THE INDIAN LAW REPORTS

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लोकायुक्त एवं उप–लोकायुक्त अधिनियम, म.प्र. (1981 का 37), धाराएँ 10, 12 व 13 – लोकायुक्त एवं उप–लोकायुक्त (अन्वेषण) नियम, म.प्र., 1982, नियम 6 व 16 – परिवाद – जाँच – नैसर्गिक न्याय के सिद्धांतों का उल्लंघन – प्रारंभिक जांच करने के पश्चात् अपीलार्थी को कारण बताओ नोटिस जारी किया गया था – नोटिस के अनुसार मौखिक सुनवाई का अवसर भी प्रदान किया गया था – अपीलार्थी ने लोकायुक्त के समक्ष व्यक्तिगत उपस्थिति दी थी – उक्त नोटिस के जवाब पर विचार करने तथा उचित अवसर प्रदान करने के पश्चात् तथ्य के निष्कर्ष का प्रतिवेदन प्रस्तुत किया गया था – अतः प्रत्यर्थी ने मामले की जांच करते समय तथा अपीलार्थी के विरूद्ध समुचित कार्यवाही करने हेतु राज्य सरकार को तथ्य के निष्कर्ष का प्रतिवेदन प्रस्तुत किये जाने

वह जाँच करे तथा इस संबंध में पर्याप्त साक्ष्य प्रस्तुत करे – ऐसा कोई साक्ष्य प्रस्तुत नहीं किया गया अतः प्रमाण–पत्र पर अविश्वास नहीं किया जा सकता – निर्धारित की गई निःशक्तता को सही माना जा सकता है – अधिकरण द्वारा पारित अवार्ड की राशि को बढ़ाया गया। (सविता बाई वि. असलम) ...100

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Engineer has been transferred on deputation from Municipal Corporation, Gwalior to Municipal Corporation, Ujjain – Held – State has been given power to transfer any officer or employee from one corporation to another with additional power that in case the tenure of employee at any corporation is more than three years then his transfer would invariably be made by the State Government – Petition deserves to be dismissed. [Pawan Kumar Singhal Vs. State of M.P.] ...*10

सेवा विधि – नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 58(5) व 58(6) एवं नगरपालिक निगम (अधिकारियों तथा सेवकों की नियुक्ति तथा सेवा की शर्तें) नियम, म.प्र., 2000, अनुसूची (I) सहपठित नियम 3 व 4 – स्थानांतरण – याची का सहायक अभियंता होने के नाते प्रतिनियुक्ति में नगरपालिक निगम, ग्वालियर से नगरपालिक निगम, उज्जैन स्थानांतरण किया गया – अभिनिर्धारित – राज्य को किसी भी अधिकारी अथवा कर्मचारी को एक निगम से दूसरे निगम पर स्थानांतरण करने की शक्ति के साथ ही यह अतिरिक्त शक्ति भी प्रदान की गई है कि किसी भी निगम पर कर्मचारी का कार्यकाल 3 वर्ष से अधिक अवधि का होने पर, राज्य सरकार द्वारा सदैव उसका स्थानांतरण किया जाएगा – याचिका खारिज करने योग्य है। (पवन कुमार सिंघल वि. म.प्र. राज्य) ...*10

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सेवा विधि – अधिवार्षिकी – याचीगण/निजी सहायता प्राप्त संस्थाओं के शिक्षक – शिक्षकों के लिए अधिवार्षिकी वय वृद्धि – अभिलेख पर यह दर्शाने हेतु कोई सामग्री उपस्थित नहीं है कि निजी सहायता प्राप्त संस्थाओं से संबंधित यू.जी.सी. विनियमन राज्य सरकार द्वारा स्वीकार किये गये हैं – याचिकाएँ खारिज। (दिनेश चन्द्र मिश्रा (डॉ.) वि. म.प्र. राज्य) ...*3

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(VOL-1)

JOURNAL SECTION

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

THE RIGHTS OF PERSONS WITH DISABILITIES ACT, 2016 (NO. 49 OF 2016)

[Received the assent of the President on the 27th December, 2016 and published in the Gazette of India (Exraordinary) Part II, Section 1. dated 28.12. 2016, Page no. 1-35]

An Act to give effect to the United Nations Convention on the Rights of Persons with Disabilities and for matters connected therewith or incidental thereto.

WHEREAS the United Nations General Assembly adopted its Convention on the Rights of Persons with Disabilities on the 13th day of December, 2006;

AND WHEREAS the aforesaid Convention lays down the following principles for empowerment of persons with disabilities,—

(a) respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

(b) non-discrimination;

(c) full and effective participation and inclusion in society;

(d) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

(e) equality of opportunity;

(f) accessibility;

(g) equality between men and women;

(h) respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities;

AND WHEREAS India is a signatory to the said Convention;

AND WHEREAS India ratified the said Convention on the 1st day of October, 2007;

AND WHEREAS it is considered necessary to implement the Convention aforesaid.

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

CHAPTER I

PRELIMINARY

1. Short title and commencement. *(1)* This Act may be called the Rights of Persons with Disabilities Act, 2016.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

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

(a) "appellate authority" means an authority notified under sub-section *(3)* of section 14 or sub-section *(1)* of section 53 or designated under sub-section *(1)* of section 59, as the case may be;

(b) "appropriate Government" means,—

(i) in relation to the Central Government or any establishment wholly or substantially financed by that Government, or a Cantonment Board constituted under the Cantonments Act, 2006 (41 of 2006), the Central Government;

(ii) in relation to a State Government or any establishment, wholly or substantially financed by that Government, or any local authority, other than a Cantonment Board, the State Government.

(c) "barrier" means any factor including communicational, cultural, economic, environmental, institutional, political, social, attitudinal or structural factors which hampers the full and effective participation of persons with disabilities in society;

(d) "care-giver" means any person including parents and other family Members who with or without payment provides care, support or assistance to a person with disability;

(e) "certifying authority" means an authority designated under sub-section *(1)* of section 57;

(f) "communication" includes means and formats of communication, languages, display of text, Braille, tactile communication, signs, large print, accessible multimedia, written, audio, video, visual displays, sign language, plain-language, human-reader, augmentative and alternative modes and accessible information and communication technology;

(g) "competent authority" means an authority appointed under section 49;

(h) "discrimination" in relation to disability, means any distinction, exclusion, restriction on the basis of disability which is the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field and includes all forms of discrimination and denial of reasonable accommodation;

(i) "establishment" includes a Government establishment and private establishment;

(j) "Fund" means the National Fund constituted under section 86;

(k) "Government establishment" means a corporation established by or under a Central Act or State Act or an authority or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in section 2 of the Companies Act, 2013 (18 of 2013) and includes a Department of the Government;

(l) "high support" means an intensive support, physical, psychological and otherwise, which may be required by a person with benchmark disability for daily activities, to take independent and informed decision to access facilities and participating in all areas of life including education, employment, family and community life and treatment and therapy;

(m) "inclusive education" means a system of education wherein

students with and without disability learn together and the system of teaching and learning is suitably adapted to meet the learning needs of different types of students with disabilities;

(n) "information and communication technology" includes all services and innovations relating to information and communication, including telecom services, web based services, electronic and print services, digital and virtual services;

(o) "institution" means an institution for the reception, care, protection, education, training, rehabilitation and any other activities for persons with disabilities;

(p) "local authority" means a Municipality or a Panchayat, as defined in clause *(e)* and clause *(f)* of article 243P of the Constitution; a Cantonment Board constituted under the Cantonments Act, 2006 (41 of 2006); and any other authority established under an Act of Parliament or a State Legislature to administer the civic affairs;

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

(r) "person with benchmark disability" means a person with not less than forty per cent. of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority;

(s) "person with disability" means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others;

(t) "person with disability having high support needs" means a person with benchmark disability certified under clause *(a)* of sub-section *(2)* of section 58 who needs high support;

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

(v) "private establishment" means a company, firm, cooperative or other society, associations, trust, agency, institution, organisation, union, factory or such other establishment as the appropriate Government may, by

notification, specify;

(w) "public building" means a Government or private building, used or accessed by the public at large, including a building used for educational or vocational purposes, workplace, commercial activities, public utilities, religious, cultural, leisure or recreational activities, medical or health services, law enforcement agencies, reformatories or judicial foras, railway stations or platforms, roadways bus stands or terminus, airports or waterways;

(x) "public facilities and services" includes all forms of delivery of services to the public at large, including housing, educational and vocational trainings, employment and career advancement, shopping or marketing, religious, cultural, leisure or recreational, medical, health and rehabilitation, banking, finance and insurance, communication, postal and information, access to justice, public utilities, transportation;

(y) "reasonable accommodation" means necessary and appropriate modification and adjustments, without imposing a disproportionate or undue burden in a particular case, to ensure to persons with disabilities the enjoyment or exercise of rights equally with others;

(z) "registered organisation" means an association of persons with disabilities or a disabled person organisation, association of parents of persons with disabilities, association of persons with disabilities and family members, or a voluntary or non-governmental or charitable organisation or trust, society, or non-profit company working for the welfare of the persons with disabilities, duly registered under an Act of Parliament or a State Legislature;

(za) "rehabilitation" refers to a process aimed at enabling persons with disabilities to attain and maintain optimal, physical, sensory, intellectual, psychological environmental or social function levels;

(zb) "Special Employment Exchange" means any office or place established and maintained by the Government for the collection and furnishing of information, either by keeping of registers or otherwise, regarding—

(i) persons who seek to engage employees from amongst the persons with disabilities;

(ii) persons with benchmark disability who seek employment;

(iii) vacancies to which persons with benchmark disabilities seeking employment may be appointed;

(zc) "specified disability" means the disabilities as specified in the Schedule;

(zd) "transportation systems" includes road transport, rail transport, air transport, water transport, para transit systems for the last mile connectivity, road and street infrastructure, etc.;

(ze) "universal design" means the design of products, environments, programmes and services to be usable by all people to the greatest extent possible, without the need for adaptation or specialised design and shall apply to assistive devices including advanced technologies for particular group of persons with disabilities.

CHAPTER II

RIGHTS AND ENTITLEMENTS

3. Equality and non-discrimination. *(1)* The appropriate Government shall ensure that the persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others.

(2) The appropriate Government shall take steps to utilise the capacity of persons with disabilities by providing appropriate environment.

(3) No person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim.

(4) No person shall be deprived of his or her personal liberty only on the ground of disability.

(5) The appropriate Government shall take necessary steps to ensure reasonable accommodation for persons with disabilities.

4. Women and children with disabilities. *(1)* The appropriate Government and the local authorities shall take measures to ensure that the women and children with disabilities enjoy their rights equally with others.

(2) The appropriate Government and local authorities shall ensure that all children with disabilities shall have right on an equal basis to freely

express their views on all matters affecting them and provide them appropriate support keeping in view their age and disability.".

5. Community life. *(1)* The persons with disabilities shall have the right to live in the community.

(2) The appropriate Government shall endeavour that the persons with disabilities are,—

(a) not obliged to live in any particular living arrangement; and

b) given access to a range of in-house, residential and other community support services, including personal assistance necessary to support living with due regard to age and gender.

6. Protection from cruelty and inhuman treatment. *(1)* The appropriate Government shall take measures to protect persons with disabilities from being subjected to torture, cruel, inhuman or degrading treatment.

(2) No person with disability shall be a subject of any research without,—

(i) his or her free and informed consent obtained through accessible modes, means and formats of communication; and

(ii) prior permission of a Committee for Research on Disability constituted in the prescribed manner for the purpose by the appropriate Government in which not less than half of the Members shall themselves be either persons with disabilities or Members of the registered organisation as defined under clause *(z)* of section 2.

7. Protection from abuse, violence and exploitation. *(1)* The appropriate Government shall take measures to protect persons with disabilities from all forms of abuse, violence and exploitation and to prevent the same, shall—

(a) take cognizance of incidents of abuse, violence and exploitation and provide legal remedies available against such incidents;

(b) take steps for avoiding such incidents and prescribe the procedure for its reporting;

(c) take steps to rescue, protect and rehabilitate victims of such incidents; and

(d) create awareness and make available information among the public.

(2) Any person or registered organisation who or which has reason to believe that an act of abuse, violence or exploitation has been, or is being, or is likely to be committed against any person with disability, may give information about it to the Executive Magistrate within the local limits of whose jurisdiction such incidents occur.

(3) The Executive Magistrate on receipt of such information, shall take immediate steps to stop or prevent its occurrence, as the case may be, or pass such order as he deems fit for the protection of such person with disability including an order—

(a) to rescue the victim of such act, authorising the police or any organisation working for persons with disabilities to provide for the safe custody or rehabilitation of such person, or both, as the case may be;

(b) for providing protective custody to the person with disability, if such person so desires;

(c) to provide maintenance to such person with disability.

(4) Any police officer who receives a complaint or otherwise comes to know of abuse, violence or exploitation towards any person with disability shall inform the aggrieved person of—

(a) his or her right to apply for protection under sub-section *(2)* and the particulars of the Executive Magistrate having jurisdiction to provide assistance;

(b) the particulars of the nearest organisation or institution working for the rehabilitation of persons with disabilities;

(c) the right to free legal aid; and

(d) the right to file a complaint under the provisions of this Act or any other law dealing with such offence:

Provided that nothing in this section shall be construed in any manner as to relieve the police officer from his duty to proceed in accordance with law upon receipt of information as to the commission of a cognizable offence.

(5) If the Executive Magistrate finds that the alleged act or behaviour constitutes an offence under the Indian Penal Code (45 of 1860), or under any other law for the time being in force, he may forward the complaint to that effect to the Judicial or Metropolitan Magistrate, as the case may be, having jurisdiction in the matter.

8. Protection and safety. *(1)* The persons with disabilities shall have equal protection and safety in situations of risk, armed conflict, humanitarian emergencies and natural disasters.

(2) The National Disaster Management Authority and the State Disaster Management Authority shall take appropriate measures to ensure inclusion of persons with disabilities in its disaster management activities as defined under clause *(e)* of section 2 of the Disaster Management Act, 2005 (53 of 2005) for the safety and protection of persons with disabilities.

(3) The District Disaster Management Authority constituted under section 25 of the Disaster Management Act, 2005 (53 of 2005) shall maintain record of details of persons with disabilities in the district and take suitable measures to inform such persons of any situations of risk so as to enhance disaster preparedness.

(4) The authorities engaged in reconstruction activities subsequent to any situation of risk, armed conflict or natural disasters shall undertake such activities, in consultation with the concerned State Commissioner, in accordance with the accessibility requirements of persons with disabilities.

9. Home and family. *(1)* No child with disability shall be separated from his or her parents on the ground of disability except on an order of competent court, if required, in the best interest of the child.

(2) Where the parents are unable to take care of a child with disability, the competent court shall place such child with his or her near relations, and failing that within the community in a family setting or in exceptional cases in shelter home run by the appropriate Government or non-governmental organisation, as may be required.

10. Reproductive rights. *(1)* The appropriate Government shall ensure that persons with disabilities have access to appropriate information regarding reproductive and family planning.

(2) No person with disability shall be subject to any medical procedure which leads to infertility without his or her free and informed consent.

11. Accessibility in voting. The Election Commission of India and the State Election Commissions shall ensure that all polling stations are accessible to persons with disabilities and all materials related to the electoral process are easily understandable by and accessible to them.

12. Access to justice. *(1)* The appropriate Government shall ensure that persons with disabilities are able to exercise the right to access any court, tribunal, authority, commission or any other body having judicial or quasi-judicial or investigative powers without discrimination on the basis of disability.

(2) The appropriate Government shall take steps to put in place suitable support measures for persons with disabilities specially those living outside family and those disabled requiring high support for exercising legal rights.

(3) The National Legal Services Authority and the State Legal Services Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987) shall make provisions including reasonable accommodation to ensure that persons with disabilities have access to any scheme, programme, facility or service offered by them equally with others.

(4) The appropriate Government shall take steps to—

(a) ensure that all their public documents are in accessible formats;

(b) ensure that the filing departments, registry or any other office of records are supplied with necessary equipment to enable filing, storing and referring to the documents and evidence in accessible formats; and

(c) make available all necessary facilities and equipment to facilitate recording of testimonies, arguments or opinion given by persons with disabilities in their preferred language and means of communication.

13. Legal capacity. *(1)* The appropriate Government shall ensure that the persons with disabilities have right, equally with others, to own or inherit property, movable or immovable, control their financial affairs and have access to bank loans, mortgages and other forms of financial credit.

(2) The appropriate Government shall ensure that the persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life and have the right to equal recognition everywhere as any other person before the law.

(3) When a conflict of interest arises between a person providing support and a person with disability in a particular financial, property or other economic transaction, then such supporting person shall abstain from providing support to the person with disability in that transaction:

Provided that there shall not be a presumption of conflict of interest just on the basis that the supporting person is related to the person with disability by blood, affinity or adoption.

(4) A person with disability may alter, modify or dismantle any support arrangement and seek the support of another:

Provided that such alteration, modification or dismantling shall be prospective in nature and shall not nullify any third party transaction entered into by the person with disability with the aforesaid support arrangement.

(5) Any person providing support to the person with disability shall not exercise undue influence and shall respect his or her autonomy, dignity and privacy.

14. Provision for guardianship. *(1)* Notwithstanding anything contained in any other law for the time being in force, on and from the date of commencement of this Act, where a District Court or any designated authority, as notified by the State Government, finds that a person with disability, who had been provided adequate and appropriate support but is unable to take legally binding decisions, may be provided further support of a limited guardian to take legally binding decisions on his behalf in consultation with such person, in such manner, as may be prescribed by the State Government:

Provided that the District Court or the designated authority, as the case may be, may grant total support to the person with disability requiring

such support or where the limited guardianship is to be granted repeatedly, in which case, the decision regarding the support to be provided shall be reviewed by the Court or the designated authority, as the case may be, to determine the nature and manner of support to be provided.

Explanation.—For the purposes of this sub-section, "limited guardianship" means a system of joint decision which operates on mutual understanding and trust between the guardian and the person with disability, which shall be limited to a specific period and for specific decision and situation and shall operate in accordance to the will of the person with disability.

(2) On and from the date of commencement of this Act, every guardian appointed under any provision of any other law for the time being in force, for a person with disability shall be deemed to function as a limited guardian.

(3) Any person with disability aggrieved by the decision of the designated authority appointing a legal guardian may prefer an appeal to such appellate authority, as may be notified by the State Government for the purpose.

15. Designation of authorities to support. *(1)* The appropriate Government shall designate one or more authorities to mobilise the community and create social awareness to support persons with disabilities in exercise of their legal capacity.

(2) The authority designated under sub-section *(1)* shall take measures for setting up suitable support arrangements to exercise legal capacity by persons with disabilities living in institutions and those with high support needs and any other measures as may be required.

CHAPTER III

EDUCATION

16. Duty of educational institutions. The appropriate Government and the local authorities shall endeavour that all educational institutions funded or recognised by them provide inclusive education to the children with disabilities and towards that end shall—

(i) admit them without discrimination and provide education and opportunities for sports and recreation activities equally with others;

(ii) make building, campus and various facilities accessible;

(iii) provide reasonable accommodation according to the individual's requirements;

(iv) provide necessary support individualised or otherwise in environments that maximise academic and social development consistent with the goal of full inclusion;

(v) ensure that the education to persons who are blind or deaf or both is imparted in the most appropriate languages and modes and means of communication;

(vi) detect specific learning disabilities in children at the earliest and take suitable pedagogical and other measures to overcome them;

(vii) monitor participation, progress in terms of attainment levels and completion of education in respect of every student with disability;

(viii) provide transportation facilities to the children with disabilities and also the attendant of the children with disabilities having high support needs.

17. Specific measures to promote and facilitate inclusive education. The appropriate Government and the local authorities shall take the following measures for the purpose of section 16, namely:—

(a) to conduct survey of school going children in every five years for identifying children with disabilities, ascertaining their special needs and the extent to which these are being met:

Provided that the first survey shall be conducted within a period of two years from the date of commencement of this Act;

(b) to establish adequate number of teacher training institutions;

(c) to train and employ teachers, including teachers with disability who are qualified in sign language and Braille and also teachers who are trained in teaching children with intellectual disability;

(d) to train professionals and staff to support inclusive education at all levels of school education;

(e) to establish adequate number of resource centres to support educational institutions at all levels of school education;

(f) to promote the use of appropriate augmentative and alternative modes including means and formats of communication, Braille and sign language to supplement the use of one's own speech to fulfill the daily communication needs of persons with speech, communication or language disabilities and enables them to participate and contribute to their community and society;

(g) to provide books, other learning materials and appropriate assistive devices to students with benchmark disabilities free of cost up to the age of eighteen years;

(h) to provide scholarships in appropriate cases to students with benchmark disability;

(i) to make suitable modifications in the curriculum and examination system to meet the needs of students with disabilities such as extra time for completion of examination paper, facility of scribe or amanuensis, exemption from second and third language courses;

(j) to promote research to improve learning; and

(k) any other measures, as may be required.

18. Adult education. The appropriate Government and the local authorities shall take measures to promote, protect and ensure participation of persons with disabilities in adult education and continuing education programmes equally with others.

CHAPTER IV

SKILL DEVELOPMENT AND EMPLOYMENT

19. Vocational training and self-employment. *(1)* The appropriate Government shall formulate schemes and programmes including provision of loans at concessional rates to facilitate and support employment of persons with disabilities especially for their vocational training and self-employment.

(2) The schemes and programmes referred to in sub-section *(1)* shall provide for—

(a) inclusion of person with disability in all mainstream formal and non-formal vocational and skill training schemes and programmes;

(b) to ensure that a person with disability has adequate support and facilities to avail specific training;

(c) exclusive skill training programmes for persons with disabilities with active links with the market, for those with developmental, intellectual, multiple disabilities and autism;

(d) loans at concessional rates including that of microcredit;

(e) marketing the products made by persons with disabilities; and

(f) maintenance of disaggregated data on the progress made in the skill training and self-employment, including persons with disabilities.

20. Non-discrimination in employment. *(1)* No Government establishment shall discriminate against any person with disability in any matter relating to employment:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, exempt any establishment from the provisions of this section.

(2) Every Government establishment shall provide reasonable accommodation and appropriate barrier free and conducive environment to employees with disability.

(3) No promotion shall be denied to a person merely on the ground of disability.

(4) No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service:

Provided that, if an employee after acquiring disability is not suitable for the post he was holding, shall be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(5) The appropriate Government may frame policies for posting and transfer of employees with disabilities.

21.Equal opportunity policy. *(1)* Every establishment shall notify equal opportunity policy detailing measures proposed to be taken by it in pursuance of the provisions of this Chapter in the manner as may be prescribed by the Central Government.

(2) Every establishment shall register a copy of the said policy with the Chief Commissioner or the State Commissioner, as the case may be.

22. Maintenance of records. *(1)* Every establishment shall maintain records of the persons with disabilities in relation to the matter of employment, facilities provided and other necessary information in compliance with the provisions of this Chapter in such form and manner as may be prescribed by the Central Government.

(2) Every employment exchange shall maintain records of persons with disabilities seeking employment.

(3) The records maintained under sub-section *(1)* shall be open to inspection at all reasonable hours by such persons as may be authorised in their behalf by the appropriate Government.

23. Appointment of Grievance Redressal Officer. *(1)* Every Government establishment shall appoint a Grievance Redressal Officer for the purpose of section 19 and shall inform the Chief Commissioner or the State Commissioner, as the case may be, about the appointment of such officer.

(2) Any person aggrieved with the non-compliance of the provisions of section 20, may file a complaint with the Grievance Redressal Officer, who shall investigate it and shall take up the matter with the establishment for corrective action.

(3) The Grievance Redressal Officer shall maintain a register of complaints in the manner as may be prescribed by the Central Government, and every complaint shall be inquired within two weeks of its registration.

(4) If the aggrieved person is not satisfied with the action taken on his or her complaint, he or she may approach the District-Level Committee on disability.

CHAPTER V

SOCIAL SECURITY, HEALTH, REHABILITATION AND RECREATION

24. Social security. *(1)* The appropriate Government shall within the limit of its economic capacity and development formulate necessary schemes and programmes to safeguard and promote the right of persons with disabilities for adequate standard of living to enable them to live independently or in the community:

Provided that the quantum of assistance to the persons with disabilities under such schemes and programmes shall be at least twenty-five per cent. higher than the similar schemes applicable to others.

(2) The appropriate Government while devising these schemes and programmes shall give due consideration to the diversity of disability, gender, age, and socio-economic status.

(3) The schemes under sub-section *(1)* shall provide for,—

(a) community centres with good living conditions in terms of safety, sanitation, health care and counselling;

(b) facilities for persons including children with disabilities who have no family or have been abandoned, or are without shelter or livelihood;

(c) support during natural or man-made disasters and in areas of conflict;

(d) support to women with disability for livelihood and for upbringing of their children;

(e) access to safe drinking water and appropriate and accessible sanitation facilities especially in urban slums and rural areas;

(f) provisions of aids and appliances, medicine and diagnostic services and corrective surgery free of cost to persons with disabilities with such income ceiling as may be notified;

(g) disability pension to persons with disabilities subject to such income ceiling as may be notified;

(h) unemployment allowance to persons with disabilities registered with Special Employment Exchange for more than two years and who could not be placed in any gainful occupation;

(i) care-giver allowance to persons with disabilities with high support needs;

(j) comprehensive insurance scheme for persons with disability, not covered under the Employees State Insurance Schemes, or any other statutory or Government- sponsored insurance schemes;

(k) any other matter which the appropriate Government may think fit.

25. Healthcare. *(1)* The appropriate Government and the local authorities shall take necessary measures for the persons with disabilities to provide,—

(a) free healthcare in the vicinity specially in rural area subject to such family income as may be notified;

(b) barrier-free access in all parts of Government and private hospitals and other healthcare institutions and centres;

(c) priority in attendance and treatment.

(2) The appropriate Government and the local authorities shall take measures and make schemes or programmes to promote healthcare and prevent the occurrence of disabilities and for the said purpose shall—

(a) undertake or cause to be undertaken surveys, investigations and research concerning the cause of occurrence of disabilities;

(b) promote various methods for preventing disabilities;

(c) screen all the children at least once in a year for the purpose of identifying "at-risk" cases;

(d) provide facilities for training to the staff at the primary health centres;

(e) sponsor or cause to be sponsored awareness campaigns and disseminate or cause to be disseminated information for general

hygiene, health and sanitation;

(f) take measures for pre-natal, perinatal and post-natal care of mother and child;

(g) educate the public through the pre-schools, schools, primary health centres, village level workers and *anganwadi* workers;

(h) create awareness amongst the masses through television, radio and other mass media on the causes of disabilities and the preventive measures to be adopted;

(i) healthcare during the time of natural disasters and other situations of risk;

(j) essential medical facilities for life saving emergency treatment and procedures; and

(k) sexual and reproductive healthcare especially for women with disability.

26. Insurance schemes. The appropriate Government shall, by notification, make insurance schemes for their employees with disabilities.

27. Rehabilitation. *(1)* The appropriate Government and the local authorities shall within their economic capacity and development, undertake or cause to be undertaken services and programmes of rehabilitation, particularly in the areas of health, education and employment for all persons with disabilities.

(2) For the purposes of sub-section *(1)*, the appropriate Government and the local authorities may grant financial assistance to non-Governmental Organisations.

(3) The appropriate Government and the local authorities, while formulating rehabilitation policies shall consult the non-Governmental Organisations working for the cause of persons with disabilities.

28. Research and development. The appropriate Government shall initiate or cause to be initiated research and development through individuals and institutions on issues which shall enhance habilitation and rehabilitation and on such other issues which are necessary for the empowerment of persons

with disabilities.

29. Culture and recreation. The appropriate Government and the local authorities shall take measures to promote and protect the rights of all persons with disabilities to have a cultural life and to participate in recreational activities equally with others which include,—

(a) facilities, support and sponsorships to artists and writers with disability to pursue their interests and talents;

(b) establishment of a disability history museum which chronicles and interprets the historical experiences of persons with disabilities;

(c) making art accessible to persons with disabilities;

(d) promoting recreation centres, and other associational activities;

(e) facilitating participation in scouting, dancing, art classes, outdoor camps and adventure activities;

(f) redesigning courses in cultural and arts subjects to enable participation and access for persons with disabilities;

(g) developing technology, assistive devices and equipments to facilitate access and inclusion for persons with disabilities in recreational activities; and

(h) ensuring that persons with hearing impairment can have access to television programmes with sign language interpretation or sub-titles.

30. Sporting activities. *(1)* The appropriate Government shall take measures to ensure effective participation in sporting activities of the persons with disabilities.

(2) The sports authorities shall accord due recognition to the right of persons with disabilities to participate in sports and shall make due provisions for the inclusion of persons with disabilities in their schemes and programmes for the promotion and development of sporting talents.

(3) Without prejudice to the provisions contained in sub-sections *(1)* and *(2)*, the appropriate Government and the sports authorities shall take

measures to,—

(a) restructure courses and programmes to ensure access, inclusion and participation of persons with disabilities in all sporting activities;

(b) redesign and support infrastructure facilities of all sporting activities for persons with disabilities;

(c) develop technology to enhance potential, talent, capacity and ability in sporting activities of all persons with disabilities;

(d) provide multi-sensory essentials and features in all sporting activities to ensure effective participation of all persons with disabilities;

(e) allocate funds for development of state of art sport facilities for training of persons with disabilities;

(f) promote and organise disability specific sporting events for persons with disabilities and also facilitate awards to the winners and other participants of such sporting events.

CHAPTER VI

SPECIAL PROVISIONS FOR PERSONS WITH BENCHMARK DISABIILITES

31. Free education for children with benchmark disabilities. *(1)* Notwithstanding anything contained in the Rights of Children to Free and Compulsory Education Act, 2009 (35 of 2009), every child with benchmark disability between the age of six to eighteen years shall have the right to free education in a neighbourhood school, or in a special school, of his choice.

(2) The appropriate Government and local authorities shall ensure that every child with benchmark disability has access to free education in an appropriate environment till he attains the age of eighteen years.

32. Reservation in higher educational institutions. *(1)* All Government institutions of higher education and other higher education institutions receiving aid from the Government shall reserve not less than five per cent. seats for persons with benchmark disabilities.

(2) The persons with benchmark disabilities shall be given an upper

age relaxation of five years for admission in institutions of higher education.

33. Identification of posts for reservation. The appropriate Government shall—

(i) identify posts in the establishments which can be held by respective category of persons with benchmark disabilities in respect of the vacancies reserved in accordance with the provisions of section 34;

(ii) constitute an expert committee with representation of persons with benchmark disabilities for identification of such posts; and

(iii) undertake periodic review of the identified posts at an interval not exceeding three years.

34. Reservation. *(1)* Every appropriate Government shall appoint in every Government establishment, not less than four per cent. of the total number of vacancies in the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities of which, one per cent. each shall be reserved for persons with benchmark disabilities under clauses *(a)*, *(b)* and *(c)* and one per cent. for persons with benchmark disabilities under clauses *(d)* and *(e)*, namely:—

(a) blindness and low vision;

(b) deaf and hard of hearing;

(c) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;

(d) autism, intellectual disability, specific learning disability and mental illness;

(e) multiple disabilities from amongst persons under clauses *(a)* to *(d)* including deaf-blindness in the posts identified for each disabilities:

Provided that the reservation in promotion shall be in accordance with such instructions as are issued by the appropriate Government from time to time:

Provided further that the appropriate Government, in consultation with

the Chief Commissioner or the State Commissioner, as the case may be, may, having regard to the type of work carried out in any Government establishment, by notification and subject to such conditions, if any, as may be specified in such notifications exempt any Government establishment from the provisions of this section.

(2) Where in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the five categories with the prior approval of the appropriate Government.

(3) The appropriate Government may, by notification, provide for such relaxation of upper age limit for employment of persons with benchmark disability, as it thinks fit.

35. Incentives to employers in private sector. The appropriate Government and the local authorities shall, within the limit of their economic capacity and development, provide incentives to employer in private sector to ensure that at least five per cent. of their work force is composed of persons with benchmark disability.

36. Special employment exchange. The appropriate Government may, by notification, require that from such date, the employer in every establishment shall furnish such information or return as may be prescribed by the Central Government in relation to vacancies appointed for persons with benchmark disability that have occurred or are about to occur in that establishment to such special employment exchange as may be notified by the Central Government and the establishment shall thereupon comply with such requisition.

37. Special schemes and development programmes. The appropriate Government and the local authorities shall, by notification, make schemes in favour of persons with benchmark disabilities, to provide,—

(a) five per cent. reservation in allotment of agricultural land and housing in all relevant schemes and development programmes, with appropriate priority to women with benchmark disabilities;

(b) five per cent. reservation in all poverty alleviation and various developmental schemes with priority to women with benchmark disabilities;

(c) five per cent. reservation in allotment of land on concessional rate, where such land is to be used for the purpose of promoting housing, shelter, setting up of occupation, business, enterprise, recreation centres and production centres.

CHAPTER VII

SPECIAL PROVISIONS FOR PERSONS WITH DISABILITIES WITH HIGH SUPPORT NEEDS

38. Special provisions for persons with disabilities with high support. *(1)* Any person with benchmark disability, who considers himself to be in need of high support, or any person or organisation on his or her behalf, may apply to an authority, to be notified by the appropriate Government, requesting to provide high support.

(2) On receipt of an application under sub-section *(1)*, the authority shall refer it to an Assessment Board consisting of such Members as may be prescribed by the Central Government.

(3) The Assessment Board shall assess the case referred to it under sub-section *(1)* in such manner as may be prescribed by the Central Government, and shall send a report to the authority certifying the need of high support and its nature.

(4) On receipt of a report under sub-section (3), the authority shall take steps to provide support in accordance with the report and subject to relevant schemes and orders of the appropriate Government in this behalf.

CHAPTER VIII

DUTIES AND RESPONSIBILITIES OF APPROPRIATE GOVERNMENTS

39. Awareness campaigns. *(1)* The appropriate Government, in consultation with the Chief Commissioner or the State Commissioner, as the case may be, shall conduct, encourage, support or promote awareness campaigns and sensitisation programmes to ensure that the rights of the persons with disabilities provided under this Act are protected.

(2) The programmes and campaigns specified under sub-section *(1)* shall also,—

(a) promote values of inclusion, tolerance, empathy and respect for diversity;

(b) advance recognition of the skills, merits and abilities of persons with disabilities and of their contributions to the workforce, labour market and professional fee;

(c) foster respect for the decisions made by persons with disabilities on all matters related to family life, relationships, bearing and raising children;

(d) provide orientation and sensitisation at the school, college, University and professional training level on the human condition of disability and the rights of persons with disabilities;

(e) provide orientation and sensitisation on disabling conditions and rights of persons with disabilities to employers, administrators and co-workers;

(f) ensure that the rights of persons with disabilities are included in the curriculum in Universities, colleges and schools.

40. Accessibility. The Central Government shall, in consultation with the Chief Commissioner, formulate rules for persons with disabilities laying down the standards of accessibility for the physical environment, transportation, information and communications, including appropriate technologies and systems, and other facilities and services provided to the public in urban and rural areas.

41. Access to transport. *(1)* The appropriate Government shall take

suitable measures to provide,—

(a) facilities for persons with disabilities at bus stops, railway stations and airports conforming to the accessibility standards relating to parking spaces, toilets, ticketing counters and ticketing machines;

(b) access to all modes of transport that conform the design standards, including retrofitting old modes of transport, wherever technically feasible and safe for persons with disabilities, economically viable and without entailing major structural changes in design;

(c) accessible roads to address mobility necessary for persons with disabilities.

(2) The appropriate Government shall develop schemes programmes to promote the personal mobility of persons with disabilities at affordable cost to provide for,—

(a) incentives and concessions;

(b) retrofitting of vehicles; and

(c) personal mobility assistance.

42. Access to information and communication technology. The appropriate Government shall take measures to ensure that,—

(i) all contents available in audio, print and electronic media are in accessible format;

(ii) persons with disabilities have access to electronic media by providing audio description, sign language interpretation and close captioning;

(iii) electronic goods and equipment which are meant for every day use are available in universal design.

43. Consumer goods. The appropriate Government shall take measures to promote development, production and distribution of universally designed consumer products and accessories for general use for persons with disabilities.

44. Mandatory observance of accessibility norms. *(1)* No

establishment shall be granted permission to build any structure if the building plan does not adhere to the rules formulated by the Central Government under section 40.

(2) No establishment shall be issued a certificate of completion or allowed to take occupation of a building unless it has adhered to the rules formulated by the Central Government.

45. Time limit for making existing infrastructure and premises accessible and action for that purpose. *(1)* All existing public buildings shall be made accessible in accordance with the rules formulated by the Central Government within a period not exceeding five years from the date of notification of such rules:

Provided that the Central Government may grant extension of time to the States on a case to case basis for adherence to this provision depending on their state of preparedness and other related parameters.

(2) The appropriate Government and the local authorities shall formulate and publish an action plan based on prioritisation, for providing accessibility in all their buildings and spaces providing essential services such as all primary health centres, civil hospitals, schools, railway stations and bus stops.

46. Time limit for accessibility by service providers. The service providers whether Government or private shall provide services in accordance with the rules on accessibility formulated by the Central Government under section 40 within a period of two years from the date of notification of such rules:

Provided that the Central Government in consultation with the Chief Commissioner may grant extension of time for providing certain category of services in accordance with the said rules.

47. Human resource development. *(1)* Without prejudice to any function and power of Rehabilitation Council of India constituted under the Rehabilitation Council of India Act, 1992 (34 of 1992), the appropriate Government shall endeavour to develop human resource for the purposes of this Act and to that end shall,—

(a) mandate training on disability rights in all courses for the training of Panchayati Raj Members, legislators, administrators, police

officials, judges and lawyers;

(b) induct disability as a component for all education courses for schools, colleges and University teachers, doctors, nurses, para-medical personnel, social welfare officers, rural development officers, asha workers, *anganwadi* workers, engineers, architects, other professionals and community workers;

(c) initiate capacity building programmes including training in independent living and community relationships for families, members of community and other stakeholders and care providers on care giving and support;

(d) ensure independence training for persons with disabilities to build community relationships on mutual contribution and respect;

(e) conduct training programmes for sports teachers with focus on sports, games, adventure activities;

(f) any other capacity development measures as may be required.

(2) All Universities shall promote teaching and research in disability studies including establishment of study centres for such studies.

(3) In order to fulfil the obligation stated in sub-section *(1)*, the appropriate Government shall in every five years undertake a need based analysis and formulate plans for the recruitment, induction, sensitisation, orientation and training of suitable personnel to undertake the various responsibilities under this Act.

48. Social audit. The appropriate Government shall undertake social audit of all general schemes and programmes involving the persons with disabilities to ensure that the scheme and programmes do not have an adverse impact upon the persons with disabilities and need the requirements and concerns of persons with disabilities.

CHAPTER IX

REGISTRATION OF INSTITUTIONS FOR PERSONS WITH DISABILITIES AND GRANTS TO SUCH INSTITUTIONS

49. Competent authority. The State Government shall appoint an

authority as it deems fit to be a competent authority for the purposes of this Chapter.

50. Registration. Save as otherwise provided under this Act, no person shall establish or maintain any institution for persons with disabilities except in accordance with a certificate of registration issued in this behalf by the competent authority:

Provided that an institution for care of mentally ill persons, which holds a valid licence under section 8 of the Mental Health Act, 1987 (14 of 1987) or any other Act for the time being in force, shall not be required to be registered under this Act.

51. Application and grant of certificate of registration. *(1)* Every application for a certificate of registration shall be made to the competent authority in such form and in such manner as may be prescribed by the State Government.

(2) On receipt of an application under sub-section *(1)*, the competent authority shall make such enquiries as it may deem fit and on being satisfied that the applicant has complied with the requirements of this Act and the rules made thereunder, it shall grant a certificate of registration to the applicant within a period of ninety days of receipt of application and if not satisfied, the competent authority shall, by order, refuse to grant the certificate applied for:

Provided that before making any order refusing to grant a certificate, the competent authority shall give the applicant a reasonable opportunity of being heard and every order of refusal to grant a certificate shall be communicated to the applicant in writing.

(3) No certificate of registration shall be granted under sub-section *(2)* unless the institution with respect to which an application has been made is in a position to provide such facilities and meet such standards as may be prescribed by the State Government.

(4) The certificate of registration granted under sub-section *(2)*,—

(a) shall, unless revoked under section 52 remain in force for such period as may be prescribed by the State Government;

(b) may be renewed from time to time for a like period; and

(c) shall be in such form and shall be subject to such conditions as may be prescribed by the State Government.

(5) An application for renewal of a certificate of registration shall be made not less than sixty days before the expiry of the period of validity.

(6) A copy of the certificate of registration shall be displayed by the institution in a conspicuous place.

(7) Every application made under sub-section *(1)* or sub-section *(5)* shall be disposed of by the competent authority within such period as may be prescribed by the State Government.

52. Revocation of registration. *(1)* The competent authority may, if it has reason to believe that the holder of a certificate of registration granted under sub-section *(2)* of section 51 has,—

(a) made a statement in relation to any application for the issue or renewal of the certificate which is incorrect or false in material particulars; or

(b) committed or has caused to be committed any breach of rules or any conditions subject to which the certificate was granted,

it may, after making such inquiry, as it deems fit, by order, revoke the certificate:

Provided that no such order shall be made until an opportunity is given to the holder of the certificate to show cause as to why the certificate of registration shall not be revoked.

(2) Where a certificate of registration in respect of an institution has been revoked under sub-section *(1)*, such institution shall cease to function from the date of such revocation:

Provided that where an appeal lies under section 53 against the order of revocation, such institution shall cease to function,—

(a) where no appeal has been preferred immediately on the expiry of the period prescribed for the filing of such appeal; or

(b) where such appeal has been preferred, but the order of revocation has been upheld, from the date of the order of appeal.

(3) On the revocation of a certificate of registration in respect of an institution, the competent authority may direct that any person with disability who is an inmate of such institution on the date of such revocation, shall be—

(a) restored to the custody of his or her parent, spouse or lawful guardian, as the case may be; or

(b) transferred to any other institution specified by the competent authority.

(4) Every institution which holds a certificate of registration which is revoked under this section shall, immediately after such revocation, surrender such certificate to the competent authority.

53. Appeal. *(1)* Any person aggrieved by the order of the competent authority refusing to grant a certificate of registration or revoking a certificate of registration may, within such period as may be prescribed by the State Government, prefer an appeal to such appellate authority, as may be notified by the State Government against such refusal or revocation.

(2) The order of the appellate authority on such appeal shall be final.

54. Act not to apply to institutions established or maintained by Central or State Government. Nothing contained in this Chapter shall apply to an institution for persons with disabilities established or maintained by the Central Government or a State Government.

55. Assistance to registered institutions. The appropriate Government may within the limits of their economic capacity and development, grant financial assistance to registered institutions to provide services and to implement the schemes and programmes in pursuance of the provisions of this Act.

CHAPTER X

CERTIFICATION OF SPECIFIED DISABILITIES

56. Guidelines for assessment of specified disabilities. The Central Government shall notify guidelines for the purpose of assessing the extent of specified disability in a person.

57. Designation of certifying authorities. *(1)* The appropriate Government shall designate persons, having requisite qualifications and

experience, as certifying authorities, who shall be competent to issue the certificate of disability.

(2) The appropriate Government shall also notify the jurisdiction within which and the terms and conditions subject to which, the certifying authority shall perform its certification functions.

58. Procedure for certification. *(1)* Any person with specified disability, may apply, in such manner as may be prescribed by the Central Government, to a certifying authority having jurisdiction, for issuing of a certificate of disability.

(2) On receipt of an application under sub-section *(1)*, the certifying authority shall assess the disability of the concerned person in accordance with relevant guidelines notified under section 56, and shall, after such assessment, as the case may be,—

(a) issue a certificate of disability to such person, in such form as may be prescribed by the Central Government;

(b) inform him in writing that he has no specified disability.

(3) The certificate of disability issued under this section shall be valid across the country.

59. Appeal against a decision of certifying authority. *(1)* Any person aggrieved with decision of the certifying authority, may appeal against such decision, within such time and in such manner as may be prescribed by the State Government, to such appellate authority as the State Government may designate for the purpose.

(2) On receipt of an appeal, the appellate authority shall decide the appeal in such manner as may be prescribed by the State Government.

CHAPTER XI

CENTRAL AND STATE ADVISORY BOARDS ON DISABILITY AND DISTRICT LEVEL COMMITTEE

60. Constitution of Central Advisory Board on Disability. *(1)* The Central Government shall, by notification, constitute a body to be known as the Central Advisory Board on Disability to exercise the powers conferred on, and to perform the functions assigned to it, under this Act.

(2) The Central Advisory Board shall consist of,—

(a) the Minister in charge of Department of Disability Affairs in the Central Government, Chairperson, *ex officio;*

(b) the Minister of State in charge dealing with Department of Disability Affairs in the Ministry in the Central Government, Vice Chairperson, *ex officio*;

(c) three Members of Parliament, of whom two shall be elected by Lok Sabha and one by the Rajya Sabha, Members, *ex officio*;

(d) the Ministers in charge of Disability Affairs of all States and Administrators or Lieutenant Governors of the Union territories, Members, *ex officio*;

(e) Secretaries to the Government of India in charge of the Ministries or Departments of Disability Affairs, Social Justice and Empowerment, School Education and Literacy, and Higher Education, Women and Child Development, Expenditure, Personnel and Training, Administrative Reforms and Public Grievances, Health and Family Welfare, Rural Development, Panchayati Raj, Industrial Policy and Promotion, Urban Development, Housing and Urban Poverty Alleviation, Science and Technology, Communications and Information Technology, Legal Affairs, Public Enterprises, Youth Affairs and Sports, Road Transport and Highways and Civil Aviation, Members, *ex officio;*

(f) Secretary, National Institute of Transforming India (NITI) Aayog, Member, *ex officio*;

(g) Chairperson, Rehabilitation Council of India, Member, *ex officio*;

(h) Chairperson, National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities, Member, *ex officio*;

(i) Chairman-cum-Managing Director, National Handicapped Finance Development Corporation, Member, *ex officio;*

(j) Chairman-cum-Managing Director, Artificial Limbs

Manufacturing Corporation, Member, *ex officio*;

(k) Chairman, Railway Board, Member, *ex officio*;

(l) Director-General, Employment and Training, Ministry of Labour and Employment, Member, *ex officio;*

(m) Director, National Council for Educational Research and Training, Member, *ex officio;*

(n) Chairperson, National Council of Teacher Education, Member, *ex officio*;

(o) Chairperson, University Grants Commission, Member, *ex officio;*

(p) Chairperson, Medical Council of India, Member, *ex officio;*

(q) Directors of the following Institutes:—

(i) National Institute for the Visually Handicapped, Dehradun;

(ii) National Institute for the Mentally Handicapped, Secundrabad;

(iii) Pandit Deen Dayal Upadhyay Institute for the Physically Handicapped, New Delhi;

(iv) Ali Yavar Jung National Institute for the Hearing Handicapped, Mumbai;

(v) National Institute for the Orthopaedically Handicapped, Kolkata;

(vi) National Institute of Rehabilitation Training and Research, Cuttack;

(vii) National Institute for Empowerment of Persons with Multiple Disabilities, Chennai;

(viii) National Institute for Mental Health and Sciences, Bangalore;

(ix) Indian Sign Language Research and Training Centre, New Delhi, Members, *ex officio*;

(r) Members to be nominated by the Central Government,—

(i) five Members who are experts in the field of disability and rehabilitation;

(ii) ten Members, as far as practicable, being persons with disabilities, to represent non-Governmental Organisations concerned with disabilities or disabled persons organisations:

Provided that out of the ten Members nominated, at least, five Members shall be women and at least one person each shall be from the Scheduled Castes and the Scheduled Tribes;

(iii) up to three representatives of national level chambers of commerce and industry;

(s) Joint Secretary to the Government of India dealing with the subject of disability policy, Member-Secretary, *ex officio*.

61. Terms and conditions of Service of members. *(1)* Save as otherwise provided under this Act, a Member of the Central Advisory Board nominated under clause *(r)* of sub-section *(2)* of section 60 shall hold office for a term of three years from the date of his nomination:

Provided that such a Member shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(2) The Central Government may, if it thinks fit, remove any Member nominated under clause *(r)* of sub-section *(2)* of section 60, before the expiry of his term of office after giving him a reasonable opportunity of showing cause against the same.

(3) A Member nominated under clause *(r)* of sub-section *(2)* of section 60 may at any time resign his office by writing under his hand addressed to the Central Government and the seat of the said Member shall thereupon becomes vacant.

(4) A casual vacancy in the Central Advisory Board shall be filled by a fresh nomination and the person nominated to fill the vacancy shall hold

office only for the remainder of the term for which the Member in whose place he was so nominated.

(5) A Member nominated under sub-clause *(i)* or sub-clause *(iii)* of clause *(r)* of sub-section *(2)* of section 60 shall be eligible for renomination.

(6) The Members nominated under sub-clause *(i)* and sub-clause *(ii)* of clause *(r)* of sub-section *(2)* of section 60 shall receive such allowances as may be prescribed by the Central Government.

62. Disqualifications. *(1)* No person shall be a Member of the Central Advisory Board, who —

(a) is, or at any time has been, adjudged insolvent or has suspended payment of his debts or has compounded with his creditors, or

(b) is of unsound mind and stands so declared by a competent court, or

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

(d) is, or at any time has been, convicted of an offence under this Act, or

(e) has so abused his position in the opinion of the Central Government as a Member so as to render his continuance in the office is prejudicial interests of the general public.

(2) No order of removal shall be made by the Central Government under this section unless the Member concerned has been given a reasonable opportunity of showing cause against the same.

(3) Notwithstanding anything contained in sub-section *(1)* or sub-section *(5)* of section 61, a Member who has been removed under this section shall not be eligible for renomination as a Member.

63. Vacation of seats by Members. If a Member of the Central Advisory Board becomes subject to any of the disqualifications specified in section 62, his seat shall become vacant.

64. Meetings of the Central Advisory Board on disability. The

Central Advisory Board shall meet at least once in every six months and shall observe such rules of procedure in regard to the transaction of business at its meetings as may be prescribed.

65. Functions of Central Advisory Board on disability. *(1)* Subject to the provisions of this Act, the Central Advisory Board on disability shall be the national-level consultative and advisory body on disability matters, and shall facilitate the continuous evolution of a comprehensive policy for the empowerment of persons with disabilities and the full enjoyment of rights.

(2) In particular and without prejudice to the generality of the foregoing provisions, the Central Advisory Board on disability shall perform the following functions, namely:—

(a) advise the Central Government and the State Governments on policies, programmes, legislation and projects with respect to disability;

(b) develop a national policy to address issues concerning persons with disabilities;

(c) review and coordinate the activities of all Departments of the Government and other Governmental and non-Governmental Organisations which are dealing with matters relating to persons with disabilities;

(d) take up the cause of persons with disabilities with the concerned authorities and the international organisations with a view to provide for schemes and projects for the persons with disabilities in the national plans;

(e) recommend steps to ensure accessibility, reasonable accommodation, non-discrimination for persons with disabilities vis-à-vis information, services and the built environment and their participation in social life;

(f) monitor and evaluate the impact of laws, policies and programmes to achieve full participation of persons with disabilities; and

(g) such other functions as may be assigned from time to time

by the Central Government.

66. State Advisory Board on disability. *(1)* Every State Government shall, by notification, constitute a body to be known as the State Advisory Board on disability to exercise the powers conferred on, and to perform the function assigned to it, under this Act.

(2) The State Advisory Board shall consist of—

(a) the Minister in charge of the Department in the State Government dealing with disability matters, Chairperson, *ex officio*;

(b) the Minister of State or the Deputy Minister in charge of the Department in the State Government dealing with disability matters, if any, Vice-Chairperson, *ex officio*;

(c) secretaries to the State Government in charge of the Departments of Disability Affairs, School Education, Literacy and Higher Education, Women and Child Development, Finance, Personnel and Training, Health and Family Welfare, Rural Development, Panchayati Raj, Industrial Policy and Promotion, Labour and Employment, Urban Development, Housing and Urban Poverty Alleviation, Science and Technology, Information Technology, Public Enterprises, Youth Affairs and Sports, Road Transport and any other Department, which the State Government considers necessary, Members, *ex officio*;

(d) three Members of the State Legislature of whom two shall be elected by the Legislative Assembly and one by the Legislative Council, if any, and where there is no Legislative Council, three Members shall be elected by the Legislative Assembly, Members, *ex officio*;

(e) Members to be nominated by the State Government:—

(i) five Members who are experts in the field of disability and rehabilitation;

(ii) five Members to be nominated by the State Government by rotation to represent the districts in such manner as may be prescribed:

Provided that no nomination under this sub-clause shall be made except on the recommendation of the district administration concerned;

(iii) ten persons as far as practicable, being persons with disabilities, to represent non-Governmental Organisations or associations which are concerned with disabilities:

Provided that out of the ten persons nominated under this clause, at least, five shall be women and at least one person each shall be from the Scheduled Castes and the Scheduled Tribes;

(iv) not more than three representatives of the State Chamber of Commerce and Industry;

(f) officer not below the rank of Joint Secretary in the Department dealing with disability matters in the State Government, Member-Secretary, *ex officio*.

67. Terms and conditions of service of Members. *(1)* Save as otherwise provided under this Act, a Member of the State Advisory Board nominated under clause *(e)* of sub-section *(2)* of section 66, shall hold office for a term of three years from the date of his nomination:

Provided that such a Member shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(2) The State Government may, if it thinks fit, remove any Member nominated under clause *(e)* of sub-section *(2)* of section 66, before the expiry of his term of office after giving him a reasonable opportunity of showing cause against the same.

(3) A Member nominated under clause *(e)* of sub-section *(2)* of section 66 may at any time resign his office by writing under his hand addressed to the State Government and the seat of the said Member shall thereupon become vacant.

(4) A casual vacancy in the State Advisory Board shall be filled by a fresh nomination and the person nominated to fill the vacancy shall hold office only for the remainder of the term for which the Member in whose place he

was so nominated.

(5) A Member nominated under sub-clause *(i)* or sub-clause *(iii)* of clause *(e)* of sub-section *(2)* of section 66 shall be eligible for renomination.

(6) the Members nominated under sub-clause *(i)* and sub-clause *(ii)* of clause *(e)* of sub-section *(2)* of section 66 shall receive such allowances as may be prescribed by the State Government.

68. Disqualification. *(1)* No person shall be a Member of the State Advisory Board, who—

(a) is, or at any time has been, adjudged insolvent or has suspended payment of his debts or has compounded with his creditors, or

(b) is of unsound mind and stands so declared by a competent court, or

(c) is, or has been, convicted of an offence which, in the opinion of the State Government, involves moral turpitude, or

(d) is, or at any time has been, convicted of an offence under this Act, or

(e) has so abused in the opinion of the State Government his position as a Member as to render his continuance in the State Advisory Board detrimental to the interests of the general public.

(2) No order of removal shall be made by the State Government under this section unless the Member concerned has been given a reasonable opportunity of showing cause against the same.

(3) Notwithstanding anything contained in sub-section *(1)* or sub-section *(5)* of section 67, a Member who has been removed under this section shall not be eligible for renomination as a Member.

69. Vacation of seats. If a Member of the State Advisory Board becomes subject to any of the disqualifications specified in section 68 his seat shall become vacant.

70. Meetings of State Advisory Board on disability. The State Advisory Board shall meet at least once in every six months and shall observe

such rules or procedure in regard to the transaction of business at its meetings as may be prescribed by the State Government.

71. Functions of State Advisory Board on disability. *(1)* Subject to the provisions of this Act, the State Advisory Board shall be the State-level consultative and advisory body on disability matters, and shall facilitate the continuous evolution of a comprehensive policy for the empowerment of persons with disabilities and the full enjoyment of rights.

(2) In particular and without prejudice to the generality of the foregoing provisions, the State Advisory Board on disability shall perform the following functions, namely:—

(a) advise the State Government on policies, programmes, legislation and projects with respect to disability;

(b) develop a State policy to address issues concerning persons with disabilities;

(c) review and coordinate the activities of all Departments of the State Government and other Governmental and non-Governmental Organisations in the State which are dealing with matters relating to persons with disabilities;

(d) take up the cause of persons with disabilities with the concerned authorities and the international organisations with a view to provide for schemes and projects for the persons with disabilities in the State plans;

(e) recommend steps to ensure accessibility, reasonable accommodation, non-discrimination for persons with disabilities, services and the built environment and their participation in social life on an equal basis with others;

(f) monitor and evaluate the impact of laws, policies and programmes designed to achieve full participation of persons with disabilities; and

(g) such other functions as may be assigned from time to time by the State Government.

72. District-level Committee on disability. The State Government

shall constitute District-level Committee on disability to perform such functions as may be prescribed by it.

73. Vacancies not to invalidate proceedings. No act or proceeding of the Central Advisory Board on disability, a State Advisory Board on disability, or a District-level Committee on disability shall be called in question on the ground merely of the existence of any vacancy in or any defect in the constitution of such Board or Committee, as the case may be.

CHAPTER XII

CHIEF COMMISSIONER AND STATE COMMISSIONER FOR PERSONS WITH DISABILITIES

74. Appointment of Chief Commissioner and Commissioners. *(1)* The Central Government may, by notification, appoint a Chief Commissioner for Persons with Disabilities (hereinafter referred to as the "Chief Commissioner") for the purposes of this Act.

(2) The Central Government may, by notification appoint two Commissioners to assist the Chief Commissioner, of which one Commissioner shall be a persons with disability.

(3) A person shall not be qualified for appointment as the Chief Commissioner or Commissioner unless he has special knowledge or practical experience in respect of matters relating to rehabilitation.

(4) The salary and allowances payable to and other terms and conditions of service (including pension, gratuity and other retirement benefits) of the Chief Commissioner and Commissioners shall be such as may be prescribed by the Central Government.

(5) The Central Government shall determine the nature and categories of officers and other employees required to assist the Chief Commissioner in the discharge of his functions and provide the Chief Commissioner with such officers and other employees as it thinks fit.

(6) The officers and employees provided to the Chief Commissioner shall discharge their functions under the general superintendence and control of the Chief Commissioner.

(7) The salaries and allowances and other conditions of service of

officers and employees shall be such as may be prescribed by the Central Government.

(8) The Chief Commissioner shall be assisted by an advisory committee comprising of not more than eleven members drawn from the experts from different disabilities in such manner as may be prescribed by the Central Government.

75. Functions of Chief Commissioner. *(1)* The Chief Commissioner shall—

(a) identify, *suo motu* or otherwise, the provisions of any law or policy, programme and procedures, which are inconsistent with this Act and recommend necessary corrective steps;

(b) inquire, *suo motu* or otherwise, deprivation of rights of persons with disabilities and safeguards available to them in respect of matters for which the Central Government is the appropriate Government and take up the matter with appropriate authorities for corrective action;

(c) review the safeguards provided by or under this Act or any other law for the time being in force for the protection of rights of persons with disabilities and recommend measures for their effective implementation;

(d) review the factors that inhibit the enjoyment of rights of persons with disabilities and recommend appropriate remedial measures;

(e) study treaties and other international instruments on the rights of persons with disabilities and make recommendations for their effective implementation;

(f) undertake and promote research in the field of the rights of persons with disabilities;

(g) promote awareness of the rights of persons with disabilities and the safeguards available for their protection;

(h) monitor implementation of the provisions of this Act and schemes, programmes meant for persons with disabilities;

(i) monitor utilisation of funds disbursed by the Central Government for the benefit of persons with disabilities; and

(j) perform such other functions as the Central Government may assign.

(2) The Chief Commissioner shall consult the Commissioners on any matter while discharging its functions under this Act.

76. Action of appropriate authorities on recommendation of Chief Commissioner. Whenever the Chief Commissioner makes a recommendation to an authority in pursuance of clause *(b)* of section 75, that authority shall take necessary action on it, and inform the Chief Commissioner of the action taken within three months from the date of receipt of the recommendation:

Provided that where an authority does not accept a recommendation, it shall convey reasons for non-acceptance to the Chief Commissioner within a period of three months, and shall also inform the aggrieved person.

77. Powers of Chief Commissioner. *(1)* The Chief Commissioner shall, for the purpose of discharging his functions under this Act, have the same powers of a civil court as are vested in a 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 witnesses;

(b) requiring the discovery and production of any documents;

(c) requisitioning any public record or copy thereof from any court or office;

(d) receiving evidence on affidavits; and

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

(2) Every proceeding before the Chief Commissioner shall be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860) and the Chief Commissioner shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

78. Annual and special reports by Chief Commissioner. *(1)* The Chief Commissioner shall submit an annual report to the Central Government and may at any time submit special reports on any matter, which, in his opinion, is of such urgency or importance that it shall not be deferred till submission of the annual report.

(2) The Central Government shall cause the annual and the special reports of the Chief Commissioner to be laid before each House of Parliament, along with a memorandum of action taken or proposed to be taken on his recommendations and the reasons for non- acceptance the recommendations, if any.

(3) The annual and special reports shall be prepared in such form, manner and contain such details as may be prescribed by the Central Government.

79. Appointment of State Commissioner in States. *(1)* The State Government may, by notification, appoint a State Commissioner for Persons with Disabilities (hereinafter referred to as the "State Commissioner") for the purposes of this Act.

(2) A person shall not be qualified for appointment as the State Commissioner unless he has special knowledge or practical experience in respect of matters relating to rehabilitation.

(3) The salary and allowances payable to and other terms and conditions of service (including pension, gratuity and other retirement benefits) of the State Commissioner shall be such as may be prescribed by the State Government.

(4) The State Government shall determine the nature and categories of officers and other employees required to assist the State Commissioner in the discharge of his functions and provide the State Commissioner with such officers and other employees as it thinks fit.

(5) The officers and employees provided to the State Commissioner shall discharge his functions under the general superintendence and control of the State Commissioner.

(6) The salaries and allowances and other conditions of service of officers and employees shall be such as may be prescribed by the State

Government.

(7) The State Commissioner shall be assisted by an advisory committee comprising of not more than five members drawn from the experts in the disability sector in such manner as may be prescribed by the State Government.

80. Functions of State Commissioner. The State Commissioner shall—

(a) identify, *suo motu* or otherwise, provision of any law or policy, programme and procedures, which are in consistent with this Act, and recommend necessary corrective steps;

(b) inquire, *suo motu* or otherwise deprivation of rights of persons with disabilities and safeguards available to them in respect of matters for which the State Government is the appropriate Government and take up the matter with appropriate authorities for corrective action;

(c) review the safeguards provided by or under this Act or any other law for the time being in force for the protection of rights of persons with disabilities and recommend measures for their effective implementation;

(d) review the factors that inhibit the enjoyment of rights of persons with disabilities and recommend appropriate remedial measures;

(e) undertake and promote research in the field of the rights of persons with disabilities;

(f) promote awareness of the rights of persons with disabilities and the safeguards available for their protection;

(g) monitor implementation of the provisions of this Act and schemes, programmes meant for persons with disabilities;

(h) monitor utilisation of funds disbursed by the State Government for the benefits of persons with disabilities; and

(i) perform such other functions as the State Government may assign.

81. Action by appropriate authorities on recommendation of State Commissioner. Whenever the State Commissioner makes a recommendation

to an authority in pursuance of clause *(b)* of section 80, that authority shall take necessary action on it, and inform the State Commissioner of the action taken within three months from the date of receipt of the recommendation:

Provided that where an authority does not accept a recommendation, it shall convey reasons for non-acceptance to the State Commissioner for Persons with Disabilities within the period of three months, and shall also inform the aggrieved person.

82. Powers of State Commissioner. *(1)* The State Commissioner shall, for the purpose of discharging their functions under this Act, have the same powers of a civil court as are vested in a 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 witnesses;

(b) requiring the discovery and production of any documents;

(c) requisitioning any public record or copy thereof from any court or office;

(d) receiving evidence on affidavits; and

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

(2) Every proceeding before the State Commissioner shall be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860) and the State Commissioners shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

83. Annual and special reports by State Commissioner. *(1)* The State Commissioner shall submit an annual report to the State Government and may at any time submit special reports on any matter, which, in its opinion, is of such urgency or importance that it shall not be deferred till submission of the annual report.

(2) The State Government shall cause the annual and the special reports of the State Commissioner for persons with disabilities to be laid before each House of State Legislature where it consists of two Houses or where such Legislature consist of one House, before that House along with a memorandum of

action taken or proposed to be taken on the recommendation of the State Commissioner and the reasons for non-acceptance the recommendations, if any.

(3) The annual and special reports shall be prepared in such form, manner and contain such details as may be prescribed by the State Government.

CHAPTER XIII

SPECIAL COURT

84. Special Court. For the purpose of providing speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district, a Court of Session to be a Special Court to try the offences under this Act.

85. Special Public Prosecutor. *(1)* For every Special Court, the State Government may, by notification, specify a Public Prosecutor or appoint an advocate, who has been in practice as an advocate for not less than seven years, as a Special Public Prosecutor for the purpose of conducting cases in that Court.

(2) The Special Public Prosecutor appointed under sub-section *(1)* shall be entitled to receive such fees or remuneration as may be prescribed by the State Government.

CHAPTER XIV

NATIONAL FUND FOR PERSONS WITH DISABILITIES

86. National Fund for persons with disabilities. *(1)* There shall be constituted a Fund to be called the National Fund for persons with disabilities and there shall be credited thereto—

(a) all sums available under the Fund for people with disabilities, constituted *vide* notification No. S.O. 573 *(E)*, dated the 11th August, 1983 and the Trust Fund for Empowerment of Persons with Disabilities, constituted *vide* notification No. 30-03/ 2004-DDII, dated the 21st November, 2006, under the Charitable Endowment Act, 1890 (6 of 1890).

(b) all sums payable by banks, corporations, financial institutions in pursuance of judgment dated the 16th April, 2004 of the Hon'ble Supreme Court in Civil Appeal Nos. 4655 and 5218 of 2000;

(c) all sums received by way of grant, gifts, donations, benefactions, bequests or transfers;

(d) all sums received from the Central Government including grants-in-aid;

(e) all sums from such other sources as may be decided by the Central Government.

(2) The Fund for persons with disabilities shall be utilised and managed in such manner as may be prescribed.

87. Accounts and audit. *(1)* The Central Government shall maintain proper accounts and other relevant records and prepare an annual statement of accounts of the Fund including the income and expenditure accounts in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India.

(2) The accounts of the Fund shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred by him in connection with such audit shall be payable from the Fund to the Comptroller and Auditor-General of India.

(3) The Comptroller and Auditor-General of India and any other person appointed by him in connection with the audit of the accounts of the Fund shall have the same rights, privileges and authority in connection with such audit as the Comptroller and Auditor-General of India generally has in connection with the audit of the Government accounts, and in particular, shall have the right to demand production of books of account, connected vouchers and other documents and papers and to inspect any of the offices of the Fund.

(4) The accounts of the Fund as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf, together with the audit report thereon, shall be laid before each House of Parliament by the Central Government.

CHAPTER XV

STATE FUND FOR PERSONS WITH DISABILITIES

88. State Fund for persons with disabilities. *(1)* There shall be constituted a Fund to be called the State Fund for persons with disabilities by a State Government in such manner as may be prescribed by the State

Government.

(2) The State Fund for persons with disabilities shall be utilised and managed in such manner as may be prescribed by the State Government.

(3) Every State Government shall maintain proper accounts and other relevant records of the State Fund for persons with disabilities including the income and expenditure accounts in such form as may be prescribed by the State Government in consultation with the Comptroller and Auditor-General of India.

(4) The accounts of the State Fund for persons with disabilities shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred by him in connection with such audit shall be payable from the State Fund to the Comptroller and Auditor-General of India.

(5) The Comptroller and Auditor-General of India and any person appointed by him in connection with the audit of the accounts of the State Fund for persons with disabilities shall have the same rights, privileges and authority in connection with such audit as the Comptroller and Auditor-General of India generally has in connection with the audit of the Government accounts, and in particular, shall have right to demand production of books of accounts, connected vouchers and other documents and papers and to inspect any of the offices of the State Fund.

(6) The accounts of the State Fund for persons with disabilites as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be laid before each House of the State Legislature where it consists of two Houses or where such Legislature consists of one House before that House.

CHAPTER XVI

OFFENCES AND PENALTIES

89. Punishment for contravention of provisions of Act or rules or regulations made thereunder. Any person who contravenes any of the provisions of this Act, or of any rule made thereunder shall for first contravention be punishable with fine which may extend to ten thounsand rupees and for any subsequent contravention with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees.

90. Offences by companies. *(1)* Where an offence under this Act has been committed by a company, every person who at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section *(1)*, where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

91. Punishment for fraudulently availing any benefit meant for persons with benchmark disabilities. Whoever, fraudulently avails or attempts to avail any benefit meant for persons with benchmark disabilities, shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to one lakh rupees or with both.

92. Punishment for offences of atrocities. Whoever,—

(a) intentionally insults or intimidates with intent to humiliate a person with disability in any place within public view;

(b) assaults or uses force to any person with disability with intent to dishonour him or outrage the modesty of a woman with disability;

(c) having the actual charge or control over a person with disability

voluntarily or knowingly denies food or fluids to him or her;

(d) being in a position to dominate the will of a child or woman with disability and uses that position to exploit her sexually;

(e) voluntarily injures, damages or interferes with the use of any limb or sense or any supporting device of a person with disability;

(f) performs, conducts or directs any medical procedure to be performed on a woman with disability which leads to or is likely to lead to termination of pregnancy without her express consent except in cases where medical procedure for termination of pregnancy is done in severe cases of disability and with the opinion of a registered medical practitioner and also with the consent of the guardian of the woman with disability, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.

93. Punishment for failure to furnish information. Whoever, fails to produce any book, account or other documents or to furnish any statement, information or particulars which, under this Act or any order, or direction made or given thereunder, is duty bound to produce or furnish or to answer any question put in pursuance of the provisions of this Act or of any order, or direction made or given thereunder, shall be punishable with fine which may extend to twenty-five thousand rupees in respect of each offence, and in case of continued failure or refusal, with further fine which may extend to one thousand rupees for each day, of continued failure or refusal after the date of original order imposing punishment of fine.

94. Previous sanction of appropriate Government. No Court shall take cognizance of an offence alleged to have been committed by an employee of the appropriate Government under this Chapter, except with the previous sanction of the appropriate Government or a complaint is filed by an officer authorised by it in this behalf.

95. Alternative punishments. Where an act or omission constitutes an offence punishable under this Act and also under any other Central or State Act, then, notwithstanding anything contained in any other law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under such Act as provides for punishment which is greater in degree.

CHAPTER XVII

MISCELLANEOUS

96. Application of other laws not barred. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

97. Protection of action taken in good faith. No suit, prosecution or other legal proceeding shall lie against the appropriate Government or any officer of the appropriate Government or any officer or employee of the Chief Commissioner or the State Commissioner for anything which is in good faith done or intended to be done under this Act or the rules made thereunder.

98. 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 or give such directions, not inconsistent with the provisions of this Act, as may appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made under this section after the expiry of the period of two years from the date of commencement of this Act.

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

99. Power to amend Schedule. *(1)* On the recommendations made by the appropriate Government or otherwise, if the Central Government is satisfied that it is necessary or expedient so to do, it may, by notification, amend the Schedule and any such notification being issued, the Schedule shall be deemed to have been amended accordingly.

(2) Every such notification shall, as soon as possible after it is issued, shall be laid before each House of Parliament.

100. Power of Central Government to make rules. *(1)* The Central Government may, subject to the condition of previous publication, 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) the manner of constituting the Committee for Research on

Disability under sub-section *(2)* of section 6;

(b) the manner of notifying the equal opportunity policy under sub-section *(1)* of section 21;

(c) the form and manner of maintaining records by every establishment under sub-section *(1)* of section 22;

(d) the manner of maintenance of register of complaints by grievance redressal officer under sub-section *(3)* of section 23;

(e) the manner of furnishing information and return by establishment to the Special Employment Exchange under section 36;

(f) the composition of the Assessment Board under sub-section *(2)* and manner of assessment to be made by the Assessment Board under sub-section *(3)* of section 38;

(g) rules for person with disabilites laying down the standards of accessibility under section 40;

(h) the manner of application for issuance of certificate of disability under sub-section *(1)* and form of certificate of disability under sub-section *(2)* of section 58;

(i) the allowances to be paid to nominated Members of the Central Advisory Board under sub-section *(6)* of section 61;

(j) the rules of procedure for transaction of business in the meetings of the Central Advisory Board under section 64;

(k) the salaries and allowances and other conditions of services of Chief Commissioner and Commissioners under sub-section *(4)* of section 74;

(l) the salaries and allowances and conditions of services of officers and staff of the Chief Commissioner under sub-section *(7)* of section 74;

(m) the composition and manner of appointment of experts in the advisory committee under sub-section *(8)* of section 74;

(n) the form, manner and content of annual report to be prepared and submitted by the Chief Commissioner under sub-section *(3)* of section 78;

(o) the procedure, manner of utilisation and management of the Fund under sub-section *(2)* of section 86; and

(p) the form for preparation of accounts of Fund under sub-section *(1)* of section 87.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, 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 rule or both Houses agree that the rule should not be made, the rule 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.

101. Power of State Government to make rules. *(1)* The State Government may, subject to the condition of previous publication, by notification, make rules for carrying out the provisions of this Act, not later than six months from the date of commencement of this Act.

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

(a) the manner of constituting the Committee for Research on Disablity under sub-section *(2)* of section 5;

(b) the manner of providing support of a limited guardian under sub-section *(1)* of section 14;

(c) the form and manner of making an application for certificate of registration under sub-section *(1)* of section 51;

(d) the facilities to be provided and standards to be met by institutions for grant of certificate of registration under sub-section *(3)* of section 51;

(e) the validity of certificate of registration, the form of, and conditions attached to, certificate of registration under sub-section *(4)* of section 51;

(f) the period of disposal of application for certificate of registration under sub-section *(7)* of section 51;

(g) the period within which an appeal to be made under sub-section *(1)* of section 53;

(h) the time and manner of appealing against the order of certifying authority under sub-section *(1)* and manner of disposal of such appeal under sub-section *(2)* of section 59;

(i) the allowances to be paid to nominated Members of the State Advisory Board under sub-section *(6)* of section 67;

(j) the rules of procedure for transaction of business in the meetings of the State Advisory Board under section 70;

(k) the composition and functions of District Level Committee under section 72;

(l) salaries, allowances and other conditions of services of the State Commissioner under sub-section *(3)* of section 79;

(m) the salaries, allowances and conditions of services of officers and staff of the State Commissioner under sub-section *(3)* of section 79;

(n) the composition and manner of appointment of experts in the advisory committee under sub-section *(7)* of section 79;

(o) the form, manner and content of annual and special reports to be prepared and submitted by the State Commissioner under sub-section *(3)* of section 83;

(p) the fee or remuneration to be paid to the Special Public Prosecutor under sub-section *(2)* of section 85;

(q) the manner of constitution of State Fund for persons with disabilities under sub-section *(1)*, and the manner of utilisation and management of State Fund under sub-section *(2)* of section 88;

(r) the form for preparation of accounts of the State Fund for persons with disabilities under sub-section *(3)* of section 88.

(3) Every rule made by the State Government under this Act shall be laid, as soon as may be after it is made, before each House of the State

Legislature where it consists of two Houses, or where such State Legislature consists of one House, before that House.

102. Repeal and savings. *(1)* The Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act, 1995 (1 of 1996) is hereby repealed.

(2) Notwithstanding the repeal of the said Act, anything done or any action taken under the said Act, shall be deemed to have been done or taken under the corresponding provisions of this Act.

THE SCHEDULE
[*See* clause (zc) of section 2]
SPECIFIED DISABILITY

1. Physical disability.—

A. Locomotor disability (a person's inability to execute distinctive activities associated with movement of self and objects resulting from affliction of musculoskeletal or nervous system or both), including—

(a) "leprosy cured person" means a person who has been cured of leprosy but is suffering from—

(i) loss of sensation in hands or feet as well as loss of sensation and paresis in the eye and eye-lid but with no manifest deformity;

(ii) manifest deformity and paresis but having sufficient mobility in their hands and feet to enable them to engage in normal economic activity;

(iii) extreme physical deformity as well as advanced age which prevents him/her from undertaking any gainful occupation, and the expression "leprosy cured" shall construed accordingly;

(b) "cerebral palsy" means a Group of non-progressive neurological condition affecting body movements and muscle coordination, caused by damage to one or more specific areas of the brain, usually occurring before, during or shortly after birth;

(c) "dwarfism" means a medical or genetic condition resulting in an adult height of 4 feet 10 inches (147 centimeters) or less.

