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Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 15(3) & 29 – Dismissal – Procedure – Departmental enquiry – **Penalty of withholding three increments inflicted – Later, again a notice issued for dismissal – Writ petition filed whereby stay was granted – Department withdrew the notice for dismissal and maintained previous penalty – Petition dismissed as infructuous – Again a notice issued and petitioner was dismissed – Held – Such order of dismissal**

would be in defiance to order of Court – Such dismissal is arbitrary and illegal – Provisions of Rule 15 and 29 not complied with – Impugned orders quashed – Petitioner directed to be re-instated if not attained age of superannuation, but will have to suffer the earlier penalty imposed – Petition partly allowed. [K.K. Sharma Vs. M.P. Power Management Co. Ltd.] ...2657

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 15(3) व 29 – पदच्युति – प्रक्रिया – विभागीय जांच – तीन वेतनवृद्धियां रोकने की शास्ति अधिरोपित की गई – बाद में, पुनः पदच्युति हेतु एक नोटिस जारी किया गया – रिट याचिका प्रस्तुत की गई जिसमें रोक प्रदान की गई थी – विभाग ने पदच्युति का नोटिस वापस लिया और पूर्वतर शास्ति को बनाए रखा – याचिका को निष्फल हो जाने से खारिज किया गया – पुनः एक नोटिस जारी किया गया और याची को पदच्युत किया गया – अभिनिर्धारित – पदच्युति का उक्त आदेश, न्यायालय के आदेश की अवज्ञा में होगा – उक्त पदच्युति, मनमानी एवं अवैध है – नियम 15 व 29 के उपबंधों का अनुपालन नहीं किया गया – आक्षेपित आदेश अभिखंडित – याची को बहाल करने के लिए निदेशित किया गया, यदि उसने अधिवार्षिकी आयु प्राप्त न की हो परंतु उसे पूर्वतर अधिरोपित शास्ति भुगतनी पड़ेगी – याचिका अंशतः मंजूर। (के.के. शर्मा वि. एम.पी. पॉवर मेनेजमेन्ट कं. लि.) ...2657

Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 29 – Power of Review – Procedure **– Held – If earlier order of penalty is required to be changed to enhance penalty, it would amount to review of earlier order and such power can be exercised by appellate authority – In present case, subsequent notice or order of penalty has not been passed by appellate authority reviewing previous order. [K.K. Sharma Vs. M.P. Power Management Co. Ltd.]** ...2657

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 29 – पुनर्विलोकन की शक्ति – प्रक्रिया – अभिनिर्धारित – यदि शास्ति में वृद्धि हेतु शास्ति के पूर्वतर आदेश को बदलना अपेक्षित है, यह पूर्वतर आदेश के पुनर्विलोकन की कोटि में आएगा और उक्त शक्ति का प्रयोग केवल अपीली प्राधिकारी द्वारा किया जा सकता है – वर्तमान प्रकरण में, अपीली प्राधिकारी द्वारा पूर्वतर आदेश का पुनर्विलोकन करते हुए शास्ति का पश्चात्वर्ती नोटिस या आदेश पारित नहीं किया गया है। (के.के. शर्मा वि. एम.पी. पॉवर मेनेजमेन्ट कं. लि.) ...2657

Civil Services (Pension) Rules, M.P. 1976, Rule 9(2)(b)(i) – Disciplinary Proceedings – Sanction of Governor – Jurisdiction **– Held – It is not necessary to obtain personal sanction of Governor of M.P.**

for taking decision to initiate disciplinary proceedings and if Council of Ministers have taken such decision, it will serve the purpose and meet the requirement of Rule 9 of the Rules of 1976 – Charge sheet served to petitioner in the name of Governor of M.P. cannot be said to be without jurisdiction – Apex Court concluded that such an order authenticated in name of Governor cannot be questioned in any Court on ground that it is made or executed by the Governor and thus is outside the scope of judicial review – No interference required – Appeal dismissed. [Shanti Bavaria (Smt.) Vs. State of M.P.] (DB)...*148

सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 9(2)(बी)(i) – अनुशासनिक कार्यवाहियां – राज्यपाल की मंजूरी – अधिकारिता – अभिनिर्धारित – अनुशासनिक कार्यवाहियों को आरंभ करने का निर्णय लेने के लिए म.प्र. के राज्यपाल की व्यक्तिगत मंजूरी लेना आवश्यक नहीं है और यदि मंत्री परिषद् ने ऐसा निर्णय लिया है, यह, 1976 के नियमों के नियम 9 के प्रयोजन की पूर्ति एवं अपेक्षा को पूरा करेगा – याची को म. प्र. के राज्यपाल के नाम से तामील आरोप पत्र बिना अधिकारिता का नहीं कहा जा सकता। – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि राज्यपाल के नाम से अधिप्रमाणित ऐसे किसी आदेश पर किसी न्यायालय में इस आधार पर प्रश्न नहीं उठाया जा सकता कि उसे राज्यपाल द्वारा बनाया या निष्पादित किया गया है और इसलिए न्यायिक पुनर्विलोकन की परिधि से बाहर है – किसी हस्तक्षेप की आवश्यकता नहीं – अपील खारिज। (शांती बावरिया (श्रीमती) वि. म.प्र. राज्य) (DB)...*148

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Criminal Procedure Code, 1973 (2 of 1974), Sections 177, 178 & 179 – Territorial Jurisdiction **– Held – Combine/joint search operation undertaken by Income Tax department simultaneously at Bhopal and Aurangabad – Offence can be tried by Courts otherwise competent at both aforementioned places – Further held – The locker eventually located, though at Aurangabad, has perceptible co-relation/ nexus with subject of assessment and appellants filed their return at Bhopal – Complaint lodged at Bhopal is maintainable – Objection rejected. [Babita Lila Vs. Union of India]** (SC)...2587

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 177, 178 व 179 – क्षेत्रीय अधिकारिता – अभिनिर्धारित – आय कर विभाग द्वारा एक साथ भोपाल एवं औरंगाबाद में संयोजित/संयुक्त तलाशी कार्यवाही की गई – उपरोक्त दोनों स्थानों पर अन्यथा सक्षम न्यायालयों द्वारा अपराध का विचारण किया जा सकता है – आगे अभिनिर्धारित – अंततः लॉकर का पता लगाया गया, यद्यपि औरंगाबाद में, निर्धारण के विषय के साथ उसका प्रत्यक्ष सह–संबंध/अंतर्सम्बन्ध है तथा अपीलार्थीगण ने भोपाल में अपनी विवरणी प्रस्तुत की – भोपाल में दर्ज परिवाद पोषणीय है – आक्षेप अस्वीकार किया गया। (बबिता लीला वि. यूनियन ऑफ इंडिया) (SC)...2587

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***Criminal Procedure Code, 1973 (2 of 1974), Section 218* – Framing of Charge – Held – Charge is the parameter set by the Court within which the trial is to be conducted – Framing of Charge thus gives a clear understanding and an opportunity to accused to know the exact offence for which he is tried. [Krishan Mohan Agrawal Vs. State of M.P.]** ...*140

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 218 – आरोप विरचित किया जाना – अभिनिर्धारित – आरोप, न्यायालय द्वारा निर्धारित वह मापदण्ड है जिसके भीतर विचारण संचालित किया जाना होता है – अतः आरोप विरचित किया जाना, अभियुक्त को सटीक अपराध, जिसके लिए उसका विचारण किया जा रहा है, का ज्ञान होने के लिए एक स्पष्ट समझ एवं एक अवसर देता है। (कृष्ण मोहन अग्रवाल वि. म.प्र. राज्य) ...*140

***Criminal Procedure Code, 1973 (2 of 1974), Section 243(2) & 482 – Right of Defence* – Counter case lodged between parties – Accused/petitioners filed application to call the MLC doctor in defence, who has been cited as a prosecution witness in the counter case – Application was dismissed – Challenge to – Held – Right to defence is a valuable right – For ensuring fair trial, opportunity to accused to call his defence witness is necessary – Trial Court directed to allow petitioner to summon MLC doctor – Petition allowed. [Jugal Das Vs. State of M.P.]** ...*139

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 243(2) व 482 – बचाव का अधिकार – पक्षकारों के मध्य प्रति–प्रकरण दर्ज – अभियुक्त/याचीगण ने बचाव में एम एल सी चिकित्सक को बुलाये जाने हेतु आवेदन प्रस्तुत किया, जिसे प्रति–प्रकरण में अभियोजन साक्षी के रूप में उल्लिखित किया गया है – आवेदन खारिज किया गया – को चुनौती – अभिनिर्धारित – बचाव का अधिकार एक मूल्यवान अधिकार है – निष्पक्ष विचारण सुनिश्चित करने के लिए अभियुक्त को उसका बचाव साक्षी बुलाने का अवसर आवश्यक है – याची को एम एल सी चिकित्सक को समन करने की अनुमति देने हेतु विचारण न्यायालय को निदेशित किया गया – याचिका मंजूर। (जुगल दास वि. म.प्र. राज्य) ...*139

***Criminal Procedure Code, 1973 (2 of 1974), Section 397 & 401 – Revision Against Acquittal* – Held – Appellants alongwith other group**

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Criminal Procedure Code, 1973 (2 of 1974), Section 397 & 401 – Revision Against Acquittal – Jurisdiction of High Court – Limited Powers **– Held – In revisionary jurisdiction against acquittal, High Court is not supposed to enter into merits of matter and re-appreciate the evidence and substitute one possible view for another – High Court can set aside the order of acquittal even at the instance of private parties, but this jurisdiction should be exercised in exceptional cases – List of such circumstances, enumerated and discussed. [Deshpal Vs. State of M.P.] (DB)...2717**

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Criminal Procedure Code, 1973 (2 of 1974), Section 482 **– Circumstances where jurisdiction u/S 482 Cr.P.C. can be invoked, discussed and explained, specifying the guidelines of the Apex Court.**

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दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – परिस्थितियां, जहाँ धारा 482 दं.प्र.सं. के अंतर्गत अधिकारिता का अवलंब लिया जा सकता है, सर्वोच्च न्यायालय के दिशानिर्देशों को विनिर्दिष्ट करते हुए विवेचित एवं स्पष्ट की गई। (अमिता श्रीवास्तव (श्रीमती) वि. म.प्र. राज्य) ...2868

Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Police Investigation – Scope & Jurisdiction **– Held – Court in exercise of powers u/S 482 Cr.P.C. cannot direct the police to investigate the case from a particular point of view and cannot supervise investigation by issuing directions as to in what manner it is to be done, as the investigation is the domain of police – Court can interfere with investigation where investigating officer acted in violation of any statutory provisions of law putting personal liberty of person in jeopardy or investigation is not *bonafide* or investigation is tainted being baised or *malafide* – No allegation against any investigating officer – Application dismissed. [Prabal Dogra Vs. Superintendent of Police, Gwalior & State of M.P.] ...2881**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – पुलिस अन्वेषण – व्याप्ति व अधिकारिता – अभिनिर्धारित – न्यायालय दण्ड प्रक्रिया संहिता की धारा 482 के अंतर्गत शक्तियों के प्रयोग में प्रकरण का अन्वेषण किसी विशिष्ट दृष्टिकोण से करने हेतु पुलिस को निदेशित नहीं कर सकता तथा निदेश जारी करके अन्वेषण का पर्यवेक्षण नहीं कर सकता कि यह किस रीति से किया जाना है, क्योंकि अन्वेषण पुलिस का अधिकार क्षेत्र है – न्यायालय अन्वेषण में हस्तक्षेप कर सकता है जहाँ अन्वेषण अधिकारी ने व्यक्ति की दैहिक स्वतंत्रता को संकट में डालते हुए विधि के किसी भी कानूनी उपबंधों का उल्लंघन किया हो या अन्वेषण सद्भावपूर्ण न हो या अन्वेषण पक्षपातपूर्ण अथवा असद्भावपूर्वक होने के कारण दूषित हो – किसी अन्वेषण अधिकारी के विरूद्ध कोई अभिकथन नहीं – आवेदन खारिज। (प्रबल डोगरा वि. सुपरिंटेंडेंट ऑफ पुलिस, ग्वालियर एण्ड म.प्र. राज्य) ...2881

Criminal Procedure Code, 1973 (2 of 1974), Section 482 – See – Negotiable Instruments Act, 1881, Section 138 & 141 **[Ganesh Vs. Chhidamilal] ...*136**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – देखें – परक्राम्य लिखत अधिनियम, 1881, धारा 138 व 141 (गणेश वि. छिदामीलाल) ...*136

Criminal Procedure Code, 1973 (2 of 1974), Section 482 – See

– *Penal Code, 1860, Section 415 & 420* [Amita Shrivastava (Smt.) Vs. State of M.P.] ...2868

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – देखें – दण्ड संहिता, 1860, धारा 415 व 420 (अमिता श्रीवास्तव (श्रीमती) वि. म.प्र. राज्य) ...2868

Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Constitution – Article 21 – Police Investigation – Documents – Held – Where material produced by accused is such to conclude that his defence is based on sound, reasonable and indubitable facts and same rules out the assertions made in complaint, High Court can always look into those documents, even at an early stage of trial – Free and fair investigation is the fundamental right of accused as guaranteed under Article 21 of Constitution. [Prabal Dogra Vs. Superintendent of Police, Gwalior & State of M.P.] ...2881

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं संविधान – अनुच्छेद 21 – पुलिस अन्वेषण – दस्तावेज – अभिनिर्धारित – जहाँ अभियुक्त द्वारा प्रस्तुत सामग्री ऐसा निष्कर्षित करने हेतु है कि उसका बचाव ठोस, युक्तियुक्त एवं निःशंक तथ्यों पर आधारित है तथा वे परिवाद में किये गये प्राख्यान को खारिज करते हैं, उच्च न्यायालय विचारण के शुरूआती प्रक्रम पर भी सदैव उन दस्तावेजों पर विचार कर सकता है – स्वतंत्र और निष्पक्ष अन्वेषण अभियुक्त का मूलभूत अधिकार है जैसा कि संविधान के अनुच्छेद 21 के अंतर्गत प्रत्याभूत है। (प्रबल डोगरा वि. सुपरिंटेंडेंट ऑफ पुलिस, ग्वालियर एण्ड म.प्र. राज्य) ...2881

Electricity Act (36 of 2003), Sections 126(4) & (5), 135 & 154(5) – Electricity Theft Case – Civil Liability – Petitioner held guilty for offence u/S 135 of the Act of 2003 and civil liability was calculated applying Section 126 (5) & (6) of the Act – Challenge to – Held – Trial Court wrongly applied provisions for calculating the loss cost – It was obligatory upon trial Court to determine civil liability applying Section 154(5) of the Act of 2003 which prescribes procedure for determination of civil liability for theft of electrical energy in terms of money – Impugned order relating to determination of civil liability is set aside – Revision allowed. [M.P. Rajya Vidyut Mandal (M.P.P.K.V.V. Co. Ltd.) Vs. Indrajeet Sahu] ...*141

विद्युत अधिनियम (2003 का 36), धाराएँ 126(4) व 5, 135 व 154(5) – विद्युत चोरी का प्रकरण – सिविल दायित्व – याची को 2003 के अधिनियम की धारा

135 के अंतर्गत अपराध का दोषी ठहराया गया तथा अधिनियम की धारा 126(5) व (6) को लागू करते हुए सिविल दायित्व की संगणना की गई थी – को चुनौती – अभिनिर्धारित – विचारण न्यायालय ने हानि की कीमत की संगणना करने हेतु उपबंधो को गलत रूप से लागू किया – विचारण न्यायालय 2003 के अधिनियम की धारा 154(5), जो विद्युत उर्जा की चोरी हेतु, रकम के रूप में, सिविल दायित्व के अवधारण हेतु प्रक्रिया विहित करती है को लागू करते हुए सिविल दायित्व का अवधारण करने के लिए बाध्यताधीन था – सिविल दायित्व के अवधारण से संबंधित आक्षेपित आदेश अपास्त किया गया – पुनरीक्षण मंजूर। (एम.पी. राज्य विद्युत मंडल (एम.पी.पी.के.व्ही.व्ही. कं. लि.) वि. इन्द्रजीत साहू) ...*141

Evidence Act (1 of 1872), Section 6 – See – Penal Code, 1860, Section 376 **[Ramnath Vs. State of M.P.] (DB)...2706**

साक्ष्य अधिनियम (1872 का 1), धारा 6 – देखें – दण्ड संहिता, 1860, धारा 376 (रामनाथ वि. म.प्र. राज्य) **(DB)...2706**

Evidence Act (1 of 1872), Section 106 – See – Penal Code, 1860, Sections 302, 364-A, 201 & 120-B **[In Reference Vs. Rajesh @ Rakesh] (DB)...2826**

साक्ष्य अधिनियम (1872 का 1), धारा 106 – देखें – दण्ड संहिता, 1860, धाराएँ 302, 364–ए, 201 व 120–बी (इन रेफ्रेन्स वि. राजेश उर्फ राकेश) **(DB)...2826**

Evidence Act (1 of 1872), Section 114-A – See – Penal Code, 1860, Section 376(2)(g) **[Dhanraj Singh Vs. State of M.P.] ...*134**

साक्ष्य अधिनियम (1872 का 1), धारा 114–ए – देखें – दण्ड संहिता, 1860, धारा 376(2)(जी) (धनराज सिंह वि. म.प्र. राज्य) **...*134**

Evidence Act (1 of 1872), Section 114(e) – See – Motor Vehicles Rules, M.P. 1994, Rule 8-A **[Rajesh Kumar Miglani Vs. State of M.P.] (DB)...2671**

साक्ष्य अधिनियम (1872 का 1), धारा 114(ई) – देखें – मोटर यान नियम, म.प्र. 1994, नियम 8–ए (राजेश कुमार मिगलानी वि. म.प्र. राज्य) **(DB)...2671**

Income Tax Act (43 of 1961), Section 132 & 246, Criminal Procedure Code, 1973 (2 of 1974), Section 195 and Penal Code (45 of 1860), Sections 191, 193 & 200 – Complaint Against Assessee – Competent Authority to File Complaint **– Deputy Director of Income Tax (Investigation) Bhopal lodged complaint before CJM Bhopal – Held –**

Deputy Director cannot be construed to be an authority to whom appeal would ordinarily lie from decisions/orders of the Income Tax Officers involved in search proceedings, thus not empowered to lodge complaint against assessee – Complaint unsustainable in law having been filed by authority, incompetent in terms of Section 195 of Cr.P.C. and hence quashed – Appeal allowed. [Babita Lila Vs. Union of India] (SC)...2587

आयकर अधिनियम (1961 का 43), धारा 132 व 246, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 195 एवं दण्ड संहिता (1860 का 45), धाराएँ 191, 193 व 200 – निर्धारिती के विरूद्ध परिवाद – परिवाद प्रस्तुत करने के लिए सक्षम प्राधिकारी – उपनिदेशक, आय कर (अन्वेषण), भोपाल ने सी.जे.एम., भोपाल के समक्ष परिवाद दर्ज किया – अभिनिर्धारित – उपनिदेशक को एक ऐसा प्राधिकारी होने का अर्थान्वयन नहीं किया जा सकता जिसे तलाशी कार्यवाहियों में शामिल आयकर अधिकारियों के निर्णयो/आदेशों की अपील सामान्यतः प्रस्तुत होगी, अतः निर्धारिती के विरूद्ध परिवाद दर्ज करने के लिए सशक्त नहीं – परिवाद, दं.प्र.सं. की धारा 195 के निबंधनों में एक अक्षम प्राधिकारी द्वारा प्रस्तुत किये जाने से कायम रखने योग्य नहीं और अतः अभिखंडित – अपील मंजूर। (बबिता लीला वि. यूनियन ऑफ इंडिया) (SC)...2587

Land Revenue Code, M.P. (20 of 1959), Section 50 & 240 – See – Adim Jan Jatiyon Ka Sanrakshan (Vrakshon Me Hit) Adhiniyam, M.P., 1999, Section 9 **[Samlu Gond Vs. State of M.P.] ...2684**

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 50 व 240 – देखें – आदिम जन जातियों का संरक्षण (वृक्षों में हित) अधिनियम, म.प्र., 1999, धारा 9 (समलू गोंड वि. म.प्र. राज्य) ...2684

Land Revenue Code, M.P. (20 of 1959), Section 117 – Adverse Possession – Presumption **– Held – Adverse possession is a question of fact – Plaintiff has not filed any document in support of purchase of land – No sale deed or any witness to sale have been examined – Sale is not proved – Revenue records does not establish continuous possession over 30 years on disputed land – No presumption can be drawn u/S 117 of the Code of 1959. [Ramakant Pathak Vs. State of M.P.] ...2699**

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 117 – प्रतिकूल कब्जा – उपधारणा – अभिनिर्धारित – प्रतिकूल कब्जा, एक तथ्य का प्रश्न है – वादी ने भूमि के क्रय के समर्थन में कोई दस्तावेज प्रस्तुत नहीं किया है – किसी विक्रय विलेख

का या विक्रय के किसी साक्षी का परीक्षण नहीं किया गया – विक्रय सिद्ध नहीं है – राजस्व अभिलेख, विवादित भूमि पर 30 वर्षों से अधिक का निरंतर कब्जा स्थापित नहीं करते – 1959 के संहिता की धारा 117 के अंतर्गत कोई उपधारणा नहीं निकाली जा सकती। (रमाकांत पाठक वि. म.प्र. राज्य) ...2699

Land Revenue Code, M.P. (20 of 1959), Section 158(d)(ii) – Bhumiswami Rights **– Held – In revenue records, disputed lands are recorded as "Tank" since 1958 and even before – Plaintiff's witnesses also establishes that disputed land is a "Tank" used for *nistar* purposes by villagers – Plaintiff's father or Plaintiff not entitled the conferral of Bhumiswami rights – Courts below rightly recorded the findings and dismissed the suit – Appeal dismissed. [Ramakant Pathak Vs. State of M.P.]** ...2699

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 158(डी)(ii) – भूमिस्वामी अधिकार – अभिनिर्धारित – राजस्व अभिलेखों में, विवादित भूमियाँ 1958 से एवं उससे पूर्व भी "जलाशय" के रूप में अभिलिखित – वादी के साक्षीगण भी स्थापित करते हैं कि विवादित भूमि एक "जलाशय" है जिसका ग्रामीणों द्वारा निस्तार के प्रयोजन हेतु उपयोग होता है – वादी का पिता या वादी, भूमिस्वामी अधिकारों का प्रदान किये जाने के लिए हकदार नहीं – निचले न्यायालयों ने उचित रूप से निष्कर्ष अभिलिखित किये तथा वाद खारिज किया – अपील खारिज। (रमाकांत पाठक वि. म. प्र. राज्य) ...2699

Land Revenue Code, M.P. (20 of 1959), Section 253 – See – Adim Jan Jatiyon Ka Sanrakshan (Vrakshon Me Hit) Adhiniyam, M.P., 1999, Section 4 & 9(2) **[Samlu Gond Vs. State of M.P.]** ...2684

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 253 – देखें – आदिम जन जातियों का संरक्षण (वृक्षों में हित) अधिनियम, म.प्र., 1999, धारा 4 व 9(2) (समलू गोंड वि. म.प्र. राज्य) ...2684

Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 7-B – Appeal & Reference – Limitation – Computation **– Held – Under clause 29 of agreement which is an arbitration clause, Superintending Engineer is not rendered *functus officio* merely because a dispute is not decided within 60 days, a decision even after 60 days is a decision under said clause and is appealable thereunder – Reference filed in terms of Section 7-B read with appended proviso within stipulated time is maintainable – Revision allowed. [Viva Construction Co. (M/s.) Vs. State of M.P.]** (DB)...2774

माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 7–बी – अपील व निर्देश – परिसीमा – संगणना – अभिनिर्धारित – करार के खंड 29, जो कि एक माध्यस्थम खंड है, के अंतर्गत, मात्र इसलिए कि एक विवाद को 60 दिन के भीतर विनिश्चित नहीं किया गया है, अधीक्षण यंत्री पदकार्य निवृत्त नहीं हो जाता, यहां तक कि 60 दिन पश्चात् का विनिश्चय भी उक्त खंड के अंतर्गत एक विनिश्चय है तथा उसके अंतर्गत अपीलीय है – धारा 7–बी सहपठित संलग्न परंतुक के निबंधनों में, नियत समय के भीतर प्रस्तुत निर्देश पोषणीय है – पुनरीक्षण मंजूर। (वीवा कंस्ट्रक्शन कं. (मे.) वि. म.प्र. राज्य) (DB)...2774

Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 7-B – Term "Decision" – **Held – An indecisiveness or an indecision on the part of Superintending Engineer can never be construed to be a "decision" giving rise to avail remedy of appeal, because unless the forum of final authority is exhausted, aggrieved person cannot avail the remedy u/S 7-B of the Adhiniyam of 1983. [Viva Construction Co. (M/s.) Vs. State of M.P.]** (DB)...2774

माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 7–बी – शब्द "विनिश्चय" – अभिनिर्धारित – अधीक्षण यंत्री की ओर से अनिश्चयपूर्वकता या अनिश्चय का अर्थान्वयन कभी भी एक "विनिश्चय" नहीं किया जा सकता जिससे अपील के उपचार का अवलंब उत्पन्न होता है, क्योंकि जब तक अंतिम प्राधिकारी के फोरम को निःशेष न किया गया हो, व्यथित व्यक्ति, 1983 के अधिनियम की धारा 7–बी के अंतर्गत उपचार का अवलंब नहीं ले सकता। (वीवा कंस्ट्रक्शन कं. (मे.) वि. म.प्र. राज्य) (DB)...2774

Minor Mineral Rules, M.P. 1996, Rule 2(xvi-b) & 68(1) Third Proviso – Term "Contractor" – **Held – Contractor as defined in Rule 2(xvi-b) is a contractor who is granted trade quarry – Petitioners have not been granted trade quarry, they are the contractors engaged in Government contract – Expression contractor in third proviso to Rule 68(1) is clarified by words "engaged in construction work" – It has to be read together and not disjunctively. [Pankaj Kumar Rai (M/s.) Vs. State of M.P.]** (FB)...2620

गौण खनिज नियम, म.प्र. 1996, नियम 2(xvi-बी) व 68(1) तृतीय परंतुक – शब्द "ठेकेदार" – अभिनिर्धारित – नियम 2(xvi-बी) में यथा परिभाषित ठेकेदार एक ऐसा ठेकेदार है जिसे व्यापारिक खदान प्रदान की गई है – याचीगण को व्यापारिक खदान प्रदान नहीं की गई है, वे सरकारी संविदा में लगे हुए ठेकेदार हैं – नियम 68(1) के तृतीय परंतुक में अभिव्यक्ति ठेकेदार को "निर्माण कार्य में लगे

हुए" शब्दों द्वारा स्पष्ट किया गया है – इसे एक साथ पढ़ा जाना चाहिए एवं न कि वियोजित रूप से। (पंकज कुमार राय (मे.) वि. म.प्र. राज्य) (FB)...2620

Minor Mineral Rules, M.P. 1996, Rule 4 & 68(1) Third Proviso – Statutory Interpretation – Principle of Harmoniuos Construction – **Held – No word in statute is superfluous and each word has its meaning – A proviso to statute has to be read as a whole by giving harmonious contruction to all provisions of law so that none of the provisions is rendered redundant – In view of such principle, third proviso is additional relaxation to Rule 4 and Rule 68(1) and is not illegal nor enlarges the scope of Rule 68(1) of the Rules of 1996. [Pankaj Kumar Rai (M/s.) Vs. State of M.P.]** (FB)...2620

गौण खनिज नियम, म.प्र. 1996, नियम 4 व 68(1) तृतीय परंतुक – कानूनी निर्वचन – समन्वयपूर्ण अर्थान्वयन का सिद्धांत – अभिनिर्धारित – कानून का कोई शब्द निरर्थक नहीं है एवं प्रत्येक शब्द का अपना अर्थ है – कानून के किसी परंतुक को विधि के सभी उपबंधों के साथ समन्वयपूर्ण अर्थान्वयन देते हुए, संपूर्णता से पढ़ा जाना चाहिए जिससे कि कोई भी उपबंध व्यर्थ न हो जाए – उक्त सिद्धांत को दृष्टिगत रखते हुए, तृतीय परंतुक, नियम 4 एवं नियम 68(1) के लिए अतिरिक्त रियायत है तथा न तो अवैध है न ही नियम 1996 के नियम 68(1) के विस्तार को बढ़ाता है। (पंकज कुमार राय (मे.) वि. म.प्र. राज्य) (FB)...2620

Minor Mineral Rules, M.P. 1996, Rule 68(1) Third Proviso – "No Mining Dues" Certificate **– Held – Since minor mineral vests in State and there is absolute prohibition in extraction of mineral other than by quarry lease or a trade quarry or permit quarry, therefore contractor who is engaged in construction work is required to prove that such mineral is royalty paid – If State Government insist on "No Mining Dues" Certificate, the same cannot be said to be illegal – Further, State Government advised to develop and adopt alternate mechanism of issuance of online "No Mining Dues" certificate. [Pankaj Kumar Rai (M/s.) Vs. State of M.P.]** (FB)...2620

गौण खनिज नियम, म.प्र. 1996, नियम 68(1) तृतीय परंतुक – "खनन अदेयता" प्रमाण पत्र – अभिनिर्धारित – चूंकि गौण खनिज राज्य में निहित होते हैं एवं खदान पट्टा या एक व्यापारिक खदान या खदान अनुज्ञा के अलावा खनिज के निष्कर्षण का पूर्ण प्रतिषेध है इसलिए निर्माण कार्य में लगे हुए ठेकेदार द्वारा यह साबित किया जाना अपेक्षित है कि ऐसा खनिज रायल्टी भुगतान किया हुआ खनिज है – यदि राज्य सरकार "खनन अदेयता" प्रमाण पत्र का आग्रह करती है उसे अवैध नहीं कहा जा सकता –

इसके अतिरिक्त, राज्य सरकार को ऑनलाईन "खनन अदेयता" प्रमाण पत्र जारी करने की वैकल्पिक क्रियाविधि विकसित करने एवं अपनाने के लिए सलाह दी गई। (पंकज कुमार राय (मे.) वि. म.प्र. राज्य) (FB)...2620

Minor Mineral Rules, M.P. 1996, Rule 68(1) Third Proviso – "No Mining Dues" Certificate – Periodical Certificates – **Held – Condition of issuance of "No Mining Dues" certificate on furnishing of copy of work completion certificate is not reasonable – Running bills require periodical payments – Mining officer shall give "No Mining Dues" certificate at least quarterly on basis of running bills submitted by contractor engaged in construction work. [Pankaj Kumar Rai (M/s.) Vs. State of M.P.]** (FB)...2620

गौण खनिज नियम, म.प्र. 1996, नियम 68(1) तृतीय परंतुक – "खनन अदेयता" प्रमाण पत्र – सामयिक प्रमाण पत्र – अभिनिर्धारित – कार्य संपादन प्रमाण पत्र की प्रति प्रस्तुत करने पर "खनन अदेयता" प्रमाण पत्र को जारी करने की शर्त युक्तियुक्त नहीं है – चालू बिलों पर सामयिक भुगतान अपेक्षित है – खनन अधिकारी निर्माण कार्य में लगे ठेकेदार द्वारा प्रस्तुत किये गये चालू बिलों के आधार पर कम से कम त्रैमासिक रूप से "खनन अदेयता प्रमाण पत्र" देगा। (पंकज कुमार राय (मे.) वि. म.प्र. राज्य) (FB)...2620

Motor Vehicles Act (59 of 1988), Section 65(2)(d) and Motor Vehicles Rules, M.P. 1994, Rule 48(2) – Inconsistency – **Held – The condition that an application for issue or renewal of fitness certificate shall be accompanied with tax clearance certificate is not inconsistent with any provision of Central Legislation (Act of 1988). [Rajesh Kumar Miglani Vs. State of M.P.]** (DB)...2671

मोटर यान अधिनियम (1988 का 59), धारा 65(2)(डी) एवं मोटर यान नियम, म.प्र. 1994, नियम 48(2) – असंगति – अभिनिर्धारित – शर्त कि उपयुक्तता प्रमाणपत्र के नवीकरण या जारी किये जाने हेतु आवेदन के साथ कर समाशोधन प्रमाणपत्र होना चाहिए, केन्द्रीय विधान (1988 का अधिनियम) के किसी उपबंध के साथ असंगत नहीं है। (राजेश कुमार मिगलानी वि. म.प्र. राज्य) (DB)...2671

Motor Vehicles Act (59 of 1988), Section 65(2)(d) Motoryan Karadhan Adhiniyam, M.P., (25 of 1991), Section 3 and Motor Vehicles Rules, M.P. 1994, Rule 48(2) – Application for Fitness Certificate – Requirement of 'No Dues Certificate' – Competence of State Legislature **– Held – Act of 1988 being Central Legislation does not contemplate grant**

of fitness certificate and it is left to be framed by State Government, therefore, issuance of fitness certificate and payment of tax falls within legislative competence of State in terms of Section 65(2)(d) of the Act of 1988 and u/S 3 of the Adhiniyam of 1991 – Rule 48(2) of the Rules of 1994 contemplating requirement of no dues certificate for grant of fitness certificate cannot be said to be illegal – Petition dismissed. [Rajesh Kumar Miglani Vs. State of M.P.] (DB)...2671

मोटर यान अधिनियम (1988 का 59), धारा 65(2)(डी), मोटरयान कराधान अधिनियम, म.प्र. (1991 का 25), धारा 3 एवं मोटर यान नियम, म.प्र. 1994, नियम 48(2) – उपयुक्तता प्रमाणपत्र हेतु आवेदन – 'अदेयता प्रमाणपत्र' की अपेक्षा – राज्य विधान मंडल की सक्षमता – अभिनिर्धारित – 1988 का अधिनियम केन्द्रीय विधान होने के नाते उपयुक्तता प्रमाणपत्र का प्रदान अनुध्यात नहीं करता तथा इसे राज्य सरकार द्वारा विरचित किये जाने के लिए छोड़ा गया है, इसलिए, उपयुक्तता प्रमाणपत्र जारी किया जाना एवं कर का भुगतान, 1988 के अधिनियम की धारा 65(2)(डी) के निबंधनों में तथा 1991 के अधिनियम की धारा 3 के अंतर्गत राज्य की विधायी सक्षमता के भीतर आते हैं – उपयुक्तता प्रमाणपत्र के प्रदान किये जाने हेतु अदेयता प्रमाणपत्र की अपेक्षा अनुध्यात करता हुआ 1994 के नियमों का नियम 48(2), अवैध नहीं कहा जा सकता – याचिका खारिज। (राजेश कुमार मिगलानी वि. म.प्र. राज्य) (DB)...2671

Motor Vehicles Rules, M.P. 1994, Rule 8-A and Evidence Act (1 of 1872), Section 114(e) – Data Updation in Official Website – Presumption **– Held – There is a presumption that official acts are performed regularly in terms of Section 114(e) of the Act of 1872, thus there will be a presumption of correctness of information available on website – Aggrieved transporter cannot be permitted to approach writ Court submitting that data on website is not updated and reflecting non-payment of tax – However, State directed to update the entire data in website and make necessary amendments in software, if required. [Rajesh Kumar Miglani Vs. State of M.P.] (DB)...2671**

मोटर यान नियम, म.प्र. 1994, नियम 8–ए एवं साक्ष्य अधिनियम (1872 का 1), धारा 114(ई) – अधिकृत वेबसाईट में डाटा को वर्तमान के अनुसार संपादित करते रहना – उपधारणा – अभिनिर्धारित – एक उपधारणा है कि 1872 के अधिनियम की धारा 114(ई) के निबंधनों में नियमित रूप से शासकीय कार्य किये जाते हैं इसलिए वेबसाईट पर उपलब्ध जानकारी की शुद्धता की उपधारणा की जाएगी – व्यथित परिवाहक को रिट न्यायालय के समक्ष जाकर यह निवेदन करने

की अनुमति नहीं दी जा सकती कि वेबसाईट का डाटा वर्तमान के अनुसार संपादित नहीं है एवं कर का असंदाय प्रतिबिंबित कर रहा है – तथापि राज्य को वेबसाईट में संपूर्ण डाटा वर्तमान के अनुसार संपादित करने एवं यदि आवश्यक हो सॉफ्टवेअर में आवश्यक संशोधन करने के लिए निदेशित किया गया। (राजेश कुमार मिगलानी वि. म.प्र. राज्य) (DB)...2671

Motor Vehicles Rules, M.P. 1994, Rule 48(2) – See – Motor Vehicles Act, 1988, Section 65(2)(d) **[Rajesh Kumar Miglani Vs. State of M.P.]** (DB)...2671

मोटर यान नियम, म.प्र. 1994, नियम 48(2) – देखें – मोटर यान अधिनियम, 1988, धारा 65(2)(डी) (राजेश कुमार मिगलानी वि. म.प्र. राज्य) (DB)...2671

Motoryan Karadhan Adhiniyam, M.P., (25 of 1991), Section 3 – See – Motor Vehicles Act, 1988, Section 65(2)(d) **[Rajesh Kumar Miglani Vs. State of M.P.]** (DB)...2671

मोटरयान कराधान अधिनियम, म.प्र. (1991 का 25), धारा 3 – देखें – मोटर यान अधिनियम, 1988, धारा 65(2)(डी) (राजेश कुमार मिगलानी वि. म.प्र. राज्य) (DB)...2671

Municipal Corporation Act, M.P. (23 of 1956), Section 307(5) – Disputed Ownership – **Held – Proceedings u/S 307(5) of the Act of 1956 is not like civil suit where title of parties can be decided but *prima facie* it can be looked into whether the person who has applied for building permission is owner or not. [Shailendri Goswami (Smt.) Vs. Indore Municipal Corporation]** ...*146

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 307(5) – विवादित स्वामित्व – अभिनिर्धारित – 1956 के अधिनियम की धारा 307(5) के अंतर्गत कार्यवाहियाँ सिविल वाद के समान नहीं है जहां पक्षकारों का हक विनिश्चित किया जा सकता है, परन्तु प्रथम दृष्ट्या इस पर विचार किया जा सकता है कि क्या वह व्यक्ति जिसने निर्माण की अनुमति हेतु आवेदन किया है, उसका स्वामी है अथवा नहीं। (शैलेन्द्री गोस्वामी (श्रीमती) वि. इंदौर म्यूनिसिपल कारपोरेशन) ...*146

Negotiable Instruments Act (26 of 1881), Section 138 & 141 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Necessary Party – Maintainability of Complaint – **Held – Cheque issued by Directors of Company – In a complaint u/S 138 of the Act of 1881, when Company is not arrayed as a party/accused, criminal**

proceedings issued against Directors is not maintainable – Proceedings of criminal cases quashed – Petitions allowed. [Ganesh Vs. Chhidamilal] ...*136

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 व 141 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – आवश्यक पक्षकार – परिवाद की पोषणीयता – अभिनिर्धारित – कम्पनी के निदेशकों द्वारा चेक जारी किया गया – 1881 के अधिनियम की धारा 138 के अंतर्गत परिवाद में, जब कम्पनी को पक्षकार/अभियुक्त नहीं बनाया गया है, निदेशकों के विरूद्ध जारी की गई दाण्डिक कार्यवाहियां पोषणीय नहीं है – दाण्डिक प्रकरणों की कार्यवाहियां अभिखंडित – याचिकाऐं मंजूर। (गणेश वि. छिदामीलाल) ...*136

Penal Code (45 of 1860), Sections 191, 193 & 200 – See – Income Tax Act, 1961, Section 132 & 246 [Babita Lila Vs. Union of India] (SC)...2587

दण्ड संहिता (1860 का 45), धाराएँ 191, 193 व 200 – देखें – आयकर अधिनियम, 1961, धारा 132 व 246 (बबिता लीला वि. यूनियन ऑफ इंडिया) (SC)...2587

Penal Code (45 of 1860), Sections 201, 302 & 376(2)(g) r/w 34 – Gang Rape and Murder – Circumstantial Evidence – Motive – Held – In case of murder based on circumstantial evidence, motive gains significance – It is established that soon after rape of prosecutrix, she and her companion was murdered so that they would not come forward to depose against appellants. [In Reference Vs. Ashok] (DB)...2783

दण्ड संहिता (1860 का 45), धाराएँ 201, 302 व 376(2)(जी) सहपठित 34 – सामूहिक बलात्संग एवं हत्या – परिस्थितिजन्य साक्ष्य – हेतु – अभिनिर्धारित – परिस्थितिजन्य साक्ष्य पर आधारित हत्या के प्रकरण में, हेतु महत्व प्राप्त करता है – यह स्थापित किया गया है कि अभियोक्त्री के बलात्संग के तुरंत पश्चात्, उसकी तथा उसके साथी की हत्या की गई थी ताकि अपीलार्थीगण के विरूद्ध अभिसाक्ष्य देने के लिए सामने न आ पायें। (इन रेफ्रेन्स वि. अशोक) (DB)...2783

Penal Code (45 of 1860), Sections 201, 302 & 376(2)(g) r/w 34 – Gang Rape and Murder – Death Sentence – Appreciation of Evidence – Circumstantial Evidence & DNA Report – Prosecutrix was raped and she alongwith her companion were murdered by appellants – Held – As per DNA report, appellant's DNA was matched and was found on underwear and vaginal swab of prosecutrix – Evidence of seizure of

mobile phone & silver payal of prosecutrix and shoes of her companion duly established and proved beyond reasonable doubt – Call details also establishes commission of offence by appellants – Evidence shows that chain of circumstantial evidence is complete – Case do not fall in category of "Rarest of Rare" case – Death sentence modified to life imprisonment – Criminal reference rejected – Appeals allowed to such extent. [In Reference Vs. Ashok] (DB)...2783

दण्ड संहिता (1860 का 45), धाराएँ 201, 302 व 376(2)(जी) सहपठित 34 – सामूहिक बलात्संग एवं हत्या – मृत्युदण्ड – साक्ष्य का मूल्यांकन – परिस्थितिजन्य साक्ष्य व डी.एन.ए. रिपोर्ट – अपीलार्थीगण द्वारा अभियोक्त्री का बलात्संग किया गया था तथा उसके साथ उसके साथी की हत्या की गई थी – अभिनिर्धारित – डी.एन. ए. रिपोर्ट के अनुसार, अपीलार्थी के डी.एन.ए. का मिलान किया गया था तथा वह अभियोक्त्री की अंडरवियर और वैजाइनल स्वैब पर पाया गया था – अभियोक्त्री के मोबाईल फोन व चांदी की पायल तथा उसके साथी के जूते की जब्ती का साक्ष्य सम्यक् रूप से स्थापित हुआ है तथा युक्तियुक्त संदेह से परे साबित हुआ है – कॉल विवरण भी, अपीलार्थीगण द्वारा अपराध कारित किया जाना स्थापित करता है – साक्ष्य दर्शाता है कि परिस्थितिजन्य साक्ष्य की श्रृंखला पूर्ण है – प्रकरण, "विरलतम से विरल" प्रकरण की श्रेणी में नहीं आता है – मृत्युदण्ड को आजीवन कारावास में उपांतरित किया गया – दाण्डिक निर्देश अस्वीकार किया गया – उक्त सीमा तक अपीलें मंजूर। (इन रेफ्रेन्स वि. अशोक) **(DB)...2783**

Penal Code (45 of 1860), Sections 201, 302 & 376(2)(g) r/w 34 – Gang Rape and Murder – Death Sentence – Rarest of Rare Case – Aggravating and Mitigating Circumstances **– Held – Upon comparison of aggravating and mitigating circumstances, the mitigating circumstances have far away outweighed the aggravating circumstances – Further, it is not possible to identify which accused case falls in category of rarest of rare case – Capital punishment imposed is altered to life imprisonment. [In Reference Vs. Ashok] (DB)...2783**

दण्ड संहिता (1860 का 45), धाराएँ 201, 302 व 376(2)(जी) सहपठित 34 – सामूहिक बलात्संग एवं हत्या – मृत्युदण्ड – विरलतम से विरल प्रकरण – गुरूतरकारी तथा कम करने वाली परिस्थितियां – अभिनिर्धारित – गुरूतरकारी एवं कम करने वाली परिस्थितियों की तुलना करने पर, कम करने वाली परिस्थितियां गुरूतरकारी परिस्थितियों से अधिक महत्वपूर्ण हैं – इसके अतिरिक्त, यह पहचानना संभव नहीं है कि किस अभियुक्त का प्रकरण विरलतम से विरल प्रकरण की श्रेणी में आता है – अधिरोपित मृत्युदण्ड को आजीवन कारावास में परिवर्तित किया गया। (इन रेफ्रेन्स वि. अशोक) **(DB)...2783**

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Penal Code (45 of 1860), Section 302 – Murder – Conviction – Life Imprisonment – Appreciation of Evidence – **Appellant administered poison (*Sulphas*) to child of complainant – Complainant saw appellant giving water from *nand* (pot) whereafter child cried loud and died – Held – Despite evidence that appellant took water from nand (pot), the same was neither recovered/seized nor water of the pot was taken for examination – No evidence led by prosecution directly or indirectly that appellant had poison in her possession or from where she procured and in which place same was stored – Prosecution failed to prove necessary ingredients – Appellant discharged – Appeal allowed. [Shanti Bai (Smt.) Vs. State of M.P.]** **(DB)...*147**

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – दोषसिद्धि – आजीवन कारावास – साक्ष्य का मूल्यांकन – अपीलार्थी ने परिवादी के बालक को विष (सल्फास) खिलाया – परिवादी ने अपीलार्थी को नांद (पात्र) से पानी देते देखा था जिसके पश्चात् बालक जोर से चिल्लाया और उसकी मृत्यु हो गई – अभिनिर्धारित – बावजूद इस साक्ष्य के कि अपीलार्थी ने नांद (पात्र) से पानी लिया, उक्त को न तो बरामद/जब्त किया गया, न ही पात्र के पानी को परीक्षण हेतु लिया गया – अभियोजन द्वारा प्रत्यक्ष या अप्रत्यक्ष रूप से कोई साक्ष्य प्रस्तुत नहीं किया गया कि अपीलार्थी के कब्जे में विष था या उसने कहां से उपाप्त किया एवं किस स्थान पर उसका भंडारण किया गया था – अभियोजन आवश्यक घटकों को साबित करने में असफल रहा – अपीलार्थी को आरोपमुक्त किया गया – अपील मंजूर। (शांती बाई (श्रीमती) वि. म.प्र. राज्य) **(DB)...*147**

Penal Code (45 of 1860), Section 302 – Murder – Conviction – Testimony of witnesses – Ocular & Medical Evidence – Discrepancy – Effect **– Held – The only eye witness of the case stated that only one blow was given on the head of deceased whereas the doctor who examined the deceased stated that he found four injuries on his head and further the doctor who performed autopsy stated that he found nine injuries, all on head and face of deceased – A slight discrepancy in medical and oral evidence is not material as the time of incident was 3–3:30 am and there was not much light and all the persons were under the influence of liquor. [Hari Vs. State of M.P.]** **(DB)...*138**

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – दोषसिद्धि – साक्षियों का परिसाक्ष्य – चाक्षुष एवं चिकित्सीय साक्ष्य – विसंगति – प्रभाव – अभिनिर्धारित – प्रकरण के एकमात्र चक्षुदर्शी साक्षी का कथन है कि मृतक के सिर पर केवल एक वार

किया गया था जबकि चिकित्सक, जिसने मृतक का परीक्षण किया था, का कथन है कि उसने उसके सिर पर चार क्षतियां पायी और आगे, चिकित्सक जिसने शव परीक्षण किया था, का कथन है कि उसने नौ क्षतियां पायी, सभी मृतक के सिर एवं चेहरे पर – चिकित्सीय एवं मौखिक साक्ष्य में थोड़ी विसंगति तात्विक नहीं क्योंकि घटना का समय प्रातः 3–3.30 बजे था और वहां ज्यादा रोशनी नहीं थी तथा सभी व्यक्ति मदिरा के प्रभाव में थे। (हरि वि. म.प्र. राज्य) (DB)...*138

Penal Code (45 of 1860), Section 302/34 – Appreciation of Evidence – Eye Witnesses – Ocular & Medical Evidence **– Held – Previous enmity existed between parties regarding property – Eyewitnesses deposed that they saw the accused giving beatings to deceased with *lathi* while medical evidence suggests that cause of death was due to fatal injury by a sharp edged weapon – Contradictions in deposition of eye witnesses – Further, police Officer who conducted seizure proceedings and prepared seizure memo was not examined – Evidence creates serious doubt on prosecution case – Conviction and sentence set aside – Appeal allowed. [Baliraj Singh Vs. State of M.P.] (SC)...2614**

दण्ड संहिता (1860 का 45), धारा 302/34 – साक्ष्य का मूल्यांकन – चक्षुदर्शी साक्षीगण – चाक्षुष एवं चिकित्सीय साक्ष्य – अभिनिर्धारित – सम्पत्ति के संबंध में पक्षकारों के बीच पूर्व वैमनस्य विद्यमान – चक्षुदर्शी साक्षीगण ने अभिसाक्ष्य दिया कि उन्होंने अभियुक्त को लाठी से मृतक की पिटाई करते देखा था जबकि चिकित्सीय साक्ष्य सुझाता है कि मृत्यु एक धारदार शस्त्र द्वारा घातक चोट के कारण हुई थी – चक्षुदर्शी साक्षीगण के अभिसाक्ष्य में विरोधाभास – इसके अतिरिक्त पुलिस अधिकारी जिसने जब्ती कार्यवाहियां संचालित की एवं जब्ती–पत्र तैयार किया था, का परीक्षण नहीं किया गया था – साक्ष्य, अभियोजन प्रकरण पर गंभीर संदेह निर्मित करता है – दोषसिद्धि एवं दण्डादेश अपास्त – अपील मंजूर। (बलीराज सिंह वि. म.प्र. राज्य) (SC)...2614

Penal Code (45 of 1860), Section 302/34 – Appreciation of Evidence – Interested/Related Witnesses **– Held – Courts below failed to scrutinize the prosecution evidence with utmost care when eye witnesses are closely related *inter-se* and to the deceased. [Baliraj Singh Vs. State of M.P.] (SC)...2614**

दण्ड संहिता (1860 का 45), धारा 302/34 – साक्ष्य का मूल्यांकन – हितबद्ध/नातेदार साक्षीगण – अभिनिर्धारित – निचले न्यायालय अभियोजन साक्ष्य की अत्यंत सावधानी से संवीक्षा करने में विफल रहे, जब चक्षुदर्शी साक्षीगण आपस में एवं मृतक के निकट संबंधी हैं। (बलीराज सिंह वि. म.प्र. राज्य) (SC)...2614

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Penal Code (45 of 1860), Sections 302, 120-B & 201 – Murder – Circumstantial Evidence – **Held – In case of circumstantial evidence, not only various links in chain of evidence should be clearly established but complete chain must be such as to rule out the likelihood of innocence of accused – In present case, only circumstances of last seen together cannot by itself be made basis for conviction. [Kishan Singh @ Krishnapal Singh Vs. State of M.P.]** **(DB)...2739**

दण्ड संहिता (1860 का 45), धाराएँ 302, 120–बी व 201 – हत्या – परिस्थितिजन्य साक्ष्य – अभिनिर्धारित – परिस्थितिजन्य साक्ष्य के प्रकरण में, न केवल साक्ष्य की श्रृंखला में विभिन्न कड़ियाँ स्पष्ट रूप से स्थापित की जानी चाहिए बल्कि संपूर्ण श्रृंखला ऐसी होनी चाहिए जिससे अभियुक्त की निर्दोषिता की संभावना को खारिज किया जा सके – वर्तमान प्रकरण में, केवल अंतिम बार साथ देखे जाने की परिस्थितियों को अपने आप में दोषसिद्धि का आधार नहीं बनाया जा सकता। (किशन सिंह उर्फ कृष्णपाल सिंह वि. म.प्र. राज्य) **(DB)...2739**

Penal Code (45 of 1860), Sections 302, 120-B & 201 – Murder – Conviction – Circumstantial Evidence – Evidence of Last Seen Together – **Held – As per medical evidence, homicidal death not proved and in absence of such, appellants cannot be convicted merely on last seen theory – Unexplained delay in recording statement of prosecution witnesses and on their part in disclosing the fact of last seen together to police – No conclusive proof to establish link connecting appellants with the offence – Appellants entitled to benefit of doubt – Conviction set aside – Appeals allowed. [Kishan Singh @ Krishnapal Singh Vs. State of M.P.]** **(DB)...2739**

दण्ड संहिता (1860 का 45), धाराएँ 302, 120–बी व 201 – हत्या – दोषसिद्धि – परिस्थितिजन्य साक्ष्य – अंतिम बार साथ देखे जाने का साक्ष्य – अभिनिर्धारित – चिकित्सीय साक्ष्य अनुसार, मानववध स्वरूप मृत्यु साबित नहीं हुई तथा उक्त की अनुपस्थिति में, अपीलार्थीगण को अंतिम बार देखे जाने के सिद्धांत मात्र पर दोषसिद्ध नहीं किया जा सकता – अभियोजन साक्षीगण के कथन अभिलिखित करने में तथा उनकी ओर से अंतिम बार साथ देखे जाने का तथ्य पुलिस को प्रकट करने में अस्पष्टीकृत विलंब – अपीलार्थीगण को अपराध के साथ जोड़ने वाली कड़ी स्थापित करने हेतु कोई निश्चायक सबूत नहीं – अपीलार्थीगण संदेह का लाभ पाने के हकदार हैं – दोषसिद्धि अपास्त – अपीलें मंजूर। (किशन सिंह उर्फ कृष्णपाल सिंह वि. म.प्र. राज्य) **(DB)...2739**

Penal Code (45 of 1860), Sections 302, 120-B & 201 – Murder –

Memorandum and Seizure Documents – Authenticity – **Held – Major discrepancies, vital contradictions and embellishment in evidence of prosecution witnesses makes prosecution story doubtful and gives strength to claim of appellants that memorandum and seizure documents were made up and fabricated. [Kishan Singh @ Krishnapal Singh Vs. State of M.P.]** **(DB)...2739**

दण्ड संहिता (1860 का 45), धाराएँ 302, 120–बी व 201 – हत्या – ज्ञापन एवं जब्ती दस्तावेज – प्रमाणिकता – अभिनिर्धारित – अभियोजन साक्षीगण के साक्ष्य में भारी विसंगतियां, महत्वपूर्ण विरोधाभास तथा अलंकरण अभियोजन कहानी को संदेहास्पद बनाते हैं और अपीलार्थीगण के इस दावे को बल देते हैं कि ज्ञापन तथा जब्ती दस्तावेज बनाये गये थे एवं कूटरचित हैं। (किशन सिंह उर्फ कृष्णपाल सिंह वि. म.प्र. राज्य) **(DB)...2739**

Penal Code (45 of 1860), Section 302 & 304 Part II – Murder – Motive/Intention to Kill – **Held – It is true that appellant was not armed with any weapon when he met the deceased, suddenly appellant picked up a piece of wood and gave blows to deceased – Appellant gave repeated blows, he might not have any intention for causing death, but intention arose immediately before the incident – Case does not fall under any exceptions of Section 300 IPC – Offence u/S 302 IPC made out – Appellant rightly convicted and sentenced u/S 302 IPC – Appeal dismissed. [Hari Vs. State of M.P.]** **(DB)...*138**

दण्ड संहिता (1860 का 45), धारा 302 व 304 भाग II – हत्या – मृत्यु कारित करने का हेतु/आशय – अभिनिर्धारित – यह सत्य है कि अपीलार्थी किसी शस्त्र से सुसज्जित नहीं था जब वह मृतक से मिला था, अचानक अपीलार्थी ने लकड़ी का एक टुकड़ा उठाया और मृतक पर वार किये – अपीलार्थी ने बारंबार वार किये, मृत्यु कारित करने का उसका कोई आशय नहीं भी हो सकता था परंतु घटना के तुरंत पहले आशय उत्पन्न हुआ – प्रकरण धारा 300 भा.दं.सं. के किसी अपवाद के अंतर्गत नहीं आता – धारा 302 भा.दं.सं. का अपराध बनता है – अपीलार्थी को उचित रूप से धारा 302 भा.दं.सं. के अंतर्गत दोषसिद्ध एवं दण्डादिष्ट किया गया – अपील खारिज। (हरि वि. म.प्र. राज्य) **(DB)...*138**

Penal Code (45 of 1860), Section 302 & 323 – Murder – Conviction – Testimony of witnesses – Identity of Accused – Ocular & Medical Evidence – Effect – **Held – It is undisputed that appellant/accused was not known to prosecution witnesses prior to the incident and it appears that for the first time accused entered into the said village – Complainant and**

prosecution witnesses identified the accused before the trial Court – No such fact came in cross-examination of prosecution witnesses which would indicate that they were not in a position to identify the accused before the Court – No doubt created regarding identity of accused – Further held – Oral evidence were supported by medical evidence – It was proved that present appellant caused injuries due to which deceased died. [Santosh Vs. State of M.P.] **(DB)...2735**

दण्ड संहिता (1860 का 45), धारा 302 व 323 – हत्या – दोषसिद्धि – साक्षीगण के परिसाक्ष्य – अभियुक्त की पहचान – चाक्षुष एवं चिकित्सीय साक्ष्य – प्रभाव – अभिनिर्धारित – यह अविवादित है कि अपीलार्थी/अभियुक्त घटना के पूर्व से अभियोजन साक्षीगण से परिचित नहीं था एवं यह प्रतीत होता है कि अभियुक्त ने प्रथम बार कथित गांव में प्रवेश किया था – परिवादी एवं अभियोजन साक्षीगण ने विचारण न्यायालय के समक्ष अभियुक्त की पहचान की – अभियोजन साक्षीगण के प्रतिपरीक्षण में ऐसा कोई तथ्य नहीं आया है जो यह दर्शाता हो कि वे न्यायालय के समक्ष अभियुक्त की पहचान करने की स्थिति में नहीं थे – अभियुक्त की पहचान के संबंध में कोई संदेह उत्पन्न नहीं होता – आगे अभिनिर्धारित – मौखिक साक्ष्य, चिकित्सीय साक्ष्य द्वारा समर्थित थे – यह साबित हुआ था कि वर्तमान अपीलार्थी ने चोटें कारित की जिसके कारण मृतक की मृत्यु हुई। (संतोष वि. म.प्र. राज्य) **(DB)...2735**

Penal Code (45 of 1860), Section 302 & 323 and Arms Act (54 of 1959), Section 25(1-B)(a) & 27 – Murder – Conviction – Private Defence **– Deceased who was unarmed, was chasing the appellant alongwith police personnels, when appellant turned around and fired upon him – Held – Relations between parties were inimical – Prosecution case based on direct evidence, where five eye witnesses were examined – Appellant has no right of private defence against an unarmed person, that too in presence of four armed policemen – Defence also failed to prove that any person from victim's party was armed even with a stick – Appellants rightly convicted – Appeal dismissed. [Deshpal Vs. State of M.P.]** **(DB)...2717**

दण्ड संहिता (1860 का 45), धारा 302 व 323 एवं आयुध अधिनियम (1959 का 54), धारा 25(1–बी)(ए) व 27 – हत्या – दोषसिद्धि – प्राइवेट प्रतिरक्षा – मृतक, जो निःशस्त्र था, पुलिस कर्मियों के साथ अपीलार्थी का पीछा कर रहा था, जब अपीलार्थी मुड़ा और उस पर गोली चलाई – अभिनिर्धारित – पक्षकारों के मध्य वैमनस्यतापूर्ण संबंध थे – अभियोजन प्रकरण प्रत्यक्ष साक्ष्य पर आधारित, जहां पांच चक्षुदर्शी साक्षीगण का परीक्षण किया गया था – अपीलार्थी को एक निःशस्त्र व्यक्ति के विरूद्ध प्राइवेट प्रतिरक्षा

का कोई अधिकार नहीं है, वह भी चार सशस्त्र पुलिसकर्मियों की उपस्थिति में – बचाव पक्ष, पीड़ित पक्ष के किसी व्यक्ति का एक छड़ी तक से सुसज्जित होना भी साबित करने में विफल रहा – अपीलार्थीगण उचित रूप से दोषसिद्ध किये गये – अपील खारिज। (देशपाल वि. म.प्र. राज्य) (DB)...2717

Penal Code (45 of 1860), Sections 302, 323 & 304 Part II – Murder – Motive/Intention to kill – Previous Enmity – Held – There was no previous enmity between deceased and appellant – Two injuries were caused on his head due to which deceased died – As per the facts of the present case, the appellant has no motive to kill the deceased, there appears to be no intention as well – Case falls under provisions of Section 304 Part II IPC – Conviction converted into one u/S 304 part II IPC – Conviction u/S 323 upheld – Appeal partly allowed. [Santosh Vs. State of M.P.] (DB)...2735

दण्ड संहिता (1860 का 45), धाराएँ 302, 323 व 304 भाग II – हत्या – हेतु/हत्या करने का आशय – पूर्व वैमनस्यता – अभिनिर्धारित – मृतक एवं अपीलार्थी में कोई पूर्व वैमनस्यता नहीं थी – उसके सिर पर दो चोटें कारित की गईं जिसके कारण मृतक की मृत्यु हुई – वर्तमान प्रकरण के तथ्यों के अनुसार, अपीलार्थी का मृतक की हत्या करने का कोई हेतु नहीं था, साथ ही ऐसा कोई आशय भी प्रतीत नहीं होता है – प्रकरण भारतीय दंड संहिता की धारा 304 भाग II के उपबंधों के अंतर्गत आता है – दोषसिद्धि भारतीय दंड संहिता की धारा 304 भाग II के अंतर्गत परिवर्तित हुई – धारा 323 के अंतर्गत दोषसिद्धि की पुष्टि की गई – अपील अंशतः मंजूर। (संतोष वि. म.प्र. राज्य) (DB)...2735

Penal Code (45 of 1860), Sections 302, 364-A, 201 & 120-B – Kidnapping & Murder of Minor Boy – Conviction – Death Sentence – Circumstantial Evidence – Presumption – Held – Case based on circumstantial evidence – No eye witness – As per postmortem report, cause of death due to cut of neck by sharp cutting object – As per DNA report, DNA of hairs found in fingers of deceased was similar to DNA profile of appellant – Having proved the factum of kidnapping for ransom, inference of consequential murder of kidnapped person is liable to be presumed – Substantive evidence on record to establish kidnapping of deceased followed by his murder at the hands of appellants – Conviction upheld – Appeals dismissed. [In Reference Vs. Rajesh @ Rakesh] (DB)...2826

दण्ड संहिता (1860 का 45), धाराएँ 302, 364–ए, 201 व 120–बी –

अप्राप्तवय बालक का व्यपहरण व हत्या – दोषसिद्धि – मृत्युदण्ड – परिस्थितिजन्य साक्ष्य – उपधारणा – अभिनिर्धारित – प्रकरण परिस्थितिजन्य साक्ष्य पर आधारित है – कोई चक्षुदर्शी साक्षी नहीं – शव परीक्षण प्रतिवेदन के अनुसार, मृत्यु का कारण धारदार काटने की वस्तु से गर्दन का काटा जाना है – डी.एन.ए. प्रतिवेदन के अनुसार, मृतक की उंगलियों में पाये गये बालों का डी.एन.ए. अपीलार्थी के डी.एन.ए. के समान था – फिरौती के लिए व्यपहरण का तथ्य साबित हो जाने पर, व्यपहृत व्यक्ति की परिणामिक हत्या के निष्कर्ष की उपधारणा की जाना संभाव्य है – यह स्थापित करने हेतु अभिलेख पर सारभूत् साक्ष्य है कि अपीलार्थीगण द्वारा मृतक का व्यपहरण कर उसके बाद उसकी हत्या की गई – दोषसिद्धि कायम रखी गई – अपीलें खारिज। (इन रेफ्रेन्स वि. राजेश उर्फ राकेश) (DB)...2826

Penal Code (45 of 1860), Sections 302, 364-A, 201 & 120-B – Kidnapping & Murder of Minor Boy – Sentence **– Held – Looking to nature and way of committing offence, no possibility of any reform and rehabilitation of appellants – Appellants having no value for human life, carrying extreme mental perversion not worthy of human condonation – Approach of accused reveals a brutal mindset of highest order – Death sentence confirmed – Aggravating and Mitigating circumstances enumerated and discussed on facts of the case. [In Reference Vs. Rajesh @ Rakesh]** (DB)...2826

दण्ड संहिता (1860 का 45), धाराएँ 302, 364–ए, 201 व 120–बी – अप्राप्तवय बालक का व्यपहरण एवं हत्या – दण्डादेश – अभिनिर्धारित – अपराध कारित करने की प्रकृति और ढंग को देखते हुए, अपीलार्थीगण के सुधार एवं पुनर्वास की कोई संभावना नहीं – अपीलार्थीगण को मानव जीवन का मूल्य नहीं, उनकी अत्याधिक मानसिक विकृति मानवीय संवेदना के अयोग्य है – अभियुक्त का दृष्टिकोण उच्चतर कोटि की क्रूर मानसिकता प्रकट करती है – मृत्यु दण्डादेश की पुष्टि की गई – प्रकरण के तथ्यों पर गुरूतरकारी एवं गंभीरता कम करने वाली परिस्थितियाँ प्रगणित एवं विवेचित की गई। (इन रेफ्रेन्स वि. राजेश उर्फ राकेश) (DB)...2826

Penal Code (45 of 1860), Sections 302, 364-A, 201 & 120-B and Evidence Act (1 of 1872), Section 106 – Burden of Proof **– Held – When it is duly established that deceased was kidnapped by appellants, section 106 of the Act of 1872 places onus on them to produce material to show the release of deceased from their custody – In absence thereof, it has to be accepted that custody remained with them till deceased was murdered. [In Reference Vs. Rajesh @ Rakesh]** (DB)...2826

दण्ड संहिता (1860 का 45), धाराएँ 302, 364–ए, 201 व 120–बी एवं साक्ष्य

अधिनियम (1872 का 1), धारा 106 – सबूत का भार – अभिनिर्धारित – जब यह सम्यक् रूप से स्थापित किया गया है कि मृतक का व्यपहरण अपीलार्थीगण द्वारा किया गया था, 1872 के अधिनियम की धारा 106 उन पर, उनकी अभिरक्षा में से मृतक को छोड़ा जाना दर्शाने हेतु सामग्री प्रस्तुत करने का भार डालती है – इसकी अनुपस्थिति में, यह स्वीकार किया जाना होगा कि मृतक की हत्या हो जाने तक वह उनकी अभिरक्षा में था। (इन रेफ्रेन्स वि. राजेश उर्फ राकेश) (DB)...2826

Penal Code (45 of 1860), Section 302, 376(A), (D) – Rape – Evidence – Minor Contradictions – **Held – Courts while trying an accused on charge of rape must deal with utmost sensitivity, examine the broader probability of case and not get swayed by minor contradictions or insignificant discrepancies in the evidence which are not of a substantial character. [Vinay Vs. State of M.P.] (DB)...2752**

दण्ड संहिता (1860 का 45), धारा 302, 376 (ए), (डी) – बलात्संग – साक्ष्य – गौण विरोधाभास – अभिनिर्धारित – न्यायालयों को बलात्संग के आरोप पर एक अभियुक्त का विचारण करते समय अत्यंत संवेदनशीलता के साथ निपटना चाहिए, प्रकरण की विस्तृत संभावना का परीक्षण करना चाहिए तथा साक्ष्य, जो सारवान प्रकृति के नहीं है, में महत्वहीन विसंगतियों या गौण विरोधाभासों द्वारा प्रभावित नहीं होना चाहिए। (विनय वि. म.प्र. राज्य) (DB)...2752

Penal Code (45 of 1860), Sections 302, 376(A), (D) & 449 and Protection of Children from Sexual Offences Act, (32 of 2012), Section 6 – Rape & Murder – Minor Girl – Conviction – Death Sentence – Circumstantial Evidence – DNA Test – **Held – Appellant is uncle of the victim – Medical evidence proves that victim was sexually assaulted before murder – As per DNA report, which is a scientific evidence, appellant's sperm and semens found in vaginal swab and clothes of victim and there is no explanation by appellant in this regard – DNA report is reliable to sustain conviction – Conviction can be based on circumstantial evidence – Conviction upheld – Death sentence set aside and life imprisonment imposed – Appeal partly allowed – Reference discharged. [Vinay Vs. State of M.P.]** (DB)...2752

दण्ड संहिता (1860 का 45), धाराएँ 302, 376 (ए), (डी) व 449 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 6 – बलात्संग एवं हत्या – अप्राप्तवय बालिका – दोषसिद्धि – मृत्यु दण्डादेश – परिस्थितिजन्य साक्ष्य – डी एन ए परीक्षण – अभिनिर्धारित – अपीलार्थी, पीड़िता का अंकल है – चिकित्सीय साक्ष्य साबित करता है कि पीड़िता पर हत्या से पूर्व लैंगिक रूप से हमला

किया गया था – डी एन ए प्रतिवेदन जो कि एक वैज्ञानिक साक्ष्य है, के अनुसार, पीड़िता के वैजाईनल स्वैब एवं कपड़ों से अपीलार्थी के शुक्राणु एवं वीर्य पाये गए और इस संबंध में अपीलार्थी द्वारा कोई स्पष्टीकरण नहीं है – डी एन ए प्रतिवेदन, दोषसिद्धि कायम रखने के लिए विश्वसनीय है – दोषसिद्धि, परिस्थितिजन्य साक्ष्य पर आधारित की जा सकती है – दोषसिद्धि कायम रखी गई – मृत्यु दण्डादेश अपास्त एवं आजीवन कारावास अधिरोपित किया गया – अपील अंशतः मंजूर – निर्देश प्रमुक्त किया गया। (विनय वि. म.प्र. राज्य) (DB)...2752

Penal Code (45 of 1860), Section 376 – Conviction – Life Imprisonment – Appreciation of Evidence – Testimony of Prosecutrix – Minor contradictions – Effect – **Held – Rape committed by father on his minor daughter aged about 14 yrs. – Victim carrying fetus of 14-16 weeks – Prosecutrix giving evidence in detail regarding instances of rape does not amount to improvement with regard to FIR and case diary statements – Mere extracting out minor contradictions and inconsistencies in cross examination of the prosecutrix is not sufficient to discredit the veracity of her evidence – Trial Court rightly awarded life sentence – Appeal dismissed. [Ramnath Vs. State of M.P.]** (DB)...2706

दण्ड संहिता (1860 का 45), धारा 376 – दोषसिद्धि – आजीवन कारावास – साक्ष्य का मूल्यांकन – अभियोक्त्री का साक्ष्य – गौण विरोधाभास – प्रभाव – अभिनिर्धारित – पिता द्वारा उसकी करीब 14 वर्षीय अप्राप्तवय पुत्री के साथ बलात्संग कारित किया गया – पीड़िता 14–16 सप्ताह का भ्रूण धारण कर रही है – अभियोक्त्री द्वारा बलात्संग के संबंध में विस्तृत साक्ष्य दी जाना, प्रथम सूचना प्रतिवेदन तथा केस डायरी कथनों में सुधार की कोटि में नहीं आता – अभियोक्त्री के प्रतिपरीक्षण में मात्र गौण विरोधाभास एवं असंगतियां निकलवाना, उसके साक्ष्य की सत्यता पर अविश्वास करने के लिए पर्याप्त नहीं है – विचारण न्यायालय ने उचित रूप से आजीवन दण्डादेश प्रदान किया – अपील खारिज। (रामनाथ वि. म. प्र. राज्य) (DB)...2706

Penal Code (45 of 1860), Section 376 and Criminal Procedure Code, 1973 (2 of 1974), Section 53-A – DNA Profiling – **Held – Provision of Section 53-A Cr.P.C. was inserted w.e.f. 23.06.06 whereas the incident is of 2005, thus it was not mandatory for prosecution to get DNA profiling of prosecutrix, her fetus and appellant to ascertain that appellant was the father of fetus – Non holding of DNA test will not affect the prosecution case adversely. [Ramnath Vs. State of M.P.]** (DB)...2706

दण्ड संहिता (1860 का 45), धारा 376 एवं दण्ड प्रक्रिया संहिता, 1973

(1974 का 2), धारा 53–ए – डीएनए प्रोफाईलिंग – अभिनिर्धारित – धारा 53–ए दं.प्र.सं. का उपबंध, 23.06.2006 से प्रभावी रूप से अंतःस्थापित किया गया था जबकि घटना 2005 की है अतः, यह सुनिश्चित करने के लिए कि अपीलार्थी भ्रूण का पिता था, अभियोजन के लिए अभियोक्त्री, उसके भ्रूण एवं अपीलार्थी के डीएनए प्रोफाईलिंग करवाना आज्ञापक नहीं था – डीएनए परीक्षण न कराया जाना, अभियोजन के प्रकरण को प्रतिकूल रूप से प्रभावित नहीं करेगा। (रामनाथ वि. म.प्र. राज्य) (DB)...2706

Penal Code (45 of 1860), Section 376 and Evidence Act (1 of 1872), Section 6 – Hearsay Evidence – Admissibility **– Held – As both prosecution witnesses are close relatives (*mausi and mami*) of prosecutrix and that she lost her mother long back before incident, she confided in them as to the person who was behind her pregnancy – It does not fall under hearsay evidence – In fact and situation, evidence reliable and admissible u/S 6 of the Act of 1872. [Ramnath Vs. State of M.P.] (DB)...2706**

दण्ड संहिता (1860 का 45), धारा 376 एवं साक्ष्य अधिनियम (1872 का 1), धारा 6 – अनुश्रुत साक्ष्य – ग्राह्यता – अभिनिर्धारित – चूंकि दोनों अभियोजन साक्षीगण, अभियोक्त्री के निकट संबंधी (मौसी व मामी) हैं और यह कि घटना से काफी समय पहले उसने अपनी माता को खोया था, उसने विश्वास से उन्हें उस व्यक्ति के बारे में बताया जो उसके गर्भधारण का कारण था – यह अनुश्रुत साक्ष्य के अंतर्गत नहीं आता – इस तथ्य एवं स्थिति में, 1872 के अधिनियम की धारा 6 के अंतर्गत, साक्ष्य, विश्वसनीय एवं ग्राह्य है। (रामनाथ वि. म.प्र. राज्य) (DB)...2706

Penal Code (45 of 1860), Section 376(2)(g) – Rape – Conviction – Medical Evidence – Injury **– Held – If sexual intercourse committed forcibly by two persons, prosecutrix would certainly receive injuries – Absence of any injury on person of prosecutrix including private parts leads to conclusion that either appellants did not resort to offence of forcible sexual intercourse or it was with her tacit consent – Statement of prosecutrix is contrary to medical evidence and thus do not inspire confidence – Conviction set aside – Appeal allowed. [Dhanraj Singh Vs. State of M.P.] ...*134**

दण्ड संहिता (1860 का 45), धारा 376(2)(जी) – बलात्संग – दोषसिद्धि – चिकित्सीय साक्ष्य – चोट – अभिनिर्धारित – यदि दो व्यक्तियों द्वारा बलपूर्वक लैंगिक संभोग किया गया हैं, अभियोक्त्री को निश्चित रूप से चोटें कारित होगी – अभियोक्त्री के शरीर पर, जिसमें गुप्तांग शामिल है, किसी चोट की अनुपस्थिति इस निष्कर्ष की ओर ले जाती है कि या तो अपीलार्थीगण ने बलपूर्वक लैंगिक संभोग के अपराध का सहारा

नहीं लिया या वह उसकी मौन सम्मति के साथ हुआ था – अभियोक्त्री का कथन चिकित्सीय साक्ष्य के विरूद्ध है और इसलिए विश्वास उत्पन्न नहीं करता – दोषसिद्धि अपास्त – अपील मंजूर। (धनराज सिंह वि. म.प्र. राज्य) ...*134

Penal Code (45 of 1860), Section 376(2)(g) & Evidence Act (1 of 1872), Section 114-A – Presumption – Onus of Proof – Medical Evidence – **Held – In a rape case, the onus is always on prosecutrix to prove affirmatively each ingredients of offence, it seeks to establish and such onus never shifts – Trial Court erred in raising presumption u/S 114-A of the Act of 1872 in absence of any medical evidence regarding resistance/injury. [Dhanraj Singh Vs. State of M.P.]...*134**

दण्ड संहिता (1860 का 45), धारा 376(2)(जी) एवं साक्ष्य अधिनियम (1872 का 1), धारा 114–ए – उपधारणा – सबूत का भार – चिकित्सीय साक्ष्य – अभिनिर्धारित – बलात्संग के प्रकरण में, अपराध जिसे स्थापित करना चाहा गया है, के प्रत्येक घटक को सकारात्मक रूप से साबित करने का भार सदैव अभियोक्त्री पर होता है, तथा उक्त भार कभी भी अन्य पर परिवर्तित नहीं होता – विचारण न्यायालय ने प्रतिरोध/चोट के संबंध में किसी चिकित्सीय साक्ष्य की अनुपस्थिति में 1872 के अधिनियम की धारा 114–ए के अंतर्गत उपधारणा बनाने में त्रुटि की। (धनराज सिंह वि. म.प्र. राज्य) ...*134

Penal Code (45 of 1860), Sections 407, 409 & 420 – Framing of Charge – Ingredients – **Applicant, the owner of warehouse from where foodgrains of farmers were found missing – Charge framed u/S 409 & 420 IPC – Held – Principal offence of criminal breach of trust is *prima facie* made out but charge framed u/S 409 do not relate to warehouse keeper – Alleged offence specifically falls within purview of Section 407 IPC – Trial Court directed to frame charge u/S 407 IPC alongwith Section 420 IPC – Revision allowed. [Krishan Mohan Agrawal Vs. State of M.P.]** ...*140

दण्ड संहिता (1860 का 45), धाराएँ 407, 409 व 420 – आरोप विरचित किया जाना – घटक – आवेदक उस भांडागार का स्वामी जहां से किसानों का खाद्यान्न लापता पाया गया था – धारा 409 व 420 भा.दं.सं. के अंतर्गत आरोप विरचित किया गया – अभिनिर्धारित – प्रथम दृष्ट्या आपराधिक न्यास भंग का प्रमुख अपराध बनता है किन्तु धारा 409 के अंतर्गत विरचित आरोप भांडागारपाल के संबंध में नहीं – अभिकथित अपराध विनिर्दिष्ट रूप से धारा 407 भा.दं.सं. की परिधि के भीतर आता है – विचारण न्यायालय को धारा 407 भा.दं.सं. के साथ–साथ धारा 420 भा.दं.सं. के अंतर्गत आरोप विरचित करने के लिए निदेशित किया गया –

पुनरीक्षण मंजूर। (कृष्ण मोहन अग्रवाल वि. म.प्र. राज्य) ...*140

Penal Code (45 of 1860), Section 415 & 420 – Cheating – **Ingredients of – Discussed and explained. [Amita Shrivastava (Smt.) Vs. State of M.P.] ...2868**

दण्ड संहिता (1860 का 45), धारा 415 व 420 – छल – के घटक – विवेचित एवं स्पष्ट किये गये। (अमिता श्रीवास्तव (श्रीमती) वि. म.प्र. राज्य) ...2868

***Penal Code (45 of 1860), Section 415 & 420 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Cheating and Forgery – Ingredients* – Applicants/land owners entered into agreement to sale with "A" whereby a cheque of Rs. 1 lakh was paid as advance which was later dishonoured – Vide notice, agreement was cancelled and applicants entered into fresh agreement with "B" whereby a cheque of Rs. 10 lakh was paid as advance – Due to objection raised by "A", subsequent agreement was not finally executed and "B" also failed to pay the remaining amount – Applicants cancelled subsequent agreement and returned the advance amount to "B", who filed private complaint whereby cognizance taken by Court – Held – Petitioners were *bonafide*, there is no deception with fraudulent or dishonest intention – Complaint and order taking cognizance quashed – Application allowed. [Amita Shrivastava (Smt.) Vs. State of M.P.] ...2868**

दण्ड संहिता (1860 का 45), धारा 415 व 420 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – छल एवं कूटरचना – घटक – आवेदकगण/भूमि स्वामीगण ने "ए" के साथ विक्रय का करार किया जिसके द्वारा रू. 1 लाख का एक चेक अग्रिम के रूप में अदा किया गया था जो कि बाद में अनादृत हुआ था – नोटिस द्वारा करार निरस्त किया गया था तथा आवेदकगण ने "बी" के साथ नया करार किया जिसके द्वारा अग्रिम के रूप में रू. 10 लाख का एक चेक अदा किया गया – "ए" द्वारा उठाये गये आक्षेप के कारण, पश्चात्वर्ती करार को अंतिम रूप से निष्पादित नहीं किया गया था एवं "बी" भी शेष रकम का भुगतान करने में विफल रहा – आवेदकगण ने पश्चात्वर्ती करार निरस्त किया और "बी" को अग्रिम की रकम लौटा दी, जिसने प्राईवेट परिवाद प्रस्तुत किया जिसका संज्ञान न्यायालय द्वारा लिया गया – अभिनिर्धारित – याचीगण सद्भाविक थे, कपट या बेईमान आशय के साथ कोई प्रवंचना नहीं है – परिवाद तथा संज्ञान लेने का आदेश अभिखंडित – आवेदन मंजूर। (अमिता श्रीवास्तव (श्रीमती) वि. म.प्र. राज्य) ...2868

Penal Code (45 of 1860), Section 498-A and Criminal Procedure Code, 1973 (2 of 1974), Section 177 & 178 – **Continuing Offence in relation to territorial jurisdiction and in relation to limitation to taking cognizance – Discussed and explained. [Dushyant Singh Gaharwar Vs. State of M.P.]** ...*135

दण्ड संहिता (1860 का 45), धारा 498–ए एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 177 व 178 – संज्ञान लेने के लिए क्षेत्रीय अधिकारिता के संबंध में तथा परिसीमा के संबंध में जारी रहने वाला अपराध – विवेचित एवं स्पष्ट किया गया। (दुष्यंत सिंह गहरवार वि. म.प्र. राज्य) ...*135

Penal Code (45 of 1860), Section 498-A and Criminal Procedure Code, 1973 (2 of 1974), Section 177 & 178 – Territorial Jurisdiction – **Held – As per the FIR and statements of complainant's witnesses u/S 161 Cr.P.C., all the instances of alleged cruelty regarding dowry demands were committed in district Shahdol in matrimonial home – None stated that any instance took place at wife's parental home at district Satna – Case triable at Shahdol and not in district Satna – Impugned order set aside – Revision allowed. [Dushyant Singh Gaharwar Vs. State of M.P.]** ...*135

दण्ड संहिता (1860 का 45), धारा 498–ए एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 177 व 178 – क्षेत्रीय अधिकारिता – अभिनिर्धारित – प्रथम सूचना प्रतिवेदन तथा धारा 161 दं.प्र.सं. के अंतर्गत परिवादी के साक्षीगण के कथनों के अनुसार दहेज की मांग से संबंधित अभिकथित क्रूरता की सभी घटनाऐं दाम्पत्य गृह में जिला शहडोल में कारित की गई थी – किसी ने कथन नहीं किया कि कोई भी घटना पत्नी के पैतृक गृह, जिला सतना में घटी – प्रकरण, शहडोल में विचारणीय है और न कि जिला सतना में – आक्षेपित आदेश अपास्त – पुनरीक्षण मंजूर। (दुष्यंत सिंह गहरवार वि. म.प्र. राज्य) ...*135

Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d) & 13(2) and Constitution – Article 20 & 20(3) – Admissibility of Voice Recording – **Application by prosecution for providing voice sample of accused persons was allowed – Challenge to – Held – Trial has not yet commenced – Charges have not been framed by trial Court – Providing voice sample would not prejudice to the applicant – Voice recorder conversation is admissible in evidence and there is no violation of Article 20 or 20(3) of Constitution – Application dismissed. [Buddha Sen Kumhar Vs. State of M.P.]** (DB)...*132

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(डी) व 13(2) एवं संविधान – अनुच्छेद 20 व 20(3) – आवाज की रिकॉर्डिंग की ग्राह्यता – अभियोजन द्वारा अभियुक्तगण की आवाज का नमूना उपलब्ध कराये जाने हेतु आवेदन मंजूर किया गया – को चुनौती – अभिनिर्धारित – विचारण अभी आरंभ नहीं हुआ है – विचारण न्यायालय द्वारा आरोप विरचित नहीं किये गये हैं – आवाज का नमूना उपलब्ध कराने से आवेदक को प्रतिकूल प्रभाव कारित नहीं होगा – आवाज रिकॉर्डर की बातचीत साक्ष्य में ग्राह्य है तथा संविधान के अनुच्छेद 20 या 20(3) का कोई उल्लंघन नहीं हुआ है – आवेदन खारिज। (बुद्ध सेन कुम्हार वि. म.प्र. राज्य) (DB)...*132

Prevention of Food Adulteration Act (37 of 1954), Sections 2(ia), 7(i), 13(2), 16(1)(a)(i) & 20-A – Adulteration and Misbranding – Quashment of Charge **– Petition against framing of charges against the shop owner and manufacturer (present applicant) – Food inspector carried out inspection of a shop purchased three packets of *haldi* and sent for public analyst whereby it was revealed that same was adulterated and misbranded – Held – U/S 13(2) of the Act of 1954, applicant can request for Re-examination of the sample from the Central Food Laboratory but in the present case, shelf life of sample of *haldi* has lapsed prior to filing of complaint before the Court, thus defence of applicant would be severely prejudiced if right available u/S 13(2) of the Act of 1954 is taken away – Cognizance taken against the applicant so far it relates to adulteration is hereby set aside – Further held – Perusal of complaint shows that on the cover of the seized article (*haldi* packets), complete name and address of the manufacturing or packaging unit has not been provided, hence for the charge of misbranding, *prima facie* case is made out against the applicant – For the charge of misbranding, trial may proceed – Application partly allowed. [Sai Enterprises (M/s.) Vs. State of M.P.]** ...*144

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धाराएँ 2(ix), 7(i), 13(2), 16(1)(ए)(i) व 20–ए – अपमिश्रण एवं मिथ्या छाप – आरोप अभिखंडित किया जाना – दुकान के मालिक एवं विनिर्माता (वर्तमान आवेदक) के विरूद्ध आरोप विरचित किये जाने के विरूद्ध याचिका – खाद्य निरीक्षक ने दुकान का निरीक्षण किया, तीन पैकेट हल्दी खरीदी और लोक विश्लेषक को भेजी, जिससे यह प्रकट हुआ था कि वह अपमिश्रित एवं मिथ्या छाप वाली है – अभिनिर्धारित – 1954 के अधिनियम की धारा 13(2) के अंतर्गत, आवेदक, नमूने का पुनः परीक्षण, केंद्रीय खाद्य प्रयोगशाला से किये जाने हेतु निवेदन कर सकता है, परंतु वर्तमान प्रकरण

में, न्यायालय के समक्ष परिवाद प्रस्तुत किये जाने के पूर्व हल्दी के नमूने की भंडारण व उपयोग होने की अवधि व्यपगत हो चुकी है अतः, आवेदक के बचाव पर गंभीर रूप से प्रतिकूल प्रभाव पड़ेगा यदि 1954 के अधिनियम की धारा 13(2) के अंतर्गत उपलब्ध अधिकार छीन लिया गया – आवेदक के विरूद्ध लिया गया संज्ञान, जहां तक अपमिश्रण से संबंधित है, एतद द्वारा अपास्त किया गया – आगे अभिनिर्धारित – परिवाद का परिशीलन दर्शाता है कि जब्तशुदा वस्तु (हल्दी पैकेट्स) के आवरण/कवर पर विनिर्माण या पैकेजिंग करने वाली ईकाई का पूर्ण नाम व पता उपलब्ध नहीं कराया गया है, अतः मिथ्या छाप के आरोप हेतु आवेदक के विरूद्ध प्रथम दृष्ट्या प्रकरण बनता है – मिथ्या छाप के आरोप हेतु विचारण की कार्यवाही की जा सकती है – आवेदन अंशतः मंजूर। (सांई इंटरप्राइजेस (मे.) वि. म.प्र. राज्य) ...*144

Protection of Children from Sexual Offences Act, (32 of 2012), Section 6 – See – Penal Code, 1860, Sections 302, 376(A), (D) & 449 **[Vinay Vs. State of M.P.] (DB)...2752**

लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 6 – देखें – दण्ड संहिता, 1860, धाराएँ 302, 376 (ए), (डी) व 449 (विनय वि. म.प्र. राज्य) **(DB)...2752**

Protection of Women from Domestic Violence Act (43 of 2005), Sections 3, 18 & 31 – Economic Abuse – Protection Order – Breach of Maintenance Order **– Held – If there is any instance of domestic violence for which an affirmative or prohibitory order is passed u/S 18 of the Act of 2005, provisions of Section 31 of the Act can be invoked for breach of such order – Non –payment of maintenance allowance is also a breach of 'protection order' or 'interim protection order' – Application u/S 31 is maintainable. [Surya Prakash Vs. Smt. Rachna] (DB)...*150**

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 3, 18 व 31 – आर्थिक दुरूपयोग – संरक्षण आदेश – भरणपोषण आदेश का भंग – अभिनिर्धारित – यदि घरेलू हिंसा की कोई घटना है, जिसके लिए 2005 के अधिनियम की धारा 18 के अंतर्गत एक सकारात्मक या प्रतिशेधात्मक आदेश पारित किया गया है, ऐसे आदेश के भंग हेतु अधिनियम की धारा 31 के उपबंधों का अवलंब लिया जा सकता है – भरणपोषण भत्ते का असंदाय भी 'संरक्षण आदेश' अथवा 'अंतरिम संरक्षण आदेश' का भंग है – धारा 31 के अंतर्गत आवेदन पोषणीय है। (सूर्य प्रकाश वि. श्रीमती रचना) **(DB)...*150**

Rewa State Land Revenue and Tenancy Code, 1935, Section 57(4) and Vindhya Pradesh Land Revenue and Tenancy Act, 1953 (3

of 1955), Section 149, 151(2) & (3) – Gairhaqdar Tenant – Patta – Held – A *gairhaqdar* tenant cannot get *patta* of "Tank" u/S 57(4) of the Code of 1935 – Similarly, right of pattedar tenant shall not accrue or deemed to have accrued in respect of a Tank – Patta of this land cannot be granted u/S 151 of Act of 1953. [Ramakant Pathak Vs. State of M.P.] ...2699

रीवा राज्य भू–राजस्व तथा काश्तकारी संहिता, 1935, धारा 57(4) एवं विंध्य प्रदेश भू–राजस्व तथा काश्तकारी अधिनियम, 1953 (1955 का 3), धारा 149, 151(2) व (3) – गैरहकदार काश्तकार – पट्टा – अभिनिर्धारित – एक गैरहकदार काश्तकार को 1935 की संहिता की धारा 57(4) के अंतर्गत "जलाशय" का पट्टा नहीं मिल सकता – समान रूप से, एक "जलाशय" के संबंध में पट्टेदार काश्तकार का अधिकार प्रोद्भूत नहीं होगा या प्रोद्भूत होना समझा नहीं जाएगा – इस भूमि का पट्टा, 1953 के अधिनियम की धारा 151 के अंतर्गत प्रदान नहीं किया जा सकता। (रमाकांत पाठक वि. म.प्र. राज्य) ...2699

Service Law – Class III (Non-Ministerial and Ministerial) Jail Service Recruitment Rules, M.P., 1974, Schedule Sr. No. 7 & 8 – Music Teacher – Principle of Equal Pay for Equal Work – Pay Scale – Held – Qualifications and duties of a Music Teacher of educational department and that of Jail department are different – Duties in educational department is full time whereas in jail, it is of temporary nature and require only for those prisoners who opt for music – Respondent, a music teacher in jail department not entitled for same pay scale as of the one in educational department – Principle of equal pay for equal work not applicable in the present case – Impugned order set aside – Appeal allowed. [State of M.P. through Secretary Department of Jail/Home, Bhopal Vs. Rajesh Kumar Shukla] (DB)...*149

सेवा विधि – तृतीय वर्ग (अलिपिक वर्गीय तथा लिपिक वर्गीय) जेल सेवा भर्ती नियम, म.प्र., 1974, अनुसूची क्र. 7 व 8 – संगीत शिक्षक – समान कार्य के लिए समान वेतन का सिद्धांत – वेतन मान – अभिनिर्धारित – शैक्षणिक विभाग तथा जेल विभाग के संगीत शिक्षक की अर्हताएं एवं कर्तव्य भिन्न हैं – शैक्षणिक विभाग में कर्तव्य पूर्णकालिक हैं जबकि जेल में, यह अस्थायी प्रकृति के हैं तथा केवल उन बंदियों के लिए अपेक्षित हैं जो संगीत का विकल्प चुनते हैं – प्रत्यर्थी, जेल विभाग में एक संगीत शिक्षक, शैक्षणिक विभाग के समान वेतनमान के लिए हकदार नहीं है – समान कार्य के लिए समान वेतन का सिद्धांत वर्तमान प्रकरण में लागू नहीं होता – आक्षेपित आदेश अपास्त – अपील मंजूर। (म.प्र. राज्य द्वारा सेक्रेटरी डिपार्टमेन्ट

ऑफ जेल/होम, भोपाल वि. राजेश कुमार शुक्ला) (DB)...*149

Service Law – Contract Appointment – Termination – **Held – Petitioners are contract appointees and they carry limited rights – Contract can always be terminated as per the terms of Contract – Contract appointment was made in 2016 for a period of one year which has already expired – Notices were issued by the competent Authority – As per the terms of contract, one month notice of termination of contract appointment was issued – No illegality in such termination – No ground for interference – Petitions dismissed. [Maya Kataria Vs. State of M.P.]** ...*142

सेवा विधि – संविदा नियुक्ति – समाप्ति – अभिनिर्धारित – याचीगण संविदा पर नियुक्त व्यक्ति हैं तथा वे सीमित अधिकार रखते हैं – संविदा हमेशा संविदा की शर्तों के अनुसार समाप्त की जा सकती है – संविदा नियुक्ति 2016 में एक वर्ष की अवधि के लिए की गई थी जो कि पहले ही समाप्त हो चुकी है – सक्षम प्राधिकारी द्वारा नोटिस जारी किये गये थे – संविदा की शर्तों के अनुसार, संविदा नियुक्ति की समाप्ति हेतु एक माह का नोटिस जारी किया गया था – ऐसी समाप्ति में कोई अवैधता नहीं – हस्तक्षेप के लिए कोई आधार नहीं – याचिकाएँ खारिज। (माया कटारिया वि. म.प्र. राज्य) ...*142

Service Law – Principle of Equal Pay for Equal Work – Interpretation – **Held – The Apex Court has concluded that principle/ doctrine of equal pay for equal work can only apply if employees are similarly situated and there is complete and wholesale identity between two groups – Principle/Doctrine cannot be applied only because nature of work is same, unless there is parity in mode of appointment, experience and educational qualifications between them. [State of M.P. through Secretary Department of Jail/Home, Bhopal Vs. Rajesh Kumar Shukla]** (DB)...*149

सेवा विधि – समान कार्य के लिए समान वेतन का सिद्धांत – निर्वचन – अभिनिर्धारित – सर्वोच्च न्यायालय ने यह निष्कर्षित किया है कि समान कार्य के लिए समान वेतन का सिद्धांत केवल तब लागू हो सकता है यदि कर्मचारीगण एक समान परिस्थिति में हैं तथा दो समूहों के मध्य पूर्ण एवं बड़े पैमाने पर समानता है – सिद्धांत केवल इस कारण से लागू किया नहीं जा सकता कि कार्य की प्रकृति समान है, जब तक कि उनके मध्य नियुक्ति के ढंग, अनुभव तथा शैक्षणिक अर्हताओं में समानता न हो। (म.प्र. राज्य द्वारा सेक्रेटरी डिपार्टमेन्ट ऑफ जेल/होम, भोपाल वि. राजेश कुमार शुक्ला) (DB)...*149

Service Law – Promotion – Consequential Benefits – **Held – Respondents are directed to issue order of promotion to petitioner/ other petitioners with all consequential benefits w.e.f. date on which her/their juniors stood promoted. [Sangeeta Soni (Smt.) Vs. State of M.P.] ...*145**

सेवा विधि – पदोन्नति – परिणामिक लाभ – अभिनिर्धारित – याची/अन्य याचीगण को, जिस तिथि से उसके/उनके कनिष्ठों की पदोन्नति हुई है, उस तिथि से सभी परिणामिक लाभों के साथ पदोन्नति का आदेश जारी करने के लिए प्रत्यर्थीगण को निदेशित किया गया। (संगीता सोनी (श्रीमती) वि. म.प्र. राज्य) ...*145

Service Law – Promotion – **Staff Nurses are entitled to be promoted on the post of Sister Tutor after obtaining degree in B.Sc. (Nursing) from M.P. Bhoj Open University – Government had itself allowed the University to conduct aforesaid course – Action of State Government as well as Indian Nursing Council and the assigned reasons for denying such promotion is arbitrary, unjust and without application of mind – Impugned order and letter quashed – Petitions allowed. [Sangeeta Soni (Smt.) Vs. State of M.P.] ...*145**

सेवा विधि – पदोन्नति – म.प्र. भोज मुक्त विश्वविद्यालय से बी.एस.सी. (उपचर्या) में उपाधि अभिप्राप्त करने के पश्चात् स्टाफ परिचारिकाऐं, शिक्षिका सिस्टर के पद पर पदोन्नति की हकदार हैं – सरकार ने स्वयं उपरोक्त पांठ्यकम संचालित करने हेतु विश्वविद्यालय को मंजूरी दी थी – राज्य सरकार साथ ही भारतीय उपचर्या परिषद् की कार्रवाई एवं उक्त पदोन्नति से इन्कार हेतु दिये गये कारण मनमाने, अन्यायपूर्ण व मस्तिष्क का प्रयोग किये बिना है – आक्षेपित आदेश व पत्र अभिखंडित – याचिकाऐं मंजूर। (संगीता सोनी (श्रीमती) वि. म.प्र. राज्य) ...*145

***Transfer of Property Act (4 of 1882), Section 109 – See – Accommodation Control Act, M.P., 1961, Section 12(1)(a) & 12(1)(c)* [Babu Lal Vs. Sunil Baree] ...2692**

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 109 – देखें – स्थान नियंत्रण अधिनियम, म.प्र., 1961, धारा 12(1)(ए) व 12(1)(सी) (बाबूलाल वि. सुनील बारी) ...2692

***VAT Act, M.P. (20 of 2002), Section 46 & 47 – Suo Motu Revisional Power* – Show cause notice issued to petitioner regarding *suo motu* revision against him – Petitioner filed objection which was dismissed – Challenge to – Held – Section 46 and 47 of the Act of 2002**

provides no further appeal or revision – Order passed by Dy. Commissioner of Commercial Tax (Appeal) is final and is not amenable to *suo motu* revisional power conferred by Section 47 of the Act – Further held – Every taxing statute must be read according to natural construction of its words – Impugned order set aside – Petition allowed with cost of Rs. 10,000/-. [Goldie Glass Industries Vs. State of M.P.] **(DB)...*137**

वैट अधिनियम, म.प्र., (2002 का 20), धारा 46 व 47 – स्वप्रेरणा से पुनरीक्षण की शक्ति – याची के विरूद्ध स्वप्रेरणा से पुनरीक्षण के संबंध में उसे कारण बताओ नोटिस जारी किया गया – याची ने आक्षेप प्रस्तुत किया जिसे खारिज किया गया – कों चुनौती – अभिनिर्धारित – 2002 के अधिनियम की धारा 46 व 47, आगे कोई अपील या पुनरीक्षण उपबंधित नहीं करती – उपायुक्त, वाणिज्यिक कर (अपील) द्वारा पारित आदेश अंतिम है और अधिनियम की धारा 47 द्वारा प्रदत्त स्वप्रेरणा से पुनरीक्षण की शक्ति के अध्यधीन नहीं है – आगे अभिनिर्धारित – प्रत्येक कर कानून को उसके शब्दों के नैसर्गिक अर्थान्वयन के अनुसार पढ़ा जाना चाहिए – आक्षेपित आदेश अपास्त – याचिका, रू. 10,000/– व्यय के साथ मंजूर की गई। (गोल्डी ग्लास इंडस्ट्रीज वि. म.प्र. राज्य) **(DB)...*137**

Vindhya Pradesh Land Revenue and Tenancy Act, 1953 (3 of 1955), Section 149, 151(2) & (3) – See – Rewa State Land Revenue and Tenancy Code, 1935, Section 57(4) **[Ramakant Pathak Vs. State of M.P.]** **...2699**

विंध्य प्रदेश भू–राजस्व तथा काश्तकारी अधिनियम, 1953 (1955 का 3), धारा 149, 151(2) व (3) – देखें – रीवा राज्य भू–राजस्व तथा काश्तकारी संहिता, 1935, धारा 57(4) (रमाकांत पाठक वि. म.प्र. राज्य) **...2699**

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THE INDIAN LAW REPORTS M.P. SERIES, 2017
(VOL-4)
JOURNAL SECTION

FAREWELL

HON'BLE MR. JUSTICE ALOK VERMA

Born on November 28, 1955 at Chhindwara, Madhya Pradesh. After completing B.Sc., M.A., LL.B., LL.M, joined State Judicial Service on 22.09.1981 as Civil Judge Class-II. Was posted on deputation as Law Officer in Housing Board, Bhopal in the year 1987. Was appointed as Civil Judge Class-I in the year 1988. Was appointed as A.C.J.M. in the year 1991 and as C.J.M. in the year 1994. Promoted as Offg. District Judge in Higher Judicial Service w.e.f. 05.09.1994 and was posted as ADJ-II at Sehore. Was posted as Deputy Secretary, Law Department, Bhopal in the year 1997. Was confirmed as District Judge in Higher Judicial Service w.e.f. 04.10.1997. Was posted as Deputy Registrar, National Judicial Academy, Bhopal in the year 2000. Was granted Selection Grade Scale w.e.f. 08.07.2000. Was posted as President, District Consumer Forum, Seoni in the year 2004. Was posted as District & Sessions Judge, Sheopur in the year 2006. Was posted as Commissioner, Departmental Enquiry (GAD) in the year 2006 at Bhopal. Was granted Super Time Scale w.e.f. 01.04.2008. Was posted as District & Sessions Judge, Satna in the year 2010. Was posted as Director, Public Prosecution, Bhopal from 25.06. 2013 till elevation.

