VOL.2

INDIAN LAW REPORT (M.P.) COMMITTEE

APRIL 2018

PUBLISHED BY

Shri Akhil Kumar Srivastava, Principal Registrar (ILR)

TABLE OF CASES REPORTED

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

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***Arbitration and Conciliation Act (26 of 1996), Section 34 & 37 – Allegation of bias against arbitrator* – Parties by mutual agreement agreed for named arbitrator – In statement of claim and during the course of proceedings before arbitrator no allegation of bias against arbitrator raised – Appellant raised plea of bias while raising objection u/S 34 – Such a course not open to appellant – Objection of bias on the ground that Commissioner has heard the appeal filed by appellant against eviction order – Held – Appeal was heard by the commissioner in his capacity as an appellate authority whereas the arbitration has been conducted in a different capacity as named arbitrator in arbitration clause – Objection of bias cannot be accepted. [Central Paints Co. Pvt. Ltd. Vs. State of M.P.] ...980**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 34 व 37 – मध्यस्थ के विरूद्ध पक्षपात का अभिकथन – पक्षकार आपसी करार द्वारा नामित मध्यस्थ हेतु सहमत हुए – दावे के कथन में एवं मध्यस्थ के समक्ष कार्यवाहियों के समय, मध्यस्थ के विरूद्ध पक्षपात का अभिकथन नहीं उठाया गया था – अपीलार्थी ने धारा 34 के अंतर्गत आक्षेप उठाते समय पक्षपात के अभिवाक् को उठाया है – अपीलार्थी के लिए उक्त मार्ग खुला नहीं – पक्षपात का आक्षेप इस आधार पर कि आयुक्त ने बेदखली के आदेश के विरूद्ध, अपीलार्थी द्वारा प्रस्तुत अपील पर सुनवाई की है – अभिनिर्धारित – आयुक्त द्वारा अपीली प्राधिकारी के रूप में उसकी क्षमता में अपील की सुनवाई की थी जबकि, माध्यस्थम को भिन्न क्षमता में, माध्यस्थम खंड में नामित मध्यस्थ के रूप में संचालित किया गया है – पक्षपात का आक्षेप स्वीकार नहीं किया जा सकता। (सेन्ट्रल पेन्टस् कं. प्रा. लि. वि. म.प्र. राज्य) ...980

***Arbitration and Conciliation Act (26 of 1996), Section 37 – Scope of appeal against the order deciding objection u/S 34 of Act* – Award of the arbitrator can be subject matter of challenge u/S 34 of the Act only on the limited ground prescribed therein – Scope of appeal cannot be wider than the scope of considering the objection u/S 34 – Unless a ground u/S 34 is made out appellate power cannot go into the findings of the arbitrator or re-appreciate the evidence. [Central Paints Co. Pvt. Ltd. Vs. State of M.P.] ...980**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 37 – अधिनियम की धारा 34 के अंतर्गत आक्षेप के विनिश्चय के आदेश के विरूद्ध अपील का विस्तार – मध्यस्थ का अवार्ड, अधिनियम की धारा 34 के अंतर्गत केवल उसमें विहित सीमित आधार पर चुनौती की विषय वस्तु हो सकता है – अपील का विस्तार, धारा 34 के अंतर्गत आक्षेप पर विचार के विस्तार से अधिक व्यापक नहीं हो सकता – जब तक कि धारा 34 के अंतर्गत आधार नहीं बनता, अपीली शक्ति, मध्यस्थ के निष्कर्षों पर विचार या साक्ष्य का पुनः मुल्यांकन नहीं कर सकती। (सेन्ट्रल पेन्टस् कं. प्रा. लि. वि. म.प्र. राज्य) ...980

fee also which is required for filing the appeal – Vakalatnama signed on 19.01.15 and appeal was filed on 20.01.15 which clearly establish that appellant did not hand over the vakalatnama alongwith the certified copy of judgment within period of limitation – Power to condone the delay can be exercised only when party approaching the Court satisfies that he had sufficient cause for not filing the appeal within prescribed period of limitation - Reasons given in the condonation application are vague in nature – Application for condonation of delay dismissed and consequently appeal also dismissed. [Sampatbai Vs. Smt. Kamlabai] …*35

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 एवं परिसीमा अधिनियम (1963 का 36), धारा 5 – द्वितीय अपील – विलंब के लिए माफी – पर्याप्त कारण – द्वितीय अपील प्रस्तुत करने में 485 दिनों का विलंब – अपीलार्थीगण का निवेदन है कि अपील प्रस्तुत करने के लिए अपीलार्थीगण में से एक ने अधिवक्ता से संपर्क किया और वे यह मान रहे थे कि उसने अधिवक्ता को अपील प्रस्तुत करने के लिए प्रमाणित प्रति दे दी थी – अभिनिर्धारित – एकमात्र कारण सद्भाविक हो सकता है परंतु विधिमान्य कारणों तथा सामग्री द्वारा समर्थित नहीं क्योंकि अपील प्रस्तुत करने के लिए अधिवक्ता को न केवल आक्षेपित आदेश की प्रमाणित प्रति बल्कि सभी पक्षकारों द्वारा सम्यक् रूप से हस्ताक्षरित वकालतनामा, वादपत्र की प्रति, लिखित कथन एवं अन्य दस्तावेज भी सौंपे जाना अपेक्षित है – अपीलार्थी ने यह कथन नहीं किया है कि उसने न्यायालय फीस खरीदी और अधिवक्ता की फीस भी अदा की थी जो कि अपील प्रस्तुत करने हेतु अपेक्षित है – वकालतनामा 19.01.2015 को हस्ताक्षरित तथा अपील 20.01.2015 को प्रस्तुत की गई थी जो कि स्पष्ट रूप से स्थापित करता है कि अपीलार्थी ने परिसीमा अवधि के भीतर निर्णय की प्रमाणित प्रति के साथ वकालतनामा नहीं सौंपा था – विलंब माफ करने की शक्ति का प्रयोग केवल तब किया जा सकता है जब न्यायालय के समक्ष जाने वाला पक्षकार यह संतुष्टि करता है कि परिसीमा की विहित अवधि के भीतर अपील प्रस्तुत नहीं करने हेतु उसके पास पर्याप्त कारण था – माफी के आवेदन में दिये गये कारण अस्पष्ट स्वरूप के है – विलंब की माफी हेतु आवेदन खारिज एवं परिणामस्वरूप अपील भी खारिज। (सम्पतबाई वि. श्रीमती कमलाबाई) …*35

Civil Procedure Code (5 of 1908), Section 115 – See – Practice & Procedure **[Raj Narayan Singh Vs. M/s. Pushpa Food Processing Pvt. Ltd.] …878**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 – देखें – पद्धति एवं प्रक्रिया (राज नारायण सिंह वि. मे. पुष्पा फुड प्रोसेसिंग प्रा. लि.) **…878**

Civil Procedure Code (5 of 1908), Section 151 – Inherent Powers of Court – Practice & Procedure **– Petition by plaintiff against dismissal of application dated 05.12.2016 u/S 151 CPC for recalling of order by which Court directed parties to appear before Collector for impounding unregistered and unstamped agreement of sale, in the suit of specific performance of**

entities being Public Sector Undertakings with the investment of Central Government – Trial Court and High Court rightly held that respondents are not liable to pay any external development fee to appellant – Appeals dismissed. [Municipal Council, Raghogarh Vs. National Fertilizer Ltd.]

(SC)…827

नगर पालिका परिषद – बाह्य विकास प्रभार – सरकारी संस्था – प्रत्यर्थीगण को कतिपय वन भूमि, जो कि नगरपालिका सीमाओं के भीतर थी, आबंटित की गई थी – नगरपालिका परिषद ने उन्हें बाह्य विकास प्रभार जमा करने हेतु नोटिस तामील किया – प्रत्यर्थी ने सिविल वाद प्रस्तुत किया जिसे यह ठहराते हुए मंजूर किया गया कि नगरपालिका परिषद को प्रत्यर्थीगण से उक्त प्रभार वसूलने का अधिकार नहीं है – नगरपालिका परिषद ने उच्च न्यायालय के समक्ष अपील प्रस्तुत की जहां भी उसे खारिज किया गया – को चुनौती – अभिनिर्धारित – राज्य सरकार के आदेश के अवलोकन से स्पष्ट होता है कि वह गृह निर्माण संस्थाओं, कालोनाइजर एवं भिन्न व्यक्तियों हेतु आशयित है – प्रत्यर्थीगण न तो कालोनाइजर है, न ही गृह निर्माण संस्थायें या व्यक्ति हैं – प्रत्यर्थीगण द्वारा विकसित आवासीय इकाईयां केवल उनके कर्मचारियों हेतु है और विक्रय या किराये पर देने हेतु आशयित नहीं है – सरकारी संस्था द्वारा, केन्द्र सरकार के निवेश के साथ सार्वजनिक क्षेत्र का उपक्रम होने के नाते निर्माण किया गया है – विचारण न्यायालय एवं उच्च न्यायालय ने उचित रूप से अभिनिर्धारित किया कि प्रत्यर्थीगण, अपीलार्थी को कोई बाह्य विकास शुल्क अदा करने के लिए दायी नहीं है – अपील खारिज। (म्यूनिसिपल काउंसिल, राघोगढ़ वि. नेशनल फर्टीलाइजर लि.) **(SC)…827**

***Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8/21(b), 42 & 50 – Compliance of Section 42 and 50 – Mandatory/ Substantial Compliance* – Heroin was seized from appellant – Trial concluded and he was convicted for offence u/S 8 and 21(b) of the Act of 1985 – Held – It is clear that provisions of Section 42 and 50 of the Act of 1985 are mandatory in nature, therefore exact and definite compliance and not only substantial compliance, is required – In the present case, mere grant of an option to accused to be searched either by Magistrate or a Gazetted Officer is not enough – He must be informed regarding such rights in clear and unambiguous terms – Evidence shows that such exercise was not conducted by any of the police officials – Evidence shows that accused was only informed about general terms of search and has not been informed about his right to be searched either by Magistrate or by a Gazetted Officer – Provisions of Section 50 was not definitely and exactly complied with – Prosecution failed to prove beyond reasonable doubt that accused was found in possession of heroin – Accused deserves the benefit of doubt – Conviction set aside – Appeal allowed. [Munna Khan Vs. State of M.P.]** **…960**

The first No confidence Motion was initiated before completion of 2 ½ years from the date Sarpanch entered her office which was not tenable and at the same time was not rejected by the competent authority – Second No Confidence Motion was initiated after 2½ years which was maintainable because previous motion was not rejected – Clauses of Section 21(3) is not attracted because the prohibition of submission of another motion is applicable when previous no confidence motion was rejected – Further held – If meaning of statute is plain and unambiguous, it should be given effect to irrespective of consequences – Each word, phrase or sentence is to be construed in the light of general purpose of the Act itself. [Sunita Bai Chaudhary (Smt.) Vs. Omkar Singh] …*38

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 21(3) – द्वितीय अविश्वास प्रस्ताव – पोषणीयता – याची के विरूद्ध प्रथम अविश्वास प्रस्ताव आरंभ किया गया था जिसे प्राधिकारी द्वारा विनिश्चित नहीं किया गया और लंबित रहने के दौरान द्वितीय अविश्वास प्रस्ताव आरंभ किया गया एवं ग्रहण किया गया तथा आक्षेपित आदेश पारित किया गया था – को चुनौती – अभिनिर्धारित – प्रथम अविश्वास प्रस्ताव, सरपंच द्वारा पद ग्रहण करने की तिथि से 2½ वर्ष पूर्ण होने के पहले आरंभ किया गया था जो कि मान्य नहीं था और उसी समय सक्षम प्राधिकारी द्वारा अस्वीकार नहीं किया गया था – द्वितीय अविश्वास प्रस्ताव 2½ वर्ष के पश्चात् आरंभ किया गया जो कि पोषणीय था क्योंकि पूर्वतर प्रस्ताव को अस्वीकार नहीं किया गया था – धारा 21(3) के खंड आकर्षित नहीं होते हैं क्योंकि दूसरे प्रस्ताव के प्रस्तुतिकरण पर प्रतिषेध तब लागू होगा जब पूर्वतर अविश्वास प्रस्ताव अस्वीकार किया गया हो – आगे अभिनिर्धारित – यदि कानून का अर्थ स्पष्ट एवं असंदिग्ध है, उसे परिणामों का विचार किये बिना प्रभावशील करना चाहिए – प्रत्येक शब्द, वाक्यांश या वाक्य का अर्थान्वयन, स्वयं अधिनियम के सामान्य प्रयोजन के आलोक में किया जाना चाहिए। (सुनीता बाई चौधरी (श्रीमती) वि. ओमकार सिंह) …*38**

***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 92 – Recovery Proceedings – Opportunity of Hearing* – In respect of improper utilization of the sanctioned amount for construction of APL and BPL toilets, proceedings u/S 92 of the Act of 1993 was drawn by the SDO against appellants, who are the elected Sarpanch – Held – Without any adjudication, recovery was directed to be made and further for not depositing the amount, warrant was also issued – As per Section 92 of the Act, competent authority was under obligation to decide the reply/objection of petitioner and to afford reasonable opportunity to the person concerned – In the present case, proceedings are patently contrary to the provisions – Action of recovery without affording opportunity to petitioner is vitiated in the eyes of law – Order of recovery is set aside – Appeals disposed of. [Nani Invati (Smt.) Vs. State of M.P.] (DB)…867**

and mentally unfit at the time of incident – It is also on record that appellant had no intention to kill the deceased – From evidence of prosecution witnesses on record, it is considered and found that at the time of incident, appellant was absolutely insane and of unsound mind – For committing a crime, the intention and act both are taken to be the constituents of crime – Appellant entitled to benefit of Section 84 IPC – Conviction and sentence set aside – Appeal allowed. [Ramnath Pav Vs. State of M.P.] (DB)…943

दण्ड संहिता (1860 का 45), धाराएँ 84, 302 व 324 – हत्या – दोषसिद्धि – आजीवन कारावास – विक्षिप्तता का अभिवाक् – अपीलार्थी, मकान में टांगी/कुल्हाड़ी से सुसज्जित होकर आया और अपनी बुआ के सिर पर वार किया जिसके परिणाम स्वरूप उसकी मौके पर ही मृत्यु हो गई – अपीलार्थी मौके से भाग गया और जब उसके बड़े भाई ने उसे रोकने का प्रयास किया, उसने उसे चोटें पहुंचाई – अभिनिर्धारित – चक्षुदर्शी साक्षीगण एवं अन्य अभियोजन साक्षियों के परिसाक्ष्य चिकित्सीय साक्ष्य द्वारा सम्यक् रूप से समर्थित हैं – अधिकतर साक्षीगण न केवल मृतिका के रिश्तेदार हैं बल्कि वे अपीलार्थी के भी रिश्तेदार हैं – स्वतंत्र चक्षुदर्शी साक्षी ने भी अभियोजन कहानी का समर्थन किया है – अभियोजन कहानी भरोसेमंद एवं विश्वसनीय प्रतीत होती है – आगे अभिनिर्धारित – सभी चक्षुदर्शी साक्षियों ने स्पष्ट रूप से कथन किया है कि अपीलार्थी विक्षिप्त था और घटना के समय मानसिक रूप से अस्वस्थ था – यह भी अभिलेख पर है कि अपीलार्थी का आशय मृतिका को जान से मारने का नहीं था – अभिलेख पर अभियोजन साक्षियों के साक्ष्य से, यह विचार किया गया तथा पाया गया कि घटना के समय अपीलार्थी पूर्ण रूप से विक्षिप्त था और विकृत चित्त का था – अपराध कारित करने के लिए, आशय एवं कृत्य दोनों को अपराध के घटक माना जाना चाहिए – अपीलार्थी, धारा 84 भा.दं.सं. के लाभ का हकदार – दोषसिद्धि एवं दण्डादेश अपास्त – अपील मंजूर। (रामनाथ पाव वि. म.प्र. राज्य)

(DB)…943

***Penal Code (45 of 1860), Section 300 (Exception 1), 302/34, 304 Part I – Conviction – Life Imprisonment – Appreciation of Evidence – Motive* – Appellant grazing his ox in the field of deceased and on this issue, sudden quarrel started between appellant and deceased – Appellants inflicted injuries to deceased with lathi and axe, as a result of which deceased died – Held – There was a sudden provocation and in that event appellant inflicted injuries by lathi, hence there was no motive to kill the deceased – Exception 1 to Section 300 IPC postulates that if there is grave and sudden provocation, offence would not be a murder – Offence committed by appellant no.1 would fall u/S 304-Part I of IPC – Further held – Deposition of eye witness that appellant no.2 (wife of appellant no.1) inflicted injuries by axe is not reliable because the evidence of doctor who performed postmortem shows that there was no incised wounds on the body of deceased – Name of appellant no.2 is also not mentioned in FIR – She cannot be convicted for the said offence –**

– विचारण न्यायालय ने अभिनिर्धारित किया कि अपीलार्थी ने अपनी पत्नी पर केरोसीन उड़ेलकर उसे आग लगा दी, जिससे उसकी जलने की चोटों के कारण मृत्यु हुई – अभिनिर्धारित – यह बार–बार दोहराई गई विधि है कि यदि अभियोजन साक्षी, अभियोजन प्रकरण का समर्थन नहीं करता और ऐसे साक्षी को पक्षविरोधी घोषित नहीं किया गया है, उक्त साक्षी के साक्ष्य पर बचाव पक्ष विश्वास कर सकता है जो अभियोजन पर बाध्यकारी होगा – वर्तमान प्रकरण में, दो अभियोजन साक्षीगण, अभियोजन कहानी के विरूद्ध गये थे और इन साक्षियों का प्रतिपरीक्षण अभियोजन द्वारा नहीं किया गया था न ही वे पक्षविरोधी घोषित किये गये थे – ऐसी परिस्थितियों में, इन दोनों साक्षियों के कथनों को आसानी से खारिज नहीं किया जा सकता, वे अभियोजन कहानी पर गंभीर संदेह निर्मित करते हैं और उसे सहजभेद्य बनाते है – आगे अभिनिर्धारित – मृत्युकालिक कथन, आहत को पढ़कर सुनाया एवं समझाया नहीं गया था और अतः उक्त दस्तावेज पर विश्वास नहीं किया जा सकता तथा अभियुक्त को दोषसिद्ध करना सुरक्षित नहीं था – अपीलार्थी को संदेह का लाभ मिलना चाहिए – दोषसिद्धि का निर्णय अपास्त – अपील मंजूर। (संजू वि. म.प्र. राज्य)

(DB)…953

***Penal Code (45 of 1860), Sections 302/149, 148, 324/149 & 97 – Murder – Conviction – Private Defence* – In respect of share in land, previous enmity between Appellant no.1 and deceased – Plea taken by appellants that they attacked in private defence – Held – In order to claim right of private defence, appellants/accused persons have to show necessary material from record, either by themselves adducing positive evidence or by eliciting necessary facts from the witnesses examined for prosecution – Nothing on record to show that there was reasonable ground for appellants to apprehend death or grievous hurt would be caused to them by the deceased – Photographs of deceased clearly established the gruesome and brutal manner in which crime was committed – 18 injuries found on the body of deceased, all grievous in nature whereas injuries found on the body of appellants are old and simple in nature – Further held, right of private defence is not available to a person who himself is an aggressor – In the present case, there was a prompt FIR and testimony of the injured eye witness is duly corroborated by the other prosecution witnesses – Appellants rightly convicted – Appeal dismissed. [Ujyar Singh Vs. State of M.P.] (DB)…970**

दण्ड संहिता (1860 का 45), धाराएँ 302/149, 148, 324/149 व 97 – हत्या – दोषसिद्धि – प्राईवेट प्रतिरक्षा – अपीलार्थी क्र.1 व मृतक के बीच भूमि में हिस्से के संबंध में पूर्व वैमनस्यता – अपीलार्थीगण द्वारा लिया गया अभिवाक् कि उन्होनें प्राईवेट प्रतिरक्षा में हमला किया – अभिनिर्धारित – प्राईवेट प्रतिरक्षा के अधिकार का दावा करने के लिए, अपीलार्थीगण/अभियुक्तों को या तो स्वयं द्वारा सकारात्मक साक्ष्य से या अभियोजन हेतु परीक्षित साक्षियों से आवश्यक तथ्यों को निकलवाकर, अभिलेख से आवश्यक सामग्री दर्शाना होती है – यह दर्शाने के लिए अभिलेख पर कुछ नहीं कि अपीलार्थीगण के लिए, मृतक द्वारा

निवासरत थी और या तो आगरा या शिरडी में रही जो कि ग्वालियर से बहुत दूर है – जहां प्रथम सूचना प्रतिवेदन एवं मृतिका के रिश्तेदारों के कथनों का संबंध है, इनमें याची के विरूद्ध मृतिका के साथ दहेज की मांगों हेतु उत्पीड़न एवं क्रूरता का व्यवहार करने के बहुप्रयोजनीय अभिकथन अंतर्विष्ट है – प्रथम सूचना प्रतिवदेन के अभिकथनों में अभिकथनों का स्वरूप, मृतिका की मृत्यु से तुरंत पूर्व कारित किसी प्रकार की क्रूरता या क्रूरता की कोई घटना घटित होने का समय व तिथि अंतर्विष्ट नहीं है – धारा 304–बी भा.दं.सं. के अंतर्गत दहेज मृत्यु के अपराध हेतु उक्त अस्पष्ट, अविनिर्दिष्ट अभिकथन, अपराध की पूर्व–अपेक्षा को संतुष्ट नहीं करते तथा मूल घटकों से कम पड़ते हैं – याची का अभियोजन स्पष्ट रूप से दुर्भावनापूर्ण प्रतीत होता है – धारा 304 बी भा.दं.सं. के अंतर्गत याची का अभियोजन अभिखंडित किया गया तथा शेष आरोप हेतु विचारण जारी रहेगा – याचिका अंशतः मंजूर। (मेघा सिंह सिंधे (श्रीमती) वि. म.प्र. राज्य) **...1017**

Penal Code (45 of 1860), Section 306 & 107 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Abetment to Suicide – Quashment of Proceeding **– Deceased, who was a section officer worked under the supervision of Manager/Applicant, committed suicide – In the suicide note and email, he blamed applicant responsible for it – Offence registered against the applicant – Challenge to – Held – To constitute the commission of offence u/S 306, an element of mens rea is an essential ingredient as the abetment involves a mental preparedness with an intention to instigate, provoke insight or encourage to do an act or a thing – Such process of instigation must have close proximity with the act of commission of suicide – In the instant case, in the emails dated 25.05.97 and 11.09.97, deceased had not made allegation of harassment, cruelty or incitement tantamounting to provocation by the applicant to take the extreme step of committing suicide – In the challan also, there is no material to suggest or attributable positive act on the part of applicant that he had an intention to push the deceased to commit suicide – Magistrate has not applied his mind and passed cognizance order in a mechanical manner – Proceeding against applicant is quashed – Application allowed. [Abhay Kumar Katare Vs. State of M.P.] ...1026**

दण्ड संहिता (1860 का 45), धारा 306 व 107 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – आत्महत्या के लिए दुष्प्रेरण – कार्यवाही अभिखंडित की जाना – मृतक, जो कि एक अनुभाग अधिकारी था, प्रबंधक/आवेदक के पर्यवेक्षण के अधीन कार्यरत था, ने आत्महत्या की – आत्महत्या लेख एवं ई–मेल में उसने आवेदक को इसका जिम्मेदार होने का दोष लगाया – आवेदक के विरूद्ध अपराध पंजीबद्ध – को चुनौती – अभिनिर्धारित – धारा 306 के अंतर्गत अपराध कारित किया जाना गठित होने के लिए, आपराधिक मनःशक्ति का तत्व एक आवश्यक घटक है क्योंकि दुष्प्रेरण में, किसी कृत्य या कार्य को करने के लिए उकसाने, उत्प्रेरित करने, उत्तेजित करने एवं प्रवृत्त करने के आशय के साथ मानसिक तैयारी शामिल है – उक्त उकसाने की प्रक्रिया का, आत्महत्या कारित करने के कृत्य के साथ

application u/S 151 CPC, there was no effort by petitioner to consolidate the suits – Trial Court rightly dismissed the application – Petitions dismissed. [Raj Narayan Singh Vs. M/s. Pushpa Food Processing Pvt. Ltd.] …878

पद्धति एवं प्रक्रिया – सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 – वादों का समेकन – याची ने एक ही संपत्ति के संबंध में तीन सिविल वादों के समेकन हेतु विचारण न्यायालय के समक्ष आवेदन प्रस्तुत किया – आवेदन खारिज किया गया – को चुनौती – अभिनिर्धारित – तीनों वाद, कार्यवाहियों के भिन्न प्रक्रमों पर है और यहां तक कि तीनों वादों के अनुतोष भी एक दूसरे से भिन्न है – उक्त वादों में से एक पहले ही खारिज किया जा चुका है तथा उसके पुनःस्थापन हेतु आवेदन अभी लंबित है एवं इन परिस्थितियों में याची के लिए तीनों वादों के समेकन हेतु सोचना भी निर्रथक है – वादों के समेकन के परिणामस्वरूप, उन्नत प्रक्रम के वादों की कार्यवाहियां, प्रारंभिक प्रक्रम के वादों के साथ तालमेल रखने के लिए धीमी हो जाएगी – आगे अभिनिर्धारित – सभी तीन वाद, वर्ष 1995, 1996 व 1997 में प्रस्तुत किये गये थे परंतु समेकन हेतु आवेदन, 2015 में प्रस्तुत किया गया था तथा धारा 151 सि.प्र.सं. के अंतर्गत उपरोक्त आवेदन से पूर्व याची द्वारा वादों के समेकन हेतु कोई प्रयास नहीं किया गया था – विचारण न्यायालय ने आवेदन उचित रूप से खारिज किया – याचिकाऐं खारिज। (राज नारायण सिंह वि. मे. पुष्पा फुड प्रोसेसिंग प्रा. लि.)

