in the Civil List. Therefore, losing some places in the seniority list is not tantamount to reduction in rank. Hence, it must be held that the provisions of Article 311(2) of the Constitution are not attracted to this case."*

19. A Constitution Bench of the Supreme Court in a celebrated case *Parshotam Lal Dhingra vs. Union of India* reported in AIR 1958 SC 36 has held as under in regard to reduction in rank :

"Applying the principles discussed above it is quite clear that the petitioner before us was appointed to the higher post on an officiating basis, that is to say, he was appointed to officiate in that post which, according to Indian Railway Code, R. 2003 (19) corresponding to F. R. 9 (19) means, that he was appointed only to perform the duties of that post. He had no right to continue in that post and under the general law the implied term of such appointment was that it was terminable at any time on reasonable notice by the Government and, therefore, his reduction did not operate as a forfeiture of any right and could not be described as reduction in rank by way of punishment."

20. When a Panchayat Karmi is notified to work as Panchayat Secretary in accordance with the provisions of Section 69 of the Act of 1993, he has to perform certain duties in accordance with the provisions of the Act of 1993 and Rules made thereunder and further he enjoys a position in accordance with the provisions of the Act of 1993. Under Section 69 of the Act of 1993 no pay scale or pay of Panchayat Secretary is fixed neither his service conditions are prescribed nor there is a provision of disciplinary control. Hence, it cannot be said that the Panchayat Secretary was considered independent post or a promotional post from the post of Panchayat Karmi. Even under the Scheme of 1995 named as Panchayat Karmi Yojna a Panchayat Karmi is eligible to get an honorarium.

21. The Division Bench in *Lalla Prasad Burman* (supra) has not considered these aspects while holding that the Rules of 1999 are applicable to the Panchayat Secretary that as per the schedule appended with the Rules of 1999 for Gram Panchayat Class IV and Class III services, the Panchayat Secretary and the General Body of the Gram Panchayat is authorized to impose minor and major penalty. However, as per Section 69 of the Act of 1993 the State Government or the prescribed Authority has been empowered to nominate or designate the incumbent as a Panchayat Secretary. It means that the State Government or the prescribed Authority is the Disciplinary Authority of Panchayat Secretary. The Rules of 1999 cannot over ride this statutory provision of the Act of 1993. In holding that the Panchayat Secretary is governed by the Rules of 1999, there would be anomaly and absurdity because

the Disciplinary Authority in regard to Panchayat Secretary as per Section 69 of the Act of 1993 is quite different than the disciplinary authority of Panchayat employee mentioned in the Appendix of the Rules of 1999.

22. It is well settled principle of Rule of interpretation that interpretation which would lead to absurdity and inconsistency must be avoided, as held by the Constitution Bench judgment of the Supreme Court in the matter of *The Central India Spinning and Weaving and Manufacturing Co., Ltd., The Empress Mill, Nagpur vs. The Municipal Committee, Wardha,* AIR 1958 Supreme Court 341.

23. In *Kunjan Singh vs. State of M.P. and others,* 2003 (3) M.P.H.T. 370, the learned Judge did not consider the fact that Disciplinary Authority in the Rules of 1999 is different in regard to Disciplinary Authority mentioned in Section 69 of the Act of 1993. That has also not been considered by the Division Bench of Chhattisgarh High Court in *Rooplal Nayak vs State of Chattisgarh and others*, reported in (2006) 4 M.P.H.T. 99. Hence, these cases are distinguishable. In the case of *Mool Chand Soni vs. State of M.P.* reported in (2007) 1 M.P.L.J. 343, the petition was disposed off with the observation that the petitioner can avail alternate remedy of appeal. None of the cases cited by the learned counsel for the appellant has noticed the legal position as discussed hitherto, hence, the cases are distinguishable.

24. On the basis of above discussion, in our opinion, the nomination of Panchayat Karmi of the Gram Panchayat as Panchayat Secretary, prior to coming into force of the statutory Rules named as Madhya Pradesh Panchayat Service (Gram Panchayat Secretary Recruitment and Conditions of Service) Rules, 2011, was a pleasure appointment. For that reason, the Panchayat Secretary could be de-notified by the State Government or the prescribed Authority in accordance with the procedure prescribed by the Government in this regard.

25. The learned Deputy Advocate General placed circular issued by the Panchayat and Rural Development Department dated 02.11.2006. It is mentioned in the circular that the State had taken a decision that before removal of Panchayat Secretary the Sub-Divisional Officer shall conduct an inquiry and adopt *quasi judicial* procedure and he shall afford opportunity of hearing to the concerned persons and thereafter, he shall take appropriate decision and the action be taken against the Panchayat Secretary in accordance with

the decision taken by the Sub-Divisional Officer (Revenue).

26. We answer the reference in affirmative by holding that the case of *Lalla Prasad Burman vs State of M.P. and others,* reported in 2008 (3) M.P.L.J. 394 does not expound the correct law – to the extent of applicability of Rules of 1999 in regard to Panchayat Karmi nominated as Panchayat Secretary prior to coming into force of the Rules of 2011. However, after introduction of the circular dated 02.11.2006, action against the Panchayat Secretary nominated prior to coming into force of Rules of 2011, was required to be taken in accordance with the said circular issued by the Department.

27. We further hold that the powers of a Panchayat Secretary appointed prior to coming into force of the Rules of 2011, could be suspended temporarily or withdrawn (de-notified) – without serving a show cause notice or by giving an opportunity of hearing in the event of registration of a criminal case against him.

28. Now we may revert to the dispensation in relation to the appointments made on the post of Gram Panchayat Secretary post-Rules of 2011. These Rules are called Madhya Pradesh Panchayat Service (Gram Panchayat Secretary Recruitment and Conditions of Service) Rules, 2011. Rule 3 provides for definition *inter alia* of 'Appointing Authority', 'Gram Panchayat Secretary' and 'Qualification', which read thus :-

> **"3.Definitions.-** (1) In these rules unless the context otherwise requires,-
>
> (a) .....
>
> (b) "Appointing Authority" with respect to Gram Panchayat Secretary means the Chief Executive Officer, Zila Panchayat;
>
> (c) .....
>
> (d) "Gram Panchayat Secretary" means such person appointed by Chief Executive Officer, Zila Panchayat in the Gram Panchayat coming under its control;
>
> (e) .....
>
> (f) "Qualification" means the qualification for Gram

Panchayat Secretary as specified in Schedule II;"

29. Rule 5 provides for method of absorption and selection. The incumbents who were nominated as Gram Panchayat Secretary and holding that office immediately before the commencement of the said Rules, were absorbed to the post and pay scale of Gram Panchayat Secretary through a one time absorption on specified terms. In the present case, which came up for consideration before the Division Bench, admittedly, it is an appointment made on the post of Panchayat Karmi for the session 2007-08. He was notified as Secretary of the said Panchayat on 14.09.2012, after coming into force Rules of 2011. As a result, the provision regarding absorption to the post and pay scale of Gram Panchayat Secretary did not arise, nor it is a case where the appellant has been substantively appointed on the post of Gram Panchayat Secretary post-Rules of 2011. Thus, the case before the Division Bench was in respect of the first category of appointment on the post of Panchayat Karmi and notified to discharge duties and functions of Gram Panchayat Secretary in absence of the Secretary directly appointed on that post. Not being a case of substantive appointment on the post of Gram Panchayat Secretary, but only one of invested with powers of Gram Panchayat Secretary, to such a case, the same principle as discussed earlier must apply with regard to the consequence of withdrawal of nomination. In other words, cases in which charge of Secretary is given to a Panchayat Karmi of the Gram Panchayat by issuance of notification, it would not be a case of suspension but limited to withdrawal of charge of the Secretary. Even in respect of suspension of the member of Panchayat service in terms of Rule 4, if applicable does not require prior notice, unlike in the case of procedure to be followed for taking disciplinary action and imposing penalty. Had it been a case of appointment of a Panchayat Karmi who entered Panchayat service prior to coming into force of Rules of 2011 and after coming into force of the said Rules having been absorbed or substantively appointed on the post of Gram Panchayat Secretary; and as a consequence of order issued by the Appropriate Authority, he would stand reverted to his original post of Panchayat Karmi, the question of giving him opportunity of hearing may arise.

30. After the Rules of 2011, the post of Gram Panchayat Secretary has been made a substantive post. The incumbent may be absorbed or freshly appointed against that substantive post, as the case may be. For being appointed to that post, the procedure prescribed in the said Rules will have to

be followed. As regards discipline and control, Rule 7 of the Rules of 2011 stipulates that Rules of Madhya Pradesh Panchayat Services (Conduct) Rules, 1998 would apply. The Rules of 1998, however, do not provide for the situation in which the incumbent can be placed under suspension or for imposing penalty. For that, the principle underlying Discipline and Appeal Rules of 1999 may have to be invoked - which apply to all persons employed in connection with the affairs of Zila Panchayat, Janpad Panchayat and Gram Panchayat and discharge the functions of Zila Panchayat, Janpad Panchayat and Gram Panchayat. The exception is only of officers and servants of the State service who are posted under the Panchayats under Section 69 or are on lone service to the Panchayats under Section 71 of the Act of 1993. Any person, if appointed as Panchayat Karmi or Gram Panchayat Secretary, may be considered as a member of Panchayat service or Panchayat servant to whom Rules of 1999 would apply in respect of action of suspension or disciplinary proceedings, as the case may be. However, as aforesaid, withdrawal of charge bestowed on any employee of the Gram Panchayat to discharge the duties and functions of Secretary of the Gram Panchayat cannot and does not result in disciplinary action or for that matter reduction in rank or suspension. In the present case, the appointment of the appellant is on the substantive post of Panchayat Karmi with investure of charge of Gram Panchayat Secretary after coming into force of Rules of 2011; and for which reason, it was always open to the Authority to withdraw the said charge for which prior notice was not required to be given.

31. We, accordingly, conclude that the legal principles stated in the case of *Lalla Prasad Burman* (supra) of the Division Bench to hold that prior notice should be given in such a case, is not the correct position of law. We hold that no prior notice or opportunity of hearing before suspension of the Gram Panchayat Secretary or for that matter withdrawal (de-notified) of such charge given to the Panchayat Karmi, is required to be given by the competent Authority to the concerned employee much less who is facing serious criminal case.

32. We answer the reference accordingly.

33. As the reference has been answered, appeal be placed before the appropriate Court for further consideration on any other questions and for decision on merits.

Order accordingly.

I.L.R. [2016] M.P., 2446
WRIT APPEAL
Before Mr. Justice P.K. Jaiswal & Mr. Justice Vivek Rusia
W.A. No. 324/2014 (Indore) decided on 29 April, 2016

STATE OF M.P. & anr. ...Appellants
Vs.
M/S SAIFI TIMBER MART & ors. ...Respondents

Stamp Act (2 of 1899), Section 47 (A) – **Instruments under valued – How to be dealt with – Admittedly the documents were submitted after the cut-off date for registration – Therefore, respondent No. 1 is not entitled for the benefit of the relaxation as per circular dated 12.05.2006 – The State Government is entitled to get the stamp duty because the instrument was presented after cut-off date – Respondent No. 1 to pay the deficit stamp duty. (Para 12)**

स्टाम्प अधिनियम (1899 का 2), धारा 47 (ए) – अवमूल्यांकित लिखत – किस प्रकार निपटाये जाना चाहिए – स्वीकृत रूप से दस्तावेज पंजीकरण हेतु नियत अंतिम तिथि के पश्चात् प्रस्तुत किये गये थे – इसलिए प्रत्यर्थी क्र. 1 परिपत्र दिनांक 12.05.2006 के अनुसार छूट के लाभ का हकदार नहीं है – राज्य शासन स्टाम्प शुल्क पाने हेतु हकदार है क्योंकि लिखत नियत अंतिम तिथि के पश्चात् प्रस्तुत किया गया था – प्रत्यर्थी क्र. 1 अपूर्ण स्टाम्प शुल्क का भुगतान करेगा।

Cases referred:

(2009) 7 SCC 438, (2009) 14 SCC 716.

Pushyamitra Bhargava, Dy.A.G., for the appellant/State.
R.D. Sonwane, for the respondent No. 1.
Tousif Warsi, for the proposed intervener.
G.M. Agrawal, for the Lrs of respondent No. 2.
Manoj Munshi, for the respondent/IDA.

ORDER

The Order of the Court was delivered by :
VIVEK RUSIA, J. :- State of Madhya Pradesh has filed the present writ appeal being aggrieved by the order dated 20.08.2013 passed in Writ Petition No.10368/12 filed by the respondent No.1 M/s Saify Timber Mart challenging the order dated 31.08.2007 passed by the Collector, Stamps; order dated

30.09.2009 passed by the Commissioner, Indore and order dated 20.09.2012 passed by the Board of Revenue by which the writ petition was allowed and the aforesaid orders were quashed with the direction to the respondents to get the sale deed executed in favour of the petitioner as per Circular dated 12.05.20016.

2. That respondent No.1/petitioner was allotted plot No.T.S-5 situated in Scheme No.31, Indore by the then Town Improvement Trust which was later on merged in to the Indore Development Authority for a consideration of Rs.29,265/-. At that time petitioner did not apply for registration but constructed the house over the plot. On 12.05.2006 a Circular was issued by the Registrar, Stamps Indore to the effect that the plots for which no sale deed has been executed by the individuals they can apply for registration on or before 01.06.2006 and they are only required to pay the stamp duty and registration fee on the basis of the rate on which the allotment was made. Similar type of advertisement was also issued by the IDA on 16.05.2006 for execution of registered deed on the basis of allotment which took place on 12.02.1975.

3. The contention of the petitioner is that in pursuant to the aforesaid advertisement he submitted an application on 16.05.2006 enclosing various documents which was duly received by the IDA. However, the IDA has remanded back the documents to the petitioner with a direction to resubmit the same along with site plan. That on 19.02.2007 IDA handed over the documents to the petitioner for presentation before the Deputy Registrar. That after completing the formalities, deeds were submitted before the registering authority on 22.02.2007 and on the same day Sub Registrar has forwarded it to the Registrar for determination of market value under section 47-A of the Stamp Act. That the Collector, Stamps registered a case No.105/06-07/47-a(1) and proposed the market value of the plot at Rs.1,66,61,000/-. The petitioner appeared before the Collector of Stamps and contested the matter on the ground that there was a delay on the part of the IDA, therefore, he is entitled for the benefit of the Circular dated 01.06.2006. The aforesaid contention of the petitioner was rejected and vide order dated 31.08.2007 Collector, Stamps assessed the market value of the property at Rs.1,49,45,000/- and directed the petitioner to pay the deficit stamp duty of Rs.14,91,600/- within a period of thirty days.

4. The aforesaid order of the Registrar dated 31.08.2007 was challenged

by the petitioner before the Commissioner by way appeal under the Indian Stamps Act, 1899. Vide order dated 30.09.2009, Commissioner, Indore has dismissed the appeal and maintained the order of the Collector of Stamps. Being aggrieved by the order of the Commissioner, petitioner preferred an appeal before the Board of Revenue, Gwalior. Vide order dated 20.09.2012, the Board of Revenue also dismissed the appeal and maintained the order of the Commissioner dated 30.09.2009.

5. That respondent No.1/petitioner approached this Court by way of writ petition No.10368/12 against the order of the Collector of Stamps, Commissioner and Board of Revenue. In para-6.2 of the writ petition, the petitioner has admitted that the disputed plot was allotted to him on 12.02.1975. It is also admitted that the registration of the instrument could not be executed for some reasons. In para-6.3 petitioner further stated that he applied for registration of the instrument with IDA on 16.05.2006 but the IDA has not given copy of the proposed instrument to the petitioner before 01.06.2006 and the same was delivered to him on 19.02.2007. Thereafter he immediately submitted the instrument for registration on 22.02.2007, hence he is not liable for the delay and he could not be penalized. He is liable to pay the prevailing market value which was prevalent on the date on which the instrument was executed. That in the writ petition the Government Advocate supported the order passed by the authorities. Counsel for the respondent/ IDA submitted that though the petitioner submitted the document on 16.05.2006 but the document was incomplete as the site plan was not submitted and on submission of the site plan documents were handed over to the petitioner. Accordingly, there was no delay on the part of the petitioner and he is not entitled to get the benefit of the Circular.

6. That the learned Single Judge vide order dated 20.08.2013 has held that vide application dated 16.05.2006 petitioner had enclosed various documents which includes copy of the site plan as mentioned in the application itself which was duly received in the office of the respondent No.5 IDA. That vide order dated 26.05.2006 it was directed that the letter be sent to the petitioner for calling the site plan. This letter was dispatched on 31.05.2006 vide dispatch No.8543 but the same is not available on record. Hon'ble Single Judge has held that the fault lies with the respondent No.5 i.e. IDA in submitting the documents in time, hence the demand of Rs.14,91,600/- as stamp duty is unjustified and the petitioner is entitled for the benefit of the Circular issued by

the respondent as he submitted the application in time i.e. on 16.05.2006.

7. Being aggrieved by the above order, the State Government has preferred writ appeal under section 2(1) of the Madhya Pradesh Ucha (sic:Uchcha) Nyayalaya (Khand Nyaypith Ko Appeal) Adhiniyam, 2005 before this Court mainly on the ground that the petitioner did not submit the instrument up to 31.05.2006 for registration as such he is liable to pay the stamp duty of Rs.14,91,600/- demanded by the Collector of Stamps. It is further submitted that the writ Court failed to consider the factual dispute between the IDA and the petitioner as a result of which revenue loss is caused to the State Government. Since he failed to get the sale deed executed since 1975 to 2007 he is liable to pay stamp duty as per the present rate and not entitled for the benefit of the Circular dated 12.05.2006.

8. Arguments were heard on admission and the delay of 114 days was condoned vide order dated 08.12.2015. Notices were issued on 11.01.2016 to the respondents and the effect of order dated 20.08.2013 was stayed. Today the appeal is heard finally at motion stage with the consent of parties.

9. Shri Pushyamitra Bhargava, learned Dy.A.G appearing for the appellant/State submits that the Collector of Stamps, Commissioner and the Board of Revenue have rightly appreciated the facts of the case and directed the respondent No.1/petitioner to pay the deficit stamp duty of Rs.14,91,600/- as it is not disputed that the instrument was presented on 21.02.2007 after 01.06.2006. He further submits that State Government is entitled to get the stamp duty irrespective of the fact that who is responsible for the delay. In support of his contention he has placed reliance over the judgment of the Supreme Court in the matter of *V.N.Devadoss Vs. Chief Revenue Control Officer-cum-Inspector and others* reported in (2009) 7 SCC 438. Para-13, 15 and 18 of the judgment reads as under:

> *13. Sub-sections (1) and (3) of Section 47-A clearly reveal the intention of the legislature that there must be a reason to believe that the market value of the property which is the subject matter of the conveyance has not been truly set out in the instrument. It is not a routine procedure to be followed in respect of each and every document of conveyance presented for registration without any evidence to show lack of bona fides of the parties to the document*

by attempting fraudulently to undervalue the subject of conveyance with a view to evade payment of proper stamp duty and thereby cause loss to the revenue. Therefore, the basis for exercise of power under Section 47-A of the Act is wilful undervaluation of the subject of transfer with fraudulent intention to evade payment of proper stamp duty.

15. The stand of the State is that what has been disclosed is clearly a sale value and the same cannot be termed as market value. There is fallacy in this argument.

18. On the facts of the case it cannot be said that Section 47-A has any application because there is no scope for entertaining a doubt that there was any undervaluation. That being so, the High Court's order is clearly unsustainable and is set aside. The registration shall be done at the price disclosed in the document of conveyance. There is no scope for exercising power under Section 47-A of the Act as there is no basis for even entertaining a belief that the market value of the property which is the subject-matter of conveyance has not been truly set forth with a view to fraudulently evade payment of proper stamp duty.

10. Per contra, counsel for the respondent No.1/petitioner Shri R.D.Sonwane submits that there is no fault or delay on the part of the petitioner as he submitted the instrument before time to the IDA, however, IDA handed over the instrument to him with delay and the IDA is responsible for the delay. Counsel for the IDA submitted that the advertisement No.91 dated 12.05.2006 published in the newspaper on 13.05.2006 was, in fact, invitation to the allottes of lease hold plot to get their lease deed executed on or before 31st May, 2006 and not for execution of the sale deed. The aforesaid advertisement was published in view of the amendment inserted in the Indian Stamp (Madhya Pradesh Prevention of Undervaluation of Instruments) Rules, 1975 as per notification No.(45) b-4-5-2005-2V dated 29.11.2005 published in M.P Rajpatra Part 4(Ga) dated 16.12.2005 which reads as under:

"3-B Market value of any property which is subject matter of conveyance by or on behalf of the Central

Government or the State Government, shall be the value shown in the instrument."

11. The said amendment came into force w.e.f. 01.06.2006 accordingly. In case of any conveyance executed by the State Government the market value of any property which is subject matter of conveyance shall be the value shown in the instrument for the purpose of stamp duty and registration fees. He has further argued that the time limit of registration of the instrument under section 23 of the Registration Act, 1908 is four months which is further extendable to four months. However, petitioner took 31 years to get it registered, therefore, he is not entitled for any relief. He has further contended that there is no default on the part of the IDA. Petitioner himself has submitted incomplete documents without site plan and now he cannot blame the IDA.

12. In view of the aforesaid, in our opinion, the present appeal filed by the State Government deserves to be allowed on the ground that the State Government is entitled to get the stamp duty on execution of any instrument under the provisions of Stamp Act. Admittedly, in the present case the benefit of the Circular dated 12.06.2006 was available up to 01.06.2006 and the instrument in dispute was presented before the registering authority on 21.02.2007 i.e beyond the period of 01.06.2006, therefore, the registering authority is not concerned with the delay either on the part of the petitioner or IDA. They have to act in accordance with the provisions of the Indian Stamp Act as laid down by the Supreme Court in the case of *V.N. Devadoss* (supra) which has held that the instruments of conveyance etc undervalued has to be dealt with under Section 47-A of the Indian Stamp Act. In the case of *Residents Welfare Association, Noida Vs. State of Uttar Pradesh and others* reported in (2009) 14 SCC 716 it was held that when the valuation shown in agreement presented for registration is undervalued, registering authorities can hold enquiry to find out if duty is chargeable on market value of the property. In the present case, there is a serious disputed question of fact between the petitioner and the IDA about the presentation of the instrument for registration, incomplete documents and delay on the part of the IDA to hand over them to the petitioner. These disputed questions cannot be decided in the writ petition especially when admittedly the documents were submitted after the cut off date for registration, therefore, petitioner is not entitled for the benefit of the relaxation as per the Circular dated 12.05.2006. The State Government is entitled to get the stamp duty because the instrument was presented after the cut off

date. Accordingly, we set aside the order passed by the learned Single Judge dated 20.08.2013 and direct the respondent No.1/petitioner to pay the deficit stamp duty.

Accordingly, appeal is allowed. No costs.

Appeal allowed.

I.L.R. [2016] M.P., 2452
WRIT PETITION
Before Mr. Justice Rohit Arya
W.P. No. 7876/2014 (Gwalior) decided on 12 March, 2015

PRAHLAD SINGH RAGHUVANSHI ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Constitution - Article 226, 243-O & 329 and Panchayat (Up-sarpanch, President and Vice President) Nirvachan Niyam, M.P., 1995, Rule 3(6) - Reservation of the post of President, Janpad Panchayat for OBC (woman category) - Challenge **- Impugned notification of reservation passed on 7.11.2014 - Election programme notified on 15.12.2014 - Writ Petition filed on 15.12.2014 - Whether Writ Petition is maintainable after commencement of election process - Held - No, as the election process has already started by issuance of election notification on 15.12.2014 and the Writ Petition has been filed on 15.12.2014, so no interference in the Writ Petition is warranted and remedy available to a party is to file an election petition u/S 122 of the M.P. Panchayat & Gram Swaraj Adhiniyam 1993 after the election process is over by publication of name of the returned candidate.**

(Paras 9 to 14)

क. संविधान – अनुच्छेद 226, 243–ओ व 329 एवं पंचायत (उप–सरपंच, अध्यक्ष एवं उपाध्यक्ष) निर्वाचन नियम, म.प्र., 1995, नियम 3(6) – अध्यक्ष, जनपद पंचायत के पद का अन्य पिछड़ा वर्ग (महिला श्रेणी) हेतु आरक्षण – चुनौती – आरक्षण की आक्षेपित अधिसूचना 07.11.2014 को पारित – निर्वाचन कार्यक्रम 15.12.2014 को अधिसूचित – 15.12.2014 को रिट याचिका प्रस्तुत – क्या निर्वाचन प्रक्रिया प्रारंभ होने के पश्चात् रिट याचिका पोषणीय है – अभिनिर्धारित – नहीं, चूंकि निर्वाचन अधिसूचना 15.12.2014 को जारी होने से निर्वाचन प्रक्रिया पूर्व में ही प्रारंभ हो चुकी थी तथा रिट याचिका दिनांक 15.12.2014 को प्रस्तुत की गई है,

इसलिये रिट याचिका में हस्तक्षेप की आवश्यकता नहीं तथा निर्वाचित प्रत्याशी के नाम के प्रकाशन के साथ निर्वाचन प्रक्रिया पूर्ण होने के उपरांत पक्षकार को म.प्र. पंचायत एवं ग्राम स्वराज अधिनियम, 1993 की धारा 122 के अंतर्गत निर्वाचन याचिका प्रस्तुत करने का उपचार उपलब्ध है।

B. ***Panchayat (Up-sarpanch, President and Vice President) Nirvachan Niyam, M.P., 1995, Rule 3(6) - Panchayat elections*** - **Reservation of the post of President, Janpad Panchayat for OBC (women category) - Challenge - Violation of Rule 3(6) - Ground - Seat reserved for a particular category in previous election shall not be included in the drawing lots till all remaining panchayats are not included - Whereas in this case lots not drawn from all Janpad Panchayat but from two Panchayats only - Held - In the instant case all Panchayats by rotation have been reserved for OBC category except Nateran which has been reserved for OBC category in the instant election and the concerned Janpad Panchayat, Basoda has been reserved for OBC category for the first time in 1994, so drawing lots between two Panchayats, Basoda & Vidisha and in turn reserving Basoda constituency for OBC, women category is not at all arbitrary or in violation of Rule 3(6) of the Rules of 1995 - Writ Petition dismissed.**

(Paras 16 to 22)

ख. पंचायत (उप सरपंच, अध्यक्ष एवं उपाध्यक्ष) निर्वाचन नियम, म.प्र., 1995, नियम 3(6) – पंचायत निर्वाचन – अध्यक्ष, जनपद पंचायत के पद का अन्य पिछड़ा वर्ग (महिला श्रेणी) हेतु आरक्षण – चुनौती – नियम 3(6) का उल्लंघन – आधार – पूर्व निर्वाचन में किसी श्रेणी विशेष हेतु आरक्षित पद लॉट निकालने की प्रक्रिया में सम्मिलित नहीं किया जायेगा जब तक कि सभी शेष पंचायतों को उसमें सम्मिलित न किया जाये – जबकि इस प्रकरण में सभी जनपद पंचायतों से लॉट न निकाले जाकर मात्र दो पंचायतों से ही लॉट निकाले गये – अभिनिर्धारित – वर्तमान प्रकरण में सभी पंचायतों को चक्रानुक्रम के अंतर्गत अन्य पिछड़ा वर्ग श्रेणी हेतु आरक्षित किया गया था, मात्र नटेरन को छोड़कर, जिसे कि वर्तमान निर्वाचन में अन्य पिछड़ा वर्ग हेतु आरक्षित किया गया है तथा संबंधित जनपद पंचायत, बासौदा को प्रथम बार वर्ष 1994 में अन्य पिछड़ा वर्ग श्रेणी हेतु आरक्षित किया गया था, अतः दो पंचायतों बासौदा एवं विदिशा में लॉट निकाला जाना तथा उनमें से बासौदा निर्वाचन क्षेत्र को अन्य पिछड़ा वर्ग, महिला श्रेणी हेतु आरक्षित किया जाना किसी भी प्रकार से मनमाना अथवा 1995 के नियमों के नियम 3(6) के उल्लंघन में नहीं है – रिट याचिका खारिज।

Cases referred:

1995 Supp (2) SCC 305 = AIR 1995 SC 1512, (2000) 8 SCC 216, AIR 1952 SC 64, (1978) 1 SCC 405, 1996(3) SCC 416.

Vivek Jain, for the petitioner.
R.P. Rathi, G.A. for the respondent Nos. 1 & 2/State.
R.D. Jain with *Sangam Jain,* for the respondent No. 3.
A.K. Nirankari, for the intervenor.

ORDER

ROHIT ARYA, J. :- By this petition under Article 226 of the Constitution of India, petitioner has put to challenge an order dated 07/11/2014 (Anexure P/1) passed by the respondent No.2/Collector, District Vidisha whereby reserved the post of President, Janpad Panchayat, Basoda for OBC – Woman category. It is alleged that provision as contained under rule 3(6) of the Madhya Pradesh Panchayat (Up-sarpanch, President and Vice President) Nirvachan Niyam, 1995 has been violated. It is contended that as per the aforesaid provision, the seat reserved in the previous election shall not be included in the drawing lots for reservation of a particular category till all remaining Panchayats are not exhausted. In the instant election, the post of President, Janpad Panchayat, Basoda constituency has been reserved for OBC woman category again which according to counsel is contrary to rule 3(6) of the Madhya Pradesh Panchayat (Up-sarpanch, President and Vice President) Nirvachan Niyam, 1995 (hereinafter referred to 1995 Rules). Besides, it is further contended that instead of drawing lot from among all Janpad Panchayats, lot was drawn only from and out of two Janpad Panchayats, Vidisha and Basoda. It is also contrary to rule 3(6) of the 1995 Rules.

2. Per contra, learned senior counsel appearing on behalf of the respondents' raised preliminary objection as regards maintainability of writ petition on the ground that the impugned notification was passed on 07/11/2014 whereas the present writ petition has been filed by the petitioner on 15/12/2014. Besides, election programme had already set in motion and notified on 15/12/2014. Therefore, in the light of the provisions as contained under Article 243-O of the Constitution of India, no interference is warranted and the remedy lies only by way of election petition under the provisions of the Madhya Pradesh Panchayat Raj Adhiniyam, 1993 and the Rules framed thereunder. Besides, learned senior counsel further submits that there are seven

Janpad panchayats, namely; Vidisha, Basoda (Ganj Basoda), Kurwai, Sironj, Gyaraspur and Nateran in the district Vidisha. In the year 1994, Vidisha & Basoda, year 1999 Kurwai & Sironj, year 2004 Gyaraspur & Nateran and in the year 2009 Basoda and Sironj have been reserved for OBC category.

3. With reference to the aforesaid details, State's counsel submits that for the first time in the year 1994, Janpand Panchayat Basoda was reserved for OBC category and thereafter by rotation, all the aforesaid Janpad Panchayats have been reserved for OBC category and each subsequent draw of lots, Panchayats already reserved for OBC category were excluded. In the election for the year 2014, one Janpad Panchayat was remained to be reserved for OBC, namely; Nateran and the same was reserved for OBC category. As out of the seven Janpad Panchayats, two were required to be reserved for OBC category, the same was done by drawing lot between Vidisha and Basoda as for the first time in the year 1994, Basoda and Vidisha were earmarked for OBC category. Accordingly, Basoda was reserved for OBC (Woman) category. It is submitted that there is no illegality in the matter of reserving Basoda for OBC category and the provision of rule 3(6) of the 1995 Rules; a regulatory measure has all along been followed for reservation of seats for the OBC category by rotation.

4. Counsel for the respondents No.1 and 2 further contended that the scope of interference in the matter of election under Article 226 of the Constitution of India has consistently been held by the Hon'ble Apex Court is circumscribed by self-imposed limitations, moreso, when the election machinery has been set in motion by issuance of election notification. It is further contended that the matters relating to constitution of Panchayats, composition of Panchayats, delimitation of Panchayats, allotment of seats, reservation of seats and conduct of elections are essentially for the Government to decide albeit with due regard and observance of the relevant Act enacted under the provisions of Articles 243B, 243C, 243D and 243K respectively and it is not for the Court how to control and regulate the manner in which the same would be done. Besides, it is submitted that there is a specific bar against interference by Courts in electoral matters as provided under Article 243-O and Article 329(b) of the Constitution of India. Learned counsel refers to judgment of the Hon'ble Apex Court in the case of *State of U.P., and others Vs. Pradhan Sangh Kshetra Samiti and others*, 1995 Supp (2) SCC 305 = AIR 1995 SC 1512. Para No.44 and 45 are relevant which reads as under:

"44. It is for the Government to decide in what manner the panchayat areas and the constituencies in each panchayat area will be delimited. It is not for the court to dictate the manner in which the same would be done. So long as the panchayat areas and the constituencies are delimited in conformity with the constitutional provisions or without committing a breach thereof, the courts cannot interfere with the same. We may, in this connection, refer to a decision of this Court in *The Hingir-Rampur Coal Co, Ltd. and Others v. The State of Orissa and Others* [(1961) 2 SCR 537]. In this case, the petitioner mine owners, had among others, challenged the method prescribed by the legislature for recovering the cess under the Orissa Mining Areas Development Fund Act, 1952 on the ground that it was unconstitutional. The majority of the Bench held that the method is a matter of convenience and, though relevant, has to be tested in the light of other relevant circumstances. It is not permissible to challenge the vires of a statute solely on the ground that the method adopted for the recovery of the impost can and generally is adopted in levying a duty of excise.

45. What is more objectionable in the approach of the High Court is that although clause (a) of Article 243-0 of the Constitution enacts a bar on the interference by the courts in electoral matters including the questioning of the validity of any law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made or purported to be made under Article 243-K and the election to any panchayat, the High Court has gone into the question of the validity of the delimitation of the constituencies and also the allotment of seats to them. We may, in this connection, refer to a decision of this Court in *Meghraj Kothari v. Delimitation Commission & Ors.* [(1967) 1 SCR 400]. In that case, a notification of the Delimitation Commission whereby a city which had been a general constituency was notified as reserved for the Scheduled Castes. This was challenged on the ground that the petitioner had a right to be a candidate for Parliament from the said constituency which had been taken away. This

Court held that the impugned notification was a law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made under Article 327 of the Constitution, and that an examination of sections 8 and 9 of the Delimitation Commission Act showed that the matters therein dealt with were not subject to the scrutiny of any court of law. There was a very good reason for such a provision because if the orders made under sections 8 and 9 were not to be treated as final, the result would be that any voter, if he so wished, could hold up an election indefinitely by questioning the delimitation of the constituencies from court to court. Although an order under Section 8 or 9 of the Delimitation Commission Act and published under Section 10 [1] of that Act is not part of an Act of Parliament, its effect is the same. Section 10 [4] of that Act puts such an order in the same position as a law made by the Parliament itself which could only be made by it under Article 327. If we read Articles 243-C, 243-K and 243-0 in place o Article 327 and sections 2 [kk], 11-F and 12-BB of the Act in place of Sections 8 and 9 of the Delimitation Act, 1950, it will be obvious that neither the delimitation of the panchayat area nor of the con-constituencies in the said areas and the allotments of seats to the constituencies could have been challenged or the Court could have entertained such challenge except on the ground that before the delimitation, no objections were invited and no hearing was given. Even this challenge could not have been entertained after the notification for holding the elections was issued. The High Court not only entertained the challenge but has also gone into the merits of the alleged grievances although the challenge was made after the notification for the election was issued on 31st August, 1994"

With the aforesaid submissions, it is contended that no interference is warranted in the instant writ petition and the same deserves to be dismissed.

5. Learned senior counsel appearing for the respondent No.3/State Election Commission supported the stand of the State's counsel and adopted the counter-affidavit filed by the respondents No.1 and 2/State.

6. Intervention has also been filed vide I.A.No.1479/15 by one of the contesting candidates, namely; Smt. Anjali Yadav w/o Manoj Yadav and submitted that the instant writ petition has been filed after elections were notified. Hence, the process of election was started and thereafter nominations have been filed. Therefore, at this stage, no interference is warranted in the matter of election in the light of Article 243-O of the Constitution of India. Counsel for the intervenor adopted the counter-affidavit filed by the respondents No.1 and 2/State.

7. Heard counsel for the parties.

8. There is no dispute between the parties that the election has been notified on 15/12/2014. Challenge to the notification for reservation dated 07/11/2014 (Annexure P/1) is made by filing instant writ petition on 15/12/2014.

9. Before adverting to the contentions advanced by respective parties, it is considered apposite to refer to decisions of the Hon'ble Apex Court in the context of Article 329(b) of the Constitution of India as in the opinion of this Court, the ratio of decisions in the context thereof also have full application as regards scope of judicial review under Article 226 of the Constitution of India in the context of panchayat elections.

> "243-O. Bar to interference by courts in election matters.- Notwithstanding anything in this Constitution
>
> (a) ....
>
> (b) no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any Law made by the Legislature of a State.
>
> 329. Notwithstanding anything in this Constitution ..
>
> (a) ....
>
> (b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

10. In catena of decisions, a comprehensive detailed and authoritative pronouncement of law has been laid down by Hon'ble Apex Court explaining the object, ambit, scope, limit and extent of jurisdiction of High Court under Article 226 of the Constitution of India in the matter of election in the light of Article 329(b) of the Constitution of India.

11. Three judges Bench in the case of *Election Commission of India through Secretary Vs. Ashok Kumar and others,* (2000) 8 SCC 216, the Hon'ble Apex Court has addressed upon the issue as regards jurisdiction of the High Court to entertain writ petition under Article 226 of the Constitution of India and issue of interim direction after commencement of election process in the context of Article 329 of the Constitution of India. The term "election" as occurring in Article 329 of the Constitution of India has been held to mean and include the entire process from the issue of the notification under section 14 of the Representation of People Act, 1951 to the declaration of result under section 66 of the said Act.

12. True, it is that power of judicial review is part of a basic structure of the Constitution of India; concept no more in issue but the scope of interference under Article 226 of the Constitution of India in the light of the embargo envisaged by Article 329 of the Constitution of India is well addressed by the Hon'ble Apex Court in the case of *N.P.Ponnuswami Vs. Returning Officer, Namakkal Constituency,* AIR 1952 SC 64 and reiterated in subsequent judgment in the case of *Mohinder Singh Gill Vs. Chief Election Commissioner,* (1978) 1 SCC 405. The provision as contained in Article 329 of the Constitution of India was described by the Constitution of India on two principles; (I) the peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion; (2) the provision for special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes other form, the right and remedy being creatures of statutes and controlled by the Constitution of India. In *Mohinder Singh Gill's* case, the authoritative meaning of Article 329 of the Constitution of India has been further reiterated as follows:

> (1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according

to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the "election"; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the "election" and enable the person effected to call it in question, they should be brought so before a special tribunal by means of an election petition being and not be made the subject of a dispute before any court while the election is in progress."

The same principle was reiterated by the Hon'ble Apex Court in the case of *Boddula Krishnaiah and another vs. State Election Commissioner, A.P., and others,* 1996(3) SCC 416.

13. There is no cavil of doubt that aforesaid principles squarely applies to Panchayat elections as well. For that reason alone, as a matter of fact, no interference is warranted in this writ petition. The remedy of filing an election petition is very much available to a party seeking to challenge the election of the declared/returned candidate under section 122 of the Adhiniyam, 1993 read with the Madhya Pradesh Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995.

14. Therefore, in the light of constitutional limitation coupled with the fact that the impugned notification was issued on 07/11/2014 and the election programme announced and notified on 15/12/2014 and thereafter, the present writ petition has been filed on 15/12/2014, in the opinion of this Court, at this stage no interference is warranted under Article 226 of the Constitution of India.

15. However, as submissions have been advanced with reference rule 3(6) of the Nirvachan Niyam, 1995, it is considered apposite to deal with the same.

16. Provision for reservation of seats for the Scheduled Castes and Scheduled Tribes are made in the light of Article 243D of the Constitution of India and the Legislature of the State under Article 243D(6) of the Constitution of India is empowered for making provision of reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens.

17. Relevant for the purpose of this writ petition is rule 3(6) of the Nirvachan Niyam, 1995 and for ready reference, the same is reproduced below:

> "3. Determination of reserved seats of Chair Person of Panchayat.
>
> (1) ... .
>
> (2) ... .
>
> (3) ... .
>
> (4) ... .
>
> (5) ....
>
> (6) In subsequent general election, the Panchayats previously reserved shall be excluded from drawing lots, for that particular category till all such Panchayats are not exhausted"

18. A careful reading of the aforesaid provision suggests; (i) that all the Panchayats have to be reserved for particular category by rotation; (ii) if Panchayat/Panchayats is/are reserved for OBC in a given election such Panchayat/Panchayats shall be excluded from drawing lots for a particular category (OBC) and (iii) ***till*** all remaining Panchayats are not reserved for OBC

(Emphasis supplied)

19. Therefore, the provision contemplates reservation of all Panchayats by rotation and unless all Panchayats are reserved for OBC by rotation, Panchayat already reserved for OBC should not be included in drawing of lots. After all Panchayats are reserved for OBC, as a matter of fact, the regulatory measure under rule 3(6) of the 1995 Rules is exhausted in strict sense and no further drawing of lots amongst the Panchayats is necessary

though respondent/State shall ensure that all the Panchayats are reserved for OBC in a fair manner bearing in mind the object as contained under rule 3(6) of the 1995 Rules.

20. In the instant case, there is no dispute that all the Panchayats by rotation have been reserved for OBC category except Nateran which has been reserved for OBC in the instant election. Therefore, the decision of the respondent/ State with reference to the reservation made in the year 1994 for the first time, regulating the reservation by drawing lots between those two Panchayats; Basoda, and Vidisha and regard being had to concept of rotation; a regulatory measure, reserved Basoda constituency for OBC woman category, in the opinion of this Court, cannot be said to be arbitrary or in violation of rule 3(6) of the 1995 Rules for the reasons stated hereinabove.

21. That apart, there is no allegation of any mala fides or collateral purpose with oblique motive is attributed in the matter of reservation of seats. After finalization of reservation of seat for OBC as early as on 07/11/2014, the elections were notified on 15/12/2014 and thereafter election process has started.

22. In the facts and circumstances of the case, writ petition sans merit and is hereby dismissed.

Petition dismissed.

I.L.R. [2016] M.P., 2462
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 3571/2014 (Gwalior) decided on 12 March, 2015

RAJESH MISHRA ...Petitioner
Vs.
RAM VILAS SINGH KUSHWAHA ...Respondent

***Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 - Injunction* - Held - Injunction cannot be granted as a matter of course or on mere asking - Apart from three necessary ingredients, i.e. *prima facie* case, balance of convenience and irreparable loss, the Courts are required to see the conduct of the parties. (Para 16)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – व्यादेश –

अभिनिर्धारित – मात्र मांगे जाने पर अथवा स्वाभाविक रूप से व्यादेश प्रदान नहीं किया जा सकता – तीन आवश्यक घटकों अर्थात् *प्रथम दृष्ट्या* प्रकरण, सुविधा का संतुलन एवं अपूरणीय क्षति के अलावा न्यायालयों द्वारा पक्षकारों का आचरण भी देखा जाना अपेक्षित है।

Cases referred:

2001 (1) MPWN SN 3, 2005 (3) MPLJ 213, 2010 (2) JLJ 210, 1986 (1) MPWN 159, 1990 (1) MPWN SN 136, AIR 1995 SCW 3521, 2008 (11) SCC 1, 1983 (4) SCC 31.

H.K. Shukla, for the petitioner.
Harish Dixit, for the respondent.

ORDER

SUJOY PAUL, J. :- This petition filed under Article 227 of the constitution takes exception to the order passed by the trial Court dated 20.12.2013 whereby the application of the present petitioner/ defendant preferred under Order 39 Rule 1 & 2 was rejected by the trial Court. The order passed in Miscellaneous Appeal No. 4/14 and 9/14 is also called in question whereby the Lower Appellate Court in exercise of power under Order 43 Rule 1 CPC passed injunction in favour of the respondant/plantiff.

2. The necessary facts for adjudication of this order are that the respondent/plaintiff filed a suit for declaration and permanent injunction (Annexure P-3). Along with the said suit, he filed an application under Order 39 Rule 1 & 2 CPC (Annexure P-4). The present petitioner therein filed his counter claim and application under order 39 Rule 1&2 (Annexure P-5). In the said counter claim, he also prayed for grant of injunction. The trial Court heard the parties and passed the order dated 20.12.2013 (Annexure P-2).

3. Shri. H.K. Shukla, learned counsel for the petitioner,submits that the property in question is situated at survey No.1976, Gram Gospura.The said property is recorded in the revenue records in the name of petitioner's father,late Prem Narayan Mishra, who was a freedom fighter. It is the case of the petitioner that a rent agreement (Annexure P-10) was entered into between the petitioner and one Shri Sudhir Singh Parihar. As per the said agreement, the land in question was manned by said Sudhir Singh Parihar for some time. However, the said rent agreement came to an end on 31.3.2013. It is contended by Shri Shukla that on 2.10.2013 the respondent/defendant

forcibly entered into the property and took possession of it. A complaint was lodged in police station Thatipur on 3.10.2013 (Annexure P-7). It was followed by other complaints seeking protection from the police authorities. These complaints dated 10.10.2013 (Annexure P-8) and 21.10.2013 (Annexure P-9) are placed on record. It is the case of the petitioner that the respondent/defendant was never engaged as a tenant and he had forcibly taken possession of the property. The same stand is taken in the counter claim and the counter application. Shri Shukla referred para 3 of the plaint filed by the plaintiff, wherein it is averred that the rent was regularly paid by him to the present petitioner and entry in this regard is mentioned in the diary kept by the plaintiff in the handwriting of the present petitioner. He submits that this best evidence was not produced before the courts below which shows that the whole story of plaintiff is concocted and like house of cards.

4. The trial Court in order dated 20. 12.2013 opined that the property in question is in the name of 'Mangal Marriage Garden". The statutory authority under M.P. Shop and Establishment Act, 1958 issued a registration certificate dated 22.10.2010 in favour of the respondent/plaintiff. Apart from this, the trial Court has taken note of various documents which show that the said marriage garden was booked by the respondent/plaintiff. The stand of respondent/plaintiff was recorded that he is tenant at the rate of Rs. 10,000/- per year. The trial Court after considering the documents filed by the plaintiff opined that the electricity bill was actually paid by the plaintiff. There exist internent connection and telephone connection for which payment is being made by the plaintiff. The trial Court gave a finding that the property tax for the period 1.4.2012 to 31.3.2013 is Rs.83621/- and, therefore, it is difficult to accept that plaintiff can be a tenant at the rate of Rs. 10,000/- per year only. On the basis of reasons assigned in the said order, the trial Court opined that although plaintiff is in possession of the property, his possession is in the capacity of encroacher and, therefore, he cannot be permitted to enjoy injunction. The claim of present petitioner for injunction was also rejected on the ground that the plaintiff is in possession.

5. The petitioner and respondent/plaintiff filed miscellaneous appeals against the said order of the trial court. The miscellaneous appeals were registered as Misc. Appeal No. 4/14 and 9/14. The appeals were analogously heard and decided by the impugned order dated 5.5.2914 (sic:2014) (Annexure P-1).

6. Shri H.K.Shukla, learned counsel for the petitioner, criticized this order by contending that the order of trial court and appellate is based on registration certificate issued under the Shop and Establishment Act.. The said certificate was obtained on misrepresentation of fact. Accordingly, the statutory authority by order dated 24.5.2014 (Annexure P-14) cancelled the same. He drew attention of this court on Annexure P-14 which shows the cancellation of registration. Reliance is placed on Annexure P-15 to submit that the internet connection stood terminated eight months before 16.7.2013. Thus, it is contended that the plaintiff's sole basis for obtaining injunction does not survive in view of said documents. Shri Shukla submits that the plaintiff is an encroacher. On the basis of illegal act and with the help of muscle men he encroached the property of the petitioner. He submits that the equity is not in favour of such litigant/plaintiff and, therefore, court below has erred in allowing the miscellaneous appeal of the plaintiff. He relied on the judgments cited by him before Lower Appellate Court (mentioned in para 20 of the said order). He submits that there is no justification in passing the order dated 5.5.2014. He submits that merely because possession is averred and shown, mechanically injunction cannot be granted. Lastly, Shri H.K.Shukla submits that apart from satisfying neccessary ingredients for grant of injunction i.e., *prima facie* case, balance of convenience and irreparable injury, the courts must see the conduct of parties while considering the prayer for grant of injunction. He submits that injunction being an equitable relief is available only to a person who has a lawful claim. He relied on certain judgments in support of his contentions.