Elevated as Additional Judge of the High Court of Madhya Pradesh, took oath on 30.06.2014 and demitted office on 27.11.2017.

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

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FAREWELL OVATION TO HON'BLE MR. JUSTICE ALOK VERMA, GIVEN ON 27.11.2017, AT THE HIGH COURT OF M.P., BENCH INDORE.

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

Justice Alok Verma, who is demitting Office today, after rendering distinguished service to this prestigious constitutional Office (of Indian Judiciary) for more than three years. I can say, without any hesitation, that with the retirement of Justice Verma, the Bench and Bar of Madhya Pradesh High Court will be loosing a good and illustrious Judge.

For a lot of people, law is by chance, but for Justice Verma, it was by choice, as his mother Late Smt. Kanti Verma and grandfather late Shri Justice Tarachand Shrivastava were the main driving force behind him to join Judicial Services.

After completing a brilliant academic career of B.Sc., M.A., LL.B. and LL.M., Justice Verma joined State Judicial Services on 22nd September, 1981 as Civil Judge Class-II. While he worked as a Judge in the lower judiciary in different capacities, he remained posted at various places in the State of MP and has acquired vast experience.

On 5th September, 1994, Justice Verma was promoted as the Officiating District & Sessions Judge. He was granted Selection Grade Scale with effect from 8th July, 2000 and Super Time Scale with effect from 1st April, 2008. Before elevation, he was posted as the Director, Public Prosecution at Bhopal with effect from 25th June, 2013.

Looking to his hard working and approach to the law in deciding the cases of different fields, he was elevated as an Additional Judge of Madhya Pradesh High Court on 30th June, 2014.

On the occasion of his elevation in reply to the ovation, he had quoted a few lines of famous philosopher 'Socrates', which I quote:-

> "Four things belong to a Judge, to hear courteously, to answer wisely, to consider soberly and to decide impartially."

and spoken few words, which I also quote:-

> "I assure that I will follow these principles while working here as a Judge. I request you to please judge me in the strictest

possible manner and guide me, if you find me lacking."

Today we are here to appreciate his work and deeds. His tenure was of a great success. Justice Verma has delivered various important judgments. His most of the judgments which are published in Law Journals are landmark judgments. His contribution to the legal fraternity is an asset and he will be remembered always for his deeds. His retirement as a Judge of High Court will be a great loss for all of us.

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

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

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

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

On behalf of my brother Judges and on my own behalf, I take this opportunity to extend my gratitude to Justice Verma for his distinguished contribution to the Institution which will be remembered forever.

I wish Justice Verma good luck in all his future endeavours.

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

I end by quoting Richard Bach, an American writer: "Don't be dismayed by good-byes. A farewell is necessary before you can meet again. And meeting again, after moments or lifetimes, is certain for those who are friends."

Friend Justice Verma - But, we shall miss you.

Thank you.

.....

Shri Manoj Dwivedi, Additional Advocate General, M.P., bids farewell :-

We all have assembled here to bid farewell to Hon'ble Shri Justice Alok Verma sahab and convey our greetings for his future endeavours.

It is said that the country which does not have brave prosecutors and fearless Judges will have plenty of anti-social elements. Shri Justice Alok Verma sahib has proved himself to be fearless Judge all along his career. On his demitting the office today the Bench and the Bar will be losing a brilliant and illustrious Judge.

Today is the day to thank Shri Justice Alok Verma sahab for his illustrious career in the Judiciary not only as a High Court Judge but also as a Judge in lower Court as well. Through his contribution to the Judicial system for more than three decades he has secured a remarkable reputation not just for himself but also for the entire Institution.

Shri Justice Alok Verma sahab has earned a reputation not only for efficient administration of justice but also for his commitment to uphold the rule of law. Shri Justice Alok Verma sahab has been effective in protecting the rights of all citizens.

In a short span Shri Justice Alok Verma sahib became a popular Judge. He has effectively dealt with the election petitions within the time frame. He also has dealt with almost all types of cases brought before him irrespective of their nomenclature. Despite of the heavy work load Shri Justice Alok Verma sahib had always a smile on his face even at 4.45 PM. He has all the qualities of the excellent Judge and the judicial temperament. Looking at him it is easy to understand that why the Hon'ble Judges are referred to as the pillar of the Judicial System. Today when the high ethical times have been succeeded by low and we all are witnessing high crime rates and ethical degradation and the Judges role has become more fundamental in protecting the society from this degradation, Judges like Shri Justice Alok Verma sahib will always be ray of hope to whom the society looks with a expectation to make a difference.

His contribution has also been read out by Hon'ble The Administrative Judge and I agree with the same.

I, on behalf of the State and on behalf of Advocate General and all my colleagues at AG office along with the staff wish him well in his year of retirement ahead and all his future endeavours.

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Shri Anil Ozha, President, High Court Bar Association, Indore, bids farewell :-

आज हम सभी माननीय न्यायमूर्ति श्री आलोक वर्मा साहब के सम्मान में आयोजित विदाई समारोह में उपस्थित हुए हैं।

विदाई के क्षण हमेशा वेदना के होते हैं। आज न्यायमूर्ति श्री वर्मासाहब द्वारा अभिभाषकों के साथ किया गया व्यवहार, सद्भावना एवं बड़प्पन चलचित्र की तरह हमारी आँखों के सामने एक बार पुनः साकार हो रहा है। एक न्यायमूर्ति को कैसा होना चाहिये, इसके आदर्श उदाहरण की तरह न्यायमूर्ति हमारे सामने विराजमान हैं। माननीय न्यायमूर्ति श्री आलोक वर्मा साहब का जन्म 28 नवम्बर, 1955 में हुआ था। माननीय महोदय अभियोजन अधिकारी के पद से न्यायमूर्ति, मध्यप्रदेश उच्च न्यायालय के पद की ऊँचाई तक पहुंचे, सन् 1981 में वे सिविल जज चयनित हुये, सन् 1991 में माननीय महोदय सी.जे.एम. बनाये गये, सन् 2008 में जिला एवं सत्र न्यायाधीश के पद पर पदोन्नत हुए। माननीय महोदय 30.06.2014 को उच्च न्यायालय मध्यप्रदेश में न्यायामूर्ति के पद पर पदस्थ हुये। माननीय महोदय ने अल्प समय में ही कई महत्वूपर्ण प्रकरणों में मील का पत्थर साबित होने वाले निर्णय दिये। आपका व्यवहार सदैव सकारात्मक और सहयोगात्मक रहा, उसके लिये हाईकोर्ट बार एसोसिएशन, इंदौर की कार्यकारिणी एवं अधिवक्ता सदस्य साथीगण तहेदिल से आपका धन्यवाद प्रेषित करती है। न्यायमूर्ति वर्मा साहब के साथ व्यतीत किया गया समय सदैव के लिये स्मरणीय रहेगा । कांफ्रेंस हॉल में अधिवक्तागण की उपस्थिति इसका प्रत्यक्ष उदाहरण है।

मै उच्च न्यायालय अभिभाषक संघ के अपने सभी सदस्यों की तरफ से अपनी सद्भावना प्रेषित करता हूँ। आपका भावी जीवन आपके जीवन में एक नये पथ का निर्माण करे यह कामना है। आप वह सब करने में समर्थ साबित हों जो आप अपनी व्यस्तता की वजह से अभी तक नही कर सके हैं। आपका एवं श्रीमती वर्मा का आने वाला समय स्वस्थ एवं प्रसन्नता के साथ गुज़रे, यही कामना है। हमारी सद्भावना है कि आप यहाँ से सेंवा निवृत्त होने के पश्चात् और अधिक सक्रिय जीवन जीयें तथा न्याय क्षेत्र में अपनी अलग भूमिका में महत्वपूर्ण रोल अदा करें। हमारी ढ़ेर सारी शुभकामनायें।

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

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

माननीय न्यायमूर्ति श्री आलोक जी वर्मा साहब का जन्म 28 नवम्बर, 1955 को हुआ। आपने बी.एस.सी.,एम.ए., एल.एल.बी. एवं एल.एल.एम. की उपाधि अर्जित करने के पश्चात् 22 सितम्बर, 1981 में व्यवहार न्यायाधीश वर्ग–2 के रूप में राज्य न्यायिक सेवा में प्रवेश किया। अतिरिक्त जिला न्यायाधीश के रूप में पदस्थ हुए एवं पदोन्नत होकर जिला एवं सत्र न्यायाधीश के रूप में कार्यभार ग्रहण किया। दिनांक 30 जून, 2014 को म.प्र. उच्च न्यायालय में न्यायाधिपति के पद पर आसीन हुए। आपने प्रदेश की विभिन्न अदालतों सहित माननीय उच्च न्यायालय में अपनी कार्यशैली, शालीनता, सादगी व

निर्भीकता से न्यायदान कर अपनी एक पहचान बनाते हुए सभी दायित्वों का आपके द्वारा सफलतापूर्वक निर्वहन किया गया।

आपके कोर्ट रूम में जूनियर व सीनियर अधिवक्ताओं को बार और बेंच के बीच जो माहौल मिला, जिससे की जूनियर अधिवक्ताओं को अपनी बात रखने में बहुत सहजता हुई।

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

आने वाले समय में आपकी अनुपस्थिति से जो रिक्तता उत्पन्न होगी वह हमेशा महसूस होती रहेगी। माननीय न्यायमूर्ति जी के अनुभवों से बहुत कुछ सीखने को मिला। न्यायदान में आपका योगदान अमूल्य एवं अभिनन्दनीय है। आपके सफल कार्यकाल पूर्ण करने पर आपसे यह अनुरोध करता हूँ कि, इस अर्धविराम के बाद प्रवाहमान होने वाली समय की गति के साथ–साथ आप उसी सहजता एवं सुलभता के साथ प्रदेश के विधि व्यवसायियो एवं समाज के अन्य वर्गों के सामाजिक विकास में अपना रचनात्मक योगदान देकर नई भूमिकाओं का निर्वहन करेंगे।

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

धन्यवाद सहित।

Shri Deepak Rawal, Assistant Solicitor General, bids farewell:-

Today, we are gathered here to bid farewell to Hon'ble Shri Justice Alok Verma Saheb, who is demitting the office today after rendering distinguished service to our High Court judicially for more than 3 years. I can say without any hesitation that with retirement of Justice Verma, the Bench and Bar of the Indore High Court will be losing a brilliant and illustrious Judge.

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

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

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

It would not be out of place to mention that Justice Verma has been Dhruv Tara of the judicial reputation.

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

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

Justice Verma will always be remembered forever for his humbleness and patience hearing irrespective of status of any lawyer, whether Junior or Senior.

On behalf of Union of India and on my behalf, I take this opportunity to extend my gratitude to Justice Verma Saheb for his distinguished contribution to the Institution, which will be remembered forever.

I conclude wishing Justice Verma good luck in all his future endeavors.

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

Thank you.

Shri Piyush Mathur, Senior Advocate, bids farewell :-

We have heard on many occasions about the qualities, an individual must possess, for being appointed as a Judge of the High Court and all of us have seen some of the finest & brilliant Judges, in our career as Lawyers and Judges, and Hon'ble Justice Alok Verma can be gracefully classified as most compassionate, intelligent, kind & gentle Judge to the core of his heart.

We all know that we work in an environment which is flooded with litigation of an adversarial nature, which brings in its fold a natural animosity amongst litigants, which at times reflect so vividly during the conduction of the trial or hearing of the appeals that at times it becomes difficult for a Judge to keep himself aloof or away from the heat & dust of the litigation, because everyone feels empty or rather relieved after completing his submissions. and thereafter begins the job of the Judge, because he has to really separate the chaff from the grain, for reaching a legal & logical conclusion, within the factual and legal parameters of the matter.

Justice Verma during his tenure as a High Court Judge has exhibited tremendous tenacity and remarkable capability of handling all such troublesome jobs with the utmost ease, poise & perfection. The size of the cause list or the bulk of case file, has never bothered him, as he is blessed with the brilliance of picking up the legal issues, in the fastest possible manner and to decide them in the absolute legal manner.

The most astonishing facet & most appreciable aspect of Justice Verma's personality is his tremendous energy and dedication for work and above all his lovely smile, which he gracefully carry right from 10.30 till 4.30 and even thereafter.

The members of the Bar had always felt most comfortable in Justice Verma's Court, as nobody has ever faced any unpleasant or uncontrollable situations, which in present day scenario, I would call as a great achievement of the Hon'ble Judge, because by his sweet & sober mannerism he had won hearts of everybody here at Indore.

In his Court, both the litigating parties had an equal feeling of being treated properly and judiciously. Many of the lawyers present here today, have heard several litigants saying; " I would even prefer to loose my case, if it is decided at the hands of Justice Verma". I am sure that Justice Verma has certainly won the hearts of each of the lawyers and has equally won the hearts of each of the litigant, which is the supreme achievement of a Judge.

As we have been seeing in the past, the "Judges come and Judges go", but their work and working style always remain alive, as a source of inspiration for the coming generation of lawyers and Judges. Today Justice Verma is leaving that legacy of his unique style behind, which would be always remembered by members of the Bar.

I know for myself that the job of the Judge is nothing short of a 'Divine Duty' which every Judge remembers every moment of the day and to decide the dispute of the disputants in the most dispassionate manner with a compassionate heart, is probably the requirement of the job and many a Judges with their compassionate attitude have achieved the glory of a brilliant Judge.

Justice Verma has drawn such a huge and brilliant benchmark, with his dedicated service to this 'August Institution' that it would always remain a matter of great pride for the entire legal fraternity. Justice Verma's court-craft and his judgments would always be remembered as remarkable 'Source of Inspiration' for the coming generations.

Our country is faced with the greatest challenge of the pendency of litigation but with his dedicated and untiring work, Justice Verma has proved on this front also that without much caring or bothering for the number of daily disposal of matters, a Judge can actually 'Decide' the cases on merits in a faster manner with the able assistance of the members of the Bar. On this count also Justice Verma deserves a great applause & appreciation that he discharged his duty of dispensing justice to a very large number of litigants, during his entire career as a Judge.

Justice Verma has lighted the flame of Justice so high & bright, that now, each one of us is required to keep it always ablaze, with our dedicated efforts & mutual co-operation, which would empower us all as a citizen and as a member of the legal fraternity.

On this occasion of saying a good bye to you, Hon'ble Justice Alok Verma, I wish to extend my greetings to you for completing your journey as an "Excellent High Court Judge" & a far superior "Human Being" and wish you and Mrs Verma a very happy, healthy & peaceful life and wish both of you a very good luck for your future life.

Farewell speech delivered by Hon'ble Mr. Justice Alok Verma:-

To begin with I pay my humble regards to "Ma Sharda Devi" the presiding deity of Maihar Shrine, "Lord Mahakaal" of Ujjain, "Lord Trinetra Ganesha" of Ranathambore Fort and "Hazarat Pir Fatah Shah Baba" of Raisen for giving me courage, strength and ability to complete my tenure as Judge of this noble institution.

The day has come to demit the office of Judge of this Court after completing 3 years 5 months of tenure and after completing 32 years 9 months tenure as Judge of the Subordinate Court.

Today, I have mixed feelings. I am sad because I am leaving this august institution, after serving it for 36 years 2 months for good and I am happy because now I will have ample time to pursue my academics and bobbies, which took back seat due to my over busy schedule throughout this period of 36 years. However, I sincerely feel that after working so hard especially for the last three and a half years in this Court, there will be a vacuum and which would not be very easy to cope with.

Working at Indore for the last 3 years gave me immense contentment. The Bar here gave me ample opportunities to learn and sharpen my skills and to enrich my knowledge of law. Some aspects of law like Election Laws, I

learned only during this tenure. In the subordinate judiciary, we do not find many opportunities to hear an Election Petition. When I joined here, I was assigned to try Election Petitions in the year 2015 and barring a brief period in the year 2016, I continuously heard Election Petitions and disposed off three Election Petitions. Apart from Election Petitions, I also worked diligently to dispose off petitions under Section 482 Cr.P.C. and also criminal and civil appeals. All these gave me great feeling of fulfillment.

When I joined judicial service in the year 1981, I came across famous saying by philosopher 'Socrates' who prescribed four qualities for a judge i.e., hear courteously, answer wisely, consider soberly and decide impartially.

I am not sure whether I was successful in my efforts to work as a Judge with aforesaid qualities, but I tried my level best. The kind words spoken here today to some extent vindicate my feeling that if not fully, I have been partially successful in my attempt to imbibe these qualities in me. I am thankful to the speakers.

I am extremely thankful to my Lord Chief Justices of this Court who head this institution during my tenure and my brother Judges for their support, cooperation and encouragement to me during this period. I am also grateful to senior advocates and members of the Bar for their support and cooperation in my judicial work during this tenure.

I am thankful to Officers of the Registry, Staff of Protocol Section, and my personal staff for their unconditional support and cooperation during this period.

I also wish to express my gratitude to my family members who have come all the way to attend the farewell ovation and for their affection and good wishes.

Last but not the least, I feel blessed for immense support of my wife Dr. Madhu Verma, my daughter Mrs. Mallika Shrivastava, my son-in-law Shantanu Shrivastava and my son Eshan Verma, throughout my career and for bringing happiness and contentment in my life.

Completing my tenure as Judge I am convinced and again quote words of George Herbert:

"God's mill grinds slow but sure."

Thanks all of you.

NOTES OF CASES SECTION

Short Note

**(131)*

Before Ms. Justice Vandana Kasrekar

W.P. No. 8315/2017 (Jabalpur) decided on 11 August, 2017

AJIT SINGH & anr. ...Petitioners

Vs.

DEVESH PRATAP SINGH & ors. ...Respondents

A. Civil Procedure Code (5 of 1908), Order 6 Rule 17, Proviso – Amendment in Written Statement – Amendment in Code – Effect – **Held – Proviso to Order 6 Rule 17 was added vide CPC (Amendment) Act, 2002 and thus would not be applicable to civil suits which are filed prior to coming into force of the amendment Act of 2002 – In present case, suit was filed in 1981 thus proviso will not apply to the suit – Petition allowed.**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17, परंतुक – लिखित कथन में संशोधन – संहिता में संशोधन – प्रभाव – अभिनिर्धारित – आदेश 6, नियम 17 के परंतुक को सि.प्र.सं. (संशोधन) अधिनियम, 2002 द्वारा जोड़ा गया था और इसलिए उन सिविल वादों के लिए लागू नहीं होगा जिन्हें 2002 के संशोधन अधिनियम प्रभावी होने से पूर्व प्रस्तुत किया गया है – वर्तमान प्रकरण में, 1981 में वाद प्रस्तुत किया गया था अतः वाद के लिए परंतुक लागू नहीं होगा – याचिका मंजूर।

B. Civil Procedure Code (5 of 1908), Order 6 Rule 17 – Amendment in Written Statement/Plaint – Principle – **Held – Apex Court concluded that amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle – Courts should be more liberal in case of an amendment of written statement, than that of a plaint – Application for amendment in written statement filed by petitioner/defendant allowed.**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – लिखित कथन/वादपत्र में संशोधन – सिद्धांत – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि एक वादपत्र का संशोधन एवं एक लिखित कथन का संशोधन, यथार्थतः समान सिद्धांत द्वारा, आवश्यक रूप से शासित नहीं होता – न्यायालयों को एक वाद पत्र की तुलना में एक लिखित कथन के संशोधन के प्रकरण में अधिक उदार होना चाहिए – याची/प्रतिवादी द्वारा प्रस्तुत लिखित कथन में संशोधन हेतु आवेदन मंजूर।

NOTES OF CASES SECTION

Cases referred :

(2007) 1 SCC 765, (2009) 14 SCC 38, (2012) 2 SCC 300.

Himanshu Mishra and *Ankit Saxena*, for the petitioners.
Rajendra Kumar Singh, for the respondent Nos. 1 to 3 on caveat.

Short Note
****(132)(DB)***
Before Mr. Justice S.K. Seth & Smt. Justice Anjuli Palo
M.Cr.C. No. 17905/2017 (Jabalpur) decided on 15 November, 2017

BUDDHA SEN KUMHAR ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d) & 13(2) and Constitution – Article 20 & 20(3) – Admissibility of Voice Recording **– Application by prosecution for providing voice sample of accused persons was allowed – Challenge to – Held – Trial has not yet commenced – Charges have not been framed by trial Court – Providing voice sample would not prejudice to the applicant – Voice recorder conversation is admissible in evidence and there is no violation of Article 20 or 20(3) of Constitution – Application dismissed.**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(डी) व 13(2) एवं संविधान – अनुच्छेद 20 व 20(3) – आवाज की रिकॉर्डिंग की ग्राह्यता – अभियोजन द्वारा अभियुक्तगण की आवाज का नमूना उपलब्ध कराये जाने हेतु आवेदन मंजूर किया गया – को चुनौती – अभिनिर्धारित – विचारण अभी आरंभ नहीं हुआ है – विचारण न्यायालय द्वारा आरोप विरचित नहीं किये गये हैं – आवाज का नमूना उपलब्ध कराने से आवेदक को प्रतिकूल प्रभाव कारित नहीं होगा – आवाज रिकॉर्डर की बातचीत साक्ष्य में ग्राह्य है तथा संविधान के अनुच्छेद 20 या 20(3) का कोई उल्लंघन नहीं हुआ है – आवेदन खारिज।

The order of the Court was passed by : **ANJULI PALO, J.**

Cases referred :

AIR 2013 SC 1132, (2016) 8 SCC 307, 2007 Cr.L.J. 1535, AIR 1961 SC 1808, 2017 Cri.L.J. (SC) 4305, AIR 2015 SC 180, AIR 1973 SC 157, (2016) 8 SCC 307, (2008) 2 SCC 383, 2012 Cr.L.J. 3290.

Pramod Thakre, for the applicant.

Pankaj Dubey, for the non-applicant/SPE Lokayukta.

Short Note

****(133)(DB)***

Before Mr. Justice S.C. Sharma & Mr. Justice Alok Verma

W.P. No. 164/2004 (Indore) decided on 26 September, 2017

CASTROL INDIA LTD. (M/S.) ...Petitioner

Vs.

COMMISSIONER OF COMMERCIAL TAX, M.P. & ors. ...Respondents

(Alongwith W.P. No. 5954/2007)

***Commercial Tax Act, M.P. 1994 (5 of 1995), Schedule II, Part III, Entry No. 9 – Lubricants – Brake Fluid* – Held – Brake fluid is a different kind of liquid altogether which is never used for purpose of lubricating either the brake or any part which is under the braking system – Brake fluid and Lubricants are different and cannot be treated under one entry for the purpose of taxation – Impugned orders quashed – Petitions allowed.**

वाणिज्यिक कर अधिनियम, म.प्र. 1994 (1995 का 5), अनुसूची II, भाग III, प्रविष्टि क्र. 9 – स्नेहक तेल – ब्रेक तरल – अभिनिर्धारित – ब्रेक तरल एक पूर्णतया भिन्न प्रकार का द्रव है जिसका उपयोग कभी भी या तो ब्रेक अथवा ब्रेकींग प्रणाली के अंतर्गत किसी हिस्से का स्नेहन करने के प्रयोजन हेतु नहीं किया जाता – ब्रेक तरल एवं स्नेहक तेल भिन्न हैं तथा कर के प्रयोजन हेतु एक प्रविष्टि के अंतर्गत नहीं माने जा सकते – आक्षेपित आदेश अभिखंडित – याचिकाएँ मंजूर।

The order of the Court was passed by : **S.C. SHARMA, J.**

Cases referred:

Sales Tax Cases (Vol-63) 322, [2014] 72 VST 383 (All), Sales Tax Cases (Vol. 61) 76, (2006) 9 STJ 292 (SC), (2011) 19 STJ 560 (MP), [2014] 70 VST 342 (SC), (2016) 29 STJ 50 (SC).

P.M. Choudhary with *D.S. Kale*, for the petitioner.

Milind Phadke, G.A. for the respondent/State.

NOTES OF CASES SECTION

Short Note

**(134)*

Before Mr. Justice S.A. Dharmadhikari

Cr.A. No. 626/2003 (Gwalior) decided on 29 August, 2017

DHANRAJ SINGH & anr. ...Appellants

Vs.

STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Section 376(2)(g) – Rape – Conviction – Medical Evidence – Injury – **Held – If sexual intercourse committed forcibly by two persons, prosecutrix would certainly receive injuries – Absence of any injury on person of prosecutrix including private parts leads to conclusion that either appellants did not resort to offence of forcible sexual intercourse or it was with her tacit consent – Statement of prosecutrix is contrary to medical evidence and thus do not inspire confidence – Conviction set aside – Appeal allowed.**

क. दण्ड संहिता (1860 का 45), धारा 376(2)(जी) – बलात्संग – दोषसिद्धि – चिकित्सीय साक्ष्य – चोट – अभिनिर्धारित – यदि दो व्यक्तियों द्वारा बलपूर्वक लैंगिक संभोग किया गया है, अभियोक्त्री को निश्चित रूप से चोटें कारित होगी – अभियोक्त्री के शरीर पर, जिसमें गुप्तांग शामिल है, किसी चोट की अनुपस्थिति इस निष्कर्ष की ओर ले जाती है कि या तो अपीलार्थीगण ने बलपूर्वक लैंगिक संभोग के अपराध का सहारा नहीं लिया या वह उसकी मौन सम्मति के साथ हुआ था – अभियोक्त्री का कथन चिकित्सीय साक्ष्य के विरूद्ध है और इसलिए विश्वास उत्पन्न नहीं करता – दोषसिद्धि अपास्त – अपील मंजूर।

B. Penal Code (45 of 1860), Section 376(2)(g) & Evidence Act (1 of 1872), Section 114-A – Presumption – Onus of Proof – Medical Evidence – **Held – In a rape case, the onus is always on prosecutrix to prove affirmatively each ingredients of offence, it seeks to establish and such onus never shifts – Trial Court erred in raising presumption u/S 114-A of the Act of 1872 in absence of any medical evidence regarding resistance/injury.**

ख. दण्ड संहिता (1860 का 45), धारा 376(2)(जी) एवं साक्ष्य अधिनियम (1872 का 1), धारा 114–ए – उपधारणा – सबूत का भार – चिकित्सीय साक्ष्य – अभिनिर्धारित – बलात्संग के प्रकरण में, अपराध जिसे स्थापित करना चाहा गया है, के प्रत्येक घटक को सकारात्मक रूप से साबित करने का भार सदैव अभियोक्त्री पर होता है, तथा उक्त भार कभी भी अन्य पर परिवर्तित नहीं होता – विचारण न्यायालय

ने. प्रतिरोध/चोट के संबंध में किसी चिकित्सीय साक्ष्य की अनुपस्थिति में 1872 के अधिनियम की धारा 114–ए के अंतर्गत उपधारणा बनाने में त्रुटि की।

T.C. Bansal, for the appellant.
Ami Prabal, Dy. A.G. for the respondent/State.

Short Note
****(135)***
Before Mr. Justice Atul Sreedharan
Cr.R. No. 1411/2006 (Jabalpur) decided on 31 August, 2017

DUSHYANT SINGH GAHARWAR & ors. ...Applicants
Vs.
STATE OF M.P. & anr. ...Non-applicants

A. ***Penal Code (45 of 1860), Section 498-A and Criminal Procedure Code, 1973 (2 of 1974), Section 177 & 178 – Territorial Jurisdiction*** **– Held – As per the FIR and statements of complainant's witnesses u/S 161 Cr.P.C., all the instances of alleged cruelty regarding dowry demands were committed in district Shahdol in matrimonial home – None stated that any instance took place at wife's parental home at district Satna – Case triable at Shahdol and not in district Satna – Impugned order set aside – Revision allowed.**

क. दण्ड संहिता (1860 का 45), धारा 498–ए एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 177 व 178 – क्षेत्रीय अधिकारिता – अभिनिर्धारित – प्रथम सूचना प्रतिवेदन तथा धारा 161 दं.प्र.सं. के अंतर्गत परिवादी के साक्षीगण के कथनों के अनुसार दहेज की मांग से संबंधित अभिकथित क्रूरता की सभी घटनाऐं दाम्पत्य गृह में जिला शहडोल में कारित की गई थी – किसी ने कथन नहीं किया कि कोई भी घटना पत्नी के पैतृक गृह, जिला सतना में घटी – प्रकरण, शहडोल में विचारणीय है और न कि जिला सतना में – आक्षेपित आदेश अपास्त – पुनरीक्षण मंजूर।

B. ***Penal Code (45 of 1860), Section 498-A and Criminal Procedure Code, 1973 (2 of 1974), Section 177 & 178*** **– Continuing Offence in relation to territorial jurisdiction and in relation to limitation to taking cognizance – Discussed and explained.**

ख. दण्ड संहिता (1860 का 45), धारा 498–ए एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 177 व 178 – संज्ञान लेने के लिए क्षेत्रीय अधिकारिता के संबंध में तथा परिसीमा के संबंध में जारी रहने वाला अपराध – विवेचित एवं

स्पष्ट किया गया।

Cases referred :

(2004) 8 SCC 100, AIR 2016 SC 3930.

Siddharth Datt, for the applicant.
Y.D. Yadav, G.A. for the non-applicant No. 1.
None present, for the non-applicant No. 2.

Short Note

****(136)***

Before Mr. Justice Shushil Kumar Palo

M.Cr.C. No. 1185/2017 (Jabalpur) decided on 21 September, 2017

GANESH ...Applicant

Vs.

CHHIDAMILAL & anr. ...Non-applicants

(Alongwith M.Cr.C. No. 1186/2017, 1189/2017)

Negotiable Instruments Act (26 of 1881), Section 138 & 141 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Necessary Party – Maintainability of Complaint – **Held – Cheque issued by Directors of Company – In a complaint u/S 138 of the Act of 1881, when Company is not arrayed as a party/accused, criminal proceedings issued against Directors is not maintainable – Proceedings of criminal cases quashed – Petitions allowed.**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 व 141 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – आवश्यक पक्षकार – परिवाद की पोषणीयता – अभिनिर्धारित – कम्पनी के निदेशकों द्वारा चेक जारी किया गया – 1881 के अधिनियम की धारा 138 के अंतर्गत परिवाद में, जब कम्पनी को पक्षकार/अभियुक्त नहीं बनाया गया है, निदेशकों के विरूद्ध जारी की गई दाण्डिक कार्यवाहियां पोषणीय नहीं है – दाण्डिक प्रकरणों की कार्यवाहियां अभिखंडित – याचिकाऐं मंजूर।

Cases referred :

1997 (3) Mh.L.J. 335, I (1995) BC 466, 2015 All MR (Cri.), 2000 (1) Crimes 26 (SC), ALL MR (Cri.) 4877, (2015) 12 SCC 781, (2012) 5 SCC 661.

J.M. Gandhi and *Purnima Bhalerao*, for the applicant.
Mukesh Kumar Shukla, for the non-applicant No. 1..
C.K. Mishra, G.A. for the non-applicant No. 2/State.

Short Note
****(137)(DB)***
Before Mr. Justice S.K. Seth & Smt. Justice Anjuli Palo
W.P. No. 7536/2014 (Jabalpur) decided on 18 August, 2017

GOLDIE GLASS INDUSTRIES ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

VAT Act, M.P. (20 of 2002), Section 46 & 47 – Suo Motu Revisional Power **– Show cause notice issued to petitioner regarding *suo motu* revision against him – Petitioner filed objection which was dismissed – Challenge to – Held – Section 46 and 47 of the Act of 2002 provides no further appeal or revision – Order passed by Dy. Commissioner of Commercial Tax (Appeal) is final and is not amenable to *suo motu* revisional power conferred by Section 47 of the Act – Further held – Every taxing statute must be read according to natural construction of its words – Impugned order set aside – Petition allowed with cost of Rs. 10,000/-.**

वैट अधिनियम, म.प्र., (2002 का 20), धारा 46 व 47 – स्वप्रेरणा से पुनरीक्षण की शक्ति – याची के विरूद्ध स्वप्रेरणा से पुनरीक्षण के संबंध में उसे कारण बताओ नोटिस जारी किया गया – याची ने आक्षेप प्रस्तुत किया जिसे खारिज किया गया – को चुनौती – अभिनिर्धारित – 2002 के अधिनियम की धारा 46 व 47, आगे कोई अपील या पुनरीक्षण उपबंधित नहीं करती – उपायुक्त, वाणिज्यिक कर (अपील) द्वारा पारित आदेश अंतिम है और अधिनियम की धारा 47 द्वारा प्रदत्त स्वप्रेरणा से पुनरीक्षण की शक्ति के अध्यधीन नहीं है – आगे अभिनिर्धारित – प्रत्येक कर कानून को उसके शब्दों के नैसर्गिक अर्थान्वयन के अनुसार पढ़ा जाना चाहिए – आक्षेपित आदेश अपास्त – याचिका, रू. 10,000/– व्यय के साथ मंजूर की गई।

The order of the Court was passed by : **S.K. Seth, J.**

G.N. Purohit with *Abhishek Oswal*, for the petitioner.
Samdarshi Tiwari, Dy. A.G. for the respondents.

NOTES OF CASES SECTION

Short Note

**(138)(DB)*

Before Mr. Justice S.C. Sharma & Mr. Justice Alok Verma

Cr.A. No. 1048/2006 (Indore) decided on 14 November, 2017

HARI ...Appellant

Vs.

STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Section 302 – Murder – Conviction – Testimony of witnesses – Ocular & Medical Evidence – Discrepancy – Effect – **Held – The only eye witness of the case stated that only one blow was given on the head of deceased whereas the doctor who examined the deceased stated that he found four injuries on his head and further the doctor who performed autopsy stated that he found nine injuries, all on head and face of deceased – A slight discrepancy in medical and oral evidence is not material as the time of incident was 3–3:30 am and there was not much light and all the persons were under the influence of liquor.**

क. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – दोषसिद्धि – साक्षियों का परिसाक्ष्य – चाक्षुष एवं चिकित्सीय साक्ष्य – विसंगति – प्रभाव – अभिनिर्धारित – प्रकरण के एकमात्र चक्षुदर्शी साक्षी का कथन है कि मृतक के सिर पर केवल एक वार किया गया था जबकि चिकित्सक, जिसने मृतक का परीक्षण किया था, का कथन है कि उसने उसके सिर पर चार क्षतियां पायी और आगे, चिकित्सक जिसने शव परीक्षण किया था, का कथन है कि उसने नौ क्षतियां पायी, सभी मृतक के सिर एवं चेहरे पर – चिकित्सीय एवं मौखिक साक्ष्य में थोड़ी विसंगति तात्विक नहीं क्योंकि घटना का समय प्रातः 3–3.30 बजे था और वहां ज्यादा रोशनी नहीं थी तथा सभी व्यक्ति मदिरा के प्रभाव में थे।

B. Penal Code (45 of 1860), Section 302 & 304 Part II – Murder – Motive/Intention to Kill – **Held – It is true that appellant was not armed with any weapon when he met the deceased, suddenly appellant picked up a piece of wood and gave blows to deceased – Appellant gave repeated blows, he might not have any intention for causing death, but intention arose immediately before the incident – Case does not fall under any exceptions of Section 300 IPC – Offence u/S 302 IPC made out – Appellant rightly convicted and sentenced u/S 302 IPC – Appeal dismissed.**

ख. दण्ड संहिता (1860 का 45), धारा 302 व 304 भाग II – हत्या – मृत्यु कारित करने का हेतु/आशय – अभिनिर्धारित – यह सत्य है कि अपीलार्थी किसी शस्त्र से सुसज्जित नहीं था जब वह मृतक से मिला था, अचानक अपीलार्थी ने लकड़ी का एक टुकड़ा उठाया और मृतक पर वार किये – अपीलार्थी ने बारंबार वार किये, मृत्यु कारित करने का उसका कोई आशय नहीं भी हो सकता था परंतु घटना के तुरंत पहले आशय उत्पन्न हुआ – प्रकरण धारा 300 भा.दं.सं. के किसी अपवाद के अंतर्गत नहीं आता – धारा 302 भा.दं.सं. का अपराध बनता है – अपीलार्थी को उचित रूप से धारा 302 भा.दं.सं. के अंतर्गत दोषसिद्ध एवं दण्डादिष्ट किया गया – अपील खारिज।

The judgment of the Court was delivered by : ALOK VERMA, J.

Archana Shukla, for the appellant.
Mukesh Kumawat, for the respondent/State.

Short Note
****(139)***
Before Mr. Justice S.K. Palo

M.Cr.C. No. 14895/2017 (Jabalpur) decided on 18 September, 2017

JUGAL DAS & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 243(2) & 482 – Right of Defence **– Counter case lodged between parties – Accused/petitioners filed application to call the MLC doctor in defence, who has been cited as a prosecution witness in the counter case – Application was dismissed – Challenge to – Held – Right to defence is a valuable right – For ensuring fair trial, opportunity to accused to call his defence witness is necessary – Trial Court directed to allow petitioner to summon MLC doctor – Petition allowed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 243(2) व 482 – बचाव का अधिकार – पक्षकारों के मध्य प्रति–प्रकरण दर्ज – अभियुक्त/याचीगण ने बचाव में एम एल सी चिकित्सक को बुलाये जाने हेतु आवेदन प्रस्तुत किया, जिसे प्रति–प्रकरण में अभियोजन साक्षी के रूप में उल्लिखित किया गया है – आवेदन खारिज किया गया – को चुनौती – अभिनिर्धारित – बचाव का अधिकार एक मूल्यवान अधिकार है – निष्पक्ष विचारण सुनिश्चित करने के लिए अभियुक्त को उसका बचाव साक्षी बुलाने का अवसर आवश्यक है – याची को एम एल सी चिकित्सक को समन करने की

अनुमति देने हेतु विचारण न्यायालय को निदेशित किया गया – याचिका मंजूर।

Cases referred :

2017 (2) M.P.L.J. 190, 2014 (2) SCC 401, 2008 (4) M.P.L.J. (S.C.) 455 = 2008 (2) M.P.L.J. (Cri.) (S.C.) 721 = (2008) 5 SCC 633.

D.N. Shukla, for the applicants.
Narendra Chourasia, Dy. G.A. for the non-applicant/State.

Short Note
****(140)***
Before Mr. Justice Sheel Nagu
Cr.R. No. 692/2017 (Gwalior) decided on 24 August, 2017

KRISHAN MOHAN AGRAWAL ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***A. Penal Code (45 of 1860), Sections 407, 409 & 420 – Framing of Charge – Ingredients* – Applicant, the owner of warehouse from where foodgrains of farmers were found missing – Charge framed u/S 409 & 420 IPC – Held – Principal offence of criminal breach of trust is *prima facie* made out but charge framed u/S 409 do not relate to warehouse keeper – Alleged offence specifically falls within purview of Section 407 IPC – Trial Court directed to frame charge u/S 407 IPC alongwith Section 420 IPC – Revision allowed.**

क. दण्ड संहिता (1860 का 45), धाराएँ 407, 409 व 420 – आरोप विरचित किया जाना – घटक – आवेदक उस भांडागार का स्वामी जहां से किसानों का खाद्यान्न लापता पाया गया था – धारा 409 व 420 भा.दं.सं. के अंतर्गत आरोप विरचित किया गया – अभिनिर्धारित – प्रथम दृष्ट्या आपराधिक न्यास भंग का प्रमुख अपराध बनता है किन्तु धारा 409 के अंतर्गत विरचित आरोप भांडागारपाल के संबंध में नहीं – अभिकथित अपराध विनिर्दिष्ट रूप से धारा 407 भा.दं.सं. की परिधि के भीतर आता है – विचारण न्यायालय को धारा 407 भा.दं.सं. के साथ–साथ धारा 420 भा.दं.सं. के अंतर्गत आरोप विरचित करने के लिए निदेशित किया गया – पुनरीक्षण मंजूर।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 218* – Framing of Charge – Held – Charge is the parameter set by the Court within which the trial is to be conducted – Framing of Charge thus gives**

a clear understanding and an opportunity to accused to know the exact offence for which he is tried.

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 218 – आरोप विरचित किया जाना – अभिनिर्धारित – आरोप, न्यायालय द्वारा निर्धारित वह मापदण्ड है जिसके भीतर विचारण संचालित किया जाना होता है – अतः आरोप विरचित किया जाना, अभियुक्त को सटीक अपराध, जिसके लिए उसका विचारण किया जा रहा है, का ज्ञान होने के लिए एक स्पष्ट समझ एवं एक अवसर देता है।

Case referred :

(2017) 3 SCC 347.

R.K. Sharma with *V.K. Agarwal*, for the applicant.
J.M. Sahani, P.P. for the non-applicant/State.

Short Note
****(141)***
Before Mr. Justice C.V. Sirpurkar

Cr.R. No. 1410/2009 (Jabalpur) decided on 8 August, 2017

M.P. RAJYA VIDYUT MANDAL
(M.P.P.K.V.V. CO. LTD.) ...Applicant
Vs.
INDRAJEET SAHU ...Non-applicant

Electricity Act (36 of 2003), Sections 126(4) & (5), 135 & 154(5) – Electricity Theft Case – Civil Liability – **Petitioner held guilty for offence u/S 135 of the Act of 2003 and civil liability was calculated applying Section 126 (5) & (6) of the Act – Challenge to – Held – Trial Court wrongly applied provisions for calculating the loss cost – It was obligatory upon trial Court to determine civil liability applying Section 154(5) of the Act of 2003 which prescribes procedure for determination of civil liability for theft of electrical energy in terms of money – Impugned order relating to determination of civil liability is set aside – Revision allowed.**

विद्युत अधिनियम (2003 का 36), धाराएँ 126(4) व 5, 135 व 154(5) – विद्युत चोरी का प्रकरण – सिविल दायित्व – याची को 2003 के अधिनियम की धारा 135 के अंतर्गत अपराध का दोषी ठहराया गया तथा अधिनियम की धारा 126(5) व (6) को लागू करते हुए सिविल दायित्व की संगणना की गई थी – को चुनौती –

अभिनिर्धारित – विचारण न्यायालय ने हानि की कीमत की संगणना करने हेतु उपबंधों को गलत रूप से लागू किया – विचारण न्यायालय 2003 के अधिनियम की धारा 154(5), जो विद्युत उर्जा की चोरी हेतु, रकम के रूप में, सिविल दायित्व के अवधारण हेतु प्रक्रिया विहित करती है को लागू करते हुए सिविल दायित्व का अवधारण करने के लिए बाध्यताधीन था – सिविल दायित्व के अवधारण से संबंधित आक्षेपित आदेश अपास्त किया गया – पुनरीक्षण मंजूर।

Case referred:

Cr.R. No. 500/2009 order passed on 13.04.2017.

O.P. Mishra, for the applicant.
None, for the non-applicant though represented.

Short Note

****(142)***

Before Mr. Justice Prakash Shrivastava

W.P. No. 5430/2017 (Indore) decided on 30 August, 2017

MAYA KATARIA & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

(Alongwith W.P. No. 5510/2017)

Service Law – Contract Appointment – Termination – **Held – Petitioners are contract appointees and they carry limited rights – Contract can always be terminated as per the terms of Contract – Contract appointment was made in 2016 for a period of one year which has already expired – Notices were issued by the competent Authority – As per the terms of contract, one month notice of termination of contract appointment was issued – No illegality in such termination – No ground for interference – Petitions dismissed.**

सेवा विधि – संविदा नियुक्ति – समाप्ति – अभिनिर्धारित – याचीगण संविदा पर नियुक्त व्यक्ति हैं तथा वे सीमित अधिकार रखते हैं – संविदा हमेशा संविदा की शर्तों के अनुसार समाप्त की जा सकती है – संविदा नियुक्ति 2016 में एक वर्ष की अवधि के लिए की गई थी जो कि पहले ही समाप्त हो चुकी है – सक्षम प्राधिकारी द्वारा नोटिस जारी किये गये थे – संविदा की शर्तों के अनुसार, संविदा नियुक्ति की समाप्ति हेतु एक माह का नोटिस जारी किया गया था – ऐसी समाप्ति में कोई अवैधता नहीं – हस्तक्षेप के लिए कोई आधार नहीं – याचिकाएँ खारिज।

Cases referred:

(2011) 15 SCC 16, AIR 1953 SC 250, 2004 (2) MPLJ 306, (2006) 12 SCC 482, (2006) 4 SCC 1,

Shashank Shekhar, for the petitioners.
Abhinav Malhotra, for the respondents.

Short Note
****(143)***
Before Ms. Justice Vandana Kasrekar
W.P. No. 18822/2013 (Jabalpur) decided on 20 July, 2017

POORNENDRA PRAKASH SHUKLA & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Constitution – Article 226 – Selection – Counselling – Selection of Junior Supply Officer (JSO) & Weights and Measures Inspectors (WMI) – VYAPAM – Held – Simultaneous counseling cannot be conducted for both the post by respondents though the select list and verification of documents were done commonly, because both the post are different and the department is also different – Procedure adopted by respondents in selecting candidates is just and proper – Petition dismissed.***

क. *संविधान – अनुच्छेद 226 – चयन – काउंसलिंग* – कनिष्ठ पूर्ति अधिकारी (जे एस ओ) व बांट और माप निरीक्षकों (डब्ल्यू एम आई) का चयन – व्यापम – अभिनिर्धारित – यद्यपि प्रत्यर्थीगण द्वारा चयन सूची एवं दस्तावेजों का सत्यापन सम्मिलित रूप से किया गया था, दोनों पदों हेतु एक साथ काउंसलिंग संचालित नहीं की जा सकती क्योंकि दोनों पद भिन्न हैं तथा विभाग भी भिन्न हैं – प्रत्यर्थीगण द्वारा अभ्यर्थियों का चयन करने में अपनायी गई प्रक्रिया न्यायसंगत एवं उचित है – याचिका खारिज।

B. ***Constitution – Article 226 – Selection – Vacant Post – Circular of State Government – Applicability – Held – As per the circular dated 07.03.2012, if during validity of wait list, any candidate does not join on the post or died or resigned, then the said post will be declared as fallen vacant and same shall not be filled up from candidate of waiting list – Further, Circular does not refer that it would be applicable only in case of Class II employees.***

ख. संविधान – अनुच्छेद 226 – चयन – रिक्त पद – राज्य सरकार का परिपत्र – प्रयोज्यता – अभिनिर्धारित – परिपत्र दि. 7.3.2012 के अनुसार, यदि प्रतीक्षा सूची की विधिमान्यता के दौरान किसी अभ्यर्थी ने पद ग्रहण नहीं किया है या मृत्यु हो गई है या त्यागपत्र दे दिया है, तब उक्त पद को रिक्त हो जाना घोषित किया जाएगा और उसे प्रतीक्षा सूची के अभ्यर्थी से नहीं भरा जाएगा – इसके अतिरिक्त, परिपत्र यह निर्देशित नहीं करता कि वह केवल श्रेणी–II कर्मचारियों के प्रकरणों में लागू होगा।

Cases referred :

W.P. No. 1062/2011 decided on 23.01.2015, AIR 1997 SC 2179, (2013) 12 SCC 243, AIR 2006 SC 789, AIR 2010 SC 2100.

Udayan Tiwari, for the petitioners.
Manoj Kushwaha, P.L. for the respondents No. 1 to 3.
Rahul Diwakar, for the respondent No. 4.

Short Note

****(144)***

Before Mr. Justice S.K. Awasthi

M.Cr.C. No. 2017/2015 (Gwalior) decided on 24 October, 2017

SAI ENTERPRISES (M/S) ...Applicant

Vs.

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

Prevention of Food Adulteration Act (37 of 1954), Sections 2(ia), 7(i), 13(2), 16(1)(a)(i) & 20-A – Adulteration and Misbranding – Quashment of Charge – **Petition against framing of charges against the shop owner and manufacturer (present applicant) – Food inspector carried out inspection of a shop purchased three packets of *haldi* and sent for public analyst whereby it was revealed that same was adulterated and misbranded – Held – U/S 13(2) of the Act of 1954, applicant can request for Re-examination of the sample from the Central Food Laboratory but in the present case, shelf life of sample of *haldi* has lapsed prior to filing of complaint before the Court, thus defence of applicant would be severely prejudiced if right available u/S 13(2) of the Act of 1954 is taken away – Cognizance taken against the applicant so far it relates to adulteration is hereby set aside – Further held – Perusal of complaint shows that on the cover of the seized article (*haldi***

packets), complete name and address of the manufacturing or packaging unit has not been provided, hence for the charge of misbranding, *prima facie* case is made out against the applicant – For the charge of misbranding, trial may proceed – Application partly allowed.

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धाराएँ 2(ix), 7(i), 13(2), 16(1)(a)(i) व 20–ए – अपमिश्रण एवं मिथ्या छाप – आरोप अभिखंडित किया जाना – दुकान के मालिक एवं विनिर्माता (वर्तमान आवेदक) के विरूद्ध आरोप विरचित किये जाने के विरूद्ध याचिका – खाद्य निरीक्षक ने दुकान का निरीक्षण किया, तीन पैकेट हल्दी खरीदी और लोक विश्लेषक को भेजी, जिससे यह प्रकट हुआ था कि वह अपमिश्रित एवं मिथ्या छाप वाली है – अभिनिर्धारित – 1954 के अधिनियम की धारा 13(2) के अंतर्गत, आवेदक, नमूने का पुनः परीक्षण, केंद्रीय खाद्य प्रयोगशाला से किये जाने हेतु निवेदन कर सकता है, परंतु वर्तमान प्रकरण में, न्यायालय के समक्ष परिवाद प्रस्तुत किये जाने के पूर्व हल्दी के नमूने की भंडारण व उपयोग होने की अवधि व्यपगत हो चुकी है अतः, आवेदक के बचाव पर गंभीर रूप से प्रतिकूल प्रभाव पड़ेगा यदि 1954 के अधिनियम की धारा 13(2) के अंतर्गत उपलब्ध अधिकार छीन लिया गया – आवेदक के विरूद्ध लिया गया संज्ञान, जहां तक अपमिश्रण से संबंधित है, एतद द्वारा अपास्त किया गया – आगे अभिनिर्धारित – परिवाद का परिशीलन दर्शाता है कि जब्तशुदा वस्तु (हल्दी पैकेट्स) के आवरण/कवर पर विनिर्माण या पैकेजिंग करने वाली ईकाई का पूर्ण नाम व पता उपलब्ध नहीं कराया गया है, अतः मिथ्या छाप के आरोप हेतु आवेदक के विरूद्ध प्रथम दृष्ट्या प्रकरण बनता है – मिथ्या छाप के आरोप हेतु विचारण की कार्यवाही की जा सकती है – आवेदन अंशतः मंजूर।

Cases referred:

M.Cr.C. No. 2414/2011 decided on 04.02.2015, M.Cr.C. No. 4296/2012 decided on 05.02.2015, M.Cr.C. No. 993/2012 decided on 18.12.2014.

Sanjay Bahirani, for the applicant.
S.S. Dhakad, Addl.P.P. for the non-applicant/State.
None, for the non-applicant No. 2.

NOTES OF CASES SECTION

Short Note

**(145)*

Before Mr. Justice Subodh Abhyankar

W.P. No. 15256/2015 (Jabalpur) decided on 7 November, 2017

SANGEETA SONI (SMT.) ...Petitioner

Vs.

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

(Alongwith W.P. Nos. 13598/2015, 15117/2015, 15118/2015, 15119/2015, 15120/2015, 15121/2015, 15255/2015)

A. Service Law – Promotion – **Staff Nurses are entitled to be promoted on the post of Sister Tutor after obtaining degree in B.Sc. (Nursing) from M.P. Bhoj Open University – Government had itself allowed the University to conduct aforesaid course – Action of State Government as well as Indian Nursing Council and the assigned reasons for denying such promotion is arbitrary, unjust and without application of mind – Impugned order and letter quashed – Petitions allowed.**

क. सेवा विधि – पदोन्नति – म.प्र. भोज मुक्त विश्वविद्यालय से बी.एस. सी. (उपचर्या) में उपाधि अभिप्राप्त करने के पश्चात् स्टाफ परिचारिकाऐं, शिक्षिका सिस्टर के पद पर पदोन्नति की हकदार हैं – सरकार ने स्वयं उपरोक्त पाठ्यक्रम संचालित करने हेतु विश्वविद्यालय को मंजूरी दी थी – राज्य सरकार साथ ही भारतीय उपचर्या परिषद् की कार्रवाई एवं उक्त पदोन्नति से इन्कार हेतु दिये गये कारण मनमाने, अन्यायपूर्ण व मस्तिष्क का प्रयोग किये बिना है – आक्षेपित आदेश व पत्र अभिखंडित – याचिकाऐं मंजूर।

B. Service Law – Promotion – Consequential Benefits – **Held – Respondents are directed to issue order of promotion to petitioner/other petitioners with all consequential benefits w.e.f. date on which her/their juniors stood promoted.**

ख. सेवा विधि – पदोन्नति – परिणामिक लाभ – अभिनिर्धारित – याची/अन्य याचीगण को, जिस तिथि से उसके/उनके कनिष्ठों की पदोन्नति हुई है, उस तिथि से सभी परिणामिक लाभों के साथ पदोन्नति का आदेश जारी करने के लिए प्रत्यर्थीगण को निदेशित किया गया।

Cases referred :

W.P. No. 10142/2012 order dated 3.12.2013, 1991 Supp (1) SCC 287, 1995 Supp (1) SCC 192, (1988) 2 SCC 386, W.P. No. 6753/2012

decided on 15.07.2014 (DB).

Sanjay K. Agrawal, for the petitioners.
Vaibhav Tiwari, P.L. for the respondents/State.
Mohan Sausarkar, for the respondent/Indian Nursing Council.
P.L. Shrivastava, for the respondent/M.P. Bhoj Open University in W.P. Nos. 15256/2015, 15117/2015, 15118/2015, 15119/2015, 15120/2015, 15121/2015 & 15255/2015.
Amrit Ruprah, for the respondent/M.P. Bhoj Open University in W.P. No. 13598/2015.

Short Note

****(146)***

Before Mr. Justice Vivek Rusia

W.P. No. 7395/2016 (Indore) decided on 26 September, 2017

SHAILENDRI GOSWAMI (SMT.) & ors. ...Petitioners
Vs.
INDORE MUNICIPAL CORPORATION & ors. ...Respondents

A. ***Bhumi Vikas Niyam, M.P., 2012, Rule 25 – Revocation of Building Permission*** – **Held – Once it has come to knowledge of Municipal Corporation that construction has been made in violation of sanctioned map, it can revoke the permission under Rule 25 of the Rules of 2012 – Once building permission is granted, it is incumbent upon builder or owner to make construction in accordance with terms and conditions of permission – Power of revocation rightly exercised – Petition dismissed.**

क. भूमि विकास नियम, म.प्र., 2012, नियम 25 – निर्माण अनुमति का प्रतिसंहरण – अभिनिर्धारित – एक बार यह नगरपालिक निगम के ज्ञान में आ जाए कि निर्माण, मंजूर किये गये नक्शे के उल्लंघन में किया गया है, वह 2012 के नियमों के नियम 25 के अंतर्गत अनुमति प्रतिसंहृत कर सकता है – एक बार निर्माण की अनुमति प्रदान कर दी गई, निर्माणकर्ता अथवा स्वामी के लिए यह अनिवार्य है कि वह अनुमति के निबंधनों एवं शर्तों के अनुसार निर्माण करें – प्रतिसंहरण की शक्ति का उचित रूप से प्रयोग किया गया – याचिका खारिज।

B. ***Municipal Corporation Act, M.P. (23 of 1956), Section 307(5) – Disputed Ownership*** – **Held – Proceedings u/S 307(5) of the Act of 1956 is not like civil suit where title of parties can be decided**

but *prima facie* it can be looked into whether the person who has applied for building permission is owner or not.

ख. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 307(5) – विवादित स्वामित्व – अभिनिर्धारित – 1956 के अधिनियम की धारा 307(5) के अंतर्गत कार्यवाहियाँ सिविल वाद के समान नहीं है जहां पक्षकारों का हक विनिश्चित किया जा सकता है, परन्तु प्रथम दृष्ट्या इस पर विचार किया जा सकता है कि क्या वह व्यक्ति जिसने निर्माण की अनुमति हेतु आवेदन किया है, उसका स्वामी है अथवा नहीं।

Cases referred :

2010(1) MPLJ 388, W.P. No. 3319/2016 decided on 20.02.2017.

Vivek Dalal, for the petitioners.
Rishi Tiwari, for the respondent Nos. 1 to 3.
A.K. Sethi with *Sunil Kumar Verma*, for the respondent Nos. 4 to 6.

Short Note
****(147)(DB)***

Before Mr. Justice S.K. Gangele & Mr. Justice Anurag Shrivastava
Cr.A. No. 329/1998 (Jabalpur) decided on 7 September, 2017

SHANTI BAI (SMT.) ...Appellant
Vs.
STATE OF M.P. ...Respondent

***Penal Code (45 of 1860), Section 302 – Murder – Conviction – Life Imprisonment – Appreciation of Evidence* – Appellant administered poison (*Sulphas*) to child of complainant – Complainant saw appellant giving water from *nand* (pot) whereafter child cried loud and died – Held – Despite evidence that appellant took water from nand (pot), the same was neither recovered/seized nor water of the pot was taken for examination – No evidence led by prosecution directly or indirectly that appellant had poison in her possession or from where she procured and in which place same was stored – Prosecution failed to prove necessary ingredients – Appellant discharged – Appeal allowed.**

दण्ड संहिता (1860 का 45), धारा 302 – हत्या. – दोषसिद्धि – आजीवन कारावास – साक्ष्य का मूल्यांकन – अपीलार्थी ने परिवादी के बालक को विष (सल्फास) खिलाया – परिवादी ने अपीलार्थी को नांद (पात्र) से पानी देते देखा था

जिसके पश्चात् बालक जोर से चिल्लाया और उसकी मृत्यु हो गई – अभिनिर्धारित – बावजूद इस साक्ष्य के कि अपीलार्थी ने नांद (पात्र) से पानी लिया, उक्त को न तो बरामद/जब्त किया गया, न ही पात्र के पानी को परीक्षण हेतु लिया गया – अभियोजन द्वारा प्रत्यक्ष या अप्रत्यक्ष रूप से कोई साक्ष्य प्रस्तुत नहीं किया गया कि अपीलार्थी के कब्जे में विष था या उसने कहां से उपाप्त किया एवं किस स्थान पर उसका भंडारण किया गया था – अभियोजन आवश्यक घटकों को साबित करने में असफल रहा – अपीलार्थी को आरोपमुक्त किया गया – अपील मंजूर।

The judgment of the Court was delivered by : **S.K. GANGELE, J.**

Case referred :

(1984) SCC 116.

Premlata Lokhande, for the appellant.
Brahmdatt Singh, G.A. for the respondent/State.

Short Note
****(148)(DB)***
Before Mr. Justice Hemant Gupta, Chief Justice & Mr. Justice Vijay Kumar Shukla
W.A. No. 58/2017 (Jabalpur) decided on 10 October, 2017

SHANTI BAVARIA (SMT.) ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

Civil Services (Pension) Rules, M.P. 1976, Rule 9(2)(b)(i) – Disciplinary Proceedings – Sanction of Governor – Jurisdiction **– Held – It is not necessary to obtain personal sanction of Governor of M.P. for taking decision to initiate disciplinary proceedings and if Council of Ministers have taken such decision, it will serve the purpose and meet the requirement of Rule 9 of the Rules of 1976 – Charge sheet served to petitioner in the name of Governor of M.P. cannot be said to be without jurisdiction – Apex Court concluded that such an order authenticated in name of Governor cannot be questioned in any Court on ground that it is made or executed by the Governor and thus is outside the scope of judicial review – No interference required – Appeal dismissed.**

सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 9(2)(बी)(i) – अनुशासनिक

कार्यवाहियां – राज्यपाल की मंजूरी – अधिकारिता – अभिनिर्धारित – अनुशासनिक. कार्यवाहियों को आरंभ करने का निर्णय लेने के लिए म.प्र. के राज्यपाल की व्यक्तिगत मंजूरी लेना आवश्यक नहीं है और यदि मंत्री परिषद् ने ऐसा निर्णय लिया है, यह, 1976 के नियमों के नियम 9 के प्रयोजन की पूर्ति एवं अपेक्षा को पूरा करेगा – याची को म.प्र. के राज्यपाल के नाम से तामील आरोप पत्र बिना अधिकारिता का नहीं कहा जा सकता – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि राज्यपाल के नाम से अधिप्रमाणित ऐसे किसी आदेश पर किसी न्यायालय में इस आधार पर प्रश्न नहीं उठाया जा सकता कि उसे राज्यपाल द्वारा बनाया या निष्पादित किया गया है और इसलिए न्यायिक पुनर्विलोकन की परिधि से बाहर है – किसी हस्तक्षेप की आवश्यकता नहीं – अपील खारिज।

The judgment of the Court was delivered by : **HEMANT GUPTA, C.J.**

Cases referred:

AIR 1996 SC 765, 2001 (1) MPLJ 587, (2016) 9 SCC 20, AIR 1955 SC 549, (1974) 2 SCC 831, 1971 (1) SCC 411, 2016 (8) SCC 1.

P.N. Dubey, for the appellant.
Amit Seth, G.A. for the respondent/State.

Short Note
****(149)(DB)***
Before Mr. Justice Hemant Gupta, Chief Justice &
Mr. Justice Vijay Kumar Shukla
W.A. No. 930/2010 (Jabalpur) decided on 12 October, 2017

STATE OF M.P. THROUGH SECRETARY
DEPARTMENT OF JAIL/HOME, BHOPAL & ors. ...Appellants
Vs.
RAJESH KUMAR SHUKLA ...Respondent

A. ***Service Law – Class III (Non-Ministerial and Ministerial) Jail Service Recruitment Rules, M.P., 1974, Schedule Sr. No. 7 & 8 – Music Teacher – Principle of Equal Pay for Equal Work – Pay Scale – Held – Qualifications and duties of a Music Teacher of educational department and that of Jail department are different – Duties in educational department is full time whereas in jail, it is of temporary nature and require only for those prisoners who opt for music – Respondent, a music teacher in jail department not entitled for same pay scale as of the one in educational department – Principle of equal***

pay for equal work not applicable in the present case – Impugned order set aside – Appeal allowed.

क. सेवा विधि – तृतीय वर्ग (अलिपिक वर्गीय तथा लिपिक वर्गीय) जेल सेवा भर्ती नियम, म.प्र., 1974, अनुसूची क्र. 7 व 8 – संगीत शिक्षक – समान कार्य के लिए समान वेतन का सिद्धांत – वेतन मान – अभिनिर्धारित – शैक्षणिक विभाग तथा जेल विभाग के संगीत शिक्षक की अर्हताएं एवं कर्तव्य भिन्न हैं – शैक्षणिक विभाग में कर्तव्य पूर्णकालिक हैं जबकि जेल में, यह अस्थायी प्रकृति के हैं तथा केवल उन बंदियों के लिए अपेक्षित हैं जो संगीत का विकल्प चुनते हैं – प्रत्यर्थी, जेल विभाग में एक संगीत शिक्षक, शैक्षणिक विभाग के समान वेतनमान के लिए हकदार नहीं है – समान कार्य के लिए समान वेतन का सिद्धांत वर्तमान प्रकरण में लागू नहीं होता – आक्षेपित आदेश अपास्त – अपील मंजूर।

***B. Service Law – Principle of Equal Pay for Equal Work – Interpretation* – Held – The Apex Court has concluded that principle/ doctrine of equal pay for equal work can only apply if employees are similarly situated and there is complete and wholesale identity between two groups – Principle/Doctrine cannot be applied only because nature of work is same, unless there is parity in mode of appointment, experience and educational qualifications between them.**

ख. सेवा विधि – समान कार्य के लिए समान वेतन का सिद्धांत – निर्वचन – अभिनिर्धारित – सर्वोच्च न्यायालय ने यह निष्कर्षित किया है कि समान कार्य के लिए समान वेतन का सिद्धांत केवल तब लागू हो सकता है यदि कर्मचारीगण एक समान परिस्थिति में हैं तथा दो समूहों के मध्य पूर्ण एवं बड़े पैमाने पर समानता है – सिद्धांत केवल इस कारण से लागू किया नहीं जा सकता कि कार्य की प्रकृति समान है, जब तक कि उनके मध्य नियुक्ति के ढंग, अनुभव तथा शैक्षणिक अर्हताओं में समानता न हो।

The judgment of the Court was delivered by : **VIJAY KUMAR SHUKLA, J.**

Cases referred:

W.P. (S) No. 27/2005 decided on 04.04.2005, (2017) 1 SCC 148, (2009) 13 SCC 635, (2004) 1 SCC 347, (2014) 6 SCC 756, (2003) 6 SCC 123, (2006) 9 SCC 321.

Amit Seth, G.A. for the appellants.
N.K. Mishra, for the respondent.

NOTES OF CASES SECTION

Short Note
****(150)(DB)***
Before Mr. Justice Hemant Gupta, Chief Justice &
Mr. Justice Vijay Kumar Shukla

M.Cr.C. No. 16718/2015 (Jabalpur) decided on 10 October, 2017

SURYA PRAKASH ...Applicant
Vs.
SMT. RACHNA ...Non-applicant

Protection of Women from Domestic Violence Act (43 of 2005), Sections 3, 18 & 31 – Economic Abuse – Protection Order – Breach of Maintenance Order – **Held – If there is any instance of domestic violence for which an affirmative or prohibitory order is passed u/S 18 of the Act of 2005, provisions of Section 31 of the Act can be invoked for breach of such order – Non –payment of maintenance allowance is also a breach of 'protection order' or 'interim protection order' – Application u/S 31 is maintainable.**

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 3, 18 व 31 – आर्थिक दुरूपयोग – संरक्षण आदेश – भरणपोषण आदेश का भंग – अभिनिर्धारित – यदि घरेलू हिंसा की कोई घटना है, जिसके लिए 2005 के अधिनियम की धारा 18 के अंतर्गत एक सकारात्मक या प्रतिषेधात्मक आदेश पारित किया गया है, ऐसे आदेश के भंग हेतु अधिनियम की धारा 31 के उपबंधों का अवलंब लिया जा सकता है – भरणपोषण भत्ते का असंदाय भी 'संरक्षण आदेश' अथवा 'अंतरिम संरक्षण आदेश' का भंग है – धारा 31 के अंतर्गत आवेदन पोषणीय है।

The order of the Court was passed by : **HEMANT GUPTA, C.J.**

Cases referred:

2009 (5) MPHT 319, Cr.Misc.Petition No. 123/2010 decided on 13.02.2012 (Rajasthan High Court), Cr.R. No. 635/2011 decided on 10.02.2012 (Allahabad High Court), Cr.R.P. No. 758/2015 decided on 18.12.2015 (Karnataka High Court), Cr. W.P. No. 305/2014 decided on 06.05.2014 (Nagpur Bench of Bombay High Court), (2015) 1 MLJ (Crl) 549, (2016) 10 SCC 165, (2016) 10 SCC 329, (2017) 2 SCC 629.

Amit Seth, as *Amicus Curiae* for the applicant.
D.K. Dixit, as Amicus Curiae for the non-applicant.

I.L.R. [2017] M.P., 2587
SUPREME COURT OF INDIA
Before Mr. Justice Pinaki Chandra Ghose &
Mr. Justice Amitava Roy
Cr.A. No. 824/2016 decided on 31 August, 2016

BABITA LILA & anr. ...Appellants
Vs.
UNION OF INDIA ...Respondent

A. Income Tax Act (43 of 1961), Section 132 & 246, Criminal Procedure Code, 1973 (2 of 1974), Section 195 and Penal Code (45 of 1860), Sections 191, 193 & 200 – Complaint Against Assessee – Competent Authority to File Complaint – **Deputy Director of Income Tax (Investigation) Bhopal lodged complaint before CJM Bhopal – Held – Deputy Director cannot be construed to be an authority to whom appeal would ordinarily lie from decisions/orders of the Income Tax Officers involved in search proceedings, thus not empowered to lodge complaint against assessee – Complaint unsustainable in law having been filed by authority, incompetent in terms of Section 195 of Cr.P.C. and hence quashed – Appeal allowed.** **(Para 67 & 76)**

क. आयकर अधिनियम (1961 का 43), धारा 132 व 246, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 195 एवं दण्ड संहिता (1860 का 45), धाराएँ 191, 193 व 200 – निर्धारिती के विरूद्ध परिवाद – परिवाद प्रस्तुत करने के लिए सक्षम प्राधिकारी – उपनिदेशक, आय कर (अन्वेषण), भोपाल ने सी.जे.एम., भोपाल के समक्ष परिवाद दर्ज किया – अभिनिर्धारित – उपनिदेशक को एक ऐसा प्राधिकारी होने का अर्थान्वयन नहीं किया जा सकता जिसे तलाशी कार्यवाहियों में शामिल आयकर अधिकारियों के निर्णयो/आदेशों की अपील सामान्यतः प्रस्तुत होगी, अतः निर्धारिती के विरूद्ध परिवाद दर्ज करने के लिए सशक्त नहीं – परिवाद, दं.प्र.सं. की धारा 195 के निबंधनों में एक अक्षम प्राधिकारी द्वारा प्रस्तुत किये जाने से कायम रखने योग्य नहीं और अतः अभिखंडित – अपील मंजूर।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 177, 178 & 179 – Territorial Jurisdiction – **Held – Combine/joint search operation undertaken by Income Tax department simultaneously at Bhopal and Aurangabad – Offence can be tried by Courts otherwise competent at both aforementioned places – Further held – The locker eventually located, though at Aurangabad, has perceptible co-relation/ nexus with subject of assessment and appellants filed their return at**

Bhopal – Complaint lodged at Bhopal is maintainable – Objection rejected. **(Para 71 & 75)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 177, 178 व 179 – क्षेत्रीय अधिकारिता – अभिनिर्धारित – आय कर विभाग द्वारा एक साथ भोपाल एवं औरंगाबाद में संयोजित/संयुक्त तलाशी कार्यवाही की गई – उपरोक्त दोनों स्थानों पर अन्यथा सक्षम न्यायालयों द्वारा अपराध का विचारण किया जा सकता है – आगे अभिनिर्धारित – अंततः लॉकर का पता लगाया गया, यद्यपि औरंगाबाद में, निर्धारण के विषय के साथ उसका प्रत्यक्ष सह–संबंध/अंतर्सम्बन्ध है तथा अपीलार्थीगण ने भोपाल में अपनी विवरणी प्रस्तुत की – भोपाल में दर्ज परिवाद पोषणीय है – आक्षेप अस्वीकार किया गया।

Cases referred:

1956 SCR 125, 1964 (6) SCR 700, (2007) 2 SCC 181, (2004) 8 SCC 100, (2008) 11 SCC 103, (2010) 9 SCC 567, (1998) 2 SCC 493, (2008) 306 ITR 277 (SC), (1978) 1 All ER 948 (HL), (2015) 9 SCC 209, (2015) 3 SCC 353, (2014) 9 SCC 129.

JUDGMENT

The Judgment of the Court was delivered by : AMITAVA ROY, J. :- Leave granted

2. Being aggrieved by the rejection of their challenge to the initiation of their prosecution under Sections 109/191/193/196/200/420/120B/34 IPC on the basis of a complaint made by the Deputy Director of Income Tax (Investigation)-I, Bhopal (M.P.), both on the ground of lack of competence of the complainant and of jurisdiction of the Trial Court at Bhopal, the appellants seek the remedial intervention of this Court under Article 136 of the Constitution of India.

3. The appellants, who are husband and wife, are residents of both Bhopal and Aurangabad. A search operation was conducted by the authorities under the Income Tax Act, 1961 (for short, hereinafter referred to as "the Act") on 28.10.2010 at both the residences of the appellants, in course whereof their statements were recorded on oath under Section 131 of the Act. On a query made by the authorities, it is alleged that they made false statements denying of having any locker either in individual names or jointly in any bank. It later transpired that they did have a safe deposit locker with the Axis Bank (formerly known as UTI Bank) at Aurangabad which they had also operated on

30.10.2010. The search at Aurangabad was conducted by the Income Tax Officer, Nashik and Income Tax Officer, Dhule and the statements of the appellants were also recorded at Aurangabad.

4. Based on the revelation that the appellants, on the date of the search, did have one locker as aforementioned and that their statements to the contrary were false and misleading, a complaint was filed as afore-stated under the above-mentioned sections of the Indian Penal Code by the Deputy Director of Income Tax (Investigation)-I, Bhopal (M.P.) on 30.5.2011 in the court of the Chief Judicial Magistrate, Bhopal, (M.P.) and the same was registered as R.T. No. 5171 of 2011.

5. The Trial Court on 9.6.2011, took note of the offences imputed and issued process against the appellants. In doing so, the Trial Court, amongst others, noted that the search proceedings undertaken by the authorities under Section 132 of the Act were deemed to be judicial proceedings in terms of Section 136 and in course whereof, as alleged, the appellants had made false statements with regard to their locker and that on the basis of the documents and evidence produced on behalf of the complainant, sufficient grounds had been made out against them to proceed under Sections 191,193, 200 IPC.

6. The appellants impugned this order of the Trial Court before the High Court under Section 482 Cr.P.C. (for short hereinafter to be referred to as "the Code") and sought annulment thereof primarily on the ground that the search operations having been undertaken by the I.T.Os. of Nashik and Dhule, the complaint could not have been lodged by the Deputy Director of Income Tax (Investigation)-I, Bhopal (M.P.) who was not the appellate authority in terms of Section 195(4) of the Code and further no part of the alleged offence having been committed within the territorial limits of the Court of the Chief Judicial Magistrate, Bhopal, it had no jurisdiction to either entertain the complaint or take cognizance of the accusations. By the order impeached herein, the High Court has declined to interfere on either of these contentions.

7. We have heard Ms. Sangeeta Kumar, learned counsel for the appellants and Mr Ranjit Kumar, learned Solicitor General for the respondent.

8. Profusely referring to Section 195 of the Code as a whole, it has been urged on behalf of the appellants that the Deputy Director of Income Tax (Investigation)-I, Bhopal (M.P.), in the facts of the case was not competent to lodge the complaint, he being not the authority to whom appeals would

ordinarily lie from the orders or actions of the I.T.Os., Nashik and Dhule. As the statements of the appellants were recorded in the course of a search under Section 132 of the Act which was a judicial proceeding and for that matter, the concerned I.T.Os., Dhule and Nashik were deemed to be civil courts, it has been argued that in observance of the mandate of Section 195 (4) of the Code, the complaint could be lodged either by the authorities conducting the search or by the authority to whom ordinarily an appeal would lie from the orders/decisions and actions of the income tax authorities undertaking the search. It has been asserted with reference to Sections 246 and 246A of the Act in particular, that the complainant, the Deputy Director of Income Tax (Investigation)-I, Bhopal (M.P.) is not the authority/forum to whom appeal lies from the orders of the I.T.Os. involved and thus was not a Court as contemplated in Section 195(1)(b) or the appellate forum under Section 195(4) of the Code.

9. It has been emphatically maintained on behalf of the appellants that having regard to the place of search, the recording of their statements as well as of the location of the locker, no cause of action for initiation of the criminal proceedings had arisen within the jurisdiction of the court of the Chief Judicial Magistrate, Bhopal in terms of Sections 177 and 178 of the Code and thus the High Court had grossly erred in deciding contrary thereto. It has been argued that the rejection of their plea by the High Court on the ground that the Deputy Director of Income Tax (Investigation)-I, Bhopal (M.P.) was an officer superior in rank to the I.T.Os. conducting the search is patently flawed and unsustainable in law and on facts, having regard to the peremptory perquisites of a valid complaint under Section 195 of the Code.

10. Reliance on the decisions of this Court in *Kuldip Singh vs. The State of Punjab and Another* 1956 SCR 125, *Lalji Haridas vs. State of Maharashtra and Another* 1964 (6) SCR 700, *Rajesh Kumar and Others vs. Deputy C.I.T. and Others* (2007) 2 SCC 181, *Y. Abraham Ajith and Others vs. Inspector of Police, Chennai and Another* (2004) 8 SCC 100 and *Bhura Ram and others vs. State of Rajasthan and Another* (2008) 11 SCC 103 has been made in buttressal of the above assertions.

11. In refutation of the arguments advanced on behalf of the appellants, the learned Solicitor General has assertively endorsed the impugned findings, contending that the decision assailed is based on a detailed reference to the provisions of the Act enumerated in Chapters XIII and XX and a correct

analysis thereof. He has maintained that having regard to the scheme of these chapters in particular and the underlying legislative intent ascertainable therefrom, the Deputy Director of Income Tax (Investigation)-I, Bhopal (M.P.) had the competence and jurisdiction to lodge the complaint at Bhopal. This authority being admittedly and as patent from the hierarchy enumerated by the Act, higher in rank than the I.T.Os. who had conducted the search and investigation, did have the authority to file the complaint and that thereby the prescriptions of Sections 195(1)(b) and 195(g) of the Code had not, in any way, been contravened. This is more so as the powers of any income tax authority under the Act and his/her jurisdiction to perform any function is not limited or restricted but has been consciously enlarged to deal with any contingency so as to advance the objectives of the legislation, he urged.

12. Vis-a-vis the competence of the court of the Chief Judicial Magistrate, Bhopal, the learned Solicitor General insisted that as the appellants were the residents both of Bhopal and Aurangabad and search operations were conducted simultaneously at both the places, and further as they had been filing their income tax returns at Bhopal, the Trial Court before which the complaint had been filed, was competent to take cognizance of the offences alleged in terms of Section 178 (b) and (d) of the Code. To reinforce the above, the decision of the Constitution Bench of this Court in *Lalji Haridas* (supra) has been pressed into service.

13. Before adverting to the competing contentions, it would be apt to note the conclusions of the High Court on these two counts. In addition to the admitted factual aspects narrated hereinabove, the High Court upheld the jurisdiction of the Chief Judicial Magistrate, Bhopal by taking note also of the fact that the income tax returns relatable to the undisclosed property i.e. the locker had been filed at Bhopal. The facts, to reiterate, that the appellants were residents of Bhopal and Aurangabad, and that the search operations were conducted simultaneously at both the places were noted as well.

14. Qua the competence of the Deputy Director, Income Tax (Investigations)-I Bhopal, the High Court held the view that he being admittedly an officer superior in rank to the I.T.Os. conducting the search, the institution of the complaint by him was not vitiated by any lack of authority. Reference to Section 136 of the Act, whereunder any proceeding before an income tax authority would be a judicial proceeding and that for that matter, every income tax authority is deemed to be a civil court was recorded as well. The High

Court did refer to the Section 195 of the Code to enter a finding that the Deputy Director, Income Tax (Investigations)-I Bhopal being an officer superior to the I.T.Os. undertaking the search and to whom an appeal from their orders/ decisions/actions ordinarily lay, was a civil court as contemplated thereunder to lodge the complaint.

15. The competing contentions have received our due consideration. The rival submissions stir up two major issues pertaining to the maintainability and adjudication of the complaint lodged before the Chief Judicial Magistrate, Bhopal, (M.P.) by the Deputy Director, Income Tax (Investigation)-I, Bhopal, (M.P) in the face of the prescription of Section 195(1)(b) of the Code, in particular read with the other cognate sub-sections thereof as well as the limits of the territorial jurisdiction of the court before which the prosecution of the appellants has been initiated in the context of Section 177 of the Code.

16. Having regard to the decisive bearing of the adjudication on the validity or otherwise of the complaint by the Deputy Director, Income Tax (Investigation)-I, Bhopal, (M.P). in the textual facts, expedient it would be to dwell on this aspect at the threshold.

17. The admitted facts reveal that the appellants have residences both at Bhopal and Aurangabad and file their returns of income tax at Bhopal. On 28.10.2010, search operations under Section 132 of the Act were simultaneously conducted at both the places. In the course of the interrogation of the appellants, more specifically on the aspect as to whether they or any of them either individually or jointly did hold any locker, the answer was in the negative. The accusation of the authorities is that further investigation revealed that they did hold a locker in the Axis Bank (formerly known as UTI Bank), Kranti Chowk, Aurangabad which had been operated by appellant No. 1 on 30.10.2010. In this factual backdrop, the complaint had been filed by the Deputy Director, Income Tax (Investigation)-I, Bhopal, (M.P) in the court of Chief Judicial Magistrate, Bhopal, (M.P.) asserting that by making such false statement in the course of search operations which were judicial proceedings in terms of Section 136 of the Act, the appellants had committed offence under Sections 109/191/193/196/200/420/120B/34 IPC. As referred to hereinabove, the Chief Judicial Magistrate, Bhopal, after necessary hearing as contemplated in law and being prima facie satisfied that sufficient grounds had been made out to proceed against the appellants under Sections 191,193 and 200 IPC, issued process against them.

18. As the documents appended to the appeal would divulge that the search operations at Aurangabad had been conducted on the strength of the warrant of authorisation dated 26.10.2010 under Section 132 of the Act, issued, signed and sealed by the Director of Income Tax (Inv.), M.P. & C.G., Bhopal/Deputy Director of Income Tax and the statements of the appellant Nos. 1 and 2 were recorded by Mrs. Bharati Choudhary, I.T.O. and Mr. A.T. Kapase, I.T.O. (Inv.), Nashik on 28.10.2010. The materials on record also disclose that search operations did continue on subsequent dates as well, in course whereof seizures were made.

19. Be that as it may, eventually the office of the Deputy Director of Income Tax (Investigation)-I, Bhopal on 8.2.2011 issued a show cause notice to the appellants under Section 277 of the Act alleging that they had made false statement under Section 132(4) thereof, thereby seeking a reply as to why prosecution would not follow by virtue thereof. It is in this factual premise, that the validity of the complaint filed by the Deputy Director, Income Tax (Investigation)-I, Bhopal, (M.P). has been questioned by the appellants. To reiterate, by the impugned order, the High Court has negated both the demurrals of the appellants pertaining to the complaint and territorial jurisdiction of the court of the Chief Judicial Magistrate, Bhopal.

20. The state of law as adumbrated by the precedents cited may now be outlined before referring to the relevant provisions involved.

21. In *Kuldip Singh* (supra), the question involved before a Constitution Bench of this Court was about the validity of a complaint made under Section 476-A read with Section 195(3) of the Code of Criminal Procedure Code 1898 against the appellant for perjury and for using a forged document as genuine. The contextual facts narrate that the 2nd respondent therein had filed a suit against the appellant for recovery of money on the basis of a mortgage in the Court of one Mr. E.F. Barlow, Subordinate Judge of 1st Class. The appellant in the suit filed a receipt which purported to show that Rs.35000/- had been paid towards the satisfaction of the mortgage and in the witness box he swore that he had paid the money for which the receipt was given.

22. Mr. Barlow held that the receipt did not appear to be a genuine document and that the evidence of the appellant to that effect was not true. A preliminary decree was accordingly passed against the appellant for the entire

amount followed by a final decree. The appeal preferred by the appellant was also dismissed by the High Court which reiterated that the receipt was a very suspicious document and that the appellant's evidence was not reliable as well.

23. The plaintiff/respondent thereafter made an application in the Court of Mr. W. Augustine who had succeeded Mr. Barlow as Subordinate Judge of 1st Class stating that a complaint be filed against the appellant under Sections 193 and 471 I.P.C. Mr. Augustine, because of his transfer could not hear the application for filing of the complaint. In his place Mr. K.K. Gujral, subordinate Judge of the 4th Class was sent. He, however, declined to entertain the matter as he was only a subordinate judge of the 4th Class and laid a report to the District Judge pointing out his lack of jurisdiction in the matter as the offences had been allegedly committed in the Court of a subordinate Judge of the 1st Class. The District Judge thereupon transferred the matter to the Senior Subordinate Judge, Mr. Pitam Singh who made the complaint. The impeachment of the validity of the complaint has arisen in this backdrop.

24. As the sequence of events unfold, the appellant filed an appeal against the order of Mr. Pitam Singh to the Additional District Judge Mr, J.N. Kapur who held that the Senior Subordinate Judge Mr. Pitam Singh had no jurisdiction to make complaint. He also held that on merits as well there was no prima facie case. The High Court, however, in revision held that the Senior Subordinate Judge had the jurisdiction and further the materials on record did disclose a prima facie case. Accordingly, the order of the Additional District Judge was set aside and the order of the Senior Subordinate Judge was restored.

25. Three questions fell before this Court for scrutiny. Firstly, whether the Senior Subordinate Judge Mr. Pitam Singh had jurisdiction to entertain the application and make a complaint. Secondly, whether the Additional District Judge had jurisdiction to entertain an appeal preferred against the order of Mr. Pitam Singh and thirdly, whether the High Court had the power to reverse the order of the Additional District Judge in revision.

26. While dwelling upon the first issue, this Court adverted at the threshold to Section 195(1)(b) and (c) of the Code which prohibited any Court from taking cognizance of either of the two offences alleged, except on the complaint in writing of the Court concerned or of some other Court to which such Court

was subordinate. Having regard to the fact that the offences were committed in the Court of E.F. Barlow, Subordinate Judge of the 1st Class, their Lordships next referred to Section 476-A of the Code which prescribed that when the Court in which the offence is said to have been committed neither makes a complaint nor rejects an application for the making of a complaint, the Court to which such former Court is subordinate within the meaning of Section 195 (3) may take action under Section 476.

27. Their Lordships noted that Section 476 authorised the appropriate Court, after recording a finding to the effect that it was expedient to do so in the interest of justice to make a complaint in writing and forward it to a Magistrate of 1st Class having jurisdiction. While examining in the scheme of prevalent hierarchy of posts as to whether the court of Senior Subordinate Judge presided over by Mr. Pitam Singh was a Court to which the Court of Mr. Barlow was subordinate within the meaning of Section 195(3) of the Code, their Lordships marked that in terms of Section 195(3), a Court for the purposes thereof, would be deemed to be subordinate to the Court to which appeals ordinarily lay from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lay, to the principal court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such Civil Court was situated. The proviso to Section 195(3) was also noted which ordained that where appeals lie to more than one court, the appellate court of the inferior jurisdiction would be the court to which such court would be deemed to be subordinate. Further when appeals lay to a Civil and also to a Revenue Court, such Courts would be deemed to be subordinate to the Civil or Revenue Court, according to the nature of the case or the proceedings in connection with which the offence was alleged to have been committed.

28. In this conspectus, this Court laid a decisive emphasis on the word "ordinarily" and to disinter the legislative intent, alluded to the relevant provisions of the Punjab Courts Act, 1918 dealing in particular with the classes and hierarchy of Civil Courts. Apart from the Courts of Small Causes, it was noticed that under the said Act following three classes of Civil Courts were provided:

(i) The Court of District Judge

(ii) The Court of Additional Judge

(iii) The Court of the Subordinate Judge

29. Vis-a-vis the provisions for appeal under Section 39 of the Act, it was noted that in the absence of any other enactment for the time being in force, appeals lay to the Court of the District Judge when the value of the suit did not exceed Rs.5,000/- and in every other case to the High Court. Section 39(3), however, empowered the High Court by notification to direct that appeals lying to the District Court from all or any of the decrees or orders passed in its original jurisdiction by a Subordinate Judge, would be preferred to such other Subordinate Judge as mentioned in such notification. The facts revealed that as a matter of fact such power had been invoked and appeals lying to the District Courts from the decrees or orders passed by a Subordinate Judge in two classes of cases as specified could be preferred before the Senior Subordinate Judge of the 1st Class exercising jurisdiction within such Civil District.

30. In this factual setting their Lordships expounded that filing of the appeal to the Senior Subordinate Judge as notified qua the two selected categories of cases, could not be termed as "ordinary" because the special appellate jurisdiction had been conferred by the notification, by way of an additional assignment so much so that the power pertaining thereto could be exercised in a certain limited categories of cases. It was not an ordinary appellate jurisdiction of the Senior Subordinate Judge and for that matter for all Senior Subordinate Judges generally, it could not be said that appeals from the Courts of Subordinate Judges ordinarily lay to that of a Senior Subordinate Judge.

31. Their Lordships thus concluded that in the paradigm of the Civil Courts as codified by the Punjab Court's Act, 1918, appeals ordinarily lay either to the District Court or to the High Court and as the District Court was of the lower tier of these two forums, it was to be regarded as the appellate authority for the purposes of Section 476 B of the Code. With reference to Proviso (b) to Section 195(3) of the Code, it was held that where in the facts of the case, appeals would lie to a Civil as well as Revenue Court, the nature of the case or proceeding would determine the court to which appeal would lie and that to that limited extent the nature of the proceeding ought to be taken into account, but once the genus of the proceeding is determined namely, Civil, Criminal or Revenue, the hierarchy of the superior Courts would be determined first by the rules that apply in their special cases, if any and next by the rule in Section 195(3).

32. While dealing with the aspect as to whether the Court of the senior Subordinate Judge was the Court to which the Court of Subordinate Judge of the 1st Class was Subordinate or both the courts were at par, their Lordships confined the adjudication to the provisions of the Punjab Court's Act, Section (18) whereof did authorise the State Government to fix the number of subordinate judges to be appointed. Section 27 which vested the power in the High Court to post a subordinate judge and also prescribe the limits of his/her jurisdiction was also referred to. Their Lordships noted in terms of the Notification dated 03.01.1923 that four classes of Subordinate Judges had been contemplated based on the pecuniary jurisdiction conferred.

33. In the above factual as well as legal premise it was thus propounded that the Senior Subordinate Judge Pitam Singh had no jurisdiction to lodge the complaint and instead it was the District Judge who was competent to do so, being the Court to which appeals ordinarily lay from the court of the subordinate judge and was lower in rank to the High Court in the hierarchy. It was held in this context, that the Court of the Additional District Judge could not be construed to be a District Judge and that the jurisdiction of the former was limited to the discharge of such functions as were to be entrusted by the District Judge. It was thus concluded that neither the Senior Subordinate Judge Mr. Pitam Singh nor the Additional Judge Mr. J.N. Kapur who construed himself as an Additional District Judge, had the jurisdiction in the matter and in view of the provisions of the Punjab Courts Act, it was the District Judge who was competent to lodge the complaint in terms of Section 195(3) of the Code. Having regard to the gravity of the allegations, this Court remitted the matter to the District Court to do the needful in the exercise of his discretion in the facts and circumstances of the case.

34. In *Lalji Haridas* (supra), a Constitution Bench of this Court was seized with the question as to whether the proceeding before the I.T.O. under Section 37 of the Indian Income Tax Act, 1922 (as it was then) could be construed to be a proceeding in any court within the meaning of Section 195(1)(b) of the Code. The factual backdrop as outlined discloses that the appellant and the respondent No. 2 therein were businessmen and used to carry on their business at two different places and were known to each other for several years. In the income tax assessment proceedings of the appellant for the assessment years 1949-50 and 1950-51, the respondent No. 2 adduced evidence on oath before the I.T.O. of the concerned ward, wherein he denied that he had a son

named Nihal Chand and that he had done any business in the name of M/s. Nihal Chand & Co. at Jamnagar. The appellant alleged that the said statement was false to the knowledge of the respondent No. 2 and was made to mislead the enquiring I.T.O. and to avoid the incidence of income tax on himself and consequently the appellant was heavily taxed.

