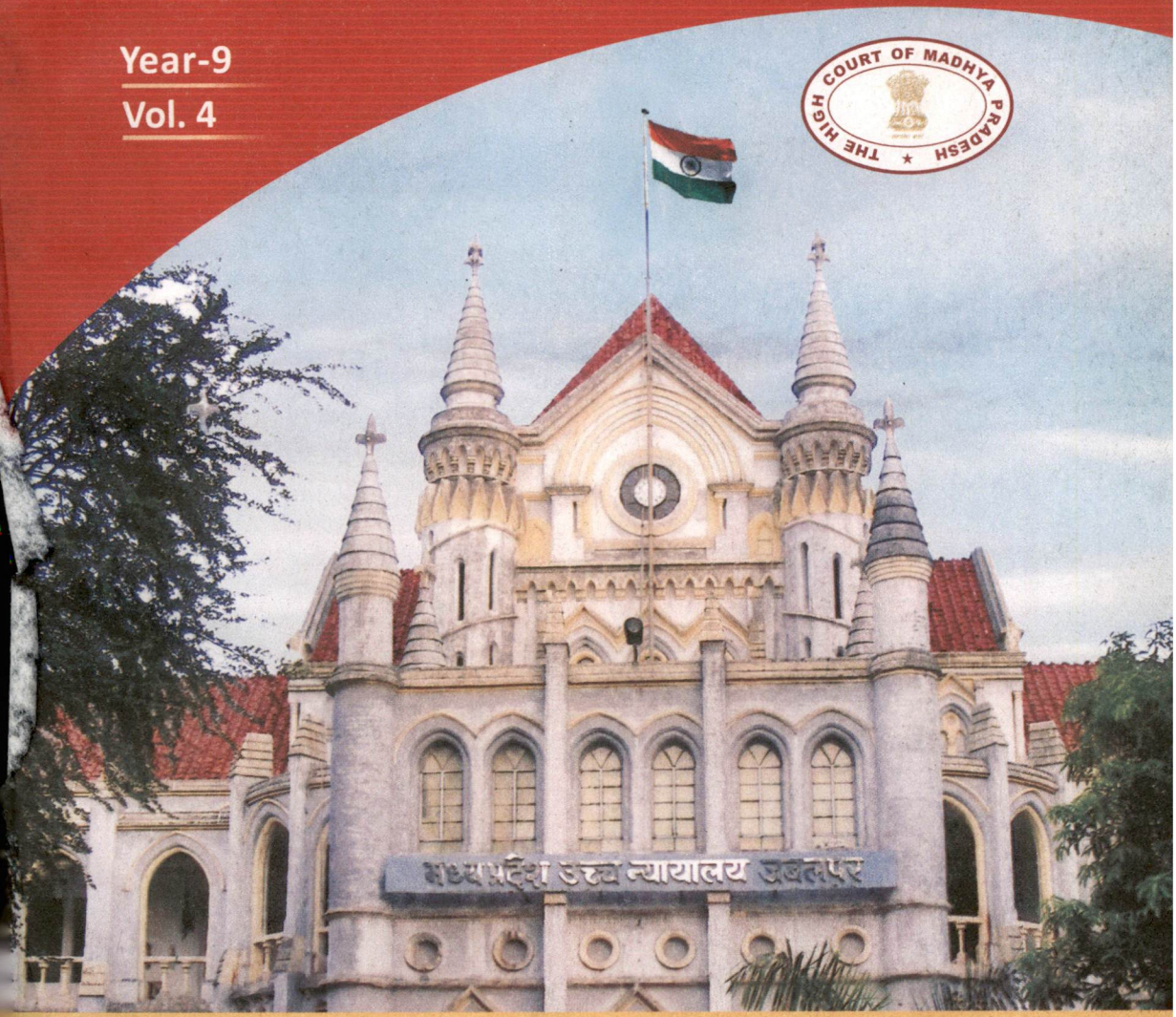
THE INDIAN LAW REPORTS

M.P. SERIES

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

Year-9
Vol. 4



OCTOBER 2017 (pp 2299 to 2586)

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TABLE OF CASES REPORTED

(Note.: An asterisk (*) denotes Note number)

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THE INDIAN LAW REPORTS M.P. SERIES, 2017

(VOL-4)

JOURNAL SECTION

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

MADHYA PRADESH ACT
No. 27 OF 2017

THE COURT-FEES (MADHYA PRADESH AMENDMENT) ACT, 2017

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MADHYA PRADESH ACT
No. 27 OF 2017

THE COURT-FEES (MADHYA PRADESH AMENDMENT) ACT, 2017

[Received the assent of the Governor on the 29th August, 2017; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 1st September, 2017 page No. 954(1) to 954(3)]

An Act further to amend the Court-fees Act, 1870 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Legislature in the Sixty-eighth year of the Republic of India as follows :-

1. Short title. This Act may be called the Court-fees (Madhya Pradesh Amendment) Act, 2017.

2. Amendment of Central Act No. VII of 1870, in its application to the State of Madhya Pradesh. The Court-fees Act, 1870 (No. VII of 1870) (hereinafter referred to as the principal Act), shall in its application to the State of Madhya Pradesh, be amended in the manner hereinafter provided.

3. Amendment of Section 13. In section 13 of the principal Act, for the words "the Appellate Court shall grant to the appellant a certificate, authorising him to receive back from the Collector the full amount of fee paid on the memorandum of appeal", the words "the Appellate Court shall grant to the appellant a certificate, authorising him to receive back from the Collector or by way of electronic transfer in such manner as may be prescribed, the full amount of fee paid on the memorandum of appeal" shall be substituted.

4. Amendment of Section 14. In section 14 of the principal Act, for the words "grant him a certificate authorizing him to receive back from the Collector so much of the fee paid on the application as exceeds the fee which would have been payable had it been presented before such day", the words "grant him a certificate authorising him to receive back from the Collector or by way of electronic transfer in such manner as may be prescribed, so much of the fee paid on the application as exceeds the fee which would have been payable had it been presented before such day" shall be substituted.

5. Amendment of Section 15. In section 15 of the principal Act, for the words "the applicant shall be entitled to certificate from the court

authorizing him to receive back from the Collector so much of the fee paid on the application as exceeds the fee payable on any other application to such Court under the second schedule to this Act, No. 1, clause (b) or clause (d)", the words "the applicant shall be entitled to certificate from the court authorizing him to receive back from the Collector or by way of electronic transfer in such manner as may be prescribed, so much of the fee paid on the application as exceeds the fee payable on any other application to such court under the second schedule to this Act, No. 1, clause (b) or clause (e) or clause (f)" shall be substituted.

6. Amendment of Section 16. In section 16 of the principal Act, for the words "the plaintiff shall be entitled to a certificate from the Court authorizing him to receive back from the Collector, the full amount of the fee paid in respect of such plaint", the words "the plaintiff shall be entitled to a certificate from the Court authorizing him to receive back from the Collector or by way electronic transfer in such manner as may be prescribed, the full amount of the fee paid in respect of such plaint" shall be substituted.

7. Amendment of Section 25. In section 25 of the principal Act, for the words "stamps", the words "stamps or electronic transfer of payment to State Government in such manner as may be prescribed" shall be substituted.

8. Amendment of Section 27. In section 27 of the principal Act, clause (a) shall be renumbered as clause (aa) and before clause (aa) as so renumbered, the following new clause shall be inserted, namely :-

"(a) the manner of electronic transfer of payment of court-fee and refund thereof;".

9. Amendment of Section 30. In section 30 of the principal Act, in second paragraph, for full stop, colon shall be substituted and thereafter the following proviso shall be added, namely :-

"Provided that, where court-fee is paid by electronic transfer of payment, the officer competent to cancel stamp shall verify the genuineness of the payment and after satisfying himself that the court-fee is paid, shall lock the entry in the computer and make an endorsement under his signature on the document that the court-fee is paid and the entry is locked.".

MADHYA PRADESH CONTRACTUAL APPOINTMENT TO CIVIL POST RULES, 2017

[Published in Madhya Pradesh Gazette (Extra-ordinary) dated 28th September, 2017, page Nos. 1052(6) to 1052(14)]

No. C-5-1-2017-1-3:- In exercise of the powers conferred by the proviso to article 309 of the Constitution of India, the Governor of Madhya Pradesh, after consultation with the Madhya Pradesh Public Service Commission, hereby, makes the following rules relating to contractual appointment, namely:-

RULES

1. **Short title and commencement.-**

   (1) These rules may be called the Madhya Pradesh Contractual Appointment to Civil Post Rules, 2017.

   (2) These rules shall come into force from the date of their publication in the Gazette.

2. **Definitions.-** In these rules, unless the context otherwise requires,-

   (1) In relation to any service or post "Appointing Authority" means the Government or such authority which has been conferred with the powers to make appointment on that service or post under the recruitment rules related to that service or post or conferred by the Government by general or special order or which maybe conferred hereafter;

   (2) "Departmental Recruitment Rules" means service recruitment rules in force for appointment to the concerned service or posts;

   (3) "Retired Government Servant" means Government servant retired from the Government Service after completing the age of superannuation;

   (4) "State" means the State of Madhya Pradesh;

   (5) "State Government" means the Government of Madhya Pradesh.

3. **Scope and Application.-** These rules shall apply in relation to every such post/posts and to such persons appointed or who may be

appointed under these rules, on the post/posts declared or may be declared as contract appointment post by the State Government under rule 4.

4. **Posts of contract appointment.**- The following posts shall be called the contract appointment post, namely :-

(1) Such posts which are sanctioned as contract appointment post in the departmental setup.

(2) Notwithstanding anything contained in the Departmental recruitment rules, such post, which requires speciality, experience and specific qualification etc. may be declared contract appointment post by general or special order by concerning departments of the State Government, in exceptional cases, for the purpose of maintaining efficiency in the public administration, excluding the post which requires in the field of judicial service under any law or rule for the time being in force.

(3) Such sanctioned posts of class III and IV in the personal establishment of Chief Minister/Ministers on which appointments are to be made till the tenure of Chief Minister/Ministers (co-terminus).

5. **Methods of Appointment.**- Contractual appointments in the concerned department of State Government may be made in the following manners, namely :-

(1) on the posts mentioned under Rule 4(1) by way of public advertisement;

(2) on the posts mentioned in Rule 4(2) by way of contract appointment of non-government persons retired government servant, on exceptional specific cases, on the basis of specialization, experience, special qualification and his suitability for the post after approval of the Finance Department;

(3) on the posts mentioned under rule 4(3) by the person recommended by the Chief Minister/Ministers on the basis of prescribed qualification/eligibility and suitability for the post.

6. Selection Committee.-

(1) Selection committee for contract appointment to the posts prescribed under rule 4(1) shall be same as prescribed in the departmental recruitment rules.

(2) The provisions of section 8 of the Madhya Pradesh Lok Sewa (Anusuchit Jatiyon, Anusuchit Janjatiyon Aur Anya Pichhade Vergon Ke Liye Arakshan) Adhiniyam, 1994 (No. 21 of 1994) shall also be applicable for the constitution of the selection committee.

7. Age Limit.-

(1) Age limit for contract appointments shall be the same as prescribed in the departmental recruitment rules for the concerned post or service:

Provided that orders/instructions issued by the General Administrative Department from time to time relating to exemption in age limit shall also be applicable for contract appointment.

(2) In the case of retired government servant, contract appointment may be given up to the age of 65 years where age of superannuation is 60 years and where the age of superannuation is 65 years, it may be given up to the age of 70 years.

8. Qualifications and eligibility criteria for appointment.-

In cases of contract appointment the qualifications and eligibility criteria shall be the same as prescribed in rule 5 and 6 of the Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961. For contract appointment minimum educational and other qualification shall be the same as prescribed in departmental recruitment rules per the said post.

9. Ineligibilities for contract appointment of retired government servants.-

(1) If confidential service record of the concerned officer/employee is not "very good" or above category in total;

(2) Where there any doubt or charge has been raised at any time during his service period regarding the integrity of concerned officer/employee and his reputation regarding his honesty and efficiency has not been good in general;

(3) On being dismissed or removed from the service or pending departmental enquiry/prosecution against him;

(4) If concerned officer/employee has been punished during the last 10 years;

(5) If his health is not sound;

10. **Reservation.-** The provisions of Madhya Pradseh Lok Sewa (Anusuchit Jatiyon, Anusuchit Janjatiyon Aur Anya Pichhade Vergon Ke Liye Arakshan) Adhiniyam, 1994 (No. 21 of 1994) and rules/ instructions issued thereunder from time to time shall apply to the posts of contract appointment, along with rules/instructions issued for reservation of women and disabled etc. from time to time, shall also be applicable.

11. **Period of Appointment.-**

(1) On the contract appointment posts mentioned under rule 4(1), the contract appointment for the first time shall be made for the period of not more than one year however, the State Government may, take decision of renewal of contract appointment by extending the period of contract appointment for a period of maximum one year at one time depending on the necessity and assessing suitability of person appointed on contract.

(2) Except the post specified in rule 4(1), the total period of contract appointment shall not be more than five years.

(3) Either of parties may terminate the contact appointment during the period of contract appointment by giving one month's notice in advance or paying one month's salary in lieu thereof.

(4) Contract appointment shall be deemed terminated automatically on expiry of the period of the contract appointment and no separate order shall be needed for terminating the services.

12. Contract pay and other facilities.-

(1) In the case of contract appointment on the posts prescribed under rule 4 (1), payable monthly lump-sum honorarium shall be such as may be fixed by the Finance Department by a general or special order issued from time to time.

(2) Regarding retired employees, contract pay shall be the lump-sum amount payable after deducting the payable pension (prior to commutation) and dearness relief thereupon, from basic pay admissible in the pay structure (pay scale as amended) and dearness allowance admissible, at the time of retirement and apart from this he shall be entitled for house rent allowance (if they do not possess government accommodation) and city compensatory allowance on the basic pay at the time of retirement and shall also be entitled for pension and dearness relief on pension.

(3) The contract appointment on higher post under rule 8(2), in case of appointment being given to non-government person in exceptional specific cases in rule 5(2) and for personal establishment of Chief Minister/Ministers, in cases of contract appointment of other persons beside the retired employees, the pay scale for the time being in force shall be payable for the period of contract and other incidental benefits may be given with the consent of Finance Department.

13. Applicability of Leave.- Under these rules, the employee appointed on contract shall be entitled for leave in the same manner as a temporary Government Servant.

14. Travelling Allowance and other facilities.-

(1) Person appointed to the post sanctioned as contract post in the departmental setup, shall be eligible for travelling allowance and other facilities.

(2) In the case of contract appointment of retired persons, they shall be eligible for travelling allowance and other benefits as payable to government servant for the concerned post/equivalent post.

(3) If for any contract appointment post, travailing allowance and

other benefits are not prescribed in the rules then the eligibility of travelling allowance and other benefits to the person appointed on such post shall be same as that of the government servant of the same or equivalent post.

15. Other conditions.-

(1) Persons appointed on contract shall be governed by the Madhya Pradesh Civil Services (Conduct) Rules, 1965.

(2) Persons appointed on contract shall not be eligible for any kind of pension, gratuity or death benefit or the period of contract and the annual increment shall not be payable as well.

(3) Confidential Report/PAR (Performance Appraisal Report) of the employee appointed on contract shall be recorded so that his work may be assessed in case he is to be given appointment on contract for the next year.

(4) During the contract appointment of retired government servants, he/they may be transferred to equivalent post in other offices and he/they may also be given additional responsibility in addition to the work of contract post which shall be mandatory for him/them to accept.

(5) Person appointed on contract shall have to deposit minimum of 10 percent of his contract pay in life insurance pension scheme or PPF for social security of his family and he shall intimate this fact to the appointing authority as to which of the scheme he has opted:

Provided that this provision shall not be applicable to retired government servants.

(6) Retired government servant appointed on contract, shall be eligible to retain the government accommodation if he is occupying the government accommodation at the time of retirement and license fee shall be recovered from him as per rule 45-A of Madhya Pradesh Fundamental Rules.

16. Interpretation.- If any question arises relating to the interpretation of these rules, it shall be referred to the General Administration

Department on which decision of the General Administration Department shall be final.

17. **Repeal and savings.**- All the rules and instructions corresponding to these rules which were in force immediately prior to the commencement of these rules, are hereby repealed:

Provided that all contract appointments on the date of coming into force of these rules shall be deemed to have been made under these rules, service condition of previous appointment order shall be applicable as it is for the remaining period of contract.

By order and in the name of the Governor of Madhya Pradesh,
C.B. PADWAR, Dy. Secy.

NOTES OF CASES SECTION

Short Note

****(123)***

Before Mr. Justice Subodh Abhyankar

W.P. No. 19123/2016 (Jabalpur) decided on 6 September, 2017

ASHRAF KHAN ...Petitioner

Vs.

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

***Service Law – Retired Employee – Recovery of Excess Payment – Ground* – Excess amount paid to petitioner (a retired employee) was deducted from his pension payment order – Challenge to – Held – In view of the ratio laid down by Apex Court in case of Jagdev Singh and the undertaking given by petitioner regarding recovery of excess payment made, same may be recovered from his pensionary benefits – Recovery made is proper – Petition dismissed.**

सेवा विधि – सेवानिवृत्त कर्मचारी – अतिरिक्त भुगतान की वसूली – आधार – याची (एक सेवानिवृत्त कर्मचारी) को भुगतान की गई अतिरिक्त राशि की कटौती उसके पेंशन भुगतान आदेश से की गई थी – को चुनौती – अभिनिर्धारित – जगदेव सिंह के प्रकरण में सर्वोच्च न्यायालय द्वारा प्रतिपादित आधार तथा किये गये अतिरिक्त भुगतान की वसूली के संबंध में याची द्वारा दिये गये परिवचन को दृष्टिगत रखते हुए, उक्त की वसूली उसके पेंशनिक लाभों से की जा सकती है – की गई वसूली उचित है – याचिका खारिज।

Cases referred:

2015 (4) SCC 334, W.P. No. 4854/2016 (S) order passed on 20.10.2016, R.P. No. 862/2016 decided on 27.03.2017.

Sachin Pandey, for the petitioner.

Gaurav Pathak, G.A. for the respondents/State.

Short Note

****(124)(DB)***

Before Mr. Justice R.S. Jha & Mr. Justice A.K. Joshi

W.P. No. 4316/2017 (Jabalpur) decided on 1 May, 2017

BRIJESH YADAV (DR.) & ors. ...Petitioners

Vs.

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

(Alongwith W.P. Nos. 4512/2017 & 4526/2017)

Post Graduate Medical Education Regulations, 2000,

***Regulations 9(iv) & 9(vii), M.P. Government Autonomous Medical and Dental Post Graduate Course (Degree/Diploma) Admission Rules, 2017, Rule 2(vii) and Constitution – Article 14 – Definition – Amendment – Constitutional Validity* – In-service Doctors – Reservation and additional/incentive marks for serving in rural and notified areas – Held – Vide amendment government deleted provision for granting benefit to rural services alone and have restricted the same to services rendered in difficult and/or remote areas – Such amended definition is declared *ultra vires*, unconstitutional and is violative of Article 14 of Constitution – Rule 2(vii) of Rules of 2017 quashed – Writ petition allowed to such extent.**

स्नातकोत्तर चिकित्सा शिक्षा विनियम, 2000, विनियमन 9(iv) व 9(vii), म. प्र. शासन स्वशासी चिकित्सा एवं दंत चिकित्सा स्नातकोत्तर पाठ्यक्रम (डिग्री/डिप्लोमा) प्रवेश नियम, 2017, नियम 2(vii), एवं संविधान – अनुच्छेद 14 – परिभाषा – संशोधन – संवैधानिक विधिमान्यता – सेवारत चिकित्सक – ग्रामीण एवं अधिसूचित क्षेत्रों में सेवा प्रदान करने हेतु आरक्षण एवं अतिरिक्त/प्रोत्साहन अंक – अभिनिर्धारित – संशोधन के माध्यम से सरकार ने केवल ग्रामीण सेवाओं का लाभ प्रदान करने के लिए उपबंध को हटा दिया तथा कठिन और/या दूरस्थ क्षेत्रों में प्रदान की गई सेवाओं तक के लिए उक्त को सीमित कर दिया – ऐसी संशोधित परिभाषा अधिकारातीत, असंवैधानिक घोषित की गई तथा संविधान के अनुच्छेद 14 का उल्लंघन है – 2017 के नियमों का नियम 2(vii) अभिखंडित – रिट याचिका उक्त सीमा तक मंजूर।

The order of the Court was delivered by : **R.S. JHA, J.**

Cases referred:

(2016) 9 SCC 749, (2003) 7 SCC 83, C.A. No. 11270-11271/2016 order passed on 25.11.2016 (Supreme Court), (1992) 2 SCC 26, (2012) 8 SCC 203, (2001) 8 SCC 694, (1997) 8 SCC 191, AIR 1958 SC 538, C.W.P. No. 581/2017 & connected matters decided on 12.04.2017 (Himanchal Pradesh High Court), (2000) 1 SCC 44.

Sidharth Gupta and *Ashish Trivedi*, for the petitioners.
Deepak Awasthi, G.A. for the respondent/State.
Indira Nair with *Rajas Pohankar*, for the respondent MCI.
Aditya Sanghi, for the respondent No. 6.

Short Note

**(125)(DB)*

Before Mr. Justice Hemant Gupta, Chief Justice &
Mr. Justice Vijay Kumar Shukla

W.A. No. 326/2017 (Jabalpur) decided on 25 September, 2017

M.P. ELECTRICITY BOARD,
NOW-M.P.P.K.V.V. CO.LTD., JABALPUR & ors. ...Appellants
Vs.
CHANDRABOSH TRIPATHI ...Respondent

Service Law – Compassionate Appointment – Grounds & Criteria – **Held – Application for compassionate appointment has to be considered as per policy prevailing at the time of consideration of the application – Full Bench of this Hon'ble Court has held that compassionate appointment is neither a vested right which can be considered at any time even after the crisis created by death of the earning member is over nor it is a hereditary right which can be bequeathed – Impugned order set aside – Writ Appeal allowed.**

सेवा विधि – अनुकंपा नियुक्ति – आधार व मानदंड – अभिनिर्धारित – आवेदन को विचार में लेते समय विद्यमान नीति के अनुसार अनुकंपा नियुक्ति के लिए आवेदन पर विचार किया जाना चाहिए – इस माननीय न्यायालय की पूर्ण न्यायपीठ ने अभिनिर्धारित किया है कि अनुकंपा नियुक्ति न तो एक निहित अधिकार है जिस पर उपार्जन करने वाले सदस्य की मृत्यु द्वारा उत्पन्न संकट समाप्त होने के पश्चात् भी किसी भी समय विचार किया जा सकता है, न ही आनुवंशिक अधिकार है जिसे वसीयत किया जा सकता है – आक्षेपित आदेश अपास्त – रिट अपील मंजूर।

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

Cases referred:

2010 (3) MPLJ 213 (FB), (2007) 9 SCC 571, (2015) 7 SCC 412, 2003 (1) MPHT 226 (FB).

Anoop Nair, for the appellants.
P.K.S. Sengar, for the respondent.

NOTES OF CASES SECTION

Short Note

**(126)*

Before Mr. Justice S.K. Awasthi

Cr.R: No. 946/2015 (Gwalior) decided on 25 July, 2017

M.P. MADHYA KSHETRA VIDYUT VITRAN CO. LTD. ...Applicant

Vs.

DEEPENDRA BHATE @ DEEPENDRA GHATE ...Non-applicant

Electricity Act (36 of 2003), Sections 138, 151 & 153 and Criminal Procedure Code, 1973 (2 of 1974), Section 251 – Jurisdiction **– Case registered and summons issued against respondent for offence punishable u/S 138 of the Act of 2003 – Case was dropped by Magistrate exercising power u/S 251 Cr.P.C. – Challenge to – Held – Once the summons have been issued to accused, the Special Court constituted u/S 153 of the Act of 2003 does not have jurisdiction to drop legal proceedings by exercising powers u/S 251 Cr.P.C. thereby discharging the accused – Impugned order set aside – Application allowed.**

विद्युत अधिनियम (2003 का 36), धाराएँ 138, 151 व 153 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 251 – अधिकारिता – प्रत्यर्थी के विरूद्ध अधिनियम 2003 की धारा 138 के अंतर्गत दण्डनीय अपराध के लिए प्रकरण पंजीबद्ध किया गया तथा समन जारी किये गये – दण्ड प्रक्रिया संहिता की धारा 251 के अंतर्गत शक्ति का प्रयोग करते हुए मजिस्ट्रेट द्वारा प्रकरण समाप्त किया गया था – को चुनौती – अभिनिर्धारित – एक बार अभियुक्त को समन जारी किये जाने के बाद, 2003 के अधिनियम की धारा 153 के अंतर्गत गठित विशेष न्यायालय के पास अधिकारिता नहीं है कि वह दण्ड प्रक्रिया संहिता की धारा 251 के अंतर्गत शक्तियों के प्रयोग द्वारा अभियुक्त को आरोपमुक्त करते हुए विधिक कार्यवाहियों को समाप्त कर सके – आक्षेपित आदेश अपास्त – आवेदन मंजूर।

Cases referred :

2004 (7) SCC 338, 2012 (5) SCC 424, (2004) 13 SCC 324, 2003 (1) MPLJ 513, 2014 SCC online Del 212.

Vivek Jain, for the applicant.

Sanjay Kumar Mishra, for the non-applicants.

NOTES OF CASES SECTION

Short Note

****(127)(DB)***

Before Mr. Justice S.K. Seth & Smt. Justice Anjuli Palo

W.A. No. 451/2017 (Jabalpur) decided on 27 June, 2017

MUNICIPAL CORPORATION, JABALPUR & anr. ...Appellants

Vs.

STATE OF M.P. & anr. ...Respondents

Service Law – Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 9(2)(a) – Suspension – Charge Sheet – Issuance & Service of – Limitation – **Suspension order of Respondent No. 2 was quashed in writ petition on the ground that charge sheet was issued beyond the period of 45 days – Challenge in appeal – Held – As per records available and the Register of Dispatch produced by appellant, charge sheet was issued on 45th day from date of issuance of suspension order – Apex Court concluded that issuance of charge sheet means its dispatch to government servant and further fact of its service is not a necessary required part – "Issue" of charge sheet does not mean service of the same – Charge sheet timely issued – Impugned order set aside – Appeal allowed.**

सेवा विधि – सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9(2)(ए) – निलंबन – आरोप पत्र – जारी किया जाना व तामील – परिसीमा – प्रत्यर्थी क्र. 2 के निलंबन आदेश को इस आधार पर रिट याचिका में अभिखंडित किया गया कि आरोप पत्र 45 दिनों की अवधि से परे जारी किया गया था – अपील में चुनौती – अभिनिर्धारित – उपलब्ध अभिलेखों तथा अपीलार्थी द्वारा प्रस्तुत जावक पंजी के अनुसार, निलंबन आदेश जारी किये जाने की तिथि से 45 वें दिन पर आरोप पत्र जारी किया गया था – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि आरोप पत्र जारी करने का अर्थ शासकीय सेवक को इसके प्रेषण से है तथा इसकी तामील का आगे का तथ्य, आवश्यक अपेक्षित भाग नहीं है – आरोप पत्र "जारी" किये जाने का अर्थ उक्त की तामील से नहीं है – आरोप–पत्र समय पर जारी किया गया – आक्षेपित आदेश अपास्त – अपील मंजूर।

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

Cases referred:

AIR 1966 SC 1313, (1994) 4 SCC 468, 1993 (3) SCC 196, 1991 (4) SCC 109.

Saurabh Sunder, for the appellants.
A.P. Singh, G.A. for the respondent No. 1/State.
Vipin Yadav, for the respondent No. 2.

Short Note

****(128)***

Before Mr. Justice J.P. Gupta

M.Cr.C. No. 12878/2011 (Jabalpur) decided on 18 April, 2017

NATHTHI BAI (SMT.) ...Applicant

Vs.

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

Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Maintenance – Entitlement – Term "wife" **– Application u/S 125 filed by applicant was dismissed by Courts below – Challenge to – Held – Concurrent findings of Courts below that applicant/wife was divorced by respondent as per the prevailing customs and thereafter wife was remarried to another person – She does not comes within the purview of definition "wife" and is not entitled to receive maintenance u/S 125 Cr.P.C. from respondent No.2/earlier husband.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरणपोषण – हकदारी – शब्द "पत्नी" – आवेदक द्वारा धारा 125 के अंतर्गत प्रस्तुत आवेदन निचले न्यायालयों द्वारा खारिज किया गया था – को चुनौती – अभिनिर्धारित – निचले न्यायालयों के समवर्ती निष्कर्ष हैं कि आवेदिका/पत्नी का प्रचलित रूढ़ियों के अनुसार प्रतिवादी से विवाह विच्छेद हुआ था तथा तत्पश्चात् पत्नी का किसी अन्य व्यक्ति से पुनर्विवाह हुआ था – वह "पत्नी" की परिभाषा की परिधि में नहीं आती तथा प्रत्यर्थी क्र. 2/पूर्व पति से दण्ड प्रक्रिया संहिता की धारा 125 के अंतर्गत भरणपोषण प्राप्त करने की हकदार नहीं है।

Cases referred:

(2005) 9 SCC 407, 2004 (4) MPLJ 455, (2008) 2 JLJ 437, (2002) CRI.L.J. 3418, 2002 CRI.L.J. 1397, 2002 CRI.L.J. 1173, 2000 CRI.L.J. 1498.

K.S. Rajput, for the applicant.
Amod Gupta, P.L. for the non-applicant No. 1/State.
Pankaj R. Soni, for the non-applicant No. 2.

Short Note

****(129)***

Before Mr. Justice S.K. Gangele

C.R. No. 439/2015 (Jabalpur) decided on 7 September, 2017

NIRMALA DEVI (SMT.) & ors. ...Applicants

Vs.

SMT. BHARTI DEVI & ors. ...Non-applicants

Partnership Act, (9 of 1932), Section 69(2) and Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Maintainability of Suit **– Revision against dismissal of application filed by petitioner/defendant under Order 7 Rule 11 CPC – Held – It is pleaded in plaint that agreement is in nature of Partnership deed – It is also admitted that such partnership deed is not registered, thus as per Section 69 of the Act of 1932, suit based on such unregistered partnership deed is not maintainable – Application under order 7 Rule 11 CPC allowed – Suit dismissed – Petition allowed.**

भागीदारी अधिनियम, (1932 का 9), धारा 69(2) एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – वाद की पोषणीयता – याची/प्रतिवादी द्वारा आदेश 7 नियम 11 सि.प्र.सं. के अंतर्गत प्रस्तुत आवेदन की खारिजी के विरूद्ध पुनरीक्षण – अभिनिर्धारित – वादपत्र में यह अभिवाक् किया गया कि करार, भागीदारी विलेख के स्वरूप का है – यह भी स्वीकार किया गया कि उक्त भागीदारी विलेख पंजीकृत नहीं है, अतः 1932 के अधिनियम की धारा 69 के अनुसार, उक्त अपंजीकृत भागीदारी विलेख पर आधारित वाद पोषणीय नहीं है – आदेश 7 नियम 11 सि.प्र.सं. के अंतर्गत आवेदन मंजूर – वाद खारिज – याचिका मंजूर।

Cases referred :

AIR 1977 SC 336, (2003) 1 SCC 557, (2015) 4 SCC 371, 2011 MPILR 2305.

Ashish Shroti and *Sanjay Malviya*, for the applicant.
Avinash Zargar and *Amit Bhurrak*, for the non-applicant No.1 & 3.
B.D. Singh, G.A. for the non-applicant No. 4/State.

Short Note

****(130)***

Before Mr. Justice P.K. Jaiswal

Cr.R. No. 1643/2015 (Indore) decided on 6 April, 2017

RAKESH ...Applicant

Vs.

SUBODH & ors. ...Non-applicants

NOTES OF CASES SECTION

Criminal Procedure Code, 1973 (2 of 1974), Section 227 & 228 – Framing of Charge – Quashing of criminal proceedings – **Held – Framing of charge is not a stage at which final test of guilt is to be applied – Apex Court has held that at the stage of framing of charge, Court is not concerned with proof of allegation rather it has to focus on the material in hand and form an opinion whether there is strong suspicion that accused committed an offence, which if put to trial, could prove his guilt – Power of quashing criminal proceedings particularly at such stage u/S 228 should be exercised very sparingly and with circumspection and that too in rarest of rare cases – In instant case, once the order of this Court was upheld by the Supreme Court, Trial Court acted illegally with material irregularity in discharging respondents – Impugned order set aside – Revision allowed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 व 228 – आरोप विरचित किया जाना – दाण्डिक कार्यवाहियों को अभिखंडित किया जाना – अभिनिर्धारित – आरोप विरचित करना ऐसा प्रक्रम नहीं जहां दोषिता का अंतिम परीक्षण लागू किया जाए – सर्वोच्च न्यायालय ने अभिनिर्धारित किया है कि आरोप विरचित करने के प्रक्रम पर, न्यायालय, अभिकथनों के सबूत पर विचार नहीं करता बल्कि उसे उपलब्ध सामग्री पर ध्यान केन्द्रित करना होता है और राय निर्मित करनी होती है कि क्या प्रबल संदेह है कि अभियुक्त ने अपराध कारित किया, जिसका यदि विचारण किया जाए तो उसकी दोषिता सिद्ध हो सकती है – विशेष रूप से ऐसे प्रक्रम पर धारा 228 के अंतर्गत दाण्डिक कार्यवाहियां अभिखंडित करने की शक्ति का प्रयोग अति संयम से एवं सावधानी से और वह भी विरल से विरलतम प्रकरणों में किया जाना चाहिए – वर्तमान प्रकरण में एक बार उच्चतम न्यायालय द्वारा इस न्यायालय के आदेश की संपुष्टि की गई थी, विचारण न्यायालय ने प्रत्यर्थीगण को आरोपमुक्त करने में तात्विक अनियमितता के साथ अवैध रूप से कार्रवाई की – आक्षेपित आदेश अपास्त – पुनरीक्षण मंजूर।

Cases referred :

AIR 1992 SC 604, AIR 2014 SC 1400, JT 2017 (2) SC 98.

P.K. Saxena with *A.K. Saraswat*, for the applicant.
Ramesh Gangore, for the non-applicants No. 3 & 4.
S.K. Vyas with *G. Chouhan*, for the non-applicant No. 5.
R. Shrivastava, for the non-applicant No. 6.
Swathi Okhale, for the non-applicant No. 7.
Sudhanshu Vyas, P.L. for the non-applicant No. 8/State.
None, for the non-applicants No. 1 & 2, though served.

I.L.R. [2017] M.P., 2299
SUPREME COURT OF INDIA
Before Mr. Justice Ranjan Gogoi & Mr. Justice Navin Sinha
Cr.A. No. 1292/2017 decided on 1 August, 2017

RAJKISHORE PUROHIT ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

A. Penal Code (45 of 1860), Section 302 & 302/34 and Arms Act (54 of 1959), Section 25(1)(a) – Murder – Conviction – Common Intention **– Acquittal of an accused Rajendra by High Court – Appeal against – Held – Conduct of the accused reveals nothing to draw inference that he was taken by surprise when co-accused opened fired the deceased – He immediately escaped from place of occurrence, indicative of his awareness of common intention – Sequence of events shows pre-concerted plan and prior meeting of minds – If common intention is established in the facts and circumstances, no overt act or possession of weapon is required – Order of acquittal passed by High Court is set aside – Order of conviction restored. (Para 12 & 14)**

क. दण्ड संहिता (1860 का 45), धारा 302 व 302/34 एवं आयुध अधिनियम (1959 का 54), धारा 25(1)(ए) – हत्या – दोषसिद्धि – सामान्य आशय – उच्च न्यायालय द्वारा एक अभियुक्त राजेन्द्र की दोषमुक्ति – के विरूद्ध अपील – अभिनिर्धारित – अभियुक्त के आचरण से ऐसा कुछ प्रकट नहीं होता जिससे यह निष्कर्ष निकाला जा सके कि वह आश्चर्यचकित था जब सह–अभियुक्त ने मृतक पर गोली चलाई – वह घटनास्थल से तत्काल भाग निकला, जो उसके सामान्य आशय के ज्ञान को उपदर्शित करता है – घटनाक्रम पूर्व चिंतित योजना एवं पूर्व में मस्तिष्कों के मेल को दर्शाता है – यदि सामान्य आशय तथ्यों एवं परिस्थितियों में स्थापित होता है, कोई प्रत्यक्ष कार्य या आयुध का कब्जा अपेक्षित नहीं – उच्च न्यायालय द्वारा पारित दोषमुक्ति का आदेश अपास्त – दोषसिद्धि का आदेश पुनः स्थापित।

B. Constitution – Article 136 – Discretionary Jurisdiction **– Held – In exercise of discretionary jurisdiction under Article 136, this Court may not interfere with an order of acquittal, reversing a conviction, yet if it finds that High Court has completely erred in appreciation of evidence, has applied wrong principles to negate common intention and has based its conclusions on speculative reasoning beyond the defence of accused himself, justice will demand**

that acquittal is reversed. **(Para 14)**

ख. संविधान – अनुच्छेद 136 – वैवेकिक अधिकारिता – अभिनिर्धारित – अनुच्छेद 136 के अंतर्गत वैवेकिक अधिकारिता के प्रयोग में, यह न्यायालय दोषसिद्धि के आदेश को उलटते हुये, दोषमुक्ति के आदेश में हस्तक्षेप नहीं कर सकता, फिर भी यदि वह यह पाता है कि उच्च न्यायालय ने साक्ष्य के मूल्यांकन में पूर्ण रूप से त्रुटि की है, सामान्य आशय को नकारने हेतु गलत सिद्धांतों का प्रयोग किया है तथा स्वयं अभियुक्तगण के बचाव से परे काल्पनिक तर्क पर उसके निष्कर्ष आधारित हैं, न्याय की मांग होगी कि दोषमुक्ति को उलटा जाये।

C. Penal Code (45 of 1860), Section 34 – Common Intention – Determination **– Held – Existence or non-existence of common intention amongst accused has to be determined cumulatively from their conduct and behaviour in the facts and circumstances of each case – There can be no straight jacket formula – Absence of any overt act of assault, exhortation or possession of weapon cannot be singularly determinative of absence of common intention.** **(Para 10)**

ग. दण्ड संहिता (1860 का 45), धारा 34 – सामान्य आशय – अवधारण – अभिनिर्धारित – अभियुक्तगण के मध्य सामान्य आशय के अस्तित्व या अनस्तित्व का अवधारण संचयी रूप से प्रत्येक प्रकरण के तथ्यों एवं परिस्थितियों में उनके आचरण एवं व्यवहार से किया जाना है – कोई निश्चित सूत्र नहीं हो सकता – हमला करने, प्रेरित करने या आयुध का कब्जा रखने के किसी भी प्रत्यक्ष कार्य की अनुपस्थिति, सामान्य आशय की अनुपस्थिति के एकमात्र रूप से अवधारक नहीं हो सकते।

Cases referred:

(2013) 14 SCC 732, (1976) 3 SCC 779.

JUDGMENT

The Judgment of the Court was delivered by : NAVIN SINHA, J. :- Leave granted.

2. The conviction of respondent no.2, under Section 302/34 IPC, by the Sessions Judge, Sagar, in Sessions Trial No. 369 of 1997, has been reversed by the High Court in appeal, acquitting him. The appellant, brother of the deceased, assails the acquittal.

3. Lokman Khatik, accused no.3, was peeved with the meeting being held for his removal from the post of Mayor. The deceased was the President

of the Congress Sewa Dal, spearheading the campaign. The trial court from the evidence arrived at the finding that all the four accused came together to the place of occurrence in a white ambassador car. Accused no.3 identified the deceased to Jitendra @ Jittu, accused no.2. Thereafter, respondent no.2 accompanied by the latter and accused no.4, Bhupendra, proceeded towards the deceased. Accused no.2 took out a revolver from his waist and fired at the deceased while the other two accused provided cover. All the four accused then left the place of occurrence in the ambassador car. The deceased died on the way to the hospital. The plea of alibi by respondent no.2 was disbelieved.

4. Accused no.2 was convicted under Section 302, IPC to Life imprisonment and rigorous imprisonment for one year under Section 25(1)(a) of the Arms Act. He is stated to have served out his sentence. Respondent no.2 and the other accused were convicted to Life imprisonment under Section 302/34 IPC.

5. The High Court, in the appeal preferred by respondent no.2, acquitted him, on the reasoning that no overt act of assault was attributed to him, neither was he armed, much less gave any exhortation. His mere presence was not sufficient to sustain the conviction, attributing common intention. It was further reasoned that respondent no. 2 may have had no knowledge that accused no.2 was carrying a revolver.

6. The submission on behalf of the appellant was that the High Court has grossly erred in acquitting respondent no.2. There existed sufficient evidence to decipher common intention. Overt act by a co-accused or possession of weapons by him was not necessary to conclude the existence of common intention. There has been inadequate appreciation of evidence to erroneously conclude lack of common intention. A well reasoned order of the Trial Court has erroneously been set aside on a presumptive reasoning based on conjectures and surmises beyond the defence of respondent no.2 himself, that he may have been unaware of the fact that the co-accused was possessed of a revolver. It has resulted in grave miscarriage of justice, warranting interference by this Court.

7. Learned counsel for respondent no. 2 submitted that his mere presence at the place of occurrence along with other co-accused was not sufficient to infer common intention. The fact that they may have come together to the

place of occurrence was also not sufficient. There is no positive evidence that they all left together after the assault in the same car. No overt act had been attributed to him and neither was he possessed of any weapon. The High Court has held that he was not aware of the fact that the co-accused was carrying a revolver. There was inadequate evidence that he had moved forward with co-accused towards the deceased after which the assault took place.

8. We have considered the respective submissions, and the materials on record. The order of acquittal, in the facts and circumstances of the case, is unsustainable, and deserves to be set aside for reasons discussed hereinafter.

9. Respondent no.2 was the nephew of accused no.3. The meeting had been called to protest for removal of accused no.3 from the post of Mayor on allegations of corruption, with the slogan "Lokman Hatao Congress Bachaao". The deceased was the President of the Congress Sewa Dal. Apparently the accused were peeved with the summoning of the meeting. The evidence of PWs 1, 4, 5, 13 and 23 are consistent that the four accused came together and alighted from a white Ambassador Car. Accused no.3 identified the deceased. Respondent no. 2, along with accused nos.2 and 4 moved forward towards the deceased. Accused no.4 and respondent no.2 then exhorted to kill the deceased, at which stage accused no.2 pulled out a revolver and fired at the deceased. In the melee that followed the shooting, the accused persons fled together in the car. The appellant, PW-1 was the own brother of the deceased and PW-5, the brother-in-law. There is no reason why they should be lying and falsely naming another as the assailants, shielding the real accused, especially when they were eye witnesses to the occurrence. Respondent no.2 has not urged false implication, and on the contrary took the defence of alibi, which has been disbelieved by the trial court and affirmed by the High Court. The taking of a false plea is an additional aggravating factor against the accused.

10. Common intention is a state of mind. It is not possible to read a person's mind. There can hardly be direct evidence of common intention. The existence or non-existence of a common intention amongst the accused has to be deciphered cumulatively from their conduct and behavior in the facts and circumstances of each case. Events prior to the occurrence as also after, and during the occurrence, are all relevant to deduce if there existed any common intention. There can be no straight jacket formula. The absence of any overt act of assault, exhortation or possession of weapon cannot be singularly determinative of absence of common intention.

11. Though judicial precedents with regard to common intention stand well entrenched, it will be sufficient to refer *State of Rajasthan vs. Shobha Ram,* (2013) 14 SCC 732, observing as follows :-

> "10. Insofar as common intention is concerned, it is a state of mind of an accused which can be inferred objectively from his conduct displayed in the course of commission of crime and also from prior and subsequent attendant circumstances. As observed in *Hari Ram v. State of U.P.*6 (SCC p. 622, para 21), the existence of direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. Therefore, in order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence before a person can be vicariously convicted for the act of the other."

12. Motive for the assault existed because the accused were aggrieved by the meeting summoned. The assault was planned in a gathering, where escape would have been easy, in the chaos that would follow the assault. The accused persons came together in a car to facilitate a quick get-away. Exhortation was made by respondent no.2, when the accused were at very close quarters to the deceased. The firing was done from a distance of about 6 inches. The respondent no.2 and accused no.4 provided cover at this time. There is nothing in the conduct of respondent no.2 to draw any inference that he was taken by surprise, when the co-accused opened fire. Rather than provide help to the deceased and his relatives, respondent no.2 immediately escaped from the place of occurrence in the chaos that followed, indicative of his awareness of the common intention. The sequence of events, and the manner in which the occurrence took place, manifests a pre-concerted plan and a prior meeting of minds. It was not the case of respondent no.2 that he was taken by surprise and was unaware that the co-accused was carrying a revolver or that they had no intention to kill the deceased. If common intention by meeting of minds is established in the facts and circumstances of the case, there need not be an overt act or possession of weapon required, to establish common intention.

13. In *Ramaswami Ayyangar vs. State of Tamil Nadu,* (1976) 3 SCC 779, explaining the essence and purport of common intention, it was observed as follows :-

> "12.....The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim, or may otherwise facilitate the [commission of crime]. Such a person also commits an 'act' as much as his co-participants actually committing the planned crime."

14. Though this Court, in exercise of discretionary jurisdiction under Article 136 of the Constitution, may not interfere with an order of acquittal, reversing a conviction, yet if it finds that the High Court has completely erred in appreciation of evidence, has applied the wrong principles to negate common intention, and has based its conclusions on speculative reasoning, beyond the defence of the accused himself, justice will demand that the acquittal is reversed. We, therefore, set aside the order of acquittal passed by the High Court and restore the order of conviction of respondent no.2 under Section 302/34 IPC passed by the Sessions Judge. Respondent no.2 has remained in custody only for 3 years, 10 months and 7 days. He is directed to surrender forthwith for serving out the remaining period of his sentence.

15. The appeal is allowed.

Appeal allowed.

I.L.R. [2017] M.P., 2304

SUPREME COURT OF INDIA

Before Mr. Justice Dipak Misra, Mr. Justice Amitava Roy & Mr. Justice A.M. Khanwilkar

Cr.A. No. 1279/2017 decided on 9 August, 2017

VASANT RAO GUHE ...Appellant

Vs.

STATE OF M.P. ...Respondent

A. Prevention of Corruption Act (49 of 1988), Section 13(1)(e) & 13(2) – Disproportionate Assets – Hypothetical

Quantification – Presumptions **– Public servant convicted for possessing disproportionate assets – Held – Prosecution admitted that appellant's agricultural income and pay for certain months were omitted while calculating total income – Courts below indulged in voluntary exercise to quantify/compute the same premised on presumptions – Any adverse inference prejudicial to appellant cannot be drawn when he was not confronted with altered imputation – Appellant subjected to a trial and was convicted for a charge different from one originally framed against him and that too on basis of calculations by applying guess work – Entitled for benefit of doubt – Conviction set aside – Appeal allowed. (Paras 12, 17, 18 & 22)**

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(ई) व 13(2) – अननुपातित आस्तियाँ – काल्पनिक परिमाणन – उपधारणाएँ – लोक सेवक को अननुपातित आस्तियों का कब्जा रखने हेतु दोषसिद्धि किया गया – अभिनिर्धारित – अभियोजन ने स्वीकार किया कि कुल आय की गणना करते समय अपीलार्थी की कृषि आय और कतिपय माह के भुगतान का लोप हुआ था – उपधारणाओं के आधार पर उक्त को परिमाणित/गणना करने हेतु निचले न्यायालय स्वैच्छिक प्रयोग में लिप्त हुये – अपीलार्थी के लिए प्रतिकूल कोई विपरीत निष्कर्ष नहीं निकाला जा सकता जब उसका परिवर्तित अभ्यारोपण से सामना नहीं कराया गया था – अपीलार्थी को विचारण के अधीन किया गया तथा उसे उसके विरूद्ध मूल रूप से विरचित किये गये आरोप से भिन्न किसी अन्य आरोप हेतु दोषसिद्ध किया गया और वह भी अनुमान लगाते हुए गणना के आधार पर – संदेह के लाभ का हकदार – दोषसिद्धि अपास्त – अपील मंजूर।

B. Prevention of Corruption Act (49 of 1988), Section 13(1)(e) & 13(2) – Conviction – Criminal Trial – Grounds and Principle **– Held – To succeed in criminal trial, prosecution has to pitch its case beyond reasonable doubt and lodge it in the realm of "must be true" category and not leaving it in domain of "may be true" – In present case, prosecution failed to prove beyond reasonable doubt the charge of criminal misconduct u/S 13(1)(e) and punishable u/S 13(2) of the Act of 1988. (Para 22)**

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(ई) व 13(2) – दोषसिद्धि – दाण्डिक विचारण – आधार एवं सिद्धांत – अभिनिर्धारित – दाण्डिक विचारण में सफल होने के लिए, अभियोजन को अपना प्रकरण युक्तियुक्त संदेह से परे स्थापित करना होगा तथा "सत्य हो सकता है" के अधिकार क्षेत्र में न छोड़ते हुए "सत्य होना चाहिए" श्रेणी के दायरे में दर्ज करना होगा – वर्तमान

प्रकरण में; अभियोजन 1988 के अधिनियम की धारा 13(1)(ई) के अंतर्गत आपराधिक अवचार तथा धारा 13(2) के अंतर्गत दण्डनीय आरोप को युक्तियुक्त संदेह से परे साबित करने में विफल रहा है।

Case referred:

(2009) 15 SCC 200.

JUDGMENT

The Judgment of the Court was delivered by : **AMITAVA ROY, J. :-** The appellant hereby seeks to overturn the judgment and order dated 09.01.2014 rendered by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No.1573 of 2000 thereby affirming his conviction under Section 13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 1988 (for short, hereinafter to be referred to as the "Act") and sentence to undergo R.I. for two years with fine of Rs.20,000/- with default sentence of R.I. of six months as recorded by the learned Special Judge (Prevention of Corruption Act) in his verdict dated 07.06.2000 rendered in Special Case No.2/1996.

2. We have heard Mr. Harsh Parashar, learned counsel for the appellant and Ms. Sakshi Kakkar, learned counsel for the respondent.

3. The genesis of the prosecution lies in a complaint lodged by one Khuman Singh, resident of Betul Ganj alleging that the appellant, who at the relevant time was holding the office of Sub-Engineer, Irrigation Department, Mahi Project Patelabad, Jhabua, by abusing his post, had acquired assets disproportionate to his known sources of income. FIR No.136 Dated 27.10.1992 was registered by Inspector, S.P. Establishment, Divisional Lokayukt, Office Bhopal and on the completion of the investigation, charge-sheet was laid to the effect that during the check period between 1970 to 1992, after adjusting the income and expenditure of the appellant, he was found to have acquired, by applying corrupt and illegal means while acting as a public servant, assets valued Rs.7,94,033/- which was disproportionate to his known sources of income and had thereby committed an offence under Section 13(1)(e) read with Section 13(2) of the Act.

4. The Trial Court framed charge under the aforementioned sections of law, punishable under Section 19 of the Act to which the appellant pleaded "not guilty" and demanded trial.

5. As the charge would disclose, the appellant during the check period was shown to have earned total income of Rs.1,95,637/- and after accounting for an expenditure of 60% thereof towards household needs, he had a saving of Rs.79,045/-. However, having regard to his bank deposits and his investments in plots and a house that he had built on one of those, he had expended thereby an amount of Rs.9,89,670/- during the said period and thus was possessed of assets to the tune of Rs.7,94,033/- which was disproportionate to his known sources of income.

6. At the trial, the prosecution adduced oral as well as documentary evidence. Its witnesses included amongst others Inspector A.J. Khan (PW6), the investigating officer and Inspector, Roop Singh Solanki (PW2) who did follow up the investigation taking the baton from PW6. As the testimony of these two witnesses is of decisive bearing and demonstrable from the analysis of the evidence as embarked upon by the Courts below, reference thereto is indispensable.

7. A.J. Khan (PW6) stated that after the registration of the First Information Report, he conducted the preliminary investigation and ascertained amongst others, the sources of income of the appellant during the check period and most importantly admitted not to have added his agricultural income and the pay for various periods, before handing over the investigation to PW2.

8. Roop Singh Solanki (PW2) who took over the investigation from PW6 stated that particulars of the income and expenditure for the check period were drawn up by him and were handed over to the Superintendent of Police, Vigilance Commissioner, Bhopal. According to him, the total income of the appellant from pay during the check period was Rs.1,94,365/- which together with the interest on the amount deposited in the bank was Rs.1,95,637/-. According to this witness, if 60% expenditure towards household necessities of the appellant and his family is deducted therefrom, his saving would be of Rs.79,045/-. In that premise, the expenditure of the appellant having been recorded to be Rs.9,89,670/-, the charge of disproportionate asset unrelatable to his known sources of income stood established. This witness in his cross-examination however admitted that from records, the annual agricultural income of the appellant appeared to be Rs.1,25,000/- which for the check period would amount to Rs.27,00,000/-. He conceded further that the appellant's salary for the period October 1970 to June 1974, September 1979 to October 1979 and March 1982 to August 1990 had not been accounted for by the

earlier investigating officer and admitted as well to have not added the same to the income of the appellant. This witness testified as well the agricultural annual income of Rs.10,000/- from village Baghoda which for the check period was quantifiable at Rs.2,22,000/- and thus his total agricultural income over the check period was Rs.29,22,000/-. He admitted as well that this agricultural income and the omitted amount of pay, if added, there would be no disproportionate assets qua the appellant.

9. The Trial Court while assessing the evidence on record with particular reference to the testimony of the aforementioned two witnesses came to a categorical finding that the prosecution version that the appellant had income of Rs.1,95,637/- during the check period was patently incorrect. It referred to documents on record and worked out for itself the pay which the appellant was supposed to earn during the periods omitted by the prosecution and computed the same to be Rs.1,93,208/- and adding the amount so calculated concluded that the appellant's income from pay during the check period was Rs.3,06,335/- which together with interest on the amount deposited in the bank came to be Rs.3,07,652/-. It deducted 60% therefrom towards expenses for the family needs and determined Rs.1,23,061/- to be his savings under that head.

10. Similarly, the Trial Court referred to the documents on record produced by the prosecution with regard to the agricultural lands at Devbhilai and Baghoda villages in the name of the appellant, his father and two brothers which disclosed an annual income of Rs.1,35,000/- including the cost of agriculture etc. Though the Trial Court initially was reluctant to accept this figure in absence of any clarification offered by the appellant albeit the evidence to that effect was produced by the prosecution, it eventually acted on the same and after deducting 60% therefrom towards the expenses/investments was of the view that annually an amount of Rs.54,000/- was available to the appellant, his father and the two brothers as agricultural income. The Trial Court quantified 1/4th of this figure in the share of the appellant and computed it to be Rs.13,500/- per annum which for 22 years i.e. the check period was calculated at Rs.2,97,000/-. According to it, thus at the end of the check period the appellant had at his disposal, from agricultural income and saving from pay Rs.4,20,061/-.

11. The learned Trial Court thereafter adverted to the expenditures incurred by the appellant towards purchase of plots and construction of house. It also

did take account of the deposits in bank. Referring to the sale deeds of the purchase of two plots from Tapti Housing Cooperative Society Limited in Multai in the name of his wife and at Gandhi Nagar Colony, Betul, it recorded that those acquisitions had been made for Rs.7728/- and Rs.18,000/- respectively. It accepted the valuation of the house constructed over the land at Betul at Rs.1,48,918/- and together with the amounts deposited in the bank in various accounts computed the quantum of expenditure during the check period to be Rs.6,35,259/-. Though as the Trial Court's narrative would reveal, that in defence, the appellant had produced documents in connection with his immovable property, those were not taken note of in absence of any clarification in connection therewith. The learned Trial Court was thus of the view, having regard to the difference in the figures representing the income and expenditures, that the charge of acquisition of assets by the appellant disproportionate to his known sources of income as levelled stood established and consequently returned a finding of guilt under Section 13(1)(e) and Section 13(2) of the Act and sentenced him as above.

12. As would be evident from the rendition of the learned Trial Court on the two major heads of income i.e. pay and agricultural earnings, the learned Trial Court not only of its own embarked on an inquiry to ascertain and compute the figures, it wholly resorted to inferences in calculating the pay for the periods omitted by the prosecution as well as in fixing 60% expenditure from pay towards household needs. Its assessment of agricultural income of the appellant to say the least is also wholly presumptive in absence of any basis whatsoever in support thereof. This is noticeably in the face of the admission of the prosecution that while levelling the charge against the appellant of acquisition of assets disproportionate to his known sources of income, it had not accounted for his income from pay vis-à-vis the periods omitted as well as from agricultural earnings. The figures ultimately arrived at by the Trial Court are thus patently different from those mentioned in the charge framed against the appellant and on which he was put on trial. In other words, the appellant was convicted by the Trial Court on a charge different from the one framed against him and that too on the basis of calculations made by it by applying inferences and guess works.

13. The High Court in turn, while noticing the aspect that the prosecution while laying the charge-sheet had not accounted for the income of the appellant by way of pay for the aforementioned periods as well as receipts from

agricultural lands, reduced the household expenditure from 60% to 50% thereby generating for the appellant, savings of Rs.1,53,826/-. Qua the agricultural income as well, the cost of production and other investments were scaled down to 50% but agreed with the Trial Court that the agricultural lands being the joint family property of the appellant, his father and two brothers, he was entitled to only 1/4th share from the income therefrom at the rate of Rs.16,875/- which was worked out to be Rs.3,71,250/- for the check period. The High Court thus computed the savings from the salary and the agricultural earnings to be Rs.5,25,076/-. It endorsed the price of the plots of land as accepted by the Trial Court but fixed the value of the construction of the house at Rs.1,63,660.44/-. It then proceeded to decide on the charge by accepting the total income of the appellant to be Rs.5,25,076/- and the expenditure as Rs.6,11,121/-. The other segments of the expenditures, as accepted by the Trial Court, were affirmed by it. Based on this computation, the High Court having found the appellant to be in possession of Rs.86,045/- which was in excess of 10% of his income from known sources i.e. Rs.5,25,076/- affirmed his conviction and sentence as awarded by the learned Trial Court. It however dismissed the appeal of the State seeking forfeiture of this amount which the Trial Court too had declined.

14. In essence, thus the High Court fell in error in the lines similar to that of the Trial Court, the only variation in approach being reduction in the percentage of expenditure in household exigencies and investments in agricultural yields. The vitiating infirmity of speculative assumptions in favour of the prosecution and against the appellant therefore afflicted its eventual determination as well.

15. The learned counsel for the appellant has insistently impeached his conviction and sentence contending that the prosecution had utterly failed to adhere to and prove the charge levelled against him and thus the impugned judgments are liable to be set aside, lest there would be travesty of justice. According to the learned counsel, not only the Courts below have grossly erred, in absence of any admissible basis, to calculate the pay of the appellant for the periods omitted as well as his agricultural income, the unfounded assumption of 60/50% expenditure towards household needs and field investments have rendered the findings on his income from the known sources as disclosed by the prosecution patently unsustainable in law and on facts. This is more so as the relevant witnesses of the prosecution have conceded

that the income of the appellant from the pay for the periods excluded as well as agricultural gains, if included, would render the charge of disproportionate assets non est, he urged. As on the basis of the materials on record, the prosecution had failed to prove/establish that the appellant during the check period was in possession of pecuniary resources or property disproportionate to his known sources of income, he in law was not called upon to offer any explanation therefor and on that premise as well, the adverse inference drawn against him on that count is indefensible.

16. Per contra, the learned counsel for the respondent/State has urged that the prosecution having proved the charge beyond all reasonable doubt as has been endorsed by the concurrent findings of the Courts below, no interference with the conviction and sentence is warranted.

17. The materials on record and the rival assertions have received our due attention. The accusations on which the charge under Section 13(1)(e) read with Section 13(2) of the Act were framed against the appellant have been set out hereinabove. Admittedly, having regard to the ultimate figures as calculated by the Courts below, the charge has undergone a metamorphosis. This assumes immense significance in view of the fact that no fresh charge had been framed on the allegations for which the appellant was eventually convicted and sentenced. Any adverse inference prejudicial to the appellant was thus not available in law, he not having been confronted with the altered imputations. To reiterate, the charge for which the appellant finally has been convicted wears a new complexion different from the one with which he had been arraigned at the initiation of the trial. The appellant thus for all practical purposes was subjected to a trial involving fleeting frames of accusations of which he was denied prior notice. This is clearly opposed to the fundamental precepts of a criminal prosecution.

18. Apart therefrom, both the Courts below indulged in voluntary exercises to quantify the pay of the appellant for the periods excluded by the prosecution as well as his agricultural income and that too premised on presumptions with regard to his possible expenditures/investments and his share in the agricultural receipts, having regard to the nature of the charge cast on the appellant and the inflexible burden on the prosecution to unfailingly prove all the ingredients constituting that same, there could have been no room whatsoever of any inference or speculation by the Courts below. A person cannot be subjected to a criminal prosecution either for a charge which is amorphous and transitory

and further on evidence that is conjectural or hypothetical. The appellant in the determinations before the Courts below has been subjected to a trial in which both the charges and evidence on aspects with vital bearing thereon lacked certitude, precision and unambiguity.

19. Section 13(1)(e) of the Act deserves extraction at this juncture:

> **"13. Criminal misconduct by a public servant**
>
> –(1) A public servant is said to commit the offence of criminal misconduct, –
>
> (a).....
>
> (b).....
>
> (c).....
>
> (d).....
>
> (e) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.
>
> Explanation. – For the purposes of this section, "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant."

20. As ordained by the above statutory text, a public servant charged of criminal misconduct thereunder has to be proved by the prosecution to be in possession of pecuniary resources or property disproportionate to his known sources of income, at any time during the period of his office. Such possession of pecuniary resources or property disproportionate to his known sources of income may be of his or anyone on his behalf as the case may be. Further, he would be held to be guilty of such offence of criminal misconduct, if he cannot satisfactorily account such disproportionate pecuniary resources or property. The explanation to Section 13(1)(e) elucidates the words "known sources of income" to mean income received from any lawful source and that such receipt

has been intimated in accordance with the provisions of law, rules, orders for the time being applicable to a public servant.

21. From the design and purport of clause (e) of sub-clause (1) to Section 13, it is apparent that the primary burden to bring home the charge of criminal misconduct thereunder would be indubitably on the prosecution to establish beyond reasonable doubt that the public servant either himself or through anyone else had at any time during the period of his office been in possession of pecuniary resources or property disproportionate to his known sources of income and it is only on the discharge of such burden by the prosecution, if he fails to satisfactorily account for the same, he would be in law held guilty of such offence. In other words, in case the prosecution fails to prove that the public servant either by himself or through anyone else had at any time during the period of his office been in possession of pecuniary resources or property disproportionate to his known sources of income, he would not be required in law to offer any explanation to satisfactorily account therefor. A public servant facing such charge, cannot be comprehended to furnish any explanation in absence of the proof of the allegation of being in possession by himself or through someone else, pecuniary resources or property disproportionate to his known sources of income. As has been held by this Court amongst others in *State of Maharashtra Vs. Dnyaneshwar Laxman Rao Wankhede*[1], even in a case when the burden is on the accused, the prosecution must first prove the foundational facts. Incidentally, this decision was rendered in a case involving a charge under Sections 7, 13 and 20 of the Act.

22. In view of the materials on record and the state of law as above, we are thus of the considered opinion that the prosecution has failed to prove beyond all reasonable doubt the charge of criminal misconduct under Section 13(1)(e) of the Act and punishable under Section 13(2) thereof against the appellant. He is thus entitled to the benefit of doubt. The prosecution to succeed in a criminal trial has to pitch its case beyond all reasonable doubt and lodge it in the realm of "must be true" category and not rest contended by leaving it in the domain of "may be true". We are thus left unpersuaded by the charge laid by the prosecution and the adjudications undertaken by the Courts below. The conviction and sentence, thus is set aside. The appeal is allowed.

Appeal allowed.

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1. (2009) 15 SCC 200

I.L.R. [2017] M.P., 2314
FULL BENCH
Before Mr. Justice Hemant Gupta, Chief Justice,
Mr. Justice C.V. Sirpurkar & Mr. Justice Vijay Kumar Shukla
W.A. No. 581/2017 (Jabalpur) order passed on 4 September, 2017

NITIN PATHAK ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

A. Constitution – Article 226 – Recruitment Examination – Answer Key – Judicial Review – **Held – In exercise of judicial review, Court should not refer the matter to Court appointed expert as Courts have a very limited role particularly when no *malafides* have been alleged against the experts constituted to finalize answer key – It would normally be prudent, wholesome and safe for Courts to leave the decisions to the academicians and experts. (Para 31)**

क. संविधान – अनुच्छेद 226 – भर्ती परीक्षा – उत्तर कुंजी – न्यायिक पुनर्विलोकन – अभिनिर्धारित – न्यायिक पुनर्विलोकन के प्रयोग में, न्यायालय को मामला, न्यायालय द्वारा नियुक्त विशेषज्ञ को निर्दिष्ट नहीं करना चाहिए क्योंकि न्यायालय की बहुत ही सीमित भूमिका होती है विशिष्ट रूप से तब जब उत्तर कुंजी को अंतिम रूप देने के लिए गठित विशेषज्ञों के विरूद्ध असद्भावना के कोई अभिकथन नहीं किये गये है – शिक्षाविदों और विशेषज्ञों पर विनिश्चयों को छोड़ना, सामान्य रूप से न्यायालय के लिए प्रज्ञायुक्त, लाभप्रद एवं सुरक्षित होगा।

B. Constitution – Article 226 – Expert Opinion – Judicial Review – Jurisdiction – **Held – This Court should not act as a Court of Appeal in matter of opinion of experts in academic matters – Power of judicial review is concerned not with the decision but with decision making process – Court should not under the guise of preventing abuse of power be itself guilty of usurping power. (Para 32)**

ख. संविधान – अनुच्छेद 226 – विशेषज्ञ की राय – न्यायिक पुनर्विलोकन – अधिकारिता – अभिनिर्धारित – इस न्यायालय को शैक्षणिक मामलों में विशेषज्ञों की राय के मामले में अपीली न्यायालय के रूप में कार्य नहीं करना चाहिए – न्यायिक पुनर्विलोकन की शक्ति विनिश्चय से संबंधित नहीं बल्कि विनिश्चय करने की प्रक्रिया से संबंधित है – न्यायालय को शक्ति के दुरूपयोग को रोकने की आड़ में स्वयं शक्ति हड़पने का दोषी नहीं होना चाहिए।

Cases referred:

2014 (3) MPLJ 84, (1983) 4 SCC 309, (2007) 12 SCC 210, (2006) 12 SCC 753, W.P. No. 1506/2012 (S) decided on 07.12.2012, (2001) 3 SCC 328, (2010) 6 SCC 759, 2003 (3) MPLJ 368, 2000 MPHT 95, 2004 (3) Karnataka Law Journal 218, L.P.A. No. 1235/2016 decided on 04.10.2016 (Patna High Court)(DB), 2016 SCC Online Pat 5800, (2008) 1 SCC 683, (1984) 4 SCC 27, (2004) 6 SCC 714, (2014) 14 SCC 523, (2007) 8 SCC 242, 2012 (4) MPLJ 388, (1994) 6 SCC 651, (2010) 8 SCC 372 : (2010) 2 SCC (L&S) 640, (2013) 10 SCC 519.

Prashant Sharma and *Navnidhi Paarharya*, for the appellant.
Samdarshi Tiwari, Addl. A.G. for the respondents No. 1 and 2/State.
Manas Verma, for the respondent No. 3.

JUDGMENT

The Judgment of the Court was delivered by : **HEMANT GUPTA, C.J. :-** The matter has been placed before this Bench in terms of an order passed by a Division Bench of this Court on 29.06.2017 for opinion of the Larger Bench on the following questions:-

> "(1) Whether this Court in exercise of power of judicial review can refer the matter to a Court chosen Expert?
>
> (2) Whether in exercise of power of judicial review, this Court can act as Court of appeal to take a different view than what has been finalized as the model answer key by the Examining Body?
>
> (3) Any other question, which the Larger Bench may think it appropriate at the time of hearing on the basis of assistance of the learned counsel for the parties."

2. The said questions arises out of the fact that a Division Bench of this Court in a judgment reported as 2014 (3) MPLJ 84 *(Chanchal Modi v. State of M.P. And another)* substituted the Model Answer Key finalized by the Public Service Commission on the basis of opinion of a Former Chief Justice of this Court after the matter was referred for his opinion.

3. A perusal of the judgment of this Court in *Chanchal Modi's* case shows that the Public Service Commission sought opinion of a Former Judge

of this Court, who did not find any error in the Model Answer Key. But this Court sought an opinion from a Former Judge of the Supreme Court for the reason that the opinion of the former Judge is not supported by reasons. However, the Hon'ble Judge refused to give opinion. Thereafter, this Court referred the matter to a Former Chief Justice. The former Chief Justice opined that the Model Answer Key finalized by the Public Service Commission on certain questions is not correct. The Court directed to correct answer key of some questions and directed revaluation of the answer sheets. It is in this background, the Court has held as under:-

> "17. These two judgments are somewhat direct on the point in regard to the power of the Court to interfere in correctness of the answers provided by the expert body. In earlier case, quoted above, which is a decision of three Judge bench, the Court has specifically answered that if the answers provided by the examiner or expert body are incorrect to the extent that no reasonable body of men well versed in the particular subject would regard as correct, then the Court can interfere. In our opinion, the principle of law laid down by the Hon'ble Supreme Court in *Kanpur University* (supra) *[Kanpur University vs. Samir Gupta* (AIR 1983 SC 1230)] is correct and has to be followed in the present case.
>
> 18. xxx xxx xxx
>
> 19. It is further well settled principle of law that an opinion of the expert is not beyond the peril of judicial review and it would certainly not be so when the statutory authority transgresses its jurisdiction. It is held by the Hon'ble Supreme Court in the case of *ICFAI vs. Council of the Institute of Chartered Accountants of India,* reported in (2007) 12 SCC 210 and in the case of *Vasu Dev Singh vs. Union of India,* reported in 2006 (12) SCC 753."

4. It is in this background, the Division Bench was not in agreement with the view expressed by the Bench in *Chanchal Modi's* case and therefore the matter has been referred to the Larger Bench.

5. The challenge in the writ petition is to the result of the post of Taxation Assistant for which an advertisement was issued in the month of March, 2010

for filling up of 275 posts, as up-dated, by Madhya Pradesh Public Service Commission (for short "the Commission"). As per the Scheme of examination, there were two question papers of objective type; one in the subject of General Studies of 150 marks and other of Commerce of 300 marks. The examination was conducted on 25.07.2010. The appellant was successful in the examination and was called for viva-voce test on 18.01.2011.

6. Since the appellant was not appointed in terms of the final result declared, he sought information in respect of his attempt in the examination, which was accepted and total marks in both the written papers were supplied.

7. The appellant filed a writ petition before this Court. In terms of direction issued, the answer-sheets of the appellant and model answer sheets have been provided on 06.06.2012. The grievance of the appellant is that after cross-checking and comparing the answers attempted by the appellants with authentic books and literature in this regard, he found that some of the Answer Keys have been wrongly set in the model answer sheet and thus he has sustained loss of 18 marks. He has disputed the answer key of eight questions in the subject of General Studies and 5 in Commerce.

8. The stand of the Public Service Commission in the reply is that originally Model Answer Keys are prepared by setters and Committee of Experts in all subjects. The model answers have been examined and have been found to be correct except question No.99 in the subject of Commerce Second Paper and Question No.49 in General Studies. The answer-sheets have been examined as per corrected model answers after verification from a Committee of Experts. It was stated that the report of Committee will be placed for perusal of the Court at the time of final hearing. It is also pointed out that there was no negative marking; therefore, final result is not affected.

9. The writ petition filed by the appellant was dismissed on 15.07.2016 wherein, the appellant relied upon a judgment of this Court in *Chanchal Modi's* case. The writ petition was dismissed *inter alia* on the ground the persons appointed in pursuance of the selection process have not been impleaded as party as vitally affected person and secondly that there is no report of expert that the model answers were palpably wrong and that the life of the panel has exhausted much before the filing of the petition therefore upsetting settled position will not be in the interest of justice.

