



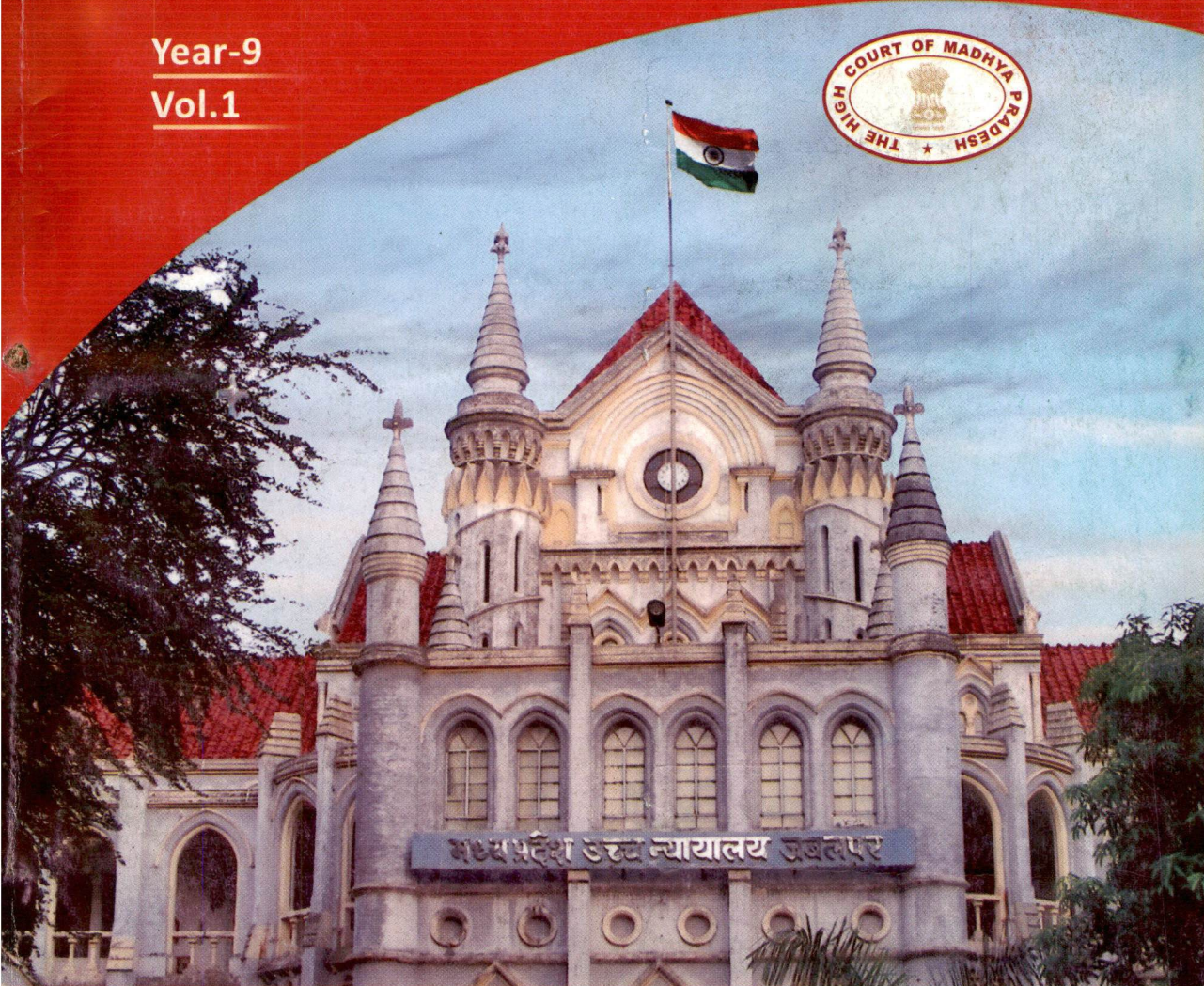
THE INDIAN LAW REPORTS

M.P. SERIES

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

Year-9

Vol.1



MARCH 2017

(pp. 507 to 772)

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 – Sub-letting – Direct evidence – It is settled position of law that direct evidence on the point of sub-letting could not be expected from the landlord. [Ratan Singh Yadav Vs. Bhagwat Singh Parmar] ...668

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(बी) – उप-भाड़े पर दिया जाना – प्रत्यक्ष साक्ष्य – यह विधि की व्यवस्थापित स्थिति है कि उप-भाड़े पर दिये जाने के बिंदु पर मू-स्वामी से प्रत्यक्ष साक्ष्य अपेक्षित नहीं किया जा सकता। (रतन सिंह यादव वि. भगवत सिंह परमार) ...668

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(b) & 12(1)(i) – Sub-letting and alternate accommodation – Appeal by tenant – Concurrent findings of fact – Appellants not living jointly – Appellant No. 1 handing over possession of suit premises to his brother, appellant No. 2 – Appellant No. 2 not examined – No documentary evidence regarding payment of rent by appellant No. 2 to previous landlord – Money order receipts only shows that it was sent to the earlier owner but sender's name is not mentioned in the receipts – Admission by appellant No. 1 (original tenant) that he has an alternate accommodation in the same city – Held – It is very much evident that appellant No. 1 has inducted appellant No. 2 in the premises, so it amounts to sub-letting – No substantial question of law – Appeal dismissed. [Ratan Singh Yadav Vs. Bhagwat Singh Parmar] ... 668

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(बी) व 12(1)(आई) – उप-भाड़े पर दिया जाना तथा वैकल्पिक स्थान – किरायेदार द्वारा अपील – तथ्य के समवर्ती निष्कर्ष – अपीलार्थीगण साथ निवासरत नहीं है – अपीलार्थी क्र. 1 द्वारा उसके भाई, अपीलार्थी क्र. 2 को वाद परिसर का कब्जा सौंपा जाना – अपीलार्थी क्र. 2 का परीक्षण नहीं किया गया – अपीलार्थी क्र. 2 द्वारा पूर्व मू-स्वामी को किराये का भुगतान किये जाने से संबंधित कोई दस्तावेजी साक्ष्य नहीं है – मनी आर्डर रसीदें केवल यह दर्शाती हैं कि उन्हें पूर्ववर्ती स्वामी को भेजा गया था परंतु रसीदों में प्रेषक का नाम उल्लिखित नहीं – अपीलार्थी क्र. 1(वास्तविक किरायेदार) द्वारा स्वीकृति कि उसके पास उसी शहर में एक वैकल्पिक स्थान है – अभिनिर्धारित – यह पूर्णतः स्पष्ट है कि अपीलार्थी क्र. 1 ने अपीलार्थी क्र. 2 को परिसर में रखा है, इसलिए यह उप-भाड़े पर दिये जाने की कोटि में आता है – विधि का कोई सारवान प्रश्न नहीं – अपील खारिज। (रतन सिंह यादव वि. भगवत सिंह परमार) ...668

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(o)

– *Condition and Compensation – Held* – In the present case, decree was passed u/S 12(1)(o) of the Act and compensation is to be given for the reason that appellant was a tenant of respondents for almost 25 years and cause of action dates back to 1992-93 when the appellant encroached upon excess area and at that time monthly rent was Rs. 350 – Compensation of Rs. 1 lakh is just and proper – Hence, if the encroached portion shown in the plaint is vacated by the appellant/tenant and Rs. 1 lakh is paid to the respondents as compensation within three months from today, then he shall not be evicted from the suit accommodation on the ground of Section 12(1)(o) of the Act – Appeal allowed. [Rajkumar Chug Vs. Dheerendra Chug] ...638

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ओ) – शर्त एवं प्रतिकर – अभिनिर्धारित – वर्तमान प्रकरण में, अधिनियम की धारा 12(1)(ओ) के अंतर्गत डिक्री पारित की गई थी एवं इस कारण से प्रतिकर दिया जाना है कि अपीलार्थी लगभग 25 वर्षों से प्रत्यर्थीगण का किरायेदार था एवं वाद हेतुक 1992-93 के समय का है जब अपीलार्थी ने अतिरिक्त क्षेत्र पर अतिक्रमण किया था तथा उस समय मासिक किराया रु. 350/- था – रु. 1 लाख का प्रतिकर न्यायसंगत एवं उचित है – अतः, यदि वादपत्र में दर्शाया गया अतिक्रमण किया हुआ हिस्सा अपीलार्थी/किरायेदार द्वारा खाली कर दिया गया है एवं प्रत्यर्थी को आज से तीन माह के भीतर रु. 1 लाख प्रतिकर के रूप में संदत्त कर दिये जाते हैं तो उसे अधिनियम की धारा 12(1)(ओ) के आधार पर वाद स्थान से बेदखल नहीं किया जाएगा – अपील मंजूर। (राजकुमार चुग वि. धीरेन्द्र चुग) ...638

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(o) & 12(11) – Question involved – Whether decree for possession can be granted without granting time for removing the possession from the portion not let out to the defendant as provided u/S 12(11) of the M.P. Accommodation Control Act, 1961 – *Held* – Unless an opportunity to the tenant is given to vacate the portion of accommodation not let out to him and to pay the landlord amount of compensation, the decree u/S 12(1)(o) cannot be issued – It is the duty of the Court to pass a conditional decree, with the stipulation of time of vacation of trespassed portion and to pay compensation. [Rajkumar Chug Vs. Dheerendra Chug] ...638

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ओ) व 12(11) – अंतर्ग्रस्त प्रश्न – क्या म.प्र. स्थान नियंत्रण अधिनियम, 1961 की धारा 12(11) के अंतर्गत दिये गये उपबंध के अनुसार प्रतिवादी को किराये पर नहीं दिये गये हिस्से

से कब्जा हटाने हेतु समय प्रदान किये बिना, कब्जे के लिए डिक्री प्रदान की जा सकती है - अमिनिर्धारित - जब तक कि किरायेदार को स्थान का वह हिस्सा जो उसे किराये पर नहीं दिया गया है उसको खाली करने का तथा भूमिस्वामी को प्रतिकर की राशि का भुगतान करने का कोई अवसर नहीं दिया जाता है धारा 12(1)(ओ) के अंतर्गत डिक्री जारी नहीं की जा सकती - यह न्यायालय का कर्तव्य है कि वह अतिचार किये गये हिस्से को खाली करने तथा प्रतिकर का भुगतान किये जाने हेतु समय नियत करते हुए सशर्त डिक्री पारित करे। (राजकुमार चुग वि. धीरेन्द्र चुग)

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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. [Bright Drugs Industries Ltd. (M/s.) Vs. Punjab Health System Corporation (M/s.)] ...141

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। (ब्राइट ड्रग्स इंडस्ट्रीज लि. (मे.) वि. पंजाब हेल्थ सिस्टम कारपोरेशन (मे.)) ...141

Arbitration and Conciliation Act (26 of 1996), Section 9 – Interim measures – Hypothecation of vehicle under a finance agreement between the parties – Agreement includes arbitration clause – Default in payment – Appellant filed application before the Additional District Judge seeking possession of vehicle and security of balance amount as an interim measure. – Application was rejected on the ground that there is no intention of appellant to initiate the arbitration proceedings and application has been filed belatedly and hence need for issuing direction u/S 9 is not proved – Held – Since appellant could not establish prima facie case as well as balance of convenience or irreparable injury, application has been rightly rejected – Appeal dismissed. [Shriram Transport Finance Ltd. (M/s.) Vs. Juber Shekh] ...392

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 9 – अंतरिम उपाय – पक्षकारों के मध्य एक वित्तीय करार के अंतर्गत वाहन को बंधक रखा जाना – करार में माध्यस्थम् खंड समाविष्ट होना – मुग्तान में व्यतिक्रम – अपीलार्थी ने अतिरिक्त जिला न्यायाधीश के समक्ष वाहन का कब्जा चाहने हेतु तथा अंतरिम उपाय के रूप में शेष राशि की सुरक्षा हेतु आवेदन प्रस्तुत किया – आवेदन इस आधार पर नामंजूर किया गया था कि अपीलार्थी का माध्यस्थम् कार्यवाही आरंभ करने का कोई आशय नहीं था तथा आवेदन विलंब से प्रस्तुत किया गया है एवं धारा 9 के अंतर्गत निदेश जारी करने की आवश्यकता साबित नहीं है – अभिनिर्धारित – चूंकि अपीलार्थी प्रथम दृष्ट्या प्रकरण और साथ ही सुविधा का संतुलन या अपूरणीय क्षति स्थापित नहीं कर सका, आवेदन उचित रूप से नामंजूर किया गया – अपील खारिज। (श्रीराम ट्रांसपोर्ट फाइनेंस लि. (मे.) वि. जुबेर शेख) ...392

Arbitration and Conciliation Act (26 of 1996), Sections 11 &

34 – See – Limitation Act, 1963, Section 14 [Commissioner, M.P. Housing Board Vs. M/s. Mohanlal and Company] (SC)...1

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11 व 34 – देखें – परिसीमा अधिनियम, 1963, धारा 14 (कमिश्नर, एम.पी. हाउसिंग बोर्ड वि. मे. मोहनलाल एण्ड कम्पनी) (SC)...1

Arbitration and Conciliation Act (26 of 1996), Section 11(6) – Application for appointment of arbitrator – Dispute – Whether petitioner liable to pay the compensation despite completing the contractual work within the extended terms – Preliminary objection that the application u/S 11(6) of the 1996 Act is not maintainable as the issue relates to the quantum of compensation and it is not arbitrable being “excepted” vide clause 25 of the contract – Clause 2, 5 and 25 of the contract – Held – It is not the quantum but the very authority to levy the compensation is disputed so it cannot be said that the dispute falls under the “excepted category” – Application u/S 11(6) of the 1996 Act allowed – Sole Arbitrator appointed. [Shridhar Dubey Vs. Union of India] ...401

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) – मध्यस्थ की नियुक्ति हेतु आवेदन – विवाद – क्या याची विस्तारित अवधि के भीतर संविदात्मक कार्य पूर्ण करने के बावजूद भी प्रतिकर का भुगतान करने के लिए दायित्वाधीन है – प्रारंभिक आक्षेप कि अधिनियम 1996 की धारा 11(6) के अंतर्गत आवेदन पोषणीय नहीं है क्योंकि विवादक प्रतिकर की मात्रा से संबंधित है तथा यह संविदा के खण्ड 25 द्वारा “अपवादित” होने के कारण माध्यस्थम् योग्य नहीं है – संविदा का खण्ड 2, 5 एवं 25 – अभिनिर्धारित – यह मात्रा नहीं बल्कि प्रतिकर उदग्रहित करने वाला प्राधिकारी ही विवादित है इसलिए यह नहीं कहा जा सकता कि विवाद “अपवादित श्रेणी” के अंतर्गत आता है – अधिनियम 1996 की धारा 11(6) के अंतर्गत आवेदन मंजूर – एकमात्र मध्यस्थ नियुक्त। (श्रीधर दुबे वि. यूनियन ऑफ इंडिया) ...401

Arbitration and Conciliation Act (26 of 1996), Section 11(6) and Limitation Act (36 of 1963), Article 137 – Application for appointment of arbitrator – Preliminary objection that the application is barred by limitation – Work completed on 16.07.2009 – Compensation being levied by letter dated 13.05.2011 – Initially civil suit filed on 02.08.2011 which was dismissed on 02.09.2013 – Held – Present application u/S 11(6) of the 1996 Act filed on 13.04.2015 i.e. within 3 years from 02.09.2013 as per residuary provision contained in Article 137 of the 1963 Act – Application not barred by time as no limitation period is prescribed under the 1996

Act—Objection turned down—Application is maintainable. [Shridhar Dubey Vs. Union of India] ...401

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) एवं परिसीमा अधिनियम (1963 का 36), अनुच्छेद 137 — मध्यस्थ की नियुक्ति हेतु आवेदन — प्रारंभिक आक्षेप कि आवेदन परिसीमा द्वारा वर्जित है — 16.07.2009 को कार्य संपूर्ण — प्रतिकर पत्र दिनांक 13.05.2011 द्वारा उदग्रहित किया गया — प्रारंभ में दिनांक 02.08.2011 को सिविल वाद प्रस्तुत किया गया जो 02.09.2013 को खारिज किया गया था — अभिनिर्धारित — वर्तमान आवेदन अधिनियम 1996 की धारा 11(6) के अंतर्गत दिनांक 13.04.2015 को प्रस्तुत किया गया अर्थात् अधिनियम 1963 के अनुच्छेद 137 में अंतर्विष्ट अवशिष्ट उपबंध के अनुसार दिनांक 02.09.2013 से 3 वर्ष के भीतर — आवेदन समय द्वारा वर्जित नहीं है क्योंकि अधिनियम 1996 के अंतर्गत कोई परिसीमा अवधि विहित नहीं है — आक्षेप खारिज — आवेदन पोषणीय है। (श्रीधर दुबे वि. यूनियन ऑफ इंडिया) ...401

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. [Union of India Vs. K.C. Sharma (M/s.)] ...77

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

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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 विरुद्ध 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। (यूनियन ऑफ इंडिया वि. के.सी. शर्मा (मे.))

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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. [Commissioner, M.P. Housing Board Vs. M/s. Mohanlal and Company]

(SC)...1

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। (कमिश्नर, एम.पी. हाउसिंग बोर्ड वि. मे. मोहनलाल एण्ड कम्पनी)

(SC)...1

Arbitration and Conciliation Act (26 of 1996), Section 36 – See – Micro, Small and Medium Enterprises Development Act, 2006, Section 18(1) & (2) [Power Machines India Ltd. Vs. State of M.P.]

(DB)...*37

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 36 – देखें – सूक्ष्म, लघु और मध्यम उद्यम विकास अधिनियम, 2006, धारा 18(1) व (2) (पॉवर मशीन्स इंडिया लि. वि म.प्र. राज्य)

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Arbitration and Conciliation Act (26 of 1996), Section 45 – Reference to arbitration – Scope of enquiry – Scope of enquiry while referring the matter to arbitration u/S 45 of the Act of 1996 is confined only to the question whether the arbitration agreement is null and void, inoperative or incapable of being performed but not the legality and validity of the substantive contract. [Sasan Power Ltd. Vs. North American Coal Corporation India Pvt. Ltd.]

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माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 45 – माध्यस्थम् हेतु निर्देश – जांच की व्याप्ति – अधिनियम, 1996 की धारा 45 के अंतर्गत, माध्यस्थम् को मामला निर्देशित किये जाते समय, जांच की व्याप्ति केवल इस प्रश्न तक सीमित होती है कि क्या माध्यस्थम् करार शून्य एवं अकृत, अप्रवर्तनीय या निष्पादन किये जाने के लिए अक्षम है, न कि सारभूत संविदा की वैधता एवं विधिमान्यता। (सासन पॉवर लि. वि. नार्थ अमेरिकन कोल कारपोरेशन इंडिया प्रा. लि.) (SC)...515

Arbitration and Conciliation Act (26 of 1996), Section 45 and Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Arbitration – Rejection of plaint – Facts – Agreement-I executed between appellant and an American Company – Agreement-II executed between appellant, respondent (Indian Company) and American Company – Dispute – Arbitration clause – Respondent making a request for arbitration – Appellant filing civil suit – Application under Order 7 Rule 11 of C.P.C. r/w Section 45 of the Act of 1996 by respondent – Trial Court dismissed the suit and subsequently appeal was also dismissed by High Court – Held – Trial Court allowed the application by recording the agreement as legal and proper and capable of being performed but it did not pass any consequential order as required u/S 45 of the Act of 1996 by referring the parties to arbitration – So with the above modification, order of the trial Court is just and proper – Appeal dismissed. [Sasan Power Ltd. Vs. North American Coal Corporation India Pvt. Ltd.] (SC)...515

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 45 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – माध्यस्थम् – वादपत्र का नामंजूर किया जाना – तथ्य – करार-I, अपीलार्थी और एक अमरीकी कंपनी के मध्य निष्पादित – करार-II, अपीलार्थी, प्रत्यर्थी (भारतीय कंपनी) और अमरीकी कंपनी के मध्य निष्पादित – विवाद – माध्यस्थम् खंड – प्रत्यर्थी ने माध्यस्थम् हेतु निवेदन किया – अपीलार्थी ने सिविल वाद प्रस्तुत किया – प्रत्यर्थी द्वारा सि.प्र.सं. के आदेश 7 नियम 11 सहपठित, अधिनियम 1996 की धारा 45 के अंतर्गत आवेदन – विचारण न्यायालय ने वाद खारिज किया और तत्पश्चात् उच्च न्यायालय द्वारा अपील भी खारिज की गई – अभिनिर्धारित – विचारण न्यायालय ने करार को विधिक एवं उचित तथा पालन किये जाने योग्य मानते हुए आवेदन मंजूर किया परंतु उसने माध्यस्थम् हेतु पक्षकारों को निर्देशित कर परिणामिक आदेश पारित नहीं किया जैसा कि अधिनियम 1996 की धारा 45 के अंतर्गत अपेक्षित है – अतः, उक्त परिवर्तन के साथ, विचारण न्यायालय का आदेश न्यायसंगत और उचित है – अपील खारिज। (सासन पॉवर लि. वि. नार्थ अमेरिकन कोल कारपोरेशन इंडिया प्रा. लि.) (SC)...515

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आयुध अधिनियम (1959 का 54), धारा 25(1बी)(ए) – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 482 (लक्ष्मण वि. म.प्र. राज्य) ...*6

Border Security Force Rules, 1969 – Rule 20 & 22 – Termination – Overstay of Leave – Held – As no enquiry was conducted before passing the termination order and order of appellate authority is also cryptic, both orders set aside – Liberty reserved to the respondents to serve Charge sheet to the petitioner and conduct enquiry in accordance with law – Petitioner be reinstated with no salary for intervening period. [Kaushlendra Singh Jatav Vs. Union of India] ...321

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Cantonments Act (41 of 2006), Section 2(zc) & 2(zt) – “Inhabitant” and “Resident” – Representation of the People Act (43 of 1951), Section 20 – “Ordinarily Resident” – Difference & Scope. [Sunil Kumar Kori Vs. Gopal Das Kabra] (SC)...261

छावनी अधिनियम (2006 का 41), धारा 2(जेड सी) व 2(जेड टी) – “रहवासी” और “निवासी” – लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 20 – “साधारणतः निवासी” – भेद एवं विस्तार। (सुनील कुमार कोरी वि. गोपाल दास काबरा) (SC)...261

Cantonments Act (41 of 2006), Section 27 & 28 and Cantonment Electoral Rules, 2007 – Chapter II, Rule 10(3) – Right to vote – Encroacher – Electoral Rolls – Whether a person living in illegally constructed house as an encroacher within a cantonment area is entitled to vote in an election by inclusion in the Electoral Rolls – Held – As per Section 28 of the Act of 2006 and Rule 10(3) of the Rules of 2007 it is evident that the persons who are living in illegally constructed houses as an encroacher, which are not assigned any house no. will not be entitled for inclusion in the electoral rolls and only persons living in houses with house no. are entitled to vote – Appeals dismissed. [Sunil

Kumar Kori Vs. Gopal Das Kabra]

(SC)...261

छावनी अधिनियम (2006 का 41), धारा 27 व 28 एवं छावनी निर्वाचन नियम, 2007 – अध्याय II, नियम 10(3) – मतदान का अधिकार – अतिक्रमणकर्ता – निर्वाचक नामावली – क्या छावनी क्षेत्र के भीतर अवैध प्रकार से निर्मित मकान में अतिक्रमणकर्ता के रूप में निवासरत व्यक्ति को निर्वाचक नामावली में सम्मिलित होकर मतदान करने का अधिकार है – अभिनिर्धारित – 2006 के अधिनियम की धारा 28 एवं 2007 के नियमों के नियम 10(3) के अनुसार यह सुस्पष्ट है कि ऐसे व्यक्ति जो अतिक्रमणकर्ता के रूप में अवैध प्रकार से निर्मित मकान में निवासरत हैं, जिन्हें कोई भी मकान क्र. नहीं सौंपा गया है, वे निर्वाचक नामावली में सम्मिलित होने के हकदार नहीं होंगे तथा केवल वही व्यक्ति जो मकान क्रमांक वाले मकान में निवासरत हैं मतदान करने के हकदार होंगे – अपीलें खारिज। (सुनील कुमार कोरी वि. गोपाल दास काबरा)

(SC)...261

Cantonments Act (41 of 2006), Sections 34(1)(e), 247 & 248 – Defence land – Encroachments – Removal thereof – Cantonment boards should be vigilant regarding removal of illegally constructed buildings in the cantonment area and should ensure that no further encroachments are made on defence land. [Sunil Kumar Kori Vs. Gopal Das Kabra]

(SC)...261

छावनी अधिनियम (2006 का 41), धाराएँ 34(1)(ई), 247 व 248 – रक्षा भूमि – अतिक्रमण – हटाने तत्संबंधी – छावनी क्षेत्र में अवैध निर्मित भवनों को हटाने के बारे में छावनी बोर्ड को सतर्क रहना चाहिए और यह सुनिश्चित करना चाहिए कि रक्षा भूमि पर आगे कोई और अतिक्रमण न किया जाए। (सुनील कुमार कोरी वि. गोपाल दास काबरा)

(SC)...261

Cantonment Electoral Rules, 2007 – Rule 54 & 55 – See – Constitution – Article 226 [Sunil Kumar Kori Vs. Gopal Das Kabra]

(SC)...261

छावनी निर्वाचन नियम, 2007 – नियम 54 व 55 – देखें – संविधान – अनुच्छेद 226 (सुनील कुमार कोरी वि. गोपाल दास काबरा)

(SC)...261

Cantonment Electoral Rules, 2007 – Chapter II, Rule 10(3) – See – Cantonments Act, 2006, Section 27 & 28 [Sunil Kumar Kori Vs. Gopal Das Kabra]

(SC)...261

छावनी निर्वाचन नियम, 2007 – अध्याय II, नियम 10(3) – देखें – छावनी अधिनियम, 2006, धारा 27 व 28 (सुनील कुमार कोरी वि. गोपाल दास काबरा)

(SC)...261

Central Motor Vehicles Rules, 1989, Rule 56 – See – Motor Vehicles Act, 1988, Sections 2(30), 50(2) & 166 [Savitri Devi Tiwari (Smt.) Vs. Abdul Jabbar] ...*42

केन्द्रीय मोटर यान नियम, 1989, नियम 56 – देखें – मोटर यान अधिनियम, 1988, धाराएँ 2(30), 50(2) व 166 (सवित्री देवी तिवारी (श्रीमती) वि. अब्दुल जब्बार) ...*42

*Cigarettes & other Tobacco Products (Prohibition of Advertisement and Regulation of Trade Commerce, Production, Supply & Distribution) Act, (34 of 2003) and Criminal Procedure Code, 1973 (2 of 1974), Section 144 – Additional District Magistrate u/S 144 of Code of Criminal Procedure, 1973 imposed ban on smoking hookah in restaurants – Order is challenged on the ground that petitioner is following COTP Act, 2003 & Rules 2008 and cannot be prohibited to do business, as the order is regulatory, not including power of prohibition & temporary in nature for two months – Held – Writ court rightly considered that hookah cannot be provided at each & every table in restaurant – If owner offers the same to customer, then same shall be in consonance with the Act and Rules – Section 144 of Cr.P.C. provides power to grant only temporary order for two months & its nature is to regulate the power not to prohibit – Appeal allowed partly. [Rahul Kalra Vs. State of M.P.] (DB)...*25*

सिगरेट एवं अन्य तम्बाकू उत्पाद (विज्ञापन का प्रतिषेध तथा व्यापार, वाणिज्य, उत्पादन, प्रदाय और वितरण का विनियमन) अधिनियम, (2003 का 34) एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 144 – दण्ड प्रक्रिया संहिता, 1973 की धारा 144 के अंतर्गत अतिरिक्त जिला मजिस्ट्रेट ने रेस्तरां में हुक्का पीने पर प्रतिबंध लगाया – आदेश को इस आधार पर चुनौती दी गई कि याची सिगरेट एवं अन्य तम्बाकू उत्पाद अधिनियम, 2003 एवं नियम 2008 का पालन कर रहा है तथा व्यापार करने से प्रतिषिद्ध नहीं किया जा सकता, क्योंकि आदेश विनियामक है, जिसमें प्रतिषेध करने की शक्ति सम्मिलित नहीं है तथा अस्थायी प्रकृति का दो माह के लिए है – अभिनिर्धारित – रिट न्यायालय ने उचित रूप से विचार में लिया कि रेस्तरां की हर एक मेज पर हुक्का नहीं दिया जा सकता – यदि मालिक ग्राहक को उक्त को पेश करता है, तो यह अधिनियम तथा नियमों के साथ असंगति होगी – दण्ड प्रक्रिया संहिता की धारा 144 दो माह के लिए अस्थायी आदेश जारी करने हेतु शक्ति प्रदान करती है तथा उसकी प्रकृति शक्ति को विनियमित करना है न कि प्रतिषिद्ध करना – अपील अंशतः मंजूर। (राहुल कालरा वि. म.प्र. राज्य) (DB)...*25

Civil Procedure Code (5 of 1908), Section 100 – Second Appeal

– Appellant neither a party before the trial Court nor before First Appellate Court – Seeking leave to file second appeal – Facts – Appellant purchased the suit property after the property has been transferred three to four times – Trial court partly decreed the suit on 27.09.1997 – First Appellate Court dismissed the appeal on 16.01.2004 – Appellant purchased the land vide registered sale deed dated 29.03.2008 – Whether in such facts leave to file second appeal can be granted – Held – No, as the litigation has attained finality in the year 2004 with dismissal of regular Civil Appeal and the appellant has purchased the property in question on 29.03.2008, so he cannot be said to have acquired any right through its original owner or through subsequent purchasers – Appellant is at liberty to bring a fresh suit – Leave to file second appeal cannot be granted – Appeal dismissed. [Karuna Gehlot (Smt.) Vs. Manikchand Choubey] ...624

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – अपीलार्थी, न तो विचारण न्यायालय न ही प्रथम अपीली न्यायालय के समक्ष पक्षकार – द्वितीय अपील प्रस्तुत करने की अनुमति चाहता है – तथ्य – तीन से चार बार संपत्ति अंतरित होने के बाद अपीलार्थी ने वाद संपत्ति को क्रय किया – दिनांक 27.09.1997 को विचारण न्यायालय ने वाद को अंशतः डिक्रीत किया – दिनांक 16.01.2004 को प्रथम अपीली न्यायालय ने अपील खारिज की – अपीलार्थी ने दिनांक 29.03.2008 को रजिस्ट्रीकृत विक्रय विलेख के माध्यम से भूमि क्रय की – क्या ऐसे तथ्यों में द्वितीय अपील प्रस्तुत करने हेतु अनुमति प्रदान की जा सकती है – अभिनिर्धारित – नहीं, चूंकि मुकदमे ने वर्ष 2004 में नियमित सिविल अपील की खारिजी के साथ ही अतिमता प्राप्त की है तथा अपीलार्थी ने दिनांक 29.03.2008 को प्रश्नगत संपत्ति क्रय की है, इसलिए यह नहीं कहा जा सकता है कि उसने वास्तविक स्वामी या पश्चात्कर्त्ता क्रैताओं द्वारा कोई अधिकार अर्जित किया है – अपीलार्थी नया वाद लाने हेतु स्वतंत्र है – द्वितीय अपील प्रस्तुत करने हेतु अनुमति प्रदान नहीं की जा सकती – अपील खारिज। (करुणा गहलोत (श्रीमती) वि. मानिकचन्द चौबे) ...624

Civil Procedure Code (5 of 1908), Section 100 – Second Appeal – Concurrent finding of facts – Appellant/Plaintiff filed a suit against present respondents and two other persons for declaring sale deeds as null and void and for perpetual injunction – Ex-parte decree against the defendants was passed on 04.07.2001 – No appeal preferred against it – Thereafter, present respondents forcefully occupied the disputed land and constructed houses on it – Execution case filed by present appellant was also dismissed – Subsequent suit filed by appellant for possession of same land was dismissed on 08.05.2014 and his appeal

also remained unsuccessful – Present suit property and previous suit property are one and the same – Previous decree not declaring title of plaintiff but only declaring sale deed as *null and void* – Appellant himself admitted that respondents were in possession of disputed land before 2001 – Held – Though in previous suit decree of perpetual injunction was granted in favour of the appellant on 04.07.2001 but appellant was not in actual possession prior to passing of decree, and he had not sought the relief of possession by amending his plaint in previously decided suit – Concurrent finding that appellant remained unsuccessful in proving title and possession – No substantial question of law arise – Appeal dismissed in *limine*. [Ram Babu Pathak Vs. Munnillal] ...359

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – तथ्यों के समवर्ती निष्कर्ष – अपीलार्थी/वादी ने वर्तमान प्रत्यर्थीगण एवं दो अन्य व्यक्तियों के विरुद्ध विक्रय विलेख को शून्य एवं अकृत घोषित किये जाने हेतु एवं स्थाई व्यादेश हेतु वाद प्रस्तुत किया – दिनांक 04.07.2001 को प्रतिवादीगण के विरुद्ध एक पक्षीय डिक्री पारित की गई – उसके विरुद्ध कोई अपील प्रस्तुत नहीं की गई – तत्पश्चात्, वर्तमान प्रत्यर्थीगण ने विवादित भूमि को बलपूर्वक अधिभोग में लिया और उस पर मकानों का निर्माण किया – वर्तमान अपीलार्थी द्वारा प्रस्तुत किया गया निष्पादन प्रकरण भी खारिज किया गया था – अपीलार्थी द्वारा उक्त भूमि के कब्जे हेतु प्रस्तुत किया गया पश्चात्तवर्ती वाद दिनांक 08.05.2014 को खारिज किया गया और उसकी अपील भी असफल रही – वर्तमान वाद सम्पत्ति एवं पूर्ववर्ती वाद की सम्पत्ति एक ही है – पूर्वतर डिक्री द्वारा वादी के हक की घोषणा नहीं की गई बल्कि केवल विक्रय विलेख को शून्य एवं अकृत घोषित किया गया – अपीलार्थी ने स्वयं स्वीकार किया है कि प्रत्यर्थीगण के पास विवादित भूमि का कब्जा वर्ष 2001 के पूर्व से था – अभिनिर्धारित – यद्यपि पूर्वतर वाद में अपीलार्थी के पक्ष में स्थाई व्यादेश की डिक्री दिनांक 04.07.2001 को प्रदान की गई थी किन्तु डिक्री पारित किये जाने से पूर्व वादी के पास वास्तविक कब्जा नहीं था और उसने पूर्ववर्ती विनिश्चित किये गये वाद में वाद पत्र के संशोधन द्वारा कब्जे का अनुतोष नहीं चाहा था – समवर्ती निष्कर्ष कि अपीलार्थी, स्वत्व एवं कब्जा साबित करने में असफल रहा – विधि का कोई सारवान प्रश्न उत्पन्न नहीं होता – अपील आरंभतः खारिज। (राम बाबू पाठक वि. मुन्नीलाल) ...359

Civil Procedure Code (5 of 1908), Section 100 & Order 41 Rule 22 – Appeal preferred by the appellant as well as the cross-objections filed by the respondents dismissed by the first appellate Court against which the appellant has preferred second appeal and respondents filed no appeal – Held – Once respondents did not file appeal against dismissal of cross-objections, it can be assumed that they accepted

the findings of the first appellate Court – Appeal is the continuation of suit and therefore the pleadings raised in the cross-objection by respondents are binding over them. [Rajkumar Chug Vs. Dheerendra Chug] ...638

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 व आदेश 41 नियम 22 – अपीलार्थी द्वारा की गई अपील तथा प्रत्यर्थागण द्वारा प्रस्तुत किये गये प्रत्याक्षेप प्रथम अपीली न्यायालय द्वारा खारिज किये गये जिसके विरुद्ध अपीलार्थी ने द्वितीय अपील की एवं प्रत्यर्थागण ने कोई अपील प्रस्तुत नहीं की – अभिनिर्धारित – जब प्रत्यर्थागण ने प्रत्याक्षेपों की खारिजी के विरुद्ध अपील प्रस्तुत नहीं की है, तब यह धारणा की जा सकती है कि उन्होंने प्रथम अपीली न्यायालय के निष्कर्षों को स्वीकार कर लिया है – अपील, वाद का जारी रहना है एवं इसलिए प्रत्यर्थागण द्वारा अभिवचनों में उठाये गये प्रत्याक्षेप उन पर आबद्धकर हैं। (राजकुमार चुग वि. धीरेन्द्र चुग) ...638

Civil Procedure Code (5 of 1908), Section 100(4) & (5) – Only one substantial question of law framed at the time of admission of second appeal and no application has been preferred by the respondents during pendency of appeal for the last 13 years to frame additional substantial question of law – Court declined to hear on any other ground. [Rajkumar Chug Vs. Dheerendra Chug] ...638

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100(4) व (5) – द्वितीय अपील की ग्राह्यता के समय विधि का केवल एक सारवान् प्रश्न विरचित किया गया एवं विधि का कोई अतिरिक्त सारवान् प्रश्न विरचित करने हेतु पिछले 13 वर्षों से अपील के लंबित रहने के दौरान प्रत्यर्था द्वारा कोई आवेदन प्रस्तुत नहीं किया गया – न्यायालय ने किसी अन्य आधार पर सुनने से इंकार किया। (राजकुमार चुग वि. धीरेन्द्र चुग) ...638

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. [Ajay Arjun Singh Vs. Sharadendu Tiwari] (SC)...10

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। (अजय अर्जुन सिंह वि. शारदेन्दु तिवारी) (SC)...10

*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. [Mohanlal Vs. Shravan Kumar] ...*8*

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। (मोहनलाल वि. श्रवण कुमार) ...*8

*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. [Ganesh Prasad Ojha Vs. Shri Hariram Ji Ojha] ...*4*

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। (गणेश प्रसाद ओझा वि. श्री हरिराम जी ओझा) ...*4

Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Application is required to be decided in the light of the pleadings contained in the plaint – Jurisdiction of the civil court is not barred when the suit is based on the ground that the order under challenge is a nullity. [Prakash Vs. Manager, Smriti Nagarik Sahakari Bank] ...344

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – आवेदन का विनिश्चय वादपत्र में अंतर्विष्ट अभिवचनों के आलोक में किया जाना अपेक्षित है – सिविल न्यायालय की अधिकारिता वर्जित नहीं जब वाद इस आधार पर आधारित हो कि चुनौती दिया गया आदेश अकृत है। (प्रकाश वि. मेनेजर, स्मृति नागरिक सहकारी बैंक) ...344

Civil Procedure Code (5 of 1908), Order 7 Rule 11 – See – Arbitration and Conciliation Act, 1996, Section 45 [Sasan Power Ltd. Vs. North American Coal Corporation India Pvt. Ltd.] (SC)...515

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – देखें – माध्यस्थ्य और सुलह अधिनियम, 1996, धारा 45 (सासन पावर लि. वि. नार्थ अमेरिकन कोल कारपोरेशन इंडिया प्रा. लि.) (SC)...515

Civil Procedure Code (5 of 1908), Order 8 Rule 6-A – Counter Claim – Filing – Purpose of – To avoid multiplicity of judicial proceedings – All disputes between same parties being decided in the course of same proceedings. [Friends School Governing Board, India Vs. Municipal Council] ...332

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 6-ए – प्रतिदावा – प्रस्तुति – का प्रयोजन – न्यायिक कार्यवाहियों की बहुलता से बचने के लिए – समान पक्षकारों के मध्य सभी विवादों को उसी कार्यवाही के दौरान निर्णीत किया जाता है। (फ्रेंड्स स्कूल गवर्निंग बोर्ड, इंडिया वि. म्यूनिसिपल काउंसिल)...332

Civil Procedure Code (5 of 1908), Order 8 Rule 6-A – Counter Claim – Petitioner/plaintiff filed a suit for permanent injunction – Written Statement filed – Framing of issues – Evidence on affidavit filed by plaintiff – Respondent No. 1 filed an application for amendment in the written statement so as to seek declaration of title by way of counter claim on the basis of adverse possession in favour of him – Amendment application allowed by the trial Court on the ground that in the counter claim, position of defendant is like a plaintiff and he is entitled to amend the written statement and raise the counter claim – Held – As the issues have already been framed and the trial has also

commenced, so the counter claim which is not contained in the original written statement may be refused and the plea of adverse possession in the counter claim cannot be taken as a weapon of offence and it can be taken only as shield to defence – Trial Court to decide suit on basis of original pleadings and issues framed by it – Petition allowed. [Friends School Governing Board, India Vs. Municipal Council] ...332

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 6-ए – प्रतिदावा – याची/वादी ने स्थायी व्यादेश हेतु वाद प्रस्तुत किया – लिखित कथन प्रस्तुत – विवाद्यकों की विरचना – वादी द्वारा शपथ पत्र पर साक्ष्य प्रस्तुत – प्रत्यर्थी क्र. 1 ने प्रतिकूल कब्जे के आधार पर अपने पक्ष में स्वत्व की घोषणा चाहने के लिए प्रतिदावे के माध्यम से लिखित कथन में संशोधन करने हेतु एक आवेदन प्रस्तुत किया – विचारण न्यायालय द्वारा इस आधार पर संशोधन आवेदन मंजूर किया गया कि प्रतिदावे में प्रतिवादी की स्थिति वादी के समान है तथा वह लिखित कथन संशोधित करने एवं प्रतिदावा उठाने का हकदार है – अभिनिर्धारित – चूँकि विवाद्यकों की विरचना पहले ही हो चुकी है एवं विचारण भी आरम्भ हो गया है, इसलिए प्रतिदावा जो कि मूल लिखित कथन में अंतर्विष्ट नहीं है, अस्वीकार किया जा सकता है तथा प्रतिदावा में प्रतिकूल आधिपत्य के अभिवाक् को आघात करने के एक हथियार के रूप में नहीं लिया जा सकता एवं इसे केवल बचाव के लिए ढाल के रूप में लिया जा सकता है – विचारण न्यायालय मूल अभिवक्तियों एवं स्वयं द्वारा विरचित विवाद्यकों के आधार पर वाद निर्णीत करेगा – याचिका मंजूर। (फ्रेन्ड्स स्कूल गवर्निंग बोर्ड, इंडिया वि. म्यूनिसिपल काउंसिल) ...332

Civil Procedure Code (5 of 1908), Order 8 Rule 6-A – Counter Claim – Suit for possession and mesne profits – Written statement filed – Subsequently, defendants filed an application under Order 6 Rule 17 of C.P.C. for setting up counter claim against the plaintiffs and other defendants which was rejected – A Petition was filed by defendants which was withdrawn with liberty to set up afresh counter claim, only against the plaintiffs – Fresh amendment application was filed in this regard and the same was allowed – Present petition by plaintiffs on the ground that whether a defendant has unfettered right to file counter claim at any stage after filing of the written statement – Held – The defendant as of right can set up a counter claim in the written statement itself but the defendant has no unfettered right to file counter claim after filing of written statement and subsequently it may be preferred by way of amendment application but subject to leave of the court and a counter claim can also be filed by way of subsequent pleading as per Order 8 Rule 9 of C.P.C. – Impugned order set aside –

Trial Court is directed to decide the amendment application afresh as per the law laid down by the Apex Court. [Sudershan Tiwari (Smt.) Vs. Sheo Prasad Tiwari Trust]
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सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 6-ए - प्रतिदावा - कब्जा एवं अंतःकालीन लाभ हेतु वाद - लिखित कथन प्रस्तुत - तत्पश्चात्, प्रतिवादीगण ने सिविल प्रक्रिया संहिता के आदेश 6 नियम 17 के अंतर्गत वादीगण एवं अन्य प्रतिवादीगण के विरुद्ध प्रतिदावा स्थापित करने हेतु आवेदन प्रस्तुत किया, जो कि नामंजूर किया गया - प्रतिवादीगण द्वारा एक याचिका प्रस्तुत की गई थी जो कि केवल वादीगण के विरुद्ध नए सिरे से प्रतिदावा स्थापित करने की स्वतंत्रता के साथ वापस ली गई - इस संदर्भ में नया संशोधन आवेदन प्रस्तुत किया गया था तथा उक्त को मंजूर भी किया गया था - वादीगण द्वारा इस आधार पर वर्तमान याचिका कि क्या एक प्रतिवादी को लिखित कथन प्रस्तुत होने के पश्चात् किसी भी प्रक्रम पर प्रतिदावा प्रस्तुत करने का बंधनमुक्त अधिकार है - अभिनिर्धारित - प्रतिवादी, अधिकार के रूप में लिखित कथन में ही प्रतिदावा प्रस्तुत कर सकता है, लेकिन प्रतिवादी को लिखित कथन प्रस्तुत होने के पश्चात् प्रतिदावा प्रस्तुत करने का कोई बंधनमुक्त अधिकार नहीं है तथा तत्पश्चात् इसे संशोधन आवेदन के माध्यम से प्राथमिकता दी जा सकती है परंतु न्यायालय की अनुमति के अधीन एवं सिविल प्रक्रिया संहिता के आदेश 8 नियम 9 के अनुसार पश्चात्पूर्ती अभिवचन के माध्यम से भी प्रतिदावा प्रस्तुत किया जा सकता है - आक्षेपित आदेश अपास्त - विचारण न्यायालय को सर्वोच्च न्यायालय द्वारा प्रतिपादित विधि के अनुसार संशोधन आवेदन को नए सिरे से विनिश्चित करने हेतु निर्देशित किया जाता है। (सुदर्शन तिवारी (श्रीमती) वि. श्योप्रसाद तिवारी ट्रस्ट)
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Civil Procedure Code (5 of 1908), Order 8 Rule 6-A - Counter Claim - Whether a counter claim can be directed against a co-defendant alongwith the plaintiff or solely against a co-defendant only - Held - A counter claim can be directed against a co-defendant alongwith the plaintiff, but a counter claim directed solely against the co-defendant is not maintainable. [Sudershan Tiwari (Smt.) Vs. Sheo Prasad Tiwari Trust]
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सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 6-ए - प्रतिदावा - क्या प्रतिदावा वादी के साथ सह-प्रतिवादी के विरुद्ध या केवल सह-प्रतिवादी के विरुद्ध ही निर्देशित किया जा सकता है - अभिनिर्धारित - प्रतिदावा, वादी के साथ सह-प्रतिवादी के विरुद्ध निर्देशित किया जा सकता है, परंतु केवल सह-प्रतिवादी के विरुद्ध निर्देशित प्रतिदावा पोषणीय नहीं है। (सुदर्शन तिवारी (श्रीमती) वि. श्योप्रसाद तिवारी ट्रस्ट)
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Civil Procedure Code (5 of 1908), Order 9 Rule 7 - Petition

filed against rejection of application under Order 9 Rule 7, as not maintainable – Held – Provision attracted when court has adjourned the hearing of suit ex-parte and application is filed before such hearing – In the present case where the final arguments are heard and matter is reserved for judgment, aforesaid provision will not be attracted because in such an eventuality the case is not adjourned for hearing – Trial court has not committed any error – Petition dismissed. [Jaitun Bi (Smt.) Vs. Mohd. Ameen] ...335

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 7 – आदेश 9 नियम 7 के अंतर्गत आवेदन को पोषणीय न होने के कारण नामजूर किये जाने के विरुद्ध याचिका प्रस्तुत की गई – अभिनिर्धारित – उपबंध आकर्षित होगा जब न्यायालय ने एकपक्षीय वाद की सुनवाई स्थगित कर दी है तथा ऐसी सुनवाई के पूर्व ही आवेदन प्रस्तुत किया गया है – वर्तमान प्रकरण में जहाँ अंतिम तर्क सुने जा चुके हैं तथा मामला निर्णय हेतु सुरक्षित रखा गया है, उपर्युक्त उपबंध आकर्षित नहीं होगा क्योंकि ऐसी संभावित परिस्थिति में प्रकरण को सुनवाई हेतु स्थगित नहीं किया गया है – विचारण न्यायालय ने कोई त्रुटि कारित नहीं की है – याचिका खारिज। (जैतून बी (श्रीमती) वि. मोहम्मद अमीन) ...335

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. [Raghuveer Vs. Hari Prasad] ...148

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 तामिली करने का प्रयास किया, परन्तु बारिश के कारण, अभिकथित रूप से समन तामिल किये बिना ही वापस किया गया – किसी साक्षी द्वारा आदेशिका तामिलकर्ता की रिपोर्ट पर हस्ताक्षर नहीं किये गये थे – समन की प्रभावकारी तामिली नहीं – आवेदन मंजूर। (रघुवीर वि. हरिप्रसाद) ...148

Civil Procedure Code (5 of 1908), Order 14 Rule 2 – Preliminary issue – Petition against rejection of an application under Order 14 Rule 2 of the Civil Procedure Code – Respondent/plaintiff filed a suit for recovery of money after lapse of three years – Petitioner filed an application for deciding the issue of limitation as a preliminary issue which was rejected by trial Court – Held – There is a factual dispute with regard to the actual date of cause of action which can be decided

only after recording evidence – Trial court has not committed any error in rejecting the application – Petition dismissed. [Lokumal Nandwani Vs. Tumato Technology Pvt. Ltd.] ...601

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 14 नियम 2 – प्रारंभिक विवाद्यक – सिविल प्रक्रिया संहिता के आदेश 14 नियम 2 के अंतर्गत आवेदन की नामंजूरी के विरुद्ध याचिका – प्रत्यर्थी/वादी ने तीन वर्ष बीत जाने के पश्चात् धन की वसूली हेतु वाद प्रस्तुत किया – याची ने परिसीमा के विवाद्यक को प्रारंभिक विवाद्यक के रूप में विनिश्चित किये जाने हेतु आवेदन प्रस्तुत किया जो कि विचारण न्यायालय द्वारा नामंजूर किया गया – अभिनिर्धारित – वाद हेतुक की वास्तविक दिनांक के संबंध में तथ्यात्मक विवाद है – जिसे केवल साक्ष्य अभिलिखित करने के पश्चात् ही विनिश्चित किया जा सकता है – विचारण न्यायालय ने आवेदन नामंजूर करने में कोई त्रुटि नहीं की है – याचिका खारिज। (लोकुमल नंदवानी वि. टुमाटो टेक्नोलॉजी प्रा. लि.) ...601

Civil Procedure Code (5 of 1908), Order 41 Rule 27 and Hindu Succession Act (30 of 1956), Section 15 & 16 – Additional evidence – Suit for declaration, partition and possession – Held – Appellant/defendant has not stated anything as to she had no knowledge of such additional evidence i.e. will and sale-deed, despite due diligence – No reason is given for failure to produce document before trial Court which is sought to be produced in the court of appeal – Appellant/defendant neither in her written statement nor in her statement before the trial Court has stated anything regarding the said will and sale deed – In absence of a plea, no amount of evidence laid in relation thereto can be looked into – Appellant failed to demonstrate existence of grounds as enumerated u/O 41 Rule 27 – Appellate Court has not committed any illegality in disallowing the application u/O 41 Rule 27 – Appeal dismissed. [Ramkuriya Bai (Smt.) Vs. Smt. Kachra Bai (Dead)] ...656

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 27 एवं हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 15 व 16 – अतिरिक्त साक्ष्य – घोषणा, विभाजन एवं कब्जा हेतु वाद – अभिनिर्धारित – अपीलार्थी/प्रतिवादी ने ऐसा कोई कथन नहीं किया है कि सम्यक् तत्परता के बावजूद उसे उक्त अतिरिक्त साक्ष्य अर्थात् वसीयत एवं विक्रय विलेख के संबंध में कोई ज्ञान नहीं था – दस्तावेज जिसे अपीली न्यायालय में प्रस्तुत करना चाहा गया है उसे विचारण न्यायालय के समक्ष प्रस्तुत करने में हुई असफलता का कोई कारण नहीं दिया गया है – अपीलार्थी/प्रतिवादी ने न तो अपने लिखित कथन में, न ही विचारण न्यायालय के समक्ष अपने कथन में उक्त वसीयत एवं विक्रय विलेख के संबंध में कोई कथन किये हैं – किसी अभिवाक् की अनुपस्थिति में, उसके संबंध में

प्रस्तुत किये जाने वाले किसी साक्ष्य पर विचार नहीं किया जा सकता — अपीलार्थी आदेश 41 नियम 27 के अंतर्गत बताये आधारों का अस्तित्व दर्शाने में असफल रहा — अपीली न्यायालय ने आदेश 41 नियम 27 के अंतर्गत आवेदन नामंजूर करने में कोई अवैधता कारित नहीं की है — अपील खारिज। (रामकुरिया बाई (श्रीमती) वि. श्रीमती कचरा बाई (मृतक)) ...656

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. [Guman Singh Damor Vs. State of M.P.] (DB)...*5

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 विरुद्ध 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। (गुमान सिंह डामोर वि. म.प्र. राज्य) (DB)...*5

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. [Pooran Singh Sisodia Vs. High Court of M.P.] (DB)...81

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। (पूरन सिंह सिसोदिया वि. हाईकोर्ट ऑफ एम.पी.) (DB)...81

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. [Pooran Singh Sisodia Vs. High Court of M.P.] (DB)...81

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। (पूरन सिंह सिसोदिया वि. हाईकोर्ट ऑफ एम.पी.) (DB)...81

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. [Pooran Singh Sisodia Vs. High Court of M.P.] (DB)...81

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। (पूरन सिंह सिसोदिया वि. हाईकोर्ट ऑफ एम.पी.) (DB)...81

Commission for Protection of Child Rights Act, 2005 (4 of 2006) – Applicability – United Nations Convention – Chief Justice of Madhya Pradesh High Court has directed for circulation of the ‘Child access & custody guidelines’ and pertaining Plan for guidance, among Additional District Judges, Family Court Judges & marriage counsellors in State of M.P. – Convention ought to be followed by competent courts having power to declare guardian – Under Act of 2015 and Rules framed thereunder, Child Welfare Committee is not conferred with power to give custody of the child – In a case wherein due to dispute between husband and wife proceedings are pending between them, Child Welfare Committee cannot direct visitation right to meet child either to husband or wife – Powers exercised by the Committee is contrary to law – Order set aside – Petition allowed. [Priya Yadav Vs. State of M.P.] ...605

बाल अधिकार संरक्षण के लिए आयोग अधिनियम, 2005 (2006 का 4) – पोषणीयता – संयुक्त राष्ट्र कन्वेंशन – म.प्र. उच्च न्यायालय के मुख्य न्यायाधिपति ने ‘बालक से मिलने की अनुमति एवं अभिरक्षा के दिशानिर्देश’ एवं तत्संबंधी मार्गदर्शन हेतु योजना का अतिरिक्त जिला न्यायाधीशों कुटुम्ब न्यायालय के

न्यायाधीशों एवं म.प्र. राज्य के विवाह परामर्शदाताओं के बीच परिचालन हेतु निदेशित किया है – सक्षम न्यायालयों द्वारा कन्वेंशन का पालन किया जाना चाहिए जिन्हें संरक्षक की घोषणा करने की शक्ति प्राप्त है – अधिनियम 2015 एवं उसके अधीन विरचित नियमों के अंतर्गत बालक की अभिरक्षा देने की शक्ति बाल कल्याण समिति को प्रदत्त नहीं है – ऐसे प्रकरण में जहाँ पति-पत्नी के बीच विवाद के कारण उनके मध्य कार्यवाहियां लंबित हैं, बाल कल्याण समिति या तो पति अथवा पत्नी किसी को भी बालक से मिलने के लिए मुलाकात का अधिकार निदेशित नहीं कर सकती – समिति द्वारा प्रयुक्त शक्तियां, विधि के प्रतिकूल हैं – आदेश अपास्त – याचिका मंजूर। (प्रिया यादव वि. म.प्र. राज्य) ...605

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. [Supreme Transport (M/s.) Vs. State of M.P.] (DB)...*15

संविधान – अनुच्छेद 14 – हवाई टैक्सी 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, व्यक्तियुक्तता एवं उद्देश्य जिसे प्राप्त करना चाहा गया है, की कसौटी पर उसका विश्लेषण करने के पश्चात्, 'दूध का जला छाँछ भी फूँक- फूँककर पीता है' के सिद्धांत पर, पूर्व व्यक्तिग्री को उचित रूप से बोली लगाने की प्रक्रिया में सहभागी होने से दूर रखा गया है – याचिका खारिज। (सुप्रीम ट्रान्सपोर्ट (मे.) वि. म.प्र. राज्य) (DB)...*15

Constitution – Article 14 & 226 – Government Contract – Notice Inviting Tender – Conditions – Scope of Judicial Review – Held – Scope is confined as to whether there was any illegality, irrationality or procedural impropriety committed by the decision making authorities – Tenders floated by government are amenable to judicial review only to prevent arbitrariness and favouritism and to protect the financial interest of the State and public interest – Court cannot check the

soundness of the decision made by competent authorities – Duty of the Court is only to examine whether decision making process was fair, reasonable, transparent and bonafide with no perceptible injury to public interest – In the present case, decision has been taken by committee of experts after due deliberations and this court in exercise of power under Article 226 of Constitution cannot sit in appeal over the decisions taken by the committee of experts – From perusal of record, it is evident that impugned conditions in Notice Inviting Tender incorporated by the committee after detailed deliberations and application of mind – No interference called for. [Holoflex Ltd. (M/s.) Vs. State of M.P.] (DB)...573

संविधान – अनुच्छेद 14 व 226 – सरकारी संविदा – निविदा आमंत्रण सूचना – शर्तें – न्यायिक पुनर्विलोकन की परिधि – अभिनिर्धारित – परिधि यहां तक सीमित है कि क्या निर्णय करने वाले प्राधिकारियों द्वारा कोई अवैधता, विवेकहीनता अथवा प्रक्रियात्मक अनुचितता कारित की गई थी – सरकार द्वारा जारी की गई निविदायें न्यायिक पुनर्विलोकन के अध्यक्षीन केवल मनमानेपन एवं पक्षपात के निवारण एवं राज्य के वित्तीय हित तथा लोकहित के संरक्षण हेतु है – न्यायालय, सक्षम प्राधिकारियों द्वारा लिये गये निर्णय की तर्कसंगतता की जांच नहीं कर सकता – न्यायालय का कर्तव्य केवल यह परीक्षण करना है कि क्या निर्णय की प्रक्रिया निष्पक्ष, युक्तियुक्त, पारदर्शी एवं सद्भाविक थी जिससे लोकहित को कोई दृष्टिगोचर क्षति नहीं हुई – वर्तमान प्रकरण में, विशेषज्ञों की समिति द्वारा सम्यक् विमर्श के पश्चात् निर्णय लिया गया है और यह न्यायालय, विशेषज्ञों की समिति द्वारा लिये गये निर्णय पर, संविधान के अनुच्छेद 226 के अंतर्गत शक्ति का प्रयोग करते हुए अपील के रूप में सुनवाई नहीं कर सकता – अभिलेख के अवलोकन से यह सुस्पष्ट है कि समिति द्वारा विस्तृत विचार-विमर्श एवं मस्तिष्क का प्रयोग कर निविदा आमंत्रण सूचना में आक्षेपित शर्तें समाविष्ट की गई हैं – हस्तक्षेप की आवश्यकता नहीं। (होलोफ्लेक्स लि. (मे.) वि. म.प्र. राज्य) (DB)...573

Constitution – Article 14 & 226 – Government Contract – Notice Inviting Tender – Grievance and Remedy – Power/Authority vested in the Excise Commissioner regarding Notice Inviting Tender is directory in nature – He has the authority to lay down terms and condition thereon – Liberty granted to petitioners to approach Excise Commissioner for their grievance – Petitions disposed. [Holoflex Ltd. (M/s.) Vs. State of M.P.] (DB)...573

संविधान – अनुच्छेद 14 व 226 – सरकारी संविदा – निविदा आमंत्रण सूचना – शिकायत एवं उपचार – निविदा आमंत्रण सूचना के संबंध में आवकारी

आयुक्त में निहित शक्ति/प्राधिकार निदेशात्मक स्वरूप की है – उसे उसमें निबंधन एवं शर्तें निर्धारित करने का प्राधिकार है – याचीगण को आबकारी आयुक्त के समक्ष अपनी शिकायत रखने की स्वतंत्रता प्रदान की जाती है – याचिकाओं का निपटारा किया गया। (होलोफलेक्स लि. (मे.) वि. म.प्र. राज्य) (DB)...573

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. [Shivshankar Mandil Vs. Shri G.S. Lamba] ...231

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। (शिवशंकर मांडिल वि. श्री जी.एस. लांबा) ...231

Constitution – Article 142 – See – Narcotic Drugs and Psychotropic Substances Act, 1985, Section 37 [Jagdish Vs. State of M.P.] ...684

संविधान – अनुच्छेद 142 – देखें – स्वापक औषधि और मनःप्रमावी पदार्थ अधिनियम, 1985, धारा 37 (जगदीश वि. म.प्र. राज्य) ...684

Constitution – Article 215 – See – Contempt of Courts Act, 1971, Section 10 & 12 [Satish Shrivastava Vs. M.K. Varshney] ...*27

संविधान – अनुच्छेद 215 – देखें – न्यायालय अवमान अधिनियम, 1971, धारा 10 व 12 (सतीश श्रीवास्तव वि. एम.के. वार्ष्णेय) ...*27

Constitution – Article 226 – Admission and Compensation – Petition against cancellation of admission despite online counselling and deposit of the required fees, on the ground that Institute is not approved from the University for the course of M.Tech (Civil Structural Engineering) – Held – Prospectus of the Institute shows that course of M.Tech (Civil Structural Engineering) is an approved course – Relief of admission cannot be granted on account of efflux of time – Amount deposited by the petitioners be refunded along with interest @ 6% p.a. till it is refunded – S.P. Gwalior directed to take action against the Institute and its Vice President on the complaint already filed by the petitioners – Compensation – Further held, since present Institute is a private educational institution not receiving any grant-in-aid from the State Government, compensation

against it cannot be granted in a petition under Article 226 as such remedy cannot be treated as public law remedy – Cost of Petition Rs. 5000 be deposited by the Institute – Petition disposed. [Pratush Kumar Sharma Vs. State of M.P.] (DB)...*38

संविधान – अनुच्छेद 226 – प्रवेश एवं प्रतिकर – ऑनलाइन काउंसलिंग एवं अपेक्षित फीस के जमा किये जाने के बावजूद, इस आधार पर कि संस्था एम. टेक. (सिविल संरचनात्मक इंजीनियरिंग) पाठ्यक्रम हेतु विश्वविद्यालय से अनुमोदित नहीं है, प्रवेश रद्द किये जाने के विरुद्ध याचिका – अभिनिर्धारित – संस्था का प्रास्पेक्टस यह दर्शाता है कि एम.टेक. (सिविल संरचनात्मक इंजीनियरिंग) का पाठ्यक्रम एक अनुमोदित पाठ्यक्रम है – समय बीत जाने के कारण प्रवेश का अनुतोष प्रदान नहीं किया जा सकता – याचीगण द्वारा जमा की गई राशि वापस कर दिये जाने तक 6 प्रतिशत ब्याज प्रतिवर्ष की दर से लौटाई/वापस की जाये – पुलिस अधीक्षक ग्वालियर को याची द्वारा पहले ही प्रस्तुत किये गये परिवाद पर, संस्था एवं उसके उपाध्यक्ष के विरुद्ध कार्रवाई करने हेतु निदेशित किया गया – प्रतिकर – आगे अभिनिर्धारित किया गया कि चूंकि वर्तमान संस्था एक निजी शैक्षणिक संस्थान है जो कि राज्य सरकार से कोई सहायता अनुदान प्राप्त नहीं करती है, अनुच्छेद 226 के अंतर्गत एक याचिका में उसके विरुद्ध प्रतिकर प्रदान नहीं किया जा सकता क्योंकि उक्त उपचार को लोक विधि उपचार नहीं माना जा सकता – संस्था द्वारा याचिका व्यय रु. 5000 जमा किया जाए – याचिका निराकृत। (प्रत्युष कुमार शर्मा वि. म.प्र. राज्य) (DB)...*38

Constitution – Article 226 – Cantonment Electoral Rules, 2007 – Rule 54 & 55 – Maintainability of writ petition – Challenge to the voter list – Alternate remedy – Election Petition under Rule 54 of the Rules of 2007 – Election Petition is not maintainable either for inclusion or exclusion in the electoral rolls. [Sunil Kumar Kori Vs. Gopal Das Kabra] (SC)...261

संविधान – अनुच्छेद 226 – छावनी निर्वाचन नियम, 2007 – नियम 54 व 55 – रिट याचिका की पोषणीयता – मतदाता सूची को चुनौती – वैकल्पिक उपचार – 2007 के नियमों के नियम 54 के अंतर्गत निर्वाचन याचिका – निर्वाचन याचिका, निर्वाचक नामावली में या तो सम्मिलित करने के लिए या अपवर्जित करने के लिए पोषणीय नहीं है। (सुनील कुमार कोरी वि. गोपाल दास काबरा) (SC)...261

Constitution – Article 226 – Compensation to victims of 1984 riots – First Information Report lodged – Various directions by High Court to the State Government to provide compensation to the victims of 1984 riots – Petitioners of both the Writ Petition filed applications before District Magistrate claiming compensation – State Government

in mechanical manner have rejected the claim – Held – FIR and quantum of loss has not been denied/disputed by the respondents – Collector directed to pay compensation towards the losses incurred by the petitioners alongwith interest @ 8.5% per annum, right from the date of loss suffered since 1984 till it is actually paid – Further directed to complete the exercise within a period of ninety days from the date of order failing which, shall have to face *suo motu* contempt proceeding – Petition allowed. [Surjeet Singh Vs. State of M.P.] ...*43

संविधान – अनुच्छेद 226 – 1984 के बलवा पीड़ितों के लिए प्रतिकर – प्रथम सूचना प्रतिवेदन दर्ज – उच्च न्यायालय द्वारा 1984 के बलवा पीड़ितों हेतु प्रतिकर प्रदान करने के लिए राज्य सरकार को विभिन्न निदेश – दोनों रिट याचिका के याचीगण ने जिला मजिस्ट्रेट के समक्ष प्रतिकर का दावा करते हुए आवेदन प्रस्तुत किये – राज्य सरकार ने यंत्रवत ढंग से याचीगण के दावे को अस्वीकार किया – अभिनिर्धारित – प्रथम सूचना प्रतिवेदन एवं हानि की मात्रा को प्रत्यर्थीगण द्वारा अस्वीकार/विवादित नहीं किया गया है – कलेक्टर को, याचीगण द्वारा वहन की गई हानि के लिए प्रतिकर के साथ, वर्ष 1984 में हानि सहन करने की तिथि से लेकर प्रतिकर की वास्तविक अदायगी होने तक, 8.5% प्रतिवर्ष की दर से ब्याज का मुग्तान करने हेतु निदेशित किया गया – आदेश दिनांक से नब्बे दिनों की अवधि के भीतर प्रक्रिया पूर्ण करने हेतु आगे निदेशित किया गया, जिसे न किये जाने पर स्वप्रेरित अवमानना कार्यवाही का सामना करना होगा – याचिकाएँ मंजूर। (सुरजीत सिंह वि. म.प्र. राज्य) ...*43

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. [Sanjay Kumar Pathak Vs. Government of M.P.] ...*13

संविधान – अनुच्छेद 226 – विभागीय जाँच – कतिपय कार्य पर आधारित आरोप पत्र जारी किये जाने के विरुद्ध 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 सत्याभासी 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 प्रारम्भिक प्रक्रम पर है, अतः, जब तक जाँच पूर्ण न हो जाए, कार्यवाही प्रक्रियात्मक पक्षपात के संदर्भ में दूषित नहीं मानी जाएगी - याचिका खारिज। (संजय कुमार पाठक वि. गव्हर्मेन्ट ऑफ़ एम.पी.) ...*13

Constitution - Article 226 - Grant of liquor licence - High Court do not formulate any policy - Remains away from making anything that would amount to legislation, rules and regulations - This court cannot direct the respondents to revive the license and extend the period of license or permit the petitioner to carry out the contract for the remaining period on the same amount on which the respondent No. 7 was awarded - The petitioner is the author of the situation - After cancellation of license, he remained silent till the period expired - He never filed any application or made request to the authority to permit him to carry out the license or deposit the arrears of remaining period - Therefore, no direction for extending the period of license or directing the respondents to permit to continue the license or restraining the respondents from auctioning the license for the period from 2016-17 can be issued. [Rajesh Malviya Vs. Commercial Taxes Department (Excise)] (DB)...289

संविधान - अनुच्छेद 226 - मदिरा अनुज्ञप्ति प्रदान की जाना - उच्च न्यायालय कोई नीति नहीं बनाता - ऐसा कुछ बनाने से दूर रहता है जो विधान, नियम एवं विनियमन की कोटि में आएगा - यह न्यायालय प्रत्यर्थीगण को अनुज्ञप्ति पुनः प्रवर्तित करने और अनुज्ञप्ति की अवधि बढ़ाने के लिए निदेशित नहीं कर सकता या याची को शेष अवधि के लिए उसी रकम पर जिस पर प्रत्यर्थी क्र. 7 को प्रदान किया गया था, करार पूरा करने हेतु अनुमति नहीं दे सकता - याची इस स्थिति का रचयिता है - अनुज्ञप्ति निरस्त होने के पश्चात् अवधि समाप्त होने तक वह शांत रहा - उसने अनुज्ञप्ति जारी रखने या शेष अवधि का बकाया जमा करने की अनुमति प्रदान करने के लिए प्राधिकारी को न कमी कोई आवेदन प्रस्तुत किया और न ही निवेदन किया - अतः अनुज्ञप्ति की अवधि बढ़ाने हेतु या अनुज्ञप्ति जारी रखने की अनुमति देने के लिए प्रत्यर्थीगण को निदेश अथवा वर्ष 2016-17 की अवधि हेतु अनुज्ञप्ति की नीलामी करने से प्रत्यर्थीगण को अवरुद्ध करने का कोई निदेश जारी नहीं किया जा सकता। (राजेश मालवीय वि. कमर्शियल टैक्सस डिपार्टमेन्ट (एक्साइज)) (DB)...289

Constitution - Article 226 - Maintainability of Writ Petition -

Petition filed by Secretary & Joint Secretary of the District Bar Association – No resolution, authority or power given by the District Bar to file petition – Petition filed in an unauthorised manner and not maintainable. [District Bar Association Burhanpur Vs. State Bar Council of M.P., Jabalpur] (DB)...*18

संविधान – अनुच्छेद 226 – रिट याचिका की पोषणीयता – जिला अधिवक्ता संघ के सचिव एवं संयुक्त सचिव द्वारा याचिका प्रस्तुत – याचिका प्रस्तुत करने के लिए जिला अधिवक्ता संघ द्वारा कोई संकल्प, प्राधिकार या शक्ति नहीं प्रदान की गई – याचिका अप्राधिकृत रूप से प्रस्तुत की गई एवं पोषणीय नहीं है। (डिस्ट्रिक्ट बार एसोसिएशन बुरहानपुर वि. स्टेट बार काउंसिल ऑफ एम.पी., जबलपुर) (DB)...*18

Constitution – Article 226 – Model By-laws – Adhoc Committee appointed by State Bar Council questioned – Term for which Bar Association was elected is over – Even the period of 90 days as per model by-laws, by which election could be conducted by the body is also over – The petitioners and even the elected body has no right to continue in their posts or take any further steps to conduct fresh election – Declined interference – State Bar Council free to conduct election through Adhoc body or nominate other Adhoc body. [District Bar Association Burhanpur Vs. State Bar Council of M.P., Jabalpur] (DB)...*18

संविधान – अनुच्छेद 226 – मॉडल उप-विधि – राज्य अधिवक्ता परिषद् द्वारा तदर्थ समिति की नियुक्ति पर प्रश्न उठाया गया – जिस कार्यकाल के लिए अधिवक्ता संघ निर्वाचित हुआ था, वह समाप्त हो गया है – मॉडल उप-विधि के अनुसार वह 90 दिनों की अवधि, जिसके भीतर निकाय द्वारा निर्वाचन संचालित किया जा सकता था, वह भी समाप्त हो चुकी है – याचीगण, और यहां तक कि निर्वाचित निकाय को, अपने पदों पर बने रहने अथवा नये सिरे से निर्वाचन संचालित करने के लिए आगे कदम उठाने का कोई अधिकार नहीं – हस्तक्षेप से मना किया गया – राज्य अधिवक्ता परिषद् तदर्थ समिति के जरिए निर्वाचन संचालित करने या अन्य तदर्थ समिति का नाम निर्दिष्ट करने के लिए स्वतंत्र है। (डिस्ट्रिक्ट बार एसोसिएशन बुरहानपुर वि. स्टेट बार काउंसिल ऑफ एम.पी., जबलपुर) (DB)...*18

Constitution – Article 226 – Scheme for Technology Upgradation/ Establishment/Modernization, Expansion of Food Processing Industries – Seeking a direction to the bank to release the amount sanctioned as subsidy under the scheme framed by the Ministry of Food Processing Industries, Government of India alongwith interest on the aforesaid amount – Held – The respondent has received the application of the petitioner under the scheme and has duly scrutinized

the same and recommended the case of the petitioner for grant of subsidy under the scheme – The bank branches are responsible for processing of the application – The petitioner has complied with all the formalities prescribed under the scheme and the scheme does not provide that if the application is not uploaded on the “e” portal, the applicant would not be entitled to grant of subsidy under the scheme – Therefore, it is appropriate to direct the respondent to process the claim of the petitioner under the scheme. [GDP Agro and Food Products Pvt. Ltd. (M/s.) Vs. Union of India] (DB)...313

संविधान – अनुच्छेद 226 – खाद्य प्रसंस्करण उद्योगों के प्रौद्योगिकी उन्नयन/स्थापना/आधुनिकीकरण, विस्तार हेतु स्कीम – खाद्य प्रसंस्करण उद्योग मंत्रालय, भारत सरकार द्वारा विरचित स्कीम के अंतर्गत सहायकी के रूप मंजूर की गई रकम को उक्त रकम पर ब्याज के साथ मुक्त किये जाने हेतु बैंक को निदेश चाहा गया – अभिनिर्धारित – प्रत्यर्थी ने स्कीम के अंतर्गत याची का आवेदन प्राप्त किया एवं सम्यक् रूप से संविक्षा कर स्कीम के अंतर्गत सहायकी प्रदान करने हेतु याची के प्रकरण की अनुशंसा की – आवेदन के प्रक्रमण के लिए बैंक शाखायें जिम्मेदार हैं – स्कीम के अंतर्गत विहित सभी औपचारिकताओं का याची ने अनुपालन किया है एवं स्कीम यह उपबधित नहीं करती कि यदि “ई” पोर्टल पर आवेदन अपलोड नहीं किया गया है तब आवेदक स्कीम के अंतर्गत सहायकी प्रदान किये जाने हेतु हकदार नहीं होगा – इसलिए, स्कीम के अंतर्गत याची के दावे पर कार्यवाही करने के लिए प्रत्यर्थी को निदेशित किया जाना उचित है। (जीडीपी एगो एण्ड फुड प्रोडक्ट प्रा. लि. (मे.) वि. यूनियन ऑफ इंडिया) (DB)...313

Constitution – Article 226 – See – Income Tax Act, 1961, Sections 143(1), 147 & 148 [Malay Shrivastava Vs. The Deputy Commissioner, Income Tax] (DB)...39

संविधान – अनुच्छेद 226 – देखें – आयकर अधिनियम, 1961, धाराएँ 143(1), 147 व 148 (मलय श्रीवास्तव वि. द डिप्टी कमिशनर, इनकम टैक्स) (DB)...39

Constitution – Article 226/227 – Alternative Remedy – Where violation of principles of natural justice is established, it is not compulsory to relegate the petitioner to avail the alternative remedy – If the petition is entertained and during the pendency of petition, limitation for alternative remedy expires, then the petition should be heard on merits and parties should not be relegated to avail the remedy under the statute. [Kaushlendra Singh Jatav Vs. Union of India] ...321

संविधान – अनुच्छेद 226/227 – वैकल्पिक उपचार – जहाँ नैसर्गिक न्याय

के सिद्धांतों का उल्लंघन स्थापित हुआ है, याची को वैकल्पिक उपचार का लाभ लेने के लिए लौटाया जाना अनिवार्य नहीं है – यदि याचिका ग्राह्य होती है तथा याचिका के लंबित रहने के दौरान वैकल्पिक उपचार की परिसीमा समाप्त हो जाती है, तब याचिका को गुणदोष के आधार पर सुना जायेगा तथा पक्षकारों को कानून के अंतर्गत उपचार का लाभ लेने से निर्वासित नहीं किया जाना चाहिए। (कौशलेन्द्र सिंह जाटव वि. यूनियन ऑफ इंडिया) ...321

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. [Jaiprakash Associates Ltd. Vs. Madhya Pradesh Electricity Regulatory Commission] ...61

संविधान – अनुच्छेद 226/227 एवं विद्युत अधिनियम (2003 का 36), धारा 111 – अपील – एम.पी.ई.आर.सी. के आदेश के विरुद्ध रिट याचिका – प्रारंभिक आक्षेप – क्या विनियामक आयोग के आदेश के विरुद्ध संविधान के अनुच्छेद 226/227 के अंतर्गत रिट याचिका पोषणीय है या नहीं – अभिनिर्धारित – चूंकि विनियमन की संवैधानिक विधिमान्यता को चुनौती नहीं दी गई है एवं आयोग के आदेश के विरुद्ध 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। (जयप्रकाश एसोसिएट्स लि. वि. म.प्र. इलेक्ट्रिसिटी रेगुलेटरी कमीशन) ...61

Contempt of Courts Act (70 of 1971), Section 10 & 12 – Constitution – Article 215 – Contempt of Court – Court directed to fix the salary, restore D.A. according to law & issue fresh PPO – After revising the salary & DA fresh PPO issued by the respondents – Petitioner not satisfied with calculation or fixation – Fresh cause of action arise to the petitioner to seek redressal – No case for initiating contempt of court proceedings. [Satish Shrivastava Vs. M.K. Varshney] ...*27

न्यायालय अवमान अधिनियम (1971 का 70), धारा 10 व 12 – संविधान – अनुच्छेद 215 – न्यायालय का अवमान – न्यायालय ने विधि अनुसार वेतन निर्धारण करने, मंहगाई भत्ता बहाल करने एवं नया पीपीओ जारी करने के लिए निदेशित किया – वेतन एवं मंहगाई भत्ता पुनरीक्षित करने के पश्चात्, प्रत्यर्थीगण द्वारा नया पीपीओ जारी किया गया – याची, संगणना एवं निर्धारण से संतुष्ट नहीं – याची को प्रतितोषण चाहने के लिए नया वाद हेतुक उत्पन्न होता है – न्यायालय के अवमान की कार्यवाहियाँ आरंभ करने के लिए कोई प्रकरण नहीं बनता। (सतीश श्रीवास्तव वि. एम.के. वाष्ण्य) ...*27

Contract Labour (Regulation and Abolition) Act (37 of 1970), Section 21(4) and Employees' Provident Funds and Miscellaneous Provisions Act (19 of 1952) – Duty of the principal employer – Even if a person is engaged through a contractor it is duty of Principal employer to ensure payment of provident fund in respect of workman in question and also to ensure payment of gratuity and payment of wages to the workman who has worked for him – Although employees were engaged through the contractor however, same will not certainly absolve the principal employer from his duty to make payment of gratuity to Respondent No. 1. [Grasim Industries Ltd. Vs. Duley Singh] ...*19

ठेका श्रम (विनियमन और उत्सादन) अधिनियम (1970 का 37), धारा 21(4) एवं कर्मचारी भविष्य-निधि और प्रकीर्ण उपबंध अधिनियम (1952 का 19) – प्रधान नियोजक का कर्तव्य – यदि किसी व्यक्ति को किसी ठेकेदार के जरिए भी लगाया गया हो तब भी यह प्रधान नियोजक का कर्तव्य होगा कि प्रश्नगत कर्मकार के संबंध में भविष्य निधि का संदाय सुनिश्चित करे और साथ ही ऐसा कर्मकार, जिसने उसके लिए कार्य किया है, के उपदान का संदाय एवं वेतन का संदाय सुनिश्चित करे – यद्यपि कर्मचारियों को ठेकेदार के जरिए लगाया गया था, परंतु इससे प्रधान नियोजक निश्चित रूप से प्रत्यर्थी क्र. 1 को उपदान का संदाय करने के अपने कर्तव्य से मुक्ति नहीं पा सकेगा। (ग्रासिम इंडस्ट्रीज लि. वि. दुले सिंह) ...*19

Co-operative Societies Act, M.P. 1960 (17 of 1961), Section 64 & 82 and Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Allegation relates to the violation of the principles of natural justice and passing an order without following the requirement of statute and not acting in accordance with the fundamental principles of judicial procedure, therefore, when such allegations were made, the plaint could not have been rejected at the threshold on the ground that the civil court had no jurisdiction – At the most trial court could have framed an issue in respect of the jurisdiction and decided the same on the basis of the

evidence relating to the aforesaid plea raised in the plaint. [Prakash Vs. Manager, Smriti Nagarik Sahakari Bank] ...344

सहकारी सोसायटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 64 व 82 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 — अभिकथन, नैसर्गिक न्याय के सिद्धांतों के उल्लंघन एवं कानून की अपेक्षा का पालन किये बिना आदेश पारित करने और न्यायिक प्रक्रिया के मूलभूत सिद्धांतों के अनुसरण में कार्यवाही नहीं करने से संबंधित है, अतः जब उक्त अभिकथन किये गये थे, वादपत्र को आरंभ में ही इस आधार पर खारिज नहीं किया जा सकता था कि सिविल न्यायालय को अधिकारिता नहीं थी — अधिक से अधिक, विचारण न्यायालय, अधिकारिता के संबंध में विवादक विरचित कर सकता था और वादपत्र में उठाये गये उक्त अभिवाक् के संबंध में साक्ष्य के आधार पर उसे विनिश्चित कर सकता था। (प्रकाश वि. मेनेजर, स्मृति नागरिक सहकारी बैंक) ...344

Co-operative Societies Act, M.P. 1960 (17 of 1961), Sections 64, 82 & 84 — Co-operative Societies Rules 1962, Rule 66(6) — Suit for declaration and permanent injunction was filed by the appellant/plaintiff on the ground that the order was passed by Joint Registrar without giving an opportunity of hearing and the order was illegal and improper — Whether suit filed by the appellant/plaintiff is barred by Section 82 of the above Act — Held — No — Dispute is about the matter touching the business of the co-operative society — Jurisdiction of the civil court is not excluded where provision of a particular statute have not been complied with or statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure or if part of the action of the state is violative of the constitutional provision or the mandatory requirement of statute or statutory rules are not followed — Civil suit is maintainable. [Prakash Vs. Manager, Smriti Nagarik Sahakari Bank] ...344

सहकारी सोसायटी अधिनियम, म.प्र. 1960 (1961 का 17), धाराएँ 64, 82 व 84 — सहकारी सोसायटी नियम 1962, नियम 66(6) — अपीलार्थी/वादी द्वारा इस आधार पर घोषणा एवं स्थाई व्यादेश हेतु वाद प्रस्तुत किया गया कि संयुक्त रजिस्ट्रार द्वारा सुनवाई का अवसर दिये बिना आदेश पारित किया गया एवं आदेश अवैध और अनुचित था — क्या अपीलार्थी/वादी द्वारा प्रस्तुत वाद उक्त अधिनियम की धारा 82 द्वारा वर्जित है — अभिनिर्धारित — नहीं — विवाद, सहकारी सोसायटी के कारोबार से जुड़े मामले के बारे में है — जहाँ किसी विशिष्ट कानून के उपबंध का अनुपालन न किया गया हो अथवा कानूनी अधिकरण ने न्यायिक प्रक्रिया के मूलभूत सिद्धांतों के अनुसरण में कार्यवाही न की हो अथवा राज्य की कार्यवाही का माग संवैधानिक उपबंध का उल्लंघन करता हो अथवा कानून या कानूनी नियमों की

आज्ञापक अपेक्षा का पालन न किया गया हो तब सिविल न्यायालय की अधिकारिता अपवर्जित नहीं — सिविल वाद पोषणीय है। (प्रकाश वि. मेनेजर, स्मृति नागरिक सहकारी बैंक) ...344

Co-operative Societies Act, M.P. 1960 (17 of 1961), Section 82
— Bar of jurisdiction — Bar of jurisdiction is to be decided by trial court after framing the issue and permitting the parties to lead evidence.
 [Prakash Vs. Manager, Smriti Nagarik Sahakari Bank] ...344

सहकारी सोसायटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 82 — अधिकारिता का वर्जन — अधिकारिता के वर्जन को विचारण न्यायालय द्वारा विवादक विरचित करने और पक्षकारों को साक्ष्य प्रस्तुत करने की अनुमति देने के पश्चात् विनिश्चित किया जाना चाहिए। (प्रकाश वि. मेनेजर, स्मृति नागरिक सहकारी बैंक) ...344

Co-operative Societies Rules 1962, Rule 66(6) — See — Co-operative Societies Act, M.P. 1960, Sections 64, 82 & 84 [Prakash Vs. Manager, Smriti Nagarik Sahakari Bank] ...344

सहकारी सोसायटी नियम 1962, नियम 66(6) — देखें — सहकारी सोसायटी अधिनियम, म.प्र. 1960, धाराएँ 64, 82 व 84 (प्रकाश वि. मेनेजर, स्मृति नागरिक सहकारी बैंक) ...344

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. [Bright Drugs Industries Ltd. (M/s.) Vs. Punjab Health System Corporation (M/s.)] ...141

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 विनिश्चय किया जाएगा। (ब्राइट ड्रग्स इंडस्ट्रीज लि. (मे.) वि. पंजाब हेल्थ सिस्टम कारपोरेशन (मे.)) ...141

Criminal Procedure Code, 1973 (2 of 1974), Section 24 and Penal Code (45 of 1860), Section 302/34 — Appointment of Special Public Prosecutor — On an application by the complainant, Special Public Prosecutor was appointed — Petition against — Held — State Government has taken a decision on the basis of report furnished by District Magistrate and Superintendent of Police and there is no allegation against these officers

– Relationship of complainant and Special Public Prosecutor is not established – No allegation about competency of Special Public Prosecutor nor it could be established that what prejudice will be caused to the petitioner/accused – Proper procedure has been adopted by the State Government for appointment – State was well within its rights in appointing a Special Public Prosecutor – Petition dismissed. [P.S. Thakur (Dr.) Vs. State of M.P.] ...562

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 24 एवं दण्ड संहिता (1860 का 45), धारा 302/34 – विशेष लोक अभियोजक की नियुक्ति – परिवादी के एक आवेदन पर विशेष लोक अभियोजक नियुक्त किया गया – इसके विरुद्ध याचिका – अभिनिर्धारित – राज्य सरकार ने जिला मजिस्ट्रेट एवं पुलिस अधीक्षक द्वारा प्रस्तुत प्रतिवेदन के आधार पर निर्णय लिया है तथा इन अधिकारियों के विरुद्ध अभिकथन नहीं है – परिवादी एवं विशेष लोक अभियोजक का संबंध स्थापित नहीं होता – विशेष लोक अभियोजक की सक्षमता के बारे में कोई अभिकथन नहीं और न ही यह स्थापित हो सका है कि याची/अभियुक्त पर क्या प्रतिकूल प्रभाव कारित होगा – राज्य सरकार द्वारा नियुक्ति हेतु उचित प्रक्रिया अपनायी गई है – विशेष लोक अभियोजक की नियुक्ति करने में राज्य अपने अधिकारों के मली-मांती भीतर था – याचिका खारिज। (पी.एस. ठाकुर (डॉ.) वि. म.प्र. राज्य) ...562

Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Second wife – When entitled to maintenance – Non-applicant (husband) got married to the applicant by suppressing the fact of his first marriage and then taking a defence that since she is not legally married wife of the non-applicant she is not entitled to maintenance – Held – Husband cannot take advantage of his own wrong and cannot be allowed to take such a defence – Further held – Where a woman knowingly enter into relationship with married male and cohabiting with him for a long time, the presumption of marriage in such situation already stands destroyed due to prior knowledge of the woman about the marital status of man – But where the woman is kept in dark about the first marriage, then it cannot be said that the woman is not entitled for maintenance u/S 125 of Cr.P.C. – Applicant would be treated as a “wife” for the purposes of grant of maintenance u/S 125 of Cr.P.C. [Pushpa Pandey (Smt.) Vs. Suresh Pandey] ...450

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – द्वितीय पत्नी – मरणपोषण हेतु कब हकदार – अनावेदक (पति) ने अपने प्रथम विवाह के तथ्य का छिपाव कर आवेदक से विवाह किया और बाद में यह बचाव लेता है कि चूंकि वह

अनावेदक की वैध रूप से विवाहित पत्नी नहीं, वह भरणपोषण की हकदार नहीं — अभिनिर्धारित — पति स्वयं के दोष का लाम नहीं ले सकता और उसे इस प्रकार का बचाव लेने की अनुमति नहीं दी जा सकती — आगे अभिनिर्धारित — जहाँ एक महिला ज्ञानपूर्वक विवाहित पुरुष के साथ संबंध बनाकर दीर्घ अवधि से उसके साथ सहवासरत है, ऐसी स्थिति में पुरुष की वैवाहिक स्थिति के बारे में महिला को पूर्व ज्ञान होने के कारण विवाह की उपधारणा नष्ट हो जाती है — परंतु जहाँ प्रथम विवाह के संबंध में महिला को अंधेरे में रखा गया है, तब यह नहीं कहा जा सकता कि दं.प्र.सं. की धारा 125 के अंतर्गत भरण पोषण हेतु महिला हकदार नहीं है — आवेदक को दं.प्र.सं. की धारा 125 के अंतर्गत भरणपोषण के प्रयोजन हेतु "पत्नी" माना जायेगा। (पुष्पा पाण्डे (श्रीमती) वि. सुरेश पाण्डे) ...450.

Criminal Procedure Code, 1973 (2 of 1974), Section 126(2) — Earlier, ex-parte order of maintenance passed by trial Court was remanded back by this court with direction to entertain prayer u/S 126(2) Cr.P.C. if made by the applicant — Objection of limitation raised by non-applicants on the application filed by applicant — Held — Intention of Co-ordinate bench is to give chance to applicant for hearing before passing final order of maintenance — No reason to raise objection of limitation if entire amount of maintenance deposited by applicant — The delay in filing application deemed to be condoned. [Madhusudan Vs. Smt. Madhuri] ...*22

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 126(2) — पूर्व में विचारण न्यायालय द्वारा पारित भरणपोषण के एकपक्षीय आदेश को इस निदेश के साथ प्रतिप्रेषित किया गया था कि दं.प्र.सं. की धारा 126(2) के अंतर्गत यदि आवेदक द्वारा प्रार्थना की जाती है तब उसे ग्रहण किया जाए — आवेदक द्वारा प्रस्तुत किये गये आवेदन पर अनावेदकगण द्वारा परिसीमा का आक्षेप उठाया गया — अभिनिर्धारित — समकक्ष न्यायपीठ का आशय भरण-पोषण का अंतिम आदेश पारित होने से पूर्व आवेदक को सुनवाई का अवसर प्रदान करना है — परिसीमा का आक्षेप उठाने का कोई कारण नहीं है, यदि आवेदक द्वारा भरण-पोषण की संपूर्ण राशि जमा कर दी गई है — आवेदन प्रस्तुत करने में हुए विलंब को माफ माना जाए। (मधुसूदन वि. श्रीमती माधुरी) ...*22

*Criminal Procedure Code, 1973 (2 of 1974), Section 144 — See — Cigarettes & other Tobacco Products (Prohibition of Advertisement and Regulation of Trade Commerce, Production, Supply & Distribution) Act, 2003 [Rahul Kalra Vs. State of M.P.] (DB)...**25

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 144 — देखें — सिगरेट एवं अन्य तम्बाकू उत्पाद (विज्ञापन का प्रतिषेध तथा व्यापार, वाणिज्य, उत्पादन, प्रदाय और

वितरण का विनियमन) अधिनियम, 2003 (राहुल कालरा वि. म.प्र. राज्य) (DB)...*25

Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) – Mandatory registration of FIR before investigation – Held – Registration of FIR is obligatory on the part of police before initiating investigation, if magistrate u/S 156(3) Cr.P.C. directs police to submit its report. [Narottam Pathak Vs. State of M.P.] ...762

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – अन्वेषण से पूर्व प्रथम सूचना प्रतिवेदन का आज्ञापक रूप से पंजीबद्ध किया जाना – अभिनिर्धारित – अन्वेषण प्रारंभ होने से पूर्व पुलिस की ओर से प्रथम सूचना प्रतिवेदन का पंजीबद्ध किया जाना आवश्यक है यदि, दं.प्र.सं. की धारा 156(3) के अंतर्गत मजिस्ट्रेट पुलिस को अपना प्रतिवेदन प्रस्तुत करने को निदेशित करता है। (नरोत्तम पाठक वि. म. प्र. राज्य) ...762

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. [Malay Shrivastava Vs. Shankar Pratap Singh Bundela] ...199

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 तात्त्विक विशिष्टियों की कमी है इसलिए कार्यवाहियाँ विधि की दृष्टि में अनुचित हैं। (मलय श्रीवास्तव वि. शंकर प्रताप सिंह बुंदेला) ...199

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. [Malay Shrivastava Vs. Shankar Pratap Singh Bundela] ...199

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। (मलय श्रीवास्तव वि. शंकर प्रताप सिंह बुंदेला) ...199

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. [Swami Sharan Singh Vs. Rakesh Tripathi] ...226

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 हैं – अभिनिर्धारित – आवेदकगण धारा 197(1) के उपबंध का लाभ लेने के हकदार नहीं हैं – याचिका खारिज। (स्वामी शरण सिंह वि. राकेश त्रिपाठी) ...226

Criminal Procedure Code, 1973 (2 of 1974), Section 200 & 482 – See – Negotiable Instruments Act, 1881, Section 138 [Rafat Anees (Smt.) Vs. Smt. Bano Bi] ...473

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 200 व 482 – देखें – परक्राम्य लिखत अधिनियम, 1881, धारा 138 (रफत अनीस (श्रीमती) वि. श्रीमती बानो बी) ...473

Criminal Procedure Code, 1973 (2 of 1974), Section 208 – Supply of copies of statements and documents to accused – It is not

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mandatory to supply all the documents to accused, the documents on which the prosecution proposes to rely has to be furnished to the accused – In this case, same has been done hence application dismissed – Further held – Discretion of court – If the documents are voluminous then instead of supplying, the accused will be allowed to inspect the same. [K.K. Mishra Vs. State of M.P.] (DB)...477

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 208 – अभियुक्त को कथनों एवं दस्तावेजों की प्रतियों का प्रदाय किया जाना – यह आज्ञापक नहीं है कि अभियुक्त को सभी दस्तावेज प्रदाय किये जाये, जिन दस्तावेजों पर अभियोजन का विश्वास करना प्रस्तावित है उन्हें अभियुक्त को दिया जाना चाहिए – इस प्रकरण में, यही किया गया है अतः आवेदन खारिज – आगे अभिनिर्धारित – न्यायालय का विवेकाधिकार – यदि दस्तावेज अधिक मात्रा में हैं तो उन्हें प्रदाय करने के बजाय, अभियुक्त को उक्त का निरीक्षण करने की अनुमति दी जाएगी। (के.के. मिश्रा वि. म. प्र. राज्य) (DB)...477

Criminal Procedure Code, 1973 (2 of 1974), Section 216 – Framing of Charge – A charge against a person can only be framed if there exists a strong suspicion – But nothing less than that – Mere suspicion without any basis could not be the reason for framing of charge against a person – Therefore, learned trial Court has not committed any mistake in rejecting the application u/S 216 of Cr.P.C. – Revision petition dismissed. [Jatan Kumar Garg Vs. Satyanarayan Tiwari] (DB)...467

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 216 – आरोप विरचित किया जाना – एक व्यक्ति के विरुद्ध आरोप विरचित सिर्फ तब किये जा सकते हैं यदि वहाँ प्रबल संदेह विद्यमान हो – परंतु उससे कम कुछ भी नहीं – बिना किसी आधार के मात्र संदेह, किसी व्यक्ति के विरुद्ध आरोप विरचित किये जाने का कारण नहीं हो सकता – अतः विद्वान विचारण न्यायालय ने दण्ड प्रक्रिया संहिता की धारा 216 के अंतर्गत आवेदन नामंजूर किये जाने में कोई भूल कारित नहीं की है – पुनरीक्षण याचिका खारिज। (जतन कुमार गर्ग वि. सत्यनारायण तिवारी) (DB)...467

Criminal Procedure Code, 1973 (2 of 1974), Section 227, Penal Code (45 of 1860), Sections 176, 336, 338, 304-A, 286 & 304, Explosives Act (4 of 1884), Section 9B & 9C and Explosive Substances Act, (6 of 1908), Section 5 – Principle that covers offences under the Indian Penal Code committed by companies – Director or a person responsible for the affairs of a company could not be prosecuted for offences under the IPC where the main allegations were against the company and the

company was not arraigned as an accused – Impugned order set aside – Applicants are discharged – Application allowed. [P. Sadanand Reddy Vs. State of M.P.] ...426

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227, दण्ड संहिता (1860 का 45), धाराएँ 176, 336, 338, 304-ए, 286 व 304, विस्फोटक अधिनियम (1884 का 4), धारा 9बी व 9सी एवं विस्फोटक पदार्थ अधिनियम (1908 का 6), धारा 5 – सिद्धांत जो कि कम्पनियों द्वारा कारित किये गये अपराध, जो भारतीय दण्ड संहिता के अंतर्गत आते हैं को आच्छादित करता है – कम्पनी के कार्यकलापों के लिए उत्तरदायी व्यक्ति अथवा निदेशक को भा.द.सं. के अंतर्गत अपराधों के लिए अभियोजित नहीं किया जा सकता जहाँ मुख्य अभिकथन कम्पनी के विरुद्ध थे और कम्पनी को अभियुक्त के रूप में दोषारोपित नहीं किया गया था – आक्षेपित आदेश अपास्त – आवेदकों को आरोपमुक्त किया गया – आवेदन मंजूर। (पी. सदानंद रेड्डी वि. म.प्र. राज्य) ...426

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. [Shivshankar Mandil Vs. Shri G.S. Lamba] ...231

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 पहुँचे 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। (शिवशंकर मांडिल वि. श्री जी.एस. लांबा) ...231

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. [Narendra Kumawat Vs. Ranjeet] ...159

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 कोर्ट 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। (नरेन्द्र कुमावत वि. रंजीत) ...159

*Criminal Procedure Code, 1973 (2 of 1974), Section 311 and Penal Code (45 of 1860), Sections 304-B & 498-A r/w Section 34 – Examination of material witness – Dying Declaration recorded by Additional Tehsildar was not part of charge sheet – During trial, dying declaration produced on record of Criminal Case – Additional Tehsildar produced as a defence witness – Application u/S 311 of Cr.P.C. moved by applicant/accused for examining Additional Tehsildar as a defence witness was dismissed by trial Court on the ground that dying declaration being the document of prosecution, can be read in favour of defence – Against which this application – Held – To prove the contents of the dying declaration, examination of Additional Tehsildar as a defence witness is a must as he is the person who has recorded the dying declaration – Order of Trial Court set aside – Application allowed. [Ashish Vs. State of M.P.] ...*17*

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 एवं दण्ड संहिता (1860 का 45), धाराएँ 304-बी व 498-ए सहपठित धारा 34 – महत्वपूर्ण साक्षी का परीक्षण – अतिरिक्त तहसीलदार द्वारा अभिलिखित किया गया मृत्युकालिक कथन अभियोक्त पत्र का भाग नहीं था – विचारण के दौरान, मृत्युकालिक कथन को दण्डिक प्रकरण के अभिलेख पर प्रस्तुत किया गया – अतिरिक्त तहसीलदार को प्रतिरक्षा साक्षी के रूप में प्रस्तुत किया गया – दण्ड प्रक्रिया संहिता की धारा 311 के अंतर्गत आवेदक/अभियुक्त द्वारा अतिरिक्त तहसीलदार को प्रतिरक्षा साक्षी के रूप में परीक्षण कराने हेतु प्रस्तुत किये गये

आवेदन को विचारण न्यायालय द्वारा इस आधार पर खारिज किया गया था कि मृत्युकालिक कथन अभियोजन का दस्तावेज होने के नाते, प्रतिरक्षा के पक्ष में पढ़ा जा सकता है - जिसके विरुद्ध यह आवेदन - अभिनिर्धारित - मृत्युकालिक कथन की अन्तर्वस्तुओं को सिद्ध करने के लिए, अतिरिक्त तहसीलदार का प्रतिरक्षा साक्षी के रूप में परीक्षण किया जाना आवश्यक है क्योंकि, यह वह व्यक्ति है जिसने मृत्युकालिक कथन को अभिलिखित किया है - विचारण न्यायालय का आदेश अपास्त - आवेदन मंजूर। (आशीष वि. म.प्र. राज्य) ...*17

Criminal Procedure Code, 1973 (2 of 1974), Section 313 - Examination of accused - False information - Court ought to draw an adverse inference against the accused and such an inference shall be an additional circumstance to prove guilt of the accused. [In Reference Vs. Sachin Kumar Singhraha] (DB)...690

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 313 - अभियुक्त का परीक्षण - मिथ्या जानकारी - न्यायालय को अभियुक्त के विरुद्ध प्रतिकूल निष्कर्ष निकालना चाहिए और उक्त निष्कर्ष अभियुक्त की दोषिता साबित करने के लिए एक अतिरिक्त परिस्थिति होगी। (इन रेफ्रेन्स वि. सचिन कुमार सिंघरहा) (DB)...690

Criminal Procedure Code, 1973 (2 of 1974), Section 313 - See - Negotiable Instruments Act, 1881, Section 20 [Nicky Chaurasia Vs. Vimal Kumar] ...236

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 313 - देखें - परक्राम्य लिखत अधिनियम, 1881, धारा 20 (निकी चौरसिया वि. विमल कुमार) ...236

Criminal Procedure Code, 1973 (2 of 1974), Section 320 - Application for compromise - Where to be filed - Held - The offences as specified in Section 320(2) Cr.P.C. can be compounded with the permission of court before which any prosecution of such offence is pending - Since in the present case, even the investigation is not complete and no charge sheet is filed, no case is pending before this court therefore, such application is not maintainable. [Monu @ Ranu Kushwaha Vs. State of M.P.] ...489

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 320 - समझौता हेतु आवेदन - कहाँ प्रस्तुत किया जावे - अभिनिर्धारित - दण्ड प्रक्रिया संहिता की धारा 320(2) में विनिर्दिष्ट अपराधों का शमन उस न्यायालय की अनुमति से किया जा सकता है जिसके समक्ष ऐसे अपराध का कोई अभियोजन लंबित है - चूंकि वर्तमान प्रकरण में, यहाँ तक कि अन्वेषण पूर्ण नहीं हुआ है एवं न आरोप पत्र प्रस्तुत हुआ है, न ही इस न्यायालय के समक्ष कोई प्रकरण लंबित है इसलिए उक्त आवेदन

पोषणीय नहीं है। (मोनू उर्फ रानू कुशवाहा वि. म.प्र. राज्य) ...489

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. [In Reference Vs. Rajendra Adivashi] (DB)...166

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। (इन रेफ्रेन्स वि. राजेन्द्र आदीवासी) (DB)...166

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. [In Reference Vs. Rajendra Adivashi] (DB)...166

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 वैद्य 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 अभिवाक प्रयोगशून्य है। (इन रेफ्रेन्स वि. राजेन्द्र आदिवासी) (DB)...166

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. [In Reference Vs. Rajendra Adivashi] (DB)...166

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। (इन रेफ्रेन्स वि. राजेन्द्र आदिवासी) (DB)...166

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. [In Reference Vs. Rajendra Adivashi] (DB)...166

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 - पक्षदोही साक्षियों के साक्ष्य - यदि, उनके कथनों में असंगति न हो तथा वे विरोधामासी 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। (इन रेफ्रेन्स वि. राजेन्द्र आदिवासी) (DB)...166

Criminal Procedure Code, 1973 (2 of 1974), Section 378 (3) - Application for leave to appeal against acquittal - Grounds of interference - Court has to be very much cautious while interfering in

an application for leave to appeal unless there are compelling and substantial grounds to interfere with the order of acquittal. [Gourishankar Nema Vs. Prabhudayal Nema] (DB)...765

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378(3) - दोषमुक्ति के विरुद्ध अपील करने की अनुमति हेतु आवेदन - हस्तक्षेप के आधार - अपील की अनुमति के आवेदन में हस्तक्षेप करते समय न्यायालय को अत्याधिक सावधान होना चाहिए, जब तक कि दोषमुक्ति के आदेश में हस्तक्षेप करने हेतु बाध्यकारी एवं सारभूत आधार न हों। (गौरीशंकर नेमा वि. प्रभूदयाल नेमा) (DB)...765

Criminal Procedure Code, 1973 (2 of 1974), Section 389 - See - Narcotic Drugs and Psychotropic Substances Act, 1985, Section 8/18(b) & 37 [Jagdish Vs. State of M.P.] ...684

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 389 - देखें - स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम, 1985, धारा 8/18(बी) व 37 (जगदीश वि. म.प्र. राज्य) ...684

Criminal Procedure Code, 1973 (2 of 1974), Section 389 - See - Narcotic Drugs and Psychotropic Substances Act, 1985, Section 8(c) r/w 15 & 35 [Mukesh Vs. State of M.P.] ...381

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 389 - देखें - स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम, 1985, धारा 8(सी) सहपठित धारा 15 व 35 (मुकेश वि. म.प्र. राज्य) ...381

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. [Malay Shrivastava Vs. Shankar Pratap Singh Bundela] ...199

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 हैं - 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 अमिखंडित किये जाने हेतु सीधे उच्च न्यायालय के समक्ष जा सकता है - दण्ड प्रक्रिया संहिता की धारा 482 के अंतर्गत आवेदन पोषणीय है। (मलय श्रीवास्तव वि. शंकर प्रताप सिंह बुंदेला) ...199

Criminal Procedure Code, 1973 (2 of 1974), Section 397 & 401 – Order framing charge u/S 376-D & 344 of IPC is assailed on the ground that no specific role of the applicant has been ascribed and there is no ground for presuming that he had formed a common intention with co-accused to commit rape upon prosecutrix – Held – Though it has not been specifically stated that applicant had any role in locking, threatening and beating the prosecutrix but he did not oppose the same nor did he do any thing to disassociate himself from the group rather he continued to be a part of the group and live under the same roof for a long period of about 4 months wherein, the prosecutrix was repeatedly raped by co-accused – Thus, he was part of the group & in such situation he shall also be deemed to have committed the offence of rape – Since the charge of offence u/S 376-D has not been framed properly, therefore, trial Court is directed to re-frame the charges in the light of above observation. [Shriram Singol Vs. State of M.P.] ...*29

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 व 401 – भारतीय दण्ड संहिता की धारा 376-डी एवं 344 के अंतर्गत आरोप विरचित करने वाले आदेश को इस आधार पर चुनौती दी गई कि आवेदक की कोई विनिर्दिष्ट भूमिका नहीं है तथा यह उपधारित करने हेतु कोई आधार नहीं है कि उसने सह-अभियुक्त के साथ मिलकर अभियोक्त्री के साथ बलात्संग कारित करने का सामान्य आशय बनाया था – अभिनिर्धारित – यद्यपि विनिर्दिष्ट रूप से यह कथन नहीं किया गया है कि अभियोक्त्री को ताला लगाकर बन्द करने, धमकी देने एवं मारपीट करने में आवेदक की कोई भूमिका थी परंतु उसने उक्त का विरोध भी नहीं किया और न ही उसने स्वयं को समूह से पृथक् करने हेतु कुछ किया बल्कि वह समूह का हिस्सा बना रहा तथा लगभग चार माह की लम्बी अवधि तक उसी छत के नीचे रहा जिसमें अभियोक्त्री के साथ सह-अभियुक्त द्वारा बार-बार बलात्संग किया गया – अतः वह उस समूह का हिस्सा था और ऐसी स्थिति में उसके द्वारा भी बलात्संग का अपराध कारित किया जाना समझा जाएगा – चूंकि धारा 376-डी के अंतर्गत अपराध का आरोप उचित रूप से विरचित नहीं किया गया, अतः उक्त अवलोकन के प्रकाश में विचारण न्यायालय को आरोप पुनः विरचित करने हेतु निदेशित किया गया। (श्रीराम सिंगोल वि. म.प्र. राज्य) ...*29

Criminal Procedure Code, 1973 (2 of 1974), Section 397/401 – Revision against framing of charge u/S 307 of IPC – Nature of injury is one of the factors and not the sole factor to decide whether prima facie an offence u/S 307 is made out – Grave suspicion regarding complicity of the accused in alleged offence, sufficient to frame charge – No legal or factual error in framing charge – Application dismissed.

[Annapurna Nath Vs. State of M.P.]