(d) "muscular dystrophy" means a group of hereditary genetic muscle disease that weakens the muscles that move the human body and persons with multiple dystrophy have incorrect and missing information in their genes, which prevents them from making the proteins they need for healthy muscles. It is characterised by progressive skeletal muscle weakness, defects in muscle proteins, and the death of muscle cells and tissue;

(e) "acid attack victims" means a person disfigured due to violent assaults by throwing of acid or similar corrosive substance.

B. Visual impairment—

(a) "blindness" means a condition where a person has any of the following conditions, after best correction—

(i) total absence of sight; or

(ii) visual acuity less than 3/60 or less than 10/200 (Snellen) in the better eye with best possible correction; or

(iii) limitation of the field of vision subtending an angle of less than 10 degree.

(b) "low-vision" means a condition where a person has any of the following conditons, namely:—

(i) visual acuity not exceeding 6/18 or less than 20/60 upto 3/60 or upto 10/200 (Snellen) in the better eye with best possible corrections; or

(ii) limitation of the field of vision subtending an angle of less than 40 degree up to 10 degree.

C. Hearing impairment—

(a) "deaf" means persons having 70 DB hearing loss in speech frequencies in both ears;

(b) "hard of hearing" means person having 60 DB to 70 DB hearing loss in speech frequencies in both ears;

D. "speech and language disability" means a permanent disability arising out of conditions such as laryngectomy or aphasia affecting one or more

components of speech and language due to organic or neurological causes.

2. Intellectual disability, a condition characterised by significant limitation both in intellectual functioning (rasoning, learning, problem solving) and in adaptive behaviour which covers a range of every day, social and practical skills, including—

(a) "specific learning disabilities" means a heterogeneous group of conditions wherein there is a deficit in processing language, spoken or written, that may manifest itself as a difficulty to comprehend, speak, read, write, spell, or to do mathematical calculations and includes such conditions as perceptual disabilities, dyslexia, dysgraphia, dyscalculia, dyspraxia and developmental aphasia;

(b) "autism spectrum disorder" means a neuro-developmental condition typically appearing in the first three years of life that significantly affects a person's ability to communicate, understand relationships and relate to others, and is frequently associated with unusal or stereotypical rituals or behaviours.

3. Mental behaviour,—

"mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, but does not include retardation which is a conditon of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence.

4. Disability caused due to—

(a) chronic neurological conditions, such as—

(i) "multiple sclerosis" means an inflammatory, nervous system disease in which the myelin sheaths around the axons of nerve cells of the brain and spinal cord are damaged, leading to demyelination and affecting the ability of nerve cells in the brain and spinal cord to communicate with each other;

(ii) "parkinson's disease" means a progressive disease of the nervous system marked by tremor, muscular rigidity, and slow, imprecise movement, chiefly affecting middle-aged and elderly people

associated with degeneration of the basal ganglia of the brain and a deficiency of the neurotransmitter dopamine.

(b) Blood disorder—

(i) "haemophilia" means an inheritable disease, usually affecting only male but transmitted by women to their male children, characterised by loss or impairment of the normal clotting ability of blood so that a minor would may result in fatal bleeding;

(ii) "thalassemia" means a group of inherited disorders characterised by reduced or absent amounts of haemoglobin.

(iii) "sickle cell disease" means a hemolytic disorder characterised by chronic anemia, painful events, and various complications due to associated tissue and organ damage; "hemolytic" refers to the destruction of the cell membrane of red blood cells resulting in the release of hemoglobin.

5. Multiple Disabilities (more than one of the above specified disabilities) including deaf blindness which means a condition in which a person may have combination of hearing and visual impairments causing severe communication, developmental, and educational problems.

6. Any other category as may be notified by the Central Government.

DR. G. NARAYANA RAJU,

Secretary to the Govt. of India

FAREWELL

HON'BLE MR. JUSTICE SUBHASH KAKADE

Born on January 23, 1955 in Dewas. After completing B.A., L.L.B., joined Judicial Services on 29.10.1979. Confirmed as Civil Judge in the year 1983. Appointed as C.J.M. in the year 1991. Posted as Offg. District Judge in Higher Judicial Services in the year 1992. Worked as Registrar, S.A.T., Bhopal in the year 1997. Confirmed as District Judge in Higher Judicial Services in the year 1997. Was granted Selection Grade Scale w.e.f. 08.05.1999. Posted as Special Judge SC/ST (P.A.) Act at Tikamgarh in the year 2003. Posted as District and Sessions Judge at Neemuch and thereafter at Guna in the year 2004. Posted as Registrar, High Court of M.P., Bench at Indore in the year 2006. Was granted Super Time Scale w.e.f. 19.05.2006. Posted as District and Sessions Judge Bhopal in the year 2009. Was posted as Registrar General, High Court of M.P. from 03.01.2011 till elevation.

Elevated as Additional Judge to the High Court of Madhya Pradesh, took oath on 01.04.2013 and demitted office on 22.01.2017.

We wish His Lordship a healthy, happy and prosperous life.

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FAREWELL OVATION TO HON'BLE MR. JUSTICE SUBHASH KAKADE, GIVEN ON 20.01.2017 IN THE CONFERENCE HALL OF THE HIGH COURT OF M.P. AT JABALPUR.

Hon'ble Mr. Justice Rajendra Menon, Acting Chief Justice bids farewell to the demitting Judge :-

We have assembled here to bid a warm and affectionate farewell to Shri Justice Subhash Kakade, who will be demitting office on 22nd January, 2017 on attaining the age of superannuation, after successfully completing tenure of over four years as a Judge of this Court and a member of the Judicial family for 38 years.

Justice Kakade was born on 23rd January, 1955 at Dewas, Madhya Pradesh in a renowned family. His father was Jagirdar of Dewas. After obtaining degree in Law, brother Justice Kakade joined Judicial Services on 29.10.1979 as Civil Judge, Class-II. He was promoted as Civil Judge, Class-I on 23.04.1987 and as CJM in the year 1991. Thereafter, he was promoted as District Judge in the year 1992 and was granted selection grade on 08.05.1999 and super time scale on 19.05.2006. During his tenure as Judicial Officer, he had worked in different capacities at Shajapur, Sehore, Agar, Seoni-Malwa, Bilaspur, Indore, Hoshangabad, Ujjain, Barwaha, Bhopal etc.. Justice Kakade was posted as Registrar in the Indore Bench of High Court of Madhya Pradesh and thereafter as Registrar General of this Court from 03.01.2011 till his elevation.

Recognizing his contribution in the field of law and scholarly experience, Justice Kakade was elevated as an Additional Judge of the High Court of Madhya Pradesh on 01.04.2013.

During his tenure as Judge of the High Court, Justice Kakade has disposed of large number of cases of varied nature which bear testimony to his Judicial acumen and versatility, his painstaking diligence and exposition of legal principles. I had the occasion of working with Justice Kakade not only in the Bench of this Court during his tenure as a Judge but even prior to that while he was in the State Judicial Service. When he was the District Judge of Guna, I had the occasion to interact with him in my capacity as Portfolio Judge of the District and thereafter, when Justice Kakade was Registrar General of this Court, I had the occasion to be associated with him in matters

of various meetings of the Administrative Committees. In fact, it was during the tenure of Justice Kakade as Registrar General of this Court that the new transfer policy pertaining to Judicial Officers was brought into force and in my capacity as a member of the Committee, which implemented the transfer policy, I had occasion to work with him. Justice Kakade always gave his best, be it an administrative or judicial matter. It was always his endeavour to ensure that justice is done to the common man and the needy litigant. His retirement will no doubt create a void and would be a big loss to the High Court, the legal family and to the public at large. I am sure that even after his retirement, Justice Kakade will keep on serving this institution, the Judicial family in the State of Madhya Pradesh and the general public.

Justice Kakade is an embodiment of the most desirable qualities reasonably expected of a Judge and indeed of a noble human being.

Retirement from service is the unfolding of a new chapter in one's life. In the words of John Sharp Williams, a well known American thinker and politician - retirement brings repose, and repose allows a kindly judgment of all things.

Smt. Bharati Kakade is also present amongst us today and we have to acknowledge the active assistive role played by her which has been instrumental in helping Justice Kakade to make the achievements as detailed by me.

I, on my behalf and on behalf of my esteemed brother and sister Judges and the Registry of High Court, wish Justice Kakade, Smt. Bharati Kakade and his family members a very happy, prosperous and glorious life ahead.

" Jai Hind".

Shri Ravish Chandra Agarwal, Advocate General, M.P., bids farewell :-

We are present today in this august gathering to bid adieu to Hon'ble Justice Subhash Kakade who is demitting office after his distinguished stint at the bench as judge of this great institution. Farewell ovations are much more than a casual *"see you later"* and a mumbled *"thanks for everything"*. It is an occasion like this which gives us the pleasure to acknowledge the

distinguished career of Hon'ble Justice Kakade and to convey our appreciation for his dedicated service to this institution. It is a testament to the respect with which your Honour is held that all of us have gathered here in good numbers to express our heartfelt gratitude for the services rendered by your kindself to this institution.

Just as treasures are uncovered from the earth, so does virtue appear from good deeds and wisdom appears from pure and peaceful mind. To walk safely through the maze of life, a person needs the light of wisdom and the guidance of virtue. The light of wisdom and virtues which Justice Kakade possesses and beholds.

May I say that, without doubt, Your Lordship has brought to the task of judging an acute sense of fairness and a great deal of empathy for, and understanding of, the frailties of the human condition. This is a jurisdiction in which sometimes the best, but more often the worst, of people and their lives are exposed and played out. In a system which depends upon integrity of process as the lynchpin of reaching right and just outcomes, and for preserving the dignity of the litigants participating in it, Your Lordship has played an integral and outstanding part.

The Bar is the Judge of Judges. Justice Kakade has endeavoured to adhere to the Judge's Prayer: "Give me grace to hear patiently, to consider diligently, to understand rightly and to decide justly. Grant me due sense of humility, that I may not be misled by my willfulness, vanity or egotism."

The judicial oath to do justice "without fear or favour, affection or ill-will". This did not simply mean that a judge must be courageous in facing possible personal threats, whether from individuals or officers of the state. "What the oath means is that, whether all those untoward threats are absent or present, the judge must be blind to prejudice: impartial, fair, balanced, with a true appreciation of the common humanity which binds us all and which we have all-every one of us –inherited. In that way we ensure equality before the law."

His Lordship through his judicial pronouncements has shown remarkable adherence to the judge's oath and that is his biggest achievement.

I, on behalf of the State Government, Law officers and my own behalf, express my deepest gratitude and extend my best wishes to Hon'ble Justice Kakade for all his future endeavors. May the divine light be with him always.

I am sure Justice Kakade has another inning to play onwards and the lines from ***Robert Frost*** appositely describe him and I quote : "The woods are lovely, dark and deep, but I have promises to keep, and miles to go before I sleep, and miles to go before I sleep."

Thank You.

Shri Adarsh Muni Trivedi, President, M.P. High Court Bar Association, bids farewell :-

My Lord Hon'ble Shri Justice Rajendra Menon, the Acting Chief Justice, My Lords the companion Judges and My Lord Shri Justice Subhash Kakade, to whom we are bidding farewell, on His Lordship demitting the glorious high office of a Judge of this Hon'ble Court creating a vacuum in high pedestal of Justice plumed with feathers of public feelings and apotheosis as Temple of Justice.

It is very first blush of new-year and the weather is larger than life and cold-wave is being perplexed with the dance of red, yellow, blue, white and orange flowers permutating the space with sweet odorous offerings to the omnipresent God, who has put his soul into each flower. The passes of spring-time are molesting; but there is sadness in the cool breeze, because Your Lordship are demitting your office in such a golden season full of fragrance of flowers.

Today, we have congregated here to bid farewell to Your Lordship Shri Justice Subhash Kakade to your new path of discovering new islands in your life- span and to reinvent and create new conversations with the time. The new dimensions of life are awaiting Your Lordship to reach to new concatenations of achieving higher goals in the voyage of life.

Your Lordship's name 'Subhash' is itself significant in its perception, which means a person, who utters the words full of meaning, by which emerges the word 'Subhashit' which in English means 'apothegm'; a pithy saying- with placidity. From the bank of holy Narmada, its Your journey back to other holy bank of river 'Kshipra' at Dewas, where the Gods reside on the course of divinity and which fortunately is your birth place.

Your Lordship were born on 23rd January, 1955 at Dewas. The day of 23rd January is significant being also date of birth of great patriot Netaji

Subhash Chandra Bose. Your Lordship obtained the degree of law with flying colours and joined Judicial Services on 29th October 1979, as Civil Judge Class-II and were promoted as Civil Judge Class-I on 23rd April 1987 and as Chief Judicial Magistrate in year 1991. Your Lordship were further promoted as District Judge in year 1992 and were granted Selection-Grade on 8th May 1999 and Super-time Scale on 19th May 2006. Your Lordship had worked in different capacities at Shajapur, Sehore, Agar, Seoni-Malwa, Bilaspur, Indore, Hoshangabad, Ujjain, Badwah and Bhopal etc. earning wide experiences of life and culture of different parts of the state of Madhya Pradesh and life-styles of its people. Your Lordship were posted as Registrar in the Indore Bench of High Court of M.P. and thereafter posted as Registrar General of High Court at Jabalpur from 3rd January, 2011 till your elevation as an Additional Judge of the High Court of Madhya Pradesh on 1st of April 2013.

Your Lordship while delivering Judgments as a Judge of this High Court have expressed sense of shades of the meaning in words, with clarity in law. Your Lordship have concentrated yourself truly to the ideal of Justice with ingenious vocation of law and wise excogitation of facts, particularly in criminal jurisprudence. Your Lordship were always soft-spoken in Court proceedings and pleasant in behaviour.

F.M. Voltaire says :-

" The sentiment of Justice is so natural and so universally accepted by all mankind that it seems to be independent of all law, all party, all religion."

The independence of Justice of all laws is the highest stage, where the course of Justice has yet to reach, but Justice without generosity is nothing but Shylock's Justice, what Mahatma Gandhi says. To do Justice is to supply light to remove darkness and not to supply mere heat. **Lord Mansfield**, a great Jurist says :-

" Give your decision, never your reason;

Your decisions may be right,

Your reasons are sure to be wrong."

Your Lordship always entered with case and completeness into spirit of law and intention of persons with instincts, keeping in mind that execution of the laws is more important than making the law. Your Lordship always kept in mind that the dispensation of Justice is the greatest duty assigned by the God to the Judges and as such you decided the cases with integrity, keen

knowledge and experience, firm fidelity and always heard the cases with impartiality and open mind. Thoughts are always mightier than the armies. Your Lordship have made a meaningful contribution to the administration of Justice, which shall always be remembered by us.

The Bar is deemed to be Judge of the Judges and I express it by a popular saying that :-

"A good lawyer knows the Law.
A great lawyer knows the Judge."
And it requires no more explanation.

Your Lordship have made great achievements in your life and in the words of **Robert Frost** :-

" Two roads diverged in a wood, and I
I took the one less traveled by,
and that has made all the difference."

Your Lordship; finality is not the language of life. The paradox of the time is that it does not go anywhere. The time is stable. We feel it by palpating it. Only we move, time does not. And your time spent with us shall always stay with us. All the Members of M.P. High Court Bar Association alongwith myself wish you a glowing life in the future. You have glorified the time and the time would glorify your magnificence. You will certainly keep your resolutions of future life upto the mark with blissful blend of experience and talent.

Emily Dickinson says :-

"If I can stop one heart from breaking,
I shall not live in vain;
If I can ease one life the aching,
Or cool one pain,
Or help one fainting robin,
Unto his nest again,
I shall not live in vain. "

We all wish you a radiant long and successful life with pleasant and lovely blissful moments and certainly with your ever-lasting energetic thoughts.

" जीवेद् शरद: शतम् " Live long for hundred and hundred years. At this great moment, I dedicate a few lines in your honour :-

" मनुजत्व की सिद्धि, अनहद की साधना ,
शाश्वत का सम्मोहन, न्याय की उपासना।
लक्ष्य की विराटता, सुभाशित तन्मयता,
सर्वोपरि आत्म विभव, दिव्य शक्ति वत्सलता।
भव्य जीवन, नव तरंग, खुल गये हैं नये पट,
जाओ पथिक रेवा तट से, शिप्रा के पावन तट।।
जागृत चेतन सुभाष , आत्म बोध निखरेगा,
नई भोर, नवल दीप्ति, नया सूर्य चमकेगा।
चलो उठो, अंजुरी भर नेह का पाथेय लो,
बिदा नहीं कुंजी यह, नव द्वार के पट खोलो।"

A rain-bow in the sky is awaiting Your Lordship.

Shri T.S. Ruprah, President, High Court Advocates' Bar Association bids farewell :-

This congregation bids farewell to Hon'ble Shri Justice Subhash Kakade, who is demitting the office of the Judge of the High Court of Madhya Pradesh.

On My Lords elevation to this Hon'ble Court, we all witnessed a calm, quiet, composed and balanced judge. One thing has been conspicuously noticeable that is the discipline Your Lordship maintained in the Court Room. A special tranquility prevailed in Your Lordships Court which helped the Court to discharge judicial function efficiently.

My Lord's love for sports is evident from the fact that My Lord participated in all games organized by the advocates in the High Court. This is a rare quality which has kept My Lord a young enthusiastic gentleman with a smiling face. The Bar has never witnessed My Lord losing temper. Be it litigants or lawyers, all came out smiling from My Lords Court.

Your Lordship would be missed by each and every one of us, for

different reasons as Your Lordship has always been courteous to everyone and gave equal treatment to Senior and Junior Members of the Bar. My Lord will always be remembered with fond memories for the warmth and responsiveness displayed towards us.

I, on behalf of the High Court Advocate's Bar Association and my own behalf extend good wishes to Your Lordship and hope that My Lord would continue to engage yourself in other activities, which will be beneficial to the Society. We are sure that Your Lordship's legal knowledge and experience gained during the last four decades shall be utilized for the betterment of the poor and the needy. Along with My Lord I also extend my heartfelt good wishes to Mrs. Kakade and all family members for a healthy, peaceful, active and happy long life.

Shri Radhe Lal Gupta, Spokesperson, State Bar Council bids farewell :-

With heavy heart we all have gathered here to bid farewell to My Lord Hon'ble Shri Justice Subhash Kakade, who is demitting the office after rendering more than 4 years of noteworthy and commendable service to the Madhya Pradesh Judiciary.

My Lord Hon'ble Shri Justice Subhash Kakade, has joined Judicial Services as Civil Judge, in the State Judiciary in the year 1979. Thereafter My Lord has the honour of gracing various prime positions in the State Judiciary of Madhya Pradesh in several Districts i.e., Shajapur, Sehore, Agar, Seoni-Malwa, Bilaspur, Indore, Hoshangabad, Ujjain etc. and thereafter continued as Registrar General of High Court of Madhya Pradesh till his elevation.

Hon'ble Shri Justice Subhash Kakade, was elevated as an additional Judge of the High Court of Madhya Pradesh on 01-04-2013. No doubt Justice Kakade, is demitting his office, but he shall always remain in our heart and continue to inspire us.

Though retirement is closure of one chapter, but every closure of chapter opens a new chapter. My Lord Shri Subhash Kakade is such courageous personality that he will make his new chapter of life equally lively, pleasant and happy because My Lord knows well, that pleasure multiplies on

its dissemination and sharing with others.

The contribution of My Lord Justice Kakade on Judicial side as well as in administrative matters is commendable and praiseworthy. The contribution in upbringing the Judiciary of State by your Lordship shall be remembered for the years to come. Apart from his deep knowledge, My Lord is very religious minded. During his tenure My Lord was very kind to all, specially to advocates.

My Lord on behalf of State Bar Council of Madhya Pradesh and on my own behalf wish you all the best for future, and wish you very happy and healthy life. May the almighty bless your Lordship very peaceful and prosperous life.

Shri Jinendra Kumar Jain, Asstt. Solicitor General, bids farewell:-

सम्माननीय कार्यवाहक मुख्य न्यायाधीश, सम्माननीय न्यायमूर्ति श्री सुभाष काकड़े जी, सम्माननीय न्यायमूर्तिगण, कार्यक्रम में उपस्थित विधि अधिकारीगण, अधिवक्ता बंधुओं एवं समारोह में शामिल सभी सम्मानीय जन।

आज अवसर आया है न्यायमूर्ति श्री सुभाष काकड़े जी को विदाई सम्मान करने का। विगत 37 वर्षों से व्यवहार न्यायाधीश से प्रारम्भ विधि जगत के क्षेत्र में न्यायाधीश के गरिमामय पद पर आसीन होकर उच्च न्यायालय के न्यायाधीश के रूप में यात्रा अपने अंतिम पड़ाव पर पहुँचकर आज के पश्चात् नई भूमिका में पदार्पण करेंगें।

न्यायमूर्ति श्री सुभाष काकड़े जी ने 24 वर्ष की उम्र में जो सपना संजोया था, उसको साकार कर अभी तक का सफर अनुशासन नियम और कानून के शिकंजे के अधीन न्यायिक प्रक्रिया का पालन करते हुये संयम, आत्मविश्वास एवं गौरव के साथ शांत एवं स्थिरता से सरल एवं गूढ़ प्रश्नों का हल चेहरे पर तनाव रहित मुद्रा के साथ निष्पादित किया।

व्यवहार न्यायाधीश से लेकर उच्च न्यायालय तक का सफर करते समय जीवन में अनेक प्रसंग होंगे जिन्हें संजोया जाय तो उनका उपयोग प्रेरणादायी एवं संस्मरणीय होगा।

इस कार्यक्रम के पश्चात भूमिका परिवर्तित होगी, मैं नई भूमिका को सफलतम, निष्कंटक समाज एवं देश हित एवं दूसरों के लिये समर्पित हो ऐसी कामना करता हूँ। आपके उज्ज्वल भविष्य की कामना करते हुये मैं अपनी ओर से भारत सरकार की ओर से समस्त केन्द्रीय विधि अधिकारियों की ओर से आपको बधाई देता हूँ एवं आपका स्वागत अभिनन्दन करता हूँ।

'जय–भारत'

Shri Rajendra Tiwari, Sr. Advocate, Senior Advocates' Council bids farewell :-

Today we are to bid farewell on your demitting Office of the Judge of this Court on reaching the age of 62 years. Your Lordship's bio-data have been read out by the Speakers preceding me and I, therefore, do not venture upon repeating the same.

My Lord you had begun your career as a Civil Judge from 1979 and in the due course escalated higher pedestals of your career to reach highest honour as the District & Sessions Judge and as the Registrar General and then as a Judge of this Court.

My Lord you had large span of judicial experience when you entered the portals of this High Court as its puisne Judge. The most remarkable achievement was that you maintained discipline in the Court; practically every Lawyer was adjusted by your Lordship without demonstrating any hurry to decide cases without considering convenience of Lawyers. I can safely quote a saying of **"Douglas Williams"**, which runs as follows :-

"The Law is not a series of calculating machines where, definitions and answers come tumbling out when the right levers are pushed."

Your Lordship's allowed enough time for preparation of cases and this kept every one in good stead.

On behalf of the Senior Advocate's Council and my own behalf, I wish your Lordship *adieu* and pray that your Lordship may have a long life to serve the Nation through the experience which has been acquired so far.

May God, bestow all his favours on your Lordship and family.

Thank you.

Farewell Speech delivered by Hon'ble Mr. Justice Subhash Kakade :-

समय आ गया है साढ़े तीन दशकों से अधिक वर्षों से न्यायिक अधिकारी के रूप में प्रारंभ यात्रा और संस्कारधानी जबलपुर में 01 जनवरी 2011 से प्रारंभ पड़ाव को अलविदा कहने का। याद आते हैं, वे दिन जब वर्ष 1979 के मई माह में समाचार पत्र से जानकारी प्राप्त हुई कि सिविल

जज पद हेतु सिलेक्शन हो गया है। मन विचारों को सैकड़ों पंख लग गये, आकांक्षाओं का समुंदर हिलौरे लेने लगा।

मेरा 25 वां जन्म दिवस आने को अभी भी 3 माह बाकी थे जब दिनांक 29 अक्टूबर 1979 को ट्रेनी व्यवहार न्यायाधीश वर्ग–2 की हैसियत से कार्यभार ग्रहण किया। तब रिटायरमेंट तो मन में कतई था ही नहीं। दूर क्षितिज में बादलों की ओट में भी नहीं। लेकिन आज वह घड़ी आ ही गई है। विदाई की बेला एक अद्‌भुत घड़ी होती है संतोष के साथ–साथ एक नई शुरूआत की। इसीलिये यह अवसर मेरे लिये भूमिका का रूपान्तरण मात्र है। भविष्य की नवीन जिम्मेदारियों, उत्तरदायित्वों को निभाने की एक नई पारी की शुरूआत, 62 रन पूर्ण कर फिर से गार्ड लेने की कवायद।

मैं अपनी 1979 बैच के सबसे कम उम्र के साथियों में दूसरे नंबर पर था और कालेज केम्पस से निकलकर सीधा न्याय मंदिर के पवित्र परिसर में पहुँच गया था। तब से लेकर आज तक 37 वर्ष 2 माह 23 दिन हो गये हैं। पीछे मुड़कर अतीत में झांकता हूँ तो जीवन में आये उतार चढ़ाव के दृश्य उभरकर ऑखों में चलचित्र की भॉति तैर जाते हैं। आज बासठ वर्ष पूर्ण हो गये हैं, स्वास्थ्य अच्छा है, आत्म सम्मान, आत्म विश्वास कायम है।

सर्वथा पृथक पारिवारिक पृष्ठभूमि के रहते स्वप्रेरणा से ही न्यायदान द्वारा समाजसेवा का यह रास्ता अपनाया था जो परिवार में रचे बसे सेवा और सहायता के माहौल से मेरा स्वाभाव बना था। परमपिता परमेश्वर, आभार आपका, आपने न्यायदान के ईश्वरीय कर्तव्य के संपादन हेतु मुझे चुना और संतोष है इस बात का कि आपकी ही कृपा से इस कठिन डगर पर संतुलित रूप से, ईमानदारी से चल पाया और अपने कर्तव्यों का सम्पूर्ण सामर्थ्य से निर्वहन किया। मुझे सात्विक गर्व है कि अपने कार्यकाल में मैंने न्यायाधीश के कर्त्तव्यों, दायित्वों के निर्वहन का प्रयास पूर्ण जिम्मेदारी, ईमानदारी एवं निष्ठा से किया। मुझे सब जगह बेतहाशा सम्मान, अनुराग, वात्सल्य एवं प्रेम प्राप्त हुआ जिसके लिये मैं हमेशा आप सभी का शुक्रगुजार रहूँगा।

विद्वान वक्ताओं द्वारा मेरे प्रति जो भावनाऐं व्यक्त की गई उनके लिये मैं हृदय से आभारी हूँ। सभागृह में उपस्थित शुभचिंतकों के प्रति आभार व्यक्त करते अब विदा चाहता हूँ। पुनः आभार, धन्यवाद, शुक्रिया।

FAREWELL

HON'BLE MR. JUSTICE JARAT KUMAR JAIN

Born on January 23, 1955 in Khandwa. After obtaining degrees of M.Com., LL.B., joined Judicial Service on September 19, 1981. Was confirmed as Civil Judge on May 5, 1985. Appointed as Civil Judge Class-I on October 27, 1987. Appointed as C.J.M on August 16, 1991. Posted as VII A.D.J. on June 13, 1994 at Indore. Was posted as Deputy Secretary, Law Department, Bhopal in May, 1997. Was confirmed as District Judge in Higher Judicial Service on October 4, 1997.Was granted Selection Grade Scale on July 8, 2000. Was posted as Additional Welfare Commissioner, Bhopal Gas Tragedy Victims, Bhopal in the year 2000. Was posted as Special Judge for Cases under SC/ST (P.A.) Act & N.D.P.S. Act, Shajapur in the year 2002. Also worked as I/C District & Sessions Judge and I AJ to I A.D.J. at Shajapur in the year 2005. Was posted as District & Sessions Judge, Shivpuri on November 7, 2005. Was granted Super Time Scale on October 10, 2007. Was posted as Registrar (I.L.R. & Examination), High Court of M.P., Jabalpur on November 1, 2007 and as Principal Registrar (I.L.R.), High Court of M.P., Jabalpur from September 2009. Was posted as District & Sessions Judge, Jabalpur in May 2010. Was working as District & Sessions Judge, Chhindwara from March 29, 2012 till elevation

Elevated as Additional Judge of the High Court of Madhya Pradesh, took oath on 28.02.2014 and demitted office on 22.01.2017.

We wish His Lordship a healthy, happy and prosperous ..

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FAREWELL OVATION TO HON'BLE MR. JUSTICE J.K. JAIN, GIVEN ON 20.01.2017, AT THE HIGH COURT OF M.P., INDORE, BENCH INDORE.

Hon'ble Mr. Justice P.K. Jaiswal, the Administrative Judge, High Court of M.P., Bench Indore, bids farewell to the demitting Judge :-

We have gathered here today to bid farewell to Justice Jarat Kumar Jain, who is demitting Office in a few days, after rendering distinguished service to this Court for about three years. I can say, without any hesitation, that with the retirement of Justice Jain, the Bench and Bar of Madhya Pradesh High Court will be loosing a good and illustrious Judge.

For a lot of people, law is by chance, but for Justice Jain, it was by choice, as he was inspired by the work done by his father Shri S.K. Jain, who had served Madhya Pradesh Lower Judiciary as District & Sessions Judge.

After completing a brilliant academic career from Dr. Harisingh Gour University, Sagar in 1977, Justice Jain enrolled himself with the Bar and started his legal career on 04.12.1977, in the office of Late Shri Justice B.C. Verma, Chief Justice of Punjab & Haryana High Court. Justice Jain practiced as an advocate for about three years. Justice Jain opted for the judicial service and joined the Judicial Service as Civil Judge, Class-II on 19th September, 1981. As an Additional District Judge, he has dealt with various branches of law for a considerable period.

On 7th November, 2005, Justice Jain was posted as the District & Sessions Judge, Shivpuri. He was granted Super Time Scale on 10th October, 2007. He was also posted as Registrar (ILR and Examination) High Court of Madhya Pradesh, Jabalpur, on 1st November, 2007 and Principal Registrar (ILR), High Court of Madhya Pradesh, Jabalpur in September, 2009. Thereafter, he was transferred and posted as District & Sessions Judge, Jabalpur and Chhindwara.

Though Justice Jain had mainly practiced on civil side as a lawyer, after his promotion as a District & Sessions Judge, he distinguished himself as an excellent Judge on criminal side and decided number of sessions cases involving complicated questions of fact and law.

Looking to his hard working and approach to the law in deciding the cases of different fields, he was elevated as an Additional Judge of Madhya Pradesh High Court on 28th February, 2014.

A Judge is required not only to faithfully interpret and apply law, but it is equally essential for him to be conscious of the social realities of the world and to decide the cases fairly and wisely.

In this respect, I must mention that Justice Jain made a very valuable contribution in the form of his extremely balanced judgments even in many high profile cases.

Though there are many landmark decisions rendered by Justice Jain, which I am not referring to you due to paucity of time, however, it can be summed up that all his decisions reflect his thorough knowledge of law, forthrightness and fierce independence.

In the short span of time that I have known him, I found that Justice Jain has a nobility of classic quality in all that he does. He is loved and respected by the Bar and the Bench alike.

Justice Jain, through his loyalty to the ethics and commitment to the cause of upholding the nobility of justice administration system, has secured a remarkable reputation not just for himself but to this institution as well.

On behalf of my brother Judges and on my behalf, I take this opportunity to extend my gratitude to Justice Jain for his distinguished contribution to the institution which will be remembered for ever.

I conclude wishing Justice Jain good luck in all his future endeavours.

May the choicest blessings of the Almighty be showered on him and his family members for more happy, healthy and prosperous years to come.

Thank you.

Shri Sunil Jain, Addl. Advocate General, bids farewell :-

Every inning comes to an end and so the every tenure. The day has come to bid your Lordship Farewell from the Office and not from our hearts and minds. It is this day that we give our judgment on you, having received so many at your hands for past so many years.

Born on 23rd January, 1955 in Khandwa, passed M.Com, LL.B.. Started his career as an Advocate. My Lord joined Judicial Service on 19th September, 1981. Thereafter served the Judiciary as Chief Judicial Magistrate, Additional District Judge and District Judge. My Lord elevated as Judge of

this High Court on 28/02/2014.

It is well said
"Speak up for those,
Who cannot speak for
themselves"

The bottom line of Justice delivery system is **"Not only must justice be done, it must also be seen to be done"**. The last hope of a common man is the Judiciary. It is a fact that our democracy is surviving only because of our judicial system. A lawyer and litigant only expect from the Court that their case be heard peacefully, completely and be decided on the basis of its own facts and applicable law. The Judge should be open to persuasion and should not sit with convictions and fixed notions. My Lord Justice Jain maintained this judicial discipline and fulfilled the legitimate expectation of lawyer and litigant. "When justice is done, it bring joy to the righteous but terror to evildoers".

Your Lordship's patience, profound knowledge reflected in his Court room, while sitting as a Judge. Your Lordship's congenial nature and the atmosphere of cordiality in the Court always added to the pleasure of conducting cases before you. Your Lordship's vast knowledge, experience and great analytical ability duly reflected in your judgments and we will always look forward to your guidance in future also.

Though, we will not be having you with us in the Court from now, you will always be with us in our minds and in our hearts. I extend good wishes to you as well as to Mrs. Jain on behalf of me, and colleagues of my office for starting a new inning and I extend good wishes and hope that you will continue as cheerful as always and spread happiness where-ever you be.

Shri P.K. Shukla, President, High Court Bar Association, Indore, bids farewell :-

आज हम माननीय उच्च न्यायालय के लोकप्रिय व मृदुभाषी माननीय न्यायमूर्ति श्री जरत कुमार जी जैन महोदय के विदाई समारोह के अवसर पर एकत्रित हुये है।

माननीय न्यायमूर्ति श्री जरत कुमार जी जैन महोदय का जन्म दिनांक 23 जनवरी 1955 को जिला खण्डवा के एक संभ्रान्त परिवार में हुआ था। सर्वविदित है कि 23 जनवरी को भारत के महान सपूत नेताजी सुभाषचन्द्र बोस का भी जन्मदिन इसी दिन मनाया जाता है।

आपने बी.कॉम, एम.कॉम व विधि की उपाधि प्राप्त कर दिनांक 19 सितम्बर 1981 को व्यवहार न्यायाधीश वर्ग–2 के पद पर इन्दौर से राज्य न्यायिक सेवा में अपनी सेवाओं से अपना सेवाकाल प्रारम्भ किया। दिनांक 27 अक्टूबर 1987 को आप बड़वानी जिला खरगोन में व्यवहार न्यायाधीश वर्ग–1 के रूप में पदस्थ हुए तथा आपने दिनांक 16 अगस्त 1981 को मुख्य न्यायिक दण्डाधिकारी धार में पदभार ग्रहण किया तथा दिनांक 13 जून 1994 को आपने अतिरिक्त जिला एवं सत्र न्यायाधीश के रूप में इन्दौर में सेवाएं प्रदान करने के पश्चात सन् 1997 में भोपाल में विधि एवं विधायी कार्य विभाग के उपसचिव के पद पर आपने प्रशासनिक दायित्व का सफलतापूर्वक निर्वहन किया तथा भोपाल में ही भोपाल गैस त्रासदी के अतिरिक्त कल्याण आयुक्त के महत्वपूर्ण पद पर आपने दिनांक 31 अक्टूबर 2000 से अपनी सेवाएँ प्रदान की। आपकी कार्य क्षमता और आत्मीय व्यवहार के कारण आपको शाजापुर में विशेष न्यायाधीश (अनुसूचित जाति–जनजाति एवं एन.डी.पी.एस.) दुरूह दायित्व प्रदान किया गया।

माननीय, आपने दिनांक 07 नवम्बर 2015 को शिवपुरी के जिला एवं सत्र न्यायाधीश का कार्यभार ग्रहण किया। दिनांक 01 नवम्बर 2007 को आप म.प्र. उच्च न्यायालय जबलपुर के रजिस्ट्रार (प्रथम) के पद पर पदस्थ हुए तथा वर्ष 2009 में आपने प्रिंसिपल रजिस्ट्रार का कार्यभार ग्रहण किया। दिनांक 27 मई 2010 को पुनः आपने जबलपुर में जिला एवं सत्र न्यायाधीश का पदभार ग्रहण किया तथा 29 मार्च 2012 को आपने जिला एवं सत्र न्यायाधीश छिन्दवाड़ा में अपनी कार्य क्षमता के कारण निर्भीक व विधि के गंभीर विषयों को निराकरण करते हुए लोकप्रियता प्राप्त की।

महोदय इस प्रकार आपने विधि की जटिलताओं को सफलतापूर्वक व निष्पक्षतापूर्वक निर्वहन किया व प्रशासनिक विभिन्न विधाओं में भी आपने दक्षतापूर्वक कार्य सम्पादित कर अपनी विलक्षण प्रतिभा का परिचय देते हुए न्यायिक क्षेत्र में महत्वूपर्ण योगदान कर आम व खास में लोकप्रियता प्राप्त की।

माननीय आपने विधि की जटिलताओं की दक्षतापूर्वक व्याख्या कर अपनी निर्भीक कार्य शैली की क्षमता को सफलतापूर्वक निर्वहन करते हुए अधिवक्ताओं और आम नागरिकों में निष्पक्ष न्यायाधीश के रूप में लोकप्रियता प्राप्त की।

माननीय महोदय आपके न्यायिक क्षेत्र में निष्पक्ष महत्वपूर्ण योगदान व सभी से आत्मीय सद्व्यवहार के महत्वपूर्ण योगदान को उचित सम्मान देते हुए भारत के महामना राष्ट्रपति महोदय द्वारा म.प्र. उच्च न्यायालय के अतिरिक्त न्यायाधीश के पद पर पदारोहित करने के आदेश पारित किए, तदनुसार आपके द्वारा 28 फरवरी 2014 को माननीय उच्च न्यायालय म.प्र. के अतिरिक्त न्यायामूर्ति के पद की गरिमामय समारोह में शपथग्रहण की। तब से आज तक आप अपनी निष्पक्षता व जटिल न्यायिक ग्रंथियों के सफलतापूर्वक व्याख्या करने के फलस्वरूप अपनी निष्पक्षता व दक्षता के लिए आम व खास में एक विशिष्ट स्थान को प्राप्त किया।

न्यायमूर्ति के पद पर आपकी कार्यशैली व निर्भीकता तथा कार्य करने की क्षमता को प्रदेश के अधिवक्ताओं ने करीब से देखा है। आपके द्वारा आपकी कार्यशैली से पीड़ित पक्षकारों को न्यायदान से अपेक्षित निष्पक्ष न्याय प्राप्त हुआ तथा आपके द्वारा पारित निर्णय न्यायिक क्षेत्र में सदैव अविस्मरणीय व विधि की जटिलताओं को सुलझाने में सफल मार्गदर्शन करते रहेंगे।

मान्यवर आज हमारे हाईकोर्ट बार एसोसिएशन इन्दौर के सभी सदस्य व अन्यत्र अपनी सेवा दे रहे अभिभाषक वर्ग के सदस्य आपके निष्पक्ष व सटीक न्यायदान के लिए और आपका सानिध्य प्राप्त

करने के कारण स्वयं को गौरवान्वित महसूस करते हैं।

यह भी एक हमारे लिए गौरव का कारण रहेगा कि न्यायमूर्ति के पद पर पदारोहण करने के पश्चात् आपका कार्यकाल निष्पक्ष न्याय के लिए जानी जाने वाली प्रथम स्मरणीया माता अहिल्या बाई जो कि अपने निष्पक्ष न्यायदान के लिए विश्व प्रसिद्ध है, से प्रारम्भ किया।

मैं आश्वस्त हूँ कि महोदय आपके न्यायदान की निष्पक्ष प्रक्रिया दीर्घ अवधि तक स्मरणीय रहेगी और न्यायिक क्षेत्र में प्रकाश स्तम्भवत निष्पक्ष निर्णय प्रदान करने के लिए मार्गदर्शन प्रदान करती रहेगी। एक प्रसिद्ध कवि ने कहा है कि :–

"यह सांझ उषा का आंगन आलिन्गन बिरह मिलन का,

चिरहास अश्रुमय आनन्द रे इस मानव जीवन का"

साधन्यवाद।

मैं जगन्नियन्ता से आपके व आपके परिवारजन के स्वस्थ व उज्जवल भविष्य की कामना करता हूँ।

Shri Sunil Gupta, Member, M.P. State Bar Council, bids farewell :-

आज का यह विशेष क्षण हम सभी के लिए अत्यन्त महत्वपूर्ण है, जब हम मध्यप्रदेश उच्च न्यायालय के माननीय न्यायमूर्ति श्री जे.के. जैन साहब के न्यायाधिपति के रूप में यशस्वी एवं सफल कार्यकाल पूर्ण होने पर उन्हें अपनी ओर से भावभीनी विदाई दे रहे हैं।

माननीय न्यायमूर्ति श्री जे.के. जैन साहब का जन्म 23 जनवरी 1955 को नर्मदांचल की धरती खण्डवा में हुआ। आपने विधि स्नातक की उपाधि अर्जित करने के पश्चात वर्ष 1981 में व्यवहार न्यायाधीश वर्ग–2 के रूप में इन्दौर से राज्य न्यायिक सेवा में प्रवेश किया। वर्ष 1994 में पुनः इन्दौर में अतिरिक्त जिला न्यायाधीश के रूप में पदस्थ हुए। वर्ष 2005 में जिला एवं सत्र न्यायाधीश के रूप में शिवपुरी में कार्यभार ग्रहण किया। वर्ष 2014 में म.प्र. उच्च न्यायालय में न्यायाधिपति के पद पर आसीन हुए। आपने प्रदेश की विभिन्न अदालतों सहित माननीय उच्च न्यायालय में अपनी कार्यशैली, शालीनता, सादगी व निर्भीकता से न्यायदान कर अपनी एक पहचान बनाते हुए सभी दायित्वों का आपके द्वारा सफलतापूर्वक निर्वहन किया गया।

आपके व्यवहार में सहजता, मधुरता और अपनत्व की जो भावना झलकती थी वह सदैव हमारे लिये अत्यन्त प्रेरणादायी रही। न्यायदान की प्रक्रिया में आपने जिस प्रकार पक्षकारों के मन की पीड़ा को समझकर प्रकरणों का त्वरित निराकरण किया, उससे सभी पक्ष सदैव संतुष्ट नजर आए।

आने वाले समय में आपकी अनुपस्थिति से जो रिक्तता उत्पन्न होगी वह हमेशा महसूस होती रहेगी। माननीय न्यायमूर्ति जी के अनुभवों से बहुत कुछ सीखने को मिला।

न्यायदान में आपका योगदान अमूल्य एवं अभिनन्दनीय है। आपके सफल कार्यकाल पूर्ण करने पर आपसे यह अनुरोध करता हूँ कि, इस अर्धविराम के बाद प्रवाहमान होने वाली समय की गति के

साथ–साथ आप उसी सहजता एवं सुलभता के साथ प्रदेश के विधि व्यवसायियों एवं समाज के अन्य वर्गों के सामाजिक विकास में अपना रचनात्मक योगदान देकर नई भूमिकाओं का निर्वहन करेंगे।

इन्हीं शुभकामनाओं के साथ मैं अपनी ओर से एवं मध्यप्रदेश राज्य अधिवक्ता परिषद् के सभी सदस्यों की ओर से ऑल इण्डिया बार काउंसिल एवं अपने सभी साथियों की ओर से आपके प्रति कृतज्ञता तथा आभार व्यक्त करता हूँ एवं आपके उत्तम स्वास्थ्य, सुखद जीवन एवं दीर्घायु होने की कामना करता हूँ।

धन्यवाद सहित।

Shri Anand Soni, Asstt. Solicitor General, bids farewell :-

Today we are bidding farewell to Hon'ble Shri Justice J.K. Jain who is demitting the office and that is why we have assembled today in this ovation.

My Lords it is very painful moment where we are bidding farewell to Hon'ble Justice Shri J.K. Jain who has spent his golden 3 years with us in this Court, in fact he has become the synonym of this High Court and it will be very difficult for us to see Court room no. 9 without him. My Lord Shri Justice Jain has left his imprint on the history of this Court and it is impossible for us to forget him. In fact some are really unforgettable, create history, Hon'ble Shri Justice J.K. Jain is one of them; he will be remembered by all of us for all the time to come.

I am sure that your Lordship's vast knowledge and experience will continue to be useful to our community even after your retirement as a Judge of this Court, my Lord had displayed his firm conviction and commitment towards the Rule of law and decided the cases without fear and favour. A man can't retire his experience we hope that my Lord would continue to serve the down trodden. Undoubtedly, after demitting your Lordship's office, we the members of the legal fraternity will be deprived of your Lordship's able guidance.

Your Lordship had a way of making everyone comfortable with your wit and compassion, I saw some of your uniqueness while you were dispensing justice. I wish my Lord all the best for your post retirement life.

Myself on behalf of Government of India being Asstt. Solicitor General of India and all the Central Government Counsels express our best wishes for good health, happiness and peace for the days ahead.

In last I would like to conclude by saying, "if you are brave enough to say goodbye then life will reward you a new hello."

Farewell speech delivered by Hon'ble Mr. Justice J.K. Jain :-

I am thankful to all of you for expressing your sentiments and kind words.

Just to recall that I started my judicial career from Indore and now after completing 35 years of service, co-incidentally I am demitting the office at Indore. By the grace of God all these years have gone smoothly and happily.

During my service I tried my level best to perform to the best of my abilities without any ill will and prejudices.

The duty of a Judge is pious and is hard but the effective co-operation of the members of Bar makes it easier. I can say with full confidence that this Bar having its tradition of rectitude and dedicated service to the cause of justice has made up my job easier.

At this occasion, I am grateful to Hon'ble Acting Chief Justice Shri Rajendra Menon, Brother and Sister Judges present and former, for their extended cooperation.

I also wish to pay gratitude to my parents, my wife and family members for their support.

Lastly I am thankful to Registry Officers and my staff for their sincere efforts.

Thank you all of you.

NOTES OF CASES SECTION

Short Note

****(1)***

Before Mr. Justice S.C. Sharma

W.P. No. 2174/2016 (Indore) decided on 2 August, 2016

ASHISH MITTAL ...Petitioner

Vs.

BANK OF BARODA & ors. ...Respondents

(Alongwith W.P. No. 2176/2016)

Transfer of Property Act (4 of 1882), Sections 58(f) & 65(a) - Mortgage by deposit of title deed - Mortgagors power to lease - **Guarantor on behalf of M/s Venkateshwars has mortgaged his property by deposit title deed in the year 2012 - Thereafter, guarantor has undertaken *inter alia* not to lease out the said property during currency of the said loan without permission of the respondent bank - Thereafter, property was leased out without permission of the bank vide lease deed - Lease deed is not binding on bank - Therefore, District Magistrate was justified in passing the impugned order and Tehsildar was also justified in passing the order dated 09.03.2016 and issuance of notice on 16.03.2016 - Petition dismissed.**

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धाराएँ 58(एफ) व 65(ए) – हक विलेखों के निक्षेप द्वारा बंधक – बंधककर्ता की पट्टा करने की शक्ति – प्रत्यामूति–दाता ने मेसर्स वैंकटेश्वर की ओर से अपनी सम्पत्ति को वर्ष 2012 में हक विलेख के निक्षेप द्वारा बंधक किया – इसके पश्चात् प्रत्यामूति–दाता ने इसके साथ ही प्रत्यर्थी बैंक की अनुमति के बिना उक्त ऋण की अवधि चालू रहने के दौरान सम्पत्ति को पट्टे पर नहीं देने का वचन दिया – इसके पश्चात् सम्पत्ति बैंक की अनुमति के बिना पट्टा विलेख द्वारा पट्टे पर दी गई – पट्टा विलेख बैंक पर बाध्यकारी नहीं है – अतः जिला मजिस्ट्रेट द्वारा आक्षेपित आदेश पारित किया जाना न्यायोचित था तथा तहसीलदार द्वारा आदेश दिनांक 09.03.2016 का पारित किया जाना एवं दिनांक 16.03.2016 को नोटिस जारी किया जाना भी न्यायोचित था – याचिका खारिज।

Cases referred:

AIR 2010 SC 530, (2014) 6 SCC 1.

Rishi Shrivastava, for the petitioner.
R.C. Sinhal, for the respondent No. 1.
Milind Phadke, for the respondent/State.

NOTES OF CASES SECTION

Short Note

**(2)*

Before Mr. Justice Alok Verma

M.A. No. 478/ 2005 (Indore) decided on 22 July, 2016

BILKEESH BANO (SMT.) & ors. ...Appellants

Vs.

KULVINDER SINGH & ors. ...Respondents

A. ***Motor Vehicles Act (59 of 1988), Section 166 - Medical evidence*** **- Causes of ARDS (Acute Respiratory Distress Syndrome) are not present in the case - No medical evidence to show that such a medical condition can be caused due to drug abuse during treatment for the injuries suffered in the accident - Inference drawn by tribunal appears to be proper - No interference required.**

क. मोटर यान अधिनियम (1988 का 59), धारा 166 – चिकित्सीय साक्ष्य – प्रकरण में ए.आर.डी.एस. (एक्यूट रेस्पीरेटरी डिसट्रेस सिण्ड्रोम) के कारण उपस्थित नहीं हैं – ये दर्शाने हेतु कोई चिकित्सीय साक्ष्य नहीं हैं कि, ऐसी चिकित्सीय परिस्थिति दुर्घटना में सहन की गई क्षति के उपचार के दौरान हुए औषधि के दुरूपयोग से कारित हो सकती है – अधिकरण द्वारा निकाला गया निष्कर्ष उचित प्रतीत होता है – किसी हस्तक्षेप की आवश्यकता नही।

B. ***Motor Vehicles Act (59 of 1988), Section 173(1) - For enhancement of amount of award*** **- Tribunal not allowed the bills & receipts on the ground that no oral evidence produced as whether the doctors who received money ever treated the deceased and certain receipts were after the death of deceased - Held - Receipts were not challenged by respondents - No evidence produced to show receipts were false - Oral evidence of son of deceased also remained unchallenged - Looking to the financial status of deceased and his family it was possible that payments were made after the death of deceased - Tribunal erred in not allowing the receipts and bills - Receipts of Rs. 48,505/- which was not allowed by tribunal is allowed - Total medical expenses Rs. 1,23,505/- adding transportation & nutritious diet comes to Rs. 1,35,000/-, Rs. 10,000/- for pain and suffering - Appellant entitled to recover total Rs. 1,45,000/- with 6% rate of interest from date of presentation of application with cost of appeal Rs. 2000/-- Appeal partly allowed.**

ख. मोटर यान अधिनियम (1988 का 59), धारा 173(1) – अवार्ड की राशि बढ़ाये जाने हेतु – अधिकरण ने इस आधार पर बिलों एवं रसीदों को स्वीकार नहीं किया

कि कोई मौखिक साक्ष्य प्रस्तुत नहीं किया गया, कि क्या जिस चिकित्सक ने रूपये प्राप्त किये उसने कभी मृतक का इलाज किया तथा कुछ रसीदें मृतक की मृत्यु के पश्चात् की थी – अभिनिर्धारित – प्रत्यर्थीगण द्वारा रसीदों को चुनौती नहीं दी गई – रसीदे मिथ्या थी यह दर्शाने हेतु कोई साक्ष्य प्रस्तुत नही किया गया था – मृतक के पुत्र के मौखिक साक्ष्य को भी चुनौती नहीं दी गई – मृतक एवं उसके परिवार की आर्थिक स्थिति को देखते हुए यह संभव था कि भुगतान मृतक की मृत्यु के पश्चात् किया गया था – रसीदों तथा बिलों की मंजूरी न किये जाने में अधिकरण ने त्रुटि की है –48,505/– रू. की रसीदें, जो अधिकरण द्वारा मंजूर नहीं की गई थी, मंजूर की जाती हैं – कुल चिकित्सीय व्यय 1,23,505/– रू. में परिवहन एवं पोषणाहार मिलाकर 1,35,000/– रू. होते हैं, तथा 10,000/– रू. पीड़ा एवं कष्ट के लिए – अपीलार्थी आवेदन प्रस्तुत करने की दिनाँक से 6 प्रतिशत ब्याज की दर से कुल 1,45,000/– रू., साथ ही 2000/– रू. अपील का व्यय प्राप्त करने का हकदार है – अपील अंशतः मंजूर।

Cases referred:

MACD 2011(1) (Raj.) 123, 2007 ACJ 1329, 2007 ACJ 1260, (2003) SCC 53.

G.K. Neema, for the appellants.
S.V. Dandwate, for the respondent No. 3.

Short Note

****(3)***

Before Mr. Justice Sujoy Paul

W.P. No. 5168/2012 (Gwalior) decided on 13 August, 2015

DINESH CHANDRA MISHRA (Dr.) ...Petitioner

Vs.

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

(Alongwith W.P. No. 294/2011, W.P. No. 366/2011, W.P. No. 1467/2012, W.P. No. 1717/2014, W.P. No. 2284/2013, W.P. No. 2690/2013, W.P. No. 2828/2011, W.P. No. 3073/2012, W.P. No. 3212/2011, W.P. No. 3669/2012, W.P. No. 3846/2014, W.P. No. 3929/2013, W.P. No. 3930/2013, W.P. No. 4357/2012, W.P. No. 4540/2013, W.P. No. 4610/2010, W.P. No. 4814/2011, W.P. No. 5539/2011, W.P. No. 5708/2010, W.P. No. 6693/2010, W.P. No. 7066/2011, W.P. No. 8192/2013, W.P. No. 8203/2011 & W.P. No. 9261/2012)

Service Law - Superannuation - **Petitioner/teachers of Private aided institutions - Enhancement of age of superannuation for the teachers - No material on record to show that UGC Regulation in relation to private**

aided institution is accepted by the State Government - Petitions dismissed.

सेवा विधि – अधिवार्षिकी – याचीगण/निजी सहायता प्राप्त संस्थाओं के शिक्षक – शिक्षकों के लिए अधिवार्षिकी वय वृद्धि – अभिलेख पर यह दर्शाने हेतु कोई सामग्री उपस्थित नहीं है कि निजी सहायता प्राप्त संस्थाओं से संबंधित यू.जी.सी. विनियमन राज्य सरकार द्वारा स्वीकार किये गये हैं – याचिकाएँ खारिज।

Cases referred:

2002 (1) MPHT 315, AIR 1990 SC 1305, (2013) 8 SCC 633, (2004) 2 SCC 510, (2006) 9 SCC 630, (2014) 8 SCC 682, (1988) 3 SCC 354, 2012 (1) MPLJ 503, 1992 Supp (3) SCC 191, (2011) 7 SCC 172, (2000) 10 SCC 527, (2007) 11 SCC 58, 2012 (2) MPLJ 538.

D.K. Agarwal, for the petitioner in W.P. No. 5168/2012, W.P. No. 1717/2014 & W.P. No. 4540/2013.

Akshay Jain, for the petitioner in W.P. No. 294/2011.

A.K. Saxena, for the petitioner in W.P. No. 366/2011, W.P. No. 3669/2012 & W.P. No. 5708/2010.

C.P. Sharma, for the petitioner in W.P. No. 1467/2012 & W.P. No. 3930/2013.

Sanjeev Agarwal, for the petitioner in W.P. No. 4357/2012.

Prashant Sharma, for the petitioner in W.P. No. 2284/2013 & W.P. No. 5539/2011.

Sanjay Singh, for the petitioner in W.P. No. 2690/2013.

D.S. Raghuvanshi, for the petitioner in W.P. No. 2828/2011, W.P. No. 3073/2012, W.P. No. 3212/2011 & W.P. No. 4814/2011.

L.S. Bhadoriya, for the petitioner in W.P. No. 3846/2014.

Sudha Shrivastava, for the petitioner in W.P. No. 3929/2013 & W.P. No. 4610/2010.

Ravindra Dixit, for the petitioner in W.P. No. 6693/2010.

B.P. Singh, for the petitioner in W.P. No. 7066/2011.

S.S. Kushwaha, for the petitioner in W.P. No. 8192/2013 & W.P. No. 9261/2012 and for the respondent No. 4 in W.P. No. 366/2011, for the respondent No. 3 in W.P. No. 5708/2010,.

Anand V. Bharadwaj, for the petitioner in W.P. No. 8203/2011.

Sangita Pachauri, G.A. for the respondent/State.

Prakash Bararu, for the respondent No. 4 in W.P. No. 5168/2012.

Jitendra Sharma, for the respondents No. 3 & 4 in W.P. No. 294/2011 and for the respondent No. 5 in W.P. No. 7066/2011.

Deepak Khot, for the respondent No. 3 in W.P. No. 1717/2014.

Vivek Khedkar, for the respondent No. 6 in W.P. No. 1717/2014 and for the respondent No. 3 in W.P. No. 3929/2013 & W.P. No. 6693/2010.

Rajnish Sharma, for the respondent No. 3 in W.P. No. 2690/2013 and for the respondents No. 3 & 4 in W.P. No. 8192/2013.

K.N. Gupta with *Anmol Khedkar,* for the respondent No. 3 in W.P. No. 2828/2011, W.P. No. 3073/2012, W.P. No. 3669/2012, W.P. No. 4610/2010, W.P. No. 4814/2011 & W.P. No. 8203/2011 and for the respondents No. 3 & 4 in W.P. No. 4357/2012.

A.K. Jain, for the respondent No. 3 in W.P. No. 3212/2011.

S.P. Bhatnagar, for the respondents No. 3 & 4 in W.P. No. 3846/2014 and for the respondents No. 3, 4 & 6 in W.P. No. 4540/2013.

Arun Dudawat, for the respondents No. 2 & 3 in W.P. No. 5539/2011.

O.P. Mathur, for the respondent No. 3 in W.P. No. 7066/2011.

Anil Sharma, for the respondents No. 3 & 4 in W.P. No. 9261/2012.

Short Note

****(4)***

Before Mr. Justice S.A. Dharmadhikari

W.P. No. 2466/2012 (Gwalior) decided on 17 June, 2016

GANESH PRASAD OJHA ...Petitioner

Vs.

SHRI HARIRAM JI OJHA & ors. ...Respondents

Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Amendment **- Held - Since parties have not yet filed their documentary evidence in the suit therefore trial has not commenced - Application for amendment allowed.**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – संशोधन – अभिनिर्धारित – चूँकि पक्षकारों ने वाद में अब तक अपने दस्तावेजी साक्ष्य प्रस्तुत नहीं किए हैं इसलिए विचारण प्रारंभ नहीं हुआ है – संशोधन के लिए आवेदन मंजूर।

Cases referred:

2009 (3) MPLJ 122, (2001) 8 SCC 97, (2012) 5 SCC 377, 2012 (2) MPLJ 464, 2014 (4) MPLJ 143.

D.D. Bansal, for the petitioner.

T.C. Narwariya, for the respondents.

NOTES OF CASES SECTION

Short Note (DB)

****(5)***

Before Mr. Justice P.K. Jaiswal & Mr. Justice I.S. Shrivastava

W.A. No. 355/2011 (Indore) decided on 10 August, 2011

GUMAN SINGH DAMOR ...Appellant

Vs.

STATE OF M.P. & anr. ...Respondents

(Alongwith W.A. No. 359/2011 & W.A. No. 369/2011)

A. ***Lokayukt Evam Up-Lokayukt Adhiniyam, M.P. (37 of 1981), Sections 10, 12 & 13 - Lokayukt Evam-Up-Lokayukt (Investigation) Rules, M.P., 1982, Rules 6 & 16 - Complaint - Inquiry*** **- Violation of principles of natural justice - After holding a preliminary enquiry a show cause notice was issued to the appellant - As per notice oral hearing was also given - Appellant gave his personal appearance before the Lokayukt - After considering reply of the said notice and giving a fair opportunity, fact finding report was submitted - Therefore, respondent has not violated the principles of natural justice while enquiring into the matter and submitting the fact finding report to the State Government for taking appropriate action against the appellant - Writ Appeal dismissed.**

क. *लोकायुक्त एवं उप–लोकायुक्त अधिनियम, म.प्र. (1981 का 37), धाराएँ 10, 12 व 13 – लोकायुक्त एवं उप–लोकायुक्त (अन्वेषण) नियम, म.प्र., 1982, नियम 6 व 16 – परिवाद – जाँच* – नैसर्गिक न्याय के सिद्धांतों का उल्लंघन – प्रारंभिक जांच करने के पश्चात् अपीलार्थी को कारण बताओ नोटिस जारी किया गया था – नोटिस के अनुसार मौखिक सुनवाई का अवसर भी प्रदान किया गया था – अपीलार्थी ने लोकायुक्त के समक्ष व्यक्तिगत उपस्थिति दी थी – उक्त नोटिस के जवाब पर विचार करने तथा उचित अवसर प्रदान करने के पश्चात् तथ्य के निष्कर्ष का प्रतिवेदन प्रस्तुत किया गया था – अतः प्रत्यर्थी ने मामले की जांच करते समय तथा अपीलार्थी के विरूद्ध समुचित कार्यवाही करने हेतु राज्य सरकार को तथ्य के निष्कर्ष का प्रतिवेदन प्रस्तुत किये जाने में नैसर्गिक न्याय के सिद्धांत का उल्लंघन नहीं किया है – रिट अपील खारिज।

B. ***Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 9*** **- Argument that after superannuation the appellant was retired from the services and therefore, no departmental enquiry can be initiated against him - No such argument was advanced before the writ court nor the said ground was taken in the writ appeal and therefore the said contention cannot be accepted at this stage in this writ appeal.**

ख. *सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966* *नियम*

9 – यह तर्क कि अधिवार्षिकी के पश्चात् अपीलार्थी सेवा से निवृत्त हुआ था, अतः उसके विरूद्ध कोई विभागीय जाँच प्रारंभ नहीं की जा सकती – रिट न्यायालय के समक्ष ऐसे कोई तर्क प्रस्तुत नहीं किया गया था न ही उक्त आधार रिट अपील में लिया गया था एवं इसलिए उक्त तर्क को रिट अपील के इस प्रक्रम में स्वीकार नहीं किया जा सकता।

The order of the Court was delivered by : **P.K. JAISWAL, J.**

Case referred:

W.A. No. 267/2010 (DB) order passed on 04.08.2010.

A.S. Garg with *S. Prasad*, for the appellant in W.A. No. 355/2011.
Girish Desai, Dy. A.G. for the respondent No. 1/State.
Anand Soni, for the respondent No. 2.
A.K. Sethi with *S.S. Sharma*, for the appellant in W.A. No. 359/2011.
Vandana Kasrekar, for the Appellant in W.A. No. 369/2011

Short Note
****(6)***
Before Mr. Justice Jarat Kumar Jain
M.Cr.C. No. 10205/2015 (Indore) decided on 4 July, 2016

LAXMAN ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Arms Act (54 of 1959), Section 25(1B)(a) - Quashing of proceeding - Speedy Trial* - Applicant/accused aged 75 years and facing trial for more than 20 years - He has suffered mental agony and physical discomfort and unnecessarily financial loss - His right to speedy trial has been infringed due to undue and inordinate delay in the trial - Therefore, continuance of such proceeding is an abuse of process of law - Therefore, criminal proceedings quashed and applicant is discharged.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं आयुध अधिनियम (1959 का 54), धारा 25(1बी)(ए) – कार्यवाही का अभिखण्डित किया जाना – शीघ्र विचारण – आवेदक/अभियुक्त की उम्र 75 वर्ष है तथा 20 साल से अधिक समय से विचारण का सामना कर रहा है – उसने मानसिक पीड़ा एवं शारीरिक असुविधा तथा अनावश्यक रूप से आर्थिक हानि सहन की है – विचारण में अनुचित एवं असाधारण विलम्ब के कारण उसके शीघ्र विचारण के अधिकार का उल्लंघन हुआ है – अतः, ऐसी कार्यवाही का जारी रहना विधि की प्रक्रिया का दुरूपयोग है – अतः, दाण्डिक कार्यवाहियाँ अभिखंडित एवं आवेदक आरोप मुक्त किया गया।

NOTES OF CASES SECTION

Cases referred:

Laws (Raj)-2000-3-28/TLRAJ-2000-0-281, 2002 (3) MPLJ 3.

Virendra Khadav, for the applicant.
Peeyush Jain, Dy. G.A. for the non-applicant/State.

Short Note
****(7)***
Before Mr. Justice Sheel Nagu
W.P. No. 2418/2015 (Gwalior) decided on 5 August, 2015

MANISH SHARMA ...Petitioner
Vs.
SARVAPRIYA ENTERPRISES ...Respondent

A. ***Land Revenue Code, M.P. (20 of 1959), Sections 109 & 110 - Mutation*** **- On the basis of sale deed which is subject matter of challenge before Civil Court - Whether mutation proceeding ought to be stalled awaiting decision in Civil Suit - Held - No.**

क. *भू राजस्व संहिता, म.प्र. (1959 का 20), धाराएँ 109 व 110 – नामांतरण* – विक्रय विलेख के आधार पर जो कि, सिविल न्यायालय के समक्ष चुनौती की विषय वस्तु है – क्या सिविल वाद में निर्णय की प्रतीक्षा करने हेतु नामांतरण कार्यवाही रोकी जानी चाहिए – अभिनिर्धारित – नहीं।

B. ***Interpretation of Statutes*** **- Conflict between two statutes - Doctrine of harmonious construction allow both to operate in their respective field by ironing out the creases of conflict without doing harm to basic scheme and object of the statutes.**

ख. *कानूनों का निर्वचन* – दो कानूनों के मध्य अन्तर्विरोध – समन्वयपूर्ण अर्थान्वयन का सिद्धांत दोनों को कानून की मूल प्रणाली तथा उद्देश्य को अपहानि पहुँचाए बिना अंतर्विरोध का समाधान करते हुए अपने–अपने क्षेत्र में प्रवर्तित रहने हेतु अनुज्ञात करता है।

Cases referred:

1989 RN 9(HC), AIR 2005 MP 60, 1987 CCLJ Note No. 65, W.P. No. 407/2013 decided on 12.06.2014(DB)(Guwahati High Court), AIR 2014 Supreme Court 3812.

P.C. Chandil with *B.B. Shukla*, for the petitioner.
D.K. Katare with *Pawan Dwivedi*, for the respondent.

NOTES OF CASES SECTION

Short Note
**(8)*
Before Mr. Justice Vivek Rusia

W.P. No. 3449/2016 (Indore) decided on 24 June, 2016

MOHANLAL & ors. ...Petitioners
Vs.
SHRAVAN KUMAR & ors. ...Respondents

Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Amendment - **Amendment application filed by plaintiff/respondent was allowed - Initially suit was filed for grant of injunction on the ground of ownership & possession - During pendency of suit plaintiff/respondent was dispossessed from the suit property - Amendment application seeking relief of possession filed by plaintiff/respondent was allowed by Trial Court - Held - No jurisdictional error by Trial Court - Question of possession shall be decided on the basis of evidence - Petition has no merits hereby dismissed.**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – संशोधन – वादी/प्रत्यर्थी द्वारा प्रस्तुत संशोधन हेतु आवेदन मंजूर किया गया था – आरंभ में वाद, स्वामित्व एवं कब्जे के आधार पर व्यादेश प्रदान करने हेतु प्रस्तुत किया गया था – वाद के लम्बित रहने के दौरान वादी/प्रत्यर्थी को वाद सम्पत्ति से बेकब्जा कर दिया गया था – वादी/प्रत्यर्थी द्वारा कब्जे के अनुतोष हेतु प्रस्तुत आवेदन को विचारण न्यायालय द्वारा मंजूर किया गया – अभिनिर्धारित – विचारण न्यायालय द्वारा अधिकारिता की त्रुटि नहीं – कब्जे का प्रश्न साक्ष्य के आधार पर विनिश्चित किया जायेगा – याचिका में कोई गुणदोष नहीं, एतद् द्वारा खारिज।

Case referred:

(2013) 9 SCC 485.

Satish Jain, for the petitioners.

Short Note (DB)
**(9)*
Before Mr. Justice Rajendra Menon & Mr. Justice S.K. Palo

W.A. No. 770/2015 (Jabalpur) decided on 2 February, 2016

MULAYAM SINGH YADAV ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section

11-B(2)(cc) **- Disqualification in the matter of appointment as a member in the mandi in view of provision contained u/S 11-B(2)(cc) of the Adhiniyam, 1972 - Held - Since after 26.01.2001 petitioner was blessed with a third child petitioner is disqualified to hold the office of Mandi as per the provision contained u/S 11-B(2)(cc) - It is an appointment prohibited under law as it is not an appointment in the eye of the law, being *non est*, inoperative and *void ab initio.***

कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 11–बी(2)(सीसी) – अधिनियम 1972 की धारा 11–बी(2)(सीसी) में अंतर्विष्ट उपबंध को दृष्टिगत रखते हुए मंडी में सदस्य के रूप में नियुक्ति के मामले में निरर्हता – अभिनिर्धारित – चूँकि याची की तीसरी संतान का जन्म दिनाँक 26.01.2001 के पश्चात् हुआ था, इसलिए धारा 11–बी(2)(सीसी) में अंतर्विष्ट उपबंधों के अनुसार याची मंडी के कार्यालय का पद धारण करने के लिए निरर्हित हो गया – यह विधि के अंतर्गत एक प्रतिषिद्ध नियुक्ति है, क्योंकि यह *नास्ति*, अप्रवर्तनीय तथा *प्रारंभ से ही शून्य* होने के कारण विधि की दृष्टि में नियुक्ति ही नहीं।

The judgment of the Court was delivered by : RAJENDRA MENON, J.

Deependra Kumar Mishra, for the appellant.
Akshay Namdeo, for the State.
R.P. Singh, for the respondent No. 3.

Short Note

****(10)***

Before Mr. Justice Sheel Nagu

W.P. No. 852/2015 (s) (Gwalior) decided on 20 February, 2015

PAWAN KUMAR SINGHAL ...Petitioner

Vs.

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

Service Law - Municipal Corporation Act, M.P. (23 of 1956), Sections 58(5) & 58(6) and Municipal Corporation (Appointment and Conditions of Service of Officers and Servants) Rules, M.P., 2000, Schedule (I) r/w Rules 3 & 4 - Transfer **- Petitioner being Assistant Engineer has been transferred on deputation from Municipal Corporation, Gwalior to Municipal Corporation, Ujjain - Held - State has been given power to transfer any officer or employee from one corporation to another with additional power that in case the tenure of employee at any corporation is more than three years then his transfer would invariably be made by the State Government - Petition deserves to be dismissed.**

सेवा विधि – नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 58(5) व 58(6) एवं नगरपालिक निगम (अधिकारियों तथा सेवकों की नियुक्ति तथा सेवा की शर्तें) नियम, म.प्र., 2000, अनुसूची (I) सहपठित नियम 3 व 4 – स्थानांतरण – याची का सहायक अभियंता होने के नाते प्रतिनियुक्ति में नगरपालिक निगम, ग्वालियर से नगरपालिक निगम, उज्जैन स्थानांतरण किया गया – अभिनिर्धारित – राज्य को किसी भी अधिकारी अथवा कर्मचारी को एक निगम से दूसरे निगम पर स्थानांतरण करने की शक्ति के साथ ही यह अतिरिक्त शक्ति भी प्रदान की गई है कि किसी भी निगम पर कर्मचारी का कार्यकाल 3 वर्ष से अधिक अवधि का होने पर, राज्य सरकार द्वारा सदैव उसका स्थानांतरण किया जाएगा – याचिका खारिज करने योग्य है।

Prashant Sharma, for the petitioner.
Praveen Newaskar, Dy. Govt. Adv. for the respondents/State.

Short Note (DB)

****(11)***

Before Mr. Justice Rajendra Menon, Acting Chief Justice &
Mr. Justice Vivek Rusia

W.P. No. 12718/2013 (Indore) decided on 30 June, 2016

RAMDEV GINNING FACTORY (M/S) ...Petitioner
Vs.
CHIEF MANAGER, AUTHORIZED OFFICER,
ICICI BANK LTD. & ors. ...Respondents

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002), Sections 17 & 18 and Recovery of Debts Due to Banks and Financial Institutions Act (51 of 1993), Section 18 - Bar of jurisdiction **- The DRAT has been constituted under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 - The DRAT is the appellate forum where the appeal lies against the order passed by the DRT u/S 17 of the SARFAESI Act of 2002 - Except the power to be exercised as appellate authority in the entire Act, the DRAT has no further power of review and revision, therefore, the DRAT cannot assume the power which is not available and provided under the Act - After passing the order u/S 18 by the DRAT, the Tribunal has become functus officio and cannot go beyond its powers.**

वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन अधिनियम (2002 का 54), धाराएँ 17 व 18 एवं बैंकों और वित्तीय संस्थाओं को शोध्य ऋण वसूली अधिनियम (1993 का 51), धारा 18 – अधिकारिता का वर्जन – **DRAT** का गठन बैंकों और वित्तीय संस्थाओं को शोध्य ऋण वसूली अधिनियम, 1993 के अंतर्गत

किया गया है – **DRAT** अपीलीय फोरम है जहाँ **DRT** द्वारा **SARFAESI** अधिनियम, 2002 की धारा 17 के अंतर्गत पारित आदेश के विरूद्ध अपील होती है – संपूर्ण अधिनियम में अपीलीय प्राधिकारी के रूप में शक्ति के प्रयोग के सिवाय **DRAT** को पुनर्विलोकन एवं पुनरीक्षण करने की अन्य कोई शक्ति नहीं है, इसलिए **DRAT** ऐसी शक्ति धारण नहीं कर सकता, जो कि उपलब्ध नहीं है तथा अधिनियम के अंतर्गत उपबंधित नहीं है – **DRAT** द्वारा धारा 18 के अंतर्गत आदेश पारित होने के पश्चात्, अधिकरण पदकार्य निवृत्त हो जाता है तथा अपनी शक्तियों से परे नहीं जा सकता।

The order of the Court was delivered by: **VIVEK RUSIA, J.**

S.M. Sanyal, for the petitioner.
A. Tugnawat, for the respondent Nos. 1 & 2.
Abhinav Malhotra, for the respondent No. 3.
A.K. Sethi with *Harish Joshi,* for the respondent No. 4.

Short Note
****(12)***
Before Mr. Justice Sujoy Paul
W.P. No. 6875/2015 (Jabalpur) decided on 3 February, 2016

RAMHIT SAHU ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

***Service Law - Financial Code, M.P., Rule 84 - Alteration of date of birth* - Date of birth can be altered only in case of clerical error - The date of birth cannot be permitted to be altered at the fag-end of the career and for computation of retiral dues, date of birth recorded in service record shall be final & determinative - Petition dismissed.**

सेवा विधि – वित्तीय संहिता, म.प्र., नियम 84 – जन्म तिथि का परिवर्तन – सिर्फ लिपिकीय त्रुटि के प्रकरण में जन्म तिथि परिवर्तित की जा सकती है – सेवाकाल के अंतिम चरण में जन्म तिथि में परिवर्तन करने की अनुमति नहीं दी जा सकती तथा सेवानिवृत्ति देयकों की गणना करने हेतु, सेवा अभिलेख में अभिलिखित जन्म तिथि अंतिम एवं निर्धारक होगी – याचिका खारिज।

Cases referred:

1993 (2) SCC 162, (2006) 6 SCC 537, (1970) 3 SCC 624, (2010) 14 SCC 423, 2007 (1) MPLJ 286, 2003 (1) MPHT 148 (DB).

Anshuman Singh, for the petitioner.
Pushpendra Yadav, G.A. for the respondents.

Short Note

****(13)***

Before Mr. Justice Anand Pathak

W.P. No. 3424/2013 (Gwalior) decided on 12 April, 2016

SANJAY KUMAR PATHAK ...Petitioner

Vs.