10. Learned counsel for the appellant relies upon an interim order passed

in W.A. No.439/2012 in *Chanchal Modi's* case on 24.01.2013. The Division Bench remitted the matter to a Former Judge of Supreme Court holding that if answers finalized by the Public Service Commission is *per se* illegal, then this Court has jurisdiction to intervene in the matter as laid down by the Hon'ble Supreme Court in *Kanpur University, Through Vice-Chancellor and Others v. Samir Gupta and Others* (1983) 4 SCC 309. It is thus contended that similar direction is required to be issued in the present appeal as well.

11. It is contended that the appellant is seeking intervention of this Court for finalization of Model Answer Key by an Expert or Committee of Experts so that a candidate who has answered the questions correctly is not deprived of the selection. Reliance is placed upon *Samir Gupta's* case wherein, while examining the multiple choice questions, the Court held as under:-

> "16. Shri Kacker, who appears on behalf of the University, contended that no challenge should be allowed to be made to the correctness of a key answer unless, on the face of it, it is wrong. We agree that the key-answer should be assumed to be correct unless it is proved to be wrong and that it should not be held to be wrong by an inferential process of reasoning or by a process of rationalisation. It must be clearly demonstrated to be wrong, that is to say, it must be such as no reasonable body of men well-versed in the particular subject would regard as correct. The contention of the University is falsified in this case by a large number of acknowledged text-books, which are commonly read by students in U.P. Those text-books leave no room for doubt that the answer given by the students is correct and the key answer is incorrect.
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> 17. xxx xxx xxx
>
> 18: If the State Government wants to avoid a recurrence of such lapses, it should compile under its own auspices a text-book which should be prescribed for students desirous of appearing for the combined Pre-Medical Test. Education has more than its fair share of politics, which is the bane of our Universities. Numerous problems are bound to arise in the compilation of such a text-book for, various applicants will come forward for doing the job and forces and counter-forces

will wage a battle on the question as to who should be commissioned to do the work. If the State can succeed in overcoming those difficulties, the argument will not be open to the students that the answer contained in the text-book which is prescribed for the test is not the correct answer. Secondly, a *system should be devised by the State Government for moderating the key answers furnished by the paper setters.* Thirdly, if English questions have to be translated into Hindi, it is not enough to appoint an expert in the Hindi language as a translator. The translator must know the meaning of the scientific terminology and the art of translation. Fourthly, in a system of 'Multiple Choice Objective-type test', care must be taken to see that questions having an ambiguous import are not set in the papers. That kind of system of examination involves merely the tick-marking of the correct answer. It leaves no scope for reasoning or argument. The answer is 'yes' or 'no'. That is why the questions have to be clear and unequivocal. *Lastly, if the attention of the University is drawn to any defect in a key answer or any ambiguity in a question set in the examination, prompt and timely decision must be taken by the University to declare that the suspect question will be excluded from the paper and no marks assigned to it."*

(Emphasis supplied)

12. It is argued that in view of the aforesaid judgment, in exercise of power of judicial review, this Court should refer the matter to the Committee of Experts to examine the model answer key finalized by the Public Services Commission as some of the answers are palpably wrong. It is contended that the appellant was given time to submit objections to the model answer key finalized by the Commission but such objections could not be supported by any reason or document and therefore an appropriate opportunity of hearing should have been granted to the Objectors to explain that the model answer is not correct. It is also argued that in terms of Section 45 of the Evidence Act, the opinion of Experts on a question of science and art is relevant, therefore, the opinion of Expert is required to determine the correctness of the answer key finalized by the Commission. It is also argued that keeping in view the provisions of Order 26 Rule 10A of Code of Civil Procedure, the

Court should refer the matter for scientific investigation as such investigations in the matter of correctness of answer key cannot be conveniently conducted by the Court. The appellant relied upon the judgments reported as (2007) 12 SCC 210 *(Institute of Chartered Financial Analysis of India and others v. Council of the Institute of Chartered Accountants of India and others)*; and, (2006) 12 SCC 753 *(Vasu Dev Singh and Others v. Union of India and Others)* in support of the contention. The reliance has also been placed be upon a Single Bench judgment of this Court in *Rekha Sachdev vs. State of Madhya Pradesh and Others* passed in W.P.No.1506/2012(S) on 07.12.2012 wherein this Court has directed re-tabulation of entire result of the preliminary examination as there were wrong questions and marks have been awarded on the basis of wrong answers to the candidates. The selection in the said case was of M.P. Civil Services Commission 2010.

13. On the other hand, learned counsel for the State refers to a judgment (2001) 3 SCC 328 *(Buddhi Nath Chaudhary and others v. Abahi Kumar and others);* (2010) 6 SCC 759 *(H.P. Public Service Commission v. Mukesh Thakur);* 2003 (3) MPLJ 368 *(Neha Indurkhya v. M.P. Board of Secondary Education, Bhopal)"*; (2000 MPHT 95) *Pranshu Indurkhya vs. State of MP and others;* Karnataka High Court Judgment reported as 2004 (3) Karnataka Law journal 218 *(Dr. Praveen Kumar I. Kusubi Vs. Rajiv Gandhi University of Health Sciences and Others)*; and, a judgment of Division Bench of Patna High Court in L.P.A. No.1235/2016 decided on 4th October, 2016 reported in 2016 SCC Online Pat 5800 *(Ashutosh Kumar Jha and others vs. The of Bihar & Others)* in support of the plea that the answer key finalized by the experts should not be interfered with in exercise of power of judicial review as the opinion of the experts has to be respected and this Court in exercise of power of judicial review under Article 226 of the Constitution of India cannot substitute the opinion of Experts either by itself or seeking an opinion of a Court appointed Expert. It is contended that neither Court has expertise or the resource to choose experts of the subject and to seek an opinion when the Commission, a specialized examining body having a pool of experts in different subjects, is competent to verify the correctness of Model Answer Keys. In the present case, the Model Answer Key was examined by Committee of Experts and such Committee of Experts has found two questions to be incorrect; one in General Studies and one in Commerce. Therefore, in exercise of power of judicial review this Court is not called upon to appoint another expert to examine the Model Answer Key finalized by the

Commission. In addition thereto, the reliance is placed upon Supreme Court judgment report as (2008) 1 SCC 683 *(Divisional Manager, Aravali Golf Club and Another v. Chander Hass and Another),* wherein the scope of interference in exercise of writ jurisdiction has been delineated.

14. We have heard learned counsel for the parties.

15. Learned counsel for the appellant could not refer to any judgment of the Hon'ble Supreme Court wherein the Court has interfered with the model answer key on the basis of opinion of a Court appointed Expert. However, it is argued that in terms of Section 45 of the Evidence Act and the provisions of Order 26 Rule 10A of CPC and also in exercise of inherent writ jurisdiction of this court, to do complete justice, this Court has jurisdiction to appoint an Expert and direct the Commission to re-tabulate result on the basis of opinion of such Expert. As mentioned above, the appellant derives support in *Samir Gupta's* case.

16. The reliance of the Appellant is upon the Judgment in *Institute of Chartered Financial Analysts of India case* (Supra), wherein the court held as under:-

> "35. Interpretation of law is the job of the superior court. An opinion of an expert is not beyond the pale of judicial review. It would certainly not be so when the statutory authority transgresses its jurisdiction. A decision taken in excess of jurisdiction would render the same a nullity. (**See:** *Vasu Dev Singh v. Union of India* – (2006) 12 SCC 753)

17. In *Buddhi Nath Chaudhary's* case (supra), the appointment as Motor Vehicle Inspector conducted by Bihar Public Service Commission was subject matter of challenge before the Patna High Court. The High Court directed the matter to be considered by the Transport Commissioner. The Supreme Court held that if the selection of the candidates was improper, the same should have been set aside with appropriate directions to redo the process of selection, but the Transport Commissioner cannot be entrusted with the process of examining the qualification of the candidates. It was held as under:-

> "5. We fail to understand as to how the matter of selection and appointment to a post could have been entrusted to the Transport Commissioner when the Commission had been

specifically entrusted with such a job and such Commission, which is an autonomous authority having a constitutional status, has selected the candidates whose appointments were in challenge. If the selection of these candidates was improper the same should have been set aside with appropriate directions to redo the process of selection or at best, the High Court could have directed the Government, which is the appointing authority, to take appropriate steps in the matter. However, in the facts and circumstances of this case, we need not dilate on this aspect nor do we need to examine various elaborate contentions addressed by either side. Suffice to say that all the selected candidates, who are in employment, except one, possess necessary qualification and in regard to that one excepted candidate, it cannot be disputed that he possesses equivalent qualification. Thus the dispute narrows down to one aspect, that is, the selected candidates may not possess necessary experience which is now required to be examined by the Transport Commissioner."

18. In *Mukesh Thakur's* case, one of the question examined was whether it is permissible for the Court to take upon itself the task to examine discrepancies and inconsistency in question paper and evaluation thereof assigned to examiner – selection board. The Supreme Court held that the Court cannot take upon itself the task of statutory authority. It was held as under:-

"20. In view of the above, it was not permissible for the High Court to examine the question paper and answer sheets itself, particularly, when the Commission had assessed the inter se merit of the candidates. If there was a discrepancy in framing the question or evaluation of the answer, it could be for all the candidates appearing for the examination and not for respondent no.1 only. It is a matter of chance that the High Court was examining the answer sheets relating to law. Had it been other subjects like physics, chemistry and mathematics, we are unable to understand as to whether such a course could have been adopted by the High Court. "

19. The Court also held that in the absence of any provisions under the

Statute or statutory Rules and Regulations, the Court should not generally direct re-evaluation. Reference was made to (1984) 4 SCC 27 *(Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth)*; and, (2004) 6 SCC 714 *(Pramod Kumar Srivastava v. Bihar Public Service Commission)* and other judgments.

20. In a judgment reported as (2014) 14 SCC 523 *(Central Board of Secondary Education through Secretary, All India Pre-Medical/Pre-Dental Entrance Examination and others v. Khushboo Shrivastava and others)*, the Supreme Court held that the High Court in exercise of power under Article 226 of the Constitution could not have substituted its own views of the answers of the candidates for that of the examiners and thus High Court has exceeded its power of judicial review under Article 226 of the Constitution. The Court held as under:-

> "11. In our considered opinion, neither the learned Single Judge nor the Division Bench of the High Court could have substituted his/its own viwes for that of the examiners and awarded two additional marks to Respondent 1 for the two answers in exercise of powers of judicial review under Article 226 of the Constitution as these are purely academic matters. This Court in *Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth* (1984) 4 SCC 27) has observed: (SCC pp. 56-57, para 29)
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> > "29. .....As has been repeatedly pointed out by this Court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grassroots problems involved in the working of the system and unmindful of the

> consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded."

21. In another judgment reported as (2007) 8 SCC 242 *(Secy. W.B. Council of Higher Secondary Education v. Ayan Das and others)* considering the Samir Gupta's case it was found that revaluation is a rarity and can be done only in exceptional cases. The Court held as under:-

> "11. Same would be a rarity and it can only be done in exceptional cases. The principles set out in *Maharashtra Board* case [(1984) 4 SCC 27] has been followed subsequently in *Pramod Kumar Srivastava v. Chairman, Bihar Public Service Commission* [(2004) 6 SCC 714], *Board of Secondary Education v. Pravas Ranjan Panda* [(2004) 13 SCC 383] and *President, Board of Secondary Education v. D. Suvankar* [(2007) 1 SCC 603].
>
> 12. In view of the settled position in law, the orders of the learned Single Judge and the Division Bench cannot be sustained and stand quashed."

22. The Division Bench of this Court in a case reported in 2012 (4) MPLJ 388 *(Radika d/o Vinay Kumar Dubey and others v. Professional Examination Education Board, Bhopal and another)* followed the earlier judgment of Division Bench reported as 2003 (3) MPLJ 368 *(Neha Indurkhya v. M.P. Board of Secondary Education, Bhopal)* that when an Expert body has already examined the questions, it is not open for the Court to interfere into the matter. The Court held as under :-

> "12. Thus, in our considered view, when an expert body has already examined the questions, it is not open for the Courts to interfere into the matter. A Division Bench of this Court at Jabalpur in the case of Ankit Tiwari vs. State of M.P. and another (supra) has already dealt with the matter and has reached to the conclusion that in view of the law laid down by the Supreme Court in the case of Secretary, All India Pre-Medical/Pre-Dental Examination, C.B.S.E. and others vs. Khushboo Shrivastava and others, Civil Appeal No. 7024 of 2011 decided on 17-8-2011 no interference is needed in the

matter. We find no ground to take a different view. It is now well settled that the Court should not interfere in matters involving academic expertise. It would not be right for the Court to sit in judgment over the decision of the University relating to the academic question because it is not a matter on which the Court possesses any expertise. It is wise and safe for the Courts to leave the decision of academic matters to experts who are more familiar with the problems they face than the Courts generally are. See – Rajendra Prasad Mathur vs. Karnataka University and another, 1986 (suppl) SCC 740. The University of Mysore vs. C.D. Govinda, AIR 1965 SC 491, Tariq Islam vs. Aligarh Muslim University, 2001(8) SCC 546."

23. The Division Bench of Patna High Court in *Ashutosh Kumar Jha's* case held that it is not permissible for the High Court in exercise of powers of judicial review to take upon itself a task of constitutional/statutory bodies. The appointment of an Expert is for aid of the Court and therefore, the question whether the High Court reexamines a question itself or through an Expert, it is impermissible for the High Court to take upon the task of a Commission. The Court held as under:-

"30. Mr. Lalit Kishore, learned Senior Counsel, appears to be right in his submission while placing his reliance on the Supreme Court's decision, in *Mukesh Thakur* (supra), in order to make out a case that this Court, in exercise of power of judicial review under Article 226 of the Constitution of India, may not got into the correctness or otherwise of the wisdom of the *Experts Body,* which has been accepted by the Commission. In our considered view, it is not permissible for the High Court, in exercise of power of judicial review under Article 226 of the Constitution of India, to take upon itself the task of the constitutional/statutory bodies."

The Court concluded as under:

"43. In the background of aforementioned discussions, we conclude as follows:

(i) The appellants have failed to plead and make out a

case that the action of the respondent-Commission of deletion of certain questions, which, according to them, were wrongly deleted and *Model Key Answers,* which, according to appellants, were incorrectly suggested by the *Expert Body*, in any manner, prejudiced their chance of being selected inasmuch as they have maintained silence with respect to their own response to such questions in the examination hall or at the time of availing opportunity of raising objections invited by the Commission after the *preliminary test* was held.

(ii) xx xx xx

(iii) xx xx xx

(iv) In view of Supreme Court's decision, in *Mukesh Thakur* (supra) and the decision of this Court, in *Ravindra Kumar Singh* (supra), we are of the considered view that it is not permissible for this Court to take upon itself the task of examiner/Selection Board and examine discrepancies and inconsistencies in the question papers and evaluation thereof. The said decision of the Supreme Court, in *Mukesh Thakur* (supra), went unnoticed by the Division Bench of this Court, in *Kumod Kumar* (supra), relied upon on behalf of the appellants."

24. A Single Bench of Karnataka High Court in a judgment in the case of *Dr. Praveen Kumar I. Kusubi* (supra) examined the scope of interference in the answer-key finalized by the University. It was held that in academic matter the University's word is the last word. The Court has neither the necessary expertise nor infrastructure to go into the correctness of such decision. It was held as under in paragraph 20:-

"20. As long as the procedure adopted in evaluation of these answer scripts are not arbitrary, reasonable, consistent, then the system cannot be found fault with. As long as all the students who took the examination are treated equally, then they cannot have any grievance whatsoever. It is settled law that in academic matter, the University's word is the last word. Court neither has the necessary expertise nor infrastructure to go into the correctness of such decision. This Court cannot sit in judgment

over those findings and examine the material on record and arrive at its own conclusion as a Court of appeal. It is also not possible in such circumstances to go on appointing the committees after committees to go into the correctness of the decision of the committee. There won't be any end to this exercise. Therefore, a key answer should be assumed to be correct unless it is proved to be wrong. It should not be held to be wrong by an inferential process of reasoning or by a process of rationalization. It must be clearly demonstrated to be wrong, that is to say, it must be such as no reasonable body of men well-versed in the particular subject would regard as correct. If it is a case of doubt, unquestionably key answer is to be preferred. Only if it is beyond the realm of doubt, possibly judicial review is permissible."

25. The argument of learned counsel for the appellant that in view of Section 45 of the Evidence Act and on the basis of principles of Order 26 Rule 10A of CPC, the Court is enjoined to seek opinion of the experts is not tenable. The role of this Court while exercising the power of judicial review is not to collect evidence for and against any party. This Court in exercise of power of judicial review examines the decision making process and not the decision itself. Reference may be made to *Tata Cellular v. Union of India,* (1994) 6 SCC 651, wherein, it is inter-alia held that the power of judicial review is in respect of decision making process. The Court held as under:-

"74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.

75. In *Chief Constable of the North Wales Police v. Evans* [(1982) 3 All ER 141, 154] Lord Brightman said:

"Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

* * *

Judicial review is concerned, not with the decision, but with the decision-making process.

> Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

In the same case Lord Hailsham commented on the purpose of the remedy by way of judicial review under RSC, Ord. 53 in the following terms:

> "This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner (p. 1160)."

In *R. v. Panel on Take-overs and Mergers, ex p Datafin plc* (1987) 1 All ER 564, Sir John Donaldson, M.R. commented:

> "An application for judicial review is not an appeal."

In *Lonrho plc v. Secretary of State for Trade and Industry* (1989) 2 All ER 609, Lord Keith said:

> "Judicial review is a protection and not a weapon."

It is thus different from an appeal. When hearing an appeal the Court is concerned with the merits of the decision under appeal. In *Amin v. Entry Clearance Officer* (1983) 2 All ER 864, Lord Fraser observed that:

> "Judicial review is concerned not with the merits

> of a decision but with the manner in which the decision was made.... Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing the administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer."
>
> 76. In *R. v. Panel on Take-overs and Mergers, ex p in Guinness plc* (1990 1 QB 146: (1989) 1 All ER 509, Lord Donaldson, M.R. referred to the judicial review jurisdiction as being supervisory or 'longstop' jurisdiction. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power."

26. Therefore, while exercising the power of judicial review, this Court is not to take upon itself the revaluation of Model Answer Key either itself or through Court appointed Expert, who is none else but a delegate of the Court. The Court in exercise of power of judicial review, if sufficient material exists to return a finding that Model Answer Key is palpably incorrect that no reasonable person would find the same to be acceptable, than the Court could direct the examining body to re-examine the answer key but cannot take over the function of the Commission in finalizing the answer key itself.

27. The Hon'ble Supreme Court in a judgment reported as *Aravali Golf Club v. Chander Hass,* (2008) 1 SCC 683 that in the name of judicial activism judges cannot cross their limits and try to take over functions which belong to another organ of the State. The Court held as under:-

> "**17.** Before parting with this case we would like to make some observations about the limits of the powers of the judiciary. We are compelled to make these observations because we are repeatedly coming across cases where judges are unjustifiably trying to perform executive or legislative functions. In our opinion this is clearly unconstitutional. In the name of judicial activism judges cannot cross their limits and

try to take over functions which belong to another organ of the State.

18. Judges must exercise judicial restraint and must not encroach into the executive or legislative domain, vide *Indian Drugs & Pharmaceuticals Ltd. v. Workmen* (2007) 1 SCC 408; and *S.C. Chandra v. State of Jharkhand* (2007) 8 SCC 279 (see concurring judgment of M. Katju, J.).

19. Under our Constitution, the legislature, the executive and the judiciary all have their own broad spheres of operation. Ordinarily it is not proper for any of these three organs of the State to encroach upon the domain of another, otherwise the delicate balance in the Constitution will be upset, and there will be a reaction.

20. Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like emperors. There is broad separation of powers under the Constitution and each organ of the State—the legislature, the executive and the judiciary—must have respect for the other and must not encroach into each other's domains.

21. The theory of separation of powers first propounded by the French thinker Montesquieu (in his book *The Spirit of Laws*) broadly holds the field in India too. In Chapter XI of his book *The Spirit of Laws* Montesquieu writes:

> "When the legislative and executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> *Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the*

> *subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.*
>
> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."
>
> (Emphasis supplied)

We fully agree with the view expressed above. Montesquieu's warning in the passage abovequoted is particularly apt and timely for the Indian judiciary today, since very often it is rightly criticised for "overreach" and encroachment into the domain of the other two organs."

28. The scope of interference in academic matters has been examined by the Supreme Court in many cases. In *Basavaiah (Dr.) v. Dr. H.L. Ramesh,* (2010) 8 SCC 372 : (2010) 2 SCC (L&S) 640, the Court held as under:-

> "38. We have dealt with the aforesaid judgments to reiterate and reaffirm the legal position that in the academic matters, the courts have a very limited role particularly when no mala fides have been alleged against the experts constituting the Selection Committee. It would normally be prudent, wholesome and safe for the courts to leave the decisions to the academicians and experts. As a matter of principle, the courts should never make an endeavour to sit in appeal over the decisions of the experts. The courts must realise and appreciate its constraints and limitations in academic matters.

29. Supreme Court in another judgment reported as *University Grants Commission v. Neha Anil Bobde,* (2013) 10 SCC 519, held that in academic matters, unless there is a clear violation of statutory provisions, the regulations or the notification issued, the courts shall keep their hands off since those

issues fall within the domain of the experts the Court. The Court held as under:

> "31. We are of the view that, in academic matters, unless there is a clear violation of statutory provisions, the regulations or the notification issued, the courts shall keep their hands off since those issues fall within the domain of the experts. This Court in *University of Mysore v. C.D. Govinda Rao* AIR 1965 SC 491; *Tariq Islam v. Aligarh Muslim University* (2001) 8 SCC 546; and, *Rajbir Singh Dalal v. Chaudhary Devi Lal University* (2008) 9 SCC 284, has taken the view that the court shall not generally sit in appeal over the opinion expressed by the expert academic bodies and normally it is wise and safe for the courts to leave the decision of the academic experts who are more familiar with the problem they face, than the courts generally are. UGC as an expert body has been entrusted with the duty to take steps as *it may think fit* for the determination and maintenance of standards of teaching, examination and research in the university. For attaining the said standards, it is open to UGC to lay down any "qualifying criteria", which has a rational nexus to the object to be achieved, that is, for maintenance of standards of teaching, examination and research. The candidates declared eligible for Lectureship may be considered for appointment as Assistant Professors in universities and colleges and the standard of such a teaching faculty has a direct nexus with the maintenance of standards of education to be imparted to the students of the universities and colleges. UGC has only implemented the opinion of the experts by laying down the qualifying criteria, which cannot be considered as arbitrary, illegal or discriminatory or violative of Article 14 of the Constitution of India."

30. Thus, we are of the opinion that the judgment of this Court in *Chanchal Modi's* case (supra) does not lay down correct law.

31. In view of the discussion above, we hold that in exercise of power of Judicial Review, the Court should not refer the matter to court appointed expert as the courts have a very limited role particularly when no mala fides have been alleged against the experts constituted to finalize answer key. It

would normally be prudent, wholesome and safe for the courts to leave the decisions to the academicians and experts.

32. In respect of the second question, this Court does not and should not act as Court of Appeal in the matter of opinion of experts in academic matters as the power of judicial review is concerned, not with the decision, but with the decision-making process. The Court should not under the guise of preventing the abuse of power be itself guilty of usurping power.

33. The third question does not arise as no other question was said to be arising in the present reference.

34. The matter be placed before the Bench as per roster in view of the opinion of this Court on the questions of law having been rendered in the above manner.

Order accordingly.

I.L.R. [2017] M.P., 2333
WRIT PETITION
Before Mr. Justice Vijay Kumar Shukla
W.P. No. 24669/2003 (Jabalpur) decided on 9 May, 2017

RUDRAPAL SINGH CHANDEL ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Service Law – Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14(23) and Police Regulations, M.P., Regulation 226 & 228 – Dismissal from Service – Opportunity of Hearing – Natural Justice*** **– Petitioner, a police constable was dismissed from service under a departmental enquiry – Appeal by petitioner was also dismissed – Challenge to – Held – Although the victim girl turned hostile, conduct of petitioner who was a member of disciplinary force, uttering obscene and indecent words, causing physical and mental harassment to the victim girl in a drunken condition in public domain has certainly damaged the image of Police Department – In the instant case, there was proper consideration of statement of prosecution witnesses and medical evidence – Punishment of dismissal is not shockingly disproportionate – No interference warranted under Writ Jurisdiction – Petition dismissed. (Paras 17, 24 & 25)**

क. सेवा विधि – सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म. प्र. 1966, नियम 14 (23) एवं पुलिस विनियम, म.प्र., विनियमन 226 व 228 – सेवा से बर्खास्तगी – सुनवाई का अवसर – नैसर्गिक न्याय – याची, एक पुलिस आरक्षक को विभागीय जांच के अंतर्गत सेवा से बर्खास्त किया गया था – याची द्वारा की गई अपील भी खारिज की गई थी – को चुनौती – अभिनिर्धारित – यद्यपि पीड़ित बालिका पक्षद्रोही हो गई, याची, जो कि अनुशासित बल का सदस्य था के आचरण, सार्वजनिक स्थान पर शराब के नशे की हालत में पीड़ित लड़की को अश्लील एवं अशिष्ट शब्द कहना शारीरिक एवं मानसिक उत्पीड़न कारित करना, ने निश्चित रूप से पुलिस विभाग की छवि धूमिल की है – वर्तमान प्रकरण में, अभियोजन साक्षीगण एवं चिकित्सीय साक्ष्य को उचित रूप से विचार में लिया गया था – बर्खास्तगी का दंड आश्चर्यजनक रूप से अननुपातिक नहीं है – रिट अधिकारिता में किसी हस्तक्षेप की आवश्यकता नहीं – याचिका खारिज।

***B. Departmental Enquiry – Degree of Proof – Doctrine of Preponderance of Probabilities – Past Conduct & Service Record* – Held – It is established law that in departmental enquiry, degree of proof as required in a criminal case where prosecution has to prove the charge beyond doubt is not required to prove misconduct – In the instant case, inebriation of petitioner was proved by Doctor – Doctrine of preponderance of probabilities is applied in such cases – Apex Court held that in case of misconduct of grave nature or indiscipline, authority may consider the past conduct and service record of the delinquent employee. (Para 19 & 23)**

ख. विभागीय जांच – सबूत का परिमाण – अधिसंभाव्यताओं की प्रबलता का सिद्धांत – पूर्व आचरण एवं सेवा अभिलेख – अभिनिर्धारित – यह स्थापित विधि है कि विभागीय जांच में, सबूत का परिमाण जैसा कि आपराधिक प्रकरण में अपेक्षित है जहाँ अभियोजन का कदाचरण साबित करने के लिए आरोप को युक्तियुक्त संदेह से परे साबित करना अपेक्षित नहीं है – वर्तमान प्रकरण में, याची का मद्यपान करना चिकित्सक द्वारा साबित – अधिसंभाव्यताओं की प्रबलता का सिद्धांत ऐसे प्रकरणों में लागू होता है – सर्वोच्च न्यायालय ने अभिनिर्धारित किया कि गंभीर प्रकृति के कदाचरण या अनुशासनहीनता के प्रकरण में, प्राधिकारी, अपचारी कर्मचारी के पूर्व आचरण एवं सेवा अभिलेख को विचार में ले सकता है।

***C. Constitution- Article 226 – Jurisdiction of Court* – Held – It is trite law that Courts are not to act as an appellate authority and scope of interference in matter of departmental enquiry is limited, unless it is established that there is violation of statutory provisions or principles of natural justice, or the findings are manifestly perverse. (Para 16)**

ग. संविधान – अनुच्छेद 226 – न्यायालय की अधिकारिता – अभिनिर्धारित – यह जीर्ण विधि है कि न्यायालयों को अपीली प्राधिकारी के रूप में कार्य नहीं करना है तथा विभागीय जांच के मामले में हस्तक्षेप का विस्तार सीमित है, जब तक कि यह स्थापित नहीं किया जाता है कि कानूनी उपबंधों या नैसर्गिक न्याय के सिद्धांतों का उल्लंघन हुआ है या निष्कर्ष प्रकट रूप से अनुचित है।

Cases referred :

AIR 1964 SC 506, (2006) 5 SCC 8, W.A. No. 43/2017 decided on 08.02.2017, AIR 1963 SC 1723, (1995) 6 SCC 749, (2013) 6 SCC 602, (2011) 13 SCC 553, AIR 2012 SC 1783, AIR 2010 SC 3769, 2007 (4) MPLJ 129, (2013) 7 SCC 685, (2011) 10 SCC 244, (2012) 6 SCC 369, (2016) 6 SCC 303.

Praveen Kumar Dubey, for the petitioner.
Ashutosh Tiwari and *Puneet Shroti*, P.Ls. for the State.

ORDER

VIJAY KUMAR SHUKLA, J. :- This petition was originally filed under Section 19 of the State Administrative Tribunal Act, 1985 before the erstwhile M.P. State Administrative Tribunal, Bhopal and after abolition of the Tribunal the matter was transferred to this Court and got registered as a writ petition.

2. In the instant petition, the petitioner has challenged the legal propriety of the order dated 7-4-1999 (Annexure-A/1) whereby he has been removed from the services from the post of Constable in the Police Department and has also challenged the order passed by the Appellate Authority (Annexure-A/2) whereby the appeal has been dismissed and the order of removal passed by the Superintendent of Police has been maintained.

3. The facts lying in a narrow compass, succinctly stated are that the petitioner was appointed as a Constable in the District Force on 22-12-1995. He was sent for training which was successfully completed. It is pleaded that while he was working as a Constable in the Police Station, Seoni Malwa, District Hoshangabad a departmental enquiry was initiated against him and the petitioner was charge-sheeted.

4. Reply to the said charge-sheet was filed by the petitioner refuting the charges levelled against him. The respondents had taken a decision to conduct a departmental enquiry against the petitioner and the Range Inspector was

appointed as an Enquiry Officer. It is submitted that on the basis enquiry report, the disciplinary authority passed an order of removal taking into consideration the enquiry report and the past track record of the petitioner. The appellate Authority dismissed the appeal without proper appreciation of the facts and the evidence. Counsel for the petitioner submitted that the enquiry officer, disciplinary authority and the appellate authority have acted in the present case in violation of the provisions of Rule 14 of the M.P. Civil Services (Classification, Control and Appeal Rules), 1966 *[hereinafter referred to as `the 1966 Rules']* and also the provisions envisaged in the .P. Police Regulations *(for short `The Regulations')*. It is submitted that in the present case the Enquiry Officer has failed to prepare the report as required under Sub-rule (23) of Rule 14 of the `1966 Rules'. The Enquiry Officer is required to assess the evidence in the light of the aforesaid provision as regards the article of charges, as the provisions of Rule 14 especially, Sub-rule (23) of the Rule is *parimateria* with the provisions of the Police Regulation 228 and the Enquiry Officer is under obligation to assess the evidence and to record reasons before coming to the conclusion in regard to the alleged charges.

5. Learned counsel for the petitioner further submitted that in the present case the enquiry officer had reproduced the charges and without assessing the evidence and ascribing any reason held that the charges No.1 to 3 framed against the petitioner are proved. It is strenuously urged by him that in the present case the victim-girl has not supported the case of the department and there was no material to establish the charges. However, on the basis of surmises and conjectures the Enquiry Officer held the charges proved because the petitioner being a police constable had influenced the complainant who had turned hostile and did not corroborate the allegations. It is also submitted that the enquiry officer further mentioned in the report that the acts of the petitioner in the present case has tarnished the image of the Police and also created disturbance in law and order of the town. On the basis of the aforesaid illegal enquiry report the disciplinary authority without application of mind and appreciation of facts and evidence of the case in proper perspective, passed the impugned order on the basis of the past record. It is submitted by him that as per judgment passed by the Apex Court in the case of the *State of Mysore vs. K. Manche Gowda,* AIR 1964 SC 506 and *M.V. Bijlani vs. Union of India and others,* (2006) 5 SCC 8 the past record of a delinquent cannot be a basis to prove the charges and to pass an order of punishment. The report of Enquiry Officer is not as per requirement of sub-rule (2) of Rule 14 of the

Rules 1966.

6. To bolster his submissions in this regard he placed reliance on the judgment passed by a Division Bench of this Court in the case of *State of M.P. and others vs. Dev Vrat Mishra and others* (W.A. No.43/2017) and also referred to the judgments passed by the Apex Court which have been referred by the learned Single Judge in the case of *Dev Vrat Mishra* (supra). It is apt to mention here that the learned Single Judge has allowed the writ petition filed by *Dev Vrat Mishra* [W.P. No.18465/2012/2002 (S)] by setting aside the order of punishment and directing that the petitioner shall get all consequential benefits. The said judgement passed by the learned Single Judge was affirmed by the Division Bench while dismissing the Writ Appeal No.43/2017 by its judgement dated 8-02-2017.

7. It is further contended that the appellate authority also without proper appreciation of the facts and evidence held that the charges are proved. It is contended by him that without there being sufficient evidence regarding consumption of alcohol by the petitioner, the finding has been recorded that the petitioner after consuming alcohol, in an inebriated condition had harassed the complaint. It is submitted by him that though blood sample of the petitioner was taken by the department but it failed to produce the FSL report to prove presence of alcohol in his blood sample hence, merely on clinical examination and on the basis of statement of the doctor, the prosecution could not establish alleged consumption of alcohol by the petitioner. Thus, the finding of the Enquiry Officer in this regard, is perverse and contrary to the record. The petitioner submitted that the appellate authority also did not appreciate the evidence available on record in proper perspective.

8. Counsel for the petitioner further submitted that the punishment of removal from service is highly disproportionate and shocking to the alleged charges levelled against the petitioner. He strenuously urged that the punishment of 'removal' is a last resort by virtue of the provisions envisaged in Regulation 226, and in the present case the same has been passed in violation of the provisions of Police Regulation 226 and settled principles of law. Counsel for the petitioner submitted that the report of the Enquiry Officer is based on preliminary enquiry and, therefore, the enquiry report as well consequential order of punishment and dismissal of appeal are vitiated in law.

9. Combating the aforesaid submissions, counsel for the State submitted

that there is no illegality or impropriety in the departmental enquiry conducted and the same was in accordance with the provisions of Rule 14 of the Rules 1966 and the Police Regulation 228. It is also submitted that the disciplinary authority and the appellate authority have passed the orders impugned after due consideration of the facts and evidence available on record. He further submitted that scope of interference in the departmental enquiry under Article 226 of the Constitution is limited. This Court cannot appreciate the facts and evidence as an appellate authority. It is submitted that the punishment is not disproportionate or shocking to the conscience of the Court, as the petitioner was working as a Constable in disciplinary force like police and high level character and conducts are expected from a member of disciplinary force. The charges levelled against the petitioner, which are proved, had certainly tarnished the image of the department. Hence, there is no illegality or perversity of approach in the impugned orders and the petition is liable to be dismissed.

10. Regard being had to the submissions advanced on behalf of the parties, it is condign to refer the charges levelled against the delinquent-petitioner, they are reproduced hereunder:

//आरोप//

(1) दि. आरक्षक द्वारा अपने कर्तव्य में डियूटी से वापसी न करना और शराब पीकर लड़की के साथ अपशब्द कहकर छेंड़छाड़ करना।

(2) लड़की से छेंड़छाड़ करने के कारण कानून/व्यवस्था की स्थिति निर्मित होना तथा पुलिस विभाग की छवि धूमिल करना।

(3) पुलिस रेग्युलेशन के पैरा 64 के उप पैरा 2 एवं 3 की अवहेलना कर घोर कदाचरण प्रदर्शित करना।"

11. From a perusal of the record it is seen that the petitioner has been afforded full opportunity of adducing oral and documentary evidence and also cross-examination of the witnesses. In regard to Charge No.1 – that the delinquent employee did not report on duty after his return and also in an inebriated condition he uttered lewd and obscene words to harass the complainant and pulled her hand at a public place. The prosecution examined PW-1, A.S. Narbariya, Sub-Inspector, who deposed that on 15-11-1998 a written complaint was given by Ku. Rashmi Kaushal making the aforesaid allegations. The petitioner was caught at the spot and he was brought to the Police Station by the brothers of the complainant along with a mob. There

was public agitation against the conduct of the petitioner, as a police personnel was alleged to have teased a girl in a public place. The application has been marked as Exhibit-1 and the statement of the complainant is marked as Exhibit-2 whereas the statements of the brothers of the victim Makhan, Gabbar Singh and Sunil Kaushal are marked as Exhibits-3, 4 and 5 respectively. The blood sample taken by the doctor was sealed and marked as Exhibit-6. The brothers of the victim-girl have supported the evidence of Shri A.S. Narbaria to the effect that the complainant had told them about the utterances of lewd and obscene words used by the petitioner and thereafter they had caught him and brought him to the Police Station concerned. They have also corroborated his statement that the written complaint was made to the Station House Officer. In the cross-examination they have stated that they did not know the petitioner personally and they did not hear the utterances of the alleged words. So far as consumption of alcohol by the delinquent-petitioner is concerned, his drunkenness was proved by the doctor. PW-3, Dr. G.R. Karode, who stated that on clinical examination of the delinquent-petitioner, he found that the petitioner was in an inebriated condition after consuming liquor. PW-4, Arjun Singh has stated that he was on duty and the report was recorded by him in 'Rojnamcha'. The department witness – Ku. Rashmi Kaushal, the complainant changed her version and stated that there was some confusion out of which she had lodged the report but now, she did not want to initiate any action against the petitioner. The Enquiry Officer after taking into consideration the ocular and documentary evidence came to the conclusion that though the complainant turned hostile and did not support the case of the prosecution, but since the petitioner in drunken state harassed the victim-girl in a public place followed by a prompt report in writing by the brother and mob resulting into disturbance of law and order, therefore, the prosecution case cannot be disbelieved. He has taken note of the fact that at the spot itself the petitioner was caught by the public and was brought by them at the Police Station. He considered that the situation was so much panic and for medical examination the doctor was required to be called at the Police Station itself.

On the basis of the aforesaid consideration and totality of the facts and circumstances, the Enquiry Officer found that all the three charges levelled against the delinquent-employee are proved. It is apt to reproduce the relevant portion of the enquiry report. The same is reproduced hereunder:

"उपरोक्त सम्पूर्ण घटना क्रमांक साक्षियों के कथनों, चिकित्सक का

प्रमाण पत्र आदि के आधार पर मैं जॉचकर्ता अधिकारी इस निष्कर्ष पर पहुँचता हूँ कि आरोपी आरक्षक व्ही.व्ही आई.पी डियूटी में खरगौर गया था वहां से बाद डियूटी वापस आकर समय से थाने में आकर अपनी आमद कराना था जबकि आरक्षक ने ऐसा न कर शराब के नशे में लड़की के साथ सार्वजनिक स्थान में छेड़छाड़ कर पुलिस की छवि धूमिल कर कानून/व्यवस्था की स्थिति निर्मित की जिस कारण से आरक्षक का मेडिकल परीक्षण डा0 द्वारा थाने पर ही बुलाकर करवाया गया आवेदिका के द्वारा कथनों में आरोपी के विरूद्ध कोइ भी कार्यवाही न करने का कारण लोकलाज का भय है।

उपरोक्त तथ्यों के आधार पर इस विभागीय जॉच में लगाये गये आरोप निम्नानुसार रूप से प्रमाणित करता हूँ:-

आरोप क्रमांकः-

1. आरक्षक द्वारा अपने कर्तव्य में डियूटी से वापसी न करना और शराब पीकर लड़की के साथ अपशब्द कहकर छेड़छाड़करना पूर्णतःप्रमाणित पाता हूँ।

2. लड़की से छेंड़छाड़ करने के कारण कानून/व्यवस्था की स्थिति निर्मित होना तथा पुलिस विभाग की छवि धूमिल करना पूर्णतः प्रमाणित पाता हूँ।

3. पु0रे0 के पैरा 64 के उप पैरा 2 एवं 3 की अवहेलना कर घोर कदाचरण प्रदर्शित करना पूर्णतः प्रमाणित पाता हूँ।"

12. Thereafter, the disciplinary authority issued a notice to the petitioner and a reply to the said notice was submitted by the petitioner. The disciplinary authority after taking into consideration the enquiry report and also the fact that in the first report which was made by the complainant in writing it was stated that the petitioner had misbehaved with her and pulled her hands uttering the words "चल मेरे साथ". The aforesaid utterance of the words with the physical action of pulling hands of the complainant in a public place has been considered sufficient to prove charges levelled against the delinquent-petitioner. The disciplinary authority had taken note of the facts that the incident had occurred at a public place, created nuisance and panic within public view, which ultimately tarnished the image of the Police Department. The relevant portion of the discussion of the disciplinary authority, which is marked as Exhibit-A-1, is reproduced hereunder:

"उपरोक्त आरोपों पर प्रकरण में विभागीय जांच हेतु रक्षित निरक्षित

होशंगाबाद के एस.के. कन्हौआ को जांच अधिकारी नियुक्त किया जाकर विभागीय जांच पूर्ण कराई गई। जांच अधिकारी आरोपी के विरूद्ध लगाये गये सभी आरोप पूर्णतः प्रभावित पाये हैं। जांच के दौरान यद्यपि आवेदिका जिसके आवेदन पत्र पर आरक्षक रूद्रपाल की विभागीय जांच हुई है, द्वारा अपने बनाम में लेख किया है कि "उसे तुम में कन्फ्यूजन हो गया था, मैं इस संबंध में कोई कार्यवाही नहीं चाहती हूँ। किन्तु आवेदिका के इस बयान से कोई खास फर्क नहीं पड़ता क्योंकि आवेदिका नें पूर्व में अपने बयान में लिखा था कि "आरक्षक रूद्रपाल ने उसके साथ बद्तमीजी करते हुए तथा उसका हाथ खींचते हुए कहा–चल मेरे साथ"। इससे स्पष्ट होता है कि अब आवेदिका द्वारा किसी दबाववश अपने बयान बदल दिये हैं। प्र.आर. अर्जुन सिंह, थाना सिवनीमालवा द्वारा बताया कि इस पटना से मोहल्ले के लोगों में अब भी इतना आकोश था कि आरक्षक रूद्रपाल का मेडिकल कराने हेतु डाक्टर को थाने बुलाना पड़ा। जांच अधिकारी द्वारा आरोपी के विरूद्ध उपरोक्त तीनों आरोप प्रभावित पाये जाने पर इस कार्यालय द्वारा भारतीय संविधान की धारा 311/2 के तहत कारण बताओ नोटिस जारी किया जाकर आरोपी के विरूद्ध सेवा से पृथक का दण्ड प्रस्तावित किया गया। "

13. At this juncture before considering the assertions made by the counsel for the petitioner, I think it condign to survey the authority on the point of scope of judicial interference in the matter of departmental enquiry by the High Court under Article 226 of the Constitution of India. In the case of *State of Andhra Pradesh and others Vs Sree Rama Rao,* AIR 1963 SC 1723 the Apex Court in para 7 of the order held as under:

> *"7... The High Court is not constituted in a proceeding under Article 226 of the Constitution of a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant; it is competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 of to review the evidence and to arrive at an*

independent finding on the evidence."

14. In the case of *B.C. Chaturvedi Vs Union of India,* (1995)6 SCC 749, the Apex Court considered the scope of judicial review by the High Court under Article 226 and held as under:

> *"A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. It the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases. impose appropriate punishment with cogent reasons in support thereof."*

It was held that if the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court or Tribunal,it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.

15. The scope of judicial review in the matters of administrative action pertaining to disciplinary proceedings is no longer *res integra* as it has been held in number of cases by the Apex Court that the judicial review in such matters has limited scope. In this regard it is useful to refer judgment of the Apex Court rendered in the case of *S. R. Tiwari vs. Union of India,* (2013) 6 SCC 602. In para 19 and 20 of the aforesaid judgment, the scope of judicial review has been crystallized in the following manner :-

> *"19. In Commissioner of Income Tax, Bombay & Ors. Vs.*

Mahindra & Mahindra Ltd. & Ors., AIR 1984 SC 1182, this Court held that various parameters of the court's power of judicial review of administrative or executive action on which the court can interfere had been well settled and it would be redundant to recapitulate the whole catena of decisions. The Court further held:

"It is a settled position that if the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to, or has been arrived at by the authority misdirecting itself by adopting a wrong approach, or has been influenced by irrelevant or extraneous matters the court would be justified in interfering with the same."

20. The court can exercise the power of judicial review if there is a manifest error in the exercise of power or the exercise of power is manifestly arbitrary or if the power is exercised on the basis of facts which do not exist and which are patently erroneous. Such exercise of power would stand vitiated. The court may be justified in exercising the power of judicial review if the impugned order suffers from mala fide, dishonest or corrupt practices, for the reason, that the order had been passed by the authority beyond the limits conferred upon the authority by the legislature. Thus, the court has to be satisfied that the order had been passed by the authority only on the grounds of illegality, irrationality and procedural impropriety before it interferes. The court does not have the expertise to correct the administrative decision. Therefore, the court itself may be fallible and interfering with the order of the authority may impose heavy administrative burden on the State or may lead to unbudgeted expenditure. (Vide:Tata Cellular Vs. Union of India, AIR 1996 SC 11; Peopleas Union for Civil Liberties & Anr. Vs. Union of India & Ors., AIR 2004 SC 456; and State of N.C.T. Of Delhi & Anr. V. Sanjeev alias Bittoo, AIR 2005 SC 2080). "(Emphasis Supplied)

16. Further, after considering various judgments including the judgment in

the case of *Union of India Vs. Bodupalli Gopalaswami,* (2011) 13 SCC 553 and *Sanjay Kumar Singh Vs. Union of India,* AIR 2012 SC 1783, relied upon by the learned Writ Court in para 28, the principle is so laid down:-

> *"28. The role of the court in the matter of departmental proceedings is very limited and the court cannot substitute its own views or findings by replacing the findings arrived at by the authority on detailed appreciation of the evidence on record. In the matter of imposition of sentence, the scope for interference by the court is very limited and restricted to exceptional cases. The punishment imposed by the disciplinary authority or the appellate authority unless shocking to the conscience of the court, cannot be subjected to judicial review. The court has to record reasons as to why the punishment is disproportionate. Failure to give reasons amounts to denial of justice. The mere statement that it is disproportionate would not suffice."*
> *(Emphasis Supplied)*

Thus, it is trite law that the courts are not to act as an appellate authority and the scope of interference in the matter of departmental enquiry is limited, unless it is established that there is violation of the statutory provisions or the principles of natural justice, or the findings are manifest perverse.

17. The contention of the petitioner that the enquiry report has not been submitted in accordance with the provisions of Sub-rule (23) of Rule 14 of the 1966 Rules which makes it obligatory for the enquiry officer to assess the evidence and give findings with cogent reasons therefor, in respect of each article of charges. Upon perusal of the enquiry report in the present case, as reproduced in the preceding paragraphs, it is evident that there was proper consideration of statements of prosecution witnesses and medical certificates and ultimately the conclusion was recorded. The enquiry report further reveals that for each charge there is consideration by the Enquiry Officer and it cannot be held that the enquiry report in the present case is not in conformity with the provisions of Sub-rule (23) of Rule 14 of the 1966 Rules.

18. The next plank of submission of the learned counsel for the petitioner is that the disciplinary authority has failed to discuss the charges and the material variable, before passing the order of removal from services. If the order passed

by the disciplinary authority is scanned, it is manifest that there is due application of mind. He has taken into account the nature of charges, statement of the victim-complainant; the statement of the Head Constable, Arjun Singh; and the plight of the alleged charges committed by the petitioner within public domain, who is a police constable posted in a disciplined force. The contentions of the petitioner that the order of punishment was passed on the basis of past conduct; and the punishment of `removal' is a last resort by virtue of the provisions envisaged in Regulation 226, have no merit. Before passing an order of removal, the disciplinary authority has taken into consideration the entire service record of the petitioner which is ostensible from the order of the disciplinary authority. Relevant portion of the order passed by the disciplinary authority is reproduced hereunder:

> मेरे द्वारा आरोपी के सेवा इतिहास का अवलोकन किया गया। आरोपी आर. रूद्रपाल दि. 22.12.95 को पुलिस विभाग में था। आरोपी को उसके लगभग साढ़े तीन वर्ष के सेवाकाल में सिर्फ 4 ईनाम दिये हैं जिनसे स्पष्ट होता है कि आरक्षक अपने कार्य के प्रति अत्यन्त उदासीन तथा लापरवाह रहता है। आरोपी आरक्षक रूद्रपाल द्वारा शराब का सेवन कर उपरोक्त कार्य किया है, ऐसे आरोपी का शासकीय सेवा में बने रहना विभाग केलिए एक बोझ साबित होगा। अतः आरक्षक 331 रूद्रपाल रक्षित केन्द्र, होशंगाबाद को उपरोक्त कृत्य के किये आदेश दि. 7.4.99 के अपरान्ह से सेवा से पृथक किया जाता है। आरोपी आरक्षक की निलम्बन अवधि को निलम्बन में सुधार किया जाता है अर्थात् निलम्बन अवधि में उसे जो कुछ देय हुआ है उसके अलावा और कुछ देय नहीं होगा।"

19. The delineation made by the disciplinary authority demonstrates that before passing the order of punishment the disciplinary authority had bestowed his anxious consideration on all the facts and evidence of the present case, therefore, the order of removal passed by the disciplinary authority cannot be held to be passed only on account of past track record. The consideration of the past record in the case of a member of a disciplinary force like police cannot be held to be illegal or irrelevant. It is useful to refer the judgment rendered in the case of *Union of India and others vs. Bishambher Das Dogra,* AIR 2010 SC 3769 where the Apex Court declined to interfere with the punishment of removal passed in a case of a member of a disciplinary force and held that in the case of misconduct of grave nature or indiscipline, the authority may take into consideration the indisputable past conduct and

service record of the employee for adding weight to the decision of imposing the punishment. The relevant part of the judgment is reproduced hereunder:

> *"It is desirable that delinquent employee may be informed by the disciplinary authority that his past conduct would be taken into consideration while imposing the punishment. But in case of misconduct of grave nature or indiscipline, even in absence of statutory rules, the authority may taken into consideration the indisputable past conduct/service record of the employee for adding weight to the decision of imposing the punishment if the facts so require." [quoted from the placitum].*

20. In the present case the order passed by the appellate authority cannot be held to be a cryptic or unreasoned order. The appellate authority has taken into consideration each of the charges and the oral and documentary evidence available on record. After extensive consideration of the facts and evidence, the following conclusion has been recorded by the appellate authority while affirming the order of removal :

> "आरोपी द्वारा रश्मि कौशल के साथ छेड़छाड़ करने पर थाने पर भीड़ इकट्ठा हो गई थी तथा अरोपी की सुरक्षा को दृष्टिगत रखते हुए मेडिकल चिकित्सालय में ले जाकर कराना संभव नहीं था। अतः रो.सा.829 दिनांक 15.11.98 पर रिपोर्ट दर्ज कर डॉक्टर को थाने बुलाकर मेडिकल कराया गया, जो अभियोजन प्रदर्श–पत्र 10 है। इसी प्रकार भीड़ द्वारा थाने के सामने इकट्ठा होने पर रो.सा.837 दिनांक 15.11.98 को रिपोर्ट दर्ज की गई है, जो अभियोजन प्रदर्शःपत्र क्रमांक–13 है। इन दोनों रो.सा.नकल की प्रति आरोपी को दी गई है। चूंकि आरोपी शासकीय कर्मचारी था और वह भी पुलिस विभाग जैसे अनुशासित बल में था, जिसका दायित्व आम जनता को सुरक्षा प्रदान करना है जो स्वयं महिला के मानव अधिकार का हनन करे यह आरोप क्षमा करने योग्य नहीं है और विभागीय जॉच में आरोप पूर्णतः प्रमाणित पाये जाने से आरोपी को पुलिस अधीक्षक द्वारा प्रदत्त दण्ड उचित है। इस कारण भू0भू0 आरक्षक क्रमांक 331 रूद्रपाल सिंह जिला–होशंगाबाद की ओर से प्रस्तुत अपील निरस्त करते हुए पुलिस अधीक्षक का आदेश बहाल रखा जाता है।"

21. The next contention of the counsel appearing for the petitioner was that the prosecution could not establish that the petitioner had consumed alcohol and he was in an inebriated condition at the time of the alleged incident. He placed reliance upon the judgment passed in the case of *Prem Singh Jhala vs. State of M.P.*, 2007(4) MPLJ 129.

22. This Court by order dated 02-3-2017 summoned the record pertaining to the departmental enquiry of the petitioner. On perusal of the record it is found that the petitioner was examined by Dr. G.P. Karode who has stated that he had examined the accused-petitioner clinically and there was smell of alcohol. Blood sample of the accused was taken and the same was sent for chemical examination. In the cross-examination a question was posed that as to whether the petitioner was drunk and smell of alcohol was there. PW-3, Dr. G.P. Karode affirmed his statement stating that the petitioner was in a drunken condition and there was smell of alcohol from his mouth. The relevant portion of deposition of Dr. G.P. Karode is reproduced hereunder:

"दिनांक 15.11.98 समय 1:10 बजे रात्रि को मेरे द्वारा श्री रूद्रपाल सिंह S/o इन्द्रपाल सिंह क्रमांक 331 थाना सि.मा. निवासी सि.मा. की जॉच की गयी थी (परिक्षण) मेडिकल परिक्षण रिपोर्ट निम्नानुसार है। श्री रूद्रपाल सिंह की सॉसों में एवं मुंह से शराब की बू आ रही थी।

– नाड़ी की गति 100 प्रति मिनट

– रक्त चाप–140/88 मि.मि. आफ मरकरी

– ज्यादा बातचीत कर रहा था।

– सॉस की गति बड़ी हुई थी।

– पेसेन्ट होस में था।

अभिमत– मेरी राय में आर. रूद्रपाल सिंह ने कुछ एल्कोहल का सेवन किया था।

– रूद्रपाल सिंह के 2 ब्लड सेंपल (खून के) लिए गए थे जिन्हें की सीधा करके आर. मुनेस कुमार क्र. 353 थाना सि.मा. को सौंप दिये गये थे। जिन्हें रासायनिक जॉच के लिए भेजा जाना था। मेडिकल का प्रमाण–पत्र यिा गया वह मेरे द्वारा दिया गया है। प्रदर्श 8 है। जिसके असिया भाग पर मेरे हस्ताक्षर हैं। (A से A) तक।

यही मेरा कथन है।

<u>प्रति परिक्षण:–</u>

प्रश्नः– क्या मैं नशे में था एवं क्या बू आ रही थी ?

उत्तरः– नशे में थे एवं बू आ रही थी।

प्रश्नः– क्या आपने मेरा मुंह सूंघा था ?

उत्तरः– हॉ मैंने मुंह सूंघा था।

मुझे इसके अलावा कुछ नहीं पूंछना है।

23. In view of the facts and circumstances of the case, the ratio laid down by this Court in *Prem Singh Jhala* (supra) would not apply in the present case. Inebriation of the petitioner was proved by the doctor. It is established law that in the departmental enquiry the degree of proof as required in a criminal case where the prosecution has to prove the charge beyond doubt is not required to prove misconduct in a departmental enquiry. The doctrine of preponderance of probabilities is applied in such cases. The view of this Court gets fortified in the judgment of the Apex Court in the case of , as held by the Apex Court in the case of *Commissioner of Police, New Delhi and another vs. Mehar Singh,* (2013) 7 SCC 685.

24. In view of the obtaining factual matrix and taking into consideration nature of charges levelled against the petitioner, who is a member of disciplinary force. The police force is a disciplined force. It shoulders the great responsibility of maintaining law and order and public order in the society. People repose great faith and confidence in it. It must be worthy of that confidence. This Court does not find any illegality or perversity of approach in the impugned orders of the disciplinary authority and affirmation thereof by the appellate authority. Since the conduct of the petitioner uttering obscene and indecent words, causing physical and mental harassment to the victim-girl in public domain, has certainly impaired the image of the Police department, therefore, the order of imposition of punishment of his removal from service, cannot be held to be disproportionate and no interference is warranted on the quantum of the punishment. It is established law, that the courts can interfere in the quantum of punishment, only where the imposition of punishment is shockingly disproportionate, as propounded by the Apex Court in the judgments rendered in the cases of *Commandant, 22 th Battalion Central Reserve Police Force, Srinagar vs. Surinder Kumar,* (2011) 10 SCC 244; *Chandra Kumar Choupra vs. Union of India and others,* (2012) 6 SCC 369; and *Delhi Police through Commissioner of Police and others vs. Sat Narayan Kaushik,* (2016) 6 SCC 303.

25. Thus, in view of the aforesaid enunciation of law discussed in preceding paragraphs, I do not find any illegality and perversity of approach in the impugned order warranting interference of this Court in writ jurisdiction and the same being impregnable deserves stamp of approval of this Court.

26. Accordingly, the writ petition being sans merit, is **dismissed.**

Petition dismissed.

I.L.R. [2017] M.P., 2349
WRIT PETITION

Before Mr. Justice Hemant Gupta, Chief Justice &
Mr. Justice Vijay Kumar Shukla

W.P. No. 21264/2016 (Jabalpur) decided on 17 July, 2017

KAM-AVIDA ENVIRO ENGINEERING PVT. LTD., PUNE ...Petitioner

Vs.

MUNICIPAL CORPORATION, REWA & ors. ...Respondents

Constitution – Article 226 – Tender – Cancellation – Grounds – Promissory Estoppel **– Under a tender by Municipal Corporation, Road Sweeping Machine/Vehicle was supplied by petitioner which was not found as per technical specifications – Tender was cancelled and bank guarantee was invoked by Corporation – Challenge to – Held – It is contractual obligation of petitioner to supply machines as per specification and standard enumerated in tender conditions – 47 defects were pointed out by corporation – If machine is not as per tender conditions, Corporation was well within its jurisdiction to reject the machine – There is no question of Promissory Estoppel – Corporation has paid Rs. 1 Crore of public money to petitioner whereby he failed to perform his part of contract – Decision to invoke bank guarantee and to cancel the contract is based upon the economic interest of corporation so as not to purchase something which is not likely to serve public purpose – Such decision cannot be held to be arbitrary, unreasonable or invalid which warrants interference – Petition dismissed.** **(Paras 20, 24 & 30)**

संविधान – अनुच्छेद 226 – निविदा – रद्दकरण – आधार – वचन–विबंध – नगरपालिका निगम द्वारा निविदा के अधीन याची द्वारा रोड स्वीपिंग मशीन/वाहन प्रदाय किया गया जो तकनीकी विनिर्देशों के अनुसार नहीं पाया गया था – निविदा रद्द की गई एवं निगम द्वारा बैंक गारंटी को भुनाया गया – को चुनौती – अभि रत – यह याची का संविदात्मक दायित्व था कि निविदा शर्तों में प्रगणित विनिर्देश व मानक के अनुसार मशीनें प्रदाय करें – निगम द्वारा 47 त्रुटियां इंगित की गई थी – यदि मशीनें निविदा शर्तों के अनुसार नहीं है, मशीन अस्वीकार करना भली–भाँति निगम की अधिकारिता के भीतर था – वचन–विबंध का कोई प्रश्न नहीं – निगम ने याची को रू. 1 करोड़ लोक धन अदा किया है जिससे वह संविदा के उसके भाग का पालन करने में विफल रहा है – बैंक गारंटी भुनाने एवं संविदा को रद्द करने का निर्णय, निगम के आर्थिक हित पर आधारित है जिससे कि कुछ ऐसा क्रय न किया जाए जिससे लोक प्रयोजन की पूर्ति होने

की संभावना नहीं है – उक्त निर्णय को मनमाना, अयुक्तियुक्त या अविधिमान्य नहीं ठहराया जा सकता जिसमें हस्तक्षेप की आवश्यकता हो – याचिका खारिज।

Cases referred :

AIR 1979 SC 621, AIR 2016 SC 2199, (2012) 11 SCC 1, AIR 2003 SC 1405, (2011) 15 SCC 16, (2015) 9 SCC 433, AIR 1954 Bom 423, (2016) 10 SCC 46.

Puneet Chaturvedi, Parag S. Chaturvedi and *Abhay Singh Kushwaha,* for the petitioner.

Arun Pandey, for the respondent No.1.

ORDER

The Order of the Court was passed by : **HEMANT GUPTA, C.J. :-** The challenge in the present writ petition is to the communication (Annexure-P/31) dated 17-11-2016 whereby Road Sweeping Machine supplied by the petitioner was not accepted to be in terms of the tender conditions, thus the petitioner was not entitled to any amount from the Municipal Corporation on account of failure of the petitioner to perform contract as per contract of acceptance dated 3.12.2015 accepting the bid offered by the petitioner.

2. The brief facts leading to the present petition are that a tender was issued by the Municipal Corporation, Rewa [for short 'the Corporation'] on 10-9-2015 for supply and delivery of Truck Mounted Johnston Sweepers Ltd., UK make road sweeper Model – VT – 561 E Duel Sweeper Skid Unit or equivalent make (as per specification attached to the tender documents) on Truck Chassis for Municipal Solid Water Management at Rewa City. The bid was to be submitted in two parts, (i) qualification criteria and technical bid; and (ii) financial bid. The petitioner offered the option of 100% advance payment against proforma invoice for supply of chassis whereas for supply of equipment was against 100% advance payment to be made against submission of a valid bank guarantee for six months.

3. The financial bid of the petitioner was opened on 15.10.2015. The same was accepted by the Corporation in its resolution on 02-11-2015. Thereafter, the letter of acceptance was issued whereby the petitioner was asked to submit bank guarantee for a value of Rs.18,20,000/- , i.e. 10% of the contract value which would be valid for a period of 36 months. The work

order was issued on 3.12.2015 with delivery period of four months with contract value of Rs.1,82,00,000/- (Annexure-P/7). As per the petitioner, the cost of chassis was Rs.18,04,430/- and the cost of equipment was Rs.1,63,95,570/-. The latter amount was to be released on payment of bank guarantee which was to be valid for a period of six months.

4. The stand of the petitioner is that it sought shipment of the Road Sweeper Model – VT – 651E on 02-03-2016 and, therefore, it sought 100% payment on furnishing of advance bank guarantee on immediate basis in order to avoid demurrage charges of custom and clear the consignment without any delay. It was on 15-03-2016 partial advance of Rs.1,00,00,000/- (Rupees One Crore) was released in favour of the petitioner. The petitioner sought release of balance advance payment of Rs.63,95,570/- before 31.3.2016. The stand of the petitioner is that it received a message from Shri A.P. Shukla, Assistant Engineer of the Corporation that the balance advance payment of Rs.63,95,970/- will be released only after delivery of Road Sweeping Machine at Rewa. Such condition was said to be in violation of the terms and conditions of the tender document by the petitioner. The petitioner informed the Corporation on 26-4-2016 that it has initiated the chassis procurement process by placing purchase order on chassis supplier – Eicher. On receipt of the chassis, the petitioner will complete mounting and integration and will send the pre-despatch inspection call to the Corporation.

5. It was on 9.5.2016, the petitioner informed the Corporation that the chassis is reaching the factory of the petitioner by 31-05-2016 and sought information of exact date of visit, name of the visiting officials so as to enable it to make necessary arrangement for inspection of the machine. The petitioner is said to have despatched the Road Sweeping Machine from Pune on 16.5.2016 which reached Rewa on 20.5.2016. The petitioner also informed the RITES Ltd. that it has supplied KAMSWEEP Model VT-651 special purpose vehicle mounted Johnston Make Machine mounted on 16 Ton Gross Vehicle Weight Chassis to the Corporation. The third party agency RITES Ltd. is said to have carried out inspection of the Road Sweeper Machine on 26th & 27th of May, 2016.

6. As per petitioner, the machine was found to be as per technical specifications mentioned in the tender document by M/s RITES Ltd. However, the petitioner was informed on 6.6.2016 that during the joint inspection, the machine was found to be leaving some dust on road surface and it escapes a lot of dust

through dust collection tank mounted on the machine. The Corporation also found some part/components of the machine without seal and identification of manufacturer to show that these parts were supplied by Johnston Sweepers Ltd., UK and some alteration has been done before delivery.

7. The stand of the petitioner is that the Machine has been supplied in total compliance to the technical specifications mentioned in the tender document and issue of non-mentioning of the name, seal, serial, identification, make for the components etc. will be forwarded to Johnston Sweepers Ltd. for clarification. Thereafter, the Johnston Sweeper Ltd. is said to have clarified on 9.6.2016 that the Machine in question was supplied to the petitioner fully built and tested from the UK and it does not label every single component. Thereafter, on 22.7.2016, the Corporation found performance of the Road Sweeper Machine unsatisfactory and decided to invoke the advance bank guarantee and performance bank guarantee.

8. The petitioner then filed a civil suit for injunction in the Court of Civil Judge, Senior Division, Pune on 28.7.2016, but before any interim order could be communicated, the bank guarantee was encashed. It is thereafter the petitioner filed the present writ petition after it received a letter of cancellation of contract on 17.11.2016.

9. Counsel appearing for the Corporation has raised preliminary objection that the instant writ petition is not maintainable, as the petitioner has filed a suit on the same cause of action claiming similar reliefs from the Civil Court as have been claimed in the present writ petition. For ready reference the prayer made in the civil suit by the petitioner reads thus:

> **(a)** The defendant No.1 Corporation either personally or through its officers, servants, employees or agents etc. be restrained by order of temporary injunction from acting on the basis of the letter dated 22.7.2016 invoking the Advance Bank Guarantee and Performance Bank Guarantee as well as from taking any steps or coercive action for encashment of the said Bank Guarantee.
>
> **(b)** The defendant No.2 and 3 banks, its agents, assigns or officers be restrained by an order of interim injunction from acting on the basis of the letter dated 22.7.2016 releasing or honouring the Advance Bank Guarantee and Performance Bank

Guarantee to the defendant No.1, Corporation.

(c) The defendant may kindly be restrained by order of stay in the form of interim relief from taking any coercive action and/or from taking any steps on the basis of impugned letter dated 22.7.2016 from invoking, encashing or releasing the payment under the Bank Guarantee.

(d) The plaintiff be allowed to amend and or alter the plaint if necessary."

10. After filing of the suit, the contract was cancelled by letter dated 17-11-2016 which is the subject-matter of challenge in the present writ petition. The petitioner has claimed the following reliefs:

"7.1 To issue a writ, order or direction in the nature of certiorari, quashing and setting aside the order dated 22-7-2016 and invocation or encashment of Bank Guarantee by the respondent No.1 hereinabove;

7.2 To direct the respondent No.1, Corporation to pay an interest at the rate of 18% per annum on Rs.1,00,00,000/- (Rs. One crore only) w.e.f. The date of invocation of the Bank Guarantee up to the actual date of payment;

7.3 To direct the, respondent No.1, Corporation to pay the legally due and payable amount of Rs.63,95,570/- (Rupees Sixty three lacs ninety five thousand five hundred seventy only) towards the arrears of consideration for the agreed price of Truck Mounted Johnston Make Road Sweeper Model VT – 651E Duel Sweeper Skid unit machine;

7.4 To direct the respondent No.1, Corporation to pay an interest at the rate of 18% per annum on the amount of Rs.63,95,570/- (Rupees Sixty three lacs ninety five thousand five hundred seventy only) mentioned hereinabove w.e.f. 25-5-2016 the date of supply of the requisite Truck Mounted Johnston Make Road Sweeper Model VT – 651E Duel Sweeper Skid unit Machine up to the actual date of payment aforesaid;

7.5 To quash or set aside the order dated 17.11.2016 passed by respondent No.1 and cancel the contract/agreement

dated 2.12.2015 delivery of Johnston Make Road Sweeper Model VT-651E Duel Sweeper Skid unit Machine."

11. It is admitted by the petitioner that an advance bank guarantee for a sum of Rs.16395570/- towards the supply of Road Sweeper machine valid for a period of six months was submitted to the Corporation.

12. In the return, the stand of the Corporation is that the Corporation paid a sum of Rs.1,00,00,000/- and that the petitioner has not stated the facts correctly in the petition. The petitioner, as per the agreement, was to supply Truck Mount Johnston Make Road Sweeper Model VT-651E Duel Sweeper Skid unit machine. During course of trial, it was found that the machine was extremely defective and unable to sweep the road; and that the parts of the machine were not manufactured by the Johnston Sweeper Limited, UK. It is asserted that 47 such defects were pointed out to the petitioner vide communication dated 3-6-2016, Annexure-P/23. It is denied in the reply that the bank guarantee was to be returned immediately on delivery of the Machine. It is stated that the petitioner was interested in getting the public money from the Corporation without supplying the machine as per the standard specifications enumerated in the tender document. It is pointed out that the petitioner was informed that the balance payment will be made only after supply of the Machine which is not at all any deviation and infringement of tender document but in the consonance of the tender document. The petitioner was only interested to obtain public money without performing the contract. It is also asserted that the petitioner has not placed any purchase order to Johnston Sweeper Ltd., U.K. It is denied that the petitioner paid any international freight, custom duty and insurance for the Machine in question because the Corporation endeavoured hard to contact M/s Johnston Sweeper Ltd. through telephone provided by the petitioner but the Corporation did not receive any response in that behalf. The specific reply of the Corporation is as under :-

"**32.** That, the contents of the para 5.27 of the writ petition is vehemently denied. It is denied that the machine was found as per the technical specification mentioned in the tender documents. It is also denied that the petitioner has also conducted any trials commissioning for 13 days, 125 hours sweeping hours 61 and 201 K.M. It is submitted that the answering respondent was not at all satisfied with the machine. The answering respondent has stated in the letter dated

03/06/2016 by which it has pointed out as many as 47 defects. It is also mentioned in the letter dated 03-06-2016 that at the time of joint inspection from 26-5-2016 to 28-05-2016 it came into the notice that the delivered machine was leaving dust under surface, also it escapes a lot of dust collection tank mounted with the machine and the parts of the machine do not appear from the Johnston manufacture. The answering respondent has also written to the Manager, RITES Ltd., Western Region, Church Gate, Mumbai in connection with the vague report submitted by Inspector Mr. Puran Singh, Raipur, Chhattisgarh and to issue necessary orders for re-inspection through Senior Officers of your organization. Thus, the answering respondent has never accepted the machine supplied by the petitioner. A copy of the letter dated 03-6-2016 is already filed as Annexure-P/23. All other adverse allegation in the instant para is denied.

33. That, the contents of the para 5.28 of the writ petition is admitted to the extent that by letter dated 03-6-2016 the answering respondent pointed out the defects. All other adverse litigation in the instant para is denied. The answering respondent simultaneously wrote a letter dated 3-6-2016 to M/s Johnston Sweeper Ltd. U.K., regarding the supply and delivery of the machine in question. The answering respondent also sought various clarifications regarding the status of authorized dealer of the company in India and whether the company has allowed the alternation of machine and its parts. It is submitted that the answering respondent has not received any communication regarding the letter and its queries. It is submitted that the officials of the answering tried to contact the Johnston Company through telephone provided by the petitioner the answering respondent did not receive any response. Hence, the machine supplied by the petitioner is not the machine as per the specification mentioned in the tender. A copy of the letter dated 03-06-2016 is filed herewith as Annexure-R-1/4.

34. That, the contents of the para 5.29 of the writ petition is specifically denied. It is vehemently denied that the machine was total compliance of technical specification mentioned in

the tender documents. It is submitted that the machine is sub-standard and is not purchased from M/s Johnston Sweeper Ltd. UK. The machine is unable to sweep the road and in the parts of the machine the seal and serial number and its identification number of M/s Johnston Sweeper Company do not appear. The petitioner has not taken any action to rectify the mistake of the machine. All other adverse allegation in the instant para is denied.

35. That, the contents of the para 5.30 of the writ petition is vehemently denied. It is denied that the petitioner had made any communication regarding the machine to M/s Johnston Sweeper Ltd. UK. It is also denied that the M/s Johnston Sweeper Ltd. UK has confirmed vide letter dated 9-6-2016 that the machine was supplied to the petitioner fully built and tested from the UK. The letter dated 9-6-2016 (Annexure-P/25) appears to be fabricated as the answering respondent is preceding paragraphs has mentioned that it has not made any contact to M/s Johnston Sweeper Ltd., UK regarding the authenticity of the machine. All other adverse allegations in the instant para are denied."