7. Shri Harish Dixit, on the other hand, supported the order passed by the Court below. By taking this Court to various paragraphs of the appellate court's order, Shri Dixit contends that the appellate court has dealt with each and every aspect raised by Shri Shukla. He submits that the plaintiff has produced the diary which shows that there were entries and payments made by the parties in favour of the plaintiff who have booked the marriage garden for the purpose of marriage functions. He submits that the electricity bills, telephone bills and internet connection etc. were paid by the plaintiff. He fairly submits that although electricity connection is in the name of present petitioner, fact remains that payments arising out of those electricity bills were paid by the plaintiff. He submits that the petitioner was unable to show any material/documents regarding his possession on the property. On the contrary, the plaintiff was able to show that he has paid the aforesaid bills, marriage garden was booked on various occasions for which amount was received by

the plaintiff etc. On the strength of these, it is submitted that the court below has not committed any error of law which warrants interference by this Court. He submits that limited injunction granted by Lower Appellate Court that plaintiff be not evicted without following due process of law, by no stretch of imagination, can be said to be either without jurisdiction or illegal in nature. In respect of aforesaid, he relied on 2001 (1) MPWN SN 3 *(Bharosilal Vs. State of M.P.)* and 2005 (3) MPLJ 213 *(Waheed Khan Vs. Gyani Bai and others)*. Lastly, Shri Dixit submits that Sudhir Singh Parihar filed an affidavit in support of the plaintiff by contending that the marriage garden is being run by the plaintiff and he is only taking care of lighting and decoration of the marriage garden.

8. No other point is pressed by learned counsel for the parties.

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

10. The petitioner, along with the present petition, has filed the Document Annexure P-14 whereby the registration of marriage garden in favour of the plaintiff was cancelled by statutory authority. The respondent has not chosen to refute the genuineness of this document. The aforesaid factual backdrop shows that the petitioner has promptly informed the police authorities that the plaintiff has forcibly entered into the suit premises and he is an unauthorized occupant. There is not even an iota of material to show that the plaintiff was a tenant of the petitioner. In view of para 3 of the plaint averment, the entry regarding payment of rent is made by the petitioner in a diary maintained by the plaintiff. This was the best piece of evidence available with the plaintiff which was deliberately not produced. There is no justifiable reason assigned for the same. The courts below have rightly doubted and disbelieved the stand of the plaintiff that the land whose annual property tax is Rs.83,621/-can be given on rent for an amount of Rs.10,000/- per year. However, it is seen that the court below is impressed with the aspect of possession of the plaintiff. The reason for giving such finding is telephone, electricity and internet bills paid by the plaintiff, registration under the Shop Act and the continuance booking of marriage garden in favour of customers.

11. The petitioner has relied on various judgments before the court below which are referred in para 20 of order dated 5.5.2014. In the present case, it is clear that the petitioner has promptly lodged the reports about forcible action of encroachment on said property by the plaintiff before the police

authorities. He approached from pillar to post for redresasal (sic:redressal) of grievances. For the reasons best known to the police authorities, no action was taken on the said police complaints. Perhaps the police authorities treated it to be a purely civil dispute. Taking advantage of police inaction, the plaintiff filed a suit seeking declaration that he be declared as a tenant. There is no material whatsoever to suggest that he is a tenant. Merely because an affidavit is filed at later stage by Sudhir Singh Parihar that will not create a strong *prima facie* material to establish that the plaintiff was a tenant. More so, when in the rent agreement dated 15.1.2011 (Annexure P-10), the present plaintiff had put his signature in the capacity of a witness only.

12. At the cost of repetition, in my opinion, there is no material at all to *prima facie* believe that plaintiff was a tenant. On the contrary, petitioners repeated representations to the police authorities, *prima facie* establish that the plaintiff is an encroacher, who forcibly entered the suit premises. The question is whether in these circumstances the injunction could have been granted by the court below in favour of the plaintiff. I find substantial force in the argument of Shri Shukla that the conduct of a party is a relevant consideration for grant of injunction.

13. The Apex Court in 2010 (2) JLJ 210 *(Narendra Kante Vs. Aanuradha Kante and others)* opined that, while considering an application for grant of injunction, the Court has not only to take into consideration the basic elements regarding existence of a parma *(sic:prima) facie* case, balance of convenience and irreparable injury, it has also to take into consideration the conduct of the parties since grant of injunction is an equitable relief.

14. This Court in 1986 (1) MPWN 159 *(Kamal Singh Vs. Jairam Singh)* opined that temporary injunction cannot be claimed merely on the basis of possession. The possession must be legal. Possession of trespassers cannot be protected. Same view is taken by this Court in 1990(1) MPWN SN 136 *(Dattatraya Vaishampayan Vs. Janakarya Vibhag Karmachari Grih Nirman Sahakari Samiti)*.

15. The Apex Court in AIR 1995 SCW 3521 *(M/s Gujarat bottling Co. Ltd. And ors. Vs. Coca Cola Company and ors.)* opined as under:-

> "In this context, it would be relevant to mention that in the instant case GBC had approached the High Court for the injunction order, granted earlier, to be vacated. Under Order

39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief, His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39, Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad-interim or temporary injunction order already granted in the pending suit or proceedings."

16. Same view is taken by Supreme Court in 2008 (11) SCC 1 *(Mandali Ranganna & Ors. Etc Versus T. Ramachandran, & Ors.)* and 1983 (4) SCC 31 *(Gangubai Bablya Chaudhary Versus Sitaram Balachandra Sukhtankar)*. In view of aforesaid judgments, it is clear that injunction cannot be granted as a matter of course or on mere asking. Apart from three necessary ingredients, i.e., *prima facie* case, balance of convenience and irreparable loss, the courts are required to see the conduct of the parties. In the present case, the best available evidence with the plaintiff (mentioned in para 3 of plaint) was deliberately suppressed which creates serious doubt about the status of the plaintiff as a tenant. No *prima facie* case is established by the plaintiff showing that he is a tenant. The conduct of plaintiff also suggest that he was not entitled for any injunction. Mere possession on the basis of forcible entry cannot be a ground for grant of injunction. If injunctions are granted in such cases, it will encourage trespassers and encroachers. They may misuse and abuse the judicial process. The judgments cited by Shri Harish Dixit are based on different factual backdrops. The said judgments have no application in the facts and circumstances of the present case.

17. As analyzed above, in my view, the order dated 5.5.2014 is bad in

law and liable to be interfered with. The Courts below have erred in not granting injunction prayed for by the petitioner.

18. Resultantly, the application preferred by the plaintiff under Order 39 Rule 1 & 2 is rejected. Accordingly, the order passed on 5.5.2014 (Annexure P-1) is also set aside. In the facts and circumstances of this case, the prayer of petitioner for grant of injunction is granted. The respondent/ plaintiff is injuncted from creating any kind of hindrance in the marriage garden in question. It will not be open to the plaintiff to cause hindrance by himself or through any body else. It is made clear that this finding of this order will not affect the merits of the case before the trial court in any manner. It is expected that the parties will cooperate with the proceedings before the court below and court below will make endeavour to decide the civil suit expeditiously.

19. Petition is allowed to the extent indicated above. No cost.

Petition allowed.

I.L.R. [2016] M.P., 2469
WRIT PETITION
Before Mr. Justice Rohit Arya
W.P. No. 9079/2013 (Gwalior) decided on 19 March, 2015

SEVEN BROTHERS (M/S.) ...Petitioner
Vs.
HINDUJA LEYLAND FINANCE CO. & ors. ...Respondents

A. Constitution - Article 12 & 226 and Companies Act (1 of 1956), Section 617 - 'Other Authority' - State - **Respondent No. 1 company not performing public duty nor discharging any statutory function - Private Finance Company - Whether a Writ Petition is maintainable against a Private Company incorporated u/S 617 of the Companies Act - Held - No, as the Respondent No. 1 Company is a private company engaged in the business of finance cannot be classified as "Other Authority" to bring it in the fold of definition of 'State' under Article 12 of the Constitution to make it amenable to Writ Jurisdiction under Article 226 of the Constitution - Petition dismissed. (Paras 10 to 14)**

क. संविधान – अनुच्छेद 12 व 226 एवं कम्पनी अधिनियम (1956 का 1), धारा 617 – 'अन्य प्राधिकारी' – राज्य – प्रत्यर्थी क्र. 1 कंपनी लोक कर्तव्य का अनुपालन नहीं करती तथा न ही वह कोई कानूनी कृत्य का निर्वहन करती है –

निजी वित्त कंपनी – क्या कंपनी अधिनियम की धारा 617 के अंतर्गत निगमित एक निजी कंपनी के विरूद्ध रिट याचिका पोषणीय है – अभिनिर्धारित – नहीं, चूंकि प्रत्यर्थी क्र. 1 कंपनी वित्त व्यापार में संलग्न एक निजी कंपनी है इसलिए इसे संविधान के अनुच्छेद 12 के अंतर्गत 'राज्य' की परिभाषा की परिधि में लाने तथा संविधान के अनुच्छेद 226 के अंतर्गत रिट अधिकारिता के अध्यधीन करने हेतु 'अन्य प्राधिकारी' के रूप में वर्गीकृत नहीं किया जा सकता है – याचिका खारिज।

***B. Constitution - Article 226* - Petition for release of Excavator Machine on 'Supardgi' & for registering criminal case against Respondents - Vehicle financed for loan amount of Rs. 36,60,000/- - Repayment Rs. 1,38,550/- per month in 33 EMI - Grave default in repayment - Show cause notice - No reply - Extended opportunity for repayment - Seizure of Excavator Machine - Police complaints by petitioner - No ground to proceed - Held - As per the loan agreement and opportunity of repayment granted to the petitioner, he is not entitled for any relief - Petition sans merit & is dismissed. (Paras 7 & 15)**

ख. संविधान – अनुच्छेद 226 – उत्खनक मशीन को 'सुपुर्दगी' पर निर्मोचित किये जाने तथा प्रत्यर्थीगण के विरूद्ध दाण्डिक प्रकरण दर्ज किये जाने हेतु याचिका – वाहन को रूपये 36,60,000/– की ऋण राशि हेतु वित्त पोषित किया गया था – रूपये 1,38,550/– प्रतिमाह की 33 आसान मासिक किस्तों में पुनर्भुगतान – पुनर्भुगतान में गंभीर चूक – कारण बताओ नोटिस – कोई जवाब नहीं – पुनर्भुगतान हेतु अवसर की सीमा बढ़ाई गई – उत्खनक मशीन का अभिग्रहण – याची द्वारा पुलिस को शिकायत – कार्यवाही करने का आधार नहीं – अभिनिर्धारित – ऋण अनुबंध के अनुसार तथा याची को पुनर्भुगतान हेतु प्रदान किये गये अवसर के पश्चात्, वह कोई सहायता प्राप्त करने हेतु हकदार नहीं – याचिका में गुणदोष न होने से खारिज।

Cases referred:

2003(10) SCC 733, (1981) 1 SCC 722, (2002) 5 SCC 111, (2001) 7 SCC 417, (1979) 4 SCC 396, (2006) 2 SCC 598, (2013) 1 SCC 400.

Arvind Dudatwat and *Dhirendra Singh,* for the petitioner.
M.M. Qureshi, for the respondents No. 1 & 2.

ORDER

Rohit Arya, J. :- Instant writ petition under Article 226 of the Constitution of India is filed for the relief in the form of direction against the respondent No.1, Hinduja Leyland Finance Company (hereinafter referred to as the respondent-company) for release of the Excavator Machine on supardgi

subject to payment of necessary dues regularly on monthly installments and further relief incorporated by way of amendment vide order dated 03/02/2014 in the form of direction to newly added respondents' No.3 and 4 to take action and register criminal case against the respondent No.2 and his companions on the basis of complaints made by the petitioner with further direction to respondent No.4 to give possession of the Machine in question to the petitioner forthwith.

2. Facts relevant and necessary for disposal of this writ petition are to the effect that petitioner had approached respondent-company, a finance company registered under the Companies Act, 1956 for purchase of new Hyundai R215 LC7 Excavator Machine with Sr. No.N603D0042 and Engine No.84093664 (hereinafter referred to as the 'Machine') under the loan scheme of the respondent-company. The loan agreement No.MPIDGW00041 dated 30/04/2013 was entered into between the petitioner (the borrower) with one Brijendra Singh as guarantor and the respondent-company (the lender). The loan amount advanced was to the tune of Rs.36,60,000/. The same was required to be repaid in 33 installments at the rate of Rs.1,38,550/per month commencing from 01/06/2013. The loan amount was released and the Machine was purchased by the petitioner from a dealer. The terms and conditions are contained in the loan agreement. Article 2.9 of the Agreement deals with repayment of loan, Article 2.10 of the Agreement deals with mode of payment of the installments. Article 13 deals with events of default and Article 14 of the Agreement deals with lender's right of recovery of loan and *inter alia* Article 14.1 provides that upon occurrence of any/all of the events of default, the borrower shall be liable to pay to the lender as provided for therein. Article 14.2 thereof provides as under:

> "14.2 In the event of failure of the Borrower in complying with the demand in the said notice the Borrower shall be bound to surrender to the Lender at the cost of the Borrower at such location, as the Lender may designate, in the same condition in which it was originally delivered to the Borrower, ordinary wear and tear expected, failing which, the Lender shall be entitled to seize the Asset wherever, is without any further notice. The Borrower shall not prevent or obstruct the Lender from taking the possession of the Asset. For purpose, the Lender's authorised representatives, employees, officers and

agents will have unrestricted right to entry and shall entitled to enter upon the premises, or garage, or godown, where the Asset shall be lying or kept, and to seize the Asset. In the event of the Borrower not cooperating, the Lender, if necessary have the right to break open any such place where the Asset is believed to kept and to seize the Asset. The Lender will be well within its rights to use towvan or any carrier to carry away the Asset. The Borrower shall be liable to pay any towing charges and other such expenses incurred by the Lender in connection with the seizure of the Asset and for its sale etc."

Article 14.3 of the Agreement provides that after seizure, Lender's authorised representative, employees, officers or agents will prepare an Inventory of the Asset. Thereafter, the Lender will send a notice with a copy of the inventory, granting the borrower 10 days time to settle the contract and to take back the vehicle by following the other conditions contained therein.

Article 22 of the Agreement provides for law, jurisdiction and arbitration which reads as under:

22.1 (a) All disputes, differences and / or claim arising out of this Agreement whether during its subsistence or there after shall be settled by arbitration in accordance with the provision of the Arbitration and Conciliation Act, 1996, or any statutory amendments thereof and shall be referred to the sole Arbitration of an Arbitrator nominated by the Managing Director of the Lender. The award given by such an Arbitrator shall be final and binding on the Borrower to this Agreement.

(b) The venue of arbitration proceedings shall be at Chennai.

(c) The arbitrator so appointed herein above, shall also be entitled to pass an Award on the hypothecated asset and also on any other securities furnished by or on behalf of the Borrower.

3. Upon perusal of the aforesaid relevant provisions, it is clear that in the event the petitioner continues to be a defaulter or fails to pay any of the loan installments within the schedule time or commits any breach of the agreement or fails to perform his loan agreement as defined under Article 13, the lender

is conferred with the right to take possession of the Machine in question and recover the balance amount of the loan installments as well as claim damages for breach of the contract. Besides, the respondent-company is also entitled to put to sale the seized asset/Machine in question and appropriate the sale proceeds towards satisfaction of the claim against the petitioner on the basis of the terms and conditions of the agreement.

4. The aforesaid narration of facts are beyond any cavil of doubt.

5. Petitioner does not dispute the principal amount of the loan and the schedule of installments to be paid towards repayment of loan. However, it is submitted that due to poor financial condition, petitioner could not deposit the installments at scheduled intervals. The petitioner is ready and willing to deposit the rest of the installments/amount due in time though the respondent-company has acted contrary to the Reserve Bank of India guidelines.

6. This writ petition was filed on 26/12/2013. Certain facts are sought to be incorporated by way of amendment which was allowed by this Court vide order dated 03/02/2014 related to the period upto 05/12/2013 but there is no plausible justification offered as to why the aforesaid facts were not pleaded at the time of filing the writ petition. By the aforesaid amendment, the petitioner sought to bring on record that the respondent-company has not allowed the petitioner to deposit the amount of installments, the possession of the Machine has been taken forcibly and seized. Complaints though have been lodged with the Police Station, Kwasi, District Aligarh, State of Uttar Pradesh and Police Station, Madhoganj, District Gwalior, State of Madhya Pradesh but no action has been taken against the respondent-company. The act of taking possession of the Machine by force was an illegal act and contrary to the loan agreement and, therefore, the complaints filed by the petitioner deserves to be registered for further action by the concerned police station.

7. Respondent No.1- company has filed the counter-affidavit and raised a preliminary objection that the present writ petition under Article 226 of the Constitution of India is not maintainable in the light of the judgment of the Hon'ble Apex Court reported in 2003 (10) SCC 733, *Federal Bank Ltd., Vs. Sagar Thomas and others* as the respondent No.1-company does not fall in the class of "other authority" within the fold of definition of "other authority" as enshrined under Article 12 of the Constitution of India to make it amenable to the writ jurisdiction. According to the respondent-company

though it is a finance company but it is a private company registered under the Companies Act engaged in the business of finance but it does not perform any public duty or is not a body corporate under law to discharge any statutory functions. That apart, on merits, it is submitted that the amount of loan advanced was to the tune of Rs.36,60,000/and the same was required to be paid in 33 monthly installments each at the rate of Rs.1,38,550/by the petitioner. The conduct of the petitioner as regards repayment of installments is catalogued in the form of chart which reads as under:

Sl.No.	Installments	Details
1.	1st installment	Cheque bounced on scheduled date.
2.	2nd installment	Paid.
3.	3rd installment	Cheque bounced on scheduled date.
4.	4th installment	Cheque bounced on scheduled date.
5.	5th installment	Part-payment made.
6.	6th installment	Cheque bounced on scheduled date.
7.	7th installment	Not paid.

As such, there was complete failure on the part of the petitioner as regards repayment of loan in terms of the loan agreement. Therefore, there is clear default committed as per Article 13 of the loan agreement. It is further submitted that a show cause notice dated 16/10/2013 (Annexure D/2) was served upon the petitioner on 23/10/2013 through postal receipts annexed as Annexure D/3. However, no heed was paid towards the aforesaid notice by the petitioner. Thereafter, Pre Repossession Intimation to Police addressed to the Officer Incharge, Gandhi Park, Aligarh-202001 was served on 05/12/2013 (Annexures D/4). Subsequent to that, the asset/Machine was restored from the operator of the Machine at Aligarh (State of UP) and the inventory of item was prepared (Annexure D/6) and after sending the Machine/Asset to the authorised yard of the respondent-company, the information post possession was sent to the concerned Police Station (Annexure D/5). Even thereafter, by

way of further indulgence in the matter, the respondent-company extended an opportunity to the petitioner vide notice dated 23/12/2003 (sic:2013) (Annexure D/7) informing that since you had defaulted in payment of monthly installments, the possession of the Machine has been taken in a peaceful manner and there is a foreclosure amount of Rs.36,39,587/- as on 31/12/2013 and is still due and payable towards the loan account even after adjustment of the installment amounts paid. Therefore, petitioner was requested to settle the loan account by paying Rs.36,39,587/- till 05/01/2014 failing which the respondent-company will be constrained to sell the same at the best possible price on 'as is where is condition' and thereafter proceed to take appropriate legal action to recover the balance amount after appropriating the sale proceeds towards the loan account. The said notice was dispatched vide speed post annexed as Annexure D/8 to the petitioner. However, the petitioner did not respond to the aforesaid notice. Instead of making efforts for payment of outstanding dues, petitioner resorted to novel method of lodging complaints to the Police Station at Aligarh, State of Uttar Pradesh and Police Station, Madhoganj, District Gwalior, State of Madhya Pradesh. It is further submitted that police investigation was conducted and it was found that the complaint lacks substance and there was no ground to proceed with the complaint, closed the same. It is further submitted that the respondent-company has all along shown gesture and afforded opportunity to the petitioner for payment of installments, despite the fact that the petitioner is a chronic defaulter in making payment of installments, but yielded no result. Hence, prayed for dismissal of the writ petition.

8. During pendency of the proceedings before this Court, an attempt was made that the dispute between the parties may be settled amicably and the matter was referred to the mediation by this Court. It appears that certain terms and conditions were incorporated in the mediation report for resolution of the dispute between the parties but yielded no results. This Court vide order dated 20/02/2015 passed the following order:

> "Counsel for the petitioner is directed to deposit Bank Draft of Rs.26,06,348/- as agreed before Mediator Shri Padam Singh in the name of Principal Registrar, High Court of M.P., Bench at Gwalior within 10 days.
>
> List this petition for further orders and direction in the light of the mediation report dated 27/11/2014 after ten days."

9. Thereafter, till the date of hearing of the petition on 19/03/2015, petitioner has not complied with the aforesaid order passed by this Court. Under such circumstances, this Court proceeded to decide the writ petition.

10. The moot question to be addressed is as regards maintainability of the writ petition against a private company incorporated under section 617 of the Companies Act?

11. In somewhat similar facts and circumstances of the case in hand, the Hon'ble Supreme Court in the case of *Federal Bank Ltd.*, (supra) has held that a private company registered under the Indian Companies Act carrying on banking business as a scheduled bank, cannot be termed as an institution or a company carrying on any statutory or public duty. As such, such company is essentially a commercial venture company involved in the activities to make profits. Financing is also one of such commercial activities. In course of business transaction, finance company enters into agreements having within its fold various terms and conditions of advancement of finance as in the present case. It has its own Board of Directors elected by its share holders having no monopoly status at all. Being a registered company, it has rights and obligations under the terms and conditions of the Agreements entered into and are enforceable at law. Advancement of loan and recovery thereof are part of the business activities. The private banking company is not set up for the purpose of building the economy of the State; on the other hand such private company has been voluntarily established for its own purposes and business interests. Of course, subject to regulatory measures of financial discipline having no adverse effect on the economy of the country in general or not put in conflict with or against the fiscal policies of the State and for such purpose guidelines are provided by the Reserve Bank of India. Such regulatory measures are to keep a check and provide guidelines but in no case can be termed to have a participatory dominance or control over the affairs of the company in its business intercourses. As regards, Reserve Bank of India regulations applicable to private companies/finance companies and the consequences flowing therefrom in the context of maintainability of writ petition under Article 226 of the Constitution of India, the Hon'ble Supreme Court observed as under:

> "33. Merely because the Reserve Bank of India lays the banking policy in the interest of the banking system or in the interest of monetary stability or sound economic growth having due regard to the interests of the depositors etc. as provided under Section

5(c)(a) of the Banking Regulation Act does not mean that the private companies carrying on the business or commercial activity of banking, discharge any public function or public duty. These are all regulatory measures applicable to those carrying on commercial activity in banking and these companies are to act according to these provisions failing which certain consequences follow as indicated in the Act itself. As to the provision regarding acquisition of a banking company by the Government, it may be pointed out that any private property can be acquired by the Government in public interest. It is now a judicially accepted norm that private interest has to give way to the public interest. If a private property is acquired in public interest it does not mean that the party whose property is acquired is performing or discharging any function or duty of public character though it would be so for acquiring authority.

34. For the discussion held above, in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. We don't find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. Mere regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor put any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a case of disciplinary action being taken against its employee by the appellant Bank. The respondent's service with the bank stands terminated. The action of the Bank was challenged by the respondent by filing a writ petition under Article 226 of the Constitution of India. The respondent is not trying to enforce any statutory duty on the part of the Bank. That being the position, the appeal deserves to be allowed."

12. The Hon'ble Apex Court in the aforesaid case has also applied six factors test laid down in the case of *Ajay Hasia Vs. Khalid Mujib Sehravardi,* (1981) 1 SCC 722 to determine as to whether a company incorporated under the Companies Act (not being a Government Company) under section 617 thereof can fall within the definition of **'other authority'** under Article 12 of the Constitution of India. The respondent No.1 company is a finance company registered under the Companies Act engaged in the business of financing and, therefore, the conclusion drawn by the Hon'ble Supreme Court in the aforesaid case has full application to the facts and circumstances of the present case. The tests read as under:

> "(i) **Application of Ajay Hasia Tests 1 & 2**
>
> Share capital of the appellant Bank is not held at all by the Government nor is any financial assistance provided by the State; nothing to say which may meet almost the entire expenditure of the company;
>
> (ii) **Application of Ajay Hasia Test 3**
>
> The third factor is also not answered since the appellant Bank does not enjoy any monopoly status nor can it be said to be an institution having State protection.
>
> (iii) **Application of Ajay Hasia Test 4**
>
> So far as control over the affairs of the appellant Bank is concerned, they are managed by the Board of Directors elected by its shareholders. No governmental agency or officer is connected with the affairs of the appellant Bank nor is any one of them a member of the Board of Directors. In the normal functioning of the private banking company there is no participation or interference of the State or its authorities. The statues have been framed regulating the financial and commercial activities so that fiscal equilibrium may be kept maintained and not get disturbed by the malfunctioning of such companies or institutions involved in the business of banking. These are regulatory measures for the purpose of maintaining a

health economic atmosphere in the country. Such regulatory measures are provided for other companies also as well as industries manufacturing goods for importance. Otherwise these are purely private commercial activities. It would hardly make any difference if such supervisory vigilance is kept by the Central Government in place of Reserve Bank of India.

(iv) Application of Ajay Hasia Test 5

Any business or commercial activity, whether it may be banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money are no doubt, such which do have an impact on the economy of the country in general. But such activities cannot be classified as one falling in the category of discharging duties or functions of a public nature.

(v) Application of Ajay Hasia Test 6

Again, the activity which is carried on by the appellant is not one which have been earlier carried on by the Government and transferred to the appellant company.

13. The aforesaid six factors test in *Ajay Hasia's* case (supra) was considered by seven Judge Bench of the Hon'ble Supreme Court in the case of *Pradeep Kumar Biswas Vs. Institute of Chemical Biology,* (2002) 5 SCC 111 wherein it was observed as under:

> "40. The picture that ultimately emerges is that the tests formulated in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be – whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand,

when the control is merely regulatory whether under statue or otherwise, it would not serve to make the body a State.".

14. In view of the authoritative law settled by Hon'ble Apex Court referred to hereinabove, in the opinion of this Court, the respondent-company, a private company engaged in the business of finance cannot be classified as **'other authority'** to bring it in the fold of definition of **"State"** under Article 12 of the Constitution of India to make it amenable to writ jurisdiction under Article 226 of the Constitution of India. Therefore, the writ petition is found to be not maintainable considering the factual matrix of the case in hand and the nature of relief claimed therein.

15. Even otherwise, the action taken by the respondent-company is in the light of the loan agreement binding between both the parties *inter alia* contained in the provisions as regards Article 2.9 repayment of loan, Article 2.10 Mode of payment of installments, Article 13 events of default, Article 14 Lender's Right, 14.1 and 14.3 (particularly) and the documents on record as D/2 to D/8 filed by the respondent-Bank. Hence, in the light of the law laid down by the Hon'ble Supreme Court in the case of *Charanjit Singh Chadha Vs. Sudhir Mehra,* (2001) 7 SCC 417, *Sardar Trilok Singh Vs. Satya Deo Tripathi,* (1979) 4 SCC 396, *Orix Auto Finance (India) Ltd. Vs. Jagmander Singh and another* (2006) 2 SCC 598 and *Anup Sarmah Vs. Bhola Nath Sharma and others* (2013) 1 SCC 400 wherein in paragraphs 4, 5 and 6 observed as under:

> "4. In *Sardar Trilok Singh Vs. Satya Deo Tripathi,* (1979) 4 SC 396, this Court examined a similar case wherein the truck had been taken in possession by the financier in terms of hirepurchase agreement, as there was a default in making the payment of instalments. A criminal case had been lodged against the financier under Sections 395,468, 465,471, 120B/ 34 IPC. The Court refused to exercise its power under Section 482 CrPC and did not quash the criminal proceedings on the ground that the financier had committed an offence. However, reversing the said judgment, this Court held that proceedings initiated were clearly an abuse of process of the court. The dispute involved was purely of civil nature,even if the allegations made by the complainant were substantially correct. Under the hirepurchase agreement, the financier had made the payment

of huge money and he was in fact the owner of the vehicle. The terms and conditions incorporated in the agreement gave rise in case of dispute only to civil rights and in such a case,the civil court must decide as to what was the meaning of those terms and conditions.

5. In *K.A.Mathai Vs. Kora Bibbikutty,* (1996) 7 SCC 212, this Court had taken a similar view holding that in case of default to make payment of instalments, the financier had a right to resume possession even if the hirepurchase agreement does not contain a clause of resumption of possession for the reason that such a condition is to be read in the agreement. In such an eventuality, it cannot be held that the financier had committed an offence of theft and that too, with the requisite *mens rea* and requisite dishonest intention. The assertion of rights and obligations accruing to the parties under the hirepurchase agreement wipes out any dishonest pretence in that regard from which it cannot be inferred that the financier had resumed the possession of the vehicle with a guilty intention.

6. In *Charanjit Singh Chadha Vs. Sudhir Mehra,* (2001) 7 SCC 417, this Court held that recovery of possession of the vehicle by the financier owner as per terms of the hirepurchase agreement, does not amount to a criminal offence. Such an agreement is an executory contract of sale conferring no right *in rem* on the hirer until the transfer of the property to him has been fulfilled and in case the default is committed by the hirer and possession of the vehicle is resumed by the financier, it does not constitute any offence for the reason that such a case/dispute is required to be resolved on the basis of terms incorporated in the agreement. The Court elaborately dealt with the nature of the hirepurchasing agreement observing that in a case of mere contract of hiring, it is a contract of bailment which does not create a title in the bailee. However, there may be variations in the terms and conditions of the agreement as created between the parties and the rights of the parties have to be determined on the basis of the said agreement. The Court further held that in such a contract, element of bailment and element of sale are involved in the sense that it contemplates an eventual sale.

> "8. The element of sale fructifies when the option is exercised by the intending purchaser after fulfilling the terms of the agreement. When all the terms of the agreement are satisfied and the option is exercised a sale takes place of the goods which till then had been hired." (*Charanjit Singh Chadha* case (supra), SCC p.422, para 8)
>
> While deciding the said case, this Court placed reliance upon its earlier judgments in *Damodar Valley Corpn. vs. State of Bihar,* AIR 1961 SC 440, *Instalment Supply (P) Ltd. Vs. Union of India,* AIR SC 53 (SCC p.744, para 8), *K.L.Johar & Co. Vs. CTO,* AIR 1965 SC 1082 (AIR p.1090, para 17) and *Sundaram Finance Ltd. Vs. Sate (sic:State) of Kerala*, AIR 1966 SC 1178."

and provisions contained under Articles 13 and 14 of the Loan Agreement (supra) and documents on record as regards intimation of pre and post stage repossession and further opportunity to the petitioner, as discussed in para 7 of the order, no direction is warranted in the context of second relief claimed in the instant writ petition.

16. Petition sans merit and is accordingly dismissed.

Petition dismissed.

I.L.R. [2016] M.P., 2482

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 13116/2009 (Jabalpur) decided on 23 June, 2015

BHOLARAM SARWE ...Petitioner

Vs.

STATE OF M.P. & ors. ...Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 92 and Criminal Procedure Code, 1973 (2 of 1974), Sections 173(2), 202 & 204 **- FIR against the petitioner in respect of the financial irregularities committed by the petitioner while posted as Panchayat Secretary, Gram Panchayat - It is urged that in case the**

petitioner was granted the opportunity of hearing, he could have explained that no offence is made out - Held - Under the scheme of Chapter XII of the Code of Criminal Procedure, there are various provisions under which no prior notice or opportunity of being heard is conferred as a matter of course to an accused person while the proceeding is in the stage of an investigation by a police officer - No interference - Petition dismissed. (Paras 3, 6 & 8)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 92 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 173(2), 202 व 204 – ग्राम पंचायत के पंचायत सचिव के तौर पर पदस्थ रहने के दौरान याची द्वारा कारित की गई वित्तीय अनियमितताओं के संबंध में उसके विरूद्ध प्रथम सूचना प्रतिवेदन दर्ज – यह निवेदन किया गया है कि यदि याची को सुनवाई का अवसर दिया जाता तो वह यह स्पष्ट कर सकता था कि कोई अपराध नहीं बनता – अभिनिर्धारित – दण्ड प्रक्रिया संहिता के अध्याय XII के अंतर्गत स्कीम में ऐसे विभिन्न उपबंध हैं जिनके अंतर्गत जब कार्यवाहियां एक पुलिस अधिकारी द्वारा अन्वेषण किये जाने के प्रक्रम पर हों तब किसी अभियुक्त को स्वाभाविक तौर पर पूर्व नोटिस अथवा सुनवाई का अवसर प्रदत्त नहीं किया जा सकता – हस्तक्षेप नहीं – याचिका खारिज।

Case referred :

1993 Supp (4) SCC 260.

Rahul Mishra, for the petitioner.
Deepak Awasthy, G.A. for the respondents No. 1, 2 & 4.
M. Verma, for the respondent No. 3.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- With consent of learned counsel for the parties the matter is finally heard.

2. The petitioner calls in question the communication dated 30.11.2009; whereby, the Sub Divisional Officer (Revenue) Prescribed Authority under Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as the 1993 Adhiniyam) has called upon the Chief Executive Officer Janpad Panchayat Lalbarra to lodge an FIR against the petitioner in respect of the financial irregularities committed by the petitioner while posted as Panchayat Secretary Gram Panchayat Panderwani Janpad Panchayat Lalbarra.

3. The fact as to the irregularities surfaced when a fact finding enquiry was held on a complaint received that from the collection towards electricity charges between the period from 18.11.2005 to 4.4.2008 an amount of Rs.5,95,000/- was not deposited in the account. This led to issuance of notice dated 16/17.11.2009, proposing three fold action against the petitioner, disciplinary action, action under section 92 of 1993 Adhiniyam for recovery of the amount allegedly misappropriated and to lodge an FIR for Criminal Prosecution. Of these three, one of the action proposed i.e. lodging of FIR is culminated vide impugned communication which is being questioned on the ground that the petitioner has not been afforded proper opportunity of hearing. It is urged that in case the petitioner was granted the opportunity of hearing he could have explained that no offence is made out.

4. The relief sought by the petitioner is being opposed by respondents. It is urged on behalf of respondents No.1, 2 and 4 that the charge of embezzlement of Rs,5,95,000/- besides civil have the criminal profile and while the recovery can be effected by taking recourse to Section 92 and in respect of misconduct by initiating departmental enquiry, whereas, as regard to mensrea qua criminal act, the same can be only by setting the criminal prosecution in motion. It is urged that since decision has been taken to lodge FIR, no prior opportunity of hearing is warranted under the provisions of the Criminal Procedure Code 1973. Respondent No.3 also supports these contentions.

5. After hearing learned counsel for the parties this Court is of the Considered opinion that there is considerable force in the contentions put forth on behalf of the respondents.

6. In this context reference can be had of a decision in the case of *Union of India and another v. W. N. Chadha* 1993 Supp (4) SCC 260, wherein it is observed by their Lordships :-

> "88. The principle of law that could be deduced from the above decisions is that it is no doubt true that the fact that a decision, whether a prima facie case has or has not been made out, is not by itself determinative of the exclusion of hearing, but the consideration that the decision was purely an administrative one and a full-fledged enquiry follows is a relevant and indeed a significant- factor in deciding whether at that stage there ought to be hearing which the statute did not expressly grant.

89. Applying the above principle, it may be held that when the investigating officer is not deciding any matter except collecting the materials for ascertaining whether a prima facie case is made out or not and a full enquiry in case of filing a report under Section 173(2) follows in a trial before the Court or Tribunal pursuant to the filing of the report, it cannot be said that at that stage rule of audi alteram partem superimposes an obligation to issue a prior notice and hear the accused which the statute does not expressly recognise. The question is not whether audi alteram partem is implicit, but whether the occasion for its attraction exists at all.

90. Under the scheme of Chapter XII of the Code of Criminal Procedure, there are various provisions under which no prior notice or opportunity of being heard is conferred as a matter of course to an accused person while the proceeding is in the stage of an investigation by a police officer.

91. In *State of Haryana v. Bhajan Lal* this Court to which both of us (Ratnavel Pandian and K. Jayachandra Reddy, JJ.) were parties after making reference to the decision of the Privy Council in *Emperor v. Khwaja Nazir Ahmad* and the decision of this Court in *State of Bihar v. J.A.C. Saldanha* has pointed out that: (SCC p. 359, para 40)

> "... the field of investigation of any cognizable offence is exclusively within the domain of the investigating agencies over which the courts cannot have control and have no power to stifle or impinge upon the proceedings in the investigation so long as the investigation proceeds in compliance with the provisions relating to investigation..."

92. More so, the accused has no right to have any say as regards the manner and method of investigation. Save under certain exceptions under the entire scheme of the Code, the accused has no participation as a matter of right during the course of the investigation of a case instituted on a police report till the

investigation culminates in filing of a final report under Section 173(2) of the Code or in a proceeding instituted otherwise than on a police report till the process is issued under Section 204 of the Code, as the case may be. Even in cases where cognizance of an offence is taken on a complaint notwithstanding that the said offence is triable by a Magistrate or triable exclusively by the Court of Sessions, the accused has no right to have participation till the process is issued. In case the issue of process is postponed as contemplated under Section 202 of the Code, the accused may attend the subsequent inquiry but cannot participate. There are various judicial pronouncements to this effect but we feel that it is not necessary to recapitulate those decisions. At the same time, we would like to point out that there are certain provisions under the Code empowering the Magistrate to give an opportunity of being heard under certain specified circumstances."

7. In view whereof no interference is perceptible in respect of a decision taken by the respondents to launch a criminal prosecution against the petitioner found involved in criminal activities in respect of embezzlement.

8. In the result petition fails and is hereby dismissed. There shall be no costs.

Petition dismissed.

I.L.R. [2016] M.P., 2486
WRIT PETITION
Before Mr. Justice Prakash Shrivastava
W.P. No. 1340/2015 (Indore) decided on 14 October, 2015

PAWAN BHARADWAJ ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

(Alongwith W.P. No. 1752/2015, W.P. No. 3953/2015, W.P. No. 4195/2015, W.P. No. 4240/2015, W.P. No. 4263/2015, W.P. No. 4265/2015, W.P. No. 4315/2015 & W.P. No. 3077/2015)

A. ***Service Law - Regularization - Petitioner appointed on contractual basis for fixed tenure*** **- In advertisement fixed tenure contract appointment mentioned - Held - No right of regularization or extension of**

period of contract after completion of contract period. (Paras 7 & 18)

क. सेवा विधि – नियमितीकरण – याची संविदा आधार पर निश्चित अवधि के लिए नियुक्त हुआ – विज्ञापन में निश्चित अवधि के लिए संविदा नियुक्ति उल्लिखित है – अभिनिर्धारित – संविदा की कालावधि पूर्ण होने के बाद नियमितीकरण या संविदा की कालावधि के विस्तार का कोई अधिकार नहीं।

***B. Service Law - Qualification for the post* - It lies in the domain of the administrative and policy decisions - No interference unless violation of constitutional and statutory provision or found to be having no reasonable nexus with the function and duties attached to the post. (Para 19)**

ख. सेवा विधि – पद के लिए अर्हता – यह प्रशासनिक एवं नीतिगत निर्णयों के अधिकार क्षेत्र में निहित है – उनमें हस्तक्षेप आवश्यक नहीं जब तक कि संवैधानिक एवं कानूनी उपबंध का उल्लंघन न हो अथवा पद से संबद्ध कार्यों एवं कर्तव्यों से युक्तियुक्त रूप से संबंधित होना न पाया जाए।

Cases referred:

(2006) 4 SCC 1, (2011) 2 SCC 429, W.P.(c) No. 1045/2013 decided on 3.5.2013 (Delhi High Court), Civil Writ Petition No. 1702/2010 decided on 13.3.2014 (Rajasthan High Court), AIR 1998 SC 101, W.P. No. 13343/2013 decided on 20.4.2015, 2015 (1) MPLJ 34, (2008) 3 SCC 432, (2011) 9 SCC 645, W.P. No. 10901/2015 & W.P. No. 10327/2015 order passed on 21.7.2015.

Meena Chaphekar, for the petitioner in W.P. No. 1340/2015, 1752/2015, 3953/2015, 4195/2015, 4240/2015, 4263/2015, 4265/2015 & 4315/2015.

Amitabh Upadhyaya, for the petitioner in W.P. No. 3077/2015.

Rohit Mangal, for the respondent No. 1.

M.S. Dwivedi, for the respondent Nos. 2 to 4 in W.P. No. 1340/2015, 3077/2015 & 1752/2015.

Prasanna Prasad, for the respondent Nos. 2 to 4 in W.P. No. 3953/2015, 4195/2015, 4240/2015, 4263/2015, 4265/2015 & 4315/2015.

ORDER

Prakash Shrivastava, J. :- This order will govern the disposal of the W.P.No.1752/2015, W.P.No.3077/2015, W.P.No.3953/2015,

W.P.No.4195/2015 W.P.No4240/2015, W.P.No.4263/2015, W.P.No.4265/2015 and W.P.No.4315/2015 since it is jointly submitted by the learned counsel for the parties that all these writ petitions involve identical issues on the similar fact situation.

2. For convenience, the facts are noted from W.P.No.1340/2015.

3. In brief, the petitioner was appointed on the post of Computer Programmer in IT Cell of the respondent company on contract basis after selection in pursuance to the advertisement dated 26.9.2009. In other connected writ petitions in the similar manner the petitioners were appointed on contract basis in pursuance to the advertisement on the post of Junior/ Assistant Engineer, System Analyst etc. The initial period of contract was 3 years and the contract agreement was also executed on 25.5.2010. On completion of three years period, the contract was further extended for a period of two years and the fresh contract agreement for two years was executed on 26.2.2015. The petitioner thereafter had filed the representations seeking regularization in service and in the meanwhile the advertisement dated 30.5.2015 was issued for making the regular recruitment on the post in question. In these circumstances, writ petitions have been filed with a prayer to restrain the respondents from terminating the services of the petitioner and to regularize the petitioner's service.

4. Learned counsel for the petitioner submits that the petitioners have already served for a period of five years, therefore, they are entitled for the regularization in service. She has further submitted that the appointment of the petitioners was after following the regular process, therefore, it was a regular appointment and that in the fresh regular recruitment process certain minimum eligibility conditions have been added which the petitioners do not fulfill, therefore, they will be debarred from participating in the same.

5. Learned counsel for the respondents have opposed the writ petition.

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

7. The record reflects that in the advertisement itself, in pursuance to which the petitioners were appointed, it was disclosed that the maximum period of contract will be five years. The advertisement mentions that the contract appointment will be for initial period of three years which could be extended for a period of two years subject to the mutual agreement. Apart from clearly

providing that the maximum contract of five years, it was also provided that the contract can be terminated by either side by giving three months notice or salary-in-lieu thereof without assigning any reasons. In the general conditions, it was disclosed that the selection is temporary in nature and for specified period. In the initial order of appointment of the petitioners also it was clearly stated that the appointment is on contract basis for a period of three years which may be extended for a period of two years. In the initial contract agreement also the same conditions were reiterated. After expiry of initial three years period of contract, the contract was renewed for a further period of two years vide order dated 2.2.2013 (in W.P.No.1340/2015 and similar orders were also passed in other connected matters also) specifically mentioning that "the contract agreement shall be terminated automatically after completion of extended contract period of two years". In pursuance to the said extension order, fresh contract agreement for a period of two years was executed between the parties. Thus, the petitioners had accepted the contract appointment with the open eyes that the appointment was for a period of five years and, therefore, now it is not open to the petitioners to claim regularization on the expiry of the said contract period. It is the settled position in law that a contract appointment is governed by the terms of the contract.

8. The petitioners have contended before this court that their appointment was regular appointment by following the due process of regular appointment but such a contention cannot be accepted in view of the fact that the advertisement, in pursuance to which the petitioners were appointed, itself mentions that the appointment is a fixed tenure contract appointment. The respondents in their reply have disclosed that the recruitment was not in pursuance to any statutory rule but looking to the urgency which was cropped up, the Board of Directors had approved the recruitment on contract and left the procedure to the discretion of the Chairman and Managing Director of the Company and the Chairman and Managing Director with consultation with other officers had adopted ad-hoc procedure for appointing the petitioners. In these circumstances, the petitioners who are the contract appointees cannot be put at par with the regular appointees.

9. That apart, the reply filed by the respondents also reveal that the petitioners in the meanwhile were given several opportunities to participate in the regular selection process which had taken place in the year 2011-12, 2012-13, 2010-11 but the performance of the petitioners in the said selection

process was very poor and they were much below in the merit list. Some of the contract employees had performed well and they have been granted the regular appointment and they are not before this Court.

10. In these circumstances, if a direction is issued to regularize the petitioners' services then, the rule of merit will be violated and the right of a more eligible candidate who may ultimately be selected in the regular selection process on that basis will be defeated.

11. The Supreme Court in the matter of *Secretary, State of Karnataka Vs. Uma Devi,* reported in (2006) 4 SCC 1 as one time measure has directed regularization of those employees who are irregularly appointed and who had worked for more than ten years or more in duly sanctioned posts and has further directed to ensure the regular recruitment to fill up the vacant sanctioned posts that are required to be filled up in cases where temporary employees or daily wages employees are being now employed. The Supreme Court has in clear terms mandated that there should be no further bypassing of the constitutional requirement and regularising or making the permanent, those not duly appointed as per the constitutional scheme.

12. In the matter of *State of Rajashtan Vs. Daya Lal,* reported in (2011) 2 SCC 429 it has again been reiterated that the High Court in exercise of powers under Article 226 of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming the regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. In the present case, though the petitioners have been appointed in pursuance to the advertisement but since the advertisement was for contract appointment, therefore, the respondents are right in contending that in the said selection process many meritorious candidates have not participated keeping in view the limited scope of contractual appointment. Therefore, the selection process cannot be said to be in accordance with the recruitment rules, the general object of which is to appoint most suitable and meritorious candidate.

13. Counsel for the petitioner has placed the reliance upon the judgment or the Delhi High Court dated 3.5.2013 passed in W.P(c).No.1045/2013 in the matter of *Amrish Chanana & Others Vs. Government of NCT of Delhi and Anr.* but in the said judgment in Para 22 the Court had found that the

appointment of the petitioners was not contractual but a regular employment.

14. So far as the judgment of the Rajasthan High Court in the matter of *Damodar Prasad Meena and 73 Ors. Vs. State of Rajasthan and Others* dated 13.3.2014 in SB Civil Writ Petition No.1702/2010 is concerned, the said judgment is distinguishable on its own facts since in that case there was a government policy which was not found to be a comprehensive policy.

15. So far as the judgment in the matter of *Vijay Goel Vs. Union of India & Anr.* reported in AIR 1998 SC 101 is concerned, in that case, employees were working for last 18-20 years and even otherwise that was a case prior to the Supreme Court judgment in the matter of *Uma Devi* (Supra).

16. The Single Bench judgment in the matter of *Dr. Pankaj Mishra Vs. The State of Madhya Pradesh* dated 20.4.2015 passed in W.P.No.13343/2013 is also of no help to the petitioners' case because that was a case where the order of regularization was sought to be annulled without giving an opportunity of hearing.

17. Counsel for the petitioner has also placed reliance upon the judgment of the Supreme Court in the matter of *State of Jharkhand and Others Vs. Kamal Prasad and Others* reported in 2015 (1) MPLJ 34 but that was also a case where the employees concerned were appointed in the year 1981 and were found to be discharging the service as permanent employees and found to be entitled for regularization in terms of the judgment in the matter of *Uma Devi* (Supra).

18. Aforesaid position in law, keeping in juxta position with the facts of this case and especially the fixed tenure contract appointment of five years, reveals that the petitioners have no right of either regularization in service or extension of period of contract after completion of the prescribed maximum period of five years.