GOVERNMENT OF M.P. & ors. ...Respondents

Constitution - Article 226 - Departmental Enquiry **- Petition against the issuance of charge sheet based upon certain act - Petitioner is working as lower division clerk (LDC) and respondent No. 3 is working as principal in the said college - Earlier the respondent No. 3 has lodged a false complaint in which the police after investigation found no plausible facts or truth - In the present case the charge sheet has been issued by the principal at the instance of the Commissioner Higher Education - Departmental enquiry is at its inception and at preliminary stage, therefore, unless the enquiry is completed, proceeding cannot be considered to be vitiated in respect of procedural bias - Petition dismissed.**

संविधान – अनुच्छेद 226 – विभागीय जाँच – कतिपय कार्य पर आधारित आरोप पत्र जारी किये जाने के विरूद्ध याचिका – याची निम्न श्रेणी लिपिक के रूप में कार्यरत है तथा प्रत्यर्थी क्र. 3 उक्त महाविद्यालय में प्राचार्य के रूप में कार्यरत है – पूर्व में प्रत्यर्थी क्र. 3 ने एक मिथ्या परिवाद दायर किया था जिसमें पुलिस द्वारा अन्वेषण के पश्चात्, कोई सत्यामासी तथ्य या सत्यता नहीं पाई गई थी – वर्तमान प्रकरण में प्राचार्य द्वारा आयुक्त उच्च शिक्षा के अनुरोध पर आरोप पत्र जारी किया गया है – विभागीय जाँच अपने आरम्भ में है तथा प्रारंभिक प्रक्रम पर है, अतः, जब तक जाँच पूर्ण न हो जाए, कार्यवाही प्रक्रियात्मक पक्षपात् के संदर्भ में दूषित नहीं मानी जाएगी – याचिका खारिज।

Cases referred:

(2006) 12 SCC 28, 2015 (3) MPHT 172, (2001) 2 SCC 330, ILR (2012) MP 2436, (2013) 16 SCC 116.

J.P. Saxena, for the petitioner.

Amit Bansal, Dy. G.A. for the respondents/State.

Short Note

****(14)***

Before Mr. Justice Rajendra Mahajan

M.Cr.C. No. 21746/2015 (Jabalpur) decided on 21 April, 2016

STATE OF M.P. ...Applicant
Vs.
JAITMANG (@ PASANG) LIMI ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) and Wild Life (Protection) Act (53 of 1972), Sections 35(8), 2(16), 9, 39, 44, 49, 50(c) & 51 - 23 accused persons - Principles of parity **- Non-applicant is kingpin of crime syndicate, involved in trading of wild life contrabands and having international contacts - Released on bail by ASJ on the ground that case is triable by the Magistrate and that other accused persons have also been released on bail - Held - Although offences are registered against the non-applicant and remaining accused persons under the same penal Sections of the 1972 Act, but the magnitude and degree of the role of non-applicant ought to have been assessed by the learned ASJ - Learned ASJ wrongly impressed with the fact that the case is triable by JMFC, losing sight of the fact that the charge levelled against non-applicant is extremely serious in nature - Show cause notice could not be served on the non-applicant as the address given by him at the time of bail was false - So non-applicant fleeing away from justice - Learned ASJ committed grave error in granting bail to non-applicant - Bail granted to the non-applicant cancelled in exercise of power u/S 439(2) of Cr.P.C. as per the dictum of the Apex Court in the case of *Abdul Basit Vs. Mohd. Abdul Kadir & anr.* Reported in 2014 (10) SCC 754 - Application allowed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) एवं वन्य जीव (संरक्षण) अधिनियम (1972 का 53), धाराएँ 35(8), 2(16), 9, 39, 44, 49, 50(सी) एवं 51 – 23 अभियुक्तगण – समानता के सिद्धांत – अनावेदक अपराध गिरोह का सरगना है, जो कि विनिषिद्ध वन्य जीव के व्यापार में अंतर्वलित है तथा उसके अन्तर्राष्ट्रीय संपर्क है – अतिरिक्त सत्र न्यायाधीश द्वारा जमानत पर इस आधार पर छोड़ा गया कि प्रकरण मजिस्ट्रेट द्वारा विचारणीय है तथा अन्य अभियुक्तगण भी जमानत पर छोड़े गये हैं – अभिनिर्धारित – यद्यपि अनावेदक एवं बाकी अभियुक्तगण के विरूद्ध अधिनियम, 1972 की समान दाण्डिक धाराओं के अंतर्गत अपराध दर्ज हुआ था, किन्तु अनावेदक की भूमिका का पैमाना एवं डिग्री (मात्रा) विद्वान अतिरिक्त सत्र न्यायाधीश द्वारा निर्धारित की जानी चाहिए – विद्वान अतिरिक्त सत्र न्यायाधीश, अनावेदक पर लगाया गया आरोप अत्यंत गंभीर स्वरूप का होने के तथ्य को नजरअंदाज करते हुए इस तथ्य से गलत रूप से प्रभावित हुए कि प्रकरण न्यायिक मजिस्ट्रेट प्रथम श्रेणी द्वारा विचारणीय है – अनावेदक को कारण बताओ नोटिस की तामीली नहीं की जा सकी क्योंकि जमानत के समय उसके द्वारा दिया गया पता गलत था – अतः अनावेदक न्याय से दूर भाग रहा है – विद्वान अतिरिक्त सत्र न्यायाधीश ने अनावेदक को जमानत प्रदान कर गंभीर त्रुटि की है – *अब्दुल बासित वि. मो. अब्दुल कादिर व अन्य,* 2014 (10) एससीसी 754 के प्रकरण में उच्चतम न्यायालय की अभ्युक्ति के अनुसार

दण्ड प्रक्रिया संहिता की धारा 439(2) के अंतर्गत शक्तियों का प्रयोग करते हुए अनावेदक को प्रदान की गई जमानत निरस्त की जाती है – आवेदन मंजूर।

Cases referred:

2015(1)(BCR)(Cri) 576, 2000 Cr.L.J. 4497, AIR 1978 SC 961, 1994 (3) Crimes 1013=1995 (1) SCC 349, 2011 (6) SCC 189, 2001 (6) SCC 338, 2012 (4) Crimes 144 (SC), 2009 (14) SCC 638, 1984 (1) SCC 284, 2005 (4) SCC 178, 2004 (13) SCC 617, 2012 (12) SCC 180, 2013 (16) SCC 797, 2014 (10) SCC 754, 2006 (1) Mh.L.J. 606 DB, 1989 (Cri.L.J.) 2038 (Kerala).

Kartik Shukul, for the applicant/State.
None, for the non-applicant.

Short Note (DB)
****(15)***
Before Mr. Justice S.K. Seth & Mr. Justice H.P. Singh
W.P. No. 10817/2016 (Jabalpur) decided on 19 July, 2016

SUPREME TRANSPORT (M/S) ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondent

Constitution - Article 14 **- Notice Inviting Tender (NIT) was issued for providing Air Taxi Services - Condition 11(e) makes petitioner ineligible because his previous contract was terminated for not fulfilling his contractual obligation - Same is challenged alleging it to be arbitrary - Held - Pre-qualification condition neither violates Article 14 nor it is arbitrary and irrational - After analyzing the same on the anvil of justness, reasonableness and the object sought to be achieved prior defaulter has rightly been kept away from participating in the bidding process on the principal of once bitten twice shy - Petition dismissed.**

संविधान – अनुच्छेद 14 – हवाई टेक्सी सेवा उपलब्ध कराने हेतु निविदा आमंत्रण सूचना जारी की गई – शर्त 11(e) याची को अयोग्य बनाती है क्योंकि उसके द्वारा अपने संविदात्मक दायित्व को पूरा न किये जाने से उसकी पूर्ववर्ती संविदा को समाप्त कर दिया गया था – उक्त को मनमाना होना अभिकथित करते हुए चुनौती दी गई – अभिनिर्धारित – योग्यता की पूर्व शर्त न तो अनुच्छेद 14 का उल्लंघन करती है न ही वह मनमानी एवं असंगत है – न्यायोचितता, युक्तियुक्तता एवं उद्देश्य जिसे प्राप्त करना चाहा गया है, की कसौटी पर उसका विश्लेषण करने के पश्चात्, 'दूध का जला छांछ भी फूंक फूंककर पीता है' के सिद्धांत पर, पूर्व व्यतिक्रमी को उचित रूप से बोली लगाने की प्रक्रिया में सहभागी होने से दूर रखा गया है – याचिका खारिज।

The order of the Court was delivered by : **S.K. Seth, J.**

Cases referred:

(2012) 8 SCC 216, (2009) 6 SCC 171, (1994) 6 SCC 651, (2015) 1 SCC 440, (2007) 8 SCC 1, (2004) 11 SCC 213, (1996) 10 SCC 760, (2008) 11 SCC 273, (2005) 4 SCC 435, (2004) 4 SCC 19, (2000) 2 SCC 617, (2005) 1 SCC 679.

Short Note (DB)

****(16)***

Before Mr. Justice Rajendra Menon & Mr. Justice Anurag Shrivastava

W.A. No. 230/2015 (Jabalpur) decided on 26 April, 2016

SUSHIL KUMAR SHARMA ...Appellant

Vs.

M.P. PROFESSIONAL EXAMINATION BOARD ...Respondent

***Samvida Shala Shikshak Shreni-III Patrata Pariksha-2008, Cheyan Avam Pariksha Sanchalan Niyam, M.P.* – Rounding off of the marks from 39.58 to 40 marks for the purpose of becoming eligible to participate in the further selection process – Held – Admittedly in the present case the rules of examination contemplates that a candidate should get 40% marks in both the groups to be eligible to participate in the further selection process – There is no provision in the rule which permits for rounding off or granting of grace marks to a candidate – Same is not permissible.**

संविदा शाला शिक्षक श्रेणी–III पात्रता परीक्षा–2008, चयन एवम् परीक्षा संचालन नियम, म.प्र. – आगे की चयन प्रक्रिया में भाग लेने के लिए योग्य बनने के प्रयोजन हेतु अंकों का 39.58 से 40 अंक में पूर्णांकन किया जाना – अभिनिर्धारित – स्वीकृत रूप से वर्तमान प्रकरण में परीक्षा के नियम यह अनुध्यात करते हैं कि अभ्यर्थी को आगे की चयन प्रक्रिया में भाग लेने के लिए योग्य बनने हेतु दोनों समूहों में 40 प्रतिशत अंक प्राप्त करने होंगे – नियम में ऐसा कोई उपबंध नहीं है जो कि पूर्णांकन करने अथवा अभ्यर्थी को कृपांक प्रदान करने की अनुमति देता हो – उक्त अनुज्ञेय नहीं है।

The order of the Court was delivered by: **Rajendra Menon, J.**

Cases referred:

2002 (2) MPLJ 619, W.P. No. 6903/2009 decided on 07.04.2010, (2011) 8 SCC 108, (2012) 8 SCC 568.

A.K. Singh and *Ajay Dwivedi*, for the appellant.

Swapnil Ganguly, G.A. present in the Court extends his assistance to this Court, even though the State is not a party.

I.L.R. [2017] M.P., 1

SUPREME COURT OF INDIA

Before Mr. Justice Dipak Misra &
Mr. Justice Rohinton Fali Nariman

C.A. No. 6573/2016 decided on 19 July, 2016

COMMISSIONER, M.P. HOUSING BOARD & ors. ...Appellants
Vs.
M/S. MOHANLAL AND COMPANY ...Respondent

A. Arbitration and Conciliation Act (26 of 1996), Section 34(3) and Limitation Act (36 of 1963), Section 14 - Applicability - **Section 14 of Limitation Act is applicable in proceedings u/S 34(3) of Arbitration and Conciliation Act. (Para 14)**

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 34(3) एवं परिसीमा अधिनियम (1963 का 36), धारा 14 – प्रयोज्यता – परिसीमा अधिनियम की धारा 14 माध्यस्थम् और सुलह अधिनियम की धारा 34(3) के अंतर्गत कार्यवाहियों में लागू होगी।

B. Limitation Act (36 of 1963), Section 14 - Exclusion of time - Requisite - **There should be liberal approach to advance cause of justice, if there is mistaken remedy or selection of wrong forum - Both the proceedings must relate to same matter in issue - Prosecution of earlier proceeding must show due diligence and good faith. (Para 17)**

ख. परिसीमा अधिनियम (1963 का 36), धारा 14 – समय का अपवर्जन – अपेक्षाएं – न्याय हेतुक के अग्रसरण के लिए उदार दृष्टिकोण होना चाहिए, यदि गलत उपचार अथवा गलत फोरम का चयन हुआ हो – दोनों कार्यवाहियां एक ही विवाद्य विषय से संबंधित होनी चाहिए – पूर्वतर कार्यवाही का अभियोजन सम्यक् तत्परता एवं सद्भाविकता दर्शाता हो।

C. Limitation Act (36 of 1963), Section 14 and Arbitration and Conciliation Act (26 of 1996), Sections 11 & 34 - Exclusion of time - Dispute referred to Arbitrator - Parties participated - Award passed - **Respondent moved High Court for appointment of arbitrator u/S 11 but not filed objection u/S 34(2) - High Court declined to appoint arbitrator - Then respondent filed objection on 26.09.2011 u/S 34(2) challenging award dated 11.11.2010 alongwith application u/S 14 of Limitation Act - District Court and High Court allowed exclusion of**

time consumed in prosecuting the case - Held - Here is absence of good faith - Respondent could have instead of participating in Arbitration proceeding, taken steps for appointment of arbitrator or he could have filed objection u/S 34(2) within permissible parameters, but he chose an innovative path - This is neither good faith nor diligence - Exclusion of time not granted. (Para 18)

ग. परिसीमा अधिनियम (1963 का 36), धारा 14 एवं माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराएँ 11 व 34 – समय का अपवर्जन – विवाद मध्यस्थ को निर्दिष्ट – पक्षकारों ने भाग लिया – अवार्ड पारित – धारा 11 के अंतर्गत मध्यस्थ की नियुक्ति हेतु प्रत्यर्थी उच्च न्यायालय के समक्ष गया परंतु धारा 34(2) के अंतर्गत आक्षेप प्रस्तुत नहीं किया – उच्च न्यायालय ने मध्यस्थ नियुक्त करने से इंकार किया – तब प्रत्यर्थी ने परिसीमा अधिनियम की धारा 14 के अंतर्गत आवेदन के साथ–साथ दिनांक 11.11.2010 के अवार्ड को चुनौती देते हुए, धारा 34(2) के अंतर्गत दिनांक 26.09.2011 को आक्षेप प्रस्तुत किया – प्रकरण के अभियोजन में लगे समय के अपवर्जन को जिला न्यायालय एवं उच्च न्यायालय द्वारा मंजूर किया गया – अभिनिर्धारित – यहाँ सद्भावना की अनुपस्थिति है – प्रत्यर्थी माध्यस्थम् कार्यवाही में भाग लेने की बजाय मध्यस्थ की नियुक्ति के लिए कदम उठा सकता था अथवा अनुज्ञेय मापदण्ड के भीतर धारा 34(2) के अंतर्गत आक्षेप प्रस्तुत कर सकता था, परंतु उसने एक अभिनव मार्ग चुना – यह न तो सद्भाविकता है और न ही सम्यक् तत्परता – समय का अपवर्जन प्रदान नहीं किया गया।

Cases referred:

(2008) 2 MPLJ 103, (2001) 8 SCC 470, (2006) 6 SCC 239, (2008) 7 SCC 169, (2005) 13 SCC 1.

JUDGMENT

The Judgment of the Court was delivered by :

DIPAK MISRA, J. :- Leave granted

2. The present appeal, by special leave, is directed against the order dated 12th August, 2013, passed by the High Court of Madhya Pradesh, Principal Seat at Jabalpur, in Civil Revision No.332 of 2012, whereby the High Court has affirmed the view expressed by the learned Additional District Judge, Bhopal, that the objection preferred by the respondent under Section 34(2) of the Arbitration & Conciliation Act, 1996 (for short, 'the 1996 Act') was condonable in aid of Section 14 of the Limitation Act, 1963 (for brevity, 'the Act')

3. The present litigation has a history. The respondent had entered into a contract for construction of a commercial complex at Bittan Market, E-5, Arera Colony, Bhopal on 29th June, 2009. During the subsistence of the contract, certain disputes arose between the parties and the matter was arbitrated upon. Clause 29 of the contract, on the basis of which the matter was referred to arbitration, reads as follows:

> "29 - Except as otherwise provided in this contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions, herein before mentioned and as to thing whatsoever, in any way, arising out of or relating to the contracts, designs, drawings, specifications, estimates, concerning the work, or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof, shall be referred to the Dy. Housing Commissioner in writing for his decision within a period of thirty days of such occurrence. Thereupon, the Dy. Housing shall give his written instructions and/or decision within a period of sixty days of such written request. This period can be extended by mutual consent of the parties. If decided amount is more than Rs.25,000/- the same shall be referred to the Housing Commissioner for his perusal.
>
> Upon receipt of written instructions, or decision, the parties shall promptly proceed without delay to comply such decision or instructions. If the Dy. Housing Commissioner fails to give his instructions or decision in writing within a period of sixty days or mutually agreed time after being requested, if the parties are aggrieved against the decision of the Dy. Housing Commissioner the parties may within thirty days prefer such dispute/disputes for arbitration to the Addl. Housing Commissioner subject to the jurisdiction and limitations in accordance with the provisions of Madhyastham Adhikaran Adhiniyam, 1995. In case the dispute is within the jurisdiction of Addl. Housing Commissioner he shall then act as sole arbitrator, and he shall pass an award after hearing both the parties, strictly in accordance with the provisions of the Arbitration Act, 1940 and the rules made thereunder for the time being in force.

> If the contractor does not make any demand for arbitration in respect of claim(s) in writing within ninety days on receiving information from the Executive Engineer that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and shall be absolutely barred and the Board shall be discharged or released of all the liabilities under the contract in respect of such claim(s).
>
> A reference to the Arbitration shall be no ground for not continuing the work on the part of the contractor and payment as per terms and conditions of the agreement shall be continued by the Board."

4. Relying on the said clause, the matter was referred to the Additional Housing Commissioner, the sole arbitrator, who passed an award on 11th November, 2010. Be it stated, both the parties appeared before the learned arbitrator and on the basis of the materials brought on record, the learned arbitrator passed the award. As is manifest from record, the arbitrator did not find any justification to allow any of the claims of the respondent-contractor.

5. When the matter stood thus, as it appears, wisdom dawned upon the respondent and he thought that he could take a somersault. And that propelled him to file an application under Section 11 of the 1996 Act before the High Court of Madhya Pradesh, which formed the subject matter of Arbitration Case No.135 of 2010, for seeking appointment of an arbitrator to adjudicate the disputes. It was contended before the High Court that clause 29 of the contract could not be treated as an arbitration clause and, therefore, the court should appoint an arbitrator. To bolster the said stand, reliance was placed on *M.P. Housing Board and Another vs. Sohanlal Chourasia and Another*[1].

6. The learned Single Judge reproduced the relevant passages from the said judgment and came to hold as follows:

> "From the aforesaid clause, it is seen that if any dispute arises between the parties, the matter has to be resolved by reference to the Dy. Housing Commissioner and, thereafter, to the Addl. Housing Commissioner. The provisions of Arbitration Clause clearly indicates that the Arbitrator appointed under the

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1. (2008) 2 M.P.L.J. 103

agreement is a named arbitration namely the Addl. Housing Commissioner and he has to exercise, powers available under the Arbitration Act of 1940. Available on record is an award passed by the Arbitrator i.e. the Addl. Housing Commissioner vide Annexure P5 and once in terms of clause 29 of the Agreement, the arbitrator i.e. the Addl. Housing Commissioner has adjudicated the dispute and has passed an award, no further action is to be taken in these proceedings against u/s 11, as the sole arbitrator in accordance with Arbitration Agreement has already adjudicated the dispute between the parties. If the petitioner is aggrieved by the adjudication of the dispute, he can now challenge the award of the Arbitration in accordance with law.

In the light of the resolution of the dispute by the sole Arbitator in accordance with clause 29 of the agreement, this court does not find any ground to interfere into the matter. The judgment relied upon by Sh. Shashank Shekhar is clearly distinguishable. In that case the question and the power is exercised by the Addl. Housing Commissioner u/s 29 of the agreement in question. In the said case, it is only held that a Dy. Housing Commissioner deciding the claim under clause 29 is not an Arbitrator."

7. We must immediately state that the said order was not assailed and, has been allowed to attain finality.

8. After facing non-success before the High Court in his effort to get an arbitrator appointed, the respondent thought it appropriate to file an objection under Section 34(2) of the 1996 Act to challenge the award. The said application was filed on 26th September, 2011. It is apt to note here that the award was passed on 11th November, 2010.

9. The respondent, along with his objection, filed an application under Section 14 of the Act seeking exclusion of the time consumed in the proceedings asserting that he was bonafidely prosecuting the case in the court having no jurisdiction. The learned Additional District Judge, upon hearing the learned counsel for the parties, allowed the application on the foundation that the respondent was entitled to exclusion of time under Section 14 of the Act.

10. Being grieved by the aforesaid order, the appellant preferred civil revision before the High Court and, as has been stated earlier, the High Court did not find any infirmity in the order passed by the learned Additional District Judge and, accordingly, gave the stamp of approval to the same.

11. We have heard Mr. Sushil Dutt Salwan, learned counsel for the appellants and Mr. Shekhar Sharma, learned counsel for the respondent.

12. The singular issue that emerges for consideration is whether in the obtaining factual scenario, Section 14 of the Act would be applicable. To appreciate the controversy, it is necessary to refer to Section 34(3) of the 1996 Act. It reads as follows:

> "34(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:
>
> Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

13. This Court in *Union of India vs. Popular Construction Co.*[2] interpreting the said provision has held that:-

> "As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result".

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2. (2001) 8 SCC 470

And again:-

"Furthermore, Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award "in accordance with" sub-section (2) and sub-section (3). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application "in accordance with that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that

"where the time for making an application to set aside the arbitral award under Section 34 has expired ... the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court".

This is a significant departure from the provisions of the Arbitration Act, 1940".

14. The aforesaid authority makes it absolutely clear that the scheme of limitation provided under the 1996 Act is different than 1940 Act; and, therefore, an application filed beyond the period of limitation under Section 34(3) of 1996 Act would not be an application in accordance with the said provision. As is evident from factual narration, the application was filed beyond the period prescribed in the said provision. Therefore, it could not have been entertained under the 1996 Act. However, the appellants sought exclusion of the time spent in the proceedings in court as envisaged under Section 14 of the Act. It is settled in law that Section 14 of the Act applies to Section 34(3) of the 1996 Act. It has been so held in *State of Goa vs. Western Builders*[3] and *Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department and others*[4].

15. Having stated thus, we are obliged to scrutinise under what situations Section 14 of the Act gets attracted. Section 14(1) of the Act, which is relevant

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3. (2006) 6 SCC 239 4. (2008) 7 SCC 169

for the present purpose, reads as follows:

> "14. *Exclusion of time of proceeding bona fide in court without jurisdiction.*- (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

16. In *Consolidated Engineering Enterprises* (supra), the Court, while dealing with the conditions in which Section 14 will be applicable, enumerated five conditions which are as follows:

> "(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;
>
> (2) The prior proceeding had been prosecuted with due diligence and in good faith;
>
> (3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;
>
> (4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;
>
> (5) Both the proceedings are in a court."

In the said case, it has also been stated that:-

> "... While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona

fide litigious activity. ..."

17. From the aforesaid passage, it is clear as noon day that there has to be a liberal interpretation to advance the cause of justice. However, it has also been laid down that it would be applicable in cases of mistaken remedy or selection of a wrong forum. As per the conditions enumerated, the earlier proceeding and the latter proceeding must relate to the same matter in issue. It is worthy to mention here that the words "matter in issue" are used under Section 11 of the Code of Civil Procedure, 1908. As has been held in *Ramadhar Shrivas vs. Bhagwandas*[5] the said expression connotes the matter which is directly and substantially in issue. We have only referred to the said authority to highlight that despite liberal interpretation placed under Section 14 of the Act, the matter in issue in the earlier proceeding and the latter proceeding has to be conferred requisite importance. That apart, the prosecution of the prior proceeding should also show due diligence and good faith.

18. In the case at hand, the respondent appeared before the learned arbitrator and after the award was passed, chose not to file any objection to the award immediately. On the contrary, the respondent filed an application under Section 11 of 1996 Act before the High Court for appointment of an arbitrator. As has been stated earlier, the learned Single Judge of the High Court distinguished the decision in the case of *Sohanlal Chourasia and Another* (supra) and came to hold that the application was not maintainable. However, he granted liberty to the respondent to file an objection in accordance with law. The words "in accordance with law" gain significance. It allows an argument to be canvassed by the respondent that the time spent in earlier proceeding deserved exclusion while computing the period of limitation. But, an ominous one for the respondent, whether Section 14 is at all attracted? Had the learned Single Judge stated that the period consumed for pursuing the remedy under Section 11 of the 1996 Act, would be excluded for filing objection, possibly the matter would have been different. In any case, we do not intend to dilate further on that aspect. It is quite clear that the quoted portion hereinabove does not so indicate. It only grants liberty to the respondent to file an objection in accordance with law. Section 14(1) of the Act which we have reproduced, lays down that the proceedings must relate to the same matter in issue. It emphasises on due diligence and good faith. Filing of an application under Section 11 of the 1996 Act for an appointment of arbitrator is totally different than

5. (2005) 13 SCC 1

an objection to award filed under Section 34 of the 1996 Act. To put it differently, one is at the stage of initiation, and the other at the stage of culmination. By no stretch of imagination, it can be said that the proceedings relate to "same matter in issue". Additionally, the respondent had participated in the arbitral proceeding and was aware of passing of the award. He, may be, by design, invoked the jurisdiction of the High Court for appointment of an arbitrator. We are absolutely conscious that liberal interpretation should be placed on Section 14 of the Act, but if the fact situation exposits absence of good faith of great magnitude, law should not come to the rescue of such a litigant. We say so because the respondent instead of participating in the arbitration proceedings, could have immediately taken steps for appointment of arbitrator as he thought appropriate or he could have filed his objections under Section 34(2) of the Act within permissible parameters but he chose a way, which we are disposed to think, an innovative path, possibly harbouring the thought that he could contrive the way where he could alone rule. Frankly speaking, this is neither diligence nor good faith. On the contrary, it is absence of both.

19. In view of the aforesaid analysis, we find that the High Court has fallen into grave error by concurring with the opinion expressed by the learned Additional District Judge and, therefore, both the orders deserve to be lancinated and, accordingly, we so direct.

20. The appeal is, accordingly, allowed. There shall be no order as to costs.

Appeal allowed.

I.L.R. [2017] M.P., 10
SUPREME COURT OF INDIA
Before Mr. Justice J. Chelameswar &
Mr. Justice Abhay Manohar Sapre
C.A. No. 8254/2016 decided on 23 August, 2016

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

Civil Procedure Code (5 of 1908), Order 6 Rule 16 - Striking out pleadings of the Election Petition **- Appellant was one of the star campaigners for the said election for the State of Madhya Pradesh - Therefore, he was required to campaign for his political party, not only in**

his constituency but also in other constituencies of the State - In the absence of any allegation that the appellant used the helicopter for travelling within 76-Churhat constituency for the purpose of campaigning, the expenditure incurred on that account, cannot be included in the election expenditure of the appellant - Therefore, Paragraph 14M of the election petition is liable to be struck off. (Paras 31 & 33)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 16 – निर्वाचन याचिका के अभिवचनों का हटाया जाना – अपीलार्थी म.प्र. राज्य के लिए उक्त निर्वाचन हेतु स्टार प्रचारकों में से एक था – इसलिए, उससे न केवल उसके निर्वाचन क्षेत्र में बल्कि, राज्य के अन्य निर्वाचन क्षेत्रों में भी उसके राजनीतिक दल का प्रचार करना अपेक्षित था – किसी अभिकथन के अभाव में कि अपीलार्थी ने 76–चुरहट निर्वाचन क्षेत्र के भीतर प्रचार करने के प्रयोजन से हेलीकॉप्टर का प्रयोग किया, उस पर वहन किया गया व्यय, अपीलार्थी के निर्वाचन व्यय में सम्मिलित नहीं किया जा सकता – अतः, निर्वाचन याचिका की कण्डिका 14एम हटा दिये जाने योग्य है।

Cases referred:

AIR 1965 SC 610, (2012) 7 SCC 788.

JUDGMENT

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

2. Aggrieved by the Order dated 17.11.2014 of the order of the High Court of Madhya Pradesh in I.A. No. 12911 of 2014 in Election Petition No. 1 of 2014, the unsuccessful applicant therein preferred the instant appeal.

3. The appellant herein is the returned candidate from 76 - Churhat Assembly constituency of the State of Madhya Pradesh in the General Elections held in the year 2013. He was a candidate sponsored by the Indian National Congress Party and won by margin of 19,356 votes. Challenging the legality of the election of the appellant, the first respondent herein, one of the other candidates at the said election, filed Election Petition No.1 of 2014.

4. The appellant herein filed I.A. No.12911 of 2014 invoking Order VI Rule 16 of the Code of Civil Procedure, 1908 (CPC) praying various paragraphs of the election petition be struck off[1] on the ground that the

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1 Para 25. That, the answering respondent, therefore, respectfully submits that paragraphs 14(A), 14(D) from pages 24 to 29 beginning from "in the Shadow Expense

allegations contained in those paragraphs are frivolous and vexatious etc. By the order impugned in this appeal, the said I.A. was dismissed. Hence the instant appeal.

5. Before we examine the various questions that arise in this appeal, we think it profitable to examine the scheme of Order VI, Rule 16.

> **"16. Striking out pleadings** – The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading –
>
> (a) which may be unnecessary, scandalous, frivolous or vexatious, or
>
> (b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or
>
> (c) which is otherwise an abuse of the process of the Court."

It authorises the court to order that any matter in any pleading before it be struck out on the grounds specified under clauses (a), (b) and (c). Each one of them is a distinct ground. For example, clause (a) authorises the court to strike out the pleadings which may be (i) unnecessary, (ii) scandalous, (iii) frivolous, (iv) vexatious. If a pleading or part of it is to be struck out on the ground that it is unnecessary, the test to be applied is whether the allegation contained in that pleading is relevant and essential to grant the relief sought. Allegations which are unconnected with the relief sought in the proceeding fall under this category. Similarly, if a pleading is to be struck out on the ground that it is scandalous, the court must first record its satisfaction that the pleading is scandalous in the legal sense and then enquire whether such scandalous allegation is called for or necessary having regard to the nature of the relief sought in the proceeding. The authority of the court under clause (c) is much wider. Obviously, such authority must be exercised with circumspection and on the basis of some rational principles.

6. The very purpose of the Rule is to ensure that parties to a legal proceeding are entitled *ex debito justitia* to have the case against them

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Register . . . Annexure P/19", 14(E), 14(F), 14(G) (i), 14(H) (i), 14(I), 14(L), 14(M), 14(N), 14(O), paragraphs 15 to 17 and 19 be struck off from the pleadings as the same are irrelevant, unnecessary, frivolous and vexatious.

presented in an intelligible form so that they may not be embarrassed in meeting the case[2]

7. In the context of the application of Order VI Rule 16, CPC to the election petition, this Court in *Bhikaji Keshao Joshi and Another Vs. Brijlal Nandlal Biyani and Others,* AIR 1965 SC 610 held that a court examining an election petition may order striking out of charges which are vague[3]

8. In *Ponnala Lakshmaiah Vs. Kommuri Pratap Reddy and Others* (2012) 7 SCC 788, this Court considered the scope of an application under Order VII Rule 11 CPC. Such an application was filed by the returned candidate praying that the election petition be dismissed for non-disclosure of any cause of action. This Court opined that for the purpose of determining such an application, the averments in the election petition must be taken to be factually correct and thereafter examine whether such averments furnish the cause of action for granting the relief to the petitioner. Such a conclusion was recorded on the basis of the law laid down in an earlier judgment of this Court[4]. We are of the opinion the same principles of law are applicable even while adjudicating the application under Order VI Rule 16.

9. In the light of the above principles of law, we proceed to examine the case on hand. The election of the appellant is challenged on the ground of commission of various corrupt practices falling under Section 123(1), 123(3) and 123(6) of the Representation of the People Act, 1951 (hereinafter referred to as "the Act"):

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2. *Golding Vs. Wharton Salt Works,* (1876) 1 Q B D 374

3. it should have ordered a striking out of such of the charges which remained vague and called upon the petitioners to substantiate the allegations in respect of those which were reasonably specific.

4. *Liverpool & London S.P. and I Assn. Ltd. Vs. M.V. Sea Success I,* (2004) 9 SCC 512, Para 8. To the same effect is the decision of this Court in *Liverpool & London S.P. and I Assn. Ltd. Vs. M.V. Sea Success I* where this Court held that the disclosure of a cause of action in the plaint is a question of fact and the answer to that question must be found only from the reading of the plaint itself. The court trying a suit or an election petition, as the position is in the present case, shall while examining whether the plaint or the petition discloses a cause of action, to assume that the averments made in the plaint or the petition are factually correct. It is only if despite the averments being taken as factually correct, the court finds no cause of action emerging from the averments that it may be justified in rejecting the plaint....

"**123. Corrupt practices.**—The following shall be deemed to be corrupt practices for the purposes of this Act:—

(1) "Bribery", that is to say—

(A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object, directly or indirectly of inducing—

(a) a person to stand or not to stand as, or to withdraw or not to withdraw from being a candidate at an election, or

(b) an elector to vote or refrain from voting at an election, or as a reward to—

(i) a person for having so stood or not stood, or for having withdrawn or not having withdrawn his candidature;

or

(ii) an elector for having voted or refrained from voting;

(B) the receipt of, or agreement to receive, any gratification, whether as a motive or a reward—

(a) by a person for standing or not standing as, or for withdrawing or not withdrawing from being, a candidate; or

(b) by any person whomsoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate to withdraw or not to withdraw his candidature.

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Para 10. Applying the above principles to the case at hand, we do not see any error in the order passed by the High Court refusing to dismiss the petition in limine on the ground that the same discloses no cause of action. The averments made in the election petition if taken to be factually correct, as they ought to for purposes of determining whether a case for exercise of powers under Order 7 Rule 11 has been made out, do in our opinion, disclose a cause of action. The High Court did not, therefore, commit any error much less an error resulting in miscarriage of justice, to warrant interference by this Court in exercise of its extraordinary powers under Article 136 of the Constitution.

(3) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate:

Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.

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(6) The incurring or authorizing of expenditure in contravention of section 77."

i.e. bribery, soliciting votes on the ground of religion and incurring of expenditure in contravention of Section 77 of the Act.

10. The allegations regarding the commission of corrupt practices falling under Section 123(1) are to be found in para 19 of the election petition. The allegations regarding commission of corrupt practices falling under Section 123(3) are contained in paragraph 18 of the election petition, which is not one of the paragraphs which was prayed to be struck off[5].

11. All the remaining paragraphs which were prayed to be struck off, pertain to the allegation of corrupt practice falling under Section 123(6). The allegations contained in each one of these paragraphs pertain to the expenditure incurred under different heads by the appellant in connection with the election campaign[6]. According to the Respondent the total amount of expenditure so

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5. *See* Footnote 1.

6. That is the admitted case (rightly) even of the appellant at para 3 of the I.A. 12911 of 2014, it is stated,

"The entire election petition is based on :-

(a) Under valuation of the items used in the election campaign

(b) Non disclosure of expenses in respect of certain items alleged to have been used in such election"

incurred by the appellant is in excess of the limit prescribed under Section 77 of the Act.

12. The allegations contained in para 19[7] of the election petition are not disputed by the appellant. On the other hand, he chose to explain his conduct in para 24 of the I.A.

> "24. The answering respondent hereby respectfully submits that an amount of Rs. 20 lacs is earmarked for expenditure by every member of the M.P. Legislative Assembly every year in his constituency. A Minister and Leader of Opposition are provided Rs. 20 lacs per year for voluntary grant. The manner in which this grant is to be distributed is the sole discretion of such Minister/Leader of Opposition. The Minister/Leader of Opposition gives a list to the Secretary of the Vidhan Sabha containing the names of the persons and the amount to whom the grant is to be made. **Accordingly, the drafts are issued to the persons concerned as per procedure.**"

13. Whether the explanation is factually correct and, if so, what are the legal implications of the said explanation are matters to be decided in trial of the election petition. If the explanation is either found to be untrue or legally unacceptable, the allegation made in para 19 of the election petition is sufficient

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7. 19. That during model code of conduct, to bribe voters, INC Candidate/respondent no.1 through his representative Shri Bharat Singh, (Vidhayak Pratinidhi) has distributed large quantity of demand drafts/cheques issued by different account maintained at T.T. Nagar Bhopal. The petitioner came across with one of the said cheques/demand draft issued in favour of one Charka Kol who is voter from polling station Dhanaha. Even during election the drafts were distributed by Bharat Singh as *Vidhayak pratinidhi,* since INC Candidate Respondent No.1 is Member of Legislative Assembly continuously and known as Vidhayak. The Election agent of petitioner has made a complaint to observer in this regard. The copy of complaint made to observer by election Agent is being filed herewith as Annexure P-53. However even then the same corrupt practice continued by representative of INC Candidate/Respondent no.1 representative Shri Bharat Singh and anti dated cheques/Demand Drafts were given to voters to influence their votes. Another such draft drawn in favour of Rajkumari Saket has been brought to the notice of petitioner who was not able to encash it as she don't have any account. When the petitioner enquired from her she disclosed that the same has been given to her by Shri Bharat Singh on 12/11/2013 with a request that "Rahul Bhaiya" has arranged the fund for her employment and have requested for vote of her and her family member. The copy of demand draft is being filed herewith as Annexure P-54.

to hold that the Appellant is guilty of the corrupt practice under S. 123(1). Therefore, we do not find any error in the order of the High Court in refusing to strike off the pleadings in para 19 of the election petition.

14. We now examine the validity of the impugned order insofar as it pertains to the incurring of expenditure (by the appellant herein) beyond the permissible limits prescribed by law. An analysis of the allegations contained in various sub-paragraphs of paragraph 14 and in paragraphs 15, 16 and 17 of the election petition indicates that the excess expenditure said to have been incurred by the appellant falls under three heads.

Furnishing of inaccurate information[8] to the District Election Officer:

(i) regarding the quantity and quality of the material used in the campaign by the appellant herein,

(ii) regarding the cost of the various items so used by the returned candidate by giving false information based on deliberate under-valuation of the material actually used by the appellant,

(iii) Total non disclosure of certain expenditure incurred by the appellant for **(a)** organizing a meeting of one of the top functionaries of the political party (Shri Rahul Gandhi) which sponsored the appellant at the election, and **(b)** the use of a helicopter by the appellant during the relevant period.

15. The allegations and counter allegations regarding the quantity and quality of the material used by the appellant during the course of his election campaign and value of such material are pure questions of fact which are required to be established on evidence. The law in this regard as already noticed is that until proved otherwise the allegations in the election petition must be presumed to be true. The burden of establishing the truth of all those allegations is essentially on the respondent/election petitioner. We have meticulously gone through the various allegations in this regard contained in various sub-paragraphs of paragraph 14 and we are of the opinion that there

8. An obligation flowing from Section 78 of the RP Act, 1951
"Section 78. Lodging of account with the district election officer.—Every contesting candidate at an election shall, within thirty days from the date of election of the returned candidate or, if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates, lodge with the district election officer an account of his election expenses which shall be a true copy of the account kept by him or by his election agent under section 77."

is nothing which warrants striking out of all those pleadings invoking Order VI Rule 16 CPC. Each of the paragraphs contains allegations that the appellant incurred some expenditure (specified) under some head or the other. The sum total of such amount would exceed the permissible limits of expenditure under Section 77 of the Act.

16. The only question which deserves our attention in this regard is that it is the case of the appellant that under the procedure that is being followed by the Election Commission a rate list has been finalized with respect to each one of the items to be utilized in the campaign by any one of the candidates at an election. The appellant's declaration of his expenditure with regard to the various items used during the process of campaign is consistent with such determination made by the Election Commission. Therefore there cannot be any further enquiry regarding the correctness of the declaration made by him about the expenditure incurred in connection with those materials. The appellant's pleading in this regard in I.A. is as follows:-

> "5. That, under Rule 90 of Conduct of Elections Rules, 1961 the maximum election expenses to be incurred by a candidate in respect of M.P. State Legislative Assembly election has been fixed at Rs. 16 lacs. In order to have a check over the limit of election expenses the Collector/District Election Officer prepared a rate list of various items which were sought to be used in the election campaign by appointing a Sub Committee of three responsible officers. The Committee pursuant thereto ascertained the rates of such material from open market in consultation with the representatives of major political parties and thereafter prepared a final rate list of various items used in the election. The answering respondent is filing copy of proceedings of the Collector/District Election Officer fixing the rates of different items used in the election as **Document No.1.** The petitioner has filed a copy of rate list as Annexure-P-3. The publication of rate list preceded the proceedings held in that behalf by the District Election Officer, which the answering respondent has now filed as Document No. 1. The rate list so prepared by the Election Officer has not been disputed by any of the political party or their representatives.

6. That, certain items which could not find place in the rate list so prepared by the Collector have since been included in the 'shadow register' of each candidate prepared by the Election Expense Observers. Such rate list and the shadow register are final and conclusive. The rate list and the 'shadow register' are not open to challenge and the valuation in respect of such items cannot be reassessed and revalued by this Court in an election process."

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9. That, the present election petition will not be maintainable in respect of expenses incurred by the answering respondent which have been accepted by the District Election Officer (for short, 'DEO') inasmuch as this Court will not sit over rate list or shadow register to give its own valuation of the election material, as the same would be beyond the scope of trial of election petition under the Representation of People Act of 1951 (hereinafter referred to as the "1951 Act").

17. On the other hand, it is the case of the respondent that the determination made by the Election Commission is not conclusive of the prices of the material used by any candidate at the election. Apart from that, the actual quantity of the campaign material used by any candidate at an election and its cost is always a question of fact. After an election is concluded, it is always open to any election petitioner to demonstrate in an election petition that the campaign material used by the returned candidate is more expensive than what was determined by the Election Commission, after all the value of the material depends both upon the quality and quantity of the material used. All these are questions of fact which are required to be examined and determined by the court in an election petition.

18. We accept the submission of the election petitioner. The values fixed by the Election Commission or its functionaries are not conclusive. There is no statutory basis for such an exercise. The valuation made by the Election Commission obviously would be based on the samples supplied by the candidates. There can never be any presumption that the candidates used the same quality of material in the actual process of campaigning. Apart from that the quantity and the quality of the material used in the election campaign and the real cost of the material actually used by any candidate are always questions

of fact, which are required to be established in evidence. We are of the opinion that the High Court rightly rejected the application of the appellant on this count.

19. The only major issue which requires an examination is regarding the third head mentioned (Para 14) above. It is once again required to be divided into two sub-headings,

(a) The expenditure allegedly incurred in connection with the public meeting of Shri Rahul Gandhi at the District Headquarters, Sidhi on 20th November, 2013. The allegations in the regard are to be found in para 14(L) of the election petition.

The substance of the allegation is that though the meeting was held at Sidhi which is beyond the territorial limits of Churhat Constituency (from which the parties herein contested), the appellant was not only present at such meeting but also shared the dais with Shri Rahul Gandhi (Vice-Chairman of the Indian National Congress). The appellant mobilized lot of voters from his constituency and hired vehicles for that purpose incurring expenditure. The appellant also incurred expenditure in connection with the erection of the pandals, security arrangement etc. According to the respondent, such expenditure would be Rs.13,88,073/- and the same is required to be added to the election expenditure of the appellant.

(b) That the appellant between 4.11.2013 to 19.11.2013[9] traveled on 8 occasions by chartered flights between Bhopal to Sidhi. According to the respondent, on this count alone the appellant incurred an expenditure of Rs.40 lakhs. The details of such flights and the allegations are to be found at para 14(M) of the election petition.

20. The response of the appellant as disclosed by IA No.12911 of 2014 with regard to the abovementioned two allegations is found at paragraph nos.19 and 20. It can be seen therefrom that the appellant does not dispute that there was a public meeting in the ground of Sanjay Gandhi College at Sidhi on 20.11.2013 attended by Shri Rahul Gandhi. According to the appellant, the venue of the meeting is within the territorial limits of 77 Sidhi Assembly

9. Periods relevant for the purpose of deciding the expenditure incurred under Section 77.

Constituency but not within the territory of 76 – Churhat Assembly Constituency. The meeting was organized by one Shri Kamleshwar Dwivedi who was the candidate of the Indian National Congress Party contesting from the said constituency. The said Kamleshwar Dwivedi lodged the account under Section 78 of the Act disclosing the details of the expenditure incurred by him for conducting the aforesaid meeting which was duly accepted by the Returning Officer of 77 - Sidhi Assembly Constituency. It is the specific plea of the appellant that he was present in the said meeting because he was also one of the "star campaigners" for the Indian National Congress Party in the said election. According to the appellant, the appellant is under no legal obligation to account for the expenditure incurred for organizing the said meeting[10].

21. It is significant to notice that there is no specific denial by the appellant of the allegation in the election petition that the appellant herein had hired a large number of vehicles[11] to facilitate voters from his constituency to attend the said public meeting. IA No.12911 of 2014 is absolutely silent regarding that allegation. The appellant does not even deny the allegation. We must not be understood to be holding that if the appellant had denied the allegation, such denial would suffice to strike out of the pleadings.

22. Coming to the second limb of that head regarding the cost incurred for the construction of pandals or barricades in connection with the abovementioned meeting of Shri Rahul Gandhi, the stand taken by the appellant in the abovementioned IA is that the said meeting was held beyond the territorial

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10. If expenses of such meeting have already been shown by the candidate in whose constituency the meeting was held, it was **not necessary or obligatory upon the answering respondent to account for** the expenses of such meeting which had not taken place in his Constituency. [See: IA No.12911 of 2014 , para 19]

11. The perusal of permission application which was obtained by INC for the said meeting, would make it clear that presence of first respondent was the individual act of the first respondent, his presence was as a candidate of 76 Churhat of INC, a large numbers of vehicle were illegally hired by INC Candidate/respondent no.1 in order to facilitate voters from his constituency 76-Churahat to attend the said public meeting. There are around 44 buses and number of taxi permit vehicle along with private vehicle were used for transportation of voters to attend said public meeting. The posters used there have photo/picture of respondent no.1, therefore, the entire expenditure of the said meeting would be included in the expenditure of first respondent, as no other candidate of any other adjoining constituencies shared the dais with Mr. Rahul Gandhi. (*See:* Para 14-L of the Election Petition)

limit of the assembly constituency from which the appellant contested. The Indian National Congress Party's candidate contesting from Sidhi constituency had declared the expenditure incurred in connection with the said meeting. The appellant is under no legal obligation to make any declaration of the expenditure incurred by him in connection with the said meeting.

23. It may be noted that the appellant does not make any categoric assertion that he did not incur any expenditure in connection with the said meeting.

24. Coming to the use of the Helicopter, once again it is not a case of the appellant that he did not use the helicopter as alleged by the respondent – election petitioner. His defence is that he is one of the 'star campaigners' contemplated under Section 77 of the Act. The expenditure was incurred by him for the use of the Helicopter as a 'star campaigner'. In that capacity he had to travel throughout the State holding public meetings propagating programme of the Indian National Congress Party. The expenditure for the use of the helicopter was "borne by the Indian National Congress" and, therefore, outside the purview of the election expenditure of the appellant. The relevant portion of the pleading at para 20 of the IA No.12911 of 2014 reads as follows:

> "In this view of the mater, **the expenses so incurred in the use of helicopter has since been borne by the Indian National Congress,** New Delhi and the same is outside the purview of election expense so far as the answering respondent is concerned by virtue of Explanation 1(a) to Section 77 referred to above. It is, however further added that the answering respondent besides being a star campaigner was also a leader of opposition in the last M.P. State Legislative Assembly. The answering respondent is otherwise a veteran leader of the Indian National Congress Party and on account of his capacity as such, he was appointed as Star Campaigner and has traveled throughout the State, holding public meetings, propagating programme of the Indian National Congress Party. The expenditure so incurred in use of helicopter in propagating the programme of the party throughout the State cannot be included in the election expense of the answering respondent in respect of his election from 76, Churhut Vidhan Sabha

Constituency. It is further made clear that he never used helicopter for his election campaign in 76, Churhut Vidhan Sabha Constituency. Thus, in view of Explanation 1(a) to Section 77 of the 1951 Act, the entire pleadings contained in paragraph 14(M) are liable to be struck off being absolutely vexatious and frivolous providing no cause of action for trial of election petition."

(emphasis supplied)

25. Section 77[12] of the Act obligates every candidate in an election to keep a separate current account of all expenditures in connection with the election between the dates on which such a candidate has been nominated and the date of the declaration of result of that election. However, clause (a) of explanation (1) to Section 77 of the Act declares "the expenditure incurred by leaders of a political party on account of travel by air or by any other means of transport for propagating programme of the political party" shall not form part of the expenditure of the candidate.

26. The expression "leaders of political party" occurring in explanation 1 is itself explained in explanation 2 to the said Section.

"Explanation 2.—For the purpose of clause (a) of Explanation 1, the expression "leaders of a political party", in respect of any election, means,—

(i) where such political party is a recognised political party, such persons not exceeding forty in number, and

(ii) where such political party is other than a recognised political party, such persons not exceeding twenty in number,

whose names have been communicated to the Election Commission and the Chief Electoral Officers of the States by

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[12] Section 77. Account of election expenses and maximum thereof.—(1) Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorized by him or by his election agent between the date on which he has been nominated and the date of declaration of the result thereof, both dates inclusive.

> the political party to be leaders for the purposes of such election, within a period of seven days from the date of the notification for such election published in the Gazette of India or Official Gazette of the State, as the case may be, under this Act."

27. It can be seen from explanation 2, to qualify to be called 'a leader of the political party' for the purpose of such an election under Section 77, the name of such a person is communicated to the Election Commission and the Chief Electoral Officer of the State by the concerned political party. Such a communication is required to be made within a period of 7 days from the notification of such election published in the gazette of India etc.

28. Persons whose names have been so communicated to the Election Commission popularly came to be called 'star campaigners' in connection with an election. It is the admitted case of the parties before us that both Shri Rahul Gandhi and the appellant are star campaigners/leaders of the Indian National Congress Party for the election in question.

29. However, the entire expenditure incurred (on whatsoever count) by such star campaigners or on behalf of such star campaigners is not exempted under Section 77 for the purpose of determining the total expenditure incurred by any candidate in an election. The language of explanation 1 to Section 77 makes it clear that only the expenditure incurred by the star campaigner that too on account of travel for propagating the programme of the political party is excluded for the purpose of computing the expenditure incurred by the candidate. In other words, the expenditure incurred in connection with arrangements like erection of pandals etc. for a meeting of a star campaigner does not form part of the exempted expenditure under explanation 1. *Secondly,* under explanation II, the star campaigners' travel expenditure must have been incurred by the star campaigner himself. It is obvious from the opening clause of explanation 1 "the expenditure incurred by leaders of a political party". If such expenditure is incurred by any person other than the star campaigner, different considerations would arise.

30. The application i.e. IA No. 12911 of 2014 does not disclose on which one of the grounds contemplated under Order VI Rule 16, the various paragraphs of the election petition are required to be struck out. On the other hand, the appellant gave an elaborate explanation with respect to each of the allegations contained in the various paragraphs of the election petition which are prayed to be struck out. The moment court is asked to examine the defence

of the returned candidate in an election petition, the election petition can neither be dismissed for want of cause of action nor any part of the pleading can be struck out under Order VI Rule 16. In the absence of the availability of any one of the grounds mentioned in Order VI Rule 16, CPC striking out is impermissible. As observed by this Court in the context of the application under Order VII Rule 11, the averments contained in the election petition at this stage must be presumed to be factually correct. The only possible scrutiny of such statement is whether those allegations are relevant in the context of the relief sought in the election petition. None of the allegations contained in the various sub paragraphs of paragraph 14, except paragraph 14M, can be said to be irrelevant in the context of the prayer in the election petition.

31. The specific pleading in the election petition at paragraph 14M is that the appellant herein used the helicopter on many occasions during the relevant period only between Bhopal and Sidhi, both of which are outside the constituency of the appellant[13]. The admitted fact is that the appellant was one of the star campaigners for the said election for the State of Madhya Pradesh. Therefore, he was required to campaign for his political party, not only in his constituency but also in other constituencies of the State. In the absence of any allegation that the appellant used the helicopter for traveling within 76-Churahat constituency for the purpose of campaigning, the

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[13] "M. ..... During election between 4/11/2013 to 19/11/2013 there were eight charter flights between Bhopal to Sidhi/Churhat which respondent no.1 has used these flights to come from his Kerwa Kothi Bhopal to assembly constituency 76-Churahat for his election campaign. In fact the first respondent on the date of filing of nomination has used charter flight to arrive at District Head Quarter at Sidhi and thereafter proceeded to Churahat. The details are as under:

i)	4/11/2013	(Panwar) Sidhi to Bhopal
ii)	05/11/2013	Bhopal to Sidhi (Panwar)
iii)	08/11/2013	Bhopal to Sidhi (Panwar)
iv)	11/11/2013	Bhopal to Sidhi (Panwar)
v)	12/11/2013	Sidhi (Panwar) to Bhopal
vi)	16/11/2013	Bhopal to Sidhi (Panwar)
vii)	18/11/2013	Bhopal to Sidhi (Panwar)
viii)	19/11/2013	Sidhi (Panwar) to Bhopal

The estimated cost of these charter flight would be Rs.40,00,000/- (Forty Lac) (@ Rs.Five Lakh per flight). True copy of permission of these flights are cumulatively filed as **Annexure P-42.**

expenditure incurred on that account, in our opinion, cannot be included in the election expenditure of the appellant. Therefore, paragraph 14M of the election petition is liable to be struck off and is, accordingly, struck off.

32. Before parting with this case, we would like to place on record that the procedure adopted by the appellant in initially filing a petition under Order VII Rule 11 petition[14], praying that the election petition be dismissed and filing the instant application after a long gap[15] is to be deprecated. Preliminary objections, if any, (in cases where there is more than one) in an election petition are to be taken at the earliest point of time and in one go. The practice such as the one adopted by the appellant only tends to delay the adjudication of the election petition which are mandated[16] by the Parliament to be decided within a period of six months. We declare that the later of such successive petitions must be dismissed by High Courts *in limine* on that count alone.

33. The appeal is, therefore, partly allowed striking out only paragraph 14M of the election petition.

Appeal partly allowed.

I.L.R. [2017] M.P., 26
WRIT APPEAL

Before Mr. Justice S.K. Gangele & Mr. Justice Subodh Abhyankar
W.A. No. 1443/2013 (Jabalpur) decided on 17 November, 2016

S.P. SINGH ...Appellant
Vs.
WEST CENTRAL RAILWAY & ors. ...Respondents

Railway Protection Force Rules, 1987 - Rules 153, 158 & 217 - **Opportunity of hearing before passing the order of issuance of fresh charge-sheet under Rule 153 in place of Rule 158 - Whether obligatory - Held - Even though the authority exercised its powers under Rule 217.3(c)(ii), it was necessary for the authority to issue a show cause notice to the appellant in accordance with rule of natural justice - Rule of natural justice has to be read in Rule 217.3(c)(ii) because by the proposed action of the appellate authority, the rights of the appellant**

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[14] Filed on 1.7.2014
[15] I.A. No. 12911/2014 in Election Petition No.1/2014 was filed on 11.9.2014
[16] S. 86(7), The Representation of the People Act, 1951

have been adversely affected - Appeal partly allowed.(Paras 14 & 15)

रेलवे सुरक्षा बल नियम, 1987 – नियम 153, 158 एवं 217 – नियम 158 के स्थान पर नियम 153 के अन्तर्गत नया आरोप–पत्र जारी करने का आदेश पारित करने से पूर्व सुने जाने का अवसर – क्या बाध्यकर है – अभिनिर्धारित – यद्यपि प्राधिकारी ने नियम 217.3(सी)(ii) के अंतर्गत अपनी शक्तियों का प्रयोग किया, प्राधिकारी के लिए यह आवश्यक था कि वह अपीलार्थी को नैसर्गिक न्याय के नियमानुसार कारण बताओ नोटिस जारी करे – नैसर्गिक न्याय का नियम, नियम 217.3(सी)(ii) में पढ़ा जाना चाहिए, क्योंकि अपीलीय प्राधिकारी की प्रस्तावित कार्यवाही से अपीलार्थी के अधिकार प्रतिकूल रूप से प्रभावित हुए हैं – अपील अंशतः मंजूर।

Cases referred:

(2006) 12 SCC 28, AIR 1998 SC 2713, AIR 1963 SC 1612.

Anoop Nair, for the appellant.
Amrit Ruprah, for the respondents.

ORDER

The Order of the Court was delivered by :
S.K. GANGELE, J. :- Appellant has filed this appeal against the order dated 27.11.2013 passed in writ petition No.540/2013.

2. Appellant was working as Inspector. At the relevant time he was posted at Bhopal. One Mr. Raju Pitale S/o Tukaram Pitale made a complaint that he had been travelling in Kerala Express on 29.11.2010 as he was going from Nagpur to Bhopal. Ticket Checker had taken Rs.500/- from him, however, no receipt was issued to him by the Ticket Checker. He further made a complaint that one RPF personnel had also taken Rs.500/- from him and issued a receipt on a plain paper. Inspector, Crime Branch RPF Bhopal enquired the complaint and thereafter, the case was registered against the appellant. A regular enquiry was conducted against the appellant.The disciplinary authority did not find appellant guilty for the misconduct levelled against him, however, the authority observed that the appellant was negligent in his duties and awarded minor punishment of stoppage of one increment for a period of three years with non-cumulative effect vide order dated 29.08.2011.

3. Against the aforesaid order, the appellant preferred an appeal. The appellate Authority without issuing show cause notice to the appellant vide order dated 10.05.2012 observed that there were certain discrepancies in

the order passed by the disciplinary authority and further ordered that fresh charge-sheet be issued after framing chargesheet for charges under Rule 153 of the Railway Protection Force Rules, 1987 (hereinafter referred to as **Rules of 1987)** which is in regard to major misconduct in place of charge-sheet issued earlier under Rule 158 of the Rules of 1987, against the appellant. The charge-sheet issued earlier under Rule 158 of the Rules of 1987 for minor misconduct is hereby dropped and action under Rule 153 of the Rules of 1987 would be initiated after issuance of fresh chargesheet. The Disciplinary authority passed the following order:-

> "I have gone through the file and the documents relating to the matter. On examination following points have come to light:
>
> 01. The complainant Raju Pitale though he has singed the complaint has not been examined. It is not understood why on arrest memo thumb impression of Raju Pitale was taken.
>
> 02. Similarly, complainant Basant Kumar Shukla needs to be examined.
>
> 03. Some of the receipts in case no.13403/10 dated 30.11.2010 are not signed.
>
> 04. There is no entry in the Anga Jama Talashi Register with regard to return of money and the signatures at the time of seizure and return are not tallying with each other. This needs to be examined by a forensic (document) expert.
>
> 05. C-3C Register case no. shown is 13404/10 and not 13403/10. Fine of Rs.100/- only was awarded and paid. There is no record of return of Rs.400=00.
>
> 06. There is a contradiction in the statements of ASI/BPL Post Ramchet D and the receipt issued.
>
> The above discrepancies calls for a thorough enquiry and hence Sr. DSC/BPL who had enquired into the matter and had held Shri S.P. Singh, IPF responsible should submit charges for issuance of chargesheet under Rules 153 in lieu of the chargesheet under Rule 158 issued to him earlier.

The chargesheet under Rule 158 issued earlier is hereby dropped and action against Rule 153 would be initiated after receipt of the draft charges from Sr.DSC/BPL."

4. Against the aforesaid order, the appellant preferred a revision on 18.10.2012 that was dismissed vide order dated 19.12.2012. Then he filed a writ petition before this Court challenging the order dated 29.08.2011 (Annexure-P-1 of the writ petition) imposition of minor punishment, order of appellate Authority dated 10.05.2012 (Annexure-P-2 of the writ petition) and the order dated 19.12.2012 (Annexure-P-3 of the writ petition) of the revisional authority. The writ Court dismissed the writ petition No.540/2013. While dismissing the writ petition vide order dated 27.11.2013, the writ Court observed that the appellate Authority has power in accordance with the Rule 217 of the Rules of 1987 and in exercise of power, it is not obligatory on the part of the appellate Authority to issue show cause notice to the employee in arriving on the conclusion. The learned Single Judge relied on Rule 217.3 (c) (ii) of the Rules of 1987.

5. Counsel for the appellant has submitted that the order passed by the writ Court is contrary to law. It was obligatory on the part of the appellate Authority to issue show cause notice and afford an opportunity of hearing to the appellant before passing the order of issuance of fresh charge-sheet under Rule 153 of the Rules of 1987 in place of Rule 158 of the Rules of 1987. Rule 153 of Railway Protection Force rules 1987 is in regard to issuance of charge sheet for major misconduct.

6. Contrary to this, counsel appearing on behalf of respondents- Railways has submitted that neither notice nor any opportunity of hearing to the appellant was necessary at the time of passing order by the appellate Authority because no final punishment order has been passed against the appellant/petitioner. In support of her contentions, learned counsel relied on the following judgment.

(i) *Union of India and another vs. Kunisetty Satyanarayana* (2006) 12 SCC 28.

7. The disciplinary authority/respondent No.4 awarded a minor punishment against the appellant by awarding a punishment of stoppage of one increment for a period of three years with non-cumulative effect. Against the aforesaid order, the appellant preferred an appeal and the appellate Authority without issuing any notice to the appellant vide order dated

10.05.2012 (operative part quoted in this order) has held that earlier charge-sheet issued against the appellant under Rule 158 of the Rules of 1987 is hereby dropped and action against the appellant be initiated under Rule 153 and draft charge-sheet be prepared for the aforesaid purpose. The appellate Authority recorded a finding that departmental enquiry proceedings be initiated against the appellant for major misconduct. It means that the appellate Authority has set aside the earlier order dated 29.08.2011 by which minor punishment was imposed against the appellant.

8. Rule 217.3 of the Rules of 1987 prescribes procedure on an appeal filed by a delinquent employee against imposing punishment specified in Rules 148 and 149 or enhancing any penalty imposed under the said rules. The relevant provision reads as under:-

> **"217.3** In the case of an appeal against an order imposing any of the punishments specified in rules 148 and 149 or enhancing any penalty imposed under the said rules the appellate authority shall consider:-
>
> **(a)** whether the procedure prescribed in these rules has been complied with, and if not whether such non-compliance has resulted in violation of any constitutional provisions or in miscarriage of Justice;
>
> **(b)** whether the findings are warranted and based on evidence on record; and
>
> **(c)** whether the punishment or the enhanced punishment imposed is adequate or inadequate or severe and pass speaking orders for-
>
> **(i)** setting aside, confirming, reducing or enhancing the punishment, or
>
> **(ii)** remitting the case to the authority which imposed or enhanced the punishment or to any other authority with such directions as it may deem fit in the circumstances of the case:
>
> **Provided that-**
>
> **(i)** no order imposing an enhanced punishment shall

be passed unless the appellant is given an opportunity of making any representation which he may wish to make against such enhanced punishment; and"

9. Rule 217.3 (c) (ii) of the Rules of 1987 empowers the appellate Authority to remit the case to the authority which imposed or enhanced the punishment or to any other authority with such directions as it may deem fit in the circumstances of the case. Proviso of the aforesaid rule further prescribes that no order imposing an enhanced punishment shall be passed unless the employee is given an opportunity of making any representation which he may wish to make against such enhanced punishment.

10. The question before this Court is that whether in exercise of powers under Rule 217.c (c) (ii) of the Rules 1987, the disciplinary authority if set asides the order of punishment and ordered for issuance of fresh charge-sheet for major misconduct by setting aside the findings and order of punishment of disciplinary authority where a minor punishment was imposed, delinquent employee is entitled to get an opportunity of show cause or not. In the present case,admittedly no opportunity of hearing was provided to the appellant.

The apex Court in the matter of *Punjab National Bank and others vs. Kunj Behari Misra* reported in AIR 1998 SC 2713 while interpreting regulations 7 (2) which prescribes that disciplinary authority if disagrees with the findings of the enquiring authority on any article of charge record reasons for such disagreement and records its own findings on such charge has held that if the disciplinary authority disagrees with the findings of the enquiring authority and is required to record its own reasons and also record its own findings it is obligatory on the authority to give hearing to the delinquent employee. The apex Court has held that rule of natural justice has to be read into regulation 7 (2) which reads as under as quoted in the judgment:-

> "**(2)** The disciplinary Authority shall if it disagrees with the findings of the Inquiring Authority or any article of charge, record its reasons for such disagreement and record its own findings on such charge, if the evidence on record is sufficient for the purpose."

11. The relevant findings of the apex Court are as under:-

> "**11.** The controversy in the present case, however, relates to

the case where the disciplinary authority disagrees with the findings of the inquiring authority and acts under Regulation - 7 (2). The said sub-regulation does not specifically state that when the disciplinary authority disagrees with the findings of the inquiring authority, and is required to record its own reason for such disagreement and also to record its own reason for such disagreement and also to record its own finding on such charge, it is required to give a hearing to the delinquent officer.

12. Sh. Reddy relied on the decision of this Court in S.S. Koshal's case (supra). In that case the disciplinary authority disagreed with the findings of the inquiry officer which was favourable to the delinquent. A question arose whether the disciplinary authority was required to give a fresh opportunity of being heard. At page 470 a Division Bench (Coram: BP Jeevan Reddy and BL Hanasria, JJ) while coming to the conclusion that fresh opportunity was not required observed as follows:

> " So far as the second ground is concerned, we are unable to see any substance in it. N such fresh opportunity is contemplated by the regulations nor can such a requirement be deduced from the principles of natural justice. It may be remembered that the inquiry officer's report is not binding upon the disciplinary authority and that it is open to the disciplinary authority to come to its own conclusion on the charges. It is not in the nature of an appeal from the inquiry officer to the disciplinary authority. It is one and the same proceeding. It is open to a disciplinary authority to hold the inquiry himself. It is equally open to him to appoint an inquiry officer to conduct the inquiry and place the entire record before hm with or without his findings. But in either case, the final decision is to be taken by him on the basis of the material adduced. This also appears to be the view taken by one of us (B.P. Jeevan Reddy, J) as a Judge

of the Andhra Pradesh High Court in Mahendra Kumar V. Union of India. The second contention accordingly stands rejected."

Reliance was also placed on M. C. Saxena's case (supra). In this case also the disciplinary authority disagreed with the findings of the inquiry officer and the after recording reasons in this regard it held that the charges against the delinquent officer stood established. In coming to this conclusion it was observed that while disagreeing the only requirement was that the disciplinary authority should record reasons for disagreement and it was not necessary in such a case for the delinquent government servant to be afforded a further opportunity of hearing.

13. Sh. Sunil Gupta, learned counsel for the respondent, drew our attention to the decision in the case of *Institute of chartered Accountant of India* (supra). The respondent therein, who was a chartered accountant, was accused of misconduct. An inquiry was instituted under the Chartered Accountants Act 1949. The disciplinary committee after hearing Ratna submitted its report to the Council opining that he was guilty of professional misconduct. The Council considered the report of the disciplinary committee and found him guilty of misconduct and thereupon the Institute wrote to Ratna that the Council had found him guilty of professional misconduct and it was proposed to remove his name from the register of members for a period not exceeding five years. Thereupon a writ petition was filed by Ratna in the Bombay High Court which was allowed with the finding that the Council should have given an opportunity to Ratna to represent before it against the report of the disciplinary committee. While affirming the decision of the High Court and coming to the conclusion that a member of the Institute of Chartered Accountants accused of misconduct is entitled to hearing by the Council when, on receipt of the report of the disciplinary committee, it

proceeds to find whether he is or is not guilty, this Court at page 550 observed as follows:

> " Now when it enters upon the task of finding whether the member is guilty of misconduct, the Council considers the report submitted by the disciplinary Committee. The report constitutes the material to be considered by the council. The Council will take into regard the allegations against the member, his case in defence, the recorded evidence and the conclusions expressed by the Disciplinary Committee. Although the member has participated in the inquiry, he has had no opportunity to demonstrate the fallibility of the conclusions of the disciplinary Committee. It is material which falls within the domain of consideration by the Council. It should also be open to the member, we think, to point out to the Council any error in the procedure adopted by the Disciplinary Committee which could have resulted in vitiating the inquiry. Section 21(8) arms the council with power to record oral and documentary evidence, and it is precisely to take account of that eventuality and to repair the error that this power seems to have been conferred. It cannot, therefore, be denied that even though the member has participated in the inquiry before the Disciplinary Committee, there is a range of consideration by the Council on which he has not been heard. He is clearly entitled to an opportunity of hearing before the council finds him guilty of misconduct."

14. In Ram Kishan's case (supra) disciplinary proceedings on two charges were initiated against Ram Kishan. The inquiry officer in his report found the first charge not proved and the second charge was partly proved. The disciplinary authority

disagreed with the conclusion reached by the inquiry officer and a show cause was issued as to why both the charges should not be taken to have been proved. While dealing with the contention that the disciplinary authority had not given any reason in the show cause to disagree with the conclusions reached by the inquiry officer an that, therefore, the findings based on that show cause notice was bad in law, a Two-Judge Bench at page 161 observed as follows:

> " ... The purpose of the show-cause notice, in case of disagreement with the findings of the inquiry officer, is to enable the delinquent to show that the disciplinary authority is persuaded not to disagree with the conclusions reached by the inquiry officer for the reasons given in the inquiry report of he may offer additional reasons in support of the findings by the inquiry officer. In that situation, unless the disciplinary authority gives specific reasons in the show cause on the basis of which the findings of the inquiry officer in that behalf is based, it would be difficult for the delinquent to satisfactorily give reasons to persuade the disciplinary authority to agree with the conclusions reached by the inquiry officer. In the absence of any ground or reason in the show-cause notice it amount to an empty formality which would cause grave prejudice to the delinquent officer and would result in injustice to him. The mere fact that in the final order some reasons have been given to disagree with the conclusions reached by the disciplinary authority cannot cure the defect."

15. At this stage it will be appropriate to refer to the case of State of Assam and Anr. Vs. Bimal Kumar Pandit ([1964] 2 SCR 1] decided by a Constitution Bench of this Court. A question arose regarding the contents of the second show cause notice when the Government accepts, rejects or partly accepts

or partly rejects the findings of the Enquiry Officer. Even though that case relates to Article 311 92) before its deletion by the 42nd Amendment, the principle laid down therein, at page 10 of the report, when read alone with the decision of this Court in Karunakar's case will clearly apply here. The Court observed at Page 10 as follows:-

> "We ought, however, to add that if the dismissing authority differs from the findings recorded in the enquiry report, it is necessary that its provisional conclusions in that behalf should be specified in the second notice. It may be that the report makes findings in favour of the delinquent officer, but the dismissing authority disagrees with the said findings and proceeds to issue the notice under Article 311 (2). In such a case, it would obviously be necessary that the dismissing authority should expressly state that it differs from the findings recorded in the enquiry report and then indicate the nature of the action proposed to be taken against the delinquent officer. Without such an express statement in the notice, it would be impossible to issue the notice at all. There may also be cases in which the enquiry report may make findings in favour of the delinquent officer on some issues and against him on some other issues. That is precisely what has happened in the present case. If the dismissing authority accepts all the said findings in their entirety, it is another matter: but if the dismissing authority accepts the findings recorded against the delinquent officer and differs from some or all of those recorded in his favour and proceeds to specify the nature of the action proposed to be taken on it own conclusions, it would be necessary that the said conclusions should be briefly indicated in the notice. In this category

of case, the action proposed to be taken could be based not only on the findings recorded against the delinquent officer in the enquiry report, but also on the view of the dismissing authority that the other charges not held proved by the enquiring officer, are according to the dismissing authority, proved. In order to give the delinquent officer a reasonable opportunity to show cause under Article 311(2), it is essential that the conclusions provisionally reached by the dismissing authority must, in such cases, be specified in the notice. But whether the dismissing authority purports to proceed to issue the notice against the delinquent officer after accepting the enquiry report in its entirety, it cannot be said that it is essential that the dismissing authority must say that it has so accepted the report. As we have already indicated, it is desirable that even in such cases a statement to that effect should be made. But we do not think that the words used in Article 311 (2) justify the view that the failure to make such a statement amounts to contravention of Article 311(2). In dealing with this point, we must bear in mind the fact that a copy of the enquiry report had been enclosed with the notice, and so, reading the notice in common sense manner, the respondent could not have found any difficulty in realising that the action proposed to be taken against him proceeded on the basis that the appellants had accepted the conclusions of the enquiring officer in the entirety."

12. The apex Court has relied on the earlier judgment of the constitutional Bench in the matter of *State of Assam vs. Bimal Kumar Pandit* reported in AIR 1963 SC 1612. The Constitutional Bench of the apex Court has held that if the disciplinary authority disagrees with the findings recorded in favour

of the delinquent employee and differs with those findings, then it is obligatory on the part of the disciplinary authority to issue a notice to the delinquent employee.

13. In the present case, the appellate Authority has disagreed with the findings recorded by the disciplinary authority in regard to imposition of minor punishment. The appellate authority further held that earlier charge-sheet issued against the appellant for minor punishment be dropped and fresh Article of charges be prepared and thereafter, a charge-sheet be issued against the appellant for major misconduct and action be initiated against the appellant for imposition of major punishment under Rule 153 of the Rules 1987.

14. In such eventuality even though the authority exercised its power under Rule 217 (3) (c) (ii) of Railway Protection Force 1987, in our opinion, it was necessary for the authority to issue a show cause notice to the appellant in accordance with rule of natural justice and upto that extent, the rule of natural justice has to be read in Rule 217.3 (c) (ii) of the Rule of 1987 because by the proposed action of the appellate Authority, the rights of the appellant have been adversely affected. The order which was in favour of the appellant was set aside and the charge-sheet issued earlier was ordered to be dropped and fresh charge-sheet for major misconduct ordered to be issued.

15. In this view of the matter, in our opinion, the reasoning put forth by the writ Court in writ petition No.540/2013 that no show cause notice was necessary in exercise of powers by the appellate Authority under Rule 153 of the Rule of 1987, is contrary to law. Consequently, the order dated 27.11.2013 [Annexure-A-1] passed in writ petition No.540/2013, is hereby set aside. The writ appeal filed by the appellant is partly allowed. The impugned order dated 10.05.2012 (Annexure-P-2 of the writ petition) passed by the appellate Authority is hereby quashed. The matter is remitted back to the appellate Authority to decide the appeal of the appellant in accordance with law.

16. It is hereby clarified that this Court has not opined on the merits of the case. No order as to the costs.

Appeal partly allowed.