13. Counsel for the petitioner vehemently argued that the respondents are bound to make payment of the machine on the principle of promissory estoppel, as the petitioner has supplied the machine as per tender conditions. The petitioner has undertaken to remove the defects as pointed out by the Corporation, but still the Corporation has proceeded to invoke the bank guarantee. Counsel for the petitioner has placed reliance upon the judgments rendered in *M/s Motilal Padampat Sugar Mills Co. Ltd. vs. The State of Uttar Pradesh and others,* AIR 1979 SC 621 and *M/s Gangotri Enterprizes Ltd. vs. Union of India and others,* AIR 2016 SC 2199. He submitted that on the basis of doctrine of promissory estoppel, the petitioner is entitled to payment of the price of the Machine in question and invocation of the bank guarantee is illegal. The argument of the counsel for the petitioner regarding promissory estoppel is based on the fact that there was limited time limit for supply of the machine of 120 days; therefore, in advance the petitioner imported the machine so that it could comply with the tender conditions. Since the machine was imported in terms of the tender submitted by the petitioner, therefore, the petitioner is entitled to entire payment of the machine in question;

and that invocation of the bank guarantee of Rs.1,00,000,00/- is not justified.

14. Relying on the judgment in *M/s Gangotri Enterprizes Ltd.* (supra), learned counsel for the petitioner urged that the Corporation is the purchaser of the machine and had to quantify the damages from a competent Court or through arbitration before it could invoke the bank guarantee.

15. Counsel for the petitioner also relied upon the judgment of the Supreme Court reported in *Monnet Ispat and Energy Ltd. vs. Union of India and ors.*, (2012) 11 SCC 1 and also invoked the doctrine of legitimate expectation as discussed in *J.P. Bansal vs. State of Rajasthan and another,* AIR 2003 SC 1405.

16. Some of the terms and conditions of the contract entered into between the parties, being relevant for the present purpose, are extracted hereunder:

> "**15.** If any dispute arises about the contract or any terms of contract, Municipal Corporation Rewa shall be the sole arbitration and his decision would be final and binding to all the parties.
>
> **16.** Test and inspect prior to dispatch/shipment and field test after delivery the following inspection and test shall be carried at manufacturer's plant by third party (Rites Ltd., Govt. of India Enterprizes) and purchaser's representative. All inspection charge would be scope of bidder.
>
> **a)** Inspection and checking of details of various component specified in the specification and agreed by the bidder, particularly the details of engine, drive system, brakes, hydraulic system, electrical system, vacuum system, brushing system etc. including their capacity, make, dimension etc. The bidder shall also produce documents of import along with test certificate of manufacturer.
>
> **b)** Functional test of Mechanical Sweeper to check its specified/guaranteed capacity by operating the machine continuously for four to six hours.
>
> **c)** The following test shall be carried out after delivery of the equipment.
>
> **d)** Field trial for 7 days (8 hours in two shifts running per

day) by operating the machine at all major roads to assess functional performance of the machine. Machine shall be inspected/verified by authorized representative/s of MCR and third party (if required) with the specification. All the expenses in field trial shall be born by bidder.

xxx xxx xxx

xxx xxx xxx

xxx xxx xxx

31. Warranty clause

(i) The tender would give warranty that the Machines/ Equipments would continue to confirm to the description and quality as specified for a period indicated in the table given below from the date of delivery of the Machine/Equipment to be purchased and that notwithstanding the fact that the Corporation may have expected and/or approved the said Machine/Equipments, if during the guarantee/warrantee period the said Machine/equipment be discovered not to confirm to the description and quality aforesaid or have determined (and the decision of the Municipal Commissioner, MCR in that behalf will be final and conclusive) the corporation will be entitled to reject the Machines/Equipment or such portion thereof as may be discovered not to confirm to the said description and quality, on such rejection the Machines/Equipment will be at the seller's risk and all the provision relating to rejection of goods, etc. or such portion thereof as is rejection by the Corporation, otherwise the Tenderer shall pay such damage as may arise by reason of the breach of the condition herein contained. Nothing herein contained shall prejudice any other right of the in that behalf under this contract or otherwise.

S. No.	Name of Machine/Equipment	Warranty/guarantee period
1	Mechanical Power sweeper Machine Truck mounted.	Three year from the date of commissioning

The Commissioner, MCR and/or his duly authorized representative shall at all reasonable time have access to the suppliers premises and shall have the power at all reasonable time to inspect and examine the materials and workmanship of the equipment/machineries during manufacturing process or afterwards as may be decided.

(i) The tenderer shall furnish completer (sic:complete) address of premises of his office, godown and workshop where inspection can be made together with name and address of the person who is to be contacted for the purpose.

(ii) The firm is liable to execute any minor change/modification suggested at the time of inspection for which no extra payment shall be paid.

32. Rejection.- Articles not approved during inspection or testing shall be rejected and will have to be replaced by the Tenderer at his own cost with the time.

xx xx xx

34. If any dispute arises out of the contract with regard to the interpretation, meaning and breach of the terms of the contract, the matter shall be referred to by the parties to the Municipal Corporation, Rewa (MCR) whose decision shall be final."

17. We do not find any merit in the argument raised by learned counsel for the respondent that the writ petition is on the same cause of action as is raised by the petitioner before the Civil Court. The challenge in the present writ petition is of an order of cancellation of contract on 17.11.2016 and also of an action of invoking bank guarantee, whereas the challenge in the civil suit is to the decision of invocation of the bank guarantee alone. The challenge in the present writ petition includes the challenge to the bank guarantee, but it cannot be said that the writ petition itself is not maintainable.

18. We have heard counsel for the parties and find that there is no merit in the present petition. The tender conditions were specific to supply the Truck Mounted Johnston make road sweeper. The chassis price of Rs.18,20,000/- was to be paid in advance whereas a sum of Rs.1,63,95,570/- was to be

paid against 100% amount of bank guarantee towards advance payment of equipment. Apart from such conditions, the petitioner was required to furnish performance bank guarantee of 10% contract value valid for a period of six months. But the machine itself has not been accepted as conforming to the tender conditions.

19. As per letter dated 3.6.2016 (Annexure-P/23) the petitioner was informed as many as 47 defects in the Machine. By letter dated 7.6.2016 (Annexure-P/24) the petitioner was communicated by the Corporation in respect of the defect that the machine is leaving some dust on road surface and also it escapes a lot of dust through dust collection tank mounted on the machine. Response of the petitioner is that there are over 50 Nos. of such machines working in India and majority of them have come in the form of repeat orders from renowned companies. It is pointed out that the Machine is fully imported skid unit complying with tender conditions; however, it was not in a position to answer as to why M/s Jonhston Sweeper Ltd. was mentioned on the seal; serial number; identification name and components.

20. Admittedly, 47 defects, as pointed out by the Corporation were neither removed by the petitioner nor it was possible to remove the defects. As many as 35 defects were mentioned, as manufacture's name, seal, identification and make were not found. The stand of the Corporation is that the petitioner has given false document as if it is from M/s Johnston Sweeper Ltd. but the said company could not be contacted to verify the assertions of the petitioner. The Corporation has taken a decision that the Machine in question is not as per the tender conditions, therefore, in exercise of power of judicial review, this Court will not examine the terms & conditions of the contract as a court of appeal – as to whether the Machine supplied is in terms of the tender documents or not.

21. The scope of judicial review in the matter of termination of services was considered by the Hon'ble Supreme Court in the case of *Gridco Limited and another Vs. Sadnanda Doloi and others* reported as (2011) 15 SCC 16. It was held that the judicial review and resultant interference is permissible where the action of the authority is *mala fide,* arbitrary, irrational, disproportionate or unreasonable but impermissible if the petitioner's challenge is based only on the ground that the view taken by the authority is less reasonable. The judicial review is not so much concerned with the correctness of the ultimate decision as it is with the decision making process. The relevant

extract reads as under :-

> "25. It is true that judicial review of matters that fall in the realm of contracts is also available before the superior courts, but the scope of any such review is not all pervasive. It does not extend to the Court substituting its own view for that taken by the decision-making authority. Judicial review and resultant interference is permissible where the action of the authority is *mala fide*, arbitrary, irrational, disproportionate or unreasonable but impermissible if the petitioner's challenge is based only on the ground that the view taken by the authority may be less reasonable than what is a possible alternative. The legal position is settled that judicial review is not so much concerned with the correctness of the ultimate decision as it is with the decision-making process unless of course the decision itself is so perverse or irrational or in such outrageous defiance of logic that the person taking the decision can be said to have taken leave of his senses.
>
> 28. Recognizing the difference between public and private law activities of the State, this Court reasoned that unlike private individuals, the State while exercising its powers and discharging its functions, acts for public good and in public interest. Consequently every State action has an impact on the public interest which would in turn bring in the minimal requirements of public law obligations in the discharge of such functions. The Court declared that to the extent, the challenge to State action is made on the ground of being arbitrary, unfair and unreasonable hence offensive to Article 14 of the Constitution, judicial review is permissible. The fact that the dispute fell within the domain of contractual obligations did not, declared this Court, relieve the State of its obligation to comply with the basic requirements of Article 14.
>
> 39. A writ Court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract. Having said that we must add that judicial review cannot extend

to the Court acting as an appellate authority sitting in judgment over the decision. The Court cannot sit in the arm chair of the Administrator to decide whether a more reasonable decision or course of action could have been taken in the circumstances. So long as the action taken by the authority is not shown to be vitiated by the infirmities referred to above and so long as the action is not demonstrably in outrageous defiance of logic, the writ Court would do well to respect the decision under challenge."

22. In the judgment in the case of *State of Kerala and others Vs. M. K. Jose* reported as (2015) 9 SCC 433, the Court was examining the action of the State terminating the contract and forfeiture of the security deposit placed by the contractor. The Court has held as under :-

"19. In this regard, a reference to *Noble Resources Ltd. v. State of Orissa,* (2006) 10 SCC 236, would be seemly. The two-Judge Bench referred to the *ABL International Ltd. Vs. Export Credit Guarantee Corpn. Of India Ltd.* (2004) 3 SCC 553,, *Dwarkadas Marfatia & Sons v. Port of Bombay,* (1989) 3 SCC 293, *Mahabir Auto Stores v. Indian Oil Corpn.,* (1990) 3 SCC 752 and *Jamshed Hormusji Wadia v. Port of Mumbai,* (2004) 3 SCC 214 and opined thus: (*Noble Resources case,* SCC p. 246, para 29)

"29. Although the scope of judicial review or the development of law in this field has been noticed hereinbefore particularly in the light of the decision of this Court in *ABL International Ltd. v. Export Credit Guarantee Corpn. Of India Ltd.* (2004) 3 SCC 553 each case, however, must be decided on its own facts. Public interest as noticed hereinbefore, may be one of the factors to exercise the power of judicial review. In a case where a public law element is involved, judicial review may be permissible. (See *Binny Ltd. v. V. Sadasivan,* (2005) 6 SCC 657: 2005 SCC (L&S) 881 and *G.B. Mahajan v. Jalgaon Municipal Council,* (1991) 3 SCC 91."

Thereafter, the Court in *Noble Resources Ltd. v. State of*

Orissa, (2006) 10 SCC 236, proceeded to analyse the facts and came to hold that certain serious disputed questions of facts have arisen for determination and such disputes ordinarily could not have been entertained by the High Court in exercise of its power of judicial review and ultimately the appeal was dismissed.

20. We have referred to the aforesaid authorities to highlight under what circumstances in respect of contractual claim or challenge to violation of contract can be entertained by a writ court. It depends upon facts of each case. The issue that had arisen in *ABL International Ltd. v. Export Credit Guarantee Corpn. Of India Ltd.* (2004) 3 SCC 553 was that an instrumentality of a State was placing a different construction on the clauses of the contract of insurance and the insured was interpreting the contract differently. The Court thought it apt merely because something is disputed by the insurer, it should not enter into the realm of disputed questions of fact. In fact, there was no disputed question of fact, but it required interpretation of the terms of the contract of insurance. Similarly, if the materials that come on record from which it is clearly evincible, the writ court may exercise the power of judicial review but, a pregnant one, in the case at hand, the High Court has appointed a Commission to collect the evidence, accepted the same without calling for objections from the respondent and quashed the order of termination of contract.

21. The procedure adopted by the High Court, if we permit ourselves to say so, is quite unknown to exercise of powers under Article 226 in a contractual matter. We can well appreciate a Committee being appointed in a Public Interest Litigation to assist the Court or to find out certain facts. Such an exercise is meant for public good and in public interest. For example, when an issue arises whether in a particular State there are toilets for school children and there is an assertion by the State that there are good toilets, definitely the Court can appoint a Committee to verify the same. It is because the

lis is not adversarial in nature. The same principle cannot be taken recourse to in respect of a contractual controversy. It is also surprising that the High Court has been entertaining series of writ petitions at the instance of the respondent, which is nothing but abuse of the process of extraordinary jurisdiction of the High Court. The Appellate Bench should have applied more restraint and proceeded in accordance with law instead of making a roving enquiry. Such a step is impermissible and by no stretch of imagination subserves any public interest."

23. We have gone through the pleadings and find that the decision-making process adopted by the Corporation does not suffer from any illegality which may warrant interference of this Court exercising writ jurisdiction under Article 226 of the Constitution of India. In fact none was pointed out.

24. The judgments referred by the counsel for the petitioner are not applicable to the facts of the present case. In *Motilal Padampat Sugar Mills Co. Ltd.* (supra) the question was for benefit of tax wherein it was laid down that a party who has, acting on a promise made by the Government, altered its position, is entitled to enforce the promise against the Government, even though the promise is not in the form of a formal contract as required by Article 299 and that Article does not militate against the applicability of the doctrine of promissory estoppel against the Government. In the present case, it is contractual obligation of the petitioner to supply the Machine in question as per the specification and standards enumerated in the tender conditions. If the machine is not as per the tender conditions, then the Corporation is within its jurisdiction to reject the machine. There is no question of promissory estoppel in the present case, as the Corporation has refused to accept the Machine for the reason that it does not conform to the specification standards enumerated in the tender document.

25. In *Gangotri Enterprizes Ltd.'* case (supra) the Court has quoted with approval the judgment of the Bombay High Court rendered in *Iron and Hardware (India) Co. vs. Firm Shamlal and Bros,* AIR 1954 Bom 423 wherein the Bombay High Court was examining the right of creditors claiming to be displaced persons entitled to damages under Displaced Persons (Debts Adjustment) Act, 1951. The Court was examining the debt as defined under the Act, which was different than the damages on account of breach of contract. The Court has held as under:

> "6..... Now, in order that there should be a debt there must be an existing obligation. The payment may be due immediately or it may be due in future, but the obligation must arise in order that the debt should be due. It may even be that the actual amount due in respect of the debt may require ascertainment by some mechanical process or by the taking of accounts. But even when the actual amount is to be ascertained the obligation must exist. It is well settled that when there is a breach of contract the only right that accrues to the person who complains of the breach is the right to file a suit for recovering damages. The breach of contract does not give rise to any debt and therefore it has been held that a right to recover damages is not assignable because it is not a chose in action. An actionable claim can be assigned, but in order that there should be an actionable claim there must be a debt in the sense of an existing obligation. But inasmuch as a breach of contract does not result in any existing obligation on the part of the person who commits the breach, right to recover damages is not an actionable claim and cannot be assigned."

26. The judgment in *Gangotri Enterprizes Ltd.* 'case (supra) has no applicability to the facts of the present case nor the argument raised by the counsel for the petitioner that the Corporation in order to claim damages have to seek quantification of the damages from the competent Court. The issue raised and decided by the Supreme Court was that the arbitration proceedings in relation to the contract were pending and that the sum claimed by the respondents from the appellant does not relate to the contract for which the bank guarantee had been furnished but it relates to another contract for which no bank guarantee had been furnished. In the present case, the Corporation has cancelled the contract on account of failure of the petitioner to supply sweeping machine as per tender condition. The Corporation has paid a sum of Rs. 1 Crore of public money to the petitioner but the petitioner has failed to perform its part of the contract to supply the sweeping machine as per the tender conditions. Therefore, it is not a question of damages but to seek restitution of the amount paid in advance for the unfulfilled contract.

27. Counsel appearing for the petitioner relied in para 188 of *Monnet Ispat and Energy Ltd.* (supra), however the said para deals with a contempt

petition and not the issue raised in the present writ petition. We do not find any relevancy of the said case as regard the issue raised in the present petition.

28. In *J.P. Bansal* (supra) the petitioner was removed from the post of Chairman of the Rajasthan Taxation Tribunal which was abolished. The erstwhile Chairman claimed that he has legitimate expectation and such a claim was declined by the Supreme Court. We find that the said judgment is of no any assistance to the petitioner.

29. In respect of law of bank guarantee, a recent judgment reported in the case of *Gujarat Maritime Board vs. Larsen and Toubro Infrastructure Development Projects Limited and another,* (2016) 10 SCC 46, the Supreme Court held that a bank guarantee is an independent and separate contract. The relevant extract from the judgment is reproduced hereunder:

> "12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more *res integra*. In *Himadri Chemicals Industries Limited v. Coal Tar Refining Company* – (2007) 8 SCC 110, at paragraph - 14:
>
> > "14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:
> >
> > (i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.
> >
> > (ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by

its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned."

13. The guarantee given by the bank to the appellant contains only the condition that in case of breach by the lead promoter, viz., the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the bank should honour it ... "without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...". It has also been undertaken by the bank that such written demand from the appellant on the bank shall be ... "conclusive, absolute and unequivocal as regards the amount due and payable by the bank under this guarantee". Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 06.02.2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal

and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc., are not within the purview of an inquiry under Article 226 of the Constitution of India. Between the bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the bank is bound to honour the payment under the guarantee."

30. The decision to invoke bank guarantee and to cancel the contract is based upon the economic interest of the Corporation so as to not to purchase something which is not likely to serve public purpose. Such decision of the Corporation cannot be said to be arbitrary, unreasonable, invalid which may warrant interference in the writ jurisdiction of this Court.

31. In view of the above discussion, we find that the present writ petition sans substance and the same is hereby **dismissed.** There shall be no order as to costs.

Petition dismissed.

I.L.R. [2017] M.P., 2368
WRIT PETITION
Before Mr. Justice J.K. Maheshwari
W.P. No. 9297/2017 (Jabalpur) decided on 8 August, 2017

ANEK @ ANIL NAGESHWAR ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Rajya Suraksha Adhiniyam, M.P. 1990 (4 of 1991),* Section 5(a) & (b) – Externment Orders – Grounds – S.P. submitted its report dated 18.12.2012 referring number of cases against petitioner – Collector passed externment order of petitioner in 2017 – Appeal was also dismissed by Commissioner – Challenge to – Held – Nothing is brought on record to show that petitioner "is engaged or is about to engaged" in commission of offences in proximity to earlier cases – Other offences committed by him years or months back cannot be a ground to pass externment order – No material on record to believe that witnesses amongst public are not turning**

up to depose against petitioner before the Court out of fear or on account of danger to person and property – No such finding is recorded by competent authority – Relying on the report of S.P. of 2012, after 4 ½ yrs, passing an externment order is without application of mind – Requirements of Section 5 (b) are not fulfilled – Impugned orders are set aside – Petition allowed. (Paras 13, 15 & 16)

राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 5(ए) व (बी) – निष्कासन आदेश – आधार – याची के विरूद्ध प्रकरणों की संख्या निर्दिष्ट करते हुये दिनांक 18.12.2012 को एस. पी. ने अपना प्रतिवेदन प्रस्तुत किया – कलेक्टर ने 2017 में याची का निष्कासन आदेश पारित किया – आयुक्त द्वारा अपील भी खारिज की गई थी – को चुनौती – अभिनिर्धारित – यह दर्शाने हेतु अभिलेख पर कुछ प्रस्तुत नहीं किया गया कि याची पूर्व प्रकरणों से निकटता वाले अपराधों को कारित करने में "शामिल है या शामिल होने वाला है" – वर्षों या महीनों पहले उसके द्वारा कारित किये गये अन्य अपराध निष्कासन आदेश पारित करने के लिए आधार नहीं हो सकते – यह विश्वास करने हेतु अभिलेख पर कोई सामग्री नहीं है कि आम जनता में से कोई साक्षीगण, न्यायालय के समक्ष याची के विरूद्ध कथन करने के लिये, भय से या व्यक्ति और संपत्ति को खतरे के कारण सामने नहीं आ रहे – सक्षम पाधिकारी द्वारा ऐसा कोई निष्कर्ष अभिलिखित नहीं किया गया है – एस. पी. के 2012 के प्रतिवेदन पर 4 ½ वर्ष पश्चात्, विश्वास कर, निष्कासन आदेश पारित किया जाना मस्तिष्क के प्रयोग बिना है – धारा 5(बी) की अपेक्षाएं पूर्ण नहीं होती – आक्षेपित आदेश अपास्त किये गये– याचिका मंजूर।

Cases referred :

2009 (4) MPLJ 434, 2011 (3) MPLJ 367, 2014 (2) MPLJ 621, 2014 (4) MPLJ 654, AIR 1952 SC 221, AIR 2005 SC 2080, AIR 1973 SC 630.

Sanjay Sharma, for the petitioner.
Girish Kekre, G.A. for the State.

ORDER

J.K. Maheshwari, J. :- Seeking quashment of the order of externment dated 10.1.2017 Annexure P/5 passed by the respondent No.2 the Collector cum District Magistrate, Balaghat so also the order Annexure P/7 dated 3.5.2017 rejecting the appeal passed by the respondent No.3 Commissioner Jabalpur Division Jabalpur, this petition has been preferred under Article 226 of the Constitution of India.

2. On perusal of the facts unfolded to the present case and looking to

the findings recorded in the order impugned Annexure P/5 dated 10.1.2017, it reveals that nineteen cases were registered against the petitioner. The Superintendent of Police, Balaghat submitted its report on 18.12.2012 referring the registration of the said offences against the petitioner and also referring two other cases pertaining to Crime No.51/2014 under Sections, 323, 294, 324, 147, 148, 149, 506B of the Indian Penal Code (hereinafter referred to as "I.P.C") and Crime No.227/2015 the offence under Sections 294 and 506 of the I.P.C. In the order, it is observed, even on filing the Ishtagasa under Sections 107 and 116(3) of the Code of Criminal Procedure (hereinafter shall be referred to as "Cr.P.C"), the petitioner is involved in commission of the offences, however, preventive action against the petitioner has become ineffective. It is also mentioned that the certified copies of the Court order regarding closure of the cases referred have not been produced despite opportunities. However, to maintain the public order and peace and because the conduct of the petitioner has not been improved and he is continuously involved in commission of the offences, therefore, sufficient ground is available to take action as per Section 5(b) of the Madhya Pradesh Rajya Suraksha Adhiniyam, 1990 (hereinafter shall be referred to as "Adhiniyam"). Thus, order of extermment of the petitioner has passed to extern him from District Balaghat and the nearby Districts Seoni, Mandla, Dindori for a period of one year. On filing the appeal, it is dismissed confirming the order of district magistrate and approving the findings vide order Annexure P/7 dated 3.5.2017. Being dissatisfied by both the orders, this petition has been preferred.

3. Learned counsel for the petitioner has filed copies of some of the judgments passed by the Criminal Courts acquitting the petitioner in those cases, while some of the cases are pending in the courts. It is also contended that as per Section 5 of the Adhiniyam, the movements or acts of any person are causing or calculated to cause alarm, danger or harm to the person or property and reasonable ground is available to believe that the person is engaged or is about to be engaged in commission of the offence, and in the opinion of the District Magistrate the witnesses are not willing to come forward to give evidence against such person by reason of apprehension as regards the safety of their person or property, the order of removal of such person from the district may be passed. But in the present case no reasonable ground is available to make out a case that the petitioner is engaged or is about to be engaged in commission of the offence. Merely relying upon the old offences during the period of 1998 till 2012, and to pass the order after about four and a half years from the report of the Superintendent of Police in the year 2017

is wholly without application of mind and it do not fulfill the requirement as contemplated under Section 5(b) of the Adhiniyam. It is also contended that the District Magistrate, Balaghat has not recorded any finding that the witnesses amongst the public are not willing to come and to give evidence against the petitioner; in absence of such finding, the order impugned cannot be sustained in law.

4. In support of the said contention, reliance has been placed by the petitioner on the Division Bench Judgment of this Court in the case of *Ashok Kumar Patel Versus State of Madhya Pradesh & Others* reported in 2009 (4) MPLJ 434 so also three other judgments of this Court in the cases of *Ashu alias Assu alias Ashish Jain alias Ankush Versus State of Madhya Pradesh & Others* reported in 2011 (3) MPLJ 367, *Pappu alias Pramod Versus State of Madhya Pradesh* reported in 2014 (2) MPLJ 621 and *Ramgopal Raghuvanshi Versus State of Madhya Pradesh & Others* reported in 2014 (4) MPLJ 654. In view of the law laid down by the aforesaid pronouncements, it is urged that the order of externment dated 10.1.2017 Annexure P/5 passed by the respondent No.2 District Magistrate, Balaghat so also the order Annexure P/7 rejecting the appeal dated 3.5.2017 passed by the respondent No.3 Commissioner Jabalpur Division Jabalpur may be set aside and the petitioner may be set free to move within the District Balaghat and the nearby Districts Seoni, Mandla, Dindori.

5. Per contra, learned Government Advocate for the respondent/State has filed their reply interalia contending that there were nineteen cases registered against the petitioner from the year 1998 till 2012 as apparent from the report submitted by the Superintendent of Police, Balaghat on 18.12.2012. However, considering the past conduct of the petitioner the order impugned has rightly been passed in view of the provisions as contained in Section 5(b) of the Adhiniyam. Learned Government Advocate has produced the original record and submitted that not only the offences mentioned in the order are registered, but two other offences have also been registered against him in the year 2014-2015, therefore, the power conferred under Section 5(b) of the Adhiniyam has rightly been exercised by the competent authority while passing the order impugned, which is confirmed by the Appellate Authority, however, the scope of judicial review warranting interference by this Court is narrower, therefore, this petition may be dismissed.

6. After having heard learned counsel for the parties and to appreciate

the arguments in the facts of the case, first of all the Section 5(a), 5(b), 5(c) of the Adhiniyam is required to be seen which is reproduced as under:-

> **"5. Removal of persons about to commit offence– Whenever it appears to the District Magistrate –**
>
> (a) that the movements or acts of any person are causing or calculated to cause alarm, danger or harm to person or property; or
>
> (b) that there are reasonably grounds for believing that such person is engaged or is about to be engaged in the commission of an offence involving force or violence or an offence punishable under Chapter XII, XVI or XVII or under Section 506 or 509 of the Indian Penal Code, 1860 (45 of 1860)) or in the abetment of any such offence, and when in the opinion of the District Magistrate witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property; or
>
> (c) that an outbreak of epidemic disease is likely to result from the continued residence of an immigrant;
>
> the District Magistrate, may by an order in writing duly served on him or by beat of drum or otherwise as the District Magistrate thinks fit, direct such person or immigrant –
>
> (a) so as to conduct himself as shall deem necessary in order to prevent violence and alarm or the outbreak or spread of such disease; or
>
> (b) to remove himself outside the district or any part thereof or such area and any district or districts or any part thereof, contiguous thereto by such route within such time as the District Magistrate may specify and not to enter or return to the said district or part thereof or such area and such contiguous districts, or part thereof, as the case may be, from which he was directed to remove himself."

7. Looking to the provisions as contained in Section 5 of the Adhiniyam, it throws light under what circumstances the order of externment of a person

who is about to commit the offence may be passed. Section 5(a) of the Adhiniyam deals about an act of the person who is causing or calculated to cause alarm, danger or harm to any person or property. On visualizing the said contingencies, as per Section 5(b) if reasonable ground to believe such facts are available to the competent authority that "the person is engaged or is about to be engaged" in the commission of an offence involving force or violence or an offence punishable under Chapter XII, XVI or XVII or under Section 506 or 509 of the I.P.C or in the abetment of any such offence and also having the contingency that looking to the antecedents of the person, the witnesses amongst the public are not willing to come and to depose in the Court against him due to apprehension of the safety of the person or property; the District Magistrate on having satisfaction may pass the order of extemment, hampering personal liberty of such person, putting check on his movements in the district or nearby districts. Meaning thereby while passing the order of externment by the competent authority, which affects the personal liberty, the order may be passed but following the procedure prescribed after recording satisfaction looking to the antecedents, that such person is engaged or about to be engaged in the offences specified in Section 5(b) of the Adhiniyam, and also looking to the material that the witnesses are not coming to depose in Court against him.

8. The Division Bench of this Court in *Ashok Kumar Patel* (supra) was having an occasion to consider the connotation "is engaged or is about to be engaged" contemplated in Section 5(b) of the Adhiniyam and while dealing with the same, it is observed that if any person was engaged in the commission of the offence or in abetment of an offence of the type mentioned in Section 5(b) of the Adhiniyam, several years or several months back, it cannot be a reasonable ground for believing that the person is engaged is or about to be engaged in commission of the offence. The Court referring the description of the offences committed by the petitioner held that if the offence is registered in between 1995 to 2007 in the facts of the said case and the order of externment has been passed in November, 2008 and in case the plea taken by the respondent regarding commission of the offence in July 2008, is also taken into consideration even then it would not constitute a reasonable ground to believe on the date of passing the order i.e. 18.11.2008 that "petitioner is engaged or is about to be engaged" in commission of the offence as to satisfy the requirement of Section 5(b) of the Adhiniyam. While considering the second part of Section 5(b) of the Adhiniyam, the Court has referred the judgment of

Hon'ble the Supreme Court rendered in the case of *Gurbachan Singh Versus State of Bombay* reported in AIR 1952 SC 221, which deals with Section 27 of the City of Bombay Police Act, 1902 having *pari materia* provision. In the said case, Hon'ble the Apex Court has observed as under:-

> "The law is certainly an extra-ordinary one and has been made only to meet those exceptional cases where no witnesses for fear of violence to their person or property are willing to depose publicly against certain bad characters whose presence in certain areas constitute a menace to the safety or the public residing therein."

9. In the said case, the Division Bench has further relied upon the judgment of Hon'ble the Supreme Court in the case of *State of N.C.T of Delhi & Another Versus Sanjeev alias Bittu* reported in AIR 2005 SC 2080. In the said case Apex Court in Paragraph No.25 has held as under:-

> "It is true that some material must exist but what is required is not an elaborate decision akin to a judgment. On the contrary, the order directing externment should show existence of some material warranting an order of externment. While dealing with question mere repetition of the provision would not be sufficient. Reference to be made to some material on record and if that is done the requirements of law are met. As noted above, it is not the sufficiency of material but the existence of material which is *sine qua non*."

10. The Division Bench in *Ashok Kumar Patel* (supra) has also considered the judgment of Hon'ble the Supreme Court rendered in the case of *Pandharinath Shridhar Rangnekar Versus Deputy Commissioner of Police, State of Maharashtra* reported in AIR 1973 SC 630. whereby the Apex Court considering the provisions of Section 56 of the City of Bombay Police Act in the context of personal liberty of a person has observed as under:-

> "It is true that the provisions of Section 56 make a serious inroad on personal liberty but such restraints have to be suffered in the larger interests of society. This Court in *Gurbachan Singh Versus State of Bombay* 1952 SCR 737=AIR 1952 SC 221 had upheld the validity of Section 27(1) of the City of Bombay Police Act, 1902, which corresponds to Section 56 of the Act. Following

that decision, the challenge to the constitutionality of Section 56 was repelled in 1956 SCR 533=AIR 1956 SC 585. We will only add that care must be taken to ensure that the terms of Sections 56 and 59 are strictly complied with and that the slender safeguards which those provisions offer are made available to the proposed externee."

11. In view of the aforesaid three judgments of Hon'ble the Supreme Court, the Division Bench of this Court while clarifying the later contingency concluded that it is incumbent on the competent authority to record the reason showing the material that the witnesses from public are not coming forth to depose in a Court against such person on account of apprehension of their life or to person and their property referring the instances but it cannot be directed merely repeating the language as written in Section 5(b) of the Adhiniyam. It has been held by the Division Bench that the compliance of twin condition; the person "is engaged or is about to be engaged" and by producing the material, or due to his activities the witnesses of the case are not coming forth, however, existence of material to record satisfaction thereof is *sine qua non* to pass the order of externment otherwise such an order passed by the District Magistrate confirmed by the Appellate Authority may be quashed.

12. The judgment delivered by the Division Bench in *Ashok Kumar Patel* (supra) has been followed by this Court in the case of *Ashu alias Assu alias Ashish Jain alias Ankush* (supra) reiterating the same principle as laid down in the case of *Ashok Kumar Patel* (supra). In the case of *Pappu alias Pramod* (supra), the similar proposition of law has been laid down considering the judgment rendered in the case of *Ashu alias Assu alias Ashish Jain alias Ankush* (supra) and recently in the case of *Ramgopal Raghuvanshi* (supra), this Court considering the judgment renderend in the cases of *Ashok Kumar Patel* (supra) and *Ashu alias Assu alias Ashish Jain alias Ankush* (supra) quashed the order of externment due to non-compliance of the said twin condition, contemplated in Sec. 5(b) of the Adhiniyam.

13. In view of the foregoing legal position, the facts of the present case are required to be analyzed. As per pleadings and the documents it is apparent that the respondent No.2 District Magistrate, Balaghat while passing the impugned order Annexure P/5 dated 10.1.2017 has referred the registration of nineteen cases against the petitioner and further made a reference of two more cases, though it was not a part of the show cause notice, but all those

cases were of the year 1998 till 2015. As per the return filed by the respondent/ State, the report submitted by the Superintendent of Police, Balaghat dated 18.12.2012 has been considered to pass an order of externment in January, 2017. The reference is made regarding two other cases of the year 2014-2015, and from the record produced before this court, two more cases have been referred that too are of the year 2014-2015. On perusal of those cases and the order of externment, it is nowhere reflected that the past act committed by the petitioner is having any proximity to the act done for which the order of externment is passed. Nothing is brought on record to show that "the petitioner is engaged or is about to be engaged" in commission of the offence in proximity to the earlier cases. Thus, the other offences committed by him years or months back, referred in the order cannot be a ground to pass an order of externment. It is to observe here, that having an antecedent against a person may be a reason to initiate the action as per Section 5(a) of the Adhiniyam. But to pass the order satisfaction of the authority must be on the material that the petitioner is engaged or about to engage in commission of the offence having proximity to his antecedents from the offence, which may be committed to fulfill the first requirement of Section 5(b) of the Adhiniyam. Until the existence of the material to believe the said fact is on record, as per the Division Bench Judgment in the case of *Ashok Kumar Patel* (supra), such action is bad in law. Looking to the facts of the case, it is held that for an offence committed by the petitioner during the year 1998 to 2015, years back or months back referred in the order impugned would not be counted in proximity to commission of the offence on the date of passing the order bringing the material to show that the act of petitioner fall in connotation "is engaged or is about to be engaged". In absence of such findings, the order impugned do not satisfy the first requirement of Section 5(b) of the Adhiniyam.

14. The second requirement is also necessitated to pass an order of externment that on account of the activities of a person, who is externee, the witnesses amongst public are not coming forth to depose in the criminal cases against him either under apprehension of person or property. But in the order impugned existence of such material is not on record, more so, no such finding has been recorded by the competent authority to record satisfaction. Therefore, the order impugned do not fulfill the second requirement of Section 5(b) of the Adhiniyam.

15. In view of the foregoing discussion, it can safely be concluded that passing an order of externment relying upon the offences registered against the petitioner from the year 1998 till 2012 and two other offences as referred

in the year 2014-2015, to pass an order in the year 2017 cannot be said to be in close proximity in absence of existence of any material. In addition to the aforesaid, on perusal of the list of the cases, it reveals that nine cases have been registered against the petitoiner for the offence under Sections 107, 110, 116 of the Cr.P.C for breach of peace; four cases have been registered against him for the offence under Sections 4, 7K, 18 of the Madhya Pradesh Parivahan Adhiniyam to bring the cattles into a slaughter house and out of the remaining cases, in three cases the copies of the judgments thereof have been filed including the offence of Section 307 of the I.P.C wherein the petitioner is acquitted by the competent court and in one case he is convicted against which appeal is filed in High Court and the jail sentence is suspended. No material is available to believe that the witnesses amongst public in those cases are not turning up to depose against him in the Court on account of having any danger to them in person or property. In addition, the finding in this regard has not been recorded by the competent authority.

16. Thus, considering all these aspects, in my considered opinion, the order of externment of the petitioner Annexure P/5 dated 10.1.2017 passed by the respondent No.2 District Magistrate, Balaghat relying upon the report of the Superintendent of Police, Balaghat dated 18.12.2012 after four and a half years and further referring some other cases not mentioned in the show cause notices, of the year 2014-2015, is without application of mind and without recording a finding regarding proximity of the act done by the petitioner from his antecedents to bring such material on record. No material exists to show that the witnesses amongst public are not coming forth to depose in those cases against him. Therefore, the order of externment do not fulfill the requirement of Sec.5(b) of the Adhiniyam. The Appellate Authority/Respondent No.3 Commissioner Jabalpur Division Jabalpur without considering those aspects dismissed the appeal filed by the petitioner vide order Annexure P/7 dated 3.5.2017, therefore, both the orders are liable to be set aside.

17. Accordingly, this petition succeeds and is hereby allowed; the order of externment Annexure P/5 dated 10.1.2017 passed by the respondent No.2 Collector-cum-District Magistrate, Balaghat so also the order Annexure P/7 rejecting the appeal dated 3.5.2017 passed by the respondent No.3 Commissioner Jabalpur Division Jabalpur are hereby set aside. In the facts and circumstances of the case, the parties are directed to bear their own costs.

Petition allowed.

I.L.R. [2017] M.P., 2378
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 19503/2016 (Jabalpur) decided on 10 August, 2017

PREETI JAIN (SMT.) & ors. ...Petitioners
Vs.
MANISH JAIN ...Respondent

A. Criminal Procedure Code, 1973 (2 of 1974), Section 125 & 125(3) – Recovery of Arrears of Maintenance – Limitation – **On 14.05.13, Family Court directed husband to pay Rs. 15,000 p.m. to wife as maintenance – Amount not paid by husband – On 14.11.15, wife filed application u/S 125(3) Cr.P.C. whereby family Court held the wife entitled to receive maintenance amount for a period of preceding one year only – Challenge to – Held – Apex Court concluded that it is unreasonable to insist on filing successive applications when liability to pay maintenance as per order passed is a continuing liability – Respondent directed to pay entire unpaid amount of maintenance from date of order i.e. 14.05.13. (Para 14)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 व 125(3) – भरणपोषण के बकाया की वसूली – परिसीमा – दिनांक 14.05.2013 को, कुटुम्ब न्यायालय ने पत्नी को 15,000/– रू. प्रतिमाह भरणपोषण के रूप में भुगतान करने हेतु पति को निदेशित किया – पति द्वारा राशि का संदाय नहीं किया गया – दिनांक 14.11.2015 को, पत्नी ने दण्ड प्रक्रिया संहिता की धारा 125(3) के अंतर्गत आवेदन प्रस्तुत किया जिसमें कुटुंब न्यायालय ने यह अभिनिर्धारित किया कि पत्नी केवल एक वर्ष पूर्व की अवधि की भरणपोषण राशि प्राप्त करने की हकदार है – को चुनौती – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि क्रमशः आवेदन प्रस्तुत करने पर जोर देना अयुक्तियुक्त है जब पारित आदेश के अनुसार भरणपोषण के भुगतान का दायित्व एक निरंतर दायित्व है – प्रत्यर्थी को आदेश दिनांक अर्थात् 14.05.2013 से भरणपोषण की संपूर्ण असंदत्त राशि का भुगतान करने हेतु निदेशित किया गया।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 125(3) – Arrears of Maintenance – Mode of Recovery – Limitation – **Held – U/S 125 Cr.P.C. two methods/alternatives are available to Magistrate in case of non-compliance of order, one is to issue warrant for levying the amount due and second is to sentence such person for whole or any part of each month's default – Even second alternative can be used by Court after execution of warrant – Since limitation of**

one year is prescribed as per proviso for issuance of warrant, second alternative can also be exercised only within time frame prescribed in the proviso. (Para 9 & 14)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125(3) – भरणपोषण का बकाया – वसूली का ढंग – परिसीमा – अभिनिर्धारित – दण्ड प्रक्रिया संहिता की धारा 125 के अंतर्गत आदेश के अननुपालन के प्रकरण में मजिस्ट्रेट के पास दो तरीके/विकल्प उपलब्ध हैं, प्रथम, देय राशि का उद्ग्रहण करने हेतु वारंट जारी करना एवं द्वितीय, ऐसे व्यक्ति को प्रत्येक माह के व्यतिक्रम के संपूर्ण या किसी भी भाग के लिए दण्डादिष्ट करना – वारंट के निष्पादन के पश्चात् न्यायालय द्वारा द्वितीय विकल्प का भी प्रयोग किया जा सकता है – चूंकि वारंट जारी करने हेतु परंतुक के अनुसार एक वर्ष की परिसीमा विहित की गई है, द्वितीय विकल्प का भी प्रयोग केवल परंतुक में विहित समय सीमा के भीतर किया जा सकता है।

Cases referred :

1980 Crl.L.J. 1212, 2005 (4) SCC 468, 2013 (10) SCC 618, 1989 (1) SCC 405, 1999 (5) SCC 672.

Sushil Sharma, for the petitioners.
Neeraj Dubey, for the respondent.

ORDER

Sujoy Paul, J. :- This petition filed under Article 227 of the Constitution takes exception to the order dated 13.05.2016 (Annexure-P/1), whereby the application preferred by the petitioners under Section 125(3) of Cr.P.C. is partly disallowed by the Family Court.

2. Briefly stated, the admitted facts are that in a Matrimonial Case No.126/2016, the Court below vide order dated 14.05.2013 directed the respondent-husband to pay Rs.15,000/- per month as maintenance amount. The said direction was issued by the Court below in exercise of powers under Section 125 Cr.P.C.

3. Shri Sushil Sharma, learned counsel for the petitioner submits that when the amount of maintenance was not deposited in consonance with the requirement of Section 125 Cr.P.C., the petitioners filed an application under Section 125(3) of Cr.P.C. on 14.11.2015. The respondent filed his reply containing a preliminary objection. The Court below, after hearing the parties on the said application, decided it by order dated 13.05.2016. Shri Sharma submits that the Court below has erred in giving a finding that the application

under Section 125 (3) of Cr.P.C. is filed on 05.11.2015 and, therefore, as per the proviso to Section 125 (3), the petitioners are entitled to get the amount only for a period of one year. In other words, the petitioners are only entitled to get the amount of maintenance from November, 2014 to November, 2015. Shri Sharma submits that the Court below has erred in disallowing the application for a period before November, 2014. He placed heavy reliance on the language employed in Section 125 (3). In support of his contention, he relied on the judgment of Allahabad High Court in the case of *Iftekhar Husain Vs. Smt. Hameed Begum,* 1980 Crl. L.J. 1212. In addition, he relied on the judgment of Supreme Court in the case reported in 2005 (4) SCC 468 (*Shantha alias Usha Devi and another Vs. B.G. Shivana Nanjappa)and another* judgment of Supreme Court in *Poongodi and another Vs. Thangavel,* 2013 (10) SCC 618.

4. *Per contra,* Shri Neeraj Dubey, learned counsel for the respondent opposed the said contention. He submits that the petitioners stayed with the respondent for quite some time. During this period, expenses of petitioners were taken care of by the respondent. Thus, the question of payment of maintenance amount during this period does not arise. The petitioners' claim prior to November, 2014 was clearly barred by limitation. As per Section 125 (3), the petitioners are only entitled to get the maintenance amount for preceding one year.

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

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

7. Before dealing with rival contentions, it is apposite to quote relevant portion of Section 125 (3) Cr.P.C. which is as under:

> *"125. (3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowances for the maintenance or the interim maintenance and expenses of proceedings, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner*

made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

(Emphasis supplied)

8. The first contention of Shri Sushil Sharma, learned counsel for the petitioner is based on the judgment of Allahabad High Court in the case of *Iftekhar Husain* (supra). In the said case, the Court opined that as per the plain reading of aforesaid section, the Court has two alternatives for the purpose of recovery of arrears of maintenance. The first is by issuance of warrant for realization of amount in the manner prescribed for levying the fine. The second is by sending the defaulter to imprisonment for one month for unpaid amount. The restriction placed as per proviso to sub section (3) is that warrant for recovery of any amount cannot be done if application in this regard is not made within a period of one year from the date the amount becomes due. The Allahabad High Court opined that there is no such limitation prescribed in sub-Section (3) of Section 125 Cr.P.C. which limits the power of Magistrate to sentence the defaulter for the whole or any part of each month's allowance remaining unpaid, after the execution of the warrant to imprisonment for a term which may extend to one month or until payment is made. In other words, though the property of the defaulter can be attached and sold for the realization of arrears of maintenance for a maximum period of one year from the date of application, yet the defaulter can be sentenced to imprisonment for recovery of arrears which may extend beyond this period.

9. I respectfully disagree with the aforesaid view taken in the case of *Iftekhar Husain* (supra). A microscopic reading of aforesaid reproduced Section 125 shows that two methods/alternatives are available to the Magistrate in cases of non-compliance of earlier order passed under Section 125 Cr.P.C. First one, as noticed by Allahabad High Court is to issue a warrant for levying the amount due in the manner provided for levying fines and second is to sentence such person for the whole or any part of each month's allowance remaining unpaid. A careful reading of this provision makes it clear that even second alternative can be used by the Court after the execution of the warrant. The expression "after the execution of the warrant" in the second part of

aforesaid provision is very important and significant. As per my judgment, the second alternative can be exercised only "after the execution of the warrant". The proviso makes it clear that no warrant shall be issued for the recovery of any amount due under this section unless application is made to the Court to levy such amount within a period of one year from the date on which it becomes due.

10. I have no scintilla of doubt that second alternative can also be exercised after the execution of warrant. Since a limitation of one year is prescribed as per the proviso aforesaid for issuance of warrant, second alternative can also be exercised only within the time frame prescribed in the said proviso. For this reason, I respectfully disagree with the view taken in *Iftekhar Husain* (supra).

11. Pertinently, in *Poongodi* (supra), the Apex Court held that "what the proviso contemplates is that the procedure for recovery of maintenance under Section 125(3) Cr.P.C., namely, by construing the same to be and the detention of the defaulter in custody would not be available to a claimant who had slept over his/her rights and has not approached the Court within a period of one year commencing from the date on which the entitlement to receive maintenance has accrued". For this reason also, I am unable to follow the view taken in *Iftekhar Husain* (supra).

12. In 1989 (1) SCC 405 *(Kuldip Kaur Vs. Surinder Singh and another),* it was held that sentencing a person to jail is a "mode of enforcement". It is not a "mode of satisfaction" of the liability. The liability can be satisfied only by making actual payment of the arrears. The whole purpose of sending to jail is to oblige a person liable to pay monthly allowance who refuses to comply with the order without sufficient cause, to obey the order and to make payment. It was further held that sentencing to jail is the means for achieving the end of enforcing the order by recovering the amount of arrears. It is not a mode of discharge liability. The order for monthly allowance can be discharged only upon the monthly allowance being recovered. Their Lordships considered the judgment of *Kuldip Kaur* (supra) and judgment of 2005 (4) SCC 468 *(Shantha alias Ushadevi and another Vs. B.G. Shivananjappa)* and 1999 (5) SCC 672 *(Shahada Khatoon and others Vs. Amjad Ali and others)* in the case of *Poongodi* (supra) and held thus:

> *"7. .....The application dated 05.02.2002 filed by*

the appellants under Section 125(3) was in continuation of the earlier applications and for subsequent periods of default on the part of the Respondent. The first proviso to Section 125(3), therefore did not extinguish or limit the entitlement of the appellants to the maintenance granted by the learned trial court, as has been held by the High Court.

8. In view of the above, we are left in no doubt that the order passed by the High Court needs to be interfered with by us which we accordingly do. The order dated 21.04.2004 of the High Court is set aside and we now issue directions to the respondent to pay the entire arrears of maintenance due to the appellants commencing from the date of filing of the Maintenance Petition (M.C.No.1/1993) i.e. 4.2.1993 within a period of six months and current maintenance commencing from the month of September, 2013 payable on or before 7th of October, 2013 and thereafter continue to pay the monthly maintenance on or before the 7th of each successive month. If the above order of this Court is not complied with by the Respondent, the learned Trial Court is directed to issue a warrant for the arrest of the respondent and ensure that the same is executed and the respondent taken into custody to suffer imprisonment as provided by Section 125(3) CrPC".

The Apex Court in the case of *Shantha*(supra) opined that it must be borne in mind that S.125 Cr. P.C. is a measure of social legislation and it has to be construed liberally for the benefit of the wife. It is unreasonable to insist on filing successive applications when the liability to pay the maintenance as per the order passed under said section is a continuing liability.

13. So far argument of Shri Neeraj Dubey, learned counsel for the respondent, is concerned, suffice it to mention that the very same argument of the respondent was not accepted by the court below. The court below rejected the said contention in the impugned order. The respondent has not assailed the impugned order by filing appropriate proceedings. Apart from this, in view of legislative mandate ingrained in Section 125 Cr.P.C., the said contention cannot be accepted.

14. The facts of the present case have great similarity with that of *Poongodi* (supra). The maintenance amount not been paid by the husband for some period for which the present petitioner preferred applications. Hence, I deem it proper to follow the course adopted by the Supreme Court in *Poongodi* (supra). Accordingly, the respondent is directed to pay the entire unpaid amount of maintenance due to the petitioner commencing from the date of basic order of the Court below dated 14.05.2013. The arrears of such amount shall be paid to the petitioner within six months from today. The amount shall be paid till the date it is due in accordance with law. If this order is not complied with by the respondent, the learned trial Court shall issue a warrant for the arrest of respondent and ensure that the same is executed and the respondent is taken into custody to suffer imprisonment as mandated in Section 125 (3) of Cr.P.C.

15. This petition, to the extent indicated hereinabove, is allowed.

Petition allowed.

I.L.R. [2017] M.P., 2384
WRIT PETITION

Before Mr. Justice Hemant Gupta, Chief Justice &
Mr. Justice Vijay Kumar Shukla

W.P. No. 12432/2017 (Jabalpur) decided on 18 August, 2017

RENEW CLEAN ENERGY PRIVATE LTD. ...Petitioner
Vs.
M.P. POWER MANAGEMENT COMPANY LTD. & anr. ...Respondents

A. ***Constitution – Article 226/227 – Writ Jurisdiction – Contractual Matters – Alternate Remedy*** **– Held – Availability of alternate remedy is a rule of discretion – It does not bar exercise of writ jurisdiction of this Court in appropriate cases, moreso when there is no dispute about the question of fact, this Court can interfere in exercise of writ jurisdiction even in contractual matters. (Para 12)**

क. *संविधान – अनुच्छेद 226/227 – रिट अधिकारिता – संविदात्मक मामले – वैकल्पिक उपचार* – अभिनिर्धारित – वैकल्पिक उपचार की उपलब्धता विवेक का एक नियम है – यह समुचित प्रकरणों में इस न्यायालय के रिट अधिकारिता के प्रयोग को वर्जित नहीं करता है, बल्कि जब तथ्य के प्रश्न के बारे में कोई विवाद नहीं है, यह न्यायालय संविदात्मक मामलों में भी रिट अधिकारिता के प्रयोग से हस्तक्षेप कर सकता है।

B. ***Constitution – Article 226/227 – Writ Jurisdiction –***

Termination of Contract – Ground **– Held – There is a delay of only 16 days in completing the first part of the agreement, for which there is a provision of penalty but action of termination of contract is not sustainable – Order of termination is set aside and action of invocation of bank guarantee as per agreement is maintained. (Para 13 & 14)**

ख. संविधान – अनुच्छेद 226/227 – रिट अधिकारिता – संविदा का पर्यवसान – आधार – अभिनिर्धारित – करार के प्रथम भाग को पूरा करने में केवल 16 दिनों का विलंब है, जिसके लिए शास्ति का प्रावधान है परन्तु संविदा के पर्यवसान की कार्रवाई कायम रखे जाने योग्य नहीं हैं – पर्यवसान का आदेश अपास्त किया गया तथा करार अनुसार बैंक गारंटी के अवलंबन की कार्रवाई कायम रखी गई।

Case referred :

(2015) 9 SCC 433.

Naman Nagrath with *Jubin Prasad, Mazag Andrabi* and *Varun Kumar*, for the petitioner.

P.K. Kaurav, A.G. with *Aditya Khandekar*, for the respondent No.1.

ORDER

The Order of the Court was passed by : **HEMANT GUPTA, C.J. :-** The challenge in the present petition is to an order dated 11.08.2017 (Annexure P/18), whereby the respondent No.1 has decided to terminate the Power Purchase Agreement executed on 10.11.2015 for the reason that petitioner has failed to complete the milestone of procuring land within the extended period of nine months after 210 days from the date of execution of the agreement.

2. The brief facts leading to the present petition are that New and Renewable Energy Department, Government of Madhya Pradesh introduced the Solar Policy for encouraging generation of power through solar power projects in Madhya Pradesh on 20.07.2012. The respondent No.1, the M.P. Power Management Company (for short "the Company") issued a request for proposal for long term procurement of 300 MW power from Grid connected Solar Energy Sources through tariff based competitive bidding for meeting Renewable Purchase Obligation. The petitioner participated in such tender process.

3. The petitioner was issued a Letter of Intent on 23.10.2015 informing

it that it is successful bidder and was allotted 51 MW capacity at quoted tariff of INR 5.457 per kilowatt. Subsequently the power purchase agreement was executed on 10.11.2015. Some of the conditions of the agreement, which are relevant for the purposes of present petition, read as under:-

"2.1 SATISFACTON OF CONDITIONS SUBSEQUENT BY THE SELLER

2.1.1. The Seller agrees and undertakes to duly perform and complete all of the following activities at the Seller's own cost and risk within 210 days from the Effective Date, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by MPPMCL:

xx xx xx xx

xx xx xx xx

e) The Seller shall produce the documentary evidence of the clear title and possession of the acquired/ allotted land for Solar Project in the name of Seller;

f) The Seller shall fulfill the technical requirements according to criteria mentioned in RFP and produce the documentary evidence of the same. The Seller would also provide evidence that the requisite technical criteria have been fulfilled and required land for project development @ 2 Hectares/MW for Solar PV and 3 Hectares/MW for Solar Thermal is under clear possession of the Seller. In this regard the Seller shall be required to furnish the following documentary evidences:-

- Ownership or lease hold rights (for at least 30 years) or right to use permission (for revenue land in Madhya Pradesh) in the name of the Seller and possession of 100% of the area of land required for the allotted project.

- Requisite documents from the concerned and competent revenue/registration authority for the

acquisition/ ownership/ vesting of the land in the name of the Seller and in case private land clear title for ownership.

(Note: (i) Change in the location of land from one place to other location is not permitted after 210 days of signing of PPA or at financial closure, whichever is earlier. (ii) The land should be free from all encumbrances. (iii) The land should neither have been proposed for other purposes & nor should have been mortgaged).

(g) ....."

2.5 DELAY IN ACHIEVING CONDITIONS SUBSEQUENT

2.5.1. In case of delay in achieving any of the Conditions Subsequent under clause 2.1 (a to h), as may be applicable, MPPMCL shall encash CPG (submitted by Seller @ Rs.30 Lakhs/MW) as under, subject to Force Majeure:

a) Delay from 0-3 months - 1% per week.

b) Delay from 3-6 months - 2% per week for the period exceeding 3 months, apart from (a) above.

c) Delay from 6-9 months - 3% per week for the period exceeding 6 months, apart from (a) and (b) above.

d) In case of delay of more than 9 months, MPPMCL shall terminate PPA and release balance amount of CPG.

2.6 COMMISSIONING

In case of Solar Project of capacity up to 50 MW, commissioning of plant shall be within 12 months from the date of financial closure subject to Force Majeure. In case of Solar Project of capacity beyond 50 MW and up to 100 MW, commissioning of plant shall be within 15 months from the date

of financial closure subject to Force Majeure. For capacity beyond 100 MW, commissioning period shall be within 18 months from the date of financial closure subject to Force Majeure.

In case of failure to achieve this milestone, provision of PPA as mentioned below shall apply:-

MMPMCL shall encash the CPG in the following manner for the capacity not commissioned, subject to Force Majeure:-

a) Delay from 0-3 months - 1% per week.

b) Delay from 3-6 months - 2% per week for the period exceeding 3 months, apart from (a) above.

c) Delay of more than 6 months - 3% per week for the period exceeding 6 months, apart from (a) and (b) above.

Part Commissioning: In case of Solar PV Projects, Part commissioning of the Project shall be accepted by MPPMCL subject to the condition that the minimum capacity for acceptance of part commissioning shall be 5 MW or in multiples of 5 MW.

COD means the commissioning date of last Unit(s) of the Power Project where upon the Seller starts injecting power from full contracted capacity of the Power Project to the Delivery Point; as approved by Competent Authority of the Transco/Discom. The PPA will remain in force for a period of 25 years from the COD."

4. Though the land was to be provided by the petitioner, but, the State Government allotted 41.811 hectares of land to the petitioner for installation of the solar power energy system. However, such land was found to be under encroachment and consequently a letter was issued by the Company to the Petitioner on 29.12.2016 substituting Note (I) of Clause 2.1.1 to read as under:-

"Change in the location of land may be permitted after 210 days of signing of PPA, by MPPMCL" however subject to provision 2.5 and 2.6 of said PPA."

5. Subsequently, the petitioner procured the land from its resources and

informed the Company on 22.03.2017 that it has acquired 253 acres of land at Ashok Nagar. The relevant sale deeds were attached with the said communication. It is thereafter, on 11.08.2017, the Company communicated the termination of the contract and ordered encashment of contract performance guarantee in the sum of Rs.1195.542 Lakhs. The letter dated 11th August 2017 reads as under:-

> "A Power Purchase Agreement (PPA) was executed between you and MPPMCL, on 10-11-2015 for supply of Power from your proposed, 51 MW. Solar PV plant located at Village-Jaitpur, District Rajgarh and subsequently location was changed to Village-Bhensarwas, District Ashoknagar at a rate of Rs.5.457 per unit, under Phase-III solar bidding.
>
> Whereas, for guarantee to fulfilment of contractual obligations within timeline as per PPA, you had submitted a Bank Guarantee amounting Rs.15,30,00,000/- (Rs. Fifteen Crore thirty lakhs only), bearing Sr.No.002GM01153090001, dated 05-11-2015, Drawn on Yes Bank Ltd., Fortune Global Arcade, Sikanderpur Mehrauali Gurgaon Road, Gurgaon, Valid upto 31.12.2017, as contract performance guarantee (CPG) to MPPMCL.
>
> Whereas, as stipulated in the PPA (ARTICLE 2: PRECOMMISSIONING ACTIVITIES), time line for scheduled commencement of supply is, mentioned hereunder-

Effective Date* (Date of PPA)	10/11/15
Last date of fulfilling Conditions Subsequent (210 days from PPA)	07/06/16
Completion of 9 months of penalty period for CS (Clause 2.5 of PPA)	07/03/17
Actual date of fulfillment of Conditions subsequent	23/03/2017
Delay in achieving condition subsequent form the dead line	16 days

> Whereas, clause 2.5 of PPA - DELAY IN ACHIEVING

CONDITION SUBSEQUENT, states that,

'2.5.1 *In case of delay in achieving any of the Conditions Subsequent under clause 2.1 (a to h), as may be applicable, MPPMCL shall encash CPG (submitted by seller @ Rs.30 Lakhs/MW) as under, subject to Force Majeure.*

a) Delay from 0-3 months - 1% per week.

b) Delay from 3-6 months - 2% per week for the period exceeding 3 months, apart from (a) above.

c) Delay from 6-9 months - 3% per week for the period exceeding 6 months, apart from (a) and (b) above.

d) In case of delay of more than 9 months, MPPMCL shall terminate PPA and release balance amount of CPG.'

Whereas, your representations and submissions vide letters dated 23.03.2017 and 28.03.2017, were examined and considered in light of the PPA, by the competent authority of the Company. It is observed that you have failed to achieve fulfillment of conditions subsequent, even during the permissible delay period with penalty (9 months after 210 days from signing of the PPA) i.e. upto 07.03.2017.

Whereas, contentions mentioned in your representation/ submissions pertaining to delay in land acquisition because of ROW problems at original site and demonetization during the land acquisition at new site, for considering as Force majeure, does not come under Force Majeure as provided in Article I of the PPA. The Condition Subsequent requirement of the clause 2.1.1 of the PPA pertains to (i) Obtaining all consents, clearances and permits required for supply of power to MPPMCL, (ii) Financial closure, (iii) Transmission Agreement with CTU/STU, and (iv) Documentary evidence of the clear title and possession of the acquired/allotted land. The PPA provides for a period of 210 days and a maximum delay of 9 months after the completion of 210 days (thus a total of 210 days - 9 months) to complete the condition subsequent. As it is evident from the RFP, Bid documents and PPA that the Seller

(M/s ReNew Clean Energy Pvt. Ltd.) was free to arrange suitable land for the project and the PPA provides options of acquiring private land or getting Govt land allotted.

Further, change in the location of land is not permitted after 210 days of signing of PPA or at financial closure, whichever is earlier (please refer note (i) under clause 2.1.1 of the PPA). However, on your request, the Board of Directors of MPPMCL permitted the change in location after 210 days of signing of PPA, in the interest of implementation of the project, subject to clauses 2.5 and 2.6 of the PPA. In light of the above facts and the provisions of the PPA, it is concluded that your justification for delay in achieving condition subsequent is not tenable, and therefore not accepted.

Therefore, as per sub-clause (d) of clause 2.5.1 of PPA, the PPA signed on 10-Nov. 2015, between M/s ReNew Clean Energy Pvt. Ltd., Haryana, (SPV of Bidding Company ReNew Solar Power Pvt. Ltd.) and MPPMCL, for Supply of Power from the proposed, 51 MW, Solar PV plant located at Village-Jaitpur, District Rajgarh and subsequently location was changed to Village-Bhensarwas, District Ashoknagar, at a rate of Rs.5.457 per unit, to MPPMCL, is hereby terminated.

Further to above, as per clause 2.5.1, Penalty due to delay in achieving condition subsequent, stands recoverable from you, same is tabulated as under-

Sr. Delay slab	Applicable rate of penalty	Penalty amount Rs. In Lac
1 Up to 210 days from execution of PPA) (From 10.11.2015 to 07.06.2016)	Nil	Nil
2 Delay from 0-3 months (from 00:00 Hrs of 08.06.2016 to 24:00 Hrs. of 07.09.2016 = 23+31+31+07 = (92/7) = 13.14 weeks	1% per week	201.042 Lakh (13.14 x 51 x 30x0.01)

3 Delay from 3-6 months (from 00:00 Hrs. of 08.09.2016 to 24:00 Hrs. of 07.12.2016 = 23+31+30+07 =91 days = 91/7 = 13 weeks.	2% per week	397.80 lakh (13X51x30x0.02)
4 Delay from 6-9 months (from 00:00 Hrs. of 08.12.2016 to 24:00 Hrs. of 07.03.2017 = 24+31+29+07 =91 days = 91/7=13 weeks	3% per week	596.70 Lakh (13X51x30x0.03)
Total Penalty		**1195.542 Lakh**

As mentioned above, an amount of Rs.1195.542 lakh (Rupees eleven crore ninety five lakh fifty four thousand and two hundred only) is being recovered through encashment of Bank Guarantee held with MPPMCL as CPG."

6. Learned Advocate General raised preliminary objection against the entertainment of the present writ petition *inter alia* on the ground that petitioner has alternative statutory remedy under Section 86(1)(f) of the Electricity Act, 2003, therefore, disputed questions of fact should not be examined in the writ petition. It is also contended that the time limit contemplated in Clause 2.5.1 is mandatory and sacrosanct, therefore, any violation of the time limit entitles the Company to terminate the contract and to take action as is permissible in law. It is also argued that as against tariff quoted by the petitioner at Rs.5.457 per kilowatt, the subsequent tariff offered by other tenderers in other contracts is as low as Rs.3.30 per kilowatt and, therefore, the payment of higher tariff to the petitioner will cost the State exchequer, may be to the tune of Rs.450 Crores for the entire duration of 25 years of the contract period. After raising arguments on the maintainability of the petition, learned Advocate General seeks time to file return on the merits of the petition as well.

7. On the other hand, Mr. Nagrath, learned counsel for the petitioner, submits that petitioner has incurred a capital expenditure of Rs.350 Crores for generation and sale of power to the Company. Therefore, it is a legitimate expectation of the Petitioner that the Company shall deal with the petitioner in a fair and reasonable manner. It is contended that though there was delay of 16 days in terms of Clause 2.5.1, but, the petitioner has maintained the ultimate time line of handing over the project on 07.09.2017 when petitioner submitted notice of commissioning of 51 MW solar plant on 10.07.2017 (Annexure

P/17), whereas, the petitioner is expected to commission the plant on or before 31.08.2017. Therefore, the delay of 16 days in terms of Clause 2.5.1 is not a good and reasonable cause with the Company to terminate the contract and put the petitioner to financial loss.

8. Before coming to the discussion on the preliminary objections, we may state that we heard the arguments of the learned counsel for the parties at length and when we tentatively conveyed that the order passed by the Company on 11.08.2017 is not sustainable and we intend to allow the writ petition, it was at that stage, the learned Advocate General stated that the Company would like to file the return. But we find that there is no dispute on the question of fact, therefore, we decline the request of the learned Advocate General to file return and proceed to decide the writ petition including preliminary objections raised by the learned Advocate General.

9. The contract is in two parts. One is procurement of land within 210 days and with a condition that the location of the land will not be permitted to be changed after 210 days. The other part is the installation of the power project in another 15 months. Clause 2.1.1 of the agreement is clear that the seller i.e. the present petitioner has to perform and complete all of the following activities on its cost and risk within 210 days from the Effective Date, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by the Company. The condition 2.1.1(e) is in respect of the production of the documentary evidence of the clear title and possession of the acquired land. However, such condition has been changed on 29.12.2016, when change in location of land was permitted even after 210 days of signing of the agreement, however, subject to provisions of clause 2.5 and 2.6 of the agreement. Clause 2.5.1 empowers the Company to encash the contract performance guarantee if there is a delay in achieving any of the conditions under Clause 2.1(a to h), as the Company is competent to encash Bank Guarantee for the delay of first three months at the rate of 1% per week; for a delay of 3-6 months at the rate of 2% per week; for a delay of 6-9 months at the rate of 3% per week, but, in case of delay of more than 9 months, the Company has been given right to terminate the agreement and release the balance amount of contract performance guarantee.

10. Though, the timeline given in Clause 2.5.1 is expected to be maintained, but, the delay in procuring land *ipso facto* will not entitle the Company to terminate the agreement. The Company permitted the petitioner

to proceed ahead with the execution of the power plant project after expiry of nine months after 210 days. The Company allowed the petitioner to invest substantial cost in erection of the power plant project after 07.03.2017; therefore, the delay of 16 days, in these circumstances, disentitles the Company to terminate the agreement. The condition of termination of the agreement after the Company has allowed the petitioner to proceed with the installation of the solar power plant project cannot be treated to be a mandatory condition. The Company could very well be justified in terminating the agreement soon after the period of default even on payment of penalty expired. But, having allowed the petitioner to proceed with the installation of solar power project, then the termination of the contract is unreasonable and arbitrary action. However, since the contract permits imposition of penalty, therefore, in terms of the said condition, the petitioner shall be liable to pay penalty in terms of clause 2.5.1 of the agreement. However, the action of the Company in terminating the Contract in these circumstances is unreasonable, arbitrary and not sustainable in law.

11. The preliminary objection raised by the learned Advocate General is that since there is statutory alternate remedy available to the petitioner, therefore, such remedy is required to be availed. We do not find any merit in the objection raised by the learned Advocate General since there is no dispute of question of fact raised in the present petition.

12. As per the Company itself, there is a delay of 16 days in completion of the first condition of the agreement. We find that such preliminary objection does not merit any consideration. The availability of alternate remedy is a rule of discretion. It does not bar the exercise of the writ jurisdiction of this Court in appropriate cases. More so, when there is no dispute about the question of fact, this Court can interfere in exercise of writ jurisdiction even in contractual matters. Reference be made to judgment reported as *State of Kerala and others v. M.K. Jose,* (2015) 9 SCC 433, where the Court held as under:-

> "**13.** A writ court should ordinarily not entertain a writ petition, if there is a breach of contract involving disputed questions of fact. The present case clearly indicates that the factual disputes are involved.
>
> xxxx xxxx
>
> **17.** In *ABL International Ltd. v. Export Credit*

Guarantee Corpn. of India Ltd., (2004) 3 SCC 553, a two-Judge Bench after referring to various judgments as well as the pronouncement in *Smt. Gunwant Kaur And Ors. vs Municipal Committee, Bhatinda,* (1969) 3 SCC 769 and *Century Spg. and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council*, (1971) 1 SCC 582, has held thus: (*ABL International* case, SCC pp. 568-69 & 572, paras 19 & 27)

> *"19.* Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of *Gunwant Kaur* this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.
>
> * * *
>
> *27.* From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:
>
> *(a)* In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.
>
> *(b)* Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.
>
> *(c)* A writ petition involving a consequential relief

of monetary claim is also maintainable."

While laying down the principle, the Court sounded a word of caution as under: (*ABL International case,* SCC p. 572, para 28)

> "28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See *Whirlpool Corpn. v. Registrar of Trade Marks,* (1998) 8 SCC 1.) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

20. We have referred to the aforesaid authorities to highlight under what circumstances in respect of contractual claim or challenge to violation of contract can be entertained by a writ court. It depends upon facts of each case. The issue that had arisen in *ABL International* was that an instrumentality of a State was placing a different construction on the clauses of the contract of insurance and the insured was interpreting the contract differently. The Court thought it apt merely because something is disputed by the insurer, it should not enter into the realm of disputed questions of fact. In fact, there was no disputed question of fact, but it required interpretation of the terms of the contract of insurance. Similarly, if the materials

that come on record from which it is clearly evincible, the writ court may exercise the power of judicial review but, a pregnant one, in the case at hand, the High Court has appointed a Commission to collect the evidence, accepted the same without calling for objections from the respondent and quashed the order of termination of contract."

13. In view of the above, we do not find any merit in the arguments raised by the learned Advocate General that the petitioner has alternative remedy, therefore, be directed to avail such remedy. Since there is no dispute on the question of fact and that the delay is of 16 days only in completing first part of the agreement, therefore, we find that the action of termination of contract is not sustainable.

14. Consequently, we allow the writ petition partly and set aside the order of termination of the contract dated 11.08.2017 (Annexure P/18) while maintaining the action of invocation of bank guarantee in terms of clause 2.5.1 of the agreement.

15. The writ petition is disposed of.

Petition partly allowed.