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दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397/401 - भा.द.स. की धारा 307 के अंतर्गत आरोप विरचित किये जाने के विरुद्ध पुनरीक्षण - क्षति का स्वरूप कारकों में से एक है और न कि एकमात्र कारक, यह विनिश्चित करने के लिए कि क्या प्रथम दृष्ट्या धारा 307 के अंतर्गत अपराध बनता है अथवा नहीं - अभिकथित अपराध में अभियुक्त की संलिप्तता के संबंध में घोर संदेह, आरोप विरचित करने के लिए पर्याप्त है - आरोप विरचित करने में कोई विधिक अथवा तथ्यात्मक त्रुटि नहीं - आवेदन खारिज। (अन्नपूर्णा नाथ वि. म.प्र. राज्य) ...421

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. [Mohd. Akbar Vs. State of M.P.] ...154

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 एवं 401 - आरोप विरचित किये जाने के विरुद्ध पुनरीक्षण - इस आधार पर कि आवेदक के विरुद्ध सह-अभियुक्त के संग मिलकर अभियोक्त्री के साथ बलात्संग कारित करने के षड्यंत्र में शामिल होने का कोई अपराध नहीं बनता, चूंकि 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। (मो. अकबर वि. म.प्र. राज्य) ...154

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. [Dinesh Vs. State of M.P.] ...162

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 विरुद्ध 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। (दिनेश वि. म. प्र. राज्य) ...162

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. [State of M.P. Vs. Jaitmang (@ Pasang) Limi] ...*14

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 गिराह 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 विरुद्ध अधिनियम, 1972 की समान दण्डिक 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। (म.प्र. राज्य वि. जैतमंग (उर्फ पासंग) लिमी) ...*14

*Criminal Procedure Code, 1973 (2 of 1974), Section 451 & 457 – Custody of Seized Vehicle on Supurdnama – Vehicle (Swift Car) was seized in relation to an offence u/s 34 of Excise Act – Registered owner of vehicle filed application for release of the vehicle on supurdnama – Collector imposed condition to furnish a bank guarantee of Rs. 5,00,000 – Held – Condition imposed is too harsh, ends of justice would be served if such stringent and onerous condition is dispensed with – Applicant directed to furnish local surety of Rs. 5,00,000 and a bond of the same amount – Application allowed. [Roseline Singh (Mrs.) Vs. State of M.P.] ...*39*

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 451 व 457 - सुपुर्दनामा पर जब्तशुदा वाहन की अभिरक्षा - वाहन (स्विफ्ट कार) आबकारी अधिनियम की धारा 34 के अंतर्गत अपराध के संबंध में जब्त किया गया था - वाहन के रजिस्ट्रीकृत स्वामी ने वाहन को सुपुर्दनामा में छोड़े जाने हेतु आवेदन प्रस्तुत किया - कलेक्टर ने रु. 5,00,000 की बैंक गारंटी प्रस्तुत करने की शर्त अधिरोपित की - अभिनिर्धारित - अधिरोपित शर्त अत्याधिक कठोर है, न्याय का उद्देश्य पूरा होगा यदि ऐसी कड़ी एवं दुर्भर शर्त से अभिमुक्ति प्रदान की जाती है - अपीलार्थी को रु. 5,00,000 की स्थानीय प्रतिभूति एवं समान राशि का बंधपत्र प्रस्तुत करने हेतु निदेशित किया गया - आवेदन मंजूर। (रोजलिन सिंह (श्रीमती) वि. म.प्र. राज्य) ...*39

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Inherent powers - Quashing of the complaint registered u/S 420, 467, 468 & 471 r/w Section 120(B) of the IPC - For prosecuting a person u/S 463 & 464 of the IPC it is not sufficient that the text of the document is false but it is to be established that the accused has made a false document as per the condition given in Section 464 of the IPC and purpose of making such a false document should fall within the purview of Section 463 - If someone induces the concerned officer to issue a particular certificate and the text of the certificate is not correct but if the certificate is issued by the competent authority, it cannot be said that the person either made false document or involved in the conspiracy of making a false documents - Certificate issued by the Sub-Divisional Officer who is competent authority to issue the same then no offence u/S 464 and 463 of the IPC is made out - Criminal proceedings quashed - Petitions allowed. [Harvir Singh Vs. State of M.P.] ...723

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 - अंतर्निहित शक्तियाँ - मा.द.सं. की धाराओं 420, 467, 468 व 471 सहपठित धारा 120(बी) के अंतर्गत पंजीबद्ध शिकायत को अभिखण्डित किया जाना - किसी व्यक्ति को मा.द.सं. की धारा 463 व 464 के अंतर्गत अभियोजित किये जाने के लिए यह पर्याप्त नहीं कि दस्तावेज का मुख्य लेख मिथ्या है बल्कि यह स्थापित किया जाना चाहिए कि मा.द.सं. की धारा 464 में दी गई शर्त के अनुसार अभियुक्त ने मिथ्या दस्तावेज बनाया है तथा ऐसा मिथ्या दस्तावेज बनाने का प्रयोजन, धारा 463 की परिधि के भीतर आना चाहिए - यदि कोई व्यक्ति, संबंधित अधिकारी को कोई विशिष्ट प्रमाणपत्र जारी करने के लिए उकसाता है और प्रमाणपत्र का मुख्य लेख सही नहीं है परंतु यदि प्रमाणपत्र को सक्षम प्राधिकारी द्वारा जारी किया गया है, यह नहीं कहा जा सकता कि उस व्यक्ति ने या तो मिथ्या दस्तावेज बनाया या मिथ्या दस्तावेज बनाने के षड्यंत्र में शामिल है - उपखंड अधिकारी द्वारा प्रमाणपत्र जारी किया गया, जो

कि उक्त प्रमाणपत्र जारी करने के लिए सक्षम प्राधिकारी है तब मा.द.सं. की धारा 464 व 463 के अंतर्गत कोई अपराध नहीं बनता - दाण्डिक कार्यवाहियाँ अभिखण्डित - याचिकाएँ मंजूर। (हरवीर सिंह वि. म.प्र. राज्य) ...723

Criminal Procedure Code, 1973 (2 of 1974), Section 482 -
Petition seeking direction to register FIR under inherent powers - Held -
Cr.P.C. provides a complete and efficacious remedy u/S 156(3) and 200 - The court declined to direct registration of FIR under inherent powers, since the petitioner has alternative remedy under the code. [Narottam Pathak Vs. State of M.P.] ...762

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 - अंतर्निहित शक्तियों के अंतर्गत प्रथम सूचना प्रतिवेदन पंजीबद्ध करने का निदेश चाहते हुए याचिका - अभिनिर्धारित - द.प्र.सं., धारा 156(3) व 200 के अंतर्गत पूर्ण एवं प्रभावशाली उपचार उपबंधित करती है - चूंकि याचिका के पास संहिता के अंतर्गत वैकल्पिक उपाय है, न्यायालय ने अंतर्निहित शक्तियों के अंतर्गत प्रथम सूचना प्रतिवेदन पंजीबद्ध करने का निदेश देने से इंकार किया। (नरोत्तम पाठक वि. म.प्र. राज्य) ...762

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. [Malay Shrivastava Vs. Shankar Pratap Singh Bundela] ...199

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 दुरुपयोग 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। (मलय श्रीवास्तव वि. शंकर प्रताप सिंह बुंदेला) ...199

Criminal Procedure Code, 1973 (2 of 1974), Section 482 -
Quashing of FIR - Applicant obtained a degree of Ayurvedic Vignyanacharya with modern medicine and surgery (A.V.M.S.) - During the inspection of the clinic of the applicant it was found that he was

also prescribing allopathic medicines unauthorisedly – Held – Since in the notification filed and relied by the applicant there is no mention about the degree of A.V.M.S. – The State Government has not authorised persons who have obtained the degree of A.V.M.S. to prescribe allopathic medicines – Therefore, the applicant is not authorised to prescribe allopathic medicines – Application dismissed. [Prakash Narayan Shukla (Dr.) Vs. State of M.P.] ...*24

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – प्रथम सूचना प्रतिवेदन अभिखण्डित किया जाना – आवेदक ने आधुनिक औषधि एवं शल्यचिकित्सा से आयुर्वेदिक विज्ञानाचार्य (ए.वी.एम.एस.) की उपाधि प्राप्त की – आवेदक के क्लीनिक के निरीक्षण के दौरान यह पाया गया कि वह अनधिकृत रूप से ऐलोपैथी औषधियाँ भी लिख रहा था – अभिनिर्धारित – चूंकि आवेदक द्वारा प्रस्तुत की गई एवं आधारित अधिसूचना में ए.वी.एम.एस. की उपाधि के संबंध में कोई उल्लेख नहीं है – राज्य सरकार ने उन व्यक्तियों को ऐलोपैथी औषधियाँ लिखने हेतु अधिकृत नहीं किया है जिन्होंने ए.वी.एम.एस. की उपाधि प्राप्त की है – अतः आवेदक ऐलोपैथिक औषधियाँ लिखने हेतु अधिकृत नहीं है – आवेदन खारिज। (प्रकाश नारायण शुक्ला (डॉ.) वि. म.प्र. राज्य) ...*24

Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Quashing of FIR – Territorial jurisdiction – Second round of petition – Earlier, the objection raised by the applicant with respect to the territorial jurisdiction was held improper and application u/S 482 Cr.P.C. was dismissed – Against that order SLP was preferred which was also dismissed – Held – Liberty extended by the Hon'ble Apex Court is to enable the present applicant to attempt establishing this objection of territorial jurisdiction by leading evidence during trial before the court below otherwise the issue of the territorial jurisdiction would not be available – It appears that the applicant in order to further cause delay in conclusion of the trial, has moved fresh application on the same ground – Application dismissed. [Yogesh Kumar Kushwaha Vs. State of M.P.] ...484

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – प्रथम सूचना प्रतिवेदन को अभिखण्डित किया जाना – क्षेत्रीय अधिकारिता – दूसरे दौर की याचिका – पूर्व में, आवेदक द्वारा क्षेत्रीय अधिकारिता के संबंध में उठाये गये आक्षेप को अनुचित ठहराया गया था तथा दण्ड प्रक्रिया संहिता की धारा 482 के अंतर्गत आवेदन खारिज किया गया था – उस आदेश के विरुद्ध विशेष अनुमति याचिका प्रस्तुत की गई जिसको भी खारिज किया गया था – अभिनिर्धारित – माननीय

सर्वोच्च न्यायालय द्वारा दी गई स्वतंत्रता वर्तमान आवेदक को निचले न्यायालय के समक्ष विचारण के दौरान साक्ष्य प्रस्तुत करते हुए क्षेत्रीय अधिकारिता के इस आक्षेप को स्थापित करने का प्रयत्न करने हेतु समर्थ बनाने के लिए है अन्यथा क्षेत्रीय अधिकारिता का विवादक उपलब्ध नहीं होगा - यह प्रतीत होता है कि आवेदक ने विचारण की समाप्ति में आगे और विलम्ब कारित करने के लिए, उक्त आधार पर नया आवेदन प्रस्तुत किया है - आवेदन खारिज। (योगेश कुमार कुशवाहा वि. म.प्र. राज्य)

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Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Whether proceeding registered under the SC/ST (Prevention of Atrocities) Act can be quashed on the ground of compromise - Held - The SC/ST (Prevention of Atrocities) Act, 1989 is a special statute and therefore, the power to quash proceedings on the basis of compromise cannot be exercised - While deciding the application for compromise u/S 482, the nature and gravity of the offences are required to be considered - If the offence is against the society at large, proceedings cannot be quashed on the basis of compromise. [Monu @ Ranu Kushwaha Vs. State of M.P.]

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दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 - क्या अनुसूचित जाति/अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम के अंतर्गत पंजीबद्ध कार्यवाही समझौते के आधार पर अभिखंडित की जा सकती है - अभिनिर्धारित - अनुसूचित जाति / अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम, 1989 एक विशेष कानून है तथा इसलिए समझौते के आधार पर कार्यवाहियों को अभिखंडित करने की शक्ति का प्रयोग नहीं किया जा सकता - धारा 482 के अंतर्गत समझौते के लिए आवेदन का विनिश्चय करते समय, अपराधों की प्रकृति एवं गंभीरता पर विचार किया जाना अपेक्षित है - यदि अपराध व्यापक रूप से समाज के विरुद्ध है, तो कार्यवाहियाँ समझौते के आधार पर अभिखंडित नहीं की जा सकती। (मोनू उर्फ रानू कुशवाहा वि. म.प्र. राज्य)

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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. [Laxman Vs. State of M.P.]

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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 दुरुपयोग है – अतः, दण्डिक कार्यवाहियाँ अभिखण्डित एवं आवेदक आरोप मुक्त किया गया। (लक्ष्मण वि. म.प्र. राज्य) ...*6

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. [Mohd. Arif Vs. Mohd. Arif Raen] ...189

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं वक्फ अधिनियम (1995 का 43), धाराएँ 61(3), 68(2) व (3) – अंतर्गत विवादक 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। (मो. आरिफ वि. मो. आरिफ राईन) ...189

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. [Balchand Gupta Vs. State of M.P.]

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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 विरुद्ध 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 विरुद्ध द्वितीय परिवाद अभियोजित करने के लिए हकदार था। (बालचन्द गुप्ता वि. म.प्र. राज्य)

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Dakaiti Aur Vyapharan Prabhavit Ksheshtra Adhiniyam, M.P. (36 of 1981), Section 11 & 13 – See – Penal Code, 1860, Section 302 r/w 34 & 394 r/w 397 [Narendra @ Chunna Kirar Vs. State of M.P.] (DB)...

डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र. (1981 का 36), धारा 11 व 13 – देखें – दण्ड संहिता, 1860, धारा 302 सहपठित 34 व 394 सहपठित 397 (नरेन्द्र उर्फ चुन्ना किरार वि. म.प्र. राज्य)

(DB)...364

Debt Recovery Tribunal (Procedure) Rules, 1993, Rule 12(6) and Debt Recovery Tribunal Regulation of Practice, 1998, Regulation 31 & 32 – Evidence on Affidavit – Application for cross-examination – Scope under Article 227 of Constitution – In respect of non-payment of loan amount, Bank filed a recovery case against the petitioners which was allowed in favour of Bank – Appeal filed by petitioners was

also dismissed – Held – As per the Rule 12(6) of the Rule of 1993, evidence may be filed on affidavit – In the present case, no application was filed by the petitioners to cross-examine the deponents/witnesses, therefore, in absence of such application under Regulation 31 and 32 of the Regulation of 1998, it cannot be said that no opportunity was granted to them – Further held – In a case, where mixed question of law and fact is involved, there is a limited scope for interference under Article 227 of the Constitution – Interference can be done when there is patent perversity or gross and manifest failure of justice or principle of natural justice has been flouted in the order passed by the court below – No error committed by the Tribunal or the Appellate Tribunal – Petition dismissed. [Ashirwad Industries (M/s.) Vs. Industrial Development Bank of India Ltd.] (DB)...*33

ऋण वसूली अधिकरण (प्रक्रिया) नियम, 1993, नियम 12(6) एवं ऋण वसूली अधिकरण पद्धति का विनियम, 1998, विनियमन 31 व 32 – शपथपत्र पर साक्ष्य – प्रति परीक्षण हेतु आवेदन – संविधान के अनुच्छेद 227 के अंतर्गत परिधि – ऋण राशि के असंदाय के संबंध में बैंक ने याची के विरुद्ध वसूली का प्रकरण प्रस्तुत किया जिसे बैंक के पक्ष में मंजूर किया गया – याचीगण द्वारा प्रस्तुत अपील भी खारिज – अभिनिर्धारित – नियम 1993 के नियम 12(6) के अनुसार, शपथपत्र पर साक्ष्य प्रस्तुत किया जा सकता है – वर्तमान प्रकरण में, याचीगण द्वारा अभिसाक्षीगण/साक्षीगण के प्रति परीक्षण हेतु आवेदन प्रस्तुत नहीं किया गया था इसलिए, विनियम, 1998 के विनियमन 31 व 32 के अंतर्गत उक्त आवेदन की अनुपस्थिति में यह नहीं कहा जा सकता कि उन्हें कोई अवसर प्रदान नहीं किया गया था – आगे अभिनिर्धारित – ऐसे प्रकरण में जहां विधि एवं तथ्य का मिश्रित प्रश्न अंतर्गुह्य है, वहां संविधान के अनुच्छेद 227 के अंतर्गत हस्तक्षेप के लिए परिधि सीमित है – हस्तक्षेप तब किया जा सकता है जब निचले न्यायालय द्वारा पारित आदेश में प्रकट विपर्यस्तता या न्याय की गंभीर एवं प्रकट विफलता या नैसर्गिक न्याय के सिद्धांत का उल्लंघन हुआ हो – अधिकरण अथवा अपीली अधिकरण द्वारा कोई त्रुटि कारित नहीं की गई – याचिका खारिज। (आशीर्वाद इण्डस्ट्रीज (मे.) लि. इण्डस्ट्रियल डेवलपमेन्ट बैंक ऑफ इंडिया लि.) (DB)...*33

Debt Recovery Tribunal Regulation of Practice, 1998, Regulation 31 & 32 – See – Debt Recovery Tribunal (Procedure) Rules, 1993, Rule 12(6) [Ashirwad Industries (M/s.) Vs. Industrial Development Bank of India Ltd.] (DB)...*33

ऋण वसूली अधिकरण पद्धति का विनियम, 1998, विनियमन 31 व 32 – देखें – ऋण वसूली अधिकरण (प्रक्रिया) नियम, 1993, नियम 12(6) (आशीर्वाद

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Essential Commodities Act (10 of 1955), Section 3/7 – See – Criminal Procedure Code, 1973, Section 482 [Balchand Gupta Vs. State of M.P.] ...184

आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3/7 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 482 (बालचन्द गुप्ता वि. म.प्र. राज्य) ...184

Evidence Act (1 of 1872), Section 3 – Appreciation of evidence – Broad day light murder – Witness could not reply about the colour of the clothes of the culprits – It was not possible for any witness to remember about the clothing of each and every culprit – Such minor contradictions in the deposition of witness could have been ignored.

[Narendra @ Chunna Kirar Vs. State of M.P.] (DB)...364

साक्ष्य अधिनियम (1872 का 1), धारा 3 - साक्ष्य का मूल्यांकन - दिन-दहाड़े हत्या - साक्षी अपराधियों के कपड़ों के रंग के बारे में उत्तर नहीं दे सका - किसी भी साक्षी के लिए यह संभव नहीं था कि वह हर एक अपराधी के पहनावे के बारे में याद रख सके - साक्षी के कथन में ऐसे मामूली विरोधाभासों को नजरअंदाज किया जा सकता था। (नरेन्द्र उर्फ चुन्ना किरार वि. म.प्र. राज्य) (DB)...364

Evidence Act (1 of 1872), Section 3 - See - Criminal Procedure Code, 1973, Section 363 [In Reference Vs. Rajendra Adivashi] (DB)...166

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Evidence Act (1 of 1872), Sections 3, 60, 145 & 157 - See - Penal Code, 1860, Sections 302, 325/149, 148 & 323 [Sitaram Vs. State of M.P.] (DB)...116

साक्ष्य अधिनियम (1872 का 1), धाराएँ 3, 60, 145 व 157 - देखें - दण्ड संहिता, 1860, धाराएँ 302, 325/149, 148 व 323 (सीताराम वि. म.प्र. राज्य) (DB)...116

Evidence Act (1 of 1872), Section 27 - Memorandum statement - Held - It is not at all mandatory to draw arrest memo prior to accused giving information u/S 27 of the Evidence Act as an accused is deemed in police custody when he gives information and recovery was made. [In Reference Vs. Sachin Kumar Singhraha] (DB)...690

साक्ष्य अधिनियम (1872 का 1), धारा 27 - ज्ञापन कथन - अभिनिर्धारित - यह बिल्कुल आज्ञापक नहीं है कि गिरफ्तारी ज्ञापन को साक्ष्य अधिनियम की धारा 27 के अंतर्गत अभियुक्त द्वारा जानकारी दिये जाने से पूर्व बनाया जाए क्योंकि जब अभियुक्त जानकारी देता है और बरामदगी की जाती है, उसे पुलिस अभिरक्षा में होना समझा जाता है। (इन रेफ्रेन्स वि. सचिन कुमार सिंघरहा) (DB)...690

Evidence Act (1 of 1872), Section 65 - Secondary evidence - Agreement II - Whether bipartite or tripartite - Concession made by counsel before High Court that it is bipartite - Whether such a concession can be regarded as a secondary evidence or not - Held - Such concession is not secondary evidence admissible under any of the clauses of Section 65 of Evidence Act and it does not preclude respondent from asserting that Agreement II is a tripartite agreement. [Sasan Power Ltd. Vs. North American Coal Corporation India Pvt. Ltd.] (SC)...515

साक्ष्य अधिनियम (1872 का 1), धारा 65 - द्वितीयक साक्ष्य - करार-II - क्या द्विपक्षीय है अथवा त्रिपक्षीय है - अधिवक्ता द्वारा उच्च न्यायालय के समक्ष स्वीकृति दी गई कि यह द्विपक्षीय है - क्या उक्त स्वीकृति को द्वितीयक साक्ष्य माना जा सकता है अथवा नहीं - अभिनिर्धारित - उक्त स्वीकृति, साक्ष्य अधिनियम की धारा 65 के किसी खंड के अंतर्गत ग्राह्य द्वितीयक साक्ष्य नहीं है और वह प्रत्यर्थी को यह प्राख्यान करने से प्रवारित नहीं करती कि करार-II, एक त्रिपक्षीय करार है। (सासन पॉवर लि. वि. नार्थ अमेरिकन कोल कारपोरेशन इंडिया प्रा. लि.) (SC)...515

Evidence Act (1 of 1872), Section 113-B - See - Penal Code, 1860, Sections 498-A, 304-B/302 & 306 [Gourishankar Nema Vs. Prabhudayal Nema] (DB)...765

साक्ष्य अधिनियम (1872 का 1), धारा 113-बी - देखें - दण्ड संहिता, 1860, धाराएँ 498-ए, 304-बी/302 व 306 (गौरीशंकर नेमा वि. प्रभूदयाल नेमा) (DB)...765

Evidence Act (1 of 1872), Sections 142 & 154 - See - Criminal Procedure Code, 1973, Section 363 [In Reference Vs. Rajendra Adivashi] (DB)...166

साक्ष्य अधिनियम (1872 का 1), धाराएँ 142 व 154 - देखें - दण्ड प्रक्रिया संहिता, 1973, धारा 363 (इन रेफ्रेन्स वि. राजेन्द्र आदिवासी) (DB)...166

Excise Act, M.P. (2 of 1915), Section 31(1) - Petitioners are challenging the re-auction notification - Whereby group license for the foreign liquor and the country liquor originally allotted to the petitioners had been put for their auction due to non payment of dues by the licensee and fresh allotment has been made in favour of the private respondent - There was a breach of contract on the part of the petitioner by not depositing the monthly license fee and basic license fee on time as provided in contract - Therefore the license is liable to be cancelled as per Section 31(1) of MP Excise Act, 1915 - Writ Petition dismissed - The petitioner shall at liberty to seek its remedies against the respondent for breach of contract. [Rajesh Malviya Vs. Commercial Taxes Department (Excise)] (DB)...289

आबकारी अधिनियम, म.प्र. (1915 का 2), धारा 31(1) - याचीगण पुनः नीलामी अधिसूचना को चुनौती दे रहे हैं - जिसके द्वारा मूल रूप से याचीगण को आबटित विदेशी मदिरा एवं देशी मदिरा की समूह अनुज्ञप्ति को, अनुज्ञप्तिधारकों द्वारा देयकों का भुगतान नहीं किये जाने के कारण, उनकी नीलामी हेतु रखा गया और निजी प्रत्यर्थी के पक्ष में नया आबंटन किया गया है - याची की ओर से मासिक अनुज्ञप्ति शुल्क एवं मूल अनुज्ञप्ति शुल्क जैसा कि संविदा में उपबंधित है, यथा समय

जमा नहीं किये जाने से संविदा का मंग हुआ है - इसलिए, म.प्र. आबकारी अधिनियम 1915 की धारा 31(1) के अनुसार, अनुज्ञप्ति निरस्त किये जाने योग्य है - रिट याचिका खारिज - याची को संविदा के मंग हेतु प्रत्यर्थी के विरुद्ध अपना उपचार चाहने की स्वतंत्रता होगी। (राजेश मालवीय वि. कमर्शियल टैक्सस डिपार्टमेन्ट (एक्साइज)) (DB)...289

*Excise Act, M.P. (2 of 1915), Section 62 and Foreign Liquor Rules, M.P., 1996 - Rule 8(1) (aa-2) - Amendment as to - Contention of Petitioner - Amendment in Rules brought about by an executive order without getting it legislated - Held - As per Section 62 of the Act of 1915, the State Government is empowered to formulate Rule and following a legislative process for amendment is not necessary as the Rule is only a regulatory measure for the purpose of collection, possession, supply & storage of intoxicants - Contention turned down. [Pradeep Chaturvedi Vs. State of M.P.] (DB)...*23*

आबकारी अधिनियम, म.प्र. (1915 का 2), धारा 62 एवं विदेशी मदिरा नियम, म.प्र., 1996 - नियम 8(1) (एए-2) - के संबंध में संशोधन - याची का तर्क - विधान बनाए बिना एक कार्यपालिक आदेश द्वारा नियमों में संशोधन लाया गया - अभिनिर्धारित - 1915 के अधिनियम की धारा 62 के अनुसार राज्य सरकार नियम बनाने के लिए सशक्त है एवं संशोधन के लिए एक विधायी प्रक्रिया का पालन करना जरूरी नहीं है क्योंकि नियम मादक पदार्थों के संग्रहण, कब्जा, आपूर्ति और भंडारण के प्रयोजन हेतु मात्र एक विनियामक उपाय है - तर्क अस्वीकार किया गया। (प्रदीप चतुर्वेदी वि. म.प्र. राज्य) (DB)...*23

*Excise Act, M.P. (2 of 1915), Section 62 and Foreign Liquor Rules, M.P., 1996 - Rule 8(1) (aa-2) - Amendment thereof - Prohibiting sale of "Draught Beer" in loose form through retail shops and permitting sale in "Sealed Bottles" only to petitioner holding license of category F.L.1. A A A A - Contention - Permitting other license holders like F.L.3; F.L. 4, F.L. 5 etc. is discriminatory - Held - The license granted under F.L. 3 and F.L. 3A is to a Hotel Bar & Resort Bar, similarly, F.L. 4 is granted to a civilian club etc., so these licenses are entirely different in purpose, conditions etc. - No case of discrimination - Contention turned down. [Pradeep Chaturvedi Vs. State of M.P.] (DB)...*23*

आबकारी अधिनियम, म.प्र. (1915 का 2), धारा 62 एवं विदेशी मदिरा नियम, म.प्र., 1996 - नियम 8(1) (एए-2) - तत्संबंधी संशोधन - खुदरा दुकानों के माध्यम से खुले ढंग में "ड्रॉट बियर" की बिक्री पर प्रतिषेध लगाना एवं केवल एफ.एल.1 ए ए ए

ए श्रेणी के लाईसेंस धारक याचिकाकर्ता को "मुहरबंद बोतलों" में बिक्री की अनुमति देना - तर्क - अन्य अनुज्ञप्तिधारियों जैसे कि एफ.एल. 3, एफ.एल. 4, एफ.एल. 5 आदि को अनुमति देना भेदभावपूर्ण है - अभिनिर्धारित - एफ.एल. 3 एवं एफ.एल. 3ए के तहत प्रदान की गई अनुज्ञप्ति होटल बार एवं रिसोर्ट बार के लिए है, इसी तरह एफ.एल. 4 को सिविलियन क्लब आदि, के लिए प्रदान किया जाता है, इसलिए ये अनुज्ञप्तियाँ प्रयोजन, शर्तों इत्यादि में पूरी तरह से भिन्न हैं - पक्षपात का कोई प्रकरण नहीं - तर्क अस्वीकार किया गया । (प्रदीप चतुर्वेदी वि. म.प्र. राज्य) (DB)...*23

*Excise Act, M.P. (2 of 1915), Section 62 and Foreign Liquor Rules, M.P., 1996 - Rule 8(1) (aa-2) - Petitioners are licensees, holding Foreign Liquor License - Amendment made in Rule 8(1) (aa-2) of the Rules of 1996 whereby the words "in Sealed Bottles" was inserted - Draught Beer - Earlier, Liquor Policy - Clause 36.1 - Prohibiting sale of "Draught Beer" through retail shops and only permitting it to be sold in "Sealed Bottles" - Challenge as to in W.P. No. 1728/2013. - Vide Order dated 19.03.2013, Petition was allowed & clause 36.1 of Liquor Policy was quashed - Interregnum - State Government amending Rule 8(1) (aa-2) of the Rules of 1996 and incorporating clause 36.1 of Liquor Policy in the said Rules - Challenge as to in present petition - Main contention - Amendment is illegal and ultra vires and has been incorporated to undo the direction or effect of the Judgment rendered in W.P. No. 1728/2013 - Held - Clause 36.1 of Liquor Policy was declared ultra vires in W.P. No. 1728/2013 because there was no change in the concerned Act or Rules and without there being any provision or amendment in the Act or Rules, introduction of clause 36.1 in the Liquor Policy by an executive decision cannot be permitted and now by way of amendment in Rule 8(1) (aa-2) of the Rules of 1996, the above said lacunae or defect in the earlier process has been rectified - So a validating Act can be passed if the lacunae or defect is rectified - Petition dismissed. [Pradeep Chaturvedi Vs. State of M.P.] (DB)...*23*

आवकारी अधिनियम, म.प्र. (1915 का 2), धारा 62 एवं विदेशी मदिरा नियम, म.प्र., 1996 - नियम 8(1) (एए-2) - याचीगण विदेशी मदिरा की अनुज्ञप्ति धारण करने वाले अनुज्ञप्तिधारी हैं - 1996 के नियमों के नियम 8(1) (एए-2) में संशोधन किया गया जिसके द्वारा "मुहरबंद बोतलों में" शब्दों को समाविष्ट किया गया - ड्राॅट बियर - पूर्व मदिरा नीति - खण्ड 36.1 - खुदरा दुकानों के माध्यम से "ड्राॅट बियर" की बिक्री प्रतिषेध की जाना एवं केवल "मुहरबंद बोतलों" में बेचे जाने की अनुमति - के संबंध में रिट याचिका क्र. 1728/2013 में चुनौती - आदेश दिनांक 19.03.2013 द्वारा याचिका

मंजूर की गई थी एवं मदिरा नीति के खण्ड 36.1 को अमिखंडित किया गया – अंतर्काल – राज्य सरकार द्वारा 1996 के नियमों में नियम 8(1) (एए-2) में संशोधन तथा उक्त नियमों में मदिरा नीति के खण्ड 36.1 को समाविष्ट किया जाना – के संबंध में वर्तमान याचिका में चुनौती – मुख्य तर्क – संशोधन अवैध एवं अधिकारातीत है तथा रिट याचिका क्र. 1728/2013 में दिए गए निर्णय के निर्देश या प्रभाव को पूर्ववत् करने के लिए समाविष्ट किया गया है – अभिनिर्धारित – मदिरा नीति के खण्ड 36.1 को रिट याचिका क्र. 1728/2013 में अधिकारातीत घोषित किया गया था क्योंकि संबंधित अधिनियम या नियमों में कोई बदलाव नहीं हुआ था तथा अधिनियम या नियमों में किसी प्रावधान या संशोधन के बिना, कार्यपालिक निर्णय द्वारा मदिरा नीति में खण्ड 36.1 को प्रविष्ट करने की अनुमति नहीं दी जा सकती एवं अब 1996 के नियमों के नियम 8(1) (एए-2) में संशोधन के जरिए पूर्वतर प्रक्रिया में उपरोक्त कमी या त्रुटि को सुधारा गया है – अतः एक विधिमान्य करने वाला अधिनियम पारित किया जा सकता है यदि कमी या त्रुटि को सुधारा गया है – याचिका खारिज। (प्रदीप चतुर्वेदी वि. म.प्र. राज्य) (DB)...*23

Explosives Act (4 of 1884), Section 9B & 9C – See – Criminal Procedure Code, 1973, Section 227 [P. Sadanand Reddy Vs. State of M.P.] ...426

विस्फोटक अधिनियम (1884 का 4), धारा 9बी व 9सी – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 227 (पी. सदानंद रेड्डी वि. म.प्र. राज्य) ...426

Explosive Substances Act, (6 of 1908), Section 5 – See – Criminal Procedure Code, 1973, Section 227 [P. Sadanand Reddy Vs. State of M.P.] ...426

विस्फोटक पदार्थ अधिनियम (1908 का 6), धारा 5 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 227 (पी. सदानंद रेड्डी वि. म.प्र. राज्य) ...426

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Tatha Gramodyog Viniyam, M.P., 1980, Clause 4(5) – Service Law – Departmental Enquiry after attaining age of superannuation – Show cause notice & charge sheet dated 27.04.2013 were issued after 11 months of superannuation whereas, allegation relates back to the year 1997-98 – Held – Initiation of Departmental Enquiry and continuation of the same after retirement is not permissible under Viniyam, 1980 – Viniyam do not provide for withholding of retiral benefits for recovery of the loss caused – Cause for initiation of Departmental Enquiry was created to the department 15 years prior to the date of superannuation – Same would amount to arbitrary exercise of powers with *malafide* intention – Show cause notice and charge sheet quashed. [Sevakram Shivedi Vs. M.P. Khadi Tatha Gram Udhog] ...*28

ग्रामोद्योग अधिनियम, म.प्र. (1978 का 16), धारा 29 एवं खादी तथा ग्रामोद्योग विनियम, म.प्र., 1980, खंड 4(5) – सेवा विधि – अधिवार्षिकी की आयु प्राप्त करने के पश्चात् विभागीय जांच – अधिवार्षिकी के 11 माह पश्चात् कारण बताओ नोटिस एवं आरोप पत्र दिनांक 27.04.2013 को जारी किये गये जबकि, आरोप वर्ष 1997-98 से संबंधित है – अभिनिर्धारित – विनियम, 1980 के अंतर्गत सेवानिवृत्ति के पश्चात् विभागीय जांच आरंभ करना और उसे जारी रखना अनुज्ञेय नहीं है – विनियम, कारित हुई हानि की वसूली हेतु निवृत्ति लाभों को रोका जाना उपबंधित नहीं करता – विभाग को, विभागीय जांच आरंभ करने का कारण अधिवार्षिकी की तिथि के 15 वर्ष पूर्व सृजित हुआ था – ऐसा करना असदभावपूर्ण आशय से शक्तियों के मनमाने प्रयोग की कोटि में आयेगा – कारण बताओ नोटिस एवं आरोप पत्र अभिखंडित किया गया। (सेवकराम शिवेदी वि. एम.पी. खादी तथा ग्राम उद्योग)

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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. [Parveen Begam Vs. Mahfooj Khan] (DB)...105

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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. [Parveen Begam Vs. Mahfooj Khan] (DB)...105

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 निरहित - तथापि, उसकी मातृत्वता को ध्यान में रखते हुए उसे मिलने का अधिकार प्रदान करना न्यायसंगत, उचित एवं मानवोचित होगा। (परवीन बेगम वि. महफूज खान) (DB)...105

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. [Parveen Begam Vs. Mahfooj Khan] (DB)...105

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 अभिमावी होगा। (परवीन बेगम वि. महफूज खान) (DB)...105

Hindu Law - Partition - Rights of the holder of the divided HUF property after the division of property - Held - Holder of the divided HUF property after partition has unfettered rights to deal with the separated property including sale or mortgage in the same manner as he can dispose of a self acquired property. [Sushila Bai Vs. Smt. Rajkumari] ...662

हिन्दू विधि - विभाजन - हिन्दू अविभाजित कुटुम्ब की विभाजित संपत्ति के धारक के संपत्ति का विभाजन होने के पश्चात् अधिकार - अभिनिर्धारित - हिन्दू अविभाजित कुटुम्ब की विभाजित संपत्ति के धारक को पृथक की गई संपत्ति के विक्रय या बंधक समेत संव्यवहार का उसी समान बंधनमुक्त अधिकार है जिस तरह से वह स्वअर्जित संपत्ति का संव्यवहार कर सकता है। (सुशीला बाई वि. श्रीमती राजकुमारी) ...662

Hindu Marriage Act (25 of 1955), Section 13 - Divorce on the ground of Adultery and Cruelty - After marriage, appellant/wife hardly

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stayed with her in-laws for two months – She ran away with one Imtiaz Khan and was later discovered and caught in a compromising position in some hotel – Police was also informed and offence was registered against Imtiaz Khan – After the incident, wife filed several cases against the husband and in-laws u/S 125 CrPC, u/S 498-A IPC and u/S 12 of the Domestic Violence Act which were found to be false and were dismissed by the court below – Held – Evidence in the case clearly shows that incident of eloping with Imtiaz Khan has been duly established and appellant/wife did not produced any witness to dislodge such allegation – Filing repeated false cases against the husband and his family members also amount to mental cruelty – Allegations of Adultery and cruelty duly established – Decree of divorce rightly granted – Appeal dismissed. [Jyoti Soni (Smt.) Vs. Mithlesh Soni] (DB)...628

हिन्दू विवाह अधिनियम (1955 का 25), धारा 13 – जारकर्म एवं क्रूरता के आधार पर विवाह विच्छेद – विवाह के पश्चात्, अपीलार्थी/पत्नी मुश्किल से 2 माह के लिए अपने ससुरालवालों के साथ रही थी – वह किसी इम्तियाज खान के साथ भाग गई तथा बाद में खोजी गई एवं किसी होटल में आपत्तिजनक स्थिति में पकड़ी गई – पुलिस को भी सूचित किया गया था तथा इम्तियाज खान के विरुद्ध अपराध पंजीबद्ध किया गया था – घटना के पश्चात्, पत्नी ने पति तथा ससुरालवालों के विरुद्ध दण्ड प्रक्रिया संहिता की धारा 125, भारतीय दण्ड संहिता की धारा 498-ए एवं घरेलू हिंसा अधिनियम की धारा 12 के अंतर्गत कई प्रकरण प्रस्तुत किये जिनका मिथ्या होना पाया गया था तथा निचले न्यायालय द्वारा खारिज कर दिये गये थे – अभिनिर्धारित – प्रकरण में साक्ष्य यह स्पष्ट दर्शाते हैं कि इम्तियाज खान के साथ भागने की घटना सम्यक् रूप से स्थापित होती है एवं अपीलार्थी/पत्नी ने ऐसे अभिकथन को हटाने हेतु कोई साक्षी प्रस्तुत नहीं किया है – पति तथा उसके परिवार के सदस्यों के विरुद्ध बार-बार मिथ्या प्रकरणों का प्रस्तुत किया जाना मानसिक क्रूरता की कोटि में आता है – जारकर्म एवं क्रूरता के अभिकथन सम्यक् रूप से स्थापित होते हैं – विवाह-विच्छेद की डिक्री उचित रूप से प्रदान की गई – अपील खारिज। (ज्योति सोनी (श्रीमती) वि. मिथलेश सोनी) (DB)...628

Hindu Marriage Act (25 of 1955), Sections 13(1)(ia), 13(1)(ib) & 25 – Cruelty & Desertion – Suit for divorce by husband on the ground of mental cruelty and desertion – Earlier suit for restitution of conjugal rights by husband was decided and a compromise was made between both the parties to live together – Due to adamant behavior of the wife, parties cannot live together – Admission of wife that she is living alone & not ready to stay with the husband at any cost – Trial Court passed decree of divorce in favour of husband which is the subject

matter of challenge in the present appeal – Held – The husband has duly pleaded & proved the instances of desertion and mental cruelty by way of oral evidence and documents – Trial Court has rightly granted the decree of divorce on the ground of mental cruelty and desertion – Maintenance u/S 25 of the Act of 1955 rightly granted – Custody of child to remain with the husband and wife will be at liberty to meet him at any time – Appeal dismissed. [Vineeta Choudhary (Smt.) Vs. Radheshyam] (DB)...*32

हिन्दू विवाह अधिनियम (1955 का 25), धाराएँ 13(1)(ia), 13(1)(ib) व 25 – क्रूरता एवं परित्याग – मानसिक क्रूरता एवं परित्याग के आधार पर पति द्वारा विवाह-विच्छेद हेतु वाद – पति द्वारा प्रस्तुत दाम्पत्य अधिकारों के प्रत्यास्थापन हेतु पूर्वतर वाद को विनिश्चित किया गया था और दोनों पक्षकारों के बीच एक साथ रहने का समझौता किया गया था – पत्नी के अडियल व्यवहार के कारण पक्षकार एक साथ नहीं रह सके – पत्नी की स्वीकृति कि वह अकेली रह रही है और किसी कीमत पर पति के साथ रहने के लिए तैयार नहीं – विचारण न्यायालय ने पति के पक्ष में विवाह विच्छेद की डिक्री पारित की जो कि वर्तमान अपील में चुनौती की विषय वस्तु है – अभिनिर्धारित – पति ने मौखिक साक्ष्य एवं दस्तावेजों के जरिए सम्यक् रूप से अभिवाक् किया है और परित्याग एवं मानसिक क्रूरता की घटनाओं को साबित किया है – विचारण न्यायालय ने क्रूरता एवं परित्याग के आधार पर उचित रूप से विवाह विच्छेद की डिक्री प्रदान की है – अधिनियम, 1955 की धारा 25 के अंतर्गत भरणपोषण उचित रूप से प्रदान किया गया है – बालक की अभिरक्षा पति के पास रहेगी और पत्नी उससे किसी भी समय मिलने के लिए स्वतंत्र रहेगी – अपील खारिज। (विनीता चौधरी (श्रीमती) वि. राधेश्याम) (DB)...*32

Hindu Marriage Act (25 of 1955), Section 24 – Maintenance pendent lite – Entitlement – Held – Looking to the short period for which parties stayed together and the conduct of the appellant/wife, she is not entitled for any relief or claim or any other benefit from respondent/husband. [Jyoti Soni (Smt.) Vs. Mithlesh Soni](DB)...628

हिन्दू विवाह अधिनियम (1955 का 25), धारा 24 – वादकालीन भरण-पोषण – हकदारी – अभिनिर्धारित – उस अल्प अवधि को देखते हुए जिसमें पक्षकार एक साथ रहे एवं अपीलार्थी/पत्नी का आचरण देखते हुए वह प्रत्यर्थी/पति से किसी अनुतोष या दावे या अन्य लाभ की हकदार नहीं है। (ज्योति सोनी (श्रीमती) वि. मिथलेश सोनी) (DB)...628

Hindu Succession Act (30 of 1956), Section 15 & 16 – See – Civil Procedure Code, 1908, Order 41 Rule 27 [Ramkuriya Bai (Smt.)

Vs. Smt. Kachra Bai (Dead)] ...656

हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 15 व 16 – देखें – सिविल प्रक्रिया संहिता, 1908, आदेश 41 नियम 27 (रामकुरिया बाई (श्रीमती) वि. श्रीमती कचरा बाई (मृतक)) ...656

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. [Malay Shrivastava Vs. The Deputy Commissioner, Income Tax] (DB)...39

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 छॉट 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। (मलय श्रीवास्तव वि. द डिप्टी कमिश्नर, इनकम टैक्स) (DB)...39

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. [Malay Shrivastava Vs. The Deputy Commissioner, Income Tax] (DB)...39

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 प्रारम्भ 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। (मलय श्रीवास्तव वि. द डिप्टी कमिश्नर, इनकम टैक्स) (DB)...39

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. [Malay Shrivastava Vs. The Deputy Commissioner, Income Tax] (DB)...39

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 निर्धारण या पुनर्निर्धारण कार्यवाहियों के प्रक्रम पर, संविधान के अनुच्छेद 226 के अंतर्गत रिट याचिका पोषणीय है – अभिनिर्धारित – निर्धारण या पुनर्निर्धारण कार्यवाहियों के प्रक्रम पर निर्धारित 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। (मलय श्रीवास्तव वि. द डिप्टी कमिश्नर, इनकम टैक्स) (DB)...39

Industrial Disputes Act (14 of 1947), Section 25-F – Termination – Petitioner/workman was appointed on regular vacancy of fire-brigade driver on 10.04.2001 by the respondent/employer – In

May 2005, he was terminated by oral order without following the prerequisite of Section 25-F of Industrial Disputes Act, 1947 – Reference made by appropriate government in this regard to Labour Court was answered against the petitioner/workman – Held – If workman has proved that he had completed 240 days in the last preceding 12 months, the burden of proof thereafter shifted to the employer to establish otherwise – Employer failed to discharge this burden by failing to produce the record in its possession pertaining to the entire service tenure of workman – Petition allowed. [Sakir Navi Quareshi Vs. The Municipal Council, Gohad] ...*41

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25-एफ – सेवा समाप्ति – याची/कर्मकार को प्रत्यर्थी/नियोक्ता द्वारा दिनांक 10.04.2001 को अग्निशामक दल के वाहन चालक की नियमित रिक्ति पर नियुक्त किया गया था – मई 2005 में, औद्योगिक विवाद अधिनियम, 1947 की धारा 25-एफ की पूर्वापेक्षा का पालन किये बिना मौखिक आदेश द्वारा उसकी सेवा समाप्त की गई थी – श्रम न्यायालय को इस संबंध में समुचित सरकार द्वारा दिया गया निर्देश, याची/कर्मकार के विरुद्ध उत्तरित किया गया था – अभिनिर्धारित – यदि कर्मकार ने यह साबित कर दिया है कि पूर्ववर्ती पिछले 12 माह में उसने 240 दिन पूर्ण कर लिये थे, तो साबित करने का भार नियोक्ता पर चला जाता है कि वह अन्यथा स्थापित करे – नियोक्ता, कर्मकार की पूर्ण सेवा अवधि से संबंधित अपने कब्जे में रखे अभिलेख को प्रस्तुत करने में असफल रहने के कारण इस भार का निर्वाह करने में असफल रहा – याचिका मंजूर। (साकिर नवी कुरैशी वि. द म्युनिसिपल काउंसिल, गोहद)...*41

Industrial Training (Non-Gazetted) Class-III Service Recruitment Rule, M.P., 2009, Rule 8 & Schedule Three – Appointment – On the post of computer operator – Rejection of candidature on the ground that the candidate does not have requisite qualification – Held – As per Recruitment Rules minimum qualification for the post is degree/diploma or BCA and in the subsequent order the department itself recognized the qualification of MCA as requisite qualification and which was possessed by the appellant – In such circumstances the rejection of the candidature of the appellant who was meritorious and was placed at higher place in the merit list, was arbitrary and illegal – Respondents are directed to appoint the appellant – Appeal allowed. [Anamika Shakla Vs. State of M.P.] (DB)...282

औद्योगिक प्रशिक्षण (अराजपत्रित) तृतीय श्रेणी सेवा मर्ती नियम, म.प्र., 2009, नियम 8 व अनुसूची तीन – नियुक्ति – कम्प्यूटर ऑपरेटर के पद पर –

अभ्यर्थिता की नामजूरी इस आधार पर कि अभ्यर्थी के पास अपेक्षित अर्हता नहीं है — अभिनिर्धारित — भर्ती नियमों के अनुसार इस पद हेतु न्यूनतम अर्हता उपाधि/डिप्लोमा या बी.सी.ए. है एवं पश्चात्पूर्ति आदेश में विभाग ने स्वयं एम.सी. ए. की अर्हता को अपेक्षित अर्हता के रूप में मान्यता प्रदान की और वह अपीलार्थी द्वारा प्राप्त की गई थी — ऐसी परिस्थितियों में अपीलार्थी जो कि प्रतिभाशाली गुणी था तथा योग्यता सूची में उच्च स्थान पर रखा गया था, उसकी अभ्यर्थिता का नामजूर किया जाना मनमाना तथा अवैध था — अपीलार्थी को नियुक्त करने हेतु प्रत्यर्थियों को निदेशित किया गया — अपील मंजूर। (अनामिका शाकला वि. म.प्र. राज्य) (DB)...282

Information Technology Act, (21 of 2000), Section 66-D – See – Penal Code, 1860, Section 420 & 468 [R. Shrinivasan Vs. State of M.P.] ...738

सूचना प्रौद्योगिकी अधिनियम (2000 का 21), धारा 66-D – देखें – दण्ड संहिता, 1860, धारा 420 व 468 (आर. श्रीनिवासन वि. म.प्र. राज्य) ...738

Interpretation of statutes – Agreement – Assignment – Meaning – Benefit of a contract can be assigned but not the burden, because the promisor cannot shift the burden of his obligation without a novation. [Sasan Power Ltd. Vs. North American Coal Corporation India Pvt. Ltd.] (SC)...515

कानूनों का निर्वचन – करार – समनुदेशन – अर्थ – संविदा का लाभ समनुदेशित किया जा सकता है परंतु भार नहीं क्योंकि वचनदाता अपने दायित्व के भार को नवीयन के बिना दूसरे पर नहीं डाल सकता। (सासन पॉवर लि. वि. नार्थ अमेरिकन कोल कारपोरेशन इंडिया प्रा. लि.) (SC)...515

*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. [Manish Sharma Vs. Sarvapriya Enterprises] ...*7*

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। (मनीष शर्मा वि. सर्वप्रिय इंटरप्राइजेस) ...*7

Interpretation of Statutes – Criminal Law – Circumstantial evidence – “Panchsheel” – Five Golden Principles. [In Reference Vs.

Sachin Kumar Singhraha]

(DB)...690

कानूनों का निर्वचन – दाण्डिक विधि – परिस्थितिजन्य साक्ष्य – “पंचशील”
– पांच स्वर्णिम सिद्धांत। (इन रेफ्रेन्स वि. सचिन कुमार सिंघरहा) (DB)...690

Interpretation of Statutes – Legislature can pass a validating Act if the lacunae or defect, because of which the provision is declared to be unconstitutional or invalid has been properly rectified by amending the law. [Pradeep Chaturvedi Vs. State of M.P.] (DB)...*23

कानूनों का निर्वचन – विधायिका एक विधिमान्य करने वाला अधिनियम पारित कर सकती है यदि वह कमी या त्रुटि, जिसके कारण उपबंध को असंवैधानिक एवं अविधिमान्य घोषित किया गया है, विधि में संशोधन द्वारा उचित रूप से सुधारा गया हो। (प्रदीप चतुर्वेदी वि. म.प्र. राज्य) (DB)...*23

Interpretation of Statutes – Right to Appeal – Right to prefer an appeal is a right created by statute. [Karuna Gehlot (Smt.) Vs. Manikchand Choubey] ...624

कानूनों का निर्वचन – अपील का अधिकार – अपील प्रस्तुत करने का अधिकार कानून द्वारा सृजित अधिकार है। (करुणा गहलोत (श्रीमती) वि. मानिकचन्द चौबे) ...624

Jurisdiction of Court – Petitioner purchased an APPLE i-phone from Bhopal which was subsequently got repaired at Lucknow and Gurgaon – Petitioner lodged a FIR at Bhopal – Held – Ordinarily that Court would get the jurisdiction to try the offence within whose jurisdiction the offence was committed – Record shows that mobile sim tray was replaced at Lucknow and petitioner came to know about the same at Gurgaon – Courts that would have the jurisdiction to try the offence would either be the Court at Lucknow where the act was done or the Court at Gurgaon where the effect ensued – No part of the offence has been committed in the State of Madhya Pradesh – Investigation against the petitioners and resultant proceedings before the trial Court at Bhopal has no legal basis and are hereby quashed. [R. Shrinivasan Vs. State of M.P.] ...738

न्यायालय की अधिकारिता – याची ने एप्पल आई-फोन भोपाल से क्रय किया जिसे तत्पश्चात् लखनऊ एवं गुरुगांव में सुधरवाया गया था – याची ने प्रथम सूचना प्रतिवेदन भोपाल में दर्ज कराया – अभिनिर्धारित – साधारणतः उस न्यायालय को अपराध का विचारण करने की अधिकारिता होगी जिसकी अधिकारिता के भीतर

अपराध कारित किया गया था - अभिलेख दर्शाता है कि मोबाईल सिम ट्रे को लखनऊ में बदला गया था और याची को इसकी जानकारी गुरगांव में हुई - न्यायालय जिन्हें अपराध का विचारण करने की अधिकारिता होगी वह या तो लखनऊ का न्यायालय होगा जहां कृत्य किया गया अथवा गुरगांव का न्यायालय जहां प्रभाव उत्पन्न हुआ - अपराध का कोई भी भाग मध्य प्रदेश राज्य में कारित नहीं हुआ - याचीगण के विरुद्ध अन्वेषण व भोपाल के विचारण न्यायालय के समक्ष परिणामिक कार्यवाहियों का विधिक आधार नहीं तथा एतद् द्वारा अभिखंडित की गई। (आर. श्रीनिवासन वि. म.प्र. राज्य) ...738

*Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Section 7-A and Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 12 - Détermination of Age - Procedure - Copy of the school Scholar Register was placed on record and was duly proved by the teacher - This document comes in the purview of documents prescribed under Rule 12(3)(a)(ii) of the Rules, 2007 in which the date of birth of the applicant is mentioned as 31.05.1997 - Consequently, at the time of incident applicant was below the age of 18 years - Thus he was juvenile - Impugned order is not sustainable and the same is hereby quashed - Revision allowed. [Sonu Jadugar @ Ajhar Khan Vs. State of M.P.] ...*30*

किशोर न्याय (बालकों की देख-रेख और संरक्षण) अधिनियम (2000 का 56), धारा 7-ए एवं किशोर न्याय (बालकों की देख-रेख और संरक्षण) नियम, 2007, नियम 12 - आयु का निर्धारण - प्रक्रिया - शाला छात्र पंजी की प्रति अभिलेख पर प्रस्तुत की गई और शिक्षक द्वारा सम्यक् रूप से साबित की गई - यह दस्तावेज, नियम, 2007 के नियम 12(3)(ए)(ii) के अंतर्गत विहित दस्तावेजों की परिधि में आता है, जिसमें आवेदक की जन्म तिथि 31.05.1997 के रूप में उल्लिखित है - परिणामस्वरूप, घटना के समय आवेदक 18 वर्ष से कम आयु का था - अतः वह किशोर था - आक्षेपित आदेश पोषणीय नहीं, एतद् द्वारा अभिखंडित - पुनरीक्षण मंजूर। (सोनू जादुगर उर्फ अजहर खान वि. म.प्र. राज्य) ...*30

*Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 12 - See - Juvenile Justice (Care and Protection of Children) Act, 2000, Section 7-A [Sonu Jadugar @ Ajhar Khan Vs. State of M.P.] ...*30*

किशोर न्याय (बालकों की देख-रेख और संरक्षण) नियम, 2007, नियम 12 - देखें - किशोर न्याय (बालकों की देख-रेख और संरक्षण) अधिनियम, 2000, धारा 7-ए (सोनू जादुगर उर्फ अजहर खान वि. म.प्र. राज्य) ...*30

Juvenile Justice (Care and Protection of Children) Act, 2015

(2 of 2016), Section 30 – Functions and responsibilities of Child Welfare Committee – Petition filed against order of Child Welfare Committee (CWC) directing petitioner to bring child in the office in between 10:00AM to 05:00PM on every Friday giving visitation right to husband – Held – Except Section 30(xii), Committee cannot take cognizance with respect to protection of a child who is in need of care & protection – *Suo Motu* cognizance has not been taken by the Committee reaching out to the child in need, but action taken on the basis of complaint by husband – Function discharged by Committee is not specified in the Section. [Priya Yadav Vs. State of M.P.] ...605

किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 30 – बाल कल्याण समिति के कार्य एवं उत्तरदायित्व – याची को प्रत्येक शुक्रवार सुबह 10 बजे से सायं 5 बजे तक बालक को कार्यालय में लाने के लिए निदेशित करते हुए पति को मुलाकात का अधिकार देते हुए बाल कल्याण समिति के आदेश के विरुद्ध याचिका प्रस्तुत – अभिनिर्धारित – सिवाय धारा 30(xii) के, समिति ऐसे बालक के संरक्षण के संबंध में संज्ञान नहीं ले सकती जिसे देखरेख एवं संरक्षण की आवश्यकता है – समिति ने जरूरतमंद बालक के लिए स्वप्रेरणा से संज्ञान नहीं लिया बल्कि पति की शिकायत के आधार पर कार्रवाई की गई – समिति द्वारा निर्वहित कार्य धारा में विनिर्दिष्ट नहीं। (प्रिया यादव वि. म.प्र. राज्य) ...605

Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), Section 37 – Powers of Child Welfare Committee – Primary function of the Committee starts when child is produced before them or intimation received by Child Welfare Committee on verification by protection officer or by own visit after passing the order by all three members – No other power can be exercised by the members of Child Welfare Committee with respect to child who is not in conflict with law and in need of care and protection, not brought before them. [Priya Yadav Vs. State of M.P.] ...605

किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 37 – बाल कल्याण समिति की शक्तियाँ – समिति का प्राथमिक कार्य, उनके समक्ष बालक को प्रस्तुत किये जाने पर या संरक्षण अधिकारी के सत्यापन द्वारा बाल कल्याण समिति को सूचना प्राप्त होने पर अथवा सभी तीनों सदस्यों द्वारा आदेश पारित करने के पश्चात्, स्वयं निरीक्षण करने पर आरंभ होता है – बाल कल्याण समिति के सदस्य, ऐसा बालक जो विधि का उल्लंघन करने वाला नहीं है और जिसे देखरेख एवं संरक्षण की आवश्यकता है, जिसे उनके समक्ष नहीं लाया गया हो, उसके संबंध में किसी अन्य शक्ति का प्रयोग नहीं कर सकते। (प्रिया यादव

वि. म.प्र. राज्य) ...605

Khadi Tatha Gramodyog Viniyam, M.P., 1980, Clause 4(5) – See – Gramodyog Adhiniyam, M.P., 1978, Section 29 [Sevakram Shivedi Vs. M.P. Khadi Tatha Gram Udhhyog] ...*28

खादी तथा ग्रामोद्योग विनियम, म.प्र., 1980, खंड 4(5) – देखें – ग्रामोद्योग अधिनियम, म.प्र., 1978, धारा 29 (सेवकराम शिवेदी वि. एम.पी. खादी तथा ग्राम उद्योग) ...*28

*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*. [Mulayam Singh Yadav Vs. State of M.P.] (DB)...*9*

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 – चूंकि याची की तीसरी संतान का जन्म दिनांक 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। (मुलायम सिंह यादव वि. म.प्र. राज्य) (DB)...*9

*Land Acquisition Act (1 of 1894), Section 18 & 54 – Reference to Court and Appeal – Apportionment of compensation amount of the land of share of respondent no. 4 in favour of appellants, merely on the basis of affidavit given by them before Tehsildar – On the basis of which Tehsildar declared present appellants to be the owner of 2/3rd share – Reference Court passed order for apportionment of only 1/3rd share of compensation amount in favour of appellants – Appeal – Held – Order passed by Tehsildar is *non est* in the eye of law as under the Transfer of Property Act, gift can be made by owner of the land only by registered sale deed and not by oral expression – Therefore, Tehsildar has no right to transfer the land of respondent No. 4 in the appellants'*

name – There is no other document in favour of the appellants – Findings of reference court affirmed – Appeal dismissed. [Anjani Prasad (Dead) through L.Rs. Ram Shiromani Tiwari Vs. State of M.P.] ...653

भूमि अर्जन अधिनियम (1894 का 1), धारा 18 व 54 – न्यायालय को निर्देश एवं अपील – प्रत्यर्थी क्र. 4 के हिस्से की भूमि की प्रतिकर राशि का प्रभाजन अपीलार्थीगण के पक्ष में मात्र उनके द्वारा तहसीलदार के समक्ष दिये गये शपथ-पत्र के आधार पर – जिसके आधार पर तहसीलदार ने वर्तमान अपीलार्थीगण को 2/3 हिस्से का स्वामी घोषित किया – निर्देश न्यायालय ने मात्र 1/3 हिस्से की प्रतिकर राशि का आदेश अपीलार्थीगण के पक्ष में पारित किया – अपील – अभिनिर्धारित – तहसीलदार द्वारा पारित आदेश, विधि की दृष्टि में नास्ति है चूंकि संपत्ति अंतरण अधिनियम के अंतर्गत दान केवल रजिस्ट्रीकृत विक्रय विलेख से भूमि के स्वामी द्वारा किया जा सकता है तथा न कि मौखिक अभिव्यक्ति द्वारा – अतः, तहसीलदार को प्रत्यर्थी क्र. 4 की भूमि अपीलार्थीगण के नाम पर अंतरित करने का कोई अधिकार नहीं है – अपीलार्थीगण के पक्ष में अन्य कोई दस्तावेज नहीं हैं – निर्देश न्यायालय के निष्कर्ष अभिपुष्ट – अपील खारिज। (अंजनी प्रसाद (मृतक) द्वारा विधिक प्रतिनिधि राम शिरोमणी तिवारी वि. म.प्र. राज्य) ...653

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. [Manish Sharma Vs. Sarvapriya Enterprises] ...*7

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। (मनीष शर्मा वि. सर्वप्रिय इंटरप्राइजेस) ...*7

Land Revenue Code, M.P. (20 of 1959), Section 164 and Hindu Succession Act (30 of 1956) – Amendment of 2005 – Devolution of rights after the death of the holder – Held – The holder of divided HUF property can dispose of the property in any manner as he deems fit but his successor will have interest over the property only when he expires and the property held by him still remains whereas in case he sells off the entire property then the question of succession does not arise. [Sushila Bai Vs. Smt. Rajkumari] ...662

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 164 एवं हिन्दू उत्तराधिकार अधिनियम (1956 का 30) – 2005 का संशोधन – धारक की मृत्यु के पश्चात्

अधिकारों का न्यागमन – अभिनिर्धारित – हिन्दू अविभाजित कुटुम्ब की विभाजित संपत्ति का धारक किसी भी तरीके से जैसा वह उचित समझे संपत्ति का निपटारा कर सकता है परन्तु उसके उत्तराधिकारी का संपत्ति पर मात्र तब हित होगा जबकि उसकी मृत्यु हो चुकी हो तथा उसके द्वारा धारण की गई संपत्ति अभी भी बची हुई है, जबकि यदि वह संपूर्ण संपत्ति विक्रय कर देता है तो उत्तराधिकारिता का प्रश्न उत्पन्न नहीं होता। (सुशीला बाई वि. श्रीमती राजकुमारी) ...662

Law of Torts – The expressions malfeasance, misfeasance and non-feasance would apply in those limited cases where the State or its officers are liable not only for breach of care and duty but it must be actuated with malice or bad faith. [Bank of Maharashtra Vs. M/s. ICO Jax India Deedwana Oli Lashkar Gwalior] ...645

अपकृत्य विधि – दुष्करण, अपकरण एवं अकरण का शब्द प्रयोग उन सीमित प्रकरणों में लागू होगा जहाँ राज्य या उसके अधिकारी न केवल सावधानी एवं कर्तव्य के भंग हेतु दायी है बल्कि वह दुर्भाव या असदभाव से प्रेरित हुआ होना चाहिए। (बैंक ऑफ महाराष्ट्र वि. मे. आई.सी.ओ. जेक्स इंडिया डीडवाना ओली लश्कर ग्वालियर) ...645

Legal Metrology Act, 2009 (1 of 2010), Sections 48(5) & 51 – See – Criminal Procedure Code, 1973, Section 482 [Balchand Gupta Vs. State of M.P.] ...184

विधिक मापविज्ञान अधिनियम, 2009 (2010 का 1), धाराएँ 48(5) व 51 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 482 (बालचन्द गुप्ता वि. म.प्र. राज्य) ...184

Life Insurance Corporation of India (Employees) Pension Rules, 1995, Rule 2(k) – Definition of 'Family' – Entitlement of Pension – Husband and son of deceased claiming pension – Earlier Writ Petition filed by husband seeking pension for the son was disposed of with a direction to respondent to pass a suitable cogent order whereby in compliance, respondent passed the impugned order in which pension was sanctioned in favour of son and son was directed to obtain NOC from the petitioner No.1 (husband of deceased) – In the present petition, Plea of estoppel was raised by the respondent on the ground that husband has waived his right in the earlier petition – Held – Merely because in the order of the earlier writ petition it is recorded that petitioner was claiming pension for son, cannot deprive the petitioner to seek pension – Under the Pension Rules, definition of 'Family' includes husband in case of female employee and he is entitled for pension because he falls in the ambit of

'Family' – It is trite law that no *estoppel* operated against the statute – Respondents depriving petitioner husband from pension is impermissible as per Rules – Petition allowed – Respondents directed to pay pension to petitioner husband in accordance with Pension Rules along with interest @ 12% p.a. and cost of Rs. 5000. [Prabhat Pathak Vs. Life Insurance Corporation] ...549

भारतीय जीवन बीमा निगम (कर्मचारी) पेंशन नियम, 1995, नियम 2(के) – 'परिवार' की परिभाषा – पेंशन की हकदारी – मृतिका के पति एवं पुत्र द्वारा पेंशन का दावा किया जाना – पूर्व में पति द्वारा पुत्र के लिए पेंशन चाहते हुए प्रस्तुत की गई रिट याचिका प्रत्यर्थी को एक उपयुक्त तर्कपूर्ण आदेश पारित करने के निदेश के साथ निराकृत की गई थी जिसके अनुपालन में प्रत्यर्थी ने आक्षेपित आदेश पारित किया जिसमें पेंशन पुत्र के पक्ष में मंजूर की गई थी तथा पुत्र को याची क्र. 1 (मृतिका के पति) से अनापत्ति प्रमाण-पत्र अभिप्राप्त करने हेतु निदेशित किया गया था – वर्तमान याचिका में, प्रत्यर्थी द्वारा *विबंध* का अभिवाक् इस आधार पर उठाया गया कि पति ने पूर्व रिट याचिका में अपने अधिकार का अधित्यजन किया था – अभिनिर्धारित – मात्र इसलिए कि पूर्व रिट याचिका के आदेश में यह अभिलिखित है कि याची, पुत्र के लिए पेंशन का दावा कर रहा था, याची को पेंशन चाहने से वंचित नहीं कर सकता – पेंशन नियमों के अंतर्गत 'परिवार' की परिभाषा में महिला कर्मचारी के प्रकरण में पति सम्मिलित है तथा वह पेंशन का हकदार है क्योंकि वह 'परिवार' की परिधि में आता है – यह प्रचलित विधि है कि कोई *विबंध* कानून के विरुद्ध प्रवर्तित नहीं होता – प्रत्यर्थीगण द्वारा याची पति को पेंशन से वंचित किया जाना नियमों के अनुसार अननुज्ञेय है – याचिका मंजूर – प्रत्यर्थीगण को याची पति को पेंशन नियमों के अनुसार 12 प्रतिशत प्रतिवर्ष की दर से ब्याज के साथ पेंशन तथा रु. 5000/- व्यय का भुगतान करने हेतु निदेशित किया गया। (प्रभात पाठक वि. लाईफ इश्योरेंस कारपोरेशन) ...549

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. [Jahoor Khan Vs. Ramvaran] ...93

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिए माफी – 1265
दिनों का विलंब – दिनांक 18.04.2012 को अधिनिर्णय पारित करने के पश्चात् दिनांक 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।
 (जहूर खान वि. रामवरन) ...93

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. [Commissioner, M.P. Housing Board Vs. M/s. Mohanlal and Company] (SC)...1

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। (कमिश्नर, एम.पी. हाउसिंग बोर्ड वि. मे. मोहनलाल एण्ड कम्पनी) (SC)...1

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. [Commissioner, M.P. Housing Board

Vs. M/s. Mohanlal and Company]

(SC)...1

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। (कमिश्नर, एम.पी. हाउसिंग बोर्ड वि. मे. मोहनलाल एण्ड कम्पनी) (SC)...1

Limitation Act (36 of 1963), Article 137 – See – Arbitration and Conciliation Act, 1996, Section 11(6) [Shridhar Dubey Vs. Union of India] ...401

परिसीमा अधिनियम (1963 का 36), अनुच्छेद 137 – देखें – माध्यस्थम् और सुलह अधिनियम, 1996, धारा 11(6) (श्रीधर दुबे वि. यूनियन ऑफ इंडिया) ...401

Limitation Act (36 of 1963), Schedule I, Article 54 - "Date fixed for performance" is a crystallized notion – Means a definite date is fixed for doing particular act – Term "Date" is definitely suggestive of specified date in the calendar. [Madina Begum Vs. Shiv Murti Prasad Pandey] (SC)...507

परिसीमा अधिनियम (1963 का 36), अनुसूची I, अनुच्छेद 54 – "पालन किये जाने हेतु नियत दिनांक" एक निश्चित धारणा है – अर्थात् विशिष्ट कार्य को करने हेतु निश्चित दिनांक नियत की गई है – शब्द "दिनांक" निश्चित रूप से कलेण्डर में विनिर्दिष्ट दिनांक का संकेतक है। (मदीना बेगम वि. शिव मूर्ति प्रसाद पाण्डे) (SC)...507

Limitation Act (36 of 1963), Schedule I, Article 54 and Specific Relief Act (47 of 1963), Section 22 – Suit for specific performance – If barred – 'A' agreed to sale property to 'B' by agreement dated 03.09.2001 agreeing to execute registered conveyance within 6 months

of agreement – Court issued injunction on alienation – Injunction became ineffective on 28.09.2006 – On 02.08.2008 name of ‘C’ mutated upon sale – ‘B’ issued notice in August, 2008 for specific performance of the contract – Held – Suit is within limitation – In agreement, no specified date for performance of agreement is mentioned. [Madina Begum Vs. Shiv Murti Prasad Pandey] (SC)...507

परिसीमा अधिनियम (1963 का 36), अनुसूची I, अनुच्छेद 54 एवं विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 22 – विनिर्दिष्ट पालन हेतु वाद – यदि वर्जित है – “ए” करार दिनांक 03.09.2001 के द्वारा करार के छह माह के भीतर रजिस्ट्रीकृत हस्तांतरण-पत्र के निष्पादन की सहमति देते हुए “बी” को सम्पत्ति विक्रय करने हेतु सहमत हुआ – न्यायालय ने अन्य संक्रामण पर व्यादेश जारी किया – व्यादेश दिनांक 28.09.2006 को प्रभावहीन हुआ – दिनांक 02.08.2008 को “सी” का नाम विक्रय पर नामांतरित हुआ – अगस्त, 2008 में “बी” ने संविदा के विनिर्दिष्ट पालन हेतु नोटिस जारी किया – अभिनिर्धारित – वाद परिसीमा के भीतर है – करार में, करार के पालन के लिए कोई विनिर्दिष्ट दिनांक उल्लिखित नहीं है। (मदीना बेगम वि. शिव मूर्ति प्रसाद पाण्डे) (SC)...507

*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. [Guman Singh Damor Vs. State of M.P.] (DB)...*5*

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 विरुद्ध समुचित

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(DB)...*5

Lokayukt Evam-Up-Lokayukt (Investigation) Rules, M.P., 1982, Rules 6 & 16 – See – Lokayukt Evam Up-Lokayukt Adhiniyam, M.P., 1981, Sections 10, 12 & 13 [Guman Singh Damor Vs. State of M.P.]

(DB)...*5

लोकायुक्त एवं उप-लोकायुक्त (अन्वेषण) नियम, म.प्र., 1982, नियम 6 व 16 – देखें – लोकायुक्त एवं उप-लोकायुक्त अधिनियम, म.प्र., 1981, धाराएँ 10, 12 व 13 (गुमान सिंह डामोर वि. म.प्र. राज्य)

(DB)...*5

Micro and Small Enterprises Facilitation Council Rules, M.P., 2006, Rule 5 – See – Micro, Small and Medium Enterprises Development Act, 2006, Section 18(1) & (2) [Power Machines India Ltd. Vs. State of M.P.]

(DB)...*37

सूक्ष्म एवं लघु उद्यम सुविधा परिषद् नियम, म.प्र., 2006, नियम 5 – देखें – सूक्ष्म, लघु और मध्यम उद्यम विकास अधिनियम, 2006, धारा 18(1) व (2) (पॉवर मशीन्स इंडिया लि. वि. म.प्र. राज्य)

(DB)...*37

*Micro, Small and Medium Enterprises Development Act (27 of 2006), Section 18(1) & (2), Micro and Small Enterprises Facilitation Council Rules, M.P., 2006, Rule 5 and Arbitration and Conciliation Act (26 of 1996), Section 36 – Execution Proceedings – Ultra Vires provisions – In case of any dispute, Section 18 of the Act of 2006 contemplates the dispute resolution mechanism under which disputes would be adjudicated through Arbitration and further award would be executed as per the provision of Section 36 of the Arbitration and Conciliation Act, 1996, whereas Rule 5 of the Rules of 2006 provides for a special procedure of recovery as if it is an arrears of land revenue – Petitioner prayed to declare Rule 5 of the Rules of 2006 to be *ultra vires* to Section 18 of the Act of 2006 – Held – Merely because a separate Rule for recovery is contemplated under the Rules of 2006, in absence of there being any conflict with the constitution, the same cannot be declared as *ultra vires* – If two remedies happens to be inconsistent, they can still continue and it is for the person to chose amongst them and once he elects one of them, action can commence accordingly – Rule formulated in addition to the statutory rule for*

execution available u/S 36 of the Act of 1996, cannot be termed as *ultra vires* or illegal to the constitution or to the Act of 2006 – Petition dismissed. [Power Machines India Ltd. Vs. State of M.P.] (DB)...*37

सूक्ष्म, लघु और मध्यम उद्यम विकास अधिनियम (2006 का 27), धारा 18(1) व (2), सूक्ष्म एवं लघु उद्यम सुविधा परिषद् नियम, म.प्र., 2006, नियम 5 एवं माध्यस्थ्यम् और सुलह अधिनियम (1996 का 26), धारा 36 – निष्पादन कार्यवाहियाँ – अधिकारातीत उपबंध – किसी विवाद की स्थिति में, अधिनियम 2006 की धारा 18 विवाद समाधान की प्रक्रिया अनुध्यात करती है जिसके अंतर्गत माध्यस्थ्यम द्वारा विवाद को न्यायनिर्णित किया जाएगा और आगे, माध्यस्थ्यम् और सुलह अधिनियम 1996 की धारा 36 के उपबंधों के अनुसार अधिनिर्णय निष्पादित होगा जबकि 2006 के नियमों का नियम 5 वसूली की विशेष प्रक्रिया उपबंधित करता है जैसा कि वह भू-राजस्व का बकाया हो – याची ने नियम, 2006 के नियम 5 को, अधिनियम 2006 की धारा 18 के अधिकारातीत घोषित करने की प्रार्थना की – अभिनिर्धारित – मात्र इसलिए कि नियम, 2006 के अंतर्गत वसूली हेतु पृथक नियम अनुध्यात है, संविधान के साथ किसी टकराव के अनुपस्थिति में, उक्त को अधिकारातीत घोषित नहीं किया जा सकता – यदि दो उपचार असंगत हो जाते हैं, वे तब भी जारी रह सकते हैं और यह व्यक्ति पर होगा कि इनमें से चयन करें तथा एक बार जब वह इनमें से एक का चयन करता है, कार्यवाही तदनुसार आरंभ हो सकती है – निष्पादन हेतु अधिनियम 1996 की धारा 36 के अंतर्गत उपलब्ध कानूनी नियम के अतिरिक्त बनाये गये नियम को संविधान अथवा अधिनियम 2006 के अधिकारातीत अथवा अवैध नहीं कहा जा सकता – याचिका खारिज। (पॉवर मशीन्स इंडिया लि. वि म.प्र. राज्य) (DB)...*37

*Motor Vehicles Act (59 of 1988), Sections 2(30), 50(2) & 166 and Central Motor Vehicles Rules, 1989, Rule 56 – Compensation – Term “Owner” – Appeal against rejection of compensation claim filed by the owner of the damaged truck – Held – Appellants have not filed the registration certificate of the vehicle in the name of deceased nor after his death, they (appellants) produced any evidence to prove their ownership – As per Section 166 of the Act of 1988 only the owner of the vehicle is entitled to receive the compensation for damage to the property in an accident – Impugned award upheld – Appeal dismissed. [Savitri Devi Tiwari.(Smt.) Vs. Abdul Jabbar] ...*42*

मोटर यान अधिनियम (1988 का 59), धाराएँ 2(30), 50(2) व 166 एवं केन्द्रीय मोटर यान नियम, 1989, नियम 56 – प्रतिकर – शब्द “स्वामी” – क्षतिग्रस्त ट्रक के स्वामी द्वारा प्रस्तुत प्रतिकर के दावे को नामंजूर किये जाने के विरुद्ध अपील – अभिनिर्धारित – अपीलार्थीगण ने मृतक के नाम से वाहन का रजिस्ट्रीकरण प्रमाण-पत्र प्रस्तुत नहीं किया, न ही उसकी मृत्यु के पश्चात् उन्होंने (अपीलार्थीगण)

उनका स्वामित्व साबित करने हेतु कोई साक्ष्य प्रस्तुत किया – अधिनियम 1988 की धारा 166 के अनुसार केवल वाहन का स्वामी ही दुर्घटना में संपत्ति को हुई क्षति का प्रतिकर प्राप्त करने का हकदार है – आक्षेपित अवार्ड की पुष्टि – अपील खारिज। (सवित्री देवी तिवारी (श्रीमती) वि. अब्दुल जब्बार) ...*42

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. [Bilkeesh Bano (Smt.) Vs. Kulvinder Singh] ...*2

मोटर यान अधिनियम (1988 का 59), धारा 166 – चिकित्सीय साक्ष्य – प्रकरण में ए.आर.डी.एस. (एक्यूट रेस्पिरेटरी डिस्ट्रेस 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 दुरुपयोग से कारित हो सकती है – अधिकरण द्वारा निकाला गया निष्कर्ष उचित प्रतीत होता है – किसी हस्तक्षेप की आवश्यकता नहीं। (बिलकिश बानो (श्रीमती) वि. कुलविन्दर सिंह) ...*2

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. [Savita Bai Vs. Aslam] ...100

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। (सविता बाई वि. असलम) ...100

Motor Vehicles Act (59 of 1988), Section 173 – Principle of Pay and recover – Liability of Insurance Company when driver of the

offending vehicle had no valid driving licence at the time of accident – Held – Insurance Co. cannot be immuned from application of pay and recover provision – Appeal dismissed. [IFFCO Tokyo General Insurance Co. Ltd. Vs. Ghasiram] ...*35

मोटर यान अधिनियम (1988 का 59), धारा 173 – संदाय और वसूली का सिद्धांत – दुर्घटना के समय आक्षेपित वाहन के चालक के पास विधिमान्य चालक अनुज्ञप्ति न होने की स्थिति में बीमा कंपनी का दायित्व – अभिनिर्धारित – बीमा कंपनी संदाय और वसूली के उपबंध की प्रयोज्यता से उन्मुक्त नहीं हो सकती – अपील खारिज। (इफको टोक्यो जनरल इश्योरेंस कं. लि. वि. घासीराम) ...*35

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. [Bilkeesh Bano (Smt.) Vs. Kulvinder Singh] ...*2

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 रुपये प्राप्त किये उसने कमी मृतक का इलाज किया तथा कुछ रसीदें मृतक की मृत्यु के पश्चात् की थी – अभिनिर्धारित – प्रत्यर्थीगण द्वारा रसीदों को चुनौती नहीं दी गई – रसीदें मिथ्या थी यह दर्शाने हेतु कोई साक्ष्य प्रस्तुत नहीं 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/- रु. की रसीदें, जो अधिकरण द्वारा मंजूर नहीं की गई थी, मंजूर की जाती हैं – कुल चिकित्सीय

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व्यय 1,23,505/- रु. में परिवहन एवं पोषणाहार मिलाकर 1,35,000/- रु. होते हैं, तथा 10,000/- रु. पीड़ा एवं कष्ट के लिए — अपीलार्थी आवेदन प्रस्तुत करने की दिनांक से 6 प्रतिशत ब्याज की दर से कुल 1,45,000/- रु., साथ ही 2000/- रु. अपील का व्यय प्राप्त करने का हकदार है — अपील अंशतः मंजूर। (बिलकिश बानो (श्रीमती) वि. कुलविन्दर सिंह) ...*2

*Municipal Corporation Act, M.P. (23 of 1956), Sections 58(5) & 58(6) — See — Service Law [Pawan Kumar Singhal Vs. State of M.P.] ...*10*

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 58(5) व 58(6) — देखें — सेवा विधि (पवन कुमार सिंघल वि. म.प्र. राज्य) ...*10

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नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 255 व 366(6) — पशुवधशाला/दुकान को बंद करना — जब म.प्र. नगरपालिक निगम अधिनियम, 1956 के उपबंध के अंतर्गत अनुज्ञप्ति प्रदान की गई थी तो उसे मात्र तब स्थगित किया जा सकता है जहाँ अनुज्ञप्ति पर उल्लिखित निर्बंधन अथवा शर्त का अनुज्ञप्तिधारक द्वारा उल्लंघन या अपवचन हुआ हो या अनुज्ञप्तिधारक इस अधिनियम या किसी भी अधिनियम या किसी नियम या उप-विधि के किसी उपबंध मंग करने हेतु दोषसिद्ध किया गया हो — शर्त के ऐसे किसी भी प्रकार के उल्लंघन की अनुपस्थिति में, अनुज्ञप्ति रद्द नहीं की जा सकती। (जितेन्द्र कुमार जैन (डॉ.) वि. म.प्र. राज्य) (DB)...308

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Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/18(b) & 37 and Criminal Procedure Code, 1973 (2 of 1974),

Section 389 – Suspension of sentence – Appellant convicted and sentenced for 10 years R.I. with fine of Rs. 1,00,000/- and in default of fine one year R.I. – Applicant seeking suspension of sentence on the ground that he suffered half of custodial sentence as awarded by the trial Court – Held – Applicant and co-accused known to each other and resident of same village – Both were riding on the motorcycle carrying opium in a bag hanging on the handle of motorcycle – Trial Court has observed that the applicant also had knowledge that co-accused was carrying opium in his bag – The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds – Conditions in Section 37 are cumulative in nature and not alternative – Thus, not appropriate to suspend sentence – Application for suspension dismissed. [Jagdish Vs. State of M.P.] ...684

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Negotiable Instruments Act (26 of 1881), Section 138 – Drawer of the cheque – Who is – Person who draws amount through cheque from his account maintained by him with the banker. [Rafat Anees (Smt.) Vs. Smt. Bano Bi] ...473

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – चैक का लेखीवाल – कौन है – व्यक्ति जो बैंकर के साथ स्वयं द्वारा चलाये जा रहे खाते से चैक के माध्यम से राशि आहरण करता है। (रफत अनीस (श्रीमती) वि. श्रीमती बानो बी) ...473

Negotiable Instruments Act (26 of 1881), Section 138 – Essential factors for attracting Section 138 of Negotiable Instruments Act – Person who is to be made liable should be the drawer of the cheque, drawn the cheque from his bank account, for payment of any amount to another person, for discharge of any debt or other liability. [Rafat Anees (Smt.) Vs. Smt. Bano Bi] ...473

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – परक्राम्य लिखत अधिनियम की धारा 138 को आकर्षित करने हेतु आवश्यक कारक – वह व्यक्ति जिसे

उत्तरदायी बनाया जाना है वह चैक का लेखीवाल होना चाहिए, जिसने किसी ऋण के उन्मोचन अथवा अन्य दायित्व के निर्वहन हेतु किसी अन्य व्यक्ति को राशि का भुगतान करने के लिए अपने बैंक खाते से चेक लिखा। (रफत अनीस (श्रीमती) वि. श्रीमती बानो बी) ...473

Negotiable Instruments Act (26 of 1881), Section 138 and Criminal Procedure Code, 1973 (2 of 1974), Section 200 & 482 – Quashing of proceedings – Non-applicant no. 1 sold land to applicant – Sale consideration was given by cheque signed by non-applicant no. 2 – Cheque dishonoured – Complaint filed against non-applicant no. 2 & applicant – Held – Non-applicant no. 2 who has signed and issued the cheque, is only liable under Section 138 of Negotiable Instruments Act, even though sale deed was executed in favour of the applicant – Application allowed. [Rafat Anees (Smt.) Vs. Smt. Bano Bi] ...473

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 200 व 482 – कार्यवाहियों का अमिखंडित किया जाना – अनावेदक क्र. 1 ने आवेदक को भूमि विक्रय की – विक्रय प्रतिफल अनावेदक क्र. 2 द्वारा हस्ताक्षरित चैक द्वारा दिया गया था – चैक अनादृत – अनावेदक क्र. 2 तथा आवेदक के विरुद्ध परिवाद प्रस्तुत – अभिनिर्धारित – अनावेदक क्र. 2 जिसने चेक हस्ताक्षर कर उसे जारी किया, इसलिए मात्र वही परक्राम्य लिखत अधिनियम की धारा 138 के अंतर्गत दायित्वाधीन है, यद्यपि विक्रय विलेख का निष्पादन आवेदक के पक्ष में किया गया था – आवेदन मंजूर। (रफत अनीस (श्रीमती) वि. श्रीमती बानो बी) ...473

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Government Notification – Prescribed Authority – As per the government notification dated 05.03.1994 which has been modified from time to time, the Sub Divisional Officer (Revenue) has been notified as prescribed authority for Gram Panchayat and similarly Collector for the Janpad Panchayat and Divisional Commissioner for Zila Panchayat – Resolution of the Janpad Panchayat can be assailed u/S 85(1) of the Adhiniyam before the Collector. [Machhali Udyog Sahakari Samiti Maryadit Vs. State of M.P.] ...555

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), सरकारी अधिसूचना – विहित प्राधिकारी – सरकारी अधिसूचना दिनांक 05.03.1994 जिसे समय-समय पर परिवर्तित किया गया है, के अनुसार, उप-खंड अधिकारी (राजस्व) को ग्राम पंचायत हेतु और इसी तरह जनपद पंचायत हेतु कलेक्टर एवं जिला पंचायत हेतु संभागीय आयुक्त को विहित प्राधिकारी के रूप में अधिसूचित किया गया

है— जनपद पंचायत के संकल्प को अधिनियम की धारा 85(1) के अंतर्गत कलेक्टर के समक्ष चुनौती दी जा सकती है। (मछली उद्योग सहकारी समिति मर्यादित वि. म. प्र. राज्य) ...555

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 69 – Appointment – Relative – “Uncle” – “Uncle” does not come under the definition of a relative as defined under Section 69 of the Act of 1993 and there is no prohibition in the statute that candidature of any candidate can be rejected if his close relative, i.e. “Uncle” was an officer of Gram Panchayat. [Narendra Kumar Vs. State of M.P.] (DB)...277

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 69 – नियुक्ति – संबंधी – “अंकल” – अधिनियम 1993 की धारा 69 के अंतर्गत “अंकल” संबंधी की परिभाषा के अधीन नहीं आता एवं कानून में ऐसा कोई प्रतिषेध नहीं है कि किसी भी अम्यर्थी की अम्यर्थिता नामंजूर की जा सकती है यदि उसके निकट संबंधी अर्थात् “अंकल” ग्राम पंचायत के अधिकारी थे। (नरेन्द्र कुमार वि. म.प्र. राज्य) (DB)...277

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 85 & 91 – Provision of Appeal – Petition against an order of Additional Collector passed in an appeal, whereby resolution passed by Janpad Panchayat was quashed – Held – Appeal against a resolution of Panchayat is not maintainable u/S 91 of the Adhiniyam and the Rules framed there under but the same can be statutorily assailed u/S 85 of the Adhiniyam before the Prescribed Authority, who in the present case is Collector – Further held, order passed by the Additional Collector is held to be an order of suspension passed u/S 85(1) of the Adhiniyam, as Section 85(1) does not confer any power to the prescribed authority to quash a resolution – Additional Collector directed to take steps u/S 85(2) of the Adhiniyam and forward the matter to the State Government for final adjudication – Petition Disposed. [Machhali Udyog Sahakari Samiti Maryadit Vs. State of M.P.] ...555

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 85 व 91 – अपील का उपबंध – अतिरिक्त कलेक्टर द्वारा एक अपील में पारित आदेश के विरुद्ध याचिका, जिसके द्वारा जनपद पंचायत द्वारा पारित संकल्प अभिखंडित किया गया – अभिनिर्धारित – पंचायत के संकल्प के विरुद्ध अधिनियम की धारा 91 के अंतर्गत एवं उसके अधीन विरचित नियमों के अंतर्गत अपील पोषणीय नहीं है किंतु, उसे कानूनी रूप से अधिनियम की धारा 85 के अंतर्गत विहित प्राधिकारी जो

कि वर्तमान प्रकरण में कलेक्टर है, के समक्ष चुनौती दी जा सकती है - आगे अभिनिर्धारित किया गया कि अतिरिक्त कलेक्टर द्वारा पारित आदेश को, अधिनियम की धारा 85(1) के अंतर्गत पारित निलंबन का आदेश माना जाना चाहिए क्योंकि धारा 85(1), विहित प्राधिकारी को संकल्प अभिखंडित करने की कोई शक्ति प्रदत्त नहीं करती - अतिरिक्त कलेक्टर को अधिनियम की धारा 85(2) के अंतर्गत कदम उठाने के लिए और अंतिम न्यायनिर्णयन करने के लिए राज्य सरकार को मामला अग्रेषित करने के लिए निदेशित किया गया - याचिका का निपटारा किया गया। (मछली उद्योग सहकारी समिति मर्यादित वि. म.प्र. राज्य) ...555

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 85 (1) & 85 (2) - 'Panchayat Karmi' - Selection - Resolution - Gram Panchayat - Appellant appointed on the post of Panchayat Karmi - Complaint by Respondent no. 4 - SDO suspended the resolution passed by Gram Panchayat, and directed to appoint respondent no. 4 - Writ Court remanded back the matter to Gram Panchayat for re-screening the applications and for preparation of fresh merit list and for selection accordingly - Held - Selection for the post of Panchayat Karmi was not done on merits, so the order of the writ court remanding back the matter for fresh consideration was right & proper - Appeal dismissed. [Narendra Kumar Vs. State of M.P.] (DB)...277

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएँ 85 (1) एवं 85 (2) - 'पंचायत कर्मी' - चयन - प्रस्ताव - ग्राम पंचायत - अपीलार्थी पंचायत कर्मी के पद पर नियुक्त किया गया - प्रत्यर्थी क्र. 4 द्वारा परिवाद - उपखंड अधिकारी ने ग्राम पंचायत द्वारा पारित प्रस्ताव को स्थगित किया तथा प्रत्यर्थी क्र. 4 को नियुक्त करने हेतु निर्देशित किया - रिट न्यायालय ने आवेदनों को पुनः छांटने तथा नई मेरिट सूची तैयार करने एवं तदनुसार चयन करने हेतु, मामले को ग्राम पंचायत को प्रतिप्रेषित किया - अभिनिर्धारित - पंचायतकर्मी के पद हेतु चयन मेरिट पर नहीं किया गया था, इसलिए रिट न्यायालय का मामले को नये सिरे से विचारण हेतु प्रतिप्रेषित किये जाने का आदेश सही तथा उचित था - अपील खारिज। (नरेन्द्र कुमार वि. म.प्र. राज्य) (DB)...277

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 85(1) & 85(2) - Power of Collector - Under Section 85(1), powers of the Collector is confined and limited only to suspending the resolution and thereafter forwarding the matter to the State Government or the nominated officer within 10 days for final adjudication u/S 85(2) of the Adhiniyam. [Machhali Udyog Sahakari Samiti Maryadit Vs. State of M.P.] ...555

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 85(1) व 85(2) – कलेक्टर की शक्ति – धारा 85(1) के अंतर्गत कलेक्टर की शक्तियाँ सीमाबद्ध हैं और केवल संकल्प के निलंबन और तत्पश्चात् अधिनियम की धारा 85(2) के अंतर्गत अंतिम न्यायनिर्णयन हेतु 10 दिनों के भीतर राज्य सरकार या नामनिर्दिष्ट अधिकारी को मामला अग्रेषित करने तक सीमित है। (मछली उद्योग सहकारी समिति मर्यादित वि. म.प्र. राज्य) ...555

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 85 (1) & 91 – ‘Panchayat Karmi’ – Selection – Resolution – Gram Panchayat – SDO setting aside resolution suo motu – Objection – Whether resolution can be suspended u/S 85 (1) of the Act of 1993 or appeal u/S 91 of the Act of 1993 is to be preferred – Held – The question of appeal u/S 91 of the Act of 1993 is not involved in the present case as the SDO has exercised suo motu power u/S 85 (1) of the Act of 1993 to suspend the resolution. [Narendra Kumar Vs. State of M.P.] (DB)...277

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1) – धाराएँ 85 (1) एवं 91 – ‘पंचायत कर्मी’ – चयन – प्रस्ताव – ग्राम पंचायत – उपखंड अधिकारी द्वारा स्वप्रेरणा से प्रस्ताव अपास्त किया जाना – आक्षेप – क्या अधिनियम 1993 की धारा 85(1) के अंतर्गत प्रस्ताव को स्थगित किया जा सकता है अथवा अधिनियम 1993 की धारा 91 के अंतर्गत अपील प्रस्तुत की जा सकती है – अभिनिर्धारित – वर्तमान प्रकरण में अधिनियम 1993 की धारा 91 के अंतर्गत अपील का प्रश्न अंतर्ग्रस्त नहीं है क्योंकि उपखंड अधिकारी ने प्रस्ताव को स्थगित करने हेतु अधिनियम 1993 की धारा 85(1) के अंतर्गत स्वप्रेरणा शक्ति का प्रयोग किया है। (नरेन्द्र कुमार वि. म.प्र. राज्य) (DB)...277

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. [Laxmi (Smt.) Vs. Beena (Smt.)] ...88

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। (लक्ष्मी (श्रीमती) वि. बीना (श्रीमती)) ...88

Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rules 3(2) & 8 – See – Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993, Section 122 [Laxmi (Smt.) Vs. Beena (Smt.)] ...88

पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता) नियम, म.प्र. 1995, नियम 3(2) व 8 – देखें – पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993, धारा 122 (लक्ष्मी (श्रीमती) वि. बीना (श्रीमती)) ...88

Payment of Gratuity Act (39 of 1972) – Object – To provide for scheme for payment of gratuity etc. to ensure the welfare of the workmen working in the country – It is a beneficial piece of legislation for the workmen working throughout the country. [Grasim Industries Ltd. Vs. Duley Singh] ...*19

उपदान संदाय अधिनियम (1972 का 39) – उद्देश्य – देश में कार्य कर रहे कर्मकारों के कल्याण को सुनिश्चित करने हेतु उपदान इत्यादि के संदाय के लिए स्कीम उपबंधित करना – यह पूरे देश में कार्य कर रहे कर्मकारों हेतु एक कल्याणकारी विधान है। (ग्रासिम इंडस्ट्रीज लि. वि. दुले सिंह) ...*19

Payment of Gratuity Act (39 of 1972), Section 7(7) – Maintainability of appeal – While preferring an appeal the petitioner company has not deposited the gratuity amount along with interest

component therefore the appeal itself is not maintainable. [Grasim Industries Ltd. Vs. Duley Singh] ...*19

उपदान संदाय अधिनियम (1972 का 39), धारा 7(7) – अपील की पोषणीयता – अपील प्रस्तुत करते समय याची/कंपनी ने उपदान की रकम, अंगमूत ब्याज के साथ जमा नहीं की है इसलिए अपील अपने आप में पोषणीय नहीं है। (ग्रासिम इंडस्ट्रीज लि. वि. दुले सिंह) ...*19

Penal Code (45 of 1860), Section 120(B) – When *prima facie* the document under challenge is not a forged document then the complaint could not have been registered for any offence relating to forgery either directly or with the help of Section 120(B) of IPC – Both the court below committed an error of law in not considering the caste certificate. [Harvir Singh Vs. State of M.P.] ...723

दण्ड संहिता (1860 का 45), धारा 120(बी) – जब प्रथम दृष्ट्या चुनौती दिया गया दस्तावेज, एक कूटरचित दस्तावेज नहीं है तब प्रत्यक्ष रूप से अथवा मा.द.सं. की धारा 120(बी) की सहायता से, कूटरचना से संबंधित किसी अपराध के लिए शिकायत पंजीबद्ध नहीं की जा सकती – जाति प्रमाणपत्र को विचार में ना लेकर दोनों निचले न्यायालयों ने विधि की त्रुटि कारित की। (हरवीर सिंह वि. म.प्र. राज्य) ...723

Penal Code (45 of 1860), Sections-166 & 167 – See – Criminal Procedure Code, 1973, Section 197 [Malay Shrivastava Vs. Shankar Pratap Singh Bundela] ...199

दण्ड संहिता (1860 का 45), धाराएँ 166 व 167 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 197 (मलय श्रीवास्तव वि. शंकर प्रताप सिंह बुंदेला) ...199

Penal Code (45 of 1860), Sections 176, 336, 338, 304-A, 286 & 304 – See – Criminal Procedure Code, 1973, Section 227 [P. Sadanand Reddy Vs. State of M.P.] ...426

दण्ड संहिता (1860 का 45), धाराएँ 176, 336, 338, 304-ए, 286 व 304 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 227 (पी. सदानंद रेड्डी वि. म.प्र. राज्य) ...426

Penal Code (45 of 1860), Section 300, exception 1, Explanation, 302 & 304 – Murder – Culpable homicide not amounting to murder – Appellant, a constable in CRPF – He purchased bricks worth Rs. 10,000/- from one Dumarilal (now dead) on credit – On fateful day, deceased demanded his payment of bricks from the appellant – Losing his temper, appellant slapped the deceased – In turn – Deceased

slapped the appellant – Appellant fired three Gun shots at point blank range – Death – Trial Court – Conviction & sentence of life imprisonment – Appeal – Grounds – Property dispute – Gun shots not from service revolver but from “*Desi Katta*” of one Chamru – Held – Guilt of the appellant is duly proved by the evidence of the eye witnesses Chamru (P.W. 9) and Bhagwan Das (P.W. 10) which is duly corroborated by forensic report, Ex. P- 17 which narrates that the gun shots were from service revolver of 0.38 bore and not from “*Desi Katta*” – Slapping to appellant by deceased not amounts to sudden provocation so as to fire gun shots – Case not covered under Section 304 Part I of IPC – Appeal dismissed. [Shivram Sahu Vs. State of M.P.](DB)...376

दण्ड संहिता (1860 का 45), धारा 300, अपवाद 1, स्पष्टीकरण, 302 व 304 – हत्या – हत्या की कोटि में न आने वाला सदोष मानव वध – अपीलार्थी, सी.आर. पी.एफ. में एक सिपाही – उसने दुमारीलाल (अब मृत) नामक एक व्यक्ति से उधार पर 10,000/- रुपये मूल्य की ईंटें खरीदी – उस दुर्भाग्यशाली दिन को मृतक ने अपीलार्थी से ईंटों के मूल्य भुगतान की माँग की – अपना आपा खोते हुए, अपीलार्थी ने मृतक को थप्पड़ मारा – बदले में – मृतक ने अपीलार्थी को थप्पड़ मारा – अपीलार्थी ने अत्यंत निकट से बंदूक की तीन गोलियाँ दाग दी – मृत्यु – विचारण न्यायालय – दोषसिद्धि एवं आजीवन कारावास का दण्डादेश – अपील – आधार – सम्पत्ति विवाद – बंदूक की गोलियाँ सर्विस रिवाल्वर से नहीं बल्कि किसी चमरू के ‘देसी कट्टा’ से चलाई गई – अभिनिर्धारित – अपीलार्थी की दोषिता चक्षुदर्शी साक्षीगण चमरू (अ.सा. 9) एवं भगवानदास (अ.सा. 10) के साक्ष्य से सम्यक् रूप से साबित हुई, जिसकी फॉरेंसिक रिपोर्ट प्र.पी.-17 द्वारा सम्यक् रूप से संपुष्टि की गई है, जो यह वर्णन करती है कि बंदूक से दागी गई गोलियाँ 0.38 बोर सर्विस रिवाल्वर की थी एवं न कि “देसी कट्टा” की थी – मृतक द्वारा अपीलार्थी को थप्पड़ मारा जाना अचानक प्रकोपन की कोटि में नहीं आता जिससे कि बंदूक की गोली दागी जाए – प्रकरण भारतीय दण्ड संहिता की धारा 304 भाग-I के अंतर्गत आच्छादित नहीं – अपील खारिज। (शिवराम साहू वि. म.प्र. राज्य) (DB)...376

Penal Code (45 of 1860), Section 302/34 – See – Criminal Procedure Code, 1973, Section 24 [P.S. Thakur (Dr.) Vs. State of M.P.] ...562

दण्ड संहिता (1860 का 45), धारा 302/34 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 24 (पी.एस. ठाकुर (डॉ.) वि. म.प्र. राज्य) ...562

Penal Code (45 of 1860), Section 302 r/w 34 & 394 r/w 397 and Dakaiti Aur Vyapharan Prabhavit Ksheshtra Adhiniyam, M.P. (36 of 1981), Section 11 & 13 – Accused persons entered into the house for

committing a robbery – During the course of robbery they inflicted Bakka (Dagger) blow on throat of the deceased – After hearing the noise of crowd, all the culprits went to the 1st floor and jumped outside the house however, accused/appellant Ballu @ Jamnaprasad already came out of house and was held by the crowd – Robbed articles recovered from accused duly identified by the PW-1 – Thereafter his absence at the spot when the deceased was killed creates a doubt as to whether he intended to kill the deceased – He is not liable to be convicted u/S 302 r/w Section 34 of the IPC – Other accused are convicted u/S 302 of the IPC & 394 of the IPC r/w Section 397 of the IPC & u/S 11 & 13 of the MPDPVK Act. [Narendra @ Chunna Kirar Vs. State of M.P.] (DB)...364

दण्ड संहिता (1860 का 45), धारा 302 सहपठित 34 व 394 सहपठित 397 एवं डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र. (1981 का 36), धारा 11 व 13 – अभियुक्तगण ने लूट कारित करने के लिए घर में प्रवेश किया – लूट कारित करने के दौरान उन्होंने बका से मृतक की गर्दन पर वार किया – भीड़ का शोर सुनने के पश्चात् सभी अपराधी प्रथम तल पर गये एवं वहां से घर के बाहर छलांग लगा दी, जबकि अभियुक्त/अपीलार्थी बल्लू उर्फ जमना प्रसाद पहले ही घर से बाहर आ चुका था तथा भीड़ द्वारा रोक लिया गया था – अभियुक्त से बरामद हुई लूट की वस्तुओं की पहचान अभियोजन साक्षी-1 द्वारा सम्यक् रूप से की गई – तत्पश्चात् जब मृतक की हत्या हुई थी, घटनास्थल पर उसकी अनुपस्थिति, यह संदेह उत्पन्न करती है कि क्या उसका मृतक की हत्या करने का आशय था – वह भारतीय दण्ड संहिता की धारा 302 सहपठित धारा 34 के अंतर्गत दोषसिद्ध किये जाने योग्य नहीं है – अन्य अभियुक्तगण को भारतीय दण्ड संहिता की धारा 302 एवं धारा 394 सहपठित धारा 397 तथा म.प्र. डकैती एवं व्यपहरण प्रभावित क्षेत्र अधिनियम की धारा 11 व 13 के अंतर्गत दोषसिद्ध किया गया। (नरेन्द्र उर्फ चुन्ना किरार वि. म.प्र. राज्य) (DB)...364

Penal Code (45 of 1860), Sections 302/149 & 148 – Conviction – Life Imprisonment – Appreciation of Evidence – Eye Witnesses – Held – Appellant along with five other co-accused persons formed an unlawful assembly and have fired gun shots on the deceased – Consistency in the statements of eye-witnesses – Evidence is fully corroborated with medical evidence and allegations in the FIR – Further held – Even if there are minor discrepancies in the statements of the eye witnesses, same cannot be given any undue importance – Interested witnesses cannot be presumed to be tainted instead upon corroboration, the same stands on the same footing as that of independent witnesses

- Lower court rightly convicted the appellant - Appeal dismissed.
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दण्ड संहिता (1860 का 45), धाराएँ 302/149 व 148 - दोषसिद्धि - आजीवन कारावास - साक्ष्य का मूल्यांकन - चक्षुदर्शी साक्षी - अभिनिर्धारित - अपीलार्थी ने अन्य पांच सह-अभियुक्तों के साथ विधि विरुद्ध जमाव निर्मित कर मृतक पर बंदूक से गोलियां दागी हैं - चक्षुदर्शी साक्षियों के कथनों में दृढ़ता - साक्ष्य की चिकित्सीय साक्ष्य एवं प्रथम सूचना प्रतिवेदन के अभिकथनों से पूर्णतः संपुष्टि होती है - आगे अभिनिर्धारित - यदि चक्षुदर्शी साक्षियों के कथनों में गौण असंगतियां हैं तब भी, उन्हें कोई अनुचित महत्व नहीं दिया जा सकता - हितबद्ध साक्षीगण के दूषित होने की उपधारणा नहीं की जा सकती, बल्कि संपुष्टि होने पर, वह उसी स्तर पर खड़े होते हैं जैसे कि स्वतंत्र साक्षीगण - निचले न्यायालय ने अपीलार्थी को उचित रूप से दोषसिद्ध किया - अपील खारिज। (विक्रम उर्फ मनोज जाट वि. म.प्र. राज्य) (DB)...672

*Penal Code (45 of 1860), Section 302 & 201 - Murder - Death Sentence - Facts - Deceased, wife of the appellant/accused - Murdered by the appellant/husband on the Railway Track by smashing her face & head on the stones lying on the track - Motive - Jewellery of the deceased was deposited by her with her sister - Trial Court - Death sentence - Reference & appeal - No eye witness - Circumstantial evidence - Extra judicial confession - Motive not established - Jewelleries as per the prosecution witnesses itself was returned back to the deceased 8 days prior to the incident - Material & Independent witnesses not examined - Testimony of Madhuri (PW-4), daughter of the deceased & appellant, full of embellishments, exaggeration & material discrepancies - FSL report not supporting the prosecution case - Ocular evidence not supported by medical evidence - Appellant/accused not medically examined - Serious discrepancies in evidence of IO - Chain of events not complete - Appellant acquitted of the charge - Judgment of conviction & sentence set aside - Reference rejected - Appeal allowed. [In Reference Vs. Phooi Chand Rathore] (DB)...*20*

दण्ड संहिता (1860 का 45), धारा 302 व 201 - हत्या - मृत्युदण्ड - तथ्य - मृतक, अपीलार्थी/अभियुक्त की पत्नी - अपीलार्थी/पति द्वारा ट्रेक पर पड़ी गिट्टी पर बार-बार उसके चेहरे और सिर को मारकर रेल्वे ट्रेक पर उसकी हत्या कर दी गई - हेतु - मृतक के आभूषणों को उसके द्वारा उसकी बहन के पास जमा कर दिया गया था - विचारण न्यायालय - मृत्युदण्ड - निर्देश एवं अपील - कोई चक्षुदर्शी साक्षी नहीं - परिस्थितिजन्य साक्ष्य - न्यायिकेत्तर संस्वीकृति - हेतु

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दण्ड संहिता (1860 का 45), धारा 302 व 201 – हत्या – मृत्युदण्ड – विचारण न्यायालय – राज्य सरकार से माधुरी को इस प्रकरण में उसके योगदान हेतु पुरस्कृत करने के लिए सिफारिश क्योंकि, अपीलार्थी/अभियुक्त की पुत्री होते हुए भी उसने अपने पिता के विरुद्ध कथन करके असाधारण साहस दिखाया है – निचले न्यायालय को साक्षी के संबंध में ऐसी कोई भी सिफारिश या टिप्पणी करने से विरत रहना चाहिए था। (इन रेफ्रेन्स वि. फूलचन्द राठौर) (DB)...*20

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. [Sitaram Vs. State of M.P.] (DB)...116

दण्ड संहिता (1860 का 45), धाराएँ 302, 325/149, 148 व 323 एवं साक्ष्य

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*दण्ड संहिता (1860 का 45), धाराएँ 304-बी व 498-ए सहपठित धारा 34 — देखें — दण्ड प्रक्रिया संहिता, 1973, धारा 311 (आशीष वि. म.प्र. राज्य) ...*17*

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दण्ड संहिता (1860 का 45), धारा 306 — देखें — दण्ड प्रक्रिया संहिता, 1973, धारा 397 एवं 401 (दिनेश वि. म.प्र. राज्य) ...162

*Penal Code (45 of 1860), Section 325 or 326 — Fracture of Nasal bone by 'Lathi' — Whether 'Lathi' (wooden stick) used in causing fracture of nasal bone can be termed as a "weapon or instrument likely to cause death" within the purview of Section 324 of IPC — Held — 'Lathi' (wooden stick) cannot be said in the present context as an instrument likely to cause death or a dangerous weapon, so grievous hurt caused by a hard and blunt weapon like 'Lathi' will fall within the purview of Section 325 of IPC and not u/S 326 — Charge u/S 326 of IPC set aside — Prima facie offence u/S 325 of IPC is made out — Revision allowed. [Manik Rao Yavle Vs. State of M.P.] ...*36*

दण्ड संहिता (1860 का 45), धारा 325 या 326 — 'लाठी' द्वारा नाक की अस्थि भंग होना — क्या नाक की अस्थि भंग करने में उपयोग की गई 'लाठी' को मा.दं.सं. की धारा 324 की परिधि में "हथियार या उपकरण जिससे मृत्यु कारित होना संभाव्य है" कहा जा सकता है — अभिनिर्धारित — वर्तमान संदर्भ में 'लाठी' को संभावित मृत्यु कारित करने वाला उपकरण या खतरनाक हथियार नहीं कहा जा सकता, इसलिए 'लाठी' जैसे सख्त एवं मोथरे हथियार से कारित घोर उपहति

भा.द.सं. की धारा 325 की परिधि के भीतर आती है न कि धारा 326 के अंतर्गत — भा.द.सं. की धारा 326 के अंतर्गत आरोप अपास्त — भा.द.सं. की धारा 325 के अंतर्गत प्रथम दृष्ट्या प्रकरण बनता है — पुनरीक्षण मंजूर। (मानिक राव यवले वि. म.प्र. राज्य) ...*36

Penal Code (45 of 1860), Section 361 & 363 – Kidnapping –
Uncle of deceased entrusting the custody of deceased to the accused –
Offence of kidnapping not made out – Conviction & sentence u/S 363
of IPC set aside – Appeal partly allowed. [In Reference Vs. Sachin
Kumar Singhraha] (DB)...690

दण्ड संहिता (1860 का 45), धारा 361 व 363 – व्यपहरण – मृतिका के चाचा द्वारा मृतिका की अभिरक्षा अभियुक्त को सौंपी गई – व्यपहरण का अपराध नहीं बनता – भा.द.सं. की धारा 363 के अंतर्गत दोषसिद्धि एवं दण्डादेश अपास्त – अपील अंशतः मंजूर। (इन रेफ्रेन्स वि. सचिन कुमार सिंघरहा) (DB)...690

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.
[Mahendra Ahirwar Vs. State of M.P.] ...128