I.L.R. [2017] M.P., 39
WRIT PETITION

Before Mr. Justice Rajendra Menon & Mr. Justice S.K. Palo
W.P. No. 4046/2015 (Jabalpur) decided on 21 April, 2016

MALAY SHRIVASTAVA ...Petitioner
Vs.
THE DEPUTY COMMISSIONER, INCOME TAX & ors. ...Respondents

A. Income Tax Act (43 of 1961), Sections 143(1), 147 & 148 - Assessment and Reassessment - "Reasons to believe" - **The expression "reasons to believe" cannot be read to say that Assessment Officer should have finally ascertained the effect by legal evidence or conclusion but only consideration at this stage is that whether there was reasonable material available to issue notice u/S 148 of Income Tax Act for reopening of assessment - The enquiry is still in progress, so it is not appropriate to hold that material produced is enough or not as the sufficiency or correctness of the material is not to be looked into at this stage by the Writ Court and the Assessing Officer has to take its own decision on the matter - Petition dismissed. (Paras 11 to 13, 17 & 18)**

क. आयकर अधिनियम (1961 का 43), धाराएँ 143(1), 147 व 148 – निर्धारण एवं पुनर्निर्धारण – "विश्वास करने के कारण" – अभिव्यक्ति "विश्वास करने के कारण" को यह कहने के लिए नहीं पढ़ा जा सकता कि निर्धारण अधिकारी को विधिक साक्ष्य या निष्कर्ष द्वारा ही प्रभाव को अंतिमतः अभिनिश्चित कर लेना चाहिए था बल्कि इस प्रक्रम पर विचारणीय केवल यह है कि क्या निर्धारण को पुनः प्रारंभ करवाने हेतु आयकर अधिनियम की धारा 148 के अंतर्गत नोटिस जारी करने हेतु युक्तियुक्त सामग्री उपलब्ध थी – जाँच अभी भी प्रगति पर है, अतः यह अभिनिर्धारित करना समुचित नहीं है कि प्रस्तुत सामग्री पर्याप्त है या नहीं, क्योंकि रिट न्यायालय द्वारा इस प्रक्रम पर सामग्री की पर्याप्तता या सत्यता नहीं देखी जाएगी तथा निर्धारण अधिकारी को मामले में अपना निर्णय स्वयं लेना होगा – याचिका खारिज।

B. Income Tax Act (43 of 1961), Sections 143(1), 147 & 148 - Assessment and Reassessment - **Notice issued u/S 148 of the Act of 1961 for re-opening of assessment for the year 2009-10 - Petitioner contended that at relevant point of time he was on deputation in another department, so no role in decision making process - Held - This aspect of the matter has been considered in detail by the Revenue as various**

stages of Tender process has taken place before deputation- Contractors were short-listed till stage of Technical Bid - Key role in decision making process, so petitioner cannot be exonerated of the charges leveled on ground of deputation - Contention turned down - Petition dismissed. (Para 15)

ख. आयकर अधिनियम (1961 का 43), धाराएँ 143(1), 147 व 148 – निर्धारण एवं पुनर्निर्धारण – वर्ष 2009–10 के निर्धारण को पुनः प्रारंभ करवाने हेतु 1961 के अधिनियम की धारा 148 के अंतर्गत नोटिस जारी किया गया – याची का तर्क है कि सुसंगत समय पर वह दूसरे विभाग में प्रतिनियुक्ति पर था, अतः निर्णय लेने की प्रक्रिया में उसकी कोई भूमिका नहीं है – अभिनिर्धारित – मामले के इस पहलू को राजस्व द्वारा विस्तृत रूप से विचार में लिया गया है चूँकि प्रतिनियुक्ति के पूर्व ही निविदा प्रक्रिया के विभिन्न प्रक्रम हो चुके हैं – तकनीकी बोली के प्रक्रम तक, ठेकेदारों को छाँट लिया गया था – निर्णय प्रक्रिया में महत्वपूर्ण भूमिका है, अतः याची को प्रतिनियुक्ति के आधार पर उस पर लगाये गये आरोपों से विमुक्त नहीं किया जा सकता – तर्क नामंजूर किया गया – याचिका खारिज।

C. Income Tax Act (43 of 1961), Sections 143(1), 147 & 148 - Constitution - Article 226 - Assessment & Reassessment - Invoking of Writ Jurisdiction - Alternate remedy **- Whether Writ Petition under Article 226 of the Constitution is maintainable at the stage of assessment or re-assessment proceedings under the Income Tax Act, 1961 - Held - At the stage of assessment or reassessment proceedings the assessee cannot be permitted to invoke Writ Jurisdiction of the High Court at the first instance without exhausting the statutory remedy available under the Income Tax Act, 1961. (Para 16)**

ग. आयकर अधिनियम (1961 का 43), धाराएँ 143(1), 147 व 148 – संविधान – अनुच्छेद 226 – निर्धारण एवं पुनर्निर्धारण – रिट अधिकारिता का अवलम्ब लेना – वैकल्पिक उपचार – क्या आयकर अधिनियम, 1961 के अंतर्गत निधारण या पुनर्निर्धारण कार्यवाहियों के प्रक्रम पर, संविधान के अनुच्छेद 226 के अंतर्गत रिट याचिका पोषणीय है – अभिनिर्धारित – निर्धारण या पुनर्निर्धारण कार्यवाहियों के प्रक्रम पर निर्धारिती को सर्वप्रथम अवसर पर आयकर अधिनियम, 1961 के अंतर्गत उपलब्ध कानूनी उपचार को निःशेष किये बिना उच्च न्यायालय की रिट अधिकारिता का अवलम्ब लेने की अनुमति नहीं दी जा सकती।

Cases referred:

(1961) 2 SCR 241, (1973) 3 SCC 581, (1977) 1 SCC 408, 2012 SCC Online ITAT 13463, (2003) 1 SCC 72, (1955) 1 SCR 448, (1998) 3

SCC 410, (2008) 296 ITR 619 (Del), [1974] 97 ITR 696 (Bom), 103 ITR 437 (SC), 57 ITR 637 (SC), 77 ITR 268 (SC), 82 ITR 147 (SC), (2012) 246 ITR 63 (MP), (1999) 236 ITR 34 (SC), (2001) 252 ITR 230 (Ker), (2007) 210 CTR 0030, (2013) 85 CCH 0191 ISCC, (2014) 89 CCH 0152, (2009) 226 CTR (ALL) 659, (2001) 169 CTR 287, (2001) 169 CTR 0039, (1999) 152 CTR 0418, (1971) 1 SCC 453, (1993) 113 CTR (SC) 436.

Kishore Shrivastava with *A.P. Shrivastava & Kunal Thakre*, for the petitioner.

Sanjay Lal, for the respondents.

ORDER

The Order of the Court was delivered by : **RAJENDRA MENON, J. :-** In this writ petition filed by the petitioner assessee under Article 226 of the Constitution, challenge is made to an order Annexure P/1 dated 23.7.2014 passed by the Deputy Commissioner of Income Tax, Bhopal, issuing a notice under Section 148 of the Income Tax Act, 1961 for reopening of assessment for the assessment year 2009-2010 by virtue of the provisions conferred under Section 147 of the Income Tax Act. Challenge are also made to an order dated 19.3.2015 whereby written objection filed by the petitioner to the notice has been rejected and another order issued under Section 142(1) on 19.3.2015 directing the petitioner to submit documents and other material for conducting further assessment proceedings.

2. Facts in brief go to show, that for the assessment year 2009-2010, petitioner submitted his return of income on 24.7.2009, for which he was issued acknowledgment No.03231008092. Records further indicates that at the relevant time petitioner was working as Commissioner, Department of Urban Administration, Government of M.P. Bhopal. It is the case of the petitioner that he worked as Commissioner in the Department of Urban Development and Administration between 13.1.2006 to 11.12.2007, thereafter was posted on deputation with the Government of India, he was relieved from the post of Commissioner, Urban Administration on 11.12.2007 vide Certificate Annexure P/8. Thereafter, he remained on deputation and returned back to his parent department in the State of M.P. only in 2014, where he is presently holding the post of Principal Secretary, Transport Department. However, it is the case of the petitioner that he received the impugned notice Annexure P/1 on 27.3.2014 issued under Section 148 of the Income Tax

Act, wherein respondent No.1 indicated to the petitioner that he has "reasons to believe" that petitioner's income with respect to assessment year 2009-2010 has escaped assessment within the meaning of Section 147, therefore, it was proposed to assess/ re-assess the income for the said assessment year. The petitioner was required to submit his return in the prescribed form for the said purpose. In response to the same petitioner vide letter Annexure P/2 on 15.4.2014, requested for certain material. It is said that the petitioner did not receive any reply to the same and when the petitioner was awaiting reply to Annexure P/2, so also the reasons for re-opening of assessment, he received another notice on 13.1.2015 under Section 142(1) calling upon to submit his return to the impugned action/ re-opening the assessment. It is said that vide Annexure P/4 dated 15.1.2015 petitioner responded and pointed out that originally return has already been filed by him on 24.7.2009 under Section 139(1) for the assessment year 2009-2010 and, therefore, he requested that the same be treated compliance of the notice under Section 148. The petitioner also requested for supply of copies of documents based on which the re-opening of assessment was ordered. It is said that vide Annexure P/5 on 15.1.2015 the reasons for re-opening were communicated to the petitioner and thereafter, petitioner was directed to appear in the office of respondent on 2.2.2015 vide notice Annexure P/6 for getting clarification on certain points. However, on being furnished with the reasons recorded for re-opening of assessment under Section 148 on 15.1.2015, petitioner raised various objections and when his objections were also rejected, the same has been challenged in this writ petition.

3. According to the petitioner in the two page, reasons furnished to the petitioner for reopening of assessment, it is indicated that the investigation wing of the Income Tax department conducted a search and seizure operation on 21.7.2008 in the premises of one Shri Mukesh Sharma and as a consequence of the search operation a large number of documents including official papers, notings, correspondence related to the department of urban administration, Government of M.P. were found and it is alleged that based on these documents, it was established that Shri Mukesh Sharma was a liasioning agent for award of contract by the department of Urban Administration, Government of Madhya Pradesh and in the award of contracts to two companies namely M/s Nagarjuna Construction Co. Ltd. and M/s Simplex Infrastructure Ltd., certain loose papers seized in the search operation bearing pages No.55 and 56 and page No.122 of LPS 21 and LPS 26 respectively,

indicates that illegal gratification was paid by M/s Nagarjun construction Co. Ltd. to the petitioner. It was said that one Shri A.G. K. Raju, a Director with the Contractor M/s Nagarjuna Construction had admitted about payment of illegal gratification. It was indicated in the reason supplied that in LPS No.1 page 155 in the back side depicts the figure of "267" which corresponds to the value of the contract awarded to M/s Nagarjuna Construction Co. Ltd. wherein the following notings were made :-

267	M	6%	16.02
267	P	1.25%	3.33
267	C	½ %	1.335
267	M	1%	2.67
267	-	½ %	1.335

4. It was said that listing as indicated herein above depicts the vertical chain of Government hierarchy involved in the allotment of Indore Sewage Project and in this, the figure "M" denotes for Minister of Urban Development, "P" the Principal Secretary, Urban Development Department, "M" the Mayor and "C" is said to be referring to the Commissioner, for Urban Administration. It was further said that in the search conducted in the premises of Mr. Mukesh Sharma, certain documents have further been seized which goes to show that illegal gratification were also paid to the petitioner by M/s Simplex Infrastructure. Indicating that the Deputy Commissioner, Income Tax has reasons to believe that the petitioner as Commissioner, Urban Administration Development in the year in question, received illegal gratification to the tune of Rs.2.21 Crore which has escaped assessment for the assessment year 2009-2010 the notice was issued. Petitioner denied each and every allegations leveled and raised various grounds in a detailed written objection submitted. The petitioner also sought for documents pertaining to the forming of the opinion which was forwarded to the petitioner vide Annexure P/10 on 2.2.2015 and the documents forwarded to the petitioner are at pages 39, 40, 41 and 42 of the paper book and these documents indicates the hierarchy in the Government as indicated herein above, the payments made and the loose papers also depicts some calculation without any name or other particulars mentioned. According to the documents produced along with Annexure P/10 the only material to implicate the petitioner is the figure "C" appearing in the documents against which a payment of 0.50% is shown and this figure "C" is said to be

denoting "Commissioner for Urban Administration". The petitioner vide Annexure P/11 submitted a detailed reply, wherein it has been pointed out that he was the Commissioner for Urban Administration in the department in question and held charge between January 2006 to December 2007. On 11.12.2007, relinquished his charge and proceed on Central deputation to New Delhi and thereafter returned back to Bhopal (i.e. Government of M.P.) only in December 2014. It was said that during the period 2008-09 when the contract was awarded the petitioner was not posted in the State of M.P. During the entire period for the financial year 2008-09 when the contract was awarded, the petitioner was on deputation to the Government of India, Ministry of Power, New Delhi. Thereafter, based on the information collected, the petitioner indicates various facts to say that the contract in question was not awarded by the Department of Urban Administration and Development. The contract was for a work given by the Indore Municipal Corporation, as per the Government notification issued in the matter of delegation of power under the provisions of Section 37 read with Section 73 and Section 433 of the M.P. Municipal Corporation Act, 1956, the Mayor-in-Council has been delegated with the full financial power for projects pertaining to Jawahar Lal Nehru Nation Urban Renewal Mission and as the Contract in question is awarded by the Municipal Corporation of Indore after due approval of the Mayor-in-Council, it was said that petitioner had no role to play in award of the contract. Petitioner with facts and figure submitted a detailed objection and when the objection was not decided and notices issued for proceeding with the matter, this writ petition was filed. However, while the writ petition was pending vide Annexure P/13 dated 19.3.2015 objections of the petitioner were rejected and it had been held that petitioner was a key person engaged in controlling the decision making process for award of contract to both these companies and as he was the intermediary between the Municipal Corporation and the Urban Administration Department based on the notings made in the papers seized and reproduced herein above, it is held that figure "C" appearing in the slip denotes the Commissioner, Department of Urban Administration and as petitioner has received illegal gratification which is nothing but income for the assessment year and as the same has escaped assessment, the proceeding has been held.

5. Shri Kishore Shrivastava, learned Senior Counsel appearing for the petitioner took us into the factual aspects of the matter and pointed out that the contract in question for which the so called illegal gratification is said to

have been paid was awarded by the Indore Municipal Corporation. It was the Indore Municipal Corporation which invited the tender on 28.6.2007. As a single tender was received, in response to this notice it was not opened and on 1.10.2007 the second tender was invited by the Indore Municipal Corporation. Initially the date for submission of tender was 27.11.2007, the tender was opened on 24.12.2007 much after the petitioner was transferred on 11.12.2007. It is said that the tender was finalized on 16.1.2008 in the presence of the Minister, Department of Urban Administration and Development, Mayor of Indore, Principal Secretary, Department of Urban Administration and Development, Commissioner, Municipal Corporation, Indore, Chief Engineer, Directorate of Urban Administration and Development, Project Officer and minutes of the meeting has been filed at page 53 of the paper book to say that decision for award of contract was taken much after the petitioner had gone on deputation and the contract itself was finalized after the petitioner had gone on deputation. Referring to the tabulated data available at pages 44, 45 and 46 of the paper book and the documents pertaining to award of the contract, Shri Kishore Shrivastava emphasized mainly on two points:- (1) That the entire contract was awarded for a work in the Indore Municipal Corporation.

(2) The award of the work was done after the petitioner was transferred on deputation to the Government of India and even in the decision making process, there is not a single piece of documents or evidence to show that petitioner ever participated. That apart, Shri Shrivastava by referring to the delegation of power under the M.P. Municipal Corporation Act, tried to point out that even the decision to award the contract is taken by a different authorities wherein the petitioner was not at all involved. He further invited our attention to the documents received by him under the RTI Act, the documents filed by the Revenue to point out that except for certain loose papers filed by the petitioner and by the respondents as Annexure R/1, R/2, R/3 and R/4 showing the figure 267, the alphabet "C" and ½% written in the loose papers, there is nothing to indicate that the petitioner was in anyway connected with any award of the contract or the work to the Contractors in question. Shri Shrivastava also invited our attention to Annexure P/15 dated 12.2.2015, the communication made by the Deputy Commissioner of Income Tax to the Principal Secretary, Department of Urban Administration, whereby the Income Tax Department sought for certified copy of the relevant file, figures, order sheet, minutes of the meeting with regard to award of the contract to

both the companies M/s Nagarjuna Construction Co. Ltd. and M/s Simplex Infrastructure Ltd., reply of the Government to the same filed as Annexure P/17 dated 18.2.2015 and 19.2.2015, wherein the Government had informed the Income Tax Department that the entire contract is awarded by the Indore Municipal Corporation, records are with the Indore Municipal Corporation, the Urban Administration and Development Department in the Government of M.P. has got nothing to do with the award of contract, therefore directions were issued by Government of M.P. through the Commissioner, Municipal Corporation to handover all the documents to the Income Tax Department. Taking us through all these aspects of the matter, Shri Kishore Shrivastava argued that in this case there is no document or evidence available on record to show that petitioner was in any way connected with award of the contract in question and therefore, allegations against the petitioner that he has received illegal gratification for award of contract is nothing but a suspicion based on the *ipse dixit* of the officers concerned who have misconstrued certain figures noted in the loose papers to link it with the petitioner.

6. Shri Kishore Shrivastava invited our attention to the provisions of Section 147 and 148 of the Income Tax Act and argued that under Section 147 income escaping assessment can be subjected to assessment or re-assessment, if the Assessing Officer has "reasons to believe" that certain income chargeable to tax has escaped assessment for the assessment year. He emphasized that the words appearing in the said section particularly "has reasons to believe" was subject matter of interpretation by the Supreme Court and various High Courts and difference has been drawn with regard to requirement of "reasons to suspect" and "reason to believe". He says that mere suspicion and surmises of the Officer cannot be a ground for holding it to be "reasons to believe". He argues that the material available with the Income Tax Officer to form the opinion does not come within the category of "reasons to believe" as the material is not co-related to the assessee, the conduct and work of the assessee and has no nexus with the petitioner, the assessee against whom the impugned action is proposed to be taken under the statutory provisions. He took us through the following judgments: *Calcutta Discount Co. Ltd. Vs. Income Tax Officer* (1961)2 SCR 241; *Union of India Vs. Messrs. Rai Singh Dev* (1973)3 SCC 581; *The Parashuram Pottery Works Vs. Income Tax Officer* - (1977)1 SCC 408; *M/s Piyush Infrastructure India Vs. ACIT* - 2012 SCC Online ITAT 13463; *GKN Driveshafts (India) Ltd. vs. Income Tax Officer* - (2003)1 SCC 72; *Suraj*

Mall Mohta Vs. A. V. Vishvanatha Sastri - (1955)1 SCR 448; *Central Bureau of Investigation vs. V. C. Shukla* - (1998)3 SCC 410; *Commissioner of Income Tax Vs. Shri Girish Chaudhary* -[2008] 296 ITR 619 (Del); *Additional Commissioner of Income Tax vs. Lata Mangeshkar* -[1974]97 ITR 696 (Bom); *Income Tax Officer Vs. Lakhmani* - 103 ITR 437 (SC); *Madhya Pradesh Industries Vs. ITO* 57 ITR 637 (SC); *Madhya Pradesh Industries vs. Income Tax Officer* - 77 ITR 268 (SC); *Sheo Nath Singh Vs. Appellate Assistant Commissioner* - 82 ITR 147 (SC); *Arjun Singh Vs. Additional Director Income Tax* - (2012) 246 ITR 63 (MP); *Raymond Woolen Mills Ltd. Vs. Income Tax Officer,* - (1999) 236 ITR 34 (SC); *G. Sukesh Vs. Deputy Commissioner of Income Tax* - (2001) 252 ITR 230 (Ker).

7. Primarily, to say that "the reason to believe" which is a prime requirement for initiating the proceeding under Section 147 read with Section 148 being not available in the present case, the entire proceedings are liable to be quashed. Apart from emphasizing on this aspect, he also made submission with regard to the procedure to be followed, the power of the Income Tax Officer and various other aspects of the matter which we will deal with as and when required at a subsequent stage.

8. Shri Sanjay Lal, learned counsel appearing for the Revenue refuted the aforesaid contentions and argued that at this stage as the assessment proceedings are in progress and when only the return filed by the petitioner is being scrutinized, as certain material has been received in the search and seizure conducted in the house of Shri Mukesh Sharma, inquiries into the matter are being conducted in the assessment proceeding, therefore, at this stage interference into the matter by this Court, exercising its extra ordinary jurisdiction in a petition under Article 226 of the Constitution is not called for. Shri Lal argued that under the statutory provision itself after the assessment proceedings are completed and when the assessment orders are passed, the petitioner has remedy of appeal and revision and as statutory remedy is available to the petitioner, interference into the matter at this stage is not called for. Reference is made to various judgments of Supreme Court and High Courts in the matter of interference at this stage under Article 226. The first and foremost objection of Shri Sanjay Lal was to say that interference at this stage is not called for. Thereafter, it was argued by Shri Sanjay Lal that the material collected by the Revenue, based on search and seizure conducted in

the premises of Shri Mukesh Sharma and in subsequent enquiry conducted are certain relevant material which goes to show that undue favor was done to the Contractor for which illegal gratification was received. This material is sufficient enough to initiate the action impugned. Sufficiency or tenability of the material is not a question to be considered by this Court at this stage. While interfering into the matter, it is said that the evidentiary value of the material seized, its sufficiency or otherwise to hold the petitioner guilty of concealing his income is a matter which is to be enquired into by the Department where the proceedings are going on and at this stage, when the inquiry by the department is in progress, interference in the matter is not called for. It is stated that the assessment order will be passed after the adjudicatory proceedings by the Assessing Officer is completed and therefore, interference by this Court is not permissible. He heavily relies upon a judgment of the Supreme Court in the case of *Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers* - (2007) 210 CTR 0030 and argued that in this case the assessment has not been completed, the return filed by the assessee was only processed under Section 143(1) and in the absence of there being conclusion to the assessment proceedings, the question of change of opinion does not arise. It is argued, based on the said judgment that as no assessment order has been passed or as the assessment is not completed, the case in hand is covered by the main provisions of Section 147 and not the proviso to Section 147 and as the condition necessary for bringing the case under the main proviso of Section 147 is in existence and Assessment Officer has formed the opinion based on the material which are available, interference into the matter at this stage is not called for. He relied upon following judgments in support of his contentions to say that at this stage interference into the matter is not called for :- *Commissioner of Income Tax Vs. Vijaybhai N. Chandrani* - (2013)85 CCH 0191 1SCC; *Joint Commissioner of Income Tax Vs. Kalanithi Maran* - (2014) 89 CCH 0152 Chen HC; *EMA India Ltd. Vs. Assistant Commissioner of Income Tax* - (2009) 226 CTR (All) 659; *Bhajan Lal Vs. Commissioner of Income Tax* - (2001) 169 CTR 287; W.P. No.8173/2009 - *Satish Vishwakarma Vs. Asstt. Commissioner of Income Tax* decided on 13.4.2010; *G. Sukesh Vs. Deputy Commissioner of Income Tax* - (2001)169 CTR 0039; *Raymond Woollen Mills Ltd. Vs. Income Tax Officer & Ors.* - (1999) 152 CTR 0418 & *Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers* - (2007) 210 CTR 0030..

9. Having heard learned counsel for the parties at length, we find that the

moot question which was canvassed by Shri Kishore Shrivastava, learned Senior Counsel at the time of hearing was primarily based on the requirement of law as contemplated under Section 147 of the Income Tax Act in the matter of forming, "reason to believe" that income chargeable to tax had escaped assessment. Apart from raising various grounds, the main contention advanced on behalf of the petitioner was to the effect that based on the material available with the Assessing Officer conclusion cannot be drawn nor an opinion formed to say that he has reason to believe that income chargeable to tax has escaped assessment. Shri Kishore Shrivastava, learned Senior Counsel had referred to the requirement of Section 147 and had submitted that the material available with the Assessing Officer should be such that he has reason to believe. He emphasized that reason to believe is not a mere suspicion or reason to suspect and it is not sufficient enough to initiate proceeding under Section 147 read with Section 148. Most of the judgments relied upon by him were to say that the material available cannot be said to be sufficient enough to come to the conclusion that the Assessing Officer has reasons to believe that income chargeable to tax has escaped assessment. He had said that for recording a finding and to say that the Assessing Officer has reasons to believe the material available should show nexus to the assessee, and the evidence and various other factors are required which is lacking in this case.

10. That being so, it would be appropriate, first examine the legal question with regard to this aspect of the matter as was canvassed by learned Senior Counsel at the time of hearing. The first judgment relied upon was in the case of *Calcutta Discount Co. Ltd.* (supra) decided by Constitution Bench in the year 1961. In this case the provision as it then existed under Section 34 of the Income Tax Act was considered and it was found that normally the well settled principle is that the High Court will have power to issue in a fit case an order prohibiting any executive authority from acting without jurisdiction. The availability of alternate remedy in the income tax act was considered in this case and it was emphasized that the condition precedent for assumption of jurisdiction under Section 34, if not satisfied then there is no reason to refuse a proper relief in a petition under Article 226 of the Constitution. Section 34 was considered in detail and the import and meaning of the words "reason to believe" was taken note of and the principle laid is that the opinion formed by the Income Tax Officer should be based on cogent and substantial material which makes the Income Tax authority feel that the requirement of the condition precedent is made out. This case was thereafter, again considered in the case

of *M/s Rai Singh Dev* (supra), wherein the Hon'ble Supreme Court has emphasized that before issuing a statutory notice under Section 34(1)(a), the Income Tax Officer must have reason to believe that by reasons of omission or failure on the part of the assessee to disclose fully and truly all material fact necessary for assessment for the year in question, some income, profit or gain chargeable to income tax has escaped assessment. It has been held in this case that existence of this pre-condition is an extremely important circumstance which is required to be satisfied to enable exercise of jurisdiction by the Income Tax Officer. Thereafter the case of *Chhugamal Rajpal Vs. S.I. Chaliha & others* - (1971)1 SCC 453 is considered by the Supreme Court and it has been held that the Income Tax Officer should have some relevant material before him from which he could draw inference that income has escaped assessment and the same is not based on vague feeling and suspicion of the officer to say that some income has escaped assessment. In the case of *Parashuram Pottery Works Co. Ltd.* (supra) Section 147 of the Income Tax Act is considered and again the requirement of fulfilling the condition i.e. "reason to believe" as a condition precedent for exercising jurisdiction is considered and it is held that an Income Tax Officer acquires jurisdiction to issue notice under Section 148 if he has reason to believe that income chargeable to tax has escaped assessment, it is held that merely based on the fact that there is some omission or failure on the part of the assessee, action cannot be taken if the omission or failure is not established and the requirement of reason to believe is not fulfilled. In the case of *Lakhmani Mewal Das* (supra) it has been held that the reason which lead to the formation of belief as is contemplated under Section 147(a) of the Act must have material bearing on the question of escapement of income. However, it has been held in this case that the existence of the belief can be challenged by the assessee but not the sufficiency of the reason for the belief. In this case it has been held that the material available for forming this belief should be relevant, should not be vague and indistinct or farfetched. It is held that reason for formation of belief must be held in good faith and should not be mere pretense, there has to be live link or close nexus which should be there in the material and the assessee. Finally a Single Bench of this Court had also considered this question in the case of *Arjun Singh* (supra), after detailed analysis of various judgments, both the questions with regard to exercise of the jurisdiction in a petition under Article 226 of the Constitution, the material available for change of opinion as is permissible under law and the difference between "recording of reason",

"reason to believe" and "reason for suspicion" have been considered and the law laid down is that an order passed adverse to the interest of the assessee should not be based on irrational or irrelevant consideration, it should be based on objective and relevant material and merely on the *ipse dixit* of the officer on vague, farfetched fanciful, remote information or allegation is not sufficient. It is held that there should be clear nexus between the material and the reason to believe. Accordingly, on a complete reading of the case law in *extensio* cited by Shri Kishore Shrivastava before us, we find that most of the cases deal with two aspects, first, the jurisdiction available to this court in such matters under Article 226 of the Constitution and the principles to be followed for recording a finding to say that the condition precedent for coming to the conclusion that the Assessing Officer has reasons to believe exists are laid down.

11. Accordingly, we find that the question of "reasons to believe" as contemplated under Section 147(a) has to be determined on the basis of the material available on record. Shri Kishore Shrivastava, learned Senior Counsel referred to the material, primarily the noting in the diaries and the loose papers to say that they are not sufficient enough to hold that there are "reasons to believe" in the mind of the competent authority to say that income liable for tax has escaped assessment. However, the Revenue has relied heavily upon the case of *Rajesh Jhaveri Stock Brokers* (supra) and they say at this stage when the assessment is in progress, this Court need not interfere into the matter and relied upon the principle of existence of statutory alternate remedy to say that interference into the writ petition is not called for.

12. Shri Sanjay Lal has stated that apart from the notings pointed out by the Senior Counsel for the petitioner, brought on record, there are other material like statement of Shri A. K.S. Raju, Executive Director of Nagarjuna Construction Ltd., wherein he speaks about grant of illegal gratification, documents and various seized documents indicating purchase of air tickets in the name of petitioner and his family members which goes to show that he has granted undue favour to the Contractors through their Liaison Officer Shri Mukesh Sharma. He submits that by analyzing all these material when the matter is to be considered by the Assessing Officer, this Court at this stage cannot go into the sufficiency of the material and interfere. That being so, we will consider the judgment rendered by the Supreme Court in the case of *Rajesh Jhaveri Stock Brokers* (supra) as Shri Sanjay Lal had placed heavy

reliance on this judgment. In the case of *Rajesh Jhaveri Stock Brokers* (supra) even though as stated by Shri Kishore Shrivastava, learned Senior Counsel, various judgments relied upon by Shri Kishore Shrivastava like the judgment in the case of *Calcutta Discount Co. Ltd.* (supra), *Parashuram Pottery Works* (supra) have not been considered but the question had been considered in the backdrop of the effect of the substitution to Section 147 brought into force upto 1st April, 1998 and in para 13 detailed analysis has been made in the following manner:-

> "13. One thing further to be noticed is that intimation under section 143(1)(a) is given without prejudice to the provisions of section 143(2). Though technically the intimation issued was deemed to be a demand notice issued under section 156, that did not per se preclude the right of the Assessins Officer to proceed under section 143(2). That right is preserved and is not taken away. Between the period from April 1, 1989 to March 31, 1998, the second proviso to section 143(1)(a), required that where adjustments were made under the first proviso to section 143(1) (a), an intimation had to be sent to the assessee notwithstanding that no tax or refund was due from him after making such adjustments. With effect from April 1, 1998, the second proviso to section 143(1)(a) was substituted by the Finance Act, 1997, which was operative till June 1, 1999. The requirement was that an intimation was to be sent to the assessee whether or not any adjustment had been made under the first proviso to section 143(1) and notwithstanding that no tax or interest was found due from the assessee concerned. Between April 1, 1998 and May 31, 1999, sending of an intimation under section 143(1)(a) was mandatory. Thus, the legislative intent is very clear from the use of the word intimation as substituted for assessment that two different concepts emerged. While making an assessment, the Assessing Officer is free to make any addition after grant of opportunity to the assessee. By making adjustments under the first proviso to section 143(1) (a), no addition which is impermissible by the information given in the return could be made by the Assessing Officer. The reason is that under section 143(1) (a) no opportunity is granted to the assessee and the

Assessing Officer proceeds on his opinion on the basis of the return filed by the assessee. The very fact that no opportunity of being heard is given under section 143(1)(a) indicates that the Assessing Officer has to proceed accepting the return and making the permissible adjustments only. As a result of insertion of the Explanation to section 143 by the Finance (No. 2) Act of 1991 with effect from October 1, 1991, and subsequently with effect from June 1, 1994, by the Finance Act, 1994, and ultimately omitted with effect from June 1, 1999, by the Explanation as introduced by the Finance (No. 2) Act of 1991 an intimation sent to the assessee under section 143(1)(a) was deemed to be an order for the purposes of section 246 between June 1, 1994, to May 31, 1999, and under section 264 between October 1, 1991, and May 31, 1999. It is to be noted that the expressions intimation and assessment order have been used at different places. The contextual difference between the two expressions has to be understood in the context the expressions are used. Assessment is used as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the tax payer. In the scheme of things, as noted above, the intimation under section 143(1)(a) cannot be treated to be an order of assessment. The distinction is also well brought out by the statutory provisions as they stood at different points of time. Under section 143(l)(a) as it stood prior to April 1, 1989, the Assessing Officer had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with and instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the Legislature, i.e., to minimize the departmental work to scrutinize each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D. K. Jain J) in Apogee International Limited v. Union of India [(1996) 220 ITR 248]. It may be noted above that under the first proviso to the newly substituted section 143(1), with effect from June 1, 1999,

except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. It is significant that the acknowledgment is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any assessment is done by them? The reply is an emphatic no. The intimation under section 143(1)(a) was deemed to be a notice of demand under section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment under section 143(1)(a), the question of change of opinion, as contended does not arise."

(Emphasis Supplied)

Finally, after taking note of the provisions of Section 148 and 147 and its amendment from time to time in para 16, the matter has been dealt with in the following manner :-

"16. Section 147 authorizes and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase reason to believe would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Delhi High Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [1991 (191) ITR 662], for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that

stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is reason to believe, but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see ITO v. Selected Dalurband Coal Co. Pvt. Ltd. [1996 (217) ITR 597 (SC)] ; Raymond Woollen Mills Ltd. v. ITO [1999 (236) ITR 34 (SC)]."

(Emphasis Supplied)

From a perusal of the aforesaid principle of law laid down by the Supreme Court, we find that the expression "reason to believe" cannot be read to say that Assessment Officer should have finally ascertained the effect by legal evidence or conclusion. At the stage when the matter is pending, the final outcome of the proceeding is not relevant. At the stage when only notice has been issued, the only consideration would be as to whether there was reasonable material available based on which a prudent man approach can be adopted to form a requisite belief. Whether the material would conclusively prove the escapement or not is not of concern at this stage. If this be the principle of law as laid down by the Supreme Court with reference to the matter, we have no hesitation in holding that objection raised by the revenue in the matter of interference at this stage has much force. In fact, in the judgment rendered in the case of *Rajesh Jhaveri Stock Brokers (P) Ltd.* (supra), the words "intimation" and "assessment" used under Section 143 in different places is considered to be with reference to different context and in the judgment the final conclusion is that if the assessment has not been completed, accuracy and sufficiency of the material should not be examined. This also is the principle laid down in the case of *Raymond Woolen Mills Ltd.* (supra) relied upon by Shri Sanjay Lal. The Kerala High Court in the case of G. Suresh, the Punjab & Haryana High Court in the case of Bhajan Lal have also laid down identical principle. In fact in para 8 of the judgment rendered by the Punjab & Haryana High Court in the case of *Bhajan Lal* (supra), reference is made to a judgment of Supreme Court in the case of *Phoolchand Bajrang Lal Vs. ITO* -

(1993)113 CTR (SC) 436 and the following principles have been laid down:-

"8. The ambit and scope of ss.147 and 148 of the Act was considered by the Supreme Court in *Phool Chand Bajrang Lal Vs. ITO* (1993) 113 CTR (SC) 436: (1993) 203 ITR 456 (SC): TC 51R.825. After reviewing several judicial precedents on the subject, a two Judges Bench of the Supreme Court held as under:-

"From a combined review of the judgments of this Court, it follows that an Income-tax Officer acquires jurisdiction to reopen assessment under Section 147(a) read with Section 148 of the Income Tax 1961 only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons which he must record, to believe that by reason of omission or failure on the part of the assessee to make a true ana full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profit or gains chargeable to income tax has escaped assessment. He may start reassessment proceedings either because some fresh facts come to light which where not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since, the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief. It would be immaterial whether the Income-tax Officer at the

> time of making the original assessment could or, could not have found by further enquiry or investigation, whether the transaction was genuine or not, if one the basis of subsequent information, the Income-tax Officer arrives at a conclusion, after satisfying the twin conditions prescribed in Section 147(a) of the Act, that the assessee had not made a full and true disclosure of the material facts at the time of original assessment and therefore income chargeable to tax had escaped assessment ....."
>
> One of the purpose of s.147 appears to us to be to ensure that a party cannot get away by willfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say 'you accepted my lie, now your hands are tied and you can do nothing'. It would be a travesty of justice to allow the assessee that latitude."
>
> *(Emphasis Supplied)*

13. If we analyze the facts of the present case in the backdrop of the aforesaid legal principle, we find that the petitioner wants this Court to hold that the material collected by the Department and relied upon, namely the entries/ notings made as indicated in the loose slip has no nexus to the petitioner and therefore, the entire proceeding should be quashed. Whereas, the Revenue wants this Court to hold that if these loose papers are considered and if they are read along with the statement of the officer of the Contractor and certain other material collected, particularly in the matter of purchase of tickets by Mahesh Sharma in the name of petitioner and his family members an enquiry into the matter is called for, which should not be stopped at this stage in a petition under Article 226 of the Constitution. When we analyze the material available on record, we find that it is a case where the enquiry into the matter by the Income Tax Department is still in progress and considering the fact that the Revenue has indicated that the petitioner was a key person having control over the decision making process, it is not appropriate for this Court to hold that material produced are not sufficient enough or reliable enough to proceed in the matter. On the contrary, when the law says that sufficiency or correctness of the material is not to be looked into at this stage by a Writ Court, this Court has to leave everything to the Assessment Officer, who, after considering each

and every aspect of the matter including the judgments relied upon by the petitioner and the objections to be raised to decide the matter. The judgment relied upon by Shri Kishore Shrivastava, learned Senior Counsel in the peculiar facts and circumstances of the present case cannot be applied in this case to quash the proceedings.

14. Even though in the judgment relied upon by Shri Kishore Shrivastava, certain distinction is carved out in the matter of fulfilling the requirement of "reason to suspect" and "reason to believe" and cognizance to be taken of loose paper and the nexus between the material collected and the assessee etc. but all those cases were decided in the context of legal principle applicable mostly after orders of assessment were passed or assessment were re-opened after they had been concluded, unlike in this case wherein in view of law laid down in the case of *Rajesh Jhaveri Stock Brokers* (supra), we have to hold that assessment process is still in progress and therefore, question of change of opinion or reopening of assessment already concluded will not arise. That being the difference between those cases and the present case, we are not inclined to accept the submissions made by Shri Kishore Shrivastava, learned Senior Counsel.

15. During the course of hearing it was indicated by Shri Kishore Shrivastava, learned Senior Counsel that the entire process of awarding the contract and its finalization was undertaken after the petitioner had left on deputation to the Government of India. This aspect of the matter has been considered by the Revenue in the detailed reason given for proceeding further in the matter and they have indicated in the said reasons that when the petitioner was holding the post of Commissioner Urban Administer (sic:Administration) and Development in M.P., various process in pursuance to the tender earlier issued and subsequently issued on modification took place and shortlisting of the two contractors namely M/s Nagarjun Construction Company, Hyderabad and M/s Simplex Infrastructure Ltd., Calcutta and after declaring them to be qualified till the stage of technical bid was undertaken by modifying the terms and conditions of the tender documents and certain process was also undertaken for eliminating the other companies and this process played a vital role in the ultimate award of contract. It is indicated by the Revenue that by following these process a final decision provisionally was already taken for awarding the contract to these parties and as all major decision except exclamation of project cast was undertaken, while the petitioner

was holding the key post of Commissioner, Urban Administration and Development. It is indicated by the Revenue that the petitioner played a key role in controlling the decision making process which ultimately led in eliminating all other Companies, shortlisting the two companies in question and it has been held that by acting as intermediate between Nagar Nigam and Commissioner of Urban Administration and Development, petitioner was indicated in various steps pertaining to award of contract. Therefore, merely, because it is said that petitioner had gone on deputation he cannot be exonerated of the charges levelled. That being the reason which weighed with the revenue authorities to proceed further in the matter, therefore, it is not appropriate for a writ Court exercising limited jurisdiction in a petition under Article 226 of the Constitution at this stage to interfere as enquiry into various aspects of the matter which was the prime consideration which weighed with the Revenue for proceeding in the matter may be required. The Revenue on a just and proper consideration has taken the decision and therefore, we are not inclined to accept this contention advanced by Shri Kishore Shrivastava.

16. On the contrary, it is a fit case where the department should be granted liberty to proceed in the matter and thereafter take a decision after evaluating each and every aspect of the matter. This is also the principle laid down by the Supreme Court in the case of *Vijaybhai N. Chandrani* (supra) relied upon by the learned Counsel for the Revenue. In the said case, the Hon'ble Supreme Court has held that the assessee cannot be permitted to invoke writ jurisdiction of the High Court at the first instance without exhausting the statutory remedy available under the Income Tax Act. It was held by the Hon'ble Supreme Court in the said case that in the stage of assessment of the proceeding the High Court ought not to have entertained the writ petition, instead should have directed the assessee to appear before the AO, permit him to take a decision and after framing of assessment order, the assessee should seek indulgence into the matter. In para 16 and 17 of the said judgment, Hon'ble Supreme Court has dealt with the matter in the following manner:-

> "16. In the present case, the assessee has invoked the Writ jurisdiction of the High Court at the first instance without first exhausting the alternate remedies provided under the Act. In our considered opinion, at the said stage of proceedings, the High Court ought not have entertained the Writ Petition and instead should have directed the assessee to file reply to the

said notices and upon receipt of a decision from the Assessing Authority, if for any reason it is aggrieved by the said decision, to question the same before the forum provided under the Act.

17. In view of the above, without expressing any opinion on the correctness or otherwise of the construction that is placed by the High Court on Section 153C, we set aside the impugned judgment and order. Further, we grant time to the assessee, if it so desires, to file reply/objections, if any, as contemplated in the said notices within 15 days' time from today. If such reply/objections is/are filed within time granted by this Court, the Assessing Authority shall first consider the said reply/objections and thereafter direct the assessee to file the return for the assessment years in question. We make it clear that while framing the assessment order, the Assessing Authority will not be influenced by any observations made by the High Court while disposing of the Writ Petition. If, for any reason, the assessment order goes against the assessee, he/it shall avail and exhaust the remedies available to him/it under the Act, 1961."

17. Keeping in view all these factors and the totality of the facts and circumstances of the case, we are of the considered view that at this stage it is not appropriate for us to interfere into the matter and quash the proceedings initiated. Instead the petitioner should appear before the AO, raise all objections and thereafter it is for the Assessing Officer to examine all aspects of the matter and take a decision in accordance with law. If the petitioner has any grievance still existing after such a decision is taken, i.e. after the amount is finalized, petitioner can challenge the same in accordance with law. In the present set of circumstances we are not inclined to interfere into the matter because for interfering into the matter we will be required to assess the material available on record and say that they are not sufficient enough to proceed in the matter and we find that when the assessment proceedings are still on discharging this function at this stage by this Court in a petition under Article 226 of the Constitution is not warranted.

18. The petition is therefore, dismissed.

Petition dismissed.

I.L.R. [2017] M.P., 61
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 10036/2013 (Jabalpur) decided on 23 May, 2016

JAIPRAKASH ASSOCIATES LTD. ...Petitioner
Vs.
MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION ...Respondent

(Along with W.P. No. 10658/2013, W.P. No. 12545/2013, M.A. No. 2524/2013, W.P. No. 15461/2013, M.A. No. 136/2014, W.P. No. 2041/2014 & W.P. No. 2048/2014)

A. Vidyut Sudhar Adhiniyam, M.P., 2000 (4 of 2001), Section 41 and Electricity Act (36 of 2003), Section 111 - Appeal - Preliminary objection - **Whether appeal u/S 41 of the Adhiniyam of 2000 is maintainable against the order of the M.P. Electricity Regulatory Commission - Held - Though the Regulatory Commission is established under the said Adhiniyam, the powers and functions of the Commission is not traceable to the said Adhiniyam - Impugned order passed by the Commission under the Act of 2003 - It is beyond comprehension as to how appeal u/S 41 of the said Adhiniyam would lie - Statutory appeal u/S 111 of the Act of 2003 would lie to the Appellate Tribunal - Appeal u/S 41 of the said Adhiniyam not maintainable - Appeals disposed of. (Paras 10 to 26)**

क. विद्युत सुधार अधिनियम, म.प्र., 2000, (2001 का 4), धारा 41 एवं विद्युत अधिनियम (2003 का 36), धारा 111 – अपील – प्रारंभिक आक्षेप – क्या म.प्र. विद्युत विनियामक आयोग के आदेश के विरूद्ध, 2000 के अधिनियम की धारा 41 के अंतर्गत अपील पोषणीय है – अभिनिर्धारित – यद्यपि उक्त अधिनियम के अंतर्गत विनियामक आयोग की स्थापना हुई है, परंतु उक्त अधिनियम से आयोग की शक्तियों एवं कार्यों का पता नहीं चलता है – 2003 के अधिनियम के अंतर्गत आयोग द्वारा आक्षेपित आदेश पारित किया गया – यह समझ से परे है कि उक्त अधिनियम की धारा 41 के अंतर्गत अपील कैसे होगी – 2003 के अधिनियम की धारा 111 के अंतर्गत कानूनी अपील अपीली अधिकरण में होगी – उक्त अधिनियम की धारा 41 के अंतर्गत अपील पोषणीय नहीं – अपीलों का निपटारा किया गया।

B. Constitution - Article 226/227 and Electricity Act (36 of 2003), Section 111 - Appeal - **Writ petition against order of MPERC -**

Preliminary objection - Whether writ petition under Article 226/227 of the Constitution against the order of Regulatory Commission is maintainable or not - Held - As the constitutional validity of a Regulation is not questioned and alternate statutory remedy of appeal before Appellate Tribunal u/S 111 of 2003 Act lies against the order of Commission, so writ petition under Article 226/227 of the Constitution is not maintainable - Writ petition dismissed with liberty to avail efficacious statutory remedy of appeal u/S 111 of 2003 Act. (Paras 27 to 31)

ख. संविधान – अनुच्छेद 226/227 एवं विद्युत अधिनियम (2003 का 36), धारा 111 – अपील – एम.पी.ई.आर.सी. के आदेश के विरूद्ध रिट याचिका – प्रारंभिक आक्षेप – क्या विनियामक आयोग के आदेश के विरूद्ध संविधान के अनुच्छेद 226/227 के अंतर्गत रिट याचिका पोषणीय है या नहीं – अभिनिर्धारित – चूँकि विनियमन की संवैधानिक विधिमान्यता को चुनौती नहीं दी गई है एवं आयोग के आदेश के विरूद्ध 2003 के अधिनियम की धारा 111 के अंतर्गत अपीली अधिकरण के समक्ष अपील का वैकल्पिक कानूनी उपचार होगा, इसलिए संविधान के अनुच्छेद 226/227 के अंतर्गत रिट याचिका पोषणीय नहीं है – 2003 के अधिनियम की धारा 111 के अंतर्गत अपील के प्रभावकारी कानूनी उपचार का अवलम्ब लेने की स्वतंत्रता के साथ रिट याचिका खारिज की गई।

Cases referred:

(2002) 8 SCC 715, (1979) 3 SCC 431, (2007) 9 SCC 109, (2000) 3 SCC 640, (2010) 4 SCC 603, (2015) 6 SCC 773.

Aditya Adhikari with *Satish Chaturvedi*, for the appellant in M.A. No. 2524/2013

Avinash Zargar, for the appellant in M.A. No. 136/2014 and that of petitioner in W.P. No. 10036/2013, W.P. No. 10658/2013, W.P. No. 12545/2013 and W.P. No. 15461/2013.

Mohammad Siddique, for the petitioners in W.P. No. 2041/2014 and W.P. No. 2048/2014.

M.L. Jaiswal with *Pradeep Banerjee*, for the respondent-M.P. Electricity Regulatory Commission.

Divya Kirti Bohrey, G.A. for the respondent-State.

ORDER

SANJAY YADAV, J. :- On 28.4.2016 taking note of the fact that a co-ordinate Bench of this Court on 12.8.2015 had deferred the hearing of these

batch of Miscellaneous Appeals and Writ Petitions for a period of three months, because of the challenge to the order passed by High Court of Andhra Pradesh, before the Supreme Court in a similar matter. That, order-dated 12.8.2015 was questioned in an Intra-Court Appeal No.831/2015; wherein, the Division Bench on 4.11.2015 observed that the statutory remedy of Appeal under Section 111 of the Electricity Act, 2003 (hereinafter referred to as "2003 Act"), being available, exercise of writ jurisdiction is not required; the matters were directed to be posted on 9.5.2016, as it was informed that, the Writ Appeal No.831/2015 was coming up for hearing on 5.5.2016.

2. When these matters are taken up today, it is informed by learned counsel for the petitioners/appellants that Writ Appeal No.831/2015 is adjourned and posted after ensuing summer vacation; accordingly, adjournment was sought. The respondents, however, have vehemently opposed the adjournment. It is urged on behalf of respondents that taking into consideration the existing statutory provision, neither an Appeal under Section 41 of Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 (for brevity "2000 Adhiniyam"), nor the Writ Petition against the order of Madhya Pradesh Electricity Regulatory Commission (for short "State Commission") is maintainable, because of the statutory remedy provided under Section 111 of 2003 Act. The respondent's counsel, therefore, insisted for hearing the matter on preliminary objection as to maintainability of these proceedings and for vacating of stay order. It is contended that there is no stay of proceedings of these Misc. Appeals and Writ Petitions by the Division Bench.

3. The matter is, therefore, heard on the preliminary objection, as to whether these proceedings emanating from the order passed by the State Commission are tenable, and whether the petitioners/appellants can be directed to avail the remedy under Section 111 of 2003 Act.

4. These proceedings, as evident from material on record, emanates from the order-dated 31.12.2012 passed by the State Commission in a *suo motu* Petition No.73/2012 and the consequential action of recovering the dues.

5. The State Commission on receiving the Petition No.50/2010 from M.P. Power Transmission Co. Ltd. in the matter of determination of parallel operation charges in case of intra-state generating units, had decided to cause study for determination of parallel operation charges. The work was contracted out to Electrical Research and Development Association (ERDA). The said

Agency submitted "Evaluation of Parallel Operation Charges" study, concluding that due to harmonic generation, negative phase sequence currents, reactive power from grid etc., the captive power plants (CPPs) loads are harmful for smooth and efficient operation without the help of utility grid. The ERDA, accordingly, suggested that grid support charges/parallel operation charges without the help of utility grid and worked out the parallel operation charges (grid support charges) @ 53.32 per KVA.

6. The State Commission, after placing ERDA report in public domain and considering the comments received from various stakeholders, including these appellants and writ petitioners, registered a *suo motu* petition for determination of parallel operation charges (grid support charges) and after hearing the stakeholders, concluded -

> "5. On considering the submissions of the respondents, the Commission is of the view that:
>
> (a) The parallel operation charges shall not be applicable if the CPPs are not connected with the grid.
>
> (b) The purposes of levying supply affording charges and standby charges are different. These are not related to the parallel operation of the CPPs with the grid.
>
> (c) Parallel operation charges cannot be made a part of transmission charges as these charges cannot be levied on all consumers.
>
> (d) Auxiliary consumption of captive generating plants as a parameter may be deducted from the installed capacity of the plant for computation of parallel operation charged.
>
> 6. The Commission also finds that the object of the Electricity Act, 2003, is to delicense generation and to freely permit CPPs. In order to promote CPPs and looking to the facility being availed by CPPs from the grid, the Commission has come to the conclusion that it would be appropriate that parallel operation charges be levied at the rate of Rs.20/- per KVA per month on the capacity of CPP (after deducting load pertaining to auxiliary consumption) connected to the grid."

7. It is this order which is being challenged by way of an Appeal under Section 41 of 2000 Adhiniyam. Whereas, some of the stakeholders have challenged it by way of writ petition under Article 226 of the Constitution of India.

8. Justifying the challenge under Section 41 of 2000 Adhiniyam and countering the preliminary objections that an Appeal under Section 111 of 2003 Act would lie, it is urged on behalf of the Appellants that, 'Electricity' being mentioned at Entry 38 of List III-Concurrent List of Schedule 7 of the Constitution of India, enabling both the parliament and the State Legislature competent to enact laws on the subject and that M.P. Vidyut Sudhar Adhiniyam, 2000 enacted by the State Legislature was reserved for the consideration of the President and has received his assent on 12.2.2001 and by virtue of sub-section (3) of Section 185 of 2003 Act, the provisions of 2000 Adhiniyam, not inconsistent therewith, being saved, and that Chapter III of 2000 Adhiniyam provides for creation of M.P. Electricity Regulatory Commission and also defines its functions and powers. And, that powers under Section 9(r) of 2000 Adhiniyam and under Section 181(2)(zp) of 2003 Act, covers the residuary powers. And, the thrust of Appeal is that the MPSERC has no jurisdiction to pass the impugned order as parallel operation charges is neither a charge nor tariff and the State Commission being entitled to determine tariff and these charges are not tariff, it is beyond its jurisdiction to determine. And, being beyond its power and jurisdiction, an Appeal before Central Appellate Tribunal under Section 111 of 2003 Act, would be a futile exercise, as it being a creation of 2003 Act, cannot look into the validity of the order passed by the State Commission on the issue of parallel operation charges.

9. The Respondents on their turn have embedded to the objection as to maintainability of these Misc. Appeals and Writ Petitions contending *inter alia* that an Appeal under Section 111 of 2003 Act lie before the Appellate Tribunal.

10. Considered the rival submissions.

11. 2003 Act is an Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies

regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.

12. Section 82 of 2003 Act provides for "Constitution of State Commission" [as defined under Section 2(64)]. Sub- Section (1) and its provisos, which we are presently concerned with, stipulate :

> (1) Every State Government shall, within six months from the appointed date, by notification, constitute for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission:
>
> Provided that the State Electricity Regulatory Commission, established by a State Government under section 17 of the Electricity Regulatory Commissions Act, 1998 and the enactments specified in the Schedule, and functioning as such immediately before the appointed date, shall be the State Commission for the purposes of this Act and the Chairperson, Members, Secretary, and other officers and other employees thereof shall continue to hold office, on the same terms and conditions on which they were appointed under those Acts:
>
> Provided further that the Chairperson and other Members of the State Commission appointed, before the commencement of this Act under the Electricity Regulatory Commissions Act, 1998 or under the enactments specified in the Schedule, may on the recommendations of the Selection Committee constituted under sub-section (1) of Section 85 be allowed to opt for the terms and conditions under this Act by the concerned State Government."

13. Furthermore, sub-section (3) of Section 185 of 2003 Act, which is a repeal and saving clause, mandates :

> "(3) The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable."

14. Thus provisions of Adhiniyam 2000 listed at Serial No.8 of the

Schedule appended with 2003 Act is saved to the extent they are not inconsistent with the provisions of 2003 Act.

15. Now, coming back to first proviso to sub-section (1) of Section 82 of 2003 Act, it says that the State Electricity Regulatory Commission, established by a State Government under section 17 of the Electricity Regulatory Commissions Act, 1998 and the enactments specified in the Schedule, and functioning as such immediately before the appointed date, shall be the State Commission for the purposes of this Act; meaning thereby that, State Electricity Regulatory Commission, though established under Adhiniyam, 2000, a State Legislation, but when discharging function under Section 86 and exercising powers under Section 181 of 2003 Act, it shall be the Commission under 2003 Act and not under the State Legislation i.e. Adhiniyam, 2000.

16. In the case at hand, the appellants and the petitioners do not dispute that the impugned order passed by the State Commission is purportedly under 2003 Act and not under Adhiniyam, 2000. Though, it is contended that the State Commission has exceeded the jurisdiction vested in it under 2003 Act; it is, however, not the case of the appellants and petitioners that the powers and functions exercised by the State Commission is traceable to Adhiniyam, 2000. If the action is not traceable to Adhiniyam 2000, it is beyond comprehension as to how an Appeal under Section 41 of Adhiniyam, 2000 would lie. Because said section provides for an Appeal to the High Court when a decision is taken by the State Commission under said Act i.e. Adhiniyam, 2000. In other words, it cannot be said that the person is aggrieved of any decision or order of the State Commission passed under Adhiniyam, 2000. When such forum under Section 41 of Adhiniyam 2000 is not available, even a petition under Article 226/227 of the Constitution of India will not be tenable in view of specific statutory appellate provision i.e. Section 111 of 2003 Act, which stipulates :

> **"111. Appeal to Appellate Tribunal.** - (1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity:
>
> Provided that any person appealing against the order of the adjudicating officer levying any penalty shall, while filing the appeal, deposit the amount of such penalty:

Provided further that wherein any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

(2) Every appeal under sub-section (1) shall be filed within a period of forty five days from the date on which a copy of the order made by the adjudicating officer or the Appropriate Commission is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(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, confirming, modifying or setting aside the order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned adjudicating officer or the Appropriate Commission, as the case may be.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal:

Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within the said period.

(6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer or the Appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit."

17. Pertinent it is to note that necessity of such an expert statutory Appellate Body as is now provided vide Section 111 of 2003 Act, was expressed by the Supreme Court in *West Bengal Electricity Regulatory Commission Vs. CESC Ltd.* (2002) 8 SCC 715, wherein their Lordships were pleased to observe :

"102. We notice that the Commission constituted under Section 17 of the 1998 Act is an expert body and the determination of tariff which has to be made by the Commission involves a very highly technical procedure, requiring working knowledge of law, engineering, finance, commerce, economics and management. A perusal of the report of the ASCI as well as that of the Commission abundantly proves this fact. Therefore, we think it would be more appropriate and effective if a statutory appeal is provided to a similar expert body, so that the various questions which are factual and technical that arise in such an appeal, get appropriate consideration in the first stage also. From Section 4 of the 1998 Act, we notice that the Central Electricity Regulatory Commission which has a Judicial Member as also a number of other Members having varied qualifications, is better equipped to appreciate the technical and factual questions involved in the appeals arising from the orders of the Commission. Without meaning any disrespect to the Judges of the High Court, we think neither the High Court nor the Supreme Court would in reality be appropriate appellate forums in dealing with this type of factual and technical matters. Therefore, we recommend that the appellate power against an order of the State Commission under the 1998 Act should be conferred either on the Central Electricity Regulatory Commission or on a similar body. We notice that

under the Telecom Regulatory Authority of India Act, 1997 in Chapter IV, a similar provision is made for an appeal to a special Appellate Tribunal and thereafter a further appeal to the Supreme Court on questions of law only. We think a similar appellate provisions may be considered to make the relief of appeal more effective."

18. That, the Appellate Tribunal established under Section 110 of 2003 Act consists a Chairperson and three members. As for the qualification, Section 113 envisages : -

> **113. Qualification for appointment of Chairperson and Members of Appellate Tribunal:-** (1) A person shall not be qualified for appointment as the Chairperson of the Appellate Tribunal or a Member of the Appellate Tribunal unless he-
>
> (a) in the case of the Chairperson of the Appellate Tribunal, is, or has been, a judge of the Supreme Court or the Chief Justice of a High Court; and
>
> (b) in the case of a Member of the Appellate Tribunal,-
>
> (i) is, or has been, or is qualified to be, a Judge of a High Court; or
>
> (ii) is, or has been, a Secretary for at least one year in the Ministry or Department of the Central Government dealing with economic affairs or matters or infrastructure; or
>
> (iii) is, or has been, a person of ability and standing, having adequate knowledge or experience in dealing with the matters relating to electricity generation, transmission and distribution and regulation or economics, commerce, law or management.
>
> ...
>
> ..."

19. In view whereof, since there is a Statutory Expert Appellate Tribunal to hear the Appeal from the order passed by the State Commission, this Court refrain from entertaining an appeal under Section 41 of Adhiniyam, 2000 or a Writ Petition under Article 226/227 of the Constitution of India.

20. There is one more reason why the forum under Section 41 of Adhiniyam 2000 is not available to the appellant. Sub-section (3) of Section 185 of 2003 Act mentions that only such provisions of the enactments specified in the Schedule, not inconsistent with its (i.e. 2003 Act's) provision, shall apply to the States in which such enactments are applicable. In the present case, the State Commission though constituted under Adhiniyam 2000, has purportedly exercised the powers in discharge of its function under 2003 Act. That being so, against its order, an Appeal under Section 111 of 2003 Act would lie, rather under Adhiniyam 2000, as otherwise the inconsistency clause will bar the forum under Section 41 of Adhiniyam, 2000.

21. The reliance placed on the decision in *M. Karunanidhi vs Union of India* (1979) 3 SCC 431 and more particularly, the proposition carved out in paragraph 35, wherein it is laid down:-

> "35. On a careful consideration, therefore, of the authorities referred to above, the following propositions emerge:-
>
> 1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.
>
> 2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.
>
> 3. That where the two statutes occupy a particular field, there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.
>
> 4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field."

22. The said proposition in given facts of present case is of no assistance to the appellant to overcome the aspect of the availability of forum under Section 111 of 2003 Act, rather under Section 41 of Adhiniyam, 2000.

23. Similarly, decisions in *Dharappa vs. Bijapur Coop. Milk Producers*

Societies Union Ltd. (2007) 9 SCC 109 and *Bank of India vs. Lekhimoni Das* (2000) 3 SCC 640 turns on their own facts and are of no assistance to the appellants to overcome the preliminary objections.

24. The decision in *PTC India Limited vs Central Electricity Regulatory Commission* (2010) 4 SCC 603; wherein the larger Bench was concerned with the following question of law, viz.

> (i) Whether the Appellate Tribunal constituted under the Electricity Act, 2003 (the 2003 Act) has jurisdiction under Section 111 to examine the validity of Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 framed in exercise of power conferred under Section 178 of 2003 Act ?
>
> (ii) Whether Parliament has conferred power of judicial review on the Appellate Tribunal for Electricity under Section 121 of the 2003 Act ?
>
> (iii) Whether capping of trading margins could be done by the CERC (the Central Commission) by making a Regulation in that regard under Section 178 of the 2003 Act ?
>
> - their Lordships were pleased to hold :
>
> "92.(i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by Orders (decisions).
>
> (ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations.
>
> (iii) A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity

can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

(iv) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the Tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the Regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.

(v) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.

(vi) Applying the principle of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze). Accordingly, we hold that the CERC was empowered to cap the trading margin under the authority of delegated legislation under Section 178 vide the impugned notification dated 23.1.2006.

(vii) Section 121, as amended by Electricity (Amendment) Act 57 of 2003, came into force with effect from 27.1.2004. Consequently, there is no merit in the contention advanced that the said section is not yet been brought into force.

Conclusion:

93. For the aforesaid reasons, we answer the question raised in the reference as follows:

The Appellate Tribunal for Electricity has no jurisdiction

to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003. The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India."

25. Present being not a case wherein validity of Regulations framed by the Central Electricity Regulatory Commission under Section 178 of 2003 Act, the *Authority of PTC* (supra) is of no help either to the appellants, nor to the petitioners.

26. These are the reasons which lead this Court to uphold the preliminary objection as to maintainability of Appeal under Section 41 of Adhiniyam, 2000.

27. Now coming to the maintainability of writ petition under Article 226/227 of the Constitution of India, besides the reasons for non-maintainability of Appeal under Section 41 of Adhiniyam 2000, reference can be had of decision in *W.B. Electricity Regulatory Comm. vs. CESC Ltd.* (supra) wherein it is held:

"44. Having held on merits that the Regulations are not arbitrary and are in conformity with the provisions of the Act, we will now consider whether the High Court could have gone into this issue at all in an appeal filed by the respondent Company. First of all, we notice that the High Court has proceeded to declare the regulations contrary to the Act in a proceeding which was initiated before it in its appellate power under Section 27 of the Act. The appellate power of the High Court in the instant case is derived from the 1998 Act. The Regulations framed by the Commission are under the authority of subordinate legislation conferred on the Commission in Section 58 of the 1998 Act. The Regulations so framed have been placed before the West Bengal Legislature, therefore it has become a part of the statute. That being so, in our opinion the High Court sitting as an appellate court under the 1998 Act could not have gone into the validity of the said Regulations in exercise of its appellate power.

...

50. From the above observations of this Court in the said judgment extracted hereinabove, it is clear that even the High Court exercising its power of appeal under a particular statute cannot exercise the constitutional power under Article 226 or 227 of the Constitution. The position of course would be entirely different if the aggrieved party independently challenges the provision by way of a writ petition in the High Court invoking the High Court's constitutional authority to do so. Therefore we are of the considered opinion that the High Court sitting as an appellate court under a statute could not have exercised its writ jurisdiction for the purpose of declaring a provision of that law as invalid when there was no separate challenge by way of a writ petition. In the instant case we notice that as a matter of fact none of the parties had challenged the validity of the Regulations, therefore the question of the High Court's suo motu exercising the writ power in a statutory appeal did not arise. For the reasons stated above we hold that the High Court could not have gone into the question of validity of the Regulations while entertaining a statutory appeal under the 1998 Act. We also hold that the Commission had the necessary statutory power to frame the Regulations conferring the right of hearing on the consumers. We also hold that the Regulations have provided for a controlled procedure for such hearing and there is no room for an indiscriminate hearing. On facts, we hold in the instant case that the Commission has not given any indiscriminate hearing to the consumers."

28. Similarly, in *Union of India v. Major General Shri Kant Sharma* (2015) 6 SCC 773, it has been held -

"34. The aforesaid decisions rendered by this Court can be summarised as follows:

(i) The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including Armed Forces Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India. (Refer: L. Chandra Kumar vs. Union of India (1997) 3 SCC 261 and

S.N. Mukherjee vs Union of India (1990) 4 SCC 594).

(ii) The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act. (Refer : Mafatlal Industries Ltd. vs Union of India (1997) 5 SCC 536).

(iii) When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: Nivedita Sharma vs. Cellular Operators Assn. of India (2011) 14 SCC 337).

(iv) The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. (Refer: Nivedita Sharma (supra))."

29. In the case at hand, since the constitutional validity of a Regulation is not questioned, it is only the order passed by the State Commission which is being challenged; the remedy, in the considered opinion of this Court, lies under Section 111 of 2003 Act.

30. Having thus considered, the objection as to maintainability of Appeal under Section 41 of Adhiniyam 2000 and Writ Petition under Article 226/227 of the Constitution of India, is upheld.

31. Consequently, the appeals and petitions are **disposed of** finally with liberty to avail efficacious statutory remedy of Appeal under Section 111 of 2003 Act.

32. Interim orders passed in any of the above matter stand vacated. There shall be no costs.

Petition disposed of.

I.L.R. [2017] M.P., 77
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 17021/2015 (Jabalpur) decided on 16 June, 2016

UNION OF INDIA ...Petitioner
Vs.
K.C. SHARMA (M/S) ...Respondent

***Arbitration and Conciliation Act (26 of 1996), Sections 34 & 85 and Arbitration Act (10 of 1940), Sections 14(2), 17 and 29* - Arbitration clause invoked on 22.06.1992 under the Act of 1940 - Arbitrator was appointed on 26.05.1999 - Arbitrator resigned on 30.01.2001 - New arbitrator appointed on 08.03.2001 - Award passed on 16.02.2002 - Execution of arbitral award under the Act of 1996 - Objection filed by the petitioner u/S 34 of the Act of 1996 regarding maintainability of execution case - Dismissal thereof - Petition against - Held - The arbitration proceedings had commenced under the 1940 Act and parties have agreed to continue under the same Act even after resignation by first arbitrator, the provisions of 1940 Act will be applicable even when the Award is to be executed - Since under the 1940 Act the award, *ipso facto* is not executable unless made rule of Court under Section 14(2), 17 and 29 of 1940 Act, so execution proceedings under the 1996 Act are dismissed - Respondent is at liberty, if limitation permits, to invoke the provisions of 1940 Act - Petition allowed. (Paras 4, 6 & 8)**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराएँ 34 व 85 एवं माध्यस्थम् अधिनियम (1940 का 10), धाराएँ 14(2), 17 एवं 29 – 1940 के अधिनियम के अंतर्गत दिनांक 22.06.1992 को माध्यस्थम् खंड का अवलम्ब लिया गया – दिनांक 26.05.1999 को मध्यस्थ नियुक्त किया गया था – दिनांक 30.01.2001 को मध्यस्थ ने त्यागपत्र दे दिया – दिनांक 08.03.2001 को नये मध्यस्थ की नियुक्ति हुई – दिनांक 16.02.2002 को अवार्ड पारित किया गया – 1996 के अधिनियम के अंतर्गत माध्यस्थम् अवार्ड का निष्पादन – याची द्वारा निष्पादन प्रकरण की पोषणीयता के संबंध में, 1996 के अधिनियम की धारा 34 के अंतर्गत आक्षेप प्रस्तुत किया गया – उसकी खारिजी – के विरूद्ध याचिका – अभिनिर्धारित – अधिनियम 1940 के अंतर्गत माध्यस्थम् कार्यवाहियाँ आरंभ हुई थी तथा प्रथम मध्यस्थ के त्यागपत्र देने के बाद भी पक्षकार उक्त अधिनियम के अंतर्गत कार्यवाही जारी रखने हेतु सहमत हुए हैं, अधिनियम 1940 के उपबंध लागू होंगे यहाँ तक कि तब भी जब अवार्ड का

निष्पादन किया जाना हो – चूँकि अधिनियम 1940 के अंतर्गत अवार्ड, स्वयंमेव ही निष्पादन योग्य नहीं है जब तक कि अधिनियम 1940 की धारा 14(2), 17 एवं 29 के अंतर्गत न्यायालय का नियम न हो, अतः 1996 अधिनियम के अंतर्गत निष्पादन कार्यवाहियाँ खारिज की जाती हैं – यदि परिसीमा अनुमति दे तो, प्रत्यर्थी 1940 अधिनियम के उपबंधों का अवलम्ब लेने हेतु स्वतंत्र है – याचिका मंजूर।

Cases referred:

AIR 2003 SC 4564, AIR 2001 SC 2293, AIR 1999 SC 3923, AIR 1999 SC 1535, AIR 1962 SC 78, 2003 (9) MPHT 15.

Kanak Gaharwar, for the petitioner.
Amrit Ruprah, for the respondent.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Rejection of an objection against the executability of Arbitration Award under Arbitration and Conciliation Act, 1996 has led the objector-Union of India and its functionaries to file this writ petition seeking quashment of order.

2. Undisputed facts are that in a dispute which arose from the contract bearing No.CEJZ/JBP/ of 86-87 for "Provision of Certain Techincal (sic:Technical) Buildings at Jabalpur, sole Arbitrator was appointed by the Engineer-in-Chief, Army Head Quarter, New Delhi vide his letter No.13600/ CC/718/E8 Dated 19.03.2001. An Award was passed on 16.02.2002 whereagainst present petitioner preferred an objection under Section 34 of 1996 Act, wherein, the trial Court while accepting the preliminary objection raised by respondent that since the Arbitrator was appointed and proceeded under the Arbitration Act, 1940 (i.e. Old Act), the provisions of 1996 Act are not applicable; declined to entertain the objection vide order dated 15.04.2009.

3. Pertinent it is to note that the Arbitration and Conciliation ordinance, 1995 was promulgated on 25.01.1996. It was replaced on 26.03.1996 by the Arbitration and Conciliation (Second Ordinance) 1996. The said ordinance was replaced by the Arbitration and Conciliation (Third) ordinance, 1996 on 26.06.1996. The 1996 Act came into force with effect from 22.08.1996 and is made applicable from 26.01.1996.

4. Section 85 of 1996 makes provisions regarding Repeal and savings. Clause (a) of Sub-Section (2) of Section 85 envisages that :

"(2) Notwithstanding such repeal -

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force."

- which means that despite the repeal of Arbitration Act, 1940 the provisions of said Act shall be applicable in relation to arbitration proceedings which have commenced prior to coming into force of the new Act, i.e. Act of 1996.

In the case at hand as is evident from the findings in paragraph 4 of the order dated 15.04.2009, passed by the trial Court that arbitration clause was invoked on 22.06.1992, under the Act of 1940. Arbitrator was appointed on 26.05.1999. The Arbitrator appointed by order dated 26.05.1999 resigned on 30.01.2001 whereon new Arbitrator was appointed on 08.03.2001 who passed the Award on 16.02.2002.

5. In the case of *State of West Bengal vs. Amritlal Chatterjee* AIR 2003 SC 4564 relying upon the judgments in *Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd.* AIR 2001 SC 2293; T*hyssen Stahlunion GMBH vs. Steel Authority of India* AIR 1999 SC 3923; *Shetty's Constructions Co.Ltd. vs. Konkan Railway Construction* AIR 1999 SC 1535 and *Hari Shankarlal vs. Shombhunath Prasad* AIR 1962 SC 78, their Lordships has been pleased to hold :

> "13. The Court having regard to the duty imposed upon the arbitrator held that the arbitrators enter on the reference as soon as they have accepted their appointment and have communicated to each other about the reference. If the Arbitrator fails in his duty to enter on the reference or make a public award during the period stipulated under Rule 3 of the First Schedule indisputably a cause of action will arise for his removal or appointment of a new arbitrator in terms of Section 11 and 12 of the 1940 Act. The words "commencement of the

arbitration proceedings" have not been defined in the 1940 Act. They have to be given their ordinary meaning having regard to the provisions contained in Chapter II thereof.

14. Furthermore, Section 85(2)(a) of the new Act may have to be construed keeping in view the provisions contained in Section 21 of the new Act."

6. In the present case, the proceedings having originated under the old Act i.e. Act of 1940 and the parties having agreed to continue under the same Act, even after the resignation of first Arbitrator, the provisions of 1940 Act would be applicable even when the Award is to be executed. Since under the Act of 1940 the Award, ipso facto is not executable unless made Rule of Court under Section 14 (2), 17 and 29 of 1940 Act, the petitioner herein were well within their right in raising an objection against maintainability of the execution proceedings brought under 1996 Act. The impugned order, therefore, cannot be given stamp of approval.

7. Reliance though is placed on the decision by a Division Bench of this High Court in *Northern Coal Fields Ltd. vs. M/s Raj Kishan and Company* reported in 2003 (9) MPHT 15 but is of no assistance to the respondent because of the findings in paragraph 14 that "the Arbitrator entered upon reference after the first Arbitration Ordinance had came into force." Whereas, in the case at hand the parties agreed that the Arbitration proceedings were under 1940 Act.

8. In view whereof, while setting aside the impugned order dated 25.07.2015, the application preferred by respondent on 07.03.2013 for execution of Award dated 16.02.2002 under 1996 Act is dismissed. The respondent however, would be at liberty, if the limitation permits, to invoke the provision of 1940 Act.

9. In the result, petition is **allowed** to the extent above. Interim order made absolute. Parties to bear their own costs.

Order accordingly.

I.L.R. [2017] M.P., 81
WRIT PETITION

Before Mr. Justice Rajendra Menon, Acting Chief Justice & Hon'ble Mr. Justice Anurag Shrivastava

W.P. No. 10757/2007 (Jabalpur) decided on 7 September, 2016

POORANSINGH SISODIA ...Petitioner
Vs.
HIGH COURT OF M.P. & ors. ...Respondents

A. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14 - Departmental Enquiry - Object of Preliminary Inquiry - **To explore as to whether a regular departmental enquiry is necessary. (Para 6)**

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14 – विभागीय जाँच – प्रारंभिक जाँच का उद्देश्य – यह जानने के लिए कि क्या नियमित विभागीय जाँच आवश्यक है।

B. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14 - Departmental Enquiry - Practice and Procedure - **Regular departmental enquiry ordered after Preliminary Inquiry - Delinquent employee was supplied statement of witnesses recorded in preliminary inquiry - No prejudice caused to employee. (Para 6)**

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14 – विभागीय जाँच – पद्धति एवं प्रक्रिया – प्रारंभिक जाँच के पश्चात् नियमित विभागीय जाँच का आदेश – अपचारी कर्मचारी को प्रारंभिक जाँच में अभिलिखित किये गये साक्षियों के कथन की आपूर्ति की गई थी – कर्मचारी को प्रतिकूल प्रभाव कारित नहीं।

C. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 10 - Departmental Enquiry - Perverse finding - Allegation - **The petitioner instigated the parents of accused to meet the Presiding Officer to get bail for their son - Departmental Enquiry conducted - Petitioner found guilty - Held - In absence of any specific evidence to show that the petitioner has instigated the parents to go and visit the Presiding Officer, the finding is perverse - Order quashed. (Para 13)**

ग. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966,

नियम 10 – विभागीय जाँच – विपर्यस्त निष्कर्ष – अभिकथन – याची ने अभियुक्त के माता पिता को अपने पुत्र की जमानत प्राप्त करने के लिए पीठासीन अधिकारी से मिलने हेतु उकसाया – विभागीय जाँच आयोजित – याची दोषी पाया गया – अभिनिर्धारित – किसी विशिष्ट साक्ष्य की अनुपस्थिति जो यह दर्शाती हो कि याची ने अभियुक्त के माता पिता को पीठासीन अधिकारी के पास जाने एवं मिलने हेतु उकसाया, निष्कर्ष विपर्यस्त है – आदेश अभिखण्डित।

Cases referred:

AIR 1982 SC 937, AIR 1971 SC 752, (2013) 6 SCC 602, AIR 1999 SC 677.

P.N. Dubey, for the petitioner.
P.R. Bhave with *Deodatt Bhave,* for the respondents.

ORDER

The Order of the Court was delivered by :

ANURAG SHRIVASTAVA , J. :- By filing this petition under Article 226 and 227 of the Constitution of India the petitioner has challenged the order dated 1.10.1999 (Annexure P-4) by which he has been reverted to lowest rank of Process Writer and also the order dated 28.9.2000 (Annexure P-5) by which the appeal preferred by him against the said order of reversion has been rejected.

2. The petitioner was initially appointed as a peon on 4.2.1981 in the District Courts establishment at Damoh. Later on he got promotion as Process Writer on 15.6.1981 and thereafter promoted as Lower Division Clerk in 1996. There was a criminal case no.2122/1997 under section 147, 148, 149, 302, 427, 323 & 324 of IPC, pending against one Munna @ Manohar before Judicial Magistrate First Class, Hatta, in which the accused Munna had moved an application for release on bail, which was pending for consideration before Special Judge, Damoh. It is alleged that petitioner had instigated the parents of accused Munna, Smt.Tulsa Bai and Chakodilal to approach the Special Judge and get their son released on bail by making payment or fulfilling the demand of the Judge concerned. As directed Smt.Tulsa Bai and Chakodilal came to Damoh and approached the Special Judge at his residence and offered him money for releasing their son on bail. The Special Judge called them in Court on the same day and after making detailed inquiry, recorded the statement of Smt.Tulsa Bai Chakodilal and other staff of Court. Chakodilal and Smt.Tulsa

Bai had categorically stated before Special Judge that they had been directed by petitioner to make approach to him for securing their son's bail. The Special Judge reported the matter to District Judge, thereafter Disciplinary Inquiry proceeding was initiated against petitioner.

3. The inquiry was conducted in accordance with the provisions of M.P.Civil Services (Classification, Control and Appeal) Rules, 1966 (hereinafter referred to as 'Rules'). The Second Additional District Judge was appointed as the Inquiry Officer. After holding the inquiry he submitted the report to the District Judge, who acted as the Disciplinary Authority and after following the procedure the Disciplinary Authority passed the impugned order dated 1.10.1999, imposed punishment on the petitioner reverting him to the lowest rank of Process Writer. The petitioner had preferred an appeal before respondent no.2, which was also rejected by order dated 28.9.2000.