I.L.R. [2017] M.P., 2397
WRIT PETITION
Before Mr. Justice Rohit Arya
W.P. No. 2176/2017 (Indore) decided on 18 August, 2017

SOMESHWAR PATEL ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 55(1) & 55(2) – Applicability – Removal of Chairman – Irregularity in auction proceedings – Held – Both sections deal with different class of persons, Members u/S 55(1) and Chairman/Vice Chairman u/S 55(2) with different nature of punishments – Allegations against petitioner are of period when he was Chairman and show cause notice also issued when he is a Chairman, thus Section 55(1) is not applicable – Impugned order to the extent, it debars petitioner u/S 55(1) is in excess of jurisdiction and is hereby quashed – However as per***

records/evidence, allegations of irregularities proved and hence order u/S 55(2) of removing him from post of Chairman for remainder of his term is affirmed – Petition partly allowed. (Paras 18, 20 & 21)

क. कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 55(1) व 55(2) – प्रयोज्यता – अध्यक्ष को हटाया जाना – नीलामी कार्यवाहियों में अनियमितता – अभिनिर्धारित – दोनों धाराएँ भिन्न श्रेणी के व्यक्तियों से संबंधित हैं, धारा 55(1) के अंतर्गत सदस्य एवं धारा 55(2) के अंतर्गत अध्यक्ष/उपाध्यक्ष से संबंधित है, भिन्न प्रकृति के दंड के साथ – याची के विरूद्ध अभिकथन उस अवधि के हैं जब वह अध्यक्ष था तथा कारण बताओ नोटिस भी तब जारी किया गया है जब वह अध्यक्ष है, अतः धारा 55(1) प्रयोज्य नहीं है – आक्षेपित आदेश उस सीमा तक जहां तक यह धारा 55(1) के अंतर्गत याची को विवर्जित करता है, अधिकारिता से अधिक है तथा एतद्द्वारा अभिखंडित किया गया – तथापि अभिलेख/साक्ष्य के अनुसार, अनियमितताओं के अभिकथन साबित हुए और इसलिए धारा 55(2) के अंतर्गत उनके कार्यकाल की शेष अवधि के लिए उन्हें अध्यक्ष के पद से हटाने के आदेश की अभिपुष्टि की गई – याचिका अंशतः मंजूर।

B. Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 55(1) & 55(2) – Removal of Chairman – Proceedings and Procedure – Principle of Natural Justice **– Held – Adhiniyam of 1972 does not provide any express rules or procedure for proceeding u/S 55(1) and (2) thereof – Section 55 itself contemplates that before action is taken against delinquent, show cause notice and reasonable opportunity of hearing shall be afforded to him – In present case, show cause notice was issued, documents were supplied as well as opportunity for personal hearing was granted to petitioner – No violation of principle of natural justice – Aims and objects of the Act of 1972 discussed. (Para 15 & 18)**

ख. कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 55(1) व 55(2) – अध्यक्ष को हटाया जाना – कार्यवाहियां एवं पद्धति – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – 1972 का अधिनियम धारा 55(1) एवं (2) के अंतर्गत कार्यवाही करने हेतु कोई अभिव्यक्त नियम या प्रक्रिया उपबंधित नहीं करता है – धारा 55 स्वयं यह अनुध्यात करती है कि अपचारी के विरूद्ध कार्रवाई किये जाने के पूर्व, उसे कारण बताओ नोटिस एवं सुनवाई का उचित अवसर प्रदान किया जाएगा – वर्तमान प्रकरण में, कारण बताओ नोटिस जारी किया गया था, याची को दस्तावेजों को प्रदाय किये जाने के साथ–साथ व्यक्तिगत सुनवाई का अवसर भी प्रदान किया गया था – नैसर्गिक न्याय के सिद्धांत का उल्लंघन नहीं – 1972 के अधिनियम के लक्ष्य और उद्देश्य विवेचित।

Cases referred :

AIR 2009 Gujarat 171, 1983 JLJ 757, (2012) 4 SCC 407, W.P. No. 3750/2016 decided on 13.12.2016, W.P. No. 3332/2016 decided on 11.05.2016, 1991 MPLJ 835, (1995) 4 SCC 201, (1999) 8 SCC 741, (2010) 9 SCC 642, (2006) 13 SCC 295, (2005) 8 SCC 351, (2001) 8 SCC 151, (1993) 3 SCC 499, AIR 1964 SC 395, AIR 1964 SC 364.

A.K. Sethi with *Arpit Oswal*, for the petitioner.
Rohit Mangal, G.A. for the respondent No. 1/State.
Sunil Jain with *Kamal Airen*, for the respondent No. 2.

JUDGMENT

Rohit Arya, J. :- This writ petition, under Article 226 of the Constitution of India, is directed against the order dated 28/3/2017 (Annexure P/1), whereby Managing Director, M.P. State Agricultural Marketing Board, exercising powers under section 55(1) and 55(2) of the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 (for short "the Adhiniyam of 1972") has removed the petitioner from the post of Chairman and Member of Krishi Upaj Mandi Samiti (hereinafter referred to as "Market Committee"), Indore with further disqualification debarring him from contesting elections or re-nomination for the post of Member of the Market Committee for six years.

2. Before tracing the contours of factual matrix, it will be proper to refer to few provisions of M.P.Krishi Upaj Mandi (Allotment of Land and Structures) Rules, 2009 (hereinafter referred to as Rules of 2009). Rule 3 deals with general principles of allotment and sub- Rule 4 provides that no person shall be alloted more than one plot or structure. Rule 4 provides for reservation of plots and structures to the extent of 10% for SC, ST etc. Rule 5 provides for Publication of advertisement. Rule 8 provides for constitution of auction committee, whereunder for the purpose of conduct of auction and scrutiny of the offers received the auction committee is empowered consisting of Chairman and three Members. In the instant case auction committee consisted of following persons. :-

(1)	Shri Someshwar Patel President, Krishi Upam Mandi Samiti, Indore.	- Chairman(Chairperson) Auction Committee

(2) Shri Mahendra Singh Chouhan -Member Auction Committee
Joint Director,
Regional Office,
Indore.

(3) Shri O.P.Malviya - Member, Auction Committee
Assistant Engineer,
Regional Office,
Indore.
(Representative of Executive Engineer)

(4) Shri R.S.Mandloi - Member-Secretary,Auction
Dy.Collector/Secretary, Committee
Krishi Upaj Mandi Samiti
Indore.

Rule 10(6) provides for third auction if the market committee does not accept the bid/offer received in the first and second attempt.

3. It is deducible from record that petitioner, consequent upon his election as Member of the Market Committee, was elected as Chairman for the period 22/7/2007 to 22/7/2011; five year term. Thereafter, he has been re-elected as Chairman with effect from 7/1/2013 for five years upto January, 2018.

4. In the year 2009, 88 shops in the premises of Mandi were available for auction and 9 shops out of the said 88 shops i.e. 10% were reserved for SC, ST and OBC class of people, as provided for under Rule 4 of the Rules of 2009.

Market Committee conducted the auction on 14/10/2009 for 88 shops fixing the upset price at Rs.1.834 lacs. Bids offered for unreserved shops ranged from 20.32 lacs to 31.54 lacs per shop. Bids offered for reserved shops ranged from 22.26 lacs to 33.51 lacs per shop by 44 bidders. Only 55 successful bidders for un-reserved shops deposited the requisite amount within time prescribed. Remaining 33 shops (24 of un-reserved and 9 of reserved category) were available for re-auction.

Advertisement was issued for second auction and the auction was conducted on 7/3/2011 for aforesaid 33 shops with the upset price fixed at Rs.7.64309 lacs. The bids offered for unreserved 24 shops ranged from 23.31 lacs to 29.05 lacs, while the bids offered by 14 bidders for 9 reserved shops

ranged from 8.95 lacs to 9.75 lacs. Thereafter, the nine reserved shops were finalized for nine bidders by the Auction Committee.

5. It appears that a complaint was made by one Bablu Kumar Suresh Kumar Birhe to the Lok Ayukta alleging favoritism, nepotism and glaring irregularities in the matter of conducting auction by the Auction Committee on 7/3/2011 in relation to 9 shops reserved for SC, ST and OBC category, in the context of sharp contrast in bid prices offered for such shops in the auctions held in the years 2009 and 2011, as detailed above. Thereafter, the said complaint was forwarded by the Lokayukta vide letter No./1650/Ja.Pra. 121/2011 dated 6/7/2011 to M.P. State Agricultural Marketing Board (Annexure R/1) and on the orders of the Deputy Director, Mandi Board, a fact finding enquiry was held. In the fact finding enquiry, it was found on the basis of record of Market Committee that there had been serious irregularities in the auction so held.

One Sunil Birhe, Proprietor, Sai Nath Vegetable Company, though filed an affidavit with the stipulation that he is annexing the caste certificate, but, the same was acknowledgment of application made to Collector, Indore for obtaining caste certificate and not caste certificate as such. Without caste certificate though he was ineligible to bid, yet, was permitted.

Likewise, one Santosh Kumar Jairam Das Bagwar filed an affidavit to the effect that he belonged to reserved category, but he filed caste certificate of one Rupesh Kumar Bagwar and not of himself and the caste certificate of 1991 presented by him in respect of his caste status was not attested by gazetted officer. Therefore, he was also not eligible to participate in the bid.

Besides, three members of the same family namely Nitin Bhola Singh Bhatkariye, Sachin Bhola Singh Bhatkariye, Vipin Bhola Singh Bhatkariye and Shriram Vegetable Company, Indore, had all participated in the bidding without submitting details of annual turnover of their firms, giving rise to serious suspicion that the aforesaid three members though bidding independently were in fact of the same family involved in joint and common business.

6. However, the aforesaid fact finding enquiry was not finalized, at that point of time, due to pendency of writ petitions before this Court in the context of aforesaid auction. However, no sooner the W.P. Nos. 2705/11 and 2905/11 were dismissed by this Court, the fact finding enquiry report was submitted to the respondent no.2-Managing Director on 7/4/2015. The Enquiry Officer

therein found that irregularities and illegalities in the auction held on 7/3/2011, as detailed above, were in contravention to the Rules of 2009, as allotment of shops to three members of the same family engaged in common business was in violation of Rule 3(4) thereof. Besides the Market Committee was found to be negligent in the matter of verification of caste status of bidders. It was also found that though the Secretary of Market Committee had drawn attention about the sharp difference/contrast in the bids offered for 9 reserve category shops in the auction held in 2009 vis-a-vis those received for the same shops in the auction held in 2011, yet the Market Committee remained unmindful of the same. The report further stated that, as a matter of fact, Auction Committee, looking to the aforesaid glaring difference in bid amounts, instead of taking guidance from the higher Authorities and deciding to conduct third re-auction under Rule 10(6) of the Rules of 2009, finalized the auction.

7. On the basis of aforesaid fact finding enquiry, a show-cause notice was issued to the petitioner on 15/7/2015 (Annexure P/3). Petitioner filed reply (Annexure P/4) thereto on 1/9/15. After submission of reply, petitioner was also afforded personal hearing on 9/1/17 and 30/1/17. It appears that during the course of enquiry, a joint report of Dy. Director and Executive Engineer, Indore dated 2/7/16 as regards market value of the shops based on their strategic location, as well as, enquiry report of Collector dated 5/11/16 based on Collector Guidelines of 2009 as regards valuation of the nine reserved shops were also obtained. Copies of aforesaid both the reports were also supplied to the petitioner. Besides, commercial rates of plots of land as per Government Guidelines were also obtained from Dy.Registrar, Indore and copy thereof was also supplied to the petitioner.

8. Respondent no.2, upon due consideration of the reply, submitted by the petitioner, contentions advanced during the course of hearing and material placed on record by both the parties including the aforesaid reports of Dy. Director, Collector and Dy.Registrar, has recorded comprehensive findings to the effect that there is a sharp contrast in the bids offered for 9 reserved shops in the years 2009 and 2011. As such, there was unfairness in the conduct of auction by the Auction Committee; favoritism and nepotism had been extended to members of the same family; there was ignorance/avoidance of note of Secretary in the deliberations of the Market Committee on 15/3/11; and in view of substantive difference in bid prices in respect of 9 reserved shops in the auctions held on 14/10/2009 and 7/3/2011 i.e. in the range of 22.26 lacs

to 33.51 lacs obtained in the year 2009 offered by 44 bidders vis-a-vis 8.95 lacs to 9.75 lacs obtained in the year 2011 offered by 14 bidders, the Auction Committee, in all fairness, ought to have resorted to third auction as contemplated under Rule 10(6) of the Rules of 2009. That was not done and in a hurried manner the auction of 2011 was finalized in favour of 9 bidders for the reserved category shops. It has also been observed in clause 5.5 of the order that all Committee members since are jointly and severally responsible for the serous (sic:serious) negligence and misconduct, therefore, departmental action was initiated against all the members of the Auction Committee summoned on 7/3/2011 by the M.P. State Agricultural Marketing Board. Thereafter, the impugned order was passed under sections 55(1) and 55(2) of the Adhiniyam of 1972, against the petitioner. Enquiry on complaint filed before the Lokayukt is still pending consideration.

9. It further transpires from the record that at a later stage the aforesaid allotment of shops was cancelled by the Market Committee on the directions of Joint Director, M.P. State Agriculture Marketing Board made vide communication dated 29/12/16 (Annexure P/9). The corresponding communications to respective shop holders are annexed to the writ petition as Annexure P/10 (Colly). It also transpired during the course of arguments that the aforesaid orders of cancellation of allotments are subject matter of writ petition pending consideration before this Court.

10. Learned counsel for the petitioner, taking exception to the impugned order has made following submissions:-

(i) Petitioner is an elected Chairman of the Market Committee for a term of 5 years (7/1/13 to January, 2018). The allegations in the show-cause notice dated 15/7/15 are of the period between 2009 to 2011 while petitioner was Chairman of the Market Committee in his previous tenure which had already expired on 22/7/2011. As such, the show-cause notice itself is bad in law and without jurisdiction for the reason that petitioner, as Chairman in the second term, could not have been subjected to show-cause notice containing allegations of his prior term. To bolster his submission, learned counsel placed reliance on decision of Gujrat High Court in the case of *Ajitsinh R. Jadeja Vs. State of Gujrat* (AIR 2009 Gujarat 171).

(ii) In the alternative, it is submitted that the show-cause notice dated 15/7/2015 served upon the petitioner, while working as Chairman of the

Market Committee, contain allegations while he was Chairman of the Market Committee in his earlier term. As such, action, if any, could have been taken only under section 55(2) and not 55(1) of the Adhiniyam of 1972. Therefore, petitioner has been subjected to double jeopardy by invocation of powers not vested in respondent no.2. For this, reliance has been placed on decision of Division Bench in the case of *Biharilal Vs. State* (1983 JLJ 757).

(iii) The proceedings initiated against the petitioner under sections 55(1) and 55(2) of the Adhiniyam are of the nature *of quasi* judicial proceedings and this is settled position of law. Learned counsel refers to judgment of Hon'ble Apex Court in the case of *Ravi Yashwant Bhoir Vs. Collector* ((2012)4 SCC 407) and submits that it was imperative and obligatory on the part of respondent no.2 to have strict adherence to provisions of the Adhiniyam of 1972 and appropriate safeguards and protection akin to principles of natural justice. Besides, looking to the serious consequences flowing from exercise of powers under section 55(1) and 55(2) of the Adhiniyam of 1972, respondent no.2 was obliged to apply its mind to the allegations, reply thereto and material placed on record meticulously before reaching a decision. Petitioner since was not allowed to participate in the enquiry held before submission of report by the Collector dated 5/11/16 and the joint report dated 2/7/16, though copies thereof were supplied to him, before the same was acted upon by respondent no.2, the said enquiry was vitiated.

(iv) The decision for allotment of 9 reserved shops to 9 reserve category bidders was upon the deliberations of entire Auction Committee and not of the petitioner alone. Likewise, the finalization thereof on 15/3/11 was by all the members of the Market Committee. Hence, petitioner cannot be singled out in attributing misconduct and negligence on his part to justify penalty under sections 55(1) and 55(2) of the Adhiniyam of 1972. Even otherwise, the allegation of loss to respondents in the matter of finalization of bids of 9 reserved shops has no foundation, as comparison of bids of 2009 and 2011 is totally misconceived and misdirected as none of the bidders of 2009 came forward to deposit the bid amount for their bids against 9 reserved shops. Therefore, the alleged loss is self styled notional loss and could not have been pressed into service for invoking the provisions of section 55(1) and 55(2) of the Adhiniyam of 1972. In any case, since the allotments made by the Auction Committee and approved by the Market Committee on 15/3/2011 have been cancelled on 27/1/17 though on the orders of M.P. State Agriculture Marketing

Board dated 29/12/2016, the impugned order, even otherwise, cannot be allowed to stand.

11. *Per contra*, Shri Sunil Jain, learned Senior Counsel and Additional Advocate General has made following submissions:-

(i) In the light of provision under section 59 of the Adhiniyam of 1972, petitioner has an alternative, efficacious and expeditious remedy of filing an appeal, therefore, the writ petition deserves to be dismissed. Learned counsel relied upon order of the co-ordinate Bench dated 13/12/16 passed in W.P.No.3750/16 and that dated 11/5/16 in W.P. No.3332/16.

(ii) Since petitioner held the post of Chairman in his first term and also in second term by virtue of being member of Market Committee, therefore, even if allegations levelled against him relate to his tenure as Chairman, respondent no.2 is not precluded from taking action against the petitioner under sections 55(1) and 55(2) of the Adhiniyam of 1972, as 55(1) deals with removal of members imposing disqualification of re-election or re-nomination as Member of Market Committee for six years and 55(2) provides for removal of Chairman or Vice Chairman with further disqualification of re-election as Chairman or Vice Chairman during the remainder of his term. In this behalf, learned counsel relied upon decision of Division Bench of this Court in *Ram Singh Vs. State of M.P.*(1991 MPLJ 835).

(iii) In the enquiry initiated against the petitioner by the Additional Director, M.P.State Agricultural Board concluded vide his report dated 7/4/15, he was given due opportunity of submission of reply and opportunity of hearing and documents viz. enquiry reports detailed above were supplied to him and it was only upon due consideration of the entire material placed on record, that the impugned order under sections 55(1) and 55(2) of the Adhiniyam of 1972 was passed. As such, there has been strict compliance of principles of natural justice and fair play.

(iv) Petitioner has not been discriminated in action for misconduct and neglect in the matter of finalization of bids pursuant to auction dated 7/3/2011 and all the members of the Auction Committee have been departmentally proceeded against. In this regard, learned counsel referred to para 5.5 of the impugned order and para 6 of the counter affidavit, as well as, Annexure R/6, to which there is nothing in the rejoinder.

(v) Petitioner, as Chairman of the Auction Committee and also that of Market Committee, despite having been pointed out by the Secretary of the Market Committee the factum of glaring difference in bid prices received for 9 reserve category shops in the years 2009 and 2011, maintained blissful silence and did not deliberately act upon the same. Conduct of the petitioner tantamount to "remiss in discharge of duty" as well within meaning of Section 55(2) of the Act. As a matter of fact, instead of approving the aforesaid auction sale, petitioner ought to have resorted to the provisions of Rule 10(6) of the Rules of 2009 and conducted re-auction (third auction), but no such steps were taken.

(vi) That apart, the factum of favoritism and nepotism has also come on record in the fact finding enquiry relating to three members of the same family offering bids with marginal difference touching the upset price replacing a well concerted and organized method adopted by such persons in offering bids to defeat the fair auction tantamounting to cartel formation and also being contrary to the provision as contained in Rule 3(4) of the Rules of 2009. Therefore, looking to the gravity and seriousness of allegations and its repercussion in the public eyes tantamouning (sic:tantamounting) to grave misconduct and negligence, it was considered fit to remove the petitioner from the post of Chairman of Market Committee and also disqualify him from being re-elected or re-nominated as Member for 6 years under sections 55(1) and 55(2) of the Adhiniyam of 1972. As such, no illegality has been committed and the judgment in the case of *Ravi Yashwant Bhoir* (Supra) relied on by the petitioner, being distinguishable on facts, has no application to the facts in hand.

(vii) The fact of cancellation of shops on 27/1/17 itself shows that the auction finalized by the Auction Committee and Market Committee chaired by the petitioner was vulnerable and not liable to be accepted. That apart, merely cancellation of allotment of shops subsequently, shall not provide a ground to the petitioner to gain premium against misconduct and negligence committed by him while finalizing the shops under auction sale.

12. Heard, learned counsel for the parties.

13. Before adverting to contentions advanced by either party on merits, it is expedient to deal with objection as against maintainability of this petition. Learned counsel for the respondent state contends that in view of section 59,

petitioner has alternative, expeditious and efficacious remedy of filing revision against the impugned order passed under section 55 of the Adhiniyam of 1972. The objection, as a matter of fact, may not detain us any longer in view of division bench judgment of the Court in the case of *Biharilal* (Supra) wherein the Division Bench held that section 59 does not contemplate remedy to delinquent intending to question an order passed against him under Section 55 of the Adhiniyam of 1972. It appears that the learned Single Judge while disposing of W.P. Nos.3750/16 and 3332/16 relegating the petitioners therein to file revision under section 59 before the competent Authority prescribed therein was not apprised of the judgment of the Division Bench in the case of *Bihari Lal* (Supra). Besides, it appears that the learned Single Judge has not addressed on the issue of availability of remedy of appeal against merits of the order passed under Section 55 of the Adhiniyam. It is settled law that scope of jurisdiction of revision and appeal are distinct in character and in substance {*Lachhman Dass Vs. Santokh Singh* (1995) 4 SCC 201, *State of U.P. Vs. Udai Narayan and another* (1999) 8 SCC 741, *James Joshph Vs. State of Kerala* (2010) 9 SCC 642 and *Kamla Devi Vs. Kushal Kanwar and another* (2006) 13 SCC 295 referred to} and, by no stretch of imagination, they can be construed to be substitute to each other. Under such circumstances, the orders of learning single judge are *per incurim* in nature and of no assistance to the respondent-State. In the opinion of this Court, power under section 59 of the Adhiniyam of 1972 conferred upon the Managing Director and the State Government are of limited nature to adjudge legality or propriety of the decision taken or order passed and to regulate the proceedings of the Committee in the hands of Managing Director and that of the Managing Director in the hands of State Government. Such provision cannot be construed to have scope of appellate jurisdiction as the appellate authority is required to examine the merits of the order impugned on facts and in law with due advertence to the material place on record, as well as, legality, justifiability, propriety of the findings/conclusions drawn by the Authority passing the impugned order, whereas revisional authority has no power to re-assess and re-appreciate the evidence unless the statute specifically confers on it that power. This limitation is implicit in the concept of revision itself. Hence, this Court is in respectful agreement with the ratio laid down in the case of *Bihari Lal* (Supra). Accordingly, the objection against maintainability of the petition is hereby overruled and rejected.

14. The first contention of petitioner questions the legality, validity and

propriety of the show-cause notice dated 15/7/15 on the premise that imputations therein are not of the present tenure of the petitioner i.e. 7/1/2013 to January 2018, but, in fact, are of his previous tenure i.e. 22/7/2007 to 22/7/2011. According to the petitioner, action under Section 55(1) can be taken only in the matter of misconduct or neglect in performing duties as member and under Section 55(2), in the matter of misconduct or neglect or remiss in discharge of duty as Chairman or Vice Chairman but only of the current tenure and not otherwise.

15. To address on this contention it is considered apposite to reiterate nature and purpose of Mandi Adhiniyam, 1972 in furtherance of its aims and objects; The Mandi Adhiniyam, 1972 has been enacted to provide benefit to the agriculturists and also to regulate the sale and purchase of agricultural produce in order to save the exploitation of agriculturists. The Act, as a matter of fact, is a beneficiary legislation and the purpose thereof is to improve the standard of marketing services; to provide fair trading in the markets and to safeguard the health and sanitation of the users of market. Besides, to ensure that Commission agents do not have any opportunity to exploit there dominating position and to make illegal and excessive commission at the cost of the producers.

To achieve the aforesaid purpose, the Adhiniyam of 1972, *inter alia,* makes provision for establishment of markets (Chapter II), constitution of market committees (Chapter III), conduct of business and powers and duties of the Market Committee (Chapter IV). Chapter X provides for control of the Managing Director into the affairs of the Market Committee, removal of members, Chairman and Vice Chairman of Market Committee and supersession of Market Committee etc. including the power to call for proceedings of the Market Committee. Section 58 in this chapter provides for liability of present or past chairman, vice chairman etc. for loss, waste or miss-application etc. and empowers the Managing Director to conduct enquiry either himself or through other officer subordinate to him, by order in writing, in that behalf to enquire into, amongst others, in the matter of conduct relating to application of money or other property belonging to or under the control of such Market Committee, resulting into loss or deficiency or gross negligence or misconduct or misappropriation etc. etc. Section 59 provides for power of the Managing Director to call for proceedings of Market Committee either on own motion or on application made to him and examine the proceedings of

any Market Committee as to the illegality proprietary of any decision taken or order passed and as to the regularity of the proceedings the Committee. If in any case, it appears to the Managing Director that such decision or order or proceeding so called for should be modified, annulled, reversed or remitted for reconsideration, he may pass such order as he may deem fit. Provided that the aforesaid power is subject to proviso that no order shall be passed under sub-section (1) without giving reasonable opportunity of hearing to the parties affected thereby. The aforesaid power is same in the hands of state government with regard to the proceedings conducted by the Managing Director. As such there is effective and pervasive control of the Managing Director over the affairs of the Market Committee and on the conduct of business and activities of the members constituting the Market Committee including the Chairman or the Vice Chairman.

Section 17 in chapter IV provides for power and duties of the Market Committee. Sub-section (2) *inter alia* empowers to construct, manage and maintain market yards in the market area amongst other duties contained therein to ensure effective working of the Market Committee.

The Rules of 2009 have been framed to regulate activities of the market committee in the matter of allotment of land and structures in the context of its duties under sub-section 2 of section 17, under which Auction Committee headed by the petitioner has accepted and finalized bids of nine shops earmarked for reserved category in the auction held on 7/3/2011 for the bids ranging from 8.95 lacs to 9.75 lacs.; genesis of the controversy involved in this petition.

16. Now turning to facts of the case, a complaint was filed in the office of Lokayukt in the year 2011 in the matter of auction of nine reserve shops conducted on 7/3/2011. The complaint was processed and thereafter made over to M.P. State Agricultural Marketing Board. Thereafter, a fact finding enquiry was though held but was not further processed/finalized due to pendency of W.P. Nos. 2705/11 and 2905/11. However, no sooner the aforesaid writ petitions got dismissed, the enquiry report was furnished to respondent no.2 whereafter show-cause notice was issued to the petitioner. As such, petitioner's conduct has been under investigation since 2011. The Managing Director has power and authority to examine, on his own motion, and call for proceedings of any Market Committee as to legality or propriety of any decision taken even in the cases of past and present Chairman. Hence,

no exception to the show-cause notice can be allowed to be taken as canvassed by the petitioner. As discussed above, the underlying policy of the Adhiniyam of 1972 is to ensure regulation of markets for sale or purchase of market produce in a fair manner within the market yard, with a paramount object to protect the agriculturists from exploitation. The aforesaid policy further extends to securing a market yard by the Market Committee as contemplated in sub-section (2) of section 17 of the Adhiniyam of 1972, whereunder Market Committee is required to construct, maintain and manage market yards and sub-market yards etc. etc., as well as, provide facilities for the marketing of agricultural produce, in furtherance whereof the Rules of 2009 have been framed. If the conduct of the Chairman of Market Committee and Auction Committee is found to be vulnerable in conducting and finalizing auction sale of market shops prejudicial and detrimental to the interest of Mandi, the same can always be inquired into for appropriate action, albeit the same needs to have reasonably close proximity with the tenure of such person being a member, Vice Chairman or Chairman of the Market Committee. That apart, Section 55 of the Adhiniyam of 1972 does not expressly provide that misconduct or neglect should be of the present tenure. As such, judgment of Gujarat High Court in the case of *Ajitsinh* (Supra) is found to be distinguishable in nature particularly regard being had to provisions of section 58 and 59 of the Adhiniyam of 1972, as no such provision appears to be involved therein and dealt with. However, the first contention is rejected.

17. The second contention relates to justifiability of invocation of powers under section 55(1) and 55(2) of the Adhiniyam of 1972.

According to the petitioner, the imputation in the impugned showcause notice dated 15/7/2015 are of the period when the petitioner was chairman of the Market Committee and the show-cause Notice has also been issued when the petitioner is chairman of the Market Committee. None of the allegations in the impugned show-cause notice relate to misconduct or neglect of the petitioner as member of the Market Committee. As such Section 55(1) has no application to the facts of the case, therefore, the punishment debarring the petitioner for 6 years from being re-elected or re-nominated as member of the Market Committee from the date of his removal is patently illegal and without jurisdiction.

For ready reference, sections 55(1) and 55(2) are quoted thus:-

55. Removal of Member, Chairman and Vice- Chairman of Market Committee. - [(1) The Managing Director may on his own motion or on a resolution passed by a majority of two-third of the members constituting the Market Committee for the time being remove any member of the Market Committee for misconduct or neglect of or incapacity to perform his duty and on such removal he shall not be re-elected or re-nominated as a member of the Market Committee for a period of six years from the date of such removal :

Provided that no order of such removal shall be passed unless such member has been given a reasonable opportunity of showing cause why such order should not be passed.

(2) The Managing Director may remove any Chairman or Vice-Chairman of a Market Committee from his office, for misconduct, or neglect of or incapacity to perform his duty or for being persistently remiss in the discharge of his duties and on such removal the Chairman or Vice-Chairman, as the case may be, shall not be eligible for re-election as Chairman or Vice-Chairman during the remainder of his term of office as member of Market Committee :

Provided that no order of removal shall be passed unless the Chairman or Vice-Chairman, as the case may be, has been given a reasonable opportunity of showing cause why such order should not be passed.

18. In the opinion of this court, for application of section 55(1) or section 55(2) of the Adhiniyam of 1972, the following twofold test is required to be applied:-

(1) relatability of the allegations to the post of the delinquent i.e. whether the allegations pertain to the period when he was Member, or, whether pertain to the period when he was Chairman/ Vice chairman of the Market Committee.

(2) the status of the delinquent on the date of issuance of show Cause Notice.

For example, if the allegations against delinquent are of the period when he held the post of Chairman, but show-cause notice was served upon

him while he was a member, he may be proceeded under Section 55(1) in terms of Division Bench judgment in the case of *Ram Singh* (Supra). On the other hand, if allegations made against a delinquent are of the period when he held post of Chairman and show Cause Notice was also served upon him when he was a Chairman, then he can only be proceeded under section 55(2) in terms of judgment in the case of *Bihari Lal* (Supra) and not under Section 55(1) of the Adhiniyam of 1972.

Now, in the instant case allegations against the petitioner are of the period when he was Chairman and show-cause notice has also been issued when he is Chairman, therefore, section 55(1) has no application to the facts of the case. The contention of learned counsel for the respondent-State that as the petitioner is Chairman of the Market Committee by virtue of being member of the Market Committee, therefore, even if the show-cause notice covers the tenure of petitioner as Chairman and notice is also served upon him when he is Chairman, it shall not make any difference, cannot be countenanced, as both sections deal with different class of persons viz. Members under section 55(1) and Chairman and Vice Chairman under Section 55(2) of the Adhinyam of 1972 with different nature of punishments. Hence, the impugned order, to the extent, it debars the petitioner from being re-elected or renominated as a member of the Market Committee for a period of six years from the date of such removal, is held to be in excess of authority and jurisdiction and, therefore, cannot be sustained in law and on facts.

18. The third and fourth contentions of the petitioner relate to justifiability of the action under section 55(2) of the Adhiniyam of 1972 on the ground of non observance of principles of natural justice while removing the petitioner from the post of Chairman and also holding him ineligible for re-election as Chairman or Vice Chairman during the remainder of his term of office as member the Market Committee on three broad propositions - (i) denial of equality before law and equal protection of law; discrimination under Article 14 of the Constitution (ii) no loss to the Market Committee having been caused due to cancellation of Auction of 2011 subsequently and (iii) Looking to nature of power under Section 55(1) and 55(2) of the Adhiniyam, 1972 and serious consequences flowing therefrom in the matter of removal of elected member and the Chairman or Vice Chairman of Market Committee proceedings thereunder are quasi judicial in nature. (2012) 4 SCC 407 relied upon.

The Adhiniyam of 1972 does not provide for any express rules or

procedure to be followed for proceeding under section 55(1) and (2) thereof. Nevertheless, section 55 itself contemplates that before action is taken against a delinquent, show-cause and reasonable opportunity of hearing is required to be afforded to him.

As discussed in the preceding paragraphs unfolded facts emanating from the record, petitioner was issued show-cause on 15/7/15 calling upon him to file reply. Reply has been filed by the petitioner on 1/9/15. Petitioner has been afforded opportunity of personal hearings on 9/1/17 and 30/1/17. He has also been supplied copies of report of Dy.Director dated 2/7/16 as regards market value of the shops based on their strategic location and that of 5/11/16 based on Collector Guidelines as regards valuation of the nine reserved shops. Thereafter, on detailed submission of the reply submitted by the petitioner, the impugned order has been passed. In the opinion of this Court, there is no violation of principles of natural justice in the matter of action taken against the petitioner under section 55(2) of the Adhiniyam of 1972. Hence, challenge in that behalf is hereby rejected.

Further, contention of the petitioner that he has been discriminated in the matter of imposition of punishment on the premise that decision of acceptance of bids and allotment of shops of 9 reserved category shops was a joint decision of the Auction Committee constituted under section 8 of the Rules of 2009 and the same has also been resolved by the Market Committee in its meeting dated 15/3/11 cannot be countenanced as the same is *dehors* the facts on record in the light of the facts relating to action taken against the other Committee members as detailed in paragraph 5.5 of the impugned order and para 6 of the counteraffidavit. Therefore, as all the members since have been proceeded against. Hence, plea of discrimination and violation of Article 14 of the Constitution is hereby rejected. Besides, the Lokayukt enquiry is also in contemplation/pending in that behalf.

To deal with the contention that there was no loss to the Market Committee, it is expedient to reiterate that section 55(2) of the Adhiniyam of 1972 does not contemplate financial loss to Market Committee as condition precedent for initiating action of removal of Chairman or Vice Chairman of the Market Committee from his Office for misconduct or neglect or remiss in discharge of his duties.

The words misconduct and negligence are not defined in the Act,

therefore, the dictionary meaning in law/judicial dictionaries and judicial precedences are taken help of to appreciate import thereof under Section 55 of the Act. The Black's Law Dictionary, 6th Edition at Page 999 defines **misconduct** thus :-

> "A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, willful in character, improper or wrong behavior; its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offense, but not negligence or carelessness."

In P.Ramanatha Aiyar's Law Lexicon, 3rd Edition, at Page 3027, the term **misconduct** has been defined as under :-

> "The word "misconduct" is a relative term, has to be construed with reference to the subject-matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being construed. "Misconduct" literally means wrong conduct or improper conduct."

In the case of *M.M.Malhotra Vs. Union of India,* (2005) 8 SCC 351 (Paras 17 and 22), the Hon'ble Supreme Court has defined the misconduct in an inclusive manner as follows :-

> "..... The range of activities which may amount to acts which are inconsistent with the interest of public service and not befitting the status, position and dignity of a public servant are so varied that it would be impossible for the employer to exhaustively enumerate such acts and treat the categories of misconduct as closed. Thus the word "misconduct" is not capable of precise definition. But at the same time though incapable of precise definition, the word "misconduct" on reflection receives its connotation from the context, the delinquency in performance and its effect on the discipline and the nature of the duty The act complained of must bear a forbidden quality or character and its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, having regard to the scope of the statute and the public purpose it seeks to serve. ....."

The word "Negligence" *M.S.Grewal Vs. Deepchand Sood,* (2001) 8 SCC 151, the Hon'ble Supreme court has given lucid inclusive meaning of negligence to the following effect :-

> "..... Negligence in common parlance means and implies "failure to exercise due care, expected of a reasonable prudent person". It is a breach of duty and negligence in law ranging from inadvertence to shameful disregard of the safety of others. In most instances, it is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from his Act. ....."

19. Petitioner being Chairman of the Market Committee and Auction Committee, not only had an onerous responsibility and accountability for securing financial interests of the Market Committee, but also for ensuring fairness in auction proceedings in the eyes of public thus safeguarding the process from allegations of favoritism and nepotism as well as extended area of vulnerability. A bare perusal of the self contained comprehensive impugned order suggests that while in the first auction held on 14/10/2009 as against upset price of Rs.1.834 lacs for 88 shops including 9 reserved shops, 44 bidders had made the bids for 9 reserved shops with bid amount ranging from 22.26 lacs to 33.51 lacs, whereas, in the second auction held on 7/3/2011 as against upset price of Rs.7.64309 lacs, 14 bidders had made the bids for 9 reserved shops with bid amount ranging from 8.95 lacs to 9.75 lacs. As such, there was sharp contrast or substantial difference in the bid offers of 2009 and 2011 for the 9 reserved shops and this difference in price of bids could not have been blinked away by the petitioner. Besides, market value of shops did rise with passage of time as well informed reports referred in the impugned order explicitly spell out. In all fairness, he ought to have resorted to third auction as contemplated under Rule 10(6) of the Rules of 2009, as rightly pointed out in the impugned order. There is no reply forthcoming in the reply submitted by the petitioner that why he has not taken recourse to third auction under the aforesaid provision of Rules of 2009. That apart, the petitioner ignored and maintained a blissful silence on the aforesaid difference of prices of bids though pointed out by the Secretary of the Market Committee while approving the bids in 2011. Besides, even in the deliberations of the Auction Committee, the aforesaid glaring fact is not found to have been discussed before finalization of the bids of such 9 persons (the Auction Committee

deliberations are at Page 126 onwards annexed to the counter affidavit of respondent no.2). Respondent no.2 has also taken note of the fact that three members of the same family having common business, had in fact, formed a cartel to control the bid prices of shops by marginally increasing the same from upset price giving rise to unfair trade practice *(Union of India v. Hindustan Development Corporation* (1993) 3 SCC 499 referred to) . Petitioner was obliged to verify as to whether such persons could be considered in the light of Rule 3(4) of the Rules of 2009. That was not done. It was incumbent upon the petitioner and other Committee members to ensure that such concerted attempts on the part of members of one family among the nine bidders are not allowed to be encouraged and precipitated.

The judgment reported in (2012) 4 SCC 407 *(Ravi Yashwant Bhoir Vs. District Collector, Raigad & Anr.)* relied upon by learned counsel for the petitioner in support of his contention against action under Section 55(2) has been carefully perused. The principle underlying the decision is beyond the pale of any doubt as consistently it has been held that nature of power under a statute empowering the authority to remove an elected member is quasi judicial in nature and required to be examined with care and caution. *Bachhittar Singh Vs. State of Punjab* (AIR 1963 SC 395), *Union of India Vs. H.C.Goel* (AIR 1964 SC 364). However, the aforesaid judgment is distinguishable on facts looking to the nature of the allegations against the petitioner and the scope of Section 55(2) qua the facts of the case in the judgment in reference and the relevant provisions of Maharashtra Municipal Council Act, 1965. Scope under Section 55(2) is wider dealing with **misconduct, negligence and persistent remiss in discharge of official duty** as against misconduct and disgraceful conduct under the Maharashtra Municipal Council Act, 1965; contours of powers to examine facts of a given case.

20. Consequently, this Court is of the opinion exercise of powers by respondent No.2 under Section 55(2) is in conformity with settled principles of law with due advertence to relevant material on record and the impugned order dated 28.3.2017 passed is impeccable in nature.

21. Upshot of aforesaid discussion results in success of the writ petition partly to the extent that the impugned order removing the petitioner as member of the Market Committee and debarring him from being re-elected or re-nominated as member of the Market Committee for a period of six years form

the date of such removal under section 55(1) of the Adhiniyam of 1972, is hereby quashed. However, the impugned order removing the petitioner from the post of Chairman of Market Committee and further holding him ineligible for re-election as Chairman or Vice Chairman for remainder of his term of office as member of Market Committee under section 55(2) of the Adhiniyam is hereby affirmed.

Interim order granted on 4.4.2017 stands vacated. No order as to costs.

Petition partly allowed.

I.L.R. [2017] M.P., 2417
WRIT PETITION
Before Mr. Justice Subodh Abhyankar
W.P. No. 2310/2016 (Jabalpur) decided on 24 August, 2017

MOHAN SINGH THAKUR ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Swatantrata Sangram Sainik Samman Nidhi Rules, M.P., 1972, Rule 3(6) – Samman Nidhi/Pension – Entitlement – Arrears & Interest – **Application seeking *"Samman Nidhi"*/Pension was rejected in 1993 for want of relevant documents/proof but later, on 28.03.14, same was allowed – Claim of arrears and interest from initial date of rejection was disallowed – Challenge to – Held – Rules were amended in 1999 and Rule 3(6) was added according to which a person shall be entitled to get *Samman Nidhi* from date of passing of order – In absence to any challenge to Rules, the same governs the field and have to be complied with – Rejection of 1993 was also never challenged by petitioner – No case of interference – Petition dismissed. (Paras 5, 7 & 9)**

स्वतंत्रता संग्राम सैनिक सम्मान निधि नियम, म.प्र., 1972, नियम 3(6) – सम्मान निधि/पेंशन – हकदारी – बकाया व ब्याज – "सम्मान निधि"/पेंशन हेतु आवेदन को सुसंगत दस्तावेजों/सबूत के अभाव के कारण 1993 में अस्वीकार किया गया था, परंतु बाद में, दिनांक 28.03.2014 को, उक्त को मंजूर किया गया था – अस्वीकृति की प्रारंभिक तिथि से बकाया एवं ब्याज के दावे को नामंजूर किया गया था – को चुनौती – अभिनिर्धारित – 1999 में नियमों में संशोधन किया गया तथा नियम 3(6) जोड़ा गया था जिसके अनुसार एक व्यक्ति आदेश पारित होने की तिथि

से सम्मान निधि पाने का हकदार होगा – नियमों को किसी चुनौती की अनुपस्थिति में, उक्त इस क्षेत्र को शासित करते हैं तथा उनका अनुपालन किया जाना होगा – 1993 की अस्वीकृति को भी याची द्वारा कभी चुनौती नहीं दी गई – हस्तक्षेप का प्रकरण नहीं – याचिका खारिज।

Case referred:

W.P. No. 2320/1996 order passed on 02.07.2013 (DB).

R.K. Samaiya, for the petitioner.
Naveen Dubey, G.A. for the respondent/State.

(Supplied: Paragraph numbers)

ORDER

SUBODH ABHYANKAR, J. :- The present petition has been preferred under Article 226 of the Constitution of India against the order dated 28.3.2014 as also against the order dated 28.12.2015, both passed by respondent No.1 State. Vide order dated 28.3.2014 the petitioner was declared as Freedom Fighter and was entitled to get the benefits of freedom fighters w.e.f. 28.3.2014 itself, whereas vide order dated 28.12.2015 (Annexure P/8), it is further held that the petitioner is not entitled to receive the arrears of "Samman Nidhi".

2. In brief the facts of the case are that the petitioner is 91 years old and as claimed by the petitioner, he had participated in the freedom movement, for which he was underground for a period more than six months and as per the law enacted by the State Government for granting benefits to the freedom fighters, which is known as M.P. Swatantrata Sangram Sainik Samman Nidhi Rules, 1972, he is entitled to receive pension. Admittedly the petitioner was trying to get the benefit of the aforesaid Rules but his claim was initially rejected on 18.10.1993 on the ground that the petitioner did not produce any proof of his remaining underground during the freedom struggle. When the petitioner produced the satisfactory evidence in support of his claim, his name was recommend by the Collector to the Secretary of General Administrative Department (GAD) on 08.03.2001 but the Secretary of General Administrative Department vide its order dated 2.2.2002 again rejected the recommendations of the Collector stating that there is no sufficient proof that the petitioner remained underground or that he remained in jail during the freedom struggle. However, the petitioner again made a representation to the government and filed the proof of his involvement in the freedom struggle, hence the Collector,

vide its letter dated 25.1.2008 recommend the case of the petitioner for providing "Samman Nidhi" under the relevant rules of 1972 and subsequently, the claim of the petitioner was sanctioned by the Deputy Secretary of General Administrative Department, Bhopal vide his order dated 28.03.2014 and was given the pension of Rs.15,000/- per month till his death and after his death, the same was ordered to be given to his wife Smt. Chandra Kunwar throughout her entire life.

3. The petitioner's contention is that his pension has been sanctioned after a period of 21 years and despite his entitlement, due to the inordinate delay to grant the same, other benefits like interest and other facilities have not been provided to him under the Scheme hence many representations were made by the petitioner but the final order was passed only on 28.12.2015 whereby the petitioner's claim for arrears was dismissed and he was informed that as per the Rules of 1972, "Samman Nidhi" is to be provided from the date of the order only and there is no provision of payment of arrears. The petitioner's contention is that his case is squarely covered by the order dated 2.7.2013 passed by the Division Bench of this Court in the case of *Sheel Chand Jain v. State of M.P. & another* passed in W.P. No.2320/1996. It is submitted by the petitioner that he is entitled to get the "Samman Nidhi" w.e.f. the date of order of first rejection i.e.18.10.1993 with interest @ 12% per annum within a period of two months. Petitioner's further contention is that he is fighting for "Samman Nidhi" since last 27 years and his first application to obtain the same was rejected on 18.10.1993 and that too after a period of six years and as decided by this Court in the case of Sheel Chand Jain, the application should have been decided within a period of one year and the freedom fighter whose application is allowed, would be entitled to get the benefit atleast from the date of rejection of his application. Being aggrieved, the petitioner submitted a representation on 16.11.2015 to the respondents but the same was rejected vide order dated 28.12.2015 hence this petition.

4. On the other hand, in the reply submitted by the respondent/ Sate(sic:State), the contentions of the State are that the petition is liable to be dismissed as no case is made out by the petitioner for the reason that none of his rights have been infringed and the order passed by the respondent on 28.11.2015 is just, proper and is in accordance with law hence is not required to be interfered with.

5. The respondent's contention is that vide Gazette Notification dated

8.3.1999 (Annexure R/2), Rules of 1972 have been amended and Rule 3(6) has been added to the aforesaid rules, which clearly mentions that the incumbent would be entitled to get the benefit of "Samman Nidhi" from the date on which such order is passed. Under such circumstances, it is submitted by the respondents that the respondents are bound by the aforesaid law of the land and in the absence of any challenge to the aforesaid notification, the impugned order cannot be quashed or interfered with. It is further submitted that merely dismissal of the petitioner's application in the year 1993, would not entitle him to get the arrears of "Samman Nidhi" since 1993 and that too with the interest @ 12% per annum.

6. Heard the learned counsel for the parties and perused the record.

7. From the record, it is apparent that under the Rule 3(6) of the amended Rules of 1972, it is clearly provided that a person shall be entitled to get the "Samman Nidhi" from the date of passing of the order. Thus, in the absence of any challenge to the aforesaid Rules, the same governs the field and have to be complied with. The respondents cannot deviate from the provision of the aforesaid Rules and so far as the judgment passed in *Sheelchand Jain's* case is concerned, the facts of the same are clearly distinguishable.

8. In the case of *Sheel Chand Jain,* the question before this court was that whether the rejection of the petitioner's application to get the Samman Nidhi was proper or not, and after appreciating the documents filed on record it was held that his rejection was not proper, hence, in these circumstances, he was granted the benefit of Samman Nidhi from the date of his rejection and with interest. In para 3 of the said order, it is observed as under:-

> " 3. A Full Bench of this Court consisting of 5 Judges on a reference vide order dated 11.3.2010 has held that Rule 3(6) of the Rues (sic:Rules) of 1972 is a valid piece of legislation and it has been further held that the term "Sanction order" (Swikriti Aadesh) would also mean the date on which order is passed by the State Government rejecting the application in a case where such an order is set aside by higher forum holding the Swatantrata Sangram Senani would be entitled for pension (samman nidhi)"

9. Thus, applying the aforesaid principle to the present case, it is not a case where the petitioner's application was wrongly rejected by the State, in

fact, in the present case, it is only after submission of the proper documents to the satisfaction of the State, that the petitioner was grated Samman Nidhi on 28.03.2014 despite the fact that his earlier application was rejected on 18.10.1993. The order dated 18.10.1993 was never challenged by the petitioner hence it does not lie in his mouth that he should have been granted the Samman Nidhi from the initial date of his rejection i.e. from 18.10.1993. Thus, the petitioner has not been able to make out any case for interference by this court. In the circumstances, the petition fails and is hereby **dismissed.**

No costs.

Petition dismissed.

I.L.R. [2017] M.P., 2421
WRIT PETITION
Before Mr. Justice Hemant Gupta, Chief Justice &
Mr. Justice Vijay Kumar Shukla
W.P. No. 18886/2016 (Jabalpur) decided on 13 September, 2017

RAGHVENDRA SINGH YADAV ...Petitioner
Vs.
UNION OF INDIA & ors. ...Respondents

(Alongwith W.P. Nos. 19005/2016, 19024/2016, 19101/2016, 19170/2016, 19184/2016, 20318/2016, 8324/2017, 8357/2017, 8359/2017, 8362/2017, 8365/2017, 8367/2017 & 8371/2017)

A. Constitution – Article 226 – Cancellation of Appointment – Opportunity of Hearing – Principle of Natural Justice **– Held – Principle of natural justice are not required to be followed where large number of candidates have been selected on basis of forged and tampered mark sheet – Admittedly, original interview marks of candidates are not available, therefore tainted and untainted candidates cannot be segregated – Decision of the Samiti to re-advertise the post is not justified as it will put the earlier candidates to a disadvantageous position – Samiti directed to conduct interview of all candidates and on the basis of marks assigned, make appointment – Petition disposed of. (Para 8 to 12)**

क. संविधान – अनुच्छेद 226 – नियुक्ति का रद्दकरण – सुनवाई का अवसर – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – जहां कूटरचित एवं छेड़छाड़

की गई अंकसूची के आधार पर बड़ी संख्या में अभ्यर्थीगण का चयन किया गया है, नैसर्गिक न्याय के सिद्धांतों का पालन अपेक्षित नहीं – स्वीकृति रूप से, अभ्यर्थीगण के मूल साक्षात्कार के अंक उपलब्ध नहीं हैं, इसलिए दागी और बेदाग अभ्यर्थीगण को अलग नहीं किया जा सकता – पद का पुनः विज्ञापन देने का समिति का निर्णय न्यायोचित नहीं है क्योंकि यह पूर्वतर अभ्यर्थीगण को प्रतिकूल स्थिति में लायेगा – समिति को सभी अभ्यर्थीगण का साक्षात्कार संचालित करने तथा नियत अंको के आधार पर नियुक्ति करने के लिए निदेशित किया गया – याचिका निराकृत की गई।

B. Constitution – Article 226 – Prescribed Rules for Process of Appointment – Jurisdiction – **Held – By judicial order, the Central Administrative Tribunal cannot issues direction to conduct interview in a manner otherwise than prescribed by Recruitment Rules – Direction of Tribunal to conduct interview in a particular manner is set aside.(Para 12)**

ख. संविधान – अनुच्छेद 226 – नियुक्ति की प्रक्रिया हेतु विहित नियम – अधिकारिता – अभिनिर्धारित – केन्द्रीय प्रशासनिक अधिकरण, भर्ती नियमों द्वारा विहित रीति से अन्यथा साक्षात्कार संचालित करने के लिए निदेश जारी नहीं कर सकता – एक विशिष्ट रीति से साक्षात्कार संचालित करने का अधिकरण का निदेश अपास्त किया गया।

Cases referred :

(2015) 6 SCC 573, (2006) 11 SCC 356, (2016) 7 SCC 615, (2017) 4 SCC 1.

Shashank Shekhar, for the petitioners.
Rajesh Chand, for the petitioner in W.P. No. 19184/2016.
Pankaj Dubey, for the Union of India.

ORDER

The Order of the Court was passed by : **HEMANT GUPTA, C.J. :-** The challenge in the present writ petitions is to an order passed by the Central Administrative Tribunal, Jabalpur Bench, Jabalpur (for short "the Tribunal") on 17.10.2016 whereby the cancellation of appointment of the applicants before the Tribunal was maintained, but the merit list was ordered to be drawn on the basis of educational qualification, performance in qualifying examination, extracurricular activities, work experience etc. without conduct of interview.

2. The Original Applicants before the Tribunal have filed writ petitions

against the said order passed by the Tribunal as also Navodaya Vidyalaya Samiti (for short "Samiti") against the direction given in para 14 in respect of manner of fresh preparation of merit list.

3. The brief facts are that an advertisement was published for filling up of 62 posts in different disciplines called Miscellaneous Teachers. Such advertisement was published on 24.04.2012 (Annexure-P/1). The appointment process was in two parts. One is written examination of 140 marks followed by interview of 60 marks. In pursuance of the merit list prepared after conduct of written test and the interview, the appointment letters were issued on 12.09.2013. Admittedly, there is no irregularity in the marking of the written examination, but it is the mark-sheets of interview which were found to be forged and tampered. The allegation of forgery in the interview mark-sheets was referred to the Central Bureau of Investigation and on the basis of report of the Central Bureau of Investigation, the appointment letters issued to the applicants were cancelled/withdrawn on 14.01.2016 and 18.01.2016 but before an order of confirmation of the services of the Original Applicants was passed. Such order of cancellation was challenged in different applications before the Tribunal.

4. The Tribunal has found that it is impossible to segregate bad from good candidates as none of the original mark-sheets of the interview are available. Therefore, relying upon the Supreme Court judgment in the case of *Tanvi Sarwal v. Central Board of Secondary Education and others,* (2015) 6 SCC 573; the action of withdrawing the appointment of all the candidates was not found to be faulty. However, the Tribunal directed that fresh merit-list be prepared by granting 60 marks assigned for interview only on the basis of documents submitted by the candidates on the basis of educational qualification, performance in qualifying examination, extracurricular activities, work assessment, work experience in terms of the relevant Recruitment Rules as well as advertisement.

5. The argument of learned counsel for the Original Applicants before the Tribunal is that the allegation of tampering the mark-sheets was in respect of 29 candidates and not the applicants, therefore, cancellation of their result is not justified. It is also argued that before cancelling or withdrawing the appointment, no opportunity of hearing was granted to the applicants nor the applicants were confronted with adverse material if any in the process of assigning marks in the interview. Therefore, the tainted candidates have to be

segregated from the nontainted ones in view of the judgment of the Supreme Court in the case of *Inderpreet Singh Kahlon and others v. State of Punjab and others,* (2006) 11 SCC 356.

6. On the other hand, the argument of Samiti is that since the entire appointment process is tainted inasmuch as there is no original mark-sheets of interview available on record, therefore, it has been decided by the Samiti to re-advertise the posts rather than to re-assess the suitability of the candidates by interviewing them again. It is also contended that the process of interview could not be re-defined by the Tribunal as the conduct of the interview is part of the statutory rules. Therefore, the statutory rules cannot be superseded by an order passed by the Tribunal to conduct interview in a particular manner.

7. We have heard learned counsel for the parties. The primary argument of the learned counsel for the applicants is that opportunity of hearing was not provided to the applicants before cancelling or withdrawing the offer of the appointment. We do not find any merit as the said issue has been examined by the Supreme Court in the case of *Nidhi Kaim vs. State of Madhya Pradesh and Others*, (2016) 7 SCC 615. The relevant extract reads as under:-

> "38. The students in Sinha case [Bihar School Examination Board v. Subhas Chandra Sinha, (1970) 1 SCC 648] relied upon an earlier judgment of this court in Ghanshyam Das Gupta Case [Board of High School and Intermediate Education v. Ghanshyam Das Gupta, AIR 1962 SC 1110]. It was held therein that the students (only 3 in number) whose examination was cancelled on the ground that they had resorted to copying ought to have been given an opportunity to defend themselves. This court distinguished Ghanshyam Das Gupta case holding that the said judgment did not imply that the rule of audi alteram partem must be followed in cases
>
> > "...where the examination as a whole was vitiated, say by leakage of papers or by destruction of some of the answer books or by discovery of unfair means practised on a vast scale ..." (Sinha case, SCC p.652, para 14).
>
> This Court further held that in Ghanshyam Das Gupta
>
> > "the Court was then not considering the right of an

examining body to cancel its own examination when it was satisfied that the examination was not properly conducted or that in the conduct of the examination the majority of the examinees had not conducted themselves as they should have" (Sinha case, SCC p.652, para 14).....

39. Sinha case judgment, in my view, yields the following principles:

xxx xxx

39.4 To insist on the observance of the principles of natural justice, i.e. giving notice to each student and holding enquiry before cancelling the examination in such cases would "hold up the functioning" of the educational institutions which are responsible for maintenance of the standards of education, and "encourage indiscipline, if not, also perjury.

39.5 Compliance with the rule of audi alteram partem is not necessary not only in the cases of employment of "unfair means on large scale" but also situations where there is a "leakage of papers" or "destruction of some of the answer books", etc.

39.6 This Court drew a distinction between action against an individual student on the ground that the student had resorted to unfair means in the examination and the cancellation of the examination on the whole (or with reference to a group of students) because the process itself is vitiated.

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42. From an analysis of the above decisions, the following principles emerge:-

42.1 Normally, the rule of audi alteram partem must be scrupulously followed in the cases of the cancellation of the examinations of students on the ground that they had resorted to unfair means (copying) at the examinations.

42.2 But the abovementioned principle is not applicable to the cases where unfair means were adopted by a relatively large number of students and also to certain other situations

where either the examination process is vitiated or for reasons beyond the control of both students and the examining body, it would be unfair or impracticable to continue the examination process to insist upon the compliance with audi alteram partem rule.

42.3 The fact that unfair means were adopted by students at an examination could be established by circumstantial evidence.

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43. Cases such as the one on hand where there are allegations of criminal conspiracies resulting in the tampering with the examination process for the benefit of a large number of students would be certainly one of the exceptional circumstances indicated in Sinha case provided there is some justifiable material to support the conclusion that the examination process had been tampered with.

44. In the light of the principles of law emerging from scrutiny of the abovementioned judgments, we are of the opinion that case on hand can fall within the category of exceptions to the rule of audi alteram partem if there is reliable material to come to the conclusion that the examination process is vitiated. That leads me to the next question – whether the material relied upon by the Board for reaching the conclusion that the examination process was contaminated insofar as the appellants (and also some more students) are concerned and the appellants are the beneficiaries of such contaminated process, is tenable?"

8. In *Nidhi Kaim's* case the Supreme Court was examining the disqualification of the candidates conducted by the M.P. Professional Board for the professional courses. Though, the said judgment pertains to adopting of unfair means in the examination, but the principle laid down would be applicable in respect of appointment to a public post as well. It has been held that adherence to principle of natural justice for each and every students not practical and would be wastage of time and lead to further litigation in Court. The Court held that the principles of natural justice can be said to be applicable if there are one or two students but if there are large number of students, the principle of natural justice cannot be applied. Though the members of the

Bench differed in respect of the disqualification of the candidates but in a later judgment reported in *Nidhi Kaim and Another v. State of Madhya Pradesh and Others* (2017) 4 SCC 1, the Supreme Court has held that the candidates who have got admission on the basis of fraud, cannot claim any equitable indulgence.

9. In view of the said judgment since admittedly original interview marks of the candidates are not available, therefore, the tainted and untainted candidates cannot be segregated as was directed in *Inderpreet Singh's* case. Therefore, the action of the Samiti in withdrawing or cancelling the offer of appointment cannot be said to be vitiated in any manner.

10. However, we are unable to agree with the decision of the Samiti is to re-advertise the posts, which will give opportunity to the applicants to apply and to be considered for appointment along with other eligible candidates.

11. We find that the selection process should not be aborted for the reason that the original interview sheets are not available with the Samiti. The illegality part can be cured by subjecting the candidates for fresh interview and assessing their suitability in terms of the Recruitment Rules and the condition of advertisement. Issuing of advertisement will enlarge the number of candidates eligible to apply for the posts to be advertised. Such process will diminish the chances of the candidates who have applied in the year 2012 and appointed in the year 2013. The applicants form a separate class who were appointed in the year 2012 and their appointment has been withdrawn only for the reason that original mark-sheets of the interview are not available. Therefore, we find that decision of the Samiti to re-advertise the posts is not justified as it will put the candidates who applied in response to advertisement published in the year 2012 to a disadvantageous position. Consequently, the decision of the Samiti to re-advertise the posts, is not accepted.

12. The Tribunal has directed the interview to be conducted in the manner which is contrary to the Recruitment Rules and conditions of the advertisement. Such process cannot be accepted as 60 marks had to be assigned on the basis of interview in the manner mentioned in the Recruitment Rules and/or the advertisement. Consequently, we direct the Samiti to conduct interview of all the candidates and on the basis of marks assigned, make appointment. Such appointment shall take effect from the date of appointment. Since no pension Scheme is available, the period spent by the applicants in pursuance

of selection which has been set aside cannot be ordered to be counted for the purpose of pension, if any such candidate is re-selected.

13. In view of the said fact, all the writ petitions stand disposed of in the manner mentioned above.

Order accordingly.

I.L.R. [2017] M.P., 2428
APPELLATE CIVIL
Before Mr. Justice V.K. Shukla
S.A. No. 459/2014 (Jabalpur) decided on 23 June, 2017

UMMED BAGHEL ...Appellant
Vs.
MOHD. ANEES KHAN ...Respondent

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(a) – Eviction Decree – Arrears of Rent – **Concurrent decree of eviction u/S 12(1)(a) against Appellant/defendant (tenant) – Appeal against – Held – Apex Court has concluded that once non-payment of rent is established then Court has no option but to decree the suit on the ground contemplated u/S 12(1)(a) of the Act of 1961 – Subsequent payment of rent during the first and second appeal is of no relevance – Courts below rightly decreed the suit of plaintiff – No substantial question of law exists – Second Appeal dismissed. (Para 8 & 9)**

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए) – बेदखली की डिक्री – भाड़े का बकाया – अपीलार्थी/प्रतिवादी (किरायेदार) के विरूद्ध धारा 12(1)(ए) के अंतर्गत बेदखली की समवर्ती डिक्री – के विरूद्ध अपील – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि एक बार भाड़े का असंदाय स्थापित हो जाने पर, न्यायालय के पास 1961 के अधिनियम की धारा 12(1)(ए) के अंतर्गत अनुध्यात आधार पर वाद को डिक्रीत करने के अलावा कोई विकल्प नहीं है – प्रथम एवं द्वितीय अपील के दौरान भाड़े के पश्चात्वर्ती भुगतान की कोई सुसंगति नहीं है – निचले न्यायालयों ने वादी के वाद को उचित रूप से डिक्रीत किया – विधि का कोई सारभूत प्रश्न विद्यमान नहीं – द्वितीय अपील खारिज।

B. Civil Procedure Code (5 of 1908), Section 100 – Second Appeal – Concurrent Findings of Fact – Jurisdiction – **Held – Concurrent findings of Courts below are based on appreciation of evidence which cannot be interfered by this Court u/S 100 CPC – Court**

u/S 100 CPC cannot re-appreciate the evidence even if another view is possible – Jurisdiction of this Court u/S 100 CPC is limited – Concurrent findings of fact cannot be interfered until and unless the same is perverse or based on no evidence or contrary to material on record. (Paras 10 to 12)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – तथ्य के समवर्ती निष्कर्ष – अधिकारिता – अभिनिर्धारित – निचले न्यायालयों के समवर्ती निष्कर्ष साक्ष्य के मूल्यांकन पर आधारित हैं जिसमें इस न्यायालय द्वारा सिविल प्रक्रिया संहिता की धारा 100 के अंतर्गत हस्तक्षेप नहीं किया जा सकता – न्यायालय सिविल प्रक्रिया संहिता की धारा 100 के अंतर्गत साक्ष्य को पुनर्मूल्यांकित नहीं कर सकता, भले ही अन्य दृष्टिकोण संभव हो – सिविल प्रक्रिया संहिता की धारा 100 के अंतर्गत इस न्यायालय की अधिकारिता सीमित है – तथ्य के समवर्ती निष्कर्ष में तब तक हस्तक्षेप नहीं किया जा सकता जब तक कि उक्त विपर्यस्त न हो या बिना किसी साक्ष्य पर आधारित न हो या अभिलेख पर मौजूद सामग्री के विपरीत न हो।

Cases referred:

2007 (5) MPHT 308, (2000) 4 SCC 380, (2005) 7 SCC 211, (2003) 1 SCC 123, (2000) 10 SCC 193, 1995 Suppl. SCC 418, 1994 Suppl (1) SCC 437, (1990) 4 SCC 40, (1989) 4 SCC 612, (1988) 1 SCC 363, AIR 1967 SC 405, AIR 1965 SC 101, AIR 1964 SC 1341, AIR 1954 SC 758, (2001) 1 JLL 351, 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.

S.K. Soni, for the appellant.
Vivek Mishra, for the respondent.

JUDGMENT

V.K. Shukla, J. :- Heard on admission.

2. This is an appeal filed under Section 100 of the Code of Civil Procedure, challenging the judgment and decree dated 25-02-2014,passed by First Additional District Judge, Balaghat, in Regular Civil Appeal No.34-A/2013, affirming the judgment and decree dated 23-08-2013, passed by 4th Civil Judge Class- II, Balaghat, in Civil Suit No.136-A/2013, whereby the suit filed by the respondent/plaintiff for eviction on the ground under Section 12(1)(b) of M.P. Accommodation Control Act,1961(hereinafter referred to

as 'the Act') has been decreed.

3. Brief facts of the present case in short are that the plaintiff/respondent filed a suit for possession and arrears of rent. It was pleaded that the plaintiff had purchased the suit land and house by registered sale deed on 29-03-2011 from one Smt. Manjula Bai, W/o Viththal Rao Kothari. It is submitted by him that the appellant was residing as a tenant in the suit house on a sum of Rs.150/- per month before execution of the registered sale deed and thereafter the appellant has become tenant of the respondent. A legal notice on 29-09-2011 was sent by the plaintiff to the appellant. Since the appellant failed to respond to the aforesaid notice, the tenancy was terminated from the midnight of 31-10-2011 and informed the appellant to deliver the vacant possession of the suit house on 01-11-2011. It is further pleaded that the appellant did not deliver the vacant possession and therefore, the suit was filed for eviction on the ground that the appellant has failed to pay the arrears of the rent .

4. The appellant filed the written statement and denied the case of the plaintiff and submitted that prior to execution of the sale deed in favour of the plaintiff, original owner Manjula Bai had executed an agreement dated 30-06-2005 with one Dilip Kumar and therefore after the execution of the agreement with Dilip Kumar, he ceased to be tenant of Manjula Bai. It is further submitted that Dilip Kumar had also filed a suit for specific performance on the strength of the aforesaid agreement. The trial court framed the issues and Issue No.3 was that whether the appellant/defendant was tenant of the plaintiff and the Issue No.4 was that whether the plaintiff failed to make payment of the rent and he is in arrears of rent since April, 2011. The said issue was also answered affirmatively.

5. The trial court after extensive evaluation of the oral and documentary evidence recorded the finding that the appellant/defendant is tenant of the respondent/plaintiff and failed to make the payment of the rent and was in arrears of rent. Paras 17 and 18 are reproduced as under :

> "17. साक्ष्य के पूर्व विश्लेषण से यह तथ्य प्रमाणित है कि वादी द्वारा वादग्रस्त मकान दिनांक 29.03.2011 के पंजीकृत विक्रय पत्र प्र.पी.1"सी" के माध्यम से क्रय किया गया। यह तथ्य भी प्रमाणित होता है कि वादी द्वारा मौखिक रूप से प्रतिवादी से किराये की मांग की गई, नोटिस प्र.पी.3 दिनांक 20.09.2011 प्रतिवादी को प्रेषित किया गया, जो प्रतिवादी को प्राप्त हुआ, जिसमें वादी द्वारा विक्रय पत्र दिनांक 29.03.2011 के आधार पर वादग्रस्त मकान का मकान मालिक होते हुये प्रतिवादी उम्मेद(प्र.सी.1) की ओर माह अप्रैल 2011 से किराये

का भुगतान बकाया होने के आधार पर किराये की मांग की गई, जो धारा 109 संपत्ति अंतरण अधिनियम, 1882 के अधीन पर्याप्त सूचना है।

18. उपरोक्त साक्ष्य के विश्लेषण उपरांत यह तथ्य प्रमाणित होता है कि वादी विक्रय पत्र प्र.पी.1"सी" दिनांक 29.03.2011 के आधार पर वादग्रस्त मकान का स्वामी हुआ, उक्त दिनांक को प्रतिवादी उम्मेद(प्र.सा.1) वादग्रस्त मकान में 150/– रुपये मासिक दर से किरायेदार के रुप में काबिज था। वादी एवं प्रतिवादी के मध्य भू–स्वामी तथा अभिधारी के संबंध प्रमाणित होते है। फलतः वादप्रश्न क्र. 2 एवं 3 सकारात्मक रुप से "हॉ" में निर्णित किये जाते है। पूर्व विश्लेषण से यह तथ्य भी प्रमाणित होता है कि प्रतिवादी उम्मेद (प्र.सा.1) द्वारा माह अप्रैल 2011 से मासिक किराया राशि का भुगतान वादी को नहीं किया गया, जिससे माह अप्रैल 2011 से माह अक्टूबर 2011 तक सात माह का 1050/–(एक हजार पचास) रुपये किराये का भुगतान प्रतिवादी की ओर बकाया होना प्रमाणित होता है। अतः वादप्रश्न क्र.4 सकारात्मक रुप से "हॉ" में निर्णित किया जाता है।"

6. Being aggrieved by the aforesaid judgment and decree, the appeal was filed. The same was also dismissed and the findings of the trial court were affirmed. The Lower Appellate Court found that after the execution of the registered sale deed in favour of the plaintiff by Ex.P-1, the appellant had become tenant of the plaintiff and did not make the payment of rent and therefore, there was no illegality in the impugned judgment and decree of possession and payment of arrears of rent. Para-22 of the Lower Appellate Court is relevant to be extracted as under :

"22. इसके विपरीत स्वयं मंजूलाबाई के द्वारा वादग्रस्त मकान विकय करने का सौदा प्रतिवादी से होने से स्पष्ट इनकार किया गया है, जिससे स्पष्ट है कि वादग्रस्त मकान विकय करने का कोई सौदा नहीं किया गया और कभी उसके द्वारा कोई अग्रिम प्रतिफल की राशि प्राप्त भी नहीं की गई है। अतः वादी द्वारा वादग्रस्त भूमि और मकान उसकी पूर्व भूमि स्वामी मंजूलाबाई से विधिवत रजिस्टर्ड विकय पत्र प्रदर्शपी–1 द्वारा कय कर आधिपत्य किया जाना प्रमाणित पाया जाता है और इस संबंध में वादी द्वारा अधीनस्थ न्यायालय में विधिवत यह तथ्य प्रमाणित किया गया है। और इस संबंध में अधीनस्थ न्यायालय द्वारा निकाला गया निष्कर्ष और उसके आधार पर पारित निर्णय तथा उसके परिप्रेक्ष्य में पारित डिकी तथ्य, विधि एवं प्रकिया के अनुरूप पाया जाता है, जिसमें हस्तक्षेप करने की कोई आवश्यकता नहीं है।"

7. Learned counsel for the appellant vehemently argued that during the pendency of the first appeal and the second appeal, the appellant had deposited the entire amount and therefore, no decree of eviction could have been passed

against him.To buttress his submission, he relied on the judgment passed by a Coordinate Bench of this court in the case of *Vinod Kumar Agrawal Vs. Chandrakant Pandey and another,* 2007(5) MPHT 308 and seeks this court to over turn the concurrent findings of both the courts.

8. In the present case after consideration of the evidence, the trial court has passed the decree of eviction on the ground of arrears of rent. The Apex Court in the cases of *Jamnalal and others Vs. Radheshyam* (2000)4 SCC 380, *Atmaram Vs. Shakuntala Rani,* (2005)7 SCC 211, *E.Palanisamy Vs. Palanisamy,*(2003)1 SCC 123, *Parmeshwar Prasad Vs. Parmeshwari Devi,* (2000)10 SCC 193, *Mohammad Yunus Vs. Gurubux Singh,* 1995 Suppl. SCC 418, *Madan Mohan and another Vs. Krishann Kumar Sood,* 1994 Suppl(1) SCC 437, *J.L.Varandani Vs. Ashalata Mukherjee* (1990) 4 SCC 40, *Arjun Khiamal Mankhijani and other Vs. Jamnadas C. Tuliani and other,* (1989) 4 SCC 612, *Mrs.Manju Choudhary Vs. Kulal Kumar Chandra,* (1988) 1 SCC 363, *Vasumatiben Gaurishankar Bhatt Vs. Naviram Mancharam Vora and Ors.* AIR 1967 SC 405, *Mungilal Vs. Sirgan Chand Rathi*(Deceased, AIR 1965 SC 101, *Vora Abbasbhai Alimahomed Vs. Haji Gulamnabi Haji Safibhai*, AIR 1964 SC 1341, *Sheodhari Rai and Ors. Vs. Suraj Prasad Singh and others,* AIR 1954 SC 758 and *Smt. Sushila Shrivastava Vs. Nafees Ahmed Qureshi and another* (2001)1 JLL 351 held that once non payment of rent is established then the court had no option but to decree the suit on the ground contemplated under Section 12(1)(b) of the Act. The reliance placed by the appellant in the case of Vinod Kumar Agrawal(supra), the ratio laid down by the Coordinate Bench also not applied in the facts of the present case, as in the said case there was no decree for eviction under Section 12(1)(a) of the Act. On the contrary the suit was dismissed by the trial court and the question which was considered in the said case was that whether the courts below had acted illegally in dismissing the suit for arrears of rent. In the facts of the said case, the court found that once the trial court had directed for deposit of the rent and the same was deposited by the tenant, then the appellant is precluded from raising the ground on eviction on the ground of arrears of rent. Thus, the said judgment would not be of any help to the appellant in the facts of the said case and the present case. No other point was argued by the learned counsel for the appellant.