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***Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, (57 of 1994), Sections 17(2), 17(3) & 28(1)(a) – Cognizance of Offence – Complainant – Appropriate Authority* – Cognizance was taken by the trial Court against the petitioners on the complaint made by Chief Medical and Health Officer (CMHO) – Challenge to – Held – As per Section 17(2), appointment of appropriate authorities are required to be notified in Official Gazette – Section 28(1)(a) put an embargo on the Court for not taking cognizance until complaint is made by appropriate authority concerned which denotes Section 17(3)(a) or any officer authorized by the Central or State Government or the appropriate authority which denotes Section 17(3)(b), under this Act – In the instant case, no document has been produced or brought on record indicating that CMHO of concerned district has been authorized by appropriate authority notified u/S 17(3) of the Act and has been conferred power to make a complaint in the Court – CMHO Bhopal and Hoshangabad are not the officer authorized u/S 17(2), 17(3) and 28(1)(a) of the Act of 1994 and therefore cognizance taken by Court on complaint made by them is illegal and without jurisdiction and is liable to be quashed – Petitions allowed. [Swaroop Charan Sahu (Dr.) Vs. State of M.P.] …*39**

गर्भधारण पूर्व और प्रसव पूर्व निदान तकनीक (लिंग चयन का प्रतिषेध) अधिनियम, (1994 का 57), धाराएँ 17(2), 17(3) व 28(1)(ए) – अपराध का संज्ञान – परिवादी – समुचित प्राधिकारी – विचारण न्यायालय द्वारा मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी (सी.एम.एच.ओ.)

राज्य सरकार द्वारा भूल को सुधारने के पश्चात् याची को पदोन्नत किया गया है, वह सभी परिणामिक लाभों का हकदार है – पदोन्नति एवं वेतन के बकाया से इंकार करने के लिए राज्य सरकार के पास कोई न्यायोचित कारण उपलब्ध नहीं – ''कार्य नहीं तो वेतन नहीं'' के सिद्धांत को लागू करने की सीमा तक आक्षेपित आदेश अभिखंडित किया गया – याची को पदोन्नति की तिथि से वेतन के बकाये का भुगतान किया जाए – प्रत्यर्थीगण को, पेंशन निर्धारण पुनरीक्षित करने एवं पेंशन के बकाये तथा अन्य सेवांत देय भी, हकदारी की दिनांक से 12% प्रतिवर्ष के ब्याज सहित भुगतान करने हेतु निदेशित किया गया – याचिका मंजूर। (दौलतराम बरोड वि. म.प्र. राज्य) **...883**

Service Law – Shaskiya Sevak (Adhivarshiki-Ayu) Adhiniyam, M.P. (29 of 1967) and Shaskiya Sevak (Adhivarshiki-Ayu) Dwitiya Sanshodhan Adhiniyam, M.P. (28 of 1998), Section 2 – Teacher – Educational Institutions – Age of Superannuation **– Amendment regarding extension of age of superannuation from 60 years to 62 years for teachers – Petitioner, a Junior Weaving Instructor claiming benefit of amendment filed writ petition and the same was allowed – State filed appeal whereby the matter was referred to larger bench – Held – Classification in the recruitment Rules is not determinative of the fact that whether a Government servant is a teacher or not, as the meaning assigned to Teacher in the State Act has to be preferred over the classification of teacher in the Recruitment Rules – Amending Act has given wide meaning to the expression "Teacher" which includes the "Teachers irrespective of the designation and appointed in a Government Technical and Medical Institutions" – As per the amending Act, "Teachers" as per the explanation is not restricted to Teacher in Government Schools or Colleges or different ranks and status but all teachers from the lowest to highest ranks – Training Centres and Vocational Training Centres of State Government are Educational Institutions for extending the benefit of age of superannuation to a person imparting training as Instructor – Hence, "Instructors" engaged for imparting training to women in the Tailoring Centre working under the Department of Women and Child Development are entitled to extension in age upto the age of 62 years being teachers as mentioned in the amending Act – Question of Law referred, answered accordingly. [State of M.P. Vs. Yugal Kishore Sharma] (FB)...844**

सेवा विधि – शासकीय सेवक (अधिवार्षिकी आयु) अधिनियम, म.प्र., (1967 का 29) एवं शासकीय सेवक (अधिवार्षिकी आयु) द्वितीय संशोधन अधिनियम, म.प्र. (1998 का 28), धारा 2 – शिक्षक – शैक्षणिक संस्थान – अधिवर्षिता की आयु – शिक्षकों के लिए अधिवर्षिता की आयु का विस्तार 60 वर्ष से 62 वर्ष किये जाने के संबंध में संशोधन – याची, एक कनिष्ठ बुनाई प्रशिक्षक ने संशोधन के लाभ का दावा करते हुए रिट याचिका प्रस्तुत की तथा उक्त को मंजूर किया गया था – राज्य ने अपील प्रस्तुत की थी जिससे मामला वृहद

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FAREWELL

HON'BLE MR. JUSTICE ANURAG KUMAR SHRIVASTAVA

Born on April 11, 1956 at Rajnandgaon, Chhattisgarh. Did B.Sc. (Maths) in the year 1975 and LL.B. in the year 1979. Was enrolled as an Advocate in the State Bar Council M.P. in the year 1980 and started practice in District Court Rajnandgaon. Joined the State Judicial Service on April 27, 1983. Worked as Civil Judge in Mahasamund, Gariyaband, Mungeli, Korba, Tahsils of Raipur and Bilaspur Districts. Was promoted as Civil Judge Class-I and was appointed as A.C.J.M. Maihar in the year 1994. Worked as CJM, Mandla in the year 1995-96. Was promoted as Additional District Judge in June, 1996 and posted in District Court, Jabalpur for three years. Worked as ADJ in Rewa, Sakti. Was posted as Special Judge (Atrocities) at Chhatarpur in the year 2005. Worked in same post in Chhatarpur and Bhopal till June 2010. Became District Judge and was posted at Balaghat from June 2010 to March 2012. Was granted Super Time Scale w.e.f. 02.01.2012. Worked as Member Secretary, State Legal Services Authority (M.P.) Jabalpur from April 2012 to March 2014. Was posted as District Judge, Balaghat in the year 2014.

Elevated as Additional Judge of the High Court of Madhya Pradesh on 07.04.2016. Appointed as Permanent Judge on 17.03.2018 and demitted office on 10.04.2018.

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

FAREWELL OVATION TO HON'BLE MR. JUSTICE ANURAG KUMAR SHRIVASTAVA, GIVEN ON 10.04.2018, IN THE CONFERENCE HALL OF THE HIGH COURT OF M.P., AT JABALPUR.

Hon'ble Mr. Justice Hemant Gupta, Chief Justice, High Court of M.P., Jabalpur, bids farewell to the demitting Judge :-

We have assembled here to bid a warm and affectionate farewell to Shri Justice Anurag Kumar Shrivastava, who is demitting office after successfully completing tenure as a Judge of this Court and a member of the Judicial fraternity for almost 35 years.

Justice Shrivastava was born on 11th April, 1956 at Rajnandgaon (Chhattisgarh). After obtaining degree in Law, Justice Shrivastava got himself enrolled as an Advocate in the year 1980 and started practice in District Court, Rajnandgaon but soon, in view of his knowledge of law, was selected as Civil Judge. He joined Judicial Service on 27.04.1983. During his career, he was promoted from time to time acknowledging his judicial acumen. He was promoted as officiating District Judge in Higher Judicial Service with effect from 05.06.1996 and had earned selection grade scale and super time scale. During his tenure as Judicial Officer, he had worked in different capacities at many places discharging the judicial and administrative duties with distinction. He also worked as Member Secretary, State Legal Services Authority, Jabalpur and took keen interest in organizing successful Lok Adalats and Mega Lok Adalats. He also worked as Member of Monitoring Committee appointed by the Supreme Court in order to provide drinking water to residents of 21 localities situated around the Union Carbide Plant at Bhopal.

Recognizing his contribution in the field of law, Justice Shrivastava was elevated as an Additional Judge of the High Court of Madhya Pradesh on 7th April, 2016 and was appointed as Permanent Judge on 17th March, 2018.

Justice Shrivastava's contribution on Judicial and Administrative side has been very illustrative. He is known for his soft and polite behavior and pleasant mannerism. Justice Shrivastava is an embodiment of the qualities expected of a Judge and indeed of a noble human being. Those who are close to Justice Shrivastava would certainly vouch for his multifaceted personality. I had the opportunity to

work with Justice Shrivastava both on Bench and also administratively. I found that Justice Shrivastava is perfect human being and a gentleman Judge.

During his tenure as Judge of the High Court, Justice Shrivastava has disposed of cases of varied nature which bear testimony to his judicial acumen and versatility, his painstaking diligence and exposition of legal principles. It was always his endeavour to ensure that justice is done to the common man and the needy litigant. His retirement will no doubt create a void and would be a loss to the High Court, the legal family. I am sure that even after his retirement, Justice Shrivastava will serve the humanity using his legal acumen to the best of his ability.

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

Shri Purushaindra Kaurav, Advocate General, M.P., bids farewell :-

Today we have gathered to bid farewell to Hon'ble Justice Shri Anurag Kumar Shrivastava, who is demitting the office after a long and illustrious tenure as a Judge of this Hon'ble Court.

Hon'ble Justice Shrivastava was born on 11th April, 1956 in district Rajnandgaon which is now part of the State of Chhattisgarh. Brought up in Rajnandgaon, did matriculation from State High School in the year 1971, did B.Sc. (Maths) in the year 1975 from Government Digvijay Mahavidyalaya, Rajnandgaon and passed LL.B. from Vidhi Mahavidyalaya, Rajnandgaon in the year 1979.

My Lord after completing his education, enrolled as an Advocate from State Bar Council of MP in the year 1980 and began practicing in District Court, Rajnandgaon under the able guidance of distinguished Advocate Shri K.C. Jain.

Thereafter, Your Lordship was appointed as Civil Judge Class II on 27.04.1983. While working as Member Secretary of State Legal Service Authority MP during the period from April 2012 to March 2014, organized Lok Adalat and Mega Lok Adalat under the direction of Executive Chairman SALSA in which record number of cases were decided by amicable settlement on account of efforts

made by Your Lordship. Also worked as Member of Monitoring Committee appointed by Hon'ble Supreme Court in order to provide drinking water to 21 localities situated around Union Carbide Plant, Bhopal, prepared an action plan, identified families, provided water connection to more than 11,000 families and submitted progress report to Hon'ble Supreme Court. Due to Your Lordship's intellect and zeal, Your Lordship was elevated as a Judge of MP High Court on 7th April, 2016.

It was indeed a great privilege to argue before Your Lordship as you were always soft spoken. Your Lordship always expected advocates to come prepared with the matters and tried to dispose of as many matters as possible.

Your Lordship was always cordial with the officers of the Court and encouraged junior members of the Bar to argue their cases. Always granted a patient hearing to all concerned and the pleasant atmosphere in the Court was always encouraging.

We bid farewell to your Lordship with a heavy heart, however, after a long and distinguished tenure of almost 35 years as a Judge, I am sure that Your Lordship would be looking forward to spend time with friends and family members.

I, on behalf of the Government of Madhya Pradesh, Law officers of the State and on my own behalf wish Your Lordship a long and healthy life.

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

Today, we have assembled here to bid farewell to Your Lordship Shri Justice Anurag Shrivastava at the eve of your demitting the office of the Judge of this Hon'ble High Court due to your retirement. With your farewell the last rose of summer in our hearts is faded at this moment.

Your Lordship were born on 11th April, 1956 at Rajnandgaon, now part of the State of Chhattisgarh. Your Lordship's father Late Shri Surendra Prasad Shrivastava was a Forest Officer. Late Smt. Shakuntala Shrivastava was your mother. At the age of only 6 months, Your Lordship were given in adoption to your maternal uncle Late Dr. Pankaj Shrivastava and Late Smt. Premlata Shrivastava. Dr. Pankaj Lal Shrivastava was a renowned doctor of Rajnandgaon.

Your Lordship were brought up in Rajnandgaon, did your matriculation from State High School Rajnandgaon in year 1971, did your B.Sc. (Maths) in year 1975 from Govt. Digvijay Mahavidyalaya, Rajnandgaon and did Your LL.B. from Vidhi Mahavidyalaya, Rajnandgaon, in year 1979. Thereafter, your Lordship got enrolled with State Bar Council of M.P. in year 1980 and started practice in District Court, Rajnandgaon under Senior Lawyer Shri K.C. Jain.

Your Lordship were selected as Civil Judge class II and joined the State Judicial Service on 27th April, 1983 at District Court Durg and worked as Civil Judge in Mahasamund, Gariyaband, Mungeli and Korba. You were then promoted as Civil Judge Class I and A.C.J.M., Maihar in year 1994 and worked as CJM, Mandla in 1995-96. Your Lordship were then promoted as Additional District Judge in June 1996 and remained posted as such continuously for three years in District Court, Jabalpur. Thereafter you worked as ADJ in Rewa, Sakti and promoted as Special Judge (Atrocities) and posted at Chhatarpur in May 2005 and then at Bhopal till June 2010. Your efforts paved the paths to higher credentials and you became District Judge and were posted at Balaghat from June 2010 to March 2012. Your success to achieve perfection is the sum of your hard efforts repeated day in and day out and Your Lordship got Super Time Scale since 2nd January, 2012.

Thereafter, Your Lordship worked as Member Secretary of State Legal Services Authority Madhya Pradesh at Jabalpur, organized Lok-Adalats and Mega Lok-Adalats, in which a record number of cases were decided by amicable settlement. Then Your Lordship worked as a Member of Monitoring Committee appointed by Supreme Court in order to provide drinking water to residents of 21 localities situated around the Union Carbide plant of Bhopal. While working as a Member, with the help of Municipal Corporation, Bhopal prepared the action plan, identified the families entitled to get tap water connections and provided potable water connections to more than 11,000 families with the help of Municipal Corporation, Bhopal and submitted the progress reports to Supreme Court from time to time. Thereafter, Your Lordship were again posted as District Judge, Balaghat.

Thereafter, Your Lordship were elevated as a Judge of this Hon'ble High Court and adorned the high pedestal of Justice by joining the galaxy of high Judicial fraternity of robed brethren. We, at Jabalpur have had occasions and privilege to

acknowledge your excellence and great virtues as an upright, intelligent and experienced Judge.

Your attractive name 'Anurag' signifies the high human qualities, three in one encompassing in one word the Affection, Love and Attachment. Where there is affection there is love and where there is love, there is an attachment, oozing charm from every pore. We have always been spell-bound by your 'Anurag', your affection, love and charming attachment. In the words of John Milton:-

"It is our mutual love, the crown of all our bliss."

Your Lordship have never been discourteous to the Members of Bar. Your Lordship imparted Justice as a perfectionist and would always be remembered for your enlightened contribution to law by your enlivened Judgments. The reported Judgments in law journals bear abundant testimony to it. This was the auspicious odyssey of Your Lordship on this golden chariot of Justice which has reached to the pinnacle of success, with high qualities of sincerity, integrity, humility, courtesy, wisdom and charity.

Your Lordship have left an indelible stamp of scholarship, impartiality, judiciousness and morality on the pages of the golden history of this High Court.

''कोई ऐसे वक्त में हमसे बिछड़ा है।
ष्शाम ढले जब पंछी घर लौट आते हैं।।''श

I, on behalf of the members of M.P. High Court Bar Association and on my own behalf bid farewell to Your Lordship with heavy hearts. We always treat Your Lordship as a part of ourselves and forever. We wish a golden future for Your Lordship as well as for all members of your family. Thomas Jefferson says :-

"I like the dreams of the future better than the history of the past."

जीवेद् शरदः शतम्।।

Shri Vijay Pandey, Vice-President, High Court Advocates' Bar Association, bids farewell :-

We are here for affectionate farewell of Hon'ble Justice Shri A.K. Shrivastava, who is demitting office today on 10th of April, 2018 and has been with us for a meaningful tenure of almost two years as Judge of this Hon'ble Court.

Retirement is an occasion that makes a person short of words as this is the time of mixed feelings. Both happy and sad moments flash in front of the person.

Justice Shrivastava at the age of 6 months was adopted by his maternal uncle Late Dr. Pankajlal Shrivastava and Late Smt. Premalata Shrivastava. Dr. Pankajlal Shrivastava was renowned doctor of Rajnandgaon (Chhattisgarh). Brought up in Rajnandgaon.

Justice Shrivastava did his matriculation from State High School, Rajnandgaon in 1971. Did B.Sc. (Maths) in the year 1975 from Govt. Digvijay Mahavidyalaya, Rajnandgaon and passed LL.B. from Vidhi Mahavidyalaya, Rajnandgaon in the year 1979.

Justice Shrivastava enrolled as an advocate from State Bar Council in the year 1980 and started practice in District Court, Rajnandgaon under Senior Lawyer Shri K.C. Jain.

Justice Shrivastava was selected as Civil Judge Class-II and joined the State Judicial Service on 27.04.1983 at District Court, Durg. Justice Shrivastava also worked as Civil Judge in Mahasamund , Gariyaband, Mungeli, Korba (C.G.) and then promoted as Civil Judge Class-I and appointed as A.C.J.M., Maihar in the year 1994, also worked as C.J.M., Mandla in the year 1995-96, then promoted as Additional District Judge in June 1996 and posted in District Court, Jabalpur, Rewa & Sakti and then promoted as Special Judge (Atrocities) and posted in Chattarpur in May 2005, worked on the same post at Bhopal and Chhatarpur till June 2010 and then become District Judge and was posted at Balaghat from June 2010 to March 2012. He also got Super Time Scale since 2nd January, 2012.

Your Honour from April, 2012 to March, 2014 worked as Member Secretary, State Legal Service Authority, Jabalpur (M.P.), organized Lok Adalats

and Mega Lok Adalats under direction of Executive Chairman, S.L.S.A. in which a record number of cases were decided by amicable settlements.

Justice Shrivastava also worked as Member of Monitoring Committee appointed by Hon'ble Supreme Court in order to provide drinking water to 21 localities, situated around the Union Carbide Plant of Bhopal. While working as a Member, with the help of Municipal Corporation, Bhopal prepared the action plan, identified the families entitled to get Tap water connections and provide potable water connection to more than 11000 families and submitted the progress report before the Hon'ble Supreme Court time to time.

On April 2014 again posted as District Judge Balaghat and thereafter elevated as High Court Judge on 7th April, 2016.

During your time as Justice you became known for the kindness and respect that you afforded to lawyers and litigants in person. What has impressed us most is his rock solid self belief and forthrightness. He has remained calm through adversity.

All lawyers can be inspired by Justice Shrivastava's lifetime of service and career-long efforts to promote the cause of justice, uphold the rule of law and protect the rights of all citizens. We wish him well in his years of retirement ahead.

Retirement marks the end of working for someone else, and the beginning of living for yourself. I may just say, for a life of judging, that you have completed with grace and aplomb that "The best is yet to come".

On behalf of the legal practitioners, who have appeared before Your Honour over the past several years, I sincerely thank Your Honour for the courtesy and respect you have always shown us and say that the courtesy and respect we have shown Your Honour has been richly deserved.

Recognizing the maxim that behind every successful man is a surprised woman, we extend our sincere thanks to his wife Mrs. Madhu Shrivastava for the strength of the support Mrs. Madhu Shrivastava has provided to enable Your Honour to make the contribution Your Honour has made to the community over years in judicial services.

While bidding farewell to you, I, on behalf of High Court Advocates' Bar Association and on my own behalf extend our deep gratitude for your judgeship and convey our best wishes for your continued good health, a long life and fulfilling occupations in the future as well.

Now I End, by quoting Richard Bach, an American writer :-

"Don't be dismayed at good-byes. A farewell is necessary before you can meet again."

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

With heavy heart all have gathered here to bid farewell to my Lord Hon'ble Justice Shri Anurag Kumar Shrivastava who is demitting the office today on 10th April, 2018.

After completing Law graduation, enrolled as an Advocate in the year 1980 and started practice in District Court, Rajnandgaon. His Lordship joined the Judicial Service in year 1983 as Civil Judge, Class-II. Thereafter, your Lordship has the honor of gracing various prime positions in the State Judiciary, the office of District and Session Judge and in different capacities in various Districts of Madhya Pradesh and Chhattisgarh. He had also worked as Member Secretary, State Legal Services Authority, Jabalpur. He was also Member of Monitoring Committee to provide drinking water to residents of 21 localities situated around the Union Carbide plant at Bhopal.

Due to great knowledge, experience and wisdom my Lord was appointed as an Additional Judge of the High Court of Madhya Pradesh in the year 2016 and as Permanent Judge in the year 2018.

My Lords smiling face makes the atmosphere of the Court very congenial and friendly to the members of the Bar. We will be missing my Lord on every occasion for style of sweet smiling as my Lord is humorous who leaves no opportunity of making the Court atmosphere lighter. My Lord Shri Shrivastava is capable to solve any serious problem in very light and easy mood. My Lord is very prompt in reaching to the correct conclusion and solution of any problem.

Though retirement is closure of one chapter, but every closure of chapter opens a new chapter. My Lord Shri Anurag Shrivastava is such courageous personality that will make his new chapter of life equally lively, pleasant and happy because my Lord knows well, that pleasure multiplies on its dissemination and sharing with others.

The contribution of your Lordship in upbringing the judiciary of state shall be remembered for the years to come. On the other hand the judgments pronounced by your Lordship are land marks in the history of this High Court of MP. Needless to say that apart from his deep knowledge, my Lord is very religious minded. During his tenure my Lord was very kind to all, specially to junior advocates.

My Lord I, on behalf of State Bar Council of Madhya Pradesh, on behalf of advocates of Madhya Pradesh and on my own behalf, wish your Lordship all the best for the days to come and wish you very happy and healthy retirement life.

At the end I would like to convey my feeling:
Some people come into our lives
And quickly go.
Some stay for a while,
Leave footprints on our hearts,
And we are never, ever the same.

Shri J.K. Jain, Asstt. Solicitor General, bids farewell :-

आज हम उस व्यक्तित्व के स्वागत एवं बिदाई समारोह के लिये एकत्रित हुए हैं, जिन्हें वात्सल्यता एवं स्नेह प्राप्त हुआ है, मां देवकी के रूप में षकुंतला का एवं यषोदा के रूप में प्रेमलता का जिन्होंने अपने प्रेम और संस्कार से नन्हें बीज को विषाल वटवृक्ष के रूप में रूपांतर करने, संजोने में अपना पूरा श्रम, त्याग के समर्पण से छायादार एवं फलदायी प्रतिफल का आकार प्रदान किया।

षकुंतला ने उस भरत को जन्म दिया जिसके प्रताप से आज संपूर्ण जगत भारतवर्ष को याद करता है एवं भरत के प्रतापी जीवन के कारण मां शकुंतला को भी गौरव प्रदान हुआ। उसी अनुराग एवं कृतित्व का फल है कि 1956 में जो बीज पल्लवित हुआ वह निरंतर स्नेह, त्याग और श्रम से सिंचित होता हुआ राजनांदगांव से चलकर अनेक आयामों से होता हुआ निरंतर प्रखरता को प्राप्त करते हुए छत्तीसगढ़ एवं मध्यप्रदेष को रोषन करते हुए विधि के क्षेत्र में अनेक प्रकल्पों को कामयाबी के साथ पूरा करते हुए, निरंतर ऊंचाईयों को छूते हुए अप्रैल, 2014 में गौरवमयी उच्च न्यायालय के जज के रूप में पदेन होकर अपनी प्रतिभा प्रदर्षित करने का अवसर प्रदान हुआ।

जीवन में हर पल परिवर्तनषील होता है एवं नये स्वरूप में आता है, आज के पष्चात् जो परिवर्तन होगा, उसमें न कोई बंधन होगा वरन् पूरी आजादी होगी, धरती और अम्बर के बीच पूरा धरातल एवं उससे लगा क्षेत्र ईष्वर के दिये हुए उपहार के रूप में ईष्वरीय कार्य के लिये प्राप्त होगा।

मैं इसी आषा और विष्वास के साथ आज के इस अवसर पर अपनी ओर से, भारत सरकार की ओर से, समस्त केन्द्रीय विधि अधिकारियों की ओर से आपका स्वागत, वन्दन करता हूँ, आपके सुंदर भविष्य की कामना करता हूँ।

"जय भारत"

Shri Rajendra Tiwari, Representative, Senior Advocates' Council, bids farewell :-

We have assembled here to bid farewell to your Lordship Shri Anurag Kumar Shrivastava, who had adorned the chair of a Judge of this Court since the 7th April, 2016 as an Additional Judge and your Lordship has been made permanent Judge of this Court very recently, i.e. only in the last month. The day of retirement of a Judge- for the matter of that anyone, has a mixed feelings of sadness and satisfaction. Sadness because the Judge is leaving us for some other pursuit or respite and the satisfaction because he is laying down his office, having earned a good name with satisfactory performance of his duties assigned to him and attached to his office.

Sirs, Justice does not come from outside, it comes from inner peace, like the happiness comes from within and not without. Why is the judiciary or the judicial system required in a social order? is still required a very illuminating answer. It is needed because if there is injustice anywhere, it is a threat to justice everywhere. This is what was said by Martin Luther King.

Many things have been experienced in the world to determine a definition of Justice, but so far no Law defines Justice within its four corners. In such a situation, the expression of a thought by Lord Denning is that Justice is what the Judge should give to the petitioner, that he deserves or is entitled to.

Sirs, the task of a Judge is very arduous and many times needs burning of midnight oil, because it is not that Law is unknowable, nor impossible, but it takes a great deal of hard work to be a good Judge. Besides this, what a Judge can always say is that he is after all only a human being and therefore, has all human frailties and fallibilities. The last but not the least, what Socrates says, appeals to me a great deal and it is that four things belong to a Judge; firstly to hear patiently and courteously; secondly to answer wisely; thirdly to consider soberly and fourthly and lastly to decide impartially.

My Lord, you had all these qualities as manifested and demonstrably revealed by your good self while hearing the cases and managing the affairs of your Court room. Your Lordship really deserves congratulations at this juncture of your superannuation, with full satisfaction. I pray the Almighty to grant you long life with an inspiration to serve the humanity in a fitting manner in days to follow.

Thank you.