4. It has been contended by the learned counsel for the petitioner that the impugned order is bad in law as no proper preliminary inquiry was held, therefore without giving the opportunity of hearing in preliminary inquiry the petitioner's fundamental right has been violated. It is also submitted that the charge framed against petitioner is vague and indefinite, due to which petitioner could not raise his defence and effectively cross examine the witnesses which vitiates the inquiry. There is no reliable evidence adduced against the petitioner. The evidence of parents of accused is not trustworthy. The Enquiry Officer had wrongly arrived at conclusion to hold petitioner guilty. The finding of Inquiry Officer is perverse, therefore impugned order is liable to be quashed and petitioner is to be reinstated as Lower Division Clerk with all benefits.

5. Learned counsel for respondents has supported the procedure adopted and findings given by the Inquiry Officer and stated that there is no procedural irregularity or flaws found in the inquiry proceedings. The findings of the Inquiry Officer are based upon due appreciation of evidence. There is no infirmity in it. Keeping in view the charge found proved and conduct of petitioner the punishment imposed upon him is not very harsh or excessive. Therefore this petition is liable to be dismissed.

6. Considering the rival contentions of the learned counsel for the parties and on perusal of record, it is found that the allegations are, the parents of accused had approached the Special Judge in order to persuade him to grant bail to their son. As they had offered him money as a bribe, the Special Judge

had recorded their statement and the statements of other eye witnesses and sent a report to the District Judge for initiating disciplinary action against the petitioner. The report of Special Judge alongwith statements of the witnesses and parents of accused may be taken as preliminary inquiry report. On the basis of this report District Judge has ordered for initiation of regular inquiry. Since copy of the report of Special Judge and statement of witnesses had already been given to petitioner, therefore there was no need to make further preliminary inquiry on the same allegations. The preliminary inquiry is conducted only to explore as to whether a regular departmental inquiry is necessary, and once after the preliminary inquiry a regular departmental inquiry is ordered and while conducting the regular departmental inquiry, statement of the witnesses recorded in the preliminary inquiry is supplied to the delinquent employee, then no prejudice is caused to the employee and, therefore, the arguments advanced before us to say that the preliminary inquiry was conducted behind the back of the petitioner is unsustainable.

7. As far as the vagueness of charge is concerned, in the charge framed except time, date and place where the petitioner had incited the parents of the accused for making approach to Special Judge, all other ingredients of mis-conduct has been mentioned. Smt. Tulsa Bai in her preliminary statement before Special Judge has stated that two days back the petitioner came to her house and told her to go to Special Judge for getting the bail of her son. This indicates the place and date of the alleged mis-conduct. The copy of the statement has already been supplied to the petitioner. Therefore it cannot be said that petitioner was misled or not able to raise his defence because of vagueness of charge.

8. In the case laws *State of Uttar Pradesh Vs. Mohd. Sharif* (AIR 1982 SC 937) and *Surath Chandra Chakravarthy Vs. State of West Bengal* (AIR 1971 SC 752) relied upon by learned counsel for petitioner the charges framed were vague and indefinite and the statements of the witnesses recorded during the preliminary inquiry were not supplied to the delinquent at the time of disciplinary inquiry, therefore Hon'ble Apex Court held that the delinquent was denied reasonable opportunity to defend himself at disciplinary inquiry and quash the proceedings. In the present case the facts are different, therefore the above case laws are not applicable.

9. The scope of judicial review in the matters of administrative actions pertaining to disciplinary proceedings has been discussed and crystallized by Hon'ble Supreme Court in the case of *S.R. Tiwari Vs. Union of India* [(2013)

6 SCC 602]. In para 19 & 20 of the aforesaid judgment Hon'ble Apex Court has reiterated as:

> "19. In *Commissioner of Income Tax, Bombay & Ors. Vs. Mahindra & Mahindra Ltd. & Ors.*, AIR 1984 SC 1182, this Court held that various parameters of the court's power of judicial review of administrative or executive action on which the court can interfere had been well settled and it would be redundant to recapitulate the whole catena of decisions. The Court further held :
>
> "It is a settled position that if the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to, or has been arrived at by the authority misdirecting itself by adopting a wrong approach, or has been influenced by irrelevant or extraneous matters the court would be justified in interfering with the same."
>
> 20. The court can exercise the power of judicial review if there is a manifest error in the exercise of power or the exercise of power is manifestly arbitrary or if the power is exercised on the basis of facts which do not exist and which are patently erroneous. Such exercise of power would stand vitiated. The court may be justified in exercising the power of judicial review if the impugned order suffers from mala fide, dishonest or corrupt practices, for the reason, that the order had been passed by the authority beyond the limits conferred upon the authority by the legislature. Thus, the court has to be satisfied that the order had been passed by the authority only on the grounds of illegality, irrationality and procedural impropriety before it interferes. The court does not have the expertise to correct the administrative decision. Therefore, the court itself may be fallible and interfering with the order of the authority may impose heavy administrative burden on the State or may lead to unbudgeted expenditure."

10. It has been argued by learned counsel for the petitioner that finding of the Inquiry Officer was perverse as there is no reliable evidence to prove that the petitioner has directed the parents of the accused to make approach to

Special Judge for obtaining bail of their son by illegal means. Although the scope of judicial review may not permit reassessment of the evidence led before the Inquiry Officer, but to consider the question of perversity, if any in recording findings, we have gone through the finding of the Inquiry Officer and we find that in the departmental inquiry eight witnesses were examined on behalf of the prosecution. The witnesses Nonhe Singh (PW3), Kalyan Singh (PW4), are the Peons of Court, J.P.Tantwaye (PW6) is Accountant, R.S.Pandey (PW7) and Khemchand Jain (PW8) are Readers. Only the witnesses B.G.Yadav (PW5) Special Judge and None Singh and Kalyan Singh, Peons had deposed in their statement that Smt.Tulsa Bai (PW1) and her husband Chakodilal (PW2) approached the Special Judge and stated that as directed by petitioner they had come for getting bail of their son and ready to pay Rs.10,000/- for the same. Therefore the statement of these witnesses are hearsay. They have no personal knowledge of the fact whether the petitioner had instigated Smt.Tulsa Bai and Chakodilal to make approach to Special Judge.

11. Now only evidence available against the petitioner is that of Smt.Tulsa Bai (PW1) and Chakodilal (PW2). As per prosecution story the petitioner had directed both Smt.Tulsa Bai (PW1) and Chakodilal (PW2) to make approach to Special Judge, but Chakodilal (PW2) in his statement had not supported the prosecution case and denied the whole prosecution story. He has deposed that he did not know the petitioner and he had no talk with petitioner regarding his son's bail. He is declared hostile. Another witness Smt.Tulsa Bai although in her examination-in-chief had supported the prosecution case, but in her re-cross examination, paras 12 & 13 she had denied her previous statements and categorically stated that petitioner had never asked her to go to Special Judge and try to get the bail of her son by offering him bribe or gratification. Therefore the statement of Smt.Tulsa Bai gets totally contradicted in her cross-examination.

12. She has stated that she had arranged Rs.10,000/- for payment of bail order by mortgaging her land to Bihari Seth, but Bihari Seth (DW1) has denied this fact. Even her husband Chakodilal has not supported her in this regard. The Enquiry Officer has rightly disbelieved the statement of Smt.Tulsa Bai regarding offering of Rs.10,000/- to Special Judge for bail. Therefore keeping in view the contradictory statement of Smt. Tulsa Bai, which is not supported by her husband Chakodilal, the sole testimony of Smt.Tulsa Bai, cannot be relied upon. There is no other evidence produced by the prosecution to show

that the petitioner had visited the house of Smt.Tulsa Bai and persuaded her and her husband Chakodilal to approach Special Judge for obtaining bail of her son. The Inquiry Officer without considering the contradictory statement of Smt.Tulsa Bai came to conclusion that the charges levelled against petitioner is proved on account of preponderance of probability. This finding is baseless and perverse.

13. The evidence of Smt. Tulsa Bai is not sufficient enough to hold that it is the petitioner who had instigated her or advised her to go to the Special Judge alongwith her husband and pay the amount. Her husband Chakodilal does not support her and in her cross-examination Smt.Tulsa Bai does not approve with regard to the previous statement made by her in the departmental inquiry. On the contrary before the Inquiry Officer, it is categorically stated by her that the present petitioner never asked her to go and see the Special Judge. That apart, from the evidence that has come on record, we find that when Smt.Tulsa Bai and Chakodilal came to the house of Special Judge, it was the peon posted in the office of Special Judge, namely PW/3 Nonhe singh, who went to the Presiding Judge and told him about the visit of Smt. Tulsa Bai and her husband and escorted them to meet the Judge concerned. There are evidence available on record which suggests that Nonhe Singh is related to both Smt.Tulsa Bai and Chakodilal and the defence of the petitioner is that it is at the instigation of Nonhe Singh that he has been falsely implicated. This aspect of the matter has been completely over looked by the departmental authorities and the Enquiry Officer and in the absence of there being specific evidence to show that it was the petitioner who instigated Smt. Tulsa Bai and her husband to go and visit the Presiding Officer, the finding recorded by the Inquiry Officer cannot be approved by this Court. It has to be termed as a perverse finding and not supported by cogent evidence.

14. In *Kuldeep Singh Vs. The Commissioner of Police and others* (AIR 1999 SC 677) Hon'ble Apex Court in para 7 observed as below :

> "In Nand Kishore v. State of Bihar, AIR 1978 SC 1277 : (1978) 3 SCC 366 : (1978) 3 SCR 708, it was held that the disciplinary proceedings before a domestic Tribunal are of quasi-judicial character and, therefore, it is necessary that the Tribunal should arrive at its conclusions on the basis of some evidence, that is to say, such evidence which, and, that too, with some degree of definiteness, points to the guilt of the

delinquent and does not leave the matter in a suspicious state as mere suspicion cannot take the place of proof even in domestic enquiries. If, therefore, there is no evidence to sustain the charges framed against the delinquent, he cannot be held to be guilty as in that event, the findings recorded by the Enquiry Officer would be perverse."

(Emphasis supplied)

15. Accordingly the petition deserves to be and is hereby allowed. The impugned order of reversion dated 1.10.1999 (Annexure P-4) and appellate order dated 28.9.2000 (Annexure P-5) are quashed. The petitioner is directed to be reinstated on his original post as Lower Division Clerk with all consequential benefits and seniority, as per rules.

Petition allowed.

I.L.R. [2017] M.P., 88
WRIT PETITION
Before Mr. Justice Prakash Shrivastava
W.P. No. 876/2016 (Indore) decided on 19 October, 2016

LAXMI (SMT.)
Vs. ...Petitioner
BEENA (SMT.) & ors. ...Respondents

***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122 and Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rules 3(2) & 8* - Objection filed by petitioner before Election Tribunal in election petition filed by respondent no. 1 that copy of election petition alongwith list of documents supplied to the petitioner was not authenticated by respondent no. 1 was rejected, hence this writ petition - Held - Requirement is to have authentication by the original signature of the election petitioner - Supplying the photocopy containing copy of impression of the signature instead of original signature cannot be treated to be a substantial compliance of the provision - There is non-compliance of Rule 3(2) of Rule 1995, therefore mandatory provision contained in Rule 8 is attracted entailing the dismissal of election petition - Order of trial Court set aside and election petition filed by respondent no. 1 dismissed. (Paras 6 to 9)**

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122 एवं पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता) नियम, म.प्र. 1995, नियम 3(2) व 8 – प्रत्यर्थी क्र. 1 द्वारा निर्वाचन अधिकरण के समक्ष प्रस्तुत की गई निर्वाचन अर्जी में याची द्वारा आक्षेप प्रस्तुत किया गया कि दस्तावेजों की सूची के साथ याची को दी गई निर्वाचन अर्जी की प्रति प्रत्यर्थी क्र. 1 द्वारा अधिप्रमाणित नहीं की गई थी, नामंजूर किया गया, अतः यह रिट याचिका – अभिनिर्धारित – अपेक्षा है, कि अधिप्रमाणीकरण, निर्वाचन याची के मूल हस्ताक्षर द्वारा हो – मूल हस्ताक्षर के बजाय हस्ताक्षर की छाप की प्रति वाली छायाप्रति प्रदान करना उपबंध का पर्याप्त अनुपालन नहीं माना जा सकता – नियम 1995 के नियम 3(2) का अनुपालन नहीं हुआ है, इसलिए नियम 8 में अंतर्विष्ट आज्ञापक उपबंध आकर्षित होते हैं जिससे निर्वाचन अर्जी की खारिजी होती है, – विचारण न्यायालय द्वारा पारित आदेश अपास्त तथा प्रत्यर्थी क्र. 1 द्वारा प्रस्तुत निर्वाचन अर्जी खारिज।

Cases referred:

AIR 1991 SC 1557, AIR 1978 SC 840, (2013) 3 SCC 489, AIR 1996 MP 43, 1996 (1) MPWN 122, 2010 (1) MPHT 477, 2012 (5) MPHT 194, AIR 1987 P & H 110, 2006 (4) MPHT 152, 2007 (3) MPHT 63.

Paresh Joshi, for the petitioner.
Ravindra Kumar Vyas, for the respondent No. 1.

(Supplied: Paragraph numbers)

ORDER

PRAKASH SHRIVASTAVA , J.:- Heard finally with consent.

This writ petition under Article 227 of the Constitution has been filed by the petitioner challenging the order of the Election Tribunal dated 22/1/2016 whereby the petitioner's objection relating to non compliance of the Rule 3(2) of the M.P Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules 1995, has been rejected.

2. In brief, the respondent No.1 had filed the Election Petition u/s.122 of the M.P. Pancyhayat Evam Gram Swaraj Adhiniyam 1993 challenging the election of the petitioner to the post of sarpanch and the petitioner had filed an application before the Election Tribunal raising an objection that the copy of election petition along with the list of documents supplied to the petitioner was not authenticated by the respondent No.1 by signing on them as true copy, hence, there was non compliance of Rule 3(2) of the Rules of 1995 and election petition was liable to be dismissed under Rule 8. The election Tribunal

by the impugned order has rejected the said application.

3. Learned counsel for petitioner submits that the requirement of authenticating the copy of election petition and the documents supplied to the petitioner is a mandatory requirement and since the requirement of Rule 3(2) has not been complied with, therefore, the election petition ought to have been dismissed.

4. As against this, learned counsel for respondent No.1 has supported the impugned order.

5. Having heard the learned counsel for parties and on the perusal of the record, it is noticed that the election tribunal on examination of the record has found that the election petition was signed by the respondent No.1 as well as his Advocate. Respondent No.1 had filed the photocopy of the said election petition, the original of which contain the signature of the election petitioner and his Advocate and the same was supplied by the election tribunal to the petitioner. It has been noted by the tribunal that since original election petition contains the signature and photo copy of the said signed original petition has been supplied to the petitioner which is the correct true copy, therefore, photocopy was not required to be again signed by the respondent No.1. Same was the position in respect of documents supplied to the petitioner, hence the election tribunal has taken the view that the compliance of Rule 3(2) has been done.

Hence the nature and scope of Rule 3(2) of the Rules of 1995 needs consideration which reads as under:

> ***"[2] Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition".***

The consequence of non compliance of Rule 3(2) is given in Rule 8 of the Rules of 1995 which provides that in case of non compliance of Rule 3, the petition shall be dismissed by the specified officer.

The above rule 3(2) in clear terms provides that "every such copy shall be attested by the petitioner under his own signature".

6. The requirement of the above Rule is very clear that the copy of election

petition filed for supplying to the respondent must be attested by the petitioner under his own signature. The above Rule requires the election petitioner to put his original signature in the copy of the election petition to authenticate the copy to be the true copy of the election petition. The object is that the petitioner must take the responsibility of the copy being a true copy of the original petition by putting his original signature in the copy in token thereof. Therefore, if the original copy of the election petition contains the signature of the election petitioner and its photocopy is taken having the impression of the signature of the petitioner taken from the original without there being the original signature of the election petitioner in the copy of the election petition authenticating it to be the true copy of the original, then there is non compliance of the provisions contained in Rule 3(2) of Rule of 1995. Since the requirement is to have the authentication by the original signature of the election petitioner, therefore, supplying the photocopy containing copy of the impression of the signature instead of the original signature cannot be treated to be the substantial compliance of the provision. Such a compliance cannot be accepted also for the reason that possibility of interpolation or manipulation at the time of taking the photocopy of the original document, cannot be ruled out.

7. The aforesaid view is duly supported by the judgment of the Supreme Court in the matter of *F.A.Sapa Etc Vs. Singora and others* reported in AIR 1991 SC 1557 wherein the *para materia* provision contained in Sec.81(3) of the Representation of Peoples Act has been considered and it has been held that the petitioner must attest the copy under his own signature to be the true copy of the petition. Similarly in the matter of *M.Kamalam Vs. Dr.V.A.Syed Mohammed* reported in AIR 1978 SC 840 it has been held that when the original signature is made by the petitioner on the copy of the election petition, the compliance of Sec.81(3) can be presumed, therefore, the emphasis is on putting the original signature on the copy of the election petition. In the matter of *Ajay Maken Vs. Adesh Kumar Gupta and another* reported in (2013) 3 SCC 489 the Supreme Court while drawing the distinction between the failure to attest copy of the election petition furnished to the respondent to be true copy of the election petition and failure to sign and verify the original copy of the election (sic: election petition) filed in the court has held that the former being in non compliance with Sec.81(3) would entail dismissal of the election petition u/S.86. This Court also in the matter of *Dr.Omprakash Soni Vs. Ashok Kumar Bhargava and others* reported in AIR 1996 MP 43, *Amol Singh Vs. Hamir Singh* reported in 1996(1) MPWN 122, *Baijulal*

Verma Vs. Addl. Collector, Chhindwara and others reported in 2010 (1) MPHT 477 and *Rakesh Vs. Returning Officer, Panchayat Nirvachan and others* reported in 2012(5) MPHT 194 considering Rule 3(2) of the Rules of 1995 has held that the said Rule is mandatory in nature and if the copy of the election petition for service to the respondent is not attested by the petitioner under his own signature to be the true copy of the petition, then there is non compliance of Rule 3(2) and the same would entail dismissal of the election petition under Rule 8 which is mandatorily worded. Same is the view taken by the Punjab & Haryana High Court in the matter of *Mrs. Vinod (Vinod Chadha) Vs. Kirpal Singh Dhillon and another* reported in AIR 1987 P&H 110.

8. Counsel for respondent has placed reliance upon the judgment of this court in the matter of *Mrs. Indira Singh Vs. Mrs. Anjana Sharma and others* reported in 2006(4) MPHT 152, but that was a case where though the copy of the election petition was signed by the election petitioner but the words 'attested true copy' were missing, therefore, this court has taken the view that the defect was not fatal, but in the present case the original signature of the election petitioner itself is missing in the copy of the election petition supplied to the respondent in the election petition. Similarly the judgment of single bench of this court in the matter of *Ku. Parwati Bai Thakur Vs. State of MP and others* reported in 2007(3) MPHT 63 is distinguishable since in that case also the copy supplied to the respondent was signed by the election petitioner on every page though there was no mentioning of the word 'true copy', hence this court has held that there is substantial compliance of Rule 3(2).

9. Keeping in view the aforesaid position in law since in the present case the copy of the election petition supplied to the present writ petitioner (respondent in the election petition) does not bear the original signature of the election petitioner, therefore, there is clear non compliance of Rule 3(2) of the Rules of 1995. Therefore, the mandatory provision contained in Rule 8 is attracted entailing the dismissal of the election petition. The trial court has failed to consider the above aspect of the matter, hence the impugned order of the trial court is set aside and the application filed by the petitioner under Rule 3(2) read with Rule 8 of Rules of 1995 is allowed and election petition filed by the respondent No.1 is dismissed.

10. c.c as per rules

Order accordingly.

I.L.R. [2017] M.P., 93
APPELLATE CIVIL
Before Mr. Justice S.A. Dharmadhikari
M.A. No. 29/2016 (Gwalior) decided on 29 April, 2016

JAHOOR KHAN & ors. ...Appellants
Vs.
RAMVARAN & ors. ...Respondents

Limitation Act (36 of 1963), Section 5 - Condonation of delay - Delay of 1265 days **- After passing the award on 18.04.2012 the execution proceeding has been filed before the Claim Tribunal on 21.06.2012 - Appellant has also filed vakalatnama in M.A. No. 742/2012 pending before this Court, as respondent no. 2 - In such circumstances it cannot be said that the appellant had no knowledge about the award passed - Appeal is miserably barred by limitation - Neither sufficient cause is shown nor the same is found to be to the satisfaction of this Court - Application for condonation of delay is dismissed - Consequently, Appeal is also dismissed. (Paras 5 & 14)**

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिए माफी – 1265 दिनों का विलंब – दिनाँक 18.04.2012 को अधिनिर्णय पारित करने के पश्चात् दिनाँक 21.06.2012 को दावा अधिकरण के समक्ष निष्पादन कार्यवाही प्रस्तुत की गई – अपीलार्थी ने प्रत्यर्थी क्र. 2 के रूप में इस न्यायालय के समक्ष लंबित एम.ए. क्र. 742/2012 में वकालतनामा भी प्रस्तुत किया है – इन परिस्थितियों में यह नहीं कहा जा सकता कि अपीलार्थी को पारित अधिनिर्णय के संबंध में कोई ज्ञान नहीं था – अपील दयनीयता से परिसीमा द्वारा वर्जित है – ना तो पर्याप्त कारण दर्शाया गया है, ना ही वह इस न्यायालय को समाधानप्रद रूप में पाया गया – विलंब के लिए माफी का आवेदन खारिज किया गया – परिणामतः अपील भी खारिज की गई।

Cases referred:

AIR 1962 SC 361, (1997) 7 SCC 556, (2008) 17 SCC 448, (2011) 4 SCC 363, (2012) 5 SCC 157, AIR 2012 SC 1506, AIR 2015 MP 161.

Aftab Qureshi, for the appellants.
None, for the respondent Nos. 1 & 3.
Ashish Saraswat, for the respondent No. 2.

JUDGMENT

S.A. DHARMADHIKARI, J. :- Heard on the question of admission. Records of the case is perused.

1. This Miscellaneous Appeal at the instance of the respondents under Section 173(1) of the Motor Vehicle Act, 1988 is directed against the impugned Award dated 18/04/2012 in Claim Case No. 20/2012 (claim dispute) by the President, Motor Accident Claims Tribunal, Morena (M.P.).

2. Heard on IA No. 53/2016, an application under Section 5 of the Limitation Act filed by the appellants for condonation of delay in filing the appeal. The appeal is drastically barred by 1265 days.

3. I have gone through the application for condonation of delay, the counsel for appellants submitted that the Award was passed on 18/04/2012 and the appeal for enhancement was required to be filed within 90 days from the date of award but same could not be filed, as the appellants are illiterate persons and did not have any knowledge about the law. On 20/12/2015 when they contacted the lawyer, then they were informed that appeal could have been filed against the Award and on the advice of the counsel, the appeal was drafted on 18/12/2015. But due to winter vacation, the same could not be filed. Ultimately, the appeal was filed on 04/01/2016 and, therefore, the delay in filing the appeal may be condoned.

4. On the other hand, the learned counsel for the respondents vehemently opposed the application by filing the reply to the application for condonation of delay and has argued that there is no justification or satisfactory reason disclosed on day to day basis explaining the delay on the part of the appellants. The appellants have not been able to show the sufficient cause for condoning the delay, therefore, the appeal deserves to be dismissed.

5. It is further contended that after the Award dated 18/04/2012 was passed, the appellants had filed execution proceedings before the Claims Tribunal on 21/06/2012 which was registered as Claim Execution No. 20/10 X 12 which is evident from Annexure R-2/1. Further, the appellants have suppressed the fact in MA No. 742/12 which is pending before this Court, he has been arrayed as respondent No.2 and appellant has also filed Vakalatnama in that case. In these circumstances, it can not be said that appellants had no knowledge about the award passed on 18/04/2012.

6. Law as regards scope and jurisdiction of the Court in the matter of condonation of delay under section 5 of the Limitation Act is well settled by the Hon'ble Apex Court and the various High Courts.

7. In the case of *Ramlal Vs. Rewa Coalfields Ltd.* AIR 1962 SC 361, Hon. Supreme Court in para 7 has held as under:-

> "7. In construing Section 5 (of the Limitation Act) it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be light-heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the court to condone delay and admit the appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice."

8. Hon. Supreme Court in the case of P.*K.RAmachandran Vs. State of Kerala*, (1997) 7 SCC 556, has held in para 6 as under:-

> "6. law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes and the courts have no power to extend the period of limitation on equitable grounds."

9. As regards meaning, scope and rationale of the law of limitation, the Hon'ble Apex Court in the case of *Pundlilk Jalam Patil (Dead) by Lrs., Vs. Executive Engineer, Jalgaon Medium Project and another,* (2008) 17 SCC 448 has held as under:

> "26. Basically the laws of Limitation are founded on public policy. In Halsbury's Laws of England,4th Ed., Vol.28,p.266,para 605, the policy of the Limitation Acts is

laid down as follows:

> "605. Policy of the Limitation Acts.- The courts have expressed at least three different reasons supporting the existence of statutes of limitation, namely,(i) that long dormant claims have more of cruelty than justice in them, (ii) that a defendant might have lost the evidence to dispute the stated claim, (iii) that persons with good causes of actions should pursue them with reasonable diligence."

27. Statutes of limitation are sometimes described as 'statutes of peace'. An unlimited and perpetual threat of limitation creates insecurity and uncertainty; some kind of limitation is essential for public order. This court in *Rajender Singh and others vs. Santa Singh and others* [(1973) 2 SCC 705] has observed : (SCC p.712, para 18)

> "18. The object of law of Limitation is to prevent disturbance and deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches".

28. In Motichand vs. Munshi [AIR 1970 SC 898], this court observed that this principle is based on the maxim *"interest reipublicae ut sit finis litium,* that is, the interest of the State requires that there should be end to litigation but at the same time law of Limitation are a means to ensuring private justice suppressing fraud and perjury, quickening diligence and preventing oppression.

29. It needs no restatement at our hands that the object for fixing time limit for litigation is based on public policy fixing a life span for legal remedy for the purpose of general welfare. They are meant to see that the parties do not resort to dilatory tactics but avail their legal remedies promptly. Salmond in his jurisprudence states that the laws come to the assistance of

the vigilant and not of the sleepy."

10. While dealing with the scope of jurisdiction under section 5 of the Limitation Act, as regards condonation of delay, the Hon'ble Apex Court in the case of *Lanka Venkateshwarlu (dead) by L.Rs., Vs. State of Andhra Pradesh and others,* (2011) 4 SCC 363 has observed as under:

> "19. We have considered the submissions made by the learned counsel. At the outset, it needs to be stated that generally speaking, the courts in this country, including this Court, adopt a liberal approach in considering the application for condonation of delay on the ground of sufficient cause under Section 5 of the Limitation Act.
>
> This principle is well settled and has been set out succinctly in the case of Collector, Land Acquisition, Anantnag & Ors. Vs. Katiji & Ors. (1987) 2 SCC 107.
>
> 23. The concepts of liberal approach and reasonableness in exercise of the discretion by the Courts in condoning delay, have been again stated by this Court in the case of Balwant Singh Vs. Jagdish Singh, (2010) 8 SCC 685, as follows:-
>
> > "25. We may state that even if the term "sufficient cause" has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of "reasonableness" as it is understood in its general connotation."
> >
> > 26. The law of limitation is a substantive law and has definite consequences on the right and obligation of party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its

> own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly."

28. We are at a loss to fathom any logic or rationale, which could have impelled the High Court to condone the delay after holding the same to be unjustifiable. The concepts such as "liberal approach", "justice oriented approach", "substantial justice" can not be employed to jettison the substantial law of limitation. Especially, in cases where the Court concludes that there is no justification for the delay. In our opinion, the approach adopted by the High Court tends to show the absence of judicial balance and restraint, which a Judge is required to maintain whilst adjudicating any lis between the parties. We are rather pained to notice that in this case, not being satisfied with the use of mere intemperate language, the High Court resorted to blatant sarcasms.

29. The use of unduly strong intemperate or extravagant language in a judgment has been repeatedly disapproved by this Court in a number of cases. Whilst considering applications for condonation of delay under Section 5 of the Limitation Act, the Courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections can not and should not form the basis of exercising discretionary powers."

11. Hon. Supreme Court in a recent decision *Maniben Devraj Shah Vs. Municipal Corporation of Brihan, Mumbai,* (2012) 5 SCC 157 has held in para 24 as under:-

> "24. What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."

12. The Hon'ble Apex Court in *Chief Post Master General and Ors Vs Living Media India Ltd and another,* reported in AIR 2012 SC 1506 has held that unless reasonable and acceptable explanation of delay and sufficient cause is shown, the application need not be accepted.

13. In the State of *M.P and others Vs M/s Perfect Sales, Gwalior,* AIR 2015 M.P. 161, this Court has held that " the appellant slept over the matter for 296 days and did nothing to assail the judgment of the subordinate court. It shows careless attitude on the part of the appellant and there being no sufficient cause shown, the delay can not be condoned".

14. In view of the aforesaid authoritative pronouncement of law as regards object, scope, extent, limitation and the discretionary power to be exercised under Section 5 of the Limitation Act laid down by the Hon'ble Apex Court, this Court is of the view that the delay of 1265 days caused in filing the appeal by the appellant is miserably barred by limitation as neither sufficient cause is shown in the application seeking condonation of delay nor the same is found to be to the satisfaction of this Court.

15. Accordingly, IA No. 53/2016, an application for condonation of delay is hereby dismissed. Consequently, the Miscellaneous appeal is also dismissed. No order as to costs.

Appeal dismissed.

I.L.R. [2017] M.P., 100
APPELLATE CIVIL
Before Mr. Justice Alok Verma
M.A. No. 1457/2015 (Indore) decided on 2 August, 2016

SAVITA BAI ...Appellant
Vs.
ASLAM & ors. ...Respondents

(Alongwith M. A. No. 1458/2015 & M.A. No. 1462/2015)

Motor Vehicles Act (59 of 1988), Sections 166 & 173 (1) - Permanent disablement **- For enhancement of amount of award - If the medical certificate produced by appellant was suspicious, it was the duty of insurance company to enquire and produce sufficient evidence in this regard - No such evidence produced therefore certificate cannot be disbelieved - Disability assessed may be taken as correct - Amount of award passed by the Tribunal enhanced. (Para 8)**

मोटर यान अधिनियम (1988 का 59), धाराएँ 166 व 173 (1) – स्थायी निःशक्तता – अवार्ड की राशि बढ़ाये जाने हेतु – यदि अपीलार्थी द्वारा प्रस्तुत किया गया चिकित्सीय प्रमाण–पत्र संदेहजनक था तब बीमा कम्पनी का यह कर्तव्य था कि वह जाँच करे तथा इस संबंध में पर्याप्त साक्ष्य प्रस्तुत करे – ऐसा कोई साक्ष्य प्रस्तुत नहीं किया गया अतः प्रमाण–पत्र पर अविश्वास नहीं किया जा सकता – निर्धारित की गई निःशक्तता को सही माना जा सकता है – अधिकरण द्वारा पारित अवार्ड की राशि को बढ़ाया गया।

Prashant Sharma, for the appellants.
Mayank Upadhyay, for the respondent No. 3.

(Supplied : Paragraph numbers)

J U D G M E N T

ALOK VERMA, J. :- This common order shall govern disposal of M.A. Nos.1457, 1458 & 1462 of 2015.

The facts and circumstances as appear in M.A. No.1457/2015 would form basis of this order.

These appeals arise from a common award passed by learned Second Motor Vehicle Accident Claims Tribunal, Dewas passed in claim case No.39, 40 and 41 of 2014.

2. Brief facts are that the appellant- Omprakash alongwith other appellants- Savita Bai and Kailash were going on his motorcycle bearing registration No.MP41-MA-3278 from Shajapur to his village Meharkheri. Near the village Titodi in front of Sagar Dhaba, respondent No.1 brought the offending vehicle bearing registration No.MP09-GF-0975 driving it rashly and negligently and by bringing the vehicle at wrong side of the road hit the motorcycle on which the appellants were travelling. Due to the accident, the appellants suffered various injuries. The separate claim applications were filed and by the common impugned award, the learned member of the tribunal awarded Rs.2,12,765/- to the appellant-Omprakash including expenses he made on his treatment and Rs.75,000/- against injuries and body pain he suffered in the accident. Appellant-Kailash was awarded a sum of Rs.1,58,147/- including expenses he made on his treatment and Rs.30,000/- was awarded against the injuries and body pain he suffered in the accident. Appellant-Savita Bai was awarded Rs.70,650/- including expenses she made on her treatment and Rs.30,000/- was awarded against the injuries and body pain she suffered in accident.

Respondents No.1 and 2 denied the claim made by the appellant in the case.

3. Respondent No.3-Insurance company denied claim of the appellants before the tribunal and it was stated by respondent No.3 that at the time of accident, three persons were travelling on the motorcycle, which was meant only to carry two persons at a time. The driver of the motorcycle Omprakash was driving the motorcycle in a rash and negligent manner and also he was driving it at wrong side of the road. He could not control his vehicle as there was excess load due to three persons travelling on it and due to this, he fell down on the road and sustained injuries. The insured vehicle was not involved in the accident and was not responsible for causing injuries to them. It was also claimed that on the principle of contributory negligence, the appellants are entitled only for 50% of the amount.

4. Learned tribunal found that no permanent disability was caused to appellant-Omprakash and Kailash and permanent disability was not claimed in respect of appellant-Savita Bai. It was further found by the tribunal that the accident was caused due to contributory negligence on part of the appellant-Omprakash and he was responsible for 30% contributory negligence.

5. The tribunal did not believe the statement of the doctor while deciding issue No.4 in claim case No.41/2014. Dr. Yogesh Limbe was examined as

AW-4. According to him, the injuries caused 45.60% permanent disability on overall body of appellant- Omprakash. However, the learned tribunal opined that in cross-examination, this witness admitted that all the bones were properly fused and he also admitted that he has not assessed the total disability caused to the entire body of the appellant. He also admitted that he can now perform his day-to-day work properly.

6. Learned counsel appearing for the appellant submits that the tribunal erred in not believing the statement of this doctor. No evidence was produced by the respondent before the tribunal to show that the certificate was fake or doctor was not qualified to issue such certificate. Only on the presumption that this doctor was not consulted during treatment of the appellant. His statement was disbelieved.

7. During argument, findings of the tribunal on other issues were not challenged and only quantum were challenged. Therefore, I have to go through the evidence available on record and found whether the findings of the tribunal were correct or not.

8. Though, it is true that there are cases in which fake medical certificate is produced to claim compensation, however, each case has to be decided on its own merit. In the present case, if the certificate produced by the appellant was suspicious, it was the duty of Insurance Company to enquire the matter and produce sufficient evidence in this regard. No such evidence is produced, and therefore, the certificate produced by the doctor cannot be disbelieved, hence, it may be held that disability as assessed by him in respect of appellants-Omprakash and Kailash may be taken as correct.

9. Coming to the quantum of the case, I shall first take the case of appellant-Omprakash in M.A. No.1462/2015, who was awarded following amounts by the tribunal :-

अ–	शारीरिक व मानसिक कष्ट हेतु	75,000/-
ब–	उपचार व्यय के मद में	1,79,950/-
स–	पोष्टिक आहार के मद में	10,000/-
द–	आय की हानि के मद में	24,000/-
य–	आवागमन व्यय के मद में	5,000/-
र–	अटेंडर व्यय के मद में	10,000/-
	कुल प्रतिकर	3,03,950/-

10. After deducting 30% of the amount on principle of contributory negligence, Rs.2,12,765/- was awarded. In the above table, it is apparent that for physical and mental suffering, Rs.75,000/- was awarded on the presumption that there was no permanent disability. However, looking to the job of broom-making and assuming his annual income as Rs.48,000/-, loss of income due to permanent disability, which is in his right leg, the total loss of income may be taken as Rs.10,000/-, and therefore, applying a multiplier of 16, total amount comes to Rs.1,60,000/-. In this amount, Rs.25,000/- may be added for mental and physical suffering by the appellant. This comes to Rs.1,85,000/- and by adding to this amount, the amount awarded on other heads, total amount of award comes to Rs.4,13,950/-. Out of this, 30% amount i.e. Rs.1,24,185/- may be deducted against contributory negligence, and thus, the total amount comes to Rs.2,89,765/-, out of which, he has already received Rs.2,12,765/-, and therefore, total amount of enhancement comes to Rs.77,000/-.

Now, coming to the case of appellant- Kailash. He was awarded the following amounts by the tribunal :-

अ–	शारीरिक व मानसिक कष्ट हेतु	30,000/-
ब–	उपचार व्यय के मद में	1,03,147/-
स–	पोष्टिक आहार के मद में	5,000/-
द–	आय की हानि के मद में	3,000/-
य–	आवागमन व्यय के मद में	5,000/-
र–	अटेंडर व्यय के मद में	12,000/-
	कुल प्रतिकर	1,58,147/-

At the time of accident, age of Kailash was 52 years, therefore, multiplier of 8 may be applied. If his income is taken as Rs.48,000/- per annum, as he was also working as labour in making brooms and his loss of income may be taken as Rs.10,000/- and applying the multiplier of 8, total amount comes to Rs.80,000/-. Apart from this, Rs.20,000/- may be awarded for physical and mental suffering, and thus, total amount of award comes to Rs.1,00,000/- adding the amount awarded against other heads which may be as under :-

अ–	शारीरिक व मानसिक कष्ट हेतु	1,00,000/-
ब–	उपचार व्यय के मद में	1,03,147/-
स–	पोष्टिक आहार के मद में	5,000/-
द–	आय की हानि के मद में	3,000/-
य–	आवागमन व्यय के मद में	5,000/-
र–	अटेंडर व्यय के मद में	12,000/-
	कुल प्रतिकर	2,28,147/-

Out of Rs.2,28,147/-, appellant-Kailash has already been awarded Rs.1,58,147/-, and thus, the enhanced amount comes to Rs.70,000/-.

Coming to the case of Savita Bai. She suffered fractures on her ribs and two of her ribs were fractured. No permanent disability was claimed and she was awarded Rs.30,000/- for mental and physical and also other amount. She was awarded the amounts by the tribunal as under :-

अ–	शारीरिक व मानसिक कष्ट हेतु	30,000/-
ब–	उपचार व्यय के मद में	19,650/-
स–	पोष्टिक आहार के मद में	5,000/-
द–	आय की हानि के मद में	2,000/-
य–	आवागमन व्यय के मद में	5,000/-
र–	अटेंडर व्यय के मद में	9,000/-
	कुल प्रतिकर	70,650/-

Looking to the injuries she suffered on her ribs, the total amount of pain and suffering may be enhanced to Rs.70,000/- and adding this amount alongwith other heads as awarded, the total amount of award comes to Rs.1,10,650/-. She was already awarded Rs.70,650/-, thus, the enhanced amount comes to Rs.40,000/-.

Accordingly, the appeals are partly allowed. The award passed by learned tribunal is modified on following terms :-

(i) Respondents shall be liable, jointly and severally, for payment of :-

(a) Rs.40,000/- to appellant-Savita Bai in M.A. No.1457/2015;

(b) Rs.70,000/- to appellant-Kailash in M.A. No.1458/2015; and

(c) Rs.77,000/- to appellant- Omprakash in M.A. No.1462/2015;

by way of enhanced amount, over and above the amount of award already awarded in their favour by the tribunal.

(ii) The enhanced amount and interest thereon shall be paid to the appellant by crossed-cheque.

(iii) Respondents shall be liable for payment of 6% simple interest per annum from the date of filing of application before the tribunal on the enhanced amount also.

(iv) The cost of the appeal shall be borne by the respondent.

(v) Counsel fee is assessed at Rs.2,000/-.

With aforesaid modifications, the appeals stand disposed of.

Certified copy, as per rules.

Appeal partly allowed.

I.L.R. [2017] M.P., 105
APPELLATE CIVIL

Before Mr. Justice R.S. Jha & Mr. Justice Rajendra Mahajan
M.A. No. 1541/2013 (Jabalpur) decided on 10 August, 2016

PARVEEN BEGAM & ors. ...Appellants
Vs.
MAHFOOJ KHAN ...Respondent

A. ***Guardians and Wards Act (8 of 1890), Sections 7 & 8 - Custody of child*** **- Factor for consideration - Welfare of the child - Material and physical well being - The education and upbringing - Happiness and moral welfare. (Para 20)**

क. *संरक्षक और प्रतिपाल्य अधिनियम (1890 का 8), धाराएँ 7 व 8*

– *बालक की अभिरक्षा* – विचार का कारक – बालक का कल्याण – भौतिक एवं शारीरिक सुविधा – शिक्षा एवं पालन–पोषण – सुख एवं नैतिक कल्याण।

B. Guardians and Wards Act (8 of 1890), Section 17 - Custody of child - Grant of **- Conflict between personnel law and consideration of welfare of the child - Latter must prevail. (Para 19)**

ख. संरक्षक और प्रतिपाल्य अधिनियम (1890 का 8), धारा 17 – बालक की अभिरक्षा – प्रदान किया जाना – स्वीय विधि एवं बालक के कल्याण का विचार दोनों के मध्य विरोध है – बाद वाला अभिभावी होगा।

C. Guardians and Wards Act (8 of 1890), Sections 7, 8 & 25 - Mohammadan Law - Hanafi Law - Custody of child **- Mother living immoral life - Held - Disqualified for custody - However, it would be just, proper & humane to grant her visitation right in recognition of her motherhood. (Para 18)**

ग. संरक्षक और प्रतिपाल्य अधिनियम (1890 का 8), धाराएँ 7, 8 व 25 – मुस्लिम विधि – हनफी विधि – बालक की अभिरक्षा – माता अनैतिक जीवन जी रही है – अभिनिर्धारित – अभिरक्षा के लिए निरर्हित – तथापि, उसकी मातृत्वता को ध्यान में रखते हुए उसे मिलने का अधिकार प्रदान करना न्यायसंगत, उचित एवं मानवोचित होगा।

D. Guardians and Wards Act (8 of 1890), Sections 7, 8 & 25 - Guardianship **- Higher education and moral values of life are prime consideration over and above the love and affection. (Para 25)**

घ. संरक्षक और प्रतिपाल्य अधिनियम (1890 का 8), धाराएँ 7, 8 व 25 – संरक्षकता – प्रेम एवं अनुराग से बढ़कर, उच्च शिक्षा तथा जीवन के नैतिक मूल्य मुख्य रूप से महत्वपूर्ण हैं।

Cases referred:

AIR 2005 M.P. 141, 1993 (2) SCC 6, AIR 2006 SC 1343, 2008 (9) SCC 413, 2009 III M.P.J.R. (SC) 169, AIR 1975 All. 67, AIR 1961 J & K 5, 1977 V-II W.N. 79, 1972 J.L.J. 1045, AIR 2001 SC 1056.

Vishal Dhagat, for the appellants.
Tribhuvan Mishra, for the respondent.

ORDER

The Order of the Court was delivered by : RAJENDRA MAHAJAN , J. :- The appellants have preferred this appeal under

Section 47 of the Guardians and Wards Act, 1890 (hereinafter referred to as "the Act") being aggrieved by and dissatisfied with the order dated 06.04.2013 passed by the First Additional Sessions Judge, Damoh in Guardian Case No.03/11 titled Mahfooj Khan Vs. Parveen Begam and three others, whereby the respondent has been appointed as guardian of minor appellant Nos. 2 to 4 under Section 7 of the Act by allowing the application filed by him.

2. The respondent filed an application before the court below on 27.08.2011 under the provisions of Sections 7 and 8 of the Act and as per the rights of Hizanat (Custody) of minor child prevaling (sic:prevailing) in Sunni Muslims governed by the Hanafi Law. His case in brief is that he got married to appellant No.1 Parveen near about 17 years before the date of filing of the application in village Kalehara, Tehsil Jabera, District Damoh according to Muslim rites and customs. From their wedlock, appellant Parveen gave birth to appellant Nos. 2 to 4 and a daughter Chandni. At present appellant Nos. 2 to 4 are minors and they are with appellant Parveen while Chandni, who is their eldest child, lives with him. As they were staying separately, appellant Parveen had filed an application under Section 125 of the Cr.P.C. claiming maintenance for herself and appellant Nos. 2 to 4 in the Court of Judicial Magistrate First Class, Damoh, which was registered as miscellaneous criminal case No.41/2010. The aforesaid case was finally disposed of vide order dated 05.04.2011. The learned J.M.F.C. has refused to grant maintenance to appellant Parveen on the ground that she is living in adultery but he has granted maintenance to appellant Nos. 2 to 4 to the tune of Rs.800/- (rupees eight hundred) per month each till they attain majority.

3. The respondent has alleged that in the night of 08.04.2010 in his house at Garhakota town when he was in Sagar, his daughter Chandni saw appellant Parveen having sex with his neighbour Pappu @ Majid. On being seen in a such position, she asked Chandni not to disclose her physical relationship with Pappu to her father/respondent inspite of which she narrated the entire incident to him. Thereafter, he filed complaint case No.201/2010 in the Court of Judicial Magistrate First Class, Garhakota District Sagar against Pappu for his prosecution under Section 497 of the IPC, which is still pending.

4. It is further the case of the respondent before the court below that appellant Parveen neglects to take proper care of appellant Nos. 2 to 4 and that she is leading an adulterous life which is having an adverse impact upon their lives. Appellant Nos. 2 to 4 are living with appellant Parveen in village

Kalehara, where no proper education facilities are available. Moreover, she is totally illiterate, and she does not have any independent source of income. As also she maintains them upon the allowance being granted by him as per the court-order, whereas his financial condition is very sound. Under the circumstances, he wants to keep appellant Nos. 2 to 4 with him and to provide them proper education for betterment of their future lives. On the basis of the aforesaid assertions it is prayed by him that he be appointed the guardian of appellant Nos.2 to 4 and appellant Parveen be ordered to hand over their custody to him.

5. In the written statement filed by appellant Parveen, she has not disputed the facts that she got married to the respondent as per Muslim rites and customs, that from their wedlock she gave birth to appellant Nos. 2 to 4 and Chandni, that Chandni is their eldest child and that she resides with the respondent, that she and appellant Nos. 2 to 4 are presently residing in village Kalehara, that she has no independent source of income and that she maintains appellant Nos. 2 to 4 upon the maintenance allowance being given by the respondent and that the learned J.M.F.C. has not granted her maintenance allowance. However, she has denied the remaining allegations levelled against her by the respondent. Her stand is that the respondent had contracted a second marriage. After his second marriage, whenever she demanded money from him for her maintenance and that of the children, he physically assaulted and tortured her. On 27.05.2010, the respondent beat her up and threw her out of their marital home on the false allegations of being immoral. Ever since, under compulsion, she and appellant Nos. 2 to 4 have been living with her parents in village Kalehara. She has alleged that the respondent does not want to give her maintenance allowance of Rs. 2400/- (rupees twenty four hundred) per month as per the court-order and, therefore, with the aforesaid ulterior motive, he has filed the application. She has also alleged that the respondent has three children with his second wife and, therefore, he and his second wife would not take proper care of appellant Nos. 2 to 4 while she, being the real mother, would take much better care of them. Hence, the overall welfare of appellant Nos. 2 to 4 lies with her. Upon the aforestated averments, she prayed for rejection of the application filed by the respondent.

6. Upon pleadings of the parties, the court below framed issues and thereafter recorded their evidence. In support of the claim, the respondent has examined himself as AW-1 and four witnesses namely, Mahboob Khan (AW-2), Mohd. Yasin (AW-3), Shayra Begam (AW-4) and Chandni (AW-

5). On the other hand, appellant Parveen examined herself as NAW-1 and her father Mohd. Yusuf (NAW-2). The learned trial Judge, having closely analyzed the evidence on record, has held that appellant Parveen is living a life of adultery and immorality. Therefore, she has lost the right of keeping appellant Nos. 2 to 4 under her custody (Hizanat). The court below has also held that the welfare of appellant Nos. 2 to 4 would be safer and more secured in the hands of respondent taking into consideration the overall prevailing factors and circumstances. Upon the aforesaid findings, the court below has allowed the application and appointed the respondent as guardian of appellant Nos. 2 to 4 with a direction to appellant Parveen to deliver their custody to the respondent. Hence, this appeal.

7. Learned counsel appearing for the appellants has submitted that there is no cogent and acceptable evidence on record that appellant Parveen is leading an immoral life. It is submitted that the finding of the learned trial Judge in this regard is totally based upon the evidence of Chandni (AW-5). While relying upon her evidence, the learned trial Judge has lost sight of the fact that Chandni is residing with the respondent and, therefore, the plausibility is there that she has given the evidence against appellant Parveen under the pressure of the respondent. It is submitted that the respondent has contracted a second marriage and that with his second wife he has three children. Therefore, the respondent and his second wife would not look after appellant Nos. 2 to 4 properly. It is submitted that as per the evidence on record appellant No.4 Sakir is mentally challenged. It is urged that in the circumstance, appellant Parveen would take proper and much better care of appellant Nos. 2 to 4 being their real mother. It is submitted that this issue has not been properly considered by the court below and, therefore, the learned trial Judge has not decided the application in right perspective and has committed perversity and illegality. Thus, the impugned order is liable to be set aside. In the alternate, it is submitted that in case this Court upholds the impugned order, then visiting rights be given to appellant Parveen as the impugned order is lacking in this regard.

8. In reply, learned counsel appearing for the respondent has submitted that there is overwhelming evidence on record to the effect that appellant Parveen is living in adultery. Therefore, the learned trial Judge has rightly decided that she has lost the right of custody of the appellant Nos. 2 to 4. It is submitted that the learned trial Judge having examined the matter from all aspects/angles has recorded a proper finding that the welfare of appellant

Nos. 2 to 4 lies with the respondent and, therefore, their custody is given to the respondent by appointing him their guardian. Thus, no interference with the impugned order is required to be made by this Court and the appeal be dismissed being meritless.

9. We have rendered our anxious consideration to the rival submissions made by the learned counsel for the parties at the Bar and perused the entire material on record.

10. The first point that arises for our consideration is whether appellant Parveen is living in adultery?

11. Respondent Mahfooj (AW-1) has testified that in pursuit of his business appellant Parveen and he went to Bhopal with their children Chandni and Ku. Mahjabi who is appellant No.2 herein. They stayed in Bhopal for about two years and six months. At that time, appellant Parveen ran away with a man. Thereupon, he lodged a report of her elopement at Police Station Jahangirabad, Bhopal on 19.08.1998. On the third day, she came back and, thereafter, he brought her and the children to his native place Garhakota, where he convened a Panchayat of his community in respect of her elopement. In the Panchayat, the Panchs directed her to live with her parents in village Kalehara. Some months later, he went to Indore for doing business. There, he contracted a second marriage with Sabra, who is the daughter of his maternal uncle and who is a divorcee with a child. When appellant Parveen's father heard about his second marriage, he sent her back with the children to live in his company. At that time, it was decided that appellant Parveen and appellant Nos. 2 to 4 and his second wife Sabra with her children would live in places namely Garhakota and Sagar respectively. He would regularly visit both the places in order to accompany them. His daughter Chandni (AW-5) told him that in his absence one neighbour Pappu @ Majid used to visit their house and that she saw appellant Parveen having sex with him in a completely naked state. Thereafter, he filed a criminal complaint Ex.P-1 for the prosecution of said Pappu under Section 497 of the IPC in the Court of Judicial Magistrate First Class, Garhakota. Upon his complaint, criminal case No.201/10 is registered in the court against Pappu and the case is still pending. He has further deposed that appellant Parveen had filed an application under Section 125 Cr.P.C. seeking maintenance for herself and appellant Nos.2 to 4 from him in the Court of Judicial Magistrate First Class, Damoh, which was registered as miscellaneous criminal case No.41/10. In that case, the court passed final

order on 05.04.2011, the certified copy of which is Ex.P-4. By recording a finding that appellant Parveen is living in adultery, the learned J.M.F.C. has refused to grant her maintenance.

12. The aforesaid evidence of the respondent is corroborated in material particulars by Mahbood Khan (AW-2), Mohd. Yasin (AW-3), Shayra Begam (AW-4) and Chandni (AW-5). It is pertinent to mention here that Shayra Begam is the wife of respondent's elder brother. She has specifically stated in para-4 of her deposition that appellant Parveen has illicit relations with some men. She has also stated that she tried her best to impress upon her not to have physical intimacy with other men, but in vain.

13. Chandni (AW-5) has stated in her evidence that when she lived with her mother/appellant Parveen in Garhakota, our neighbour Pappu used to visit our house in the absence of her father/respondent. One night, when she came back from the residence of her aunt Shayra (AW-4) after watching the T.V., she saw Pappu and her mother naked on the bed in an intimate state. She narrated the incident to her aunt Shayra. It is pertinent to mention herein that her aforesaid statement is corroborated by Shayra (AW-4) in para-2 of her deposition. Having perused meticulously and carefully the statement of Chandni, especially her cross-examination, we find that there is nothing in her cross to draw even a remote inference that the statement given by her against her mother is under the influence or pressure of the respondent. As per her deposition, she was about 16 years old at the time of recording her statement before the trial court. Thus, she was mature enough at that time to understand and anticipate the consequences thereof and adverse impact of the same upon the life of her mother. We, therefore, hold that her evidence is reliable on the point of the immoral and adulterous character of appellant Parveen. It is worth noting that the learned J.M.F.C. in para-7 of the order of maintenance Ex.P-4 has also given a finding that appellant Parveen is living in adultery. In para-15 of the written statement, it is mentioned that appellant Parveen had filed a revision against the order denying maintenance to her. However, the revisional court has dismissed her revision. The record clearly indicates that both the said courts dealing with the maintenance case have placed reliance upon the evidence of Chandni while recording a finding that appellant Parveen is living in adultery.

14. From a perusal of the statements of respondent, Mahboob Khan (AW-2), Mohd. Yasin (AW-3) and Shayra Begam (AW-4), we find that there is

nothing in their cross-examinations to discredit their evidence on the point of adulterous life of appellant Parveen.

15. Appellant Parveen (NAW-1) and her father Mohd. Yusuf (NAW-2) have simply denied the fact that appellant Parveen is living in adultery with Pappu in their evidence. However, they have not given any cogent reason to discredit the statements of the witnesses of respondent especially of Chandni (AW-5). Hence, their statements of denial when weighed against unshakeable and positive evidence adduced by the respondent pales into insignificance.

16. In the light of aforesaid discussion, we hold that appellant Parveen is leading an adulterous life. Thus, the finding given by the learned trial Judge in this regard is affirmed.

17. Now, the second point that arises for our consideration is whether the learned trial Judge is justified in appointing and declaring the respondent as guardian of appellant Nos. 2 to 4.

18. Admitted facts of the case amongst others are that appellant Parveen and the respondent are biological parents of appellant Nos. 2 to 4 and that they are Sunni Muslims governed by the Hanafi Law. Hence, it will be first seen what are the provisions of grant of custody of minor children in the Hanafi Law. As per renowned Author Mulla on Mohomedan Law and the ratio laid down by this Court in *Wazid Ali Vs. Rehana Anjum* (AIR 2005 M.P. 141), a Hanafi mother is entitled to the custody of her minor male child until he has completed the age of seven years and of her minor female child until she has attained puberty i.e. age of 15 years. This right continues though she is divorced by the father of the child, unless she remarries in which case the custody belongs to the father. Failing the mother, the custody of the child belongs to other female relations i.e. maternal grand-mother, paternal grand-mother, full sister and so on in that order. According to Mulla, a female including the mother, who is otherwise entitled to the custody of a child, loses the right of custody (i) if she remarries a person not related to the child within the prohibited degrees, or (ii) if she goes and resides during the subsistence of the marriage, at a distance from the father's place of residence; or (iii) if she is leading an immoral life or (iv) if she neglects to take proper care of the child. In view of the said tenets of the Hanafi Law, the learned trial Judge has rightly disqualified appellant Parveen from the guardianship of appellant Nos. 2 to 4 on the ground that she is living an immoral life.

19. We are fully aware of the propositions of law that while deciding the issue of custodial rights and appointment of guardian under the Act, the welfare of the child has also to be considered and has to be given due weightage keeping the facts and circumstances of the case in mind and the personal law. But Section 17 of the Act provides that if there is a conflict between the personal law to which the child is subject and the consideration of his/her welfare, the latter must prevail. In this regard, references may be made to the decisions rendered in the cases namely *Chandrakala Menon Vs. Upin Menon* 1993 (2) SCC 6; *Shiela B. Das Vs. P.R. Sugasree* AIR 2006 SC 1343; *Nil Ratan Kundu and another Vs. Abhijit Kundu* 2008 (9) SCC 413; *Anjali Kapoor Vs. Rajiv Baijal* 2009 III M.P.J.R. (SC) 169; *Ali Munnisan Vs. Mukhtar Ahmad* AIR 1975 All. 67; *Hassan Bhat Vs. Ghulam Mohd.* AIR 1961 J & K 5.

20. In the decisions reported in *Mohammed Mehboob Khan Vs. Rahmit Bi and others* (1977 V-II W.N. 79) and *Rajkumar Vs. Indrakumari* (1972 J.L.J. 1045), this Court has observed that the dominant factor for consideration of the court is the welfare of the child, which is not to be measured only in terms of money and physical comforts. The word "Welfare" must be taken in its widest sense so as to embrass (sic:embrace) the material and physical well-being; the education and upbringing; happiness and moral welfare. The court must consider every circumstance bearing upon these considerations.

21. In a decision reported in *R.V. Srinath Prasad Vs. Nandamuri Jayakrishna* (AIR 2001 SC 1056), the Supreme Court has emphasized that the custody of child is a sensitive issue. It is also a matter involving the sentimental attachment. Such a matter is to be approached and tackled carefully. A balance has to be struck between attachment and sentiment of the parties towards the child and the welfare of child is a paramount importance.

22. Now, we apply the propositions of law aforenoted to the factual matrix of the case while proceeding to decide the second issue.

23. Respondent Mahfooj Khan (AW-1) has testified in paras- 3 and 7 of his deposition that appellant Parveen is grossly negligent in taking care of appellant Nos. 2 to 4 and that her loose morals are also having an adverse impact upon their character. He has further testified that she is not paying attention towards their education. She and the remaining appellants are residing in village Kalehara, where the education facilities are only up to primary level

i.e. 5th standard. Hence, the future of appellant Nos. 2 to 4 is in the dark if they remain with her. He is in the business of shoe-selling and thereby he earns Rs.5,000/- to 6,000/- per month. With this income he would provide them good education while keeping them with him in Garhakota, where there are facilities for higher education as it is a big town.

24. On the other hand, appellant Parveen (NAW-1) has denied in her deposition that she is negligent in looking after appellant Nos. 2 to 4. She has further deposed that the respondent has three children with his second wife and that he lives with them. In the circumstance, if appellant Nos. 2 to 4 reside with them, then they would not get love and affection and care as she has been showering upon them. They will certainly get discriminatory treatment from them. She has also stated that appellant No.4 Sakir is mentally challenged, therefore, he needs special care which only she can provide to him being her mother. She has alleged that the respondent has filed the application with an ulterior motive which is that in case appellant Nos. 2 to 4 reside with them, then he need not pay her maintenance allowance of Rs.2400/- (rupees twenty four hundred) per month as fixed by the J.M.F.C. Court. Appellant Parveen in paras-9, 12, 13 and 15 of her cross examination has admitted that she is totally illiterate and that she can only put her signature. She has further admitted that she does not have any independent source of income and that she is not doing any job to earn money. Appellant Nos. 2 to 4 and she live on the maintenance allowance being granted by the respondent. She could not state as to what level of education is available in village Kalehara. She has admitted the facts that when she was living with the respondent at Garhakota, appellant No.3 Sakib used to study in a private school and that the children of respondent's second wife are getting education in a convent school. Appellant Parveen's father Yusuf (NAW-2) has admitted in his cross examination almost all the material facts that have been admitted by appellant Parveen in her deposition.

25. Neither appellant Parveen nor her father Yusuf (NAW-2) has given any cogent and reliable evidence much less medical evidence to prove that appellant Sakir is mentally challenged. Hence, their evidence on the status of health of appellant Sakir is not reliable. Appellant Parveen had deposed before the trial court on 05.02.2013 and that time she has stated in para-10 of her evidence that the ages of appellant Nos. 2 to 4 are 14, 11 and 9 years respectively. Hence, it may be said that by this time each of them has become older by about two years. Therefore, they do not need the day to day care of

appellant Parveen. On the other hand, it is the right time that they should get higher education for the betterment of their future lives. Hence, we give primacy to their higher education and moral values of life over and above the love and affection. Taking into consideration the admissions made by appellant Parveen in her cross-examination, we may say with certitude that she is not in a position to provide appellant Nos. 2 to 4 higher education. In this view of the matter, we hold that the learned trial Judge has rightly appointed the respondent as guardian of appellant Nos. 2 to 4.

26. Upon the perusal of the impugned order, we find that the learned trial Judge has not granted visitation rights to appellant Parveen when appellant Nos.2 to 4 will be in custody of the respondent. Since appellant Parveen is their mother and and she is also the legally wedded wife of the respondent as their marriage still subsists and as they have so far been in her custody and care, we deem it just, proper and humane to grant her visiting rights in recognition of her motherhood. Accordingly, we grant her visitation right as under:

(i) The respondent shall allow appellant Parveen to spend sufficient time with appellant Nos. 2 to 4 at the time of their birthdays, festivals and all such other occasions which require celebrations such as good performance by them in the domain of education, sports and any other remarkable activity as also at the time of their illness.

(ii) The respondent shall not prevent appellant Nos. 2 to 4 from taking all sorts of gifts from appellant Parveen.

(iii) The respondent shall permit appellant Parveen to take appellant Nos. 2 to 4 to outings, movies, gardens and treats subject to the consent of appellant Nos. 2 to 4.

(iv) If any of appellant Nos. 2 to 4 expresses his/her desire to meet appellant Parveen, then the respondent shall not prevent them from doing so.

(v) Apart from the aforesaid rights, as the relationship between the parties still subsists, they shall be at liberty to make any other additional arrangements relating to residence and visitation that may be mutually agreed and decided by them.

27. In view of the discussion supra, the impugned order is confirmed with the addition of the aforestated visitation rights. Consequently, this appeal is dismissed. The parties are directed to bear their own costs of litigation.

Appeal dismissed.

I.L.R. [2017] M.P., 116
APPELLATE CRIMINAL
Before Mr. Justice Rajendra Menon &
Mr. Justice Sushil Kumar Palo
Cr.A.No. 373/2002 (Jabalpur) decided on 28 March, 2016

SITARAM & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Sections 302, 325/149, 148 & 323 and Evidence Act (1 of 1872), Sections 3, 60, 145 & 157 **- Accused persons allegedly assaulted deceased and other eye witnesses in a very cruel manner with farsa, tangi, bhala and lathi - Deceased and his sons sustained grievous injuries - Complainant party were neither aggressors nor armed with deadly weapons - No injury was sustained by the accused persons - Held - There is no reason to disbelieve the prosecution version which was duly corroborated by the evidence of eye-witnesses, independent witness as well as by the medical evidence - On account of minor contradiction whole statement can not be discarded - Prosecution has discharged its onus - No interference is called for - Appeal dismissed. (Paras 30, 31, 32 & 33)**

दण्ड संहिता (1860 का 45), धाराएँ 302, 325/149, 148 व 323 एवं साक्ष्य अधिनियम (1872 का 1), धाराएँ 3, 60, 145 व 157 – अभियुक्तगण ने अभिकथित रूप से मृतक एवं अन्य चक्षुदर्शी साक्षियों पर फरसा, टांगी, भाला एवं लाठी से बहुत ही क्रूरतापूर्ण तरीके से हमला किया – मृतक एवं उसके पुत्रों को गंभीर क्षति कारित हुई – परिवादी पक्ष न तो आक्रमणकारी थे न ही घातक आयुधों से सुसज्जित थे – अभियुक्तगण को कोई क्षति कारित नहीं हुई थी – अभिनिर्धारित – अभियोजन कथन पर अविश्वास करने का कोई कारण नहीं है, जिसकी संपुष्टि सम्यक् रूप से चक्षुदर्शी साक्षियों के साक्ष्य, स्वतंत्र साक्षी तथा चिकित्सीय साक्ष्य द्वारा की गई थी – मामूली विरोधाभास के कारण संपूर्ण कथन को अमान्य नहीं किया जा सकता – अभियोजन ने अपने दायित्व का निर्वहन किया – हस्तक्षेप की कोई आवश्यकता नहीं है – अपील खारिज।

Cases referred:

1999 (2) JLJ 310, AIR 1985 SC 48, AIR 1988 SC 696, AIR 2011 SC 200.

V.K. Lakhera, for the appellants.
Akshay Namdeo, P.L. for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : **S. K. PALO, J. :-** This appeal under Section 374 (2) of the Cr.P.C is directed against judgment dated 29.1.2002, passed by First A.S.J, Shahdol in S.T. No. 331/2000 whereby the learned Sessions Judge has convicted the appellants for offence under Section 302, 325/149, 148 and 323 I.P.C and sentenced the appellants R.I for life imprisonment and fine of Rs. 1,000/-, R.I for two years and fine of Rs. 500/-, R.I for one year with stipulated default respectively to each of the appellants.

2 The factual matrix of the case in brief runs as follows:- On 20.10.2000 Biharil Lal (PW 2) lodged a repot (sic:report) at Police Station Jaitpur that he has certain agricultural land at village Diyagadh regarding which he had quarrel with the accused Chhannu and others. The complainant Biharilal (PW 2) cultivated paddy in the disputed field. On the date of incident, he was at his home, when his sister-in-law informed him that accused Chhannu is taking away the paddy yield from his field by Cart. He along with Shyam (PW 4) deceased Baljeet, Sobhnath (PW 5), Ramdas (PW 1) went to the field to stop the accused persons. When they reached near the field, accused Sitaram and Ramcharan abused them. They ran towards him armed with axe and lathi and threatened them to kill, if they enter into the field. They inflicted injury on the head of the Baljeet because of which he fell on the ground. When Shyam (PW 3), Sobhnath (PW 4) and Ramdas (PW 1) tried to save Baljeet, accused Sitaram shouted to the other accused persons and exhorted to kill them, so that they should not go alive. Accused Mangaldeen, Chhannu, Bharat and Puran armed with lathi, farsa, danda and stone ran after them and started inflicting injuries to the complainant party. They inflicted injury to Baljeet to such an extent that he died there only. Complainant Bihari (PW 2), Shyam (PW 3), Sobhnath (PW 4), Ramdas (PW 1) sustained injuries. Baljeet, Ramdas, Shyam received grievous injuries.

3. On the death of Baljeet, report Ex. P/2 was lodged. Dead body of

Baljeet was sent for post mortem and other injured persons were medically examined. The accused persons were arrested. On their memorandum different weapons were seized. Charge sheet has been filed.

4. After the case was committed, the learned A.S.J framed charge under Section 148, 302, in alternative 302 read with Section 149, 323 read with Section 149, 325 read with Section 149 of I.P.C.

5. The accused persons abjured guilt and pleaded innocence.

6. The learned trial Court having gone through the evidence pronounced the judgment on 29.01.2002 and convicted the appellants and sentenced them as aforesaid.

7. The appellants, being aggrieved by the conviction and sentence, have challenged the impugned judgment on the following grounds. According to the appellants, the learned trial Court committed grave error in holding them guilty. The evidence produced by the prosecution has not been properly appreciated. The learned trial Court has failed to consider the medical report and statements of the witnesses which are contradictory. The learned trial Court also failed to see that no independent witness has supported the prosecution story. There is no eyewitness to support the prosecution story that the appellants have inflicted injury to Baljeet. Ramdas (PW 1), Bihari (PW 2), Shyam (PW 3), Sobhnath (PW 4) whom the trial Court relied, are all interested witnesses. No conviction could have been based on the basis of their testimony. The learned trial Court also failed to see that there was dispute over the possession of land. Deceased Baljeet, Sobhnath, Ramdas and Shyam had come with sharp edged weapons and attacked the appellant Sitaram. Bharat Singh (PW 13), an independent witness, has stated that the disputed land is in the possession of the appellants. The learned trial Court did not appreciate this statement. Therefore, pray for allowing the appeal and to acquit the appellants.

8. On the other hand, learned counsel for the State opposed the above contentions and justified the impugned judgment stating that the injured witnesses were present at the time of incident, therefore, their statements cannot be disbelieved. The medical report and post-mortem report also corroborate the prosecution story. Hence, the impugned judgment of conviction and sentence is not called for any interference.

9. According to Dr. Rajesh Mithoriya (PW 11), a Medical Officer at the Primary Health Centre, on 21.10.2000 dead body of Baljeet was referred to him for post-mortem vide requisition Ex. P/6. He examined the dead body on 22.10.2000 and drawn the post mortem repot (sic:report) Ex. P/6 -A.

(A-Head):-

(i) Lacerated Wound- 4"x 2 c.m.x depth of skull bone, clotted blood in gap, the margins irregular, lying obliquely on the left temporal region.

(ii) Incised wound 2"x c.m. x depth of the skull bone having a clean cut mark as furrow, lying vertically on the right parietal lobe. Margins are regular and the mark on the bone is also clean.

(iii) Lacerated Wound:- 3"x 1 c.m x depth of skull seen lying horizontally. The clot and dust particles in the gap seen on the posterior aspect of the parietal bone.

(B- Head):-

At the back, there were multiple imprint abrasion (blush black in colour lying in all direction and crossing the vertical column gap on the right and left sides. At the periphery on the left side back over the chest wall, All the bruise had collapsed to form a large single blackish mass. Infiltration of blood in to the tissue. The single mass is swollen on the left side thigh. Tissues are swollen. There was a fracture of the 4th, 5th, 6th, 7th and 8th on the left side. The site at which the five ribs were fractured were different. On the left side plenal cavity -parietal plensa was discontinued and blood is seen the pernal cavity left side. However, the contours of the left and right ribs were unaffected but they were congested.

(C) Right Lower Limb:-

(i) Imprint abrasion 6"x3 c.m..black coloured lying obliquely on the lower part of the gluteal fold and upper part of thigh.

(ii) Imprint abrasion:- 5"x 2 c.m.x blush black coloured having two parallel streaks seen lying horizontally on the middle 1/3rd of the thigh positively.

(iii) Lacerated wound:- 4 c.m x 2 c.m.x depth of under lying skin the margin tethered and pieces of the underlying fractured bone particle seen in the gap. The injury is seen below the right knee. Destruction shows comminuted

compound fracture of the right tivia bone four pieces of bone etc. Tearing destruction of the underlying tissue that above mentioned injuries seem to be caused by hard blunt perpendicular object and all are ant mortem in nature.

(D) Left Lower Limb:-

Abrasion 3"x 2" grazetype, brown (Blackish Blue) in coloumn seen at the left knee.

(E) Right Upper Limb:-

(i) 1"x 1 c.m. depth of the muscle, spindle shaped by sharp cutting edge obliquely placed the margin everted clear cut seen on the posterior aspect of the right shoulder.

(ii) I/w:- 1"x1 c.m x depth of muscle having margins clear cut and everted, horizontally placed and the lethal side of the right arm in the lower the swelling of the corresponding elbow.

(iii) Swelling of the right forearm:- The swelling is more marked upto the joint of middle and lower 1/3rd. Overlying skin is bluish black, presenting part of the compound fracture of the radius bone 1' x1 c.m at the middle of the Arm. There is extravasations of blood and tearing of muscles. There is compound fracture of the radius bone and fracture at the lower 1/3rd of the extravasations of blood in the surrounding region, the two ends one displaced and had penetrated the tissues. This injury is also caused by hard and blunt perpendicular object.

(F) Left Upper Limb:-

(i) Bluish black coloured imprint abrasion accompanied with swelling, crackling sound on movements seen at the left arm in the middle region. Infiltration of blood into tissue and swelling of subcutaneous tissue of the infiltration of blood into the underlying muscle. Fracture of spiral of the left humerous bone in the middle 1/3rd.

(ii) Black coloured imprint abrasion 2x 1 c.m. oblique placed on the back of elbow joint.

(iii) Abrasion 2x2 c.m on the ulma border of left forearm.

(iv) Lacerated wound:- 1.5 c.m. gave out the left thumb. Fracture of promixal phalynix at the middle of the thumb.

10. The Medical Officer has opined that the cause of death is due to hypo volumic shock and massive destruction of bones. Therefore, it is clear that deceased Baljeet died due to injuries he sustained.

11. According to Medical Officer Dr. Rajesh Mithoriya, (PW 11) who also examined injured Bihari and drawn Ex. P/10 report. He observed

(i) Imprint abrasion reddish in colour elevated 3"x 1 c.m. on the left lateral aspect of left arm.

(ii) There was pain back on the right hand having no external injury.

12 Dr. Rajesh Mithoria (PW 11) has also examined injured Shyam and submitted report Ex. P/11. In his report, he explained

(i) swelling with crackling surrounding of the left mid arm:- swelling at the middle 1/3rd of left arm producing crackling sound of the restriction of movement at the shoulder and elbow. There is suspect of fracture on the lower middle 1/3rd of the left humerous bone and advised ex-ray.

(ii) A lacerated wound 2 ½" x 5 c.m. wide depth of whole skin and apinemosis the occipital tube of the skull. The margins are swellen and tethered having irregular margins.

(iii) Swelling and crackling sound in the left forearm at the middle 1/3rd swelling at the upper middle 1/3rd of left forearm producing crackling sound with the restriction of movement at the elbow and wrist joint.

(iv) Swelling at the right elbow joint accompanying upper 1/3rd up to middle of the right forearm and swelling of the right palm posterior.

13. The Medical Officer Rajesh Mithoriya, also examined Sobhnath and drawn Ex. P/12 and observed that:-

(i) Imprint abrasion 6"x 2.5 c.m. wide red coloured and the elevation of the skin seen lying horizontally on the right chest wall on the back.

(ii) Imprint abrasion:- 2"x ½", red in colour the superficial at the right mastoid bone prominece vertically placed behind the right ear.

(iii) Lacerated wound:- 1 c.m x ½ c.m depth of skin at the back of the left elbow surrounding area is swollen.

(iv) Imprint abrasion:- 2 c.m wide x 1 c.m. long the abrasion, red in colour and the swelling of the right arm at the lower 1/3rd over the triceps region which was advised for x-ray.

(v) Complaint of back pain:- all the injuries were caused by hard and blunt object.

14. All these go to show that the complaint party which include deceased Baljeet received injuries. Baljeet died due to the injuries and other witnesses Bihari (PW 2), Shyam (PW 3), Sobhnath (PW 4) and Ramdas (PW 1) have received injuries including grievous injuries.

15. Now we may examine the evidence as to who are responsible for causing these injuries and the death of Baljeet?

16. Ramdas (PW 1) in his statement has reiterated the prosecution story and has stated that when his father Baljeet entered into the field ahead of him, at that time, Shyam and Bihari were also with him. Accused Ramcharan and Chhannu said to them that, if they enter into the field, they will be cut to pieces. When Baljeet tried to intervene and asked the accused persons not to cut the crop, accused Chhannu inflicted injury to him by farsa (a sharp cutting weapon). Accused Ramcharan exhorted and said cut them to pieces. At the same time, he inflicted injury to Shyam on the back of his head, near the neck. Accused Puran used stone and inflicted injury to Ramdas (PW 1) on his left leg. Because of which bone in his leg fractured. He ran away to a nearby house. Accused Sitaram and Mangal caught him, accused Puran inflicted injury on his head by means of stone when he shouted the accused persons left him and fled. He further submits that accused Chhannu by means of Farsa, accused Ramcharan by means of Tangi and accused Puran by means of Bhalla inflicted injuries to Baljeet. They also cut his cheek. His father Baljeet died on the spot. The accused persons also inflicted injuries to Shyam and Sobhnath. Bihari went to the Police Station to lodge report.