9. Learned counsel for the respondents submitted that the appeal filed by Dinesh who claimed of decree on the basis of so called agreement executed by original owner Manjula Bai has also been dismissed. However, I am afraid

that this is a ground for consideration of this appeal for admission.

10. In view of the aforesaid facts and considering the material on record, in the opinion of this court, the arguments advanced by the appellant cannot be countenance in exercise of jurisdiction under Section 100 of the Code of Civil Procedure. The entire gamut of material is in the realm of facts. The findings recorded by both the courts below are impregnable in nature. No question of law much less substantial question of law arises warranting interference under Section 100 of the Code of Civil Procedure.

11. I do not find any illegality or perversity in the concurrent findings recorded by the courts below. The question raised by the appellant could not be held to be a question of law rather than substantial question of law as the concurrent findings of the courts below are based on appreciation of evidence, which cannot be interfered by this court at this stage under Section 100 of the Code of Civil Procedure as laid down by the Apex Court in the cases of *Kalyan Singh Vs. Ramswaroop and another,* 1996 JLJ 247 and *Machalabai Vs. Nanakram,* 2006 (2) MPLJ 484.

12. 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).

13. In view of the aforesaid discussion, I have not found any perversity or 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., 2434
APPELLATE CIVIL
Before Mr. Justice Vivek Rusia
M.A. No. 2295/2014 (Indore) decided on 18 August, 2017

MOHD. YUNUS MUNSHI ...Appellant
Vs.
PUBLIC IN GENERAL ...Respondent

A. Mental Health Act (14 of 1987), Sections 50, 51 & 76 – Inquisition **– Suit for ejectment and *mesne* profit against Mohd. Yunus Munshi and Mohd. Kamar Hussain – An application u/S 50 of the Act of 1987 was filed by Mohd. Kamar Hussain seeking declaration that Mohd. Yunus Munshi is mentally ill person and is unable to manage his property – Trial Court held that Mohd. Yunus Munshi is mentally ill person but dismissed the application on the ground that details of properties had not been disclosed – Review application filed by applicant which was also dismissed – Challenge to – Held – Only one application is required to be made u/S 50 of the Act, where District Judge is required to conduct inquisition and give a declaration u/S 51 of the Act – In the present case, trial Court wrongly dismissed the application on technical ground and without giving any declaration – Application filed by appellant was maintainable u/S 50 and Section 51 of the Act – Impugned order set aside – Matter remitted back to District Court – Appeal allowed. (Paras 4, 6 & 7)**

क. मानसिक स्वास्थ्य अधिनियम (1987 का 14), धाराएँ 50, 51 व 76 – समीक्षा – मो. युनुस मुन्शी एवं मो. कमर हुसैन के विरूद्ध बेदखली एवं अंतःकालीन लाभ हेतु वाद – मो. कमर हुसैन द्वारा 1987 के अधिनियम की धारा 50 के अंतर्गत यह घोषणा चाहते हुये कि मो. युनुस मुन्शी मानसिक रूप से अस्वस्थ व्यक्ति है तथा अपनी संपत्ति की देखभाल करने में असमर्थ हैं, एक आवेदन प्रस्तुत किया गया था – विचारण न्यायालय ने यह अभिनिर्धारित किया कि मो. युनुस मुन्शी मानसिक रूप से अस्वस्थ व्यक्ति है परन्तु इस आधार पर आवेदन खारिज कर दिया कि संपत्तियों का विवरण प्रकट नहीं किया गया है – आवेदक द्वारा पुनर्विलोकन आवेदन प्रस्तुत किया गया जिसे भी खारिज किया गया था – को चुनौती – अभिनिर्धारित – अधिनियम की धारा 50 के अंतर्गत केवल एक आवेदन किया जाना अपेक्षित है, जहां अधिनियम की धारा 51 के अंतर्गत जिला न्यायाधीश द्वारा समीक्षा संचालित किया जाना एवं घोषणा की जाना अपेक्षित है – वर्तमान प्रकरण में, विचारण न्यायालय ने तकनीकी आधार पर एवं बिना कोई घोषणा किये आवेदन को दोषपूर्ण रूप से

खारिज किया – अपीलार्थी द्वारा प्रस्तुत आवेदन अधिनियम की धारा 50 एवं 51 के अंतर्गत पोषणीय था – आक्षेपित आदेश अपास्त – मामला जिला न्यायालय को प्रतिप्रेषित – अपील मंजूर।

B. Mental Health Act (14 of 1987), Sections 52, 53 & 54 – Procedure for appointment of Guardian/Manager – **Section 51 mandates that District Court shall record its findings regarding mental illness of the person and if person is declared mentally ill, another inquiry is to be conducted u/S 52 of the Act for whether such person is capable of taking care of himself and managing his property – If he is incapable of taking care of himself, then guardian will be appointed and if he is incapable to manage his properties, a manager will be appointed u/S 54 of the Act – In the present case, if appellant wants declaration that said person is incapable of managing his property, District Court ought to have directed him to give a declaration about details of his properties instead of rejecting the application – Further held – Entire enquiry can be conducted in one application u/S 50 of the Act, no separate application is required to be filed. (Para 7)**

ख. मानसिक स्वास्थ्य अधिनियम (1987 का 14), धाराएँ 52, 53 व 54 – संरक्षक/प्रबंधक की नियुक्ति हेतु प्रक्रिया – धारा 51 आदेशित करती है कि जिला न्यायालय व्यक्ति की मानसिक अस्वस्थता के संबंध में अपने निष्कर्ष अभिलिखित करेगा एवं यदि व्यक्ति मानसिक रूप से अस्वस्थ घोषित किया जाता है, तब अधिनियम की धारा 52 के अंतर्गत एक अन्य जांच संचालित की जानी चाहिए कि क्या ऐसा व्यक्ति स्वयं का ध्यान रखने एवं अपनी संपत्ति की देखभाल करने में समर्थ है – यदि वह अपना ध्यान रखने में असमर्थ है, तो संरक्षक नियुक्त किया जाएगा एवं यदि वह अपनी संपत्ति की देखभाल करने में असमर्थ है, तो अधिनियम की धारा 54 के अंतर्गत एक प्रबंधक नियुक्त किया जाएगा – वर्तमान प्रकरण में, यदि अपीलार्थी घोषणा चाहता है कि कथित व्यक्ति उसकी संपत्ति की देखभाल करने में असमर्थ है, तो जिला न्यायालय को चाहिए था कि वह आवेदन नामंजूर करने के बजाय, उसे संपत्तियों के विवरणों के बारे में घोषणा देने हेतु निदेशित करे – आगे अभिनिर्धारित – संपूर्ण जांच अधिनियम की धारा 50 के अंतर्गत एक आवेदन में संचालित की जा सकती है, कोई पृथक आवेदन प्रस्तुत किया जाना अपेक्षित नहीं।

Akash Rathi, for the appellant.

None, for the respondents despite publication in newspaper.

ORDER

VIVEK RUSIA, J. :- THE appellant has filed the present appeal under Section 76 of the Mental Health Act, 1987 [in brief "the Act of 1987"] being aggrieved by order dated 06.02.2013 by which his application under Section 50 of the Act of 1987 has been rejected.

2. Facts of the case, in short, are as under :-

(a) That One Pakki Maszid through Intzamiya Committee filed a suit for ejectment and mesne profit against Mohd. Yunus Munshi and Mohd. Kamar Hussain Munshi from House No.22, Jawahar Marg, Indore. Since Mohd. Yunus Munshi is of unsound mind, therefore, on his behalf Mohd. Kamar Hussain Munshi has filed an application under Section 50 of the Act of 1987 before the District Court, Indore seeking declaration to the effect that he is a mentally ill person and unable to manage his property.

(b) Notice to General Public was issued by way of paper publication and thereafter statements of Mohd. Kamar Hussain Munshi, Naima Banu and Mohd. Salman were taken by way of affidavit. The learned Trial Court vide judgment dated 06.02.2013 has held that Mohd. Yunus Munshi is mentally ill person but since the details of the properties have not been disclosed, therefore, application under Section 50 of the Act of 1987 has been rejected. However, the liberty has been granted that he can file an application in Civil Suit No.9-A/2011 regarding his status of unsound of mind.

(c) Being aggrieved by the aforesaid, the appellant preferred an application under Order XLVII Rule 1 of CPC seeking review of order dated 06.02.2013. By order dated 07.10.2014 the learned 9th Additional District Judge, Indore has rejected the same. Hence, the present appeal is filed before this Court.

3. I have heard the arguments of Shri Akash Rathi, learned counsel for the appellant.

4. The appellant has filed an application under Section 50 of the Act of 1987 seeking declaration that he is a mentally ill person because one Pakki Maszid through Intzamiya Committee has filed the suit against him for eviction. That Section 50 of the Act of 1987 provides that where an alleged mentally ill person is possessed of property, an application for holding an inquisition into the mental condition of such person may be made either by his relatives or by

Advocate General to the District Court within whose local limits mentally ill person resides. On receipt of such application, the District Judge shall, by personal service or by such other mode of service, serve a notice on the alleged mentally ill person to attend the proceedings.

5. Under Section 51 of the Act of 1987, the District Court is required to record its findings on two issues, namely (i) whether the alleged mentally ill person is in fact mentally ill or not ? (ii) if such person is mentally ill, then whether he is incapable of taking care of himself or managing his property ? Under Section 52 of the Act of 1987, where the District Judge records a finding that the alleged mentally ill person is in fact mentally ill and is incapable of taking care of himself or managing his property, he shall make an order for the appointment of a guardian under Section 53 of the Act or of a manager under Section 54 of the Act of 1987 for management of his property. If he is capable of taking care of himself but not capable of managing his property, then he shall pass an order under Section 54 of the Act of 1987 regarding management of his property. Section 50 to 54 of the Act of 1987 are reproduced below :-

> **"50. *Application for judicial inquisition.*—(1) Where an alleged mentally ill person is possessed of property, an application for holding an inquisition into the mental condition of such person may be made either—**
>
> **(a) by any of his relatives, or**
>
> **(b) by a public curator appointed under the Indian Succession Act, 1925 (39 of 1925), or**
>
> **(c) by the Advocate-General of the State in which the alleged mentally ill person resides, or**
>
> **(d) where the property of the alleged mentally ill person comprises land or interest in land, or where the property or part thereof is of such a nature as can lawfully be entrusted for management to a Court of Wards established under any law for the time being in force in the State, by the Collector of the District in which such land is situate, to the District Court within the local limits of whose jurisdiction the alleged mentally ill person resides.**

(2) On receipt of an application under sub-section (1), the District Court shall, by personal service or by such other mode of service as it may deem fit, serve a notice on the alleged mentally ill person to attend at such place and at such time as may be specified in the notice or shall, in like manner, serve a notice on the person having the custody of the alleged mentally ill person to produce such person at the said place and at the said time, or being examined by the District Court or by any other person from whom the District Court may call for a report concerning the mentally ill person:

Provided that, if the alleged mentally ill person is a woman, who according to the custom prevailing in the area where she resides or according to the religion to which she belongs, ought not to be compelled to appear in public, the District Court may cause her to be examined by issuing a commission as provided in the Code of Civil Procedure, 1908 (5 of 1908).

(3) A copy of the notice under sub-section (2) shall also be served upon the applicant and upon any relative of the alleged mentally ill person or other person who, in the opinion of the District Court, shall have notice of judicial inquisition to be held by it.

(4) For the purpose of holding the inquisition applied for, the District Court may appoint two or more persons to act as assessors.

51. *Issues on which finding should be given by District Court after inquisition.*—On completion of the inquisition, the District Court shall record its findings on,—

(i) whether the alleged mentally ill person is in fact mentally ill or not, and

(ii) where such person is mentally ill, whether he is incapable of taking care of himself and of managing

his property, or incapable of managing his property only.

52. Provision for appointing guardian of mentally ill person and for manager of property.—(1) Where the District Court records a finding that the alleged mentally ill person is in fact mentally ill and is incapable of taking care of himself and of managing his property, it shall make an order for the appointment of a guardian under section 53 to take care of his person and of a manager under section 54 for the management of his property.

(2) Where the District Court records a finding that the alleged mentally ill person is in fact mentally ill and is incapable of managing his property but capable of taking care of himself, it shall make an order under section 54 regarding the management of his property.

(3) Where the District Court records a finding that the alleged mentally ill person is not mentally ill, it shall dismiss the application.

(4) Where the District Court deems fit, it may appoint under sub-section (1) the same person to be the guardian and manager.

53. Appointment of guardian of mentally ill person.—(1) Where the mentally ill person is incapable of taking care of himself, the District Court or, where a direction has been issued under sub-section (2) of section 54, the Collector of the District, may appoint any suitable person to be his guardian.

(2) In the discharge of his functions under sub-section (1), the Collector shall be subject to the supervision and control of the State Government or of any authority appointed by it in that behalf.

54. Appointment of manager for management of property of mentally ill person.—(1) Where the property of the mentally ill person who is incapable of managing it is such as can be taken charge of by a Court of Wards under

any law for the time being in force, the District Court shall authorise the Court of Wards to take charge of such property, and thereupon notwithstanding anything contained in such law, the Court of Wards shall assume the management of such property in accordance with that law.

(2) Where the property of the mentally ill person consists in whole or in part of land or of any interest in land which cannot be taken charge of by the Court of Wards, the District Court may, after obtaining the consent of the Collector of the District in which the land is situated, direct the Collector to take charge of the person and such part of the property or interest therein of mentally ill person as cannot be taken charge of by the Court of Wards.

(3) where the management of the property of the mentally ill person cannot be entrusted to the Court of Wards or to the Collector under sub-section (1) or sub-section (2), as the case may be, the District Court shall appoint any suitable person to be the manager of such property.

6. In the present case the appellant has filed an application with a prayer that inquisition be made and declare that he is mentally ill person and unable to take care of his property. The learned District Judge on the basis of the material available on record has held that he is mentally ill person but rejected the application on technical ground that the details of properties have not been filed.

7. As per Chapter-VI of the Act of 1987, only one application is required to be made under Section 50 of the Act of 1987 and under which the District Judge is required to conduct inquisition and give a declaration under Section 51 of the Act of 1987. Therefore, the application filed by the appellant was very much mentainable (sic:maintainable) under Sections 50 and 51 of the Act of 1987. The District Judge has wrongly rejected the application without giving any declaration. That Section 51 of the Act of 1987 mandates that the District Court shall record its findings whether the alleged mentally ill person is in fact mentally ill or not. If the appellant is declared mentally ill person, then another

enquiry is required to be conducted as contemplated under Section 52 of the Act of 1987 whether he is capable of taking care of himself and managing his property. If he is incapable of managing himself, then guardian would be appointed and if he is not capable of managing his properties, then the manager would be appointed under Section 54 of the Act of 1987. If the appellant wants declaration that he is incapable of managing his property, then the District Court ought to have directed him to give a declaration about the details of the property instead of rejecting the application. For declaration under Sections 52, 53 and 54 of the Act of 1987, no separate application is required to be filed, entire enquiry can be conducted in one application filed under Section 50 of the Act of 1987. Therefore, the learned Court has wrongly rejected his application.

8. In view of the above, the impugned order dated 06.02.2013 is hereby set-aside. The matter is remitted back to the District Court to decide the application as per Section 52 to 54 of the Act of 1987.

9. The appeal is allowed.

Appeal allowed.

I.L.R. [2017] M.P., 2441
APPELLATE CIVIL

Before Mr. Justice Sheel Nagu & Mr. Justice Ashok Kumar Joshi
F.A. No. 196/2017 (Gwalior) decided on 30 August, 2017

REETA BAIS (SMT.) ...Appellant
Vs.
VISHWAPRATAP SINGH BAIS ...Respondent

A. ***Hindu Marriage Act (25 of 1955), Section 24 – Maintenance Pendente lite – Grounds – Quantum*** **– Family Court vide interim order granted Rs. 2500 pm and Rs. 1500 pm as *pendente lite* maintenance to wife and infant child respectively – Quantum challenged by wife – Husband submitting that he is unemployed and totally dependent upon his father and elder brother – Held – Notification of 2017 issued under Minimum Wages Act, 1948 prescribed Rs. 350 per day as minimum rate of wages for unskilled labour – Husband, an able bodied man is legally responsible to maintain his wife who has no source of income – Rs. 200 per day for wife and Rs. 100 per day for infant**

child would suffice to enable them to sustain a life of dignity – Amount of Rs. 6000 pm to wife and Rs. 3000 for child granted – Impugned order modified. (Paras 4.3, 4.4 & 5)

क. हिन्दू विवाह अधिनियम (1955 का 25), धारा 24 – वादकालीन भरणपोषण – आधार – मात्रा – कुटुम्ब न्यायालय ने अंतरिम आदेश के माध्यम से वादकालीन भरणपोषण के रूप में 2500/– रू. प्रतिमाह एवं 1500/– रू. प्रतिमाह क्रमशः पत्नी और नवजात शिशु को प्रदान किये – पत्नी द्वारा मात्रा को चुनौती – पति ने यह निवेदित किया कि वह बेरोजार है तथा पूरी तरह से अपने पिता और बड़े भाई पर आश्रित है – अभिनिर्धारित – न्यूनतम मजदूरी अधिनियम, 1948 के अंतर्गत जारी 2017 की अधिसूचना अकुशल श्रमिक के लिए 350/– रू. प्रतिदिन मजदूरी की न्यूनतम दर के रूप में विहित करती है – पति एक शारीरिक रूप से समर्थ व्यक्ति अपनी पत्नी जिसकी आय का कोई स्त्रोत नहीं है, का भरणपोषण करने के लिए विधिक रूप से दायी है – पत्नी के लिए 200/– रू. प्रतिदिन और नवजात शिशु के लिए 100/– रू. प्रतिदिन, उनके गरिमापूर्ण जीवन जीने के लिए पर्याप्त होगा – पत्नी को 6000/– रू. प्रतिमाह तथा बच्चे को 3000/– रू. प्रतिमाह की राशि प्रदान की गई – आक्षेपित आदेश उपांतरित।

B. Hindu Marriage Act (25 of 1955), Section 24 and Family Courts Act (66 of 1984), Section 19 – Maintenance Pendente lite – Appeal – Maintainability **– Held – Full Bench of Allahabad High Court concluded that the nature, character and colour of an order u/S 24 of the Act of 1955 is of a final order as it decides rights and liabilities of wife in a substantial manner therefore can be treated akin to "judgment" – Appeal maintainable – Objection raised by husband rejected. (Paras 1, 1.2 & 1.3)**

ख. हिन्दू विवाह अधिनियम (1955 का 25), धारा 24 एवं कुटुम्ब न्यायालय अधिनियम (1984 का 66), धारा 19 – वादकालीन भरणपोषण – अपील – पोषणीयता – अभिनिर्धारित – इलाहाबाद उच्च न्यायालय की पूर्ण न्यायपीठ ने निष्कर्षित किया कि 1955 के अधिनियम की धारा 24 के अंतर्गत एक आदेश की प्रकृति, विशेषता और उसका स्वरूप एक अंतिम आदेश का है, क्योंकि यह सारभूत ढंग से पत्नी के अधिकारों और दायित्वों का विनिश्चय करता है इसलिए इसे "निर्णय" के समान माना जा सकता है – अपील पोषणीय है – पति द्वारा उठाया गया आक्षेप अस्वीकार।

Case referred:

2005 (23) LCD page 1.

Vivek Khedkar, for the appellant.
Syed Momin Ali Shah, for the respondent.

JUDGMENT

Learned counsel for the respondent has raised preliminary objection as to maintainability of this appeal on the ground that the same filed under Section 19 of the Family Court's Act is not maintainable having been filed against an interlocutory order passed under Section 24 of the Hindu Marriage Act granting interim maintenance to the wife less than what was sought by her.

1.2. Learned counsel for the appellant relying upon a decision of the Full Bench of Allahabad High Court in the case of *Smt. Kiran Bala Shrivastava Vs. Jai Prakash Shrivastava* reported in 2005(23) LCD page 1 submits that the nature, character and colour of an order under Section 24 of the Hindu Marriage Act is of a final order as it decides the rights and liabilities of the wife in a substantial manner and, therefore, can very well be treated akin to "judgment". By relying the Full Bench decision, it is submitted that the instant appeal under Section 19 of the Family Court Act is maintainable.

1.3. In view of the decision of the Full Bench of the Allahabad High Court, this Court rejects the preliminary objection of maintainability and hold that the instant appeal is maintainable.

2. The present appeal is filed against the order of ad-interim maintenance passed under Section 24 of the Hindu Marriage Act awarding *pendente lite* maintenance @ Rs.2500/- per month to appellant wife and @ 1500/- per month for the son aged about 18 months along with composite litigation cost of Rs.3000/-.

3. Learned counsel for the appellant wife seeking enhancement contends that the husband, as per the application filed under Section 24 was earning about Rs.1 lakh per month by indulging in sale and purchase of real estate. It was submitted by the wife in the application that respondent-husband has agricultural land which is an additional source of income. In this factual backdrop, wife sought interim maintenance of Rs.45,000/- per month for herself and her son before the Family Court.

3.1. In reply to the aforesaid claim u/s 24 HMA, the respondent-husband denied the contentions of the wife by stating that in business of sale and purchase of immoveable property he suffered loss and thereafter opened a shop in the city which venture also could not succeed and now he has no source of income and is totally dependent on his 70 years old father and elder brother.

3.2. Undeniably the respondent-husband has not challenged the order of interim maintenance and, therefore, to the extent of this failure to challenge the respondent-husband has admitted his liability to ad-interim maintenance to the wife to the extent granted by the impugned order.

4. Thus the only question which now begs for an answer is about the quantum of pendente lite maintenance awarded.

4.1. It is not denied that the respondent-husband is an able bodied man who is legally responsible to maintain his wife who has no source of livelihood.

4.2. This Court is of the considered view that from the current standard of living and rising price index the amount of compensation of Rs.4000/- per month is deficient to sustain a woman as well as her infant child.

4.3. To *prima facie* ascertain the minimum essentials required to allow an individual to survive and live a life of dignity, this court deems it appropriate to seek guidance from the Notification No. S.O.2413(E) dated 28th July, 2017 of the Ministry of Labour and Employment issued under the Minimum Wages Act, 1948 prescribing minimum rates of wages for unskilled Labourer as Rs.350/- per day.

4.4. This Court is of the considered view that taking a modest figure of Rs.200/- per day for the appellant-wife and Rs.100/- per day for her infant child would suffice to enable them to sustain a life of dignity allowing them to meet the requirement of necessity and a little bit of comfort.

5. Consequently, an amount of Rs.**6,000/-** per month for wife and Rs.**3,000/-** per month for the child would be reasonable *pendente lite* maintenance.

6. Accordingly, the impugned order of grant of maintenance to the wife is modified to the extent indicated above and the respondent-husband is directed to pay the enhanced amount from first February, 2017. The arrears arising out of this order shall be paid to the wife within a period of two months and the respondent-husband shall ensure payment of *pendente lite* maintenance in future at the said enhanced rate till pendency of Section 13 divorce petition filed by the husband, by the tenth day of every month.

7. This order shall not prejudice the rights and liabilities of the rival parties in the pending divorce petition.

Order accordingly.

I.L.R. [2017] M.P., 2445
APPELLATE CRIMINAL
Before Mr. Justice Ravi Shankar Jha &
Mr. Justice Ashok Kumar Joshi
Cr.A. No. 1792/2003 (Jabalpur) decided on 18 May, 2017

SAKHARAM @ BAGAD & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Section 302/149 & 148 – Murder – Conviction – Child Witness – Credibility — Appreciation of Evidence – **Held – Solitary statement of child witness does not inspire confidence because of material contradictions, exaggeration, inconsistencies, omissions and improvements in the Court statements in comparison to *dehati nalishi* and police statement – Such evidence is wholly unsafe unless corroborated by independent witnesses – Absence of corroboration even of departmental prosecution witness – Evidence not reliable and trustworthy – Appellants acquitted of charge – Appeal allowed. (Paras 31, 33, 34 & 36)**

क. दण्ड संहिता (1860 का 45), धारा 302/149 व 148 – हत्या – दोषसिद्धि – बाल साक्षी – विश्वसनीयता – साक्ष्य का मूल्यांकन – अभिनिर्धारित – बाल साक्षी का एकल कथन, देहाती नालिशी और पुलिस कथन की तुलना में तात्विक विरोधाभास, अतिशयोक्ति, असंगतियां, लोप तथा न्यायालय कथनों में सुधार होने के कारण विश्वास उत्पन्न नहीं करता – ऐसा साक्ष्य पूर्णतः असुरक्षित है जब तक कि स्वतंत्र साक्षीगण द्वारा संपुष्टि नहीं की जाती है – विभागीय अभियोजन साक्षी की संपुष्टि भी अनुपस्थित – साक्ष्य विश्वसनीय और भरोसेमंद नहीं – अपीलार्थीगण आरोप से दोषमुक्त किये गये – अपील मंजूर।

B. Penal Code (45 of 1860), Section 302/149 & 148 – Murder – Seizure of Weapons – Circumstantial Evidence – Proof – **Held – Seizure of weapons from appellants not supported by witnesses – As per FSL report, no blood found on any seized weapon – Circumstantial evidence regarding seizure is inconclusive, immaterial and is unable to establish any link between appellants and the incident of murder. (Para 35)**

ख. दण्ड संहिता (1860 का 45), धारा 302/149 व 148 – हत्या – शस्त्रों की जब्ती – परिस्थितिजन्य साक्ष्य – सबूत – अभिनिर्धारित – अपीलार्थीगण से शस्त्रों की जब्ती साक्षीगण द्वारा समर्थित नहीं – एफ.एस.एल. प्रतिवेदन के

अनुसार, किसी जब्तशुदा शस्त्र पर कोई रक्त नहीं पाया गया – जब्ती के संबंध में परिस्थितिजन्य साक्ष्य अनिर्णायक, तत्वहीन है तथा अपीलार्थीगण और हत्या की घटना के मध्य कोई कड़ी स्थापित करने में असमर्थ है।

Cases referred:

1990 JLJ 401, 1990 J.L.J. 772, AIR 1976 SC 2423, AIR 1975 SC 1727, AIR 1953 SC 514, 2008 (1) M.P.L.J. (Cri.) 676, AIR 1979 SC 1408, 2012 (1) M.P.L.J. (Crl.) (SC) 19, 2003 (2) J.L.J. 129, 2012 (2) M.P.L.J. (Crl.) 77, 2008 (2) MPLJ (Crl.) 561 (SC), AIR 1976 SC 560, AIR 1976 SC 989.

V.P. Singh, for the appellants.

Vaibhav Tiwari, P.L. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by :

ASHOK KUMAR JOSHI, J. :- In this appeal filed under Section 374(2) of the Criminal Procedure Code, challenge is to the conviction and sentence recorded on 19.9.2003 by the First Additional Sessions Judge, Balaghat in Sessions Trial No.192/2002, whereby each of the original eight appellants has been convicted and sentenced under Section 302/149 (on four counts) of the IPC for life imprisonment with a fine of Rs.500/- on each count and under Section 148 of the IPC to undergo rigorous imprisonment for one year. All the jail sentences of each appellant have been directed to run concurrently and in default of above mentioned fine, each appellant is directed to undergo one year rigorous imprisonment additionally. According to written information received from Central Jail, Jabalpur, original appellant No.5 Shobhelal S/o Saradhya had died on 4.4.2015 during treatment in Medical College, Jabalpur undergoing his life imprisonment.

2. Prosecution's case in brief is that before 15.8.2002, present appellant No.1 Sakharam alias Bagad had killed a dog of the family of 12 years old complainant Sunil Kumar (P.W.6). On this issue, quarrel had occurred between brothers of the complainant and appellant No.1 Sakharam alias Bagad and his friends. On the date of incident 15.8.2002 at about 4-30 p.m., when about 12 years old complainant Sunil Kumar (P.W.6) was at his house in village Chhota Jagpura with his parents and brothers, then appellant No.1 Sakharam alias Bagad and appellant No.2 Sukhlal each having tangia, appellants Madhu and Bhaulal each having an iron rod, appellant Somaji armed with axe and

other appellants Baton, Sobhelal and Shivlal each having a stick in his hand came before the house of complainant and after giving abuses called the complainant's brothers to come out and appellants were saying that today you will be disposed of. Thereafter, complainant's mother Chandrakala and brothers Surendra and Gajendra came out from their house to pacify the appellants, thereafter all appellants started beating of Chandrakala, Surendra and Gajendra with their arms. After hearing crying of injured, complainant's father Sukhlal came out from his house and after looking the beating of Chandrakala, Gajendra and Surendra on the spot started running towards the hill, then all appellants chased him and surrounded Sukhlal and gave heavy beating by iron rods, stick and other arms and the appellants killed above mentioned four members of complainant's family. Complainant Sunil Kumar had seen the incident when he was near a tree of mango, but after seeing the incident, he was much frightened and thus after running had entered into his house and got himself hidden in inner room of his house and after much time, he came out from the house, then saw that his mother, father and two brothers have died, but being frightened, he got hidden in the house. On next morning, when his sister-in-law Shakuntala (P.W.11 wife of deceased Surendra) met him, then complainant informed her about the incident.

3. The Sarpanch of Gram Jagpura, Jhankar Singh (P.W.10) and village Kotwar Devanand (P.W.7) after seeing dead bodies at 10.00 P.M. on spot informed at police station Bharveli in the mid-night that in above mentioned village, dead-bodies of Sukhlal, his wife and his two sons are lying in heavily injured conditions in front of their house and they suspected that unknown persons have committed the incident. Their information was registered at roznamcha sanha no.523 (Ex.P.47-A) on 16.8.2002 at 2-05 a.m. (mid-night). The relating S.H.O., Bharveli Ashish Singh Pawar (P.W.14) intimated the Police Superintendent about the incident and as the area being naxalites affected and due to heavy rain in the mid-night, on the next morning, the received information was confirmed. The S.H.O. of Police Station Bharveli Ashish Singh Pawar (P.W.14), thereafter reached with police force to the spot early in the morning on 16.8.2002. Four dead-bodies were lying in front of the house of the deceased persons. Within some time, small boy complainant Sunil Kumar and his sister-in-law (bhabhi) Shakuntala Bai came to him. Sunil Kumar intimated him about the incident, which was recorded by the A.S.H.O. in the form of dehati nalishi (Ex.P.36), which was sent to police station Bharveli for registration of crime. In presence of complainant, Ashish Singh (P.W.14)

prepared a spot map (Ex.P.6) and took photographs of the scene of occurrence by government photographer and also got videography. The above mentioned investigator prepared different inquest memos (Ex.P-1 to Ex.P-4) separately in relation to each deceased. He also seized differently blood stained soil nearer to each dead-body and prepared seizure memos (Ex.P-9 to Ex.P-12) and by separate applications (Ex.P-48 to Ex.P-51), all the four dead-bodies were sent to District Hospital, Balaghat for post-mortem.

4. Dr.G.R.Brahma (P.W.4) on 16.8.2002 in above mentioned hospital conducted autopsy of these dead-bodies and recorded post-mortem reports (Ex.P.31 to Ex.P.34) about deceased Surendra, Chandrakala, Gajendra and Sukhlal respectively.

5. Investigator Ashish Singh Pawar (P.W.14) on 17.8.2002 after receiving four sealed packets from the district hospital, Balaghat prepared seizure memos (Ex.P.14 and Ex.P.15). On 18.8.2002, appellants Shivlal and Bhaulal were arrested and on disclosure statement (Ex.P.46) of Shivlal and on the basis of this information after seizing relating articles, seizure memo (Ex.P-42) was prepared. On disclosure statement (Ex.P-44) of appellant Bhaulal, and after seizing relating articles, seizure memo (Ex.P.45) was prepared. The appellant Madhu was arrested on 19.8.2002 and on the basis of his disclosure statement (Ex.P.7), a stick was seized by seizure memo (Ex.P.8). With a draft (Ex.P-52) prepared in the office of the Police Superintendent, Balaghat, the seized articles were sent for chemical analysis to F.S.L., Sagar. During investigation, outline diagram (Ex.P-35) was got prepared from patwari Meghalal (P.W.5) after completing investigation, a charge-sheet was filed in the Court of Chief Judicial Magistrate, Balaghat, who committed the arisen criminal case to the Sessions Court, Balaghat and arisen Sessions Trial was transferred by the Sessions Judge to the above mentioned trial Court.

6. Each appellant denied the framed charges by the trial Judge under Sections 302/149 (on four counts) of the IPC and section 148 of the IPC. Fourteen prosecution witnesses were examined. It was defence of the appellants/accused persons before the trial Court that they were falsely implicated in the case. An additional specific defence was taken by the appellant No.1 Sakharam alias Bagad that on the date of incident, when he returned back to his house finishing his labour work, then complainant Sunil had intimated him that his parents had been killed thereafter he gave food to the complainant and kept him in the night at his house and in the next morning, he

handed over the complainant to the police. Appellant No.1 Sakharam alias Bagad and appellant No.4 Somaji also took defence under their relating examination under Section 313 of the Cr.P.C. that previously police officials were regularly visiting the house of the deceased persons and the deceased persons were informers of the police, who gave information about activities of naxalites to the police. A neighbourer of the deceased persons, Kanhaiya (D.W.1) was examined as defence witness for the accused persons before the trial Court, who deposed that he had seen that the murders of deceased were committed by eight to nine unknown persons who were wearing green coloured dress and having guns, barchhi and bhala. The trial Court after completing hearings believed on the eye witness account of complainant Sunil Kumar and evidence of investigator Ashish Singh Pawar (P.W.14) regarding some seizures on previous disclosure statements of some appellants and convicted and sentenced each appellant as stated hereinabove.

7. Learned counsel for the appellants vehemently contended that the statement of child witness Sunil Kumar (P.W.6) is substantially contradicted by his signed dehati nalishi (Ex.P.36) and placing reliance on the citations of *Mangilal and others Vs. State of M.P.* (1990 JLJ 401), *Chhakki Vs. State of M.P.* (1990 J.L.J 772), *Ishwar Singh Vs. State of U.P.* (AIR 1976 SC 2423), *Ram Narayan Vs. State of Punjab* (AIR 1975 SC 1727) and *Mohinder Singh Vs. State* (AIR 1953 SC 514), it has also been contended that the statement of Sunil Kumar (P.W.6) is contradicted by medical evidence in relation to used weapons by some appellants and being a child witness, his statement could not have been relied on looking to material contradictions between his statement and his dehati nalishi (Ex.P.36) and material exaggerations in its Court's statement and material omissions of important facts in his alleged dehati nalishi (Ex.P.36) and his police statement (Ex.D.1). It was also argued that as according to F.S.L. report (Ex.P.53), human blood was not found on any of the articles allegedly seized from appellants, their appeal should be allowed.

8. On the other hand, the learned panel lawyer for the respondent/State had supported the impugned judgment and contended that conduct of the child complainant Sunil Kumar (P.W.6) was natural and his evidence is totally supported by his signed dehati nalishi (Ex.P-36) and complainant's presence at his house could not be doubted, whereas the presence of the complainant is confirmed by the defence witness Kanhaiya (D.W.1).

9. It is not disputed that all the above mentioned four deceased persons' death were homicidal. Dr.G.R.Brahma (P.W.4) deposed that on 16.8.2002 on conducting post-mortem of the deceased Surendra, following external injuries were found:-

(1) Abdomen of the deceased was open and intestine, liver, spleen and both kidneys were missing which might have been eaten by any animal.

(2) Lacerated wound of size 7 x 2 cms. over nose horizontally placed under which nasal bone was appearing broken, maxilla bone was also fractured, both eyes were entangled in skull cavity and on dissection, it was found that nasal bone has been broken in parts and some portions of maxilla bone were dislocated and the joints of jaws were also open.

(3) Lacerated wound of size 2.5 cm x 1 cm on left side of forehead into bone deep.

(4) Right clavicle bone was fractured.

10. In the opinion of doctor, all external injuries of Surendra were ante-mortem and caused by hard and blunt objects with sufficient force and on dissection of the dead-body, a laceration of 8 cm. long was found on left chest wall and ninth and tenth ribs were fractured and there was clotting of blood and the broken rib had inserted in left part of the heart and thus incised wound of size 1 x 1 cm. was found on left atrium of heart and some portions of lungs were found in thoracic cavity and heart was bloodless and there was 100 cc blood collected in thoracic cavity. In opinion of above mentioned doctor, reason of death of Surendra was assigned as shock because of injuries to vital organs and Surendra had died within a period of 36 to 48 hours before starting of post mortem. Dr.G.R.Brahma (P.W.4) proved relating post-mortem report of deceased Surendra as Ex.P-31.

11. Dr.G.R.Brahma (P.W.4) found following external injuries on the dead-body of deceased Chandrakala:-

(1) A stabbed wound size 3 x 1 cms. on left side of the abdomen 6 cms. below the umbilicus and on its dissection, it was found that there was a wound of 1 x 1 cm in interior

portion of the abdomen where blood and food particles were mixed.

(2) Right arm was found broken and deformed and on its dissection, it was found that there was a huge collection of blood.

(3) There was fracture of right humerus bone in its lower two third region.

(4) Lacerated wound size 5 x 3 cms on left ear pinna and on its dissection, clotting of blood was found and fracture of jaw of left mandible was found and fracture of parietal bone of skull and membrane of brain was also found inferior.

12. In opinion of Dr.G.R.Brahma (P.W.4), all the injuries of Chandrakala were ante-mortem and caused by hard and blunt and pointed weapons and reason of her death was assigned shock due to injuries to vital organs. She had died within 36-48 hours before starting of her post-mortem. Dr.G.R.Brahma (P.W.4) proved post mortem report in relation to deceased Chandrakala as Ex.P-32.

13. According to evidence of Dr.G.R.Brahma (P.W.4) on dead-body of deceased Gajendra, following injuries were found:-

(1) An incised wound of size 10x7 cms, over head was obliquely placed where internal fracture was present and there was laceration over membrane of the brain and brain was oozing out and right parietal bone was fractured.

(2) Lacerated wound of size 4 x 2 cms. over left eyebrow into bone deep

(3) Lacerated wound of size 2 x 1 cm. above the left eyebrow into bone deep.

(4) Incised and stabbed wound of size 4 x 1 cm on left side of the umbilicus and on dissection of abdomen, it was found that below stabbed wound, blood was clotted due to which a loop of the intestine had come out, over its one third portion, there was perforation.

14. In opinion of Dr.G.R.Brahma (P.W.4), all the injuries of Gajendra were ante-mortem and were caused by different hard, cutting and pointed weapons with sufficient force and in his opinion, Gajendra had died within 36 to 48 hours before starting of the post-mortem of his dead-body due to arisen shock because of the injuries to vital organs. Dr.G.R.Brahma (P.W.4) proved post mortem report in relation to deceased Gajendra as Ex.P-33.

15. On the same date, Dr.G.R.Brahma (P.W.4) found following injuries on the dead-body of Sukhlal:-

(1) Lacerated wound of size 6 x 4 cms, just above the right pinna of ear with crushing of pinna and depressing underline of skull bone in an area of 10 x 10 cms.

(2) Right arm was deformed and on its dissection, large haematoma (blood collection) was found beneath the deformity site and there was fracture in the shaft bone and humerus bone.

(3) Left arm was deformed and on its dissection, large haematoma (blood collection) was found beneath the deformity site and there was fracture in upper 2/3rd portion of humerus bone.

16. In Dr.G.R.Brahma's opinion, all the injuries of deceased Sukhram were ante-mortem and on its dissection below external injury found near right ear, there was a large haematoma and beneath it, parietal bone was fractured and brain membrane was having lacerated, through which membrane was oozing and on further dissection, fracture was found at the joint of right mandible and jaw. In his opinion, injuries of Sukhlal were caused by different hard, sharp and blunt object with sufficient force and in his opinion, Sukhlal had died within a period of 36-48 hours before starting of his post-mortem. Dr.G.R.Brahma (P.W.4) also proved his post-mortem report as Ex.P.34.

17. It is clear from the medical evidence of Dr.G.R.Brahma (P.W.4) that all the four deceased persons' death was homicidal and this fact has not been challenged by the appellants' learned counsel. It would be significant to mention here that except Sunil Kumar (P.W.6), Dr.G.R.Brahma (P.W.4), constable Jitendra (P.W.2) patwari Meghalal (P.W.5), head-constable Indra Kumar (P.W.9) and investigator Ashish Singh Pawar (P.W.14), all other prosecution witnesses were declared hostile by the prosecution.

18. Sunil Kumar (P.W.6) stated before Court that he knew all the appellants. Sunil had also deposed that on 15.8.2002, he was at his home at about 4.00 p.m., then appellant Bagad alias Sakharam was abusing, then his brother Gajendra, after him his younger brother Surendra and Chandrakala went, then all the accused persons after running started beating of his brothers and mother and appellants had beaten them by rods, sticks and tangia and at that time, his father was returning to the house after answering the call of nature, then his father was also beaten by the appellants by rods and in the result of beating by the appellants, his parents and brothers had died, then the appellants chased him, but he got hidden behind his house and after much searching by the appellants, he could not be traced out by the appellants, then the appellants went away. Sunil Kumar (P.W.6) had deposed that he stayed in his house in the whole night and in the morning, police came to village with mukamdam (Patel) and dead-bodies were taken by the police through vehicles to Balaghat. Sunil Kumar (P.W.6) deposed that one month prior to the incident, their dog barked on the accused Bagad, then appellant Bagad alias Sakharam had cut all the four legs of their dog and thereafter their dog died and due to this, the quarrel had started and on the date of incident, he lodged a report to the police and after hearing Dehati Nalishi (Ex.P.36), he admitted that such report was lodged by him and he proved his signature also on it and also proved his signatures on spot map (Ex.P.5) prepared by the investigator and an another outline map (Ex.P.35) prepared by patwari. Sunil Kumar (P.W.6) deposed in cross-examination (para 4) that Kanhaiya (D.W.1) was also seeing the incident and at the time of incident, he had seen barchhi in hand of accused Shobhelal.

19. The wife of deceased Surendra, Shakuntala Bai (P.W.11) deposed that on the date of incident, she had gone for her labour work to the place of relating farmer and after completing the duty hours at about 6:00 p.m. when she was returning to her house, in the way she was intimated that her all family members have been killed and she was advised not to return to her house, then she went to the house of mukadam Bhuwanlal (P.W.1) of village Manjara and in the whole night she stayed there and on this point, her evidence is supported by Bhuwanlal (P.W.1). Mahendra Katre (P.W.8) supported her evidence and deposed that on the date of incident, in the night at about 8.30 p.m., widowed wife of one young man intimated him after reaching to his house that four persons have been killed at her house. Mahendra Katre (P.W.8) deposed that in the same night, he reached to village Jagpura and saw the

dead-bodies and thereafter sent information to the sarpanch and thereafter sent sarpanch to the relating police station.

20. Shakuntala (P.W.11) and Mahendra (P.W.8) deposed that in next morning at 8.00 a.m., Sunil (P.W.6) met them, but Sunil did not tell them anything about the incident. Much emphasis has been given by the learned counsel for the appellants on the deposition of Shakuntala Bai (P.W.11), who was declared hostile by the prosecution on the ground that even the widowed wife of murdered elder brother of complainant had not supported the statement of Sunil Kumar (P.W.6)

21. After considering the total statement of Sunil Kumar (P.W.6), whose statement was recorded by the learned trial Court without administering the oath to him, it is clear that his statement is having material contradictions and inconsistencies on points that at the time of beginning of incident where his father was, wherefrom his father came to scene of occurrence, after seeing the incident, where complainant had hidden himself and whether the appellants have chased him or not and after the incident, where he remained in the whole night till coming of the police in next morning and on the point of weapon used by accused Shobhelal.

22. In reference to a child witness, it has been observed by a Division Bench of this Court in case of *Tulsi and others Vs. State of M.P.* [2008 (1) M.P.L.J. (Cri.) 676] as follows:-

> "8. In Abbas Ali Shah Vs. Emperor reported in AIR 1933 Lahore 667, it has been observed that Children are a most untrustworthy class of witnesses, for, when of a tender age they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others, and are greatly influenced by fear of punishment; by hope of reward, and by desire of notoriety. When considering the evidence of child witnesses, these observations should not be lost sight of, although each case would depend upon its particular facts and circumstances. Similar observations have been made in Arun Lal Israel Vs. State, AIR 1955 TC 6."

23. In the case of *Suraj Mal Vs. State (Delhi Administration)* (AIR 1979 SC 1408), the Apex Court said in para 2 that:

"Para 2.....It is well settled that where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances, no conviction can be based on the evidence of such witnesses."

24. Similarly in the case of *State of U.P. Vs. Naresh* [2012 (1) M.P.L.J. (Crl.) (SC) 19], it has been observed in para 25 as follows:-

"25. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the Court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The Court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide: State Represented by Inspector of Police Vs. Saravanan and anr., AIR 2009 SC 152; Arumugam Vs. State, AIR 2009 SC 331; Mahendra Pratap Singh Vs. State of U.P., (2009) 11 SCC

334; and Dr.Sunil Kumar Sambhudayal Gupta and ors. Vs. State of Maharashtra, JT 2010 (12) SC 287]."

25. It appears that on each material point, Sunil Kumar's (P.W.6) statement given in Court is self-contradictory. His age at the time of recording of Court's statement is shown to be 12 years. Sunil Kumar (P.W.6) stated in examination-in-chief that the appellants assaulted his family members by rods, sticks and tangias whereas in his signed dehati nalishi (Ex.P.36), it was mentioned by him that appellants Sakharam alias Bagad and Sukhlal were having tangias, appellants Madhu and Bhaolal each was having an axe and three appellants Baton, Shobhelal (now deceased) and Shivlal were having sticks (lathis), but in cross-examination (para 14), he stated that accused Shobhelal was having a barchhi and this fact was mentioned by him in his dehati nalishi report and police statement. but this fact is missing in his dehati nalishi (Ex.P.36) and police statement (Ex.D.1). Dr. G.R.Brahma (P.W.4) who conducted autopsy of all the four deceased persons deposed in his cross-examination (para 26) that two deceased persons Chandrakala and Gajendra each was having a stabbed wound, and these stabbed wounds would have been caused by some sharp edged and pointed weapons and these stabbed wounds could not be caused by an axe. Thus, it appears that to explain these stabbed wounds, Sunil Kumar (P.W.6) for the first time stated in Court that accused Shobhelal was having a barchhi, which is a pointed as well as sharp edged weapon. Thus, it appears that Sunil Kumar (P.W.6) has modified prosecution story in his Court's statement to be analogous to medical evidence to explain these stabbed wounds. Dr.G.R.Bramh (P.W.4) clearly stated in cross-examination that two deceased persons Sukhlal and Surendra were not having any injury caused by sharp edged and pointed weapon.

26. Sunil Kumar (P.W.6) in his Court's statement made improvements regarding reasons of the enmity of his deceased brothers with the appellants. In his dehati nalishi (Ex.P.36), it was mentioned that before some days from the date of incident, appellant no.1 Bagad alias Sakharam and his friends have killed their dog and due to this reason, there was quarrel among his brothers and appellant Bagad and his friends. But in Court's statement, in para 15, Sunil Kumar (P.W.6) stated that since before the incident, all appellants were throwing stones over his house and due to this reason, there was previous enmity. Contrary to dehati nalishi (Ex.P.36) Sunil Kumar (P.W.6) stated before Court in para 3 that about one month prior to the incident, their dog barked

on appellant No.1 Sakharam alias Bagad and appellant Bagad had severed all the legs of their dog and hence their dog had died and this was only reason of enmity. Contrary to dehati nalishi (Ex.P.36), Sunil Kumar (P.W.6) stated in Court that at the time of incident, the appellants had chased him, but after running he had hidden behind his house and thereafter the appellants made search for a long time, but he could not be traced out, thereafter the appellants went away whereas in dehati nalishi (Ex.P.36) he had mentioned that at the time of incident, he had after running hidden himself in a inner room of his house because he was much frightened.

27. Contrary to dehati nalishi (Ex.P.36), Sunil Kumar (P.W.6) stated in Court (para 13) that appellants have entered into his house to search him. If in consonance with his dehati nalishi (Ex.P.36), Sunil Kumar (P.W.6) had hidden himself in his house just after the incident, then the appellants would have easily found him. Thus, it is clear that Sunil Kumar (P.W.6) had made substantial changes in prosecution story at the time of his court's statement and thus has made the facts mentioned in dehati nalishi most suspicious. In cross-examination (para 13), he clearly stated that if facts are recorded in his dehati nalishi and police statement that after some time from the incident, he had come out from his hosue and then found that his parents and both brothers have died, then these facts are totally wrong and he had not mentioned these facts. Sunil Kumar (P.W.6) deposed in para 14 that his parents, brothers and he himself had shouted at the time of the incident, but nobody came to save the deceased persons and their neighbourer Kanhaiya (D.W.1) was also seeing the incident and all these facts were stated by him to the police, but all these facts are totally missing in his dehati nalishi (Ex.P.36) and police statement (Ex.D.1). In dehati nalishi and police statement, he stated that he remained in village after the incident, but he stated before the Court that he remained in his house in whole night, because if he would have come out from his house then the appellants would have killed him also. It is clear that Sunil Kumar (P.W.6) is not stable on any material fact and there are material improvement in his Court's statement in comparison to his dehati nalishi (Ex.P.36) and police statement (Ex.D.1).

28. It is clear from the evidence of the investigator Ashish Singh Pawar (P.W.14) and particularly from the map (Ex.P/35) prepared by patwari Meghalal (P.W.5) that just behind the house of murdered Sukhlal and Sunil Kumar (P.W.6), there are so many houses situated behind it, thus the statement

of Sunil Kumar (P.W.6) that after chasing by the appellants, he had hidden behind his house at about 4.30 P.M. appears to be impossible. The unlawful assembly of murderers, who had killed both of his parents and two elder brothers would not have left him alive. Sunil Kumar's modified version that he had hidden behind his house is totally falsified by his signed dehati nalishi (Ex.P.36) and police statement (Ex.D.1). Looking to all these material contradictions, improvements and omissions, the statement of Sunil Kumar (P.W.6) does not appear to be trustworthy.

29. The learned trial Judge has commented that the contradictions, inconsistencies and improvements regarding Court's statement of Sunil Kumar (P.W.6) are not material, but it is clear that contradictions, inconsistencies and improvements appearing in his Court's statement in comparison to dehati nalishi and police statement could not be termed as trivial, minor or unimportant. It has been held by the Apex Court in the case of *Bhagwan Singh and others Vs. State of M.P.* [2003 (2) J.L.J. 129] that where the statement of only eye witness, a child is full of infirmities, his sole testimony cannot be relied upon without adequate corroboration. In the same citation, in para 21 of Apex Court's decision, it has been observed as follows:-

> "21. .....Mere presence of children in the house at the time of the incident is no assurance to the case of the prosecution that the eldest child got up on hearing hue and cries and had not only seen the incident but also identified the accused. Taking into consideration child psychology, a lad of 6 years having seen his mother being assaulted would have raised a cry; but he says that he quietly went back to sleep. It is most unnatural even for a child that after witnessing his mother being assaulted by known persons, he would go back to sleep to wake up late in the morning only when his maternal uncle Agyaram came to fetch him and his younger brothers to his father's village Alampur."

30. In the case in hand, Sunil Kumar (P.W.6) stated in examination-in-chief that he remained in whole night alone in his house and at next morning, police came to village alongwith mukadam, then he peeped from the house and after seeing the police came out of his house at about 7.00 A.M. Sunil Kumar (P.W.6) stated in cross-examination (para 18) that after the incident in the night, sarpanch, kotwar and 10-12 persons of his village had come on

scene of occurrence and had seen all the four dead-bodies and these persons had also come to his house, but they could not see him and at that time, he did not think about intimating sarpanch and other persons regarding accused persons, whereas according to his dehati nalishi (Ex.P.36) and police statement (Ex.D.1), after the incident, he remained in the village. Thus, it is clear that Sunil's conduct and statement in light of the above mentioned citations totally appears to be unbelievable and unnatural also.

31. It is well established that deposition of a witness who has made material improvement in his version is wholly unsafe unless it is corroborated by some other independent evidence that may probablize his version. Sunil Kumar (P.W.6) had clearly stated in his cross-examination that all the facts which he stated in Court's statement previously he had stated to the police, but above mentioned improvements are totally missing in his dehati nalishi (Ex.P.36) and police statement (Ex.D.1). On the point when such omissions amount to contradictions, in the case of *Sampat Kumar Vs. Inspector of Police, Krishnagiri* [2012 (2) M.P.L.J. (Crl.) 77] in para 9, it has been observed as under:-

> "9. In Narayan Chetanram Chaudhary and anr. Vs. State of Maharashtra, AIR 2000 SC 3352, this Court held that while discrepancies in the testimony of a witness which may be caused by memory lapses were acceptable, contradictions in the testimony were not. This Court observed:
>
> > "Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the Court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution become doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person."

32. Sunil Kumar's (P.W.6) statement is not supported by his sister-in-law

Shakuntala Bai (P.W.11), who was declared hostile. According to evidence of Shakuntala Bai (P.W.11), Bhuwanlal (P.W.1) resident of village Chhota Jagpura, Shakuntala Bai (P.W.11) after the incident stayed in the house of Bhuwanlal (P.W.1) who was resident of village Manjara because Bhuwanlal (P.W.1) was mukadam (Patel) of village at relevant time. Shakuntala Bai (P.W.11) deposed that on next morning, his little devar Sunil came with police to the house of mukadam of village Manjara and Sunil intimated her that his father and others were killed by anyone but Sunil (P.W.6) had not disclosed the names of murderers. Shakuntala Bai (P.W.11) was declared hostile by the prosecution, but even the departmental witness Sub-Inspector and Investigator Ashish Singh Pawar (P.W.14), who also recorded dehati nalishi (Ex.P.36) of Sunil Kumar (P.W.6) had not supported the statement of Sunil Kumar (P.W.6) on material points. Ashish Singh Pawar (P.W.14) deposed that in the mid-night of 15th and 16th August, 2002, village Jagpura sarpanch Jhankar Singh and Kotwar Devanand after reaching to police station Bharveli intimated that the dead-bodies of residents of his village Sukhlal and his wife and both of their sons are lying in front of their house, but as in the night, there was heavily raining and the area was naxalite affected, received intimation was verified in next morning at about 6.00 A.M. through police constable Jai Dayal and after verification, he had reached to the scene of occurrence, where he found that in a open ground in front of house of the deceased persons, four dead-bodies were lying and within few minutes, little boy of deceaseds' family, Sunil and Shakuntala Bai came nearer to him and the boy got lodged dehati nalishi (Ex.P.36), but Ashish Singh Pawar (P.W.14) clearly deposed in his cross-examination (para 25) that Sunil did not state to him that at the time of the incident, his father was returning after answering the call of nature and similarly Sunil (P.W.6) had not stated in his report and police statement that the appellants had chased him and Sunil did not state that the appellants had entered into his house to search him and similarly Sunil did not disclose the facts that at the time of incident, his parents and he had cried and Kanhaiya had witnessed the incident and he had seen the barchhi in the hand of accused Shobhelal. Ashish Singh Pawar (P.W.14) clearly deposed in para 25 that he did not ask to Sunil that in the night where he remained and Sunil also did not state that where he stayed in the night. Investigator Ashish Singh Pawar (P.W.14) clearly stated that he did not know that wherefrom Sunil and Shakuntala had come to the scene of occurrence in next morning after his reaching there, but Sunil and Shakuntala had not come out from their house. Thus, it is clear that Sunil

Kumar's Court's statement is even not supported by the departmental prosecution witness Ashish Singh Pawar (P.W.14) on material points.

33. In the light of citations of *Animireddy Venkataramana and others Vs. Public Prosecutor* [2008 (2) MPLJ (Crl.) 561 (SC)], *Badri Vs. State of Rajasthan* (AIR 1976 SC 560 and *Muluwa and others Vs. State of M.P.* (AIR 1976 SC 989), it is clear that the solitary statement of child witness Sunil Kumar (P.W.6) does not inspire confidence because of above mentioned material contradictions, inconsistencies, omissions and improvements and in absence of corroboration even of departmental prosecution witness investigator. In our considered opinion, the learned trial Court had erred in believing Sunil Kumar's (P.W.6) statement and overlooking of above mentioned infirmities.

34. In the light of the above referred citations, it is clear that the statement of child witness Sunil Kumar (P.W.6) does not appear to be of category of wholly reliable and thus in our considered opinion, the learned trial Judge erred in placing reliance on his such infirm, exaggerated, self-contradictory and his unnatural statement.

35. In relation to recovery of various weapons and blood stained clothes of some of the appellants, on the basis of previous disclosure statements of relating appellants, the evidence of investigator Ashish Singh Pawar (P.W.14) is not corroborated by relating panch witnesses of relating disclosure statements and seizure memo Bhuwanlal (P.W.1), Hemlal (P.W.3), Lalchand (P.W.12) and Beniram (P.W.13). All these hostile declared panch witnesses deposed that none of the appellants gave any previous information regarding any recovery and in their presence, nothing was seized by the police from any of the appellants. Thus, it is clear that on the point of relating recovery from the appellants, the solitary evidence of I.O. Ashish Singh Pawar (P.W.14) is not supported by any of the panch witnesses. According to evidence of I.O. Ashish Singh Pawar (P.W.14), an axe was seized from appellant Somaji, a stick was seized from appellant Baton, a tangia was seized from appellant Sukhlal, another tangia and blood stained shirt were seized from appellant Sakharam alias Bagad, an iron rod was seized from appellant Bhaulal, a stick was seized from appellant Shivlal, another iron rod was seized from appellant Madhu and a stick was also seized from accused Shobhelal, but according to F.S.L. report (Ex.P.53) blood was not found on any of the seized sticks, iron

rods, axe and two tangias. According to evidence of Dr.G.R.Brahma (P.W.4), the recovered weapons of offence were not sent to him during investigation. Thus, as blood was not found on any of the seized weapons, the evidence of investigator Ashish Singh Pawar (P.W.14) relating to recovery of these articles is unable to establish any connection between relating appellants and the incident. Thus, the circumstantial evidence in the form of above mentioned seizure is inconclusive and immaterial in the case in hand. According to F.S.L. report, blood was found on allegedly seized shirt of appellant Sakharam alias Bagad, but its source could not be identified in the laboratory. Thus, it is not clear that the blood found on the shirt of appellant Sakharam alias Bagad was human blood or blood from any other source as according to statement of Sunil Kumar (P.W.6), before some days from the incident, appellant No.1 Sakharam alias Bagad had severed all the legs of their dog and thereafter, killed their dog. Thus, allegedly found blood on the shirt could not establish any connection between the relating appellant Sakharam alias Bagad and the incident as blood source and its group could not be identified in the laboratory. Thus, it is clear that the circumstantial evidence relating to various seizures was unable to establish any link between any of the appellants and the incident of murder of four above mentioned persons.

36. In the light of the above mentioned referred citations, in our considered opinion, the learned trial Court erred in placing reliance on totally infirm, self-contradictory, exaggerated and unnatural evidence of child witness Sunil Kumar (P.W.6) and thereby convicting and sentencing all the appellants. In our considered opinion, no any framed charge was proved beyond reasonable doubt against any of the appellants. Thus, the appeal filed by the appellants is worthy of acceptance.

37. In the result, the appeal filed by the appellants is allowed and their conviction and sentences recorded by the learned trial Court are set aside and each present appellant is acquitted from the offences punishable under Section 302/149 (on four counts) of the IPC and Section 148 of the IPC. All the appellants who are serving their sentences as imposed by the trial Court are directed to be released forthwith, if not wanted in any other case. A copy of this judgment be immediately sent to the concerned Jail Superintendent.

Appeal allowed.

I.L.R. [2017] M.P., 2463
APPELLATE CRIMINAL
Before Mr. Justice Hemant Gupta, Chief Justice &
Mr. Justice C.V. Sirpurkar
Cr.A. No. 1085/2004 (Jabalpur) decided on 13 July, 2017

MAHESH SONI ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 302 – Murder – Conviction – Circumstantial Evidence – Plea of Alibi – Burden of Proof **– Appellant convicted for murder of his wife – Held – Wife was killed by throttling during night hours in bed room of their house when she was sleeping alongwith her husband (appellant) and minor children – Appellant found missing in morning – Crime committed within four corners of house – Burden of explaining the circumstances wherein deceased was throttled to death was on appellant but he utterly failed to discharge the same – No evidence in defence to establish plea of *alibi* – Deposition of appellant's son that appellant was at home at the night of incident, was not challenged in cross-examination – Trial Court rightly convicted the appellant – Appeal dismissed. (Paras 19, 22 & 25)**

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – दोषसिद्धि – परिस्थितिजन्य साक्ष्य – अन्यत्र उपस्थित होने का अभिवाक् – सबूत का भार – अपीलार्थी को उसकी पत्नी की हत्या के लिए दोषसिद्ध किया गया – अभिनिर्धारित – पत्नी जब अपने पति (अपीलार्थी) और अवयस्क बच्चों के साथ सो रही थी तब उनके घर के शयनकक्ष में रात्रि के समय गला घोंटकर उसकी हत्या कर दी गई थी – अपीलार्थी सुबह लापता पाया गया – अपराध, घर की चार दीवारी के भीतर कारित किया गया – उन परिस्थितियों को स्पष्ट करने का भार जिनमें मृतिका को गला घोंटकर मार दिया गया था अपीलार्थी पर था परंतु वह उक्त का निर्वहन करने में संपूर्ण रूप से विफल रहा – अन्यत्र उपस्थित होने के अभिवाक् को स्थापित करने हेतु बचाव में कोई साक्ष्य नहीं – अपीलार्थी के पुत्र का अभिसाक्ष्य कि अपीलार्थी घटना की रात घर पर ही था, को प्रतिपरीक्षण में चुनौती नहीं दी गई थी – विचारण न्यायालय ने अपीलार्थी को उचित रूप से दोषसिद्ध किया – अपील खारिज।

Cases referred:

(2006) 10 SCC 681, AIR 1956 (SC) 404.

Abhay Raj Singh Gaharwar, as amicus curiae for the appellant.
Manjeet P.S. Chuckal, P.L. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by :
C.V. SIRPURKAR, J. :- This criminal appeal against conviction under Section 374 (2) of the Cr.P.C. filed on behalf of the appellant/accused Mahesh Soni is directed against the judgment dated 29.05.2004 passed by the 2nd Additional Sessions Judge, Satna in Sessions Trial No. 264/2003, whereby accused/ appellant Mahesh Soni was convicted under Section 302 of the I.P.C. for committing murder of his wife Kanchan Bai and was sentenced to undergo life imprisonment and pay a fine in the sum of Rs.1,000/-. In default of payment of fine, he was directed to undergo rigorous imprisonment for a further period of six months.

2(a). The prosecution case before the trial Court may briefly be stated thus. Accused Mahesh Soni was husband of the deceased Kanchan Bai. They had four children. The eldest son Manoj (PW-3) was aged 13 years. The couple had three daughters including Roshni (PW-1), who was 11 years old. Suresh (PW-7) is brother of the accused Mahesh. At night on 25.02.2003, accused Mahesh had slept along with Kanchan Bai in the bedroom of their house along with his three daughters including Roshni (PW-1). Son Manoj (PW-3) slept in the Varanda. At around 04:15 a.m. on 26.02.2003, daughter Priyanka was calling her mother as she wanted to go to the bathroom; however, deceased Kanchan did not respond; whereon, she called her brother Manoj. When Manoj woke up, he found that his father was not in the room and his mother was lying dead. There were throttling marks on her throat. Meanwhile, at around 04:00 a.m., accused Mahesh went to his brother Suresh, who lived in adjacent part of the house and told him that he had killed his wife and he was going. He asked Suresh to look after his children. Thereafter, Suresh called Heeralal and told him about the matter. They went together to Sarpanch, Shivpal Singh (PW-4) and reported the matter to him. Sarpanch advised them to lodge the FIR in the police station. Suresh and Heeralal returned and went inside the accused Mahesh's room and saw that the deceased Kanchan was lying dead in the room. Villagers searched accused and he was found sitting under a Peepal Tree in the Village; therefore, he was caught. Thereafter, Suresh went with Brijraj Singh by Jeep to Police Station. Brijraj Singh lodged the first information report at about 08:30 a.m.

2(b). During post-mortem examination, it was found that the deceased had died as a result of asphyxia caused by throttling. During investigation, six stubs of Bidi, six burnt matchsticks and three pieces of broken bangles were seized from the spot. A match box and nine Bidis were seized from the right hand side pocket of the shirt of the accused appellant upon his arrest.

3. The trial Court held on the basis of the statements of the prosecution witnesses that on the eve of the incident, the accused had slept along with his daughters and wife in the same room. Next morning, he was found missing and his wife was found dead having been throttled. Six stubs of smoked bidis and six burnt matchsticks were recovered from the spot. Bidis and Match box of the same make were recovered from the possession of the appellant accused at the time of the arrest; therefore, it was proved beyond reasonable doubt that in the night of the incident, the accused had slept with his wife and children. Therefore, the burden was upon the accused to explain the circumstance in which his wife had died; however, the accused had failed to discharge that burden; therefore, he was convicted under Section 302 of the I.P.C. for having throttled his wife to death.

4. The trial Court framed the charge under Section 302 of the I.P.C.. Accused abjured the guilt and claimed to be tried. In the examination under Section 313 of the Cr.P.C., he had claimed that on the date of the incident, he had gone to attend Kirtan and had stayed there overnight. He had returned home only the next evening to discover that his wife had died. The witnesses have falsely implicated him due to partisan politics in the village.

5. The findings recorded by the trial Court have been challenged before us by the learned counsel for the appellant on the grounds that most of the prosecution witnesses have turned hostile. The conclusion of the trial Court that the appellant was present with the deceased in the night of the incident, is based upon sketchy and unreliable evidence; therefore, there was no burden upon the appellant to explain the circumstances wherein, the deceased had died. It has also been contended that the police had failed to lift the fingers print from the throat of the deceased; therefore, a vital piece of evidence has been missed by the Investigating Officer. Moreover, if the appellant had throttled the deceased and scratch marks and abrasions were found on her throat, there would surely have been blood in the nails of the appellant; however, there is no evidence that any such blood was found; therefore, it has been argued that the appellant deserves the benefit of doubt.

6. Learned panel lawyer for the respondent State on the other hand has supported the impugned judgment.

7. On perusal of the record and due consideration of the rival contentions, in our opinion, this criminal appeal against conviction must fail for the reasons hereinafter stated:

8. First of all, we shall consider, whether the deceased had died a homicidal death by asphyxia as a result of throttling. Dr. V.P. Mishra (PW-9), who conducted the post-mortem examination on the dead body, found three contusions and other marks of injury spread between median parts of the neck and up to 2 c.ms. below ears. Thus, there was marks, which appeared to have been created by thumb and fingers. Between contusions, there were several abrasions under the pressure marks. At many places, muscles had ruptured and blood clots were present. In the opinion of the doctor, the deceased had died of asphyxia as a result of throttling. No serious challenge has been mounted with regard to aforesaid finding; therefore, the prosecution has succeeded in proving beyond reasonable doubt that the deceased had died a homicidal death as a result of asphyxia caused by throttling.

9. Now the question that arises for consideration is whether the deceased was throttled to death by the appellant?

10. There is no eye witness to the incident. The prosecution case is based entirely upon circumstantial evidence and presumption arising from the circumstances proved. It is not in dispute that Roshni (PW-1) and Manoj (PW-3), who are daughter and son respectively of the ill fated couple, were with their mother on the night of the incident. Suresh, who is brother of the appellant, lived in adjacent part of the same house.

11. Roshni (PW-1), who is 11 years old daughter of the deceased, has stated that after taking their meals, they had slept. Her mother had died but she did not know as to how she had died. Her father did not kill her mother. When in the morning, she woke up, she found that her mother was lying dead. Her father was not at home on the date on which her mother had died. In the same breath, she has stated that her father was at home that night.

12. Manoj (PW-3), who is 13 years old son of the deceased, has stated that on the night of the incident, he was sleeping separately. His mother and sisters were sleeping together. His father was also sleeping. At about 12:00

a.m., his sister Priyanka got up to urinate. At that time, he learnt that his mother was lying dead and his father was not at home. He did not see any injury on the person of his mother. He does not know as to who had killed his mother.

13. Suresh Soni (PW-7), brother of the appellant has stated that the incident occurred at about 03:00 a.m. on 26.02.2003; however, nothing happened in his pesence (sic:presence) him. Three children of his brother Mahesh were crying; therefore, he woke up. He does not as to how Mahesh's wife had died.

14. Rani (PW-2) has stated that Veeru Soni's father was shouting loudly; therefore, she had woken her husband. Her husband went to Veeru's house. Her husband Heeralal had gone along with Veeru's father. She has also stated that she had told the police that Mahesh Soni had killed his wife.

15. Heeralal (PW-5) has stated that he had visited the house of the appellant on hearing commotion at about 03:30 a.m. in the night of the incident. Several persons from the neighbourhood were present there. He saw that the appellant Mahesh's wife was lying dead.

16. Investigating Officer, Mohammad Irshad (PW-10) has stated that he had seized six stubs of smoked Bidis and six burnt matchsticks from the spot and had prepared seizure memo (Ex.P/6). He had also seized nine un-smoked Bidis and one matchbox from the pant pocket of the appellant and had prepared seizure memo (Ex.P/7).

17. In the light of the aforesaid evidence, the main question that arises for consideration is whether the appellant was present with his wife and children at his home in the night of the incident?

18. In this regard, only two witnesses namely Manoj (PW-3) and Roshni (PW-1) have partly supported the prosecution case. It may be noted here that Manoj was 13 years old son and Roshni was 11 years old daughter of the ill fated couple; therefore, their presence on the spot was most natural. Their presence was also not challenged at any stage by the appellant. For obvious reasons, they were not inclined to support the prosecution; yet, the prosecution was able to coax certain information from them. Manoj (PW-3) has stated that at the night of the incident, his mother and sisters were sleeping at one place. He was sleeping at a different place and his father was also

sleeping. Thus, Manoj has clearly stated that his father was also sleeping in the house along with himself, his mother and sisters that night. Likewise, Roshni has at first denied that his father was not at home on the date on which her mother had died but in the same sentence, she has stated that his father was at home. Suresh (PW-7), brother of the appellant has turned hostile and has given no indication as to whether or not the appellant was at his home on the date of the incident.

19. Even if we ignore the statement of Roshni (PW-1) because she blows hot and cold in the same breath, it is clear that Manoj has unequivocally stated that his father was at home. This part of his statement has not been challenged in cross-examination at all. The defence of the appellant has been that he had gone to attend Kirtan at the night of the incident and returned only the next evening; however, no such suggestion has been given in the cross-examination to any of the prosecution witnesses. The appellant has also not adduced any evidence in defence to establish the plea of alibi taken by him in his examination under Section 313 of the Cr.P.C. In these circumstances, it stands proved that the appellant was present at home at the night of the incident along with his wife deceased Kanchan, three daughters and a son. He was found missing in the morning. In these circumstances, where the crime was committed within the four corners of the house, the burden shifts upon the appellant to explain the circumstances in which his wife was throttled to death; however, the appellant has adduced no evidence to explain these circumstances.

20. Instead, he has raised two more grounds. The first ground is that the Investigating Officer had failed to lift the fingers print from the throat of the deceased and get it matched with those of the appellant; therefore, a vital link in the chain circumstance is missing. This argument is baseless because no finger prints are to be found on the skin of the throat in the case of throttling. Therefore, this argument is liable to be summarily dismissed.

21. The second argument is that though six smoked stubs of Bidis and six burnt matchsticks were found on the spot and a match box and a packet with nine Bidis was recovered from the person of the appellant. There is nothing to indicate that both the sets of stubs of Bidis and matchsticks belonged to the same make or brand. This argument is liable to be accepted because no investigation was conducted for the purpose of matching the two sets of Bidis and matchsticks; therefore, there is nothing on record to indicate that both sets belonged to the same source. However, even if we ignore this

circumstances, there is enough evidence against the appellant.