35. The appellant thereafter filed a criminal complaint against respondent No. 2 under Section 193 IPC. At the hearing of the complaint, the respondent No. 2 raised a preliminary objection that the learned Magistrate before whom the complaint had been filed, could not have taken cognizance thereof as the allegation was making of a false statement by him on oath in a proceeding before the court within the meaning of Section 195(1)(b) of the Code and in such an eventuality, the complaint was to be filed by the court concerned as required under the said provision of the Code and thus the appellant was not competent to lodge the prosecution.

36. Though the learned Magistrate held that the I.T.O. was not a court within the meaning of Section 195(1)(b) of the Code, the High Court, on a revision being filed by the respondent No. 2, sustained his challenge to the maintainability of the complaint. The High Court held that the I.T.O. was a court within the meaning of Section 195(1)(b) of the Code and resultantly dismissed the complaint filed by the appellant, who eventually approached this Court.

37. Adverting to Section 37 of the Income Tax Act, 1922 and sub-section (4) thereof in particular, it was held that as apparent therefrom, any proceeding before the I.T.O. in which powers under sub-sections (1), (2) and (3) are exercised by him, would be judicial proceeding for the purposes of the three sections of the Indian Penal Code as enumerated in sub-section (4). Consequently, the question as to whether the false statement alleged to have been made by the respondent No. 2 was rendered in a judicial proceeding within the meaning of Section 193 IPC was answered in the affirmative.

38. This Court also dwelt upon the aspect whether "judicial proceeding" as referred to in Section 193 IPC was synonymous with the expression "any proceeding in any court" used in Section 195(1)(b) of the Code. This issue surfaced primarily in view of the two classes of proceedings contemplated in Section 193 IPC attracting two varying punishments. This provision, it was noted, envisaged a punishable offence for giving false evidence in any stage of

a judicial proceeding or fabricating false evidence for the purpose of being used in any stage of a 'judicial proceeding' and also for giving or fabricating false evidence in 'any other' case. This Court in the ultimate analysis propounded on a conjoint reading of Section 193 IPC and Section 195(1)(b) of the Code that the proceedings which are judicial under the former ought to be taken to be proceedings in any court under the latter. In this context, it was ruled that having regard to the higher sentence for the offence under Section 193 IPC qua a judicial proceeding compared to 'any other case; the legislature thus had intended that there ought to be a safeguard in respect of complaints pertaining to the offence relatable to judicial proceedings as engrafted in Section 195(1)(b) of the Code. It was observed that an offence which was treated as more serious by the first paragraph of Section 193 IPC, being one committed during the course of a judicial proceeding, should be held to be an offence committed in a proceeding in any court for the propose of Section 195(1)(b) of the Code. In terms of the majority decision that was rendered, the view taken by the High Court was sustained and the complaint was dismissed as not filed in compliance of the statutory prescriptions contained in Section 195(1)(b) of the Code.

39. Noticeably in course of the adjudication, it was marked that Section 195 was an exception to an ordinary rule that any person could make a complaint in respect of commission of an offence triable under the Code. The restrictive mandate of this provision of the Code against cognizance of any offence punishable under the sections mentioned therein, when those pertain to any proceedings in any court, except on the compliant in writing of such court or of some other court to which such court is subordinate, was underlined in particular. This Court, thus emphasised that in the matter of invocation of Section 195(1)(b) of the Code, vis-a-vis a complaint about any of the offences as mentioned therein, an exception to the ordinary rule of making complaint by any person has been carved out and by way of a safeguard, only the court in the proceeding before which such offence had been committed or such officer of the Court as it may authorise in writing or some other court to which to this Court is subordinate, has been legislatively identified as competent to do so.

40. The decision in *Rajesh Kumar* (supra) pertains to the decision of the authorities under the Act to conduct a special audit of the account of the petitioner - assessee in terms of Section 142(2-A) of the Act. This was

subsequent to a raid conducted in the premises of the assessee in course whereof some documents including its books of accounts had been seized. The assessee questioned this decision of appointment of a special auditor principally on the ground of want of fairness in action as no opportunity of hearing was given to it, prior thereto. The interpretation and application of Section 142(2-A) of the Act in the textual facts thus fell for consideration in this case. It is in this context that this Court ruled that an assessment proceeding under the Act, is in terms of Section 136 thereof, a judicial proceeding and that when a statutory power is exercised by the assessing authority in exercise of judicial function which is detrimental to the assessee, the same is not and cannot be administrative in nature. In the extant facts and circumstances the challenge of the assessee was upheld.

41. As the genesis of the debate is rooted to Section 195 of the Code, a detailed reference thereto is indispensable. For convenience, Section 195 as a whole is extracted hereinbelow:

> "195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.
>
> (1) No Court shall take cognizance-
>
> (a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or
>
> (ii) of any abetment of, or attempt to commit, such offence, or
>
> (iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;
>
> (b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub- clause (i) or sub- clause (ii),

[except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate].

(2) Where a complaint has been made by a public servant under clause (a) of sub-section (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint: Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.

(3) In clause (b) of sub- section (1), the term" Court" means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section.

(4) For the purposes of clause (b) of sub-section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court in situate:

Provided that-

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed."

Section 195(1)(b) of the Code, which is relevant for the instant pursuit, prohibits taking of cognizance by a court vis-a-vis the offences mentioned in the three clauses (i), (ii) and (iii) except on a complaint in writing of the Court when the offence(s) is/are alleged to have been committed in or in relation to any proceeding before it or in respect of a document produced or given in evidence in such a proceeding or by such officer of that court as it may authorise in writing or by some other court to which the court (in the proceedings before which the offence(s) has been committed) is subordinate. A patently regulatory imposition in the matter of lodging of a complaint for such offences is discernible assuredly to obviate frivolous and wanton complaints by all and sundry.

42. Sub-section (3) of Section 195 clarifies that the term "Court" would mean a Civil, Revenue or Criminal court and would include a tribunal constituted by or under a Central, Provincial or State Act, if declared by that Act to be a Court for the purposes of this section.

43. In terms of sub-section (4), for the purposes of sub-section (1) (b), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction, such Civil Court is situated.

44. The proviso to sub-section (4) explains that where appeals lie to more than one Court, the Appellate Court of the inferior jurisdiction shall be the Court to which such Court (in the proceedings before which the offence has been committed) shall be deemed to be subordinate and where appeals lie to a Civil and also to a Revenue Court, the subordination would be determined

by the nature of the case or the proceeding, in connection with which the offence is alleged to have been committed.

45. Noticeably Section 195 of the Code appears under Chapter XIV enumerating the conditions requisite for initiation of proceedings thereunder. Though Section 190 of the Code outlines the categories of inputs on which a Magistrate of the first class, and any Magistrate of the second class specially empowered, can take cognizance of the offence alleged, Section 195 dealing with the prosecution for contempt of lawful authority of public servant and for offences against public justice or relating to documents given in evidence, unmistakably marks a departure from the usual modes of taking cognizance under Section 190 by prescribing the restrictions as adverted to hereinabove.

46. That the provisions of Section 195 of the Code are mandatory so much so that non-compliance thereof would vitiate the prosecution and all consequential orders, has been ruled by this Court, amongst others in *C. Muniappan and Others vs. State of Tamil Nadu* (2010) 9 SCC 567 wherein the following observations in *Sachida Nand Singh and Another vs. State of Bihar and Another* (1998) 2 SCC 493 were recorded with approval.

> "7.....Section 190 of the Code empowers 'any Magistrate of the First Class' to take cognizance of 'any offence' upon receiving a complaint, or police report or information or upon his own knowledge. Section 195 restricts such general powers of the Magistrate, and the general right of a person to move the court with a complaint is to that extent curtained. It is a well-recognised canon of interpretation that provision curbing the general jurisdiction of the court must normally receive strict interpretation unless the statute or the context requires otherwise.....". (emphasis supplied).

47. There is thus no escape from the proposition that for a valid complaint under Section 195 of the Code, the mandate thereof has to be essentially abided and as is easily perceivable this is to prevent frivolous, speculative and unscrupulous allegations relating to judicial proceedings in any court, lest the process of law is abused and public time is wasted in avoidable litigation.

48. That the search operations did constitute a proceeding under the Act before an income tax authority and that therefore the same is deemed to be a judicial proceeding within the meaning inter alia of Sections 193 and 196 IPC

and that every income tax authority for the said purpose would be deemed to be a civil court for the purposes of Section 195 is not an issue between the parties.

49. The essence of the discord is the competence of the Deputy Director, Income Tax (Investigation)-I, Bhopal (M.P.) to lodge the complaint. Whereas, according to the appellants, he is not the authority or the forum before which appeals would ordinarily lie from the actions/decisions of the I.T.Os. who had recorded their statements, as mandated by Section 194(4) of the Code, it is urged on behalf of the respondent that having regard to the overall scheme of the Act, he indeed was possessed of the appellate jurisdiction to maintain the complaint. As nothing much turns on the ingredients of the offences under Sections 193,196,200 IPC qua the issue to be addressed, detailed reference thereto is considered inessential. The relevant provisions of the Act next demand attention.

50. As enumerated under Section 116 of Chapter XIII of the Act, Deputy Director of Income tax/Deputy Commissioner of Income Tax/Deputy Commissioner of Income Tax (Appeals) amongst others are the designated income tax authorities. Section 118 authorises the Central Board of Direct Taxes constituted under the Central Board of Revenue Act, 1963 (hereinafter referred to as "the Board") to direct by notification in the official gazette that any income tax authority or authorities specified therein would be subordinate to such other income tax authority or authorities as may be specified in such notification. In course of the arguments, such a notification as contemplated has been laid before this Court and attention has been drawn to clause (e) thereof in the following terms:

> "Income-tax Officers shall be subordinate to the Assistant Directors or Assistant Commissioners within whose jurisdiction they perform their functions or other income-tax authority under whom they are appointed to work and to any other income tax authority to whom the Assistant Director or the Assistant Commissioner, as the case may be, or other income tax authority is subordinate."

51. As would be evident from the above extract, it deals exclusively with the inter se subordination of the authorities mentioned therein so much so that Income Tax Officers have been made subordinate to Assistant Directors or

Assistant Commissioners within whose jurisdiction they perform their functions or other income tax authorities under whom they are appointed to work and to any other income tax authority to whom the Assistant Director or the Assistant Commissioner as the case may be or other income tax authority is subordinate. Noticeably this clause does not spell out any territorial barriers but logically warrant some order/notification to activate the functional mechanism in order to address the institutional exigencies.

52. Our attention has not been drawn to any document to this effect. Additionally as well, the decisive and peremptory prescription of Section 195(4) of the Code is not merely the levels of the rank inter se but the recognised appellate jurisdiction ordinarily exercised by the authority or the forum concerned for a complaint to be validly lodged by it, if in a given fact situation, the initiation of prosecution is sought to be occasioned not by the court in the proceedings before which the contemplated offence(s) had been committed, but by a court to which ordinarily appeals therefrom would lie.

53. Considerable emphasis has been laid on behalf of the respondent on the provisions of the Act outlining the jurisdiction of the income tax authorities as encompassed in Sections 120 and 124 of the Act in particular. Section 120 provides that income tax authorities would exercise all or any of the powers and perform all or any of the functions conferred on or as the case may be assigned to such authorities under the Act in accordance with such directions as the Board may issue in this regard. The factors to be taken note of by the Board or any other income tax authority authorised by it for such purposes have also been prescribed. As a necessary corollary, the Board can also by general or special order and subject to such conditions, restrictions or limitations as may be specified therein, authorise such authorities as enumerated in sub-section (4) thereof to perform such functions, as may be assigned.

54. The powers of an assessing officer vested with the jurisdiction as permitted by Section 120 of the Act, extends as is clarified by Section 124, to any person carrying on business or profession, if the place at which he carries on his business or profession is situated within the limits of the area over which such officer had been vested with the jurisdiction or if the person concerned carries on business in more places than one, if the principal place of his business or profession is situated within the area over which the assessing officer has jurisdiction. In addition, such officer would have also jurisdiction in respect of any other person residing within the area. Sub-section 3 of Section

124 debars a person to call in question the jurisdiction of an assessing officer in the eventualities as mentioned in sub-clauses (a) and (b) thereof.

55. The power with regard to discovery, production of evidence etc. and the officer empowered to exercise the same has been dealt with in details in Section 131 of the Act. The procedure to be complied with in conducting search and seizure has been delineated in Section 132 of the Act. Seemingly, to this extent, the parties are one and ad idem.

56. The bone of contention lies in the interpretation of Section 246 of the Act in particular which is contained in Chapter XX dealing with Appeals and Revision. Whereas Section 246 catalogues the orders of an assessing officer other than those of the Deputy Commissioner from which appeal would lie to the Deputy Commissioner (Appeals), Section 246A lists the orders from which appeal would lie to the Commissioner (Appeals). Admittedly, the categories of orders specified under Section 246(1) of the Act do not include one stemming from any proceeding before an assessing officer under Section 132 of the Act pertaining to search or seizure. Noticeably though under Section 116 of the Act, as referred to hereinabove, under clause (d) thereof, Deputy Director of Income Tax, Deputy Commissioner of Income Tax and Deputy Commissioner of Income Tax (Appeals) have been bracketed together, it is only the Deputy Commissioner (Appeals), as is apparent from Section 246(1), who has been conferred with the appellate jurisdiction to entertain appeals, albeit from specified orders passed by an assessing officer as mentioned in that sub-section. The Deputy Director of Income Tax in particular, has not been designated to be the appellate authority or forum from such orders or any other order of the assessing officer. Having regard to the issue to be addressed, it is considered inessential to dilate on Section 246A which deals with the appeals to the Commissioner (Appeals).

57. Our attention has not been drawn to any provision of the Act whereunder the Deputy Director of Income Tax has been designated to be an authority or forum before whom an appeal would lie from any order of any subordinate officer including the I.T.O.. To reiterate, I.T.Os. are included in the classes of income tax authorities as per Section 116 of the Act and having regard to the hierarchy designed, they are subordinate in rank to the Deputy Director of Income Tax, Deputy Commissioner of Income Tax and the Deputy Commissioner of Income Tax (Appeals).

58. On a conjoint reading of the above provisions of the Act, it is thus patent that the statute has not only identified the income tax authorities but also has specified their duties and jurisdiction, territorial and otherwise. It has stipulated as well the eventualities and the pre-requisites, for the exercise of such jurisdiction or performance of the duties assigned to ensure effective and purposeful implementation of the provisions thereof. These functional framework indubitably has been made for the desired conduct of the organisational affairs as legislatively intended.

59. The word "ordinary" as defined in ***Blacks Law Dictionary, 10th Edition,*** reads thus:

> **"Ordinary:** occurring in regular course of events; normal; usual.

The word "ordinarily" is a derivative of this word (adverb) carrying the same meaning.

60. The word "ordinarily" therefore would denote developments which are likely to occur, exist or ensue in the regular or normal course of events as logically and rationally anticipated even though not set out or expressed in categorical terms. This is a compendious expression to encompass all events reasonably expected to occur in the usual and common course of occurrences and are expected to so happen unless prohibited, prevented or directed by some express and unexpected interventions to the contrary.

61. As adverted to hereinabove, Section 195 of the Code read as a whole unambiguously impose restrictions in the matter of lodgement of complaint qua the offences as mentioned in sub-section (1)(b) thereof in particular and therefore as a corollary, any interpretation for identifying the court/authority/ forum contemplated thereby to be competent has to be in furtherance of the restraint and not in casual relaxation thereof. Consequently, therefore the exposition of the provisions of the corresponding substantive law which designs the forums or authorities and confers original and appellant jurisdiction has also to be in aid of the underlying objectives of the restrictions stipulated. Any postulation incompatible with the restrictive connotations would be of mutilative bearing thereon and thus frustrate the purpose thereof, a consequence not approvable in law. To reiterate, Section 195 of the Code clearly carves out an exception to the otherwise conferred jurisdiction on a court under Section 190 to take cognizance of an offence on the basis of the complaints/information from the sources as enumerated therein.

62. Viewed in this context, in our estimate, the notification issued under Section 118 of the Act cannot be conceded an overriding effect over the scheme of the statute designating the appellate forums more particularly in absence of any order, circular, notification of any authority thereunder to that effect. The Deputy Director of Income Tax for that matter, as the framework of the Act would reveal, has not been acknowledged to be the appellate forum from any order or the decision of the assessing officer/I.T.O., notwithstanding several other provisions with regard to conferment of various powers and assignments of duties on the said office. In the teeth of such mindful and unequivocal module of the Act, recognition of the Deputy Director of Income Tax to be a forum to whom an appeal would ordinarily lie from any decision or action of the assessing officer/income tax officer would not only be inferential but would also amount to unwarranted judicial legislation by extrinsic additions and doing violence to the language of the law framed. On the contrary, acceptance of the Deputy Commissioner (Appeals) as the forum to which an appeal would ordinarily lie from an order/decision of the assessing officer/ I.T.O., would neither be inconsistent with nor repugnant to any other provision of the Act and certainly not incompatible with the legislative scheme thereof. Mere silence in Section 246 of the Act about any decision or order other than those enumerated in sub-section (1) thereof as appealable /decision to the Deputy Commissioner (Appeals), does not ipso fact spell legislative prohibition in that regard and in our comprehension instead signifies an affirmative dispensation.

63. It is a trite law that there is no presumption that a *casus omissus* exists and a court should avoid creating a casus omissus where there is none. It is a fundamental rule of interpretation that courts would not feel the gaps in statute, their functions being *jus discre non facere* i.e. to declare or decide the law. In reiteration of this well-settled exposition, this Court in (2008) 306 ITR 277 (SC) *Union of India and others vs. Dharmendar Textile Processors and others* had ruled that it is a well settled principle in law that a court cannot read anything in the statutory provision or a stipulated provision which is plain and unambiguous. It was held that a statute being in edict of the Legislature, the language employed therein is determinative of the legislative intent. It recorded with approval the observation in *Stock v. Frank Johns (Tipton) Limited* (1978) 1 All ER 948 (HL) that it is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. The observation therein that, rules of interpretation do not permit the courts to do

so unless the provision as it stands meaningless or doubtful and that the courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the statute, was underlined. It was proclaimed that a *casus omissus* cannot be supplied by the court except in the case of clear necessity and that reason for is found in the four corners of the statute itself but at the same time a *casus omissus* should not be readily inferred and for that purpose, all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute.

64. More recently this Court amongst others in *Petroleum and Natural Gas Regulatory Board vs. Indraprastha Gas Limited and Others* (2015) 9 SCC 209 had propounded that when the legislative intention is absolutely clear and simple and any omission inter alia either in conferment of power or in the ambit or expanse of any expression used is deliberate and not accidental, filling up of the lacuna as perceived by a judicial interpretative process is impermissible. This was in reiteration of the proposition in *Sree Balaji Nagar Residential Association vs. State of Tamil Nadu and Others* (2015) 3 SCC 353 to the effect that *casus omissus* cannot be supplied by the court in situations where omissions otherwise noticed in a statute or in a provision thereof had been a conscious legislative intendment.

65. The judicial formulations on the theme is so consistent and absolute in terms that no further dilation is essential. The scheme of the Act and the legislative design being unreservedly patent in the instant case, that it is plainly impermissible to acknowledge the Deputy Director of Income Tax to be the forum to which an appeal would ordinarily lie from an order/decision of an assessing officer/I.T.O. The present is thus not a case where this Court can premise that the statute suffers from casus omissus so as to recognise the Deputy Director of Income Tax as such an appellate forum.

66. In this persuasive backdrop, the conferment of appellate jurisdiction on the Deputy Commissioner of Appeals from the orders/decisions of the assessing officers as is apparent from Section 246 of the Act, has to be construed as a conscious statutory mandate. This is more so as noticed hereinabove, the Deputy Director of Income Tax, Deputy Commissioner of Income Tax and the Deputy Commissioner of Income Tax (Appeals) have

been otherwise placed at par in the list of income tax authorities provided by Section 116 of the Act. The omission to either vest the Deputy Director of Income Tax with the appellate powers or to contemplate the said post to be an appellate forum from the orders/decisions of the assessing officers cannot thus be accidental or unintended. The relevant provisions of the Act pertaining to the powers, duties and jurisdiction of the various income tax authorities do not leave any room for doubt, in our estimate, to conclude otherwise. True it is, that the Deputy Commissioner of Appeals has been construed in terms of Section 246 of the Act to be an appellate forum from the orders as enumerated in sub-section (1) thereof, but in absence of any provision in the statute nominating the Deputy Director of Income Tax to be an appellate forum for any order/decision of the assessing officer/I.T.O., the inevitable conclusion is that the said authority i.e. Deputy Director of Income Tax cannot be construed to be one before whom an appeal from any order/decision of any income tax authority, lower in rank would ordinarily lie.

67. The Parliament has unmistakably designated the Deputy Commissioner (Appeals) to be the appellate forum from the orders as enumerated under Section 246(1) of the Act. This however, in our view, as observed hereinabove does not detract from the recognition of this authority to be the appellate forum before whom appeals from the decisions of an assessing officer or of an officer of the same rank thereto would generally and ordinarily lie even in the contingencies not referred to in particular in sub section 1 of Section 246. This is more so, to reiterate, in absence of any provision under the Act envisaging the Deputy Director of Income Tax to be an appellate forum in any eventuality beyond those contemplated in Section 246(1) of the Act. Neither the hierarchy of the income tax authorities as listed in Section 116 of the Act nor in the notification issued under Section 118 thereof, nor their duties, functions, jurisdictions as prescribed by the cognate provisions alluded heretobefore, permit a deduction that in the scheme of the legislation, the Deputy Director of Income Tax has been conceived also to be an appellate forum to which appeals from the orders/decisions of the I.T.Os./assessing officers would ordinarily lie within the meaning of Section 195(4) of the Code. The Deputy Director of Income Tax (Investigation)-I Bhopal, (M.P.), in our unhesitant opinion, therefore cannot be construed to be an authority to whom appeal would ordinarily lie from the decisions/orders of the I.T.Os. involved in the search proceedings in the case in hand so as to empower him to lodge the complaint in view of the restrictive preconditions imposed by Section 195 of the Code.

The complaint filed by the Deputy Director of Income Tax, (Investigation)-I, Bhopal (M.P.), thus on an overall analysis of the facts of the case and the law involved has to be held as incompetent.

68. The cavil on the competence of the Court of the Chief Judicial Magistrate, Bhopal to entertain the complaint and take cognizance of the offences alleged, though reduced to an academic exercise, in view of the above determination needs to be dealt with in the passing.

69. In *Y. Abraham Ajith* (supra), the issue of territorial jurisdiction of the Trial Court in which a complaint had been filed by the respondent No. 2 under Sections 498A and 406 IPC, in the face of Sections 177 and 178 of the Code surfaced for scrutiny. The defence raised the plea that as no part of the cause of action constituting the alleged offence had arisen within the jurisdiction of the court before which the complaint had been filed, it lacked competence to entertain the same and conduct the trial following the submission of the charge-sheet. The complaint had disclosed that the allegations levelled therein related to the incident that had happened at her previous place of stay beyond the territorial limits of the court in which it had been filed. This Court after dilating on the scope and purport of Sections 177 and 178 of the Code as well as the judicially expounded connotation of the expression "cause of action" sustained the objection to the maintainability of the complaint. It was noticed that there was no whisper of any allegation relatable to the offences imputed at the place of stay of the complainant where the complaint had been filed. It was thus held that no part of cause of action did arise within the jurisdiction of the Trial Court before which the complaint had been filed and the proceedings resultantly were quashed.

70. A similar fact situation obtained in *Bhura Ram* (supra) also involving offences under Sections 498A/406/147 IPC. In the attendant facts, it being apparent that no part of the cause of action for the alleged offence had arisen or no part of the offence had been committed within the jurisdiction of the court before which the complaint had been filed, the proceedings were quashed.

71. Both these decisions on territorial jurisdiction, to start with having regard to the facts involved herein are distinguishable and are of no avail to the appellants. As hereinbefore stated, the appellants as assesses, had residences both at Bhopal and Aurangabad and had been submitting their

income tax returns at Bhopal. The search operations were conducted simultaneously both at Bhopal and Aurangabad in course whereof allegedly the appellants, in spite of queries made, did not disclose that they in fact did hold a locker located at Aurangabad. They in fact denied to hold any locker, either individually or jointly. The locker, eventually located, though at Aurangabad, has a perceptible co-relation or nexus with the subject matter of assessment and thus the returns filed by the appellants at Bhopal which in turn were within the purview of the search operations. The search conducted simultaneously at Bhopal and Aurangabad has to be construed as a single composite expedition with a common mission. Having regard to the overall facts and the accusation of false statement made about the existence of the locker in such a joint drill, it cannot be deduced that in the singular facts and circumstances, no part of the offence alleged had been committed within the jurisdictional limits of the Chief Judicial Magistrate, Bhopal.

72. Chapter XIII of the Code sanctions the jurisdiction of the criminal courts in inquries and trials. Whereas Section 177 of the Code stipulates the ordinary place of inquiry and trial, Section 178 enumerates the places of inquiry or trial. In terms of Section 179, when an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a court within whose local jurisdiction such thing has been done or such consequence has ensued. For immediate reference, Sections 177 and 178 are extracted hereinbelow.

> "**177:** Ordinary place of inquiry and trial – Every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed.
>
> **178**: Place of inquiry or trial – (a) When it is uncertain in which of several local areas an offence was committed, or
>
> (b) where an offence is committed partly in one local area and partly in another, or
>
> (c) where an offence is continuing one, and continues to be committed in more local areas than one, or
>
> (d) where it consists of several acts done in different local areas, it may be inquired into or tried by a court having jurisdiction over any of such local areas.

73. As would be evident from hereinabove, ordinarily every offence ought to be inquired into and tried by a court within whose local jurisdiction it had been committed as is mandated by Section 177 of the Code. Section 178, however marks a departure contingent on the eventualities as listed in clauses (a),(b), (c) and (d) of Section 178 to identify the court that would have the jurisdiction to try the offences as contemplated therein.

74. Though the concept of "cause of action" identifiable with a civil action is not routinely relevant for the determination of territoriality of criminal courts as had been ruled by this Court in *Dashrath Rupsingh Rathod vs. State of Maharashtra and Another*, (2014) 9 SCC 129, their Lordships however were cognizant of the word "ordinarily" used in Section 177 of the Code to acknowledge the exceptions contained in Section 178 thereof. Section 179 also did not elude notice .

75. Be that as it may, on a cumulative reading of Sections 177, 178 and 179 of the Code in particular and the inbuilt flexibility discernible in the latter two provisions, we are of the comprehension that in the attendant facts and circumstances of the case where to repeat, a single and combine search operation had been undertaken simultaneously both at Bhopal and Aurangabad for the same purpose, the alleged offence can be tried by courts otherwise competent at both the aforementioned places. To confine the jurisdiction within the territorial limits to the court at Aurangabad would amount, in our view, to impermissible and illogical truncation of the ambit of Sections 178 and 179 of the Code. The objection with regard to the competence of the Court of the Chief Judicial Magistrate, Bhopal is hereby rejected.

76. The inevitable consequence of the determination in its entirety however is that the complaint is unsustainable in law having been filed by an authority, incompetent in terms of Section 195 of the Code.

77. In the result, the appeal succeeds and the impugned proceeding and the order assailed are set-aside. The respondent is however left at liberty to take appropriate steps in the matter, as available in law, if so advised.

Appeal allowed.

I.L.R. [2017] M.P., 2614
SUPREME COURT OF INDIA
Before Mr. Justice N.V. Ramana & Mr. Justice Prafulla C. Pant
Cr.A. No. 333/2013 decided on 25 April, 2017

BALIRAJ SINGH ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. ***Penal Code (45 of 1860), Section 302/34 – Appreciation of Evidence – Eye Witnesses – Ocular & Medical Evidence*** **– Held – Previous enmity existed between parties regarding property – Eyewitnesses deposed that they saw the accused giving beatings to deceased with lathi while medical evidence suggests that cause of death was due to fatal injury by a sharp edged weapon – Contradictions in deposition of eye witnesses – Further, police Officer who conducted seizure proceedings and prepared seizure memo was not examined – Evidence creates serious doubt on prosecution case – Conviction and sentence set aside – Appeal allowed. (Paras 5, 9, 11 & 13)**

क. दण्ड संहिता (1860 का 45), धारा 302/34 – साक्ष्य का मूल्यांकन – चक्षुदर्शी साक्षीगण – चाक्षुष एवं चिकित्सीय साक्ष्य – अभिनिर्धारित – सम्पत्ति के संबंध में पक्षकारों के बीच पूर्व वैमनस्य विद्यमान – चक्षुदर्शी साक्षीगण ने अभिसाक्ष्य दिया कि उन्होंने अभियुक्त को लाठी से मृतक की पिटाई करते देखा था जबकि चिकित्सीय साक्ष्य सुझाता है कि मृत्यु एक धारदार शस्त्र द्वारा घातक चोट के कारण हुई थी – चक्षुदर्शी साक्षीगण के अभिसाक्ष्य में विरोधाभास – इसके अतिरिक्त पुलिस अधिकारी जिसने जब्ती कार्यवाहियां संचालित की एवं जब्ती–पत्र तैयार किया था, का परीक्षण नहीं किया गया था – साक्ष्य, अभियोजन प्रकरण पर गंभीर संदेह निर्मित करता है – दोषसिद्धि एवं दण्डादेश अपास्त – अपील मंजूर।

B. ***Penal Code (45 of 1860), Section 302/34 – Appreciation of Evidence – Interested/Related Witnesses*** **– Held – Courts below failed to scrutinize the prosecution evidence with utmost care when eye witnesses are closely related *inter-se* and to the deceased. (Para 5 & 11)**

ख. दण्ड संहिता (1860 का 45), धारा 302/34 – साक्ष्य का मूल्यांकन – हितबद्ध/नातेदार साक्षीगण – अभिनिर्धारित – निचले न्यायालय अभियोजन साक्ष्य की अत्यंत सावधानी से संवीक्षा करने में विफल रहे, जब चक्षुदर्शी साक्षीगण आपस में एवं मृतक के निकट संबंधी हैं।

Case referred:

AIR 1983 SC 484.

JUDGMENT

The Judgment of the Court was delivered by : **N.V. RAMANA, J. :-** This appeal arises out of impugned Judgment and Order dated 12th January, 2012 passed by a Division Bench of High Court of Madhya Pradesh, Jabalpur in Criminal Appeal No. 533 of 1994 upholding the conviction and sentence passed by the learned trial Court against the appellant herein for the offence punishable under Section 302/34, IPC.

2. The facts, limited for the purpose of dealing with this appeal, as divulged by the prosecution case are that on 6th January, 1992, Hira Singh Gond (Complainant—PW 7) lodged an FIR at Bahri Police Station, Sidhi District stating that his brother Mangal Singh had gone to the fields to answer nature's call, when Baliraj Singh (A1 & Appellant herein) and Baijnath Singh (A2) attacked him (Mangal Singh) with *lathis* causing instantaneous death of Mangal Singh. Accordingly police registered Crime No. 5/92 against the accused, body of the deceased was sent for postmortem examination, *lathis* allegedly used in the crime were seized at the instance of the accused and charges were framed against them under Section 302/34, IPC to which the accused pleaded not guilty and claimed trial.

3. In order to bring home the guilt of the accused, prosecution has examined 13 witnesses, while no one was examined on the defense side. On the basis of statements of eyewitnesses, Ramrati (PW 9—wife of the deceased), Chameli (PW 8—wife of the complainant and sister-in-law of the deceased), and Lakhan Singh (PW 12—family friend of the deceased), and considering the medical evidence, the trial court came to the conclusion that accused were guilty of committing the murder of Mangal Singh (deceased). Accordingly, the trial Court convicted the accused under Section 302/34, IPC and sentenced them to undergo imprisonment for life.

4. Aggrieved by the order of the trial court, both the accused filed criminal appeal before the High Court. However, during the pendency of appeal before the High Court, Baijnath Singh (A2) had died, therefore his sentence got abated. The High Court also found the statements of eyewitnesses to be cogent and trustworthy, therefore concurred with the judgment of the trial Court and

dismissed the appeal of the appellant-accused. Hence the present appeal by way of special leave.

5. We have heard learned counsel for the parties at length. The case on behalf of the appellant as advanced by the learned counsel is that most of the prosecution witnesses are interested witnesses, particularly the eyewitnesses belong to one family and they had a longstanding grudge against the accused over property dispute between both families, and hence the appellant was falsely implicated in retaliation. The testimonies of Hira Singh (PW 7—brother of the deceased), Chameli (PW8—sister-in-law of the deceased), Ramrati (PW9—wife of the deceased) and Lakhan Singh (PW 12—family friend of the deceased) cannot be relied on as they were inconsistent and lack credibility. Besides they are contrary to the medical evidence. According to the own deposition of Lakhan Singh (PW 12—family friend of the deceased), he used to call the deceased as *'maama'*. He has stated that he arrived first at the place of incident upon hearing hue and cry of the deceased and saw the accused running away from the scene of offence. But, as per the testimonies of Chameli (PW 8—sister-i-law of the deceased) and Ramrati (PW 9—wife of the deceased) who reached the place of occurrence afterwards, the accused were still beating the deceased with *lathis*. Contrary to their statements, Dr. R.K. Dixit (PW 13) who conducted postmortem examination on the body of the deceased opined that the death was caused due to fatal injury by a sharp and pointed object or weapon. Nowhere in their testimony, the eyewitnesses specified that the accused carried sharp edged weapons, attributing the fatal injury to the victim. It is only before the trial Court, Ramrati (PW 9—wife of the deceased) improvised her version and deposed that when she reached the place of occurrence, the accused were beating her husband with *lathis* which were coated with iron. Her statement cannot be made basis for convicting the accused as she is very much an interested witness, more so when there is no specific averment as to who caused the fatal injury on the neck, leading to the death of the victim. It was not appropriate on the part of Courts below to ignore the fact that the eyewitnesses deposed that they saw the accused giving beatings to the victim with sticks while the medical evidence suggests that the cause of death was by a sharp edged weapon. Before substantiating the crime against accused, the courts below failed to scrutinize the prosecution evidence with utmost care when the eyewitnesses are closely related. Only by placing reliance on couched evidence, the trial Court recorded conviction of the accused. The High Court also ignored just principles of law to ensure that the

prosecution should prove its case beyond reasonable doubt and in a mechanical way fastened crime with the appellant and committed serious error by upholding conviction.

6. Adverting to the above arguments, learned counsel for the State submitted that the ocular testimony of PWs 8 and 9 remained consistent and duly corroborated by the medical evidence. There was no suspicion for false implication of the accused as the eyewitnesses had categorically explained the beatings given by the accused leading to the death of Mangal Singh. There was specific statement by PW 9 (wife of the deceased) that the sticks with which accused given beatings to the deceased were coated with iron. The Courts below were at no fault in appreciating the direct evidence of eyewitnesses so as to connect the accused with the commission of the crime and the judgment of conviction under Section 302/34, IPC does not call for any interference by this Court.

7. In the backdrop of what has been argued by the learned counsel for the parties and in the light of relevant material available on record we may now proceed with our observations. Admittedly there was no peace and harmony between the victim and accused groups as they locked horns with each other over a longstanding dispute dating back 30 years, relating to mutation proceedings of some landed property. The thrust of the prosecution to prove the charge against the appellant was mainly on the evidence of Chameli (PW 8)—wife of the complainant Hira Singh and sister-in-law of the deceased, Ramrati (PW 9)— wife of the deceased and Lakhan Singh (PW12)—family friend of the deceased, to make an endeavor that in all probability it was the accused who committed the guilt.

8. We find from the record that PW12—Lakhan Singh was the first person to reach the place of occurrence when an alarm was raised by the victim. In his statement to the police under Section 161, Cr.P.C. it was unambiguously stated in clear terms that when he reached the place of occurrence, he saw the accused running away from the spot. It was not mentioned in the FIR or in his statement to the police that he witnessed the accused-appellant injuring the victim. It is only in his deposition before Court, with variation to his earlier statement before the police, he narrated that he was present at the spot at the time of commission of offence and witnessed the accused showering *lathi* blows on the deceased. He admittedly made clear that PWs 8 and 9 reached the place of occurrence afterwards.

9. On the other hand, PW 8 in her statement deposed that she saw accused beating the deceased with *lathis* due to which the deceased had sustained injuries on head, neck and blood was oozing out from there and there was sunlight at that time. PW 9 (wife of the deceased) also made the same statement however with some intensity that the *lathis* were coated with iron. Veracity of the statements of these two witnesses is doubtful at the threshold itself, as they do not tally with the statement of PW12 who admittedly reached the place of occurrence first.

10. Considering the totality of the prosecution case, we fail to understand that at the time of such occurrence in a small village, when there was sunlight and PW8 & PW9 along with villagers rushed upon hearing uproar of PW12, no attempt was made by any of the eyewitnesses or villagers to catch hold of the accused. This lacuna in the prosecution case becomes stronger with the fact that in the FIR it was clearly mentioned, as PW8 saying to the complainant that upon hearing hue and cry from the field, PW9, PW12 and other people of village rushed to the field. Though there was no indication in the FIR on PW8 herself rushing to the scene of offence, it is however apparent that some other people of village rushed to the place of occurrence, but there was none among the villagers who rushed with PWs 8 & 9 as independent eyewitness.

11. Thus, it is true that other than PW12—family friend of the deceased, the prosecution has not made any independent witness from the village people who rushed to the place of offence along with PWs 8 & 9 on hearing hue and cry from the field. The circumstances warrant application of due care and caution in appreciating the statements of eyewitnesses because of the fact that the prime eyewitnesses are related inter-se and to the deceased. Hence, the prosecution has failed to put a strong case as we cannot attach credence to the statements of PWs 8, 9 & 12. The courts below erred in not applying the principle of strict scrutiny in assessing the evidences of eyewitnesses (PWs 8, 9 & 12).

12. Further, we find from the postmortem report (Annexure P1) prepared by Dr. R.K. Dixit (PW 13) upon examining the body of deceased, that there was a punctured wound just below the angle of right mandible over the right side of neck 1" x ½" x 3" and on dissection, he found that major artery was punctured and trachea was cut. There was hematoma underlying the whole side of neck and in the opinion of Doctor, the injury was caused by a sharp piercing object. In his evidence, Doctor (PW 13) confirmed that cause of

death was due to excessive hemorrhage form the punctured wound over the right side of neck caused by sharp piercing object and due to punctured major blood vessel, over right side of neck.

13. It is on record that at the instance of the accused—appellant, police have recovered (Ext.P7) from *arhar* field the *lathi* allegedly used in the offence. However, nowhere it is recorded that the seized *lathi* contained any sharp edges with iron coated. Even it was not sent for examination of Dr. R.K. Dixit (PW 13) to ascertain whether the fatal injury could be resulted by it. Moreover, the record says that the blood on the bloodstained cap of deceased (Ext. P9) seized from the place of occurrence did not tally with that of the deceased. Another glaring deficiency is that Sub-Inspector who conducted the seizure proceedings and prepared the Ext. P7 (seizure memo) has not been examined by the prosecution. It is settled proposition in criminal jurisprudence that ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses.[1] In this case the nature of injury, contradiction about the time of arrival of the witnesses, contradictions between the ocular and medical evidence, non-examination of Police officer who conducted seizure and subsequent improvement by one of the eye witness casts a serious doubt on the prosecution's case.

14. For the foregoing reasons, we cannot hold the accused—appellant guilty of the offence in the present case. The conviction against appellant as recorded by the trial court and upheld by the High Court is therefore set aside and he is acquitted of the charges. He shall be set at liberty forthwith if not required to be detained in connection with any other offence.

15. The appeal stands allowed accordingly.

Appeal allowed.

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1. *Solanki Chimanbhai Ukabhai v. State of Gujarat,* AIR 1983 SC 484

I.L.R. [2017] M.P., 2620
FULL BENCH

Before Mr. Justice Hemant Gupta, Chief Justice,
Mr. Justice H.P. Singh, Mr. Justice Rajeev Kumar Dubey,
Mr. Justice Vijay Kumar Shukla & Mr. Justice Subodh Abhyankar
W.P. No. 7798/2017 (Jabalpur) order passed on 12 October, 2017

PANKAJ KUMAR RAI (M/S) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

(Alongwith W.P. No. 11608/2017)

A. Minor Mineral Rules, M.P. 1996, Rule 68(1) Third Proviso - "No Mining Dues" Certificate - **Held - Since minor mineral vests in State and there is absolute prohibition in extraction of mineral other than by quarry lease or a trade quarry or permit quarry, therefore contractor who is engaged in construction work is required to prove that such mineral is royalty paid - If State Government insist on "No Mining Dues" Certificate, the same cannot be said to be illegal - Further, State Government advised to develop and adopt alternate mechanism of issuance of online "No Mining Dues" certificate. (Paras 27, 29 to 31)**

क. गौण खनिज नियम, म.प्र. 1996, नियम 68(1) तृतीय परंतुक – "खनन अदेयता" प्रमाण पत्र – अभिनिर्धारित – चूंकि गौण खनिज राज्य में निहित होते हैं एवं खदान पट्टा या एक व्यापारिक खदान या खदान अनुज्ञा के अलावा खनिज के निष्कर्षण का पूर्ण प्रतिषेध है इसलिए निर्माण कार्य में लगे हुए ठेकेदार द्वारा यह साबित किया जाना अपेक्षित है कि ऐसा खनिज रायल्टी भुगतान किया हुआ खनिज है – यदि राज्य सरकार "खनन अदेयता" प्रमाण पत्र का आग्रह करती है उसे अवैध नहीं कहा जा सकता – इसके अतिरिक्त, राज्य सरकार को ऑनलाईन "खनन अदेयता" प्रमाण पत्र जारी करने की वैकल्पिक क्रियाविधि विकसित करने एवं अपनाने के लिए सलाह दी गई।

B. Minor Mineral Rules, M.P. 1996, Rule 68(1) Third Proviso - "No Mining Dues" Certificate - Periodical Certificates - **Held - Condition of issuance of "No Mining Dues" certificate on furnishing of copy of work completion certificate is not reasonable - Running bills require periodical payments - Mining officer shall give "No Mining Dues" certificate at least quarterly on basis of running bills submitted by contractor engaged in construction work. (Para 29)**

ख. गौण खनिज नियम, म.प्र. 1996, नियम 68(1) तृतीय परंतुक – "खनन अदेयता" प्रमाण पत्र – सामयिक प्रमाण पत्र – अभिनिर्धारित – कार्य संपादन प्रमाण पत्र की प्रति प्रस्तुत करने पर "खनन अदेयता" प्रमाण पत्र को जारी करने की शर्त, युक्तियुक्त नहीं है – चालू बिलों पर सामयिक भुगतान अपेक्षित है – खनन अधिकारी निर्माण कार्य में लगे ठेकेदार द्वारा प्रस्तुत किये गये चालू बिलों के आधार पर कम से कम त्रैमासिक रूप से "खनन अदेयता प्रमाण पत्र" देगा।

C. Minor Mineral Rules, M.P. 1996, Rule 4 & 68(1) Third Proviso - Statutory Interpretation - Principle of Harmoniuos Construction **- Held - No word in statute is superfluous and each word has its meaning - A proviso to statute has to be read as a whole by giving harmonious contruction to all provisions of law so that none of the provisions is rendered redundant - In view of such principle, third proviso is additional relaxation to Rule 4 and Rule 68(1) and is not illegal nor enlarges the scope of Rule 68(1) of the Rules of 1996.**

(Para 24 & 25)

ग. गौण खनिज नियम, म.प्र. 1996, नियम 4 व 68(1) तृतीय परंतुक – कानूनी निर्वचन – समन्वयपूर्ण अर्थान्वयन का सिद्धांत – अभिनिर्धारित – कानून का कोई शब्द निरर्थक नहीं है एवं प्रत्येक शब्द का अपना अर्थ है – कानून के किसी परंतुक को विधि के सभी उपबंधों के साथ समन्वयपूर्ण अर्थान्वयन देते हुए, संपूर्णता से पढ़ा जाना चाहिए जिससे कि कोई भी उपबंध व्यर्थ न हो जाए – उक्त सिद्धांत को दृष्टिगत रखते हुए, तृतीय परंतुक, नियम 4 एवं नियम 68(1) के लिए अतिरिक्त रियायत है तथा न तो अवैध है न ही नियम 1996 के नियम 68(1) के विस्तार को बढ़ाता है।

D. Minor Mineral Rules, M.P. 1996, Rule 2(xvi-b) & 68(1) Third Proviso - Term "Contractor" **- Held - Contractor as defined in Rule 2(xvi-b) is a contractor who is granted trade quarry - Petitioners have not been granted trade quarry, they are the contractors engaged in Government contract - Expression contractor in third proviso to Rule 68(1) is clarified by words "engaged in construction work" - It has to be read together and not disjunctively. (Para 18)**

घ. गौण खनिज नियम, म.प्र. 1996, नियम 2(xvi-बी) व 68(1) तृतीय परंतुक – शब्द "ठेकेदार" – अभिनिर्धारित – नियम 2(xvi-बी) में यथा परिभाषित ठेकेदार एक ऐसा ठेकेदार है जिसे व्यापारिक खदान प्रदान की गई है – याचीगण को व्यापारिक खदान प्रदान नहीं की गई है, वे सरकारी संविदा में लगे हुए ठेकेदार हैं – नियम 68(1) के तृतीय परंतुक में अभिव्यक्ति ठेकेदार को "निर्माण कार्य में

लगे हुए" शब्दों द्वारा स्पष्ट किया गया है – इसे एक साथ पढ़ा जाना चाहिए एवं न कि वियोजित रूप से।

Cases referred :

2016 (2) MPLJ 704, (1976) 1 SCC 128, (1996) 4 SCC 596, (2004) 6 SCC 672, 2016 (6) SCC 120, (2000) 2 SCC 451, AIR 1985 SC 582, (1994) 2 SCC 691, (2002) 2 SCC 678, (2014) 1 SCC 258.

Vivek Dalal, Mukesh Kumar Agarwal, Shekhar Sharma, Utkarsh Agrawal and *Amit Singh,* for the petitioners.

P.K. Kaurav, A.G. with *Amit Seth,* G.A. for the respondents/State.

ORDER

The Order of the Court was passed by : **HEMANT GUPTA, C.J. :-** The present Writ Petition No.7798/2017 was earlier referred to larger Bench vide order dated 16.8.2017 whereby a Division Bench of this Court *prima facie* found that the view taken by the Full Bench of this Court in W.P. No.4547/2016 *(M/s Phaloudi Constructions and Infrastructure Pvt. Ltd. vs. State of Madhya Pradesh)* and other connected matters decided on 10.5.2016 requires reconsideration. Thus, following two questions were referred for consideration to the Larger Bench:-

> (i) Whether the purchase of minor minerals from open market in terms of 3rd proviso to rule 68(1) excludes the obtaining of "No Mining Dues" certificate from Mining Department as the open market may include illegally extracted minor minerals as well?
>
> (ii) Whether the judgment in Phaloudi Constructions and Infrastructure Pvt. Ltd. lays down good law, in view of the fact that the amendment carried out in Rules on 23rd March, 2013 and later on 2.7.2013 was not brought to the notice of the Bench, when the Rule 68(1) was substituted?

2. Later, a Full Bench of three Judges hearing the petition found that the second question does not arise for consideration, but, finding that the view in *Phaloudi Constructions and Infrastructure Pvt. Ltd.'s* case (supra) does not seem to be correct, therefore, the petition was ordered to be placed before the larger Bench. It is how; this Bench is seized of the petition.

3. The brief facts leading the abovesaid question, in short, are that the petitioner herein is a registered contractor with Public Works Department and has been awarded work order for construction work. In terms of the agreement, the petitioner is being paid periodically but in every bill deduction of royalty amount is made in spite of submitting purchase bills of the minor minerals of the authorized dealers. The grievance of the petitioners is that deductions of amount of royalty are being made without issuing any notice to the petitioners and the entire payments are not being paid to the petitioners. It is pointed out that there is no express provision of law to pay royalty to the Department of Mines as the royalty is to be paid by the contractor, who undertakes mining operation. The material is purchased by the petitioners from the trader who pays royalty as the payment of royalty is mentioned in the invoices raised and given to the petitioners. The petitioners seek support from the Full Bench judgment of this Court reported as 2016 (2) MPLJ 704 *(Phaloudi Constructions and Infrastructure Pvt. Ltd. vs. State of M.P.)* wherein the Court has concluded as under:-

> "25. Thus, whether it is under clause (i) or clause (ii) of sub-rule (1) of Rule 68 of 1996 Rules, the fact remains that the same relates to contractor engaged in Government work of the nature stipulated therein and are given permission for extraction, removal and transportation of any minor mineral and not the contractors who though engaged in the work of any department and undertaking but purchases the minor mineral from open market. This aspect gets clarified from the definition of "Contractor" as contained under clause (xvi-b) of Rule 2 of 1996 Rules, which means a person who holds a "trade quarry". Accordingly, quarry permit holder/contractor engaged in construction as find mention in Third Proviso is the contractor, who has been so permitted under clause (i) and (ii), as the case may be. Though this proviso contains an expression "or used by purchasing from open market"; however, since no such class of contractor engaged in work of any department and undertaking, who is not authorised under clause (i) or (ii) of sub-rule (1) of Rule 68, completes such work by purchasing minor mineral from open market, is created under these clauses, we decline to accept the contentions on behalf of the respondent that Third Proviso

creates a substantive class of contractors engaged in works of Govt. department and undertaking. In view whereof, the regime of *M/s Tomar Construction Company (supra)* and *M/s Chandrama Construction Company (supra)* does not get obliterated, even with insertion of Third Proviso to sub rule (1) of Rule 68 of 1996 Rules.

26. Even if for the sake of argument if the contentions of State Government Counsel is accepted that the contractor, which find mentions in Third Proviso, would include the contractor engaged in work of Government department and undertaking who purchase minor minerals from open market to complete such work, no provision in the Act of 1956 or the Rules and Regulations made thereunder including the Rules of 1996 and 2006 has been commended at, having control over such retails traders operating in open market. There being no such provision regulating open market it is beyond comprehension that, the Mining Officer/Officer-in-Charge, Mining Sector will have any document available with him for verification. On the contrary, the discretion given to the Competent Authority vide orders in *M/s Tomar Constructions (supra)*, *M/s Chandrama Construction, Prashant Singh Bhadoriya (supra)* and *M/s Trishul Construction (supra)* to shift the onus on the contractor engaged in the works of the Government and undertaking who claims refund of royalty on the ground of having purchased from the open market to establish the source. In case, if he fails, the Government not only can deny the refund; simultaneously, can take action against such contractor under law, as in such cases, it can legally be inferred that the minor mineral is obtained through illegal source. These powers would be in addition to the statutory powers."

4. Before this Bench, the argument of the learned counsel for the petitioners is that the third proviso to Rule 68(1) of the M.P. Minor Mineral Rules, 1996 (in short "the Rules") does not include the purchase of the minerals from the traders. The construction work undertaken by the petitioners is excluded from the scope and preview of the third proviso. A contractor, as defined under the Rules alone is required to obtain 'No Mining Dues' certificate

and/or a quarry permit holder and not the contractor who is executing separate construction contract on behalf of the State. Therefore, 'No Mining Dues' certificate is not required to be submitted by the petitioners as the petitioners in the writ petitions are the purchasers of the mineral from the open market. It is argued that keeping in view the law of interpretation, this Court will not add any words to the Statute, therefore, in view the plain language of the third proviso, the petitioner is not liable to furnish 'No Mining Dues' certificate for use of mineral in the construction work being undertaken by the petitioner. It is argued that the judgment in *Phaloudi Constructions* (supra) does not require reconsideration as the same has considered various aspects of the provisions and the law applicable thereto.

5. Some of the learned counsel for the petitioners have submitted that 'No Mining Dues' certificate is not issued for years together, therefore, the requirement of 'No Mining Dues' certificate interferes with the right of business run by the petitioners. It is also argued that the invoices through which the petitioners purchase the minor mineral have the endorsement of payment of royalty. It is for the State to verify whether the royalty has been paid or not but the petitioners, the petty contractors engaged in construction work, cannot ensure that the traders from whom they have purchased the minor mineral on the basis of invoices raised to verify as to whether the royalty has been paid or not. Therefore, the third proviso which mandates the petitioners to obtain 'No Mining Dues' certificate is not applicable to the petitioners and, in any case, it is not practically possible.

6. Shri Vivek Dalal, learned counsel for the petitioners relies upon the decision of the Supreme Court reported as (1976) 1 SCC 128 *(Dwarka Prasad vs. Dwarka Das Saraf)* to contend that if the principal provision is clear, a proviso cannot expand or limit the substantive provision. It is argued that the interpretation being given by the State enlarges the scope of proviso which is not permissible. Reliance has also been placed upon the Supreme Court decision reported as (1996) 4 SCC 596 *(S. Gopal Reddy vs. State of Andhra Pradesh).*

7. Shri Shekhar Sharma, learned counsel appearing for the petitioner in W.P. No.11608/2017 relies upon the Supreme Court judgment reported as (2004) 6 SCC 672 *(Maulavi Hussein Haji Abraham Umarji vs. State of Gujarat and another)* to contend that the Court cannot read anything in a statutory provision when the language is plain and unambiguous. Shri Amit

Singh, learned counsel appearing for the petitioners in some cases argued that royalty payable is different from no mining dues being claimed from the petitioners. Royalty is payable as per Form X, XI and XII appended with the Rules for which monthly, half-yearly and annual return is to be filed whereas the petitioners are being called upon to obtain 'No Mining Dues' certificate which is not dealt with in the Rules.

8. On the other hand, learned Advocate General submitted that the words "contractor engaged in construction work" appearing in the proviso to Rule 68(1) of the Rules, is not a "Contractor" as defined in Rule 2(xvi-b) of the Rules. It is also submitted that the "Quarry permit" holder as mentioned in third proviso is defined in Clause 2(xxiii) of the Rules, which is different from the "Quarry lease" defined in Rule 2(xxv) of the Rules. It is argued that Rule 4 prohibits mining operation without the trade quarry or a quarry permit or a quarry lease. The Rule 6 deals with the grant of quarry lease whereas Rule 7 deals with trade quarry that is the lease by auction only in respect of quarries of minerals specified in Serial No.5 of Schedule-I and Serial No.1 and 3 of Schedule-II of the Rules. As such there is absolute prohibition of the extraction of mineral without allotment or auction, therefore, Rule 68 is an exception to Rule 4. Rule 68 grants permission for extraction, removal and transportation of any minor mineral from any specified quarry, if it is required for the works of any department and undertaking of Central or the State Government. Said permission can be granted to the concerned Departmental Authorities or its authorized contractor on furnishing proof of award of contract as envisaged in Rule 68(1)(i) of the Rules. Clause (ii) of Rule 68(1) permits the Executive Engineer to permit the use of *murrum* and ordinary clay for construction of roads under the Public Sector Authority, Board or local body.

9. It is argued that "Quarry permit" holder as mentioned in third proviso, defined in Rule 2(xxiii), is a permission granted to extract and remove any minor mineral for any specified period. Thus, the quarry permit is different and given for a limited period as against "Trade quarry" as defined in Rule 2(xvi-a) or "'Quarry lease" as defined in Rule 2(xxv) of the Rules. Therefore, proviso is an exception to prohibition of extraction of minor mineral other than by allotment or auction to a person who is granted quarry permit. Such quarry permit holder is to deposit advance royalty in terms of Sub-Rule (3) whereas in respect of contractor engaged in construction work, such contractor has to produce 'No Mining Dues' certificate to ensure that only legally extracted

minor minerals are used in construction activity rather than illegally extracted minerals without payment of royalty. Reliance is placed upon the Supreme Court judgment reported as 2016 (6) SCC 120 *(State of Rajasthan and another vs. Deep Jyoti Company and another).*

10. It is argued that in the judgment in *Phaloudi Construction* (supra), the expression "contractor engaged in construction work" has been misinterpreted to mean "Contractor" as defined in Rule 2(xvi-b) of the Rules whereas such proviso is applicable to a contractor who has been granted Trade quarry.

11. The M.P. Minor Mineral Rules, 1996 have been framed under Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957 (No.67 of 1957) (hereinafter referred to in short as "the Act"). Section 15 of the Act empowers the State Government to frame Rules to provide for all or any of the following matters, namely,

> "(a) the person by whom and the manner in which, applications for quarry leases, mining leases or other mineral concessions may be made and the fees to be paid therefor;
>
> xxx xxx xxx"

12. In terms of such statutory provision, the Rules have been framed and the relevant extract of the Rules is reproduced as under:-

> "2. **Definitions.** - In these rules, unless the context otherwise requires, -
>
> xxx xxx xxx
>
> (xvi-a) "Trade quarry" means a quarry for which the right to work is auctioned:
>
> (xvi-b) "Contractor" means a person who holds a "trade quarry".
>
> xxx xxx xxx
>
> (xxiii) "Quarry permit" means a permission granted under these rules to extract and remove any minor mineral in any specified period;

(xxv) "Quarry Lease" means a mining lease for minor minerals as mentioned in Section 15 of the Act;"

xxx xxx xxx

4. **Prohibition of mining operation without a trade quarry or quarry permit or quarry lease-** (1) No person shall undertake any mining operation in any area except under and in accordance with the terms and conditions of a trade quarry or quarry lease granted under these rules:

Provided that nothing in this sub-rule shall affect any mining or quarrying operation undertaken in any area in accordance with the terms and conditions of permit, a quarry lease, trade quarry or royalty quarry granted before the commencement of these rules which is in force at the time of such commencement.

(2) No trade quarry or quarry lease shall be granted other than in accordance with the provisions of these rules.

xxx xxx xxx

6. **Powers to grant quarry lease.** - Quarry lease in respect of minerals specified in Schedule-I and II shall be granted and renewed by the authority mentioned in column (2) for the minerals specified in column (3) subject to the extent as specified in the corresponding entry in column (4) thereof of the Table below:-

xxx xxx xxx

7. **Power to grant trade quarry.** - (1) The quarries of Minerals, specified in serial number 5 of Schedule I and serial numbers 1, 3 of Schedule II, situated in government land, shall be allotted only by auction:

Provided that quarry lease of minerals specified in serial number 1 of Schedule II may be granted in favour of the Madhya Pradesh State Mining Corporation Limited (Government of Madhya Pradesh Undertaking).

(2) The period of quarry of minerals specified in serial number 5 of schedule I and mineral specified in serial number 1 and 3 of schedule II shall be upto the end of fifth financial year from the financial year, fixed for auction:

xxx xxx xxx

9. Application for quarry lease. - An application for the grant or renewal of a quarry lease shall be made in Form I in triplicate for the minerals specified in Schedule I and II. The application shall be affixed with a court fee stamp of the value of five rupees and shall contain the following particulars together with documents in support of the statements made therein:-

xxx xxx xxx

18. Disposal of applications for the grant or renewal of quarry lease. - (1) On receipt of an application for the grant or renewal of a quarry lease, its details shall be first circulated for display on the notice board of the Zila Panchayat, Janpad Panchayat and Gram Sabha concerned of the district and collectorate of the district concerned.

(1-A) Addition to in sub-rule (1), the details of quarry lease application, received for any area shall be published in leading daily Hindi newspaper in the form of notice for general information within fifteen days from the date of receipt of application.

xxx xxx xxx

36. Auction of quarries. - (1) The quarries of minerals, specified in serial number 5 of Schedule I and minerals specified in serial number 1 and 3 of Schedule II situated in Government land, shall be allotted only by auction:

Provided that quarry lease of mineral specified in serial number 1 of Schedule II may be granted in favour of the Mahdya Pradesh State Mining Corporation Limited (Government of Madhya Pradesh Undertaking).

(2) Notice of auction shall be published in Form XV atleast 15 days before the auction at the notice board or any conspicuous place by way of fixing the copy of such notice thereon in the office of the concerned Gram Panchayat, Janpad Panchayat, Zila Panchayat, Development Block, Tahsil and Collectorate and the village where the quarries are situated:

Provided that auction of the quarry shall also be made by the process of e-auction as per the conditions prescribed.

(3) Every bidder shall execute an agreement in Form XVI before he/she participates in the auction.

68. **Quarry permit and transport permit for renewal of minor minerals.-** (1) (i) The concerning Officer Incharge, Mining Section shall grant permission for extraction, removal and transportation of any minor mineral from any specified quarry or land which may be required for the works of any department and undertaking of the Central Government or State Government. Such permission shall only be granted to either the concerned departmental authority or its authorized contractor on furnishing proof of award of contract.

(ii) Notwithstanding anything contained in clause (i) above, in case of roads under construction or to be constructed under the public sector, authority, board, local body of State Government or Government department of the State, the permits of murrum and ordinary clay shall be given by the Executive Engineer or officer equivalent to Executive Engineer of the concerned public sector, authority, board local body of State Government or Government department of the State to the authorised contractor and prior to issuing of such permit no objection from Mining, Revenue and Forest Department shall be obtained by them and copy of the permit issued shall be endorsed to these departments. The Executive Engineer or officer equivalent to Executive Engineer of concerned public sector, authority, board, local body of State Government or Government departments of the State shall obtain Transit Pass Book in advance from office of the Collector and he shall issue

the transit pass to contractors and quantity of the minor mineral excavated shall be informed, in every three months, to the concerned Collector.]

Provided that information of in-principle sanction of permit shall be given to the applicant. Applicant shall furnish permission from the District level environment committee, within one month maximum, from the date of receipt of such information:

Provided further that if in-principle sanction is for five hectare or more area, then applicant from the date of receipt of such information, shall submit environment permission obtained under notification dated 14.09.2006 of Ministry of Environment and Forest within period of six months. After completion of all formalities sanctioning authority shall issue sanction order of quarry permit. Sanctioning authority may permit to enhance the time period, if all formalities are not completed in prescribed time period, on the basis of satisfactory reasons:

Provided also that quarry permit holder/contractor engaged in construction work shall obtain certificate of no mining dues to ensure payment of royalty for the mineral used in construction work, for the mineral excavated from quarry permit area or used by purchasing from open market. Certificate of no mining dues shall be issued by Mining officer/officer in-charge mining section, after verification of documents submitted by contractor/ quarry permit holder engaged in construction work.

(2) Such permission shall not exceed the quantity of minerals required for construction work and the period shall not exceed the period of construction work.

(3) Such permission shall only be granted on payment in advance of royalty calculated at the rates specified in Schedule III. The transit pass in Form IX then shall be issued.

Provided that royalty on ordinary clay and murrum shall

not be payable for all construction works carried out or to be carried out under public sector, authority, board, local body of the State Government or Government department of the State.

(4) The permit shall be governed by the following conditions:-

(a) The permit holder shall maintain complete and correct account of the mineral removed and transported from the area.

(b) The permit holder shall allow any officer authorised by the Zila/ Janpad/Gram Panchayat in respect of the permission given by the Collector/Additional Collector to the Collector/Additional Collector/Deputy Director/ Mining Officer/Assistant Mining Officer/Mining Inspector, to inspect quarrying operations and verify the accounts.

(c) No sooner the permitted quantity is transported within the time period of Construction work or earlier, duplicates of all transit pass, such unused transit passes together with a complete statement of the quantities duly certified by the Officer of the concerned department shall be furnished to the Sanctioning Authority.]"

[emphasis supplied]

The third proviso as reproduced above cannot be said to be satisfactory translation of the authorized notification published in Hindi in Madhya Pradesh Gazette (Extraordinary) dated 23.03.2013. The Gazette Notification containing third proviso, in Hindi, read as under:-

"परन्तु यह भी कि उत्खनन अनुज्ञाधारी/ठेकेदार जो निर्माण कार्य में लगे हो, निर्माण कार्य में उपयोग में लाए गए खनिज उत्खनन अनुज्ञा क्षेत्र से निकाले गये खनिज अथवा खुले बाजार से क्रय किए जाकर उपयोग में लाए गए खनिज के लिए रायल्टी के भुगतान को सुनिश्चित करने के लिए नो माइनिंग ड्यूज अभिप्राप्त करेंगे. नो माइनिंग ड्यूज प्रमाण–पत्र, खनि अधिकारी/प्रभारी अधिकारी खनन शाखा द्वारा निर्माण कार्य में लगे हुए ठेकेदार/उत्खनन अनुज्ञाधारी द्वारा प्रस्तुत किए गए दस्तावेजों का सत्यापन करने के पश्चात् जारी किया जाएगा."

13. We have heard learned counsel for the parties and find that the "Quarry Permit" mentioned in Rule 68 third proviso is distinct from a "Trade quarry" granted under Rule 7 read with Rule 36 or a "Quarry lease" granted under Rule 6 read with Rule 18 of the Rules. The grant of "Quarry permit" as defined in Rule 2 (xxiii) of the Rules is dealt with only in third proviso of Rule 68 as a permit to extract minor mineral for a specified period of the contract. Such a specified period of contract is granted on payment of advance royalty in terms of Sub-Rule (3) of Rule 68 of the Rules as against the royalty in case of quarry lease or a trade quarry, which is payable after the extraction of mineral in certain situations. For the purpose of Quarry permit, Rule 68 is the complete Code; specifying the period, payment of royalty and the conditions attached to it. The "Contractor" has been defined to mean the person who holds the trade quarry. The "trade quarry" is the one for which right to work is auctioned in terms of Rule 7 read with Rule 36 as contained in Chapter VI of the Rules. The quarry lease is allotted under Rule 6. Thus, the quarry lease is granted by allotment whereas the trade quarry is allotted by auction whereas the quarry permit is granted for a specified period for the purposes of specific contract in terms of third proviso to Rule 68. The "Contractor" defined under Rule 2(xvi-b) of the Rules is a person who holds a trade quarry. The third proviso to Rule 68 is not applicable to a contractor who has been given a trade quarry but a contractor who is engaged in construction work. The definitions given in Rule 2 are *"unless the context otherwise requires"*. Since the expression "Contractor" in third proviso is followed by the expression "engaged in construction work" therefore, the contractor in third proviso is not a contractor, who has been given a trade quarry but a contractor engaged in construction work of the Central or the State Government.

14. In *Phaloudi Construction* (supra), the Full Bench examining the definition of a "Contractor" under Clause (xvi-b) of Rule 2 held that the contractors engaged in the work of any Department and Undertaking to purchase the minor mineral from open market are not covered by the said definition. The Court held that there is no such contractor engaged in work of the department or undertaking who purchases from open market, therefore, it does not create a substantive class of the contractor engaged in works of Government department and Undertaking. We find that the conclusions drawn by the Full Bench are not in tune with the statutory provision, which deals separately with trade quarry or quarry lease and quarry permit. The third proviso deals with quarry permit holder as provided under Rule 4 in

contradiction to allotment of quarry lease and auction of trade quarry. Such definitions have not been examined properly by the Full Bench in *Phaloudi Construction* (supra).

15. We are unable to agree with the argument of the learned counsel for the petitioners that the proviso is enlarging the scope of Rule 68 of the Rules. In fact, Rule 68 itself is proviso to Rules 4, 6 and 7 of the Rules. Rule 6 deals with grant of quarry lease by allotment and trade quarry by auction. Rule 68 confers power on the State or the Central Government to extract remove or transport any minor mineral from a specified quarry in terms of sub-clause (i) of Rule 68(1) of the Rules without trade quarry or quarry lease. In fact, third proviso deals with two situations i.e. (1) extraction of minor mineral by a quarry permit holder, who is required to pay royalty in advance and (2) a contractor engaged in construction work who has to obtain certificate of 'No Mining Dues' to ensure payment of royalty for the mineral used in construction work. We find that the translation of third proviso is shoddy but since the issue being examined is: purchase of minor minerals by the contractor engaged in construction work, therefore, if the proviso is read by striking of the words *quarry permit,* the provision would read as under:-

> "Provided also that ~~quarry permit holder~~ contractor engaged in construction work shall obtain certificate of no mining dues to ensure payment of royalty for the mineral used in construction work, for the mineral excavated from quarry permit area or used by purchasing from open market. Certificate of no mining dues shall be issued by Mining officer/officer in-charge mining section, after verification of documents submitted by contractor ~~quarry permit holder~~ engaged in construction work."

16. In fact, the argument raised by the learned counsel for the petitioners that proviso is enlarging the main substantive provision, is wholly misplaced. Firstly, the proviso is a part of the Rule, which itself is a proviso to Rule 4, which prohibits that no person shall undertake any mining operation in any area except by way of trade quarry or a quarry lease. Rule 68 deals with neither a trade quarry or a quarry lease but it deals with a situation where the Central or the State Government or a contractor engaged by it are given permission for extraction, removal and transportation of any minor mineral from any specified quarry. Third proviso is a further exception to Sub-clause (1) of Rule 68 when a quarry permit holder or a contractor engaged in

construction work are permitted to use the excavated mineral on payment of royalty or on payment of proof of royalty. Therefore, third proviso is not an enlargement of Sub-Rule (1) of Rule 68 but is an additional exception to Rule 4 containing absolute prohibition.

17. In *Dwarka Prasad's* case (supra), the Supreme Court held that the golden rule of interpretation is to read the whole section inclusive of proviso in such manner that they mutually throw light and result in harmonious construction. Relevant extracts from the said decision read as under-

> "18. ..... If the rule of construction is that prima facie a proviso should be limited in its operation to the subject matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.
>
> The proper course is to apply the broad general rule of construction which is that a section or enactment must be construed as a whole each portion throwing light if need be on the rest.
>
> The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail. (**Maxwell on Interpretation of Statutes** 10th Edn. P. 162)
>
> 19. We now move on to `dominant intent' as the governing rule. In our view, the dominant intent is found in leading decision of this Court. Indeed, some State Legislatures, accepting the position that where the dominant intention of the lease is the enjoyment of a cinema, as distinguished from the building, have deliberately amended the definition by suitable changes (e.g. Kerala and Andhra Pradesh) while other Legislatures, on the opposite policy decision, have expressly excluded the rent

control enactment (e.g., the later Act)."

18. Shri Vivek Dalal, learned counsel for the petitioners relied upon the judgment reported as (2000) 2 SCC 451 *(Special Officer & Competent Authority, Urban Land Ceilings, Hyderabad and another vs. P.S. Rao)* to contend that the word contractor cannot be given any other meaning than one as defined under the Rules, is again not tenable. Opening line of the Rule 2 is *"Unless the context otherwise requires"*. Contractor as defined in Rule 2(xvi-b) is a contractor who is granted trade quarry. The petitioners are not the one who have been granted trade quarry. In fact, the petitioners are the contractors engaged in Government contracts and that the expression contractor in third proviso is clarified by the words *"engaged in construction work"*. The words "contractor engaged in construction work" have to be read together and not disjunctively and therefore, the judgment in *Special Officers & Competent Authority's* case (supra) is not applicable to the facts of the present case as the context in which contractor has been defined is materially different than the expression contractor engaged in execution of the contract appearing in third proviso.

19. In AIR 1985 SC 582 *(S. Sundaram Pillai etc. vs. V.R. Pattabiraman)* the Court culled down four different purposes which a proviso serves. The relevant extract from the said judgment is reproduced as under:-

> "42. We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes:
>
> (1) qualifying or excepting certain provisions from the main enactment;
>
> (2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;
>
> (3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and
>
> (4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment

of the statutory provision."

20. In *Maulavi Hussein Haji Abraham* (supra), the Supreme Court has held that the Court cannot read anything into a statutory provision which is plain and unambiguous statute. The language employed in a statute is the determinative factor of legislative intent. The question is not what may be supposed and has been intended but what has been said. The relevant paras from the said decision read as under:-

> "18. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed, not as theorems of Euclid", Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See *Lenigh Valley Coal Co. v. Yensavage, 218 FR 547).* The view was reiterated in *Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama, (1990) 1 SCC 277 (SCC p. 284, para 16).*
>
> 19. In *Dr. R. Venkatchalam v. Dy. Transport Commissioner, (1977) 2 SC 273,* it was observed that Courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.
>
> 20. While interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See *CST v. Popular Trading Co., (2000) 5 SCC 511.* The legislative casus omissus cannot be supplied by judicial interpretative process.
>
> 21. Two principles of construction - one relating to casus omissus and the other in regard to reading the statute as a whole - appear to be well settled. Under the first principle a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus

omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. "An intention to produce an unreasonable result", said *Danackwerts, L.J. in Artemiou v. Procopiou, [1966] 1 QB 878,* "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the obvious intention of the legislature and produce a wholly unreasonable result", we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction. (*Per Lord Reid in Luke v. IRC, 1963 AC 557* where at p. 577 he also observed: (All ER p. 664 I) "This is not a new problem, though our standard of drafting is such that it rarely emerges.")."

21. The Supreme Court while examining the Karnataka Minor Mineral Concession Rules, 1969 in a judgment reported as *Premium Granites and another vs. State of T.N. and others, (1994) 2 SCC 691*, held that for bringing harmonious construction, reading down a provision in the statute, is an accepted principle. The Court said as under:-

"55. In various statutes, the provision of relaxation or exemption finds place and it has been indicated that such provisions of relaxation and exemption have been noticed and upheld by this Court in some of the statutes. In the MMRD Act itself, there is such provision for relaxation, being Section 31. Such provision of relaxation in Karnataka Minor Mineral Concession Rules, 1969 is contained in Rule 66. It has been rightly contended that where in respect of prohibited categories, the law carves out restriction or relaxation, the purpose is to take out certain exceptions from the prohibited area and keeping certain categories outside the purview of restrictions imposed under other provisions in the statute. In

such circumstances, it will not be appropriate to hold that the exception militates with other provisions and hence should not be permitted. In our view, in interpreting the validity of a provision containing relaxation or exemption of another provision of a statute, the purpose of such relaxation and the scope and the effect of the same in the context of the purpose of the statute should be taken into consideration and if it appears that such exemption or relaxation basically and intrinsically does not violate the purpose of the statute rendering it unworkable but it is consistent with the purpose of the statute, there will be no occasion to hold that such provision of relaxation or exemption is illegal or the same ultra vires other provisions of the statute. The question of exemption or relaxation ex hypothesi indicates the existence of some provisions in the statute in respect of which exemption or relaxation is intended for some obvious purpose.

56. There is no manner of doubt that for bringing harmonious construction, reading down a provision in the statute, is an accepted principle and such exercise has been made by this Court in a number of decisions, reference to which has already been made. But we do not think that in the facts and circumstances of the case, and the purpose sought to be achieved by Rule 39, such reading down is necessary so as to limit the application of Rule 39 only for varying some terms and conditions of a lease. If the State Government has an authority to follow a particular policy in the matter of quarrying of granite and it can change the provisions in the Mineral Concession Rules from time to time either by incorporating a particular rule or amending the same according to its perception of the exigencies, it will not be correct to hold that on each and every occasion when such perception requires a change in the matter of policy of quarrying a minor mineral in the State, particular provision of the Mineral Concession Rules has got to be amended. On the contrary, if a suitable provision empowering exemption or relaxation of other provisions in the Mineral Concession Rules is made by confining its exercise in an objective manner consistent with the MMRD Act and in

furtherance of the cause of mineral development and in public interest, by giving proper guidelines, such provision containing relaxation or exemption cannot be held to be unjustified or untenable on the score of violating the other provisions of the Mineral Concession Rules."

22. In another Judgment reported as *Kailash Chandra and another vs. Mukundi Lal and others*, (2002) 2 SCC 678, the Court held that a provision in the statute is not to be read in isolation. It has to be read with other related provisions in the Act itself, more particularly, when the subject-matter dealt with in different sections or parts of the same statute is the same or similar in nature. The relevant extract from the Judgment read as under:-

"11. A provision in the statute is not to be read in isolation. It has to be read with other related provisions in the Act itself, more particularly, when the subject-matter dealt with in different sections or parts of the same statute is the same or similar in nature. As in the case in hand, we find that the matter relates to liability of the tenant to pay rent to the landlord and the consequences on failure to do so as provided under Section 20(2)(a) of the Act. Sub-section (4) of Section 20 deals with payment of arrears of rent etc. at the first hearing of the suit which in that event provides protection from eviction. Section 30 deals with the two circumstances in which for one reason or the other, the rent is deposited in the court instead of payment to the landlord. As noted earlier the effect of deposit of rent is provided under sub-section (6) of Section 30. Therefore, all the related provisions have to be read together for the purposes of proper and harmonious construction. It is not only permissible but much desirable for proper understanding of the contents and meaning of the provisions under consideration. In *R.S. Raghunath v. State of Karnataka (1992) 1 SCC 335* it has been observed: "No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place." In *M. Pentiah v. Muddala Veeramallappa AIR 1961 SC 1107,* a reference was made to the observations made by Lord Davey in *Canada Sugar Refining Co. v. R.*

1898 AC 735, it reads as follows:

> "Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

23. In another judgment reported as *State of Andhra Pradesh through Inspector General, National Investigation Agency vs. Mohd. Hussain alias Saleem*, (2014) 1 SCC 258, the Court held that it is a well-settled canon of interpretation that when it comes to construction of a section, it is to be read in its entirety, and its sub-sections are to be read in relation to each other, and not disjunctively. Besides, the text of a section has to be read in the context of the statute. The Court held as under:-

> "**19.** We cannot ignore that it is a well-settled canon of interpretation that when it comes to construction of a section, it is to be read in its entirety, and its sub-sections are to be read in relation to each other, and not disjunctively. Besides, the text of a section has to be read in the context of the statute. A few sub-sections of a section cannot be separated from other sub-sections, and read to convey something altogether different from the theme underlying the entire section. That is how a section is required to be read purposively and meaningfully."

24. Thus, in view of the principle of statutory interpretation that no word in statute is superfluous and each word has its meaning, the provisos of the statute have to be read as a whole by giving harmonious construction to all the provisions of the law so that none of the provision is rendered redundant. Keeping in view the principle of harmonious construction, the third proviso is additional relaxation to Rule 4 of the Rules and 68(1) of the Rules. Therefore, third proviso cannot be said to be illegal in any manner.

25. Thus, from the plain language of Rule 68; Scheme of Statute and the purpose of Rules that there should not be any illegal extraction of minerals and all minerals should be royalty paid, therefore, we find that third proviso is neither illegal nor enlarges the scope of proviso to than that of Rule 68 or any

other provision of the Rules.

26. Apart from the plain meaning of the statute, the Supreme Court in the case of *Deep Jyoti Company* (supra) was examining somewhat similar situation in Rajasthan whereby short term permit was being granted to a contractor engaged in the government construction work. The present is a case of contractor who is purchasing mineral from an open market and using the same in the Government works. The Supreme Court held that the purpose of the Statute is to ensure that no mineral is excavated and used without payment of royalty. The proviso ensures that the material is purchased by the contractor from the market which is a legal mined and the objective is to see that illegal minor mineral is not purchased by the contractor and used in the construction work which is awarded by the Government. The Supreme Court held, thus:-

> "10. Insofar as the contention that in terms of the circular there is compulsion to obtain short term permit, in our view, as such there is no such compulsion. It is only to ensure that no mineral is excavated and used without payment of royalty. The purpose of short-term permit is to ensure that the material and minerals etc. used by the contractor in the construction work are royalty paid. It only means that such material is purchased by the contractor from the market which is legally mined and on which due royalty is paid. In other words, the objective is to see that illegally mined mineral/material is not purchased by the contractor and used in the construction work which is awarded by the Government. Not only it is a laudable object, such a stipulation is inserted in order to check illegal mining which unfortunately has assumed serious proportions in the recent past. Otherwise, the respondents herein do not stand to loose anything inasmuch as the moment evidence is produced to the effect that royalty was paid on the minerals by the leaseholder which was used in the construction, the construction contractor like the respondents would be refunded the royalty so paid by it in terms of circular dated 06.10.2008. In terms of clauses (5) and (7) of the said circular, the contractor has to pay royalty at the rates specified in the circular depending upon the nature of work and on production of bills showing payment of royalty, the contractor can get refund of royalty. There is, thus, no

financial burden on the respondents of any nature. The purpose which is sought to be achieved, viz., non-royalty paid mineral (which would naturally be illegally mined mineral) is not used in the execution of the Government work and it cannot be treated as unreasonable or arbitrary. In our view, there is a complete justification for providing such a provision.

11. The minor minerals removed from the quarries, admittedly are the property of the government and the same cannot be removed and used without payment of royalty. It is therefore the duty of the government to ensure that only royalty paid minerals are used in the work and the purpose of issuing such circular was to avoid pilferage/leakage of revenue because royalty can be very conveniently evaded by the contractors either by not purchasing the material from the mining leaseholders or obtaining it from unauthorized excavators. In case, if the contractor purchases the material from unauthorized person who has not paid royalty, there would be loss to the public exchequer and the circular was issued to check evasion or loss to the public exchequer. Such condition cannot be said to be unreasonable and arbitrary and therefore no prejudice could be said to have been caused to the contractors."

27. Since minor mineral vests in the State and there is absolute prohibition in extraction of mineral other than by a quarry lease or a trade quarry or permit quarry, therefore, contractor who is engaged in construction work is required to prove that such mineral is royalty paid. For such condition, if the State Government insists on 'No Mining Dues' certificate, the same cannot be said to be illegal as it is to ensure that all minor minerals used in the construction activity are royalty paid material.

28. An affidavit has been filed on behalf of the State Government that the following documents are required in terms of third proviso:-

(i) Copy of the transit passes issued for transportation of total quantity of minerals used in the government construction work.

(ii) Copy of the bills of total quantity of minerals used in the government construction work.

(iii) Copy of the 'work completion certificate' issued by the Government department/Government functionary in respect of work, in which minor minerals have been used.

(iv) Copy of the valid mineral dealer license for use of mineral in government construction work as per Rule 3(2)(iii) of M.P. Mineral (Prevention of Illegal Mining, Transportation and Storage) Rules 2006.

The affidavit further states that no specific time period for issuing of 'No Mining Dues' certificate is contemplated in the Rules, but, looking to the nature of work, *minimum two months* time is required by the Mining Officer for completion of said exercise for taking appropriate decision/ passing appropriate orders.

29. We find that the condition No. (iii) that 'No Mining Dues' certificate shall be issued on furnishing of copy of work completion certificate is not reasonable. The contractor, who is engaged in construction work, purchases minor mineral required for construction work. Such running bills require periodical payments as well. The periodical bills raised quarterly, are required to be verified so that the contractor is not deprived of his lawful dues, therefore, instead of obtaining 'No Mining Dues' certificate by the contractor after completion of the work, the Mining Officer shall give 'No Mining Dues' certificate at least quarterly on the basis of running bills submitted by the contractor engaged in the construction work.

30. The third proviso to Rule 68(1) of the Rules provides for issuance of 'No Mining Dues' certificate after verification of the documents submitted by the contractor engaged in construction work. Such documents although are not the part of the Rules but they have been supplemented in the affidavit dated 07.10.2017. The affidavit further states that verification of purchase of mineral from other Districts takes some time, therefore, the State has sought minimum two months time to verify and issue 'No Mining Dues' certificate. We find that to ensure transparency and the digital infrastructure available, the State would be well advised to develop a software, which will give online information of extraction of the minerals by the contractors holding trade quarry or quarry lease or quarry permit. Once that data is available, the Mining Officer of the State can verify how a quantity of extracted minor mineral has been disposed of by each of the category of permit holders. It will create a

transparent and also efficient mechanism for issuing certificate of 'No Mining Dues'.

31. In view of the above, we find that the judgment in *Phaloudi Construction* (supra) is not correct enunciation of law and the same is thus, **overruled.** The contractors who are engaged in construction work are required to obtain 'No Mining Dues' certificate on production of the documents in terms of this order. Such 'No Mining Dues' certificate shall be issued expeditiously in a time frame of two months till such time alternative mechanism is developed for the issuance of online 'No Mining Dues' certificates.

32. The principle of law having been settled, the writ petitions be posted for hearing as per Roster on 23.10.2017.

Order accordingly.

I.L.R. [2017] M.P., 2645
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 6972/2017 (Jabalpur) decided on 24 August, 2017

SATPUDA INFRACON PVT. LTD. (M/S) ...Petitioner
Vs.
M/S SATPURA INFRACON PVT. LTD. & ors. ...Respondents

***A. Companies Act (18 of 2013), Section 16 and Companies Act (1 of 1956), Section 22 – Rectification of Name of Company* – Held – Central Government can form an opinion for purpose of rectification, *suo motu* or on an application filed by aggrieved person – Respondent rightly held that prior registration of a company is a relevant factor – No jurisdictional error, procedural impropriety or perversity in impugned order and hence upheld – Petition dismissed. (Paras 11, 13 & 14)**

क. कम्पनी अधिनियम (2013 का 18), धारा 16 एवं कम्पनी अधिनियम (1956 का 1), धारा 22 – कंपनी के नाम में सुधार – अभिनिर्धारित – केंद्र सरकार स्वप्रेरणा से या व्यथित व्यक्ति द्वारा आवेदन प्रस्तुत करने पर, सुधार के प्रयोजन हेतु राय बना सकती है – प्रत्यर्थी ने उचित रूप से अभिनिर्धारित किया कि कंपनी का पूर्व रजिस्ट्रीकरण एक सुसंगत कारक है – आक्षेपित आदेश में कोई अधिकारिता की त्रुटि, प्रक्रियात्मक अनौचित्य या विपर्यस्तता नहीं है और इसलिए कायम रखा गया – याचिका खारिज।

B. Constitution – Article 226 – Suppression of Material Facts – Effect – **Petitioner suppressed the fact that a civil suit in respect of the same issue is pending before the trial Court – Conjoint reading of writ petition and civil suit shows direct nexus between both the matter – Factual background of both matters are similar – Action of petitioner is deprecated – Serious disputed question of facts are involved in relation to formation of partnership firm, which cannot be decided in this writ petition – Petitioner free to establish his rights in pending civil suit. (Para 13 & 14)**

ख. संविधान – अनुच्छेद 226 – तात्विक तथ्यों को छिपाना – प्रभाव – याची ने इस तथ्य को छिपाया कि उसी विवाद्यक के संबंध में एक सिविल वाद विचारण न्यायालय के समक्ष लंबित है – रिट याचिका एवं सिविल वाद का एक साथ पढ़े जाने पर दोनों मामलों के मध्य प्रत्यक्ष संबंध दर्शित होता है – दोनों मामलों की तथ्यात्मक पृष्ठभूमि समान हैं – याची की कार्रवाई की निंदा की गई – भागीदारी फर्म के बनाये जाने के संबंध में तथ्यों के गंभीर विवादित प्रश्न अंतर्ग्रस्त हैं, जो इस रिट याचिका में विनिश्चित नहीं किये जा सकते – याची लंबित सिविल वाद में अपने अधिकारों को स्थापित करने हेतु स्वतंत्र है।

C. Constitution – Article 226 – Writ Petition – Suppression of Material Facts – Practice – **Held – Apex Court concluded that a litigant must approach the Court with clean hands, clean mind, clean heart and clean objective – In cases of suppression of material facts, litigant is not entitled to be heard on merits. (Para 13)**

ग. संविधान – अनुच्छेद 226 – रिट याचिका – तात्विक तथ्यों को छिपाना – पद्धति – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि मुकदमेबाज़ को न्यायालय के समक्ष स्वच्छ अंतःकरण, साफ मन, स्वच्छ हृदय एवं स्पष्ट उद्देश्य के साथ जाना चाहिए – ऐसे प्रकरणों में जहाँ तात्विक तथ्यों को छिपाया गया हो, मुकदमेबाज़ गुणदोष पर सुनवाई किये जाने का हकदार नहीं है।

Cases referred:

2013 (4) Mh.L.J. 168, 2013 SCC OnLine Bom 1093, 2014 SCC OnLine P&H 24572, 2017 SCC OnLine Del 9219, 2004 (12) SCC 624, AIR 1968 SC 647, AIR 1976 SC 1766, AIR 1987 SC 1073, AIR 1999 Calcutta 289, 2010 SCC OnLine Guj 4123, 2009 SCC OnLine Bom 769, 2010 (11) SCC 557, 2011 (7) SCC 69, 2007 (8) SCC 449, 2012 (8) SCC 384, 2011 (3) SCC 436.

Shashank Shekhar and *Munish Saini*, for the petitioner.
Sanjay K. Agrawal, for the respondent Nos. 1 to 4.
Aditya Pyasi, G.A. for the respondent Nos. 5 & 6.

ORDER

SUJOY PAUL, J. :- In this petition filed under Article 226 of the Constitution, the parties are at logger heads on the question of legality, validity and propriety of the order dated 23.3.2017 Annexure P/8 whereby the Regional Director, North Western Region has allowed the application filed by respondent No.1 under Section 16 of the Companies Act, 2013 ***(hereinafter called as 'the Act')*** and directed the petitioner Company to change its name.

2. The petitioner contended that a partnership firm in the name and style of M/s Om Sai Prakash Construction was formed having four partners namely; late Shri Laxmikant Shrivastava, Smt. Preeti Kapoor, Smt. Pushpa Sahni and Smt. Chandrakant Shrivastava. Subsequently, the name of respondent No.2 Shri Ayodhya Prasad Tripathi was introduced as partner. Shri Ayodhya Prasad Tripathi is the father of Shri Vivek Tripathi who happens to be the Government servant i.e. Tahsildar and at present is suspended whereas Smt. Preeti Kapoor and Smt. Pushpa Sahni (mother-in-law) are also close relatives of Shri Vivek Tripathi. Shri Vivek Tripathi introduced his relatives as partners in the firm as being Government servant he himself was not in a position to carry on the business of real estate in his own name. Shri Shashank Shekhar submitted that due to death of Shri Laxmikant Shrivastava, the partnership deed of M/s Om Sai Prakash Construction was amended on 12.10.2000 and as such Sanjay Shrivastava and Smt. Baijanti Shrivastava (mother of Sanjay Shrivastava) were introduced as partners in the firm with 50% shares in aggregate. It is submitted that one Vinod Chate who was the owner of land situated at Khasra No.4/4, P.C. No.28/32, Number Bandobast 726, Mauja Nayagaon, Tahsil and District Jabalpur having Rakba of 23 acres executed an agreement to sale with M/s Om Sai Prakash Construction. However, Shri Vinod Chate instead of selling the land to M/s Om Sai Prakash Construction also executed an agreement to sell with one Ashok Urmaliya. Being aggrieved by the same, M/s Om Sai Prakash Construction preferred a civil suit bearing Civil Suit No.12-A/2005 for specific performance of the agreement executed between Shri Vinod Chate and M/s Om Sai Prakash Construction and vide judgment and decree dated 26.3.2007, the suit was decreed in favour M/s Om Sai Prakash Construction. It is submitted that against the judgment and

decree dated 26.3.2007, Shri Vinod Chate preferred an first appeal before this court which was registered as F.A. No.303/2007 wherein Shri Vinod Chate and M/s Om Sai Prakash Construction reached to a compromise and a compromise deed alongwith other terms and conditions was presented before this Court. As per the compromise deed, it was agreed upon that out of the total 23 acres of the land in question, 12 acres 35 dismal land would be sol (sic:sold) to M/s Om Sai Prakash Construction and remaining 10 acres 65 dismal of land would be sold to Shri Ashok Urmarlia. It is submitted that this court vide order dated 4.9.2010 in Lok Adalat allowed the compromise in terms of settlement mentioned in the compromise deed. Shri Shekhar further submits that Shri Sanjay Shrivastava and Shri Vivek Tripathi (represented through his relative in the firm as being Government servant he was not able to do the real estate business in his own name) purchased number of properties in the city of Jabalpur and adjoining villages under the M/s Om Sai Prakash Construction. It is submitted that an understanding was made between Shri Sanjay Shrivastava on one part and Shri Vivek Tripathi and Shri Ayodhya Tripathi (father of Vivek Tripathi and respondent no.2) that both the persons were ready to divide the properties owned and purchased by M/s Om Sai Prakash Construction and as such, it was agreed that the land which was to be purchased pursuant to the compromise decree in F.A. No.303/2007 would be purchased by Shri Sanjay Shrivastava and he would be the sole owner of the property, whereas, in lieu thereof, Shri Sanjay Shrivastava would transfer the property in the name of Sukoon Hotel of Smt. Bimmi Tripathi (wife of Shri Vivek Tripathi). It is further submitted that on 29.3.2011 Shri Sanjay Shrivastava informed Shri Ayodhya Tripathi that he alongwith another partner is forming a partnership firm in the name and style of M/s Satpuda Infracon Pvt. Ltd. and pursuant to which Shri Sanjay Shrivastava and Shri Joseph Verghese formed an unregistered partnership firm in the name & style of Satpuda Infracon Pvt. Ltd. Shri Shashank Shekhar contended that pursuant to the understanding arrived at between Shri Sanjay Shrivastava, Shri Vivek Tripathi and Shri Ayodhya Tripathi (father of Vivek Tripathi), Shri Sanjay Shrivastava transferred the property in the name of Sukoon Hotel in favour of Smt. Bimmi Tripathi and in lieu thereof Shri Sanjay Shrivastava purchased the land measuring 11.35 acres from Shri Vinod Chate (in compliance of compromise decree passed in FA No.303/2007) vide registered sale deed dated 13.5.2011. In this sale deed, M/s Om Sai Prakash Construction granted its consent/no objection for the sale. This property was purchased in favour of M/s Satpuda Infracon Pvt.

Ltd. and Shri Sanjay Shrivastava's name was shown as its Proprietor/Executor. The amount of consideration against the purchase of the land was given by Shri Sanjay Shrivastava from his bank account. It is submitted that Shri Vivek Tripathi formed a company in the name and style of Satpura Infracon Pvt. Ltd. with malafide intention. Shri Vinod Chate handed over the physical possession of the property in question to Shri Sanjay Shrivastava. It is submitted that Shri Sanjay Shrivastava formed a company and got it registered in the name and style of Satpuda Infracon Pvt. Ltd. and the said company, respondent No.1 herein, filed an application under Section 16 of the Companies Act before the Regional Director, North Western Region, Ministry of Corporate Affair, Ahmedabad against the petitioner and the said authority vide order dated 20.3.2017 allowed the said application and erroneously directed the petitioner to change its name.

3. Shri Shekhar Sharma submits that the unregistered partnership of petitioner was formed on 1.4.2011. Merely because the respondent No.1 got his company registered under the Companies Act prior in time, this will not make any difference because the aforesaid factual detail makes it clear that it was a calculated attempt on the part of the respondent No.1 to grab the land and business of petitioner company and therefore they have chosen a similar name by adopting a linguistic engineering. In nutshell, the points raised by Shri Sharma, learned counsel for the petitioner can be culled out as under:

(i) The application preferred by respondent no.1 under Section 16 of the Act was not maintainable. Section 16 of the Act can be invoked by Central Government *suo motu* or on an application preferred by a registered proprietor of a Trade Mark. Reliance is placed on Section 2(1)(b) of the Trade Marks Act, 1999 which defines 'registered proprietor' under the Trade Marks Act;

(ii) Mere registration of respondent No.1 Company prior to registration of petitioner Company is not decisive. The other relevant facts were not examined by respondent No.7. Reliance is placed on the judgment of Bombay High Court in the case reported in **2013 (4) Mh. L.J. 168** *(Vov Cosmetic vs. Union of India).*

(iii) The direction to change the name of petitioner company by impugned order should not, in any way, effect the assets, rights, business, etc. of petitioner company. In other words, it is submitted that rights of the petitioner

accrued prior to the direction of change of name of the company may be directed to remain intact. Reliance is placed on Section 23 of the Companies Act, 1956 **(old Act)**. However, during the course of arguments, Shri Shekhar Sharma fairly admitted that in the new Act of 2013, there is no corresponding/ analogous provision like Section 23 of the old Act.

4. In support of aforesaid contentions, Shri Shekhar Sharma relied upon 2013 SCC On Line Bom 1093 *(Intelgain Technologies Pvt. Ltd. vs. Regional Director, Western Region, Ministries of Corporate Affairs and another)* and 2014 SCC OnLine P&H 24572 *(Mind Tree Limited vs. Ministry of Corporate Affairs)*. Lastly, he relied upon an injunction order passed by Delhi High Court in *Bhandari Homoeopathic vs. L.R. Bhandari* on 3.4.1975.