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 रुपये 1,00,000/- नकद राशि के बहाने उसको फूसलाकर ले गया – भारतीय दण्ड संहिता की धारा 363 एवं 366 के अंतर्गत दोषसिद्धि एवं दण्डादेश की पुष्टि की गई। (महेन्द्र अहिवार वि. म.प्र. राज्य) ...128

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. [Mahendra
Ahirwar Vs. State of M.P.] ...128

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। (महेन्द्र अहिवार वि. म.प्र. राज्य) ...128

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. [State of M.P. Vs. Ravi @ Ravindra] (DB)...221

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 विरुद्ध अभिलेख पर उपस्थित संपूर्ण तात्त्विक 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 विरुद्ध अपील की अनुमति का आवेदन आरम्भ में ही खारिज। (म. प्र. राज्य वि. रवि उर्फ रवीन्द्र) (DB)...221

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. [Mahendra Ahirwar Vs. State of M.P.] ...128

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। (महेन्द्र अहिवार वि. म.प्र. राज्य) ...128

Penal Code (45 of 1860), Section 376A – See – Protection of Children from Sexual Offences Act, 2012, Section 5(i), (m) r/w Section 6 & 42 [In Reference Vs. Sachin Kumar Singhraha] (DB)...690

दण्ड संहिता (1860 का 45), धारा 376 ए – देखें – लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012, धारा 5(आई), (एम) सहप्रति धारा 6 व 42 (इन रेफरेन्स वि. सचिन कुमार सिंघराहा) (DB)...690

Penal Code (45 of 1860), Sections 376A, 302 & 201(II) and Protection of Children from Sexual Offences Act, (32 of 2012), Section 5(i), (m) r/w Section 6 – Circumstantial evidence – Appreciation of evidence – Appellant – Driver of vehicle – Deceased – Girl, aged 5 years – Rape – Murder – Facts – Deceased alongwith her uncle was going to school in four wheeler owned and being driven by the appellant – In between, uncle of the deceased got down from the vehicle and entrusted custody of the deceased to the appellant for dropping her at school – Deceased not reached the school – Body of the deceased recovered from the well – Dead body of the deceased and her school bag were recovered pursuant to disclosure statement of appellant/accused – Post Mortem report – Sexual assault and throttling – Trial Court – Death sentence – Reference & Appeal – Held – As the whole case is based on circumstantial evidence and the chain of events are complete and there is no material contradiction and omission in evidence of prosecution witnesses, so the conviction & sentence awarded u/S 201 (II), 376A and 302 of IPC is affirmed as it is covered under Rarest of Rare Cases – Reference answered accordingly. [In Reference Vs. Sachin Kumar Singhraha] (DB)...690

दण्ड संहिता (1860 का 45), धाराएँ 376 ए, 302 व 201(II) एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5(आई), (एम) सहप्रति धारा 6 – परिस्थितिजन्य साक्ष्य – साक्ष्य का मूल्यांकन – अपीलार्थी – वाहन चालक – मृतिका – बालिका, उम्र 5 वर्ष – बलात्संग – हत्या – तथ्य – मृतिका अपने चाचा के साथ अपीलार्थी के स्वामित्व के एवं उसके द्वारा चलाये जा रहे चार पहिया वाहन में स्कूल जा रही थी – बीच में, मृतिका का चाचा वाहन से उतरा और मृतिका को स्कूल छोड़ने के लिए उसकी अभिरक्षा अपीलार्थी को सौंपी – मृतिका स्कूल नहीं पहुँची – मृतिका का शव कुएं से बरामद किया गया – मृतिका का शव एवं उसका स्कूल बैग, अपीलार्थी/अभियुक्त के प्रकटन कथन के अनुसरण में बरामद किये गये – शव विच्छेदन प्रतिवेदन – लैंगिक हमला एवं गला घोट्टा जाना – विचारण न्यायालय – मृत्युदण्ड – निर्देश व अपील – अभिनिर्धारित – चूँकि

संपूर्ण प्रकरण परिस्थितिजन्य साक्ष्य पर आधारित है और घटनाओं की श्रृंखला पूर्ण है तथा अभियोजन साक्षीगण के साक्ष्य में कोई तात्त्विक विरोधामास एवं लोप नहीं, अतः भा.द.सं. की धारा 201(II), 376 ए व 302 के अंतर्गत की गई दोषसिद्धि एवं दण्डादेश को अभिपुष्ट किया गया क्योंकि यह विरल से विरलतम प्रकरणों के अंतर्गत आच्छादित होता है - तदनुसार निर्देश उत्तरित किया गया। (इन रेफ्रेन्स वि. सचिन कुमार सिंघरहा) (DB)...690

Penal Code (45 of 1860), Sections 376 (2)(h) & 302 - See - Criminal Procedure Code, 1973, Section 363 [In Reference Vs. Rajendra Adivashi] (DB)...166

दण्ड संहिता (1860 का 45), धाराएँ 376 (2)(एच) व 302 - देखें - दण्ड प्रक्रिया संहिता, 1973, धारा 363 (इन रेफ्रेन्स वि. राजेन्द्र आदिवासी) (DB)...166

Penal Code (45 of 1860), Section 396 - When 5 persons were not involved in a crime of robbery then it is not a dacoity - For proof of offence u/S 396 of IPC it is necessary to prove that the crime was done by 5 persons - When it is not proved then none of the appellant can be convicted of offence u/S 396 of IPC however they can be convicted for the offence u/S 394 r/w Section 397 of the IPC. [Narendra @ Chunna Kirar Vs. State of M.P.] (DB)...364

दण्ड संहिता (1860 का 45), धारा 396 - जब पाँच व्यक्ति लूट के अपराध में शामिल नहीं थे, तो वह डकैती नहीं है - भारतीय दण्ड संहिता की धारा 396 के अंतर्गत अपराध के सबूत के लिए यह साबित करना आवश्यक है कि अपराध 5 व्यक्तियों द्वारा किया गया था - जब यह साबित नहीं हुआ है तो किसी भी अपीलार्थी को भारतीय दण्ड संहिता की धारा 396 के अंतर्गत दोषसिद्ध नहीं किया जा सकता है, यद्यपि उन्हें भारतीय दण्ड संहिता की धारा 394 सहपठित धारा 397 के अंतर्गत अपराध के लिए दोषसिद्ध किया जा सकता है। (नरेन्द्र उर्फ चुन्ना किरार वि. म.प्र. राज्य) (DB)...364

Penal Code (45 of 1860), Section 420 & 468 and Information Technology Act, (21 of 2000), Section 66-D - Quashment of FIR - Complainant lodged an FIR against the petitioners u/S 420 & 468 IPC and u/S 66-D of Information Technology Act - Held - Petitioners are the Managing Directors and as the company was not made an accused, the initiation and continuation of proceedings against the Managing Directors in absence of company as an accused, was not maintainable - FIR and all the proceedings are quashed - Petition allowed. [R. Shrinivasan Vs. State of M.P.] ...738

दण्ड संहिता (1860 का 45), धारा 420 व 468 एवं सूचना प्रौद्योगिकी अधिनियम (2000 का 21), धारा 66-D - प्रथम सूचना प्रतिवेदन का अभिखंडन - परिवादी ने याचीगण के विरुद्ध धारा 420 व 468 भा.द.सं. एवं सूचना प्रौद्योगिकी अधिनियम की धारा 66-D के अंतर्गत प्रथम सूचना प्रतिवेदन दर्ज किया- अभिनिर्धारित - याचीगण, प्रबंध निदेशक हैं और चूंकि कम्पनी को अभियुक्त नहीं बनाया गया था, कम्पनी की अभियुक्त के रूप में अनुपस्थिति में प्रबंध निदेशकों के विरुद्ध कार्यवाहियां आरंभ करना एवं जारी रखना पोषणीय नहीं था - प्रथम सूचना प्रतिवेदन एवं सभी कार्यवाहियां अभिखंडित - याचिका मंजूर। (आर. श्रीनिवासन वि. म.प्र. राज्य) ...738

Penal Code (45 of 1860), Sections 498-A, 304-B/302 & 306, Dowry Prohibition Act (28 of 1961), Section 3 & 4, Criminal Procedure Code, 1973 (2 of 1974), Section 378 (3) and Evidence Act (1 of 1872), Section 113-B - Presumption - Application for leave to appeal against acquittal - Death due to strangulation within 7 years of marriage - Trial court found that prosecution could not establish cruelty in relation to demand of dowry soon before death - Sister-in-law of deceased deposing that only issue of quarrel was regarding leaving of in-laws house by deceased without permission - In the police report submitted by deceased, there was no allegations regarding dowry demand and torture - No ocular or medical evidence to establish that non-applicants have murdered or abetted her to commit suicide - Held - There is no illegality or perversity in the impugned order and no ground to interfere with the order of acquittal - Application for leave to appeal dismissed. [Gourishankar Nema Vs. Prabhudayal Nema] (DB)...765

दण्ड संहिता (1860 का 45), धाराएँ 498-ए, 304-बी/302 व 306, दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 3 व 4, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378(3) एवं साक्ष्य अधिनियम (1872 का 1), धारा 113-बी - उपधारणा - दोषमुक्ति के विरुद्ध अपील करने की अनुमति हेतु आवेदन - विवाह से सात वर्षों के भीतर गला घोटने के कारण मृत्यु - विचारण न्यायालय ने यह पाया कि अभियोजन मृत्यु से ठीक पूर्व दहेज की मांग से संबंधित क्रूरता स्थापित नहीं कर सका - मृतिका की मांमी ने यह कथन किया कि झगड़े का एकमात्र मुद्दा मृतिका का बिना अनुमति के ससुराल छोड़कर जाना था - मृतिका द्वारा दी गई पुलिस रिपोर्ट में, दहेज की मांग एवं यातना के संबंध में कोई अभिकथन नहीं थे - यह स्थापित करने को कोई चाक्षुष एवं चिकित्सीय साक्ष्य नहीं है कि अनावेदकगण ने हत्या की या उसे आत्महत्या कारित करने को दुष्प्रेरित किया - अभिनिर्धारित - आक्षेपित आदेश में कोई अवैधता या विपर्यस्तता नहीं है तथा दोषमुक्ति के आदेश में हस्तक्षेप करने का कोई आधार नहीं है - अपील करने की अनुमति का आवेदन

खारिज। (गौरीशंकर नेमा वि. प्रमूदयाल नेमा)

(DB)...765

Practice – Civil – A person who approaches the Court must come out with clean hands – A litigant who approaches the court is bound to produce all the documents executed by him which are relevant to the litigation. [Bank of Maharashtra Vs. M/s. ICO Jax India Deedwana Oli Lashkar Gwalior] ...645

पद्धति – सिविल – न्यायालय के समक्ष आने वाले व्यक्ति को स्वच्छ अंतःकरण से आना चाहिए – कोई मुकदमेबाज जो न्यायालय के समक्ष आता है वह उसके द्वारा निष्पादित उन सभी दस्तावेजों को प्रस्तुत करने के लिए बाध्य है जो मुकदमे से सुसंगत है। (बैंक ऑफ महाराष्ट्र वि. मे. आई.सी.ओ. जेक्स इंडिया डीडवाना ओली लश्कर ग्वालियर) ...645

Practice – Criminal – Procedure when magistrate does not order investigation u/S 156(3) but takes cognizance instead – Held – Where a magistrate does not think it proper to pass an order u/S 156(3) Cr.P.C., then he can take cognizance and follow the procedure provided in chapter 15 of Cr.P.C. and if after recording of statement of complainant witnesses the magistrate proposes to seek help from the police, then he can direct inquiry u/S 202(1) Cr.P.C. [Narottam Pathak Vs. State of M.P.] ...762

पद्धति – दार्ष्टिक – प्रक्रिया जब मजिस्ट्रेट धारा 156(3) के अंतर्गत अन्वेषण का आदेश नहीं देता है, बल्कि इसके बजाय संज्ञान लेता है – अभिनिर्धारित – जहाँ एक मजिस्ट्रेट द.प्र.सं. की धारा 156(3) के अंतर्गत आदेश पारित करना उचित नहीं समझता है, तब वह संज्ञान ले सकता है एवं द.प्र.सं. के अध्याय 15 में उपबंधित प्रक्रिया का पालन कर सकता है तथा यदि परिवादी के साक्षीगण के कथनों को अभिलिखित करने के पश्चात् मजिस्ट्रेट पुलिस से सहायता चाहना प्रस्तावित करता है, तो वह द.प्र.सं. की धारा 202(1) के अंतर्गत जांच निदेशित कर सकता है। (नरोत्तम पाठक वि. म.प्र. राज्य) ...762

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. [Malay Shrivastava Vs. Shankar Pratap Singh Bundela] ...199

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 सकती 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। (मलय श्रीवास्तव वि. शंकर प्रताप सिंह बुंदेला) ...199

Practice & Procedure – Duty of Court to deal with all the issues and evidence lead by the parties before recording findings – In the instant case, High Court only considered issue of limitation – Other issues not considered – Impermissible – Court ought to have considered all the issues – Appeal allowed – Matter remanded to High Court to decide remaining issues on merits. [Madina Begum Vs. Shiv Murti Prasad Pandey] (SC)...507

पद्धति एवं प्रक्रिया – न्यायालय का कर्तव्य है कि निष्कर्षों के अभिलिखित किये जाने से पूर्व पक्षकारों द्वारा प्रस्तुत किये गये सभी विवादकों एवं साक्ष्य का विचार करे – वर्तमान प्रकरण में, उच्च न्यायालय ने केवल परिसीमा पर विचार किया है – अन्य विवादकों पर विचार नहीं किया गया – अननुज्ञेय – न्यायालय को सभी विवादकों पर विचार करना चाहिए था – अपील मंजूर – शेष विवादकों को गुणदोषों के आधार पर विनिश्चित किये जाने हेतु, उच्च न्यायालय को मामला प्रतिप्रेषित। (मदीना बेगम वि. शिव मूर्ति प्रसाद पाण्डे) (SC)...507

Practice & Procedure – Laches – Party seeking to prevent an action on the ground of laches must establish the crystallisation 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. [Malay Shrivastava Vs. Shankar Pratap Singh Bundela] ...199

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। (मलय श्रीवास्तव वि. शंकर प्रताप सिंह बुंदेला) ...199

Practice & Procedure - Legal Maxim - Vigilantibus, et non dormientibus, jura sub veniunt - Meaning - The law shall aid the vigilant and not the indolent. [Malay Shrivastava Vs. Shankar Pratap Singh Bundela] ...199

पद्धति व प्रक्रिया - विधिक सूत्र - अर्थ - विधि जागरूक की सहायता करती है, न कि सुषुप्त की। (मलय श्रीवास्तव वि. शंकर प्रताप सिंह बुंदेला) ...199

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*. [Malay Shrivastava Vs. Shankar Pratap Singh Bundela] ...199

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। (मलय श्रीवास्तव वि. शंकर प्रताप सिंह बुंदेला) ...199

Prevention of Corruption Act (49 of 1988), Section 13(1)(e) & 13(2) - Disproportionate Assets - Appreciation of Evidence and Documents - Conviction - Held - Trial Court concluded that during the check period, accused had an income of Rs. 50,000 by selling two properties whereas the specific written endorsement on Agreement of sale, Statement of the Investigating Officer and the Tabulation Chart prepared by the prosecution itself, clearly shows that accused had an income of Rs. 3,50,000 from selling his two properties during the check period - Further held - The contention that there was a typographical error deserves to be accepted whereby Rs. 50000 was typed in place of Rs. 3,50,000 - Prosecution has not discharged their burden to prove the case beyond reasonable doubt - Accused was not in possession of disproportionate assets - Findings of the Court below is perverse and is set aside - Appeal allowed. [Dhaniram Lakhera Vs. State of M.P.] (DB)...*34

गुप्ताचार निवारण अधिनियम (1988 का 49), धारा 13(1)(ई) व 13(2) - अनुपातिक आस्तियाँ - साक्ष्य एवं दस्तावेजों का मूल्यांकन - दोषसिद्धि - अभिनिर्धारित - विचारण न्यायालय ने यह निष्कर्ष निकाला है कि जांच की अवधि

के दौरान, अभियुक्त को, दो संपत्तियों के विक्रय द्वारा रु. 50,000 की आय हुई थी जबकि विक्रय करार पर विनिर्दिष्ट लिखित पृष्ठांकन, अन्वेषण अधिकारी का कथन एवं अभियोजन द्वारा ही तैयार की गई सारणीबद्ध तालिका स्पष्ट रूप से दर्शाते हैं कि अभियुक्त को, उसकी दो संपत्तियों के विक्रय से रु. 3,50,000 की आय हुई थी – आगे अभिनिर्धारित किया गया कि यह तर्क कि जांच की अवधि के दौरान वहाँ पर एक टंकन त्रुटि हुई थी स्वीकार करने योग्य है, जिसके द्वारा रु. 3,50,000 के स्थान पर रु. 50,000 टंकित हो गये थे – अभियोजन ने युक्तियुक्त संदेह से परे प्रकरण साबित करने के अपने भार का निर्वहन नहीं किया – अभियुक्त, के कब्जे में अननुपातिक आस्तियाँ नहीं थी – निचले न्यायालय के निष्कर्ष विपर्यस्त है एवं अपास्त किये गये – अपील मंजूर। (घनीराम लखेरा वि. म.प्र. राज्य) (DB)...*34

Protection of Children from Sexual Offences Act, (32 of 2012), Section 3/4 – See – Penal Code, 1860, Sections 363, 366, 376(1) [State of M.P. Vs. Ravi @ Ravindra] (DB)...221

लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 3/4 – देखें – दण्ड संहिता, 1860, धाराएँ 363, 366 व 376(1) (म.प्र. राज्य वि. रवि उर्फ रवीन्द्र) (DB)...221

Protection of Children from Sexual Offences Act, (32 of 2012), Section 5(i), (m) r/w Section 6 – See – Penal Code, 1860, Sections 376A, 302 & 201(II) [In Reference Vs. Sachin Kumar Singhraha] (DB)...690

लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5(आई), (एम) सहपठित धारा 6 – देखें – दण्ड संहिता, 1860, धाराएँ 376 ए, 302 व 201(II) (इन रेफ्रेन्स वि. सचिन कुमार सिंघरहा) (DB)...690

Protection of Children from Sexual Offences Act, (32 of 2012), Section 5(i), (m) r/w Section 6 & 42 and Penal Code (45 of 1860), Section 376 A – Alternate punishment – Conviction & sentence both u/S 376 A of IPC & Section 5(i), (m) r/w Section 6 of Act of 2012 – Whether punishment both under specified sections of IPC & Protection of Children from Sexual Offences Act is permissible in the light of provisions as enshrined u/S 42 of the Act of 2012 – Held – No, as per Section 42 of the Act of 2012, the punishment which is greater in degree either under Protection of Children from Sexual Offences Act or specified sections of IPC is to be imposed – So the sentence awarded under the Protection of Children from Sexual Offences Act set aside as the sentence awarded u/S 376 A of IPC is greater in degree. [In Reference Vs. Sachin Kumar Singhraha] (DB)...690

लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5(आई), (एम) सहपठित धारा 6 व 42 एवं दण्ड संहिता (1860 का 45), धारा 376 ए – वैकल्पिक दण्ड – भा.दं.सं. की धारा 376 ए एवं अधिनियम, 2012 की धारा 5(आई), (एम) सहपठित धारा 6, दोनों के अंतर्गत दोषसिद्धि एवं दण्डादेश – क्या अधिनियम, 2012 की धारा 42 के अंतर्गत प्रतिष्ठापित उपबंधों के आलोक में भा.दं.सं. एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम दोनों की विनिर्दिष्ट धाराओं के अंतर्गत दंड अनुज्ञेय है – अभिनिर्धारित – नहीं, अधिनियम, 2012 की धारा 42 के अनुसार दंड, या तो भा.दं.सं. की विनिर्दिष्ट धाराओं अथवा लैंगिक अपराधों से बालकों का संरक्षण अधिनियम के अंतर्गत, जो भी अधिक हो, अधिरोपित किया जाएगा – अतः लैंगिक अपराधों से बालकों का संरक्षण अधिनियम के अंतर्गत प्रदान किये गये दंडादेश को अपास्त किया गया क्योंकि भा.दं.सं. की धारा 376 ए के अंतर्गत प्रदान किये गये दंडादेश की मात्रा अधिक है। (इन रेफ्रेन्स वि. सचिन कुमार सिंघरहा) (DB)...690

Protection of Women from Domestic Violence Act (43 of 2005), Section 2(a) – “Aggrieved person” – There is no divorce between the parties – Wife is still in domestic relationship and therefore respondent wife would be an aggrieved person u/S 2(a) of the Act. [Babulal Vs. Smt. Premwati] ...753

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 2(ए) – “व्यथित व्यक्ति” – पक्षकारों के मध्य कोई विवाह-विच्छेद नहीं है – पत्नी अभी भी घरेलू संबंध में है तथा इसलिए प्रत्यर्थी पत्नी अधिनियम की धारा 2(ए) के अंतर्गत एक व्यथित पक्षकार होगी। (बाबूलाल वि. श्रीमती प्रेमवती) ...753

Protection of Women from Domestic Violence Act (43 of 2005), Sections 12 – Retrospective Effect of the Act – Maintainability of Application – Incidents prior to the date of coming into force of the Act will also be considered for the purpose of the Act – Application is maintainable. [Babulal Vs. Smt. Premwati] ...753

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 – अधिनियम के भूतलक्षी प्रभाव – आवेदन की पोषणीयता – अधिनियम के प्रभावी होने की पूर्व की तिथि की घटनाओं पर भी इस अधिनियम के प्रयोजन हेतु विचार किया जाएगा – आवेदन पोषणीय है। (बाबूलाल वि. श्रीमती प्रेमवती) ...753

Protection of Women from Domestic Violence Act (43 of 2005), Section 12 & 19 – Residence Order – Wife filed application u/S 12 and 19 of the Act against her husband Devilal and other family members submitting that they (applicants herein) use to abuse her and her

unmarried daughter and they do not allow them to reside in the house and husband do not provided anything for maintenance – In reply before the Trial Court, it was submitted that house has been partitioned and Devilal sold his share to one Dharmendra and therefore now she can't make any claims in the said house – Trial Court directed that applicants should not obstruct in peaceful residence of wife alongwith her daughter in the house – Held – Wife filed application on 01.08.2011 whereas sale deed was executed on 12.06.2012 through a power of attorney – It is also not denied that Dharmendra is son of one of the applicants – Trial Court rightly held that the sale deed was a sham document purposefully created to defeat the very purpose of the application – Petition dismissed. [Babulal Vs. Smt. Premwati] ...753

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 व 19 – निवास आदेश – पत्नी ने अधिनियम की धारा 12 एवं 19 के अंतर्गत अपने पति देवीलाल एवं परिवार के अन्य सदस्यों के विरुद्ध यह निवेदन करते हुए आवेदन प्रस्तुत किया कि वे (यहाँ आवेदकगण) उसके तथा उसकी अविवाहित पुत्री के साथ दुर्व्यवहार करते हैं तथा वे उन्हें मकान में निवास करने की अनुमति नहीं देते तथा पति भरणपोषण हेतु कोई व्यवस्था नहीं करता – विचारण न्यायालय के समक्ष जवाब में, यह निवेदन किया गया था कि मकान का बंटवारा हो चुका है एवं देवीलाल ने अपना हिस्सा किसी घरमेन्द्र को विक्रय किया था तथा इसलिए अब वह उक्त मकान में किसी प्रकार का दावा नहीं कर सकती – विचारण न्यायालय ने यह निदेशित किया कि आवेदकगण, पत्नी को उसकी पुत्री के साथ मकान में शांतिपूर्ण निवास करने में बाधा नहीं डाल सकते – अभिनिर्धारित – पत्नी ने दिनांक 01.08.2011 को आवेदन प्रस्तुत किया जबकि विक्रय विलेख दिनांक 12.06.2012 को मुख्तारनामा द्वारा निष्पादित किया गया – यह भी इन्कार नहीं किया गया है कि घरमेन्द्र, आवेदकगण में से एक का पुत्र है – विचारण न्यायालय ने उचित रूप से यह अभिनिर्धारित किया कि विक्रय विलेख एक छद्म दस्तावेज था जो कि आवेदन के प्रयोजन को ही विफल करने के उद्देश्य से सृजित किया गया था – याचिका खारिज। (बाबूलाल वि. श्रीमती प्रेमवती) ...753

Public Interest Litigation – Closing of the slaughterhouse/shop during the Paryushan Parv festival of Jain community – In absence of any provision under the Madhya Pradesh Municipal Corporation Act, 1956 no direction can be issued. [Jitendra Kumar Jain (Dr.) Vs. State of M.P.] (DB)...308

जनहित याचिका – जैन समुदाय के त्यौहार पर्युषण पर्व के दौरान पशुवधशाला/दुकान का बंद किया जाना – म.प्र. नगरपालिक निगम अधिनियम,

1956 के अंतर्गत किसी उपबंध की अनुपस्थिति में कोई निर्देश जारी नहीं किये जा सकते। (जितेन्द्र कुमार जैन (डॉ.) वि. म.प्र. राज्य) (DB)...308

Public Interest Litigation – Principle of delay and laches – Applicability – Petition filed after delay of seven years from date of execution of agreement, for which no explanation has been offered – Principle of delay and laches is applicable to public interest litigation as well – Further held – Project has been undertaken for development of tourism and recreational amenities, so there is no element of public interest litigation – Respondents directed to complete the undertaken project as per the time schedule of agreement – Petition disposed. [Sachin Gupta Vs. The Municipal Corporation] (DB)...*40

लोकहित वाद – विलंब एवं अनुचित विलंब का सिद्धांत – प्रयोज्यता – याचिका, करार के निष्पादन की तिथि से 7 वर्ष के विलंब के पश्चात् प्रस्तुत की गई जिसके लिए कोई स्पष्टीकरण नहीं दिया गया – विलंब एवं अनुचित विलंब का सिद्धांत लोक हित वाद पर भी लागू होता है – आगे अभिनिर्धारित – परियोजना पर्यटन एवं मनोरंजन की सुख सुविधाओं के विकास के लिए शुरू की गई है अतः यहाँ लोक हित वाद का कोई तत्व नहीं है – प्रत्यर्थीगण को करार की कार्ययोजना के अनुसार शुरू की गई परियोजना को पूर्ण करने के लिए निर्देशित किया गया – याचिका का निपटारा किया गया। (सचिन गुप्ता वि. द म्युनिसिपल कारपोरेशन) (DB)...*40

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 have been adversely affected – Appeal partly allowed. [S.P. Singh Vs. West Central Railway] (DB)...26

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। (एस.पी. सिंह वि. वेस्ट सेंट्रल रेलवे) (DB)...*26

*Recovery of Debts Due to Banks and Financial Institutions Act (51 of 1993), Section 18 – See – Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Sections 17 & 18 [Ramdev Ginning Factory (M/s.) Vs. Chief Manager, Authorized Officer, ICICI Bank Ltd.] (DB)...*11*

बैंकों और वित्तीय संस्थाओं को शोध्य ऋण वसूली अधिनियम (1993 का 51), धारा 18 – देखें – वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन अधिनियम, 2002, धाराएँ 17 व 18 (रामदेव गिनिंग फेक्टरी (मे.) वि. चीफ मैनेजर, अथोराइज्ड ऑफिसर, आई.सी.आई.सी.आई. बैंक लि.) (DB)...*11

Registration Act (16 of 1908), Section 17 – Compromise Decree – Registration of – Admissibility in Evidence – At the stage of examination of defendant witness, petitioner/defendant wanted to exhibit a compromise decree passed earlier, whereby the trial Court refused on the ground that the decree was not registered – Held – Earlier suit was based on the plea of adverse possession which reflects that plaintiff (in the earlier suit) had no pre-existing title in the suit property, rather till the suit was decreed, he was a mere encroacher – In the present case, since the petitioner had no pre-existing right in the property prior to compromise decree and for the first time right was created, the compromise decree is required to be registered – No illegality in the impugned order – Petition dismissed. [Mohd. Yusuf Vs. Rajkumar] ...617

रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 17 – समझौता डिक्री – का रजिस्ट्रीकरण – साक्ष्य में ग्राह्यता – प्रतिवादी साक्षी के परीक्षण के प्रक्रम पर, याची/प्रतिवादी ने पूर्वतर पारित उस समझौता डिक्री को प्रदर्शित करना चाहा, जिसे विचारण न्यायालय द्वारा इस आधार पर अस्वीकार कर दिया गया था कि डिक्री रजिस्ट्रीकृत नहीं थी – अभिनिर्धारित – पूर्ववर्ती वाद, विपरीत कब्जे के अभिवाक् पर आधारित था जो दर्शाता है कि वादी (पूर्ववर्ती वाद में) को वाद सम्पत्ति में कोई पूर्व विद्यमान हक नहीं था बल्कि वाद डिक्रीत किये जाने तक वह मात्र एक अतिक्रमणकर्ता था – वर्तमान प्रकरण में, चूंकि याची के पास समझौता डिक्री से पूर्व सम्पत्ति में पूर्व विद्यमान अधिकार नहीं था और प्रथम बार अधिकार सृजित हुआ था, समझौता डिक्री का रजिस्ट्रीकरण अपेक्षित है – आक्षेपित आदेश में कोई अवैधता नहीं – याचिका खारिज। (मो. युसुफ वि. राजकुमार) ...617

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. [Sushil Kumar Sharma Vs. M.P. Professional Examination Board] (DB)...*16

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। (सुशील कुमार शर्मा वि. एम.पी. प्रोफेशनल एक्जामिनेशन बोर्ड) (DB)...*16

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. [Vikram Singh Vs. State of M.P.] ...139

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33)(दिनांक 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 विरुद्ध 1989 के अधिनियम की धारा 14-ए के अंतर्गत ऐसे आदेश जिसके विरुद्ध अपील की गई है, की दिनांक से 90

दिनों के भीतर उच्च न्यायालय के समक्ष अपील उपबन्धित है एवं धारा 14-ए की उपधारा 3 उपबन्धित 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। (विक्रम सिंह वि. म.प्र. राज्य) ...139

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. [Vikram Singh Vs. State of M.P.] ...139

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33) (दिनांक 26.01.2016 को अधिनियम क्र. 1/2016 द्वारा यथा संशोधित), धारा 14-ए - अपील - पोषणीयता - विचारण न्यायालय ने दिनांक 05.10.2015 को जमानत आवेदन अस्वीकार किया - उच्च न्यायालय ने दिनांक 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 विरुद्ध 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 विरुद्ध कोई अपील उपबन्धित नहीं है। (विक्रम सिंह वि. म.प्र. राज्य) ...139

*Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002), Sections 13(2), 13(3A), 13(8), 14 & 18 - Property auction - Maintainability of the writ petition - Availability of alternative remedy - Borrower directly challenging the order of DRT without exhausting the statutory remedy of appeal - Therefore, petition filed by borrower is not maintainable hence it is dismissed. [Surendra Jain Vs. Shripad] (DB)...*31*

वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन अधिनियम (2002 का 54), धाराएँ 13(2), 13(3ए), 13(8), 14 व 18 - सम्पत्ति की नीलामी - रिट याचिका की पोषणीयता - वैकल्पिक उपचार की उपलब्धता - ऋणी ने अपील के कानूनी उपचार को निःशेष किये बिना ऋण वसूली अधिकरण के

आदेश को प्रत्यक्ष रूप से चुनौती दी - अतः ऋणी द्वारा प्रस्तुत याचिका पोषणीय नहीं है इसलिए खारिज की जाती है। (सुरेन्द्र जैन वि. श्रीपद) (DB)...*31

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. [Ramdev Ginning Factory (M/s.) Vs. Chief Manager, Authorized Officer, ICICI Bank Ltd.] (DB)...*11

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 विरुद्ध 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। (रामदेव गिनिंग फेक्टरी (मे.) वि. चीफ मैनेजर, अथोराइज्ड ऑफिसर, आई.सी.आई.सी.आई. बैंक लि.) (DB)...*11

Security Interest (Enforcement) Rules, 2002, Rules 9(3) & 9(4) - In auction notice itself the bank has wrongly provided deposit of 10% amount along with the tender and remaining 90% after acceptance of the tender contrary to Rule 9(3) whereas Rule 9(4) contemplates that balance amount of the purchase price shall be paid by the purchaser to the authorised officer on or before 15th day of confirmation of the sale or such extended period as may be agreed upon in writing

between the parties – No such agreement in writing was arrived at between the auction purchaser and the bank and time can not be treated to be extended by way of correspondence in absence of any agreement in writing. [Surendra Jain Vs. Shripad] (DB)...*31

प्रतिभूति हित (प्रवर्तन) नियम, 2002, नियम 9(3) एवं 9(4) – नीलामी के नोटिस में ही बैंक ने गलत रूप से 10% राशि निविदा के साथ तथा शेष 90% निविदा की स्वीकृति के पश्चात् जमा की जाना उपबंधित किया है, जो नियम 9(3) के प्रतिकूल है जबकि नियम 9(4) यह अनुध्यात करता है कि क्रय मूल्य की बकाया राशि का भुगतान क्रेता द्वारा प्राधिकृत अधिकारी को विक्रय के पुष्टिकरण के 15वें दिन या उसके पूर्व अथवा ऐसी विस्तारित अवधि जिस पर पक्षकारों के मध्य लिखित रूप से सहमति हो किया जायेगा – नीलामी क्रेता एवं बैंक के मध्य ऐसा कोई लिखित करार नहीं हुआ था तथा किसी लिखित करार की अनुपस्थिति में पत्राचार के माध्यम से समय को विस्तारित किया गया है ऐसा नहीं माना जा सकता। (सुरेन्द्र जैन वि. श्रीपद) (DB)...*31

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. [Ramhit Sahu Vs. State of M.P.] ...*12

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। (रामहित साहू वि. म.प्र. राज्य) ...*12

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. [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

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. [Dinesh Chandra Mishra (Dr.) Vs. State of M.P.] ...*3

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

Service Law - VRS Scheme - Employees had a right to withdraw the offer during the validity period of the Scheme but not thereafter. [M.P. State Road Transport Corporation Vs. Manoj Kumar] (SC)...241

सेवा विधि - वी.आर.एस. स्कीम - कर्मचारियों को स्कीम की विधिमान्यता अवधि के दौरान प्रस्ताव वापस लेने का अधिकार था लेकिन उसके बाद नहीं। (म. प्र. स्टेट रोड ट्रांसपोर्ट कारपोरेशन वि. मनोज कुमार) (SC)...241

Service Law and Fundamental Rules-9(17) - Transfer - Petitioner has been posted from one office to another in District Bhopal - Petitioner posted in Bhopal for last more than 13 years - Order cannot be treated as a frequent transfer order but it is only a local arrangement - Clause 11.1 of Transfer Policy specifically prescribes that transfer from one office to another in the same head office is a local arrangement and it would not be treated under the category of transfer - Petitioner failed to point out violation of any statutory rules as well as failed to

point out that impugned transfer order has been issued with *mala fide* intention – Petition dismissed. [Sushil Kumar Tiwari (Dr.) Vs. State of M.P.] ...*44

सेवा विधि एवं मूलभूत नियम-9(17) – स्थानांतरण – याची को भोपाल जिले में एक कार्यालय से दूसरे कार्यालय पदस्थ किया गया है – याची पिछले 13 वर्षों से अधिक समय से भोपाल में पदस्थ है – आदेश को बारंबार स्थानांतरण आदेश नहीं माना जा सकता, किंतु यह केवल एक स्थानीय व्यवस्था है – स्थानांतरण नीति का खंड 11.1 विनिर्दिष्ट रूप से विहित करता है कि एक ही मुख्य कार्यालय में एक कार्यालय से दूसरे कार्यालय स्थानांतरण, एक स्थानीय व्यवस्था है और इसे स्थानांतरण की श्रेणी के अंतर्गत नहीं समझा जा सकता – याची किन्हीं कानूनी नियमों के उल्लंघन को दर्शाने में असफल रहा और साथ ही यह दर्शाने में भी असफल रहा कि आक्षेपित स्थानांतरण आदेश, असदभावपूर्वक आशय के साथ जारी किया गया था – याचिका खारिज। (सुशील कुमार तिवारी (डॉ.) वि. म.प्र. राज्य) ...*44

Specific Relief Act (47 of 1963), Section 22 – See – Limitation Act, 1963, Schedule I, Article 54 [Madina Begum Vs. Shiv Murti Prasad Pandey] (SC)...507

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 22 – देखें – परिसीमा अधिनियम, 1963, अनुसूची I, अनुच्छेद 54 (मदीना बेगम वि. शिव मूर्ति प्रसाद पाण्डे) (SC)...507

*State Mining Corporation Limited, M.P. (Service and Conduct Rule) Rules, Clause 54(1) – Suspension order placing the petitioners under suspension as they have demanded bribe – Challenged on the ground that the provision under clause 54 is only an enabling provision which provides that an employee can be placed under suspension when criminal charge is pending against him – Held – Petitioners were caught red-handed while accepting the bribe – Reasons for suspension are spelled out in the order itself – Thus “charge is pending” must be related to accusation and not related to “charge framed” in a criminal case – There is no legal error in placing the petitioners under suspension – Petition dismissed. [Rajeev Lochan Sharma Vs. State of M.P.] ...*26*

स्टेट माइनिंग कॉर्पोरेशन लिमिटेड, म.प्र. (सेवा एवं आचरण नियम) नियमों, खण्ड 54(1) – निलंबन आदेश के तहत याचीगण को निलंबन में रखा जाना क्योंकि उन्होंने रिश्वत की मांग की है – इस आधार पर चुनौती दी गई है कि खण्ड 54 के अंतर्गत उपबंध मात्र एक सामर्थ्यकारी उपबंध है जो यह उपबंधित करता है कि एक

कर्मचारी को निलंबन पर रखा जा सकता है जब उसके विरुद्ध दाण्डिक आरोप लंबित हो — अभिनिर्धारित — याचीगण रिश्वत लेते रंगे हाथों पकड़े गये थे — निलंबन के कारणों को आदेश में ही बताया गया है — इस प्रकार "आरोप लंबित है" अभियोग से संबंधित होना चाहिए तथा न कि दाण्डिक प्रकरण में "आरोप विरचना" से संबंधित होना चाहिए — याचीगण को निलंबन में रखे जाने में कोई विधिक त्रुटि नहीं है — याचिका खारिज। (राजीव लोचन शर्मा वि. म.प्र. राज्य) ...*26

Transfer of Property Act (4 of 1882), Section 3 – Actionable claim – Whether the loss of pay order and its subsequent misuse can give rise to an actionable claim against the appellant and whether trial court was right in holding the appellant liable to compensate the loss on the basis of the evidence on record – Held – After loss of the printed pay order form, the Head Office of the Bank has taken steps vigilantly and promptly issued circular, much prior to the date of incident, hence Bank has sufficiently discharged its duty and onus – No actionable claim can be raised against the appellant Bank because to be actionable claim and get redress from Court, the liability must assume legal shape in any recognized category of wrong such as negligence, malfeasance, misfeasance and non-feasance etc. – Further held – From the facts and evidence it is established that there was no contractual and tortious liability of the appellant Bank for compensating respondent No. 1. [Bank of Maharashtra Vs. M/s. ICO Jax India Deedwana Oli Lashkar Cwalior] ...645

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 3 – अनुयोज्य दावा – क्या संदाय आदेश का गुम हो जाना और उसका तत्पश्चात् दुरुपयोग अपीलार्थी के विरुद्ध अनुयोज्य दावा उत्पन्न कर सकता है और क्या विचारण न्यायालय अभिलेख के साक्ष्य के आधार पर अपीलार्थी को हानि की पूर्ति हेतु दायी ठहराने में सही था — अभिनिर्धारित — मुद्रित संदाय आदेश फार्म गुम जाने के पश्चात्, बैंक के प्रधान कार्यालय ने घटना की तिथि से काफी पहले, सतर्कता से एवं तुरंत रूप से परिपत्र जारी किया, अतः बैंक ने पर्याप्त रूप से अपने कर्तव्य एवं भार का निर्वहन किया है — अपीलार्थी बैंक के विरुद्ध कोई अनुयोज्य दावा नहीं उठाया जा सकता क्योंकि अनुयोज्य दावा होने के लिए और न्यायालय से प्रतितोष प्राप्त करने के लिए, दायित्व को उपेक्षा, दुष्करण, अपकरण और अकरण इत्यादि जैसे किसी दोष की मान्यता प्राप्त श्रेणी में विधिक आकार धारण करना चाहिए — आगे अभिनिर्धारित — तथ्यों एवं साक्ष्य से यह स्थापित होता है कि प्रत्यर्थी क्र. 1 की क्षतिपूर्ति हेतु बैंक का कोई संविदात्मक एवं अपकृत्यजन्य दायित्व नहीं था। (बैंक ऑफ महाराष्ट्र वि. मे. आई.सी.ओ. जेक्स इंडिया डीडवाना ओली लश्कर ग्वालियर) ...645

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. [Ashish Mittal Vs. Bank of Baroda] ...*1

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धाराएँ 58(एफ) व 65(ए) – हक विलेखों के निक्षेप द्वारा बंधक – बंधककर्ता की पट्टा करने की शक्ति – प्रत्याभूति-दाता ने मेसर्स वेंकटेश्वर की ओर से अपनी सम्पत्ति को वर्ष 2012 में हक विलेख के निक्षेप द्वारा बंधक किया – इसके पश्चात् प्रत्याभूति-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। (अशीष मित्तल वि. बैंक ऑफ़ बड़ौदा)

 ...*1

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. [Jaiprakash Associates Ltd. Vs. Madhya Pradesh Electricity Regulatory Commission] ...61

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THE INDIAN LAW REPORTS M.P. SERIES, 2017

(VOL-1)

JOURNAL SECTION

IMPORTANT ACTS, AMENDMENTS, CIRCULARS,
NOTIFICATIONS AND STANDING ORDERS.THE CHILD LABOUR (PROHIBITION AND REGULATION)
AMENDMENT ACT, 2016

No. 35 OF 2016

[Received the assent of the President on the 29th July, 2016 and published in the Gazette of India (Extra-ordinary), Part II, Section 1, dated the 30th July, 2016 page no.1-6].

An Act further to amend the Child Labour (Prohibition and Regulation) Act, 1986.

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

1. Short title and commencement. (1) This Act may be called the Child Labour (Prohibition and Regulation) Amendment Act, 2016.

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

2. Amendment of long title. In the Child Labour (Prohibition and Regulation) Act, 1986 (61 of 1986) (hereinafter referred to as the principal Act), for the long title, the following shall be substituted, namely:—

“An Act to prohibit the engagement of children in all occupations and to prohibit the engagement of adolescents in hazardous occupations and processes and the matters connected therewith or

incidental thereto.”.

3. Amendment of short title. In section 1 of the principal Act, in sub-section (1), for the words, brackets and figures “the Child Labour (Prohibition and Regulation) Act, 1986 (61 of 1986)”, the words, brackets and figures “the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986” shall be substituted.

4. Amendment of section 2. In section 2 of the principal Act,—

(a) clause (i) shall be renumbered as clause (ia) thereof and before clause (ia) as so renumbered, the following clause shall be inserted, namely:—

‘(i) “adolescent” means a person who has completed his fourteenth year of age but has not completed his eighteenth year;’;

(b) for clause (ii), the following clause shall be substituted, namely:—

‘(ii) “child” means a person who has not completed his fourteenth year of age or such age as may be specified in the Right of Children to Free and Compulsory Education Act, 2009 (35 of 2009), whichever is more;’.

5. Substitution of new section for section 3. For section 3 of the principal Act, the following section shall be substituted, namely:—

“3. Prohibition of employment of children in any occupation and process. (1) No child shall be employed or permitted to work in any occupation or process.

(2) Nothing in sub-section (1) shall apply where the child,—

(a) helps his family or family enterprise, which is other than any hazardous occupations or processes set forth in the Schedule, after his school hours or during vacations;

(b) works as an artist in an audio-visual entertainment

industry, including advertisement, films, television serials or any such other entertainment or sports activities except the circus, subject to such conditions and safety measures, as may be prescribed:

Provided that no such work under this clause shall effect the school education of the child.

Explanation.—For the purposes of this section, the expression,

(a) “family” in relation to a child, means his mother, father, brother, sister and father’s sister and brother and mother’s sister and brother;

(b) “family enterprise” means any work, profession, manufacture or business which is performed by the members of the family with the engagement of other persons;

(c) “artist” means a child who performs or practices any work as a hobby or profession directly involving him as an actor, singer, sports person or in such other activity as may be prescribed relating to the entertainment or sports activities falling under clause (b) of sub-section (2).”.

6. Insertion of new section 3A. After section 3 of the principal Act, the following section shall be inserted, namely:—

“3A. Prohibition of employment of adolescents in certain hazardous occupations and processes. No adolescent shall be employed or permitted to work in any of the hazardous occupations or processes set forth in the Schedule:

Provided that the Central Government may, by notification, specify the nature of the non-hazardous work to which an adolescent may be permitted to work under this Act.”.

7. Amendment of section 4. In section 4 of the principal Act, for the words “add any occupation or process to the Schedule”, the words “add to, or, omit from, the Schedule any hazardous occupation or process” shall be substituted.

8. Amendment of section 5. In section 5 of the principal Act,—

(i) in the marginal heading, for the words “Child Labour Technical Advisory Committee”, the words “Technical Advisory Committee” shall be substituted;

(ii) in sub-section (1), for the words “Child Labour Technical Advisory Committee”, the words “Technical Advisory Committee” shall be substituted.

9. Amendment of Part III. In the heading of Part III of the principal Act, for “CHILDREN” substitute “ADOLESCENTS.”.

10. Amendment of section 6. In section 6 of the principal Act, for the word and figure “section 3”, the word, figure and letter “section 3A” shall be substituted.

11. Amendment of section 7. In section 7 of the principal Act, for the word “child”, wherever it occurs, the word “adolescent” shall be substituted.

12. Amendment of section 8. In section 8 of the principal Act, for the word “child”, the word “adolescent” shall be substituted.

13. Amendment of section 9. In section 9 of the principal Act, for the word “child”, at both the places, where it occurs, the word “adolescent” shall be substituted.

14. Amendment of section 10. In section 10 of the principal Act, for the word “child”, at both the places, where it occurs, the word “adolescent” shall be substituted.

15. Amendment of section 11. In section 11 of the principal Act,—

(a) for the word “children”, the word “adolescent” shall be substituted.

(b) for the word “child”, wherever it occurs the word “adolescent” shall be substituted.

16. Amendment of section 12. In section 12 of the principal Act,—

(a) in the marginal heading, for the words and figures “sections 3 and 14” the words, figures and letter “sections 3A and 14” shall be substituted;

(b) for the words and figures “sections 3 and 14”, the words, figures and letter “sections 3A and 14” shall be substituted.

17. Amendment of section 13. In section 13 of the principal Act, for the word “children”, wherever it occurs, the word “adolescent” shall be substituted.

18. Amendment of section 14. In section 14 of the principal Act,—

(a) for sub-section (1), the following sub-sections shall be substituted, namely:—

“(1) Whoever employs any child or permits any child to work in contravention of the provisions of section 3 shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years, or with fine which shall not be less than twenty thousand rupees but which may extend to fifty thousand rupees, or with both:

Provided that the parents or guardians of such children shall not be punished unless they permit such child for commercial purposes in contravention of the provisions of section 3.

(1A) Whoever employs any adolescent or permits any adolescent to work in contravention of the provisions of section 3A shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years or with fine which shall not be less than twenty thousand rupees but which may extend to fifty thousand rupees, or with both:

Provided that the parents or guardians of such adolescent shall not be punished unless they permit such adolescent to work in contravention of the provisions of section 3A.

(1B) Notwithstanding anything contained in sub-sections (1) and (1A) the parents or guardians of any child or adolescent referred to in section 3 or section 3A, shall not be liable for punishment, in case of the first offence.”.

(b) for sub-section (2), the following sub-sections shall be substituted, namely:—

“(2) Whoever, having been convicted of an offence under section 3 or section 3A commits a like offence afterwards, he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years.

(2A) Notwithstanding anything contained in sub-section (2), the parents or guardian having been convicted of an offence under section 3 or section 3A, commits a like offence afterwards, he shall be punishable with a fine which may extend to ten thousand rupees.”.

(c) clauses (a), (b) and (c) of sub-section (3) shall be omitted.

19. Insertion of new sections 14A, 14B, 14C and 14D. After section 14 of the principal Act, the following sections shall be inserted, namely:—

“14A. **Offences to be Cognizable.** Notwithstanding anything

contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence committed by an employer and punishable under section 3 or section 3A shall be cognizable.

14B. Child and Adolescent Labour Rehabilitation Fund. (1)

The appropriate Government shall constitute a Fund in every district or for two or more districts to be called the Child and Adolescent Labour Rehabilitation Fund to which the amount of the fine realized from the employer of the child and adolescent, within the jurisdiction of such district or districts, shall be credited.

(2) The appropriate Government shall credit an amount of fifteen thousand rupees to the Fund for each child or adolescent for whom the fine amount has been credited under sub-section (1).

(3) The amount credited to the Fund under sub-sections (1) and (2) shall be deposited in such banks or invested in such manner, as the appropriate Government may decide.

(4) The amount deposited or invested, as the case may be under sub-section (3), and the interest accrued on it, shall be paid to the child or adolescent in whose favour such amount is credited, in such manner as may be prescribed.

Explanation:— For the purposes of appropriate Government, the Central Government shall include the Administrator or the Lieutenant Governor of a Union territory under article 239A of the Constitution.

14C. Rehabilitation of rescued child or adolescent. The child or adolescent, who is employed in contravention of the provisions of this Act and rescued, shall be rehabilitated in accordance with the laws for the time being in force.

14D. Compounding of offences. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the District Magistrate may, on the application of the accused person,

compound any offence committed for the first time by him, under subsection (3) of section 14 or any offence committed by an accused person being parent or a guardian, in such manner and on payment of such amount to the appropriate Government, as may be prescribed.

(2) If the accused fails to pay such amount for composition of the offence, then, the proceedings shall be continued against such person in accordance with the provisions of this Act.

(3) Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence, against the offender in relation to whom the offence is so compounded.

(4) Where the composition of any offence is made after the institution of any prosecution, such composition shall be brought in writing, to the notice of the Court in which the prosecution is pending and on the approval of the composition of the offence being given, the person against whom the offence is so compounded, shall be discharged.”.

20. Insertion of new sections 17A and 17B. After section 17, the following sections shall be inserted, namely:—

“17A. District Magistrate to implement the provisions.

The appropriate Government may confer such powers and impose such duties on a District Magistrate as may be necessary, to ensure that the provisions of this Act are properly carried out and the District Magistrate may specify the officer, subordinate to him, who shall exercise all or any of the powers, and perform all or any of the duties, so conferred or imposed and the local limits within which such powers or duties shall be carried out by the officer as may be prescribed.

17B. Inspection and monitoring. The appropriate Government shall make or cause to be made periodic inspection of the places at which the employment of children is prohibited

and hazardous occupations or processes are carried out at such intervals as it thinks fit, and monitor the issues, relating to the provisions of this Act.”.

21. Amendment of section 18. In section 18 of the principal Act, in sub-section (2),—

(i) clause (a) shall be relettered as clause (b) thereof and before clause (b), as so relettered, the following clause shall be inserted, namely:—

(a) the conditions and the safety measures under clause (b) of sub-section (2) and other activities under clause (b) to *Explanation* of sub-section (2) of section 3;

(ii) in clause (b), as so relettered, for the words “Child Labour Technical Advisory Committee”, the words “Technical Advisory Committee” shall be substituted.

(iii) clauses (b), (c) and (d) shall be relettered as clauses (c), (d) and (e) thereof and in clause (c) as so relettered, for the word “child”, the word “adolescent” shall be substituted;

(iv) after clause (e), as so relettered, the following clauses shall be inserted, namely:—

“(f) the manner of payment of amount to the child or adolescent under sub-section (4) of section 14B;

(g) the manner of composition of the offence and payment of amount to the appropriate Government under sub-section (1) of section 14D;

(h) the powers to be exercised and the duties to be performed by the officer specified and the local limits within which such powers or duties shall be carried out under section 17A.”.

22. Substitution of new Schedule for the Schedule. In the principal Act, for the Schedule, the following Schedule shall be substituted, namely:—

‘THE SCHEDULE

(See section 3A)

(1) Mines.

(2) Inflammable substances or explosives.

(3) Hazardous process.

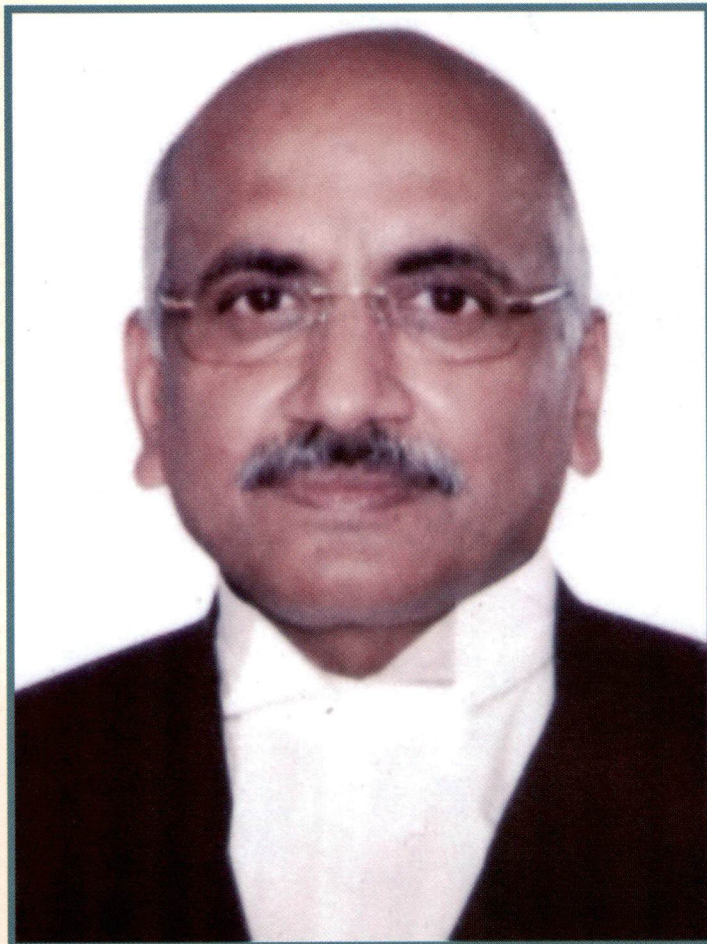
Explanation.—For the purposes of this Schedule, “hazardous process” has the meaning assigned to it in clause *(cb)* of the Factories Act, 1948 (63 of 1948).’.

DR. G. NARAYANARAJU,

Secretary to the Govt. of India.

APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Hon'ble Mr. Justice Hemant Gupta on his appointment as Chief Justice of the High Court of Madhya Pradesh. Hon'ble Mr. Justice Hemant Gupta, took oath as Chief Justice of the High Court of M.P. on 18/03/2017 at Bhopal.



**HON'BLE MR. JUSTICE HEMANT GUPTA,
CHIEF JUSTICE**

Born on 17, October 1957. Enrolled as an Advocate in July 1980. Practised mainly on Civil side including Labour, Company, Constitutional and Service Law. Worked as Additional Advocate General, Punjab from 1997 to 1999. Appointed as Judge of High Court of Punjab and Haryana on July 02, 2002. Appointed as Judge of the Patna High Court on February 08, 2016. Appointed as Acting Chief Justice of the Patna High Court on October 29, 2016. Appointed as Chief Justice of the High Court of Madhya Pradesh on March 18, 2017.

His Lordship belongs to a family of illustrious lawyers. His grandfather was a prominent civil lawyer. His Lordship's father was Chief Justice of Punjab & Haryana High Court. His Lordship has delivered some of noticeable judgments regarding grant of professional degrees through distance education mode by the Deemed Universities; appointment of the Chairman of the Punjab Public Service Commission; interpretation of Section 29 of the State Financial Corporation Act, 1951; interpretation of Section 24 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013; Appeal in the matter arising out of Kandhar Indian Airlines plane hijack case; interpretation of Section 427(2) of the Code of Criminal Procedure; and rights of the inmates in the jail in Punjab, Haryana and U.T., Chandigarh. His Lordship was member of the Computer Committee, Punjab & Haryana High Court, for more than 10 years. This period saw a complete computerization of the High Court.

His Lordship also remained as Executive Chairman of the State Legal Services Authority, U.T., Chandigarh, from July, 2012 till January, 2016. During his tenure, a unique scheme was among others, the projects of '*Sakshar Balak-Balika*' and '*Saksham Maa*' for the underprivileged classes were conceptualized and put into place in collaboration with an NGO called *Hamari Kaksha*. The scheme provided adult education to the mothers so as to empower them to take care of themselves and also to motivate them to teach their child and also to make children to enable them to go to school. Another project, namely, '*Hamari Pathshala*' was also started for the children belonging to the poor sections of the society i.e. rag pickers, street vendors and slum dwellers.

His Lordship was sworn in as the 23rd Chief Justice of the Madhya Pradesh High Court on March 18, 2017 and was accorded welcome ovation on 20th March, 2017 in the Conference Hall of South Block of High Court of Madhya Pradesh, Jabalpur.

We, on behalf of the Indian Law Reports (M.P. Series) wish Hon'ble Mr. Justice Hemant Gupta, Chief Justice and Patron a successful tenure on the Bench.

**OVATION TO HON'BLE MR. JUSTICE HEMANT GUPTA,
CHIEF JUSTICE, GIVEN ON 20-03-2017 IN THE CONFERENCE
HALL OF HIGH COURT M.P. AT JABALPUR.**

Hon'ble Mr. Justice S.K. Seth, Administrative Judge, while felicitating the new Chief Justice, said :-

It is my proud privilege to initiate this welcome ovation on your appointment as the Chief Justice of Madhya Pradesh High Court. We all have assembled here to felicitate you and extend a very warm welcome to this Court.

Born on 17th October, 1957, you belong to a renowned family of lawyers. Your grandfather was a top ranking civil lawyer of his time. Your father, Justice J.V. Gupta, was the Chief Justice of Punjab and Haryana High Court. You have carried forward the illustrious legacy in full measure.

You were enrolled as an Advocate in July 1980 and after spending initial few years in the District Courts, you practiced at the High Court of Punjab and Haryana and by your hard work soon made a mark in the profession. In your professional life as an Advocate, you mainly dealt with the civil cases, including labour, Company, Constitutional and Service Law. You also worked as Additional Advocate General, Punjab from 1997 to 1999. Your merit was recognized and you were elevated as a Judge of the High Court in July 2002.

As a Judge in the High Court, you have had the opportunity to deal with all branches of laws, be it Civil, Revenue, Constitutional, Company, Tax or Criminal.

At Punjab and Haryana High Court, you had the opportunity to deal with a number of important legal issues as a member of the Full Benches and Division Benches, apart from Single Bench.

When I met you in Bhopal for the first time, I was impressed with your straight forward attitude. Under your leadership, I am sure that we will

scale greater heights.

I, on my behalf and on behalf of all my colleagues, offer to your Lordship respectful congratulations and assure you of our fullest co-operation in the task ahead.

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

On this momentous occasion of Your Lordship's appointment as the Chief Justice of Madhya Pradesh, I consider it my proud privilege and distinct honor to rise on behalf of the State Government of Madhya Pradesh and Office of the Advocate General to extend a very warm and Cordial welcome to you and offer heartiest felicitations.

This Court has seen a grand mix of stupendous and exceptional judges who had donned the chair of this Hon'ble Court as Chief Justices. They have not only enamored one and all by their suave mannerisms and exceptional intellect but have also acted as veritable role models for the entire legal community.

My endeavor to refer to this past glory is with a certain objective; the immense responsibility on all of us and especially My Lord the Chief Justice to carry forward the tradition of greatness. We will only deserve such place in history as the collective efforts of lawyers and Judges bring to the cause of justice and service to public. The noble profession carries with it great sense of responsibility.

I am conscious of the uphill task faced by My Lord to administer and ensure rule of law in one of the biggest states in the country. Judicial method is not concerned with the ephemeral opinions of the community. The law is most needed when it stands against popular attitudes sometimes engendered by those with power and when it protects the unpopular against the clamour of the multitude. But judicial method is concerned with the equal dignity of every person, his or her capacity to participate in the life of the community, to contribute to society and to share in its benefits; it is concerned with the powers entrusted to Governments and the manner in which those powers are exercised. Judicial method starts with an understanding of the existing rules; it seeks to perceive the principle that underlies them and, at an even deeper level, the values that underlie the principle.

This High Court has been the pioneer of bringing the entire listing system to the doorsteps of every litigant with a click of a mouse. Use of optimal computer technology for all round improvement in justice delivery system coupled with better Court management can go a long way to get a better output. At the same time, conventions must hold good but then change is also a necessity as we cannot be stuck in a time warp. Each case should be able to be tracked from its cradle to grave and I am sure that My Lord with his vast experience and tenacity would be able to iron out the glitches in the system and make it more robust.

The legitimacy and acceptance of the court's authority rests on the level of trust and confidence that the public has in the judiciary and in its ability to deliver and administer justice. A strong and effective judiciary imbues the legal system, and society, with the necessary stability and predictability and this in turn bolsters the confidence of public at large in the system.

The reputation of your Lordship precedes him. Your unflinching zeal and determination is a stuff of legends and I am confident that this institution shall scale unprecedented heights under your able leadership and tutelage. We are confident that you shall take up all the challenges and turn them into opportunities. Though the task is arduous and stressful, but we have not even a iota of doubt that you shall handle everything with consummate ease.

My Lord we immensely value and respect your benign presence amongst us and we assure you we shall move together with a common spirit and object in mind to give to the people of Madhya Pradesh, a High Court efficient in system and quick in delivery of justice.

The presence of this large gathering reveals the adulation and respect which my lord has already garnered and there is an air of expectation in the four corners of this great institution.

May Your Lordship shine as a beacon light in the legal horizon not only of our State but entire country.

Thank You.

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

The Holy Bible says – “The joy cometh in morning”; and this morning is really full of joy for us. We all have congregated here to extend our felicitations to My Lord Shri Justice Hemant Gupta, on Your Lordship’s adorable adornment on the chariot of Justice as Chief Justice of the High Court of Madhya Pradesh. I feel it to be my proud privilege, while standing at this momentous morning on behalf of more than 5000 members of the M.P. High Court Bar Association to welcome Your Lordship.

Kautilya in his ‘Arthshastra’ says :-

“The fragrance of flowers spreads only in the direction of winds, but the goodness of a person spreads in all directions.”

The fragrance of high and good qualities of Your Lordship has visited us much before your arrival to this State. In these mid-March days, the sun has started up to stare us with its hot angle. The summer is summarizing its winter. Rough winds are shaking darling buds of March. However, joining of ranks by Your Lordship as Chief Justice in winged chariot of this High Court has come to us walking upon the moderate cool breeze. I welcome this cool breeze in the portals of this High Court, elevated from the very root of vision and virtues.

Lord Buddha says :- “अप्य दीपो भव ।” Become your own lamp.

Martin Luther King Jr. had said :-

“Darkness cannot drive out darkness, only light can do that.”

Let the light within you, illumine your life in order to drive out darkness in the lives of most of the people of this poor State standing far away from mile-stones of milky ways. The hopes of people are to be rekindled. It is a reminder to slay all that is negative to these hopes. Rabindra Nath Tagore says :-

“He who wants to do good, knocks at the gate.

He who loves finds the gates open.”

Your Lordship must have found that the gates of our hearts for you are wide open. Kindly make your entrance into our hearts with love. If a drop

of water falls in a lake there is no identity. But if that drop of water falls on a petal of lotus, it shines like a pearl. Your Lordship are that very drop of water which fell from the heaven on this High Court's petal of lotus and the destiny has chosen the best place, where you will shine like a precious pearl.

Your Lordship hail from the pious land of Punjab and Haryana, wherefrom the pages of history of India begin. This is a pious land of "Panchnad" (Five Rivers) which symbolizes five great qualities of joyful life, pleasant mannerism, kindness, dancing attitudes and great feelings of love. This is the land of Vedic sages, the land of sagas of bravery of Hari Singh Nalwa. This is the land of mythical love-songs of Heer-Ranjha. Your Lordship have come to us like the rhythm of the drums of Baisakhi.

Your Lordship were born on 17th October, 1957 in a family belonging to the illustrious lawyers. Your grandfather was a prominent civil lawyer, who voluntarily left practice at the prime of his professional career at the age of 65 years. It is the matter of glory that Your Lordship's father was also Chief Justice of Punjab and Haryana High Court. "आत्मनो जायते पुत्रः ।" Now, the glorious son is Chief Justice of High Court of Madhya Pradesh.

Your Lordship were enrolled as an Advocate in July 1980. After initially practicing for a few years in the District Courts, Your Lordship started practice in the High Court and mainly dealt with the Civil cases including Labour; Company, Constitutional and Service Laws. Your Lordship were appointed as Additional Advocate General of Punjab from year 1997 to 1999. Your Lordship as a young lawyer had a matchless and meteoric rise at the Bar. Your Lordship were also a member of Rotary Club of Chandigarh and had taken active role in Pulse Polio immunization programme.

Your Lordship as a Judge in the High Court have had the opportunity to deal with all disciplines of law, be it Civil, Revenue, Constitutional, Company, Tax or Criminal laws. Your Lordship have dealt with the number of important legal issues as a member of the Full Benches and Division Benches, apart from Single Benches. Some of the remarkable judgments delivered by Your Lordship, are regarding the grant of professional degrees through distance education mode by the deemed Universities; appointment of the Chairman of Punjab Public Service Commission; interpretation of Section 29 of the State Financial Corporation Act, 1951; interpretation of Section 24 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013; appeal in the matter arising out of Kandhar Indian

Airlines plane hijack case; interpretation of Section 427(2) of the Code of Criminal Procedure and the rights of inmates in the Jails in Punjab, Haryana and U.T. Chandigarh. Your Lordship continued to touch heights and in whatever walks of life you marched, success was standing ahead.

The great Urdu poet Faiz Ahmad Faiz has said:-

“फैज की राह सरबसर मंजिल।

हम जहाँ पहुँचे कामयाब आये।।”

Your Lordship had keen desire to bring an era of modernization in the Judicial circle. Your Lordship were Member of the Computer Committee, Punjab & Haryana High Court, for more than 10 years till Your Lordship took over as a Judge of Patna High Court. This era witnessed a complete computerization of the High Court. Some of the IT initiatives taken during this period were, LCD based display-boards for the benefit of Advocates and litigants; establishment of a remote location data-centre; implementation of Bio-metric system for on-line attendance of the High Court staff; Digitization of the entire records of Judicial files including developing a mechanism to scan even the freshly filed case; introduction of the Case Management System; launching of E-diary; E-filing of the cases; access to paper book module; online availability of the judgments and the daily/interim orders, extensive usage of the SMS; dispensing with the manual peshi-registers; E-inspection, E-copy of the judgment(s)/order(s) by creating automated centralized copy agency. In the High Court of M.P. much in this direction has been done; and much is awaiting to be done under able guidance of Your Lordship as the Chief Justice.

Your Lordship also remained as Executive Chairman of the State Legal Services Authority, U.T., Chandigarh from July, 2012 till January, 2016. During Your Lordship's tenure, a unique scheme was launched amongst others including the projects of 'साक्षर बालक-बालिका' and 'साक्षर माँ' [Literate Boys and Girls and Literate Mothers] for underprivileged classes. These projects were conceptualized and put into place in collaboration with an NGO called 'हमारी कक्षा' [Hamari Kaksha]. The scheme provided adult-education to mothers so as to empower them to take care of themselves and also to motivate them to teach their children and also to make children to enable them to go to school. Another project, namely, 'हमारी पाठशाला' was also started for the children belonging to the poor sections of the society, i.e. rag-pickers, street vendors and slum-dwellers. This is really a great achievement and high service to mankind, particularly to poor.

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."

It is what the word 'Justice' means in its true meaning. 'संन्यायं विधि लक्षणम्' । [The purpose of law is the quest for Justice]. What Your Lordship have done for the poor, down-trodden and underprivileged class of the people is the real quest for Justice. A great thinker Mencius says :-

"The great-man is he who does not lose his child's heart."

Your Lordship after gaining such vast mileage in your quest for Justice, took over as Judge of Patna High Court on 8th February, 2016 and as Acting Chief Justice on 29th October, 2016 before your arrival to the heart-land of the country, from the banks of holy Ganga to the banks of holy Narmada. It is said that whatever a person spiritually gains by taking a dip in the Ganga, he gets the same by having a mere glimpse of Narmada, which is also historically named as "Rewa".

The famous Urdu poet Firak Gorakhpuri has said :-

"अपनी परछाइयाँ, साथ लेते चलो ।
क्या जरूरी वहाँ कोई बरगद भी हो ।।"

Your Lordship, we welcome your great shadows too. In Punjab and Haryana High Court as well as in Patna High Court Your Lordship were respected as out-standing Judge having deep insight of law in all fields and the Judgments delivered by Your Lordship speak volumes about your legal acumen. A short resume of this chronology of your Judicial voyage would reveal that Your Lordship never looked behind after starting your career in the field of law.

David Everett says :-

"Large streams originate from little fount.

Tall oaks grow from little roots.”

‘Kathopnishad’ exhorts as follows :-

“उत्तिष्ठत् जाग्रत प्राप्य वरान्निबोधत ।

क्षुरस्य धारा निश्चिता दुरत्यया

दुर्ग पथस्तक्कदयो वदन्ति ।।”

[कठोपनिषद् I (iii) 14]

[Arise, awake and approaching great souls, receive instructions from them. The wise says that the road is difficult to tread; it is like treading on the sharp edge of a razor.]

William Shakespeare says :- “What is in a name?” But I think the ‘name’ of a person symbolizes the inner qualities of his personality. Your Lordship’s name ‘Hemant’ is very significant in all respects. According to Maharishi Charak in ‘Charak-Samhita’, the ‘Hemant’ is the healthiest season in all six weathers of this country. The great poet Kalidas in his great poem “Ritu Samharam” [ऋतु संहारम्] narrates the weather of “Hemant” in following words :-

“नवप्रवालोद्गमसस यरभ्य प्रफुल्लोद्धः परिपक्वशालिः ।

विलीनपद्म प्रपततुषारोः हेमन्त कालः समुपागता यम् ।।”

[This is beautiful weather of Hemant. The seeds have started germination. The trees are so happy that the flowers have started blooming on their branches. The paddy crop has ripen and ready for cultivation. But, however lotus flowers have disappeared, and the women-folk have to use other flowers for their make-up. The dew-drops are resting on the petals. The winter is awaiting at the door step. For their beautification the women are using paste of sandal. The ponds are full of water. Seeing the fields and the ponds the hearts of people are delighted with cheeriness and joy.]

The great poet Malik Mohammad Jaysi says that this is the weather to sip drinks together :-

“ ऋतु हेमन्त संग पिएऊ पियाला ।।”

In Rajasthan and Punjab, ‘Hemant’ is also called as ‘Siyala’; the women become love-sick in this weather and they use to stop their beloved, not to go abroad in Hemant (Siyala) :-

“ अकेले मत छोड़ जइयो जी सियाला में ।

परदेश न जइयो जी सियाला में ।।”

So, Your Lordship, as Hemant, have brought the most healthy season for this High Court, both Bar and the Bench.

Your Lordship, this is part of the State of Madhya Pradesh comprising Mahakoshal, Vindhya and Bundelkhand mythically known as ‘Rewakhand’; which constitutes the territorial jurisdiction of the Principal Bench of this High Court at Jabalpur. This part of the State as per World Bank Report, is the richest region of the world so far as Natural Resources like minerals, forests, crops, animal-husbandry, river-water etc. are concerned. But in contrast, most of its population belong to poor tribals, down-trodden class people and the people living much below poverty-line. The women and children are under-nourished. Their poverty, backwardness and unemployment rather amount to shut doors of the Temples of Justice on the face of this stark-helpless population, just because they have no means to approach the Courts against injustice caused to them. The Bar has a great concern that this population shall have meaningful access to Justice, which lies in midst of turbulent times.

At this glorifying moment, I feel it to be my duty to apprise Your Lordship with brevity the history of M.P. High Court Bar Association, which came into existence simultaneously with Re-organisation of States on 1st November, 1956 and the establishment of High Court of M.P. at Jabalpur. Since its very inception, the legal fraternity has witnessed and felt its well engraved concepts, determination and endeavour for strengthening the legal system through its great luminaries in the galaxy.

We hope that Your Lordship shall evoke elegant expectations in our hearts. The performance of a Chief Justice is generally measured in terms of his contribution to efficacious improvement of Justice Delivery System and relationship of the Bench and the Bar. Your Lordship have to fulfill this credibility during your tenure by nourishing this Eden Garden of Justice with great novelty. Your Lordship have to pave the path-way for unique understanding between the Bar and Bench and have to gear up the whole Institution for qualitative and better output by displaying great foresight in order to meet with the requirements of this High Court. We hope that under your great leadership this Institution will soon be bloomed and blossomed in all respects.

We know that spirituality is Your Lordship’s Hallmarks while

sincerity is your Bench-mark. Robert Frost says :-

“Two Roads diverged in a wood,
And I took the one less traveled by
and that has made all the difference. ”

We know that Your Lordship, as our Chief Justice will have the heart and gumption to put the right questions and to give the right enlightened answers by your complete dedication and shall cement unique and unprecedented understanding between the Bar and Bench. A true commitment is a heart-felt promise to your own self from which Your Lordship will not back down. Magna-Carta for a Judge ought to be ‘FLAT JUSTITIAE – RUAT CAELUM’ – Let Justice be done, though heavens may fall. We hope that Your Lordship as our 23rd Chief Justice will leave an indelible stamp of scholarship, learning, impartiality, judiciousness and morality on the golden pages of the history of this High Court.

At last I cite a few lines from Rabindra Nath Tagore’s poem ‘Kadi O Komal’ :-

“Into the mouths of these
Dumb, pale and meek
We have to infuse the language of the soul.
Into the hearts of these
Weary and worn, dry and forlorn
We have to minstrel the language
of humanity.”

‘शुभास्ते सन्तु पन्थानः ।।’

[Let your path be easy to tread upon.]

Thank you.

Shri T.S. Ruprah, President, M.P. High Court Advocates' Bar Association, said :-

I deem it to be my proud privilege to offer felicitations to Your Lordship on Your appointment as the new Chief Justice of this High Court. We welcome you to this large and pleasant state of Madhya Pradesh.

My Lord, today you are the Chief Justice of this great institution and join the select and distinguished group of jurists and administrators of justice, who have left indelible mark on its institutional culture. Your Lordship's remarkable and enviable profile makes you eminently suitable for this high honour. Your elevation as a Judge in the Punjab & Haryana High Court was recognition of your juristic talent and qualities of head and heart. Thereafter it was the State of Bihar, which had the satisfying benefit of justice by and through you. Your all round experience is bound to help in successful and satisfying discharge of your duties and obligations. Since the success of the judiciary and judicial administration in the State is closely linked with your success in this office, we wish and pray for your success.

My Lord, this Bar is known for its high traditions. It is full of illustrious seniors and energetic, respectful and courteous bright young members. We the members of the Bar, have great expectations from Your Lordship. Burning desire to do justice, brushing aside all the conservative procedural technicalities is the need of the hour. The most significant advance in the modern science of law is the change from the analytical to the functional attitude. It is the justice that saveth and defendeth the nation, makes it happy, fruitful and prosperous. Your Lordship will be the hand that will guide the administration of justice in this state. With such a wealth of experience, vast knowledge of law, an almost inexhaustible fund of patience, tolerance, compassion, unfailing courtesy, affection and regard to the Bar, Your Lordship is bound to come up victorious.

Human life is fraught with responsibilities. When a person is raised from one position to another, his responsibilities become more onerous and such responsibilities can only be discharged efficiently and properly with the co-operation of all. Today with firm conviction we assure Your Lordship of our fullest co-operation in discharging your functions.

The existence of an independent and fearless judiciary must necessarily mean an independent and fearless Bar also. For what is true about one partner has got to be true about the other. It is unimaginable that a Bar, which is

afflicted with a fear-psychosis, can assist the Court fearlessly, much less independently. My Lords, it is imperative for a sound judicial functioning, that a counsel must be allowed to say what according to him, would be in the best interests of his client, in an atmosphere of mutual respect. Voltaire once said, "I disapprove of what you say, but I will defend to the death your right to say it."

My Lord, there are certain universally accepted attributes of those who preside over the man-made Temples of Justice. When they preside, numerous litigants, either peep through the windows of the Court Room, or take their seats inside to see and understand how justice is being delivered in People's Courts. This is the hour of test for the Counsel and the Court to demonstrate that justice is not only being done, but it can be seen to be done. I must say that proudly for us in our High Court, all these years, the relations between the Bench and the Bar have been excellent and we all firmly believe that Your Lordship would surpass all your predecessors in maintaining these high traditions for which Your Lordship will always have our full co-operation and assistance.

I, on behalf of all the members of the High Court Advocates' Bar Association and on my own behalf welcome Your Lordship and Mrs. Alka Gupta to this glorious State and wish Your Lordship a very brilliant and successful tenure as the Chief Justice of this High Court.

Shri Radhelal Gupta, Spokesperson, State Bar Council of M.P.,
said :-

Before this august gathering today I have the honour of introducing a great legal personality My Lord Justice Shri Hemant Gupta. It is great pleasure for all of us to welcome My Lord to this great institution of justice, who has come from Patna High Court and is adorning the office of M.P. High Court. We offer our heartiest welcome and congratulation to My Lord and wish to tell him how greatly we rejoice that he has become the Chief Justice of this traditionally rich High Court. My Lord has already taken oath on eighteenth of this month as twenty-third Chief Justice of this High Court. Today, in the history of this High Court once again a new chapter is about to begin when we are getting one more stalwart & highly experienced judge having new ideas of high technology in present era of computer.

In State of Haryana at Chandigarh My Lord was born on 17-10-1957 in an illustrious family of Lawyers. His grandfather Shri Dileep Chand Gupta was a prominent and famous lawyer of his time, who left practice at the prime of his professional career at the age of 65. Hon'ble Shri Justice Jitendra Vir Gupta father of My Lord was Chief Justice of Punjab & Haryana High Court who also did not accept any job after retirement. After completing Law My Lord enrolled as an advocate in the year 1980. As advocate My Lord was master of all, who practiced in each & every branch of Law and occupied coveted position including that of additional Advocate General with Government of Punjab & Haryana.

My Lord Hon'ble Justice Hemant Gupta is a person who has been blessed with a multifaceted personality. Where on one hand, his hobby of cycling for miles in one go, have left many surprised, on the other, his compassion towards orphan & destitute kids, particularly girls is equally overwhelming. His Lordships concern for preservation of environment has driven him to pilot many small scales, but noticeable initiatives back in Punjab, which became an inspiration for all others to emulate.

My Lord was instrumental in setting up of educational projects like "*Sakshar Balak – Balika*" & women empowerment initiatives like "*Saksham Maa*" in collaboration with various Civil society organizations. Truly, his efforts left long lasting effects on value based education system today in places where such laudable projects were undertaken.

A Jurist & Senior Advocate Mr. Fali S. Nariman in his memoirs "Before the Memory Fades" has quoted one of the essential attributes of any Judge:-

A Judge never speaks, but it is divinity which speaks through them. A Judge adorning the seat of Justice is akin to god dispensing natural justice. It is therefore necessary that, Judgeship must always be sprinkled with humanitarian approach & sensitivity for humane sufferings, without which a Judge would always be lacking perfection.

There is no work greater than the work of dispensation of Justice. Judges are representative of God, as his agents. For this important work "God" appoints them as representative having full responsibility with wit and wisdom given to them by God. But some times its distribution becomes indifferent like varied types of trees those giving fruits and some remaining dry.

कबीर ने इस संबंध में कुछ पंक्तियां कही हैं :-

बड़ा हुआ तो क्या हुआ, जैसे पेड़ खजूर
पंथी को छाया नहीं, फल लागे अति दूर।

When I studied about the Judgments & contribution made by Justice Hemant Gupta, I was convinced that he is a Judge who is imbued with human sensitivities. The whole Bar & every member Advocate, fondly believes that his Lordship will truly make the holy seat of Chief Justice divine for all litigants of the State.

The Judicial career of Hon'ble Justice Hemant Gupta has been no less illuminating. He has authored more than 50 judgments as member of full benches of 5 Hon'ble members and 3 Hon'ble Members during his stint at Punjab & Haryana High Court.

I would like to add that reading of all his judgments all go on to show the benign & serious consideration bestowed by his Lordship to various intricate legal issues cropping up before him.

Like erstwhile Chief Justice Hon'ble Justice A.M. Khanwilkar as he was then, My Lord is also champion of digitization & computerization of judicial System. So we are expecting correction of the errors presently crept in digitization & computerization of the court and hope we will get much improvement and better system.

Fortunately as much as I know your Lordship and I understand his personality, what I feel that Hon'ble Shri Justice Hemant Gupta is Justice conscious. Although Office of the Chief Justice of MP has been proven to be the gateway to Supreme Court, because right from the First Chief Justice of High Court of MP, Shri Justice Hidayatullah up to our last preceding Chief Justice, Justice Shri A.M. Khanwilkar and most of Chief Justices have been elevated to the Apex Court and along my best wishes for his Lordship for his further elevation to Supreme Court, I am of conviction that he is a justice conscious Judge not merely carrier conscious. To my knowledge probably, it is because of his faith on holy 'Ganga' and lord 'Shiva', which persistently and consistently mandates for delivery of Justice to the nation, without expecting any rewards.

However, I would like to strike a note of pessimism about the city of Jabalpur, for My Lord's consideration. Jabalpur has unfortunately been, throughout, a city which has always received step motherly treatment from the bureaucratic as well as political echelons of state. Only salvatore of Jabalpur

has been the High Court. Be it the Airport, or its railway station or functioning of various Tribunal, for all the maladies, High Court has been the only remedy. My earnest request to My Lord the Chief Justice would, therefore be treat PIL's pertaining to City's concern with a large hearted approach and consideration.

As a representative of lawyer community, we would urge one more request. The High Court has been running with 40% of its vacancy for the last almost 3 years. The statement includes the proposed 8 additional posts, which are awaiting final notification from the Ministry of Law & Justice. As opposed to this, the statistics of pending are witnessing a rapid upward graph therefore I beseech My Lord to attend to two immediate & pressing issues & of judicial strength:- First, expediting the final notification of additional sanctioned posts by the Central Govt. & second of undertaking path breaking steps toward filling of the staggering whole vacant posts in higher Judiciary in Madhya Pradesh High Court.

My Lord we hope that being leader of the state judiciary your Lordship will be kind enough to maintain co-operation with the Members of the Bar and give fame and glory to the High Court. My Lord we assure that office of State Bar council will not leave any stone unturned in rendering co-operation in the process of administration of Justice.

This state is the state of tribes, poor-men, socio-economically weaker people and for them litigation is not luxury. The circumstances compel them for knocking the doors of the court. They do not drive pleasure in involving litigation so compassion is essential element of dispensation of Justice.

As we heard about My Lord Justice Shri Hemant Gupta that My Lord, always wants to give as much relief as is permissible by fair administration of justice. This quality of My Lord is equal to the quality of a surgeon who wants to give maximum relief to his patient by giving as little pain as possible. I am sure, the surgeon who has discovered or invented the pain less surgery must be a surgeon of human qualities of My Lord.

My Lord, I on behalf of MP State Bar Council and on behalf of all the advocates of the state and on my own behalf congratulate and wish My Lordship Hon'ble Shri Justice Hemant Gupta as Chief Justice of High Court of M.P.. I also wish & congratulate to Madam Smt. Alka Gupta and other family members in these moments of accomplishments for their happiness of

their family. I wish that your Lordship will enhance the dignity of the Judicial System.

At the end, I again welcome and congratulate My Lord Shri Justice Hemant Gupta with the following lines :-

“May flowers always line your path and sunshine light your day,
May songbirds serenade you every step along the way,
May a rainbow run beside you in a sky that’s always blue,
And may happiness fill your heart each day your whole life through.”

Jinendra Kumar Jain, Asstt. Solicitor General, said :-

आज अवसर है, शपथ ग्रहण के पश्चात् पद ग्रहण का, इस अवसर पर हम आपका स्वागत करते हैं अभिनन्दन करते हैं। म.प्र. उच्च न्यायालय का गौरवशाली इतिहास रहा है। प्रदेश के प्रथम मुख्य न्यायाधीश श्री एम. हिदायतुल्ला से लेकर प्रख्यात विधि लेखक जस्टिस स्व. जी.पी. सिंह और जस्टिस ए.एम. खानविलकर तक प्रख्यात न्यायाधीशों ने इस पद को सुशोभित किया है, इस उच्च न्यायालय के मुख्य न्यायाधीशों ने उच्चतम न्यायालय के मुख्य न्यायाधीश, भारत के उप-राष्ट्रपति एवं राष्ट्रपति के गरिमामय पद को भी सुशोभित किया है। इस गौरवमयी परम्परा के प्रतीक तेईसवें मुख्य न्यायाधीश के रूप में पदोन्नत न्यायाधीश के सम्मुख अनेक चुनौतियाँ हैं, जिनमें करीब पौने तीन लाख लंबित मामले प्रमुख चुनौती हैं, इसके अलावा समाज के आखरी छोर तक न्याय की कल्पना को साकार करना जबकि जजों के पद रिक्त हैं, इन परिस्थितियों में लक्ष्य को प्राप्त करना किसी चुनौती से कम नहीं है।

सम्माननीय न्यायमूर्ति द्वारा जज के पद पर रहते हुये अनेक प्रकल्पों की शुरुआत कर सफलतापूर्वक संचालन कर उनको मुकाम तक पहुँचाया है। न्यायिक क्षेत्र के अलावा सामाजिक जीवन में भी अनेक योजनाओं के माध्यम से निम्नतर, पिछड़े, गरीब अनपढ़ व्यक्तियों के लिये, बालक बालिकाओं के लिये, महिलाओं के उत्थान एवं शैक्षणिक विकास हेतु उनके जीवन स्तर को उंचा उठाकर उन्हें समक्ष लाने के लिये जो प्रयत्न किये हैं वे इनके लिये आपके मन की पीड़ा एवं क्रियाशीलता को प्रगट करते हैं।

आपके कृतित्व, व्यक्तित्व एवं सामाजिक जीवन की ओर आपकी दृष्टि पर हमें विश्वास है, गर्व है कि एक योग्य नेतृत्व द्वारा निश्चित ही सुनहरे भविष्य के सपने को साकार करने में एवं पीड़ित व्यक्ति को वास्तविक न्याय प्रदान करने में आपकी महती भूमिका रहेगी।

पूर्व में भी माननीय मुख्य न्यायाधीशों द्वारा अहम फैसले किये गये हैं जो नजीर के रूप में जाने जाते हैं जिनमें जस्टिस हिदायतुल्ला की खंडपीठ ने नागरिकों के मूल अधिकारों की अहम व्याख्या की थी। 1993 में जस्टिस एस. के. झा की खंडपीठ ने अयोध्या में राममंदिर और बाबरी मस्जिद विवाद में ऐतिहासिक फैसले में कहा कि राष्ट्रपति शासन अनुचित है। सन् 2009 में जस्टिस पटनायक की खंडपीठ

ने, एक निजी मेडिकल कॉलेज के छात्रों ने प्रदेश में मेडिकल कॉलेजों की मनमानी के खिलाफ याचिका दायर की जिसमें खंडपीठ ने माना कि इसका एकमात्र उपाय इसके लिये राष्ट्रीयकृत परीक्षा कराना है। राज्य द्वारा इन कॉलेजों में सीटों के आबंटन व फीस निर्धारण को कोर्ट ने सही ठहराया। सन् 2016 में राज्य सरकार के म.प्र. लोक सेवा प्रमोशन रूल्स 2012 को चुनौती दी गई कि इसके प्रावधान राष्ट्रीय आरक्षण नीति व संविधान की मूल भावना के विपरीत हैं। जस्टिस ए.एम. खानविलकर की खंडपीठ ने फैसले में कहा कि नौकरी में आरक्षण पाने के बाद दोबारा आरक्षण की माँग अनुचित है। कोर्ट ने पदोन्नति में आरक्षण अवैध ठहराया।

माननीय न्यायाधीश द्वारा उच्च न्यायालय में न्यायाधीश के पद पर रहते हुये अनेक महत्वपूर्ण फैसले कानून की सभी शाखाओं के सन्दर्भ में पारित किये हैं जिनमें महत्वपूर्ण बिंदुओं का विश्लेषण किया गया है जो भावी पीढ़ी के लिये मार्गदर्शन करेंगे।

हम आशा करते हैं कि आपका भविष्य उज्ज्वल होगा। आपके द्वारा किये गये कार्य पीड़ित व्यक्तियों की आशा किरण बन कर उनके जीवन को आलोकित करेंगे।

इस अवसर पर मैं अपनी ओर से, भारत सरकार की ओर से समस्त केन्द्रीय विधि अधिकारियों की ओर से आपका स्वागत करता हूँ एवं आपके उज्ज्वल एवं निष्कटंक भविष्य की कामना करता हूँ।

जय-भारत

Smt. Indira Nair, Sr. Advocate, on behalf of Sr. Advocates Council, said:-

Today we have assembled here to welcome my Lord Chief Justice on his appointment as Chief Justice of Madhya Pradesh High Court.

Coming from an illustrious family and a distinguished career, Your Lordship has achieved this position with sheer hard work and learning. Regarding your lordship's achievements and caliber earlier speakers have spoken and I only can say, I agree with them.

My Lord, Madhya Pradesh High Court have high tradition and convention. Jabalpur Bar is considered to be one of the best Bars in India. We always cooperate with the Bench in dispensation of justice.

My Lord Madhya Pradesh has got special culture and tradition. It consists of large number of farmers who are poor and many of them are landless. We also have a large population of tribes and scheduled castes. This sector requires protection to maintain their culture and also to bring them to main stream of life. They are mostly uneducated and largely poor. My Lord has to address these issues. There is no dearth of laws enacted to protect

them but the implementation is poor. The Courts will step in at this juncture so that these people will feel safe and confident that there is somebody to look after their interest.

Your Lordship's attention is required in yet another area and that is the problems related to women of this country. My Lord the citizens of this country have a right to live with dignity. On the contrary, women met with lot of injustice and victimization, including physical abuse. Earlier one man use to rape a young girl, now the scenario has changed where gang rape is occurring and victims are from 2 year old girl to 80 year old women. Even though there are more than 100 women specific laws enacted by the Parliament, because of their poor implementation, this injustice continues.

Your Lordship's indulgence is required here and if the message goes to these criminals that the Courts will not be mute spectators, there will be certainly lot of change and reduction in the crime rate.

My Lord, Constitution has enshrined various rights to the citizens of India. Our tradition is of tolerance, we believe in the philosophy of tolerance and Constitution practices tolerance. We should not dilute that. Judiciary is an important pillar of democracy and to preserve our wonderful democracy, the Bar and Bench has to work together. In order to give effect to various provisions of the Constitution, the Courts have come forward and had taken effective measures like legal services, Lok Adalat, Mediation etc., for the poor. Courts also dispense social justice by interpreting the existing laws so that the poor people of this Country are protected. In this process the role of legal fraternity cannot be denied.

Law teaches us peaceful co-existence, a life free of conflicts and settlement of dispute through justice. A Lawyer has an edge to think differently, distinguish between right and wrong and stand up rights of unprivileged as well as fight against their exploitation. It is the judiciary who decides it and thus a heavy responsibility falls on it. We hope My Lord the Chief Justice with his wide knowledge and vast experience will dispose it ably and judiciously.

My Lord, while assuring our full hearted cooperation to your Lordship in dispensing justice, we the elders in the profession, welcome you to Jabalpur High Court and as is the Indian tradition, we the elders, bless your Lordship for a successful and meaningful tenure in this great High Court.

I, on my behalf and on behalf of the members of the Senior Advocates'

Council, welcome you once again to this Hon'ble Court. May God bless your Lordship.

**Reply to the ovation, by Hon'ble Mr. Justice Hemant Gupta,
Chief Justice :-**

It is indeed a great pleasure for me to be amongst you to discharge my duties in this Court.

Madhya Pradesh High Court has glorious history. Late Mr. Justice Hidayatullah, an eminent jurist, scholar, educationist and author was the first Chief Justice of this Court. My first experience of great legal acumen from this Court was when Mr. Shiv Dayal, former Judge of High Court appeared for one of the parties in an original suit filed in my parent High Court at Chandigarh way back in 1982-83. The trial of an original suit in the High Court was my first experience. Later Hon'ble Mr. Justice B.C. Verma from this Court was appointed as Chief Justice of Punjab and Haryana High Court, I had the opportunity to appear before him and it was personally and professionally an enriching experience considering his conduct and depth of legal knowledge. One invaluable work is "Principles of Statutory Interpretation" by Justice G.P. Singh, author of one of the authoritative book on laws of interpretation by an Indian author. The strong legal foundation of the Bar and Bench can be gauged from the number of eminent lawyers like Shri Rajendra Singh; Shri Y.S. Dharmadhikari and Shri M.M. Sapre. Hon'ble Mr. Justice J.S. Verma and Hon'ble Mr. Justice Ramesh Chandra Lahoti, whose sound and crisp judgments are source of inspiration.

It is also a matter of pride for this Court that a Hon'ble Judge who has adorned the Bench of this Court for almost thirteen years would be next Chief Justice of India.

It is indeed an honour for me to be part of this acclaimed Court. I hope that with the co-operation of my brother and sister judges, members of the Bar and the Court staff, we will be able to meet the expectations of the litigating public of fair and quick decisions of the cases.

FAREWELL



***HON'BLE MR. JUSTICE
DHARMDHWAJ KUMAR PALIWAL***

Born on 16th March, 1955 in Hamirpur, Uttar Pradesh. After completing B.Sc., LL.M., joined Judicial Services on 05.11.1981. Confirmed as Civil Judge in the year 1985. Appointed as A.C.J.M. in the year 1991 and as C.J.M. in the year 1992. Posted as Offg. District Judge in Higher Judicial Services in the year 1993. Confirmed as District Judge, Higher Judicial Services in the year 1997. Was granted Selection Grade Scale w.e.f. 04.06.1999. Worked as Additional Secretary, M.P. Law and Legislative Affairs Department, Bhopal in the year 2001. Worked as Legal Remembrancer and Secretary (Law Department, Bhopal in the year 2004. Posted as District & Sessions Judge, Bhind in the year 2005. Was granted Super Time Scale w.e.f. 10.10.2007. Posted as District & Sessions Judge, Shivpuri in the year 2008. Posted as District Judge (Inspection and Vigilance), High Court of M.P. at Bench Gwalior, in the year 2009. Was posted as District and Sessions Judge, Gwalior from 01.06.2010 till elevation.

Elevated as Additional Judge to the High Court of Madhya Pradesh and took oath on 01.04.2013. Was appointed as Judge on 06.09.2014 and demitted office on 15.03.2017.

We, on behalf of the Indian Law Reports (M.P. Series) wish His Lordship a healthy, happy and prosperous life.

**FAREWELL OVATION TO HON'BLE MR. JUSTICE
DHARMDHWAJ KUMAR PALIWAL, GIVEN ON 15.03.2017 AT
THE HIGH COURT OF M.P., BENCH GWALIOR.**

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

Today, we have gathered here to honour and give farewell/ovation to Hon'ble Shri Justice Dharmdhvaj Kumar Paliwal who after rendering his valuable services at this prestigious Constitutional Institution of Indian Judiciary with grandeur, is demitting the office of the Judge of the High Court of Madhya Pradesh today i.e. on 15th March, 2017.

To recapitulate, Hon'ble Shri Justice Paliwal was born on 16th March, 1955 in Hamirpur, Uttar Pradesh in the family of late Mr. Parmeshwari Dayal Ji Paliwal. Having attained the degrees in B.Sc. and LL.M., His Lordship joined his judicial services and thereby commenced his magnificent innings as Civil Judge, Class II on 5th November, 1981 by his first posting at Shivpuri (M.P.). After getting due experience, his Lordship was promoted as a Civil Judge Class I in due course and thereafter, His Lordship adorned the post of Chief Judicial Magistrate with effect from 23rd August, 1991. Again, His Lordship was promoted as District Judge in Higher Judicial Services with effect from 18th October, 1993 and being Additional District and Sessions Judge he also worked as Additional Secretary, M.P. Law & Legislative Affairs Department in the period from September, 2001 to 2004. For few months, I was also his colleague in the Law Department. He was appointed as District & Sessions Judge on 09th May, 2005 in Bhind and thereafter also worked at Shivpuri, Ashok Nagar and Gwalior. The collegium of High Court selected His Lordship for his elevation as a Judge of this August Institution and he was appointed as Additional Judge of this Court. He took oath as Additional Judge on 01st April, 2013 and on 06.09.2014, he was appointed as a Judge of this Court.

Judicial approach of Justice Paliwal is par excellence and is well known to all of us. The four-fold responsibilities of a Judge in the words of Socrates are:

To hear courteously,
to answer wisely
to consider soberly and
to decide impartially

Justice Paliwal has proved himself on the anvil and touchstone of all these four qualities.

As the Sun never fails to spread its rays to everyone unhesitatingly and without discrimination, His Lordship has, at all times, proved to have all such attributes of a Judge.

His Lordship had good control over the quality as well as quantity of work. In his tenure, he decided various important cases in which Statute has been interpreted. Such judgments have been reported in various law books and shall be available to take decisions for Judges and Advocates. In His tenure of approximately 47 months, he has decided more than twenty one thousand cases and therefore its monthly average comes as 460 cases. When His Lordship was sitting in the Single Bench, he disposed off bail applications with speed. His average disposal of a day was approximately 30 to 40 bail applications and hence he was able to resolve the backlog in this subject. Besides bail applications, he disposed off criminal revisions and the matters pertaining to Section 482 of Cr.P.C., Civil matters as well as Constitutional matters. To have quality with speed is a need of an hour at present amongst the Judges and His Lordship has proved himself to be a Judge of 21st Century.

A Judge, in the country like India, should not only be excellent in the field of law, but should also be able enough to translate the law into justice being prone to the ground realities being faced by the common man day to day. His Lordship has remained thorough, painstaking and industrious in every such aspect which deals with and heals the groaning life of a common man and thus has left indelible stamp of scholarship, learning, impartiality, judiciousness and morality on the pages of the great history of this Court.

Kautilya, great scholar of ancient India, defines 'order' broadly to include both social as well as order in the sense of preventing and punishing criminal activity. Kautilya ascribed a lot of importance to 'dharma'. According to him, 'the ultimate source of all law is dharma'. He appealed in the name of 'dharma' to the sense of honour and duty and to human dignity, to moral responsibility and to enlightened patriotism. It's quite intelligible that the Judge in the arthashastra was called 'dharmashta' or upholder of dharma. In this connection, the address which was delivered by Shri Aadarsh Muni Trivedi, the then President, High Court Bar Association, Jabalpur, at the time of elevation of His Lordship, may be mentioned here in which he has described the meaning of name of His Lordship i.e. "धर्मध्वज" that His Lordship was

carrying, in his hands, the flag of justice since his birth and after completion of tenure by His Lordship it can be said that he proved his name by holding the flag of justice and taking it to the appropriate heights.

Justice Paliwal having vast judicial experience has been a deep asset for this August Institution and the motherland. Your precision in contributing landmark judgments would not only enlighten the young legal professionals but also aid immensely for rendering justice to a person standing the last shore, vanquishing all evils from his life.

I found Justice Paliwal has a deep understanding of law which has culminated in delivering huge number of judgments. The Court is indebted to the valuable contribution rendered by Justice Paliwal.

To part is always painful, but it is inevitable. Today, when His Lordship is demitting his office as a Judge of this Court, I, on behalf of my Brother Judges and on my own behalf congratulate His Lordship for his successful judicial career and pray the Almighty that he may live in peace, joy and sound health, for all the years to come and shall continue with the field of law in his next inning by various other methods.

Shri Vishal Mishra, Addl. Advocate General, High Court of M.P., Gwalior bids farewell :-

Today, we have assembled here to give farewell to Your Lordship Hon'ble Justice Shri D.K. Paliwal who is demitting this office on completing his tenure as a Judge of this High Court today.

Your Lordship was born on 16.03.1955 at Hamirpur (UP). After attaining the academic qualification of B.Sc., LL.B and LL.M and before entering into this noble profession and the Institution, Your Lordship has worked as Lecturer at Government Degree College, Sheopur, M.P. In the year 1980 he has joined judicial service as Civil Judge Class-II on 5.11.1981 and was posted at Shivpuri. In the year 1992 he was promoted as CJM. Thereafter he was given responsibility of Additional Secretary, Law and Legislative Affairs Department, State of MP Bhopal in the year 2001 where he has worked with utmost devotion and sincerity and performed his duties upto the year 2004.

Thereafter he was posted as District and Sessions Judge on 09.05.2005 and was posted at District Bhind, he was elevated as Additional

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Judge of MP High Court and he took oath on 01.04.2013, as Judge of this noble Institution. He has rendered his services at Indore Bench and Gwalior Bench.

We are very fortunate to have a long tenure of Your Lordship at Gwalior as he was initially promoted and posted as C.J.M at Gwalior and thereafter he has performed his duties as District and Sessions Judge, Gwalior. He has also worked as High Court Judge at Gwalior for considerable period and before demitting this institution, he was again posted at Gwalior till the age of superannuation.

Your Lordship is a kind hearted and noble person and is having all good qualities of Judge. A Judge should give patient hearing with open mindness, courtesy, courage, tact, punctuality, firmness, understanding, compassion, humanity and common sense. Your Lordship is having all the aforesaid qualities.

We have also appeared before the Lordship in this Hon'ble High Court. In entire tenure, after his elevation Lordship has rendered marvelous judgments. He has in-depth legal knowledge and has tried to impart the justice without delay. He has always encouraged the juniors and young lawyers to understand the law and to plead fearlessly before the Hon'ble High Court within the provision of Law. In fact most of the juniors have got the opportunity to understand the law and to plead most effectively from the Lordship. The attitude and behavior of the Lordship towards the Bar has always been praiseworthy. He has created indelible prints in a very short span and which will continue in future.

I, on behalf of myself and on behalf of all the law officers, wish a happy, healthy and prosperous long life to the Lordship and his family.

Shri Vivek Khedkar, Asstt. Solicitor General, bids farewell :-

We all have assembled here today to say 'bid adieu' to My Lord Hon'ble Shri Justice Dharmdhvaj Kumar Paliwal, well known as 'D.K. Paliwal' on his demitting the Office as a Judge of this prestigious High Court of Madhya Pradesh.

While addressing at this juncture, it feels me with a great pleasure and honour but also with heavy hearts, we are expressing our gratitude to My

Lord because My Lord is demitting his Office. I personally feel that a true Judge is going to retire and it is also a great loss to the legal fraternity. So many times, feelings can not be expressed by words. With great pleasure I am expressing my gratitude towards My Lord.

I had an opportunity to appear before My Lord when My Lord was working as Second Additional District Judge, Gwalior. I feel that My Lord was doing justice right from beginning with pragmatic approach. I found him sincere worker behind his face. He is having decent personality and full quality of a complete judge capable of doing social justice and of applying legal principles with pragmatic approach. I had an opportunity to appear before My Lord in this august Institution as a Government Advocate as well as Assistant Solicitor General and I found that My Lord is having vast knowledge in criminal laws as well as in civil laws. One speciality I found while appearing before My Lord is that My Lord gave equal treatment to all the lawyers including junior and senior one. Face value before My Lord was not a matter but always the facts and legal approach is the basic thing before My Lord.

My Lord Hon'ble Shri Justice Dharmdhvaj Kumar Paliwal, as the divinity in his name itself spreads fragrance among all, was born on 16.03.1955. After completing his graduation as well as LL.M, he joined judicial service on 5th November 1981 as a Civil Judge Class II and was posted at Shivpuri. Thereafter he joined as CJM in the year 1992 and from Sept. 2001 to 2004 held the post of Additional Secretary, M.P. Law and Legislative Affairs Department. My Lord was appointed as District and Sessions Judge on 09.05.2005 at Bhind and also worked at Shivpuri and Gwalior till elevation. My Lord Hon'ble Justice Paliwal was elevated as Additional Judge of Hon'ble High Court on 1st April 2013.

My Lord Hon'ble Justice Paliwal is having various qualities and great knowledge of law. After completing more than 35 years of judicial service, now he is going to demit the office. My Lord Justice Paliwal is very kind hearted and full of compassion for the poor persons. Various judgments given by My Lord will definitely guide us in years together.

I, on my behalf and on behalf of Union of India, convey and express the gratitude for all the faith and trust My Lord has bestowed upon us and guided us towards excellence.

Your journey of accomplishment will continue to inspire us in achieving heights on the path of justice dispensation system.

Farewell Speech delivered by Hon'ble Mr. Justice Dharmdhvaj Kumar Paliwal:-

I express my heartfelt thanks for the good words and sentiments expressed by the speakers about me. I really don't know how much do I deserve and how much do I not. Today it is my last sitting on the dias and so is your appearance as an advocate before me. It is the end of my inning as a Judge. Hereinafter I will no longer wear the robes of Judge. It is a matter of great achievement for any Judge to retire after successful tenure. With the feeling of complete satisfaction I am putting down the reins today and bidding adieu to you all.

Retirement by most of us is accepted with a very heavy heart. And this feeling of sadness comes from the fact that after years of active life spend in discharging sovereign functions one suddenly finds oneself in wildness. What next arises the question? It is not a good feeling but there is a positive side to it also. Retirement provides a cooling period before one embarks upon another journey. It gives an opportunity to reflect over your achievements and failures. But surely it is not the end of the road.

I entered in the judicial services of State of M.P. in the year 1981 and worked in different capacity at Shivpuri, Betul, Maihar, Gwalior, Bhind, Ashok Nagar, Sironj, Rewa, Bhopal and Indore. Most of period I spend in Gwalior, Bhind and Shivpuri districts. I joined here on my transfer in the year 1991 as ACJM. The members of the Bar contributed a lot in shaping my carrier. Every member of the Bar either senior or junior had been affectionate to me. They had fully cooperated with me in performing my duties and with their support, guidance and blessings I was promoted as ADJ, thereafter selection grade and super time was awarded and ultimately I got elevated to the High Court. I have no words to express my thanks to all of you. I am highly obliged for your support, guidance and blessings throughout my posting at Gwalior.

This High Court has a glorious history and has produced Judges of great eminence. I am really fortunate to work as a Judge of this court. I strongly believe in the concept of "A good Bar creates a good Bench" since the judiciary draws sustenance from the Bar. Members of the Bar are an integral part of the judicial system. In the anxiety of providing responsive, qualitative and timely justice, if I have hurt any member of the Bar, please forgive me.

I remember the holy words from *Shrimad Bhagwadgeeta* which always enlighten me that knowledge will help to perform the right Karma and

not worry about the fruits of action. Though I have decided cases all these years but I was under constant public gaze all these years. It is said that a Judge is always on trial and Bar is the judge of Judges. Today is the judgment day and the Bar is the best judge to assess my performance and pronounce its verdict dispassionately.

I express my gratitude to the former Judges of this Court Hon'ble Shri Justice Susheel Harkauli the then Acting Chief Justice, Hon'ble Shri Justice K.K. Lahoti, the then Administrative Judge and Hon'ble Shri Justice Ajit Singh at present Chief Justice of Gauhati High Court, who had recommended my name for elevation to this High Court. I express my gratitude towards Hon'ble Shri Justice S.A. Bobde, the then Chief Justice of this court, now Judge Supreme Court of India, who administered oath to me. I express my regard to Hon'ble Shri Justice A.K. Mishra now Judge Supreme Court of India who always blessed me. I pay my sincere regards to Hon'ble Shri Justice A.M. Khanwilkar, the then Chief Justice of this court, now Judge Supreme Court of India, who always supported and guided me in discharge of my duties. I am grateful from the core of my heart to Hon'ble Shri Justice Rajendra Menon Acting Chief Justice of this Court, for extending me whole hearted co-operation and support. After my elevation I shared the Dias with Shri Justice Rakesh Saxena at Jabalpur. I learnt a lot while sitting with Justice Rakesh Saxena at Jabalpur. After three days I was transferred to Gwalior Bench and shared the Dias with Hon'ble Justice S.K. Gangele, Justice U.C. Maheshwari, Justice Sheel Nagu. After about two years I have been transferred to Indore Bench where I have got opportunity to share the Dias with Justice P.K. Jaiswal, Justice Prakash Shrivastava and Justice Satish Sharma. They were very kind to me and at the initial stage they guided me, for which I am highly grateful to them.

I am grateful to my brother Judges, Hon'ble Justice Shri N.K. Gupta, Hon'ble Justice Shri Sheel Nagu, Hon'ble Justice Shri Rohit Arya, Hon'ble Justice Shri S. Dharmadhikari, Hon'ble Justice Shri Anand Pathak, Hon'ble Justice Shri Vivek Agarwal, Hon'ble Justice Shri S.K. Awasthi and Hon'ble Justice Shri G.S. Ahluwalia for extending their valuable support to me.

I am very grateful to Registrar General Shri Manohar Mamtani, ex-Registrar General Justice Ved Prakash Sharma, Principal Registrar Shri G.S. Dubey, Shri Naveen Saxena Registrar cum OSD, and ex-Principal Registrars Sarv Shri A.K. Shrivastava, R.K. Gupta, Justice J.P. Gupta, and A.M. Saxena, Principal Registrar Shri D.S. Solanki. Sarva Shri A.J. Khan, Dr. Mohammad

Shamim ex-Principal Registrars Indore Bench. I am grateful to Shri Abhishek Bhargava Protocol Officer, Shri Harendra Savita A.P.O. and Protocol officers of Indore and other ministerial staff of the Registry who very well looked after all my protocol needs. I express my heartfelt thanks to my Private Secretary Shri R.K. Sharma, Smt. Vandana Verma and Stenographers Mrs. Valsala, Ms. Barkha Jha, Reader Shri Fazlur Rahman along with Jamadar Shri Ram Din and PSOs Mr. H.P. Tiwari and Mr Virendra Singh Bhadauria and Driver Mr. Ram Autar and staff on bungalow duty. I also thank all the staff members of High Court who directly or indirectly assisted and cooperated me in discharge of my duties. I am thankful to Dr. R.K. Chaturvedi and Dr. R.K. Sharma who have promptly attended my medical needs.