Farewell Speech delivered by Hon'ble Mr. Justice Anurag Kumar Shrivastava :-

I have no words to express my gratitude for the praise, wishes and blessings showered on me by all of you. I do not know how much do I deserve. I had many shortcoming but still the members of the Bar treated me as good Judge. It is all due to the greatness of the members of the Bar for which, I shall always remain thankful.

I have joined Judicial Services as Civil Judge in the year 1983 and after completion of 33 years of service, I was elevated as Judge of this august institution in the year 2016. Friends, reaching the high Office of the Judge of the High Court was for all material purposes, culmination of the ambition and cherished dreams of a Civil Judge, starting from the lowest rung of the ladder of the State Judicial hierarchy. I am an ardent believer of God, the almighty. Without his will, nothing can happen. By His grace I have completed 35 years of service in the domain of justice quite successfully and to my entire satisfaction within.

I am grateful to Hon'ble Shri Justice A.M. Khanwilkar, the then Chief Justice and presently Judge of Supreme Court of India, who has administered the oath of this pious Office to me and instilled much confidence in me during my tenure. I am also grateful to the members of collegium who had nominated me for this prestigious constitutional post.

During my long tenure as a Judge, I have been posted in many districts of the State and had privilege to interact with large number of litigants, Advocates and colleague Judges. Jabalpur remained important for me because I had been posted here for three times. Firstly, during 1996 to 1999 as Additional Sessions Judge, thereafter during 2012 to 2014 as Member Secretary SLSA and thirdly, as High Court Judge. I always felt blessings of Maa Narmada during my tenure. I believe that the legal profession is firmly based on values and ethics and the real power of the judiciary based on good will and confidence of the people. The percentage of illiteracy in our country is high and a large number of people are backward

economically and socially. Most of the people, if I may say so are ignorant and are not aware of their legal rights. The government as well as intellectuals and associations including the Bar association must make genuine effort and endeavour in all possible ways to popularize the various legal rights of the people and also the relevant and material constitutional provisions.

At present I want to say the Judges and the Advocates are the members of the judicial family and without any one of them, adjudication of the *lis is* not possible. Cordial relationship, friendly atmosphere, faith, honesty and other moral values among these two limbs are the basic and necessary ingredients for imparting quick justice in true sense. Everybody expects that we persons should work together in accordance with law by maintaining decorum and dignity of the Court in a friendly atmosphere.

During my tenure as a Judicial Officer, I have been helped and guided by many Judicial Officers namely Late Shri R.K. Seth, Shri Justice S.P. Khare, Shri Justice I.S. Shrivastava, Shri Justice Subhash Kakade, Shri Mohit Vyas who were my Districts Judges in early days. I am obliged to them for their guidance and support. I can never forget the love and guidance of my elder brother-in-law Shri Hemant Shrivastava, Advocate. I am grateful to all members of legal fraternity and other Officers, who assisted and cooperated to me in discharging my official function during this long span of time. I pay my utmost respect and gratitude to my mentors, my parents, family members because of their love, affection and support.

I convey my thanks to Hon'ble Shri Justice Hemant Gupta, the Chief Justice who is very judicious, generous, cordial and helping, I feel pride and privilege to share the Bench with his Lordship to see his working closely. I can never forget the love and guidance of Hon'ble Shri Justice Rajendra Menon, the then Acting Chief Justice of this Court with whom I shared the Bench for longest time. At this juncture I also extend my thanks to my senior colleagues Hon'ble Shri Justice S.K. Seth, Shri Justice S.K. Gangele, Shri Justice R.S. Jha, Shri Justice J.K. Maheshwari and Shri Justice Sujoy Paul with whom I had an opportunity to sit in Division Bench. I learnt a lot from all my seniors and brother Judges. I am grateful to them.

I am extremely happy that my family always stood with me. I have received constant support from my life partner wife Smt. Madhu Shrivastava. Without her support and cooperation, I could not have completed this long journey as a Judge. I am also thankful to my son Shri Swapnil Shrivastava and daughter Ku. Neha Shrivastava for their support and affection. My son Shri Swapnil Shrivastava has recently joined as an Advocate in High Court Bar at Jabalpur. I hope your full guidance and support would be given to him in his career.

I would like to thank everyone with whom I have been associated with or who have come into contact with me in discharge of my duty, I was extended full coordination by the Registrar General and the Officers of the Registry, I am thankful to them. A special word of thanks goes to my personal staff namely Shri Santosh P. Mathews, Smt. Trupti Gunjal, Shri Vinod Sharma, Ku. Varsha Dubey, Shri Saqlain Haider, Shri Sandeep Khare, Shri Mukesh Verma, Shri Deendayal Kushwaha and Shri Rakesh Dubey for their whole hearted support and assistance, I would also like to record my appreciation for the day to day assistance provided by the Protocol Section more particularly by Shri Ajay Pawar and Shri C.L. Patle, Shri Radhye Shyam Karluke and Shri Balmik Pandey. I am also thankful to Dr. Sonkar who has given me full medical assistance and advise.

For my future plan I would like to quote Benjamin Franklin who wrote "If you would not be forgotten as soon as you are dead and rotten, either write things worth reading or do things worth writing". I would like to remain in judicial field by doing arbitration work and giving legal advise and assistance to people in need.

I bid you all an affectionate good bye.

अभी मैं थका नहीं

अभी मैं रूका नहीं

अभी मैं चुका नहीं

अभी मैं झुका नहीं

अभी है कितनी डगर शेष

अभी है कितने समर शेष।

Thank you very much, Jai Hind.

NOTES OF CASES SECTION

Short Note
****(31)***
Before Mr. Justice Vivek Rusia

M.C.C. No. 236/2017 (Indore) decided on 17 January, 2018

BHANUSHALI GRIH NIRMAN SAHKARI MARYADIT, UJJAIN …Applicant

Vs.

NAGGIBAI & ors. …Non-applicants

***Civil Procedure Code (5 of 1908), Section 24 & 151 – Transfer of Proceeding – Grounds* – Applicant/plaintiff filed an application u/S 24 C.P.C. r/w Section 151 C.P.C. seeking transfer of his suit for specific performance from Ujjain to Indore on the ground that defendant No. 5 is a practicing lawyer at Ujjain and he may influence the proceedings – Application rejected by trial Court – Challenge to – Held – Power of transfer of cases should be exercised with due care and caution – In the present case, suit property is situated at Ujjain and all parties are residents of Ujjain – All allegations against defendant/ respondent No. 5 are of the period 2009-2010 and after that period, plaintiff failed to point out any incident when he tried to influence a Judge or tried to threaten the plaintiff or his witnesses – Proceedings cannot be transferred just because the respondent/defendant No.5 is an advocate and practicing at Ujjain – No case of transfer is made out – M.C.C. dismissed.**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 24 व 151 – कार्यवाही का अंतरण – आधार – आवेदक/वादी ने विनिर्दिष्ट पालन हेतु अपने वाद का उज्जैन से इंदौर अंतरण चाहते हुए सि.प्र.सं. की धारा 24 सहपठित धारा 151 के अंतर्गत एक आवेदन इस आधार पर प्रस्तुत किया कि प्रतिवादी क्र.5 उज्जैन में वकील के रूप में व्यवसायरत है एवं वह कार्यवाहियों को प्रभावित कर सकता है – विचारण न्यायालय द्वारा आवेदन नामंजूर किया गया – को चुनौती – अभिनिर्धारित – प्रकरणों को अंतरित करने की शक्ति का प्रयोग सम्यक् सावधानी एवं सतर्कता से किया जाना चाहिए – वर्तमान प्रकरण में, वाद संपत्ति उज्जैन में स्थित है एवं सभी पक्षकार उज्जैन के निवासी है – प्रतिवादी/प्रत्यर्थी क्र.5 के विरूद्ध समस्त अभिकथन 2009–2010 की अवधि के हैं एवं उस अवधि के पश्चात् वादी ऐसी कोई घटना दर्शा पाने में विफल रहा जब उसने न्यायाधीश को प्रभावित करने की कोशिश या वादी अथवा उसके साक्षीगण को धमकाने की कोशिश की हो – कार्यवाहियाँ मात्र इसलिए हस्तांतरित नहीं की जा सकती कि प्रत्यर्थी/प्रतिवादी क्र.5 एक अधिवक्ता है और उज्जैन में व्यवसायरत है – अंतरण का कोई प्रकरण नहीं बनता – विविध सिविल प्रकरण खारिज।

Cases referred:

(2008) 3 SCC 659, (2009) 1 SCC 130, (2009) 8 SCC 646, AIR 2006 MP 6.

Vijay Assudani, for the applicant.

A.K. Chitale with *A. Pradhan,* for the non-applicants.

NOTES OF CASES SECTION

Short Note

****(32)***

Before Mr. Justice Vijay Kumar Shukla

Cr.A. No. 1087/2012 (Jabalpur) decided on 20 January, 2018

KRIPAL SINGH …Appellant

Vs.

STATE OF M.P. …Respondent

***Penal Code (45 of 1860), Sections 450, 376 & 506-II – Rape Under Threat – Injury Marks – Testimony of Prosecutrix* – Appellant alongwith his friend entered the temporary shed (Jhuggi) where prosecutrix was sleeping with her 9 months old child and her husband was out of station – They took the child on point of knife and under administration of threat committed rape with prosecutrix – Conviction by Trial Court – Challenge to – Held – Rape was committed under threat, keeping the child on point of knife and in such circumstances, if there is no sign of resistance or mark of injury on the body of prosecutrix, it cannot be inferred that she was a consenting party – Prompt FIR was lodged in the present case – Testimony of prosecutrix is corroborated with statement of other prosecution witness (her neighbour) – Prosecution case proved beyond doubt – Appeal dismissed.**

दण्ड संहिता (1860 का 45), धाराएँ 450, 376 व 506–II – धमकी के अधीन बलात्संग – चोट के निशान – अभियोक्त्री का परिसाक्ष्य – अपीलार्थी अपने मित्र के साथ झुग्गी में प्रविष्ट हुआ जहां अभियोक्त्री अपने 9 माह के बच्चे के साथ सो रही थी तथा उसका पति शहर से बाहर था – उन्होंने बच्चे को चाकू की नोक पर रखा और धमकी देकर अभियोक्त्री के साथ बलात्संग किया – विचारण न्यायालय द्वारा दोषसिद्धि – को चुनौती – अभिनिर्धारित – बच्चे को चाकू की नोक पर रखते हुए धमकी के अधीन बलात्संग कारित किया गया था और ऐसी परिस्थितियों में यदि अभियोक्त्री के शरीर पर प्रतिरोध का चिन्ह या चोट का निशान नहीं है, यह निष्कर्ष नहीं निकाला जा सकता कि वह सहमत पक्षकार थी – वर्तमान प्रकरण में तत्काल प्रथम सूचना प्रतिवेदन दर्ज किया गया था – अभियोक्त्री के परिसाक्ष्य की संपुष्टि अन्य अभियोजन साक्षी (उसके पड़ोसी) के कथन से होती है – अभियोजन प्रकरण संहेह से परे साबित किया गया – अपील खारिज।

Case referred:

AIR 2011 SC 697.

R.S. Shukla, amicus curiae for the appellant.

Sharad Sharma, G.A. for the State.

NOTES OF CASES SECTION

Short Note
****(33)***
Before Mr. Justice J.P. Gupta

M.Cr.C. No. 7134/2012 (Jabalpur) decided on 22 March, 2018

PREM SINGH CHOUHAN …Applicant
Vs.
STATE OF M.P. & anr. …Non-applicants

***Penal Code (45 of 1860), Sections 420, 467, 468, 471 r/w Section 34 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Quashment of Charge-Sheet* – Petitioner, a power of attorney holder of a company of Delhi purchases land at Katni on behalf of company, through local broker of Katni – Complainant/respondent No. 2, who was the real owner of land filed a complaint that his land has been sold by some person impersonating him – FIR was lodged and offence was registered against petitioner and other persons – Challenge to – Held – Petitioner has conducted the transaction and paid the consideration amount on behalf of company – Petitioner is residing at Delhi and had no knowledge about the real person who was the owner of the land – *Prima facie,* no material in charge-sheet to satisfy the ingredients of the said offences – Charge-sheet pending before the trial Court, so far it relates to petitioner, is quashed – Petition allowed.**

दण्ड संहिता (1860 का 45), धाराएँ 420, 467, 468, 471 सहपठित धारा 34 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – आरोप पत्र को अभिखंडित किया जाना – याची, दिल्ली की एक कंपनी के मुख्तारनामा धारक, ने कंपनी की ओर से कटनी के स्थानीय दलाल के जरिए, कटनी में भूमि क्रय की – परिवादी/प्रत्यर्थी क्र.2 जो भूमि का वास्तविक स्वामी था, ने यह परिवाद प्रस्तुत किया कि किसी व्यक्ति द्वारा उसका प्रतिरूपण कर उसकी भूमि का विक्रय कर दिया गया है – प्रथम सूचना प्रतिवेदन दर्ज किया गया तथा याची एवं अन्य व्यक्तियों के विरूद्ध अपराध पंजीबद्ध किया गया – को चुनौती – अभिनिर्धारित – याची ने कंपनी की ओर से संव्यवहार संचालित किया है और प्रतिफल राशि अदा की है – याची दिल्ली में निवासरत है और उसे, वास्तविक व्यक्ति जो भूमि का स्वामी था, के बारे में कोई जानकारी नहीं थी – प्रथम दृष्ट्या, उक्त अपराधों के घटकों की संतुष्टि हेतु आरोप पत्र में कोई सामग्री नहीं – विचारण न्यायालय के समक्ष लंबित आरोप पत्र, जहां तक याची से संबंधित है अभिखंडित किया गया – याचिका मंजूर।

Case referred:

1992 Suppl (1) SCC 335.

Satyam Agrawal, for the applicant.
Rajesh Tiwari, G.A. for the non-applicant/State.
None, for the non-applicant No. 2/complainant.

NOTES OF CASES SECTION

Short Note
****(34)***
Before Mr. Justice G.S. Ahluwalia

M.Cr.C. No. 2945/2017 (Jabalpur) decided on 8 February, 2018

RAHUL ASATI …Applicant
Vs.
STATE OF M.P. …Non-applicant

***Penal Code (45 of 1860), Section 420, Negotiable Instruments Act (26 of 1881), Section 138 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Scope – Ingredients of Offence* – In a cheque bounce matter, offence was registered by police and charges were framed by the Court against the petitioner u/S 420 & 422 IPC – Challenge to – Held – It is clear that ingredients of offence u/S 420 IPC are different from that of offence u/S 138 of the Act of 1881 and a person even if he has been convicted u/S 138 of Negotiable Instrument Act, can still be prosecuted for offence u/S 420 IPC on similar allegations – Further held – When disputed questions of facts are involved, the same cannot be adjudicated by this Court while exercising powers u/S 482 Cr.P.C. – *Prima facie* offence u/S 420 and 422 IPC is made out – Order framing charge is upheld – Application dismissed.**

दण्ड संहिता (1860 का 45), धारा 420, परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – व्याप्ति – अपराध के घटक – चैक बाउंस के एक मामले में, पुलिस द्वारा अपराध पंजीबद्ध किया गया था एवं न्यायालय द्वारा याची के विरूद्ध भा.दं.सं. की धारा 420 व 422 के अंतर्गत आरोप विरचित किये गये थे – को चुनौती – अभिनिर्धारित – यह स्पष्ट है कि धारा 420 भा.दं.सं. के अंतर्गत अपराध के घटक, 1881 के अधिनियम की धारा 138 के अंतर्गत अपराध के घटकों से भिन्न है तथा एक व्यक्ति, भले ही उसे परक्राम्य लिखत अधिनियम की धारा 138 के अंतर्गत दोषसिद्ध किया गया हो, तब भी उसे समान अभिवचनों पर धारा 420 भा.दं.सं. के अंतर्गत अपराध हेतु अभियोजित किया जा सकता है – आगे अभिनिर्धारित – जब तथ्यों के विवादित प्रश्न अंतर्ग्रस्त हों, उसे इस न्यायालय द्वारा दं.प्र.सं. की धारा 482 के अंतर्गत शक्तियों का प्रयोग करते हुए न्यायनिर्णित नहीं किया जा सकता – धारा 420 व 422 भा.दं.सं. के अंतर्गत प्रथम दृष्ट्या अपराध बनता है – आरोप विरचित करने का आदेश कायम रखा गया – आवेदन खारिज।

Cases referred:

(2012) 4 SCC 547, (2015) 11 SCC 776, (2014) 10 SCC 616, (2012) 7 SCC 621, (2013) 3 SCC 330, (2013) 9 SCC 293, (2005) 1 SCC 568, 2007 AIR SCW 3683, 2010 CRI.L.J. 1427, AIR 1977 SC 2018, AIR 1979 SC 366, AIR 1990 SC 1869, AIR 2013 SC 52.

S.M. Guru, for the applicant.
Vivek Mishra, P.P. for the non-applicant-State.
Manish Tiwari, for the complainant.

NOTES OF CASES SECTION

Short Note
****(35)***
Before Mr. Justice Vivek Rusia

S.A. No. 43/2015 (Indore) decided on 15 February, 2018

SAMPATBAI & ors. …Appellants
Vs.
SMT. KAMLABAI & ors. …Respondents

Civil Procedure Code (5 of 1908), Section 100 and Limitation Act (36 of 1963), Section 5 – Second Appeal – Condonation of Delay – Sufficient Cause – **Delay of 485 days in filing second appeal – Appellants submitted that one of the appellants contacted the counsel for filing appeal and they were under the impression that he had given certified copy to advocate for filing appeal – Held – Sole reason may be *bonafide* but not supported by valid reasons and materials as for filing the appeal, not only certified copy of the impugned judgment but vakalatnama duly signed by all parties, copy of plaint, written statement and other documents are also required to be handed over to counsel – Appellant has not stated that he purchased the court fee and paid the counsel fee also which is required for filing the appeal – Vakalatnama signed on 19.01.15 and appeal was filed on 20.01.15 which clearly establish that appellant did not hand over the vakalatnama alongwith the certified copy of judgment within period of limitation – Power to condone the delay can be exercised only when party approaching the Court satisfies that he had sufficient cause for not filing the appeal within prescribed period of limitation - Reasons given in the condonation application are vague in nature – Application for condonation of delay dismissed and consequently appeal also dismissed.**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 एवं परिसीमा अधिनियम (1963 का 36), धारा 5 – द्वितीय अपील – विलंब के लिए माफी – पर्याप्त कारण – द्वितीय अपील प्रस्तुत करने में 485 दिनों का विलंब – अपीलार्थीगण का निवेदन है कि अपील प्रस्तुत करने के लिए अपीलार्थीगण में से एक ने अधिवक्ता से संपर्क किया और वे यह मान रहे थे कि उसने अधिवक्ता को अपील प्रस्तुत करने के लिए प्रमाणित प्रति दे दी थी – अभिनिर्धारित – एकमात्र कारण सद्भाविक हो सकता है परंतु विधिमान्य कारणों तथा सामग्री द्वारा समर्थित नहीं क्योंकि अपील प्रस्तुत करने के लिए अधिवक्ता को न केवल आक्षेपित आदेश की प्रमाणित प्रति बल्कि सभी पक्षकारों द्वारा सम्यक् रूप से हस्ताक्षरित वकालतनामा, वादपत्र की प्रति, लिखित कथन एवं अन्य दस्तावेज भी सौंपे जाना अपेक्षित है – अपीलार्थी ने यह कथन नहीं किया है कि उसने न्यायालय फीस खरीदी और अधिवक्ता की फीस भी अदा की थी जो कि अपील प्रस्तुत करने हेतु अपेक्षित है – वकालतनामा 19.01.2015 को हस्ताक्षरित तथा अपील 20.01.2015 को प्रस्तुत की गई थी जो कि स्पष्ट रूप से स्थापित करता है कि अपीलार्थी ने परिसीमा अवधि के भीतर निर्णय की प्रमाणित प्रति के साथ वकालतनामा नहीं सौंपा था – विलंब माफ करने की शक्ति का प्रयोग केवल तब किया जा सकता है जब न्यायालय के समक्ष जाने वाला पक्षकार यह संतुष्टि करता है कि परिसीमा की विहित अवधि के भीतर अपील प्रस्तुत नहीं करने हेतु उसके पास पर्याप्त कारण था – माफी के

आवेदन में दिये गये कारण अस्पष्ट स्वरूप के है – विलंब की माफी हेतु आवेदन खारिज एवं परिणामस्वरूप अपील भी खारिज।

Cases referred:

2017 SAR (Civil) 1003, (2011) 4 SCC 602, 2002 (I) MPWN 60, 2002 (I) MPWN 193, 2012 (I) MPLJ 93, F.A. No. 460/2016 decided on 23.02.2017, 2017 (2) MPLJ 232, ILR (2015) MP 2155, 2015 SCC Online MP 2669, ILR (2014) MP 2690.

J.B. Mehta, for the appellants.
R.S. Laad, for the respondents No. 1 to 5.

Short Note
****(36)***
Before Mr. Justice Vijay Kumar Shukla
Cr.A. No. 823/2003 (Jabalpur) decided on 20 January, 2018

SANTOSH …Appellant
Vs.
STATE OF M.P. …Respondent

***Penal Code (45 of 1860), Section 354, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xi) and Criminal Procedure Code, 1973 (2 of 1974), Section 320(1) & (2) – Conviction – Compounding of Offence* – Held – In this appeal, an application u/S 320(1) Cr.P.C. for compounding the offence was jointly filed by the complainant and appellant which was allowed by this Court – Offence u/S 354 IPC is compoundable u/S 302(2) Cr.P.C. for the relevant time – Further held – Evidence of prosecutrix shows that she was going to forest when appellant stopped and forcibly caught hold of her and dragged her to the bushes and pressed her breast and outraged her modesty – Contents of FIR and testimony of prosecutrix shows that offence was not committed on account of caste – Offence u/S 354 IPC has already been compounded – No case under the provision of the Act of 1989 is made out – Appellant acquitted of the charge – Appeal allowed.**

दण्ड संहिता (1860 का 45), धारा 354, अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 13(1)(xi) एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 320(1) व (2) – दोषसिद्धि – अपराध का शमन – अभिनिर्धारित – इस अपील में, परिवादी एवं अपीलार्थी द्वारा अपराध के शमन हेतु संयुक्त रूप से धारा 320(1) दं.प्र.सं. के अंतर्गत एक आवेदन प्रस्तुत किया गया जिसे इस न्यायालय ने मंजूर किया था – सुसंगत समय के लिए धारा 354 भा.दं.सं. के अंतर्गत अपराध, धारा 302 (2) दं.प्र.सं. के अंतर्गत शमनीय है – आगे अभिनिर्धारित – अभियोक्त्री का साक्ष्य दर्शाता है कि वह वन में जा रही थी जब अपीलार्थी ने रोका और बलपूर्वक उसे पकड़कर झाड़ियों तक घसीट ले गया तथा उसके वक्षों को दबाया एवं उसकी लज्जा भंग की – प्रथम सूचना प्रतिवेदन की अंतर्वस्तु एवं अभियोक्त्री का परिसाक्ष्य दर्शाता है कि जाति के कारण अपराध कारित नहीं किया गया था – धारा 354 भा.दं.सं. के अंतर्गत अपराध का पहले ही शमन किया

जा चुका है – 1989 के अधिनियम के उपबंध के अंतर्गत प्रकरण नहीं बनता – अपीलार्थी आरोप से दोषमुक्त किया गया – अपील मंजूर।

Cases referred:

(2013) 14 SCC 577, AIR 2007 SC 155, (2008) 8 SCC 435, (2011) 6 SCC 405.

Chhoti Kushram, for the appellant.
Ashutosh Tiwari, G.A. for the State.

Short Note
****(37)***
Before Mr. Justice S.C. Sharma
F.A. No. 81/1999 (Indore) decided on 15 February, 2018

SHUBH LAXMI GRIH NIRMAN SAHAKARI
SANSTHA MARYADIT, INDORE …Appellant
Vs.
SURESH @ GOPAL & ors. …Respondents

***Specific Relief Act (47 of 1963), Section 16(1)(c) & 20 and Civil Procedure Code (5 of 1908), Form 17, Appendix A – Readiness and Willingness – Belated Suit – Inadequate Consideration* – Appeal against the judgment of trial Court dismissing the suit for specific performance filed by appellant/ plaintiff – Held – In a suit for specific performance of contract, plaintiff has to plead and prove readiness and willingness to perform his part of contract and if there is no pleading, no evidence can be adduced or can be looked into to prove the case nor any findings can be recorded by trial Court – In the present case, in absence of such pleadings, suit was rightly dismissed as basic requirements of pleadings as provided u/S 16(1)(c) r/w Form 17 Appendix A of CPC was not fulfilled – Further held – Agreement to sale executed in 1993, agreement was disputed by respondent no.2 in 1994, nothing prevented the appellant/plaintiff to approach the trial Court in time – Relief of specific performance is a discretionary and equitable relief and at present cannot be granted keeping in view the conduct of appellant, after a lapse of 24 years – Further held – The property which was agreed to be sold for Rs. 8.5 lacs in 1986-88 was valued in agreement of 1993 as of Rs. 1.05 lacs, this raises a serious doubt regarding the said agreement as highly inadequate consideration was mentioned in agreement – Trial Court rightly dismissed the suit – Appeal dismissed.**

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16(1)(सी) व 20 एवं सिविल प्रक्रिया संहिता (1908 का 5), प्रारूप 17 परिशिष्ट ए – तैयारी एवं रजामंदी – विलंबित वाद – अपर्याप्त प्रतिफल – अपीलार्थी/वादी द्वारा विनिर्दिष्ट पालन हेतु प्रस्तुत किया गया वाद खारिज करने के विचारण न्यायालय के निर्णय के विरूद्ध अपील – अभिनिर्धारित – संविदा के विनिर्दिष्ट पालन हेतु वाद में, वादी को अपनी ओर से संविदा का पालन करने की तैयारी एवं रजामंदी का अभिवचन कर साबित करना होता है और यदि कोई अभिवचन नहीं है,

प्रकरण को साबित करने के लिए न तो कोई साक्ष्य दिया जा सकता है न देखा जा सकता है और न ही विचारण न्यायालय द्वारा किसी निष्कर्ष को अभिलिखित किया जा सकता है – वर्तमान प्रकरण में, ऐसे अभिवचनों की अनुपस्थिति में, वाद को उचित रूप से खारिज किया गया था क्योंकि सि.प्र.सं. की धारा 16(1)(सी) सहपठित प्रारूप 17 परिशिष्ट ए के अंतर्गत यथा उपबंधित अभिवचनों की मूल अपेक्षाओं की पूर्ति नहीं की गई थी – आगे अभिनिर्धारित – 1993 में विक्रय करार निष्पादित, प्रत्यर्थी क्र.2 द्वारा 1994 के करार को विवादित किया गया, यथा समय अपीलार्थी/वादी को विचारण न्यायालय के पास जाने से रोकने के लिए कुछ नहीं था – विनिर्दिष्ट पालन का अनुतोष एक वैवेकिक एवं साम्यापूर्ण अनुतोष है तथा वर्तमान में, अपीलार्थी का आचरण दृष्टिगत रखते हुए, 24 वर्ष व्यपगत होने के पश्चात् प्रदान नहीं किया जा सकता – आगे अभिनिर्धारित – संपत्ति, जिसे 1986–88 में रू. 8.5 लाख में विक्रय किये जाने का करार हुआ था, 1993 के करार में रू. 1.05 लाख मूल्यांकित की गई, यह उक्त करार के संबंध में गंभीर संदेह उत्पन्न करता है क्योंकि करार में अति अपर्याप्त प्रतिफल उल्लिखित किया गया था – विचारण न्यायालय ने उचित रूप से वाद खारिज किया – अपील खारिज।

Cases referred:

(1989) 4 SCC 313, (2006) 2 SCC 496, (2010) 10 SCC 512, (2012) 2 SCC 300, AIR 2011 SC 2057, 2004 (2) MPLJ 169, AIR 1997 SC 1751, AIR 2010 Rajasthan 128, 1985 MPWN 327, 2017 (3) MPLJ 540, (2001) 6 SCC 600, (2008) 7 SCC 310, 2006 (3) MPLJ 205.