22. On the basis of the statement of the appellant's Son Manoj, it is proved beyond reasonable doubt that on the night of the incident, the appellant had slept in his house with his wife deceased Kanchan, three daughters and a son and he was found missing the next morning. The dead body of his wife Kanchan, who had been throttled to death was found in his house along with his children. No attempt was made to break open the house and no article was found to be missing. The deceased was a housewife with four children. The eldest of them being 13 years old. It is inconceivable that she would have any enmity with someone outside the house. In these circumstances, heavy burden of explaining the circumstance wherein his wife had died had shifted upon the appellant but he utterly failed to discharge the same; therefore, the seeming absence of any motive or absence of evidence regarding blood in finger nails of the appellant would not derail the prosecution case.

23. In the case of *Trimukh Maruti Kirak Vs State of Maharashtra* (2006) 10 SCC 681 the Supreme Court in respect an offence committed within four wall of the home has held that:

"15. Where an offence like murder is committed in secrecy inside a house the initial burden to establish the case would undoubtedly be upon the prosecution but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

24. Likewise in the case of *Shambhunath Mehra Vs State of Ajmer,* AIR 1956 (SC) 404, has held that:

11. "This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would impossible, or at any rate

disproportionately difficult for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."

25. Thus, the trial Court has rightly concluded that the appellant is guilty of committing murder of his wife Kanchan. Consequently, in our opinion, the trial Court committed no error in convicting the appellant Mahesh Soni under Section 302 of the I.P.C. As such, no interference is warranted in the impugned judgment of conviction.

26. Consequently, this criminal appeal **fails.** The impugned judgment convicting the appellant Mahesh Soni under Section 302 of the I.P.C. and sentencing him to undergo life imprisonment and to pay a fine in the sum of Rs.1,000/-, is affirmed.

27. For the able assistance rendered by Shri Abhay Raj Singh Gaharwar, Advocate to this Court as *amicus curiae,* we direct the M.P. State Legal Services Authority to pay a sum of **Rs.5,000/- (Rupees Five thousand)** to the learned *amicus curiae* as honorarium for defending the appellant in the present appeal.

Appeal dismissed.

I.L.R. [2017] M.P., 2470
APPELLATE CRIMINAL
Before Mr. Justice S.K. Gangele & Mr. Justice Anurag Shrivastava
Cr.A. No. 407/2003 (Jabalpur) decided on 10 August, 2017

SANJU @ SANJAY ...Appellant
Vs.
STATE OF M.P. ...Respondent

(Alongwith Cr.A. No.516/2003)

A. ***Penal Code (45 of 1860), Sections 302, 302/34, 325 & 325/34 – Common Intention & Pre-meditation*** **– Held – It is a case of free fight – Appellants did not come on spot together – Every accused liable for his individual act – No evidence of pre-concert of mind and that appellants Sanju and Mukesh had common intention or has**

instigated or exhorted the main accused Gopi to kill the deceased – They have not assaulted the deceased – Sanju only grappled with deceased and Mukesh has assaulted the complainant whereas Gopi gave knife blows to deceased – Conviction of Gopi u/S 325/34 IPC is set aside and is convicted u/S 302 IPC, Mukesh is acquitted u/S 302/34 and is convicted u/S 325 IPC and Sanju is acquitted for charges u/S 302/34 and 325/34 – Appeal of Sanju allowed – Appeals of Gopi and Mukesh partly allowed. (Paras 20 to 25)

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 302/34, 325 व 325/34 – सामान्य आशय व पूर्व चिंतन – अभिनिर्धारित – यह एक स्वतंत्र झगड़े का प्रकरण है – अपीलार्थी घटनास्थल पर एक साथ नहीं आए – प्रत्येक अभियुक्त अपने व्यक्तिगत कृत्य के लिए दायी है – मस्तिष्क का पूर्व मेल था तथा अपीलार्थीगण संजू और मुकेश का सामान्य आशय था या उन्होंने मृतक की हत्या करने के लिए मुख्य अभियुक्त गोपी को उकसाया या प्रेरित किया, इसका कोई साक्ष्य नहीं – उन्होनें मृतक पर हमला नहीं किया – संजू ने मृतक के साथ केवल हाथापाई की और मुकेश ने परिवादी पर हमला किया जबकि गोपी ने मृतक पर चाकू से वार किये – भा.दं.सं. की धारा 325/34 के अंतर्गत गोपी की दोषसिद्धि अपास्त की गई तथा उसे भा.दं.सं. की धारा 302 के अंतर्गत दोषसिद्ध किया गया, मुकेश को धारा 302/34 के अंतर्गत दोषमुक्त किया गया तथा भारतीय दण्ड संहिता की धारा 325 के अंतर्गत दोषसिद्ध किया गया एवं संजू को धारा 302/34 और 325/34 के अंतर्गत आरोपों से दोषमुक्त किया गया – संजू की अपील मंजूर – गोपी एवं मुकेश की अपीलें अंशतः मंजूर।

***B. Penal Code (45 of 1860), Section 34 – Common Intention* – Held – It is settled law that common intention can develop during course of occurrence but there has to be cogent material on the basis of which Court can arrive at that finding and hold an accused vicariously liable for the act of other accused u/S 34 IPC. (Para 18)**

ख. दण्ड संहिता (1860 का 45), धारा 34 – सामान्य आशय – अभिनिर्धारित – यह सुस्थापित विधि है कि सामान्य आशय घटना के दौरान विकसित हो सकता है परंतु तर्कपूर्ण सामग्री होनी चाहिए जिसके आधार पर न्यायालय उस निष्कर्ष पर पहुँच सके तथा भारतीय दंड संहिता की धारा 34 के अंतर्गत अन्य अभियुक्त के कृत्य के लिए एक अभियुक्त को प्रतिनिधिक रूप से दायी ठहरा सके।

Cases referred:

AIR 1999 SC 3830, AIR 2003 SC 1014.

None, for the appellant.
B.D. Singh, G.A. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : ANURAG SHRIVASTAVA, J. :- These appeals under Section 374(2) of Cr.P.C. have been preferred by the appellants/accused persons against the judgment dated 28.02.2003, passed by learned Additional Sessions Judge, Sihora, Jabalpur (MP), in S.T. No.150/2000, whereby the appellants/accused Gopi has been convicted under Section 302, 325/34 of IPC, Mukesh has been convicted under Section 302/34 and 325 of IPC and Sanju has been convicted under Section 302/34, 325/34 and **each** has been sentenced to undergo RI for life with fine of Rs.1000/- and also imprisonment for 3 years with fine of Rs.500/- respectively.

2. The case of prosecution in brief is that in the Village Bachaiya the appellant/accused Gopi Lal had developed a kitchen garden on the land on backyard of his house. Adjoining of this land, there is the field of deceased Vijay Kumar. Vijay Kumar claims that the accused Gopi had developed kitchen garden *(Baadi)* on encroaching upon his land. There were a dispute between the parties over this land prior incident. On the date of incident i.e. 13.11.1999, the complainant Mathura Prasad @ Gayalal Sharma lodged a report at about 1:30 pm at police station Majholi stating that at about 11:00 am, he was in his field and his son Vijay Kumar was ploughing his field, adjacent to backyard of house of accused Gopi by tractor. At the same time, the wife of Vijay Kumar was coming to the field, when she reached near the *Baadi* of Gopi, she had some hot talks with Munni Bai, the wife of Gopi. Hearing the noise of quarrel, Vijay Kumar went there to intervene and settle the dispute. Seeing him, the appellant Sanju @ Sanjay and accused Rajendra Barman came there with Lathi and caught hold of Vijay Kumar. Thereafter, appellant Gopi armed with a knife and his son Mukesh armed with Lathi came there and Gopi dealt 2-3 blows of knife on the chest and abdomen of Vijay Kumar. His wife Urmila Bai tried to save him, she was assaulted by Munni Bai and Ranu, the wife and daughter of appellant Gopi. Seeing the incident, the complainant Mathura Prasad @ Gayalal came on the spot to save his son, the appellant Mukesh inflicted an injury by Lathi on his left hand. Vijay Kumar died on the spot. After assaulting the complainant and deceased, the appellant and other accused persons ran away.

3. The police recorded FIR Ex.P-9 and Marg intimation Ex.P-10 and registered the offence against the accused persons. During inquest, the spot

map Ex.P-7 and panchanama of dead body of deceased Vijay Kumar Ex.P-6 were prepared, the red earth, a case of knife, Lathi were seized vide seizure memo Ex.P-2 from the spot. Gayalal was medically examined and the dead body was sent for postmortem. On 17.11.1999, appellant Gopi was taken into custody and on his memorandum Ex.P-1, a knife was seized vide seizure memo Ex.P-2. The statements of witnesses were recorded and after usual investigation, the charge sheet has been filed against the Gopi, Mukesh, Rajendra, Sanju, Ranu and Munni Bai. The accused Rajendra and Munni Bai were absconding and Ranu being juvenile, she was tried before Juvenile Court. The trial of appellants Gopi, Mukesh and Sanju was conducted in ST No.150/2000. Accused Rajendra was arrested later on and he was tried separately in ST No.363/2009 and acquitted by the trial Court vide judgement dated 09.05.2013.

4. The trial Court has framed the charges of offence under Sections 148, 302/149 and 325/149 against the appellants. They abjured guilt and pleaded innocence. It is pleaded by the appellants that they have been falsely implicated in this offence. There is property dispute between the parties. They were not present at the time of incident.

5. The trial Court, on appreciation of evidence, has arrived at the conclusion that the appellants had formed a common intention to kill the deceased Vijay Kumar and in furtherance of this, the appellant Gopi has committed the murder of Vijay Kumar and appellant Mukesh had assaulted Gayalal and inflicted grievous injuries. Thus, the trial Court had found appellants guilty for commission of offence as mentioned hereinabove in para1 and sentenced them.

6. In this appeal, it is argued by the learned counsel for the appellants that the incident took place inside the *Baadi* of appellant Gopi. The deceased Vijay Kumar and his wife came in the *Baadi* and assaulted the wife and daughter of appellant. There was no unlawful assembly constituted by the appellant and family members. The trial Court had acquitted the appellants for the offence under Sections 148 and 149 of IPC. This shows that the complainant and wife of deceased are trying to falsely implicate all family members of the appellant. There are material contradictions and discrepancies found in the statements of complainant and wife of deceased. There was previous enmity between the parties, therefore, the statements of above witnesses cannot be relied upon without corroboration by independent

witnesses. No independent witness has corroborated the case of prosecution. The presence of appellants on the spot is doubtful. The trial Court, on erroneous appreciation of evidence, has held the appellants guilty. There is no evidence to show that the appellants have common intention to commit murder of the deceased. The deceased and his wife were aggressor. In view of the conviction and sentence inflicted by the trial Court is not sustainable.

7. Learned Panel Lawyer for the State has supported the findings recorded by the trial Court and submitted that at the time of incident, the appellants Mukesh and Sanju had caught hold of deceased and appellant Gopi inflicted fatal injury on abdomen and chest of the deceased by knife. When complainant tried to save his son, appellant Sanju caused him grievous injury. This shows the common intention of appellants. The trial Court, on right appreciation of evidence, has found the appellants guilty for commission of aforesaid offences. There is no infirmity or error in the findings recorded by the trial Court. Therefore, the appeal may be dismissed.

8. Considering the rival contentions of the learned counsel for the parties and on perusal of record, it appears that it is not disputed that the deceased Vijay Kumar has died of injuries sustained by him at the time of incident. The complainant Mathura Prasad (PW-4) has lodged the report of incident Ex.P-9 soon after the incident at police station Majholi. The police recorded Marg intimation Ex.P-10 and the inquest has been conducted by SHO J.P. Mishra, (PW-8). These facts have been established by the evidence of Mathura Prasad @ Gayalal (PW-4), head constable Kamleshwar (PW-6) and IO J.P. Mishra (PW-8). It is also found that after preparing panchnama Ex.P-6 and spot map Ex.P-7, the IO has sent the dead body for postmortem to government hospital Majholi.

9. Dr. S.S. Thakur (PW-7) deposed that on 13.11.1999 in Primary Health Center, Majholi, he has performed the postmortem of body of deceased Vijay Kumar and found following injuries:-

> "(1) Stab wound present at the level of 6th rib left side 1 inch left lateral to sternum margin clear cut. On probing the wound 6th rib cut completely, margin of lungs also cut and left ventricle of heart and its membrane cut. The profused blood present in the thoracic cavity and heart, lungs. The size of wound 1-1/2x 1/2 inch x deep to the heart.

(2) Stab wound present at upper part of abdomen left side just below coastal margin and 2 inch below the first wound. Margin of wound is clear cut. On exploration of wound, muscle is cut omen-tum cut and lower boarder of right lobe of lever cut through and through abdominal cavity failed with blood size of wound 1-1/2 x 1/2 inch x deep to the lever.

(3) Incised (stab wound) present at lower side of left chest 7 inches lateral to sternum at the level of 9th rib size 1-1/2 x 1/2 x 1 inches.

It is opined by the doctor that the injuries are caused by hard, sharp and pointed weapon and death is caused due to shock and bleeding are caused by injuries. The evidence doctor is duly corroborated by postmortem report Ex.P-16 and time is 24 hours from postmortem. The statement of doctor is not challenged in cross-examination by the defence.

10. Thus, relying upon the statement of doctor and postmortem report Ex.P-16, it is rightly found proved by the trial Court that the deceased Vijay Kumar has died of the injuries inflicted to him by hard and sharp object. The death is homicidal.

11. Now the question arises whether the appellants have formed a common intention to kill the deceased and in furtherance of this, the appellant Gopi had inflicted the fatal injuries on the person of deceased and killed him? In this regard, the trial Court has relied upon the statement of wife of the deceased Urmila Bai (PW-3) and father Gayalal (PW-4), who are said to be eye-witnesses. Since, they are near relatives of the deceased, therefore, their evidence has to be considered with caution.

12. Urmila Bai (PW-3) and Gayalal (PW-4) had admitted that there was a dispute between the parties prior to the incident in respect of *Baadi* raised by the appellant Gopi in backyard of his house. The witnesses claim that this land belongs to them and the appellant has wrongly encroached upon their land.

13. Urmila Bai (PW-3) deposed that on 13.11.1999 at about 10:30-11:00 am, she went to her field alongwith her husband Vijay. Her husband was going some 10-15 feets ahead of her, when he reached in the field, Urmila Bai was standing near the bunds of field adjacent to *Baadi* of appellant. Meanwhile,

the appellants and accused persons Rajendra, Ranu and Munni Bai came near and surrounded her. They asked about her husband. Accused Munni Bai and Ranu Bai caught hold of her and other accused went near her husband Vijay Kumar. Accused Sanju and Rajendra caught hold of the hands of Vijay Kumar and accused Gopi dealt the blow of knife on the chest and abdomen of the Vijay Kumar. Her father-in-law Gayalal arrived on the spot to intervene, but he was assaulted by accused Mukesh by a Lathi on his left hand. Her husband fell down on the ground, thereafter, accused persons ran away from the spot. The witnesses Bhagwan Das (PW-1) and Munnanunia had seen the incident.

14. There are some discrepancies found in the statement of Urmila Bai and her police statement recorded under Section 161 of Cr.P.C. (Ex.D-1). In her police statement, she had stated that at the time of incident, her husband had gone to his field earlier and engaged in ploughing of field by tractor. Urmila Bai was going to field, when she reached near the *Baadi* she had hot talks with Munni Bai and a quarrel took place there between the ladies. Hearing the noise of quarrel, her husband Vijay Kumar came near the *Baadi* to intervene, then, accused Rajendra Burman and Sanju came there armed with Lathi and caught hold of her husband, then appellants Gopi and Mukesh came there. This statement shows that all the accused persons including appellants did not come on the spot, simultaneously and jointly. They came after some interval on the spot. She had stated in Ex.D-1 that Ranu came on the spot after beating of her husband by Gopi. Whereas, in court statement, she has deposed that all the appellants and accused persons came together and Munni Bai and Ranu caught hold of her. The same discrepancies are also found in the statement of Gayalal (PW-4) and his police statement Ex.D-2. Urmila Bai has stated that her husband was going to his field with her whereas Gayalal has deposed that deceased was already in the field and Urmila Bai was coming alone from her house. In view of above contradictions and discrepancies, we cannot rely upon the statements of Urmila Bai and Gayalal, which shows that all the accused persons came on the spot together.

15. Gayalal (PW-4) also seems to make exaggerated statements he deposed against Mukesh Soni to have assaulted the deceased by knife, but there is omission in his police statement Ex.D-2 in this regard. He has also denied his police statement that at the time of incident there was a quarrel between Munni Bai and Urmila Bai and deceased went to intervene and prevent

his wife to indulge in quarrel. There is omission in his police statement about the fact that Munni Bai and Ranu Bai exhorted to other accused persons to kill the deceased. Thus, it appears that Gayalal and Urmila Bai are not stating truly about genesis of occurrence.

16. The other eye-witness Bhagwan Das (PW-1) deposed that at the time of incident ploughing the field of deceased Vijay Kumar by tractor. There was a hot talks going on between Gayalal and appellant Gopi on account of destroying the *Baadi* of appellants by Urmila Bai and Vijay Kumar. Urmila Bai told Gopi that he had encroached upon her land and raised the *Baadi* therefore, she had rightly removed the *Baadi* from her land. A quarrel took place between Gopi and Urmila and Urmila had assaulted Gopi by Lathi. Although this witness has been declared hostile by the prosecution, but his statement indicates that there was a quarrel between Urmila Bai and Gopi on account of damage of *Baadi.*

17. Thus, from the evidence adduced by the prosecution, it appears that there was a quarrel between Urmila Bai (PW-3) the wife of deceased and Munni Bai (wife of Gopi) over the damage of *Baadi.* This quarrel took place near the Baadi when Urmila Bai was going to her field. Seeing the quarrel, the deceased Vijay Kumar came there. Seeing Vijay in support of his wife Urmila Bai, the appellant Sanju @ Sanjay came there and caught hold of Vijay Kumar. It is possible that there would have been a scuffle between them. Seeing this, the appellant Gopi came from his house armed with Knife and all of sudden, he had assaulted the deceased giving blow of knife on his chest and abdomen. Seeing the occurrence, complainant Mathura Prasad @ Gayalal, who was present in nearby field, came there and he was assaulted by other appellant Mukesh by Lathi. He sustained grievous injury on his left hand and his radius and ulna bone were fractured. This fact is proved by MLC report Ex.P-15 given by Dr.S.S. Thakur (PW-7) and X-ray report Ex.P-11 given by Radiologist Dr. M.M. Agrawal (PW-5).

18. Now the question arises whether the co-accused Sanju and Mukesh had common intention with main accused Gopi to kill the deceased. It is settled law that the common intention can develop during the course of occurrence, but there has to be cogent material on the basis of which the Court can arrive at that finding and hold an accused vicariously liable for the act of other accused by invoking Section 34 of IPC. In the case of *Ramashish Yadav Vs. State of Bihar*, reported in AIR 1999 SC 3830, the Apex Court has dealt with the

distinctive feature of Section 34 of the IPC and has observed thus:-

> "3. ..... The common intention implies acting in concert, existence of a prearranged plan which it to proved either from conduct or from circumstances or from any incriminating facts. It requires a prearranged plan and it presupposes prior concert. Therefore, there musts be prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be a prearrangement or premeditated concert.

19. After having laid down the proposition of law as above, the Apex Court found on facts in the said case that two accused persons viz., Ram Pravesh Yadav and Ramanand Yadav, were found to have caught hold of one Tapeshwar and thereafter, accused Samundar Yadav Sheo Layak Yadav came there with Gandasa in their hands and gave blows to Tapeshwar. Having regard to the above facts emerging from the evidence on record, the Apex Court held that it cannot be said that Ram Pravesh Yadav and Ramanand Yadav shared the common intention with Samundar Yadav and also Sheo Layak Yadav.

20. In the present case, the whole incident took place because of trivial incident and altercation between Munni Bai, the wife of appellant Gopi and Urmila Bai, wife of deceased Vijay Kumar. This incident resulted in a quarrel and deceased Vijay Kumar came on the spot to intervene. It is alleged by prosecution witnesses that accused Sanju and Rajendra came there and caught hold of deceased. But in separate trial, ST No.363/2009, the trial Court has acquitted Rajendra. This creates doubt about the involvement of Rajendra in commission of crime. Therefore, it cannot be believed beyond reasonable doubt that Sanju and Rajendra had caught hold of deceased. Even if we presume that Sanju had caught hold of deceased, but from the evidence, it appears that he was not armed with any weapon and he had not inflicted any injury to deceased. He simply grappled with the deceased, which may be for purpose of preventing him to indulge in the quarrel of women. Since Sanju came alone, therefore, it cannot be said that he had common intention to kill the deceased. The main accused Gopi came on the spot armed with knife and directly inflicted injuries on person of deceased. There is no evidence that other appellants

Sanju or Mukesh has exhorted or instigated Gopi to kill the deceased. There is no pre-concert of mind. Similarly, other appellant Mukesh had assaulted only the complainant Gayalal. He came after-wards on the spot. Mukesh and Sanju had not assaulted the deceased.

21. In view of the aforesaid facts, it appears that there was a free fight between the parties. The trial Court has found there was no unlawful assembly and acquitted the appellants of the charges of Section 148 and 149 of IPC. The appellants did not come on the spot together. There is no evidence to show pre-concert of mind. The main accused Gopi came from his house armed with knife and directly assaulted the deceased. Therefore, in facts and circumstances of the present case, it cannot be inferred that the other appellants Sanju and Mukesh had also shared common intention with main accused Gopi to kill the deceased. In the case law *Cherlopalli Cheliminabi Saheb and another Vs. State of A.P.* AIR 2003 SC 1014, an altercation started between two ladies i.e. wife of deceased and wife of appellant in regard to taking water from tap. The altercation turned out into fight in which the members of both family joined and some body stabbed deceased. Fight not pre-planned. There was no material available on record to show common intention. Hon'ble Apex Court held that the provision of Section 34 of IPC was not attracted.

22. Thus, the trial Court, on erroneous appreciation of evidence, has arrived at conclusion that appellants had shared common intention to kill the deceased and assaulted the complainant. This is case of free fight. It is not proved beyond reasonable doubt that the appellants Sanju and Mukesh had common intention with main accused Gopi to kill the deceased and similarly Gopi and Sanju had shared common intention to inflict grievous injury to the complainant. In the case of free fight, every accused shall be liable for his individual act. The trial Court has wrongly held appellant Sanju and Mukesh guilty for the offence punishable under Section 302/34 of IPC. Similarly Gopi and Sanju had been wrongly convicted under Section 325/34 of IPC.

23. Thus, the appeals are partly **allowed.** The conviction and sentence awarded by trial Court against the appellants Sanju @ Sanjay and Mukesh for commission of offence under Section 302 r/w 34 of IPC is set aside and similarly, the conviction and sentence of Gopi and Sanju @ Sanjay awarded under Section 325 r/w 34 of IPC is set aside. The appellants are acquitted from the charges of above offence.

24. It is proved that the appellant Gopi has committed murder of deceased Vijay Kumar punishable under Section 302 of IPC and appellant Mukesh has inflicted grievous injury to the complainant Gayalal punishable under Section 325 of IPC. The conviction and sentence awarded by trial Court against the appellant Gopi under Section 302 of IPC and appellant Mukesh under Section 325 of IPC are affirmed and sustained. They have to undergo the sentence imposed upon them under aforesaid offence. The appellant Mukesh is entitle to set off in respect of the period already undergone in custody in view of Section 428 of Cr.P.C.

25. The appeal of appellant Sanju @ Sanjay (Cr.A.No.407/2003) is allowed and the appeal of appellant Gopi & Mukesh (Cr.A.No.516/2003) is partly allowed.

26. The appellant Sanju @ Sanjay is acquitted and be set at liberty.

Order accordingly.

I.L.R. [2017] M.P., 2480
APPELLATE CRIMINAL

Before Mr. Justice S.K. Seth & Smt. Justice Anjuli Palo
Cr.A. No. 803/1994 (Jabalpur) decided on 31 August, 2017

STATE OF M.P. ...Appellant
Vs.
KESHOVRAO ...Respondent

A. Penal Code (45 of 1860), Section 326, Criminal Procedure Code, 1973 (2 of 1974), Section 378 (3) – Acquittal Converted to Conviction – **Held – Supreme Court has concluded that if order of acquittal has been made on improper and erroneous appreciation of evidence, the same can be set aside by Appellate Court. (Para 20)**

क. दण्ड संहिता (1860 का 45), धारा 326, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378(3) – दोषमुक्ति दोषसिद्धि में परिवर्तित – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि यदि दोषसिद्धि का आदेश साक्ष्य के अनुचित एवं त्रुटिपूर्ण मूल्यांकन पर किया गया है, तो अपीली न्यायालय द्वारा उक्त को अपास्त किया जा सकता है।

B. Penal Code (45 of 1860), Section 326 & 324 – Acquittal – Appreciation of Evidence – Testimony of Eye Witnesses – Minor

Contradictions **– Held – Although prosecution failed to prove that complainant sustained grievous injury but there are sufficient direct evidence of complainant and eye witnesses available against accused which were duly corroborated by medical evidence that simple injuries were voluntarily caused by accused using sharp cutting object – No material contradiction between ocular and medical evidence – Thus offence u/S 326 IPC not made out but offence u/S 324 is made out and proved beyond reasonable doubt – Finding of acquittal is hereby set aside – Accused guilty of and is convicted for offence u/S 324 IPC. (Paras 21 to 23)**

ख. दण्ड संहिता (1860 का 45), धारा 326 व 324 – दोषमुक्ति – साक्ष्य का मूल्यांकन – चक्षुदर्शी साक्षीगण के परिसाक्ष्य – मामूली विरोधाभास – अभिनिर्धारित – यद्यपि अभियोजन, साबित करने में विफल रहा कि परिवादी ने गंभीर चोट सहन की परन्तु अभियुक्त के विरूद्ध परिवादी एवं चक्षुदर्शी साक्षीगण के पर्याप्त प्रत्यक्ष साक्ष्य उपलब्ध हैं जो कि चिकित्सीय साक्ष्य द्वारा सम्यक् रूप से संपुष्ट थे कि साधारण चोटें अभियुक्त द्वारा धारदार काटने वाली वस्तु का उपयोग करते हुये स्वेच्छापूर्वक कारित की गई थी – चाक्षुष एवं चिकित्सीय साक्ष्य के मध्य कोई तात्विक विरोधाभास नहीं – इसलिए भारतीय दंड संहिता की धारा 326 के अंतर्गत अपराध नहीं बनता परन्तु धारा 324 के अंतर्गत अपराध बनता है तथा युक्तियुक्त संदेह से परे साबित हुआ है – दोषमुक्ति का निष्कर्ष एतद् द्वारा अपास्त – अभियुक्त भारतीय दंड संहिता की धारा 324 के अंतर्गत अपराध हेतु दोषी तथा दोषसिद्ध किया गया।

C. Criminal Practice – Motive **– Held – Case is based on direct evidence and not on circumstantial evidence and hence it is not compulsory for prosecution to prove motive of accused – Only for absence of motive, direct evidence cannot be ignored. (Para 16)**

ग. दांडिक पद्धति – हेतु – अभिनिर्धारित – प्रकरण प्रत्यक्ष साक्ष्य पर आधारित है तथा न कि परिस्थितिजन्य साक्ष्य पर एवं इसलिए अभियोजन के लिए अभियुक्त का हेतु साबित करना अनिवार्य नहीं है – केवल हेतु की अनुपस्थिति के लिए, प्रत्यक्ष साक्ष्य को अनदेखा नहीं किया जा सकता।

Cases referred :

2010 (13) SCC 657, (2011) 3 SCC 317, (2016) 10 SCC 506, AIR 1934 PC 227 (2), 2017 Cr.L.J. 149 (SC), 2017 Cr.L.J. 291 (SC), 2017 Cr.L.J. (NOC) 308 (All), 2013 Cri.L.J. 2514, 2013 Cri.L.J. 749, 2017 Cr.L.J. 529 SC, 2017 Cri.L.J. 578 (SC), AIR 2011 SC 3753, 2012 Cri.L.J. 672.

Sheetal Tiwari, P.L. for the appellant/State.
V.B. Singh, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : ANJULI PALO, J. :- This appeal has been filed by the State being aggrieved by the judgment dated 4.1.1994 passed by the Chief Judicial Magistrate, Betul in Criminal Case No.2371/1986, whereby the respondent/accused was acquitted from the charge of offence under Section 326 of the IPC.

2. The prosecution case in short is that the complainant Bhimrao and the respondent Keshorao are relatives. The complainant settled the marriage of sister of the respondent with Sheshrao at village Bheempur, Doldhana District Betul. On 2nd June, 1986, for celebrating the ring ceremony, the complainant Bhimrao and the respondent/accused came to the village Umari to the house of Nilamber, who is brother of the complainant Bhimrao. In the intervening night of 1st & 2nd June, 1986, the complainant and the respondent were sleeping side by side in the courtyard (Aangan). Suddenly, the respondent assaulted Bhimrao with a knife, caused injuries on his neck and back. The complainant Bhimrao raised hue and cry and caught hold of the respondent. After hearing the noise of Bhimrao, Shivcharan came to the spot. He saw that the respondent held a knife in his hand, Bhimrao who was griping with the respondent. Shivcharan snatched the knife from the respondent. After hearing the voice, so many persons namely Tenya, Mahadeo, Anandrao and Nilamber assembled at the scene of occurrence. It was stated by Bhimrao to them that the respondent assaulted him with a knife on his stomach, chest and neck. On the report of Shivcharan, Police Station Athner District Betul registered a case under Section 307 of the IPC against the respondent. After investigation, charge sheet was filed before the competent Court. After committal the case, trial was conduced (sic:conducted) by the learned trial Court.

3. In the impugned judgment, learned trial Court found that the evidence adduced by the prosecution is not reliable and trustworthy. The respondent had no motive to commit the offence against the complainant. However, knife was seized from the possession of respondent, but no blood stain was found on the seized article. After considering the weakness of prosecution case, learned trial Court held that the prosecution has failed to prove the charge levelled against the respondent beyond reasonable doubt.

4. Aforesaid finding has been challenged by the State on the grounds that evidence of prosecution witnesses Bhimrao (PW-1) and Shivcharan (PW-2)

ought to have been accepted as the same is in consistence with their previous version. The medical opinion also supports their version. Learned trial Court has lost sight of the material aspect of the evidence. On the basis of minor contradictions in the statement of witnesses who are villagers, learned trial Court acquitted the respondent. It is alleged by the appellant/State that it is very important to see that after long cross-examination, the witnesses could not demolish the prosecution case. Hence, the judgment of acquittal passed by the learned trial Court is liable to be quashed and set aside. It is prayed that the respondent be punished in accordance with law.

5. Learned counsel for the respondent contended that the appellate Court should not ordinarily set aside the judgment of acquittal in the case even though two views are possible. The view of the appellate Court may be more probable one. The trial Court, which has benefit of watching the manner of witnesses, is best judge of the credibility of witnesses. The reliance has been placed in the case of *"Sunil Kumar Shambhudayal Gupta (doctor) Vs. State of Maharashtra,* 2010(13) SCC 657", *"V.S. Achuthanan Vs. Balkrishna Pillai* (2011) 3 SCC 317" and *"Raja Vs. State of Karnatka,* (2016) 10 SCC 506."

6. Having heard learned counsel for the parties at length and perused the record. The question for consideration is that whether this Court can legally reverse the acquittal of the respondent on the basis of evidence available on record.

7. In *Sheo Swarup v. King-Emperor* [AIR 1934 PC 227 (2)] afford a correct guide for the appellate Court's approach to a case in disposing of such an appeal. The different phraseology used in the judgment of this Court such as (I) substantial and compelling reasons (II) good and sufficiently cogent reasons (III) strong reasons are not intended to curtail the undoubted power of an appeal against acquittal to review the entire evidence and to come to its own conclusion but it should not only evidence every matter on record having a bearing on the question of fact and the reasons given by the Court below. In support of its order of acquittal in its arriving at a conclusion on those facts, but should also express these reasons in its judgment, which lead it to hold that the acquittal was not justified.

8. It is settled law that every accused is presumed to be innocent unless his guilt is proved and that is presumption of his innocence gets re-enforced

with his acquittal by the trial Court verdict. A judge presides over the trial not only to ensure that no innocent is punished but also to see that guilty does not escape. It is well settled principle of law that the appellate Court has full power to review and consider the entire evidence on record on which the order of acquittal is based, so as to arrive at finding as to whether the views of the trial Court were perverse or otherwise unsustainable.

9. It is not in dispute that the complainant Bhimrao and respondent Keshorao are near relatives to each other and they belongs to same village. On 1st June, 1986 in the afternoon, they both came to the house of Nilamber at District Betul for celebrating the ring ceremony of sister of respondent/ accused and they stayed there in the intervening night of 1st and 2nd June, 1986. It is also not in dispute that at the time of incident, both were sleeping side by side in the open courtyard of Nilamber (PW-6). Aforesaid facts were admitted by the respondent in accused statement in question nos.1, 2 & 4. In question no.10, he also admitted that at midnight, the complainant Bhimrao raised hue and cry and caught hold of the respondent. The complainant Bhimrao (PW-1) clearly stated against the respondent that the respondent caused said injuries to him by a knife and during the incident, he caught hold of the respondent with a knife and again the respondent inflicted three blows on his back.

10. It is also not in dispute that at the time of incident, Shivcharan (PW-2) and Nilamber (PW-6) were present near the spot. They were sleeping there. Shivcharan (PW-2) and Nilamber (PW-6) deposed that after hearing hue and cry of the complainant Bhimrao, they came on the spot and saw that the respondent was caught by the complainant Bhimrao along with a knife. Nilamber (PW-6) further stated that in his presence, another blow was inflicted by the respondent on the chest of complainant Bhimrao and thereafter, knife was snatched by Shivcharan (PW-2) from the respondent. The said facts are very important to implicate the respondent in crime, who attacked the complainant by knife. It is also important that at that time, presence and act of Shivcharan (PW-2) are unchallenged by the defence in accused statement. The respondent has admitted that he was caught hold by the complainant Bhimrao and thereafter by other persons who assembled there just after the incident.

11. Head Constable Deorao (PW-9) corroborated the testimony of Shivcharan (PW-2), who registered the report of Shivcharan against the respondent just after the incident on 2nd June, 1986 at about 9:20 p.m. in the

police station situated about 40 kms. away from the spot. It cannot be presumed that the report could be lodged as an afterthought against the respondent, who is also near relative of Shivcharan (PW-2). In para 4 of the cross-examination, he also stated that Bhimrao was brought by Shivcharan in unconscious condition and he was not fit to give his statement.

12. In sequence of the incident, the testimony of Dr. S.K. Khandelwal (PW-10) has not been challenged by the respondent, which established that at the time of medical examination, the complainant sustained following injuries:-

(i) incised wound 1"x1/2"x1", 1 c.m. deep in peritoneal cavity 5 cm. below and lateral to the umbilicus

(ii) incised wound 1"x1/2"x1/2" over left supra clavicle region with bleeding

All above injuries were caused by sharp cutting object. According to the report, the injuries were caused by knife (article 'B'). There is no material contradiction between ocular evidence and medical evidence. In these circumstances, it is proved that in the presence of respondent, the complainant sustained aforesaid injuries in the intervening night of 1st and 2nd June, 1986.

13. Head Constable Yashwant Rao (PW-15) seized knife (article 'B') from the respondent. He found some blood stains in the knife during investigation. He also seized one shirt, pyjama and baniyan etc. from the respondent on 3rd June, 1986. Investigation officer Yashwant Rao found blood stains on the clothes of the respondent. In the FSL report, human blood was found on the clothes seized from the respondent. In the FSL report, blood of 'A' blood group is found on the shirt of victim and on the shirt, pyjama and handkerchief of the respondent and on other clothes of the complainant. It is a very important piece of evidence which involves the respondent with crime.

14. Above relevant fact has been put up before the respondent during the accused statement under Section 313 of the Cr.P.C. in question nos.42 & 43. In question no.42, the respondent/accused has not explained why he had knife in his hand, why he was caught hold by the complainant Bhimrao and what happened at that night. At the time of incident, who was the other one who caused the injury to the complaint (sic:complainant), why respondent's clothes were stained with blood. We are not satisfied with the explanation given by the respondent/accused that he was caught by the complainant

Bhimrao, hence, his clothes had blood stains. The complainant's blood was found not only on the shirt of respondent but also on his baniyan, pyjama and handkerchief. This evidence is corroborated by the testimony of Bhimrao (PW-1), Shivcharan (PW-2) and Nilamber (PW-6). Learned trial Court has held that because no blood stains were found on the knife as per Article 'B', hence it is doubtful that the seized knife was used for committing the crime. It is not a proper ground to ignore the evidence of eye witnesses.

15. It is important that this case is not based on circumstantial evidence, whereas it is based on the direct evidence of the complainant and other eyewitnesses. Hence, only for such type of weakness, the testimony of Bhimrao (PW-1), Shivcharan (PW-2) and Nilamber (PW-6) cannot be brushed aside in the criminal trial. The maxim *"falsus in uno, falsus in omnibus "* (false in one thing, false in everything) would not be applicable.

16. The learned trial Court acquitted the respondent on the ground that the respondent/accused had no motive to commit crime. This case is based on the direct evidence and not on the circumstantial evidence. Hence, it is not compulsory for the prosecution to prove the motive of the accused. Only for absence of motive direct evidence cannot be ignored. In case of *"Saddik @ Lalo Gulam Hussein Shaikh and others Vs. State of Gujrat* 2017 Cr.L.J 149 (SC) and *"Yogesh Singh Vs. Mahabeer Singh and others* 2017 Cr.L.J. 291 (SC)," it was held that:

> "It is settled legal position that even if the absence of motive, as alleged, is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of the offene, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance."

17. In the present case, Mahadeo (PW-4), Anandroa (PW-5), Ramji (PW-7) and Tenya (PW-8) were also witnesses, who assembled on the spot and they saw the respondent, who was caught hold by complainant Bhimrao. At the time of incident, they also saw knife in hand of respondent/accused, which was snatched by Shivcharan (PW-2). Testimony of these witnesses is found natural and reliable. Under Section 6/8 of the Evidence Act, it is relevant

in the present case. There is no reason as to why they would falsely implicate the respondent in this case. In case of *"Netram Chena Baghel Vs. State of UP"* 2017 Cr.LJ (NOC) 308 (All), it was held that:

> "Relevancy of facts forming part of same transaction- Facts, though not in issue but so connected with issue, shall form part of same transactions and also be relevant."

18. The conduct of Bhimrao (PW-1) is considerable because he is near relative of the respondent and at that time, he stayed with the accused/ respondent at Nilamber's house then why they would falsely implicate the respondent. He had no bad intention or rivalry with the accused/respondent. Similar thought is also applicable for other witnesses namely Shivcharan (PW-2), Mahadeo (PW-4), Nilamber (PW-6), Ramji (PW-7) and Tenya (PW-8).

19. With regard to some contradiction in their evidence, we find that the contradictions are not material in nature. In the case of *"Unnikrishnan Vs. State of Kerala,* 2013 Cri.L.J. 2514". It was held that:-

> "In appreciation of evidence, minor discrepancies in statements of witnesses occurring due to illiteracy of witness and long gap between recording of testimony of offence, not ground to discard evidence."

Some contradiction and omission are natural/normally occurred in the evidence because the incident was occurred in the year 1986 and after two or more years, their evidence was recorded in the trial Court. Hence, such type of contradictions cannot be adversely effect and truthfulness of the prosecution case. In case of *"Mahaveer Singh Vs. State of M.P.,* 2013 Cri.L.J. 749". It was held that:

> "It is duty of the Court to separate chaff from husk..... though it is natural to state variant statement due to time gap. But if such statement go to defeat core of prosecution then such contradictions are material. It is settled principle of law that if evidence of even single eyewitnesses, truthful, consistent and inspiring confidence is sufficient for conviction of the accused."

20. After over all consideration and appreciation of evidence, we find that learned trial Court failed to consider the above aspect in the prosecution

case and ignored the material facts, which were duly implicated the respondent/ accused with the crime. In case of *"Anjan Das Gupta Vs. State of West Bengal and others* 2017 Cr.L.J. 529 SC", the Supreme Court has held that and it is well settled law that:-

> "If order of acquittal has been made on improper and erroneous appreciation of evidence, can be set aside by the appellate Court."

In cases of *"Bhagwan Jagannath Markad Vs. State of Maharashtra,* 2017 Cri.L.J. 578 (SC) and *"Mrinal Das Vs. State of Tripura,* AIR 2011 SC 3753", it is held by the Apex Court that:-

> "It is the duty of the appellate Court to marshal the entire evidence on record and only by giving cogent and adequate reasons set aside the judgment of acquittal. If the order is clearly unreasonable, it is a compelling reason for interference. When the trial Court has ignored the evidence or misread the material evidence or has ignored, the appellate Court is competent to reverse the decision of the trial Court depending on the materials placed."

21. We find that the findings of learned trial Court were apparently perverse or otherwise unsustainable. It is not a case where two views are possible. It is a case where sufficient direct evidence is available against the respondent/ accused, which corroborated by the medical evidence also. It is true that, in this case the prosecution failed to prove that the complainant sustained grievous injuries because there is no evidence with regard to any fracture caused to the complainant or he was treated in the hospital for 20 or more days. Hence, offence under Section 326 of the IPC is not made out against the respondent/ accused. It is established by the prosecution that the injuries were voluntarily caused by the respondent to the complainant. It is proved beyond reasonable doubt that injuries were simple in nature caused by sharp cutting object. Hence, the offence under Section 324 of the IPC is duly made out against the respondent. In case of *"C. Ronald and another Vs. State of U.T. Of Andaman & Nicobar,* 2012 Cri.L.J. 672, it is held that:-

> "There is no restriction on the powers of the appellate Court to convert an order of acquittal into a conviction

22. On the basis of aforesaid discussion, we find that the findings of the learned trial Court are perverse and against the evidence on record. Learned

trial Court lost sight to consider material aspects of the evidence and comes to the conclusion that the prosecution has failed to prove its case beyond reasonable doubt against the respondent. Therefore, the appeal presented by the State is hereby allowed. The findings of learned trial Court are hereby set aside. We hold that the prosecution has successfully proved that the respondent voluntarily caused simple injuries to the complainant Bhimrao in the intervening night of 1st & 2nd June,1986.

23. The result is appeal partly succeeds. We find the respondent is guilty of the offence under Section 324 of the IPC. Hence, respondent is convicted for offence under Section 324 of the IPC. With regard to the sentence, the respondent is facing trial since the year 1986 for the offence under Section 326 of the IPC. He was in custody about 3 months & 26 days. Looking to the facts and circumstances of the case, we sentence the respondent for offence under Section 324 of the IPC with fine of Rs.5,000/-. In default of payment of fine, three months R.I. is awarded. If fine is deposited then, a sum of Rs.3,000/- be provided to the complainant Bhimrao as compensation under Section 357 of the Cr.P.C.

24. Office is directed to transmit the record immediately to the trial Court with a copy of this judgment. The respondent/accused shall appear before the Trial Court **on 15.09.2017.** Upon his failure to do so, the Trial Court, under intimation to registry, shall take forthwith necessary steps as per law to see that order of this Court is duly carried out.

Ordered accordingly.

Appeal partly allowed.

I.L.R. [2017] M.P., 2489
APPELLATE CRIMINAL

Before Mr. Justice S.K. Gangele & Mr. Justice Anurag Shrivastava

Cr.A. No. 2173/2006 (Jabalpur) decided on 5 September, 2017

RAMANDA @ YASHVANT GOND ...Appellant

Vs.

STATE OF M.P. ...Respondent

A. ***Penal Code (45 of 1860), Section 302 and Evidence Act (1 of 1872), Section 32 – Murder – Conviction – Dying Declaration – Appreciation of Evidence*** **– Deceased was set ablaze on denial of giving**

money to appellant for liquor – Dying declaration recorded by Naib Tehsildar – Held – Deceased was alive for 18 hours after recording dying declaration and doctor also deposed that he was fully conscious and was fit/capable of making statement – Dying declaration against appellant is reliable and is fully corroborated by statements of eye witnesses – Appellant rightly convicted – Appeal dismissed. (Paras 13 to 16 & 19)

क. दण्ड संहिता (1860 का 45), धारा 302 एवं साक्ष्य अधिनियम (1872 का 1), धारा 32 – हत्या – दोषसिद्धि – मृत्युकालिक कथन – साक्ष्य का मूल्यांकन – अपीलार्थी को मदिरा के लिए पैसे देने से इंकार करने पर मृतक को आग लगा दी गई थी – नायब तहसीलदार द्वारा मृत्युकालिक कथन अभिलिखित किया गया – अभिनिर्धारित – मृत्युकालिक कथन अभिलिखित किये जाने के पश्चात् 18 घंटे तक मृतक जीवित रहा तथा चिकित्सक ने भी कथन किया कि वह पूरी तरह सचेत था और कथन देने हेतु स्वस्थ/सक्षम था – अपीलार्थी के विरूद्ध मृत्युकालिक कथन विश्वसनीय है तथा चक्षुदर्शी साक्षीगण के कथनों द्वारा पूर्णतः संपुष्ट है – अपीलार्थी उचित रूप से दोषसिद्ध किया गया – अपील खारिज।

***B. Criminal Practice – Eye Witnesses – Interested Witnesses* – Held – Although evidence of interested witness is to be considered with care and caution but merely because eye witnesses are closely related/interested to deceased, their testimonies cannot be doubted and their evidence does not necessarily require corroboration before acting upon. (Para 16 & 17)**

ख. दाण्डिक पद्धति – चक्षुदर्शी साक्षीगण – हितबद्ध साक्षीगण – अभिनिर्धारित – यद्यपि हितबद्ध साक्षी के साक्ष्य को सावधानी और सतर्कता के साथ विचार में लिया जाना चाहिए परंतु मात्र इसलिए कि चक्षुदर्शी साक्षीगण मृतक से निकट रूप से संबंधी/हितबद्ध हैं, उनके परिसाक्ष्यों पर संदेह नहीं किया जा सकता तथा उनके साक्ष्य पर आगे कार्रवाई करने से पूर्व उनकी संपुष्टि आवश्यक रूप से अपेक्षित नहीं है।

Case referred:

(2012) 4 SCC 327.

None, for the appellant.

Prakash Gupta, appointed as amicus curiae to appear on behalf of appellant.

Akshay Namdeo, G.A. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : ANURAG SHRIVASTAVA, J. :- This appeal under Section 374(2) of Cr.P.C. has been preferred by the appellant/accused against the judgment and conviction dated 30.08.2006, passed by Additional Sessions Judge, Sohagpur, District Hoshangabad, in Sessions Trial No.236/2005, whereby the appellant has been convicted for commission of offence under Section 302 of IPC with fine of Rs.500/-, with default stipulation.

2. The case of prosecution in brief is that the deceased Prahlad Gond was residing in Thakur Mohalla Bankhedi. In the intervening night of 07.05.2005 and 08.05.2005 deceased was sleeping in the courtyard of his house. His son Pramod was also sleeping in the courtyard. At about 1:00 O' clock in the night, the appellant Ramanda came there, he was keeping a kerosine (sic:kerosene) lamp in his one hand and a steel jug on other hand. He demanded Rs.50/- from the deceased to consume liquor. When deceased refused to give him money, the appellant poured the kerosine (sic:kerosene) oil on the his person and dragged him to the Chabutra and set him ablaze. Seeing the incident, the Pramod, the son of deceased and other relatives douse the fire by pouring water on the deceased. The appellant ran away from the spot. Deceased went to police station Bankhedi with his son Pramod and daughter Lata Bai, and lodged the FIR Ex.P-4. Police registered the offence and sent him for MLC and treatment to community health center Bankhedi. He was given first aid there, his dying declaration was recorded by Naib Tahsildar and thereafter, he was referred to Jabalpur for further treatment. The deceased was admitted in the medical college, Jabalpur where he expired in the night. A Marg was registered in police station Gadha, Jabalpur and inquest was conducted. The dead body of deceased was sent for postmortem. The offence under Section 302 of IPC has been registered against the appellant at police station Bankhedi and after completion of investigation, charge sheet has been filed against the appellant.

3. The trial Court has framed the charges for the offence punishable under Sections 302 of IPC. The appellant abjured guilt and pleaded innocence. The prosecution has examined 13 witnesses in its support whereas the appellant has not examined any witness in his defence.

4. Learned trial Court, on appreciation of evidence adduced by the

parties, arrived at the conclusion that the appellant has demand the Rs.50/- for consuming liquor from the deceased and on his refusal, he set him ablaze by pouring kerosine (sic:kerosene) oil. Thus, the trial Court held the appellant guilty for commission of offence punishable under Sections 302 of IPC and sentenced him as mentioned herein above.

5. Heard arguments of learned counsel for the parties and perused the record.

6. The defence has not challenged the death of deceased Prahlad due to burn injuries sustained by him during the intervening night of incident. The appellant has given suggestion in his defence that "at the time of incident, the deceased was sitting in a water tank situated in the courtyard of his house, a kerosine (sic:kerosene) lamp was also lit there. Accidentally, the lamp fell on the deceased and he sustained injuries due to fire caused by lamp". The doctor S.K. Chandaiya (PW-12) deposed that on 08.05.2005, he had examined the deceased Prahlad Singh at about 1:40 am in the community health center Bankhedi and found about 80% superficial first to second degree burn on his body. After giving first aid, he referred him to medical college Jabalpur. The statement of doctor is corroborated by MLC report Ex.P-10 given by him.

7. The deceased has expired in the night in medical college, Jabalpur. Doctor Abhishek Singh (PW-6) deposed that he had performed the postmortem of deceased in medical college Jabalpur and found superficial and deep burn injuries on the person of body of deceased. The burn of all over the body. The cause of death was shock due to burn injuries. The statement of doctor is corroborated by postmortem report Ex.P-3. The appellant has not challenged the findings of postmortem given by doctor in cross examination. Therefore, the trial Court relying upon the MLC report and postmortem report of the deceased has rightly arrived at the conclusion that the death of deceased Prahlad was caused due to burn injuries. The death is homicidal.

8. Now the question arises whether the appellant has set the deceased on fire? In this regard, the prosecution has examined Pramod (PW-1) Lata Bai (PW-2) and Munna (PW-4) as eye-witnesses of the incident. Pramod and Lata Bai are children of deceased and Munna is his son-in-law, who were present on the spot at the time of incident.

9. Pramod (PW-1) deposed that at the time of incident, in the night about 12-1:00 am, he was sleeping in the courtyard of his house. His father Prahlad was

also sleeping near him, the appellant Ramanda came there. He was keeping kerosine (sic:kerosene) lamp in his one hand and a jug of kerosine (sic:kerosene) oil in his other hand. Appellant demanded Rs.50/- from the deceased to consume liquor when deceased refused to give him money, appellant poured the kerosine (sic:kerosene) oil on the deceased and set him ablaze by kerosine (sic:kerosene) lamp. Seeing in the incident, Pramod tried to catch the appellant, but he ran away. Pramod tried to douse the fire and he also sustained burn injuries. His sister Lata, brother-in-law Munna and other witnesses Munna Mistri, Sukkhu etc also arrived on the spot. He took his father to police station Bankhedi where his father lodged the FIR. The police sent him and his father for treatment to CHC Bankhedi, where Naib Tahsildar had recorded the statement of his father. The doctor had medically examined the witness and his father, thereafter his father was referred to medical college Jabalpur for further treatment. His father has expired in the night during treatment in the medical college Jabalpur.

10. In cross examination, this witness Pramod has not made any substantial contradictory statement and has denied the suggestions given by defence that the deceased was burnt due to accidental fire. The statement of Pramod is duly corroborated by his sister Lata Bai (PW-2) and brother-in-law Munna (PW-4).

11. Lata Bai (PW-2) and Munna (PW-4) deposed that at the time of incident, they were sleeping in *Dahlan (Porch)* of the house, their father Prahlad was sleeping in the courtyard. The appellant came there and demanded Rs.50/- for consuming liquor from Prahlad. When Prahlad refused to give him money, the appellant poured the kerosine (sic:kerosene) oil on him and set him ablaze by a kerosine (sic:kerosene) lamp, which he was carrying in his hand. Lata, Munna and other witnesses doused the fire and took the deceased Prahlad to police station where he had lodged the report.

12. Other prosecution witness Munna (PW-3) deposed that on hearing hue and cry from the house of deceased and on seeing the fire, he arrived on the spot. He had seen the appellant running away also. The deceased told him that the appellant has demanded Rs.50/- from him for consuming liquor and set him ablaze.

13. The statements of Pramod, Lata Bai and Munna are also corroborated by the FIR Ex.P-4 lodged by the deceased himself and dying declaration Ex.P-8 recorded by Naib Tahsildar Sudheer Kumar Jain in the community

health center Bankhedi.

14. N.P. Parihar, ASI, police station Bankhedi (PW-8) deposed that on 08.05.2005 at about 1:30 am in the night, the deceased Prahlad came in police station Bankhedi and lodged the FIR Ex.P-4 against the appellant. He was brought by his son Pramod, daughter Lata Bai, son-in-law Munna Lal and neighbour Sukhlal. He had recorded the statement of deceased and above witnesses and sent the deceased for medical examination and treatment to CHC, Bankhedi. In the hospital, the dying declaration of deceased was also recorded by Naib Tahsildar on request of police. In cross examination, this witness has categorically deposed that at the time of lodging of report and in the hospital, the deceased Prahlad was fully conscious and capable of making statement.

15. Naib Tahsildar Sudheer Kumar Jain (PW-11) deposed that on 08.05.2005 at about 1:55 am, he had reached to CHC Bankhedi and recorded the dying declaration Ex.P-8 of Prahlad. As the hands of Prahlad were burnt therefore, he had obtained the thump (sic:thumb) impression of him in the dying declaration. In cross examination, PW-11 further deposed that the deceased was fully conscious and capable of making statement. His mental and physical condition and fitness was certified by the doctor also. This fact is corroborated by Dr.S.K. Chandaiya (PW-12) who deposed that he had examined the deceased at the time of recorded of dying declaration and found him fit to give statement. He had certified this fact on the dying declaration Ex.P-8 at C to C and D to D. Since deceased was alive for about 18 hours after recording of dying declaration, he was conscious during his admission in medical college hospital Jabalpur, therefore it can be believed that at the time of recording of dying declaration he was fully conscious and the dying declaration made by him is reliable.

16. In his dying declaration the deceased has clearly stated that the appellant had set him ablaze. This dying declaration is fully corroborated by statements of eye witnesses Pramod (PW-1) Lata Bai (PW-2) and Munna (PW-4). Although they are close relatives of deceased but merely on this ground there (sic:their) testimonies can not be doubted. The incident occurred in the court yard of the house of deceased during summer season. It is quite natural that in the late hours of night the deceased and other members of family were sleeping in the courtyard. The presence of these witnesses in the house is natural and believable. In the late hours of night we can not expect the presence of any independent witness on the spot.

17. It is settled law that merely because witnesses are closely associated with or interested in the deceased, their evidence does not necessarily require corroboration before acting upon. Evidence of interested witness is to be considered with care and caution. Evidence of a witness cannot be discarded merely on the ground of his being an interested witness as a witness normally would not leave the real culprits and rope in innocent persons.

18. The Hon'ble Apex Court in the case of *Bhajju v. State of M.P.* [(2012) 4 SCC 327] in para 22 observed that :-

> "The law is very clear that if dying declaration has been recorded in accordance with law, is reliable and gives cogent and possible explanation of occurrence of events, then the DD can certainly be relied upon by the Court and could form the sole piece of evidence resulting in the conviction of the accused".

19. In view of aforesaid discussion in our considered opinion the trial Court has rightly relied upon the dying declaration made by the deceased and also the evidence of prosecution witnesses Pramod (PW-1) Lata Bai (PW-2) and Munna (PW-4) and arrived at the conclusion that the appellant has committed murder of the deceased by setting him ablaze. The trial Court on proper appreciation of evidence held the appellant guilty for commission of offence punishable under section 302 of IPC and sentenced him accordingly.

20. Thus, the appeal is devoid of merit and is hereby **dismissed.**

Appeal dismissed.

I.L.R. [2017] M.P., 2495
APPELLATE CRIMINAL
Before Mr. Justice S.C. Sharma & Mr. Justice Alok Verma
Cr.A. No. 254/2008 (Indore) decided on 20 September, 2017

BHANWARLAL & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

(Alongwith Cr.A. No. 372/2008)

***A. Penal Code (45 of 1860), Section 302 – Murder – Conviction – Testimony of witnesses – Close Relative – Ocular & Medical Evidence – Absence of FSL Report – Effect* – Held – Witnesses**

are close relatives of deceased, however their statements cannot be doubted only because of this reason – When statement of two prosecution witnesses were found reliable, there appears to be no effect if some independent witnesses were not examined by prosecution and on this ground no benefit can be given to appellants – Many injuries were found on body of deceased, statement of witnesses that they did not observe as to which side of axe was used, there appears to be no discrepancies between ocular evidence and medical evidence – In the present case, when ocular evidence is available, non-receipt of FSL report does not affect the case adversely – Trial Court rightly convicted and sentenced the appellants – Appeal dismissed. (Para 11 & 12)

क. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – दोषसिद्धि – साक्षीगण के परिसाक्ष्य – करीबी रिश्तेदार – चाक्षुष एवं चिकित्सीय साक्ष्य – एफ.एस.एल. प्रतिवेदन की अनुपस्थिति – प्रभाव – अभिनिर्धारित – साक्षीगण, मृतक के करीबी रिश्तेदार हैं, तथापि केवल इस कारण से उनके कथनों पर संदेह नहीं किया जा सकता – जब दो अभियोजन साक्षीगण के कथन विश्वसनीय पाये गये थे, कोई प्रभाव प्रतीत नहीं होता यदि कुछ स्वतंत्र साक्षीगण का अभियोजन द्वारा परीक्षण नहीं किया गया था एवं इस आधार पर अपीलार्थीगण को कोई लाभ नहीं दिया जा सकता – मृतक के शरीर पर कई चोटें पाई गईं, साक्षीगण के कथन कि उन्होंने ध्यान से नहीं देखा कि कुल्हाड़ी का किस तरफ से उपयोग किया गया था, चाक्षुष साक्ष्य एवं चिकित्सीय साक्ष्य में कोई विसंगतियाँ प्रतीत नहीं होती – वर्तमान प्रकरण में, जब चाक्षुष साक्ष्य उपलब्ध है, एफ.एस.एल. प्रतिवेदन का प्राप्त न होना प्रकरण को प्रतिकूल रूप से प्रभावित नहीं करता – विचारण न्यायालय ने अपीलार्थीगण को उचित रूप से दोषसिद्ध एवं दण्डादिष्ट किया – अपील खारिज।

B. *Medical Jurisprudence – Rigor Mortis* – Held – Incident took place at 1:00 pm and as per the FIR, postmortem was conducted about 3 hrs 15 minutes after the incident – In India, rigor mortis sets after 3-6 hours – In the present case, there was no rigor mortis in the body of deceased, there appears to be no reason to doubt the time of incident. (Para 9)

ख. चिकित्सीय विधि शास्त्र – शव में अकड़न – अभिनिर्धारित – दोपहर 1:00 बजे घटना घटित हुई एवं प्रथम सूचना प्रतिवेदन के अनुसार, घटना के लगभग 3 घंटे 15 मिनट के पश्चात् शव परीक्षण संचालित किया गया – भारत में, 3–6 घंटे के पश्चात् शव में अकड़न आना शुरू हो जाती है – वर्तमान प्रकरण में, मृतक के शरीर पर कोई अकड़न नहीं थी, घटना के समय पर संदेह करने का कोई कारण प्रतीत नहीं होता।

Virendra Sharma, for the appellants.
H.Y. Mehta, for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **ALOK VERMA, J. :-** This common judgment will dispose of Cr.A.No.254/2008 and Cr.A.No.372/2008.

2. These appeals arises out of judgment of conviction and sentence passed by the learned Additional Sessions Judge, Link Court, Mahidpur, Ujjain in S.T.No.196/2007 dated 14.02.2008, whereby the learned Additional Sessions Judge held the appellants guilty under Section 147, 302 read with Section 149 of IPC and sentenced them to one year R.I. each under Section 147 of IPC and life imprisonment with fine of Rs.10,000/- each under Section 302 read with Section 149 of IPC alongwith one year additional R.I. each by way of default stipulation. Learned trial Court directed to pay Rs.40,000/- to the legal representatives of Banesingh by way of compensation under Section 357 of Cr.P.C. out of amount of fine.

3. According to the prosecution story, the incident took place on 09.05.2007. The report was lodged by Karan Singh (PW-1). He is nephew of the deceased Bane Singh. It was reported to the police that the accused persons were nurturing grudge against the deceased, as he objected them to draw water from a Government Bore-well. On the date of incident, the deceased Banesingh alongwith his nephew Karan Singh (PW-1) went to his well situated at his field and while they were coming back, the accused persons Bhanwarlal, Nagji, Balaram, Niranjan, Dayaram, Mukesh and Rakesh came there and started beating the deceased Banesingh. Bhanwarlal, Nagji and Balaram were having axe by which they inflicted injury on the body of the deceased. They kept on beating him and thereafter went away. The deceased fell down. After the incident, this witness alongwith 4-5 villagers arranged a tractor trolly in which the deceased was being shifted to the hospital. He succumbed to his injuries on the way and therefore, instead of taking him to the hospital the dead body was taken to the Police Station Raghvi, district Ujjain, where Karan Singh (PW-1) lodged a report Ex.P-7, on which crime no.126/2007 was registered on 09.05.2007. The report was lodged at 2.05 P.M. while the incident allegedly took place at 1 P.M.. The distance from the spot to the Police Station was 12 Kms.

4. The trial Court framed charges under Section 147,148 and 302 and

in alternative under Section 302/149 of IPC and after recording evidence of both the parties convicted and sentenced them as aforesaid. Aggrieved by the aforesaid judgment, these appeals are filed on the following grounds:-

(i) The trial Court failed to appreciate the oral evidence produced by the prosecution.

(ii) The trial Court wrongly placed reliance on the statements of Karan Singh (PW-1), Arjunsingh (PW-2), Bane Singh (PW-5) and Omprakash Sharma (PW-6).

(iii) This apart the testimony of the Investigating Officer Virendra Singh Gurjar (PW-7) is also not reliable. Omprakash Sharma (PW-6) was not an eye witness. He reached only after the incident was over.

(iv) There are material contradictions between oral evidence of Karan Singh (PW-1) and Arjun Singh (PW-2). According to them all the three accused persons were having axe. They inflicted injuries on the deceased. However, no incised wound was found on the body of the deceased. All the injuries were lacerated wound and due to these discrepancies between oral evidence and medical evidence, their statements are unreliable.

(v) The prosecution witnesses are all close relatives of the deceased and as such they were interested witnesses and statements of such witnesses should not be relied upon.

(vi) It is also a ground taken by the appellants that Dhapubai and Saurambai allegedly saw the incident and were independent witnesses, but were not examined by the prosecution. The spot of the incident is also doubtful. In the FIR, it was written that incident took place near the well of Banesingh, however in the FIR, the spot was stated to be Chowraha of the village.

(vii) The impugned judgment passed was on assumption and surmises and therefore, these appeals be allowed and judgment be set aside.

(viii) The FIR was anti-timed. The provision of Section 157 Cr.P.C was not complied with. The counter copies of FIR and Roznamcha Sanha were not produced by the prosecution.

5. Learned counsel appearing for the State supports the impugned judgment and pray that the same may be affirmed.

6. The FIR was lodged by Karan Singh (PW-1). He stated before the

Court that he went with the deceased to his well for filling water and there the appellants came and started beating the deceased. His statement was supported by Arjun Singh (PW-2), who is son of the deceased. He was examined as child witness, however, his age was mentioned as 17 years and it is apparent that he is of such age, who could understand and depose about the incident quite well. Both these witnesses were asked as to which side of the axes were used for causing injury on the deceased and both replied that they did not see which side of the axes were used and therefore, they were not in a position to say whether it was sharp side or from blunt side.

7. Learned counsel for the appellants submits that there was discrepancies regarding the spot of the incident, however, from the spot map it is apparent that the incident took place near a square in a village. The well and field of the deceased is shown at serial no.2 and that place is not away from the spot of incident. When cross examined, both the witnesses specifically stated that they went to the well at 12.30 P.M. and when they were coming back the incident took place and therefore, so far as the spot is concerned, there appears to be not much discrepancies in the statements of these witnesses.

8. Learned counsel for the appellants submits that in the postmortem report the doctor observed that when postmortem was done at 4.15 P.M. on 09.05.2007, the body of the deceased was cold but no rigor mortis was present. Learned counsel referred to page 223 of 22nd Edition of Book written by learned Author Shri Jaisingh P.Modi entitled "A Text Book of Medical Jurisprudence and Toxicology" and tried to impress upon the Court that incident took in the month of May when it was a very hot in middle part of India and according to the opinion given by the learned Author, Dr. Dinesh Sisodia, who is examined as (PW-3) in his statement in para 12 was confronted with the opinion expressed by the learned Author and he remained firm in his opinion that the body was cold at the time of post mortem. In 25th Edition of Book written by learned Author Shri Jaisingh P. Modi entitled "A Text Book of Medical Jurisprudence and Toxicology." at page 338 the opinion regarding cooling of dead body was expressed. The Author opined as under:-

> ".....(3)Cooling of the body- After death, the body begins to lose its animal heat by conduction, convection and radiation and gradually attains the same temperature as its surrounding medium similar to all inert objects. However, it must be borne in mind that this loss of heat cannot be

considered as a certain sign of death, until the body has lost 15 to 20 degrees of the normal heat; namely, 98.4°F; for a rectal temperature of 90°F to 94°F may be observed in the algid state or cholera and severe cases of collapse, and a much lower temperature of 23°C or 24°C may be noted in cases of long exposure to cold. Elevated rectal temperature have been observed in cases of carbon monoxide poisoning, coronary thrombosis and ruptured aortic aneurysms.

The rate of cooling is not uniform, but it is almost proportional to the difference in the temperature between the body and its surroundings. The rate is, therefore, rapid during the first few hours after death, and is slow afterwards, as the temperature of the body comes nearer to that of its surrounding. .....

.....*Surrounding of the body*- A dead body cools more slowly when kept in a small room with still air, than when kept in a large room with access of cold droughts of air from outside. Similarly a body covered with clothes and other coverings and lying in bed, or in a cesspool or dung heap, cools less rapidly than a naked body lying on a stone slab in the open air; while a body immersed in water especailly in running water, cools more rapidly than when exposed to the air. Cooling is delayed when the temperature of the atmospheric air or water is high. In icy weather of high altitude, the body may freeze and become hard and may be well-preserved....."

9. In the present case, the incident took place at 1 P.M. immediately after the incident as it happened during the day time, inside the field, the deceased was shifted in tractor attached with open trolly to hospital. However, on the way he died so instead of taking him to the hospital, the dead body was taken to the Police Station. There Panchayatnamalash was prepared by Virendra Singh Gurjar (PW-7) while the body was still in the trolly and thereafter the dead body was transferred to the hospital for postmortem. If we accept the time mentioned in the FIR, after the incident the postmortem was conducted about 3 hours 15 minutes, according to the learned Author in India rigor mortis sets after 3-6 hours. There was no rigor mortis in the body and therefore, there appears to be no reason to doubt the time of incident.

10. If incident took place at 1 P.M., the report was lodged at 2.05 P.M.,

there appears to be no delay as distance from the spot to the police station is stated to be 12 Kms. All the arguments in respect of FIR being anti-time or time of the incident has been wrongly mentioned appears to be not acceptable and has no force.

11. Coming to the statements of Karan Singh (PW-1) and Arjun Singh (PW-2), it is apparent that they were close relatives of the deceased, however their statements cannot be doubted only because of this reason. The FIR was promptly lodged. There were many injuries found on the body of the deceased. His left and right tibia fibula bones of both legs were fractured, one of the femur bone was fractured, 3 ribs were fractured and there was fracture on his skull bone which was the main reason for his death.

11. Taking these injuries and their statements that they did not observe as to which side of the axe was used, there appears to be no discrepancies between ocular evidence and the medical evidence.

12. Learned counsel for the appellant submits that two independent witnesses were not examined whose names were mentioned in the list of witnesses by the prosecution. However, when the statements of two prosecution witnesses were found reliable, there appears to be no effect if some independent witnesses were not examined by the prosecutor. At the most it may be said that there was a lapse on the part of the prosecutor as their names were mentioned in the list of witnesses. These witnesses were Dhapubai and Saurambai. However, their names were not mentioned in the trial programme by the prosecutor and therefore, no benefit can be given to the appellants. He further submits that no human blood and similar group of blood was found on the axe as no FSL report was filed by the prosecution during the trial. However, in this particular case ocular evidence is available. Non receipt of FSL report does not affect the case adversely.

In this situation in the considered opinion of this Court, the statements of prosecution witnesses Karan Singh (PW-1) and Arjun Singh (PW-2) are reliable. As such, conviction and sentence passed by the learned trial Court appears to be proper and based on cogent evidence. No interference in the findings return by the trial Court is called for. This appeal is devoid of no force and liable to be dismissed and dismissed accordingly.

C.C.as per rules.

Appeal dismissed.

I.L.R. [2017] M.P., 2502
APPELLATE CRIMINAL
Before Mr. Justice Sheel Nagu & Mr. Justice G.S. Ahluwalia
Cr.A. No. 635/2006 (Gwalior) decided on 25 September, 2017

PRATAP ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Sections 84, 302, 307 & 309 and Criminal Procedure Code, 1973 (2 of 1974), Section 329 – Murder – Conviction – Plea of Insanity – Burden of Proof – Appreciation of Evidence – **Appellant killing his two minor children and inflicted injuries to wife – Held – Prosecution witnesses specifically stated that appellant was of unsound mind and committed offence because of insanity and these witnesses were not declared hostile – Non-filing of documents of medical treatment of appellant prior to incident is not fatal in light of subsequent mental condition – Trial remained stayed for 10 yrs. u/S 329 Cr.P.C. as appellant was not able to enter his defence because of unsound mind – Appellant succeeded in proving his defence and is entitled for benefit u/S 84 IPC – Appellant acquitted of the charge u/S 302 & 307 – Appeal allowed. (Para 47)**

क. दण्ड संहिता (1860 का 45), धाराएँ 84, 302, 307 व 309 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 329 – हत्या – दोषसिद्धि – उन्मतता का अभिवाक् – सबूत का भार – साक्ष्य का मूल्यांकन – अपीलार्थी ने अपने दो अवयस्क बच्चों की हत्या कीं तथा पत्नी को चोटें पहुंचाई – अभिनिर्धारित – अभियोजन साक्षीगण ने विनिर्दिष्ट रूप से कथन किया कि अपीलार्थी विकृत चित्त था तथा उसने उन्मतता के कारण अपराध कारित किया एवं इन साक्षीगण को पक्षद्रोही घोषित नहीं किया गया – घटना से पूर्व अपीलार्थी के चिकित्सा उपचार के दस्तावेजों को प्रस्तुत नहीं किया जाना, पश्चात्वर्ती मानसिक स्थिति के आलोक में घातक नहीं है – दण्ड प्रक्रिया संहिता की धारा 329 के अंतर्गत विचारण 10 वर्षों तक रूका रहा क्योंकि चित्त विकृति के कारण अपीलार्थी अपना बचाव प्रस्तुत करने में समर्थ नहीं था – अपीलार्थी अपना बचाव साबित करने में सफल रहा तथा भारतीय दण्ड संहिता की धारा 84 के अंतर्गत लाभ का हकदार है – अपीलार्थी को धारा 302 व 307 के अंतर्गत आरोप से दोषमुक्त किया गया – अपील मंजूर।

B. Penal Code (45 of 1860), Section 309 – Medical Evidence – Appreciation of Evidence – **Held – Although one incised wound found**

on neck of appellant but there is no evidence on record that appellant tried to commit suicide by causing injury to himself by cutting his neck – Appellant acquitted of charge u/S 309 IPC. (Para 30)

ख. दण्ड संहिता (1860 का 45), धारा 309 – चिकित्सीय साक्ष्य – साक्ष्य का मूल्यांकन – अभिनिर्धारित – यद्यपि अपीलार्थी की गर्दन पर एक कटा घाव पाया गया परंतु अभिलेख पर ऐसा कोई साक्ष्य नहीं है कि अपीलार्थी ने अपनी गर्दन काटकर स्वयं को चोट कारित करते हुए आत्महत्या करने का प्रयत्न किया – अपीलार्थी को भारतीय दण्ड संहिता की धारा 309 के अंतर्गत आरोप से दोषमुक्त किया गया।

C. Evidence Act (1 of 1872), Section 145 and Criminal Procedure Code, 1973 (2 of 1974), Section 154 & 161 **– Held – Fact of insanity not mentioned in FIR and case diary statements but witnesses were not confronted with their previous statements u/S 145 of the Act of 1872 and even they were not declared hostile on the question of insanity – Ground taken by prosecution cannot be considered. (Para 43)**

ग. साक्ष्य अधिनियम (1872 का 1), धारा 145 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 व 161 – अभिनिर्धारित – उन्मतता के तथ्य का प्रथम सूचना प्रतिवेदन तथा केस डायरी कथनों में उल्लेख नहीं किया गया परंतु अधिनियम 1872 की धारा 145 के अंतर्गत साक्षीगण का उनके पूर्वतर कथनों से सामना नहीं कराया गया और उन्हें उन्मतता के प्रश्न पर पक्षद्रोही घोषित भी नहीं किया गया – अभियोजन द्वारा लिया गया आधार विचार में नहीं लिया जा सकता।

D. Criminal Practice – Medical Insanity & Legal Insanity **– Held – To prove insanity or unsoundness of mind of accused, his previous as well as post mental status may be considered – Every insanity is not legal insanity – Person may be suffering from medical insanity but it may not be sufficient to treat the same as legal insanity. (Para 40)**

घ. दाण्डिक पद्धति – चिकित्सीय उन्मतता व विधिक उन्मतता – अभिनिर्धारित – अभियुक्त की उन्मतता या चित्त विकृति को साबित करने के लिए, उसकी पूर्ववर्ती और साथ ही उत्तरवर्ती मानसिक स्थिति को विचार में लिया जा सकता है – प्रत्येक उन्मतता विधिक उन्मतता नहीं है – व्यक्ति चिकित्सीय उन्मतता से ग्रसित हो सकता है परंतु यह पर्याप्त नहीं हो सकता कि उक्त को विधिक उन्मतता के रूप में माना जाए।

Cases referred:

(2002) 1 SCC 219, (2007) 8 SCC 66, (2010) 10 SCC 582, (2011) 11 SCC 495, (2003) 12 SCC 587, AIR 1964 SC 1563, (1987) 3 SCC 480.