19. The petitioners have raised an additional issue that in the regular selection process some additional qualifications have been prescribed which the petitioners do not possess, therefore, those qualifications should be deleted so that the petitioners can participate in the regular selection process. The prescription of the qualification or the additional qualification lies within the domain of the administrative and policy decisions and normally not open to interference unless found to be in violation of constitutional and statutory

provision or found to be having no reasonable nexus with the function and duties attached to the post. [see *Basic Education Board UP Vs. Upendra Rai,* reported in (2008)3 SCC 432) and *Chandigarh Administration Vs. Usha Khetrapal,* reported in (2011) 9 SCC 645] but in the present case none of these offending factors have been pointed out.

20. Besides above, counsel for the respondents has also pointed out that similar writ petitions being W.P.No.10901/2015 in the matter of *Deepak Chaudhary and others Vs. State of MP* and W.P.N0.10327/2015 in the matter of *Mukesh Bidwal and others Vs. State of MP and others* by identically placed petitioners have been dismissed by the Principal Seat by order dated 21.7.2015.

21. In view of the aforesaid analysis, I am of the opinion that the writ petitions filed by the petitioners are devoid of any merit which are accordingly dismissed. However, it is made clear that the contract appointees whose period of contract of five years is not yet over will be allowed to continue in accordance with the terms of the contract till the completion of the said period.

22. Original order be kept in the file of WP No.1340/2015 and a copy of the order be placed in the record of connected Writ Petitions.

Petition dismissed.

I.L.R. [2016] M.P., 2492
WRIT PETITION
Before Mr. Justice Prakash Shrivastava
W.P. No. 4336/2015 (Indore) decided on 20 October, 2015

VIJAY MADANLAL CHOUDHARY ...Petitioner
Vs.
UNION OF INDIA & anr. ...Respondents

(Alongwith W.P. No. 4341/2015, W.P. No. 4344/2015, W.P. No. 4347/2015, W.P. No. 4350/2015, W.P. No. 5089/2015, W.P. No. 5091/2015 & W.P. No. 5625/2015)

*A. **Prevention of Money Laundering Act, 2002 (15 of 2003), Section 4** -* **Offences Cognizable and Non Bailable - Offence of money laundering is punishable with rigorous imprisonment for a term not less than 3 years extending to 7 years and with fine - Section 4 read with**

Second Schedule of Cr.P.C. makes clear that offences under the Act are cognizable and non-bailable. (Para 13)

क. धनशोधन निवारण अधिनियम, 2002 (2003 का 15), धारा 4 – संज्ञेय तथा अजमानतीय अपराध – धनशोधन का अपराध अर्थदण्ड के साथ ऐसी अवधि के कठोर कारावास से दण्डनीय है जो तीन वर्षों से कम नहीं होगी तथा सात वर्षों तक की हो सकेगी – दं.प्र.सं. की धारा 4 सहपठित द्वितीय अनुसूची यह स्पष्ट करती है कि अधिनियम के अंतर्गत अपराध संज्ञेय एवं अजमानतीय हैं।

***B. Prevention of Money Laundering Act, 2002 (15 of 2003), Section 19 and Prevention of Money Laundering Rules, 2005, Rule 3* - Provision u/S 19 empowers specified officers to arrest a person by following prescribed procedure - Rules requires the arresting officer to forward a copy of order of arrest and the material to the adjudicating officer in a sealed cover. (Paras 27 & 28)**

ख. धनशोधन निवारण अधिनियम, 2002 (2003 का 15), धारा 19 एवं धनशोधन निवारण नियम, 2005, नियम 3 – धारा 19 के अंतर्गत उपबंध विनिर्दिष्ट अधिकारियों को विहित प्रक्रिया का पालन करते हुए किसी व्यक्ति को गिरफ्तार करने की शक्ति प्रदान करता है – यह नियमों द्वारा अपेक्षित है कि गिरफ्तार करने वाला अधिकारी गिरफ्तारी आदेश की एक प्रति तथा संबंधित सामग्री एक सीलबंद लिफाफे में न्याय निर्णायक अधिकारी की ओर अग्रेषित करेगा।

***C. Prevention of Money Laundering Act, 2002 (15 of 2003), Section 43* - Central Government vide notification dated 01.06.2006 designated "Sessions Court" not "Sessions Judge" as Special Court for trial of offences under Section 4 - Additional Sessions Judge is covered within the meaning of Sessions Court in terms of Section 9 of Cr.P.C. - Additional Sessions Court is competent for trial of the case. (Para 24)**

ग. धनशोधन निवारण अधिनियम, 2002 (2003 का 15), धारा 43 – केन्द्रीय सरकार ने अधिसूचना दिनांक 01.06.2006 द्वारा धारा 4 के अंतर्गत अपराधों के विचारण हेतु "सत्र न्यायालय" को अभिहित किया है न कि "सत्र न्यायाधीश" को – दं.प्र.सं. की धारा 9 के निबंधनों के अनुसार अतिरिक्त सत्र न्यायाधीश, सत्र न्यायालय के अर्थान्तर्गत आच्छादित है – अतिरिक्त सत्र न्यायालय मामले के विचारण हेतु सक्षम है।

***D. Prevention of Money Laundering Act, 2002 (15 of 2003), Section 65 - Applicability - Section 71- Overriding effect* - Under the Act, investigating officer is not Police Officer - No procedure prescribed**

for investigation of offence under the Act - Held - Procedure prescribed under Cr.P.C. required to be followed for investigation under the Act. (Paras 17 & 18)

घ. धनशोधन निवारण अधिनियम, 2002 (2003 का 15), धारा 65 – प्रयोज्यता – धारा 71 – अध्यारोही प्रभाव – अधिनियम के अंतर्गत अन्वेषक अधिकारी पुलिस अधिकारी नहीं है – अधिनियम के अंतर्गत अपराध के अन्वेषण हेतु कोई प्रक्रिया विहित नहीं – अभिनिर्धारित – अधिनियम के अंतर्गत अन्वेषण किये जाने हेतु दं.प्र.सं. के अंतर्गत विहित प्रक्रिया का पालन किया जाना अपेक्षित है।

Cases referred:

(2011) 14 SCC 1, Special Criminal Application (Habeas Corpus) No. 4247/2015 judgment passed on 03.08.2015 (Gujarat High Court), (1992) Supp(1) SCC 335.

Vikram Choudhary with *Dinesh Tiwari, M. Ramesh, Sudhanshu Vyas, S. Vyas,* for the petitioners.

Vikas Garg with *V. Phadke,* for the respondents.

ORDER

Prakash Srivastava, J. :- This order will govern the disposal of W.P. Nos.4336/15, 4341/15, 4344/15, 4347/15, 4350/15, 5089/15, 5091/15 & 5625/15 since it is submitted by counsel for both the parties that the issue involved in all these writ petitions is identical.

2. The writ petition Nos.4336/15, 4341/15, 4344/15, 4347/15, 4350/15, 5089/15 & 5091/15 have been filed by the petitioner for quashing the proceeding and investigation initiated under Prevention of Money Laundering Act (in short PMLA) whereas in W.P. No.5625/2015 additionally writ of Habeas Corpus has been prayed.

3. In brief the case of petitioner in W.P. Nos.4336/15, 4341/15, 4344/15, 4347/15, 4350/15, 5089/15 & 5091/15 is that petitioner No. 1 is promoter and Group Chief Executive of Zoom Group of Companies, petitioner No.2. Petitioner No.2 had availed non-fund based bank guarantee facilities from Punjab National Bank and other banks and when number of lending banks increased, a consortium was formed under the leadership of Punjab National Bank as PNB consortium and credit limits were sanctioned to respondent No. 2. Due to the global economic meltdown of 2008, the bank

guarantees were invoked by the bankers which brought the business activities of petitioner at a halt in November 2009. When the CDR process was going on at that stage complaints were filed by PNB and other banks, as a result of which five cases were registered under Section 120-B read with Section 420 of IPC against the petitioners being (1) RC BD1/2011/E/0005 at the instance of PNB; (2) RC BD1/2011/E/0009 by Syndicate Bank Mumbai; (3) RC BD1/2011/E/0010 at the instance of Canara Bank Mumbai; (4) RC BD1/2012/E/0007 at the instance of United Bank of India Mumbai & (5) RC BD1/2013/E/0001 by Union Bank of India Mumbai. In these cases, the investigation has been done by CBI and the charge sheets have been filed before the competent court and petitioner No.1 was enlarged on bail. The respondents thereafter based upon the above five FIRs registered by CBI have suo motu registered five cases i.e. (I) ECIR/INSZO/7/2013; (ii)ECIR/INSZO/8/2013; (iii) ECIR/INSZO/9/2013; (iv) ECIR/INSZO/10/2013; & (v) ECIR/INSZO/11/2013 under Sections 3 & 4 of the Prevention of Money Laundering Act, 2002 at Indore Sub Zonal Office.

4. The petitioners have approached this Court with a prayer to quash the case registered and proceedings initiated against them under the PMLA and alternatively to restrain the respondents from subjecting the petitioner to coercive and custodial interrogation.

5. The respondents No. 1 & 2 had filed preliminary reply to the writ petition raising the objection that petitioner No. 1 is not cooperating and inspite of issuance of summons on five occasions he had not appeared and a further plea has been raised that non-bailable warrants have been issued by the Court of competent jurisdiction against the petitioner No. 1 under PMLA and the petitioner No. 1 is not traceable and that the Special Court CBI has also issued the non bailable warrant which is pending for execution. It is stated in the reply that the CBI had registered the FIR against the petitioner and in the investigation by the CBI it was revealed that petitioners had misrepresented their financial health before the PNB consortium of banks by resorting to illegal activities and that the offence under Sections 120-B and 420 of IPC are scheduled offences under PMLA in respect of which CBI has already filed charge sheet against the petitioner. The material which has been gathered during investigation has been disclosed in the reply. It has further been stated that even after 1/6/2009 the funds were siphoned off and scheduled offences were committed, the details thereof have also been disclosed in the reply and

a plea has been raised that the investigation is being rightly done under PMLA.

6. The petitioners have filed rejoinder as well as additional rejoinder and the respondents have filed the second preliminary reply on 20th August 2015 and an application for raising additional grounds has also been filed by petitioner.

7. The same issue is involved in W.P. No.5625/2015 which has been filed by one Sharad Tikamdas Kabra seeking the writ of habeas corpus challenging the arrest order dated 20.5.2015 and raising the additional ground that the Special Court of Additional Sessions Judge is not the designated court under Section 43 and 44 of the PMLA and that the proceedings before the said Special Court are not competent.

8. Learned counsel for petitioner submits that in the Bill as well as the Act which was originally enacted on 17/1/2003 under Section 45 the offences were cognizable offences but subsequently on 21/5/05 Section 45 was amended and the offences were made non cognizable. He further submits that in respect of non cognizable offences under Section 2(l) Cr.P.C. the police officer has no authority to arrest a person without warrant and under Section 155 of Cr.P.C.the procedure has been prescribed for information as to non cognizable cases and investigation of such cases and without following the said procedure the respondents cannot be allowed to proceed with the investigation. He further submits that even assuming the offence in question is a cognizable offence then also in terms of Section 154 of Cr.P.C. the FIR is required to be registered and under Section 157 the report is required to be sent to the Magistrate and under Section 167 of Cr.P.C. case diary is required to be maintained and submitted before the Magistrate for taking remand and under Section 172 Cr.P.C. the case diary is required to be maintained and under Section 173 the report is to be submitted after completion of investigation. He has raised a submission that all these procedure has not been followed therefore, the investigation is not sustainable.

9. Learned counsel for respondents has opposed the writ petition and has submitted that on account of their conduct, the petitioners are not entitled for any relief since they are not cooperating in the investigation and they have given incorrect address of the company and they are not appearing despite of service of summons. He further submits that petitioners are required to appear under Section 8 of PMLA Act before the adjudicating authority and raise all preliminary objections. He further submits that non-bailable warrant has been

issued in June, 2015 by the Special Court but the petitioner No. 1 is not appearing before the Special court nor he has applied for cancellation of non-bailable warrant. He has also submitted that in terms of Section 19 of PMLA reasons have been submitted before the Special court in sealed cover and under Section 45(1A) the officers of respondents are not the police officers. He has also submitted that in terms of Section 65 of PMLA, the provisions of Cr.P.C. is not attracted to the extent the provisions are contained in PMLA. He has also submitted that Section 71 of PMLA has overriding effect. He has further submitted that at this stage only summons have been issued under Section 40 therefore, the petitioner cannot raise an issue in respect of arrest and that investigation is being done in accordance with law.

10. Pressing W.P. No.5625/2015, learned counsel appearing for the petitioner submits that the offence is triable by the Special Court established in terms of Section 43 and 44 of PMLA but in the present case though the Sessions Judge has been notified as Special Court, but in the work distribution memo the case has been assigned to the Additional Sessions Judge which is not the designated Court and the bail application of the petitioner has been rejected by order dated 1.7.2015 by the Court of Additional Sessions Judge, which was not the competent court.

11. As against this learned counsel for the respondent opposing the writ petition has submitted that the Sessions Court is the designated court, hence the Additional Sessions Judge is competent to consider the matter.

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

13. The first issue is if the offence under PMLA is cognizable offence or it is non-cognizable offence? In terms of Section 2(l) of the Cr.P.C., non-cognizable offence is one in which a police officer has no authority to arrest without warrant, whereas in terms of Section 2(c) of the Cr.P.C. cognizable offence is one in which a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant. In terms of Section 4 of PMLA offence of money laundering is punishable with rigorous imprisonment for a term not less than 3 years extending to 7 years and with fine. The Second Schedule to the Cr.P.C. relates to classification of offences under other laws and in terms of the Second Schedule of the Cr.P.C. an offence which is punishable with imprisonment for 3 years and upward but not more than 7 years, is a cognizable and non-

bailable offence. Thus, Section 4 of the PMLA read with Second Schedule of the Cr.P.C., makes it clear that the offences under PMLA are cognizable offences. Section 45 of the PMLA also provides that offences under the PMLA are cognizable and non-bailable. So far as the second proviso to sub-section 1 of Section 45 of PMLA is concerned, that relates to the taking cognizance of offence by the Special Court and from that it alone cannot be inferred that the offence is not cognizable.

14. Learned counsel for the petitioner has placed reliance upon the judgment of the Supreme Court in the matter of *Om Prakash and Another Vs. Union of India and Another,* reported in (2011) 14 SCC 1 in support of his submission that the offences under PMLA are non-cognizable offences but in the case of *Omprakash* (supra) the Supreme Court considering the provisions contained in Section 9-A(1) of Central Excise Act, 1944 which in clear terms provides that the offences under Section 9 are deemed to be non-cognizable within the meaning of the Cr.P.C. as also considering Section 20 of the Act and the object of the Excise Act relating to recovery of excise duty and not to punish for infringement of provisions of the Act, has held that the offences under the Excise Act are not cognizable offences but in the PMLA no such deeming fiction as contained in Section 9-A of the Central Excise Act, 1944 is available and the object of PMLA is also different, therefore, the reasoning given in the judgment of the Supreme Court in the matter of *Omprakash* (supra) cannot be applied in the present case and the benefit of the said judgment cannot be granted to the petitioner.

15. Counsel for the petitioner has also relied upon the judgment of the Gujarat High Court in the matter of *Rakesh Manekchand Kothari Vs. Union of India* dated 3.8.2015, passed in Special Criminal Application (Habeas Corpus) No.4247/2015 but in that judgment the Gujarat High Court has considered and stated about the procedure to be followed in both the eventualities, i.e. if the offence under PMLA is treated to be cognizable and if it is not treated to be cognizable. At one place the Gujarat High Court has, in one sentence, said that offence under provisions of PMLA is non-cognizable, but in my humble opinion the said finding is not supported by reasons. Even otherwise the said judgment only has persuasive value and considering the provisions of Section 4 of PMLA read with Part-II of First Schedule to Cr.P.C., I am of the opinion that the offence under PMLA is cognizable.

16. Having held so the next question arises whether the procedure

prescribed in Cr.P.C. for investigation of cognizable offence i.e. Section 154 of the Cr.P.C. relating to registering the FIR, Section 157 & 167 relating to investigation, Section 172 of the Cr.P.C. relating to maintaining the case diary is required to be followed while investigating the offence under the PMLA?

17. Section 71 of PMLA gives overriding effect to the Act and provides as under :-

> **"71. Act to have overriding effect.-**The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

18. Section 65 of the PMLA relates to applicability of the Cr.P.C. and provides as under :-

> **"65. Code of Criminal Procedure, 1973 to apply.-** The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, insofar as they are not inconsistent with the provisions of this Act, to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under this Act."

19. Since PMLA is a special act and the provisions of this Act have been given overriding effect, therefore, they will prevail in case if there is any inconsistency with the general Act. In terms of Section 65 of PMLA, the provisions of PMLA relating to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under PMLA have the overriding effect and the provisions of the Cr.P.C. not inconsistent with the provisions of PMLA in this regard, only are made applicable.

20. So far as the search and seizure is concerned, Section 16 and 17 starting with the non-obstante clause provide a detailed power of survey and procedure of search & seizure. Section 19 of PMLA provides for power to arrest. In respect of attachment, Section 5 of PMLA provides for attachment of property involved in money laundering and for confiscation Section 8(5) of PMLA gives the power. Section 45 of PMLA provides for the prosecution by Special Court on complaint in writing made by the specified officer. In terms of Section 46 of the PMLA, the provisions of Cr.P.C. are applicable in the proceedings before the Special Court.

21. So far as the issue of investigation is concerned, the PMLA does not

contain any provision parallel to Section 154 of the Cr.P.C. for registration of FIR, Section 157 of the Cr.P.C. relating to sending the report to the Magistrate, Section 167 Cr.P.C. relating to the procedure when investigation cannot be completed within 24 hours and Section 172 of the Cr.P.C. relating to maintaining the case diary. If the offence is registered against a person under the PMLA then the investigation is to be carried out by following some reasonable procedure. Such a course is also necessary keeping in view the issue of personal liberty and fair and proper investigation. The judgment of the Supreme Court in the matter of *State of Haryana and others Vs. Bhajan Lal and others,* reported in (1992) Supp(1) SCC 335 also supports the petitioner's contention that unfettered power cannot be given in respect of investigation. Though in the said judgment it has been observed that the investigation of the offence is the field exclusively reserved for the police officers, but the said observation has been made in respect of offence registered under the IPC whereas in the present case the offence is registered under PMLA. Under the provisions of PMLA, the investigating officers are not the police officers but since for investigation of offence Provisions of Cr.P.C. are held to be applicable, therefore, they are required to follow the same. Keeping in view the provisions of Section 65 of PMLA and also the fact that there is no procedure prescribed in PMLA for investigation of the offence, I am of the opinion that the procedure which has been prescribed under the Cr.P.C. is required to be followed while investigating the offence under PMLA.

22. So far as the present case is concerned, in the case of *Vijay Madanlal Choudhary* in W.P. Nos.4336/15, 4341/15, 4344/15, 4347/15, 4350/15, 5089/15 & 5091/15, the matter is at the investigation stage, therefore, the investigating authorities are directed to carry out the investigation in accordance with the provisions contained in the Cr.P.C.

23. So far as the W.P. No.5625/2015 of *Sharad Tikamdas Kabra* is concerned, the Challan has already been filed before the Special Court, therefore, it would be open to the petitioner to raise an objection in respect of defect in investigation under Section 173(8) of the Cr.P.C. before the Special Judge and if the Special Judge reaches to the conclusion that the investigation has not been done in accordance with the procedure prescribed in the Cr.P.C., then it would be open to him to pass the appropriate orders in this regard.

24. The next issue which has been raised is, whether the Court of Additional Sessions Judge is the Special Court within the meaning of Section 43 of PMLA?

Section 43 of PMLA empowers Central Government to designate one or more courts of Sessions as Special Court or special courts for notified areas and places for trial of the offences punishable under Section 4. The Central Government vide notification dated 1.6.2006 issued under Section 43(1) of the PMLA has designated the Courts of Sessions at Gwalior, Indore, Bhopal, Sagar and Jabalpur as Special Courts for trial of offences punishalbe under Section 4 of the Act. Exercising the power under Section 43 of PMLA, Central Government vide Notification dated 1.6.2006 has designated the Sessions Court at Gwalior, Indore, Bhopal, Sagar and Jabalpur as Special Court, therefore, the Additional Sessions Judge who in terms of Section 9 of Cr.P.C. is covered within the meaning of Court of Sessions, is empowered to try the offences under Section 4 of PMLA being the designated Court. The Central Government has not confined the designation of the Special Court to "Sessions Judge" only but it has notified Sessions Court as designated court, therefore, the contention of the petitioner that the Additional Sessions Judge is not the designated court, cannot be accepted.

25. In W.P. No.5625/2015 filed by *Sharad Tikamdas Kabra*, a prayer for issuance of writ of Habeas Corpus has been made alleging that the said petitioner has been kept in illegal custody.

26. Section 19 of PMLA deals with the power of arrest under PMLA by the specified officer and provides as under :-

> **"19. Power to arrest.**-(1) If the Director, Dy. Director, Assistant Director, or any other officer authorized in this behalf by the Central Government by general or special order, has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.
>
> (2) The Director, Deputy Director, Assistant Director or any other officer shall, immediately after arrest of such person under sub-section(1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the matter, as may be prescribed and such Adjudicating

Authority shall keep such order and material for such period, as may be prescribed.

(3) Every person arrested under sub-section (1) shall within twenty-four hours, be taken to a Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction:

Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Magistrate's Court."

27. Under sub-section 1 of Section 19 the specified officers on the basis of the material in possession, having reason to believe which is to be recorded in writing that the person has been guilty of offence under the Act, has power to arrest such person and he is required to inform the grounds for such arrest at the earliest and in terms of sub-section 3 of Section 19, the arrested person is required to be produced to the jurisdictional judicial magistrate or metropolitan magistrate within 24 hours excluding the journey time from the place of arrest to the Magistrate's Court. Exercising the rule making power under Section 73, Central Government has framed the rules namely "THE PREVENTION OF MONEY-LAUNDERING (THE FORMS AND THE MANNER OF FORWARDING A COPY OF ORDER OF ARREST OF A PERSON ALONG WITH THE MATERIAL TO THE ADJUDICATING AUTHORITY AND ITS PERIOD OF RETENTION) RULES, 2005 which required the arresting officer to forward a copy of order of arrest and the material to the adjudicating officer in sealed cover.

28. By virtue of the aforesaid provisions, the specified officers under PMLA are empowered to arrest a person by following the prescribed procedure under Section 19 of PMLA read with the rules mentioned above.

29. So far as issue of grant of bail is concerned, Section 45(i) of PMLA which again starts with the non-obstante clause, relates to the power to grant bail and reads as under :-

"45. Offences to be cognizable and non-bailable.-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years

under Part A of the Schedule shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail;

Provided that a person who is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the special court so directs:

Provided further that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by-

(i) the Director; or (ii) any officer of the Central Government or State Government authorised in writing in this behalf by the Central Government by a general or a special order made in this behalf by that Government."

30. In the present case nothing has been pointed out to show that the respondents have acted in contravention of the aforesaid provision relating to arrest as contained in Section 19 or the bail has been rejected in violation of Section 45 of the Act. Hence, it cannot be held that the petitioner is in illegal custody. The Special Court, which has been found to be the competent Court, has already rejected the application for bail, hence no ground is made out for issuing the writ of Habeas Corpus.

31. For the reasons mentioned above, I am of the opinion that no case is made out for quashing the offence which has been registered against the petitioner under PMLA and so far as the issue of investigation is concerned, the parties are required to take appropriate steps in terms of Paragraph 22 & 23 of the judgment.

32. So far as the W.P. No.5625/2015 of Sharad Tikamdas Kabra is concerned in which the prayer for habeas corpus has been made but since the arrest of the petitioner is in accordance with the provisions of PMLA and the

Special Court (which has found to be competent) has already rejected the application for bail, therefore, it cannot be held that the writ petitioner in W.P. No.5625/2015 is in illegal custody, especially when this Court has held that Special Court includes the Court of Additional Sessions Judge. Hence, the writ of habeas corpus cannot be issued in the matter.

33. The writ petitions are accordingly disposed off.

34. Signed order be kept in the file of W.P. No.4336/2015 and a copy whereof be placed in the file of connected W.P. Nos. 4341/15, 4344/15, 4347/15, 4350/15, 5089/15, 5091/15 & 5625/15.

Petition disposed of.

I.L.R. [2016] M.P., 2504
WRIT PETITION
Before Mr. Justice R.S. Jha
W.P. No. 20804/2015 (Jabalpur) decided on 8 December, 2015

ANKIT VERMA ...Petitioner
Vs.
M.P. MADHYA KSHETRA VIDYUT VITRAN COMPANY ...Respondent

Service Law - Compassionate appointment **- Petitioner's father did not suffer an accidental death while in service and had died on account of heart attack - Petitioner's case does not fall within the scheme of compassionate appointment, 2013 as amended vide notification dated 24.12.2014 - Petition dismissed. (Para 4)**

सेवा विधि – अनुकम्पा नियुक्ति – याची के पिता की सेवा में रहते हुए, दुर्घटना से मृत्यु नहीं हुई अपितु हृदयाघात से उनकी मृत्यु हुई – याची का प्रकरण अधिसूचना दिनांक 24.12.2014 द्वारा संशोधित अनुकंपा नियुक्ति नीति, 2013 के अंतर्गत नहीं आता है – याचिका खारिज।

Vijay Singh, for the petitioner.

(Supplied: Paragraph numbers)

ORDER

R.S. Jha, J. :- The petitioner has filed this petition praying for a direction to the respondent/company to consider the case of the petitioner for grant of compassionate appointment in view of the circular dated 24.12.2014

Annexure P/6 as it is stated that pursuant to the said circular those employees who had died while in service between 15.11.2000 to 10.4.2012 have also been included for grant of benefit of compassionate appointment under the Scheme of 2013.

2. The learned counsel appearing for the petitioner submits that the petitioner's father had died while in service on 6.8.2001 when he was posted as Test Supervisor Grade II in M.P. Electricity Board, Division Office, Bhopal and therefore, as his father had died between 15.11.2000 to 10.4.2012 his case is entitled to be considered under the circular dated 24.12.2014 Annexure P/6.

3. Having heard the learned counsel for the petitioner and having perused the amendment in the Scheme made vide notification dated 24.12.2014 Annexure P/6, it is observed that the cases of those employees who died while in service on account of accident while performing their duties during the period 15.11.2000 to 10.4.2012 have been included for grant of compassionate appointment under the Compassionate Appointment Scheme 2013.

4. Apparently and undisputedly, petitioner's father did not suffer an accidental death while in service and had died on account of heart attack. In the circumstances, as the petitioner's case does not fall within the scheme of Compassionate Appointment 2013 as amended vide notification dated 24.12.2014, I do not find merit in the petition, which is accordingly dismissed.

Petition dismissed.

I.L.R. [2016] M.P., 2505
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 11434/2015 (Jabalpur) decided on 24 February, 2016

HANUMAN PRASAD VERMA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Municipal Corporation (Appointment and Conditions of Service of Officers and Servants) Rules, M.P., 2000, Rule 10 & 13 - Promotion - **Denial of promotion to the post of Superintending Engineer by the State Government, although, the same was recommended by the DPC and approved by the Mayor-in-Council - Assailed on the ground that it is not required to possess the degree in Engineering for promotion to the post of**

S.E - Held - Petitioner is eligible for promotion to the post of Superintending Engineer, as he possesses 5 years of experience on the post of Executive Engineer, which has been prescribed as eligibility criteria under Rule 10 of Rules 2000 - Amendment made in Rules 2000 w.e.f. 15.07.2015 does not apply to the case of the petitioner - Impugned order and the order rejecting representation are quashed - Petition is disposed of directing the Government to pass an appropriate order. (Paras 9 & 10)

नगर निगम (नियुक्ति तथा अधिकारियों एवं कर्मचारियों की सेवा शर्तें) नियम, म.प्र., 2000, नियम 10 एवं 13 – पदोन्नति – राज्य शासन द्वारा अधीक्षण यंत्री के पद पर पदोन्नति से इंकार, यद्यपि, उसे विभागीय पदोन्नति समिति द्वारा अनुशंसित एवं महापौर परिषद द्वारा अनुमोदित किया गया था – उसे इस आधार पर चुनौती दी गई कि अधीक्षण यंत्री के पद पर पदोन्नति हेतु इंजीनियरिंग की डिग्री होना अपेक्षित नहीं है – अभिनिर्धारित – याची अधीक्षण यंत्री के पद पर पदोन्नति हेतु हकदार है, क्योंकि उसके पास कार्यपालन यंत्री के पद का पांच वर्षों का अनुभव है, जिसे कि नियम, 2000 के नियम 10 के अंतर्गत पात्रता मानदण्ड के रूप में विहित किया गया है – नियम 2000 में दिनांक 15.07.2015 से प्रभावशील किया गया संशोधन याची के मामले में लागू नहीं होता है – आक्षेपित आदेश एवं अभ्यावेदन खारिज करने वाला आदेश अभिखण्डित – शासन द्वारा उचित आदेश पारित किये जाने के निदेश के साथ याचिका निराकृत।

Cases referred:

2012 (2) MPLJ 386, 2013(3) MPLJ 67, AIR 1986 SC 135, AIR 1994 SC 2544, AIR 2008 SC 1414

Praveen Dubey, for the petitioner.
Girish Kekre, G.A. for the respondents No. 1 & 2.
R.K. Tripathi, for the respondent No. 3.

ORDER

ALOK ARADHE, J. :- In this writ petition, a pure question of law with regards to interpretation of Rule 13 of Madhya Pradesh Municipal Corporation (Appointment and Conditions of Service of Officers and Servants) Rules, 2000 (hereinafter referred to as '2000 Rules') arises for consideration on admitted facts, which are stated infra.

2. The petitioner was promoted to the post of Executive Engineer vide order dated 22.10.1999 and was working as such in Municipal Corporation, Satna. The petitioner was given the additional charge of the post of Superintending Engineer on 27.2.2015. The service conditions of the petitioner

are admittedly governed by the provisions of 2000 Rules. On 23.1.2015, a meeting of the Departmental Promotion Committee was held and the case of the petitioner was recommended for promotion to the post of Superintending Engineer. The recommendations of the Departmental Promotion Committee were approved by the Mayor-in-Council by a resolution passed on 2.2.2015 and the same was forwarded for confirmation to the State Government on 7.2.2015 under Section 58(1)(iii) of the M.P. Municipal Corporation Act, 1956. The State Government by an order dated 16.6.2015 rejected the resolution passed by the Mayor-in-Council on the ground that the same has been passed without taking into consideration the educational qualification prescribed for promotion to the post of Superintending Engineer. In the aforesaid factual background, the petitioner has approached this Court.

3. Learned counsel for the petitioner submitted that the petitioner is not required to possess the degree in Engineering, as the same is not provided in Schedule III of the 2000 Rules and the qualification which is referred to by the respondents is relevant in case of filling up post of Superintending Engineer by direct recruitment. In Municipal Corporation, there is no quota prescribed for direct recruitment and all the posts have to be filled up either by promotion or by deputation only. In support of aforesaid submissions, learned counsel for the petitioner has placed reliance on decisions in the case of *Ram Kumar Baishander Vs. State of M.P and others,* 2012(2) MPLJ 386 and *S.K. Gupta and another Vs. State of M.P and others,* 2013 (3) MPLJ 67.

4. On the other hand, learned Government Advocate while inviting the attention of this Court to Rule 13 of the 2000 Rules, has submitted that since the educational qualification for promotion to the post of Superintending Engineer has not been prescribed, therefore, it is competent to the State Government to prescribe the same. In this connection, reference has been made by learned Government Advocate to the Rules namely Madhya Pradesh Public Works Engineering (Gazetted) Service Recruitment Rules, 1969 (hereinafter referred to the '1969 Rules'). While referring to the aforesaid Rules, it was pointed out that for promotion to the post of Superintending Engineer, only graduate in Engineering will be eligible. It is urged that since the petitioner does not hold the graduate degree in Engineering, therefore, he is not entitled for promotion to the post of Superintending Engineer. It is further submitted that the representation submitted by the petitioner for his promotion during the pendency of the writ petition, has been rejected by a well reasoned order dated 20.11.2015, which has not been challenged by the petitioner.

in the instant writ petition.

5. I have considered the respective submissions made by learned counsel for the parties. Admittedly, the 1969 Rules are the Rules which govern the service conditions of employees of Public Works Department of the State Government. It is not in dispute that the aforesaid Rules were also applicable to the employees of local bodies namely Municipal Corporation by virtue of executive instructions prior to 2000. In the year 2000, in exercise of powers under Section 433 read with Section 58(1) of M.P. Municipal Corporation Act, 1956, the State Government has framed Rules relating to set up, strength, recruitment, appointment, scale of pay, allowance and other conditions of service of the officers and servants of Municipal Corporation of Madhya Pradesh, which are known as 2000 Rules. The relevant extract of Rule 10 of the aforesaid Rules, which is relevant for the purpose of controversy involved in this petition reads as under:

> **"10. Promotion.-** (1) Subject to the provisions of Rule 4, the Committee specified in Schedule 1V shall select candidates for departmental promotion on the posts as shown in column(2) of Schedule III.
>
> (2) When a post is to be filled by promotion fall vacant and in the opinion of the appointing authority the filling up the vacant post is necessary in the interest of the Corporation, then the Commissioner, shall prepare the seniority list of officers/ employees shown in column (3) of Schedule III, in their character rolls, the details of award/punishment given to such Officers/ Employees and submit before the Committee specified in Schedule 1V".

Admittedly, 2000 Rules have been amended w.e.f. 15.7.2015 by which educational qualification for promotion to the post of Superintending Engineer has been prescribed as Bachelor's degree in Engineering. It is also not in dispute that aforesaid amendment does not apply to the case of the petitioner.

6. From perusal of Rule 10 of the 2000 Rules, it is evident that subject to provision of Rule 4, the committee specified in Schedule IV shall select the candidates for departmental promotion on the posts as shown in column (2) of Schedule III. Rule 13 is reproduced below for the facility of reference:

> ***13. Other conditions of Service. -*** *(1) The Corporation*

shall be competent to prescribe the method/procedure under which decision is to be taken in respect of medical treatment general Provident Fund and Pension. The other conditions of service which have not been provided in these rules or any other rules made under the Act shall be deemed to be the same which are applicable to Government servants on the same post from time to time.

7. Relevant extract of Schedule III of the Rules which is in consonance with Rule 10 of 2000 Rules, is reproduced below :-

SCHEDULE -III

[See Rule 10(1)]

ELIGIBILITY FOR PROMOTION

Sr. No.	Name of the post to which promotion is to be made	Name of the post from which promotion made	Minimum years service required on the post shown in column (3) for promotion to the post shown in column (2)
1	Superintending Engineer	Executive Engineer	5 years
2	.....	.....	.....
3	Executive engineer (Water Works Engineering Electricity)	Assistant Engineer	According to the criterion of Govt. (PWD)
4	Account Officer	Assistant Account Officer	8 years
5	.....	.....	.....
6	.....	.....	.....
7	.....	.....	.....
8	.....	.....	.....
9	Assistant Engineer	Sub-Engineer/Draftsman	According to the criterion of Govt. (PWD)

10	.....	.....	.....
11	.....	.....	.....
12	.....	.....	.....
13	.....	.....	.....
14	.....	.....	.....
15	.....	.....	.....
16	.....	.....	.....

8. It is well settled Rule of Statutory Interpretation that a prior general law may be affected by subsequent particular or special law, if the subject matter of the particular Act prior to its enforcement was being governed by general provisions of the earlier law. See: *Daurji Vs. Ljfe Corporation of India,* AIR 1986 SC 135, *Punjab State Electricity Board Vs. Bassi Cold Storage,* AIR 1994 SC 2544 and *Suresh Nanda Vs. Central Bureau of Investigation,* AIR 2008 SC 1414. In the instant case, admittedly, the prior general law i.e. 1969 Rules, were governing the service conditions of the employees of local bodies. However, subsequently, the special provision namely 2000 Rules has been enacted which affects the provisions of general law.

9. In the context of aforesaid well settled legal proposition, the provisions of 2000 Rules may be seen. The 2000 Rules are complete code in itself in so far as it pertains to set up, strength, recruitment, appointment, scale of pay, allowance and other conditions of service of the officers and servants of the local bodies are concerned. Rule 10 provides for promotion which is made by the committee specified in Schedule IV. Schedule III prescribes eligibility for promotion. The Legislature in its wisdom has prescribed 5 years of experience as eligibility criteria on the post of Executive Engineer for promotion to the post of Superintending Engineer. Wherever, the Legislature had thought it apposite to refer to the qualification which are applicable in case of a Government servant, reference has been made to the criteria which is fixed under the Rules in respect of Public Works Department. In this connection, reference may be made to Entry 3 and 9 of Schedule III. It is also pertinent to mention that w.e.f. 15.7.2015 eligibility criteria for the post of Superintending Engineer has been altered and requirement of possessing Bachelor's degree in Engineering has been made mandatory. Thus, seniority on the feeder post has been prescribed as eligibility criteria for promotion to the post of Superintending

Engineer upto 15.7.2015 i.e. till amendment of the 2000 Rules. The Legislature has prescribed the eligibility criteria for promotion in case of Superintending Engineers in the Rules in 2000 itself, which is a special law. It is not the case where the Legislature has not prescribed any eligibility criteria for promotion. Therefore, the contention made by learned Government Advocate that with recourse to Rule 13 of Rule 2000, read with 1969 Rules, the petitioner can be held to be not eligible for promotion to the post of Superintending Engineer, as he does not possess the degree of Engineering, cannot be accepted. The petitioner is eligible for promotion as he holds the requisite criteria prescribed under Rules 2000, which is a special law applicable to the case of the petitioner.

10. In view of preceding analysis, the impugned order dated 16.6.2015 and the order dated 20.11.2015 by which the representation of the petitioner was rejected, are hereby quashed. The State Government is directed to pass an appropriate order in light of the observations made in this order on the recommendation sent by the Mayor-in-Council, within a period of six weeks from the date of receipt of certified copy of the order passed today.

With the aforsaid direction, the writ petition is disposed of.

Petition dosposed of.

I.L.R. [2016] M.P., 2511
WRIT PETITION
Before Mr.Justice A.M. Khanwilkar, Chief Justice
& Mr. Justice Sanjay Yadav
W.P. No. 4501/2016 (Jabalpur) decided on 21 March, 2016

BANSAL CONSTRUCTION WORKS PVT. LTD. (M/S.) ...Petitioner
Vs.
M.P. ROAD DEVELOPMENT CORPORATION LTD. ...Respondent

Tender – Construction of Road – Petitioner – Lower Bidder – Rejection of Bid – Grounds **– Non-fulfilment of term relating to technical capacity – Term – "Bidder shall, over the past five financial years preceding the Bid Due Date, have received payments for construction, such that the sum total thereof is more than Rs. 562/- Crores" – Bid Due Date is 24.02.2016 – Value of present project is Rs. 224.82 Crores – Petitioner submitted bid with technical capacity information for the period from 01.04.2011-31.03.2012 to 01.04.2015-15.02.2016 –**

Petitioner failed to furnish financial information from 01.04.2010 till 31.03.2011 – Held – The words "over the past five years" "preceding the Bid Due Date" would not include the financial information for the period from 01.04.2015 to 15.02.2016, as the Bid due date is 24.02.2016 and non-submission of financial information from 01.04.2010 to 31.03.2011 resulted in violation of the terms in clause 2.2.2.2 of the Tender document & for this reason, the requirement of receipt of Threshold Technical Capacity of Rs. 562/- Crores over the past five years is also not met out – Petition is dismissed notwithstanding the fact that the petitioner has offered the lowest bid. (Paras 13 to 23)

निविदा – सड़क का निर्माण – याची – निम्नतर बोली लगाने वाला – बोली का निरस्त किया जाना – आधार – तकनीकी क्षमता से संबंधित निबंधन की पूर्ति न किया जाना – निबंधन – "बोली हेतु नियत तिथि से पूर्ववर्ती विगत पांच वर्षों में बोली लगाने वाला इतनी राशि जिसका कुल योग रू. 562 करोड़ से अधिक हो, निर्माण कार्य के भुगतान हेतु प्राप्त कर चुका हो – बोली की नियत तिथि 24.02.2016 है – वर्तमान परियोजना का मूल्य रू. 224.82 करोड़ है – याची ने 01.04.2011–31.03.2012 की अवधि से लेकर 01.04.2015–15.02.2016 तक की अवधि तक तकनीकी क्षमता की जानकारी के साथ बोली प्रस्तुत की – याची 01.04.2010 से 31.03.2011 तक की अवधि की वित्तीय जानकारी प्रस्तुत करने में विफल रहा – अभिनिर्धारित – शब्दों "बोली हेतु नियत तिथि के पूर्ववर्ती" "विगत पांच वर्ष" के अंतर्गत 01.04.2015 से 15.02.2016 तक की अवधि की वित्तीय जानकारी सम्मिलित नहीं होगी, क्योंकि बोली हेतु नियत तिथि 24.02.2016 है तथा 01.04.2010 से 31.03.2011 की अवधि की वित्तीय जानकारी प्रस्तुत न किये जाने के परिणामतः निविदा दस्तावेज के पद क्र. 2.2.2.2 में उल्लिखित निबंधनों का उल्लंघन हुआ है एवं इस कारण से, विगत पांच वर्षों के दौरान रू. 562 करोड़ की प्रारंभिक तकनीकी क्षमता प्राप्त किये जाने की अपेक्षा की पूर्ति भी नहीं हुई है – इस तथ्य के होते हुए भी कि याची ने न्यूनतम बोली लगाई है, याचिका खारिज की जाती है।

Cases referred:

(2006) 11 SCC 548, (1977) 2 SCC 847, (2014) 11 SCC 288, (2000) 2 SCC 617.

Naman Nagrath with *Ayush Dev Bajpai & Qasim Ali*, for the petitioner.

P.K. Kaurav with *Aditya Khandekar*, for the respondent No. 1.

A. Rajeshwar Rao, for the respondent No. 3.

ORDER

The Order of the Court was delivered by :

A.M. KHANWILKAR, C.J. :- Heard counsel for the parties.

2. By this writ petition under Article 226 of the Constitution of India, the petitioner has challenged the rejection of the bid given by the petitioner being nonresponsive due to shortage of technical capacity, as communicated to the petitioner vide letter dated 28.02.2016 (Annexure-P/3). The petitioner has prayed for a direction against the respondent No.1 to permit the petitioner to participate in the ongoing bidding process. However, during the pendency of this writ petition, letter of intent was issued in favour of the respondent No.3/Company and an Agreement has also been executed in favour of the said respondent. As a consequence, the petitioner has amended the prayer clause and has asked for a further relief that the Agreement executed in favour of the respondent No.3/Company be declared illegal and instead the contract in question be awarded to the petitioner being the lowest bidder.

3. The backdrop in which present petition has been filed, can be briefly stated as follows. A Concession Agreement was executed in favour of M/s. Transstroy Bhopal-Berasia-Sironj Tollways Private Limited for construction of road on section of SH-23 from Chainage Km. 4.100 to Km.110.420 (Design length 106.320 km) to two lane with paved/hard/hard shoulder road in the State of Madhya Pradesh, on BOT basis. That agreement was terminated by the respondent No.1, on 25.08.2015. However, due to assurances given by the Concessionaire that balance work would be completed within December, 2016, termination order was revoked on 04.12.2015. The said Concessionaire having failed to meet the requisite time lines, once again Concession Agreement in its favour was terminated on 21.01.2016; and a fresh tender process for construction of that road on EPC basis after taking administrative approval, was commenced on 21.01.2016 itself. The said Concessionaire challenged the termination of Concession Agreement vide order dated 21.01.2016, by way of W.P.No.4884/2016, which, however, was confined to prayer clause 7(iii) of the said petition – limited to issuing direction to the Appropriate Authority to consider his representation in terms of Article 44 of the Agreement. The said writ petition No.4884/2016 was disposed of on 17.03.2016. As a result, it became necessary to examine the claim of the present petitioner as to whether rejection of petitioner's bid is for just and proper reason.

4. As aforesaid, the petitioner's bid has been rejected as it was found to be nonresponsive bid due to shortage of technical capacity. The challenge in this petition, therefore, revolves around the correctness of that view taken by the Appropriate Authority of respondent No.1 in the context of the terms and conditions specified in the tender notice. An incidental issue also arises as to whether the respondent No.1 has hastened the tender process to award Contract to the respondent No.3, for reasons best known to the respondent No.1. It is alleged that from the circumstances available on record, it is an obvious case of *mala fide* exercise of power, in law.

5. For analyzing these aspects, we may straightway advert to the relevant Clauses of the tender document. Clause 1.1.7 reads thus;

> "1.1.7 The Authority shall receive BIDs pursuant to this RFP in accordance with the terms set forth in this RFP and other documents to be provided by the Authority pursuant to this RFP (collectively the **"Bidding Documents"**) and all BIDs shall be prepared and submitted in accordance with such terms on or before the BID due date specified in Clause 1.3 for submission of BIDs (the **"BID Due Date"**)"

6. Clause 2.1.5 reads thus;

> "2.1.5 The BID shall be furnished in the format exactly as per Appendix-I i.e. Technical Bid as per Appendix IA and Financial Bid as per Appendix IB. BID amount shall be indicated clearly in both figures and words, in Indian Rupees in prescribed format of Financial Bid and it will be signed by the Bidder's authorised signatory. In the event of any difference between figures and words, the amount indicated in words shall be taken into account."

7. Clause 2.1.17 reads thus;

> "2.1.17 Notwithstanding anything to the contrary contained herein, in the event that the Bid Due Date falls within three months of the closing of the latest financial year of a Bidder, it shall ignore such financial year for the purposes of its Bid and furnish all its information and certification with reference to the 5 (five) years or 1 (one) year, as the case may be, preceding its latest financial year. For the avoidance of doubt, financial

year shall, for the purpose of a Bid hereunder, mean the accounting year followed by the Bidder in the course of its normal business."

8. The most relevant condition which resulted in rejection of petitioner's bid can be found in Clause 2.2.2.2, which reads thus;

"2.2.2.2 **Technical Capacity**

(i) For demonstrating technical capacity and experience (the **"Technical Capacity"**), the Bidder shall, over the past 5 (five) financial years preceding the Bid Due Date, have received payments for construction of Eligible Project(s), or has undertaken construction works by itself in a PPP project, such that the sum total thereof is more than [Rupees 562.00 crore (Rs. Five hundred sixty two crores)] (the **"Threshold Technical Capacity"**)

(ii) Provided that at least one similar work of 50% of Estimated Project Cost Rs.112.41 crore (Rupees One hundred twelve crore and forty one lacs) shall have been completed from the Eligible Projects in Category 1 and / or Category 3 specified in Clause 2.2.2.5. For this purpose, a project shall be considered to be completed, if more than 90% of the value of work has been completed" and such completed value of work is equal to or more than 50% of the estimated project cost."

9. It may be useful to advert to Clause 2.2.2.7, which reads thus;

"2.2.2.7 Submission in support of Technical Capacity

(i) The Bidder should furnish the details of Eligible Experience for the last 5 (five) financial years immediately preceding the Bid Due Date.

(ii) The Bidder must provide the necessary information relating to Technical Capacity as per format at Annex-II of Appendix-IA.

(iii) The Bidder should furnish the required Project-specific information and evidence in support of its claim of Technical Capacity, as per format at Annex-IV of Appendix-IA."

10. We may also refer to Annexure-II appended to Appendix IA of the tender document, on which, reliance has been placed by the petitioner. The same reads thus;

"Appendix IA
Annex-II

ANNEX-II

Technical Capacity of the Bidder@

(Refer to Clauses 2.2.2.2, 2.2.2.5 and 2.2.2.7 of the RFP*)*

Applicant type	Project Code*	Category$	Experience** (Equivalent Rs. Crore)$$		Technical Experience £
			Payments received for construction of Eligible Projects in Categories 3 & 4	Value of self construction in Eligible Projects in Categories 1and 2	
(1)	(2)	(3)	(4)	(5)	(6)
Single entity	a				
Bidder or Lead	b				
Member including	c				
other members of	d				
the Joint Venture	e				
	f				
Aggregate Technical Experience=					

@ Provide details of only those projects that have been undertaken by the Applicant, or its Lead member including members in case of joint venture, under its own name

separately and / or by a project company eligible under Clause 2.2.2.6(i) (b). In case of Categories 1 and 2, include only those projects which have an estimated capital cost exceeding the amount specified in Clause 2.2.2.6(i)(c) and for Categories 3 and 4, include only those projects where the payments received exceed the amount specified in Clause 2.2.26(ii). In case the Bid Due Date falls within 3 (three) months of the close of the latest financial year, refer to Clause 2.2.12.