I bow my head at the lotus feet of my parents Late Shri P.D. Paliwal and mother late Smt. Lila Paliwal. Without their blessings, it would have been not possible for me to achieve this august post, their blessings are still with me. I bow to my father-in-law late Shri Manik Chandra Sharma. He desired that I should be a Judge of High Court. Unfortunately he left for heavenly abode before my elevation as Judge of High Court. I am very glad that his desire has been fulfilled by me with heaven's blessings. I am very happy that my mother-in-law saw me working as Judge of High Court.

I am extremely happy that my wife who shouldered the entire burden of managing the family effectively and bringing up my sons as worthy members of the society because I had no sufficient time to properly look after them. She always stood with me. I had received consistent support from my wife Smt. Neelima Paliwal, sons Mayank and Priyank Paliwal, Daughter-in-law Mrs. Rupal Paliwal who have kept me away from the trivial worries of day to day life. I am extremely grateful to them. I am also grateful to my brother-in-laws, sister-in-laws, other relatives, friends and well wishers, who are present here for their affection and blessings.

At last I would like to say that my departure from this court is not a departure from my duties towards the community, or this esteemed institution. I would continue to work with high spirits for the same.

Thank you very much for coming and allowing me to express myself on this occasion. I am touched greatly by your generosity and good wishes. I wish everyone of you well and extend my warmest greetings to one and all.

Thanks a lot.

NOTES OF CASES SECTION

Short Note (DB)

**(33)*

Before Mr. Justice P.K. Jaiswal & Mr. Justice Alok Verma

W.P. No. 2365/2013 (Indore) decided on 11 May, 2016

ASHIRWAD INDUSTRIES (M/S.) & anr.

...Petitioners

Vs.

INDUSTRIAL DEVELOPMENT BANK OF INDIA LTD. & ors. ...Respondents

Debt Recovery Tribunal (Procedure) Rules, 1993, Rule 12(6) and Debt Recovery Tribunal Regulation of Practice, 1998, Regulation 31 & 32 – Evidence on Affidavit – Application for cross-examination – Scope under Article 227 of Constitution – In respect of non-payment of loan amount, Bank filed a recovery case against the petitioners which was allowed in favour of Bank – Appeal filed by petitioners was also dismissed – Held – As per the Rule 12(6) of the Rule of 1993, evidence may be filed on affidavit – In the present case, no application was filed by the petitioners to cross-examine the deponents/witnesses, therefore, in absence of such application under Regulation 31 and 32 of the Regulation of 1998, it cannot be said that no opportunity was granted to them – Further held – In a case, where mixed question of law and fact is involved, there is a limited scope for interference under Article 227 of the Constitution – Interference can be done when there is patent perversity or gross and manifest failure of justice or principle of natural justice has been flouted in the order passed by the court below – No error committed by the Tribunal or the Appellate Tribunal – Petition dismissed.

ऋण वसूली अधिकरण (प्रक्रिया) नियम, 1993, नियम 12(6) एवं ऋण वसूली अधिकरण पद्धति का विनियम, 1998, विनियमन 31 व 32 – शपथपत्र पर साक्ष्य – प्रति परीक्षण हेतु आवेदन – संविधान के अनुच्छेद 227 के अंतर्गत परिधि – ऋण राशि के असंदाय के संबंध में बैंक ने याची के विरुद्ध वसूली का प्रकरण प्रस्तुत किया जिसे बैंक के पक्ष में मंजूर किया गया – याचीगण द्वारा प्रस्तुत अपील भी खारिज – अभिनिर्धारित – नियम 1993 के नियम 12(6) के अनुसार, शपथपत्र पर साक्ष्य प्रस्तुत किया जा सकता है – वर्तमान प्रकरण में, याचीगण द्वारा अभिसाक्षीगण/साक्षीगण के प्रति परीक्षण हेतु आवेदन प्रस्तुत नहीं किया गया था इसलिए, विनियम, 1998 के विनियमन 31 व 32 के अंतर्गत उक्त आवेदन की अनुपस्थिति में यह नहीं कहा जा सकता कि उन्हें कोई अवसर प्रदान नहीं किया गया था – आगे अभिनिर्धारित – ऐसे प्रकरण में जहां विधि एवं तथ्य का मिश्रित

NOTES OF CASES SECTION

प्रश्न अंतर्गत है, वहाँ संविधान के अनुच्छेद 227 के अंतर्गत हस्तक्षेप के लिए परिधि सीमित है – हस्तक्षेप तब किया जा सकता है जब निचले न्यायालय द्वारा पारित आदेश में प्रकट विपर्यस्तता या न्याय की गंभीर एवं प्रकट विफलता या नैसर्गिक न्याय के सिद्धांत का उल्लंघन हुआ हो – अधिकरण अथवा अपीली अधिकरण द्वारा कोई त्रुटि कारित नहीं की गई – याचिका खारिज।

The order of the Court was delivered by : P.K. JAISWAL, J.

Cases referred:

AIR 2004 MP Page 1 (F.B.), AIR 2004 MP 1, (2015) 7 SCC 373.

A.K. Sethi with Harish Joshi, for the petitioners.

Vinay Saraf, for the respondent No.1.

S.C. Bagadiya with Pankaj Bagadiya, for the Assignee - India SME Asset Reconstruction Co. Ltd.

Short Note (DB)

*(34)

Before Mr. Justice R.S. Jha & Mr. Justice V.K. Shukla

Cr.A. No. 1393/2006 (Jabalpur) decided on 27 October, 2016

DHANIRAM LAKHERA

...Appellant

Vs.

STATE OF M.P.

...Respondent

Prevention of Corruption Act (49 of 1988), Section 13(1)(e) & 13(2) – Disproportionate Assets – Appreciation of Evidence and Documents – Conviction – Held – Trial Court concluded that during the check period, accused had an income of Rs. 50,000 by selling two properties whereas the specific written endorsement on Agreement of sale, Statement of the Investigating Officer and the Tabulation Chart prepared by the prosecution itself, clearly shows that accused had an income of Rs. 3,50,000 from selling his two properties during the check period – Further held – The contention that there was a typographical error deserves to be accepted whereby Rs. 50000 was typed in place of Rs. 3,50,000 – Prosecution has not discharged their burden to prove the case beyond reasonable doubt – Accused was not in possession of disproportionate assets – Findings of the Court below is perverse and is set aside – Appeal allowed.

NOTES OF CASES SECTION

ग्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(ई) व 13(2) – अननुपातिक आस्तियाँ – साक्ष्य एवं दस्तावेजों का मूल्यांकन – दोषसिद्धि – अभिनिर्धारित – विचारण न्यायालय ने यह निष्कर्ष निकाला है कि जांच की अवधि के दौरान, अभियुक्त को, दो संपत्तियों के विक्रय द्वारा रु. 50,000 की आय हुई थी जबकि विक्रय करार पर विनिर्दिष्ट लिखित पृष्ठांकन, अन्वेषण अधिकारी का कथन एवं अभियोजन द्वारा ही तैयार की गई सारणीबद्ध तालिका स्पष्ट रूप से दर्शाते हैं कि अभियुक्त को, उसकी दो संपत्तियों के विक्रय से रु. 3,50,000 की आय हुई थी – आगे अभिनिर्धारित किया गया कि यह तर्क कि जांच की अवधि के दौरान वहाँ पर एक टंकन त्रुटि हुई थी स्वीकार करने योग्य है, जिसके द्वारा रु. 3,50,000 के स्थान पर रु. 50,000 टंकित हो गये थे – अभियोजन ने युक्तियुक्त संदेह से परे प्रकरण साबित करने के अपने भार का निर्वहन नहीं किया – अभियुक्त, के कब्जे में अननुपातिक आस्तियाँ नहीं थी – निचले न्यायालय के निष्कर्ष विपर्यस्त है एवं अपास्त किये गये – अपील मंजूर।

The judgment of the Court was delivered by : V.K. SHUKLA, J.

Cases referred:

AIR 1960 SC 7, (1964) 4 SCR 631, (1981) 3 SCC 199.

Pallavi Khare, for the appellant.

Pankaj Dubey, for the State/respondent.

Short Note

*(35)

Before Mr. Justice S.K. Awasthi

M.A. No. 1210/2014 (Gwalior) decided on 4 November, 2016

IFFCO TOKYO GENERAL INSURANCE CO. LTD. ...Appellant

Vs.

GHASIRAM & ors.

...Respondents

Motor Vehicles Act (59 of 1988), Section 173 – Principle of Pay and recover – Liability of Insurance Company when driver of the offending vehicle had no valid driving licence at the time of accident – Held – Insurance Co. cannot be immuned from application of pay and recover provision – Appeal dismissed.

मोटर यान अधिनियम (1988 का 59), धारा 173 – संदाय और वसूली का सिद्धांत – दुर्घटना के समय आक्षेपित वाहन के चालक के पास विधिमान्य चालक अनुज्ञप्ति न होने की स्थिति में बीमा कंपनी का दायित्व – अभिनिर्धारित – बीमा

NOTES OF CASES SECTION

कंपनी संदाय और वसूली के उपबंध की प्रयोज्यता से उन्मुक्त नहीं हो सकती – अपील खारिज।

Cases referred:

1997 ACJ 1065, (2001) 4 SCC 342, 2004 ACJ 1, (2004) 3 SCC 343, 2008 ACJ 1307, 2008 ACJ 2144, (2011) 6 SCC 425.

S.N. Gajendragadkar, for the appellant.

S.S. Rajput, for the respondent Nos. 1 to 5.

R.K. Singh Kushwaha, for the respondent No. 6.

Short Note

*(36)

Before Mr. Justice S.K. Palo

Cr.R. No. 1754/2016 (Jabalpur) decided on 5 August, 2016

MANIK RAO YAVLE

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Penal Code (45 of 1860), Section 325 or 326 – Fracture of Nasal bone by ‘Lathi’ – Whether ‘Lathi’ (wooden stick) used in causing fracture of nasal bone can be termed as a “weapon or instrument likely to cause death” within the purview of Section 324 of IPC – Held – ‘Lathi’ (wooden stick) cannot be said in the present context as an instrument likely to cause death or a dangerous weapon, so grievous hurt caused by a hard and blunt weapon like ‘Lathi’ will fall within the purview of Section 325 of IPC and not u/S 326 – Charge u/S 326 of IPC set aside – Prima facie offence u/S 325 of IPC is made out – Revision allowed.

दण्ड संहिता (1860 का 45), धारा 325 या 326 – ‘लाठी’ द्वारा नाक की अस्थि भंग होना – क्या नाक की अस्थि भंग करने में उपयोग की गई ‘लाठी’ को भा.द.सं. की धारा 324 की परिधि में “हथियार या उपकरण जिससे मृत्यु कारित होना संभाव्य है” कहा जा सकता है – अभिनिर्धारित – वर्तमान संदर्भ में ‘लाठी’ को संभावित मृत्यु कारित करने वाला उपकरण या खतरनाक हथियार नहीं कहा जा सकता, इसलिए ‘लाठी’ जैसे सख्त एवं मोथरे हथियार से कारित घोर उपहति भा.द.सं. की धारा 325 की परिधि के भीतर आती है न कि धारा 326 के अंतर्गत – भा.द.सं. की धारा 326 के अंतर्गत आरोप अपास्त – भा.द.सं. की धारा 325 के अंतर्गत प्रथम दृष्टया प्रकरण बनता है – पुनरीक्षण मंजूर।

NOTES OF CASES SECTION

Case referred:

1985 CRLJ 1903 (SC).

Sushil Kumar Tiwari, for the applicant.

Surbhi Nigam, Deputy G.A. for the non-applicant/State.

Short Note (DB)

*(37)

*Before Mr. Justice Rajendra Menon, Acting Chief Justice &
Mr. Justice Anurag Shrivastava*

W.P. No. 11824/2016 (Jabalpur) decided on 18 July, 2016

POWER MACHINES INDIA LIMITED

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

*Micro, Small and Medium Enterprises Development Act (27 of 2006), Section 18(1) & (2), Micro and Small Enterprises Facilitation Council Rules, M.P., 2006, Rule 5 and Arbitration and Conciliation Act (26 of 1996), Section 36 – Execution Proceedings – Ultra Vires provisions – In case of any dispute, Section 18 of the Act of 2006 contemplates the dispute resolution mechanism under which disputes would be adjudicated through Arbitration and further award would be executed as per the provision of Section 36 of the Arbitration and Conciliation Act, 1996, whereas Rule 5 of the Rules of 2006 provides for a special procedure of recovery as if it is an arrears of land revenue – Petitioner prayed to declare Rule 5 of the Rules of 2006 to be *ultra vires* to Section 18 of the Act of 2006 – Held – Merely because a separate Rule for recovery is contemplated under the Rules of 2006, in absence of there being any conflict with the constitution, the same cannot be declared as *ultra vires* – If two remedies happens to be inconsistent, they can still continue and it is for the person to chose amongst them and once he elects one of them, action can commence accordingly – Rule formulated in addition to the statutory rule for execution available u/S 36 of the Act of 1996, cannot be termed as *ultra vires* or illegal to the constitution or to the Act of 2006 – Petition dismissed.*

सूक्ष्म, लघु और मध्यम उद्यम विकास अधिनियम (2006 का 27), धारा 18(1)

NOTES OF CASES SECTION

व (2), सूक्ष्म एवं लघु उद्यम सुविधा परिषद् नियम, म.प्र., 2006, नियम 5 एवं माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 36 – निष्पादन कार्यवाहियाँ – अधिकारातीत उपबंध – किसी विवाद की स्थिति में, अधिनियम 2006 की धारा 18 विवाद समाधान की प्रक्रिया अनुध्यात करती है जिसके अंतर्गत माध्यस्थम् द्वारा विवाद को न्यायनिर्णित किया जाएगा और आगे, माध्यस्थम् और सुलह अधिनियम 1996 की धारा 36 के उपबंधों के अनुसार अधिनिर्णय निष्पादित होगा जबकि 2006 के नियमों का नियम 5 वसूली की विशेष प्रक्रिया उपबंधित करता है जैसा कि वह भू-राजस्व का बकाया हो – याची ने नियम, 2006 के नियम 5 को, अधिनियम 2006 की धारा 18 के अधिकारातीत घोषित करने की प्रार्थना की – अभिनिर्धारित – मात्र इसलिए कि नियम, 2006 के अंतर्गत वसूली हेतु पृथक नियम अनुध्यात है, संविधान के साथ किसी टकराव के अनुपस्थिति में, उक्त को अधिकारातीत घोषित नहीं किया जा सकता – यदि दो उपचार असंगत हो जाते हैं, वे तब भी जारी रह सकते हैं और यह व्यक्ति पर होगा कि इनमें से चयन करें तथा एक बार जब वह इनमें से एक का चयन करता है, कार्यवाही तदनुसार आरंभ हो सकती है – निष्पादन हेतु अधिनियम 1996 की धारा 36 के अंतर्गत उपलब्ध कानूनी नियम के अतिरिक्त बनाये गये नियम को संविधान अथवा अधिनियम 2006 के अधिकारातीत अथवा अवैध नहीं कहा जा सकता – याचिका खारिज।

The order of the Court was delivered by : **RAJENDRA MENON, Ag.C.J.**

Cases referred:

2015 SCC Online Mad 13110, 2015 SCC Online Ker 34011, 2015 SCC Online Ker 21856, (2004) 8 SCC 747, (1968) 3 SCR 251:: AIR 1968 SC 1232, AIR 1962 SC 1543, AIR 1992 SC 1789, AIR 1993 SC 1222.

Ashim Sood, Mayank Pandey and Sankalp Kochar, for the petitioner.

Samdarshi Tiwari, Deputy A.G. for the respondent/State.

Shashank Shekhar, for the respondent No. 3.

Short Note (DB)

*(38)

Before Mr. Justice Alok Aradhe & Mr. Justice Anand Pathak

W.P. No. 6278/2014 (Gwalior) decided on 1 July, 2016

PRATUSH KUMAR SHARMA & ors.

...Petitioners

Vs.

STATE OF M.P. & ors.

...Respondents

Constitution – Article 226 – Admission and Compensation –

NOTES OF CASES SECTION

Petition against cancellation of admission despite online counselling and deposit of the required fees, on the ground that Institute is not approved from the University for the course of M.Tech (Civil Structural Engineering) – Held – Prospectus of the Institute shows that course of M.Tech (Civil Structural Engineering) is an approved course – Relief of admission cannot be granted on account of efflux of time – Amount deposited by the petitioners be refunded along with interest @ 6% p.a. till it is refunded – S.P. Gwalior directed to take action against the Institute and its Vice President on the complaint already filed by the petitioners – Compensation – Further held, since present Institute is a private educational institution not receiving any grant-in-aid from the State Government, compensation against it cannot be granted in a petition under Article 226 as such remedy cannot be treated as public law remedy – Cost of Petition Rs. 5000 be deposited by the Institute – Petition disposed of.

संविधान – अनुच्छेद 226 – प्रवेश एवं प्रतिकर – ऑनलाइन काउंसलिंग एवं अपेक्षित फीस के जमा किये जाने के बावजूद, इस आधार पर कि संस्था एम. टेक. (सिविल संरचनात्मक इंजीनियरिंग) पाठ्यक्रम हेतु विश्वविद्यालय से अनुमोदित नहीं है, प्रवेश रद्द किये जाने के विरुद्ध याचिका – अभिनिर्धारित – संस्था का प्रोस्पेक्टस यह दर्शाता है कि एम.टेक. (सिविल संरचनात्मक इंजीनियरिंग) का पाठ्यक्रम एक अनुमोदित पाठ्यक्रम है – समय बीत जाने के कारण प्रवेश का अनुतोष प्रदान नहीं किया जा सकता – याचीगण द्वारा जमा की गई राशि वापस कर दिये जाने तक 6 प्रतिशत ब्याज प्रतिवर्ष की दर से लौटाई/वापस की जाये – पुलिस अधीक्षक ग्वालियर को याची द्वारा पहले ही प्रस्तुत किये गये परिवाद पर, संस्था एवं उसके उपाध्यक्ष के विरुद्ध कार्रवाई करने हेतु निदेशित किया गया – प्रतिकर – आगे अभिनिर्धारित किया गया कि चूंकि वर्तमान संस्था एक निजी शैक्षणिक संस्थान है जो कि राज्य सरकार से कोई सहायता अनुदान प्राप्त नहीं करती है, अनुच्छेद 226 के अंतर्गत एक याचिका में उसके विरुद्ध प्रतिकर प्रदान नहीं किया जा सकता क्योंकि उक्त उपचार को लोक विधि उपचार नहीं माना जा सकता – संस्था द्वारा याचिका व्यय रु. 5000 जमा किया जाए – याचिका निराकृत।

The order of the Court was delivered by : ALOK ARADHE, J.

Cases referred:

(2011) 6 SCC 145, (2012) 7 SCC 389, (2014) 10 SCC 521, (2016) 1 SCC 662, 2014 (3) MPLJ 84, W.P. No. 946/2014 decided on 9.10.2014, W.P. No. 6155/2014 decided on 13.05.2014, (2014) 2 SCC 1, (2004) 6

NOTES OF CASES SECTION

SCC 213, (2011) 14 SCC 481, (2011) 13 SCC 329, (2009) 4 SCC 473.

J.P. Mishra and *Gaurav Mishra*, for the petitioners.

Praveen Newaskar, G.A. for the respondents No. 1, 2 & 6.

Anil Sharma, for the respondent No. 3.

S.S. Bansal, for the respondents No. 4 & 5.

Short Note

*(39)

Before Mr. Justice H.P. Singh

M.Cr.C. No. 18328/2016 (Jabalpur) decided on 8 November, 2016

ROSELINE SINGH (MRS.)

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 451 & 457

– Custody of Seized Vehicle on *Supurdnama* – Vehicle (Swift Car) was seized in relation to an offence u/s 34 of Excise Act – Registered owner of vehicle filed application for release of the vehicle on *supurdnama* – Collector imposed condition to furnish a bank guarantee of Rs. 5,00,000 – Held – Condition imposed is too harsh, ends of justice would be served if such stringent and onerous condition is dispensed with – Applicant directed to furnish local surety of Rs. 5,00,000 and a bond of the same amount – Application allowed.

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 451 व 457 – सुपुर्दनामा पर जब्तशुदा वाहन की अभिरक्षा – वाहन (स्विफ्ट कार) आबकारी अधिनियम की धारा 34 के अंतर्गत अपराध के संबंध में जब्त किया गया था – वाहन के रजिस्ट्रीकृत स्वामी ने वाहन को सुपुर्दनामा में छोड़े जाने हेतु आवेदन प्रस्तुत किया – कलेक्टर ने रु. 5,00,000 की बैंक गारंटी प्रस्तुत करने की शर्त अधिरोपित की – अभिनिर्धारित – अधिरोपित शर्त अत्याधिक कठोर है, न्याय का उद्देश्य पूरा होगा यदि ऐसी कड़ी एवं दुर्भर शर्त से अभिमुक्ति प्रदान की जाती है – अपीलार्थी को रु. 5,00,000 की स्थानीय प्रतिभूति एवं समान राशि का बंधपत्र प्रस्तुत करने हेतु निदेशित किया गया – आवेदन मंजूर।

Case referred:

2003 (2) MPHT 46 (CG).

Naveen Singh, for the applicant.

Puneet Shrotri, P.L. for the non-applicant-State.

NOTES OF CASES SECTION

Short Note (DB)

***(40)**

Before Mr. Justice Alok Aradhe & Mr. Justice Anand Pathak

W.P. No. 7014/2015 (Gwalior) decided on 18 July, 2016

SACHIN GUPTA

...Petitioner

Vs.

THE MUNICIPAL CORPORATION & ors.

...Respondents

Public Interest Litigation – Principle of delay and laches – Applicability – Petition filed after delay of seven years from date of execution of agreement, for which no explanation has been offered – Principle of delay and laches is applicable to public interest litigation as well – Further held – Project has been undertaken for development of tourism and recreational amenities, so there is no element of public interest litigation – Respondents directed to complete the undertaken project as per the time schedule of agreement – Petition disposed of.

लोकहित वाद – विलंब एवं अनुचित विलंब का सिद्धांत – प्रयोज्यता – याचिका, करार के निष्पादन की तिथि से 7 वर्ष के विलंब के पश्चात् प्रस्तुत की गई जिसके लिए कोई स्पष्टीकरण नहीं दिया गया – विलंब एवं अनुचित विलंब का सिद्धांत लोक हित वाद पर भी लागू होता है – आगे अभिनिर्धारित – परियोजना पर्यटन एवं मनोरंजन की सुख सुविधाओं के विकास के लिए शुरू की गई है अतः यहाँ लोक हित वाद का कोई तत्व नहीं है – प्रत्यर्थागण को करार की कार्ययोजना के अनुसार शुरू की गई परियोजना को पूर्ण करने के लिए निदेशित किया गया – याचिका निराकृत।

The order of the Court was delivered by : **ALOK ARADHE, J.**

Cases referred:

(2005) 5 SCC 136, (2014) 8 SCC 804, (2004) 3 SCC 349, (2003) 7 SCC 546, (2010) 3 SCC 402, (2006) 3 SCC 434, (1993) Suppl. 4 SCC 46.

P.C. Chandil, for the petitioner.

N.K. Gupta with **Ravi Gupta**, for the respondent No. 1.

Arvind Dudawat, Addl. A.G. for the respondents No. 2 & 3/State.

V.K. Bhardwaj with **Anand Bhardwaj**, for the respondent No. 4.

NOTES OF CASES SECTION

Short Note

***(41)**

Before Mr. Justice Sheel Nagu

W.P. No. 757/2014 (Gwalior) decided on 1 July, 2016

SAKIR NAVI QUARESHI

...Petitioner

Vs.

THE MUNICIPAL COUNCIL, GOHAD

...Respondent

Industrial Disputes Act (14 of 1947), Section 25-F – Termination
– Petitioner/workman was appointed on regular vacancy of fire-brigade driver on 10.04.2001 by the respondent/employer – In May 2005, he was terminated by oral order without following the pre-requisite of Section 25-F of Industrial Disputes Act, 1947 – Reference made by appropriate government in this regard to Labour Court was answered against the petitioner/workman – Held – If workman has proved that he had completed 240 days in the last preceding 12 months, the burden of proof thereafter shifted to the employer to establish otherwise – Employer failed to discharge this burden by failing to produce the record in its possession pertaining to the entire service tenure of workman – Petition allowed. .

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25-एफ – सेवा समाप्ति
– याची/कर्मकार को प्रत्यर्थी/नियोक्ता द्वारा दिनांक 10.04.2001 को अग्निशामक दल के वाहन चालक की नियमित रिक्ति पर नियुक्त किया गया था – मई 2005 में, औद्योगिक विवाद अधिनियम, 1947 की धारा 25-एफ की पूर्वापेक्षा का पालन किये बिना मौखिक आदेश द्वारा उसकी सेवा समाप्त की गई थी – श्रम न्यायालय को इस संबंध में समुचित सरकार द्वारा दिया गया निर्देश, याची/कर्मकार के विरुद्ध उत्तरित किया गया था – अभिनिर्धारित – यदि कर्मकार ने यह साबित कर दिया है कि पूर्ववर्ती पिछले 12 माह में उसने 240 दिन पूर्ण कर लिये थे, तो साबित करने का भार नियोक्ता पर चला जाता है कि वह अन्यथा स्थापित करे – नियोक्ता, कर्मकार की पूर्ण सेवा अवधि से संबंधित अपने कब्जे में रखे अभिलेख को प्रस्तुत करने में असफल रहने के कारण इस भार का निर्वाह करने में असफल रहा – याचिका मंजूर।

Cases referred:

AIR 1968 SC 1413, AIR 1977 SC 638, (2015) 12 SCC 754.

G.S. Sharma, for the petitioner.

Sangeeta Pachori, for the respondent.

NOTES OF CASES SECTION

Short Note

*(42)

Before Smt. Justice Anjuli Palo

M.A. No. 3618/2005 (Jabalpur) decided on 19 December, 2016

SAVITRI DEVI TIWARI (SMT.) & ors.

...Appellants

Vs.

ABDUL JABBAR & ors.

...Respondents

Motor Vehicles Act (59 of 1988), Sections 2(30), 50(2) & 166 and Central Motor Vehicles Rules, 1989, Rule 56 – Compensation – Term “Owner” – Appeal against rejection of compensation claim filed by the owner of the damaged truck – Held – Appellants have not filed the registration certificate of the vehicle in the name of deceased nor after his death, they (appellants) produced any evidence to prove their ownership – As per Section 166 of the Act of 1988 only the owner of the vehicle is entitled to receive the compensation for damage to the property in an accident – Impugned award upheld – Appeal dismissed.

मोटर यान अधिनियम (1988 का 59), धाराएँ 2(30), 50(2) व 166 एवं केन्द्रीय मोटर यान नियम, 1989, नियम 56 – प्रतिकर – शब्द “स्वामी” – क्षतिग्रस्त ट्रक के स्वामी द्वारा प्रस्तुत प्रतिकर के दावे को नामंजूर किये जाने के विरुद्ध अपील – अभिनिर्धारित – अपीलार्थीगण ने मृतक के नाम से वाहन का रजिस्ट्रीकरण प्रमाण-पत्र प्रस्तुत नहीं किया, न ही उसकी मृत्यु के पश्चात् उन्होंने (अपीलार्थीगण) उनका स्वामित्व साबित करने हेतु कोई साक्ष्य प्रस्तुत किया – अधिनियम 1988 की धारा 166 के अनुसार केवल वाहन का स्वामी ही दुर्घटना में संपत्ति को हुई क्षति का प्रतिकर प्राप्त करने का हकदार है – आक्षेपित अवार्ड की पुष्टि – अपील खारिज।

Cases referred:-

2008 (2) TAC 287 M.P., AIR 1997 SC 3444.

Vikram Singh, for the appellants.

None for the respondents no. 1 & 2

Rakesh Jain, for the respondent no. 3.

NOTES OF CASES SECTION

Short Note

***(43)**

Before Mr. Justice S.C. Sharma

W.P. No. 8523/2014 (Indore) decided on 17 August, 2016

SURJEET SINGH

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

(Alongwith W.P. No. 8522/2014)

Constitution – Article 226 – Compensation to victims of 1984 riots – First Information Report lodged – Various directions by High Court to the State Government to provide compensation to the victims of 1984 riots – Petitioners of both the Writ Petition filed applications before District Magistrate claiming compensation – State Government in mechanical manner have rejected the claim – Held – FIR and quantum of loss has not been denied/disputed by the respondents – Collector directed to pay compensation towards the losses incurred by the petitioners alongwith interest @ 8.5% per annum, right from the date of loss suffered since 1984 till it is actually paid – Further directed to complete the exercise within a period of ninety days from the date of order failing which, shall have to face *motu* contempt proceeding – Petitions allowed.

संविधान – अनुच्छेद 226 – 1984 के बलवा पीड़ितों के लिए प्रतिकर – प्रथम सूचना प्रतिवेदन दर्ज – उच्च न्यायालय द्वारा 1984 के बलवा पीड़ितों हेतु प्रतिकर प्रदान करने के लिए राज्य सरकार को विभिन्न निदेश – दोनों रिट याचिका के याचीगण ने जिला मजिस्ट्रेट के समक्ष प्रतिकर का दावा करते हुए आवेदन प्रस्तुत किये – राज्य सरकार ने यंत्रवत ढंग से याचीगण के दावे को अस्वीकार किया – अभिनिर्धारित – प्रथम सूचना प्रतिवेदन एवं हानि की मात्रा को प्रत्यर्थीगण द्वारा अस्वीकार/विवादित नहीं किया गया है – कलेक्टर को, याचीगण द्वारा वहन की गई हानि के लिए प्रतिकर के साथ, वर्ष 1984 में हानि सहन करने की तिथि से लेकर प्रतिकर की वास्तविक अदायगी होने तक, 8.5% प्रतिवर्ष की दर से ब्याज का भुगतान करने हेतु निदेशित किया गया – आदेश दिनांक से नब्बे दिनों की अवधि के भीतर प्रक्रिया पूर्ण करने हेतु आगे निदेशित किया गया, जिसे न किये जाने पर स्वप्रेरित अवमानना कार्यवाही का सामना करना होगा – याचिकाएँ मंजूर।

NOTES OF CASES SECTION

Cases referred:

1993 Supp (4) SCC 46, 2010 AIR SCW 825.

Himanshu Joshi, for the petitioner.

Milind Phadke, for the respondents State.

Short Note

*(44)

Before Ms. Justice Vandana Kasrekar

W.P. No. 14015/2016 (Jabalpur) decided on 14 October, 2016

SUSHIL KUMAR TIWARI (DR.)

...Petitioner

Vs.

STATE OF M.P. & anr.

...Respondents

Service Law and Fundamental Rules-9(17) – Transfer – Petitioner has been posted from one office to another in District Bhopal – Petitioner posted in Bhopal for last more than 13 years – Order cannot be treated as a frequent transfer order but it is only a local arrangement – Clause 11.1 of Transfer Policy specifically prescribes that transfer from one office to another in the same head office is a local arrangement and it would not be treated under the category of transfer – Petitioner failed to point out violation of any statutory rules as well as failed to point out that impugned transfer order has been issued with *mala fide* intention – Petition dismissed.

सेवा विधि एवं मूलभूत नियम-9(17) – स्थानांतरण – याची को भोपाल जिले में एक कार्यालय से दूसरे कार्यालय पदस्थ किया गया है – याची पिछले 13 वर्षों से अधिक समय से भोपाल में पदस्थ है – आदेश को बारंबार स्थानांतरण आदेश नहीं माना जा सकता, किंतु यह केवल एक स्थानीय व्यवस्था है – स्थानांतरण नीति का खंड 11.1 विनिर्दिष्ट रूप से विहित करता है कि एक ही मुख्य कार्यालय में एक कार्यालय से दूसरे कार्यालय स्थानांतरण, एक स्थानीय व्यवस्था है और इसे स्थानांतरण की श्रेणी के अंतर्गत नहीं समझा जा सकता – याची किन्हीं कानूनी नियमों के उल्लंघन को दर्शाने में असफल रहा और साथ ही यह दर्शाने में भी असफल रहा कि आक्षेपित स्थानांतरण आदेश, असदभावपूर्वक आशय के साथ जारी किया गया था – याचिका खारिज।

NOTES OF CASES SECTION

Cases referred:

(1993) 4 SCC 357, 2016 (1) MPLJ 693, 2006 (3) MPHT 38, (2007) 8 SCC 150.

Ajay Pal Singh, for the petitioner.

Sanjay Dwivedi, Dy. A.G. for the respondents.

R.G Mahajan, for the intervenor.

I.L.R. [2017] M.P., 507

SUPREME COURT OF INDIA

Before Mr. Justice Madan B. Lokur & Mr. Justice R.K. Agrawal

C.A. No. 6687/2016 decided on 1 August, 2016

MADINA BEGUM & anr.

...Appellants

Vs.

SHIV MURTI PRASAD PANDEY & ors.

...Respondents

A. Limitation Act (36 of 1963), Schedule I, Article 54 - "Date fixed for performance" is a crystallized notion - Means a definite date is fixed for doing particular act - Term "Date" is definitely suggestive of specified date in the calendar. (Para 19)

क. परिसीमा अधिनियम (1963 का 36), अनुसूची I, अनुच्छेद 54 - "पालन किये जाने हेतु नियत दिनांक" एक निश्चित धारणा है - अर्थात् विशिष्ट कार्य को करने हेतु निश्चित दिनांक नियत की गई है - शब्द "दिनांक" निश्चित रूप से कलेंडर में विनिर्दिष्ट दिनांक का संकेतक है।

B. Limitation Act (36 of 1963), Schedule I, Article 54 and Specific Relief Act (47 of 1963), Section 22 - Suit for specific performance - If barred - 'A' agreed to sale property to 'B' by agreement dated 03.09.2001 agreeing to execute registered conveyance within 6 months of agreement - Court issued injunction on alienation - Injunction became ineffective on 28.09.2006 - On 02.08.2008 name of 'C' mutated upon sale - 'B' issued notice in August, 2008 for specific performance of the contract - Held - Suit is within limitation - In agreement, no specified date for performance of agreement is mentioned. (Paras 13, 15 & 22)

ख. परिसीमा अधिनियम (1963 का 36), अनुसूची I, अनुच्छेद 54 एवं विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 22 - विनिर्दिष्ट पालन हेतु वाद - यदि वर्जित है - "ए" करार दिनांक 03.09.2001 के द्वारा करार के छह माह के भीतर रजिस्ट्रीकृत हस्तांतरण-पत्र के निष्पादन की सहमति देते हुए "बी" को सम्पत्ति विक्रय करने हेतु सहमत हुआ - न्यायालय ने अन्य संक्रामण पर व्यादेश जारी किया - व्यादेश दिनांक 28.09.2006 को प्रभावहीन हुआ - दिनांक 02.08.2008 को "सी" का नाम विक्रय पर नामांतरित हुआ - अगस्त, 2008 में "बी" ने संविदा के विनिर्दिष्ट पालन हेतु नोटिस जारी किया - अभिनिर्धारित - वाद परिसीमा के भीतर है - करार में, करार के पालन के लिए कोई विनिर्दिष्ट दिनांक उल्लिखित नहीं है।

C. Practice & Procedure – Duty of Court to deal with all the issues and evidence lead by the parties before recording findings – In the instant case, High Court only considered issue of limitation – Other issues not considered – Impermissible – Court ought to have considered all the issues – Appeal allowed – Matter remanded to High Court to decide remaining issues on merits. (Para 24 & 25)

ग. पद्धति एवं प्रक्रिया – न्यायालय का कर्तव्य है कि निष्कर्षों के अभिलिखित किये जाने से पूर्व पक्षकारों द्वारा प्रस्तुत किये गये सभी विवादों एवं साक्ष्य का विचार करे – वर्तमान प्रकरण में, उच्च न्यायालय ने केवल परिसीमा पर विचार किया है – अन्य विवादों पर विचार नहीं किया गया – अननुज्ञेय – न्यायालय को सभी विवादों पर विचार करना चाहिए था – अपील मंजूर – शेष विवादों को गुणदोषों के आधार पर विनिश्चित किये जाने हेतु, उच्च न्यायालय को मामला प्रतिप्रेषित।

Cases referred:

(2009) 5 SCC 462, (2015) 5 SCC 223, (2015) 1 SCC 391, (2001) 4 SCC 756.

J U D G M E N T

The Judgment of the Court was delivered by : **MADAN B. LOKUR, J. :-** The two questions for our consideration are whether the suit filed by the appellant Madina Begum was barred by limitation in terms of the first part of Article 54 of Schedule 1 of the Limitation Act, 1963 and whether the High Court ought to have decided the first appeal filed by Madina Begum not only on the preliminary issue of limitation but also on all other issues. As far as the first question is concerned our answer is in the negative and as far as the second question is concerned, in our opinion, the High Court ought to have considered all the issues in the first appeal rather than only the preliminary issue of limitation.

2. The land in dispute in this appeal is 1.63 acres of agricultural land bearing khasra nos. 438, 439, 440 and 456 (total area being 2.13 acres) in Patwari Halka No. 26 Gram Amkhera, Tehsil and District Jabalpur.

3. There was a dispute about the title of the entire aforesaid land and to resolve that dispute, Gulab Bai claiming to be the owner and in possession of the entire land, filed Suit No. 479A of 1994 in the Court of the Additional District Judge in Jabalpur. The defendants in the suit were Amar Singh and

Jaswant Singh. The prayer made by Gulab Bai in her plaint was for a declaration with regard to her title and possession. She also prayed for an injunction restraining the defendants Amar Singh and Jaswant Singh from interfering with her possession.

4. On 2nd August, 2001 the suit was decreed in favour of Gulab Bai and thereafter on 3rd September, 2001 she entered into an agreement to sell 1.63 acres of agricultural land being the disputed property to Madina Begum. The consideration for the sale was Rs. 4,89,000/- out of which an advance of Rs. 1,25,000/- was paid by Madina Begum to Gulab Bai. This fact is recorded in the agreement to sell.

5. What we are concerned with in this appeal is the interpretation of Clause 3 of the agreement to sell which reads as follows:-

“3 That Party no. 1 has sold 1.63 acres land at the rate of Rs. 3,00,000/- (Rs. Three lakh) per acre and Party no. 1 Gulab Bai has obtained Rs. 1,25,000/- (One lakh twenty five thousand) as advance. The rest of the amount of Rs. 3,64,000/- (Rs. Three lakh sixty four thousand) would be paid by Party no. 2 to Party no. 1 within the period of six months from this date and having received it the party no. 1 will execute Benama Registry in favour of Party no. 2 or any such person specified by party no. 2 in one part or many parts.”

6. Apparently on coming to know that Gulab Bai had agreed to sell the disputed land to Madina Begum an appeal being F.A. No.399 of 2001 was filed by Amar Singh and Jaswant Singh in the High Court of Madhya Pradesh challenging the decree dated 2nd August, 2001. An interim application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure was filed along with the appeal. The application was taken up for consideration on 22nd September, 2001 and while issuing notice in the application it was directed as follows:-

“In the meanwhile till the disposal of M(C) P. No. 3231/2001, status quo regarding possession over the suit property shall be maintained and the respondent shall not alienate the suit property.”

7. On 16th November, 2001 Gulab Bai executed a Will (which was

registered) in which she categorically mentioned that she had negotiated the sale of 1.63 acres of land to Madina Begum and had given possession thereof to her but the remaining amount and registration of the sale remained to be completed. In her Will, Gulab Bai appointed Shiv Murti Prasad Pandey and Devendra Prasad Pandey (respondents herein) as her executors. The Will mentioned that upon her demise, her agricultural land except 1.63 acres will devolve on Shiv Murti Prasad Pandey and Devendra Prasad Pandey and in the event of her death before the registration of the sale deed it would be their responsibility to execute and register the sale deed in favour of Madina Begum. Unfortunately, Gulab Bai passed away on 2nd January, 2002.

8. Thereafter, F.A. No. 399 of 2001 filed by Amar Singh and Jaswant Singh was heard by the High Court and came to be dismissed on 28th September, 2006. We are told that the decree passed by the High Court has attained finality.

9. Upon the dismissal of the aforesaid appeal, it appears that Madina Begum required Shiv Murti Prasad Pandey and Devendra Prasad Pandey to execute the sale deed but apparently they did not take any steps in this regard. On the contrary, it appears that on or about 2nd August, 2008 the land in dispute was mutated in the name of Anita Jain pursuant to a sale made in her favour by Shiv Murti Prasad Pandey and Devendra Prasad Pandey.

10. When Madina Begum came to know of the transfer of the disputed land, she sent a notice to Shiv Murti Prasad Pandey and Devendra Prasad Pandey on 13th August, 2008 calling upon them to execute the sale deed in terms of the agreement to sell dated 3rd September, 2001 and the Will executed by Gulab Bai on 16th November, 2001. The notice was replied to by Shiv Murti Prasad Pandey and Devendra Prasad Pandey and we are told that they declined to execute the sale deed. This led to Madina Begum filing a suit, *inter alia*, for specific performance of the agreement being Suit No. 17A of 2008 (perhaps renumbered later as 41A of 2010) in the Court of the Additional District Judge, Jabalpur.

11. The defendants in the suit namely Shiv Murti Prasad Pandey and Devendra Prasad Pandey and Anita Jain filed their written statement and one of the contentions raised was that the suit was barred by limitation having been instituted more than three years beyond the date specified in the agreement to sell dated 3rd September, 2001. It was also submitted that Madina Begum

had given an advance of only Rs. 90,000/- which had since been returned to her and that on 19th November, 2001 the agreement to sell between Gulab Bai and Madina Begum was cancelled.

12. On the pleadings, one of the issues framed by the Trial Court was issue No. 8: Whether the suit is time barred?

13. The Trial Court considered the issue whether the suit filed by Madina Begum was barred by time and answered it in the negative. It was held in paragraph 38 of the decision rendered on 1st February, 2011 as follows:-

“38. On perusal of the record it is gathered that agreement Ex. P-1 was executed on 03.09.2001 and thereafter stay has been granted by Hon’ble High Court in first appeal on 22.09.2001 but the first appeal was finally decided on 28.09.2006 vide Ex. P-5 since it was dismissed and in this manner, the stay order had become ineffective on 28.09.2006. Thereafter, the plaintiffs have sent notice to the defendants in August 2008 i.e. after two years from the date of decision in the first appeal which was dismissed on 28.09.2006 which was done within prescribed period of three years. Therefore, it cannot be said that the plaintiffs had filed the suit beyond the period of limitation with a view to harass the defendants. Thus, issues No. 8 and 9 are being answered against the defendants.”

14. Even though the issue of limitation was decided in her favour, the suit filed by Madina Begum was dismissed on merits. Feeling aggrieved by the dismissal of the suit on merits Madina Begum preferred First Appeal No. 175 of 2011 in the High Court of Madhya Pradesh and that led to the impugned judgment and order dated 16th August, 2013. The Division Bench hearing the appeal did not go into the merits of the dispute between the parties but only adverted to the issue of limitation and since it was found that the institution of the suit was barred by time (contrary to the conclusion of the Trial Court) there was no necessity of considering the merits of the case.

15. In coming to the conclusion that the suit was barred by time, the High Court considered Article 54 of Schedule 1 of the Limitation Act, 1963 (for short, “the Act”). The discussion thereon was brief and it reads as follows:-

“Under Article 54 of the Limitation Act, the prescribed period

of limitation for filing a suit of specific performance of a contract is three years and the period of three years has to be calculated based on two contingencies i.e. the date fixed for performance of the contract or if no such date is fixed, the date when the plaintiffs had notice about refusal of the performance by the defendants. In this case, admittedly, a date for performance is fixed i.e. six months from the date of execution of the contract and, therefore, as a specific period for performance is fixed, the period of limitation would be three years w.e.f. 3.03.2002 i.e. the date when the period of six months for execution of the sale-deed lapsed."

16. The High Court held that since the suit was barred by limitation, the Trial Court committed a grave error in recording a finding that the suit was within limitation.

17. The interpretation of the first part of Article 54 of Schedule 1 of the Act is no longer *res-integra*. Article 54 reads as follows:-

"54	For specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused."

18. In *Ahmadsahab Abdul Mulla (2) (Dead) v. Bibijan and Ors.*¹ the following question was considered by a three judge Bench of this Court: "Whether the use of the expression "date" used in Article 54 of the Schedule to the Limitation Act, 1963 (in short "the Act") is suggestive of a specific date in the calendar?"

19. While answering this question on a reference made to the three judge Bench, this Court considered the meaning of the word "date" and "fixed" appearing in Article 54. Upon such consideration, this Court held that the expression "date fixed for the performance" is a crystallized notion. When a date is fixed it means there is a definite date fixed for doing a particular act. Therefore, there is no question of finding out the intention from other circumstances. It was reiterated that the expression "date" is definitely

1. (2009) 5 SCC 462

suggestive of a specified date in the calendar. Paragraphs 11 and 12 of the Report in this regard are of importance and they read as follows:-

“11. The inevitable conclusion is that the expression “date fixed for the performance” is a crystallized notion. This is clear from the fact that the second part “time from which period begins to run” refers to a case where no such date is fixed. To put it differently, when date is fixed it means that there is a definite date fixed for doing a particular act. Even in the second part the stress is on “when the plaintiff has notice that performance is refused”. Here again, there is a definite point of time, when the plaintiff notices the refusal. In that sense both the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances.

12. Whether the date was fixed or not the plaintiff had notice that performance is refused and the date thereof are to be established with reference to materials and evidence to be brought on record. The expression “date” used in Article 54 of the Schedule to the Act definitely is suggestive of a specified date in the calendar. We answer the reference accordingly. The matter shall now be placed before the Division Bench for deciding the issue on merits.”

20. Quite independently and without reference to the aforesaid decision, another Bench of this Court in *Rathnavathi and Another v. Kavita Ganashamdas*² came to the same conclusion. It was held in paragraph 42 of the Report that a mere reading of Article 54 would show that if the date is fixed for the performance of an agreement, then non-compliance with the agreement on the date would give a cause of action to file a suit for specific performance within three years from the date so fixed. But when no such date is fixed, the limitation of three years would begin when the plaintiff has notice that the defendant has refused the performance of the agreement. It was further held, on the facts of the case that it did not fall in the first category of Article 54 since no date was fixed in the agreement for its performance.

21. The Clauses of the agreement for consideration in *Rathnavathi* were

Clauses 2 and 3 and they read as follows:-

“2. The purchaser shall pay a sum of Rs. 50,000 (Rupees fifty thousand only) as advance to the seller at the time of signing this agreement, the receipt of which the seller hereby acknowledges and the balance sale consideration amount shall be paid within 60 days from the date of expiry of lease period.

3. The seller covenants with the purchaser that efforts will be made with the Bangalore Development Authority for the transfer of the schedule property in favour of the purchaser after paying penalty. In case it is not possible then the time stipulated herein for the balance payment and completion of the sale transaction will be agreed mutually between the parties.”

22. As far as the present appeal is concerned, the agreement between Gulab Bai and Madina Begum did not specify a calendar date as the date fixed for the performance of the agreement. Consequently, the view expressed in *Ahmadsahab Abdul Mulla* and *Rathnavathi* on the first part of Article 54 clearly applies to the facts of the case. In taking a contrary view, ignoring the absence of a specified date for the performance of the agreement and reversing the Trial Court, the High Court has fallen in error.

23. It is not necessary for us to multiply authorities on the subject particularly when the issue has been conclusively settled by a Bench of three learned judges of this Court in *Ahmadsahab Abdul Mulla* and we see no reason to take a different view.

24. The second question that requires consideration is whether the High Court was right in merely deciding the issue of limitation in a first appeal filed under Section 96 of the Code of Civil Procedure without going into the merits of the case. Quite recently, in *Vinod Kumar v. Gangadhar*³ this Court had occasion to consider the issue whether, under Section 96 of the Code of Civil Procedure, the first appellate court ought to decide all the issues before it or not. Reference was made to a very large number of decisions rendered by this Court and it was concluded, particularly relying upon *Madhukar v. Sangram*⁴ decided by a Bench of three learned judges of this Court that sitting as a court of first appeal it is the duty of the High Court to deal with all the issues and

3. (2015) 1 SCC 391

4. (2001) 4 SCC 756

evidence led by the parties before recording its findings.

25. In so far as the present appeal is concerned, the High Court only considered the issue of limitation and did not consider the other issues in the appeal. This was impermissible. The result is that since we do not agree with the view taken by the High Court on the issue of limitation, there is no option but to set aside the view expressed by the High Court and following the decisions of this Court, remand the matter to the High Court to decide the remaining issues in the first appeal filed under Section 96 of the Code of Civil Procedure.

26. It is a little unfortunate that the parties have to undergo another round of litigation which could easily have been avoided if the settled legal principles laid down by this Court from time to time were followed in regard to the requirements of Section 96 of the Code of Civil Procedure. This is quite apart from the delay caused in the resolution of the dispute between the parties.

27. In view of our discussion, the appeal is allowed and the impugned judgment and order of the High Court dated 16th August, 2013 is set aside and the matter is remanded to the High Court for deciding the remaining issues in the appeal on merits.

Appeal allowed.

I.L.R. [2017] M.P., 515

SUPREME COURT OF INDIA

Before Mr. Justice J. Chelameswar &

Mr. Justice Abhay Manohar Sapre

C.A. No. 8299/2016 decided on 24 August, 2016

SASAN POWER LIMITED

...Appellant

Vs.

NORTH AMERICAN COAL CORPORATION

INDIA PRIVATE LIMITED

...Respondent

A. Arbitration and Conciliation Act (26 of 1996), Section 45 and Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Arbitration – Rejection of plaint – Facts – Agreement-I executed between appellant and an American Company – Agreement-II executed between appellant, respondent (Indian Company) and American Company – Dispute – Arbitration clause – Respondent making a request for arbitration –

Appellant filing civil suit—Application under Order 7 Rule 11 of C.P.C. r/w Section 45 of the Act of 1996 by respondent – Trial Court dismissed the suit and subsequently appeal was also dismissed by High Court – Held – Trial Court allowed the application by recording the agreement as legal and proper and capable of being performed but it did not pass any consequential order as required u/S 45 of the Act of 1996 by referring the parties to arbitration – So with the above modification, order of the trial Court is just and proper – Appeal dismissed.

(Paras 76 to 80)

(Justice A.M. Sapre)

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 45 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – माध्यस्थम् – वादपत्र का नामंजूर किया जाना – तथ्य – करार-I, अपीलार्थी और एक अमरीकी कंपनी के मध्य निष्पादित – करार-II, अपीलार्थी, प्रत्यर्थी (भारतीय कंपनी) और अमरीकी कंपनी के मध्य निष्पादित – विवाद – माध्यस्थम् खंड – प्रत्यर्थी ने माध्यस्थम् हेतु निवेदन किया – अपीलार्थी ने सिविल वाद प्रस्तुत किया – प्रत्यर्थी द्वारा सि.प्र.सं. के आदेश 7 नियम 11 सहपठित, अधिनियम 1996 की धारा 45 के अंतर्गत आवेदन – विचारण न्यायालय ने वाद खारिज किया और तत्पश्चात् उच्च न्यायालय द्वारा अपील भी खारिज की गई – अभिनिर्धारित – विचारण न्यायालय ने करार को विधिक एवं उचित तथा पालन किये जाने योग्य मानते हुए आवेदन मंजूर किया परंतु उसने माध्यस्थम् हेतु पक्षकारों को निर्देशित कर परिणामिक आदेश पारित नहीं किया जैसा कि अधिनियम 1996 की धारा 45 के अंतर्गत अपेक्षित है – अतः, उक्त परिवर्तन के साथ, विचारण न्यायालय का आदेश न्यायसंगत और उचित है – अपील खारिज।

B. Evidence Act (1 of 1872), Section 65 – Secondary evidence – Agreement II – Whether bipartite or tripartite – Concession made by counsel before High Court that it is bipartite – Whether such a concession can be regarded as a secondary evidence or not – Held – Such concession is not secondary evidence admissible under any of the clauses of Section 65 of Evidence Act and it does not preclude respondent from asserting that Agreement II is a tripartite agreement.

(Para 25)

(Justice Chelameswar)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 65 – द्वितीयक साक्ष्य – करार-II – क्या द्विपक्षीय है अथवा त्रिपक्षीय है – अधिवक्ता द्वारा उच्च न्यायालय के समक्ष स्वीकृति दी गई कि यह द्विपक्षीय है – क्या उक्त स्वीकृति को द्वितीयक साक्ष्य माना जा सकता है अथवा नहीं – अभिनिर्धारित – उक्त स्वीकृति, साक्ष्य अधिनियम की धारा 65 के किसी खंड के अंतर्गत ग्राह्य द्वितीयक साक्ष्य नहीं है और वह

प्रत्यर्थी को यह प्राख्यान करने से प्रवारित नहीं करती कि करार-II, एक त्रिपक्षीय करार है।

C. Arbitration and Conciliation Act (26 of 1996), Section 45 – Reference to arbitration – Scope of enquiry – Scope of enquiry while referring the matter to arbitration u/S 45 of the Act of 1996 is confined only to the question whether the arbitration agreement is null and void, inoperative or incapable of being performed but not the legality and validity of the substantive contract. (Paras 45 to 48)

(Justice Chelameswar)

ग. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 45 – माध्यस्थम् हेतु निर्देश – जांच की व्याप्ति – अधिनियम, 1996 की धारा 45 के अंतर्गत, माध्यस्थम् को मामला निर्देशित किये जाते समय, जांच की व्याप्ति केवल इस प्रश्न तक सीमित होती है कि क्या माध्यस्थम् करार शून्य एवं अकृत, अप्रवर्तनीय या निष्पादन किये जाने के लिए अक्षम है, न कि सारमूल संविदा की वैधता एवं विधिमान्यता।

D. Interpretation of statutes – Agreement – Assignment – Meaning – Benefit of a contract can be assigned but not the burden, because the promisor cannot shift the burden of his obligation without a novation. (Para 19) (Para 59)

(Justice Chelameswar) (Justice A.M. Sapre)

घ. कानूनों का निर्वचन – करार – समनुदेशन – अर्थ – संविदा का लाभ समनुदेशित किया जा सकता है परंतु भार नहीं क्योंकि वचनदाता अपने दायित्व के भार को नवीयन के बिना दूसरे पर नहीं डाल सकता।

E. Words & Phrases – “Novation of contract” – Scope & Ambit. (Paras 67 to 69)

(Justice A.M. Sapre)

ड. शब्द एवं वाक्यांश – “संविदा का नवीयन” – विस्तार एवं परिधि।

Cases referred:

(1902) 2 K.B. 660, (1903) AC 414, (1882) 7 App. Cas. 345, 351, (2012) 9 SCC 552, (2002) 4 SCC 105, (2008) 4 SCC 190, (2015) 10 SCC 213, (1991) 57 BLR 1 (CA), (1981) AC 909, (1912) AC 1, (2003) 6 SCC 503, (2014) 7 SCC 603, AIR 1954 SC 345, (1906) ILR 33 (Calcutta) 702.

J U D G M E N T

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

2. The Appellant herein a company registered under the laws of India and an American company known as North American Coal Corporation (A Delaware Corporation) hereinafter referred to as the ‘American company’ entered into an agreement dated 1st January, 2009 for mine and development operations hereinafter referred to as “AGREEMENT-I”.

3. Under AGREEMENT-I, the American company agreed to provide certain consultancy and other onsite services for a mine to be operated by the appellant herein in India. Article XII¹ of AGREEMENT-I provides for two things – (1) the governing law of the agreement, and (2) resolution of disputes, if any to arise between the parties, by arbitration.

4. Section 12.1 stipulates that (i) the governing law of the agreement shall be the law of the United Kingdom, (ii) the conflict of laws principles of England will have no application while interpreting AGREEMENT-I in accordance with the laws of the United Kingdom. Section 12.2 stipulates the arbitrator, seat of arbitration and the procedure to be followed in the arbitration (i) the arbitration is “to be administered by the International Chambers of Commerce (the ICC)”, (ii) the place of arbitration shall be London, (iii) such arbitration shall be conducted in accordance with the commercial arbitration rules of the ICC, in effect at the time of the arbitration.

5. Article XV Section 15.6 of the AGREEMENT-I provides for

¹ Article XII insofar as it is relevant for our purpose reads as follows:-

“Section 12.1 Governing Law. This Agreement shall be governed by, and construed and interpreted in accordance with the laws of the United Kingdom without regard to its conflict of laws principles.

Section 12.2 Dispute Resolution; Arbitration.

(a) Any and all claims, disputes, questions or controversies involving Reliance (i.e. SASAN) on the one hand and NAC on the other hand arising out of or in connection with this Agreement (collectively, “Disputes”) which cannot be finally resolved by such parties within 60 (sixty) days of arising by amicable negotiation shall be resolved by final and binding arbitration to be administered by the International Chamber of Commerce (the “ICC”) in accordance with its commercial arbitration rules then in effect (the “Rules”). The place of arbitration shall be London, England.

assignment:

“Article XV Section 15.6. Successors and Assigns. This Agreement may be assigned by NAC to any Affiliate of NAC; with the previous written consent of Reliance, which consent shall not be unreasonably withheld. Without the written consent of NAC, which consent shall not be unreasonably withheld, Reliance shall not assign its rights under this Agreement or cause its obligations under this Agreement to be assumed by any other person. No assignment or other transfer shall release the assignor from its obligations or liabilities hereunder. Any assignment in violation of the foregoing shall be null and void *ab initio*. This agreement shall be binding upon and inure to the benefit of the parties hereto and their successors and permitted assigns.”

6. On 1.4.2011, the appellant, the American company and the respondent herein, which is an Indian Company and a fully owned subsidiary² of the American company entered into an agreement (hereinafter AGREEMENT-II). By the said agreement, the American company purported to assign³ all its rights and obligations with the consent of the appellant to the Indian Company with effect from 1.4.2011. A fact which is significant in the context of the questions argued in this appeal is that all the three signatories to the AGREEMENT-II agree that the American company is not relieved of its obligations and liabilities.

7. Disputes arose between the appellant and the respondent. The respondent by its letter dated 23.7.2014 purported to terminate the

² Section 4 of the Companies Act.

³ “ASSIGNMENT AND ASSUMPTION

(1) NAC hereby transfers and assigns all of NAC’s rights and obligations under the Agreement to NACC India. NAC hereby acknowledges that, as provide^{3d} (sic:provided) in Section 15.6 of the Agreement, NAC’s transfer and assignment of all of NAC’s rights and obligations under the Agreement to NACC India does not release NAC, as assignor, from its obligations or liabilities under the Agreement.

(2) NACC India hereby accepts the transfer and assignment of all of NAC’s rights and hereby assumes all of NAC’s obligations under the Agreement, and hereby agrees to perform such obligations in accordance with the terms of the Agreement.

AGREEMENT-I. Thereafter, the respondent made a request for arbitration on 08.08.2014.

8. The appellant herein filed a suit (Suit No.4A of 2014 in the Court of the District Judge, Singrauli, Madhya Pradesh) seeking various reliefs. The reliefs insofar as they are relevant for our purpose are as follows:-

- (i) Pass a decree of declaration in favour of the Plaintiff declaring Section 10.2 of the Agreement dated 01.01.2009 as null, void, inoperative and unenforceable.
- (ii) Pass a decree of declaration declaring that the invoices raised by the defendant upon the plaintiff dated defendant's invoices dated 01.10.2013, 02.01.2014, 01.04.2014, 11.04.2014, 16.01.2014, 11.04.2014, and four invoices dated 21.07.2014 as also Section 10.2 of the Agreement are illegal, null and void and unenforceable.
- (iii) Pass a decree of declaration declaring that not even a default having occurred as per Section 8.1, the letter of termination dated 23.7.2014 is illegal, null and void and inoperative and issuance of such a letter amounts to a breach of the contract by the defendant.
- (iv) Pass a Decree of Declaration in favour of the Plaintiff and against the Defendant, thereby declaring the Governing Law and Arbitration Agreement being Article XII of the Agreement as null, void, inoperative and unenforceable; and that the Arbitration Agreement has no legal and binding force in the eyes of Law;
- (v) Pass a decree for Permanent Injunction, in favour of the Plaintiff and against the Defendant, thereby

CONSENT TO ASSIGNMENT AND ASSUMPTION

(3) Reliance hereby consents to NAC's transfer and assignment of all of NAC's rights and obligations under the Agreement to NACC India, and agrees that hereafter NACC India shall have the right to enforce all of NAC's rights under the Agreement."

restraining the Defendant or any other person on its behalf in any manner proceeding or continuing with the arbitration proceedings (bearing No.20432/TO) initiated by Defendant before the ICC in London against the Plaintiff.

- (vi) Pass a decree of declaration that Request for Arbitration dated. 8.8.2014 is null and void being contrary to Indian law.

9. It is relevant to take note of two facts. There is no prayer with respect to the AGREEMENT-II. The American company is not a party to the suit, inspite of the fact that the 1st relief sought in the suit is for a declaration of the illegality of one of the clauses of AGREEMENT-I to which only the appellant and American company are parties

In the said suit, an ex-parte order came to be passed on 11.11.2014 injuncting the ICC from proceeding with the arbitration.

10. Thereafter, the respondent filed two applications, one (I.A. No.5/15) under Order 7 Rule 11(d) CPC read with Section 45 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "1996 Act") praying that the dispute be referred to arbitration and the second (I.A. No. 4/15) under Order 39 Rule 4 CPC seeking vacation of the injunction order. The applications were contested by the appellant unsuccessfully. The suit was dismissed. The operative portion of the judgment reads:

"On the basis of the above discussions, the application filed by the defendant/applicant as I.A. No.5 under Order 7 Rule 11-D CPC read with Sec. 45 of the Arbitration and Conciliation Act, 1996 is allowed, resultantly the present **plaint of the plaintiff is rejected**. I.A. No.4 under Order 39 Rule 4 CPC is also allowed on the same ground on which I.A. No.5 has been allowed. **Resultantly, the orders/directions of this Court dated 11.11.2014 and 2.12.14, 7.1.15 and 11.3.15, restraining the defendant from proceeding further with the arbitration proceeding No.20432/T.O. before ICC, London are set aside.**"

Aggrieved by the same, the appellant carried the matter to the High Court of

Madhya Pradesh. The High Court dismissed the appeal and held:

“71. Finally, we may observe that once it is found by us that parties by mutual agreement have decided to resolve their disputes by arbitration and when then on their own, chose to have the seat of arbitration in a foreign country, then in view of the provisions of Section 2(2) of the Act of 1996, Part 1 of the Act, will not apply in a case where the place of arbitration is not India and if Part 1 does not apply and if the agreement in question fulfills the requirement of Section 44 then Part II will apply and when Part II applies and it is found that agreement is not null or void or inoperative, the bar created under Section 45 would come into play and if bar created under Section 45 comes into play then it is a case where the Court below had no option but to refer the parties for arbitration as the bar under Section 45 would also apply and the suit itself was not maintainable.

72. Accordingly, in the facts and circumstances, we find no error in the order passed by the learned District Judge, warranting record deration.

73. Appeal is therefore, dismissed. No order on costs.”

Hence the present appeal.

11. One of the grounds of appeal is that the High Court has erroneously rejected the contention of the appellant that two Indian companies are prevented from entering into an agreement for arbitration of their dispute to be seated outside India. We do not find from the impugned judgment anything to indicate that such a submission was made before the High Court. On the other hand, learned counsel for the appellant specifically submitted during the course of the argument before us that he is not making that submission before us.

12. The argument before us was confined only to the question whether two Indian companies can enter into an agreement with a stipulation that their agreement “be governed by, construed and interpreted in accordance with the laws of the United Kingdom”. Various submissions incidental to that main submission were made and would be taken note of at the appropriate place.

13. Parties have filed written submissions after the conclusion of the

arguments before this Court. In the written submissions filed by the appellant, it is stated that three questions “of general importance arise for the consideration and decision of this Court” and they are;

- Q.(1) Whether it is permissible under the consolidated Indian law of arbitration (now contained in the Arbitration and Conciliation Act 1996) for two Indian Companies (each incorporated and registered in India) to agree to refer their commercial disputes (that might arise between them) to a binding arbitration, (ad hoc or institutional), with place of arbitration outside India, and with governing law being English law?
- Q.(2) Whether two Indian companies, Sasan Power Ltd. and NACC India Ltd., each of whom have been incorporated and registered in India could in law be said to have “made an agreement referred to in Section 44” of the 1996 Act, so as to confer jurisdiction and authority on the competent Court (District Court of Singrauli, Madhya Pradesh) to refer the parties to ICC arbitration in London under Section 45 of the Arbitration and Conciliation Act 1996?
- Q.(3) Whether the arbitration agreement in Clause XII was invalid and void for being in breach of Clause (a) of Section 28 of the Indian Contract Act 1872 (not being saved by the Exception Clause), and also void because of the provisions of Section 23 of the Indian Contract Act, 1872, and hence not referable to arbitration under Section 45 of the Arbitration and Conciliation Act, 1996?

14. We presume that Question No.I insofar as it pertains to the “place of arbitration” found its way into the written submission by oversight as the said submission was expressly given up at the time of the argument. From the questions projected by the appellant, it can be seen that the entire case of the appellant is built up on the assumption that the parties to the arbitration agreement are only two Indian companies. The substance of the other two questions is that parties herein (two Indian companies) could not enter into an

agreement with a stipulation that the governing law for the construction and interpretation of the AGREEMENT-I to be the law of United Kingdom. The appellant also raise a further question that in view of the fact that both the parties to the dispute in the arbitration⁴ being companies registered in India whether the respondent could have invoked Section 45 of the 1996 Act and the courts below were justified in referring the dispute to arbitration purportedly in discharge of the statutory obligation under Section 45.

15. The basic prayer in the suit is twofold i.e. for declaration that Article X Section 10.2 and Article XII of the AGREEMENT-I are null and void. The remaining prayers in the suit are either incidental or ancillary to these two prayers. The appellant's grievance regarding the Article X, Section 10.2 is to be found in paragraphs 39-41.⁵ According to the copies of the plaint supplied

⁴ Admittedly, already initiated on a request of the Respondent on 8.8.2014 – Admitted, See prayers V and VI of the plaint.

⁵ **Para 39-** "The Plaintiff submits that Section 10.2 of the Association Agreement reproduced hereinafter "Limitation on Damages in no event shall either party be liable to the other for any consequential, incidental, special punitive or indirect damages, including loss of profits, revenue or business opportunities. Reliance acknowledges and agrees that its exclusive remedies against NAC and its direct and indirect owners and Affiliates for any breach or other violation of this Agreement are set forth in Sections 6.3(b) and 8.2 and that in no event shall any damages recoverable against NAC and its direct and indirect owners and Affiliates exceed U.S. \$1,000,000" which sets a cap on the damages that may be recovered by the Plaintiff is contrary to the principle that when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Section 10.2 of the Association Agreement is consequently liable to be declared null and void and set aside as being contrary to 5.7.3 of the Contract Act."

Para 40- "It is submitted that the section 10.2 should be construed as a clause merely to prevent breach of contract, and is not a measure of damages accrued to the Plaintiff. The Section 10.2 since it puts a cap on the liquidated damages is unenforceable, illegal and liable to be declared as null and void."

Para 41 "Upon a declaration by this Hon'ble Court that Section 10.2 of the said Agreement is null and void, the Plaintiff is entitled to the aforesaid damages. The plaintiff reserves its remedy of seeking damages under Order II rule 2 of Civil Procedure Code and would file proceedings once a aforesaid declaration is made by this Hon'ble Court."

to us by the appellant, Section 10.2 of AGREEMENT-I is “contrary to 5.7.3 of the Contract Act”. We presume 5.7.3 refers Section 73 of the Indian Contract Act, 1872!?

16. Before we examine this question of law, certain indisputable facts are to be noted:

- 1) The rights and obligations of the American company (under AGREEMENT-I) were purported to have been **assigned** in favour of the respondent by AGREEMENT-II.
- 2) From a copy of the AGREEMENT-II filed along with the appeal it is clear that the representatives of all the 3 companies, i.e., the AMERICAN and the two INDIAN companies (parties herein) signed the AGREEMENT-II.
- 3) Under the AGREEMENT-II it is agreed that such an assignment does not release the American company from its obligations or liabilities under AGREEMENT-I.
- 4) Apart from that, it was agreed between the parties that certain clauses of AGREEMENT-I would be substituted with new clauses⁶.

Another important feature of AGREEMENT-II is that the parties agreed – “except as amended by this amendment, the agreement shall remain in effect as written”. The expression ‘agreement’ is defined in AGREEMENT-II as follows:-

“WHEREAS, Reliance and NAC are parties to that certain Association Agreement for Mine Development and Operations, dated as of January 1, 2009, as amended by that certain First Amendment, dated as of September 30, 2009 (as amended, the “AGREEMENT”).” –

⁶ Section 5.3 and 5.6 of Article V came to be substituted.

* See para 6 of the agreement

i.e. AGREEMENT as amended by 30.09.2009 agreement.

In other words, the appellant never raised any objection regarding the consistency of Section 10.2 of Article X and Article XII of AGREEMENT-I with the Indian Contract Act either when the appellant entered into AGREEMENT-II or when the parties acted upon it.

17. At the outset we would like to examine the legal nature of the transaction covered by the AGREEMENT-II. It can be seen from the tenor⁷ of the AGREEMENT-II that it is a tripartite agreement. The assignment to be effective between the American company and the respondent requires the consent of the appellant in view of **Section 15.6** of AGREEMENT-I⁸. The consent given by the appellant herein is qualified. The appellant retained its right against the American company for the enforcement of obligations and liabilities under AGREEMENT-I owed by the American company to the appellant. Therefore, the rights and obligations flowing out of AGREEMENT-II between the three parties are interdependent. What exactly are such rights and obligations and their legal implications require an elaborate enquiry and no argument in this behalf has been advanced before us. The appellant's case that the transaction covered by the AGREEMENT-II is an assignment is a question which requires examination. Because it is neither the nomenclature adopted by the parties to an agreement nor their understanding of law that determines the true nature and the legal character of the agreement. The rights and obligations created under the agreement determine the legal character of an agreement.

18. An assignment is understood to be the transfer from one person to

⁷ "This Assignment and Assumption Agreement, Consent and Second Amendment to Association Agreement for Mine Development and Operations (this "Amendment") is made and entered into effective as of April 1, 2011 by and between Sasan Power Limited, an Indian company ("Reliance"), The North American Coal Corporation, a Delaware corporation ("NAC"), and North American Coal Corporation India Private Limited, an Indian company ("NACC India") that is 99% owned by NAC and 1% owned by TRU Global Energy Services, L.L.C., a wholly-owned subsidiary of NAC."

⁸ "NAC hereby acknowledges that, as provide^{3d} (sic: provided) in Section 15.6 of the Agreement, NAC's transfer and assignment of all of NAC's rights and obligations under the Agreement to NACC India does not release NAC, as assignor, from its obligations or liabilities under the Agreement."

another (referred to in law as the assignor and assignee respectively) the whole or part of an existing right or interest in intangible property presently owned by the assignor. The right or interest itself is not extinguished.⁹

19. It is settled law that there can only be an assignment of rights arising under a contract but not the “burden of a contract”.¹⁰ In *Tolhurst v. The Associated Portland Cement Manufacturers Limited*, [1902] 2 K.B. 660, Collins MR held as follows-

“It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee ... this can only be brought about by the consent of all three, and involves the release of the original debtor ... it is equally clear that the benefit of a contract can be assigned”

The Court of Appeal further laid down-

(i) Assignment of the benefit of the contract IS PERMISSIBLE where the consideration has been executed and nothing remains but to enforce the obligation against the party who has received the consideration; and

(ii) “There is, however, another class of contracts, where there are mutual obligations still to be enforced and where it is impossible to say that the whole consideration has been executed. Contracts of this class cannot be assigned at all in the sense of discharging the original contractee and creating privity or quasi privity with a substituted person.”

⁹ See A.G. Guest and Ting Khai Liew, *Guest on the Law of Assignment*, 2nd ed. Pg. 1 (Sweet and Maxwell, UK).

¹⁰ *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.*, ILR (33) Cal 702 at page 707- “...the rule as regards the assignability of contracts in this country is that the benefit of a contract...as distinguished from the liability thereunder may be assigned...This rule is however subject to two qualifications: first that the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to fulfil...that the contract is not one which has been induced by the personal qualifications or considerations as regards the parties to it”

The decision of the Court of Appeal was affirmed by the House of Lords¹¹.

20. In the facts and circumstances of the case on hand as indicated by the record, the AGREEMENT-II appears to be falling under the 2nd of the above mentioned two classes of the contracts. There is no discharge of the original contractee i.e., the American company's obligations. There are mutual obligations (arising out of AGREEMENT-I) still to be enforced. The American company legally cannot claim to have been discharged from the obligations arising under AGREEMENT-I and in fact has not been discharged. On the other hand, the appellant by an express covenant under AGREEMENT-II retained its rights to enforce obligations (arising under AGREEMENT-I) against the American company (See Footnote 3). AGREEMENT-II perhaps only creates an agency¹² where the American company is the principal and the respondent its an arrangement for "vicarious performance". We hasten to add that we are not expressing any conclusive opinion on this question as no arguments in this behalf are advanced by either side before us. We only conclude that the transaction covered by AGREEMENT II is not an assignment.

21. However, the appellant's suit is based on its understanding that the respondent stepped into the shoes of the American company. Therefore, both "in fact and law" the AGREEMENT-II is between the parties to this appeal! (two Indian companies).

"15. ... The Assignment agreement was signed in India. Hence, NACC US novated the Association Agreement in favour of the Defendant. The Defendant stepped in to the shoes of NACC US and, in fact and law, the Assignment agreement¹³ is one between the Plaintiff and the Defendant.

¹¹ *Tolhurst v. The Associated Portland Cement Manufacturers Limited*, (1903) AC 414

¹² The Indian Contract Act though does not define the expression agency defines agent and principal under Sec. 182.

"Section 182: An 'agent' is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the 'principal'."

¹³ Perhaps it is "association agreement". Whether it is a typographical error in the copy supplied to us or in the original plaint itself or the draftsman's error – god only knows. If read as 'assignment agreement' the pleading in our opinion makes no sense

A reference to the Association Agreement hereafter, shall, unless the context otherwise requires, mean the Association Agreement or between the Plaintiff and the Defendant.”¹⁴

22. In law, novation means-

“... there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties, the consideration mutually being the discharge of the old contract”¹⁵.

23. The pleading is wholly untenable in law for the following reasons

(i) There cannot be any novation between the American company and the respondent because prior to the AGREEMENT-II, there was no agreement whatsoever between them.

(ii) The respondent cannot be said to have stepped into the shoes of the American company because the obligations under AGREEMENT-I owed by the American company to the appellant were not discharged by the AGREEMENT-II.

It is on the basis of such a flawed understanding of law regarding the nature of the AGREEMENT-II the appellant raises the esoteric proposition whether two Indian Companies could have stipulated that their agreement be governed by the laws of the United Kingdom.

24. Adjudication of the dispute raised by the respondent in the arbitration would necessarily involve examination of the rights and obligations of the American company under AGREEMENT-I and AGREEMENT-II. Therefore, it is a dispute between three parties (of which one is an American company) with a foreign element i.e. rights and obligations of the American company. Hence, the stipulation regarding the governing law cannot be said to be an agreement between only two Indian companies.

25. At this stage, we must deal with the submission made on behalf of the appellant that there was a concession by the respondent before the High Court

¹⁴ Paragraph 15 of Plaint RCS No. 4A of 2014.

¹⁵ Lord Selborne L.C. in *Scarf v. Jardine* (1882) 7 App. Cas. 345, 351.

that AGREEMENT-II is not a tripartite agreement but a bipartite agreement¹⁶.

What is the number of parties to a document is a question of fact. When a fact is in issue¹⁷, the same is required to be proved in accordance with the provisions of the Evidence Act. Disposition of the property whether it be by way of a contract or grant or any other, if reduced to writing, parties are prohibited from giving any evidence regarding the terms of such disposition¹⁸ except the document itself or 'secondary evidence'¹⁹ of that document. Provided that such secondary evidence is otherwise admissible under the Evidence Act. Though oral evidence can be secondary evidence under Section 63(5), Section 64 mandates that documents must be proved by primary evidence except in exceptional circumstances specified under the other provisions of Evidence Act. Logically, a concession at the bar regarding the content of a written agreement including the fact as to who are the parties to

¹⁶ 20.. That apart, Shri A. Krishnan, learned counsel for the respondent, at the very outset had admitted that the findings recorded by the learned District Judge to say that the Assignment Agreement is a tripartite agreement is not correct and the objection in this regard raised by Shri V.K. Tankha, learned Senior Advocate, may be accepted, he agrees that the same is a *Bi parte* agreement.

¹⁷ The Indian Evidence Act, 1872 – **Section 3. Facts in issue.**– The expression “facts in issue” means and includes – any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

¹⁸ **Section 91 – Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents** – When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

¹⁹ **Section 63 – Secondary evidence.** Secondary evidence means and includes.— (1) certified copies given under the provisions hereinafter contained;

(2) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(3) Copies made from or compared with the original;

(4) Counterparts of documents as against the parties who did not execute them;

(5) Oral accounts of the contents of a documents given by some person who has himself seen it.

the document, in our opinion, does not stand on any different footing than the oral evidence of the parties. The concession made by the counsel for the respondent is not secondary evidence admissible under any of the clauses of Section 65 of the Evidence Act. Therefore, in our opinion, the concession made at the bar by the learned counsel (for the respondent herein) before the High Court does not preclude the respondent from asserting that AGREEMENT-II is a tripartite agreement. The tenor and content and the fact that representatives of the three companies signed the document cannot be ignored simply on the basis of an uninformed concession made at the bar.

26. Therefore, the question whether two Indian companies could enter into an agreement to be governed by the laws of another country would not arise in this case.

So long as the obligations arising under the AGREEMENT-I subsists and the American company is not discharged of its obligations under the AGREEMENT-I, there is a 'foreign element' therein and the dispute arising therefrom. The autonomy of the parties in such a case to choose the governing law is well recognised in law. In fact, Section 28(1) (b)²⁰ of the 1996 Act expressly recognises such autonomy.

27. We then proceed to examine the question whether the suit filed by the appellant is maintainable or barred by Section 45 of the 1996 Act as contended by the respondents or any other provisions of the 1996 Act or any other law,

²⁰ Section 28. Rules applicable to substance of dispute.— (1) Where the place of arbitration is situate in India,—

- (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
- (b) in international commercial arbitration,—
 - (i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
 - (ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
 - (iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

because if a suit is barred by law the Court is bound to take note of the bar whether such a question is raised by the parties or not. To begin with a survey of the history and background of the 1996 Act and its scheme would be helpful in answering the various questions that arise in this appeal.

28. The history and development of the law of arbitration in this country was very succinctly captured by this Court in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. etc.*, (2012) 9 SCC 552²¹ (for short "BALCO"). It traced out the origin and development of not only the domestic law of arbitration in India but also the international arrangements regarding arbitration agreements and awards made in one country but sought recognition or enforcement in another country - the Geneva Protocol on Arbitration Clauses, 1923 and the Geneva Convention on Execution of Foreign Arbitral Awards, 1927 and the New York Convention, 1958. It also indicated how two consequential enactments known as the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961 came to be made by the Parliament to give effect to the above international arrangements.

29. All the three international legal instruments dealt with the various aspects of problems which could arise out of an international commercial arbitration, such as the recognition of arbitration agreements entered into and enforcement of arbitral awards made in countries other than the one in which the arbitration agreement is entered into or award is sought to be enforced. Whereas the two enactments dealt²² with the enforcement of "foreign awards" and matters incidental thereto in this country.

30. With the increase of international trade and commerce in the second half of the 20th Century, all the abovementioned assignments were considered inadequate and, therefore, the United Nation Commission on International Trade Law adopted a model law on international arbitration popularly known

(2) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it do so.

(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.

²¹ See para 32 to 38 of *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. etc.* (2012) 9 SCC 552

²² Repealed by Section 85 of the 1996 Act.

as UNCITRAL. The General Assembly of the United Nations by a resolution dated 11.12.1985 recommended that "all States give due consideration to the Model Law on an international commercial arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice". Pursuant to the said recommendation, the 1996 Act came to be made by the Parliament. It is in four parts. Relevant for enquiry are only Parts I and II.

31. Part-II of the 1996 Act is headed "Enforcement of Certain Foreign Awards". It contains provisions (Section 44 to 60 divided into two Chapters I and II) dealing with the enforcement of foreign awards falling under two categories i.e. New York Convention Award and Geneva Convention Awards. Sections 44 to 52 (falling under Chapter I) deal with the New York Convention Awards, the remaining sections (falling under Chapter-II) deal with Geneva Convention Awards. Both the classes of Awards are referred to as "foreign awards" in Chapters I and II of Part-II. Section 44(a)²³ and 53(a)²⁴ define the expression "foreign award" for the purposes of Chapters I and II respectively to mean an arbitral award in pursuance of an agreement for arbitration to which the convention set forth in Ist or protocol and convention set forth in the IInd Schedule of the Act respectively applies. Such foreign awards are deemed to be a decree of a Court²⁵. Various conditions which render a foreign award unenforceable are specified in Sections 48 and 57 respectively. The other provisions deal with matters incidental to the enforcement of foreign awards. It is significant to note that Part II does not deal with any matter pertaining to any step anterior to the making of an (foreign) arbitral award.

32. We now deal with the scheme of Part I of the 1996 Act. It contains provisions which defines an arbitration agreement, its form and content, the procedure for appointment of arbitrators, jurisdiction of arbitral tribunals, the procedure to be followed by the arbitral tribunals, form and content of the arbitral awards, the forum before which and the procedure by which the arbitral award can be challenged and all matters incidental and ancillary to the above-

²³ "Section 44 ... in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies,"

²⁴ "Section 53(a) in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies,"

²⁵ See Section 49 and 68

mentioned aspect of the arbitration.

33. This Court in *Bhatia International v. Bulk Trading S.A. & Another*, (2002) 4 SCC 105 considered the question whether Part 1 of 1996 Act would apply to an arbitration where the place of arbitration is outside India.²⁶ On consideration of the matter, this Court held as follows:

“32. To conclude, we hold that the provisions of Part 1 would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part 1 would completely apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part 1. In cases of international commercial arbitrations held out of India provisions of Part 1 would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part 1, which is contrary to or excluded by that law or rules will not apply.”

34. However, in a subsequent judgment in *BALCO*, a larger bench of this Court disagreed²⁷ with the conclusions recorded in *Bhatia International* and held as follows:

²⁶ The parties had a contractual relationship and the contract contained an arbitration clause which provided that in the event of any dispute the matter would be resolved by arbitration as per the International Chamber of Commerce. Eventually, the dispute arose and the respondent before this Court filed a request for arbitration under ICC. ICC appointed the sole arbitrator and parties agreed that the arbitration be held in Paris. The first respondent thereafter moved an application under Section 9 of the 1996 Act in the Court of Addl District Judge, Indore against the appellant. Such an application was resisted on the ground of maintainability successfully by the appellant upto the High Court. Therefore, the appeal to this Court.

²⁷ Para 195. With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in *Bhatia International v. Bulk Trading S.A.*, (2002) 4 SCC 105 and *Venture Global Engg. v. Satyam Computer Services Ltd.* (2008) 4 SCC 190. In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign-seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simpliciter would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.”

“194. ... We are of the considered opinion that Part I of the Arbitration Act, 1996 **would have no application to international commercial arbitration held outside India.** Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in the Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996.

196. We conclude that Part I of the Arbitration Act, 1996 is applicable only to *all the arbitrations* which take place within the territory of India.”

However, such a declaration of law was directed to operate only prospectively.²⁸

35. In view of the law laid down in **BALCO**, it is the submission of the appellant that since the AGREEMENT-I and AGREEMENT-II are anterior to **BALCO** judgment, the case on hand is governed by the law declared by this Court in *Bhatia International* (supra).

36. The case of the appellant has been that in view of the assignment under AGREEMENT-II, the dispute becomes purely a dispute between two Indian companies (parties to this appeal). Therefore, any arbitration agreement between such companies cannot be an agreement to which the (New York) Convention set forth in the First Schedule of the 1996 Act applies. If such Convention does not apply, the question of application of Section 45 does not arise. In view of the judgment of this Court in *Bhatia International*, only

²⁸ Para 197 of the **BALCO** case reads-

“The judgment in *Bhatia International* [(2002) 4 SCC 105] was rendered by this Court on 13-3-2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in *Venture Global Engg.* [(2008) 4 SCC 190] has been rendered on 10-1-2008 in terms of the ratio of the decision in *Bhatia International* [(2002) 4 SCC 105]. Thus, in order to do complete justice, we hereby order that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter.”

Part-I of the 1996 Act applies and, therefore, Interlocutory Application No.5 of 2015 is liable to be rejected.

37. From a plain reading of Part I of the 1996 Act, having regard to the scheme of the Act and language of Section 2(2), Part I of the Act applies to all arbitrations which take place in India. It is irrelevant whether any one of the parties to such arbitration agreement is an Indian entity (either a citizen or body corporate incorporated in India etc.) or not. If two non-Indian entities agree to have their disputes resolved through the process of arbitration with seat of arbitration in India, such an arbitration would obviously be governed by the provisions of Part I of the Act. By virtue of the law declared by this Court in the case of *Bhatia International* (supra), even if the seat of arbitration is not in India, if one of the parties to such arbitration is an Indian entity²⁹, Part I would apply unless parties by an agreement in such a case choose to exclude the application of all or some of the provisions of Part I by an agreement.³⁰

38. The question, therefore, is whether the arbitration agreement in question is one falling exclusively under Part-I of the 1996 Act or falling under both parts of the 1996 Act. *Bhatia International* never declared that the arbitration agreement falling under the scope of Part-I of the 1996 Act would automatically cease to fall under Part-II of the 1996 Act. On the other hand there are observations to the contra.³¹ A recent judgment of this Court³² clearly recorded that *Bhatia International* judgment leads to such a possibility. However, with reference to the agreements entered into subsequent to *BALCO*, this question

²⁹ Though *Bhatia's* case did not make it express, the requirement of some legal connection between the arbitration and India either the territory or sovereignty is essential and therefore necessarily implicit in the declaration made in the judgment. Hence the requirement of at least one of the parties to be an Indian entity.

³⁰ Parties to the AGREEMENT I agreed to exclude the application of Part I of the Arbitration Act except Sec. 9 thereof. The relevant part of Art. XII Sec. 12.2 (a) reads as follows: "Save and except the provision under Section 9, the provisions of the Part I of (Indian) Arbitration and Conciliation Act, 1996, as amended (the "Arbitration Act") shall not apply to the arbitration.

³¹ See paras 26 and 32 of *Bhatia International*

³² *Union of India v. Reliance Industries Limited & Others* (2015) 10 SCC 213

"15. However, this Court in *Bhatia International v. Bulk Trading S.A.*, (2002) 4 SCC 105, resurrected this doctrine of concurrent jurisdiction by holding, in para 32, that

does not arise. It is only for the interregnum between the date of the 1996 Act and the date of the judgment, in *BALCO* such a question arises.

39. To determine the question, whether an arbitration agreement governed by the law laid down by *Bhatia International* is one which falls exclusively within the operation of Part-I or one which falls within the operation of both Part-I and Part-II of the 1996 Act, depends on three factors

- i. who are the parties to the arbitration agreement;
- ii. the venue of the arbitration; and
- iii. in a foreign seated arbitration where one of the parties is not an Indian entity whether parties agreed to exclude the application of Part I.

40. In any case, whether an arbitration agreement is exclusively governed by the provisions of either Part-I or by Part-II of the 1996 Act or both (as discussed earlier), judicial authorities seized of an action in respect of which there exists an arbitration agreement are bound to refer the dispute between the parties to arbitration and are precluded under Sections 8 and 45 from adjudicating the dispute (of course) subject to the other conditions stipulated in the two sections.

41. The instant appeal as already noticed arises out of an order in Interlocutory Application No.5 of 2015 filed by the respondent herein in the suit filed by the appellant herein. In the Interlocutory Application, the

even where arbitrations are held outside India, unless the parties agree to exclude the application of Part-I of the Arbitration Act, 1996, either expressly or by necessary implication, the courts in India will exercise concurrent jurisdiction with the court in the country in which the foreign award was made. *Bhatia International* was in the context of a Section 9 application made under Part I of the 1996 Act by the respondent in that case for interim orders to safeguard the assets of the Indian company in case a foreign award was to be executed in India against it. *The reductio ad absurdum of this doctrine of concurrent jurisdiction came to be felt in a most poignant form in the judgment of Venture Global Engg v. Satyam Computer Services Ltd., (2008) 4 SCC 190*, by which this Court held that a foreign award would also be considered as a domestic award and the challenge procedure provided in Section 34 of Part I of the 1996 Act would therefore apply. This led to a situation where the foreign award could be challenged in the country in which it is made; it could also be challenged under Part-I of the 1996 Act in India; and could be refused to be recognised and enforced under Section 48 contained in Part II of the 1996 Act."

respondent made two prayers³³, (i) to reject the plaint in the suit filed by the appellant being barred by law; and (ii) to refer the dispute between the appellant and the respondent to arbitration as contemplated under the AGREEMENT.

42. Insofar as the first of the abovementioned two prayers is concerned, the applicant's/respondent case is to be found at para nos.16 and 17 of the application. In substance, the plea is that the suit is barred by virtue of Section 45 of the 1996 Act and, therefore, the plaint is liable to be rejected. Section 45 reads as follows:

“45. Power of judicial authority to refer parties to arbitration.—Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

It can be seen from Section 45 that a judicial authority in this country when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44 “shall refer the parties to arbitration” at the request of one of the parties to the agreement. The agreement referred to in Section 45 is one contemplated in Section 44. Section 44³⁴ contemplates an arbitration agreement to which the New York Convention applies.

³³ “i.. Refer the disputes between the Applicant and the Respondent to Arbitration (bearing ICC No.20432/TO as contemplated under the Agreement;

ii. Reject the Plaint in C.S. (O.S.) 4A of 2014 as being barred by law and pass any other Orders that this Court may deem fit in the interest of justice.”

³⁴ Relevant portion of Section 44 reads as follows:

“44. Definition.—In this Chapter, unless the context otherwise requires, “foreign award” means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies,

(b) x x x.”

43. Section 45, permits an enquiry into the question whether the arbitration agreement is “null and void, inoperative and incapable of being performed”.

44. The appellant’s case as evidenced by the plaint in its suit is that parts of the AGREEMENT-I though created valid rights and obligations between the (original) parties thereto ceased to be valid subsequent to the assignment under AGREEMENT-II. Because (according to the appellant’s understanding) the parties to AGREEMENT-II are only two companies incorporated in India. They could not have agreed that the governing law of the agreement should be the law of the United Kingdom. According to the appellant, such a stipulation in the agreement would be contrary to the public policy and hit by Sections 23 of the Indian Contract Act, 1872. Therefore, the arbitration agreement initiated by the respondent cannot be proceeded with.

45. It is settled law that an arbitration agreement is an independent or “self contained” agreement. In a given case, a written agreement for arbitration could form part of another agreement, described by Lord Diplock as the “substantive contract”³⁵ by which parties create contractual rights and obligations. Notwithstanding the fact that all such rights and obligations arising out of a substantive contract and the agreement to have the disputes (if any, arising out of such substantive contract) settled through the process of arbitration are contained in the same document, the arbitration agreement is an independent agreement. Arbitration agreement/clause is not that governs rights and obligations arising out of the substantive contract. It only governs the way of settling disputes between the parties.³⁶

46. In our opinion, the scope of enquiry (even) under the Section 45 is confined only to the question whether the arbitration agreement is “null and void, inoperative or incapable of being performed” but not the legality and

³⁵ *Aughton Ltd. v. MF Kent Services Ltd.* (1991) 57 BLR 1 (CA)

“the status of a so-called ‘arbitration clause’ included in a contract of any nature is different from other types of clauses because it constitutes a ‘self contained contract collateral or ancillary to’ ‘the substantive contract’. These are the words of Lord Diplock in *Bremer Vulkan v. South India Shipping* [1981] AC 909. It is a self-contained contract, even though it is, by common usage, described as an “arbitration clause”. It can, for example, have a different proper law from the proper law of the contract to which it is collateral. This status of “self-contained contract” exists irrespective of the type of substantive contract to which it is collateral.

³⁶ See *T.W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd.* (1912) AC 1

validity of the substantive contract.

47. The case of the appellant as disclosed from the plaint is that Article X, Section 10.2 is inconsistent with some provisions of the Indian Contract Act, 1872, and hit by Section 23 of the Indian Contract Act (as being contrary to public policy). It is a submission regarding the legality of the substantive contract. Even if the said submission is to be accepted, it does not invalidate the arbitration agreement because the arbitration agreement is independent and apart from the substantive contract. All that we hold is that the scope of enquiry under the Section 45 does not extend to the examination of the legality of the substantive contract. The language of the Section is plain and does not admit of any other construction. For the purpose of deciding whether the suit filed by the appellant herein is maintainable or impliedly barred by Section 45 of the 1996 Act, the Court is required to examine only the validity of the arbitration agreement within the parameters set out in Section 45, but not the substantive contract of which the arbitration agreement is a part.

48. This Court in *Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums*, (2003) 6 SCC 503, which was a case where there was a dealership agreement between the parties for supply of petroleum products to the respondents before this Court. On the ground that the dealer committed certain irregularities in business, supply of petroleum products was suspended by the appellant for a period of 30 days and along with the penalty of Rs.15,000/-. The dealer filed a civil suit seeking a declaration that the action of the HPCL was illegal and arbitrary. In the said suit, HPCL filed an application praying that the dispute be referred to arbitration in view of the arbitration agreement between the parties. The said application was dismissed by the civil court holding that the dispute between the parties was not covered by the arbitration agreement which finding came to be confirmed by the High Court in a Revision. Dealing with the question, this Court held:

“16. It is clear from the language of the section, as interpreted by the Constitution Bench judgment in *Konkan Rly.* that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the Arbitral Tribunal concerned. ... the courts below ought not to have proceeded to examine the applicability of the arbitration clause to the facts of the case...”

If it is impermissible for a civil court to examine whether a dispute is really covered by the arbitration agreement, we see no reason to hold that a civil court exercising jurisdiction under Section 45 could examine the question whether the substantive agreement (of which the arbitration agreement is a part) is a valid agreement. No doubt that HPCL case was in the context of the bar contained in Section 8 of the 1996 Act. But the same principles of interpretation apply even for the interpretation of Section 45.

49. The stipulation regarding the governing law contained in Article XII Section 12.1 is an independent stipulation applicable to both the substantive agreement and the arbitration agreement. Either of the agreements can survive in an appropriate case without the other. For example, if in a given case, (of a across border contract) parties can agree upon for the governing law but do not have any agreement for settlement of dispute through arbitration, it would not make any legal difference to the governing law clause (if otherwise valid) and bind the parties. The judicial forum before which the dispute (if any arises) falls for adjudication is normally obliged to apply such chosen governing law - a principle of international law recognised by this Court³⁷. Similarly, it is possible in a given case, parties to a substantive contract in a cross border transaction agree for the resolution of the disputes, if any, to arise out of such contract through arbitration without specifying the governing law. In such case, it would be the duty of the arbitrator to ascertain the "proper law" applicable to the case in terms of the established principles of international law. It is also possible that in a given case parties agree that the governing law of the substantive contract be that of one country and the governing law of the arbitration agreement be of another country³⁸. The principles of law in this regard are well settled. In all of the cases, the validity of either of the clauses/

³⁷ *Reliance Industries Limited & Another v. Union of India*, (2014) 7 SCC 603

"76.4 Therefore, the remedy against the award will have to be sought in England, where the juridical seat is located. However, we accept the submission of the appellant that since the substantive law governing the contract is Indian law, even the courts in England, in case the arbitrability is challenged, will have to decide the issue by applying Indian law viz. the principle of public policy, etc., as it prevails in Indian law.

³⁸ In fact, the transaction which was the subject matter of dispute in *Union of India v. Reliance Industries Limited & Others*, (2015) 10 SCC 213 is one such. The substantive agreement is governed by the Indian law and the arbitration agreement by the law of England. See Para 2 of the said judgment.

agreements does not depend upon the existence of the other.

Therefore, the examination of the question of consistency of Article X Section 10.2 (part of the substantive contract) with Section 23 of the Contract Act are beyond the scope of the enquiry while adjudicating the validity of the arbitration agreement either under Section 45 or Section 8 (amended or original) of the 1996 Act. Therefore, the submissions of the appellant in this regard are required to be rejected.

50. We are left with only one question. Relief No.(iv) claimed in the suit of the appellant is for decree of declaration “against the defendant”, respondent herein, that Article XII of AGREEMENT-I is “null and void, inoperative and unenforceable”.

Obviously Prayer No.(iv) is also based on the assumption that the dispute is exclusively between the appellant and the respondent, and therefore, there could not be an agreement between them for arbitration of their disputes arising out of the substantive agreement to be governed by the laws of the United Kingdom. In view of our conclusion that the dispute is not exclusively between two parties to the suit, such a relief could not be given in the suit, because the prayer itself is misconceived.

51. In view of the above, we see no reason to interfere with the conclusions recorded by the courts below. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

PER : ABHAY MANOHAR SAPRE, J.

52. I have had the advantage of going through the elaborate, well considered and scholarly draft judgment proposed by my esteemed Brother Jasti Chelameswar, J. I entirely agree with the reasoning and the conclusion, which my erudite Brother has drawn, which are based on remarkably articulate process of reasoning. However, having regard to the issues involved, which were ably argued by learned counsel appearing in the case, I wish to add few lines of concurrence.

53. The question that arises for consideration in this appeal is whether the Courts below were justified in allowing the application filed by the respondent (defendant) under Section 45 of the Arbitration and Conciliation Act, 1996 (for short "The Act") read with Order VII Rule 11 of the Code of Civil

Procedure 1908 (in short “the Code”) in a civil suit filed by the appellant (plaintiff) for declaration and, in consequence, were justified in dismissing the appellant’s civil suit?

54. The aforementioned question arose in the context of the facts, which are succinctly stated by my learned Brother in his judgment. I need not, therefore, repeat the same facts again in my judgment.

55. Though both the learned senior counsel appearing for the parties argued several issues elaborately in support of their respective contentions but in my view, the aforesaid question including three questions posed by the appellant in their written submissions (quoted in Para 13 by my learned Brother in his judgment) need to be examined in the first instance by finding out the true nature and import of the two agreements referred to as (Agreement-I and Agreement-II) and relied on by the parties and also after taking into consideration the law laid down by this Court in the case of *Bhatia International vs. Bulk Trading S.A. & Ors.*, (2002) 4 SCC 105 and *Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc.* (in short “Balco”), (2012) 9 SCC 552.

56. At the outset, I may take note of the rule of interpretation, which is applicable while construing any Deed. The learned Judge Vivian Bose, J. speaking for the Bench in his inimitable style of writing succinctly laid down the rule in a leading decision of this Court in *Pandit Chunchun Jha vs. Sheikh Ebadat Ali & Anr.*, AIR 1954 SC 345 in following words:

“Deed – Construction – (T.P. Act, 1882, S. 8)

Where a document has to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. If, however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended.”

57. Perusal of Agreement-I indicates that it is executed between the

appellant (an Indian company) and the American Company (NAC) whereas Agreement-II indicates that it is executed between the appellant, respondent (NACC—an Indian Company) and an American Company (NAC). Secondly, the Agreement-II is styled as "Assignment and Assumption Agreement".

58. The question that arises for consideration is whether Agreement-II is a "Deed of Assignment"? While dealing with the principles relating to transfer of actionable claims under Section 130 of the Transfer of Property Act, 1882, the learned author Sir D.F. Mulla in his celebrated commentary on Transfer of Property Act (11th Edition page 1028) dealt with the issue of "Assignment of Contracts" and explained its meaning and further explained as to what can be assigned by the contract.

59. The learned author said, *"The benefit of a contract can be assigned but not the burden, for the promisor cannot shift the burden of his obligation without a novation."*

60. The learned author quoted a passage from an old case of Calcutta High Court authored by J Sale, J. in *Jaffer Meher Ali vs. Budge-Budge Jute Mills Co.*, (1906) ILR 33 (Calcutta) 702 which reads as under:

"The rule as regards the assignability of contracts in this country is that the benefit of a contract for the purchase of goods as distinguished from the liability thereunder may be assigned, understanding by the term *benefit*, the beneficial right or interest of a party under the contract and the right to sue to recover the benefits created thereby. This rule is, however, subject to two qualifications; first, that the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to fulfil, and next that the contract is not one which has been induced by personal qualifications or considerations as regards the parties to it."

61. In my view, the law laid down by the Calcutta High Court in the case of *Jaffer Meher Ali* (supra) is the correct principle of law on the subject.

62. As mentioned above, examination of the Agreement-I would go to show that firstly, Agreement-I is executed between the appellant and the American Company (NAC) whereas the Agreement-II is executed between

the appellant, respondent (NACC-India) and American Company (NAC). In other words, Agreement-I is a bi-party agreement between an Indian Company (appellant) and American Company (NAC) whereas Agreement-II is a tri-partite agreement between the three companies viz., two Indian companies (appellant and the respondent) and third-an American company(NAC); Secondly, the Agreement-II recognizes transfer of the rights of the original contractee, i.e., American Company (NAC) coupled with their obligations specified in the Agreement-I; Thirdly, the obligations specified in the Agreement-I are not fully performed much less to the satisfaction of the parties concerned but are still to be performed *inter se qua* each other; Fourthly, by virtue of the terms of the Agreement-II, the parties are still under obligation to perform and, if necessary, enforce their respective rights and obligations arising out of Agreement-I against each other depending upon the nature of breaches when committed by any of the parties; Fifthly, Agreement-II appears to be in the nature of amendment to the Agreement-I because while recognizing the existence of Agreement-I parties have incorporated some new clauses and added one new party to the Agreement-II, i.e., the respondent (NACC-India) herein.

63. Keeping in view the aforementioned facts which, in my view, emerge from the reading of two agreements and applying the aforementioned principle of law, I am of the considered opinion that the Agreement-II is not a "Deed of Assignment". It is, *inter alia*, for the reason that it seeks to transfer interest in the contract with burden, i.e., obligations of a contracting party.

64. In my considered opinion, once it is noticed that firstly, the Agreement-II is a tri-partite agreement between the appellant-an Indian company, the respondent-an Indian company (NACC-India) and the original contractee party, i.e., an American Company (NAC) and secondly, the Agreement-II is essentially in the nature of an amendment to the Agreement-I, Sections 12.1 and 12.2(a) to (f) of Article XII of the Agreement-I become a part of Agreement-II.

65. *A fortiori*, all the three parties to the Agreement-II are then bound or/and become entitled to take recourse to Article XII and Sections 12.1, 12.2(a) to (f) of the Agreement-I for enforcement of their respective rights and obligations against each other in terms of respective clauses of Agreement-I and Agreement-II.

66. That apart, in my view, reading of Agreement-I and Agreement-II also does not indicate that any novation of contract has emerged *inter se* parties. It is for the reason that in order to constitute a "Novation of contract", it is necessary to prove, in the first place, that the contract is in existence and second, such contract is substituted by a new contract either by the same parties or different parties with a mutual consideration of discharge of the old contract.

67. In other words, the novation of contract comprises of two elements. First is the discharge of one debt or debtor and the second is the substitution of a new debt or debtor. The novation is not complete unless it results in substitution, recession or extinguishment of the previous contract by the new contract. Mere variation of some terms of a contract does not constitute a novation. (See **Pollock & Mulla Indian Contract and Specific Relief Acts, 13th Edition, pages 1225-1226**).

68. As observed supra, execution of Agreement-II has not resulted in substituting or rescinding or extinguishing Agreement-I. On the other hand, it recognized the existence of Agreement-I and resulted in its amendment by adding some new clauses and one party.

69. In these circumstances, it is not possible to hold that as a result of execution of Agreement-II, novation of contract has come in to be *inter se* parties.

70. This takes me to examine the legal position arising in the case, namely, that if one party to the arbitration agreement is a foreign company then whether such agreement becomes an "international commercial arbitration" within the meaning of Section 2(f) of the Act.

71. In this case, I find that NAC is an American company and being a party to Agreement-I as also to Agreement-II along with two Indian companies (appellant and the respondent), a *fortiori*, Agreement-I and Agreement-II become an "international commercial arbitration" within the meaning of Section 2(f) of the Act which, in clear terms, provides that if one of the parties to the agreement is a foreign company then such agreement would be regarded as "international commercial arbitration".

72. One can not dispute the legal position arising in the light of law laid down by this Court in *Balco's* case (supra) (See Para 197 at page 648 of the

decision) that the case at hand would be governed by the law laid down in the case of *Bhatia International* (supra) because the case at hand arose prior to *Balco* regime. The law laid down in *Bhatia International* is contained in para 32, which reads as under:

“32. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.”

(Emphasis supplied)

73. Article XII of Agreement-I deals with governing law and dispute resolution. It consists of Sections 12.1 and 12.2(a) to (f). Section 12.1 provides that the agreement shall be governed by laws of U.K whereas Section 12.2(a) provides that firstly, all the disputes shall be resolved by ICC as per ICC rules; Secondly, the place of arbitration shall be London; and thirdly, the provisions of part I of the Act will not apply to the arbitration in question.

74. In my opinion, Sections 12.1 and 12.2(a) of Article XII are in conformity with the law laid down in *Bhatia International* (supra) and thus satisfy the test laid down therein. These sections are, therefore, capable of being given effect to in the manner provided therein by the parties *inter se* for deciding their disputes, which have arisen between them in relation to Agreement-I and Agreement-II.

75. In the light of foregoing discussion, we need not consider any other argument of learned counsel for the parties.

76. Before parting with the case, we consider it apposite to deal with one issue relating to the exercise of jurisdiction by the Court under Section 45 of the Act which reads as under:

“45.Power of judicial authority to refer parties to arbitration.- Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

77. Mere reading of Section 45 would go to show that the use of the words "shall" and "refer the parties to arbitration" in the section makes it legally obligatory on the Court to refer the parties to the arbitration once it finds that the agreement in question is neither null and void nor inoperative and nor incapable of being performed. In other words, once it is found that the agreement in question is a legal and valid agreement, which is capable of being performed by the parties to the suit, the Court has no discretion but to pass an order by referring the parties to the arbitration in terms of the agreement.

78. In this case, I find that the Trial Court though allowed the application filed by the respondent (defendant) under Section 45 of the Act by recording the findings that the agreement in question is legal and proper and capable of being performed but it did not pass any consequential order as required under Section 45 by referring the parties to the arbitration in terms of Section 12.2(a) and instead simply dismissed the suit as not maintainable.

79. In our view, the order thus needs a modification to this extent only so as to make the order in conformity with the requirement of Section 45 of the Act.

80. In the light of foregoing discussion and subject to aforesaid modification of the impugned order, I entirely agree with the reasoning and the conclusion arrived at by my learned Brother.

Order accordingly.

I.L.R. [2017] M.P., 549.

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 13304/2015 (Jabalpur) decided on 25 February, 2016

PRABHAT PATHAK & anr.

...Petitioners

Vs.

LIFE INSURANCE CORPORATION & anr.

...Respondents

Life Insurance Corporation of India (Employees) Pension Rules, 1995, Rule 2(k) – Definition of ‘Family’ – Entitlement of Pension – Husband and son of deceased claiming pension – Earlier Writ Petition filed by husband seeking pension for the son was disposed of with a direction to respondent to pass a suitable cogent order whereby in compliance, respondent passed the impugned order in which pension was sanctioned in favour of son and son was directed to obtain NOC from the petitioner No.1 (husband of deceased) – In the present petition, Plea of estoppel was raised by the respondent on the ground that husband has waived his right in the earlier petition – Held – Merely because in the order of the earlier writ petition it is recorded that petitioner was claiming pension for son, cannot deprive the petitioner to seek pension – Under the Pension Rules, definition of ‘Family’ includes husband in case of female employee and he is entitled for pension because he falls in the ambit of ‘Family’ – It is trite law that no estoppel operated against the statute – Respondents depriving petitioner husband from pension is impermissible as per Rules – Petition allowed – Respondents directed to pay pension to petitioner husband in accordance with Pension Rules along with interest @ 12% p.a. and cost of Rs. 5000. (Paras 10, 12, 13, 14 & 17)

भारतीय जीवन बीमा नियम (कर्मचारी) पेंशन नियम, 1995, नियम 2(के) – ‘परिवार’ की परिभाषा – पेंशन की हकदारी – मृतिका के पति एवं पुत्र द्वारा पेंशन का दावा किया जाना – पूर्व में पति द्वारा पुत्र के लिए पेंशन चाहते हुए प्रस्तुत की गई रिट याचिका प्रत्यर्थी को एक उपयुक्त तर्कपूर्ण आदेश पारित करने के निदेश के साथ निराकृत की गई थी जिसके अनुपालन में प्रत्यर्थी ने आक्षेपित आदेश पारित किया जिसमें पेंशन पुत्र के पक्ष में मंजूर की गई थी तथा पुत्र को याची क्र. 1 (मृतिका के पति) से अनापत्ति प्रमाण-पत्र अभिप्राप्त करने हेतु निदेशित किया गया था – वर्तमान याचिका में, प्रत्यर्थी द्वारा विबंध का अभिवाक् इस आधार पर उठाया गया कि पति ने पूर्व रिट याचिका में अपने अधिकार का अधित्यजन किया था –

अभिनिर्धारित – मात्र इसलिए कि पूर्व रिट याचिका के आदेश में यह अभिलिखित है कि याची, पुत्र के लिए पेंशन का दावा कर रहा था, याची को पेंशन चाहने से वंचित नहीं कर सकता – पेंशन नियमों के अंतर्गत 'परिवार' की परिभाषा में महिला कर्मचारी के प्रकरण में पति सम्मिलित है तथा वह पेंशन का हकदार है क्योंकि वह 'परिवार' की परिधि में आता है – यह प्रचलित विधि है कि कोई विवध कानून के विरुद्ध प्रवर्तित नहीं होता – प्रत्यर्थागण द्वारा याची पति को पेंशन से वंचित किया जाना नियमों के अनुसार अननुज्ञेय है – याचिका मंजूर – प्रत्यर्थागण को याची पति को पेंशन नियमों के अनुसार 12 प्रतिशत प्रतिवर्ष की दर से ब्याज के साथ पेंशन तथा रु. 5000/- व्यय का भुगतान करने हेतु निदेशित किया गया।

Cases referred:

1992 (Supp) 1 SCC 5, AIR 1955 SC 504, 1999 (6) SCC 464, 2013 (4) MPLJ 35, 1994 (2) SCC 240.