Sudha Shrivastava, from Legal Aid Cell for the appellant.
Prakhar Dhengula, P.P. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by :
G.S. Ahluwalia, J. :- This Criminal Appeal under Section 374 of Cr.P.C. has been filed against the judgment and sentence dated 17-6-2002 passed by Special Judge and Additional Sessions Judge, Guna in Sessions Trial No.149/1991, by which the appellant has been convicted under Section 302 (on two counts), Sections 307 and 309 of I.P.C. and has been sentenced to undergo Life Imprisonment and a fine of Rs.500/- with default imprisonment for offence under Section 302 of I.P.C.(on two counts for killing Ms. Rekhabai and Rajesh), under Section 307 of I.P.C. for rigorous imprisonment of 10 years and fine of Rs.500/- with default imprisonment and for offence under Section 309 of I.P.C. for simple imprisonment of 6 months. All the sentences have been directed to run concurrently.

2. The necessary facts for the disposal of the present appeal in short are that on 7-4-1991, at about 10:45 A.M., an F.I.R. was lodged by Gendalal (P.W.1), alleging therein that at about 6 A.M., he was sleeping in his house along with his wife. He heard the screaming and, therefore, he and his wife came out of the house and found that the appellant was assaulting his wife Munnibai. When he and his wife Smt. Sumitra Bai, tried to save the injured Munnibai, then the appellant ran after them. It was alleged that the appellant Pratap had killed his own children Ms. Rekhabai and his son Rajesh by farsa and has thereafter ran away from the spot. On the basis of the oral information given by Gendalal (P.W.1), the police registered the F.I.R. The dead bodies of Ms. Rekhabai and Rajesh, were sent for postmortem. Spot map, Ex.P.5 was prepared. Plain and blood stained earth was seized from the spot vide seizure memo Ex. P.6, P.7 and P.8. The injured Munnibai was sent for treatment. The appellant Pratap was arrested vide arrest memo Ex.P.23. The confessional statement, Ex. P.24 was recorded. At the instance of appellant, one farsa and one blood stained shirt was seized from the possession of the appellant vide seizure memo Ex.P.13. After completing the investigation, the police filed the charge sheet against the appellant for offence under Sections 302,307 and 309 of I.P.C.

3. The Trial Court by order dated 17-5-1991, framed charges under

Sections 302 (on two counts), 307 and 309 of I.P.C. The appellant abjured his guilt and pleaded not guilty.

4. The prosecution in order to prove its case, examined Gendalal (P.W.1), Munnibai (P.W.2), Pemaram (P.W.3), Mishrilal (P.W.4), Kasiya (P.W.5), Sumitra Bai (P.W.6), Ramkobai (P.W.7), Bablu (P.W.8), Dr. Chakradhari Varma (P.W.9), Gappalal (P.W.10), Sukua (P.W.11), Radheshyam (P.W.12), Shishupal Singh (P.W.13), Dr. Rajendra Kumar Jain (P.W. 14), Lacchiram (P.W.15), Balkrishan Arya (P.W.16) and Sunil Bhaskar Joshi (P.W.17). The appellant did not examine any witness in his defence.

5. During arguments, a defence was taken by the Appellant that he is of unsound mind and the incident had taken place on account of insanity and therefore, he may be acquitted.

6. The Trial Court after considering the evidence on record as well as the defence of the appellant under Section 84 of I.P.C., convicted the appellant for offence under Section 302 (on two counts), Sections 307 and 309 of I.P.C.

7. Challenging the judgment and sentence passed by the Trial Court, it is submitted by the Counsel for the appellant that in fact the appellant was of unsound mind and the offence was committed on account of insanity. He not only killed his two minor children Ms. Rekhabai and Master Rajesh but also attempted to kill his wife Smt. Munnibai. It is further submitted that by causing injury on his neck, it is alleged that the appellant also tried to commit suicide. During the pendency of the Trial, the appellant was got examined by Doctor who had specifically opined that the appellant is not able to understand the things and he is not capable of entering defence and accordingly, not only the appellant was sent to mental asylum for treatment but the Trial Court had also stayed the further proceedings under Section 329 of Cr.P.C.

8. *Per contra*, it is submitted by the Counsel for the State that there is nothing on record to suggest that the appellant was insane at the time of incident. Merely because he was treated for insanity at subsequent point of time, and the proceedings were kept in abeyance by the Trial Court, would not mean that the appellant was insane even at the time of incident, as no document has been filed by the appellant to show that prior to incident, he was ever treated for insanity. It is further submitted that all the eye witnesses, including Munnibai

(P.W.2) who was injured have specifically stated that the appellant had caused injuries to the deceased Ms. Rekhabai and Rajesh and had also caused injuries to Munnibai. It is further submitted that subsequently, the appellant also tried to commit suicide by making an attempt to cut his neck.

9. Heard the learned Counsel for the parties.

10. The first question for determination is that whether the deceased Ms. Rekhabai and Rajesh died a homicidal death and whether the injured Munnibai (P.W.2) sustained any injury or not?

11. Dr. Rajendra Kumar Jain (P.W.14) had conducted the postmortem of dead body of deceased Ms. Rekhabai, aged about 4 years and found the following injuries :

> "(i) Incised wound 7 cm x 5 cm x bone deep on left side of neck.
>
> (ii) Incised wound 4cm x 2cm x 2cm on neck.
>
> (iii) Multiple abrasions on face of various size and shape."

Cause of death of Haemorrhage shock due to injury on neck. The postmortem report of the deceased Ms. Rekhabai is Ex. P.20.

12. Dr. Rajendra Kumar Jain (P.W.14) had also conducted postmortem of dead body of deceased Rajesh, aged about 2 years and had found the following injuries :

> "(i)Incised wound on upper part and right side of neck.
>
> (ii)Incised wound 3cm x 2cm x 2 cm on left shoulder."

Cause of death was Haemorrhage because of shock due to injury on neck. The postmortem report of the deceased Rajesh is Ex. P.21.

13. Dr.Rajendra Kumar Jain (P.W.14) had also medically examined the injured Munnibai and had found the following injuries on her body :

> "(i) One incised wound on back of right lower chest 2"x ½ "x ¼ ."
>
> (ii) One incised would (sic:wound) on back of left lower chest 2"x ½ "x ¼ ."

(iii) Incised would (sic:wound)on right should 2"x2"x bone-deep.

(iv) Incised wound at back of right upper chest 2"x ½ "x bone deep.

(v) Multiple linear abrasions of various size and shape on back of right upper chest.

(vi) Crush injury on right ring finger.

(vii) Incised wound on left index finger.

(viii) Incised wound at middle of phalanx of left middle finger.

(ix) Abrasion on right frontal region size 2"x ½ ".

The M.L.C. report of injured Munnibai (P.W.2) is Ex. P/15. In x-ray report, fracture of middle phalanx left middle finger, fracture of Achromian of scapular right side was found and Partial distal phalanx left ring finger was found missing. The x-ray report of injured Munnibai (P.W.2) is Ex.P.19.

14. The appellant has not challenged the injuries sustained by injured Munnibai (P.W.2) as well as the injuries sustained by the deceased Ms. Rekhabai and Rajesh and cause of their death, therefore, it is held that the deceased Ms. Rekhabai and Rajesh had met with a homicidal death whereas injured Munnibai (P.W.2) had sustained multiple incised wounds on vital parts of her body.

15. The next question for determination is that whether the appellant had suffered any injury on his body or not?

16. Dr. Chakradhari Sharma (P.W.9) has stated that on 7-4-1991, he was posted in District Hospital Guna and examined the appellant Pratap and had found the following injuries :-

"One incised wound 6cm x 6cm on middle of neck.

Trachea was found cut. "

The M.L.C. report of the appellant Pratap is Ex.P.10.

17. Thus, it is clear that appellant Pratap had also sustained incised wound

on his neck and on internal examination, trachea was also found cut.

18. The next question is that whether the appellant Pratap had attempted to commit suicide by causing self inflicting injury on his neck or not and whether he had caused murder of deceased Ms. Rekhabai and Rajesh and had attempted to murder his wife Munnibai (P.W.2) ?

19. The prosecution has examined Gendalal (P.W.1), Munnibai (P.W.2),Kasia (P.W.5), Sumitrabai (P.W.6) as eye witnesses. Gendalal (P.W.1) had lodged the F.I.R. This witness has stated that on 7-4-1991 at about 6 A.M. he had seen the appellant causing injuries to his wife Munnibai (P.W.2). He saw that the appellant was causing injuries by means of farsa. When this witness tried to save her, the appellant chased him. It is further submitted that the appellant had caused injuries to his minor children Ms. Rekhabai and Rajesh. He brought Munnibai (P.W.2) to his house and She was alive. She had sustained injuries on her back, shoulder, waist etc. He also brought the dead bodies of both the children. Thereafter he lodged the F.I.R. in the police station Myana, District Guna, which is Ex.P.1. In cross examination, this witness has stated that the place of incident is adjoining to his house. The house of the appellant and the witness are situated in the same premises however, both the brothers i.e., the appellant and this witness reside separately. He has further stated that he has no information that the appellant had also tried to commit suicide. However, it was specifically stated by this witness, that the appellant was of unsound mind and therefore, he was not knowing as to what he was doing. This witness was not declared hostile by the prosecution on the question of unsound mind of the appellant.

20. Munnibai (P.W.2) has also stated that She and her children were assaulted by the appellant. However, She has specifically stated in her examination in chief, that about 2 years prior to the date of incident, the appellant became patient of unsoundness of mind and under the insanity, he had committed the offence. It was further stated that prior to the incident also, he was treated at Guna and Gwalior but his mental condition did not improve. This witness was not declared hostile by the prosecution. In cross -examination, this witness has further stated that the appellant had committed offence because of unsoundness of his mind.

21. Kasia (P.W.5) has also supported the prosecution case, but this witness also stated that the appellant was of unsound mind and under the insanity, he

had committed the offence. This witness was declared hostile as he had not supported the prosecution case in its entirety. However, in cross examination by the public prosecutor, this witness has stated with authority that the appellant was of unsound mind and he was also not cultivating the land because of insanity. In cross-examination by the counsel for the appellant, this witness further stated that the appellant was being treated for the last 2-3 years for mental instability.

22. Sumitra Bai (P.W.6) has also supported the prosecution story, but She has also stated that the appellant was of unsound mind and he was insane for the last 2 years prior to the date of incident. This witness was declared hostile and was cross examined by the Public Prosecutor. In cross examination, this witness has again stated that even at the time of incident, the appellant was of unsound mind and in spite of regular treatment his mental condition did not improve.

23. Pemaram (P.W.3), Mishrilal (P.W.4), Ramko bai (P.W.7) have stated that the appellant was insane.

24. Bablu (P.W.8) is a child witness and is a hearsay witness.

25. Gappalal (P.W.10) and Sukua (P.W.11) were the witnesses of oral dying declaration and have not supported the prosecution case and were declared hostile.

26. Radheshyam (P.W.12) has stated that the appellant was admitted in District Hospital, Guna. He was discharged from the Hospital on 16-4-1991.The appellant was already under arrest. The appellant made a confessional statement and at his instance, one farsa and blood stained shirt was seized from the possession of the appellant. The farsa was taken out by the appellant from a place near *Nala*. Both the articles were seized by seizure memo Ex.P.13. In cross examination, this witness has stated that the confessional statement of the appellant was already recorded by the investigating officer on 9-4-1991. This witness denied the suggestion that the appellant was insane for about 2-3 years prior to the date of incident.

27. Lachhiram (P.W.15) had prepared the spot map Ex. P.22.

28. Balkrishna Arya (P.W.16) is the investigating officer who had conducted the investigation.

29. From the appreciation of the evidence of Gendalal (P.W.1), Munnibai (P.W.2), Kasia (P.W.5), Sumitra Bai (P.W.6), it is proved that the appellant had caused fatal injuries to his minor children Ms. Rekhabai and Rajesh and had also caused injuries to injured Munnibai (P.W.2). Munnibai (P.W.2) is the wife of the appellant and mother of the deceased children. The F.I.R. was lodged promptly. There is no reason to disbelieve the ocular evidence of injured witness Munnibai (P.W.2). Even during arguments, the Counsel for the appellant has not challenged the findings of guilt arrived at by the Trial Court. Accordingly, it is held that the appellant had killed his two minor children, namely Ms. Rekhabai and Rajesh and had caused such injuries to injured Munnibai (P.W.2) which were sufficient in the ordinary course of its life to cause death.

30. So far as the charge under Section 309 of I.P.C. is concerned, there is no evidence on record that the appellant tried to commit suicide by causing injury to himself by cutting his neck. The appellant was admitted by Police Station Kotwali, Distt. Guna in District Hospital Guna, however, the prosecution, for the reasons best known to it has not examined any witness to show that under what circumstances, he was found by the Police Station Kotwali, District Guna. Although the Doctor Chakradhari Sharma (P.W.9) had found one incised wound on his neck, but in absence of any specific proof that the appellant had himself caused the said injury with an intention to commit suicide, the conviction of the appellant under Section 309 of I.P.C. is set aside and he is acquitted of the charge under Section 309 of I.P.C.

31. It was next contended by the Counsel for the appellant, that the appellant had committed the offence on account of unsoundness of mind and therefore, he is entitled for the benefit of Section 84 of I.P.C.

32. In support of her contention, the Counsel for the appellant relied upon the order-sheets of the Trial Court as well as on the evidence of Dr. Sunil Bhasker Joshi (P.W.17), who has stated that on 7-8-1991, the appellant was admitted in the mental ward of Central Jail, Gwalior and this witness had medically examined him. He had found that he was not capable of entering defence and his observation report is Ex.C.1. He had treated the appellant during his detention in the jail, but no improvement was found. He had treated the appellant for a year and had given electric shocks but in spite of that his mental condition did not improve. In cross-examination, this witness has admitted that he is not in a position to state that since long the appellant was

insane. This witness has also stated that it is possible that the appellant might be suffering from insanity for a long time.

33. From the order sheet dated 29-7-1991 of the Trial Court, it appears that the Superintendent, Sub-Jail wrote a letter to the Trial Court requesting to send the appellant to Mental Hospital, Gwalior for treatment. The said application was allowed and it was directed by the Trial Court to send the appellant to Mental Hospital, Gwalior for treatment. Thereafter as the appellant was not produced before the Trial Court, therefore, the evidence of some of the witnesses could not be recorded. On 25-10-1991, a reply was received from the Superintendent Central Jail, Gwalior that due to non-availability of the guard, he could not be produced and accordingly, the Reserved Inspector was directed to make the Guard available. Ultimately, the appellant was produced in custody on 16-3-1992 and Balkrishna (P.W.16) was examined and the case was adjourned to 30-3-1992 for cross-examination of Radheshyam Sharma. On 30-3-1992, Radheshyam (P.W.12) was cross-examined but a request was made by the counsel for the appellant, that the appellant is insane and is not in a position to give his defence, therefore, his statement under Section 313 of Cr.P.C. may not be recorded. In the light of the statement made by the Counsel for the appellant, the Trial Court thought it proper to get the appellant medically examined from a psychiatrist and it was directed that after receiving the report from psychiatrist, his statement under Section 313 of Cr.P.C. would be recorded. On 9-5-1992, the report of psychiatrist was received but since, the appellant was not produced therefore, the case was adjourned. An application under Section 439 of Cr.P.C. was filed for grant of bail which was rejected by order dated 22-5-1992. Thereafter, on 2-6-1992,the appellant was produced in custody, however, an observation report was sent by Central Jail Gwalior that the appellant is not capable of entering defence, therefore, the Trial Court directed the jail authorities to send the appellant to Mental Hospital, Gwalior. It appears that the appellant was released on bail, however, on 2-11-1992, the sureties filed an application that they are not in a position to control the appellant, therefore, the appellant may be taken back in custody. Accordingly, the appellant was once again taken in custody and was sent to jail. On 2-11-1992, Dr. Sunil Bhasker Joshi (PW-17) was examined on the question of insanity of appellant. Thereafter on 6-11-1992, the jail authorities were once directed to send the appellant to Mental Hospital Gwalior for treatment. On 8-1-1993, a report

was received that the appellant is not capable of entering defence. Thereafter on certain dates, observation reports were submitted to the effect that the appellant is not capable of entering defence and ultimately, the Counsel for the appellant filed an application under Section 328,329 of Cr.P.C. for staying the proceedings. After considering the various reports of the appellant, the Trial Court by order dated 8-6-1994 stayed the further proceedings under Section 329 of Cr.P.C.

34. The case was adjourned from time to time awaiting the improvement of mental condition of the appellant and ultimately, a report was received from the Mental Hospital, Gwalior on 24-7-2001, that the appellant can be discharged as his mental condition has improved. However, as it was not mentioned that whether the appellant is capable of entering defence or not, therefore, further report was called. On 16-8-2001, again it was mentioned by the Mental Hospital Gwalior, that the appellant is not capable of entering defence. On 18-9-2001, the appellant was produced before the Trial Court and it was observed by the Trial Court, that the appellant does not appear to be mentally sound and therefore, report was called that whether the appellant is capable of entering defence or not? Ultimately by order dated 9-3-2002, the trial resumed and the case was fixed for recording of accused evidence. Thus, it is clear that the last prosecution witness was examined on 30-3-1992 but thereafter the trial could not proceed because of mental condition of the appellant and ultimately, the Trial Court by order dated 8-6-1994 stayed the further proceedings under Section 329 of Cr.P.C. which remained stayed till 9-3-2002. During this period, various reports were received with regard to the insanity of the appellant and the appellant remained admitted in Hospital or Mental Ward of jail. Thus, it is clear that the appellant was found incapable of entering defence and therefore, the Trial was kept stayed for 10 long years i.e., from 1992 till 8-6-1994, the case was adjourned and on 8-6-1994 the Trial was stayed. Now, one fact is clear from record that immediately after the incident, the appellant was found to be of unsound mind and his insanity was to such an extent, that the Trial Court could not record his statement under Section 313 of Cr.P.C. and the proceedings before the Trial Court were kept in abeyance for 10 long years. Now, the sole question for determination is that whether the appellant is entitled for the benefit of Section 84 of Indian Penal Code or not?

35. Section 84 of Indian Penal Code reads as under :-

"**84. Act of a person of unsound mind.**—Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

36. The Supreme Court in the case of *T.N. Lakshmaiah Vs.State of Karnataka,* reported in (2002) 1 SCC 219 has held as under :-

"7. Section 84 of the Indian Penal Code provides that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that what he is doing is either wrong or contrary to law. The section forms part of Chapter IV dealing with general exceptions. The importance of the Chapter was highlighted by Lord Macaulay before the House of Commons at the time of introduction of the Bill as under:-

"This Chapter has been framed in order to obviate the necessity of repeating in every penal clause a considerable number of limitations. Some limitations relate only to a single provision, or to a very small class of provisions.... Every such exception evidently ought to be appended to the rule which it is intended to modify. But there are other exceptions which are common to all the penal clauses of the Code, or to a greater variety of clauses dispersed over many chapters. It would obviously be inconvenient to repeat these exceptions several times in every page. We, have, therefore, placed them in a separate chapter and, we have provided that every definition of an offence, every penal provision, and every illustration of a definition or penal provision, shall be construed subject to the provisions contained in that chapter."

8. The principle embodied in the Chapter is based upon the maxim *actus non facit reum, nisi mens sit rea* i.e. an act is not criminal unless there is criminal intent.

9. Under the Evidence Act, the onus of proving any of the exceptions mentioned in the Chapter lies on the accused though

the requisite standard of proof is not the same as expected from the prosecution. It is sufficient if an accused is able to bring his case within the ambit of any of the general exceptions by the standard of preponderance of probabilities, as a result of which he may succeed not because that he proves his case to the hilt but because the version given by him casts a doubt on the prosecution case.

10. In *State of M.P. v. Ahmadulla AIR 1961 SC 998* this Court held that the burden of proof that the mental condition of the accused was, at the crucial point of time, such as is described by the section, lies on the accused who claims the benefit of this exemption vide Section 105 of the Evidence Act [Illustration *(a)*]. The settled position of law is that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. Mere ipse dixit of the accused is not enough for availing of the benefit of the exceptions under Chapter IV.

11. In a case where the exception under Section 84 of the Indian Penal Code is claimed, the court has to consider whether, at the time of commission of the offence, the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. The entire conduct of the accused, from the time of the commission of the offence up to the time the sessions proceedings commenced, is relevant for the purpose of ascertaining as to whether plea raised was genuine, bona fide or an afterthought. Dealing with the plea of insanity, the scope of Section 84 IPC, the attending circumstances and the burden of proof, this Court in *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat AIR 1964 SC 1563* held: (AIR pp. 1566-67, para 5)

> "It is fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The

prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in Section 299 of the Indian Penal Code. This general burden never shifts and it always rests on the prosecution. But, Section 84 of the Indian Penal Code provides that nothing is an offence if the accused at the time of doing that act, by reason of unsoundness of mind was incapable of knowing the nature of his act or what he was doing was either wrong or contrary to law. This being an exception, under Section 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within the said exception lies on the accused, and the court shall presume the absence of such circumstances. Under Section 105 of the Evidence Act, read with the definition of 'shall presume' in Section 4 thereof, the court shall regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that the said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. To put it in other words, the accused will have to rebut the presumption that such circumstances did not exist, by placing material before the court sufficient to make it consider the existence of the said circumstances so probable that a prudent man would act upon them. The accused has to satisfy the standard of a 'prudent man'. If the material placed before the court, such as oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfies the test of 'prudent man' the accused will have discharged his burden. The evidence so placed may not be sufficient to discharge the burden under Section 105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a Judge as regards one or other

of the necessary ingredients of the offence itself. It may, for instance, raise a reasonable doubt in the mind of the Judge whether the accused had the requisite intention laid down in Section 299 of the Indian Penal Code. If the Judge has such reasonable doubt, he has to acquit the accused, for in that event the prosecution will have failed to prove conclusively the guilt of the accused. There is no conflict between the general burden, which is always on the prosecution and which never shifts, and the special burden that rests on the accused to make out his defence of insanity."

12. After referring to various textbooks and the earlier pronouncements of this Court, it was further held: (AIR p. 1568, para 7)

"7. The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions: *(1)* The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. *(2)* There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code: the accused may rebut it by placing before the court all the relevant evidence — oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. *(3)* Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the

prosecution was not discharged."

13. To the same effect is the judgment in *Bhikari v. State of U.P. AIR 1966 SC 1.*"'

37. The Supreme Court in the case of *Bapu alias Gujraj Singh Vs. State of Rajasthan,* reported in (2007) 8 SCC 66 has held as under:-

"7.Section 84 lays down the legal test of responsibility in cases of alleged unsoundness of mind. There is no definition of "unsoundness of mind" in IPC. The courts have, however, mainly treated this expression as equivalent to insanity. But the term "insanity" itself has no precise definition. It is a term used to describe varying degrees of mental disorder. So, every person, who is mentally diseased, is not ipso facto exempted from criminal responsibility. A distinction is to be made between legal insanity and medical insanity. A court is concerned with legal insanity, and not with medical insanity. The burden of proof rests on an accused to prove his insanity, which arises by virtue of Section 105 of the Evidence Act, 1872 (in short "the Evidence Act") and is not so onerous as that upon the prosecution to prove that the accused committed the act with which he is charged. The burden on the accused is no higher than that resting upon a plaintiff or a defendant in a civil proceeding. (See *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat AIR 1964 SC 1563*). In dealing with cases involving a defence of insanity, distinction must be made between cases, in which insanity is more or less proved and the question is only as to the degree of irresponsibility, and cases, in which insanity is sought to be proved in respect of a person, who for all intents and purposes, appears sane. In all cases, where previous insanity is proved or admitted, certain considerations have to be borne in mind. Mayne summarises them as follows:

"Whether there was deliberation and preparation for the act; whether it was done in a manner which showed a desire to concealment; whether after the crime, the offender showed consciousness of guilt and made efforts

> to avoid detections, whether after his arrest, he offered false excuses and made false statements. All facts of this sort are material as bearing on the test, which Bramwall, submitted to a jury in such a case: 'Would the prisoner have committed the act if there had been a policeman at his elbow?' It is to be remembered that these tests are good for cases in which previous insanity is more or less established."

These tests are not always reliable where there is, what Mayne calls, "inferential insanity".

8. Under Section 84 IPC, a person is exonerated from liability for doing an act on the ground of unsoundness of mind if he, at the time of doing the act, is either incapable of knowing *(a)* the nature of the act, or *(b)* that he is doing what is either wrong or contrary to law. The accused is protected not only when, on account of insanity, he was incapable of knowing the nature of the act, but also when he did not know either that the act was wrong or that it was contrary to law, although he might know the nature of the act itself. He is, however, not protected if he knew that what he was doing was wrong, even if he did not know that it was contrary to law, and also if he knew that what he was doing was contrary to law even though he did not know that it was wrong. The onus of proving unsoundness of mind is on the accused. But where during the investigation previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the court and if this is not done, it creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused. The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors. Every person is presumed to know the natural consequences of his act. Similarly every person is also presumed to know the law. The prosecution has not to establish these facts.

9. There are four kinds of persons who may be said to be *non compos mentis* (not of sound mind) i.e. *(1)* an idiot; *(2)* one made *non compos* by illness; *(3)* a lunatic or a mad man; and *(4)* one who is drunk. An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals; and those are said to be idiots who cannot count twenty, or tell the days of the week, or who do not know their fathers or mothers, or the like, (see *Archbold's Criminal Pleadings, Evidence and Practice,* 35th Edn., pp. 31-32; *Russell on Crimes and Misdemeanors,* 12th Edn., Vol.1, p. 105; 1 *Hale's Pleas of the Crown* 34). A person made non compos mentis by illness is excused in criminal cases from such acts as are committed while under the influence of this disorder, (see 1 Hale PC 30). A lunatic is one who is afflicted by mental disorder only at certain periods and vicissitudes, having intervals of reason, (see Russell, 12th Edn., Vol. 1, p. 103; Hale PC 31). Madness is permanent. Lunacy and madness are spoken of as acquired insanity, and idiocy as natural insanity.

10. Section 84 embodies the fundamental maxim of criminal law i.e. *actus non reum facit nisi mens sit rea* (an act does not constitute guilt unless done with a guilty intention). In order to constitute an offence, the intent and act must concur; but in the case of insane persons, no culpability is fastened on them as they have no free will (*furios is nulla voluntas est).*

**** * *******.

13. The standard to be applied is whether according to the ordinary standard, adopted by reasonable men, the act was right or wrong. The mere fact that an accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts in the past, or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but

there was nothing abnormal in his behaviour, or that his behaviour was queer, cannot be sufficient to attract the application of this section."

38. The Supreme Court in the case of *Sudhakaran Vs. State of Kerala,* reported in (2010) 10 SCC 582 has held as under :-

"**33.** This Court has on several occasions examined the standard of proof that is required to be discharged by the appellant to get the benefit of Section 84 IPC. We may make a reference here to the observation made in *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat*4. The relevant aspects of the law and the material provisions relating to the plea of insanity were noticed and considered as follows: (AIR pp. 1566-67, para 5)

"5. ... Penal Code

'299. *Culpable homicide.*—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.'

'84. *Act of a person of unsound mind.*—Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.'

Evidence Act

'105. *Burden of proving that case of accused comes within exceptions.*—When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code (45 of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of

such circumstances.'

'4. ... *"Shall presume"*.—Whenever it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.'

'3. ... *"Proved"*.—A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Disproved".—A fact is said to be disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.'

'101. *Burden of proof*.—Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said 'that the burden of proof lies on that person.'

It is a fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in Section 299 of the Penal Code. This general burden never shifts and it always rests on the prosecution. But, Section 84 of the Penal Code provides that nothing is an offence if the accused at the time of doing that act, by reason of unsoundness of mind was incapable of knowing the nature of his act or what he was doing was either wrong or contrary to law. This being

an exception, under Section 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within the said exception lies on the accused, and the court shall presume the absence of such circumstances. Under Section 105 of the Evidence Act, read with the definition of 'shall presume' in Section 4 thereof, the court shall regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that the said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. To put it in other words, the accused will have to rebut the presumption that such circumstances did not exist, by placing material before the court sufficient to make it consider the existence of the said circumstances so probable that a prudent man would act upon them. The accused has to satisfy the standard of a 'prudent man'. If the material placed before the court, such as, oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfies the test of 'prudent man' the accused will have discharged his burden. The evidence so placed may not be sufficient to discharge the burden under Section 105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a Judge as regards one or other of the necessary ingredients of the offence itself. It may, for instance, raise a reasonable doubt in the mind of the Judge whether the accused had the requisite intention laid down in Section 299 of the Penal Code. If the Judge has such reasonable doubt, he has to acquit the accused, for in that event the prosecution will have failed to prove conclusively the guilt of the accused. There is no conflict between the general burden, which is always on the prosecution and which never shifts, and the special burden that rests on the accused to make out his defence of insanity."

34. Thereafter, upon further consideration, this Court defined

the doctrine of burden of proof in the context of the plea of insanity in the following propositions: (*Dahyabhai Chhaganbhai Thakkar case* AIR 1964 SC 1563 p. 1568, para 7)

> "*(1)* The prosecution must prove beyond reasonable doubt that the [appellant] had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial.
>
> *(2)* There is a rebuttable presumption that the [appellant] was not insane, when he committed the crime, in the sense laid down by Section 84 of the Penal Code: the [appellant] may rebut it by placing before the court all the relevant evidence — oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings.
>
> *(3)* Even if the [appellant] was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the [appellant] or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the [appellant] and in that case the court would be entitled to acquit the [appellant] on the ground that the general burden of proof resting on the prosecution was not discharged."

35. It is also a settled proposition of law that the crucial point of time for ascertaining the existence of circumstances bringing the case within the purview of Section 84 is the time when the offence is committed. We may notice here the observations made by this Court in *Ratan Lal v. State of M.P. (1970) 3 SCC 533 : 1971 SCC (Cri)) 139* . In para 2 of the aforesaid judgment, it is held as follows: (SCC p. 533)

> "It is now well settled that the crucial point of time at which unsoundness of mind should be established is the time when

the crime is actually committed and the burden of proving this lies on the [appellant]."

39. The Supreme Court in the case of *Surendra Mishra Vs. State of Jharkhand* reported in (2011) 11 SCC 495 has held as under :-

"**11.** In our opinion, an accused who seeks exoneration from liability of an act under Section 84 of the Penal Code is to prove legal insanity and not medical insanity. Expression "unsoundness of mind" has not been defined in the Penal Code and it has mainly been treated as equivalent to insanity. But the term "insanity" carries different meaning in different contexts and describes varying degrees of mental disorder. Every person who is suffering from mental disease is not ipso facto exempted from criminal liability. The mere fact that the accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behaviour or the behaviour is queer, are not sufficient to attract the application of Section 84 of the Penal Code.

12. The next question which needs consideration is as to on whom the onus lies to prove unsoundness of mind.

13. In law, the presumption is that every person is sane to the extent that he knows the natural consequences of his act. The burden of proof in the face of Section 105 of the Evidence Act is on the accused. Though the burden is on the accused but he is not required to prove the same beyond all reasonable doubt, but merely satisfy the preponderance of probabilities. The onus has to be discharged by producing evidence as to the conduct of the accused prior to the offence, his conduct at the time or immediately after the offence with reference to his medical condition by production of medical evidence and other relevant factors. Even if the accused establishes unsoundness of mind, Section 84 of the Penal Code will not come to its rescue, in case it is found that the accused knew that what he was doing

was wrong or that it was contrary to law. In order to ascertain that, it is imperative to take into consideration the circumstances and the behaviour preceding, attending and following the crime. Behaviour of an accused pertaining to a desire for concealment of the weapon of offence and conduct to avoid detection of crime go a long way to ascertain as to whether, he knew the consequences of the act done by him.

14. Reference in this connection can be made to a decision of this Court in *T.N. Lakshmaiah v. State of Karnataka (2002) 1 SCC 219*, in which it has been held as follows: (SCC p. 224, paras 9-11)

> "*9.* Under the Evidence Act, the onus of proving any of the exceptions mentioned in the Chapter lies on the accused though the requisite standard of proof is not the same as expected from the prosecution. It is sufficient if an accused is able to bring his case within the ambit of any of the general exceptions by the standard of preponderance of probabilities, as a result of which he may succeed not because that he proves his case to the hilt but because the version given by him casts a doubt on the prosecution case.
>
> *10.* In *State of M.P. v. Ahmadulla AIR 1961 SC 998* this Court held that the burden of proof that the mental condition of the accused was, at the crucial point of time, such as is described by the section, lies on the accused who claims the benefit of this exemption vide Section 105 of the Evidence Act [Illustration *(a)*]. The settled position of law is that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. Mere ipse dixit of the accused is not enough for availing of the benefit of the exceptions under Chapter IV.
>
> 11. In a case where the exception under Section 84 of the Indian Penal Code is claimed, the court has to consider whether, at the time of commission of the offence, the accused, by reason of unsoundness of mind, was incapable

> of knowing the nature of the act or that he is doing what is either wrong or contrary to law. The entire conduct of the accused, from the time of the commission of the offence up to the time the sessions proceedings commenced, is relevant for the purpose of ascertaining as to whether plea raised was genuine, bona fide or an afterthought."

40. Thus, it is clear that the burden to prove that the offence was committed on account of insanity is on the accused/appellant. The Crucial point of ascertaining existence of insanity is the time when the offence is committed. Absence of motive to commit offence cannot be a ground to prove insanity. To prove the insanity or unsoundness of the mind of the accused, his previous as well as post mental status may be considered. Further every insanity is not legal insanity and there may be a case, where a person may be suffering from Medical insanity but it may not be sufficient to treat the same as legal insanity so as to give benefit of Section 84 of I.P.C.

41. If the facts of the case are considered, then it would be clear that the witnesses namely Gendalal (P.W.1), Munnibai (P.W.2) Kasia (P.W.5), Sumitrabai (P.W.6) Ramkobai (P.W.7) have specifically stated that the applicant was suffering from mental disorder for near about 2 years prior to the date of incident, but surprisingly, the Public Prosecutor decided not to declare Gendalal (PW-1) and Munnibai (PW-2) hostile on this issue. The Trial Court in para 21 of the judgment has held that as these witnesses had not stated about the insanity of the appellant either in the F.I.R., or in their case diary statements, therefore, it appears that they are not telling the truth before the Court. Section 145 of Evidence Act requires, that the witness has to be confronted with his/her previous statement and in absence of which any omission in the previous statement cannot be taken into consideration.

42. The Supreme Court in the case of *Karan Singh Vs. State of M.P.* reported in (2003) 12 SCC 587 has held as under:-

> "5. When a previous statement is to be proved as an admission, the statement as such should be put to the witness and if the witness denies having given such a statement it does not amount to any admission and if it is proved that he had given such a statement the attention of the witness must be drawn to that statement. Section 145 of the Evidence Act is clear on this

aspect. The object is to give the witness a chance of explaining the discrepancy or inconsistency and to clear up the particular point of ambiguity or dispute. In the instant case, Ext. D-4 statement as such was not put to the witness nor was the witness given an opportunity to explain it. Therefore, Ext. D-4 statement, even if it is assumed to be a statement of PW 1 Hari Singh, that is of no assistance to the appellants to prove their case of private defence."

43. The Public Prosecutor relied upon the Judgment passed by the Supreme Court in the case of *Dahyabhai Chhaganbhai Thakkar Vs. State of Gujarat*, reported in AIR 1964 SC 1563, submitted that when the witnesses had not stated in their case diary statements with regard to the insanity of the appellant, then it should be presumed that the appellant was not insane either prior to incident or at the time of incident. The submission made by the Counsel for the State cannot be accepted for a single reason, that in the said case, the witnesses were confronted with their previous statements whereas in the present case, Gendalal (PW-1) and Munnibai (PW-2) were not declared hostile on the question of insanity of the appellant. The Supreme Court in the case of *Dahyabhai Chhaganbhai Thakkar* (Supra) has held as under :-

"**8.** Now we come to the merits of the case. Ordinarily this Court in exercise of its Jurisdiction under Art. 136 of the Constitution accepts the findings of fact arrived at by the High Court. But after having gone through the judgments of the learned Additional Sessions Judge and the High Court, we are satisfied that this is an exceptional case to depart from the said practice. The learned Additional Sessions Judge rejected the evidence of the prosecution witnesses on the ground that their version was a subsequent development designed to help the accused. The learned Judges of the High Court accepted their evidence for two different reasons. Raju, J., held that a court can permit a party calling a witness to put questions under S. 154 of the Evidence Act only in the examination-in-chief of the witness; for this conclusion, he has given the following two reasons: (1) the wording of Ss. 137 and 154 of the Evidence Act indicates it; and (2) if he is permitted to put questions in the nature of cross-examination at the stage of

re-examination by the party, the adverse party will have no chance of cross-examining the witness with reference to the answers given to the said questions. Neither of the two reasons, in our view, is tenable. Section 137 of the Evidence Act gives only the three stages, in the examination of a witness, namely examination-in-chief, cross-examination and re-examination. This is a routine sequence in the examination of a witness. This has no relevance to the question when a party calling a witness can be permitted to put to him questions under S. 154 of the Evidence Act: that is governed by the provisions of S. 154 of the said Act, which confers a discretionary power on the court to permit a person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Section 154 does not in terms, or by necessary implication confine the exercise of the power by the court before the examination-in-chief is concluded or to any particular stage of the examination of the witness. It is wide in scope and the discretion is entirely left to the court to exercise the power when the circumstances demand. To confine this power to the stage of examination-in-chief is to make it ineffective in practice. A clever, witness in his examination-in-chief faithfully conforms to what he stated earlier to the police or in the committing court, but in the cross-examination introduces statements in a subtle way contradicting in effect what he stated in the examination-in-chief. If his design is obvious, we do not see why the court cannot, during the course of his cross-examination, (sic-re-examination) permit the person calling him as witness to put questions to him which might be put in cross-examination by the adverse party. To confine the operation of S. 154 of the Evidence Act to a particular stage in the examination of a witness is to read words in the section which are not there. We cannot also agree with the High Court that if a party calling a witness is permitted to put such questions to the witness after he has been cross-examined by the adverse party, the adverse party will not have any opportunity to further cross-examine the witness on the answers elicited by putting such questions. In such an event the court certainly, in exercise

of its discretion, will permit the adverse party to cross-examine the witness on the answers elicited by such questions. The court, therefore, can permit a person, who calls a witness, to put questions to him which might be put in the cross-examination at any stage of the examination of the witness, provided it takes care to give an opportunity to the accused to cross-examine him on the answers elicited which do not find place in the examination-in-chief. In the present case what happened was that some of the witnesses faithfully repeated what they had stated before the police in the examination-in-chief, but in the cross-examination they came out with the story of insanity of the accused. The court, at the request of the Advocate for the prosecution, permitted him to cross-examine the said witnesses. It is not suggested that the Advocate appearing for the accused asked for a further opportunity to cross-examine the witnesses and was denied of it by the court. The procedure followed by the learned Judge does not conflict with the express provisions of S. 154 of the Evidence Act. Mehta. J., accepted the evidence of the witnesses on the ground that the earlier statements made by them, before the police did not contradict their evidence in the court, as the non-mention of the mental state of the accused in the earlier statements was only an omission. This reason given by the learned Judge is also not sound. This Court in Tahsildar Singh v. State of U. P. (1959) Supp (2) SCR 875 at p. 903 : (AIR 1959 SC 1012 at p. 1026) laid down the following text, for ascertaining under what circumstances an alleged omission can be relied upon to contradict the positive evidence in court:

"....(3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement; (4) such a fiction is permissible by construction only in the following three cases: (i) when a recital is necessarily implied from the recital or recitals found in the statement ..... : (ii) a negative aspect of a positive recital

in a statement ....., and (iii) when the statement before the police and that before the Court cannot stand together....."Broadly stated, the position in the present case is that the witnesses in their statements before the police attributed a clear intention to the accused to commit murder, but before the court they stated that the accused was insane and therefore, he committed the murder. In the circumstances it was necessarily implied in the previous statements of the witnesses before the police that the accused was not insane at the time he committed the murder. In this view the previous statements of the witnesses before the police can be used to contradict their version in the court. The judgment of the High Court, therefore, in relying upon some of the important prosecution witnesses was vitiated by the said errors of law. We would, therefore, proceed to consider the entire evidence for ourselves.

9. When a plea of legal insanity is set up, the court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of S. 84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed the crime."

44. Further, the Trial Court has disbelieved the defence of the appellant under Section 84 of I.P.C., on the ground that in his statement under Section 313 of Cr.P.C., he had not taken a specific stand that the offence was committed on account of insanity. This singular circumstance by itself is not sufficient to discard the defence of the appellant. Another reason for discarding the defence of the appellant is the recovery of blood stained farsa and shirt. As per F.S.L. report Ex.P.25, blood was found on farsa and shirt but there is no evidence on record that whether the blood was human blood and what was the blood group.

45. The Supreme Court in the case of *Kansa Behera Vs. State of Orissa,* reported in (1987) 3 SCC 480, has held as under:-

> "12. As regards the recovery of a shirt or a dhoti with bloodstains which according to the serologist's report were stained with human blood but there is no evidence in the report of the serologist about the group of the blood and therefore it could not positively be connected with the deceased. In the evidence of the Investigating Officer or in the report, it is not clearly mentioned as to what were the dimensions of the stains of blood. Few small bloodstains on the clothes of a person may even be of his own blood especially if it is a villager putting on these clothes and living in villages. The evidence about the blood group is only conclusive to connect the bloodstains with the deceased. That evidence is absent and in this view of the matter, in our opinion, even this is not a circumstance on the basis of which any inference could be drawn."

46. Therefore, in absence of any evidence to prove that human blood was found on the farsa as well as on the Shirt recovered from the possession of the appellant, it cannot be said that the prosecution has proved beyond reasonable doubt that the seized farsa is the weapon of offence and the appellant was wearing the same shirt at the time of incident. In the present case, one important aspect of the matter is that the appellant had also sustained incised wound therefore, his shirt was bound to be stained with blood. Thus, it was obligatory on the part of the prosecution to prove that the shirt and the farsa were stained with human blood and further what was the blood group? As already mentioned, as per the F.S.L. report Ex.P.25 only blood was found on these two articles. The report is not clear that whether the blood was human blood or not. Therefore, the recovery of blood stained farsa and Shirt cannot be considered to be an incriminating circumstance.

47. If the facts and circumstances of the case are considered in the light of the evidence of Gendalal (P.W.1), Munnibai (P.W.2) Kasia (P.W.5), Sumitrabai (P.W.6) Ramkobai (P.W.7), it is clear that these witnesses have specifically stated that the appellant was of unsound mind for the last near about 2 years prior to the incident and he had committed the offence on account of insanity and these witnesses were either not declared hostile on this issue or nothing could be elicited from their evidence which may indicate that the appellant

was not of unsound mind. Further, under the facts and circumstances of the case, non-filing of the medical documents showing the treatment of the appellant prior to incident doesnot appear to be fatal in the light of the subsequent mental condition of the appellant, as deposed by Dr. Sunil Bhaskar Joshi (P.W.17) as well as the fact that even the Trial had remained stayed for near about 10 long years under Section 329 of Cr.P.C. Thus, in the considered opinion of this Court, the appellant has succeeded in proving his defence that he had committed the offence on account of insanity and therefore, it is held that the appellant is entitled for the benefit of Section 84 of I.P.C. As nothing is an offence if it is committed, if by reason of unsoundness of mind, the accused was incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law, therefore, the appellant is acquitted of charges under Sections 302 (on two counts) and 307 of I.P.C. As already held that the prosecution has failed to prove that the appellant had tried to commit suicide by causing self-inflicted injury on his neck, therefore, he is also acquitted of charge under Section 309 of I.P.C.

48. The judgment and sentence dated 17-6-2002 passed by Additional Sessions Judge, Guna in S.T. No.149/1991 is hereby set aside.

49. The appellant is not on bail, therefore, he be released immediately, if not required in any other case.

50. The appeal succeeds and is hereby **allowed.**

Appeal allowed.

Per :Sheel Nagu, J.

1. I am in full agreement with the view taken and the foundational reasons assigned by my learned brother while acquitting the appellant.

2. However, I am compelled to write a few words to express by anguish arising from the disturbing fact of appellant having to suffer 26 (twenty six) long years of incarceration before being acquitted.

3. I in my usual nonchalance can very well turn a Nelson's eye towards this disturbing feature by terming it to be a systemic defect but my conscience impels me to do otherwise.

4. It is for the executive and as well the judiciary to take remedial steps

to prevent recurrence of such instances where rendering of judgment becomes a source for remorse rather than relief. Appellant Pratap was arrested in April, 1991. Pratap faced a long drawn prosecution, interspersed by repeated stay of trial which concluded in June 2002 by convicting him whereafter this appeal took 15 (fifteen) long years to culminate into this judgment upholding the defence of innocence.

5. I hope, trust and pray to God that we judges, the executive and legislative functionaries of the State and the Union get strength and inclination to come out from our comfort zones and become more sensitive towards the grievance of the persons like appellant Pratap by making the necessary changes on the legislative, executive and judicial front to prevent another Pratap to crop up and shake our conscience again.

I.L.R. [2017] M.P., 2533
ARBITRATION CASE

Before Mr. Justice Prakash Shrivastava

Arb.C. No. 14/2015 (Indore) decided on 1 August, 2017

INDIAN CONSTRUCTION CO.(GUJ.) LTD. ...Applicant
Vs.
INDORE MUNICIPAL CORPORATION & anr. ...Non-applicants

A. ***Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 2(1)(g) – Chapter 36 – Public Undertaking* – Any Government Company including a Corporation & Statutory authority satisfying the conditions of definition is a public undertaking – Municipal Corporation is substantially controlled by the State Government therefore it is a public undertaking – No separate notification for public undertaking required. (Para 15 & 16)**

क. *माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 2(1)(जी) – अध्याय 36 – लोक उपक्रम* – कोई सरकारी कम्पनी जिसमें निगम एवं कानूनी प्राधिकरण शामिल हैं, जो कि परिभाषा की शर्तों को संतुष्ट करता है, एक लोक उपक्रम है – नगर निगम सारभूत रूप से राज्य सरकार द्वारा नियंत्रित है इसलिए यह एक लोक उपक्रम है – लोक उपक्रम के लिए कोई पृथक अधिसूचना अपेक्षित नहीं।

B. ***Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 2 (1)(i) – Agreement for execution of works contract* – Applicant**

having remedy to approach Arbitration Tribunal under section 7(1) of the Madhyastham Act – Application under section 11(6) of the Arbitration and Conciliation Act, 1996 not maintainable – Application rejected. (Para 18)

ख. माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 2(1)(आई) – कार्य संविदा के निष्पादन के लिए करार – आवेदक के पास माध्यस्थम् अधिनियम की धारा 7(1) के अंतर्गत माध्यस्थम् अधिकरण के पास जाने का उपचार है – माध्यस्थम् और सुलह अधिनियम, 1996 की धारा 11(6) के अंतर्गत आवेदन पोषणीय नहीं है – आवेदन अस्वीकार।

Cases referred :

2013 (3) MPLJ 434, (2016) 4 SCC 750, AIR 1991 M.P. 233, (2009) 2 SCC 486.

K.G. Sukhwani, for the applicant.

Aniket Naik, for the non-applicants.

ORDER

Prakash Shrivastava, J. :- By this arbitration case filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 a prayer has been made by the applicant for appointing the independent arbitrator for resolving the dispute between the parties.

2. The case of the applicant is that the Respondent- Indore Municipal Corporation had awarded the contract to the applicant for construction of overflow spillway across river Gambhir and the work order dated 18.4.2007 was issued with stipulated period of 24 months. The completion of the work was delayed for certain reasons and the completion certificate was finally issued on 30.9.2012. Certain amount was withheld by the respondent-Municipal Corporation, therefor, the applicant had sent the letter dated 21.5.2012 and 26.9.2012. The defect liability period of 24 months expired on 30.9.2014, therefore, vide letter dated 13.10.2014 a request was made by the applicant for retaining Rs.20 Lakhs and releasing the balance amount but the respondent-Municipal Corporation retained more than the said amount and had released only Rs.45,32,727/-. According to the applicant, he is entitled to a sum of Rs.5,75,74,381.50. The applicant had served the notice dated

21.4.2015 on the Commissioner and made unsuccessful attempt to serve notice dated 21.4.2015 and 15.5.2015 to the Engineer-in-charge and the Project Oficer. Thereafter notice dated 2.7.2015 was sent to appoint the panel of arbitrator in terms of the arbitration clause. Since no action was taken by the respondents, therefore, present arbitration case is filed.

3. The respondents have filed the reply taking the stand that the work awarded to the applicant was in the nature of Works Contract and the respondent-Indore Municipal Corporation is a public undertaking, therefore, the applicant has remedy to seek arbitration under the M.P. Madhyastham Adhikaran Adhiniyam, 1983 (For short "Madhyastham Act") and the present application is not maintainable and that the bills of the applicant have been settled and the claim has now become time barred.

4. Core issue is as to whether the Indore Municipal Corporation is a public undertaking as defined in Section 2(1) (g) of the Madhyastham Act and applicant has remedy before the Madhyastham Tribunal?

5. Counsel for both the parties have relied upon the judgments of this Court as well as the Hon'ble Supreme Court in support of their submission. In order to find out if the aforesaid issue is concluded by any of them, these judgments are examined at the first instance.

6. Learned counsel for the respondents has referred to the Full Bench judgment of this Court in the matter of *Gulab Bai wd/o Shriram Chandra Sanotia and others Vs. Subhash Chandra* reported in 2013(3) MPLJ 434 but the said judgment was delivered in different context wherein the issue was in respect of the entitlement of a landlord, who was a retired employee of the Municipal Corporation, to approach the Rent Controlling Authority under Section 23-A of the M.P. Accommodation Control Act. In the definition of landlord under Section 23-J, retired servant of a Company owned and controlled either by the Central or State Government, are covered. The said definition is materially different from the definition of public undertaking given in Section 2(1)(g) of the Madhyastham Act. Even otherwise in the matter of *Subhash Chandra Vs. Gulab Bai and others* reported in (2016) 4 SCC 750, the Hon'ble Supreme Court has referred the matter to the larger bench for interpretation of Section 23(J)(ii) of the M.P. Accommodation Control

Act.

7. In another judgment in the matter of *Administrator, Municipal Corporation, Drug and others Vs. M/s. Janico Designers and Executors, Drug* reported in AIR 1991 M.P. 233 before the Full Bench of this Court issue of arbitrability by Madhyastham Tribunal had come up, wherein the Municipal Corporation was superseded and administrator was appointed, therefore, the full bench had taken the view that for the dispute between the administrator and contractor executing the municipal work, the Madhyastham Tribunal was competent to adjudicate, but in that case the issue if the Municipal Corporation is a Public Undertaking either owned or controlled by the Government within the meaning of Section 2(1)(g) of the Madhyastham Act, was left open.

8. Learned counsel for the applicant has placed reliance upon the judgment of the Supreme Court in the matter of *Om Construction Company Vs. Ahmedabad Municipal Corporation and Another* reported in (2009) 2 SCC 486, wherein in reference to the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992, the Ahmedabad Municipal Corporation has not been held to be a Public Undertaking on the ground that the notification in that regard under Section 2(1)(i) of the Gujarat Act was not published. Section 2(1)(i) of the Gujarat Act defines Public Undertaking as under:-

> "Public Undertaking" means:-
>
> (i) any company as defined in section 3 of the Companies Act, 1956 in which not less than fifty-one per cent of the paid up share capital is held by the State Government or any company which is a subsidiary (within the meaning of the Act) of the first mentioned company.
>
> (ii) any corporation (not being a company as defined in section 3 of the Companies Act, 1956 or a local authority) established by or under a Central Act or a State Act and owned or controlled by the State Government.
>
> (iii) such class of local authorities as the State Government may, by notification in the Official Gazette, specify.

In terms of sub-section (iii) above, separate notification for local

authorities is necessary. Though sub-section (ii) is in respect of Corporation but local authorities are expressly excluded. The language of Section 2(1)(g) of the Madhyastham Act is different, therefore, the present issue can not be held to be concluded by above judgment and benefit of above judgment cannot be granted to the applicant.

9. Since no authoritative pronouncement on the issue involved has been pointed out, therefore, the issue is examined in the light of the provisions of Madhyastham Act and the Municipal Corporation Act.

10. A reference under the Madhyastham Act can be made to the tribunal under Section 7(1) by a party to a works contract, which reads as under:-

> **7. Reference to Tribunal.-**
>
> (1) Either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Tribunal.

11. It is not in dispute in the present case that the work awarded to the applicant was in the nature of Works Contract but the only dispute raised by the applicant is that the Indore Municipal Corporation is not a public undertaking for the purpose of Madhyastham Act.

12. The contention of learned counsel for the applicant is that for approaching Madhyastham Tribunal under Section 7(1) as against Municipal Corporation, a separate notification under Section 2(1)(i) of the Act for the Municipal Corporation is required.

13. Section 2(1)(i) defines works contract and reads as under:-

> **Section 2(1)(i) :-**
>
> "Works Contract" means an agreement in writing for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, work-shop, powerhouse, transformers or such other works of the State Government or Public Undertaking as the State Government may, by notification, specify in this behalf at any of its stages, entered into by the State Government or by an

official of the State Government or Public Undertaking or its official for and on behalf of such Public Undertaking and includes an agreement for the supply of goods or material and all other matters relating to the execution of any of the said work."

14. A minute examination of above definition reveals that the presence of following ingredients is necessary for holding an agreement to be a Works Contract:-

(a) There should be an agreement in writing.

(b) The agreement should be for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, work-shop, powerhouse, transformers.

(c) The agreement can also be for such other works of the State Government or Public Undertaking as the State Government by notification specify at any of its stages.

(d) The agreement should be entered into by the State Government or an official of the State Government or Public Undertaking or its official for and on behalf of such Public Undertaking.

(e) Such agreement also includes an agreement for supply of goods and material and all matters relating to the execution of the said work.

15. The phrase "such other works of the State Government or Public Undertaking as the State Government may, by notification, specify in this behalf at any of its stages" is a single phrase and notification mentioned therein is referable to the work to be executed under the agreement and not to the Public Undertaking, meaning thereby, by notification the State Government can specify other works also at any stage to be covered by the definition. If the petitioner's contention that the notification in above definition refers to the Public Undertaking is accepted, then the phrase "at any of its stages" becomes otiose. On reading the aforesaid definition as a whole, it is clear that no separate

Notification for Public Undertaking is required.

16. Such a submission can not be accepted also because Section 2(1)(g) of the Madhyastham Act separately defines Public Undertaking as under:-

> "Public Undertaking" means a Government Company within the meaning of Section 617 of the Companies Act, 1956 (No.1 of 1956) and includes a Corporation or other statutory body by whatever name called in each case, wholly or substantially owned or controlled by the State Government."

Any Government Company including a corporation and statutory authority satisfying the conditions of above definition, is a Public Undertaking for the purposes of the Madhyastham Act. Under above definition clause a Corporation or other statutory body substantially controlled by the State Government falls within the net of public undertaking.

17. To examine the issue if Indore Municipal Corporation is substantially controlled by the State Government, the provisions of Municipal Corporation Act, 1956 (for short "the Act") need to be looked into.

18. The respondent-Municipal Corporation Indore has been constituted under the provisions of the Act. Chapter 36 of the Act deals with the control of the State Government on the Municipal Corporation. Section 417 of Chapter 36 empowers the State Government to require the Commissioner to furnish the return or to call for and examine the record of any case pending before or disposed of by the Commissioner, the Corporation or the Mayor-in-Council. Section 417-A empowers the Government to depute officers to make enquiry into the affairs of the Corporation or inspection or examination of any department, office, service, work or thing under the control of any Corporation authority and to report to it the result of such enquiry, inspection or examination. Section 418 gives power to the State Government to require Municipal Authority to take action. Section 418-A gives power to the State Government to issue directions to the Municipal Corporation for implementation of welfare measure. Under Section 419 the Government is empowered to appoint a person if the Corporation fails to take action within stipulated period on the order issued under Section 418 or directions issued under Section 418-A. If the Government feels that any officer or servant of the Corporation is negligent

in the discharge of his duty, it can require the Corporation to suspend, fine or otherwise punish him Under Section-420. Section 421 empowers the Government to suspend any resolution or order of the Corporation and Section 422 empowers the State Government to dissolve the Corporation on certain contingencies. Under Section 423 on dissolution of the Corporation, the administrator can be appointed by the Government. Section 425 empowers the Government to enforce its order if the Corporation makes default in carrying out them. In terms of Section 425-A authorized officials of the State Government are entitled to attend any meeting of the Corporation or Mayor-in-Council and address it on any matter concerning the work of his department. Section 426 empowers the Government to make rules authorizing inspection by servants of the Government, of Institution and works which are under the management and control of the Corporation and regulating such inspection. Section 426-A authorises the Government to remove any difficulty which arises in giving effect to the provisions of the Act.

19. The aforesaid provisions make it clear that the Municipal Corporation is substantially controlled by the State Government, therefore, it is a public undertaking under Section 2(1)(g) of the Madhyastham Act.

20. The record further reveals that in the matters relating to Works Contract with the Municipal Corporation, other aggrieved parties are approaching the Madhyastham Tribunal and such references are being entertained and adjudicated by the Tribunal. Along with the additional reply one such award passed by the Madhyastham Tribunal has been placed on record.

21. Having regard to the aforesaid analysis, I am of the opinion that the Municipal Corporation, Indore being substantially controlled by the State Government, is a Public Undertaking within the meaning of Section 2(1)(i) of the Madhyastham Act and since undisputedly the agreement was for execution of Works Contract, therefore, the applicant has a remedy to approach the statutory Arbitration Tribunal constituted under the Madhyastham Act and the present application under Section 11(6) of the Arbitration and Conciliation Act, 1996 is not maintainable, which is accordingly rejected.

Order accordingly.

I.L.R. [2017] M.P., 2541
CIVIL REVISION
Before Mr. Justice S.K. Awasthi
C.R. No. 114/2016 (Gwalior) decided on 18 May, 2017

DURGESH SINGH & ors. ...Applicants
Vs.
NARENDRA KANTE ...Non-applicant

A. Civil Procedure Code (5 of 1908), Order 11 Rule 12 & 21 – Eviction Suit – **Declaration regarding Possession of Documents – Held – The party concerned, which is confronted with an application under Order 11 Rule 12 CPC is required to give declaration as to the status of possession of documents – In present case, respondent/plaintiff has accordingly declared the status regarding possession of document – Provision under Order 11 Rule 21 is not attracted for non-production of documents – Revision dismissed. (Paras 12 to 14)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 11 नियम 12 व 21 – बेदखली वाद – दस्तावेजों के कब्जे के संबंध में घोषणा – अभिनिर्धारित – संबंधित पक्षकार; जो कि सिविल प्रक्रिया संहिता के आदेश 11 नियम 12 के अंतर्गत आवेदन का सामना करता है उसके द्वारा दस्तावेजों के कब्जे की स्थिति के बारे में घोषणा की जाना अपेक्षित है – वर्तमान प्रकरण में, प्रत्यर्थी/वादी ने तद्नुसार, दस्तावेज के कब्जे के संबंध में स्थिति घोषित की है – दस्तावेज प्रस्तुत नहीं किये जाने के लिए आदेश 11 नियम 21 के अंतर्गत आवेदन/उपबंध आकर्षित नहीं होते – पुनरीक्षण खारिज।

B. Civil Procedure Code (5 of 1908); Order 11 Rule 12 & 13 – Nomenclature of Document – **Applicant's contention that affidavit is captioned as one under Order 11 Rule 13 CPC which cannot be given colour of one under Order 11 Rule 12 CPC – Held – Nomenclature of document is of no significance and contents of the document are to be considered to ascertain the nature of the same. (Para 13)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 11 नियम 12 व 13 – दस्तावेज की नामावली – आवेदक का तर्क है कि शपथ पत्र को सि.प्र.सं. के आदेश 11 नियम 13 के अंतर्गत होने का शीर्षक दिया गया है जिसे सि.प्र.सं. के आदेश 11 नियम 12 के अंतर्गत होने का रंग नहीं दिया जा सकता – अभिनिर्धारित – दस्तावेज

की नामावली का कोई महत्व नहीं है तथा उक्त की प्रकृति सुनिश्चित करने के लिए दस्तावेज की अंतर्वस्तु को विचार में लिया जाना चाहिए।

Cases referred :

2009 (4) M.P.L.J. 530, (2000) 10 SCC 64.

P.C. Chandil, for the applicants.
B.B. Shukla, for the non-applicant.

ORDER

S.K. AWASTHI, J. :- The instant civil revision has been preferred to challenge the order dated 14.07.2016 passed in Civil Suit No.94A/2016 by the Court of XIVth Civil Judge Class II, Gwalior by which the application under Order XI Rule 21 of the Civil Procedure Code (for brevity 'CPC') filed by the present applicants/defendants has been dismissed.

2. The facts necessary for adjudication of the present case are that, the respondent/plaintiff filed a suit for eviction, recovery of arrears of rent and mesne profit with respect to the suit property, more particularly described in para 1 of the plaint (Annexure P-2). The present respondent/plaintiff filed a list of documents which are relied upon by him in order to establish his case. The trial Court invited defendants to file their written statement. However, the defendants/applicants moved an application under Order XI Rules 12, 14 read with Section 151 of CPC, on the ground that the list of documents indicated in the table termed as "list of reliance' refers to several documents, however, their copies have not been supplied to the defendants. Further, it has not been indicated whether the respondent/plaintiff is in possession of these documents or not. Due to these contingencies, the present applicants/ defendants are unable to file their written statement.

3. The application came for consideration on 7.5.16 and on such date, the same was partly allowed and the present respondent/plaintiff was directed to furnish description of the documents referred to in the table termed as "list of reliance" as also to indicate whether the documents are in his possession or not. The respondent/plaintiff was further directed to supply the copy of the documents to the applicants/defendants in order to enable the defendants to file their written statement.

4. The present respondent/plaintiff obeyed the direction issued by the court below on 7.5.16 and furnished an affidavit alongwith the description of the documents. The perusal of the affidavit indicates that the respondent/ plaintiff declared as to which are the documents those are in possession of the respondent/plaintiff.

5. The present applicants/defendants being dissatisfied with the steps taken by the respondent/plaintiff, in compliance of the order dated 7.5.16 passed by the trial Court, an application under Order XI Rule 21 of CPC was preferred to seek dismissal of the suit for non-compliance of the order dated 7.5.2016. This application by the applicants/defendants suffered rejection vide impugned order dated 14.7.16 as according to the view of the trial Court, the respondent/plaintiff substantially complied with the order dated 7.5.16. In this backdrop, the applicants/defendants have moved this Court.

6. The learned counsel for the applicants/ defendants submitted that the order dated 7.5.16 is unambiguous and clearly directs the respondent/plaintiff to provide for complete description of the documents relied upon by him indicated in the "list of reliance". However, the respondent has not complied with the order dated 7.5.16 in letter and spirit which mandates supply of certified copies of the said documents. In order to substantiate this contention, the learned counsel has relied upon the observation made by the court in the concluding paragraph of the order dated 7.5.16 whereas the respondent/ plaintiff has evaded the order dated 7.5.16 by not furnishing the certified copies of the documents relied upon him rather the respondent/plaintiff has flagrantly violated the order dated 7.5.16 by mentioning that the documents shall be supplied as and when found necessary during the pendency of the suit. Moreover, it was also contended that the affidavit which was filed on 22.6.16 was clearly captioned as " under Order XI Rule 13 of CPC". Thus, the court below erred in ignoring the fact that there was no affidavit filed with respect to the Order XI Rule 12 of CPC. Therefore, in sum and substance, the contention of the learned counsel for the applicants/defendants is that the documents were also directed to be supplied for enabling the defendants to file their written statement which has remained non-complied. Further, the declaration in terms of Order XI Rule 12 of CPC is not sufficient.

7. Per contra, the learned counsel for the respondent/plaintiff submitted

that the applicants/defendants are not considering the domain of Order XI Rule 12 of CPC as the same does not include non-production of the documents within its ambit. Further, the declaration mandated by the Order XI Rule 12 of CPC is only with respect to the status of possession of the documents sought to be discovered. The respondent/plaintiff has duly complied with the portion of the order dated 7.5.16 and fulfilled the scope of Order XI Rule 12 of CPC. Consequently, it was contended that the trial Court has not committed any error in rejecting the application under XI Rule 21 of CPC preferred by the applicants/defendants.

8. In the light of the above, the questions which arise for consideration by this Court are that firstly, whether the non-production of the documents by plaintiff is fatal and will the suit suffer the consequences provided under Order XI Rule 21 of CPC or not. Secondly, whether the affidavit furnished by the respondent/plaintiff on 22.6.16, is sufficient compliance of the mandate provided under Order XI Rule 12 of CPC or not. Thirdly, whether the trial Court committed error in dismissal of the application under Order XI Rule 21 of CPC or not.

9. Before recording findings of this Court with respect to the case at hand it is apposite to deal with the question framed hereinabove.

10. The first question relates to the ambit under Order XI Rule 21 of CPC vis-a-vis non-production of documents. In this regard, it is appropriate to refer to the judgment of this Court in case of *Archdiocese of Bhopal vs. Hasan Kabir,* 2009 (4) M.P.L.J 530, in which while dealing with the aforesaid question of non-production, the Division Bench of this Court has recorded its observation in the following manner :-

> **8.** A bare reading of Rule 21 of Order 11, Civil Procedure Code makes it clear that the provision entails non-compliance of the order to answer interrogatories. Interrogatories are dealt with under Rule 1 to Rule 11 of Order 11. Rule 12 of Order 11, Civil Procedure Code deals with application for discovery of documents. Inspection of the documents which is referred to in Rule 21 is again dealt with in Rule 15 to 18 of Order 11, Civil Procedure Code. The Order 11 Rule 1, Civil Procedure Code enables party to a suit to make discovery by

interrogatories by leave of Court. Rule 2 of Order 11, Civil Procedure Code provides that particular interrogatories to be submitted to the Court, and factors to be taken into consideration. Order 11 Rule 11 provides that when any person omits to answer or answer insufficiently the Court may on application, direct to answer or further answer. The Court orders discovery of document under Rule 12 of Order 11, Civil Procedure Code. The Rule 18 of Order 11, Civil Procedure Code provides that where the party served with notice under Rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit. In case plaintiff fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, be liable to have his suit dismissed for want of prosecution. In case of defendant not complying with the provision, his defence can be struck off and he may be placed in the same position as if he had not defended. It is further required that party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect and by way of amendment which has been inserted with effect from 1-2-1977 the order may be made under Order 11, Rule 21, Civil Procedure Code after notice to the parties and after giving them reasonable opportunity of being heard. The sine qua non for exercising the power under Rule 21 is failure to answer the interrogatories, order of discovery or inspection of documents. Non-compliance of Rule 14 which is with respect to production of document is not covered under Rule 21, Civil Procedure Code. Legislature has thought it appropriate in case of plaintiff if he fails to comply with the order relating to interrogatories, discovery or inspection of documents a suit be dismissed or in case of defendant his defence may be struck off. Legislature in its wisdom has not included in Rule 21 of Order 11, Civil Procedure Code such a penal consequence due to non-

compliance of order passed under Order 11, Rule 14 Civil Procedure Code. Moreover, in the instant case, it is not in dispute that no application was filed for dismissal of suit under order 11, Rule 21, Civil Procedure Code which is condition precedent for exercise of the power under the aforesaid provision, thus, even assuming for a moment that aforesaid provision was applicable, it was not open for the trial Court to have passed the order dismissing the suit. An order under Order 11, Rule 21, Civil Procedure Code can be passed only on an application and that too after giving notice to the parties and giving them reasonable opportunity of being heard. It is also provided in sub-rule (1) of Rule 21 of Order 11, Civil Procedure Code, the plaintiff shall be precluded from bringing a fresh suit on the same cause of action. This dire consequence is not provided with respect to non-compliance of Order, 11 Rule 14, Civil Procedure Code.

15. In view of above, we hold that due to non-compliance of provision under Order XI Rule 14 of CPC suit cannot be dismissed under Order XI Rule 21 of CPC. It can be dismissed only in the exigencies such as due to noncompliance of orders interrogatories, discovery or inspection as envisaged under Order XI Rule 21 of CPC.

11. The perusal of the reproduced portion of the judgment needs no iota of doubts that the contention of the learned counsel for the applicants/ defendants is misplaced and deserves to be repelled.

12. The next question is with respect to the affidavit filed on 22.6.16 by the respondent/ plaintiff as to whether the same fulfills the mandate under Order XI Rule 12 of CPC. The perusal of the Order XI Rule 12 of CPC indicates that the party concerned, which is confronted with an application under Order XI Rule 12 of CPC, is required to give a declaration as to the status of the possession of the documents. In this context, if para 2 of the affidavit dated 22.6.16 is considered, then the only logical conclusion which can be drawn is that the plaintiff/respondent has discharged its obligation in terms of Order XI Rule 12 of CPC by declaring that the documents are not in

possession on the date of submission of the affidavit and the same are in custody of the Court and that, he would furnish the same by procuring the certified copy of the documents. Consequently, the outcome of the question also goes against the applicants/defendants.

13. Lastly, with regard to the question as to whether the contention of the applicants/ defendants that the affidavit is captioned as one under Order 11 Rule 13 of CPC and therefore, the same cannot be given a colour of the one under Order 11 Rule 12 of CPC, suffice it to observe that the law is well settled that nomenclature of the document is of no significance and the contents of the document are to be considered to ascertain the nature of the document. In this regard, Hon'ble Supreme Court in the case of *Prakash Roadlines (P) Ltd. vs. Oriental Fire & General Insurance Co. Ltd.*, (2000) 10 SCC 64 held in the following manner :-

> **3.** It is settled law that a document has to be interpreted not by its nomenclature but what is contained in the said document. A reading of the document shows that it was a deed of assignment in favour of the Insurance Company. We are, therefore, in agreement with the view taken by the High Court. Consequently, we do not find any merit in the appeal. It is accordingly dismissed. There shall be no order as to costs.