5. *Per contra,* Shri Sanjay K. Agrawal, learned counsel for the respondent No.1 to 4 contended that the application preferred under Section 16 of the Act was maintainable. The reliance is placed on the judgment of Delhi High Court 2017 SCC OnLine Del 9219 *(Mondelez Foods Private Limited vs. The Regional Directo (North), Ministry of Corporate Affairs & others)*. He further contended that the acid test in this regard is which company was registered first under the provision of the Companies Act. The judgment of Supreme Court reported in 2004 (12) SCC 624 *(Milmet Oftha Industries and others vs. Allergan Inc)* is relied upon for this purpose which is related with the question of trade mark. Shri Agrawal further urged that the respondent no.7 has considered the real issues involved in Section 16 proceedings and recorded its satisfaction in accordance with the mandate of Section 16 of the Act. The petitioner in order to create confusion, has made wild and reckless allegations which cannot be entertained. It is averred that respondent no.1 Satpura Infra Con Pvt. Ltd. was registered and incorporated as a private company on 1.4.2011 Annexure R-1/1. It is further averred that respondent no.1 company purchased a piece of land bearing Khasra No.4/4 area 4.600 hectare Situated at Nayagaon, Tahsil & District Jabalpur. The respondent no.1 company authorized Shri Sanjay Shrivastava to execute sale-deed for and in favour of respondent no.1 Company. The resolution authorizing the said person to get sale deed executed in favour of respondent no.1 company is filed as Annexure R-1/2. On the basis of aforesaid, Shri Sanjay Shrivastava signed the sale deed as purchaser on behalf of the respondent No.1 Company. The sale deed was executed on 13.5.2011. The name of the Company in the sale deed was mentioned in Hindi. Since 'Saturda' and 'Satpura' are pronounced

similarly in Hindi, Shri Sanjay Shrivastava with an ill motive trying to grab the valuable property of respondent no.1 Company. Since sale deed dated 3.5.2011 is executed after registration of respondent no.1 company, it is clear that sale deed was executed by Shri Shrivastava at the behest of respondent No.1 company.

6. In the reply, it is further stated that upon receiving information that Shri Sanjay Shrivastava and petitioner are playing fraud by getting a company registered with a similar name, a complain was lodged by Shri Ayodhya Tripathi in Police Station, Omti, Jabalpur. Since petitioner company started claiming right over the property in question only on the basis of its registration with almost similar name, Respondent No.1 preferred application under Section 16 of the Act which was rightly entertained and allowed by respondent no.7. It is categorically denied in the reply that Sarva Shri Sanjay Shrivastava and Joseph Varghese were carrying on the same business under an unregistered partnership firm with a similar name. It is vehemently argued that partnership firm cannot use the expression "private limited" as per Section 453 of the Old Act which is analogous to Section 631 of the New Act. The said partnership firm was also not registered under any provision of law and therefore no such firm was in existence.

7. The respondents have placed the copy of civil suit No.336/2017 Annexure R-1/04 filed by the petitioner Company. Shri Sanjay K. Agrawal urged that property rights of the petitioner may be decided by the civil court and said aspect cannot be gone into in the present petition. Respondent no.1 has no objection whatsoever if petitioner is permitted to pursue his civil suit in accordance with law.

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

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

10. Before dealing with the rival contentions, it is apposite to quote Section 22 of the old Act and Section 16 of the new Act in juxtaposition which shows that both the provisions are almost similar:

Section 22 of the old Act, 1956	Section 16 of the new Act, 2013
22. Rectification of name of company.	**Rectification of name of company.**
If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name, is registered by a name which,	If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name, is registered by a name which,
(i) in the opinion of the Central Government, is identical with, or too nearly resembles, the name by which a company in existence has been previously registered, whether under this Act or any previous companies law, the first- mentioned company-	(i) in the opinion of the Central Government, is identical with, or too nearly resembles, the name by which a company in existence had been previously registered, whether under this Act or any previous company law, it may direct the company to change its name and the company shall change its name or new name, as the case may be, within a period of three months from the issue of such direction, after adopting an ordinary resolution for the purpose;
(ii) on an application by a registered proprietor of a trade mark, is in the opinion of the Central Government identical with, or too nearly resembles, a registered trade mark of such proprietor under the Trade Mark Act, 1999, such company-	
(a) may, by ordinary resolution and with the previous approval of the Central Government signified in writing, change its name or new name; and	(b) on an application by a registered proprietor of a trade mark that the name is identical with or too nearly resembles, a registered trade mark of such proprietor under the Trade Mark Act, 1999 (47 of 1999), made to the Central Government within three years of incorporation or registration or change of name of the company, whether under this Act or any previous company law, in the opinion of the Central Government is identical with or too nearly
(b) shall, if the Central Government so directs within 12 months of its first registration or registration by its new name, as the case may be, or within 12 months of the commencement of this Act, whichever is later, by ordinary resolution and with the previous	

approval of the Central Government signified in writing, change its name or new name within a period of three months from the date of the direction or such longer period as the Central Government may think fit to allow. Provided that no application under clause (ii) made by a registered proprietor of a trade mark after five years of coming to notice of registration of the Company shall be considered by the Central Government. (2) If a Company makes default in complying with any direction given under clause (b) of sub section (1), the Company, and every officer who is in default, shall be punishable with fine which may extent to one thousand rupees for every day during which the default continues.	resembles an existing trade mark, it may direct the company to change its name and the company shall change its name or new name, as the case may be within a period of six months from the issue of such direction, after adopting an ordinary resolution for the purpose- (2) Where a company changes its name or obtain a new name under sub-section (1), it shall within a period of 15 days from the date of such change, give notice of the change to the Registrar alongwith the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and the memorandum. (2) If a Company makes default in complying with any direction given under clause (1), the company shall be punishable with fine of one thousand rupees for every day during which the default continues and every officer who is in default shall be punishable with fine which shall not be five thousand rupees but which may extend to one lakh rupees.

11. Point No.1 is relating to maintainability of application under Section 16 of the Act by respondent No.7. Admittedly, the application which is decided by impugned order was not preferred by a registered proprietor of a trade mark. Thus, (b) of Section 16 of the New Act is clearly not attracted. The spinal issue is whether Central Government can form an opinion under clause (i) of Section 16 on an application preferred by an aggrieved party? In the considered opinion of this court, the Central Government can form such an

opinion *suo motu* or on the basis of an application preferred by an aggrieved person. Clause (ii) nowhere restricts the Government that such powers can be exercised only *suo motu* by Central Government. In the case of *Intelgain Technologies Pvt. Ltd.* (Supra), in para 11, the High Court considered Section 22 of the old Act and almost reproduced the language employed therein. A microscopic reading of this judgment also shows that the court opined that "it is abundantly clear that Central Government may *suo motu* give direction to a Company to change its name provided an application is made within twelve months from the date of first registration of the Company". Thus, this judgment cited by the petitioner does not help the point raised by the petitioner. In the case of *Mind Tree Ltd.* (Supra), the High Court has not decided the question whether powers under Section 16 can be exercised by Central Government on an application preferred by an aggrieved party. This is trite law that a judgment is an authority/precedent on the point actually decided by it and not on something which is logically flowing from it. See AIR 1968 SC 647 *(State of Orissa vs. Sudhansu Sekhar Misra and others)*, AIR 1976 SC 1766 *(Regional Manager and another vs. Pavan Kumar Dubey)* and AIR 1987 SC 1073 *(Ambica Quarry Works vs. State of Gujarat and others)*.

12. In view of aforesaid analysis, In my considered opinion, Section 16 of the new Act which is *pari materia* to Section 22 of the old Act cannot be read in the manner suggested by learned counsel for the petitioner. It nowhere restrict the Central Government to exercise its powers for change of name of Company if other parameters are satisfied. I find support in my view from AIR 1999 Calcutta 289 *(Sen & Pandit Electronics (P) Ltd. and others vs. Union of India and others)* wherein it is held as under:

> *"In my judgment, what is conferred by S. 22 of the Act is a discretionary power to be exercised by the repository of the power on the formation of an opinion. The said power may be exercised suo motu and may be upon an application by an aggrieved person."*

The same view is taken in 2010 SCC OnLine Guj 4123 *(Bisazza India Limited vs. Pino Bsazza Glass Pvt. Ltd. and another)*, *MBC Logistics Pvt. Ltd. vs. Regional Director*, 2009 SCC OnLine Bom 769 and 2013 SCC OnLine Bom 1093 *(Intelgain Technologies Pvt. Ltd. vs. Regional Director, Western Region, Ministries of Corporate Affairs and another)*. Thus, first point raised by the petitioner must fail.

13. Point (ii) is based on the judgment of Bombay High Court in the case of *Vov Cosmetic* (Supra). In para 19 of the judgment, court opined that the word "otherwise" mentioned in Section 2(1) is not defined in the Act. Whether the Registration in favour of a particular party is deliberate or inadvertent was not decided by the court and this question was left open. For this purpose, the said judgment is of no assistance to the petitioner. No doubt, in *Vov Cosmetic* (Supra), it was held that while exercising powers under Section 22 of the old Act, it is necessary for Regional Director to consider various aspects. However, court made it clear that such aspects cannot be defined in a straightjacket manner. It depends on the facts and circumstances of the case. The petitioner has placed heavy reliance on certain factual aspects i.e. registration of sale deed with the signature of Shri Sanjay Shrivastava, his rights under civil/revenue laws based on it, etc. The question is whether these aspects raised by the petitioner were required to be gone into by respondent no.7 and whether these aspects can be said to be decisive factors for deciding an application preferred under Section 16 of the Act. Pausing here for a moment, it is apposite to quote the relief claimed by the petitioner in Civil Suit No.336/2017 as under:

> *"In the facts and circumstances of the instant case, the plaintiff prays for following judgments and decrees in favour of the plaintiff against the defendants:*
>
> *1. To declare that the plaintiff through Sanjay Shrivastava who is the owner of the suit premises is having right over and above defendant No.1 to 4, the suit premises.*
>
> *2. To declare that defendant no.1 to 4 are falsely projecting themselves to be owners of the suit premises with malafide intention to defraud the plaintiff and its directors.*
>
> *3. To restrain the defendants permanently not to disturb the peaceful physical possession of the plaintiff and its directors on the suit premises.*
>
> *4. To restrain the defendants from interfering in any manner in the usage of suit premises by the plaintiff or to create any third party right in relation to the suit premises.*
>
> *5. To grant any other relief as may be deemed fit and proper*

by this Hon'ble Court."

If averments of civil suit are examined in juxtaposition to the averments of this writ petition, it will be clear that certain paras are verbatim same. For instance, para 3 of civil suit is similar to para 5.3 of the writ petition. Subject matter of civil suit has a direct nexus with the points involved in the present petition. In all fairness, petitioner should have disclosed about filing/pendency of civil suit in para 2 of this petition. During the course of arguments, learned counsel for the petitioner fairly admitted that the petitioner should have disclosed about filing of civil suit in the body of present writ petition. Even otherwise, a conjoint reading of the averments of the writ petition and said civil suit makes it clear that there is direct nexus between both the matters. The basic factual background in both the matters are similar Thus, the action of the petitioner in not disclosing about pendency of the said civil suit in the body of writ petition is deprecated. The Apex Court in catena of judgments held that a litigant must approach the court with clean hands, clean mind, clean heart and clean objective. In cases of suppression of material facts, litigant is not entitled to be heard on merits. See 2010 (11) SCC 557 *(Manoharlal Vs. Ugrasen),* 2011 (7) SCC 69 *(Amar Singh vs. Union of India),* 2007 (8) SCC 449 *(Prestige Lights Ltd. vs. State Bank of India)* and 2012 (8) SCC 384 *(Vidur Impex & Traders Pvt. Ltd. and others vs. Tosh Apartments Pvt. Ltd. and others).* The factual matrix further shows that parties are not at *ad idem* on the factum of formation of unregistered partnership in the name & style of Satpuda Infra Con. Pvt. Ltd. On 1.4.2011. The petitioner and respondent No.1 have taken diametrically opposite stand on this aspect. Hence, this disputed question of fact whether any such unregistered firm was actually formed cannot be gone into in this petition. The Civil Court is best suited to record evidence on this aspect and decide the disputed questions. The statements of witnesses filed with the petition can also be gone into by the appropriate court of first instance and no finding on merits can be given by this court. Since serious disputed questions of fact are involved in relation to formation of partnership firm (unregistered) on 1.4.2011, I am unable to hold that such point was a relevant point and should have been taken into account by respondent no.7 while deciding application under Section 16 of the Act. Similarly whether Shri Sanjay Shrivastava had put his signature on the sale deed for respondent no.1 or for respondent no.2 or in his individual capacity, is also a disputed question of fact which can be gone into by the Civil Court. Accordingly, I am unable to hold that these were the relevant points for the

purpose of deciding an application under Section 16 of the Act of respondent no.7. In my view, the respondent no.7 has taken into account the relevant facts. The respondent no.7 rightly held that prior registration of a company is a relevant factor. No fault can be found in the said finding. While arguing point (iii), Shri Shekhar Sharma argued that petitioner's rights and assets flowing from the sale-deeds and other benefits may be protected in the teeth of Section 23 of the old Act. A writ of mandamus may be issued in this regard. However, a plain reading of the relief claimed, shows that no such relief is claimed by the petitioner in para 7 of the petition. The relief not claimed, cannot be granted [see 2011 (3) SCC 436 *(State of Orissa and another vs. Mamta Mohanty)*]. Apart from this, the petitioner has already claimed such relief in the civil suit. Thus, no relief is due to the petitioner based on arguments relating to point (iii).

14. In the result, since no jurisdictional error, procedural impropriety or perversity would be established by the petitioner in impugned order dated 23.3.2017 passed by respondent no.7, the impugned order dated 23.3.2017 is upheld. The petitioner is free to establish his rights in the pending civil suit or in any other proceedings in accordance with law.

15. With the aforesaid observation, petition is dismissed.

Petition dismissed.

I.L.R. [2017] M.P., 2657
WRIT PETITION
Before Mr. Justice J.K. Maheshwari
W.P. No. 20123/2012 (S) (Jabalpur) decided on 4 September, 2017

K.K. SHARMA ...Petitioner

Vs.

M.P. POWER MANAGEMENT CO. LTD. & ors. ...Respondents

***A. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 15(3) & 29 – Dismissal – Procedure – Departmental enquiry* – Penalty of withholding three increments inflicted – Later, again a notice issued for dismissal – Writ petition filed whereby stay was granted – Department withdrew the notice for dismissal and maintained previous penalty – Petition dismissed as**

infructuous – Again a notice issued and petitioner was dismissed – Held – Such order of dismissal would be in defiance to order of Court – Such dismissal is arbitrary and illegal – Provisions of Rule 15 and 29 not complied with – Impugned orders quashed – Petitioner directed to be re-instated if not attained age of superannuation, but will have to suffer the earlier penalty imposed – Petition partly allowed.

(Paras 16 to 18 & 26)

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 15(3) व 29 – पदच्युति – प्रक्रिया – विभागीय जांच – तीन वेतनवृद्धियां रोकने की शास्ति अधिरोपित की गई – बाद में, पुनः पदच्युति हेतु एक नोटिस जारी किया गया – रिट याचिका प्रस्तुत की गई जिसमें रोक प्रदान की गई थी – विभाग ने पदच्युति का नोटिस वापस लिया और पूर्वतर शास्ति को बनाए रखा – याचिका को निष्फल हो जाने से खारिज किया गया – पुनः एक नोटिस जारी किया गया और याची को पदच्युत किया गया – अभिनिर्धारित – पदच्युति का उक्त आदेश, न्यायालय के आदेश की अवज्ञा में होगा – उक्त पदच्युति, मनमानी एवं अवैध है – नियम 15 व 29 के उपबंधों का अनुपालन नहीं किया गया – आक्षेपित आदेश अभिखंडित – याची को बहाल करने के लिए निदेशित किया गया, यदि उसने अधिवार्षिकी आयु प्राप्त न की हो परंतु उसे पूर्वतर अधिरोपित शास्ति भुगतनी पड़ेगी – याचिका अंशतः मंजूर।

B. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 29 – Power of Review – Procedure **– Held – If earlier order of penalty is required to be changed to enhance penalty, it would amount to review of earlier order and such power can be exercised by appellate authority – In present case, subsequent notice or order of penalty has not been passed by appellate authority reviewing previous order.** **(Para 22 & 23)**

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 29 – पुनर्विलोकन की शक्ति – प्रक्रिया – अभिनिर्धारित – यदि शास्ति में वृद्धि हेतु शास्ति के पूर्वतर आदेश को बदलना अपेक्षित है, यह पूर्वतर आदेश के पुनर्विलोकन की कोटि में आएगा और उक्त शक्ति का प्रयोग केवल अपीली प्राधिकारी द्वारा किया जा सकता है – वर्तमान प्रकरण में, अपीली प्राधिकारी द्वारा पूर्वतर आदेश का पुनर्विलोकन करते हुए शास्ति का पश्चात्वर्ती नोटिस या आदेश पारित नहीं किया गया है।

C. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 10 & 15(3) – Disciplinary Authority & Inquiring

Authority **– Held – If disciplinary authority is not an inquiring authority, it is incumbent on him to apply his own mind while recording findings prior to proposing penalty – In subsequent notice, nothing is referred why the earlier findings were inappropriate which required to be changed proposing penalty of dismissal – Provision of Rule 15(3) not complied by Disciplinary Authority. (Para 20 & 21)**

ग. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 10 व 15(3) – अनुशासनिक प्राधिकारी व जांचकर्ता प्राधिकारी – अभिनिर्धारित – यदि अनुशासनिक प्राधिकारी एक जांचकर्ता प्राधिकारी नहीं है, उसे शास्ति प्रस्तावित करने से पूर्व निष्कर्षों को अभिलिखित करते समय स्वयं अपने मस्तिष्क का प्रयोग करना अनिवार्य है – पश्चात्वर्ती नोटिस में, इसका कोई संदर्भ नहीं कि पूर्वतर निष्कर्ष क्यों अनुचित थे जिन्हें पदच्युति की शास्ति प्रस्तावित करते हुए बदलना आवश्यक था – अनुशासनिक प्राधिकारी द्वारा नियम 15(3) के उपबंध का अनुपालन नहीं किया गया।

D. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 15(3) – Competent Authority **– Held – The power of the disciplinary authority conferred under statute to the officer ought not be exercised by other officer, holding the current charge. (Para 25)**

घ. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 15(3) – सक्षम प्राधिकारी – अभिनिर्धारित – कानून के अंतर्गत अनुशासनिक प्राधिकारी को प्रदत्त शक्ति का प्रयोग वर्तमान पदधारक अन्य अधिकारी द्वारा नहीं किया जाना चाहिए था।

Cases referred:

W.P. No. 3304/2008 (s) judgment passed on 12.02.2015, AIR 1973 MP 104.

K.C. Ghildiyal, for the petitioner.
Anoop Nair, for the respondent Nos. 2, 3 & 4.

ORDER

J.K. Maheshwari, J. :- This petition under Article 226 of the Constitution of India has been filed assailing the orders of penalty of withholding three increments with cumulative effect dated 25.10.2011 Annexure P-1, the order of dismissal dated 24.7.2012 Annexure P-2 and the order dated 8.11.2012 Annexure P-3 passed by the appellate authority. It is also

prayed that the circular dated 14.12.2011 Annexure P-17 by which the powers of disciplinary authority delegated to the officers holding the current charge, without any order passed by the Board or the Members of the Company, be also quashed, seeking direction of reinstatement with backwages.

2. The facts unfolded to file the present petition are that the petitioner was working as Assistant Grade III at the relevant time in the office of M.P. Purva Kshetra Vidyut Vitran Company Limited, Chichli, Gadarwara, District Narsinghpur. He was served with a charge sheet dated 28.08.2010 levelling two charges. The first charge was, in place of depositing an amount of Rs.10,000/-, the receipt of Rs.1,000/- was issued causing loss of Rs.9000/- to the Board. The second charge was, in place of depositing Rs.2,500/-, a receipt of Rs.250/- was issued causing loss of Rs.2250/- to the Board.

3. The reply to the said charges were submitted on 15.09.2010 denying those allegations and raising question of competence of Mr. Sanjay Nigam, Executive Engineer who issued the charge sheet on the plea of holding the current charge to the post of Superintending Engineer. On appointment of the inquiry officer, the enquiry was conducted without following the procedure and in violation of the rules as pleaded in paras 5.6, 5.7, 5.8 and 5.9 of the writ petition. It is said without supplying the enquiry report a show-cause notice dated 08.04.2011 was issued proposing the penalty of dismissal. On receiving the reply Mr. B. Kumar officiating Superintending Engineer, Narsinghpur has passed the order after analyzing the averments of reply, statement of the witnesses and enquiry report. He has recorded the finding that charge No.1 has not been proved while charge No.2 is partially proved, therefore, vide order Annexure P-1 dated 25.10.2011 the penalty of withholding three increments with cumulative effect has been inflicted. As per Rule 23 of the *M.P. Civil Services (Classification, Control & Appeal) Rules, 1966* (hereinafter it would be referred to as the Rules), the petitioner was supposed to file an appeal challenging the said order, but within 17 days, a show-cause notice dated 11.11.2011 was issued by the same authority asking the reply why not cancelling the order dated 25.10.2011 Annexure P-1 the penalty of dismissal be inflicted on him.

4. The petitioner had knocked the door of this Court by filing the Writ Petition No. 19302/2011 (s) challenging the said show cause notice, wherein stay was granted while issuing notice to other side on 21.11.2011. On receiving the order of stay the authority competent passed an order on 27.12.2011,

maintaining the order of penalty dated 25.10. 2011 and the show-cause notice has been withdrawn. The respondents have produced the order dated 27.12.2011 before the Court, however, considering the reply of the Board, the said writ petition was dismissed as infructuous on 01.02.2012.

5. After the order of writ Court, the respondents have again issued a show-cause notice dated 14.02.2012 through the Additional Chief Secretary to which reply was filed on 28.02.2012 and the writ petition bearing number 5780/2012 (s) was also filed. But prior to the date of hearing, the order of dismissal was passed on 24.07.2012 vide Annexure P-2, however withdrawing the said writ petition, petitioner preferred an appeal to appellate authority, which was dismissed vide order dated 08.11.2012 Annexure P-3, however, both these orders have been challenged in this petition.

6. Shri K.C. Ghildiyal, learned counsel has strenuously urged that the show cause notice dated 14.2.2012 Annexure P-21 was issued to circumvent the order of this Court passed in W.P. No. 19302/2011, whereby after granting stay the said show cause notice of the proposed penalty of dismissal was withdrawn, maintaining the order of withholding three increments. The Chief Engineer on dismissing the said writ petition, tend to overreach the order of the Court by passing a fresh order of dismissal, though previous order of the penalty was maintained vide order dated 27.12.2011 withdrawing the notice of proposed penalty of dismissal. The appellate authority has also been dismissed, without due application of mind and considering the said facts and the legal issues raised in the memo of appeal.

7. It is further urged that as per Rule 15(3) of the Rules, if disciplinary authority is not the inquiring authority, he is supposed to record his own finding on all or any of the articles of the charges prior to form his opinion, affording an opportunity to the petitioner, but the said Rule is not complied by respondents. In support of the said contention, reliance has been placed on the judgment of this Court in *R.K. Vishwakarma Vs. The M.P. State Electricity Board* passed on 12.2.2015 in W.P. No. 3304/2008 (s) whereby this Court held the disciplinary authority is supposed to record the own findings assigning the reason while proving the misconduct on all charges, in case he is not the enquiring authority.

8. It is contened that the order impugned Annexure P-2 was passed by the Chief Engineer, M.P. Purva Kshetra Vidyut Vitran Company, Jabalpur,

holding the current charge of the post though he was holding the substantive post of Superintending Engineer, Jabalpur. However, he cannot exercise the power of disciplinary authority i.e. Superintending Engineer, Narsinghpur because the posting of the petitioner was at Chichli, Tehsil Gadarwara, District Narsinghpur. Therefore, the order impugned is illegal and without jurisdiction. The petitioner is also challenging the circular dated 14.12.2011 Annexure P-17 issued by the company by which the powers of disciplinary authority have been assigned to the officers who are in current charge, without the decision of the Company or by all the members of the Board, therefore, the said circular is also bad in law. In support of the said contention, reliance has been placed on the full Bench judgment of this Court in the case of *Girja Shanker Shukla v. Sub Divisional Officer, Harda* – AIR 1973 MP 104. In view of the said submissions prayer is made to quash the order impugned and to reinstate the petitioner with full back wages.

9. The respondents have filed their reply, inter alia, contending that the petitioner has committed the financial irregularity however, he was placed under suspension on 19.07.2010 and a charge-sheet was also served on him. The enquiry was conducted on filing the reply and giving an opportunity to cross-examine the departmental witnesses, however, inquiry officer submitted his report on 19.03.2011. The said report was placed before the disciplinary authority who issued the show-cause notice dated 08.04.2011 proposing the penalty of dismissal. The reply to the said show-cause notice was filed, however, considering the same, penalty of withholding three increments with cumulative effect was passed on 25.10.2011. It is said, while passing the said order, the circulars dated 23.08.2007 and 03.07.2008 were not in the knowledge of the disciplinary authority, however, to review the said order a show-cause notice dated 11.11.2011 was issued proposing the penalty of dismissal. It is not disputed that the said notice was challenged in W.P. No. 19302/2011 wherein vide order dated 27.12.2011, stay was granted and thereafter the show-cause notice was withdrawn. It is urged because the order of penalty was passed without knowledge of the two circulars, therefore, a fresh show-cause notice has rightly been issued and the penalty of dismissal was imposed. On filing the appeal, it was dismissed by the appellate authority after due application of mind, however, in such circumstances interference is not warranted.

10. Shri Anoop Nair, learned counsel representing the Board contends

that after passing the order by this Court, referring certain circulars which were not considered in the earlier show cause notice, a fresh show cause notice was issued vide Annexure P-21 proposing the penalty of dismissal. After filing the reply and affording an opportunity to petitioner, the order impugned has rightly been passed by the Chief Engineer sitting at the head quarter, Jabalpur, who can exercise the power of the disciplinary authority. It is further argued, looking to the order of penalty, the disciplinary authority has accepted the findings of the inquiring authority, however, concurring those findings, the penalty of dismissal has rightly been passed. It is urged that as per circular Annexure P-17, disciplinary powers have been assigned to the officers who have rightly exercised the powers, in such circumstances interference is not warranted.

11. After hearing learned counsel for the parties and as prayed by the counsel for petitioner, the relief seeking quashment of the order dated 25.10.2011 Annexure P-1 has not been pressed, therefore, this petition to the extent of such relief is dismissed as not pressed and it is being entertained for the remaining reliefs.

12. In the facts of the present case, it is to be examined; whether the action of the respondents to pass the orders impugned Annexures P-2 and P-3 is in defiance to the orders passed by this Court in WP No.19302/2011? Whether impugned orders Annexure P-2 and P-3 have been passed by the authorities without following the procedure as prescribed in Rules 15 and 29 of the Rules of 1966? Whether the power of disciplinary authority can be exercised by the authority holding the current charge and the circular Annexure P-17 of the Board may be quashed?

13. To advert the arguments as advanced and to answer the questions posed, it is seen that two charges were levelled against the petitioner. The charge No. 1 relates to deposit of Rs.1000/- in place of Rs.10000/- causing loss of Rs.9000/- to the Department and charge No. 2 relates to deposit of Rs.250/- in place of Rs.2500/- causing loss to the Department of Rs.2250/-. After departmental inquiry the order dated 25.10.2011 Annexure P-1 was passed inflicting the penalty of withholding three increments with cumulative effect. The disciplinary authority had specified the reason, why the said penalty is sufficient after considering the statement of Naresh Kumar Kaurav and held the charge No.1 was not found prove. For the second charge, after perusal of the statement of Bholaram, said that he gave a sum of Rs.2500/- to

the petitioner but the receipt of a sum of Rs.250/- was issued to him, therefore, the said charge was found partially proved. Thus penalty of withholding three increments with cumulative effect was directed.

14. It is seen after imposing the said penalty, for the same charges and inquiry report, petitioner was served with a show cause notice dated 11.11.2011 by the disciplinary authority, why the order of penalty of withholding three increments with cumulative effect may not be withdrawn, inflicting the penalty of dismissal. The said notice was challenged by the petitioner before this Court by filing W.P. No. 19302/2011 on the ground of incompetence of the authority along with other grounds, wherein this Court vide order dated 21.11.2011 passed the interim order in following terms:-

21.11.2011

Heard Shri S.K.Rao, learned Sr. counsel with Shri V.K.Pandey, counsel for the petitioner on the question of admission and interim relief.

At this stage, Shri Mukesh K. Agrawal, learned counsel enters appearance on caveat for the respondents and submits that the petition is premature. He also prays for and is granted two weeks' time to file a reply to the application for interim relief.

Two sets of the copy of the petition be supplied to him within this week.

In the meanwhile, looking to the fact that by the impugned notice, the same authority seeks to review the order of punishment for which it is stated that it has no power or authority, it is directed that no further steps, pursuant to the Annexure P/1 dated 11.11.2011, shall be taken by the respondents till the next date of hearing.

C.C. as per rules.

15. On perusal of the said order, it reveals that the respondent Board sought time to file reply, which was filed later on 6.1.2012 inter alia stating that the show cause notice of proposed penalty of dismissal is hereby withdrawn maintaining the order of penalty of withholding three increments dated

25.10.2011, therefore, the said petition has rendered infructuous. The order passed by the Board withdrawing the show cause notice is having much relevance to the arguments advanced, however, it is reproduced as thus:-

कार्यालय अधीक्षण अभियंता (संचालन एवं संधारण) वृत्त
म.प्र.पूर्व क्षेत्र विद्युत वितरण कंपनी लिमि.नरसिंहपुर.

क.अयंन/संसं/स्था नरसिंहपुर दिनांक 27.12.11

आदेश

श्री के.के.शर्मा, का.सहा.श्रेणी–तीन के प्रकरण में अधोहस्ताक्षरकर्ता द्वारा जारी कारण बताओ सूचना पत्र कमांक 166–17 दिनांक 11.11.2011 में दीर्घ शास्ति के तहत सेवा समाप्ति का दण्ड प्रस्तावित किया गया था, को वापस लिया जाता है। तथा आदेश कमांक 111–12 दिनांक 25.10.2011 को जारी मूल दण्डादेश जिसमें तीन वार्षिक वेतन वृद्धियां संचयी प्रभाव से रोकी गयी हैं, को तत्काल प्रभाव से यथावत (Maintains) रखा जाता हैं।

अधीक्षण यंत्री (संचा/संधा)
म.प्र.पू.क्षे.वि.वि.कं.लिमि.नरसिंहपुर

16. On the next date of hearing, this Court vide order dated 1.2.2012 dismissed the writ petition as infructuous and passed the order in following terms :-

1.2.2012

Shri S.K. Chaturvedi, learned counsel for the petitioner.

Shri Anoop Nair, learned counsel for the respondents.

Learned counsel for the respondents submitted that the impugned order has been withdrawn therefore the writ petition has been rendered infructuous.

In view of the aforesaid submission made by learned counsel for the respondents, the writ petition is dismissed as infructuous.

However, in case the impugned order is not withdrawn, it would be open to the petitioner to seek revival of the writ petition.

In view of the above facts, it is apparent that on account of withdrawing

the show cause notice of the proposed penalty of dismissal maintaining the order of withholding three increments dated 25.10.2011, the writ petition No. 19302/2011 was dismissed as infructuous. Meaning thereby the order passed by the Board has been relied by this Court while dismissing the said writ petition.

17. After dismissing the said writ petition, a fresh notice dated 14.2.2012 was again issued from the office of Chief Engineer, Jabalpur. In the show cause notice, the penalty of dismissal was again proposed against the petitioner without asking cancellation of the order dated 25.10.2011. On submitting, the reply to the said notice, vide order dated 24.7.2012 Annexure P-2 the petitioner was dismissed, contrary to the finding recorded by Mr. B. Kumar in the order Annexure P-1 dated 25.10.2011. The respondents without asking show cause under rule 15(3) of the Rules to record its own finding, showing dissent from the findings of Mr. B. Kumar, the order impugned Annexure P-2 has been passed by which the penalty of dismissal is directed.

18. The bare perusal of the aforesaid facts, it is clear that the first order of penalty dated 25.10.2011 Annexure P-1 withholding three increments with cumulative effect was maintained and the notice of the proposed penalty of dismissal was withdrawn vide order dated 27.12.2011. However relying upon the said order, the writ petition No. 19302/2011 was dismissed as infructuous on 1.2.2012 by this Court. Thereafter nothing remains to the authorities to review the said order and to pass the order of dismissal, without cancelling the order dated 25.10.2011 by seeking leave from the Court. In view of the foregoing, it can safely be concluded that the subsequent show cause notice dated 14.2.2012 proposing penalty of dismissal and to pass the order impugned on 24.7.2012 Annexure P-2 is contrary to the order dated 27.12.2011, relied by this Court while dismissing the Writ Petition No. 19302/2011 as infructuous. Therefore, action of the respondent-Board is arbitrary and illegal. The appellate authority while deciding the appeal has not considered after due application of mind, therefore, the order passed by the appellate authority dated 8.11.2012 is also illegal.

19. Now reverting to the issue of violation of Rule 15(3) of the Rules and to appreciate the aforesaid argument, it would be necessary to refer Rule 15 of the Rules, which is reproduced as under :-

15. Action on the inquiry report:-(1) The disciplinary authority

if it is not itself the inquiring authority may, for reasons to be recorded by it in writing, remit the case to the inquiring authority for further inquiry and report and the inquiring authority shall thereupon proceed to hold the further inquiry according to the provisions of rule 14 as far as may be.

(2) The disciplinary authority shall, if it disagrees with the findings of the inquiring authority on any article of charge, record its reasons for such disagreement and record its own finding on such charge, if the evidence on record is sufficient for the purpose.

(3) If the disciplinary authority having regard to its findings on all or any of the articles of charge is of the opinion that any of the penalties specified in rule 10 should be imposed on the Government servants, it shall, notwithstanding anything contained in rule 16, make an order imposing such penalty but in doing so it shall record reasons in writing:

Provided that in every case where it is necessary to consult the Commission, the record of the inquiry shall be forwarded by the disciplinary authority to the Commission for its advice and such advice shall be taken into consideration before making any order imposing any penalty on the Government servant.

20. In the present case, violation of Rule 15(3) of the Rules has been pleaded, however, on perusal thereof, it is apparent that in case disciplinary authority is not an inquiring authority, it is incumbent on him to apply his own mind while recording the finding on the articles of the charges levelled against the delinquent employee. On perusal of the enquiry report, the disciplinary authority having regard to its finding may propose penalty as specified in Rule 10. In the context of said provision, if a show cause notice Annexure P-21 is perused, then on internal page 2 of the notice in Paragraphs 1 and 2, reference of earlier notice dated 8.4.2011 is made, thereafter in third paragraph after referring circular dated 3.7.2008, it is said that charges No. 1 and 2 are found prove. It does not indicate that disciplinary authority, who is not an inquiring authority, accepted the finding of the inquiry by its own and proposed the penalty of dismissal by the said show cause notice. At this stage, it is

incumbent to refer the order dated 25.10.2011 of disciplinary authority inflicting the penalty of withholding three increments, was passed after going through the evidence and the reply filed by the delinquent. In the said order, the disciplinary authority has recorded the findings that the Charge No.1 is not proved while the Charge No.2 is partially proved. However, in the subsequent show-cause notice nothing is referred why the findings of the disciplinary authority earlier recorded were inappropriate and those findings are required to be changed proposing the penalty of dismissal.

21. In this respect, looking to the language engrafted in Rule 15(3) of the Rules, it is incumbent upon the disciplinary authority to record its own finding prior to proposing the penalty. But in the facts of this case, looking to the discussion made above, the observance of Rule 15(3) is conspicuously missing. In that view of the matter, I am of the considered opinion that the disciplinary authority has not complied the provision of Rule 15(3) of the Rules, therefore, also the orders impugned cannot be sustained in law.

22. As per discussion made hereinabove, it may be noticed that by issuing subsequent notice, the order of penalty dated 25.10.2011 was sought to be reviewed which may be permissible in exercise of the power of review. The power of review has been specified in Rule 29 of the Rules. The said rule is relevant, however, it is reproduced as under:-

> "**29.** (1) Notwithstanding anything contained in these rules except rule 11"-
>
> (i) the Governor, or
>
> (ii) the head of a department directly under the State Government, in the case of a Government servant serving in a department or office (not being the Secretariat), under the control of such head of a department, or
>
> (iii) the appellate authority, within six months of the date of the order proposed to be reviewed, or
>
> (iv) any other authority specified in this behalf by the Governor by a general or special order, and within such time as may be prescribed in such general or special order; may at any time, either on his or its own motion or otherwise call for the records of any inquiry and review any order made under these rules or

under the rules repealed by rule 34 from which an appeal is allowed but from which no appeal has been preferred or from which no appeal is allowed, after consultation with the commission where such consultation is necessary, and may-

(a) confirm, modify or set aside the order; or

(b) confirm, reduce, enhance or set aside the penalty imposed by the order, or impose any penalty where no penalty has been imposed or;

(c) remit the case to the authority which made the order or to any other authority directing such authority to make such further inquiry as it may consider proper in the circumstances of the case; or

(d) pass such other orders as it may deem fit ;

Provided that no order imposing or enhancing any penalty shall be made by any reviewing authority unless the Government servant concerned has been given a reasonable opportunity of making a representation against the penalty proposed and where it has proposed to impose any of the penalties specified in clauses (V) to (IX) of rule 10 or to enhance the penalty imposed by the order sought to be reviewed to any of the penalties specified in those clauses, no such penalty shall be imposed except after an inquiry in the manner laid down in rule 14* and except after consultation with the commission where such consultation is necessary:

23. In the facts of the present case Rule 29(1)(i) & (ii) would not apply and it may be a case of Rule 29(1)(iii) and (iv) of the Rules whereby the appellate authority may review the order within six months from the date of the order proposed to be reviewed or any other authority specified in this behalf by the Governor by a general or special order, and within such time as may be prescribed in such general or special order. The authority specified by Hon'ble Governor is not brought on record by the respondent Board. In the facts of present case, if the earlier order of penalty is required to be changed to enhance the penalty, it would amounting to review of the earlier order of penalty and such power can be exercised by appellate authority within six

months following the procedure as specified. But the subsequent show cause notice or the order of penalty has not been passed by the appellate authority reviewing the previous order. Therefore, on this count also the order impugned is illegal, arbitrary and is liable to be quashed. Consequent to the above discussion, the question Nos. 1 and 2 are answered in favour of the petitioner.

24. In view of the foregoing discussion, in my considered opinion, the order of penalty of dismissal of the petitioner passed by the disciplinary authority is to circumvent the order of the Board, dated 27.12.2011 accepted by this Court in the writ petition No. 19302/2011 and without seeking leave passed the order of dismissal, though in the order dated 27.12.2011 the earlier order dated 25.10.2011 of withholding three increment was maintained. It is further held that the order impugned is also without complying the Rule 15 (3) and 29 of the Rules. Thus order of penalty of dismissal of the petitioner cannot be sustained in law, therefore, Annexure P-2 is hereby quashed. As the appellate authority has not considered all the said aspects, however, the order passed by the appellate authority Annexure P-3 is also without due application of mind, therefore, quashed.

25. On the issue of exercising the power of the disciplinary authority by an officer holding the current charge, reliance has been placed by the petitioner on the case of *Girija Shanker Shukla* (supra) of the Full Bench of this Court wherein it is held that the power as conferred under the statute ought to be exercised by the authority as specified therein and Such power cannot be exercised by an authority who is holding the current charge. In my considered opinion, it is a trite law that the power of the disciplinary authority conferred under the statue to the officer ought not to be exercised by the other officer who is holding the current charge. Be that as it may, in any case as per the discussion made hereinabove the order impugned was found illegal on the grounds aforementioned, however, this Court is not inclined to deal with the third question regarding validity of the circular Annexure P-17 issued by the Board regarding conferment of the powers of the disciplinary authority to the officer holding the current charge, however, the said question is left open for decision in appropriate case. In view of the above discussion, the question Nos. 1 and 2 are hereby answered in favour of the petitioner and the question No.3 is left open for decision in the appropriate case.

26. Consequent upon the discussion, this petition succeeds and is hereby allowed in part. Orders impugned Annexure P-2 dated 24.07.2012 and P-3

dated 08.11.2012 stand quashed. In consequence thereto, if the petitioner has not yet attained the age of superannuation, he be reinstated forthwith but he has to suffer order of penalty of withholding three increments with cumulative effect as directed vide order dated 25.10.2011 Annexure P-1. The petitioner shall also be entitled for consequential and monetary benefits on account of quashing the order of penalty of dismissal. The respondents are directed to comply the said directions within a period of three months from the date of receipt of certified copy of this order. In the facts and circumstances of the case, parties are directed to bear their own costs.

Petition partly allowed.

I.L.R. [2017] M.P., 2671
WRIT PETITION
Before Mr. Justice Hemant Gupta, Chief Justice &
Mr. Justice Vijay Kumar Shukla
W.P. No.14557/2017 (Jabalpur) decided on 3 October, 2017

RAJESH KUMAR MIGLANI & anr. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

A. Motor Vehicles Act (59 of 1988), Section 65(2)(d), Motoryan Karadhan Adhiniyam, M.P., (25 of 1991), Section 3 and Motor Vehicles Rules, M.P. 1994, Rule 48(2) – Application for Fitness Certificate – Requirement of 'No Dues Certificate' – Competence of State Legislature – **Held – Act of 1988 being Central Legislation does not contemplate grant of fitness certificate and it is left to be framed by State Government, therefore, issuance of fitness certificate and payment of tax falls within legislative competence of State in terms of Section 65(2)(d) of the Act of 1988 and u/S 3 of the Adhiniyam of 1991 – Rule 48(2) of the Rules of 1994 contemplating requirement of no dues certificate for grant of fitness certificate cannot be said to be illegal – Petition dismissed.** **(Para 12)**

क. मोटर यान अधिनियम (1988 का 59), धारा 65(2)(डी), मोटरयान कराधान अधिनियम, म.प्र. (1991 का 25), धारा 3 एवं मोटर यान नियम, म.प्र. 1994, नियम 48(2) – उपयुक्तता प्रमाणपत्र हेतु आवेदन – 'अदेयता प्रमाणपत्र' की अपेक्षा – राज्य विधान मंडल की सक्षमता – अभिनिर्धारित – 1988 का अधिनियम केन्द्रीय विधान होने के नाते उपयुक्तता प्रमाणपत्र का प्रदान अनुध्यात नहीं करता तथा इसे

राज्य सरकार द्वारा विरचित किये जाने के लिए छोड़ा गया है, इसलिए, उपयुक्तता प्रमाणपत्र जारी किया जाना एवं कर का भुगतान, 1988 के अधिनियम की धारा 65(2)(डी) के निबंधनों में तथा 1991 के अधिनियम की धारा 3 के अंतर्गत राज्य की विधायी सक्षमता के भीतर आते हैं – उपयुक्तता प्रमाणपत्र के प्रदान किये जाने हेतु अदेयता प्रमाणपत्र की अपेक्षा अनुध्यात करता हुआ 1994 के नियमों का नियम 48(2), अवैध नहीं कहा जा सकता – याचिका खारिज।

B. Motor Vehicles Act (59 of 1988), Section 65(2)(d) and Motor Vehicles Rules, M.P. 1994, Rule 48(2) – Inconsistency – **Held – The condition that an application for issue or renewal of fitness certificate shall be accompanied with tax clearance certificate is not inconsistent with any provision of Central Legislation (Act of 1988).** **(Para 15)**

ख. मोटर यान अधिनियम (1988 का 59), धारा 65(2)(डी) एवं मोटर यान नियम, म.प्र. 1994, नियम 48(2) – असंगति – अभिनिर्धारित – शर्त कि उपयुक्तता प्रमाणपत्र के नवीकरण या जारी किये जाने हेतु आवेदन के साथ कर समाशोधन प्रमाणपत्र होना चाहिए, केन्द्रीय विधान (1988 का अधिनियम) के किसी उपबंध के साथ असंगत नहीं है।

C. Motor Vehicles Rules, M.P. 1994, Rule 8-A and Evidence Act (1 of 1872), Section 114(e) – Data Updation in Official Website – Presumption – **Held – There is a presumption that official acts are performed regularly in terms of Section 114(e) of the Act of 1872, thus there will be a presumption of correctness of information available on website – Aggrieved transporter cannot be permitted to approach writ Court submitting that data on website is not updated and reflecting non-payment of tax – However, State directed to update the entire data in website and make necessary amendments in software, if required.** **(Para 16 & 17)**

ग. मोटर यान नियम, म.प्र. 1994, नियम 8–ए एवं साक्ष्य अधिनियम (1872 का 1), धारा 114(ई) – अधिकृत वेबसाईट में डाटा को वर्तमान के अनुसार संपादित करते रहना – उपधारणा – अभिनिर्धारित – एक उपधारणा है कि 1872 के अधिनियम की धारा 114(ई) के निबंधनों में नियमित रूप से शासकीय कार्य किये जाते हैं इसलिए वेबसाईट पर उपलब्ध जानकारी की शुद्धता की उपधारणा की जाएगी – व्यथित परिवाहक को रिट न्यायालय के समक्ष जाकर यह निवेदन करने की अनुमति नहीं दी जा सकती कि वेबसाईट का डाटा वर्तमान के अनुसार संपादित नहीं है एवं कर का असंदाय प्रतिबिंबित कर रहा है – तथापि राज्य को वेबसाईट में संपूर्ण डाटा वर्तमान के अनुसार संपादित करने एवं यदि आवश्यक हो सॉफ्टवेअर

में आवश्यक संशोधन करने के लिए निदेशित किया गया।

Cases referred:

(2016) 6 SCC 602, (2017) 3 SCC 545.

R.N. Tripathi, for the petitioners.
Samdarshi Tiwari, Addl. A.G. for the respondents/State.

ORDER

The Order of the Court was passed by : HEMANT GUPTA, C.J. :- The challenge in the present writ petition is to the legality of Sub-Rule (2) of Rule 48 of Madhya Pradesh Motor Vehicles Rules, 1994 (hereinafter referred to as *"the Rules of 1994"* in short) to the extent it requires that fitness application for vehicle shall be accompanied with a tax clearance certificate in Form M.P.M.V.R.-23 (TCC). The impugned Sub-Rule (2) of Rule 48 of the Rules of 1994 reads as under:-

> "(2) An application for issue or renewal of certificate of fitness shall be made in Form M.P.M.V.R.-22 (C.F.A.), to the Registering Authority or the operator of the authorised testing station in whose jurisdiction the vehicle is normally kept or whose functional area includes the major portion of the route or area to which the permit relating to the vehicle extends and shall be accompanied with a tax clearance certificate in Form M.P.M.V.R.-23 (T.C.C.)."

2. The petitioners are engaged in the business of bus operations and have 74 buses on their fleet. The buses are required to have fitness certificate in terms of Motor Vehicles Act, 1988 (in short *"the Act of 1988"*) and the Rules made thereunder whereas the passenger tax is payable on such vehicles under Motoryan Karadhan Adhiniyam, 1991 (hereinafter referred to as *"the 1991 Act"*) and M.P. Motoryan Karadhan Rules, 1991 (in short as *"the Rules of 1991"*). The grievance is that levy and collection of tax cannot be correlated with issuance of fitness certificate as both operate in separate legislative schemes. The fitness certificate is covered by the Central law i.e. Act of 1988 whereas the tax is governed by the 1991 Act and the Rules made thereunder i.e. the Rules of 1991. Therefore, condition of clearance of tax cannot be a condition precedent for grant of fitness certificate.

3. The petitioners have pointed out that grant and renewal of fitness

certificate is sought to be declined in wholly illegal and arbitrary manner as the no dues certificate of tax is not issued to the transporters without assigning any reason. It is pleaded that even if the tax clearance certificate is not issued by the department and even when the certificate is issued, the Transport Authority refuses to entertain the application on the pretext that the computer system is showing the tax due on the vehicle. It is pointed out that there is a complete machinery for levy of tax and penalty for failure to pay tax and they also have power of entry, seizure and detention of motor vehicle in case of non-payment of tax but without issuing any notice of payment of tax, the tax assessment is not done and arbitrarily the motor vehicle owner is asked to pay the tax and when he fails to meet the demand, the fitness certificate is not issued.

4. The argument of the petitioners is that the condition of issuance of no dues certificate of tax, as a condition precedent for issuance of fitness certificate, gives rise to conflict between the Central and the State law and that in terms of Article 254 of the Constitution of India in case of a conflict, the Central Act will prevail.

5. To examine the arguments raised, certain statutory provisions needs to be reproduced.

6. The M.P. Motor Vehicles Rules, 1994 have been framed in terms of the provisions of the Motor Vehicles Act, 1988. The relevant provision of the Act of 1988 which is relevant to frame the Rules regarding fitness certificate, reads as under:-

> "**65. Power of the State Government to make rules.-**(1) A State Government may make rules for the purpose of carrying into effect the provisions of this Chapter other than the matters specified in section 64.
>
> (2) Without prejudice to the generality of the foregoing power, such rules may provide for –
>
> *** *** ***
>
> (d) the issue or renewal of certificates of registration and fitness and duplicates of such certificates to replace the certificates lost, destroyed or mutilated;

(e) the production of certificates of registration before the registering authority for the revision of entries therein of particulars relating to the gross vehicle weight;"

7. The relevant Rule for issue of fitness certificate in terms of the Rules framed in exercise of Section 65 of the Act of 1988 is the Rule 48 of 1994 Rules, which is again reproduced as under:-

> **"48. Issue or Renewal of Certificate of Fitness.**-(1) A certificate of fitness shall be issued or renewed by the Registering Authority or subject to its general control and direction by such officer of the Transport department not below the rank of Transport Sub-Inspector as may be authorised by it in this behalf or by an operator of the authorised testing station specified by the Government under sub-section (2) of section 56 of the Act.
>
> (2) An application for issue or renewal of certificate of fitness shall be made in Form M.P.M.V.R.-22 (C.F.A.), to the Registering Authority or the operator of the authorised testing station in whose jurisdiction the vehicle is normally kept or whose functional area includes the major portion of the route or area to which the permit relating to the vehicle extends and shall be accompanied with a tax clearance certificate in Form M.P.M.V.R.-23 (T.C.C.).
>
> *** *** ***"

8. Section 3 of 1991 Act imposes tax on every motor vehicle used or kept for use in the State at the rate specified in the First Schedule. Such tax, in terms of Section 5, is payable in advance by the owner of the motor vehicle, at his choice, quarterly, half-yearly or annually on a token to be obtained by him. Section 8 casts a duty upon an owner to file a declaration with the Taxation Authority together with the proof of the payment of the tax. Section 8 of 1991 Act reads as under:-

> **"8. Filing of declaration and determination of tax payable.-**
>
> (1) Every owner, who is liable to pay the tax under this Act shall file a declaration with the Taxation Authority together

with the proof of the payment of the tax which he appears to be liable to pay in respect of such vehicle in such form and within such time as may be prescribed.

(2) When any motor vehicle in respect of which tax has been paid is altered in such a manner as to cause the vehicle to become a motor vehicle in respect of which higher rate of tax is payable, the owner of such vehicle shall file an additional declaration with the Taxation Authority together with the certificate of registration and the proof of the payment of difference of tax which he appears to be liable to pay in respect of such vehicle, in such form and within such time as may be prescribed.

(3) On receipt of the declaration under sub-section (1) or the additional declaration under sub-section (2) as the case may be, the Taxation Authority shall, after making such enquiry as it deems fit and after giving to the owner an opportunity of being heard, determine, by an order in writing, the tax payable by the owner and intimate the same to him in such form and within such time as may be prescribed.

(4) Where the owner fails to file a declaration required under sub-section (1) or (2) the Taxation Authority may, on the basis of information available with it and after giving to the owner an opportunity of being heard, by an order in writing, determine the amount of tax payable by such owner *suo-motu* and intimate the same to him in such form and within such time as may be prescribed.

(5) On determination of the tax payable under sub-section (3) or (4) as the case may be, by the Taxation Authority, the difference of the amount of tax payable and the amount of tax paid shall as the case may be, be paid by or refunded to the owner in a manner applicable to the payment or refund of tax under this Act and rules.

(6) Where the owner files a false declaration the taxation authority shall, after giving the owner an opportunity of being heard, by an order in writing, impose a penalty not exceeding

twice the amount of tax determined under sub-section (3).

Explanation. - "Alteration in a motor vehicle" includes an acquisition, surrender or non-use of or any change in a permit by which the vehicle is covered."

9. Section 13 of the 1991 Act deals with penalty for failure to pay tax whereas Section 15 deals with the procedure for recovery of the tax, penalty or both. Section 16 of the said Act empowers the Taxation Authority to enter into and inspect any motor vehicle or premises where he has reason to believe that the motor vehicle is kept for the purposes of verifying whether the provisions of the Act or any rules made thereunder are being complied with. Section 20 provides a remedy of appeal against an order made for levy of tax and penalty imposed under Section 13 or aggrieved by the seizure of the motor vehicle under Section 16 of the said Act of 1991.

10. The M.P. Motoryan Karadhan Rules, 1991 provide for declaration to be filed under Section 8 of the 1991 Act in terms of Rule 5 thereof. Rule 6-A deals with the procedure for determination of the tax payable and Rule 8A deals with filing of declaration, determination and payment of tax by a fleet owner. Rule 15 provides for the recovery of tax, etc. whereas Rule 17 deals with the procedure for seizure and detention of motor vehicle in case of non-payment of tax. The relevant Rules of the 1991 Rules are reproduced as under:-

"**6A. Determination of tax payable.** - (1) On receipt of declaration under sub-section (1) or (2) of Section 8 of the Act the Taxation Authority shall without delay proceed to determine the amount of tax payable and shall pass the order required under sub-section (3) of the said section as early as possible.

(2) Where no declaration is filed by the owner by the last date fixed for payment of tax, the Taxation Authority shall without delay proceed *suo motu* to determine the amount of lax payable under sub-section (4) of Section 8 and shall pass order required under that sub-section as early as possible.

(3) While passing the order referred to in sub-section (3) or (4) of Section 8 of the Act, the Taxation Authority shall,

simultaneously, issue the intimation of such order in Form-E-2 to be served on the owner in the manner laid down in sub-rule (2) of Rule 15.]

[*Explanation.* - The order passed under sub-rule (1) or (2) shall be valid until the rate of tax or the vehicle is altered and the determination of tax afresh shall be necessary only after any alteration in the rate of tax or the vehicle.]

*** *** ***

8A. Filing of declaration, determination and payment of tax by a fleet owner. - (1) Notwithstanding anything contained in Rule 5, 6, 6A, 7 or 8 a declaration required to be filed under sub-section (1) of Section 8 of the Act by a fleet owner in respect of stage carriages and reserve stage carriages owned by him shall be in Form H-1 and shall be delivered to the Taxation Authority through a duly authorised representative within ten days from the commencement of the month.

(2) The additional declaration required under sub-section (2) of Section 8 of the Act by a fleet owner in respect of his stage carriages and reserve stage carriages altered during a month shall be in Form H-2 and shall be delivered to the Taxation Authority through a duly authorised representative within ten days from the close of the month.

(3) The declaration under sub-rule (1) or the additional declaration under sub-rule (2), as the case may be, shall be accompanied by a crossed bank draft or paid up treasury challan marked "Original" evidencing the payment of tax which the fleet owner appears to be liable to pay by such declaration or additional declaration.

(4) On receipt of the declaration under sub-rule (1) and the additional declaration under sub-rule (2) for the month, the Taxation Authority, after satisfying itself as to the correctness of the declaration and the additional declaration and after making such enquiries as it deems fit, pass an order in writing determining the amount of tax payable for the month by the

fleet owner in respect of his stage carriages and reserve stage carriages and issue the intimation of such order in Form H-3 to be served on the fleet owner in the manner laid down in sub-rule (2) of Rule 15.

(5) If the fleet owner fails to file the declaration under sub-rule (1) or the additional declaration under sub-rule (2), the Taxation Authority shall without delay, proceed *suo motu* to determine the amount of monthly tax payable by the fleet owner on the basis of information available with it and shall proceed to recover the tax so determined in accordance with the Act and these rules.

(6) When the amount of monthly tax payable by the fleet owner in respect of his stage carriages and reserve stage carriages is determined under sub-rule (4) or (5), as the case may be, the difference of tax shall be paid by or refunded to the fleet owner in the manner laid-down in these rules.

(7) The Taxation Authority may for the purposes of this rule require the fleet owner to produce before it any vehicle or any account, register, records or other documents or to furnish any information or may examine the vehicle or the accounts, registers, records or other documents and the fleet owner shall comply with any such requirement.

*** *** ***

15. Recovery of tax, etc. - (1) If any owner fails to pay tax due, penalty or interest payable under the Act and these rules, the Taxation Authority to whom such amount is payable, shall serve on the owner a notice in [Form 'E-2'–*subs. by No.1 dt. 11.10.1992*] for the sum payable.

(2) Provisions of the Madhya Pradesh Land Revenue Code, 1959 (No.20 of 1959) and the rules made thereunder shall apply *mutatis mutandis* in respect of service of notice issued under sub-rule (1).

(3) If within seven days of the service of notice, the sum contained in the notice is not paid and no reasonable cause

for its non-payment has been shown, the Taxation Authority may proceed to recover the amount as an arrear of land revenue.

(4) Notwithstanding anything contained in the aforesaid sub-rules, the Taxation Authority may take action under sub-section (3) of Section 16 of the Act for the realisation of sum payable.

*** *** ***

17. Procedure for seizure and detention of motor vehicle in case of non-payment of tax. - (1) The memorandum of seizure and the order of seizure and detention of motor vehicle under sub-section (3) of Section 16 of the Act shall be made in Form U-l and U-2 respectively, and copies thereof shall be served on the persons from whose possession or control such motor vehicle has been seized and detained.

(2) The motor vehicle seized and detained shall be kept in safe custody at the nearest Police Station or at any other place at the discretion of the officer seizing the motor vehicle or the Taxation Authority.

(3) The vehicle detained shall be released by the officer or the Taxation Authority seizing it on payment of tax, penalty and interest due.

(4) The detained vehicle shall not be released by the officer or Taxation Authority seizing it if proceedings of confiscation under sub-section (6) of Section 16 of the Act has been initiated by the Taxation Authority.

(5) The Taxation Authority shall send the intimation for initiation of proceedings for confiscation of Vehicle under clause (a) of sub-section (7) of Section 16 of the Act in Form 'X' to the Magistrate having jurisdiction to try the offence."

11. The argument of the learned counsel for the petitioners is required to be examined in the context of the aforesaid provisions. The argument is that non-issuance of no dues certificate or non-updation of the tax status on the

web portal infringes the right of the petitioners to carry on business under Article 19(1)(g) of the Constitution of India, therefore, the procedure adopted by the respondents in the light of the statutory provisions is illegal and unsustainable.

12. Section 65(2)(d) of the Act of 1988 (Central Act) empowers the State Government to frame the Rules regarding grant of fitness certificate. In exercise of such power, the State Government has notified the Rules of 1994, which deal with the procedure of issuance of fitness certificate. The payment of tax is made conditional for issuance of the fitness certificate for the reason that a defaulter of payment of tax should not be issued fitness certificate in respect of every vehicle so as to ensure due compliance of the statutory provisions. We find that the issue of fitness certificate and payment of tax falls within the legislative competence of the State in terms of Section 65(2)(d) of the Act of 1988 and under Section 3 of the 1991 Act. Therefore, Sub-Rule (2) of Rule 48 of the Rules of 1994 contemplating that no dues certificate shall be required for grant of fitness certificate, cannot be said to be beyond the legislative competence of the State Government. The Central Legislation does not contemplate the grant of fitness certificate or the condition thereof. They have been left to be framed by the State Government; therefore, condition imposed of payment of tax before grant of fitness certificate is in larger public interest to ensure that tax dues are paid by the transporters.

13. The question as to when there can be said to be a conflict between the Central and the State legislation was examined by the Supreme Court in a judgment reported as (2016) 6 SCC 602 (*Goa Foundation and another vs. State of Goa and another,* wherein the Land Acquisition Act, 1894 was amended by the Legislative Assembly of Goa in the year 2009 when the Clause 6, 7, 8 and 9 were inserted in Section 41 of the Act. Examining the challenge to the said provisions, the Court held as under:-

> "**29.** We do not see how repugnancy between the two legislative exercises on the principles laid down in *M. Karunanidhi* (1979) 3 SCC 431 and *Kanaka Gruha Nirmana Sahakara Sangha* (2003) (1) SCC 228 can be said to exist in the present case. Section 41 of the Principal Act and the terms of the agreement executed thereunder (even if the latter is understood to be 'Law' enacted by the competent legislature for the purpose of Article 254) are silent with regard

to modification/variation or deletion/subtraction of the terms of the agreement. The State Amendment Act by bringing in clauses (6) to (9) of Section 41 invalidates a clause of the agreement [Clause 4(viii)] by effecting a deletion thereof with retrospective effect i.e. 15.10.1964 (the date of coming into operation of the Principal Act to the State of Goa). The State Amendment, by no means, sets the law in a collision course with the Central/Principal enactment. Rather, it may seem to be making certain additional provisions to provide for something that is not barred under the Principal Act. Moreover, if the provisions of the State Amendment are to be tested on the anvil of the finding of this Court that the acquisition in the present case is under Section 40(1)(aa) of the Land Acquisition Act, the deletion of the relevant clause of the agreement as made by the said amendment may appear to be really in furtherance of the purpose of the acquisition under the Central Act. We, therefore, do not find any repugnancy between the Principal Act and the State Amendment, as urged on behalf of the petitioners in this case."

14. In a later judgment reported as (2017) 3 SCC 545 *(Ahmedabad Municipal Corporation vs. GTL Infrastructure Limited and Others)*, the Supreme Court was examining the provisions of Gujarat Provincial Municipal Corporation Act, 1949 (59 of 1949) wherein the levy of property tax on mobile towers was challenged. The High Court held that levy of property tax on mobile towers under Gujarat Provincial Municipal Corporation Act is *ultra vires* the Constitution except the cabin that houses the BTS system. The argument was that as per Entry 49 List-II Schedule VII, the State can impose taxes on lands and building and not on mobile towers. The Supreme Court held as under:-

"**18.** Though Article 246 has often been understood to be laying down the principle of Parliamentary supremacy, it must be qualified that such supremacy, if any, is extremely limited and very subtle. This has to be said when the federal structure of the Indian Union has been recognised as a basic feature of the Constitution. Both, the Central and the State legislatures, are competent to enact laws in any matters in their respective Lists

i.e. List I and List II. Conflict or encroachments must be ironed out by the Courts and only on a failure to do so the provisions of Article 246 will apply. Insofar as the common List i.e. List III is concerned, any repugnancy in law making by the Union and State Legislatures is dealt with by Article 254 which gives primacy to the Parliamentary law over the State law subject to the provisions of clause (2) of Article 254 of the Constitution which again is subject to a proviso which may indicate some amount of Parliamentary supremacy.

31. The measure of the levy, though may not be determinative of the nature of the tax, cannot also be altogether ignored in the light of the views expressed by this Court in *Goodricke Group Ltd vs State of W.B.*-1995 Suppl (1) SCC 707. Under both the Acts read with the relevant Rules, tax on Mobile Towers is levied on the yield from the land and building calculated in terms of the rateable value of the land and building. Also the incidence of the tax is not on the use of the plant and machinery in the Mobile Tower; rather it is on the use of the land or building, as may be, for purpose of the mobile tower. That the tax is imposed on the "person engaged in providing telecommunication services through such mobile towers" (Section 145-A of the Gujarat Act) merely indicates that it is the occupier and not the owner of the land and building who is liable to pay the tax. Such a liability to pay the tax by the occupier instead of the owner is an accepted facet of the tax payable on land and building under Schedule VII List II Entry 49."

15. In view of the foregoing analysis of the provisions of the Act and the Rules made thereunder and the law laid down by the Supreme Court, the condition that an application for issue or renewal of certificate of fitness shall be accompanied with a tax clearance certificate in Form M.P.M.V.R. - 23 (TCC) is not inconsistent with any provision of the Central Legislation (Act of 1988). Therefore, the offending clause i.e. Sub-Rule (2) of Rule 48 of the Rules of 1994 cannot be said to be illegal or beyond the legislative competence of the State.

16. The argument that the tax is demanded if the demand finds mention on

the web portal. It is contended that web portal is not updated and that without finalizing the orders under the 1991 Act or the Rules framed thereunder, the demand is raised. We find that argument is based upon apprehensions. There is a presumption that the official acts are performed regularly in terms of Sub-section (e) of Section 114 of the Evidence Act. Therefore, there will be presumption of correctness of the information available on the website. But if any demand is reflected on the website though it may not actually exist, an owner has a right to file declaration, determination and payment of tax payable in terms of Rule 8A of the Rules of 1991. An order of imposing penalty is required to be passed under Section 13 of the Act. Therefore, an aggrieved transporter cannot be permitted to come to the writ Court that data on the website is not updated and is reflecting non-payment of tax.

17. However, in the interest of justice, it is directed that the web portal should have the entire data of the tax paid of each of the vehicle and an aggrieved person should be given an opportunity to reconcile such payment by submitting online request. Such transparent process will redress the grievance of the aggrieved person(s) such as the petitioners to a large extent. We hope and trust that the State Government shall make necessary amendments in the software, if not already provided for, within three months.

18. Writ petition stands **disposed of.**

Order accordingly.

I.L.R. [2017] M.P., 2684
WRIT PETITION
Before Mr. Justice Subodh Abhyankar
W.P. No. 14965/2016 (Jabalpur) decided on 7 November, 2017

SAMLU GOND ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

(Alongwith W.P. Nos. 18136/2016, 18137/2016, 18138/2016 & 18139/2016)

*A. **Adim Jan Jatiyon Ka Sanrakshan (Vrakshon Me Hit) Adhiniyam, M.P. (25 of 1999), Section 4 & 9(2) and Land Revenue Code, M.P. (20 of 1959), Section 253 – Confiscation and Penalty* –* **Held – As per Section 4 of Adhiniyam of 1999, Bhumiswami belonging to aboriginal tribe who intends to cut any specified tree in his land**

shall apply for permission to Collector – Merely belonging to aboriginal tribe would not entitle him to cut the trees standing on his land on his own will – Adhiniyam of 1999 not only protects persons of aboriginal tribe but also protects the trees as well as the same are government property. (Para 10)

क. आदिम जन जातियों का संरक्षण (वृक्षों में हित) अधिनियम, म.प्र. (1999 का 25), धारा 4 व 9(2) एवं भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 253 – अधिहरण एवं शास्ति – अभिनिर्धारित – 1999 के अधिनियम की धारा 4 के अनुसार आदिम जनजाति का भूमिस्वामी जो उसकी भूमि पर किसी विनिर्दिष्ट वृक्ष को काटना चाहता है, वह कलेक्टर की अनुमति हेतु आवेदन करेगा – मात्र आदिम जनजाति का होने से वह अपनी स्वयं की इच्छा से उसकी भूमि पर खड़े वृक्षों को काटने का हकदार नहीं होगा – 1999 का अधिनियम न केवल आदिम जनजाति के व्यक्तियों का संरक्षण करता है बल्कि वृक्षों का भी संरक्षण करता है क्योंकि वह सरकारी संपत्ति है।

B. Adim Jan Jatiyon Ka Sanrakshan (Vrakshon Me Hit) Adhiniyam, M.P. (25 of 1999), Section 9 and Land Revenue Code, M.P. (20 of 1959), Section 50 & 240 – Suo Motu Revisional Power – Competent Authority **– Held – SDO passed final order whereas as per provisions of Adhiniyam of 1999, only Collector or Additional Collector is empowered to pass final order in respect of trees which are standing on land of aboriginal tribe and have been cut – When initially original order passed by SDO was without jurisdiction, Collector wrongly exercised its *suo motu* revisional power u/S 50 of the Code – Impugned order quashed – Writ petition allowed. (Paras 12 to 16)**

ख. आदिम जन जातियों का संरक्षण (वृक्षों में हित) अधिनियम, म.प्र. (1999 का 25), धारा 9 एवं भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 50 व 240 – स्वप्रेरणा से पुनरीक्षण की शक्ति – सक्षम प्राधिकारी – अभिनिर्धारित – एसडीओ ने अंतिम आदेश पारित किया जबकि 1999 के अधिनियम के उपबंधों के अनुसार केवल कलेक्टर या अतिरिक्त कलेक्टर ही आदिम जनजाति की भूमि पर खड़े एवं काटे गये वृक्षों के संबंध में अंतिम आदेश पारित करने के लिए सशक्त है – जब आरंभिक रूप से एसडीओ द्वारा पारित मूल आदेश बिना अधिकारिता के था, कलेक्टर ने संहिता की धारा 50 के अंतर्गत अपनी स्वप्रेरणा से पुनरीक्षण शक्ति का गलत रूप से प्रयोग किया – आक्षेपित आदेश अभिखंडित – रिट याचिका मंजूर।

Vipin Yadav, for the petitioners.
G.P. Singh, G.A. for the respondents/State.

ORDER

SUBODH ABHYANKAR, J. :- The order passed in W.P. No.14965/2016 shall also govern the disposal of W.P. Nos.18136/2016, 18137/2016, 18138/2016 and 18139/2016.

2. This petition has been filed under Article 226 of the Constitution of India against the order dated 5.8.2016 passed by the respondent No.2/Collector, Seoni whereby the respondent No.2 in exercise of powers under Section 9(2) of the Madhya Pradesh Adim Jan Jatiyon Ka Sanrakshan (Vrakshon Mein Hit) Adhiniyam, 1999 (hereinafter referred to as **'the Adhiniyam of 1999'**) has confiscated the entire teak wood.

3. The petitioner's contention is that the invocation of the provisions of the aforesaid Act is without jurisdiction for the reason that the petitioner is the member of the scheduled tribe only and despite the fact that the aforesaid Act has been framed to safeguard the interests of the members of the scheduled tribe community.

4. In brief the facts of the case are that the petitioner owns a land bearing survey no.6/2 ad-measuring 1.96 hectare, Patwari Halka No.12 at Dhuma Tehsil Lakhnadon, District Seoni. The petitioner had chopped off 30 teak wood trees from his land without taking any permission from the competent authority, which led to preparation of a report by the Tehsildar, Lakhnadaun on 30.1.2012. After preparation of the aforesaid report, the Tehsildar has placed the same before the Sub Divisional Officer (Revenue) Lakhnadon, who vide his order dated 9.9.2015 has held that the petitioner has wrongfully fallen 30 teak wood trees hence a fine of Rs.50,000/- has been imposed under Section 253 of the M.P. Land Revenue Code, 1959 (in short **'the Code of 1959'**) and has further directed to confiscate Rs.50,000/- from the value of the teak wood. Subsequently, as submitted by the counsel for the petitioner, on 23.4.2016 a show cause notice was issued to the petitioner by the office of the Collector, Seoni. On 5.8.2016 in exercise of his suo-moto powers under Section 9(2) of the Adhiniyam of 1999 the Collector has passed the order dated 5.8.2016 (Annexure P/3) whereby the entire teak wood of the petitioner has been directed to be confiscated.

5. The petitioner's contention is that the provisions of the aforesaid Adhiniyam of 1999 cannot be made applicable against the petitioner who happens to be a member of the Scheduled Tribe community and had cut the trees legally and the provisions of Section 9 of the Adhiniyam can only be invoked when the members of other community i.e. except Scheduled Tribe enters into the land of Scheduled Tribe community and cut the trees illegally. Apart from that, it is further submitted that the suo-moto initiation of revisional power in respect of order dated 9.9.2015 passed by the Sub Divisional Officer after a lapse of 7 months cannot be exercised especially when against the order passed by the Sub Divisional Officer, an appeal is also provided and in such circumstances, the provisions of Section 50(4) (a) & (c) of the Code of 1959 shall be attracted and hence the Collector has clearly acted without jurisdiction.

6. It is further submitted by the petitioner that the violation of Section 240 of the Code of 1959 cannot be levelled against the petitioner as he has cut the trees from his own land without any permission, hence the power of confiscation is also not available to the authority as the confiscation can only take place when the trees have been cut from the Government land.

7. In their return, the respondents' contentions are that the Collector has rightly taken decision by invoking suo-moto revisional power. It is further submitted that the Sub Divisional Officer has taken the cognizance of the incident and has imposed the fine upon the petitioner and the Collector in his suo-moto revisional power after taking note of Section 241(4) of the Code as also Section 9 of the Adhiniyam of 1999 has passed the order since the Sub Divisional Officer has not gone through the provisions of the aforesaid Sections, hence the Collector had to invoke his suo-moto revisional jurisdiction and was required to pass order under Section 9 of the Adhiniyam of 1999.

8. Heard learned counsel for the parties and perused the record.

9. In the present case, the facts of the case are admitted. The petitioner belongs to a scheduled tribe community and that he was responsible for cutting of the trees from his own land. The only question is whether the provisions of Section 9 of the Adhiniyam of 1999 can be invoked in such situation and whether the Collector has rightly exercised the suo-moto revisional power vested in him under Section 240 of the Code of 1959. For the purpose of properly appreciating the matter, the relevant Sections of the aforesaid

Adhiniyam of 1999 read as under :

> **"3. Protection of Interest of Bhumiswami belonging to Aboriginal Tribes in specified trees on his holding.** (1) No trees of the specified species, standing on the holding of a Bhumiswami belonging to an Aboriginal Tribe shall be cut girdled or pruned except as provided for hereinafter.
>
> (2) xxx xxx xxx
>
> **4. Permission to cut the specified trees.** - (1) Any Bhumiswami belonging to an Aboriginal Tribe, who intends to cut any specified tree standing on his holding shall apply for permission to the Collector, in the prescribed form, giving full and complete reasons thereof, in such manner as may be prescribed.
>
> (2) The Collector shall have the application enquired into in accordance with such rules as may be prescribed and shall not grant or reject the application without considering the report from Tehsildar, the Sub- Divisional Officer (Revenue) and the Divisional Forest Officer having territorial jurisdiction:
>
> Provided that no such permission shall be granted in a case where a period of five years has not elapsed after the date of acquisition of title in the land in any manner, except by succession.
>
> **Explanation.** - The date of acquisition of title shall be the date of certification of mutation under the Code.
>
> (3) The permission to cut the trees in a year shall be restricted only to such number of specified trees as may fetch the Bhumiswami such amount of money, not exceeding rupees fifty thousand in a year as is considered by the Collector to be adequate to meet the purpose specified in the application :
>
> Provided that under special circumstances, the Collector may after due consideration, grant permission in a year for a value not exceeding rupees two lakh or the value of one tree, whichever is higher.

8. Appeal, Revision, Review : - The provisions of Appeal, Revision and Review as in the Code shall also apply to any order passed by the Collector under this Act.

9. Punishment for contravention . - (1) Any person who cuts, girdles, prunes or otherwise damages any specified trees standing on the holding belonging to the Aboriginal Tribes or removes any pat thereof, in contravention of the provisions of this Act or the rules made thereunder, shall on conviction be liable to rigorous imprisonment which may extend to three years and fine which may extend to ten thousand rupees.

(2) Wood of any specified trees constituting the basis of action under sub-section (1) shall be seized and stand forfeited to the State.

Provided that if conspiracy, fraud and deception is played on the Bumiswami, the sale proceeds of the wood, so forfeited shall be given to the extent of fifty per cent to Bhumiswami subject to a maximum limit of Rupees Fifty Thousand under the order of Collector, after disposal of the criminal case.

(3) xxx xxx xxx

10. Offences to be cognizable. - All offences under Section 9 shall be cognizable."

10. So far as the contention of the learned counsel for the petitioner that the petitioner belongs to a scheduled tribe community hence the provisions of the aforesaid Adhiniyam of 1999 cannot be invoked by the authorities is concerned, the same is not tenable in the light of the aforesaid provisions of the Adhiniyam of 1999. Section 4 of the same clearly provides that any Bhumiswami belonging to an Aboriginal Tribe, who intends to cut any specified tree standing on his holding shall apply for permission to the Collector, in the prescribed form, giving full and complete reasons thereof, in such manner as may be prescribed. Thus only on the basis of the language used in Section 9, to say that the provisions of this Adhiniyam of 1999 are not applicable to the Bhumiswami who belongs to an Aboriginal Tribe/Scheduled Tribe cannot be accepted. The Adhiniyam of 1999 not only protects the persons of Aboriginal

Tribe but protect the trees as well and merely if a person belongs to an Aboriginal Tribe would not entitle him to cut the trees standing on his land on his own will as the trees are the Government property and apparently the aforesaid Adhiniyam of 1999 has been enacted with a view to strike a balance between the interest of the aboriginal tribe vis.a.vis. the trees standing on his holding.

11. Coming to the question of invocation of suo-moto revisional powers under Section 50 of the Code of 1959, Section 50(1) reads as under :

> ."**50. Revision.** - (1) the Board may, at any time on its motion or on an application made by any party or the Commissioner or the Settlement Commissioner or the Collector or the Settlement Officer may, at any time on his own motion, all for the record of any case which has been decided or proceedings is which an order has been passed by any Revenue Officer subordinate to it or him and in which no appeal lies thereto, and if it appears that such subordinate Revenue Office, -
>
> (a) has exercised a jurisdiction not vested in him by this code, or
>
> (b) has failed to exercise a jurisdiction so vested, or
>
> (c) has acted in the exercise of his jurisdiction illegally or with material irregularity,
>
> the Board or the Commissioner or the Settlement Commissioner or the Collector or the Settlement Officer, as the case may be, make such order in the case as it or he thinks fit:
>
> Provided that the Board of the Commissioner or the Settlement Commissioner or the Collector or the Settlement Officers shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of the proceeding, except where-
>
> (a) the order, if it had been made in favour of the party applying for revision to the Board, would

have finally disposed of the proceeding,

or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made."

12. A bare perusal of the aforesaid section reveals that this power of revision is indeed available to the Collector but in the considered opinion of this Court the aforesaid Section is not at all applicable in the present case. It is true that the Collector, in the title of his order dated 5.8.2016 has mentioned that it is suo-moto revision but the fact of the matter is that under the Adhiniyam of 1999 it is only the Collector or the Additional Collector who can pass the final order in respect of the trees which are standing on a land of an aboriginal tribe and have been cut.

13. As already mentioned above, the permission to allow a person to cut the trees vests only with the Collector and as per the scheme of the Act, under Section 2(c) the "Collector" means the Collector of the District concerned and includes an Additional Collector of such district who is specially empowered by the State Government by notification to exercise and perform the powers and functions of the Collector under this Act.

14. A perusal of the record reveals that initially an enquiry was conducted by the Naib Tehsildar only who had conducted the enquiry at the instance of the Additional Collector, Seoni. After the enquiry was completed, vide his order dated 25.2.2012 certain directions were issued by the Additional Collector, thereafter the matter was again remanded back to Sub Divisional Officer for its compliance but the Sub Divisional Officer vide his order dated 9.9.2015 has passed the final order which, in the considered opinion of this Court, he had no jurisdiction to pass because as per provisions of the Adhiniyam of 1999 only the Collector or the Additional Collector are empowered to pass order under the provisions of the Adhiniyam of 1999. Thus in the considered opinion of this Court, the Additional Collector could not have relegated the powers vested in the Collector or to the Additional Collector himself to the Sub Divisional Officer. In the circumstances, initially when the original order itself was passed without jurisdiction by the Sub Divisional Officer hence the Collector had wrongly exercised its suo-moto jurisdiction under Section 50 of the Code and if at all the Collector wanted to exercise his jurisdiction then, he should have held that the order passed by the

Sub Divisional Officer is without jurisdiction instead of deciding the matter on merits.

15. Thus, in the considered opinion of this Court, the impugned order dated 5.8.2016 is liable to be quashed though for different reasons as this Court does not find the grounds raised by the learned counsel for the petitioner to be valid grounds but on a close scrutiny of the provisions of the Adhiniyam of 1999 and the Code of 1959 this Court finds that the order passed by the Sub Divisional Officer under the provisions of Adhiniyam of 1999 was wholly without jurisdiction and subsequent revision of the same by the Collector exercising his suo-moto jurisdiction is also untenable and without authority of law.

16. In the result, the writ petition is allowed and the impugned order dated 5.8.2016 is hereby quashed. However, the respondents are at liberty to proceed against the petitioner in accordance with law as provided under the provisions of the Adhiniyam of 1999.

Petition allowed.

I.L.R. [2017] M.P., 2692
APPELLATE CIVIL
Before Mr. Justice V.K. Shukla
S.A. No. 1494/2016 (Jabalpur) decided on 19 June, 2017

BABU LAL ...Appellant
Vs.
SUNIL BAREE & ors. ...Respondents

A. Accommodation Control Act, M.P. (41 of 1961), Sections 12(1)(a), 12(1)(c) & 13(1) – Title of Landlord & Arrears of Rent – Concurrent eviction decree u/S 12(1)(a) & 12(1)(c) **– Held – It is concurrently established that there was relationship of landlord and tenant between parties and appellant was defaulter in payment of regular rent as even after receiving demand notice and committed error u/S 13(1) of the Act – Concurrent findings that appellant by denying title of respondent/plaintiff caused substantial injury to his right and title in suit property – No substantial question of law requiring consideration – Appeal dismissed. (Paras 9, 14 & 16)**

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराएँ 12(1)(ए),

12(1)(सी) व 13(1) – भूमिस्वामी का स्वत्व व भाड़े का बकाया – धारा 12(1)(ए) व 12(1)(सी) के अंतर्गत बेदखली की समवर्ती डिक्री – अभिनिर्धारित – यह समवर्ती रूप से स्थापित किया गया है कि पक्षकारों के मध्य भूमिस्वामी और किरायेदार का संबंध था तथा अपीलार्थी मांग नोटिस प्राप्त करने के पश्चात् भी नियमित भाड़े के भुगतान में व्यतिक्रमी था तथा अधिनियम की धारा 13(1) के अंतर्गत त्रुटि कारित की – समवर्ती निष्कर्ष हैं कि अपीलार्थी ने प्रत्यर्थी/वादी के स्वत्व से इंकार कर वाद संपत्ति में उसके अधिकार एवं स्वत्व को सारवान् क्षति पहुंचाई है – विधि का कोई सारभूत प्रश्न नहीं जिस पर विचार किया जाना अपेक्षित हो – अपील खारिज।

B. Accommodation Control Act, M.P. (41 of 1961), Sections 12(1)(a) & 12(1)(c) – Landlord – **Held – Section 12(1)(a) is not dependent on the provisions of section 12(1)(c) – Further held – For the purpose of Section 12(1)(a), it is not necessary that the landlord has to be owner of property also. (Para 10 &11)**

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराएँ 12(1)(ए) व 12(1)(सी) – भूमिस्वामी – अभिनिर्धारित – धारा 12(1)(ए), धारा 12(1)(सी) के उपबंधों पर निर्भर नहीं है – आगे अभिनिर्धारित – धारा 12(1)(ए) के प्रयोजन हेतु, यह आवश्यक नहीं है कि भूमिस्वामी को संपत्ति का स्वामी भी होना चाहिए।

C. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(a) & 12(1)(c) and Transfer of Property Act (4 of 1882), Section 109 – **Original owner sold the property to respondents (Plaintiff) – For purpose of decree u/S 12(1)(a), appellant being tenant of original owner shall become tenant of transferee by virtue of Section 109 of the Act of 1882. (Para 10)**

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए) व 12(1)(सी) एवं सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 109 – मूल स्वामी ने प्रत्यर्थीगण (वादी) को संपत्ति विक्रय की – धारा 12(1)(ए) के अंतर्गत डिक्री के प्रयोजन हेतु, अपीलार्थी मूल स्वामी का किरायेदार होने के कारण 1882 के अधिनियम की धारा 109 के आधार पर अंतरिती का किरायेदार बन जाएगा।

D. Civil Procedure Code (5 of 1908), Section 100 – Second Appeal – **Held – The Court in exercise of power u/S 100 CPC cannot re-appreciate the evidence even if another view is possible. (Para 13)**

घ. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – अभिनिर्धारित – न्यायालय सि.प्र.सं. की धारा 100 के अंतर्गत शक्ति के प्रयोग में अन्य दृष्टिकोण के संभव होने पर भी साक्ष्य का पुनर्मूल्यांकन नहीं कर सकता।

Cases referred:

AIR 1992 MP 115, (2002) 3 SCC 375, (2000) 4 SCC 380, 1971 JLJ 102, 1996 JLJ 247, 2006 (2) MPLJ 484, (2009) 5 SCC 264, (2011) 7 SCC 189, (2012) 8 SCC 148, (2011) 1 SCC 158, (2012) 7 SCC 288.

Sanjay K. Agrawal, for the appellant.
Amrit Kaur Ruprah, for the respondent on caveat.

ORDER

V.K. Shukla, J. :- The appellant/defendant who is a tenant has directed this appeal under Section 100 of the C.P.C being aggrieved by the judgment and decree dated 01.12.2016 passed by 9th Upper District Judge, Bhopal in Civil Appeal No. 241/2015 whereby the judgment and decree passed by 15th Civil Judge, Class-I, Bhopal in Civil Suit No. 13-A/1973 dated 30.07.2015 decreeing the suit of the respondents for eviction against the appellants on the grounds enumerated under Section 12 (1)(a) and(c) of M.P. Accomodation (sic:Accommodation) Control Act, 1961 (in short "Act") have been affirmed.

2. The facts giving rise to this appeal in short are that a suit for eviction was filed by the original plaintiff Shri Ram Prakash Bairi on 24.12.1968 on the ground that the suit property was purchased by him by registered sale deed on 22.10.1965 from one Usman Khan. The appellant/defendant was admittedly a tenant of Usman Khan. After the purchase of the said property, a notice dated 30.10.1965 was issued to the appellant/defendant but he did not deposit the rent and a notice in this regard was also issued to him but instead of depositing the rent, the appellant disputed the ownership of the original plaintiff. In addition to the grounds under Section 12 (1)(a) and 12 (1)(c) of the Act, the suit was also filed on the grounds under Section 12 (1)(h) or (n), however, the trial Court decreed the suit in favour of the respondent only on the grounds enumerated under Section 12 (1)(a) and 12 (1)(c) of the Act.

3. Challenging the said decree, the appeal was filed which has also been dismissed by affirming the findings recorded by the trial Court on the grounds of Section 12 (1)(a) and 12 (1)(c), on which the appellant/defendant has come forward to this Court in the instant appeal to overturn the concurrent findings of the Courts below. It is relevant to mention here at this stage that the present suit was filed in year 1968 almost about 50 years back. The matter

traveled many times in revision and appeal either before this Court or before lower appellate Court. Finally, by order dated 06.05.2010 passed in Civil Appeal No. 164/2009, the appellate Court set aside exparte judgment and decree dated 04.08.1989 and the suit was remanded and thereafter on 22.06.2010 the suit was again registered and renumbered and finally the impugned judgment and decree of eviction was passed by the trial Court on 30.07.2015.

4. The main plank of submission of the learned counsel for the appellants is that the Courts below have erred while passing the decree on the ground under Section 12 (1)(c) on the ground that the appellant had denied the title of the plaintiff. He further contended that the appellant had every right to deny the land lord's title in the case where the title of the land lord is transferred or devolves upon the third person and therefore he was not estopped from denying title of the plaintiff.

5. It is also submitted that the ground of eviction under Section 12(1)(a) of the Act is dependent on the ground under Section 12(1)(c) and therefore decree of the eviction on the ground under Section 12(1)(a) is also bad in law.

6. In support of his submissions, the learned counsel for the appellants relied on the judgment passed by this Court in the case of *Nirvikar Gupta Vs. Ram Kumar* AIR 1992 MP 115 and the judgment passed by the Apex Court in the case of *Sheela and Ors Vs. Firm Prahlad Rai Prem Prakash,* (2002) 3 SCC 375. He also referred the judgment passed in the case of *Jamnalal and others Vs. Radheshyam* (2000) 4 SCC 380.

7. Having heard learned counsel for the appellants, I have carefully examined the record of both the Courts below and also perused the impugned judgment, it is apparent on the record on appreciation of the evidence led by the parties that the Courts below concurrently held the existence of relationship between them as tenant and land lord and appellant to be defaulter in payment of the regular rent.

8. The trial Court and the lower appellate Court has discussed in para 18 of the impugned judgment and decree appreciating the evidence of original plaintiff Ram Prakash Bairi and Rajkumar Bajaj found that the property in question was purchased by wife of the original plaintiff on 22.10.1965 by registered sale deed from one Usman Khan and the appellant was tenant of

Usman Khan. The relevant paras 18 and 19 of the impugned judgment and decree are reproduced as under :

"18. प्रथमतः यह प्रश्न विनिश्चय के योग्य है कि क्या प्रत्यर्थी/वादी वादग्रस्त स्थान की भवन स्वामी और अपीलार्थी/प्रतिवादी उसका किराएदार है? वाद पत्र में यह अभिवचन किया गया है कि वादी ने वादग्रस्त स्थान उसके पूर्व स्वामी उस्मान खां से पंजीकृत विक्रय पत्र दिनांक 22.10.1965 के द्वारा क्रय किया था और इसकी सूचना प्रतिवादी को दी गयी थी। प्रतिवादी ने लिखित कथन में उक्त अभिवचनों को अस्वीकार किया है किंतु प्रतिवादी ने वादग्रस्त स्थान पर उसके स्वयं के आधिपत्य की प्रकृति और अधिकार के संबंध में कोई अभिवचन नही किए है। वादी साक्षी सुनील बैरी ने इस आशय का कथन किया है कि उसकी मां श्रीमती उषा बैरी (मूल वादी) ने वादग्रस्त स्थान उस्मान खां से क्रय किया था। यह भी कथन किया है कि श्री वल्लभ नामक व्यक्ति ने एक सिविल वाद क्र. 83ए/1997 दिनांक 30.04.1973 को उस्मान खां उषा बैरी सुखनंदन और प्रतिवादी बाबूलाल के विरूद्ध प्रस्तुत किया था जो दिनांक 13.11.1998 को निरस्त किया गया था तथा इसके विरूद्ध श्री वल्लभ की प्रथम अपील क्र.197/1999 माननीय उच्च न्यायालय द्वारा दिनांक 14.09.2010 को निरस्त की गयी थी। विक्रय पत्र दिनांक 22.10.1965 (प्रदर्श पी.8) सिविल वाद क्र. 83 ए/1997 में दिए गए निर्णय एवं डिक्री दिनांक 13.11.1998 की प्रमाणित प्रति (प्रदर्श पी.09 एवं प्रदर्श पी.10) तथा प्रथम अपील क्र. 197/1999 में माननीय उच्च न्यायालय द्वारा पारित आदेश दिनांक 14.09.2010 की प्रमाणित प्रति (प्रदर्श पी.11) प्रस्तुत किए गए हैं। वादी साक्षी सुनील बैरी के प्रतिपरीक्षण में वादग्रस्त स्थान वादी द्वारा उस्मान खां से क्रय किए जाने के कथन को कोई चुनौती नही दी गयी है केवल माननीय उच्च न्यायालय में लंबित प्रथम अपील क्र. 197/1999 को पुनः नंबर पर लिए जाने की कार्यवाही लंबित होने का सुझाव दिया गया है लेकिन उक्त अपील पुनः नंबर पर ली गयी है, इस तथ्य की कोई साक्ष्य अभिलेख पर नही है।

19. वादी साक्षी रामप्रकाश बैरी ने यह कथन किया है कि उसकी पत्नी श्रीमती उषा बैरी ने वादग्रस्त स्थान उस्मान खां से संस्थित विक्रय पत्र दिनांक 22.10.1965 के द्वारा क्रय किया था जिसमें प्रतिवादी 80 रूपये प्रतिमाह की दर से किराएदार है। इसके पूर्व वह उस्मान खां का किराएदार था। यह भी कथन किया है कि क्रय किए जाने के उपरांत प्रतिवादी को इसकी सूचना दी गयी थी लेकिन प्रतिवादी ने सूचना पत्र के उत्तर दिनांक 30.07.1967 में वादी को भवन स्वामी मानने से इंकार कर दिया है। प्रतिवादी को प्रेषित सूचना पत्र दिनांक 29.06.1967 की प्रति (प्रदर्श पी.1), डाक रसीद (प्रदर्श पी.2), प्रतिवादी द्वारा प्रेषित जवाब (प्रदर्श पी.4), सिविल वाद क्र. 78ए/1971 में दिए गए निर्णय एवं डिक्री दिनांक 25.08.1981 की प्रमाणित प्रतियां (प्रदर्श पी.5 एवं प्रदर्श पी.6) प्रस्तुत किए हैं। वादी की ओर से प्रस्तुत साक्षी राजकुमार बजाज ने इस आशय के कथन किए हैं कि वादग्रस्त स्थान

जिस भूखंड का भाग है, उस पर प्रतिवादी किराएदार है तथा भूखंड का कुल क्षेत्रफल 6500 वर्गफिट है जिसके आधे से अधिक भाग पर उसके पिता उस्मान खां के किराएदार थे और वर्ष 1965 से श्रीमती उषा बैरी के किराएदार रहे हैं। उस्मान खां ने उक्त भूखंड श्रीमती उषा बैरी को विक्रय कर दिया था।"

9. Thus, both the Courts held concurrently that the existence of relationship between the original plaintiff and the appellant as tenant and land lord was found to be proved and the appellant was defaulter in payment of regular rent as even after receiving the demand notice, the outstanding rent was neither paid within two months to the respondent nor deposited the same within one month from the service with the trial Court and also committed error in depositing the regular monthly rent in accordance with provisions of Section 13(1) of the Act.

10. On elaborate considerations, the Courts below have concurrently held that the appellant by denying the title of the respondent caused substantial injury to his right and title in the property in dispute. In the present case, it is not denied by the appellant that he was the tenant of the original owner of the property Usman Khan and he also could not bring any evidence that how did he come in the possession of the suit land and continued on the same if he was not tenant of the appellant. By transfer of the property in favor of the original plaintiff by Usman Khan, for the purpose of the decree under Section 12(1)(a), the appellant being tenant of the original owner shall become tenant of the transferee by virtue of the provisions of Section 109 of the Transfer of the Property Act, 1982 (sic:1882) as held by this Court in the case of *Shankar Sahai Vs. Kanmal and another* 1971 JLJ 102. It is also relevant to mention here that for the purpose of Section 12(1)(a), it is not necessary that the land lord has to be owner of the property also.

11. From bare reading the provisions of Section 12(1)(a) and 12(1)(c) of the Act, this Court does not find any force in the contention of the appellant that Section 12(1)(a) is dependent on the provisions of Section 12(1)(c). So far as the case relied by the appellant, *Sheela and Ors Vs. Firm Prahlad Rai Prem Prakash* (supra) is concerned, the same is based and decided on different facts and context. That was a case where the Apex Court was dealing decree for eviction being maintained by the owner-land lord under Section 12 (1)(f) of the M.P. Accommodation Control Act and not under Section 12 (1)(a). Thus, in view of the aforesaid discussion the same would not extend any aid to the appellant in the circumstances of the present case. The other

case laws relied by the counsel for the appellant in the case of *Nirvikar Gupta Vs. Ram Kumar* (supra) would also not apply in the facts of the present case as in the said case, the Court was considering the issue regarding the eviction decree under Section 12(1)(c) only. In the present case, decree is also passed under Section 12 (1)(a) of the Act. The judgment relied in the case of *Jamnalal and others Vs. Radheshyam* (supra) is not an authority on the issue canvassed by the learned counsel for the appellants.

12. The question regarding the relationship of the land lord and tenant the same could not be turned to be question of law rather than substantial question of law as the concurrent findings of the Courts below holding such relationship between the parties being based on appreciation of evidence could not be interfered by this Court at this stage under Section 100 of the C.P.C as laid down by the Apex Court in the case of *Kalyan Singh Vs. Ramswaroop and another* 1996 JLJ 247 and *Machalabai Vs. Nanakram* 2006 (2) MPLJ 484. In the case of *Jamnalal and others Vs. Radheshyam* (supra), the Court held that the findings proved on facts cannot be interfered under Section 100 of the CPC.