Manoj Chandurker, for the petitioners.

Mukhtar Ahmad, for the respondents.

ORDER

SUJOY PAUL, J. :- The petitioners have fought a long drawn battle in the corridors of the Court. This matter has a checkquered (sic:chequered) history.

2. Draped in brevity, the relevant facts are that the wife of petitioner No.1 was working as Assistant in respondent Corporation. She died on 27/09/1998. The petitioner No.2 was minor at the time of death of her mother. The petitioner No.1 preferred a representation for grant of pension as per the rules namely Life Insurance Corporation of India (employees) Pension Rules 1995 (hereinafter called as "Pension Rules"). Since pension was not released in favour of the petitioners, the petitioner No.1 filed W.P. No.5141/2006 before this Court which was disposed of on 18/12/2008. The respondents/ Corporation was directed to dwell upon the claim put-forth by the petitioners and pass a suitable cogent order within stipulated time.

3. Shri Manoj Chandurker, learned counsel for the petitioners submits that in obedience of this Court's order, the respondents were required to pass a reasoned order. However, by communication dated 27/02/2009 (AnnexureP/5) the respondents/Corporation informed the petitioner that a testamentary petition is filed by brother of the deceased at Bombay High Court. Since that matter is pending, it is impossible for Corporation to make

payment of pensionary benefits in favour of the petitioners.

4. Shri Chandurker contends that the said testamentary petition was dismissed on 25/06/2010 (Annexure-P/6). Thereafter, petitioner preferred another representation through his counsel Annexure-P/7. In turn, the respondents by communication dated 20/12/2010 informed that the respondents have taken necessary steps for finalizing the pension matter. The said communication is followed by impugned order dated 25/02/2013 (Annexure-P/9). By criticizing this order, Shri Chandurker submits that this order runs contrary to the Pension Rules. In the order it is mentioned that the pension was sanctioned in favour of petitioner No.2 (son of the deceased). The petitioner No.2 was directed to obtain a No Objection from petitioner No.1. In addition, the declaration was desired from both the petitioners that any grant of pension will remain subject to outcome of legal proceedings initiated by Shri Gauri Charan Dubey (brother of the deceased).

5. Learned counsel for the petitioners submits that this action of the respondents in depriving the petitioner No. 1 from the fruits of pension is impermissible. As per rules, petitioner No.1 has first right to get the pension. The respondents have adopted the aforesaid *modus operandi* with a view to stop pension in favour of petitioner No.2 soon he attains the age of 25 years.

6. It is submitted that petitioner No.2 has also joined in the present petition which shows that he is also aggrieved by impugned order Annexure-P/9.

7. Shri Mukhtar Ahmed, learned counsel for the Corporation supported the order Annexure-P/9. Shri Ahmed drew the attention of this Court on the order passed by this Court in W.P. No.5141/2006 dated 18/12/2008. He submits that a plain reading of this order makes it clear that petitioner No.1 approached this Court with a prayer that the pension be released in favour of the petitioner No.2. After having taken such a stand, the petitioner is estopped from claiming pension under the rules. Putting it differently, Shri Ahmed contends that petitioner has waived his right to claim pension, in view of, petitioners stand recorded in the order sheet dated 18/12/2008. Shri Ahmed further contends that the petitioner unsuccessfully made an effort to seek review of the order passed in W.P. No.5141/2006. His W.P. No.2845/2012 and subsequent R.P. No.472/2013 were not entertained. In the result, petitioner No. 1 cannot claim pension. Reliance is placed on 1992 (Supplementary 1 SCC 5) *Jaswant Singh Mathura Singh Vs. Ahmedabad Municipal*

Corporation and Others. No other point is pressed by the learned counsel for the parties.

8. I have bestowed my anxious consideration on the rival contentions advanced by the parties and perused the record.

9. Before dealing with the rival stand, I deem it apposite to quote the relevant provisions from the Pension Rules. The "family" is defined as under in the said Rules:

"Wife in the case of a male employee or husband in the case of a female employee.

A judicially separated wife or husband, such separation not being granted on the ground of adultery and the person surviving was not held guilty of committing adultery.

Son who has not attained the age of 25 years and unmarried daughter who has not attained the aged of 25 years including such son or daughter adopted legally before retirement. " (E.S)

10. A plain reading of this definition shows that husband of the deceased is included in the definition of family. The main issue needs consideration is whether petitioner No.1 can be deprived from the fruits of pension on the basis of facts mentioned in the order passed by this Court in W.P. No.5141/2006.

11. If the order dated 18/12/2008 passed in W.P. No.5141/2006 is read in its entirety, it will be clear that this Court has not expressed any opinion on the merits of the case. This Court only directed the respondents to decide the claim of the petitioner by cogent order. There is no undertaking by the petitioner in the said case that he has waived his right to claim pension under the Pension Rules. Thus, the question is whether the principle of waiver/estoppel can be invoked in the factual backdrop of this matter?

12. In the considered opinion of this Court, the said principle has no application in the facts and circumstances of the present case. This is trite law that no estoppel operates against the statute AIR 1955 SC 504 (Thakur Amar Singhji and others Vs. State of Rajasthan and others) and 1999 (6) SCC 464

(M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and others)

13. So far the question of waiver is concerned, merely because it is recorded in order dated 18/12/2008 that petitioner No.1 is claiming pension for his son, it by no stage of imagination can deprive the petitioner No.1 to seek pension. Petitioner No.1, in the teeth of pension rules is entitled to get pension because he falls within the ambit of "family."

14. Thus, in my view, the action of respondents in depriving the petitioner No.1 from the fruits of pension runs contrary to the rules and the same is in impermissible.

15. This is a well settled that pension and retiral dues are not bounty. The same falls within the ambit of 'property' flowing from Article 300-A of the Constitution. In catena of judgments it was held that a person can be deprived from the fruits of property/retiral dues only when law permits to do so. This Court in 2013 (4) MPLJ 35 (Bhaskar Ramchandra Joshi Vs. State of M.P and others) has considered the legal journey on this aspect and opined as under:

"The Apex Court on different occasions had considered the scope and ambit of property. In Madhav Rao Scindia Vs. Union of India, AIR 1971 SC 530 opined that Privy Purse payable to ex-rulers is property. In Nagraj, K Vs. State of A.P., AIR 1985 SC 553, Apex Court opined that right of person to his livelihood is property which is subject to rules of retirement. In State of Kerala Vs. Padmanabhan, AIR 1985 SC 356 the Apex Court opined that right of pension is property under the Government Service Rules. In Madhav Rao Scindia Vs. State of M.P., AIR 1961 SC 298 and State of M.P. Vs. Ranojirao, 1968 MPLJ (S.C.) 785=AIR 1968 SC 1053, the Apex Court opined that property in the context of Article 300-A includes 'money, salary which has accrued pension, and cash grants annually payable by the Government; pension due under Government Service Rules; a right to bonus and other sums due to employees under statute. This view was also taken in 1971 M.P.L.J (S.C), Note 56 = AIR 1971 SC 1409, Deokinandan Vs. State of Bihar. Bombay High Court in

the case reported in 2012(3) Mh.L.J 126. Shapoor M. Mehta Vs. Allahabad Bank opined that retiral benefits including pension and gratuity constitute a valuable right in property. In Deokinandan (Supra) Apex Court opined as under:

"(i) The right of the petitioner to receive pension is property under Article 31 (1) and by a mere executive order the State had no powers to withhold the same. Similarly, the said claim is also property under Article 19 (1) (f) and it is not saved by sub-article (5) of Article 19. Therefore, it follows that the order denying the petitioner right to receive pension affects the fundamental right of the petitioner under Article 19 (1) (f) and 31 (1) of the Constitution and as such the writ petition under Article 32 is maintainable."

16 (sic:17). In the light of aforesaid, it is clear that there is no enabling provision under the Pension Rule which deprives the petitioner No.1 from the fruits of pension. The judgments relied upon by Shri Ahmed in the case of *Jaswant Singh, Mathura Singh* (Supra) has no application in the facts and circumstances of the present case. Petitioners case is squarely covered by the Rules and the respondents/Corporation should have decided their claim strictly in accordance with rules.

15. As analyzed above, the petition deserves to succeed. Resultantly, the impugned order dated 25/02/2013 is quashed. The respondents are directed to pay pension to the petitioner No.1 in accordance with Pension Rules. The entire exercise be completed within 90 days from today. The petitioners shall also be entitled to get interest @2%, P.A, in view of the judgment of Supreme Court reported in 1994 (2) SCC 240 *Union of India Vs. Justice S.S. Sandhawalia (Retd.)* and *others* and *Justice S.S Sandhawalia (Retd.) Vs. Union of India and Others*. The respondents shall pay Rs.5,000/- as cost to the petitioners.

The petition is allowed.

Petition allowed.

I.L.R. [2017] M.P., 555

WRIT PETITION

Before Mr. Justice R.S. Jha

W.P. No. 3583/2013 (Jabalpur) decided on 13 June, 2016

MACHHALIUDYOG SAHAKARI SAMITIMARYADIT

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 85 & 91 – Provision of Appeal – Petition against an order of Additional Collector passed in an appeal, whereby resolution passed by Janpad Panchayat was quashed – Held – Appeal against a resolution of Panchayat is not maintainable u/S 91 of the Adhiniyam and the Rules framed there under but the same can be statutorily assailed u/S 85 of the Adhiniyam before the Prescribed Authority, who in the present case is Collector – Further held, order passed by the Additional Collector is held to be an order of suspension passed u/S 85(1) of the Adhiniyam, as Section 85(1) does not confer any power to the prescribed authority to quash a resolution – Additional Collector directed to take steps u/S 85(2) of the Adhiniyam and forward the matter to the State Government for final adjudication – Petition Disposed. (Para 13)

क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 85 व 91 – अपील का उपबंध – अतिरिक्त कलेक्टर द्वारा एक अपील में पारित आदेश के विरुद्ध याचिका, जिसके द्वारा जनपद पंचायत द्वारा पारित संकल्प अभिखंडित किया गया – अभिनिर्धारित – पंचायत के संकल्प के विरुद्ध अधिनियम की धारा 91 के अंतर्गत एवं उसके अधीन विरचित नियमों के अंतर्गत अपील पोषणीय नहीं है किंतु, उसे कानूनी रूप से अधिनियम की धारा 85 के अंतर्गत विहित प्राधिकारी जो कि वर्तमान प्रकरण में कलेक्टर है, के समक्ष चुनौती दी जा सकती है – आगे अभिनिर्धारित किया गया कि अतिरिक्त कलेक्टर द्वारा पारित आदेश को, अधिनियम की धारा 85(1) के अंतर्गत पारित निलंबन का आदेश माना जाना चाहिए क्योंकि धारा 85(1), विहित प्राधिकारी को संकल्प अभिखंडित करने की कोई शक्ति प्रदत्त नहीं करती – अतिरिक्त कलेक्टर को अधिनियम की धारा 85(2) के अंतर्गत कदम उठाने के लिए और अंतिम न्यायनिर्णयन करने के लिए राज्य सरकार को मामला अग्रेषित करने के लिए निदेशित किया गया – याचिका का निपटारा किया गया।

B. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Government Notification – Prescribed Authority – As per

the government notification dated 05.03.1994 which has been modified from time to time, the Sub Divisional Officer (Revenue) has been notified as prescribed authority for Gram Panchayat and similarly Collector for the Janpad Panchayat and Divisional Commissioner for Zila Panchayat – Resolution of the Janpad Panchayat can be assailed u/S 85(1) of the Adhiniyam before the Collector. (Para 6)

ख. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), सरकारी अधिसूचना – विहित प्राधिकारी – सरकारी अधिसूचना दिनांक 05.03.1994 जिसे समय-समय पर परिवर्तित किया गया है, के अनुसार, उप-खंड अधिकारी (राजस्व) को ग्राम पंचायत हेतु और इसी तरह जनपद पंचायत हेतु कलेक्टर एवं जिला पंचायत हेतु संभागीय आयुक्त को विहित प्राधिकारी के रूप में अधिसूचित किया गया है— जनपद पंचायत के संकल्प को अधिनियम की धारा 85(1) के अंतर्गत कलेक्टर के समक्ष चुनौती दी जा सकती है।

C. *Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 85(1) & 85(2) – Power of Collector – Under Section 85(1), powers of the Collector is confined and limited only to suspending the resolution and thereafter forwarding the matter to the State Government or the nominated officer within 10 days for final adjudication u/S 85(2) of the Adhiniyam.* (Para 13)

ग. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 85(1) व 85(2) – कलेक्टर की शक्ति – धारा 85(1) के अंतर्गत कलेक्टर की शक्तियाँ सीमाबद्ध हैं और केवल संकल्प के निलंबन और तत्पश्चात् अधिनियम की धारा 85(2) के अंतर्गत अंतिम न्यायनिर्णयन हेतु 10 दिनों के भीतर राज्य सरकार या नामनिर्दिष्ट अधिकारी को मामला अग्रेषित करने तक सीमित है।

Cases referred:

2008 (2) MPLJ 194, 2008 ILR Vol. 2 1370, W.A. No. 627/2008 decided on 07.08.2008.

Mukesh Kumar Agrawal, for the petitioner.

Vaibhav Tiwari, P.L. for the respondent/State.

Amit Khatri, for the respondent No. 4.

ORDER

R.S. JHA, J. :- This petition has been filed by the petitioner being aggrieved by order dated 4.12.2012 passed by the Additional Collector, Chhindwara in Appeal Case No.30/A- 89/2011-12 whereby the Additional

Collector, Chhindwara has quashed the resolution passed by the Janpad Panchayat, Chhindwara dated 5.5.2012 (Annexure P/6) by which it was resolved to grant the lease of Pakhadiya Water Tank, Chhindwara to the petitioner for the purposes of undertaking fishing operation for a period of 10 years.

2. The only ground on which the impugned order is challenged by the learned counsel for the petitioner before this Court during arguments is that the Additional Collector/Collector, Chhindwara had no power or authority to entertain an appeal against the resolution passed by the Janpad Panchayat in view of the decisions rendered by this Court in the case of *Sagar Macchua Sahakari Samiti, Seoni Vs. Chief Executive Officer* [2008 (2) MPLJ 194] and in the case of *Devidayal Raikwar Vs. State of M.P.* [2008 ILR Vol.2 1370] as well as the decision of the Division Bench of this Court rendered in the case of *Basant Kumar Vs. State of M.P.* Writ Appeal No.627/2008 decided on 7.8.2008. It is submitted by the learned counsel for the petitioner that the provisions of the Madhya Pradesh Panchayat Raj Adhiniyam, 1993 (herein after referred to as the "Adhiniyam") does not provide for any statutory remedy of appeal under the provisions of Section 91 of the Adhiniyam or the rules framed thereunder against a resolution of the Panchayat and, therefore, the appeal filed by the respondents against the resolution passed by the Janpad Panchayat, Chhindwara was not maintainable and consequently the impugned order passed by the Collector being without authority of law deserves to be quashed.

3. The learned counsel appearing for the respondent no.4 and the learned Panel Lawyer appearing for the State submit that while it has been held by the Division Bench of this Court in the above mentioned cases, that admittedly and undisputedly no appeal under Section 91 or the rules framed thereunder lies against a resolution passed by the Janpad Panchayat, however, the statutory provisions of Section 85 of the Adhiniyam provide for raising a dispute against the resolution before the State Government or the prescribed authority, who in the case of Janpad Panchayat is the Collector and, therefore, no fault can be found in the impugned order or the act of the Collector in entertaining the dispute raised by the respondent under Section 85 of the Adhiniyam.

4. Before I advert to the issue raised by the rival parties, it would be proper to quote the provisions of Section 85 of the Adhiniyam of 1993 as the same is relevant for the purposes of decision of the issues raised by the parties:

“85. Power to suspend execution of orders, etc. - (1) The State Government or the prescribed authority may by an order in writing and for reasons to be stated therein suspend the execution of any resolution passed, order issued, licence or permission granted or prohibit the performance of any Adhiniyam by a Panchayat, if in his opinion, -

(a) such resolution, order, licence, permission or Adhiniyam has not been legally passed, issued, granted or authorised;

(b) such resolution, order, licence, permission or Adhiniyam is in excess of the powers conferred by this Adhiniyam or is contrary to any law;

or

(c) the execution of such resolution or order, or the continuance in force of such licence or permission or the doing of such Adhiniyam is likely -

(i) to cause loss, waste or misapplication of any money or damage to any property vested in the Panchayat;

(ii). to be prejudicial to the public health, safety or convenience;

(iii). to cause injury or annoyance to the public or any class or body of persons; or

(iv). to lead to a breach of peace.

[(2) Whenever an order is made by the prescribed authority under sub-section (1), it shall forthwith and in no case later than ten days from the date of order, forward to the State Government or the Officer nominated by the State Government for this purpose, copy of the order with the statement of reasons for making it, and the State Government or the officer nominated by it [may confirm, set aside, revise or modify the order] or

direct that it shall continue to be in force with or without modification permanently or for such period as may be deemed fit

Provided that no order of the prescribed authority passed under sub-section (1) shall be confirmed, (set aside], revised or modified by the State government or the officer nominated by it without giving the Panchayat concerned a reasonable opportunity of being heard against the proposed order].”

5. From a bare perusal of Section 85 of the Adhiniyam, it is apparent that the State Government or the authority prescribed by the State Government has the power to suspend the resolution passed by the Panchayat or to suspend any lease or permission, etc. issued by it. A perusal of sub-section 2 of Section 85 of the Adhiniyam, makes it further clear that the prescribed authority on taking up the issue under Section 85(1) and on passing an order of suspension is required to forward the matter to the State Government or the authority nominated by the State Government under Section 85(2) of the Adhiniyam, within 10 days for adjudication of the matter.

6. It is also pertinent to note that the State Government in exercise of its powers to delegate and notify under sub-section 3 of Section 93 of the Adhiniyam of 1993, has issued a notification on 5.3.1994 which has subsequently been modified by subsequent notifications including notification dated 12.9.1998 and at item no.40 of the said notification the State Government has notified the prescribed authority under Section 85(1) of the Adhiniyam. A perusal of item no.40 of this notification makes it clear that the Sub Divisional Officer (Revenue) has been notified as the prescribed authority for the Gram Panchayat, Collector has been notified as the prescribed authority for the Janpad Panchayat and the Divisional Commissioner has been notified as the prescribed authority for the Zila Panchayat. From a conjoint reading of Section 85(1) of the Adhiniyam, alongwith the aforesaid notification, it becomes luminicently apparent that a resolution of the Janpad Panchayat can be assailed under Section 85(1) of the Adhiniyam, before the Collector concerned.

7. The aforesaid statutory mandate that the proceedings against a resolution of the Panchayat can be taken up under Section 85 of the Adhiniyam of 1993 has also been stated, elucidated and has been affirmed and confirmed by the Division

bench in the case of "*Sagar Macchua Sahkari Samiti, Seoni Vs. Chief Executive Officer*" [2008 (2) MPLJ 194] as well as in the case of "*Basant Kumar Vs. State of M.P.*" Writ Appeal No.627/2008 decided on 7.8.2008.

8. From a perusal of the decision of the Division Bench in the case of *Sagar Macchua Sahkari Samiti* (supra), it is also clear that this notification dated 5.3.1994, as modified from time to time, was not brought to the notice of the Division Bench and it was in such circumstances that the Division Bench stated that a prescribed authority has not been notified by the State Government. However, in the case of *Basant Kumar* (supra) the delegation of authority was taken note of and it has been held that in the case of Gram Panchayat the Sub Divisional Officer can exercise powers under Section 85(1) of the Adhiniyam of 1993.

9. In view of the aforesaid provisions of Section 85 of the Adhiniyam of 1993 and the notification dated 5.3.1994 as modified from time to time by the State Government and the above cited decisions of this Court, I am of the considered opinion that while an appeal against a resolution of the Janpad Panchayat is not maintainable and cannot be filed under Section 91 of the Adhiniyam or the rules framed thereunder, a dispute against the resolution can be and has rightly been entertained by the Collector in the present case under Section 85(1) of the Adhiniyam.

10. However, from a perusal of the provisions it is abundantly clear that the powers under Section 85(1) of the Adhiniyam conferred upon the prescribed authority is limited only to suspend the resolutions or orders and the exercise of such a power is subject to final scrutiny and decision by the State Government or the nominated officer under Section 85(2) on the matter being transmitted and referred to the State by the prescribed authority under Section 85(1) of the Adhiniyam, as the power to confirm, set-aside, revise or modify a resolution has ultimately and finally been conferred on the authority mentioned in Section 85(2) of the Adhiniyam.

11. When confronted with the aforesaid legal position the learned (sic:learned) counsel for the respondent states that the impugned order passed by the Additional Collector be treated as an order of suspension and the State Government may be directed or he may be granted liberty to take up the issue before the State Government against the same under Section 85(2) of the Act.

12. Learned counsel for the petitioner states that in case the status-quo as

it exists today is continued, i.e. the petitioner is permitted to take up fishing activities in the Pakhadiya Water Tank, Chhindwara in accordance with the interim arrangement made by this Court in the present petition, he has no objection if the preposition is accepted and the matter is taken up by the respondent no.4 under Section 85(2) of the Adhiniyam before the State Government or the nominated officer and is ultimately and finally decided.

13. In view of the aforesaid consensus between the parties, and the agreement expressed by them before this Court, while it is held that an appeal against a resolution of the Panchayat is not maintainable under section 91 of the Adhiniyam and the rules framed thereunder but the same can be statutorily assailed under section 85 of the Adhiniyam before the prescribed authority, who in the present case is the Collector, and that the power conferred on the Collector under Section 85(1) is confined and limited only to suspending the resolution and thereafter forwarding the matter to the State Government or the nominated officer within 10 days for final adjudication under section 85(2) of the Adhiniyam, in the peculiar facts and circumstances of this case, the petition filed by the is disposed off with the following directions :-

(1). That the impugned order dated 4.12.2012 passed by the Additional Collector, Chhindwara is held to be an order passed under Section 85(1) of the Adhiniyam of 1993 as no appeal against the resolution passed by the Janpad Panchayat is maintainable under Section 91 of the Adhiniyam or the rules framed thereunder.

(2). That the impugned order passed by the Additional Collector, Chhindwara shall be treated to be an order of suspension of the resolution and not an order quashing the same in view of the fact that Section 85(1) of the Adhiniyam does not confer any power to quash a resolution on the prescribed authority under Section 85(1) of the Adhiniyam.

(3). A copy of the order passed today shall be furnished to the Additional Collector, Chhindwara by the respondent no.4 or the petitioner within two weeks from today and the Additional Collector/Collector, Chhindwara shall thereafter immediately and forthwith take steps to forward the matter along with the necessary requirements as prescribed under Section 85 (2) of the Adhiniyam to the State Government or the officer nominated by the State Government for this purpose

within ten days from the date of furnishing the certified copy of the order passed by this Court.

(4) The State Government or the officer nominated by the State Government for this purpose shall thereafter immediately take up the issue and decide the same as expeditiously as possible preferably within a period of six months thereafter.

(5). As the prescribed authority under sub-section 1 of Section 85 of the Adhiniyam did not forthwith or in any case within 10 days, forward the matter for final adjudication to the State Government or the officer nominated by the State Government for this purpose in accordance with the procedure prescribed under Section 85(1) of the Adhiniyam, therefore, till the matter is finally decided under section 85(2) of the Adhiniyam, the impugned order of the Collector shall be treated as inoperative and in accordance with the interim order passed by this Court, the resolution of the Janpad Panchayat shall be treated to be operative and the petitioner shall be permitted to take up fishing activities in Pakhadiya Water Tank, Chhindwara.

(6). It is further made clear that the interim arrangement made by this Court would in any case be subject to the ultimate decision taken by the State Government in this regard.

With the aforesaid directions and observation the petition filed by the petitioner is disposed of.

Petition disposed of.

I.L.R. [2017] M.P., 562

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 439/2015 (Jabalpur) decided on 12 July, 2016

P. S. THAKUR (DR.)

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Criminal Procedure Code, 1973 (2 of 1974), Section 24 and Penal Code (45 of 1860), Section 302/34 – Appointment of Special Public Prosecutor – On an application by the complainant, Special Public

Prosecutor was appointed – Petition against – Held – State Government has taken a decision on the basis of report furnished by District Magistrate and Superintendent of Police and there is no allegation against these officers – Relationship of complainant and Special Public Prosecutor is not established – No allegation about competency of Special Public Prosecutor nor it could be established that what prejudice will be caused to the petitioner/accused – Proper procedure has been adopted by the State Government for appointment – State was well within its rights in appointing a Special Public Prosecutor – Petition dismissed.
(Para 20 & 21)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 24 एवं दण्ड संहिता (1860 का 45), धारा 302/34 – विशेष लोक अभियोजक की नियुक्ति – परिवादी के एक आवेदन पर विशेष लोक अभियोजक नियुक्त किया गया – इसके विरुद्ध याचिका – अभिनिर्धारित – राज्य सरकार ने जिला मजिस्ट्रेट एवं पुलिस अधीक्षक द्वारा प्रस्तुत प्रतिवेदन के आधार पर निर्णय लिया है तथा इन अधिकारियों के विरुद्ध अभिकथन नहीं है – परिवादी एवं विशेष लोक अभियोजक का संबंध स्थापित नहीं होता – विशेष लोक अभियोजक की सक्षमता के बारे में कोई अभिकथन नहीं और न ही यह स्थापित हो सका है कि याची/अभियुक्त पर क्या प्रतिकूल प्रभाव कारित होगा – राज्य सरकार द्वारा नियुक्ति हेतु उचित प्रक्रिया अपनायी गई है – विशेष लोक अभियोजक की नियुक्ति करने में राज्य अपने अधिकारों के मली-भांती भीतर था – याचिका खारिज।

Cases referred :

2012 (3) MPLJ 223, (1994) 4 SCC 602, (1999) 7 SCC 467, (2010) 6 SCC 1, 1992 MPLJ 772, 1998 Cri.L.J. 998, (1988) 3 SCC 144, (2009) 12 SCC 159.

Anil Khare with H.S. Chhabra, for the petitioner.

A.P. Singh, for the State of M.P. & its functionaries.

Naman Nagrath with R.P. Singh, for the respondent no. 3.

T.S. Ruprah with U.S. Tiwari, for the respondent no. 4.

ORDER

SANJAY YADAV, J. :- An FIR dated 13.2.2013 at 23:30 hours at Police Station City Kotwali Sagar by Rammilan Dubey, Head Constable 901 on behalf of Anoop Kumar, son of Rajababu Dubey, led to registration of an offence under Section 302 read with Section 34 of the Indian Penal Code

against Dr. P.S. Thakur and one Martand Singh Thakur.

2. The commission of crime reported was due to death of one Abhishek Dubey. Material on record reveals that both the accused absconded (sic:absconded) which led the police to take steps under Section 83 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') whereon order was passed on 18.5.2013 by the Chief Judicial Magistrate Sagar. Later, by an order-dated 12.11.2013 passed in Misc. Criminal Case No.13433/2013 on an application under Section 438 of the Code, the petitioner was granted benefit of anticipatory bail and was directed to join the investigation and fully co-operate with the investigation. The arrest memo on record reveals that the petitioner remained absconded from 13.2.2013 to 27.11.2013.

3. The FIR borne out from the complaint which led to registration of an offence under Section 302 read with 34 IPC reads thus -

“मैं पुलिस चौकी तिली अस्पताल थाना गोपालगंज सागर मे प्रआर. के पद पर पदस्थ हूँ आज दिनांक 13-02-13 करीब 23.00 बजे थाना कोतवाली के स.उ.नि. एस.सी. श्रीवास्तव ने मुझे एक देहाती नालसी धारा 302, 34 IPC के असल नम्बर पर कायमी हेतु दी है जो पेश करता हूँ कायमी की जाये देहाती नालसी नकल जेल है- देहाती नालसी थाना कोतवाली जिला सागर अप.क्र. 0/13 धारा 302, 34 IPC घटना दिनांक समय 13-02-13 के 20:30 बजे, घटना स्थल होटल राम सरोज पैलेश परिषर तिलकगंज सागर दिनांक समय रिपोर्ट 13-02-13 के 23:00 बजे नाम फरियादी अनूप कुमार दुबे S/O राज बाबू दुबे उम्र 35 साल जवाहरगंज परकोटा सागर नाम मृतक अभिषेक दुबे S/O राज बाबू दुबे उम्र 30 साल जवाहरगंज परकोटा सागर नाम आरोपी 1. डाक्टर पी.एस ठाकुर 2- मार्तण्ड सिंह ठाकुर कायमीकर्ता एस.सी. श्रीवास्तव थाना कोतवाली जिला सागर, विवरण मैं ठेकादारी व कृषि का कार्य करता हूँ मैं और मेरे साथ मे सुरेन्द्र चौबे, बृजेश दुबे, विनोद गुरु, धर्मेन्द्र गुरु एवं मेरे चाचा का लडका श्याम जी दुबे अनीश रावत की बारात मे होटल राम सरोज पैलेश तिलकगंज गये थे, वहां पर डाक्टर पी.एस. ठाकुर एवं मार्तण्ड सिंह ठाकुर (माउजर) लिए थे गाना चल रहा था मुन्नी बदनाम हुई, उस पर पी.एस. ठाकुर जो माउजर लेकर डान्स कर रहे थे डान्स पर से अभिषेक दुबे और पी.एस. ठाकुर डाक्टर की झूमा झटकी होने लगी, तभी मार्तण्ड सिंह ने कहा कि बहुत उडता है, मारो साले को इतने मे पी.एस.ठाकुर ने गोली चलाई जो सीधे अभिषेक दुबे के सीने मे लगी उस समय राजेश्वर सेन, ब्रजेश दुबे, दीपक दुबे, श्याम जी दुबे, राजेश रजक, आनन्द दुबे आदि लोग थे जिन्होने सम्पूर्ण घटना देखी है। मौके पर अभिषेक दुबे गंभीर रूप से घायल हो गया, तो उसे विनोद गुरु, लाल टवेश से श्याम जी दुबे, राजेश्वर सेन गाडी मे डालकर जिला अस्पताल सागर लाये। डाक्टर पी.एस. ठाकुर वहां से भाग गया। हम लोगो ने अभिषेक दुबे को

अस्पताल लाया भर्ती करवा, डाक्टर द्वारा तिली अस्पताल मे चेक कर बताया कि इसकी मृत्यु हो गई है। इस घटना मे पी.एस. ठाकुर द्वारा घटना समय जान बूझकर अभिषेक दुबे को गोली मारी है, जिससे अभिषेक दुबे की मृत्यु हुई है, रिपोर्ट करता हूँ कार्यवाही की जाये। हस्ताक्षर अपठनीय अनूप कुमार दुबे 13.02.13 हस्ताक्षर अपठनीय एस.सी. श्रीवास्तव 13.02.13”

4. That, before committal of the proceedings to the Court of Session, i.e. during pendency of the matter before Judicial Magistrate First Class, the complainant filed an application on 2.2.2014 addressed to the District Magistrate, Sagar requesting for appointment of one Writ Petition No.439/2015 Satish Chandra Rawat as Special Public Prosecutor by invoking powers under sub-section (8) of Section 24 of the Code. The applicant also proposed to bear the expenses of the Special Public Prosecutor.

5. At this stage, it is pertinent to note that the said application by the complainant was endorsed by the Minister, Panchayat and Rural Development, Social Justice, specially abled welfare, co-operation, Govt. of Madhya Pradesh and though a feeble submissions were made that a political interference has been sought; however, the submissions were not carried further in absence of any pleadings therefor and non-impleadment of the concerned Minister. Be that as it may.

6. The application routed through the District Magistrate, culminated into an order-dated 27.8.2014 passed by the State Government appointing one Shri Satish Chandra Rawat, Advocate Sagar as Special Public Prosecutor on the terms and conditions contained in the Department of Law and Legislative Affairs's Order No.17(ई)/60/95/21-ब.दो dated 23.11.2006 as amended on 15.11.2007 on State Govt. expenses. For a ready reference, the order is reproduced -

“फा0कमांक 1(सी)/25/21-ब(दो)/2014, राज्य शासन, दण्ड प्रक्रिया संहिता, 1973 (कं0 2 सन् 1974) की धारा 24(8) द्वारा प्रदत्त शक्तियों को प्रयोग में लाते हुए, सत्र न्यायालय सागर के न्यायालय में विचाराधीन सत्र प्रकरण कमांक 114/2014 मध्यप्रदेश शासन विरुद्ध पी.एस.ठाकुर एवं अन्य में राज्य शासन की ओर से पैरवी करने हेतु श्री सतीश चन्द्र रावत, अधिवक्ता सागर को एतद्द्वारा, विशेष लोक अभियोजक नियुक्त करता है।

श्री सतीश चन्द्र रावत, अधिवक्ता सागर को उपरोक्त प्रकरण में विशेष लोक अभियोजक के रूप में पैरवी करने के फलस्वरूप इस विभाग के आदेश कमांक

17(ई)60/95/21-ब(दो) दिनांक 23.11.2006 में किये गये संशोधन आदेश दिनांक 15.11.2007 में वर्णित शर्तों के अधीन फीस का भुगतान शासन द्वारा किया जायेगा।”

7. It is this order which is being challenged by the petitioner on the following grounds -

(a) That State has not assigned any reasons for appointment of Special Public Prosecutor.

(b) The impugned order is a non-speaking order.

(c) The impugned order will cause serious prejudice to the petitioner because the Special Public Prosecutor is of the choice of the complainant.

(d) The appointment is on mere asking and in a mechanical manner.

(e) That because the complainant and the Special Public Prosecutor are close relatives, the petitioner apprehends that he will be deprived of fair trial if the Special Public Prosecutor is continued.

(f) That it is not shown that existing Public Prosecutor who was handling the matter is not competent to deal with the same. And, the appointment of Special Public Prosecutor despite the objection raised by existing Public Prosecutor would demoralize the public prosecutor-in-charge of prosecution in the Session Court.

(g) That, the basic precept that the Public Prosecutor should be unbiased and independent, has been given the go-bye by appointing public prosecutor of complainant's choice.

(h) There being no exceptional circumstances, the appointment of Special Public Prosecutor is not tenable.

8. To substantiate these submissions, besides the note-sheets maintained by the Department of Law and Legislative Affairs, obtained through application under the Right to Information Act, 2005, reliance is placed on the decision in *Paras Kumar Jain v. State of M.P.* 2012 (3) MPLJ 223 and the judgments relied therein.

9. Besides, State of M.P., the complainant and Special Public Prosecutor who are impleaded, have filed their respective reply, denying adverse allegations and defending the appointment. Whereas, the State Government placing reliance on the very note-sheets which the petitioner has filed, has to submit that the decision for appointment of Special Public Prosecutor was taken after objectively considering the report furnished by the District Magistrate and the Superintendent of Police, Sagar. It is submitted that there being the circumstances warranting appointment of Special Public Prosecutor, State Government is justified in appointing Shri Satish Chandra Rawat as Special Public Prosecutor. It is further contended that the competency of the Special Public Prosecutor has never been questioned even by the public prosecutor who had expressed his reservation, nor is there any allegation in the petition regarding competency. As to contention that the Special Public Prosecutor who has been appointed is the close relative of the complainant which will jeopardise the trial, learned Government Advocate relying on the uncontroverted contention made by respondent No.3 in his reply contends that there is no relationship between the complainant and Special Public Prosecutor. It is urged that since there is no relationship between the two and no instances have been shown as to the Special Public Prosecutor representing the complainant in any matter prior to his appointment by the State as Special Public Prosecutor, petitioner's apprehension about the trial being jeopardized is ill-found as there is no cogent material on record to substantiate the same. It is submitted that the State with an object to have a fair trial in the given facts deliberated upon, appointed the Special Public Prosecutor. Learned Government Advocate further deny the petitioner's contention that Special Public Prosecutor has been appointed to secure the conviction. It is urged that as the petitioner, an accused, has a right of fair trial, the victim also has the same right and merely because a person whose name has been suggested, is appointed as Special Public Prosecutor, his appointment cannot be said to be on a mere asking, as the decision is taken only after the District Magistrate and Superintendent of Police gave their opinion. There being no allegation against these two officers nor the competency of the Special Public Prosecutor who is appointed is being questioned, the apprehension that the petitioner will not get justice is ill-found. Accordingly, the State seeks dismissal of the petition.

10. Reply is filed by the complainant, whereby he denies any relationship between the complainant and the Special Public Prosecutor. In paragraph 5 of the reply, the complainant has given reasons which led him to believe and

apprehend that his cause of justice may get prejudiced at the hand of existing Public Prosecutor, it is stated :-

“.. It is pertinent to mention here on behalf of answering respondent that he has right to fair and free trial and as he had no faith in the earlier Public Prosecutor looking to the bitter experience of the answering respondent, at the time of cross-examination, examination-in-chief in other cases, as a result of which, the Prosecution Agency has failed to establish its case beyond reasonable doubt, as a result of which, the accused concerned were discharged/acquitted by the trial Court, hence the answering respondent No.1 and 2 assigned the reason that the case is serious in nature.”

11. Respondent-complainant has also placed reliance on the findings recorded by the Chief Judicial Magistrate, Sagar on an application under Section 82 of the Code whereon by order-dated 18.5.2013, the CJM, Sagar found :-

“विचार किया गया । चूंकि आरोपीगण न्यायालय द्वारा जारी गिरफ्तारी वारंट पर गिरफ्तार नहीं हुए, उनके द्वारा अपने को छिपाया गया तथा वे फरार है । इसके संबंध में धारा 82 द.प्र.सं. के अंतर्गत उद्घोषणा भी जारी की गई । जिसका प्रकाशन भी हुआ, जिसके समाचार पत्र की प्रति केस डायरी के साथ प्रस्तुत की गई है । आरोपी धारा 82 द.प्र.सं. के अंतर्गत जारी उद्घोषणा के पश्चात् भी हाजिर नहीं हुए है । ऐसी स्थिति में धारा 83 द.प्र.सं. के अंतर्गत उनकी संपत्ति की कुर्की का आदेश दिया जाता है । आदेश इस निर्देश के साथ दिया जाता है कि आरोपीगण की केवल व्यक्तिगत संपत्ति ही कुर्क की जावे, साथ ही आदेश किया जाता है कि ऐसी संपत्ति जो राजस्व देने वाली है वह कलेक्टर के माध्यम से कुर्क की जावे । जहां तक आरोपी की ओर से इस आशय का आवेदन प्रस्तुत किया गया है कि अपराध के संबंध में जांच अतिरिक्त पुलिस अधीक्षक द्वारा की जा रही है इस कारण कोई आदेश न दिया जावे इस संबंध में पुलिस थाना कोतवाली द्वारा प्रतिवेदन दिया गया है कि जांच चल रही है, परंतु उनकी गिरफ्तारी करने से रोकने हेतु कोई निर्देश नहीं है । ऐसी स्थिति में जो आपत्ति धारा 83 द.प्र.सं. के संबंध में की गई है, वह उचित नहीं है ।

धारा 83 द.प्र.सं. के अंतर्गत जो आपत्ति श्रीमति लक्ष्मी ठाकुर द्वारा पेश की गई है । उसके संबंध में जांच श्री अनूप त्रिपाठी न्या. मजि. प्रथम श्रेणी की ओर समुचित निराकरण हेतु भेजी जाती है ।

पुलिस थाना कोतवाली की ओर से प्रस्तुत की गई प्रार्थना धारा 83 द.प्र.सं. स्वीकार

की जाती है तथा मात्र आरोपीगण की व्यक्तिगत संपत्ति के संबंध में धारा 83 द. प्र.सं के अंतर्गत संपत्ति कुर्की करने का आदेश दिया जाता है । ”

12. It is contended that even after the order-dated 18.5.2013, two accused including the petitioner did not surrender. And, it was only when they had an anticipatory bail order in the hand, the petitioner surrendered on 27.11.2013. All these eventualities, it is urged, has given rise to an apprehension that the accused being an influential person and capable of even influencing the conduct of trial at the hand of existing Public Prosecutor that he requested for appointment of a most competent lawyer as a Special Public Prosecutor. It is submitted that the petitioner did not exert any pressure as has been argued on behalf of petitioner. As to the competency of the State Government, it is not disputed on behalf of complainant that it is the State Government which has sole discretion to appoint Special Public Prosecutor which being satisfied that the circumstances so warrants and having appointed the Special Public Prosecutor need not be interfered with as due process has been followed.

13. Special Public Prosecutor whose appointment has been questioned has also filed the reply. In paragraph 4 of his reply, it is stated that he is not related to either the complainant or any of his family members. It is also stated that he is also not related to the Rawat Family in whose marriage celebration the alleged incident occurred. It is further stated in paragraph 6 of his reply that “the petitioner has not alleged any allegation against the answering respondent about his conduct of fairness and impartiality. The function of Public Prosecutor is to conduct the trial with all fairness and impartiality. There are no allegation of any apprehension with regard to these two elements in the writ petition”. It is further stated in paragraph 7 of his reply that he has been public prosecutor in the Session Court, Sagar for over 35 years during which period he has conducted numerous important and sensational criminal trials and that the State previously has appointed him Special Public Prosecutor in five cases. It is stated that his impartiality and fairness in conducting the criminal trials is undisputed.

14. The petitioner though filed the rejoinder to the reply filed by respondent No.3 but has chosen not to controvert the stand taken by respondent No.4.

15. In its rejoinder to the return filed by respondent No.3, the petitioner in paragraph 6 of the rejoinder has contradicted the stand of respondent No.3 about the competency of the existing public prosecutor. It is stated that these

were not the reasons given by the respondent-complainant in his application for appointment of Special Public Prosecutor. However, an averment of relationship of respondents No.3 and 4 is reiterated but no details are given as to how they are related except that they are cousin brothers. Whereas, respondent No.4 in his reply denied any sort of relationship either with respondent No.3 or even those where the marriage has solemnized. The averments are not controverted by the petitioner. That, vide I.A. No.12798/2015 the petitioner has brought on record additional documents which include the objection raised by him before the State Government on 14.10.2014 and the proceedings drawn thereon, to state that they are not taken to logical end. As to these objections, it is for the State Government to consider the same. And, it being not the claim of the petitioner that the State Government be directed to take a decision on the objection raised. The objections are left to be dwelt by the State Government. For the present, since relief sought in present petition is being perused, the matter is heard and decided after considering the rival contentions.

16. There can be no cavil to the proposition that the Public Prosecutor does not represent the investigating agencies, but the State. And, that he is an important officer of the State, acting independently, fairly and bring all relevant facts before the Court so that truth prevails and justice is done to all the parties including the victim (please see. *Hitendra Vishnu Thakur vs State of Maharashtra* (1994) 4 SCC 602, *Shiv Kumar vs Hukum Chand* (1999) 7 SCC 467, *Manu Sharma vs State (NCT of Delhi)* (2010) 6 SCC 1. That, the appointment of Special Public Prosecutor could be in cases in which the Govt. on the basis of material on record and nature of the case objectively exercise the discretion. (please see *Sunil Kumar v. State of M.P.* 1992 MPLJ 772).

17. It is also trite, as has been spelt out in *Rajendra Nigam vs State of M.P.* 1998 Cri LJ 998 that, "The philosophy involved which can be discerned from the sub-section is two fold. *First*, if there should be special circumstance for making such appointment. *Second*, for appointing a Special Public Prosecutor, Government shall consider a more experienced advocate for the assignment. The very idea behind conferment of the power on a Special Public Prosecutor is to meet special situations. In other words, a Special Public Prosecutor is not to be appointed in ordinary circumstance.

18. These stipulations though are not provided under the Statute, but are

carved out from various judicial pronouncement to meet out the ends of justice to both the victim as also the accused. In this context, it was observed in *Mukul Dalal v. Union of India* (1988) 3 SCC 144 that "The primacy given to the Public Prosecutor under the scheme of the Code has a social purpose. ... we are inclined to observe that the request for appointment of a Special Public Prosecutor should be properly examined by the Remembrancer of Legal Affairs and only when he is satisfied that the case deserves the support of a Public Prosecutor or a Special Public Prosecutor that such a person should be appointed to be in charge of the case."

19. Thus, the appointment as such of a Special Public Prosecutor is not thwarted. What has been discouraged is non-consideration of the circumstance leading to request for appointment. Therefore, the competent authority has been cautioned to be careful while considering the request for appointment. In each of the cases relied upon by the petitioners, the observations are in the context of the given facts in respective cases. Each of the observation, however, aims at that role of a Public Prosecutor and the care to be taken by the State Government while considering the request for appointment of a Special Public Prosecutor. Thus, a decision to appoint or not to appoint a Special Public Prosecutor has to be examined in the light of given facts.

20. In the case at hand, as evident from the impugned order that the State Government does not abruptly take a decision, but takes an action on the basis of the report furnished by the District Magistrate and the Superintendent of Police. There is no allegation against these two officers that they acted with any malice. Thus, a proper procedure has been adopted by the State Government before taking a decision for appointment of Special Public Prosecutor, after satisfying itself that the case deserves to be conducted by Special Public Prosecutor. In this context, reference can be had of a decision in *State of Maharashtra v. Prakash Prahlad Patil* (2009) 12 SCC 159, wherein it is held -

"5. The scope for judicial review has been examined by this court in several cases. It has been consistently held that the power of judicial review is not intended to assume a supervisory role or don the robes of omnipresent. The power is not intended either to review governance under the rule of law nor do the courts step into the areas exclusively reserved by the supreme lex to other organs of the State. A mere wrong

decision, without anything more, in most of the cases will not be sufficient to attract the power of judicial review. The supervisory jurisdiction conferred upon a court is limited to see that the authority concerned functions within its limits of its authority and that its decisions do not occasion miscarriage of justice.

6. The courts cannot be called upon to undertake governmental duties and functions. Courts should not ordinarily interfere with a policy decision of the State. While exercising power of judicial review the court is more concerned with the decision making process than the merit of the decision itself.

7. In the instant case, acting on a petition filed by close relatives of a victim decisions have been taken at various levels. The High Court was not justified to pick up stray sentences from the records to conclude that there was non-application of mind. In any event, the appointment of a Special Public Prosecutor to conduct a proceeding does not in any way cause prejudice to the accused. In that sense the writ petition before the High Court was wholly misconceived. ..”

21. Be it noted that the verdict in *Prakash Prahlad Patil* (supra) is in the context of the case wherein several accused were facing trial and though initially it was not disclosed that respondent No.1 was related to one of the accused opposing the appointment of respondent No.3 as Special Public Prosecutor at the instance of brother and son of victim. Whereas, in the present case, appointment is primarily opposed on the ground of close relationship which may cause prejudice. However, since the petitioner fails to establish the relationship between the complainant and the Special Public Prosecutor and that there is no allegation against the competency of the Special Public Prosecutor nor could it be established as to what prejudice would be caused to the petitioner with the appointment of respondent No.4 as Special Public Prosecutor, the State is well within its right in appointing respondent No.4 as Special Public Prosecutor.

22. In view whereof, since no relief can be granted to the petitioner, petition is **dismissed**. However, no costs.

Petition dismissed.

I.L.R. [2017] M.P., 573

WRIT PETITION

Before Mr. Justice Alok Aradhe & Mr. Justice S.A. Dharmadhikari

W.P. No. 4448/2016 (Gwalior) decided on 6 September, 2016

HOLOFLEX LTD. (M/S)

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

(Alongwith W.P. No. 4594/2016, W.P. No. 4664/2016 & W.P. No. 5071/2016)

A. Constitution – Article 14 & 226 – Government Contract – Notice Inviting Tender – Conditions – Scope of Judicial Review – Held – Scope is confined as to whether there was any illegality, irrationality or procedural impropriety committed by the decision making authorities – Tenders floated by government are amenable to judicial review only to prevent arbitrariness and favouritism and to protect the financial interest of the State and public interest – Court cannot check the soundness of the decision made by competent authorities – Duty of the Court is only to examine whether decision making process was fair, reasonable, transparent and bonafide with no perceptible injury to public interest – In the present case, decision has been taken by committee of experts after due deliberations and this court in exercise of power under Article 226 of Constitution cannot sit in appeal over the decisions taken by the committee of experts – From perusal of record, it is evident that impugned conditions in Notice Inviting Tender incorporated by the committee after detailed deliberations and application of mind – No interference called for.

(Paras 21, 29 & 31)

क. संविधान – अनुच्छेद 14 व 226 – सरकारी संविदा – निविदा आमंत्रण सूचना – शर्तें – न्यायिक पुनर्विलोकन की परिधि – अभिनिर्धारित – परिधि यहां तक सीमित है कि क्या निर्णय करने वाले प्राधिकारियों द्वारा कोई अवैधता, विवेकहीनता अथवा प्रक्रियात्मक अनुचितता कारित की गई थी – सरकार द्वारा जारी की गई निविदायें न्यायिक पुनर्विलोकन के अध्यक्षीन केवल मनमानेपन एवं पक्षपात के निवारण एवं राज्य के वित्तीय हित तथा लोकहित के संरक्षण हेतु है – न्यायालय, सक्षम प्राधिकारियों द्वारा लिये गये निर्णय की तर्कसंगतता की जांच नहीं कर सकता – न्यायालय का कर्तव्य केवल यह परीक्षण करना है कि क्या निर्णय की प्रक्रिया निष्पक्ष, युक्तियुक्त, पारदर्शी एवं सद्भाविक थी जिससे लोकहित को कोई दृष्टिगोचर

क्षति नहीं हुई – वर्तमान प्रकरण में, विशेषज्ञों की समिति द्वारा सम्यक् विमर्श के पश्चात् निर्णय लिया गया है और यह न्यायालय, विशेषज्ञों की समिति द्वारा लिये गये निर्णय पर, संविधान के अनुच्छेद 226 के अंतर्गत शक्ति का प्रयोग करते हुए अपील के रूप में सुनवाई नहीं कर सकता – अभिलेख के अवलोकन से यह सुस्पष्ट है कि समिति द्वारा विस्तृत विचार-विमर्श एवं मस्तिष्क का प्रयोग कर निविदा आमंत्रण सूचना में आक्षेपित शर्तें समाविष्ट की गई हैं – हस्तक्षेप की आवश्यकता नहीं।

B. Constitution – Article 14 & 226 – Government Contract – Notice Inviting Tender – Grievance and Remedy – Power/Authority vested in the Excise Commissioner regarding Notice Inviting Tender is directory in nature – He has the authority to lay down terms and condition thereon – Liberty granted to petitioners to approach Excise Commissioner for their grievance – Petitions disposed. (Para 33)

ख. संविधान – अनुच्छेद 14 व 226 – सरकारी संविदा – निविदा आमंत्रण सूचना – शिकायत एवं उपचार – निविदा आमंत्रण सूचना के संबंध में आवकारी आयुक्त में निहित शक्ति/प्राधिकार निदेशात्मक स्वरूप की है – उसे उसमें निबंधन एवं शर्तें निर्धारित करने का प्राधिकार है – याचीगण को आवकारी आयुक्त के समक्ष अपनी शिकायत रखने की स्वतंत्रता प्रदान की जाती है – याचिकाओं का निपटारा किया गया।

Cases referred:

(2001) 8 SCC 491, (2004) 11 SCC 485, (2007) 8 SCC 1, (2009) 3 SCC 458, (2009) 6 SCC 171, (2015) 13 SCC 233, (2014) 3 SCC 760, (2012) 8 SCC 216, I.L.R. (2008) M.P. 226, I.L.R. (2011) M.P. 2347, AIR 1979 SC 1628, AIR 2000 MP 175, AIR 1991 KARNATAKA 205, AIR 1989 PATNA 170, (1994) 6 SCC 651, (2000) 2 SCC 617, (2004) 4 SCC 19, (2005) 1 SCC 679, (2005) 4 SCC 435, 2016 (2) MPHT 123, (2007) 14 SCC 517, (2016) 6 SCC 408, AIR 2016 JHARKHAND 88, (2012) 4 SCC 407, (2012) 7 SCC 389, 1990 (Supp) SCC 440, (2010) 6 SCC 303, (2014) 11 SCC 288, (1993) 3 SCC 499.

R.N. Singh with Arpan J. Pawar, Akshay Pawar, Aishwarya Singh & Ankur Maheshwari, for the petitioner in W.P. No. 4448/2016.

Aditya Adhikari with Abhishek Gulatee and Santosh Agarwal, for the petitioner in W.P. No. 4594/2016.

H.D. Gupta with Santosh Agarwal, for the petitioner in W.P. No. 4664/2016.

Prashant Sharma, for the petitioner in W.P. No. 5071/2016.

Ravish Agarwal, A.G. with *Swapnil Ganguli*, G.A. for the respondents No. 1 & 2 in W.P. Nos. 4448/2016 & 4594/2016 and for the respondents in W.P. Nos. 4664/2016 & 5071/2016.

R.S. Jaiswal with *Chetan Kanoongo*, for the respondent No. 3 in W.P. Nos. 4448/2016 & 4594/2016.

Rajiv Agarwal, for the respondent No. 4 in W.P. Nos. 4448/2016 & 4594/2016.

ORDER

The Order of the Court was delivered by :
ALOK ARADHE, J. :- In these writ petitions, the petitioners which are the companies engaged in manufacture and supply of security holograms and authentication solutions, both in private and public sectors, have assailed the validity of the condition number 2 and number 4 in the Notice Inviting Tenders dated 8.6.2016. For the facility of reference, facts from Writ Petition No.4448/2016 are being referred to.

Factual Background :

2. Admittedly, between the years 2006 to 2014 the Madhya Pradesh Laghu Udyog Nigam Limited (hereinafter referred to as the 'Nigam') invited tenders for supply of security holograms to authorised bottlers in the years 2006, 2008, 2011 and 2014. The petitioner was awarded contract as it was the lowest bidder. Thus, admittedly the petitioner has supplied security holograms to the authorised bottlers in the State of Madhya Pradesh between the period from 2006 till date. It is also not in dispute that the petitioner has successfully supplied security holograms to the tune of 155 and 172 for the year 2014-2015 and 2015-2016.

3. The State Government with a view to ensure that spurious liquor is not sold in the State and to upgrade the technology for fixation of specification of hologram, constituted an internal committee on 25.4.2015, which was headed by Deputy Commissioner, Excise Indore. The Committee after deliberations with the departmental authorities, public representatives as well as taking into account the terms and conditions of the contract of other States opined that latest technology may be introduced with all checks and balances to ensure that there is no pilferage of public revenue. Thereafter, a pre-bid conference was held on 18.4.2016, which was attended by 13 bidders including the petitioners. The committee submitted its suggestions on 11.5.2016

which interalia provide that supplier should establish a plant to manufacture the holograms in the State itself, who should function under supervision of Excise Department so as to ensure that it is near impossible to replicate the hologram and no copy can be made of it, which in turn will ensure that there is no pilferage of public revenue. It was also noted that the States of Tamil Nadu and Andhra Pradesh have adopted similar measures.

4. The Excise Commissioner after taking into account the report of the committee by communication dated 19.5.2016 apprised the State Government about the recommendations of the committee. The State Government by an order dated 20.5.2016 directed the Excise Commissioner to initiate tender process and formed a committee to issue tenders. The committee was constituted on 20.5.2016 itself, comprising Additional Excise Commissioner, State Level Flying Squad, Managing Director of Madhya Pradesh Laghu Udyog Nigam Limited or his nominee, Deputy Commissioner Excise Indore, Joint Director Finance, and Assistant Excise Commissioner, Divisional Flying Squad, Bhopal, which made deliberations and finally with the assistance of earlier committee final draft was prepared. The State Government by an order dated 4.6.2016 directed to opt for e-tendering of the contract in question. Thereafter, the Notice Inviting Tender dated 8.6.2016 was issued, by which tenders in the two bid system, namely, Technical and Price bid, were invited from reputed hologram manufacturers for production and supply of security holograms in spool form for application on liquor bottles. The approximate quantity of security holograms was 175 crores in a year and last date of submission of tender was 2.7.2016 and the technical bid was to be opened on 5.7.2016. The period of contract is 5 years, i.e., 2016 till 2021. The aforesaid notice inviting tenders contains conditions number 2 and 4, which have been impugned in this bunch of writ petitions. The impugned condition number 2 of the Notice Inviting Tender pertains to requirement of annual turn over of not less than Rs.40 Crores for the preceding three years whereas impugned condition number 2 deals with net worth and provides that tenderer should have minimum net worth of Rs.30 Crores as on 31.3.2015.

5. Being aggrieved by the aforesaid conditions in the Notice Inviting Tender, the petitioner submitted a representation to the Excise Commissioner on 15.6.2016. However, the same was rejected by the Excise Commissioner on 24.6.2016 interalia on the ground that requirement of turnover is as per Central Vigilance Commission Guidelines and the introduction of net worth

requirement is necessary to ensure that bidder has sufficient financial reserves to set a factory immediately, the cost of which may run into crores. In the aforesaid factual background, the petitioners have approached this Court.

6. The petitioner in Writ Petition No.4448/2016 approached this Court on 28.6.2016 whereas Writ Petition No.4594/2016, Writ Petition No.4664/2016 and Writ Petition No.5071/2016 were filed respectively on 1.7.2016, 4.7.2016 and 17.7.2016. On 22.7.2016 the petitioner in Writ Petition No.4448/2016 moved an application seeking amendment by impleading respondents No.3 and 4 and averments with regard to alleged formation of cartelship, favoritism and malice in law were incorporated. The aforesaid application was allowed on 26.7.2016 and on 27.7.2016 final arguments in the case were heard. However, at the time of hearing learned senior counsel for the respondent No.3 and counsel for the respondent No.4 made their submissions without filing any reply in the matter. An application, namely, I.A.No.5117/2016 filed by the petitioner in Writ Petition No.4448/2016 for taking additional facts on record, was also allowed. Thereafter on 29.7.2016 this Court passed an order directing the respondents No.3 and 4 to file reply to ensure fair and complete adjudication of the controversy involved in the writ petition, pursuant to which respondents No.3 and 4 had filed their returns and the petitioner in Writ Petition No.4448/2016 has filed a rejoinder. Thereafter on 26.8.2016 and 30.8.2016 the arguments were heard.

Contentions :

7. Learned senior counsel for the petitioner in Writ Petition No. 4448/2016 submitted that the committee constituted by the State Government recommended that a tenderer must have experience in manufacture as well as supply of holograms. However the aforesaid condition was deliberately omitted in the Notice Inviting Tender and the impugned conditions are tailor-made conditions incorporated in the notice inviting tenders to suit respondents No.3 and 4. While referring to condition number 2 of the impugned Notice Inviting Tenders, it is pointed out that annual turn over of Rs.40 Crores mentioned in the aforesaid condition has no reference to manufacture and supply of holograms and, therefore, any person who may not have any experience of manufacture and supply of holograms, is also eligible to participate in the tender. It is also submitted that the criteria with regard to annual turn over in other States is very small and there is no requirement of net worth. It is also argued that with a view to extend favour to big manufacturers and suppliers

the requirement of turnover has been increased 10 fold and is quantified at Rs.40 Crores whereas new condition of having Net worth of Rs.30 Crores has been introduced. It is further argued that hologram industry in India comprises largely small enterprises and required turnover of Rs.40 Crores will not be met by most of the manufacturers. It is also pointed out that even though the petitioner had low turnover, yet it has been satisfactorily supplying security holograms to the extent of 129.95 Crores to 180 Crores between the years 2012-2013 to 2015-2016.

8. It is also contended that justification for condition of insertion of Net worth of Rs.40 Crores on the ground that new factory is required to be set up in the State of Madhya Pradesh is not justified as it is possible to set up new hologram unit with an expenditure of Rs.5 Crores. It is also argued that incorporation of impugned conditions in the Notice Inviting Tender is against public policy and public interest and defeats the object of creating a level playing field. It is further submitted that respondents No.3 and 4 have common factory address, namely, 29-B, Malanpur Industrial Area, District Bhind and have formed a cartel to cause huge loss of revenue to the State. In this connection, our attention has been invited to the latest Annual Reports and the balance sheet to point out that the respondent No.4 is the largest shareholding company which constitutes 3.05% of equity capital of respondent No.3. From the balance sheet of respondent No.3, it is pointed out that the respondent No.3 has advanced a loan of Rs.30 Crores to respondent No.4 and respondents No.3 and 4 are sister concerns having common interest and common factory premises. It is also pointed out that on 31.3.2013 the respondent No.4 has invested in as many as 7 companies which are all in the promoters group of respondent No.3 and, therefore, the respondents No.3 and 4 are one and the same entity. It is also pointed out that respondent No.4 in its bid has enclosed documents of its plant and machinery provided by respondent No.3. It is also pointed out that the respondent No.5, which does not have a Net worth of more than Rs.2.00 Crores, has submitted its bid at the instance of respondent No.3 so as to make the tender process in question look competitive.

9. It is urged that respondent No.3 has admitted that it has leased out the land and building to respondent No.4, on yearly short term lease and though it is alleged that the same was later on purchased by respondent No.4 in the year 2012, yet no sale deed has been placed on record. It is further urged that

even though respondent No.3 is not a non-banking financial institution yet it advanced an unsecured loan to the tune of Rs.30 Crores to respondent No.4. It is further urged that from inter se transactions between respondents No.3 and 4, it is evident that the interests of respondents No.3 and 4 are common and there cannot be any competition between respondents No.3 and 4. Learned senior counsel for the petitioner submits that he be permitted to withdraw the statement made in paragraph 9 of the rejoinder containing the pleading that independent Director of the respondent No.3, Mr. M.G. Gupta, is the father of the main promoter of respondent No.4. It is submitted that the aforesaid pleading was based on general information available on the website/annual report and in view of the similarity in the name of father of the petitioner and respondent No.4 and the independent Director of respondent No.3, and the aforesaid averment was made inadvertently. He has tendered his sincere apologies for the mistake which has crept in the pleadings through inadvertence. Lastly, it is urged that the respondents No.3 to 5 had participated in the tender process in the State of Uttar Pradesh and had formed a cartel, pursuant to which a complaint was lodged against them which is being investigated by a Retired Judge of High Court of Allahabad. In support of the aforesaid submissions, learned senior counsel for the petitioner in Writ Petition No.4448/2016 has placed reliance on the decisions in the cases of *Union of India and others vs. Dinesh Engineering Corporation and others* (2001) 8 SCC 491; *Jespar I. Slong vs. State of Meghalaya and others* (2004) 11 SCC 485; *Reliance Energy Ltd. and another vs. Maharashtra State Road Development Corpn. Ltd. and others* (2007) 8 SCC 1; *B.S.N. Joshi and Sons Limited vs. Ajoy Mehta and another* (2009) 3 SCC 458; and, *Meerut Development Authority vs. Association of Management Studies and another* (2009) 6 SCC 171; *Rishikaran Logistics Pvt. Ltd. vs. Board of Trustees* (2015) 13 SCC 233; *Maa Binda Express Carrier vs. North-East Frontier Railway* (2014) 3 SCC 760; *Michigan Rubber (India) Ltd. vs. State of Karnataka* (2012) 8 SCC 216; *Sharad Oswal vs. M.P. Poorva Kshetra Vidyut Vitran Company Ltd.*, I.L.R. [2008] M.P. 226; *L.M.P. Precision Engineering Co. Pvt. Ltd. vs. Union of India*, I.L.R. [2011] M.P., 2347.

10. Learned senior counsel for the petitioner in Writ Petition No.4594/2016 has submitted that turnover has been increased 8 times to eliminate competition, even though the requirement of holograms has been increased only 1.2 times, i.e., from Rs.150 Crores to Rs. 180 Crores. It is

also argued that requirement of turnover is not confined to hologram business and the aforesaid requirement is violative of Central Vigilance Commission Guidelines. It is further submitted that the requirement of Net worth of Rs.30 Crores has no rational relation with the object of securing best quality holograms at competitive price. It is also submitted that the respondents No.3,4 and 5 have formed a cartel. Our attention has also been invited to pre-qualifying bid conditions laid down by other States as well. In support of aforesaid submissions, learned senior counsel has placed reliance on the decisions in the cases of *Ramana Dayaram Shetty vs. International Airport Authority of India*, AIR 1979 SC 1628; *Laxminarayan Deohare vs. Union of India*, AIR 2000 MP 175; *M/s Pratibha R.C.C. Spun, Pipe and Cements vs. State of Karnataka*, AIR 1991 KARNATAKA 205; and, *Jai Bharat Transport Company vs. Central Coal Fields Limited*, AIR 1989 PATNA 170.

11. Learned senior counsel for the petitioner in Writ Petition No.4664/2016 as well as learned counsel for the petitioner in Writ Petition No.5071/2016 have adopted the submissions made by learned senior counsel for the petitioner in Writ Petitions No.4448/2016 and 4594/2016.

12. On the other hand, learned Advocate General for the respondents No.1 to 3 submitted that quantity of holograms for the year 2015-2016, which was required to be supplied was 172.88 Crores, having turnover of Rs.41.02 Crores. The contract in question is for five years, i.e., from 2016 to 2021. It is further submitted that after due deliberations by the committees, new conditions have been incorporated, namely, establishment of plant and machinery in Madhya Pradesh, installation of latest technology and equipments and the tenderer is required to work under the supervision of the excise department. Therefore, the impugned conditions have been incorporated in the NIT in public interest to ensure that spurious liquor is not supplied and even the remote possibility of misbranding/mislabelling is eliminated. Our attention has also been invited to Interlocutory Application No.3950/2016 and it is pointed out that the Flying Squad has registered a case on 30.5.2016, pursuant to which an enquiry was made and it was found that the petitioner in Writ Petition No.4448/2016 is supplying parallel series of holograms illegally to bottlers which is resulting in loss of public revenue. It is also urged that pleadings made by the petitioner do not satisfy the requirements of malice in law and the writ petition is premature as the technical bids are yet to be finalised

by the competent committee which will be followed by opening of the financial bid.

13. It is also urged that an element of public exchequer is involved in the contract in question and if duplicate holograms are affixed on the liquor bottles then it would amount to direct loss to the public exchequer. The impugned conditions have been incorporated, being the safety measure and by no stretch of imagination the same can be said to be irrational or arbitrary. It is also submitted that the guidelines issued by Central Vigilance Commission are directory in nature and the authority issuing the tender can formulate the terms and conditions inviting tender. It is further submitted that, in fact the committees constituted by the State Government had recommended annual turnover of Rs.50 Crores which is reduced to Rs.40 Crores. It is also submitted that since the supplier is required to set up a factory in the State of Madhya Pradesh, therefore, the requirement of Net worth has been prescribed to ensure safety of public in large and to avoid sale of spurious liquor as well as to ensure that there is no pilferage of public revenue. It is also argued that a supplier would be required to spend a sum of Rs. 15 to 20 Crores for installation of the factory which has to function under the supervision of Excise Department. It is further submitted that the recommendations of the committee have been approved by the State Government on 20.5.2016. Learned Advocate General has also produced the relevant record for our perusal.

14. It is urged that the conditions impugned in the instant writ petitions are reasonable and the scope of judicial review is extremely limited with regard to interference with the conditions contained in the Notice Inviting Tender. It is also urged that purpose of incorporation of the impugned conditions is with a view to ensure that by use of latest technology holograms are made more visible with utmost clarity and are highly secured, which is the prime obligation of the State. It is also urged that enhancement of turnover as well as Net worth are essential for the State so that healthy competition is generated and genuine companies participate in the tender and If the contract is awarded to a successful tenderer, the performance should not be affected on account of poor turnover and net worth. The requirement of net worth has been inserted to assess financial credibility of the company and setting up of the factory will involve substantial investment and three months of rolling capital will also be required, which would be to the tune of Rs.12-13 Crores. Therefore, the financial worthiness of a tenderer plays an important role.

15. It is also pointed out that clause 43 of the Notice Inviting Tender provides appropriate forum for redressal of the grievance and, therefore, the writ petition at this stage is premature. It is argued that hologram business is worth Rs.250 Crores and cannot be handled by small scale industry. It is further argued that the respondents No.3 and 4 are separate legal entities and have independent Board of Directors. It is also argued that the petitioner had supplied 172.88 Crores holograms having turnover of Rs.42.01 Crores. Therefore, the requirement of net worth is reasonable condition as the petitioner has expressed his willingness to set up the factory in Madhya Pradesh. It is also pointed out that rest of the petitioners except the petitioner in Writ Petition No.4448/2016 have not approached this Court in quite promptitude. It is further submitted that there is no pleading in the writ petition that in the previous Notice Inviting Tenders, which were issued by Nigam, the condition of manufacture and supply was there and the condition with regard to supply has been deliberately omitted despite recommendation made by the committee. It is also submitted that clauses 37 and 43 of the Notice Inviting Tender is complete answer to the issue of cartelisation raised by the petitioner. It is also submitted that though the technical bid has been opened, yet the same has to be finalised, as the samples have been made over to Indian Institute of Packaging, Delhi, which is a Government of India Undertaking. Lastly, it is urged that in case any of the petitioners has any grievance with regard to process of tender, the petitioners would be at liberty to approach the Excise Commissioner, who shall deal with the complaint with utmost objectivity. In support of aforesaid submissions, learned Advocate General has placed reliance on the decisions in the cases of *Tata Cellular vs. Union of India*, (1994) 6 SCC 651; *Air India Limited vs. Cochin International Airport Limited* (2000) 2 SCC 617; *Directorate of Education vs. Educomp Datamatics Limited* (2004) 4 SCC 19; *Association of Registration Plates vs. Union of India* (2005) 1 SCC 679; *Global Energy Limited vs. Adani Exports Limited* (2005) 4 SCC 435; *Michigan Rubber (India) Limited vs. State of Karnataka* (2012) 8 SCC 216; *Welcome Distillery Pvt. Ltd. vs. State of Madhya Pradesh and others*, 2016 (2) MPHT 123; Writ Petition No.1521/2015 (*Rajeev Kumar Sharma vs. State of MP*); Writ Petition No.4501/2016 (*Bansal Construction Co. Pvt. Ltd. vs. M.P.R.D.C.*).

16. Learned senior counsel for the respondent No.3 has submitted that the petitioner in Writ Petition No.4448/2016 had submitted the representation dated 12.6.2016 with regard to the impugned tender conditions, however, no

allegation was made in the representation with regard to the co-relation between respondents No.3 and 4. Thus, the allegations made against the respondents No.3 and 4 are nothing but an after thought. It is further submitted that the respondents No.3 and 4 are separate legal entities and apart from respondent No.4, 11 shareholders have collective share holdings to the tune of 21.05 % whereas the respondent No.4 is holding only 3.05% shares and, therefore, the respondent No.3 can neither be termed as associate company nor subsidiary company, as it holds less than 20% and 50% shares respectively. It is further submitted that inter business transactions are permissible under Section 186 of the Companies Act, 2013 (hereinafter, referred to as the 'Act'). A loan of Rs.30 Crores was given on 30.9.2015 to respondent No.4, which was refunded by the respondent No.4 on 6.10.2015. It is argued that such advancement of loan or inter-corporate deposit between two corporate bodies is normal business transaction, in the course of business. It is also pointed out that the respondent No.3 had initially given its factory, plant and machinery, building and land at 29-A and 29-B, Malanpur Industrial Area, Bhind on licence from 2002 till 2011 to respondent No.4 and thereafter the entire plant and machinery installed at 29-A and 29-B has been sold out in 2012 and the land and building is still in the name of respondent No.3, as the same cannot be sold due to pending permissions of various financial institutions and respondent No.3 has ceased manufacturing activities from the premises. Therefore, the address of 29-A and 29-B at Malanpur factory in the column of 'works' is shown as owner of land and building. It is further pointed out that respondent no.3 has its factory at Noida.

17. It is further argued that the companies in the field of hologram business are inter-dependent for material and machinery and respondent No.3 at several points of time has business dealings with respondent No.4 along with other customers and the aforesaid transactions are business transactions and, therefore, the documents of respondent No.3 were enclosed with the tender document, and it cannot be concluded that the respondents No.3 and 4 are sister concerns. It is submitted that the amount was paid to respondent No.5 under consultancy agreement which is evident from the document, Annexure R-3(4) and the same does not establish any relation between respondents No.3 and 5. It is also submitted that when the financial bids are opened then only the question of cartelisation can be gone into. It is also submitted that Board of Directors of respondent No.3 is different and its factory is situate at Noida. It is also pointed out that similar transactions have taken place with

one of the writ petitioners and, therefore, no adverse inference can be drawn. It is also urged that before opening of the financial bid it is also not possible to guess the rates quoted by the respondents No.3 and 4 and the respondents No.3 and 4 have quoted their rates as per their own wisdom, therefore, the allegation of cartelization made by the petitioner is wholly baseless. It is also pointed out that the enquiry initiated by the Government of Uttar Pradesh on the complaint filed by one Satyaprakash Mishra is still pending and no irregularity has been found so far. It is also pointed out that the complainant, namely, Vinay Mishra happens to be the Secretary of Shramik Kalyan Samiti, who is in the habit of filing false and bogus complaints. It is also submitted that aforesaid Vinay Mishra had filed a Public Interest Litigation, namely, Writ Petition No. 58597/2012 before the High Court of Allahabad on the issue of tender in respect of holograms. However, the writ petition was withdrawn by him on 15.3.2014. It is pointed out that respondent No.3 has experience of manufacture of holograms and the requisite documents have been annexed with the tender document. In support of aforesaid submissions, reliance has been placed on decisions of the Supreme Court in the case of *Jagdish Mandal v. State of Orissa* (2007) 14 SCC 517; *Centre for Public Interest Litigation vs. Union of India and others*, (2016) 6 SCC 408; and, *M/s. Wave Industries Private Limited, Amroha (Uttar Pradesh) v. State of Jharkhand & others*, AIR 2016 JHARKHAND 88.

18. Learned counsel for the respondent No.4 while supporting the submissions made by learned senior counsel for the respondent No.3 submitted that the writ petition filed by the petitioner is based on presumptions and assumptions. It is further submitted that on account of incorrect statement made in paragraph 9 of the rejoinder, the respondent No.4 has filed an application under Section 340 of the Code of Criminal Procedure and, therefore, appropriate action be taken against the petitioner in Writ Petition No.4448/2016. It is further submitted that the respondent No.4 is a separate legal entity and has a separate Board of Directors. Learned counsel for the respondent No.4 also submitted that the respondent No.4 has experience of manufacture of holograms and requisite documents in this regard have been annexed with the tender form.

19. By way of rejoinder reply learned senior counsel for the petitioner has submitted that requirement of supply and experience in the impugned notice inviting tenders has been diluted to favour the respondents No.3 and 4 and to

create monopoly in favour of major players in the field. It is also argued that the respondents No.3 and 4 have no experience of manufacturing the holograms. It is also pointed out that a fake report has been prepared by the Deputy Commissioner during the pendency of the writ petition with regard to supply of fake holograms by the petitioner. It is also pointed out that assets of respondents No.3 and 4 are less and liabilities are more. It is also argued that the action of the respondent No.3 is actuated by malice in law. In support of aforesaid submissions, reference has been made to decisions of Supreme Court in the cases of *Ravi Yashwant Bhoir vs. District Collector, Raigad and others*, (2012) 4 SCC 407, and *Asha vs. Pt.B.D. Sharma University of Health Sciences and others*, (2012) 7 SCC 389.

The Scope of Judicial Review :

20. We have considered the submissions made by learned counsel for the parties and have perused the record. It is well settled in law that discretion to grant largesse including award of jobs, contracts, quotas, license and so on must be structured by rational, relevant and non-discretionary standard or norms. If the Government departs from such standard or norms, its action would be liable to be struck down unless the Government can establish that departure was not arbitrary, but was based on some valid principles which in itself was not irrational, irrelevant, unreasonable or discriminatory. See, *Narendra Kumar Maheshwari vs. Union of India*, 1990 (Supp) SCC 440. It is equally well settled legal proposition that it is open to the State to prescribe conditions in the tender, prescribing the eligibility criteria and if the State can justify the tender conditions in the context of particular contract, the courts will not interfere and whenever there are different alternatives, it is not for the courts to suggest that a particular alternative is justified. In awarding contract, the public interest is of paramount consideration and there should be no arbitrariness in awarding the contract and all participants in the tender process must be treated alike. In the celebrated case of *Tata Cellular (supra)*, the Supreme Court while dealing with the scope of judicial power of review held that it would apply to exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. It has been held that the ground upon which the administrative action is subject to control by judicial review is on the grounds of illegality, irrationality and procedural impropriety. It has further been held that terms of the invitation to tender are not open to judicial scrutiny because invitation to tender is in the realm of contract and more often

than not, such decisions are made qualitatively by experts. It has further been held that the Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness but must be free from arbitrariness not affected by bias or actuated by mala fides.

21. The principles regarding award of contract were again reiterated by the Supreme Court in the case of *Director of Education* (supra) and it was held that Government must have a free hand in setting the terms of tender and the courts cannot strike down the terms of tender prescribed by the Government because it feels that some other terms in the tender would have been fairer, wiser or more logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or actuated by malice. In the case of *Shimnit Utsch India Private Limited vs. West Bengal Transport Infrastructure Development Corporation Limited*, (2010) 6 SCC 303, the Supreme Court while taking note of the law laid down in *Assn. of Registration Plates* (supra), reiterated that State Government has the right to get the right and most competent person and in the matter of formulating conditions of tender documents, unless the action of tendering authority is found to be malicious and is a misuse of statutory powers, the tender conditions are unassailable. In the case of *Siemens Aktiengesellschaft and Seimens Limited vs. Delhi Metro Rail Corporation Limited and others*, (2014) 11 SCC 288, it was held that tenders floated by the Government are amenable to judicial review only in order to prevent arbitrariness and favoritism and protect the financial interest of the State and the public interest. Thus, the scope of judicial review is confined as to whether there was any illegality, irrationality or procedural impropriety committed by the decision making authority. It has further been held that the court cannot sit in appeal over the soundness of the decision made by the competent authority and the court can only examine whether the decision making process was fair, reasonable, transparent and bonafide with no perceptible injury to public interest. From the various decisions cited on both sides, following legal principles are deducible :-

- (i) The procedure adopted by 'State' under Article 12 while awarding contract can be adjudged and tested on the touchstone of Article 14 of the Constitution of India.

- (ii) The Government cannot act in a manner which would benefit a private party at the expense of the State as the same would be unreasonable and contrary to public interest.
- (iii) While exercising power of judicial review the court will not examine the details of contract but only are concerned with decision making process and whether the same was reasonable, rational and arbitrary or is violative of Article 14 of the Constitution of India.
- (iv) The State while inviting tenders cannot take into account the factors which are irrelevant and detrimental to public interest.
- (v) An administrative action is subject to control by judicial review on the grounds of illegality, irrationality and procedural impropriety.
- (vi) The power of judicial review is available in cases where it is established that terms of invitation to tender are tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process, unless the tender conditions are wholly arbitrary, discriminatory or actuated by malice, the terms of tender notice are not subject to judicial review.
- (vii) Level Playing Field is an important concept while construing Article 19(1)(g) of the Constitution of India, which confers fundamental right to carry on business. However, the aforesaid doctrine is subject to public interest.
- (viii) The power of judicial review is also available in a case where the action of the respondent is not only arbitrary, unreasonable and curtails public participation which vitally affects public interest and if permitted would result in causing loss to public exchequer for want of adequate competition. The Court would intervene if

tender conditions give rise to formation of cartel which is against public policy.

- (ix) The Government while entering into contract or issuing quotas is expected not to like a private individual but should act in conformity with certain healthy standards and norms which are not arbitrary, irrational or irrelevant.
- (x) The terms of invitation to tender are not subject to judicial scrutiny and more often than not such decisions are made by experts and it is not open for the courts, whenever there are different alternatives, to suggest that particular alternative is more justified. Greater latitude is to be conceded to State authorities in the matter of formulating conditions of tender and awarding contracts.
- (xi) The Government has freedom of contract and court cannot strike down terms of tender merely because it feels that some other conditions in the tender would have been fairer, wiser or more logical. The courts can interfere only when conditions of tender are arbitrary, discriminatory and actuated by malice.
- (xii) The award of contract, whether it is by a private party or a public body or the State, is essentially a commercial transaction. The State can choose its own method to arrive at its decision and can fix its own terms of invitation of tender and that is not open to judicial scrutiny. Even when some defect is found in decision making process, the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely of making out a legal point.
- (xiii) No person can claim a fundamental right to carry on business with the Government. All that he can claim is that, in competing for the contract, he should not be

unfairly treated and discriminated to the detriment of public interest.

(xiv) The Government is the guardian of State finances and is expected to protect it. The right to choose cannot be considered as arbitrary as long as it complies with requirement of principles of Article 14 of the Constitution of India.

(xv) The test to be adopted is whether something has gone wrong of a nature and degree which requires court's intervention. See, *R. vs. Secy. of State for Home Deptt. Ex P. Brind* (1991) 1 All ER 720 (HL).

22. The Supreme Court in the case of *Union of India vs. Hindustan Development Corporation and others*, (1993) 3 SCC 499, while dealing with the expression 'cartel' in the context of contract has held that the cartel is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity. Analysing the object of formation of a cartel, in other words, it amounts to an unfair trade practice which is not in the public interest. However, mere offering of a lower price by itself, though appears to be predatory, cannot be a factor for inferring formation of a cartel unless an agreement amounting to conspiracy is also proved. A mere offer of a lower price by itself does not manifest the requisite intent to gain monopoly and in the absence of a specific agreement by way of a concerted action suggesting conspiracy, the formation of a cartel among the producers who offered such lower price cannot readily be inferred. Similar view was taken by the Supreme Court in the case of *B.S.N. Joshi & Sons Limited* (supra).

The Issues:

23. In the backdrop of aforesaid well settled legal principles, the issues which emerge for our consideration are, namely, (i) whether the impugned tender conditions are irrational, arbitrary, violative of Article 14 and are tailor-made to suit the respondents No.3 and 4; (ii) whether impugned tender conditions are against the object of creating a level playing field and contrary to public policy and public interest; (iii) whether the conditions contained in impugned Notice Inviting Tender are contrary to the guidelines issued by Central Vigilance Commission; (iv) whether insertion of impugned tender

conditions leads to formation of cartel, which is against public policy; (v) whether respondents No.3 and 4 are separate legal entities. We shall now proceed to deal with the issues *ad seriatum*.

Analysis :

24. Before proceeding further, we deem it appropriate to reproduce the impugned tender conditions for the facility of reference:-

"TURNOVER -

2. *The tenderer should have an annual turnover of not less than Rs.40 Crores for the preceding 3 years. As the audited annual Report for the years 2012-13, 2013-14 and 2014-15 should be attached.*

NET WORTH -

4. *The tenderer should have minimum Net worth of Rs.30 Crores as on 31.3.2015. The audited annual Report for the year 2014-15 should be attached.*

Explanation – For the purpose of this clause Net worth means as defined in Companies Act, 1956."

25. The condition number 2 provides that tenderer should have annual turn over of not less than Rs.40 Crores for preceding three years, whereas condition number 4 prescribes net worth of Rs. 30 Crores. Admittedly, prior to issuance of impugned Notice Inviting Tender, Nigam was issuing Notice Inviting Tender. A comparative yearwise chart of tenders issued from 2005-2006 by the Nigam and the impugned Notice Inviting Tender with relevant clauses is reproduced below:-

TERMS AND CONDITIONS OF HOLOGRAM TENDER (COMPARISON YEARWISE)

2005-06	2008-10	2010-12	2014-16	2016-21
The tenderer must have atleast six months of experience facility to prepare Dot	The tenderer must have capability of design and construction of the master in	The tenderer must have atleast 4 years of experience in shooting of both Dot matrix	The tenderer must have atleast 4 years of experience in shooting of both Dot matrix	The tenderer should have High Security Master at resolution of atleast 12000DPI

matrix, 2D/3D combine master.	house of 2500DPI or more with experience of minimum six months for the above purpose, i.e., facility to prepare Dot matrix, 2D/3D combine master.	6000DPI and conventional 2D/3D master recombine together in house.	6000DPI and conventional 2D/3D master recombine together in house.	or more by using either single or multiple master origination systems.
The tenderer must have 2 years experience of manufacturing in supply of Security Holograms.	The tenderer must have 2 years experience of manufacturing in supply of Security Holograms.	The tenderer must have 4 years experience of manufacturing in supply of Polyester based Security Holograms.	The tenderer must have 4 years experience of manufacturing in supply of Polyester based Security Holograms.	The tenderer should have at least 5 years of experience in the field of manufacturing of security holograms or mastering lab.
The tenderer must have turnover of atleast Rs. 2 Crores in the business of holograms in financial years 2004-05.	The tenderer must have turnover of atleast Rs. 2 Crores in the business of holograms in each financial years 2005-06 and 2006-07.	The tenderer should have supplied polyester based security holograms to atleast one State Excise Department in India	The tenderer must have turnover of atleast Rs. 5 Crores in manufacture and supply of Polyester based security holograms per year in the financial year 2011-12 and 2012-13.	The tenderer should have an annual turnover of not less than Rs. 40 Crores for preceding 3 years 2012-13, 2013-14 and 2014-15.
		The tenderer should have supplied atleast 30 Crores Polyester based Security holograms to single customer in preceding financial year i.e., 2009-10.	The tenderer should have supplied atleast 30 Crores Polyester based Security holograms to single customer in preceding financial year i.e., 2012-13.	The tenderer should have minimum Net Worth of Rs. 30 Crores as on 31.03.2015.

26. Thus, it is evident that in the tender issued in the year 2014 by the Nigam, which was for a period of two years, requirement of turn over is enhanced from Rs. 2 Crores to Rs.5 Crores, which has now been enhanced to Rs.40 Crores in the contract, which is for a period of five years. The Madhya Pradesh Distilleries Association submitted representation on 6.4.2015 to the Minister, Commercial Tax Department that the rate on which hologram is being supplied to them by the petitioner in Writ Petition No.4448/2016 is excessive. Thereupon, the Commissioner Excise by an order dated 25.4.2015 constituted a committee consisting of Deputy Commissioner Excise, Indore, Divisional Assistant Excise Commissioner, Flying Squad Bhopal and Assistant Commissioner Excise posted in Headquarter to recommend specification of hologram, so as to ensure that hologram can be supplied at a lesser rate and sale of spurious liquor can be prevented. The aforesaid committee held meeting on 6.6.2015 in which 15 Excise Officers posted in various places were present and representatives of Distilleries were also present and their suggestions were also invited. After due deliberations, it was resolved to specify the size of hologram and it was recommended that the number of hologram should be mentioned vertically in the hologram. Thereafter, on 19.6.2015, the committee submitted its recommendations, namely - (i) adoption of latest technique for manufacture of hologram, containing general and special features so as to ensure that it is near impossible to replicate the hologram and no copy can be made; (ii) manufacture of hologram should be made under the control and supervision of the Excise Department; (iii) another committee should be constituted to ascertain technical specifications consisting of Additional Excise Commissioner and Deputy Commissioner Excise; (iv) in the committee which may be constituted for selection of tenderer, Joint Director Finance and a representative of the Nigam should also be included.

27. Thereafter, on 16.3.2016 the Excise Commissioner directed to finalise the specification of hologram and to hold pre-bid meeting. Thereafter a pre-bid conference was held on 18.4.2016 which was attended by 13 hologram manufacturers including the petitioners. After due deliberations, it was resolved to prescribe polyester based hologram so as to ensure that it is near impossible to replicate the same and no copy can be made of the hologram. The hologram manufacturers, who attended the pre-bid conference suggested that technology of manufacture of hologram should include mastering features, non-mastering features, taggant features and suggested that such technology should be adopted so that the hologram cannot be replicated. Thereafter, the Deputy

Commissioner Excise by communication dated 11.5.2016 informed the Commissioner Excise that the factory should be installed in the State of Madhya Pradesh which shall manufacture holograms for Excise Department exclusively and such arrangement is in place in the State of Tamil Nadu, Andhra Pradesh and Telangana. The Deputy Commissioner submitted a report of the conference which, in turn, was forwarded to the Excise Commissioner on 19.5.2016 to the State Government.

28. The State Government on 20.5.2016 directed constitution of another committee to finalise the terms and conditions of the Notice Inviting Tender. The committee consisting of Additional Excise Commissioner, State Level Flying Squad, Managing Director of Madhya Pradesh Laghu Udyog Nigam Limited or his nominee, Deputy Commissioner Excise Indore, Joint Director Finance, and Assistant Excise Commissioner, Divisional Flying Squad, Bhopal, was formed to provide assistance to Commissioner Excise to frame tender conditions. After due deliberations, the committee recommended that if the period of contract is kept at three years, the price of hologram may increase up to 15% but if it is kept at five years, the price of hologram may increase only up to 10%. Therefore, it was recommended that the decision may be taken to extend the period of contract up to five years. The committee also recommended that the manufacturing capacity of a tenderer should be more than average number of holograms supplied in previous years in the State of Madhya Pradesh and, therefore, recommended incorporation of conditions of turn over and net worth. The committee also recommended that a tenderer should have experience in the manufacture and supply of hologram.

29. The Commissioner Excise by a communication dated 7.6.2016 informed the Deputy Commissioner Excise Flying Squad Indore that the committee has recommended that considering the annual quantum of procurement it would be appropriate to fix average turn over requirement during last three years at Rs.30 Crores and the net worth may be fixed as Positive Net worth. Thereupon by communication dated 8.6.2016 the Deputy Commissioner Excise Flying Squad informed that taking into account the fact that there may be increase of 10% of consumption every year, the requirement of turn over of Rs.40 Crores is justified. It was further pointed out that net worth for a company means total assets minus total liabilities and net worth is an important determinant of the value of a company, considering it is composed primarily of all the money that has been invested since its inception, as well as

the retained earnings for the duration of its operation. It was further stated that net worth can be used to determine creditworthiness because it gives a snapshot of the company's investment history. Thereafter the Notice Inviting Tenders was issued, in which requirement of net worth was reduced to Rs. 30 Crores. Thus, from perusal of the record, which has been produced before us, it is evident that the impugned conditions in the Notice Inviting Tender have been incorporated by the committee after detailed deliberations and application of mind.

30. The enhancement in the turn over to Rs.40 Crores was made in the impugned Notice Inviting Tender, as a tenderer is required to establish plant in the State of Madhya Pradesh and is required to install the latest technology and the equipments. The aforesaid plant is required to work under the supervision of officers of the State Government. The term of the contract has also been enhanced from 2 to 5 years and the bidder has to work for a period of five years with several fluctuating conditions. In addition, three months of rolling capital would be involved to the extent of 3 to 4 months sale, which would be to the tune of 12 to 13 Crores. The petitioner has asserted that a factory can be set up with an investment up to Rs.5 Crores whereas the State in paragraph 13(D) of the return has denied the same. Therefore, it is not possible for us, in this proceeding under Article 226 of the Constitution of India to record a finding as to the amount with which the plant and machinery for the manufacture of holograms can be set up. It has been asserted by the State Government that the revenue of the State Government depends on the quality, quantity, security and supply of holograms by the tenderer and the hologram is a security product and public revenue depends on it. All the aforesaid aspects were taken into account by the committee of experts before finalising the draft of proposed tender in the interest of public revenue by way of collection as Excise duty which contributes major share in State revenue, and therefore a decision was taken to insert a condition of setting up a factory by a tenderer under the departmental supervision to ensure better control.

31. Admittedly, the petitioner in Writ Petition No.4448/2016 has supplied 172.88 Crores holograms having turn over of Rs.41.02 Crores and even in 2014-2015 has supplied 156 Crores holograms having turn over of Rs.32.11 Crores. Therefore, the conditions of having turn over of Rs.40 Crores and net worth of Rs.30 Crores are reasonable conditions. The impugned conditions in the Notice Inviting Tender have been inserted, to prevent sale of spurious

liquor and to eliminate the remote possibility of misbranding/mislabelling. Thus, the prime object of insertion of the impugned conditions is to augment public exchequer which is in public interest. The decision has been taken by the committee of experts after due deliberations and this Court in exercise of power under Article 226 of the Constitution of India cannot sit in appeal over the decision taken by the committee of experts. On the touchstone of aforesaid well settled legal principles with regard to scope of judicial review referred to supra, the impugned tender conditions can neither be said to irrational, arbitrary, violative of Article 14 or tailor-made to suit respondents No.3 and 4. Accordingly the issue No.(i) is answered.

32. Now, we may deal with the second issue, namely, whether the impugned tender conditions are against the object of creating a level playing field and contrary to public policy and public interest. The Supreme Court in the case of *Reliance Energy Limited* (supra), has held that doctrine of level playing field is subject to public interest. We have already held that the impugned tender conditions have been incorporated in the Notice Inviting Tender in the public interest, therefore, doctrine of level playing field has to subserve, the public interest. Accordingly, issue no. (ii) is answered.

33. We may advert to third issue, namely, whether the impugned tender conditions are contrary to the guidelines issued by the Central Vigilance Commission. It is trite law that terms of invitation to tender cannot be open to judicial scrutiny because invitation to tender is in the realm of contract. The State Government has the right to get the right and most competent person and should have freedom in the matter of formulating conditions of tender documents, unless the action of tendering authority is found to be malicious and is a misuse of statutory powers, the tender conditions are unassailable. [See, *Shimnit Utsch India Private Limited vs. West Bengal Transport Infrastructure Development Corporation Limited*, (2010) 6 SCC 303]. Therefore, the Commissioner Excise has the authority to lay down the terms and conditions of the Notice Inviting Tender and even if the same are violative of the guidelines issued by the Central Vigilance Commission, which even otherwise are directory in nature, the same have no bearing on the issue involved in this petition. Accordingly, the aforesaid issue is answered.

34. Now we may deal with the issue relating to formation of cartel. It is pertinent to mention here that at this stage, the financial bid is not opened, therefore, we are afraid that at this stage the contention of the petitioners that

the respondents No.3 and 4 have formed a cartel cannot be examined and the same can be examined after opening of the financial bids. Therefore, at this stage, we refrain ourselves from expressing any opinion on this issue. Accordingly, issue no. (iv) is answered.

35. We may advert to issue no.(v), namely, whether the respondents No.3 and 4 are separate legal entities. Section 2(6) of the Act defines the expression 'associate company', whereas section 2(87) of the Act defines the expression 'subsidiary company'. For the facility of reference, section 2(6) and section 2(87) of the Act are reproduced below:-

“2(6) “associate company”, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

2(87) “subsidiary company” or “subsidiary”, in relation to any other company (that is to say the holding company), means a company in which the holding company--

(i) controls the composition of the Board of Directors; or

(ii) exercises or controls more than one-half of the total share capital either at its own or together with one of more of its subsidiary companies:

· Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Explanation.-- For the purpose of this clause,--

(a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;

- (b) *the composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;*
- (c) *the expression "company" includes any body corporate;*
- (d) *"layer" in relation to a holding company means its subsidiary or subsidiaries."*

Admittedly, the respondent No.4 holds only 3.05% shares in the respondent No.3 company, therefore, the respondent No.3 can neither be termed as associate company nor subsidiary company, as provided under sections 2(6) and 2(87) of the Act. Section 186 of the Act enable the company to take loan and make investment. Therefore, if there are certain business transactions between the respondents No.3 and 4, no inference can be drawn that the respondents No.3 and 4 are not distinct legal entities.

36. Besides that, it is pertinent to mention that in the annual report of 2013-2014 of respondent No.3, names of subsidiary companies of respondent No.3 have been mentioned in which the name of respondent No.4 does not find place. The respondent No.3 has a factory at Noida as well which is evident from the annual report of 2013-2014. The Board of Directors of respondent No.3 consists of the Directors, namely, (i) Mr. Ashok Chaturvedi, Chairman and Managing Director, (ii) Mr. Ravi Kathpalia, (iii) Mr. M.G.Gupta, (iv) Mr. Achintya Kartiati, (v) Mr. Vijay Kumar Gupta, and (vi) Mr. H.K.Kaushik, whereas respondent No.4 company has two Directors, namely, Mr. M.G.Gupta, who is different from the Director in respondent No.3 company, and another Director, who is not the Director in the respondent No.3 company. Thus, it is evident that the Board of Directors of respondents No.3 and 4 are different and respondents No.3 and 4 are separate legal entities. Accordingly, issue no. (v) is answered.

37. Reverting to the submissions made on behalf of the petitioners that even though the committee had recommended that a tenderer should have experience in the supply of hologram, yet the aforesaid condition has been

omitted in the Notice Inviting Tender is concerned, we may refer to clause 19 of the impugned Notice Inviting Tender, which reads as under:-

"19. The successful tenderer shall start the supply of Polyester Holograms as per the design approved by the Excise Commissioner within 30 days from the date of placement of purchase order failing which the contract will be cancelled by the Excise Commissioner and the successful tenderer shall be liable for compensating the loss incurred by the department for making alternative arrangements for getting the supply of Holograms. The delivery of Security Holograms shall be as per the schedule to be furnished by the Excise Commissioner at the time of placing order. The tenderer shall submit PERT CHART indicating time frame for completing within 30 days the various steps involved in the supply of Holograms."

Thus, it is evident that the successful tenderer has to supply the polyester holograms as per the purchase order for which, in our considered opinion, no experience is required. Therefore, even if the condition with regard to experience of supply is dispensed with in the Notice Inviting Tender, the same is inconsequential.

38. So far as the contention made on behalf of the petitioners that the respondents No.4 and 5 have no experience of manufacture of hologram is concerned, suffice it to say that the respondents No.4 and 5 have categorically stated before this Court that they have annexed the documents with regard to their experience of manufacture of holograms along with the tender documents and the eligibility of the respondents No.4 and 5 is to be examined by the tender committee. Therefore, we refrain from expressing our opinion in this regard as the process of evaluation of the tender submitted by the respondents No.4 and 5 is on. So far as the contention raised on behalf of the petitioners that the respondents No.3 and 4 had formed a cartel in the State of Uttar Pradesh and the complaint is being investigated by retired Judge of Allahabad High Court is concerned, suffice it to say that the complainant had filed a writ petition before the Allahabad High Court, namely, Writ Petition No.58597/2012, which was withdrawn by him on 15.3.2014. It has been stated in the return filed on behalf of the respondent No.3 that the aforesaid enquiry is

still pending in which no progress has been made as the complainant has failed to appear before the committee. Therefore, the aforesaid contention does not advance the case of the petitioners any further. The submission made by the petitioners that the expression 'turn over' used in condition number 3 and the impugned Notice Inviting Tender, has no reference to manufacture of holograms and, therefore, any person who may not have experience in manufacture of holograms may be eligible to participate in the process of tender is concerned, the aforesaid contention is not required to be examined, in view of categorical stand taken by the respondents No.4 and 5 that they have experience of manufacture of hologram and they have submitted documents in this regard along with their tenders. The tender committee shall look into the aforesaid aspect of the matter and, therefore, it is not necessary for us to dilate on the aforesaid issue any further. Similarly, the contention that the conditions are tailor-made and have been incorporated with a view to extend favour to big manufacturers is concerned, the same does not deserve acceptance for the reason recorded by us in the preceding paragraphs wherein after perusal of the record we have held that the tender committee has incorporated the conditions after due deliberations and in public interest and public exchequer which is of paramount consideration while awarding contract. It is pertinent to mention that Supreme Court had upheld impugned conditions in the notice inviting tenders in the case of *Association of Registered Plates* (supra), wherein only one tenderer was found eligible as per terms of notice inviting tenders. Therefore, the contention that impugned conditions have been incorporated with a view to oust small manufacturers cannot be accepted.

39. So far as the submission made by learned counsel for the respondent No.5 that an appropriate proceeding under Section 340 of the Code of Criminal Procedure be initiated against the petitioner in Writ Petition No.4448/2016 for making an incorrect statement in paragraph 9 of the rejoinder is concerned, we are not inclined to initiate the aforesaid proceeding as at the outset, learned senior counsel for the petitioner in Writ Petition No.4448/2016 had sought withdrawal of the aforesaid statement and has expressed his sincere apology in respect of pleading which was made due to inadvertence.

40. So far as submission that financial assistance was given by respondent

No.3 to respondent No.5 to enable it to participate in the process of tender, to make the tender look competitive is concerned, the same also does not deserve acceptance as certain amount was paid to respondent No.5 under a consultancy agreement, Annexure R-3-4. We refrain from expressing our opinion with regard to effect of annexing document of respondent No.4 by respondent No.3 as the effect of same has to be dealt with by tender scrutiny committee.

41. The petitioners in Writ Petition No. 4594/2016, Writ Petition No.4664/2016 and Writ Petition No.5071/2016 are not entitled to any relief for yet another reason as they have approached this Court belatedly. The last date of submission of bids was 2.7.2016. The petitioners have filed writ petitions respectively on 1.7.2016, 4.7.2016 and 17.7.2016. Their conduct disentitles them to any relief in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India.

42. Learned Advocate General has taken a specific stand that in case the petitioners have any grievance, they can approach the Excise Commissioner with regard to their grievance. In view of the aforesaid statement by learned Advocate General, the liberty is granted to the petitioners to approach the Excise Commissioner with regard to their grievance, if any. Needless to state that if the petitioners approach the Excise Commissioner with regard to their grievance, the Excise Commissioner shall take appropriate action on the complaint if any, which may be submitted by the petitioners. We trust and hope that the Excise Commissioner as well as the tender committee shall act with utmost objectivity while dealing with the evaluation of the tenders and shall bear in mind that public interest as well as public exchequer is of paramount consideration while awarding the contract. In case the tender committee comes to the conclusion that the respondents No.3 and 4 have formed any cartel, an appropriate action shall be taken in accordance with the terms and conditions of the Notice Inviting Tender including Clause 37 of the Notice Inviting Tender, which empowers the Excise Commissioner to reject all or any of the tenders.

With the aforesaid directions, the writ petitions are disposed of.

Petition disposed of.

I.L.R. [2017] M.P., 601

WRIT PETITION

Before Mr. Justice S.A. Dharmadhikari

W.P. No. 204/2015 (Gwalior) decided on 21 November, 2016

LOKUMAL NANDWANI

...Petitioner

Vs.

TUMATO TECHNOLOGY PVT. LTD.

...Respondent

Civil Procedure Code (5 of 1908), Order 14 Rule 2 – Preliminary issue – Petition against rejection of an application under Order 14 Rule 2 of the Civil Procedure Code – Respondent/plaintiff filed a suit for recovery of money after lapse of three years – Petitioner filed an application for deciding the issue of limitation as a preliminary issue which was rejected by trial Court – Held – There is a factual dispute with regard to the actual date of cause of action which can be decided only after recording evidence – Trial court has not committed any error in rejecting the application – Petition dismissed. (Paras 2, 4 & 8)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 14 नियम 2 – प्रारंभिक विवादक – सिविल प्रक्रिया संहिता के आदेश 14 नियम 2 के अंतर्गत आवेदन की नामंजूरी के विरुद्ध याचिका – प्रत्यर्थी/वादी ने तीन वर्ष बीत जाने के पश्चात् धन की वसूली हेतु वाद प्रस्तुत किया – याची ने परिसीमा के विवादक को प्रारंभिक विवादक के रूप में विनिश्चित किये जाने हेतु आवेदन प्रस्तुत किया जो कि विचारण न्यायालय द्वारा नामंजूर किया गया – अभिनिर्धारित – वाद हेतुक की वास्तविक दिनांक के संबंध में तथ्यात्मक विवाद है – जिसे केवल साक्ष्य अभिलिखित करने के पश्चात् ही विनिश्चित किया जा सकता है – विचारण न्यायालय ने आवेदन नामंजूर करने में कोई त्रुटि नहीं की है – याचिका खारिज।

Cases referred:

2015 (5) SCC 674, 2015 (6) SCC 412.

Yogesh Singhal, for the petitioner.

None for the respondents though served.

ORDER

S.A. DHARMADHIKARI, J. :- Heard.

1. In this petition under Article 227 of the Constitution of India, the petitioner inter alia has challenged the validity of the order dated 15.10.2014

by which the application preferred by the petitioner under Order 14 Rule 2 CPC has been rejected.

2. The learned counsel for the petitioner contends that a suit for recovery of money has been filed by the Respondent/Plaintiff on 04.01.2011 on the basis of cheque issued on 05.05.2016, therefore, the suit is barred by limitation. He further contends that the trial Court has framed as many as five issues and Issue No.5 is with regard to the limitation. The petitioner had moved an application under Order 14 Rule 2 CPC on the ground that Issue No.5 may be decided as a preliminary Issue. In view of the admitted facts in respect of question of Limitation it was not necessary for the trial Court to defer the decision on the Preliminary Issue No.5. The issue of Limitation can be decided only on the pleadings of the parties. The suit itself is barred by limitation since the same has been filed after three years, the Trial Court ought to have dismissed the same. The trial Court erred in deferring the matter for recording evidence. It is urged that the impugned order so far as it defers the decision on issue No.5 for recording evidence be set aside and the matter be remitted to the trial Court to decide the Issue No.5 with regard to Limitation first.

3. The trial Court while deciding the application came to the conclusion that the Respondent/Plaintiff has disputed the date of cause of action, the matter involves a mixed question of fact and law and the same cannot be decided as a preliminary issue without recording evidence.

4. In the present case, the Respondent/Plaintiff had entered into an agreement with one Subhash Khushiramani for purchase of Land and the petitioner Lokumal Nandmani had played the role of middleman and for this purpose a cheque for Rs.51,000/- was issued to the petitioner on 05.05.2006. On 3.1.2009 it was informed that Subhash Khushiramani is not in a position to register the sale-deed. The petitioner contended that since the suit was filed after three years, the same is barred by limitation whereas the contention of the Respondent/Plaintiff is that the suit was filed only after the non performance of the agreement when the petitioner failed to pay the amount. Accordingly, there is a factual dispute with regard to the actual date of cause of action. The said question can be decided only after recording evidence.

5. The core question which crop up consideration is whether an issue of Limitation could be taken up as a preliminary Issue.

6. The Apex Court in *Satti Paradesi Samadhi and Pillayar Temple*

Vs. M. Sankuntala (dead) through L.Rs. and Others, reported in 2015 (5) SCC 674 held that:

“In the case at hand, we find that unless there is determination of the fact which would not protect the plaintiff under Section 10 of the Limitation Act the suit cannot be dismissed on the ground of limitation. It is not a case which will come within the ambit and sweep of Order 14 Rule 2 which would enable the court to frame a preliminary issue to adjudicate thereof. The learned Single Judge, as it appears, has remained totally oblivious of the said facet and adjudicated the issue as if it falls under Order 14 Rule 2. We repeat that on the scheme of Section 10 of the Limitation Act we find certain facts are to be established throw the lis from the sphere of the said provision so that it would come within the concept of limitation. The Division Bench has fallen into some error without appreciating the facts in proper perspective. That apart, the Division Bench, by taking recourse to Articles 92 to 96 without appreciating the factum that it uses the words “transferred by the trustee for a valuable consideration” in that event the limitation would be twelve years but in the instant case the asseveration of the plaintiff is that the trustee had created three settlement deeds in favour of his two daughters and a granddaughter. The issue of consideration has not yet emerged. This settlement made by the father was whether for consideration or not has to be gone into and similarly whether the property belongs to the Trust as Trust is understood within the meaning of Section 10 of the Limitation Act has also to be gone into. Ergo, there can be no shadow of doubt that Issue 1 that was framed by the learned Single Judge was an issue that pertained to the fact and law and hence, could not have been adjudicated as a preliminary issue. Therefore, the impugned order is wholly unsustainable.

7. In another case, the Apex Court in the case of *Foreshore Cooperative Housing Society Limited Vs. Praveen D. Desai (Dead) through Legal Representatives and Others*, reported in 2015 (6) SCC 412, has held that,

“36. Order 14 Rule 2 of the Code of Civil Procedure, confers

power upon the court to pronounce judgment on all the issues. But there is an exception to that general rule i.e. where issues both of law and fact arise in the same suit and the court is of the opinion that the case or any part thereof may be disposed of on the issue of law, it may try that issue first if that issue relates to the jurisdiction of the court or a bar to the suit created by any law.

37. Order 14 Rule 2 of the Code of Civil Procedure as it existed earlier reads as under:-

“2. Issues of law and of fact:- Where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it think fit, postpone the settlement of the issues of fact until after the issues of law have been determined.”

38. A comparative reading of the said provision as it existed earlier to the amendment and the one after amendment would clearly indicate that the consideration of an issue and its disposal as preliminary issue has now been made permissible only in limited cases. In the unamended Code, the categorisation was only between issues of law and of fact and it was mandatory for the court to try the issues of law in the first instance and to postpone the settlement of issues of fact until after the issues of law had been determined. On the other hand, in the amended provision there is a mandate to the court that notwithstanding that a case may be disposed of on a preliminary issue, the court has to pronounce judgment on all the issues. The only exception to this is contained in sub-rule (2). This sub-rule relaxes the mandate to a limited extent by conferring discretion upon the court that if the court is of opinion that the case or any part thereof may be disposed of “on an issue of law only”, it may try that issue first. The exercise of this discretion is further limited to the contingency that the issue to be so tried must relate to the jurisdiction of the court or a bar to the suit created by a law in force.”