** Refer Annex-IV of this Appendix-I. Add more rows if necessary.*

$ Refer Clause 2.2.2.5(i)

*** Construction shall not include supply of goods or equipment except when such goods or equipment form part of a turn-key construction contract/EPC contract for the project. In no case shall the cost of maintenance and repair, operation of Highways and land be included while computing the Experience Score of an Eligible Project.*

$$ For conversion of US Dollars to Rupees, the rate of conversion shall be Rupees [50 (fifty)] to a US Dollar. In case of any other currency, the same shall first be converted to US Dollars as on the date 60(sixty) days prior to the Application Due Date, and the amount so derived in UD Dollars shall be converted into Rupees at the aforesaid rate. The conversion rate of such currencies shall be the daily representative exchange rates published by the International Monetary Fund for the relevant date.

£ In the case of an Eligible Project situated in an OECD country, the Experience Score so arrived at shall be further multiplied by 0.5, in accordance with the provisions of Clause 2.2.2.5(ii) and the product thereof shall be the Experience Score for such Eligible Projects.

NOTE: In case of a Joint Venture, information in Annex-II and Annex-IV of Appendix-I shall be provided separately for

other Members so as to establish that each such Member has 30 percent or more of the Threshold Technical Capacity. Such information may be provided as Annex-IIA, Annex-IIB, Annex-IVA and Annex-IVB respectively *(Refer Clause 2.2.2.4)*."

11. The petitioner relies on Chart Annexure-P/2 to assail the impugned decision of the respondent No.1 in rejecting the bid submitted by the petitioner. The same reads thus;

BANSAL CONSTRUCTION WORKS PVT. LTD.

NOW:- Rehabilitation and Up-gradation of Bhopal-Berasia-Sironj Section of SH-23 from Chainage Km. 4.100 to Km. 110.420 (Design length 106.320 km) to two lane with paved/hard/hard shoulder road in the State of Madhya Pradesh on Engineering Procurement and Construction (EPC) mode

Project Cost: 224.82 Cr. LDOP: 22.02.16 LDOS: 23.02.2016

Sr. No.	Qualification	Required (Rs.in	With BCWPL (Rs. In Crores)
1	**Technical Capacity**: The Bidder shall, over the past 5 (five) financial years preceding the Bid Due Date, have received payments for construction of Eligible Project(s), or has undertaken construction works by itself in a PPP project, such that the sum total thereof is more than [Rupees 562.00 Crore] (the 'Threshold Technical Capacity") **Page No. 00 {Clause 2.2.2.2 (i)}**	562.00	565.50 (Upto 13/02/2016)
2	Provided that at least one similar work of 50% of Estimated Project Cost Rs.112.41 Crore shall have been completed from the Eligible Projects in Category 1 and / or	112.41	234.55 (DAMOH-KATNI)

	Category 3 specified in Clause 2.2.2.5. For this purpose, a project shall be considered to be completed, if more than 90% of the value of work has been completed and such completed value of work is equal to or more than 50% of the estimated project cost. **Page No. 00 {Clause 2.2.2.2 (ii)}**		
3	**Financial Capacity:** The Bidder shall have a minimum New Worth (the "Financial Capacity") of Rs.22.48 Crores at the close of the preceding financial year. **Page No. 00 (Clause 2.2.2.3)**	22.48	96.83 (2015-16)
4.	**Bid Capacity:** (A*N*2-B) **Page No. 00 {Clause 2.2.2.1}**	>224.82	Bid Cap.=(A*N*2-B) A=252.69 Cr. (2015-16) N= 24/12=02 Yrs B=168.53 Cr. Bid Cap= (252.50*1)* 2*2= 168.53)=842.23 Cr.

12. The respondents have filed reply-affidavit and refuted the claim of the petitioner. They assert that the rejection of petitioner's bid was for valid consideration and not being arbitrary, unreasonable or *mala fide,* as is contended. The respondent No.1 contends that the Appropriate Authority has rejected the bid submitted by the petitioner on application of the relevant provisions and on the basis of indisputable facts. In that, the petitioner submitted financial information for financial years between 1.4.2011 - 31.03.2012 to 1.4.2015 - 15.2.2016, which was duly considered. The petitioner did not comply with the conditions specified in the tender document of submitting financial information for period over the past 5 (Five) financial years preceding

the Bid Due Date indicating that it has received payment for construction of eligible Projects or has undertaken construction work by itself in a PPP project such that the sum total thereof is more than Rs.562 Crores. This has been specified as "Threshold Technical Capacity". In other words, the petitioner failed to furnish financial information for the period between 1.4.2010 till 31.3.2011, which was essential to qualify the Threshold Technical Capacity. Further, financial information for the period from 1.4.2015 to 15.02.2016 is of no consequence; and in any case could not be reckoned for scrutiny of the bid to ascertain the compliance of Threshold Technical Capacity of the bidder. If the financial information for that period of the petitioner was to be excluded from consideration, the petitioner did not fulfill the criteria of turnover of sum total of Rs.562 Crores. It is also asserted in the reply-affidavit that 7 bids were found qualified and remaining 2 (including of the petitioner) were found disqualified having failed to furnish financial information for the period between 1.4.2010 to 31.3.2011. According to respondent, if the interpretation given by the petitioner to Clause 2.2.2.2 of the tender document, in particular, was to be accepted it would mean that only two bids out of 7 bids had qualified the Threshold Technical Capacity, which contention must be rejected.

13. Having considered the rival submissions, the entire matter revolves around the true meaning of Clause 2.2.2.2 being qualification for Threshold Technical Capacity. From the plain language of the said condition, it is seen that the bidder was expected to submit financial information for the past 5 (five) financial years preceding the Bid Due Date. The Bid Due Date is specified in the tender document as 24.02.2016 – of physical submission of bid.

14. The moot question is : the true meaning of the expression "over the past 5 (five) financial years preceding the Bid Due Date". Should it be reckoned from 01.04.2010 - 31.03.2011 till 01.04.2014 - 31.03.2015 as claimed by the respondent No.1 or from 01.04.2011 - 31.03.2012 up to 01.04.2015 - 15.02.2016 as asserted by the petitioner? The expression "Financial Years Preceding" will have to be given its correct meaning. The "Financial years preceding" is linked to the "Bid Due Date". The petitioner in the writ petition has not disclosed as to what financial year has been followed by the petitioner. We would assume that petitioner follows financial year from 1st April to 31st March. Clause 2.1.17 of the tender document assumes significance and would explain the expression found in Clause 2.2.2.2 of the same document. In Clause 2.1.17 which opens with non-obstante clause, it is stipulated that in the event

the Bid Due Date falls within three months of the closing of latest financial year of the bidder, the bidder "shall ignore" such financial year for the purpose of its bid and furnish all information and certification with reference to 5 (five) years or 1 (one) year, as the case may be, preceding its latest financial year. It is further clarified for avoidance of any doubt, that financial year shall, for the purpose of its bid would mean the accounting year followed by the bidder in the course of its normal business. In no circumstance, the petitioner can claim that the financial information between 01.04.2015 to 15.02.2016 would be covered by this stipulation. The financial year required to be furnished is for the entire financial year and which must be over the past 5 (five) financial years "preceding the Bid Due Date". No other construction can be given to these stipulations. It is not a provision for giving information of preceding 5 (five) years before the Bid Due Date. Instead, it is made very explicit that the financial information must pertain to over the past 5 (five) financial years "preceding the Bid Due Date".

15. Realizing this difficulty, the petitioner has been advised to contend that the bid due date prescribed in the bid document was 23.02.2016, which does not fall within three months of financial year ending on 31.03.2015; and, therefore, Clause 2.1.17 of the bid document was not applicable to the case of the petitioner. Accordingly, the turnover information and certification for calculating technical capacity of the petitioner for the period 1.4.2015 to 23.02.2016 should also be reckoned. This plea can be discerned from communication sent by the petitioner dated 28.02.2016 at page 97 of the paper book.

16. Accepting this contention would be doing violence to Clause 2.2.2.2 read with 2.1.17 of the tender document. On this finding, the financial information furnished by the petitioner for the period 01.04.2015 to 23.02.2016 – by no standards can be taken into account for demonstrating the technical capacity and experience of the petitioner as Threshold Technical Capacity. If that information is to be excluded, the bid submitted by the petitioner contained financial information only for 4 (four) financial years between 01.04.2011 - 31.03.2012 to 01.04.2014 -31.03.2015 respectively. That information does not fulfill the requirement of furnishing the financial information over the past 5 (five) financial years "preceding the Bid Due Date" to qualify the Threshold Technical Capacity.

17. The Counsel for the petitioner heavily relies on the decision of the

Supreme Court in *B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd. and Others*[1]. He submits that, what is required to be considered for the purpose of technical capacity of the bidder is to ascertain the physical capability of the bidder to carry out the work stipulated in the tender document. The project cost in the present case is around Rs.224.82 Crores. The petitioner was already engaged in execution of at-least four Projects of the same type, including of the respondent No.1.

18. The question is: whether the exposition of the Supreme Court in the abovesaid decision, pressed into service, is of any help to the petitioner. In our opinion, the dictum of the Supreme Court in the said decision is in the context of facts of that case. In that case, the notice inviting tender provided that the bidder should have executed the work of total minimum quantity of 5 (five) million metric tons per year for preceding 5 (five) years. Further, the bidder should produce a valid proof of payment of provident fund contribution of 100 personnel during the last financial year. The decision of the Supreme Court, pressed into service, therefore, rests on the facts of that case. In the present case, however, the tender condition regarding Technical Capacity of the bidder is explicit and in no uncertain terms mandates that the bidder shall submit financial information pertaining to period "over the past 5 (five) financial years" "preceding the Bid Due Date". Suffice it to observe that on a fair and holistic interpretation of tender conditions in the case on hand, there is no scope for argument that financial information furnished for the period between 01.04.2015 to 15.02.2016 can be reckoned as financial information for the whole of financial year preceding the Bid Due Date.

19. Notably, to buttress the argument, the respondents have placed on record that the bid submitted by the respondent No.3 for some other project in the past was rejected for the same reason. Even bids offered by other Contractors in respect of other Projects were rejected as nonresponsive on applying the same criterion, as is applied to the case of the petitioner. In that sense, it is not a case of impugned decision taken to favour the respondent No.3 nor can be painted as unjust, arbitrary or unreasonable. On the other hand, we must hold that same is in conformity with the tender conditions and which approach has been consistently adopted by the respondents for all the tenders issued by them in the past and the present one, therefore, just, fair

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1. (2006) 11 SCC 548

and proper.

20. Counsel for the petitioner had also relied on the decision of the Supreme Court in the case of *Union of India vs. The Central India Machinery Manufacturing Company Ltd. and Others*[2], in particular paragraph 28 of the said decision, which deals with the approach to be adopted for construction of terms and conditions of the Contract. The Supreme Court has held that a correct construction depends on a reading of the Standard and Special Conditions as a whole. It would not be proper to cull out a sentence here or sub-clause there and read the same in isolation. Further, what is required is not a fragmentary examination in parts but an overall view and understanding of the whole. It is the substance of the documents constituting the Contract, and not merely Form which has to be looked into. We fail to understand as to how this exposition can support the petitioner. On the other hand, it must come to the aid of respondents, who have justified the impugned action on the basis of conjoint reading of the relevant terms and conditions of the subject document.

21. The respondent No.1 has rightly invited our attention to the recent decision of the Supreme Court in the case of *Siemens Aktiengeselischaft and Siemens Limited vs. Delhi Metro Rail Corporation Limited and Others*[3]. After analyzing host of decisions on the scope of judicial review of administrative decisions, the Supreme Court in paragraph 18 has observed thus;

> **"18.** The principles governing the judicial review of administrative decisions are now fairly well settled by a long line of decisions rendered by this Court since the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority of India* which is one of the earliest cases in which this Court judicially reviewed the process of allotment of contracts by an instrumentality of the State and declared that such process was amenable to judicial review. Several subsequent decisions followed and applied the law to varied situations but among the latter decisions one that reviewed the law on the subject comprehensively was delivered by this Court

2. (1977) 2SCC 847

3. (2014) 11SCC 288

in *Tata Cellular Case* wherein this Court once again reiterated that judicial review would apply even to the exercise of contractual powers by the Government and government instrumentalities in order to prevent arbitrariness or favouritism. Having said that this Court noted the inherent limitations in the exercise of that power and declared that the State was free to protect its interest as the guardian of its finances. This Court held that there could be no infringement of Article 14 if the Government tried to get the best person or the best quotation for the right to choose cannot be considered to be an arbitrary power unless the power is exercised for any collateral purpose. The scope of judicial review, observed this Court, was confined to the following three distinct aspects:

(i) Whether there was any illegality in the decision which would imply whether the decision-making authority has understood correctly the law that regulates his decision-making power and whether it has given effect to it;

(ii) Whether there was any irrationality in the decision taken by the authority implying thereby whether the decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at the same; and

(iii) Whether there was any procedural impropriety committed by the decision-making authority while arriving at the decision."

22. On the same lines, in the case of *Air India Ltd. vs. Cochin International Airport Ltd. and Others*[4], the Supreme Court has restated the legal position. Emphasis has been placed on the exposition in paragraph 7 of this decision, by the respondents. The same reads thus:

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this

4. (2000) 2 SCC 617

Court in *Ramana Dayaram Shetty v. International Airport Authority of India, Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India, CCE v. Dunlop India Ltd., Tata Cellular v. Union of India, Ramniklal N. Bhutta v. State of Maharashtra* and *Raunaq International Ltd. v. I.V.R. Construction Ltd.* The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. **The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny.** It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. **It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness.** The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. **Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point.** The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. **Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."**

(emphasis supplied)

23. Having given our thoughtful consideration to the case on hand, we have no hesitation in taking the view that non-submission of financial information for the period between 01.04.2010 to 31.03.2011 by the petitioner resulted in infraction of the stipulation contained in Clause 2.2.2.2 of the tender document and for which reason, failure to fulfil (sic:fulfill) the Threshold Technical Capacity. Assuming that sub-clause (i) of the said condition was to be considered as stipulation for taking overall view of the technical capacity and experience of the petitioner, it must be held that the financial information regarding the total sum received by the bidder during the past 5 (five) financial years "preceding the Bid Due Date" alone must be considered, which means, financial information for financial year from 01.04.2010 - 31.03.2011 till 01.04.2014 - 31.03.2015. Any other information will be of no help to the petitioner. However, the petitioner failed to furnish financial information for the financial year 01.04.2010 to 31.03.2011, for reasons best known to the petitioner. Further, the financial information given by the petitioner for the period from 01.04.2015 to 15.02.2016 cannot be reckoned; and as it is required to be excluded, the petitioner does not qualify the requirement of receipt of Rs.562 Crores to meet the Threshold Technical Capacity, keeping in mind the volume of the present project of Rs.224.82 Crores. Hence, the petitioner must fail notwithstanding the fact that the petitioner had offered lowest bid.

24. The incidental issue raised by the petitioner is about the alleged undue haste shown by the respondent No.1 in awarding the Contract to respondent No.3. This argument is founded on the schedule of bidding process specified in Clause 1.3. The same reads thus;

Sl.No.	Event Description	Date
1.	Purchase of Bid document Start date	21.01.2016 17:31 hrs
2.	Purchase of Bid document End Start date	22.02.2016 17:30 hrs
3.	Late date for receiving queries/Clarifications	01.02.2016 17:30 hrs
4.	Pre-Proposal Conference (Pre-bid meeting)	01.02.2016 15.30 hrs
6.	Bid submission End date (online)	23.02.2016 17.30 hrs
7.	Physical submission of bid	24.02.2016 17.30 hrs

8.	Opening of technical bid	25.02.2016 at 11:00 hrs
9.	Financial proposal (Envelop C) opening	Will be informed later
10.	Opening of Financial BID	Will be informed later
11.	Letter of Award (LOA)	Within 90 days of BID Due Date
12.	Validity of BID	120 days from BID Due Date
13.	Signing of Agreement	Within 15 days of award of LOA.

25. The argument proceeds that after the technical bid was opened on 25.02.2016, the respondent No.1 hastened to issue Letter Of Award (LOA) in favour of respondent No.3 without doing any other scrutiny. This was done to push the petitioner to a *fait accompli* situation, even after knowledge of filing of the present writ petition on 01.03.2016. Not only that, respondent No.1 hastened the process of signing the agreement – which was executed on 08.03.2016 – inspite of the order passed by this Court on 08.03.2016 to maintain *status quo* as on that day with regard to the subject matter.

26. The argument though attractive at the first blush, deserves to be stated to be rejected for more than one reason. Firstly because, the dates and period specified against each of the activity mentioned in Column description of the Chart, in particular, in respect of Item Nos.10 to 13, is only to provide for an outer limit for completing that process. It is not a provision to wait for the period specified against the stated activity. Secondly, it is true that the present petition was filed on 01.03.2016, however, the same was mentioned before the Court only on 03.03.2016 for listing. It was ordered to be listed on 04.03.2016 when it was adjourned to 08.03.2016 on the request made by the counsel for the respondents for time to take instructions. In that sense, the respondents appeared in the present proceeding and became aware about the filing of this petition only on 03.03.2016, when copy of the petition was served on the respondent No.1. Incidentally, on the same day, Letter Of Award (LOA) was already issued in favour of the respondent No.3 with regard to the subject contract and it was accepted by the respondent No.3. Indeed, agreement was signed by respondent No.1 in favour of respondent No.3 on 08.03.2016 notwithstanding the knowledge of filing of present petition, but,

since there was no interim stay and Letter Of Award was already executed in favour of respondent No.3, the Appropriate Authority of respondent No.1 proceeded in the matter in larger public interest, as is stated in the reply-affidavit. In any case, these facts or circumstances cannot be the basis to answer the core issue on which the bid submitted by the petitioner has been rejected being nonresponsive. Only if the petitioner had succeeded in that contention, it would have become necessary for us to examine this grievance of the petitioner more elaborately or even to undertake microscopic analysis thereof. Suffice it to observe that grievance about undue haste shown by the respondent No.1 does not warrant any further consideration.

27. Taking overall view of the matter, we find that the petition is devoid of merits, hence it deserves to be **dismissed.**

Ordered accordingly.

Interim stay stands vacated forthwith

Petition dismissed.

I.L.R. [2016] M.P., 2528
WRIT PETITION
Before Mr. Justice Vivek Agarwal
W.P. No. 4696/2010(S) (Gwalior) decided on 14 June, 2016

OM PRAKASH DIXIT ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966 - Rule 16(1)(d) - Service Law - Minor Penalty - **Stoppage of one increment without cumulative effect - Scope of interference of High Court - Held - Rule 16(1) requires that before passing any order of minor punishment, the concerned employee should be served with a show cause notice and order of minor penalty can be passed after affording opportunity of furnishing reply - High Court not to sit as an appellate authority over the decision of disciplinary authority inflicting minor penalty of stoppage of one increment.** **(Para 6)**

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966 – नियम 16(1)(डी) – सेवा विधि – लघु शास्ति – असंचयी प्रभाव से एक वेतनवृद्धि

का रोका जाना – उच्च न्यायालय के हस्तक्षेप की परिधि – अभिनिर्धारित – नियम 16(1) यह अपेक्षा करता है कि लघु शास्ति का कोई आदेश पारित करने के पूर्व संबंधित कर्मचारी पर कारण बताओ नोटिस की तामील कराई जानी चाहिए एवं उसका जवाब प्रस्तुत करने का अवसर प्रदान करने के उपरांत ही लघु शास्ति का आदेश पारित किया जा सकता है – एक वेतनवृद्धि रोकने की लघु शास्ति अधिरोपित करने वाले अनुशासनिक प्राधिकारी के विनिश्चय पर उच्च न्यायालय को एक अपीलीय प्राधिकारी के तौर पर नहीं बैठना चाहिए।

B. Constitution - Article 226 - Alternative remedy - Service Law - **Difference in the position of workmen under the Industrial/Labour Law and that of a civil servant - Held - Labour Law being a beneficial legislation is more lenient in the matter of technicalities because labour is considered to be illiterate and underprivileged, but the same is not the position of a civil servant and not availing the alternative remedy will not entitle a civil servant to claim relief under the writ jurisdiction.** **(Para 6)**

ख. संविधान – अनुच्छेद 226 – वैकल्पिक उपचार – सेवा विधि – औद्योगिक/श्रम विधि के अंतर्गत एक कर्मकार एवं एक सिविल सेवक में अंतर – अभिनिर्धारित – श्रमविधि एक हितकारी विधान होने के नाते तकनीकियों के मामले में अधिक उदार है क्योंकि श्रमिक को अशिक्षित एवं वंचित माना जाता है, परंतु एक सिविल सेवक इस स्थिति में नहीं होता है तथा वैकल्पिक उपचार का अवलंब न लिये जाने से सिविल सेवक रिट अधिकारिता के अंतर्गत अनुतोष का दावा करने हेतु पात्र नहीं होगा।

Cases referred:

(2013) 7 SCC 25, (2008) 5 SCC 632, (2006) 4 SCC 733.

Alok Katare, for the petitioner.
Praveen Newaskar, G.A. for the respondents No. 1 to 3/State.
None for the respondent No. 4.

ORDER

VIVEK AGARWAL, J. :- Petitioner has filed this petition claiming the benefit of Krammonati on completion of 12 years period of service on the post of Lecturer. He has also assailed the order Annexure P/8 vide which minor punishment of stoppage of one increment without cumulative effect was inflicted on him under the provisions of Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966.

2. Respondents have filed a return. They have expressed that petitioner was granted benefit of Kramonati vide order dated 26.3.11 with effect from 7.3.2004. In view of this fact which is not disputed by the learned counsel for the petitioner, first relief seeking benefit of Kramonati has become infructuous.

3. As far as petitioner's second claim for quashing of minor punishment is concerned, learned counsel for the petitioner has submitted that in terms of the provisions contained in Rule 16(1)(d), no order imposing any penalty specified in clause (i) to (iv) of Rule 10 could have been made without recording a finding on each imputation of misconduct or misbehaviour. He has also relied on the judgments in the cases of *State of M.P. and others Vs. Sanjay Nagayach and others,* (2013) 7 SCC 25; *Rajasthan State Electricity Board Vs. Union of India and others*, (2008) 5 SCC 632 and *UP SRTC Ltd. Vs. Sarada Prasad Misra and Anr.*, (2006) 4 SCC 733.

4. Per contra, learned Govt. Advocate for the State submits that there is a statutory remedy of appeal provided in Rule 23 of the Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966, and therefore, this writ petition is not maintainable in view of the availability of alternative remedy. It is also submitted that there is misjoinder of causes inasmuch as petitioner has mixed two different causes, namely grant of Kramonati and challenge to the order of minor penalty in one writ petition, whereas two different cause of actions being distinct, different writ petitions should have been filed. Learned counsel for the State has also submitted that this writ petition has been filed much after the expiry of limitation for filing an appeal against the order of punishment, therefore, the writ petition suffers from delay and laches also.

5. This Court has perused the record, The ratio of law laid down by the Supreme Court in *Rajasthan State Electricity Board* (supra) is not applicable to the facts and circumstances of the case inasmuch as in that case the respondent/Railway had admitted their liability, and therefore, the Supreme Court deprecated the order of the High Court dismissing the writ petition with a direction to the appellant to approach the Railway Claims Tribunal for availing alternative remedy provided under Section 13 of the Railway Claims Tribunal Act, 1987. In the present case, there is no admission or concession on the part of the respondent/State.

6. The case of *UP SRTC Ltd.* (supra) is a case under labour law wherein

delay in filing the claim for reinstatement and backwages was entertained by the Court overlooking the delay on the part of the workman. The position of the workman under the industrial law/labour law is different from a civil servant and the labour law being a beneficial legislation is more lenient in the matter of technicalities because labour is considered to be illiterate and underprivileged, but same is not the position of a Lecturer who is also a civil servant, therefore, not availing the remedy of appeal will not entitle the petitioner to claim relief under the writ jurisdiction. Similarly the judgment in the case of *Sanjay Nagayach* (supra) has been pressed into service to demonstrate that mandatory requirement of Section 16(1)(d) was not fulfilled and therefore order of punishment is not sustainable. The fact of the matter is that Rule 16(1) requires that before passing any order of minor punishment, the concerned employee should be served with a show-cause notice and after giving opportunity of furnishing reply order of minor penalty can be passed. Annexure P/6 is the show-cause notice dated 5.12.2008 stating therein that petitioner has violated the provisions of *Bhandar Krya Niyam* Rules and made amendments in the vouchers besides filing forged vouchers. It was also alleged that he has without competent sanction used amounts sanctioned as travel advance on other heads and has not presented the vouchers in time. Thus, he has violated the provisions of Rule 3 of the Madhya Pradesh Civil Services (Conduct) Rules 1965. Petitioner filed his reply in which he has admitted his guilt that he had overspent the amounts against the instructions of Rajya Shiksha Kendra. He has also admitted utilization of the amounts drawn on certain heads on certain other head without the competent sanction. In view of these admissions, it cannot be said that the petitioner has been harassed unnecessarily. At this distance of time, no useful purpose would be served in relegating the petitioner to the appellate authority and this Court should not sit as an appellate authority over the decision of disciplinary authority which has inflicted minor penalty of stoppage of one increment without cumulative effect. As far as the provisions of Rule 16(1)(d) are concerned, there is a clear finding that the petitioner was found guilty of violating the instructions of Rajya Shiksha Kendra during I.E.D. training. This finding is sufficient to make the requirement of Rule 16(1)(d), and therefore, argument of the petitioner that punishment order is not sustainable in the light of the provisions contained in Rule 16(1)(d) is not satisfactory. Thus, this petition being devoid of merits deserves to be and is hereby dismissed.

Petition dismissed.

I.L.R. [2016] M.P., 2532
WRIT PETITION
Before Mr. Justice S.K. Seth & Mr. Justice H.P. Singh
W.P. No. 3018/2016 (Jabalpur) decided on 26 July, 2016

M.P. POORV KSHETRA VIDYUT VITRAN CO.LTD. ...Petitioner
Vs.
M/S. EASUN REYROLLE LIMITED, CHENNAI & anr. ...Respondents

***Constitution - Article 226* - Encashment of Bank Guarantee which is valid and extended thrice in the past by the bank - Whether bank was justified in law in refusing to en-cash a confirmed and irrevocable Bank Guarantee issued by it - Held - When in the course of commercial dealings, unconditional guarantee is given and accepted by the beneficiary, the beneficiary is entitled to realize such a Bank Guarantee on the very demand and his demand is conclusive - Bank Guarantee is independent of primary contract between the parties - Stand taken by bank is untenable - Petition is allowed with costs of Rs. 25,000/-. (Paras 10, 11, 12 & 15)**

संविधान – अनुच्छेद 226 – बैंक गारंटी को भुनाया जाना जो कि वैध है तथा जिसे बैंक द्वारा भूतकाल में तीन बार बढ़ाया गया था – क्या बैंक उसके द्वारा जारी की गई एक पुष्ट एवं प्रतिसंहरणीय बैंक गारंटी को भुनाये जाने से इंकार करने में विधि सम्मत था – अभिनिर्धारित – जहाँ वाणिज्यिक संव्यवहार के दौरान बिना शर्त गारंटी दी गई है तथा जिसे हिताधिकारी द्वारा स्वीकार किया गया है, वहाँ हिताधिकारी मांग करने पर ऐसी बैंक गारंटी को वसूल करने हेतु हकदार है तथा उसकी मांग निश्चायक है – बैंक गारंटी पक्षकारों के मध्य प्रारंभिक संविदा से स्वतंत्र है – बैंक द्वारा उठाया गया कदम असमर्थनीय है – रूपये 25,000/– के व्यय के साथ याचिका मंजूर।

Cases referred:

(1998) 8 SCC 436, AIR 1981 SC 1426, AIR 1994 SC 626, (1995) 4 SCC 515, (1995) 5 SCC 34, (1997) 1 SCC 568, AIR 2007 SC 2798, (2008) 1 SCC 544, (2008) 8 SCC 290.

ORDER

The Order of the Court was delivered by :
S.K. Seth, J. :- Is the respondent No. 2 Bank justified in law in refusing to en-cash a confirmed and irrevocable Bank Guarantee issued by it? That is the

short and the only question which arises for our consideration in this petition.

2. Relevant and material facts, culled out from pleadings and documents available on record, and not in dispute, lie in a narrow compass.

3. On 2.4.2012 petitioner entered into a contract with the respondent No.1 for delivery, installation, complete and commission of certain facilities viz. for survey, design, manufacture, pre-dispatch, inspection,testing, supply of plant and material, storage, installation and commission of SCADA equipment on turn-key and maintain the system for next 5 years, from the declaration of successful commissioning of the SCADA equipment at Jabalpur town against the RAPDRP part B.

4. In view of term and conditions of the contract, respondent No. 2(State Bank of India, Overseas Branch, Bangalore) on 23.4.2012 issued a confirmed and irrevocable Bank Guarantee of Rs. 2,16,73,658/-payable on demand of the petitioner (beneficiary). Thrice in the past, the validity of the Bank Guarantee was extended and now it is valid up to 28.7.2016.

5. On account of unsatisfactory delay in execution of the work, petitioner terminated the contract on 5.1.2016 and on the same day, raised demand for payment of the amount covered under the Bank Guarantee.

6. Instead of honoring its obligation and commitment, respondent No. 2 on 8.1.2016 wrote back to the petitioner stating that it was a condition for any claim and payment under the guarantee to be made that the advance payment must have been received by the Contractor on its SBI account at Bangalore.

7. On 9.1.2016 petitioner reiterated the demand stating that as per request of respondent No.1, mobilization advance was paid in its bank account with the ICICI Bank under intimation to all concerned and the same was acknowledged by the representative of the respondent No. 1 at Jabalpur. It was also pointed out that Bank Guarantee in question was extended regularly well before its expiry by the respondent no. 2 without raising any queries. Final claims were also lodged by the petitioner before the expiry of the BG , 3 times during the currency of the BG period or extension thereof and respondent No. 2 never raised any objection of any sort. Alongwith the said communication, all supporting documents were enclosed.

8. After receipt of above communication, respondent Bank changed its

stand and submitted that the payment of mobilization amount should be confirmed by the respondent No. 1. When this was replied to, respondent Bank has now taken a stand that the Bank Guarantee is an irrevocable guarantee and could not be en-cashed. This stand is not borne out from record. Petitioner is aggrieved by the deliberate and the arbitrary refusal of the State Bank of India to en-cash the Bank Guarantee furnished by it in favor of the petitioner.

9. After having heard the rival submissions at length and on a careful analysis of the decisions cited at the Bar, we are of the considered opinion that the stand taken by the respondent No. 2 Bank is untenable and the petition must allowed with costs.

10. It is well settled that a confirmed and irrevocable Bank Guarantee, or Letter of Credit is a commercial document issued by a Bank for the benefit of the beneficiary and it could be invoked in a commercial manner. The law relating to the invocation of Bank Guarantee is equally well settled by the Supreme Court in a series of decisions. Bank guarantee which provides that it is payable on demand by the beneficiary is considered to be an unconditional Bank Guarantee.

11. When in the course of commercial dealings, unconditional guarantee is given and accepted by the beneficiary, later is entitled to realize such a Bank Guarantee on the very demand and his demand is conclusive.

12. In such a case, the beneficiary is the sole Judge as to the breach of contract and the Bank has to discharge its obligation on a demand being raised by the beneficiary in the manner prescribed. A letter of credit or a Bank Guarantee is independent of primary contract between the party furnishing the Bank Guarantee and the beneficiary. The issuing Bank is not concerned with the underlying contract between the purchaser and the beneficiary. It is equally well settled that the Courts would do their utmost to enforce it according to its terms and they will not, in the ordinary course of things, interfere to prevent its due implementation or performance. But this is not an absolute rule. There are exceptions to it. For example, when a Bank Guarantee is tainted with fraud, which would vitiate the very foundation of the guarantee, and the beneficiary is trying to take advantage thereof, the Court certainly would not come to the rescue of the beneficiary. Such is not the case here. Plea of fraud is neither set up, nor is the relevant material placed on record. The Bank is estopped by its own conduct when it renewed/extended the Bank Guarantee without demur or protest.

13. We, therefore, cannot come to rescue of respondent No.2. Reliance placed on the decision in the case of *Hindustan Construction Co. Ltd. V. State of Bihar* reported in (1998) 8 SCC 436, is of no avail to the respondent No. 2 Bank, as the facts of the decided case are clearly distinct from the facts of the case in hand. Thus, we find it difficult to sustain the inaction of the Bank.

14. We are supported in taking this view by the decisions of the Supreme Court in the case of *United Commercial Bank v. Bank of India*-AIR 1981 SC 1426; *Svenska Handelshanken v. M/s. Indian Charge Chrome*-AIR 1994 SC 626; *National Thermal Power Corporation Ltd, v. Flowmore Pvt. Ltd & another*-(1995) 4 SCC 515; *Hindustan Steel Works Construction Ltd. V. Tarapore Co. & another* (1995) 5 SCC 34; *U.P. Sugar Corporation v. Sumac International Ltd.* (1997) 1 SCC 568; *Himadri Chemicals v. Coal Tar Refining Company*- AIR 2007 SC 2798; *Vinitec Electronics (P) Ltd. v. HCL Infosystems Ltd.*, (2008) 1 SCC 544,; *Bank of India v. Nagia Construction (I) Pvt. Ltd & another* (2008) 8 SCC 290,

15. In view of the foregoing discussion, we allow the writ petition with costs of Rs. 25,000/- and direct the respondent Bank to immediately discharge its commercial obligation in favor of petitioner in terms of the Bank Guarantee.

16. Ordered accordingly.

Petition allowed.

I.L.R. [2016] M.P., 2535
APPELLATE CIVIL
Before Mr. Justice Alok Aradhe & Mr. Justice Rohit Arya
F.A. No. 225/2011 (Gwalior) decided on 11 April, 2016

RACHANA BHARGAVA (SMT.) ...Appellant
Vs.
KRISHANLAL SAHNI & ors. ...Respondents

(Alongwith F.A. No.187/2012)

A. Contract Act (9 of 1872), Section 20 – Mistake of fact – **In order to attract the applicability of mistake of fact, it has to be common mistake of both the parties with regard to vital facts of the agreement. (Para 24)**

क. संविदा अधिनियम (1872 का 9), धारा 20 – तथ्य की भूल – तथ्य की भूल की प्रयोज्यता को आकर्षित करने हेतु करार के महत्वपूर्ण तथ्यों के संबंध में उभयपक्ष की समान भूल का होना आवश्यक है।

***B. Contract Act (9 of 1872), Section 73* – Compensation for loss or damages caused by the breach of contract – Compensation can only be given for any loss actually suffered and not for any indirect loss.** **(Para 24)**

ख. संविदा अधिनियम (1872 का 9), धारा 73 – संविदा भंग द्वारा कारित हानि अथवा नुकसान हेतु प्रतिकर – केवल वास्तविक रूप से भुगती हुई हानि हेतु ही प्रतिकर दिया जा सकता है न कि किसी अप्रत्यक्ष हानि हेतु।

Cases referred:

(1998) 3 SCC 471, (2004) 11 SCC 425, AIR 2006 Calcutta 1, AIR 1927 Allahabad 693, AIR 2005 SC 3110, (2000) 3 SCC 581, 2013 (3) JLJ 346, 1970 MPLJ 465, (2000) 6 SCC 113, AIR 1932 PC 196, (2003) 3 SCC 239, AIR 1993 Kerala 184, (1895) 21 BOM 175, AIR 1928 BOM 427, (1992) 1 SCC 647, (1962) 1 SCR 653, (2015) 4 SCC 136, (1980) 4 SCC 636, AIR 2000 SC 2003, (2003) 7 SCC 52, (2005) 4 SCC 120, (1995) 1 SCC 717, (1992) 1 SCC 508, (2008) 1 SCC 494, (1912) AC 673, (2010) 13 SCC 398, (2008) 17 SCC 133, (2013) 14 SCC 59, (2009) 12 SCC 324, (2003) 7 SCC 197.

Deepak Khot, for the appellant in F.A. No. 225/2011 & for the respondents in F.A. No. 187/2012.

K.S. Tomar with *J.S. Kaurav,* for the respondent No.1 in F.A. No. 225/2011.

K.N. Gupta with *R.S. Dhakad,* for the appellant in F.A. No. 187/2012.

JUDGMENT

The Judgment of the Court was delivered by : **ALOK ARADHE, J. :-** In these appeals, under section 96 of the Code of Civil Procedure since common questions of law and fact arise for consideration, they were heard analogously and are being decided by this common judgment. The plaintiff has filed First Appeal No. 187/2012, being aggrieved by judgment and decree dated 7.4.2011 seeking enhancement of the amount of damages, whereas First Appeal No. 225/2011 has been filed by the legal representatives of the original defendant against the impugned judgment and decree, by which

the claim of the plaintiff has been decreed. In order to appreciate the challenge of the plaintiff as well as of the legal representatives of the original defendant to the impugned judgment and decree, few relevant facts need mention, which are stated infra.

2. The plaintiff, who has retired from the post of Major from Indian Army in the year 1987, admittedly purchased two plots, namely, plots bearing No.23 and 25, situate at Rajendra Prasad Colony, Gwalior from the original defendant, namely, Sushil Chandra Bhargava, vide registered sale deeds dated 3.3.1989 (Ex.P/1 and P/2) for a consideration of Rs. 90000/-. After execution of the sale deeds, one Ramvir Singh and others filed a civil suit under Order 1 Rule 8 of the Code of Civil Procedure on 22.6.1989, namely, Civil Suit No. 263A/1994, in which a declaration was sought that the sale deed executed in favour of the plaintiff as well as the gift deed executed in favour of the society which was arrayed as defendant No.9 in the suit, be declared null and void. The aforesaid civil suit was decreed vide judgment and decree dated 10.4.1997 by the trial court and the aforesaid decree was affirmed in First Appeal vide judgment and decree dated 13.8.2002. It is not in dispute that against the judgment and decree dated 13.8.2002, a Second Appeal, namely, Second Appeal No. 4/2003 was preferred before this Court which was dismissed vide judgment dated 5.1.2005 and the Special Leave Petition, namely, Special Leave Petition No.13998/2005, preferred against the aforesaid judgment passed by this Court, was dismissed by the Supreme Court vide order dated 11.7.2005. It is also not in dispute that the plaintiff was party in the previous round of litigation.

3. Thereafter the plaintiff filed a civil suit on 9.3.2007 claiming damages to the tune of Rs.44,93,000/- on the ground that the sale deeds executed in favour of the plaintiff dated 3.3.1989 were declared null and void. The original defendant filed the written statement in which the claim of the plaintiff was denied and it was inter alia pleaded that the fact that the suit plots are reserved for purposes of school, in the lay out plan was well within the knowledge of the plaintiff. It was further pleaded that the suit plots were sold to the plaintiff after obtaining permission from the competent authority and no false assurance was given to the plaintiff and, therefore, the original defendant is not liable to pay any damages. During pendency of the suit the original defendant expired. Thereupon, his legal representatives filed an application for amendment of the written statement, which was allowed by the trial court, by which plea was

incorporated that the original owner of the suit plots was one Raghuvar Dayal Shiksha Samiti and by a gift deed dated 11.10.1965 the suit plots were gifted to the original defendant.

4. The trial Court in view of the pleadings of the parties framed the issues and recorded the evidence. The trial Court vide judgment and decree dated 7.4.2011 inter alia held that the sale deeds in respect of the suit plots were executed in favour of the plaintiff by original defendant in his personal capacity. It was further held that the plaintiff is entitled to damages which were quantified at Rs.4,40,380/- and the defendants were directed to pay interest on the aforesaid amount @ 6% per annum for a period from 10.4.1997 to 9.3.2007. The defendants were also directed to refund a sum of Rs. 90000/-, i.e., the amount of sale consideration along with interest @ 6% per annum from 10.4.1997 to 9.3.2007.

5. Learned counsel for the appellant while taking us through paragraphs 40,44,46,47,55,56,59,61,62,65,66 and 67 of the evidence of the plaintiff (PW.1) submitted that the fact that the land was reserved for the purposes of school was well within the knowledge of the plaintiff and the plots in question were sold to the plaintiff after obtaining permission of the competent authority. It was also pointed out that the plaintiff was aware that the revised lay out in respect of the plots in question, prior to execution of sale deed, has been approved by the Town & Country Planning Department. It is further submitted that the breach of the contract on the part of the original defendant has not been established and the agreement is void on account of mistake of fact by both the parties, essential to the agreement. While referring to section 73 of the Act, it is contended that plaintiff is not entitled to any remote or indirect loss and an amount of Rs.10,000/- could not have been awarded to the plaintiff on account of mental agony. It was also argued that the burden of proof is on the plaintiff to prove the damages. In support of aforesaid submissions, learned counsel for the appellant in First Appeal No.225/2011 has placed reliance on decisions of the Supreme Court, reported in (1998) 3 SCC 471 *(Tarsem Singh Vs. Sukhminder Singh)*; (2004) 11 SCC 425 *(Draupadi Devi and Anr. Vs. Union of India and Ors)*; AIR 2006 Calcutta 1 *(Jalpaiguri Zilla Parishad and Anr. Vs. Shankar Prasad Halder)*.

6. On the other hand, learned senior counsel for the respondent in First Appeal No. 225/2011 has submitted that the fact that fraud was played with the plaintiff has been established in the previous round of litigation. In this

connection, learned senior counsel has invited attention of this Court to paragraph 25 of the judgment and decree dated 10.4.1997 and has submitted that the aforesaid finding has attained finality and, therefore, the plaintiff is entitled to claim damages from the defendants. It is further submitted that the trial Court on the basis of meticulous appreciation of evidence on record has awarded damages to the plaintiff which does not call for any interference by this Court. In support of his submissions, learned senior counsel for the respondent in First Appeal No.225/2011 has placed reliance on AIR 1927 Allahabad 693 *(Mt. Akhtar Jahan Begam and Ors. Vs. Hazari Lal)*; AIR 2005 SC 3110 *(State of Andhra Pradesh and Anr. Vs. T.Surayachandra Rao)*; (2000) 3 SCC 581 *(United India Insurance Co. Ltd. Vs. Rajendra Singh and Ors.)*; 2013 (3) JLJ 346 *(President, Nagar Panchayat Phoop and Anr. Vs. R.B.Dubey and Anr.)*.

7. Learned senior counsel for the appellant in First Appeal No. 187/2012 has submitted that the trial court in paragraph 25 of the judgment dated 10.4.1997 has found that the plaintiff has been cheated and the aforesaid finding has attained finality, as the Special Leave Petition has been dismissed vide order dated 11.7.2005. It was urged that the forms were filled up by the plaintiff for seeking the permission to sell the property under the provisions of Urban Land (Ceiling and Regulation) Act, 1976 and the facts that the will executed in favour of the society was forged and the plots in question under the lay out plan were reserved for purposes of school were not within the knowledge of the plaintiff. It has further been urged that the market value of the suit plots as on the date of institution of the suit, i.e., 9.3.2007 should be ascertained. In the alternative, it was submitted that the market value of the suit plots on the day when the Special Leave Petition was dismissed, i.e., 11.7.2005, should be ascertained. It is further submitted that in the year 2007 the market value of the suit plots as per the guidelines of the Collector was Rs.3900/- per sq.ft. and, therefore, the market value ought to have been ascertained on the aforesaid basis and interest on the amount of market value of the suit plots ought to have been awarded from the date of execution of the sale deed, i.e., from 3.3.1989 till 9.3.2007, i.e., date of filing of the suit.

8. It is also argued that since the transaction in question was commercial transaction, therefore, the plaintiff is entitled to higher rate of interest and not the interest @ 6%. It is submitted that the trial court grossly erred in adopting the mean value of the market price between the period from 10.4.1997 to

9.3.2007 and the damages should have been ascertained as per the market value prevalent in the year 2007, as the plaintiff was required to purchase the plot in the year 2007. It is further argued that the trial court grossly erred in discarding the opinion of an expert, namely, Ajay Bansal (PW.2), who is an architect and the report (Ex.P/9) submitted by him. It is also pointed out that no evidence in rebuttal was led by the defendants with regard to the report prepared by the expert, namely, Ajay Bansal (PW.2). In support of aforesaid submissions, learned senior counsel for the appellant in First Appeal No.187/2012 has placed reliance on 1970 MPLJ 465 *(Collector Jabalpur and Another Vs. Nawab Ahmad Yar Jahangir Khan);* (2000) 6 SCC 113 *(Ghaziabad Development Authority Vs. Union of India and Anr.);* AIR 1932 PC 196 *(Lord Wright, Sir lancelot Sanderson and Sir Dinshah MullaVs. Maharaja Dhiraj Kameshwar Singh and Another)*; (2003) 3 SCC 239 *(State of U.P. and Anr. Vs. Union of India and Anr.);* and, AIR 1993 Kerala 184 *(Mrs. Rosy George Vs. State Bank of India and ors.).*

9. Learned counsel for the respondent in First Appeal No.187/2012 has submitted that as per valuation report, Ex.P/9, value of the land comes to Rs.48/- per sq.ft. whereas the plaintiff had purchased the suit plots @ Rs.30/- per sq.ft. It is further submitted that the plaintiff never asked for refund of the amount and on the other hand defended his title in the previous round of litigation. Therefore, the plaintiff is not entitled to damages at the enhanced rate as claimed by him. However, in view of indemnity clause contained in the sale deeds with regard to defect in title, learned counsel fairly submitted that plaintiff is entitled to refund of sale consideration along with interest.

10. We have considered the rival submissions made on both sides and have perused the record. Before proceeding further it is apposite to notice relevant statutory provisions, namely, Sections 20 and Section 73 of the Indian Contract Act, 1872 (hereinafter, referred to as the "Act"), which read as under:-

> *"**Section 20.** Agreement void where both parties are under mistake as to matter of fact- Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement the agreement is void.*
>
> *Explanation- An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of*

fact.

***Section 73.** Compensation for loss or damage caused by breach of contract- When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract- When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation - In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

From careful scrutiny of Section 20 of the Act it is axiomatic that in order to render a contract void on the ground of mistake, three grounds should coexist, namely, both the parties to the contract must be in a mistake, mistake should be one of fact and not of law, and mistake should be essential to the agreement.

Section 73 of the Act deals with one of the remedies available for the breach of contract, namely, damages where a party sustains a loss on account of breach of contract. In order to attract applicability of Section 73 of the Act, it is *sine qua non* that the defendant is guilty of breach of contract. Section 73 provides for damages which naturally arose in the usual course of things from the breach and which the parties knew when they made the

contract, to be likely to result from that breach. In first eventuality usual losses may be claimed whereas in the second eventuality additional losses as well, may be claimed.

11. At this stage, we advert to the well settled legal position with regard to scope of section 73 of the Act in cases of breach of contract for sale of immoveable properties and principles laid down with regard to ascertainment of damages, as both the parties have relied up on section 73 of the Act. In the case of *Nagar Das vs. Ahmed Khan* (1895) 21 BOM 175, it was held that the legislature while enacting Section 73 of the Act has not prescribed a different measure of damages in the case of contracts dealing with the land from that laid down in the case of contracts relating to commodities. Similar view was taken in the case of *Harilal Dalsukhram vs. Mulchand,* AIR 1928 BOM 427 and it was held that "as Section 73 imposes no exception on the ordinary law as to damages, whatever the subject matter of the contract, in cases of breach of contract for sale of immoveable property through inability on the vendor's part to make good the title, the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages. The Supreme Court in the case of *Jagdish Singh vs. Natthu Singh* (1992) 1 SCC 647, referred to the decision in the case of *Nagar Das* (supra) and approved the ratio laid down therein that the legislature has not prescribed a different measure of damages in the contracts dealing with land from that laid down in the case of contracts relating to commodities.