13. Even otherwise, it is well settled in law that the jurisdiction of this Court to interfere with the findings of the fact under Section 100 of the C.P.C is limited where the findings is either perverse or based on no evidence. This Court cannot interfere with the findings of the fact until and unless the same is perverse or based on no evidence or contrary to material on record. It is equally settled law that the Court in exercise of power under Section 100 of the C.P.C cannot re-appreciate the evidence even if another view is possible (see- *Narayan Rajendra and Anr. Vs. Lekshmy Sarojini and others* (2009) 5 SCC 264, *Hafazat Hussain Vs. Abdul Majeed and others* (2011) 7 SCC 189, *Union of India Vs. Ibrahim Uddin* (2012) 8 SCC 148, *D.R. Rathna Murthy Vs. Ramappa* (2011) 1 SCC 158 and *Vishwanath Agrawal V. Sarla Vishwanath Agrawal,* (2012) 7 SCC 288).

14. That, so far the other ground canvassed under Section 12 (1)(c) is concerned, it has already been held by this Court that in the present case in view of the facts and findings of the Courts below it is established that there was a relationship of the land lord and tenant between the parties and both the Courts below have concurrently held that the appellant by denying the title of the respondent caused substantial injury to the plaintiffs right and title in the property in dispute.

15. In the present case, this Court has taken note of the fact of the case that the present suit for eviction was filed in year 1968 and for last more than 48 years the LRs of plaintiffs have been contesting the suit after the death of original plaintiff.

16. In view of the aforesaid discussion, I have not found any perversity or informity (sic:infirmity) in appreciation of evidence by the Courts below or any circumstances giving rise to any question of law much less the substantial question of law requiring any consideration at this stage under Section 100 of the C.P.C. Hence, this appeal being devoid of any such question deserves to be and is hereby **dismissed** at the stage of admission. There shall be no order as to costs.

Appeal dismissed.

I.L.R. [2017] M.P., 2699
APPELLATE CIVIL
Before Mr. Justice Anurag Shrivastava
S.A. No. 114/2015 (Jabalpur) decided on 22 September, 2017

RAMAKANT PATHAK ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

A. Land Revenue Code, M.P. (20 of 1959), Section 158(d)(ii) – Bhumiswami Rights – **Held – In revenue records, disputed lands are recorded as "Tank" since 1958 and even before – Plaintiff's witnesses also establishes that disputed land is a "Tank" used for *nistar* purposes by villagers – Plaintiff's father or Plaintiff not entitled the conferral of Bhumiswami rights – Courts below rightly recorded the findings and dismissed the suit – Appeal dismissed. (Para 7 & 16)**

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 158(डी)(ii) – भूमिस्वामी अधिकार – अभिनिर्धारित – राजस्व अभिलेखों में, विवादित भूमियों 1958 से एवं उससे पूर्व भी "जलाशय" के रूप में अभिलिखित – वादी के साक्षीगण भी स्थापित करते हैं कि विवादित भूमि एक "जलाशय" है जिसका ग्रामीणों द्वारा निस्तार के प्रयोजन हेतु उपयोग होता है – वादी का पिता या वादी, भूमिस्वामी अधिकारों का प्रदान किये जाने के लिए हकदार नहीं – निचले न्यायालयों ने उचित रूप से निष्कर्ष अभिलिखित किये तथा वाद खारिज किया – अपील खारिज।

B. Land Revenue Code, M.P. (20 of 1959), Section 117 – Adverse Possession – Presumption – **Held – Adverse possession is a**

question of fact – Plaintiff has not filed any document in support of purchase of land – No sale deed or any witness to sale have been examined – Sale is not proved – Revenue records does not establish continuous possession over 30 years on disputed land – No presumption can be drawn u/S 117 of the Code of 1959. (Para 8)

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 117 – प्रतिकूल कब्जा – उपधारणा – अभिनिर्धारित – प्रतिकूल कब्जा, एक तथ्य का प्रश्न है – वादी ने भूमि के क्रय के समर्थन में कोई दस्तावेज प्रस्तुत नहीं किया है – किसी विक्रय विलेख का या विक्रय के किसी साक्षी का परीक्षण नहीं किया गया – विक्रय सिद्ध नहीं है – राजस्व अभिलेख, विवादित भूमि पर 30 वर्षों से अधिक का निरंतर कब्जा स्थापित नहीं करते – 1959 के संहिता की धारा 117 के अंतर्गत कोई उपधारणा नहीं निकाली जा सकती।

***C. Rewa State Land Revenue and Tenancy Code, 1935, Section 57(4) and Vindhya Pradesh Land Revenue and Tenancy Act, 1953 (3 of 1955), Section 149, 151(2) & (3) – Gairhaqdar Tenant – Patta* – Held – A *gairhaqdar* tenant cannot get *patta* of "Tank" u/S 57(4) of the Code of 1935 – Similarly, right of pattedar tenant shall not accrue or deemed to have accrued in respect of a Tank – Patta of this land cannot be granted u/S 151 of Act of 1953. (Paras 11 to 15)**

ग. रीवां राज्य भू–राजस्व तथा काश्तकारी संहिता, 1935, धारा 57(4) एवं विंध्य प्रदेश भू–राजस्व तथा काश्तकारी अधिनियम, 1953 (1955 का 3), धारा 149, 151(2) व (3) – गैरहकदार काश्तकार – पट्टा – अभिनिर्धारित – एक गैरहकदार काश्तकार को 1935 की संहिता की धारा 57(4) के अंतर्गत "जलाशय" का पट्टा नहीं मिल सकता – समान रूप से, एक "जलाशय" के संबंध में पट्टेदार काश्तकार का अधिकार प्रोद्भूत नहीं होगा या प्रोद्भूत होना समझा नहीं जाएगा – इस भूमि का पट्टा, 1953 के अधिनियम की धारा 151 के अंतर्गत प्रदान नहीं किया जा सकता।

Case referred:

2016 (4) M.P.L.J. 57.

Ashok Kumar Pandey, for the appellant.
P.K. Chourasia, G.A. for the respondent/State.

JUDGMENT

ANURAG SHRIVASTAVA, J. :- This second appeal u/s 100 C.P.C. has

been preferred by the appellant/plaintiff against the judgment and decree dated 16.12.2014, passed by the First Additional District Judge, Maihar, District Satna, in Civil Appeal No.76-A/2014, whereby the judgment and decree dated 18.06.2014, passed by Civil Judge, Class-I, Maihar in Civil Suit No.62-A/2014 has been affirmed and the appeal filed by the plaintiff has been dismissed.

2. The case of the appellant/plaintiff in brief is that the father of plaintiff namely Ramkripal Pathak had purchased the land Kahasra No.518 ad-measuring area 1 Bhigha 13 biswa from Rampal, land Kahasra No.564 measuring area 9 biswa from Chota S/o Rambaksh, land Kahasra Nos.566 and 567 measuring area 28 biswa from Nanda Dhobi on 05.06.1959 for the sale consideration of Rs.90/-, Rs.20/-, Rs.45/- respectively and got possession of the land. Remaining land Kahasra Nos.519 and 566 measuring area 8 bigha 25 biswa was under possession of Ramkripal from the State time. In *Jamabandi Khatoni* of year 1958-59, the aforesaid seller Rampal, Chota and Nanda Dhobi were recorded as *Gair Haqdaar Kashatkar* under class (5) of sub-class (6). Therefore, after coming into force of M.P. Land Revenue Code, 1959, the plaintiff become the Bhuswami under Section 158 of M.P. L.R.C. 1959. It is further pleaded by plaintiff that since 1959 the father of plaintiff Ramkripal and thereafter plaintiff was cultivating and possessing the aforesaid land continuously as owner of the land, therefore, they have perfected their title by virtue of adverse possession. These lands are recorded illegally in the name of M.P. Government without notice or knowledge of the plaintiff. Now, the respondents are trying to dispossess the plaintiff from the disputed land, therefore, after giving notice under Section 80 of C.P.C. plaintiff filed the suit for declaration of title and permanent injunction against the respondents.

3. Respondent/defendant Nos. 1 and 2 remained ex-parte before the trial Court. Respondent No.3 Gram Panchayat Belha in its written statement denied the entire claim of the plaintiff, it is averred that the disputed land is a tank and Government property, the management of the tank is given to Gram Panchayat. The plaintiff's father or plaintiff never remained in possession of the disputed land. The tank is used by general public. Plaintiff has no right or title over the disputed land. The suit of the plaintiff is not maintainable and liable to be dismissed.

4. The trial Court vide judgment dated 18.06.2014 arrived at the conclusion that it is not proved that the plaintiff's father had purchased the

disputed land from Rampal Chota and Nanda Dhobi and got its possession. It is also not found proved that the plaintiff and his father remained continuously in possession of the entire disputed land and have perfected their title by virtue of adverse possession. In view of the aforesaid finding, the trial Court dismissed the suit. In appeal, also learned Appellate Court recorded concurrent findings against the appellant and found that the plaintiff has neither title nor possession over the disputed land and the appeal was dismissed vide judgment and decree dated 16.12.2014.

5. In present Second Appeal, it is contended by learned counsel for the appellant that the factum of the possession of plaintiff's father and plaintiff since 1959 is duly proved by Khasra Panchshala and other oral evidence adduced by the plaintiff. The trial Court and the Appellate Court erroneously ignored the revenue records and other evidence given by the plaintiff and committed illegality. The claim of the plaintiff is mainly based upon adverse possession. Plaintiff was shown in revenue record as *Gair Haqdaar Kashatkar* since 1959, therefore, he would get *Bhumiswami* right automatically as per provision of Section 158 (d)(ii) of M.P. Land Revenue Code, 1959. Thus, the appeal deserves to be allowed and plaintiff's suit ought to be decreed.

6. Heard arguments of learned counsel for the appellant and perused the record.

7. To resolve the controversy we have to see the nature of disputed land as to whether it is "Agricultural land" or "Tank". The revenue record Jamabandi of year 1958-59 (Ex.P/2) shows that kh. no.518 is recorded as a "Tank". Another Khsara of the year 1944-45 (Ex.P/4) records the lands 565 as "Tank", kh.566 and 567 as "Bandhi" (embankment). In the khasara panchshala for the years 1969-70 to 1973-74 (Ex.P/13 and P/14) land kh. no.564, 565, 566 are recorded as Tank and kh. no. 518, 519, and 567 are shown as Paar-Taalab (embankments of tank). The same fact is recorded in khasara panchshala for the years 1974-75 to 1993-94 (Ex. P/15 to P/22). Thus it is evident that in revenue records the disputed lands are recorded as Tank and its embankments since 1958 and even before. The plaintiff's witness Laalman (PW-2) in his statement para 4 has categorically admitted that the disputed land is a tank which is used by all villagers for their Nistaar. Another witness Rajaram Sahu (PW-3) also deposed that the disputed land is known as "Delha Taalab" or 'Bada Taalab'. He is not able to give the Khasra number or area of

land which is being cultivated by plaintiff. Thus the statements of plaintiff's witnesses establishes that the disputed land is a Tank. The embankment of Tank is also the part of Tank. In view of aforesaid, the Courts below have rightly recorded the finding that the disputed land is a Tank.

8. Second question arises for consideration is whether the plaintiff has perfected his title over the disputed land on the basis of adverse possession. This is the question of fact. The Courts below have recorded concurrent findings against the plaintiff. Although, the plaintiff has averred that the disputed land Khasra No.518, 564, 566, 567 were purchased on 05.06.1959 but, he has not filed any document in support of above fact. No sale deed or any witness to the sale have been examined by the plaintiff. Therefore, sale is not proved. The Khasra Panchshala for the year 1969 - 70 to 2010 – 11 (Ex.P/13 to P/23) show that the disputed lands are recorded on the name of M.P. Government. Although, in *Kaifiyat* column of some years the possession of plaintiff's father and plaintiff have been recorded but no presumption of possession under Section 117 of M.P. Land Revenue Code could be drawn on the basis of such entries. Only during the year 1979 – 80 to 1983- 84 Khasra (Ex.P/13) the possession of plaintiff was recorded as per order of Tahsildar. This stray entries of possession for five years only cannot give rise the presumption of possession during the entire period i.e. 1959 to 2010. Thus, the revenue records does not establish the continuous possession of plaintiff over 30 years on the disputed land.

9. As far as oral evidence is concerned the plaintiff's witness Laalman Vishwakarma (PW-2) and Rajaram Sahu (PW-3) admitted that the disputed land is a tank, which is being used by village community for their *Nistar* rights. The possession of plaintiff or his father over disputed tank is not proved. The Courts below has rightly recorded the concurrent findings denying the adverse possession of the plaintiff over the disputed land. The findings of trial Court and learned appellate Court cannot be said as perverse or illegal, the findings are based on proper appreciation of evidence on record. Hon'ble Apex Court in case law *Damodar Lal Vs. Sohan Devi* 2016 (4) M.P.L.J. 57 held as under:-

> *"Concurrent findings of trial Court and first Appellate Court on pure question of fact even if finding of fact is wrong that by itself will not constitute a question of law. Wrong findings should stem out of a complete misreading*

of evidence or it should be based on conjectures and surmises."

10. It is also contended by the learned counsel for the appellant that after purchase of the land the plaintiff's father was recorded as *Gair Haqdaar Kastakar* in the year 1959, therefore, after coming into force of M.P. Land Revenue Code, 1959 he will become Bhumiswami automatically under Section 158 (d)(ii) of the Act. This argument cannot be accepted on following grounds:-

(i) Section 158 of M.P. Land Revenue Code 1959 provides for conferral of Bhumiswami rights to certain class of persons. The relevant Section 158 (1)(d) reads as under:-

158 (1) Every person who at the time of coming into force of this Code, belongs to any of the following classes shall be called a Bhumiswami and shall have all the rights and be subject to all the liabilities conferred or imposed upon a Bhumiswami by or under this Code, namely:-

(a)------

(b)------

(c)---------

(d)-------

(i) Every person in respect of land held by him in the Vindhya Pradesh region as a pachapan paintalis tenant, pattedar tenant, a grove holder or as a holder of tank as defined in the Vindhya Pradesh Land Revenue and Tenancy Act, 1953 (III of 1955)

(ii) Every person in respect of land (other than land which is a grover or tank or which has been acquired or which is required for Government or public purposes) held by him in the Vindhya Pradesh region as a gair haqdar tenant and in respect of which he is entitled to a patta in accordance with the provisions of sub-section 4) of section 57 of the Rewa State Land Revenue and Tenancy Code, 1935.

(iii) every person in respect of land held by him as a

tenant in the Vindhya Pradesh region and in respect of which he is entitled to a patta in accordance with the provisions of sub section (2) and (3) of section 151 of the Vindhya Pradesh Land Revenue and Tenancy Act, 1953 (III of 1955) but has omitted to obtain such patta before the coming into force of this Code.

11. In present case the plaintiff's father was not holder of tank. Whether he is entitled to a patta in accordance with provision of sub section 4 of Section 57 of Rewa State Land Revenue and Tenancy Code 1935 or under provision of sub section 2 and 3 of Section 151 of Vindhya Pradesh Land Revenue and Tenancy Act, 1953 has to be seen.

12. Section 57 (4) of Rewa State Land Revenue and Tenancy Code 1935 (in short Rewa Act) provides as under:-

"(4) A ghairhaqdar tenant who has occupied land other than grove-land, tank, or land acquired or held for a public purpose or a work of public utility, with the consent, express or implied of the Tahsildar or the pawaidar or sub pawaidar, as the case may be shall be entitled to be recorded as a pattedar tenant and to obtain a patta if he agrees to pay rent determined in accordance with the provision of section 83."

13. Thus, it is clear that a ghairhaqdar tenant cannot get patta of tank under Section 57 (4) of Rewa Code.

14. Similarly section 151 (1) of Vindhya Pradesh Land Revenue and Tenancy Act, 1953 (in short V.P. Act) provides that every pachpan – paintalis tenant and every pattadar tenant shall be entitled to be granted a patta. Section 149 of V.P. Code provides that:-

"149. Rights of pattedar tenant not to accrue in certain lands:- Notwithstanding anything contained in the Rewa Land Revenue and Tenancy Code, 1935 or in this Act or any other law for the time being in force the rights of pattedar tenant shall not accrue and shall not be deemed to have accrued in respect of any of the following classes of land; namely:- (i) grove land, (ii) pasture land, (iii) tank,

(iv) State bandh, (v) land acquired or held for a public purpose or a work of public utility. (vi) land situated to place of religion worship which according to local custom is let out from year to year or on lease for a fixed period, (vii) land within the boundaries of the State Government reserve forest or, (viii) land which has been let out under a special lease granted under the provision of this Act."

15. Thus, it is also clear that right of pattedar tenant shall not accrue or deemed to have accrued in respect of land "tank". Therefore, a patta of this land cannot be granted under Section 151 of V.P. Act.

16. In view of aforesaid, it is evident that plaintiff's father or plaintiff are not entitled the conferral of Bhumiswami right on the disputed land under Section 158 (1)(d) of M.P. Land Revenue Code, 1959.

17. Thus, neither the adverse possession of plaintiff is proved over the disputed land neither it is proved that the plaintiff is entitled to get Bhumiswami right over the land. The findings recorded by Courts below are proper and acceptable. Thus, no substantial question arises for consideration in present appeal.

18. Appeal is devoid of merits and is hereby dismissed.

Appeal dismissed.

I.L.R. [2017] M.P., 2706
APPELLATE CRIMINAL

Before Mr. Justice Rajendra Mahajan & Mr. Justice C.V. Sirpurkar
Cr.A. No. 2494/2006 (Jabalpur) decided on 22 June, 2017

RAMNATH ...Appellant
Vs.
STATE OF M.P. ...Respondent

***A. Penal Code (45 of 1860), Section 376 – Conviction – Life Imprisonment – Appreciation of Evidence – Testimony of Prosecutrix – Minor contradictions – Effect* – Held – Rape committed by father on his minor daughter aged about 14 yrs. – Victim carrying fetus of 14-16 weeks – Prosecutrix giving evidence in detail regarding instances of rape does not amount to improvement with regard to FIR and case**

diary statements – Mere extracting out minor contradictions and inconsistencies in cross examination of the prosecutrix is not sufficient to discredit the veracity of her evidence – Trial Court rightly awarded life sentence – Appeal dismissed. (Paras 11, 12, 14, 20 & 25)

क. दण्ड संहिता (1860 का 45), धारा 376 – दोषसिद्धि – आजीवन कारावास – साक्ष्य का मूल्यांकन – अभियोक्त्री का साक्ष्य – गौण विरोधाभास – प्रभाव – अभिनिर्धारित – पिता द्वारा उसकी करीब 14 वर्षीय अप्राप्तवय पुत्री के साथ बलात्संग कारित किया गया – पीड़िता 14–16 सप्ताह का भ्रूण धारण कर रही है – अभियोक्त्री द्वारा बलात्संग के संबंध में विस्तृत साक्ष्य दी जाना, प्रथम सूचना प्रतिवेदन तथा केस डायरी कथनों में सुधार की कोटि में नहीं आता – अभियोक्त्री के प्रतिपरीक्षण में मात्र गौण विरोधाभास एवं असंगतियां निकलवाना, उसके साक्ष्य की सत्यता पर अविश्वास करने के लिए पर्याप्त नहीं है – विचारण न्यायालय ने उचित रूप से आजीवन दण्डादेश प्रदान किया – अपील खारिज।

***B. Penal Code (45 of 1860), Section 376 and Evidence Act (1 of 1872), Section 6 – Hearsay Evidence – Admissibility* – Held – As both prosecution witnesses are close relatives (*mausi and mami*) of prosecutrix and that she lost her mother long back before incident, she confided in them as to the person who was behind her pregnancy – It does not fall under hearsay evidence – In fact and situation, evidence reliable and admissible u/S 6 of the Act of 1872. (Para 16)**

ख. दण्ड संहिता (1860 का 45), धारा 376 एवं साक्ष्य अधिनियम (1872 का 1), धारा 6 – अनुश्रुत साक्ष्य – ग्राह्यता – अभिनिर्धारित – चूंकि दोनों अभियोजन साक्षीगण, अभियोक्त्री के निकट संबंधी (मौसी व मामी) हैं और यह कि घटना से काफी समय पहले उसने अपनी माता को खोया था, उसने विश्वास से उन्हें उस व्यक्ति के बारे में बताया जो उसके गर्भधारण का कारण था – यह अनुश्रुत साक्ष्य के अंतर्गत नहीं आता – इस तथ्य एवं स्थिति में, 1872 के अधिनियम की धारा 6 के अंतर्गत, साक्ष्य, विश्वसनीय एवं ग्राह्य है।

***C. Penal Code (45 of 1860), Section 376 and Criminal Procedure Code, 1973 (2 of 1974), Section 53-A – DNA Profiling* – Held – Provision of Section 53-A Cr.P.C. was inserted w.e.f. 23.06.06 whereas the incident is of 2005, thus it was not mandatory for prosecution to get DNA profiling of prosecutrix, her fetus and appellant to ascertain that appellant was the father of fetus – Non holding of DNA test will not affect the prosecution case adversely. (Para 19)**

ग. दण्ड संहिता (1860 का 45), धारा 376 एवं दण्ड प्रक्रिया संहिता,

1973 (1974 का 2), धारा 53–ए – डीएनए प्रोफाईलिंग – अभिनिर्धारित – धारा 53–ए दं.प्र.सं. का उपबंध, 23.06.2006 से प्रभावी रूप से अंतःस्थापित किया गया था जबकि घटना 2005 की है अतः, यह सुनिश्चित करने के लिए कि अपीलार्थी भ्रूण का पिता था, अभियोजन के लिए अभियोक्त्री, उसके भ्रूण एवं अपीलार्थी के डीएनए प्रोफाईलिंग करवाना आज्ञापक नहीं था – डीएनए परीक्षण न कराया जाना, अभियोजन के प्रकरण को प्रतिकूल रूप से प्रभावित नहीं करेगा।

Cases referred :

Cr.A. No. 1775/2000 decided on 07.05.2009, (2017) 4 S.C.C. 558, (2017) 4 S.C.C. 393, 2009 (1) M.P.L.J. (Cri.) 98, 2013 (1) MPWN 94, 2017 Cr.L.J. 1359, 1991 (3) SCC 471.

Durgesh Gupta, for the appellant.
Y.D. Yadav, P.L. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **RAJENDRA MAHAJAN, J. :-** This appeal is directed against the judgment and order dated 22.11.2006 passed by the Third Additional Sessions Judge (FTC) Katni in Sessions Trial No.14 of 2006, by which the appellant-accused stands convicted under Section 376 of the IPC and sentenced to life imprisonment with a fine of Rs.1000/- (one thousand) in default to suffer further imprisonment for six months.

2. The following are uncontroverted and admitted facts of the case -:

(1) The relation between the appellant and the prosecutrix (PW-3) is the father and the daughter respectively.

(2) At the relevant point of time, the age of the prosecutrix was near-about 14 years.

(3) The prosecutrix's mother had died before the incident in question.

(4) Uma @ Salma (PW-4) and Shakun Bai (PW-5) are Mousi (real sister of the prosecutrix's mother) and Mami (maternal aunt) of the prosecutrix respectively. At the material point of time, they were neighbours in village Bilari.

(5) After the lodgement of the FIR by the prosecutrix, she has been living with Uma.

3. The prosecution case as unfolded at the trial, in brief, is as follows:-

(3.1) On 21.08.2005, the prosecutrix accompanied by Uma and Shakun Bai made an oral report at Police Station Madhav Nagar of Katni town stating that she is a resident of village Bhaiswahi and she does house chores. Her mother had died five years ago. She and her two younger brothers live with her father Ramnath, who is the appellant-accused herein, in village Bhaiswahi. Her father used to commit sexual intercourse with her despite her strong protests. He did not allow her to go outside the house. For the said reason, she did not narrate his perverted sexual acts to any person of her acquaintance. As a result of the cohabitation, she became pregnant and she is at present carrying a fetus aged about four months in her womb. On 21.08.2008, her father brought her to the house of Uma at village Bilari for medical treatment as her health is deteriorating on account of pregnancy. In the absence of her father, she related the matter to her Mousi Uma and Mami Shakun Bai. Upon their suggestion, she has come to lodge the report. Upon her oral report, Sub-Inspector C.K. Tiwari (PW-10) recorded an FIR being Ex.P-3 and registered a case against the appellant under Section 376 IPC at Crime No.0 of 2005 as the place of occurrence village Bhaiswahi falls under the territorial jurisdiction of Police Station Vijayraghavgarh of Katni district.

(3.2) On 22.08.2005, C.K. Tiwari sent the prosecutrix for medico-legal examination to the Government Hospital Katni, where Dr. Sunita Verma (PW-6) examined her and gave a report Ex.P-6 stating that there is a fetus aged about 14 to 16 weeks in the prosecutrix's womb. She also collected smear of her vaginal swab and prepared slides of it for forensic tests.

(3.3) On 22.08.2005, C.K. Tiwari sent the FIR Ex.P-3 and the prosecutrix's medical report Ex.P-6 to Police Station Vijayraghavgarh. On the basis of the FIR, Sub-Inspector Manjeet Singh (PW-11) recorded FIR Ex.P-12 verbatim and registered a case against the appellant at Crime No.150 of 2005.

(3.4) Sub-Inspector Manjeet Singh took over the investigation. He

prepared the site plan Ex.P-4, recorded the case diary statements of the witnesses who are conversant with the incident, and arrested the appellant vide arrest memo Ex.P-15. On 23.08.2005, he sent the appellant for medico-legal examination to the Community Health Center, Vijayraghavgarh, where Dr. R.K. Jharia (PW-2) examined him and gave a report Ex.P-2 stating that the appellant is capable of doing sexual intercourse. He also prepared slides of semen of the appellant.

(3.5) Upon the conclusion of investigation, the police filed a charge-sheet against the appellant for his prosecution under Section 376 IPC.

4. The learned trial Judge framed the charge against the appellant under Section 376 IPC. He pleaded not guilty to the charge and opted to contest the case. In the examination under Section 313 of the Cr.P.C., the appellant denied all the incriminating evidence and circumstances appearing against him in the case except the admitted facts. His defence, simpliciter, was of false implication by the prosecutrix at the instigation of her Mousi Uma. However, he did not adduce any oral or documentary evidence in support of his defence.

5. The learned trial Judge having marshalled, analyzed and evaluated the evidence on record has held the appellant guilty of raping the prosecutrix several times. Having held so, he convicted the appellant under Section 376 IPC and sentenced thereunder as noted in para 1 of this judgment.

6. Feeling aggrieved by and dissatisfied with the impugned judgment, the appellant has filed the appeal before this court.

7. Learned counsel for the appellant after referring extensively to the contents of the FIR Ex.P-3 lodged by the prosecutrix herself, her case diary statement Ex.D-1 and her deposition, submitted that the prosecutrix has improved her court statement on the material points to a great extent. This improvements erode the credibility and trustworthiness of her testimony. She further submitted that as per the provision of Section 53-A Cr.P.C. in the course of investigation, the DNA samples of the prosecutrix, her fetus and the appellant ought to have been taken to get the DNA profiling done to ascertain whether the appellant was biological father of the fetus who was in the womb of the prosecutrix. She further submitted that the compliance of Section 53-A Cr.P.C. is mandatory, therefore, non-compliance of the provision of the Section

supports the defence of the appellant that he had never had sexual intercourse with the prosecutrix and he has been falsely implicated in the case. She further submitted that Dr. Sunita Verma (PW-6) and Dr. R.K. Jharia (PW-2) have deposed that they had prepared slides of smear of the prosecutrix and semen of the appellant respectively for forensic tests, but there is no evidence on record whether the prosecution had sent the slides to the forensic science laboratory for the tests and whether the same sent the report(s) in this respect. Moreover, the evidence of Investigating Officer Manjeet Singh (PW-11) is completely silent on the point. She further submitted that Uma (PW-4) and Shakun Bai (PW-5) have deposed what they were told by the prosecutrix, therefore, they are hearsay witnesses. As such, their testimonies have no evidentiary value. Upon the aforesaid submissions, she submitted that the prosecution has failed to prove its case beyond reasonable doubt. Therefore, the impugned judgment is liable to be set aside.

8. In the alternative, learned counsel for the appellant submitted that the appellant has been in jail in the case since 22.08.2005, the date of his arrest. Thus, the appellant has by now suffered imprisonment of near-about 12 years. The appellant has no previous conviction nor has he criminal antecedents. Upon the aforesaid facts, she prayed that the appellant's jail sentence be reduced to the period he had already undergone. In this respect, she placed reliance upon a decision of this court rendered in Criminal Appeal No.1775 of 2000 titled *Omkar Vs. State of M.P.* the date of judgment 07.05.2009 (oral).

9. Per contra, learned Panel Lawyer submitted that as per the FIR, case diary statement of the prosecutrix and her court statement, the appellant committed rape upon her not once but several times. That is why she has given the evidence in detail as to the place, manner and conduct of the appellant at the time of committing rape by him upon her. As per record, the prosecutrix is of rural background and she is an illiterate girl, therefore, it cannot be expected from her to record the FIR and the case diary statement elaborately on her own. Moreover, the FIR and the case diary statements are not the encyclopedia. Therefore, recording evidence in detail by the prosecutrix does not amount to improvement. He submitted that the provision of Section 53-A Cr.P.C. came into effect w.e.f. 23.06.2006, whereas the incident of the present case was of the year 2005. Therefore, holding of the DNA tests was not mandatory on the part of the prosecution in the case. He further submitted

that the prosecutrix lodged the FIR when she was carrying the pregnancy of near-about four months old. In the circumstances, the forensic examinations of the smear of vagina of the prosecutrix and the semen of the appellant have no bearing upon the case even remotely. On the quantum of sentence, he submitted that the prosecutrix has found solace from her father/the appellant after she had lost her mother at the age of about 10 years. In the circumstances, the sexual exploitation of the prosecutrix by the appellant is the most abominable act. Therefore, the learned trial Judge has rightly awarded the sentence of life imprisonment to the appellant. Upon these submissions, he supported the impugned judgment of conviction and order of sentence and prayed for dismissal of the appeal.

10. We have earnestly considered the rival submissions made across the Bar and perused the entire material before us together with the impugned judgment.

11. Prosecutrix (PW-3) has testified that she had lost her mother near-about five years prior to the incident. She and her two younger brothers lived with her father-appellant in village Bhaiswahi. Near-about a year before the lodgement of the FIR Ex.P-3 by her, the appellant used to come at night after consuming liquor and Ganja. Thereafter, he stripped her naked and undressed himself. He forcibly committed sexual intercourse with her. Whenever, she complained to him regarding pain in her private parts, he applied oil on her thighs. As a result of sexual intercourse, she became pregnant and started vomiting. She had also lost her appetite. Seeing that, he took her to a doctor for treatment. After her clinical examination, the doctor told him that she was carrying pregnancy of about four months. Since he had no money to have her abortion, he approached her Mousi Uma to get money from her on credit. At that time, he told Uma that she had pregnancy with someone and to get her pregnancy terminated, money is required. Uma asked him to keep her present before her. Later, he took her to village Bilari, the native place of Uma. One evening, she and Uma went outside to attend the call of nature. At that time, Uma enquired from her as to how she had become pregnant. Thereupon, she narrated her that it was her father/the appellant who had pregnanted her committing forcibly sexual intercourse upon her several times. Thereafter, she lodged the FIR Ex.P-3 with the police accompanied by Uma and Mami Shakun Bai. We find that the prosecutrix has stated in the FIR and her case diary statement that the appellant used to commit sexual intercourse upon her in

their house, whereas she has stated in her evidence that the appellant ravished her in a hut situated in an agricultural field. In our opinion, this contradiction is of minor nature. We find that the prosecutrix has not given details of the instances of rape in the FIR and her case diary statement. As per record, the proseuctrix (sic:prosecutrix) is of rural background and that she is totally illiterate girl, therefore, it cannot be expected from her to give details of the ordeals she had gone through when she was every time subjected to rape by the appellant on his own unless and until the police officials, who recorded the FIR and the case diary statement of her, asked her in minute details. In this backdrop, in our considered view, giving evidence in detail regarding instances of rape by the prosecutrix does not amount to improvement in her evidence. Our said view is fortified by a decision of the Supreme Court rendered in the case of *M.G. Eshwarappa and others Vs. State of Karnataka* , (2017) 4 S.C.C. 558.

12. We have also found some contradictions and inconsistencies in the contents of the FIR, case diary statement of the prosecutrix and her deposition but they are of very minor nature having no bearing on the case.

13. It is pertinent to mention at this place that in para 15 of the cross-examination of the prosecutrix, the defence has put some suggestions with an objective to elicit evidence from her in their favour to shake the reliability of her evidence. The suggestions are that she had pregnancy with someone else not by her father-appellant, that he had opposed the marriage of her Mousi Uma with a muslim man, as a result the relation between Uma and her father are very much strained, that she had in fact a tumour in her stomach but upon the instigation of Uma she had lodged the false report against her father. The prosecutrix has categorically denied all the aforestated suggestions.

14. In our considered view, where a minor girl has testified that her father raped her at the time when she was in his company, the strong evidence in favour of the father is required to disbelieve her testimony. The underlying premise is that such accusation is in the nature of rarest of rare because no girl would level such charge in normal course against her own father. Mere extracting out some minor contradictions and inconsistencies in the cross-examination of the girl will not be sufficed to discredit the veracity of her evidence. From this point of view, we have perused the evidence appearing in the cross-examination of the prosecutrix and we find that nothing material evidence has come out

to cast a doubt upon the truthfulness of her testimony leaving alone the discarding of it as unreliable.

(emphasis is ours)

15. In view of the preceded close scrutiny of the evidence of the prosecutrix, we hold that the testimony of the prosecutrix inspires full confidence.

16. From the perusal of the depositions of Uma (PW-4) and Shakun Bai (PW-5), we find that they have corroborated the evidence given by the prosecutrix in material particulars except some minor inconsistencies and contradictions here and there. We also find that the defence has failed to elicit in their cross-examination any evidence in their favour to discredit their evidence. As both the witnesses are close relatives of the prosecutrix and that she had lost her mother long back before the incident, therefore, it is natural that she confided in them as to the person who was behind her pregnancy. In this fact situation, we hold that their evidence is admissible in terms of Section 6 of the Evidence Act, after rejecting the contention raised by the learned counsel for the appellant that the evidence of both the witnesses falls under the category of hearsay evidence. We, therefore, hold that their testimonies are reliable and lend full support to the evidence of the prosecutrix.

17. Dr. Sunita Verma (PW-6) has deposed that she had done medico-legal examination of the prosecutrix on 22.08.2005 at the District Hospital Katni. She had found that the prosecutrix was carrying pregnancy of 14 to 16 weeks. In respect she gave report Ex.P-6. She has also deposed that on 13.09.2005, the prosecutrix was brought by one Uma (PW-4) for treatment. At that time, she and her colleague Dr. Anita Singh (not examined) medically examined her and found that she was heavily bleeding with short intervals via her vagina, her uterus was half-opened, her blood pressure was 100-140 and hemoglobin level in blood was 9.4. In the circumstances, the termination of pregnancy of the prosecutrix was necessary to save her life, for which they got permission from the then Civil Surgeon of the Hospital Dr. Baronia (not examined). She has also deposed that upon her advice Dr. Joystana (PW-1) had submitted obstetric sonography report Ex.P-1 of the prosecutrix. On the basis of the report, she terminated the pregnancy of the prosecutrix after admitting her in the hospital. Upon the perusal of the cross-examinations of both the witnesses, we find that nothing has come out to disbelieve their

evidence. Consequently, their evidence is wholly reliable. Thus, it is medically proved that the prosecutrix had pregnancy at the relevant point of time.

18. Dr. R.K. Jharia (PW-2) has testified that on 23.08.2005, he examined the appellant and found him capable of performing sexual intercourse. He has proved his medical report Ex.P-2. In his cross-examination, only one irrelevant question is asked by the defence. On the basis of his evidence we, therefore, hold that the appellant was physically capable of performing sexual intercourse at the material point of time.

19. The provision of Section 53-A Cr.P.C. was inserted in the Cr.P.C. w.e.f. 23.06.2006, whereas the incident of the present case is of the year 2005. Therefore, it was not mandatory for the prosecution to get the DNA profiling of the prosecutrix, her fetus and the appellant to ascertain that the appellant was the father of the fetus. In *Sunil Vs. State of M.P.*, (2017) 4 S.C.C. 393, the Supreme Court has held that the conviction of the accused under Section 376 IPC is also possible on the basis of other available evidence, in case of non-holding of the DNA test or failure to prove DNA test report. In the light of the aforesaid ratio, we hold that non-holding of DNA test will not affect the prosecution case adversely.

20. In the light of the aforesaid close scrutiny of the evidence on record, we hold that the learned trial Judge has rightly held the appellant guilty for sexually exploiting her daughter/the prosecutrix.

21. The next question before us is whether any lenience in sentence is called for?

22. At this stage, it is pertinent to quote first the angst and anguish voiced by the Supreme Court in the case of *Siriya @ Shri Lal Vs. State of M.P.* [2009 (1) M.P.L.J. (Cri.) 98], wherein the father was held guilty for raping her minor daughter by the trial court and this High court.

Para 1 :-

> "There can never be more shocking, depraved and heinous crime than when the father is charged of having raped his own daughter. He not only delicts the law but, it is a betrayal of trust. The father is the fortress and refuge of his daughter in whom the daughter reposes trust to protect her. Charged of raping his own daughter under his refuge and fortress is worse

than the gamekeeper becoming a poacher and treasury guard becoming a robber."

Para 5 :-

"...The father is supposed to protect the dignity and honour of his daughter. This is a fundamental facet of human life. If the protector becomes the violator, the offence assumes a greater degree of vulnerability. The sanctity of father and daughter relationship gets polluted. It becomes an unpardonable act. It is not only a loathsome sin, but also abhorrent..."

On the basis of the aforesaid, the apex court has upheld the life sentence awarded to the accused-appellant by the learned trial Judge and affirmed by this High court, stating that no sympathy or lenience is called for.

23. This court had expressed almost similar sentiments in para 12 of the decision rendered in the case of *Anand Vs.State of M.P.* 2013 (1) MPWN 94. In that case, this court upheld the father guilty of committing rape upon her eight years old daughter and affirmed the life imprisonment awarded by the trial court to him stating that no lenience is given in such type of cases. Recently, the Rajasthan High Court in the case of *Shiv Lal Uka Ji Vs. State of Rajasthan*, 2017 Cr.L.J. 1359 upheld the life imprisonment under Section 376(1) IPC awarded to the accused for having raped her minor daughter.

24. In the case of *Omkar Vs. State of M.P.* (supra) this court has reduced the life imprisonment awarded to the appellant-accused under Section 376 IPC to rigorous imprisonment for 10 years. But the facts of the case are entirely different. Therefore, the ratio of said case is not applicable in the present case.

25. In the case of *Sevaka Perumal etc. Vs. State of Tamil Nadu*, 1991 (3) SCC 471, the Supreme Court had considered the impact of imposition of inadequate sentence and observed as under :-

Para 8 :-

"Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice delivery system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is,

therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

In the light of aforesaid authorities and the facts and circumstances of the present case, we find that the learned trial Judge has rightly awarded life imprisonment to the appellant. Therefore, we reject the prayer for granting lenience in sentence as prayed for by learned counsel for the appellant.

26. For the forgoing reasons and discussions, we arrive at the ultimate conclusion that this appeal is devoid of merits and substance. We, therefore, dismiss this appeal, affirming the conviction and sentence imposed upon the appellant by the learned trial Judge vide the impugned judgment.

Appeal dismissed.

I.L.R. [2017] M.P., 2717
APPELLATE CRIMINAL
Before Mr. Justice Hemant Gupta, Chief Justice &
Mr. Justice C.V. Sirpurkar
Cr.A. No. 1717/2005 (Jabalpur) decided on 13 July, 2017

DESHPAL & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

(Alongwith Cr.R. No. 1769/2005)

***A. Penal Code (45 of 1860), Section 302 & 323 and Arms Act (54 of 1959), Section 25(1-B)(a) & 27 – Murder – Conviction – Private Defence* – Deceased who was unarmed, was chasing the appellant alongwith police personnels, when appellant turned around and fired upon him – Held – Relations between parties were inimical – Prosecution case based on direct evidence, where five eye witnesses were examined – Appellant has no right of private defence against an unarmed person, that too in presence of four armed policemen – Defence also failed to prove that any person from victim's party was armed even with a stick – Appellants rightly convicted – Appeal dismissed. (Paras 11, 21 & 22)**

क. दण्ड संहिता (1860 का 45), धारा 302 व 323 एवं आयुध अधिनियम

(1959 का 54), धारा 25(1–बी)(ए) व 27 – हत्या – दोषसिद्धि – प्राइवेट प्रतिरक्षा – मृतक, जो निःशस्त्र था, पुलिस कर्मियों के साथ अपीलार्थी का पीछा कर रहा था, जब अपीलार्थी मुड़ा और उस पर गोली चलाई – अभिनिर्धारित – पक्षकारों के मध्य वैमनस्यतापूर्ण संबंध थे – अभियोजन प्रकरण प्रत्यक्ष साक्ष्य पर आधारित, जहां पांच चक्षुदर्शी साक्षीगण का परीक्षण किया गया था – अपीलार्थी को एक निःशस्त्र व्यक्ति के विरूद्ध प्राइवेट प्रतिरक्षा का कोई अधिकार नहीं है, वह भी चार सशस्त्र पुलिसकर्मियों की उपस्थिति में – बचाव पक्ष, पीड़ित पक्ष के किसी व्यक्ति का एक छड़ी तक से सुसज्जित होना भी साबित करने में विफल रहा – अपीलार्थीगण उचित रूप से दोषसिद्ध किये गये – अपील खारिज।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 397 & 401 – Revision Against Acquittal – **Held – Appellants alongwith other group members were been chased by policemen and while running, appellant suddenly turned around and fired a shot – In such a situation, other persons cannot be held vicariously liable for such action – No evidence whether other accused persons incited appellant or commended him for shooting the deceased – Trial Court rightly acquitted other accused persons – Revision dismissed.** **(Para 32 & 33)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 व 401 – दोषमुक्ति के विरूद्ध पुनरीक्षण – अभिनिर्धारित – पुलिसकर्मियों द्वारा, समूह के अन्य सदस्यों के साथ–साथ अपीलार्थीगण का पीछा किया जा रहा था तथा भागते हुए अपीलार्थी अचानक पीछे मुड़ा और गोली चलाई – ऐसी परिस्थिति में, अन्य व्यक्तियों को उक्त कृत्य के लिए प्रतिनिधिक रूप से दायी नहीं ठहराया जा सकता – कोई साक्ष्य नहीं है कि अन्य अभियुक्तगण ने अपीलार्थी को उद्दीप्त किया या मृतक को गोली मारने हेतु उसकी सराहना की – विचारण न्यायालय ने अन्य अभियुक्तगण को उचित रूप से दोषमुक्त किया – पुनरीक्षण खारिज।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 397 & 401 – Revision Against Acquittal – Jurisdiction of High Court – Limited Powers – **Held – In revisionary jurisdiction against acquittal, High Court is not supposed to enter into merits of matter and re-appreciate the evidence and substitute one possible view for another – High Court can set aside the order of acquittal even at the instance of private parties, but this jurisdiction should be exercised in exceptional cases – List of such circumstances, enumerated and discussed.** **(Paras 28 to 31, 35 & 36)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 व 401 –

दोषमुक्ति के विरूद्ध पुनरीक्षण – उच्च न्यायालय की अधिकारिता – सीमित शक्तियाँ – अभिनिर्धारित – दोषमुक्ति के विरूद्ध पुनरीक्षण की अधिकारिता में, उच्च न्यायालय द्वारा प्रकरण के गुणदोषों पर विचार करना एवं साक्ष्य का पुनर्मूल्यांकन करना तथा एक संभाव्य दृष्टिकोण को अन्य दृष्टिकोण से प्रतिस्थापित करना अपेक्षित नहीं है – उच्च न्यायालय प्राइवेट पक्षकारों के अनुरोध पर भी दोषमुक्ति का आदेश अपास्त कर सकता है, परन्तु इस अधिकारिता का प्रयोग अपवादिक प्रकरणों में किया जाना चाहिए – ऐसी परिस्थितियों की सूची, प्रगणित एवं विवेचित।

Cases referred :

(1987) 3 SCC 434, (1996) 9 SCC 667, (2006) 9 SCC 531, (2014) 5 SCC 744, (2017) 2 SCC 737, (1951) 1 SCR 284, (1951) SCR 676, (1963) 3 SCR 412, (1968) 2 SCR 287, (1992) 4 SCC 305, (2005) 1 SCC 115, AIR 2008 Supreme Court 1165.

Alok Vagrecha, for the appellant.
Manjeet P.S. Chuckal, P.L. for the State.

J U D G M E N T

The Judgment of the Court was delivered by : **C.V. Sirpurkar, J. :-** Criminal Appeal No.1717/2005 and Criminal Revision No.1769/2005 arose from the same judgment dated 11.08.2005 passed by the Court of Sessions Judge, Panna in Sessions Trial No.133/2001; whereby appellants/accused persons Deshpal and Yashpal were convicted and sentenced as hereunder:

Appellant Deshpal

Conviction	Sentence
U/s 302 I.P.C.	Imprisonment for life, Fine of Rs.2000/- in default, R.I. for one year.
U/s 323 I.P.C.	R.I. for six months.
U/s 25(1-B) (a) of the Indian Arms Act.	R.I.for one year, Fine of Rs.1000/- in default, R. I. For six months.
U/s 27 of the Indian Arms Act.	R. I. for three months, fine of Rs.1000/- in default, R. I. For six months.

Appellant Yashpal @ Bobby

Conviction	Sentence
U/s 25(1-B) (a) of the Indian Arms Act.	R.I. for one year, Fine of Rs.1000/- in default, R. I. For six months.

2. Remaining accused persons/respondents in Criminal Revision No.1769/2005 namely Budh Singh, Dhirendra Singh @ Rajjan Raja, Nagendra Singh, Jammulddin and Munna @ Laxman Singh were acquitted of the offence punishable under Sections 148 and 302 read with section 149 and 323 read with section 149 of the Indian Penal Code. Likewise, accused persons Nokhelal, Ram Singh, Ram Avtar and Ram Narayan were acquitted of the offence punishable under section 302 read with section 120-B of the Indian Penal Code. Since, the Criminal Appeal filed under section 374 (2) of the Code of Criminal Procedure against conviction of appellants Deshpal and Yashpal and Criminal Revision filed by Smt. Sarman Raja, the mother of deceased Bharatendu against acquittal of aforesaid accused persons arose from the same judgment, they were heard analogously and are being disposed of by this common judgment.

3 (a). The case of the prosecution before the trial Court may be summarized as hereunder: Shankar Pratap Singh, father of deceased Bharatendu was Sarpanch of Village Hathkuri from the year, 1983 till the year, 2000. However, he lost elections to Ishwar Singh Upadhyay in the year, 2000. Shankar Pratap Singh lived with his sons at Village-Kumhari; however, he also had a house at Hathkuri. On 08.04.2001, a meeting of the Gram Sabha was to be held at Village -Hathkuri for constitution of different committees. In this connection, Shankar Pratap Singh (PW-14) and his son deceased Bharatendu, Gajendra Pratap Singh (PW- 16) and relatives Mahendra Singh (PW-19), Jahendra Singh and Devendra Singh had gone to Hathkuri. They saw that their rivals Deshpal Singh armed with a country made muzzle loading pellets gun, Yaspal Singh armed with a 12 bore single barrel gun and Jamaluddin armed with an axe, were standing in front of Shankar Pratap Singh's house at Hathkuri. They were accompanied by accused persons Ramnarayan, Ram Singh, Nokhelal, Munna, Ramavtar and Ishwardeen Upadhyay, who has since expired. They started abusing Shankar Pratap Singh. They were saying that if he attended the meeting of Gram Sabha, they would kill him and he would not be able to go back unscathed that day; whereon, Shankar Pratap Singh asked his son

Gajendra Singh to go to Pawai on motorcycle and inform his brother Surendra Singh that there were chances of breach of peace at Hathkuri. Therefore, Surendra Singh should go to Hathkuri with police. Accordingly, Gajendra Singh went to Pawai and informed Surendra Singh, who gave a written application to the S.H.O., P.S.-Pawai, Town Inspector, Mohan Singh Patel (PW-23); whereon, Mohan Singh Patel and four other policemen, Surendra Singh and Gajendra Singh left for Hathkuri in a Jeep. Meanwhile, Shankar Pratap Singh, having waited for police to arrive for a long time, left for Kumhari at about 03:30 p.m. on a tractor along with his son deceased Bharatendu. They reached Kumhari at about 04:00 p.m. and parked their tractor in front of Bhagwat Singh's house. Meanwhile, the police party in Jeep reached Range T-point, where they met Ram Pratap Singh. Surendra Singh told Ram Pratap Singh (PW-10) to go to Kumhari as they were proceeding to Hathkuri. Meanwhile, Devendra Tiwari, Omprakash, Sunil Tiwari and Chunnu Raja @ Ram Pratap Singh arrived at Kumhari. Aforesaid persons accompanied by Bharatendu left for Shankar Pratap Singh's house while he stayed back for checking his tractor. The police party proceeded to Hathkuri. Near village Hathkuri, they met Kaushlendra, who told them that Shankar Pratap Singh and Bharatendu had left for Kumhari on a tractor about 20-25 minutes ago. He also told them that Deshpal, Yashpal and Jamaluddin armed with guns, had gone behind Shankar Pratap Singh and Bharatendu on another tractor; therefore, the police party accompanied by Surendra Singh left for Kumhari. Near Nagendra Singh's house, they found that Deshpal armed with a country made gun and Yashpal armed with 12 bore gun and Jamaluddin armed with an axe and Nagendra Singh, Budh Singh and Rajjan Raja armed with *farsas* were standing. The police party alighted from the Jeep and ran behind them. Surendra Singh and Gajendra Singh were also with the police party, chasing the aforesaid persons. T.I. Mohan Singh chased them in his Jeep. At the same time, Ram Pratap Singh @ Chunnu Raja, Devendra Tiwari (PW-21), Sunil Tiwari (PW-18) and Omprakash (PW-13) arrived on motorcycles at Bhagwat Singh's door. They also parked their motorcycles and proceeded towards the temple along with Bharatendu. When they reached the square, they saw Deshpal, Yashpal, Jamaluddin, Nagendra Singh, Budh Singh, Rajjan Raja armed as stated above running towards them. Aforesaid accused persons were being chased by the police, Surendra Singh and Gajendra Singh. Bharatendu ran fast and proceeded ahead of everyone and reached near accused persons. In front of Munna Dheemar's house, Deshpal fired with his

gun. As a result, Bharatendu and Beni Bai suffered gun-shot injuries. Bharatendu fell down and accused persons escaped from the spot and fled towards the drain situated outside the Village. Devendra Tiwari, Sunil Tiwari, Om Prakash Pathak, Chunnu Raja, Surendra Singh and Gajendra Singh reached Bharatendu. The policemen chased accused persons. Bharatendu told aforesaid persons that Deshpal had fired upon him and he was accompanied by accused persons Nagendra Singh, Budh Singh, Yashpal @ Bobby Raja and Jamaluddin. Thereafter, Bharatendu expired on the spot. Surendra Singh gave a written report to the police (Ex.P/4) at Kumhari; whereon, first information report (Ex.P/6) was recorded.

(b). In the post-mortem examination, pellets were taken out of the dead body of deceased Bharatendu. It was found that his heart and lungs had been pierced by pellets. Beni Bai had also suffered gun-shot injuries. Pellets were taken out of her body. During investigation, at the instance of accused Deshpal, a country made gun was recovered. Likewise, on the disclosure statement made by accused Yashpal, a 12 bore gun was seized. At the instance of accused Jamaluddin, an axe was seized. Aforesaid weapons were sent to FSL for examination. After obtaining sanction from District Magistrate, Panna under section 39 of the Arms Act, charge sheet was filed.

4. The trial Court framed a charge under sections 148, 302 and 323 of the Indian Penal Code and 25 and 27 of the Arms Act against accused Deshpal Singh, a charge under sections 148 and 302 read with section 149 and 323 read with section 149 of the Indian Penal Code against accused persons Budh Singh, Dhirendra Singh @ Rajjan Raja, Nagendra Singh, Jamaluddin and Munna @ Laxman Singh, under sections 25 & 27 of the Arms Act against accused Yashpal Singh @ Bobby Raja and under section 302 read with section 120-B of the Indian Penal Code against accused persons Nokhelal, Ram Singh, Ramavtar and Ramnarayan.

5. After the trial, the trial Court recorded the findings to the effect that:

(I) the prosecution had succeeded in proving beyond reasonable doubt that:

(a) appellant/accused Deshpal Singh had committed murder of deceased Bharatendu and had intentionally caused simple injuries to Beni Bai (PW-8) by firing a gun shot with a muzzled loaded gun;

(b) accused/appellant Yashpal Singh @ Boby had in his possession an unlicensed 12 bore gun;

(II) the prosecution had failed to prove beyond reasonable doubt that:

(a) the appellant/accused Deshpal was the member of an unlawful assembly;

(b) Budh Singh, Dhirendra Singh @ Rajjan Raja, Nagendra Singh, Yashpal Singh, Jamaluddin and Munna @ Laxman Singh had constituted an unlawful assembly along with appellant Deshpal and committed murder of Bharatendu and caused simple injuries to Beni Bai in prosecution of common object of any such unlawful assembly;

(c) accused persons Nokhelal, Ram Singh, Ramavtar and Ramnarayan had entered into a conspiracy to commit murder of Bharatendu;

6. It appears from the Court order dated 27.09.2006 passed in this criminal appeal that appellant no.2 Yashpal Singh was directed to be released from jail as he had already undergone the entire sentence imposed upon him. No arguments have been advanced on behalf of the appellant no. 2 Yashpal Singh before us.

7. Shri Alok Vagrecha, learned counsel for the appellant Deshpal Singh has challenged the conviction and sentence of appellant Deshpal as stated above mainly on the ground that the trial Court has held in as many words that at the time of the incident, appellant Deshpal was running along with co-accused persons Nokhelal, Budh Singh, Raju @ Omprakash, Yashpal and Jamaluddin. They were being followed by Bharartendu, Surendra Pratap Singh, Gajendra Pratap Singh, Ram Pratap Singh, Sunil, Devendra, Om Prakash and at least three police men, who were armed with 303 rifles. Bharatendu was running some distance ahead of other persons in the group. At that time, Deshpal turned around and fired a shot upon Bharatendu from a distance of about 10-12 feet causing his death and injuring Beni Bai. In this backdrop, learned counsel for the appellant Deshpal has invited attention of the Court to the statements made in examination-in-chief (paragraph no.2) by Sunil Tiwari (PW-18), who has stated that when he had reached Hathkuri, he was told that the deceased Bharatendu and his father Shankar Pratap Singh had gone behind Deshpal Singh. He has also admitted in his cross-examination (paragraph no.7) that, if Bharatendu and Shankar Pratap Singh had not gone behind Deshpal,

Bharatendu would not have been killed. On the basis of aforesaid admissions, it has been argued that the police was under the influence of the victim's party. Admittedly, Shankar Pratap Singh, father of Bharatendu, had sent Gajendra Pratap Singh (PW-16) to Pawai to inform Shankar Pratap's brother Surendra Pratap Singh (PW-24) that there was apprehension of breach of peace at Hathkuri; therefore, Shankar Pratap Singh should seek police help and bring police force to Hathkuri so as to avoid any untoward incident during the meeting of Gram Sabha at Hathkuri. It has further been argued that when Deshpal saw that he was being persuaded by the members of the victim's party accompanied by armed police men, he assumed that the police was under the influence of victim's party and if the victim's party managed to catch hold of him, he would be killed. Bharatendu was in the forefront of the victim's party; therefore, when there was a distance of about 10-12 feet left between Deshpal and Bharatendu, he turned around and fired a solitary shot upon Bharatendu, killing him on the spot and injuring Beni Bai. Thus, even if it is assumed for the sake of arguments that the prosecution case is worthy of credence, it can be assumed that the appellant Deshpal fired the shot in self defence and at worst, he can be said to have exceeded his right of private defence; therefore, his act would not fall under the category of culpable homicide amounting to murder but culpable homicide not amounting to murder. Hence, if appellant Deshpal is not acquitted, he is liable to be convicted only under Sections 304 (part-I) of the IPC; therefore, his sentence is liable to be converted to the period already undergone. In support of his contention, learned counsel for the appellant has placed reliance upon the judgments rendered by the Supreme Court in the cases of *State of U.P. Vs. Niyamat and Others*, (1987) 3 SCC 434, *Harish Kumar & Another Vs. State of M.P.*, (1996) 9 SCC 667, *Surendra Singh Alias Bittu Vs. State of Uttaranchal* (2006) 9 SCC 531, *State of Rajasthan Vs. Manoj Kumar*, (2014) 5 SCC 744 and *Suresh Singal Vs. State (Delhi Administration)*, (2017) 2 SCC 737.

8. On the other hand, Smt. Sarman Raja, mother of the deceased Bharatendu has preferred a criminal revision being Cr.R.No.1769/2005 against the acquittal of accused persons Budh Singh, Dhirendra Singh, Nagendra Singh, Jamaluddin, Nokhelal, Ramsingh, Ramavtar, Munna and Ramnarayan as also Yashpal. However, no one appeared on behalf of the revision petitioner to put forth arguments in support of the revision petition.

9. Learned panel lawyer for the respondent State on the other hand, has

supported the impugned judgment.

10. On perusal of the record of the trial Court and due consideration of the rival contentions, this Court is of the view that both the criminal appeal as well as criminal revision must fail for the reasons hereinafter stated:

11. The prosecution case against the appellant Deshpal is based upon the direct evidence. The prosecution has examined five eye witnesses namely Ram Pratap Singh (PW-10), Raju @ Om Prakash (PW-13), Gajendra Pratap Singh (PW-16), Sunil Tiwari (PW-18) and Surendra Pratap Singh (PW-24). In addition thereto, Shankar Pratap Singh (PW-14), father of the deceased Bharatendu, who was witness to prelude to the murder but did not actually witnessed the shot being fired, have also been examined. Likewise, T.I., Mohan Singh Patel, (PW-23) who had gone to Village-Kumhari along with Surendra Pratap Singh and Gajendra Pratap Singh, who had not witnessed the murder, has also been examined. In addition thereto, the prosecution has examined Dr. Munnilal Choudhari (PW-1), who had conducted the post-mortem examination upon the dead body of the deceased Bharatendu and medico-legal examination upon injured Beni Bai (PW-8) has also been examined. Devendra Singh (PW-20) and Devendra Kumar Tiwari (PW-21), Jahendra Singh (PW-25) alleged eye witnesses, have turned hostile and did not support the prosecution case. Defence examined defence witnesses namely Vishnu (DW-1), Jagat Singh (DW-2), Raju Sharma (DW-3), Jitendra Singh (DW-4), Gudda (DW-5), Kamlesh Pathak (DW-6) and Bhagwat Deen (DW-7). Most of them are on the plea of alibi.

12. The gist of the prosecution evidence relied upon by the trial Court is that Shankar Pratap Singh (PW-14), father of the deceased Bharatendu lived in Village- Kumhari with his sons deceased Bharatendu and Gajendra Pratap Singh. Mahendra Singh, Jahendra Singh and Devendra Singh are his relatives and Ram Pratap Singh (PW-10) and Surendra Pratap Singh (PW- 24) are his brothers. Shankar Pratap Singh was Sarpanch of Gram Panchayat, Hathkuri, which is a village situated at a distance of about 5 kms. from Kumhari, from the year, 1983 to the year, 2000. However, in the year, 2000, he had lost the election of Sarpanch to accused Ishwar Deen Upadhyay, who had died during the trial. Shankar Pratap Singh also had a house at Village-Kumhari. Victim's party belonged to the group of Shankar Pratap Singh and the accused party belonged to the group of Ishwar Deen Upadhyay. There was no love lost between the two parties.

13. The prosecution witnesses have stated that on 08.04.2001, there was a meeting of Gram Sabha at Hathkuri to elect the Treasurer and other office bearers of Gram Sabha at Hathkuri. In the morning, Shankar Pratap Singh accompanied by his sons Bharatendu Singh and Gajendra Pratap Singh and relatives Mahendra Singh, Jahendra Singh and Devendra Singh had gone to Village-Hathkuri and at about 11:00 a.m., was at his house at Hathkuri. Accused persons Deshpal Singh armed with an unlicensed muzzle loading gun, Yashpal armed with a 12 bore gun, Jamaluddin armed with an axe, were also present there. They were accompanied by Ram Singh, Nokhelal, Ramnarayan, Munna, Ramavtar and Ishwar Deen. The trial Court did not rely upon the statements of Gajendra Pratap Singh (PW-16) that the accused persons abused them and threatened that if they attended the meeting of Gram Sabha, they would kill them in the same manner they had killed Hakke Raja. Accused persons also threatened that Deshpal, Yashpal and Jahendra have been specifically called to kill them. Accused persons Ram Singh and Ramnarayan also stated that if they went to the meeting of Gam (sic:Gram) Sabha, they would not be allowed to return alive. The Court also did not believe the statements of Shankar Pratap Singh (PW-14) to the effect that accused persons had abused him and had said that if they went to the meeting of Gram Sabha, they would kill them.

14. After due analysis of the evidence, the trial Court has held that there was a meeting of Gram Sabha on 08.04.2001 at Kumhari and both the parties were present in strength to attend that meeting. Shankar Pratap Singh (PW-14) apprehended breach of peace; therefore, he sent his son Gajendra Pratap Singh (PW-16, to inform Surendra Pratap Singh (PW-24) and seek help of the police. The trial Court observed that if the accused persons intended to harm the victim's party at Hathkuri, they had ample opportunity to do so but no untoward incident occurred at Hathkuri.

15. The trial Court further held on the basis of prosecution evidence that on instructions of Shankar Pratap Singh, Gajendra Pratap Singh had gone to Pawai and had informed Surendra Pratap Singh regarding situation at Hathkuri and requested him to take help of the police. Accordingly, Surendra Pratap Singh met T.I., Mohan Singh Patel, S.H.O., Pawai (PW-23) and gave him a detailed written application (Ex.P/14) seeking his help to avoid breach of peace during the Gram Sabha meeting at Hathkuri. At the instance of Surendra Pratap Singh, T.I. Mohan Singh, (PW-23) accompanied by a posse of 4 police men armed with 303 rifles, left in a Jeep for Hathkuri along with Surendra

Pratap Singh and Gajendra Pratap Singh.

16. The trial Court held that on their way to Hathkuri, the party in Jeep met Ram Pratap Singh (PW-10), another brother of Surendra Pratap Singh a Pawai T-Point. Surendra Pratap Singh told Ram Pratap Singh that he was going to Hathkuri because there was some quarrel there. He instructed Ram Pratap Singh (PW-10) to return to Kumhari. Accordingly, Ram Pratap Singh (PW-10) took Devendra Kumar Tiwari (PW-21), Raju @ Omprakash (PW-13) and Sunil Tiwari (PW-18) and proceeded to Village Kumhari on two motorcycles. At Kumhari, they parked their motorcycles in front of Mahendra Singh's house.

17. Meanwhile, after Gajendra Pratap Singh (PW-16) left Hathkuri for pawai, Shankar Pratap Singh and Bharatendu waited for Gajendra Pratap Singh to arrive with police. However, since the meeting of Gram Sabha did not take place because those entrusted with conducting the meeting failed to arrive, Shankar Pratap Singh and Bharatendu left for Kumhari on a tractor. Deshpal Singh and Yashpal Singh also left for Kumhari on another tractor either before or after Shankar Pratap Singh and Bharatendu.

18. In the meantime, the police party in Jeep proceeded towards Hathkuri. When they reached outskirts of Hathkuri, Kaushlendra Singh, nephew of Surendra Pratap Singh told him that Shankar Pratap Singh and Bharatendu had gone towards Kumhari on the tractor about 20-25 minutes ago and they were followed in another tractor by Deshpal Singh, Yashpal Singh and Jamaluddin; therefore, they turned their Jeep and proceeded towards Kumhari.

19. The trial Court also held that it is clear that the victim's party reached Village-Kumhari in three different groups:

(i) the first group comprised Shankar Pratap Singh and Bharatendu, who reached Kumhari on tractor;

(ii) the second group comprised Ram Pratap Singh (PW-10), Raju @ Om Prakash (PW-13), Sunil Tiwari (PW-18) and Devendra Kumar Tiwari (PW-21), who reached Kumhari on two motorcycles;

(iii) the third group comprised Surendra Pratap Singh (PW-24), Gajendra Pratap Singh (PW-16) and T.I. Mohan Singh Patel (PW-23) and four policemen including one Head-Constable and three Constables. Bharatendu stopped his tractor in front of Bhagwat Singh's door. At that time, Surendra

Pratap Singh's younger brother Chunnu Raja @ Ram Pratap Singh (PW-10), Devendra Kumar Tiwari, Sunil Tiwari, Omprakash also arrived at Bhagwat's door and parked their motorcycles. The party in Jeep reached Nagendra Singh's house, they saw that the tractor was standing there and accused persons Deshpal, Yashpal and Jamaluddin were sitting in that tractor and accused persons Nagendra Singh, Budh Singh and Rajjan Raja were standing there armed with *farsa*. The police stopped the vehicle. The police personnel, Surendra Pratap Singh and Gajendra Pratap Singh alighted from the vehicle and proceeded toward those persons. When accused persons saw the policemen, they ran. Meanwhile, T.I., who was still in the Jeep followed them by the side track used by bullock-carts. Meantime, Ram Pratap Singh, Devendra Tiwari, Sunil Tiwari and Omprakash, who had arrived at Bhagwat Singh's door on two motorcycles and Bharatendu proceeded towards Bharatendu's house. As soon as, this party reached the square near Temple, they saw Deshpal Singh etc., in all six persons followed by four policemen, Gajendra Singh and Surendra Pratap Singh. Bharatendu Singh out run others and reached near the six accused persons. Near Munna Dhheemar's house, Deshpal Singh turned around and fired a shot with the muzzled loading gun upon Bharatendu. As a result, Bharatendu fell down. Beni Bai had also suffered pellets injuries from the fire. Gajendra Singh, Ram Pratap Singh, Sunil, Devendra Singh and Omprakash reached Bharatendu. Gajendra took deceased Bharatendu in his lap. In a short while, Bharatendu died.

20. Now the question that arises for consideration is whether in the aforesaid circumstances, appellant Deshpal had any right of private defence of person and if yes, whether he exceeded that right by firing a shot upon Bharatendu.

21. It is true that the relations between the victim's party and the accused party were inimical. It is also true that at the time, appellant Deshpal, who fired the shot and his companions were on the run. They were being followed by Bharatendu Singh, Ram Pratap Singh, Devendra Kumar Tiwari, Sunil Tiwari, Omprakash, Surendra Pratap Singh and Gajendra Singh with four policemen, who were armed with 303 rifles. When Bharatendu reached within 10 or 12 feet of appellant Deshpal Singh, he turned around and fired the fatal shot. It is also true that he fired only one shot.

22. However, the Court cannot lose sight of the fact that when Shankar Pratap Singh, father of the deceased Bharatendu Singh sensed that the

atmosphere before the meeting at Hathkuri was tense, he sought help of the police. Though, it has been suggested to the prosecution witnesses that Surendra Pratap Singh took the police under his influence and paid for transportation of policemen by Jeep, none of the prosecution witnesses have accepted this suggestion; therefore, there is no ground for presuming that the policemen were under the influence of victim's party and were in fact acting as their henchmen. On seeing the police party, the appellant and his companions ran away. The most probable reason for the appellant and his companions to run away from the police could be that Deshpal and Yashpal were armed with unlicensed weapons. In these circumstances, it was the duty of the policemen to arrest Deshpal and Yashpal. It was incumbent upon appellants Deshpal and Yashpal to have allowed the police to apprehend them. When as many as four policemen were at hand to take recourse to the remedy provided by law, there could have been no right of private defence in favour of the appellant Deshpal, even if the policemen were accompanied by his rivals. It may further be noted that Bharatendu Singh was at a distance of about 10-12 feet, when Deshpal turned around and fired upon him. Though, suggestions have been given to the prosecution witnesses to the effect that the victim's party was also armed but these were stray suggestions, which were emphatically denied by the prosecution witnesses. The defence was not able to prove that any persons from the victim's party was armed even with a stick. In such circumstances, the arguments of learned counsel for the appellant to the effect that the appellant had right of private defence against an unarmed person, that too in the presence of as many as four armed policemen, is not acceptable. Even if the appellant believed that the policemen had been won over by the victim's party and in fact were following him and his companions in order to eliminate them, such apprehension was totally unfounded. The right of private defence arises on the basis of reasonable apprehension and not on the basis of unfounded conjectures and surmises. Thus, in the opinion of this Court, no right of private defence arose in favour of the appellant Deshpal at the time of the incident; yet, he intentionally fired a shot upon the deceased Bharatendu. Though, a single shot was fired but this fact cannot be ignored that it was fired from a muzzled loading gun with pellets, from a distance of not more than 10-12 feet; therefore, the probability of causing death by such a shot, was almost certain. Keeping in view the previous history of animosity between the appellant and the deceased, only reasonable conclusion that can be drawn in such circumstances is that the appellant had intention to kill the deceased.

23.. It may be noted here that the authorities cited by the learned counsel for the appellant are distinguishable on facts. In the case of *State of U.P. Vs. Niyamat and others* (supra), the right of private defence in favour of the respondents arose because the policemen were trying to effect an unlawful arrest. No such condition exists in the present case. In the case of *Harish Kumar & Another* (supra), the right of private defence is said to have arisen in the peculiar facts and circumstances of that case, which are not applicable to the present case. In the case of *Surendra Singh Alias Bittu* (supra), there was no police available at hand to take recourse to the machinery of law. The case of *State of Rajasthan Vs. Manoj Kumar* (supra), it is on different point altogether, which is not involved in this case. In the case of *Suresh Singhal* (supra), it has been held that a mere reasonable apprehension is enough to put the right of self defence into operation and it is not necessary that there should be an actual commission of offence in order to give rise to private defence. In the case at hand, apprehension, if any, in the mind of appellant was not a reasonable apprehension and was based merely upon conjectures and surmises, without any foundation. In aforesaid circumstances, the authorities cited on behalf of the appellant does not help him in any manner.

24. In aforesaid circumstances, the trial Court was justified in holding that the appellant Deshpal had fired a shot upon the deceased Bharatendu with a muzzled loading gun with the intention to cause his death; therefore, the conviction of the appellant Deshpal under Section 302 of the IPC is not liable to be interfered with.

25. So far as the appellant Yashpal is concerned, all eye witnesses namely Rampratap Singh (PW-10), Raju @ Om Prakash (PW-13), Gajendra Pratap Singh (PW-16), Sunil Tiwari (PW-18) and Surendra Pratap Singh (PW-24) have stated that he was going along with the appellant and other co-accused persons armed with a 12 bore gun at the time of the incident. The same was seized on the disclosure statements made by him under Section 27 of the Evidence Act. He failed to produce any license for the same; therefore, his conviction under Sections 25 (1-B) (a) of the Arms Act is also well founded and no interference therewith is warranted.

26. Now the question that arises for consideration is whether the acquittal of other accused persons as stated above, call for interference by this Court. Before adverting to the facts of this case, it would be appropriate to take a look at the legal position in this regard.

27. On consideration of the authoritative pronouncement made by the Apex Court in the cases of *D. Stephens Vs. Nosibolla,* (1951) 1 SCR 284, *Logendranath Jha And Others Vs. Polai Lal Biswas,* (1951) SCR 676, K. *Chinaswamy Reddy Vs. State of Andhra Pradesh,* (1963) 3 SCR 412, *Mahendra Pratap Vs. Sanju Singh And Another* (1968) 2 SCR 287, *Janta Dal Vs. H.S. Choudhary,* (1992) 4 SCC 305, *Satyajeet Banerjee Vs. State of West Bengal,* (2005) 1 SCC 115 and *Johar Vs. Mangal Prasad,* AIR 2008 Supreme Court 1165 following principles with regard to scope and ambit of powers of the High Court while adjudicating a criminal revision preferred by aggrieved person against a judgment of acquittal, may be culled out.

28. It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal; but this jurisdiction should be exercised by the High Court only in exceptional cases. The High Court while exercising its revisional jurisdiction under Sections 397 and 401 of the Code of Criminal Procedure, exercises a limited power. Its jurisdiction to entertain a revision application, although is not barred but is severally restricted, particularly when it arises from a judgment of acquittal. Nothing in section 401 is deemed to authorize a High Court to convert a finding of acquittal into one of conviction. So the High Court, at best, can set aside the judgment of acquittal and order a retrial. Sub-section (1) of S. 401 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High Court to set aside a finding of acquittal in revision. The High Court has to be alive to the fact that by ordering a retrial, the dice is heavily loaded against the accused because however much the High Court may caution the Subordinate Court, it is always difficult to re-weigh the evidence ignoring the opinion of the High Court. Thus, it is only in exceptional cases that this power should be exercised.

29. The High Court may exercise powers in exceptional cases:

(1) where the interests of public justice requires interference for the correction of a manifest illegality for the prevention of gross miscarriage of justice;

(2) where there is some glaring defect in the procedure, like want of jurisdiction or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice.

(3) to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment.

(4) where the Court had shut out some material evidence which was admissible or any relevant evidence has been overlooked or where the Court attempted to take into account evidence which was not admissible, leading to gross and flagrant miscarriage of justice.

30. The High Court may not exercise the power:

(1) where it is required to enter into merits of the matter by analyzing the depositions of witnesses examined on behalf of the prosecution and reappreciate the whole evidence for substituting one possible view by another;

(2) by merely characterizing the judgment of the trial court as "perverse" and "lacking in perspective, without assigning reasons therefor;

(3) simply because the lower court has taken a wrong view of the law without causing flagrant miscarriage of justice;

(4) where the Court below has mis-appreciated the evidence on record without making the judgment perverse; or

(5) to upset pure findings of fact based on the trial Court's appreciation of the evidence in the case.

31. The aforesaid list of circumstances where the High Court may or may not exercise revisional jurisdiction at the instance of the aggrieved person in respect of finding of acquittal, is enumerative and not exhaustive.

23. In the backdrop of aforesaid legal position, reverting back to the facts of the case, we find that the trial Court has recorded following reasons for acquitting the remaining accused persons.

(a) Though, several persons from both the parties had gathered at Hathkuri for the meeting of Gram Sabha in order to demonstrate their respective strengths, the victims were not threatened, abused or intimidated at Hathkuri. They were also not harmed in any manner.

(b) There was no evidence that accused persons Nokhelal, Ram Singh, Ramavtar, Munna @ Laxman Singh and Ramnarayan entered into a criminal conspiracy to eliminate Bharatendu; therefore, for want of clear and cogent evidence, there was no ground to believe that any criminal conspiracy was hatched by accused persons to kill Bharatendu.

(c) There were discrepancies in the statements of prosecution witnesses with regard to weapons, accused persons Nagendra Singh, Budh Singh, Dhirendra Singh etc. were allegedly armed with. Some witnesses say that they had sticks, some said they had axes and some said they had *farsas;* whereas, T.I., Mohan Singh (PW-23) only saw guns in the hands of two accused persons.

(d) There was enmity between the two sides on the ground of Panchayat politics.

(e) All witnesses are relatives of deceased Bharatendu. No independent eye witnesses have been examined. Even, injured eye witness, Beni Bai has turned hostile. In these circumstances, the possibility of false implication of some other accused persons along with main culprits could not be ruled out.

(f) None of the eye witnesses has stated that when Deshpal had fired upon Bharatendu, accused Munna @ Laxman Singh was also with Deshpal; therefore, there is no evidence so far as accused Munna @ Laxman Singh is concerned.

(g) It is admitted by the prosecution witnesss that Budh Singh was about 75-80 years old and suffering from poor eye sight. He was being chased by four policemen and members of victim's party, who were young; yet, they failed to catch Budh Singh; therefore, the possibility of false implication of Budh Singh can also not be ruled out.

32. When policemen reached Kumhari, accused persons were standing in front the house of Nagendra Singh, in other words, they were standing in front of their own house. When the police started chasing them, they started to run. Even if it is assumed for the sake of arguments that the accused persons were standing in front of their own house with fire arms, it cannot be said that they had constituted an unlawful assembly. Even if it is assumed for the sake of arguments that they had indeed constituted an unlawful assembly, when the policemen started chasing them, they started to run in order to save themselves.

Thus, the unlawful assembly, even if there was one, had dispersed because now their object was to avoid apprehension in any which way they could. If in such a situation, one of them suddenly turns and fired a shot, no one else could be held to be vicariously liable for his action.

33. It is true that Surendra Pratap Singh (PW-24) has stated that as Bharatendu reached near accused persons Nagendra Singh, Budh Singh, Dhirendra Singh @ Rajjan Raja, Boby Raja and Jamaluddin said that "fire shot, otherwise, he will catch you." whereon Deshpal turned around and fired a shot. After that accused persons Nagendra Singh, Budh Singh, Rajjan Raja, Boby Raja and Jamaluddin said that "Well done, it will serve him well for running so fast behind them"; however, these exhortations and commendations were missing from the police statements of Surendra Singh. Surendra Singh has also said that after being hit, Bharatendu was taken into his lap by Gajendra Singh. In this regard, even Gajendra Singh, who had simultaneously reached Bharatendu, does not say that accused persons Nagendra Singh, Budh Singh, Rajjan Raja @ Dhirendra Singh, Jamaluddin etc. had either incited the appellant Deshpal or had thereafter, commended him for shooting the deceased; therefore, the trial Court has rightly disbelieved that any such sentences were uttered at the time of the incident by remaining accused persons.

34. On the basis of aforesaid facts and circumstances of the case, the trial Court reached the conclusion that other co-accused persons would not be held responsible for the act of the appellant Deshpal; therefore, they were acquitted extending benefit of doubt.

35. Applying aforesaid principle to the case at hand, we find that there is no manifest error of law on the part of the learned trial Court leading to miscarriage of justice. It cannot be said that any relevant evidence has not been considered and irrelevant material has been taken into consideration. Learned trial Court has analyzed the evidence of all prosecution witnesses and has recorded reasons for not placing reliance upon them. In revisionary jurisdiction against acquittal, the High Court is not supposed to enter into the merits of the matter and re-appreciate the whole evidence and substitute one possible view for another. The findings recorded by the trial Court cannot be said to be perverse. This is not one of those exceptional case where the interest of public justice requires interference in the findings of acquittal for correction of a manifest illegality or for prevention of gross miscarriage of justice.

36. Even if we assume for the sake of arguments that the learned trial Court had mis-appreciated the evidence on record, the High Court in exercise of revisionary jurisdiction cannot reverse pure finding of facts on which the acquittal was based.

37. In aforesaid view of the matter, no case is made out for interfering with the judgment of acquittal.

38. Accordingly, this criminal appeal ***fails***. The conviction of appellants Deshpal and Yashpal as recorded by judgment dated 11.08.2005 passed by the Court of Sessions Judge, Panna in Session Trial No.133/2001 and the sentence imposed upon them is hereby ***affirmed.***

39. In the same manner, this criminal revision is also ***dismissed*** and acquittal of respondents/accused persons in criminal revision by aforesaid judgment, is also ***affirmed.***

Appeal dismissed.

I.L.R. [2017] M.P., 2735
APPELLATE CRIMINAL
Before Mr. Justice S.C. Sharma & Mr. Justice Alok Verma
Cr.A. No. 311/2007 (Indore) decided on 14 November, 2017

SANTOSH ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. ***Penal Code (45 of 1860), Section 302 & 323 – Murder – Conviction – Testimony of witnesses – Identity of Accused – Ocular & Medical Evidence – Effect*** **– Held – It is undisputed that appellant/ accused was not known to prosecution witnesses prior to the incident and it appears that for the first time accused entered into the said village – Complainant and prosecution witnesses identified the accused before the trial Court – No such fact came in cross-examination of prosecution witnesses which would indicate that they were not in a position to identify the accused before the Court – No doubt created regarding identity of accused – Further held – Oral evidence were supported by medical evidence – It was proved that present appellant caused injuries due to which deceased died. (Paras 5, 8 & 10)**

क. दण्ड संहिता (1860 का 45), धारा 302 व 323 – हत्या – दोषसिद्धि – साक्षीगण के परिसाक्ष्य – अभियुक्त की पहचान – चाक्षुष एवं चिकित्सीय साक्ष्य – प्रभाव – अभिनिर्धारित – यह अविवादित है कि अपीलार्थी/अभियुक्त घटना के पूर्व से अभियोजन साक्षीगण से परिचित नहीं था एवं यह प्रतीत होता है कि अभियुक्त ने प्रथम बार कथित गांव में प्रवेश किया था – परिवादी एवं अभियोजन साक्षीगण ने विचारण न्यायालय के समक्ष अभियुक्त की पहचान की – अभियोजन साक्षीगण के प्रतिपरीक्षण में ऐसा कोई तथ्य नहीं आया है जो यह दर्शाता हो कि वे न्यायालय के समक्ष अभियुक्त की पहचान करने की स्थिति में नहीं थे – अभियुक्त की पहचान के संबंध में कोई संदेह उत्पन्न नहीं होता – आगे अभिनिर्धारित – मौखिक साक्ष्य, चिकित्सीय साक्ष्य द्वारा समर्थित थे – यह साबित हुआ था कि वर्तमान अपीलार्थी ने चोटें कारित की जिसके कारण मृतक की मृत्यु हुई।

***B. Penal Code (45 of 1860), Sections 302, 323 & 304 Part II – Murder – Motive/Intention to kill – Previous Enmity* – Held – There was no previous enmity between deceased and appellant – Two injuries were caused on his head due to which deceased died – As per the facts of the present case, the appellant has no motive to kill the deceased, there appears to be no intention as well – Case falls under provisions of Section 304 Part II IPC – Conviction converted into one u/S 304 part II IPC – Conviction u/S 323 upheld – Appeal partly allowed. (Para 11 & 12)**

ख. दण्ड संहिता (1860 का 45), धाराएँ 302, 323 व 304 भाग II – हत्या – हेतु/हत्या करने का आशय – पूर्व वैमनस्यता – अभिनिर्धारित – मृतक एवं अपीलार्थी में कोई पूर्व वैमनस्यता नहीं थी – उसके सिर पर दो चोटें कारित की गईं जिसके कारण मृतक की मृत्यु हुई – वर्तमान प्रकरण के तथ्यों के अनुसार, अपीलार्थी का मृतक की हत्या करने का कोई हेतु नहीं था, साथ ही ऐसा कोई आशय भी प्रतीत नहीं होता है – प्रकरण भारतीय दंड संहिता की धारा 304 भाग II के उपबंधों के अंतर्गत आता है – दोषसिद्धि भारतीय दंड संहिता की धारा 304 भाग II के अंतर्गत परिवर्तित हुई – धारा 323 के अंतर्गत दोषसिद्धि की पुष्टि की गई – अपील अंशतः मंजूर।

Yashpal Rathore, for the appellant.

Archana Kher, for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by :

ALOK VERMA, J. :- This Criminal Appeal is directed against the judgment of conviction and sentence passed in Session Trial No. 28/2006 by the learned Sessions Judge, Maheswar, West Nimar dated 19.01.2007, wherein the learned Sessions Judge convicted the present appellant under Section 302 of

IPC and sentenced him to life imprisonment and under Section 323 (2 counts) of IPC for causing injury to Mukesh and Bittu and sentenced him to six months rigorous imprisonment

2. According to prosecution story, the deceased Bama was working as Choukidar of the village and he was petrolling the village along with Sheru Pinjara, Bhatore etc. At 1:30 AM in the night, a person came towards them and when that person reached in front of the house of Chhogalal, the deceased Bama stopped him and asked him to disclose his identity. He told the deceased Bama that he was a Policeman. Not believing him, the deceased tried to lift his shirt to check whether he was wearing a police badge to ensure that he was a Policeman. However, on that occasion he slapped him and to defend himself he tried to take an iron pipe from the complainant Chhogalal. But before he could hand over the pipe to the deceased Bama, that person snatched the pipe and gave two blows on the head of the deceased, due to which, he suffered fatal injuries and died. After the incident, that person, who came there ran away. The person who were with the deceased tried to chase him but they could not catch him. Subsequently, it was stated that after sometime, the accused came back in the village along with the pipe in his hand and there, he was seen by other prosecution witnesses, and thereafter, they caught hold of him.

3. After recording evidence of both the sides, and also the statement of the accused, the trial Court found him guilty under the sections as aforesaid and sentenced him.

4. Aggrieved by the judgment of conviction and sentence, this appeal is filed on the ground *inter-alia* that the appellant was not known to the prosecution witnesses and there was no proper identification of the appellant, and therefore, he should be given benefit of doubt, which the trial Court failed to extend. There was also a contradiction about time of death as per the oral evidence and medical evidence. The main ground in this appeal appears to be identity of the accused. It is undisputed that he was not known to the prosecution witnesses prior to the incident and it appears that the first time he entered into the village.

5. The complainant Chhogalal (P.W-1) said that on the date of incident, he along with Sheru, Bhatore and deceased Bama petrolling in the village. They were sitting in front of house of Anokchand. At that time, a person came

from the side of culvert, and thereafter, the incident took place as stated in the prosecution story. He also said that the deceased asked him to give him pipe as the appellant slapped him. He also identified the appellant before the Court and said that he was the same person, who came in their village in the night.

6. Sheru was the another person who was also petrolling along with complainant Chhogalal (P.W-1). He also identified the accused in the Court, then he said that he could see the assailant only from behind.

7. Ram Krishna Bhatore (P.W-3) is also one of the person who was petrolling in the night. He said that he went behind the appellant till river but taking advantage of darkness, he fled away.

8. The prosecution witnesses identified the present appellant before the trial Court. There was no cross-examination of the prosecution witnesses on the point that there was no source of light on the spot and they were not familiar with the appellant, and therefore, he cannot identified him before the Court.

9. Mitthu (P.W-10) is the person who saw him when second time, he entered the village. This witness was amongst the person who chased the appellant, however, when they could not catch him, he came back and he was sitting in front of the house and when he re-entered the village, seeing him, he shouted and call other persons and then they tried to catch hold of him, however, this time also he fled away.

10. All these witnesses were cross-examined by the defence counsel, however, no such fact came in cross-examination of these witnesses, which would indicate that the witnesses were not in the position to identify him before the Court. No doubt created could be regarding identity of the present appellant. Their oral evidence were supported by the medical evidence, and therefore, it was proved that the present appellant caused injuries, due to which, the deceased Bama died.

11. Coming to the point of conviction, it is apparent that as per the prosecution story itself, there was no enmity between the deceased and the present appellant. He was first time seen in the village, and therefore, being Chokidar of the village and as it was time of midnight, the deceased was asked to disclose his identity, on which, two injuries were caused on his head, due to which, he died. As such, from the story itself, which is accordingly the

facts stated in the prosecution story, which are also proved before the Court, the present appellant had no motive to kill the deceased. There appears to be no intention as well and as such, the case falls under the provision of Section 304 part-II of IPC. Accordingly, in considered opinion of this Court, the conviction of the appellant under Section 302 of IPC should be converted into the conviction under Section 304 Part-II of IPC.

12. Accordingly, this appeal is partly allowed. The conviction of the present appellant under Section 302 of IPC is set aside, however, he is convicted under Section 304 Part-II of IPC. His conviction under Section 323 of IPC is hereby affirmed. His sentence of life imprisonment imposed under Section 302 of IPC is set aside instead, he is convicted for 10 years rigorous imprisonment under Section 304 Part-II of IPC. As due to his poor economic conditions, the trial Court did not find it proper to impose any sentence of fine on him. This view is affirmed and no fine is imposed.

The sentence would run concurrently and if he has already completed period of 10 years under custody, he shall be released forthwith if his presence is not required in any other case.

Appeal partly allowed.

I.L.R. [2017] M.P., 2739
APPELLATE CRIMINAL
Before Mr. Justice R.S. Jha & Smt. Justice Nandita Dubey
Cr.A. No. 1552/2005 (Jabalpur) decided on 20 November, 2017

KISHAN SINGH @ KRISHNAPAL SINGH ...Appellant
Vs.
STATE OF M.P. ...Respondent

(Alongwith Cr.A. Nos. 1569/2005 & 1605/2005)

A. ***Penal Code (45 of 1860), Sections 302, 120-B & 201 – Murder – Conviction – Circumstantial Evidence – Evidence of Last Seen Together*** **– Held – As per medical evidence, homicidal death not proved and in absence of such, appellants cannot be convicted merely on last seen theory – Unexplained delay in recording statement of prosecution witnesses and on their part in disclosing the fact of last seen together to police – No conclusive proof to establish link connecting appellants with the offence – Appellants entitled to benefit of doubt –**

Conviction set aside – Appeals allowed. **(Para 34 & 35)**

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 120–बी व 201 – हत्या – दोषसिद्धि – परिस्थितिजन्य साक्ष्य – अंतिम बार साथ देखे जाने का साक्ष्य – अभिनिर्धारित – चिकित्सीय साक्ष्य अनुसार, मानववध स्वरूप मृत्यु साबित नहीं हुई तथा उक्त की अनुपस्थिति में, अपीलार्थीगण को अंतिम बार देखे जाने के सिद्धांत मात्र पर दोषसिद्ध नहीं किया जा सकता – अभियोजन साक्षीगण के कथन अभिलिखित करने में तथा उनकी ओर से अंतिम बार साथ देखे जाने का तथ्य पुलिस को प्रकट करने में अस्पष्टीकृत विलंब – अपीलार्थीगण को अपराध के साथ जोड़ने वाली कड़ी स्थापित करने हेतु कोई निश्चायक सबूत नहीं – अपीलार्थीगण संदेह का लाभ पाने के हकदार हैं – दोषसिद्धि अपास्त – अपीलें मंजूर।

B. Penal Code (45 of 1860), Sections 302, 120-B & 201 – Murder – Memorandum and Seizure Documents – Authenticity – **Held – Major discrepancies, vital contradictions and embellishment in evidence of prosecution witnesses makes prosecution story doubtful and gives strength to claim of appellants that memorandum and seizure documents were made up and fabricated.** **(Para 30 & 31)**

ख. दण्ड संहिता (1860 का 45), धाराएँ 302, 120–बी व 201 – हत्या – ज्ञापन एवं जब्ती दस्तावेज – प्रमाणिकता – अभिनिर्धारित – अभियोजन साक्षीगण के साक्ष्य में भारी विसंगतियां, महत्वपूर्ण विरोधाभास तथा अलंकरण अभियोजन कहानी को संदेहास्पद बनाते हैं और अपीलार्थीगण के इस दावे को बल देते हैं कि ज्ञापन तथा जब्ती दस्तावेज बनाये गये थे एवं कूटरचित हैं।

C. Penal Code (45 of 1860), Sections 302, 120-B & 201 – Murder – Circumstantial Evidence – **Held – In case of circumstantial evidence, not only various links in chain of evidence should be clearly established but complete chain must be such as to rule out the likelihood of innocence of accused – In present case, only circumstances of last seen together cannot by itself be made basis for conviction.** **(Para 21 & 29)**

ग. दण्ड संहिता (1860 का 45), धाराएँ 302, 120–बी व 201 – हत्या – परिस्थितिजन्य साक्ष्य – अभिनिर्धारित – परिस्थितिजन्य साक्ष्य के प्रकरण में, न केवल साक्ष्य की श्रृंखला में विभिन्न कड़ियाँ स्पष्ट रूप से स्थापित की जानी चाहिए बल्कि संपूर्ण श्रृंखला ऐसी होनी चाहिए जिससे अभियुक्त की निर्दोषिता की संभावना को खारिज किया जा सके – वर्तमान प्रकरण में, केवल अंतिम बार साथ देखे जाने की परिस्थितियों को अपने आप में दोषसिद्धि का आधार नहीं बनाया जा सकता।

Cases referred :

AIR 1975 SC 258, (2010) 15 SCC 588, (2016) 1 SCC 550, (2009) 15 SCC 548, (1982) 2 SCC 351, (2016) 16 SCC 418, AIR 1973 SC 2773, AIR 1984 SC 1622.

Surendra Singh with *A.K. Dubey*, for the appellant in Cr.A. No. 1552/2005.

Jai Shukla, for the appellant in Cr.A. No. 1569/2005.

Prakash Upadhyay, for the appellant in Cr.A. No. 1605/2005.

Ajay Shukla and *Anubhav Jain*, G.A. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **NANDITA DUBEY, J. :-** Criminal appeal Nos. 1552/2005, 1569/2005 and 1605/2005 arise out of the same incident and, therefore, heard and decided concomitantly.

2. These three appeals arise out of judgment dated 29.07.2005 passed by Fourth Additional Sessions Judge (Fast Track), Sidhi in S.T. No.164/2004, whereby the appellant Kishan Singh @ Krishnapal Singh has been found guilty of an offence punishable under Section 302 read with Section 120-B of the Indian Penal Code and has been sentenced to life imprisonment with fine of Rs. 500/- in default rigorous imprisonment for one month and appellants Manish @ Bablu and Vikas @ Pinku have been found guilty of an offence punishable under Sections 302 read with Section 120-B and 201 of the Indian Penal Code and have been sentenced to life imprisonment with fine of Rs. 500/- and rigorous imprisonment for 7 years and fine of Rs.200/- respectively and in default further rigorous imprisonment for one month for each offence.

3. Prosecution case, in short, is that the appellants committed the murder of Promod Singh @ Dadu, by drowning him in Gopal Das Dam and thereafter with the intention of disposing the body, hid it in a paddy field.

4. According to prosecution, on 05.09.2004, at about 3.00 A.M., P.W.-3 Mahesh Prasad Gupta lodged a report to the effect that he had been robbed of his pickup truck. During the investigation, appellants Manish and Vikas were taken into custody on suspicion. On interrogation, accused/appellants Manish and Vikas disclosed about the commission of murder of Promod Singh by drowning him in Gopal Das Dam with the help of appellant Kishan and

expressed their willingness to show the place where they had committed the murder of Pramod Singh. According to the prosecution, appellants Manish and Vikas were going in NE car to dispose of the body, but on account of the fact that there was no fuel in the car, they hid the body of the deceased in a paddy field near the Sidhi-Rewa main road.

5. On the basis of memorandum (Ex. P-9 & Ex. P-10) of appellants Manish and Vikas, body of the deceased was recovered from open paddy field, next to the Sidhi-Rewa road. Dehati Merg (Ex.P.-40) and panchnama was recorded and spot map (Ex.P-12) was made. Body of the deceased was sent to mortuary. The police party thereafter proceeded to Gopal Das Dam, from where they recovered a piece of shirt pocket and a white button (Ex.P-13) and thereafter proceeded to the house of appellant Kishan, from where a shirt with missing pocket was seized.

6. Body of the deceased was sent for postmortem. The postmortem report indicates that the body was in an advanced stage of decomposition. Dr. K.S. Nigam (P.W.-4), who conducted the postmortem has opined that death was homicidal in nature and occurred due to asphyxia but could not determine the actual cause for asphyxia due to the decomposed stage.

7. The accused/appellants were put to trial. The prosecution examined as many as 15 witnesses. The statement of the accused persons under Section 313 of the Cr.P.C. were recorded. The defence examined 3 witnesses in support of their case.

8. The learned trial Court found the appellants guilty of committing the offence as aforesaid, on the basis of statement/evidence of P.W.-1 Dr. Chandra Kant Mishra, P.W.-4 Dr. K.S. Nigam and on the basis of documentary evidence Ex.P-1 and Ex.P-2 postmortem report and on this basis held that death of deceased Promod was homicidal. The trial Court has reached to a conclusion that the death of deceased was the result of "dry drowning" relying on page 164 of 20th edition of Medical Jurisprudence and Toxicology by Dr. Modi. The trial Court further relying on the evidence of P.W.-6 Snehlata Singh and P.W.-8 Jitendra Singh held that the accused/appellants were the persons, last seen with the deceased. The trial Court on the basis of aforesaid evidence found the chain of circumstances to be complete and held that the prosecution has proved the guilt of the appellants beyond reasonable doubt and convicted them as aforesaid.

9. Shri Surendra Singh, learned senior counsel appearing for appellant Kishan and Shri Prakash Upadhyay and Shri Jai Shukla, learned counsel respectively appearing for the appellants Vikas and Manish have raised the following submissions in support of the appeals :-

(i) There is no proof of homicidal death. Medical evidence negate the death by drowning.

(ii) There were no eye witnesses of the events. Circumstantial link was not proved beyond doubt.

(iii) Recovery of Shirt pocket and button from Gopal Das Dam would not lead to the conclusion that it was appellant Kishan, who had committed the murder.

(iv) The memorandum and seizure were fabricated.