8. In the light of the judgments of the Apex Court and the facts and circumstance of the case, the trial Court has not committed any error in rejecting the application under order 14 Rule 2 C.P.C. and has rightly deferred the decision on the issue to be decided along with other issues after recording evidence.

9. No case is made out for interference, the petition is bereft of merits and substance. Accordingly, the same is dismissed.

Let a copy of this order be sent to the Trial Court by FAX.

No order as to costs.

Petition dismissed.

**I.L.R. [2017] M.P., 605
WRIT PETITION**

Before Mr. Justice J.K. Maheshwari

W.P. No. 6163/2016 (Indore) decided on 23 November, 2016

PRIYA YADAV

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), Section 30 – Functions and responsibilities of Child Welfare Committee – Petition filed against order of Child Welfare Committee (CWC) directing petitioner to bring child in the office in between 10:00AM to 05:00PM on every Friday giving visitation right to husband – Held – Except Section 30(xii), Committee cannot take cognizance with respect to protection of a child who is in need of care & protection – *Suo Motu* cognizance has not been taken by the Committee reaching out to the child in need, but action taken on the basis of complaint by husband – Function discharged by Committee is not specified in the Section. (Para 6)

क. किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 30 – बाल कल्याण समिति के कार्य एवं उत्तरदायित्व – याची को प्रत्येक शुक्रवार सुबह 10 बजे से सायं 5 बजे तक बालक को कार्यालय में लाने के लिए निदेशित करते हुए पति को मुलाकात का अधिकार देते हुए बाल कल्याण समिति के आदेश के विरुद्ध याचिका प्रस्तुत – अभिनिर्धारित – सिवाय धारा 30(xii) के, समिति

ऐसे बालक के संरक्षण के संबंध में संज्ञान नहीं ले सकती जिसे देखरेख एवं संरक्षण की आवश्यकता है – समिति ने जरूरतमंद बालक के लिए स्वप्रेरणा से संज्ञान नहीं लिया बल्कि पति की शिकायत के आधार पर कार्रवाई की गई – समिति द्वारा निर्वहित कार्य धारा में विनिर्दिष्ट नहीं।

B. Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), Section 37 – Powers of Child Welfare Committee – Primary function of the Committee starts when child is produced before them or intimation received by Child Welfare Committee on verification by protection officer or by own visit after passing the order by all three members – No other power can be exercised by the members of Child Welfare Committee with respect to child who is not in conflict with law and in need of care and protection, not brought before them. (Para 11)

ख. किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 37 – बाल कल्याण समिति की शक्तियाँ – समिति का प्राथमिक कार्य, उनके समक्ष बालक को प्रस्तुत किये जाने पर या संरक्षण अधिकारी के सत्यापन द्वारा बाल कल्याण समिति को सूचना प्राप्त होने पर अथवा सभी तीनों सदस्यों द्वारा आदेश पारित करने के पश्चात्, स्वयं निरीक्षण करने पर आरंभ होता है – बाल कल्याण समिति के सदस्य, ऐसा बालक जो विधि का उल्लंघन करने वाला नहीं है और जिसे देखरेख एवं संरक्षण की आवश्यकता है, जिसे उनके समक्ष नहीं लाया गया हो, उसके संबंध में किसी अन्य शक्ति का प्रयोग नहीं कर सकते।

C. Commission for Protection of Child Rights Act, 2005 (4 of 2006) – Applicability – United Nations Convention – Chief Justice of Madhya Pradesh High Court has directed for circulation of the 'Child access & custody guidelines' and pertaining Plan for guidance, among Additional District Judges, Family Court Judges & marriage counsellors in State of M.P. – Convention ought to be followed by competent courts having power to declare guardian – Under Act of 2015 and Rules framed thereunder, Child Welfare Committee is not conferred with power to give custody of the child – In a case wherein due to dispute between husband and wife proceedings are pending between them, Child Welfare Committee cannot direct visitation right to meet child either to husband or wife – Powers exercised by the Committee is contrary to law – Order set aside – Petition allowed. (Para 12)

ग. बाल अधिकार संरक्षण के लिए आयोग अधिनियम, 2005 (2006 का 4) – पोषणीयता – संयुक्त राष्ट्र कन्वेंशन – म.प्र. उच्च न्यायालय के मुख्य

न्यायाधिपति ने 'बालक से मिलने की अनुमति एवं अभिरक्षा के दिशानिर्देश' एवं तत्संबंधी मार्गदर्शन हेतु योजना का अतिरिक्त जिला न्यायाधीशों, कुटुम्ब न्यायालय के न्यायाधीशों एवं म.प्र. राज्य के विवाह परामर्शदाताओं के बीच परिचालन हेतु निदेशित किया है – सक्षम न्यायालयों द्वारा कन्वेंशन का पालन किया जाना चाहिए जिन्हें संरक्षक की घोषणा करने की शक्ति प्राप्त है – अधिनियम 2015 एवं उसके अधीन विरचित नियमों के अंतर्गत बालक की अभिरक्षा देने की शक्ति बाल कल्याण समिति को प्रदत्त नहीं है – ऐसे प्रकरण में जहाँ पति-पत्नी के बीच विवाद के कारण उनके मध्य कार्यवाहियां लंबित हैं, बाल कल्याण समिति या तो पति अथवा पत्नी किसी को भी बालक से मिलने के लिए मुलाकात का अधिकार निदेशित नहीं कर सकती – समिति द्वारा प्रयुक्त शक्तियां, विधि के प्रतिकूल हैं – आदेश अपास्त – याचिका मंजूर।

A.S. Rathore, for the petitioner.

Rohit Mangal, for the respondent/State.

Manoj Manav, for the respondent No. 5.

ORDER

J.K. MAHESHWARI, J. :- This writ petition under Article 226/227 of the Constitution of India has been filed assailing the order dated 20.07.2016 passed by Child Welfare Committee, Indore directing the petitioner to bring the child in the office of Child Welfare Committee (in short 'CWC'), Prabhu Nagar, Indore in between 12.00 a.m. to 5.00 p.m. on every Friday giving visitation right to the husband on his application. In the said order it is specified that non compliance would make her liable for the consequences.

2. Learned counsel for petitioner has strenuously urged that as per section 2(22) of Juvenile Justice(Care and Protection of Children) Act, 2015 (which shall be referred hereinafter as the 'Act' of 2015) the committee would mean the 'Child Welfare Committee'; may be constituted as per section 27 of the Act. The State Government has conferred with the power to appoint the Child Welfare committees for exercising the power to discharge the duties in relation to children in need of care and protection under the Act. The powers of the committee has been specified under section 29 by which the committee can dispose of the cases relating to care, protection, treatment, development and rehabilitation of the child in need of care and protection. Section 30 further specifies the functions and responsibilities of the committee. However, looking to the same and in the facts, committee cannot exercise the power to pass the order impugned. It is said that in the case, husband and wife are litigating in

the family court on initiation of proceedings asking maintenance and the proceeding under section 498-A of the IPC where husband applied before the family court asking visitation right and during pendency of the said application, submitted an application before CWC, Indore contending that he is ready to take over the responsibility being father of his daughter, however to take care of her, overall balanced emotional and social welfare, care and love as she deserves like other child, requested for the custody. In the said application, nothing is said how the child is in need of care and protection. Again applications with the similar wordings have been filed, on all those CWC has taken cognizance issuing the notice to petitioner to bring the child in the office of CWC. On 20.07.2016 application was filed contending that CWC had intimated to respondent No.5 that child was ill, however husband applied for visitation right and to grant the permission for her treatment. It is submitted that CWC, Indore cannot pass such order, therefore action taken by them is in excess to the power conferred on them. It has also been brought to the notice of this court that the Child Welfare Committee, Indore by receiving the applications, regularly passing the orders to give custody of the child. Copy of one of the order dated 25.5.2015 has been brought to the notice contending that in respect to custody of one child, proceedings were pending before the family court, even then assuming the jurisdiction, order has been passed. In view of aforesaid, it is contended that the appropriate directions may be issued to the CWCs of the State to discharge their duties within the framework of law.

3. Shri Rohit Mangal, learned Govt. Advocate representing the State made an endeavour to satisfy the Court that CWC is conferred with a power to give the visitation right to the guardian in a case where the child is in need of care and protection but in view of provisions as contained under section 27 to 30 as well the procedure contemplated under section 31 to 37 of the Act of 2015 and the Rules framed by the Central Govt. known as Juvenile Justice (Care and Protection of Children), Rules 2016 (hereinafter referred as the 'Rules'), it is fairly conceded that CWC does not confer with a power to give the custody of the child because such powers are conferred to the Court under the provisions of Guardian and Wards act (sic:Act), 1890 and by the Family Courts Act, 1984. However, it is urged that looking to the scope of provisions of the Act of 2015, appropriate directions may be issued to all the Child Welfare Committees in the State of Madhya Pradesh.

4. Shri Manoj Manav, learned counsel representing respondent No.5 has argued with vehemence supporting the order impugned passed by the CWC conferring visitation right to respondent No.5 directing the petitioner to bring the child in the office of CWC in between 12.00 am to 5.00 pm in every week on Friday. It is urged by him that as per provisions of the Commission For Protection of Child Rights Act, 2005 under section 2(b), "child rights" have been defined by which the children's right adopted in the United Nations Convention on the Rights of the Child on 20.11.1989 and ratified by the Government of India on 11.12.1992 shall be included and it is required to be protected. The Child Welfare Committee is conferred with the powers to take care of the children who are not in conflict with law, however as per Article 9 and 10 of the United Nations Convention, it is the duty of the parties that the child shall not be separated from his or her parents against their will, however in the benefit of the child, both the parents have to maintain personal relations and remain in direct contact to the child until it is contrary to the children's best interest. In the present case on filing the complaint, alleging cruelty and harassment by the wife proceeding under section 498-A of the IPC is pending against husband and also filed the proceedings under section 125 of the Cr.P.C. seeking maintenance would cause hardship to the child in maintaining the inter-personal relationship to the spouse, therefore to show love and affection, husband has rightly been permitted for visitation right by the CWC, Indore by the order impugned. In view of aforesaid, it is urged that petition filed by the petitioner may be dismissed.

5. After hearing learned counsel appearing on behalf of both the parties and on perusal of the object and reasons to bring the Act of 2015, it is clear that this Act has been brought in pursuance to Article 15 of the Constitution, whereby State is conferred with powers to make the special provisions for the children. Article 39(e) and (f), 45 and 47 further makes the State responsible for ensuring that all needs of children are met and their basic human rights are protected. The reference of the United Nations Convention on the Right of Children ratified by India on 11.12.1992 have also been given effect whereby State parties are required to undertake all appropriate measures in case of a child alleged as, or accused of, violating any penal law, including (a) treatment of the child in a manner consistent with the promotion of the child's sense of dignity and worth (b) reinforcing the child's respect for the human rights and fundamental freedoms of others (c) taking into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a

constructive role in society. Under the Act of 2015, vide section 2(22), the Child Welfare Committee is required to be constituted as per section 27. Chapter 5 of the Act of 2015 starts from Section 27 which deals with Child Welfare Committee, required to be constituted by the State Government notifying it in a official gazette for every district which may be more than one at the said district. The committee may exercise their power and duties conferred on them, in relation to children in need of care and protection. The qualification for appointment has also been mentioned therein. The functions of the Committee how and in what manner and to preside over has been specified under section 28. In section 29 the powers of committee has been mentioned whereby it is apparent that the committee shall have the authority to dispose the cases for the care, protection, treatment, development and rehabilitation of children in need of care and protection, as well as to provide for their basic needs and protection. Section 30 deals with functions and responsibilities of the Committee and it shall include :-

- (i) taking cognizance of and receiving the children produced before it;
- (ii) conducting inquiry on all issues relating to and affecting the safety and well-being of the children under Act;
- (iii) directing the Child Welfare Officers or probation officers or District Child Protection Unit or non- governmental organisation to conduct social investigation and submit a report before the committee;
- (iv) conducting inquiry for declaring fit persons for care of children in need of care and protection;
- (v) directing placement of a child in foster care;
- (vi) ensuring care, protection, appropriate rehabilitation or restoration of children in need of care and protection, based on the child's individual care plan and passing necessary directions to parents or guardians or fit persons or children's homes or fit facility in this regard.
- (vii) selecting registered institution for placement of each child requiring institution support, based on the child's age, gender, disability and needs and keeping in mind the available capacity

of the institution;

(viii) conducting atleast two inspection visits per month of residential facilities for children in need of care and protection and recommending action for improvement in quality of services to the District Child Protection Unit and the State Government.

(ix) certifying the execution of the surrender deed by the parents and ensuring that they are given time to reconsider their decision as well as making all efforts to keep the family together;

(x) ensuring that all efforts are made for restoration of abandoned or lost children to their families following due process' as may be prescribed;

(xi) declaration of orphan, abandoned and surrendered child as legally free for adoption after due inquiry;

(xii) taking suo motu cognizance of cases and reaching out to children in need of care and protection, who are not produced before the Committee, Provided that such decision is taken by atleast three members;

(xiii) taking action for rehabilitation of sexually abused children who are reported as children in need of care and protection to the Committee by Special Juvenile Police Unit or local police, as the case may be, under the Protection of Children from Sexual Offences Act, 2012

(xiv) dealing with cases referred by the Board under sub-section(2) of Section 17;

(xv) co-ordinate with the police, labour department and other agencies involved in the care and protection of children with support of the District Child Protection Unit or the State Govt.

(xvi) in case of a complaint of abuse of a child in any child care institution, the Committee shall conduct an inquiry and give directions to the police or the District Child Protection Unit or labour department or childline services, as the case may be;

(xvii) accessing appropriate legal services for children;

(xviii) such other functions and responsibilities, as may be prescribed.

6. On perusal of the aforesaid, it is apparent that except section 30 sub-clause (xii), the Committee cannot take cognizance with respect to protection of a child who is in need of care and protection. In the present case suo motu cognizance has not been taken by the Committee reaching out to the child in need of care and protection but the action has been taken on the basis of a complaint made by the husband on supplying the information by the Committee. However, the function as discharged by the Committee is not specified in this section.

7. Chapter 6 specifies the procedure to be followed in relation to the children in need of care and protection which starts from section 31 to section 38. Section 31 is relevant, however it is reproduced as under :-

Section 31- (1) any child in need of care and protection may be produced before the committee by any of the following persons namely :-

(i) any police officer or special juvenile Police Unit or designated Child Welfare officer or any officer of District Child Protection Unit or Inspector appointed under any Labour Law for the time being in force;

(ii) any public servant;

(iii) Childline Services or any voluntary or non- governmental organisation or any agency as may be recognised by the State Government;

(iv) Child Welfare Officer or probation officer;

(v) any social worker or a public spirited citizen;

(vi) by the child himself; or

(vii) any nurse, doctor or management of a nursing home, hospital or maternity home;

These persons may produce the child before the committee without any loss of time within a period of 24 hours excluding the time necessary for journey.

(2) the State Govt. may make rules consistent with this Act, to provide for the manner of submitting the report to the committee and the manner of sending and entrusting the child to Children's home or fit facility or fit person as the case may be, during the period of enquiry.

8. Bare reading of the aforesaid, it is apparent that Police Officer or Special Juvenile Police Unit or designated Child Welfare Officer or any officer of the District Child Protection Unit or Inspector appointed under Labour Law, any public servant, childline service or any voluntary or non-voluntary Governmental organisation or any agency recognized by the Government, Child Welfare Officer or Probation Officer, Social Worker, Public spirited citizen, Nurse, Doctor, Management of Nursing Homes, Hospital and Maternity Home may bring the child in need of care and protection before the CWC or otherwise the child himself may remain present asking relief as conferred to the Committee. In the said provision, no space has been provided to take action by the CWC on an application submitted by the husband against a wife to produce the child who are litigating in the court of law.

9. As per sub-section 32, it has been made mandatory on the aforesaid persons to make report regarding a child found separated from guardian and in case of non reporting, it would be an offence as per section 33 and section 34 who provides for penalty. Thereafter the committee shall take steps as specified in section 35 for surrender of the children following the procedure as specified.

10. Section 37 is relevant which clarifies what type of orders can be passed by the CWC with respect to the child in need of care and protection, hence it is reproduced as under :-

37(1) The committee on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view; pass one or more of the following orders, namely -

- (a) declaration that a child is in need of care and protection;
- (b) restoration of the child to parents or guardian or family

with or without supervision of Child Welfare Officer or designated social worker;

(c) placement of the child in Children's Home or fit facility or Specialised Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child.

(d) placement of the child with fit person for long term or temporary care;

(e) foster care orders under section 44;

(f) sponsorship orders under section 45;

(g) directions to persons or Institutions or facilities in whose care the child is placed regarding care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention; psychiatric and psychological support including need-based counselling, occupational therapy or behaviour modification therapy, skill training, legal aid, educational services and other developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies;

(h) declaration that the child is legally free for adoption under section 38.

(2) The Committee may also pass orders for-

(i) declaration of fit persons for foster care;

(ii) getting after care support under section 46 of the Act; or

(iii) any other order related to any other function as may be prescribed.

Any other function as may prescribed.

11. For the purpose of chapter 5 of the Act of 2015 and chapter 5 of the

Rules, it is clear that any child who is in need of care and protection is required to be produced before the committee during the working hours at its place and beyond working hours before members as per duty. What is supposed to be done by the committee has been specified under the Act as well as in the Rules. Thus primary function of the committee starts when child is produced before them or otherwise in case any intimation has been received by the CWC, on verification by the Protection Officer or Probationary Officer or by own visit, after passing the order by all three members. Thus the powers as conferred under the Act and the Rules to initiate the proceedings and to pass the order have been specified under section 37 and the power can be exercised to the extent as indicated. No other power can be exercised by the members of the CWC with respect to a child who is not in conflict with law and in need of care and protection, not brought before them.

12. In the context of aforesaid legal position, arguments advanced by the counsel for the respondent referring the provisions of Commission for Protection Of Child Rights Act, 2005 and as per United Nations Conventions is required to be adverted. Counsel referring the said convention urged that Madhya Pradesh High Court vide order dated 20.03.2014 has accepted the applicability of those conventions but on perusal of the order, it is apparent that Chief Justice of the Madhya Pradesh High Court has directed for circulation of the Child Access and Custody Guidelines and pertaining Plan for guidance, among the Additional District Judges, Family Court Judges and marriage counsellors in the State of Madhya Pradesh. Whereby it is clear that High Court was conscious enough that said convention ought to be followed by the competent court of law to which the power has been conferred to declare guardian, therefore said convention is required to be observed by those courts or Forums having competence conferred to them under the law. Under the Act of 2015 and the Rules framed thereunder, CWC is not conferred with a power to give the custody of the child. It is a case wherein due to dispute in between the husband and wife, proceedings are pending between them, however CWC, Indore cannot direct visitation right to meet the child either to husband or to wife in the facts of the case. In the said context the provisions of the Guardian and Wards Act, 1890 are relevant whereby as per section 7, the court may make an order as to guardianship on submitting an application by a person as specified in section 8 before the competent court having jurisdiction to entertain such an application in a form as prescribed. As per section 7 the court may have power to decide who would be the guardian of

the child. Similarly in the Family Courts Act, as per section 7(1)(b), explanation(g) the proceedings may be brought before the Family Court in a suit or proceeding asking guardianship of the child or the custody or access to any minor.

13. Thus, it is apparent that under the provisions of Guardian and Wards Act as well as under the provisions of Family Court Act, the powers are conferred to the court of competent jurisdiction who shall have powers to decide those application and in the said context if the letter of the High Court dated 20.03.2014 is interpreted applying the United Nations Conventions then it is rightly communicated to the Courts having power to decide guardianship or to give visitation right to or access to the minor child, therefore argument advanced by the counsel for respondent No.5 asking benefit of convention through CWC, Indore is misplaced and repelled.

14. In view of the discussions made hereinabove, it can safely be concluded that under the provisions of Juvenile Justice(Care and Protection of Children) Act, 2015 and Juvenile Justice (Care and Protection of Children) Rules, 2016, Child Welfare Committee does not confer power to give custody of a child taking it from mother and give to the father in the manner as done by the CWC, Indore in the present case. It is seen that CWC, Indore is passing orders granting custody of the children and one of such order has been brought to the notice of this court dated 25.5.2015. In the said case also the proceedings were pending before the Family Court for custody of the child but CWC usurp the jurisdiction and during pendency of those proceedings directed custody of the child to the mother. Similar is the position in the present case wherein also as per Annx.P/2, an application for custody of the child has also been filed before the Family Court but during pendency of the said application, respondent No.5 applied to the CWC where on the order of the visitation right has been passed directing to bring the child in the office of CWC, Indore on every Friday between 10.00 am to 5.00 pm to the petitioner. In my considered opinion the aforesaid exercise of powers by the CWC, Indore is not in conformity with the Act and the Rules and also contrary to the powers conferred under the other law applicable for the time being in force, therefore the order impugned is set aside.

15. As per the discussions made hereinabove, a note of caution is to be taken by the court that such power should not be exercised by the other CWCs functioning in the State of M.P.. The aforesaid note of caution fortifies from the

fact that the members appointed by the State Government either Chairman or members may not possess legal education, not having acquaintance (sic:acquaintance) with law and they are also not well versed with the provisions of law, however it is necessary to bring to the notice of all the CWCs, that what powers are required to be exercised by them. In this respect it is directed that they may exercise the powers within the ambit of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Rules framed therein and not beyond the same. It is directed that custody of child cannot be given by them in the facts discussed above, therefore the order passed today by this court is required to be circulated to all the CWCs of the State (sic:State) of M.P. directing them that visitation right or custody as guardian should not be invoked by them assuming the jurisdiction in this regard.

16. Accordingly, this petition succeeds and is hereby allowed. The order impugned is set aside. The Child Welfare Committee, Indore is directed not to exercise such powers as exercised by them in this case and they are restrained to do so in future. Parties shall bear their own costs.

17. Copy of this order be sent by the Registrar of the Bench Registry to the Member Secretary, State Legal Services Authority, M.P., the Principal Secretary, Women and Child Development Department for communication to all the Child Welfare Committees functioning in the State of M.P. issuing direction to them to discharge their function within the ambit of framework and Act of 2015 and Rules framed thereunder.

With the aforesaid, the petition stands allowed and disposed of.

C.C. as per rules.

Petition allowed.

I.L.R. [2017] M.P., 617

WRIT PETITION

Before Mr. Justice Prakash Shrivastava

W.P. No. 2170/2015 (Indore) decided on 13 February, 2017

MOHAMMADE YUSUF & ors.

...Petitioners

Vs.

RAJKUMAR & ors.

...Respondents

Registration Act (16 of 1908), Section 17 – Compromise Decree

– Registration of – Admissibility in Evidence – At the stage of examination of defendant witness, petitioner/defendant wanted to exhibit a compromise decree passed earlier, whereby the trial Court refused on the ground that the decree was not registered – Held – Earlier suit was based on the plea of adverse possession which reflects that plaintiff (in the earlier suit) had no pre-existing title in the suit property, rather till the suit was decreed, he was a mere encroacher – In the present case, since the petitioner had no pre-existing right in the property prior to compromise decree and for the first time right was created, the compromise decree is required to be registered – No illegality in the impugned order – Petition dismissed. (Para 11 & 18)

रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 17 – समझौता डिक्री – का रजिस्ट्रीकरण – साक्ष्य में ग्राह्यता – प्रतिवादी साक्षी के परीक्षण के प्रक्रम पर, याची/प्रतिवादी ने पूर्वतर पारित उस समझौता डिक्री को प्रदर्शित करना चाहा, जिसे विचारण न्यायालय द्वारा इस आधार पर अस्वीकार कर दिया गया था कि डिक्री रजिस्ट्रीकृत नहीं थी – अभिनिर्धारित – पूर्ववर्ती वाद, विपरीत कब्जे के अभिवाक् पर आधारित था जो दर्शाता है कि वादी (पूर्ववर्ती वाद में) को वाद सम्पत्ति में कोई पूर्व विद्यमान हक नहीं था बल्कि वाद डिक्रीत किये जाने तक वह मात्र एक अतिक्रमणकर्ता था – वर्तमान प्रकरण में, चूंकि याची के पास समझौता डिक्री से पूर्व सम्पत्ति में पूर्व विद्यमान अधिकार नहीं था और प्रथम बार अधिकार सृजित हुआ था, समझौता डिक्री का रजिस्ट्रीकरण अपेक्षित है – आक्षेपित आदेश में कोई अवैधता नहीं – याचिका खारिज।

Cases referred :

(1995) 5 SCC 709, AIR 2008 SC 2337, (2009) 13 SCC 22, (2015) 3 SCC 465, (2015) 3 SCC 164, 2014 (3) MPLJ 36, 2010 (1) MPLJ 70, AIR 2006 SC 3297, AIR 2016 Punjab & Haryana 73, AIR 2014 (1) K LJ 228, AIR 1978 Allahabad 485, (1920) ILR 47 PC 485, (2010) 9 SCC 385.

Vinay Gandhi, for the petitioners.

Satish Jain, for the respondent Nos. 4 to 7.

ORDER

PRAKASH SHRIVASTAVA, J. :- This writ petition under Article 227 of the Constitution is at the instance of the defendants challenging the order of the trial court dated 7/1/2015 whereby the trial court has held that the compromise decree is not admissible in evidence for want of registration.

In brief, in the suit filed by the respondents plaintiffs, at the stage of

examination of the defendants witness Mohd. Hafiz, the petitioner wanted to exhibit compromise decree passed in CS No.250-A/1984 dated 4/10/1985 in the matter of *Habib Khan Vs. Pradyumn* and the objection was raised by the respondent plaintiffs that the decree is required to be registered u/S.17 of the Registration Act and since it was not registered, therefore, not admissible in evidence. Trial court has allowed the objection by the impugned order.

3. Learned counsel for petitioners submits that Sec.17(1)(e) of the Registration Act is attracted when any right accrued under the decree is transferred or assigned whereas in the present case, the petitioner is claiming the right under the decree without there being any assignment or transfer. He further submits that even Sec.17(1) (b) & (c) are not attracted in view of Sec.17(2) (vi) because the compromise decree was confined to the subject matter of the suit. He further submits that the right was created in favour of the petitioner in view of Sec.27 of the Limitation Act as soon as the limitation for filing the suit by the original owner had expired and by the compromise decree only the pre-existing right was declared and that the petitioner may be permitted to exhibit the decree only for the collateral purpose.

4. As against this, learned counsel for respondents submits that by the compromise decree for the first time the right had accrued in favour of the petitioner and that prior to the compromise decree the petitioner was merely an encroacher.

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

6. By the alleged compromise decree dated 4/10/1985 passed in CS No.250-A/1984 the suit filed by Habibkhan (petitioner's father) for declaration and permanent injunction based upon the plea of adverse possession was decreed.

7. Section 17 of the Act provides for the document registration of which is compulsory. Sec.17(1) (b), (c) & (e) as also Sec.17(2)(vi) which are relevant for the present purpose are reproduced hereunder:-

"17(1)(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

[c] non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and.

[e] non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

[2] Nothing in clauses (b) and (c) of sub-section (1) applies to--

[vi] any decree or order of a Court [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding]; or

8. A co-joint reading of Section 17(1)(b) and 17(2)(vi) reveals that when by a compromise decree any right or interest in the immovable property of value more than Rs.100/- is created for the first time, then registration of such a decree is necessary, but when a bona-fide compromise decree merely declares the pre-existing right in such an immovable property which was subject matter of suit or proceedings, then it does not require registration.

9. The aforesaid provisions in the context of the compromise decree were considered by the supreme court in the matter of *Bhoop Singh Vs. Ram Singh Major and others* reported in (1995) 5 SCC 709 and the position of law qua Sec.17(2)(vi) was summarised as follows:-

"18] The legal position qua clause (vi) can, on the basis of the aforesaid discussion, be summarised as below:

[1] Compromise decree if bona fide, in the sense that the compromise is not a device to obviate payment of stamp duty and frustrate the law relating to registration, would not require registration. In a converse

situation, it would require registration.

[2] If the compromise decree were to create for the first time right, title or interest in immovable property of the value of Rs. 100 or upwards in favour of any party to the suit the decree or order would require registration.

[3] If the decree were not to attract any of the clauses of sub-section (1) of Section 17, as was the position in the aforesaid Privy Council and this Court's cases, it is apparent that the decree would not require registration.

[4] If the decree were not to embody the terms of compromise, as was the position in Lahore case, benefit from the terms of compromise cannot be derived, even if a suit were to be disposed of because of the compromise in question.

[5] If the property dealt with by the decree be not the "subject-matter of the suit or proceeding", clause (vi) of sub-section (2) would not operate, because of the amendment of this clause by Act 21 of 1929, which has its origin in the aforesaid decision of the Privy Council, according to which the original clause would have been attracted, even if it were to encompass property not litigated".

10. Subsequently in the matter of *K.Raghunandan & Ors Vs. Ali Hussain Sabir & Ors.* reported in AIR 2008 SC 2337 in a case where after the compromise decree the plaintiff had claimed title to the suit passage on the basis of the compromise decree wherein the suit passage was not subject matter in the earlier suit, the supreme court has held that the compromise decree need to be registered. The matter was referred to the larger bench by order passed in the matter of *Phool Patti and another Vs. Ram Singh (dead)*

through LR.s and another reported in (2009) 13 SCC 22 on expressing opinion that there was inconsistency between the decisions in the cases of *Bhoop Singh and Raghunandan* (supra). The larger bench of the supreme court by the judgment in the matter of *Phool Patti and another Vs. Ram Singh (dead) through LR.s and another* reported in (2015) 3 SCC 465 has held that there was no inconsistency between the judgment in the case of *Bhoop Singh and Raghunandan* (supra). After the larger bench judgment, the matter was again taken up by the division bench of supreme Court in the matter of *Phool Patti and another Vs. Ram Singh (dead) through LR.s and another* reported in (2015) 3 SCC 164 and the two judges bench held that the property in respect of which the consent decree declared pre-existing right of the plaintiff, did not require compulsory registration whereas the decree passed in respect of other property required registration since for the first time the right title or interest of value greater than Rs.100/- was created for other property in favour of the said plaintiff.

11. In the present case, in the earlier suit CS No.250-A/1984 the petitioner had claimed declaration of title on the plea of adverse possession and the compromise decree was passed in the suit. The very fact that the suit was based upon the plea of adverse possession reflects that the petitioner had no preexisting title in the suit property. Till the suit was decreed, the petitioner was a mere encroacher, at the most denying the title of lawful owner.

12. The supreme Court in the matter of *Gurudwara Sahib Vs. Gram Panchayat Village Sirthala* reported in 2014(3) MPLJ 36 has settled that declaratory decree based on plea of adverse possession cannot be claimed and adverse possession can be used only as shield in defence by the defendant. It has been held that:-

"7] In the Second Appeal, the relief of ownership by adverse possession is again denied holding that such a suit is not maintainable. There cannot be any quarrel to this extent the judgments of the Courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings filed against the appellant and appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

13. The plea of the petitioner based upon Sec.27 of the Limitation Act is found to be devoid of any merit since it relates to the extinction of the right of the lawful owner after expiry of the Limitation Act, but in view of the judgment of the supreme court in the matter of *Gurudwara Sahib* (supra), the petitioner cannot claim himself to be the owner automatically after the expiry of the said limitation.

14. Even otherwise as settled by the supreme court in the matter of *Sneh Gupta Vs. Devi Swaroop* reported in 2010 (1) MPLJ 70, a compromise decree is merely an agreement between the parties with the seal of the court super-added to it and that the title to the property must be determined in terms of the statutory provision and relinquishment of right in property by the party must be done by a registered instrument.

15. Counsel for petitioner has also placed reliance upon the judgment of the supreme court in the matter of *Som Dev & Ors Vs. Rati Ram & Anr.* reported in AIR 2006 SC 3297, but in that case it was found that by the decree, the right was not created for the first time, hence Sec.17(1)(a) was held to be not applicable.

16. Keeping in view the aforesaid position in law, the benefit of judgments in the matter of *Gulkandi Vs. Dhikkal and others* reported in AIR 2016 Punjab & Haryana (sic:Haryana) 73, *Munnoottam Kuzhiyil Vayaloli Balan Nambiar Vs. Thekkedath Sankara Kurup* reported in AIR 2014(1)KLJ 228 and *Gokul Chand Vs. Jagdish Chandra and another* AIR 1978 Allahabad 485, cannot be granted to the petitioner as they are distinguishable on their own facts.

17. So far as the judgment of the Privy Council in the matter of *Rani Hemanata Kumari Debi Vs. Midnapur Zamindari Company Limited* reported in (1920) ILR 47 PC 485 is concerned, it was rendered prior to the amendment in the Section 17 of the Registration Act.

18. It is also worth noting that since in the present case by an instrument no decree or order of the court has been transferred or assigned, therefore, Sec.17(1)(e) is not attracted, but mere mentioning of the incorrect provision ie. Sec.17(1)(e) will not render the order of the trial court erroneous.

19. Since the petitioner had no pre-existing right in the property prior to the compromise decree and by the decree for the first time right was created, therefore, the trial court has rightly held that the decree is required to be

registered. Hence, I am of the opinion that the impugned order passed by the trial court does not suffer from any patent illegality.

20. Even otherwise, the Supreme Court in the matter of *Jai Singh and others Vs. Municipal Corporation of Delhi and Another* reported in 2010(9) SCC 385 while considering the scope of interference under Article 227 of the Constitution, has held that the jurisdiction under Article 227 cannot be exercised to correct all errors of judgment of a court, or tribunal acting within the limits of its jurisdiction. Correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice.

21. The writ petition is accordingly dismissed.

Petition dismissed.

I.L.R. [2017] M.P., 624

APPELLATE CIVIL

Before Mr. Justice Sanjay Yadav

S.A. No. 315/2014 (Jabalpur) decided on 20 June, 2016

KARUNA GEHLOT (SMT.)

...Appellant

Vs.

MANIKCHAND CHOUBEY & ors.

...Respondents

A. Civil Procedure Code (5 of 1908), Section 100 – Second Appeal – Appellant neither a party before the trial Court nor before First Appellate Court – Seeking leave to file second appeal – Facts – Appellant purchased the suit property after the property has been transferred three to four times – Trial court partly decreed the suit on 27.09.1997 – First Appellate Court dismissed the appeal on 16.01.2004 – Appellant purchased the land vide registered sale deed dated 29.03.2008 – Whether in such facts leave to file second appeal can be granted – Held – No, as the litigation has attained finality in the year 2004 with dismissal of regular Civil Appeal and the appellant has purchased the property in question on 29.03.2008, so he cannot be said to have acquired any right through its original owner or through subsequent purchasers – Appellant is at liberty to bring a fresh suit – Leave to file second appeal cannot be granted – Appeal dismissed.

(Paras 6, 8 & 9)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील –

अपीलार्थी, न तो विचारण न्यायालय न ही प्रथम अपीली न्यायालय के समक्ष पक्षकार — द्वितीय अपील प्रस्तुत करने की अनुमति चाहता है — तथ्य — तीन से चार बार संपत्ति अंतरित होने के बाद अपीलार्थी ने वाद संपत्ति को क्रय किया — दिनांक 27.09.1997 को विचारण न्यायालय ने वाद को अंशतः डिक्रीत किया — दिनांक 16.01.2004 को प्रथम अपीली न्यायालय ने अपील खारिज की — अपीलार्थी ने दिनांक 29.03.2008 को रजिस्ट्रीकृत विक्रय विलेख के माध्यम से भूमि क्रय की — क्या ऐसे तथ्यों में द्वितीय अपील प्रस्तुत करने हेतु अनुमति प्रदान की जा सकती है — अभिनिर्धारित — नहीं, चूंकि मुकदमे ने वर्ष 2004 में नियमित सिविल अपील की खारिजी के साथ ही अंतिमता प्राप्त की है तथा अपीलार्थी ने दिनांक 29.03.2008 को प्रश्नगत संपत्ति क्रय की है, इसलिए यह नहीं कहा जा सकता है कि उसने वास्तविक स्वामी या पश्चात्कर्ता क्रेताओं द्वारा कोई अधिकार अर्जित किया है — अपीलार्थी नया वाद लाने हेतु स्मृतंत्र है — द्वितीय अपील प्रस्तुत करने हेतु अनुमति प्रदान नहीं की जा सकती — अपील खारिज।

B. Interpretation of statutes – Right to Appeal – Right to prefer an appeal is a right created by statute. (Para 7)

ख. कानूनों का निर्वचन — अपील का अधिकार — अपील प्रस्तुत करने का अधिकार कानून द्वारा सृजित अधिकार है।

Cases referred:

(1983) 3 SCC 75, 2014 (3) M.P.H.T. 45 (CG), (2013) 9 SCC 261.

J.L. Soni, for the appellant.

Neelam Goel, for the respondent No. 1.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Appellant who was not party in Civil Suit No.7-A/96 nor in Regular Civil Appeal No. 17-A/1999, vide application I.A.No.5200/2014 seeks leave to file Second Appeal against judgment and decree passed in Civil Suit and affirmed in Regular Appeal.

2. Civil Suit No.7-A/1996 was filed by Ram Dayal owner of 13.13 Acre of land which was subjected to an auction conducted by respondent no.6, State of M.P. through Excise Officer, Excise Department, District Raisen and purchased by respondent no.1 Manik Chand Choubey. During pendency of said suit Ram Dayal expired and the suit was carried forward by respondents 2, Naresh Kumar, respondent no.3 Suresh Kurnar and respondent no.4 Dinesh Kumar. The suit was partly decreed by Judgment/Decree dated 27.9.1997 in

the following terms:

उभय पक्ष का दावा प्रतिदावा के निष्कर्ष को ध्यान में रखते हुए निम्नांकित डिक्री किया जाता है। (1) यह घोषित किया जाता है कि वाद ग्रस्त भूमि 13.93 एकड़ भूमि जो ग्राम पिपलिया गज्जू मे ख.नं. 10@1 रकवा 10.15 एकड़ ख.नं. 12 रकवा 2.60 तथा ख.नं. 51@1 तथा 51@2 रकवा 1.22 एकड़ कुल 13.93 एकड़ मे से 5 एकड़ का विक्रय अवैध है मात्र 5.93 एकड़ भूमि का विक्रय प्रतिवादी 1 के पक्ष में वैध है।

(2) प्रतिवादी उक्त 5.13 एकड़ आधिपत्य भूमि वाद भूमि में से अपना बंटवारा नामांतरण कराकर आधिपत्य प्राप्ति हेतु राजस्व न्यायालय मे विधिवत कार्यवाही करें।

(3) प्रतिवादी, वादी से आज दिनांक बंटवारा बाद आधिपत्य पाने तक प्रतिवादी 2625/- दो हजार छै: सौ पच्चीस रुपये मध्यवर्ती लाभ पाने का हकदार है वादी उक्त रकम तदनुसार अदा करें। उभयपक्ष अपना अपना वाद व्यय व अधिवक्ता शुल्क अदा करेगा।

3. Respondents no.2, 3 and 4 preferred Regular Civil Appeal No.17-A/1999 which was dismissed on 16.1.2004 being barred by 345 days. That during the lifetime Ram Dayal the original plaintiff alienated the land bearing Khasra No.20 and 35, area 11.67 acres to Umesh Singh, Bapulal and Vishnu Prasad. These three persons further transferred the present agricultural land to Kamlesh Babu and thereafter he(i.e. Kamlesh Babu) sold the land to Smt. Malti Sakalle, Smt. Shailja Sakalle and Smt. Neha Sakalle vide registered sale deed dated 29.3.2008. Present appellant purchased the land bearing Khasra No.20/1,20/2,20/3 and 35 area 5.160 hectares =12.75 acres from Smt.Malti Sakalle, Smt. Shailja Sakalle and Smt.Neha Sakalle.

4. It is on the strength of sale deed dated 29.3.2008, the appellant has filed the present application seeking leave to challenge the judgement/decreed passed by the Civil Court and affirmed in Regular Civil Appeal.

5. The relief as sought is being opposed by respondent no. on the ground, that being not a party to earlier suit since the decree passed in Civil Suit No.7-A/1996 attained finality with dismissal of Regular Civil Appeal No.7-A/1999 on 16.1.2004. The appellant who purchased the land in question vide sale deed dated 29.3.2008, has no locus to question the decree. It is further contended on behalf of respondent no.1 that a Civil Suit is filed by answering respondent in the year 2010 seeking decree of declaration that sale deed in favour of the present appellant and other defendants be declared as null and void. Present Appeal has been filed seeking leave to file a Second Appeal to over reach the challenge to

their sale deed.

6. In realm of these facts, the question which arises for consideration is as to whether appellant can be granted leave to file an appeal against judgment/decree dated 27.9.1997 passed in Civil Suit No.7-A/1996 and affirmed in Regular Civil Appeal No.17-A/1999 dismissed on 16.1.2004.

7. Trite it is that unless conferred by a statute a person does not have an inherent right of Appeal. It is held in *M/s M. Ramanarain Private Limited and another V. State Trading Corporation of India Limited*: (1983) 3 SCC 75:

"16. The right to prefer an appeal is a right created by Statute. No party can file an appeal against any judgment, decree or order as a matter of course in the absence of a suitable provisions of some law conferring on the party concerned the right to file an appeal against any judgment, decree or order. The right of appeal so conferred on any party may be lost to the party in appropriate cases by the provisions of some law and also by the conduct of the party. The law of limitation may deprive a party of the right he may enjoy to prefer an appeal by virtue of any statutory provisions. Also, in appropriate cases a party may be held to have become disentitled from enforcing the right of appeal which he may otherwise have."

8. In case at hand that lis attained a finality in the year 2004 with the dismissal of Regular Civil Appeal No. 17-A/1999 and the appellant having purchased the property vide Registered sale deed dated 29.3.2008 cannot be said to have acquired any right allegedly claimed through Ramdayal who transferred the property to Umesh Singh, Bapulal and Vishnu Prasad who later on sold the land to Kamlesh Babu and Kamlesh Babu sold the land to Smt. Malti Sakalle, Smt. Shailja Sakalle and Smt. Neha Sakalle, who later on sold the land to present appellant. If the appellant thinks that she is a bonafide purchaser of the land which was declared to be that of the ownership of Ramdayal she is always at liberty to bring a fresh suit as she does not inherit a right to claim through said Ramdayal's land more than 8 Acres which has been declared in his favour.

9. In view whereof, no leave can be granted to the appellant.

10. The decision relied by the appellant in *Yashwant Raj and others V.*

Sadanand Singh and others: 2014(3) M.P.H.T 45 (CG) and (2013) 9 SCC 261 *Hardevinder Singh V. Paramjit Singh and others*, would be of no assistance to the appellant as the judgment turns on their respective facts.

11. In *Hardevinder Singh* (supra) the appellant who sought leave to file an appeal the facts as borne out from paragraphs 23, 25 and 26 reveals that Plaintiff claiming to be a co-sharer filed the suit and challenged the will. Defendant no.5, brother of the plaintiff supported his case. The trial Court decreed the suit in an appeal in the instance of defendants no.1 to 4. The judgment/decreed was over ruled. Plaintiff entered into a settlement with a constesting (sic:contesting) defendants who had preferred the Appeal. Such a decree prejudicially affects defendant no. 5 as he was benefited by the decree passed by the Trial Court and the same having been unsettled, the benefit accrued in his favour became extinct and thus having suffered legal injury by virtue of the overturning of the decree. Defendant no. 4 was a person aggrieved as was prejudicially affected by the decree passed by the Appellate Court and hence he was well within his right to have preferred an Appeal.

12. Whereas in case of *Yashwant Raj* (supra) learned Single Judge of Chattisgarh High Court while dwelling upon the right of a party who in turn claimed his right from grand father but was not impleaded in the suit.

13. Present being not the case as were the cases, decision whereof are cited by the appellant, the appellant is not benefited from said two decisions.

14. Having thus considered, since this Court does not find any merit in the leave sought by the appellant. I.A.No.5200/2014 stands dismissed.

15. Consequently. Appeal is also dismissed. There shall be no costs.

Appeal dismissed.

I.L.R. [2017] M.P., 628

APPELLATE CIVIL

Before Mr. Justice R.S. Jha & Mr. Justice Rajendra Mahajan

F.A. No. 823/2015 (Jabalpur) decided on 25 July, 2016

JYOTI SONI (SMT.)

...Appellant

Vs.

MITHLESH SONI

...Respondent

A. *Hindu Marriage Act (25 of 1955), Section 13 – Divorce*

on the ground of Adultery and Cruelty— After marriage, appellant/ wife hardly stayed with her in-laws for two months — She ran away with one Imtiaz Khan and was later discovered and caught in a compromising position in some hotel — Police was also informed and offence was registered against Imtiaz Khan — After the incident, wife filed several cases against the husband and in-laws u/S 125 CrPC, u/S 498-A IPC and u/S 12 of the Domestic Violence Act which were found to be false and were dismissed by the court below — Held — Evidence in the case clearly shows that incident of eloping with Imtiaz Khan has been duly established and appellant/wife did not produced any witness to dislodge such allegation — Filing repeated false cases against the husband and his family members also amount to mental cruelty — Allegations of Adultery and cruelty duly established — Decree of divorce rightly granted — Appeal dismissed. (Para 14 & 16)

क. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13 — जारकर्म एवं क्रूरता के आधार पर विवाह विच्छेद — विवाह के पश्चात्, अपीलार्थी/पत्नी मुश्किल से 2 माह के लिए अपने ससुरालवालों के साथ रही थी — वह किसी इम्तियाज खान के साथ भाग गई तथा बाद में खोजी गई एवं किसी होटल में आपत्तिजनक स्थिति में प्रकड़ी गई — पुलिस को भी सूचित किया गया था तथा इम्तियाज खान के विरुद्ध अपराध पंजीबद्ध किया गया था — घटना के पश्चात्, पत्नी ने पति तथा ससुरालवालों के विरुद्ध दण्ड प्रक्रिया संहिता की धारा 125, भारतीय दण्ड संहिता की धारा 498-ए एवं घरेलू हिंसा अधिनियम की धारा 12 के अंतर्गत कई प्रकरण प्रस्तुत किये जिनका मिथ्या होना पाया गया था तथा निचले न्यायालय द्वारा खारिज कर दिये गये थे — अभिनिर्धारित — प्रकरण में साक्ष्य यह स्पष्ट दर्शाते हैं कि इम्तियाज खान के साथ भागने की घटना सम्यक् रूप से स्थापित होती है एवं अपीलार्थी/पत्नी ने ऐसे अभिकथन को हटाने हेतु कोई साक्षी प्रस्तुत नहीं किया है — पति तथा उसके परिवार के सदस्यों के विरुद्ध बार-बार मिथ्या प्रकरणों का प्रस्तुत किया जाना मानसिक क्रूरता की कोटि में आता है — जारकर्म एवं क्रूरता के अभिकथन सम्यक् रूप से स्थापित होते हैं — विवाह-विच्छेद की डिक्री उचित रूप से प्रदान की गई — अपील खारिज।

B. *Hindu Marriage Act (25 of 1955), Section 24 – Maintenance pendent lite – Entitlement* — Held — Looking to the short period for which parties stayed together and the conduct of the appellant/wife, she is not entitled for any relief or claim or any other benefit from respondent/husband. (Para 21)

ख. हिन्दू विवाह अधिनियम (1955 का 25), धारा 24 — वादकालीन

भरण-पोषण – हकदारी – अभिनिर्धारित – उस अल्प अवधि को देखते हुए जिसमें पक्षकार एक साथ रहे एवं अपीलार्थी/पत्नी का आचरण देखते हुए वह प्रत्यर्थी/पति से किसी अनुतोष या दावे या अन्य लाभ की हकदार नहीं है।

Cases referred:

F.A. No. 214/2005 decided on 13.04.2006, F.A. No. 186/2010 decided on 20.03.2012, (2012) 7 SCC 288, (2013) 5 SCC 226, (2014) 7 SCC 640.

Priyank Choubey, for the appellant.

Praveen Verma, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by **R.S. JHA, J. :-** This appeal has been filed by the appellant being aggrieved by judgment dated 12.8.2015 passed by Principal Judge, Family Court, District Satna in H.M. Case No.525/2014 whereby the application under Section 13 of the Hindu Marriage Act, filed by the respondent for divorce has been allowed on the ground of adultery and cruelty.

2. The brief facts leading to the filing of the appeal are that the appellant and respondent were married as per Hindu rights on 12.5.2007 at Maihar and thereafter, she went to Bhopal for pursuing her computer course and returned in December, 2007. On 1.1.2008 when the respondent was on duty at Katni the appellant ran away with one Imtiaz Khan and was discovered along with him at Dashmesh Hotel, Satna whereafter her maternal uncle Ashok Soni and Brijesh Soni were informed who reached the spot. Subsequently on 2.1.2008 the respondent was also informed of the fact that the appellant had run away on her own and the matter was also reported to the Police Station on 2.1.2008 and to the Superintendent of Police on 3.1.2008. On account of the incident that occurred at Dashmesh Hotel, a case was also registered against the said Imtiaz Khan at Police Station Nagod on 11.4.2008 under Section 456 of I.P.C. On 2.1.2008 the appellant lodged a report against the respondent under Section 498-A, 323 and 325/34 of I.P.C read with Section 3/4 of the Dowry Prohibition Act, at Police Station, Nagod in which an enquiry was conducted by the S.D.O.P. Nagod who found that no offence had been committed and submitted a final report to the Court in that regard on 20.10.2008 and in the said report it was suggested that a case under Section

334 and 335 of I.P.C, be registered against the appellant's maternal uncles, Ashok Soni and Brijesh Soni for having used force against the appellant.

3. The appellant also filed an application under Section 125 of Cr.P.C, claiming maintenance before the Principal Judge, Family Court, Bhopal which was rejected by order dated 8.4.2009 on the ground that the appellant had failed to establish that she was staying away from her husband for sufficient reasons. The appellant had also filed a case under Section 12 of the Protection of Women From Domestic Violence Act, 2005, which was dismissed by the Chief Judicial Magistrate, Bhopal on 30.4.2010 and the appeal filed by the appellant against the dismissal of this case has also been dismissed by order dated 31.10.2013 by the Thirteenth Additional Sessions Judge, Bhopal. On the basis of the aforesaid allegations the respondent filed an application under Section 13 of the Hindu Marriage Act, seeking divorce.

4. Initially the case for divorce filed by the respondent was allowed *ex parte* by order dated 23.11.2010 as the appellant failed to appear before the Court. However, the said *ex parte* decree of divorce was set aside in appeal and the matter was remitted back to the Court for re-adjudication after giving due opportunity of hearing to the appellant where after the impugned judgment and decree has been passed by the Court below allowing the application seeking divorce filed by the respondent. It is also brought on record by the respondent that after the application for divorce was allowed *ex parte* by the trial Court the respondent has entered into a second marriage with one Priyanka Soni on 29.6.2012 and has also been blessed with a daughter on 21.4.2013.

5. The learned counsel appearing for the appellant has assailed the order on the ground that the findings recorded by the Court below regarding adultery is perverse inasmuch as the Court below has failed to take note of the fact that the respondent did not file any case before the police authorities in respect of the fact that the appellant was found at hotel Dashmesh along with Imtiaz Khan. It is submitted that had such an incident occurred, the respondent would naturally have filed a police complaint and as he has not done so, the finding recorded by the Court below merely on oral evidence adduced by the respondent is perverse and unsustainable. It is also submitted that the appellant was subjected to physical abuse and demand of dowry by the respondent but the Court below has not taken into consideration the evidence adduced by the appellant in that regard and has thereby committed perversity. It is also stated that though a final report had been submitted by the S.D.O.P on the

complaint filed at the instance of the appellant under Section 498-A of the I.P.C. However, subsequently on a complaint being filed by the appellant before the Judicial Magistrate First Class the matter has been re-opened and the Police has been directed to conduct an investigation which fact is evident from a perusal of the documents that had been filed by the respondent himself before the Court below along with which he had filed the order sheet of the Chief Judicial Magistrate, Satna dated 1.2.2012 passed in Case No:552/2012. It is submitted that the impact of the aforesaid aspect has also not been considered by the Court below and hence the impugned judgment be set aside and the appeal be allowed.

6. The learned counsel for the respondent per contra submits that after marriage the appellant hardly stayed with the respondent for a few days and in fact has admittedly never stayed with the respondent after 2.1.2008. It is stated that on 1.1.2008 when the respondent was away on duty at Katni the appellant ran away from the house along with one Imtiaz Khan which fact was established by the witnesses of the village who saw the appellant leaving the village in a jeep. It is stated that the driver of the jeep has himself stated and affirmed the aforesaid aspect and it was he who informed the persons that the appellant along with Imtiaz Khan were staying at Dashmesh Hotel where after members of the respondent's family reached the hotel and found the appellant with Imtiaz Khan in an objectionable position. It is stated that the maternal uncles of the appellant were informed immediately who reached the spot and beat up the appellant for her act and thereafter, the appellant was taken away by her maternal uncle and was handed over to her mother with whom she is staying since then. It is submitted that the respondent was also informed about the fact that the appellant had run away on 2.1.2008. It is stated that this adulterous act on the part of the appellant has duly been established by the witnesses whose statements have been analyzed by the Courts below extensively and thereafter a finding has been recorded to the effect that the conduct of the appellant was adulterous:

7. The learned counsel for the respondent states that after the incident on 1.1.2008 for the first time the appellant lodged a report regarding demand of dowry against the respondent and his family members under Section 498-A of the I.P.C and also filed an application under Section 12 of the Protection of Women From Domestic Violence Act, 2005, and under Section 125 of the Cr.P.C. It is stated that the application under Section 125 of the Cr.P.C was

dismissed by the Court below on the ground that the appellant was staying away from the respondent on her own without any justifiable reason and the case under section 12 of the Protection of Women From Domestic Violence Act, 2005, was dismissed by the competent Court and the appeal against the same was also dismissed by recording a finding to the effect that the respondent or his family members had not committed any domestic violence upon the appellant. It is submitted that the appellant has also filed a case against the respondent under Section 498-A of I.P.C and therefore, lodging of repeated false cases against the respondent amounts to cruelty. It is submitted that the Courts below on the basis of the aforesaid facts regarding lodging of false cases against the respondent has recorded a finding of cruelty and has therefore, rightly allowed the application under Section 13 of the Hindu Marriage Act granting divorce to the respondent which does not call for any interference.

8. Having heard the learned counsel for the parties and having perused the record of the appeal, we are of the considered opinion that the Courts below from Paragraphs 6 to paragraph 28 has extensively discussed the statements of Mithlesh Kumar Soni (PW1), Ramesh Soni (PW2), Purshottam Mishra (PW3), Ramdev Kushwaha (PW4) as well as the statements of Jyoti (DW1) i.e. the appellant, Kedar Patel (DW2) who is a resident of village of the maternal uncles of the appellant and Mira Soni (DW3) mother of the appellant and has thereafter recorded a finding in paragraphs 27 and 28 to the effect that the respondent has conclusively established, on the basis of the oral and documentary evidence available on record, that the appellant has run away (sic:away) with one Imtiaz Kahn on 1.1.2008 and was discovered at Hotel Dashmesh in Satna and therefore she has committed adultery; that the cases under Section 125 of the Cr.P.C, Section 12 of the Protection of Women From Domestic Violence Act, 2005, and Section 498-A of the I.P.C read with other sections had been lodged by the appellant against the respondent and that the case under Section 125 of the Cr.P.C and Section 12 of the Protection of Women From Domestic Violence Act, 2005, has dismissed by the competent Court by recording a finding in favour of the respondent. The Court has also held that in view of the aforesaid proceedings being initiated against the respondent by the appellant under Section 125 of the Cr.P.C and Section 12 of the Protection of Women From Domestic Violence Act, 2005, which were found to be false and a case under Section 498-A of I.P.C filed by the appellant against the respondent and his family members the respondent

had been subjected to cruelty by the appellant and has consequently granted a decree of divorce.

9. The Court below has also recorded a finding to the effect that though the parties were married on 12.5.2007, and the allegations regarding demand of dowry and cruelty have been made by the appellant before the Court below but admittedly and apparently no complaint or FIR was ever lodged by her against the respondent in this regard till 1.1.2008. The Court below has recorded a finding that the cases under Section 498-A of the I.P.C, 125 of Cr.P.C and Section 12 of the Protection of Women From Domestic Violence Act, 2005, was filed by the appellant against the respondent on 4.12.2008 and on 15.7.2008 i.e. after the incident of 1.1.2008 when the appellant ran away from the house of the respondent and was caught along with Imtiaz Khan at Hotel Dashmesh, Sagar.

10. We have carefully gone through the judgment of the Court below as well as the record of the case. On a perusal of the record, it is clear that after the marriage between the parties on 12.5.2007 the appellant stayed in the house of her in-laws till 21.6.2007 as the marriage ceremony of the sister of the respondent and sister-in-law of the appellant was to be performed and thereafter she went to the house of her parents. On the basis of the facts on record it is also clear that the appellant returned to the house of her in-laws on 1.12.2007 and that thereafter, the incident of her running away with Imtiaz Khan occurred on 1.1.2008. It is also apparent from the undisputed facts on record that on 1.1.2008 the appellant was on duty elsewhere and was not at home. It is also an undisputed fact and a concurrent finding that has been recorded by the Court below that since 1.1.2008 the parties have not stayed together as husband and wife.

11. From the aforesaid facts it is clear that the appellant, after her marriage on 12.5.2007, has hardly stayed with her in-laws for a period of two months. It is also an admitted fact that though the appellant has made allegations of demand of dowry and cruelty on non-fulfillment of the same since the day of her marriage on 12.5.2007, no complaint or report in that regard was filed by her and that the case under Sections 498-A, 223 and 225/34 of I.P.C and Section 3/4 of the Dowry Prohibition Act were lodged by the appellant on 2.1.2008 after the incident of her eloping with Imtiaz Khan had occurred on 1.1.2008 and on the basis of which Crime No.186/2008 was registered against Imtiaz Khan under Section 456 of I.P.C on the report lodged by maternal

uncles of the appellant herself as well as the missing person report lodged by the father of the respondent. It is also an undisputed and admitted fact that the appellant had also filed a case under Section 12 of the Protection of Women From Domestic Violence Act, 2005 and the Chief Judicial Magistrate, Bhopal, while dismissing the said application, has recorded a finding to the effect that the appellant had failed to establish her allegations of cruelty and domestic violence as well as the allegation of demand of dowry whereas the respondent had clearly demonstrated and established his contention that the appellant had eloped with Imtiaz Khan on 1.1.2008 and was caught in a compromising position in Dashmesh Hotel in the night thereof by the father and other persons of the respondent's family as well as her two maternal uncle who had lodged a report against Imtiaz Khan in respect of the incident which was registered as Crime No.186/2008 and that subsequent thereto the maternal uncles of the appellant had taken the appellant to her maternal house and handed her over to her mother Mira Soni and obtained a written acknowledgment in that regard which had also been filed and established before the Magistrate. The Magistrate, while dismissing the case under section 12 of the Protection of Women From Domestic Violence Act, 2005, has also taken note of the fact that the appellant, before the said Magistrate, had stated that she did not wish and had no desire to stay with the respondent. The Magistrate, after recording the aforesaid finding, had rejected the case of the appellant by stating that she had in fact eloped with Imtiaz Khan. The aforesaid finding of the Magistrate has been affirmed in Criminal Appeal No.327/2010 decided on 31.10.2013 by the Third Additional Sessions Judge, Bhopal who has reiterated the finding recorded by the Magistrate.

12. It is also apparent from a perusal of the order dated 8.4.2009 passed by the Second Additional Principal Judge, Family Court, Bhopal in M.J.C. No.434/2008, dismissing the application filed by the appellant under Section 125 of the Cr.P.C, that similar and identical finding, on the basis of the same documents, has also been recorded by the said Court while dismissing the appellant's application with a further finding against the appellant to the effect that she is staying away from the respondent without any justifiable reason. It is also apparent and admitted fact that the appellant has also instituted cases against the respondent under Section 498-A and other provisions of the I.P.C. However, the current status of the same has not been informed to this Court by either of the parties.

13. From a perusal of the impugned judgment as well as the record of the case it has also been established in the present case that the incident regarding eloping of the appellant with Imtiaz Khan on 1.1.2008 has been duly established by the respondent on the basis of the statement of independent witnesses Purshottam Mishra (PW3) and Ramdev Kushwaha (PW4) as well as the statement of Ramesh Soni (PW2). In fact the independent witnesses Purshottam Mishra (PW3) and Ramdev Kushwaha (PW4) have clearly stated that on 1.1.2008 *Ramayan* was going on in the village and most of the residents of the village had collected there and that during the said ceremony the father of the respondent discovered that the appellant was missing and a hue and cry was raised in that regard, as a result of which several persons started searching for the appellant upon which one Mulchand Kushwaha informed Purshottam Mishra (PW3) and Ramdev Kushwaha (PW4) that the appellant had gone away in a hired jeep in which another boy was sitting and as the driver of the jeep was known to Mulchand Kushwaha and the mobile number of the said driver was known to him, he was contacted who informed them that he had dropped the boy and girl at Dashmesh Hotel pursuant to which they informed the maternal uncles of the appellant and thereafter rushed to Dashmesh Hotel whereupon the appellant was caught in a compromising position with Imtiaz Khan by the persons accompanying the father of the respondent as well as the maternal uncles of the appellant and that the maternal uncles were so agitated on their discovery that they beat up the appellant and also lodged a criminal case at Police Station Nagod which was registered as Crime No.186/2008 against Imtiaz Khan whose PAN Card, driving license and photo was also discovered and were seized by the police authorities of Nagod Police Station.

14. On the basis of the aforesaid documents and evidence on record, specifically lodging of the report against Imtiaz Khan by the maternal uncles of the appellant, the Court below has recorded a finding against the appellant that she has committed adultery. It is also apparent from a perusal of the record that the appellant has not produced any witness who could dislodge the aforesaid allegation against her. It is pertinent to note that though her maternal uncles were the one who lodged the report against Imtiaz Khan and were the best persons to clarify the position, they have not been summoned as witnesses by the appellant nor have their statement been recorded in support of her claim.

15. In view of the aforesaid facts and circumstances, we are of the considered opinion that the finding regarding adultery on the part of the appellant has rightly

been recorded by the Court below and does not deserve to be interfered with.

16. We are also of the considered opinion that the fact that the appellant lodged repeated false cases against the respondent, firstly under Section 12 of the Protection of Women From Domestic Violence Act, 2005, Section 125 of the Cr.P.C and Section 498-A of the I.P.C, in which the appellant had sought to implicate as many as seven members of the respondent's family, resulted in subjecting the respondent to mental cruelty and, therefore, he has rightly been granted a decree of divorce on that count by the Court below.

17. The view taken by us regarding mental cruelty on account of filing repeated cases against the respondent and his family members, find support from the decision of this Court rendered in the cases of *Smt. Kavita vs. Harish Raisen*, (First Appeal No.214/2005) decided on 13.4.2006 and *Anurag Jain vs. Smt. Vandana Jain*, (First Appeal No.186/2010) decided on 20.3.2012, wherein this Court has allowed the application seeking divorce filed by the husband on account of the fact that the wife had filed criminal cases against the husband and his family members under section 498-A IPC.

18. The law in this regard has also been (sic:been) laid down by the Supreme Court in the case of *Vishwanath Agrawal vs. Sarla Vishwanath Agrawal*, (2012) 7 SCC 288, wherein the Supreme Court in paras 46 and 47 of the judgment has extensively considered the concept of mental cruelty and has held that lodging of criminal cases against the respondent amounts to mental cruelty.

19. The Supreme Court, in para-16 of the judgment, in the case of *K. Shrinivas Rao vs. D. A. Deepa* (2013) 5 SCC 226, has held that making unfounded indecent defamatory allegations against the spouse or his relatives in the pleadings and filing repeated false complaint and cases in the court against the spouse amongst other grounds, amounts to causing mental cruelty to the other spouse. Similar view has also been taken by the Supreme Court, in paras 43 and 44 of the judgment, in the case of *Malathi Ravi, M. vs. B. V. Ravi, M.D.*, (2014) 7 SCC 640, and it has been held that the conduct of prosecuting the husband by the wife in repeated Criminal cases amounts to mental cruelty.

20. In view of the aforesaid facts and circumstances of the case, we are of the considered opinion that as the allegations of adultery and cruelty are duly established, therefore, the finding regarding adultery and cruelty recorded by the court below and the consequent decree of divorce granted to the

respondent deserves to be and is hereby affirmed and is accordingly upheld.

21. We are also of the considered opinion that looking to the short period for which the parties have stayed together and the conduct of the appellant, she is not entitled to any other relief or claim or any other benefit from the respondent. The claim of the appellant for maintenance *pendent lite* is also unsustainable and is hereby rejected.

22. The appeal filed by the appellant is, accordingly, dismissed.

In the facts and circumstances of the case there shall be no order as to costs.

Appeal dismissed.

I.L.R. [2017] M.P., 638

APPELLATE CIVIL

Before Mr. Justice Anand Pathak

S.A. No. 138/2003 (Gwalior) decided on 28 July, 2016

RAJKUMAR CHUG

...Appellant

Vs.

DHEERENDRA CHUG & ors.

...Respondents

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(o) & 12(11) – Question involved – Whether decree for possession can be granted without granting time for removing the possession from the portion not let out to the defendant as provided u/S 12(11) of the M.P. Accommodation Control Act, 1961 – Held – Unless an opportunity to the tenant is given to vacate the portion of accommodation not let out to him and to pay the landlord amount of compensation, the decree u/S 12(1)(o) cannot be issued – It is the duty of the Court to pass a conditional decree, with the stipulation of time of vacation of trespassed portion and to pay compensation. (Paras 3, 11 & 12)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ओ) व 12(11) – अंतर्गत प्रश्न – क्या म.प्र. स्थान नियंत्रण अधिनियम, 1961 की धारा 12(11) के अंतर्गत दिये गये उपबंध के अनुसार प्रतिवादी को किराये पर नहीं दिये गये हिस्से से कब्जा हटाने हेतु समय प्रदान किये बिना, कब्जे के लिए डिक्री प्रदान की जा सकती है – अभिनिर्धारित – जब तक कि किरायेदार को स्थान का वह हिस्सा जो उसे किराये पर नहीं दिया गया है उसको खाली करने का तथा भूमिस्वामी को

प्रतिकर की राशि का भुगतान करने का कोई अवसर नहीं दिया जाता है धारा 12(1)(ओ) के अंतर्गत डिक्री जारी नहीं की जा सकती — यह न्यायालय का कर्तव्य है कि वह अतिचार किये गये हिस्से को खाली करने तथा प्रतिकर का भुगतान किये जाने हेतु समय नियत करते हुए सशर्त डिक्री पारित करे।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(o) – Condition and Compensation – Held – In the present case, decree was passed u/S 12(1)(o) of the Act and compensation is to be given for the reason that appellant was a tenant of respondents for almost 25 years and cause of action dates back to 1992-93 when the appellant encroached upon excess area and at that time monthly rent was Rs. 350 – Compensation of Rs. 1 lakh is just and proper – Hence, if the encroached portion shown in the plaint is vacated by the appellant/tenant and Rs. 1 lakh is paid to the respondents as compensation within three months from today, then he shall not be evicted from the suit accommodation on the ground of Section 12(1)(o) of the Act – Appeal allowed. (Para 19)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ओ) – शर्त एवं प्रतिकर – अभिनिर्धारित – वर्तमान प्रकरण में, अधिनियम की धारा 12(1)(ओ) के अंतर्गत डिक्री पारित की गई थी एवं इस कारण से प्रतिकर दिया जाना है कि अपीलार्थी लगभग 25 वर्षों से प्रत्यर्थीगण का किरायेदार था एवं वाद हेतुक 1992-93 के समय का है जब अपीलार्थी ने अतिरिक्त क्षेत्र पर अतिक्रमण किया था तथा उस समय मासिक किराया रु. 350/- था – रु. 1 लाख का प्रतिकर न्यायसंगत एवं उचित है – अतः, यदि वादपत्र में दर्शाया गया अतिक्रमण किया हुआ हिस्सा अपीलार्थी/किरायेदार द्वारा खाली कर दिया गया है एवं प्रत्यर्थी को आज से तीन माह के भीतर रु. 1 लाख प्रतिकर के रूप में संदत्त कर दिये जाते हैं तो उसे अधिनियम की धारा 12(1)(ओ) के आधार पर वाद स्थान से बेदखल नहीं किया जाएगा – अपील मंजूर।

C. Civil Procedure Code (5 of 1908), Section 100 & Order 41 Rule 22 – Appeal preferred by the appellant as well as the cross-objections filed by the respondents dismissed by the first appellate Court against which the appellant has preferred second appeal and respondents filed no appeal – Held – Once respondents did not file appeal against dismissal of cross-objections, it can be assumed that they accepted the findings of the first appellate Court – Appeal is the continuation of suit and therefore the pleadings raised in the cross-objection by respondents are binding over them. (Para 14 & 17)

ग. *सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 व आदेश 41 नियम 22* – अपीलार्थी द्वारा की गई अपील तथा प्रत्यर्थागण द्वारा प्रस्तुत किये गये प्रत्याक्षेप प्रथम अपीली न्यायालय द्वारा खारिज किये गये जिसके विरुद्ध अपीलार्थी ने द्वितीय अपील की एवं प्रत्यर्थागण ने कोई अपील प्रस्तुत नहीं की – अभिनिर्धारित – जब प्रत्यर्थागण ने प्रत्याक्षेपों की खारिजी के विरुद्ध अपील प्रस्तुत नहीं की है, तब यह धारणा की जा सकती है कि उन्होंने प्रथम अपीली न्यायालय के निष्कर्षों को स्वीकार कर लिया है – अपील, वाद का जारी रहना है एवं इसलिए प्रत्यर्थागण द्वारा अभिवचनों में उठाये गये प्रत्याक्षेप उन पर आबद्धकर हैं।

D. *Civil Procedure Code (5 of 1908), Section 100(4) & (5) – Only one substantial question of law framed at the time of admission of second appeal and no application has been preferred by the respondents during pendency of appeal for the last 13 years to frame additional substantial question of law – Court declined to hear on any other ground.*
(Para 16)

घ. *सिविल प्रक्रिया संहिता (1908 का 5), धारा 100(4) व (5)* – द्वितीय अपील की ग्राह्यता के समय विधि का केवल एक सारवान् प्रश्न विरचित किया गया एवं विधि का कोई अतिरिक्त सारवान् प्रश्न विरचित करने हेतु पिछले 13 वर्षों से अपील के लंबित रहने के दौरान प्रत्यर्था द्वारा कोई आवेदन प्रस्तुत नहीं किया गया – न्यायालय ने किसी अन्य आधार पर सुनने से इंकार किया।

Cases referred:

1972 MPLJ 187, 1980 MPRCJ 257, 1985 MPRCJ 33 (N-20), 1984 MPRCJ 102, 1983 MPLJ 381,

Anand V. Bharadwaj, for the appellant.

D.D. Bansal, for the respondents.

J U D G M E N T

ANAND PATHAK, J. :- The present appeal under Section 100 CPC has been preferred at the instance of the defendant/tenant. The respondents/plaintiff have filed suit for eviction under Section 12(1)(a)(e) & (o) of the M.P. Accommodation Control Act, 1961 (for brevity "the Act"). The suit was dismissed on the ground of Section 12(1)(a) & (e) of the Act but decreed under Section 12(1)(o) of the Act. Challenging the said decree passed under Section 12(1)(o) of the Act, the present appellant has preferred First appeal under Section 96 of CPC before the Appellate Court.

2. The respondents/plaintiff preferred cross-objection under Order XLI Rule 22 CPC challenging the findings of the appellate Court by which the suit was dismissed on the basis of Section 12(1)(a)&(e) of the Act. The first appellant/plaintiff as well as cross-objection preferred by the respondents/defendant. In the result, the appellant suffered under Section 12(1)(o) of the Act, therefore, the appellant has preferred Second Appeal under Section 100 CPC before this Court. Respondents did not prefer to challenge the said findings.

3. This Court has admitted the appeal vide order dated 7/04/2003 on following substantial questions of law-

"Whether decree for possession can be granted without granting time for removing the possession from the portion not let out to defendant as provided under Section 12(11) of the M.P. Accommodation Control Act, 1961 "

4. The thrust of the arguments advanced by counsel for the appellant is that the first appellate Court has nowhere discussed the implication of Section 12(11) of the Act before passing the decree under Section 12(1)(o) of the Act. Thus, according to the counsel for the appellant, while not granting any time to remove the possession as contemplated under Section 12(11) of the Act, grave illegality has been caused by the appellate Court in passing the decree therefore, the same is liable to be set aside.

5. Learned counsel for the appellant further submitted that the cross-objection preferred by respondents/defendant specifically mentioned regarding challenge under Section 12(1)(a)(e) & (o) of the Act and it nowhere mentioned that the cross-objection is being preferred under Section 12(1)(c) of the Act also. Therefore, on the basis of pleadings of the respondents, the cross-objection in first appeal was preferred by them was under Section 12(1)(a)(e) of the Act only. Therefore, once the judgment and decree was passed under Section 12(1)(o) of the Act only then mandatory requirement of Section 12(11) had to be followed and non-compliance of the same vitiates the judgment and decree. To bolster his submissions, learned counsel for the appellant relied upon the judgment rendered by the M.P.High Court in the matter of *Motilal Vs. Yusuf Ali and Others* as reported in 1972 MPLJ 187 as well as in the matter of *Pooranchand Vs. Laxminarain* as reported in 1980 MPRCJ 257

and in the matter of *Keshar Singh Vs. Mst. Sohadradevi* as reported in 1985 MPRCJ 33(N-20) and in the matter of *Shankerlal Vs. Virendra Nath* as reported in 1984 MPRCJ 102.

6. On the other hand, learned counsel for the respondents submitted that the respondents have amended the plaint and added the pleadings in respect of Section 12(1)(c) of the Act in the plaint before the trial Court and additional issues as 7(a)(b) were framed. Evidence was also led in this regard and judgment and decree under Section 12(1)(c) was also drawn in favour of respondents/plaintiff. According to the counsel for the respondents, the trial Court has decreed the suit on the basis of 12(1)(o) as well as Section 12(1)(c) of the Act. Learned counsel for the respondents further submitted that as per order VI CPC, pleadings in suit or written statement are to be seen and if any omission in cross-objection exists in respect of Section 12(1)(c) of the Act then the same shall not be looked into and on the basis of such omission, parties cannot be put to disadvantage.

7. According to counsel for the respondents once, the decree is on two grounds like in the present case where decree under Section 12(1)(c) and 12(1)(o) of the Act has been passed then compliance under Section 12(1)(11) is not mandatory and the suit cannot be decreed on the basis of Section 12(1)(o) of the Act. In support of his submissions, learned counsel for the respondents relied upon the judgment rendered by the M.P. High Court in the matter of *Kevalchand Puranchand Vs. Sugandchand* as reported in 1983 MPLJ 381.

8. Heard learned counsel for the parties and perused the record.

9. The respondents/plaintiff have preferred suit initially under Section 12(1)(a)(e) & (o) of the Act and later on, amended the suit and inserted certain more pleadings purportedly in respect of Section 12(1)(c) of the Act. The suit was seemingly dismissed under Section 12(1)(a)&(e) of the Act but decreed under Section 12(1)(o) of the Act. Being aggrieved by the findings in respect of 12(1)(o) of the Act, the present appellant has preferred appeal. Similarly, respondents/plaintiff have also preferred cross-objection under Order XLI Rule 22 CPC challenging the findings of the trial Court wherein the suit was dismissed in respect of Section 12(1)(a)&(e) of the Act. Respondents did not prefer to challenge the appeal on the ground of Section 12(1)(c) of the Act. From perusal of the cross-objection, it is evident that respondents/plaintiff

have preferred cross-objection only under Section 12(1)(a) & (e) of the act. Respondents/plaintiff have not mentioned that the cross-objection has been preferred challenging the judgment of the trial Court on the basis of Section 12(1)(c) of the Act also.

10. The appeal as preferred by the present appellant as well as cross-objection preferred by the respondents got dismissed by the lower appellate Court. Now, the appellant has preferred Second Appeal before this Court. Respondents have not preferred any appeal against the order of lower appellate Court.

Section 12(11) of the Act reads as under:-

"No order for the eviction of a tenant shall be made on the ground specified in clause (o) of sub-section (1), if the tenant within such time as may be specified in his behalf by the Court vacates the portion or portions of accommodation not let to him and pays to the landlord such amount by way of compensation as it may direct."

11. Perusal of Section 12(11) of the Act makes it abundantly clear that unless an opportunity to the tenant is given to vacate the portion of accommodation not let out to him and to pay the landlord amount of compensation, the decree under Section 12(1)(o) of the Act cannot be issued. The judgment of this Court in the matter of *Motilal* (supra) clearly mandates so, which has been relied upon by this Court in the matters of *Pooranchand* (supra), *Keshar Singh* (supra) and *Shankerlal* (supra).

12. When the decree under Section 12(1)(o) of the Act is granted then it is the duty of the Court to pass a conditional decree, with the stipulation of time of vacate the portion, which the tenant has trespassed and to pay compensation.

13. Neither the trial Court, nor the Appellate Court has given this direction in respect of Section 12(11) of the Act, therefore, it is contrary to law laid down by this Court. At present the decree is issued only on the basis of Section 12(1)(o) of the Act. If the suit would have been decreed on other grounds also, then the appellant would had to vacate the premises in his occupation, but here in the present case, no other ground for eviction is available to the respondents except Section 12(1)(o) of the Act.

14. Although, learned counsel for the respondents tried to assert that the decree under Section 12(1)(c) of the Act was also in existence but respondents themselves have not challenged the judgment of the trial Court in cross-objection under Section 12(1)(c) of the Act. Once, respondents did not prefer any appeal against the order of the first Appellate Court, thus it can be assumed that respondents have accepted the findings of the first Appellate Court and now they cannot raise the plea which they attempted to plead orally.
15. Even respondents did not prefer any appeal against the order of first Appellate Court and accepted the findings of the first Appellate Court. Due to somewhat overlapping nature of contents of Section 12(1)(c) and 12(1)(o) of the Act, respondents have taken the shelter of observations of the trial Court and tried to establish that the trial Court has passed the decree on the basis of Section 12(1)(c) of the Act also. From perusal of the record, same is not established.
16. Even otherwise, this Court has framed only one substantial question of law and even during the pendency of appeal for last thirteen years, till date, no application under Section 100(4) and (5) of CPC has been preferred by the respondents for framing any additional substantial question of law. In absence of any such substantial question of law in this regard, and looking to the fact situation of the case, such plea cannot be entertained by respondents at this juncture.
17. Appeal is continuation of suit and therefore, the pleadings as raised in the cross-objection by respondents/plaintiffs are binding over them.
18. Thus, this Court holds that the Courts below have erred in issuing decree of eviction under Section 12(1)(o) of the Act without following the mandatory requirement of Section 12(11) of the Act. Judgments referred (supra) by the Appellant are applicable in the present set of facts. Similarly the judgment relied upon by the respondents does not help them being distinguishable on facts and circumstances.
19. The decree for eviction was based upon Section 12(1)(o) of the Act and therefore, ought to be modified. This Court directs that the appellant shall not be evicted from the tenanted portion of accommodation as per the description given in the plaint, if the appellant within a period of three months from today puts the respondents/plaintiff in vacant possession of the portion which he encroached as per the plaint description and also pays Rs.1,00,000/-

(Rs. One Lac only) as compensation to the respondents/plaintiff within the period of three months from today. The said amount as compensation is to be given for the reason that appellant is the tenant of respondents for almost 25 years and the cause of action dates back to year 1992-93 when the appellant has encroached upon excess area. At that time, the appellant was a tenant of respondents at monthly rent of Rs.350/-. Therefore, compensation of Rs. 1,00,000/- (Rs. One Lac Only) is just and proper looking to the facts and circumstances of the case. It is further clarified that if the portion shown in the plaint is vacated by the appellant and Rs. 1,00,000/- is paid to the respondents as compensation within three months from today, then he shall not be evicted from the suit accommodation on the ground of Section 12(1)(o) of the M.P. Accommodation Control Act, 1961. In absence of the said compliance, appellant would render himself liable for eviction forthwith after lapse of three months from today.

20. The substantial question of law is answered accordingly. Appeal is allowed in above terms.

Appeal allowed.

I.L.R. [2017] M.P., 645

APPELLATE CIVIL

Before Mr. Justice Anand Pathak

F.A. No. 147/2000 (Gwalior) decided on 1 September, 2016

BANK OF MAHARASHTRA

...Appellant

Vs.

M/S ICO JAX INDIA DEEDWANA

OLI LASHKAR GWALIOR & anr.

...Respondents

A. *Transfer of Property Act (4 of 1882), Section 3 – Actionable claim* – Whether the loss of pay order and its subsequent misuse can give rise to an actionable claim against the appellant and whether trial court was right in holding the appellant liable to compensate the loss on the basis of the evidence on record – Held – After loss of the printed pay order form, the Head Office of the Bank has taken steps vigilantly and promptly issued circular, much prior to the date of incident, hence Bank has sufficiently discharged its duty and onus – No actionable claim can be raised against the appellant Bank because to be actionable claim and get redress from Court, the liability must assume legal shape in any recognized category of wrong

such as negligence, malfeasance, misfeasance and non-feasance etc. — Further held — From the facts and evidence it is established that there was no contractual and tortious liability of the appellant Bank for compensating respondent No. 1. (Paras 12, 18, 19 & 24)

क. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 3 — अनुयोज्य दावा — क्या संदाय आदेश का गुम हो जाना और उसका तत्पश्चात् दुरुपयोग अपीलार्थी के विरुद्ध अनुयोज्य दावा उत्पन्न कर सकता है और क्या विचारण न्यायालय अमिलेख के साक्ष्य के आधार पर अपीलार्थी को हानि की पूर्ति हेतु दायी ठहराने में सही था — अभिनिर्धारित — मुद्रित संदाय आदेश फार्म गुम जाने के पश्चात्, बैंक के प्रधान कार्यालय ने घटना की तिथि से काफी पहले, सतर्कता से एवं तुरंत रूप से परिपत्र जारी किया, अतः बैंक ने पर्याप्त रूप से अपने कर्तव्य एवं भार का निर्वहन किया है — अपीलार्थी बैंक के विरुद्ध कोई अनुयोज्य दावा नहीं उठाया जा सकता क्योंकि अनुयोज्य दावा होने के लिए और न्यायालय से प्रतितोष प्राप्त करने के लिए, दायित्व को उपेक्षा, दुष्करण, अपकरण और अकरण इत्यादि जैसे किसी दोष की मान्यता प्राप्त श्रेणी में विधिक आकार धारण करना चाहिए — आगे अभिनिर्धारित — तथ्यों एवं साक्ष्य से यह स्थापित होता है कि प्रत्यर्थी क्र. 1 की क्षतिपूर्ति हेतु बैंक का कोई संविदात्मक एवं अपकृत्यजन्य दायित्व नहीं था।

B. *Practice – Civil* – A person who approaches the Court must come out with clean hands – A litigant who approaches the court is bound to produce all the documents executed by him which are relevant to the litigation. (Para 22)

ख. पद्धति — सिविल — न्यायालय के समक्ष आने वाले व्यक्ति को स्वच्छ अंतःकरण से आना चाहिए — कोई मुकदमेबाज जो न्यायालय के समक्ष आता है वह उसके द्वारा निष्पादित उन सभी दस्तावेजों को प्रस्तुत करने के लिए बाध्य है जो मुकदमे से सुसंगत हैं।

C. *Law of Torts* – The expressions malfeasance, misfeasance and non-feasance would apply in those limited cases where the State or its officers are liable not only for breach of care and duty but it must be actuated with malice or bad faith. (Para 25)

ग. अपकृत्य विधि — दुष्करण, अपकरण एवं अकरण का शब्द प्रयोग उन सीमित प्रकरणों में लागू होगा जहाँ राज्य या उसके अधिकारी न केवल सावधानी एवं कर्तव्य के भंग हेतु दायी हैं बल्कि वह दुर्भाव या असदभाव से प्रेरित हुआ होना चाहिए।

D. *Words & Phrases* – Expression 'negligence', 'malfeasance',

'misfeasance' and 'non-feasance' – Explained. (Para 24)

घ. शब्द एवं वाक्यांश – 'उपेक्षा', 'दुष्करण', 'अपकरण' एवं 'अकरण' का शब्द प्रयोग – स्पष्ट किया गया।

Cases referred:

(2012) 11 SCC 574, (1994) 4 SCC 1.

Ankur Modi, for the appellant.

None for the respondent.

J U D G M E N T

ANAND PATHAK, J. :- The appellant -Bank of Maharashtra has preferred this appeal under Section 96 of the Code of Civil Procedure, 1908 against the judgment and decree dated 12-05-2000 passed by the 9th Additional District Judge, Gwalior in case No.187-B/1996 whereby the decree of Rs.30,940/- has been passed against the appellant.

2. Facts in brief are that the plaintiff/respondent No.1 happened to be a trader in electronic items, namely, TV and VCR, pursuing his business in Gwalior. On 27-01- 1991 respondent No.2 visited the shop of respondent No.1 and gave an offer of purchasing electronic merchandise and promised to give payment by way of pay order of Bank of Maharashtra (hereinafter referred as 'Bank') under the Educated Unemployed Loan Scheme of the Bank.

3. Respondent No.1 supplied the electronic merchandise in response to the order placed by respondent No.2 and in consideration of the same, got pay order of Rs.34,200/-. When respondent No.1 submitted the said pay order for encashment in his Bank; Indian Overseas Bank, then much to its chagrin, surprise and dismay found that the said pay order was forged one and was not at all issued by the appellant bank.

4. The matter was reported to the police and it was found that the pay order which was purportedly given by respondent No.2 to respondent No.1 was earlier lost/stolen by somebody from the Jabalpur Branch and while affixing the forged seal of Gwalior Branch over the said pay order the respondent No.2 tried to get advantage of it and purportedly paid for the purchased goods through that forged pay order. Police investigated the matter but could not get trace of respondent No.2 Ramnaresh. Therefore, the actual conspiracy

could not come to the light. On the other hand, respondent No.1 who has supplied the electronic merchandise to respondent No.2 has preferred a civil suit for recovery against the present appellant bank as well as against respondent No.2 on the pretext that due to carelessness/negligence of the Bank, respondent No.1 plaintiff suffered loss for which the Bank should compensate him accordingly. According to the respondent No.1/plaintiff, the Bank had not published the news of theft or loss of pay order in public, therefore, plaintiff suffered.

5. The trial Court issued the notices and present appellant caused its appearance and submitted written statement and contested the claim of respondent No.1/plaintiff whereas the respondent No.2/defendant No.3 did not turn up and remained ex-parte. The trial Court has framed five issues for adjudication in which issue No.2 (a) and (b) are in respect of alleged negligence/carelessness attributable on the part of appellant Bank. Issue No.2(a) and (b) reads as under:

“2अ. क्या प्रतिवादी क01 व 2 की असावधानी के कारण प्रतिवादी क03 को पे आर्डर प्राप्त हुआ यदि हां ?

2ब. तो क्या प्रतिवादी क01 व 2 वादी को 34,200 रुपये अदा करने के लिए उत्तरदायी है ?”

6. To support its claim, respondent No.1/plaintiff had examined three witnesses; including the proprietor of the plaintiff through power of attorney holder. Personally proprietor of plaintiff Smt. Radha Khetan did not prefer to appear in the witness box.

7. On behalf of present appellant/defendants No.1&2, Branch Manager of Gwalior Branch appeared in the witness box as DW-1 and deposed in favour of the Bank and another witness, local trader of the Gwalior city as DW-2.

8. The trial Court after considering the evidence led by the parties and submissions made in this behalf, passed the impugned judgment and decree fastening the liability of Rs.30,940/- over the appellant Bank for causing carelessness and negligence because of which respondent No.2 got pay order, misused it and cheated the plaintiff.

9. In the trial Court, present respondent No.2 (defendant No.3) remained *ex parte* and did not appear even before this Court, therefore, the appellant

had moved an application for dispensing with service of respondent No.2 which got allowed vide order dated 06-02-2008.

10. The appeal was admitted for final hearing vide order dated 13-12-2000 and since then pending consideration for final hearing.

11. Heard learned counsel for the appellants and with his assistance perused the record.

12. The question for consideration in the appeal is whether the loss of pay order and its subsequent misuse can give rise to an actionable claim against the appellant and whether the judgment and decree passed by the trial Court holding the appellant liable to compensate respondent No.1 is just and proper based on sufficient appreciation of evidence ?

13. In the evidence, Ramesh Kumar Gyani (PW-1), Assistant Manager, Indian Overseas Bank, Gwalior Branch has deposed on behalf of the plaintiff and he could not make any statement regarding alleged carelessness / negligence on behalf of present appellant. In his examination-in-chief he only mentioned the fact regarding rejection of pay order by the appellant Bank when it was sent for encashment which was very obvious looking to the nature of pay order being forged one.

14. Similarly, Radhakishan Khetan (PW-2) who was power of attorney holder of proprietor of respondent No.1 firm was examined. He admitted in para 8 of his cross-examination that the Bank of Maharashtra has issued the circular dated 15-03-1989 in respect of missing of pay orders book and circular dated 15-03-1989 was exhibited as Ex-P/15. Perusal of Ex-P/15 shows that the pay order form was lost on 11-01-1989 much prior to the date of incident i.e. 27-02-1989. The same witness in paras 14 and 15 has accepted the fact that once the pay order is being issued for payment by any client then they do not verify whether the pay order is genuine or forged one; because pay order is always issued by the Bank after deposition of the amount. In para 16 also, he admitted that he did not crosscheck the contents of the pay order including signature. From the evidence of this witness nowhere any fact surfaced which could have stood against the appellant for showing/committing any carelessness or negligence so as to cause loss to respondent No.1/plaintiff. In fact, it was plaintiff who did not show due care and precaution while dealing with a stranger in commercial transaction.

15. Krishna Sharan Vaishya (PW-3) another dealer of the area entered into the witness box and gave evidence in support of the plaintiff. He did not reveal any evidence or information in favour of the plaintiff which could have been prejudicial to the interest of defendants No.1 and 2 bank .

16. On the other hand, the present appellant (Bank) led the evidence of Mr. A.K. Jain, Senior Manager (DW-1). He categorically narrated the steps which are to be taken when the book of pay orders form is lost. He described in paras 4 and 14 of his deposition that appellant Bank has practice of referring the quotation given by the applicant coming under Educated Unemployed Loan Scheme.

17. The Bank has deposed one more witness Chandrashekhar Sharma (DW-2) who happened to be a dealer in the electronic items. He also deposed in favour of the Bank and his testimony remained unrebutted. He categorically submitted that regarding loan transactions of customer, Bank issues letter along with Pay Order.

18. Respondent No.1/plaintiff himself has exhibited the original pay order as Ex-P/1 as well as circular issued by the Indian Overseas Bank Ex-P/3 and other documents uptill Ex-P/15. Perusal of these documents nowhere suggest that the Bank was at fault. After loss of pay order form at Jabalpur Branch and after its subsequent misuse by the present respondent No.2, the Bank has taken the steps vigilantly and looking to the fact that loss of pay order form was from Bank of Maharashtra, Jabalpur Branch, therefore, the Bank of Maharashtra, Gwalior Branch could not had any inclination or anticipation of such mishap. Once the circular has been promptly issued by the Head Office (General Manager CS and Chief Vigilance Officer) then no actionable claim against the Bank can be raised or attracted. The printed pay order form was lost from the Jabalpur Branch and misused by respondent No.2 by affixing seal (of Gwalior branch) at Gwalior. The seal could have affixed at any place of any branch of the Bank and could have been misused anywhere in the country. The incident like the present one could have taken place anywhere.

19. The trial Court while appreciating the evidence and the documents placed before the Court for adjudication ignored the fact that the Bank has sufficiently discharged the duties and discharged its onus once the Head Office, Vigilance Cell has issued the circular which is on record. No procedural memo or guidelines have been placed so as to suggest culpability or involvement of the Bank. The trial

Court misconstrued the evidence led by the parties and caused perversity in coming to the conclusion that the Bank is liable to pay the amount in which respondent No.1 has been conned by respondent No.2. The fact of absconding of respondent No.2 further raised doubt about the whole incident.

20. There is possibility that respondents No.1&2 might have misused the process of law because respondent No.1 (plaintiff) has not deposed about the statement if any made before the investigating officer in the criminal case registered against respondent No.2 so as to substantiate his claim about being cheated by respondent No.2. In absence of such evidence about the fate of investigation as well as the absence of respondent No.2 in the present civil suit, it appears that respondent No.1/plaintiff and respondent No.2/defendant No.3 stood *In Pari Delicto*. In fact, respondent No.1/plaintiff as well as respondent No.2 (defendant No.3) are at fault and do not come with clean hands. Therefore, the relief as claimed by the plaintiff is not legal and equitable. On this count also, the case of the plaintiff fails.

21. In para 10 of the plaint, respondent No.1/plaintiff himself has admitted regarding the factum of forged draft of the Bank. Once he himself admitted that the draft was forged and he could not establish any ill motive or *mens rea* of Bank, then in absence of any involvement of Bank or its employees, no adverse inference could have been drawn against the Bank.

22. From the conduct of respondent No.1, it appears that he has not approached the Court with clean hands and a litigant who approaches the Court is bound to produce all the documents executed by him which are relevant to the litigation. He must come with clean hands. {See: (2012) 11 SCC 574, *Badami (deceased) By Her LR Vs. Bhali*}. In the present case also, the plaintiff has not come to the Court with clean hands. He has not disclosed about the chain of events through which he followed the investigation process in criminal case registered against the conman, i.e. respondent No.2. He did not elaborate the fate of police investigation and he has tried to shift the liability over the Bank which in the facts and circumstances of the case cannot be shifted.

23. No contractual liability exists between the Bank and respondent No.1. Respondent No.1 had neither contractual agreement with it nor was the customer of the Bank, therefore, no contractual liability of appellant Bank existed in the present set of facts. Similarly, from the facts and evidence it is established that no tortious liability of the appellant bank exists for suitably compensating respondent No.1.

24. In view of the aforesaid, no actionable claim can be raised against the Bank because to be actionable claim and get redress from Court, the liability must assume legal shape in any recognized category of wrong such as negligence, malfeasance, misfeasance and non-feasance etc.

'Negligence' ordinarily means failure to do statutory duty or otherwise giving rise to damage, undesired by the defendant, to the plaintiff. Thus its ingredients are

- (a) a legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of the duty;
- (b) breach of that duty;
- (c) consequential damage to B."

According to Dias,

"Liability in negligence is technically described as arising out of damage caused by the breach of a duty to take care."

The axis around which the law of negligence revolves is duty, duty to take care, duty to take reasonable care. But concept of duty, its reasonableness, the standard of care required cannot be put in strait-jacket. It cannot be rigidly fixed. In Black's Law Dictionary the meaning of each of these expressions is explained as under:

"Malfeasance.- Evil doing; ill conduct. The commission of some act which is positively unlawful; the doing of an act which is wholly wrongful and unlawful; the doing of an act which person ought not to do at all or the unjust performance of some act which the party had no right or which he had contracted not to do. Comprehensive term including any wrongful conduct that affects, interrupts or interferes with the performance of official duties.

Misfeasance.- The improper performance of some act which a man may lawfully do.

Non-feasance.- Non-performance of some act which ought to be performed, omission to perform a required duty at all, or total neglect of duty."

25. The expressions 'malfeasance', 'misfeasance' and 'nonfeasance' would, therefore, apply in those limited cases where the State or its officers are liable

not only for breach of care and duty but it must be actuated with malice or bad faith {See; (1994) 4 SCC 1, *Jay Laxmi Salt Works (P) Ltd. Vs. State of Gujarat*}.

26. Here, in the present case from the pleadings and evidence of respondent No.1/plaintiff, negligence, misfeasance and non-feasance have not been established in any manner. Plaintiff could not establish the malice or bad faith, in the present case. On the other hand, correspondence available on the record suggested that the Bank has taken due care to inform all the branches, Offices and the persons concerned regarding loss of pay order form, moment they come to know about the fraud. Respondent No.1 was neither customer of the appellant bank nor was in contractual agreement with the Bank. Therefore, on the count of absence of any contractual liability also, no liability could have been fastened over the Bank. The finding so arrived in the impugned judgment and decree are perverse and therefore, set aside.

27. In view of the aforesaid discussions, the judgment and decree dated 12-05-2000 passed by the 9th Additional District Judge, Gwalior is hereby set aside.

The amount including the cost and interest deposited by the appellant in pursuance to the order dated 06-02-2006 passed by this Court, be refunded back to the appellant Bank after due verification.

Appeal allowed.

Appeal allowed.

I.L.R. [2017] M.P., 653

APPELLATE CIVIL

Before Mr. Justice J.P. Gupta

F.A. No. 238/2002 (Jabalpur) decided on 20 September, 2016

ANJANI PRASAD (DEAD) THROUGH L.Rs.

RAM SHIROMANI TIWARI & anr..

...Appellants

Vs.

STATE OF M.P. & ors.

...Respondents

Land Acquisition Act (1 of 1894), Section 18 & 54 – Reference to Court and Appeal – Apportionment of compensation amount of the land of share of respondent no. 4 in favour of appellants, merely on the basis of affidavit given by them before Tehsildar – On the basis of

which Tehsildar declared present appellants to be the owner of 2/3rd share – Reference Court passed order for apportionment of only 1/3rd share of compensation amount in favour of appellants – Appeal – Held – Order passed by Tehsildar is *non est* in the eye of law as under the Transfer of Property Act, gift can be made by owner of the land only by registered sale deed and not by oral expression – Therefore, Tehsildar has no right to transfer the land of respondent No. 4 in the appellants' name – There is no other document in favour of the appellants – Findings of reference court affirmed – Appeal dismissed. (Para 7 & 8)

भूमि अर्जन अधिनियम (1894 का 1), धारा 18 व 54 – न्यायालय को निर्देश एवं अपील – प्रत्यर्थी क्र. 4 के हिस्से की भूमि की प्रतिकर राशि का प्रमाजन अपीलार्थीगण के पक्ष में मात्र उनके द्वारा तहसीलदार के समक्ष दिये गये शपथ-पत्र के आधार पर – जिसके आधार पर तहसीलदार ने वर्तमान अपीलार्थीगण को 2/3 हिस्से का स्वामी घोषित किया – निर्देश न्यायालय ने मात्र 1/3 हिस्से की प्रतिकर राशि का आदेश अपीलार्थीगण के पक्ष में पारित किया – अपील – अभिनिर्धारित – तहसीलदार द्वारा पारित आदेश, विधि की दृष्टि में *नास्ति* है चूंकि संपत्ति अंतरण अधिनियम के अंतर्गत दान केवल रजिस्ट्रीकृत विक्रय विलेख से भूमि के स्वामी द्वारा किया जा सकता है तथा न कि मौखिक अभिव्यक्ति द्वारा – अतः, तहसीलदार को प्रत्यर्थी क्र. 4 की भूमि अपीलार्थीगण के नाम पर अंतरित करने का कोई अधिकार नहीं है – अपीलार्थीगण के पक्ष में अन्य कोई दस्तावेज नहीं हैं – निर्देश न्यायालय के निष्कर्ष अभिपुष्ट – अपील खारिज।

Pratap Narayan Mishra, for the appellants.

Ashutosh Tiwari, for the respondent.Nos. 3 & 4.

J U D G M E N T

J.P. GUPTA, J. :- This appeal under Section 54 of Land Acquisition Act read with Section 96 of the Code of Civil Procedure has been filed against the judgment dated 19.3.2012 passed by III Additional District Judge, Satna in MJC No.64/95 arising out of Reference Application filed under Section 18 of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act') for apportionment of the compensation amount determined by the Land Acquisition Officer by the award dated 5.6.1001 to the claimant to the extend of 2/3rd share instead of 1/3rd share.

2. In brief, the relevant fact of the case are that the agricultural land bearing Survey No.1275 area 0.287 hectare, Survey No. 1276 area 0.311 hectare,

Survey No. 1277 area 0.1981 hectare situated at village Kandwa tahsil Rampur Baghelan district Satna were acquired on behalf of the M.P. State by the Collector, Satna and as per the provision of the Act compensation of the acquired land was determined for Rs.1,29,442.67 by award dated 5.6.1991.

3. At the time of acquisition, Bansidhar, Shiv Balak and Anjani Prasad were recorded the owners of the land, therefore, the award was passed in favour of all of them. There was a dispute amongst them about the apportionment of the compensation amount hence, the Land Acquisition Officer submitted this dispute to the District Judge, Satna as a reference for apportionment of the compensation amount.

4. On behalf of the appellant, it is submitted that the acquired land was the property of the joint ownership of Shivhsran, Shiv Balak and Anjani Prasad. The appellants are legal representatives of Anjani Prasad. Shivsharan had a daughter Bhoori, who has also expired and Bansidhar Respondent No.3 is son of Bhoori. Shiv Balak is also dead, he had three daughters namely Tagasia, Buddhi and Narbadia (Respondent No.1 a,b and c). It is also stated that the respondent No.4 being legal representatives of Shiv Balak released their share in the aforesaid land in favour of the appellants and with that effect they have filed affidavit before the Naib Tahsildar, Rampur Baghelan, district Satna and the same passed and order on 28.10.1992 by which the present appellants were declared to be the owner of 2/3rd share of the aforesaid property and their name was mutated in the revenue record and other records respectively. But the learned Reference Court by ignoring the aforesaid facts, documents and evidence on record wrongly passed the impugned order for apportionment of only 1/3rd share of the compensation amount, hence, the impugned order be modified as claimed by the appellants.

5. In this matter the respondent No.1 and 2 are formal parties. None was present on behalf of them. On behalf of respondent No. 3 and 4, it is stated that the impugned judgment regarding apportionment of the compensation is correct and appropriate and no interference is required, as the Tahsildar has no right to deprive the rightful owner of the land to claim the ownership on the property on the basis of affidavit, hence, in the eye of law, order passed by the Tahsildar is *non est* and cannot be taken into consideration to deprive the right to get compensation on acquisition of land of their share, hence, the appeal deserves to be rejected.

6. In this appeal a short question involved is whether the appellants have a legal right to get compensation of the land of share of respondent No.4 on the basis of affidavit given by them before the Naib Tahsildar, who declared the appellants the owner of the land of share of the respondent No.4?

7. On perusal of record, it is found that the appellants have submitted a certified copy of the order dated 28.10.1992 Ex. D-3 passed by the Naib Tahsildar, Rampur Baghelan in Revenue Case No.105A/6/85-86. On perusal of the aforesaid order, it appears that it is passed behind the respondent No.4 as they are not party in the case and on the basis of their affidavit and the affidavit of their mother submitted by Ramsharan Appellant No.1 the share of Shiv Balak was deemed to be transferred in favour of appellants and recorded their name on the share of Shiv Balak. This order is nonest in the eye of law as under the Transfer of Property Act, gift can be made by the owner of the land by only Registered deed not by oral expression. Therefore, Tehsildar has no right to consider the land transferred orally and recorded appellant's name as the owner of the land on the share of the Shivbalak, therefore, learned lower Court has not committed any error by ignoring the aforesaid document. Apart from it, there is no other document which may be considered to establish the fact that the appellants are also entitled to get the share of Shiv Balak in accordance with law.

8. In view of the aforesaid circumstances, the appeal has no substance as the apportionment of the compensation amount made by the Land Acquisition Officer was rightly confirmed by the learned lower Court. Hence, this Court also affirms the aforesaid finding of learned Reference Court.

5. Resultantly, this appeal is dismissed with no order as to costs.

Appeal dismissed.

I.L.R. [2017] M.P., 656

APPELLATE CIVIL

Before Mr. Justice Anurag Shrivastava

S.A. No. 1411/2009 (Jabalpur) decided on 5 October, 2016

RAMKURIYA BAI (SMT.)

...Appellant

Vs.

SMT. KACHRA BAI (DEAD) & ors.

...Respondents

Civil Procedure Code (5 of 1908), Order 41 Rule 27 and Hindu

Succession Act (30 of 1956), Section 15 & 16 – Additional evidence – Suit for declaration, partition and possession – Held – Appellant/defendant has not stated anything as to she had no knowledge of such additional evidence i.e. will and sale-deed, despite due diligence – No reason is given for failure to produce document before trial Court which is sought to be produced in the court of appeal – Appellant/defendant neither in her written statement nor in her statement before the trial Court has stated anything regarding the said will and sale deed – In absence of a plea, no amount of evidence laid in relation thereto can be looked into – Appellant failed to demonstrate existence of grounds as enumerated u/O 41 Rule 27 – Appellate Court has not committed any illegality in disallowing the application u/O 41 Rule 27 – Appeal dismissed. (Para 10 & 11)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 27 एवं हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 15 व 16 – अतिरिक्त साक्ष्य – घोषणा, विभाजन एवं कब्जा हेतु वाद – अभिनिर्धारित – अपीलार्थी/प्रतिवादी ने ऐसा कोई कथन नहीं किया है कि सम्यक् तत्परता के बावजूद उसे उक्त अतिरिक्त साक्ष्य अर्थात् वसीयत एवं विक्रय विलेख के संबंध में कोई ज्ञान नहीं था – दस्तावेज जिसे अपीली न्यायालय में प्रस्तुत करना चाहा गया है उसे विचारण न्यायालय के समक्ष प्रस्तुत करने में हुई असफलता का कोई कारण नहीं दिया गया है – अपीलार्थी/प्रतिवादी ने न तो अपने लिखित कथन में, न ही विचारण न्यायालय के समक्ष अपने कथन में उक्त वसीयत एवं विक्रय विलेख के संबंध में कोई कथन किये हैं – किसी अभिवाक् की अनुपस्थिति में, उसके संबंध में प्रस्तुत किये जाने वाले किसी साक्ष्य पर विचार नहीं किया जा सकता – अपीलार्थी आदेश 41 नियम 27 के अंतर्गत बताये आधारों का अस्तित्व दर्शाने में असफल रहा – अपीली न्यायालय ने आदेश 41 नियम 27 के अंतर्गत आवेदन नामंजूर करने में कोई अवैधता कारित नहीं की है – अपील खारिज।

Cases referred:

(1999) 3 SCC 573, (2004) 10 SCC 779, (2015) 9 SCC 755.

G.S. Baghel, for the appellant.

None present for the respondents.

J U D G M E N T

ANURAG SHRIVASTAVA, J. :- Appellant/defendant no.1 has filed this second appeal under section 100 of CPC being aggrieved by the judgment

and decree dated 9.10.2009 passed by the First Additional District Judge, Chhindwara in Civil Appeal No.10-A/2009 affirming and confirming the judgment and decree dated 3.1.2009 passed by the Civil Judge, Class-II, Junnardeo, District Chhindwara in Civil Suit No.184-A/2008; whereby the suit filed by respondent no.1 Late Kachra Bai and respondent no.2 Phoolbati (plaintiffs) for declaration of their 1/4th - 1/4th share in the suit property and for partition thereof has been decreed in their favour by recording the concurrent finding of facts against the appellant.

2. The aforesaid suit has been filed by plaintiffs Late Smt.Kachra Bai and Phoolbati against Ramkuriya Bai (defendant no.1) and Galjhar (defendant no.2) alleging that the disputed property, total area 24.85 acres situated in Village Itawa, District Chhindwara belongs to Late Somati Bai, who was the mother of Late Kachra Bai, Phoolbati, Galjhar and Late Buddhu. Somati Bai died in the year 1972 and after her death her son Buddhu and daughters, as stated above, had inherited the disputed property and had equal shares 1/4th - 1/4th in it. Buddhu has died in the year 2000 and his daughter Ramkuriya Bai (present appellant) has inherited his share in the property. The disputed property is joint family property and has never been partitioned. The appellant wrongly got mutated the entire property in her own name. As appellant was denying the right and share of plaintiffs in the property, therefore, they had filed a suit for declaration, partition and separate possession of their 1/4th - 1/4th share in the disputed property before the trial Court. During the pendency of this second appeal, respondent no.1 has died and her legal representatives have been brought on record.

3. The appellant in his written statement denied the entire allegations of plaint and stated that the disputed property is not ancestral property of Smt.Somati Bai. The property Khasra No.392 and 396 have been purchased by Buddhu on 13.4.1964 by a registered sale-deed and this is his self-acquired property. Rest of the disputed property belongs to Nanda, the father of Somati Bai and after his death Somati Bai being only daughter and heir became the owner of this property. Therefore, Somati Bai was the absolute owner of the disputed property. Somati Bai had executed a will dated 16.10.1971 in favour of Ramkuriya Bai. Therefore, after the death of Somati Bai the appellant Ramkuriya Bai has become the owner of entire disputed property by virtue of will and also sole heir of her father Buddhu. The plaintiffs have no right over the disputed property and suit filed by them is baseless and liable to be

dismissed.

4. The trial court, after recording the evidence and hearing the parties, has arrived at the conclusion that the disputed property is a joint family property of appellant and respondents in which they have equal right of 1/4th - 1/4th share. The trial Court decreed the suit, declared 1/4th share of each plaintiffs and defendants and passed a decree of partition in favour of plaintiffs.

5. Being aggrieved by judgment and decree of learned trial court the appellant has preferred the appeal, which has been dismissed by recording a concurrent finding of the facts, as have been found proved by the trial Court.

6. In this second appeal, it has been submitted by the learned counsel for appellant that the Courts below have wrongly held that the disputed property is ancestral property of appellant and respondent nos. 1, 2 and 3. It is self-acquired property of Smt. Somati Bai, the mother of respondent nos. 1, 2 and 3 and grand-mother of appellant. Smt. Somati Bai has right to alienate the property during her life time and she has executed a will in favour of the appellant on 16.10.1971. Therefore, after the death of Somati Bai the appellant has become the absolute owner of the property by virtue of said will. The appellant has filed an application under order 41 Rule 27 of CPC for permission to file alleged will dated 16.10.1971 and a sale-deed dated 13.4.1964. He has also filed an application under Order 18 Rule 17 of CPC for permission to re-examine the plaintiffs in evidence. These applications have been dismissed by the learned appellate Court without assigning any reason. These documents are important to establish the right of appellant on disputed property. Therefore, the learned appellate Court has committed illegality.