12. It is well settled legal proposition that damages for a breach of contract must be based on the market price prevalent on the date of the breach. See *Murlidhar Chiranjilal vs. Harishchandra Dwarkadas* (1962) 1 SCR 653, and, *Kailash Nath Associates vs. Delhi Development Authority and another* (2015) 4 SCC 136. It is equally well settled legal proposition that if a contracting party has suffered damage through breach of contract by another contracting party, it is his duty to minimise the damage and if he has failed to do so when it was in his power, he cannot recover in respect of the damage which he could have avoided. See, *M. Lachia Setty & Sons Ltd. vs. Coffee Board* (1980) 4 SCC 636.. The Supreme Court in the case of *Gaziabad Development Authority vs. Union of India* (AIR 2000 SC 2003) has held that in case of breach of a commercial contract, damages for anguish and vexation caused by breach of contract cannot be awarded. It is well settled in

law that when the parties enter into a contract under a mutual mistake or misapprehension as to a matter of fact essential to the agreement, the very foundation thereof, there is no contract between them, or in order (sic:other) words such a contract is void under Section 20 of the Act. See *Tarsem Singh vs. Sukhminder Singh* (1998) 3 SCC 471.

13. In the back drop of aforesaid well settled legal position, we may now refer to the evidence on record. The plaintiff (PW.1) has examined himself and Ajay Bansal as PW.2, whereas defendants have examined Ravi Kumar Gupta (DW.1), Smt. Madhu Bhargava (DW.2) and Bharat Bhargava (DW.3). PW.1 (plaintiff) in paras 40, 44, 46 and 47 of his cross-examination has stated that layout plan from Town & Country Planning was approved on 9.1.1989 and plot was sold to him after obtaining permission from competent authority under Urban Land (Ceiling and Regulation) Act, 1976 and for obtaining such permission he had filled up the forms, which were submitted before the competent authority. In paras 55 and 56 of the cross-examination, plaintiff has admitted that he had defended his title in previous round of litigation and had filed layout plan approved by the Town & Country Planning and permission given by the competent authority under Urban Land (Ceiling and Regulation) Act, 1976 and the copies of sale deeds. In paras 62 and 65 to 67 in the cross-examination, plaintiff has admitted his deposition (Ex.P/7) in previous round of litigation and has answered the questions put to him in this regard. Ajay Bansal (PW.2), who is a valuer and has obtained B.E. Degree in Civil, has been examined to prove valuation report (Ex.P/9) to prove that market value of the plots in question as on 21.11.2007 was Rs.30.00 lacs. In para 9 of his cross-examination, he has admitted that he has no knowledge whether any plot in locality was sold in 2007 and though he had enquired about rates of plot from residents of locality, however he is unable to tell their names. From perusal of Ex.P/9, it is evident that the market value has been determinated as per plinth area method. The defendants have examined Ravi Kumar Gupta (DW.1), Clerk in the office of Registrar. Smt. Madhu Bhargava has been examined as DW.2, i.e., Secretary of the society, who stated that original defendant executed the sale deeds as Secretary of the society and the society is the owner of suit plots. Bharat Bhargava (DW.3) has stated that adjoining plot was sold by his father, i.e., original defendant vide registered sale deed dated 17.6.1999 (Ex.D/6) and has relied upon Ex.D/8, i.e., guideline issued by the Collector for the purposes of market value of the plots. He has also challenged valuation paper, Ex.P/9, in para 6 of his examination-in-chief.

14. Admittedly, after the plaintiff had purchased the suit plots by registered sale deed dated 3.3.1989, a Civil Suit under Order 1 Rule 8 of the Code of Civil Procedure, namely, Civil Suit No. 263A/1994 was filed by one Ramveer Singh and others on 22.6.1989, in which a declaration was sought that sale deeds executed in favour of the plaintiff who was arrayed as defendant No.8 in the suit, be declared null and void. It is also not in dispute that the aforesaid civil suit was decreed vide judgment and decree dated 10.4.1997 wherein in paragraph 25, the trial Court recorded the finding in the following terms :-

> "25. यद्यपि प्रतिवादी क0 8 जो सेना से सेवानिवृत्त मेजर है तथा उभयपक्षों की साक्ष्य में यह आया है कि वह पूर्व में इसी कालोनी में निवास करता था तब प्रतिवादी क01 के व उसके पिता की ख्याती के प्रभाव में आकर उसने प्रतिवादी क01 पर विश्वास कर बड़ी भूल की जबकि वस्तुतः प्रतिवादी क01 ने उसे कूट रचित वसीयत व प्रतिवादी क04 समिती की सम्पत्ति होने का झॉसा देकर प्रतिवादी क01 लगायत 4 के साक्षी जितेन्द्र सिंह कुशवाह (प्र0 सा02) जिसने स्वयं वादग्रस्त विकयपत्र की कार्यवाहियों का संचालक होने का वर्णन दिया है के सहयोग से कूट रचित दस्तावेज की आड़ में प्रतिवादी क08 को ठका एवं प्रतिवादी क01 की यह कार्यावाहियॉ से प्रतिवादी क0 8 त्रस्त हुआ है जिसके लिये प्रतिवादी क0 8 के पास सिविल व कीमिनल कार्यवाही दोनो के उपचार प्राप्त है क्योंकि प्रतिवादी क01 ने इन विकयपत्रों हेतु प्रतिवादी क0 8 से धन लिया एवं भूमियों के इतने वर्षों में जितने भाव बढ़े उस अनुपात में प्रतिवादी क0 8 प्रतिवादी क01 से वसूली क्षति की कर सकता है प्रतिवादी क01 सक्षम भी है, अतिरिक्त इसके इस कूट रचना द्वारा झॉसा देकर सार्वजनिक सम्पत्ति बेचने के आपराधिक दायित्व हेतु भी प्रतिवादी क08 प्रतिवादी क01 को दांडिक न्यायालय के समक्ष अपराधिक कृत्य का पीड़ा उपचार निवारण कर अपराधियों को दंडित करवा सकता है एवं उसे ऐसा करना चाहिये लेकिन बावजूद इसके यह न्यायालय प्रतिवादी क08 को कोई राहत नही दे सकती।"

Admittedly, the aforesaid decree has attained finality whereunder liberty is granted to the plaintiff in paragraph 25 of the judgment to claim damages against his vendor to the extent of escalation of the price of the plots has attained finality and is binding on the parties in view of the principles of *res judicata* even though an issue may not have been formally framed in this regard. See, *Sayeda Akhtar vs. Abdul Ahad* (2003) 7 SCC 52; and *Commissioner of Endowment and others vs. Vittal Rao and others* (2005) 4 SCC 120. Even otherwise, admittedly the sale deeds executed in favour of the plaintiff have been held to be null and void by the trial Court and the decree passed by the trial Court has attained finality. Therefore, on the basis

of principles contained in Section 73 of the Act the plaintiff is entitled to claim damages.

15. The trial Court while computing the damages has taken into account the guidelines issued by the Collector (Ex.D/8) for the year 1989-90 and has held that as per guideline, Ex.D/8, market value of the property was Rs.350/- per square meter, whereas in the year 2006- 2007, it was Rs.3900/- per square meter. Thus, the trial Court came to conclusion that from 1989-90 to 2006-07, the rates of residential plots increased by Rs.3550/- per square meter (Rs.3900 - Rs.350). Accordingly, it was held that average increase in the price of residential plots was Rs.197.2/- per year. The market value of the plots was computed to be Rs.1580/- per square meter (197.2 x 8). It was held that since area of plots is 278.72 square meters, market value of plots in the year 1995- 96 comes to Rs.4,40,380/-. Thus, the trial court has computed market value of the property by taking into account the guidelines issued by the Collector, which is not permissible in view of decision of the Supreme Court in the case of *Land Acquisition Officer vs. S. Jasti Rohini* (1995) 1 SCC 717, as guidelines are issued by the Collector for fiscal purpose of collecting stamp duty and registration charges and market value mentioned therein cannot form basis for determining compensation. The trial Court also erred in not appreciating that transaction in question is commercial transaction and in granting interest at the rate of 6% only. The trial Court also erred in awarding interest on sale consideration from 10.4.1997, in view of the fact that sale deed was executed on 3.3.1989.

16. Section 73 of the Act is declaratory of the common law as to damages. Though the section deals with damages in case of breach of contract and, therefore, the section in terms may not be applicable to the fact situation of the case as in the instant case, issue pertains to claim of damages on account of sale deeds being declared null and void. However, it is well settled in law that even though a provision may not apply in fact situation of the case, yet the principle governing the provision may be applied to facts of a case. [See, *Irrigation Department, Government of Orissa vs. G.C.Roy* (1992) 1 SCC 508, and, *Sarva Shramik Sangathana (KV) vs. State of Maharashtra,* (2008) 1 SCC 494]. In this connection, reference may also be made to decision of Division Bench of Allahabad High Court in the case of *Mt. Akhtar Jahan Begam and others vs. Hazarilal* (AIR 1927 ALL 693), wherein it has been held that principles of Contract Act apply to Transfer of Property as well.

17. We, therefore, proceed to deal with claim of plaintiff for damages in the light of principle incorporated in section 73 of the Act. The plaintiff therefore is entitled to damages, i.e., the difference between contract price and market price on the date of breach and would not be entitled to damages which he could have avoided. The plaintiff would also not be entitled to recover any amount on account of indirect loss or mental agony and physical suffering.

18. The core issue involved in these appeals is with regard to quantum of damages and not with regard to entitlement of plaintiff to claim damages. In the instant case, market value of plots in question has to be ascertained as on 11.7.2005, i.e., when the decree passed by the trial court declaring the sale deeds in favour of plaintiff attained finality and cause of action accrued to him. The plaintiff is under the duty to take all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part which is due to his neglect to take such steps. [See, *British Westinghouse Electric and Mfg. Co.Ltd. vs. Underground Electric Rlys. Co. of London Ltd.*, (1912) AC 673. The plaintiff is, therefore, not entitled to claim damages up to 9.3.2007 as he could have avoided damages by instituting the suit in quite promptitude immediately after the dismissal of Special Leave Petition on 11.7.2005 by the Supreme Court. There is no material on record to ascertain market value of sale deeds in the year 2005. Though the burden to prove market value of suit plots is on the plaintiff, however, it loses its significance when both parties adduce evidence on an issue. In order to prove the market value of the plots in question the plaintiff has examined Ajay Bansal. From his evidence, it is clear that he has not seen the documents pertaining to sale of plots of the locality and is unable to disclose the name of a single person from whom he allegedly made enquiries with regard to market value of suit plots. The valuation report (Ex.P/9) does not disclose any reasonable basis for ascertaining the market value of the property. Therefore, the same cannot be made basis for ascertaining the same.

19. It is well settled in law that an element of some guess work is always involved while ascertaining the market value of the property, however, the same has to be ascertained by making an assessment by an objective standard. In the instant case, the comparable as well as instances of sale of similar lands in the neighbourhood which are the best evidence for determining the market value of the suit plots at the relevant time are not available. Therefore, it is the duty of this Court to ascertain that market value determined in respect of suit

plots is just and fair. See *Charan Dass vs. Himachal Pradesh Housing Urban Development Authority and others* (2010) 13 SCC 398. It well settled in law that court can take judicial notice of the fact that there is steady increase in the market value of the land and the Supreme Court has approved 10% increase per year in the market value of immovable property. [See, *Sardar Jogendra Singh vs. State of U.P.* (2008) 17 SCC 133), and *Ahasanvar Hoda vs. State of Bihar* (2013) 14 SCC 59].

20. The sale deed (Ex.D/6) dated 17.6.1999 is on record by which a plot situate in same colony in which suit plots are situate, has been sold at the rate of Rs.35/- per square feet. However, it is pertinent to mention that from recitals of sale deed, it is evident that sale consideration was fixed on 8.10.1990, i.e., at the time of execution of agreement, at Rs.35/- per square feet and possession was handed over though sale deed was executed on 17.6.1999. The plaintiff had purchased suit plots on 3.3.1989 @ Rs.30/- per square feet. It is also noteworthy that sale deed (Ex.D/6) pertains to a bigger plot, i.e., 7660 square feet, whereas plots of plaintiff are smaller, i.e., 3000 square feet and market value of small residential plot is on higher side. Taking into account the fact that market value of plot in the same locality was Rs.35/- per suare (sic:square) feet in the year 1990 as well as the fact that plot of plaintiff is smaller in area and is capable of fetching higher market price and the fact that Court can take judicial notice of the fact that there is steady increase in the prices of immovable property and there is 10% increase per year in the market value of the immovable property as held by the Supreme Court in *Sardar Jogendra Singh* (supra), the market value of suit plots can safely be fixed at Rs.146/- per square feet in the year 2005.

21. In view of preceding analysis, market value of the suit plots is assessed in July 2005 at the rate of Rs.146/- per square feet which admeasures 3000 square feet, is quantified at Rs.4,38,000/-. The transaction in question is commercial transaction, therefore, in view of law laid down in the case of *Rampur Fertilizer Ltd. vs. Vigyan Chemical Indusieis* (2009) 12 SCC 324, the interest has to be paid on the amount at the rate paid by the banks.

22. We are conscious of the fact that in the preceding paragraph, we have held that market value of the plots has to be ascertained in the year 2005 when the judgment and decree dated 10.4.1997 passed by the trial Court in previous round of litigation had attained finality. However, the instant case is not a case of compensation but a case of damages. The interest on the market

value of the plots is being awarded by way of damages. The distinction between the term "compensation" and "damages" is well established. The term "compensation" as stated in the Oxford Dictionary signifies that which is given in recompense, an equivalent rendered. "Damages" on the other hand constitute the sum of money, claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money, of something lost or withheld. [See, *Divisional Controller, KSRTC vs. Mahadeva Shetty and another* (2003) 7 SCC 197]. In the backdrop of aforesaid well settled legal position, the claim of the plaintiff for grant of interest has to be tested on the touchstone of the principle, namely, that the person who has broken the contract is not to be exposed to the additional burden by reason of the plaintiff not having done what that he ought to have done as reasonable man. Though the sale deed executed in favour of the plaintiff was declared null and void by judgment and decree dated 10.4.1997, the plaintiff neither demanded the aforesaid amount from the defendants nor filed any suit seeking the relief of damages, in the absence of any order prohibiting him to do so. The plaintiff in previous round of litigation had defended his title and had filed the layout plan approved by Town and Country Planning Authority and the permission granted by the competent authority under the Urban Land (Ceiling and Regulations) Act, 1976 in the previous suit. The plaintiff has also not offered any explanation in the plaint for not having filed the suit immediately after passing of the judgment and decree dated 10.4.1997 except mentioning the fact that appeal was pending against the judgment and decree passed by the trial Court. The plaintiff in para 69 of his cross-examination has admitted that he was placed in possession of the suit plots after execution of the sale deed. In view of preceding analysis, we restrict the claim of the plaintiff for interest at the rate of 9% per annum from 3.3.1989 till 10.4.1997. Therefore, the claim of the plaintiff for interest for a period from 3.3.1989 till 11.7.2005 is negatived.

23. The plaintiff shall also be entitled to refund of the amount of sale consideration of Rs.90000/- along with interest @ 9% per annum from the date 3.3.1989 till actual payment is made in view of indemnity clause with regard to defect of title contained in sale deeds as well as in view of fact that entitlement of plaintiff to same has not been disputed by defendants. The plaintiff shall also be entitled to get Rs.15000/- as cost of litigation. However, the plaintiff is not entitled to receive sum of Rs.10000/- on account of mental agony in view of the law laid down by the Supreme Court in *Gaziabad Development Authority* (supra).

24. The submissions made by learned counsel for appellant in First Appeal No. 225/2011, that since plaintiff was well aware with regard to revised layout of plots in question and sale deeds were executed after obtaining permission of the competent authority, therefore, the agreement is void under Section 20 of the Act, do not appeal to us. In order to attract applicability of Section 20 of the Act, it has to be common mistake of fact of both the parties with regard to vital fact to the agreement, which is not the case in hand. Therefore, decision referred to in the case of *Tarsem Singh* (supra) does not apply to the fact situation of the case, as it pertains to Section 20 of the Act. The decision in the case of *Draupadi Devi* (supra) referred to by learned counsel lays down the proposition that burden to prove damages is on the plaintiff, whereas in the decision relied on in the case of *Jalpaiguri Zilla Parishad* (supra), it has been held that damages can only be given for any loss actually suffered and not for any indirect loss. Similarly, the submission of learned senior counsel for appellant in First Appeal No.187/2012 does not commend to us that market value of suit plots was Rs.3900/- per square feet, as the same is based on guidelines issued by Collector, which is fixed for fiscal purposes and for purposes of stamp duty and cannot be used for determining the market value of the property.

25. In view of preceding analysis, the judgment and decree by the trial Court dated 7.4.2011 passed in Civil Suit No. 1B/2011 is modified to the aforesaid extent. The respondents shall bear the cost of the proceedings. Accordingly, the appeals are disposed of.

Appeal disposed of.

I.L.R. [2016] M.P., 2549
APPELLATE CRIMINAL
Before Mr. Justice Sheel Nagu & Mr. Justice S.K. Palo
Cr.A. No. 572/2004 (Gwalior) decided on 13 March, 2015

RAGHUWAR SINGH @ RAGHUVEER SINGH ...Appellant
Vs.
STATE OF M.P. ...Respondent

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 389 - Suspension of sentence* - Primary factors for consideration enumerated. (Para 12)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 389 – दण्डादेश का निलंबन – विचार हेतु प्राथमिक कारकों को प्रगणित किया गया।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 389 - Suspension of sentence **- Considerations are - The antecedents of convict & whether release of convict would be detrimental to the public interest. (Para 13)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 389 – दण्डादेश का निलंबन – विचारयोग्य बातें हैं – सिद्धदोष व्यक्ति का पूर्ववृत्त एवं क्या सिद्धदोष व्यक्ति को छोड़ा जाना लोक हित के लिए हानिकारक होगा।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 389 - Suspension of sentence **- Substantial part of sentence suffered - No hope of final hearing of appeal in near future - Factors to be considered - Period of custody, post conviction behavior, instances of misuse of bail, age, possibility of final hearing, efforts for final hearing. (Para 18)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 389 – दण्डादेश का निलंबन – दण्डादेश का अधिकांश भाग भुगत लिया गया – निकट भविष्य में अपील की अंतिम सुनवाई की कोई आशा नहीं – कारक जिन पर विचार किया जाना है – निरोध की अवधि, दोषसिद्धि पश्चात् आचरण, जमानत के दुरूपयोग के उदाहरण, आयु, अंतिम सुनवाई की संभावना एवं अंतिम सुनवाई हेतु प्रयास।

D. Criminal Procedure Code, 1973 (2 of 1974), Section 389 - Suspension of sentence - Granted - Ground **- Substantial part of sentence suffered i.e. 12 years - Little possibility of final hearing of appeal in near future - Not misused temporary bail - Absence of criminal antecedents - These factors out-weigh the gravity of offence and the manner of commission of offence. (Paras 25 & 26)**

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 389 – दण्डादेश का निलंबन – स्वीकार किया गया – आधार – दण्डादेश का अधिकांश भाग अर्थात् 12 वर्ष भुगत लिया गया – निकट भविष्य में अपील की अंतिम सुनवाई की सूक्ष्म संभावना – अस्थाई जमानत का दुरूपयोग नहीं – आपराधिक पूर्ववृतों की अनुपस्थिति – ये सभी कारक अपराध की गंभीरता तथा अपराध कारित करने की रीति की तुलना में अधिक महत्वपूर्ण हो जाते हैं।

Cases referred:

(2006) 1 SCC (Cr.) 757, (2012) 5 SCC 752, (2014) 8 SCC 868, 1978

(1) SCC 579, (2000) 4 SCC 178, (1999) 4 SCC 421, (2000) 6 SCC 461, (2002) 9 SCC 364, (2002) 9 SCC 366, (2004) 6 SCC 175, (2004) 7 SCC 638, (2008) 5 SCC 721, (2008) 5 SCC 230, (2009) 3 SCC 767, (1995) 2 SCC 486, (1977) 3 SCC 287, (1998) 7 SCC 392, 12 CB 406, p.415.

Prashant Sharma with *Sarvesh Sharma,* for the appellant.
Neelesh Tomar, P.L. for the respondent/State.
Arun Barua, for the complainant.

ORDER

The Order of the Court was delivered by : **SHEEL NAGU, J. :-** IA. No.2036/2015 filed for urgent hearing of IA No.2388/2014 (repeat application u/S. 389, Cr.P.C.) is considered and allowed for the reasons mentioned therein.

2. I.A.No.2388/2014 repeat application for suspension of jail sentence of sole appellant filed under Section 389 of Cr.P.C., is taken up.

3. The reply filed by the State to I.A. No. 2388/2014 objecting to the prayer for suspension of sentence is also considered.

4. Learned counsel for the appellant relying upon the decision of the Apex Court in the cases of *Kamal v. State of Haryana* reported in (2006) 1 SCC (Cr.) 757, *Fazal v. State of Uttar Pradesh* reported in (2012) 5 SCC 752 and Sunil Kumar v. Vipin Kumar reported in (2014) 8 SCC 868 prays for suspension of sentence of life imprisonment being suffered by the sole appellant on account of the impugned judgment and conviction dated 05.08.2004 in S.T. No. 268/2003 by First Additional Judge to the court of Sessions Judge, Gwalior (M.P.)

5. Learned counsel for the appellant in support of the said prayer raises the following grounds ;

1. The appellant has suffered more than 11 years of rigorous imprisonment as against the life sentence awarded.

2. The appellant has been wrongly convicted and sentenced by incorrect appreciation of facts and circumstances attending the case.

3. The appellant's past conduct has been exemplary for

not having misused the liberty of temporary suspension of the sentence granted earlier on ground of ill-health by orders dated 20.06.2008, 24.04.2009, 24.08.2009 and 20.03.2010.

4. Despite the present appeal being of 2004 vintage and despite directions of this Court for expeditious hearing of this appeal and despite the appellant having made all out efforts to get the appeal heard, the same continues to be pending with no hope of hearing taking place in the near future, since the appeals of the year of 1998 are still pending for consideration.

6. Pertinently, I.A. 2388/2014 is a repeat application for suspension of sentence after rejection of similar applications by order dated 03.02.2012 and 17.05.2013 which were dismissed on merits.

7. This Court refrains from entering into the merits of the allegations found proved against the appellant in view of rejection of earlier bail application for suspension of sentence on merits.

8. The sole question before this Court is as to whether in the attending circumstances as mentioned above, a life convict who has suffered about 11-12 years of rigorous imprisonment can successfully seek suspension of sentence merely on grounds of having undergone substantial period of sentence and there being no possibility of final hearing of the pending appeal.

9. Before answering the above said question, it would be appropriate to consider the earlier verdicts of the Apex Court on the said aspect which are enumerated below ;

In *Kashmira Singh v. State of Punjab* reported in 1977 (4) SCC 291, while contemplating upon the question as to whether the earlier practice, of not suspending the sentence of life convict for offence under Section 302 of IPC, can be departed from or not the Apex Court in sum and substance, held as under ;

1. No practice, howsoever, sanctified by usage and hallowed by time can be allowed to prevail if the same leads to injustice.

2. Every practice of the Court must find its ultimate justification in the interest of justice.

3. Earlier practice of denial of suspension of sentence to a life convict was based on the assumption that the appeal in question shall be disposed of within a reasonable period of time to avoid prolonged post conviction custody.

4. The rationale of this practice can have no application where the Court is unable to dispose of appeals for five/six years.

5. Absence of any provision in the Cr.P.C. to compensate a convict who is ultimately found to be innocent.

6. Keeping the innocent convict under the prolonged custody shakes the confidence of the public in the administration of justice when the convict is found innocent after prolonged post conviction custody.

10. Therefore, the earlier practice of not suspending the sentence can be relaxed when the courts are unable to hear the appeal within reasonable period of time unless cogent grounds to act otherwise are available.

11. The above said view of the Apex Court was followed in *Babu Singh V. State of U.P.*, reported in 1978 (1) SCC 579 and *Shailendra Kumar V. State of Delhi* reported in (2000) 4 SCC 178.

12. The liberal and pro-convict view taken by the Apex Court in the case of *Kashmira Singh* (supra) has crystallized into a more balanced approach in the decisions of *Bhagwan Rama Shinde Gosai and Ors. v. State of Gujrat* reported in (1999) 4 SCC 421, *Akhilesh Kumar v. State of Bihar* reported in (2000) 6 SCC 461, *Vijay Kumar v. Narendra* reported in (2002) 9 SCC 364, *Ramji Prasad v. Rattan Kumar Jaiswal* reported in (2002) 9 SCC 366, *State of Haryana v. Hasmat* reported in (2004) 6 SCC 175, *Kishori Lal v. Rupa* reported in (2004) 7 SCC 638, *State of Maharashtra v. Madhukar Wamanrao Smarth* reported in (2008) 5 SCC 721, *Sidhartha Vashisht v. State (NCT of Dehli)* reported in (2008) 5 SCC 230, *Angana v. State of Rajasthan* reported in (2009) 3 SCC 767, *Sunil Kumar v. Vipin Kumar* reported in (2014) 8 SCC 868 in which following were held to be some of the primary factors to be kept in mind while considering prayer for suspension of sentence in conviction involving grave offences.

1. Nature of accusation.

2. Manner of commission of crime.

3. Gravity of offence.

4. Desirability of release of convict on bail.

5. The convict did not misuse the liberty of bail granted earlier by the trial/Appellate Court.

6. The power of suspension of sentence of offence like murder should be sparingly exercised in exceptional cases.

7. The order of suspension of sentence ought to contain reasons in writing reflecting the consideration of these relevant aspect.

8. The suspension of sentence in serious offences like murder ought not to be granted merely on the ground that an accused was on bail during trial.

13. Apart from the above said relevant consideration elucidated by the Apex Court, this Court is of the considered view that the following considerations should also be taken into account while deciding the question of suspension of sentence of a convict suffering life sentence ;

1. The antecedent of convict, to find out existence/non-existence of criminal proclivity.

2. Where the release of the convict would be detrimental to the public interest.

14. The foundational factual matrix involved herein is that the petitioner has suffered about 11 to 12 years of incarceration. The appellant has not misused the liberty of temporary suspension of sentence granted by this court on grounds of ill health. In this High Court (Gwalior Bench) the criminal appeals of 1998-99 are yet to be heard and therefore there does not appear any possibility of this appeal coming up for final hearing in the near future. It is reflected from the arrest memo dated 13.7. 2003 that the applicant does not have criminal antecedents. The appellant is presently stated to be about 54/ 55 years of age.

15. From the evidence found to be proved prima facie it appears that the appellant has participated in the offence of murder of deceased Hero by repeated assault with knife. Learned counsel for the appellant has attempted to point out certain omissions, contradictions and embellishment in the prosecution story but this court refrains from considering the same since this court intends to decide it on considerations other than merits.

16. Per contra, learned counsel for the State and the victim have objected to the suspension of sentence by contending that similar prayer has earlier been rejected on merits and there is no new circumstance for making the said prayer again much less allowing the same.

17. It is settled proposition of law that an appeal is a continuation of trial and, therefore the conviction, which it challenges, is though binding on the parties, but is not final and remains subject to the appellate order, as and when passed.

18. Therefore while considering the application under Section 389, Cr.P.C. at the initial stage of the appeal, the merits of the findings of the trial Court are seen though perfunctorily to ascertain justifiability of release on bail. However, when substantial part of the sentence is suffered with no foreseeable hope of final hearing in the appeal in near future, the factor of merit involving gravity of offence, nature of commission of offence and quality of evidence on record, takes a backseat and instead, the factors pertaining to the post conviction period, i.e., period of custody, post conviction behaviour, instances of misuse of bail, age, possibility of hearing of the appeal in near future and efforts made by the counsel for convict to get the appeal heard, assume prominence and primacy.

19. When the claim for suspension of sentence raised by the appellant is tested on the principles laid down by the Apex Court, it is seen that 11 to 12 years of custody is suffered by the appellant who has no criminal antecedents. However looking to the fact of nature of offence and the active participation of the appellant in the said crime release of appellant on bail by suspension of sentence may give rise to an apprehension of unleashing of vendetta between the rival parties. The existence of such apprehension cannot be denied, but the emotion of revenge if at all present in all probabilities must have diluted to a considerable extent due to passage of time. The offence was committed some time in July, 2003 whereafter nearly 12 years have goneby. The intensity

of the feeling of animosity between the rival parities must have lost its sting. Time is said to be a big healer. Passage of about 12 long years not only mitigates the feeling of animosity but also gives rise to saner and humane emotions of forgive and forget. Elapse of such long period of time changes the outlook of an individual towards a particular incident howsoever painful it may be. This view has been upheld by the Apex Court in the case of *State of Punjab v. Ajaib Singh* reported in (1995) 2 SCC 486, relevant extract of which is reproduced herein below:-

> *"6. Prior to adjudicating on the rival submissions, it appears necessary to preface it with few observations general in nature but vital according to us. Although crime never dies nor there should be any sympathy for the criminal, yet human factors play an important role and reflect advertently or inadvertently in the decision-making process. In this appeal there is a time-lag of more than eighteen years from the date of the incident and nearly fifteen years from the date of acquittal and its hearing. By any standard it is shocking. And this has been aggravated by still more shocking behaviour of the Government which shall be adverted to later. Speedy trial, early hearing and quick disposal are sine qua non of criminal jurisprudence. In some countries like England days are fixed statutorily for trial of cases. Keeping an accused in custody for a day more than it is necessary is constitutionally impermissible and violative of human dignity, freedom of life and liberty. The overcrowded court dockets, the phenomenal rise of public interest litigation, duty to ensure enforcement of fundamental rights undoubtedly keeps this Court under stress and strain. But that cannot be an excuse for keeping the sword of Damocles hanging on the accused for an indefinite period of time. It does not do any credit rather makes one sad. If the accused is not granted bail and serves out the sentence then the appeal is rendered academic for all practical purposes. And the right to establish innocence fades away in lack of enthusiasm and interest. If he is granted bail then long delay may give rise to humane considerations. Time heals the gravest scar and mitigates*

deepest injury suffered physically, mentally and emotionally. Therefore, if the courts have been rendered helpless and the exasperating delay is threatening to eat away the system then the Government may consider either to increase the strength to clear the backlog or devise some mechanism by which criminal appeals pending for more than reasonable time in higher courts should stand disposed of." (emphasized supplied)

20. An appeal of a life convict in custody pending since more than 11 years with no hope of final hearing in the near future, discloses a dismal scenario. If the State cannot provide final hearing of appeals within reasonable time, then State is obliged to create a suitable mechanism, by way of legislation or executive fiat to remove this malady. Such positive step shall repose confidence of the common man in the judicial system. Judiciary is known to be the last resort of the people aggrieved by action/inaction of the legislature and executive. People at large look up to judiciary for justice rendered with promptitude. "Justice delayed is justice denied" is a well known maxim. Even if the appeal of a life convict in custody is allowed at a time when substantial part of sentence is suffered, the justice rendered gets defeated in actuality. The frustration faced by the acquitted, gets accentuated by absence of any compensatory provision in criminal law to indemnify against wrongful confinement and prosecution.

21. Moreover our criminal jurisprudence does not exclude the element of reformation by making it available even to persons convicted of serious offences. The concept of reformatory criminal jurisprudence derives strength from the benign and humane emotion of forgive and forget and the ever present urge of human race to improve itself by making amends and corrective steps to prevent re-occurence of misdemeanor committed earlier.

22. Emphasizing the theory of reformation and rehabilitation in criminal jurisprudence, Justice V.R. Krishna Iyer in the case of *Mohd. Giasuddin v. State of A.P.* reported in (1977) 3 SCC 287, has stressed upon the need for humanitarian grounds to be taken into consideration while sentencing. The punishment inflicted on the criminal should be therapeutic, rather than an 'in terrorem' in nature. Following this view the Apex Court in the case of *State of Gujarat v. Hon'ble High Court of Gujarat* reported in (1998) 7 SCC 392 has observed thus:

28. This is the context to consider whether deterrence is the main objective for punishment. Among the conflicting theories for punishment, modern criminologists are highlighting the reformative effect on the punished criminal as the most germane aspect. Jereme Bentham who propounded the theory of deterrence is now considered as the apostle of a conservative old school of thought. The retributive theory of punishment has waned into a relic of primitivity because civilised society has realised that retribution cannot solve the problem of escalating criminal offences. Crime is now considered to be a problem of social hygiene. That modern diagnosis made by criminologists is now causing a sea change to the whole approach towards crime and punishment. The emphasis involved in punishment has now been transposed from retribution to cure and reform so that the original man, who was mentally healthy, can be recreated from the ailing criminal.

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31. The theory of reformation through punishment is grounded on the sublime philosophy that every man is born good but circumstances transform him into a criminal. The aphorism that "if every saint has a past every sinner has a future" is a tested philosophy concerning human life. V.R. Krishna Iyer, J. has taken pains to ornately fresco the reformative profile of the principles of sentencing in Mohd. Giasuddin v. State of A.P.7 The following passage deserves special mention in this context: (SCC pp. 289-90, para 7)

"If the psychic perspective and the spiritual insight we have tried to project is valid, the police bully and the prison drill cannot 'minister to a mind diseased', nor tone down the tension, release the repression, unbend the perversion, each of which shows up as debased deviance, violent vice and behavioural turpitude. It is a truism, often forgotten in the hidden vendetta in human bosoms, that barbarity breeds barbarity, and injury recoils as injury, so that if healing the mentally or morally maimed or malformed man

(found guilty) is the goal, awakening the inner being, more than torturing through exterior compulsions, holds out better curative hopes."

32. Reformation should hence be the dominant objective of a punishment and during incarceration, every effort should be made to recreate the good man out of a convicted prisoner. An assurance to him that his hard labour would eventually snowball into a handsome saving for his own rehabilitation would help him to get stripped of the moroseness and desperation in his mind while toiling with the rigours of hard labour during the period of his jail life. Thus, reformation and rehabilitation of a prisoner are of great public policy. Hence they serve a public purpose.

33. A reformative approach is now very much intertwined with a rehabilitative aspect to a convicted prisoner. It is hence a reasonable conclusion from the above discussion that a directive from the court under the authority of law to subject a convicted person (who was sentenced to rigorous imprisonment) to compulsory manual labour gets legal protection under the exemption provided in clause (2) of Article 23 of the Constitution because it serves a public purpose.

Similar view has been reiterated in the recent decision of *Gopal Singh v. State of Uttrakhand* reported in (2013) 7 SCC 545, while summarizing the principles for just and proper sentencing.

23. Viewed from a different angle, another reason for suspension of sentence takes shape. The well known maxim *"actus curiae neminem gravabit"* means that the act of the Court shall prejudice none. This maxim *"is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law" (per CRESSWELL J. in Freeman v. Tranah, 12 CB 406, p.415).*

24. If this principle is applied to the facts of this case, it comes to light that the reason for delayed disposal of appeal is attributed to the systematical failure of inadequate Judges to deal with the huge backlog and flood of fresh

filing. This failure ought not to visit anyone, including a convict in custody, with adverse consequences. True it is that certain fundamental rights of a convict suffer abridgement during custody, but one such fundamental right very much available, is the right to expeditious disposal of his appeal enshrined in Article 21 of the Constitution of India, which mandates right to speedy trial/appeal as a concomitant of right to life. Elucidating the maxim *"actus curiae neminem gravabit"* the Apex Court held thus:-

> In *Anil Rai v. State of Bihar* reported in (2001) 7 SCC 318, para 3. *any procedure or course of action which does not ensure a reasonable quick adjudication has been termed to be unjust. Such a course is contrary to the maxim 'actus curiae neminem gravabit' that an act of the Court shall prejudice none.*
>
> In *Gaya Prasad v. Pradeep Shrivastava* reported in (2001) 2 SCC 604, para 15 *on the basis of the maxim, it was observed that the judicial tardiness for which our system has acquired notoriety, causes the lis to creep through the line for long, long years from the start to the ultimate termini, is a malady afflicting the system. During this long interval many-many events are bound to take place which might happen in relation to the parties as well as the subject matter of this lis. If the cause of action is to be submerged in such subsequent events on account of malady of the system it shatters the confidence of the litigant, despite the impairment already caused.*

25. In view of the above and looking to the past conduct of the petitioner where he has not misused the liberty of temporary suspension and the fact of the appellant having suffered substantial period of sentence ie. about 12 years with little possibility of this appeal being decided finally in the near future, this court is inclined to allow IA. 2388/2014.

26. It is pertinent to observe that the factor of prolonged post-conviction incarceration, bleak possibility of this appeal coming up for hearing in the near future and the appellant not having misused the liberty of temporary bail granted earlier and absence of criminal antecedents, outweigh the gravity of offence and the manner of commission of the offence.

27. This court is alive to the blemish and embarrassment that it may face, if the appellant is ultimately found to be innocent, especially in the absence of any mechanism in the Cr.P.C. for compensating a convict who is found innocent after having suffered substantial period of sentence.

28. Accordingly, I.A.No.2388/2014 is allowed.

29. It is directed that execution of remaining part of jail sentence of the appellant shall remain suspended till final decision of the present appeal on his executing bail bond in the sum of Rs. 1,00,000/- (One Lac Only) two solvent sureties in the like amount to the satisfaction of concerned CJM. Appellant is directed to appear before the Principal Registrar of this Court on 06-04-2015 and on such other dates as may be fixed by the Registry for his appearance during pendency of the present appeal.

30. Record is available.

31. List for final hearing in due course.

Order accordingly.

I.L.R. [2016] M.P., 2561
CRIMINAL REVISION
Before Mr. Justice Rajendra Menon &
Mr. Justice Sushil Kumar Palo
Cr.R. No. 2964/2015 (Jabalpur) decided on 11 January, 2016

V.K. SHARMA ...Applicant
Vs.
STATE OF M.P. & anr. ...Non-applicants

Prevention of Corruption Act (49 of 1988), Sections 7 & 13(1)(d) and Criminal Procedure Code, 1973 (2 of 1974), Sections 397 & 482 - High Court's powers of revision - Quashment of charges - Reappreciation of evidence - Impermissibility **- Held - High Court should not unduly interfere - No meticulous examination is needed for considering whether the case would end in conviction or not, at the stage of framing of charge or quashing of charge - There is sufficient prima facie evidence to frame charge - Order of the court below does not suffer from any irregularity, illegality or perversity - Not called for any interference - Petition dismissed. (Paras 24, 26 & 27)**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7 व 13(1)(डी) एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 व 482 – उच्च न्यायालय की पुनरीक्षण की शक्तियाँ – आरोपों का अभिखण्डन – साक्ष्य का पुनर्विवेचन – अननुज्ञेयता – अभिनिर्धारित – उच्च न्यायालय को असम्यक् रूप से हस्तक्षेप नहीं करना चाहिए – आरोप के विरचन अथवा अभिखण्डन के प्रक्रम पर इस बात पर विचार हेतु सूक्ष्म परीक्षण किया जाना आवश्यक नहीं है कि क्या प्रकरण का अंत दोषसिद्धि में होगा अथवा नहीं – आरोप विरचित किये जाने हेतु पर्याप्त प्रथम दृष्ट्या साक्ष्य उपलब्ध है – निचले न्यायालय का आदेश किसी अनियमितता, अवैधता अथवा प्रतिकूलता से ग्रसित नहीं – किसी हस्तक्षेप की आवश्यकता नहीं – याचिका खारिज।

Cases referred:

AIR 1966 SC 911, AIR 2010 SC 201, (1979) 4 SCC 725, 2006 Cri.L.J. 804 (SC), AIR 1976 SC 1497, 2005 (8) SCALE 266, AIR 2007 SC 3213, (2012) 7 SCC 80, (2001) 1 SCC 691, (2010) 1 SCC 322, (2014) 10 SCC 473, (2015) 3 SCC 13, (1992) 1 SCC 222, AIR 2007 SC 4789, 2007 Cr.L.J. 2919, (2002) 2 SCC 135, (2010) 2 Crimes 1 SC, (2012) 9 SCC 512, (2013) 3 SCC 330, (2014) 14 SCC 401, (2015) 2 SCC 417, (2012) 1 SCC 680.

A.M. Trivedi with *Ashish Trivedi,* for the applicant.
Pankaj Dubey, for the non-applicant No. 1/SPE (Lokayukta).

O R D E R

The Order of the Court was delivered by :
S.K. Palo, J. :- The petitioner is the accused in Special Case No. 4/2015 *(State Vs. Vishnu Kumar Sharma)* pending before the Court of Special Judge (under Prevention of Corruption Act), Balaghat, has preferred this revision under Section 397 of the Cr.P.C. challenging the validity, legality and propriety of order dated 13.8.2015, whereby the learned trial Court has framed charge under Section 7 read with Section 13(1)(d) of the Prevention of Corruption Act, 1988.

2. The facts which are requisite to be stated for disposal of this revision are, that the complainant Ratanlal Lanjewar, Secretary, Gram Panchayat Hatta, Janpad Panchayat Baihar, District Balaghat moved an application to the Lokayukt Police, Jabalpur stating that arrears of Rs. 40,000/- was to be paid to him from the office of Vishnu Kumar Sharma, the accused in the present case, the Chief Executive Officer, Janpad Panchayat, Baihar. The complainant

was given a voice recorder for recording the conversation between him and the accused and constable Jaharsingh was deputed to accompany the complainant. On 28.3.2014, the complainant Ratanlal Lanjewar had a conversation with the accused in which the accused asked to pay Rs. 3000/-. At 4.00 p.m. office of the Lokayukt Police was intimated telephonically about the conversation. A trap was organised. On 29.3.2014, the trap party along with witnesses, reached to Haweli Resort Mochcha where the complainant was waiting for them. After hearing the recorded conversation, the trap party noted down the numbers of the currency notes given by the complainant and phenolphthalein powder was used on the currency notes. After instructing the complainant, he was sent for delivery of the said amount along with constable Vishnu Kumar Sharma and Mohar Bharti. When the currency notes were delivered and signal was given, the trap party entered into the room and caught the accused Vishnu kumar Sharma. When his hands were washed the solution become colored. The number of the currency notes were tallied. Memorandum of the trap was drawn. Crime No.135/2014 has been registered under Section 7 read with Section 13(2) of the Prevention of Corruption Act, 1988.

3. After filing of the charge sheet, a petition under Section 482 of Cr.P.C. (as MJC No.870/2014) was moved by the accused. The same was permitted to be withdrawn with liberty to the petitioner to raise objections at the time of framing of charges before the trial Court..

4. Before the learned trial Court, the petitioner raised objections. The same was dealt with in the impugned order dated 13.8.2015 and the learned trial Court held that on the basis of the prosecution documents there is sufficient ground for framing of charges against the petitioner.

5. Aggrieved by this, the petitioner has preferred this revision on several grounds. It is contended that while framing the charge, the learned Special Judge over looked the facts and documents in regard to the innocence of the petitioner. There was no demand nor acceptance of any gratification. The complainant, because of animosity and ill-will, has implicated the accused as the accused refused to buckle under the pressure of the complainant for exonerating him from charge of financial irregularities and recovery of the amount to the tune of Rs.8,67,129/-. The complainant with an ulterior motive has falsely implicated the accused/applicant. It was also contended that the departmental inquiry which was being conducted by the applicant, was concluded on 24.3.2014 whereas the complaint to the Lokayukta was made

on 27.3.2014 and the alleged trap was conducted on 29.3.2014.

6. It is further contended that the arrears of the complainant, was disbursed to him along with the salary of other persons on 20.3.2014, therefore, there was no amount due to the complainant on the date of trap. Hence, there was no cause of action arisen for the complainant of non-payment of arrears.

7. Learned counsel for the petitioner referring several citations strenuously argued at length and contended that the learned trial Court erred in framing charge, over looking the factual scenario of the case and did not consider the defence version of the story.

8. We have given our thoughtful consideration on the submissions made by the petitioner. While considering the submissions it will be appropriate to keep in mind that a conversation has been recorded before the trap was conducted, in which an amount of Rs.3000/- was settled to be given to the accused. We cannot lost sight of the fact that the amount of arrears was paid to the complainant before the complaint was made i.e. on 27.3.2014 whether the payment of arrears was made and it was known to him is a fact to be established after recording evidence. Otherwise also, it would deem to be illegal gratification if the payment is made after the arrears is disbursed or received by the accused as consideration for showing such official favour.

9. Section 20 of the Prevention of Corruption Act, 1988 entails the Trial Court to "presume", where the public servant accepts gratification. We may point out that the expressions "may presume" and "shall presume" are defined in Section 4 of the Evidence Act, 1872. The presumption falling under the former category are compendiously known as "factual presumptions" or "discretionary presumptions" and those filling under the later are "legal presumptions" or "compulsory presumptions". When the expression "shall presume" is employed in Section 20(1) of the Act, it must have same import of compulsion.

10. The accused has received gratification as a motive or reward for doing or forebearing to do any official act etc, if the condition envisaged in the former part of the section is satisfied. The only condition for drawing such a legal presumption under Section 20 is that during trial it should be proved that the accused has accepted or agreed to accept any gratification. It can only be ascertained after adducing evidence. At this stage, it would be premature to draw any conclusion in this regard. Unless the "presumption" is disproved or

dispelled or rebutted, the Court can treat the presumption as tantamounting to 'proof'.

11. As regard the admissibility of electronic record certificates have been issued by the concern authority. The validity of which can only be ascertained after adducing the evidence.

12. Learned counsel for the petitioner has placed reliance on number of the citations namely: *Thakur Ram Vs. State of Bihar*, AIR 1966 SC 911, *M.N. Ojha Vs. Alok Kumar Srivastav,* AIR 2010 SC 201 which relates to petitions under Section 482 of Cr.P.C.

13. Learned counsel for the petitioner also relied on *Suraj Mal Vs. State (Delhi Administration)* reported in {(1979) 4 SCC 725}, *T. Subramanian Vs. The State of Tamilnadu,* reported in {2006 Cri.L.J.804 (SC)} , *Chaturdas Bhagwandas Patel Vs. the State of Gujrat*, AIR 1976 SC 1497, *State through Inspector of Police Andhara (sic:Andhra) Pradesh Vs. K. Narasimhachary,* 2005(8) SCALE 266, *Ganpati Sánya Naik Vs. State of Karnataka,* AIR 2007 SC 3213, *Narendra Champaklal Trivedi Vs. State of Gujraj (sic:Gujrat),* (2012) 7 SCC 80, *M. Narsinga Rao Vs. State of A.P.*, (2001) 1 SCC 691 and *Parminder Kau Vs. State of UP,* (2010) 1 SCC 322.

14. All these cases related to discussion of evidence on the basis of which it has been held that the accused were falsely implicated but in the present case, the evidence is yet to be recorded.

15. Counsel for the petitioner also relied on *Anvar P.V. Vs. P.K. Basheer,* (2014) 10 SCC 473 which relates to the electronic evidence which depends on the satisfaction of the four conditions enumerated in Section 65-B(2) of the Evidence Act.

16. Learned counsel for the petitioner also placed reliance on *Sanjay Singh Ramarao Chavan Vs. Dattatray Gulaprao Phalke*, (2015) 3 SCC 13, *State of Bihar Vs. PP. Sharma,* (1992) 1 SCC 222, which relate to the revisional jurisdication (sic:jurisdiction) of the Court and the liberty of a citizen. The conversation is inaudible or not can only be ascertained when it will be examined by the Court. As regarding the deprivation of personal liberty, in the present case the prosecution has acted as per the procedure prescribed in the Cr.P.C. and the Evidence Act. Therefore, at this moment it cannot be termed as right of the personal liberty of the applicant is infringed.

17. Counsel for the petitioner has also placed reliance on *V.Venkata Subbarao Vs. State*, AIR 2007 SC 4789 in which the Hon'ble Supreme Court has held that, in the absence of proof of demand, the question for raising the presumption could not arise which again can only be ascertained after evidence is adduced. In *T. Subramanian Vs. The State of Tamilnadu,* 2006 Cri.L.J.804 relied by learned counsel for the petitioner, Hon'ble the Apex Court after evaluating the evidence of the prosecution witnesses observed that the circumstances raises serious doubt about the amount having been received by the accused by illegal gratification. In the present contest, it would be appropriate to observe that evidence is yet to begin.

18. Learned counsel for the petitioner has also placed reliance on *State of M.P. Vs. Anil Kumar Verma,* 2007 Cr.L.J.2919 in which the Hon'ble Apex Court has expressed its opinion on the basis of the evidence, therefore, these citations are of no avail to the petitioner at this stage.

19. It would be appropriate to mention here that at the time of framing of charge, the Court has to ascertain whether a prima facie case has been made out against the accused or not. The Court while considering the question of framing of charge has the undoubted power to shift and weigh the evidence for the limited purpose of finding out whether the prima facie case has been made against the accused/petitioner, where the material placed before the Court disclose grave suspicion against the accused which has not been properly explained. The court is fully justified in framing the charge.