10. Shri Ajay Shukla and Shri Anubhav Jain, learned Govt. Advocates appearing for the respondent/State have supported the judgment. It was contended that finding and conclusion arrived at by the Court below was based on cogent evidence and the circumstantial evidence brought on record by the prosecution were sufficient to convict the accused persons.

11. Having heard the learned counsel for the parties at length and on meticulous perusal of record, it is clear that there is no direct evidence to establish that the appellants murdered the deceased Pramod by drowning him in Gopal Das Dam and the evidence regarding the murder is purely circumstantial.

12. First of all, we may deal with the argument advanced on behalf of the appellants that the cause of death is not evident from the postmortem report and there is no proof that death was homicidal. According to learned Senior Counsel, once the cause of death is not proved, the appellants would be entitled to an order of acquittal.

13. Postmortem report is exhibited as Ex.P-2 and the relevant part thereof reads as under :-

"Naked body wearing underwear lying flat with extended arms and legs with partial flexon at knee joint, in stage of advanced decomposition of body. Vesicles present all over the body. Skin pealed off specially face, abdomen, neck,

back. Maggot's present over both eyeballs and rectal area. Rigor mortis passed off. Foul smelling present. Both eyes open and protruded. Mouth open, tongue lied between the teeth. Tip of tongue protruded, crushed between tooth and tip of tongue cyanosed. Both pupils dilated and fixed. Whole body was swollen. Face cyanosed. Nails cyanosed. Conjunctiva congested. Abdomen was distended. Neck cyanosed. Scrotum and penis was oedematus."

"On knees following injuries were present :

1. Abrasion on the front of right knee 2 x 1 inch in size, dry blood clot and oedema was present (Ante mortem in nature).

2. Abrasion present over front of left knee, 3x1 inch in size, dry blood clot present."

Postmortem lividity present over chest and upper part of abdomen.

No water was present over both middle ear cavity."

Opinion of the doctor.

"In our opinion, deceased died of asphyxia. Actual cause of Asphyxia could not detected due to advance decomposition of the body. Police may investigate the cause. Viscera's, cloth's and trachea preserved. Time lapsed was between 24 to 36 hours. Homicidal in nature."

14. The doctor was examined as P.W.-4. The doctor has opined that the death could be due to asphyxia, but did not say as to how he reached to that conclusion in absence of any marks/injury on the body. The doctor has categorically deposed that no water was present over both middle ear cavity of the deceased and the death has not occurred due to drowning. The FSL report brought on record is also inconclusive as regard to the death by drowning. Moreover, there is no evidence or eye witnesses to the effect that deceased was taken to the Gopal Das Dam and murdered by drowning. It is also evident from the evidence of P.W.-1 Dr. C.K. Mishra, Sr. Scientist and P.W.-11 Ramendra Singh that the body of deceased was found lying face

down in an open paddy field, next to the main road, visible to all. Body was found lying flat with extended arms and legs with partial flex on at knee joint. The photographs (Ex.P-17 to P-25) clearly show that the deceased was wearing only underpants which were drawn half down to his knees. One hand of the body was extended in air as if tying to break the fall. As per the evidence that has come on record that deceased and appellants were under the influence of alcohol and intoxicated. There were abrasions on both the knees and according to P.W.-4 K.S. Nigam, the same could have been the result of accidental fall. Under these circumstances, looking to the position of the body recovered, the possibility that the deceased fell face down while sitting in the field to ease himself and accidentally suffocated himself cannot be ruled out.

15. The trial Court on the basis of Modi's Medical Jurisprudence had arrived on the conclusion that it was a case of "dry drowning". However, the trial Court has totally ignored the fact that Modi's Medical Jurisprudence also says that even an adult can accidentally suffocate himself under the influence of alcohol or epileptic by falling face down (page 580, 23rd edition). From a perusal of Ex.P-36, it is evident that for determining the cause of death or to form an opinion that the death was caused by drowning, it was essential to perform "diatom test", however the same was not asked for by the police or the team of doctors, who conducted the postmortem. From the evidence on record, it is clear that there is no other evidence or proof to prove that it was a case of homicidal death.

16. Similar issue as to whether the death is homicidal, came up for consideration in the case *State of Punjab Vs. Bhajan Singh* AIR 1975 SC 258, where the Supreme Court after considering the testimony of the doctor has held :-

> *"Question then arises as to whether the death of the two persons whose dead bodies were recovered was homicidal. So far as this aspect is concerned, we find that Dr. Saluja has deposed that he found no marks of ligature on either of the two dead bodies. According further to the doctor, he could not find the cause of death because the two dead bodies were in a de- composed state. In the face of the above evidence of the doctor, it is not possible to hold that the death of the two persons, whose bodies were recovered, was homicidal.*

17. In *Madho Singh Vs. State of Rajasthan* (2010) 15 SCC 588, the Supreme Court has held :-

> *"The primary, if not solitary basis of the conviction of the appellants is on the theory of last seen as the deceased left his house with the appellants at abqut 11.00p.m. on the 1st May, 1999. In order to convict the appellants for an offence under section 302 the first and foremost aspect to be proved by the prosecution is the homicidal death. The evidence on record produced by the prosecution falls short of the proof of homicidal death of Om Singh. According to PW11 Dr. Lakhan Lal, his face had been crushed. According to testimony of PW15 Dr. Disaniya, the injuries received by the deceased could be sustained in the accident. Besides these two witnesses, there is no evidence to prove that it was a case of homicidal death."*

18. Apart from the aforesaid, the alleged NE car said to have been used in the incident has not been subjected to chemical examination so as to determine whether the body of the deceased was infact carried into it, nor investigated as regard the ownership of the car. Moreover, recovery of shirt pocket and button from Gopal Das Dam in absence of any other corroborative evidence will have no direct bearing on the death of deceased and would not lead to the conclusion that it was appellant Kishan, who committed the murder.

19. As per P.W-1 Dr. C.K Mishra and P.W.-4 Dr. K.S. Nigam, the body of the deceased was in an advanced stage of decomposition as described in the preceding paragraphs. According to Modi's Jurisprudence, page 342, the duration of rigor mortis is 24 to 48 hours in winter and 18 to 36 hours in summer. The maggots are normally formed after an average of 39 hours of the death. In the instant case, from the condition of the body as described above, it is evident that the death of the deceased has occurred much prior to the time as alleged by the prosecution.

20. It is settled law that inferences drawn by the Court have to be on the basis of established case and not on conjectures. The prosecution came out with a specific case that deceased Promod was murdered by drowning him in Gopal Das Dam, however, the same is not established from the medical evidence that has come on record. Hence, the inferences drawn by the trial

Court that deceased Pramod Singh was murdered by drowning in Gopal Das Dam and thereafter his body was carried in the NE car and disposed of in the paddy field is perverse and cannot be sustained.

21. The prosecution has relied on the testimony of P.W.-6 Snehlata and P.W.-8 Jitendra Singh to prove that the appellants were last seen together with the deceased. It is settled law that the circumstances of last seen together cannot by itself form the basis of holding the accused guilty of the offence.

22. The principles of circumstantial evidence is reiterated in *Nizam and another Vs. State of Rajasthan* (2016) 1 SCC 550, the Supreme Court has held :-

> *8. Case of the prosecution is entirely based on the circumstantial evidence. In a case based on circumstantial evidence, 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, forming a chain 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 totally inconsistent with his innocence.*

23. In *State of Uttar Pradesh Vs. Shyam Behari and another* (2009) 15 SCC 548, referring to the case of *Gambhir Vs State of Maharashtra* (1982) 2 SCC 351, the Supreme Court has held:-

> *"The law regarding circumstantial evidence is well settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests:*
>
> *(1) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established:*
>
> *(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probabilities the crime was*

committed by the accused and none else. 4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any order hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See Gambhir v. State of Maharashtra, AIR 1982 SC, 1157)

24. In the instant case, the trial Court has relied on the testimony of P.W.-6 Smt. Snehlata Singh and P.W.-8 Jitendra Singh. According to these witnesses, the deceased was seen with the appellants between 6 P.M. to 11 P.M. on 04.09.2004 roaming around in NE car at different places. According to P.W.-6 Snehlata, the deceased went out with the appellants in their NE car on 04.09.2004 at 6.00 P.M to visit one Vivek at Rewa. According to P.W.-6, she and her father were informed about the death of Pramod on 05.09.2004 by one Inspector Baghel, but despite knowing about the murder of her brother, she did not disclose the fact of her brother going with the appellant to the police. It is only after 20-25 days of the incident, when for the first time she made a statement to this effect. According to P.W.-5 Harikeshav Singh and P.W.-6 Snehlata, the deceased and the appellants were good friends.

25. P.W.-8 Jitendra Singh claimed to have seen the appellants and deceased together at 11 P.M. at a liquor shop near the bus stand. The statement of P.W.- 8 Jitendra Singh is also doubtful for the fact that he claimed to have seen the dead body at 9.00 P.M. on 5.09.2004, whereas, according to prosecution the memorandum of appellants (Ex.P-9 & P-10) regarding the place where body of deceased was hidden was taken at 9.10 P.M. and the body was recovered at around 10.00 P.M. (Ex.P-11). This witness admits his presence at the spot from where the dead body was recovered but surprisingly did not disclose the fact of having seen the deceased with appellants on the previous night, i.e., on 04.09.2004 at 11.00 P.M. as claimed by him.

26. From the evidence on record, it is clear that there is unexplained delay in recording the statement of P.W.-6 Snehlata and P.W.-8 Jitendra and on their part in disclosing the fact of last seen to the police. The delay in recording of statement and the conduct of these witnesses in not disclosing the fact to police or to anyone else for the matter renders their story doubtful and unreliable.

27. In *Harbeer Singh Vs. Sheeshpal and others* (2016) 16 SCC 418 the Supreme Court has held:

> *17. However, Ganesh Bhavan Patel Vs. State Of Maharashtra, (1978) 4 SCC 371, is an authority for the proposition that delay in recording of statements of the prosecution witnesses under Section 161 Cr.P.C., although those witnesses were or could be available for examination when the Investigating Officer visited the scene of occurrence or soon thereafter, would cast a doubt upon the prosecution case. [See also Balakrushna Swain Vs. State Of Orissa, (1971) 3 SCC 192; Maruti Rama Naik Vs. State of Mahrashtra, (2003) 10 SCC 670 and Jagjit Singh Vs. State of Punjab, (2005) 3 SCC 68]. Thus, we see no reason to interfere with the observations of the High Court on the point of delay and its corresponding impact on the prosecution case.*

28. In *Madho Singh Vs. State of Rajasthan* (2010) 15 SCC 588, the Supreme Court has held:

> *8. In the absence of proof of homicidal death the appellants cannot be convicted merely on the theory of last seen - 'they having gone with the deceased in the manner noticed hereinbefore. The appellants' conviction cannot be maintained merely on suspicion, however strong it may be, or on their conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that all the three were good friends for over a decade.*

29. In the case of circumstantial evidence, not only the various links in the chain of evidence should be clearly established but the complete chain must be such as to rule out the likelihood of innocence of the accused. In the present case, even if the evidence of appellants having been seen last seen together with deceased is accepted, it would at best amount to be evidence of last seen together with the deceased, but in absence any other satisfactory link connecting the appellants to the crime and pointing to the guilt of the appellants, the only circumstance of last seen together cannot be made basis of the

conviction.

30. Apart from the aforesaid, it is clear from the record that there are major discrepancies and contradictions, embellishment in the prosecution story. There is major contradictions in the evidence of P.W.-1 Dr. C.K. Mishra and P.W.-11 Ramendra Singh. According to P.W.-1 Dr. C.K. Mishra, he got the information to inspect the spot at 12 O'Clock in the mid night of 5.09.2004 and conducted the inspection on 6.09.2004 (Ex.P-1) at 8.00 A.M. He found the body lying face down in open field next to road, in the condition as described in the preceding paragraphs. Whereas, according to P.W.-11 Ramendra Singh, the body was removed from the spot after taking photographs on 5.09.2004 and kept in mortuary at 12 O'Clock in the night and sent for postmortem at 8.00 A.M. in the morning of 06.09.2004. This fact is also corroborated by P.W.-4 Dr. K.S. Nigam, who conducted the postmortem at 8.00 A.M. on 06.09.2004.

31. Apart from the aforesaid, the time entered on the memorandum does not found corroboration from the statement of other witnesses. The prosecution claimed to have recorded the memorandum at 9.00 and 9.10 P.M. and recovered the body at 10.00 P.M. However, P.W.-9 Krishnapratap Singh, witness of memorandum has stated that memorandum was recorded at 7.15 P.M. and thereafter the body of deceased was recovered at 7.30 P.M. These vital contradictions in the evidence of prosecution witnesses makes the entire prosecution story doubtful and given strength to the claim of appellants that the memorandum and seizure documents were made up and fabricated.

32. In *Kali Ram Vs. State of Himachal Pradesh* AIR 1973 SC 2773, the Supreme Court has observed as under:

> *"Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence."*

33. In *Sharad Birdhichand Sarda Vs. State of Maharashtra* AIR 1984 SC 1622, the Supreme Court has held as under:

"The facts so established should be consistent only with the hypothesis of the guilt of the accused. There should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. 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.

Graver the crime, greater should be the standard of proof. An accused may appear to be guilty on the basis of suspicion but that cannot amount to legal proof. When on the evidence two possibilities are available or open, one which goes in the favour of the prosecution and the other benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. The principle has special relevance where the guilt or the accused is sought to be established by circumstantial evidence."

34. In view of the medical evidence on record, the death of deceased Pramod Singh could not be termed as homicidal and in absence of the proof of homicidal death, the appellants cannot be convicted merely on the theory of last seen. In view of the aforesaid circumstances, there is nothing on record to conclusively establish that the appellants were the author of the crime. The circumstances on the record do not rule out every other hypothesis except the guilt of the appellants and in our view, the prosecution has filed (sic:failed) to establish the guilt of the appellants beyond reasonable doubt. Under the circumstances, the appellants are entitled to the benefit of doubt.

35. In view of the above, it is clear that the prosecution has failed to prove the case against the appellants beyond reasonable doubt. Thus, the appeals succeed and are hereby allowed. The conviction and sentence imposed on the appellants is set aside. The appellants, who are on bail shall be discharged of their bail bonds.

36. A copy of this judgment be also kept in the record of Cr.A. Nos. 1569/2005 and 1605/2005.

Appeal allowed.

I.L.R. [2017] M.P., 2752
APPELLATE CRIMINAL
Before Mr. Justice S.K. Seth & Smt. Justice Anjuli Palo
Cr.A. No. 2756/2017 (Jabalpur) decided on 23 November, 2017

VINAY ...Appellant
Vs.
STATE OF M.P. ...Respondent

(Alongwith Cr. Ref. No. 04/2017)

A. ***Penal Code (45 of 1860), Sections 302, 376(A), (D) & 449 and Protection of Children from Sexual Offences Act, (32 of 2012), Section 6 – Rape & Murder – Minor Girl – Conviction – Death Sentence – Circumstantial Evidence – DNA Test*** **– Held – Appellant is uncle of the victim – Medical evidence proves that victim was sexually assaulted before murder – As per DNA report, which is a scientific evidence, appellant's sperm and semens found in vaginal swab and clothes of victim and there is no explanation by appellant in this regard – DNA report is reliable to sustain conviction – Conviction can be based on circumstantial evidence – Conviction upheld – Death sentence set aside and life imprisonment imposed – Appeal partly allowed – Reference discharged. (Paras 30 to 32, 35, 44 & 56)**

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 376 (ए), (डी) व 449 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 6 – बलात्संग एवं हत्या – अप्राप्तवय बालिका – दोषसिद्धि – मृत्यु दण्डादेश – परिस्थितिजन्य साक्ष्य – डी एन ए परीक्षण – अभिनिर्धारित – अपीलार्थी, पीड़िता का अंकल है – चिकित्सीय साक्ष्य साबित करता है कि पीड़िता पर हत्या से पूर्व लैंगिक रूप से हमला किया गया था – डी एन ए प्रतिवेदन जो कि एक वैज्ञानिक साक्ष्य है, के अनुसार, पीड़िता के वैजाईनल स्वैब एवं कपड़ों से अपीलार्थी के शुक्राणु एवं वीर्य पाये गए और इस संबंध में अपीलार्थी द्वारा कोई स्पष्टीकरण नहीं है – डी एन ए प्रतिवेदन, दोषसिद्धि कायम रखने के लिए विश्वसनीय है – दोषसिद्धि, परिस्थितिजन्य साक्ष्य पर आधारित की जा सकती है – दोषसिद्धि कायम रखी गई – मृत्यु दण्डादेश अपास्त एवं आजीवन कारावास अधिरोपित किया गया – अपील अंशतः मंजूर – निर्देश प्रमुक्त किया गया।

B. ***Penal Code (45 of 1860), Section 302, 376(A), (D) – Rape – Evidence – Minor Contradictions*** **– Held – Courts while trying an accused on charge of rape must deal with utmost sensitivity, examine**

the broader probability of case and not get swayed by minor contradictions or insignificant discrepancies in the evidence which are not of a substantial character. (Para 40)

ख. दण्ड संहिता (1860 का 45), धारा 302, 376 (ए), (डी) – बलात्संग – साक्ष्य – गौण विरोधाभास – अभिनिर्धारित – न्यायालयों को बलात्संग के आरोप पर एक अभियुक्त का विचारण करते समय अत्यंत संवेदनशीलता के साथ निपटना चाहिए, प्रकरण की विस्तृत संभावना का परीक्षण करना चाहिए तथा साक्ष्य, जो सारवान प्रकृति के नहीं है, में महत्वहीन विसंगतियों या गौण विरोधाभासों द्वारा प्रभावित नहीं होना चाहिए।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 118 – Child Witness* – Held – A child witness is competent witness u/S 118 Cr.P.C. (Para 13)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 118 – बालक साक्षी – अभिनिर्धारित – धारा 118 दं.प्र.सं. के अंतर्गत, बालक साक्षी एक सक्षम साक्षी है।

Cases referred :

AIR 2013 SC 553, (2013) 7 SCC 263, 2013 Cri.L.J. 2040, (2017) 6 SCC 1, (2014) 5 SCC 353, (2010) 9 SCC 747, (2001) 5 SCC 311, (2017) 2 SCC 51, AIR 1980 SC 898, 1983 AIR 957, AIR 2014 SC 1911.

Khalid Noor Fakhruddin, for the appellant in Cr.A. No. 2756/2017.
Bramhdatt Singh, G.A. for the respondent-State.

JUDGMENT

The Judgment of the Court was delivered by: ANJULI PALO, J. :- The above criminal appeal is preferred by the appellant, to set aside the impugned judgment of conviction and sentence. The criminal reference (CRRFC No. 04/2017) has been referred under Section 366 (A) of Criminal Procedure Code, 1973 by Second Addl. Session Judge, Multai, District Betul. Both these cases arise out of judgment dated 22.06.2017 passed in Session Trial No. 13/2017 whereby the appellant has been convicted and sentenced as under, therefore are being decided by this common judgment:

Section	Act	Sentence	Fine	In default of fine
449	Indian Penal Code	R.I. for Life Imprisonment	Rs.25,000/-	R.I. For 1year
376-A	Indian Penal Code	Death Sentence	-	-
376-D	Indian Penal Code	R.I. for life imprisonment	Rs.25,000/-	R.I. For 1year
302	Indian Penal Code	Death Sentence	Rs.25,000/-	R.I. For 1year
6	Protection of Children from Sexual Offence	(awarded death sentence in the major offence under Section 376-A of IPC		

2. Brief facts of the prosecution case is that, appellant is the uncle of the victim. The victim was a minor girl aged about 13 years. On 16.11.2016 at about 3:00 to 5:30 p.m. she was alone at her house in village Raiseda, Police Station Amla, District Betul. Her parents had gone to village Deopipariya leaving behind their children at home. At the time of incident, the siblings of the victim were not present at the house with the victim. At about 4:30 pm, appellant along with his two friends Mukesh and Ashok (both are juvenile) came there. Finding her alone, appellant and his juvenile friends committed rape one after the other. After committing rape, they killed her by hitting her head with a stone, strangulated her and hanged her from the roof with a red coloured saree. When her brother Rupesh (PW-6) and sister Rubina (PW-5) returned home from the school, they saw their sister/victim dead, hanging from the roof and the appellant along with other accused persons namely Mukesh and Ashok were present on the spot. Rupesh, brother of the victim ran towards the village and called Laxman and other persons for help. In the meanwhile, the body of the victim was brought down by appellant. Laxman (PW-4) along with other persons came there and saw the injuries of the victim. They saw that there was no clothes on the lower part of her body, there were injuries over her neck and bleeding from her private genital parts. Laxman informed the parents of the victim and reported the incident to the Police Station Amla. Offence was registered against the appellant and his associates (juvenile in conflict with law). After investigation, charge-sheet was filed by

the police under Section 376(A)(D), 449, 302 of IPC r/w Section 5(i)(j)(k)/ 6 and Section 4 of Protection of Children from Sexual Offences Act, 2012 before the concerned Court.

3. After committal of the case, learned Trial Court framed charges under Section 449, 376(A)(D), 302 of Indian Penal Code and Section 6 of Protection of Children from Sexual Offences Act. The appellant abjured his guilt and pleaded that he is innocent and was falsely implicated by the police.

4. After considering the entire evidence on record, the learned trial Court found the appellant guilty of committing the aforesaid offences. With regard to the above, the trial Court found that the ocular evidence is duly corroborated by the medical evidence and DNA profile report of the victim tallied with the DNA sample of the appellant. At the time of incident, the victim was aged about 13 years. She sustained severe injuries on her neck and genital parts. Doctors and experts proved that after committing gang rape with her, the victim was killed by strangulation and she was hanged from the roof, so that it would look like a case of suicide. Thus, appellant was convicted and sentenced as mentioned in paragraph one of this judgment.

5. The matter is referred to this Court under section 366(A) of Criminal Procedure Code for confirmation of the death sentence of the appellant awarded by the learned Trial Court. In the opinion of the learned Trial Court, the crime committed by the appellant is heinous in nature. If liberal view was taken with regard to punishment, the society would be unsafe and people would lose faith from the administration of justice.

6. The criminal appeal under section 374(2) of the Cr.P.C., 1973 is filed by the appellant on the ground that the learned Trial Court has committed legal errors in appreciation of evidence of prosecution witness and material brought on record. Learned Trial Court wrongly relied upon the evidence of child witnesses Sabina (PW-5) and Rupesh (PW-6) (minor sister and brother of the victim). The prosecution story is not corroborated by independent witness. There are several doubts and lacuna in the prosecution case, the chain of circumstantial evidence is not complete in this case. The DNA reports and its conclusions are not correct. DNA report is unreliable and untrustworthy. Therefore, prosecution has failed to prove its case beyond reasonable doubt. Hence, the appellant is entitled to be acquitted from the charges leveled against him.

7. We have heard rival submissions at length. Carefully perused the record.

8. The questions for consideration before us are as follows :

(i) Whether the trial Court committed error in convicting the appellant in the facts and circumstances of the case?

(ii) Whether the present case comes under the purview of "rarest of the rare" case for capital punishment?

9. All the relatives of the victim clearly stated that the victim was a minor. Her age was proved by her parents and relatives particularly Lakhanlal Verma (PW-10) proved her date of birth as 27.07.2004. The entry in the admission register (Exh. P/10) and school certificate (Exh. P/11) also corroborated the same. The testimony of Lakhanlal (PW-10) is reliable. In our considered view, the learned Trial Court has rightly appreciated in paragraphs 11 to 14 of the impugned judgment with regard to age determination of the victim. In case of *Ashwani Kumar Saxena Vs. State of MP* [AIR 2013 SC 553], the Supreme Court has held as under :-

> In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –
>
> (a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
>
> (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
>
> (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

10. In case of *Jarnail Singh Vs. State of Haryana* [(2013) 7 SCC 263], the Hon'ble Supreme Court has made it clear that Rule of Juvenile Justice Act, 2002 should be the basis for determination of age of the child victim as well as the child in conflict with law.

11. Therefore, the school register (Exh. P/10), is reliable piece of evidence to hold that the victim was minor on the date of occurrence. Further, the

appellant has also not claimed that the victim was a major. The learned Trial Court has rightly held the age of the victim as 13 years.

12. It is not in dispute that on 16.11.2016 at the time of incident, the parents of the victim were not present at home. It is admitted by the appellant that the parents of the victim went to village Deopipariya leaving behind their children alone at home. The appellant has also admitted that he is the uncle of victim. The victim was found dead in her house. In the accused statement under Section 313 of Cr.P.C., (question No. 5), the appellant admitted these facts. The appellant has admitted that, at around 4:30 pm when brother and sister of victim Rupesh and Sabina returned home from their school he was present on the spot near the dead body of the victim, alongwith the juveniles Ashok and Mukesh.

13. Hence, after considering the aforesaid admissions it is not in dispute that Sabina (9 years old) and Rupesh (5 years old) saw the appellant at their house with the body of the victim just after the incident. As these facts are admitted by appellant himself, hence, the question with regard to the fact that they are child witnesses and not reliable, does not arise. A child witness is competent witness under Section 118 of Cr.P.C. Further, in the cross-examination, presence of appellant is duly established. Their testimony is very important. Section 6 of the Evidence Act defines relevancy of facts forming part of same transaction. Though, the aforesaid facts are not in issue, they are so connected with a fact in issue as to form part of the same transaction, are relevant with regard to circumstantial evidence. Similarly, those facts are relevant under Section 8 of the Indian Evidence Act as motive, preparation and previous or subsequent conduct of the accused. Both the witnesses clearly stated that, they returned home from the school at about 4:30 pm. The incident took place during 3:00 pm to 4:30 pm. The appellant had not disclosed / explained the reason as to why the appellant along with other juvenile co-accused was present there.

14. Sabina (PW-5) and Rupesh (PW-6) also deposed that, at that time their sister (victim) was hanging from the roof and her body was taken down by the appellant. This fact was also admitted by appellant in question No. 3. Sabina (PW-5) deposed that she saw injury over her sister's neck.

15. Sabina (PW-5) also stated that, appellant went to Laxman to inform him about the incident. This testimony is corroborated by Laxman (PW-4).

Laxman deposed that the appellant informed him that "victim committed suicide". Then he came to the spot. He saw the injuries of the victim over her neck and bleeding from her private parts. After receiving the intimation from Laxman (PW-4), parents of the victim, Somji (PW-1) and Rundo (PW-15) came and saw the victim in injured condition and they corroborated the testimony of Sabina (PW-5), Rupesh (PW-6) and Laxman (PW-4).

16. Shri S.K. Yadav (PW-20), the Investigation Officer deposed that on 16.11.2016, father of the victim, Somji (PW-1) lodged the report. Thereafter, he went to the spot and saw injuries over the neck of the victim and bleeding. He recorded *dehati nalishi* (Exh.P/38). Learned counsel for the appellant raised objection that the above reports were against the unknown persons. Hence, offence is not made out against the appellant.

17. After the incident, at about 12:30 am in the night, Dr. Deepti Shrivastav (PW-24) Sr. Scientific Officer, Scene of Crime Unit inspected the spot. She found blood on the spot, red saree and black legging of the victim which were handed over to the police. The testimony of Dr. Deepti Shrivastav (PW-14) is unchallenged. On 17.11.2016, S.K. Yadav (PW-20) seized the blood stained red saree, black legging, soil, blood stained *kathdi*, one *phavda* (spade), pointed stone of about 8-10 kg vide seizure memo (Exh. P/4) before witnesses Nakul and Sonu. Sonu (PW-3) punch witness duly corroborated the testimony of S.K. Yadav (PW-20) Investigation Officer. In his cross-examination, he explained that all the above items were seized from the spot. Hence, seizure of above articles is found reliable.

18. Rundo (PW-15) mother of the victim, Somji (PW-1) father of the victim, Laxman (PW-4) and Sarje Rao (PW-22) saw the bleeding from the private part of the victim. From the testimony of Dr. Anand Malviya (PW-11) Medical Officer who conducted the post-mortem of the victim, that he found an incised wound of about 8 x 1 x 3 cms at 7 O' clock position and bleeding in her vagina. He found lacerated wound on the hind side of the vagina. There was dry blood on her private parts, both thighs and buttocks. He also found multiple lacerated abrasion over both the breasts of the victim as shown in the post mortem report (Exh. P/12) which may have been caused by human bite. As per his opinion, the victim was sexually assaulted and ravished and those injuries were caused within 24 hours of the post-mortem. Dr. Malviya (PW-11) found the following other injuries on her body :

(i) Abrasion of size 1/2 x 1/2 cm. on the right side of the face.

(ii) Abrasion of size 2x1/2 cm on the left side of the face.

(iii) Abrasion of size 3x1/2 cm on the left side of the mandible.

(iv) Abrasion of size 2x1cm on the left side of the face.

(v) A lacerated wound of size 1x1/2x1/2 cm on the back side of the head.

(vi) A ligature mark around the neck of size 29 cm in length indicative of the fact that the victim was killed by tying rope along her heck and pulling it tight.

(vii) Another ligature mark below the first ligature mark of size 29 cm long and 3 cm wide.

(viii) Third ligature mark below the second ligature mark similar in nature.

19. Dr. Anand Malviya (PW-11) was firm in his opinion in his cross-examination that ligature mark found on the dead body could not be caused by suicide. He further explained that in suicidal cases, the ligature mark is in slightly slanting position. In case of murder, the ligature mark is circular around the neck. In his opinion, the above injuries on the neck were not caused due to suicide. His evidence proves that the victim died due to asphyxia and her death was not suicidal in nature. Dr. Anand Malviya (PW-11) clearly opined that the victim was sexually assaulted and thereafter, she was murdered. This opinion was also jointly made by Lady Doctor Pratima Raghuvanshi. There is nothing on record to discard the evidence of the medical officers who conducted the post-mortem and opined that there was sexual assault on the victim before she died due to strangulation and there had been ligature marks. Thus, we find the medical report (Exh. P/12) wholly reliable.

20. We are in firm opinion and in agreement with the findings of the learned Trial Court that the victim was murdered after committing rape. In our considered view, there is no possibility that the victim herself had committed suicide.

21. Rajnikant (PW-7) and Sachin Dewangi (PW-9), Constables both

witnesses established that on 17.11.2016 they received clothes of the victim (Article N), her vaginal slide (Article O), pubic hair & skin (Article P), a hair (Article Q), vaginal swab (Article R) and impression of human bite on her chest (Article T), etc. in presence of witness Sushil Dhurve (PW-12) Constable, after chemical examination. Sushil (PW-12) also corroborated the above evidence.

22. As per the FSL report, Dr. D.K.Pandey (PW-25) has confirmed that he found blood stains on the soil (Article A) collected from the place of incident, *kathdi* (Article C), red saree (Article D), black legging (Article E), pointed stone (Article F) and *phavda* (ArticleG). He also confirmed that on black legging (Article E) and *phavda* (Article G), human blood was present. He also found semen present over the *kathdi* (Article C), red saree (Article D) and black legging (Article E). Similarly, after microscopic examination, he found sperms over the aforesaid articles.

23. As per chemical analysis report (Exh. P/12), the above articles were stained with human blood. The medical evidence referred earlier as well as the investigation panchanama point out that victim was sexually assaulted before murder. There is no reason to disbelieve the above evidence. We do not see any cogent reason to interfere with the finding of fact recorded by the Trial Court on this count.

24. Learned counsel for the appellant tried to rebut the FSL examination after suggesting very common questions which are not sufficient to discard the FSL report (Exh. P/57). Such report is also corroborative piece of evidence which establish that before the causing death, the victim was forcibly raped.

25. Learned counsel for the appellant contended that all the above facts are not sufficient to connect the appellant with the crime. He had himself informed about the incident to Laxman (PW-04). There is no eye-witness of the incident. Further, the incident took place during the day time. There are so many people residing in the neighborhood. No one heard the hue & cry of the victim. We are not in agreement with the above contention. Such type of crime is committed in lonesome places and also where there is least chance of being caught. Therefore, in such type of crimes, normally no witness is available nor expected from the prosecution in that regard. Conviction can be based on such circumstantial evidence.

26. In case of *Prakash Vs. State of Rajasthan* [2013 Cri. L.J. 2040], Hon'ble Supreme Court has held as under:

In a leading decision of this Court in Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116, this Court elaborately considered the standard of proof required for recording a conviction on the basis of circumstantial evidence and laid down the golden principles of standard of proof required in a case sought to be established on the basis of circumstantial evidence which are as follows:

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established: (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 where the observations were made: [SCC para 19, p. 807): Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions." (2) 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, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

27. To link the appellant with the crime, S.K.Yadav (PW-20) deposed that he recorded the memorandum of the appellant under Section 27 of the Indian Evidence Act before Akhilesh (PW-2) and Imrat. As per the memorandum of the appellant, a green faded printed *chunari/dupatta* thrown behind the house of the victim was recovered. According to memorandum (Exh. P/1) said chunari was seized by the police vide seizure memo (Exh P/2) on 18.11.2016 as Article K/4. The aforesaid testimony is corroborated by Akhilesh (PW-2). We find no material contradiction with regard to the seizure of *chunari*. The testimony of both the witness Akhilesh (PW-2) and S.K.Yadav (PW-20) with regard to Exhibit P/1 is found reliable.

28. The DNA test report (Exh. P/54) is available on record. Dr. Rupesh Kumar (PW-23) Medical Officer who had examined the appellant on 18.11.2016, deposed that the blood sample of the appellant was taken by him in presence of Shiv Kumar Yadav and Ammilal pursuant to application Exh. P/56. The medical examination of the appellant was conducted by Dr. Rupesh Kumar. The report is Exh. P/46. In the opinion of Dr. Rupesh Kumar the appellant is capable of intercourse. Dr. Rupesh Kumar prepared two semen slides and recovered underwear of the appellant and his pubic hair. After properly sealing all the articles he handed over the same to the police. In the Court, Dr. Rupesh Kumar duly identified the appellant. We find no irregularity in his proceedings.

29. Dr. Pankaj Shrivastav (PW-26), Scientist who has experience of conducting DNA test in about 2500 cases and examined various DNA test reports. In the case at hand, following articles were examined by him :

Sl. No.	Packet	Materials found inside	Whose/from whom
1	N	Clothes	Victim Ravina
2	O	Vaginal Slide	Victim Ravina
3	P	Pubic hair	Victim Ravina
4	Q	Hair	Spot
5	R	Vaginal Swab	Victim Ravina
6	U	Nails	Victim Ravina
7	K1	Underwear	Accused Vinay

8	L1	Underwear	Accused Mukesh
9	M1	Underwear	Accused Ashok
10	K4	Chunri	Accused Vinay
11	M4	Underwear	Accused Ashok
12	V	Blood Sample	Accused Vinay
13	W	Blood Sample	Accused Ashok
14	X	Blood Sample	Accused Mukesh

30. Dr. Pankaj Shrivastav found male DNA profile of more than one individual on the clothes of the victim (Article N) and vaginal slides of the victim (Article O). He further opined that the same were similar to the male DNA profile of appellant with cloth (Article N) of the victim and her vaginal swab (Article R). Dr. Pankaj Shrivastav clearly stated that presence of atleast one more male is detectable on the victim. Dr. Pankaj Shrivastav (PW-26) found similar DNA profile from the blood sample taken from the appellant and on the chunari (Article K4). He clearly found the presence of appellant's DNA.

(i) Article V was detected on the source of Article K/4.

(ii) Accused Ashok and Mukesh cannot be excluded by this DNA report.

(iii) Accused Ashok can be excluded by this DNA report (Exh. P/54).

31. We find the DNA report Exh. P/54 is reliable to sustain the conviction.

32. In order to establish a live link between the accused persons and the incident, the Deoxyribonucleic Acid (DNA) test report is a scientific evidence. In a recent case of *Mukesh Vs. State (NCT) of Delhi* [(2017) 6 SCC 1], the importance of DNA test has been broadly analysed by the Supreme Court. The Supreme Court considered various cases of DNA test. In case of *Rajkumar Vs. State of MP* [(2014) 5 SCC 353] the case of rape and murder of a 14 year old girl, the DNA test established presence of semen of the accused in the vaginal swab of the victim. The clothes of the victim were also found having the accused semen spots. It was held that the conviction of the

appellant was recorded relying on the DNA report is proper. Similarly, in case of *Santosh Kumar Singh Vs. State* [(2010) 9 SCC 747] a young girl was raped and murdered. The DNA reports were relied upon by the High Court and approved by the Supreme Court. The Supreme Court held that the DNA report has been scientifically accurate and exact science as held by the Supreme Court in case of *Kamti Devi Vs. Koshiram* [(2001) 5 SCC 311].

33. In *Kamti Devi* case (supra) the Supreme Court has observed that, "we may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement with Deoxirybonucleic Acid (DNA) as well as Ribo Nucleic Acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate.

34. In the light of principles laid down in above case laws and other case laws, in case of *Mukesh* (supra) the Hon'ble Supreme Court held as under :

> "DNA technology accurately identifies criminals. DNA profiling is now a statutory scheme under Section 53 of Cr.P.C. And such profiling is a must in case of examination of rape victims as per Section 164-A of Cr.P.C. DNA report deserves to be accepted unless it is absolutely dented. If the sampling is proper and if there is no evidence of tampering of sample, DNA Test report is to be accepted.

35. In the present case, it is established that the semen and sperms were found on the *kathdi* (Article C), red saree (Article D) and legging (Article E) of the victim. As per DNA report (Exh. P/54), on the clothes (Article N) and vaginal swab (Article R) and chunari (Article K4) of the victim, the presence of the appellant's DNA was detected. This scientific evidence clearly link the appellant with the crime. In statement under Section 313 of Cr.P.C., appellant could not offer any explanation with regard to the presence of his semen, sperms and DNA on the above articles. In case of *Mukesh* (supra), the Apex Court has also held as under:

> "Courts below rightly took note of DNA analysis report in finding accused guilty. There is no plausible explanation from accused as to matching DNA profile generated from their clothes with DNA profile of victim and PW1."

36. The appellant is the uncle of the victim. Appellant was very well acquainted with the victim as well as her family members. It is admitted that the parents of the victim had gone out on the fateful day. The victim was alone in her home. Such a circumstance gave temptation to the appellant to commit offence.

37. This brings us to the circumstance that any other person or outsider may not know that the victim's family members had gone out and she was alone in her house. Her parents would not return till night. Outsider would not know that the victim is alone in the house. Any stranger, after committing the crime would have ran away leaving the dead body at home and would not make any attempt to prove that the victim committed suicide.

38. In case of *State of Himachal Pradesh Vs. Sanjay Kumar @ Sunny* [(2017) 2 SCC 51].

> Various studies show that in more than 80% cases of such abuses, perpetrators have acquaintance with the victims who are not strangers – Danger is more within than outside – Most of the time, acquaintance rapes, when the culprit is a family member, are not even reported for various reasons, no difficult to fathom. The strongest among those is the fear of attracting social stigma. Another deterring factor which many times prevents such victims or their families to lodge a complaint is that they find whole process of criminal justice system extremely intimidating coupled with absence of victim protection mechanism. Therefore, time is ripe to bring about significant reforms in the criminal justice system as well. Equally there is also a dire need to have a survivor-centric approach towards victims of sexual violence, particularly, the children, keeping in view the traumatic long-lasting effects on such victims.

39. The appellant himself stated that he came to her home with two other persons. In this case, it was alleged that the victim was gang-raped by three accused persons, one after another. At that time, she was alone in her home. Further, she may not have expected that her own relative will commit rape with her. She was a helpless victim.

40. The Courts while trying an accused on the charge of rape must deal

with the case with utmost sensitivity, examine the broader probability of a case and not get swayed by minor contradiction or insignificant discrepancies in the evidence of witness which are not of a substantial character.

41. After considering the entire prosecution case, we find an important link to connect the appellant with the case is that in the accused statement, in question No. 37 with regard to his memorandum under Section 27 of the Evidence Act, he admitted that he along with other two juveniles in conflict with law, Mukesh and Ashok brought the crabs which they had caught from the dam but in the accused statement under Section 313 of Cr.P.C. he had denied that the crabs were crushed by them at the house of the victim. The testimony of the S.K.Yadav, Investigation Officer (PW-20) and Akhilesh (PW-2) is unrebutted that the appellant also stated that the crabs were crushed by them at the house of the victim on *silbatta*.

42. In the spot map (Exh. P/20) prepared by S.K.Yadav, at the place indicated as 'G', it was shown that silbatta and a container on which some remaining flesh of the crabs were found. This fact establishes that the appellant was present at the house of the victim, in the absence of the family members of the victim. If the incident would have happened before their reaching the spot for crushing the crabs, they ought to have informed other persons about the same but, nothing of that sort happened. This conduct of appellant show that he was present with the victim when she was alive at the time of incident.

43. As per the statement of Laxman (PW-4), it was established that appellant gave false intimation to him that the victim had committed suicide.

44. The appellant could not offer any explanation whatsoever as to how the sperm and semens were found in the vaginal swab and clothes of the victim. Therefore, we also come to the same conclusion, as arrived at by the learned trial Court, that the appellant and his associates (juvenile in conflict with law) went to the house of the victim knowing well that her parents were not at the home and thereafter taking advantage of her loneliness and helplessness, forcibly committed rape on her, thereafter murdered her by throttling, strangulating her and finally hanged her on the roof with a saree. Doctor had found injuries and the Investigating Officer found a pointed stone and *phavda* near the place of incident. After considering the testimony of Dr. Anil Maliviya, we find his evidence to be reliable that after the victim was killed, dead body was hanged from the roof by the accused persons.

45. We find the following circumstantial evidence against the appellant :-

1. The appellant is a relative (uncle) of the victim. He knew that at what time the victim was alone at her house.

2. Blood stains, semen and sperms which were found in the vaginal swab, clothes, etc. tallied with the DNA profile of the appellant and other juvenile accused.

3. The appellant could not offer any explanation as to whatsoever how his semens and sperms were present in the vagina of the victim.

4. On the date of incident at about 4:30 pm, brother Rupesh and sister Sabina of the victim saw the appellant along with his juvenile friends near the dead body of the victim at their house. No explanation has been offered in this regard as to how they were present on the spot at the time of incident.

5. The appellant admitted that they had caught crabs. S.K. Yadav (PW-20) deposed from the memorandum that the appellant informed that crabs were crushed by them in the house of the victim. This establishes the fact that the appellant was present at the house of the victim. They have not given in any explanation as to whether the incident took place before they reached the house of the victim.

6. After committing murder of the victim, the appellant gave false information to his brother that the victim had committed suicide.

46. In such circumstances, all the above facts sufficiently establish hypothesis of the guilt of the appellant, that is to say, they should not be explainable on any other hypothesis except that the appellant is guilty. The circumstances are conclusive in nature and tendency. The circumstance exclude every possible hypothesis except that the accused appellant is culprit. The chain of evidence is complete without leaving any reasonable ground for the conclusion consistent with the innocence of the appellant and show that in all human probability the act must have been done by the appellant only. Thus, the appellant is rightly convicted by the trial Court for the charges leveled

against him.

47. Learned counsel for the appellant contended that looking to the overall facts and circumstances of the case and socio-economic background of the appellant, the present case is not the 'rarest of rare case'. The sentence of death penalty is not justified in the present case. He places reliance on the following cases :-

(i) Criminal Appeal No. 864/2013 Judgment dated 01.09.2016 (Shyam Singh @ Bhima Vs. State of MP).

(ii) Criminal Appeal Nos. 292-293/2014 Judgment dated 16.09.2016 (Tattu Lodhi @ Pancham Lodhi Vs. State of MP).

(iii) Criminal Appeal Nos. 1481-1482/2014 Judgment dated 08.09.2016 (Rajesh Vs. State of M.P.).

(iv) Criminal Appeal Nos. 1584-1585/2014 Judgment dated 15.09.2016 (Govindswamy Vs. State of Kerala).

(v) Criminal Appeal Nos. 1720-1721/2014 Judgment dated 21.09.2016 (Kamlesh @ Ghati Vs. State fo MP).

(vi) B.Kumar Vs. Inspector of Police 2016 (1) MPLJ (Criminal (SC) 189).

(vii) State of MP vs. Kailash, 2017 (1) MPLJ (Criminal) 424.

(viii) In reference Judge Vs. Phoolchand Rathore, 2017 (2) MPLJ (Criminal) 231 (I).

(ix) State of MP Vs. Anil, 2016 (3) MPLJ (Criminal) 211.

(x) In reference Judge Vs. Arvindalias Chhotu Thakur, 2015 (1) MPLJ (Criminal) 167.

48. In the above referred cases, it was held that if the accused comes from a deprived socio-economic background without any criminal history and his conduct, while in custody, does not suffer from any blemish, the possibility of reformation on the materials on record cannot be ruled out. In such

condition, instead of death penalty, the punishment of life imprisonment subject to the provisions of remission, etc. under the Code of Criminal Procedure, 1973 would be adequate to meet the ends of justice.

49. In the case of *Mukesh* (supra), Hon'ble Supreme Court has referred to the following cases:

> **"Dhananjoy Chatterjee Vs. State of W.B [(1994) 2 SCC 220],** a security guard who was entrusted with the security of a residential apartment had raped and murdered an eighteen year old inhabitant of one of the flats in the said apartment, between 5.30 p.m. And 5.45 p.m. The entire case of the prosecution was based on circumstantial evidence. However, the Court found that it was a fit case for imposing death penalty. Following observed of the Court while imposing death penalty is worth quoting :
>
> In recent years, the rising crime rate-particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an over-all view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.
>
> In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the

criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

In case of **Shankar Kisanrao Khade Vs. State of Maharashtra [(2013) 5 SCC 546],** the Hon'ble Supreme Court after analysing various cases of rape and murder, wherein death sentence was confirmed by the Apex Court, in paragraph 122 briefly laid down the grounds which weighed with the Court in confirming the death penalty and the same read as under :

The principal reasons for confirming the death penalty in the above cases include :

(1) the cruel, diabolic, brutal, depraved and gruesome nature of the crime (Jumman Khan vs. State of UP [(1991) 1 SCC 752], Dhananjoy Chatterjee Vs. State of W.B. [(1994) 2 SCC 220], Laxman Naik Vs. State of Orissa (1994) 3 SCC 381 , Kamta Tiwari Vs. State of MP [(1996) 6 SCC 250], Nirmal Singh Vs. State of Haryana [(1999) 3 SCC 670], Jai Kumar Vs. State of MP [(1999) 5 SCC 1], State of Uttar Pradesh v. Satish [(2005) 3 SCC 114]; Bantu v. State of Uttar Pradesh, [(2008) 11 SCC 113], Ankush Maruti Shinde Vs. State of Maharashtra [(2009) 6 SCC 667], B.A. Umesh Vs. High Court of Karnataka [(2011) 3 SCC 85], Mohd. Mannan Vs. State of Bihar [(2011) 5 SCC 317] and Rajendra Prahladrao Wasnik Vs. State of Maharashtra) [(2012) 4 SCC 37];

(2) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community (Dhananjoy Chatterjee, Jai Kumar, Ankush Maruti Shinde and Mohd. Mannan);

(3) the reform or rehabilitation of the convict is not likely or that he would be a menace to society (Jai Kumar, B.A. Umesh and Mohd. Mannan);

(4) the victims were defenceless (Dhananjoy Chatterjee, Laxman Naik, Kamta Tewari, Ankush Maruti Shinde, Mohd. Mannan and Rajendra Pralhadrao Wasnik);

(5) the crime was either unprovoked or that it was premeditated (Dhananjoy Chatterjee, Laxman Naik, Kamta Tewari, Nirmal Singh, Jai Kumar, Ankush Maruti Shinde, B.A. Umesh and Mohd. Mannan) and in three cases the antecedents or the prior history of the convict was taken into consideration (Shivu, B.A. Umesh and Rajendra Prahladrao Wasnik).

In **Shankar Kisanrao Khade** (supra) case wherein the Hon'ble Supreme Court has exhaustively analysed the case of rape and murder where death penalty was converted to that of imprisonment for life and some of the factors that weighed with the Court in such commutation. Paragraphs 106 reads as under:

A study of the above cases suggests that there are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include :-

(1) the young age of the accused (Amit v. State of Maharashtra [(2003) 8 SCC 93] aged 20 years, Rahul aged 24 years, Santosh Kumar Singh Vs. State [(2010) 9 SCC 747] aged 24 years, Rameshbhai Chandubhai Rathod vs. State of Gujarat [(2011) 2 SCC 764] (2) aged 28 years and Amit v. State of Uttar Pradesh [(2012) 4 SCC 107] aged 28 years);

(2) the possibility of reforming and rehabilitating the accused (Santosh Kumar Singh and Amit v. State of Uttar Pradesh) the accused, incidentally, were young when they committed the crime;

(3) the accused had no prior criminal record (Nirmal Singh, Raju, Bantu, Amit v. State of Maharashtra, Surendra Pal

Shivbalakpal, Rahul and Amit v. State of Uttar Pradesh);

(4) the accused was not likely to be a menace or threat or danger to society or the community (Nirmal Singh, Mohd. Chaman, Raju, Bantu, Surendra Pal Shivbalakpal [(2005) 3 SCC 127], Rahul vs. State of Maharashtra [(2005) 10 SCC 322] and Amit v. State of Uttar Pradesh).

(5) A few other reasons need to be mentioned such as the accused having been acquitted by one the Courts (State of Tamil Nadu v. Suresh [(1998) 2 SCC 372], State of Maharashtra v. Suresh [(1998) 2 SCC 372], State of Maharashtra vs. Bharat Fakira Dhiwar [(2002) 1 SCC 622], Mansingh and Santosh Kumar Singh;

(6) the crime was not premeditated (Kumudi Lal vs. State of UP [(1999) 4 SCC 108], Akhtar vs. State of UP [(1999) 6 SCC 60], Raju and Amrit Singh [(2006) 12 SCC 79]);

(7) the case was one of circumstantial evidence (Mansingh and Bishnu Prasad Sinha [(2007) 11 SCC 467]).

In one case, commutation was ordered since there was apparently no 'exceptional' feature warranting a death penalty (Kumudi Lal) and in another case because the Trial Court had awarded life sentence but the High Court enhanced it to death (Haresh Mohandas Rajput [(2011) 12 SCC 56]).

In case of **Mukesh** (supra) Hon'ble Supreme Court had held that :

Where a crime is committed with extreme brutality and the collective conscience of the society is shocked, courts must award death penalty, irrespective of their personal opinion as regards desirability of death penalty. By not imposing a death sentence in such cases, the courts may do injustice to the society at large.

The diabolical manner in which crime was committed leaves one startled as to the pervert mental state of the inflictor. On top of it, after having failed to kill her on the spot, by running the bus over her, the victim was thrown half naked in the

wintery night, with grievous injuries."

50. Accordingly, this Court must also ascertain the mitigating and aggravating circumstances pertaining to the crime as also the criminal.

51. Now the residual question that remains to be decided is whether the death penalty is appropriate punishment in the case?

52. The learned Government Advocate submitted that the present case is clearly a case which comes under the category of "rarest of rare" case as per the decision of the Hon'ble Supreme Court in case of *Mukesh* (supra), *Bachan Singh* [AIR 1980 SC 898] and *Machhi Singh & Ors.* [1983 AIR 957]. Taking into consideration the offence and age of the victim, he submits that this is a case of rape and brutal murder of an innocent and helpless young girl in her teens.

53. We are of the considered view that in the facts and circumstances of the case, it would be appropriate to impose the alternative punishment for life, following the guidelines given in the case of *Selvam vs. State* [AIR 2014 SC 1911] and *Rajkumar vs. State of MP* [(2014) 5 SCC 353] instead of death sentence.

54. We seriously considered the mitigating circumstances in favours of the conviction. The appellant belongs to schedule tribe without criminal antecedents.

55. The prosecution has not proved the probability that the conviction cannot be reformed and rehabilitated and the probability that he would continue to commit criminal acts and thereby would pose threat to the society. Thus, appeal filed by the appellant is partly allowed.

56. Accordingly, we uphold the conviction of the appellant under Sections 449, 376(A), 376(D) and 302 of IPC and Section 6 of Protection of Children from Sexual Offences Act, however, we set aside the death sentence awarded to the appellant and instead direct him to undergo life imprisonment (life long without remission) for the offences under Sections 449, 376(A), 376(D) and 302 of IPC.

57. Accordingly, the reference made by the learned trial Court is discharged. Subject to above modification, for the aforesaid reasons, the criminal appeal is partly allowed.

Appeal partly allowed.

I.L.R. [2017] M.P., 2774
ARBITRATION REVISION

Before Mr. Justice Sanjay Yadav & Mr. Justice S.K. Awasthi
Arb.R. No. 01/2016 (Gwalior) decided on 24 August, 2017

VIVA CONSTRUCTION CO. (M/S) ...Applicant
Vs.
STATE OF M.P. & ors. ...Non-applicants

A. Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 7-B – Appeal & Reference – Limitation – Computation – **Held – Under clause 29 of agreement which is an arbitration clause, Superintending Engineer is not rendered *functus officio* merely because a dispute is not decided within 60 days, a decision even after 60 days is a decision under said clause and is appealable thereunder – Reference filed in terms of Section 7-B read with appended proviso within stipulated time is maintainable – Revision allowed. (Paras 10, 13, 15 & 16)**

क. माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 7–बी – अपील व निर्देश – परिसीमा – संगणना – अभिनिर्धारित – करार के खंड 29, जो कि एक माध्यस्थम खंड है, के अंतर्गत, मात्र इसलिए कि एक विवाद को 60 दिन के भीतर विनिश्चित नहीं किया गया है, अधीक्षण यंत्री पदकार्य निवृत्त नहीं हो जाता, यहां तक कि 60 दिन पश्चात् का विनिश्चय भी उक्त खंड के अंतर्गत एक विनिश्चय है तथा उसके अंतर्गत अपीलीय है – धारा 7–बी सहपठित संलग्न परंतुक के निबंधनों में, नियत समय के भीतर प्रस्तुत निर्देश पोषणीय है – पुनरीक्षण मंजूर।

B. Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 7-B – Term "Decision" – **Held – An indecisiveness or an indecision on the part of Superintending Engineer can never be construed to be a "decision" giving rise to avail remedy of appeal, because unless the forum of final authority is exhausted, aggrieved person cannot avail the remedy u/S 7-B of the Adhiniyam of 1983. (Para 12)**

ख. माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 7–बी – शब्द "विनिश्चय" – अभिनिर्धारित – अधीक्षण यंत्री की ओर से अनिश्चयपूर्वकता या अनिश्चय का अर्थान्वयन कभी भी एक "विनिश्चय" नहीं किया जा सकता जिससे अपील के उपचार का अवलंब उत्पन्न होता है, क्योंकि जब तक अंतिम प्राधिकारी के फोरम को निःशेष न किया गया हो, व्यथित व्यक्ति, 1983 के अधिनियम की धारा 7–बी के अंतर्गत उपचार का अवलंब नहीं ले सकता।

Case referred :

2012 (4) MPLJ 212

Siddharth Jain, for the applicant.
Yogesh Chaturvedi, G.A. for the non-applicants/State.

ORDER

The Order of the Court was passed by : **SANJAY YADAV, J. :-** Petitioner vide this Revision under Section 19 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (for brevity "Adhiniyam, 1983") takes exception to the Award dated 27.11.2015 passed by the Madhyastham Adhikaran, whereby while finding the petitioner entitled for Award of Rs.25,84,203/-, non-suited the petitioner on the finding that the Appeal is not in consonance with the stipulations contained under Clause 29 of the Agreement, as such not tenable under Section 7B of the Adhiniyam, 1983.

2. Relevant facts giving rise to controversy briefly are that the petitioner entered into works contract with respondents on 02.01.2009 for construction of Kunwarpur to Burda road under district Shivpuri under CRF Scheme. The amount of tender was Rs.665.00 lacs. The tender was accepted @ 14.30% below schedule of rates (SOR) = Rs.569,90,500.00; work order was issued on 02.01.2009. The completion period was 16 months to be reckoned after 30 days of issue of work order as per Clause 2 of Agreement No. 100/2008-09. The due date of completion was scheduled as on 31.05.2010. As the work could not be completed within the scheduled time, an extension was sought which was turned down and respondent opted to terminate the contract under Clause 3(C) of the Agreement. The contract was rescinded on 23.02.2011. Petitioner invoked Clause 29 of the Agreement requesting the Superintending Engineer to allow the claims for losses and damages to the petitioner through its letter dated 28.02.2011. Superintending Engineer rejected all claims by his order dated 16.06.2011. Aggrieved petitioner preferred an Appeal before the Chief Engineer on 23.06.2011. As the Chief Engineer did not decide the Appeal, the petitioner after waiting for six months and before expiry of one year filed reference petition before the Madhyastham Adhikaran on 16.10.2012. The Adhikaran vide impugned Award though held the petitioner entitled for the amount as find mention in paragraph 12 of the Award, yet non-suited the petitioner as the reference was not found

maintainable as per Clause 29 of the Agreement.

3. The reasons find mention in paragraph 8 of the Award, wherein the Adhikaran observed:-

> 8.(i) First and the foremost objection of the respondents is that the reference petition being in contravention of clause 29 of the contract agreement is not maintainable in view of the law laid down by the larger bench of the High Court of M.P. in the light of the decision rendered in Sanjay Dubey V. State of M.P., 2012 (4) MPLJ 212. The petitioner in paragraph 6 of the reference petition has averred in specific that the dispute arose on 23.2.2011 when the Respondent No. 2 took action under clause 3(c) of the contract agreement. The petitioner being aggrieved by it, submitted dispute and quantified claim before the S.E. on 28.2.2011. The reminder was also issued on 08.03.2011. The S.E. rejected all the claims vide office letter dated 16.06.2011. The petitioner preferred an appeal against it before the C.E. on 23.06.2011, which according to the petitioner, was lying unattended at the time of filing of the reference petition on 17.10.2012.
>
> (ii) The respondents submitted that the petitioner having acted in contravention of clause 29 of the contract agreement, the reference petition is not maintainable in view of the decision in Sanjay Dubey's case (supra).
>
> The relevant portion of clause 29 runs as under:-
>
> "Arbitration Clause
>
> Clause 29 – Except as otherwise provided in this contract all question and dispute relating to the meaning of the specifications designs, drawings and instructions herein before mentioned and as to thing whatsoever, in any way arising out of or relating to the contract designs, drawings, whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the

S.E. in writing for his decision within a period of 30 days of such occurrence. Thereupon the S.E. shall give his written instructions and/or decisions within a period of 60 days of such request. This period can be extended by mutual consent of the parties.

Upon receipt of written instructions or decisions, the parties shall promptly proceed without delay to comply such instructions or decisions. If the S.E. fails to give his instructions or decisions in writing within a period of 60 days or mutually agreed time after being requested if the parties are aggrieved against the decision of the S.E. the parties may within 30 days prefer an appeal to the C.E. who shall afford an opportunity to the parties of being heard and to offer evidence in support of his appeal. The C.E. will give his decision within 90 days. If any party is not satisfied with the decision of the C.E., he can prefer such disputes for arbitration by a Tribunal constituted by the State Government from among the officers belonging to the Department not below the rank of S.E. one Retired Chief Engineer of any Technical Department and one serving officer not below the rank of S.E. belonging to another Technical Department."

(iii) Aforesaid clause makes it obligatory on the part of the petitioner to submit dispute before the S.E. in writing for a decision within a period of 30 days of such occurrence. According to the petitioner itself, the cause of action arose on 23.2.2011 when action under clause 3(c) of the contract agreement was taken against it. The quantified claim/dispute submitted before the S.E. on 28.2.2011 was well within time as per the contract agreement. In case of failure on the part of the S.E. to decide the dispute within a period of 60 days or

mutually agreed time, the party aggrieved was under a further obligation to prefer appeal within 30 days. We have gone through the order of the S.E. dated 16.6.2011 (Ex.D.4). It does not mention the consent / agreement of the respondents in extending time to render the decision. There is no other document to establish that the order on quantified claim was passed on 16.6.2011 within extended period in mutually agreed manner.

(iv) The respondents in paragraph 6 of written statement have clearly denied that the S.E. decided the issue in mutually extended period. The written statement is supported by affidavit of the OIC. In this view of the matter, the petitioner was obliged to prove that the order on quantified claim was passed by the S.E. on 16.6.2011 within mutually agreed extended period. In the absence of proof in this regard, the petitioner was obliged to prefer an appeal before the S.E. within 30 days on failure of the S.E. to decide the quantified claim within a period of 60 days from the date of its receipt. According to the petitioner itself, the quantified claim was submitted on 28.2.2011 and its reminder was submitted on 8.3.2011. Accordingly, the appeal ought to have been preferred before the C.E. in the absence of mutually agreed extended period up to 30th May, 2011 (as per the submission of the quantified claim on 28.2.2011 and 8th June, 2011 (as per the submission of the reminder on 8.3.2011). Instead, the petitioner submitted its appeal on 23.6.2011, which was beyond the period prescribed contractually by virtue of clause 29, and has, thus, contravened the said clause. In the case of Sanjay Dubey (supra) the larger bench of the High Court of M.P. hasobserved:-

> "13.(i) Where the works contract contains a clause like Clause 29, the jurisdiction of the Tribunal can be invoked only after approaching the Authority as provided under the terms of the works contract."

(v) A feeble attempt has been made to avail six months period of failure on the part of the S.E. to decide the dispute, as provided in the proviso to sub-sec.(1) of Sec.7-B of the

Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983. The provision is reproduced below for convenience:-

> "[7-B. Limitation.-- [(1) The Tribunal shall not admit a reference petition unless--
>
> (a) the dispute is first referred for the decision of the final authority under the terms of the works contract; and
>
> (b) the petition to the Tribunal is made within one year from the date of communication of the decision of the final authority.
>
> Provided that if the final authority fails to decide the disputes within a period of six months from the date of reference to it, the petition to the Tribunal shall be made within one year or the expiry of the said period of six months.]"

The aforesaid proviso applies in case of failure on the part of the final authority to decide the dispute within a period of six months from the date of reference to it. The words "Final authority" has not been defined either in the contract agreement or elsewhere in the present case. The word "Final" means, as per the Black's Law Dictionary, as under:-

"Final. - Last; conclusive; decisive, definitive; terminated; completed. In its use in reference to legal actions, this word is generally contrasted with "interlocutory".

According to clause 29 itself, the C.E. is the final authority as per the contract agreement; whereas S.E. is the initial/pre-final authority. Thus, proviso to sub-sec.(1) of Sec.7-B (supra) does not get attracted in the present case.

In view of the aforesaid discussion, we uphold the objection of the respondents and hold that the petitioner has failed to establish that it has made compliance of clause 29 of the contract agreement; and consequently, the reference petition is found to be in contravention of clause 29 and is not maintainable."

4. The petitioner has confined to only one issue, i.e., the construction of Clause 29 of the Agreement. It is urged that the Adhikaran has grossly erred in construing the provision under Clause 29 that once no action is taken by the Superintending Engineer on an objection raised and unless the period is mutually extended, the Superintending Engineer is abdicated of the jurisdiction to decide the objection if not decided within 60 days. It is contended that this erroneous construction of Clause 29 percolated in the analysis made by the Adhikaran leading it to draw a conclusion that the petitioner ought to have filed the reference under Section 7 of Adhiniyam, 1983 on or before 30.05.2011.

5. Evidently, the date 30.05.2011 construed to be the last date on which the petitioner ought to have filed the reference is arrived at on the finding that with the recession of contract on 23.02.2011 and the dispute being raised before the Superintending Engineer on 28.02.2011 with the reminder submitted on 08.03.2011 on a failure on the part of the Superintending Engineer in deciding the matter within 60 days from the date of receipts, the Adhikaran has construed that the Superintending Engineer would be *functus officio* unless the parties mutually agree for extension of time. This reasoning has led the Adhikaran conclude that there being no mutual consent amongst the parties for extension of time to pass Award, the reference ought to have been on or before 30.05.2011. Thus in the tacit opinion of the Adhikaran, the order passed by the Adhikaran on 16.06.2011 was not an order in the eyes of law and, therefore, even an appeal before Chief Engineer was of no consequence.

6. Respondents on their turn have supported the verdict by the Tribunal. However, as against the findings as to entitlement of the petitioner, the respondents have not challenged the same.

7. Considered rival submission.

8. After careful reading, the reasons assigned by the Adhikaran and the interpretation given to Clause 29, we beg to differ with the Adhikaran.

9. Clause 29 of the Agreement is an arbitration clause providing two tier forum for resolution of a dispute arising out of or relating to a contract, the forums are the Superintending Engineer and the Chief Engineer, who is final departmental Authority to resolve the dispute. That, an inbuilt mechanism has been provided with specified time within which the decision is to be taken. For Superintending Engineer, the time within which the decision is to be taken is 60 days. However, there is an additional clause that if the mutual agreement

give their consent, this period 60 days is extendable. For how many days it is to be extended is not provided. The clause is further silent as to the consequences that if the decision is not taken within 60 days and if there is no mutual consent whether the Superintending Engineer is prohibited from passing the order.

10. In our considered opinion, the Superintending Engineer is not *functus officio* merely because the decision is not taken within 60 days. Had that been the intention it could have been incorporated in the Clause that non-decision within 60 days or within extended period would render the dispute raised otiose. If that was the intention then there was no need to incorporate the sentence "if the parties are aggrieved against the decision of the S.E., the parties may within 30 days prefer an appeal to the C.E. who shall afford an opportunity to the parties of being heard and to offer evidence in support of his appeal". The appeal thus lies against a decision.

11. The expression "decision" has been construed to be:

> "A word which has been used as signifying the judgment of the Court; a judgment given by a competent tribunal; the findings of fact; the finding by the Court upon which a decree or judgment may be entered; the result of the deliberations of a tribunal, See 18 CLJ 128 : 20 IC 1 : 32 Cal 162 : 13 Bom LR 113 : 35 Bom 231 : 25 All 109 : 30 IA 35 (PC) : 5 Bom LR 100 : 4 OC 66. The word 'decision' unless otherwise qualified by the context, may possibly embrace matters both of civil and criminal law. AIR 1930 PC 291 (PC). The refusal of the judge to do a ministerial act can hardly, with propriety, be called a 'ruling' or 'decision'. 'Cruse v. Mc Queen,' (Tex. Civ. App. 1894) (Pl. See Law Lexion by P Ramanatha Aiyar, 4th Edition 2010 Page 1816).

12. In view whereof, an "indecisiveness" or an "indecision" on the part of the Superintending Engineer can never be construed to be a "decision" giving rise to avail the remedy of Appeal. Because unless the forum of final authority is exhausted, aggrieved person cannot avail the remedy under Section 7-B of the Adhiniyam, 1983.

13. The question can be examined from the angle of Section 7-B of the Adhiniyam, 1983 which mandates that the reference under Section 7 is not

admissible unless (i) the dispute is first referred for the decision of the final Authority under the terms of works contract (i.e. clause 29) and (ii) the petition is made within one year from the date of communication of the decision of the final Authority. Proviso appended with Section 7-B of the Adhiniyam, 1983 stipulates that if the final Authority fails to decide the disputes within a period of six months from the date of reference to it, the petition to the Tribunal shall lie within one year of the expiry of six months. Thus, imperative it is that before involving the forum before Adhikaran, the departmental remedy undoubtedly is in the case at hand the Chief Engineer and not the Superintending Engineer is the final Authority. If the interpretation given by the Adhikaran is accepted and the Superintending Engineer has derelicted in discharging its duty in deciding the Appeal within 60 days, then the aggrieved person is left with no remedy because there being no decision, he cannot avail the remedy of Appeal before the Chief Engineer nor can he file the reference. That, trite it is that a person cannot be left remedyless.

14. Reliance placed on behalf of the State on paragraph 9 of the decision in *Sanjay Dubey v. State of M.P. and another* [2012 (4) MPLJ 212] hardly takes us anywhere in the present fact situation. Reading of paragraph 9 would make it clear that the special Bench was concerned with the period of limitation under Section 7-B as to how it is to be arrived at and not with the nuances of Clause 29 as in the case at hand.

15. Taking any view of the matter, we do not approve the conclusion arrived by the Adhikaran *qua* Clause 29 of the Agreement. Accordingly, the decision, that the Reference was not tenable, is set aside.

16. That the dispute *qua* termination of contract on 23.02.2011 was raised on 28.02.2011 wherein order was passed on 16.06.2011. Petitioner preferred an appeal within 30 days on 23.06.2011. And the Appellate Authority having failed to take decision thereon within 90 days, the petitioner was well within the period of limitation. Since the Adhikaran had found the petitioner entitled to certain claims and the petitioner has confined only to the issue regarding Clause 29 of the Agreement, we hold that the Reference is maintainable and the petitioner is entitled for the claim arrived at by the Adhikaran. The impugned Award is modified to the extent above. There shall be no costs.

Order accordingly.

I.L.R. [2017] M.P., 2783
CRIMINAL REFERENCE

Before Mr. Justice J.K. Maheshwari & Mr. Justice Rajendra Mahajan,
Cr.Ref. No. 1/2014 (Jabalpur) decided on 19 May, 2017

IN REFERENCE ...Applicant
Vs.
ASHOK & ors. ...Non-applicants

(Alongwith Cr.A. Nos. 3538/2014, 1075/2015, 3512/2014 & 3598/2014)

A. Penal Code (45 of 1860), Sections 201, 302 & 376(2)(g) r/w 34 – Gang Rape and Murder – Death Sentence – Appreciation of Evidence – Circumstantial Evidence & DNA Report – **Prosecutrix was raped and she alongwith her companion were murdered by appellants – Held – As per DNA report, appellant's DNA was matched and was found on underwear and vaginal swab of prosecutrix – Evidence of seizure of mobile phone & silver payal of prosecutrix and shoes of her companion duly established and proved beyond reasonable doubt – Call details also establishes commission of offence by appellants – Evidence shows that chain of circumstantial evidence is complete – Case do not fall in category of "Rarest of Rare" case – Death sentence modified to life imprisonment – Criminal reference rejected – Appeals allowed to such extent.**

(Paras 43 to 58, 60, 61 & 83)

क. दण्ड संहिता (1860 का 45), धाराएँ 201, 302 व 376(2)(जी) सहपठित 34 – सामूहिक बलात्संग एवं हत्या – मृत्युदण्ड – साक्ष्य का मूल्यांकन – परिस्थितिजन्य साक्ष्य व डी.एन.ए. रिपोर्ट – अपीलार्थीगण द्वारा अभियोक्त्री का बलात्संग किया गया था तथा उसके साथ उसके साथी की हत्या की गई थी – अभिनिर्धारित – डी.एन.ए. रिपोर्ट के अनुसार, अपीलार्थी के डी.एन.ए. का मिलान किया गया था तथा वह अभियोक्त्री की अंडरवियर और वैजाइनल स्वैब पर पाया गया था – अभियोक्त्री के मोबाईल फोन व चांदी की पायल तथा उसके साथी के जूते की जब्ती का साक्ष्य सम्यक् रूप से स्थापित हुआ है तथा युक्तियुक्त संदेह से परे साबित हुआ है – कॉल विवरण भी, अपीलार्थीगण द्वारा अपराध कारित किया जाना स्थापित करता है – साक्ष्य दर्शाता है कि परिस्थितिजन्य साक्ष्य की श्रृंखला पूर्ण है – प्रकरण, "विरलतम से विरल" प्रकरण की श्रेणी में नहीं आता है – मृत्युदण्ड को आजीवन कारावास में उपांतरित किया गया – दाण्डिक निर्देश अस्वीकार किया गया – उक्त सीमा तक अपीलें मंजूर।

B. Penal Code (45 of 1860), Sections 201, 302 & 376(2)(g) r/w 34 – Gang Rape and Murder – Circumstantial Evidence – Motive – **Held**

– In case of murder based on circumstantial evidence, motive gains significance – It is established that soon after rape of prosecutrix, she and her companion was murdered so that they would not come forward to depose against appellants. (Para 65)

ख. दण्ड संहिता (1860 का 45), धाराएँ 201, 302 व 376(2)(जी) सहपठित 34 – सामूहिक बलात्संग एवं हत्या – परिस्थितिजन्य साक्ष्य – हेतु – अभिनिर्धारित – परिस्थितिजन्य साक्ष्य पर आधारित हत्या के प्रकरण में, हेतु महत्व प्राप्त करता है – यह स्थापित किया गया है कि अभियोक्त्री के बलात्संग के तुरंत पश्चात्, उसकी तथा उसके साथी की हत्या की गई थी ताकि अपीलार्थीगण के विरूद्ध अभिसाक्ष्य देने के लिए सामने न आ पायें।

C. Penal Code (45 of 1860), Sections 201, 302 & 376(2)(g) r/w 34 – Gang Rape and Murder – Death Sentence – Rarest of Rare Case – Aggravating and Mitigating Circumstances **– Held – Upon comparison of aggravating and mitigating circumstances, the mitigating circumstances have far away outweighed the aggravating circumstances – Further, it is not possible to identify which accused case falls in category of rarest of rare case – Capital punishment imposed is altered to life imprisonment. (Paras 81, 83 to 86)**

ग. दण्ड संहिता (1860 का 45), धाराएँ 201, 302 व 376(2)(जी) सहपठित 34 – सामूहिक बलात्संग एवं हत्या – मृत्युदण्ड – विरलतम से विरल प्रकरण – गुरूतरकारी तथा कम करने वाली परिस्थितियां – अभिनिर्धारित – गुरूतरकारी एवं कम करने वाली परिस्थितियों की तुलना करने पर, कम करने वाली परिस्थितियां गुरूतरकारी परिस्थितियों से अधिक महत्वपूर्ण हैं – इसके अतिरिक्त, यह पहचानना संभव नहीं है कि किस अभियुक्त का प्रकरण विरलतम से विरल प्रकरण की श्रेणी में आता है – अधिरोपित मृत्युदण्ड को आजीवन कारावास में परिवर्तित किया गया।

Cases referred:

(2001) 5 SCC 311, (2010) 9 SCC 747, AIR 2014 SC 932, (2014) 4 SCC 69, 2014 (5) MPHT 45, 955 F.2d 786 (2d Cir. 1992), ILR (2012) MP 1351, 2008 Cr.L.J. 107, (2012) 2 MPHT 182 DB (MP), 2013 Cr.L.R. (M.P.,) 79, 2013 Cr.L.J. (M.P.) 791, (2015) 1 SCC 67, (2015) 1 SCC 253, (2015) 6 SCC 632, (1983) 3 SCC 470, (1980) 2 SCC 684, (1998) 7 SCC 177, (1999) 3 SCC 19, (2003) 7 SCC 141, 2013 Cr.L.J. 1559, (1984) 4 SCC 116, AIR 1990 SC 79, AIR 2002 SC 3164, 2007 AIR SCW 2226, 1992 Cr.L.J. 1104 SC, (2013) 5 SCC 722, (1996) 10 SCC 193, AIR 2010 SC 2352, (2012) 10 SCC 464, (2012) 11 SCC 196, 2010 Cr.L.J. 3871, 2010 (2) JLJ 104, (2012) 6

SCC 107, (2002) 3 SCC 76, (2011) 12 SCC 56, (2009) 6 SCC 498, (2013) 5 SCC 546, (1998) 3 SCC 625, (2016) 8 SCC 313.

Divya Kirti Bohrey, G.A. assisted by *Manjeet Chakkal*, P.L. for the prosecution.

S.K. Gangrade, for the accused-appellant in Cr.A. No. 3538/2014.

P.S. Gaharwar, for the accused-appellant in Cr.A. No. 1075/2015.

Krishna Dev Singh, for the accused-appellant in Cr.A. No. 3512/2014.

Amit Dubey and *Abhinav Dubey*, for the accused-appellant in Cr.A. No. 3598/2014.

JUDGMENT

The Judgment of the Court was delivered by : **RAJENDRA MAHAJAN, J. :-** Since the aforesaid criminal reference and criminal appeals have arisen out of one and the same judgment dated 14.11.14 passed by the learned Additional Sessions Judge, Pipariya, District Hoshangabad in Sessions Trial No.200/10, they are being decided by this common judgment.

2. Vide the impugned judgment, the learned ASJ has held that the period between 13.02.10 at about mid-noon and 15.02.10 at about 5:00 p.m. in the agricultural field of Durjan Singh (PW-14) situated nearby village Samnapur the accused-appellants committed gang-rape upon the deceased-prosecutrix, and later murdered her and her companion deceased Deepak in furtherance of common intention to conceal the evidence of gang-rape. Having held so, the learned ASJ has convicted and sentenced the accused appellants as under:-

Sr. No.	Name of accused appellants	Penal sections of Conviction	Jail sentences	Fine sentences	Default jail sentences
1	Ashok	(i) 376(2)(g) IPC	Imprisonment for life	Rs.1000/-	R.I. for six months
		(ii) 302 r.w. 34 IPC (two counts)	Death sentence for each count	Rs.1000/- for each count	For each count R.I. for six months
		(iii) 201 IPC	R.I. for seven years	Rs.1000/-	R.I. for six months
2	Ramjeevan	(i) 376(2)(g) IPC	Imprisonment for life	Rs.1000/-	R.I. for six months

		(ii) 302 r.w. 34 IPC (two counts)	Death sentence for each count	Rs.1000/- for each count	For each count R.I. for six months
		(iii) 201 IPC	R.I. for seven years	Rs.1000/-	R.I. for six months
3	Kapil	(i) 376(2)(g) IPC	Imprisonment for life	Rs.1000/-	R.I. for six months
		(ii) 302 r.w. 34 IPC (two counts)	Death sentence for each count	Rs.1000/- for each count	For each count R.I. for six months
		(iii) 201 IPC	R.I. for seven years	Rs.1000/-	R.I. for six months
4	Ajju @ Ajay	(i) 376(2)(g) IPC	Imprisonment for life	Rs.1000/-	R.I. for six months
		(ii) 302 r.w. 34 IPC (two counts)	Death sentence for each count	Rs.1000/- for each count	For each count R.I. for six months
		(iii) 201 IPC	R.I. for seven years	Rs.1000/-	R.I. for six months

3. The learned Trial Judge has sent the proceedings for confirmation of sentences of death awarded to the accused-appellants in order to comply with the provisions of Section 366 of the Cr.P.C., whereas being aggrieved by and dissatisfied with the impugned judgment, each of the accused-appellants has preferred a separate appeal under Section 374 Cr.P.C.

4. The prosecution case as unfolded during the trial is narrated below in detail as it is entirely based upon the circumstantial evidence:-

(4.1) On 15.02.10, Rambagas (PW-21), the Kotwar of village Samnapur, gave an oral intimation at the Police Station Pipariya that two unknown dead bodies of young persons, one male and one female, in semi-naked state are lying in the agricultural field of Durjan Singh (PW-14), the resident of village Samnapur, among the standing wheat-crop. The dead body of man is identified as that of Deepak s/o Babulal Kushwaha a resident of village Kalmesera of Hoshangabad district and the dead body of the woman remains unidentified. Upon the

aforesaid intimation, Sub Inspector Rai Singh Soni (not-examined— due to his death in a vehicular accident before recording of his statement in the trial court.) recorded marg intimation Ex.P-19 at Nos.12/10 and 13/10 under Section 174 Cr.P.C.

(4.2) In the morning of 16.02.10, Rai Singh Soni reached the place of occurrence. First he prepared a spot map Ex.P-33 of the place where the dead bodies were lying in the presence of Laxman singh (PW-28). Thereafter, he prepared the inquest proceedings Ex.P-20 and Ex.P-34 of dead bodies of Depak and unknown woman respectively in the presence of witnesses namely Dinesh (PW-22), Laxman Singh (PW-28), Ram Singh (PW-30), Rambagas (PW-21) and Narayan Prasad (PW-51). The witnesses opined that both the deceased were murdered and the woman was subjected to rape before being murdered. He also prepared Panchnamas Ex.P-22 to Ex.P-25, showing the signs of scuffles, in the presence of Laxman Singh and Rambagas. Vide seizure memo Ex.P-26, he seized the deceased woman's clothes namely underwear, Salwar, Dupatta (Stole) and Kurti which were in torn condition and upon which stains of blood and semen were present, as also a bunch of hair, some pieces of ears of wheat (Gehu Ki Bali) and soil smeared with her vaginal swab. He also noticed that a stump of ears of wheat was partly inside her vagina. Be it noted that he had also recorded his said observations in the aforesaid seizure memo. Vide seizure memo Ex.P-27, he seized deceased Deepak's torn jeans and a belt as also blood stained soil and plain soil. Vide seizure memo Ex.P-28, he seized a gent's chappal of right foot and a purse. Vide seizure memo Ex.P-29, he seized a motorcycle bearing registration No. MP-05-MP-1371 with deflated tyres which was parked some distance away from the place of occurrence. In the course of investigation, it is found that the motorcycle was registered in the name of Laxmi Narayan (PW-26), who happens to be nephew (the sister's son) of deceased Deepak. He prepared the aforesaid seizure memos in the presence of Rambagas and Laxman Singh. Pratap Singh (PW-58), the photographer of

the FSL Unit, took the photographs Ex.P-106 to Ex.P-123 of both the dead bodies from various angles.

(4.3) Having completed all the legal requirements at the place of occurrence, Rai Singh Soni sent both the dead bodies for post-mortems to the Community Health Center Pipariya, where on 16.02.10 Dr. A.K. Agrawal (PW-46) performed autopsy on the dead body of deceased Deepak, and he and Dr. Anita Sahu (not-examined) jointly conducted post-mortem examination on the dead body of the deceased-prosecutrix. Ex.P-66 and Ex.P-67 are the post-mortem reports of deceased Deepak and the deceased-prosecutrix respectively. As per the post-mortem examinations, they suffered homicidal death and the deceased-prosecutrix was subjected to rape before her death.

(4.4) Dr. A.K. Agrawal also prepared a slide of sticky liquid deposited on deceased Deepak's glans penis and cut off finger-nails of his both hands and he and Dr. Anita Sahu also prepared a slide of vaginal swab of the deceased-prosecutrix, cut off a few strains of her pubic hairs, finger-nails of her both hands for forensic tests/examinations.

(4.5) On the basis of the outcome of marg inquiry and postmortem reports, on 16.02.10 Rai Singh Soni lodged an FIR being Ex.P-88 and registered a case at Crime No.63/2010 under Sections 302, 376, 201 and 34 of the IPC against an unknown person.

(4.6) On 17.02.10, Sushila Bai (PW-27) identified the dead body of the deceased-prosecutrix, as her daughter, aged about 17 years, whereupon identification memo Ex.P-31 was prepared by Rai Singh Soni.

(4.7) The investigation of the case was started under the supervision of Rajesh Raghuwanshi (PW-57), the Sub Divisional Police Officer, Pipariya on account of the seriousness and gravity of the crime. He constituted an investigating team (for short 'the team') comprising Rai Singh Soni, Dinesh Singh Chouhan @ D.S. Chouhan (PW-56), the S.I. of Police Station

Pipariya, Malkit Singh (PW-59), the SHO of Police Station Shohagpur and Umed Singh (PW-54) ASI of Police Station Pipariya.

(4.8) At the preliminary stage of investigation, the team came to know that both the deceased had mobile phones with them at the time of incident, but they were not found on the spot or with their dead bodies or nearby the place of occurrence. Therefore, the perpetrator(s) of crime may have definitely taken the mobile phones of the deceased with them after the commission of ghastly crime and they may be using the mobile phones. That is why, they thought that the culprits may be nabbed with the help of International Mobile Equipment Identity (for short 'IMEI') numbers of mobile phones, mobile numbers and call-details records thereof.

(4.9) On 22.02.10, Rai Singh Soni seized a carton/box of a mobile phone of Motorola company from the possession of Sushila Bai, the mother of deceased-prosecutrix, vide seizure memo Ex.P-32, whereupon IMEI No.35648-40028-49822 is printed. However, the case diary and the call details reveal that he made the mistake while noting IMEI number in the seizure memo Ex.P-32. The last digit is, in fact, zero instead of two. Thus, the correct IMEI number, which is printed on the carton, is 35648-40028-49820.

(4.10) The team also traced that deceased Deepak purchased a prepaid SIM from the Idea Cellular Limited (for short the Idea) in his name vide the application Ex.P-86 and he was allotted the SIM No.8991787107084727456 and Mobile No.97547-75495.

(4.11) As per the call details of IMEI No.35648-40028-49820 supplied by the service provider companies, namely, the Bharti Airtel Limited (for short 'the Airtel') and the Vodafone vide Ex.P-81 and Ex.P-60 respectively. Two SIMs bearing Mobile Nos.96850-48589 and 95841-47788 were used for a period between 14.02.10 and 23.02.10 in the mobile phone of the said IMEI number.

(4.12) As per the call details Ex.P-77, Ex.P-80 and Ex.P-82 provided by the Airtel, SIM of Mobile No.97552-33915 was used in the mobile phone bearing IMEI No.35845-50206-59230 for a period between 10.02.10 and 28.02.10 (as per Ex.P-77, Ex.P-80) and SIM of Mobile No.96308-46291 was used in the mobile phone of aforesaid IMEI for a period between 01.02.10 and 23.02.10 (as per Ex.P-82).

(4.13) Vide Ex.P-102 to Ex.P-105, the Airtel also provided particulars as to whose name SIMs of some of mobile numbers are issued.

(4.14) The Idea provided call details Ex.P-142 of SIM of Mobile No.97547-75495 for a period between 01.02.10 and 16.02.10 which was installed in a mobile phone bearing IMEI No.35845-50206-59230.

(4.15) On the basis of aforesaid call details and Ex.P-86, Malkit Singh, a member of the team, found that the Airtel has allotted SIM of Mobile No.97547-75495 to deceased Deepak in his own name and he had installed the SIM in the mobile phone bearing IMEI No.35845-50206-59230. With that mobile phone, deceased Deepak talked last time on 13.02.10 at about 2:58 p.m. At that time, his mobile phone was in the range of Idea mobile tower located in village Dongrykheda. Under the range of said tower, the place of occurrence falls. Later, the SIM of mobile number 96308-46291 was installed in the mobile phone. He also found that in the mobile phone of the deceased-prosecutrix bearing IMEI No.35648-40028-49820 SIM of Mobile Nos. 96850-48589 was installed and used.

(4.16) The team traced that SIM of Mobile No.95841-47788 was purchased by accused-appellant Kapil in the name of his maternal uncle Rajesh Purvalia (PW-13) from Vikram Singh (PW-49), who was the authorised distributor of SIMs of the Vodafone.

(4.17) On 24.02.10, Rai Singh Soni seized a mobile phone of the Sigmatel company with two mobile SIMs of the Airtel

bearing Mobile Nos. 96308-46291 and 97552-33915 from the possession of Ashok s/o Bhurelal (PW-49) vide the seizure memo Ex.P-6 in the presence of Ajab Singh (PW-10) and Santosh (PW-50).

(4.18) On the basis of the information as stated in the aforesaid para, on 02.03.10 Dinesh Singh, a team member, arrested accused-appellant Kapil vide the arrest memo Ex.P-53. On the same day, he interrogated him in the presence of Lakhanlal (PW-31) and Halke Bhaiya (PW-37). In the course of interrogation, he disclosed amongst other things that he and accused-appellant Ajju @ Ajay had taken the mobile phones of the deceased-prosecutrix and deceased Deepak respectively. He also disclosed that the SIM installed in the mobile phone of the deceased-prosecutrix was removed, and he installed the new SIM bearing Mobile No.96850-48589, which was given to him by accused-appellant Ajju. He used the said SIM for a period between 14.02.10 and 16.02.10. Later, he threw the original SIM and the SIM given by accused-appellant Ajju in a water canal flowing nearby village Chirmeta. Later, he used the mobile phone with SIM of Mobile No.95841-47788. This SIM was given to him by his brother Deepak (not-examined). He also disclosed that his soil stained pants and shirt were kept in his house. Upon the aforesaid information, Dinesh Singh prepared disclosure statement Ex.P-45. Pursuant to which, he seized one mobile phone of Motorola company with a SIM bearing Mobile No.95841-47788 and soil stained pants and shirt at his instance from his house in the presence of aforesaid prosecution witnesses vide the Ex.P-47.

(4.19) On 02.03.10, Dinesh Singh arrested accused-appellant Ashok vide the arrest memo Ex.P-51 in the presence of Lakhanlal and Halke Bhaiya. On the same day, he interrogated him in their presence. Whereupon, accused-appellant Ashok revealed amongst other things that he had removed a pair of silver payals (anklets) of the deceased-prosecutrix and kept the payals, his own mobile phone with

the SIM, which he used before and after incident, and soil stained pants and shirt in various places of his house. Thereupon, Dinesh Singh drew his disclosure statement Ex.P-41. On 05.03.10, he recovered a mobile phone of Nokia Company model No.1028 with SIM of Mobile No.95755-31130, the payals and soil stained clothes vide the recovery memo Ex.P-42 at his instance in the presence of aforesaid prosecution witnesses.

(4.20) On 02.03.10, Dinesh Singh arrested accused-appellant Ramjeevan vide the arrest memo Ex.P-52 in the presence of Lakhanlal and Halke Bhaiya. On being interrogated by Dinesh Singh, he disclosed that he had killed deceased Deepak by hitting with a big stone on his head and threw it in the field where the crime was committed, and he had hidden his soil stained pants and shirt in the agricultural field of one Kapil (not-examined) situated on the out-skirts of village Chirmeta. Upon the said information, Dinesh Singh drew disclosure statement Ex.P-43 and recovered the aforesaid articles at his instance vide the memos Ex.P-50 and Ex.P-57 in the presence of the aforesaid prosecution witnesses.

(4.21) On 13.03.10, accused-appellant Ajju was arrested by Dinesh Singh vide the arrest memo Ex.P-12 in the presence of Sheikh Yakub (PW- 16) and Narsinghdas (not-examined). On the same day, he was interrogated by him in the presence of Laxman Singh and Halke Bhaiya. He disclosed amongst other things that he took deceased Deepak's mobile phone, his shoes and a pocket diary. He left his own chappals at the place of occurrence as the same got stuck in mud. Later, he threw the shoes in one agricultural field. He sold the mobile phone to Ashok Raghuvanshi (PW-39) at Rs.450/-. He also stated that at the relevant time he had a stolen motorcycle make Hero Honda model CD-Dawn, which he has kept in the house of Pooja's grandfather. Thereupon, Dinesh Singh drew his disclosure statement Ex.P-35.

(4.22) On 13.03.2010, Dinesh Singh vide the seizure memo Ex.P-36 seized the shoes of deceased Deepak from the

agricultural field of one Pop Singh Raghuvanshi (not-examined), which is situated on the out-skirts of village Kheriya, at his instance in the presence of Laxman Singh and Hakle Bhaiya. On 15.03.2010, he seized one motorcycle without registration plate make Hero Honda CD-Dawn, soil stained pants and shirt at his instance from the house of Pooja's grandfather in the presence of Laxman Singh and Halke Bhaiya vide the seizure memo Ex.P-37, but could not recover the pocket diary and the chappals at his instance. In this connection, he prepared search Panchnamas Ex.P-38 and Ex.P-39.

(4.23) On 21.03.2010, Basant Kumar (PW-32) held the test identification parade of seized articles in the presence of Laxman Singh (PW-28) and Dinesh s/o Chhotelal (PW-23). In the identification parade, Meena Bai (PW-9), the wife of deceased Deepak, identified a pair of shoes, one mobile phone, one belt and one purse of her husband. Thereupon, identification memo Ex.P-5 was prepared by said Basant Kumar.

(4.24) On 02.05.2010, accused-appellants, namely, Kapil, Ashok and Ramjeevan and on 14.03.2010 accused-appellant Ajju were medically examined by Dr. A.K. Agrawal (PW-46), and he gave the reports Ex.P-69, Ex.P-72, Ex.P-73 and Ex.P-74 respectively to the effect that they are capable of doing sexual intercourse. He also noticed some minor healed-up injuries on the person of accused-appellant Ramjeevan, which he mentioned in his report Ex.P-73. In addition to the aforesaid examinations, he prepared slides of their semen and cut off a few of their pubic hairs and handed them over to Yashwant (PW-19) and Sheikh Yakub (PW-16) in sealed packets for forensic tests.

(4.25) On 05.05.2010, Kishore Shah (PW-33) held the test identification parade of seized articles in the presence of Harkishan (PW-18) and Preetam Singh (PW-44), in which Sushila Bai, the deceased-prosecutrix's mother, identified one mobile phone and one pair of payals as those of the deceased-prosecutrix. In this regard, he prepared identification memo

Ex.P-15

(4.26) In the course of investigation, Rai Singh Soni, Umesh Singh (PW-54) and Dinesh Singh (PW-56) have recorded the case diary statements of all the prosecution witnesses.

(4.27) During the course of investigation, the police got statements of Ashok s/o Bhurelal and Ramvilash recorded under Section 164 Cr.P.C. and the same are exhibited as Ex.P-62 and Ex.P-64 respectively.

(4.28) The incriminating articles mentioned in the letter Ex.P-144 were sent to the FSL Sagar for the purpose of forensic tests and the DNA analysis/typing/profiling/finger-printing. Thereupon, the FSL sent the DNA report Ex.P-143 and one unexhibited report pertaining to examinations of the samples of soil collected from the place of offence and soil-stains found on the clothes of the accused-appellants. The DNA report Ex.P-143 has confirmed that the semen found in the vaginal swab of the deceased-prosecutrix and on her underwear is of all the accused-appellants in addition to absconding accused persons, namely, Vimlesh and Munda @ Parsram, who have absconded in the course of trial on 16.08.2013 (see para 8 for detail).

5. Upon the seizure of incriminating articles at the instances of the accused-appellants and absconding accused Munda @ Parsram and Vimlesh and the DNA test report Ex.P-143, the team arrived at the ultimate conclusion that the accused-appellants and the aforesaid absconding accused persons had committed the ghastly crime. On 28.05.10, the police filed the charge-sheet against the accused-appellants and the absconding accused persons under Sections 302, 376(2)(g), 201 and 34 IPC in the court of A.K. Nagotra, the Judicial Magistrate First Class, Pipariya. The learned Magistrate committed the case to the Sessions Court vide the committal order dated 23.06.2010. Thereupon, the case is registered as Sessions Trial No.200/2010 and is made over to the court of Additional Sessions Judge, Pipariya.

6. The learned ASJ framed the charges against the accused-appellants and absconding accused persons under Sections 376(2)(g), 302 r.w. 34 (two counts) in the alternative 302 (two counts), simpliciter, and 201 IPC. They

denied the charges and claimed to be tried.

7. The prosecution examined 61 witnesses, exhibited 144 documents and marked all the seized articles in the support of its case, whereas the defence exhibited 6 documents and examined one witness Dr. Sudhir Jaisani (DW-1) in their defence. In the examinations under Section 313 Cr.P.C., the accused-appellants denied all the incriminating evidence and circumstances appearing against them in the case. However, they admitted their arrests in the case. They have taken the common defence of false implication in the case.

8. It is worthwhile to mention at this stage that when the case was posted for final arguments accused Vimlesh and Munda @ Parasram have escaped from the custody of Sub- Jail Pipariya on 16.08.2013. The trial court has declared them absconders vide order dated 06.06.2014 and ordered to separate their trial.

9. Upon the evaluation of evidence in the impugned judgment, the learned ASJ has found the accused-appellants guilty for committing gang-rape upon the deceased-prosecutrix and in furtherance of causing disappearance of the evidence of the gang-rape they have murdered her and deceased Deepak. Upon the aforesaid findings, the learned ASJ has convicted and sentenced the accused-appellants as stated in para 2 of this judgment.

10. We have heard arguments advanced by the learned counsel for the parties at length. For the purpose of convenience, we categorize broadly their arguments under two heads "first" on the point of conviction and "second" on the point of sentence.