7. Considering the arguments of learned counsel for the appellant and on perusal of the records of both the Courts below, it appears that Somati Bai was the owner of the disputed property. It is concurrent finding of the Courts below that Somati Bai has acquired the property from her father Nanda as she was the only daughter. Therefore, Somati Bai was the absolute owner of the property and after her death, her son and daughters will get equal 1/4th - 1/4th share in the disputed property under sections 15 and 16 of the Hindu Succession Act. It is the appellant's case that Khasra Nos. 392 and 396 have been purchased by Buddhu on 13.4.1964 by a registered sale-deed and this is his self-acquired property. The burden to prove this fact lies upon appellant but she has not filed this sale-deed dated 13.4.1964 in the trial Court. The

trial court and the appellate Court have considered the evidence of the appellant regarding purchase of above land and found that this fact has not been proved. This is the concurrent finding of the Courts below, which is based upon right appreciation of the evidence and does not call for any interference.

8. The Hon'ble Supreme Court in the case of *Vidhyadhar Vs. Manikrao & Ors.* (1999) 3 SCC 573 held that concurrent findings of fact recorded by Trial Court and First Appellate Court could not have been legally upset by High Court in second appeal unless such findings are shown to be perverse, being based on no evidence or on the evidence on record no reasonable person could have come to such conclusion.

9. Now the question arises whether the learned appellate Court has committed illegality in dismissing the application moved by appellant under Order 41 Rule 27 of CPC. By this application the appellant wanted to file the will dated 16.10.1971 and a sale-deed dated 13.4.1964 alleged to have been executed in favour of his father Buddhu. Hon'ble the Supreme Court in *Karnataka Board of Wakf Vs. Government of India* (2004) 10 SCC 779 held that- the scope of Order 41 rule 27 is very clear to the effect that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, unless they have shown that in spite of due diligence, they could not produce such documents and such documents are required to enable the court to pronounce proper judgment.

10. In present case, the appellant has not stated anything as to he had no knowledge of such additional evidence i.e. will and sale-deed despite due diligence. No reason is given for failure to produce document in trial Court which is sought to be produced in the Court of appeal.

11. Another important fact is that there is no pleading regarding alleged will has been made in the written statement of appellant/defendant no. 1. It is settled law that in the absence of a plea no amount of evidence laid in relation thereto can be looked into. Hon'ble Supreme Court in the case of *Nandkishore Lalbhai Mehta Vs. New Era Fabrics* (2015) 9 SCC 755 reiterated in Para 16 as under:-

“16. The principle was reiterated by this Court in *Ram Sarup Gupta v. Bishun Narain Inter College*:

“6. ... It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also

equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings; instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal.” (emphasis supplied)”

It is also pertinent to mention that appellant Smt.Ramkuriya Bai (D.W.1) in her statement before the trial Court has not stated anything regarding will. Appellant and other witnesses Galjhar did not state that Somati Bai had executed the will in favour of appellant and bequeathed the property to her. Therefore in absence of pleadings regarding will, the appellant cannot be permitted to lead evidence in this regard. It is thus clear that the appellant was not able to demonstrate the existence of grounds as enumerated under Order 41 Rule 27 of CPC for permission to produce additional evidence. If Court cannot pronounce a judgment without additional evidence, additional evidence is to be taken. In this case, this situation does not arise. Therefore, the appellate Court has not committed any illegality in disallowing the application of appellant under Order 41 Rule 27 of CPC.

12. Therefore, after examination of the concurrent findings of the Courts below with the help of evidence on record, no error is found in it. The findings are based on correct appreciation of evidence and no illegality or perversity appears in it.

13. In the circumstances, I am of the considered opinion that no substantial question of law arises for adjudication in this present appeal. The appeal filed by the appellant, being meritless, is accordingly dismissed.

Appeal dismissed.

I.L.R. [2017] M.P., 662

APPELLATE CIVIL

Before Mr. Justice S.K. Awasthi

S.A. No. 160/2014 (Gwalior) decided on 3 November, 2016

SUSHILA BAI & ors.

...Appellants

Vs.

SMT. RAJKUMARI & ors.

...Respondents

A. *Hindu Law – Partition* – Rights of the holder of the divided HUF property after the division of property – Held – Holder of the divided HUF property after partition has unfettered rights to deal with the separated property including sale or mortgage in the same manner as he can dispose of a self acquired property. (Para 13)

क. *हिन्दू विधि – विभाजन* – हिन्दू अविभाजित कुटुम्ब की विभाजित संपत्ति के धारक के संपत्ति का विभाजन होने के पश्चात् अधिकार – अभिनिर्धारित – हिन्दू अविभाजित कुटुम्ब की विभाजित संपत्ति के धारक को पृथक की गई संपत्ति के विक्रय या बंधक समेत संव्यवहार का उसी समान बंधनमुक्त अधिकार है जिस तरह से वह स्वअर्जित संपत्ति का संव्यवहार कर सकता है।

B. *Land Revenue Code, M.P. (20 of 1959), Section 164 and Hindu Succession Act (30 of 1956) – Amendment of 2005* – Devolution of rights after the death of the holder – Held – The holder of divided HUF property can dispose of the property in any manner as he deems fit but his successor will have interest over the property only when he expires and the property held by him still remains whereas in case he sells off the entire property then the question of succession does not arise. (Para 15)

ख. मू राजस्व संहिता, म.प्र. (1959 का 20), धारा 164 एवं हिन्दू उत्तराधिकार अधिनियम (1956 का 30) – 2005 का संशोधन – धारक की मृत्यु के पश्चात् अधिकारों का न्यायमन – अभिनिर्धारित – हिन्दू अविभाजित कुटुम्ब की विभाजित संपत्ति का धारक किसी भी तरीके से जैसा वह उचित समझे संपत्ति का निपटारा कर सकता है परन्तु उसके उत्तराधिकारी का संपत्ति पर मात्र तब हित होगा जबकि उसकी मृत्यु हो चुकी हो तथा उसके द्वारा धारण की गई संपत्ति अभी भी बची हुई है, जबकि यदि वह संपूर्ण संपत्ति विक्रय कर देता है तो उत्तराधिकारिता का प्रश्न उत्पन्न नहीं होता।

Cases referred:

(2006) 8 SCC 581, 2002 (3) MPLJ 576, 2004 RN 109, 2007 (4) MPLJ 418, 2012 (II) MPWN 58, I.L.R. [2009] M.P. 1402, I.L.R. [2012] M.P. 951, (2008) 7 SCC 46.

Vilas Tikhe, for the appellants.

R.K. Upadhyay, for the respondents.

J U D G M E N T

S.K. AWASTHI, J. :- The subject matter of the present second appeal is the judgment and decree dated 18.12.2013 passed in Civil Appeal No. 29A/2012 by Additional District Judge, Chachoda, District Guna (M.P.), whereby the judgment and decree dated 7.5.2012 passed in Civil Suit No. 1A/2012 by the Additional Judge to the Court of Civil Judge Class-1, Chachoda, District Guna, rejecting the suit filed by the present appellants/plaintiffs has been affirmed.

2. The facts in brief necessary for adjudication of the instant appeal are that the appellants/plaintiffs are the daughters of the deceased defendant No.1 Shrilal, who expired during the course of consideration of the first appeal. The deceased defendant No.1 Shrilal was a coparcener with his father Shri Biharilal being the Karta of the Hindu Undivided Family (for brevity, 'HUF'). The defendant No.1 had two brothers, who further have their children. After the death of Biharilal, the remaining coparceners, i.e., the defendant No.1 and his two brothers, entered into family settlement and carried out partition of the properties in the name of HUF. Subsequent to partition, the defendant No.1 acquired the ownership of survey No. 503 admeasuring 3.166 hectares, survey No. 875/1 admeasuring 4.682 hectare, survey No. 876 admeasuring 0.084 hectares, survey No. 532/2 admeasuring 1.902 hectares, and survey No. 778 admeasuring 0.052 hectares in village Bhamawat, Tahsil Kumbhraj,

District Guna (M.P.).

3. During the life time of deceased defendant No.1, he had sole possession over the land in question described above. As indicated above, the defendant No.1 had three daughters, who are the plaintiffs. The defendant No.1 parted with his ownership from the land in question by executing three separate sale deeds on 7.9.2010. Vide the first sale deed (Ex.D/2), the land of survey No.503 was sold to the defendant No.2. The second sale deed (Ex.D/3) was executed for transfer of a part of survey No.875/1 and 876 in favour of defendants No.4 and 5. The third sale deed (Ex.D/1) was executed for transfer of the land of survey No.532/2, 778 and remaining portion of survey No.875/1 in favour of defendant No.3.

4. The appellants/plaintiffs have objection to the transfer of property in question on the ground that they have coparcenary rights in the property in question, as they are the daughters of the defendant No.1. In order to substantiate this ground, the appellants/plaintiffs relied on the amendment carried out in the year 2005 under the Hindu Succession Act, 1956, by which the rights have been conferred on the Hindu females to have coparcenary rights in the property of HUF. Consequently, the suit for declaration and permanent injunction has been filed before the Court of Civil Judge Class-1 to declare the sale deeds dated 7.9.2010 as null and void.

5. It is borne out from the record that the plaint has been framed in a manner that the appellants/plaintiffs have admitted the status of the property in question to be a separate property and not the property under HUF, as the partition has already taken place amongst the coparceners of the HUF prior to coming into force of the amendment of 2005 in the Hindu Succession Act, 1956. The record further reveals that in the cross-examination, the appellants/plaintiffs have admitted that they are born post the year 1956. On a cumulative consideration of these facts and the evidence brought on record by both the parties, the trial court vide judgment dated 7.5.2012 dismissed the suit.

6. The appellants/plaintiffs challenged the judgment pronounced by the trial court by the way of appeal under Section 96 of the Code of Civil Procedure, 1908 before the First Appellate Court, District Guna in an appeal bearing Civil Appeal No. 29A/2012 and canvassed the same grounds that they have interest in the property of the deceased defendant No.1 Shrilal and, therefore, execution of sale deeds dated 7.9.2010 is null and void as the

transfer is without the consent of the appellants/ plaintiffs. The First Appellate Court after carefully examining the record of the case and arguments advanced by both the parties came to conclusion that the judgment dated 7.5.2012 does not suffer from any infirmity warranting interference. Consequently, the First Appellate Court vide judgment dated 18.12.2013 dismissed the appeal affirming the findings of the trial court.

7. Feeling aggrieved by the concurrent finding recorded by both the courts below, the instant appeal has been preferred under Section 100 of the Code of Civil Procedure.

8. The primary contention of the appellants/plaintiffs is that the property in question was acquired by the funds of HUF during the life time of their grandfather Shri Biharilal and as per the Personal Law prevailing at the point of time, all the coparceners have equal interest in the property acquired from the funds of the HUF. It has also been contended that the share of Hindu woman has been recognised by the Legislature in the year 2005 whereas the sale deeds have been executed in the year 2010. Therefore, the appellants/plaintiffs are women and may not have right prior to 2005 but the facts in hand refer to the transaction with coparcenery property in the year 2010 when the rights of the appellants/plaintiffs had been duly recognised.

9. Learned counsel for the appellants has placed reliance on the judgment pronounced by the Hon'ble Apex Court in the case of *Sheela Devi and others vs. Lal Chand and others* (2006) 8 SCC 581, to submit that the Court clearly recognised the fact that if, at the time of dealing with the property of HUF a birth in the family had taken place then by virtue of Mitakshara School of Hindu Law, without the consent of the coparcener disposition of the property cannot be done.

10. On the contrary, learned counsel for the respondent/defendant submitted that the law relating to birth right has undergone a change in the year 1956 by introduction of Hindu Succession Act, 1956 and, therefore, any birth which has taken place post the year 1956 will have no rights in the HUF property. The learned counsel referred to the statements of the appellants/plaintiffs in which an admission with regard to their date of birth to be post the year 1956 has been made. Therefore, it is contended that the courts below have not committed any error in dismissing the suit of the appellants/plaintiffs. In order to substantiate the contentions, learned counsel for the respondents/

defendants placed reliance on the judgments in the cases of *Chandrakanta and another vs. Ashok Kumar and others*, 2002 (3) MPLJ 576; *Anil and others vs. TGattulal and others*, 2004 RN 109; *Ghanshyam vs. Kanhiyalal*, 2007 (4) MPLJ 418; *Babulal vs. Ramkali Bai*, 2012 (II) MPWN 58; *Bipta Bai (Smt.) vs. Smt. Shipra Bai & ors.*, I.L.R. [2009] M.P. 1402; and *Rajesh vs. Keshar Singh*, I.L.R.[2012] M.P., 951.

11. Having regard to the submissions advanced by all the parties, it is appropriate to first refer to the legal position with respect to the property in question. It is admitted amongst the parties that prior to execution of sale deeds dated 7.9.2010 the partition amongst the members of HUF had taken place. In fact the property in question described above was received by the defendant No.1 after the partition. Therefore, the point for determination is that after the division of HUF property what are the rights of the holder of the divided HUF property?

12. At this juncture, reference to judgment of Apex Court in the case of *Hardeo Rai vs. Sakuntala Devi and others*, (2008) 7 SCC 46, is relevant. The Apex Court while dealing with the similar issue about the status of the divided HUF property after partition observed in the following manner :-

"22. For the purpose of assigning one's interest in the property, it was not necessary that partition by metes and bounds amongst the coparceners must take place. When an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a coparcener is determined, it ceases to be a coparcenary property. The parties in such an event would not possess the property as "joint tenants" but as "tenants-in-common". The decision of this Court in SBI v. Ghamandi Ram (1969) 2 SCC 33, therefore, is not applicable to the present case.

23. Where a coparcener takes definite share in the property, he is owner of that share and as such he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property."

13. The reproduced portion of the judgment of the Apex Court in *Hardeo Rai* (supra) leaves no iota of doubt that the holder of the divided HUF property

after partition has unfettered rights to deal with the separated property which includes alienation by sale or mortgage in the same manner as he can dispose of a self acquired property.

14. At this stage, the judgment of Apex Court relied upon by learned counsel for the appellants/ plaintiffs in the case of *Sheela Devi* (supra) is required to be appreciated in the light of the facts of the present case. A fair reading of the judgment clearly indicates that the Apex Court in an unambiguous manner has held that the birth right in the HUF property is only available to the person who has taken birth prior to the year 1956. However, in the facts of the present case it is an admitted position that the appellants/plaintiffs are born post the year 1956, therefore, the judgment does not help cause of the appellants/plaintiffs.

15. The next contention advanced by the appellants/ plaintiffs is that by introduction of the amendment in the year 2005 in Hindu Succession Act, 1956, the appellants/plaintiffs have equal share as that of a male member of the family. It is true that the Legislature has duly recognised the long due rights of the woman in the property held by a Hindu family but it is also true that right which is referred to will have significance only in the case the holder/ owner of the property dies since section 164 of the M.P. Land Revenue Code, 1959, which deals with the devolution of right over agricultural lands, clearly provides that the interest or right shall only devolve after the death of the holder. To put it differently, the holder of the land can dispose of his property in any manner as he deems fit but his successor will have interest over the said property only when he expires and the property held by him still remains whereas in case he sells off the entire property then the question of succession does not arise.

16. In view of the above discussion made herein above, the contentions canvassed by learned counsel for the appellants/plaintiffs deserve to be repelled. It is the settled position of law that the appeal preferred under Section 100 of the Code of Civil Procedure, 1908 can only be entertained if there exists a substantial question of law for adjudication. However, in the case at hand, there appears no substantial question of law involved and in the light of the settled legal position, no interference with the concurrent finding recorded by both the courts below is mandated. Consequently the appeal is dismissed. The costs to be borne by respective parties.

Appeal dismissed.

I.L.R. [2017] M.P., 668

APPELLATE CIVIL

Before Mr. Justice Ashok Kumar Joshi

S.A. No. 1320/2010 (Jabalpur) decided on 18 November, 2016

RATAN SINGH YADAV & anr.

...Appellants

Vs.

BHAGWAT SINGH PARMAR

...Respondent

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(b) & 12(1)(i) – Sub-letting and alternate accommodation – Appeal by tenant – Concurrent findings of fact – Appellants not living jointly – Appellant No. 1 handing over possession of suit premises to his brother, appellant No. 2 – Appellant No. 2 not examined – No documentary evidence regarding payment of rent by appellant No. 2 to previous landlord – Money order receipts only shows that it was sent to the earlier owner but sender's name is not mentioned in the receipts – Admission by appellant No. 1 (original tenant) that he has an alternate accommodation in the same city – Held – It is very much evident that appellant No. 1 has inducted appellant No. 2 in the premises, so it amounts to sub-letting – No substantial question of law – Appeal dismissed. (Paras 8 to 12)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(बी) व 12(1)(आई) – उप-माड़े पर दिया जाना तथा वैकल्पिक स्थान – किरायेदार द्वारा अपील – तथ्य के समवर्ती निष्कर्ष – अपीलार्थीगण साथ निवासरत नहीं है – अपीलार्थी क्र. 1 द्वारा उसके भाई, अपीलार्थी क्र. 2 को वाद परिसर का कब्जा सौंपा जाना – अपीलार्थी क्र. 2 का परीक्षण नहीं किया गया – अपीलार्थी क्र. 2 द्वारा पूर्व भू-स्वामी को किराये का भुगतान किये जाने से संबंधित कोई दस्तावेजी साक्ष्य नहीं है – मनी आर्डर रसीदें केवल यह दर्शाती हैं कि उन्हें पूर्ववर्ती स्वामी को भेजा गया था परंतु रसीदों में प्रेषक का नाम उल्लिखित नहीं – अपीलार्थी क्र. 1 (वास्तविक किरायेदार) द्वारा स्वीकृति कि उसके पास उसी शहर में एक वैकल्पिक स्थान है – अभिनिर्धारित – यह पूर्णतः स्पष्ट है कि अपीलार्थी क्र. 1 ने अपीलार्थी क्र. 2 को परिसर में रखा है, इसलिए यह उप-माड़े पर दिये जाने की कोटि में आता है – विधि का कोई सारवान प्रश्न नहीं – अपील खारिज।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(b) – Sub-letting – Direct evidence – It is settled position of law that direct evidence on the point of sub-letting could not be expected

from the landlord.

(Para 9)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(बी) – उप-माड़े पर दिया जाना – प्रत्यक्ष साक्ष्य – यह विधि की व्यवस्थापित स्थिति है कि उप-माड़े पर दिये जाने के बिंदु पर मू-स्वामी से प्रत्यक्ष साक्ष्य अपेक्षित नहीं किया जा सकता।

R.K. Verma with Saurabh Shrivastava, for the appellants.

ORDER

A.K. Joshi, J. :- This appeal under Section 100 of the C.P.C. has been filed by the appellants against the decree passed on 29/10/2010 by Third Addl. District Judge, Bhopal in Regular Civil Appeal No.143-A/2008, affirming the decree passed on 3/5/2008 by Fourth Addl. Civil Judge Class-I, Bhopal in Civil Suit No.275-A/2006 decreeing the suit of eviction filed by the present respondent/plaintiff for the relief of getting vacant possession of suit accommodation, arrears of rent, *mesne* profit on the ground envisaged under Section 12(1) (b) and 12(1)(i) of the M.P. Accommodation Control Act, 1961 (hereinafter to be referred as 'the Act')

2. Admittedly appellant No.1 Ratan Singh was tenant in the suit accommodation from the time of previous owner and landlord Gulab Bai for residential purpose and respondent purchased the house including suit accommodation on 4/6/2004 from Gulab Bai. Appellant No.2 Ballu is real brother of appellant no.1.

3. It would be significant to mention here that the respondent had filed the above mentioned suit for eviction of tenant also on other grounds envisaged under Section 12(1)(a), (e) and (g) of the Act, but as the trial Court and appellate Court had decreed the suit only on the above mentioned two grounds envisaged under Section 12(1)(b) and (i) of the above mentioned Act, pleadings and evidence relating to these two grounds are being referred.

4. Respondent had filed suit on pleadings that after receiving the notice sent by registered post, appellant no.1 did not pay or tender the demanded arrears of rent and not vacated the tenanted room situated on upper floor. Appellant No.1 got a plot in Bhopal City from a Grah Nirman Society and constructed his two storeyed house and is residing there. Thereafter appellant no.1 had given the suit accommodation (room) on sub-tenancy to appellant no.2 without permission of the landlord, thus above mentioned reliefs were

sought by the suit .

5. The appellants pleaded in their joint written statement that respondent had not given them any intimation about purchase of suit accommodation from previous landlord Gulab Bai. Appellant No.1 was tenant from the year 1986 and his brother appellant no.2 came to Bhopal in the year 1994, thereafter appellant no.1 took two other rooms at ground floor of the same house on rent from Gulab Bai and appellant no.2 had become tenant of Gulab Bai for the suit accommodation since that time. Appellant No.2 is not sub-tenant of appellant no.1 in relation to suit accommodation. For want of intimation regarding sale of the suit accommodation, appellant no.2 was sending rent to Gulab Bai by money orders. Appellant No.1 had purchased a plot from housing society and thereafter built a house on it, but as the electrical high tension line is passing over it, the Municipal Corporation, Bhopal had stopped construction work after giving notice to appellant no.1 for demolition. Plaintiff filed his suit on false grounds and is not entitled for any relief.

6. After framing issues and recording evidence and hearing, the trial Court had decreed the suit filed by the respondent only on above mentioned two grounds envisaged under Section 12(1) (b) and 12(1)(i) of the Act and the appeal preferred by the present appellants before district Court remained unsuccessful. Hence, this second appeal has been filed.

7. It has been contended by the learned counsel for the appellant that both the lower Court have erred in decreeing the suit on these two grounds and the appellate Court also erred in dismissing interim applications filed by the appellants. The Courts below erred in raising presumption against the appellants due to non-examination of appellant no.2 Ballu as a witness before the trial Court, as the burden to prove his case was on the respondent himself and he could not succeed on weakness of the opponent. Govind Yadav (D.W-3) was examined in an another suit pending between the same parties before trial Court, but his evidence has been wrongly referred in relating suit. It was not proved from the evidence available on record that appellant no.1 had sublet the suit accommodation to appellant no.2.

8. From original registered sale-deed (Ex.P-1) it was clear that previous owner and landlord Gulab Bai had sold the house relating to the suit accommodation to the respondent on 4/6/2004. In evidence from relating post office, Shri P.N. Mishra (D.W.-1) Jan Sampark Nirikshak was called in

evidence, who had proved receipts relating different money orders as Ex.D-1 to Ex.D-26, but in this receipts only the name of Gulab Bai is written, to whom the money orders were sent and the name of the sender is not mentioned in this receipts. Appellant No.1 Ratan Singh (D.W-2) had clearly deposed that he never sent rent through money order to Gulab Bai. Appellant No.2 Ballu was not examined and last money order receipt Ex.D-26 is bearing the seal relating to the date of concerned post office showing the date 9/9/2004. The suit before the trial Court was filed on 30/9/2006. Thus, the appellants failed in establishing that previous owner and landlord Gulab Bai has accepted appellant no.2 Ballu as her tenant in suit accommodation and appellants also failed in proving that appellant no.2 Ballu Yadav had sent monthly rent to Gulab Bai.

9. It was admitted by appellant no.1 Ratan Singh (D.W-1) in his deposition that he had sent his reply (Ex.P-10) dated 25/8/2006 to the notice sent by the respondent prior to suit. In this reply also it was not mentioned by the appellant that in the suit accommodation situated on first floor appellant no.2 Ballu Yadav is tenant of Gulab Bai. In this reply it is mentioned that all the three brothers, two appellants and Govind Yadav (D.W-3) are living jointly, but Ratan Singh Yadav (D.W-2) clearly deposed in para no.8 of his affidavit filed under Order 18 rule 4 of the CPC that he, Govind (D.W-3) and Ballu Yadav are living separately. Thus, there are material contradiction between the pleadings and evidence of the appellants. Respondent Bhagwat Singh (P.W-1) deposed that appellant no.1 had sublet suit accommodation to appellant no.2. Appellant's brother Govind had deposed that he had separately received his accommodation on rent, which establishes that all the three brothers are not having a joint family and residing separately. In Ex.P-10, it has been mentioned that all the three brothers are living in four rooms, but it was not specifically mentioned that which special room is occupied by which brother. It was clear from the evidence of Govind (D.W-3) that the suit accommodation was under exclusive possession of appellant no.2 Ballu and as it was proved that the possession of suit accommodation was handed over by the tenant to another person, then it could be safely presumed that the accommodation has been handed over in lieu of consideration or has been sublet to another. Direct evidence on the point of subletting could not be expected from the landlord. In absence of evidence of appellant no.2 Ballu and in absence of any other documentary evidence relating to payment of rent by him to previous landlord Gulab Bai, the learned trial Court was right in holding that subletting by

appellant no.1 of suit accommodation to appellant no.2 is proved.

10. In relation to the ground of Section 12(1)(i) of the Act it has been pleaded by appellant no.1 that a plot from a society was allotted to him for construction of residential house and registered sale-deed (certified copy P-9A) relating to plot was produced on record and this registered document is admitted by appellant no.1 Ratan Singh in his cross-examination. Ratan Singh (D.W-2) had deposed that due to passing of electrical high-tension line over his constructed house, Municipal Corporation, Bhopal had stopped his construction by giving him notice, but he admits that he has not filed that notice in the suit and also admits that he is having a construction over 450 sq.ft. at ground floor of his constructed house and there is a room also over the first floor, thus the trial Court was absolutely right in holding that the tenant i.e. appellant no.1 Ratan Singh had acquired his own suitable residential house.

11. It appears from the record that both the Courts below have passed well reasoned judgments after properly and legally appreciating the evidence available on record and there appears no perversity on any finding recorded by them.

12. In result of the above mentioned discussion, I am of the considered view that there is no any substance or the circumstance in the matter giving rise to any question of law rather than substantial question of law. Consequently, this appeal being devoid of any merit deserves to be and is hereby dismissed at the stage of motion hearing. There shall be no order as to costs.

Appeal dismissed.

**I.L.R. [2017] M.P., 672
APPELLATE CRIMINAL**

Before Mr. Justice Rohit Arya & Mr. Justice Anand Pathak

Cr.A. No. 58/2008 (Gwalior) decided on 21 June, 2016

VIKRAM @ MANOJ JAT

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Sections 302/149 & 148 – Conviction – Life Imprisonment – Appreciation of Evidence – Eye Witnesses – Held – Appellant along with five other co-accused persons formed an unlawful assembly and have fired gun shots on the deceased –

Consistency in the statements of eye-witnesses – Evidence is fully corroborated with medical evidence and allegations in the FIR – Further held – Even if there are minor discrepancies in the statements of the eye witnesses, same cannot be given any undue importance – Interested witnesses cannot be presumed to be tainted instead upon corroboration, the same stands on the same footing as that of independent witnesses – Lower court rightly convicted the appellant – Appeal dismissed.

(Paras 28, 29, 30 & 34)

दण्ड संहिता (1860 का 45), धाराएँ 302/149 व 148 – दोषसिद्धि – आजीवन कारावास – साक्ष्य का मूल्यांकन – चक्षुदर्शी साक्षी – अभिनिर्धारित – अपीलार्थी ने अन्य पांच सह-अभियुक्तों के साथ विधि विरुद्ध जमाव निर्मित कर मृतक पर बंदूक से गोलियां दागी हैं – चक्षुदर्शी साक्षियों के कथनों में दृढ़ता – साक्ष्य की विकिर्तीय साक्ष्य एवं प्रथम सूचना प्रतिवेदन के अभिकथनों से पूर्णतः संपुष्टि होती है – आगे अभिनिर्धारित – यदि चक्षुदर्शी साक्षियों के कथनों में गौण असंगतियां हैं तब भी, उन्हें कोई अनुचित महत्व नहीं दिया जा सकता – हितबद्ध साक्षीगण के दूषित होने की उपधारणा नहीं की जा सकती, बल्कि संपुष्टि होने पर, वह उसी स्तर पर खड़े होते हैं जैसे कि स्वतंत्र साक्षीगण – निचले न्यायालय ने अपीलार्थी को उचित रूप से दोषसिद्ध किया – अपील खारिज।

Cases referred:

AIR 1983 SC 753, AIR 1985 SC 1384, (1997) 1 SCC 80, AIR 1978 SC 1525, (1989) 1 SCC 437, (2010) 13 SCC 409, (2013) 4 SCC 607.

Pradeep Katare, for the appellant.

B.P.S. Chouhan, G.A. for the respondent/State.

D.R. Sharma, for the complainant.

J U D G M E N T

The Judgment of the Court was delivered by :
ROHIT ARYA, J. :- This appeal, under section 374 Cr.P.C., at the instance of the convict Vikram alias Manoj Jat s/o Govind Singh Jat is against the judgment dated 05/01/2008 passed by the Special Judge (Atrocities), Gwalior in Special case No.12/2001.

The appellant is convicted under section 148 IPC and sentenced to suffer 2 years rigorous imprisonment with fine of Rs.1,000/- as well as under sections 302/149 IPC for life imprisonment with fine of Rs.1,000/- besides,

in default to undergo six months further imprisonment for each offence and direction that both the jail sentences shall run concurrently.

2. As per prosecution story, on the date of incident, i.e., on 03/06/2000 at about 8.00 am deceased Balkishan belonging to "Batham community", while going to attend Water Shed Committee meeting being President, was sitting at the *Chabutara* (Platform) near the bus stand at village Tiholi. In the close vicinity, at the check post of Forest Department, prosecution witness Buddharam Batham (P.W.3) was also sitting. Preetam, Mahesh (P.W.2) and Naval Kishore (P.W.4) had arrived at the bus stand just before occurrence of the incident after unloading cement at Stop Dam. At that time, a bus coming from Behad had come and stopped. Accused persons, Govind Singh, Vinod, Pratap Joshi, Dablu Joshi, Kamal Ojha and present appellant Vikram alighted from the bus. Appellant Vikram armed with Mouzar gun, Govind Singh armed with double barrel 12 bore gun, Vinod armed with single barrel 12 bore gun and the remaining three accused persons were armed with *Katta* (country made pistol). After getting down from the bus, all the accused persons took their position behind tractor-trolley standing on the other side of the road. Appellant Vikram fired a gunshot at the deceased, Balkishan which hit on his left hand. Deceased, Balkishan to save his life ran towards the Village. Accused, Vikram alongwith 05 co-accused chased the deceased Balkishan firing gun shots. Deceased Balkishan entered nearby house of Ratanlal (P.W.1). Accused Vikram alongwith 05 other co-accused also entered the house of P.W.1 Ratanlal. Accused persons dragged Balkishan in the courtyard of the house and fired several gun shots piercing through forehead, left eye, below ear lobe (कनपटी) and chest resulting into death of Balkishan. Thereafter they fled away.

3. P.W.3 Buddharam at about 9.00 am lodged FIR (exhibit P/3) at the Police Station Utila situated at about 4 kms from the place of incident. Case was registered under sections 147, 148, 149 and 302 IPC and also under section 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short "the Act of 1989"). As regards death of Balkishan, *marg* report (exhibit P/4) was also prepared. The investigation was carried out by B.S. Yadav, Station House Officer (P.W.6). Spot map was prepared vide exhibit P/6. As per seizure memo (exhibit P/5), the following items have been seized:

"(1) बारह बोर राउण्ड का खोख जिनके पेदे पर थोड़ा लाल पेंट लगा है।
Shaktiman Express Long Range लिखा है प्रकरण के घटना स्थल के

स्थान 1(D) आमकोड पर पड़ा मिलने पर।

(2) एक पीतल का राउण्ड जिनके पेदे पर 8 MM KF 98 लिखा है बिका है जो घटना स्थल रतन लाल वाथम के मकान नंबर 9 के E स्थान की खपेरेल के मकरे में पड़ा मिलने पर।

(3) घटना स्थल रतन लाल वाथम के ऑगन जहां मृतक बालकिशनकां शव पड़ा है शव से निकले खून की खून मौजूदा मिट्टी।

(4) घटना स्थल शव के पास की सादा मिट्टी।

(5) मृतक के शव के सिर के नीचे जमीन में गड़ी हुई एक गोली बारह बोर की चार रिक्सी गत्ते की तथा प्लास्टिक की काले रंग की टोपी जो चार अंगुल जमीन में गड़ी हुई खुदवाने से प्राप्त होने पर तीनों आइटमों को पृथक-पृथक जप्त किया गया।

नोट:- उपरोक्त माल पृथक पृथक मौके पर जप्त किए गए तथा कट्टे.....
.....(Not clear) किये गये।"

4. Besides, Dr. Vijay Kumar Diwan (P.W.5) has also found 40 pellets, one plastic rim and one disc from the right lung of the deceased, Balkishan. As per medical report, the deceased Balkishan sustained fire arm injuries on his body. The nature of injuries were sufficient for causing death of a person in the ordinary course. As such, deceased Balkishan had suffered homicidal death within 6 to 12 hours of the *post mortem*.

5. Further, as per prosecution, during investigation on 02/05/2001, one 12 bore double barrel gun and licence were seized from appellant, Vikram's father Govind Singh.

6. As the present accused Vikram was absconding, prosecution filed challan against Govind Singh father of Vikram, Vinod brother of accused, Vikram, Dablu, Kamlesh and Preetam and the case was registered as Special Case Nos.12/2001 and 1/2002 whereunder after trial vide judgment dated 21/03/2002 all the five accused were convicted for offences under sections 148 and 302/149 IPC.

7. Criminal Appeal No.158/2002 was preferred by accused Dablu s/o Dhandhu Joshi, Criminal Appeal No.194/2002 was preferred by Govind Singh S/o Bhagwant Singh & Vinod alias Ajay s/o Govind Singh, Criminal Appeal No.207/2002 was preferred by Pratap alias Pratap Narayan and Criminal Appeal No.259/2002 was preferred by Kamlesh Govind Singh died during

pendency of the appeal and, therefore, his name was deleted from the cause title. A Division Bench of this Court vide judgment dated 09/11/2010 had dismissed appeals upholding conviction under sections 148 and 302/149 IPC awarded by the trial Court.

8. Accused/appellant Vikram was arrested on 19/09/2005 and supplementary challan was filed on 25/11/2005. Thereafter the case was committed to the Court of sessions on 15/12/2005 and the judgment under challenge was passed by Sessions Judge convicting the accused/appellant under sections 148 and 302/149 IPC as stated above.

9. Undisputedly, the deceased belonged to 'Batham community' and accused Vikram belonged to 'Jat community'. There was election rivalry (sic:rivalry) between the deceased, Balkishan and the accused, Vikram.

10. Accused/Vikram is son of co-accused Govind Singh and brother of co-accused, Vinod.

11. The deceased Balkishan was son of Naval Kishore (P.W.4), brother of Buddharam (P.W.3) and uncle of Mahesh (P.W.2). Ratanlal (P.W.1) is resident of village Tiholi. The occurrence of the incident on 03/06/2000 was at two places, firstly; at bus stand where Vikram fired a gun shot which hit left hand of the deceased, Balkishan and secondly; in the courtyard of the house of P.W.1, Ratanlal where Balkishan had entered to save himself but the accused persons chased him, entered the house and dragged him in the courtyard where accused persons caused fire arm injuries resulting into death of Balkishan as detailed above.

12. The Sessions Judge has critically examined evidence of eye-witnesses, namely; Ratanlal (P.W.1), Mahesh (P.W.2), Buddharam (P.W.3) and Naval Kishore (P.W.4), besides, Investigating Officer, B.S. Yadav (P.W.6) and Dr. V.K.Diwan (P.W.5).

13. The Sessions Judge has discussed the nature of injuries caused on the body of the deceased, Balkishan vividly whereunder it is found that as per post mortem report (exhibit P/7) conducted by Dr. Vijay Diwan (P.W.5), in all there were five gun shot injuries which reads as under:

- (i) Gun shot wound of entry just lateral to right eye 2 cm x 2 cm with blackening of margins and lacerated edges inverted going from underneath to nasal bone to left eye making the

gun shot wound of exit;

(ii) Gun shot wound corresponding to injury No.(i) making gutter shape size: 13 cm x 7 cm x 3 cm deep with fracture of nasal bone orbit and laceration of both eye-ball present;

(iii) Gun shot wound of entry left side chest upper part over left axillary fold 5 cm below clavicle of size 2 cm x 2 cm blackening, margins lacerated, edges inverted;

(iv) Gun shot wound of exit corresponding to injury No.(iii) left posterior axillary fold 14 cm below tip of left shoulder 3 ½ cm x 2 cm margins lacerated, edges averted.

(v) Gun shot wound of entry left side lower chest posterior axillary line 29 cm below tip of left shoulder and 17 cm lateral to spine of size: 2 cm x 2 cm, margins lacerated, edges inverted with bleeding present with lacerated wound on left elbow anterior medially of size: 7 cm x 5 cm with two wounds of size: 3 cm x 2 cm, 2 cm apart.”

The evidence of Dr. Vijay Dewan (P.W.5) was found to be impeccable in nature having proved the post mortem. Therefore, the Sessions Judge reached the conclusion that the deceased, Balkishan suffered homicidal death due to bullet injuries in his head, eyes, ear and chest area.

14. The Sessions Judge while carefully examining the evidence of eye-witnesses has found that there is consistency in the statements of P.W.2 Mahesh, P.W.3 Buddham and P.W.4 Naval Kishore though there were minor contradictions or omissions as regards statement of P.W.1 Ratanlal. On account of overwhelming evidence of occurrence of the incident and involvement of the accused/Vikram with other co-accused, seizure memo (exhibit P/5), post mortem report (exhibit P/7) and evidence of Dr. Vijay Diwan (PW5), the trial Court has concluded that the accused/Vikram alongwith other co-accused persons had formed unlawful assembly with common object of causing death of deceased, Balkishan resulting into homicidal death of the deceased, Balkishan. Accordingly convicted the accused/appellant Vikram under sections 148 and 302/149 IPC. However, acquitted him of the charge under section 3(2)(v) of the Act of 1989.

15. Learned counsel for the appellant while criticizing the judgment

contended that the Sessions Judge has committed grave illegality having relied upon the evidence led by cited eye-witnesses, i.e., P.W.2 Mahesh, P.W.3 Buddharam and P.W.4 Naval Kishore being relatives of the deceased, Balkishan while concluding that the appellant, Vikram was the member of unlawful assembly with common object of causing death of the deceased, Balkishan. In fact, the Sessions Court ought to have relied upon evidence of defence witnesses, viz., D.W.1 Surendra Singh, D.W.2 Ramprasad, D.W.3 Bahadur Singh, D.W.4 Mahendra and D.W.5 Ramjilal who have deposed that the appellant Vikram was at a different place at the relevant point of time. As such, the appellant Vikram not being a member of the alleged unlawful assembly could not have been convicted under sections 148 and 302/149 IPC.

16. Learned counsel further contends that the appellant, Vikram was alleged to have been armed with Mouzer gun, however, no used cartridges of Mouzer gun have been seized from the places of incident and no prosecution witness has specifically deposed against Vikram to have fired gun shot from the Mouzer gun causing particular injury resulting into death of the deceased, Balkishan. As such, the conviction under section 302/149 IPC was wholly unjustified and cannot be sustained.

17. Learned counsel further contends that report was not submitted before the Magistrate under section 157 Cr.P.C., therefore, the prosecution has failed to follow the procedure under law. As regards this contention, it is considered apposite to observe that Sessions Court in paragraph 28 of the judgment has found that B.S.Yadav (P.W.6), Investigating Officer on the basis of entries made in the diary specially deposed that vide dispatch No.714, a copy of first information report has been forwarded to the Court of concerned Magistrate. Hence, the said contention is without force and is hereby rejected.

18. *Per contra*, State's counsel as well as counsel for the complainant contend that the date of incident was 03/06/2000 and the appellant Vikram since then was absconding. However, the appellant has surrendered on 19/09/2005 and thereafter supplementary challan was filed on 25/11/2005. Defence witnesses for the first time have deposed after 04 to 07 years since the date of incident and during this period, no where they have made a statement in support of plea of *alibi* raised by the appellant Vikram. That apart, the Sessions Court while discussing evidence of defence witnesses from paragraphs 37 to 40 of the judgment has found that there are apparent contradictions and

falsity in their statements inasmuch as D.W.1 Surendra Singh has stated that the appellant Vikram has *Aata Chakki* (Flour Mill) at Meera Nagar, Morar, Gwalior where at about 8.00 am on 03/06/2000, he had gone there for grinding flour whereas appellant Vikram in his statement under section 313 Cr.P.C., in reply to question No.56 has stated that he was at his residence in Morar at the time of the incident. Hence, the appellant has not stated that he was present at his Flour Mill. As such, the evidence of D.W.1 Surendra Singh is absolutely concocted and the Sessions Court has rightly ignored the same.

19. As regards D.W.2 Ramprasad who is resident of village Tiholi and claims to be present at the bus stand where the incident had occurred, he had stated that Govind Singh and four others alighted from the bus. This witness has stated that he has suffered pellet injury on the left side of forehead. According to this witness, the appellant Vikram was not present at the scene of occurrence. As such if this witness had suffered such injury, he would have reported the matter to the Police Station and also got him medically examined. That was not done. Therefore, the aforesaid nature of deposition by such person after about 05 years of the incident is another piece of concocted evidence and has rightly been rejected by the Sessions Court.

20. Likewise, D.W.3 Bahadur Singh who also claims to be standing at the bus stand has nowhere stated in his statement that appellant Vikram did not alight from the bus. In his cross-examination, there is apparent inconsistency as found by the Sessions Court and not worthy of credence, therefore, the evidence of such witness has rightly been discarded by the Sessions Court.

21. D.W.4 Mahendra Singh who claims to be chowkidar in the Forest Naka is alleged to have been present at the spot on the date of the incident. Though, this witness deposed that the accused persons had alighted from the bus and formed an unlawful assembly as well as fired gun shots at Balkishan but he did not depose that the appellant, Vikram was not there and had not fired a gun shot by fire-arm.

22. Likewise, D.W.5 Ramjilal did not state that no other person except the five persons named in his statement have alighted from the bus and fired gun shot at the deceased, Balkishan.

23. Learned counsels as such contend that there are apparent contradictions and falsity in the statements of defence witnesses after gap of about 4 to 7 years from the date of incident and, therefore, the plea of *alibi*

raised by the appellant cannot be sustained in the given facts and circumstances of the case.

24. Learned counsels further contend that a comparative assessment of evidence led by eye-witnesses, P.W.2 Mahesh, P.W.3 Buddharam and P.W.4 Naval Kishore bring on surface consistency in their statements either while deposed in Special Case No.1/2002 in respect of 05 other accused persons or in Special Case No.12/2001 in respect of the appellant Vikram. Their statements are in corroboration with the FIR, statements of witnesses under section 161 Cr.P.C., in both the Special Case Nos. 12/2001 and 1/2002, injuries on the body of the deceased, Balkishan as well as medical evidence. Merely because the prosecution witnesses happens to be related to the deceased, Balkishan that by itself cannot justify discarding statements of eye-witnesses. In support of their case, learned counsels relied upon the following judgments:

(a) *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat*, AIR 1983 SC 753;

(b) *State of U.P., Vs. Ballabh Das and others*, AIR 1985 SC 1384; and

(c) *Hardev Singh Vs. Harbhej Singh and others*, (1997) 1 SCC 80; and

25. Learned counsels further contend that in all there are six accused persons; appellant Vikram armed with Mouzar gun, Govind Singh (since dead) armed with double barrel 12 bore gun, Vinod armed with single barrel 12 bore gun and the remaining three accused persons, namely; Pratap alias Pratap Narayan, Kamlesh & Dablu armed with *Katta* (country made pistol). All had alighted from the bus at the bus stand as well as formed unlawful assembly with common object/knowledge of causing such bodily injuries to cause death of Balkishan. Appellant Vikram at first fired gun shot from his mouzer gun which hit the deceased, Balkishan on his left arm. Thereafter, Balkishan ran from the place of incident towards village to save his life and has entered the house of Ratanlal. Thereafter, all accused persons including the appellant, Vikram chased Balkishan and entered into the house of Ratanlal. Thereafter, dragged the deceased, Balkishan in the court-yard of the house of Ratanlal and fired gun shots which hit on various parts of the body viz., lateral to right eye causing fracture of nasal bone orbit and laceration of both-eye balls, left

side chest upper part over left axillary fold 5 cm below clavicle, left posterior axillary fold 14 cm below tip of left shoulder and left side lower chest posterior axillary line 29 cm below tip of left shoulder and 17 cm lateral to spine as well as left elbow anterior medially – two wounds. The medical evidence also discloses 40 pellets, one plastic rim and one disc in the right lung of the deceased, Balkishan. Under such circumstances, Sessions Court was fully justified having convicted the appellant for the offence under sections 148 and 302/149 IPC.

26. Heard learned counsel for the parties.

27. Before advertng to the contentions advanced by learned counsel for the appellant, it is considered apposite to reiterate the law as settled by Hon'ble Apex Court.

28. Contention of learned counsel for the appellant that P.W.2 Mahesh, P.W.3 Buddharam and P.W.4 Naval Kishore being relatives of the deceased Balkishan ought not have been relied upon as eye-witnesses to conclude that the appellant was a member of the unlawful assembly alongwith 05 other co-accused persons for the reason that in the absence of any independent witness, the evidence of interested witnesses should not be relied upon for convicting the appellant Vikram, in the opinion of this Court, cannot be acceded to. As a matter of fact, the law requires where the witnesses are interested, the Court should examine their evidence with care and caution to rule out possibility of any false implication. However, the interested witnesses cannot be presumed to be tainted instead upon corroboration, the same stands on same footing as that of independent witness.

29. Facts of the case in hand suggest that there is consistency in the statements of the eye-witnesses; P.W.2 Mahesh, P.W.3 Buddharam and P.W.4 Naval Kishore in the matter of presence of the appellant, Vikram armed with Mouzer gun alongwith other co-accused persons at bus stand while appellant fired gun shot which hit at the left hand of the deceased. Thereafter, the appellant alongwith other co-accused chased the deceased, Balkishan and dragged him in the court-yard of the house of Ratanlal (P.W.1) and caused death by firing gun shots. This piece of evidence is fully corroborated with the medical evidence on record, allegations in the FIR, earlier depositions of witnesses in Special Case No. 1/2012. The Sessions Judge has critically examined the evidence of the eye-witnesses in a comprehensive manner and rightly reached

a conclusion that the evidence of eye-witnesses is worth credence. That apart, the Hon'ble Supreme Court in the case of *Hardev Singh* (supra) rejected the contention that for want of examination of the independent eyewitness, the conviction based on testimony of relatives was bad in law and held as under:

“.....This Court time and again has emphasised that the evidence of close relations who testified the facts relating to the occurrence be not rejected merely on the ground that they happened to be relatives. All that this Court has ruled is that the evidence of such witnesses be scrutinized very carefully...”

30. Therefore, in the opinion of this Court, the Sessions Judge has not committed any illegality while relying upon the evidence of the eye-witnesses; namely; P.W.2 Mahesh, P.W.3 Buddharam and P.W.4 Naval Kishore to conclude that the appellant was member of the unlawful assembly. More over, there is apparent contradiction and falsity in the deposition of the defence witnesses as discussed in paragraphs 37 to 40 of the judgment. Besides, even if there are minor discrepancies in the statements of the eye-witnesses, the same cannot be given any undue importance as held by the Hon'ble Supreme Court in the case of *Bharwada Bhoginbhai Hirjibhai* (supra), whereunder plausible reasons have been given in paragraph 5 and in paragraph 6, it is observed that discrepancies which do not go to the root of the matter and change the basic version of the witness are of no significance. More over, when all important “probabilities-factor” echoes in favour of the version narrated by the witness and have reason for it. The ratio of the judgment in the case of *Bharwada Bhoginbhai Hirjibhai* (supra) is squarely applicable to the facts of the case in hand.

31. In the case of *Sarwan Singh and others Vs. The State of Punjab*, AIR 1978 SC 1525, it has been held that in order to find out the person guilty of offence under section 302 read with section 149 IPC, the prosecution is required to establish that the offence was committed by any member of an unlawful assembly in prosecution of the common object or knowledge of the assembly or such act as a member of the assembly knew to be likely to be committed in furtherance of the common object or knowledge. The cumulative effect of the injuries are of relevant nature which are found to have been sufficient in the ordinary course of nature to cause death where the common object or knowledge of the unlawful assembly was to commit an offence under section 302 IPC.

32. Further, in the case of *Lalji and others Vs. State of U.P.*, (1989) 1 SCC 437, the Hon'ble Apex Court while interpreting the provision as contained under section 149 IPC ruled that a member of an unlawful assembly is responsible as a principal for the acts of each and all the members being a member of an unlawful assembly and knew it to be likely to be committed. The foundation of such constructive guilt under section 149 IPC of the member of the unlawful assembly is with requisite common object or knowledge. Therefore, mere presence of a member of the unlawful assembly even in the absence of any overt act or active participation in furtherance of the common object of commission of crime, the person being member of such unlawful assembly shall be vicariously liable for the criminal act under section 149 IPC.

33. The aforesaid judgments have been followed recently; in the cases of *Ramesh and others Vs. State of Haryana*, (2010) 13 SCC 409 and *Subal Ghorai and others Vs. State of West Bengal* (2013) 4 SCC 607.

34. Therefore, the contention of the learned counsel for the appellant that none of the eye-witnesses have deposed specifically as regards gun shot fired by the appellant, Vikram causing particular injury on the body of the deceased, Balkishan or that no recovery of such empty cartridge on the spot; the appellant Vikram is not liable to be convicted for the offence under section 302/149 IPC, pales into insignificance and deserves rejection being contrary to settle principle of law as the eye-witnesses, namely; P.W.2 Mahesh, P.W.3 Buddharam and P.W.4 Naval Kishore have consistently stated that appellant, Vikram alongwith other 05 co-accused at 8.00 am on 03/06/2000 have alighted from the bus at the bus stand and thereafter appellant, Vikram had fired gun shot with Mouzer gun which hit on the left hand of the deceased, Balkishan. Deceased, Balkishan in order to save his life ran from the place of incident, i.e. bus stand. Appellant Vikram alongwith 05 other co-accused have chased the deceased. Deceased, Balkishan entered into the house of Ratanlal where the accused persons dragged Balkishan in the court-yard of the house and caused five fire-arm injuries resulting into his death. In the light of these facts, this Court is of the firm opinion that the appellant was member of the unlawful assembly in furtherance of the common object/knowledge causing death of the deceased, Balkishan. Hence, the Sessions Judge has rightly convicted the appellant for the offence under section 302/149 IPC.

35. Moreover, a Division Bench of this Court while deciding criminal

appeals filed by 05 other co-accused have been decided by a common judgment dated 09/11/2010 as mentioned in paragraph 7 hereinabove has concluded that the appellant, Vikram alongwith 05 other co-accused persons formed an unlawful assembly with common object/knowledge and have fired gun shots causing injuries on the body of the deceased, Balkishan resulting into his death. Hence, the contention is rejected.

36. Resultantly, the appeal fails and is hereby dismissed. The appellant is reported to be in jail. Hence, the appellant is directed to serve the remaining part of jail sentence if not required in any other case.

Appeal dismissed.

**I.L.R. [2017] M.P., 684
APPELLATE CRIMINAL**

Before Mr. Justice Rajeev Kumar Dubey

Cr.A. No. 538/2015 (Indore) order passed on 13 January, 2017

JAGDISH

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/18(b) & 37 and Criminal Procedure Code, 1973 (2 of 1974), Section 389 – Suspension of sentence – Appellant convicted and sentenced for 10 years R.I. with fine of Rs. 1,00,000/- and in default of fine one year R.I. – Applicant seeking suspension of sentence on the ground that he suffered half of custodial sentence as awarded by the trial Court – Held – Applicant and co-accused known to each other and resident of same village – Both were riding on the motorcycle carrying opium in a bag hanging on the handle of motorcycle – Trial Court has observed that the applicant also had knowledge that co-accused was carrying opium in his bag – The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds – Conditions in Section 37 are cumulative in nature and not alternative – Thus, not appropriate to suspend sentence – Application for suspension dismissed. (Para 8 & 12)

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/18(बी) व 37 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 389 –

दण्डादेश का निलंबन – अपीलार्थी को दोषसिद्ध कर 10 वर्ष सश्रम कारावास के साथ रु. 1,00,000/- का अर्थदण्ड एवं अर्थदण्ड के व्यतिक्रम में एक वर्ष सश्रम कारावास से दण्डादिष्ट किया गया – आवेदक ने इस आधार पर दण्डादेश का निलंबन चाहा कि वह विचारण न्यायालय द्वारा प्रदान दण्ड की आधी अवधि अभिरक्षा में भुगत चुका है – अभिनिर्धारित – आवेदक एवं सह-अभियुक्त एक दूसरे को जानते थे एवं एक ही ग्राम के निवासी थे – दोनों मोटरसाईकिल पर सवारी कर रहे थे जिसके हैंडिल पर लटके बैग में अफीम ले जाया जा रहा था – विचारण न्यायालय का संप्रेक्षण है कि आवेदक को भी यह ज्ञात था कि सह-अभियुक्त अपने बैग में अफीम ले जा रहा है – अभियुक्त के दोषी न होने के संबंध में अनुध्यात संतुष्टि, युक्तियुक्त आधारों पर आधारित होनी चाहिए – धारा 37 की शर्तें, संचयी स्वरूप की हैं न कि वैकल्पिक – अतः दण्डादेश निलंबित करना उचित नहीं – निलंबन हेतु आवेदन खारिज।

B. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 37 – “Reasonable grounds” – Has not been defined in the Act but means something more than *prima facie* grounds – It connotes substantial probable causes for believing accused not guilty of offence charged – Reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of alleged offence – Recording of satisfaction on both aspects is *sine qua non* for granting of bail under NDPS Act. (Para 8)

ख. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 37 – “युक्तियुक्त आधार” – अधिनियम में परिभाषित नहीं किया गया है किंतु इसका अर्थ है प्रथम दृष्ट्या आधारों से कुछ अधिक – यह, लगाये गये आरोप का अभियुक्त दोषी न होने का विश्वास किये जाने हेतु सारवान संभाव्य कारणों की ओर संकेत करता है – अनुध्यात युक्तियुक्त विश्वास, बदले में ऐसे तथ्यों एवं परिस्थितियों को इंगित करता है जो कि अपने आप में इस संतुष्टि को न्यायोचित ठहराने के लिए पर्याप्त है कि अभियुक्त अभिकथित आरोप का दोषी नहीं है – स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम के अंतर्गत जमानत प्रदान किये जाने हेतु दोनों पहलुओं की संतुष्टि अभिलिखित की जाना अनिवार्य है।

C. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 37 & Constitution – Article 142 – Binding effect of order passed u/A 142 – Hon'ble Supreme Court may grant release on bail or suspension of sentence without getting itself satisfied with requirements of Section 37 for doing complete justice – Such authority is not available to High Court or trial Court – Order passed in authority exercised by Supreme Court under Article 142, is not having binding effect or a

precedent for the High Court or other subordinate Courts. (Para 6)

ग. *स्वायत्त औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 37 एवं संविधान - अनुच्छेद 142 - अनुच्छेद 142 के अंतर्गत पारित आदेश का बाध्यकारी प्रभाव - माननीय उच्चतम न्यायालय, संपूर्ण न्याय करने के लिए धारा 37 की अपेक्षाओं से स्वयं की संतुष्टि किये बिना, जमानत पर मुक्ति या दण्डादेश का निलंबन प्रदान कर सकता है - उक्त प्राधिकार उच्च न्यायालय या विचारण न्यायालय को उपलब्ध नहीं है - उच्चतम न्यायालय द्वारा अनुच्छेद 142 अंतर्गत प्राधिकार के प्रयोग में पारित आदेश का उच्च न्यायालय या अन्य अधीनस्थ न्यायालयों हेतु बाध्यकारी प्रभाव या पूर्व निर्णय नहीं होगा।*

Cases referred:

(2006) 1 SCC (Cri.) 279, Cr.A. No. 165/2013 decided on 21.01.2013 (Supreme Court), AIR 2000 SC 3203, (2009) 2 SCC 624, (2009) 1 SCC 482, 2014 Cri.L.J. 2860 (Raj).

A.S. Saraswat, for the appellant.

Himanshu Joshi, P.P. for the respondent/State.

ORDER

R.K. DUBEY, J. :- Heard on I.A.No.181/2017- an application under Section 389 of the Code of Criminal Procedure for suspension of custodial sentence of appellant Jagdish s/o Rameshwar Patidar.

1. The appeal has been preferred against the judgment dated 26.03.2015 passed by Additional Special Judge, NDPS Act in Special S.T. No.03/2012, whereby the appellant has been convicted for offence under Section 8/18 (B) of NDPS Act (hereinafter referred to as the Act of 1985) and sentenced to undergo ten years R.I. with fine of Rs.1,00,000/- and in default of payment of fine one year R.I.

2. As per prosecution story on 07.12.2011 at about 07:40 PM police received a secret information that co-accused Vinod and appellant Jagdish were coming from village Daloda side on a bike bearing registration No. MP 14-MB-8993. They were carrying opium in a bag hanging on the handle of motorcycle. On the information Shri U.S. Bhadoria the then A.S.I. of P.S. Afjalpur apprehended the applicant and co-accused Vinod and sized (sic:seized) 3.390 kilogram opium from the possession of co-accused Vinod and arrested the appellant and co-accused Vinod.

3. Learned counsel for the appellant submits that the appellant is in custody since 07.12.2011 and suffered almost half of the custodial sentence as awarded by the trial Court and hearing of the appeal is likely to take time. Learned counsel for the appellant further submitted that opium was found in a bag hanging on a bike, which was being driven by co-accused Vinod and seized from his possession and he is the owner of the said bike. No contraband was seized from the possession of the appellant. The appellant has no idea as to what was being carried by co-accused Vinod on his bike. He was just a pillion rider and has falsely been implicated in the matter. Hence, counsel prayed for grant of suspension of jail sentence.

4. Learned counsel for the State opposed the application stating that appellant was apprehended carrying 3.45 kg. opium on the bike. The appellant and co-accused Vinod both were involved in the crime. He further submits that since the matter involves commercial quantity and hence, provisions of Section 37 of the Narcotic Drugs & Psychotropic Substances Act, 1985 are attracted and at this stage, it cannot be said that the appellant is not guilty of the said offence nor at this stage, it is necessary to weigh the evidence meticulously to arrive at a positive finding as to whether or not accused committed the said offence under the provisions of the Act of 1985 and prayed for dismissal of the application.

5. In this regard, learned counsel for the appellant placed reliance in the Apex Court judgment passed in *Mansingh vs. Union of India* reported in (2006) 1 SCC (Cri.) 279, He has also drawn attention to the decision dated 21.01.2013 of the Apex Court in the case of *Ramnik Singh v. Intelligence Officer, Directorate of Revenue Intelligence in Criminal Appeal No.165/2013* wherein the Hon'ble Apex Court considering the fact that the appellant has completed more than five years jail sentence out of ten years rigorous imprisonment awarded by the learned Special Judge, allowed the application for suspension of jail sentence of the appellant.

6. But Hon'ble Supreme Court may grant release on bail or suspension of sentence without getting itself satisfied with requirements of S.37, if that is necessary for doing complete justice, such an authority, however, is not available to the High Court or trial Court as the case may be. The order passed above in the said case is a reflection of the Authority exercised by the Supreme Court under Article 142 of Constitution of India, is not having a binding effect or in other words, an authority of precedent for the High Court

or the other Courts subordinate. The judgment passed in the case of *Dadu @ Tulsidas V/s State of Maharashtra* AIR 2000 SC 3203 and *Union of India vs. Rattan Mallik @ Habul*, reported in (2009) 2 SCC 624 and *Ratan Kumar Vishwas vs. State of UP* reported in (2009)1 SCC 482 are laying down law, hence, are having binding effect and those are required to be adhered in their true spirit. Thus, it is to be followed by the courts while dealing with the applications submitted by the accused of the offences referred in S.37 for grant of bail or for suspension of sentence. As held by Three judge bench of Rajasthan High Court in *Daulat Singh alias Gatu vs. State of Rajasthan* reported in 2014 Cri.L.J. 2860 (Raj. HC).

7. Apex Court in the case of *Dadu @ Tulsidas V/s State of Maharashtra* reported in AIR 2000 SC 3203 – held that a sentence awarded under the Act can be suspended by the appellate Court only and strictly subject to the conditions spelt out in Section 37 of the Act. Namely (i) there is reasonable ground that the accused is not guilty of the offence for which he was convicted. (ii) he is not likely to committed any offence during the period of suspension of sentence are satisfied . The Hon'ble apex Court in the case of *Ratan Kumar Vishwas vs. State of UP* reported in (2009)1 SCC 482 held that suspension of sentence and grant of bail- a person/accused of offence under the act should not be released on bail, during trial unless mandatory condition provided under Section 37 of Act. There are reasonable ground for holding that the accused is not guilty of a such offence and that he is not likely to commit any offence while on bail are satisfied.

8. The Hon'ble apex Court in the matter of *Union of India vs. Rattan Mallik @ Habul*, reported in (2009) 2 SCC 624 held that The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail." It is plain from a bare reading of the non obstante clause in the Section and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that

the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds". The expression 'reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

9. **Thus**, it is clear that in the case of NDPS Act suspension of sentence cannot be suspend only on the ground of delay for granting suspension of sentence the provision of u/S.37 of NDPS Act should be considered.

10. Although learned counsel for the appellant also submitted that opium was found in a bag hanging on the bike, which was being driven by co-accused Vinod and was seized from his possession and he is the owner of the said bike, no contraband was seized from the possession of the appellant. The appellant has no idea as to what co-accused Vinod was carrying on his bike. He was just a pillion rider.

11. While learned counsel for the State submitted that appellant was apprehended carrying 3.45 kg. opium on the bike. The appellant and co-accused Vinod both were involved in the crime. Hence, in the light of provisions of Section 37 of Narcotic Drugs & Psychotropic Substances Act, 1985 appellant is not entitled for bail.

12. Although, it appears that opium weighing 3.45 kg was seized from the possession of co-accused Vinod. But from the statement of prosecution witnesses and documentary evidence produced by the prosecution, it also appears that Police apprehended co-accused Vinod and appellant Jagdish, on the information of informant that they were coming from village Daloda side on a bike bearing registration No. MP 14-MB-8993 carrying opium in a bag hanging on the handle of motorcycle. Applicant and co-accused Vinod, knew each other and residing in the same village. The learned trial Court in para 31-32 of the impugned judgment appreciated the fact and observing

that the applicant also had knowledge that the co-accused Vinod carrying opium in his bag. So looking to the provisions of Section 37 of Act, it is not appropriate to suspend the sentence of the accused. Accordingly, the application is dismissed.

Order accordingly.

**I.L.R. [2017] M.P., 690
CRIMINAL REFERENCE**

Before Mr. Justice S.K. Seth & Mr. Justice Rajendra Mahajan

Cr.Ref. No. 05/2015 (Jabalpur) decided on 3 March, 2016

IN REFERENCE

...Applicant

Vs.

SACHIN KUMAR SINGHRAHA

...Non-applicant

(Alongwith Cr.A. No. 2203/2015)

A. Penal Code (45 of 1860), Sections 376A, 302 & 201(II) and Protection of Children from Sexual Offences Act, (32 of 2012), Section 5(i), (m) r/w Section 6 – Circumstantial evidence – Appreciation of evidence – Appellant – Driver of vehicle – Deceased – Girl, aged 5 years – Rape – Murder – Facts – Deceased alongwith her uncle was going to school in four wheeler owned and being driven by the appellant – In between, uncle of the deceased got down from the vehicle and entrusted custody of the deceased to the appellant for dropping her at school – Deceased not reached the school – Body of the deceased recovered from the well – Dead body of the deceased and her school bag were recovered pursuant to disclosure statement of appellant/ accused – Post Mortem report – Sexual assault and throttling – Trial Court – Death sentence – Reference & Appeal – Held – As the whole case is based on circumstantial evidence and the chain of events are complete and there is no material contradiction and omission in evidence of prosecution witnesses, so the conviction & sentence awarded u/S 201 (II), 376A and 302 of IPC is affirmed as it is covered under Rarest of Rare Cases – Reference answered accordingly.

(Paras 33, 38, 44, 53, 59, 61 & 79)

क. दण्ड संहिता (1860 का 45), धाराएँ 376 ए, 302 व 201(II) एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5(आई),

(एम) सहपठित धारा 6 – परिस्थितिजन्य साक्ष्य – साक्ष्य का मूल्यांकन – अपीलार्थी – वाहन चालक – मृतिका – बालिका, उम्र 5 वर्ष – बलात्संग – हत्या – तथ्य – मृतिका अपने चाचा के साथ अपीलार्थी के स्वामित्व के एवं उसके द्वारा चलाये जा रहे चार पहिया वाहन में स्कूल जा रही थी – बीच में, मृतिका का चाचा वाहन से उतरा और मृतिका को स्कूल छोड़ने के लिए उसकी अभिरक्षा अपीलार्थी को सौंपी – मृतिका स्कूल नहीं पहुँची – मृतिका का शव कुएं से बरामद किया गया – मृतिका का शव एवं उसका स्कूल बैग, अपीलार्थी/अभियुक्त के प्रकटन कथन के अनुसरण में बरामद किये गये – शव विच्छेदन प्रतिवेदन – लैंगिक हमला एवं गला घोट्टा जाना – विचारण न्यायालय – मृत्युदण्ड – निर्देश व अपील – अभिनिर्धारित – चूंकि संपूर्ण प्रकरण परिस्थितिजन्य साक्ष्य पर आधारित है और घटनाओं की श्रृंखला पूर्ण है तथा अभियोजन साक्षीगण के साक्ष्य में कोई तात्त्विक विरोधाभास एवं लोप नहीं, अतः भा.द.सं. की धारा 201(II), 376 ए व 302 के अंतर्गत की गई दोषसिद्धि एवं दण्डादेश को अभिपुष्ट किया गया क्योंकि यह विरल से विरलतम प्रकरणों के अंतर्गत आच्छादित होता है – तदनुसार निर्देश उत्तरित किया गया।

B. Penal Code (45 of 1860), Section 361 & 363 – Kidnapping – Uncle of deceased entrusting the custody of deceased to the accused – Offence of kidnapping not made out – Conviction & sentence u/S 363 of IPC set aside – Appeal partly allowed. (Para 61)

ख. दण्ड संहिता (1860 का 45), धारा 361 व 363 – व्यपहरण – मृतिका के चाचा द्वारा मृतिका की अभिरक्षा अभियुक्त को सौंपी गई – व्यपहरण का अपराध नहीं बनता – भा.द.सं. की धारा 363 के अंतर्गत दोषसिद्धि एवं दण्डादेश अपास्त – अपील अंशतः मंजूर।

C. Evidence Act (1 of 1872), Section 27 – Memorandum statement – Held – It is not at all mandatory to draw arrest memo prior to accused giving information u/S 27 of the Evidence Act as an accused is deemed in police custody when he gives information and recovery was made. (Para 46)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 27 – ज्ञापन कथन – अभिनिर्धारित – यह बिल्कुल आज्ञापक नहीं है कि गिरफ्तारी ज्ञापन को साक्ष्य अधिनियम की धारा 27 के अंतर्गत अभियुक्त द्वारा जानकारी दिये जाने से पूर्व बनाया जाए क्योंकि जब अभियुक्त जानकारी देता है और बरामदगी की जाती है, उसे पुलिस अभिरक्षा में होना समझा जाता है।

D. Protection of Children from Sexual Offences Act, (32 of 2012), Section 5(i), (m) r/w Section 6 & 42 and Penal Code (45 of 1860), Section 376 A – Alternate punishment – Conviction & sentence both u/S

376 A of IPC & Section 5(i), (m) r/w Section 6 of Act of 2012 – Whether punishment both under specified sections of IPC & Protection of Children from Sexual Offences Act is permissible in the light of provisions as enshrined u/S 42 of the Act of 2012 – Held – No, as per Section 42 of the Act of 2012, the punishment which is greater in degree either under Protection of Children from Sexual Offences Act or specified sections of IPC is to be imposed – So the sentence awarded under the Protection of Children from Sexual Offences Act set aside as the sentence awarded u/S 376 A of IPC is greater in degree. (Para 64)

घ. लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5(आई), (एम) सहपठित धारा 6 व 42 एवं दण्ड संहिता (1860 का 45), धारा 376 ए – वैकल्पिक दण्ड – भा.दं.सं. की धारा 376 ए एवं अधिनियम, 2012 की धारा 5(आई), (एम) सहपठित धारा 6, दोनों के अंतर्गत दोषसिद्धि एवं दण्डादेश – क्या अधिनियम, 2012 की धारा 42 के अंतर्गत प्रतिष्ठापित उपबंधों के आलोक में भा.दं.सं. एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम दोनों की विनिर्दिष्ट धाराओं के अंतर्गत दंड अनुज्ञेय है – अभिनिर्धारित – नहीं, अधिनियम, 2012 की धारा 42 के अनुसार दंड, या तो भा.दं.सं. की विनिर्दिष्ट धाराओं अथवा लैंगिक अपराधों से बालकों का संरक्षण अधिनियम के अंतर्गत, जो भी अधिक हो, अधिरोपित किया जाएगा – अतः लैंगिक अपराधों से बालकों का संरक्षण अधिनियम के अंतर्गत प्रदान किये गये दंडादेश को अपास्त किया गया क्योंकि भा.दं.सं. की धारा 376 ए के अंतर्गत प्रदान किये गये दंडादेश की मात्रा अधिक है।

E. Interpretation of Statutes – Criminal Law – Circumstantial evidence – “Panchsheel” – Five Golden Principles. (Para 16)

ड. कानूनों का निर्वचन – दण्डिक विधि – परिस्थितिजन्य साक्ष्य – “पंचशील” – पांच स्वर्णिम सिद्धांत।

F. Words & Phrases – “Aggravating circumstances” and “Mitigating Circumstances” – Aggravating circumstances relates to the crime and mitigating circumstances relates to the criminal – Explained. (Para 75 & 76)

च. शब्द एवं वाक्यांश – “गंभीरता बढ़ाने वाली परिस्थितियाँ” और “गंभीरता कम करने वाली परिस्थितियाँ” – गंभीरता बढ़ाने वाली परिस्थितियाँ अपराध से संबंधित होती हैं तथा गंभीरता कम करने वाली परिस्थितियाँ अपराधी से संबंधित होती हैं – स्पष्ट किया गया।

G. Criminal Procedure Code, 1973 (2 of 1974), Section 313

- Examination of accused - False information - Court ought to draw an adverse inference against the accused and such an inference shall be an additional circumstance to prove guilt of the accused.(Para 22)

छ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 313 - अभियुक्त का परीक्षण - मिथ्या जानकारी - न्यायालय को अभियुक्त के विरुद्ध प्रतिकूल निष्कर्ष निकालना चाहिए और उक्त निष्कर्ष अभियुक्त की दोषिता साबित करने के लिए एक अतिरिक्त परिस्थिति होगी।

Cases referred:

2013 Cr.L.J. 1559, (1984 (4) SCC 116 : 1984 SCC (Cri) 487), AIR 1990 SC 79, AIR 2002 SC 3164, 2007 AIR SCW 2226, 1992 Cr.L.J. 1104 SC, 2013 (15) SCC 722, 1996 (10) SCC 193, AIR 1991 SC 917, 1995 Supp. (4) SCC 259, AIR 2010 SC 2352=2010 (6) SCC 1, 2012 (10) SCC 464, 2012 (11) SCC 196, 2010 Cr.L.J. 3871, 2010 (2) JLJ 104, 2014 (5) SCC 509, 2008 MPHT 326 (DB), 2006 (4) SCC 512, 2012 (13) SCC 213, 1983 (3) SCC 470, 2002 (3) SCC 76, 2015 (1) SCC 67, 2011 (12) SCC 56, 2014 (4) SCC 69, 2010 (9) SCC 747, 2009 (6) SCC 498, 1980 (2) SCC 684, 2013 (5) SCC 546, AIR 1995 SC 1387, 1996 (6) SCC 250, 2004 Cr.L.J. 658 SC, 2008 (11) SCC 113, 2008 (15) SCC 269, 2011 (5) SCC 317, 2012 (4) SCC 37 = AIR 2012 SC 1377, 2005 (3) SCC 114, 2015 (1) SCC 253.

Ajay Shukla, G.A. for the prosecution.

Mrigendra Singh with *Vikas Mahawar*, for the accused-appellant.

J U D G M E N T

The Judgment of the Court was delivered by :
RAJENDRA MAHAJAN, J. :- Since aforesaid criminal reference and criminal appeal have arisen out of the judgment dated 06.08.2015 passed by the learned First Additional Sessions Judge Maihar, District Satna in Special Sessions Trial No. 41/15, both the matters are hereby disposed of by this common judgment.

2. Vide the impugned judgment, the learned ASJ has convicted the accused-appellant for the offences punishable under Sections 363, 376(A), 302 and 201 (II) of the Indian Penal Code (for short the IPC) and 5 (i) (m) r/w 6 of the Protection of Children from Sexual Offences Act, 2012 (for short the POCSO Act) and sentenced him thereunder to suffer on first-count rigorous imprisonment (for short the R.I.) for 7 years with a fine of Rs.5,000/- (rupees

five thousand) in default of which R.I. for 3 months, second-count death sentence, third-count death sentence with a fine of Rs. 10,000/- (rupees ten thousand) in default of which R.I. for 6 months, fourth-count R.I. for 7 years with a fine of Rs.5,000/- (rupees five thousand) in default of which R.I. for 3 months and fifth-count life imprisonment with a fine of Rs. 10,000/- (rupees ten thousand) in default of which R.I. for six months.

3. Learned ASJ has submitted proceedings for confirmation of death sentence as imposed by him on the accused-appellant under Sections 376(A) and 302 of the IPC under the provisions of Section 366 (1) of the Cr.P.C., while feeling aggrieved by the impugned judgment, the accused-appellant has preferred the appeal under Section 374 of the Cr.P.C.

4. The prosecution case is narrated below in detail as it is based upon the circumstantial evidence.

- (4.1) On 23.02.2015, at around 5.00 p.m. Sampat (PW-1) lodged an oral report at Police Station Maihar, stating that he is a native of village Itma. His daughter Ku. Richa Tomar (since deceased), aged near-about 5 years, studies in L.K.G standard in the New Horizon Public School, Maihar (for short 'the School'). On 23.02.2015 at about 10.00 a.m., his brother Brajbhan (PW-4) came over to Maihar from his village to drop his daughter in the school in a vehicle make Ace-Magic bearing registration No. MP-19-T-2374 (for short 'the vehicle'). The driver of the vehicle was Sachin Kumar Singaraha, who is the accused-appellant herein. His brother Brajbhan got off the vehicle near *Sabzi Mandi* (the vegetable market) Maihar, asking him to drop her at the school. In the evening of 23.02.2015, his daughter had not reached his residence. Thereupon, a massive hunt was launched to locate her, but she is still not traceable. He doubts that his daughter is kidnapped by an unknown offender and his needle of suspicion moves onto driver Sachin (the accused-appellant) who has left her daughter somewhere else. Upon his oral report, Sub-Inspector Sudama Prasad Mishra (PW-12) recorded the First Information Report Ex. P/1 and

a case is registered at Crime No.174/15 under Section 363 of the IPC against an unknown offender.

- (4.2) A.S.I. Pramod Singh (PW-15) was entrusted with the investigation of the case. On 23.02.2015, he prepared a spot map Ex.P/2 on the description of Sampat (PW-1), father of the deceased. On 25.02.2015, he took the accused-appellant into the custody and thereafter he interrogated him in the presence of Arun Verma (PW-2) and Ramji Kacher (PW-3). Upon the information disclosed by the accused-appellant, he reduced it into writing and thus he prepared his disclosure statement Ex. P/6 under Section 27 of the Indian Evidence Act, 1872. On the same day at about 8.30 a.m., he recovered a school bag from the roof of school building of village Dubehi at the instance of the accused-appellant in the presence of the aforesaid witnesses and drew recovery memo Ex. P/8. On the same day, at about 11.10 a.m., he recovered the deceased dead body from a well situated near the water canal of village Paraswara at the instance of the accused-appellant and prepared *Lash Baramadgi Panchnama* Ex. P/7 in the presence of witnesses namely Devendra Singh (not examined), Constable Ravi Shankar Dubey (PW-14), Arun Verma (PW-2) and Arun Paroha (not examined). He also seized one floating shoe from the well, which is alleged to be of the deceased, and he collected a bottle of water of the well. In this regard, he prepared a memo Ex. P/9 in the presence of Arun Verma (PW-2) and Ramji Kacher (PW-3). Upon his directions, photographer Kaushal Kishore Mishra (PW-13) took snap-shots which are marked as Articles A-1 to A-9. Upon an oral intimation of Arun Verma (PW-2) he recorded Dehati Marg intimation Ex. P/12 at the aforesaid place. Thereafter, he drew inquest proceedings Ex. P/4 in the presence of Sampat (PW-1), Arun Verma (PW-2) and other witnesses namely Balkishore, Rajkumar and

- Santosh, (who are not examined). On the same day, at about 1.30 p.m., he made formal arrest of the accused-appellant vide arrest memo Ex. P/11 in the presence of Arun Verma (PW-2) and Ramji Kacher (PW-3). After completing all the formalities at the aforesaid place, he sent the dead body of the deceased for post-mortem examination to the Civil Hospital, Maihar.
- (4.3) On 25.02.2015 at about 3.00 p.m., Pramod Singh (PW-15) seized the vehicle from the residence of the accused-appellant vide seizure memo Ex.P/10 in the presence of Arun Verma (PW-2) and Ramji Kacher (PW-3).
- (4.4) On 25.02.2015, Sub-Inspector Sarla Mishra (PW-9) registered Marg intimation Ex.P/12 at Marg case no. 14/15 under Section 174 of the Cr.P.C.
- (4.5) On 25.02.2015, a panel of doctors comprising Dr. Pradeep Nigam (PW-10), Dr. V.K. Goutam (PW-7) and Dr. (Smt.) S.B. Awadhiya (PW-11) conducted the autopsy on the dead body of the deceased in the mortuary of the Civil Hospital, Maihar. The panel gave post-mortem report Ex. P/18. According to the report, the deceased suffered ante-mortem sexual assault and throttling. However, she died of cardio-respiratory failure due to ante-mortem drowning. Her death occurred between 12 to 72 hours before the commencement of the post-mortem examination. The panel also prepared the slides of the deceased's vaginal swab and preserved her visceral material and clothes for forensic examination. Upon the direction of the panel, photographer Kaushal Kishore Mishra (PW-13) took a close-up, which is marked as Article A-10, of deceased's external genitalia.
- (4.6) On 26.02.2015, Dr. V.K. Gautam (PW-7), at Civil Hospital Maihar, conducted medico-legal examination of the accused-appellant and found that he is capable

of performing sexual intercourse and in this regard, he gave his report, Ex. P/13. He also prepared slides of semen of the accused-appellant for the forensic test.

(4.7) Vide letter Ex.P/23, the visceral-material, the slides of the deceased and the accused-appellant and the deceased clothes were sent to FSL, Sagar for forensic test. The FSL gave its reports Exs. P/25 and P/26.

(4.8) Vide letter Ex. P/24, a piece of femur-bone of the deceased and the water collected vide memo Ex. P/9 were sent for "Diatom test" to the Medico-Legal Institute Gandhi Medical College Bhopal. The Institute gave its report Ex. P/29.

5. After completing the investigation, on 31.03.2015 the police filed a charge-sheet against the accused-appellant for his prosecution for the offences punishable under sections 363, 372, 201, 376 of the IPC and 3 r/w 4 of the POCSO Act in the Court of Shri Vivek Patel, the Judicial Magistrate First Class, Maihar. The learned Magistrate committed the case vide committal order dated 23.04.2015. The case is registered as Special Case No.41/15 in the Court of First Additional Sessions Judge, Maihar.

6. The learned ASJ framed the charges against the accused-appellant for the offences punishable under Sections 363, 376 (A), 302 and 201 of the IPC and 5 (i) (m) r/w 6 of the POCSO Act. He denied the charges and claimed to be tried. Thereupon, he was put on trial. The prosecution examined 15 witnesses and marked 29 documents and Articles A-1 to A-10, whereas the accused-appellant examined in his defence his father Sajjan Prasad Singhraha (DW-1) and marked 5 documents, which are, in fact, the case diary statements of the prosecution witnesses. The accused-appellant in his examination under Section 313 of the Cr.P.C., has denied all the incriminating circumstances and evidence appearing against him and took a plea that he has been falsely implicated in the case.

7. Having appreciated the evidence on record, the learned ASJ, has held the accused-appellant guilty of committing rape and murder of the deceased and throwing her dead body into the well to conceal the evidence of the murder and rape. Upon the aforesaid findings, he convicted and sentenced the accused-appellant as stated in para-2 of this judgment.

8. We heard arguments advanced by the learned counsel for the parties at length.

9. The learned Government Advocate submitted that although the prosecution case rests entirely upon the circumstantial evidence, yet the prosecution has proved all the circumstances beyond reasonable doubts and they are of conclusive nature and none of them is capable of being explained in favour of the accused-appellant. He further submitted that the cumulative effects of the proved circumstances are that they form a complete chain which points unerringly that none other than the accused-appellant himself has committed the crime. Thus, the learned ASJ has rightly convicted the accused-appellant. On the sentence part, he submitted that the accused-appellant raped and murdered the deceased aged near-about five years, at a time when he was given a responsibility by her *Tau* Brajbhan (PW-4) to drop her at the school, reposing faith in his bonafides. However, he betrayed the faith. He further submitted that as per the evidence on record, the accused-appellant has got a daughter whose age is almost same as that of the deceased. As such, he had a filial duty towards the deceased, but he made her a tool of satisfying her sexual lust. Hence, he is worse than a beast in the garb of human body. Under the circumstances, the learned ASJ has rightly awarded him capital punishment. He, therefore, prayed for the confirmation of the death sentence.

10. Per contra, the learned counsel for the accused-appellant submitted that he does not contradict the fact that on the fateful day, Brajbhan (PW-4) took the deceased from village Itma to Maihar in the vehicle of the accused-appellant. Having referred to the depositions of Sampat (PW-1), Arun Verma (PW-2) and Ramji Kacher (PW-3), he argued that Brajbhan (PW-4) has not taken any active part in the search of the deceased when she had not returned to her home. Thus, his conduct is quite unnatural. In the cross-examination of Sampat (PW-1), it is challenged on behalf of the accused-appellant that he has a property dispute with his elder brother Brajbhan (PW-4). Hence, the real culprit of the crime is Brajbhan (PW-4), who committed her murder due to said dispute. However, the accused-appellant is made an accused of the case just on the ground that on the fateful day i.e. 23.02.2015 the deceased travelled in his vehicle from her native village Itma to Maihar. He further submitted that the conduct of Pramod Singh (PW-15) in seizing the school bag and the dead body of the deceased is also unusual because he had first gone to the place wherefrom he recovered the school bag and thereafter he

went to the well for the recovery of the deceased's dead body. In the normal course, he ought to have first recovered the dead body of the deceased and thereafter the school bag. He further submitted that in the disclosure statement Ex. P/6 it is mentioned that on the deceased's dead body there is only an underwear, whereas the photographs of Articles A-4 to A-6, show that when the deceased's dead body was took out from the well, she was in her full school uniform. Arun Verma (PW-2) and Ramji Kacher (PW-3) are the witnesses of the disclosure statement Ex. P/6 and the recovery memos Ex. P/8 and Ex.P/9. As per their depositions, they are the deceased's maternal uncle and *Pupha* (the husband of her father's sister) respectively. Hence, they are interested witnesses. Thus, their evidence is not reliable on the points that the accused-appellant had made the disclosure statement and that at his instance the school bag and the dead body of the deceased were recovered. He further submitted that during investigation the school bag was not got identified by the deceased's parents and her relatives in accordance with law. Hence, there is no evidence on record that the school bag belongs to the deceased. He further submitted that the Investigating Officer Pramod Singh (PW-15) arrested the accused-appellant vide arrest memo Ex.P/11 after the recovery of deceased's dead body and the school bag. Hence, the disclosure statement Ex. P/6 and the recovery memos Ex. P/7 and P/8 are inadmissible in evidence.

11. The learned counsel for the accused-appellant further submitted that as per the FSL reports Exs. P/25 and P/26, no human spermatozoa were found on the deceased's clothes and her vaginal swab. Hence, the offence of rape is not proved. He further submitted that Brajbhan (PW-4) himself entrusted the custody of the deceased to the accused-appellant to drop her at the school. Hence, the offence of kidnapping is also not made out. He also submitted that the learned A.S.J., has sentenced the accused-appellant under Sections 376 (A) of the IPC and 5 (1) (m) r/w 6 of the POCSO Act, which is against the provisions of amended Section 42 of the POCSO Act. Thus, the impugned judgment suffers aforesaid legal infirmities. He concluded his submissions asserting that the impugned judgment is based upon misappreciation and misreading. Hence, it is liable to be set-aside and the accused-appellant deserves to be acquitted of all the charges.

12. Alternatively, the learned counsel for the accused-appellant submitted that in case this Court upholds the conviction of the accused-appellant, then

this case does not fall in the category of “the rarest of the rare case”. Hence, the capital sentence awarded to him under Sections 376 (A) and 302 of the IPC deserves to be altered in the sentence for life imprisonment.

13. In view of the law laid down by the Supreme Court in *Mohinder Singh Vs. State of Punjab* (2013 Cr.L.J. 1559), first, we satisfy ourselves whether the learned ASJ has rightly recorded the conviction of the accused-appellant under Sections 363, 376 (A), 302, 201 (ii) of the IPC and 5 (i) (m) r/w 6 of the POCSO Act.

14. Upon perusal of the impugned judgment, we find that it suffers from verbosity and repetition of the evidence. Moreover, the learned ASJ has not mentioned categorically in the impugned judgment upon which circumstances the prosecution has based its case and whether they are proved by it. In the course of arguments before us, the learned Government Advocate submitted that the prosecution has relied on the following circumstances to establish the guilt of the accused-appellant.

(1) On the fateful day i.e. 23.02.2015 Brajbhan (PW-4) and the deceased travelled from their native village Itma to Maihar in the vehicle owned by and being driven by the accused-appellant himself.

(2) On the fateful day at Sabzi Mandi Maihar Brajbhan (PW-4) had given the deceased in the custody of accused-appellant upon his assurance that he would drop her at the school.

(3) On the fateful day, the deceased was with the accused-appellant all the time before her death.

(4) Recoveries of the empty school bag without books and the dead body of the deceased at the instance of accused-appellant, pursuant to his disclosure statement.

(5) The deceased was subjected to sexual assault and later she was murdered by throttling.

15. Before analyzing aforesaid circumstances, we would refer to some of the illuminating judgments as to when the order of conviction can be passed in a murder case where the prosecution case is entirely based upon

circumstantial evidence.

16. In *Sharad Birdhichand Sarda V. State of Maharashtra*, (1984 (4) SCC 116 : 1984 SCC (Cri) 487), the Supreme Court has set out the five golden principles which have been stated to constitute the “panchsheel” of the proof of a case based on circumstantial evidence. They are:

(i) that the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely “may be” fully established;

(ii) that the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) that the circumstances should be of a conclusive nature and tendency;

(iv) that they should exclude every possible hypothesis except the one to be proved; and

(v) that 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 accused and must show that in all human probability the act must have been done by the accused.

In this case, the Supreme Court has also held that the onus is on the prosecution to prove that the chain is complete and any infirmity or lacuna in the prosecution case cannot be cured by a plea of false defence.

17. The Supreme Court has reiterated the same principles in *Padala Veera Reddy Vs. State of M.P.*, (AIR 1990 SC 79) and *Bodh Raj alias Bodhu and others Vs. State of Jammu and Kashmir* (AIR 2002 SC 3164) though they are couched in different terms. Almost a similar view is also taken by the Supreme Court in *State of Goa Vs. Sanjay* (2007 AIR SCW 2226).

18. In *State of U.P. Vs. Ashok Kumar Shrivastava* (1992 Cr.L.J. 1104 SC), the Supreme Court has pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied upon is reasonably

capable of two inferences one of which is in favour of the accused it must be accepted. It is also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of the guilt of the accused.

19. In *Raj Kumar @ Raju @ Batiya Vs. State of Rajasthan* (sic: *Rajasthan*) (2013 (15) SCC 722), the Supreme Court, while again reiterating the same principle as laid down in *Sharad Birdhichand Sarda V. State of Maharashtra* (Supra), has held that suspicion cannot take place of proof as there is a large difference between may be and must be.

20. We may also make a reference to a decision of the Supreme Court in *C. Chenga Reddy v. State of A.P.* (1996 (10) SCC 193) wherein it has been observed, thus :

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

21. In *State of Gujrat Vs. S.D. Soni* (AIR 1991 SC 917), the apex court has laid down that the circumstances must be established beyond reasonable doubt before conviction is recorded on the basis of circumstantial evidence. The same view is also taken in *Balwindar Singh Vs. State of Punjab* (1995 Supp. (4) SCC 259).

22. In *Manu Sharma Vs. State NCT Delhi* (AIR 2010 SC 2352 = 2010 (6) SCC 1), the Supreme Court in para 274 of the decision has held that where an accused furnishes false answer as regard to proved evidence in his examination under Section 313 of the Cr.P.C., the court ought to draw an adverse inference qua him and such an inference shall be an additional circumstance to prove the guilt of the accused.

23. In *Munish Mubar Vs. State of Haryana* (2012 (10) SCC 464), the Supreme Court has held that it is obligatory on the part of the accused while being examined under Section 313 of the Cr.P.C. to furnish some explanation

with regard to incriminating circumstances associated with him. The court must take note of such explanation even in a case of circumstantial evidence so as to decide whether the chain is complete? The same view is taken by the Supreme Court in *Pudhu Raja Vs. State* (2012 (11) SCC 196).

24. In *Sanatan Vs. State of West Bengal* (2010 Cr.L.J. 3871), the Supreme Court has observed as under when a case rests upon circumstantial evidence.

“That the circumstantial evidence is more reliable than eye witness. The basic principle of circumstantial evidence is that it should be consistent with the guilt of the accused and inconsistent with innocence of the accused.”

25. Recently, the Supreme Court in *Munish Mubar Vs. State of Haryana* (supra) has observed upon circumstantial evidence as follows:-

“The circumstantial evidence is a close companion of factual matrix creating a fine network through which there can be no escape for the accused primarily because the said facts when taken as a whole do not permit us to arrive at any other inference but one indicating the guilt of the accused.”

26. In *Musheer Khan @ Badshah Khan and Anr. Vs. State of M.P.* (2010 (2) J.L.J. 104), the Supreme Court has cited Lord Coleridge who has stated that circumstantial evidence is like gossamera thread, light and as unsubstantial as the air itself as may vanish of merest of touch.

27. Sir Alfred Wills in his admirable book *Wills' Circumstantial Evidence* (Chapter VI) lays down the following rules especially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there is any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

28. Now, we shall proceed to test the circumstances mentioned in para 14 on the touchstone of the above- stated propositions of law relating to circumstantial evidence.

29. From perusal of the material on record, we find following facts are not controverted on behalf of the accused-appellant in the cross-examination of the prosecution witnesses.

(i) The distance between village Itma and Maihar town is approximately 9 km. In this regard, para-4 of the deposition of Ramji Shukla (PW-5) is relevant.

(ii) At the time of occurrence, the deceased was studying at the New Horizon Public School, Maihar and she was a student of the L.K.G. standard as per Ex. P/14.

(iii) The date of birth of the deceased was 14.11.2009 as per the Ex. P/14. Thus, on the fateful day the age of the deceased was 5 years, 2 months and 9 days.

(iv) At the relevant time the accused-appellant was the registered owner of the vehicle in question.

(v) At the relevant time the daughter of accused-appellant was also a student of the school. (vi) Investigating Officer, Pramod Singh (PW-14) seized the vehicle vide seizure memo Ex. P/10 from the residence of accused-appellant on 25.02.2015.

30. Now, we shall proceed to scrutinize the evidence on the circumstances of Para-14 upon which the prosecution case is based.

31. Sampat (PW-1), father of the deceased, has stated in his evidence that the deceased used to go to school by school bus from his native village Itma. On 23.02.2015, she missed the school bus. Thereupon, he asked his brother Brajbhan (PW-4) to take her to the school. At about 10.00 a.m., Brajbhan (PW-4) took her in the vehicle of the accused-appellant. In para-9 of his cross, he has given evidence in detail as to how he knows the accused-appellant prior to the crime. In para-11, he has stated that Brajbhan (PW-4) does a job of electrician at one electric shop by the name of Agrasen Electricals, Maihar. In view of the aforesaid evidence, it appears to us that it is quite a

natural on his part to ask his brother Brajbhan (PW-4) to take the deceased to the school. Moreover, it is not challenged by the defence that on the fateful day Brajbhan (PW-4) and the deceased travelled in the accused-appellant's vehicle from village Itma to Maihar. Thus, we hold that aforesaid evidence of Sampat (PW-1) is fully reliable.

32. Brajbhan (PW-4) and Ramikumar (PW-6) have also corroborated the evidence given by Sampat (PW-1). There is nothing adverse in their cross-examinations to disbelieve their evidence.

33. Having examined the evidence of Sampat (PW-1), Brajbhan (PW-4) and Rajkumar (PW-6), we hold that the prosecution has conclusively proved circumstance no.1 beyond reasonable doubt that on the fateful day at about 10.00 a.m. Brajbhan (PW-4) and the deceased left their native village Itma for Maihar in a vehicle being driven by the accused-appellant himself.

34. Brajbhan (PW-4) has stated in his evidence that when the vehicle reached the turn of Katni road in Maihar, he told the accused-appellant to drop them at the school. Thereupon, he told him that at first he would unload the vegetables from his vehicle at Sabzi Mandi, Maihar. He also told him that he had to go to the school to deposit his daughter's fee. Therefore, he would drop her there. Believing upon his commitment, he got off the vehicle and left the deceased into his custody.

35. The learned counsel for the accused-appellant has challenged the credibility of Brajbhan's (PW-4) statement on the grounds, first; he and the deceased in fact got off the vehicle at Maihar, secondly; there are property disputes between him and his brother Sampat (PW-1) and thirdly; he had not played any active role in search of the deceased when she had not come back to her native village after the school was closed for a day.

36. We will examine Brajbhan's (PW-4) evidence in the light of aforesaid contentions. In para 8 of his cross, he has strongly denied that he and the deceased both had alighted from the vehicle at Sabzi Mandi. Ramji Shukla (PW-5) has stated in para-2 of his statement that on 23.02.2015 he saw the deceased in the vehicle of the accused-appellant near the gate of Sabzi Mandi, Maihar. Nothing adverse has come out in his cross-examination. Therefore, his evidence is trustworthy. Thus, the defence's contention is not true much less proved that Brajbhan (PW-4) and the deceased got off the vehicle at Sabzi Mandi, Maihar. In para-12 of his cross, Sampat (PW-1) has

emphatically denied that there are property disputes between him and his brother Brajbhan (PW-4) on account of which their relations are strained. Upon the perusal of entire depositions of Sampat (PW-1) and Brajbhan (PW-4), we find that both are semi-literate and they earn their livelihood by doing manual jobs. Moreover, there is no evidence either documentary or oral on record on the point that they have substantial parental properties on account of which there is a bitterness in their relations over the property disputes. If, there exists a property related dispute between them, Sampat (PW-1) would have never asked Brajbhan (PW-4) to take the deceased to her school. Thus, we completely rule out the possibility that Brajbhan (PW-4) himself murdered the deceased on account of property-dispute. Brajbhan (PW-4) has stated in para-3 of his statement that in the evening of the fateful day when the deceased had not reached her home, then he with others went to the school to ascertain whether the deceased had attended the school? His statement is corroborated by Sampat's (PW-1) evidence appearing in para-9 of his deposition. Brajbhan (PW-4) has also stated in para-3 of his deposition that when they came to know that the deceased had not reached her school, he and other persons searched her. In view of the above, it cannot be said that Brajbhan (PW-4) had not taken active part in the search of the deceased. Hence, there is no evidence on record to draw a conclusion that his conduct was unusual on account of which the needle of suspicion moves onto him. On the basis of the aforesaid analysis of evidence. We hold that credibility of the evidence of Brajbhan (PW-4) is not eroded on the aforementioned grounds.

37. Having drawn our attention in paras 5 and 6 of the statement of Brajbhan (PW-4), the learned counsel for the accused-appellant has argued that there are material discrepancies and the omissions between his deposition and his case dairy (sic:diary) statement Ex. D/3. Upon the perusal, we hold the discrepancies and omissions are minor in nature which do not impinge upon the trustworthiness of his evidence.

38. On the basis of above close scrutiny of the evidence, we hold that the prosecution has proved circumstance no.2 beyond reasonable doubt that on the fateful day Brajbhan (PW-4) had left the deceased in the custody of accused-appellant upon his assurance that he would drop her at the school.

39. Ramji Shukla (PW-5) has testified that he is a resident of village Itma. He knows the accused-appellant and the deceased since long. He is an artisan by occupation. On 23.2.2015, he came to Maihar in search of a job. On that

day, at Sabazi Mandi Gate, Maihar around 9:30 a.m. he saw the accused-appellant sitting at the driving seat in his vehicle and by his side the deceased in her school uniform. This witness has stated in his cross-examination that on 26.02.2015 the police recorded his case diary statement, Ex.D/4, whereas his case diary statement was, in fact, recorded on 28.2.2015. In our view, this contradiction is not material and it has certainly cropped up on account of lapse of memory. We also find some omissions appearing in his evidence and his case diary statement, Ex.D/4. On due consideration, we find that the omissions are not material. Moreover, learned counsel for the accused-appellant has not pointed out anything in his cross-examination which render his deposition unreliable and untrustworthy. Hence, we hold that his evidence is fully reliable.

40. Ram Kumar Kushwaha (PW-6) has stated in his evidence that he is a resident of village Itma. He knows very well the accused-appellant and the deceased. He has *Pan Ki Dukan* (betel-shop) at *Tamatar Mandi*, Itma. On 23.2.2015, at about 11:00 a.m., sitting in his shop he saw the deceased with the accused-appellant in his vehicle going towards Katni road. At that time, the accused-appellant was driving the vehicle on high speed. This witness was subjected to lengthy cross-examination but there is nothing adverse in his cross-examination to draw an inference that he is prejudiced against the accused-appellant. Therefore, we hold that his evidence is trustworthy and reliable.

41. On the basis of the aforesaid testimonies of Ramji Shukla (PW-5) and Ram Kumar Kushwaha (PW-6), we hold that on the fateful day the deceased was with the accused-appellant after Brajbhan (PW-4) had left her in his custody.

42. Prahlad Patel (PW-8) is the Manager and Teacher of the School. On the basis of the attendance register, Ex.P/15, for the month of February 2015, he has stated that on 23.2.2015 the deceased has not attended the classes. There is nothing contrary in his cross-examination to discredit his evidence. Therefore, we hold that the accused-appellant had not dropped the deceased-prosecutrix at the school on the fateful day.

43. In *Dharam Deo Yadav Vs. State of U.P.* (2014 (5) SCC 509), the Supreme Court in para 19 of the decision has held that if the prosecution on the basis of reliable evidence establishes that the missing person was seen in the

company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. Hence, in the instant case, the accused-appellant has to explain where he parted company with the deceased. We find that the accused-appellant has not offered any explanation either through the cross-examination of material prosecution witnesses or in his examination under Section 313 of the Cr.P.C. as to the place where he had left the deceased on the fateful day. It is pertinent to mention here that we have rejected the accused-appellant plea that he had dropped the deceased and her uncle Brajbhan (PW-4) at Sabzi Mandi, Maihar. Thus, there is ample evidence on record to hold that the deceased was with the accused-appellant before her death.

44. On the basis of the aforesaid analysis of evidence, we hold that the prosecution has proved the circumstance no.3 beyond reasonable doubt that the deceased was with the accused-appellant all the time before she was murdered.

45. Pramod Singh (PW-15), the Investigating Officer of the case, has deposed that on 25.2.2015 he took the accused-appellant in his custody at Police Station Maihar. Thereupon, he thoroughly interrogated him in the presence of Arun Verma (PW-2) and Ramji Kacher (PW-3). He reduced all the information furnished by him into writing in his own language in the disclosure statement, Ex.P/6. Thereafter, he took him and the aforesaid witnesses to the roof of the building of Primary School, Dubehi, wherefrom he recovered an old empty school bag i.e. without books vide seizure memo, Ex.P/8 at the instance of the accused-appellant. Therefrom, he took them to a well which is located on the bank of water canal near village Paraswara. They saw a shoe floating in the well. With the help of persons gathered there, he got the dead body of the deceased extricated from the bed of the well. In this connection, he prepared the *Lash Baramadgi Panchnama*, Ex.P/7, in the presence of some of the persons who had collected there. He also seized the shoe and collected some water from the well. In this regard he prepared Panchnama, Ex.P/9. At last, he arrested the accused-appellant at the aforesaid place vide arrest memo, Ex.P/11.

46. The learned counsel for the accused-appellant has argued that as per the evidence of Pramod Singh (PW-15), it is crystal clear that he arrested the accused-appellant after the recording of disclosure statement and drawing aforesaid memos. This means that the accused-appellant was not in police

custody when they were prepared. The upshot is that the disclosure statement and the recovery memos are inadmissible in evidence. Therefore, the learned ASJ has committed an error in law by placing reliance upon them. In *Manohar and another Vs. State of M.P.* (2008 MPHT 326 (DB)), this court has held that it is not necessary that arrest memo should have been drawn up prior to the accused-appellant giving information under Section 27 of the Indian Evidence Act, and getting recoveries made. An accused is deemed to be in police custody when he gives information and gets the recoveries made to the Investigating Officer. In view of the said ratio, we hold that the disclosure statement and recovery memos are admissible in evidence.

47. The learned counsel for the accused-appellant has assailed the truthfulness of Pramod Singh's testimony on the ground that he has falsely recorded the disclosure statement and the recovery memos in the name of the accused-appellant. In this regard, he has pointed out the following facts: first, his conduct is unusual because he first recovered the school bag and thereafter the deceased's dead body, whereas the normal conduct of him would have been opposite i.e., first, the recovery of the dead body of the deceased and later the recovery of school bag. Secondly, as per the disclosure statement, there is only an underwear on the person of the deceased, whereas her photographs, Articles A/5 and A/6, show that when her dead body was recovered from the well, she was found in her full school uniform and thirdly witnesses to the disclosure statement and the recovery memos are Arun Verma (PW-2) and Ramji Kacher (PW-3) who are the close-relatives of the deceased. Hence, they are interested witnesses.

48. Now, we proceed to consider the aforesaid submissions. Upon the perusal of cross-examination of Pramod Singh (PW-15), we find that he was not cross-examined on the point why he had given preference to recovery of the school bag over the recovery of the dead body of deceased. To our mind, if he had been cross-examined on the aforesaid point, he would have certainly explained the reasons on account of which he preferred the recovery of school bag first. Under the circumstance, we do not find his conduct unusual. True is that in the disclosure statement, it is mentioned that there is only an underwear on the person of the deceased, whereas her photographs Articles A/5 and A/6 show that her dead body was recovered in her full school uniform. To our opinion, the said discrepancy is not material. It is true that the witnesses of the disclosure statement and the recovery memos are close relatives of the deceased. The Supreme Court has observed in para 9 of its decision in *State*

of *A. P. Vs. S. Rayappa* (2006 (4) SCC 512) that it has now almost become a fashion that the public is reluctant to appear and depose before the court especially in criminal cases because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are harassed a lot. They are being threatened, intimidated and at the top of all, they are subjected to lengthy cross-examinations. In such a situation, the only natural witnesses available to the prosecution would be the relative witnesses. A relative witness is not necessarily an interested witness. On the other hand, being in close relation to the deceased he will try to prosecute the real culprit by stating the truth. There is no reason as to why a close relative will implicate and depose falsely against somebody and screen the real culprit to escape him unpunished. The only requirement is that the testimony of a relative witness should be examined cautiously. The same view is taken by the Supreme Court in *Sahabuddin Vs. State of Assam* (2012 (13) SCC 213). On the basis of the aforesaid ratio, the bonafides of Pramod Singh (PW-15) cannot be doubted on this count. In the light of the discussion, we reject the aforesaid submissions made by the learned counsel for the accused-appellant.

49. From the perusal of the evidence appearing in the cross-examination of Pramod Singh (PW-15), we find that there is no evidence to the effect that he acted against the accused-appellant in a prejudice manner. Hence, we hold that his evidence is credible and trustworthy.

50. Arun Verma (PW-2) and Ramji Kacher (PW-3) have corroborated in material particulars the evidence given by Pramod Singh (PW-15). Both are subjected to grueling cross-examinations on behalf of the accused-appellant. But there is no conflicting and contradictory evidence in their cross-examinations to disbelieve their testimonies or to draw a conclusion that they have given evidence having been prejudiced against the accused-appellant. Thus, their evidence strengthens Pramod Singh's statement.

51. Ravi Shankar (PW-14) who is a witness of *Lash Baramadgi Panchnama* Ex.P/7, has deposed that on 25.2.2015 he was posted as a Constable at Police Station Maihar. On that day at around 10:00 to 11:00 a.m., the SHO of Police Station Maihar instructed him on cellphone to go a well near the water canal of village Paraswara with ropes and hooks. Thereupon, he reached the said place taking with him the aforesaid articles. He and some of the persons present there made an attempt to fish the dead body out by means of ropes and hooks but in vain. Thereupon, he and

Devendra, who is also a witness of *Lash Baramadgi Panchnama* but was not examined by the prosecution, climbed-down in the well and found a dead body lying on the bed of the well. They tied the dead body with ropes and hooks. Thereafter, the dead body of the deceased was pulled out from the well. This witness was crossed in brief by the defence. We find no inconsistencies in his evidence as a whole. On the other hand, photographs marked as Articles A/3 and A/4, support the veracity of his statement. On the basis of the evidence of this witness, we hold that since the dead body of deceased was recovered from the bed of the well, it was exclusively in the knowledge of the accused-appellant the place where the deceased's dead body was lying.

52. We find that the recovered school bag was not put to the test identification proceedings. However, the defence has not challenged in the cross-examination of Promod Singh (PW-15), Arun Kumar (PW-2) and Ramji Kacher (PW-3) that the bag is not of the deceased. Hence, their testimonies remain unchallenged. We, therefore, hold that the recovered school bag belongs to the deceased.

53. Upon the aforesaid analysis of the evidence, we hold that the prosecution has proved beyond reasonable doubt circumstance no.4 that the dead body of the deceased and her school bag were recovered pursuant to the disclosure statement of the accused-appellant.

54. Dr. Pradeep Nigam (PW-10) has stated that on 25.02.2015 in the mortuary of the Civil Hospital Maihar he, Dr. (Smt.) S. B. Awadhiya (PW-11) and V. K. Gautam (PW-7) jointly conducted the autopsy on the dead body of the deceased upon the requisition of Police Station Maihar and they have found the following injuries on her person:

External Injuries

- (i) The dead body was emitting foul smell.
- (ii) Rigor mortis had set in.
- (iii) Four ante-mortem bluish green bruises on the neck. Out of them, three in the linear shape were on the right side of the neck and they were in the size of 2X1 cm., 4X1 cm. and 3X1 cm. respectively and one bruise on the left side of the neck, the size of which was 4X2 cm.

- (iv) Hematoma was present beneath all the bruises.
- (v) A semi-circular tear was present in the hymen.
- (vi) Ante-mortem bruises were present over the female genitalia.
- (vii) The vagina was in swollen state.
- (viii) Fresh bright-red colour blood was present inside the labia majora.
- (ix) A scratch on the right side of the labia majora the size of which was 0.5X0.5 cm.

Internal Injuries

- (i) Lungs, liver, spleen and kidneys were congested.
- (ii) Blood was present in right chamber of the heart. However, left chamber of the heart was empty.

He has opined that the ante-mortem bruises on the neck and ante-mortem injuries on the female genitalia were indicative of the facts that the deceased was subjected to sexual assault and throttling. He has also opined that the mode of death of the deceased was cardio-respiratory failure due to ante-mortem drowning and her death was occurred 12 to 72 hours prior to the commencement of post-mortem examination. He has proved post-mortem examination report, Ex.P/18, and identified the signatures of the panel doctors thereon. He has also stated that Dr. (Smt.) S. B. Awadhiya has given opinion as to the sexual assault. In paras 12 of the cross, he has emphatically denied that the deceased sustained injuries on her neck due to a fall or rubbing her neck against a bushy plant.

55. Nothing has been pointed out by the learned counsel for the accused-appellant which may lead us to discard his testimony. Moreover, the positive diatom-test report Ex.P/29 confirms his opinion that the cause of death of deceased was ante-mortem drowning.

56. Dr. (Smt.) S.B. Awadhiya (PW-11) fully corroborates the testimony of Dr. Pradeep Nigam (PW-10). She has added her opinion in the post-mortem examination report, Ex.P/15, that the presence of injuries on her genitalia prove that the deceased was subjected to sexual assault. Replying to a query raised by the learned trial Judge, she has stated that the deceased suffered injuries on her private parts on account of forceful insertion of penis. In cross,

she has explained in detail the reasons of finding fresh blood in the labia majora. Notwithstanding that, her dead body was lying in water for long hours. According to her, the orifice of labia majora of the deceased was very narrow, on account of which water could not reach inside it. It is apposite to mention here that the photograph of Article A-10 is a close-up of the deceased's genitalia showing the presence of fresh blood on her labia majora. Thus, the photograph confirms the aforesaid opinion given by her. Moreover, there is nothing in her cross to reject her aforesaid opinion.