A.K. Sethi with *Harish Joshi,* for the appellant.
Rajat Raghuvanshi, for the respondent No. 1.
None, for the respondents No. 2 to 5.
V.K. Jain, with *Vaibhav Jain,* for the respondents No. 7 & 8.

Short Note
****(38)***
Before Mr. Justice Sujoy Paul
W.P. No. 22731/2017 (Jabalpur) decided on 1 March, 2018

SUNITA BAI CHAUDHARY (SMT.) …Petitioner
Vs.
OMKAR SINGH & ors. …Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 21(3) – Second No Confidence Motion – Maintainability **– First No Confidence Motion initiated against petitioner which was not decided by the authority and during the pendency second No Confidence Motion was initiated and was entertained and impugned order was passed – Challenge to – Held – The first No confidence Motion was initiated before completion of 2 ½ years from the date Sarpanch entered her office which was not tenable and at the same time was not rejected by the competent authority – Second No Confidence Motion was initiated after 2½ years which was maintainable because previous motion was not rejected – Clauses of Section 21(3) is not**

attracted because the prohibition of submission of another motion is applicable when previous no confidence motion was rejected – Further held – If meaning of statute is plain and unambiguous, it should be given effect to irrespective of consequences – Each word, phrase or sentence is to be construed in the light of general purpose of the Act itself.

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 21(3) – द्वितीय अविश्वास प्रस्ताव – पोषणीयता – याची के विरूद्ध प्रथम अविश्वास प्रस्ताव आरंभ किया गया था जिसे प्राधिकारी द्वारा विनिश्चित नहीं किया गया और लंबित रहने के दौरान द्वितीय अविश्वास प्रस्ताव आरंभ किया गया एवं ग्रहण किया गया तथा आक्षेपित आदेश पारित किया गया था – को चुनौती – अभिनिर्धारित – प्रथम अविश्वास प्रस्ताव, सरपंच द्वारा पद ग्रहण करने की तिथि से 2½ वर्ष पूर्ण होने के पहले आरंभ किया गया था जो कि मान्य नहीं था और उसी समय सक्षम प्राधिकारी द्वारा अस्वीकार नहीं किया गया था – द्वितीय अविश्वास प्रस्ताव 2½ वर्ष के पश्चात् आरंभ किया गया जो कि पोषणीय था क्योंकि पूर्वतर प्रस्ताव को अस्वीकार नहीं किया गया था – धारा 21(3) के खंड आकर्षित नहीं होते है क्योंकि दूसरे प्रस्ताव के प्रस्तुतिकरण पर प्रतिषेध तब लागू होगा जब पूर्वतर अविश्वास प्रस्ताव अस्वीकार किया गया हो – आगे अभिनिर्धारित – यदि कानून का अर्थ स्पष्ट एवं असंदिग्ध है, उसे परिणामों का विचार किये बिना प्रभावशील करना चाहिए – प्रत्येक शब्द, वाक्यांश या वाक्य का अर्थान्वयन, स्वयं अधिनियम के सामान्य प्रयोजन के आलोक में किया जाना चाहिए।

Cases referred:

AIR 1953 SC 274, (2012) 4 SCC 463, 1987 (1) SCC 424, (2007) 3 SCC 700, (2015) 10 SCC 369, (2017) 4 SCC 202, (2017) 10 SCC 713, (1992) 4 SCC 711.

Parmendra Singh, for the petitioner.
Rajesh Tiwari, G.A. for the respondent/State.
Anshuman Singh, for the respondents No. 1 to 20.

Short Note

****(39)***

Before Mr. Justice J.K. Maheshwari

M.Cr.C. No. 11773/2013 (Jabalpur) decided on 5 January, 2018

SWAROOP CHARAN SAHU (DR.) & anr. …Applicants
Vs.
STATE OF M.P. …Non-applicant

(Alongwith M.Cr.C. No. 3067/2015, M.Cr.C. No. 9854/2015 & M.Cr.C. No. 18265/2015)

Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, (57 of 1994), Sections 17(2), 17(3) & 28(1)(a) – Cognizance of Offence – Complainant – Appropriate Authority **– Cognizance was taken by the trial Court against the petitioners on the complaint made by Chief Medical and Health Officer (CMHO) – Challenge to – Held – As per Section 17(2), appointment of appropriate authorities are required to be notified in Official Gazette – Section 28(1)(a) put an embargo on the Court for not taking**

cognizance until complaint is made by appropriate authority concerned which denotes Section 17(3)(a) or any officer authorized by the Central or State Government or the appropriate authority which denotes Section 17(3)(b), under this Act – In the instant case, no document has been produced or brought on record indicating that CMHO of concerned district has been authorized by appropriate authority notified u/S 17(3) of the Act and has been conferred power to make a complaint in the Court – CMHO Bhopal and Hoshangabad are not the officer authorized u/S 17(2), 17(3) and 28(1)(a) of the Act of 1994 and therefore cognizance taken by Court on complaint made by them is illegal and without jurisdiction and is liable to be quashed – Petitions allowed.

गर्भधारण पूर्व और प्रसव पूर्व निदान तकनीक (लिंग चयन का प्रतिषेध) अधिनियम, (1994 का 57), धाराएँ 17(2), 17(3) व 28(1)(ए) – अपराध का संज्ञान – परिवादी – समुचित प्राधिकारी – विचारण न्यायालय द्वारा मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी (सी.एम.एच.ओ.) के परिवाद पर याचीगण के विरूद्ध संज्ञान लिया गया – को चुनौती – अभिनिर्धारित – धारा 17(2) के अनुसार, समुचित प्राधिकारियों की नियुक्ति शासकीय राजपत्र में अधिसूचित की जाना अपेक्षित है – धारा 28(1)(ए) न्यायालय पर संज्ञान न लेने की रोक लगाता है जब तक कि इस अधिनियम के अंतर्गत संबंधित समुचित प्राधिकारी द्वारा जो कि धारा 17(3)(ए) में निर्दिष्ट है अथवा केन्द्र या राज्य सरकार या समुचित प्राधिकारी द्वारा प्राधिकृत कोई अधिकारी जो कि धारा 17(3)(बी) में निर्दिष्ट है परिवाद नहीं किया जाता – वर्तमान प्रकरण में, कोई दस्तावेज प्रस्तुत नहीं किया गया या अभिलेख पर नहीं लाया गया जो दर्शाता हो कि संबंधित जिले के सी.एम.एच.ओ. को अधिनियम की धारा 17(3) के अंतर्गत अधिसूचित समुचित प्राधिकारी द्वारा प्राधिकृत किया गया है तथा न्यायालय में परिवाद प्रस्तुत करने की शक्ति प्रदान की गई है – सी.एम.एच.ओ., भोपाल एवं होशंगाबाद, 1994 के अधिनियम की धारा 17(2), 17(3) व 28(1)(ए) के अंतर्गत प्राधिकृत अधिकारी नहीं है और इसलिए उनके द्वारा किये गये परिवाद पर न्यायालय द्वारा संज्ञान लिया जाना अवैध एवं बिना अधिकारिता के है तथा अभिखंडित किये जाने योग्य है – याचिकाएं मंजूर।

Cases referred:

ILR (2014) MP 1176, M.Cr.C. Nos. 6408/2013 & 6407/2013 and Cr.R. No. 1175/2012 order passed on 21.01.2016, M.Cr.C. No. 10264/2016 order passed on 30.01.2017, AIR 2000 SC 1102, AIR 1985 SC 1622, AIR 1980 All 23, (2008) CriLJ 1509, (1987) 1 SCC 658.

Som Mishra, for the applicant in M.Cr.C. No. 11773/2013.
Hemant Namdeo, for the applicant in M.Cr.C. No. 3067/2015.
Anurag Gohil, for the applicant in M.Cr.C. Nos. 9854/2015 & 18265/2015.
Girish Kekre, G.A. for the non-applicant/State.

I.L.R. [2018] M.P. 827 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice N.V. Ramana & Mr. Justice S. Abdul Nazeer

C.A. No. 2511/2011 decided on 30 January, 2018

MUNICIPAL COUNCIL, RAGHOGARH & anr. …Appellants

Vs.

NATIONAL FERTILIZER LTD. & ors. …Respondents

(Alongwith C.A. No. 2512/2011)

Municipal Council – External Development Charges – Government Entity **– Certain forest lands which were within the Municipal limits were alloted to respondents – Municipal Council served them a notice to deposit external development charges – Respondent filed a civil suit which was allowed holding that Municipal Council have no right to recover such charges from respondents – Municipal Council filed an appeal before High Court whereby the same was also dismissed – Challenge to – Held – Perusal of State Government orders makes it clear that they are meant for housing construction societies, colonizers and individual persons – Respondents are neither colonizers nor house construction societies or individuals – Dwelling units developed by respondents are for their employee only and not meant for sale or for letting out on rent – Construction has been done by Government entities being Public Sector Undertakings with the investment of Central Government – Trial Court and High Court rightly held that respondents are not liable to pay any external development fee to appellant – Appeals dismissed.**

(Para 12 & 13)

नगरपालिका परिषद – बाह्य विकास प्रभार – सरकारी संस्था – प्रत्यर्थीगण को कतिपय वन भूमि, जो कि नगरपालिका सीमाओं के भीतर थी, आबंटित की गई थी – नगरपालिका परिषद ने उन्हें बाह्य विकास प्रभार जमा करने हेतु नोटिस तामील किया – प्रत्यर्थी ने सिविल वाद प्रस्तुत किया जिसे यह ठहराते हुए मंजूर किया गया कि नगरपालिका परिषद को प्रत्यर्थीगण से उक्त प्रभार वसूलने का अधिकार नहीं है – नगरपालिका परिषद ने उच्च न्यायालय के समक्ष अपील प्रस्तुत की जहां भी उसे खारिज किया गया – को चुनौती – अभिनिर्धारित – राज्य सरकार के आदेश के अवलोकन से स्पष्ट होता है कि वह गृह निर्माण संस्थाओं, कालोनाइजर एवं भिन्न व्यक्तियों हेतु आशयित है – प्रत्यर्थीगण न तो कालोनाइजर है, न ही गृह निर्माण संस्थायें या व्यक्ति हैं – प्रत्यर्थीगण द्वारा विकसित आवासीय इकाईयां केवल उनके कर्मचारियों हेतु है और विक्रय या किराये पर देने हेतु आशयित नहीं है – सरकारी संस्था द्वारा, केन्द्र सरकार के निवेश के साथ सार्वजनिक क्षेत्र का उपक्रम होने के नाते निर्माण किया गया है – विचारण न्यायालय एवं उच्च न्यायालय ने

उचित रूप से अभिनिर्धारित किया कि प्रत्यर्थीगण, अपीलार्थी को कोई बाह्य विकास शुल्क अदा करने के लिए दायी नहीं है – अपील खारिज।

J U D G M E N T

The Judgment of the Court was delivered by:
N.V. RAMANA, J. :- These two Appeals arise out of a common Judgment passed on 3rd August, 2007 in First Appeal Nos.1 of 1996 and 175 of 1995, respectively, by the High Court of Madhya Pradesh, Bench at Gwalior.

2. The short question that arises for our consideration in these appeals is whether the contesting respondents herein, i.e. National Fertilizers Limited and Gas Authority of India Limited, are liable to pay external development charges to the appellant—Municipal Council as per its demand?

3. Both the contesting respondents in these appeals were allotted forest lands within the municipal limits of the appellant Council. Subsequently, the respondents were served with a notice calling upon them to deposit external development charges @ Rs.5/- per sq. meter in consonance with Government of Madhya Pradesh, Housing and Environment Department, Notification No. F.3-39/32/85, dated 28-11-1985. Raising objections, respondents challenged the notices by filing Civil Suits before the District Judge, Guna, Madhya Pradesh contending that they are Central Government entities and would not come under the purview of the said Notification and hence sought declaration and permanent injunction restraining the appellant from demanding external development fee from them.

4. The District Judge, Guna by separate judgments dated 11th October, 1995 decreed the Suits in favour of respondents and declared that the defendants (appellant and proforma respondents herein) jointly or severally have no right to recover amount by name of external development fee and no amount shall be recovered from the plaintiffs (respondents herein) in the form of external development fee.

5. Against the said judgment of the District Judge, the appellant moved the High Court by way of First Appeals challenging the decree that the Suit has been filed before expiry of period of notice under Section 80, CPC and no Suit is maintainable against the Municipal Council without notice under Section 319 of the Municipalities Act. The other stand taken by the appellant was that since the plaintiffs are avoiding recovery of external development fee, therefore, without payment of *ad valorem* court fee suit ought to have been dismissed or the trial Court should have rejected the plaint for insufficient payment of court fee.

6. The Division Bench of the High Court by judgment dated 12th May, 2005 allowed the First Appeals and set aside the decree passed by the trial Court. The High Court,

however, without giving its opinion on the merits, held that both the Suits have not been properly valued and notice issued was not one under Section 80, CPC and Suits as filed were not maintainable. In the absence of notice under Section 319 of the Madhya Pradesh Municipalities Act, Suit against Municipal Council is not maintainable.

7. The contesting respondents herein challenged aforesaid judgment of the High Court in Civil Appeal Nos. 3502 and 3503 of 2006 before this Court. By order dated 21st November, 2006 this Court opined that having regard to the fact that the State of M.P. did not prefer any appeal against the judgment and decree passed by the learned trial Judge, the Division Bench of the High Court went wrong in holding that the suit was barred under Section 80, CPC. So far as the non-maintainability of the suit for want of notice under Section 319 of the M.P. Municipalities Act is concerned, neither any such plea was taken in the written statement nor any issue was raised before the trial Court by the Municipal Council. Therefore, it was held that the Division Bench of the High Court was wrong in holding that the Suit was not maintainable. This Court, accordingly, set aside the judgment passed by the High Court and remitted the matter back to the High Court for consideration of the first appeals on merit.

8. The High Court, after considering the matter on merits, by the judgment impugned herein, formed the opinion that the trial Court did not commit any error in declaring that the appellant Municipal Council had no authority under law to charge external development cost and thereby affirmed the judgment of the trial Court and dismissed the appeals of the Municipal Council. Aggrieved thereby, the said Municipal Council is in appeal before us.

9. The case put forward on behalf of the appellant Municipal Council is that it is a statutory body providing various amenities and necessities to the general public residing in its area limits. Relying on Order No.F./3-39/32/85 dated 28-11-1983 of Housing and Environment Department, Government of Madhya Pradesh, it is stated that the areas where there is a Municipal Committee or Municipal Corporation, the internal development work of colonies by House Construction Societies and individual persons will be done in supervision of respective Municipal Committee or Municipal Corporation. For that all the activities pertaining to maintenance, civil amenities, development work and construction require heavy expenditure. About Rs.5 lakhs per month is the electricity bill to maintain the streetlights and to run pump houses. Nearly Rs.25 lakhs per annum are the vehicle maintenance charges, Rs.50 lakhs for supply of water and pipeline maintenance and about Rs.25 lakhs for sanitation and Rs.2 crores per year is required for maintenance, construction and development of roads. In view thereof, in accordance with the prevailing rules, the externational development fee @ Rs.5/- per. Sq.m. has been legally charged on the contesting respondents and they are liable to make payment. But, unfortunately the trial Court committed legal error and declared that the defendants (appellant and proforma respondents herein)

jointly or severally have no right to recover amount by name of external development fee from the plaintiffs (respondents herein) and the same view has been affirmed by the High Court. The entire development activity in the Municipality, Rahograh has come to standstill and it is therefore necessary for this Court to set aside the impugned judgment.

10. On behalf of contesting respondents, it is contended that the contesting respondents are not private entities, nor colonizers. The ownership of the institutions lies with the Government of India in whose control the day to day activities of the institutions are run. The institutions being totally secured, no outsider can enter the Company premises without prior permission. As regards the maintenance, cleanliness, electricity, roads and safeguarding environment in the entire area is being done by the institutions and therefore they are not binding on the demands of Municipal Council for making payment of external development charges. The Courts below have thoroughly examined the issue in clear legal view and only thereafter rendered the judgment in their favour and therefore there is no occasion for this Court to exercise the power under Article 136 of the Constitution to interfere in these appeals.

11. Having heard learned counsel on either side, we have also given our thoughtful consideration to various Government of Madhya Pradesh Orders including the first and foremost Order on the issue in question viz., No. 2681/1677/32, dated 6th July, 1978 for levying internal development charges. The subsequent Order No. 2997/ C.R.129/32/Bhopal, dated 27th July, 1978 provides certain relaxations regarding the mode of payment of the amount required to be deposited under original order dated 6th July, 1978. The next one is the Order No. F.3-39/32/85 dated 28th November, 1983 on levying external development fee @ Rs.5/- per sq. mtr.

12. It is clearly noticeable from the aforementioned Government Orders that they are meant for housing construction societies, colonizers and individual persons where the internal developmental works of the colonies are done by the respective house construction society, colonizers or individual persons. In the same way, if any colonizer, house construction society or individual person constructs a colony under the supervision of Municipal Committee or Municipal Corporation, as the case may be, Rs.5/- per sq. mtr. towards external development charges are applicable. While so, in the case on hand, the contesting respondents are neither colonizers nor house construction societies or individuals. The dwelling units developed by them are for their employees only and not meant for sale or for letting out on rent. Apparently, the construction of dwelling units and the residential areas developed by the contesting respondents are done by the contesting respondents i.e. Government entities being Public Sector Undertakings with the investment of Central Government.

13. For all the aforementioned reasons we do not see any error in the impugned judgment. In our opinion, the trial Court as well as the High Court considered all the

relevant issues in their true spirit and came to the right conclusion that the contesting respondents are not liable to pay any amount in the form of external development fee as demanded by the appellants. The appeals fail and therefore stand dismissed devoid of merit without any order as to costs.

Appeal dismissed,

I.L.R. [2018] M.P. 831 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice A.K. Sikri & Mr. Justice Ashok Bhushan

C.A. No. 1562/2018 decided on 8 February, 2018

STATE OF M.P. THROUGH PRINCIPAL SECRETARY & anr. …Appellants
Vs.
MAHENDRA GUPTA & ors. …Respondents

Motor Vehicles Act (59 of 1988), Section 68 and Motor Vehicles Rules, M.P. 1994, Rule 63 & 65 – State Transport Authority – Quorum of Meeting – **Held – Application for change of time schedule of permit was filed before State Transport Authority – Quorum of meeting of the Authority is three – Accordingly, Chairperson and two members heard the application in meeting dated 16.10.14 and order was subsequently pronounced on 15.12.14 but the order was signed by only Chairperson and one member, the third member having been transferred in the meanwhile – Petitioner challenged the legality of the order whereby the High Court held the order to be illegal – State filed an appeal whereby the same was also dismissed by Division bench of the High Court – Challenge to – Held – Order passed by the State Transport Authority, a multi member body, signed by the Chairperson and one member is a valid order having been issued with the majority opinion of two out of three, who heard the application – No illegality in the order – Judgments of the High Court set aside – Appeal allowed.**

(Para 12 & 25)

मोटर यान अधिनियम (1988 का 59), धारा 68 एवं मोटर यान नियम, म.प्र. 1994, नियम 63 व 65 – राज्य परिवहन प्राधिकरण – मीटिंग के लिए कोरम – अभिनिर्धारित – राज्य परिवहन प्राधिकरण के समक्ष परमिट की समय सारणी के बदलाव हेतु आवेदन प्रस्तुत किया गया था – प्राधिकरण की मीटिंग के लिए तीन का कोरम है – तद्नुसार, अध्यक्ष एवं दो सदस्यों ने मीटिंग दिनांक 16.10.2014 में आवेदन को सुना और तत्पश्चात् 15.12.2014 को आदेश उद्घोषित किया, परंतु, आदेश पर केवल अध्यक्ष एवं एक सदस्य द्वारा हस्ताक्षर किये गये क्योंकि इस दौरान तृतीय सदस्य को स्थानांतरित किया गया था – याची ने आदेश की वैधता को चुनौती दी जिसमें उच्च न्यायालय ने आदेश को अवैध अभिनिर्धारित किया – राज्य ने अपील प्रस्तुत की जिसमें उक्त को भी उच्च न्यायालय की खंड न्यायपीठ द्वारा

खारिज किया गया – को चुनौती – अभिनिर्धारित – राज्य परिवहन प्राधिकरण, एक बहु–सदस्यीय निकाय द्वारा पारित आदेश, जिस पर अध्यक्ष एवं एक सदस्य द्वारा हस्ताक्षर किये गये है, आवेदन को सुनने वाले तीन में से दो मतों के बहुमत के साथ जारी किये जाने के नाते एक विधिमान्य आदेश है – आदेश में कोई अवैधता नहीं – उच्च न्यायालय के निर्णय अपास्त किये गये – अपील मंजूर।

Cases referred:

AIR 1958 SC 56, AIR (1938) P.C. 292, AIR 1985 A.P. 256.

J U D G M E N T

The Judgment of the Court was delivered by:
Ashok Bhushan, J.:- The State of Madhya Pradesh is in appeal against the judgment of Division Bench of the High Court of Madhya Pradesh, Bench at Gwalior dated 22.03.2017 by which judgment writ appeal filed by the State questioning the judgment of the learned Single Judge dated 17.03.2015 has been dismissed.

2. The parties shall be described as referred to in the writ petition. The facts giving rise to this appeal are:

The writ petitioners have permanent permit for two routes, one Gwalior to Bhander and second Gwalior to Datia. Respondent No.3 has also the permanent permit for the route Gwalior to Jhansi. Respondent No.3 preferred an application for modification of time schedule for movement of his vehicle. The application of Respondent No.3 came for hearing before the State Transport Authority on 16.10.2014. On the date of hearing both counsel for the applicant as well as counsel for the objectors were heard. The State Transport Authority allowed the modification and decided to change the time schedule as prayed by the applicant in the public interest. The order was issued by the State Transport Authority on 15.12.2014. Aggrieved by the order dated 15.12.2014, Writ Petition No.883 of 2015 was filed by the two petitioners who were objectors before the State Transport Authority. In the writ petition various grounds were taken questioning the application filed by the applicantPawan Arora. One of the grounds taken before the learned Single Judge was that although the State Transport Authority heard the matter on 16.10.2014 consisted of Chairperson and two members, however, the order was delivered with the signatures of Chairperson and only one member, since one member, Shri Sanjay Choudhary was transferred in the meanwhile, hence, the order dated 15.12.2014 is illegal. The learned Single Judge accepted the contention of the writ petitioners and allowed the writ petition by setting aside the order dated 15.12.2014.

3. The State of Madhya Pradesh filed writ appeal challenging the judgment of the learned Singe Judge. The State contended before the Division Bench of the High Court that there was no illegality in the order issued by the Chairperson and one member, although, it was heard by three members when the meeting took place on 16.10.2014. The Division Bench dismissed the appeal upholding the view of the learned Single Judge.

4. Learned counsel for the appellant in support of the appeal contends that under the Madhya Pradesh Motor Vehicles Rules, 1994 quorum of the meeting of the State Transport Authority is three-Chairman plus two members and quorum was complete when the meeting was held on 16.10.2014, the decision delivered by the majority of the members is in no manner illegal. It is submitted that after hearing, one member was transferred and was not available to be part of the order issued on 15.12.2014. It is submitted that even it is assumed that one member was not agreeing with the decision of two other members, although, there is no such pleading or material on the record, the decision taken by the majority of the members was fully valid and there was no infirmity in the order dated 15.12.2014. It is submitted that the learned Single Judge as well as Division Bench committed error in taking the view that the order dated 15.12.2014 was an illegal order.

5. Learned counsel for the respondents supported the order of the High Court and contends that when one member who heard the matter on 16.10.2014 was not available, no decision could have been taken by the State Transport Authority. He submits that the matter was heard by three members, hence decision could have been issued only by three members and the views taken by the learned Single Judge and Division Bench are in accordance with law.

6. We have considered the submissions of the learned counsel for the parties and perused the records.

7. The Motor Vehicles Act, 1988 provides for constitution of a State Transport Authority to exercise and discharge the powers and functions as specified in sub-section (3) of Section 68. Section 68(1) and 68(3) are quoted below:

> ***"68. Transport Authorities.*** *(1) The State Government shall, by notification in the Official Gazette, constitute for the State a State Transport Authority to exercise and discharge the powers and functions specified in sub-section (3), and shall in like manner constitute Regional Transport Authorities to exercise and discharge throughout such areas (in this Chapter referred to as regions) as may be specified in the notification, in respect of each Regional Transport Authority; the powers and*

functions conferred by or under this Chapter on such Authorities:

Provided that in the Union territories, the Administrator may abstain from constituting any Regional Transport Authority.