17. Shyama (PW 3) has also supported the prosecution story and corroborated the statement of Ramdas (PW 1). According to him, in the month of Kartik, the date was 20th, his sister-in-law Punia who had gone to the field for cutting grass to be used as fodder for the cattle, came from the field and informed them that, accused Chhannu, Ramcharan, Puran, Bharat, Sitaram and Mangal are cutting the standing crop of their field and taking away by loading it on cart. On hearing this, his father Baljeet along with this witness

and others went to the field. They saw the accused persons cutting the standing paddy crop and are loading on the bullock-cart. His father Baljeet tried to stop the accused persons. Accused Chhannu came behind his father and inflicted injury on his head. Accused Ramcharan also inflicted injury by Tangi (a sharp cutting weapon) near his neck. All accused persons then started inflicting injuries to Baljeet. The accused persons including Puran, Bharat, Sitaram, Mangal were armed with Lathi. When this witness shouted that his father is being assaulted, accused persons surrounded him and they inflicted injuries to him. He received injury on the left wrist and armed by lathi. His wrist bone and arm bone were fractured. He also sustained injuries on the head, right hand and waist. On his shout, Bihari and Sobhnath approached accused and ran after them. His father Baljeet died on the spot. This witness became unconscious on the spot. He was taken to the hospital where he regained consciousness. He was admitted in the hospital for eleven days.

18. Sobhnath (PW 4) his another son Baljeet had gone to their field at Deogadh for cutting grass to be used as fodder. His father Baljeet told him that Punia has been informed that accused persons are cutting the standing paddy crop, therefore, he is going to field to stop them. Baljeet and Shyam went to the field situated at village Deogadh. He and Bihari were behind them. When he reached the spot, he saw the accused persons inflicting injury to Baljeet at that time, Baljeet fell on the ground. Accused Ramcharan armed with axe, accused Chhannu armed with Farsa and accused Mangal, Sitaram, Bharat armed with lathis were inflicted injuries to Baljeet. On seen this witness, accused Mangal, Sitaram and Bharat also ran after him. When he ran away towards Dabda, accused persons returned to the field. The accused persons inflicted injuries by throwing stone and he sustained injuries on both of his arms and head. According to him because of the injuries his father died.

19. In this regard, the statement of P.W. 2 Bihari is also important. According to him, in the month of Kartik at about 4 p.m, the incident took place. He also supports the prosecution story and describes the incident as described by the other witnesses. He further goes to say that when Shyam tried to save Baljeet, the accused persons inflicted injuries by surrounding him. Accused Puran inflicted injury to him by throwing stone. He further said that the accused persons also inflicted injury to Sobhnath his brother by means of lathi etc. He went to the village and with the help of Narendra, he went to the Police Station by motor cycle and lodged report Ex. P/1.

20. Saddu Choudhary (PW 5) has also stated that Baljeet informed him that some persons are cutting his standing paddy crop at about 12 noon. On the shout of Baljeet, he approached the field. He sa . the accused persons armed with Balam, Farsi and Lathi are assaulting Baljeet. Accused Ram Charan armed with Balam, accused Chhannu and Sitaram armed with Farsa and other accused armed with Lathi were inflicting injuries to Baljeet. When he tried to stop the accused persons, accused Chhannu ran towards him, saying that you have come to witness of incident. Ramdas and Shyam also came there. The accused persons inflicted injuries to them.

21. The statement of child witness Santosh (PW 6) also has its own importance. According to him, the accused persons are cutting the standing wheat crop. They were trying to take away the crop with the help of the Bullock-cart. When Baljeet went to the field and opposed the same, the accused persons Ramcharan with Tangi, Chhannu with Farsa and others with Lathi inflicted injury to Baljeet. When the other witnesses tried to save him they were also assaulted. When Ramdas was beaten, he ran into a nearby house. Accused Sitaram and Mangaldeen dragged him out and inflicted injuries.

22. Ex. P/1 is the F.I.R lodged by Bihari PW/2. The F.I.R has been lodged at 7.55 p.m on the same day. It would be appropriate to mention here that the incident took place at about 4.pm and the place of incident is situated at a distance of 30 k.m from the Police Station Jaitpur. Keeping in view the same, the report cannot be said to have lodged belatedly. More so, the contents of F.I.R also corroborate the statements of the witnesses and the medical reports. That being so, we have no reason to disbelieve the genuineness of the F.I.R.

23. Of course, there are some contradictions and omissions in the statements of the witnesses but these are natural and it removes the possibility of tutoring the witnesses. In the case of *State of M.P. Vs. Hanif Khan & Others* 1999 (2) JLJ 310 a Division Bench of this Court has held that:-

> "Evidence Act, 1872-Ss. 60, 145, and 157-minor contradictions in statements of eye witnesses-are natural - whole statement cannot be discarded - evidence corroborating medical evidence - can safely be believed."

24. We have no reason to doubt the statement of Dr. Rajesh Mithoriya (PW 11), who has given vivid description of the injuries received by the witnesses and deceased Baljeet. The spot map was prepared by S.B. Verma

(PW 12) the Sub-Inspector of Police, who was in-charge of Police Station, Jaitpur on the date of incident. He also seized two lathi and baniyan marked with blood and soil, and some mixed with blood from the spot. On 20.10.2000, he seized a Farsa on the basis of memorandum of Ex. P/20 from accused Chhannu by means of Ex. P/26 seizure memo. He also seized a lathi from accused Mangaldeen on the basis of memorandum P/21 by means of seizure memo and Ex. P/27. He seized a Tangi (axe) from accused Ramcharan on the basis of memorandum P/22 vide seizure memo P/28. He also seized lathi from accused Sitaram on the basis of Ex. P/23 a memorandum vide seizure memo No. Ex. P/29. he also seized a danda from accused Puran on the basis of memorandum P/24 from his house vide seizure memo P/30. He also seized a lathi from accused Bharat on the basis of memorandum P/25 vide seizure memo Ex. P/31.

25. Another independent witness Halimun (Pw/9) has been examined by the prosecution. She has clearly stated that on the date of incident, the accused persons had come to the field and were cutting the standing crop being cultivated by Baljeet since last 20 years and were loading into a bullock-cart. At about 3 p.m Baljeet and his son Shyam came to the field. Accused Ramcharan armed with Tangi, accused Chhannu armed with Farsa and others accused persons armed with Lathi, assaulted Baljeet with these weapons. When they also inflicted injury to Shyam, at that time, Sobhnath, Bihari and Ramdas were also present there. The accused persons also ran after these witnesses. When Ramdas tried to escape and tried to hide himself in her house, the accused persons came there and dragged Ramdas from her house and inflicted injuries to him. Accused Puran inflicted injury by means of stone when accused Sitaram, Mangal, Bharat caught hold of Ramdas. Ramdas was found lying in front of his house, whereas Baljeet and Shyam were lying in the field. In her cross-examination, there are some omissions and contradictions but these contradictions and omissions seem to be not of that nature, which can disturb her credibility.

26. Another witness examined is Naredra Prajapati (PW 10) who escorted injured Bihari from the village to the police station by means of his motorcycle, to lodge the report. He has said that at about 4 p.m, Bihari came to him and told him about the assault, therefore, he took Bihari on his motor cycle to the Police Station Jaitpur. He also narrated that in his presence, Panchnama Ex. P/8 was prepared after giving him a notice for preparing Panchnama Ex. P/9. On the above circumstances, we have no reason to disbelieve the prosecution

evidence.

27. The minor discrepancies brought into our notice by learned counsel for the appellants are of no such nature which may raise grievous doubt in the prosecution case. In the case of *State of U.P. Vs. M.K. Anthony* AIR 1985 Supreme Court 48, the Apex Court has held that:

> "(C) Evidence Act (1 of 1872), S. 3- Evidence -Appreciation of -Proper approach-Evidence found generally reliable- Much importance should not be given to minor discrepancies and technical errors- Appellate Court when may interfere. (Criminal P.C. (2 of 1974), S. 386)."

28. In Appabhai & Another Vs. State of Gujarat AIR 1988 Supreme Court 696, it is held that :-

> "(B) Penal Code (45 of 1860), S. 300-Murder-Failure of prosecution to examine independent witnesses-Held, prosecution case cannot be thrown out on that ground alone. (Evidence Act (1 of 1872), S.3)"

29. As regarding the defence that the disputed land belongs to the appellants and the deceased and the prosecution witnesses were the aggressors. We are unable to accept the same. Bharat Singh (PW 13) has agreed that the land in which the incident took place is Survey No. 313 measuring about 94 decimals. According to the revenue records, this land belongs to accused Ramcharan and Chhannu. Hemraj Singh (DW 1) also supports the defence and says that the land in question belongs to accused Chhannu, which is his neighbouring land. Shambhu (DW 2) also supports the defence version and says that the land in question belongs to the accused persons and he has issued the certificate Ex. D/9, about the land being distributed between the deceased and the accused persons on the basis of partition. This witness has no authority to issue such a certificate.

30. Hemraj Singh, the neighbour (DW 1) in his cross-examination, is unable to say the area of the disputed land Survey No. 313. He agreed that this land has been partitioned between the Baljeet and the accused persons. But he is unable to say when this land was partitioned. Besides this, we have no reason to disbelieve Halimun (DW 9) an independent witness who says that since last twenty years, deceased Baljeet was cultivating the disputed land. In this

background, we hold that the complainant party were not the aggressors nor they were armed with deadly weapons at the time of incident.

31. We are unable to accept the contentions of learned counsel for the appellants, specially when the statements of prosecution witnesses' corroborate with each other, which is also found support by the F.I.R Ex. P/1 and the medical reports and the seizure of deadly weapons used in the scene or crime.

32. In *Paramjeet Singh Vs. State of Uttarakhand* AIR 2011 Supreme Court 200, the Hon'ble Apex Court held that:-

> "11. A criminal trial is not a fairy tale wherein one is free to give flight to one's imagination and fantasy. Crime is an event in real life and is the product of an interplay between different human emotions. In arriving at a conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case, in the final analysis, would have to depend upon its own facts. The Court must bear in mind that "human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions." Though an offence may be gruesome and revolt the human conscience, an accused can be convicted only on legal evidence and not on surmises and conjecture. The law does not permit the Court to punish the accused on the basis of a moral conviction or suspicion alone."

33. The burden of proof in a criminal trial never shifts and it is always the burden of the prosecution to prove its case beyond the reasonable doubt on the basis of acceptable evidence. In the present case, the prosecution has discharged its onus and has proved by acceptable evidence. The witnesses, who are the sons of deceased, are supported by independent witnesses like Halimun (PW 9) and Dr. Rajesh Mithoriya (PW 11). The accused persons have not sustained any injury whereas the deceased and his sons sustained injuries which are grievous in nature. All these constitute to say that the prosecution has brought home the guilt of accused persons. The fact that the offence was committed in a very cruel, revolting and gruesome manner which may be termed as "shocking nature of crime." Therefore, the learned trial Court has awarded the sentences mentioned above. Considering the nature

of crime and the manner in which it has been committed, calls for no interference even regarding the quantum of punishment.

34. Thus, we do not see any cogent reasons to interfere with the findings of the learned trial Court and the sentence imposed therein. The appeal is hereby dismissed.

Appeal dismissed.

I.L.R. [2017] M.P., 128
APPELLATE CRIMINAL
Before Mr. Justice Ashok Kumar Joshi
Cr.A. No. 2910/1998 (Jabalpur) decided on 11 November, 2016

MAHENDRA AHIRWAR ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. ***Penal Code (45 of 1860), Sections 361, 363 & 366 -*** **Determination of age of Prosecutrix - Ossification test - As not confined to examination of a single bone only, the margin of error could be ±six months - Age of prosecutrix found between 15-17 years - Prosecutrix stated her age to be 16 years on the date of incident - Trial Court rightly held prosecutrix age below 18 years. (Para 21)**

क. *दण्ड संहिता (1860 का 45), धाराएँ 361, 363 व 366* – अभियोक्त्री की आयु का निर्धारण – अस्थि परीक्षण – चूंकि मात्र एक ही अस्थि के परीक्षण तक सीमित नहीं है, त्रुटि का अंतर 6 महीने कम या ज्यादा हो सकता है – अभियोक्त्री की आयु 15–17 वर्ष के मध्य पाई गई – अभियोक्त्री ने अपनी आयु घटना दिनांक को 16 वर्ष होनी बताई – विचारण न्यायालय द्वारा अभियोक्त्री की आयु 18 वर्ष से कम उचित अभिनिर्धारित की गई।

B. ***Penal Code (45 of 1860), Sections 361, 363 & 366 -*** ***Abduction*** **- Prosecutrix was taken out from safe keeping of her parents - Appellant enticed her with proposal of marriage and cash of Rs. 1,00,000/- - Conviction and sentence u/S 363 and 366 of IPC confirmed. (Para 7 & 26)**

ख. *दण्ड संहिता (1860 का 45), धाराएँ 361, 363 व 366 – अपहरण* – अभियोक्त्री को उसके माता–पिता की संरक्षा से दूर ले जाया गया – अपीलार्थी विवाह का प्रस्ताव एवं रूपये 1,00,000/– नकद राशि के बहाने उसको फुसलाकर

ले गया – भारतीय दण्ड संहिता की धारा 363 एवं 366 के अंतर्गत दोषसिद्धि एवं दण्डादेश की पुष्टि की गई।

C. Penal Code (45 of 1860), Section 376 - Rape - Consent - **Age of prosecutrix found between 15-17 years in ossification test - No injury marks on body or private parts, after recovery prosecutrix has not stated to anyone about the fact of rape, prosecutrix was above 16 years of age and on the date of incident the age of consent for the offence u/S 376 of IPC was 16 years so prosecutrix was a consenting party to the act - Appeal partially allowed - Conviction & sentence u/S 376 of IPC set aside. (Paras 21, 26 & 28)**

ग. दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – सहमति – अस्थि परीक्षण में अभियोक्त्री की आयु 15–17 वर्ष के मध्य पाई गई – शरीर एवं गुप्तांगों पर चोट के कोई निशान नहीं, पुनः प्राप्ति के पश्चात् अभियोक्त्री ने बलात्संग के तथ्य का किसी से कथन नहीं किया, अभियोक्त्री की आयु 16 वर्ष से अधिक थी तथा घटना दिनांक को भारतीय दण्ड संहिता की धारा 376 के अंतर्गत अपराध के लिए सहमति की उम्र 16 वर्ष थी, अतः अभियोक्त्री इस कृत्य में सम्मत पक्षकार थी – अपील अंशतः मंजूर – भारतीय दण्ड संहिता की धारा 376 के अंतर्गत दोषसिद्धि एवं दण्डादेश अपास्त।

Cases referred:

(2010) 8 SCC 714, AIR 2011 SC 697, 2009 (5) MPHT 30, 2016 (2) MPWN 136.

P.S. Das, for the appellant.
D.K. Paroha, P.L. for the respondent/State.

JUDGMENT

Ashok Kumar Joshi, J. :- Challenge in this appeal is to the conviction and sentence recorded by the Sessions Judge, Sagar on 9.11.1998 by judgment passed in Sessions Trial No.119/1998, whereby the appellant has been sentenced to 7 years R.I. under Section 376, 3 years R.I. under Section 366 and 2 years R.I. under Section 363 of the IPC and it is directed that all the jail sentence shall run concurrently and the detention period during the trail (sic:trial) would be adjusted in jail sentence.

2. Prosecution case in brief is that the prosecutrix P.W.1 was residing with her father Bhagwal Singh (P.W.2) and mother Durga Bai (P.W.4) in a

tenanted house of village Karrapur owned by Indur Singh (P.W.3). On the date of incident 17.1.1998, at Police Out-post Karrapur. Complainant Bhagwal Singh (P.W.2) lodged an FIR that on the same date, at 6 p.m., his 16 years daughter prosecutrix (P.W.1) has been abducted by the appelant (sic:appellant) Mahendra belonging to the same village after enticing her and the incident has been witnessed by his wife Durga Bai (P.W.4), Indur Singh (P.W.3) and his son Ram Singh (P.W.10). He was searching for her daughter but on not finding her is lodging report, which was recorded by A.S.I. Ramsewak Tiwari (P.W.11). On the next day i.e. 18.1.1998 at 11 a.m., prosecutrix (P.W.1) was recovered with the appellant from a field of Amol Singh Thakur near the village Karrapur. Thereafter, the appellant was arrested by above mentioned A.S.I. Prosecutrix informed that she was raped by the appellant, thus she was sent to Dafrin hospital, Sagar, where on the same date 18.1.1998 Dr. Chitra Shrivastava (P.W.5) examined the prosecutrix and did not found any sign of injury on body and private parts. The lady doctor prepared two slides of vaginal swab of the prosecutrix and sealed a black coloured underwear, which was worn by the prosecutrix and advised for x'ray examination for determining her age. The lady doctor found herself unable to record any definite opinion regarding rape and prepared report (Ex.P.8). On 20.1.1998, in district hospital, Sagar, the x'ray examination of right wrist, right elbow and right iliac crest of right buttock were performed by Dr.Jinesh Diwakar (P.W.12), who recorded his opinion in report (Ex.P.19) that on that day, the age of the prosecutrix was between 15 to 17 years. During investigation, prosecutrix's mark-sheet of 9th Class was obtained, in which her date of birth was recorded as 02.06.1982.

3. Appellant after his arrest was also sent for medical examination to District hospital, Sagar on 19.1.1998, but on that day, he did not cooperate with the doctor, thus he was medically examined by Dr.Sudhir Kumar Jain (P.W.13) on 20.1.1998, who also sealed the underwear worn by the appellant and recorded his opinion in report (Ex.P.22) that the appllenat (sic:appellant) was capable of performing sexual intercourse. The sealed material was sent for examination to Forensic Science Laboratory, Sagar, according to whose report (Ex.P.18), the stains of semen and human sperms were found on underwear and slides of the prosecutrix and also on underwear of the appellant. After completing investigation, charge-sheet was filed in the Court of JMFC, Sagar, who committed the case to Sessions Court, Sagar.

4. The appellant denied the charge framed by the Sessions Judge, Sagar against him for offences punishable under sections 363, 366 and 376 of the IPC. It was the defence of the appellant that he has been falsely implicated. Thirteen prosecution witnesses were examined. No any defence witness was examined. The Sessions Judge, Sagar believing on the evidence of the prosecution witnesses held the appellant guilty for the charged offences and sentenced him as mentioned hereinabove.

5. It has been vehemently contended by the appellant's counsel that from evidence available on the record, it was not proved that the age of the prosecutrix was below than 18 years on the date of incident and it was clear that the prosecutrix was a consenting party in reference to the alleged sexual activity, but the learned Sessions Judge had erred in convicting and sentencing the appellant as mentioned above.

6. On the other hand, the Panel Lawyer for the State supporting the recorded conviction and sentence has argued that the trial Judge has recorded clear finding that the appellant had given a greed to the prosecutrix that he being a scheduled caste fellow, if she performed intercaste marriage with the appellant, then Government would give them Rs.1,00,000/-, which would be divided between them, thus the alleged consent was not voluntarily and legal and thus, the alleged consent was immaterial, even if prosecutrix is considered to be major.

7. Prosecutrix (P.W.1) deposed before the trial Court that when she was 16 years old at the time of incident, the appellant has proposed her for marriage and the appellant had stated that if she would marry him, then Rs.1,00,000/- would be given by the Government, then she had replied to the appellant that she would ask to her parents in this regard. Prosecutrix deposed in examination-in-chief that just two or three days after this proposal, appellant took her to a field of Amol Singh, near the village, where the appellant removed her underwear and salwar and then after removing his clothes, appellant committed intercourse with her forcefully, then she shouted, but nobody came there and she tried to escape, but her hands were caught by the appellant. Prosecutrix deposed that when the appellant took her with him on that day, her father was not at house and her mother had gone in the lane and at that time she was alone in the house and after committing intercourse the appellant detained her in the field and the incident happened at 6 to 7 in the evening and about one hour later, her landlord Indur Singh came in the field of Amol Singh.

8. Prosecutrix deposed that she also intimated to Indur Singh in the field that the appellant had stated her that if she would marry him, then Rs.1,00,000/- would be given to them, which would be equally distributed, but on this point her evidence is not supported by Indur Singh (P.W.3). According to the evidence of prosecutrix (P.W.1), the rape was not reported to Indur Singh (P.W.3) by her. Prosecutrix deposed that she had studied upto the 9th Class and her date of birth is 02.06.1982 and police had seized a bag from her, in which her dress and a ring were kept and the relating seizure memo (Ex.P.1) is signed by her, but this seizure memo has not been proved by the seizing officer Ramsewak Tiwari (P.W.11), who prepared it.

9. Durga Bai (P.W.4) deposed that on the date of incident in village Karrapur, she had gone to the house of neighbourers leaving her daughter prosecutrix at house, but when she returned, then she intimated to their landlord Indur Singh that prosecutrix is not at house and on the same day, her husband returned to their house at 8 p.m. from another village, then she intimated her husband that prosecutrix is missing, then her husband searched for prosecutrix, but she could not be found by her husband and prosecutrix was traced by their landlord Indur Singh at 9 p.m. and prosecutrix was taken to house back by Indur Singh, then prosecutrix intimated her that the appellant had taken her for performing marriage and the appellant was telling that she would receive money from the Government. Durga Bai (P.W.4) had not deposed that rape was reported to her by prosecutrix (P.W.1).

10. There are material contradictions in the evidence of prosecution witnesses on the points that on what date and what time, the prosecutrix was recovered by whom and whether there was any eye witness to the incident of kidnapping or abduction. The father of the prosecutrix Bhagwal Singh (P.W.2) deposed that at 6 p.m., when he returned from another village to their house at Karrapur, then his wife intimated him that prosecutrix had gone with the appellant, then he intimated their landlord and when after searching she was not traced, then he intimated about this at police outpost Karrapur, but he had clearly deposed that after recovery of prosecutrix, he had lodged report at police outpost Karrapur. Bhagwal Singh (P.W.2) has proved his signature on FIR (Ex.P.2) lodged at police outpost Karrapur, but it is written in the FIR that the prosecutrix was not recovered at that time. His evidence on this point that his wife intimated him that prosecutrix had gone with the appellant Mahendra, is not supported even by his wife Durga Bai (P.W.4).

11. Bhagwal Singh (P.W.2), Indur Singh (P.W.3), Durga Bai (P.W.4) and brother of the prosecutrix Ram Singh (P.W.10) were also declared hostile by the prosecution, as their Court's evidence was not consistent with their police statements recorded during the investigation and complainant Bhagwal Singh's evidence was not consistent with his signed FIR (Ex.P.2).

12. On the point of recovery of the prosecutrix, the evidence of Indur Singh (P.W.3) is contradicted by the evidence of investigator Ramsewak Tiwari (P.W.11). Indur Singh (P.W.3) deposed that on the date of incident, at the time of 6 to 7 in the evening, he was intimated by a small child that there is cry of weeping at his house because his tenant Bhagwal Singh's daughter had left the house, then he reached to his house then, there Bhagwal Singh intimated him that prosecutrix is missing, then both of them searched for prosecutrix. Indur Singh deposed that he found prosecutrix with appellant in the field of Amol Singh near the village, then he asked both of them to return to house, but they were not agreeing and on his repeating dictate, prosecutrix and appellant stood up and the bag of prosecutrix was taken by the appellant and they returned to village and at that time when he asked the prosecutrix that how she came to the field, then prrosecutrix (sic:prosecutrix) replied that she is going anywhere, then he caused to understand prosecutrix and appellant, but they were not agreeing, thereafter he took them to the house of prosecutrix and thereafter he reached to the police outpost Karrapur with father of the prosecutrix. In cross-examination, Indur Singh deposed that he had taken prosecutrix and appellant to the house of Sarpanch Kashiram and Sarpanch Kashiram also tried to understand the prosecutrix and the appellant and prosecutrix had told to the Sarpanch that she would marry appellant. Prosecutrix (P.W.1) deposed in para 13 that when she reached to police outpost Karrapur, then appellant was present with her at outpost.

13. It is important to mention here that, according to the depositions of father and mother of the prosecutrix and Indur Singh, after recovery of the prosecutrix, she had not informed anyone that she had been raped by the appellant. The depositions of prosecutrix, parents of prosecutrix, Indur Singh and brother of the prosecutrix, Ram Singh (P.W.10) are totally inconsistent with the statement of investigator Ramsewak Tiwari (P.W.11). Ram Singh (P.W.10) deposed that on the date of incident when he returned at 10 to 11 p.m. in the night to his house after playing cricket, then prosecutrix was at his house and his mother has intimated him that the appellant was abducting his sister prosecutrix.

14. According to evidence of prrosecutrix (sic:prosecutrix), her parents and Indur Singh, prosecutrix was recovered in the night on the date of incident, but investigator Ramsewak Tiwari (P.W.11) deposed in Para 9 of his cross-examination that on next day at 12 O'clock of the day in the field of Amol Singh Thakur, prosecutrix and appellant, where both of them were sitting, were recovered after encirclement by police and thereafter both of them were taken to police outpost Karrapur and at the same time i.e. 12 noon, appellant Mahendra was arrested. Appellant's arrest memo (Ex.P.17) has been proved by him, which is prepared at 12 noon on 18.1.1998. Thus it is clear that the evidence of Indur Singh and all family members of the prosecutrix, including prosecutrix about her recovery is not supported by the investigator Ramsewak Tiwari (P.W.11), who tells the Court a totally different story about the recovery of prosecutrix on next day. It is surprising that no any recovery memo relating to the prosecutrix was prepared by the investigator. Thus it is clear that there are material contradictions in evidence of all the above mentioned prosecution witnesses relating to the manner, date and time of the recovery of the prosecutrix.

15. On the point of age of the prosecutrix, there are also much contradictions in evidence of prosecutrix and her brother Ram Singh (P.W.10). Ram Singh (P.W.10) deposed that prosecutrix is aged about 18 to 19 years and he was aged 20 years on the date of his deposition, but in cross-examination, he disclosed his inability to state his date of birth, though he deposed that on the date of deposition, he was a student of B.A. first year. Thus his evidence on the point of age of prosecutrix appears to be unbelievable.

16. Prosecutrix (P.W.1) clearly deposed in her examination-in-chief that she was 16 years old at the time of incident, though she also stated that her date of birth is 2.6.1982. On calculating her age from above mentioned date of birth, she appears to be aged about 15 years and 7 months old at the time of incident, but as her birth certificate or her school admission register's entry was not produced and proved by anyone, above mentioned date of birth is not proved by the prosecution evidence. On this point, the observation made by the Hon'ble Apex Court in the case of *Satpal Singh Vs. State of Haryana* [(2010) 8 SCC 714] is as follows:-

> "28. The entry made in the official record by an official or person authorised in performance of an official duty is admissible under Section 35 of the Evidence Act but the party

> may still ask the Court/authority to examine its probative value. The authenticity of the entry would depend as to on whose instruction/information such entry stood recorded and what was his source of information. Thus, entry in school register/ certificate requires to be proved in accordance with law. Standard of proof for the same remains as in any other civil and criminal case."

17. Bhagwal Singh (P.W.2) deposed that at the time of incident his daughter prosecutrix was 16 years old and she was studying in school, but he could not state her date of birth, but he deposed that on the date of incident, his son Ram Singh was 19 years old. Her wife Durga Bai deposed in her cross-examination that at that time, the age of her son Ram Singh was about 20-21 years and the prosecutrix is 3 years younger than Ram Singh. Thus, it is clear that on the point of age of the prosecutrix on the date of incident, the evidence of her parents are not of conclusive nature, but from their evidence, it appears that at that time prosecutrix was about 17-18 years old.

18. In this regard, on the basis of x'ray examination, Dr.Jinesh Diwakar (P.W.12) deposed that on the basis of x'ray examination on 20.1.1998, he found that in right elbow, epiphysis have joined, thus her age was above 15 years, in right wrist, epiphysis were partially joined, thus her age was below 17 years and the epiphysis of right iliac crest of buttock have not joined, thus her age was below 17 years and in his opinion and report (Ex.P.19) on above mentioned date, the age of the prosecutrix was between 15 to 17 years. In cross-examination, he deposed that according to Dr.Modi's view, deviation of 2 years is possible due to geographical circumstances, living standard and genus of the person.

19. Dr.Chitra Shrivastava (P.W.5) deposed that on 18.1.1998 at the time of medical examination of prosecutrix, she had found that her secondary sexual characters were well developed. Thus, on the basis of above mentioned medical evidence of both the doctors, the learned counsel for the appellant contended that it is not proved beyond reasonable doubt that the prosecutrix was below the age of 18 years on the date of incident, whereas the trial Court has given finding in para 5 that definitely on the date of incident, prosecutrix was of the age below than 18 years and thus she was minor.

20. In this regard, the observation made by the Hon'ble Supreme Court in

the case of *State of U.P. Vs. Chhoteylal* (AIR 2011 SC 697) appears to be material, which are as follows:-

> "11. We find outselves in agreement with the view of the trial Court regarding the age of the prosecutrix. The High Court conjectured that the age of the prosecutrix could be even 19 years. This appears to have been done by adding two years to the age opined by P.W.5. There is no such rule much less an absolute one that two years have to be added to the age determined by doctor. We are supported by a 3-Judge Bench decision of this Court in *State of Karnataka Vs. Bantara Sudhakara @ Sudha and another* (2008) 11 SCC 38], wherein this Court at page 41 of the report stated as under:-
>
> > "Additionally, merely because the doctor's evidence showed that the victims belong to the age group of 14 to 16, to conclude that two years' age has to be added to the upper age limit is without any foundation."

21. As the ossification test was not confined to x'ray examination of a single bone only, in light of the case of *Rajesh Bahelia Vs. State of M.P.* (2009 (5) MPHT 30], the margin of error could be ± six months. In light of the above mentioned citations, in my considered opinion, the trial Court was absolutely right in holding that in any case, on the date of incident, the prosecutrix's age was below than 18 years and thus she was minor, looking to the provision of Section 361 of the IPC.

22. In relation to the charged offences punishable under Section 363 and 366 of the IPC, according to FIR (Ex.P.2), Durga Bai (P.W.4), Ram Singh (P.W.10) and Indur Singh (P.W.3) had seen the appellant Mahendra kidnapping the prosecutrix from her house, but all these witnesses have deposed that they are not eye witnesses to the kidnapping or abduction. In this relation, some interesting facts are available in deposition of prosecutrix (P.W.1). She deposed in her cross-examination that appellant was previously known to her, because he was her classmate and the appellant was living just opposite to her house, on the other side of the road. Though she refused the suggestion given by the defence counsel that she had written love letter (Ex.D.1) on a greeting card to the appellant, but she deposed in para 10 of her cross-examination that on the date of incident, in the noon, appellant had come to her house and told her

that she should accompany him, then they will perform marriage and received Rs.1,00,000/- would be equally distributed between them and at the instance of the appellant, he had prepared her bag in the day time for eloping with appellant. In para no.14 she deposed that she herself had kept her clothes in her bag and the appellant had asked her to give her bag to him after coming to her house at the time of 6 to 7 in evening and when they left the house, then sun had set and there was dark, but when she was going with the appellant towards the field of Amol, nobody had met them in the way and there are ten other houses between her house and the field of Amol.

23. Though, prosecutrix had deposed that appellant forcefully committed sexual intercourse with her in the field of Amol Singh, but from her total deposition, it is clear that previously she was having intimate relations with the appellant, who used to come to her house in the noon and evening, in absence of her other family members and she was of the age more than 16 years, at the time of incident, as has been found proved by the trial Court itself, thus looking to the total behaviour and conduct of herself before and after the alleged sexual contact with the appellant in the field, as she remained stayed with the appellant till her recovery in the field and according to the evidence of Indur Singh (P.W.3), she was not willing to go back to her parents house and had expressed her willingness to marry the appellant even before the Sarpanch Kashiram, it is apparent that her evidence that the appellant committed intercourse with her forcefully or despite her resistence, is not believable, as the lady doctor had not found any sign of any injury on her body and private parts. According to the total evidence of her parents and brother Ram Singh (P.W.10) and evidence of Indur Singh (P.W.3), it is clear that she had not stated to anyone after recovery that appellant had committed rape with her. Thus, it is clear that she was a consenting party to the sexual activities occurred in the field of Amol Singh.

24. The learned trial Court had observed that her consent was obtained by giving her greed of Rs.1,00,000/-, but she had deposed in cross-examination that before the incident, she was already engaged for marriage to a boy resident of village Dadgaon and after the incident she was married to another boy of village Bachhona. Her father Bhagwal Singh (P.W.2) deposed in cross-examination that just after the incident, he performed the marriage of prosecutrix. It is significant to mention here that the deposition of the prosecutrix was recorded before the trial Court on 14.8.1998 i.e. within seven months from the incident.

25. Prosecutrix (P.W.1) clearly deposed in her examination-in-chief that on the date of incident she was taken by the appellant to the field of Amol Singh, where she stayed with appellant for some hours, though according to the deposition of investigator Ramsewak Tiwari (P.W.11), she stayed there with appellant for whole night till next noon. It is clear from evidence of prosecutrix (P.W.1) that prosecutrix had not been taken by appellant on the date of incident for marriage or receiving money from anyone or Government. For marriage, the village should have been immediately left, thus the finding recorded by the trial Court that her consent for intercourse was not voluntarily and result of given greed for money, appears to be erroneous and it is clear from the total deposition of prosecutrix that on the date of incident, she was taken by the appellant to that field only for fulfilment of their bodily needs with her prior consent.

26. Though prosecutrix (P.W.1) had deposed that she was forcefully raped by the appellant despite her resistance, but her evidence on that point is not reliable as after recovery she did not complain about rape by appellant to her parents, brother, Indur Singh and as no any sign of violence or resistance was found by the lady doctor on her body and private parts. It is clear from her evidence and her father's evidence that just after the incident, she was married to another boy, in such situation, her evidence against the appellant does not appear to be reliable on the point of rape. After considering the total conduct of the prosecutrix (P.W.1) as depicted in her statement, certainly she was above 16 years of age at the time of incident and at that time, the age of consent for the offence under Section 376 of the IPC was 16 years. (The citation of *State of M.P. Vs. Yogesh* [2016 (2) MPWN 136], wherein the judgment has been reproduced in toto is followed). Thus, it appears that the conviction and sentence recorded by the learned Sessions Judge under Section 376 of the IPC is not proper and legal but so far as other offences are concerned, it has been found proved that on the date of incident, her age was less than 18 years. Thus she was minor looking to the provision of Section 361 of the IPC and it is proved that she was taken out from the keeping of her parents and enticed by the appellant and similarly, it is proved beyond reasonable doubt that she was kidnapped by the appellant in order to be seduced to have illicit intercourse with the appellant, the conviction recorded by the trial Court of the appellant for offences punishable under Sections 363 and 366 of the IPC appears to be based on proper appreciation of evidence available on record.

27. On the point of adequacy of sentences recoded (sic:recorded) by the trial Court of the appellant under Sections 363 and 366 of the IPC, in totality of the proved facts and circumstances, the imposed sentences do not appear to be harsh and disproportionate. Thus, the sentences under both of the above mentioned offences do not require any interference.

28. In the result, the appeal filed by the appellant Mahendra is partially allowed and his conviction and sentence recorded by the trial Court under Section 376 of the IPC is set aside and the appellant is acquitted from the charge of Section 376 of the IPC, but his appeal is partially dismissed in relation to his conviction and sentence recorded by the trial Court under Sections 363 and 366 of the IPC i.e. appellant's conviction and sentence as recorded by the trial Court under Sections 363 and 366 of the IPC are confirmed. The appellant was released on bail. His bail bonds are discharged. The appellant is directed to immediately surrender before the trial Court to undergo the remaining jail sentences under Sections 363 and 366 of the IPC. The order of the trial Court about running the jail sentences concurrently is confirmed.

Appeal partly allowed.

I.L.R. [2017] M.P., 139
APPELLATE CRIMINAL
Before Mr. Justice S.K. Seth
Cr.A. No. 3520/2016 (Jabalpur) decided on 29 November, 2016

VIKRAM SINGH ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989) (as amended by Act No. 1/2016 on 26.01.2016), Section 14-A- Appeal - Maintainability **- Trial Court rejected bail application on 05.10.2015 - High Court rejected bail application u/S 439 of Cr.P.C. on 21.04.2016 - Whether appeal u/S 14-A of the Act of 1989 is maintainable against the bail order, (accepting or rejecting), passed by the High Court - Held - No appeal is provided from an order passed by the High Court, accepting or rejecting the bail application under the scheme of the Act of 1989. (Paras 3 and 4)**

क. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33)(दिनाँक 26.01.2016 को अधिनियम क्र. 1/2016 द्वारा यथा संशोधित), धारा 14–ए – अपील – पोषणीयता – विचारण न्यायालय ने दिनाँक 05.10.2015 को जमानत आवेदन अस्वीकार किया – उच्च न्यायालय ने दिनाँक 21.04.2016 को दण्ड प्रक्रिया संहिता की धारा 439 के अंतर्गत जमानत आवेदन अस्वीकार किया – क्या उच्च न्यायालय द्वारा पारित जमानत आदेश (स्वीकार अथवा अस्वीकार करने वाला), के विरूद्ध 1989 के अधिनियम की धारा 14–ए के अंतर्गत अपील पोषणीय है – अभिनिर्धारित – 1989 के अधिनियम की स्कीम के अंतर्गत जमानत आवेदन को स्वीकार अथवा अस्वीकार करने वाले, उच्च न्यायालय द्वारा पारित आदेश के विरूद्ध कोई अपील उपबंधित नहीं है।

B. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989)(as amended by Act No. 1/2016 on 26.01.2016), Section 14-A - Appeal - Bail Application - Rejection thereof - Special Court - High Court **- Held - u/S 14-A of the Act of 1989 an appeal is provided against an order rejecting bail application by the Special Court to High Court within 90 days from the date of the order appealed from & sub-Section 3 of Section 14-A provides that the High Court can condone the delay, if appeal is presented within a period of 180 days but beyond 90 days - After 180 days there is no power vested in the Court to condone the delay. (Para 2)**

ख. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33)(दिनाँक 26.01.2016 को अधिनियम क्र. 1/2016 द्वारा यथा संशोधित), धारा 14–ए – अपील – जमानत आवेदन – उसका अस्वीकार किया जाना – विशेष न्यायालय – उच्च न्यायालय – अभिनिर्धारित – विशेष न्यायालय द्वारा जमानत आवेदन अस्वीकार किये जाने के आदेश के विरूद्ध 1989 के अधिनियम की धारा 14–ए के अंतर्गत ऐसे आदेश जिसके विरूद्ध अपील की गई है, की दिनाँक से 90 दिनों के भीतर उच्च न्यायालय के समक्ष अपील उपबंधित है एवं धारा 14–ए की उपधारा 3 उपबंधित करती है कि यदि अपील 180 दिनों की अवधि के भीतर परन्तु 90 दिनों के पश्चात् प्रस्तुत की गई हो, तो उच्च न्यायालय विलम्ब माफ कर सकता है – 180 दिनों के पश्चात् विलम्ब की माफी की कोई शक्ति न्यायालय में निहित नहीं है।

Harpreet Ruprah, for the appellant.
Ajay Tamrakar, P.L. for the respondent/State.

JUDGMENT

S.K. Seth, J. :- This appeal has been preferred under Section 14-A

of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 as amended by Act No. 1/2016 which came into force on 26.1.2016.

2. A bare perusal of Section 14-A of the Act shows that an appeal is provided against an order rejecting bail application by the Special Court or Exclusive Special Court to the High Court within 90 days from the date of the order appealed from. Sub-section 3 of Section 14-A of the Act provides that the High Court can condone the delay if appeal is presented within a period of 180 days but beyond 90 days. After 180 days there is no power vested in the Court to condone the delay.

3. Admittedly, the trial Court rejected the bail application by order dated 5.10.2015 so the period of limitation would start running from the date of the order of the trial Court. The 90 days would expire on 5.1.2016 and 180 days would end on 5.4.2016. Beyond this period, this Court has no power to condone the delay.

4. Counsel for the petitioner submitted that earlier he had filed bail application under Section 439 of the Cr.P.C. which was dismissed on 21.4.2016, therefore, the present appeal is within time. I am not impressed with this contention because under the scheme of the Act, no appeal is provided from an order passed by the High Court accepting or rejecting the bail application.

5. In view of the aforesaid situation, this appeal is not maintainable and, therefore, it is here by dismissed as not maintainable.

Appeal dismissed.

I.L.R. [2017] M.P., 141
CIVIL REVISION
Before Mr. Justice Prakash Shrivastava
C.R. No. 274/2011 (Indore) decided on 20 September, 2016

BRIGHT DRUGS INDUSTRIES LTD. (M/S) ...Applicant
Vs.
PUNJAB HEALTH SYSTEM CORPORATION (M/S) ...Non-applicant

A. ***Arbitration and Conciliation Act (26 of 1996), Sections 7(5) & 8 - Arbitration agreement*** **- Power to refer parties to arbitration where there is an arbitration agreement - The Arbitration clause existing in the**

general conditions of contract is treated to be a part of the agreement executed between the parties and conditions enumerated in Section 8 of the Act are satisfied then Court is under an obligation to refer the parties to the arbitration in terms of the agreement. (Paras 13, 16 & 17)

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराएँ 7(5) व 8 – माध्यस्थम् करार – जहाँ माध्यस्थम् करार है वहाँ पक्षकारों को माध्यस्थम् हेतु निर्दिष्ट करने की शक्ति – संविदा की सामान्य शर्तों में विद्यमान माध्यस्थम् खंड पक्षकारों के मध्य निष्पादित हुए करार का भाग माना जाएगा एवं अधिनियम की धारा 8 में विहित शर्तें पूरी होती हैं तब न्यायालय करार की शर्तों के अनुसार पक्षकारों को माध्यस्थम् हेतु निर्दिष्ट करने हेतु एक दायित्व के अधीन है।

***B. Court Fees Act (7 of 1870), Section 16 - Refund of Court fee* - Matter referred to arbitration in terms of agreement - If an appropriate application is filed before the trial Court for refund of Court fees, then the same will be considered and decided by the trial Court on its own merit. (Para 18)**

ख. न्यायालय फीस अधिनियम (1870 का 7), धारा 16 – न्यायालय शुल्क का प्रतिदाय – मामला करार की शर्तों के अनुसार माध्यस्थम् हेतु निर्दिष्ट – यदि विचारण न्यायालय के समक्ष एक समुचित आवेदन प्रस्तुत होता है, तब उक्त पर विचारण न्यायालय द्वारा उसके गुणदोष के आधार पर विचार एवं विनिश्चिय किया जाएगा।

Cases referred:

(2009) 7 SCC 696, (2003) 6 SCC 503, (2007) 3 SCC 686, AIR 2015 SC 1303.

Amit S. Agrawal, for the applicant.
Sanjay Patwa, for the non-applicant.

ORDER

PRAKASH SHRIVASTAVA, J. :- This revision petition under Section 115 of CPC is at the instance of the plaintiff in the suit challenging the order of trial court dated 31/10/2011 whereby respondent's application under Section 8 of Arbitration and Conciliation Act, 1996 has been allowed and parties have been directed to approach the Arbitrator for resolving the dispute.

2. In brief the petitioner had filed the suit for recovery of money on the plea that the contract was awarded by respondent for supply of medicines to the petitioner and as per contract, the supplies were made but payments were

not done.

3. The respondent had filed an application under Section 8 of Arbitration and Conciliation Act, 1996 (for short the Arbitration Act, 1996) and initially the trial court vide order dated 13/2/2004 had dismissed the suit on the ground that remedy of arbitration is available, against which CR No. 91/2004 was filed before this court and by order dated 3rd August, 2010, the matter was remanded back to the trial court to decide whether there was any arbitration agreement /clause in existence between the parties or not before taking any decision on the respondent's objection under Section 8 of the Act. Trial court thereafter has passed the impugned order dated 31/10/11 allowing the respondent's objection and directing the parties to approach the arbitrator as per Section 8 of the Act.

4. Learned counsel for petitioner submits that no arbitration clause exits (sic:exists) between the parties since the incorporation of the general conditions of contract was by way of reference without specifically incorporating the arbitration clause in the agreement. He has placed reliance upon judgment of Supreme court in the matter of *M.R. Engineers and Contractors Private Limited Vs. Som Datt Builders Limited,* reported in (2009) 7 SCC 696 in this regard. Alternatively, he has submitted that petitioner is entitled for refund of the court fee in terms of Section 16 of Court Fees Act.

5. Counsel for respondent has submitted that since the arbitration clause exists in general conditions of contract and same forms part of contract executed between the parties therefore, trial court has not committed any error in passing the impugned order.

6. Having heard the learned counsel for parties and on perusal of the record it is noticed that the agreement was executed between the petitioner and respondent on 5th August 1998 and clause 2 of agreement reads as under:-

> "2. The following documents shall be deemed to form and be read and construed as part of this agreement, viz;
>
> (a) the Bid form and the price schedule submitted by the bidder;
>
> (b) the schedule of requirements.
>
> (c) the Technical specifications.
>
> (d) the General Conditions of contract.

(e) the special conditions of contracts; and

(f) the purchaser's notification of award."

7. The General Conditions of contract referred to in clause 2(d) of the contract between the parties contains the following clause 26.3(a) as arbitration clause which reads as under:

> "In case of dispute or difference arising between the purchase and a domestic supplier relating to any matter arising out of or connected with this agreement, such disputes or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The arbitral tribunal shall consist of 3 arbitrators one each to be appointed by the purchaser and the supplier. The third arbitrator shall be chosen by the two arbitrator appointed by the parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Medical Council of India."

8. The clause 1.1(a) of above General Conditions of contract defines contract and reads as under:-

> "The contract" means the agreement entered into between the purchaser and the supplier, as recorded in the contract from signed by the parties including all the attachments and appendices thereto and all documents incorporated by reference therein."

9. The agreement entered into between the parties in the present case is covered under above definition.

10. The contention of counsel for petitioner is that the agreement dated 5th August 1998 does not contain any arbitration clause, therefore, mere incorporating of general conditions of contract by reference in the agreement is not sufficient to hold that arbitration clause exists between the parties.

11. Such a contention cannot be accepted because there is a distinction between the reference to another document in a contract and incorporation of

another document in a contract by reference. In the former case by way of reference parties may intend to adopt only a part of the referred document whereas in the later case the parties intend to incorporate the entire referred document in the agreement, therefore, the court has to examine if the parties intended to incorporate another document by reference. If the intention is clear that parties wanted to bodily lift the entire document and incorporate it in the agreement then all terms and condition of said document will form part of the agreement and in such a case, if the said document contains the arbitration clause then there will be incorporation by reference of arbitration clause also.

12. In the present case the words "deemed to form and be read and construed as part of this agreement" mentioned in clause 2 of agreement dated 5th August 1998 leave no iota of doubt that parties intended to bodily lift and incorporate the general conditions of contract in the agreement. Hence the arbitration clause existing in the general conditions of contract is treated to be a part of the agreement executed between the parties.

13. Counsel for the petitioner has mainly relied upon the judgment of the Supreme court in the matter of *M.R. Engineers* (supra) in support of his submission that arbitration clause does not exist. In the said judgment while considering the scope of Section 7(5), the Supreme court has held as under:

> "24. The scope and intent of section 7(5) of the Act may therefore be summarized thus:
>
> (i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled :
>
> (1) The contract should contain a clear reference to the documents containing arbitration clause,
>
> (2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,
>
> (3) The arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.
>
> (ii) When the parties enter into a contract, making a general

reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent Trade or Professional Institution (as for example the Standard Terms & Conditions of a Trade Association or Architects Association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the Conditions of Contract of one of the parties to the contract shall form a part of their contract (as for example the General Conditions of Contract of the Government where Government is a party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties."

14. Since in the present case the General conditions of contract are standard form of term and conditions of the respondent/corporation therefore, the present case is covered by para 24(iv) and (v) of the above judgment and by

virtue of clause 2 of the agreement dated 5/8/1998, also there was incorporation of the arbitration clause in the agreement by reference in terms of Section 7(5) of the Act.

15. Since the arbitration clause exists therefore, no error has been committed by the trial court in reaching to the conclusion in this regard. After considering the relevant judgment on the point and nature of contract between the parties trial court has rightly held that provision of Section 8 of Act are attracted in the matter.

16. It is settled position in law that where the arbitration agreement exists between the parties, the court is under an obligation to refer the parties to the arbitration in terms of the arbitration agreement (See: *Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleum* reported in (2003) 6 SCC 503). The said provision is peremptory in nature (See: *Agri Gold Exims Ltd. Vs. Sri Lakshmi Knits & Wovens and others* reported in (2007) 3 SCC 686). Where the arbitration clause exists, court has a mandatory duty to refer the dispute arising between the contracting parties to arbitrator and civil court has no jurisdiction to continue with the suit once the application under Section 8 has been filed. (See: *Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleum* reported in (2003) 6 SCC 503). Once the application under Section 8 of Act is filed the approach of the Court should not be to see whether court still has jurisdiction but to see whether there is ouster of jurisdiction (See: *M/s Sundaram Finance Limited and another Vs. T. Thankam* reported in AIR 2015 SC 1303).

17. In view of the above discussion it is held that since the arbitration clause exists between the parties and conditions enumerated in Section 8 of Act are satisfied therefore, trial court has not committed any error in directing the parties to approach the arbitrator for deciding the dispute.

18. So far as the petitioner's grievance in respect of refund of court fee under Section 16 of Court Fees Act is concerned, no such prayer seems to have been made before the trial court while passing the impugned order. Therefore, petitioner would be at liberty to file an appropriate application in accordance with law before the trial court and if such an application is filed the same will be considered and decided by trial court on its own merit.

Revision petition is accordingly dismissed.

Revision dismissed.

I.L.R. [2017] M.P., 148
CIVIL REVISION
Before Mr. Justice H.P. Singh
C.R. No. 59/2011 (Jabalpur) decided on 28 September, 2016

RAGHUVEER ...Applicant
Vs.
HARI PRASAD & ors. ...Non-applicants

Civil Procedure Code (5 of 1908), Order 9 Rule 13 **- Application for setting aside ex parte judgment and decree - Process server tried to serve the summons on the applicant, but the same was allegedly returned unserved on account of rain fall - No witness had signed on the report of the process server - No effective service of summons - Application allowed. (Paras 10 & 11)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 13 – एकपक्षीय निर्णय एवं डिक्री को अपास्त करने हेतु आवेदन – आदेशिका तामीलकर्ता ने आवेदक को समन की तामीली करने का प्रयास किया, परन्तु बारिश के कारण, अभिकथित रूप से समन तामील किये बिना ही वापस किया गया – किसी साक्षी द्वारा आदेशिका तामीलकर्ता की रिपोर्ट पर हस्ताक्षर नहीं किये गये थे – समन की प्रभावकारी तामीली नहीं – आवेदन मंजूर।

Cases referred:

2001 (2) MPLJ 142, AIR 2002 SC 2370.

Ishteyaq Hussain, for the applicant.
R.P. Khare, for the non-applicants.

ORDER

H.P. Singh , J. :- This Civil Revision under Section 115 of the Code of Civil Procedure, has been filed by the applicant/defendant No.2 assailing the order dated 26.10.2010, passed in Misc. Civil Appeal No.22/2009 (Raghuveer Vs. Hari Prasad and others), by II Additional District Judge to the Court of I Additional District Judge, Bhopal, arising out of order dated 23.7.2009, passed in Misc. Judicial Case No.1/2005 (Kunjilal and others Vs. Hari Prasad & another), by Civil Judge Class-I, Berasiya, District Bhopal (M.P.), thereby the application filed by the applicant/defendant No.2 under Order 9 Rule 13 of Civil Procedure Code (hereinafter referred to as the Code

for short), for setting aside ex-parte judgment and decree passed in Civil Suit No.63-A/2000 (Hari Prasad Vs. Kunjilal and others), has been dismissed, treating that the same was filed beyond the period of limitation.

2. Facts of the case in nutshell is that the respondent No.1/plaintiff is the son of respondent No.3/defendant No.1, filed a Civil Suit claiming declaration of his share and permanent injunction in the suit property bearing No.137/1 Ward No.14, earlier Ward No.11, situated at Shantikunj Road, Sherpura, Berasiya, District Bhopal, against the defendant/applicant as well as other defendants/respondents. It is alleged that defendants are in exclusive possession of other ancestral property and they are trying to oust the applicant forcefully with the help of defendant No.2. It is alleged that defendant No.3 with the help of defendant No.1 had tried to oust them from the suit property, abused, threatened them and subjected the plaintiff/respondent No.1 his wife as well as children to Marpeet and he also tried to do away the household articles from the house during scuffle.

3. In the suit, defendant No.4/respondent No.2 herein, has submitted his written statement and supported the statement of plaintiff/respondent No.1 wherein it is stated that suit property is ancestral property and he is also entitled to his share in the same. He submitted that defendant No.1 being a labour, was not in a position to purchase such property at Berasiya and ousting of the plaintiff from the suit property is not proper. The learned trial Court due to absence of other defendants proceeded ex-parte against them.

4. Learned trial Court after going through the factual aspects, framed the issues. On the basis of supportive evidence adduced by Banshilal, Prem Narayan, Mukundilal and Kaniram, learned trial Court came to the conclusion that plaintiff is in possession of the suit property being co-sharer and, therefore, granted permanent injunction in favour of appellants, by the impugned judgment and decree. It is further held by the learned trial Court that without partition, the defendants are directed not to oust the plaintiff from the suit property. The defendant No.2/applicant being aggrieved by the aforesaid judgment and decree preferred an application under Order 9 Rule 13 of the Code of Civil Procedure before the learned trial Court for quashment of the impugned judgment and decree, alleging that the same has been passed ex-parte without giving him notice, which has also been dismissed on the ground that the same is barred by limitation. Assailing the order passed on the aforesaid application, the defendant No.2 preferred the appeal before the lower appellate Court,

which has also been dismissed, treating as if the application itself is barred by period of one year.

5. Learned counsel for the applicant submitted that the order passed by the appellate Court as well as by the learned trial Court both are illegal and liable to be set aside. He further submitted that applicant came to know about the impugned judgment and decree only when for the first time on 26.3.2005 in the Holi Festival. He further submitted that notices were not properly served upon the defendants. Learned counsel for the applicant further submitted that as per law signatures of the witnesses must be obtained on the notices, if any of the noticee refuses to accept the same. But, here in the present case no such legal procedure was adopted. Therefore, service cannot be said to be legal and no ex-parte proceedings could be drawn by the Courts below. He prayed that impugned orders as well as judgment and decree both, be set aside by allowing his application under Order 9 Rule 13 of the Code of Civil Procedure.

6. Learned counsel for the applicant submitted that in the absence of such, service cannot be held to be valid, it is contrary to the provisions of Rules 17, 19 of Order 5 of Code. This Court in the case of *Baijnath Vs. Harishankar* [2001(2) MPLJ 142] has considered this question and held :-

> "19. In *Kunja Vs. Lalaram and others,* 1987 MPLJ 746, it has been laid down that the provisions of Rule 19 of Order 5 of the Code are mandatory and cast a duty on the Court to make a judicial order while accepting service effected in the manner prescribed under Rule 17 of Order 5 of the Code. It has further been observed that non-compliance of Order 5, Rule 19 will cause serious injustice to the defendant. Bombay High Court in *Baburao Soma Bhoi Vs. Abdul Raheman Abdul Rajjak Khatik,* 2000(1) Mh.L.J. 481 =(1991) All India High Court Cases 3725, has observed that the return of summon should be accompanied by the affidavit of the process server, which is in Form 11 of the First Schedule of the Appendix "B" of the code. If the return report of the process server is without an affidavit, the Court has to record the statement of process server and after making further enquiry, the Court should hold that the summons has been duly served or not."

20. In the instant case as noticed above, the trial Court without examining the process server, directed that the appellant/ defendant No.1 be proceeded against ex-parte; even though the report of the process server was not accompanied with his affidavit. Obviously such a course was not permissible.

21. In the instant case, since the trial Court has not made any enquiry regarding the service of summons on the appellant as also regarding the refusal of summons reported by serving officer, the mandatory requirements of Order 5 Rule 19 of the Code have not been duly complied with. The approach of the trial Court during trial as also while holding the enquiry on the application of the appellant under Order 9 Rule 13, Civil Procedure Code, for setting aside ex-parte judgment and decree passed against him, appears to be rather casual and negligent, as has been pointed out above. Moreover, the cause of delay shown by the appellant is belated filing of the said application under Order 9 Rule 13 read with Section 151 of the Code also deserves acceptance."

7. Learned counsel for the applicant further submits that, several infirmities and lapses on the part of the process-server as he did not affix a copy of the summons and the plaint on the wall of the shop. In this context, learned counsel relied on a decision of the Apex Court in the case of *Sushil Kumar Sabharwal V. Gurpreet Singh and others* (AIR 2002 SC 2370), in paras 8 & 12 as follows :-

"8. We find several infirmities and lapses on the part of the process-server. Firstly, on the alleged refusal by the defendant either he did not affix a copy of the summons and the plaint on the wall of the shop or if he claims to have done so, then the endorsement made by him on the back of the summons does not support him, rather contradicts him. Secondly, the tendering of the summons, its refusal and affixation of the summons and copy of the plaint on the wall should have been witnessed by persons who identified the defendant and his shop and witnessed such procedure. The endorsement shows that there were no witnesses available on the spot. The correctness of such endorsement is difficult to believe even prima facie." The

tenant runs a shoe shop in the suit premises. Apparently, the shop will be situated in a locality where there are other shops and houses. One can understand refusal by unwilling persons requested by process-server to witness the proceedings and be a party to the procedure of the service of summons but to say that there were no witnesses available on the spot is a statement which can be accepted only with a pinch of salt."

12. The provision contained in Order 9 Rule 6 of C.P.C. Is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff appears and the defendant does not appear and three courses to be followed by the Court depending on the given situation. The three situations are : (I) when summons duly served; (ii) when summons not duly served, and (iii) when summons served but not in due time. In the first situation, which is relevant here, when it is proved that the summons was duly served, the Court may make an order that the suit be heard ex-parte. The provision casts an obligation on the Court and simultaneously invokes a call to the conscience of the Court to feel satisfied in the sense of being 'proved' that the summons was duly served when and when alone, the Court is conferred with a discretion to make an order that the suit be heard ex-parte. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the Court to satisfy itself on the service of summons. Any default or causal approach on the part of the Court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an ex parte decree or proceedings in the suit wherein he was deprived of hearing for no fault of his. If only the trial Court would have been conscious of its obligation cast on its by Order 9 Rule 6 of the C.P.C., the case would not have proceeded ex-parte against the defendant-appellant and a wasteful period of over eight years would not have been added to the life of this litigation."

8. Learned counsel for the respondents submits that summons were duly served on applicants. Since respondent No.2-Patiram , being family member was served with the summon and he had appeared on 12.8.200 before the

Court below and application under Order 6 Rule 17 was filed, it cannot be said that applicants were unaware about the suit. They were absent in the trial Court deliberately. The applicants were well aware in respect of pendency of the suit and in view of second proviso of Order 9 Rule 13, merely on the ground of irregularity in the service of summon the ex-parte decree cannot be set aside. The application was also barred by time. The applicant, having knowledge of the ex-parte decree, ought to have filed an application for setting aside ex-parte decree within 30 days. There was no necessity to await for the certified copy of the judgment and decree. The application can be filed without certified copy of the decree, but since it was not filed within time, the same was barred by time. Learned counsel for respondents further submits that both the Courts below have rightly passed the order after going through the material aspects. He fairly contended that the notices were properly issued, but the applicant had refused to accept the same and because of which ex-parte order was passed against the applicant.

9. Heard learned counsel for the parties at length and perused the record.

10. From perusal of records and submissions putforth by learned counsel for the parties, it reveals that the process server tried to serve the summons on the applicant, but the same was allegedly returned unserved on account of rain fall. No witness had signed on the report of the Process Server. It is trite law that if summons was not served on the party concerned, the same should have been affixed on the house. Apart from this, when the service was seriously disputed by the defendant/applicant in the trial Court, it was obligatory on the part of respondents to examine process server who has affected the service. Learned trial Court on the basis of enquiry report made by Sale Ameen dated 20.7.2000, which was found to be proper on which applicant had put the signatures, has passed the ex-parte judgment and decree against the applicant.

10. In view of the foregoing discussions, I deem it appropriate to afford an opportunity to the applicant to contest the matter in the trial Court, in the interest of justice, so that valuable right of a person, like applicant to participate in the hearing may not be deprived.

11. Accordingly, the revision is **allowed.** The impugned order dated 26.10.2010, passed in Misc. Civil Appeal No.22/2009 (Raghuveer Vs. Hari Prasad and others), by II Additional District Judge to the Court of I Additional District Judge, Bhopal, arising out of order dated 23.7.2009, passed in Misc. Judicial Case No.1/2005 (Kunjilal and others Vs. Hari Prasad & another),

by Civil Judge Class-I, Berasiya, District Bhopal (M.P.), is set aside. The application filed by the defendant/applicant under Order 9 Rule 13 of Civil Procedure Code for setting aside ex-parte judgment and decree passed in Civil Suit No.63-A/2000 (Hari Prasad Vs. Kunjilal and others) is hereby allowed. The applicant is permitted to appear before the trial Court concerned on **07.11.2016** and to produce his witnesses and material evidence, subject to payment of cost of **Rs.2000/- (Rupees Two Thousand).** Learned trial Court is, hereby, directed to consider and decide the case of the defendant/ applicant afresh on merits, after affording opportunity of hearing to the party concerned, in accordance with law. It is also directed that defendant/applicant be given only two working days in general circumstances to produce his evidence and material documents before the learned trial Court.

12. With the aforesaid, the revision stands allowed.

Revision allowed.

I.L.R. [2017] M.P., 154
CRIMINAL REVISION
Before Mr. Justice C.V. Sirpurkar
Cr.R. No. 225/2016 (Jabalpur) decided on 11 July, 2016

MOHD. AKBAR ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 397 and 401 - Revision against framing of charge **- On the ground that no offence against applicant of having entered into a conspiracy with co-accused to commit rape upon the prosecutrix, is made out as there was no meeting of minds regarding commission of crime - Held - Applicant choses to provide keys of his house which was deserted at that time to co-accused - Circumstances in which the applicant made keys available to co-accused raises a strong suspicion that he was hand-in-glove with co-accused - His act went beyond mere connivance which amounted to facilitation of the crime of rape - Thus there is no ground to quash the charge - Since applicant had aided the commission of crime, Trial Court is directed to consider framing of charge u/S 376 r/w Section 109 of the IPC also in the alternative. (Paras 4, 11 & 12)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 एवं 401 – आरोप

विरचित किये जाने के विरूद्ध पुनरीक्षण – इस आधार पर कि आवेदक के विरूद्ध सह–अभियुक्त के संग मिलकर अभियोक्त्री के साथ बलात्संग कारित करने के षड्यंत्र में शामिल होने का कोई अपराध नहीं बनता, चूँकि अपराध कारित करने के संबंध में दोनों के मस्तिष्कों का मिलाप नहीं हुआ था – अभिनिर्धारित – आवेदक ने अपने घर की चाबियाँ जो उस समय परित्यक्त था सह–अभियुक्त को प्रदान करना चुना – जिन परिस्थितियों में आवेदक ने सह–अभियुक्त को चाबियाँ उपलब्ध कराई वे एक प्रबल संदेह उत्पन्न करती हैं कि उसके सह–अभियुक्त से घनिष्ठ संबंध थे – उसका कृत्य मात्र मौनानुमति से परे था जिसने बलात्संग के अपराध में सुविधा प्रदान की – इस प्रकार आरोप अभिखंडित करने के लिए कोई आधार नहीं है – चूंकि आवेदक ने अपराध कारित करने में सहायता की थी, विचारण न्यायालय को भारतीय दण्ड संहिता की धारा 376 सहपठित धारा 109 के अंतर्गत भी, विकल्प में आरोप विरचित किये जाने पर विचार करने हेतु निदेशित किया गया।

Cases referred:

AIR 2012 SC 493, AIR 2005 SC 2820, AIR 1972 SC 545, AIR 1977 SC 1489, AIR 1979 SC 366, AIR 1990 SC 1962, AIR 1977 SC 2018, AIR 1980 SC 52, 2009 Cr.L.J. 338, AIR 2013 SC 52.

S.C. Datt with *C.S. Upadhyay,* for the applicant.
A.R.S. Chouhan, P.L. for the non-applicant/State.

ORDER

C.V. SIRPURKAR, J. :- This criminal revision has been preferred on behalf of the accused/petitioner Mohammad Akbar. It is directed against the order dated 11.12.2015 passed by the Court of 4th Additional Sessions Judge, Jabalpur, in S.T. No. 80/2015, whereby a charge under Section 376 read with Section 120-B of the IPC has been framed against accused Mohammad Akbar.

2. The prosecution case before the trial Court, relevant for the purpose of this criminal revision, may be summarized as hereunder: Co-accused Deepak Kispotta and the prosecutrix work in Punjab National Bank at Jabalpur. They were good friends. In April, 2014, accused Deepak had proposed to the prosecutrix; however, she had declined. On 07.06.2014, accused Deepak took the prosecutrix to his home and tried to molest her but when the prosecutrix resisted, co-accused Deepak relented and dropped the prosecutrix back to her room. Thereafter, the prosecutrix started avoiding co-accused Deepak. However, he kept pursuing her. On 28.07.2014, he met the

prosecutrix in the parking-lot of her home and snatched away keys of her two-wheeler and her mobile phone. Thereafter, he proposed to drop her to her bank in his car. The prosecutrix was constrained to sit in his car. Thereafter, the co-accused took her to various places. At a secluded spot, he slapped her resulting in bleeding from her nose. The prosecutrix tried to escape from the car but failed to do so. Accused lifted her garments and tried to molest her.

3. Thereafter, he spoke to his brother-in-law (Jeeja) Akbar on telephone and asked for the keys of his house. After that, Deepak took the prosecutrix to the Military gate near St. Thomas School, where his brother-in-law accused/ petitioner Akbar met him. The prosecutrix weeping and bleeding from nose, told accused Akbar that Deepak was forcibly doing obscene things to her; however, accused Akbar ignored her pleas and handed over keys of his house to co-accused Deepak and left. The co-accused took the prosecutrix to Akbar's house and dragged her inside. She screamed but since it was raining, no one came to her rescue. There was no one in Akbar's house. The prosecutrix was raped by co-accused Deepak six times, in the deserted house of Akbar. Written FIR of the incident was lodged the next day.

4. The order framing charge has been assailed on behalf of the petitioner Mohammad Akbar mainly on the grounds that even if all the allegations made against the petitioner Deepak are taken at their face value and presumed to be true, no offence against petitioner Akbar of having entered into a conspiracy with Deepak to commit rape upon the prosecutrix, would be made out. It has further been contended that to constitute offence of conspiracy there must be meeting of minds resulting in decision taken by the conspirators regarding commission of crime. It has also been argued that the crux of offence of the conspiracy is the agreement between two and more persons to do or cause to be done an illegal act or a legal act by illegal means. There must be meeting of minds resulting in an ultimate decision taken by the conspirators regarding commission of the crime. In support of aforesaid legal position, learned senior counsel for the petitioner has invited attention of the Court to the judgments rendered by the Supreme Court in the cases of *Sherimon Vs. State of Kerala,* AIR 2012 Supreme Court 493 and *NCT of Delhi Vs. Navjot Singh Sandhu,* AIR 2005 SC 2820,

5. Learned senior counsel for the petitioner has also contended that if there is no ground for presuming that the accused has committed an offence, the charge must be considered to be groundless, which is same thing as saying

that there is no ground for framing the charge. For the purpose of determining whether there is sufficient ground for proceeding against the accused, the Court has 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. In exercising his jurisdiction under Section 227, the Court cannot act merely as a Post Office or mouthpiece of the prosecution but has to consider broad probabilities of the case, total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. The Court should frame charge only where on evaluating the material and the documents on record with a view to find out if the facts emerging therefrom, taken at their face value, disclosed the existence of all ingredients constituting the alleged offence. The Court may, for this limited purpose sift the evidence as it cannot be expected even at that initial stage, to except all that the prosecution states as a gospel truth, even if it is opposed to common sense or broad probabilities of the case. In support of aforesaid proposition of law, learned senior counsel for the petitioner has invited attention of the Court to the judgments rendered by the Supreme court in the cases of *Century Spinning and Manufacturing Co. Ltd Appellants v. The State of Maharashtra,* AIR 1972 SC 545, State of Bihar Vs. Ramesh Singh, AIR 1977 SC 1489, *Union of India Vs. Prafulla Kumar Samal,* AIR 1979 SC 366 and *Niranjan Singh Vs. Jitendra Bhimraj,* AIR 1990 SC 1962.

6. Learned Panel Lawyer for the respondent/State on the other hand has supported the order framing charge.

7. As per the prosecution case, based largely upon the written report dated 29.07.2014 lodged by the prosecutrix and her statements under Sections 161 and 164 of the Cr.P.C., the role ascribed to the petitioner Mohammad Akbar in the matter is that he is brother-in-law of the main accused Deepak Kispotta. On 28.07.2014, the prosecutrix was taken to various places in his car by main accused Deepak Kispotta and he tried to molest her in the car itself. When the prosecutrix resisted, Deepak slapped her twice on her face leading to bleeding from nose. On his way back, he called his brother-in-law Akbar on mobile phone and asked for keys to his house. Thereafter, accused Deepak took her to Military gate situated near St. Thomas School. Petitioner Akbar came and handed over the keys to Deepak. The prosecutrix told Akbar, while weeping that Deepak was doing obscene things to her; however, Akbar ignored her pleas and left. Thereafter, main accused Deepak took her to

Akbar's house, which was deserted. He dragged her inside and raped her.

8. Learned counsel for the petitioner has submitted that even as per the statements of the prosecutrix, petitioner Akbar only made keys to his house available to accused Deepak. The same does not denote that he was aware that accused Deepak was going to commit rape upon her at his home. In any case, accused Deepak and the prosecutrix were known to each other for about year and a half next before the date of the offence and were on friendly terms. Thus, there is nothing on record to suggest that there was prior meeting of minds between accused Deepak and petitioner which prompted Deepak to commit rape upon the prosecutrix. Thus, essential ingredients to constitute offence of criminal conspiracy are missing in the present case; therefore, the petitioner deserves to be discharged.

9. On perusal of the record and due consideration of the rival contention, the Court is of the view that this criminal revision must fail for the reasons hereinafter stated: It has been held by the Supreme Court in the cases of *State of Bihar Vs. Ramesh Singh,* AIR 1977 Supreme Court 2018, *Superintendent and Remembrancer of Legal Affairs West Bengal Vs. Anil Kumar Bhunja,* AIR 1980 SC 52, *Sanghi Brothers (Indore) Private Limited Vs. Sanjay Choudhary and Others*, 2009 Cr.L.J 338 and *Shoraj Singh Ahlawat Vs. State of U.P,* AIR 2013 SC 52 that at the stage of framing charge, even a strong suspicion founded upon the materials before the Court, which leads to form a presumptive opinion as to the existence of factual ingredients constituting the offence alleged, may justify the framing of charge against the accused in respect of the commission of that offence.

10. In the backdrop of aforesaid proposition of law, when we examine the facts of the case we find that:

1. Petitioner Akbar is brother-in-law of the accused Deepak.

2. Accused Deepak asked petitioner on mobile phone for keys to his house which was at that time deserted.

3. Thereafter, accused Deepak arrived in his car along with the prosecutrix at the Military gate near St. Thomas School.

4. At that time, the prosecutrix was bleeding from her nose and was weeping.

5. She specifically told the petitioner that accused Deepak was

doing obscene things to her.

11. In aforesaid circumstances, any man of common prudence would immediately realize as to why accused Deepak wanted keys to his house. It was so obvious that he wanted the keys so that he could have the desired privacy and solitude to have sexual intercourse with the prosecutrix. Since, the prosecutrix was bleeding from nose and while weeping, she explicitly told the petitioner that accused was doing obscene things to her, it was clear that the impending sexual intercourse was not going to be consensual, so far as the prosecutrix was concerned. Yet, the petitioner chose to provide keys of his house, which was deserted at that time, to accused Deepak. Thus, circumstances in which the petitioner made keys available to Deepak raises a strong suspicion that he was hand-in-glove with accused Deepak. At any rate, his act went beyond mere connivance. It actually amounted to facilitation of the crime of rape. Thus, there is no ground to quash the charge against the petitioner framed under Section 376 read with Section 120 B of the IPC. In fact, the definition of 'abetment' as given under Section 107 (thirdly) of the IPC clearly provides that a person abets the doing of a thing, if he intentionally aids, by any act or illegal omission, the doing of that thing. The petitioner by providing keys to his house which was deserted at that time, to the co-accused Deepak under aforementioned circumstances, actually aided the commission of the crime; therefore, learned trial Court ought to have framed a charge in the alternative under Section 109 of the IPC, as well.

12. Consequently, this criminal revision is dismissed. The trial Court is directed to consider framing of charge under Section 376 read with Section 109 of the IPC also, in the alternative, after following due procedure.

Revision dismissed.

I.L.R. [2017] M.P., 159
CRIMINAL REVISION
Before Mr. Justice Alok Verma
Cr.R. Nos. 47 & 48 of 2015 (Indore) decided on 22 July, 2016

NARENDRA KUMAWAT ...Applicant
Vs.
RANJEET ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 256 & 378(4) **- Complaint u/S 138 Negotiable Instrument Act 1881, dismissed**

at defence stage due to non-appearance - In revision, Sessions Court set aside the dismissal and direction issued to dispose matter on merits - Held - Section 256 Cr.P.C. provides that when a complaint is dismissed in summon case, it amounts to acquittal, therefore appeal will lie under Section 378 (4) Cr.P.C. - Matter remanded back to revisional court for reconsideration - Revision allowed. (Paras 2, 6 & 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 256 व 378(4) – परक्राम्य लिखत अधिनियम 1881, की धारा 138 के अंतर्गत परिवाद, बचाव के प्रक्रम पर अनुपस्थिति के कारण खारिज – पुनरीक्षण में, सत्र न्यायालय ने खारिजी अपास्त की एवं मामले का निपटारा गुण–दोष के आधार पर करने हेतु निदेश जारी किया – अभिनिर्धारित – दण्ड प्रक्रिया संहिता की धारा 256 यह उपबंधित करती है कि जब समन प्रकरण में परिवाद खारिज होता है, वह दोषमुक्ति की कोटि में आता है, इसलिए दण्ड प्रक्रिया संहिता की धारा 378(4) के अंतर्गत अपील प्रस्तुत होगी – मामला पुनरीक्षण न्यायालय को पुनर्विचार हेतु प्रतिप्रेषित किया गया – पुनरीक्षण मंजूर।

Case referred:

2002 (7) SCC 726.

Amit Bhatia, for the applicant.
Harshat Warnekar, for the non-applicant.

(Supplied: Paragraph numbers)

ORDER

ALOK VERMA, J. :- This common order shall govern disposal of Criminal Revisions No.47 and 48 of 2015.

1. These two revisions are directed against two separate orders passed by learned Second Additional Sessions Judge, Dhar in criminal revision Nos.160 & 161 of 2014, as facts and issues involved in both the cases are same.

2. The relevant facts for disposal of these applications are that the applicant-Narendra Kumawat in both the revisions was facing prosecution under Section 138 of Negotiable Instrument Act in criminal case Nos.1751 and 2016 of 2012. Both the criminal cases arose on a complaint filed by the respondent. The cases were fixed for defence evidence on 12.06.2014. On this date, neither the complainant nor his advocate appeared before the

Magistrate, and therefore, after calling the case thrice during course of the day, finally, at 5 PM, the complaint was dismissed.

3. After this, the complainant filed two separate revisions before the learned Sessions Judge, which were disposed of by the impugned orders. Learned Additional Sessions Judge proceeded to set-aside the order passed by learned Magistrate on the ground that when the case was fixed for defence evidence, it was not necessary for the complainant to remain present before the court. The Magistrate was at liberty to record defence evidence and disposed of the matter on merit. It was also observed by learned Additional Sessions Judge placing reliance on judgment of Hon'ble Apex Court in case of *Mohd. Azeem Vs. A. Venkatesh and another* 2002(7) SCC 726 by the question of maintainability of revision against the order as in the opinion of learned Additional Sessions Judge when complaint was dismissed in absence of the complainant it comes within the purview of Section 204 Cr.P.C., and therefore, in accordance with the principles laid down in case of *Mohd. Azeem* (supra), it was held that the revision is maintainable.

4. Counsel appearing for the applicant submits that when the complaint case was dismissed in summons cases under Section 256 Cr.P.C., it amounts to acquittal and appeal lies under Section 378(4) Cr.P.C., and when any appeal lies against a particular order, revision is not maintainable.

5. Counsel appearing for the respondent, however, submits that the orders passed by learned Additional Sessions Judge are proper and do not call for any interference by this court.