57. However, the learned counsel for the appellant has challenged the opinion of Dr.(Smt.) S. B. Awadhiya on the basis of FSL reports, Exs.P/25 and P/26. According to the reports, no human spermatozoa were found on the deceased clothes and in her vaginal swab. Since the deceased dead body was lying in deep water for long hours, on the basis of which we may say with certitude that the semen would have dissolved in water as being soluble. Hence, the FSL reports are negative. Under the circumstances, the negative reports of the F.S.L. do not debunk the opinion given by Dr.(Smt.) S. B. Awadhiya.

58. Dr. V. K. Gautam (PW-7) has deposed that on 26.2.2015 at Civil Hospital, Maihar, he has examined the accused-appellant upon the requisition of Police Station Maihar. Upon his medico-legal examination, he found that the accused-appellant is capable of performing sexual intercourse. In this regard, he has given M.L.C. report, Ex.P/13. There is one line cross-examination of this witness whereunder he has admitted that he had not found any injury on the accused-appellant male-genitalia. Thus, we hold that the accused-appellant was capable of committing sexual intercourse.

59. In the light of close scrutiny of the aforesaid evidence, we hold that the prosecution has proved beyond reasonable doubt circumstance no. (5) that the accused-appellant had sexually assaulted and murdered the deceased by throttling.

60. Now, we consider defence evidence. The accused-appellant has examined in his defence his father Sajjan Prasad (DW-1). He has testified in his evidence that the accused-appellant was taken into custody by the police on 23.2.2015. However, he has not given any cogent evidence in this regard to prove his version. The prosecution has also challenged his version in his cross-examination. The prosecution has produced Rojnamcha entries Ex.P/27 to Ex.P/28 in the evidence of Pramod Singh (PW-15), the Investigating Officer,

upon the perusal of Ex.P/27, it is manifest that the accused-appellant was taken into custody on 25.02.15. In his cross, the correctness of entries is not challenged even remotely. There is no evidence on record to doubt the correctness of Rojnamcha entry Ex.P/27. Hence, his bald statement cannot be relied on. Even if it is presumed that the police had taken the accused-appellant into custody on 23.02.2015 after the recording of the FIR, despite that his evidence has no evidentiary value because he is totally silent on the point what he wants to prove by saying that the accused-appellant was taken into custody on 23.02.15 in place of 25.02.2015. Thus, we hold that the evidence of this defence witness has no relevancy at all.

61. Considering the cumulative effect of all the proved circumstances, we hold that the chain of circumstantial evidence is complete, which unerringly points that none other than the accused-appellant had committed the crime. Therefore, the learned ASJ has rightly held the accused-appellant guilty for committing rape upon the deceased and murder of her and for causing the disappearance of evidence of her rape and murder by throwing her dead body into the well. However, the learned ASJ has committed an error in holding the accused-appellant guilty of kidnapping of the deceased on the ground that Brajbhan (PW-4) himself had entrusted the custody of the deceased to the accused-appellant getting an assurance from him that he would drop her off at the school. Hence, offence of kidnapping as defined in Section 361 of the IPC is not made out.

62. Now, we shall deal with the facet of sentence.

63. We have already held that the learned ASJ has committed an error of law in convicting the accused-appellant under Section 363 of the IPC. Hence, the sentence awarded to him in this Section is set aside and he is acquitted of the aforesaid charge.

64. We have noticed that the learned ASJ has convicted the accused-appellant under Sections 376 (A) of the IPC and 5 (i) (m) r/w 6 of the POCSO Act and sentenced thereunder with death penalty and life imprisonment with a fine of Rs.10,000/- respectively. Taking into consideration the provisions of the amended Section 42 of the POCSO Act, which is given below, we hold that the learned A.S.J., has committed an error in law by convicting the accused-appellant in both the aforesaid sections:-

“Section 42. Alternate punishment – Where an act or

omission constitutes an offence punishable under this Act and also under sections 166-A, 354-A, 354-B, 354-C, 354-D, 370, 370-A, 375, 376, 376-A, 376-C, 376-D, 376-E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree”.

Since the learned ASJ has awarded greater punishment under Section 376 (A) of the IPC in comparison to Section 5 (i) (m) r/w 6 of the POCSO Act, the learned ASJ ought not to have sentenced the accused-appellant in the aforesaid sections of the POCSO Act. Hence, we set aside the sentence awarded to the accused-appellant by learned ASJ under Section 5 (i) (m) r/w 6 of the POCSO Act.

65. Now, we consider whether in the fact situation of the case, the imposition of death sentence upon the accused-appellant under Sections 376(A) and 302 of the IPC by the learned ASJ holds justification?

66. The Supreme Court has evolved the doctrine of the rarest of the rare case in awarding the death sentence through its several pronouncements. Hence, the first point before us is whether the present case falls under the category of the rarest of the rare case?

67. In *Macchi Singh and Others Vs. State of Punjab* (1983 (3) SCC 470), the Supreme Court has observed in para 39 of the decision that the following questions may be asked and answered as a test to determine the “rarest of the rare” cases in which death sentence can be inflicted.

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigation circumstances which speak in favour of the offender?

68. The Supreme Court in *Lehna Vs. State of Haryana* (2002 (3) SCC 76), has defined in para 27 of the decision that the rarest of the rare case is one when the collective conscience of the community is so shocked that it will expect the holders of the judicial power center to inflict death penalty

irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:-

- “(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.
- (2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.
- (3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.
- (4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.
- (5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.”

69. The Supreme Court in *Mofil Khan Vs. State of Jharkhand* (2015 (1) SCC 67) in para 64 of its decision has expressed its view upon the “rarest of the rare” case as under:-

“The “rarest of the rare” case exists when an accused would be a menace, threat and antithetical to harmony in the society. Especially in cases where an accused does not act on provocation, acting on the spur of the moment but meticulously executes a deliberately planned crime in spite of understanding

the probable consequence of his act, the death sentence may be the most appropriate punishment.”

70. The Supreme Court has ruled in para 20 of its judgment rendered in *Haresh Mohandas Rajput Vs. State of Maharashtra* (2011 (12) SCC 56) thus;

“The rarest of rare case when a convict would be menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of the “rarest of the rare case”.

71. The Supreme Court has laid down the test of the rarest of the rare case in para 27 of its decision in *Anil @ Anthony Arikswamy Joseph Vs. State of Maharashtra* (2014 (4) SCC 69) thus;

“The rarest of the rare test depends upon perception of the society i.e. “society-centric” and not “Judge-centric”, that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into the variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls, intellectually challenged minor girls, minors suffering from physical disability, old and infirm women, etc.”

72. In *Santosh Kumar Vs. State through C.B.I.* (2010 (9) SCC 747), the Supreme Court in para 98 has observed the philosophy behind the rarest of the rare principle thus;

“Undoubtedly, the sentencing part is a difficult one and often exercises the mind of the court but where the option is between a life sentence and a death sentence, the options are indeed extremely limited and if the court itself feels some difficulty in awarding one or the other, it is only appropriate that the lesser sentence should be awarded. This is the underlying philosophy behind “the rarest of the rare” principle.”

73. In *Santosh Kumar Satishbhushan Bariyar Vs. State of Maharashtra* (2009 (6) SCC 498), the apex court held the nature, motive, and impact of crime, culpability, quality of evidence, socio-economic

circumstances, impossibility of rehabilitation and some of the factors, the Court may take into consideration while dealing with such cases.

74. In *Bachan Singh Vs. State of Panjab* (1980 (2) SCC 684) the Supreme Court has laid down the following guidelines to be applied to the facts to each individual case where the question of imposition of death sentence arises.

(i) The extreme penalty of death need not be inflicted except in the 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. 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 has 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.

75. In the cases of *Bachan Singh and Machhi Singh* (supra), the Supreme Court has enumerated the following aggravating and mitigating circumstances for consideration of awarding the capital punishment.

Aggravating circumstances (crime test)

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or devise which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed, to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Cr.P.C.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold-blooded murder without provocation.

(13) The crime is committed so brutally that it pricks

or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances (criminal test)

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.

However, we are aware that the Supreme Court in *Shankar Kisanrao Khade vs. State of Maharashtra* (2013 (5) SCC 546) has observed that the

application of aggravating and mitigating circumstances need a fresh look in sentencing process. Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance-sheet cannot be drawn up for comparing the considerations, for both are distinct and unrelated. In the sentencing process, both the crime and criminal are equally important.

76. In the light of the aforesaid legal positions, we shall consider whether the instant case falls within the category of “rarest of the rare case”? We have noticed the following aggravating and the mitigating circumstances in the present case:-

Aggravating Circumstances

(1) At the time of commission of the crime, the age of the deceased was five years and over three months. Thus, we can say that she was raped and murdered at the age when girls often play with their dolls and when they are unaware about the materialistic world.

(2) As per the record, at the time of commission of offence, the age of accused-appellant was near-about 33 years. Thus, he was matured enough to know the consequences of committing the ghastly crime.

(3) The age difference between the deceased and the accused-appellant is near-about 28 years. Thus, it is not a case of physical intimacy between them which had provoked the accused-appellant to commit the crime.

(4) As per the record, the accused-appellant has got a daughter whose age is almost similar to that of the deceased and they were the school-mates. Hence, he ought to have bestowed upon him (sic:her) love and affection as he bestows upon his own daughter but he made her a scapegoat for satisfying his sexual lust. Thus, he is a beast in the clothe of human body. Hence, he does not deserves any kind of sympathy and looking to the nature of crime even a common man would expect from the court to award him no punishment other than the death penalty.

(5) He committed the crime when Brajbhan (PW- 4) left the deceased into his custody with a high hope that he would drop her at the school but he betrayed his belief by committing the crime.

(6) We have come across through the media many cases of rape where the rapists first committed rape and thereafter murdered the victims with the

sole criminal intention that they would not lodge the police reports against them. The present case falls in this category. In the circumstances, we are of the view that a strong message ought to go to criminals of like minded that in such cases the Courts would award only death penalty.

Mitigating Circumstances

(1) The prosecution has not produced any criminal record of the accused-appellant at the trial. Hence, the logical inference may be that the accused-appellant is first offender.

Upon the comparison of aggravating and the mitigating circumstances, we find that the aggravating circumstances outweigh the only mitigating circumstances.

77. In *Santosh Kumar Satishbhushan Bariyar Vs. State of Maharashtra* (2009 (6) SCC 498), the Supreme Court in para 131 has observed that when the court is faced with a capital sentencing case, a comparative analysis of the case before it with other purportedly similar cases would be in the fitness of the scheme of the Constitution. Comparison will presuppose an identification of a pool of equivalently circumstanced capital defendants.

78. In view of the aforesaid observation, we have found that in the following cases the Supreme Court has affirmed the death sentence wherein the age of victim girl ranges from three to nine years and they were first raped and thereafter murdered treating them to be the “rarest of the rare” cases:-

- (i) *Laxman Naik Vs. State of Orissa* (AIR 1995 SC 1387).
- (ii) *Kamta Tiwari Vs. State of M.P.* (1996 (6) SCC 250).
- (iii) *Sushil Murmu Vs. State of Jharkhand* (2004 Cr.L.J. 658 SC).
- (iv) *Bantu Vs. State of Uttar Pradesh* (2008 (11) SCC 113)
- (v) *Shivaji alias Dadya Shankar Alhat Vs. State of Maharashtra* (2008 (15) SCC 269).
- (vi) *Mohd. Mannan alias Abdul Mannan Vs. State of Bihar* (2011 (5) SCC 317).
- (vii) *Rajendra Prahladrao Wasnik Vs. State of Maharashtra* (2012 (4) SCC 37 = AIR 2012 SC 1377).
- (viii) *State of U. P. Vs. Satish* (2005 (3) SCC 114).

(ix) *Vasant Sampat Dupare Vs. State of Maharashtra* (2015 (1) SCC 253).

Upon the aforesaid rulings and the facts and circumstances of the case, we hold that the learned A.S.J., is justified in awarding capital sentence to the accused-appellant.

79. In the result,

(i) Criminal Reference No.05/15 made by the trial court for confirmation of death sentences awarded to the accused-appellant under Section 376(A) and 302 of the IPC are hereby affirmed.

(ii) The appeal filed by the accused-appellant against the impugned judgment is partly allowed and his conviction and sentence under Section 363 are set aside, acquitting him of the aforesaid charge. Further, maintaining his conviction under Section 5 (i) (m) r/w 6 of the POCSO Act, his sentence thereunder is set aside in view of the provisions of amended Section 42 of the POCSO Act.

(iii) The sentences of fine with default jail sentences, as imposed by the trial court upon the accused-appellant under Sections 302 and 201 (II) of the IPC, shall remain as they are.

80. A copy of the judgment be sent to the trial court along with its records for information and compliance without any delay.

81. A copy of the judgment shall also be kept in the record of Criminal Appeal No.2203/15.

Order accordingly.

I.L.R. [2017] M.P., 723

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice N.K. Gupta

M.Cr.C. No. 5897/2014 (Gwalior) decided on 28 June, 2016

HARVIR SINGH & ors.

...Applicants

Vs.

STATE OF M.P. & ors.

...Non-applicants

(Alongwith M.Cr.C. No. 6319/2014)

A. *Criminal Procedure Code, 1973 (2 of 1974), Section 482*

– *Inherent powers – Quashing of the complaint registered u/S 420, 467, 468 & 471 r/w Section 120(B) of the IPC* – For prosecuting a person u/S 463 & 464 of the IPC it is not sufficient that the text of the document is false but it is to be established that the accused has made a false document as per the condition given in Section 464 of the IPC and purpose of making such a false document should fall within the purview of Section 463 – If someone induces the concerned officer to issue a particular certificate and the text of the certificate is not correct but if the certificate is issued by the competent authority, it cannot be said that the person either made false document or involved in the conspiracy of making a false documents – Certificate issued by the Sub-Divisional Officer who is competent authority to issue the same then no offence u/S 464 and 463 of the IPC is made out – Criminal proceedings quashed – Petitions allowed. (Para 11 & 12)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अंतर्निहित शक्तियाँ – मा.दं.सं. की धाराओं 420, 467, 468 व 471 सहपठित धारा 120(बी) के अंतर्गत पंजीबद्ध शिकायत को अभिखण्डित किया जाना – किसी व्यक्ति को मा.दं.सं. की धारा 463 व 464 के अंतर्गत अभियोजित किये जाने के लिए यह पर्याप्त नहीं कि दस्तावेज का मुख्य लेख मिथ्या है बल्कि यह स्थापित किया जाना चाहिए कि मा.दं.सं. की धारा 464 में दी गई शर्त के अनुसार अभियुक्त ने मिथ्या दस्तावेज बनाया है तथा ऐसा मिथ्या दस्तावेज बनाने का प्रयोजन, धारा 463 की परिधि के भीतर आना चाहिए – यदि कोई व्यक्ति, संबंधित अधिकारी को कोई विशिष्ट प्रमाणपत्र जारी करने के लिए उकसाता है और प्रमाणपत्र का मुख्य लेख सही नहीं है परंतु यदि प्रमाणपत्र को सक्षम प्राधिकारी द्वारा जारी किया गया है, यह नहीं कहा जा सकता कि उस व्यक्ति ने या तो मिथ्या दस्तावेज बनाया या मिथ्या दस्तावेज बनाने के षड्यंत्र में शामिल है – उपखंड अधिकारी द्वारा प्रमाणपत्र जारी किया गया, जो कि उक्त प्रमाणपत्र जारी करने के लिए सक्षम प्राधिकारी है तब मा.दं.सं. की धारा 464 व 463 के अंतर्गत कोई अपराध नहीं बनता – दण्डिक कार्यवाहियाँ अभिखण्डित – याचिकाएँ मंजूर।

B. *Penal Code (45 of 1860), Section 120(B)* – When *prima facie* the document under challenge is not a forged document then the complaint could not have been registered for any offence relating to forgery either directly or with the help of Section 120(B) of IPC – Both the court below committed an error of law in not considering the caste certificate. (Para 13)

ख. दण्ड संहिता (1860 का 45), धारा 120(बी) – जब प्रथम दृष्ट्या चुनौती दिया गया दस्तावेज, एक कूटरचित दस्तावेज नहीं है तब प्रत्यक्ष रूप से अथवा भा.द.सं. की धारा 120(बी) की सहायता से, कूटरचना से संबंधित किसी अपराध के लिए शिकायत पंजीबद्ध नहीं की जा सकती – जाति प्रमाणपत्र को विचार में ना लेकर दोनों निचले न्यायालयों ने विधि की त्रुटि कारित की।

Cases referred:

(2005) 8 SCC 751, AIR 1952 Nag 12, (1990) 3 SCC 130, 1998 SCC (Cri.) 1400, AIR 2014 SC 1106, AIR 1992 SC 604.

Rajmani Bansal, for the applicants in M.Cr.C. No. 5897/2014.

S.S. Rajput, for the applicant in M.Cr.C. No. 6319/2014.

Prabal Solanki, P.P. for the non-applicant No. 1/State in M.Cr.C. No. 5897/2014 and for the non-applicant No. 2/State in M.Cr.C. No. 6319/2014.

Vinod Pathak, for the non-applicant No. 2 in M.Cr.C. No. 5897/2014 and for the non-applicant No. 1 in M.Cr.C. No. 6319/2014.

ORDER

N.K. GUPTA, J. :- Both the petitions under Section 482 of the Code of Criminal Procedure (for brevity “the Code”) have been filed to quash the proceedings of Criminal Complaint Case No.1072/2014 pending before the Judicial Magistrate First Class, Guna (M.P.) and therefore both the petitions are hereby disposed off with the present common order.

2. The applicants of Mcrc No.5897/2014 have filed the present petition under Section 482 of the Code to quash the proceedings of Criminal Complaint Case No.1072/2014 pending before the Judicial Magistrate First Class, Guna (M.P.) for offence under Section 420, 467, 468, 471 read with Section 120-B of IPC but they have also challenged the order dated 28.05.2014 passed by the concerned JMFC under Section 204 of IPC and the order dated 10.07.2014 passed by the III Additional Sessions Judge, Guna (M.P.) in Criminal Revision No.85/2014 whereby the revision filed by the applicants was dismissed.

3. The applicant of Mcrc No.6319/2014 has filed the present petition under Section 482 of the Code to quash the aforesaid proceedings of the trial court and she has also challenged the order dated 01.07.2014 passed by the III Additional Sessions Judge, Guna (M.P.) in Criminal Revision No.96/2014

along with the order dated 28.05.2014 passed by the Judicial Magistrate First Class, Guna (M.P.).

4. Facts of the case, in short, are that applicant Rajendra Singh had applied for his caste certificate before the competent authority at Guna. In support of that application, the applicant Harveer Singh on behalf of management committee of Gurdwara Shri Guru Singh Sabha, Guna (M.P.) had issued a certificate that the applicant Rajendra Singh was "Sansi" by caste. The applicant Amreek Singh, being the father of the applicant Rajendra Singh had given an affidavit in support of the applicant Rajendra Singh and applicant Smt. Kiran Jain, being the ward member of the locality where the applicant Rajendra Singh was residing, had given a certificate about the caste of applicant Rajendra Singh. On the basis of such documents vide order dated 31.05.2008, Tahsildar concerned had issued a provisional caste certificate to the applicant Rajendra Singh. Thereafter, on 08.08.2008, the Sub-Divisional Officer, Guna (M.P.) had issued a permanent caste certificate to the applicant Rajendra Singh that his caste was "Sansi". On complaint, the matter was referred to the High Power Scrutiny Committee constituted for dealing with all such cases. The High Power Scrutiny Committee gave a report on 10.08.2011 in shape of order and minutes of the meeting which took place before the concerned Principal Secretary of the State Government in which the caste certificate issued on 08.08.2008 was set aside and forfeited by the government and the committee. Thereafter, the applicant Rajendra Singh filed a writ petition bearing number 6378/2011, however, the same was dismissed by the Single Bench of this Court vide order dated 21.03.2012. A writ appeal was also filed which was dismissed vide order dated 07.05.2012. The applicant Rajendra Singh went before the Apex Court but his Special Leave Petition (SLP) was dismissed at preliminary stage. The complainant, namely, Komal Prasad Shakya, respondent No.2 in Mcrc No.5897/2014 and respondent No.1 in Mcrc No.6319/2014, filed a criminal complaint against the applicants and various persons including the Sub-Divisional Officer and the Tahsildar. The Judicial Magistrate First Class, Guna (M.P.) after considering the evidence adduced by the complainant under Section 200 and 202 of the Code vide order dated 28.05.2014 registered a complaint against the applicant Rajendra Singh for the offence punishable under Sections 420, 467, 468, 471 of IPC and the complaint was registered against other applicants for offence under Sections 420, 467, 468 and 471 read with Section 120B of IPC whereas the complaint filed by the complainant against other accused persons was dismissed under

Section 203 of the Code. It would be clear from that order that complaint was dismissed against Mr. Virendra Katare, the then Tahsildar, Guna, Mr. D.K. Jain, the then Sub- Divisional Officer (Revenue) Guna, Mr. Mahendra Sharma, the then Patwari, Halka No. 75, Tahsil Guna, Mr. Awadhesh Pratap Singh, the then SDO(P), Raghogarh, Dr. R.S. Bhati, Medical Officer, District Hospital, Guna and two citizens, namely, Mr. Gajadhar Prasad Agrawal and Mr. Awadhesh Maheshwari.

5. Heard the learned counsel for the parties at length.

6. In the present case, it would be made clear that the order passed by the High Power Scrutiny Committee in question is to be considered as to whether applicants have done any forgery or conspiracy to commit the offence of forgery and cheating. The High Court in Writ Petition and in Writ Appeal has discussed the order passed by the High Power Scrutiny Committee to consider its validity but in such matters *mens rea* of any of the applicants relating to criminal aspect in the process of the issuance of caste certificate was not examined and therefore it is to be examined before this Court. It is the case of the complainant that the applicant Rajendra Singh during his education and initial profession or business did not mention that he was "Sansi" by caste. He used the word "Sikh" in the column of caste while filling various application forms for his educational examinations etc. Suddenly, he prayed for a certificate of caste that he was "Sansi" by caste. The complainant has filed so many documents to show that the applicant Rajendra Singh had claimed himself to be a "Sikh" by caste whereas suddenly, he changed his version to claim his caste. However, notion of the complainant is not correct. In this connection, the order dated 11.10.2004 passed by the Collector, District Guna (M.P.) may be referred which was filed by the complainant before this Court on 04.09.2004 along with other documents in which the Collector constituted the District Level Minority Welfare Committee and in which some citizens were appointed to assist the Collector for Muslim community, Jain community, Sikh community and Christian community. There is a lot of difference between the caste and community. A person who is in a particular community may not have the same caste as of another member of that community. Hence, if the applicant Rajendra Singh had mentioned his caste as "Sikh" during his educational period and thereafter, his such conduct could be due to lack of knowledge and it cannot be said that he was not competent to claim for the benefits of his caste. Actually, "Sikh" is not a complete

community and "Sikh" is a sect of that "Punjabi" community or it can be said that "Sikh" is a special community within the Punjabi community. If someone says that he is an Indian then it cannot be said that he does not belong to a particular caste. Under these circumstances, the applicant Rajendra Singh was competent to move an application for getting a caste certificate about his caste within the "Sikh" community. Hence, the submission made by the learned counsel for the complainant/respondent- Komal Prasad Shakya cannot be accepted that the applicant Rajendra Singh took a somersault about his caste.

7. It is observed at the national level that public in general is not aware of laws, various rules and circulars issued relating to their daily lives and therefore National Legal Services Authority is arranging legal literacy camps throughout the country with the help of State Legal Services Committee and district level committees. Hence, the conduct of the applicant Rajendra Singh prior to his claim of his caste shall be considered as an ignorance about the various provisions of law. Though it is a settled view of the Apex Court that ignorance of law is no excuse but still the Apex Court with the help of NALSA is trying to get literacy relating to laws in general public and therefore it cannot be said *prima facie* that since the applicant Rajendra Singh did not mention that he was of "Sansi" caste at initial stage, and therefore, he was not competent to claim his caste before the competent authority.

8. The complainant has filed a detailed complaint and various documents to show the conduct of the applicants while getting the caste certificate. In the complaint, the document is not specified against such complaint was filed, however, it would be apparent that the case was registered against the applicant Rajendra Singh for forgery and using forged documents whereas the complaint case is registered against the remaining applicants for the same offence due to criminal conspiracy done by these persons and according to the view taken by the High Power Scrutiny Committee (sic:committee) in its order dated 10.08.2011, provisional caste certificate was not blamed because such provisional caste certificate could be issued on the basis of the affidavit and the High Power Scrutiny Committee had cancelled the caste certificate dated 08.08.2008 and therefore only that certificate appears to be under challenge as a forged document.

9. It would be pertinent to note that High Power Scrutiny Committee has mentioned in its report that the certificate was issued in favour of the applicant Rajendra Singh by a Tahildar of Amritsar district in the State of Punjab and

when the matter was given to the Superintendent of Police concerned for investigation, Sub-Inspector Shri Dinesh Sharma was deputed to visit Amritsar in the State of Punjab who went there and verified the information given by the Tahsildar of Amritsar and he found that the information given by Tahsildar of Amritsar was correct and the applicant was "Sansi" by caste. There is no evidence on record that any of the applicants had manipulated the record at the office of Tahsildar at Amritsar in the State of Punjab. Such fact should be considered to assess the *mens rea* of the applicants in prosecuting the application of caste certificate, however, it is apparent that the complainant has challenged the overt acts of the applicants of forgery in making the caste certificate dated 08.08.2008 issued by Sub-Divisional Officer, Guna (M.P.).

10. If a person applies for a caste certificate and the same is not issued by the competent authority and he prepares a false document then he commits an offence of forgery. In the present case, it is an admitted fact that the certificate dated 08.08.2008 was issued by the competent authority i.e. Sub-Divisional Officer, Guna (M.P.). Though it was issued without the sufficient evidence, but that document was not forged in the eyes of law. It was a genuine certificate though issued without any sufficient basis. In this context, the definition of forgery as prescribed in Section 463 of IPC is hereby reproduced for ready reference:

463. Forgery.—Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury], to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

According to that definition, offence of forgery is constituted if a false document would have been created by any person. A provision relating to making of a false document is prescribed in Section 464 of IPC which is reproduced as under (illustrations of that section are not reproduced):-

"464 Making a false document.—[A person is said to make a false document or false electronic record—First —Who dishonestly or fraudulently—

(a) makes, signs, seals or executes a document or part of

a document;

- (b) makes or transmits any electronic record or part of any electronic record;
- (c) affixes any [electronic signature] on any electronic record;
- (d) makes any mark denoting the execution of a document or the authenticity of the [electronic signature],

with the intention of causing it to be believed that such document or part of document, electronic record or [electronic signature] was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed; or

Secondly — Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with [electronic signature] either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly — Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his [electronic signature] on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or electronic record or the nature of the alteration.

11. After considering the provisions of Section 463 and 464 of IPC, it should be clear while prosecuting a person for forgery that it is not sufficient that the text of the document is false but it is to be established that the accused has made a false document as per the conditions given in Section 464 of IPC and the purpose of making such a false document should fall within the purview

of Section 463. If someone induces the concerned officer to issue a particular certificate and the text of the certificate is not correct but if the certificate is issued by the competent authority, it cannot be said that the person either made false document or involved in the conspiracy of making false documents.

12. If the conduct of the applicants is examined in the light of Section 464 of IPC then it would be clear from the caste certificate dated 08.08.2008 that neither signature nor seals etc. of Sub-Divisional Officer were forged but the caste certificate was issued by the Sub-Divisional Officer, Guna himself and therefore it was not a false document in the eyes of law according to the provisions of Section 464 of IPC. Hence, it cannot be said that it was a forged document. In this connection, the judgment passed by the Apex Court in the case of "*Mohd. Ibrahim Vs. State of Bihar*" [(2005) 8 SCC 751], is worth mentioning, in which it is observed that when a document is executed by a person claiming a property, which is not his, he is not claiming that he is someone else nor is he claiming that he is authorized by someone else. Therefore, the execution of such document [purporting to convey some property of which he is not the owner] is not execution of a false document as defined under Section 464 of IPC. Similarly, in this context, the judgment/order passed by the single Bench of this Court in the case of "*State Government, Madhya Pradesh Vs. Hafizulrahman*" [AIR 1952 Nag 12], in which it is laid that for the offence of forgery, the document must be purported to have been signed, made or sealed by a person who did not in fact do it. The fact that a document contains false recitals or statements which induced persons who deceive to part with or deliver the property would not make it an offence of forgery.

13. In the light of the aforesaid judgment of the Apex Court in the case of *Mohd. Ibrahim* (supra) and judgment/order passed by the single Bench of this Court in the case of *State Government, Madhya Pradesh* (supra), if caste certificate dated 08.08.2008 is examined then certificate was issued by the concerned Sub-Divisional Officer, Guna though its contents were not correct because it was issued without sufficient evidence. Hence, in the light of the aforesaid judgments, the document in question cannot be said to be a forged document in the light of provisions contained under Sections 463 and 464 of IPC. When *prima facie* the document under challenge is not a forged document then the complaint could not have been registered for any offence relating to forgery either directly or with the help of Section 120-B of IPC.

Both the Courts below have committed an error of law in not considering the caste certificate dated 08.08.2008 that it was not at all a forged document and therefore, complaint could not be registered for offences under Sections 467, 468, 471 of IPC or similar inferior offence of forgery either directly or with help of Section 120-B of IPC.

14. The complaint has also been filed for the offence under Section 420 of IPC against all of the applicants. It is submitted by the learned counsel for the complainant/ respondent Komal Prasad Shakya that all the applicants except Rajendra Singh, specifically Amreek Singh, Harveer Singh and Smt. Kiran Jain had executed either an affidavit or issued a caste certificate in favour of the applicant Rajendra Singh for which they were not competent to issue and, therefore, they participated in the crime of applicant Rajendra Singh and they were involved in the criminal conspiracy. However, it would be apparent by status of applicant Harvindra Singh and Smt. Kiran Jain that they were the office bearers of Gurdwara Shri Guru Singh Sabha, Guna (M.P.) and ward member of the concerned ward, where the applicant Rajendra Singh had resided, respectively. Though they did not have any record relating to the caste of their members or residents in that ward but they were enjoying a social status. Therefore, under due to their social obligation in their respective fields if they had analyzed the evidence produced before them and if they had issued such certificate relating to the caste of applicant Rajendra Singh then it cannot be said that they were involved in the criminal conspiracy along with applicant Rajendra Singh. It is possible that Harveer Singh who was the office bearer of Gurdwara Shri Guru Singh Sabha, Guna (M.P.) had obtained knowledge from various members and devotees of Gurdwara Shri Guru Singh committee that the applicant Rajendra Singh was "Sansi" by caste and therefore if he had issued a certificate then it may be his *bona fide* social act and therefore it cannot be said that he was involved in the crime of cheating. When the Magisterial Court dismissed the complaint under Section 203 of the Code against the Sub-Divisional Officer, Tahsildar, Patwari and a Medical Officer who had also believed the evidence produced or collected before them then on the same analogy no case could be registered against the applicant Harveer Singh who was the office bearer of Gurdwara Shri Guru Singh Sabha, Guna (M.P.). Situation of applicant Smt. Kiran Jain is similar to that of the applicant Harveer Singh that being a representative of the ward or a ward member, if she had relied upon the various documents and it was the necessity for the application of caste certificate to be filed before the competent authority, she

would have given such a certificate. She gave a certificate by social obligation of virtue of her post on the basis of documents produced before her and therefore on the similar analogy as applied in the case of Harveer Singh it cannot be said *prima facie* that Smt. Kiran Jain was involved in the criminal conspiracy for offence of cheating. The courts below did not consider such a situation while passing the orders and a criminal complaint was wrongly registered against the applicants Harveer Singh and Smt. Kiran Jain for the offence under Section 420 read with Section 120-B of IPC.

15. Conduct of the applicant Rajendra Singh and his father Amreek Singh is different from applicants Harveer Singh and Smt. Kiran Jain. The applicant Rajendra Singh had filled up various forms during the tenure of his academic career by mentioning his caste to be "Sikh" and suddenly he and his father have started to claim that they were "Sansi" by caste. It is submitted by the learned counsel for the complainant/respondent - Komal Prasad Shakya that the overt act of these two persons falls within the purview of offence under Section 420 of IPC. The applicant- Amreek Singh helped the applicant Rajendra Singh in getting a false certificate of his caste and therefore he was involved in the criminal conspiracy with the applicant Rajendra Singh. However, as discussed above that the forefathers of applicant Rajendra Singh had migrated from Pakistan. Thereafter, they resided in the territory of Amritsar District for 3-4 years and thereafter they again migrated to Guna in the State of Madhya Pradesh. It is discussed earlier that the legal literacy is required amongst the public in general. If the overt act of the Sub-Divisional Officer, Guna is considered while issuance of caste certificate, it appears that he was also not aware of the rules framed by the State Government for issuance of a caste certificate and therefore possibility cannot be ruled out that the applicant Rajendra Singh and his father would have received the knowledge of their caste being scheduled when the applicant Rajendra Singh had already grown up and if applicant Rajendra Singh had applied for the caste certificate and applicant Amreek Singh had given an affidavit in support of that application then directly it cannot be said that their such conduct was of cheating or of conspiracy to commit cheating.

16. In this connection, the order dated 10.08.2011 passed by the High Power Scrutiny Committee should be examined with criminal aspect. In that order, it was mentioned that various witnesses were examined. A letter was written to the Superintendent of Police, Guna (M.P.) to enquire about the

caste certificate of the applicant Rajendra Singh from the Tahsil Office at Amritsar. Sub-Inspector Mr. Dinesh Sharma had gone to that Tahsil Office and he confirmed that the applicant was "Sansi" by caste, however, High Power Scrutiny Committee has referred the various rules and it relied upon the statement given by the then Sub-Divisional Officer Shri D.K. Jain who issued the caste certificate that he did not follow the procedure of issuance of a permanent caste certificate and consequently that caste certificate was cancelled and forfeited. In this connection, a Circular No. एफ-7-13/2004/आ. प्र./एफ dated 11.07.2005 may be perused. In para 6.6 of that circular, it was clearly mentioned as to how a permanent caste certificate can be issued. A detailed procedure was given for that purpose. As per para 6.7 of that circular a provisional caste certificate can be issued on the basis of affidavits etc. Hence, it was for the Sub-Divisional Officer, Guna to adopt the procedure as given in para 6.6 of that circular before issuance of the caste certificate and the High Power Scrutiny Committee has cancelled the certificate mainly because Sub-Divisional Officer did not adopt the procedure as required.

17. In the present case, it is admitted fact that the forefathers of the applicant Rajendra Singh had migrated from Pakistan to Punjab in the year 1947 and thereafter they resided at a village of Amritsar Tahsil [State of Punjab] for 3-4 years. Thereafter, they migrated from that place to Guna in the State of Madhya Pradesh. Applicant Amreek Singh, father of the applicant Rajendra Singh, could not give the exact dates about such migration from State of Punjab to the State of Madhya Pradesh. If the forefathers of the applicant Rajendra Singh were not much literate, there was no possibility for them to get the caste certificate from the very beginning or to treat the documents relating to their caste or to get the documents relating to dates of migration etc. Documents of the year 1950 cannot be obtained from various places without any difficulty. Hence, it was for the Sub-Divisional Officer concerned to assess the caste of the applicant Rajendra Singh on the basis of the aforesaid facts. In this connection, the judgment passed by the Apex Court in the case of "*Maari Chandra Shekhar Rao Vs. Dean, Seth G.S. Medical College and others*" [(1990) 3 SCC 130] may be referred in which it is held that when a Scheduled Caste or tribe migrates, there is no inhibition in migrating but when he migrates, he does not and cannot carry any special rights or privileges attributed to him or granted to him in the original State specified for that State or area or part thereof. If that right is not given in the migrated state it does not interfere with his constitutional right of equality or of migration or of carrying on his trade,

business or profession. Hence, it was for the applicant Rajendra Singh to establish that his forefathers had migrated from the State of Punjab to the State of Madhya Pradesh prior to the year 1950 when a notification relating to caste was issued and Constitution of India came into force. If forefathers of applicant Rajendra Singh would have migrated prior to 1950 from the State of Punjab to the State of Madhya Pradesh then being a resident of Madhya Pradesh he could get an advantage of his caste "Sansi" but if his forefathers had migrated from the State of Punjab to the State of Madhya Pradesh after the year 1950 then they could have a status of Scheduled Caste in the State of Punjab because of their caste but after their migration to the State of Madhya Pradesh, they could not get the advantage of their caste, unless such reservation was recognized by the State of Madhya Pradesh.

18. As per the information received from the office of Tahsildar of Tahsil Amritsar [State of Punjab], it is clear that the forefathers of the applicant Rajendra Singh had migrated after the year 1950 otherwise prior to the year 1950, the office of Tahsildar was not required to register the caste of various residents in the area of Tahsil. Therefore, in the light of aforesaid judgment passed by the Apex Court in the case of *Maari Chandra Shekhar Rao* (supra), the applicant Rajendra Singh could get his caste certificate on the basis of the decisions taken by the State of Madhya Pradesh. In this connection, the complainant has filed the circular dated 11.07.2005 relating to procedure for issuance of the caste certificate in which para 3.1 to para 3.4 are provided for immigrants. According to para 3.2 of that circular if an applicant files an application for issuance of a caste certificate whose parents or forefathers had migrated from another State then it was for him to file the caste certificate issued by the competent authority of that State from where they had migrated and a special certificate on Form No.III would be issued to that applicant if that caste is declared "SC" in the State of Madhya Pradesh. Hence, when the applicant applied for his caste certificate he did not produce the caste certificate issued by the competent officers of Amritsar Tahsil in the State of Punjab before the competent authority of District Guna and therefore High Power Scrutiny Committee had objected the procedure adopted by the Sub-Divisional Officer concerned and consequently the caste certificate dated 08.08.2008 issued by the Sub-Divisional Officer, Guna (M.P.) was cancelled and forfeited.

19. As discussed above, due to legal illiteracy, it is possible that being a member of "Sikh" community, father or grand-father of the applicant Rajendra

Singh would not have thought that they can claim for various reservations etc. on the basis of their caste and therefore the applicant Rajendra Singh and his family members have used the name of the community as "Sikh" while filling up column of caste in various applications and documents. However, it is pertinent to note that there is no evidence filed by the complainant to show that the information received from the office of Tahsildar of Tahsil Amritsar [State of Punjab] was manipulated by the applicant Rajendra Singh or his father Amreek Singh. One Sub-Inspector was sent for verification of that information and he found the information to be correct that the forefathers of applicant Rajendra Singh were registered as "Sansi" by caste in the office of Tahsildar of Tahsil Amritsar [State of Punjab]. It would be clear that due to such verification, S.P. Guna did not register any criminal case against any of the applicants, after getting the order of High Power Scrutiny Committee. When that document was not challenged and no evidence was produced that information or certificate issued by the Tahsildar, Amritsar, was not correct then it cannot be said that by filing of an application and getting a caste certificate dated 08.08.2008, the applicant Rajendra Singh had committed a crime of cheating. Similarly, if on the basis of information given by the senior members of the family, the applicant Amreek Singh had executed an affidavit in support of the applicant Rajendra Singh then it cannot be said that he participated in the conspiracy of cheating.

20. In the order dated 10.08.2011 passed by the High Power Scrutiny Committee, no comments were given on the certificate or the information received from the office of Tahsildar of Tahsil Amritsar. Hence, though the certificate was cancelled and forfeited but no criminal aspect emerges from that cancellation order because the High Power Scrutiny Committee did not give any opinion that information received from the office of Tahsildar of Tahsil Amritsar was incorrect or such information was recorded in that office by fraudulent applications etc.

21. As discussed above that possibility cannot be ruled out that the applicant Rajendra Singh was not aware about his caste. He and his father were of the view that initially they were "Sikh" but when they obtained an information that amongst the Sikh community there are so many castes and they were of the caste "Sansi" then if the applicant has claimed for the right of that caste by moving an application to get a caste certificate and a caste certificate was also provided by Sub-Divisional Officer, Guna on 08.08.2008 then in the light of the information received from office of Tahsildar of Tahsil

Amritsar [State of Punjab] the overt act of the applicants Rajendra Singh and Amreek Singh do not fall within the purview of cheating. When the applicant Rajendra Singh got an intimation that he belongs to "Sansi" caste which falls within the Scheduled Caste category then if he moved any application and collected some documents in support of his application then he had every right to prosecute his rights. Unless it was established that the information sent by office of Tahsildar of Tahsil Amritsar [State of Punjab] was incorrect or those were prepared due to fraudulent activities of the applicant Rajendra Singh or his father applicant Amreek Singh then *prima facie* it shall be presumed that the forefathers of the applicant Rajendra Singh were registered as the persons belonging to "Sansi" by caste at office of Tahsildar of Tahsil Amritsar [State of Punjab]. Hence, though the caste certificate was cancelled and forfeited by the High Power Scrutiny Committee but no criminal indication emerges by the cancellation of that certificate. Hence, if the applicant Rajendra Singh and his father Amreek Singh have tried to get an advantage of the caste of their forefathers whose caste was already registered soon after the year 1950 at the office of Tahsildar of Tahsil Amritsar [State of Punjab] then their conduct does not fall within the purview of cheating. Nobody is prohibited to get the advantage of his/her caste. It is a different thing that due to non-availability of proper evidence and without proceeding according to the appropriate procedure the Sub-Divisional Officer, Guna had issued a caste certificate in favour of the applicant Rajendra Singh and thereafter it was cancelled by the High Power Scrutiny Committee then still the applicant Rajendra Singh and Amreek Singh cannot be held guilty of offence of cheating. Hence, no offence under Section 420 of IPC or inferior offence of similar nature is *prima facie* made out against the applicants Rajendra Singh as well as Amreek Singh.

22. On the basis of the aforesaid discussion, it would be apparent that no offence under Section 467, 468 or 471 of IPC is made out against any of the applicants either directly or with the help of Section 120-B of IPC because the caste certificate dated 08.08.2008 was not *prima facie* established to be forged. Similarly, in the light of the information given by office of Tahsildar of Tahsil Amritsar [State of Punjab] where the caste of the forefathers of the applicant Rajendra Singh is mentioned as "Sansi", no offence of cheating is made out against any of the applicants either directly or with the help of Section 120-B of IPC. Both the courts below did not consider the legal aspects of the case as discussed above and orders passed by the courts below are perverse.

Though the present petitions are allowable against the orders passed by the courts below, however, applicants have also challenged the registration of complaint and therefore this Court is competent to quash the proceedings of the criminal complaint before the concerned court.

23. In the light of the judgment passed by the Apex Court in the case of "*M/s Pepsi Foods Ltd & Anr Vs. Special Judicial Magistrate & Ors*" [1998 SCC (Cri.) 1400], "*Umesh Kumar Vs. State of Andhra Pradesh*" [AIR 2014 SC 1106] and "*State Of Haryana and Ors vs Ch. Bhajan Lal And Ors*" [AIR 1992 SC 604], it is the duty of the High Court that no person should be harassed by filing of a criminal case against that person without any basis.

24. In the light of the aforesaid discussion, the petition filed by the applicants, namely, **Harveer Singh, Amreek Singh and Rajendra Singh** and the petition filed by **Smt. Kiran Jain** are hereby allowed. Both the orders passed by the courts below are hereby set aside. Proceedings of criminal complaint registered against the applicants as Criminal Case no.1072/2014 is hereby quashed. The concerned court is directed to drop the proceedings against all the aforesaid applicants:

Application allowed.

I.L.R. [2017] M.P., 738

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Atul Sreedharan

M.Cr.C. No. 5555/2013 (Jabalpur) decided on 15 November, 2016

R. SHRINIVASAN & ors.

...Applicants

Vs.

STATE OF M.P. & anr.

...Non-applicants

A. Penal Code (45 of 1860), Section 420 & 468 and Information Technology Act, (21 of 2000), Section 66-D – Quashment of FIR – Complainant lodged an FIR against the petitioners u/S 420 & 468 IPC and u/S 66-D of Information Technology Act – Held – Petitioners are the Managing Directors and as the company was not made an accused, the initiation and continuation of proceedings against the Managing Directors in absence of company as an accused, was not maintainable – FIR and all the proceedings are quashed – Petition allowed. (Para 28)

क. दण्ड संहिता (1860 का 45), धारा 420 व 468 एवं सूचना प्रौद्योगिकी अधिनियम (2000 का 21), धारा 66-D — प्रथम सूचना प्रतिवेदन का अभिखंडन — परिवादी ने याचीगण के विरुद्ध धारा 420 व 468 मा.द.सं. एवं सूचना प्रौद्योगिकी अधिनियम की धारा 66-D के अंतर्गत प्रथम सूचना प्रतिवेदन दर्ज किया— अभिनिर्धारित — याचीगण, प्रबंध निदेशक हैं और चूंकि कम्पनी को अभियुक्त नहीं बनाया गया था, कम्पनी की अभियुक्त के रूप में अनुपस्थिति में प्रबंध निदेशकों के विरुद्ध कार्यवाहियां आरंभ करना एवं जारी रखना पोषणीय नहीं था — प्रथम सूचना प्रतिवेदन एवं सभी कार्यवाहियां अभिखंडित — याचिका मंजूर।

B. Jurisdiction of Court — Petitioner purchased an APPLE i-phone from Bhopal which was subsequently got repaired at Lucknow and Gurgaon — Petitioner lodged a FIR at Bhopal— Held— Ordinarily that Court would get the jurisdiction to try the offence within whose jurisdiction the offence was committed — Record shows that mobile sim tray was replaced at Lucknow and petitioner came to know about the same at Gurgaon — Courts that would have the jurisdiction to try the offence would either be the Court at Lucknow where the act was done or the Court at Gurgaon where the effect ensued — No part of the offence has been committed in the State of Madhya Pradesh — Investigation against the petitioners and resultant proceedings before the trial Court at Bhopal has no legal basis and are hereby quashed. (Para 18 & 21)

ख. न्यायालय की अधिकारिता — याची ने एप्पल आई-फोन भोपाल से क्रय किया जिसे तत्पश्चात् लखनऊ एवं गुरगांव में सुधरवाया गया था — याची ने प्रथम सूचना प्रतिवेदन भोपाल में दर्ज कराया — अभिनिर्धारित — साधारणतः उस न्यायालय को अपराध का विचारण करने की अधिकारिता होगी जिसकी अधिकारिता के भीतर अपराध कारित किया गया था — अभिलेख दर्शाता है कि मोबाईल सिम ट्रे को लखनऊ में बदला गया था और याची को इसकी जानकारी गुरगांव में हुई — न्यायालय जिन्हें अपराध का विचारण करने की अधिकारिता होगी वह या तो लखनऊ का न्यायालय होगा जहां कृत्य किया गया अथवा गुरगांव का न्यायालय जहां प्रभाव उत्पन्न हुआ — अपराध का कोई भी भाग मध्य प्रदेश राज्य में कारित नहीं हुआ — याचीगण के विरुद्ध अन्वेषण व भोपाल के विचारण न्यायालय के समक्ष परिणामिक कार्यवाहियों का विधिक आधार नहीं तथा एतद् द्वारा अभिखंडित की गई।

Cases referred :

1994 Supp. (1) SCC 590, 1992 Supp (1) SCC 335, (2015) 12 SCC 781, (2012) 5 SCC 661.

R.N. Singh with Akshay Pawar and Ranjeet Dwivedi, for the

applicants.

Manjeet P. Chuckal, P.L. for the Non-applicants/State.

ORDER

ATUL SREEDHARAN, J. :- The instant is a petition under section 482 of the Code of Criminal procedure filed by the Petitioners for quashing the proceedings arising from the registration of the First Information Report being Crime no.19/2013 for offences punishable under sections 420, 468 IPC and section 66-D of the Information Technology Act.

2. The Petitioners No.1 and 2 are the Managing Directors of Redington India Limited, based at Chennai. The Petitioner No.3 is the General Manager (Corporate) (who has been made Petitioner by post and not by name) and is based at Chennai. The Petitioner No.4 is the Regional Manager of Redington India Ltd., at its branch office in Lucknow and Petitioner No.5 is again the General Manager (Corporate) (by post and not by name) at New Delhi. By order of this Court dated 22.1.2015, the complainant Amit Gupta was made Respondent No. 2. Vide order dated 8.7.2015, this petition was admitted for final hearing and it has been recorded that no one appears for Respondent No. 2 despite service of notice. The factual premises of the case which is sought to be quashed is as follows –

3. On 24.10.2011 the Respondent No. 2 purchased an Apple i-phone bearing IMEI no. – 012743002674647 from Gopal Stationery Book House at Bhopal. In February 2012 when the Respondent No. 2 was at Lucknow, the phone stopped working and so he approached M/s. Freedom World at Lucknow for repairs of the said i-phone. On 7.2.2012, the i-phone was returned to Respondent No. 2 after repairs by M/s. Freedom World. Thereafter in October 2012 when the Respondent No. 2 was in Gurgaon, some problem occurred once again in the said i-phone and the Respondent No. 2 visited the authorized show room of i-phone in Gurgaon being Tresor Systems. The said service centre/show room inspected the phone and thereafter informed the complainant/Respondent No. 2 that the phone has been replaced as many as 7 times. The Respondent No. 2 issued a notice to Redington India Limited upon which the company came to know about the cheating committed on the Respondent No. 2. The Petitioners verified the records and found that the replacement of the complainant's phone had been carried out by M/s Freedom World at Lucknow. Further, it also came to their notice that on four occasions the replacement had been availed by the reseller in its own name.

Redington also came to know that one hundred and twenty similar replacements had been done in good faith to M/s Freedom World against dead phones.

4. As the issue relating to the dead i-phone was not resolved the Respondent No. 2 registered the aforementioned FIR against the Petitioners and the same was taken into investigation by the Police. At the very outset, the Petitioners clarified that they are merely the employees of M/s Redington India Limited and it is the company M/s Redington India Limited that is the authorized service provider for Apple i-phones and also provides the warranty support system on behalf of M/s Apple India Private Limited. The service centre of Redington India Limited (hereinafter referred to as "Redington") is allowed by Apple India Limited to perform screening/preliminary checks on the handsets to ascertain the nature of the problems. However, Redington is not permitted to dis-mantle the same, which means that Redington can only deal with the software related issues whereas the case against the Petitioners involves modification/tampering with the hardware of the phone. If the problem relating to the malfunctioning i-phone is on account of a software related issue, then the service centre of Redington carries out an upgradation of the software. However, if the problem is identified as one pertaining to the hardware the phone is packed and sent back to the company i.e. Apple India Limited.

5. Investigation by the Police had revealed that the sim tray of the phone of the complainant was tampered with and changed with that of another i-phone which was no longer covered by warranty. It is alleged by the Petitioners that the complainant/Respondent No. 2 has embarked on a vengeful journey in order to falsely implicate the Petitioners herein only on account of them being associated at various levels and capacities with Redington. The learned Counsel for the Petitioners has drawn my attention to the FIR which is at page 4 of the additional documents which is filed along with I.A.No.11252/2013, which for the reasons stated therein, is allowed and the said documents are taken on record and considered. The learned Senior Counsel for the Petitioners has stated that all those persons who are at the top level, involved with the management of the company have been named as accused persons. With specific reference, he has drawn my attention to those at senior nos. 4 and 5 who are merely mentioned as General Manager of the Corporate Office at Chennai and the General Manager at the Corporate Officer (sic:office) at New Delhi. The learned counsel for the Petitioners has submitted that the very fact that two of the persons said to be arrayed as accuseds are incorporeal,

being a post or a position in the company and not as specific individuals, only goes to reveal that the complainant/Respondent No. 2 has taken the names of the Petitioners herein from internet and thereafter inserted their names as accused persons knowing fully well that there existed no specific allegation that could be levelled against them. The only aspersion that the Respondent No.2 has levelled is that the principal accused could not have committed this offence sitting in Lucknow without the connivance and collaboration of the Petitioners herein sitting in Chennai, Lucknow and Delhi.

6. The learned counsel for the Petitioners has also stated that the FIR could not have been registered against the Petitioners in Bhopal as no part of the offence is stated to have taken place in the State of Madhya Pradesh. He has contended that the offence, if at all had taken place, had taken place at the outlet of M/s. Freedom World at Lucknow where the i-phone was given for the first time to be repaired in February 2012. He has further stated that the alleged offence relating to the change in sim tray has taken place in Lucknow. The Respondent No. 2 came to know about the said offence when he gave the same for repairs again in the month of October to Tresors Systems at Gurgaon where he was informed that the mobile has already been replaced 7 times.

7. The learned counsel for the State on the other hand submits that the Petitioners are all named in the FIR and the contents of the FIR prima facie make out a case of the aforementioned offences. She has most forcefully argued that the Respondent No. 2 was cheated by the Petitioners as they are the authorized company to deal with complaints relating to i-phones. She has further stated that the process by which the offence has taken place clearly goes to show the connivance of Redington and without its active participation the same was not possible.

8. Heard the learned counsel for the Petitioners and the State and perused the documents along with the charge sheet. In the FIR, the complainant has reiterated as aforementioned that he had given his i-phone for repairs firstly to M/s. Freedom World at Lucknow, as he was in Lucknow during the material point of time when the i-phone went dead. It was returned to Respondent No. 2 on 07/02/12 in a working condition. Thereafter, in the month of October 2012, upon the same problem recurring, the Respondent No. 2 approached Tresor Systems at Gurgaon which informed the Respondent No. 2 that the mobile has been replaced at least seven times. He further states in the complaint that upon his return to Bhopal, he checked the status of his phone over the

internet and was aghast to learn that the record also revealed that the IMIE number was replaced 7.times. The mobile was allegedly in a non-functional condition on the day he had registered the FIR against the Petitioners. The Petitioners, upon coming to know about the case filed against them, approached this Court in the year 2013 which vide order dated 13/05/13 stayed the further proceedings/investigation in the FIR registered against the Petitioners. The said order was made absolute vide order of this Court dated 08/07/15, by which this petition was admitted for final hearing. However, as the stay operated only against the Petitioners herein, the Police investigated the case as against other persons and in the course of the said investigation arrested several other co-accused persons and recorded their disclosure statements under section 27 of the Evidence Act.

9. The first statement is that of accused Rahul Shrivastava, S/o Narendra Shrivastava, which was also recorded on 28.2.2013. This accused person has stated to the cyber-crime cell of the Madhya Pradesh Police that he is acquainted with the technique of changing the IMEI number and serial number of i-phone and that he is willing to show the Police the technique and the equipment he uses to do the same.

10. The second statement is of accused Faiz Khan, S/o Nisar Ahmad, who was arrested and whose statement was also recorded on 28/02/13. Like the previous accused person, he has also stated that he has technical expertise and equipment to change the IMEI number and serial numbers of Apple i-phones. The next accused, whose statement has been recorded by the cyber cell of the MP Police is accused Zishan Ali S/o Late Zabbar. This witness in his disclosure statement has elaborately explained the modus operandi of the crime. He informs the police that he knows how to log into Apple and Blackberry phones. He further states that he has the knowledge of how to unlock an Apple i-phone from its serial and IMEI number. He says that the IMEI number of an apple phone is not seen externally on the hand set and that the serial number and IMEI number are located in the sim plate of an Apple i-phone. He further says that whenever they get an Apple i-phone in a dysfunctional states which they want to change, they keep the hand set with them and wait till an Apple i-phone is received which is within warranty and upon receiving the said phone they remove the sim tray from the Apple i-phone, which is within warranty period and remove the sim tray of the dysfunctional i-phone which is beyond the warranty period and exchange them

whereby, the sim tray of the Apple i-phone which is within the warranty is fixed inserted in the dysfunctional Apple i-phone which is past its warranty period and the same is logged for replacement. After changing the sim plate, this accused states that he used to send the phone to co-accused Rahul at Redington, Lucknow, which used to forward the said i-phone to Apple India Limited, which would detect the old phone as one under Redington warranty on account of IMEI number, which is present on the sim tray and replace the same, which would come back to the Redington's Lucknow Office.

11. Learned counsel for the State has submitted that Respondent No. 2, who did not suspect of what was happening behind his back, whose phone may have had no problem beyond a minor software glitch and which was apparently fixed and returned to him by M/s Freedom World in February 2012. However, when the mobile malfunctioned a second time in October 2012, the Respondent No. 2 went to Tresors Systems in Gurgaon for its rectification and it is at this point of time that he came to know about the cheating that was committed upon him. Learned counsel for the respondent State has submitted that the accused persons named herein before, used the sim tray bearing the original IMEI number and serial number of Respondent No. 2's phone and got 7 such replacements from the company i.e., Apple India Limited. She states that the Respondent No. 2 has been cheated by the co-accused persons and the Petitioners herein on account of which Respondent No. 2 after having spent so much money has been saddled with a non-functional i-phone, which till the date of registration of the FIR had not been repaired or replaced.

12. The undisputed facts that flow from the narrative given by both the learned counsel for the Petitioners and the learned counsel for respondent State is that; A) that the i-phone was purchased by the Respondent No. 2 at Bhopal from Gopal Stationary Book House on 24.12.2011; B) in February 2012 the said mobile phone was given for repairs at M/s Freedom World Lucknow which after repairs and the alleged crime committed in relation to the said phone, was returned to Respondent No. 2 on 7.2.2012, C) in October 2012 when the problem reoccurred, the Respondent No. 2 visited the authorized show room/service centre M/s Tresor Systems at Gurgaon in Haryana and came to know that the mobile has been replaced as many as 7 times and D) in the year 2012 when he came back to Bhopal he checked over the internet and came to realize that what was informed to him by Tresor Systems at Gurgaon was correct as the official site of Apple India Limited

itself showed that his phone has been replaced 7 times.

13. The learned counsel for the Petitioners has forwarded three arguments in support of his petition. Firstly, that there was no offence committed within the jurisdiction of Madhya Pradesh in order for the Madhya Pradesh Police to register an FIR and carry out an investigation as the offence was committed at Lucknow in February 2012 by M/s Freedom World Lucknow. The second argument placed before the Court by the Ld. Counsel for the Petitioners is that even, if the sum totality of all the allegations levelled in the FIR and the material that has been collected in the course of the investigation against the co-accused persons is taken to be the absolute truth, even then a prima facie offence is not made out against his clients and on that ground alone, the FIR and all proceedings arising therefrom deserve to be quashed. Lastly, he has argued that the principal accused here is Redington India Ltd., a company incorporated under the relevant provisions of the Companies Act and that the company has not been made an accused by the Police and the company not having been made an accused, vicarious liability for offences under the IPC or under the provisions of the information Technology Act cannot be pinned on the Petitioners.

14. Per contra, the learned counsel for the State has argued that the Madhya Pradesh Police has jurisdiction to register the first information report and investigate the same as the offence was committed in various places and is a continuing offence. Secondly, she has stated that the investigation reveals that the offence committed by the co-accused persons could not have succeeded without the active connivance and participation of the Petitioners herein. As regards the third argument forwarded by the learned counsel for the Petitioners, the learned counsel for the State has fairly conceded that the company Redington has not been made as an accused in this case. However, she states that the involvement of the Petitioners herein, whether vicariously or directly can only be revealed after an investigation into their actions which has been stayed by this Court vide its interim order dated 13.5.2013. She also stated that the question relating to the nature of the liability of the Petitioners herein can only be seen by the Trial Court in the course of the trial.

15. As regards the jurisdiction of criminal courts to conduct an enquiry and trial, the same is dealt in Chapter XIII of the Cr.P.C. Sections 177 to 189 cover the varied circumstances and situations which vests a criminal court to try an offence. Section 177 provides that the ordinary place of enquiry and trial of an offence shall be the Court within whose local jurisdiction the said

offence was committed. Section 178 is applicable in a situation where it is uncertain as to which of the several local areas an offence was committed and provides for three situations. (a) where an offence is partly committed in one local area and partly in another local area, (b) where the nature of the offence committed is a continuing one being committed in more local areas than one and (c) where it consists of several acts done in different local areas. In such a situation, the accused could be tried by any of the courts within whose jurisdiction the said offence or a part thereof was committed.

16. Section 179 relates to the jurisdiction of a Court to try an offence on account of an act done or where its consequence ensues. This section relates to any act which is an offence on account of the consequences which ensue out of such an act. In such cases, the Court within whose jurisdiction such an act was done or the Court within whose jurisdiction the consequence of such an act ensues, are legally vested with the authority to try the offence. The other sections in this chapter not being directly relevant for a decision in this case, are not being adverted to. The Ld. Counsel for the State has largely tried to bring in the jurisdiction of the criminal Court in Madhya Pradesh with the aid of section 178 and 179 Cr.P.C. She has argued that (a) the offence was spread of three states, being Madhya Pradesh, Uttar Pradesh and Haryana and (b) that though the offence may have been committed in Uttar Pradesh, the effect of the said offence ensued in Madhya Pradesh and so the Court at Bhopal has the territorial jurisdiction to try the offence. This Court is unable to agree with the said contention. As regards the offence itself, the same involved the act of changing the sim tray of the Respondent No.2's iPhone, and that took place in Lucknow in the State of Uttar Pradesh. No part of the offence took place in the State of Haryana as the only event that took place there was that the phone stopped working for a second time when the Respondent No.2 was in Gurgaon and he was later informed by Tresor Systems at Gurgaon where he was informed about the phone being changed seven times under warranty. As regards Madhya Pradesh, the only instance on account of which the Ld. Counsel for the State submitted that the courts here have jurisdiction to try the offence is based on the statement of the Complainant that after returning to Bhopal, he checked over the internet from the official site of Apple and came to know that the information given by Tresor Systems at Gurgaon was true. As regards the jurisdiction of the Courts at Lucknow and Gurgaon are concerned, the same are made out as in Lucknow, the offence was committed by replacing the sim tray of defective iPhone with that of the

Respondent No.2's. The jurisdiction of Gurgaon is also made out as the effect of changing the sim tray at Lucknow ensued at Gurgaon when the Respondent No.2's iPhone stopped working again. However, the stand of the Ld. Counsel for the State that the jurisdiction of Bhopal is also carved out as the Complainant came to know about the commission of the offence after returning to Bhopal and checking up on the internet is misplaced. Merely coming to know about the offence does not give the court where the knowledge about the said offence was gathered, the jurisdiction to try the offence. When asked specifically by the Court as to what part of the transaction relating to the offence took place in Madhya Pradesh, the Ld. Counsel for the State could not give a satisfactory reply and was unable to spell out as to which part of the transaction relating to the offence was committed in Bhopal.

17. The learned counsel for the Petitioner has vehemently argued that the place where the offence has been committed was Lucknow. It is his contention that the offence was committed on February 2012 when the Petitioner gave his i-phone for repairs to M/s Freedom World, Lucknow, when the sim tray of the phone was changed. The learned counsel for the Petitioners states that the period of the offence could be deemed to have been between February 2012 when the offence had been committed and 7.12.2012 when the Complainant's phone stopped working a second time on account of the replacement of the sim tray of the phone in February 2012 at Lucknow, which was the ensuing effect of the offending act committed in February 2012. He has argued that the date on which the discovery of the offence was effected cannot be taken to be date when the offence was committed. Learned counsel for the respondent/State has argued that if one looks at chain of events, then the Apple i-phone was purchased at Bhopal which is undisputed and that the same was first given for repairs in Lucknow where the alleged offence is stated to have taken place, which again is undisputed and thereafter she says that the discovery of the offence was almost 8 months after in October 2012 when the phone went dead again and the Respondent No. 2 took to same for repairs to Treasors Systems at Gurgaon where it came to his knowledge that the phone has been replaced at least 7 times and that was the place where he came to know about the offence. Learned counsel for the respondent State has further stated that after coming to Bhopal, the Respondent No. 2, through the internet checked out the status of his i-phone which once again revealed that the same had been replaced 7 times. Therefore, on the basis of the chain and sequence of events, the learned counsel for the State has indicated that the Madhya Pradesh Police gets jurisdiction to register the said offence and that

the Court at Bhopal gets the jurisdiction to try the offence as; A) the mobile was purchased in Bhopal and thereafter over the internet the Respondent No. 2 came to know again that the mobile has been replaced 7 times. Another argument that has been put forward by the learned counsel for the State in order to show that the court at Bhopal has the jurisdiction to try the said offence is the inclusion of an offence under the Information Technology Act. She has argued that an offence under the Information Technology Act is an offence without borders and territories and by way of computers can be committed from anywhere. In order to buttress her claim she has stated that the Respondent No. 2 finally came to know about the cheating committed on him when he accessed the site of the company through the internet and received the information about the replacement relating to the i-phone, which was done from Bhopal.

18. I am afraid that I am unable to agree with the submissions of the learned counsel for the State. As regards her contention that the Court at Bhopal would get the jurisdiction to try the said offence as the mobile was purchased at Bhopal, is legally untenable. Chapter XIII of the Cr.P.C. vests a criminal court with jurisdiction only in those cases as provided under the various provisions of that chapter. Ordinarily, that Court would get the jurisdiction to try the offence within whose jurisdiction the offence was committed. The purchase of the mobile was not an offence and, therefore, the same cannot vest the court at Bhopal with jurisdiction to try the offence. The second argument relating to jurisdiction, which relates to the aspect of the Respondent No. 2/complainant accessing the internet at Bhopal and thereafter coming to know that his mobile was replaced 7 times also, does not vest the Court at Bhopal with jurisdiction as receiving information regarding the commission of an offence, does not vest the Court within whose jurisdiction such an information was received, with the jurisdiction to try the offence. Even otherwise, the Respondent No. 2 had received information relating to the replacement of the said phone 7 times earlier at Gurgaon in the month of October 2012 from Tresors Systems when he had taken the i-phone for repairs, the second time when it went dead. The last argument taken by the learned counsel for the State with relation to the offence under section 66-D of the Information Technology Act on the grounds that the offences under the Information Technology Act being continuing offences, can be tried by the Courts where the act is done or the consequences ensue. If one looks into the sequence of events, the offence was complete when the sim trays were changed and the phone was put for replacement by the co-accused persons, who have been named hereinabove. The said act took place in Lucknow. Thereafter, the mobile was handed over in the month of

February 2012 to the respondent after having been repaired. Thereafter, the consequence of the act ensued when the i-phone went dead the second time and the Respondent No. 2 took the i-phone for repairs to Tresors Systems at Gurgaon. Thus, if one were to apply the provisions of section 179 Cr.P.C, the Courts that would have the jurisdiction to try the said offence would either be the Court at Lucknow where the act was done or the Court at Gurgaon where the effect ensued.

19. The jurisdiction under the Cr.P.C. has been created for the criminal courts in a well thought out manner applying the yardsticks of reasonableness and practicality, both in the investigation and trial of the offences. The reason why the criminal courts have been vested with the jurisdiction to try cases within whose jurisdiction the actual offence was committed is bearing in mind the fact that evidence relating to commission of an offence is most preponderant at the place where the offence was committed and where the witnesses reside. If too wide an interpretation is accorded to the said sections dealing with investiture of jurisdiction to criminal courts, a trial can be rendered oppressive if an offence which has taken place in one state can be tried and conducted without demur in another state far away, where no act relating to the said offence was committed or any consequence connected with the said act constituting that offence ensued.

20. The jurisdiction of the Criminal Court to try an offence is different from the duty imposed upon the Police to register a first information report even in those cases where the offence has not taken place within the confines of its territorial jurisdiction. In this regard the Supreme Court in the case of *State of Andhra Pradesh Vs. Punati Ramulu and others*, 1994 Supp. (1) SCC 590, had held that the refusal by the Police to record information relating to the commission of a cognizable offence on the ground of lack of territorial jurisdiction over the place where the crime was committed amounts to a dereliction of duty. In such a case, the Supreme Court held that the Police should record the information and forward the same to the Police Station having jurisdiction over the area where the offence was committed.

21. Though the Police would have the jurisdiction to register and investigate an offence which had not occurred within the territorial jurisdiction of such Police Station, by either investigating the offence themselves or by forwarding the first information report after registering the same as "zero", to such Police Station within whose jurisdiction the offence was committed. However, for a

criminal court to be vested with jurisdiction, the alleged act constituting the offence must have been committed within the jurisdiction of the court trying the same in consonance with the provisions of Chapter XIII of the Cr.P.C. The material on record goes to show that no part of the offence has been committed in the State of Madhya Pradesh. Under the circumstances, this Court has no hesitation at arriving at the finding that the investigation against the Petitioner and the resultant proceedings before the trial court at Bhopal have no legal basis on the ground of jurisdiction and ought to be quashed on this ground alone. In this regard, it is important to State here that upon the offence coming to the notice of Redington, Redington itself has registered a complaint case in the Court of the learned Chief Judicial Magistrate, Lucknow against four persons including M/s Freedom World. A copy of which is Annexure P2 of the petition. Learned counsel for the Petitioners has stated that the said complaint is pending.

22. The argument of the learned counsel for the Petitioners is that the sum totality of the facts, taken as a whole does not prima facie disclose the commission of any offence by the Petitioners herein. It has strongly been contended by the learned senior counsel for the Petitioners that the Petitioners have been made accused persons only to arm twist the company as they are senior officials of the company who are in no way involved in the functioning of the M/s Freedom World at Lucknow. The learned senior counsel has referred to the disclosure statements of the co-accused persons given to the State in which far from being mentioned by the said accused persons, whose details are given herein above in paragraph No. 10, there is no material collected by the prosecution to connect the Petitioners to the alleged offence. As stated herein before, the Petitioner Nos. 1 and 2 are Managing Directors who are based at Chennai and Petitioner no.4 is the Regional Manager of the company based at Lucknow and Petitioner nos. 3 and 5 are not even persons but posts of the General Manager (Corporate) at Chennai and Delhi.

23. It is contended by the learned counsel for the Petitioners that where the material does not even disclose any offence committed by the Petitioners, ratio of the Supreme Court in the case of *State of Haryana Vs. Bhajan Lal* reported in 1992 Supp. (1) SCC 335, would be squarely applicable. In opposition, the learned counsel for the respondent State has submitted that investigation could not proceed against the Petitioners herein and material could not be unearthed as there was a stay of the investigation and further proceedings against the Petitioners by this Court. She further stated that had

investigation proceeded, it may have resulted in unearthing material /evidence against the Petitioners herein also. I am afraid I cannot agree by the said contention put forward by the learned counsel for the State.

24. The ratio in *Bhajan Lal* judgment protects individuals from being proceeded against maliciously in criminal cases by way of registration of a first information report by the Police or institution of a criminal complaint in the Court of the Magistrate, where the said information/ report or the complaint, taken as a whole does not disclose the commission of a cognizable offence against the accused persons. The submission put forward by the learned counsel for the State bears dangerous portents if accepted, where the first information report in which there are no allegations against the persons named in the FIR is allowed to proceed only on the grounds that investigation may result in the unearthing of evidence against such persons is fraught with danger, as anyone and everyone can be named in the first information report without any allegation against such a person and if such an FIR or complaint is sustained merely on the ground that investigation may unearth an evidence against such a person then it is exposing such a person to the dangers of an arrest and harassment even without any evidence being there against such a person to start with. Even though there are judgments of the Supreme Court where it is consistently held that an FIR is not an encyclopaedia of an offence and is merely an enabling point for the Police to commence an investigation, even in those cases, for the FIR to be sustainable, there must be some allegation/ material disclosing a prima facie involvement of the persons who are named in the FIR.

25. In this case, the manner in which the names of the Petitioners have been taken, especially Petitioner nos. 3 and 5, reveals that the complainant got their names inserted in the FIR by browsing the internet and not because he had any credible prima facie evidence regarding their personal involvement in the offence. That is why Petitioners Nos. 3 and 5 are not corporeal persons but merely designations in the company which have been made accused persons in the FIR. The statements of co-accused persons are bereft of any allegation or even advertence to the Petitioners herein. The FIR is miserably deficient of any allegation against the Petitioners as to how the Petitioners, sitting in the head office at Chennai, the office at Delhi and the Regional office at Lucknow were in any way associated with the co-accused persons and M/s Freedom World without there being any allegation to that effect, it is clear that the Petitioner have been roped in as accused only on account of the post they hold in the company and not on account of any evidence against them disclosing

their involvement in the offence.

26. Under the said circumstances, this case deserves to be quashed by applying the ratio in the case of *Bhajan Lal* (supra) as the FIR and all material gathered by the Police in the Course of investigation fail to disclose a prima facie case against the Petitioners.

27. The last argument put forward by the learned counsel for the Petitioners is that the Petitioners are employees of Redington. Redington is the company which looks after the servicing and repairs of i-phones. The complaint of the Respondent No. 2 is also basically directed at Redington, being the service provider and that the Petitioners have been included as accused in their capacity as employees of the company. In other words, the Ld. Counsel for the Petitioners has submitted that the Petitioner have been made vicariously liable for the offence committed by the company.

28. The learned counsel for the Petitioners has submitted that this being the factual aspect of the case, the Petitioners cannot be proceeded against as it is undisputed that the company Redington India Limited has not been made an accused. In order to make the Petitioners vicariously liable for the offence committed by the Company, it is imperative to make the company as the principal offender which has not been done in this case. In this regard the judgment of the Supreme Court in *Sharad Kumar Sanghi Vs. Sangita Rane* (2015) 12 SCC 781, assumes significance. The Supreme Court, following the judgment in *Anita Hada Vs God Father Tours and Travels Private Limited* (2012) 5 SCC 661, quashed the case against the Petitioner therein who was being proceeded against before the Court of the learned JMFC Betul for an offence under section 420 IPC on the ground that the Petitioner was only the Managing Director and as the company was not made an accused, the initiation and continuation of the proceeding against the Managing Director in the absence of the company as an accused, was not maintainable. Therefore, on this aspect also the case against the Petitioners deserves to be quashed.

29. Under the circumstances, the petition succeeds. The first information report against the Petitioners herein being Crime No.19/2013 of Police Station Cyber and Hitech Offences, Bhopal and all proceedings arising there from stand quashed.

Application allowed.

I.L.R. [2017] M.P., 753

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice G.S. Ahluwalia

M.Cr.C. No. 2528/2013 (Gwalior) decided on 6 December, 2016

BABULAL & ors.

...Applicants

Vs.

SMT. PREMWATI

...Non-applicant

A. Protection of Women from Domestic Violence Act (43 of 2005), Section 2(a) – “Aggrieved person” – There is no divorce between the parties – Wife is still in domestic relationship and therefore respondent wife would be an aggrieved person u/S 2(a) of the Act. (Para 13)

क. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 2(ए) – “व्यथित व्यक्ति” – पक्षकारों के मध्य कोई विवाह-विच्छेद नहीं है – पत्नी अभी भी घरेलू संबंध में है तथा इसलिए प्रत्यर्थी पत्नी अधिनियम की धारा 2(ए) के अंतर्गत एक व्यथित पक्षकार होगी।

B. Protection of Women from Domestic Violence Act (43 of 2005), Sections 12 – Retrospective Effect of the Act – Maintainability of Application – Incidents prior to the date of coming into force of the Act will also be considered for the purpose of the Act – Application is maintainable. (Para 15)

ख. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 – अधिनियम के भूतलक्षी प्रभाव – आवेदन की पोषणीयता – अधिनियम के प्रभावी होने की पूर्व की तिथि की घटनाओं पर भी इस अधिनियम के प्रयोजन हेतु विचार किया जाएगा – आवेदन पोषणीय है।

C. Protection of Women from Domestic Violence Act (43 of 2005), Section 12 & 19 – Residence Order – Wife filed application u/S 12 and 19 of the Act against her husband Devilal and other family members submitting that they (*applicants herein*) use to abuse her and her unmarried daughter and they do not allow them to reside in the house and husband do not provided anything for maintenance – In reply before the Trial Court, it was submitted that house has been partitioned and Devilal sold his share to one Dharmendra and therefore now she can't make any claims in the said house – Trial Court directed that applicants should not obstruct in peaceful residence of wife

alongwith her daughter in the house – Held – Wife filed application on 01.08.2011 whereas sale deed was executed on 12.06.2012 through a power of attorney – It is also not denied that Dharmendra is son of one of the applicants – Trial Court rightly held that the sale deed was a sham document purposefully created to defeat the very purpose of the application – Petition dismissed. (Para 9)

ग. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 व 19 – निवास आदेश – पत्नी ने अधिनियम की धारा 12 एवं 19 के अंतर्गत अपने पति देवीलाल एवं परिवार के अन्य सदस्यों के विरुद्ध यह निवेदन करते हुए आवेदन प्रस्तुत किया कि वे (यहाँ आवेदकगण) उसके तथा उसकी अविवाहित पुत्री के साथ दुर्व्यवहार करते हैं तथा वे उन्हें मकान में निवास करने की अनुमति नहीं देते तथा पति भ्रमणपोषण हेतु कोई व्यवस्था नहीं करता – विचारण न्यायालय के समक्ष जवाब में, यह निवेदन किया गया था कि मकान का बंटवारा हो चुका है एवं देवीलाल ने अपना हिस्सा किसी घरमेन्द्र को विक्रय किया था तथा इसलिए अब वह उक्त मकान में किसी प्रकार का दावा नहीं कर सकती – विचारण न्यायालय ने यह निदेशित किया कि आवेदकगण, पत्नी को उसकी पुत्री के साथ मकान में शांतिपूर्ण निवास करने में बाधा नहीं डाल सकते – अभिनिर्धारित – पत्नी ने दिनांक 01.08.2011 को आवेदन प्रस्तुत किया जबकि विक्रय विलेख दिनांक 12.06.2012 को मुख्तारनामा द्वारा निष्पादित किया गया – यह भी इंकार नहीं किया गया है कि घरमेन्द्र, आवेदकगण में से एक का पुत्र है – विचारण न्यायालय ने उचित रूप से यह अभिनिर्धारित किया कि विक्रय विलेख एक छद्म दस्तावेज था जो कि आवेदन के प्रयोजन को ही विफल करने के उद्देश्य से सृजित किया गया था – याचिका खारिज।

Cases referred:

(2012) 4 MPHT 104, (2016) 2 SCC 705, (2012) 3 SCC 183, (2014) 3 SCC 712, AIR 2015 SC 2605.

Prashant Sharma, for the applicants.

Pramod Gohadkar, 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 27.02.2013 passed by Seventh Additional Sessions Judge, Gwalior in Criminal Appeal No. 89/2013 arising out of the order dated 10.12.2012 passed by JMFC, Gwalior in case No.6982/2012.

2. The necessary facts for the disposal of the present application are that

the respondent had filed an application under Section 12, 19 of Protection of Women from Domestic Violence Act, 2005 against the applicants alleging that the applicants used to abuse her and her unmarried daughter and they do not allow the respondent to reside in the house and her husband Devi Lal do not provide anything for the maintenance of the respondent and her daughter, therefore, it was prayed that the applicants should not create any obstruction in peaceful residence of the respondent in the house situated at Indra Nagar Char Shahar Ka Naka Hazira, Gwalior.

3. Per contra, the applicants filed their reply and submitted that the proceedings under Section 125 of Cr.P.C. were initiated against the non-applicant Devi Lal in the year 1985 and from thereafter the respondent/applicant has never come to the house nor has met with them. The property has already been partitioned and the applicants are residing in the house which has fallen to their share. They had never abused the respondent/applicant. Husband of the applicant namely Devi Lal has already sold his share of the house and has paid the maintenance allowance and thereafter he is residing along with the respondent in her house. The respondent/applicant never came to the house situated at Indra Nagar, Hazira, Gwalior and prayed that the application be rejected.

4. It is important to mention here that although the application under Section 12, 19 of Protection of Women from Domestic Violence Act, 2005 was filed against the applicants and Devi Lal (husband of the respondent/applicant) but Devi Lal never appeared before the Court and he was proceeded ex parte. The Trial Court allowed the application filed by the respondent/applicant under Section 197 of Protection of Women from Domestic Violence Act, 2005 on the ground that from the perusal of the partition deed dated 17.04.1984, it is clear that house No.381 situated at Indra Nagar, District Gwalior was partitioned amongst Kamta Prasad, Tejpal, Devi Lal and Babu Lal. One portion of the house went to the share of Devi Lal who is the husband of the respondent and, therefore, the applicant is entitled to reside in the said portion of the house. So far as the contention of the applicants that Devi Lal has already sold his share was concerned, the Trial Court rejected the same as it was evident on the basis of evidence which has come on record that Devi Lal had executed a Power of Attorney on 6.1.2004 in favour of applicant No.3 Hetram. After the application under Section 12, 19 of the Protection of Women from Domestic Violence Act, 2005 was filed, Hetram, on the basis of

the Power of Attorney, sold the share of Devilal in favor of one Dharmendra for a consideration of Rs. 4 lacs. It is also not out of place to mention that Dharmendra is the son of one of the applicants. Thus, the Trial Court came to the conclusion that the so called Sale deed has been executed with an intention to frustrate the very purpose of the application and in fact the entire house is still in possession of the applicants and consequently directed that the applicants should not obstruct in peaceful residence of the respondent along with her daughter in House No. 5/381, Ward No. 7, Gwalior.

5. Being aggrieved by this order, the applicants filed an appeal which was dismissed by the Appellate Court by order dated 27-2-2013.

6. It is contended by the learned Counsel for the applicants that in fact the house was partitioned and Devilal, the husband of the respondent had already sold his share therefore, the prayer under Section 19 of the Protection of Women From Domestic Violence Act, 2005 (In Short DVA, 2005) cannot be granted. Further, it was submitted by the Counsel for the applicants that in view of the fact that the acts which fall within the definition of "Domestic Violence" were committed prior to coming into force of DVA, 2005, therefore, the application was not maintainable.

7. Per contra, it is submitted by the respondent that the sale deed is nothing but a sham document executed with an intention to frustrate the very purpose of the DVA, 2005. It was also contended by the learned Counsel for the respondent that since, the act complained of by the respondent was a continuing offence, therefore, the application under Section 12, 19 of the Constitution of India is maintainable.

8. Considered the arguments advanced by the learned Counsel for the parties and perused the record.

9. The contention of the learned Counsel for the applicants that Devilal had already sold his share therefore, the Trial Court should not have passed the Residence Order under Section 19 of the DVA, 2005, cannot be accepted. The learned Counsel for the applicants could not dispute the fact that the respondent had filed an application under Section 12, 19 of the DVA, 2005 on 1-8-2011 whereas the sale deed was executed by Hetram, in favor of Dharmendra on 12-6-2012 on behalf of Devilal on the strength of a Power of Attorney. This fact has also not been denied by the applicants that Dharmendra is son of one of the applicants. Thus, in the considered view of this Court, the

Trial Court did not commit any mistake in holding that the so called sale deed was executed with a view to frustrate the very purpose of the DVA, 2005. Accordingly it is held that the sale deed dated 12-6-2012 was merely a sham document.

10. The next contention of the learned Counsel for the applicants is that all the acts which were complained by the respondent were prior to coming into force of DVA, 2005, therefore, the respondent cannot be said to be an aggrieved person and further, the acts complained of cannot be treated as continuing for the purpose of conforming jurisdiction on the Court, therefore, the application was not maintainable. To buttress his contention, the learned Counsel for the applicants relied upon judgment dated passed by a co-ordinate bench of this Court in the case of *Devkaran Vs. Sanjana Bai* reported in (2012) 4 MPHT 104.

11. To consider the contention of the learned Counsel for the applicants with regard to the maintainability of the application under Section 12, 19, 20 of the DVA, 2005, first of all we will have to consider the basic purpose for which the DVA, 2005 was enacted. As the preamble would reflect, the DVA, 2005 has been enacted to provide for more effective protection of the Rights of the Women. The Supreme Court in the case of *Krishna Bhattacharjee Vs. Sarathi Choudhary* reported in (2016) 2 SCC 705 has held as under :

“3. Regard being had to the nature of the legislation, a more sensitive approach is expected from the courts whereunder the 2005 Act no relief can be granted, it should never be conceived of but, before throwing a petition at the threshold on the ground of maintainability, there has to be an apposite discussion and thorough deliberation on the issues raised. It should be borne in mind that helpless and hapless “aggrieved person” under the 2005 Act approaches the court under the compelling circumstances. It is the duty of the court to scrutinise the facts from all angles whether a plea advanced by the respondent to nullify the grievance of the aggrieved person is really legally sound and correct. The principle “justice to the cause is equivalent to the salt of ocean” should be kept in mind. The court of law is bound to uphold the truth which sparkles when justice is done. Before throwing a petition at the threshold, it is obligatory to see that the person aggrieved

under such a legislation is not faced with a situation of non-adjudication, for the 2005 Act as we have stated is a beneficial as well as assertively affirmative enactment for the realisation of the constitutional rights of women and to ensure that they do not become victims of any kind of domestic violence.”

12. Thus, keeping the above proposition of law in mind, we have to understand the meaning of Domestic Violence. The word “Domestic Violence” has been defined in Section 3 of the DVA, 2005, which reads as under :

“3. Definition of domestic violence.—For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.—For the purpose of this section,—

(i) “physical abuse” means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) “sexual abuse” includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity

of woman;

(iii) “verbal and emotional abuse” includes—

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) “economic abuse” includes—

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.—For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes “domestic violence” under this section, the overall facts and circumstances of the case shall be taken into consideration.”

13. Thus, it is clear that “economic abuse” is also included in the definition

of "Domestic Violence". As it is evident from the provision 3(iv)(a),(b) and (c), the word "economic abuse" has several aspects. It is also not in dispute that the marital ties between the respondent and Devilal have not been separated. They are still husband and wife and no decree of divorce has been passed. As the respondent is in domestic relationship with her husband Devilal, therefore, certainly, the respondent would be an "aggrieved person" as defined in Section 2(a) of the DVA, 2005.

14. The objection raised by the learned counsel for the applicants with regard to the maintainability of the application is misconceived. The contention raised by the learned Counsel for the applicants has already been considered and decided by the Supreme Court in the case of *V.D. Bhanot Vs. Savita Bhanot* reported in (2012) 3 SCC 183. The Supreme Court while upholding the Judgment passed by the Delhi High Court held that "after considering the Constitutional safeguards under Article 21 of the Constitution vis-à-vis the provisions of Sections 31 and 33 of the PWD Act, 2005, and after examining the Statement of Objects and Reasons for the enactment of the PWD Act, 2005, it was held that it was with the view of protecting the rights of women under Articles 14,15 and 21 of the Constitution, that Parliament enacted the PWD Act, 2005, in order to provide for some effective protection of rights guaranteed under the Constitution to women, who are victims of any kind of violence occurring within the family and matters connected therewith and incidental thereto, and to provide an efficient and expeditious civil remedy to them. It was accordingly held that even if the acts of Domestic Violence had been committed prior to the coming into force of the said Act, notwithstanding the fact that in the past she had lived together with her husband in a shared household, but was not more living with him, at the time when the Act came into force.

15. Thus, it is clear that even if the acts of Domestic Violence have been committed prior to coming into force of DVA, 2005, the application under Section 12,19 etc under DVA, 2005 is maintainable.

16. The Supreme Court in the case of *Saraswathy Vs. Babu* reported in (2014) 3 SCC 712, has held as under :

"23. The other issue that whether the conduct of the parties even prior to the commencement of the DVA, 2005 could be taken into consideration while passing an order under Sections

18, 19 and 20 fell for consideration before this Court in *V.D. Bhanot v. Savita Bhanot* (2012) 3 SCC 183. In the said case, this Court held as follows:

“12. We agree with the view expressed by the High Court that in looking into a complaint under Section 12 of the DVA, 2005, the conduct of the parties even prior to the coming into force of the DVA, could be taken into consideration while passing an order under Sections 18, 19 and 20 thereof. In our view, the Delhi High Court has also rightly held†† that even if a wife, who had shared a household in the past, but was no longer doing so when the Act came into force, would still be entitled to the protection of the DVA, 2005.”

24. We are of the view that the act of the respondent husband squarely comes within the ambit of Section 3 of the DVA, 2005, which defines “domestic violence” in wide terms. The High Court made an apparent error in holding that the conduct of the parties prior to the coming into force of the DVA, 2005 cannot be taken into consideration while passing an order.”

17. In the case of *Shalini Vs. Kishor and others* reported in AIR 2015 SC 2605, the Supreme Court after relying on the Judgments passed in the cases of *V.D. Bhanot* (Supra) and *Saraswathy Vs. Babu* (Supra) held that as the Domestic Relationship between the parties is not in dispute and since, the applicant has specifically stated that her maternal uncle is no more ready to allow her to stay in the house, therefore, the application filed under Section DVA, 2005 under Section 12, 19 and 20 was maintainable.

18. So far as the judgment passed by co-ordinate Bench of this case in the case of *Devkaran* (Supra) is concerned, in the considered opinion of this Court it is no more a good law in view of the judgments passed by Supreme Court in the cases of *V.D. Bhanot* (Supra), *Saraswathy* (Supra), *Shalini Vs. Kishor and others* (Supra), *Krishna Bhattacharjee* (Supra).

19. Accordingly it is held, the contention raised by the learned Counsel for the applicants that since the acts of Domestic Violence were committed prior to

the coming into force of DVA, 2005, therefore, application filed by the respondent was not maintainable, is misconceived and therefore, it is rejected.

20. Consequently, the application is dismissed being devoid of merits.

Application dismissed.

**I.L.R. [2017] M.P., 762
MISCELLANEOUS CRIMINAL CASE**

Before Mr. Justice G.S. Ahluwalia

M.Cr.C. No. 3701/2016 (Gwalior) decided on 8 December, 2016

NAROTTAM PATHAK & anr.

...Applicants

Vs.

STATE OF M.P. & ors.

...Non-applicants

A. *Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) – Mandatory registration of FIR before investigation – Held – Registration of FIR is obligatory on the part of police before initiating investigation, if magistrate u/S 156(3) Cr.P.C. directs police to submit its report.* (Para 4)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – अन्वेषण से पूर्व प्रथम सूचना प्रतिवेदन का आज्ञापक रूप से पंजीबद्ध किया जाना – अभिनिर्धारित – अन्वेषण प्रारंभ होने से पूर्व पुलिस की ओर से प्रथम सूचना प्रतिवेदन का पंजीबद्ध किया जाना आवश्यक है यदि, दं.प्र.सं. की धारा 156(3) के अंतर्गत मजिस्ट्रेट पुलिस को अपना प्रतिवेदन प्रस्तुत करने को निदेशित करता है।

B. *Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Petition seeking direction to register FIR under inherent powers – Held – Cr.P.C. provides a complete and efficacious remedy u/S 156(3) and 200 – The court declined to direct registration of FIR under inherent powers, since the petitioner has alternative remedy under the code.*(Para 8 & 9)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अंतर्निहित शक्तियों के अंतर्गत प्रथम सूचना प्रतिवेदन पंजीबद्ध करने का निदेश चाहते हुए याचिका – अभिनिर्धारित – दं.प्र.सं., धारा 156(3) व 200 के अंतर्गत पूर्ण एवं प्रभावशाली उपचार उपबंधित करती है – चूंकि याची के पास संहिता के अंतर्गत वैकल्पिक उपाय है, न्यायालय ने अंतर्निहित शक्तियों के अंतर्गत प्रथम सूचना प्रतिवेदन पंजीबद्ध करने का निदेश देने से इंकार किया।

C. *Practice – Criminal – Procedure when magistrate does*

not order investigation u/S 156(3) but takes cognizance instead – Held – Where a magistrate does not think it proper to pass an order u/S 156(3) Cr.P.C., then he can take cognizance and follow the procedure provided in chapter 15 of Cr.P.C. and if after recording of statement of complainant witnesses the magistrate proposes to seek help from the police, then he can direct inquiry u/S 202(1) Cr.P.C. (Para 6)

ग. पद्धति – दायिदक – प्रक्रिया जब मजिस्ट्रेट धारा 156(3) के अंतर्गत अन्वेषण का आदेश नहीं देता है, बल्कि इसके बजाय संज्ञान लेता है – अभिनिर्धारित – जहाँ एक मजिस्ट्रेट द.प्र.सं. की धारा 156(3) के अंतर्गत आदेश पारित करना उचित नहीं समझता है, तब वह संज्ञान ले सकता है एवं द.प्र.सं. के अध्याय 15 में उपबंधित प्रक्रिया का पालन कर सकता है तथा यदि परिवादी के साक्षीगण के कथनों को अभिलिखित करने के पश्चात् मजिस्ट्रेट पुलिस से सहायता चाहना प्रस्तावित करता है, तो वह द.प्र.सं. की धारा 202(1) के अंतर्गत जांच निदेशित कर सकता है।

Cases referred:

Crl.O.P. No. 19197/2016 order passed on 27.09.2016 (High Court of Madras), (2007) 6 SCC 171, (2008) 2 SCC 409, (2008) 3 SCC 542, W.P. No. 8906/2016 order passed on 24.10.2016, Writ-C No. 47416/2016 order passed on 30.09.2016 (Allahabad High Court), AIR 2006 SC 705.

Sankalp Sharma, for the applicants.

Girdhari Singh Chauhan, P.P. for the non-applicant No. 1 & 2/State.

ORDER

G.S. AHLUWALIA, J. :- This petition under Section 482 of CrPC has been filed seeking a direction to the respondents to register the FIR on the basis of his complaint dated 20.10.2015 made to Station House Officer, Police Station City Kotwali, Morena and complaint dated 05.03.2016 made to Superintendent of Police, Morena.

2. The counsel for the applicants relied upon a common order dated 27.09.2016 passed by High Court of Madras in the case of *Sugesan Transport Pvt. Ltd vs The Inspector Of Police* (Crl.O.P. No.19197/2016) and submitted that although the High Court has held that in case of non-registration of FIR, the aggrieved person must avail alternative remedy of filing application under Section 156 (3) of CrPC but prayed for other similar directions.

3. Without entering into the merits of the case, in the light of the judgments passed by the Supreme Court in the cases of *Aleque Padamsee & Ors. Vs. Union of India & Ors.*, reported in (2007) 6 SCC 171, *Sakiri Vasu Vs. State of U.P.*, reported in (2008) 2 SCC 409 and *Divine Retreat Centre Vs. State of Kerala & Ors.* reported in (2008) 3 SCC 542, order dated 24.10.2016 passed by a Coordinate Bench of this Court in the case of *Soniya vs. State of M.P. & Ors.* (W.P.No.8906/2016) and order dated 30.09.2016 passed by Division Bench of Allahabad High Court in the case of *Smt. Sudami Devi Vs. State of U.P. & Ors.*, (Writ - C No. 47416/2016), it is held that the complainant has an efficacious and alternative remedy of filing a criminal complaint before the court of competent jurisdiction.

4. When an application under Section 156 (3) of CrPC is filed and if the order is passed on the said application directing the police to submit its report then whether the Magistrate has directed or not, it is obligatory on the part of the police to register the FIR before initiating investigation.

5. Section 156 (3) of CrPC reads as under:-

“(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.”

6. As it is evident from Section 156 of CrPC that Chapter 12 of the Code of Criminal Procedure deals with the various steps which are required to be taken by the investigating officer. The investigation starts with the registration of FIR and ends only with the filing of the report by the police as required under Section 173 of CrPC. Thus, when an order under Section 156 (3) of CrPC is passed by the Magistrate then the police must register the FIR irrespective of the fact that whether such an order has been given by the Magistrate or not. Where a Magistrate does not think it proper to pass an order under Section 156 (3) of CrPC, then he can take cognizance of the offence and can follow the procedure as provided in Chapter 15 of the Code of Criminal Procedure. After recording the statements of the complainant witnesses, if the Magistrate proposes to seek help from the police, then he can direct for any inquiry under Section 202 (1) of CrPC.

7. The Supreme Court in the case of *Mohd. Yousuf v. Smt. Afaq Jahan & Anr.* reported in AIR 2006 SC 705 has held as under:-

“11. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation

under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

8. Thus, it is clear that the Code of Criminal Procedure provides for a complete and efficacious remedy to the complainant. Thus, under the facts and circumstances of the case, no further direction is required to be given.

9. Accordingly, the petition is dismissed as the petitioner has an efficacious and alternative remedy of filing an application/complaint under Section 156 (3), 200 of CrPC.

10. The petition is accordingly dismissed.

Application dismissed.

I.L.R. [2017] M.P., 765

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Ravi Shankar Jha &

Mr. Justice Vijay Kumar Shukla

M.Cr.C. No. 19319/2016 (Jabalpur) decided on 22 December, 2016

GOURISHANKAR NEMA

...Applicant

Vs.

PRABHU DAYAL NEMA & ors.

...Non-applicants

A. Penal Code (45 of 1860), Sections 498-A, 304-B/302 & 306, Dowry Prohibition Act (28 of 1961), Section 3 & 4, Criminal

Procedure Code, 1973 (2 of 1974), Section 378 (3) and Evidence Act (1 of 1872), Section 113-B – Presumption – Application for leave to appeal against acquittal – Death due to strangulation within 7 years of marriage – Trial court found that prosecution could not establish cruelty in relation to demand of dowry soon before death – Sister-in-law of deceased deposing that only issue of quarrel was regarding leaving of in-laws house by deceased without permission – In the police report submitted by deceased, there was no allegations regarding dowry demand and torture – No ocular or medical evidence to establish that non-applicants have murdered or abetted her to commit suicide – Held – There is no illegality or perversity in the impugned order and no ground to interfere with the order of acquittal – Application for leave to appeal dismissed.
(Paras 6 to 12)

क. दण्ड संहिता (1860 का 45), धाराएँ 498-ए, 304-बी/302 व 306, दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 3 व 4, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378(3) एवं साक्ष्य अधिनियम (1872 का 1), धारा 113-बी – उपधारणा – दोषमुक्ति के विरुद्ध अपील करने की अनुमति हेतु आवेदन – विवाह से सात वर्षों के भीतर गला घोटने के कारण मृत्यु – विचारण न्यायालय ने यह पाया कि अभियोजन मृत्यु से ठीक पूर्व दहेज की मांग से संबंधित क्रूरता स्थापित नहीं कर सका – मृतिका की भाभी ने यह कथन किया कि झगड़े का एकमात्र मुद्दा मृतिका का बिना अनुमति के ससुराल छोड़कर जाना था – मृतिका द्वारा दी गई पुलिस रिपोर्ट में, दहेज की मांग एवं यातना के संबंध में कोई अभिकथन नहीं थे – यह स्थापित करने को कोई चाक्षुष एवं चिकित्सीय साक्ष्य नहीं है कि अनावेदकगण ने हत्या की या उसे आत्महत्या कारित करने को दुष्प्रेरित किया – अभिनिर्धारित – आक्षेपित आदेश में कोई अवैधता या विपर्यस्तता नहीं है तथा दोषमुक्ति के आदेश में हस्तक्षेप करने का कोई आधार नहीं है – अपील करने की अनुमति का आवेदन खारिज।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 378 (3) – Application for leave to appeal against acquittal – Grounds of interference – Court has to be very much cautious while interfering in an application for leave to appeal unless there are compelling and substantial grounds to interfere with the order of acquittal. (Para 11)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378(3) – दोषमुक्ति के विरुद्ध अपील करने की अनुमति हेतु आवेदन – हस्तक्षेप के आधार – अपील की अनुमति के आवेदन में हस्तक्षेप करते समय न्यायालय को अत्याधिक सावधान होना चाहिए, जब तक कि दोषमुक्ति के आदेश में हस्तक्षेप करने हेतु बाध्यकारी एवं सारमूल आधार न हों।

Cases referred:

2015 (9) SCC 588, (2016) 10 SCC 220.

Akshay Namdeo, for the applicant.

Piyush Dharmadhikari, G.A. for the non-applicant/State.

ORDER

The Order of the Court was delivered by :
VIJAY KUMAR SHUKLA, J. :- This is an application under Section 378 (3) of Code of Criminal Procedure for leave to appeal against the impugned judgment dated 14/11/2014 passed by Second Additional Sessions Judge, Narsinghpur in S.T. No. 266/2013 whereby the learned Sessions Judge has acquitted the accused/respondents from all the charges levelled against them. This application is filed by brother of deceased Surekha. The accused/respondents were tried for offences under sections 498-A, 304-B alternatively for commission of offence u/s 302 and 306 of IPC.

2. The facts of the case in brief are that deceased Surekha was married with accused Vinod Nema in the year 2010. After the marriage Surekha had gone to house of her husband where she had lived peacefully in the first six months. It is stated that thereafter, the respondents started demanding dowry and harassing the deceased. It is alleged that they used to demand dowry and torture the deceased. It is alleged that when Surekha was pregnant, she was left in her father's house where she had given birth to a female child. On 4/05/2013 applicant who is brother of deceased had gone to the house of respondents at 11.00 AM for taking his sister and there he remained till 3.00 PM. He stated that the accused Vinod was demanding Rs. 1 to 2 lacs for construction of another house. The applicant expressed his inability to fulfill the demand of the accused. It is alleged that the applicant wanted to bring his sister with him but the accused persons did not allow him to take his sister with him because he could not fulfill the demands of the accused persons and he had no option but to return without his sister. It is also stated that on the same day, accused Vinod had informed the applicant on phone that his sister has committed suicide by hanging herself. Immediately, he rushed to the house of the respondents where from his sister was taken to the hospital Gotegaon where she was declared dead. The intimation was given to the police station by the applicant and crime no. 292/2013 for commission of offences under sections 498-A/304-B of IPC and also u/s 3 and 4 of the Dowry Prohibition

Act was registered against the accused persons.

3. The order of acquittal is challenged by the present applicant, brother of deceased mainly on the ground that the judgment of the trial court acquitting the respondents is wholly erroneously as it is passed without taking into account the prosecution evidence in the proper perspective. The respondents were tried for commission of offences u/s 498-A, 304-B of IPC and for commission of offence u/s 302 and 306 of IPC. In support of the prosecution case, the main witnesses Somnath (PW-1, father of deceased), Gourishankar (PW-6, brother of deceased) and his wife Amrita (PW-9, sister-in-law of deceased) were examined to establish the case of dowry death u/s 304-B of IPC.

4. We have perused the impugned judgment of acquittal and the record of the trial Court. The facts of the present case are to be examined on anvil of the ingredients of Section 302-B of IPC and Section 113-B of the Indian Evidence Act and the law laid down by the Apex Court. Before adverting further to the facts of the case, it is relevant to refer to the judgment of the Apex Court passed in the case of *V.K. Mishra and another Vs. State of Uttarakhand and another*, 2015 (9) SCC 588. The relevant para 7 of the said judgment is quoted as under:-

“7. In order to attract application of Section 304B IPC, the essential ingredients are as follows:-

1. The death of a woman should be caused by burns or bodily injury or otherwise than under a normal circumstance.

2. Such a death should have occurred within seven years of her marriage.

3. She must have been subjected to cruelty or harassment by her husband or any relative of her husband.

4. Such cruelty or harassment should be for or in connection with demand of dowry.

5. Such cruelty or harassment is shown to have been meted out to the woman soon before her death.

On proof of the essential ingredients mentioned above, it becomes obligatory on the court to raise a presumption that

the accused caused the dowry death. A conjoint reading of Section 113B of the Evidence Act and Section 304B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. 'Soon before' is a relative term and it would depend upon circumstance of each case and no strait-jacket formula can be laid down as to what would constitute a period 'soon before the occurrence'. There must be inexistence a proximate live link between the facts of cruelty in connection with the demand of dowry and the death. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned it would be of no consequence."

5. In the light of the above mentioned legal position, the evidence and material of the present record is to be examined whether there is evidence to prove that 'soon before the occurrence' deceased was subjected to torture and harassment in connection with demand of dowry and whether the court below was right in acquitting the respondents u/s 304-B of IPC.

6. The trial Court found that the prosecution could not establish the ingredients constituting an offence u/s 304-B of IPC so as to attract presumption as envisaged u/s 113-B of Indian Evidence Act. The prosecution could not establish the demand of dowry or the fact that the deceased was subjected to cruelty in relation to the demand of dowry soon before the incident. It is found that deceased Surekha died because of strangulation by hanging herself and her death was unnatural and she died under unnatural circumstances within a period of seven years from the date of her marriage. The witness Somnath (PW-1) father of deceased has stated that the marriage had taken place on 9/02/2010 and thereafter, the deceased lived with accused persons peacefully. It is stated that she was given good treatment in her in-laws' house and there was no complaint. This fact is also supported by the evidence of Gourishankar (PW-6), brother of deceased. They have stated that after some time, accused Vinod and father-in-law Prabhudayal had started beating her and a demand of motorcycle and gold ear rings was made. Somnath (PW-1) has stated that in the marriage he had given Rs. 51,000/-, gold chain and gold ring alongwith other essential articles. Gourishankar (PW-6) has deposed that whenever he used to go to house of deceased she

used to make complaint of beating and demand of dowry. According to him, he used to assure the respondents that he would try his best to fulfill their demand. He has stated that this had continued for the last 2 -3 years that whenever there was a quarrel and the deceased was subjected to beating, he used to visit her house and have a talk with her in-laws' family. He has further stated that in February, 2011 also his sister was subjected to *marpeet* because of non-fulfillment of demand of motorcycle and ear rings. He has stated that a report (Exhibit P-13) was also lodged at police station Dhooma. This part of the statement regarding incident of February, 2011 is not supported by the statement of father of deceased Somnath (PW-1).

7. Gourishnakar (PW-6) has stated that in the month of March, 2013 he had visited to the house of his sister and again the same complaint was made by her and thereafter, in the month of April, 2013 he had brought his sister with him. He stated that the accused persons asked him that if you are taking your sister alongwith you then you have to leave her back in their house. PW-6 has also stated that on 4th of May, 2013 in morning his sister had made a complaint on phone that the accused persons were harassing her. He has stated that on the said date he went to the house of his sister alongwith his wife namely Amrita (PW-9) and they spent whole day in the house of respondents. It is pertinent to mention that at this stage he did not say that there was any torture or harassment by the respondents with the deceased or any demand of dowry. His wife Amrita (PW-9) was also present with them. His sister wanted to come alongwith him but she was not permitted by the accused persons. On the same day at about 3:30 PM he was informed by accused Vinod on telephone that his sister has hanged herself and died. Immediately, he had proceeded to the house of the respondents and the deceased was taken to the hospital but she was declared dead.

8. The statement of Gourishankar (PW-6) regarding demand of motorcycle and gold ear rings has not been supported by statement of Amrita (PW-9) but she has stated that most of the time the quarrel was regarding the demand of the deceased for going to her parents house. She has deposed that on the date of incident i.e. 4/05/2013 the main issue of quarrel in the family was regarding leaving of in-laws' house by Surekha without their permission. Amrita (PW-9) has also stated that the respondents did not agree to send Surekha with Gourishankar and they said that after the divorce only she could be taken to her parents house. In the present case, Amrita (PW-9)

is sister-in-law (Bhabhi) of deceased who is not a member of the same family of deceased. The other eye witnesses Somnath (PW-1) and Gourishankar (PW-6) are father and brother of deceased respectively. She did not make any allegation that there was any demand of dowry on the date of incident i.e. 4/05/2013 or any torture to the deceased by the respondents. The statement of PW-9 is that there was a quarrel only on the issue of taking Surekha from in-laws' house to her parents house. Though Somnath (PW-1) has deposed that eight days prior to the date of incident, his daughter had informed him about beating by the respondents but the same is not supported by other witnesses. The said act was also not mentioned in his first statement made to police (Exhibit D-1) regarding torture and harassment on the date of incident. The same was not mentioned in merger intimation (Exhibit P-9) and also in the statement (Exhibit D-2) by witness Gourishankar (PW-6).

9. On perusal of Exhibit P-13 which is a report at police station Dhooma on 16/12/2011, it is evident that a complaint was made regarding harassment by husband, mother-in-law, father-in-law and brother-in-law but there was no complaint regarding any demand of dowry and torture by the respondents to the deceased. The police had sent the matter to Parivar Paramarsh Kendra, Lakhnadon as there was no allegation of torture and demand of dowry by the respondents. The trial Court after considering the statements of all witnesses recorded a finding that prosecution has failed to establish the basic ingredients under section 304-B of IPC so as to attract presumption u/s 113-B of Indian Evidence Act.

10. The trial Court further recorded a finding that the prosecution has failed to prove the offences u/s 302 and 306 of IPC in absence of any *mens rea*. There is neither ocular nor medical evidence to establish that the respondents had murdered the deceased or abated her to commit suicide. As stated in the preceding paragraph by detailed judgment of 84 pages, the trial Court after taking into consideration the statement of witnesses and the record and after evaluation of oral and documentary evidence has held that the prosecution has failed to prove the basic ingredients of offence of dowry death u/s 304-B of IPC read with section 113-B of Indian Evidence Act and also offence under Sections 302 and 306 of IPC.

11. The Apex Court has held in the case of *Mahavir Singh Vs. State of M.P.*, (2016) 10 SCC 220 that in the cases of acquittal by the court of law, the court has to be very cautious in interfering in an appeal unless there are

compelling and substantial grounds to interfere with the order of acquittal. The relevant paras 11 and 12 of the said judgment of *Mahavir Singh* (supra) quoted as under:-

“11. We have heard the learned counsel on either side at length and perused the material available on record. Now it is imperative to look into the scope of interference by the appellate Court in an appeal against acquittal and whether the High Court was justified in convicting the accused under Section 302, IPC by reversing the order of acquittal passed by the Trial Court.

12. In the criminal jurisprudence, an accused is presumed to be innocent till he is convicted by a competent Court after a full-fledged trial, and once the Trial Court by cogent reasoning acquits the accused, then the reaffirmation of his innocence places more burden on the appellate Court while dealing with the appeal. No doubt, it is settled law that there are no fetters on the power of the appellate Court to review, reappraise and reconsider the evidence both on facts and law upon which the order of acquittal is passed. But the court has to be very cautious in interfering with an appeal unless there are compelling and substantial grounds to interfere with the order of acquittal. The appellate Court while passing an order has to give clear reasoning for such a conclusion.”

12. In view of the aforesaid findings recorded by the trial Court and the law laid down by the Apex Court, we do not find any illegality or perversity in the impugned order and there are no compelling and substantial grounds to interfere with the order of acquittal. Hence, application for leave to appeal is dismissed.

Application dismissed.