20. In the case of *Dilawar Balu Kurane Vs. State of Maharashtra*, (2002) 2 SCC 135, the Hon'ble Supreme Court has observed so. The same has been relied by the learned counsel for the petitioner. In the case of *P. Vijayan Vs. State of Kerala* (2010) 2 Crimes 1 SC, the Hon'ble Apex Court has pronounced that when two views are possible and one of them give rise to suspicion only as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused but the Hon'ble Supreme Court has further made it clear that in assessing this fact, it is not necessary for the Court to enter a weighing and balancing of evidence and probabilities which is really the function of the Court, after the trial starts.

21. In *C.B.I. Vs. K. Narayan Rao* (2012) 9 SCC 512, the Hon'ble Apex Court interpreting Sections 227 and 228 of the Cr.P.C. has relied on 2010 (2) Crimes 1 SC (supra) and opined that in assessing the fact it is not necessary

to enter into the pros and cons of the matter or into a weighing and balancing of the evidence and probabilities which is really the function of the Court after trial starts. In the present case, the evidence is yet to be recorded.

22. Learned counsel for the petitioner placed reliance on the cases of *Rajiv Thapar Vs. Madan Lal Kapoor,* (2013) 3 SCC 330, *L. Krishna Reddy Vs. State* (2014) 14 SCC 401 and *State Vs. A.Arun Kumar,* (2015) 2 SCC 417 which relate to the extraordinary jurisdiction of the Court under Section 482 of Cr.P.C, therefore, are not of any avail to the petitioner.

23. In the case of *Ashish Chadha Vs. Asha Kumari & another,* (2012) 1 SCC 680, the Hon'ble Apex Court has opined as under:

> *"C. Criminal Procedure Code, 1973 -Ss.401 and 482- High Court's powers of revision - Quashment of charges - Reappreciation of evidence - Impermissiblity - Held, it is trial Court which has to decide whether evidence on record is sufficient to make out a prima facie case against accused to frame charges against him."*

24. One of the principle of revision is that the High Court should not unduly interfere. No meticulous examination is needed for considering whether the case would end in conviction or not, at the stage of framing of charge or quashing of charge.

25. At this stage, the Court has to record or to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence.

26. In the present case, in our considered opinion, there is sufficient prima facie evidence to frame charge. The order of the Court below does not suffer from any irregularity, illegality or perversity. Hence is not called for any interference.

27. In the above circumstances, we find that the petition sans merit and is therefore dismissed.

Revision dismissed.

I.L.R. [2016] M.P., 2568
CRIMINAL REVISION
Before Mr. Justice Atul Sreedharan
Cr.R. No. 2143/2015 (Jabalpur) decided on 5 May, 2016

RAMSWAROOP & ors. ...Applicants
Vs.
STATE OF M.P. & anr. ...Non-applicants

Penal Code (45 of 1860), Sections 306 & 498-A and Criminal Procedure Code, 1973 (2 of 1974), Sections 397 & 401 - **Revision against framing of charge u/S 306 and 498-A of the IPC on the ground that deceased has consumed poison on a minor incident of not being allowed to go alongwith her brother - Ingredients of Section 107 of IPC are not satisfied - Therefore, offence is not made out - Held - There are at least 3 witnesses who have alleged that the deceased was beaten by the applicants - Whether the said allegations are true or false or whether not allowing the deceased to go with her brother was the last straw that broke the camel's back or whether the deceased was hypersensitive, can only be deduced in trial - There is no illegality or perversity in the impugned order - Application is dismissed. (Paras 18 & 19)**

दण्ड संहिता (1860 का 45), धाराएँ 306 व 498–ए एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 व 401 – भा.दं.सं. की धारा 306 एवं 498–ए के अंतर्गत विरचित आरोपों के विरूद्ध पुनरीक्षण इस आधार पर प्रस्तुत कि मृतिका को मात्र उसके भाई के साथ न जाने देने की तुच्छ सी घटना पर से उसने जहर पी लिया – भा0दं0सं0 की धारा 107 के अवयवों की संतुष्टि नहीं – इसलिए, अपराध नहीं बनता है – अभिनिर्धारित – कम से कम तीन गवाहों ने यह अभिकथन किया है कि आवेदकगण द्वारा मृतिका को पीटा जाता था – क्या उक्त आक्षेप सही हैं अथवा गलत या क्या मृतिका को उसके भाई के साथ न जाने देना उस अंतिम चोट की तरह था जिससे उसकी सहनशीलता समाप्त हो गई या फिर मृतिका अत्यधिक संवेदनशील थी, उक्त तथ्य केवल विचारण के समय ही निष्कर्षित किये जा सकते हैं – प्रश्नगत आदेश में कोई अवैधता अथवा प्रतिकूलता नहीं है – आवेदन खारिज।

Cases referred:

(2010) 12 SCC 190, 1995 MPLJ 458, (2010) 8 SCC 628, (2010) 1 SCC 750, (2001) 9 SCC 618, (2011) 3 SCC 626, (2006) 1 SCC 368, 2013 (3) MPLJ 126, AIR 1979 SC 366 & 1979 Cri.L.J. 154.

Sankalp Kochar, for the applicants.
R.S. Shukla, P. L. for the non-applicant No. 1/State.

JUDGMENT

A. SREEDHARAN, J. :- The Petitioners have filed the instant Criminal Revision impugning thereby the validity of order dated 09/07/15 passed by the Court of the Ld. Additional Sessions Judge, Begumganj, District Raisen, by which the Trial Court, upon examining the charge-sheet along with the material on record, arrived at the opinion that there was adequate material to frame charges against the Petitioners herein, who are the husband, mother in law and father in law of the deceased, for offences punishable u/ss. 306 and 498-A of the IPC.

2. An FIR, being Crime No. 359/14 dated 28/08/14 was registered at P.S. Gairatganj against the Petitioners herein u/ss. 306 and 498-A IPC. The same was registered on the suicide by one Mulayam Bai, the wife of the Petitioner No.1 and the daughter in law of the Petitioners 2 and 3, wherein it was alleged that the Petitioners had troubled the deceased and had treated her with physical and mental cruelty on account of which she committed suicide on 18/08/14.

3. Mr. Sankalp Kochar, Ld. Counsel on behalf of the Petitioners has stridently argued that even a bare perusal of the charge-sheet and particularly, the statement of Golu@Gajraj, who is the brother of the deceased, it is clear beyond doubt that the deceased had consumed poison on a minor incident of not being allowed to go along with her brother on 18/08/14. Thus, the Trial Court gravely erred in framing charges against the Petitioners in the absence of material to substantiate such charges. The Ld. Counsel for the Petitioners has cited several judgments of the Supreme Court and this Court in his endeavor to establish that the ingredients of abetment, as laid out in section 107 IPC, were not fulfilled by the allegations leveled against the Petitioners herein by the Complainant and the Witnesses and therefore, the offence u/s. 306 IPC could not have been pinned on the Petitioners without their action fulfilling the requirements of section 107 IPC.

4. The first judgment cited by the Ld. Counsel for the Petitioners is *S.S. Chheena Vs. Vijay Kumar Mahajan and Others* – (2010) 12 SCC 190. In this case, the appellant before the Supreme Court was a security officer at the Guru Nanak Dev University at Amritsar. Charges were framed against him

u/s. 306 IPC by the Court of the Additional Sessions Judge, Amritsar. The Appellant was an enquiry officer in a case related to the theft of a mobile in which the suspect committed suicide by jumping in front of a running train. The deceased had left behind a suicide note in which had indicted another person by the name of Harminder Singh for having framed the deceased. The suicide note only refers to the Petitioner S.S. Chhenna as the person conducting the enquiry. It is relevant to mention that S.S Chhenna was not named in the FIR and was ultimately roped in as an accused on the basis of a complaint case filed by the father of the deceased and in due course, charges were framed against him u/s. 306 IPC. The criminal revision preferred by the Petitioner before the High Court was also dismissed. The Supreme Court, after discussing the ambit and scope of "Abetment" u/s. 107 IPC arrives at the finding that the deceased in that case was hypersensitive and that no conviction of the Petitioner could be affected on the basis of material on record and thereby quashed the proceedings against the Petitioner.

5. Thereafter, the Ld. Counsel for the Petitioner has cited the judgment of the Supreme Court in *Vedprakash Tarachand Bhaiji Vs. State of Madhya Pradesh* – 1995 MPLJ 458, this was a case where the Petitioner was being prosecuted for an offence under s. 306 IPC for having abetted the suicide of one Ramesh Kumar Sadholia to whom the Petitioner Vedprakash had loaned money and was now demanding the repayment of the same which is said to have bordered on harassment and undue pressure on the deceased who is said to have committed suicide by consuming poison and left behind a suicide note holding the Petitioner and others responsible for his death and so the Trial Court framed charges against the Petitioner Vedprakash who then filed a criminal revision before this Court in which the abovesaid order was passed. This Court, after referring to various cases arrived at the finding in paragraph 15 that no case was made out for the alleged commission of an offence punishable under section 306 IPC. In the process, this Court also held that the victim had an "escapist attitude" and he committed suicide in order to put the Petitioner Vedprakash in legal difficulties.

6. In *Madan Mohan Singh Vs. State of Gujarat* – (2010) 8 SCC 628, the Petitioner was being prosecuted for offences punishable u/s. 306 and 294(b) IPC and upon the dismissal of his petition under section 482 Cr.P.C, approached the Supreme Court in which the abovesaid order was passed. The Petitioner Madan Mohan Singh is alleged to have made life miserable for

his driver, Deepakbhai Krishanlal Joshi, who is said to have committed suicide and left behind a suicide note in which he has blamed his act of committing suicide on the highhandedness of the Petitioner Madan Mohan Singh. While quashing the case against Madan Mohan Singh, the Supreme Court in paragraph 11 arrived at the finding that it cannot be said that the Petitioner had ever intended that the deceased should commit suicide.

7. The Supreme Court in *Gangula Mohan Reddy Vs State of Andhra Pradesh* – (2010) 1 SCC 750, yet again examined the ambit and scope of "Instigation" as enshrined in section 107 IPC in the backdrop of suicide by a labourer working for the appellant. The labourer had consumed pesticide and ended his life as he could not bear the allegation of theft levelled upon him by his employer, Gangula Mohan Reddy. The appellant was convicted by the Trial Court and the same was upheld by the High Court on appeal. In paragraph 20 of the said judgment, the Supreme Court relied upon the case of *Ramesh Kumar Vs. State of Chhattisgarh* (2001) 9 SCC 618, where the Supreme Court laid down the meaning of instigation to mean "goad, urge forward, provoke, incite or encourage to do an act" and thereafter came to the conclusion that the conviction of the appellant was misplaced as the evidence on record did not reveal that the actions of the appellant were of such nature so as to fit within the meaning of abetment by instigation and so acquitted the appellant.

8. The last case relied upon by the Ld. Counsel for the Petitioners is *M.Mohan Vs. State represented by the Deputy Superintendent of Police* – (2011) 3 SCC 626, which was a case of a housewife committing suicide on account of feeling slighted by an instance where the deceased and her husband were asked to travel by public transport and were not allowed to travel by the Qualis car of her brother in law, the appellant Mohan, on a trip to the theme park at Madurai from Karaikudi in Tamil Nadu. It was alleged that the wife of Mohan had told the deceased Kamatchi that if she wanted to travel by car she should have got one from her father. This taunt is said to have propelled the deceased to take the extreme step. The parents of the deceased had informed the police that it was on account of the taunts of Easwari (wife of the deceased's brother in law) that their daughter committed suicide. The police however roped in the appellant and his parents also, notwithstanding the fact that nothing overt was attributed to them. In a petition under s.482 Cr.P.C before the High Court, proceedings u/s. 304-B and 498-A were quashed but

the charge u/s. 306 IPC was retained and so the appeal to the Supreme Court. The Supreme Court, in paragraph 48, arrived at the finding that the deceased was undoubtedly hypersensitive to ordinary petulance, discord and differences which happen in our day-to-day life" and in paragraph 49 the Supreme Court finds that the appellants were not even remotely connected with the offence under section 306 IPC and quashed the charges under Section 306 IPC against the appellants.

9. Ld. Counsel for the State Mr. R.S. Shukla has on the other hand supported the impugned order on the grounds that there is adequate material on record to frame charges and that the contentions of the Petitioners have to be tested during trial.

10. The Ld. Counsel for the Petitioners has relied upon the statement of Golu@Gajraj under Section 161 Cr.P.C, who is the brother of the deceased to show that the deceased had done the unthinkable on a very trivial issue as she was not allowed to go with her brother on 18/08/14 by the Petitioner No.1 who told the deceased that she was free to go if she wanted to but he will not let the children go along with her. On account of this, the deceased was said to have committed suicide the same evening. The witness also states that there were marks of beatings on the back of the deceased. The Counsel for the Petitioners has stated that this observation is negated by the inquest report and the postmortem report which record that there were no external injuries on the deceased. This witness states that the Petitioners herein used to beat the deceased and used to heap mental and physical torture on the deceased. The allegations by this witness relating to mental and physical torture of the deceased by the Petitioners herein are omnibus in nature and are not in relation to time. The Section 161 statement of the maternal grandfather of the deceased categorically states that the Petitioners herein did not let the deceased go with her brother to her parental home and it is on account of this that the deceased committed suicide by consuming a poisonous substance.

11. The 161 statement of Bhagwati Bai, the sister of the deceased also gives omnibus allegations of mental and physical torture and mentions that whenever the deceased used to go to her parental home, she used to tell this witness about the beatings inflicted upon her by the Petitioner No.1 and the verbal abuses and criticisms heaped upon her by the Petitioners 2 and 3. However, this witness states specifically to an instance to which she was an eyewitness four months before the incident, when she had gone with others to

the matrimonial house of the deceased, there she saw the Petitioner No.1 beating the deceased in front of her, upon this witness asking the deceased, the deceased is said to have told this witness that the Petitioners regularly beat the deceased and hurled abuses at her and tortured her mentally and physically. Identical allegation is also found in the statement u/s. 161 Cr.P.C of witnesses Shanti Bai, the sister in law of the deceased (brother's wife), of witness Sonu, another sister in law of the deceased (brother's wife) and witness Chunnilal, the father of the deceased, though he states that the incident happened twenty five days before the suicide as opposed to the four months prior date given by the other two witnesses.

12. It is trite law that a judgment, be it of the Supreme Court or of the High Courts, ought not to be understood or interpreted like a statute. A judgment has to be appreciated in the fact circumstances in which it was passed. The adage "one shoe fits all sizes" is never applicable to the law of precedents. The ratio has to be culled from the attendant circumstances in which the judgment was delivered. The Supreme Court in *Union of India and another Vs. Major Bahadur Singh* – (2006) 1 SCC 368, held at paragraph 7 that ***"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes".*** The said judgment was followed by this Court in *Dheer Singh Yadav Vs. State of Madhya Pradesh and Another* – 2013 (3) MPLJ 126, wherein at paragraph 5 it was succinctly held ***".....it is noteworthy that the basic principle to consider the judgment/ precedent is that a judgment has to be examined in the facts and circumstances in which it is passed. This is settled in law that a judgment is an authority on a question which has been decided by it and is not a precedent on something which is logically flowing from it".***

13. The judgments cited on behalf of the Petitioners, though relating to offences under Section 306 and 107 IPC were in cases of 'one off instances' viz., that the impugned acts of abetment were singular instances of alleged abetment on account of which the deceased had committed suicide. The judgment discussed in paragraph 4 supra, related to the deceased committing suicide on account of the humiliation he felt on being charged with the theft of the mobile and the Petitioner before the Supreme Court was charged u/s. 306 IPC being the enquiry officer looking into the charges against the deceased. In the judgment in paragraph 5 supra, the deceased was being pursued allegedly by 'loan sharks' for a loan that he had taken and unable to bear the harassment, he committed suicide and the Petitioner in that case before this Court was one of those who had lent money to the deceased. The judgment discussed in paragraph 6 supra related to a driver committing suicide allegedly on account of the conduct of his employer and where the employer was being tried for an offence u/s. 306 IPC. Quite similar are the instances in the judgment referred to in paragraph 7 supra wherein a labourer is said to have committed suicide on account of the conduct of his employer who suspected him of theft and was allegedly pressuring the deceased to return the stolen property. However, the case referred to in paragraph 8 does bear some semblance to the case at hand. There a housewife committed suicide in her matrimonial home but the act was allegedly caused by a singular instance of taunt by the sister in law of the deceased and further, there was no allegation about the involvement of the Petitioner and yet he was being proceeded against.

14. Abetment can be by instigation, conspiracy or by participation/aiding the act so proscribed. In *Ramesh Kumar Vs. State of Chhattisgarh* – (2001) 9 SCC 618, the Supreme Court held in paragraph 20 ***"Instigation is to goad, urge forward, provoke, incite or encourage to do 'an act'. To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out....."***.

15. Instigation, I feel is also the creation of an environment, apparent or subtle, where the person so instigated is compelled to act in a particular manner on account of such instigation. Instances of instigation or what constitutes instigation can never be straight jacketed and the same will have to be construed

in every case from the attending facts and circumstances that are specific to that case.

16. Cruelty in the matrimonial home, to the extent that it compels a wife to commit suicide, is unique and distinguishable from other instances of abetment to suicide as the same always happens behind closed doors of the matrimonial home. The most credible witnesses of the offence are invariably the perpetrators of the offence. It is practically inconceivable that a newly married bride would maintain a diary noting therein the date and time of instances of cruelty being committed on her and the instances of demand for dowry by the husband and his family members. Likewise, it is equally improbable that the parents and relations of the girl so exposed to cruelty would also meticulously maintain the dates and narratives of the actions by the husband and in laws, amounting to cruelty. No parent would think that their daughter would one day commit suicide on account of cruelty inflicted upon her by the in laws. Therefore, if a case arising from matrimonial cruelty or dowry demand, be it one under Sections 498-A, 306 or 304-B, is to be quashed or the accused discharged, only because it lacks in specificity with relations to date, time and nature of act then a substantial number of the cases relating to 498-A and 306 must be terminated at the very inception. Such cannot be the intent of the various judgments of the Supreme Court.

17. This is not to suggest that the power of discharge cannot be exercised by the Trial Court or the plenary powers vested in this Court under Section 482 can never be exercised in relations to cases under S. 498-A and 306 IPC, but only to caution, that such powers may be exercised only in those exceptional cases where there is no evidence at all against the accused or where the evidence available is no evidence at all in the eyes of the law. At the stage of discharge, the Trial Court only has to see if the evidence on record, uncontroverted, raises a strong suspicion that the accused may have committed the offence. In this regard, the judgment of the Hon'ble Supreme Court in *Union off India Vs. Prafulla Kumar Samal & Anr* – AIR 1979 SC 366 & 1979 Cri.L.J 154 lays down the law with great clarity wherein it held in paragraph 7 that ***"The words 'not sufficient ground for proceeding against the accused' clearly shows that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In***

assessing this fact, it is not necessary for the Court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really his function after the trial starts. A the stage of section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. The sufficiency of ground would take within its fold the nature of evidence recorded by the police or the documents produced before the Court which ex facie discloses that there are suspicious circumstances against the accused so as to frame a charge against him". **Thereafter in paragraph 10 of the same judgment, the Supreme Court lays down:** *"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge: (1) That the Judge while considering the question of framing the charges under Section 227 of the Code, has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. (2) Where the materials placed before the Court discloses a grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial. (3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused. (4) That in exercising his jurisdiction under section 227 of the code the Judge which under the present code is a senior and experienced Court cannot act merely as a post office or mouth piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case so on. This however does not mean that the judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial".*

18. In the specific facts and circumstances of the present case, it must be fairly stated that the evidence on record does not disclose the demand for dowry. The Ld. Counsel for the Petitioners has stated that the deceased committed suicide only over the trivial incident of not being allowed to go with

her brother on the date of the incident. Undoubtedly, that does appear to be the *causa causans*, however, as observed in paragraph 11 supra, there are at least three witnesses who have spoken of beatings being inflicted on a continuous basis upon the deceased by the Petitioners herein, one instance in which the witnesses themselves have seen the Petitioner No.1 beating the deceased and the deceased herself having told the witnesses that all the Petitioners herein beat her and abuse her regularly. Now whether the said allegation is true or false and if true whether the said environment at her matrimonial home was such that the last incident where she was not allowed to go with her brother on account of which the deceased is alleged to have committed suicide, was the last straw that broke the camel's back or whether the same was an instance of the deceased being hypersensitive, as suggested by the Ld. Counsel for the Petitioners, can only be deduced in trial.

19. Under the circumstances, I do not find any illegality or perversity in the impugned order and dismiss this petition. The Trial Court shall proceed with the trial completely uninfluenced by this order, bearing in mind that the observations of this Court on the evidence on record is based on a prima facie appreciation of the same and the same shall not be considered by the Ld. Trial Court while conducting the trial.

Petition dismissed.

I.L.R. [2016] M.P., 2577
CRIMINAL REVISION
Before Mr. Justice Anurag Shrivastava
Cr.R. No. 229/2014 (Jabalpur) decided on 9 May, 2016

SHRISH KUMAR MISHRA ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Penal Code (45 of 1860), Sections 294 & 307 and Criminal Procedure Code, 1973 (2 of 1974), Sections 397 & 401 - Framing of charge - Attempt to murder* - Dispute arose on parking of the car - Driver was asked to remove the car - On intervention of the complainant, applicant started abusing him and he brought a knife from his medical shop and gave knife blow on abdomen of the complainant - Held - Evidence collected by the prosecution *prima facie* establishes that the injury is caused by knife on vital part of the complainant - The strong suspicion arises against**

the applicant for commission of offence u/S 307 of IPC - Trial Judge has rightly framed charge u/S 294 & 307 of the IPC and 25(1-B)(b) of the Arms Act - Revision is dismissed. (Paras 5 & 8)

दण्ड संहिता (1860 का 45), धाराएँ 294 व 307 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 व 401 – आरोप विरचित किया जाना – हत्या का प्रयास – कार खड़ी करने को लेकर विवाद उत्पन्न हुआ – वाहन चालक को कार हटाने हेतु कहा गया – शिकायतकर्ता द्वारा हस्तक्षेप करने पर, आवेदक ने उसे गाली देना शुरू कर दिया एवं अपनी मेडिकल की दुकान से वह एक चाकू लाया और उसने शिकायतकर्ता के पेट पर चाकू से वार किए – अभिनिर्धारित – अभियोजन द्वारा एकत्रित की गई साक्ष्य प्रथम दृष्ट्या यह सिद्ध करती है कि शिकायतकर्ता के महत्वपूर्ण अंग पर चाकू से उपहति कारित की गई है – भा.दं.सं. की धारा 307 के अंतर्गत अपराध कारित करने हेतु आवेदक के विरूद्ध प्रबल संदेह उत्पन्न होता है – विचारण न्यायाधीश ने भा.दं.सं. की धारा 294 एवं 307 तथा आयुध अधिनियम की धारा 25(1–बी)(बी) के अंतर्गत उचित रूप से आरोप विरचित किए हैं – पुनरीक्षण खारिज।

Cases referred:

AIR 2010 SC 597, AIR 2009 SC 9, AIR 2012 SC 431.

Mahesh Prasad Shukla, for the applicant.
Akshay Namdeo, P.L. for the non-applicant/State.

ORDER

ANURAG SHRIVASTAVA, J. :- This revision under Section 397/401 of the Code of Criminal Procedure is directed against the order dated 12.7.2013 passed by the learned Sessions Judge, Singrauli in Sessions Trial No.26/2013, by which the charges under Sections 294 and 307 of the Indian Penal Code and Section 25(1-B)(b) of the Arms Act, have been framed against applicant/ accused.

2. As per the prosecution story, on 22.9.2012 at about 9:30 a.m. in Village Waidhan, complainant Chandrabushan Singh alias Raju Singh, while returning from Singrauli Railway Station stopped his car near the medical store of applicant/accused Shrish Kumar Mishra and went to a fruit juice shop. Meanwhile, the applicant came near the car and told Driver Satish to remove the car, which was parked in front of his medical shop, otherwise he would break the glasses of the car. Hearing this, the complainant came on the spot and tried to intervene into the matter. The applicant got angry and started abusing him, when complainant tried to interrupt him. Thereafter, applicant

went to his shop and brought a knife and in order to kill the complainant stabbed him in his stomach and caused injury. The complainant was taken to nearby Waidhan Hospital, where he was medically examined and as his condition was not stable, he was referred to Nehru Hospital Jayant, where he was admitted. The report of the incident was lodged by the complainant on the same day at Police Station Waidhan. The police registered the offence against the applicant. The complainant was medically examined and after usual investigation, the charge-sheet was filed.

3. It is argued by the learned counsel for the applicant that complainant has not received any grievous injury, but his father is working as Senior Doctor in Waidhan Hospital, therefore, due to his influence the treating doctor in MLC report has described the injury of complainant as dangerous to life. This report is not reliable because subsequently in Nehru Hospital, Jayant, the treating doctor in his report was not able to describe the nature of injury whether it is grievous or not. Therefore, the MLC report of doctor of Waidhan Hospital becomes suspicious. The complainant was discharged from the hospital within one day. Therefore, the injury of complainant seems to be simple in nature. *Prima facie* there is no evidence on record, which shows that the applicant had caused injuries to complainant with intention to kill him.

4. It is also submitted by the learned counsel for the applicant that at the time of the incident complainant party had assaulted the applicant and caused injuries to him in his shop. The applicant lodged the report against the culprits, but it was not registered by the police, then he had made a complaint to the Inspector General of Police, Rewa, against in-activeness of the police and thereafter, on 25.10.2012 the police registered an offence under Sections 294, 323 and 506/34 against the complainant and two other persons. A copy of this first information report is filed as Annexure A-5. Therefore, the report lodged by the complainant becomes suspicious and *prima facie* no case is made out against the applicant under Section 307 of the Indian Penal Code. The learned trial Court has wrongly framed the charge under this section, therefore, the impugned order is liable to be set aside and applicant may be discharged.

5. On perusal of the first information report and other documents relating to the sessions trial *prima facie* it appears that the dispute arose on parking of the car by the complainant, near the shop of applicant. The applicant asked the driver of the car to remove it and some hot talks between them took

place. The complainant tried to intervene there and then the applicant started abusing him and he brought a knife from his medical shop and gave knife blow on abdomen of complainant. The MLC report of this hospital, Annexure A-3, which has been given by the Government Hospital, Waidhan shows - "the injury caused by the pointed and sharp object, dangerous to life." Thereafter, complainant was taken to Northern Coal Fields, Nehru Hospital Jayant, where he was medically examined. The MLC report, Annexure A-4, also confirms an incised wound in right side of abdomen caused by sharp object. Here the doctor has given opinion regarding the nature of injury as - "it may be of grievous nature". Generally in case of stab wound the nature of injury cannot be ascertained by external examination only. It requires internal examination to find out whether any vital organ is affected/damaged or not. Therefore, medical report, Annexure A-4, does not rule out the possibility of grievous injury. Thus, from both the medical reports it appears that the injury was caused by some pointed sharp weapon on the stomach of the complainant. In the first information report, complainant has categorically stated that the applicant caused this injury in order to kill him. The applicant brought the knife from his shop in order to assault the complainant and caused injury on his vital part of the body. A deep stab wound caused on stomach/abdomen is capable of causing death. Hence, *prima facie* it can be inferred that applicant has caused this injury to complainant with intention or knowledge of above facts.

6. The Supreme Court in the case of *Ratan Singh Vs. State of M.P.*, AIR 2010 SC 597 in pars (sic:paras) 6 and 7 has held that :-

> "6.It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The Section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. Therefore, an accused charged under Section 307 IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt.
>
> 7. This position was highlighted in *State of Maharashtra v. Balram Bama Patil and Ors.* (1983 (2) SCC 28) : (AIR 1983 SC305), *Girija Shanker v. State of Uttar Pradesh* (2004 (3)

SCC 793) : (2004 AIR SCW 810), *R. Parkash v. State of Karnataka* (JT 2004 (2) SC348) : (2004 AIR SCW 815) and *State of M. P. v. Saleem alias Chamaru and Anr.* (2005 (5) SCC 554) : (2005 AIR SCW 3511) and, *State of Madhya Pradesh v. Imrat and Anr.*, 2008 (11) SCC 523 : (2008 AIR SCW 4993)"

7. It is settled law that at the stage of framing of charge, the probative value of material on record cannot be gone into. There may be discrepancy regarding time of examination of complainant at both hospitals but it could be explained during trial by prosecution. At this stage, the defence of applicant/accused or the documents relating to counter FIR lodged by applicant cannot be looked into. Hon'ble Supreme Court in the case of *Sanghi Brothers (Indore) Pvt.Ltd. Vs. Sanjay Choudhary,* AIR 2009 SC 9 has held that if there is *prima facie* suspicion about commission of offence and involvement of accused found from evidence collected during investigation then the charge can be framed against the accused. In *Ashish Chaddha Vs. Smt. Asha Kumari,* AIR 2012 SC 431 it is held that High Court in its revisional jurisdiction cannot apprise the evidence. It is the trial court which has to decide whether evidence on record is sufficient to make out a *prima facie* case against the accused so as to frame charge against him. Pertinently, even the trial court cannot conduct roving and fishing inquiry into evidence. It has only to consider whether the evidence collected by the prosecution discloses *prima facie* case against the accused or not.

8. In the present case, perusing evidence collected by prosecution and also considering the injury caused by knife on vital part of the complainant, the strong suspicion arises against the applicant for commission of offence under section 307 of IPC, therefore, the learned Sessions Judge has rightly framed the charge against the applicant under sections 294, 307 of the Indian Penal Code and section 25(1-B)(b) of the Arms Act. There is no illegality in the impugned order.

9. It is also made clear that the observations made in this order regarding facts of the case is not binding upon the trial court.

10. The revision is, therefore, dismissed.

Revision dismissed.

I.L.R. [2016] M.P., 2582

CRIMINAL REFERENCE

Before Mr. Justice Rajendra Menon & Mr. Justice S.K. Palo

Cr.Ref. No. 6/2015 (Jabalpur) decided on 1 February, 2016

IN REFERENCE ...Applicant

Vs.

RAJESH VERMA & anr. ...Non-applicants

(Alongwith Cr.A. No. 2516/2015)

A. Penal Code (45 of 1860), Sections 302/34, 376 D & 201 - Prosecutrix - Aged 10 years - Subjected to rape & murder - Three accused persons - Trial Court - Death sentence - Reference & appeal - Facts - **Prosecutrix visiting shop of one of the co-accused persons for purchasing grocery items - Subjected to gangrape & murder by strangulation through rope - Dead body recovered in a Gunny bag from a well - Circumstantial evidence - Same Gunny bags & rope found from the house of one of the accused persons - Injuries on the body of accused persons found with no explanation - DNA profile from private part of prosecutrix matched up with DNA of all the three accused persons - Evil smell coming out from the wheat straw kept in the house of one of the accused persons where body of the prosecutrix was kept for sometime - Held - Circumstantial evidence is complete in all other hypothesis and it only leads to sole conclusion of guilt of the accused persons - Judgment of conviction pronounced by the Trial Court upheld - Rarest of Rare cases - Parameters - Individual role played by each of the accused persons in the crime is not clear - Sentence of death penalty commuted to life imprisonment - Appeal allowed as above and reference answered accordingly. (Paras 17 to 20 & 26 to 28)**

क. दण्ड संहिता (1860 का 45), धाराएँ 302/34, 376 डी व 201 – अभियोक्त्री – आयु 10 वर्ष – बलात्संग एवं हत्या की गई – तीन अभियुक्तगण – विचारण न्यायालय – मृत्यु दण्डादेश – निर्देश एवं अपील – तथ्य – अभियोक्त्री किराने का सामान खरीदने हेतु सह–अभियुक्तगण में से किसी एक की दुकान पर आई – उसके साथ सामूहिक बलात्संग किया गया तथा रस्सी के द्वारा गला घोंटकर हत्या की गई – शव एक कुएँ से एक टाट के बोरे से बरामद हुआ – परिस्थितिजन्य साक्ष्य – ठीक वैसे ही टाट के बोरे एवं रस्सी अभियुक्तगण में से एक के घर में पाए गए – अभियुक्तगण के शरीर पर चोटें पाई गईं, जिनका कोई स्पष्टीकरण नहीं था

– अभियोक्त्री के निजी भाग से प्राप्त डी.एन.ए. का तीनों अभियुक्तगण के डी.एन.ए. से मिलान होना पाया गया – अभियुक्तगण में से एक के मकान में रखे गेहूं के भूसे में से भयंकर बदबू आ रही थी, जहाँ कि अभियोक्त्री का शव कुछ समय के लिए रखा गया था – अभिनिर्धारित – अन्य समस्त प्रकल्पनाओं में परिस्थितिजन्य साक्ष्य पूर्ण है तथा यह अभियुक्तगण के दोषी होने के एकमात्र निष्कर्ष की ओर ले जाती है – विचारण न्यायालय द्वारा सुनाया गया दोषसिद्धि का निर्णय संपुष्ट – विरल से विरलतम मामले – मापदण्ड – अपराध कारित करने में प्रत्येक अभियुक्त की व्यक्तिगत भूमिका स्पष्ट नहीं – मृत्यु दण्डादेश को आजीवन कारावास में लघुकृत किया गया – उपरोक्तानुसार अपील मंजूर तथा निर्देश तद्नुसार उत्तरित किया गया।

B. Penal Code (45 of 1860), Sections 302/34, 376 D & 201 - Circumstantial evidence - Conviction - **Parameters laid down. (Para 26)**

ख. दण्ड संहिता (1860 का 45), धाराएँ 302/34, 376 डी व 201 – परिस्थितिजन्य साक्ष्य – दोषसिद्धि – मापदण्ड निर्धारित।

Cases referred:

Laws (SC)-2013-4-38, 2012 Legal Eagle (SC) 150, Cr.A. No. 1292/2015 decided on 11.12.2015 (DB), (2013) 7 SCC 263, (1984) 4 SCC 116, (2005) 3 SCC 114, (2001) 2 SCC 28, (2010) 1 SCC 58, (2012) 4 SCC 107, (1998) 3 SCC 625.

Ajay Kumar Shukla, G.A. for the State.

P.K. Mishra, for the non-applicants in Cr.Ref. No. 06/2015 & for the appellants in Cr.A. No. 2516/2015.

JUDGMENT

The Judgment of the Court was delivered by : **S.K. PALO, J.** :- This Criminal Reference No. 06/2015 is listed before this Court against the death penalty with fine of Rs. 2,000 dated 27.08.2015 to each of the appellants imposed by the 1st Additional Session Judge, Panna, District Panna in Session Trial No. 25/2013 recording a finding of guilt against the appellants for offence punishable under Section 302 read with Section 34 I.P.C. The appellants are also convicted under Section 376 (D) IPC and awarded life imprisonment to each convicted persons with fine of Rs. 2,000/-. In default of payment of fine, the appellants are to undergo two months rigorous imprisonment in each of the Section.

2. The appellants are also held guilty under Section 201 of the I.P.C and sentenced to seven years rigorous imprisonment with a fine of Rs. 1,000/- each, in lieu of fine, they are to undergo additional rigorous imprisonment for one month each.

3 Criminal Appeal No. 2516/2015 has been filed by the appellants Rajesh Verma and Ram Sajeevan Verma being aggrieved by the aforesaid judgment, conviction and sentence.

4 As both the cases arise out of the same judgment, involved common issues, they are heard and being decided analogously. The appellants have prayed for allowing the appeal by setting aside the impugned judgment and to acquit them from the charges urging various facts and grounds.

5 The relevant facts in relation to the prosecution case are briefly stated are that on 8.05.2013 at about 9:30 P.M, Kamlesh (PW 3) the father of the victim approached Police Station Saleha and lodged a report to the effect that his daughter aged about ten years is found missing. The Assistant Sub-Inspector Kesari Prasad (PW 11) registered the missing report 0/13 which is Ex. P/5. On 13.05.2013 at about 10:00 a.m, Ram khilawan, (PW 6) a resident of village Jamarai came to the Police Station Saleha and intimated the Police that a gunny bag was seen floating in his well, wherefrom evil smell is coming out. Sub-Inspector M.R. Bagen (PW 22) wrote the information at Sanha No. 396 marked as Ex.P/48. He went to the village to verify the information. He found a body floating in the well. The body was pulled out in presence of Panch witnesses and a panchnama Ex. P/22 was drawn and also prepared a panchnama to the identification of the dead body marked as Ex. P/2 and recovery panchnama Ex. P/7. He also prepared spot map Ex. P/8, drawn a Dehati Nalishi Ex. P/50 and Merg Intimation Ex. P/49. Shri M.R. Bagen (PW 22) sent notice to the witnesses and prepared inquest report Ex. P/4. He also recovered two plastic cement bags, one litre water of the well in a plastic bottle, by drawing Ex. P/23. The body of the victim was sent for postmortem vide Ex. P/51. Dehati merg Ex. P/49 and dehati nalishi P/50 was sent to Police Station Saleha. On the basis of this, ASI Keshari Prasad (PW 11) registered Merg Intimation No. 18/13 Ex. P/24 and registered Crime No. 55/13 on 13.05.2013. A team of doctors comprising Dr. Yogesh Yadav (PW 13), Dr. Smriti Gupta conducted a short post mortem and prepared report Ex. P/33. They examined the dead body, furnished an elaborate post mortem report which is Ex. (P/34). The medical team preserved viscera,

collected femur bone of the left leg, prepared four vaginal slides and handed them to the constable of P.S Saleha. They also handed over the rope and clothes of the victim in sealed condition. These materials were seized by Kesari Prasad (PW 11) SI of Police Station Saleha on 14.05.2013.

6 The birth records of the victim was collected from Govt. Middle School, village Jamrai by the Investigation Officer vide seizure memo Ex. P/29. The statements of the witnesses were recorded during the course of investigation. M.R. Bagen (PW 22) had gone to the house of Dakhhan Verma the father of the accused Rajesh from where he observed evil smell coming out from the straw (fodder) stored in attari (a room in which fodder etc. are kept). Later, it was known that the dead body was allegedly kept there for sometime. He prepared panchnama Ex. P/13 and P/14. Accused persons were arrested on 16.05.2013. Memorandum Ex. P/9 and Ex. P/10 were recorded and plastic cement bag, nylon rope, straw of wheat mixed with gram, terricott pant, terricott shirt were recovered from accused Rajesh. A terricott pant and a shirt were also recovered from accused Ramsajiwan as per seizure memo P/11 and P/12. The accused persons were sent for medical examination. Dr. Yogesh (PW 13) examined them on 16.05.2013 and prepared report Ex. P/35 and P/36. He also prepared semen slides of both the accused persons collecting their underwears and handed them over to the constable in sealed condition. Dr. Mahesh (PW 14) collected the blood samples of the accused persons after preparing identification forms on 16.06.2013 at District Hospital Panna and handed over the same to constable Rajkumar (PW 18). M.R. Bagen (PW 22) seized the blood samples as per Ex. P/47, on production of the same by Rajkumar (PW 18) on the same day.

7 The materials seized from spot, collected from Medical Officer, seized from the accused persons etc in sealed conditions were sent for FSL examination through Superintendent of Police, Panna vide letter Ex. P/40 dated 16.06.2013. After receiving FSL report Ex. P/42, P/43 and P/44 as well as Ex. P/46, the police has filed the charge sheet to set the criminal law in motion.

8 It would be appropriate to mention here that a third accused Manish Verma also said to be responsible for the crime. But Manish having found to be juvenile, charge sheet against him was filed before the Juvenile Justice Board.

9 The learned trial Court after analyzing the evidence held the appellants

guilty and sentenced them as stated above by the impugned judgment.

10 Learned counsel for the appellants has drawn our attention to various provisions and the statements of the prosecutrix witnesses stating that the prosecution has failed to establish the offence. He also referred to case laws of *Tejinder Singh @ Kaka Vs. State of Punjab* reported as Laws (SC)-2013-4-38, *Govindaraju @ Govinda Vs. State* reported in 2012 Legal Eagle (SC) 150 and judgment rendered à co-ordinate Bench of this Court in Criminal Appeal No. 1292/2015 in the case of *Phoolchand Rathore Vs. State of M.P* decided on 11.12.2015.

11 Learned counsel for the appellants has drawn our attention to the statements of the prosecution witnesses and tried to convince us that the whole case is based on circumstantial evidence and the prosecution has failed to prove beyond reasonable doubt the guilt of the accused persons. The seizure memos have not been proved in accordance with the law and the FSL report has been found proved without examining the person who conducted the test. It is strongly contented that the court below has passed its findings on presumptions, surmises and conjectures, therefore, is liable to be set aside. He contended that as there is no direct evidence, the circumstantial evidence should be unimpeachable whereas no such unimpeachable evidence is available on record, therefore, the learned trial Court erred in holding the appellants guilty, is liable to be set aside. The learned counsel for the appellants has also argued that the appellants are young men of tender age and have no criminal record but without considering the above, the learned trial Court has imposed harsh and excessive sentence.

12 The age of the victim plays an important role in a criminal trial. Hon'ble the Supreme Court, in the case of *Ashwani Kuamr (sic:Kumar) Saxena Vs. State of M.P.* 2013, SC 553, has held that in every case concerning a child or juvenile in conflict with law the age determination enquiry shall be conducted by the Court seeking evidence by obtaining (i) matriculation or equivalent certificate if available and in absence whereof (ii) the date of birth certificate from the School "other than a play school" the first attended and in the absence whereof (iii) birth certificate given by a Corporation or a Municipal Authorities or a Panchayat.

13 In the case of *Jarnail Singh Vs. State of Haryana* (2013) 7 SCC 263, Hon'ble Supreme Court has made it clear that Rule 12 of the Juvenile

Justice Act 2002 should be the basis for determination of age of the child victim as well as the child in conflict with law. In scheme contemplated under Rule 12 (b), it is not permissible to determine the age in any other manner. Therefore, the matriculation of equivalent certificate if available can be considered. In these options the date of birth certificate from the school other than a play school, the first attended may be taken into consideration.

14 Vishwanath Pratap Verma (PW 12) is the Headmaster, Government Secondary School, village Jamarai, who has issued the certificate Ex. P/27 on 6.8.2013, on the basis of the admission register of the school. The admission register is maintained by school in its normal course of business. This register Article 1 and Ex. P/28, is very relevant in this regard. Therefore, when this register is available, the date of birth of the victim may be safely held as entered in the record Ex. P/28, in which the date of birth of the deceased victim is mentioned as 02.07.2003. The incident took place on 08.05.2013, therefore, on the date of incident the exact age of the victim was ten years, ten months and seven days. Therefore, the learned trial Court has rightly held the victims' age as below ten years.

15 It would be essential to examine the circumstances which allegedly constituted the crime. It also indicates that the deceased victim girl used to visit the shop of accused Rajesh Verma to bring groceries and used to visit the house of accused Ramsajeevan for watching television, as has been stated by Rajkumari (PW 2). The dead body has been recovered from the well, which was identified by Heeralal (PW 4) the grandfather of the victim and mother of the deceased Rajkumari (PW 2). It could not have been an accidental death because the dead body was tied by nylon rope at the trunk and a thin rope of about 49 c.m was tied at the neck gave ligature mark.

16 The medical Officer Dr. Yogesh Yadav (PW 13) who performed the post mortem of the deceased has opined that deceased has undergone sexual assault. In the short DNA report, Ex. P/33, Dr. Yogesh Yadav and Dr. Smriti Gupta have opined that the deceased has undergone sexual assault. The vaginal walls separated about three fingers size. The interior and posterior fornices ruptured. In the post mortem report Ex. P/36 also it was noted that vaginal introitus widely separated. Interior and posterior walls widely separated and thigh men (sic:hymen) completely torn. Therefore, it seems that she had undergone sexual assault. The most probable cause of death was asphyxia due to strangulation. The viscera material was preserved and femur bone of

leg was also kept for diatem test. The FSL report Ex. P/43 with regard to viscera show no chemical poison. The Medico Legal Institute, Bhopal submitted its report dated 21.6.2014 Ex. P/46, that the bone of the prosecutrix received from diatem test was found negative while water is found positive for diatem test. This medical evidence corroborates the prosecution case and we see no reason to disbelieve the evidence of the medical Officer and the FSL report.

17 After the accused persons were arrested including the juvenile in conflict with law, Manish Verma, they were medically examined. The medical Officer, Dr. Yogesh Yadav (PW 13) has stated that applicant Ramsajeevan was examined on 16.5.2013. The scratch marks on the central part of the back for a number of different sizes were found. He also examined appellant Rajesh and found old scar on left side of his left leg. These injuries are seven to ten days old. No exaplanation has been offered by the defence as to how these injuries were received by the accused persons. This has to be remembered that the incident took place on 08.05.2013 and the accused persons were medically examined on 16.05.2013. He did not found any symptom which would go to show that the accused persons could not perform sexual intercourse. He prepared "semen slides" and preserved their underwears, which were later handed over to the constable. The slides, sealed packets of underwears of accused persons were later seized from constable K.P. Singh (PW 9). The blood samples of accused persons were collected by Dr. Mahesh (PW 14) on 16.06.2013 at District Hospital, Panna in connection with Crime No. 55/2013 of P.S. Saleha for the purpose of DNA test. The identification form of the accused persons and the blood samples were handed over to constable Rajkumar. These sealed blood samples were sent to DNA analysis to the Director, Medico Legal Department of Gandhi Medical College, Bhopal vide letter dated 16.06.2013 marked as P/40 along with Ex. P/41 indicating materials for test in sealed condition.

18 In the FSL report the plastic bags seized from the spot by Ex. Article A (i) and A (ii) and the plastic bags seized from the house of Rajesh Article (K) were found identical in every respect. The seized rope Ex. (L) from the possession of accused Rajesh was found identical in every respect to that of the rope tied up in the dead body marked as Ex. G (i) and G (ii).

19 The DNA report which is a scientific piece of evidence play an important role in recent days in detecting a crime more scientifically. The chain

of custody, the complete record of biological evidence from the place of its extraction and up to presentation in the Court and its complete documentation at every stage is complete in the present case. Dr. Yogesh Yadav (PW 13) prepared vaginal smear slides of the deceased was sent for DNA analysis to FSL, Sagar along with the blood samples of accused persons collected by Dr. Mahesh (PW 14). The report of DNA finger printing unit, FSL Sagar is Ex. (P/52). It would be pertinent to mention here that under Section 193 Cr.P.C, these DNA finger prints are scientific reports and on 18.5.2015, the report has been admitted in evidence, therefore, marked as Ex. (P/52). The defence has not objected to the same. The objection of learned counsel for the appellants in the appellate stage is that the Officer who conducted DNA finger print has not been examined, has no force for the reason that no objection has been raised at the time of exhibiting the same. More so no challenge has been made to the seizures and no objection has been made to Dr. Yogesh Yadav (PW 13) and Dr. Mahesh (PW 14) as regarding the collection of the samples. The DNA test which can be considered as very scientific, conclusive proof. The DNA profile prepared from vaginal smear of deceased fully matched with the DNA of appellants Ramsajeevan, Rajesh and juvenile conflict with law Manish Verma. The matching of the mixed male DNA profile prepared from vaginal smear of deceased with DNA profile of the accused persons make it crystal clear that no other persons except the accused persons had committed rape with the victim prosecutrix, who aged under sixteen years.

20 The evidence of M.R. Bagen (PW 22) is very important to explain the circumstances. He justified that during the investigation of the crime, he went to the house of appellant Rajesh Verma and after search found straw wheat inside the house (attari) from where an evil smell was coming out. He prepared panchnama Ex. P/14 and evil smell panchnama P/13 in presence of Ramkhilawan (PW 6) and Ramesh Verma (PW 16). These witnesses have admitted their signatures in Ex. P/13 and P/14 and supported the version of M.R. Bagen (PW 22). On information of appellant Rajesh Verma, memorandum Ex. P/9 dated 16.05.2013 was prepared. On this information, a plastic cement bag bearing ISI mark and nylon rope of length of about 15 meters, straw of wheat mixed with gram, terricott pant and terricott shirt vide seizure memo Ex. P/11 was seized. On the basis of memorandum statement of appellant Ramsajeevan Ex. P/10 dated 16.05.2013, he recovered a terricott pant and full shirt by seizure memo P/12. Ramkhilawan (PW 6) and Ramesh Verma (PW 16) admitted the signatures in the memorandum and seizure.