(2) .....

(3) The State Transport Authority and every Regional Transport Authority shall give effect to any directions issued under section 67 and the State Transport Authority shall, subject to such directions and save as otherwise provided by or under this Act, exercise and discharge throughout the State the following powers and functions, namely :-

(a) to coordinate and regulate the activities and policies of the Regional Transport Authorities, if any, of the State ;

(b) to perform the duties of a Regional Transport Authority where there is no such Authority and, if it thinks fit or if so required by a Regional Transport Authority, to perform those duties in respect of any route common to two or more regions;

(c) to settle all disputes and decide all matters on which differences of opinion arise between Regional Transport Authorities;

[(ca) Government to formulate routes for playing stage carriages;] and

(d) to discharge such other functions as may be prescribed."

8. The Rules have been framed by the State of Madhya Pradesh, namely, the Madhya Pradesh Motor Vehicles Rules, 1994. Chapter V of the Rules contains heading **"Control of Transport Vehicles"**. Rule 63 provides for State Transport Authority. Rule 63(4) to (7) are quoted as below:

"63. State Transport Authority.

(4) The State Transport Authority shall meet at such time and at such place as the Chairman may appoint.

(5) Not less than three days' notice shall be given to a member of the meeting of the State Transport Authority.

(6) The quorum to constitute a meeting of the State Transport Authority shall be the Chairman or the nominated Chairman under the sub-rule (7) and two other members (whether official or non-official). If within hall an hour from the time appointed for the meeting a quorum is not completed, the meeting shall be adjourned to such day and at such time and place as the Chairman or the acting Chairman nominated under sub-rule (7) may appoint and no quorum is necessary for holding the adjourned meeting.

(7) The Chairman, if unable to attend the meeting, shall nominate a member to act as Chairman at the meeting."

9. Rule 64 provides for Regional Transport Authority and Rule 65 is for Conduct of Business of Transport Authorities. Rule 65(2) to 65(4) are as follows:

65. Conduct of Business of Transport Authorities.

(2) The State or Regional Transport Authority, as the case may be, may decide any matter of urgent nature without holding a meeting by the majority of votes of members by recorded in writing and send to the Secretary (hereinafter referred to as the procedure by circulation).

(3) In the event of procedure by circulation being followed, the Secretary shall send to each member of the Transport Authority such particulars of the matter as may be reasonably necessary in order to enable the member to arrive at a decision and shall specify the date by which the votes of members are to be received in the office of the Transport Authority. Upon receipt of the votes of members as aforesaid, the Secretary shall lay the papers before the Chairman, who shall record the decision by endorsement on the form of application or other document, as the case may be, according to the votes received and the vote or votes cast by the Chairman. The record of the votes cast shall not be available for inspection by any person save by a member of the Transport Authority at a regularly constituted meeting of the Transport Authority. No decision shall be made

upon procedure by circulation, if before the date by which the voles of members are required to reach the office of the Transport Authority, not less than one-third of the members of the Transport Authority have given notice in writing to the Secretary demanding that the matter be referred to a meeting of the Transport Authority.

(4) The number of votes, excluding the Chairman's second or casting vote, necessary for a decision to be taken upon procedure by circulation shall not be less than the members necessary to constitute a quorum.

xxx xxx xxx

10. The facts of the case, as noted above, reveal that State Transport Authority convened the meeting of the Authority by issuing the Agenda for 16.10.2014. In addition to Chairperson, two members- Shri Sanjay Chaudhary, Transport Commissioner and Shri Rajiv Sharma, Chief Engineer, Public Works Department were present in the meeting. The applicant as well as the counsel for the objectors were heard on 16.10.2014. The decision of the Committee was issued on 15.12.2014 which was signed by the Chairperson and only one member, Shri Rajiv Sharma, since, after the date of the hearing and before the issuance of the order one member, Shri Sanjay Chaudhary was transferred. The copy of the order dated 15.12.2014 has been brought on record as Annexure P-1 which clearly mentions the date of hearing, i.e., 16.10.2014. It is useful to extract only the relevant parts of the order for the present case:

"THE STATE TRANSPORT AUTHORITY,
MADHYA PRADESH MOTIMAHAL, GWALIOR

Agenda Serial No.71
Case No.2159/2014 Hearing on 16.10.2014
Before:

1.	*Pramod Agrawal* *Principal Secretary,* *Madhya Pradesh Government* *Transport Department, Bhopal*	*Chairperson*
2.	*Sanjay Chaudhary* *Transport Commissioner* *Madhya Pradesh, Gwalior*	*Member*
3.	*Rajiv Sharma* *Chief Engineer* *Public Works Department,* *Gwalior*	*Member*

... ...

... ...

Listing the aforesaid application submitted by the applicant for hearing in the meeting of the State Transport Authority dated 16.10.2014 the same was included in the agenda and published on the Departmental Website and the notice board of the Office and all regional/ additional regional / District Transport Office. The objections of the aforesaid Drivers were obtained until the aforesaid fixed date.

The case was presented in the meeting dated 16.10.2014 of the State Transport Authority. On the day of hearing, on behalf of the parties their appointed counsels appeared, who were heard.

... ...

... ...

Note: Since one member Shri Sanjay Chaudhary of the Authority was transferred after hearing, the aforesaid order is being passed by the Chairperson and one member Chief Engineer of the Authority.

Sd/ *sd/*

Member *Member*
State Transport Authority *State Transport Authority*
Madhya Pradesh"

11. The only issue which needs to be considered in this appeal is as to whether, when in the meeting dated 16.10.2014 the Chairperson and two members had heard the application for the change of the time schedule, the order could have been passed allowing the application by the two members (Chairperson and one member) alone, since the order was signed only by the Chairperson and one member, on 15.12.2014.

12. The statutory provisions of the Motor Vehicles Act, 1988 as well as the Madhya Pradesh Motor Vehicles Rules, 1994 indicate that the State Transport Authority is a multi-member body constituted by the State Government under Section 68(1). The State Transport Authority is a multi-member body which transacts business in meeting except in case of emergency. Meeting is to be convened at such time and at such place as the Chairman may appoint. Three days' notice is required to be given to the members and quorum of the meeting is the Chairman or the nominated Chairman and

two other members, i.e., quorum is three. In the present case, there is no dispute that when the meeting was held on 16.10.2014 quorum was complete since Chairperson and two members were present which fact is clearly noticed in the order dated 15.12.2014 as extracted above. The three members who were present in the meeting heard the applicant and objectors. But the order could be issued only on 15.12.2014, by which one of the members had been transferred and was not available to sign the order. One more important fact which is to be noticed is that learned Single Judge had categorically noted that the above issue was raised only during the hearing before the learned Single Judge and there was no pleading in the writ petition. In paragraph 16 of the judgment, learned Single Judge himself has noticed the following:

> *"16. The last question raised by the parties is about the competency of the STA in passing the impugned order. Although there is no pleading in this regard in this petition. However, learned senior counsel, Shri K.N. Gupta has not disputed the fact that the matter was heard by three members and order is passed by two members....."*

13. The multi-member body transacts its business after debate, consultation and discussion. The view of multi-member body is expressed unanimously or by votes. For various kind of decisions by multi-member body special majorities are also provided for acceptance of the decision. Normally, all decisions of a multi-member body are expressed by opinion of majority of the members present except where the special majorities are provided in the statute itself.

14. Shackleton on the "Law and Practice of Meetings", Eleventh Edition while discussing the majority has stated following in paragraph 7-30. Relevant parts of paragraphs 7-30 and 7-31 are quoted below:

"4 MAJORITY

Definition

7-30 Majority is a term signifying the greater number. In legislative and deliberative assemblies, it is usual to decide questions by a majority of those present and voting. This is sometimes expressed as a "simple" majority, which means that a motion is carried by the mere fact that more votes are cast for than against , as distinct from a "special" majority where the size of the majority is critical.

> *The principle has long been established that the will of a corporation or body can only be expressed by the whole or a majority of its members, and the act of a majority is regarded as the act of the whole.*
>
> ***A majority vote binds the minority***
>
> *7-31 Unless there is some provision to the contrary in the instrument by which a corporation is formed, the resolution of the majority, upon any question, is binding on the majority and the corporation, but the rules must be followed."*

15. Although Rules, 1994 do not expressly provide that decision of the State Transport Authority shall be taken in accordance with the opinions of the majority but there being no special majority provided for decision to be taken in the meeting of the State Transport Authority, normal, rule that decision by majority of the members present has to be followed. In the present case when three members were present and quorum was complete, the decision taken by majority, i.e., opinion of two members shall form the valid decision of the State Transport Authority.

16. Rule 65 sub-section (2) of the Rules dealing with the conduct of business of Transport Authorities provides:

> *"65(2) The State or Regional Transport Authority, as the case may be, may decide any matter of urgent nature without holding a meeting by the majority of votes of members by recorded in writing and send to the Secretary (hereinafter referred to as the procedure by circulation)."*

17. Thus, the concept of taking decision by majority of votes of the members is very much present in the scheme of the Rules. Although, where a decision is to be taken by the circulation by votes a special majority is provided in Rule 65(4) but present being not a case of decision by circulation, simple majority by members present was sufficient for making a binding decision by the State Transport Authority.

18. In paragraph 18.1 of the judgment, the Division Bench observed that:

> *"18.1. In the instant case there is nothing on record to indicate that the STA with complete quorum heard the matter and before one of the members Shri Sanjay Chaudhry was transferred out any draft order was got approved from the said transferred member."*

19. The above observation was made by the Division Bench of the High Court while distinguishing the judgment of this Court in *Ramaswamy Nadar v. The State of Madras, AIR 1958 SC 56.* Before we refer to the decision of this Court in *Ramaswamy Nadar,* it is clear that observation of the Division Bench of the High Court that there is nothing on record to indicate that the quorum of State Transport Authority was complete, is factually wrong. The order of the State Transport Authority dated 15.12.2014 has been brought on record as Annexure P-1 and the relevant portion of the order has been extracted above by us which clearly mentions that the hearing took place on 16.10.2014 where the Chairperson and two members were present the quorum being three as per Rule 68(1) was complete. The hearing took place by three members which is noted in the order itself, as extracted above. Thus, observation of the Division Bench of the High Court that quorum was not complete and matter was not heard by three members is not correct.

20. Now, we come to the judgment of this Court in *Ramaswamy Nadar* (supra). In the above case the matter was heard by a Bench of three Judges of this Court who after hearing had announced the decision of acquittal. Draft judgment was also approved by one of the Judges who had, however, died before judgment could be delivered. Note appended in the judgment was to the following effect:

"NOTE

SINHA, J.

When hearing of this appeal was finished last week by a Bench consisting of three of us, B.P. Sinha, P. Govinda Menon and J.L. Kapur, JJ., we announced that we had come to the conclusion that the appellant should be acquitted. We also indicated that the judgment will be delivered the week following. The draft of the judgment was sent to late Mr. Justice Menon last week and he had approved of it. What we are now delivering are the reasons of the Judges who constituted the Bench; but it will be signed by two only of us on account of the unexpected death of Mr. Justice. Menon.

K.S.B. Appeal allowed."

21. In the above case judgment was pronounced with the concurrence of the three judges. When the hearing took place opinion of all the three Judges was expressed but judgment could be signed by two Judges since one of the Judges died. Although, the facts of the above case was little different i.e. there was material to indicate that the third Judge who could not sign had also concurred with the opinion, but in the present case there is no pleading of third member whether agreeing or not agreeing

with the decision. For the present case, we proceed on the premise that the third member did not agree with the decision. For the decisions of this Court, Article 145 sub-clause (5) of the Constitution of India provides that judge of this Court can deliver a judgment with the concurrence of a majority of the Judges present at the hearing of the case.

22. The present is a case where decision by a multi-member body is to be taken in the meeting of the Committee as per the statutory Rules. There being no such majority provided for taking a decision, the decision by majority has to be accepted as the opinion of the State Transport Authority.

23. Two more cases, which were relied by the appellant and noticed by the High Court need to be noted. The Privy Council judgment in *Gokal Chand Jagan Nath Vs. Nand Ram DasAtma Ram, AIR (1938) P.C. 292,* is relevant for the present case. In the appeal before the Privy Council, judgment of the High Court was assailed on the ground that the two Hon'ble Judges of the High Court heard the matter, although, both judges concurred with the judgment, but one Judge went on leave before signing the judgment, which was signed by only one Judge. The Privy Council repelled the contention and held that signing by one of the Judges at best was only irregularity, not affecting the merits of the case. Following was laid down in Paragraphs 6, 7 and 8:"

> *6. A further point was raised by the appellants. They urged that the judgment of the High Court appealed from was not a valid judgment because it failed to comply with Order XLI, Rule 31, of the Code of Civil Procedure. The relevant facts on this issue are that the hearing in the High Court was before two Judges, Harrison and Agha Haider JJ., and was actually delivered by the former Judge, the latter agreeing. The judgment was delivered on February 22, 1933. But Harrison J. went on leave before signing the judgment, which was signed by Agha Haider J., the Deputy Registrar appending a note that Harrison J. had gone on leave before signing the judgment he delivered.*
>
> *7. Order XLI, Rule 31 requires that the judgment of the appellate Court shall be in writing and shall state various matters, and "shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."*
>
> *8. The Rule does not say that if its requirements are not complied with the judgment shall be a nullity. So startling*

a result would need clear and precise words. Indeed the Rule does not even state any definite time in which it is to be fulfilled. The time is left to be defined by what is reasonable. The Rule from its very nature is not intended to affect the rights of parties to a judgment. It is intended to secure certainty in the ascertainment of what the judgment was. It is a rule which Judges are required to comply with for that object. No doubt in practice Judges do so comply, as it is their duty to do. But accidents may happen. A Judge may die after giving judgment but before he has had a reasonable opportunity to sign it. The Court must have inherent jurisdiction to supply such a defect. The case of a Judge who has gone on leave before signing the judgment may call for more comment, but even so the convenience of the Court and the interest of litigants must prevail. The defect is merely an irregularity. But in truth the difficulty is disposed of by Sections 99 and 108 of the Civil Procedure Code. Section 99 provides that no decree shall be reversed or substantially varied nor shall any case be remanded, in appeal on account of any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court. That Section conies in the part dealing with appeals from original decrees. But Section 108 applies the same provision to appeals from appellate decrees and it is always in the discretion of the Board to apply the principle on appeal to His Majesty in Council. In their Lordships' judgment, the defect here was an irregularity not affecting the merits of the case or the jurisdiction of the Court, and is no ground for setting aside the decree. "

24. Another judgment, which was cited by the appellant was *A. Shanta Rao Vs. State Transport Appellate Tribunal, Hyderabad & Ors., AIR 1985 A.P. 256.* In the above case, State Transport Appellate Tribunal consisting of Chairman and two members heard the matter. However, the order was issued only with the signature of Chairman. The order was attacked on the ground that the other two members having not signed the order, the order is illegal. Repelling the contention following was stated in Paragraph 9:-

> *"9. On the first question, I am of the view that once the minutes of the State Transport Authority are found to be signed by all the members including the Chairman, the mere fact that the final order is communicated under the signature of the Chairman alone does not amount to any illegality. The Court has to see the substance of the matter and not the mere form, and if it is clear that all the members of the Tribunal have applied their mind to the facts of the case and arrived at a conclusion, it does not matter if the communication is made under the signature of the Chairman."*

25. Although, in above two cases, there was concurrence of all the members of Court/Tribunal but all had not signed the order. The present is a case where Chairperson and two members heard the application in meeting dated 16.10.2014 but order was subsequently pronounced on 15.12.2014 and signed by only Chairperson and one member. The third member having been transferred in the meanwhile. As noticed above, there is no pleading in the writ petition as to whether the third member, who was transferred had agreed with the proposed order or did not agree with the decision, which was to be delivered by the State Transport Authority. Had third member agreed, there cannot be any debate in this matter, the issues being covered by judgment of this Court in *Ramaswamy Nadar* (supra) and judgment of the Privy Council in *Gokal Chand Jagan Nath* (supra). But there being neither any pleading nor any material to come to the conclusion that the third member has agreed with the opinion, we have proceeded to examine the present case as if, the third member did not agree with the order proposed. We have already noticed the reason for coming to the conclusion that the order issued by the State Transport Authority, signed by the Chairperson and one member is a valid order having been issued with the majority opinion of two out of three, who heard the application on 16.10.2014. Thus, in any view of the matter, no illegality can be attached with the order dated 15.12.2014, which was signed by the Chairperson and one member.

26. In view of the foregoing discussion, we are of the opinion that decision dated 15.12.2014 issued with the signatures of Chairperson and one member was a valid decision in spite of the fact that one of the members who was present in the hearing when the meeting took place on 16.10.2014 and had been transferred in the meanwhile did not sign the order. The decision of the State Transport Authority dated 15.12.2014 was fully in accordance with the statutory scheme of the Rules, 1994 and both the learned Single Judge and Division Bench erred in holding the decision as invalid. We, thus, are of the view that judgments of learned Single Judge and Division Bench do not express the correct view of the law.

27. In the result, the appeal is allowed and judgments of the High Court are set aside.

Appeal allowed.

I.L.R. [2018] M.P. 844 (FB)
FULL BENCH

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

W.A. No. 613/2016 (Jabalpur) order passed on 24 January, 2018

STATE OF M.P. & ors. …Appellants
Vs.
YUGAL KISHORE SHARMA …Respondent

***A. Service Law – Shaskiya Sevak (Adhivarshiki-Ayu) Adhiniyam, M.P. (29 of 1967) and Shaskiya Sevak (Adhivarshiki-Ayu) Dwitiya Sanshodhan Adhiniyam, M.P. (28 of 1998), Section 2 – Teacher – Educational Institutions – Age of Superannuation* – Amendment regarding extension of age of superannuation from 60 years to 62 years for teachers – Petitioner, a Junior Weaving Instructor claiming benefit of amendment filed writ petition and the same was allowed – State filed appeal whereby the matter was referred to larger bench – Held – Classification in the recruitment Rules is not determinative of the fact that whether a Government servant is a teacher or not, as the meaning assigned to Teacher in the State Act has to be preferred over the classification of teacher in the Recruitment Rules – Amending Act has given wide meaning to the expression "Teacher" which includes the "Teachers irrespective of the designation and appointed in a Government Technical and Medical Institutions" – As per the amending Act, "Teachers" as per the explanation is not restricted to Teacher in Government Schools or Colleges or different ranks and status but all teachers from the lowest to highest ranks – Training Centres and Vocational Training Centres of State Government are Educational Institutions for extending the benefit of age of superannuation to a person imparting training as Instructor – Hence, "Instructors" engaged for imparting training to women in the Tailoring Centre working under the Department of Women and Child Development are entitled to extension in age upto the age of 62 years being teachers as mentioned in the amending Act – Question of Law referred, answered accordingly.**

(Paras 4, 20, 41, 42)

क. सेवा विधि – शासकीय सेवक (अधिवार्षिकी आयु) अधिनियम, म.प्र., (1967 का 29) एवं शासकीय सेवक (अधिवार्षिकी आयु) द्वितीय संशोधन अधिनियम, म.प्र. (1998 का 28), धारा 2 – शिक्षक – शैक्षणिक संस्थान – अधिवर्षिता की आयु – शिक्षकों के लिए

अधिवर्षिता की आयु का विस्तार 60 वर्ष से 62 वर्ष किये जाने के संबंध में संशोधन – याची, एक कनिष्ठ बुनाई प्रशिक्षक ने संशोधन के लाभ का दावा करते हुए रिट याचिका प्रस्तुत की तथा उक्त को मंजूर किया गया था – राज्य ने अपील प्रस्तुत की थी जिससे मामला वृहद न्यायपीठ को निर्दिष्ट किया गया – अभिनिर्धारित – भर्ती नियमों में वर्गीकरण इस तथ्य का निर्धारक नहीं है कि क्या शासकीय सेवक शिक्षक है या नहीं, क्योंकि राज्य अधिनियम में शिक्षकों के नियत किये गये अर्थ को भर्ती नियमों में शिक्षक के वर्गीकरण पर प्राथमिकता दी जानी चाहिए – संशोधनकारी अधिनियम ने अभिव्यक्ति ''शिक्षक'' को व्यापक अर्थ दिया है जो कि ''शिक्षकों के पदनाम के बावजूद तथा शासकीय तकनीकी एवं चिकित्सा संस्थानों में नियुक्त'' को सम्मिलित करता है – संशोधनकारी अधिनियम के अनुसार ''शिक्षक'' स्पष्टीकरण के अनुसार, शासकीय विद्यालयों या महाविद्यालयों या विभिन्न रैंको तथा स्थिति के शिक्षक तक ही सीमित नहीं है बल्कि न्यूनतम से उच्चतम रैंक के सभी शिक्षक सम्मिलित हैं – राज्य सरकार के प्रशिक्षण केंद्र एवं व्यावसायिक प्रशिक्षण केंद्र प्रशिक्षक के रूप में प्रशिक्षण देने वाले व्यक्ति को अधिवर्षिता की आयु का लाभ पहुंचाने वाले शैक्षणिक संस्थान हैं – अतः, महिला एवं बाल विकास विभाग के अधीन कार्य कर रहे सिलाई केंद्रों में महिलाओं को प्रशिक्षण देने में लगे हुए ''प्रशिक्षक'' संशोधन अधिनियम में उल्लिखित शिक्षकों के अनुरूप होने के कारण 62 वर्ष की आयु तक के विस्तार के हकदार हैं – निर्देशित किया गया विधि का प्रश्न तद्नुसार उत्तरित।

B. ***Interpretation of Statutes – Rule* – Supreme Court held, that rule of interpretation is that definition given in one statute cannot be exported for interpretation of another statute – If two statutes dealing with same subject use different language then it is not permissible to apply the language of one statute to other while interpreting such statutes – The same words may mean one thing in one context and another in a different context – It is well settled principle of interpretation that dictionary meaning and the common parlance test can also be adopted and not the scientific meaning.**

(Paras 22, 23 & 24)

ख. कानूनों का निर्वचन – नियम – उच्चतम न्यायालय ने अभिनिर्धारित किया है, कि निर्वचन का नियम है कि किसी एक कानून में दी गई परिभाषा किसी अन्य कानून के निर्वचन हेतु निर्यात नहीं की जा सकती – यदि एक ही विषय से संबंधित दो कानून अलग–अलग भाषा का उपयोग करते हैं तो ऐसे कानूनों की व्याख्या करते समय किसी एक कानून की भाषा दूसरे पर लागू करना अनुज्ञेय नहीं है – समान शब्दों का अर्थ एक संदर्भ में कुछ और तथा अन्य संदर्भों में दूसरा हो सकता है – निर्वचन का यह सुस्थापित सिद्धांत है कि शब्दकोष का अर्थ तथा सामान्य बोल–चाल की कसौटी को अंगीकृत किया जा सकता है, एवं न कि वैज्ञानिक अर्थ।

Cases referred :

AIR 1968 SC 662, AIR 1997 SC 1436, 2007 (4) MPHT 147, 1987 MPLJ 500, AIR 1969 SC 563, 2001 (2) MPHT 373, W.A. No. 402/2016 decided on 23.08.2016, (2009) 13 SCC 635, (1997) 8 SCC 350, 1988 MPLJ 196, 2003 (4) MPHT 484, AIR 1953 SC 58, (2017) 1 SCC 554, (2007) 7 SCC 242, 1896 AC 500, AIR 1959 SC 459, AIR 1962 SC 547, W.P. No. 2289/2003 decided on 07.11.2003

P.K. Kaurav, A.G. with Samdarshi Tiwari, Addl. A.G. and *Amit Seth,* G.A. for the appellants/State.

Umesh Shrivastava, for the respondent.

O R D E R

The order of the Court was delivered by:

Hemant Gupta, Chief Justice:- The present intra-Court appeal is directed against an order passed by the learned Single Bench on 13.08.2014 in W.P. No. 4030/2009 (Yugal Kishore Sharma vs. State of M.P. and others) whereby the writ petition directed against an order dated 06.03.2009 superannuating the writ-petitioner at the age of 60 years was allowed.

02. On 25.09.2017, a Division Bench of this Court while hearing the present appeal along with a bunch of intra-Court appeals involving the identical questions of law and fact such as W.A. No.686/2016 (State of M.P. vs. Smt. Ravi Jain), W.A. No.690/2016 (State of M.P. vs. Smt. Madurima Singh), W.A. No.726/2016 (State of M.P. vs. Siyaram Sahu), W.A. No.727/2016 (State of M.P. vs. Ku. Shikha Khare), W.A. No.728/2016 (State of M.P. vs. Smt. Usha Awasthy) and W.A. No.745/2016 (State of M.P. vs. Smt. Durga Jaiswal), has referred the following questions for the opinion of the Larger Bench:-

> (1) Whether the writ-petitioners who are not designated and classified in the cadre of a 'teacher' under relevant Recruitment Rules but, are engaged in teaching or imparting training, can be held to be a 'teacher' for the purpose of the age of superannuation under Fundamental Rule 56?
>
> (2) Whether training centres, nursing centres, vocational training centres and Yoga centres of the State Government can be held to be an 'educational institution' for extending the benefit of age of superannuation to a person imparting training in these institutions, under Fundamental Rule 56?

03. Learned Advocate General appearing for the appellants-State submits that the services of all the writ-petitioners are governed by Madhya Pradesh Panchayat & Social Welfare Class-III (Executive) Service Recruitment Rules, 1967 (for short "the Rules") as the writ-petitioners are appointed in the Social Welfare Department. It is

contended that there is no writ-petition relating to Nursing Centres or Yoga Centres, therefore, Question No.(2) requires to be modified so as to delete the reference made to Nursing Centres and Yoga Centres. Since there is no dispute regarding the said fact, therefore, Question No.(2) stands modified to that extent.