6. I have gone through the judgement passed by Hon'ble Apex Court in case of *Mohd. Azeem* (supra). It appears that the learned Additional Sessions Judge erred in holding that the dismissal of a complaint in summons case comes within the purview of Section 204 Cr.P.C. In this particular case, an appeal was filed under Section 378(4) Cr.P.C. and the High Court dismissed the appeal against which the matter travelled upto Apex Court. The principle laid down in that case was that when there is a single case of default, such dismissal is not proper. However, fact remains that Section 256 Cr.P.C. itself provides that when a complaint is dismissed in a summons case, it amounts to acquittal, and therefore, appeal lies under Section 378(4) Cr.P.C.

7. Though, in the present case, on point of maintainability, it appears that this point was not raised properly by the respondent, and therefore, looking

to the peculiar circumstances of the case, these revisions are allowed.

8. The impugned orders passed by learned Additional Sessions Judge are set-aside. The matter is remanded back to the revisional court for reconsideration in the light of principles laid down in case of *Mohd. Azeem* (supra). The applicant is at liberty to raise question of maintainability in the light of provisions of Section 256 Cr.P.C. and other relevant provisions of law before the revisional court.

Parties to appear before the revisional court on **24.08.2016.**

With observations and directions as aforesaid, these revisions stand disposed of.

Order accordingly..

I.L.R. [2017] M.P., 162
CRIMINAL REVISION
Before Mr. Justice Ved Prakash Sharma
Cr.R. No. 844/2016 (Indore) decided on 17 August, 2016

DINESH ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Sections 397 and 401 and Penal Code (45 of 1860), Section 306 - Abetment of suicide* - Applicant alongwith 6 other persons charge sheeted for abetment to commit suicide on the basis of suicide note of deceased - Held - No clear and specific allegation against applicant that he instigated, goaded, urged, provoked, incited or encouraged the deceased to commit suicide - Merely goading or persuading the deceased to refund the alleged amount of loan may not itself amount to an act of inciting or instigating u/S 107 r/w 306 IPC - Deceased instead of pursuing legal remedy, committed suicide - No case of abetment to commit suicide - Charge u/S 306 IPC set aside - Revision allowed. (Paras 7 & 8)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 एवं 401 एवं दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या का दुष्प्रेरण – आवेदक पर 6 अन्य व्यक्तियों सहित मृतक के आत्महत्या लेख के आधार पर आत्महत्या का दुष्प्रेरण का आरोप लगाया गया – अभिनिर्धारित – आवेदक के विरूद्ध कोई स्पष्ट व विशिष्ट आक्षेप नहीं है कि उसने मृतक को आत्महत्या करने के लिए उकसाया, प्रेरित, आग्रह,

प्रकोपित, उद्दीप्त या प्रोत्साहित किया – मृतक को अभिकथित ऋण की राशि प्रतिदाय करने के लिए मात्र प्रेरित करना या समझाना भारतीय दण्ड संहिता की धारा 107 सहपठित धारा 306 के अंतर्गत स्वयं में उद्दीप्त करने या उकसाने का कृत्य नहीं बनता – मृतक ने विधिक उपचार का अनुसरण करने के बजाय आत्महत्या कर ली – आत्महत्या का दुष्प्रेरण का कोई मामला नहीं – भारतीय दण्ड संहिता की धारा 306 के अंतर्गत आरोप अपास्त – पुनरीक्षण मंजूर।

Cases referred:

1995 MPLJ 458, 2009 (III) MPWN 79, AIR 2002 SC 1998, AIR 1992 SC 604.

Brijendra Sharma, for the applicant.
Ajay Jain, for the non-applicant/State.

(Supplied: Paragraph numbers)

ORDER

VED PRAKASH SHARMA, J. :- This petition under Section 397 r/w Section 401 of the Cr.P.C. has been preferred for quashment of the order dated 31.05.2016 passed by 10 th Additional Sessions Judge, Ujjain in S.T. No.153/16, Whereby and whereunder the charge for offence under Section 306 IPC has been framed against the petitioner.

2. The petitioner along with 6 other persons has been charge-sheeted for abetting Gaurav Solanki to commit suicide. Allegedly, Gaurav solanki had borrowed money from the petitioner and some other persons. They were demanding the repayment of loan along with interest. It is further alleged that the petitioner and other persons had obtained blank cheques and stamp papers having signatures of the deceased. It is also alleged that the petitioner and other persons had extended threats to kill Gaurav Solanki if he fails to repay the money along with interest. Feeling, perturbed and depressed on 17.11..2014, around 10.30 am Gaurav Solanki committed suicide in his house by hanging himself from the ceiling of the room. He is said to have left a suicide note which runs as under:

> "मैं गौरव सोलंकी अपनें होश–हवास में लिख रहा हूं कि मेरी मौत का कारण यह ब्याज वालों की वजह से मैं अपने आप को खत्म कर रहा हूं, उनके नाम है– 1. बद्री नारायण पाटीदार 2. नन्दू खत्री 3. दिनेश पाण्डे 4. योगेश 5. जिवन परमार प्रदीप 6. अर्जुन रजावत 7. सुभाष गहलोत

इनके पास मेरे चेक और स्टाम हैं, मेरी पत्नी के नाम के चेक ओर स्टाम हैं, यह मुझे जान से मारने की धमकी दे रहे थे, इस कारण मैने इनका ब्याज 10 प्रतिशत और 7 प्रतिशत का लेते थे इनको ब्याज भर भर के में कर्ज में हो गया था।

प्रार्थी,

गौरव सोलंकी "

3. The learned Counsel for the petitioner has submitted that even if all the allegations made in the charge-sheet are accepted at their face value, a case for abetment to commit suicide punishable under Section 306 of IPC is not made out against the petitioner because demanding back the money or even extending any threat in that behalf by itself cannot amount to an act of abetment as required under Section 107 of IPC. Abetment to commit suicide is an offence under Section 306 of I.P.C. Expression 'abetment' has been defined in Section 107 of IPC which runs as under:

> "107. 'Abetment of a thing.-A person abets the doing of a thing, who-
>
> *First.*- instigates any person to do that thing; or
>
> *Secondly.*-Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> *Thirdly.*- Intentionally aids, by any act or illegal omission, the doing of that thing."

4. In *Ved Prakash Tarachand Bhaiji vs. State of Madhya Pradesh,* 1995 M.P.L.J. 458 while dealing with the ambit scope and applicability of Section 107 of IPC it has been held as under:

> "10. As per definition given in Section 107 of the Indian Penal Code abetment is constituted by:-
>
> i) Instigating a person to commit an offence; or
>
> ii) engaging' in a conspiracy to commit it; or
>
> iii) intentionally aiding a person to commit it

> 11. A person is said to 'instigate' another to an act, when he actively suggests or stimulates him to the act by any means of language, direct or indirect, whether it takes the form of express solicitation, or of hints, insinuation or encouragement. The word 'instigate' means to goad or urge forward or to provoke, incite, urge or encourage to do an act. In the present case none of the accused goaded or urged forward, provoked, incited or urged or encouraged the deceased to commit suicide. They merely goaded him to refund or repay the amount advanced by them to him. They never intended that the deceased should commit suicide. On the other hand they wanted the loan advanced by them to the deceased to be repaid by him. For the said purpose, it was at least needed, if not essential, that Ramesh Kumar Sadholia should live.."

5. Learned counsel has also placed reliance on *Munnalal Jain vs. State of M.P.*, 2009(III) MPWN 79, wherein the deceased committed suicide because he was being forced to repay the remaining loan amount of Rs.1,05,000/- and allegedly, was also beaten in this connection by the accused. This Court after referring to a number of authorities including decision of the apex Court in *Sanju alias Sanjay Singh Sengar vs. State of Madhya Pradesh*; AIR 2002 SC 1998, held that in absence of evidence with regard to provocation, incitement, instigation or encouragement by the accused to the deceased to commit suicide an offence under Section 306 of IPC cannot be made out.

6. In the instant case, no clear and specific allegation is there against the petitioner that he instigated, goaded, urged, provoked, incited, instigated or encouraged the deceased by an act or omission to commit suicide. Merely goading or persuading the deceased to refund the alleged amount of loan may not by itself amount to an act of goading, provoking, inciting or instigating within the meaning of Section 107 r/w 306 of IPC as regards commission of suicide.

7. If the deceased was being unduly pressurised to repay the loan and he felt harassed then he ought to have taken recourse to law by lodging a report against the petitioner and other persons that they are threatening to kill him for non-payment of loan. The deceased instead of pursuing a legal remedy

had committed suicide, obviously to put the petitioner and his other tormentors into hot waters. Be that as it may, a case for abetment to commit suicide is not at all made out against the petitioner.

8. In view of the aforesaid, it is a fit case for quashment of charge in the light of law laid down by the apex Court in the *State of Haryana vs. Bhajanlal Choudhary,* AIR 1992 SC 604.

9. Consequently, this petition is hereby allowed and the impugned order with regard to framing of charge against the petitioner for offence under Section 306 of IPC hereby set aside and the petitioner is discharged for offence under Section 306 of IPC.

Revision allowed.

I.L.R. [2017] M.P., 166
CRIMINAL REFERENCE
Before Mr. Justice Rajendra Menon &
Mr. Justice Sushil Kumar Palo
Cr.Ref. No. 09/2015 (Jabalpur) decided on 22 April, 2016

IN REFERENCE ...Applicant
Vs.
RAJENDRA ADIVASHI ...Non-applicant

(Alongwith Cr.A. No. 3191/2015)

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 363, Penal Code (45 of 1860), Sections 376 (2)(h) & 302 and Evidence Act (1 of 1872), Section 3 - Death reference* - Rape with a minor girl and murder - Determination of age - Plea that age of the deceased was not ascertained by legal evidence - Kotwar of the village stated that the age of the deceased was six years same is also mentioned in Naksha Panchnama - Doctor has also mentioned the age of the deceased in Post Mortem report - No cross-examination has been made in this regard - Therefore this plea is of no avail. (Para 13)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 363, दण्ड संहिता (1860 का 45), धाराएँ 376 (2)(एच) व 302 एवं साक्ष्य अधिनियम (1872 का 1), धारा 3 – मृत्यु निर्देश – अप्राप्तवय बालिका के साथ बलात्संग तथा हत्या – आयु का निर्धारण – अभिवाक्, कि मृतक की आयु वैध साक्ष्य द्वारा अभिनिर्धारित नहीं थी –

गांव के कोटवार का कहना है कि मृतक की आयु 6 वर्ष थी, नक्शा पंचनामा में भी वही उल्लिखित है – चिकित्सक ने भी शव परीक्षण रिपोर्ट में मृतक की आयु का उल्लेख किया है – इस संबंध में कोई प्रतिपरीक्षण नहीं किया गया – अतः यह अभिवाक् प्रयोगशून्य है।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 363, Penal Code (45 of 1860), Sections 376 (2)(h) & 302 and Evidence Act (1 of 1872), Sections 142 & 154 - Evidence of hostile witnesses **- May be considered if their statements have no inconsistency and the same are not contradictory - Statements are found supported by medical evidence and circumstantial evidence - Therefore, there is no reason to disbelieve them. (Para 33)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 363, दण्ड संहिता (1860 का 45), धाराएँ 376 (2)(एच) व 302 एवं साक्ष्य अधिनियम (1872 का 1), धाराएँ 142 व 154 – पक्षद्रोही साक्षियों के साक्ष्य – यदि, उनके कथनों में असंगति न हो तथा वे विरोधाभासी न हों तो विचार में लिए जा सकते हैं – कथन चिकित्सीय साक्ष्य तथा परिस्थितिजन्य साक्ष्य द्वारा समर्थित हैं – अतः उन पर अविश्वास करने का कोई कारण नहीं है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 363, Penal Code (45 of 1860), Sections 376 (2)(h) & 302 and Evidence Act (1 of 1872), Section 3 - Circumstantial evidence **- Dead body of prosecutrix was discovered in the house of appellant, deceased was last seen with the appellant, witnesses have stated that the appellant was offering Namkeen and Biscuit to the prosecutrix - This, statement is also supported by medical evidence - These circumstances are clear & cogent and indicates the hypothesis that appellant is guilty of the offences - Trial Judge has rightly convicted the appellant. (Paras 35, 36, 38, 41 & 43)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 363, दण्ड संहिता (1860 का 45), धाराएँ 376 (2)(एच) व 302 एवं साक्ष्य अधिनियम (1872 का 1), धारा 3 – परिस्थितिजन्य साक्ष्य – अभियोक्त्री का शव अपीलार्थी के मकान में पाया गया, मृतक को अंतिम बार अपीलार्थी के साथ देखा गया था, साक्षियों का कथन है कि अपीलार्थी अभियोक्त्री को नमकीन तथा बिसकुट दे रहा था – यह कथन चिकित्सीय साक्ष्य द्वारा भी समर्थित है – यह परिस्थितियाँ स्पष्ट एवं तर्कपूर्ण हैं तथा यह परिकल्पना इंगित करती है कि अपीलार्थी अपराधों का दोषी है – विचारण न्यायाधीश ने अपीलार्थी को उचित रूप से दोषसिद्ध किया।

D. Criminal Procedure Code, 1973 (2 of 1974), Section 363,

Penal Code (45 of 1860), Sections 376 (2)(h) & 302 and Evidence Act (1 of 1872), Section 3 - Imposition of death sentence **- After considering the mitigating circumstances that the appellant wanted to fulfil his sexual desire as a result of which death of the minor girl was caused - This case does not fall within the category of "Rarest of the rare case" - Extreme penalty of death should not be imposed - Therefore death penalty is commuted to imprisonment for life. (Paras 51 to 55)**

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 363, दण्ड संहिता (1860 का 45), धाराएँ 376 (2)(एच) व 302 एवं साक्ष्य अधिनियम (1872 का 1), धारा 3 – मृत्यु दण्डादेश का अधिरोपण – कम करने वाली परिस्थितियों पर विचार करने के पश्चात् कि अपीलार्थी अपनी कामवासना की पूर्ति करना चाहता था जिसके परिणामस्वरूप अप्राप्तवय बालिका की मृत्यु हुई थी – यह प्रकरण "विरल से विरलतम" की श्रेणी में नहीं आता – मृत्यु की अत्याधिक शास्ति अधिरोपित नहीं की जानी चाहिए – अतः मृत्यु दण्ड को आजीवन कारावास में परिवर्तित किया जाता है।

Cases referred:

(1996) 10 SCC 360, (2011) 09 SCC 479, AIR (2013) 11 SCC 719, AIR (2013) 11 SCC 546, AIR (1954) SC 20, AIR 2000 SC 591, AIR 1957 SC 614, AIR 2002 SC 3164, AIR 1952 SC 343, AIR 1981 SC 765, (1980) 2 SCC 565, (1980) 2 SCC 684, (2010) 9 SCC 747.

Ajay Shukla, G.A. for the State.

U.K. Sharma with *N.K. Shah,* for the non-applicant in Cr.Ref. No. 09/2015 and for the appellant in Cr.A. No. 3191/2015.

JUDGMENT

The Judgment of the Court was delivered by : **S.K. Palo, J. :-** By this common judgment we propose to dispose of the Criminal Reference No.09/2015 as well as Cr.A. No.3191/2015. This death reference and the criminal appeal have arisen out of the judgment and sentence awarded by the Additional Sessions Judge, Raheli, District Sagar in S.T. No.507/2013 decided on 27/10/2015, whereby learned Additional Sessions Judge has convicted appellant Rajendra Adivashi (hereinafter called the "appellant") in respect of offences punishable under Sections 376(2)(h) and 302 of the IPC and sentenced to imprisonment for life with a fine of Rs.5,000/- and imposed death sentence with fine of Rs.5,000/- respectively with default stipulation

2. The learned Additional Session Judge has made this death reference under Section 363 of the Code of Criminal Procedure, 1973 (for brevity the Code), to this Court for confirmation, whereas the appellant has challenged the judgment of conviction and order of death sentence by filing this criminal appeal.

3. In the present case, a minor girl of seven years old gone to the school on 20/09/2015 (sic:2005) not knowing that it was her last visit and final journey from this planet.

4. Genesis of the prosecution case is rape with a minor girl and murder and subsequently causing disappearance of evidence.

5. The prosecution story, in brief, is that on 20/09/2005, the complainant, Tara Adivashi, father of the minor deceased, lodged a report Ex.P/8 at Police Station, Raheli, about missing of his daughter, stating that her minor daughter studying in Class-II left for the school as usual but did not return after the school was off. He searched for the girl but did not found her. He enquired from the other girls namely Rukmani (PW/5) and Babita (PW/2). They narrated that around 1:30 p.m. during the recess they came out of the school. At that time, the appellant had come to the school carrying biscuits and mixture (namkeen). He offered the same to the prosecutrix and took her with him towards his house. The complainant searched for the appellant but he could not found her. When he went to the house of appellant, it was found locked. At that time, Munnilal (PW/1), Umashanker (PW/3), Jahar Singh (PW/4) and Badri Prasad (PW/6) accompanied the complainant. When they tried to see through the hole of the door, they saw that the body of the minor girl was lying on the floor and a gunny bag was covered on her. It was also stated that in the above circumstances and alleging that the appellant has committed rape and murder of the minor girl. On the basis of which S.K. Goswami, the scribe of the report also lodged a merg intimation No.98/2005 under Section 174 of the Code, which is marked as Ex.P/9.

6. The investigation officer went to the spot, broken open the lock. Issuing notice to the witnesses, drawn the Naksha Panchayat Nama (Ex.P/3) of the deceased. He further sent the dead body for postmortem vide Ex.P/6 through constable Rajendra Kumar by issuing the duty certificate (Ex.P/11)..

7. Dr. Mukesh Jain (PW/7), the Medical Officer of Primary Health Centre, Raheli examined the dead body and drawn the postmortem report Ex.P/6.

He opined that deceased had received 3 injuries. The cause of death is Cardio Respiratory failure which is due to the injuries caused on vital organs and neurogenic shock. He also explained that befor'e her death she was subjected to sexual assault. He prepared vaginal slides and handed over to constable Rajendra Kumar. The dead body was later handed over to her father Tara Adivashi by supurdaginama Ex.P/10. A spot map Ex.P/5 was prepared by Patwari in presence of witnesses.

8. The appellant was then arrested vide arrest memo and was sent for medical examination on 05/09/2013 to Dr. R.S. Thakur (PW/10) of Health Center. After examining the appellant, Dr. R.S. Thakur (PW/10) has opined that, no symptoms has been observed on the basis of which, it could be said that the appellant is not capable of performing sexual act.

9. The seized items were sent to Forensic Laboratory, Sagar vide letter Ex.P/15 & 16. The receipt of which is (Ex.P/17). After investigation charge-sheet has been filed under Section 376(2)(h) and 302 of IPC. After committal the case was received by the Additional Sessions Judge. Charges have been framed. The appellant abjured guilt and claimed innocence.

10. The learned Trial Court after adducing the evidence pronounced the impugned judgment and held the appellant guilt under Section 376(2) (h) and 302 of IPC and sentenced as stated above. The learned trial Court further held that the appellant has committed the offence of rape on a minor girl and murdered her to suppress and causing disappearance of evidence. This is a gruesome and cruel murder which is committed ruthlessly which may be termed as "rarest of rare" case. Hence sentenced the appellant to life term for commission of rape and death penalty for commission of murder.

11. The appellant has challenged the impugned judgment on the ground that the conviction and sentence is contrary to facts and circumstances of the case. No independent witness has supported the prosecution case. The age of the girl has not been proved by any positive evidence or radio logical test. Only oral evidence adduced is not sufficient. All the witnesses are interested witnesses or chance witnesses and are not reliable. The conviction and sentence is therefore deserves to be set aside. It is further pleaded that the appellant is about 40 years old and is an innocent person has been falsely implicated. The chain of circumstances is not complete to hold the appellant guilt.

12. At the other hand, Shri Ajay Shukla, learned Government Advocate

for the State has vehemently opposed the submissions made by the Senior Counsel, Shri U.K. Sharma and submitted that the learned trial Court has elucidated the evidence systematically and with cogent reasons has arrived into the conclusion. The chain of events has been discussed with proper marshaling the evidence and therefore the findings arrived by the trial Court is not called for any interference.

13. During the course of arguments, learned senior counsel for the appellant has repeatedly argued that the age of the deceased was not ascertained by legal evidence. Therefore, it is not correct to hold that she was a minor. In this regard, it would be appropriate to mention here that Munnilal (PW/1), the Kotwar of village Vijaypura stated that age of deceased was six years. No cross-examination has been made in this regard. Ku. Babita (PW/2) was the classmate of deceased. Babita was examined on 30/12/2013 before the trial Court and her apparent age has been recorded as 16 years on the date of her deposition. She has stated that the incident took place 6-7 years ago. This gives a estimated age of the deceased. Rukmani (PW/5) has stated that on the date of incident she was studying in class-III and deceased was studying in Class-II. The incident took place about 10 years ago, statement of this witness was recorded on 13/10/2014 and on the date of recording of her statement, her apparent age was 19 years as per the estimation of the trial Court. The age of the deceased has been mentioned in the Naksha Panchayat Nama Ex.P/3 as 6 years. Dr. Mukesh Jain (PW/7) has mentioned the age of the deceased in his postmortem report Ex.P/6. No objection has been raised in this regard nor any suggestion has been made to the witnesses. Simply, because the age of the deceased has not been proved by producing the school records, it would not be appropriate to hold that the deceased was not a minor. As per the prosecution story, the deceased was 6 years old and the witnesses have stated so in their examination and this fact has not been challenged nor any question has been asked in the cross-examination, suggesting that the deceased was not a minor, therefore, this plea of the learned senior counsel is of no avail, at the appellate stage.

14. On perusal of the postmortem report Ex.P/6, it is observed that the dead body of a female child aged about 6 years wearing blue synthetic *sameej* and white synthetic shirt and brown underwear. Her both pupil were dilated, mouth closed and tongue lying inside the mouth. The whole face and neck congested. "Namkeen" mixed vomiting present in the mouth as well as on

right side of the face. Abdomen distended mildly. Both extremities lies on their side. Lips and nails are cynoxed. Faecal matter present on anal orifice. Blood stain present over external genitalia. The Medical Officer has also expressed that vagina contained blood. Following injuries are found on the private part:

(i) The labia majora and minora are congested and abrasion was present.

(ii) Lacerated wound present from fourchette to anterior vaginal wall 1 cm X l/4cmXO.2cm deep.

(iii) Lacerated wound present from posterior commissure.

All injuries might have caused by hard and blunt object and are anti-mortem in nature. It may be due to penetration The cause of death has been explained as Cardio-Respiratory failure due to neurogenic shock to vital organs as a result of injury. The medical officer (PW/7) Dr. Mukesh Jain has also stated that these injuries might have caused because the deceased was subjected to sexual intercourse before her death.

15. The medical officer has denied the suggestion that these injuries might have caused due to fall on a wooden stick. He said that it could be possible only if the diameter of stick is of 2 cm and the deceased have fallen straight on to the wooden stick. But no evidence on the record show that the deceased having fallen on such an object.

16. This indicates that the theory of falling of the deceased to such an object is not possible, neither it was suggested to any witnesses nor any evidence has been led in this regard. It is also to be noted here that the dead body of the deceased has been found at the house of the appellant. Therefore, the theory of falling on the wooden stick without, having received any corresponding injury on the body of the deceased is not sustainable. It does give an indication that the deceased was subjected to sexual intercourse. In the examination of appellant also there was no such explanation about the injuries received by the deceased. Even no suggestion was made to the medical officer (PW/6) in his cross-examination. Nor there is any defence that the dead body was not found at the house of the appellant.

17. The statement of medical officer Dr. Mukesh Jain (PW/7) indicates that the deceased died due to Cardio Respiratory failure because of neurogenic shock and before her death the minor girl was subjected to sexual intercourse. We have no reason to disbelieve the same.

18. The learned counsel for the appellant has argued that the prosecution has utterly failed to prove that the house from where the dead body was recovered belonged to the appellant and no such documents has been shown to prove that it was the appellant only who resided in the house and no other person had any access to that house. Therefore, a serious doubt has been created in the prosecution case, the benefit of which should go to the appellant.

19. Regarding the house of the appellant, not only the minor witnesses Babita (PW/2) and Rukmani (PW/5) have narrated that the appellant took the prosecutrix to his house. But also, Kotwar Munilal (PW/l) has stated that when he accompanied Tara Adivashi along with the police to the house of the appellant, police broken open the locked door and recovered the dead body of the deceased from the house of the appellant. The village Kotwar Munilal (PW/l) has stated that both front door as well as rear door were locked when they reached the house. Police broke open the rear lock. When asked about the house of the appellant, the Kotwar Munilal (PW/l) has stated that the appellant was living with his brother Vijay at that time. But, he immediately clarified that Vijay was living separately in a different house. This statement depicts that the appellant was living alone in his house. Jahar Singh (PW/4) another witnesses has also stated that police had come to the village. He accompanied the police to the house of the appellant. After breaking open the lock, the dead body of the prosecutrix was recovered and panchnama was prepared. Regarding how many doors in the house of the appellant, Munilal (PW/1) and Rukmani (PW/5) have stated that there are two doors one front and one on the rear side at the house of the appellant.

20. Counsel for the appellant argued that if no documents with regard to the ownership of the house has been produced, it does not show that the house was occupied by the appellant has not been proved, it is to be noted here that no suggestions has been made to the prosecution witnesses in this regard and no claim has been made that the appellant has no house in the village. That being so, the arguments advanced by the learned counsel for the appellant that the house was not in exclusively possession of the appellant is not proved, does not carry much weight.

21. It is further claimed by the learned Senior counsel for the appellant that all the prosecution witnesses are declared hostile, therefore, the prosecution evidence is no legal prove.

22. This contention has to be examined on the backdrop that the incident took place on 20/09/2005, whereas the prosecution witnesses were examined in the fag-end of the year 2013. The reason for the delay of recording the evidence was that the appellant remained absconded after the incident. According to Umashanker (PW/3), the appellant was not found when the villagers were searching him. On the following day, after the dead body of the deceased was discovered from the house of the appellant, the villagers set his house on fire. As per record, the appellant was taken into custody only on 17/07/2013. After his arrest, the charge sheet was set in motion and same was committed to the Session Court and trial began. Therefore, the delay in examination of the prosecution witnesses. The prosecution witnesses were examined almost after 8 years. Hence, their full version could not be recorded in the examination in chief. The learned public prosecutor after declaring them hostile has put certain questions to bring about the full version. In these circumstances, Munnilal Kotwar (PW/l), Babita (PW/2), Umashanker (PW/3), Rukmani (PW/5) and Badri Prasad (PW/6) cannot be held as hostile witnesses. Though, Jahar Singh (PW/4) has not supported the prosecution story, even after he was declared hostile. But, all other witnesses have supported the prosecution story to its helm.

23. Even if for the sake of the arguments, if the witnesses are taken as hostile witnesses, their evidence cannot be out rightly rejected. Ordinarily, we would not have accepted the statements of the witnesses Munnilal Kotwar (PW/1), Babita (PW/2), Umashanker (PW/3), Rukmani (PW/5) and Badri Prasad (PW/6). But their statements are corroborated with each other and found support by the statement of medical officer. It is well known principle of evidence that statement of hostile witnesses can be believed if the same is otherwise reliable and inspires confidence *(State of Uttar Pradesh V/s Ramesh Prasad Mishra* (1996) 10 SCC 360 may be referred in this regard).

24. It is also the settled principle of law that corroborated part of evidence of hostile witnesses, regarding commission of offence, is admissible. Reference can be made to paragraphs 66 to 69 of decision rendered in *Mrinal and others V/s State of Tripura* (2011) 09 SCC 479.

25. Regarding hostile witnesses, the Apex Court in *Attar Singh Vs. State of Maharashtra* reported as AIR (2013) 11 SCC 719 held that Criminal Trial - Witnesses - Hostile witness -Whether testimony of witness who has been declared hostile could be relied upon - It cannot be ignored that when a

witness is declared hostile and when his testimony is not shaken on material points in cross-examination, there is no ground to reject his testimony in toto - **Court is not precluded from taking into account the statement of a hostile witness altogether and it is not necessary to discard the same in toto and can be relied upon partly** - If some portion of statement of hostile witness inspires confidence, it can be relied upon - **If evidence of a hostile witness is corroborated by other evidence, there is no legal bar to convict the appellant** - Evidence Act, 1872 - Ss. 142 and 154 - Hostile witness.

26. In a similar case, Hon'ble the Supreme Court in *Gudu Ram Vs State of Himachal Pradesh* reported as AIR (2013) 11 SCC 546 has propounded that "Criminal Trial - Witnesses - Hostile witness -Testimony of - How to be treated - Evidence of such witness need not be completely rejected only because he has turned hostile - Court must, however, be circumspect in accepting his testimony and, to the extent possible, look for its corroboration."

27. The contentions that all witnesses have turned hostile therefore, there is no legal evidence against the appellant is unacceptable and cannot be adhered to.

28. In the above circumstances, the fact that the witnesses have been declared hostile at the instance of the public prosecutor and he was allowed to ask few reading (sic:leading) questions to the witnesses, furnishes no justification for rejecting en-bloc evidence of the prosecution witnesses. The eye-witnesses who have seen the appellant taking away or luring the minor prosecutrix including the hostile witnesses, firmly establish the prosecution version. More so, it is well settled that in a criminal trial, creditable evidence even hostile witnesses can form the basis for conviction:

29. To the above aforementioned extend, we find no force in the contention of Shri U.K. Sharma, learned Senior counsel for the appellant.

30. Counsel for the appellant placed reliance on the *State of Madhya Pradesh Vs. Ramkrishna Ganpat Rao Limsey and others* reported as AIR (1954) SC 20 (Vol.41) C.N.7 in which it is held that "Criminal Trial- Semble - in the absence of legal proof of the crime, there can be no legal criminality."

31. He further placed reliance on *Mujeeb & another Vs. State of Kerala* reported as AIR 2000 SC 591 held that Penal Code (45 of 1860), S. 300 -

Murder trial-Circumstantial evidence - Plea that deceased was given sleeping tablets and intoxicating liquor and then he was strangulated - Rejected by both lower Courts in view of evidence of doctor and chemical analysis report - Identification of appellant by prosecution witness in belated test identification parade also not accepted by lower Courts - Clear statement by doctor who conducted autopsy that during postmortem there was no positive evidence of ligature strangulation - Missing links found in chain of circumstances - Conviction of appellant set aside.

32. Learned Senior counsel for the appellant also cited *Vadivilu Thivar Vs. State of Madras* reported as AIR 1957 SC 614 and asserted that generally speaking oral testimony in this context may be classified into three categories namely: (a) wholly reliable (b) wholly unreliable (c) neither wholly reliable nor wholly unreliable. Learned Senior counsel contended that the first category of proof, the Court should have no difficulty in coming to its conclusion either way. In the second category, the Court equally had no difficulty in coming to its conclusion. But, in the third category of the case, the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. He further contended that in the present case, there is no legal proof as all the witnesses are declared hostile. Therefore, the prosecution has utterly failed to prove the case.

33. As we have stated earlier, the witnesses even after they are declared hostile, may be considered, if their statement have no inconsistency and no contradictory. In the present case the statements are found support by the medical evidence and the dead body having been recovered from the house of the appellant in which he was living alone. Therefore, no reason to disbelieve prosecution witnesses.

34. We may advert to the principles laid down in the following case laws in which principles have been laid down regarding circumstantial evidence. In *Bodh Raj @ Bodha and others Vs. State of Jammu and Kashmir* reported in AIR 2002 SC 3164, it is held that Evidence Act (1872), Section 3 Circumstantial evidence - Can be sole basis for conviction - Conditions to be satisfied. The conditions which laid are -

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may' be established;

(2) The facts so established should be consistent only with the hypothesis of the guilt of the appellant, this is to say, they should not be explainable on any other hypothesis except that the appellant is guilty;

(3) The circumstances should be of a conclusive nature and tendency.

(4) They should exclude every possible hypothesis except the one to be proved; and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the appellant and must show that in all human probability the act must have been done by the appellant.

35. The Division Bench of this Court in *Golu @ Rajendra Vs. State of Madhya Pradesh* reported in AIR 2003 (3) MPLJ 133 has propounded that "Evidence Act, Section 3- Circumstantial evidence-Must be complete and conclusive- Proved circumstances should be consistent only with the hypothesis of guilt of appellant and totally inconsistent with his innocence." In the present case, the evidence of the prosecution witnesses especially the girls who are minors at the time of incident have given the prosecution version, which inspires confidence, which is also consistent and discover of the dead body of the minor prosecutrix in the house of the appellant are the circumstances which are consistent with the hypothesis of the guilt of the appellant can be adjudged by the evidence brought on record.

36. Similarly, the deceased was last seen with the appellant. Both the witnesses Bábita (PW/2) and Rukmani (PW/5) have without any hitch have said that the appellant was offering *Namkeen and Biscuit* when he was luring the minor prosecutrix to take her home. Dr. Mukesh Jain (PW/7) in his postmortem report (EX.P/6) has observed that Namkeen mixed vomit present in the mouth as well as right side of the face. This indicates that the statement of the minor witnesses are found support by the evidence of the medical officer.

37. The learned Senior counsel for the appellant citing *Hanumant Govind Vs. State of Madhya Pradesh* reported in AIR 1952 SC 343 and claimed that while appreciating the circumstantial evidence, it is to be borne in the mind that there is always the danger that conjuncture or suspicion may take the place of legal proof. The circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts

so established should be consistent only with the hypothesis of the guilt of the appellant.

38. In the present case, keeping an over view of the evidence adduced by the prosecution, we have no hesitation in stating that all the chain of the circumstances indicates the guilt of the appellant and excludes every hypothesis but the one proposed to be proved. That being so, the citation of *Hanumant Govind* supra has no application in the present case.

39. In *Shankerlal Gyarasilal Dixit Vs. State of Maharastra* reported in AIR 1981 SC 765 the broad principles of circumstantial evidence has been laid as follows- "Evidence Act (1 of 1872), S.3 -Evidence - Appreciation of - Circumstantial evidence - Judgment of Court to show whether or not circumstances are compatible with the hypothesis of the guilt of the appellant."

40. In the nutshell, we found the following circumstances to establish the charges of rape and murder leveled against the appellant-

(1) At the recess, the appellant came with *Namkeen and Biscuits* to the school and offered the same to the deceased prosecutrix;

(2) The two minor girls Babita (PW/2) and Rukmani (PW/5) also tried to accompany with the appellant and the prosecutrix, but the appellant did not allow them to go.

(3) The deceased /prosecutirx was not seen after that.

(4) The dead body was discovered on the next day in the locked house of the appellant.

(5) Dr. Mukesh Jain (PW/7), the Medical Officer found Namkeen mixed vomit present in the mouth as well as on the right side of the face of deceased.

(6) The deceased was sexually assaulted as injuries were seen in her private parts.

(7) The cause of death has been explained as Cardio Respiratory failure due to neurogenic shock to vital organs as a result of injury.

(8) The appellant was not found after the incident and he reamined (sic:remained) absconded. He was arrested in the year 2013 after about 8 years.

(9) The appellant is not the author of the crime and has been falsely

implicated seems patently false.

41. Since this case is based on circumstantial evidence, these circumstances are clear and cogent and indicates the hypothesis that the appellant is guilt of the offences. The circumstances are of such nature are consistent of the sole hypothesis that the appellant is guilty of the crime imputed to him.

42. The creditable evidence of the witnesses regarding the circumstantial evidence enumerated above along with the other documentary evidence such as panchnama and postmortem report are relevant, cogent and reliable.

43. Our judgment will raise a legitimate query, if the appellant is not present in his house at the material time, why then did so many people conspire to involve him falsely. The answer to such question is not always easy to give in criminal cases. In the instance case, the dead body of a tender girl raped and smothered was found in the appellant's house. Thus, for the above reasons we hold that the learned trial Court did not err in holding the appellant guilty.

44. We now proceed to consider about the death sentence imposed by the learned trial Judge under Section 376-A and 302 of the IPC.

45. In *Gurbaksh Singh Sibbia Vs. State of Punjab* Manu/SC/0215/1980: (1980) 2 SCC 565, the Apex Court has stated broad guidelines relating to the mitigating circumstances, in which it is held that:

> *"Judges should never be blood thirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, Courts have inflicted the extreme penalty with extreme infrequency-a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that Courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death*

sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed"

46. In the case of *Bachan Singh Vs. State of Punjab* (1980) 2 SCC 684, the Hon'ble Apex Court has culled out the following prepositions:

"(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

47. In *Santosh Kumar Singh vs. State through CBI* (2010) 9 SCC 747 the Hon'ble apex Court has opined as under:-

"Death sentence or life imprisonment-choice between Priyadarshini Mattoo rape and murder case - held where Court feels some difficulty in making choice, appropriate course is to award lesser sentence. This flows from the 'rarest of rare' principle aggravating and mitigating

circumstances while choosing between two punishments. Appellant committing rape and murder of a hapless junior college student for having rebuffed his amorous overturns and after causing long harassment and stalking her; while appellant was a young man of 24 years. Before murdering her; appellant himself sustained injuries while mercilessly beating the deceased with his helmet and causing 19 injuries including three fractured ribs, to her person. He got married after his acquittal by trial Court. There was no indication that appellant was not capable of reform. These facts considered as mitigating circumstances. On the other hand, misuse of power and pelf which appellant enjoyed by virtue of his father's high position, considered as aggravating circumstance. Balancing the two factors, held, appropriate sentence was life imprisonment. Death sentence awarded by High Court therefore, commuted to life imprisonment. Penology - Reformation - Criminal Trial -Sentence - Death sentence - commutation to life imprisonment when warranted."

48. In *Samir Bhowmik* (supra) the Gauhati High Court has held as under:

"Rape and murder - Aggravating circumstances and mitigating factors manner in which deceased was raped and killed by appellant was undoubtedly brutal. But, there is nothing on record to shown that he had any pre-meditated plan to commit offence of rape. Death of deceased was result of appellant desire to meet his sexual urge. Case does not fall within the category of 'rarest of the rare cases'. Not a case where extreme penalty of death should be imposed. Imposition of punishment of rigorous imprisonment for life would be sufficient to meet the ends of justice."

49. In the present case aggravating circumstances are:

(I) The victim was a hapless female child aged about 7 years

(II) She was studying in Class-II and she was playing with her

friends during recess.

(III) She was lured by the appellant and was taken away to his house.

(IV) She was sexually assaulted causing injuries, the appellant probably smothered her causing her death.

(V) The appellant exhibited complete absence of human feelings, while deciding to commit rape on a seven years old minor, resulting into her death.

(VI) After commission of the offence in cool mind, the appellant locked her in the house and left.

(VII) Despite committing the ghastly acts on the helpless child, the appellant suffered from no instinctive remorse.

(VIII) The manner in which the innocent helpless minor girl was raped and immediately killed was inhuman, barbaric and dastardly.

(IX) The act of committing rape, followed by murder of the minor and locking her inside the house were done in cold blood.

(X) The nature of offence committed by the appellant was not only horrifying but also shocking to the society.

50. Mitigating circumstances in the present case are:

(i) The appellant is a villager and aged about 40 years.

(ii) The appellant while committing rape on the victim caused her death. Either to destroy the evidence of such crime committed by him or to stop her from raising alarm during the rape or from reporting the matter to others and accordingly to save himself might have caused the death.

(iii) As a result of the aforesaid rape on a seven year minor girl injuries were caused to her. Certainly the minor must have suffered tremendous pain compelling her to cry and in order to stop her from raising alarm, the appellant probably smothered her causing her death.

(iv) The medical evidence also indicates that the death was

the result of the combined effect of the injuries and smothering.

(v) In order to save himself from being caught in connection with the crime, the appellant locked the dead body in his house and left the village.

(vi) There is nothing on record to show that there was any previous plan or design to commit the said offences.

(vii) There is nothing on record to find that the appellant was a menace or threat to the society or that his joining the society would be injurious to the society.

(viii) The appellant has no criminal antecedents.

51. On careful consideration of the above aggravating circumstances appearing against the appellant as well as mitigating factors which speak in his favour, we find that after giving full consideration to the mitigating circumstances that the appellant wanted to fulfil his sexual desire, as a result of which death of the minor deceased was caused.

52. There is no previous complaint of any criminal activity of the appellant. Therefore, it can safely be held that in all probabilities the idea of committing the rape came to his mind when he took her with him. There was no previous intention or design to commit her murder. The appellant failed to apply his prudent mind and reasons and got prompted to fulfil his desire by using the said minor. It may be said that it is a case of failure of human mind to apply reasoning and good conscience.

53. The death of the deceased was a result of the appellant's desire to meet his sexual urge. Therefore, though the offences look heinous, it cannot, in the circumstances, be termed as "rarest of rare case".

54. In the light of the above discussion, we feel inclined to conclude that this case does not fall within the category of 'rarest of the rare case'. Therefore, in our view it is not a case where extreme penalty of death should be imposed.

55. We may further add that imposition of punishment of imprisonment of life would be sufficient to meet the ends of justice. 'Accordingly, the death penalty for offence under sections 302 of IPC is commuted to imprisonment for life. The appellant, therefore, instead of awarding the death penalty, is hereby sentenced to undergo imprisonment for life under sections 302 of IPC

and fine of Rs.5,000/-. The part of sentence imposed by learned Session Judge under Section 376(2) (h) of IPC imposing life imprisonment with a fine of Rs.5,000/- is maintained.

56. With the above modification in sentence, the appeal stands partly allowed. The sentence shall run concurrently.

57. In the result and for the reasons discussed above, we decline to confirm the sentence of death imposed against the appellant by the learned trial Judge.

58. Accordingly, the criminal death reference and the criminal appeal stand disposed of. Record of the trial Court be sent back for necessary action.

Order accordingly.

I.L.R. [2017] M.P., 184
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice N.K. Gupta
M.Cr.C. No. 54/2016 (Gwalior) decided on 2 March, 2016

BALCHAND GUPTA ... Applicant
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Legal Metrology Act, 2009 (1 of 2010), Sections 48(5) & 51 and Essential Commodities Act (10 of 1955), Section 3/7 - Quashing of First Information Report **- Second FIR u/S 3/7 of the Essential Commodities Act - Prior to the registration of First Information Report under the Essential Commodities Act, the offence under Legal Metrology Act was compounded - Later on offence registered under the Essential Commodities Act - If the officer of the Legal Metrology Act would have filed the criminal complaint against the applicant then still when they were not competent to proceed under the Essential Commodities Act, the food officer was entitled to prosecute the second complaint against the applicant under the Essential Commodities Act. (Para 8)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, विधिक मापविज्ञान अधिनियम, 2009 (2010 का 1), धाराएँ 48(5) व 51 एवं आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3/7 – प्रथम सूचना प्रतिवेदन का अभिखंडित किया जाना – आवश्यक वस्तु अधिनियम की धारा 3/7 के अंतर्गत द्वितीय प्रथम सूचना प्रतिवेदन

– आवश्यक वस्तु अधिनियम के अंतर्गत प्रथम सूचना प्रतिवेदन पंजीबद्ध होने से पूर्व ही विधिक मापविज्ञान अधिनियम के अंतर्गत अपराध का शमन हो चुका था – इसके पश्चात् आवश्यक वस्तु अधिनियम के अंतर्गत अपराध पंजीबद्ध किया गया – यदि विधिक मापविज्ञान अधिनियम के अधिकारी ने आवेदक के विरूद्ध आपराधिक परिवाद दायर कराया होता तो फिर भी जब वे आवश्यक वस्तु अधिनियम के अंतर्गत आगे बढ़ने हेतु सक्षम नहीं थे, खाद्य अधिकारी आवश्यक वस्तु अधिनियम के अंतर्गत आवेदक के विरूद्ध द्वितीय परिवाद अभियोजित करने के लिए हकदार था।

Cases referred:

(2011) 2 SCC 703, M.Cr.C. No. 4086/2008 order passed on 12.03.2015, 2003 SCC (Cri.) 425.

Sanjay Bahirani, for the applicant.
B.K. Sharma, P.P. for the State.

ORDER

N.K. Gupta, J. :- Applicant has preferred the present petition under Section 482 of the Code of Criminal Procedure, 1973 for quashing the FIR registered at crime No.347/2015 at Police Station Madhoganj District Gwalior for the offence under Section 3/7 of the Essential Commodities Act (in short ' the EC Act').

2. Facts of the case in short are that the applicant is a proprietor of Bapu Indane Gas and prosecuting a gas agency of Indane gas. On 14-05-2015, the officer of Weights and Measurements empowered under the Legal Metrology Act, 2009 (hereinafter it would be referred as 'the LM Act') inspected the shop of the applicant and found that 24 gas cylinders were kept by the applicant in a vehicle MKW 2826 and on weighing 7 cylinders were found to be underweight and therefore, the case was registered under the LM Act. Thereafter, the applicant moved an application to compound the offence and the offence was compounded. After that, intimation was given to the District Supply Controller, Gwalior who sent a letter to take action against the applicant under the EC Act but the Deputy Controller of Weights and Measurements had informed that after compromise no prosecution can be initiated under the LM Act due to the provisions of Section 48 (5) of the LM Act. Ultimately, the FIR was lodged by the Junior Food Supply Officer, Gwalior (Smt. Pooja Sikarwar) at Police Station Madhoganj District Gwalior for the offence under Section 3/7 of the EC Act.

3. I have heard learned counsel for the parties at motion stage on 25-02-2016.

4. It was mainly contended by learned counsel for the applicant that according to the provisions of Sections 48(5) and 51 of the LM Act, no further prosecution could be initiated against the applicant. Secondly, clause 13 of the Liquefied Petroleum Gas (Regulation of Supply and Distribution) Order, 2000 (in short 'the Control Order') gives a right of inspection to the officer of Food Department and without such inspection, the Officer of the Food Department cannot initiate the proceedings against the applicant. Thirdly, such proceedings are against the provisions of Section 300 of Cr.P.C. In this connection, learned counsel for the applicant has relied upon the judgment passed by the Apex Court in the case of *"Kolla Veera Raghav Rao vs. Gorantla Venkateswara Rao & Anr."* {(2011) 2 SCC 703}. Reliance is also placed on the order dated 12-03-2015 passed by the Single Bench of this Court in the case of *"Rakesh Gupta Vs. State of M.P."* (M.Cr.C.No.4086/2008) in which it is held that no second prosecution can be initiated in the light of the provisions of Section 300 of Cr.P.C. Fourthly, it was also submitted that since the applicant did not flout clause 5 of the Control Order, therefore, no offence under Section 7 of the EC Act is made out. It was not established that the applicant sold some gas cylinders containing lesser quantity of the gas to any consumer, therefore, it was prayed that the registration of second crime should be quashed.

5. After considering the submissions made by learned counsel for the parties and looking to the facts and circumstances of the case, it would be apparent that the LM Act is a special enactment which governs the penal provisions of that Act itself and the food controller did not direct the officer of the LM Act to prosecute the applicant for any penal provision of the LM Act, therefore, for registration of a crime under the EC Act there is no bar of Sections 48 (5) or Section 51 of the LM Act because the bar created under that provision is that after acceptance of compromise, no further prosecution under that Act will be initiated but it was not mentioned that if simultaneously any other crime was constituted then other crime which was not of the LM Act cannot be registered or the accused cannot be prosecuted for other crime. The provisions of Sections 48(5) and 51 of the LM Act are only binding on the officers of the LM Act not to prosecute the accused for any offence under the LM Act when the compromise takes place. In the present case, the officer

of the LM Act are not prosecuting the applicant again for any offence under the LM Act and therefore, such prohibition does not give any help to the applicant. Hence, the officers of the LM Act have informed the food controller that after compounding of the offence, no action will be taken by them and therefore, the Junior Food Supply Officer had lodged an FIR at Police Station Madhoganj District Gwalior.

6. Similarly, clause 13 of the Control Order empowers an inspector or equivalent or superior officer of the Food Supply Department to inspect the shop of the applicant and such distributor but it is not mentioned in that clause that if the inspection was not done by the officer of the Food Department and otherwise intimation is received by the officer of Food Department then no action can be taken against the applicant. Hence, the power of food inspector or the officer vested in clause 13 of the Control Order does not debar the food inspector or the officer to lodge the case against any dealer on the evidence received from the other source. In the present case, when the officer of Weights and Measurements Department had already inspected and found that the cylinders kept in the vehicle for supply, were underweight and lesser quantity of gas was supplied to the consumer and also the applicant applied for the compromise and offence was compounded then in view of the provisions of clause 13 of the Control Order, it cannot be said that without inspection done by food inspector or the officer, they can not proceed to file a complaint before the SHO of concerned police station, hence the contention of learned counsel for the applicant cannot be accepted that without inspection food controller cannot proceed against the applicant under the EC Act.

7. So far as the objection relating to Section 300 of Cr.P.C. is concerned, this provision and Article 20 of the Constitution of India prohibits the prosecution of a person for two times. Learned counsel for the applicant has referred an order of Single Bench of this Court in the case of *Rakesh Gupta* (supra), however in that case the complaint under the LM Act was filed and thereafter, matter of the EC Act was filed against the concerned accused. In the present case, the applicant compounded the offence with the officer of the LM Act, therefore, no charge-sheet or the complaint was filed on that account and therefore, in the case registered under the EC Act if the charge-sheet is filed against the applicant then it would not be the second charge-sheet in the eyes of law. It would be first charge-sheet because due to compromise, no charge-sheet or the complaint could be filed against the

applicant by the officer of the LM Act whereas in the case of *Rakesh Gupta* (supra), the charge-sheet was also filed against the accused under the LM Act therefore, when it is not proved that the charge-sheet which is to be filed under the EC Act would be the second charge-sheet, the provisions of Section 300 of Cr.P.C. are not attracted in the present case.

8. Also, in this connection it should be mentioned that the law laid down in *Kolla Veera Raghav Rao* (supra) cannot be applied in the present case because in that case the accused was convicted for the offence under Section 138 of the Negotiable Instruments Act, therefore, it was laid that second prosecution of offence under Section 420 of IPC could not be initiated. In this connection, the judgment passed by the Apex Court in the case of *"Mahesh Chand Vs. B. Janardhan Reddy & Anr."* (2003 SCC (Cri.) 425) may also be referred, in which it is led that the second complaint on the same facts could be entertained only in exceptional circumstances namely where the previous order was passed on an incomplete record or on a misunderstanding of the nature of complaint or it was manifestly absurd, unjust or where new facts which could not, with reasonable diligence, have been brought on record in the previous proceedings, have been adduced. In the present case, the officer of the LM Act could not file any FIR before the Police Station Madhoganj under the provisions of the EC Act. They had limited power to prosecute the applicant under the LM Act only and therefore, if the Junior Food Supply Officer had lodged second FIR against the applicant for a different offence constituted on the same set of facts then such second prosecution is permissible according to the ratio led by the Apex Court in the case of *Mahesh Chand* (supra). Hence, if the officers of the LM Act would have filed the criminal complaint against the applicant then still when they were not competent to proceed under the EC Act, the food officer was entitled to prosecute the second complaint against the applicant under the EC Act.

9. So far as the last contention of the applicant that clause 5 of the Control Order would be applicable on sale or distribution of lesser quantity of gas to the consumer, is concerned, learned counsel for the applicant has submitted that all the gas cylinders were kept in a loading vehicle those were neither sold nor distributed, therefore, the applicant did not flout clause 5 of the Control Order.

10. On the other hand, learned counsel for the State has stated that now a days consumer books a gas cylinder by internet or phone and thereafter the

bill is issued in the name of that consumer and employees of the distributor are required to supply the gas cylinder on the basis of bill and receipt issued in favour of the consumer and therefore, if the gas cylinders having lesser gas were loaded in the vehicle for supply on the basis of order given by the consumers then loading of such cylinders in the vehicle includes supply and therefore, the applicant has flouted clause 5 of the Control Order. However, there is nothing on record about the procedure relating to supply of the cylinders to the consumer and it would be dependent upon the factual position of the supply procedure as to whether loading of cylinders on a vehicle for supply comes within the purview of supply or not therefore, at this premature stage it should not be discussed and decided. It would be proper for the trial Court to consider the defence of the applicant on the basis of evidence collected by the prosecution when the charge-sheet is filed.

11. Hence, *prima facie* it cannot be said that no offence under Section 3/7 of the EC Act is made out against the applicant or Junior Food Supply Officer was not competent to lodge the FIR at Police Station Madhoganj or due to compromise between the officers of the LM Act and the applicant, the applicant could not be prosecuted under the EC Act. Under these circumstances, it is not a case where inherent power of this Court vested under Section 482 of Cr.P.C. may be invoked in favour of the applicant, therefore, the petition under Section 482 of Cr.P.C. filed by the applicant - Balchand Gupta is hereby dismissed at motion stage.

Application dismissed.

I.L.R. [2017] M.P., 189
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice J.K. Maheshwari
M.Cr.C. No. 13232/2015 (Jabalpur) decided on 20 July, 2016

MOHD. ARIF ...Applicant
Vs.
MOHD. ARIF RAEEN ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Wakf Act (43 of 1995), Sections 61(3), 68(2) & (3) **- Issue involved is that whether the application filed u/S 68(2) and (3) of 1995 Act by the successor mutawalli is not maintainable without seeking permission of the Board as specified u/S 61 (3) of the Act - Held - Scope of Section**

61(3) and 68(2) and (3) - Both cannot be put at the same footing - Proceeding initiated by the Board and by the successor mutawalli are totally in different context and cannot be equated to each other - On filing an application u/S 68(2) by the successor mutawalli, Magistrate is duty bound to pass an order specifying the period for delivery of charge and can also exercise power u/S 68(3) convicting the removed mutawalli - Objection raised by the applicant is rejected - Petition stands dismissed. (Paras 8, 10 & 11)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं वक्फ अधिनियम (1995 का 43), धाराएँ 61(3), 68(2) व (3) – अंतर्ग्रस्त विवाद्यक यह है कि क्या उत्तराधिकारी मुतावली द्वारा 1995 के अधिनियम की धारा 68(2) एवं (3) के अंतर्गत प्रस्तुत आवेदन, बोर्ड की अनुमति प्राप्त किये बिना, जैसा कि अधिनियम की धारा 61(3) में विनिर्दिष्ट है, पोषणीय नहीं है – अभिनिर्धारित – धारा 61(3) तथा 68(2) एवं (3) का विस्तार – दोनों को समान परिप्रेक्ष्य में नहीं रखा जा सकता – बोर्ड द्वारा एवं उत्तराधिकारी मुतावली द्वारा आरम्भ की गई कार्यवाही पूर्णतः भिन्न संदर्भ में है एवं आपस में समीकृत नहीं की जा सकती – धारा 68(2) के अंतर्गत उत्तराधिकारी मुतावली द्वारा आवेदन प्रस्तुत करने पर, मजिस्ट्रेट प्रभार परिदान की अवधि को विनिर्दिष्ट करने वाला आदेश पारित करने हेतु कर्तव्य बाध्य है तथा धारा 68(3) के अंतर्गत, हटाये गए मुतावली को दोषसिद्ध करने हेतु शक्ति का प्रयोग भी कर सकता है – आवेदक द्वारा उठाया गया आक्षेप अस्वीकार किया गया – याचिका खारिज।

Case referred:

2010 (III) MPWN 67.

H.K. Namdeo, for the applicant.
M.K. Tripathi, for the non-applicant.

ORDER

J.K. MAHESHWARI, J. :- Invoking the jurisdiction under Section 482 of the Code of Criminal Procedure to assail the order dated 9.2.2015 passed by the Chief Judicial Magistrate, Harda and the order dated 24.6.2015 passed by Additional Sessions Judge, Harda confirming the order of trial court, this petition has been preferred for setting aside the same.

2. On perusal of the facts as obtaining from the pleadings, it reveals that vide order dated 3.9.2012 of Chairman, M.P. Wakf Board respondent was appointed as mutwalli for a period of one year or until further orders, removing the applicant from the post of mutwalli. Because the charge of mutwalli was

not delivered by the removed mutwalli to successor, however, the respondent submitted an application under Section 68 (2) and (3) of the Wakf Act, 1995. On filing such an application, notice was issued to the removed mutwalli (applicant), whereupon an application under Section 61 (3) of the Act was filed seeking dismissal of the application of the successor mutwalli (respondent). The said application has been rejected vide order impugned passed by CJM on 9.2.2015, which is confirmed in revision by the Additional Sessions Judge, however, this petition has been preferred by applicant.

3. Learned counsel appearing for the applicant has referred the provisions of Section 61(3) of the Act contending that until the complaint is made by the Board or by a person duly authorized by the Board the Magistrate can not take cognizance for an offence punishable under this Act. In the present case, the complaint has been filed by the successor mutwalli, and not by the Board which is not entertainable. Both the courts committed error of jurisdiction and also of the procedure as prescribed under the Code of Criminal Procedure, however, prayed to allow the application of the applicant, under Section 61 (3) of the Act, and the application filed by respondent under Section 68(2) & (3) may be dismissed. To buttress his contention, learned counsel has placed reliance on a judgment of this Court in the case of *Said-ur-rehman vs. Mohammad Yusuf Khan and another*-2010 (III) MPWN 67.

4. On the other hand, learned counsel representing respondent has referred the language of Section 68(2) of the Act, to contend that on removal of mutwalli or committee by the Wakf Board if the mutwalli or the committee so removed from the office fails to deliver the charge on appointment of successor mutwalli or committee, the application on the instructions of successor mutwalli or any of the member of the committee may be made which is entertainable before any Magistrate First Class, and on direction if removed mutwalli fails to deliver the charge then, as per sub-section (3) of Section 68, he may be sent to jail for a period of six months or impose fine or both, however, in the facts of the case the argument of applicability of Section 61 (3) of the Act is baseless. In view of the aforesaid, it is urged that Judicial Magistrate First Class as well revisional court have rightly rejected the objection filed by the applicant. Therefore, petition filed by applicant may be dismissed with cost, with further direction to removed mutwalli to deliver the charge, and on failure, trial court may be directed to send the applicant to jail, as per Section 68(3) of the Act.

5. After hearing learned counsel appearing on behalf of both the parties and looking to the facts of this case, the issue involved in the present case is; whether on filing an application under Section 68 (2) and (3) of the Act by successor mutwalli, the objection under Section 61 (3) of the Act filed by removed mutwalli may be allowed, to reject the application of successor mutwalli? In this respect to advert the arguments as advance and to decide the said issue, the provisions as contained under Section 68 as well as 61 of the Act are required to be noticed. Section 68 of the Act deals with the duty of mutwalli or committee to deliver possession of records. However, the relevant provision of Section 68 (1)(2) and (3) are reproduced which reads as under:

> **"68. Duty of mutawalli or committee to deliver possession of records, etc.—**
>
> (1) Where any mutawalli or committee of management has been removed by the Board in accordance with the provisions of this Act, or of any scheme made by the Board, the mutawalli or the committee so removed from the office (hereinafter in this section referred to as the removed mutawalli or committee) shall hand over charge and deliver possession of the records, accounts and all properties of the wakf (including cash) to the successor mutawalli or the successor committee, within one month from the date specified in the order.
>
> (2) Where any removed mutawalli or committee fails to deliver charge or deliver possession of the records, accounts and properties (including cash) to the successor mutawalli or committee within the time specified in sub-section (1), or prevents or obstructs such mutawalli or committee, from obtaining possession thereof after the expiry of the period aforesaid, the successor mutawalli or any member of the successor committee may make an application, accompanied by a certified copy of the order appointing such successor mutawalli or committee, to any Magistrate of the first class within the local limits of whose jurisdiction any part of the wakf property is situated and, thereupon, such Magistrate may, after giving notice to the removed mutawalli or members of the removed committee, make an order directing the delivery of

charge and possession of such records, accounts and properties (including cash) of the wakf to the successor mutawalli or the committee, as the case may be, within such time as may be specified in the order.

(3) Where the removed mutawalli or any member of the removed committee, omits or fails to deliver charge and possession of the records, accounts and properties (including cash) within the time specified by the Magistrate under sub-section (2), the removed mutawalli or every member of the removed committee, as the case may be, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to eight thousand rupees, or with both.

Bare perusal of the aforesaid, it is apparent that if any removed mutwalli or committee fails to deliver the charge or to deliver possession of the record, accounts and properties (including cash) to the successor mutwalli or committee within time specified in sub-section (1), or prevents or obstruct such mutwalli or committee, from obtaining possession thereof after expiry of the period as specified in order passed under sub-section (1), the successor mutwalli or any member of the successor committee may make an application, accompanied by a certified copy of the order appointing successor mutwalli or committee, to any Magistrate of the first class within whose local jurisdiction the property of Wakf situates. The Magistrate may direct to deliver the charge within the time so specified in the order. In case removed mutwalli fails to carry out the order passed by the Magistrate then in exercise of the power contained under sub-section (3) removed mutwalli or member of the said committee may be punished with imprisonment for a term which may extend to six months or with fine which may extend to eight thousand rupees, or with both.

6. Section 61 of the Act deals with Penalties, which reads as under:-

"61. Penalties.— (1) If a mutawalli fails to—

(a) apply for the registration of a wakfs;

(b) furnish statements of particulars or accounts or returns as required under this Act;

(c) supply information or particulars as required by the Board;

(d) allow inspection of wakf properties, accounts, records or deeds and documents relating thereto;

(e) deliver possession of any wakf property, if ordered by the Board or Tribunal;

(f) carry out the directions of the Board;

(g) discharge any public dues; or

(h) do any other act which he is lawfully required to do by or under this Act,

he shall, unless he satisfies the court or the Tribunal that there was reasonable cause for his failure, be punishable with fine which may extend to eight thousand rupees.

(2) Notwithstanding anything contained in sub-section (1) if—

(a) a mutawalli omits or fails, with a view to concealing the existence of a wakf, to apply for its registration under this Act,—

(i) in the case of a wakf created before the commencement of this Act, within the period specified therefor in sub-section (8) of section 36;

(ii) in the case of any wakf created after such commencement, within three months from the date of the creation of the wakf; or

(b) a mutawalli furnishes any statement, return or information to the Board, which he knows or has reason to believe to be false, misleading, untrue or incorrect in any material particular, he shall be punishable with imprisonment for a term which may extend to six months and also with fine which may extend to fifteen thousand rupees.

(3) No court shall take cognizance of an offence punishable under this Act save upon complaint made by the

Board or an officer duly authorised by the Board in this behalf.

(4) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the fine imposed under sub-section (1), when realised, shall be credited to the Wakf Fund.

(6) In every case where offender is convicted after the commencement of this Act, of an offence punishable under sub-section (1) and sentenced to a fine, the court shall also impose such term of imprisonment in default of payment of fine as is authorised by law for such default."

On perusal of the above, it is apparent that if any mutwalli fails to apply for the registration of a wakf or to furnish statements of particulars or accounts or returns as required under this Act; supply information or particulars as required by the Board, allow inspection of wakf properties, accounts, records or deed and documents relating thereto, deliver possession of any wakf property, if ordered by the Board or Tribunal, carry out the direction of the Board, discharge any public dues or do any other act which he is lawfully required to do by or under this Act, he shall, unless satisfies the Court or the Tribunal that there was reasonable cause for his failure, be punishable with fine which may extend to eight thousand rupees. Notwithstanding to the duties of mutwalli, if he omits or fails, with a view to concealing existence of the Wakf, to apply for registration as per the contingencies of Section 61(2)(1)(a)(i), (ii) or furnishes any statement, return or information to the Board, which he knows or was reason to believe to be false, misleading, untrue or incorrect shall be punishable with imprisonment, as specified. Under sub-section (3) it has been made clear that cognizance cannot be taken by a Court under the Act unless the complaint made by the Board or an officer duly authorized by the Board in this behalf.

7. In addition to the aforesaid verbal meaning, to understand the scope of Section 61 and also of Section 68 of the Act, it is necessary to know its object and reason to which it is introduced. Both the said sections are in chapter VI which starts from Section 44 to 71, and deals with maintenance of

accounts of Wakf. Section 44 specifies budget, to which mutwalli of the Wakf is assigned or duty bound to fill up the prescribed forms and to submit the same. Section 45 authorizes to the Chief Executive Officer to prepare budget for every financial year for all the Wakfs in the state. As per Section 46, every mutwalli shall keep regular account and submit it to the Board before 1st of May of every year which shall be audited by an officer as required by Section 47. On receiving the said audited accounts the Board shall examine the same and pass order on the auditor's report. As per Section 50, it shall be the duty of mutwalli to carry out the direction of the Board; to furnish returns and supply information or particulars as may be required time to time; to inspect the wakf properties, accounts, or records, or deeds and documents relating to it; or to discharge any public duty, or act which is lawfully required to be done.

8. Thus, looking to the various sections of the Chapter, it is clear that mutwalli owe certain duties to perform towards the Board. Simultaneously, the Wakfs Board are required to regulate the function of mutwalli, conferring the powers on the Board; i.e. alienation of wakf property is restricted and in case the illegal possession has been given, the action may be taken as per Section 52. The Board is also having powers to put restriction on purchase of property on behalf of Wakf, power of removal of encroachment from the wakf property and restrictions to grant lease of Wakf property as specified under Sections 53, 54, 55 and 56. In case the duty as specified on the mutwalli towards Board has not been performed and the Board is satisfied for not discharging the function as classified in Section 50, and Section 61(1) (a) to (h) or under sub-section (2) the action may be taken by the Board or by the authorized person, as per Section 61(3). Thus, it is apparent that the intention of legislature in Chapter-VI from Section 44 to 60 is to classify certain duties of the mutwalli towards Board and on failure to discharge the said duties, the Board may take action for the penalty as specified under Section 61. However, sub-section (3) of Section 61 is inserted with the said intent using the words that "the court may take cognizance of an offence punishable under the Act upon complaint made by the Board or an officer duly authorized by the Board in this behalf." Thereafter, power to remove the mutwalli has been conferred to the Board as per Section 64. In case the Board is not exercising such powers, the State Government, in certain contingencies, may exercise those powers. Thus under Chapter VI, from Section 44 to 61 deals the duties of mutwalli to discharge towards the Board, and the powers of the Board towards

mutwalli, which includes to take steps for penalties against mutwalli. Thereafter Section 64 onwards deals the power of the Board to remove the mutwalli who is not performing his duties, and to appoint new mutwalli, and the procedure, how the charge and possession of the property of the Wakf can be taken. However, on removal and on appointment of mutwalli as per Section 67 certain duties have been classified on the mutwalli or the committee so removed as well on newly appointed. In case of failure to discharge those duties the newly appointed mutwalli conferred the right as per Section 68 (2) to apply to the Magistrate and in case of failure to carry out the order passed by the Magistrate First Class with respect to handing over of the charge, delivery of the possession of the record, accounts and all properties of the wakf including cash to the successor mutwalli within the time specified, the power under sub-section (3) has been conferred to punish the removed mutwalli in case he is not carrying out the directions of the court. Thus, it is clear that after specifying the duties of mutwalli towards the Board and in case of failure to discharge those duties, the Board is conferred with a power to take action for the penalty as specified against the mutwalli under Section 61 and thereafter the power may be exercised to remove the said mutwalli appointing successor mutwalli who may take recourse under Section 68 of the Act. Therefore, the scope of Section 61(3) is in the context of duties of mutwalli towards the Board and the scope of Section 68 is in between the removed and successor mutwalli are in different context. Therefore, both cannot be put at the same footings and the proceedings initiated by the Board as well as the proceedings initiated by the successor mutwalli are totally in different context and cannot be equated to each other. However, the arguments as advanced by the learned counsel for the applicant that the application under Section 68(2) (3) of the Act is not entertainable without seeking permission of the Board as specified under Section 61(3) of the Act is devoid of any merit. In the said context, the judgment in the case of *Said-urrehman* (supra) relied by the applicant is required to be explained. The facts in the said case were, the successor mutwalli filed an application under Section 68 and 73 of the Act before the Judicial Magistrate First Class. It was alleged that against the order of removal the earlier mutwalli had preferred an appeal before the Wakf Tribunal and on its dismissal on filing the application by successor mutwalli directions were issued to hand over the charge within two months. Against the said order, the earlier mutwalli approached to the High Court, which was stayed. Ignoring the said stay order, the Judicial Magistrate passed an order

convicting the earlier mutwalli and directed to undergo sentence with fine against which the appeal was preferred, that too was dismissed. However, on filing the revision, the High Court remitted back the matter to the Judicial Magistrate First Class for deciding it afresh considering the fact of stay granted by the Court. The Judicial Magistrate has again passed an order of conviction. In appeal, the conviction was maintained, but the sentence was reduced. However, in the said context the court was influenced of the fact that the action taken by the Judicial Magistrate convicting the appellant ignoring the order of stay was not justified. In addition to the said fact, the reference of Section 61(3) of the Act has been made without taking note of the scope of Section 61 (3) and 68 (2) and (3) of the Act. However, the said judgment is not a precedent in the context of Section 61(3) to maintain the application under Section 68 (2) and (3) of the Act. In view of the foregoing discussion and analysis of scope and object of Section 61(3) as well 68(2) and (3) and also the context the judgment of Said-ur-rehman (supra) is hereby explained. Thus, in my considered opinion the arguments as advanced by the counsel for the applicant is devoid of any merit, hence, repelled.

9. On perusal of the proceedings of this case it reveals that on 11.7.2016 this Court has passed the order, which is reproduced as under:

> "Shri Hemant Kumar Namdeo, learned counsel for the petitioner.
>
> Shri Mithilesh Prasad Tripathi, learned counsel for the respondent.
>
> During the course of the arguments, it has been stated by learned counsel for the petitioner that Annexure A-6 has been filed before the J.M.F.C. seeking direction for handing over the charge. It is also stated at the Bar that the petitioner is prepared to hand over the charge to the respondent.
>
> Keeping in view the same, the parties are to take appropriate steps within seven days.
>
> Case be listed after seven days.
>
> C.C. as per rules."

Today, on the said order counsel appearing on behalf of the applicant contends that this order has been passed without perusal of the record under

misrepresentation, however, has not been complied with.

10. But, on perusal of the facts as well as the legal position discussed hereinabove, the arguments as advanced by the learned counsel for the applicant that the order dated 11.7.2016 passed by this Court directing to deliver the charge to the successive mutwalli was under misrepresentation is meritless. It is to be noted here that on filing an application under Section 68(2) by the successive mutwalli for handing over of the charge and delivery of the possession of records, accounts and all properties of the wakf including cash, the Magistrate is duty bound to pass an order specifying the period for delivery of the said charge to the successive mutwalli and in case of failure to carry out the said direction of the Magistrate within the time so specified, he can exercise power under sub-section (3) of Section 68 of the Act convicting removed mutwalli and to sentence him for the period as specified therein and also of fine or both.

11. In view of the forgoing discussion, the objection as raised by the applicant to dismiss the application under Section 68 (2) and (3) of the Act filed by the successor mutwalli is hereby rejected. Accordingly, the petition filed by the applicant stands dismissed with cost Rs.2,500/-. The Magistrate concerned is directed to pass appropriate orders in exercise of powers under Section 68(2) of the Act within two weeks from the date of production of certified copy of this order and in case of failure to carry out those directions, the powers as conferred under Section 68(3) of the Act shall be exercised in accordance with law.

Application dismissed.

I.L.R. [2017] M.P., 199

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Atul Sreedharan

M.Cr.C. No. 1052/2008 (Jabalpur) decided on 14 September, 2016

MALAY SHRIVASTAVA & ors. ... Applicants

Vs.

SHANKAR PRATAP SINGH BUNDELA & anr. ...Non-applicants

(Alongwith M.Cr.C. No. 830/2014)

A. Practice & Procedure - Barred by limitation & barred by laches - Distinction **- When an action is barred due to limitation, the same is on account of operation of statute mainly the Limitation**

Act, 1963 - Party is prevented from seeking relief for not having sought judicial redress within specific period stipulated under Limitation Act, Special Statute & rules of the High Courts and Supreme Court within which the litigant may approach for relief - Whereas, action is barred by laches because of inordinate delay though not provided under any statute, causing prejudice to another - Laches is the denial of judicial redress based on principle of equity. (Para 5)

क. पद्धति व प्रक्रिया – परिसीमा द्वारा वर्जित एवं अनुचित विलंब द्वारा वर्जित – विभेद – जब एक कार्यवाही परिसीमा द्वारा वर्जित है, तो वह उक्त कानून के प्रवर्तन मुख्यतः परिसीमा अधिनियम, 1963 के कारण है – परिसीमा अधिनियम, विशेष कानून तथा उच्च न्यायालयों एवं उच्चतम न्यायालय के नियमों के अंतर्गत नियत विनिर्दिष्ट अवधि जिसके भीतर मुकदमेबाज अनुतोष प्राप्त कर सकता है उस अवधि के भीतर न्यायिक प्रतितोष नहीं चाहने के कारण पक्षकार को अनुतोष पाने से रोका गया – जबकि कार्यवाही असाधारण विलंब होने के कारण, अनुचित विलंब द्वारा वर्जित है, यद्यपि किसी कानून में उपबंधित नहीं है, जिससे अन्य पर प्रतिकूल प्रभाव कारित होता है – अनुचित विलंब, साम्या के सिद्धांत पर आधारित न्यायिक प्रतितोष का प्रत्याख्यान है।

***B. Practice & Procedure - Legal Maxim - Vigilantibus, et non dormientibus, jura sub veniunt* - Meaning - The law shall aid the vigilant and not the indolent. (Para 5)**

ख. पद्धति व प्रक्रिया – विधिक सूत्र – अर्थ – विधि जागरूक की सहायता करती है, न कि सुषुप्त की।

***C. Practice & Procedure - Laches* - Party seeking to prevent an action on the ground of laches must establish the crystalisation of his right by efflux of time which would be prejudiced if the action of other party is entertained by the Court - Delay simpliciter would not be adequate to invoke laches. (Para 5)**

ग. पद्धति एवं प्रक्रिया – अनुचित विलंब – कार्यवाही को रोकने के लिए अनुचित विलंब का आधार चाहने वाले पक्षकार को यह अवश्य स्थापित करना चाहिए कि यदि दूसरे पक्षकार की कार्यवाही को न्यायालय द्वारा ग्रहण किया जाता है, तब समय के बीत जाने के कारण उसके अधिकार स्पष्ट और सुनिश्चित होने पर विपरीत प्रभाव पड़ेगा – साधारणतः विलंब, अनुचित विलंब का अवलंब लेने हेतु पर्याप्त नहीं होगा।

***D. Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Power/jurisdiction/scope* - Not restricted only to situation where no**

remedy provided in law - Also provides remedy for all situations where the continuance of criminal proceedings would result in abuse of process of law - Power of the High Court u/S 482 is plenary in nature limited only by express statutory prohibitions and limitations imposed by Supreme Court by judgments. (Para 5 & 7)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – शक्ति/अधिकारिता/विस्तार – केवल उस परिस्थिति तक ही सीमित नहीं, जहाँ विधि में कोई उपचार उपबंधित नहीं है – उन सभी परिस्थितियों के लिए उपचार भी प्रदान करती है जहाँ दाण्डिक कार्यवाहियों की निरंतरता के परिणामस्वरूप विधि की प्रक्रिया का दुरूपयोग होगा – धारा 482 के अंतर्गत उच्च न्यायालय की शक्ति सर्वांगीण स्वरूप की है मात्र अभिव्यक्त कानूनी प्रतिषेध तथा उच्चतम न्यायालय के निर्णय द्वारा अधिरोपित परिसीमाओं द्वारा ही सीमित है।

E. Criminal Procedure Code, 1973 (2 of 1974), Sections 156(3), 200, 202, 204 & 482 - Cognizance of offence **- Police Report does not disclose commission of offence and reveals only civil liability - To take cognizance even then - The court is bound to give reasons as to what were the compelling circumstances for taking cognizance and show the application of mind - Failing is fatal - The order is woefully silent as to what was the material in the statement u/S 200 Cr.P.C. which compelled Trial Court to reject the police report of non-commission of offence - Held - The order summoning accused is deficient in material particulars therefore, the proceedings are bad in law. (Para 25)**

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 156(3), 200, 202, 204 व 482 – अपराध का संज्ञान – पुलिस रिपोर्ट अपराध का कारित होना प्रकट नहीं करती तथा केवल सिविल दायित्व प्रकट करती है – तब भी संज्ञान लिया जाना – न्यायालय कारण देने हेतु बाध्य है कि संज्ञान लेने के लिए वे कौनसी बाध्यकर परिस्थितियाँ थी तथा मस्तिष्क का प्रयोग दर्शाये – ऐसा न किया जाना घातक है – आदेश खेदजनक रूप से मौन है कि दण्ड प्रक्रिया संहिता की धारा 200 के अंतर्गत कथन में वह क्या तत्व था जिसने विचारण न्यायालय को अपराध कारित न होने के पुलिस प्रतिवेदन को अस्वीकार करने के लिए बाध्य किया – अभिनिर्धारित – अभियुक्त को समन किये जाने के आदेश में तात्विक विशिष्टियों की कमी है इसलिए कार्यवाहियाँ विधि की दृष्टि में अनुचित है।

F. Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 399, 401 & 482 - Exercise of power - Doctrine of election **- Where the options available under the law are mutually opposed to each other - Person**

can either elect to challenge by way of revision before Court of Sessions or High Court, or approach the High Court u/S 482 Cr.P.C. directly to quash the order - Application u/S 482 Cr.P.C. maintainable. (Para 27)

च. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397, 399, 401 व 482 – शक्ति का प्रयोग – चुनाव का सिद्धांत – जहाँ विधि अंतर्गत उपलब्ध विकल्प परस्पर रूप से एक दूसरे के प्रतिकूल है – व्यक्ति या तो सत्र न्यायालय अथवा उच्च न्यायालय के समक्ष पुनरीक्षण के माध्यम से चुनौती देने का चुनाव कर सकता है या फिर दण्ड प्रक्रिया संहिता की धारा 482 के अंतर्गत आदेश को अभिखंडित किये जाने हेतु सीधे उच्च न्यायालय के समक्ष जा सकता है – दण्ड प्रक्रिया संहिता की धारा 482 के अंतर्गत आवेदन पोषणीय है।

***G. Criminal Procedure Code, 1973 (2 of 1974), Section 197 and Penal Code (45 of 1860), Sections 166 & 167* - Sanction u/S 197 - Prerequisite for taking cognizance of offences u/S 166 & 167 I.P.C. - Offences which by their very nature could only be committed in discharge of official duties - If alleged act of accused is unequivocally linked with the discharge of duties - Requirement of sanction is prerequisite for cognizance. (Para 29)**

छ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 197 एवं दण्ड संहिता (1860 का 45), धाराएँ 166 व 167 – धारा 197 के अंतर्गत मंजूरी – भारतीय दण्ड संहिता की धारा 166 व 167 के अंतर्गत अपराधों का संज्ञान लेने की पूर्वापेक्षित शर्त – अपराध जो अपने स्वरूप के कारण केवल पदीय कर्तव्य का निर्वहन करने के दौरान ही कारित किया जा सकते थे – यदि अभियुक्त का आक्षेपित कृत्य स्पष्ट रूप से कर्तव्य निर्वहन से संबद्ध है – मंजूरी की आवश्यकता संज्ञान के लिए पूर्वापेक्षित है।

***H. Practice & Procedure - Prosecution of Civil Servant* - For offence arising out of discharge of his official duties - Requisite - The impugned act must disclose preponderant existence of *mens rea*. (Para 30)**

ज. पद्धति एवं प्रक्रिया – सिविल सेवक का अभियोजन – उसके पदीय कर्तव्यों के निर्वहन से उत्पन्न होने वाले अपराध के लिए – अपेक्षा – आक्षेपित कृत्य से आपराधिक मनःस्थिति के अस्तित्व की प्रबलता प्रकट होनी चाहिए।

Cases referred:

Crl. M.C. No. 3844/2015 & Crl.M.A. No. 13675-13676/2015 decided on 28.09.2015 (High Court of Delhi), (1996) 7 SCC 556, (2013) 3 SCC 649, (2009) 6 SCC 475, (2008) 13 SCC 229, 1992 Supp (1) SCC

335, AIR 1968 SC 117, (1998) 5 SCC 749, AIR 2013 SC 2248, (2013) 7 SCC 789, 2016 SCC OnLine SC 905, (2009) 3 SCC 398, AIR 2009 SC 1404, AIR 2009 SC 2015, (2012) 12 SCC 72, (2008) 13 SCC 229.