Point No.1

11. Smt. Divyakirty Bohre, the learned Government Advocate, has submitted that the prosecution case is entirely based upon the circumstantial evidence, yet it has proved the guilt of the accused-appellants by unimpeachable evidence and if all the circumstances, which are of conclusive nature and tendency and which are not capable of being explained, are put together, they form a complete chain pointing unerringly towards the guilt of the accused-appellants. She submitted that the DNA report Ex.P-143 itself is capable of proving conclusively the guilt of the accused-appellants. As to reliability of the DNA report, she submitted that as per the research carried out with the exception of identical twins not two individuals have the same

DNA blue print. She submitted that it is not the defence of any of the accused-appellants that he has twin siblings. Hence, the aforesaid possibility does not exist in the case. She submitted that the DNA tests are carried out on the basis of the DNA samples taken from the semen of the accused-appellants. As per available research data, there is one chance in 300 million that the semen samples could have come from someone other than the specific individual. In this regard, the learned counsel has placed a research paper on record. She submitted that in the cases of *Kamti Devi Vs. Poshi Ram*, (2001) 5 SCC 311, *Santosh Kumar Singh Vs. State through CBI*, (2010) 9 SCC 747, and *Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik*, AIR 2014 SC 932, the Supreme Court has observed that the DNA report must be accepted as scientifically accurate and exact science. She submitted that the apex Court in the case of *Anil Vs. State of Maharashtra*, (2014) 4 SCC 69, affirmed the conviction of the accused-appellant under Section 377 IPC placing reliance on the DNA report and a Division Bench of this High Court in the case of *Jitendra @ Jeetu and others Vs. State of M.P.*, 2014 (5) MPHT 45, confirmed the death sentence awarded to the appellants placing mainly reliance on the DNA report. She submitted that in the present case, the DNA report confirms that the accused-appellants committed gang-rape upon the deceased-prosecutrix. She also brought to our notice that the U.S. Supreme Court in the case of *United States Vs. Jakobetz*, [955 F.2d 786 (2d Cir. 1992)] had upheld the conviction of the rapist only on the basis of DNA evidence available against him. She submitted that the defence has not challenged seriously in the crossexamination of Dr. A.K. Agrawal (PW-46) that both the deceased had suffered homicidal death. She concluded her arguments by saying that the order of conviction passed by the learned ASJ is based upon proper appreciation of evidence. Hence, there is no need on the part of this court to interfere with it.

12. Learned counsel for accused-appellant Ashok has submitted that Lakhanlal (PW-31) and Halke Bhaiya (PW-37) are the witnesses of all the arrest memos, the disclosure statements and the seizure/recovery memos of the accused-appellants including the absconder accused persons. Lakhanlal is a permanent resident of village Kalmesera of which deceased Deepak was also resident (as per para 16 of his deposition). Halke Bhaiya is the cousin-brother of deceased Deepak (as per para 20 of his deposition). Hence, they are not independent witnesses of disclosure statement Ex.P-41 and recovery memo Ex. P-42, therefore, they are not reliable witnesses. He submitted that

an investigating officer tends to do padding of the prosecution case. Under the circumstances, the testimony of Dinesh Singh, who is the author of aforesaid disclosure statement and recovery memo, cannot be relied upon. Learned ASJ has wrongly relied upon the recoveries of a pair of payals, a mobile phone and soil stained clothes at the instance of accused-appellant Ashok. He submitted that as per the identification memo Ex.P-15, Kishore Shah (PW-33) conducted identification parade for the seized articles. But, he has completely denied in his evidence to have conducted the identification parade and to have got the articles identified by Sushila Bai (PW-27), the mother of the deceased-prosecutrix. Moreover, she has admitted in her evidence that she had identified the aforesaid articles at the police station. As per identification memo, the identification was held in the presence of Harkishan (PW-18) and Preetam Singh (PW-44). Harkishan has admitted that he is the maternal-uncle of the deceased-prosecutrix in para one of his deposition. Preetam Singh has admitted in his cross-examination that he has merely put his signature upon the identification memo at the police station. Since the identification of the seized articles were not conducted following the due procedure, it is doubtful that the articles namely payals and mobile phone belong to the deceased-prosecutrix. He submitted that the prosecution had sent soil -stained clothes seized from the possessions of the accused-appellants to FSL Sagar in order to ascertain whether the samples of soil collected from the place of crime and stains of soil found on their clothes are same in the texture and composition. The FSL report thereof is on record. But the prosecution has not exhibited it in the course of trial. The FSL report being of scientific nature falls under Section 293 Cr.P.C. and, therefore, it is admissible in evidence as per provision of Section 294 Cr.P.C.. He submitted that for the aforesaid reasons the defence can rely upon the unexhibited report. In this regard, reliance is placed by him upon the decisions of this court rendered in cases of *Brijlal Ghosi and another Vs. State of M.P.*, ILR (2012) MP 1351, and *State of M.P. Vs. Ghanshyam,* 2008 Cr.L.J. 107. He submitted that according to the report, stains of soil found on the seized clothes of accused-appellant Ashok and the samples of soil collected from the place of occurrence are different in the texture and composition. Thus, the FSL report disproves completely the presence of accused-appellant Ashok at the place of occurrence. He submitted that the prosecution has not proved satisfactorily that the slide of vaginal swab of the deceased-prosecutrix and the slide of accused-appellant Ashok's semen were prepared taking all the necessary precautions and they were sealed properly before sending to the FSL. In these circumstances, it is not safe to place

absolute reliance upon the DNA report Ex.P-143. Upon the aforesaid arguments, he submitted that there is no cogent and concrete evidence to connect accused-appellant Ashok to the crime, therefore, the impugned judgment insofar as it relates to accused-appellant Ashok is liable to be set aside.

13. Learned counsel for accused-appellant Ramjivan has adopted the arguments raised by learned counsel for accused-appellant Ashok insofar as the arguments support his case. Hence, there is no need to recapitulate the arguments. He submitted that pursuant to disclosure statement Ex.P-43 of accused-appellant Ramjivan, seizing officer Dinesh Singh had seized a stone near the place of occurrence and his soil-stained clothes vide the seizure memos Ex.P-44 and Ex.P-57 respectively. The police did not send the seized stone to the FSL for forensic test to ascertain whether it has stains of human blood. Since stones of all sizes are found everywhere, the seizure of a stone at his instance does not have any evidentiary value without the forensic test. He submitted that as per the unexhibited report of the FSL, the composition of soil collected from the place of occurrence and the stains of soil found on his seized clothes are different. Hence, the seizure of his soil-stained clothes does not connect him with the crime. Upon these arguments, he submitted that there is no evidence at all on record to connect accused-appellant Ramjivan even remotely to the crime. Therefore, the impugned judgment deserves to be set aside against Ramjivan.

14. Learned counsel for accused-appellant Kapil has also adopted the arguments advanced by learned counsel for accused-appellant Ashok to the extent which has direct relevancy to his case. He submitted that Dinesh Singh recovered one mobile phone of the Motorola Company with SIM of Mobile No.95841-47788 and seized his soil-stained clothes vide the seizure memo Ex.P-47 from his house in pursuance of the disclosure statement Ex.P-45. As per call details Ex.P-60, the SIM of aforesaid mobile number was installed in a mobile phone bearing IMEI No.35648-40028-49820, whereas Rai Singh seized a carton of mobile phone of the Motorola Company from the deceased-prosecutrix's mother Sushila Bai bearing IMEI No.35648-40028-49822 vide the seizure memo Ex.P-32. Thus, he had not recovered the mobile phone from the possession of accused-appellant Kapil, which was alleged to be in possession of the deceased-prosecutrix at the time of incident. He submitted that as per the unexhibited FSL report, the composition of soil found on his seized clothes are different from the composition of soil collected from the

place of occurrence. Hence, the seizure of his soil-stained clothes does not have any evidentiary value. With these submissions, learned counsel submitted that there is no evidence on record to connect accused-appellant Kapil to the crime. He is, therefore, wrongly convicted and sentenced.

15. Learned counsel for accused-appellant Ajju @ Ajay has also supported the arguments raised on behalf of accused-appellant Ahsok (sic:Ashok), insofar as they are relevant to his case. He submitted that on 24.02.10 vide the seizure memo Ex.P-6 Rai Singh seized one mobile phone of the Sigmatel Company and two SIMs of Mobile Nos.96308-46291 and 97552-33915 from the possession of Ashok (PW-39), whereas the disclosure statement Ex.P-35 of him was recorded by Dinesh Singh on 13.03.10 in which he revealed first time amongst other things that he had sold the mobile phone of deceased Deepak to aforesaid Ashok at Rs.450/-. If these facts are put together, he submitted, it is crystal clear that the mobile phone was seized about 17 days prior to the recording of his disclosure statement Ex.P-35. This fact proves amply that the mobile phone was not recovered at his instance. He submitted that Ashok (PW-39) has denied in his evidence that accused-appellant Ajju had sold him the mobile phone. Seizure witnesses namely Ajab Singh (PW-10) and Santosh (PW-50) s/o Tularam have also not supported the seizure of mobile phone and aforesaid SIMs from the possession of said Ashok. They are also declared hostile by the prosecution. He submitted that there is no cogent and reliable evidence that the seized mobile phone belongs to deceased Deepak. He submitted that Dinesh Singh recovered deceased Deepak's shoes vide the memo Ex.P-36 on the basis of his disclosure statement Ex.P-35 from the agricultural field of one Pohap Singh Raghuvanshi. However, the prosecution had not made him a witness in the case. Laxman Singh and Halke Bhaiya, who are the witnesses of disclosure statement Ex.P-35 and seizure memo Ex.P-36, are interested witnesses. Hence, the recovery of deceased Deepak's shoes at the instance of him are not proved beyond doubt. He submitted that vide the seizure memo Ex.P-37, Dinesh Singh seized one motorcycle and soil-stained clothes at the instance of him. There is no evidence on record that the seized motorcycle was used in the commission of offence. As per the unexhibited FSL report, the soil stains found on the clothes of him are entirely different from the soil collected from the scene of crime in composition. Hence, the seizure of his clothes does not connect him to the crime. As such, there is no evidence worthy of credence on record as to the involvement of him in the crime. Hence, he is convicted and sentenced upon erroneous findings.

Point two

16. Learned Government Advocate has submitted that as per the DNA report Ex.P-143, in the vaginal swab and on the underwear of the deceased-prosecutrix traces of semen of not only all the four accused-appellants, but also both the absconding accused persons are found. Thus, it proves that all the six perpetrators committed gang-rape upon her. As per the post-mortem reports of both the deceased, the deceased-prosecutrix suffered homicidal death by strangulation, whereas deceased Deepak suffered homicidal death on account of fracture in the temporal bone of his head. Thus, the mode of their deaths proves that they were murdered in a cruel and barbaric manner. As such, all the four accused-appellants and both the absconding accused are beasts in the garb of human bodies. She submitted that in recent times many cases are reported in the newspapers in which victims are first raped/gang-raped and thereafter they are murdered by rapists with the criminal intent that they could not come forward to give evidence against them in the courts. In the instant case, the accused-appellants committed murder of the deceased-prosecutrix and deceased Deepak with the aforesaid criminal intent. In the circumstances, there is a crying need for sending messages on the part of the courts to the rapists that the courts will award them only death sentences in such type of cases. With these submissions, she prayed for confirmation of death sentences awarded to the accused-appellants. In support of her submissions, she relied upon the following cases in which death sentences are confirmed; *In reference Vs. Guddu @ Dwarikendra*, (2012) 2 MPHT 182 DB (MP), *State of M.P. Vs. Shyam Singh @ Bhima*, 2013 Cr.L.R. (M.P) 79, *In reference Vs. Sunil Balai*, 2013 Cr.L.J. (M.P) 791, *Mofil Khan and another Vs. State of Jharkhand*, (2015) 1 SCC 67, *Vasanta Sampat Dupare Vs. State of Maharashtra*, (2015) 1 SCC 253, and *Shatnam Vs. State of U.P.*, (2015) 6 SCC 632.

17. Per contra, learned counsels for the accused-appellants have submitted in one voice on the point of death penalty that the instant case does not pass the test of "the rarest of rare case" as laid down by the Supreme Court in para 39 of its decision rendered in the case of *Machhi Singh and others Vs. State of Punjab*, (1983) 3 SCC 470, and the guidelines given by the Supreme Court in the aforesaid case and in the case of *Bachan Singh Vs. State of Punjab*, (1980) 2 SCC 684. They further submitted that the decree of brutality in committing of murder and the numbers of murders are also not the criteria for awarding death sentence, placing reliance upon the law laid down by the

Supreme Court in the cases of *Panchsheel Vs. State of U.P.*, (1998) 7 SCC 177, *Omprakash Vs. State of Haryana*, (1999) 3 SCC 19, and *Ram Pal Vs. State of M.P.*, (2003) 7 SCC 141. Upon these submissions, they urged that if this court confirms the findings of convictions and sentences under Section 302 r.w. 34 (two counts) as imposed by the trial court, then each of the accusedappellants be sentenced for life imprisonment in place of death sentence thereunder.

18. After being heard learned counsels for the parties at length, we have to satisfy ourselves first whether the trial court has rightly convicted the accused-appellants for the offences punishable under Sections 376(2)(g), 302 r.w. 34 and 201 IPC in view of the law laid down by the Supreme Court in the case of *Mohinder Singh Vs. State of Punjab*, 2013 Cr.L.J. 1559.

19. Upon the perusal of the impugned judgment, we find that it suffers from verbosity and the learned ASJ has not given specific findings as to what circumstances are proved against each accused. However, it appears to us that the conviction of the accused-appellants is mainly based upon the DNA report Ex.P-143. In the course of arguments, learned Government Advocate has submitted that the prosecution has proved following circumstances against the accused-appellants:-

(i) At the time of incident both the deceased were in the company of each other.

(ii) Recovery of the deceased-prosecutrix's mobile phone with the SIM of Mobile No.95841-47788 from the possession of accused-appellant Kapil.

(iii) Accused-appellant Ashok had used mobile phone of the deceased-prosecutrix on 14.02.10 with SIM of mobile No.95755331130 and he was found in possession of the deceased-prosecutrix's a pair of silver payals.

(iv) Recovery of deceased Deepak's mobile phone and shoes from the possession of accused-appellant Ajju.

(v) The DNA report confirming that the deceased-prosecutrix was subjected to gang-rape by all the four accused-appellants.

(vi) The autopsy reports confirming that both the deceased had suffered homicidal death.

20. Before analyzing the aforestated circumstances, it would be pertinent to refer to some of the illuminating judgments in which legal principles are propounded for convicting an accused solely on the basis of circumstantial evidence in a murder case.

21. In the case of *Sharad Birdhichand Sarda V. State of Maharashtra,* (1984) 4 SCC 116, the Supreme Court has set out the following five golden principles for proving a case based on circumstantial evidence:-

(i) the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely "may be" fully established;

(ii) 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) the circumstances should be of a conclusive nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved; and

(v) 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 the infirmity or lacuna in the prosecution case cannot be cured by a false defence of plea.

22. The Supreme Court had reiterated the same legal principles in the cases of *Padala Veera Reddy Vs. State of A.P.* , AIR 1990 SC 79, and *Bodh Raj alias Bodhu and others Vs. State of Jammu and Kashmir* , AIR 2002 SC 3164, though they were restated in a different way. Almost similar view was also taken by the Supreme Court in *State of Goa Vs. Sanjay* 2007 AIR SCW 2226.

23. In the case of *State of U.P. Vs. Ashok Kumar Shrivastava* , 1992 Cr.L.J. 1104 SC, the Supreme Court has sounded a note of warning that

great care must be taken in evaluating circumstantial evidence. Therein, it is pointed out that if the evidence relied upon is reasonably capable of two inferences, then one in favour of the accused 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 circumstances so established must be consistent only with the hypothesis of the guilt of the accused.

24. In the case of R*aj Kumar Singh @ Raju @ Batiya Vs. State of Rajsthan* , (2013) 5 SCC 722, the Supreme Court after reiterating the same principles as laid down in the case of *Sharad Birdhichand Sarda* (supra) has held that in a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof.

25. We may also make a reference to a decision of the Supreme Court rendered in the case of *C. Chenga Reddy Vs. 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."

26. In the case of *Manu Sharma Vs. State NCT Delhi* , AIR 2010 SC 2352, the Supreme Court in para 274 of the decision has held that where an accused furnishes a false answer as to a proved circumstance in his examination under Section 313 Cr.P.C., the court ought to draw an adverse inference against the accused and such an inference shall be an additional circumstance for proving the guilt of him.

27. In the case of *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 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 was taken by the Supreme Court in the case of *Pudhu Raja Vs. State* , (2012) 11

SCC 196.

28. In the case of *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"

29. In the case of *Musheer Khan @ Badshah Khan and Anr. Vs. State of M.P.* , 2010 (2) JLJ 104, the Supreme Court has cited Lord Coleridge who has stated that circumstantial evidence is like gossamer thread, light and as unsubstantial as the air itself as may vanish of merest of touch.

30. Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence (Chapter VI)" lays down the following rules specially 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 be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

31. From a careful reading of the aforenoted decisions of the Supreme Court and the other material, it is crystal clear that the basic principle of criminal law is that an accused is presumed to be innocent until his/her guilt is proved and, therefore, in a case of circumstantial evidence it is necessary for the prosecution to prove each fact which forms a chain of evidence so complete which leads to the inevitable and only conclusion of guilt of the accused. In a case of circumstantial evidence the facts established by the prosecution should be consistent only with the hypothesis of guilt of the accused, and the facts should not indicate the possibility of any other conclusion. The court has a duty to ensure that mere suspicion or conjectures would not take the place of legal proof and the prosecution has to produce clear, cogent and unimpeachable

evidence which leads to the sole conclusion of guilt of the accused.

32. Now, we will proceed to test the circumstantial evidence mentioned in para 19 on the touch stone of the propositions of law relating to the circumstantial evidence.

33. Sushila Bai (PW-27), the mother of the deceased-prosecutrix, has testified in paras 5 and 8 that her deceased daughter knew deceased Deepak and he gave her a mobile phone on her birthday. She is not cross examined upon her said statement by the defence. Therefore, her statement remains uncontroverted. Upon which, it is held that both the deceased were on intimate terms.

34. Durjan Singh (PW-14) and his son Mukesh (PW-25) have stated in their evidence that the police recovered two dead bodies from their agricultural field. Laxman Singh (PW-28) has deposed that the police prepared a spot panchnama Ex.P-33 of the place where the two dead bodies were lying. There is nothing in their cross-examinations to disbelieve them. Upon the evidence of the aforesaid witnesses and Ex.P-33, it is crystal clear that the dead bodies of the two were lying adjacent to each other.

35. On the basis of aforesaid evidence, we hold that just before and at the time of the incident both the deceased were in the company of each other. Thus, the circumstance No.1 is proved by the prosecution beyond reasonable doubts.

36. Before dealing with the circumstances number (ii), (iii) and (iv), it is relevant to consider the evidence rendered by Pradeep singh (PW-36), Sai Dutt Bohre (PW-52), Santosh Jadav (PW-53) and Rajesh Kumar Singh (PW-55), who are the nodal officers of the mobile service provider companies, namely, the Vodafone, the Airtel, the Reliance Communication and the Idea. Pradeep Singh tendered in his evidence call details Ex.P-60 of a mobile phone bearing IMEI No.356484002849820 for the period between 14.02.2010 and 23.02.2010. Sai Dutt Bohre tendered in his evidence call details of mobile numbers 9755233915 and 9685048589 Ex.P- 77 and Ex.P-79 respectively for a period between 10.02.2010 and 28.02.2010 and call details of mobile phones bearing IMEI Nos. 358455020659230 and 35648002849820 Ex.P-80 and Ex.P-81 for a period between 14.02.10 and 20.02.10, and, 14.02.10 and 23.02.10 respectively. Santosh Jadhav provided call details of Mobile No.93030-87081 Ex.P-85 for a period between 01.02.10 and 21.02.10.

Rajesh Kumar Singh has stated in his evidence that the Idea had allotted deceased Deepak Mobile No.97547-75495 upon his application vide Ex.P-86. He further stated that as per call details Ex.P-142 the SIM of aforesaid mobile number was used in the mobile phone bearing IMEI No.35845-50206-59230 for a period between 01.02.10 and 13.02.10. The aforesaid witnesses are subjected to gruelling cross-examinations by the defence on the authenticity of call details. They have stated that the call details are system generated, therefore, there is no possibility of fabrication of call details and the same are tamper-proof. In the case of *Munish Mubar* (supra), the Supreme Court has relied upon the call details of the accused and the slain to prove the fact that they were in contact with each other before the incident. Hence, we place implicit reliance on the aforesaid call details.

37. Sushila Bai (PW-27), the mother of the deceased-prosecutrix, has deposed that she had given a carton of mobile phone of Motorola Company to the police, which was seized by the police vide the seizure memo Ex.P-32 in the presence of Jitendra (PW-42) and Bablu (PW-43). Both the aforesaid witnesses have corroborated the testimony of Sushila Bai. As per the seizure memo Ex.P-32, Rai Singh Soni had seized the carton. It has been already stated that he had died in a vehicular accident before recording of his statement in the trial court. Upon the perusal of their evidence, we find that they are independent witnesses and there is nothing adverse in their cross-examinations to disbelieve their testimonies. Hence, their evidence is fully reliable. Moreover, the seizure of the carton from the possession of Sushila Bai is not challenged by the defence in her cross-examination. Relying upon the evidence of Sushila Bai and the aforesaid seizure witnesses, we hold that Rai Singh Soni had seized a carton of mobile phone of the Motorola Company from the possession of Sushila Bai vide the seizure memo Ex.P-32 on 22.02.10.

38. Rai Singh Soni has mentioned in the seizure memo Ex.P-32 as that on the seized carton IMEI No.35648-40028- 49822 is printed. However, as per the case-diary and call details Ex.P-60, Ex.P-79, Ex.P-80 and Ex.P-81, the team sought call details of mobile phone bearing IMEI No.35648-40028-49820 from the concerned mobile service provider companies. Therefore, on the basis of the aforesaid documents, we safely hold that Rai Singh Soni had seized a carton vide seizure memo Ex.P-32 upon which IMEI No.35648-40028-49820 is printed. However, he has written last digit "two" instead of "zero" in the seizure memo Ex.P-32 by mistake. For the aforesaid reasons, the benefit of said mistake cannot be extended to accused-appellant Kapil as

sought by his counsel in the course of arguments.

39. Dinesh Singh (PW-56), a member of the team, has deposed that on 02.03.10 he arrested accused-appellant Kapil before Lakhan Lal (PW-31) and Halke Bhaiya (PW-37). Thereafter, he interrogated accused-appellant Kapil before them. He disclosed him amongst other things that he had lifted the mobile phone from the dead body of the deceased-prosecutrix. Thereafter, he removed the original SIM and installed therein the SIM of Mobile No.96850-48589 which was given to him by accused-appellant Ajju. He used the mobile phone with the aforesaid SIM for a period between 14.02.10 and 16.02.10. Later, he threw the original SIM and the aforesaid SIM in a water canal passing nearby village Chirmeta. Thereafter, he installed the SIM of Mobile No.95841-47788 in the mobile phone. The said SIM was given him by his brother Deepak. Thereupon, he drew disclosure statement Ex.P-45. On 05.03.10, he recovered the mobile phone of the Motorola Company with a SIM of Mobile No.95841-47788 and his soil-stained pants and shirt from his house in the presence of aforesaid witnesses vide the seizure memo Ex.P-47. It is pertinent to mention here that Dinesh Singh could not recover the original SIM of the deceased-prosecutrix and SIM of Mobile No.96850-48589 at the instance of accused-appellant Kapil from the water canal. In this regard, he has drawn search memo Ex.P-56.

40. Lakhan Lal and Halke Bhaiya have fully corroborated the version given by Dinesh Singh. It has been argued by the defence that Lakhan Lal is a permanent resident of village Kalmesera, the native place of deceased Deepak, and Halke Bhaiya is the cousin-brother of deceased Deepak. Hence, they are interested witnesses. Consequently, their evidence is not reliable. We find that they are put to gruelling cross-examinations on behalf of accused-appellant Kapil, but there is nothing adverse in their cross-examinations to draw the inference that they have given evidence being prejudiced against accused-appellant Kapil. Therefore, we hold their testimonies reliable.

41. Dinesh Singh is also subjected to lengthy cross-examination on behalf of accused-appellant. However, there is nothing in his cross-examination to disbelieve his evidence. It is pertinent to mention here that in the case of *Munish Mubar* (supra), the Investigating Officer seized incriminating articles from the possession of accused in the absence of public witnesses, but the Supreme Court has relied upon the statement of the Investigating Officer. In view of the above ratio, we may rely on the sole evidence of Dinesh Singh

assuming for the sake of arguments that Lakhan Lal and Halke Bhaiya are interested witnesses.

42. On the basis of the aforesaid evidence, we hold that Dinesh Singh seized a mobile phone of Motorola Company with SIM of Mobile No.95841-47788 from the possession of accused-appellant Kapil.

43. As per call details Ex.P-79 and Ex.P-81 for a period between 14.02.10 and 16.02.10 SIM of Mobile No.96850-48589 was installed in a mobile phone of IMEI No.35648-40028-49820. As per call details Ex.P-60 for a period between 21.02.10 and 23.02.10 the SIM of Mobile No.95841-47788 was installed in the mobile phone of aforesaid IMEI number. It has already been held that the mobile phone of aforesaid IMEI number belongs to the deceased-prosecutrix. As per the Marg intimation report Ex.P-19, inquest report of the deceased-prosecutrix Ex.P-34 and the statement of Dr. A.K. Agrawal (PW-16) on the timing of death of the deceased-prosecutrix, it can be held that she was murdered between 13.02.10 and 15.02.10, but her mobile phone was in use till 23.02.10. Accused-appellant Kapil has not given any cogent explanation in his examination under Section 313 Cr.P.C. or otherwise as to how he has acquired the mobile phone of the aforesaid IMEI number and the company.

44. In view of the aforesaid analysis of the evidence, we hold that the prosecution has proved circumstance No.2 beyond reasonable doubts that the deceased-prosecutrix's mobile phone was recovered from the possession of accused-appellant Kapil and he had used the mobile phone till 23.02.10.

45. Dinesh Singh (PW-56) has deposed that on 02.03.10 he arrested accused-appellant Ashok in the presence of Lakhan Lal (PW-31) and Halke Bhaiya (PW-37) vide the arrest memo Ex.P-51. On the same day, he quizzed him in the presence of the aforesaid witnesses. He revealed amongst other things that he had lifted a pair of silver payals from the dead body of the deceased-prosecutrix. He also disclosed that he had used the mobile phone with a SIM and he had kept the aforesaid articles in an iron-box kept in one of the bedrooms of his house. On the basis of this information, he drew the disclosure statement Ex.P-41. On 05.03.10, he recovered a mobile phone of the Nokia Company Model No.1028 with SIM No.957553.1130, one pair of silver payals and soil smudged clothes from his house in the presence of the aforesaid witnesses vide the seizure memo Ex.P-42. Both the said witnesses have fully corroborated the statement given by Dinesh Singh. All the three are

put to lengthy cross-examinations by learned counsel of accused-appellant Ashok. However, learned counsel has failed to elicit any evidence in favour of him. Thus, we hold their testimonies are reliable.

46. While considering circumstance No.2, we have already held that Dinesh Singh had seized the deceased-prosecutrix's mobile phone from the possession of accused- appellant Kapil. As per call details Ex.P-81, on 14.02.10 SIM of Mobile No.95755-31130, which is seized by Dinesh Singh from the possession of accused-appellant Ashok, was used in the mobile phone of IMEI No.35648-40028-49820, which belonged to the deceased-prosecutrix. Thus, the call details prove that accused-appellant Ashok had used the mobile phone of the deceased-prosecutrix on 14.02.10, which connects him to the crime.

47. As per the identification memo Ex.P-15, on 05.05.10 Kishore Shah (PW-33) had got one mobile phone and one pair of silver payals identified by Sushila Bai (PW-27), the mother of the deceased-prosecutrix, in the presence of Har Kishan (PW-18) and Preetam Singh (PW-44). However, Kishore Shah has denied in his evidence having held the identification parade. Thereupon, the prosecution has declared him hostile. However, Sushila Bai has deposed that in the identification proceedings she identified a mobile phone and one pair of silver payals amongst other things as those of her daughter/the deceased-prosecutrix. Harkishan and Preetam Singh have deposed that Sushila Bai had correctly identified the aforesaid articles in their presence. There is nothing adverse in the cross-examinations of Sushila Bai, Harkishan and Preetam Singh to disbelieve their testimonies on the point. Hence, there is no adverse impact upon the prosecution case because of Kishore Shah has been declared hostile by the prosecution. Thus, we hold that Dinesh Singh recovered the deceased-prosecutrix's silver payals from the possession of accused-appellant Ashok. We find that he has not offered any explanation in his examination under Section 313 Cr.P.C. or otherwise as to how he got possession over the deceased-prosecutrix's payals. Consequently, it is proved that he had removed the seized payals from the dead body of the deceased-prosecutrix.

48. In conclusion, we hold that the prosecution has proved circumstance No.3 beyond reasonable doubts that on 14.02.10 accused-appellant Ashok had the mobile phone of the deceased-prosecutrix and her payals which were recovered from his possession after her murder.

49. As per the seizure memo Ex.P-6, on 24.02.10, Rai Singh Soni seized a mobile phone of the Sigmatel Company with two SIMs of Mobile Nos. 96308-46291 and 97552-33915 of the Airtel on being produced by Ashok Raghuwanshi (PW-39) in the presence of Ajab Singh (PW-10) and Santosh (PW-15). However, they have denied the aforesaid seizure in their examination-in-chief. Thereupon, they have been declared hostile by the prosecution. On being cross-examined by the prosecution, Ashok Raghuwanshi in para 6 of his evidence has admitted that SIM of Mobile No.96308-46291 has been issued in the name of his aunt Shanta Bai and he found SIM of Mobile No.97552-33915 on a public way. It has already been held that IMEI number of deceased Deepak's mobile phone is 35845-50206-59230. As per the call details Ex.P-77 and Ex.P-80, the SIMs of aforesaid mobile numbers were used in the mobile phone of aforesaid IMEI number between 14.02.10 and 22.02.10, whereas deceased Deepak had been murdered between 13.02.10 and 15.02.10. Thus, on the basis of the aforesaid call details, it is held that aforesaid witnesses namely Ashok Raghuwanshi, Ajab Singh and Santosh have given false evidence as to seizure of the mobile phone and the SIMs.

50. Dinesh Singh (PW-56) has testified that on 13.03.10 he arrested accused-appellant Ajju vide the arrest memo Ex.P-12 in the presence of Sheikh Yakub (PW-16) and Narsinghdas (not-examined). On the same day, he interrogated him in the presence of Laxman Singh (PW-28) and Halke Bhaiya (PW-37). He disclosed him that he had removed from the dead body of deceased Deepak his mobile phone, shoes and pocket diary. Thereafter, he pulled out the installed SIM out of the mobile phone and later sold the mobile phone to Ashok Raghuwanshi (PW-39) at Rs.450/-, his chappals got stuck in mud which he left near the scene of crime and put on deceased Deepak's shoes, which he, later, threw in a field having standing wheat-crop. The filed (sic:field) is nearby village Kheriya. Thereupon, he recorded his disclosure statement Ex.P-35. On the same day, he recovered deceased Deepak's shoes at his instance in the presence of the aforesaid witnesses from the said field owned by Pohap Singh Raghuwanshi vide the seizure memo Ex.P-36.

51. We have already held that deceased Deepak's mobile phone was recovered from the possession of Ashok Raghuwanshi (PW-39). Thus, we place reliance on that part of accused-appellant Ajju's disclosure statement wherein he has stated to have sold deceased Deepak's mobile phone to Ashok Raghuwanshi (PW-39), which, in turn, proves that accused-appellant Ajju had removed deceased Deepak's mobile phone from his dead body.

52. Laxman Singh and Halke Bhaiya have corroborated in their evidence the aforesaid statement made by Dinesh Singh. Learned counsel for accused-appellant Ajju has crossed them at length. But, he has failed to discredit their evidence. Thus, we hold that Dinesh Singh has seized deceased Deepak's shoes at the instance of accused-appellant Ajju.

53. Basant (PW-32) has stated that on 21.03.10 he got one pair of shoes, one belt, one purse and one mobile phone identified by Meena Bai (PW-9), the wife of deceased Deepak, by mixing up other similar articles in size and shape in the presence of Laxman Singh (PW-28) and Dinesh Singh s/o Chhotelal (PW-23). He further stated that Meena Bai had identified the aforesaid articles amongst other articles as those of her husband/deceased Deepak. He has proved the identification memo Ex.P-5. His evidence is fully corroborated by the testimonies of Meena Bai, Laxman Singh and Dinesh. They are subjected to tedious cross-examinations on behalf of accused-appellant Ajju. However, there is nothing in their cross-examinations to disbelieve them. It is pertinent to mention here that as per the seizure memos Ex.P-27 and Ex.P-28 Rai Singh Soni seized a belt and a purse close to the dead body of deceased Deepak, therefore, only the identification of deceased Deepak's shoes by his wife is material. Thus, we hold that deceased Deepak's shoes are recovered at the instance of accused-appellant Ajju.

54. It may be mentioned here that Dinesh Singh could not recover deceased Deepak's pocket diary and accused-appellant Ajju's chappals which he has stated to have left at the place of occurrence. In this regard, he has prepared search memos Ex.P-38 and Ex.P-39.

55. On the basis of aforesaid evidence, we hold that prosecution has proved circumstance No.4 beyond reasonable doubts that deceased Deepak's mobile phone and his shoes are recovered at the instance of accused-appellant Ajju.

56. Dr. A.K. Agrawal (PW-46) has testified that on 16.02.10 he and Dr. Anita Sahu (not-examined) had jointly performed the autopsy on the dead body of the deceased-prosecutrix. At that time, they had prepared slides of her vaginal swab/smear, cut off a few strains of her pubic hairs, finger-nails of her both hands and removed her underwear from her person and thereafter they sealed them in separate packets and handed them over to Constable Kailash Chandra (PW-38) for forensic tests. He further testified to have done medico-legal examinations of accused-appellants namely Kapil, Ashok and

Ramjivan on 02.05.10 and accused-appellant Ajju on 14.03.10. He found them capable of performing sexual intercourse and gave reports Ex.P-69, Ex.P-72, Ex.P-73 and Ex.P-74 respectively. He further testified that he prepared slides of their semen and cut off their some of pubic hairs and sealed them in different packets and handed them over to Head Constable Yashwant (PW-19). Both the aforesaid police constables have stated in their evidence to have received sealed packets from Dr. A.K. Agrawal. Upon the perusal of evidence appearing in the cross-examination of Dr. A.K. Agrawal, we find that his aforesaid evidence remains uncontroverted and unchallenged as he is not substantially cross-examined on behalf of all the accused-appellants. Thus, we hold that his evidence is reliable on the aforesaid points.

57. Head Constable Gopal Singh (PW-61) has stated in his evidence that the seized articles had been sent to the FSL Sagar for forensic tests vide the letter Ex.P-144. The letter bears signature of Rajesh Raghuwanshi (PW-57). There is nothing in his cross-examination to disbelieve his evidence. Thus, we place reliance upon his evidence.

58. Dr. Pankaj Shrivsatava (PW-60) has deposed that he has been posted as Scientific Officer in the FSL Sagar since 09.09.08. He further stated that he has been carrying out DNA tests since March, 2007. Before carrying out the DNA tests in the present case, he had tallied the impression of sample-seal with those on sealed packets numbering 48 and found the same. He also found the sealed packets were intact. Thus, he had not found any evidence of tampering or interpolation. He further deposed that in the course of DNA tests, he extracted DNAs from the source materials namely deceased-prosecutrix's underwear and slides of her vaginal swab by using organic extraction and deferential organic technique. He found that the source materials contain DNAs of more than one person. Thereafter, with the same technique he extracted DNAs of all accused-appellants namely Ashok, Ramjivan, Kapil and Ajju from their semen-slides. Upon comparison and matching, he found their DNAs on the underwear and the vaginal swab of the deceased-prosecutrix. After the completion of DNA tests, he prepared his report Ex.P-143 on 16.12.10, which runs into 8 pages and each page bears his signature.

59. On the perusal of cross-examination of Dr. Pankaj Shrivastava, we find that general suggestions are given in his cross-examination on behalf of the accused-appellants, which he has denied. Not only that one of the advocate of the accused-appellants has misconception to the extent that the finger print

expert and the DNA finger-printing expert are the one and the same person and he has crossed Dr. Pankaj Shrivastava as if he were a finger print expert. Not a single question is put in his cross-examination as to his competency in conducting DNA tests, his own credibility, accuracy of the methodology or the procedure followed by him for DNA profiling or possibility of the samples having been contaminated or tampered with. In the case of *Sandeep Vs. State of U.P.* , (2012) 6 SCC 107, the apex court has held that the burden of proving that the DNA report was vitiated for any reason was on the accused. From a perusal of cross-examination of this witness, we find that nothing is elicited on behalf of the accused-appellants to cast a doubt either on the reliability of the testimony of the witness or the authenticity of the DNA report.

60. In the cases of *Kamti Devi* (supra), *Santosh Kumar Singh's* (supra) and *Nandlal Wasudeo Badwaik* (supra), the Supreme Court has held that the DNA report is scientifically accurate and exact science. In the cases of *Santosh Kumar Singh* (supra) and *Anil* (supra), the Supreme Court has held on the basis of the DNA reports that deceased victims were subjected to rape and sodomy before being murdered.

61. In view of the aforesaid authorities, we place absolute reliance upon the evidence of Dr. Pankaj Shrivastava and his DNA report Ex.P-143. On the basis of the aforesaid discussion, we hold that the prosecution has established circumstance No.5 beyond reasonable doubts that the deceased-prosecutrix was subjected to gang-rape by the accused-appellants.

62. Dr. A.K. Agrawal (PW-46), in his evidence has stated that on 16.02.2010 he and Dr. Anita Sahu were posted as Medical Officers at the Community Health Center, Pipariya. Upon the requisitions of the Police Station Pipariya, on that day he alone performed the autopsy on the dead body of deceased Deepak and he and Dr. Anita Sahu jointly conducted the post-mortem on the dead body of an unknown woman. He has further stated that he has assessed the age of deceased Deepak near-about 24 years and found following injuries on his person.

External Injuries

(i) One contusion on the right parietal temporal region of head, size 8x4 c.m.

(ii) One contusion on the left parietal region of head, size 10x3 c.m.

(iii) One contusion on the posterior side of head, size 8x3 c.m.

(iv) One contusion on the forehead, size 7x2 c.m.

(v) One contusion on the back side of scapular region of right shoulder, size 12x5 c.m.

(vi) One contusion over the scapula of left shoulder, size 5x2 c.m.

(vii) One contusion over the frontal side of right hand arm, size 10x4 c.m.

(viii) One contusion (size is not mentioned in the post-mortem report) over the outer side of right forearm.

(ix) One contusion over the outer side of left arm, size 5x4 c.m.

(x) One contusion over the outer side of left forearm, size 5x2 c.m.

Internal Injuries

Right temporal bone of the head was broken, blood clotted over the brain and its tissues were torn.

Opinion - All the injuries were ante-mortem in nature and caused by a hard and blunt object. Breakage of the temporal bone of the head was sufficient to cause death in ordinary course of nature. The remaining injuries were simple in nature. All the injuries were inflicted within six hours before the death. Deceased Deepak died of shock and hemorrhage. He died 48 to 72 hours before the post-mortem examination. The nature of his death was homicidal. His postmortem report is Ex.P-66.

63. Dr. A.K. Agrawal has also stated that he and Dr. Anita Sahu had assessed the age of the deceased woman near-about 24 years and found following injuries on her person.

External Injuries

(i) Five abrasions caused by finger-nails over upper region

of the right breast, each of the abrasions had the width about 1 c.m.

(ii) Five marks of finger-nails over lower region of the right breast, the width of each of the marks was 1 c.m.

(iii) Five brown marks of finger-nails over the right side of the neck.

(iv) One ligature mark around the neck which was below the thyroid cartilage, the width of ligature mark was 1/2 c.m. and the margins of mark were brown.

(v) One ears of wheat with stalk was partly found into the vagina.

Injuries No. (i) to (iii) were ante-mortem in nature caused by finger-nails. Injury No.(iv) was caused by means of a piece of rope or wire. All the injuries were caused within two hours before the death.

Internal Injuries

Both the lungs were swollen and red. Blood was present in the left and the right chambers of heart. The remaining internal organs were red.

Opinion - The cause of death of deceased woman was asphyxia due to strangulation. Signs of sexual assaults were present indicating that the deceased-woman was subjected to rape before her death. The mode of her death was homicidal. The deceased-woman died 48 to 72 hours prior to the post-mortem examination. Her post-mortem report is Ex.P-67.

64. Upon the perusal of cross-examination of Dr. A.K. Agrawal, we find that the defence has not challenged seriously the mode of death of both the deceased. Hence, we hold that the prosecution has proved circumstance No.6 beyond reasonable doubts that both the deceased have suffered homicidal deaths.

65. It is a settled law in a case of murder based upon the circumstantial evidence, the motive gains significance. We have already held that the deceased-prosecutrix was gang-raped and immediately thereafter she and deceased

Deepak were murdered. Upon combining both the events, we also hold that the motive behind the murders of both the deceased by the accused-appellants was that they would not lodge the police report of gang-rape and come forward to give evidence against them in respect of the gang-rape in the court of law.

66. It is pertinent to mention at this stage that we have carefully considered the depositions of all the 61 prosecution witnesses but discussed the statements of those prosecution witnesses in the judgment whose evidence have relevancy even remotely from the point of views of the prosecution or the defence.

67. We have seriously considered the value of unexhibited FSL report as argued thereon by the defence. As per the report, the samples of soil collected from the scene of crime and the stains of soil found on the clothes seized from the possessions of the accused-appellants are different in the composition and the texture. We do not attach any importance to the report in view of the overwhelming evidence against the accused-appellants being found reliable by us after due discussion.

68. Before proceeding to examine the evidence of lone defence witness Dr. Sudhir Jaswani (DW-1), we mention herein that Dr. G.P. Khare (PW-45) took the blood samples of all the accused-appellants for DNA tests. Dr. Sudhir Jaswani in his evidence has stated that the Government of Madhya Pradesh had terminated the services of Dr. G.P. Khare on the ground that his MBBS Degree was found forged in the inquiry. Upon the said statement, it was argued by the defence that Dr. G.P. Khare was not qualified for taking blood samples of the accused-appellants for the DNA tests. DNA analyst Dr. Pankaj Shrivastava (PW-60) has stated in para 10 of his evidence that he had not obtained DNA profiling of the accused-appellants from their blood samples. Hence, we hold that the evidence of this witness has no evidentiary value at all.

69. Considering the cumulative effect of all the proved circumstances, we hold the chain of circumstantial evidence is complete that unerringly points that none other than the accused-appellants had committed the crime. Therefore, the trial court has not committed any error of law or facts in convicting the accused appellants for the offences punishable under Sections 376(2)(g), 302 r.w. 34 (two counts) and 201 IPC.

70. Now, we shall proceed to deal with whether the imposition of death sentence upon the accused-appellants by the trial court under Section 302 IPC holds any justification?

71. The Supreme Court has evolved the doctrine of "the rarest of the rare" case in awarding the death sentence through its scores pronouncements. Hence, the first point before us is whether the present case falls under the category of the rarest of the rare case?

72. In the case of *Machhi Singh* (supra), 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 case 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 mitigating circumstances which speak in favour of the offender?

73. In the case of *Lehna Vs. State of Haryana*, (2002) 3 SCC 76, the Supreme Court has defined in para 23 of the decision that "the rarest of rare" case when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre 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."

74. The Supreme Court in the case of *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."

75. The Supreme Court has ruled in para 20 of its judgment rendered in the case of *Haresh Mohandas Rajput Vs. State of Maharashtra*, (2011) 12 SCC 56, thus:-

"The rarest of the rare case comes 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".

76. The Supreme Court has laid down the test of the rarest of the rare case in para 27 of its decision in the case of *Anil @ Anthony Arikswamy Joseph* (supra) thus:-

"The rarest of the rare test depends upon the perception of the society that is "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."

77. In the case of *Santosh Kumar Vs. State through C.B.I.*, (2010) 9 SCC 747, the Supreme Court in para 98 has explained 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."

78. In the case of *Santosh Kumar Satishbhushan Bariyar Vs. State of Maharashtra*, (2009) 6 SCC 498, the apex Court held that the nature, motive, and impact of crime, culpability, quality of evidence, socio economic circumstances, impossibility of rehabilitation are some of the factors, the Court may take into consideration while dealing with such cases.

79. In the case of *Bachan Singh* (supra), 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 the 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.

80. In the cases of *Bachan Singh and Machhi Singh* (supra), the Supreme Court has enumerated 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 the case of *Shankar Kisanrao Khade vs. State of Maharashtra*, (2013) 5 SCC 546, has stated that the application of aggravating and mitigating circumstances needs 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 two. The considerations for both are distinct and unrelated. In the sentencing process both the crime and criminal are equally important.

81. In the light of aforesaid legal position, we shall consider whether the instant case falls within the category of rarest of the rare case? We visualise that following are the aggravating and the mitigating circumstances.

Aggravating circumstances

(1) The accused-appellants first committed gang-rape and thereafter they murdered the deceased-prosecutrix and her companion deceased Deepak. They were quite young and were murdered in a cruel and barbaric manner.

(2) In recent past many cases are reported in the newspapers that rapist/ rapists first commits/commit rape/gang-rape and thereafter murder the victim-girl/woman so that she would not depose against him/them in the courts. Hence, there is an urgent need on the part of the courts to send strong messages to

such criminal(s) that the court would deal with him/them with the severest punishment i.e. capital punishment.

(3) The accused-appellants had not committed the offence under the influence of alcohol or any other intoxicating substance.

(4) The accused-appellants have absolutely no regard for the chastity of a woman and the life and limb of a person.

Mitigating circumstances

(1) The prosecution has not produced any evidence against any of the accused-appellants with regard to his criminal antecedents. Hence, we may deduce that the accused-appellants being the first offenders are not menace or threat to the society.

(2) All the accused-appellants are in the age group of 25 to 30 years and some of them are married.

(3) There is no evidence on record as to which accused-appellant took a lead to instigate other accused-appellants to commit the crime. Hence, it is not possible for us to identify whose case among the accused-appellants falls in the category of the rarest of the rare case.

(4) Evidence on record reveals that the deceased-prosecutrix was unmarried girl, whereas deceased Deepak was married man. The deceased-prosecutrix belonged to Kahar caste, while deceased Deepak was of Kushwaha caste. Moreover, they were permanent residents of different places. The deceased-prosecutrix was a resident of Sohagpur, whereas deceased Deepak was a resident of village Kalmesera. Sushila Bai (PW-27), the mother of the deceased-prosecutrix, has stated in her evidence that the deceased-prosecutrix had left the house, saying that she was going to Itarsi to meet her elder sister Pooja. Meena Bai (PW-9), the wife of deceased Deepak, has stated in her evidence that her husband left the house, saying that he was going to village Bankhedi. Sushila Bai has also stated that deceased Deepak gave a mobile phone to her deceased daughter on her birthday. The dead bodies of both the deceased were found in the agricultural field close to each other. If these facts are put together, it appears to us that both the deceased had close physical intimacy. Hence, it may be that the accused-appellants saw them in a compromising position which aroused them and they committed the crime. Thus, it can be said safely that the accused-appellants committed

the offence at the spur of moment.

Upon the comparison of the aggravating and the mitigating circumstances, we find that the mitigating circumstances have far outweighed the aggravating circumstances.

82. The Supreme Court in the case of *Shankar Kisanrao Khede* (supra) has considered a slew of cases, where the victims were first subjected to rape/gang-rape/sodomy and thereafter they were murdered by the accused/ accused persons, in which the Supreme Court has affirmed the death sentences or converted the same into the life imprisonments.

83. The facts of the present case are similar to those of the case of *Ronny Vs. State of Maharashtra* , (1998) 3 SCC 625. In that case, three accused persons in the age group of 23 to 25 years had committed three murders and a gang-rape. The Supreme Court commuted their death sentences to imprisonments for life on the ground that it was not possible to identify whose case would fall in the category of "the rarest of the rare" case. We have already stated under the head of mitigating circumstance that it is not possible to identify whose accused-appellant case falls in the category of rarest of the rare case. Keeping in view the facts of case-law, we are not inclined to affirm the capital punishment as imposed by the learned Trial Judge upon the accused-appellants.

84. Now, the point remains to be decided by us is what will be appropriate sentence to be given to the accused-appellants.

85. Taking the global view of the present case and keeping in mind the law laid down in the aforenoted rulings, we alter the capital punishment awarded to each of the accused-appellants into the imprisonment for life for each of the two counts under Section 302 r.w. 34 IPC.

86. In the result,

(1) The criminal reference of 1 of the year 2014 made by the learned Trial Judge for confirmation of death sentences awarded to the accused-appellants under Section 302 r.w. 34 IPC (two counts) is rejected. However, the order of convictions under Sections 201, 376(2)(g) and 302 r.w. 34 (two counts) IPC is upheld.

(2) All the appeals filed by the accused-appellants are allowed to the extent that they would suffer life-imprisonment for each count under Section 302 r.w. 34 IPC instead of capital punishment.

(3) Each of the accused-appellants would suffer RI for 7 (seven) years under Section 201 IPC, RI for life under Section 376(2)(g) IPC and RI for life for each of the two counts under Section 302 r.w. 34 IPC. Keeping in view the law laid down by the supreme court in the case of *Muthuramalingam and others Vs. State , represented by Inspector of Police,* (2016) 8 SCC 313, each of the accused-appellants shall suffer first jail sentence under section 201 IPC and thereafter life imprisonments awarded to him under sections 376(2)(g) and 302 r.w. 34 (two counts) IPC "concurrently".

(4) The fine sentences with default jail sentences as imposed by the trial court upon each of the accused-appellants shall remain as they are.

87. Before parting with this case, we would say a few words upon the DNA test/profiling/finger-printing. It is a recently developed impeccable scientific technique in determining the identity of a person alleged to be involved in crime provided the crime-related DNA samples are properly collected, not tampered with or not contaminated and the DNA analyst correctly matches them with duly obtained DNA sample from the person concerned. Now-a-days, the DNA profiling is being increasingly used by the investigating agencies to nab culprits especially in those cases where the ocular evidence is not forthcoming. To safeguard the interests of culprits, the persons who have collected crime-related DNA samples and the DNA analysts are required to be cross-examined effectively by their advocates. It is only possible when they know the areas where the DNA samples collectors may make irregularities in collecting them or the DNA analysts may make mistakes at the time of matching the DNA profilings. Keeping in view the aforesaid, we request the State Bar Council of Madhya Pradesh to make efforts to enlighten lawyers as to how the aforesaid persons can be effectively crossed by arranging lectures of experts of the DNA field and by making lawyers available exhaustive reading-materials in this regard. We have come across that in the United State (sic:States) of America if the prosecution case is entirely based upon the DNA evidence, then it is mandatory for the prosecuting concerned agency to get the DNA samples analyzed by the two recognized laboratories without disclosing each other the fact that the DNA samples are also sent for analysis to another laboratory as well. If the reports of both the laboratories are same, then the prosecution is launched. Hence, we also request to the investigating agencies to follow the suit in this regard.

88. Copies of this judgment be sent to the Bar Council of Madhya Pradesh

and the Principal Home Secretary to the State Government of M.P. Bhopal for information and taking steps in respect of recommendations made by us in para 87 of this judgment.

Order accordingly.

I.L.R. [2017] M.P., 2826
CRIMINAL REFERENCE
Before Mr. Justice S.K. Seth & Mr. Justice H.P. Singh
Cr.Ref. No. 1/2017 (Jabalpur) decided on 10 August, 2017

IN REFERENCE ...Applicant.
Vs.
RAJESH @ RAKESH & anr. ...Non-applicants

(Alongwith Cr.A. No. 83/2017 & Cr.A. No. 84/2017)

A. Penal Code (45 of 1860), Sections 302, 364-A, 201 & 120-B – Kidnapping & Murder of Minor Boy – Conviction – Death Sentence – Circumstantial Evidence – Presumption **– Held – Case based on circumstantial evidence – No eye witness – As per postmortem report, cause of death due to cut of neck by sharp cutting object – As per DNA report, DNA of hairs found in fingers of deceased was similar to DNA profile of appellant – Having proved the factum of kidnapping for ransom, inference of consequential murder of kidnapped person is liable to be presumed – Substantive evidence on record to establish kidnapping of deceased followed by his murder at the hands of appellants – Conviction upheld – Appeals dismissed. (Para 46 & 47)**

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 364–ए, 201 व 120–बी – अप्राप्तवय बालक का व्यपहरण व हत्या – दोषसिद्धि – मृत्युदण्ड – परिस्थितिजन्य साक्ष्य – उपधारणा – अभिनिर्धारित – प्रकरण परिस्थितिजन्य साक्ष्य पर आधारित है – कोई चक्षुदर्शी साक्षी नहीं – शव परीक्षण प्रतिवेदन के अनुसार, मृत्यु का कारण धारदार काटने की वस्तु से गर्दन का काटा जाना है – डी.एन.ए. प्रतिवेदन के अनुसार, मृतक की उंगलियों में पाये गये बालों का डी.एन.ए. अपीलार्थी के डी.एन.ए. के समान था – फिरौती के लिए व्यपहरण का तथ्य साबित हो जाने पर, व्यपहृत व्यक्ति की परिणामिक हत्या के निष्कर्ष की उपधारणा की जाना संभाव्य है – यह स्थापित करने हेतु अभिलेख पर सारभूत साक्ष्य है कि अपीलार्थीगण द्वारा मृतक का व्यपहरण कर उसके बाद उसकी हत्या की गई – दोषसिद्धि कायम रखी गई – अपीलें खारिज।

B. Penal Code (45 of 1860), Sections 302, 364-A, 201 & 120-

B and Evidence Act (1 of 1872), Section 106 – Burden of Proof – **Held – When it is duly established that deceased was kidnapped by appellants, section 106 of the Act of 1872 places onus on them to produce material to show the release of deceased from their custody – In absence thereof, it has to be accepted that custody remained with them till deceased was murdered. (Para 47)**

ख. दण्ड संहिता (1860 का 45), धाराएँ 302, 364–ए, 201 व 120–बी एवं साक्ष्य अधिनियम (1872 का 1), धारा 106 – सबूत का भार – अभिनिर्धारित – जब यह सम्यक् रूप से स्थापित किया गया है कि मृतक का व्यपहरण अपीलार्थीगण द्वारा किया गया था, 1872 के अधिनियम की धारा 106 उन पर, उनकी अभिरक्षा में से मृतक को छोड़ा जाना दर्शाने हेतु सामग्री प्रस्तुत करने का भार डालती है – इसकी अनुपस्थिति में, यह स्वीकार किया जाना होगा कि मृतक की हत्या हो जाने तक वह उनकी अभिरक्षा में था।

C. Penal Code (45 of 1860), Sections 302, 364-A, 201 & 120-B – Kidnapping & Murder of Minor Boy – Sentence – **Held – Looking to nature and way of committing offence, no possibility of any reform and rehabilitation of appellants – Appellants having no value for human life, carrying extreme mental perversion not worthy of human condonation – Approach of accused reveals a brutal mindset of highest order – Death sentence confirmed – Aggravating and Mitigating circumstances enumerated and discussed on facts of the case. (Paras 50 to 55)**

ग. दण्ड संहिता (1860 का 45), धाराएँ 302, 364–ए, 201 व 120–बी – अप्राप्तवय बालक का व्यपहरण एवं हत्या – दण्डादेश – अभिनिर्धारित – अपराध कारित करने की प्रकृति और ढंग को देखते हुए, अपीलार्थीगण के सुधार एवं पुनर्वास की कोई संभावना नहीं – अपीलार्थीगण को मानव जीवन का मूल्य नहीं, उनकी अत्याधिक मानसिक विकृति मानवीय संवेदना के अयोग्य है – अभियुक्त का दृष्टिकोण उच्चतर कोटि की क्रूर मानसिकता प्रकट करती है – मृत्यु दण्डादेश की पुष्टि की गई – प्रकरण के तथ्यों पर गुरूतरकारी एवं गंभीरता कम करने वाली परिस्थितियाँ प्रगणित एवं विवेचित की गई।

Cases referred:

(1984) 4 SCC 116, (1997) 7 SCC 156, (2001) 4 SCC 375, (2011) 12 SCC 56, (2012) 4 SCC 257, (2012) 4 SCC 289, (1971) 3 SCC 759, (2013) 10 SCC 421, (2015) 6 SCC 632.

Ajay Shukla, G.A. for the applicant/State in Cr. Ref. No. 1/2017 and

for the respondent/State in Cr.A. Nos. 83/2017 & 84/2017.

S.C. Datt with *Kishwar Khan*, for the accused/non-applicants in Cr.Ref. No. 1/2017, for the accused/appellant in Cr.A. No. 83/2017 and for the accused/appellants in Cr.A. No. 84/2017.

JUDGMENT

The Judgment of the Court was delivered by : **H.P.Singh, J. :-** The instant Criminal reference No.1/2016 has been referred by the learned III Addl. Sessions Judge, Jabalpur, against the same judgment dated 29.12. 2016, passed in Sessions Trial No.560/2013, against which the accused/ Om Prakash Yadav and Rajesh @ Rakesh have preferred Criminal Appeal No.83/2017 and Criminal Appeal No.84/2017, respectively, therefore, all these matters are being decided by this common judgment.

2. The learned III Addl. Special Judge vide judgment dated 29.12.2016 in S.T.No.560/2013 convicted the accused/appellant Omprakash for offence punishable under Sections 364-A r/w Sec. 120-B of IPC and sentenced to undergo life imprisonment and fine of Rs.2000/- in default R.I. For two months, whereas, appellant Rajesh @ Rakesh and Raja Yadav have been convicted for offences punishable under Sections 364-A r/w 120-B of IPC and they are sentenced to death sentence each, and fine amount of Rs.1000/- each, in default of payment of fine amount, they are sentenced to R.I. for two months each. They have been further convicted for offence punishable under Section 302 r/w 120-B of IPC, and sentenced to undergo death sentence each and fine of Rs.1,000/- each, in default of payment of fine amount, they are sentenced to R.I. for two months each and convicted under Section 201 of IPC, they are sentenced to undergo R.I. for five years each with fine of Rs.500/- each and in default of fine, R.I. for one month each. Since death sentence was passed by the Court below, therefore, the death reference is referred to this Court.

3. Being aggrieved with the aforesaid judgment, conviction and sentences, the accused/appellants has preferred Criminal Appeal No.83/2017 and Criminal appeal No.84/2017.

4. The prosecution case, in short, is that on 26.3.2013 at about 9:00 PM, Ajit Pal @ Boby, aged about 15 years, had gone to see "Holika" and thereafter he did not return to home. Thereafter, the mother of Ajit Pal @ Boby, Rajwant Kaur (PW/1), her brother Mitthu @ Amarjeet and neighbourer, accused/appellant Om Prakash Yadav went Gurudwara at Gwarighat and

searched about Ajit Pal @ Boby, but they did not find Ajit Pal @ Boby. Thereafter, Rajwant Kaur (PW/1) lodged a missing report Ex.P/1 on 27.3.2013, at 16:15 PM about missing of her son Ajit Pal @ Boby, at Gwarighat outpost of Police Station Gorakhpur, District Jabalpur, which was registered by Head Constable Ganesh Singh (PW/6) vide Missing Person No.46/13.

5. Further, prosecution story is that on 28.3.2013, Mitthu @ Amarjeet (PW/2) and accused/appellant Om Prakash Yadav were returning and as soon as they reached Gwarighat, then Amarjeet @ Mitthu (PW/2) received a call from mobile phone No.8305620342, on his mobile phone No.9300434520. The caller identified himself as 'Khan' and stated that Boby is in his custody. The caller demanded a ransom of Rs.50 lacs and also asked him to have a talk with the mother of Boby. The caller threatened that in case of non-payment of ransom or in case of disclosing the incident to police, he will cut the neck of Ajit Pal @ Boby. Consequently, the mobile phone was disconnected. When Amarjeet @ Mitthu (PW/2) was receiving call, at that time, accused/appellant Om Prakash was present with him. Thereafter, Amarjeet @ Mitthu (PW/2) went to Rajwant Kaur (PW/1) and stated about that call and when he was stating about said call, again another call came, then the brother of Rajwant Kaur (PW/1), Amarjeet (PW/2) gave his mobile phone to her. When she was talking with that caller, the mobile phone fell down, which was picked up by accused/appellant Om Prakash. Accuased (sic:accused)/appellant Om Prakash was talking with that caller and asked him where the said ransom has to be brought. Thereafter, Monu alias Taranjeet Singh Gujral (PW/10) by his own mobile had taken that mobile phone and started to talk with the said caller, but mobile was disconnected. Monu alias Taranjeet Singh Gujral (PW/10) himself has dialed again and asked the caller and requested to have a talk with the Boby, then Boby talked with him and consequently mobile phone was disconnected. Said Monu alias Taranjeet (PW/10) told that Boby shouted "Mammi Main Boby Main Boby" and started weaping. Monu has further stated that the said sound was not that of Boby and he gave the number of that caller in writing to Rajwant Kaur (PW/1) and suggested her to lodge a report in the police Station. Thereafter, Rajwant Kaur (PW/1) informed the police. After completing inquiry about missing person report, SHO Shri R.S. Parmar (PW/16), of Police Station Gorakhpur, recorded the FIR on 28.3.2013 vide Crime No.273/2013 Ex.P/35 for offence punishable under Sections 364-A & 365 of IPC.

6. During the course of investigation, SHO Shri R.S. Parmar (PW/16), on the basis of aforesaid facts, appeared from caller of kidnapper of Boby, demand of ransom from mobile No.8305650342 and on the basis of enquiry report Ex.P/35 submitted by Nodal Officer Bharti Airtel Limited, Indore, Sai Datt Bohre (PW/15) and Santosh Jatav (PW/17), Nodal Officer of Reliance Company, on the basis of call details of said mobile number took appellant Rajesh @ Rakesh into custody and recorded his memorandum statement Ex.P/8. As per memorandum on the denotation of accused/appellant Rajesh @ Rakesh reached along with the witnesses, namely, Jitendra Singh(PW/8) and Malkit Singh, near Khandari Nala and got prepared the spot map vide Ex.P/13. Thereafter, the dead body of Ajit Pal @ Boby, which was in the well, contained in a plastic bag was got taken out and from the said dead body, certain flock of hair antangle of handful of the deceased, gunny bag and shawl roped in neck; were seized and for that Seizure Panchnama Ex.P/12 was prepared. From the spot, blood stained soil and plain soil, plastic chappal were seized vide seizure memo Ex.P/9. On the same date, i.e. 29.3.2013, on the basis of memorandum of accused/appellant Rajesh in presence of witnesses near the spot, one empty Macdowel bottle was seized vide Ex.P/10. On the indication of accused/appellant Rajesh in presence of same witnesses, one knife was seized vide seizure memo Ex.P/11. Spot map was prepared as Ex.P/14. During investigation, after giving notice Ex.P/2, inquest memo of dead body of deceased Ajit Pal @ Boby was prepared by Shri R.S. Parmar (PW/16) in presence of witnesses, as Ex.P/3. Thereafter, the dead body was sent for postmortem examination vide Ex.P/11 through Constable Sushil (PW/12). The postmortem of dead body of deceased Ajit Pal @ Boby was conducted by Dr. Vivek Shrivastava (PW/7), vide Ex.P/7. On outer examination of dead body of deceased, he found following injuries :-

(i) incised wound (cut throat wound) measuring 12 cm x 0.2 cm x 4 cm present over frond of neck just below thyroid cartilage, cutting the underlying skin. Soft tissues, blood vessels (carotids, veins and arteries), nerves, trachea essophagous upto vertebra. Deep infilteration of clotted blood present in the surrounding tissues .

(ii) superficial cut throat wound (incised) measuring 7 cm x 0.2 cm x 0.3 cm present just below the above injury. The margins of the above two wounds are clear cut. Deep infilteration of clotted blood present.

On interior examination of dead body of deceased, he found following injuries :-

> Scalp, craniel & vertebrae are healthy. Sillo, brain and spinal cord were found semi-liquified (half were melted), ribs and pneumonia were healthy, already stated about throat and breath vessels, both lungs were blackish, perchornium and trachea, spleen, galbladder and kidneys were found melted. There were no blood in big vessels.

He opined that the death of deceased was caused within 3 to 5 days of his examination. The cause of death was haemorrhagic shock which was caused due to cut of neck by sharp cutting object. According to him, the cut wound on the neck was sufficient to cause death in ordinary course of nature and death was likely to be homicidal in nature.

7. The cloths of deceased Ajit Pal @ Boby were packed and sealed by Dr. Vivek Shrivastava (PW/7) and handed over the same to the concerned Constable. The seized knife was also examined by doctor Vivek Shrivastava (PW/7) and opined that the knife was stained by some rusty spot and death of deceased can be caused by that knife. After examination, he packed and sealed that knife and handed over to the concerned Constable for its examination by FSL. One mobile (Intex) and one mobile (Micromax) were also seized from the accused/appellant Raja Yadav vide Ex.P/19. All these articles were taken into custody by Investigating Officer R.S. Parmar (PW/16) and handed over to the concerned Constables vide Ex.P/40 and Ex.P/41 Summary report of call details were taken vide Ex.P/42.

8. Blood samples of accused/appellant Rajesh @ Rakesh Yadav and accused/appellant Raja Yadav were taken, preserved and sealed packets of seized articles were sent to F.S.L. Sagar. As per the report of FSL Sagar Ex.P/44, DNA profile of hair stranded in the finger of right hand of deceased Ajit Pal @ Boby of male profile i.e. Ex.A(ID 7905) is similar to that of DNA Profile of accused/appellant Rajesh @ Rakesh Yadav i.e. Ex.B(ID-7906) whereas the DNA Profile of accused/appellant Raja Yadav i.e. Ex.C(ID-7907) is different.

9. After investigation police filed charge sheet before the concerned Judicial Magistrate First Class, who committed the case to the Sessions Judge. A charge was framed against them under Section 302, 364-A, 120-B and

201 of the IPC. The accused/appellants abjured the guilt. they took plea that they have been falsely implicated in the case, they were brought to trial. In their statements under Section 313 of Cr.P.C., the appellants pleaded false implication. Appellant Om Prakash also plaeaded an alibi and claimed that he had been admitted at Rohaniya Varansi for treatment. They have also taken defence that police had taken their blood samples by creating pressure and thereafter, false case has been made against them. In his defence, the appellants examined Dr. Ajay Bhandari(DW/1), Princy Thakur (DW/2) and Dr. Sandeep Kumar (DW/3).

10. Learned Sessions Judge, after considering the prosecution evidence convicted and sentenced the accused/appellants as mentioned above.

11. We have considered the rival submissions of learned counsel for the parties and perused the records.

12. Learned Govt. Advocate appearing on behalf of the respondent/State has submitted that there is enough clinching material evidence to hold guilty the accused/appellants for commission of offence. Learned Govt. Advocate, further submitted that as per the DNA profile test done by FSL Sagar, it is clearly proved that there is cogent evidence against the accused/appellants, and they are found guilty of commission of the offence, because DNA of accused/appellants and DNA profile of the hair stranded in the finger of right hand of deceased Ajit Pal @ Boby, which clearly indicates that accused/ appellants had committed murder of the deceased in brutal manner. The matching of DNA profile with the dead body cannot be termed as a co-incidence. This is the important piece of evidence which on meticulous examination are corroborative evidence and cannot be overlooked. The blood samples of accused/appellants have been kept in proper custody and were sent for test without tampering. Therefore, the same cannot be questioned. Hence, it is a rarest of rare case and trial Court has rightly awarded death sentence against the accused/appellants.

13. Shri Datt, learned counsel for the accused/appellants submits that learned trial Court has failed to appreciate the factual aspects of the case and has wrongly framed charge against them. He further submitted that appellants have been falsely implicated in this case as there are material discrepancies, contradictions, omissions and improvements in the statements of prosecution witnesses. He further submits that the findings recorded by learned Sessions Judge are erroneous and not based on proper appreciation of evidence available

on record. No ingredients are available in the present case, which connect the accused/appellants in the crime. Learned counsel for appellants has drawn our attention to the statements of prosecution witnesses and tried to convince us that the whole case is based on circumstantial evidence and the prosecution has failed to prove its case beyond reasonable doubt. It is contended that the Court below has given its findings on presumptions, surmises and conjectures, therefore, is liable to be set aside. He further contends before us that there is no direct evidence available on record to prove the guilt of the accused/ appellants. Learned counsel for the accused/appellants further submits that the circumstantial evidence should be unimpeachable and in the present case no such unimpeachable evidence is available on record, therefore, the learned Court below erred in holding the appellants guilty. He prays for acquittal of the appellants by setting aside the judgment of the lower Court.

14. There is no eye witness of the incident in this case and accordingly, conviction of accused/appellants is based on circumstantial evidence.

15. Now, the question for our consideration is whether the deceased Ajit Pal @ Boby had died unnatural death during period of 9:00 PM of 26.3.2013 to 1:45 PM of 29.3.2013? and was his death homicidal ?

16. Rajwant Kaur (PW/1) mother of the deceased has stated that on 26.3.2013 at about 9:00 PM Ajit Pal @ boby had gone somewhere out of the house to see "Holika" and thereafter he did not return. Rajwant Kaur (PW/1), mother of deceased Ajit Pal @ boby, Amarjeet Singh @ Mitthu (PW/2), who is brother of Rajwant Kaur and maternal uncle of deceased, Pooran Singh (PW/3), who is father of sister-in-law of Rajwant Kaur (PW/1), Jitendra Singh (PW/8), who is son of brother of mother of deceased, Taranjeet Gujral @ Mullu, who is neighbour of deceased, in a voice and sound have stated that deceased Ajit Pal @ Boby had died. They had seen the dead body of the deceased. They had stated in one voice and sound that dead body of the deceased was taken out from the well contained in a plastic gunny bag. They have also stated that they had seen cut injury on the neck of dead body of deceased. Certain flock of hair entangled with the finger of deceased, gunny bag, shawl roped in neck were seized and panchnama was prepared. Spot map vide Ex.P/13 was prepared. Investigating Officer, R.S. Parmar (PW/16) has stated that he discovered the dead body of deceased on the basis of memorandum statement of appellant Rajesh @ Rakesh on 29.3.2013 at about 13:45 PM and has prepared inquest memo Ex.P/3 of dead body of deceased in presence of witnesses after giving notice Ex.P/2 to

them. Amarjeet Singh @ Mitthu (PW/2) has also supported the statement of R.S. Parmar (PW/16) and stated that proceedings of inquest memo was conducted before him. Above all witnesses have stated that they have seen the cut injury on the neck of the deceased and as per their opinion deceased had died due to that injury and other injuries caused on the neck of deceased. The dead body of deceased was sent to Medical College Jabalpur for postmortem by R.S. Parmar (PW/16). Dr. Vivek Shrivastava (PW/7) had conducted the postmortem examination of the dead body of the deceased on 30.3.2013. He has stated that as per his report Ex.P/7, he found following injuries :-

(i) incised wound (cut throat wound) measuring 12 cm x 0.2 cm x 4 cm present over frond of neck just below thyroid cartilage, cutting the underlying skin. Soft tissues, blood vessels (carotids, veins and arteries), nerves, trachea essophagous upto vertebra. Deep infilteration of clotted blood present in the surrounding tissues .

(ii) superficial cut throat wound (incised) measuring 7 cm x 0.2 cm x 0.3 cm present just below the above injury. The margins of the above two wounds are clear cut. Deep infilteration of clotted blood present.

On interior examination of dead body of deceased, he found following injuries:-

Scalp, craniel & vertebrae are healthy. Sillo, brain and spinal cord were found semi-liquified (half were melted), ribs and pneumonia were healthy, already stated about throat and breath vessels, both lungs were blackish, perchornium and trachea, spleen, galbladder and kidneys were found melted. There were no blood in big vessels.

He opined that the death was caused within 3 to 5 days of his examination. The cause of death was due to haemorrhagic shock which was caused due to cut of neck by sharp cutting object. According to him, the cut wound on the neck was sufficient to cause death in ordinary course of nature and death was likely to be homicidal in nature.

Accordingly, cause of death of the deceased was haemorrhage and shock due to cut of neck by sharp cutting object. The appellants have shown their ignorance on this point, which does not rebut the prosecution case. Thus, it is well proved that deceased Ajit Pal @ Boby had died an unnatural death

during the period 9:00 PM of 26.3.2013 to 1:45 PM of 29.3.2013 and his death was homicidal.

17. **Now, the questions arise are whether appellants conspired to kidnap the deceased for ransom ? and in compliance of conspiracy whether the appellants had kidnapped the deceased Ajit Pal @ Boby for alleged ransom and they had killed Ajit Pal @ Body for that ransom ?**

18. The mother of deceased, Rajwant Kaur (PW/1) has stated that deceased Ajit Pal @ Boby was her son, aged about 15 years and he studied upto 5th Class. She has further stated that she had sold her house for a sum of Rs.60 lacs on 22.5.2013 to one Kirti Tiwari. She has further stated that on 26.5.2013, at about 9:00 PM in the night his son, deceased Ajit Pal @ Boby, had gone somewhere out of the house to see 'Holika' and thereafter he did not return to home. She thought that he went to the house of his maternal uncle. On the next day, i.e. 27.3.2013, her daughters after enquiring the matter informed her that deceased did not go to the house of his maternal uncle, then she asked about her son from her relatives on phone. She went to Gurudwara, near Gwarighat, and searched about her son, but she could not get him and thereafter lodged missing report of her son in Gwarighat outpost of Police Station Gorakhpur, District Jabalpur vide Ex.P/1, which was duly signed by her.

19. Rajwant Kaur (PW/1) has further stated that on 28.3.2013, her brother Amarjeet @ Mitthu (PW/2) and her neighbour appellant Om Prakash Yadav went to Gurudwara of Gwarighat to search the deceased, but they could not get her son. When they were returning to home, Amarjeet @ Mitthu (PW/2) received a phone of a person, who was introducing himself as Khan and told that deceased Ajit Pal @ Boby was in his possession, asked him to send Rs.50 lacs and thereatened that if the said money is not sent to him, he will kill Ajit Pal @ Boby by cutting his neck. On reaching house, when Amarjeet Singh was stating above conversation to her, then again said Khan called him, which was received by Amarjeet Singh in the meantime, he gave the phone to Rajwant Kaur (PW/1). She further stated that at that time, that person was stating as follows:-

> 4..... "मैं खान बोल रहा हूँ, तुम्हारा बॉबी मेरे कब्जे में है, मुझे पचास लाख रूपये भिजवाओं और अगर तुमने पुलिस या अन्य किसी व्यक्ति को बताया, तो में तुम्हारे बॉबी का गला काट कर हत्या कर दुंगा। मैंने कहा ऐसा नहीं करना तुम जहॉ कहोगे मैं पैसा भिजवा दुंगी।फिर मैने उससे कहा मेरे बच्चे को कुछ नहीं करना मेरी बॉबी से बात कराओ। फोन में आवाज आइ मम्मी बचा लो

मम्मी बचा लो मैं बॉबी बोल रहा हूँ। मैं बॉबी की आवाज सुनकर गिर गई फोन मेरे हाथ से छूठ गया था और ओमप्रकाश उसी समय मेरे पीछे खडा था वह फोन ओमप्रकाश ने ले लिया ओमप्रकाश उससे बात करने लगा और बोले जल्दी बताओं पैसा कहा लेकर आना है मैं दीदी के साथ पैसा लेकर आ रहा हूं। ओमप्रकाश ने फोन करने वाले को गाली गलौच भी की, फिर वह फोन मोनू गुजराल ने ले लिया जो की मेरा पडौसी है जैसे ही मोनू ने फोन लिया फोन कट गया। फिर मोनू ने अपने फोन से फोन लगाया और बोले की बॉबी से बात कराओ। जब फोन करने वाले ने बॉबी की मोनू से बात कराइ तो मोनू बोले ये बॉबी की आवाज नहीं है तब फोन करने वाले ने कहा की मुझे बॉबी ने बतलाया है की मम्मी के पास तीन लाख रूपये है जो उसको अभी दे दें बाकी के बीस लाख रूपये एक महीने में दे दें तब मोनू गुजराल ने बोले की क्या बच्चे को एक महीने तक पल सकते हो।

5. फिर मेरे पीछे वही पर ओमप्रकाश खडा था उसने बोले दीदी अभी तुम कितने पैसे की व्यवस्था कर सकती हो मैंने ओमप्रकाश से बोला था की मेरे पास अभी घर में एक लाख रूपये हैं और ओमप्रकाश ने बोले की बाकी का पैसा तो मैंने बोला वह बैंक में है तो ओमप्रकाश टोला तुम एक लाख मुझे अभी दे दो और बाकी का बीस लाख रूपये बैंक से निकलवा लो पर मेरे घर में रिस्तेदार आये थे तो मैं ओमप्रकाश को एक लाख रूपये नहीं दे पाई तब ओमप्रकाश ने मुझसे कहा कि दीदी क्या आप के पास एटीएम है तो मैंने कहा नहीं। मुझे जिस फोन से धमकी मिल रही थी वह फोन का नंबर मुझे मोनू गुजराल ने लिख कर दिया था वह नंबर मैंने जाकर पुलिस को दे दिया। जब मैं थाने से नंबर देकर वापस आई तो मेरे पास ओमप्रकाश आया था वह मुझसे बोला दीदी पुलिस को कुछ नहीं बताना तुम्हारा बॉबी आज रात को 12 बजे छूट जायेगा।

In her cross-examination, she has stated that she did not state above statements to the police in her statement Ex.D/1. It was not asked that why had she not stated in her statement Ex.D/1. Police had taken her statement on 28.3.2013. Upto that date, it was not known to her that appellant Rajesh was involved in that crime, but appellant-Om Prakash and her son accused Rajesh were pretending to help him and due to that she had not stated the role of appellant Om Prakash and his son. She was understanding them as her aspicious thinker. In this circumstances, her above statement cannot be said to be unreliable. Rajwant Kaur (PW/1) has stated in her cross-examination that appellant Rajesh was his neighbour and she knew him from his childhood. At the time of taking on phone, she had recognized the voice of Rajesh, but she did not disclose his name because the life of her son was in danger. She has not explained why did she not state the above facts in her statement before

police, if all these were in her personal knowledge. Perusal of Ex.D/1 also reflects that these statements are not there.

20. Amarjeet Singh @ Mitthu (PW/2), has stated that on 28.3.2013, he with appellant Om Prakash went to Gurudwara, Gwarighat to search Ajit Pal @ Boby, but they did not get him. He further stated that at 9:28 AM, he received a call on phone of a person introducing himself as a Khan, who was telling that Ajit Pal @ Boby was in his possession and asked him to send Rs.50 lacs. He further stated that number of his mobile is **9300434520** and he received the call of number **8305620342** on his above mobile phone number. He has supported the statement of Rajwant Kaur (PW/1) that he went to Rajwant Kaur (PW/1) with appellant Omprakash and at the same time, he received call from same mobile phone. He gave his mobile phone to his sister Rajwant Kaur (PW/1) and at the time of conversation, the mobile phone fell from her hand, thereafter appellant Omprakash picked up cell phone and started talking and he was asking that where he should come with alleged ransom. Appellant Omprakash was abusing on phone. He further stated that thereafter Taranjeet Gujral @ Monu (PW/10) dialed the same number by his own number and asked to have a talk with Boby. Thereafter, he heard the a voice and then Taranjeet Gujral @ Monu (PW/10) said that said voice is not that of deceased Ajit Pal @ Boby. Taranjeet Gujral @ Monu (PW/10) noted down the above mobile phone number and gave the same to Rajwant Kaur (PW/1). Rajwant Kaur (PW/1) has stated that she had given the above mobile number to police. Taranjeet Gujral @ Monu (PW/10) has supported the version of Rajwant Kaur (PW/1) and Amarjeet Singh (PW/2) and stated that on 28.3.2013, when he was going to his dairy farm, then he saw that mother of Boby was talking on phone and during conversation, she started weaping. Thereafter, appellant Om Prakash took that mobile phone and started conversation with kidnapper and asked where he should bring the money and abused the said kidnapper. He further stated that he took that mobile phone, but the same got disconnected and then he dialed that number by his own mobile phone. As per his statement, he saved the said mobile phone number in his mobile phone and before the trial Court he had shown the saved number as **8305620342**. He has further stated that he does not know the name of holder of sim number **8305620342**. In his statement, Taranjeet Singh @ Monu (PW/10), had stated the above facts to police at the time of recording of his statement under Section 161 of Cr.P.C. and if that version was not written by the police, then he cannot say anything.

21. Investigating Officer, R.S. Parmar (PW/16) has stated that he had collected the call details of mobile phone number **8305620342** by which ransom was demanded. From cyber cell, he got information that said sim was used from mobile phone of IMIE number **358327028551270** and on that mobile phone, sim number **9993135127** was being used, which was in the name of appellant Om Prakash Yadav.

22. Santosh Jadhav (PW/17), posted as Assistant Nodal Officer of Reliance Company, at Reliance Communication, Mansarowar Complex, Bhopal, since February 2011, has stated that on asking by Superintendent of Police Jabalpur, he provided call details of mobile number 8305620342 through e-mail taken out by using software of computer of Call Details Company, which is in his possession and control. The user I.D. And password thereof is also with him. The call details Ex.P/35-A, containing two pages and relates to the mobile number **8305620342** for the period w.e.f. 6.3.2013 to 28.3.2013 and produced in the Court. He further states that mobile phone of **IMEI No.358327028551270** is used in the aforesaid call details. The aforesaid call details have been duly signed as per provisions of Section 65-B of the Evidence Act vide certificate Ex.P/36, which was produced in defence and when defence counsel had raised the question in respect of Ex.D/6, then it revealed that mobile phone No.**8305620342** was handed over to Bhuraji, S/o Deepu, R/o House No.433, Gandhi Ward, Tehsil & District Jabalpur.

23. Amarjeet Singh @ Mitthu (PW/2) has stated that he has received the call on his mobile phone No.**9300434520** from mobile phone No.**8305620342**. During cross-examination, in para 21 he has stated that neither his mobile phone nor sim was seized by the police, but in the cross-examination it was not asked that he was not having mobile phone No.**9300434520**. It is clear from Ex.P35-A that on 28.3.2013 from 9:35 to 9:50 hours, there were calls from mobile phone No.**8305620342** having **IMEI No.358327028551270** on the mobile phone No.**9300434520** which belongs to Amarjeet @ Mitthu.

24. Sai Datt Bohre (PW/15), posted as Nodal Officer in Bharti Airtel Ltd. Indore, has stated that he is authorised to provide call details of mobile number **9993135127** from 1.3.2013 to 28.3.2013 to Superintendent of Police Jabalpur through E.mail. The aforesaid call details were procured by him by using software through computer provided by the company and he is authorised to do so by the company. On demand by the police by using I.D. Password,

he provided call details IMEI detail to police or other investigating agency through E.mail. He has stated that mobile number **9993135127** was issued in the name of appellant Om Prakash R/o 1200/CH Gwarighat, Jabalpur. During recording of his statement, he has produced application form which was produced by consumer Om Prakash along with his I.D. Call details sent by him to Superintendent of Police Jabalpur is present on record. He further stated that he had appeared along with the record. The certificate of call details of mobile number **9993135127** is Ex.P/33 and certificate of IMEI 358327028551270 is Ex.P/34 and same were duly signed by him. In his cross-examination, he has stated that he does not know the name of holder of sim number **8305620342** and police had not inquired about this number, but inquired about call details and IMEI Number of above sim number.

25. Investigating Officer, R.S. Parmar (PW/16), has further stated that on this information, he took Rajesh @ Rakesh in his custody and on interrogation before Jitendra Singh alias Sonu (PW/8) and Malkit Singh, he gave information that he will get recovered the dead body of the deceased from the well and knife from the Nala situated behind his house. He wrote down his memorandum statement as Ex.P/8 and took signature and thereafter on his information, he reached at the well from where dead body of deceased Ajit Pal @ Boby was taken out contained in a plastic gunny bag after cutting the rope by which that gunny bag was tied. After giving notice to the witnesses, he prepared inquest memo of the dead body of the deceased vide Ex.P/12. He further stated that dead body was identified by mother of the deceased, Rajwant Kaur (PW/1) as body of Ajit Pal @ Boby. Panch witnesses of memorandum and seizure of dead body, namely, Jitendra alias Sonu (PW/8), who has supported the statement of Investigating Officer R.S. Parmar (PW/16) and stated that on 29.3.2013, police has interrogated appellant Rajesh, who has stated that dead body of deceased Ajit Pal @ Boby was found in the well of Narmada Nagar. Thereafter, his memorandum was prepared vide Ex.P/8 duly signed by him. It is further stated by Jitendra alias Sonu (PW/8) that they reached near well with appellant Rajesh where appellant Rajesh told about the said well. In the well, dead body wrapped in gunny plastic bag was seen in the water, which was taken out and recovered. The statements of these witnesses cannot be denied.

26. In support of the prosecution case, Investigating Officer R.S. Parmar (PW/16) has stated that after receiving the information that alleged mobile phone No.8305620342, operated from the mobile phone of appellasnt (sic:appellant) Om Prakash i.e. 9993135127, he went to Narmada Nagar,

Gwarighat to the house of accused/appellants and had taken accused/appellant Rajesh @ Rakesh into custody, taken him to police station, interrogated him before witnesses Jitendra @ Sonu and Malkit Singh on 29.3.2013 at 13:45, then he disclosed about seizure of dead body from the well and knife from Nala. The memorandum of Rajesh @ Rakesh was recorded by this witness vide Ex.P/8 duly signed by him and accused/appellant Rajesh @ Rakesh. Jitendra Singh (PW/8) has also supported the version of R.S. Parmar (PW/16) and stated about his arrest at P.S. Gorakhpur. On interrogration by Town Inspector of Police, he has stated that dead body is in the well at Narmada Nagar, Gwarighat.

27. R.S. Parmar (PW/16) has stated that he had prepared spot map Ex.P/13 on 29.3.2013 at 15:15 before witnesses Jitendra and Malkit Singh, which was supported by Jitendra Singh (PW/6). R.S. Parmar (PW/16) has deposed in his deposition that on the basis of information given by accused/appellant Rajesh, he gave notice vide Ex.P/2 to Panchas and in presence of panchas, he prepared inquest memo vide Ex.P/3. The dead body was kept in white coloured sack tied from by black coloured rope. The said sack was cut and opened by Dashrath Barman. The neck and face of dead body was wrapped with shawl. Half of the neck was shown to be cut towards right side by sharp edged weapon. In the finger of right hand, some hairs were found and putrid smell was coming out from the dead body. This witness has put his signature on Ex.P/3, confirmed the stuck hair in the right hands' finger of dead body which were taken out and sealed. Plastic sack and shawl were also sealed vide seizure memo Ex.P/12, duly singed and confirmed the same. The dead body was said to be of Ajit Pal @ Body (sic:Boby).

28. R.S. Parmar (PW/16) has further stated in his statement that on 29.3.2013, on the basis of information given by accused/appellant Rajesh, he has taken bloods from inner and outside of cement vessel, plain soil and blood stained soil, black plastic chappal kept in cement vessel, in presence of witnesses, sealed the same and prepared seizure memo as Ex.P/9. On the basis of information given by appellant Rajesh, one bottle of Mc. Dowell No.1 was also seized vide Ex.P/10, which was duly signed and confirmed. On the same day, on the basis of memorandum statements of appellant Rajesh @ Rakesh Ex.P/8, blood stained knife, which was taken out by appellant Rajesh @ Rakesh from Nala and after production thereof, the same was seized, sealed and signed vide Ex.P/11. Jitendra Singh (PW/8) has also supported the version of R.S.Parmar (PW/16) and stated that he had singed (sic:signed) Ex.P/11. On showing the knife mentioned as Article 'A', he said that

this is the knife which has been seized by the police. He further stated that on 29.3.2013, on the basis of information of appellant Rajesh, spot map Ex.P/14 was prepared. Jitendra Singh (PW/8) has also stated that arrest memo Ex.P/36A, of accused/appellant Rajesh, was prepared and signed by R.S. Parmar and this fact cannot be denied during cross-examination of Jitendra Singh (PW/8). Jitendra Singh (PW/8) in his deposition has stated that search memo, about sim from the house of accused/appellant, is Ex.P/37. He stated that on 30.3.2013, the sim could not to be traced out by R.S. Parmar (PW/16). Ex.P/38 is also search Panchnama.

29. On the basis of information given by appellant Rajesh, police officials reached Gwarighat and searched about broken sim, which could not be traced out. On 31.3.2013, Jitendra (PW/8), who was on police remand during interrogation at P.S. Gorakhpur, in the presence of witnesses Bambam and Surjit, has stated in his memorandum statement that said mobile was kept with his brother Brajesh and he shall get it seized. On the same day, at 15 hours, Ex.P/16 was prepared in which appellant Rajesh has said that he shall get seized blood stained cloths which were kept in the dairy under Khali-Chuni in a room. It is also stated by this witness that on the basis of information given by appellant Rajesh vide Ex.P/16, T-shirt, blood stained black colour Jeans were seized vide Ex.P/18 duly stated to be written and signed by said R.S. Parmar. It is also stated to be confirmed that on 31.3.2013, in the presence of witnesses accused/ appellant has been arrested vide Ex.P/20.

30. Bambam @ Shaiwal (PW/9) is the witness of Ex.P/15, Ex.P/16 and Ex.P/18, and confirmed the contentions made therein in the presence of accused appellant Rajesh @ Rakesh with regard to the fact of concealment of cloths under Khali in the dairy, the seizure thereof by police and arrest of appellant Rajesh @ Rakesh @ Raja by putting his signatures on Ex.P/15, P/16, P/18 and P/20. On 31.3.2013, accused Brajesh was taken into custody by R.S. Parmar (PW/16) for interrogation, who has stated about concealment of mobile of his brother in a room and on the basis of Ex.P/17, intex mobile having duel sim and micromax mobile containing sim No.9993135127, were stated to be seized from the possesion of accused Brajesh vide Ex.P/19. Accused Brajesh has been arrested vide Ex.P/21 duly signed and confirmed by R.S. Parmar (PW/16). Bambam @ Shaiwal(PW/9) have supported the statements of R.S. Parmar (PW/16) and signed to be proved the version mentioned in Ex.P/17, Ex.P/19 and Ex.P/21.

31. Invesigating Officer R.S. Parmar (PW/16) has deposed that he had written a letter Ex.P/39 dt. 2.4.2013, duly signed by him to Chief Medical Officer, Victoria Hospital, Jabalpur for taking the blood samples of accused appellants-Rajesh @ Rakesh and Raja Yadav. Dr. P.K. Sharma (PW/5) has deposed in his deposition that on 2.4.2013, the accused/appellants were brought for the said purpose in the hospital. He further stated that in presence of witnesses Bambam @ Shaiwal(PW/9) who was of deceased side and Shiv Prakash, who was the witness of accused/appellants side, their blood samples were taken out, sealed and handed over to the police for DNA test. Blood sample of accused/appellant Rakesh @ Rajesh was taken and Panchnama vide Ex.P/5 was prepared and blood sample of accused/appellant Raja was taken and Panchnama vide Ex.P/6 was prepared. Thereafter, Dr. P.K. Sharma (PW/5) has deposed, that he had signed Ex.P/5 and Ex.P/6, which were signed by other witnesses also, clearly show that on 2.4.2013 at 18:55 hours, the blood samples of accused/appellants Rajesh and Raja Yadav were taken on the same day and Panchnama was prepared in presence of witnesses.

32. It is clear from para 3 of cross-examination of Dr. P.K. Sharma (PW/5) that blood samples of accused/appellants were taken by technician, but who has taken the blood samples, his name is not mentioned in Ex.P/5 and Ex.P/6. This witness has not taken blood samples of accused/ appellants. From para 4 of his cross-examination, it is clear that persons from whom blood samples were taken, their identity has not been mentioned. There is no mention about handing over of blood samples to the police constable and in para 5, name of constable to whom the blood samples were given, has also not been mentioned. This witness could not state in his statement in para 7 that on what time he had come to take blood samples, but he has stated that it is true that blood samples Ex.P/5 & Ex.P/6 were collected by him at about 10-10:30, because on that day police personnel had came to him at 10-10:30 to 11:00 and he had completed the proceedings within half an hour. It is denied by Dr. P.K. Sharma (PW/5) that he did not go to hospital in the evening at 5-6 PM, and also denied that he had not taken any sample and also denied that he had signed Panchnama Ex.P/5 and P/6 at the instance of police, thereby, it is clear that sealed samples were taken and handed over by Dr. P.D. Sharma (PW/5) to constable. It is also denied by Dr. P.K. Sharma (PW/5) that blood samples were not taken by him or before him by the technician. On the basis of not mentioning each and every particulars in Ex.P/5 and Ex.P/6, it cannot be said that credibility thereof is doubtful.

33. Shiv Prakash (PW/4) is the brother of accused/appellant Raja Yadav. This witness has not supported the assertion of Dr. P.K. Sharma (PW/5) and signatures put on Ex.P/5 and Ex.P/6. He has been declared hostile and in his cross-examination by prosecution, he denied the suggestion of prosecution that he is not giving true statement with a view to save his brother. Shaiwal @ Bambam (PW/9) had accepted his signatures on Ex.P/5 and Ex.P/6 and stated that on 2.4.2013 at 6:00 PM in the evening at Victoria Hospital Dr. P.K. Sharma (PW/5) had taken blood samples of appellants Raja and Rajesh vide Panchnama Ex.P/5 and Ex.P/6 and at that time, brother of appellant Raja and uncle Shiv Prakash (PW/4) were present. This version is contradictory to his statement mentioned in para 17, wherein he has stated that blood samples of appellant Raja and Rajesh were taken by Dr. Pramod Sharma in a syringe, but this anomaly does not make doubtful about taking of blood samples of appellants Raja and Rajesh.

34. R.S. Parmar (PW/16) has deposed that he had sent all articles seized during investigation to FSL Sagar through Superintendent of Police Jabalpur. He further deposed that he sent sealed hairs stuck in the finger of right hand of deceased Ajit Pal @ Boby, blood samples of acccused/appellants Rajesh and Raja Yadav to FSL Sagar vide memo Ex.P/40. He also deposed that he sent other seized articles as per draft Ex.P/41. He had also stated about preparation of summary of call details vide Ex.P/42. He further deposed that he had received the report from FSL Sagar as Ex.P/43 and DNA report as Ex.P/44. From perusal of Ex.P/43, it is clear that on 22.4.2013, 10 sealed packets and on 29.3.2013 seized articles A-soil, B-Chappal, C-Chappal, D-Plastic sack, E -Shawl, F-cloth, G-knife from possession of accused appellant Rajesh, T. Shirt of Ajit Pal @ Boby, Lower, Handkerchief, as Article H1, H2, H3 & Full pant of Raja Yadav, T-Shirt, I-1 and I-2, Lower, T-shirt, underwear of appellant Rajesh @ Rakesh, as Article J1, J2 and J3 were produced and the same were chemically examined. Blood stained Articles A, C, D, E, F,G, H1, H2, H3, I1, I2, J1 & J2 were also chemically examined. As per report Ex.P/43, human blood was found on Articles G, I1, I2, J1, J2 and J3. Due to decomposition, blood found on on Articles A, D, E, F, H1, H2 & H3, their blood group could not be ascertained. No sufficient blood was found on Article C. From above reports it is clear that on Article G-knife seized from accused appellant Rajesh Yadav, his cloths Article I1, I2 and cloths of appellant Rajesh, Article J1, J2 and J3, human blood was found.

35. R.S. Parmar (PW/16) has deposed that he had received the report of

DNA finger printing unit of State Forensic Science Laboratory, Sagar as Ex. P/44. It is settled law that the evidence of the experts is admissible in evidence in terms of section 45 of the Evidence Act, 1872. It can be read without proving of its contents. Its truthness has not been challenged. As per report Ex. P/44, on examination of blood of accused/appellant Rajesh @ Rakesh and Raja Yadav and hairs stuck found in the finger of right hand of deceased Ajit Pal @ Bobby, it was found that DNA source found on hair Ex. A (1D-7905), DNA profile of male was found. Male DNA profile found on hair stuck, found in the finger of the deceased Ex. A (1D7905) and DNA found on the blood of appellant Rajesh @ Rakesh Ex. B (ID-7906) are similar but, male DNA profile found on hair stuck, found in the finger of the deceased, Ex. A(1D-7905) and DNA found on the blood of appellant Raja Yadav, Ex.C ID-7907 are not similar. Thus DNA profile of stuck of hairs found in the finger of the deceased was same as the DNA profile of blood of Rajesh @ Rakesh.

36. The DNA test report maching the DNA profile of blood of appellant Rajesh @ Rakesh as well as hair found in the finger of dead body of deceased or the curcumstances, which definitely and unerringly indicate towards the guilt of the said appellant/accused. The maching of DNA profile with the dead body or hair found in the finger of the deceased cannot be termed as co-incidence. This is the important piece of evidence, which is on maticulous examination or corroborative evidence and cannot be overlooked.