14. Taking this view of the matter, it is only a formality to observe that the trial Court has not committed any error in rejecting the application under Order 11 Rule 21 of CPC as for the non-production of the documents, the provision under Order 11 Rule 21 of CPC is not attracted and that the affidavit furnished on 22.06.2016 by the plaintiff is a substantial compliance of the mandate provided under Order 11 Rule 12 of CPC. Further, the nomenclature of the affidavit pales into significance in the light of the settled position of law mentioned herein above.

15. Resultantly, the instant revision petition filed by the applicants is hereby dismissed. No order as to costs.

Revision dismissed.

I.L.R. [2017] M.P., 2548
CIVIL REVISION
Before Mr. Justice Sujoy Paul
C.R. No. 161/2008 (Jabalpur) decided on 14 September, 2017

SANGAM SAHAKARI GRIH NIRMAN SAMITI MYDT. ...Applicant
Vs.
SMT. JETHIBAI PURUSHWANI & ors. ...Non-applicants

A. Civil Procedure Code (5 of 1908), Order 9 Rule 13 – Maintainability of Application – **Suit decreed against respondent No.2/ defendant No.1 – He filed an appeal where applicant/defendant No.2 was not made a party – Appeal was also dismissed – Applicant filed an application under Order 9 Rule 13 CPC which was dismissed – Challenge to – Held – Trial Court passed a decree against respondent No.2/defendant No. 1 and not against the applicant – As per the provision, a defendant against whom an *ex-parte* decree is passed may apply to Court for setting it aside – Present application not maintainable – Revision dismissed. (Para 10 & 12)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 13 – आवेदन की पोषणीयता – वाद, प्रत्यर्थी क्र. 2/प्रतिवादी क्र. 1 के विरूद्ध डिक्रीत – उसने अपील प्रस्तुत की जिसमें आवेदक/प्रतिवादी क्र. 2 को पक्षकार नहीं बनाया गया था – अपील भी खारिज की गई – आवेदक ने आदेश 9 नियम 13 सि.प्र.सं. के अंतर्गत एक आवेदन प्रस्तुत किया जिसे खारिज किया गया – को चुनौती – अभिनिर्धारित – विचारण न्यायालय ने प्रत्यर्थी क्र. 2/प्रतिवादी क्र. 1 के विरूद्ध डिक्री पारित की और न कि आवेदक के विरूद्ध – उपबंध के अनुसार, एक प्रतिवादी, जिसके विरूद्ध एकपक्षीय डिक्री पारित की गई है, वह उसे अपास्त करने हेतु न्यायालय को आवेदन कर सकता है – वर्तमान आवेदन पोषणीय नहीं – पुनरीक्षण खारिज।

B. Civil Procedure Code (5 of 1908), Order 9 Rule 13 Second Proviso – Setting Aside of Ex-parte Decree – Ground – **Held – *Ex-parte* decree cannot be set aside on mere allegation of irregularity of service of summons – In present case, record shows that summons were duly served on correct address of the applicant society. (Para 13 & 14)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 13 द्वितीय परंतुक – एक पक्षीय डिक्री को अपास्त किया जाना – आधार – अभिनिर्धारित – एकपक्षीय डिक्री को मात्र समन की तामील की अनियमितता के अभिकथन पर अपास्त

नहीं किया जा सकता – वर्तमान प्रकरण में, अभिलेख दर्शाता है कि समन आवेदक सोसाईटी के सही पते पर सम्यक् रूप से तामील किये गये थे।

Cases referred :

1998 (2) JLJ 344, 2004 (3) MPLJ 632, AIR 2002 SC 2370, AIR 1977 Delhi 110, 2001 SCC Online Mad 160, 2008 (13) SCC 466.

Shobhitaditya, for the applicant.
Pranay Verma, for the non-applicant No.1.
Ashok Lalwani, for the non-applicants No. 1(ii) & 2(iii).

ORDER

SUJOY PAUL, J. :- This revision filed under Section 115 of the Code of Civil Procedure is directed against the order dated 01.03.2008, passed in MCA No.14/2007, by the learned VIth Addl. Sessions Judge, Bhopal, whereby the order passed by the learned trial Court in MJC No.21/2002 dated 16.11.2006 was affirmed by the Court below.

2. Briefly stated, the facts are that the respondent No.1/plaintiff filed a civil suit (RCS No.36-A/2000) on 28.11.1995 for declaration of title and perpetual injunction by contending that plot bearing No. A/91 was purchased by her husband Late Thalumal Purushwani by registered sale deed dated 24.08.1887 and respondent No.1 is owner of the said land. The plaintiff contended that respondent No.2/defendant No.1 unauthorizingly encroached upon the said land and constructed his house. In the aforesaid civil suit the respondent No.2/defendant No.1 filed a written statement contending that Vice President of applicant's Society never authorizes anybody to sell the land and the land in question (Plot No. A/91) was initially sold to some other member. This is also not in dispute that respondent No.1/plaintiff preferred an application under Order 1 Rule 10 CPC dated 25.06.1998, whereby the present applicant was permitted to be added as defendant No.2 in the said civil suit. The trial Court after inclusion of the name of present applicant in the array of the defendants, issued notices to the present applicant on 25.06.1998. Thereafter, the trial Court heard the matter and decide the same by judgment and decree dated 25.09.2001. The case of present applicant is that the defendant No.1 feeling aggrieved by the said judgment and decree preferred an appeal before the first appellate Court. The counsel appearing for the

appellant therein informed the counsel for the present applicant that against the judgment and decree dated 25.09.2001, defendant No.1 has preferred an appeal. As per applicant's contention, when he gathered knowledge about filing of said appeal and passing of judgment and decree by the trial Court on 04.05.2002, on the very same date, the present applicant filed an application under Order 9 Rule 13 CPC before the trial Court (Annexure-A/7). The trial court after hearing both the parties rejected the said application on 16.11.2006. Aggrieved, the applicant preferred an appeal before the appellate Court which was also dismissed on 01.03.2008 (Annexure-A/8).

3. Mr. Shobhitadtiya, learned counsel for the applicant submits that the present applicant was a necessary party and therefore plaintiff's application under Order 1 Rule 10 CPC was allowed by the Court below. However, the Court below did not ensure that the notices issued to the present applicant are served or not. The Court below has not given any finding whatsoever that notices issued by the Court below are served on the present applicant. Mr. Shobhitadtiya, referred to the order-sheet of trial Court dated 01.12.1999 which shows that one Shri R.B. Pandey (proposed party) appeared in person. In this order it is mentioned that the notices could not be served on the present applicant. Thereafter on 18.01.2000, one Shri Rajput, Advocate appeared before the trial Court on behalf of said proposed party and submitted an application seeking time to file written statement. Learned counsel for the applicant submits that Vakalatnama of Shri Rajput, Advocate is available in the record shows that he was engaged by the defendant No.3. Shri Rajput, Advocate was not representing the present applicant. Learned counsel for the applicant by placing reliance on the entire order-sheets of trial Court submits that the Court below has not recorded any finding that the present applicant was served.

4. Mr. Shobhitaditya, criticized the order dated 16.11.2006, wherein the trial Court rejected the application on the presumption that Shri Rajput, Advocate was representing the present applicant. In para 10 of the order dated 16.11.2006 the trial Court opined that Shri Rajput, Advocate appearing on behalf of the proposed parties, whereas it is clear from the Vakalatnama that he entered appearance only for the defendant No.3. Thus, the trial Court rejected the application on incorrect and irrelevant reasons.

5. Learned counsel for the applicant assailed the order of appellate Court

by submitting that one Shri MP Padmanabhan, entered into witness box on behalf of the applicant and made it clear that the notices of civil suit was not served on him. The lower appellate Court has committed an error in giving a finding that Shri Padmanabhan put his signatures on the acknowledgment and in view of address of Society mentioned in the acknowledgment, it is clear that notices were served on the present applicant. In addition, the Court opined that the present applicant is not adversely affected by the judgment and decree. The plaintiff has not claimed any relief against the present applicant. The trial Court has not passed any judgment and decree against the present applicant. Mr. Shobhitaditya, submits that since notices were not duly served, the Courts below have erred in rejecting the application and appeal preferred by the present applicant. Reliance is placed on 1998 (2) JLJ 344, *[Satish Construction Co. (M/s) v. Allahabad Bank]*, 2004 (3) MPLJ 632, *[Nagarjuna Construction Co. Ltd. Hyderabad vs. R.K. Maheshwari, Bhopal]*, AIR 2002 SC 2370, *[Sushil Kumar Sabharwal vs. 'Gurpreet Singh & other]*.

6. *Per-contra,* Mr. Ashok Lalwani, and Mr. Pranay Verma, Advocates for the other side supported the impugned order. Mr. Pranay Verma, submits that a plain reading of Order 9 Rule 13 CPC makes it clear that the defendants can apply for setting aside a decree passed *ex-parte*, provided such decree is passed 'against the defendant'. It is urged that in the present case, the judgment and decree was not passed against the present applicant. The applicant was only a formal party. Since judgment and decree cannot be said to be 'against the present applicant' the application under Order 9 Rule 13 CPC is not maintainable. Mr. Verma, further contends that acknowledgment of notices of civil suit (Ex.D/1) shows that it was served on Society. In view of statement of Shri Padmanabhan, one thing is crystal clear that address of Society is correct. Thus, whether or not Shri Padmanabhan admits his signature, fact remains that notices were served at correct address to some responsible person of the Society. Mr. Verma, further submits that as per the deposition of Shri Padmanabhan, it is clear that at the time of issuance of alleged service of notice, Shri Padmanabhan was not working as President/office bearer of the Society. Thus, Society should have produced competent person who was office bearer at the relevant point of time when notices were allegedly served on the present applicant. In absence thereto, there is no reason to disbelieve

the service of notice which is evident from Ex.D/1.

7. No other point has been pressed by the learned counsel for the parties.

8. I have heard the parties at length and perused the record.

9. Before dealing with the rival contentions, I deem it proper to refer to Rule 13 of Order 9 CPC, which reads as follows:

> *"13. Setting aside decree ex parte against defendants.- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:*
>
> *Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be sent aside as against all or any of the other defendant also:*
>
> *Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.*
>
> *Explanation : Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule of setting aside the ex parte decree."*
>
> ***[Emphasis Supplied]***

10. A plain reading of this provision shows that a defendant against whom *ex-parte* decree is passed may apply to the Court for setting it aside. Since, objection raised by Mr. Pranay Verma, goes to the root of the matter i.e.

regarding maintainability of application filed by present applicant, I deem it proper to deal with this aspect at the out set. Admittedly, the present applicant was defendant No.2 before the trial Court. It is also not in dispute between the parties that the judgment and decree was passed against the defendant No.1 and not against the defendant no.2/applicant. Thus, the spinal issue is whether the application preferred by the applicant/defendant No.2 under Order 9 Rule 13 CPC was tenable. This aspect was dealt with by Delhi High Court in the case reported in AIR 1977 Delhi 110 *[Smt. Santosh Chopra vs. Teja Singh & another]*, the Court opined as under:

> *"Indeed, even a person who is formally a party but against whom nothing is said in the operative portion of the decree or who has been expressly exempted from a decree cannot apply under the Rule to set aside an ex parte decree."*

[Emphasis Supplied]

11. This judgment was followed by Madras High Court in the case reported in 2001 SCC Online Mad 160, *[Muthlingam vs. Gangai Ammal]*. The Apex Court in 2008 (13) SCC 466 *[Bank of India vs. Mehta Brothers]* opined that "a reading of Order 9 Rule 13 of the Code would clearly show that under this provision it was clarified that an *ex parte* decree was ordinarily to be set aside only against the defendant against whom the decree was passed *ex parte* and the suit was to be revived only qua the said defendant applying for setting aside the *ex parte* decree. It is true that the heading of Order 9 Rule 13 of the Code starts with the expression "setting aside an *ex parte* decree". But if we examine this provision under Order 9 Rule 13 of the Code as well as its proviso in depth and in detail, it would not be difficult for us to come to a conclusion that under Order 9 Rule 13, it has been clarified that an *ex parte* decree is ordinarily to be set aside only as against the defendants against whom the decree has been passed *ex parte* and the suit is to be revived only qua the defendant who applied for setting aside the *ex parte* decree". In the same judgment it was further held that the only requirement for applicability of this order is that the decree should be *ex-parte against the defendant* applied to for its setting aside.

12. In the light of aforesaid judgment, in my view, the objection raised by Mr. Pranay Verma has substantial force. The present application under Order

9 Rule 13 CPC on behalf of present applicant was not entertainable because the *ex-parte* decree was not passed by trial Court against the applicant/ defendant No.2.

13. The second proviso to Rule 13 of Order 9 further shows that an *ex-parte* decree shall not be set aside on the ground that in service of summons, there has been irregularity. If the Court is otherwise satisfied that notice was served and defendant had sufficient time to appear and answer the claim, the decree cannot be set aside.

14. In the present case, the trial Court has certainly committed an error in assuming that Shri Rajpoot, Advocate filed 'vakalat' and appeared on behalf of present applicant, whereas it is satisfactorily established before this Court that said counsel appeared for the defendant No.3. Thus, the trial Court has committed an error in this regard. However, this error is not at all useful for the present applicant because Ex.D/1 is an acknowledgment of notice served on the defendant No.2. In order to dispute the service of notice through Ex.D/1, one Shri Padmanabhan entered into the witness box. The lower appellate Court considered his statement in great detail. The appellate Court recorded that this witness has admitted that earlier address of defendant No.2 was 64/5 South TT Nagar, Bhopal and summons were issued on this address. The acknowledgment (Ex.D/1) shows about this address only. The Court below further opined that although Shri Padmanabhan denied the acknowledgment contains his signature, fact remains that acknowledgment contains a signature which establishes service of notice on the Society. Shri Padmanabhan failed to establish that when Ex.D/1 was served, he was President of the Society. The acknowledgment (Ex.D/1) contains the signature of the person who has received the notice. Thus, the lower appellate Court opined that notice was served on the Society. In my view, there is no perversity or illegality in the said finding. The lower appellate Court has taken a plausible view which does not warrants any interference from this Court. As per second proviso of Order 9 Rule 13, the aforesaid decree cannot be set aside on mere allegation of irregularity in service. As held above, the application under Order 9 Rule 13 CPC at the behest of defendant No.2 was not tenable. The lower appellate Court has given proper finding about service of notice on the defendant No.2. In this back drop, the judgments cited by the applicant which are based on different factual back drop are not applicable in the aforesaid case.

15. In view of aforesaid analysis, no fault can be found in the impugned order dated 01.03.2008, passed in MCA No.14/2007 and in order dated 16.11.2006 passed in MJC No.21/2002. Resultantly, the revision fails and is hereby **dismissed.** No cost.

Revision dismissed.

I.L.R.[2017] M.P., 2555

CRIMINAL REVISION

Before Mr. Justice S.K. Seth & Smt. Justice Anjuli Palo

Cr.R. No. 928/2017 (Jabalpur) decided on 8 August, 2017

SHOBHA JAIN (SMT.) ...Applicant

Vs.

STATE OF M.P. ...Non-applicant

A. Prevention of Corruption Act (49 of 1988), Section 8 & 12 – Revision Against framing of Charge – **Ingredients – After receiving the bribe amount, the main accused handed over the amount to his wife (applicant) on the spot and thereafter they were trapped and bribe amount was recovered from applicant – Held – It cannot be presumed that wife merely acts as a channel between bribe giver and the receiver public servant (husband) without any gain of herself – She accepted the bribe through her husband – She is liable for trial u/S 8 and 12 of the Act of 1988. (Para 15)**

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 8 व 12 – आरोप विरचित किये जाने के विरूद्ध पुनरीक्षण – घटक – रिश्वत राशि प्राप्त होने के पश्चात्, मुख्य अभियुक्त ने घटना स्थल पर अपनी पत्नी (आवेदिका) को राशि सौंप दी तथा तत्पश्चात वे पकड़े गये थे, तथा आवेदिका से रिश्वत राशि बरामद की गई थी – अभिनिर्धारित – यह उपधारणा नहीं की जा सकती कि पत्नी ने, स्वयं के किसी लाभ के बिना रिश्वतदाता तथा प्राप्तकर्ता लोकसेवक (पति) के बीच मात्र एक माध्यम के रूप में कार्य किया – उसने अपने पति के माध्यम से रिश्वत स्वीकार की – वह 1988 के अधिनियम की धारा 8 एवं 12 के अन्तर्गत विचारण हेतु दायी है।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 228 – Framing of Charge – Appreciation of Evidence – **Held – At the stage of framing of charge, Court has to prima facie consider whether there is sufficient ground for proceeding against accused – Court is not required**

to appreciate the evidence and arrive at conclusion that material produced are sufficient for conviction – If court is satisfied that prima facie case is made out, then charge has to be framed. (Para 16)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 228 – आरोप विरचित किया जाना – साक्ष्य का मूल्यांकन – अभिनिर्धारित – आरोप विरचित किये जाने के प्रक्रम पर, न्यायालय को प्रथम दृष्ट्या यह विचार करना चाहिए कि क्या अभियुक्त के विरूद्ध कार्यवाही के लिये पर्याप्त आधार है – न्यायालय द्वारा साक्ष्य का मूल्यांकन करना तथा इस निष्कर्ष पर आना कि प्रस्तुत की गई सामग्री दोषसिद्धि हेतु पर्याप्त है, अपेक्षित नहीं है – यदि न्यायालय संतुष्ट है कि प्रथम दृष्ट्या प्रकरण बनता है, तो आरोप विरचित किये जायेंगे।

Cases referred :

1999 Cr.L.J. 3967 : AIR 1999 SC 2556, AIR 2000 SC 665, AIR 1979 SC 366.

Ruchika Gohil, for the applicant.
Pankaj Dubey, for the non-applicant/SPE Lokayukt.

ORDER

The Order of the Court was passed by :
ANJULI PALO, J. :- This criminal revision has been filed by the petitioner under Section 397 read with Section 401 of the Code of Criminal Procedure for revising and setting aside the order dated 26.08.2016 passed by the Learned Special Judge (Prevention of Corruption Act, 1988), Chhindwara in Special Case No. 04/2016.

2. Heard learned counsel for the parties at length. Perused the record.

3. The main contention of learned counsel for the petitioner is that the prosecution could not establish as to how the petitioner was involved in the crime under Section 8 and 12 of the Prevention of Corruption Act, 1988 (hereafter referred to as the "Act 1988").

4. As per the prosecution story, the complainant Sumran Markam was posted as Secretary Gram Panchayat, Jogimuar, Tamia. Main accused Mahavir Prasad Jain (husband of the petitioner) was posted as Chief Executive Officer in the Janpad Panchayat, Tamia, District Chhindwara. He issued a notice to

the complainant with regard to inspection of records of the gram panchayat. After receiving the report from the officer, Mahavir Prasad Jain demanded a bribe of Rs. 50,000/- from the complainant to protect him. It is alleged that due to the inability shown by the complainant Sumran to pay Rs. 50,000/-, Mahavir Prasad Jain agreed to receive Rs. 20,000/-.

5. On the basis of complaint of Sumran Markam, the co-accused Mahavir Prasad was trapped by the Lokayukt police on 03.12.2014. After receiving the bribe of Rs. 20,000/-, accused Mahavir Prasad Jain handed over the bribe money to his wife petitioner Shobha Jain on the spot. It is further alleged that the sodium carbonate test was found positive for both the accused persons i.e.the petitioner and her husband Mahavir Prasad Jain. The bribe money was recovered from petitioner, hence, case was registered under Section 8 and 12 of the "Act 1988" against the petitioner.

6. Learned counsel for the petitioner contended that, in the FIR it is not mentioned that the petitioner was demanding money. In the negotiation with regard to bribe money by Mahavir Prasad, nowhere the petitioner was involved in the alleged crime. She was just present on the spot at the time of trap and she merely collected the money from her husband. There was no conspiracy between the petitioner and the co-accused Mahavir Prasad Jain in the alleged crime. Hence, it is contended that the charges framed by the learned Trial Court under Section 8 and 12 of the "Act 1988" against the petitioner is baseless and the same be quashed.

7. Respondent counsel vehemently opposed the contention of the learned counsel for the petitioner. He supported the order passed by the Trial Court.

8. In this regard, firstly we shall see the ingredients of Section 8 and 12 of the "Act 1988".

> **Section 8:** Taking gratification, in order, by corrupt or illegal means, to influence public servant.—Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant, whether named or otherwise, to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or

disfavour to any person, or to render or attempt to render any service or disservice to any person with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

Section 12 : Punishment for abetment of offences defined in section 7 or 11.—Whoever abets any offence punishable under section 7 or section 11 whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

9. Learned counsel for the applicant contended that the mandatory requirement to establish 'abetment' so as to constitute offence under Section 7 of the Act 1988 *(public servant taking gratification other than 'legal remuneration' in respect of an official act)* and under Section 11 of the Act 1988 *(public servant obtaining valuable things without consideration from person concerned in proceeding or business transacted by such public servant)* is *prima facie* not made out by the prosecution and neither has there been any substantial material available in this regard.

10. Since, the word 'abetment' has not been defined in the "Act 1988", hence, we may profitably refer to its exhaustive definition as provided under Section 107 of the Indian Penal Code. As per Section 107 of IPC, a person abets the doing of a thing when he does any of the acts mentioned in the following three clauses:

> *"(i) instigates any person to do that thing, or*
>
> *(ii) engages with one or more other person or persons in any conspiracy for the doing of that thing."*

The first and second clauses are not germane in this context and third

clause alone is required to be looked into which is reproduced hereunder:

"(iii) Intentionally aids, by any act or illegal omission, the doing of that thing."

The word 'aids' has been clarified in Explanation-2 of Section 107 of IPC which reads as under :

> *"Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, thereby facilitates the commission thereof, is said to aid the doing of that act."*

11. The wordings of Section 109 of IPC also relates to commission of offence of the bribery in consequence of the abetment and as such, it has been strenuously argued that when offence has not been committed, no question of abetment comes in. The abetment under the "Act 1988", now is punishable even if the offence is not complete in consequence of such abetment. Keeping in view the Explanation-2 in Section 107 of IPC it is thus clear that under the 3rd Clause when a person abets by aiding, the act so aided should have been committed in order to make such aiding an offence.

12. In the case of *P.Nallammal Vs. State* [1999 Cr.L.J. 3967 : AIR 1999 SC 2556], the Apex Court held as under:

> *"If a non-public servant has abetted any of the offences which the public servant commits, such non-public servant is also liable to be tried along with the public servant."*

13. It is not in dispute that merely giving help will not make the abetment of offence if the person who gave the help did not know that an offence was being committed or contemplated. The intention should be to help an offence or to facilitate the commission of crime. There is *prima facie* evidence on record for offence under Section 120-B of IPC of the meeting of minds for acceptance of money between Mahavir Prasad/husband and his wife/petitioner.

14. In the present case, the petitioner is, prior to or at the time of commission of act apparently support her husband the prime accused in order to facilitate the commission of crime of taking bribe. Hence, she abet her husband for the commission of offence under Section 107 of IPC. As the wife

of the accused Mahavir Prasad Jain it is presumed that she knows what is bribe and what is legal remuneration. Her husband Mahavir Prasad Jain is the main accused charged under Section 7 and 13(1)(d) of "Act 1988". Section 7 of the "Act 1988" corresponds to Section 161 of IPC with some modification. Section 161 of IPC reads as under :

> *"Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in Section 21 or with any public servant, or with any public servant, as such, shall be punishable with imprisonment of either description for a term which may extend to three years, or with fine, or with both."*

15. With regard to Section 7 of "Act 1988", the term 'remuneration' would mean money paid for a work or a service. As per Section 7 of the "Act 1988", the receipt of any remuneration other than the legal remuneration alone is offence. It cannot be presumed that wife who merely acts as a channel between the bribe giver and the receiver public servant (husband) without any gain of herself. She accepted the bribe through her husband. Therefore, she is also liable for trial under Section 8 and 12 of the "Act 1988".

16. In this revision the petitioner has challenged the charges framed against her. It is settled law that at the state (sic:stage) of framing of charge the Court has to *prima-facie* consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence and arrived at the conclusion that the material produced are sufficient or not for conviction of the accused. If the Court is satisfied, prima-facie case is made

out for proceeding further, then charge has to be framed, as held in the cases of *State of M.P. Vs. S.B. Johri and Ors.* (AIR 2000 SC 665), *Union of India Vs. Prafulla Kumar Samal and Ors.* (AIR 1979 SC 366).

17. In light of the above analysis of facts and the legal aspects, this criminal revision is liable to be dismissed. Accordingly, the same is dismissed.

Revision dismissed.

I.L.R. [2017] M.P., 2561
CRIMINAL REVISION
Before Mr. Justice Sushil Kumar Palo
Cr.R. No. 1796/2016 (Jabalpur) decided on 13 September, 2017

SOOMA DEVI ...Applicant
Vs.
RAMKRIPAL MISHRA ...Non-applicant

A. Protection of Women from Domestic Violence Act (43 of 2005), Section 12 & 2(f) – Maintenance – Eligibility – Relationship in Nature of Marriage **– Held – Petitioner was aware that respondent was married man with wife and children, before commencement of their relationship – Status of petitioner is that of concubine or mistress who entered into relationship not in the nature of marriage – Concubine cannot maintain relationship in the nature of marriage because such relationship will not have exclusivity and will not be monogamous in character - "Domestic Relationship" discussed and explained – Domestic Violence Act 2005 does not take care of such relationship – Petitioner not entitled for any relief under the Act of 2005 – Petition dismissed. (Para 10 & 11)**

क. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 व 2(एफ) – भरणपोषण – पात्रता – विवाह के स्वरूप का संबंध – अभिनिर्धारित – याची को प्रत्यर्थी के साथ उसका संबंध आरंभ होने के पूर्व से जानकारी थी कि प्रत्यर्थी विवाहित पुरूष था जिसकी पत्नी एवं संताने थी – याची की हैसियत उपपत्नी या रखेल की है जिसने ऐसा संबंध बनाया जो विवाह के स्वरूप का नहीं – उपपत्नी, विवाह के स्वरूप का संबंध नहीं रख सकती क्योंकि ऐसे संबंध में अनन्यता नहीं होगी और एक पत्नीक प्रकृति का नहीं होगा – "घरेलू संबंध" विवेचित एवं स्पष्ट किया गया – घरेलू हिंसा अधिनियम, 2005 ऐसे संबंध का निपटान नहीं करता – याची 2005 के अधिनियम

के अंतर्गत किसी अनुतोष की हकदार नहीं – याचिका खारिज।

***B. Protection of Women from Domestic Violence Act (43 of 2005), Section 12 – Live-in-relationship – Presumption – Rebuttal* – Held – Continuous cohabitation of man and woman as husband and wife may raise presumption of marriage but the presumption drawn from long cohabitation is a rebuttable one and if there are circumstances which weaken and destroy the presumption, Court cannot ignore them – In instant case, there is a rebuttal of presumption. (Para 7)**

ख. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 – लिव–इन–रिलेशनशिप – उपधारणा – खंडन – अभिनिर्धारित – पुरूष और स्त्री का पति एवं पत्नी के रूप में निरंतर सहवास, विवाह की उपधारणा निर्मित कर सकता है परंतु लंबे सहवास से निकाली गई उपधारणा खंडनीय है और यदि ऐसी परिस्थितियां हैं जो उपधारणा को कमजोर एवं नष्ट करती हैं, न्यायालय उन्हें अनदेखा नहीं कर सकता – वर्तमान प्रकरण में, उपधारणा का खंडन होता है।

Cases referred :

(2013) 15 SCC 755, (2010) 10 SCC 469, (1978) 3 SCC 527, (2008) 4 SCC 520.

Shivam Mishra, for the applicant.

K.K. Pandey, for the non-applicant No.1.

ORDER

S.K. PALO, J. :- This revision under section 397 read with section 401 of the Code of Criminal Procedure has been filed by the petitioner/complainant assailing the order dated 14.1.2016 passed by Additional Sessions Judge, Kotma, District Anuppur in Criminal Appeal No.62/2015 whereby the order dated 10.6.2015 passed by Judicial Magistrate First Class, Kotma in M.Cr.C.No. 126/2014 under section 12 of the Protection of Women from Domestic Violence Act, 2015 (sic:2005) [for short "DV Act, 2005], wherein the Judicial Magistrate First Class had allowed the petition and granted interim maintenance of Rs.2500/- to the petitioner has been set aside.

2. Brief facts requisite for the disposal of this petition are that the petitioner had filed a complaint under section 12 of DV Act, 2005 claiming maintenance to the tune of Rs. 10,000/- from the respondent. The Judicial Magistrate First

Class after hearing the parties allowed the interim maintenance to the tune of Rs. 2500/- per month. The same was challenged before the Additional Sessions Judge, Kotma wherein the Additional Sessions Judge held that under the definition provided in section 2(f) of DV Act, 2005 holding that the petitioner is not "in the domestic relations," is not entitled for any maintenance. The petitioner has preferred this revision challenging the order of the Additional Sessions Judge on the ground that the finding of the Additional Sessions Judge is wholly illegal and contrary to the provision of the Act, It is not necessary that the applicant should be the legally wedded wife. The provisions of the Act apply to other persons who include the relationship in the nature of marriage, consanguinity, adoption or are family members living together as a joint family, Therefore, the order of Additional Sessions Judge suffered from illegality.

3. Learned counsel for the respondent vehemently opposed the contentions and submitted that the petitioner is not the legally wedded wife of the respondent and hence, the provisions of DV Act, 2005 are not applicable to the petitioner.

4. Perused the record. The evidence available on the record show that the petitioner was living with the respondent for quite long years. The reply dated 12.3.2015 filed by the respondent needs mention here. The respondent admitted that the petitioner came to him in the year 1970 and lived with him as a concubine. After living happily, she started quarrelling. Thereafter, she left the place and for 16-17 years she lived with someone else. Two daughters were born to her. Who is father of these two daughters is not known. After living separately from him, the third daughter was born to the petitioner. The respondent allowed the petitioner to live with him thinking that, future of her three daughters should not be spoiled. In the landed property and residential house situated at village Khudri his married wife of the respondent and his children are living after taking partition. It is also clear from the reply that the respondent is receiving pension apart from his ancestral property. The respondent has also admitted that his daughters, Sushila, Ramlali and Preeti have been married.

5. The words "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a share household, when they are related by consanguinity, marriage, or through a

relationship in the nature of marriage, adoption or are family members living together as a joint family. The words "through a relationship in the nature of marriage" include a person living in relationship for a considerable long period.

6. In the case of *Indra Sarma vs. V.K.V. Sarma,* reported as(2013) 15 SCC 755 the Apex Court has given guidelines for testing under what circumstances, a "live in relationship" will fall within the expression "relationship in the nature of marriage" under section 2(f) of the DV Act. According to the Supreme Court :-

> *"(i) **Duration of period of relationship:** Section 2(f) of the DV Act has used the expression "at any point of time", which means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation.*
>
> *(ii) **Share household:** The expression has been defined under Section 2(s) of the DV Act and hence, needs no further elaboration.*
>
> *(iii) **Pooling of resources and financial arrangements:** Supporting each other, or any one of them, financially, sharing bank accounts, acquiring immovable properties in joint names or in the name of the woman, long term investments in business, shares in separate and joint names, so as to have a long-standing relationship, may be a guiding factor.*
>
> *(iv) **Domestic arrangements:** Entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or upkeeping the house, etc. is an indication of a relationship in the nature of marriage.*
>
> *(v) **Sexual relationship:** Marriage-like relationship refers to sexual relationship not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring, etc.*

(vi) ***Children:*** *Having children is a strong indication of a relationshp in the nature of marriage. The parties, therefore, intend to have a long-standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.*

(vii) ***Socialisation in public:*** *Holding out to the public and socialising with friends, relations and others, as if they are husband and wife is a strong circumstances to hold the relationship is in the nature of marriage.*

(viii) ***Intention and conduct of the parties:*** *Common intention of the parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship. Intention may be expressed or implied and what is relevant is their intention as to matters that are characteristices of a marriage."*

7. Though these parameters are not exhaustive, but will definitely give some insight to such relationship, observed by the Supreme Court. In the present case, the petitioner admittedly entered into "live in relationship" with the respondent but with the knowledge that the respondent is a married man. The generic proposition that where a man and a woman are proved to lived together as husband and wife, the law presumes that they are living together in consequence of a valid marriage. Hence, the relation of the petitioner and the respondent was not a relation in the nature of marriage. The status of the petitioner is, therefore, was of a concubine. A "concubine" cannot maintain relations in the nature of marriage. Because, such a relaiton (sic:relation) will not have exclusivity and will not be monogamous in character. The continuous cohabitation of man and woman as husband and wife may raise the presumption of marriage, but the presumption which may be drawn from long cohabitation is a rebuttable one and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them. In the instant case, there is rebuttal of the presumption.

8. Learned counsel for the respondent has also placed reliance on the

case of *Indra Sarma* (supra) which has been cited by the petitioner also. In that case, the petitioner therein filed an application before the Judicial Magistrate First Class to pass protection order and residence order under sections 18 and 19 of the DV Act and also to pass mandatory order under section 20 and compensation order under section 22 and *ex parte* interim order under section 23 of DV Act, directing the respondent to pay Rs. 75,000/- towards the medical expenses and maintenance charges per month. The respondent opposed the same and admitted that he had co-habitated with the petitioner since 1993, though he was married and had two children, which are known to the petitioner. Pregnancy to the petitioner was terminated with her consent. The respondent also spent large amount for medical treatment. The respondent also sent cheque of Rs.2,50,000/- for medical expenses.

9. Judicial Magistrate First Class took the view that the plea of domestic violence has been established and directed the respondent to pay Rs. 18,000/- per month as maintenance from the date of petition. Subsequently, the respondent preferred an appeal under section 29 of the DV Act. The learned appellate Court observing that the petitioner lived with the respondent for 14 long years and considered to be a lived in relation for considerable period, and that non maintenance of the petitioner would amount to domestic violence, held that the respondent is legally obliged to maintain her and confirmed the order passed by the Judicial Magistrate First class. The respondent then preferred an appeal before the High Court. The High Court has held that respondent being married person, having two children, yet the petiioner (sic:petitioner) developed relation with the respondent inspite of opposition raised by the wife of the respondent and parents of the appellants. Relying on the decision in the case of *D.Velusamy vs. D.Patchaiammal,* (2010) 10 SCC 469 the Court held that the relationship between the parties would not fall within the ambit of "relationship in the nature of marriage", set aside the order passed by the Courts below. Aggrieved by the same, the petitioner filed an appeal before the Apex Court. The Apex Court after discussing the aspect elaborately propounded the guidelines mentioned above and affirmed the order of the High Court.

10. The respondent is a married man. In the application under section 12 of DV Act, 2005 the petitioner has accepted in paragraph 2 that the respondent is a married man having 5 daughters and 3 sons. Two sons are living at village

Khurdi. This indicates that petitioner has knowledge of marriage of respondent. Therefore, the petitioner entered into live in relationship with the respondent knowing that he was married person with wife and children. Hence, generic proposition laid down that where a man and a woman are proved to have lived together as husband and wife, the law presumes that they are living together in consequence of a valid marriage will not apply in the present case and hence, relation between the petitioner and the respondent was not a relationship in the nature of marriage and the status of the petitioner was that of a concubine. The concubine cannot maintain relationship in the nature of marriage. Because such relationship will not have exclusivity and will not be monogamous in character. In this regard, reference may be made to the cases of *"Badri Prasad vs. Director of Consolidation,* (1978) 3 SCC 527 and *Tulsa vs. Durghatiya;* (2008) 4 SCC 520."

11. As the petitioner was aware that the respondent was the married man even before the commencement of their relationship, hence, the status of the petitioner is that of "concubine" or mistress, who entered into relationship not in the nature of marriage. Long standing relations as concubine, though relations is not in the nature of marriage, of course, may at times, deserve protection because that woman might not have financial independence, but the DV Act 2005 does not take care of such relationship. Hence, the petitioner is not entitled for the relief under the DV Act, 2005. That being so, the petition is dismissed.

Revision dismissed.

I.L.R. [2017] M.P., 2567

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice J.P. Gupta

M.Cr.C. No. 5761/2016 (Jabalpur) decided on 18 April, 2017

SAIYAD ASFAQ ALI & ors. ...Applicants

Vs.

KAISAR BEGUM OWAISI ...Non-applicant

Penal Code (45 of 1860), Section 379 & 498-A and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Quashment of Criminal Proceedings **– Wife left matrimonial house alleging dowry demands and cruelty by husband and mother-in-law – She lodged FIR**

u/S 498-A, filed complaint case under Domestic Violence Act and also filed a case seeking maintenance – Subsequently, in-laws also filed a complaint case u/S 379 IPC against wife, her father and her cousin alleging that while leaving matrimonial house, wife took all ornaments with her – Cognizance taken and summons issued – Challenge to – Held – It is a matrimonial/civil dispute, daughter-in-law taking her belongings /ornaments is not an act of theft – No evidence that ornaments were not stridhan – No FIR was lodged by respondent – Criminal case u/S 379 IPC filed as a counter blast – Proceedings against applicants is abuse of process of Court/law – Proceedings quashed – Application allowed. (Para 5 & 7)

दण्ड संहिता (1860 का 45), धारा 379 व 498–ए एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – दाण्डिक कार्यवाहियों को अभिखंडित किया जाना – पत्नी ने पति एवं सास द्वारा दहेज की मांग और क्रूरता का अभिकथन करते हुए दाम्पत्य निवास छोड़ा – उसने धारा 498–ए के अंतर्गत प्रथम सूचना प्रतिवेदन दर्ज किया, घरेलू हिंसा अधिनियम के अंतर्गत परिवाद प्रकरण प्रस्तुत किया एवं भरणपोषण चाहते हुए एक प्रकरण भी प्रस्तुत किया – तत्पश्चात्, ससुराल वालों ने भी पत्नी, उसके पिता और रिश्ते का भाई के विरूद्ध भारतीय दण्ड संहिता की धारा 379 के अंतर्गत परिवाद प्रकरण प्रस्तुत किया, जिसमें अभिकथन किया गया कि दाम्पत्य निवास छोड़ते समय, पत्नी अपने साथ समस्त आभूषण ले गई – संज्ञान लिया गया तथा समन जारी किया गया – को चुनौती – अभिनिर्धारित – यह एक वैवाहिक/सिविल विवाद है, बहू द्वारा अपनी वस्तुएं/आभूषण ले जाना चोरी का कृत्य नहीं है – आभूषण स्त्रीधन नहीं थे इसका कोई साक्ष्य नहीं – प्रत्यर्थी द्वारा कोई प्रथम सूचना प्रतिवेदन दर्ज नहीं किया गया – भारतीय दण्ड संहिता की धारा 379 के अंतर्गत दाण्डिक प्रकरण एक प्रत्याक्रमण के रूप में प्रस्तुत किया गया – आवेदकगण के विरूद्ध कार्यवाहियां न्यायालय/विधि की प्रक्रिया का दुरूपयोग है – कार्यवाहियां अभिखंडित – आवेदन मंजूर।

Cases referred:

(2002) SCC OnLine Cal 382:(2003) 1 Cal LJ 582, (2014) 7 SCC 215.

Shashank Shekhar, for the applicants.

None, for the non-applicant.

ORDER

J.P. GUPTA, J. :- This petition has been preferred under section 482 of the Cr.P.C against the impugned order dated 07/09/2015 passed by the Judicial Magistrate First Class, Rewa in Criminal Case No. 3010/2015 whereby the complaint case under section 379 of the IPC has been registered against the applicants.

2. In brief, relevant facts of the case are that the respondent son Dr.Shad F. Zaman Owaisi marriage was solemnized with the applicant no.3 on 14/04/2012 at district Indore as per muslim customs and rituals. Applicant no.1 is the father of the applicant no.3 and applicant no.2 is the cousin of applicant no.3. After the marriage, applicant no.3 went to the matrimonial house of respondent situated at Rewa. Thereafter respondent and her son started demand of dowry and harassed and tortured the applicant no.3. On 19/04/2015 respondent and her son/husband of the applicant no.3 brutally beaten the applicant no.3 and caused severe injury on her left ear. Then the applicant no.3 informed his father applicant no.1 who send applicant no.2 to Rewa and thereafter she came back to Indore along with the applicant no.2 on 21/04/2015 and lodged an FIR against the respondent and his son/husband of the applicant no.3 on 23/04/2015 in Mahila Thana Indore, which was registered as Crime No.28/2015 under section 498A, 323, 506/34 of the IPC and under section 4 of the Dowry Prohibition Act and also filed complaint under Protection of Woman from Domestic Violence Act and have also filed the petition under section 125 of the Cr.P.C for maintenance. When the respondent and his son came to know about the fact that aforesaid FIR has been registered against them then respondent in order to dissolve the case filed against them on 18/06/2015 filed a complaint stating that on 21/04/2015 applicant no.3 and her cousin brother applicant no.2 dishonestly took out ornaments worth Rs.10 lacs from the house. On the aforesaid complaint, after enquiry learned JMFC have taken cognizance for offence under section 379 of the IPC and the summons have been issued to the applicants, therefore this petition has been filed.

3. It is submitted that the allegation in the complaint case does not disclose any criminal offence committed by the applicants. The complaint case is bereft of any details showing the role of the applicants and consisting of vague allegations and are so absurd and inherently improbable that on the

same no prudent person can ever reach to a just conclusion that there is sufficient ground for proceeding against the applicants. Even the allegation if taken on their face value accepted entirely do not *prima facie* constitute any offence or make out a case against the applicants. The aforesaid criminal proceeding is manifestly attended with malafide or maliciously instituted with an ulterior motive for wreaking vengeance on the applicants. In the present case applicants would be put to severe hardship if they continue to face full fledged trial. The continuation of criminal proceeding amounts to an abuse of the process of law and deserve to be quashed. In this regard learned counsel for the applicants placed reliance on the judgment in the case of *Manju Rani Gharami Vs. State of West Bengal* (2002) SCC OnLine Cal 382: (2003) 1 Cal LJ 582 and relevant para 6 and 7 are reproduced as under :-

> 6. Coming about the question to consider whether the allegation raised has disclosed an offence punishable under section 380 IPC, it is to be noted that under the defination of the offence theft contained in Section 378 IPC, the prosecution must establish that there was a taking away of a movable property, out of a possession of another, without his consent and such taking away was with the intention to take the same dishonestly. Section 24 of the IPC defines 'dishonestly' in the following manner. "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing 'dishonestly'. 'Wrongful gain' and 'wrongful loss' have been defined in Section 24 of the Act in the following manner. 'Wrongful gain' is gained by lawful means of property to which the person gaining is not legally entitled. 'Wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled.
>
> 7. In the instant case, the whole allegation is that the petitioner the wife of the defacto-complainant while leaving the house took, away some ornaments without the consent of the defacto-complainant and in the petition of complaint there was no allegation that the gold ornaments belonged to the defacto-complainant exclusively. The admitted back-ground, in this case is that the petitioner/wife who solong lived with the

husband and who also was in possession of those gold ornaments along with the husband left the house with those gold ornaments. In that background, it cannot be said that the action on the part of the wife was to cause wrongful gain to her or wrongful loss to defacto-complainant, the husband. It is well established that before the offence of theft is made out, it has to be show that (1) the accused was not legally entitled to the property alleged to be stolen and that (2) the complainant was wrongfully deprived of the property. Considering all these it can be said clearly that in the facts and circumstances of the case one of the most important ingredients of the theft, namely, intending to take dishonestly any movable property, is absent and therefore *prima facie* there cannot by any allegation punishable under Section 379 or under Section 380 of the Indian Penal Code.

4. On behalf of the respondent none was present.

5. Considering the contention of the parties and on perusal of the record of the complaint case, it appears that on 21/04/2015 applicant no.3 left matrimonial house with her cousin applicant no.2 and it is alleged that sometime keys of almirah was handed over to the respondent. Later on 05/05/2015, it was found that lot of ornaments kept in the almirah were not found and enquiry was made on phone from the applicant no.3, the applicant no.3 admitted that she and her cousin brother applicant no.2 on direction of applicant no.1 took out all the ornaments. Later on applicant no.1 also admitted the facts on telephone and also stated that if respondent son will divorce the applicant no.3 they will return the ornaments otherwise the applicant no.3 will take it in her use. From the averments in the complaint, *prima facie* it appears that this is not a case of theft, it is a matrimonial dispute in which daughter-in-law took with her the ornaments kept in the matrimonial house. There is no *prima facie* evidence to establish the fact that the property was not *"stridhan"* or was the property of the exclusive ownership of the respondent. The applicant no.3 has left the house in the circumstances when she was beaten therefore, taking her belonging with her along with her ornaments or other articles of her matrimonial house cannot be said to be an act of theft. This is a dispute of civil nature and definitely it is filed as a counter blast after lodging of the FIR

against the respondent and his son with regard to property and demand of dowry with the applicant no.3. Apart from it, as per the allegation in the complaint no one has seen to take away the ornaments by the applicant no.1 and 2. Near about 15 days the ornaments found missing no complaint has been lodged, no specific date and telephone number have been mentioned to make query with the applicant no.3 and applicant no.1. After refusal of the return of ornaments, no written notice has been given no complaint to the police was lodged or no protest has been lodged against none recording of FIR by the police till more than one month. In such circumstances, no prudent man can belief that the allegations be considered *prima facie* to reach to a such conclusion that there is a sufficient ground for proceeding against the applicants.

6. The scope of section 482 of Cr.P.C. has been discussed by the Apex court in the case of *Rishipal Singh Vs. State of Uttar Pradesh and another*, reported in (2014)7 SCC 215 extensively. The relevant paras are reproduced herein :-

> **10.** Before we deal with the respective contentions advanced on either side, we deem it appropriate to have a thorough look at Section 482 CrPC, which reads:
>
> **"482.** ***Saving of inherent powers of High Court***-Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice."
>
> A bare perusal of Section 482 CrPC makes it crystal clear that the object of exercise of power under this section is to prevent abuse of process of court and to secure ends of justice. There are no hard-and-fast rules that can be laid down for the exercise of the extraordinary jurisdiction, but exercising the same is an exception, but not a rule of law. It is no doubt true that there can be no straitjacket formula nor defined parameters to enable a court to invoke or exercise its inherent powers. It will always depend upon the facts and circumstances of each

case. The courts have to be very circumspect while exercising jurisdiction under Section 482 CrPC.

11. This Court in *Medchl Chemicals & Pharma (P) Ltd. V. Biological E. Ltd.* [(2000) 3 SCC 269 : 2000 SCC (Cri) 615] has discussed at length about the scope and ambit while exercising power under Section 482 CrPC and how cautious and careful the approach of the courts should be. We deem it apt to extract the relevant portion from that judgment, which reads: (SCC p. 272, para 2)

"2. Exercise of jurisdiction under the inherent power as envisaged in Section 482 of the Code to have the complaint or the charge-sheet quashed is an exception rather than a rule and the case for quashing at the initial stage must have to be treated as the rarest of rare so as not to scuttle the prosecution. With the lodgement of first information report the ball is set to roll and thenceforth the law takes its own course and the investigation ensues in accordance with the provisions of law. The jurisdiction as such is rather limited and restricted and its undue expansion is neither practicable nor warranted. In the event, however, the court on a perusal of the complaint comes to a conclusion that the allegations levelled in the complaint or charge-sheet on the face of it does not constitute or disclose any offence as alleged, there ought not to be any hesitation to rise up to the expectation of the people and deal with the situation as is required under the law. Frustrated litigants ought not to be indulged to give vent to their vindictiveness through a legal process and such an investigation ought not to be allowed to be continued since the same is opposed to the concept of justice, which is paramount".

12. This Court in a plethora of judgments has laid down the guidelines with regard to exercise of jurisdiction by the courts under Section 482 CrPC. In *State of Haryana v. Bhajan Lal* [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] this Court has listed the categories of cases when the power

under Section 482 can be exercised by the Court. These principles or the guidelines were reiterated by this Court in (1) *CBI v. Duncans Agro Industries Ltd.* [(1996) 5 SCC 591 : 1996 SCC (Cri) 1045], (2) *Rajesh Bajaj v. State (NCT of Delhi)* [(1999) 3 SCC 259 : 1999 SCC (Cri) 401] and (3) *Zandu Pharmaceutical Works Ltd. V. Mohd. Sharaful Haque* [(2005) 1 SCC 122 : 2005 SCC (Cri) 283]. This Court in *Zandu Pharmaceutical Works Ltd.* [(2005) 1 SCC 122 : 2005 SCC (Cri) 283] observed that:

The power under Section 482 of the Code should be used sparingly and with circumspection to prevent abuse of process of court, but not to stifle legitimate prosecution. There can be no two opinions on this, but, if it appears to the trained judicial mind that continuation of a prosecution would lead to abuse of process of court, the power under Section 482 of the Code must be exercised and proceedings must be quashed.

Also see *Om Prakash v. State of Jharkhand* [(2012) 12 SCC 72 : (2013) 3 SCC (Cri) 472], SCC p. 95, para 43.

13. What emerges from the above judgments is that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made in the complaint prima facie establish the case. The courts have to see whether the continuation of the complaint amounts to abuse of process of law and whether continuation of the criminal proceeding results in miscarriage of justice or when the court comes to a conclusion that quashing these proceedings would otherwise serve the ends of justice, then the court can exercise the power under Section 482 CrPC. While exercising the power under the provision, the courts have to only look at the uncontroverted allegation in the complaint whether prima facie discloses an offence or not, but it should not convert itself to that of a trial court and dwell into the disputed questions of fact.

7. In the light of the aforesaid discussion, it is clear that the continuance

of the proceedings against the applicants on the basis of complaint made by the respondent with regard to commission of offence under section 379 of IPC would be not justifiable and it would amount to an abuse of the process of the court hence the proceeding deserves to be quashed. Accordingly this petition is allowed.

Application allowed.

I.L.R. [2017] M.P., 2575
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Rajendra Mahajan
M.Cr.C. No. 1310/2016 (Jabalpur) decided on 1 May, 2017

RAKESH SAHU ...Applicant
Vs.
SMT. MAMTA SAHU ...Non-applicant

***Protection of Women from Domestic Violence Act (43 of 2005), Sections 2(o), 12, 18, 28(1) & 31 and Protection of Women from Domestic Violence Rules, 2006, Rule 6(5) – Maintenance Order & Protection Order – Enforcement* – Wife filed application u/S 31 of the Act of 2005 for recovery of arrears of maintenance amount from applicant – Bailable warrant issued – Challenge to – Held – As per Section 18 r/w Section 2(o) of the Act of 2005, order of granting maintenance is not a Protection Order and non-payment of same would not attract Section 31 of the Act – Impugned order quashed – Further held – Rule 6(5) of Rules of 2006 provides enforcement of order of Magistrate as provided in Section 125 Cr.P.C., hence Magistrate directed to treat the application filed u/S 31 as if filed under Rule 6(5) of the Rules of 2006 and proceed giving opportunity of hearing to applicant – Application partly allowed. (Paras 5 to 7)**

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 2(ओ), 12, 18, 28(1) व 31 एवं घरेलू हिंसा से महिलाओं का संरक्षण नियम, 2006, नियम 6(5) – भरणपोषण आदेश व संरक्षण आदेश – प्रवर्तन – पत्नी ने आवेदक से भरणपोषण की राशि के बकाया की वसूली हेतु 2005 के अधिनियम की धारा 31 के अंतर्गत आवेदन प्रस्तुत किया – जमानतीय वारंट जारी किया गया – को चुनौती – अभिनिर्धारित – 2005 के अधिनियम की धारा 18 सहपठित धारा 2(ओ) के

अनुसार भरणपोषण प्रदान करने का आदेश एक संरक्षण आदेश नहीं है तथा उक्त का असंदाय अधिनियम की धारा 31 को आकर्षित नहीं करेगा – आक्षेपित आदेश अपास्त – आगे अभिनिर्धारित – नियम 2006 का नियम 6(5) दंड प्रक्रिया संहिता की धारा 125 में दिये गये उपबंध अनुसार मजिस्ट्रेट के आदेश का प्रवर्तन उपबंधित करता है, इसलिए मजिस्ट्रेट को धारा 31 के अंतर्गत प्रस्तुत आवेदन को ऐसा माने जाने हेतु जैसे कि वह नियम 2006 के नियम 6(5) के अंतर्गत प्रस्तुत किया गया हो तथा आवेदक को सुनवाई का अवसर देते हुए कार्यवाही करने के लिए निदेशित किया गया – आवेदन अंशतः मंजूर।

Case referred:

2008 (4) MPLJ (SC) 455.

Pal Singh Yadav, for the applicant.
None, for the non-applicant-though properly represented.

ORDER

RAJENDRA MAHAJAN, J. :- The applicant has filed the petition under Section 482 of the Cr.P.C. for quashment of the orders dated 27.04.2015 and 27.11.2015 passed by the Judicial Magistrate First Class Bhopal in R.T. No. 12543/15 titled Smt. Mamta Sahu Vs. Rakesh Sahu.

2. The brief background facts of the case for adjudication of the petition are as follows:-

2.1 On 12.01.2009, respondent Smt. Mamta Sahu filed an application before the court of Judicial Magistrate First Class Bhopal under Section 12 of the Protection of Women from Domestic Violence Act 2005 (for short "the Act") against applicant Rakesh Sahu and others seeking various reliefs from them. Thereupon, Misc. Criminal Case No. 519/08, Smt. Mamta Sahu Vs. Rakesh Sahu and others was registered, In that case, on 04.09.2014, The learned JMFC passed the final order, directing the applicant to pay the respondent a total of Rs. 7,000/- per month towards her personal maintenance and taking a house on rent from the date of filing the application with a direction that the interim maintenance allowance shall be adjusted. Feeling

aggrieved by the order, the applicant filed Criminal Appeal No. 943/14, Rakesh Sahu Vs. Smt. Mamta Sahu under Section 29 of the Act. Vide the judgment dated 22.07.2015, the learned Appellate Judge reduced the maintenance from Rs. 7,000/- to Rs. 5000/- per month.

2.2 Thereafter, on 23.03.2015 the respondent filed an application under Section 31 of the Act along with her affidavit for the recovery of arrears of the maintenance amounting to Rs. 49,000/- due as on 23.03.2015 from the applicant. On 27.04.2015, the learned JMFC has ordered to register the application under the aforesaid Section. Thereupon, the application is registered first as MJC No. 627/15, later as R.T. No.12543/15. On 27.11.2015, the learned JMFC passed an order, directing to secure the presence of applicant in the case by issuing a bailable warrant of arrest in the sum of Rs. 5000/- and fixed the case for his presence. Hence, the petition.

3. Having taken this court through the order dated 04.09.2014 passed in M.Cr.C. No. 519/08 and the judgment dated 22.07.2015 passed in Criminal Appeal No. 943/14, the learned counsel for the applicant submits that both the courts have not passed the Protection Order in terms of Section 18 of the Act against the applicant. Therefore, the application filed by the respondent under Section 31 of the Act is not maintainable and the learned JMFC has committed legal errors by registering the application vide order dated 27.04.2015 and directing vide order dated 27.11.2015 to secure the presence of the applicant in the case by means of bailable warrant of arrest. Thus, both the orders passed in R.T. No. 12543/15 are liable to be set aside by this court in exercise of powers under Section 482 Cr.P.C. He also submits that the applicant has already paid the maintenance to the respondent up to May, 2017. In support of this contention, he has drawn the attention of this court towards the statement of accounts prepared by him.

4. I have earnestly considered the submissions made by the learned

counsel for the applicant and perused the entire material on record.

5. From the order dated 04.09.2014 passed in M.Cr.C. No. 519/08 and the judgment and order dated 22.07.2015 passed in Criminal Appeal No. 943/14, it is crystal clear that neither the learned JMFC nor the learned Appellate Judge has passed the Protection Order in terms of Section 18 of the Act against the applicant. On a plain reading of Section 18 of the Act in the light of definition of "Protection Order" given in Section 2 (0) of the Act, it could be definitely said that the order of granting maintenance is not Protection Order and non-payment of the same will not attract the provisions of Section 31 of the Act. Thus, the learned JMFC has committed legal errors in passing the order dated 27.04.2015 for the registration of the application under Section 31 of the Act and the order dated 27.11.2015 for securing the presence of the applicant through the execution of bailable warrant of arrest in R.T. No. 12543/15. In conclusion, both the impugned orders are quashed.

6. It is pertinent to mention herein that the sub-rule 5 of rule 6 of the Protection of Women from Domestic Violence Rules 2006 (for short the 'Rules 2006') provides that the orders of Magistrate shall be enforced in the same manner as laid down in Section 125 Cr.P.C. Thus, if any person so ordered to pay the maintenance fails to comply with the order the Magisterial Court of the competent jurisdiction is bound to issue warrant for levying the amount due in the manner for levying fines as per Section 421 Cr.P.C and may send the defaulter respondent to civil prison as per the procedure contemplated under Section 125 Cr.P.C. Section 28 (1) of the Act provides that the provisions of Section 12, 18 to 23 and 31 of the Act shall be governed by the general provisions of the Cr.P.C. In this view of the matter, the learned JMFC ought to have registered the application filed by the respondent herein, under sub-rule 5 of rule 6 of the Rules 2006, notwithstanding that the respondent has filed an application under Section 31 of the Act in view of the law laid down by the Supreme Court in the case of *T.Nagappa Vs. Y.R.Muralidhar* [2008 (4) MPLJ (SC)455], wherein it is held that mere wrong mentioning of provision of law in an application would not be of any relevance, if the court concerned has the requisite jurisdiction to pass an order on it. Admittedly, the learned JMFC has jurisdiction to pass an order for recovery of the arrears of maintenance allowance against the applicant.

7. In view of the foregoing discussion, this petition is partly allowed and

orders dated 27.04.2015 and 27.11.2015 passed in R.T. No.12543/15 are quashed with a direction to the learned JMFC to treat the application which the respondent filed under Section 31 of the Act, as if it was filed under sub-rule 5 of rule 6 of the rules 2006 and if necessary change the nomenclature of the case-file from R.T. to Miscellaneous Criminal case. The learned JMFC is also directed to give an opportunity to the applicant to prove his claim that he has already paid the maintenance to the respondent up to May, 2017. The applicant is directed to appear before the concerned JMFC court **on or before 27.06.2017.** If the learned JMFC takes him into custody for any reason whatsoever, then he be released upon his furnishing the personal bond in the sum of Rs. 40,000/-.

8. A copy of this order be sent to the court of learned JMFC concerned.

9. In the aforesaid terms and conditions, this M.Cr.C. is finally disposed of.

Certified copy as per rules.

Application partly allowed.

I.L.R. [2017] M.P., 2579

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.K. Seth & Smt. Justice Anjuli Palo

M.Cr.C. No. 7959/2017 (Jabalpur) decided on 31 August, 2017

RABIYA BANO ...Applicant

Vs.

RASHID KHAN & anr. ...Non-applicants

A. Penal Code (45 of 1860), Sections 363, 366, 376(2)(I) and Protection of Children from Sexual Offences Act, (32 of 2012), Section 3/4 – **Held – Prosecutrix and her parents have not deposed the exact date of birth – Documentary evidence do not establish that age of prosecutrix was less than 18 yrs – No ossification test conducted – Date of birth recorded by mother in school record is based on presumption and is not reliable – No conclusive evidence regarding age of prosecutrix – Story told by prosecutrix is unnatural and doubtful – Delayed FIR – As per medical opinion, prosecutrix habitual to intercourse – No external or internal injury found on prosecutrix – Accused deserves benefit of doubt – Application dismissed.**

(Paras 9, 10, 13 to 17, 20 & 23)

क. दण्ड संहिता (1860 का 45), धाराएँ 363, 366, 376(2)(I) एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 3/4 – अभिनिर्धारित – अभियोक्त्री एवं उसके माता–पिता ने निश्चित जन्मतिथि का अभिसाक्ष्य नहीं किया – दस्तावेजी साक्ष्य स्थापित नहीं करता है कि अभियोक्त्री की आयु 18 वर्ष से कम थी – कोई अस्थि विकास परीक्षण संचालित नहीं किया गया – माता द्वारा शाला अभिलेख में अभिलिखित की गई जन्मतिथि उपधारणा पर आधारित है तथा विश्वसनीय नहीं है – अभियोक्त्री की आयु के संबंध में कोई निश्चायक साक्ष्य नहीं है – अभियोक्त्री द्वारा बताई गई कहानी अस्वाभाविक और संदेहास्पद है – प्रथम सूचना प्रतिवेदन में विलंब – चिकित्सीय मतानुसार, अभियोक्त्री संभोग की आदी है – अभियोक्त्री पर कोई बाहरी या अंदरूनी चोट नहीं पाई गई – अभियुक्त संदेह का लाभ दिये जाने योग्य है – आवेदन खारिज।

B. Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 12 – Proof of Age – Applicability of Rules – **Held – Apex Court has concluded that Rule 12 of the Rules of 2007 though strictly applicable to a child in conflict with law, would be applicable to determine the age of a child who is a victim of crime – Rule 12(3) is applicable for determining the age of prosecutrix. (Para 11)**

ख. किशोर न्याय (बालकों की देखरेख और संरक्षण) नियम, 2007, नियम 12 – आयु का सबूत – नियमों की प्रयोज्यता – अभिनिर्धारित – सर्वोच्च न्यायालय ने यह निष्कर्षित किया है कि 2007 के नियम का नियम 12 यद्यपि विधि के विरूद्ध एक बालक पर कठोरता से लागू होता है, उस बालक की आयु अवधारित करने के लिए प्रयोज्य होगा जो अपराध का पीड़ित है – नियम 12(3) अभियोक्त्री की आयु का अवधारण करने के लिए प्रयोज्य है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 378(3) – Leave to Appeal against Acquittal – Grounds & Practice – **Held – Apex Court has concluded that in appeal against acquittal, two views are possible and the one which goes in favour of acquittal has to be adopted – Further held – Even otherwise, it is settled law that appellate Court may only interfere in appeal against acquittal where there are substantial and compelling reasons to do so. (Para 21 & 22)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378(3) – दोषमुक्ति के विरूद्ध अपील करने हेतु अनुमति – आधार व पद्धति – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि दोषमुक्ति के विरूद्ध अपील में, दो दृष्टिकोण

संभव है तथा उनमें से एक जो दोषमुक्ति के पक्ष में होता है उसे अंगीकार किया जाना चाहिए – आगे अभिनिर्धारित – अन्यथा भी यह सुस्थापित विधि है कि अपीली न्यायालय केवल तब दोषमुक्ति के विरूद्ध अपील में हस्तक्षेप कर सकता है जहां ऐसा करने के लिए सारभूत एवं बाध्यकारी कारण हों।

Cases referred:

2013 (7) SCC 263, 1988 Supp. SCC 604, 2017 SCC OnLine Del 8186, 2017 SCC OnLine Del 9111, 2016 (1) SCC 696, AIR 2009 SC (Supp) 1318, 2017 Cr.L.J. 732 (SC), 2017 Cr.L.J. 749 (SC), AIR 1934 PC 227 (2), AIR 1963 SC 200, (2003) 8 SCC 180.

Sanjay Patel, for the applicant.
None, for the non-applicant No. 1.
Akshay Namdeo, G.A. for the non-applicant No. 2/State.

ORDER

The Order of the Court was passed by :

ANJULI PALO, J. :- This application under Section 378 (3) of Code of Criminal Procedure has been filed by the prosecutrix for leave to appeal being aggrieved by the judgment dated 10.4.2017 passed by the 7th Additional Sessions Judge, Bhopal in Sessions Trial No.196/15, whereby the learned trial Court has acquitted the respondent No.1 for the offences punishable under Sections 363, 366, 376 (2) (I) of IPC and Section 3/4 Protection of Children from Sexual Offences Act, 2012.

2. As per the prosecution case, the prosecutrix who was aged about 15 years was residing with her parents. On 11.2.2015 at about 10.00 pm when the prosecutrix was in front of her home, the accused came there and closed her mouth and took her to the roof of her house and committed rape with her. On 16.2.2015 when her father returned back to home from Bombay, the prosecutrix narrated the incident to her parents. Thereafter she lodged the FIR at the police station, Shyamla Hills against the respondent No.1. An offence under Sections 363, 366, 376 (2) (I) of IPC and Section 3/4 Protection of Children from Sexual Offences Act, 2012 has been registered against him. After completing the investigation, the police filed a charge sheet before the concerned magistrate and the same was committed to the trial Court.

3. The learned trial Court framed the charges against the respondent

No.1 under Section 363, 366, 376 (2) (I) of IPC in alternate under Section 3/ 4 Protection of Children from Sexual Offences Act, 2012. The respondent No.1 abjured his guilt and stated that he was falsely implicated by the complainant family to create pressure on him to marry with the prosecutrix. In this regard defence witnesses also produced by the respondent No.1. Further the respondent No.1 also took plea of alibi.

4. After appreciation of evidence on record, the learned trial Court found that the prosecution has failed to establish that the prosecutrix was minor at the time of incident and the respondent No.1 committed rape on her. It was also found that the prosecutix was 26 years of age and her conduct was unnatural. The incident was narrated by her to the parents after 5 days of the incident. The FIR was delayed, therefore, the respondent No.1 has been acquitted from the offences punishable under Sections 363, 366, 376 (2) (I) of IPC in alternate under Section 3/4 Protection of Children from Sexual Offences Act, 2012.

5. The prosecutrix has submitted that the findings of the learned trial Court are illegal and contrary to law. The learned trial Court committed error in holding that the prosecution failed to prove the allegation without proper appreciation of the medical material available on record.

6. Heard and perused the record.

7. Learned GA has opposed the above grounds and submitted that the findings of the trial Court is based on the evidence on record, hence, no interference is called for in the findings of the learned trial Court.

8. Two questions arise for our consideration :-

(1) Whether the trial Court was correct in concluding that it cannot be assumed that the age of the prosecutrix was less than 18 years on the date of incident ?

(2) Whether the trial Court erred in discarding the testimony of the prosecutrix which could be made sole basis for convicting the accused ?

9. With regard to the age of the prosecutrix at the time of offence, the prosecutrix (PW1) herself has not stated about her date of birth. At the time of incident she was student of 7th Class. Her father Abdul Mazid (PW2) and

her mother Rajio Bano (PW3) both of them have also not deposed the date of birth of the prosecutrix. Abdul Mazid (PW2) has explained that the prosecutrix is her elder daughter. In paragraph 10 he explained that he had not gone to the School for admission of the prosecutrix. The prosecutrix was admitted in school by her mother. In paragraph 8 Rajio Bano (PW3) her mother explained the date of birth was recorded by her on the basis of mark sheet. In the last part of paragraph 8, she again explained that she has no document with regard to date of birth of her daughter.

10. Prashant (PW6), Principal of Public Higher Secondary School in his cross-examination has admitted that he had no birth certificate or other document with regard to ascertain the exact date of birth of the prosecutrix. From his testimony, it seems that he was not able to say that the date of birth registered in the school record is right or wrong. The aforesaid evidence is not the conclusive evidence to prove the date of birth of the prosecutrix as 10.6.2000. No ossification test was conducted by the doctor which would establish the characteristic, fusion of bones, proof of date of birth, etc. to determine the age of the prosecutrix. Hence we find that the date of birth of the prosecutrix was recorded by her mother in school record is based only on presumption, hence it is not found reliable.

11. The Apex Court in the case of *Jarnail Singh Vs. State of Hariyana* [2013 (7) SCC 263] has held that Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 though strictly applicable to a child in conflict with law, would also be applicable to determine the age of a child who is a victim of a crime. Accordingly, Rule 12(3) is applicable for determining the age of the prosecutrix, which reads as under:

> **"12.Procedure to be followed in determination of Age:-**
> 3. In every case concerning a chile 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 speaking 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;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be record a finding in respect of his age and either or the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence, whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

12. At the same time, it has also been held in *Birad Mal Singhvi V. Anand Purohit,* 1988 Supp. SCC 604 (Paragraph 15) that an entry relating to date of birth made in a school register is not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded [See also *State (Govt. of NCT of Delhi) V. Charan Singh,* 2017 SCC OnLine Del 8186 (paragraphs 16-21); and *State (GNCT of Delhi) V. Mohd. Irfan,* 2017 SCC OnLine Del 9111 (paragraphs 12-15)].

13. Accordingly, the documents on record could not be relied upon and prove that the age of the prosecutrix was less than 18 years at the time of incident. Thus, the ingredients of Section 361 of IPC are not established by the prosecution.

14. In the case of *State of M.P. Vs. Munna* 2016 (1) SCC 696, the Supreme Court has held as under :-

"The age of the prosecutrix not proved beyond reasonable doubt to be less than 16 years of age at the time of incident,

therefore, the High Court was right in holding that the prosecutrix was more than 16 years of age and was competent to give her consent."

15. The prosecutrix (PW1) has stated that the incident was took place at about 10.00 PM and at that time her mother, brother, real aunty and uncle were present in the home. It cannot be possible for the respondent No.1, without the consent of prosecutrix, he abducted her and took her on the roof of the house through the stairs. The story told by the prosecutrix that due to fear of the respondent No.1 she could not raise the alarm seems to be unnatural and doubtful because the respondent No.1 was bare handed. After the said incident, the prosecutrix kept mum for about 4-5 days. She could have told the incident to her mother and brothers, who were present in home at that time. She also stated that she is more closure to her mother than her father. Then why she waited up to 4-5 days for her father, not immediately narrated the incident to her mother.

16. Dr. Dipti Pawar (PW8) in the medical examination of prosecutrix found her secondary sex character was well developed and hymen was old and healed. Doctor not found any internal or external injury over the body of the prosecutrix. No definite opinion was given by her about intercouse with the prosecutrix.

17. The medical opinion also indicates that the prosecutrix was found habitual to have intercouse. It seems that due to pressure of her family members, she lodged the report against the respondent No.1. Hence delayed FIR has also great importance, which creates reasonable doubt to the testimony of the prosecutrix, hence the benefit of doubt be given to the respondent No.1. The defence taken by the respondent No.1/accused seems to be reasonable and plausible. Prior to the incident both of them known to each other very well.

18. Samsher (DW1) deposed that prior to the incident, father of the prosecutrix came to his home with the proposal of marriage for the prosecutrix with the respondent No.1. Mohd Arshad (DW2) deposed that at the time of incident, respondent No.1 was present with him at Lalghati Chouraha up to 12.30 PM. Thereafter the respondent No.1 went to his home. The value of defence witness is equal to the prosecution witnesses, which creates reasonable

doubts about the story of prosecution. Therefore, due to above mentioned weaknesses of testimony of the prosecutrix, the defence evidence cannot be ignored superficially.

19. On the above ground, it could be interfered that the respondent No.1/ accused would not have forcibly had sexual intercourse with the prosecutrix (PW1).

20. The circumstances lead us to the conclusion that she freely, voluntarily and consciously consented for having sexual intercourse with the respondent No.1. She did not resist the respondent No.1.

21. In the cases of *Ghurvey Lal Vs. State of U.P.* [AIR 2009 SC (Supp) 1318] *Madarthi Narayan Vs. State of Kerala* [2017 Cr.L.J. 732 (SC)] and *Mahaveer Singh Vs. State MP* [2017 Cr.L.J. 749 (SC)], the Apex Court has held that in appeal against acquittal of two views are possible. View which goes in favour of the acquittal has be adopted.

22. Even otherwise, it is settled law that the appellate court may only interfere in an appeal against the acquittal where there are substantial and compelling reasons to do so, as held in cases of *Sheo Swarup Vs. King Emperor* [AIR 1934 PC 227 (2)], *M.G. Agrawal Vs. State of Maharashtra* [AIR 1963 SC 200] and *State of Rajasthan Vs. Rajaram* [(2003) 8 SCC 180].

23. In the above circumstances, we are of the considered opinion that no interference is warranted in the impugned judgment. Hence leave is not granted in favour of the appellant to file appeal against acquittal. Accordingly, the application is dismissed.

24. Let the record be sent back to the trial Court alongwith a copy of this order.

Application dismissed.