Ramesh Verma (PW 16) has supported the seizure and corroborated the evidence of M.R. Bagen (PW 22). However, they have not supported Ex. P/9 and P/10. But because, there is no inconsistency in the evidence of M.R. Bagen (PW 22), the learned trial Court did not disbelieve or reject the evidence of M.R. Bagen (PW 22). The matching of DNA profile and the matching of the rope and the bags seized from the house of appellant Rajesh with that of the bag and rope found with the dead body cannot be termed as a co-incidence. These are important piece of evidence which on meticulous examination are corroborative evidence and cannot be overlooked. The vaginal smear and the blood samples of the appellants have been kept in proper custody and was sent for test without tempering. Therefore, cannot be questioned.

21 The recovery of the dead body of the deceased from the well covered in a cement plastic bag and the medical evidence show that the victim was subjected to sexual intercourse and was found that she was subjected to strangulation. Later the dead body was found in the well, has been proved by the prosecution by cogent, reliable and unimpeachable evidence. The materials collected from the spot as well as recovery from the house of appellant Rajesh were identical on the scientific reason. The DNA test report matching the DNA profile of appellant as well as the vaginal smear of the deceased are the circumstances which are definitely and unerringly point towards the guilt of the appellants.

22 Learned counsel for the appellants has repeatedly and strenuously argued about extra judicial confession and cited the case of *Tejinder Singh @ Kaka Vs. State of Punjab* (supra). The same is of no avail in the present case as there is extra judicial confession in the present case.

23 Learned counsel for the appellants has submitted that the evidence of Police Officer cannot be relied upon. He relied upon *Govindaraju @ Govinda Vs. State* (supra) in which it is held that "it is settled law that, it is not the number of witnesses that matters but it is the substance of evidence. Prosecution is not required to examine a large number of witnesses, if guilt of accused is brought home even by a limited number of witnesses."

24 As has been classified in cited judgment, witnesses can fall in one of the three categories, namely, wholly reliable; wholly unreliable; and, neither wholly reliable nor wholly unreliable. In last category, there should be a cautious approach and it should have to be seen that statement of such witnesses is

corroborated, either by other witness or by other documentary or expert evidence."

25 Perhaps, this citation is more suitable to the prosecution in the present case. The police officers and the witnesses who have examined, except the witnesses who have not supported the prosecution story i.e. Keshkali (PW 7), Rambhajan Chaurasia (PW 15) and hearsay witness Sanjay Verma (PW 20), the evidence of all other witnesses stood the test of cross-examination and evidence of these witnesses cannot be termed as unreliable, therefore, the same cannot be rejected.

26 In the present case, the test regarding the circumstantial evidence is fully meted out. In *Sharad Birdhichand Sarda Vs. State of Maharashtra,* (1984) 4 SCC 116, which was later followed in many other cases including in *State of U.P. Vs. Satish* (2005) 3 SCC 114, the Hon'ble Apex Court has laid down that when the case rests upon circumstantial evidence, such evidence must satisfy the following tests:-

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.

(iii) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(iv) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypotheses than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

27. The citation of *Phoolchand Rathore* (supra) is in different footing. In the present case, as circumstantial evidence is complete and is capable of explaining all other hypothesis than that of the guilt of the accused. The evidence in the present case, not only is consistent with the guilt of the accused but is inconsistent with the innocence of the appellants. It only gives rise the guilt of the appellants. There is no suspicion or conjectures but with legal proof produced by the prosecution it is clear, cogent and unimpeachable leads to sole conclusion of the guilt of the appellants.

28 We, therefore, have no hesitation in holding the appellants guilty of the offences and, therefore, upheld the judgment pronounced by the learned trial Court in so far as convicting the accused appellants.

29 The second aspect remains to be decided is whether it is a rarest of rare case in which the appellants are to be imposed death sentence?

30 Incontrovertibly, the judicial approach towards sentencing has to be cautious, circumspect and careful. The Courts at all stages of trial and appeal must therefore peruse and analyze the facts of the case and reach an independent conclusion which must be appropriately and cogently justified in the "reasons" or "special reasons" recorded by it for imposition of life imprisonment or death penalty. The length of the discussion would not be a touchstone for determining correctness of a decision. The test would be that reasons must be lucid and satisfy the appellate Court that the Court below has considered the case in toto and, thereafter, upon balancing all the mitigating and aggravating factors, recorded the sentence.

31 We are now adverting to the sentencing procedure prescribed by the law. Under Section 235 (2) of the Code, the Court on convicting an accused must unquestionably afford an opportunity to the accused to present his case on the question of sentence and under Section 354 (3) record the extraordinary circumstances with regard to the imposition of death sentence keeping in view the entire facts of the case and the submissions of the accused. In doing so, if, for any reason, it omits to do so or does not assign elaborate reasons and the accused makes a grievance of it before the higher Court, it would be upon to that Court to remedy the same by elaborate upon the said reasons.

32 In appropriate cases, this Court may opine to the contrary that the facts and circumstances of the case do not require imposition of capital punishment and the ends of justice would be achieved by a less harsh sentence, it could accordingly commute the sentence awarded by the courts below.

33 In the present case, the learned trial Court has recorded and discussed the submissions made by the appellants before passing the order of sentence. According to us, the mitigating facts and circumstances are as follows:-

(i) The appellants are not hardcore criminals;

(ii) They are not threat/menace to the society;

(iii)They have no criminal antecedent;

(iv)They are not anti-social elements;

(v) The State has failed to prove that they are incapable of being reformed;

(vi) There is a Global move to abolish death sentence. 138 countries have abolished death sentence, while 59 countries including India have retained death sentence (2009) 6 SCC 498.

(vii) Both the appellants Rajesh Verma and Ramsajeevan Verma were twenty one years old at the time of commission of offence, which may be said that they were young. There is every probability that the appellants can be reformed and rehabilitated.

(viii) All four main objectives which State intends to achieve namely deterrence, retribution, prevention and reformation can be achieved by keeping the appellants alive.

34. Besides, the facts in toto and procedural impropriety, loomed large in exercising such discretion.

35 We are unable to accept the submissions made by the learned P.L that the reasons mentioned by the trial Court while sentencing are sufficient to consider it as rarest of rare case and impose them death sentence.

36 The Hon'ble Apex Court in a catena of cases has consistently held that only in those exceptional cases where the crime is so brutal, diabolical and revolting so as to shock the collective conscious of the community, would it be appropriate to award "death sentence." Since such circumstances cannot be laid down as a straight jacket formula, it must be ascertained from case to case, the legislature has left it open for the Courts to examine the facts of the case and appropriately decide upon the sentence proportionately to the gravity of the offence.

37 In *Mohammad Chaman Vs. State NCT of Delhi* (2001) 2 SCC 28, the Hon'ble Apex Court in a case where the convict had raped a 1 ½ year child, who died as a result of unfortunate incident held that the crime committed was serious and heinous, the criminal had dirty and perverted mind and had no control over his carnal desire. Nevertheless, the Apex Court found it difficult to held that the criminal was such a dangerous person that to spare his life would endangerous the society, therefore, reduced the sentence to

imprisonment for life.

38 In *Sebastain Vs. State of Kerala* (2010) 1 SCC 58, the Hon'ble Apex Court has held that the criminal had raped and murdered a two year old child. He was found to be paedophile with "extremely violent propensities." He was earlier convicted for offence under Section 354 I.P.C for outraging the modesty of a woman. Subsequently, he was convicted for serious offence under Section 302, 363 and 376 of I.P.C. The Apex Court opined that the convict also appears to have been tried for murder of several other children but was acquitted in 2005 with benefit of doubt. Notwithstanding the nature of the offence, as well as "extremely violent propensities," the sentence of death awarded to him was reduced imprisonment for the rest of his life.

39 In the case of *Amit Vs. State of U.P.* reported as (2012) 4 SCC 107 in which a three year old child was subjected to rape, unnatural offence and murder. The Apex Court held that the convict was found guilty of causing the disappearance of evidence. The sentence of death awarded to him was reduced to imprisonment for life subjected to remissions. The Apex Court opined that there was nothing to suggest that he would repeat the offence and that the possibility of his reform over a period of years could not be ruled out.

40 The present case is based on circumstantial evidence and with some scientific evidence adduced by the prosecution, we have held the appellants guilty for the rape and murder of the victim. In a similar case *Ronny Vs. State* (1998) 3 SCC 625, the Hon'ble Supreme Court, on facts, held that it is possible in a given set of facts that the Court might think even in a case where death sentence awarded, the same need not to be awarded because of the peculiar facts of that case like the possibility of one or more of the appellants being responsible for the offence, less culpable than the other accused. In such circumstances in the absence of there being no material available to bifurcate the case of each appellant, the Court might think it prudent not to award extreme penalty of death. But then such a decision would raise on the availability of the evidence in a particular case. Hon'ble the Supreme Court further held that "from the facts and circumstances, it is not possible to predict as to who among the three played which part. It may be that the role of one has been more culpable in degree than that of the others and *vice versa*. Wherein a case like this it is not possible to say as to whose case falls within "the rarest of rare" cases it would serve the ends of justice if the capital punishment commuted into life imprisonment.

41. On the basis of above decisions of the Hon'ble Apex Court and the factual position mentioned by us, the mitigating circumstances elaborately given by us, taking an over all view and considering the underlying principles of sentencing jurisprudence, we are of the considered opinion that the sentence awarded to the appellants should be commuted to life imprisonment till the rest of their life.

42 The property seized be destroyed after the appeal period is over.

43 The reference and the appeal are disposed of in the aforesaid terms.

Order accordingly.

I.L.R. [2016] M.P., 2595
CRIMINAL REFERENCE

Before Mr. Justice N.K. Gupta & Mr. Justice S.A. Dharmadhikari

Cr.Ref. No. 01/2015 (Gwalior) decided on 14 July, 2016

STATE OF M.P. ...Applicant
Vs.
VEERENDRA ...Non-applicant

(Alongwith Cr.A.No. 39/2015)

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228 - Framing of Charge - **Held - No necessity to frame charge u/S 376-A of IPC, when the charges of Sections 302 & 376 of IPC were framed, unless there was an additional effect of framing such a charge for or against the accused. (Para 9)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227 व 228 – आरोप विरचित किया जाना – अभिनिर्धारित – जब भा.दं.सं. की धारा 302 एवं 376 के अंतर्गत आरोप विरचित किये गये हों तब भा.दं.सं. की धारा 376–ए के अंतर्गत आरोप विरचित किये जाने की आवश्यकता नहीं है, जब तक कि अभियुक्त के विरूद्ध ऐसा आरोप विरचित किये जाने पर उस पर कोई अतिरिक्त प्रभाव न पड़ता हो।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 311 - Recalling of witness - **Held - On an application for recalling of witnesses, trial court has to pass a speaking order that the prayer was made with the purpose of causing delay or vexation or defeating the ends of the justice - Framing of charge u/S 376-A of IPC creates an extra burden upon accused and if the prayer of the appellant is not**

accepted for recalling of witnesses, then a prejudice is caused to the appellant for not being given the advantage of Section 217 of Cr.P.C. - In such circumstances, the High Court held that the accused cannot be convicted u/S 376-A of IPC. (Paras 8 & 9)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 – साक्षी को पुनः बुलाया जाना – अभिनिर्धारित – साक्षियों को पुनः बुलाये जाने हेतु आवेदन पर विचारण न्यायालय को ऐसा सकारण आदेश पारित करना चाहिए कि उक्त प्रार्थना विलंब कारित करने अथवा तंग करने अथवा न्याय के उद्देश्य को विफल करने के प्रयोजन से की गई थी – भा.दं.सं. की धारा 376–ए के अंतर्गत आरोप विरचित किये जाने से अभियुक्त पर अतिरिक्त भार निर्मित होता है एवं यदि साक्षियों को पुनः बुलाये जाने की अपीलार्थी की प्रार्थना स्वीकार नहीं की जाती है, तब अपीलार्थी को दं.प्र.सं. की धारा 217 का लाभ न दिये जाने के कारण उस पर प्रतिकूल प्रभाव पड़ेगा – ऐसी परिस्थितियों में उच्च न्यायालय ने यह अभिनिर्धारित किया कि अभियुक्त को भा.दं.सं. की धारा 376–ए के अंतर्गत दोषसिद्ध नहीं किया जा सकता।

C. Penal Code (45 of 1860), Section 300 - Murder **- Even if it is presumed that the appellant was not intended to cause the death of the deceased, but act of the accused in inserting his penis in the vagina of a girl of about 8 years having short aperture with force and continued to give jerks so that her uterus was torn and ruptured is an imminently dangerous act and he should know that in all probability of such act, the death of the prosecutrix would be caused and therefore his act falls within the fourth ingredient of Section 300 of IPC. (Para 27)**

ग. दण्ड संहिता (1860 का 45), धारा 300 – हत्या – यदि ऐसा उपधारित कर भी लिया जाये कि अपीलार्थी का आशय मृतिका की मृत्यु कारित करने का नहीं था, परंतु फिर भी लगभग 8 वर्ष की एक लड़की के छोटे से योनि छिद्र में बलपूर्वक अपना शिश्न प्रवेश कराने तथा निरंतर झटके देकर उसके गर्भाशय को क्षतिग्रस्त एवं छिन्न भिन्न करने का अभियुक्त का कृत्य आसन्न रूप से खतरनाक था तथा उसे यह पता होना चाहिए था कि ऐसे कृत्य से संभाव्यतः अभियोक्त्री की मृत्यु हो जायेगी एवं इसलिए, उसका यह कृत्य भा.दं.सं. की धारा 300 के चौथे अवयव की परिधि के अंतर्गत आता है।

D. Penal Code (45 of 1860), Sections 302 & 376 - Circumstantial Evidence **- Circumstances against the accused - Firstly, the accused chased the prosecutrix when she left the house - Secondly, he was found by a witness coming out of the place of incident dusting his clothes - Thirdly, dead body was recovered at his instance - Fourthly,**

several injuries were found on the body of the deceased and semen and sperms were found in her vaginal swab - Fifthly, death was homicidal and blood was oozing out of the wounds of the deceased - Sixthly, a full pant having stains of blood was recovered from the accused - Held - The chain of circumstances is complete and accused was held guilty of Sections 376(2)(i) & 302 of IPC and Section 6 of POCSO Act - Death sentence confirmed. (Paras 32 & 33)

घ. दण्ड संहिता (1860 का 45), धाराएँ 302 व 376 – परिस्थितिजन्य साक्ष्य – अभियुक्त के विरूद्ध परिस्थितियां – प्रथमतः, जब अभियोक्त्री अपने घर से निकली, अभियुक्त ने उसका पीछा किया – द्वितीयतः, एक साक्षी द्वारा उसे घटनास्थल से बाहर आकर अपने कपड़ों से धूल झाड़ते हुए देखा गया – तृतीयतः, उसकी निशादेही पर शव बरामद किया गया – चतुर्थतः, मृतिका के शरीर पर कई चोटें पाई गई तथा उसके योनि स्राव में वीर्य एवं शुक्राणु पाये गये – पंचमतः, उसकी मृत्यु मानव वध प्रकृति की थी तथा मृतिका के घावों से रक्त का रिसाव हो रहा था – षष्ठतः, रक्त के धब्बों से युक्त एक फुल पैन्ट अभियुक्त से बरामद किया गया – अभिनिर्धारित – परिस्थितियों की श्रृंखला पूर्ण हुई तथा अभियुक्त को भा.दं.सं. की धारा 376(2)(i) एवं 302 तथा लैंगिक अपराधों से बालकों का संरक्षण अधिनियम की धारा 6 के अंतर्गत दोषी ठहराया गया – मृत्यु दंडादेश अभिपुष्ट।

***E. Penal Code (45 of 1860), Section 53 - Rarest of Rare Cases* - Circumstances against the accused - Accused being near relative of the deceased, who was a minor girl of about 8 years, committed rape and thereby committed her death - Injury to the deceased whereby the uterus was almost smashed like vegetable and perineal tear show the gruesome manner of the offence - Held - Such cruelty towards a young child is appalling - The act of the accused was monstrous and invited extreme indignation of the community and shocked the collective conscious of the society - The case falls within the rarest of the rare category. (Para 39)**

ङ. दण्ड संहिता (1860 का 45), धारा 53 – विरल से विरलतम मामले – अभियुक्त के विरूद्ध परिस्थितियां – अभियुक्त ने मृतिका, जो कि लगभग 8 वर्ष की अवयस्क लड़की थी, का नजदीकी रिश्तेदार होकर उसका बलात्कार किया तथा तद्द्वारा उसकी मृत्यु कारित की – मृतिका की चोट, जिसमें उसके गर्भाशय को सब्जी की भांति कुचल दिया गया था, तथा उसका फटा हुआ पेरीनियल अपराध के वीभत्स रूप को दर्शाते हैं – अभिनिर्धारित – एक छोटे बच्चे के साथ ऐसी क्रूरता भयाक्रांत करने वाली है – अभियुक्त का कृत्य दानवी था तथा उससे समुदाय में अत्यंत रोष उत्पन्न हुआ एवं उसने समाज के सामूहिक अंतःकरण को झकझोर दिया

– यह मामला विरल से विरलतम की श्रेणी में आता है।

F. Criminal Trial - **Effect of absence of DNA Test - Held - If DNA sample was not taken from the accused, it would not be fatal to the remaining evidence.** **(Para 22)**

च. दाण्डिक विचारण – डीएनए परीक्षण की अनुपस्थिति का प्रभाव – अभिनिर्धारित – यदि अभियुक्त से डीएनए का नमूना नहीं लिया गया था, यह शेष साक्ष्य हेतु सांघातिक नहीं होगा।

G. Medical Jurisprudence - **Possibility of injury on penis in case of rape - Held - Depends upon various factors - If a penis is inserted in vagina having small aperture skin covering glans penis may be injured - If penetration is done without any injury, there is no possibility of getting any further injury.** **(Para 24)**

छ. चिकित्सा न्यायशास्त्र – बलात्कार के मामले में शिश्न पर चोट की संभावना – अभिनिर्धारित – विभिन्न कारकों पर निर्भर करती है – यदि छोटे छिद्रयुक्त योनि में शिश्न प्रवेश कराया जाता है तब शिश्न मुण्ड की त्वचा क्षतिग्रस्त हो सकती है – यदि प्रवेशन बिना किसी चोट के हो जाता है तब आगे और चोट आने की कोई संभावना नहीं होती।

H. Practice (Criminal) - **Remand of the case where charge is wrongly framed - Held - No need to remand the case though the charge u/S 376-A was found to be not sustainable - The accused was found properly convicted u/S 302 & 376(2)(i) of IPC - It cannot be said that unless a charge u/S 376-A of IPC is proved, the accused/appellant cannot be effectively punished.** **(Para 34)**

ज. प्रैक्टिस (क्रिमिनल) – जहां गलत रूप से आरोप विरचित किये गये हैं वहां मामले का प्रतिप्रेषण – अभिनिर्धारित – यद्यपि धारा 376–ए के अंतर्गत आरोप स्थिर न रखे जाने योग्य पाये गए, प्रकरण को प्रतिप्रेषित किये जाने की कोई आवश्यकता नहीं – अभियुक्त को भा.दं.सं. की धारा 302 एवं 376(2)(i) के अंतर्गत दोषसिद्ध किया जाना उचित पाया गया – यह नहीं कहा जा सकता है कि जब तक कि भा.दं.सं. की धारा 376–ए के अंतर्गत अपराध सिद्ध नहीं होता है, तब तक अभियुक्त/अपीलार्थी को प्रभावी रूप से दण्डित नहीं किया जा सकता।

Cases referred:

2001 Cri.L.J. 3665, AIR 1995 SC 1219, (2016) 1 SCC 550, AIR 1991 SC 1388, (2011) 5 SCC 317, (2015) 9 SCC 44, AIR 2013 SC 651,

AIR 1987 SC 1507, (2014) 5 SCC 108, (2011) 7 SCC 130, AIR 1973 SC 343, (2015) 7 SCC 178, (1994) 2 SCC 220, AIR 2009 SC 56, (2012) 4 SCC 107, (2014) 5 SCC 353, (2013) 5 SCC 546, 1991 JLJ 564, (2015) 9 SCC 502, (2015) 1 SCC 253.

B.K. Sharma, P.P. and *J.M. Sahni,* P.L., for the State.

Ravindra Dixit, for the non-applicant in Cr.Ref.No. 01/2015 & for the appellant in Cr.A. No. 39/2015.

JUDGMENT

The Judgment of the Court was delivered by : **N.K. Gupta, J. :-** Since both the matters are connected and arise out of the common judgment dated 27.12.2014 passed by the II Additional Sessions Judge, Dabra, District Gwalior (M.P.) in ST No.642/2014, the present common judgment is being passed.

2. The appellant has been convicted of offence under Section 376-A, 302, 376(2)(i) of Indian Penal Code (for short "the IPC") and under Section 6 of the Protection of Children From Sexual Offences Act, 2012 (for brevity "the POCSO Act") and sentenced to death sentence with a fine of Rs.2,000/-, death sentence with a fine of Rs.2,000/-, Life imprisonment with a fine of Rs.2,000/- and Life imprisonment with a fine of Rs.2,000/- respectively. Being aggrieved by the aforesaid judgment, the appellant Veerendra has preferred the present appeal (Criminal Appeal No.39/2015) whereas the Additional Sessions Judge, Dabra, District Gwalior (M.P.) has sent the reference for confirmation of death sentence.

3. Facts, in short, are that the deceased/prosecutrix was the daughter of Laxmibai Batham (PW-1). On 19.09.2014, the deceased/prosecutrix, aged 8 years, was sent by Raju, the uncle of the deceased/prosecutrix, to fetch a bundle of Bidi from the shop of Sunil and thereafter she was found missing. Laxmibai (PW-1) had lodged a missing report, Ex.P-1. In the entire night, she could not be traced. On the next day, Sub-Inspector- Shri B.L. Bansal (PW-19) called the applicant Veerendra and his companions including Pappu @ Patiram (PW-4). After some interrogation, the appellant Veerendra was arrested and arrest memo Ex.P-4 was prepared. He gave the information about the dead body of the deceased and told the details of the incident. Shri Bansal recorded the memo, Ex.P-5, under Section 27 of the Evidence Act. Thereafter, Shri Jitendra Nagaich (PW-16), the Station House Officer of the

Police Station, proceeded with the investigation and the body of the deceased/ prosecutrix was recovered from the abandoned house of the witness Jagdish @ Jagan (PW-6). The dead body of the deceased/prosecutrix was sent for post mortem. Dr. D.C. Arya (PW-10) and lady doctor Asha Singh have performed the post mortem on the body of the deceased. Along with other particulars, they found so many injuries to the deceased/prosecutrix. There was a perennial tear of 3.5 inches X 2.5 cms from private part to anal cavity. There was swelling and congestion on whole private part of the deceased/ prosecutrix. Her uterus was found to be ruptured and was coming out of her private part. Doctor collected the vaginal swab, nails, a portion of vaginal tissues etc and handed over to the concerned constable after sealing them separately. The police recovered a full pant of the appellant from him and all such articles were sent to the Forensic Science Laboratory. Ultimately, a report, Ex.P-21, was received in which some articles were found stained with human blood and semen was also found on some of the articles. After due investigation, the charge-sheet was filed before the Additional Chief Judicial Magistrate, Dabra, District Gwalior (M.P.) who committed the case to the court of Sessions and ultimately it was transferred to II Additional Sessions Judge, Dabra, District Gwalior (M.P.).

4. The appellant abjured his guilt. He did not take any specific plea in the defence. He has simply stated, under Section 313 of Cr.P.C., that he was innocent and falsely implicated in the matter. No defence evidence was adduced.

5. Initially, the trial court had framed the charges of offence under Sections 364, 376(2)(i), 302, 201 of IPC and under Sections 3, 5 and 6 of the POCSO Act but vide order dated 16.12.2014, the charge of offence under Section 376-A of IPC was added and Dr. D.C. Arya (PW-10) was recalled. The trial court acquitted the appellant from the charges of offence under Sections 364A and 201 of IPC but convicted and sentenced him as mentioned above.

6. We have heard the learned counsel for the parties at length.

7. The present case totally depends upon the circumstantial evidence and therefore it would be appropriate to examine each and every circumstance of the case. Prior to such consideration, the objection raised by the learned counsel for the appellant relating to provision under Section 217 of Cr.P.C. should be considered. Learned counsel for the appellant has submitted that

after examining all the witnesses, the trial court suddenly added the charge of Section 376-A of IPC but thereafter the provision contained under Section 217 of Cr.P.C. was not followed though the learned counsel for the appellant had requested for recalling of the witnesses but prayer of the appellant was refused. In this context, the learned counsel for the appellant has referred the order-sheet dated 16.12.2014 of the trial court in which the prayer of the defence counsel for recalling the witnesses was not accepted. It was mentioned "on perusing the record it is clear that summoning the examined witnesses is not for just decision of the case", however, the prayer of the prosecutor was accepted and Dr. D.C. Arya (PW-10) was recalled. In this connection, the learned counsel for the appellant has invited the attention of this Court to the judgment passed in the case of *"Vikas and others Vs. State of Madhya Pradesh"* [2001 Cri.L.J. 3665] in which it is held by the Madhya Pradesh High Court that where an additional charge is framed against the accused persons under Section 149 of IPC the court is not justified in rejecting the application of the accused for recalling the witnesses for the purpose of cross-examination. In this context, the judgment passed by the Apex Court in the case of *"Ranbir Yadav Vs. State of Bihar"* [AIR 1995 SC 1219] may also be referred in which it is held that the court may, however, deny such right if it is of the opinion that the purpose is only delay or vexation or defeating the ends of justice. Similar right with the same safeguard is also conferred on the prosecution. Court is not duty bound to ask the accused, after the charge has been altered, to state whether he wishes to have any of the witnesses recalled or re-examined and whether he wishes to call any further witnesses.

8. In the present case, when the learned counsel for the appellant had prayed for recalling of the witnesses then it was for the trial court to pass a speaking order that the prayer was made with the purpose of causing delay or vexation or defeating the ends of justice. The trial court has written a single sentence that in his opinion the evidence on record was clear and therefore, the witnesses were not required to be called for just decision of the case.

9. When the charges of Sections 302 and 376 of IPC were also framed against the appellant then there was no necessity to frame the charge under Section 376-A of IPC by the trial court unless there was an additional effect of framing of such charge for or against the accused. If charges under Sections 302 and 376 of IPC were framed and it was found that the deceased/ prosecutrix died during the course of rape and the accused did not intend to

kill her then it was possible that crime of the appellant would be within the purview of Section 304 of IPC and the trial court could not record a death sentence against the appellant for any offence including Section 376 of IPC. The provision under Section 376-A of IPC is a special provision enacted with the object that if during commission of rape, accused inflicts any injury which causes death of that woman or causes woman to be in persistent vegetative state, though the accused did not intend to kill the deceased/prosecutrix even then death sentence can be inflicted and therefore, when a special provision was enacted and death sentence is provided for that offence then an opportunity could be given to the accused for recalling of all the witnesses. It was for the trial court to mention that prayer for recall was made only to cause delay or vexation and it was not in the interest of justice but the trial court did not mention any such reason in its order. As discussed above, the framing of charge under Section 376-A of IPC creates an extra burden upon the appellant and a death sentence could be recorded against him for offence of rape, even if offence under Section 302 of IPC was not proved and therefore if the prayer of the appellant was not accepted for recalling of the witnesses then a prejudice was caused to the appellant that he was not given the advantage of Section 217 of Cr.P.C. In the light of the aforesaid judgments passed by the Apex Court and the M.P. High Court, the Additional Sessions Judge, has committed an error in not following the provision contained under Section 217 of Cr.P.C. and therefore, the appellant cannot be convicted for the offence under Section 376-A of IPC. In such a case, it would be appropriate for this Court either to remand the matter to the trial court for compliance of the provision under Section 217 of Cr.P.C. and to pass a fresh judgment or to consider the remaining case except of charge under Section 376-A of IPC. Looking to original charges and evidence, we do not find any reason to remand the case for retrial of additional charge.

10. In the present case, the first circumstance which goes against the appellant is evidence of last seen. The deceased/prosecutrix was sent by Raju, her uncle, to fetch a bundle of Bidi from the shop of Sunil. The witness Brajlal (PW-2) and Pappu @ Patiram (PW-4) have stated that the appellant followed her and thereafter she did not come back and was found missing. The learned counsel for the appellant has submitted that Brajlal (PW-2) was the relative of the deceased/prosecutrix being maternal grandfather and therefore he may be a partial witness implicating the appellant in the case. If he had seen the appellant who was chasing the deceased/prosecutrix then while lodging the missing report,

such suspicion could be shown by him. However, such submission cannot be accepted at this stage. If statements of Brajlal (PW-2) and Pappu @ Patiram (PW-4) are minutely considered then it would be apparent that Brajlal (PW-2) was the common relative of the deceased/prosecutrix and the appellant. Hence, he would not have thought against the appellant as to why he was chasing the deceased/prosecutrix. However, since he had shown his suspicion, therefore, Sub-Inspector Shri B.L. Bansal (PW-19) had called the appellant as well as his companions including Pappu @ Patiram (PW-4) and started interrogation. Pappu @ Patiram (PW-4), a friend of the appellant, has clearly stated that the appellant gave him some money to fetch a bottle of liquor. When he prepared pegs for them, the deceased/prosecutrix passed through the way near the house of Pappu @ Patiram (PW- 4) and according to him, the appellant Veerendra did not consume liquor and he told Pappu @ Patiram (PW-4) that he was returning soon and thereafter he followed the deceased/ prosecutrix. Pappu @ Patiram (PW-4) has clearly stated in para 1 and 6 that he was preparing drinks for the appellant Veerendra and one Rakesh and when the appellant Veerendra was called by the police, he and witness Rakesh were also called to the police station which clearly indicates that the police had suspicion upon these persons i.e. Rakesh, Pappu and appellant Veerendra.

11. If Brajlal (PW-2) had not seen the appellant chasing the deceased/ prosecutrix then he could not have shown his suspicion against these three persons and police could not have called these three persons simultaneously at the police station. A suggestion was given to the witness Pappu @ Patiram (PW-4) that he had a dispute with the appellant relating to driving a rickshaw but such suggestion appears to be hypothetical suggestion. If there was enmity between Pappu @ Patiram (PW-4) and the appellant then it was not possible for the appellant to give some money to the witness Pappu @ Patiram (PW-4) and to have a cocktail party. Under these circumstances, the evidence of Brajlal (PW-2) and Pappu @ Patiram (PW-4) is believable and the prosecution has proved beyond doubt that when the deceased/prosecutrix had passed through the house of the witness Pappu @ Patiram (PW-4), the appellant started chasing her. Consequently, the factum of last seen is duly proved against the appellant.

12. The learned counsel for the appellant has placed his reliance upon the judgment passed by the Apex Court in the case of *"Nizam and another Vs. State of Rajasthan"* [(2016)1 SCC 550] in which it is held that it is not

prudent to base the conviction solely on "last seen theory". Where time gap is long it would be unsafe to base the conviction on the "last seen theory"; it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution. The aforesaid judgment cannot be applied in the present case because in the present case there was no time gap between the event of last seen and the crime committed. Also, it is not a case in which no corroboration of the evidence of last seen is available. There are also some corroborative pieces of circumstantial evidence to prove the theory of last seen.

13. Second circumstance against the appellant is the place, where the dead body of the deceased/prosecutrix was found. It was a ruin of a house and nobody would ordinarily go inside that ruined house. Jagdish @ Jagan (PW-6), owner of that property, has stated that on that plot there were four rooms and one courtyard but now it had turned into a ruin. One wall had fallen down and therefore anybody could enter at that place. He had kept some sacks in those rooms. The ruined house was located at such a place where shouts and cry of the deceased/prosecutrix could not have been heard by anyone and therefore it is proved by the prosecution that the place of incident was a remote ruin and the appellant had knowledge about that place.

14. The witness Madanlal (PW-12) has stated that at about 09:00 pm, he saw the appellant coming out of that ruined house of witness Jagdish @ Jagan (PW-6) while removing dust and dirt from his clothes. Madanlal (PW-12) is though a chance witness but not at all an interested witness. Learned counsel for the appellant has submitted that the police has recorded the evidence of Madanlal (PW- 12) with delay. However, it is proved by other prosecution witnesses that since such crime was sensational the deceased/prosecutrix, a girl child of eight years, was missing and at the time of recovery and seizure so many persons had surrounded the place of incident and the investigation of the case was a talk of the town and therefore the witnesses who knew about such a fact which was not important otherwise in their opinion in the beginning would have visited the police station and told about the fact which they had seen or observed. Hence, if Madanlal (PW-12) had not tendered the evidence as a witness to the police, the police could not have imagined that Madanlal had seen the accused coming out of that ruined house of Jagdish @ Jagan (PW-6) at about 09:00 pm. No enmity or bias of the witness Madanlal (PW-12) is established with the accused and therefore there is no reason to discard

his testimony. Hence, it is proved by the prosecution that soon after the incident the appellant was coming out of the place of incident. Though such evidence is not a direct evidence but the same is admissible under Section 6 of the Evidence Act and this is also a circumstance which goes against the accused.

15. Sub-Inspector Shri B.L. Bansal (PW-19) and Brajlal (PW-2) have stated that the appellant told about the entire incident and accepted to show the place where he had hidden the dead body the deceased/prosecutrix. A memo, Ex.P-5, was recorded. Thereafter, the Station House Officer Shri Jitendra Nagaich (PW-16) went to the spot along with the witnesses and dead body of the deceased/prosecutrix was recovered as shown by the appellant. The recovery was done before the witnesses Brajlal and Ganesh. The learned counsel for the appellant has submitted that Brajlal was the maternal grandfather of the deceased/prosecutrix and the given up witness, namely, Ganesh was the father of the deceased/prosecutrix and since no independent witness was taken by the investigating officers the entire proceeding of recovery of the body appears to be fishy. It is further submitted that the appellant was called at the police station in the morning and without recording his memo under Section 27 of the Evidence Act, he was arrested. Also, after recording of the memo under Section 27 of the Evidence Act he was not taken to the place of incident for a longer period and thereafter investigating officer was changed and Shri Jitendra Nagaich (PW-16) had completed the portion of recovery whereas various documents were found in the handwriting of Sub-Inspector Shri B.L. Bansal and Shri Jitendra Nagaich had appended his signatures on various documents. The objection raised by the learned counsel for the appellant is not acceptable. Such argument is dependent upon the time of information given by the witness Shri Akhilesh Bhargava, Senior Scientist of Mobile Unit of Forensic Science (PW-14) and Shri Balkrishna Mehoriya Sub-Inspector, Photographs (PW-15). According to these witnesses, they were intimated to come to the spot at about 04:00 pm when no memo of the appellant under Section 27 of the Evidence was recorded. However, these witnesses were not on such a post so that they could state about the exact time of information given to them but they have accepted that at the time of recovery of body they were present at the spot.

16. In this connection, the statement given by the Tahsildar and Executive Magistrate Shri Deepak Shukla (PW-11) is important which explains everything relating to objection raised by the learned counsel for the appellant.

According to Shri Deepak Shukla (PW-11), Sub-Divisional Magistrate, Dabra, District Gwalior (M.P.) called him and told that there was a problem of law and order and therefore he should go to the police station. Law and order problem could be created because eight years' old girl child was missing and the public was agitating that the police was not doing anything to trace the child. Therefore, the Tahsildar Shri Deepak Shukla (PW-11) was sent to the police station who has categorically mentioned that the appellant took the police party and the witnesses to the spot. He removed some sacks and showed the dead body of the deceased. Similarly, the evidence of Shri Sonish Vashishtha (PW-5), a journalist, is equally important who has stated that on getting information he went to the police station at about 4-5 pm and thereafter he completed the videography of the recovery of dead body of the deceased/ prosecutrix. He also prepared the CD of the videography record and CD was provided to the police which was recovered as seizure memo Ex.P-10. Shri Sonish Vashishtha has also stated that the appellant at the spot went ahead, removed some sacks and showed the dead body of the deceased. If Ganesh and Brajlal were the relatives of the deceased/prosecutrix then still journalist Shri Sonish Vashishtha (PW-5) and Executive Magistrate Shri Deepak Shukla (PW-11) have corroborated the factum of recovery of the dead body and they have categorically provided that the appellant removed some sacks and got the dead body recovered from the spot. Hence, if the investigating officer did not take any independent witness then it makes no difference in the present case. A reputed journalist and an executive magistrate cannot be disbelieved. Also the CD was recovered by the police relating to videography done by Shri Sonish Vashishtha (PW-5) to prove that the dead body was shown by the appellant after removing sacks.

17. So far as the change of investigating officer is concerned, it would be apparent that it was a sensational matter and the crowd had gathered in front of the police station. The SDM sent the Executive Magistrate to control the position of law and order then it was necessary for the SHO not to leave the investigation with the Sub-Inspector Shri B.L. Bansal and to take investigation in his own hands and therefore after recording the memo under Section 27 of the Evidence Act if Shri Jitendra Nagaich (PW-16) had taken the investigation in his hands and he obtained the assistance of Shri B.L. Bansal (PW-19) then it does not cause any prejudice to the appellant. By the evidence of aforesaid witnesses it is proved beyond doubt that the dead body of the deceased/ prosecutrix was recovered on the information given by the appellant. This is a

grave circumstance against the appellant. In the case of *"Jaharlal Das Vs. State of Orissa"* [AIR 1991 SC 1388], the Apex Court had laid that the crucial circumstance is the discovery of body at the instance of the accused. In that case since no such circumstance was proved, the Apex Court acquitted the accused but it was also held that the discovery of the dead body at the instance of the accused is a crucial circumstance. Also in this connection the judgment passed by the Apex Court in the case of *"Mohd. Mannan alias Abdul Mannan Vs. State of Bihar"* [(2011) 5 SCC 317] may be referred in which it is held that the discovery of body at the instance of the accused is the most important circumstance. In the present case, it is one of the most important circumstance that the body of the deceased/prosecutrix was discovered on the basis of information given by the appellant Veerendra.

18. The dead body of the deceased/prosecutrix was sent for the post-mortem and Dr. D.C. Arya (PW-10) performed the post-mortem along with Dr. Asha Singh and gave a report Ex.P-17. The learned counsel for the appellant has submitted that since it was a body of the female child, therefore, the post-mortem of the body should have been done by a lady doctor and she would have been examined. Hence, the statement of Dr. D.C. Arya (PW-10) has no much meaning. However, such contention cannot be accepted. When a team of doctors including a lady doctor performs the post-mortem on the body of a girl child and when a common report has been given by the doctors then such report can be proved by any of the doctors and if report Ex.P-17 is proved by Dr. D.C. Arya (PW-10), a male doctor, then it makes no difference. According to Dr. D.C. Arya (PW-10), approximately eight injuries were found on the body of the deceased/prosecutrix. She had blunt wounds on her little finger, right thigh, left thigh and left side of private part. In this connection, the injuries no.7 and 8 as mentioned by Dr. D.C. Arya (PW-10) before the trial court were important. It was mentioned that there was a perennial tear below the private part which was continued up to anal cavity. Its size is 3.7 inches X 2.5 cms. Her uterus was ruptured and it was coming out of her private part. According to him, all such injuries were ante-mortem in nature. Dr. D.C. Arya (PW-10) collected the vaginal swab, tissues from the private part, nails of fingers etc. and referred them for Forensic Science Examination. The report from FSL Ex.P-21 has been received. According to that report, in the vaginal swab of the deceased/prosecutrix blood as well as semen and human sperms were found. The post-mortem report given by Dr. D.C. Arya (PW-10) and the FSL report Ex.P-21 indicate that the rape was committed upon the

prosecutrix and her death was homicidal in nature. Such circumstance also goes against the appellant.

19. Shri Jitendra Nagaich (PW-16) has proved the seizure memo Ex.P-8 by which one pant and shirt were recovered from the appellant and in the report of the Forensic Science Laboratory, Ex.P-21, human blood was found on the pant article "C", however, serological part of the report Ex.P-21 does not indicate about any blood-group etc. Learned counsel for the appellant submits that it was not established that the semen found in the vaginal swab of the deceased/prosecutrix was of the appellant or the blood found on his pant was of the deceased/prosecutrix. In this connection, the reliance has been placed upon the judgment passed by the Apex Court in the case of *"State of Uttar Pradesh Vs. Satveer and others"* [(2015) 9 SCC 44]. In that case, it was not proved that the blood stains which were found were of human origin. In that case, it was not laid that if other corroborative evidence is available then the same may be discarded on the basis of grouping of blood. The reliance has also been placed upon the judgment passed by the Apex Court in the case of *"R. Shaji Vs. State of Kerala"* [AIR 2013 SC 651] in which it is laid down that a failure to trace the origin of the blood found on the weapon then in such a case unless the doubt is of a reasonable dimension, which a judicially conscientious mind may entertain with some objectivity, no benefit can be claimed by the accused in this regard.

20. However, in the present case, factual position is different. The other strong circumstances are available against the appellant. In this connection, the judgment passed by the Apex Court in the case of *Kansa Behera Vs. State of Orissa* [AIR 1987 SC 1507] may be referred in which it is mentioned that when the conviction is to be recorded only on the basis of blood stains then it is for the prosecution to prove beyond doubt that blood found on the articles of the accused should be of the deceased and hence blood group of the blood found on the articles of the deceased should be ascertained but when other circumstances are available then absence of detection of blood group is not fatal to other circumstances against the accused, specially that human blood was found on his pant.

21. The learned counsel for the appellant has also placed his reliance upon the judgment passed by the Apex Court in the case of *"State of Gujarat Vs. Kishanbhai and others"* [(2014) 5 SCC 108] in which the necessity of blood group and DNA test was observed. However, in that case, the blood group of

the victim as well as the accused was the same as "B Positive" and therefore need of DNA test was mentioned. But it was not laid in that case that in absence of any DNA report or grouping of blood no conclusion can be drawn. Under these circumstances, the law laid down in the case of *State of Gujarat* (supra) cannot be applied in the present case. Learned counsel for the appellant has also invited attention of this Court to the provisions of Section 53-A of Cr.P.C. that DNA test of the accused with vaginal swab was to be done and it was mandatory. In the absence of that DNA report, the accused cannot be held guilty. Actually, Section 53-A of Cr.P.C., gives a duty on the prosecution to examine the accused of rape by medical practitioner. In this context, the provision of Section 53-A(2) of Cr.P.C. may be reproduced as under:

> **"Section 53-A(2):** The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely-
>
> 1. the name and address of the accused and of the person by whom he was brought,
>
> 2. the age of the accused,
>
> 3. marks of injury, if any, on the person of the accused,
>
> 4. the description of material taken from the person of the accused for DNA profiling, and"
>
> 5. Other material particulars in reasonable detail."

Perusal of sub-section (2) of Section 53-A of Cr.P.C., it appears that the medical practitioner is directed to give the particulars as mentioned in sub-section 2 if he had taken any material from the person of the accused for DNA profiling then such particulars should be given. In this provision, it is not mentioned that DNA test is mandatory.

22. In this connection, the judgment passed by the Apex Court in the case of *"Krishan Kumar Malik Vs. State of Haryana"* [(2011) 7 SCC 130] may be perused in which it is held that after the incorporation of Section 53 (A) in Cr.P.C., it has become necessary for the prosecution to go in for DNA test in cases, facilitating the prosecution to prove its case against the accused. But such necessity was shown to make the case full proof but it is

not observed that in absence of any DNA test the remaining evidence of the prosecution shall be thrown away. Hence, if Dr. Harish Arya (PW-17), in his report Ex.P-24, did not mention to take DNA sample of the appellant then it makes no difference in the case. If DNA sample was not taken from the appellant then it would not be fatal to the remaining evidence. Learned counsel for the appellant has also submitted that tissues of private part of the prosecutrix were collected by Dr. D.C. Arya (PW-10) and provided to the police but the same were not transmitted to the Forensic Science Laboratory. In the circumstances of the case, no further analysis was required of such tissues to connect with the appellant and therefore, it appears that such tissues sample was not sent to the FSL by the S.P. Concerned and it makes no difference.

23. Dr. Harish Arya (PW-17), on examining the appellant, gave a report Ex.P-24. He found four scratches on the face of the appellant. One was on the left jaw, second was on left side of his neck, third was on his right cheek and the fourth was below the angle of left jaw. No explanation was given by the appellant as to how such injuries were caused. In this connection, Brajlal (PW-2) has categorically stated in para 2 of his statement that since there were nail marks on the face of the appellant, he had a doubt upon the appellant that he was the culprit. The learned counsel for the appellant submits that Dr. D.C. Arya (PW-10) took the nails of the deceased for forensic analysis. But such nails were not sent to the Forensic Science Laboratory. It is true that such nails were not sent for FSL, however, since no sample of skin of the appellant was taken by Dr. Harish Arya (PW-17) then by sending of nails if any tissue of skin was found in those nails then sample of such tissues could not be compared with and therefore non-sending of the nails to the FSL does not create any adverse effect on the remaining evidence of the prosecution.

24. Learned counsel for the appellant has also referred the evidence given by Dr. Harish Arya (PW-17) in which he did not find any injury on the penis of the appellant. No injury was found on the scrotum and thigh. It is, therefore, submitted that if the appellant had committed rape upon a girl of minor age of eight years then he would have sustained some injuries on his penis and since no injury was found on his penis he was innocent and family members of the prosecutrix would have implicated him falsely with the help of investigating officer. In this connection, reliance is placed upon the judgment passed by the Apex Court in the case of *"Rahim Beg and another Vs. State of U.P."* [AIR 1973 SC 343] in which it is held that rape alleged to have been committed

by fully developed man on a girl aged 10-12 years who was virgin. The absence of such injuries on the male organ indicates the innocence of the accused. However, such opinion was given on the basis of evidence given by Dr. Katiyar who opined in that case that there were likely to be injuries on male organ of the man in such intercourse. Actually, the injury on male organ depends upon several facts. If a penis is inserted in vagina having small aperture skin covering glans penis may be injured. If the penetration has been done without any injury then thereafter committing the offence of rape, there is no possibility of getting any further injury. Dr. D.C. Arya (PW-10) has found that there was a perennial tear on the private part of the deceased/prosecutrix which indicates that the skin and tissues of her private part were so soft that a big tear was caused on penetration. Also, it was for the appellant to ask such questions to Dr. D.C. Arya (PW-10) as well as Dr. Harish Arya (PW-17) to confirm that in committing the aforesaid offence the appellant could have surely sustained injuries on his penis or not. Also, it is established that the deceased child was the relative of the appellant who was under mental and physical control of the appellant and the appellant was in a position to manage the deceased/ prosecutrix so that at the time of insertion he would not get any injury on his private part. Thereafter, the prosecutrix was not in a position to resist. She had to suffer only, hence, there was no possibility for the appellant to receive any injury on his scrotum or thigh. Under these circumstances, looking to the injuries caused to the deceased, it cannot be said that it was necessary in committing the offence of such rape, that the penis of the appellant should have been injured or injury must have been caused on the penis or other parts. Hence, the law laid down in the case of *Rahim Beg* (supra) which depends upon the opinion of Dr. Katiyar cannot be applied in the present case due to different factual position.

25. Learned counsel for the appellant has submitted that the trial court has concentrated on an underwear found at the spot whereas it was not proved beyond doubt that the underwear found at the spot was of the appellant. The contention of the appellant may be accepted because when the appellant left the spot after putting on his clothes then it was not for him to leave the underwear at the spot. It was for the prosecution to prove that the underwear found at the spot was of appellant. Also, when the underwear was lying separately and there was no indication of blood etc of the deceased on the underwear its seizure has no much meaning. In the alternate, if underwear was of the appellant then he removed the underwear thereafter he committed

the crime of rape and thereafter he did not put on underwear again then there was no possibility of any blood stain from the origin of the deceased on that underwear. The importance of seizure of underwear was only to show the presence of the appellant on the spot but unfortunately it could not be proved that seized underwear was of the appellant.