04. The facts, in brief, leading to the present reference are that the writ-petitioner was appointed in the office of Women & Child Development Department on 13.01.1981 as Junior Weaving Instructor. The petitioner asserts that he has been teaching the students of tailoring and cutting and the job assigned to the petitioner was to give training to the students in the Training Centre. Since the petitioner, as an Instructor, is a Teacher, therefore, he is entitled to extension in age of superannuation up to 62 years by virtue of the amendment in Fundamental Rule 56 vide Section 2 of the Madhya Pradesh Shaskiya Sevak (Adhivarshiki-Ayu) Dwitiya Sanshodhan Adhiniyam, 1998 [M.P. Act No.27 of 1998] (for short "the Amending Act"), therefore, the order passed i.e. to retire him on attaining the age of 60 years is not legal.

05. It may be stated that initially Madhya Pradesh Shaskiya Sevak (Adhivarshiki-Ayu) Adhiniyam, 1967 [No.29 of 1967] (for short "the Act") was enacted to fix the age of superannuation of the employees of the State. Such Act was amended by M.P. Act No.35 of 1984, w.e.f. 05.09.1984 which provided that every Government teacher shall retire from service on the afternoon of the last day of the month in which he attains the age of 60 years while 58 was the age of superannuation of other Government servants. By virtue of the Amending Act (M.P. Act No.27 of 1998), the following amendment was carried out by which the age of retirement of Teachers was extended to 62 years while age of other Government servants was fixed at 60 years. The relevant clause of the Amending Act read as under:-

> "2. Amendment of Fundamental Rule 56 as substituted by Section 2 of the Madhya Pradesh Act No.29 of 1967. -
>
> *** *** ***
>
> "(1-a) Subject to the provisions of sub-rule (2), every Government Teacher shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty two years:
>
> Provided that a Government teacher whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty two years.
>
> **Explanation. -** For the purpose of this sub-rule "Teacher" means a Government servant by whatever designation called, appointed for the purpose of teaching in

> Government educational institution including technical or medical educational institutions, in accordance with the recruitment rules applicable to such appointment and shall also include the teacher who is appointed to an administrative post by promotion or otherwise and who has been engaged in teaching for not less than twenty years provided he holds a lien on a post in the concerned School/Collegiate/Technical/ Medical education service."

06. Initially, the writ petition filed by the writ-petitioner was allowed by the learned Single Bench on 02.01.2013. The learned Single Bench relied upon a judgment of the Supreme Court reported as AIR 1968 SC 662 *(S. Azeez Basha and another vs. Union of India)* wherein the word "Educational Institutions" are held to be of very wider import and would include a 'University' also. Reliance was also placed upon another Supreme Court judgment reported as AIR 1997 SC 1436 *(Aditanar Educational Institution vs. Additional Commissioner of Income Tax)* and upon a Single Bench decision of this Court reported as 2007 (4) MPHT 147 *(S.A.M. Ansari vs. State of M.P.)* to hold that the word "Educational Institution" is wide and that in view of *Ansari's case* (supra) the Instructors are to be treated as teachers for the purpose of Amending Act. Considering the said fact, it was held that age of superannuation of the teachers would be 62 years. The order passed by the learned Single Bench was set aside by a Division Bench on 27.11.2013 in *W.A. No.682/2013 (State of M.P. and others vs. Yugal Kishore Sharma)* when the matter was remanded to the learned Single Bench to consider as to whether the writ-petitioner was, in fact, a Government servant and more so, engaged for the purposes of teaching in Government Educational Institution.

07. Learned Advocate General argued that all the writ-petitioners are governed by the Rules which specify the post of Teacher and Instructor distinctively with separate eligibility and qualifications for appointment. Since the statutory Rules contemplate the post of Teacher as different from Instructor, therefore, the Instructor such as the writ-petitioner cannot be treated to be a teacher for the purposes of the Act as amended so as to grant benefit of enhanced age of superannuation. In support of such an argument, the learned counsel has referred to the documents pertaining to Government Women Tailoring, Embroidery and Doll Making Training Centre, Bhopal, which contemplates that the winter session is from 1st August to 15th April and summer session from 16th April to 31st July. It is contended that the purpose of the Centre is to make the women self-reliant, optimum utilization of the time, saving of fabrics and financial benefits. It is pointed out that the State Government in the Department of Women & Child Development has taken a decision that the Instructors in the Tailoring Centre work as Instructors and not as Teacher and therefore, they are not entitled to extension in age.

08. The Act, as it was amended in 1984, came up for consideration before a Division Bench of this Court in a judgment reported as 1987 M.P.L.J. 500, *(Mahendra Pal Singh vs. State of M.P. and others)*. The question was in respect of Instructor in the National Cadet Corps (NCC). The Division Bench quoted from Lord Herschall in *Mayor, & C. of Manchester vs. McAdam (Surveyor of Taxes)* (1896 AC 500) that an Institution means an undertaking formed to promote some defined purpose having in view generally the instruction or education of the public but it can well be a body called into existence to translate the purpose as conceived in the minds of the founders into a living and active principle. It was held that the meaning to word 'institution' will depend upon the context in which it is used. The reference was made to a judgment reported as AIR 1969 SC 563 *(Kamaraju Venkata Krishna Rao vs. Sub-Collector, Ongole and another)* wherein the word 'education' was defined to mean action or process of educating or of being educated. In one sense, the word 'education' may be used to describe any form of training, any manner by which physical or mental aptitude, which a man may desire to have for the purpose of his work, may be acquired. After considering a bulletin in respect of N.C.C., the Court held as under:-

> "6. …. In a bulletin published at the occasion of the 33rd Anniversary of the National Cadet Corps in M.P. the aims of the National Cadet Corps have been stated thus:
>
> 1. *** *** ***
>
> 2. *** *** ***
>
> 3. To provide training for students with a view to developing in them officer like qualities, thus also enabling them to obtain commissions in the Armed Forces.
>
> These aims and objects with which the National Cadet Corps was created and has ever since been working clearly indicate that it is not an educational institution, since the object is to develop leadership, character, comradeship and to create a force of disciplined and trained manpower and to develop office-like quality in students enrolled in different educational institutions enabling them to commission in Armed Forces. Thus, the object of the National Cadet Corps is not the advancement of education although a few like the petitioner are concerned with imparting training in different wings of the Corps."

09. We find that the judgments of the Supreme Court in *S. Azeez Basha* (supra); and *Aditanar Educational Institution* (supra) are defining the word "Educational

Institution" as it appears in Aligarh Muslim University Act, 1920 or in Income Tax Act, 1961, therefore, the context in which such judgments are rendered are not relevant for the purpose of the Act. The provisions of the Act, as amended are required to be interpreted keeping in view the language, context, object and purpose of the Statute.

10. At this stage only, it would be profitable to refer to the decision of the Supreme Court in *Kamaraju Venkata Krishna Rao* (supra) wherein the Court has held, while examining the provisions of Andhra Inams (Abolition & Conversion into Ryotwari) Act 36 of 1956, that when the Act has not defined either the expression "charitable institution" or even "institution", the meaning of that term is to be looked into with reference to the context in which it is found. The Court held as under:-

> "5. Mr Narsaraju, learned Counsel for the appellant contended that even if we come to the conclusion that the Inam was granted for a charitable purpose, the object of the charity being a tank, the same cannot be considered as a charitable institution. According to him a tank cannot be considered as an institution. In support of that contention of his he relied on the dictionary meaning of the term 'institution'. According to the dictionary meaning the term 'institution' means "a body or organization of an association brought into being for the purpose of achieving some object". Oxford Dictionary defines an 'institution' as "an establishment organization or association, instituted for the promotion of some object especially one of public or general utility, religious, charitable, educational etc.". Other dictionaries define the same word as 'organised society established either by law or the authority of individuals, for promoting any object, public or social'. In *Minister of National Revenue v. Trusts and Guarantee Co. Ltd*. 1940 SC 138, the Privy Council observed:
>
> > "It is by no means easy to give a definition of the word "institution" that will cover every use of it. Its meaning must always depend upon the context in which it is found."

11. Later, a Single Bench of this Court in a judgment reported as 2001 (2) M.P.H.T. 373 *(Smt. Maya Verma vs. Jawaharlal Nehru Krishi Vishwavidyalaya, Jabalpur and another)* examined the case of a Lady Extension Teacher in Jawaharlal Nehru Agriculture University. This Court found that the Lady Extension Officer does not fall under the category of Teacher in terms of Clause 32 of the University Statute; therefore, her request for enhancement of retirement age from 60 to 62 years cannot

be accepted. That was a case where the word "Teacher" was defined in Section 2(x) of M.P. Jawaharlal Nehru Krishi Vishwavidyalaya Act, 1963 to mean a person appointed or recognized by the University for the purpose of imparting instructions and/or conducting and guiding research and/or extension programmes and to include a person who may be declared by the Statutes to be Teacher. The Statute 32 of the M.P. Jawaharlal Nehru Krishi Vishwavidyalaya Statutes, 1964 described "Vishwavidyalaya Teachers" as servants of the University for imparting instructions and/or conducting and guiding research and/or extension programmes such as Professor, Associate Professor and Assistant Professor. The relevant extract read as under:-

> "7. It is not the case that the petitioner Lady Extension Teacher was engaged as a Teacher described in Section 2 (x) and Statute 32 in the extension activity of the University. She was merely associating with the team so engaged and merely because she was also imparting instructions in the sense that she was bringing the farmers abreast of the developments and the latest techniques in farming, it can not be said that she was engaged in imparting such instructions as a teacher. It is also not the case of the petitioner that the petitioner was ever recognised by the University as teacher for the purpose of imparting instructions in extension programmes. While it is true that the designation of the petitioner did suggest that she was a teacher, the word "teacher" as understood in common parlance must yield to the description contained in the definition and the Statute to which the petitioner does not correspond. Consequently, the claim of the petitioner deserves to be rejected."

12. Another Single Bench of this Court in a judgment rendered in *S.A.M. Ansari* (supra) was considering the case of a Weaving Master in jail. The claim of the petitioner for extension age was declined for the reason that the jail department cannot be said to be an 'Educational Institution'. The relevant para read as under:-

> "9. In the present case, the petitioner was employed by the Jail Department for the purposes of imparting training to the prisoners. The Jail Department, under the circumstances, cannot be said to be an educational institution including the technical or medical education institution so that by extending the meaning of the Explanation attached to the said provision referred to hereinabove it would be applicable to the petitioner. Under the circumstances, the petitioner even

> though being a teacher but is not employed in the educational institution including technical or medical institution, has no right to continue till he reaches the age of superannuation of 60 years."

13. Another Division Bench of this Court in a decision rendered on 23.08.2016 in W.A. No.402/2016 *(Ashok Kumar Gupta vs. State of M.P. and others)* declined the claim of the writ-petitioner, who was appointed as Block Extension Educator in a Departmental Training Institute, for extension in age. The Court held as under:-

> "6. We have heard learned counsel for the parties and we find that under the explanation in question, a teacher, is classified as a Government servant by whatever designation called, who is appointed for the purpose of teaching in Government educational institute including technical or medical education institute, in accordance with the requirement of the recruitment rules. Admittedly in this case, appellant does not fulfill this criteria as laid down in the rule he was neither appointed as a teacher in any Government educational institute including technical or medical education institute and his substantive appointment in the post of Block Extension Educator and for some time he discharged duties as a health instructor/teacher in a health training institute i.e. a departmental training institute."

14. Apart from the various Single and Division Bench judgments, the learned Advocate General relies upon a Supreme Court decision reported *as* (2009) 13 SCC 635 *(State of Madhya Pradesh and others vs. Ramesh Chandra Bajpai)*, which appeal was pertaining to parity of pay claimed by Physical Training Instructor in Government Ayurvedic College with the teachers, who had been granted UGC scale of pay. The Court distinguished the earlier judgment reported as (1997) 8 SCC 350 *(P.S. Ramamohana Rao vs. A.P. Agricultural University and another)* and held as under:-

> "22. We may now notice the ratio of the decision in *P.S. Ramamohana Rao vs. A.P. Agricultural University and another* (1997) 8 SCC 350. In that case, this Court was called upon to decide whether the Physical Training Instructor in Andhra Pradesh Agricultural University was a teacher within the meaning of Section 2(n) and was entitled to continue in service up to the age of 60 years. The appellant in that case was employed as a Physical Director in Bapatla Agricultural College, which was later on transferred to

> Andhra Pradesh Agricultural University. The University sought to retire the appellant on completion of 58 years. The writ petition filed by him questioning the decision of the University was dismissed by the Division Bench of the High Court on the premise that Physical Director does not fall within the ambit of definition of 'teacher'.
>
> *** *** ***
>
> 25. We may observe that definition of 'teacher' contained in Section 2(n) of the Andhra Act was an expansive one to include those persons who had not only been imparting instructions but also were conducting and carrying on research for extension programmes. It also included those who had been declared to be a teacher within the purview of the definition thereof in terms of any Statute framed by such State.
>
> 26. In our view, the aforementioned decision has been misapplied and misconstrued by the High Court. It is now well settled principle of law that a decision is an authority for what it decides and not what can logically be deduced therefrom. In *Ramamohana Rao* (supra), this Court, having regard to the nature of duties and functions of Physical Director, held that that post comes within the definition of teacher as contained in Section 2(n). The proposition laid down in that case should not have been automatically extended to other case like the present one, where employees are governed by different sets of rules."

15. At this stage, it may be mentioned that in *P.S. Ramamohana Rao's case* (supra), the provision under consideration was Section 2(n) of the Andhra Pradesh Agricultural University Act, 1963 which defines the 'Teacher' to include a Professor, Reader, Lecturer or other person appointed or recognized by the University for the purpose of imparting instruction or conducting and guiding research or extension programmes and any person declared by the statutes to be a teacher.

16. On the other hand, learned counsel for the writ-petitioner relies upon a Division Bench judgment of Gwalior Bench of this Court reported as 1988 MPLJ 196 *(Maina Swamy vs. State of M.P. and others)* wherein the writ-petitioner was holding the post of Principal of Lady Health Visitors Promotee School for giving training to Lady Health Visitors and Auxiliary Nurse Midwife already in employment of the State. The Court held as under:-

"7A. By "education" as also by "training", latent faculties of a man are developed, whether or not he is following an avocation. When a person who is educated is further "trained" in the same field his knowledge is thereby increased of the same subject which is also the purpose of "Education". According to Shorter Oxford English Dictionary, the word "Education" means, *inter alia*, the process of bringing up, the systematic instructions, school in or training given. We have no doubt that the means, methods and men employed in an Institution determine its character and not how persons come and who are the persons who are taken in the Institution to be "educated" or "trained". According to us, it cannot be said that some persons are receiving only "training" in an Institution merely because they have been deputed by the Government or they are in the employment of the Government; they would not cease to be students who are given education in the respective subjects in accordance with the syllabi and curricula. We have, therefore, no hesitation to hold that the Institution in which the petitioner was serving on the date of her retirement, namely, Lady Health Visitors Promotee School, which was formerly known as Public Health Orientation Training School, is a "Medical Education Institution" within the meaning of the term used in Enactments concerned, namely, Act No.35 of 1984 and 23 of 1987.

8. In so far as the scope of the "Explanation", as amended in Act No.23 of 1987 is concerned, we are satisfied that the case of the petitioner is covered by the first part of the Explanation which envisages that the person concerned must have been appointed for the purpose of teaching in the particular institution on the date when the Act had come into force. What appears on record before us is the fact that although the petitioner had been appointed as a "Principal", she had been actually teaching the subjects of Midwifery and Health Education, as averred in para 5 of the petition. In the return, this fact is not denied and what is stated only is that how a person serves at the fag-end of his service would not be determinative of his status as claimed by the petitioner. We also read again Annexure R/III above-referred which shows that the petitioner has been holding teaching posts

> even earlier on the admission of respondents themselves and on the relevant date, material for the application of the statutory provision, it is the admission of the respondents in Annexure R/III itself that she was holding a teaching post and that too for eight years, from June, 1979 to October, 1987."
>
> With the aforesaid findings, the writ petition was allowed.

17. Learned counsel for the writ-petitioner also made reference to another Single Bench order passed by this Court reported as 2003 (4) M.P.H.T. 484 *(Chokhelal Sahu vs. State of M.P. and others)* wherein the writ-petitioner was appointed as Physical Training Instructor and later re designated as Sports Officer. It was held that the Physical Director is a Teacher. The relevant extract of the decision read as under:-

> "5……..Further, it is inherent in the duties of a Physical Director that he imparts to the students various skills and techniques of these games and sports. There are large number of indoor and outdoor games in which the students have to be trained. Therefore, he has to teach them several skills and the techniques of these games apart from the rules applicable to these games. It may be that the Physical Director gives his guidance or teaching to the students only in the evenings after the regular classes are over. It may also be that the University has not prescribed in writing any theoretical and practical classes for the students so far as physical education is concerned. Among various duties of the Physical Director, expressly or otherwise, are included the duty to teach the skills of various games as well as their rules and practices. The said duties bring him clearly within the main part of the definition as a 'teacher'. He is therefore, not liable to superannuate after completion of 58 years but is entitled to continue till he completed 60 years of service".
>
> 6. In view of the wide phraseology in the definition of 'teacher' given in the Explanation to Section 2 (1-a) of the Act, and in view of the nature of duties of a Physical Training Instructor (Sports Officer) given in the decision of the Supreme Court referred above it must be held that the Sports Officer in M.P. also comes within the definition of teacher. It is well settled that executive order of the Government such as order dated 29-5-2001 (Annexure R-l) can not run

> contrary to the statutory provisions in the Act of the legislature. As the Sports Officer is covered under the definition of "teacher" given in this Act he would also be entitled to the benefit of the age of superannuation raised from 60 to 62 years. Therefore, the impugned orders dated 27-6-2000 (Annexure P-l) of the respondent No. 4 and order dated 29-5-2001 (Annexure R-l) of the respondent No. 1 must be quashed. It is not in dispute that the rules applicable to Government teachers also apply to teachers of aided College."

18. With this background and conflicting judgments, we have heard learned counsel for the parties and find that the Instructors governed by the Rules are "Teachers" for the purpose of age of superannuation to 62 years for the reasons recorded here-in-after.

19. As per the provisions of the law, the expression "Teacher" is not defined under the Act but the explanation gives the parameters as to what the legislature meant of the expression "teacher" when extending the age of Teachers to 62 years. The first principal condition is that a person has to be a Government servant irrespective of the designation called; he has to be appointed for the purposes of teaching in Government Educational Institutions including Technical or Medical Institutions. When paraphrased, the conditions to be satisfied as a "Teacher" are as under:-

(1) the person has to be a Government servant by whatever designation called;

(2) appointed for the purpose of teaching in Government Educational Institutions;

(3) Institutions should be Technical or Medical Educational Institutions;

(4) It also includes the person, who is appointed to an administrative post by promotion or otherwise and who has been engaged in teaching for not less than 20 years provided he holds a lien on a post in the concerned School/Collegiate/ Technical/Medical education service.

20. Firstly, we find that the amendment in the Act so as to extend the age is a beneficial provision for a class of employees, who are teachers. The 'teacher', as per the explanation, has been given widest possible connotation - not restricted to teachers in Government schools or colleges or different ranks and status but all teachers from the lowest to the highest rank.

21. The second test is teaching in Government Educational Institutions. As per the learned Advocate General, the Government Educational institution means only those Educational Institutions, which are engaged in imparting regular educational courses and not the vocational training institutes. However, we find that the Government Educational Institutions cannot be given a restricted meaning, as is sought by the learned Advocate General inasmuch as the expression used is "Teacher engaged for the purpose of teaching including technical or medical educational institutions". There may not be any issue in respect of Medical Educational Institution but a Technical Educational Institution will receive wide connotation that will include the women training institutes or other vocational training institutes to make the enrolled candidates self-reliant, therefore, such institutes would satisfy the test of being technical institutes.

22. The rule of interpretation is that the definition given in one Statute cannot be exported for interpretation of another Statute. The judgments in *S. Azeez Basha* (supra) and *Aditanar Educational Institution* (supra) deal with the expressions "Educational Institution" or the "Education" as they appear in the different Statutes. The interpretation is in the context of each Statute as was being discussed by the Supreme Court but such interpretation either in respect of "Educational Institution" or the "Institute" cannot be extended to the word "Government Educational Institution" or the "Technical Institute" appearing in the Amending Act in question. Reference may be made to the judgment of the Supreme Court reported as AIR 1953 SC 58 *(D.N. Banerji vs. P.R. Mukherjee and others),* wherein the Court held that though the definition may be more or less the same in two different statutes, still the objects to be achieved not only as set out in the preamble but also as gatherable from the antecedent history of the legislation may be widely different. The same words may mean one thing in one context and another in a different context. The relevant extract of the decision in *D.N. Banerji* (supra) is as under:-

> "12. These remarks are necessary for a proper understanding of the meaning of the terms employed by the statute. It is no doubt true that the meaning should be ascertained only from the words employed in the definitions, but the set-up and context are also relevant for ascertaining what exactly was meant to be conveyed by the terminology employed. As observed, by *Lord Atkinson in Keates v. Lewis Merthyr Consolidated Collieries Ltd.* (1911) A.C. 641. "In the construction of a statute it is, of course, at all times and under all circumstances permissible to have regard to the state of things existing at the time the statute was passed, and to the evils which as appears from its provisions, it was designed to remedy." If the words are capable of one meaning alone, then it must be adopted, but if they are

> susceptible of wider import, we have to pay regard to what the statute or the particular piece of legislation had in view. Though the definition may be more or less the same in two different statutes, still the objects to be achieved not only as set out in the preamble but also as gatherable from the antecedent history of the legislation may be widely different. The same words may mean one thing in one context and another in a different context. This is the reason why decisions on the meaning of particular words or collection of words found in other statutes are scarcely of much value when we have to deal with a specific statute of our own; they may be helpful, but cannot be taken as guides or precedents."

23. In another recent Judgment reported as (2017) 1 SCC 554 *(Bhim Singh, Maharao of Kota through Maharao Brij Raj Singh, Kota vs. Commissioner of Income Tax, Rajasthan-II, Jaipur),* the Court held that if two statutes dealing with the same subject use different language then it is not permissible to apply the language of one statute to other while interpreting such statutes. The relevant extract read as under:-

> "36. It is a settled rule of interpretation that if two statutes dealing with the same subject use different language then it is not permissible to apply the language of one statute to other while interpreting such statutes. Similarly, once the assessee is able to fulfil the conditions specified in the section for claiming exemption under the Act then provisions dealing with grant of exemption should be construed liberally because the exemptions are for the benefit of the assessee."

24. The another well settled principle of interpretation is that the dictionary meaning and the common parlance test can also be adopted and not the scientific meaning as held in a judgment reported as (2007) 7 SCC 242 *(Trutuf Safety Glass Industries vs. Commissioner of Sales Tax, U.P.),* wherein the Supreme Court held that while interpreting the entry for the purpose of taxation recourse should not be made to the scientific meaning of the terms or expressions used but to their popular meaning, that is to say, the meaning attached to them by those dealing in them. This is what is known as "common parlance test".

25. The Privy Council in its judgment reported as 1896 AC 500 *(Mayor, & C. of Manchester vs. McAdam {Surveyor of Taxes})* was examining the levy of Income Tax on a public library established under the Public Libraries Act, 1892. The Income Tax was not chargeable on any building, the property of any literary or scientific

institution used solely for the purpose of such institution. In the said case, the majority view was recorded by Lord Herschell, which read, thus:

> "It may be well to consider, first, what is the meaning of the word "institutions" as used in the section. It is a word employed to express several different ideas. It is sometimes used in a sense in which the "institution" cannot be said to consist of any persons, or body of persons, who could, strictly speaking, own property. The essential idea conveyed by it in connection with such adjectives as "literary" and "scientific" is often no more than a system, scheme or arrangement, by which literature or science is promoted without reference to the persons with whom the management may rest, or in whom the property appropriated for these purposes may be vested, save in so far as these may be regarded as a part of such system, scheme, or arrangement. That is certainly a well-recognized meaning of the word. One of the definitions contained in the Imperial Dictionary is as follows: "A system, plan, or society, established either by law, or by the authority of individuals, for promoting any object, public or social." An illustration of this use is to be found in the Libraries Act itself."

In a separate, but, concurring judgment, Lord Macnaghten expressed the view as under:-

> "It is a little difficult to define the meaning of the term "institution" in the modern acceptation of the word. It means, I suppose, an undertaking formed to promote some defined purpose having in view generally the instruction or education of the public. It is the body (so to speak) called into existence to translate the purpose as conceived in the mind of the founders into a living and active principle. Sometimes the word is used to denote merely the local habitation or the headquarters of the institution. Sometimes it comprehends everything that goes to make up the institution – everything belonging to the undertaking in connection with the purpose which informs and animates the whole."

26. Though in the aforesaid judgment, the word "institution" was explained as it appears in the Income Tax Act, 1842 but the interpretation given to the word "institution" is nearest to the object of the Act in question.