Purushaindra Kaurav and *Utkarsh Agarwal,* for the applicants in M.Cr.C. No. 1052/2008.

Sanjay K. Agarwal and *Dhruv Verma,* for the applicants in M.Cr.C. No. 830/2014.

Ankit Saxena, for the non-applicants.

ORDER

ATUL SREEDHARAN, J. :- M.Cr.C No. 1052/08 and M.Cr.C No. 830/14 arise from Criminal Case RT No. 515/08 pending before the Court of the Ld. Judicial Magistrate First Class, Bhopal, and are being decided by a common order. M.Cr.C No. 1052/08 was dismissed for non-prosecution vide order dated 31/01/12, and thereafter restored to its original position vide order dated 21/07/14 passed in M.Cr.C No. 813/14.

1. In M.Cr.C No. 1052/08, the Petitioner No.1 is an officer of the Indian Administrative Service (hereinafter referred to as "IAS") belonging to the Madhya Pradesh Cadre and at the material point of time, was posted as the Commissioner and Registrar of the Co-Operative Societies, Government of Madhya Pradesh from 31/03/05 to 31/01/06. The Petitioner No.2 is a retired IAS officer, who was the predecessor in officer of the Petitioner No.1 and officiated on the said post from 15/01/04 to 31/03/05. The Petitioner No.3 is the successor in officer of the Petitioner No.1 and was officiating on the post of the Commissioner and Registrar of Co-Operative Societies at the time of filing of the case before this Court. The Petitioner No.4, was at the material point of time the Additional Registrar of the Co- Operative Societies and was appointed by the Petitioner No.2 vide order dated 17/02/04 for the conduct of the affairs of the Madhya Pradesh State Co-Operative Agricultural and Rural Development Bank.

2. In M.Cr.C No. 830/2014, the Petitioner No. 1 was the then Minister in the Government of Madhya Pradesh in the Department of Co-operative Societies, the Petitioner No.2 was the Managing Director of the Madhya Pradesh State Agriculture and Rural Development Bank from 05/02/99 to 27/01/04, Petitioner No. 3 was the Managing Director of the State Agriculture and Rural Development Bank from 18/07/04 to 31/08/05 and the Petitioner

No. 4 was the Managing Director of the State Agriculture and Rural Development Bank from 01/09/05 to 14/11/05.

3. In both the abovementioned cases, the Respondents are the same, being the erstwhile Directors of the Madhya Pradesh State Agriculture and Rural Development Bank, and are the Complainants in Criminal Case No. 515/08 pending before the Court of the Ld. Judicial Magistrate First Class, Bhopal, the termination of which is sought by way of the two quash petitions mentioned hereinabove.

4. At the outset, the Ld. Counsel for the Respondents has taken a preliminary objection relating to the maintainability of M.Cr.C No. 830/14 on the ground of laches. It is his contention that the said petition U/s. 482 Cr.P.C has been filed after an inordinate delay of eight years after the filing of the complaint case by the Respondents and about six years from the date of the impugned order dated 17/01/08. passed by the Ld. Judicial Magistrate First Class, Bhopal (hereinafter referred to as "JMFC"). Reliance has been placed on a judgment passed by the High Court of Delhi in Crl. M.C No. 3844/2015 and Crl. M.A No. 13675-13676/2015, *Neerja Bhargava Vs. State of NCT Delhi and Another,* dated 28/09/15, by which the Hon'ble High Court was pleased to dismiss a petition for quash of proceedings against the Petitioner on the ground of laches of nineteen years in approaching the High Court U/s. 482 Cr.P.C. The High Court of Delhi had relied upon the judgement of the Supreme Court in *P.K. Ramachandran Vs. State of Kerala and Another* (1996) 7 SCC 556, where the Supreme Court declined to condone the delay of five hundred and sixty-five days on the part of the State of Kerala in preferring a First Appeal before the High Court of Kerala. The High Court of Kerala condoned the delay against which the Petitioner had approached the Supreme Court, which was pleased to set aside the order of the High Court of Kerala and dismissed the application for condonation of delay on account of the delay not having been adequately explained by the State and resultantly the First Appeal. The second case relied upon by the Hon'ble High Court of Delhi was *Esha Bhattacharjee Vs. Raghunathpur Nafar Academy and Others* – (2013) 3 SCC 649. In that case, the Respondent had filed a Writ Appeal before the Division Bench of the High Court of Calcutta which was delayed by two thousand four hundred and forty-nine days, which was condoned by the Hon'ble High Court of Calcutta. Once again, the Supreme Court allowed the appeal filed by the Petitioner and set aside the order of the

High Court of Calcutta, condoning the delay, as the same had not been adequately explained. Thereafter, applying the principles in the said judgements passed by the Supreme Court, the Hon'ble High Court of Delhi held, that the powers under section 482 Cr.P.C are meant to be exercised in cases where there is no express provision of law to pursue a remedy, and where there is such an express provision of law which could have been invoked, the inherent power ought not to be exercised in order to circumvent the express provisions of law. Therefore, the High Court of Delhi, was of the view that where there existed a right to pursue relief by way of filing a criminal revision U/s. 397 Cr.P.C, the petition U/s. 482 Cr.P.C could not be sustained after a lapse of nineteen years on account of having not filed the criminal revision from the order of the Court below, for which the limitation was ninety days.

5. Ld. Counsel for the Respondents has submitted on the strength of the abovementioned judgement of the High Court of Delhi that M.Cr.C. No. 830/2014 ought to be dismissed for laches. With the highest regard to the opinion of the Hon'ble High Court of Delhi in the case adverted to by the Ld. Counsel for the Respondents, I am unable to agree with the same. The judgements of the Supreme Court in *P.K. Ramachandran's* case and *Esha Bhattacharjee's* case, relied upon by the Hon'ble High Court of Delhi, were passed in cases where relief was denied on account of limitation and not laches. The distinction between the two being that when an action is barred due to limitation, the same is on account of an operation of statute, mainly the Limitation Act, 1963, where a party is prevented from seeking relief for not having sought judicial redress within a specific period of time stipulated under the Limitation Act, 1963. Special Statues and Rules of the High Courts and the Supreme Court may also provide for limitation within which a litigant maybe expected to approach the courts for redress. Whereas, an action is barred on account of laches because of an inordinate delay which, though not provided for specifically under any statute, is still barred on account of an indefeasible right which may have accrued to the adverse party on account of efflux of time or simply on account of a party having sought judicial redress after an inexplicable delay causing prejudice to another. Laches is the denial of judicial redress based on a principle of equity enshrined in the Latin maxim *Vigilantibus non et dormientibus jura subveniunt* which simply means that the law shall aid the vigilant and not the indolent. The party seeking to prevent an action on the part of another on the ground of laches must establish the crystallization of his rights on account of the efflux of time which would be prejudiced if the action

of the other party were entertained by the court. Delay simpliciter would not be adequate to invoke the common law doctrine of laches. Besides, power under section 482 Cr.P.C is not restricted only to situations "when there is no express provision of law to a person to have its remedy" as has been held by the High Court of Delhi, but it also provides remedy for all such situations where the continuance of criminal proceedings would result in an abuse of the process of law.

6. There is no time limit specified under the Limitation Act, 1963, for seeking remedy U/s. 482 Cr.P.C. The Supreme Court in *Keki Hormusji Gharada Vs. Mehervan Rustom Irani* – (2009) 6 SCC 475, while dealing with a case where the High Court had dismissed a petition U/s. 482 Cr.P.C solely on the ground of delay, the Supreme Court in paragraph 20 of the judgement held that the delay notwithstanding, the High Court ought to have examined the harassment that the Petitioner would have faced on account of the trivial allegations against them, if the criminal case against them was allowed to be continued. The case was quashed by the Supreme Court, the laches notwithstanding.

7. Where the proceedings are an abuse of process and the perpetuation of the same was repugnant to the law of the land and judicial conscience of the Court, there, non-exercise of powers under section 482 by the High Court, only on the ground that an alternate remedy was available by way of a criminal revision under section 397 Cr.P.C which was now foreclosed on account of limitation, having not approached the Court of Revision within ninety days, would be a travesty of justice. That would leave the litigant in limbo despite him having a justiciable cause on merits and the same would militate against the common law principle of where there is a right there is a remedy as enshrined in the maxim *"Ubi jus ibi remedium"*. A justiciable cause may be defeated on the ground of limitation by merely showing that the Lis was brought before the Court beyond the prescribed period of limitation and which delay has not been adequately explained in order to condone it. However, to defeat the same using the plea of laches, the party raising the plea must establish prejudice to a right which crystallised during the intervening period. The power of the High Court under section 482 Cr.P.C is plenary in nature limited only by express statutory prohibitions and the limitations imposed upon its exercise by the Supreme Court through its judgements. This Court is aware that extraordinary powers have to be exercised with extraordinary circumspection and the same

is to be utilised only in those cases where it is apparent on the face of the record that the continuation of the case would result in an abuse of the process of law.

8. In the present case, besides stating that there is a delay of six years on the part of the Petitioners in approaching this Court by way of M.Cr.C No. 830/2014 U/s. 482, there is no argument forwarded as to what unassailable right had accrued to the Respondents in the intervening period of six years which would now cause prejudice to them if the case was heard on merits. Further, on examining the record of proceedings of this Court in the connected case, being M.Cr.C No. 1052/08, the proceedings of the lower Court were stayed by this Court vide order dated 30/01/08 which continued till 31/12/12 when M.Cr.C No. 1052/08 was dismissed on account of non-prosecution which also resulted in the vacation of stay. Thereafter, the case was restored by this Court vide order dated 21/07/14. However, before the restoration of M.Cr.C No. 1052/08, M.Cr.C No. 830/14 was filed and vide order dated 05/02/14 passed in M.Cr.C No. 830/14, this Court once again stayed the proceedings in the complaint case filed by the Respondents before the Trial Court. On the basis of the above, I dismiss the preliminary objection of laches in M.Cr.C No. 830/14 raised on behalf of the Respondents.

9. The facts being the same in both the petitions, the narrative relating to them in this order shall be common to both the cases. The Petitioners, at the material point of time, were the Minister in Co-Operative Department and officers of the Madhya Pradesh State Co-Operative Agriculture and Rural Development Bank (hereinafter referred to as the "Bank"). It is undisputed that the Petitioners were "Public Servants" as defined under section 21 of the Indian Penal Code as the Bank comes under the Department of Co-Operative of the Madhya Pradesh Government.

10. The Commissioner and Registrar of the Co-Operative Societies received an information from the Managing Director of the Bank (Petitioner No. 2 in M.Cr.C No. 830/14) vide letter dated 24/01/04 that on account of disqualification of certain Directors of the Bank, the quorum to hold the Board Meeting of the Bank was not being fulfilled. Mr. V.G. Dharmadhikari, the then Registrar of the Co-Operative Societies (Petitioner No.2 in M.Cr.C No. 1052/08), exercised authority vested in him and disqualified certain Directors in terms of rule 45(3) of the Madhya Pradesh Co-Operative Societies Rules, 1962 (hereinafter referred to as the "Rules") and thereafter exercised his power

U/s. 53 (13) of the Madhya Pradesh Co-Operative Societies Act, 1960 (hereinafter referred to as the "Societies Act") and vide order dated 17/02/04, appointed Mr. P.D. Mishra, the then Additional Registrar of the Co-Operative Societies (Petitioner No. 4 in M.Cr.C No. 1052/08), to conduct the affairs of the Bank.

11. Mr. Shankar Pratap Singh Bundela, the Respondent No.1, who is also the Complainant No.1 before the Trial Court, challenged the order dated 17/02/04 before the Madhya Pradesh Co-Operative Tribunal at Bhopal (hereinafter referred to as the "Tribunal") through Revision No. 84/04. The Ld. Tribunal, vide its order dated 30/11/04 set aside the impugned order dated 17/02/04 on the premise that the procedure laid down in section 19 (aa) of the Societies Act had to be adhered to before any Director could be disqualified. The Ld. Tribunal however gave the liberty to the Registrar to proceed in accordance with law after complying with the procedure laid down in section 19 (aa) of the Societies Act.

12. By the time the order dated 30/11/04 came to be passed by the Ld. Tribunal, Mr. Malay Shrivastava (Petitioner No. 1 in M.Cr.C No. 1052/08) was appointed as Registrar as Mr. V.G.Dharmadhikari (Petitioner No. 2 in M.Cr.C No. 1052/08) had retired. The Petitioner No.1 in M.Cr.C No. 1052/08, examined the matter and passed a fresh order dated 02/07/05 U/s. 53 (13) of the Societies Act, and appointed a managing committee to look after the affairs of the Bank.

13. The above order dated 02/07/05 was challenged again by the Respondent No.1 before the Tribunal through Revision No. 59/06. This time, the Ld. Tribunal, by an elaborately reasoned order dated 25/04/07 (Annexure P/7 at page 117 to 129 in M.Cr.C No. 1052/08), dismissed the Revision filed by the Respondent No.1 and upheld the order dated 02/07/05 passed by Mr. Malay Shrivastava (Petitioner No. 1 in M.Cr.C No. 1052/08) U/s. 53 (13) of the Societies Act. Though the said order has given finding on the merits of the case, the said judgment in paragraph 28 at page 129 had held that the order passed by Mr. Malay Shrivastava (Petitioner No. 1 in M.Cr.C No. 1052/08) dated 02/07/05 being an order under section 53 (13) of the Societies Act, was a final order and therefore an appeal ought to have been preferred by the Respondent No.1 instead of a revision and that the revisional jurisdiction of the Ld. Tribunal was invoked to overcome the delay in filing the appeal which was hit by limitation. The Ld. Tribunal has even observed that the belated

revision lacked bonafides as the Applicants had simultaneously invoked the jurisdiction of the Civil Court in Civil Suit No. 62-A/2006 which was dismissed by the Ld. II Civil Judge, Class 1, Bhopal, vide order dated 06/03/06. The Ld. Counsel for the Respondents has argued that the revision filed by the Respondent No.1 (who was the Applicant No.3 before the Tribunal) was dismissed as the Tribunal was of the view that only an appeal was maintainable, does not appear to be correct in view of the findings of the Ld. Tribunal in paragraph 28 of its order dated 25/04/07 wherein it appears clearly that the said order was passed on merits.

14. The order passed by the Tribunal was challenged before the High Court by way of Writ Petition No. 6884/07, which was dismissed as infructuous by this Court vide its order dated 26/02/09 (Annexure P/7 at page 151 to 152 in M.Cr.C No. 830/14). Subsequently, a change was made in the Managing Committee of the Bank and Mr. Gopal Bhargava, the then Minister of Co-Operative Societies, Government of Madhya Pradesh, (Petitioner No. 1 in M.Cr.C No. 830/08) was placed as Chairman of the Managing Committee in the place of the Commissioner Agricultural Production. Later, this is also said to have been changed as one Mr. Kishan Singh Bhatol is stated to have been nominated as President of the Managing Committee in the place of the Petitioner No.1 in M.Cr.C No. 830/2014. Thereafter, the Respondents have filed the impugned complaint case against the Petitioners in the Court of the Ld. JMFC Bhopal, U/s. 200 Cr.P.C alleging offences U/ss. 166, 167, 420, 467, 468, 471 and 120-B of the Indian Penal Code in which the Ld. Trial Court has issued process against the Petitioner vide order dated 17/01/08.

15. Heard the Ld. Counsels for the parties and perused the record of the case. It is the case of the Petitioners that having failed in the Civil Suit, the revision before the Ld. Tribunal and in the Writ Petition before this Court, the Respondents have resorted to arm twisting methods by filing the impugned complaint case. The main grievance of the Respondents, as reflected in paragraph 2 of the complaint is that after, the Bharatiya Janata Party (hereinafter referred to as the "BJP") came to power in Madhya Pradesh and the Petitioner No.1 (in M.Cr.C No. 830/14), was appointed as the Minister of Co-Operative Societies and who, in order to usurp control over the Madhya Pradesh State Co-Operative Bank and the Madhya Pradesh Agricultural and Rural Development Bank and further in order to become the President of the said

institutions, wanted to dilute the powers of the Board of Directors and therefore is stated to have conspired with the other co-accused persons to remove the Complainants and others who were Directors on the Board on account of insufficiency of quorum, declared the Complainants/Respondents ineligible to remain on the Board of Directors on account of them being defaulters of their respective District Development Banks under Rule 45 (3) of the Madhya Pradesh Co-Operative Societies Rules. According to the Ld. Counsel for the Petitioners, the solitary point, in view of which the Ld. Magistrate is stated to have taken cognizance of the allegations against the Petitioners is that they have abused their powers under Rule 45 (3) of the Societies Rules knowing fully well that the said rule was inapplicable in the case of the Bank and that the offending order was passed to accommodate the Respondent No.1 in M.Cr.C No. 830/14, as the President of the Executive Committee to look after the affairs of the Bank.

16. The Ld. Counsel for the Petitioners has submitted that, even assuming that the exercise of powers under Rule 45 (3) of the Rules were erroneous, even then, a criminal liability could not be imposed on the Petitioners on account of improper exercise of jurisdiction, more so when the allegations of intentional misuse of authority were not supported with cogent evidence for the Ld. Trial Court to arrive at a *prima facie* finding of *mens rea* in the actions of the Petitioners. The attention of the Court has been drawn to page 47 of the petition (M.Cr.C No. 830/14) which is the order dated 02/05/05 passed by the Petitioner No.1 (in M.Cr.C No.1052/08), who at the material point of time was the Registrar of Co-Operative Societies, by which a five-member Executive Committee was constituted to look after the functioning of the Bank in which the Commissioner of Agricultural Production and Additional Chief Secretary, was made the President. Subsequently, the Petitioner No.1 (in M.Cr.C No. 830/14) was made the President vide order dated 22/03/06, a copy of which is at page 49 of the petition.

17. It is undisputed that the criminal case has come about on account of the exercise of certain powers vested in the Petitioners under the Societies Act and the Rules made thereunder which according to the Respondents were exercised with a malafide intent in order to remove the Respondents from the Board of Directors. Ld. Counsel for the Petitioners has submitted that the Respondents had approached the Tribunal and then the High Court, being aggrieved by the order dated 02/07/05, which were dismissed. The Ld.

Counsels for the Petitioners have challenged the very existence of the impugned criminal proceedings on three grounds (a) the absence of sanction U/s. 197 Cr.P.C and (b) on the grounds of malice and (c) the absence of a prima facie case against the Petitioners.

18. The complaint case was filed in the Court of the Ld. Judicial Magistrate First Class, Bhopal (hereinafter referred to as the "JMFC"), on 17/10/08. In paragraph 2 of the said complaint, the Complainants state that as per clause 20 of the byelaws of the Development Bank, a Board of Directors has been constituted which *Interalia* would consist of 38 members, i.e., one from each of the District Development Banks who have been elected by their respective District Development Banks. The Respondents are such duly elected members who were Directors on the Board of the Bank. In paragraph 3 of the complaint, it is alleged that the BJP, upon taking the reins of governance in Madhya Pradesh, the Petitioner No. 1 in M.Cr.C No. 830/14 who was a Minister in the BJP Government, is alleged to have sought control over the wealth of the various financial institution. Therefore, with the intent of undermining the authority of the Board of Directors, he is alleged to have conspired with the other co-accused persons to remove the Complainants/Respondents herein and other Directors from the Board, and so got the Co-Accused persons to exercise jurisdiction under Rule 45 (3) of the Rules and disqualify the Respondents on the grounds that they were defaulting members of their respective District Development Banks. This malafide exercise of power by the Petitioners under rule 45 (3) is alleged to have been done with and sole intent of conferring authority to the Petitioner No.1 (in M.Cr.C No. 890/2014). Thus, the complaint case against the Petitioners came to be filed on 17/10/08 by the Respondents, seeking their prosecution and conviction for offences U/ss. 166, 167, 420, 467, 468, 472 and 120-B IPC.

19. On receiving the complaint, it is evident that the JMFC did not take cognizance U/s. 190 (1) (a) of the Cr.P.C as the Ld. JMFC did not examine the Complainants or their witnesses U/s. 200 Cr.P.C and instead, referred the case to P.S Jehangirabad for a report, on 17/10/08 itself. Though the said order does not articulate if the reference to the police was made U/s. 156(3) Cr.P.C or U/s. 202 Cr.P.C, however, as the case was referred to the police on the same day on which the complaint was filed and before the examination of the Complainants and their witnesses, it is evident that the said order was one U/s. 156(3) Cr.P.C, as an order U/s. 202 Cr.P.C is at the post cognizance

stage. On 10/11/06, while the case was pending investigation before the police, four of the Petitioners, namely Gopal Bhargava, Malay Shrivastava, B.G. Dharmadhikari and P.D. Mishra moved an application U/s. 203 Cr.P.C for the dismissal of the complaint case, Interalia on the grounds of absence of sanction U/s. 197 Cr.P.C on account of which the Ld. Trial Court was precluded from taking cognizance of the offences alleged to have been committed by the Petitioners. The Respondents filed their reply to the said application and took the plea that as cognizance was not yet taken and process was not issued to the Petitioners/Prospective Accused persons, they did not have a locus standi to intervene in the proceedings and therefore the said application U/s. 203 Cr.P.C ought to be dismissed. On 07/12/06, the report of P.S. Jahangirabad was filed before the Ld. Trial Court stating that the investigation conducted by the police did not reveal any offence alleged to have been committed by the Petitioners herein and that the complaint only disclosed a civil dispute between the Petitioners and the Respondents herein.

20. On 06/01/07, the Ld. Trial Court, after perusing the report filed by the police and taking note of the fact that the police had concluded that only a civil dispute was disclosed, decided that it would be in the interest of justice to record the statement of the Complainants and their witnesses under section 200 and 202 Cr.P.C. On 14/03/07, the statement U/s. 200 of the Respondent No.1 was recorded by the Ld. Trial Court and the Court adjourned the case to enable the Complainants to produce their witnesses and have their statements U/s. 202 Cr.P.C recorded. Vide order dated 18/09/07, the Ld. Trial Court was pleased to dismiss the application filed by the Petitioners and very rightly so, on the ground that the accused has a right to be present at the proceedings but not the right to participate in them during the pre-summoning stage of the complaint case. The Ld. Trial Court also recorded that the Respondents did not want to examine any witnesses u/s. 202 Cr.P.C, and so the Trial Court proceeded to hear arguments on the registration of the Complaint Case on the basis of the complaint, the police report and the sole statement of the Respondent No.1 u/s. 200 Cr.P.C. Thereafter, vide order dated 17/01/08, the Trial Court ordered the registration of the case against the Petitioners U/ss. 166 and 167 IPC and 120-B r/w 166 and 167 IPC.

21. Ld. Counsel for the Respondents has argued that Rule 45 (3) was not applicable against the Respondents and that the Petitioners who had full knowledge of the fact that the said rule was not applicable to disqualify the

Respondents, exercised jurisdiction under the said provision and thereby acted maliciously to the detriment of the Respondents and therefore were prima facie guilty of having committed the offences U/s. 166 and 167 IPC.

22. The Ld. Counsel for the Petitioners has laid a strong emphasis on the point that the order taking cognizance and the summons issued to the Petitioners to stand trial for offences as herein abovementioned are bad in law as no prior sanction U/s. 197 Cr.P.C has been placed before the JMFC by the Respondents. In support of his contention, the Ld. Counsel has placed reliance on the judgement of the Supreme Court passed in *P.K.Choudhury Vs. Commander*, 48 BRTF (GREF) – (2008) 13 SCC 229, wherein the Supreme Court while dealing with a case arising from a complaint U/s. 200 Cr.P.C before the Judicial Magistrate where two points arose for consideration (i) whether an offence, the cognizance of which had been hit by limitation on account of the operation of S. 468 Cr.P.C, cognizance could have been taken by the Judicial Magistrate without condoning the delay? And (ii) whether the Magistrate could have taken cognizance of offences U/ss. 166 and 167 without sanction U/s. 197 Cr.P.C? as regards the instant case, it is only the second question that has been answered by the Hon'ble Supreme Court which is of relevance. In paragraph 12 of the said judgement, the Supreme Court held **"Far more important however, is the question of non-grant of sanction. The appellant admittedly is a public servant. He is said to have misused his position as a public servant. Section 197 of the Code of Criminal Procedure lays down requirements for obtaining an order of sanction from the competent authority, if in committing the offence, a public servant acted or purported to act in discharge of his official duty. As the offences under Sections 166 and 167 of the Penal Code have a direct nexus with commission of a criminal misconduct on the part of a public servant, indisputably an order of sanction was prerequisite before the learned Judicial Magistrate could issue summons upon".** In the instant case also, undisputedly the Petitioners are all Public Servants and therefore it was contended that the offences which have been taken cognizance of by the Ld. Trial Court by their very nature were such that (a) the same could only have been committed by a Public Servant and (b) the same could only have been committed by such Public Servant in the discharge of his official duties. It was therefore contended that the order taking cognizance and the issuance of process against the Petitioners U/s. 204 Cr.P.C were bad in law and so the entire proceedings against the Petitioners deserved to be quashed, as the

continuation of the same would be a gross abuse of process.

23. The judgment of the Supreme Court in *State of Haryana Vs. Bhajan Lal* - 1992 Supp (1) SCC 335, has also been relied upon by the Ld. Counsel for the Petitioner in order to demonstrate that the complaint case falls foul of the said judgment and so deserves to be quashed. In particular, the attention of the Court has been drawn to category seven which is elaborated in paragraph 102 of the judgement wherein, the Supreme Court has held that such criminal cases whose genesis is tainted by malice on the part of the Complainant can be quashed by the High Court in exercise of its inherent powers U/s. 482 Cr.P.C. By referring to this judgement, the Ld. Counsel for the Petitioners has tried to make a point that the complaint case is a result of political vendetta as the Respondents/Complainants are from the Congress Party and the Petitioner No.1 is from the BJP and the other Petitioners are shown as collateral victims of the Respondents malice who have been made accused along with the Petitioner No.1, so as to cover up the defence of malice that may be taken by the Petitioner No.1 (in M.Cr.C No. 830/2014) in any judicial proceeding where the Respondents can demonstrate that there is no political vendetta or malice on their part in prosecuting the Petitioner No.1 as they have proceeded against all such other persons who they have felt are complicit in the offence.

24. Another aspect that has been argued forcefully by the Ld. Counsel for the Petitioners is that the Ld. JMFC had initially exercised jurisdiction U/s. 156 (3) Cr.P.C and referred the complaint case for investigation to P.S. Jehangirabad on 17/10/06. The police after having investigated the case submitted their report before the Ld. Trial Court on 07/12/06. In the said report, the police have stated that there is no criminal case made out by the Respondents against the Petitioners and that the dispute is civil in nature. The Ld. Counsel for the Petitioners has argued that once the report of the police disclosed only a civil liability the Ld. JMFC ought to have dismissed the case against the Petitioners on that ground alone instead, the Ld. Trial Court has proceeded to record the statement of the Complainant U/s. 200 Cr.P.C and thereafter issued summons to the Petitioners to stand trial which is not permissible in law. The power of the Court of First Instance to take cognizance of an offence even after a report of the police is placed before the Trial Court, in compliance of its order U/s. 156 (3) Cr.P.C is no longer *res integra*. The Supreme Court in *Abhinandan Jha and Others Vs. Dinesh Mishra* – AIR 1968 SC 117, has laid down the options before the Magistrate once a report

under section 173 Cr.P.C was filed before it by the police. In that case, the police had filed a final report to the effect that there was no offence made out against the accused persons. The Magistrate directed the police to file a charge sheet against the accused persons. When the matter reached the Supreme Court, it held that where a final report was filed by the police before the Magistrate stating that there was no offence made out, the Magistrate could not direct the police to file a charge sheet. The Magistrate could however (a) refer the case back to the police to carry out further investigation U/s. 156 (3) or (b) after hearing the complainant, accept the report of the police and close the case for lack of evidence to proceed further or (c) take cognizance of the offence and summon the accused persons to stand trial, the final report of the police to the contrary notwithstanding.

25. In a complaint case, where the JMFC, without taking cognizance refers the case to the police U/s. 156 (3) Cr.P.C, the same by necessary implication discloses (a) that the JMFC is not satisfied that the complaint, as filed, discloses the commission of a cognizable offence or any offence for that matter and (b) where the JMFC is satisfied that the allegations in complaint case though constitute a prima facie case against the accused persons but *abundans cautela* wants to ascertain the veracity of the allegations levelled in the complaint and is of the opinion that an investigation into the same by a qualified and neutral investigating agency such as the police is desirable to assess the truth in the allegations. Therefore, where the police after investigation files a report to the effect that the complaint case does not disclose the commission of any offence and that the allegations only reveal a civil liability, there the Ld. JMFC is bound to give reasons, howsoever brief they maybe as to what are those compelling circumstances to take cognizance of the offences against the accused persons contrary to the police report. The Trial Court does not have to be elaborate while rejecting the police report but at least it is incumbent upon the Trial Court that its order summoning the accused in such circumstances, reveals an application of mind as to why it was necessary to issue process to the accused persons when the police report filed after an investigation in compliance of the Trial Court's order U/s. 156 (3) Cr.P.C revealed only a civil liability. In such a case, where the Trial Court wants to reject the police report which does not disclose the commission of any offence, a reasoned order revealing the application of mind on the part of the Trial Court, albeit a brief one, is the only safeguard against arbitrariness. This assumes great significance when seen in the light of the judgement of the Supreme

Court in *Pepsi Foods Ltd., and Another Vs. Special Judicial Magistrate and Others* – (1998) 5 SCC 749, wherein at paragraph 28 the Supreme Court held **"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto".** In the facts of this case, the Ld. Trial Court, vide its order summoning the Petitioners dated 17/01/08, records that it has seen the complaint and all the documents filed therewith, the police report and the statement of the Respondent No.1 herein U/s. 200 Cr.P.C. In the next paragraph, the Ld. JMFC finds that on the basis of the above, there is adequate prima facie material to proceed against the Petitioners U/ss. 166 and 167 IPC and U/s. 120-B r/w 166 and 167 IPC. However, the said order is woefully silent on the aspect as to what was the material in the statement of the Respondent No.1 herein U/s. 200 Cr.P.C which compelled the Ld. Trial Court to reject the report of the police which stated that their investigation did not reveal the commission of any offence. Under the circumstances, I am inclined to hold that the order summoning the Petitioners dated 17/01/08 is deficient in material particulars and therefore the proceedings against the Petitioners is bad in law.

26. The Ld. Counsel for the Respondents on the other hand has challenged the sustainability of the petitions filed U/s. 482 Cr.P.C on the ground that the summoning order passed by the Ld. Trial Court was an order which should have been challenged under section 397 Cr.P.C, the order being revisable. He further submitted that where the Code provided a specific procedure to seek a relief, resort to the inherent jurisdiction is prohibited. In support of his contention, the Ld. Counsel for the Respondents has placed reliance on the judgement of the Supreme Court in *Mohit alias Sonu and Another Vs. State of Uttar Pradesh and Anr.* – AIR 2013 SC 2248 – (2013) 7 SCC 789 – where, in a case before the Trial Court an application U/s. 319 Cr.P.C moved by the Complainant was dismissed, the same was challenged before the High Court U/s. 482 Cr.P.C. The High Court, without issuing notice to the prospective accused persons, set aside the order of the Trial Court and directed the Trial Court to add the persons named in the application U/s. 319 to the array of accused persons and summon them to stand trial. Thereafter, the persons who were prejudiced by the order of the High Court approached the

Supreme Court in which, the Hon'ble Supreme Court held that an order passed U/s. 319, not being an interlocutory order was amenable to revision and therefore the order should have been challenged as a Criminal Revision U/s. 397 and not by invoking the inherent jurisdiction U/s. 482. The Supreme Court also held that once an application for calling persons as accused in a criminal trial U/s. 319 was declined by the Trial Court, those who were sought to be so prosecuted had been vested with a right of not being so prosecuted without giving them an opportunity to oppose the revision filed against the order of the Trial Court dismissing the application U/s. 319. This judgement, as far as it relates to the power of the High Court U/s. 482 Cr.P.C, where it was held that where a specific procedure for seeking relief under the Cr.P.C was provided, there the exercise of inherent power U/s. 482 Cr.P.C was completely barred, has now been set aside by a judgement of the Supreme Court passed by a larger bench of three judges vide order dated 05/09/16 passed in *Prabhu Chawla Vs. State of Rajasthan* – 2016 SCC OnLine SC 905, wherein the Supreme Court had set aside the abovestated proposition enunciated by the two judge bench in *Mohit alias Sonu and Another Vs. State of Uttar Pradesh and Anr.* – AIR 2013 SC 2248 – (2013) 7 SCC 789, with specific reference to paragraph 28 of the said judgement.

27. Even otherwise, where the Doctrine of Election permits a person, having more than one option of seeking relief against the order of the Trial Court which summons him to stand trial as an accused exercising jurisdiction in a complaint case. U/s. 204 Cr.P.C and where the options available under the law are mutually opposed to each other, the accused in such a situation can elect to either challenge the impugned order of the Trial Court by way of a revision petition before the Court of Sessions or the High Court U/s. 397 or 399 Cr.P.C as the case may be, or approach the High Court directly by invoking its inherent jurisdiction U/s. 482 Cr.P.C to quash an impugned order. However, if the accused seeks to have the proceedings in a complaint case itself quashed without impugning a specific order of the Trial Court, or where the quash of the proceedings are sought on the grounds that the complaint case has been instituted on malicious grounds, then such proceedings can only be entertained U/s. 482 Cr.P.C by the High Court as, (a) a criminal revision can only be preferred against an impugned order of a Court inferior to the High Court or the Court of Sessions and (b) in a criminal revision, the Court sitting in revision can only examine the correctness of the impugned order in the backdrop of the *jus scriptum* and the *jus commune* and go no

further. A Court sitting in revision over the order passed by a Court judicially subordinate to it, cannot set aside an impugned order where the said order is consonance with the statute law and the common law of the land on the ground that the proceedings have been motivated by malicious intent on the part of the Complainant. That power is exclusively vested in the High Court U/s. 482 Cr.P.C. In the instant case, the prayer clause in both the petitions have sought the relief of quashing the entire proceedings before the Court of the Ld. JMFC and not the order summoning the Petitioners. Under the specific fact circumstances, even if the judgement of the Supreme Court in *Mohit alias Sonu and Another Vs. State of Uttar Pradesh and Anr.* – AIR 2013 SC 2248 – (2013) 7 SCC 789 was still in existence, even then the said judgement would not have applied in this case as the Petitioners have not challenged the particular order summoning the Petitioners to stand trial, but sought the quash of the complaint case itself pending before Ld. JMFC. However, in the light of the judgement of the Supreme Court in *Prabhu Chawla Vs. State of Rajasthan* – 2016 SCC OnLine SC 905, the embargo imposed upon approaching the High Court U/s. 482 Cr.P.C against an order in which a Criminal Revision could have been preferred, as held in *Mohit alias Sonu and Another Vs. State of Uttar Pradesh and Anr.* – AIR 2013 SC 2248 – (2013) 7 SCC 789, no longer exists and is rendered purely academic. Under the circumstances, the contention of the Ld. Counsel for the Respondents that these petition U/s. 482 Cr.P.C were not maintainable and deserved to be dismissed on that ground alone is devoid of merit and is rejected.

28. The next contention on the part of the Ld. Counsel for the Respondents is that the stage for assessing the necessity of prior Sanction U/s. 197 Cr.P.C is at the stage of the trial. In support of this contention, the Ld. Counsel has relied upon *Choudhury Parveen Sultana Vs. State of West Bengal and Another* – (2009) 3 SCC 398, AIR 2009 SC 1404. The facts in that case related to a confession being compelled from a witness by the police and upon his refusal to do so, being threatened with dire consequences. Against such a conduct on the part of the police, the Petitioner in that case preferred a complaint case U/s. 385 and 506 IPC in which the Respondent No.2 (in that case) was summoned by the Trial Court. The High Court quashed the proceedings against the Respondent No.2 and so the Complainant approached the Supreme Court. The Supreme Court set aside the order passed by the High Court quashing the case against the Respondent No.2 after arriving at the finding that the offence alleged against the Respondent No.2 did not have

a nexus with the discharge of his functions as a police officer though the same was done in the course of investigating an offence.

29. The judgement of the Supreme Court in *M. Gopalakrishnan Vs. State* – AIR 2009 SC 2015, has been relied upon by the Ld. Counsel for the Respondents in order to buttress his contention as above, that the requirement for sanction can been appreciated by the Trial Court at the appropriate stage. In that case, the Supreme Court dismissed the contention of the Petitioner/ Accused by holding that it was for the Trial Court to consider if the acts of the Petitioner came within the four corners of his discharge of official functions in the course of the trial. Another facet of the case was the inclusion of the charge U/s. 420 IPC for which the Supreme Court has consistently held that the commission of an offence U/s. 420 can never be considered as an act done in the discharge of official duties. The Ld. Counsel for the Respondents has tried to show the relevance of the above judgements in the backdrop of the facts of the present case where he has argued that the exercise of authority under rule 45 (3) of the Rules was wrong as the same related only to the competence of a person to be elected to the office and not for the removal of a person already on the post. In short, the Ld. Counsel for the Respondents has impressed upon the Court that the discharge of power/authority being motivated, the requirement of sanction is to be seen at the stage of trial and not before that. I am unable to agree with the contention of the Ld. Counsel for the Respondent. It is true that the requirement of a sanction U/s. 197 Cr.P.C is not always to be seen at the commencement of the trial and can also be appreciated in the course of the trial by the Trial Court. However, if the facts of the case reveal at the very outset that the acts of the accused were of such nature that they were so intrinsically associated to the discharge of official duties by the accused, then the requirement for sanction has to be considered at the very outset. In this regard, the judgement of the Supreme Court in *Om Prakash and Others Vs. State of Jharkhand* – (2012) 12 SCC 72, wherein a case of alleged fake encounter, the High Court was pleased to quash the proceedings against a police officer on the ground that requisite sanction U/s. 197 Cr.P.C was not on record at the time the Trial Court took cognizance of the offences against the Petitioners in that case, is relevant and directly applicable in this case. On an appeal being filed before the Supreme Court by the father of the deceased, *Interalia* the Supreme Court, while discussing the stage at which the issue of sanction can be looked into, held at paragraph 41 that **"The upshot of this discussion is that whether sanction is necessary**

or not has to be decided from stage to stage. This question may arise at any stage of the proceeding. In a given case, it may arise at the inception. There may be unassailable and unimpeachable circumstances on record which may establish at the outset that the police officer or public servant was acting in performance of his official duty and is entitled to protection given under Section 197 of the Code. It is not possible for us to hold that in such a case, the court cannot look into any documents produced by the accused or the public servant concerned at the inception. The nature of the complaint may have to be kept in mind. It must be remembered that previous sanction is a precondition for taking cognizance of the offence and, therefore, there is no requirement that the accused must wait till the charges are framed to raise this plea". Under the circumstances, the Court must see if the alleged act of the accused is so unequivocally linked with the discharge of his official duties, in which case the requirement for sanction U/s. 197 Cr.P.C is a prerequisite to cognizance of the offences by the Trial Court. In this case, the judgement of the Supreme Court in *P.K. Choudhury Vs. Commander,* 48 BRTF (GREF) – (2008) 13 SCC 229, which has been discussed elaborately in paragraph 23 supra which is identical to this case where the Supreme Court held that for offences U/s. 166 and 167 IPC, which by their very nature could only be committed by a person in the discharge of his official duties, sanction U/s. 197 Cr.P.C was a pre-requisite. Therefore, I hold that the prosecution of the Petitioners is vitiated on account of the absence of sanction U/s. 197 Cr.P.C.

30. Even on merits, the only allegation against the Petitioners are that they knowingly used the wrong provision of law to exercise their authority in order to remove the Respondents. An executive action which even on the face of it is an improper exercise of executive discretion, the same alone cannot give rise to a criminal proceeding. A view to the contrary can result in Administrative Paralysis with every functionary of the State vested with the authority and duty of taking decisions, would never dare to take a decision out of the box in the fear of such a decision leading to a criminal prosecution against him on a later date. If a civil servant is prosecuted only on account of a decision that he has taken in his official capacity which may be erroneous and may have deviated from the norm, the same will kill initiative and creativity in the bureaucracy. Where a civil servant is required to be prosecuted for an offence arising from the discharge of his official duties, the impugned act must disclose a

preponderant existence of *mens rea* and not merely a doubt that he has acted thus with malice or criminal intent. There can be no rule of thumb while assessing this and the same must be based on the facts and circumstances of each case.

31. Thus, the petitions succeed. The proceedings in Criminal Case RT No. 515/2008, pending against the Petitioners in M.Cr.C No. 1052/2008 and M.Cr.C No. 830/2014, before the Court of the Ld. JMFC Bhopal is quashed by this Court in exercise of its power U/s. 482 Cr.P.C.

Order accordingly.

I.L.R. [2017] M.P., 221

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.K. Gangele & Mr. Justice H.P. Singh

M.Cr.C. No. 2094/2016 (Jabalpur) decided on 29 September, 2016

STATE OF MADHYA PRADESH ...Applicant

Vs.

RAVI @ RAVINDRA & anr. ...Non-applicants

***Penal Code (45 of 1860), Sections 363, 366, 376(1) and Protection of Children from Sexual Offences Act, (32 of 2012), Section 3/4 - Offences under* - Trial Court has considered the entire material evidence on record against non-applicants/accused in its entirety and on a proper appreciation of evidence and after assigning detailed and cogent reasons, has acquitted the non-applicants/accused - Evaluation of the evidence by the trial Court does not suffer from illegality, manifest error or perversity - No interference - Application for leave to appeal against acquittal of the accused/non-applicants dismissed in limine. (Paras 13 & 14)**

दण्ड संहिता (1860 का 45), धाराएँ 363, 366 व 376(1) एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 3/4 – के अंतर्गत अपराध – विचारण न्यायालय ने अनावेदकगण/अभियुक्त के विरूद्ध अभिलेख पर उपस्थित संपूर्ण तात्विक साक्ष्य पर समग्रता से विचार किया तथा साक्ष्य के उचित मूल्यांकन पर एवं विस्तृत और तर्कपूर्ण कारण देने के पश्चात्, अनावेदकगण/अभियुक्त को दोषमुक्त किया – विचारण न्यायालय द्वारा साक्ष्य का मूल्यांकन, अवैधता, प्रकट त्रुटि या विपर्यस्तता से ग्रसित नहीं – कोई हस्तक्षेप नहीं – अभियुक्त/अनावेदकगण की दोषमुक्ति के विरूद्ध अपील की अनुमति का आवेदन आरम्भ में ही खारिज।

Cases referred:

1976 SCC (Cr.) 338, (2007) 4 SCC 415, 2014 AIR SCW 3406, (2006) 4 SCC 357.

Pradeep Singh, G.A. for the applicant/State.
Vinod Tiwari, for the non-applicants.

ORDER

The Order of the Court was delivered by : **H.P. Singh, J. :-** This is an application filed under Section 378(3) & 378(1) of Cr.P.C., seeking leave to present an appeal against the impugned judgement of acquittal dated 18.05.2015, passed by the Ist Additional Sessions Judge, Tikamgarh, District Tikamgarh (MP), in Special S.T.No.15/2014, acquitting the accused/respondents for offences punishable under Sections 363, 366, 376(1) of Indian Penal Code (hereinafter referred to as "IPC" for short) and Section 3 /4 of the Protection of Children from Sexual Offence Act, 2012 (hereinafter referreed (sic:referred) to as 'POCSO' Act for short).

2. The case of prosecution is that on 5.7.2014, at about 2:00 PM, when prosecutrix, aged about 15 years, had gone to answer the call of nature, accused/respondent No.1 came there, covered her mouth with a cloth, kidnapped and taken her on a motorcycle and committed rape upon her. On 6.7.2014, father of prosecutrix (PW/4) reported the matter about her missing to Police Station Mohangarh. On 12.7.2014, prosecutrix was recovered from the residence of Pawan at Village Bhakora, a son of 'Bua' of prosecutrix. Her statements were taken and Crime No.111/2014 was registered by the police Mohangarh vide Ex.P/21 for offences punishable under Sections 366, 376 (1) of IPC and Section 3/ 4 of POCSO Act, against accused/respondent No.1, whereas, offence punishable under Sections 363, 366/368 of IPC has been registered against the accused/ respondent No.2.

3. Further, case of the prosecution is that on 13.7.2014, prosecutrix (PW/ 4) was medically examined as per Ex.P/3 by Dr. Megha Khare (PW/3) after obtaininging (sic:obtaining) her consent and consent of her mother, and it was found by doctor Khare that hymen of prosecutrix was ruptured and there was no bleeding or redness found on the private part of prosecutrix. Two vaginal slides were prepared and sealed samples were handed over to lady Constable. There was no definite opinion given by this witness about rape. After arrest on

9.7.2014, the accused was also medically examined by Dr. D.S. Chourasiya (PW/2) and according to him, accused/respondent was capable of performing sexual intercourse. After investigation, the accused/respondents were charge-sheeted for the aforesaid offences.

4. On the basis of the charge-sheet, trial Court framed charges against the accused/respondents for aforesaid offences. Accused/respondents abjured the guilt.

5. The trial Court after considering the plea of the accused/respondents, disbelieved the testimony of various prosecution witnesses and acquitted the accused/ respondents.

6. Learned Govt. 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 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.

7. 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?

8. It is settled law that in an appeal against acquittal, the appellate Court has full power to review, re-appreciate and reconsider the evidence. There is no limitation, restriction or condition for the exercise of such powers and the appellate Court may draw its own conclusion on all questions of fact and law. However, the reversal of acquittal can be made only if the conclusions recorded by the trial Court did not reflect a possible view, that is to say a view which can reasonably be arrived at. In the case of acquittal, the judgement of the trial Court may be interfered with only where there is absolute assurance of guilt of the accused/respondents on the basis of evidence on record and not merely because the High Court can take another possible or a different view.

9. 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 incident ?

10. On the basis of the medical opinion given by Dr. Megha Khare (PW/2) and on the basis of entry in her mark sheet in the Govt. Primary School Kanchanpura, Mohangarh, District Tikamgarh, 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 15.12.1999. Accordingly, on the date of incident on 6.7.2014, the age of the prosecutrix was 15 years, 5 months & 9 days. So far as the date of birth recorded as 15.12.1999, in the mark sheet is concerned, the Headmaster of school, namely, Mukesh Meena (PW/15) has stated that he had issued age certificate on the basis of entry made in the admission register of the school and he does not know that who had made that entry in the said admission register. He further stated that there is no such entry in the school register to show that who had made the same. He further stated that he cannot say that the date of birth written in the register is right or wrong. Mother of prosecutrix has stated that admission of the prosecutrix had been done by father of the prosecutrix Dharmdas, who had stated that the admission of the prosecutrix was done by his elder brother Sudama Prasad. It is pertinent to note here that said Sudama Prasad was not examined by the prosecution. In this way, the date of birth recorded in the school register, in the absence of definite and cogent evidence is of not much evidentiary value. So far as evidence of ossification test is concerned, Dr. Megha Khare (PW/2) has stated that on the basis of examination of X-ray, she has concluded that the age of prosecutrix at the time of examination of prosecutrix was about 17-19 years. 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.

11. The main witness of the prosecution prosecutrix (PW/4), has stated that on receiving information from one Kallu that Ravi had called her, she went to the house of Kallu where accused/respondent No.1 was already present. There he offered her water for drink. Thereafter, she felt drowsiness and due to call of nature, she went to ease herself towards hilly area, where accused/respondent No.1 and one other accused came. The accused/ respondent No.1 had taken the prosecutrix in the residence of his mother-accused/respondent No.2 at Mauranipur, where he had committed rape upon her and left her. Thereafter, accused/respondent No.2, carried prosecutrix to her relatives for about eight days. She kept prosecutrix in a rented house near railway station Mauranipur.

12. From the statement of the prosecutrix (PW/4), it is clear that accused/

respondent No.2 had permitted prosecutrix and accused/respondent No.1 to live in her house even after knowing that she had been kidnapped and she will be compelled to illicit intercourse. That apart, from her evidence it is clear that she was taken to different places by the accused/respondents and she went along with them without any protest. Moreover, she met number of persons, but did not tell or narrate to anyone about the kidnapping or rape. Had she been forcibly kidnapped by the respondents, there were numerous occasions on which she could have had 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 No.1 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 accused/respondent No.1 for offences punishable under Sections 366, 376(1) of IPC and Sections 3/4 of POCSO Act and against accused/respondent No.2 for offence punishable under Sections 363, 366/368 of IPC, have not been proved and rightly held so by the trial Court.

13. In the aforesaid circumstances, in the considered opinion of this Court, trial Court has considered the entire material evidence on record against respondents in its entirety and on a proper appreciation of evidence and after assigning detailed and cogent reasons, has acquitted the respondents. Unless the judgement of acquittal is palpably wrong and grossly unreasonable, interference in a case against acquittal is not called for in view of the law settled by the Supreme Court in the catena of decisions. Hon'ble the Supreme Court held that if the evaluation of the evidence by the trial Court does not suffer from illegality, manifest error or perversity and the main grounds on which it has based its order is 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].

14. The application for leave to appeal against acquittal of the accused/

respondents has no merit and substance and accordingly is hereby dismissed in *limine* at the stage of admission itself.

15. Let record of the trial Court be sent back with a copy of this order without delay.

Application dismissed.

I.L.R. [2017] M.P., 226
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice J.P. Gupta
M.Cr.C. No. 20476/2015 (Jabalpur) decided on 3 October, 2016

SWAMI SHARAN SINGH & anr. ...Applicants
Vs.
RAKESH TRIPATHI ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 197(1) & 482 - Quashment of proceedings - Sanction **- Applicants are not the Public Servants appointed by the State Government and are not removable from their office save by or with the sanction of the Government -Held - Applicants are not entitled to get the benefit of the provision of Section 197(1) - Petition dismissed. (Paras 8, 14 & 15)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 197(1) व 482 – कार्यवाहियाँ अभिखण्डित की जाना – मंजूरी – आवेदकगण राज्य सरकार द्वारा नियुक्त किये गए लोक सेवक नहीं हैं तथा राज्य सरकार की मंजूरी से अथवा अन्यथा अपने पद से हटाये जाने योग्य नहीं है – अभिनिर्धारित – आवेदकगण धारा 197(1) के उपबंध का लाभ लेने के हकदार नहीं हैं – याचिका खारिज।

Cases referred:

2003 (5) MPLJ 545, 2007 (4) MPLJ 331, (2015) 13 SCC 87, AIR 1992 SC 604, (2008) 9 SCC 613, 2013 (10) SCC 705, (2016) 2 SCC 143.

Arun Kumar Pandey, for the applicants.
Ashok Kumar Gupta, for the non-applicant.

ORDER

J.P. Gupta, J. :- The applicants-accused have filed this application under Section 482 of Cr.P.C seeking quashment of criminal proceedings of

Sessions Trial No. 12/14 pending before the First Additional Sessions Judge, Amarpatan District Satna.

2. The fact relevant to dispose of this petition are that against the applicants-accused on the basis of the complaint filed by the respondent No. 2, a criminal case under Section 467, 468 and 471 of IPC have been registered and after necessary formalities, it was committed to the court of Sessions and at present it is pending as Sessions Trial No. 12/2014 before the First Additional Sessions Judge, Satna.

3. The allegations against the applicants are that the applicant No.1 is the Sarpanch of Gram Panchayat, Joba Police Station Ramnagar and applicant No. 2, is the Secretary of the Gram Panchayat and they have prepared forged job cards in the fake names and received money under the Scheme of National Rural Employment Guarantee and dishonestly misappropriated the money hence, committed the offence of cheating, forgery and breach of trust as public servant and committed offence punishable under the aforesaid Sections.

4. On behalf of the applicants before the learned Trial Court an application under Section 197(1) of Cr.P.C was filed with the objection that the complainant-respondent No.2 has not got the sanction under Section 197(1) of Cr.P.C to prosecute the applicants, which is must. In the absence of sanction, the applicants cannot be prosecuted hence, the proceedings be quashed but, the said application has been dismissed by the learned lower Court vide order dated 29-07-2015. The aforesaid order is contrary to law hence, learned lower Court's order be set aside and the application of the applicants be allowed and proceedings be quashed.

5. On behalf of the respondent No.2, it is contended that in this case provision under Section 197(1) Cr.P.C is not attracted as the applicants are not public servant of the category, who are entitled protection under Section 197(1) Cr.P.C. Only Judges, Magistrates and other public servant whose services are removed by the State or with the sanction of the State come within the purview of the provisions of Section 197(1) of the Cr.P.C. Apart from it, the nature of offence is not such that can be deemed to be done in discharge of official duty therefore, the petition is liable to the dismissed.

6. Having heard the contentions of the learned counsel for the parties and on perusal of the record, in view of this court the application of the

applicants deserves to be dismissed as the protection of provision under Section 197(1) of Cr.P.C is not available to the applicants and the offence cannot be said to be done in discharge of official duty by the public servant.

7. The provision of Section 197(1) of Cr.P.C reads as under:-

> ***"197. Prosecution of Judges and public servants.***-(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-
>
> (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;
>
> (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:
>
> [Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression" State Government" occurring therein, the expression" Central Government" were substituted].

8. This Court in the case of *Ashok Kumar Vs. Balmukund* 2003 (5) MPLJ 545 and *J.B.Sharma VS. State of M.P.* 2007 (4) MPLJ 331 have laid down that to attract the provision in Sub-section (1) of Section 197 of Cr.P.C, three conditions are pre-supposed.

1] Firstly, the person should be a Public Servant;

2] Secondly, he should not be removable from his office save by

or with the sanction of the Government and;

3] The offence should have been committed by him while acting or purporting to act in the discharge of his official duty. All these three conditions should co-exist.

In the present case, the applicants are not the public servants appointed by the State Government and to remove them from the post hold by them, the State is not competent nor its sanction is required, therefore, in absence of second condition as mentioned above, the applicants are not entitled to get the benefit of the aforesaid provision.

9. In addition, the Hon'ble Apex Court in the case of *Inspector of Police and another Vs. Battenapatla Venkata Ratnam and another* (2015) 13 SCC 87 has laid down that the question is whether the alleged offence has been committed by them while acting or purporting to act in discharge of their official duty. The alleged indulgence of the offence in cheating, fabrication of records or misappropriation cannot be said to be in discharge of their official duty. Their official duty is not to fabricate records or permit evasion of payment of duty and cause loss of Revenue.

10. In the aforesaid pronouncements of the Hon'ble Apex Court, the alleged offence against the applicants cannot be said to be done in discharge of their official duty therefore, on account of it, in this case, provision of Section 197(1) of Cr.P.C is not attracted.

11. Learned counsel for the applicants have placed reliance in the case of *State of Haryana and others Vs. Ch. Bhajan Lal and others* AIR 1992 SC 604, wherein it has been held that where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceedings is instituted) to the institution and continuance of the proceedings and / or where there is a specific provision in the Code or the concerned Act, providing effacacious (sic:efficacious) redress for the grievance of the aggrieved party, the High Court may exercise the powers under Section 482 of Cr.P.C and may interfere in the proceedings relating to cognizable offence to prevent abuse of process of any Court however, power should be exercised sparingly and that too in the rarest of rare cases. So far as power of this court is concerned, quashing the proceedings of the learned lower Court is not disputed here. The moot question is whether without

sanction under Section 197(1) of Cr.P.C, applicants can be prosecuted for the offence ?

12. Learned counsel for the applicants have placed reliance in the case of *Goondla Venkateswarlu Vs. State of Andhra Pradesh and Another* (2008) 9 SCC 613, in which in the absence of sanction under Section 197(1), prosecution of Sales Tax Official relating to offence under Sections 448, 380, 384 and 506 of IPC have been quashed. The applicants have also placed reliance on the Hon'ble Apex Court in the case of *Anil Kumar and others Vs. M.K. Aiyappa and another* 2013 (10) SCC 705, in which it has been held that the Magistrate has no power under Section 156(3) of Cr.P.C to direct the police for investigation relating to the crime in which provision of Section 19 of Prevention of Corruption Act is attracted. Learned counsel for the applicants have also placed reliance on the judgment of the Hon'ble Apex Court in the case of *N.K. Ganguly Vs. Central Bureau of Investigation, New Delhi* (2016) 2 SCC 143, in which it has been held that in case it is alleged against the accused persons that they have been abusing the official position as a public servant and are unauthorisedly and illegally transferring the property with a view to get or to give undue pecuniary advantage to others, sanction under Section 197 of Cr.P.C and under Section 19 of Prevention of Corruption Act for prosecution under Sections 13(1)(d) and (2) r/w S. 120-B of IPC is must and in absence of such sanction, proceedings relating to taking cognizance is quashed.

13. The facts and circumstances of the aforesaid cases cited by the learned counsel for the applicants are totally different from the facts of the case at hand therefore, on the basis of the aforesaid case laws, it cannot be held that in the present case sanction under Section 197(1) of Cr.P.C is must or in absence of it, the order taking cognizance of offence is illegal and the applicants cannot be prosecuted.

14. As discussed earlier, in this case, there is no requirement under Section 197(1) of Cr.P.C, looking to the nature of offence, the facts and circumstances of the case and in view of the fact that the applicants are not public servant, who are not removable from their office save by or with the sanction of the Government.

15. In view of the aforesaid discussion, this petition is dismissed accordingly.

Application dismissed.

I.L.R. [2017] M.P., 231
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice G.S. Ahluwalia
M.Cr.C. No. 9606/2016 (Gwalior) decided on 18 November, 2016

SHIVSHANKAR MANDIL ... Applicant
Vs.
SHRI G.S. LAMBA ...Non-applicant

A. ***Constitution - Article 21 - Right to Fair Trial*** **- Held - Fair Trial is the main object of Criminal Law - Denial of Fair Trial is as much injustice to the accused and the justice should not only be done, it should be seen to have done. (Para 14)**

क. संविधान – अनुच्छेद 21 – निष्पक्ष विचारण का अधिकार – अभिनिर्धारित – निष्पक्ष विचारण आपराधिक विधि का मुख्य उद्देश्य है – निष्पक्ष विचारण का प्रत्याख्यान अभियुक्त के साथ अन्याय है तथा न्याय केवल किया जाना नहीं चाहिए बल्कि न्याय होता हुआ नजर आना चाहिए।

B. ***Criminal Procedure Code, 1973 (2 of 1974), Section 243(2)*** **- Grounds on which application can be rejected - Held - The application u/S 243(2) of Cr.P.C. can be rejected only when the Court comes to a conclusion that the documents sought to be summoned are not relevant and the application has been filed to delay or vex the proceedings - Further held - Merely because the documents got produced through the court u/S 243(2), it would not mean that their effects cannot be seen - Merely summoning the documents u/S 243(2) would not mean that the accused is not required to prove them in accordance with law. (Para 19)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 243(2) – आधार जिन पर आवेदन नामंजूर किया जा सकता है – अभिनिर्धारित – दण्ड प्रक्रिया संहिता की धारा 243(2) के अंतर्गत आवेदन सिर्फ तब नामंजूर किया जा सकता है जब न्यायालय इस निष्कर्ष पर पहुंचे कि समन किये गये दस्तावेज सुसंगत नहीं हैं तथा कार्यवाहियों में विलम्ब अथवा परेशान करने हेतु आवेदन प्रस्तुत किया गया है – आगे अभिनिर्धारित – मात्र इसलिए कि दस्तावेजों को धारा 243(2) के अंतर्गत न्यायालय के माध्यम से प्रस्तुत किया गया है, इसका यह अर्थ नहीं होगा कि उनका प्रभाव नहीं देखा जा सकता – मात्र धारा 243(2) के अंतर्गत दस्तावेजों को समन किये जाने का यह अर्थ नहीं है कि अभियुक्त को विधि के अनुसार उन्हें साबित करने की आवश्यकता नहीं है।

Cases referred:

2014 (2) SCC 401, (2008) 5 SCC 633.

Prashant Sharma, for the applicant.
Rajesh Gupta, for the non-applicant.

ORDER

G.S. AHLUWALIA, J. :- This is a petition under Section 482 of Cr.P.C filed for quashing the order dated 28.5.2016 passed by the Special Judge (Electricity Act), Morena in Case No. 194/2005.

2. By the impunged (sic:impugned) order dated 28.5.2016, the application filed by the applicant for production of documents pertaining to grant of loan to M/s. Deepti Polycon, Jiwajiganj Morena from SBI Jivajiganj Branch Morena as well as the register of registration from the office of District Industrial Centre, Morena in respect of M/s. Deepti Polycon, Morena has been rejected.

3. It is the case of the complainant, that a complaint under Sections 135, 151 of Electrictity (sic:Electricity) Act has been filed against the applicant as an accused No.2, whereas the accused No.1 Ramjidas is prosecuted being the proprietor of M/s Deepti Polycon.

4. It was the case of the respondent that on 7.9.2005, the vigilance team had carried out the inspection in the premises of the factory and it was found that the electric metres (sic:meters) were interpolated as a result of which they were not giving proper reading and thus there was a theft of electricity.

5. The respondent examined their witnesses. In the cross examination of these witnesses, specific stand was taken by the applicant that he is not a proprietor of M/s. Deepti Polycon and has wrongly been implicated in the matter.

6. By filing an application under Section 243 (2) of Cr.P.C, the applicant made a prayer to the Trial Court for summoning the documents mentioned in the application, in order to show that he is not the proprietor of the factory and, therefore, he can not be held liable for manipulation of the electricity meter, if any.

7. Application was opposed by the respondents.

8. The Trial Court by the impugned order dated 28.5.2016 has rejected the application on the ground that the person who is a proprietor as well as the person who is using the premises are consumer. Therefore, the person who was using the premises is also liable to be punished under Section 135 (1) of Electricity Act, if it is found that there was theft of electricity.

9. Further more, it was held that if the applicant wants to produce any document pertaining to the title of M/s. Deepti Polycon, then he can obtain the said documents from the concerned department in accordance with law and therefore, the prayer for summoning the documents pertaining to grant of loan as well as the registration of M/s. Deepti Polycon Factory was rejected.

10. The learned counsel for the applicant submitted that he is required to prove his defence and at this stage unless and until the Trial Court comes to the conclusion that the documents are not relevant and the application has been filed with intention to delay or vex the proceedings or for defeating the ends of justice, the opportunity of leading defence evidence cannot be denied. The Trial Court should have summoned the documents. It is further submitted that in the impugned order, merely by saying that the person who is also in possession of the premises is responsible for theft of electricity, nothing has been held that the documents which are sought to be summoned are not relevant.

11. Per contra, the learned counsel for the respondents submitted that the applicant has already produced certificate from the Office of Commercial Tax in relation to firm M/s Deepti Polycon to show that the accused No.1 Ramjidas was the proprietor of the firm and, therefore, the documents which applicant wants to summon are not relevant. Further it is submitted by the counsel for the respondents that the applicant had signed the Panchnama, which was prepared under Section 126, 135 of Electricity Act, 2003. Thus, it is clear that at the time of inspection he was present in the premises. Accordingly, it is submitted by the counsel for the respondents that since the applicant is also in possession of the premises of M/s. Deepti Polycon, therefore, he is also responsible for the theft of electricity.

12. Heard the learned counsel for the parties.

13. Section 243(2) of Cr.P.C read as under:

> "(2) If the accused, after he has entered upon his defense applies to the Magistrate to issue any process for compelling

the attendance of any witness for the purpose of examination or cross examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing;

Provided that, when the accused has cross examined or had the opportunity of cross examining any witness before entering on his defense, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice."

14. It is well established principle of law that Fair Trial is the main object of criminal law and it should not be hampered in any manner. Fair Trial must be accorded to every accused. Denial of fair trial is as much injustice to the accused and justice should not only be done, it should be seen to have been done.

14A. In the case of *J. Jayalalithaa and others Vs. State of Karnataka and others* reported in 2014 (2) SCC 401, it is held as under:

"that free and fair trial is *sine qua non* of Article 21 of the Constitution. Right to get fair trial is not only a basic fundamental right but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution.

15. The Supreme Court in case of T. *Nagappa Vs. Y.R. Muralidhar* reported in (2008) 5 SCC 633, has held that" The right to defend oneself and for that purpose to adduce evidence is recognized by he Parliament in terms of sub-section (2) of section 243 of the Code of Criminal Procedure". It is further held "that it is the accused who knows how to prove the defence and what should be the nature of the evidence is not a matter should be left only to the discretion of the Court".

16. However, the Court must determine that whether the application filed by the applicant accused is bona fide or not or whether he intends to bring on record the relevant material or not. At the same there cannot be doubt that

accused should not be allowed to unnecessarily protract trial or summon witness whose evidence would not be at all relevant.

17. If the facts of the present case are considered in the light of the provision of Section 243 (2) of Cr.P.C, it is clear that the applicant intends to establish the fact that he is not the proprietor of M/s. Deepti Polycon. If he wants to summon the documents to show that the accused No.1 Ramjidas was the proprietor then he must get fair opportunity to prove the defence. Even the Trial Court while rejecting the application has not held that the documents which the applicant wants to summon are not relevant. Merely because he can obtain the documents under the Right to Information Act by itself is not sufficient to reject the application, in view of the specific averments made by the applicant in the application that the docments cannot be supplied to him under the Right to Information Act as the same pertains to third party.

18. The Trial Court has also not held that the application has been filed to delay the proceedings. The application under Section 243 (2) of Cr.P.C can be rejected only when the Court comes to a conclusion that the documents sought to be summoned are not relevant and the application has been filed to delay or vex the proceedings.

19. Since fair trial is the cardinal principle of law and the accused must get reasonable opportunity to defend himself and it is for the accused to decide that what evidence he wants to lead in support of his defence, therefore in the considered view of this Court the applicant must get an opportunity to summon the documents as desired by him. Further merely because the documents are got produced through the Court under Section 243 (2) of Cr.P.C, it would not mean that the effect of the documents so summoned cannot be seen. Further merely be (sic:by) summoning the documents under Section 243 (2) of Cr.P.C it would not mean that the accused is not required to prove those documents in accordance with law. The Trial Court is still required to decide that whether the accused has succeeded in proving his defence on the basis of those documents or not?

20. Accordingly, the order dated 28.5.2016 passed by the Trial Court is set aside. The application filed by the applicant for summoning the documents as mentioned in the application, is allowed.

21. As it is evident from the record that the case is pending since 2005. Much delay has already been caused and 11 years have already passed.

Therefore, unlimited time cannot be allowed to be given to the applicant to prove his defence, therefore, it is directed that the Trial Court shall conclude the Trial within a period of three months positively from the date of communication of this order.

22. With the aforesaid observation, the petition filed under Section 482 of Cr.P.C is allowed.

Application allowed.

I.L.R. [2017] M.P., 236

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice G.S. Ahluwalia

M.Cr.C. No. 12242/2016 (Gwalior) decided on 18 November, 2016

NICKY CHAURASIA ...Applicant

Vs.

VIMAL KUMAR ...Non-applicant

Negotiable Instruments Act (26 of 1881), Section 20 and Criminal Procedure Code, 1973 (2 of 1974), Section 313 **- Effect of admission of signatures on cheque and giving it to the payee - Held - Once accused admits signature on the cheque and also that he gave the same to the payee, presumption u/S 20 of Negotiable Instrument Act can be drawn - Further held - Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments which is either wholly blank or having written thereon an incomplete negotiable instrument then he gives *prima facie* authority to the holder to complete an incomplete negotiable instrument.** **(Paras 10 & 12)**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 20 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 313 – चैक पर हस्ताक्षरों की ग्राह्यता तथा उसे अदाता को देने का प्रभाव – अभिनिर्धारित – एक बार अभियुक्त ने चैक पर के हस्ताक्षर स्वीकार कर लिये तथा उक्त को अदाता को दे भी दिया, परक्राम्य लिखत अधिनियम की धारा 20 के अंतर्गत उपधारणा की जा सकती है – आगे अभिनिर्धारित – जहाँ एक व्यक्ति परक्राम्य लिखत से संबंधित विधि के अनुसार स्टाम्प लगे हुए कागज पर हस्ताक्षर कर उसे किसी अन्य को परिदत्त करता है जो या तो पूर्णतः निरंक हो या फिर उस पर अपूर्ण परक्राम्य लिखत लिखा हो, तब वह धारक को अपूर्ण परक्राम्य लिखत को पूर्ण करने का *प्रथम दृष्टया* प्राधिकार देता है।

Case referred:

M.Cr.C. No. 8893/2015 order dated 26.08.2015.

Vijay S. Chauhan, for the applicant.
H.K. Shukla, for the non-applicant.

ORDER

G.S. AHLUWALIA, J. :- This petition under Section 482 of Cr.P.C. has been filed against the order dated 26.9.2016 passed by the Court of II Additional Sessions Judge, Ashok Nagar in Criminal Revision No.25/2016 arising out of order dated 2.7.2016 passed by J.M.F.C., Ashok Nagar in Criminal Case No.2484/2014.

2. The necessary facts for the disposal of the present petition in short are that the respondent has filed a complaint under Section 138 of Negotiable Instruments Act (for short 'NI Act') alleging that he and the applicant/accused are in the same business and, therefore, known to each other. The applicant had demanded Rs.3 lacs from the respondent to meet his domestic requirements and when the respondent/complainant demanded his money back, the applicant gave him a cheque on 22.08.2014 by signing the same and he had also requested the respondent not to present the cheque immediately and he should present the cheque after two or three days. On 26.9.2014, the cheque was presented which was returned unpaid on 26.9.2014 itself with a note that the account does not have sufficient funds. A statutory notice was given and thereafter the complaint under Section 138 of NI Act was filed.

3. After the complainant examined all his witnesses and the statement of the applicant was recorded under Section 313 of CrPC., the applicant filed an application for sending the cheque in dispute to a handwriting expert on the allegation that the cheque in dispute does not bear his signature as well as the other contents are also not in his handwriting.

4. The trial court after considering the fact that, in his statement under Section 313 of CrPC, the applicant/accused has admitted that the cheque in dispute bears his signature, rejected the application and held that once the accused has admitted his signature on the cheque in dispute then the cheque is not required to be send to the handwriting expert to find out that in whose handwriting the remaining contents are.

5. Being aggrieved by the order of the trial court, the applicant filed a criminal revision too which has been dismissed by the revisional court by order dated 26.9.2016.

6. Heard the learned counsel for the parties.

7. In statement under Section 313 of CrPC, in reply to question No.5, the applicant has admitted that he had signed the cheque No.759479 and he had given the same to the complainant. In reply to question No.7, the applicant has admitted that he had given the disputed cheque to the complainant. He has further admitted in reply to question No.8 that he had received the registered notice sent by the complainant. Thus, it is clear that the applicant had not denied his signature on the cheque in dispute.

8. In the case of *Vipin Kumar Vimal Kumar H.U.F. Vs. Shobhit Kumar @ Mintu Samaiya* (M.Cr.C.No.8893/2015), a Coordinate Bench of this Court by order dated 26.8.2015 held as under:-

> "12. On the basis of the aforesaid discussion, it would be apparent that Magistrate did not consider that fact that none of the cheque was returned by the bank on the ground that signature found on the cheque does not match with the specimen signatures kept in the bank and therefore, prima facie there was no need to refer any of the cheque to the hand-writing expert for verification of the signature of the respondent. So far as ink etc. found on the remaining text of the cheque is concerned, it could be in the handwriting of a particular person then, without taking any specimen of that hand-writing, expert cannot say anything about that hand-writing. At the most, it can be said that remaining text of the cheque was not in the hand-writing of the respondent. However, it is admitted by the parties that remaining text of the cheque is not required to be in the hand-writing of the respondent. In this context, the order passed by the single Bench of this Court in case of *Satyendra Upadhyay* (supra) and *Bhadauriya Tiles* (supra) may be referred, in which it is held that when it is found that signature on the cheque was of the accused then, there is no need to refer the cheque to the hand-writing expert for remaining text of the cheque because of various presumptions given in the

provision of NI Act like Section 20. Hence, the application filed by the respondent was not acceptable. It was filed only to cause delay otherwise, after getting a report from one handwriting expert, again the cheques are to be referred to another hand-writing expert of the choice of the complainant and a conflict in the opinions of two hand-writing experts will not give any clear cut result to the Court. By acceptance of such application, only delay would be caused in the trial."

9. Section 20 of NI Act reads as under:-

"20. Inchoate stamped instruments.—Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount; provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder."

10. Thus, it is clear that where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments which is either wholly blank or having written thereon an incomplete negotiable instrument then he thereby gives prima-facie authority to the holder to complete an incomplete negotiable instrument.

11. It is well established principle of law that an accused has a right of fair trial. He has a right to defend himself as a human as well as it is his fundamental right. The applicant has taken a defence that there was a loan transaction between the applicant and the complainant but stated that he had taken a loan of Rs.1 lacs and he has returned the same. Whether, this defence is plausible or not, is a matter which is to be considered by the trial court.

12. However, once the applicant/accused has admitted his signatures on

the cheque in dispute and has also admitted that he had given the same to the applicant (sic:non-applicant), then a presumption can be drawn under Section 20 of NI Act.

13. Thus, in the facts and circumstances of the case, this Court is of the opinion that the trial court has not committed any error in rejecting the application filed by the complainant for sending the cheque in dispute to the handwriting expert.

14. Accordingly, the present petition is dismissed without any costs.

Application dismissed.