26. Learned counsel for the appellant, at this stage, has also submitted that initially Dr. D.C. Arya (PW-10) stated that the deceased had died due to asphyxia but when he was recalled by the court he accepted that the deceased could die due to injuries caused on her private part and uterus. If the appellant had committed intercourse he could not imagine that the prosecutrix would die due to that injury and therefore offence of the appellant does not fall within the purview of Section 302 of IPC, however, such submission cannot be accepted. Dr. D.C. Arya (PW-10) found a linear wound having internal haemorrhage present below the subcutaneous tissues having size of 8X2 cm on left to right side of the neck. If the appellant wanted to stop the noise and the sound of cry of the prosecutrix then he would have closed the mouth of the prosecutrix. There was no need to press her neck so hard that internal haemorrhage was caused on the neck below the skin and she would have died due to asphyxia. Hence, looking to the injuries found on the neck of the deceased prosecutrix, it is apparent that the appellant was intended to kill the deceased/prosecutrix otherwise there was no need to press her neck in such a manner. It cannot be said definitely that such throttling was done during the commission of rape or thereafter. Dr. D.C. Arya (PW-10) was asked a question that by such throttling hyoid bone (कंठष्ठ) should have been broken but he has clearly opined that looking to linear pressure on the neck it was not necessary that hyoid bone (कंठष्ठ) should have broken. Hence, looking to the cause of death that deceased died due to asphyxia it is very much clear that during intercourse or thereafter the appellant pressed the throat of the victim by a linear object like core of his palm and killed the deceased and therefore his intention was very well visible and it was to cause death of the deceased/ prosecutrix.

27. If it is presumed that the deceased would have died due to rape committed by the appellant then the overt act of the appellant is considered that he inserted his penis in the vagina of the girl aged eight years having short aperture with force and continued to give jerks so that her uterus was torn and ruptured then it is an imminently dangerous act and he should know that in

all probability of such act the death of the prosecutrix would be caused and therefore his overt act falls within the fourth ingredient of Section 300 of IPC and therefore, he is liable for offence under Section 302 of IPC.

28. It is an admitted fact that the prosecutrix was only eight years' old. In this connection, the evidence of teacher Shanti Verma (PW-9) and Dr. D.C. Arya (PW-10) cannot be discarded. According to the learned counsel for the appellant the age of the prosecutrix is not disputed.

29. Learned counsel for the appellant has placed reliance upon the various judgments relating to circumstantial evidence. A reliance has been placed upon the judgment of *"Tomaso Bruno and another Vs. State of Uttar Pradesh"* [(2015) 7 SCC 178], however, that judgment was depending upon the footage of CCTV camera and due to factual difference law laid down in that judgment cannot be applied in the present case. Similarly, for appreciation of evidence, reliance has been placed upon the judgment passed by the Apex Court in the case of *"Krishan Kumar Malik Vs. State of Haryana"* [(2011) 7 SCC 130] in which the prosecution's story was discarded because the evidence of the prosecution was shaky. In the present case, the entire evidence of the prosecution depends upon the circumstances. Prosecutrix was not available to give her evidence and due to factual difference law laid down in the case of *Krishan Kumar Malik* (supra) cannot be applied in the present case.

30. On the other hand, learned counsel for the State has placed his reliance upon the judgment passed by the Apex Court in the case of *"Dhananjoy Chatterjee alias Dhanna Vs. State of West Bengal"* [(1994)2 SCC 220] in which it is held that if chain of circumstantial evidence is complete then the accused shall be convicted. Learned counsel for the State has also placed reliance upon the judgment passed by the Apex Court in the case of *"Shivaji @ Dadya Shankar Alhat Vs. State of Maharashtra"* [AIR 2009 SC 56] in which it is laid down that all the incriminating facts and circumstances are proved beyond doubt and are found incompatible with innocence of the accused or the guilt of any other person then conviction on the basis of circumstantial evidence is justified.

31. In the light of the aforesaid judgments passed in the case of *Shivaji @ Dadya Shankar* (supra) and *Dhananjoy Chatterjee* (supra), the chain of circumstantial evidence in the present case, is complete against the appellant and the trial court has rightly concluded that the appellant had killed the

deceased/prosecutrix.

32. If all the circumstances which are proved against the appellant are considered simultaneously then it is proved that the appellant had chased the deceased/prosecutrix when she left the house of Raju to fetch a bundle of Bidi form (sic:from) the shop of Sunil and the factum of last seen is proved. Secondly, he was found by the witness Madanlal (PW-12) at about 09 pm when he was coming out of the place of incident dusting his clothes. Thirdly on his information the dead body of the deceased was discovered. Fourthly the several injuries were found on the body of the deceased and in her vaginal swab semen and sperms were found which indicates that the rape was committed upon her before her death and blood also oozed out of her wounds. It was also proved beyond doubt that the death of the deceased was homicidal in nature. She might have sustained fatal injuries during the offence of rape committed upon her but she was definitely killed by throttling. In the alternate, it was established that the act of the appellant of rape and to continue with such an offence so that even uterus of the prosecutrix was badly torn and ruptured. His overt act falls within the purview of offence of murder. A full pant was recovered from the appellant having stains of human blood. Dr. Harish Arya (PW-17) found four scratches on the face and neck of the appellant. It is also proved that the age of the prosecutrix was eight years and hence rape committed upon her falls within the purview of Section 376(2)(i) of IPC. Out of these circumstances, crucial circumstance is that the dead body was discovered on the information given by the accused. If the appellant was not involved in the crime then how could he know as to where the dead body was kept. Hence, after considering all the circumstances, only conclusion can be drawn that the appellant had committed rape upon the deceased/ prosecutrix and killed her.

33. Hence, on the basis of the aforesaid discussion and the circumstances proved against the appellant, the trial court has rightly found that the appellant was guilty of offence under Section 376(2)(i) and Section 302 of IPC. Consequently, the accused is guilty of offence under Section 6 of the POCSO Act which is an analogous provision to Section 376 of IPC.

34. When the appellant is found properly convicted of offence under Sections 302 and 376(2)(i) of IPC, then it would not be appropriate to remand the case for its retrial only because the charge under Section 376-A of IPC was added. Looking to the circumstances of the case, it cannot be said that

unless a charge under Section 376-A of IPC is proved the appellant cannot be effectively punished and therefore it would be appropriate to punish the appellant for the offences which are duly proved and charge of such offence initially framed against the appellant. Under these circumstances, we do not find any reason to remand the case for cross-examination of the witnesses for the charge under Section 376-A of IPC and therefore the appellant cannot be held guilty of offence under Section 376A of IPC and it would be appropriate that the charge of Section 376-A shall not be considered while recording the judgment.

35. So far as the sentence is concerned, learned counsel for the appellant has placed reliance upon the various judgments of the Apex Court. In the case of *"Amit Vs. State of Uttar Pradesh"* [(2012)4 SCC 107], it is held that there is nothing on evidence to suggest that accused is likely to repeat similar crimes in future and therefore no death sentence was awarded. Similarly, in the case of *"Rajkumar Vs. State of M.P."* [(2014)5 SCC 353] it is held that if the court finds that imposition of life imprisonment is totally inadequate then and only then death sentence can be granted. In the case of *"Shankar Kisanrao Khade Vs. State of Maharashtra"* [(2013)5 SCC 546], it was held by the Apex Court that death sentence can be imposed in "rarest of the rare" case. In that case the Apex Court had directed that all the sentenced (sic:sentences) imposed upon the accused for multiple offences to run consecutively. Learned counsel for the appellant referred the judgment passed by the Division Bench of this court in the matter of *"Neeraj Vs. State of Madhya Pradesh"* [1991 JLJ 564] in which it is held that without assigning special reasons death sentence cannot be granted. On the other hand, learned counsel for the State has referred the judgment passed by the Apex Court in the case of *"Vikram Singh @ Vicky and another Vs. Union of India and others"* [(2015) 9 SCC 502] and *"Vasanta Sampat Dupare Vs. State of Maharashtra"* [(2015) 1 SCC 253]. In case of *Vasanta Sampat Dupare* (supra), the death sentence of the accused was confirmed who committed the rape upon a minor girl child of four years and thereafter killed her whereas the accused was 47 years' old man. For ready reference a small portion of para 60 of the judgment rendered by the Apex Court in *Vasanta Sampat Dupare* (supra) is reproduced as under:

> "60. In the case at hand, as we find, not only was the rape committed in a brutal manner but murder was also committed

in a barbaric manner. The rape of a minor girl child is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child and the soul of society and such a crime is aggravated by the manner in which it has been committed. The nature of the crime and the manner in which it has been committed speaks about its uncommonness. The crime speaks of depravity, degradation and uncommonality. It is diabolical and barbaric. The crime was committed in an inhuman manner. Indubitably, these go a long way to establish the aggravating circumstances."

(36) Again, a small portion of para 61 is also reproduced:

"61.....There are cases when this Court has commuted the death sentence to life finding that the accused has expressed remorse or the crime was not premeditated. But the obtaining factual matrix when unfolded stage by stage would show the premeditation, the proclivity and the rapacious desire. The learned counsel would submit that the appellant had no criminal antecedents but we find that he was history-sheerer and had a number of cases pending against him. That alone may not be sufficient. The appalling cruelty shown by him to the minor child is extremely shocking and it gets accentuated, when his age is taken into consideration. It was not committed under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed or rehabilitated. As the circumstances would graphically depict, he would remain a menace to society, for a defenceless child has become his prey. In our considered opinion, there are no mitigating circumstances."

37. Similarly, the Apex Court, in the judgment passed in the case of *Vikram Singh @ Vicky* (supra), gave eight guidelines in para 52 to consider the severity of sentence.

38. Also, in case of *Shivaji @ Dadya Shankar Alhat* (supra), it is held by the Apex Court that even in case of circumstantial evidence death sentence can be awarded, if offence having great impact on social order and public interest exemplary treatment is required. In this connection, a little portion of

paras 23, 24, 25, and 26 of the judgment passed by the Apex Court in the case of *Mohd. Mannan alias Abdul Mannan* (supra) may be reproduced:

> 23. It is trite that death sentence can be inflicted only in a case which comes within the category of rarest of the rare cases but there is no hard and fast rule and the parameter to decide this vexed issue. This Court had the occasion to consider the cases which can be termed as rarest of the rare cases and although certain comprehensive guidelines have been laid to adjudge this issue but no hard and fast formula of universal application has been laid down in this regard. Crimes are committed in so different and distinct circumstances that it is impossible to lay down comprehensive guidelines to decide this issue.....
>
> 24. Further crime being brutal and heinous itself does not turn the scale towards the death sentence. When the crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community and when collective conscience of the community is petrified, one has to lean towards the death sentence. But this is not the end. If these factors are present the court has to see as to whether the accused is a menace to the society and would continue to be so, threatening its peaceful and harmonious co-existence. The court has to further enquire and believe that the accused condemned cannot be reformed or rehabilitated and shall continue with the criminal acts. In this way a balance-sheet is to be prepared while considering the imposition of penalty of death of aggravating and mitigating circumstances and just balance is to be struck.....
>
> 25. .....The appellant is a matured man aged about 43 years. He held a position of trust and misused the same in a calculated and preplanned manner. He sent the girl aged about 7 years to buy betel and few minutes thereafter in order to execute his diabolical and grotesque desire proceeded towards the shop where she was sent. The girl was aged about 7 years of thin built and 4 feet of height and such a child was incapable

of arousing lust in normal situation. Appellant had won the trust of the child and she did not understand the desire of the appellant which would be evident from the fact that while she was being taken away by the appellant no protest was made and innocent child was made prey of the appellant's lust.

26. .....These injuries show the gruesome manner in which she was subjected to rape. The victim of crime is an innocent child who did not provide even an excuse, much less a provocation for murder. Such cruelty towards a young child is appalling. The appellant had stooped so low as to unleash his monstrous self on the innocent, helpless and defenceless child. This act no doubt had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the authority conferred with the power to adjudicate is to inflict the death sentence which is natural and logical.....

39. Hence, after considering the factual position of this case in the light of the aforesaid judgments passed by the Apex Court, the appellant being a near relative of the deceased/prosecutrix used his relations upon the innocent child. He is a matured youth of 25 years of age. Looking to the perennial tear and position of the uterus almost smashed like vegetable, it is clear that in order to execute his diabolical and grotesque desire, the appellant proceeded towards a lonely place of one Jagdish @ Jagan (PW-6). The girl was about eight years who was incapable of arousing lust in normal situation. Appellant had won the trust of the child and she did not understand the desire of the appellant, hence, while she was being taken away by the appellant no protest was made by the innocent child. The injuries caused to the deceased/prosecutrix show the gruesome manner in which she was subjected to rape. The victim of crime is an innocent child who did not provide even an excuse, much less a provocation for murder. Such cruelty towards a young child is appalling. The act of the appellant is his monstrous self on the innocent, helpless and defenceless child. This act, no doubt, had invited extreme indignation of the community and shocked the collective conscience of the society. Due to that act, a message has gone in the public that girls of such age even are unsafe while moving in the locality and a crowd was collected when the appellant had accepted his guilt and went to show the dead body of the deceased. Thereafter, when the

deceased child had already suffered a great pain with a crushed childhood, she was killed by throttling. Under these circumstances, the present case falls within the purview of "rarest of the rare case". Looking to the overt act of the appellant, a deterrent sentence is necessary to be passed so that a message should go to the society that such crime should not be repeated by anyone and such heinous crime is highly deprecated and therefore the trial court has rightly punished the appellant with death sentence for the offence of murder. We confirm the recording of death sentence against the appellant for the offence under Section 302 of IPC.

40. In the result, the appeal filed by the appellant is hereby partly allowed. His conviction as well as sentence of offence under Section 376-A of IPC is hereby set aside on technical ground whereas the conviction and sentences of offence under Sections 376(2)(i), 302 of IPC and Section 6 of the POCSO Act recorded by the trial court are confirmed. The reference sent by the trial court is partly accepted. Death sentence recorded for the offence under Section 302 of IPC is hereby confirmed by us.

Order accordingly.

I.L.R. [2016] M.P., 2619
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice C.V. Sirpurkar
M.Cr.C. No. 11491/2008 (Jabalpur) decided on 14 March, 2016

CHETAN BAI (SMT.) ...Applicant
Vs.
RAMESH KUMAR PATHARIYA ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Sections 482 & 127 - Enhancement of Maintenance Allowance* - Maintenance allowance was enhanced from Rs. 600/- to Rs. 900/- by order dated 03.08.2005 - Further enhancement declined - Application u/S 482 of Cr.P.C. after 11 years of original order on application u/S 127 of the Cr.P.C. - Held - (A) Entitlement - Wife is entitled for the amount which is modestly consistent with the status of the family - Maintenance allowance is enhanced from Rs. 900/- to Rs. 2500/- - (B) Date from which it is to be paid - Although the delay is attributable to the applicant, however, fact remains that she had been surviving on penurious amount awarded by courts below, for which she can not be held to be responsible - Maintenance allowance at the enhanced**

rate shall be payable from the date of the order of revisionary court i.e. 03.08.2005. (Paras 6, 7, 11 to 14)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 482 व 127 – भरण पोषण भत्ते का बढ़ाया जाना – आदेश दिनांक 03.08.2005 द्वारा भरण पोषण भत्ता रूपये 600/– से बढ़ाकर रूपये 900/– किया गया था – भत्ते में और वृद्धि से इंकार – दं.प्र.सं. की धारा 127 के अंतर्गत प्रस्तुत आवेदन पर पारित मूल आदेश के 11 वर्ष पश्चात् दं.प्र.सं. की धारा 482 के अंतर्गत आवेदन प्रस्तुत – अभिनिर्धारित – (ए) हकदारी – पत्नी उतनी राशि हेतु हकदार है जितनी कि मर्यादित रूप से परिवार की हैसियत के अनुरूप हो – भरण पोषण भत्ता रूपये 900/– से बढ़ाकर रूपये 2500/– किया गया – (बी) दिनांक जिससे भुगतान किया जाना है – यद्यपि, विलंब आवेदक की ओर से किया गया है, तथापि यह तथ्य है कि वह निचले न्यायालयों द्वारा प्रदान की गई अत्यल्प राशि में गुजारा करती आ रही थी, जिसके लिए उसे जिम्मेदार नहीं ठहराया जा सकता है – बढ़ी हुई दर से भरण पोषण भत्ता, पुनरीक्षण न्यायालय के आदेश की दिनांक अर्थात् 03.08.2005 से संदेय होगा।

Cases referred:

AIR 1975 SC 83, 2015 (2) SCC 385.

Vinay Sharma, for the applicant.
Umesh Trivedi, for the non-applicant.

ORDER

C.V. SIRPURKAR, J. :- This miscellaneous criminal case under section 482 of the Code of Criminal Procedure is directed against the order dated 03-08-2005 passed by the Court of I Additional Sessions Judge, Hoshangabad, in Criminal Revision No.118/2004; whereby the order dated 26-03-2004 passed by the Judicial Magistrate First Class, Itarsi in MJC No.52/2002 under section 127 of the Code of Criminal Procedure, enhancing the rate of maintenance allowance awarded to petitioner wife under section 125 thereof, from Rs.600/- per month to Rs.900/- per month.

2. The facts necessary for disposal of this miscellaneous criminal case may briefly be stated thus: The Court of Judicial Magistrate First Class, Itarsi, by order dated 29-07-1999 passed in MJC No.80/1998 awarded maintenance under section 125 of the Code of Criminal Procedure to petitioner Chetan Bai at the rate of Rs.600/- per month. By order dated 26-03-2004 passed under section 127 of the Code of Criminal Procedure by Judicial Magistrate First Class, Itarsi in MJC No.52/2002, the amount of maintenance was

enhanced from Rs.600/- per month to Rs.900/- per month. The petitioner wife Chetan Bai challenged that order before I Additional Sessions Judge, Hoshangabad, in Criminal Revision No.118/2004. By impugned order dated 03-08-2005, learned Additional Sessions Judge declined to enhance the amount any further.

3. The impugned order has been challenged in this miscellaneous criminal case under section 482 of the Code of Criminal Procedure mainly on the ground that respondent husband is a driver of goods trains in Indian Railways and earns approximately rupees one lac per month. Therefore, the amount of maintenance at the rate of Rs.900/- per month is hopelessly inadequate.

4. It has to be noted at the outset that learned Magistrate disposed of the application under Section 127 of the Code of Criminal Procedure on 26.3.2004 and learned Additional Sessions Judge decided the Criminal Revision on 3.8.2005. This Miscellaneous Criminal Case was instituted on 2.12.2008 *i.e.* more than three years after the disposal of criminal revision. Thus, almost 11 years have elapsed since passing of the original order on application under Section 127 of the Cr.P.C.. In this situation, this Court has to consider as to what would have been the appropriate amount to grant to the petitioner by way of maintenance in the year 2004. Hence, this Court cannot take into account the subsequent increase in the monthly emoluments of the respondent since the disposal of the application under Section 127 of the Code of Criminal Procedure. If the petitioner wishes that amount of maintenance allowance should be fixed on the basis of current emoluments of the respondent, she will have to file a fresh application under Section 127 of the Cr.P.C..

5. Having thus made the scope of consideration for enhancing the maintenance allowance clear, it may be seen that there was evidence on record to conclude that the basic pay of the respondent in the year 2004 was Rs.5600/ per month. So this was the minimum amount he would take home every month. In May, 2000 and June, 2002, he took home as much as Rs. 15539/- and Rs.15386/- respectively. The additional allowance was tied up to the actual mileage logged by him in a particular month. However, learned trial Court as well as revisionary Court have failed to take into account this additional allowance, which though not fixed, accrued fairly regularly to the respondent. Thus, average of this additional income should also have been factored in to arrive at the monthly earnings of the respondent, which learned Courts below

failed to do.

6. Moreover, in paragraph no.7 of the impugned judgment, the revisionary Court has observed that if the monthly salary of the petitioner is presumed to be Rs. 6000/- per month, it would be not in the interest of justice to award maintenance @ more than 1/3rd of the salary of the respondent. Thus, even on the basis of the basic salary, the petitioner ought to have been awarded Rs. 2,000/- per month by way of maintenance. There was no justification for fixing the amount at a lowly Rs. 900/- per month. If the average of amount accruing to the respondent by way of mileage logged, the amount of maintenance would be still higher. It has come on record that the respondent is required to maintain his mother as well. He has no other responsibilities. As far back as in the year 1975, a three Judge bench of the Supreme Court had held in the case of *Bhagwan Dutt Vs. Kamla Devi,* AIR 1975 SC 83 that the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious but is modestly consistent with the status of the family.

7. Applying aforesaid principle to the set of fact and circumstances available on record of the case, in the opinion of this Court, the petitioner was entitled to Rs.2500/- per month even in the year 2004. The Courts below grossly erred in fixing the amount at a penurious Rs. 900/- per month on unsustainable ground that she failed to prove as to how Rs. 900/- per month was inadequate for her maintenance.

8. The next question that arises for consideration is from which date the amount of maintenance should be enhanced. The Supreme Court in recent case of *Jaiminiben Hirenbhai Vyas and another Vs. Hirenbhai Rameshchandra Vyas and another* 2015(2) SCC 385 has held that whether the maintenance is granted from the date of the order or the date of application, reasons have to be recorded. Sections 125 and 354 (6) of the Code of Criminal Procedure have to be read together for this purpose.

9. In the case at hand, due to lapse of inordinately long period after passing of the original order of enhancement under Section 127 of the Cr.P.C., the question with regard to the date from which the enhanced maintenance allowance is required to be payed, assumes significance.

10. Learned counsel for the respondent/husband has concentrated his arguments mainly upon the date from which the amount of maintenance should

be enhanced. He submits that the original order maintenance was passed in the year 1999 @ Rs. 600/- per month. It was enhanced under Section 127 of the Cr.P.C. from Rs. 600/- per month to Rs.900/- per month by learned Magistrate in the year 2003. Leaned (sic: Learned) Additional Sessions Judge affirmed that amount in the year 2005. The petitioner filed this miscellaneous criminal case under Section 482 of the Code of Criminal Procedure, after a delay more than 3 years *i.e.* in December, 2008. The case is being adjourned from the year 2008 to the year 2016 mainly on the ground of failure of the petitioner to prosecute it properly. Barring the last date, learned counsel for the respondent/husband never prayed for adjournment. In aforesaid set of circumstances, it has been argued that the enhanced amount should be made payable from the date of order passed in this Miscellaneous Criminal Case.

11. A perusal of the record reveals that it is true that no delay in entire process has been caused by the respondent Husband. Almost all delay is attributable to the petitioner but the fact remains that the petitioner has been surviving on penurious amount of maintenance awarded to her by the Courts below, for which she cannot be held to be responsible. In any case, the respondent has been utilizing the amount, which rightfully belonged to the petitioner since at least the year, 2005; therefore, the maintenance allowance at enhanced rate ought to be made payable since the date of order of the revisionary Court. Respondent being a permanent government employee can very well afford to pay arrears to the petitioner.

12. On the basis of foregoing discussion, this Court is of the view that interference by the High Court in exercising of inherent powers reserved to it by Section 482 of the Cr.P.C. is warranted to secure the ends of justice.

13. Consequently, this petition under Section 482 of the Cr.P.C. is allowed. The rate of maintenance allowance payable to the petitioner wife by the respondent husband is enhanced from Rs.900/- allowed under Section 127 of the Cr.P.C. by the Courts below to Rs.2,500/- per month.

14. The maintenance allowance at the enhanced rate shall be payable to the petitioner wife from the date of the order of revisionary Court *i.e.* 03.08.2005.

15. The petitioner shall provide number of her saving bank account in a nationalized bank to the respondent husband within two weeks from the date of this order. Thereafter, the respondent husband shall deposit each month's

allowance in that account before the 15th day of succeeding month, without fail.

16. The entire amount of arrears from 03.08.2005 till the date of this order shall be deposited in aforesaid account by the respondent husband within a period of two months from the date of this order.

17. This miscellaneous criminal case stands disposed of accordingly.

Application disposed of.

I.L.R. [2016] M.P., 2624

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Jarat Kumar Jain

M.Cr.C. No. 1362/2015 (Indore) decided on 13 June, 2016

KASIM ALI & anr. ...Applicants

Vs.

STATE OF M.P. & anr. ...Non-applicants

***A. Penal Code (45 of 1860), Section 420, Copyright Act, (14 of 1957), Section 63 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Application for quashment of FIR* - Allegation in written complaint that applicants are manufacturing electric goods using similar trade mark, which is registered in the name of M/s Vertex Manufacturing Co. Pvt. Ltd., therefore, customers were cheated - Held - Provisions of Copyright Act are not applicable for the purpose of electric products using same or similar trade mark - No complaint from any person or consumer that they have been cheated - No offence made out u/S 420 of IPC - Application allowed - Criminal proceedings pending before Trial Court quashed. (Paras 12 & 17)**

क. दण्ड संहिता (1860 का 45), धारा 420, प्रतिलिप्यधिकार अधिनियम (1957 का 14), धारा 63 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – प्रथम सूचना प्रतिवेदन को अभिखण्डित किये जाने हेतु आवेदन – लिखित शिकायत में यह अभिकथन है कि आवेदकगण मेसर्स वर्टेक्स मैन्यूफैक्चरिंग कं.प्रा. लिमि. के नाम से पंजीकृत व्यापार चिन्ह के समरूप व्यापार चिन्ह का उपयोग करके विद्युत वस्तुओं का विनिर्माण कर रहे हैं, इसलिए ग्राहकों के साथ छल हुआ – अभिनिर्धारित – प्रतिलिप्यधिकार अधिनियम के उपबंध समान अथवा समरूप व्यापार चिन्ह वाले विद्युत उत्पादों के उपयोग के प्रयोजन हेतु लागू नहीं होते हैं – किसी भी व्यक्ति अथवा उपभोक्ता द्वारा उसके साथ छल होने की शिकायत नहीं – भा.दं.

सं. की धारा 420 के अंतर्गत कोई अपराध नहीं बनता है – आवेदन मंजूर – विचारण न्यायालय के समक्ष लंबित दाण्डिक कार्यवाहियाँ अभिखण्डित।

***B. Trade Marks Act (47 of 1999), Section 115 (4)* - As per allegation in FIR, applicants committed offence u/S 102 of the Act - Police Officer not below the rank of Deputy Superintendent of Police, shall obtain opinion of Registrar before search & seizure - In present case, procedure has not been complied with - Court is not competent to take cognizance of the offence u/S 103 of the Act - To continue such proceedings is misuse of process of law. (Paras 15, 16 & 18)**

ख. व्यापार चिन्ह् अधिनियम (1999 का 47), धारा 115(4) – प्रथम सूचना प्रतिवेदन के अभिकथन के अनुसार, आवेदकगण ने अधिनियम की धारा 102 के अंतर्गत अपराध कारित किया – तलाशी तथा जप्ती किये जाने से पूर्व, ऐसा पुलिस अधिकारी जो उप पुलिस अधीक्षक से निम्नतर पद का न हो, रजिस्ट्रार का अभिमत प्राप्त करेगा – वर्तमान प्रकरण में प्रक्रिया का अनुपालन नहीं किया गया – अधिनियम की धारा 103 के अंतर्गत अपराध का संज्ञान लेने हेतु न्यायालय सक्षम नहीं है – ऐसी कार्यवाहियों का चलते रहना विधि की प्रक्रिया का दुरूपयोग है।

Cases referred:

Cri.Misc.No. M-9229/2009 decided on 22.03.2011 (Punjab & Haryana High Court), Cri.Misc.No. M-23090/2009 decided on 11.10.2010 (Punjab & Haryana High Court), (2015) 11 SCC 776.

M.M. Bohara, for the applicants.
Mamta Shandilya, Dy.G.A. for the non-applicant No. 1/State.
Aniruddha Gokhale, for the non-applicant No.2/Complainant.

ORDER

J.K. JAIN, J. :- THIS petition under Section 482 of the Code of Criminal Procedure [in brief "the Code"] has been filed for quashment of FIR under Section 420 of IPC and under Section 63 of the Copyright Act, 1957 [in brief "the Act, 1957"] registered at Police Station Sadar Bazar, Indore and subsequent proceedings before JMFC, Indore in Criminal Case No.19746/2014 against the applicants.

2. Non-applicant No.2/complainant has filed a written complaint against the applicants alleging that they are using the brand name "SENTINEL" for their electric products; whereas the trade mark has been registered by "M/s

Vertex Manufacturing Co. Pvt. Ltd.". Thus, they are misusing the trade mark and cheating the customers as well as the Company by selling fake electric products. On this basis, Police Station Sadar Bazar, Indore registered a Crime No.12/2014 for the offence under Section 420 of IPC and under Section 63 of the Act, 1957 against the applicants. The police has seized the fake electric products from possession of the applicants and after completing the investigation submitted final report before the JMFC, Indore. Before the Magistrate, the applicants have raised the objection that the trade mark is not registered in the Company's name, therefore, they be discharged. However, learned Magistrate rejected the objection and framed the charges under Section 420 of IPC and under Section 63 of the Act, 1957 against the applicants.

3. The applicants averted in this petition that initially SENTINEL trade mark was registered in favour of the Vertex through Proprietor N.K. Bhimani which was removed on 11.08.2008 and on 09.03.2013 applicant No.1 has made an application under Section 23 (2), Rule 62 (1) of the Trade Marks Act, 1999 [in brief "the Act, 1999]. However, M/s Vertex Manufacturing Co. Pvt. Ltd. on 18.07.2013 has filed an application for registration of the trade mark over SENTINEL. It is further averted that without any power or authority, the Vertex Company entered into an agreement with the complainant Mr. Sachidanand Chitale, whereas the trade mark SENTINEL was expired on 11.08.2008. Therefore, such an agreement being *void ab initio*. Thus, the applicants have not committed any offence which is punishable under Section 63 of the Act, 1957 or under Section 420 of IPC. If there is any infringement of right of the complaint then the action may be taken under the Act, 1999. Section 115 of the Act, 1999 provides a specific procedure for taking cognizance but the procedure has not been complied, therefore, the Court cannot take cognizance for the offence under the Act, 1999. In such circumstances to continue such prosecution against the applicants is misuse of process of law.

4. Learned counsel for the applicants submits that the applicants have not committed any offence under Section 63 of the Act, 1957 and under Section 420 of IPC. However, it may be a case of infringement of right under the Act, 1999. Section 115 of the Act, 1999 provides that an offence under Section 107, 108 or 109, the Court can take cognizance on complaint in writing made by the Registrar and police officer not below the rank of Deputy Superintendent of Police is authorized for search and seizure. But in the present

case no such procedure has been followed.

5. It is further submitted that the complainant has not produced Certificate of registration contemplated under Section 23 of the Act, 1999 or entry in register contemplated under Section 45 of the Act, 1957. It appears that SENTINEL trade mark has not been registered in the name of Vertex Co. In similar facts, Punjab & Haryana High Court in the case of *Anil Kumar v/s State of Punjab,* in Cri. Misc. No.M-9229 of 2009 decided on 22.03.2011 and in the case of *Satpal v/s State of Punjab*, in Cri. Misc. No.M-23090 of 2009 decided on 11.10.2010, held that offence under Section 63 of the Act, 1957 and under Section 420 of IPC has not been made out and quashed the proceedings.

6. Learned counsel for the applicants submits that Section 27 of the Act, 1999 provides that no action for infringement of unregistered trade mark can be taken. In the present case, the Non-applicant No.2 has not produced any Certificate of registration of trade mark. Therefore, no prosecution can be instituted against the applicants.

7. On the other hand, learned counsel for the Non-applicants vehemently oppose the prayer and submit that the offence has rightly been registered under the Act, 1957. The provisions of trade mark Act are not applicable in this case. There is an infringement of rights of goodwill of the Non-applicant No.2. The documents which are not filed along with the final report, cannot be considered at this stage. For this purpose placed reliance on the judgment of Hon'ble apex Court in the case of *HMT Watches Ltd. v/s M.A.Abida* [(2015) 11 SCC 776]. It is further submitted that the trade mark is registered in the name of M/s Vertex Manufacturing Co. Pvt. Ltd. for last 45 years. The disputed questions of fact cannot be decided at this stage. The Trial Court has rightly framed the charges against the applicants. Therefore, petition be dismissed.

8. After hearing learned counsel for the parties, perused the record.

9. It is alleged in the written complaint of Non-applicant No.2 that the applicants are manufacturing electric goods using similar trade mark which is registered in the name of M/s Vertex Manufacturing Co. Pvt. Ltd. and, therefore, the customers were being cheated by the applicants. The final report has been filed under Section 420 of IPC and under Section 63 of the Act, 1957.

10. Section 63 of the Act, 1957 is as under :-

"63. Offence of infringement of copyright or other rights conferred by this Act – Any person who knowingly infringes or abets the infringement of :-

(a) the copyright in a work, or

(b) any other right conferred by this Act, except the right conferred by section 53A shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine shich shall not be less than fifty thousand rupees but which may extend to two lakh rupees :

Provided that where the infringement has not been made for gain in the course of trade or business the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees.

Explanation.- Construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work shall not be an offence under this section."

11. Section 13 of the Act, 1957 deals with the work in which copyright subsists. Section 13 of the Act, 1957 reads as under :-

"13. Works in which copyright subsists :- (1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsists throughout India in the following classes of works, that is to say,-

(a) original literary, dramatic, musical and artistic works;

(b) cinematograph films; and

(c) sound recording."

12. In view of Section 13 of the Act, 1957 Copyright Act is applicable in

original literary, dramatic, musical and artistic works, cinematograph films, sound recording. The provision of the Act, 1957 are not applicable for the purpose of electric products using the same or similar trade mark which is registered in the name of Vertex Co.

13. From the facts, as averted in the FIR, it seems that the applicants have committed the offence under Section 102 of the Act, 1999 which is punishable under Section 103 of the Act, 1999. For the ready reference, Sections 102 and 103 are reproduced as under :-

> **"102. *Falsifying and falsely applying trade marks.*— (1) A person shall be deemed to falsify a trade mark who, either,--**
>
> **(a) without the assent of the proprietor of the trade marks makes that trade mark or a deceptively similar mark; or**
>
> **(b) falsifies any genuine trade mark, whether by alteration, addition, effacement or otherwise.**
>
> **(2) A person shall be deemed to falsely apply to goods or services a trade mark who, without the assent of the proprietor of the trade mark,--**
>
> **(a) applies such trade mark or a deceptively similar mark to goods or services or any package containing goods;**
>
> **(b) uses any package bearing a mark which is identical with or deceptively similar to the trade mark of such proprietor, for the purpose of packing, filling or wrapping therein any goods other than the genuine goods of the proprietor of the trade mark.**
>
> **(3) Any trade mark falsified as mentioned in sub-section (1) or falsely applied as mentioned in sub-section (2), is in this Act referred to as a false trade mark.**
>
> **(4) In any prosecution for falsifying a trade**

mark or falsely applying a trade mark to goods or services, the burden of proving the assent of the proprietor shall lie on the accused.

103. *Penalty for applying false trade marks, trade descriptions, etc.-- Any person who--*

(a) falsifies any trade mark; or

(b) falsely applies to goods or services any trade mark; or

(c) makes, disposes of, or has in his possession, any die, block, machine, plate or other instrument for the purpose of falsifying or of being used for falsifying, a trade mark; or

(d) applies any false trade description to goods or services; or

(e) applies to any goods to which an indication of the country or place in which they were made or produced or the name and address of the manufacturer or person for whom the goods are manufactured is required to be applied under section 139, a false indication of such country, place, name or address; or

(f) tampers with, alters or effaces an indication of origin which has been applied to any goods to which it is required to be applied under section 139; or

(g) causes any of the things above-mentioned in this section to be done,

shall, unless he proves that he acted, without intent to defraud, be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be

less than fifty thousand rupees but which may extend to two lakh rupees:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees."

14. The Act, 1999 provides a procedure under Section 115 for taking cognizance. It is useful to refer Section 115 which is as under:

"115. *Cognizance of certain offences and the powers of police officer for search and seizure.*-- (1) No court shall take cognizance of an offence under section 107 or section 108 or section 109 except on complaint in writing made by the Registrar or any officer authorized by him in writing:

Provided that in relation to clause (c) of sub-section (1) of section 107, a court shall take cognizance of an offence on the basis of a certificate issued by the Registrar to the effect that a registered trade mark has been represented as registered in respect of any goods or services in respect of which it is not in fact registered.

(2) No court inferior to that of a Metropolitan Magistrate or Judicial Magistrate of the first class shall try an offence under this Act.

(3) The offences under section 103 or section 104 or section 105 shall be cognizable.

(4) Any police officer not below the rank of deputy superintendent of police or equivalent, may, if he is satisfied that any of the offences referred to in sub-section (3) has been, is being or is likely to be, committed, search and seize without warrant the goods, die, block, machine, plate, other instruments or things involved in committing the offence, wherever found, and all the articles so seized shall, as soon as practicable, be produced before a Judicial Magistrate of the first class

or Metropolitan Magistrate, as the case may be :

Provided that the police officer, before making any search and seizure, shall obtain the opinion of the Registrar on facts involved in the offence relating to trade mark and shall abide by the opinion so obtained.

(5) Any person having an interest in any article seized under sub-section (4), may, within fifteen days of such seizure, make an application to the Judicial Magistrate of the first class or Metropolitan Magistrate, as the case may be, for such article being restored to him and the Magistrate, after hearing the applicant and the prosecution, shall make such order on the application as he may deem fit."

15. There is allegation in the FIR that the applicants were using the same trade mark or a deceptively similar trade mark to goods or package containing goods, which is registered in the name of Vertex Manufacturing Co. Thereby they have committed the offence defined under Section 102 which is punishable under Section 103 of the Act, 1999. Section 115 (3) of the Act, 1999 provides that the offences under Section 103, Section 104 and Section 105 shall be cognizable. Sub-section (4) of Section 115 provides that any police officer not below the rank of Deputy Superintendent of Police, if he is satisfied that an offence under Section 103 or 104 or 105 has been committed or is likely to be committed, may search and seize goods, die, block, machine etc. without warrant. It is also provided that before making any serach (sic:search) and seizure, he shall obtain the opinion of the Registrar on facts involved in the offence relating to trade mark and shall abide by the opinion so obtained.

16. In the present case, no such opinion has been obtained from the Registrar and search and seizure has been conducted by the Sub Inspector. Thus, the mandatory provisions of the Act, 1999 have not been complied with. When statutes, which create an offence provide for a procedure the Court or the authorities cannot ignore the same. In the present case, the procedure provided under Section 115 of the Act, 1999 has not been complied with, therefore, the Court is not competent to take cognizance of the offence under Section 103 of the Act, 1999.

17. Now I have considered whether the offence under Section 420 of

IPC is made out against the applicant. There is no complaint from any person or consumers that they have been cheated by the purchase of any electric goods which is said to be manufactured by the applicant No.1 and which contained deceptively similar trade mark as of M/s Vertex Company. From the facts, the offence under Section 420 of IPC has not been made out.

18. With the aforesaid, it is clear that the Court has wrongly taken the cognizance for the offence under Section 63 of the Act, 1957 and under Section 420 of IPC and from the facts the applicants may be prosecuted for the offence under Section 102 read with Section 103 of the Act, 1999. However, the mandatory procedure provided under Section 115 of the Act, 1999 has not been complied with. Hence, applicants cannot be prosecuted for offence under Trade Marks Act, 1999. Therefore, to continue such proceedings is misuse of process of law.

19. Accordingly, this petition is **allowed.** The FIR registered at Police Station Sadar Bazar, Indore at Crime No.12/2014 for the offence under Section 420 of IPC and under Section 63 of the Copyright Act, 1957 is hereby quashed and further proceedings in Criminal Case No.19746/2014 pending before JMFC, Indore against the applicants are also quashed.

Application allowed.

I.L.R. [2016] M.P., 2633

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.K. Seth & Mr. Justice H.P. Singh

M.Cr.C. No. 456/2016 (Jabalpur) decided on 14 July, 2016

STATE OF M.P. ...Applicant

Vs.

RAMRATAN @ BABLU LONI ...Non-applicant

***Penal Code (45 of 1860), Section 376 and Criminal Procedure Code, 1973 (2 of 1974), Section 378(3) - Rape - Leave to appeal* - Prosecution has failed to prove that the prosecutrix was minor - Father of the prosecutrix died & mother left her, therefore, they were not examined - Uncle has admitted the possibility that the prosecutrix could be more than 18 years - As regards the date of birth recorded in the mark sheet, author of the entry was not examined, therefore, the same has no evidentiary value - Despite having numerous opportunities, she did not raise an alarm to invite**

intention of others - She was a consenting party - Held - Since the Trial Court has considered the entire material evidence on record and on a proper appreciation of evidence, has passed a reasoned order of acquittal, impugned order does not suffer from illegality, manifest error or perversity - No interference is warranted. (Paras 11, 13 & 14)

दण्ड संहिता (1860 का 45), धारा 376 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378(3) – बलात्संग – अपील के लिए अनुमति – अभियोजन यह सिद्ध करने में असफल रहा कि अभियोक्त्री अवयस्क थी – अभियोक्त्री के पिता की मृत्यु हो चुकी है तथा माँ ने उसे छोड़ दिया है, अतएव उनका परीक्षण नहीं किया गया – उसके चाचा ने इस संभावना को स्वीकार किया है कि अभियोक्त्री की आयु 18 वर्ष से अधिक हो सकती है – अभियोक्त्री की अंकसूची में अभिलिखित जन्मतिथि की प्रविष्टि के लेखकर्ता का परीक्षण न कराये जाने से उसका कोई साक्ष्यिक मूल्य नहीं है – अनेक अवसर उपलब्ध होने के बावजूद अभियोक्त्री ने अन्य व्यक्तियों का ध्यान आकर्षित करने हेतु शोर नहीं मचाया – वह सहमत पक्षकार थी – अभिनिर्धारित – चूंकि विचारण न्यायालय ने अभिलेख पर उपलब्ध संपूर्ण सारभूत साक्ष्य पर विचार किया है तथा साक्ष्य के उचित मूल्यांकन उपरांत दोषमुक्ति का सकारण आदेश पारित किया है, प्रश्नगत आदेश अवैधता, प्रकट त्रुटि अथवा प्रतिकूलता से ग्रसित नहीं है – हस्तक्षेप की आवश्यकता नहीं।

Cases referred:

1976 SCC (Cr.) 338, (2007) 4 SCC 415, 2014 AIR SCW 3406, (2006) 4 SCC 357.

Prakash Gupta, P.L. for the applicant/State.

None for the non-applicant.

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 09.10.2015, passed by the Additional Sessions Judge, Satna, District Satna (MP), in Special S.T.No.168/2014, titled as State of M.P. Vs. Ramratan @ Bablu Loni, acquitting the respondent-Ramratan @ Bablu Loni for offences punishable under Sections 5 read with Section 6 of the Protection of Children from Sexual Offence Act, 2012 (hereinafter referred to as 'POCSO Act' for short) and Section 376(2) (n) of Indian Penal Code (hereinafter referred to as the Code for short):

2. The case of prosecution is that father of prosecutrix died 8 to 10 years ago. After the death of her father, her mother left her and went elsewhere. Prosecutrix lived with her uncle Rajkumar Loni (PW/1) and aunt Smt. Mamta Loni (PW/4). Accused-respondent used to come to the house of his sister who is living in the neighbourhood of prosecutrix (PW/2), and were known to each other. Seven months prior to 21.10.2014, when uncle Rajkumar (PW/1) and aunt Smt. Mamta Loni (PW/4) of prosecutrix (PW/2) went Katni for treatment and prosecutrix who was alone in the house, accused came to house of prosecutrix and with an assurance to marry her, he committed sexual intercourse with her. It is alleged that subsequently also accused-respondent had sex with prosecutrix several times. She became pregnant. On finding her alone on 28.8.2014, accused-respondent took her to his house. Then he took her to Tahsil office and got written some documents. Thereafter, on getting opportunity, she came back to her home. She narrated the incident to her uncle and aunt. On 21.10.2014, prosecutrix gave written complaint and on the basis of that complaint, Crime No.131/2013 was registered by the Police Amarpatan vide Ex.P/6, against the accused Ramratan @ Bablu Loni for offences punishable under Sections 5 read with Section 6 of the POCSO Act and Section 376(2) (N) of Code.

4. Further case of the prosecution is that on 22.10.2014, prosecutrix was medically examined by Dr. Alok Khanna (PW/9), who did not give any definite opinion about recent intercourse. He further opined that she is carrying pregnancy of seven months. Ultrasound of prosecutrix was also taken by Dr. H.K. Agrawal, who found that she is carrying pregnancy of 37 weeks. After arrest on 22.10.2014, the accused was also medically examined by Dr. G.S. Bhadoriya (PW/6) and according to him respondent/accused was capable of performing sexual intercourse. Statements of prosecutrix and witnesses were recorded by the police. After investigation, the respondent was charge sheeted for the aforesaid offences.

5. On the basis of the charge-sheet, trial Court framed charges against the accused/respondent for offences punishable under Sections 5 read with Section 6 of the POCSO Act and Section 376(2) (N) of Code. Respondent abjured his guilt.

6. The trial Court after considering the plea of the accused/respondent, disbelieved the testimony of various prosecution witnesses and acquitted the accused/respondent.

7. Panel advocate for 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.

8. 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?

9. 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/respondent on the basis of evidence on record and not merely because the High Court can take another possible or a different view.

10. In this regard, first question which is required to be considered, is whether the prosecutrix was below 18 years of age on the date of the incident?

11. On the basis of the statements of the prosecutrix (PW/2), her uncle Rajkumar Loni (PW/1) and on the basis of entry in her mark sheet and learned trial Court inferred that it has not been proved beyond reasonable doubt that on the date of the incident, the prosecutrix had not completed the age of 18 years. Perusal of mark sheet of the prosecutrix, reflects that the date of birth of the prosecutrix is 12.8.1998. Accordingly, on the date of incident on 21.3.2014 i.e. seven months prior to 21.10.2014, from the date of complaint, the age of the prosecutrix was 15 years, 7 months & 9 days. In his cross-examination, he has admitted the possibility that on date of incident, her age could be more than 18 years. No doubt, father of the prosecutrix died before 8 to 12 years of the incident and mother of the prosecutrix left her, due to that she was living with her uncle Rajkumar (PW/1) and Smt. Mamta Loni (PW/4), on account of which parent of prosecutrix were not examined. So far as the date of birth recorded as 12.8.1988, in the mark sheet is concerned, the author of that entry was not examined. The date of birth recorded in the school

register, in the absence of definite and cogent evidence is of not much evidentiary value. In these circumstances, learned trial Court has committed no error in refusing to place reliance upon the mark-sheet and learned trial Court concluded rightly, that the age of the prosecutrix could not be held to be less than 18 years on the date of the incident.

12. From perusal of the record, it is clear that trial Court has recorded detailed and cogent reasons for its finding, supported by statements of witnesses. In these circumstances, the finding regarding the age cannot be lightly interfered with.

13. So far as statements of prosecutrix regarding abduction is concerned, trial Court has observed that version of the prosecutrix as given by her in her statement recorded under Section 161 of the Code of Criminal Procedure differs substantially from the evidence given by her in the Court. That apart, from her evidence it clear that she was taken to different places by the respondent and she went along without any protest. Moreover, she met a number of persons, but did not tell or narrate to anyone about the abduction or rape. Had she been forcibly abducted by the respondent, there were numerous occasions on which she could have easily raised an alarm and invite intervention of others. However, she singularly failed to do so, which, as per the trial Court leads to the inescapable conclusion that she was a consenting party and had accompanied the respondent on her own free will and accord. As stated above, prosecution has failed to prove that at the time of the incident, the prosecutrix was less than 18 years of age and thus, the charges levelled against the respondent under Sections 5 read with Section 6 of the Protection of Children from Sexual Offence Act, 2012 (hereinafter referred to as 'POCSO Act' for short) and Section 376(2) (n) of the Code., have not been proved and rightly held so by the trial Court.

14. In the aforesaid circumstances, in the considered opinion of this Court, trial Court has considered the entire material evidence on record against respondent in its entirety and on a proper appreciation of evidence and after assigning detailed and cogent reasons, has acquitted the respondent. 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, in view of the law laid down by Hon'ble the Supreme Court in the matters *Bhagwati and others Vs. State of U.P.* [1976 SCC (Cr.) 338), *Chandrappa & others Vs. State of Karnataka* [(2007) 4 SCC 415], *Ashok Rai Vs. State of U.P. and others* (2014 AIR SCW 3406) and *Sadhu Saran Singh Vs. State of Uttar Pradesh and others* [(2006) 4 SCC 357].

15. The application for leave to appeal against acquittal of the accused/respondent has no merit and substance and accordingly is hereby dismissed in *limine* at the stage of admission itself.

16. Let record of the trial Court be sent back with a copy of this order without delay.

Application dismissed.