27. In a judgment reported as AIR 1959 SC 459 *(Sri Ram Ram Narain Medhi and others v. State of Bombay),* while dealing with the landlord and tenant legislation, the Supreme Court held that the legislation should not be construed in a narrow and pedantic sense but it should be given a large and liberal interpretation. The Court held as under:-

> "10. All these petitions followed a common pattern and the main grounds of attack were: that the State Legislature was not competent to pass the said Act, the topic of legislation not being covered by any 'entry in the State List; that the said Act was beyond the ambit of Art. 31-A of the Constitution and was therefore vulnerable as infringing the fundamental rights enshrined in Arts. 14, 19 and 31 thereof; that the provisions of the said Act in fact infringed the fundamental rights of the petitioners conferred upon them by Arts. 14, 19 and 31 of the Constitution; that the said Act was a piece of colourable legislation and in any event a part of the provisions thereof suffered from the vice of excessive delegation of legislative power. The answer of the State was that the impugned Act was covered by Entry No. 18 in List II of the Seventh Schedule to the Constitution, that it was a piece of legislation for the extinguishment or modification of rights in relation to estates within the definition thereof in Art. 31-A of the Constitution and that therefore it was not open to challenge under Arts. 14, 19 and 31 thereof and that it was neither a piece of colourable legislation nor did any part thereof come within the mischief of excessive delegation.
>
> 11. As to the legislative competence of the State Legislature to pass the impugned Act the question lies within a very narrow compass. As already stated, the impugned Act was a further measure of agrarian reform enacted with a view to further amend the 1948 Act and the object of the enactment was to bring about such distribution of the ownership and, control of agricultural lands as best to subserve the common good. This object was sought to be achieved by fixing ceiling areas of lands which could be held by a person and by prescribing what was an economic holding. It sought to equitably distribute the lands between the landholders and the tenants and except in those cases where the landholder wanted the land for cultivating the same personally for which

> due provision was made in the Act, transferred by way of compulsory purchase all the other lands to tenants in possession of the same with effect from April 1, 1957, which was called the "tillers day". Provision 'Was also made for disposal of balance of lands after purchase by tenants and the basic idea underlying the provisions of the impugned Act was to prevent the concentration of agricultural lands in the hands of landholders to the common detriment. The tiller or the cultivator was brought into direct contact with the State eliminating thereby the landholders who were in the position of intermediaries. The enactment thus affected the relation between landlord and tenant, provided for the transfer and-alienation of agricultural lands, aimed at land improvement and was broadly stated a legislation in regard to the rights in or over land:-categories specifically referred to in Entry 18 in List II of the Seventh Schedule to the Constitution, which specifies the head of legislation as "land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization ".

28. In another judgment reported as AIR 1962 SC 547 *(Magiti Sasamal vs. Pandab Bissoi and others)* the Supreme Court held that having regard to beneficial object which the legislature had in view, it should receive a liberal interpretation. The relevant excerpt from the said decision is quoted as under:-

> "8. It is true that having regard to the beneficent object which the Legislature had in view in passing the Act its material provisions should be liberally construed. The Legislature intends that the 'disputes contemplated by the said material provisions should be tried not by ordinary civil courts but by tribunals specially designated by it, and so in dealing with the scope and effect of the jurisdiction of such tribunals the relevant words used in the section should receive not a narrow but a liberal construction."

29. Recently, in a judgment reported as 2014 (5) SC 189 *(National Insurance Company Ltd. and another vs. Kripal Singh)* examining the pension scheme of an Insurance Company it was held by the Supreme Court that the expression "retirement" should not only apply to cases which fall within para 30 of the scheme but also a case falling under special voluntary retirement scheme. The Court held as under:-

> "10. The only impediment in adopting that interpretation lies in the use of the word *"retirement"* in Para 14 of the Pension *Scheme,* 1995. A restricted meaning to that expression may mean that Para 14 provides only for retirements in terms of Paras (2)(t)(i) to (iii) which includes *voluntary retirement* in accordance with the provisions contained in Para 30 of the Pension Scheme. There is, however, no reason why the expression *"retirement"* should receive such a restricted meaning especially when the context in which that expression is being examined by us would justify a more liberal interpretation; not only because the provision for payment of pension is a beneficial provision which ought to be interpreted more liberally to favour grant rather than refusal of the benefit but also because the *Voluntary Retirement Scheme* itself was intended to reduce surplus manpower by encouraging, if not alluring employees to opt for *retirement* by offering them benefits like ex gratia payment and pension not otherwise admissible to the employees in the ordinary course. We are, therefore, inclined to hold that the expression *"retirement"* appearing in Para 14 of the Pension *Scheme*, 1995 should not only apply to cases which fall under Para 30 of the said Scheme but also to a case falling under the *Special Voluntary Retirement Scheme* of 2004. So interpreted, those opting for voluntary retirement under the said SVRS of 2004 would also qualify for payment of pension as they had put in the qualifying service of ten years stipulated under Para 14 of the Pension *Scheme*, 1995.

30. A Division Bench of this Court in *Mahendra Pal Singh* (supra) has quoted Lord Herschall that the word 'education' is not restricted to traditional class room teaching i.e. from nursery till degree or postgraduate degree but also includes the vocational training education, which again helps a candidate to improve mental aptitude for the purpose of work. To that extent, we approve the interpretation of the Division Bench of this Court, which read as under:-

> "3. It is somewhat difficult to define the term 'Institution' in the modern acceptation of the word. Lord Herschall in his speech in *Manchester Corporation vs. Acadam,* 1896 AC 500 relying upon the definition in Imperial Dictionary described this term to mean an undertaking formed to promote some defined purpose having in view generally the instruction or education of the public. It can well be a body

> called into existence to translate the purpose as conceived in the minds of the founders into a living and active principle. It may be an organisation, establishment, foundation, society or the like devoted to the promotion of a particular object specially one of a public, educational or charitable character. The meaning to this word 'institution' will depend upon the context in which it is used. Thus, even a tank may be a charitable Institution when there is dedication in respect of that tank (See *Kamaraju Venkata Krishna Rao vs. Sub-Collector, Ongole and another,* AIR 1969 SC 563) and 'education' may mean the action or process of educating or of being educated. In one sense this word 'education' may be used to describe any form of training, any manner by which physical or mental aptitude, which a man may desire to have for the purpose of his work, may be acquired. (See *Chartered Insurance Institute vs. London Corporation,* 1957 2 All. ER 638). The term 'education' as used in Entry No. 11 of List II of the Seventh Schedule of the Constitution of India, was held by the High Court of Bombay in *Ramchand vs. Malkapur Municipality* AIR 1970 Bom. 154, to mean teaching or training of the persons in general other than teaching or training for a business or profession. Thus, an educational Institution would be an Organisation or an establishment constituted would be an organization or an establishment constituted to promote education both technical and non-technical and may also include physical education."

31. However, the view taken by the Division in *Mahendra Pal Singh* (supra) that the training of students in National Cadet Corps for developing officer-like quality is not education under the Act is not the correct interpretation. The Bench rightly found that the object of the National Cadet Corps is to develop leadership, character, comradeship and to create a force of disciplined and trained manpower and to develop officer-like quality in students enrolled in different educational institutions enabling them to commission in the Armed Forces but the conclusion drawn "is not the advancement of education" does not merit acceptance. The factors noticed by the learned Division Bench will make the Instructors in the National Cadet Corps as Teacher, as what he is doing as Instructor is what a teacher is expected to do in a regular class-room teaching. Therefore, the finding that the object of the National Cadet Corps is not advancement of education is not tenable.

32. In absence of any meaning to the word "Education" or "Educational Institution" in the Statute, one may have to revert to the dictionary meaning of such words. In

Oxford Advanced Learner's Dictionary (New 8th Edition 2010), the meaning of words "Education", "Institution" and "Institute" is given as under:-

> **"education – 1.** a process of teaching, training and learning, especially in schools or colleges, to improve knowledge and develop skills: *primary/elementary education – secondary education – further/higher/post-secondary education – students in full-time education – adult education classes – a college/university education – the state education system*..... 2. a particular kind of teaching or training; *health education*..... 3. (*also Education :* the institutions or people involved in teaching and training: the *Education Department – the Department of Health, Education and Welfare*..... 4. the subject of study that deals with how to teach: a *College of Education – a Bachelor of Education degree...*"
>
> **institution –** 1. a large important organization that has a particular purpose, for example, a university or bank; *an educational/financial, etc. institution*..... 2. a building where people with special needs are taken care of, for example because they are old or mentally ill; *a mental institution*....."
>
> "**institute–** an organization that has a particular purpose, especially one that is connected with education or a particular profession; the building used by this organization; a *research institute – the Institute of Chartered Accountants – institutes of higher education.* "

33. The meaning of the words "education", "institution" and "institute" as find place in Collins Cobuild English Dictionary New Edition (Reprinted 1997), read as under:-

> **"education. 1. Education** involves teaching people various subjects, usually at a school or college, or being taught.
>
> **2. Education** of a particular kind involves teaching the public about a particular issue..... *better health education.*
>
> **institute 1.** An **institute** is an organization set up to do a particular type of work, especially research or teaching. You can also use institute to refer to the building the organization occupies....*the National Cancer Institute.... an elite research institute devoted to computer software*.....

> **institution. 1.** An **institution** is a large important organization such as a university, church, or bank. *Class size varies from one type of institution to another...*
>
> 2. An **institution** is a building where certain people are looked after, for example people who are mentally ill or children who have no parents."

34. In Black's Law Dictionary (Tenth Edition) the term "educational institution" is defined as under:-

> "**educational institution.** (1842) 1. A school, seminary, college, university, or other educational facility, though not necessarily a chartered institution. 2. As used in a zoning ordinance, all buildings and grounds necessary to accomplish the full scope of educational instruction, including those things essential to mental, moral, and physical development."

35. In P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Edition Reprint 2007) the words "education" and "institution" have been elaborated as under:-

> **"Education** is the bringing up; the process of developing and training the powers and capabilities of human beings. In its broadest sense the word comprehends not merely the instruction received at school, or college but the whole course of training moral, intellectual and physical; is not limited to the ordinary instruction of the child in the pursuits of literature. It also comprehends a proper attention to the moral and religious sentiments of the chila. And it is sometimes used as synonymous with 'learning'.
>
> **Institution.** The word 'institution', both in legal and colloquial use, admits of application to physical things. One of its meaning, as defined in Webster's Dictionary is 'an establishment, especially of public character, or affecting a community.' The term 'institution' is sometimes use as descriptive of an establishment or place where the business or operations of a society or association is carried on. At other times it is used to designate the organised body.'
>
> The word 'institution' properly means an organisation organised or established for some specific purpose, though it is sometimes used in statutes and in common parlance in the sense of the building or establishment in which the business of such a society is carried on."

36. Therefore, in view of the dictionary meaning of the word "educational institution", and when the object of National Cadet Corps is to develop leadership, character, comradeship and to create a force of disciplined and trained manpower and to develop officer-like quality in students, therefore, we find that the training of the students by the Instructors in the NCC and in weaving would be a "Teacher" for the purpose of the Act.

37. The judgment in *Smt. Maya Verma's case* (supra) was dealing with the expression "Teacher" as it appears in M.P. Jawaharlal Nehru Krishi Vishwavidyalaya Act, 1963 (in short "the 1963 Act"). The teacher as defined in the said Act does not necessarily exclude the teachers as defined in the Act as the purport and object of the two Statutes is different. The statute under consideration in *Smt. Maya Verma's case* (supra) was a Statute in respect of recruitment of teachers and their service conditions whereas the Act specifically deals with only one aspect i.e. the age of superannuation, therefore, the 1963 Act is a general Statute and the Act is a special Statute which will have preference over the provisions of the 1963 Act. Thus, the judgment in *Smt. Maya Verma* (supra) is not helpful to determine the age of superannuation of the teachers.

38. The Single Bench decision in *S.A.M. Ansari's case* (supra) is a case of Weaving Instructor employed in a jail. We find that the said judgment is not applicable in the facts of the present case because the jail cannot be treated to be a Technical Educational Institution, therefore, the benefit of extension of age cannot be granted to the Weaving Instructor employed in the jail.

39. Similarly, in a Division Bench judgment in *Ashok Kumar Gupta's case* (supra) the finding recorded is that he was teaching in a departmental training institute. The departmental training institute is also an educational institute and therefore, such person appointed in a training institute of a technical nature would be entitled to benefit of extension of age of superannuation. Therefore, even the judgment in *Ashok Kumar Gupta's case* (supra) is not a correctly decided principle of law.

40. In view of the above, we do not approve the judgments passed by Single Bench of this Court in *S.A.M. Ansari* (supra) and *Smt. Maya Verma* (supra) and Division Bench decision in *Ashok Kumar Gupta* (supra) and a part of Division Bench judgment in *Mahendra Pal Singh* (supra). However, we approve the meaning assigned to words "teacher", "training" and "education" in *Maina Swamy's case* (supra). We also approve the Single Bench judgments of this Court in W.P. No.2289/2003 (*Annapurna Prasad Shukla vs. State of M.P. and others*) passed on 07.11.2003 and *Chokhelal Sahu* (supra).

41. In view of the above, we hold that classification in the recruitment Rules is not determinative of the fact: whether a Government servant is a Teacher or not – as the

meaning assigned to Teacher in the State Act has to be preferred over the classification of Teacher in the recruitment Rules. The Amending Act has given wide meaning to the expression "Teacher", which includes the "Teachers irrespective of the designation and appointed in a Government Technical and Medical Institutions". Therefore, the "Instructors" engaged for imparting training to women in the Tailoring Centre work under the Department of Women & Child Development are entitled to extension in age up to the age of 62 years being teachers as mentioned in the amending Act.

42. In respect of the second question, it is held that the Training Centres and the Vocational Training Centres of the State Government are Educational Institutions for extending the benefit of age of superannuation to a person imparting training as the Instructor is a Teacher for the purpose of the Act, which has been given very wide definition.

43. Now, the question arises is that what relief should be granted to the teachers, who stand superannuated on attaining the age of superannuation of 60 years prior to this Judgment. The provisions of the Act are to extend the age of superannuation of the teachers so that services of experienced work-force of the teachers are utilized for constructive work of imparting education for another period of two years. The provision is not meant for a personal benefit of the teachers but for larger public good that the experienced teachers should impart education for another period of two years. In view of the said fact, we hold that the teachers, who have attained the age of 62 years prior to the order of this Court passed today, shall not be entitled to any consequential benefit of pay and allowances but the teachers, who have not attained the age of 62 years, shall be called upon to perform their duties up-to the age of 62 years.

44. Having answered the question of law, the matter be placed before the Bench as per Roster for final disposal.

Order accordingly.

I.L.R. [2018] M.P. 867 (DB)
WRIT APPEAL

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

W.A. No. 38/2017 (Jabalpur) decided on 10 January, 2018

NANI INVATI (SMT.) …Appellant
Vs.
STATE OF M.P. & ors. …Respondents

(Alongwith W.A. No. 39/2017)

***A. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 92 – Recovery Proceedings – Opportunity of Hearing* – In respect of improper utilization of the sanctioned amount for construction of APL and**

BPL toilets, proceedings u/S 92 of the Act of 1993 was drawn by the SDO against appellants, who are the elected Sarpanch – Held – Without any adjudication, recovery was directed to be made and further for not depositing the amount, warrant was also issued – As per Section 92 of the Act, competent authority was under obligation to decide the reply/objection of petitioner and to afford reasonable opportunity to the person concerned – In the present case, proceedings are patently contrary to the provisions – Action of recovery without affording opportunity to petitioner is vitiated in the eyes of law – Order of recovery is set aside – Appeals disposed of.

(Paras 4, 5 & 7)

क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 92 – वसूली की कार्यवाहियां – सुनवाई का अवसर – ए.पी.एल. एवं बी.पी.एल. शौचालयों के निर्माण हेतु मंजूर की गई राशि के अनुचित उपयोग के संबंध में एस.डी.ओ. द्वारा अपीलार्थीगण, जो कि निर्वाचित सरपंच हैं, के विरूद्ध 1993 के अधिनियम की धारा 92 के अंतर्गत कार्यवाहियां तैयार की गई थी – अभिनिर्धारित – बिना किसी न्यायनिर्णयन के वसूली निदेशित की गई थी और इसके अतिरिक्त, रकम जमा न किये जाने हेतु वारंट भी जारी किया गया था – अधिनियम की धारा 92 के अनुसार, सक्षम प्राधिकारी, याची के प्रतिउत्तर/आक्षेप का विनिश्चय करने के लिए और संबंधित व्यक्ति को युक्तियुक्त अवसर प्रदान करने के लिए बाध्यताधीन था – वर्तमान प्रकरण में, कार्यवाहियां प्रकट रूप से उपबंधों के विपरीत हैं – याची को अवसर प्रदान किये बिना वसूली की कार्रवाई विधि की दृष्टि में दूषित है – वसूली का आदेश अपास्त किया गया – अपीलें निराकृत।

***B. Panchayats (Appeal and Revision) Rules, M.P. 1995, Section 3 – Appeal – Grounds* – Held – The single bench disposed the writ petition on the ground of availability of an appeal under the Rules of 1995 but failed to appreciate that there was no adjudication by the authority in the present case and therefore remedy of appeal would be meaningless and purposeless in absence of adjudication.**

(Para 5)

ख. पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, धारा 3 – अपील – आधार – अभिनिर्धारित – एकल न्यायपीठ ने रिट याचिका को 1995 के नियमों के अंतर्गत अपील की उपलब्धता के आधार पर निराकृत किया परंतु यह मूल्यांकन करने में विफल रहा कि वर्तमान प्रकरण में, प्राधिकारी द्वारा कोई न्यायनिर्णयन नहीं था और इसलिए न्यायनिर्णयन की अनुपस्थिति में अपील का उपचार अर्थहीन एवं प्रयोजनहीन होगा।

Case referred :

2017 (3) MPLJ 384.

Jaideep Sirpurkar, for the appellants.
Namrata Agrawal, G.A. for the respondents/State.

J U D G M E N T

The Judgment of the Court was delivered by:
V.K.Shukla, J.:- In these appeals, a common point has been raised that whether an authority could have taken proceedings for recovery under Section 92 of the M.P. Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993(hereinafter referred to as 'the Act') without giving reasonable opportunity to the petitioner and consideration of the reply filed by the petitioner to the show cause notice.

2. The facts in short are noted from the writ appeal filed by Smt.Sumitra Dhurve. The appellant was elected as Sarpanch of the Gram Panchayat. During the appellant's term as an office bearer, it has been found that the amount sanctioned for construction of APL & BPL toilets have not been utilized properly by the Gram Panchayat.

3. Learned counsel for the appellant submitted that the proceedings under Section 92 of the Act was drawn by the Sub Divisional Officer and the order sheet was written on 05-05-2015 to issue show cause notice to the petitioner and the Secretary of the Gram Panchayat. In pursuant to the said order sheet, a show cause notice dated 01-08-2015 was issued to the appellant and she was directed to file reply and in absence of reply, ex-party proceedings shall be drawn against the appellant. The appellant submitted reply and the competent authority on 20-05-2015 without consideration of the reply, an order was passed to issue the warrant for non-deposit the alleged recovery amount.

4. In the writ appeal filed by Smt. Nani Invati also, it is noted that in pursuant to the order sheet dated 05-05-2015, a show cause notice was issued on 01-08-2015. The reply was filed before the competent authority vide Annexure P-4. From the order sheet dated 20-05-2015, it is noted that the authority has recorded that the reply is not satisfactory and the Sub Engineer was directed to produce work completion certificate on the next date. In the present case also without any adjudication, the recovery was directed to be made and for not depositing the said amount, the warrant has been issued.

5. Learned counsel for the appellants submitted that the learned Single Judge has disposed of the writ petition on the ground of availability of an appeal under the M.P.Panchayat (Appeal & Revision) Rules,1995 but failed to appreciate that there was no adjudication by the competent authority therefore, the remedy of appeal would be meaningless and purposeless in absence of adjudication. He further submitted that as per the provisions of Section 92 of the Act, the competent authority is under obligation to decide the reply/objection of the petitioner and to afford reasonable opportunity to the person concerned. In the present case the proceedings of recovery are patently contrary to the provisions of Section 92 of the Act. He relied the judgment passed by a Coordinate Bench in the case of *Narendra Pandey Vs. State of M.P. and others,* 2017(3) M.P.L.J. 384.

6. Combating the aforesaid submissions, learned counsel for the State submitted that the proceedings under Section 92 is of execution nature and since the petitioner has failed to offer reasonable explanation for not depositing the amount, therefore, there is no illegality in the recovery proceedings initiated by the competent authority. Learned counsel for the State submitted that notice dated 01-08-2015 is in fact an order passed by the authority under Section 92 of the Act.

7. Upon perusal of the records of the appeal, it has been found that there is no adjudication on the objection/reply of the appellant to the show cause notice. In the case of Smt. Nani Invati, it is found that in a cryptic and caviler (sic: cavalier) manner, the authority has mentioned that the reply is not satisfactory without adverting to the contentions raised in the reply filed on behalf of the appellant . The provisions of Section 92 of the Act has been considered by a Coordinate Bench in the case of *Narendra Pandey* (supra) and the word reasonable opportunity under section 92(4) has been discussed. In the said case, it has been held that the action of the recovery without affording reasonable opportunity as contemplated under section 92(4) is vitiated in the eyes of law.

8. As already discussed that there is no adjudication by the authority in these two matters, therefore, the contention of the counsel for the State that Annexure P-3 dated 01-08-2015 in both the cases is an order of recovery is rejected. The competent authority shall treat the letter dated 01-08-15 as show cause notice and the reply filed by the appellants shall be considered and decided in accordance with law after giving reasonable opportunity in accordance with provisions of Sub section 4 of Section 92 of the Act. The appellants are also granted liberty to submit additional representation/ objection. The authority shall conclude the proceedings within a period of three months from the date of filing of certified copy.

9. In view of the aforesaid, both the appeals are disposed of.

Order accordingly.

I.L.R. [2018] M.P. 870 (DB)
WRIT APPEAL

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

W.A. No. 539/2017 (Jabalpur) decided on 30 January, 2018

JAYA RATHI (SMT.) & ors. …Appellants
Vs.
SHRI SUMMA & ors. …Respondents

(Alongwith W.A. No. 540/2017, W.A. No. 542/2017, W.A. No. 543/2017, W.A. No. 544/2017 & W.A. No. 545/2017)

***Land Revenue Code, M.P. (20 of 1959), Sections 57, 165(7-b) & 257 – Lease Hold Rights – Jurisdiction of Civil Court* – Appellants purchased lease**

hold rights from Bhoomiswami vide sale deeds – On a complaint, SDO found contravention of Section 165(7-b) of the Code of 1959 and declared the sale deeds *void ab initio* – Appellants filed writ petitions which were dismissed – Challenge to – Held – Land was granted to landless persons on lease by State Government and transfer of such lease lands could only be affected after getting approval from Collector – In the present case, approval from Collector was not sought and therefore such transactions was rightly found to be void as in contravention to statutory provisions – Further held – State having granted lease of the land had a right over the land as owner – In respect of any decision regarding any dispute of right u/S 57(1) of the Code of 1959 between State Government and any person jurisdiction of Civil Court is barred u/S 257 of the Code of 1959 – Appeals dismissed.

(Paras 2, 6, 7 & 8)

भू राजस्व संहिता, म.प्र. (1959 का 20), धाराएँ 57, 165(7–बी) व 257 – पट्टाधृति अधिकार – सिविल न्यायालय की अधिकारिता – अपीलार्थीगण ने भूमिस्वामी से विक्रय विलेखों के माध्यम से पट्टाधृति अधिकारों का क्रय किया – परिवाद पर, उपखंड अधिकारी ने 1959 की संहिता की धारा 165(7–बी) का उल्लंघन पाया तथा विक्रय विलेखों को प्रारंभ से ही शून्य घोषित किया – अपीलार्थीगण ने रिट याचिकाएँ प्रस्तुत की जिन्हें खारिज कर दिया गया था – को चुनौती – अभिनिर्धारित – राज्य सरकार द्वारा पट्टे पर भूमिहीन व्यक्तियों को भूमि दी गई थी तथा ऐसी पट्टे की भूमि का अंतरण, कलेक्टर से अनुमोदन मिलने के पश्चात् ही प्रभावित किया जा सकता था – वर्तमान प्रकरण में, कलेक्टर से अनुमोदन नहीं चाहा गया था तथा इसलिए इस तरह के संव्यवहार को कानूनी उपबंधों के उल्लंघन में उचित रूप से शून्य पाया गया था – आगे अभिनिर्धारित – राज्य द्वारा भूमि का पट्टा प्रदान किये जाने के बावजूद उसे भूमि पर स्वामी के रूप में अधिकार था – राज्य सरकार तथा किसी भी व्यक्ति के मध्य 1959 की संहिता की धारा 57(1) के अंतर्गत अधिकार के किसी भी विवाद से संबंधित किसी भी विनिश्चय के बारे में सिविल न्यायालय की अधिकारिता 1959 की संहिता की धारा 257 के अंतर्गत वर्जित है – अपीलें खारिज।

Sanjay Agrawal, for the appellants.
Namrata Agrawal, G.A. for the respondent/State.

O R D E R (Oral)

The order of the Court was delievered by:
Hemant Gupta, Chief Justice :- The challenge in the present appeals is to an order passed by learned Single Bench on 22.03.2017 whereby the challenge to the orders dated 29.11.2001 and 30.11.2010 passed by Sub-Divisional Officer (Revenue) Bareli, District Raisen remained unsuccessful.

2. The appellants are said to be purchaser of lease hold rights from a *Bhoomiswami* who have been allotted land by the State Government under Madhya Pradesh Land

Revenue Code, 1959 (for short "the Code"). The appellants have purchased such lease hold rights vide sale deeds executed on different dates in the year 1991-1992. On a complaint made, the matter was referred to the Collector for inquiry. The Collector sent it to the Sub- Divisional Officer. It is the Sub-Divisional Officer who found that such sale is in contravention of provisions contained in Section 165 (7-b) of the Code and consequently, the transactions of sale were found to be *void ab initio*.

3. Learned counsel for the appellants raised an argument that even if the appellants have not sought permission from the Collector as is required in terms of sub-clause (7-b) of Section 165 of the Code, still, the Revenue Authorities have no jurisdiction to declare the document of title as void. It is contended that such right has been conferred only on the Civil Court.

4. The relevant provision of the Code reads as under:

> "**165. Rights of transfer.** - (1) Subject to the other provisions of this section and the provision of section 168 a Bhumiswami may transfer any interest in his land.
>
> *** *** ***
>
> **(7-b)** Notwithstanding anything contained in sub-section (1), [a person who holds land from the State Government or a person who holds land in Bhoomiswami rights under sub-section (3) of Section 158] or whom right to occupy land is granted by the State Government or the Collector as a Government lessee and who subsequently becomes Bhoomiswami of such land, shall not transfer such land without the permission of a revenue officer, not below the rank of a Collector, given for reasons to be recorded in writing."

5. We have heard learned counsel for the parties and find no merit in the present appeal.

6. The land was granted to the landless persons on lease by the State Government. The transfer of land leased to a landless person could be affected only after getting approval from the Collector. Since admittedly the approval from the Collector was not sought, such transaction has been rightly found to be void as such transaction is in contravention of statutory provisions.