37. Pooran Singh (PW/3), knowing the identity of appellants on the basis of name and face, has stated that deceased Boby was the son of his daughter's sister-in-law. Previously the appellants had visited his house. He went to the house of Rajvinder Kaur (PW/1) at Narmada Nagar to give the sweet on Holi Festival in the evening hours after performing his duty at Guru Govind Singh Khalsa School. When he was going to his house and reached near railway crossing at 9:00 PM from her daughter's house, then on way, he met with appellants Raja, Rajesh and deceased Ajit @ Boby and asked Boby that it is 9:00 PM and why he did not go to home, then Boby replied that he is going to see Holika. Thereafter, Pooran Singh (PW/3) went to bus-stand by an auto-rickshaw to go to his house at Saliwada. On 28.3.2013, his daughter had called him alleging that Boby was kidnapped and ransom of Rs.50 lacs is demanded. On the next day i.e. 29.3.2013, again he received call of his daughter that dead body of Boby was found in a well; which was being taken out at the instance of appellants Raja and Rajesh. This witness has also attended

the cremation of deceased Boby on 30.3.2013.

38. Further, Pooran Singh (PW/3) has stated that when he went to attend the cremation of deceased Boby, then near railway crossing he met with Town Inspector and told that on 26.3.2013 deceased was with appellants Rajesh and Raja. In para 3 of his cross-examination, he has stated that his daughter is the aunt (Mami) of deceased Boby and her house is situated at a distance of 15-20 kms where he went by an autorickshaw along with other passengers. He went alone to his daughter's house. During cross-examination, he has also stated that he received the information about kidnapping of deceased Boby on 28.3.2013, but at that time, he did not give this information to the police. In para 7, he further stated that deceased Boby was seen with appellants Raja and Rajesh on 26.3.2013, but he has not stated this fact to anyone except police. Pooran Singh (PW/3), in para 8 of his cross-examination, he deposed that in morning hours at 10:30 AM, he met with Town Inpsector and on the same day in the evening at 5:00 PM, his statement was recorded in the police station, but he denied to become a witness in respect of the fact that deceased Boby was seen by him last time along with appellants Raja and Rajesh. He also denied that he gave the statements as per Town Inspector's version. Thus, looking to the aforesaid aspects, the statement of Pooran Singh (PW/3) is contradictory and, therefore, cannot be believed. Accordingly, prosecution is failed to prove that deceased was lastly seen with appellants-Raja and Rajesh. Thus, there is no evidence of last seen of deceased with appellants-Raja and Rajesh.

39. The solitary contention advanced by the learned counsel for the accused/appellants on the merits of the case was, that the prosecution had ventured to substantiate the allegations levelled against the appellants only on the basis of circumstantial evidence. It was sought to be pointed out, that in the absence of direct evidence, the slightest of a discrepancy, depicting the possibility of two views would exculpate the accused of guilt, on the basis of benefit of doubt. Before dealing with the circumstantial evidence relied upon against the accused/appellants, learned counsel invited our attention to the legal position declared by the Apex Court, on the standard of proof required for recording of conviction, on the basis of circumstantial evidence.

40. The Apex Court in the case of *Sharad Birdhichand Sarda Vs. State of Maharashtra* [(1984) 4 SCC 116] has laid down the golden principles of standard of proof, required in a case sought to be established on the basis of

circumstantial evidence. In this case Hon'ble Apex Court has observed as follows :-

"152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here tht this Court indicated that the circumstances concerned 'must or should'and not 'may be'established. There is not only a gramatical but a legal distinction between 'may be proved' and 'must be or should be proved as was held by this Court in *Shivaji Sahebrao Bobade V. State of Maharashtra*: 1973 Cr.L.J. 1783 where the following observtions were made :

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict, and the mental distance between 'may be 'must be' is long and divides vague conjectures from sure conclusions.

(2) 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.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

41. Further, in the case of *Tanviben Pankajkumar Divetia Vs. State of Gujarat,* (1997) 7 SCC 156, the Apex Court in paras 45 & 46 has held thus :-

> "45. The principle for basing a conviction on the basis of circumstantial evidence has been indicated in a number of decisions of this Court and the law is well settled that each and every incriminating circumstances must be clearly established by reliable and clincing evidence and the circumstances so proved must form a chan of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. This Court has clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the Court has to be watchful and avoid the danger of allowing the suspicion to make the place of legal proof for some times, unconsciously it may happen to be a short step between moral certainly and legal proof. It has been indicated by this Court that there is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions. (*Jharlal Das Vs. State of Orissa* : 1991 3 SCC 27).
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> 46. We may indicate here that more the suspicious circumstances, more care and caution are required to be taken otherwise the suspicious circumstances may unwittingly enter the adjudicating thought process of the Court even though the suspicious circumstances had not been clearly established by clinching and reliable evidences. It appears to us that in this case, the decision of the Court in convicting the appellant has been the result of the suspicious circumstances entering the adjudicating thought process of the Court."

42. It is also the legal position that where there was any vacuum in evidence, the circumstantial evidence could not be relied upon. The Apex Court in the case of *Sucha Singh Vs. State of Punjab* [(2001) 4 SCC 375], has held that each aspect of the criminal act alleged against the accused, had to be established on the basis of material of a nature, which would be sufficient to lead to the inference that there could be no other view possible, than the one arrived at on the basis of the said circumstantial evidence. In para 19, it is observed by the Apex Court as under :-

> "19. Learned senior counsel contended that Section 106 of the Evidence Act is not intended for the purpose of filling up the vacuum in prosecution evidence. He invited our attention to the observations made by the **Privy Council in Attygalle Vs. R. (AIR 1936 PC 169,** and also in **Stephen Seneviratne Vs. The King : AIR 1936 PC 289.** In fact the observations contained therein were considered by this Court in an early decision authored by **Vivian Bose, J. In Shambhu Nath Mehra Vs. State of Ajmer, AIR 1956 SC 404.** The statement of law made by the learned Judge in the aforesaid decision has been extracted by us in **State of West Bengal Vs. Mir Mohammad Omar, 2000 (8) SCC 382**. It is useful to extract a further portion of the observation made by us in the aforesaid decision:
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> > "33. presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from othr set of proved facts, the court exercises a process of reasoning and reaches of logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the Court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the

common course of natural events, human conduct etc. In relation to the facts of the case."

20. We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a difference inference."

43. From the aforesaid scenario, it is clear that the prosecution had placed sufficient material on the record of the case to substantiate the factum of kidnapping and murder of deceased Ajit Pal @ Boby. Be that as it may, without drawing any such inference, we would still endeavour to determine, whether the prosecution had been successful in establishing the factum of kidnapping and murder of the deceased Ajit Pal @ Boby, at the hands of the accused/appellants. In so far as the instance aspect of the matter is concerned, reference may be made to the statements of Rajwant Kaur (PW/1), her brother Mitthu @ Amarjeet (PW/2) and Taranjeet Gujral @ Monu (PW/10) wherein they affirmed that on 25.3.2013 at about 9:00 PM deceased Ajit Pal @ Boby had gone somewhere out of the house to see Holika, but he did not return. Thereafter, during search, when Amarjeet Singh @ Mitthu PW/2 was returning from Gurudwara, then Mitthu received a call on mobile phone. The caller was introducing himself as Khan and he was telling that Ajit Pal @ Boby was in his possession and he asked him to send Rs.50 lacs towards ransom. The mobile phone number of that caller was **8305620342** and he received that call on his mobile phone number No.**9300434520**. Thereafter, when Amarjeet Singh (PW/2) was stating about conversion to her sister, namely, Rajwant Kaur (PW/1), then again said person introducing himself as Khan, called on mobile No.**9300434520** then he handed over the mobile phone to Rajwant Kaur (PW/1). Thereafter, said Khan had talked to Rajwant Kaur (PW/1) and stated that her son was in his possession and demanded Rs.50 lacs as ransom. During conversation, the mobile pone fell down from her hand, thereafter appellant-Om Prakash picked up that mobile phone and started talking and asked that where he should come with said ransom. Appellant-Om prakash was abusing on phone. Appellant Om Prakash suggested Rajwant Kaur (PW/1) for

immediate release of Rs.1 lakh for liberation of Ajit Pal @ Boby. Thereafter, Taranjeet Gujral @ Monu (PW/10) dialed the same number by his own mobile phone number and then gave that number of said Khan i.e. **8305620342** to Rajwant Kaur (PW/1) with advise to inform the police about mobile phone number **8305620342**. Thereafter, on collecting call details of mobile number **8305620342**, by which ransom was demanded from cyber cell, it was found that the said sim was used from phone of IMIE number **358327028551270** and on that mobile phone sim number **9993135127** was being used which was in the name of appellant Om Prakash Yadav. It is also clear from EX.P/ 35-A that on 28.3.2013 from 9:35 to 9:50 hours, there were calls from mobile phone number **8305620342** having IMEI No.**358327028551270** on mobile No.**9300434520** which belongs to Amarjeet Singh @ Mitthu (PW/2) and by the statement of Sai Datt Bohre (PW/15), Nodal Officer of Bharti Airtel Limited, mobile number **9993135127** was issued in the name of appellant-Om Prakash. Seizure of dead body of deceased Ajit Pal @ Boby from the well, kept in a plastic sack, murder of the deceased, seizure of knife stained with human blood, on production of appellant-Rajesh Yadav, recovery of cloths of appellants-Raja and Rajesh @ Rakesh Yadav, stained with human blood, which have been established beyond reasonable doubt, itself prove that accused-appellants had committed the offence. Demanding of ransom on phone and informing that deceased was with appellants-Raja and Rajesh @ Rakesh and thereafter finding of dead body of deceased Boby, in absence of any contrary material evidence produced by appellants, it has to be accepted that deceased Ajit Pal @ Boby was in the custody of appellants.

44. Based on the evidence noticed in the aforesaid paragraphs, there can be no doubt whatsover, that the accused/appellants had kidnapped Ajit Pal @ Boby and had taken him away, and demanded ransom of Rs.50 lacs, therefore, stands duly established.

45. The material question to be determined is, whether the aforesaid circumstantial evidence is sufficient to further infer, that the accused/appellants had committed the murder of Ajit Pal @ Boby. According to the learned counsel for the appellants, there is no evidence whatsoever, on record of the case, showing the accused/ appellants participation of the accused/appellants in any of the acts which led to the death of Ajit Pal @ Boby. It was, therefore, the submission of the learned Senior counsel for appellants that even though the accused/appellants may be held guilty of having kidnapped Ajit Pal @ Boby, since it had not been established that he had committed the murder of

Ajit Pal @ Boby; they cannot be held guilty of murder in the facts of this case.

46. Having given our thoughtful consideration to the submission advanced at the hands of learned Senior counsel for the appellants, we are of the view that the instant submission is wholly misplaced and fallacious. In so far as the instant aspect of the matter is concerned, reference may be made to the judgment rendered by the Apex Court in *Sucha Singh Vs. State of Punjab,* (2001) 4 SCC 375 wherein it was held as under :

> "21. We are mindful of what is frequently happening during these days. Persons are kidnapped in the sight of others and are forcibly taken out of the sight of all others and later the kidnapped are killed. If a legal principle is to be laid down that for the murder of such kidnapped, there should necessarily be independent evidence apart from the circumstances enumerated above, we would be providing a safe jurisprudence for protecting such criminal activities. India cannot now afford to lay down any such legal principle insulating the marauders of their activities of killing kidnapped innocents outside the ken of others."

A perusal of the aforesaid determination would reveal, that having proved the factum of kidnapping, the inference of the consequential murder of the kidnapped person, is liable to be presumed. We are one with the aforesaid conclusion. The logic for the aforesaid inference is simple. Once the person concerned has been shown as having been kidnapped, the onus would shift on the kidnapper to establish how and when the kidnapped individual came to be released from his custody. In the absence of any such proof produced by the kidnapper, it would be natural to infer/presume, that the kidnapped person continued in the kidnapper's custody, till he was eliminated. The instant conclusion would also emerge from Section 106 of the Indian Evidence Act, 1872 which is being extracted hereinunder :

> "106. Burden of proving fact especially within knowledge-. When any fact is especcially within the knowledge of any person, the burden of proving that fact is upon him."
>
> (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket, the burden of proving that he had a ticket is on him."

47. Since in the facts and circumstances of this case, it has been duly established, that Ajit Pal @ boby had been kidnapped by the accused/appellants; the accused/appellants have not been able to produce any material on the record of this case to show the release of Ajit Pal @ Boby from his custody. Section 106 of the Indian Evidence Act, 1872 places the onus on them. In the absence of any material produced by the accused/appellants, it has to be accepted, that the custody of Ajit Pal @ Boby had remained with the accused/appellants, till he was murdred. The motive/reason for the accused/appellants, for taking the extreme step was, that ransom as demanded by the accused/appellants, had not been paid. When the accused/appellants Rajesh @ Rakesh was detained on 29.3.2013, he had made a confessional statement in the presence of Jitendra Singh @ Sonu (PW/8) stating that his uncle Raju had caught hold deceased and he committed murder by cutting his neck, whereupon his body was put into gunny bag and thrown into the well and he had hidden the knife near the drain. It was, thereafter, on pointing out of him the dead body of deceased was recovered from the aforesaid well kept in a gunny bag as stated by accused/appellant Rajesh @ Rakesh. Dr. Vivek Shrivastava (PW/7) concluded, after holding the postmortem of the dead body of deceased, that he had died due to haemorrhagic shock, which was caused due to cut of neck by sharp cutting object. On pointing of accused/appellant Rajesh @ Rakesh, blood stained knife was seized. Dr. Vivek Shrivastava (PW/7) opined, on perusal of seized knife that injury found on the neck of dead body of deceased would be caused by said knife. Accused/appellant Raja was also detained on 31.3.2013 and he had made a confessional statement in presence of witness Bambam @ Shaiwal, stating that he caught hold the hands of deceased Ajit Pal @ Boby and accused/appellant Rajesh @ Rakesh by cutting his neck, caused murder of deceased and whereupon his body was put into a gunny bag and thrown the same in the well. He further stated that during commission of murder, his cloths were stained with blood of deceased. He further stated that he had concealed that cloths in his dairy under the 'Khali-Chuni'. On the pointing out of him, blood stained cloths were seized. The instant evidence clearly nails all the accused/appellants to be the perpetrator of kidnapping of deceased Ajit Pal @ Boby for alleged ransom and also nails the accused/appellants Rajesh @ Rakesh and Raja Yadav as perpetrator of murder of deceased Ajit Pal @ Boby, due to not receiving the alleged ransom.

In view of the factual and legal position dealt with herein above, we have no doubt in our mind that the prosecution has produced substantive material to establish not only the kidnapping of deceased Ajit Pal @ Boby at the hands of all accused/appellants Om Prakash, Rajesh @ Rakesh & Raja Yadav, but also his murder at the hands of accused/appellant Rajesh @ Rakesh and Raja Yadav.

48. Trial Court convicted the accused/ appellant Om Prakash for offence punishable under Section 364-A r/w Section 120-B of IPC and sentenced to undergo life imprisonment and fine of Rs.2,000/-, in default R.I. for two months whereas appellant Rajesh @ Rakesh and Raja Yadav have been convicted for offence under Section 364- A r/w Section 120-B of IPC and they are sentence to death sentence each and fine amount of Rs.1,000/-, in default R.I. for two months each. They have been further convicted for offence punishable under Section 302 r/w Section 120-B of IPC and sentenced to undergo death sentence each and fine of Rs.1,000/- each and in default of payment, R.I. for two months and they have been also convicted under Section 201 IPC and sentenced to undergo R.I. for five years each, with fine of Rs.500/- each, in default of fine, R.I. for one month each. The punishment of co-accused Om Prakash under Section 364-A r/w Section 120-B of IPC is not a matter of dispute before us as it has not been contested by the prosecution by preferring any appeal. The minimum sentence for the offence punishable under Section 364-A of IPC is life imprisonment and thus there is no need to consider the quantum of sentence against appellant Om Prakash.

49. So far sentence of accused/appellants Rajesh @ Rakesh and Raja Yadav is concerned, their learned counsel assailed the death sentence imposed by the trial Court. During the course of hearing, it was the vehement contention of the learned counsel for the accused-appellants, that infliction of life imprisonment, in the facts and circumstances of this case, would have satisfied the ends of justice. It was also the contention of the learned counsel for the accused-appellants, that the facts and circumstances of this case are not sufficient to categorize the present case as a 'rarest of a rare case', wherein only the death penalty would meet the ends of justice. To substantiate the contention of learned counsel for appellants, we may profitably refer to the decision of the Apex Court in the case of *Haresh Mohandas Rajput Vs. State of Maharashtra,* (2011) 12 SCC 56, wherein, having taken into consideration earlier judgments, Apex Court delineated the circumstances in which the death penalty could be imposed. Reliance was placed on the

following observations recorded therein:-

"Death Sentence ' When Warranted:

"18. The guidelines laid down in Bachan Singh v. State of Punjab, (1980) 2 SCC 684, may be culled out as under:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty, the circumstances of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances have to be accorded full weightage and just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

19. In Machhi Singh and Ors. v. State of Punjasecb, (1983) 2 SCC 684, this Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in Bachan Singh to cases where the "collective conscience" of a community is so shocked that it will expect the holders of the judicial powers centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, such a penalty can be inflicted. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between aggravating and mitigating circumstances.

20. "The rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful co-existence of the society. The crime may be heinous or brutal but may not be in the category of "the rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious co-existence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the-moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fiber of the society, e.g. crime committed for power or political ambition or indulging in organized criminal activities, death sentence should be awarded. (See: C. Muniappan and Ors. v. State of Tamil Nadu, AIR 2010 SC 3718; Rabindra Kumar Pal alias Dara Singh v. Republic of India, (2011) 2 SCC 490; Surendra Koli v. State of U.P. and Ors., (2011) 4 SCC 80; Mohd. Mannan (supra); and Sudam v. State of Maharashtra, (2011) 7 SCC 125).

21. Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether death sentence should be awarded, would depend upon the factual scenario of the case in hand."

50. The Apex Court in *Ramnaresh & Ors. Vs. State of Chhattisgarh,* (2012) 4 SCC 257 has laid down the principles about death sentence and life

imprisonment as follows :-

"The death sentence and principles governing its conversion to life imprisonment.

56. Despite the transformation of approach and radical changes in principles of sentencing across the world, it has not been possible to put to rest the conflicting views on sentencing policy. The sentencing policy being a significant and inseparable facet of criminal jurisprudence, has been inviting the attention of the Courts for providing certainty and greater clarity to it.

57. Capital punishment has been a subject matter of great social and judicial discussion and catechism. From whatever point of view it is examined, one undisputable statement of law follows that it is neither possible nor prudent to state any universal formula which would be applicable to all the cases of criminology where capital punishment has been prescribed. It shall always depend upon the facts and circumstances of a given case. This Court has stated various legal principles which would be precepts on exercise of judicial discretion in cases where the issue is whether the capital punishment should or should not be awarded.

58. The law requires the Court to record special reasons for awarding such sentence. The Court, therefore, has to consider matters like nature of the offence, how and under what circumstances it was committed, the extent of brutality with which the offence was committed, the motive for the offence, any provocative or aggravating circumstances at the time of commission of the crime, the possibility of the convict being reformed or rehabilitated, adequacy of the sentence of life imprisonment and other attendant circumstances. These factors cannot be similar or identical in any two given cases.

59. Thus, it is imperative for the Court to examine each case on its own facts, in light of the enunciated principles. It is only upon application of these principles to the facts of a given case that the Court can arrive at a final conclusion whether the case in hand is one of the 'rarest of rare' cases and imposition of

death penalty alone shall serve the ends of justice. Further, the Court would also keep in mind that if such a punishment alone would serve the purpose of the judgment, in its being sufficiently punitive and purposefully preventive.

xxx xxx xxx xxx

72. The above judgments provide us with the dicta of the Court relating to imposition of death penalty. Merely because a crime is heinous per se may not be a sufficient reason for the imposition of death penalty without reference to the other factors and attendant circumstances.

73. Most of the heinous crimes under the IPC are punishable by death penalty or life imprisonment. That by itself does not suggest that in all such offences, penalty of death alone should be awarded. We must notice, even at the cost of repetition, that in such cases awarding of life imprisonment would be a rule, while 'death' would be the exception. The term 'rarest of rare' case which is the consistent determinative rule declared by this Court, itself suggests that it has to be an exceptional case.

74. The life of a particular individual cannot be taken away except according to the procedure established by law and that is the constitutional mandate. The law contemplates recording of special reasons and, therefore, the expression 'special' has to be given a definite meaning and connotation. 'Special reasons' in contra-distinction to 'reasons' simpliciter conveys the legislative mandate of putting a restriction on exercise of judicial discretion by placing the requirement of special reasons.

75. Since, the later judgments of this Court have added to the principles stated by this Court in the case of Bachan Singh (supra) and Machhi Singh (supra), it will be useful to restate the stated principles while also bringing them in consonance, with the recent judgments.

76. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were

stated in the case of Bachan Singh (supra) and thereafter, in the case of Machhi Singh (supra). The aforesaid judgments, primarily dissect these principles into two different compartments - one being the 'aggravating circumstances' while the other being the 'mitigating circumstances'. The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354(3) Cr.P.C.

Aggravating Circumstances:

(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 device 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:

(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 eye-witness though prosecution has brought home the guilt of the accused.

77. While determining the questions relateable to sentencing policy, the Court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles:

(1) The Court has to apply the test to determine, if it was the 'rarest of rare' case for imposition of a death sentence.

(2) In the opinion of the Court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was

committed and the circumstances leading to commission of such heinous crime.

78. Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the Court, while exercising its jurisdiction. It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the Court may consider in its endeavour to do complete justice between the parties.

79. The Court then would draw a balance-sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The Court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of 'just deserts' that serves as the foundation of every criminal sentence that is justifiable. In other words, the 'doctrine of proportionality' has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.

80. Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the Courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death.

81. Wherever, the offence which is committed, manner in which it is committed, its attendant circumstances and the motive and status of the victim, undoubtedly brings the case within

the ambit of 'rarest of rare' cases and the Court finds that the imposition of life imprisonment would be inflicting of inadequate punishment, the Court may award death penalty. Wherever, the case falls in any of the exceptions to the 'rarest of rare' cases, the Court may exercise its judicial discretion while imposing life imprisonment in place of death sentence."

51. The Apex Court on a decision in the case of *Brajendra Singh Vs. State of Madhya Pradesh*, (2012) 4 SCC 289, having followed the decision rendered in *Ramnaresh & Ors. Vs. State of Chhattisgarh* (cited supra), further held as under:-

"38. First and the foremost, this Court has not only to examine whether the instant case falls under the category of 'rarest of rare' cases but also whether any other sentence, except death penalty, would be inadequate in the facts and circumstances of the present case.

39. We have already held the Appellant guilty of an offence under Section 302, Indian Penal Code for committing the murder of his three children and the wife. All this happened in the spur of moment, but, of course, the incident must have continued for a while, during which period the deceased Aradhna received burn injuries as well as the fatal injury on the throat. All the three children received injuries with a knife similar to that of the deceased Aradhna. But one circumstance which cannot be ignored by this Court is that the prosecution witnesses have clearly stated that there was a rift between the couple on account of her talking to Liladhar Tiwari, the neighbour, PW10. Even if some credence is given to the statement made by the accused under Section 313 Cr.P.C. wherein he stated that he had seen the deceased and PW10 in a compromising position in the house of PW10, it also supports the allegation of the prosecution that there was rift between the husband and wife on account of PW10. It is also clearly exhibited in the FIR (P-27) that the accused had forbidden his wife from talking to PW10, which despite such warning she persisted with and, therefore, he had committed the murder of her wife along with the children."

52. The Apex Court in the case of *Mukesh & another Vs. State for NCT of Delhi and others* [Criminal Appeal No.607-608 of 2017, arising out of S.L.P. (Cri.) Nos. 3119-3120 of 2014] with Criminal Appeal No. 609-610 of 2017 arising out of SLP (Criminal) No. 5027-5028 of 2014 referring to pronouncement in the case of *Bachan Singh* (Supra) *Machhi Singh* (Supra), *Ramnaresh and others vs. State of Chhattisgarh* (2012) 4 SCC 257, has also tried to lay down a nearly exhaustive list of aggravating and mitigating circumstances. It would be apposite to refer to the same here :

> **"Aggravating Circumstances :**
>
> (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 device 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. When the crime is enormous in proportion like making an attempt of murder of the entire family

or members of a particular community. 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.

(9) When murder is committed for a motive which evidences total depravity and meanness.

(10) When there is a cold blooded murder without provocation.

(11) 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:

(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 eye-witness though prosecution has brought home the guilt of the accused."

53. We are one with the learned counsel for the accused-appellants, on the parameters prescribed by the Apex Court, for inflicting the death sentence. Rather than deliberating upon the matter in any further detail, we would venture to apply the parameters laid down in the judgments of Apex Court to determine whether or not life imprisonment or in the alternative the death penalty, would be justified in the facts and circumstances of the present case. We may first refer to the **aggravating circumstances** as under:-

(i) The accused-appellants have been found guilty of the offence under Section 364A of the Indian Penal Code. Section 364A is being extracted hereunder:-

"364A. Kidnapping for ransom, etc.'Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organization or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

A perusal of the aforesaid provision leaves no room for any doubt, that the offence of kidnapping for ransom accompanied by a threat to cause death contemplates punishment with death. Therefore, even without an accused actually having committed the murder of the individual kidnapped for ransom, the provision contemplates the death

penalty. Insofar as the present case is concerned, there is no doubt, that the accused-appellants have been found to have kidnapped Ajit Pal @ Boby for ransom, and accused/ appellants, Rajesh @ Rakesh and Raja Yadav have also actually committed his murder. In the instant situation therefore, the guilt of the accused-appellants Om Prakash, Rajesh @ Rakesh and Raja Yadav (under Section 364A of the Indian Penal Code) must be considered to be of the gravest nature, justifying the harshest punishment prescribed for the offence.

(ii) The accused-appellants Rajesh @ Rakesh and Raja Yadav have also been found guilty of the offence of murder under Section 302 of the Indian Penal Code. Section 302 of the Indian Penal Code also contemplates the punishment of death for the offence of murder. It is, therefore apparent, that the accused-appellants Rajesh @ Rakesh and Raja Yadav are guilty of two heinous offences, which independently of one another, provide for the death penalty.

(iii) The accused/appellants Rajesh @ Rakesh and Raja Yadav caused the murder of child of about 15 years. The facts and circumstances of the case do not depict any previous enmity between the parties. There is no grave and sudden provocation, which had compelled the accused to take the life of an innocent child. The murder of a child, in such circumstances makes this a case of extreme culpability.

(iv) Kidnapping of a child was committed with the motive of carrying home a ransom. On account of the non-payment of ransom, a minor child's murder was committed. This fact demonstrates that the accused had no value for human life. The instant circumstance demonstrates extreme mental perversion not worthy of human condonation.

(v) The manner in which the child was murdered,and the approach and method adopted by the accused, disclose the traits of outrageous criminality in the behaviour of the accused. The child was first murdered by cutting his neck by a sharp edged weapon and the dead body of the child was then tied in

a gunny bag, and finally the gunny bag was thrown into a well. All this was done, in a well thought out and planned manner. This approach of the accused reveals a brutal mindset of the highest order.

(vi) All the aforesaid aggravating circumstances are liable to be considered in the background of the fact, that the child was known to the accused-appellants. The child and accused/ appellants were same locality. Murder was therefore committed, not of a stranger, but of a child with whom the accused were acquainted. This conduct of the accused-appellants, places the facts of this case in the abnormal and heinous category.

(vii) The choice of kidnapping the particular child for ransom, was well planned and consciously motivated. The parents of the deceased had three children ' two daughters and one son'. Kidnapping the only male child was to induce maximum fear in the mind of his parents. Purposefully killing the sole male child, has grave repercussions for the parents of the deceased. Agony for parents for the loss of their only male child, who would have carried further the family lineage, and is expected to see them through their old age, is unfathomable. Extreme misery caused to the aggrieved party, certainly adds to the aggravating circumstances.

54. As against the aforesaid aggravating circumstances, learned counsel for the accused-appellants has pointed out following **mitigating circumstances:-**

(i) The chances of the accused/appellants Rajesh @ Rakesh and Raja Yadav of not indulging in commission of the crime again and the probability of the accused/ appellants being reformed and rehabilitated.

(ii) The age of the accused/appellants Rajesh @ Rakesh is a relevant consideration.

Except aforesaid mitigating circumstances, learned counsel for the accused/appellants could not point out any other mitigating circumstances.

So far young age of the appellant Rajesh @ Rakesh is concerned, there is no mitigating circumstance for commutation to life, as has been held in the case of *Bhagwan Swarup Vs. State of U.P.* (1971) 3 SCC 759, *Deepak Rai Vs. State of Bihar* (2013) 10 SCC 421 and *Shabhnam Vs. State of Uttar Pradesh* (2015) 6 SCC 632. So far as the accused/appellants Rajesh @ Rakesh and Raja Yadav of not indulging in commission of the crime again and the probability of the accused/appellants being reformed and rehabilitated is concerned looking to the nature and way of committing above offence, in our considered view, there is no possibility of any reform and rehabilitation.

55. Thus, viewed on the parameters laid down by Apex Court, in the decisions mentioned above, we have no choice, but to **affirm the death penalty** imposed upon the accused-appellants Rajesh @ Rakesh and Raja Yadav by the trial Court.

56. In view of the above, we find no justification whatsoever, in interfering with the impugned judgment of the trial Court, either on merits or on the quantum of punishment.

57. The property seized be destroyed after the appeal period is over.

58. In view of the foregoing discussions, we confirm the death sentence awarded by the trial Court and dismiss Cr.A.No.83/2017 and Cr.A.No.84/2017.

Ordered accordingly.

Order accordingly.

I.L.R. [2017] M.P., 2868

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice J.K. Maheshwari

M.Cr.C. No. 3305/2012 (Jabalpur) decided on 4 September, 2017

AMITA SHRIVASTAVA (SMT.) & ors. ...Applicants

Vs.

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

A. ***Penal Code (45 of 1860), Section 415 & 420 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Cheating and Forgery – Ingredients* – Applicants/land owners entered into agreement to sale with "A" whereby a cheque of Rs. 1 lakh was paid as advance which was later**

dishonoured – Vide notice, agreement was cancelled and applicants entered into fresh agreement with "B" whereby a cheque of Rs. 10 lakh was paid as advance – Due to objection raised by "A", subsequent agreement was not finally executed and "B" also failed to pay the remaining amount – Applicants cancelled subsequent agreement and returned the advance amount to "B", who filed private complaint whereby cognizance taken by Court – Held – Petitioners were *bonafide*, there is no deception with fraudulent or dishonest intention – Complaint and order taking cognizance quashed – Application allowed. (Paras 10 to 12, 14 & 15)

क. दण्ड संहिता (1860 का 45), धारा 415 व 420 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – छल एवं कूटरचना – घटक – आवेदकगण/भूमि स्वामीगण ने "ए" के साथ विक्रय का करार किया जिसके द्वारा रू. 1 लाख का एक चेक अग्रिम के रूप में अदा किया गया था जो कि बाद में अनादृत हुआ था – नोटिस द्वारा करार निरस्त किया गया था तथा आवेदकगण ने "बी" के साथ नया करार किया जिसके द्वारा अग्रिम के रूप में रू. 10 लाख का एक चेक अदा किया गया – "ए" द्वारा उठाये गये आक्षेप के कारण, पश्चात्वर्ती करार को अंतिम रूप से निष्पादित नहीं किया गया था एवं "बी" भी शेष रकम का भुगतान करने में विफल रहा – आवेदकगण ने पश्चात्वर्ती करार निरस्त किया और "बी" को अग्रिम की रकम लौटा दी, जिसने प्राईवेट परिवाद प्रस्तुत किया जिसका संज्ञान न्यायालय द्वारा लिया गया – अभिनिर्धारित – याचीगण सद्भाविक थे, कपट या बेईमान आशय के साथ कोई प्रवंचना नहीं है – परिवाद तथा संज्ञान लेने का आदेश अभिखंडित – आवेदन मंजूर।

***B. Penal Code (45 of 1860), Section 415 & 420 – Cheating* – Ingredients of – Discussed and explained. (Paras 7, 8, 13 & 14)**

ख. दण्ड संहिता (1860 का 45), धारा 415 व 420 – छल – के घटक – विवेचित एवं स्पष्ट किये गये।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 482* – Circumstances where jurisdiction u/S 482 Cr.P.C. can be invoked, discussed and explained, specifying the guidelines of the Apex Court. (Para 9)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – परिस्थितियां, जहाँ धारा 482 दं.प्र.सं. के अंतर्गत अधिकारिता का अवलंब लिया जा सकता है, सर्वोच्च न्यायालय के दिशानिर्देशों को विनिर्दिष्ट करते हुए विवेचित एवं स्पष्ट की गई।

Cases referred:

AIR 1992 SC 604, (2013) 3 SCC 330, (2011) 1 SCC 74, (2012) 3

SCC 132, (2006) 6 SCC 736, (2011) 5 SCC 708, (2002) 9 SCC 533.

S.C. Datt assisted by *Kishwar Khan*, for the applicants.
Anil Khare assisted by *J.S. Hora*, for the non-applicant No. 2.

ORDER

J.K. MAHESHWARI, J. :- This petition under Section 482 of the Cr.P.C. has been filed by the accused challenging the order taking cognizance dated 06.09.2011 on a private complaint filed by complainant for the offence punishable under Section 420 of the IPC and issuing the summons by JMFC, Bhopal in R.T. No. 7977/2012. It is also prayed that the complaint filed by respondent No.2 may be quashed.

2. The facts unfolded to file present petition are, land of Khasra Nos. 101, 102, 108, 109 and 99/6 having area of 2.02 hectare, 1.20 hectare, 0.82 hectare, 0.81 hectare, total area 4.85 hectare and 0.07 Acre 32x100 sq.ft. adjacent to main road of village Chhapri, Patwari Halka No. 32 of Tehsil Huzur, District Bhopal is owned by petitioner No.1, Panchamlal and Smt. Chandrawati who agreed to sale the said land to one Harnath Singh, to which they entered into an agreement dated 15.1.2007 for a sum of Rs.2,07,00,000/-. In furtherance to the said agreement, an amount of Rs.1,00,000/- was paid and the remaining part of the amount was agreed to pay on or before 15.3.2007. As per the terms of the agreement, cheque of Rs.1,00,000/- of Standard Chartered ,Bank given by Harnath, was dishonoured. He gave a notice on 6.2.2007 to the seller, to return the said cheque and take the amount in cash or through DD, however, the sale-deed may be possibly executed prior to the outer date i.e. 15.3.2007. On 14.2.2007, Harnath again gave a notice to petitioner No. 3 (power of attorney holder) mentioning the same fact and making further request for measurement of the land in question. Petitioner No. 1 and other sellers gave its reply to the notice stating that on account of non-compliance of the terms of the agreement and issuing the notice unnecessarily, the agreement dated 15.1.2007 is automatically cancelled and the notice send by him is based on absolutely false and baseless allegation. In the agreement to sale, one Mukesh Shrivastava was the witness, who in fact was a middleman (broker). After giving reply to the said notice and cancelling the agreement, petitioners, Chandrawati and Panchamlal have entered into an agreement with complainant Hemant Raghuvanshi on 31.3.2007 for the same property for the sale consideration of Rs. 2,53,47,000/- and

Rs. 10,00,000/- was paid by them by way of advance to the petitioners. The complainant published a public notice in the newspaper regarding purchase of the said land on which Harnath Singh submitted his objection stating that agreement to sale was executed earlier with him on 15.1.2007. However, on receiving the said objection, notice was given by complainant on 3.5.2007 Annexure P-16 to petitioners and other seller making a request that dispute with Harnath may be settled under intimation to them, otherwise he may not be in a position to make the payment of the remaining amount of consideration. Reply to the said notice was given by the petitioners on 13.6.2007 contending that complainant has not complied the terms of the agreement regarding payment of remaining amount of consideration, therefore, it is cancelled and amount of Rs.10,00,000/- paid by him in advance, is hereby returned to them through cheque, which may kindly be acknowledged under intimation to the petitioners. A copy of the notice given to the complainant alongwith the cheque has also been filed.

3. It is also known that Harnath Singh filed a suit seeking declaration for unilateral cancellation of his agreement to sell and the property in question cannot be sold by the petitioners to any other person, however, perpetual injunction to not to interfere in their possession was sought. During pendency of the suit amendment was sought seeking relief of specific performance of contract. The complainant of this case has applied under Order 1 Rule 10 of the CPC to join him as a party, but it was rejected, however, the fact remains that the complainant was not a party to the said civil litigation. It has also been brought to the notice that in the said case, judgment was delivered by 12th ADJ, Bhopal on 18.9.2012 dismissing the suit against which first appeal is pending before this Court.

4. The complainant of this case has filed a private complaint *inter alia* contending that in Clause 3 of the agreement dated 31.3.2007, it is stated that the suit land has not been agreed to sale, bequeathed, gifted, mortgaged with any Bank or financial institution and not kept or attached for the purpose of surety. However, prior to entering into agreement to sale dated 31.3.2007 previous agreement to sale was executed in the name of Harnath Singh on 15.1.2007 was not disclosed to him. However, the said act would come within the purview of cheating, therefore, they may be punished for commission of the forgery. On recording the statements of Harnath Singh, as well as Mukesh Shrivastava, middle man in the earlier agreement, the court took the cognizance

summoning the petitioners. On receiving notice of the complaint, this petition has been filed to set aside the order taking cognizance and to quash the private complaint filed by the respondent No.2.

5. Learned Senior Counsel appearing on behalf of the petitioners referring the provision of Section 415 of the IPC has strenuously urged that looking to the facts of the present case first agreement was cancelled giving a notice to earlier intended purchaser and thereafter the agreement was entered with the complainant to sell the same property. On receiving the notice by the petitioners from the complainant, it was replied contending that he has not complied the terms of agreement and in case there appears some dispute, the amount of advance given by the complainant may be taken back through cheque. In the sequel of the said facts, there was no fraud or dishonest intention to induce the complainant for delivery of the amount of consideration. It is also not a case wherein the purchaser has been induced to do or omit to do anything which he would not do or omit, if he was not so deceived with an intent to cause harm to that person in body, mind, reputation or property. It is said that there is no dishonest concealment of the fact, which may come within the purview of deception. Learned Senior Counsel further referring the definition clause of dishonesty and fraud contends that looking to the facts of the case, if earlier agreement was cancelled by him giving a notice prior to the second agreement with the complainant. But, on public notice, due to objection of the first intended purchaser and also by the subsequent, the amount of advance received was offered to take back by the complainant, however, in such situation none of the ingredients specified for cheating in Section 415 of the IPC are available in the present case. In the said factual backdrop, relying upon the judgment of *State of Haryana and others Vs. Ch. Bhajanlal and others* reported in AIR 1992 SC 604, it is submitted that present case falls within the purview of direction No. 3 and 7 of the said judgment, however, exercising the inherent powers under Section 482 of the Cr.P.C. order taking cognizance passed by the Court, may be set aside. Learned senior counsel, relying upon the judgment of *Rajiv Thapar and others Vs. Madan Lal Kapoor* reported in (2013) 3 SCC 330 urged, the present case falls under all the circumstances specified in Para 30 of the said judgment more specifically looking to the judgment of the Court whereby the suit filed by Harnath seeking specific performance has been dismissed against which appeal is pending but considering the said document, it can safely be presumed that earlier agreement dated 15.1.2017 was cancelled by notice dated 22.2.2007, which is

recognized by the Court in the judgment and in the said situation, if subsequent agreement was entered into on 31.3.2007 without disclosing the said fact, it would not come within the purview of dishonest concealment of the facts with dishonest intention, therefore, order taking cognizance passed by the trial Court particularly considering the statement of a person namely Mukesh Shrivastava, who was the middle man and known to both the parties and now deposed in favour of complaint and Harnath Singh, intended purchaser in first agreement who remained unsuccessful in the civil case and relying their statements, the cognizance taken by the court is not in accordance to law. It is said that the land belongs to the petitioners who entered into agreement to sale twice, but amount of consideration have not been paid in full to them by both the intended purchaser, however, it is a case wherein petitioners were cheated, therefore, the complaint is liable to be quashed setting aside the order taking cognizance.

6. *Per contra* learned Senior Counsel representing the complainant/ respondent No. 2 has placed heavy reliance on the judgment of the Apex Court in the case of *Iridium India Telecom Limited Vs. Motorola Incorporated and others* reported in (2011) 1 SCC 74 to contend that after entering into the agreement with Harnath Singh on 15.1.2007 subsequent agreement was entered with the complainant on 31.3.2007. In the subsequent agreement, the fact regarding earlier agreement to sale has not been disclosed, therefore, it would come within the purview of deceiving the complainant fraudulently or dishonestly to take the amount of consideration causing loss to him. It is urged, deception of not disclosure of the earlier agreement from the complainant while entering into subsequent agreement with him would amounting to dishonest concealment of the fact and it would come within the purview of definition of cheating. Learned senior counsel referring paragraphs 64 and 75 of the said judgment contends that in the facts of the case, the said judgment is fully applicable and the arguments as advanced by the petitioners to prove their bonafide, do not come within the purview of concealment or dishonest or fraudulent intention, which can be gathered after recording evidence during trial. It is urged, at present the averements of the complaint and material brought before the court may be taken into consideration, however, looking to the same, *prima facie*, ingredients to commit offence under Section 420 of the IPC is made out against the petitioners, therefore, the trial Court has rightly taken the cognizance in the matter. Reliance has also been placed on the judgments of the Apex Court in *Lee Kun Hee, President,*

Samsung Corporation, South Korea and others Vs. State of Uttar Pradesh and others reported in (2012) 3 SCC 132, *Indian Oil Corporation Vs. NEPC India Ltd. and others* reported in (2006) 6 SCC 736 and also *Sushil Suri Vs. Central Bureau of Investigation and another* reported in (2011) 5 SCC 708 and in the case of *Inspector of Police, CBI Vs. B. Raja Gopal and others* reported in (2002) 9 SCC 533. It is contended that if the amount due is paid by accused at a later stage it can not be accepted for innocence and not enough to quash the private complaint. In such circumstances, it is urged, complaint filed by the complainant and the order taking cognizance may be maintained.

7. After having heard learned Senior counsel representing the parties and on perusal of the facts of the present case and looking to the order impugned, it reveals, the trial Court has taken the cognizance on 6.9.2011 registering a complaint under Section 420 of the IPC looking to the averments made in the private complaint and the statements of complainant, Harnath Singh and Mukesh Shrivastava. Section 420 of the IPC deals the punishment for cheating and dishonestly inducing delivery of property. Cheating has been defined in Section 415 of the IPC, however, to understand the ingredients of cheating, first of all, it is required to be referred, therefore, Section 415 of the IPC is reproduced as thus :-

> **415. Cheating.-** Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".
>
> *Explanation.*- A dishonest concealment of facts is a deception within the meaning of this section.

8. Meaning thereby, it is essential that there must be a deception by the accused to the person so deceived with fraudulent and dishonest intention. To such deception, person must be induced either to deliver the property to any person or consent that any person shall retain any property. From the later

part of the said section, it reveals that the accused by deception intentionally to the person deceived either to do or omit to do anything, which he would not do or omit, if not deceived, the said act and omission must cause damage or harm to that person in body, mind, reputation or property. However, in the facts of the case, it is required to analyze whether ingredients of Section 415 of the IPC are available to take cognizance by the Court in the complaint filed against the petitioners.

9. At this juncture, while invoking the jurisdiction under Section 482 of the Cr.P.C. the circumstances, in which inherent powers of the High Court can be invoked may be explained. The Apex Court in the judgment of Rajiv Thapar (supra) in Paragraphs 29 and 30, specified the guidelines whereupon the Court must exercise the jurisdiction under Section 482 of the Cr.P.C. However, Paragraphs 29 and 30 of the said judgment are reproduced thus:-

> **29.** The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 Cr.P.C. at the stages referred to hereinabove, would have far-reaching consequences inasmuch as it would negate the prosecution's/complainant's case without allowing the prosecution/ complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 CrPC the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/ complainant. It should be sufficient to rule out,

reject and discard the accusations levelled by the prosecution/ complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 CrPC to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC.

30.1. *Step one:* whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

30.2. *Step two:* whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

30.3. *Step three:* whether the material relied upon by the accused has not been refuted by the prosecution/complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?

30.4. *Step four:* whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5. If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to

quash such criminal proceedings in exercise of power vested in it under Section 482 CrPC. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not conclude in the conviction of the accused.

10. In the present case to conceptualize commission of offence on the basis of allegation alleged in the private complaint may be seen. On perusal, it reveals that petitioner Nos. 1 and 2 along with other are the owners of the piece of land as described in previous paragraphs. Petitioner No. 3 is the power of attorney holder of petitioner Nos. 1 and 2. Petitioner No. 3 had entered into an agreement with one Harnath Singh on 15.1.2007 for the said piece of land and agreed to sell such property for a sum of Rs.2.07 Crores. As per the terms of the agreement, Rs.1 Lakh was paid in cash and a cheque of Rs.1 Lakh of Standard Chartered Bank was given, which was dishonoured. Harnath gave a notice due to dishonouring of his cheque to the seller on 6.2.2007 to take the said amount in cash from him or through DD thereby sale-deed may be executed in terms of the said agreement prior to 15.3.2007. Similar notice was also given to petitioner No. 3 power of attorney holder on 14.2.2007. It is noted here, if cheque given by a purchaser has been dishonoured, either he has to offer the amount along with said notice or to pay the sum in cash to show his bonafide, it was not required to issue two notices by him to the sellers, who agreed to sell his property having worth of more than Rs.2 Crores for which only Rs.1 Lakh was said to be paid in advance to which cheque given to petitioners was dishonoured. The time was the essence of the contract for execution of the sale deed prior to 15.3.2007 but the remaining amount was not paid. Petitioners and other seller gave the reply to the notice on 22.2.2007 referring various clauses of the agreement and also referring dishonouring of the cheque. By the said notice, agreement entered with him on 15.1.2007 was automatically cancelled in terms of the agreement. Petitioner No. 3 has also given reply on the same guideline offering the amount, which was given by Harnath Singh through cheque, canceling the said agreement. Thereafter owners of the land through petitioner No. 3 entered into subsequent agreement dated 31.3.2007 for the same piece of land for a sum of Rs.2,53,47,000/- and advance of Rs.10 Lakhs has been received from the complainant. The complainant published a public notice in the

newspaper. In response to the said public notice, Harnath submitted an objection referring the earlier agreement to sale with him, however, the complainant of this case gave notice to the petitioners and other owners on 3.5.2007 making request that in Clause No. 5 of the agreement. It was mentioned that if any dispute regarding title arise with any persons, it would be the responsibility of the owner to settle it, so that he may be in a position to make payment. In reply to the notice, petitioners clarified the situation stating that as per the terms of the agreement, keeping its photocopy to them. In case any issue arises with Harnath Singh, it would be the responsibility of the sellers, however, if the complainant is not ready to abide by the terms and conditions of the agreement, they are responsible for their misdeeds. The reply to the notice was sent to the Advocate and also to the party and a copy of cheque of Rs. 10 Lakhs was offered to the complainant keeping its photocopy which is filed in record. It is true, the said cheque has not been encashed by the complainant but all these facts are relevant for the purpose of understanding, whether petitioners were having any fraudulent or dishonest intention to induce the complainant to deliver the money to him and would it constitute an offence of cheating by such act and omission. The said fact is also relevant to understand explanation attached to Section 415 of the IPC to demonstrate that in the facts of the case, is there any dishonest concealment, which would come within the purview of deception. In this respect, it is to observe here that the present complaint is filed by complainant Hemant Raghuvanshi, who is the subsequent intended purchaser. One Mukesh Shrivastava, who is the witness in the first agreement being middle man and Harnath Singh intended purchaser in first agreement to sell and complainant of this case have deposed against petitioners under Section 200 of the Cr.P.C. On the other hand the petitioners, have their own land and owner thereof, want to sell the same to which entered into first agreement with Harnath Singh on 15.1.2007 who for a total sum of Rs.2,07 Crores paid the advance sum of Rs.1 Lakh only by the cheque which was dishonoured then he gave the notice. In reply to the same by way of notice dated 22.2.2007, the said agreement was cancelled by petitioners unilaterally, because terms of the agreement regarding payment have not been complied within time schedule. After cancellation of the said agreement, petitioners have entered into the subsequent agreement with the complainant of this case on 31.3.2007 who gave sum of Rs.10 Lakhs towards advance. On public notice, an objection was raised by previous intended purchaser Harnath Singh. In reply to the notice given to petitioners, the responsibility has been taken by

them to settle the same with Harnath Singh or in case he is ready offered the amount of advance to return them through the cheque of Rs.10 Lakhs signed by the petitioners. However, in such circumstances for selling of the land of his own to which two intended purchasers have come forward, who have not made the payment of the amount of consideration and for the pretext one or another want to grab the property without making the payment of consideration to which civil suit filed by the previous intended purchaser has dismissed decided by the Court. In the said facts, in my considered opinion, there cannot be any fraudulent or dishonest intention of the petitioners to deceive the complainant.

11. Section 24 of the IPC defines "Dishonestly" whereby anything done with intention of causing wrongful gain to one person or wrongful loss to another person. Section 25 of the IPC defines "Fraudulently" whereby any act done with intent to defraud him but not otherwise, is said to be done fradulently. In the present case when the first intended purchaser has not fulfilled the terms and conditions of the agreement, the amount which was given by him, has been returned through cheque by power of attorney holder. Thereafter as per subsequent agreement the intended purchaser, who is the complainant in the present case, also not paid the amount of consideration by not fulfilling the condition of the agreement, mainly due to objection of the first intended purchaser, this private complaint is filed. In my considered opinion, it would not come within the purview of cheating as its ingredients are not made out in the facts of the present case, therefore, present case is squarely covered by Clause 3 of the judgment of the Supreme Court in the case of *State of Haryana and others Vs. Ch. Bhajanlal and others* (supra).

12. In addition to the aforesaid, it is also required to observe here that petitioners are the owners and power of attorney holder of their own land, they wanted to sell it to the aspirant purchaser. The first agreement was entered on 15.1.2007 with one Harnath, which was cancelled by issuing a notice on 22.2.2007. The civil suit filed by Harnath Singh was dismissed vide judgment dated 18.9.2012 deciding issue No. 2 against him holding that cancellation of previous agreement vide notice dated 22.2.2007 is valid. Though appeal is pending against the said judgment but primarily the judgment of the Court can be taken to be documents of unimpeachable character subject to decision by the High Court. Thereafter, petitioners who were willing to sell it, entered into second agreement with the subsequent intended purchaser, who is complainant

of this case, who paid an amount of Rs.10 Lakh in advance. However, remaining amount of consideration has not been paid within the time so specified though in reply to the notice on the issue of objection by Harnath, petitioners have taken the responsibility to take up the matter with Harnath Singh, but the terms of agreement were not complied with, however, petitioners have given the cheque of the amount of Rs.10 Lakhs to the complainant but the complainant filed this complaint wherein first intended purchaser, middle man and witnesses of first agreement have deposed against them under Section 200 of the Cr.P.C. However, in the said facts in my considered opinion, the present complaint also falls within the purview of direction No. 7 of the judgment of *State of Haryana and others Vs. Ch. Bhajanlal and others* (supra), therefore, in my considered opinion it is a fit case to invoke the jurisdiction under Section 482 of the Cr.P.C.

13. At this stage, the judgments relied upon by learned Senior counsel for the respondents may be dealt with looking to the facts of this case. In the case of *Iridium India Telecom Limited* (supra), the Court referred the facts of that individual case whereby for business transaction, an agreement was entered into and in furtherance to the said agreement huge amount of public money was invited from the public and thereafter the deception was found from the terms of the said agreement because the basis to which that money was collected was not found correct; however, the Court referring the provision of Section 415 of the IPC, in the facts of the given case opined that the act of the respondent comes within the purview of Section 415 of the IPC, to which at the stage of taking cognizance, interference made by the High Court, was not found justifiable. In the case of *Lee Kun Hee, President, Samsung Corporation, South Korea* (supra), the issue was also with respect to business transaction and that consequentially required to execute the bill of exchange and in the facts of that case the trial Court has taken cognizance because *prima facie* ingredients of Section 415 of the IPC were found, however, observing the same, interference was declined.

14. Similarly, in the case of *Sushil Suri* (supra), in the factual backdrop, in a Bank scheme, land was taken fraudulently on the basis of the documents which were not correct, however, the Court referring all the provisions and other provisions declined to interfere in the case. In the case of *Indian Oil Corporation* (supra), the Court found breach of contract and also the ingredients of Section 415 of the IPC was made out looking to the facts of the

said case, it was held that High Court not justified in quashing the complaint. The judgment of *Inspector of Police, CBI Vs. B. Raja Gopal and others* (supra) relied upon on the pretext that return of the amount at later stage would not absolve the accused from the responsibility of the commission of offence, is also of no help to the petitioner comparing the facts of the said case and of the present case. The facts of this case indicate the bonafide of the petitioners as discussed above, there is no deception with fraudulent or dishonest intention by the petitioners, therefore, judgment as relied by the respondents is of no help to them.

15. In view of the foregoing discussion, the case at hand is one of the case wherein the evidence brought by the complainant are not sound, reasonable and indubitable and not of sterling, unimpeachable character looking to the factual scenario as discussed above. In that view of the matter, the private complaint and the direction issued by the Court to take cognizance is not justified and liable to be quashed in exercise of power under Section 482 of the Cr.P.C.

16. Resultantly, this petition succeeds and is hereby allowed. The order taking cognizance stands quashed. The private complaint filed by respondent No. 2 also stands quashed. In the facts of the case, parties to bear their own costs.

Application allowed.

I.L.R. [2017] M.P., 2881
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice G.S. Ahluwalia
M.Cr.C. No. 10446/2017 (Gwalior) decided on 30 November, 2017

PRABAL DOGRA ...Applicant
Vs.
SUPERINTENDENT OF POLICE, GWALIOR
& STATE OF M.P. ...Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Police Investigation – Scope & Jurisdiction – **Held – Court in exercise of powers u/S 482 Cr.P.C. cannot direct the police to investigate the case from a particular point of view and cannot supervise investigation by issuing directions as to in what manner it is to be done,**

as the investigation is the domain of police – Court can interfere with investigation where investigating officer acted in violation of any statutory provisions of law putting personal liberty of person in jeopardy or investigation is not *bonafide* or investigation is tainted being baised or *malafide* – No allegation against any investigating officer – Application dismissed. (Paras 13 to 15, 20 & 23)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – पुलिस अन्वेषण – व्याप्ति व अधिकारिता – अभिनिर्धारित – न्यायालय दण्ड प्रक्रिया संहिता की धारा 482 के अंतर्गत शक्तियों के प्रयोग में प्रकरण का अन्वेषण किसी विशिष्ट दृष्टिकोण से करने हेतु पुलिस को निदेशित नहीं कर सकता तथा निदेश जारी करके अन्वेषण का पर्यवेक्षण नहीं कर सकता कि यह किस रीति से किया जाना है, क्योंकि अन्वेषण पुलिस का अधिकार क्षेत्र है – न्यायालय अन्वेषण में हस्तक्षेप कर सकता है जहाँ अन्वेषण अधिकारी ने व्यक्ति की दैहिक स्वतंत्रता को संकट में डालते हुए विधि के किसी भी कानूनी उपबंधों का उल्लंघन किया हो या अन्वेषण सद्भावपूर्ण न हो या अन्वेषण पक्षपातपूर्ण अथवा असद्भावपूर्वक होने के कारण दूषित हो – किसी अन्वेषण अधिकारी के विरूद्ध कोई अभिकथन नहीं – आवेदन खारिज।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Constitution – Article 21 – Police Investigation – Documents* – Held – Where material produced by accused is such to conclude that his defence is based on sound, reasonable and indubitable facts and same rules out the assertions made in complaint, High Court can always look into those documents, even at an early stage of trial – Free and fair investigation is the fundamental right of accused as guaranteed under Article 21 of Constitution. (Para 18 & 19)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं संविधान – अनुच्छेद 21 – पुलिस अन्वेषण – दस्तावेज – अभिनिर्धारित – जहाँ अभियुक्त द्वारा प्रस्तुत सामग्री ऐसा निष्कर्षित करने हेतु है कि उसका बचाव ठोस, युक्तियुक्त एवं निःशंक तथ्यों पर आधारित है तथा वे परिवाद में किये गये प्राख्यान को खारिज करते हैं, उच्च न्यायालय विचारण के शुरूआती प्रक्रम पर भी सदैव उन दस्तावेजों पर विचार कर सकता है – स्वतंत्र और निष्पक्ष अन्वेषण अभियुक्त का मूलभूत अधिकार है जैसा कि संविधान के अनुच्छेद 21 के अंतर्गत प्रत्याभूत है।

Cases referred:

2010 6 SCC 1, (2012) 9 SCC 771, (2016) 3 SCC 135, (2011) 1 SCC 307, AIR 2014 SC 666, (2014) 3 SCC 1, (2013) 12 SCC 529, (2010)

12 SCC 254, (2001) 7 SCC 659, (2009) 10 SCC 488, (2009) 8 SCC 617, (2005) 1 SCC 568, (2013) 3 SCC 330, (2013) 9 SCC 293, (2008) 12 SCC 346, (2014) 2 SCC 1.

Rajiv Sharma, for the applicant.
Girdhari Singh Chauhan, P.P. for the non-applicants-State.
Arun Kumar Barua, for the complainant.

ORDER

G.S. AHLUWALIA, J. :- This application under Section 482 of Cr.P.C. has been filed seeking a direction to the police to conduct fair and impartial investigation in Crime No.350/2017 registered by Police Station Kampoo, Gwalior as well as for a directing the S.H.O. of concerning Police Station/ investigating officer to get the injured medically examined by the Medical Board.

2. The necessary facts for the disposal of the present application in short are that complainant Avneesh Sharma, lodged a police complaint on 31-7-2017 at Police Station Kampoo Distt. Gwalior, alleging therein that on 30-7-2017, at about 11:40 P.M., when he was returning back after leaving one Vikram Bhadauria, one swift car came there, and the applicant along with other co-accused persons alighted from the swift car and accusing that the complainant had killed the father of the applicant in the year 2008, the applicant, fired a gun shot on the complainant, causing injury on the back side of the head of the complainant. Another gunshot was fired, however, it missed. The co-accused Golu Parmar, fired another gunshot, but it also missed. Other co-accused persons were shouting that the complainant should not be spared. As Dheeru Bhargav and other persons came on the spot, and after noticing them, the accused persons, including the applicant went away. The police registered the F.I.R. in crime no.350/2017 for offence under Section 307, 34 of I.P.C. The complainant was sent for medical examination.

3. The applicant made an application to the Superintendent of Police, Gwalior and the Collector, Gwalior to conduct a free and fair investigation and to get the complainant medically examined by a Medical Board, but as no heed was paid, therefore, the present application has been filed seeking aforementioned directions. The prayer of the applicant in the present case is as under :-

> "It is, therefore, most respectfully prayed that the petition filed by the petitioner may kindly be allowed and issuing direction to respondents to conduct the fair and impartial investigation into matter and also to issuing the direction to the concerning S.H.O., Police Station Kampoo, to conduct medical examination of injured Avneesh Sharma @ Raja by the Medical Board Distt. Gwalior in connection with crime No.350/2017 registered at P.S. Kampoo, Dist. Gwalior for offence punishable under Section 307,34 of I.P.C., in the interest of justice."

4. It is submitted by the Counsel for the applicant, that free and fair investigation is the fundamental right of the accused, as guaranteed under Article 21 of the Constitution of India and therefore, it is obligatory on the part of the police to conduct the investigation from all necessary and possible angles. It is submitted that the complainant is an influential person being the leader of Congress Party and in connivance with the Doctors, a false M.L.C. has been got prepared to the effect that the complainant has suffered firearm injury, whereas in fact, no injury was sustained by the complainant. Thus, it was directed that the respondents may be directed to conduct the investigation in free and fair manner and further the complainant may be got medically examined by the Medical Board, Gwalior.

5. *Per contra,* it is submitted by the Counsel for the State that it has been alleged by the applicant, that the complainant has got the forged M.L.C. report prepared in connivance with the Doctor, however, the Doctor has not been made a party to this application. When an allegation of *mala fide* is made against a person, then he should have been made a party to this petition, in order to answer the allegations and in absence of necessary party, the petition is bad and is liable to be dismissed. It is further submitted that there is no allegation against the investigating officer, to *prima facie* show that the investigation in free and fair manner is not being done. The applicant by this application, merely seeks indulgence of this Court so that the complainant may be re-examined by the Medical Board. The incident had taken place on 30-7-2017, and after 4 months, no useful purpose would be served by getting the complainant examined by Medical Board. It is further submitted that it is well established principle of law that the Courts should not supervise the investigation, and the investigation is the prerogative of the Police. In absence

of any allegation of *mala fides* against the investigating officer, the present application is not maintainable.

6. Heard the learned Counsel for the parties.

7. The complainant was medically examined by C.M.O./Medico-legal Officer, Casualty, J.A. Hospital, Gwalior on 31-7-2017 and found the following injury :

> "A cutting shaped wound present over scalp occipital region. Size 8x2cm placed superficially. Direction Oblique right to left upward. Blackening, tattooing, burning present. Firearm injury."

Thus, according to the Doctor, a gunshot injury was found on the back of the head of the complainant.

8. Now, the centripetal question for determination is that to what extent, the High Court in exercise of power under Section 482 of Cr.P.C. can issue direction to the investigating officer.

The Supreme Court in the case of *Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi)* reported in 2010 6 SCC 1 has held as under :-

> **"197.** In the Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.

198. A person is entitled to be tried according to the law in force at the time of commission of offence. A person could not be punished for the same offence twice and most significantly cannot be compelled to be a witness against himself and he cannot be deprived of his personal liberty except according to the procedure established by law. The law in relation to investigation of offences and rights of an accused, in our country, has developed with the passage of time. On the one hand, power is vested in the investigating officer to conduct the investigation freely and transparently. Even the courts do not normally have the right to interfere with the investigation. It exclusively falls in the domain of the investigating agency. In exceptional cases the High Courts have monitored the investigation but again within a very limited scope. There, on the other a duty is cast upon the Prosecutor to ensure that rights of an accused are not infringed and he gets a fair chance to put forward his defence so as to ensure that a guilty does not go scot-free while an innocent is not punished. Even in the might of the State the rights of an accused cannot be undermined, he must be tried in consonance with the provisions of the constitutional mandate. The cumulative effect of this constitutional philosophy is that both the courts and the investigating agency should operate in their own independent fields while ensuring adherence to basic rule of law.

199. It is not only the responsibility of the investigating agency but as well as that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of the criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law dehors his position and influence in the society.

200. In *Kashmeri Devi v. Delhi Admn 1988 Supp. SCC 482* it has been held that the record of investigation should not

show that efforts are being made to protect and shield the guilty even where they are police officers and are alleged to have committed a barbaric offence/crime. The courts have even declined to accept the report submitted by the investigating officer where it is glaringly unfair and offends basic canons of the criminal investigation and jurisprudence. *Contra veritatem lex nunquam aliquid permittit:* implies a duty on the court to accept and accord its approval only to a report which is the result of faithful and fruitful investigation. The Court is not to accept the report which is *contra legem* but (sic) to conduct judicious and fair investigation and submit a report in accordance with Section 173 of the Code which places a burden and obligation on the State Administration. The aim of criminal justice is two-fold. Severely punishing and really or sufficiently preventing the crime. Both these objects can be achieved only by fair investigation into the commission of crime, sincerely proving the case of the prosecution before the court and the guilty is punished in accordance with law.

201. Historically but consistently the view of this Court has been that an investigation must be fair and effective, must proceed in proper direction in consonance with the ingredients of the offence and not in haphazard manner. In some cases besides investigation being effective the accused may have to prove miscarriage of justice but once it is shown the accused would be entitled to definite benefit in accordance with law. The investigation should be conducted in a manner so as to draw a just balance between citizen's right under Articles 19 and 21 and expansive power of the police to make investigation. These well-established principles have been stated by this Court in *Sasi Thomas v. State,* (2006) 12 SCC 421 *State (Inspector of Police) v. Surya Sankaram Karri* (2006) 7 SCC 172 and *T.T. Antony v. State of Kerala* (2001) 6 SCC 181."

The Supreme Court in the case of *V.K. Sasikala Vs. State* reported in (2012) 9 SCC 771 has held as under :-

"**12.** The parameters governing the process of investigation of a criminal charge, the duties of the investigating agency and the role of the courts after the process of investigation is over and a report thereof is submitted to the court is exhaustively laid down in the different Chapters of the Code of Criminal Procedure, 1973 (CrPC). Though the power of the investigating agency is large and expansive and the courts have a minimum role in this regard there are inbuilt provisions in the Code to ensure that investigation of a criminal offence is conducted keeping in mind the rights of an accused to a fair process of investigation. The mandatory duty cast on the investigating agency to maintain a case diary of every investigation on a day-to-day basis and the power of the court under Section 172(2) and the plenary power conferred in the High Courts by Article 226 of the Constitution are adequate safeguards to ensure the conduct of a fair investigation."

The Supreme Court in the case of *Pooja Pal Vs. Union of India* reported in (2016) 3 SCC 135 has held as under:-

"**86.** A trial encompasses investigation, inquiry, trial, appeal and retrial i.e. the entire range of scrutiny including crime detection and adjudication on the basis thereof. Jurisprudentially, the guarantee under Article 21 embraces both the life and liberty of the accused as well as interest of the victim, his near and dear ones as well as of the community at large and therefore, cannot be alienated from each other with levity. It is judicially acknowledged that fair trial includes fair investigation as envisaged by Articles 20 and 21 of the Constitution of India. Though well-demarcated contours of crime detection and adjudication do exist, if the investigation is neither effective nor purposeful nor objective nor fair, it would be the solemn obligation of the courts, if considered necessary, to order further investigation or reinvestigation as the case may be, to discover the truth so as to prevent miscarriage of the justice. No inflexible guidelines or hard-and-fast rules as such can be prescribed by way of uniform and universal invocation and the decision is to be conditioned to the attendant facts

and circumstances, motivated dominantly by the predication of advancement of the cause of justice.

87. Any criminal offence is one against the society at large casting an onerous responsibility on the State, as the guardian and purveyor of human rights and protector of law to discharge its sacrosanct role responsibly and committedly, always accountable to the law-abiding citizenry for any lapse. The power of the constitutional courts to direct further investigation or reinvestigation is a dynamic component of its jurisdiction to exercise judicial review, a basic feature of the Constitution and though has to be exercised with due care and caution and informed with self-imposed restraint, the plenitude and content thereof can neither be enervated nor moderated by any legislation.

88. The expression "fair and proper investigation" in criminal jurisprudence was held by this Court in *Vinay Tyagi v. Irshad Ali* (2013) 5 SCC 762 to encompass two imperatives; firstly, the investigation must be unbiased, honest, just and in accordance with law; and secondly, the entire emphasis has to be to bring out the truth of the case before the court of competent jurisdiction.

89. Prior thereto, in the same vein, it was ruled in *Samaj Parivartan Samudaya v. State of Karnataka (2012) 7 SCC 407* that the basic purpose of an investigation is to bring out the truth by conducting fair and proper investigation in accordance with law and to ensure that the guilty are punished. It held further that the jurisdiction of a court to ensure fair and proper investigation in an adversarial system of criminal administration is of a higher degree than in an inquisitorial system and it has to take precaution that interested or influential persons are not able to misdirect or hijack the investigation, so as to throttle a fair investigation resulting in the offenders, escaping the punitive course of law. Any lapse, it was proclaimed, would result in error of jurisdiction.

90. That the victim cannot be afforded to be treated as an

alien or total stranger to the criminal trial was reiterated by this Court in *Rattiram v. State of M.P. (2012) 4 SCC 516* It was postulated that the criminal jurisprudence with the passage of time has laid emphasis on victimology, which fundamentally is the perception of a trial from the viewpoint of criminal as well as the victim when judged in the social context.

91. This Court in *NHRC v. State of Gujarat* (2009) 6 SCC 767 did proclaim unambiguously that discovery, investigation and establishment of truth are the main purposes of the courts of justice and indeed are raison d'étre for their existence."

The Supreme Court in the case of *Nahar Singh Yadav Vs. Union of India* reported in (2011) 1 SCC 307 has held as under :-

"**21.** Reverting to the main issue, a true and fair trial is sine qua non of Article 21 of the Constitution, which declares that:

"21. *Protection of life and personal liberty.*— No person shall be deprived of his 'life' or 'personal liberty' except according to procedure established by law."

It needs no emphasis that a criminal trial, which may result in depriving a person of not only his personal liberty but also his life has to be unbiased, and without any prejudice for or against the accused. An impartial and uninfluenced trial is the fundamental requirement of a fair trial, the first and the foremost imperative of the criminal justice delivery system. If a criminal trial is not free and fair, the criminal justice system would undoubtedly be at stake, eroding the confidence of a common man in the system, which would not augur well for the society at large. Therefore, as and when it is shown that the public confidence in the fairness of a particular trial is likely to be seriously undermined, for any reason whatsoever, Section 406 CrPC empowers this Court to transfer any case or appeal from one High Court to another High Court or from one criminal court subordinate to one High Court to another criminal court of equal or superior jurisdiction subordinate to another High Court, to meet the ends of justice.

22. It is, however, the trite law that power under Section 406 CrPC has to be construed strictly and is to be exercised sparingly and with great circumspection. It needs little emphasis that a prayer for transfer should be allowed only when there is a well-substantiated apprehension that justice will not be dispensed impartially, objectively and without any bias. In the absence of any material demonstrating such apprehension, this Court will not entertain application for transfer of a trial, as any transfer of trial from one State to another implicitly reflects upon the credibility of not only the entire State judiciary but also the prosecuting agency, which would include the Public Prosecutors as well.

23. In *Zahira Habibulla H. Sheikh v. State of Gujarat* (2004) 4 SCC 158 while explaining the import of the expression "fair trial", this Court had observed that: (SCC p. 184, para 36)

> "36. ... Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial."

24. In *Maneka Sanjay Gandhi v. Rani Jethmalani (1979) 4 SCC 167* speaking for a Bench of three learned Judges of this Court, V.R. Krishna Iyer, J. said: (SCC p. 169, para 2)

> "2. Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is

necessitous if the court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances."

25. In *Abdul Nazar Madani v. State of T.N.* (2000) 6 SCC 204 dealing with a similar application, this Court had echoed the following views: (SCC pp. 210-11, para 7)

"7. ... The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any court or even at any place, the appropriate court may transfer the case to another court where it feels that holding of fair and proper trial is conducive. No universal or hard-and-fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society."

26. In *K. Anbazhagan v. Supdt. of Police (2004) 3 SCC*

767 this Court had an occasion to deal with the prayer for transfer of a criminal trial from Tamil Nadu to another State mainly on the ground of apprehension of political interference in the trial. While finally directing the transfer of the case to the State of Karnataka, the Court observed thus: (SCC p. 784, para 30)

> "30. Free and fair trial is sine qua non of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the mind of the petitioner."

27. Recently, in *Amarinder Singh v. Parkash Singh Badal,* (2009) 6 SCC 260 while dealing with two transfer applications preferred under Section 406 CrPC on the ground that with the change in State Government, the trial was suffering setback due to the influence of the new Chief Minister as also the lack of interest by the Public Prosecutor, P. Sathasivam, J., speaking for a three-Judge Bench has observed thus: (SCC p. 273, paras 18-20)

> "18. For a transfer of a criminal case, there must be a reasonable apprehension on the part of the party to a case that justice will not be done. It is one of the principles of administration of justice that justice should not only be done but it should be seen to be done. On the other hand, mere allegations that there is apprehension that justice will not be done in a given case does not suffice. In other words, the court has further to see whether the apprehension alleged is

reasonable or not. The apprehension must not only be entertained but must appear to the court to be a reasonable apprehension.

19. Assurance of a fair trial is the first imperative of the dispensation of justice. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that the public confidence in the fairness of a trial would be seriously undermined, the aggrieved party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 CrPC.

20. However, the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary. Free and fair trial is sine qua non of Article 21 of the Constitution. If the criminal trial is not free and fair and if it is biased, judicial fairness and the criminal justice system would be at stake, shaking the confidence of the public in the system. The apprehension must appear to the court to be a reasonable one."

The Supreme Court in the case of *Manohar Lal Sharma Vs. Principal Secretary and others* reported in AIR 2014 SC 666 has held as under :

"**29.** In the criminal justice system the investigation of an offence is the domain of the police. The power to investigate into the cognizable offences by the police officer is ordinarily not impinged by any fetters. However, such power has to be exercised consistent with the statutory provisions and for legitimate purpose. The Courts ordinarily do not interfere in the matters of investigation by police, particularly, when the facts and circumstances do not indicate that the investigating officer is not functioning bona fide. In very exceptional cases, however, where the Court finds that the police officer has exercised his investigatory powers in breach of the statutory provision putting the personal liberty and/or the property of the citizen in jeopardy by illegal and improper use of the power or there is abuse of the investigatory power and process by

the police officer or the investigation by the police is found to be not bona fide or the investigation is tainted with animosity, the Court may intervene to protect the personal and/or property rights of the citizens."

9. Article 20 of the Constitution of India reads as under :

"20. Protection in respect of conviction for offences.— (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself."

Article 21 of the Constitution of India reads as under :-

"21. Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law."

10. Thus, Article 20 and 21 of Constitution of India, guarantee protection to the citizens of India that no person accused of any offence shall be compelled to be a witness against himself and no person shall be deprived of his life or personal liberty except according to procedure established by law and no one shall be prosecuted and punished for the same offence more than once.

11. The personal liberty of a person cannot be curtailed except according to procedure established by law. The Supreme Court in the case of *Pooja Pal*(supra) has held that a trial encompasses investigation, inquiry, trial, appeal and retrial i.e. the entire range of scrutiny including crime detection and adjudication on the basis thereof.

12. The Supreme Court in the case of *Shatrughan Chauhan Vs. Union of India* reported in (2014) 3 SCC 1, has held as under :-

"57. Another vital aspect, without mention of which the present discussion will not be complete, is that, as aforesaid, Article 21 is the paramount principle on which rights of the convict are based, this must be considered along with the rights of the victims or the deceased's family as also societal consideration since these elements form part of the sentencing process as well. It is the stand of the respondents that the commutation of sentence of death based on delay alone will be against the victim's interest."

The Supreme Court in the case of *Karan Singh Vs. State of Haryana* reported in (2013) 12 SCC 529 has held as under :-

"16. The investigation into a criminal offence must be free from any objectionable features or infirmities which may give rise to an apprehension in the mind of the complainant or the accused, that investigation was not fair and may have been carried out with some ulterior motive. The investigating officer must not indulge in any kind of mischief, or cause harassment either to the complainant or to the accused. His conduct must be entirely impartial and must dispel any suspicion regarding the genuineness of the investigation. The investigating officer, "is not merely present to strengthen the case of the prosecution with evidence that will enable the court to record a conviction, but to bring out the real unvarnished version of the truth". Ethical conduct on the part of the investigating agency is absolutely essential, and there must be no scope for any allegation of mala fides or bias. Words like "personal liberty" contained in Article 21 of the Constitution of India provide for the widest amplitude, covering all kinds of rights particularly, the right to personal liberty of the citizens of India, and a person cannot be deprived of the same without following the procedure prescribed by law. In this way, the investigating agencies are the guardians of the liberty of innocent citizens. Therefore, a duty is cast upon the investigating officer to ensure that an innocent person should not suffer from unnecessary harassment of false implication, however, at the same time, an accused person must not be given undue leverage. An investigation

> cannot be interfered with or influenced even by the courts. Therefore, the investigating agency must avoid entirely any kind of extraneous influence, and investigation must be carried out with equal alacrity and fairness irrespective of the status of the accused or the complainant, as a tainted investigation definitely leads to the miscarriage of criminal justice, and thus deprives a man of his fundamental rights guaranteed under Article 21 of the Constitution. Thus, every investigation must be judicious, fair, transparent and expeditious to ensure compliance with the rules of law, as is required under Articles 19, 20 and 21 of the Constitution."

The Supreme Court in the case of B*abubhai Vs. State of Gujarat* reported in (2010) 12 SCC 254 has held as under :-

> "**38.** Unless an extraordinary case of gross abuse of power is made out by those in charge of the investigation, the court should be quite loathe to interfere with the investigation, a field of activity reserved for the police and the executive. Thus, in case of a mala fide exercise of power by a police officer the court may interfere. (*Vide S.N. Sharma v. Bipen Kumar Tiwari,* (1970) 1 SCC 653)"

13. Thus, it is clear that only when a person who has been arraigned as an accused points out that investigation is being done because of extraneous influence, or mala fide, or bias or in short that the investigation is a tainted investigation, and an extraordinary case of gross abuse of power by the investigating officer is made out, only then the Courts can interfere in the matter and can issue directions for ensuring free and fair investigation.

14. The next question for determination is that whether an accused can seek a direction to the investigating officer, to investigate the matter from his angle of defence or not?

The word "Fair" means free from any biases, *mala fides*, arbitrariness. Thus, unless and until, an allegation of bias, or *mala fides* is alleged against the investigating officer, pointing out the instances, *prima facie* proving beyond reasonable doubt, that the investigating officer, is indulged in tainted, biased investigation, it cannot be said that the investigating which is being done by

the investigating officer, is not free and fair. The words "free and fair" are relative words. A free and fair investigation for some one, may be a tainted investigation for another. Therefore, it is obligatory on the part of person, alleging tainted investigation, to make out a strong and a case beyond doubt, that the investigating officer for one reason or the other, is biased against the accused or is conducting tainted investigation with *mala fides*. Merely because the person arraigned as an accused feels that he has been falsely implicated, he cannot seek direction for the police to conduct the investigation from his defence point of view also.

15. It is well established principle of law that investigation is the domain of the police.

The Supreme Court in the case of *S.M. Datta Vs. State of Gujarat*, reported in (2001) 7 SCC 659 has held as under :-

> "**2.** Since the decision of the Privy Council in *Khwaja Nazir Ahmad* (*King Emperor v. Khwaja Nazir Ahmad (1944) 71 IA 203)* and till this day there is existing one salutary principle that in normal circumstances, the law courts would not thwart any investigation and criminal proceedings initiated must be allowed to have their own course under the provisions of the Code. The powers of the police ought to stand unfettered to investigate cases where they suspect or even have reasons to suspect the commission of a cognizable offence and the first information report (FIR) discloses such offence. The Judicial Committee in the decision of *Nazir Ahmad* observed: (AIR p. 22)
>
> "In Their Lordships' opinion, however, the more serious aspect of the case is to be found in the resultant interference by the court with the duties of the police. Just as it is essential that everyone accused of a crime should have free access to a court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of

enquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as Their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the court to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus. In such a case as the present, however, the court's functions begin when a charge is preferred before it and not until then."

3. It is paramount to note however, that the observations of Lord Porter in *Nazir Ahmad* stand qualified by inclusion of the following: (AIR p. 22)

"No doubt, if no cognizable offence is disclosed, and still more if no offence of any kind is disclosed, the police would have no authority to undertake an investigation...."

4. The qualified statement of the Judicial Committee however stands noted in *Sanchaita Investment (State of W.B. v. Swapan Kumar Guha, (1982) 1 SCC 561)*. Incidentally, *Sanchaita Investment* and subsequent decisions, including *Bhajan Lal (State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335)* and *Rajesh Bajaj (Rajesh Bajaj v. State NCT of Delhi (1999) 3 SCC 259)* in one tune stated that if an offence is disclosed the court will not interfere with an investigation and will permit investigation into the offence alleged to have been committed. If, however, the materials do not disclose an

offence, no investigation should normally be permitted.

5. The approach of this Court and the law as laid down by the Judicial Committee in *Nazir Ahmad* cannot but be termed to be in accordance with the principles of justice. While liberty of an individual are "sacred and sacrosanct" and it is a bounden obligation of the court to protect them but in the event of commission of a cognizable offence and an offence stand disclosed in the first information report, interest of justice requires further investigation by the investigating agency. Needless to record that investigation of an offence is within the exclusive domain of the police department and not the law courts. In the event of disclosure of an offence, it is a duty incumbent to investigate into the offence and bring the offender to book in order to serve the cause of justice and it is only thereafter the investigating officer submits the report to the court with a prayer to take cognizance of the offence under Section 190 CrPC and it is on submission of the report that the duty of the police ends, subject however to the provisions as contained in Section 173(8) of the Code. There is thus a clear and well-defined area of operation and demarcated function in the field of investigation of crimes and its subsequent adjudication. In this context reference may be made to the decision of this Court in *State of Bihar v. J.A.C. Saldanha,* (1980) 1 SCC 554 .

6. While an offence if disclosed in the FIR ought not to be thwarted at the initial stages, but in the event however, the materials do not disclose an offence, no investigation should normally be permitted. It is in this context this Court in *Sanchaita Investment* observed: (SCC pp. 597-98, para 65)

> "65. In my opinion, the legal position is well settled. The legal position appears to be that if an offence is disclosed, the court will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to be completed; if, however, the materials do not disclose an offence, no investigation

should normally be permitted....."

The Supreme Court in the case of *D. Venkatasubramaniam vs. M.K. Mohan Krishnamachari* reported in (2009) 10 SCC 488, has held as under:-

"17. Be it noted that there is no allegation of dereliction of any duty on the part of the investigating agency. There is also no allegation of any collusion and deliberate delay on the part of the investigating agency in the matter of investigation into the case that had been promptly registered on the information lodged by the respondent. The petition almost reads like a civil suit for recovery of the money.

18. As noted hereinabove, the petition has been filed within one week of registration of the crime by which time the police had already started serious investigation as is evident from the material available on record. It is also required to notice that none of the appellants have been impleaded as party-respondents to the petition filed under Section 482 of the Code. The State represented by its Sub-Inspector of Police, Central Crime Branch, Egmore, Chennai alone was impleaded as the respondent. The investigating agency in its counter filed in the High Court stated that after obtaining necessary legal opinion, a case was registered and "commenced the investigation". It is also stated in categorical terms that the police had "inquired all the connected witnesses, recorded their statements and also collected the material documents and confirmed commission of cognizable offences by all the accused".

19. The High Court, within a period of one month from the date of filing of the petition, finally disposed of the same observing that,

"it is obligatory on the part of the respondent police to conduct investigation in accordance with law, including recording of statements from witnesses, arrest, seizure of property, perusal of various documents and filing of chargesheet. It is also needless to state that if any account is available with the accused persons, or

any amount is in their possession and any account is maintained in a nationalised bank, it is obligatory on the part of the respondent police to take all necessary steps to safeguard the interest of the aggrieved persons in this case".

The Court accordingly directed the police to expedite and complete the investigation within six months from the date of receipt of a copy of the order. The said order of the High Court is impugned in these appeals.

* * * *

25. It is the statutory obligation and duty of the police to investigate into the crime and the courts normally ought not to interfere and guide the investigating agency as to in what manner the investigation has to proceed. In *M.C. Abraham v. State of Maharashtra (2003) 2 SCC 649* this Court observed: (SCC pp. 657-58, para 14)

"14. ... Section 41 of the Code of Criminal Procedure provides for arrest by a police officer without an order from a Magistrate and without a warrant. The section gives discretion to the police officer who may, without an order from a Magistrate and even without a warrant, arrest any person in the situations enumerated in that section. It is open to him, in the course of investigation, to arrest any person who has been concerned with any cognizable offence or against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned. Obviously, he is not expected to act in a mechanical manner and in all cases to arrest the accused as soon as the report is lodged. In appropriate cases, after some investigation, the investigating officer may make up his mind as to whether it is necessary to arrest the accused person. At that stage the court has no role to play. Since the power is discretionary, a police officer is not always bound to

arrest an accused even if the allegation against him is of having committed a cognizable offence. Since an arrest is in the nature of an encroachment on the liberty of the subject and does affect the reputation and status of the citizen, the power has to be cautiously exercised. It depends inter alia upon the nature of the offence alleged and the type of persons who are accused of having committed the cognizable offence. Obviously, the power has to be exercised with caution and circumspection."

26. It is further observed: (*M.C. Abraham case,* SCC pp. 659-60, para 17)

"17. The principle, therefore, is well settled that it is for the investigating agency to submit a report to the Magistrate after full and complete investigation. The investigating agency may submit a report finding the allegations substantiated. It is also open to the investigating agency to submit a report finding no material to support the allegations made in the first information report. It is open to the Magistrate concerned to accept the report or to order further enquiry. But what is clear is that the Magistrate cannot direct the investigating agency to submit a report that is in accord with his views. Even in a case where a report is submitted by the investigating agency finding that no case is made out for prosecution, it is open to the Magistrate to disagree with the report and to take cognizance, but what he cannot do is to direct the investigating agency to submit a report to the effect that the allegations have been supported by the material collected during the course of investigation."

27. This Court while observing that it was not appropriate for the High Court to issue a direction that the case should not only be investigated but a chargesheet must be submitted, held: (*M.C. Abraham case,* SCC p. 660, para 18)

> "18. ... In our view the High Court exceeded its jurisdiction in making this direction which deserves to be set aside. *While it is open to the High Court, in appropriate cases, to give directions for prompt investigation, etc. the High Court cannot direct the investigating agency to submit a report that is in accord with its views as that would amount to unwarranted interference with the investigation of the case by inhibiting the exercise of statutory power by the investigating agency.*"

16. It is a well established principle of law that the prosecution cannot be compelled to file those documents, on which it does not want to place reliance. If the prosecution is directed to investigate the matter from the defence point of view of the accused, then it would mean, that by issuing such a direction, a Court has also issued a direction to the prosecution to file even those documents, on which the prosecution otherwise does not want to rely. It is a well established principle of law that a prosecution document, even if it remains unexhibited, can be relied upon by an accused, if the said document is in favour of the accused, or even at the time of framing charge, the prosecution document, in favour of the accused has to be taken into favour.

The Supreme Court in the case of *State of M.P. Vs. Sheetala Sahai and others* reported in (2009) 8 SCC 617 has held as under :-

> "**52.** In this case, the probative value of the materials on record has not been gone into. The materials brought on record have been accepted as true at this stage. It is true that at this stage even a defence of an accused cannot be considered. But, we are unable to persuade ourselves to agree with the submission of Mr Tulsi that where the entire materials collected during investigation have been placed before the court as part of the chargesheet, the court at the time of framing of the charge could only look to those materials whereupon the prosecution intended to rely upon and ignore the others which are in favour of the accused.
>
> **53.** The question as to whether the court should proceed on the basis as to whether the materials brought on record even if

given face value and taken to be correct in their entirety disclose commission of an offence or not must be determined having regard to the entirety of materials brought on record by the prosecution and not on a part of it. If such a construction is made, sub-section (5) of Section 173 of the Code of Criminal Procedure shall become meaningless.

54. The prosecution, having regard to the right of an accused to have a fair investigation, fair inquiry and fair trial as adumbrated under Article 21 of the Constitution of India, cannot at any stage be deprived of taking advantage of the materials which the prosecution itself has placed on record. If upon perusal of the entire materials on record, the court arrives at an opinion that two views are possible, charges can be framed, but if only one and one view is possible to be taken, the court shall not put the accused to harassment by asking him to face a trial. (See *State of Maharashtra v. Som Nath Thapa*, (1996) 4 SCC 659)

The Supreme Court in the case of *State of Orissa Vs. Debendra Nath Padhi* reported (2005) 1 SCC 568 has held as under :-

"**23.** As a result of the aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. *Satish Mehra* case holding that the trial court has powers to consider even materials which the accused may produce at the stage of Section 227 of the Code has not been correctly decided.

* * * *

29. Regarding the argument of the accused having to face the trial despite being in a position to produce material of unimpeachable character of sterling quality, the width of the powers of the High Court under Section 482 of the Code and Article 226 of the Constitution is unlimited whereunder in the interests of justice the High Court can make such orders as may be necessary to prevent abuse of the process of any court

or otherwise to secure the ends of justice within the parameters laid down in *Bhajan Lal* case."

17. Thus, it is clear that where the accused cannot be permitted to produce any document in his favour even at the stage of framing of charge, then in exercise of powers under Section 482 of Cr.P.C., the High Court cannot direct the prosecution to investigate the matter from the defence point of view of the accused. The basic purpose of investigation is to find out the truth in the allegations made by the complainant against as accused. Safeguards have been provided under Section 169 of Cr.P.C. itself. If the investigating officer after concluding the investigation comes to a conclusion that the allegations made by the complainant are false, then it can file a closure report. Thus, it is clear that the investigating officer has to conduct the investigation from all possible angles, and after the final report is filed, then it would be open to the accused or to the victim, to show that the said final report is not worth acceptance. When a closure report is filed, the complainant is entitled for hearing by the Magistrate, before acceptance of the closure report, and where the charge sheet is filed, the accused will have a right to argue on the question of discharge or framing of charges or even proving his defence by leading cogent evidence or by showing preponderance of probabilities. The Supreme Court in the case of *Rajiv Thapar Vs. Madan Lal Kapor* reported in (2013) 3 SCC 330 has held as under :

> "**30.** Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:
>
> **30.1.** *Step one:* whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?
>
> **30.2.** *Step two:* whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a

reasonable person to dismiss and condemn the factual basis of the accusations as false?

30.3. *Step three:* whether the material relied upon by the accused has not been refuted by the prosecution/complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?

30.4. *Step four:* whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5. If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 CrPC. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not conclude in the conviction of the accused."

The Supreme Court in the case of *Prashant Bharti Vs. State* (NCT of Delhi) reported in (2013) 9 SCC 293 has held as under :-

"**22.** The proposition of law, pertaining to quashing of criminal proceedings, initiated against an accused by a High Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "CrPC") has been dealt with by this Court in *Rajiv Thapar v. Madan Lal Kapoor, (2013) 3 SCC 330* wherein this Court inter alia held as under: (SCC pp. 347-49, paras 29-30)

"29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 CrPC, if it chooses to quash the initiation of the prosecution against an accused at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before

the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 CrPC, at the stages referred to hereinabove, would have far-reaching consequences, inasmuch as it would negate the prosecution's/ complainant's case without allowing the prosecution/ complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 CrPC the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 CrPC to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice."

18. Thus, it is clear that where the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound,

reasonable and indubitable facts, and the same would rule out the assertions contained in the complaint, the High Court can always look into those documents.

19. Article 21 of Constitution of India provides that no one shall be deprived of his personal liberty except in accordance with procedure established by law. Thus, it is clear that where the accused is in a position to *prima facie* prove that his documents are sound, reasonable and indubitable, then the same can be looked into, even at an early stage of trial, otherwise, the accused is always entitled to prove his defence in the Trial by either by showing preponderance of probabilities or by leading cogent and reliable evidence.

20. Free and fair investigation is the fundamental right of the accused as guaranteed under Article 21 of the Constitution of India, however, the Courts have limited power to interfere with the investigation as the investigation is the prerogative/domain of police. The Court cannot supervise the investigation and cannot issue directions to the investigating officer, to investigate the case from a particular point of view. The Courts can always interfere with the investigation, when it is shown that the investigating officer has acted in violation of any statutory provision of law putting the personal liberty of a person in jeopardy or the investigation is not *bona fide* or the investigation is tainted being biased or *mala fide*. Thus, in nutshell, where allegations against the investigating officers are made and when the same are found to be proved, only then the Court can interfere with the investigation. However, where a prayer is made that the police be directed to investigate the matter from the accused's point of view, then the Courts cannot interfere with the matter. Even otherwise, the *mala fides* of an informant may not be sufficient to interfere with the investigation.

The Supreme Court in the case of *Renu Kumari Vs. Sanjay Kumar and Others* reported in (2008) 12 SCC 346 has held as under :-

> "11. As noted above, the powers possessed by the High Court under Section 482 Cr.P.C. are very wide and the very plenitude of the power requires great caution in its exercise. The court must be careful to see that its decision, in exercise of this power, is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court

being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in the court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings".

(See Dhanalakshmi v. R. Prasanna Kumar (1990 Supp SCC 686), State of Bihar v. P. P. Sharma (1992 Supp (1) SCC 222), Rupan Deol Bajaj v. Kanwar Pal Singh Gill (1995(6) SCC 194) , State of Kerala v. O.C. Kuttan (1999(2) SCC 651), State of U.P. v. O.P. Sharma(1996 (7) SCC 705), Rashmi Kumar v. Mahesh Kumar Bhada (1997 (2) SCC 397), Satvinder Kaur v. State (Govt. of NCT of Delhi) (1999 (8) SCC 728) and Rajesh Bajaj v. State NCT of Delhi State (1999 (3) SCC 259).

The above position was again reiterated in State of Karnataka v. M. Devendrappa (2002) 3 SCC 89, State of M.P. v. Awadh Kishore Gupta (2004) 1 SCC 691 and State of Orissa v. Saroj Kumar Sahoo (2005) 13 SCC 540, SCC pp. 547-50, paras 8-11."

21. It is well established principle of law that the free trial is the fundamental right of the accused as well as of the complainant. If the Court supervises the investigation by issuing directions to the investigating officer, and compels the investigating officer to form his opinion based on the directions of the Court, then nothing would be left in the Trial Court.

The Supreme Court in the case of *Manohar Lal Sharma* (Supra) has held as under :

> "**39.** However, the investigation/inquiry monitored by the court does not mean that the court supervises such investigation/ inquiry. To supervise would mean to observe and direct the execution of a task whereas to monitor would only mean to maintain surveillance. The concern and interest of the court in such "Court-directed" or "Court-monitored" cases is that there is no undue delay in the investigation, and the investigation is conducted in a free and fair manner with no external interference. In such a process, the people acquainted with facts and circumstances of the case would also have a sense of security and they would cooperate with the investigation given that the superior courts are seized of the matter. We find that in some cases, the expression "Court-monitored" has been interchangeably used with "Court-supervised investigation". Once the court supervises an investigation, there is hardly anything left in the trial. Under the Code, the investigating officer is only to form an opinion and it is for the court to ultimately try the case based on the opinion formed by the investigating officer and see whether any offence has been made out. If a superior court supervises the investigation and thus facilitates the formulation of such opinion in the form of a report under Section 173(2) of the Code, it will be difficult if not impossible for the trial court to not be influenced or bound by such opinion. Then trial becomes a farce. Therefore, supervision of investigation by any court is a contradiction in terms. The Code does not envisage such a procedure, and it cannot either. In the rare and compelling circumstances referred to above, the superior courts may monitor an investigation to ensure that the investigating agency conducts the investigation in a free, fair

and time-bound manner without any external interference."

22. If the facts of this case are considered, then it would be clear that no allegations have been made by the applicant against the investigating officer, but on the contrary, the basic allegations are that he is being falsely implicated by the complainant.

The Supreme Court in the case of *Lalita Kumari Vs. State of U.P.* reported in (2014) 2 SCC 1 has held as under :-

"**120.** In view of the aforesaid discussion, we hold:

120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

120.3. If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances

of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

120.8. Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."

23. Thus, where a complaint is made disclosing the commission of cognizable offence, then it is mandatory on the part of the police to register the F.I.R. In the present case, the allegations made in the F.I.R., do disclose the commission of cognizable offence. Thus, the police did not commit any mistake by registering the F.I.R. in the matter. Whether the allegations made in the F.I.R. or case diary statements of the witnesses are worth reliable or not, it is for the investigating officer to form its opinion after concluding the investigation. This Court cannot supervise the investigation by issuing directions

as to in what manner the investigation is to be done. It is the prerogative of the investigating officer unless and until, it is shown that the investigating officer is doing a biased investigation because of some extraneous considerations or *mala fides*. This Court in exercise of powers under Section 482 of Cr.P.C. cannot direct the police to investigate the case from a particular point of view also. There is no allegation against the investigating officer with regard to dereliction from duties. Even the investigating officer has not been made a party to this petition. Even the Doctor who had examined the complainant and has given the M.L.C. report, has not been made a party to this application, therefore, the allegations of *mala fides* against him can not be considered. No allegations of *mala fides* have been made against the concerning Doctor, except by mentioning that a false M.L.C. report has been prepared in connivance with the Doctor. Further more, whether the M.L.C. report was right or manipulated, can be proved during Trial while cross examining the concerning witness.

24. Thus, this Court is of the view that no case is made out by the applicant warranting any direction to the investigating officer in the matter.

25. The application fails and is hereby dismissed.

Application dismissed.