7. Section 57 of the Code confers ownership in all lands on the State whereas, sub-section (2) contemplates that if a dispute arises between the State Government and any person in respect of any right under sub-section (1), such dispute shall be decided by the State Government or by the Collector. Still further, under Section 257

of the Code, the jurisdiction of civil court is barred in respect of any decision regarding any right under sub-section (1) of Section 57 between the State Government and any person. The relevant clauses read as under:

> **"57. State ownership in all lands. -** (1) All lands belong to the State Government and it is hereby declared that all such lands, including standing and flowing water, mines, quarries, minerals and forests reserved or not, and all rights in the sub-soil of any land are the property of the State Government:
>
> Provided that nothing in this section shall, save as otherwise provided in this Code, be deemed to affect any rights of any persons subsisting at the coming into force of this Code in any such property.
>
> (2) Where a dispute arises between the State Government and any person in respect of any right under sub-section (1) such dispute shall be decided by the State Government/Collector.
>
> *** *** ***
>
> **257. Exclusive jurisdiction of revenue authorities.-** Except as otherwise provided in this Code, or in any other enactment for the time being in force, no Civil Court shall entertain any suit instituted or application made to obtain a decision or order on any matter which the State Government, the Board, or any Revenue Officer is by this Code, empowered to determine, decide or dispose of, and in particular and without prejudice to the generality of this provision, no Civil Court shall exercise jurisdiction over any of the following matters:-
>
> **(a)** any decision regarding any right under sub-section (1) of Section 57 between the State Government and any person.
>
> *** *** ***

8. Therefore, the State having granted lease of land to landless persons, had a right over the land in question as owner and the appellants having obtained sale deeds from the landless persons, the matter could be decided only by the State Government or by the Collector in terms of Section 57 read with Section 257 of the Code. The sale could not be declared void by the Civil Court as the jurisdiction of the Civil Court is barred in terms of Section 257 read with Section 57 of the Code. In view thereof, we do not find any merit in the present appeal. Accordingly, the same is **dismissed.**

Appeal dismissed.

I.L.R. [2018] M.P. 874
WRIT PETITION
Before Mr. Justice Vivek Rusia
W.P. No. 3375/2017 (Indore) decided on 10 January, 2018

ALOK …Petitioner
Vs.
SMT. SHASHI SOMANI & ors. …Respondents

Civil Procedure Code (5 of 1908), Section 151 – Inherent Powers of Court – Practice & Procedure **– Petition by plaintiff against dismissal of application dated 05.12.2016 u/S 151 CPC for recalling of order by which Court directed parties to appear before Collector for impounding unregistered and unstamped agreement of sale, in the suit of specific performance of contract – Held – Trial Court vide order dated 25.02.15 referred the document to Collector, said order has not been challenged by the petitioner at the relevant time instead filed application u/S 151 on the basis of Chandanlal's case – Now, after filing this petition, petitioner also wants to challenge that order by way of amendment – Section 151 cannot be invoked where specific provision is available – Plaintiff could have filed a review under Order 47 CPC or could have challenged the order by way of writ petition at relevant point of time, which was not done – Order dated 25.02.15 has attained finality and cannot be challenged by way of an amendment in this petition – Order was passed three years back and since then there is no progress in the civil suit – Plaintiff adopted wrong procedure of law – No interference called for – Trial Court rightly dismissed the application – Petition dismissed.**

(Para 6)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 151 – न्यायालय की अंतर्निहित शक्तियाँ – पद्धति एवं प्रक्रिया – आदेश, जिसके द्वारा संविदा के विनिर्दिष्ट पालन के वाद में न्यायालय ने पक्षकारों को अरजिस्ट्रीकृत तथा अस्टांपित विक्रय के करार को परिबद्ध किये जाने के लिए कलेक्टर के समक्ष प्रस्तुत होने हेतु निदेशित किया, को वापस लिये जाने के लिए याची द्वारा सिविल प्रक्रिया संहिता की धारा 151 के अंतर्गत आवेदन दिनांक 05.12.2016 की खारिजी के विरूद्ध याचिका – अभिनिर्धारित – विचारण न्यायालय ने आदेश दिनांक 25.02.2015 द्वारा दस्तावेज कलेक्टर को निर्दिष्ट किया, याची द्वारा उक्त आदेश को सुसंगत समय पर चुनौती नहीं दी गई, बल्कि चंदनलाल के प्रकरण के आधार पर धारा 151 के अंतर्गत आवेदन प्रस्तुत किया – अब, यह याचिका प्रस्तुत करने के पश्चात्, याची संशोधन के माध्यम से उस आदेश को भी चुनौती देना चाहता है – जहाँ विनिर्दिष्ट उपबंध उपलब्ध है, वहाँ धारा 151 का अवलंब नहीं लिया जा सकता – वादी, सिविल प्रक्रिया संहिता के आदेश 47 के अंतर्गत पुनर्विलोकन प्रस्तुत कर सकता था या रिट याचिका के माध्यम से

सुसंगत समय पर आदेश को चुनौती दे सकता था, जो नहीं किया गया था – आदेश दिनांक 25.02.2015 ने अंतिमता प्राप्त कर ली तथा इस याचिका में संशोधन के माध्यम से चुनौती नहीं दी जा सकती – आदेश तीन वर्ष पूर्व पारित हुआ था एवं तब से सिविल वाद में कोई प्रगति नहीं है – याची ने विधि की गलत प्रक्रिया अपनाई – कोई हस्तक्षेप की आवश्यकता नहीं – विचारण न्यायालय ने उचित रूप से आवेदन खारिज किया – याचिका खारिज।

Cases referred :

(2008) 9 Supreme Court Cases 648, (2004) 11 Supreme Court Cases 168, (2010) 9 SCC 385.

V. Lashkari, for the petitioner.

(Supplied: Paragraph numbers)

Vivek Rusia, J.:- The petitioner has filed the present petition being aggrieved by order dt. 16.2.2017 by which application under Section 151 of the CPC has been rejected.

2. The petitioner plaintiff filed the suit for specific performance of the contract. The plaintiff and the defendants are close relatives. Defendant No.1 executed an agreement to sale dt. 23.11.2007 in favour of the plaintiff in respect of the sale of House No. 530 Katju Nagar Ratlam, in total sale consideration of Rs. 23 lacs. According to the plaintiff at the time of execution of the agreement he paid amount of Rs. 3,50,000/- as an advance amount and the defendant has agreed to execute the sale deed within six months. Thereafter the plaintiff has paid amount of Rs. 4 lacs to the defendant No.1.

3. After notice, the defendant filed the written statement denying the averment made in the plaint. Thereafter the Trial Court has framed the issues for adjudication. During evidence when the plaintiff has tendered the agreement to sale, the defendant raised an objection that it is neither registered nor properly stamped therefore, it cannot be marked as an exhibit. Vide order dt. 25.2.2015 the Trial Court has directed the parties to appear before the Collector (Stamps) on 17.3.2015 for the purpose of impounding but till today, the Collector has not passed any order for impounding.

4. The plaintiff filed an application under Section 151 CPC on 5.12.2016 for recalling of order dt. 25.2.2015 in the light of the judgment passed by this Court in case of *Chandmal and another vs. Labhchand and another* reported in 2016 (3) MPLJ. The learned Trial Court after considering the judgment has rejected the application filed under Section 151 of CPC hence, the present petition.

5. Learned Counsel for the petitioner submits that in a suit for specific performance the agreement to sale is not required to be registered therefore, the learned Trial Court has wrongly referred the document to the Collector Stamps for impounding.

6. The learned Trial Court vide order dt. 25.2.2015 has already referred the document to the Collector for impounding and the said order has not been challenged by the petitioner at the relevant time but filed the application under Section 151 CPC on the basis of the judgment passed in the case of Chandmal (supra). After filing this petition, now the petitioner has filed an application for amendment to challenge the order dt. 25.2.2015 also. The provision of Section 151 CPC cannot be invoked where a specific provision is available in the CPC. The plaintiff could have filed an application for review under the provisions of Order 47 CPC or could have challenged the order dt. 25.2.2015 by way of writ petition at the relevant point of time. He has filed an application under Section 151 CPC on the basis of the judgment passed by this Court therefore, he has adopted wrong procedure of law. The order dt.25.2.2015 has attained finality and the same cannot be challenged by way of amendment in this petition. The said order was passed three years back and since last three years, there is no progress in the civil suit hence, no interference is called for.

7. In the case of *Durgesh Sharma vs. Jayshree* reported in (2008) 9 Supreme Court Cases 648 in para 56 it has been held as under:-

> 56.We are unable to agree with the view that in such cases, inherent powers may be exercised under Section 151 of the Code as held by the High Court of Punjab and Haryana in SBI. It is settled law that inherent powers may be exercised ex debito justitiae in those cases, where there is no express provision in the Code. The said power cannot be exercised in contravention or in conflict of or ignoring express and specific provisions of law. Since the law relating to transfer is contained in Sections 22 to 25 of the Code, and they are exhaustive in nature, Section 151 has no application. Even that contention, therefore, cannot take the case of the respondent wife further.

8. In the case of *Shipping Corporation of India Ltd. vs. Machado Brothers and others* reported in (2004) 11 Supreme Court Cases 168 in para 19 and 20 it has been held as under:-

> **19.** Coming to the maintainability of IA No. 20651 of 2001, the learned counsel for the appellant in support of his contention that an application under Section 151 CPC for the dismissal of the suit on the ground of same having become

infructuous was maintainable, has relied on a number of judgments. In *Ram Chand & Sons Sugar Mills (P) Ltd. v. Kanhayalal Bhargava* while discussing the scope of Section 151 CPC this Court after considering various previous judgments on the point held : (AIR p. 1902, para 5)

> "The inherent power of a court is in addition to and complementary to the powers expressly conferred under the Code. But that power will not be exercised if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code. If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by the said provisions. Whatever limitations are imposed by construction on the provisions of Section 151 of the Code, they do not control the undoubted power of the court conferred under Section 151 of the Code to make a suitable order to prevent the abuse of the process of the court."

20. From the above, it is clear that if there is no specific provision which prohibits the grant of relief sought in an application filed under Section 151 of the Code, the courts have all the necessary powers under Section 151 CPC to make a suitable order to prevent the abuse of the process of court. Therefore, the court exercising the power under Section 151 CPC first has to consider whether exercise of such power is expressly prohibited by any other provisions of the Code and if there is no such prohibition then the court will consider whether such power should be exercised or not on the basis of facts mentioned in the application.

9. The Apex Court in the case of *Jai Singh v/s Municipal Corporation of Delhi* [(2010) 9 SCC 385], has explained the nature and scope of writ petition under Article 227 of the Constitution of India and held as under :-

> **"The High Court, under Article 227 of the Constitution of India, has the jurisdiction to ensure that all subordinate courts as well as statutory or quasi-judicial tribunals, exercise the powers vested in them, within the bounds of their authority. The High Court has the**

power and the jurisdiction to ensure that they act in accordance with the well-established principles of law. The High Court is vested with the powers of superintendence and/or judicial revision, even in matters where no revision or appeal lies to the High Court. The jurisdiction under this article is, in some ways, wider than the power and jurisdiction under Article 226 of the Constitution of India. It is, however, well to remember the well-known adage that greater the power, greater the care and caution in exercise thereof. The High Court is, therefore, expected to exercise such wide powers with great care, caution and circumspection. The exercise of jurisdiction must be within the well-recognised constraints. It can not be exercised like a "bull in a china shop", to correct all errors of judgment of a court, or tribunal, acting within the limits of its jurisdiction. This correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice."

10. The learned Trial Court has rightly dismissed the application. I do not find any substance in the writ petition. Hence, the same is, hereby, **dismissed**.

Petition dismissed

I.L.R. [2018] M.P. 878
WRIT PETITION

Before Mr. Justice Subodh Abhyankar

W.P. No. 21324/2015 (Jabalpur) decided on 22 January, 2018

RAJ NARAYAN SINGH …Petitioner

Vs.

M/S PUSHPA FOOD PROCESSING PVT. LTD. & ors. …Respondents

(Alongwith W.P. No. 21323/2015 & W.P. No. 21325/2015)

Practice & Procedure – Civil Procedure Code (5 of 1908), Section 115 – Consolidation of Suits **– Petitioner filed application before trial Court for consolidation of three civil suits pending in respect of the same property – Application dismissed – Challenge to – Held – All three suits are at different stages of proceedings and even the relief of three suits is different from each other – One of the said suits has already been dismissed and its restoration**

application is still pending and in these circumstances it is rather preposterous for the petitioner even to think for consolidation of the three suits – Consolidation of the suits would result in slow down the proceedings of suits which are at advance stage to keep up the pace with the suits which are at their preliminary stage – Further held – All the three suits were filed in the year 1995, 1996 and 1997 but application for consolidation was filed in 2015 and before aforesaid application u/S 151 CPC, there was no effort by petitioner to consolidate the suits – Trial Court rightly dismissed the application – Petitions dismissed.

(Para 9 & 12)

पद्धति एवं प्रक्रिया – सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 – वादों का समेकन – याची ने एक ही संपत्ति के संबंध में तीन सिविल वादों के समेकन हेतु विचारण न्यायालय के समक्ष आवेदन प्रस्तुत किया – आवेदन खारिज किया गया – को चुनौती – अभिनिर्धारित – तीनों वाद, कार्यवाहियों के भिन्न प्रक्रमों पर है और यहां तक कि तीनों वादों के अनुतोष भी एक दूसरे से भिन्न है – उक्त वादों में से एक पहले ही खारिज किया जा चुका है तथा उसके पुनःस्थापन हेतु आवेदन अभी लंबित है एवं इन परिस्थितियों में याची के लिए तीनों वादों के समेकन हेतु सोचना भी निर्रथक है – वादों के समेकन के परिणामस्वरूप, उन्नत प्रक्रम के वादों की कार्यवाहियां, प्रारंभिक प्रक्रम के वादों के साथ तालमेल रखने के लिए धीमी हो जाएगी – आगे अभिनिर्धारित – सभी तीन वाद, वर्ष 1995, 1996 व 1997 में प्रस्तुत किये गये थे परंतु समेकन हेतु आवेदन, 2015 में प्रस्तुत किया गया था तथा धारा 151 सि.प्र.सं. के अंतर्गत उपरोक्त आवेदन से पूर्व याची द्वारा वादों के समेकन हेतु कोई प्रयास नहीं किया गया था – विचारण न्यायालय ने आवेदन उचित रूप से खारिज किया – याचिकाऐं खारिज।

Cases referred :

ILR (2009) MP 3296, 2017 (IV) MPJR 166.

Himanshu Mishra, for the petitioners.
Nityanand Mishra, for the respondent No. 1.
R.K. Tripathi, for the respondent No. 4 in W.P. No. 21323/2015.

O R D E R

Subodh Abhyankar, J.:- This order passed in WP No. 21324/2015 shall also govern the disposal of WP No. 21323/2015 and 21325/2015, as the issues in these petitions are common.

2. WP No. 21324/2015 has been filed by the petitioner under Article 227 of the Constitution of India against the order dated 1.12.2015 passed by the Third Additional District Judge, Satna in Civil Suit No. 27-A/2008, whereby the application filed under Section 151 of CPC by the petitioner/defendant No. 1 for consolidation of three civil suits, has been rejected.

3. In brief the facts of the case are that the respondent No. 1/ plaintiff has filed a civil suit for possession and eviction for the old municipal House No. 333 situated at Ward No.27 at Khasra No. 340/2 Railway Station Road, Satna, and also for the rent of Rs. 4350. This civil suit is registered as 27-A/2014 (M/s Pushpa Food Processing Pvt. Ltd. Vs. Rajnarayan Singh & others) filed on 10.11.1996. Another suit has been filed by the present petitioner against the plaintiff in Civil Suit No. 27-A/2014 i.e. respondent No.1 in the present petition. In the aforesaid suit the petitioner has sought declaration in respect of land bearing Khasra No. 340/2 par area 22x53 total area 1166 sq. ft. This civil suit is registered as 75-A/2005 (Raj Narayan Vs. M/s Pushpa Food Processing Pvt. Ltd.) filed on 12.10.1997, which was dismissed in default at the evidence stage and the restoration application is still pending before the same Court as MJC No. 70/2013 (Rajnarayan Singh Vs. M/s Pushpa Food Processing Pvt. Ltd.). Apart from two aforesaid civil suits, the State Government has also filed a civil suit against the plaintiff-M/s Pushpa Food Processing Pvt. Ltd. for permanent injunction. In this case also the disputed property is the land bearing Khasra No. 340/2. This civil suit is registered as 28-A/2014 (State of MP Vs. M/s Pushpa Food Processing Pvt. Ltd.) filed on 12.12.1995.

4. The petitioner's further case is that on 30.11.2015 an application under Section 151 of the CPC was filed by the petitioner for consolidation of the aforesaid three civil suits, which is in respect of the same property. However, the aforesaid application came to be dismissed by the trial Court vide its order dated 1.12.2015, which is under challenge before this Court.

5. The contention of the petitioner is that prior to the aforesaid application under Section 151 of CPC, another application under Section 24 of CPC was filed by the petitioner before the District Judge, Satna for transfer of one of the civil suits to a place where other civil suit was pending. The aforesaid application was allowed, however it was directed that the suit be consolidated and subsequently on an application filed by the respondents for clarification of the order that whether the civil suits have been consolidated or have to be tried separately by the same Court, it was held by the learned Judge of the trial Court that no order for consolidation of the suit was filed and it was mentioned that the civil suit shall be tried on their own merits separately.

6. Learned counsel for the petitioner has submitted that the aforesaid order is erroneous inasmuch as it would only to create more confusion between the parties because of the nature of the relief prayed for and conflicting judgments may be delivered by the judge if the suits are not consolidated.

7. On the other hand, learned counsel for the respondents has submitted that there is no need to consolidate the aforesaid civil suits, because the trial Court has already held that when the matter was transferred from one Court to another, it was not ordered that the suit should be consolidated and correcting its own error, which

has occurred due to earlier order sheets of the trial Court. The trial Court has passed the order holding that there would be no consolidation of the civil suits and it was specifically mentioned that since each of the civil suit is at a different stage, in such circumstances they have to be tried separately. In support of his contention, learned counsel for the respondents has placed reliance upon the order of the Division Bench of this Court in the case of *Parwati Bai Vs. Kriparam & others,* reported in ILR (2009) MP 3296 and in the case of *Udayraj Vs. Dinesh Chandra Bansal,* reported in 2017 (IV) MPJR 166.

8. Heared the learned counsel for the parties and perused the record.

9. From the record, it is apparent that three civil suits have been filed by three different parties although in respect of the same property bearing Khasra No. 340/2, however the reliefs sought are different. It is also an admitted fact that all the three civil suits at a different stage and by consolidation the civil suits, which are at an advance stage, would be required to be stayed or slowed down to keep up the pace with the suits, which are at their preliminary stages. In the facts and circumstances of the case, this Court is of the considered opinion that no illegality or jurisdictional error has been committed by the learned Judge of the trial Court in dismissing the petitioner's application under Section 151 of CPC.

10. So far as the order of the Division Bench of this Court in the case of *Parwati Bai* (supra) is concerned, the facts of the same are not distinguishable and therefore the same is applicable in the present case. The relevant para 17 of the said order is reproduced as under:

> "17. In the case of consolidation of suits, common evidence is recorded which serves the purpose in the cases consolidated. In Civil Suit No. 63-A/08 evidence has been already recorded substantially prior to order of consolidation which cannot be utilized in Civil Suit No. 62-A/08 except with the express consent of the parties concerned. It has been admitted by the learned counsel for the parties that no such consent was given by the plaintiff of both the suits. It is undisputed position of law as held by the Apex Court in the case of *Mitthulal and another V. State of M.P.* 1975 JLJ 432 that each case must be decided on the evidence recorded in it and evidence recorded in another case cannot be taken into account in arriving at a decision of another case. In view of the aforesaid legal position, the evidence recorded in Parwati Bai's suit prior to order of consolidation cannot be legally looked into in the suit instituted by Kriparam and evidence shall have to be freshly recorded even in the case

> of Parwati Bai in view of the order of consolidation. Thus, impugned order shall have an effect of reopening of Parwati Bai's case for no justifiable reason. On the other hand, Parwati Bai, who has already produced her evidence would be dragged in the suit instituted by Kriparam, although no relief has been sought against her in that suit. An application for consolidation even in pursuance of this Court's order ought to have been submitted promptly within reasonable time. Respondents No.2 and 3 despite direction of this Court on 05.10.05 to move an application for consolidation observed silence for more than three years and five months and, therefore, they will be deemed to have acquiesced their right to have consolidation in the light of this Court's order dated 05.10.05. Moreover, this Court vide the said order did not direct for consolidation but had merely observed that it shall be open to any of the parties to file an appropriate application for seeking consolidation which shall be considered in accordance with law. Thus, the learned trial Judge while passing the order of consolidation has failed to exercise jurisdiction in judicious manner. He ought to have considered the stages of the suits and the purpose which could be achieved by ordering consolidation. Learned counsel for the respondents No.2 and 3, Shri Seth submitted that since proceedings of subsequent suit were stayed by this Court, respondent No. 2 was unable to move an application for consolidation within reasonable time. This submission is totally incorrect and highly misconceived because this Court in the order dated 05.10.05 itself has observed that stay of one of the suits passed by this Court shall not come in way for consideration of the application for consolidation. Thus, silence of the respondent No.2 in the matter of submission of application for consolidation did amount to acquiescence on his part and he could not have insisted for consolidation due to substantial progress of earlier suit which was well within his knowledge."

11. Taking account of the case at hand in view of the aforesaid preposition laid down by the Division Bench of this Court in the case of *Parwati Bai* (supra), it is observed that the three civil suits were filed on following dates:

(a) Civil Suit No. 27-A/2014 -10.11.1996

(b) Civil Suit No. 75-A/2005-12.10.1997-MJC No. 70/2013

(c) Civil Suit No. 28-A/2014- 12.12.1995

The aforesaid civil suits have been allotted new numbers but they were filed in the year 1996, 1997 and 1995 respectively and the Civil Suit No. 75-A/2005 has already been dismissed for want of prosecution and its restoration application being MJC No. 70/2013 is still pending consideration of the trial Court.

12. Admittedly the application under Section 151 of CPC for consolidation of the civil suits was filed on 30.11.2015. Prior to the aforesaid application there appears to be no efforts made by the petitioner to consolidate the aforesaid suits and not only that the Civil Suit No. 75-A/2005 has already been dismissed and its restoration application is still pending. There was no reason that the petitioner to apply for consolidation of the aforesaid civil suit also along with other two civil suits. It is also an admitted fact that all these three suits at their different stages of proceeding and as such even the relief of three suits is also different from each other. In such circumstances, when all the civil suits are at different stages and one of them has already been dismissed and its restoration application is still pending, it is rather preposterous on the part petitioner even to think aforesaid suit be consolidated, it would only lead to further preposterous of the proceeding of the civil suits, which are pending in the advance stage, and as also held by the Division Bench of this Court in the case of *Parwati Bai* (supra). Apart from that, the facts of the present case being akin to the facts of the aforesaid case, hence no case for any interference in the impugned order is made out.

13. In the result, all the three petitions filed by the petitioner are hereby **dismissed** with no order as to costs. However, since the civil suit is pending since last 20 years, the trial Court is directed to dispose of the civil suit expeditiously positively by **31.12.2018.**

Petition dismissed.

I.L.R. [2018] M.P. 883
WRIT PETITION

Before Mr. Justice S.C. Sharma

W.P. No. 355/2015 (Indore) decided on 23 January, 2018

DOULATRAM BAROD …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***Service Law – Retrospective Promotion – Arrears of Salary* – Petition against non grant of monetary benefits on account of retrospective promotion – Respondent Department, on 02.08.2014 passed an order granting promotion to petitioner w.e.f. 25.02.1992 subject to no work no pay – Challenge to – Held – Petitioner was not at fault in matter of grant of promotion and it was fault of employer, he was not promoted and not permitted to work on the**

promotional post – Once petitioner has been promoted after rectifying the mistake by State Government, he is entitled for all consequential benefits – No justifiable reason is available with State Government to deny promotion and arrears of salary – Impugned order to the extent of applying principle of "No Work No Pay" is quashed – Petitioner shall be paid arrears of salary from the date of promotion – Respondents further directed to revise pension fixation and also to pay arrears of pension and other terminal dues alongwith an interest of 12% p.a. from the date of entitlement – Petition allowed.

(Paras 12, 14, 15 & 16)

सेवा विधि – भूतलक्षी पदोन्नति – वेतन का बकाया – भूतलक्षी पदोन्नति के कारण आर्थिक लाभ प्रदान न किये जाने के विरूद्ध याचिका – प्रत्यर्थी विभाग ने 02.08.2014 को आदेश पारित कर, कार्य नहीं तो वेतन नहीं के अध्यधीन याची को 25.02.1992 से प्रभावी रूप से पदोन्नति प्रदान की – को चुनौती – अभिनिर्धारित – पदोन्नति प्रदान किये जाने के मामले में याची की गलती नहीं थी और यह नियोक्ता की गलती थी, याची को पदोन्नत नहीं किया गया था तथा पदोन्नति के पद पर कार्य करने की अनुमति नहीं दी गई – एक बार राज्य सरकार द्वारा भूल को सुधारने के पश्चात् याची को पदोन्नत किया गया है, वह सभी परिणामिक लाभों का हकदार है – पदोन्नति एवं वेतन के बकाया से इंकार करने के लिए राज्य सरकार के पास कोई न्यायोचित कारण उपलब्ध नहीं – ''कार्य नहीं तो वेतन नहीं'' के सिद्धांत को लागू करने की सीमा तक आक्षेपित आदेश अभिखंडित किया गया – याची को पदोन्नति की तिथि से वेतन के बकाये का भुगतान किया जाए – प्रत्यर्थीगण को, पेंशन निर्धारण पुनरीक्षित करने एवं पेंशन के बकाये तथा अन्य सेवांत देय भी, हकदारी की दिनांक से 12% प्रतिवर्ष के ब्याज सहित भुगतान करने हेतु निदेशित किया गया – याचिका मंजूर।

Cases referred :

AIR 1991 SC 2010, 2015 (2) MPLJ 285.

Manu Maheshwari, for the petitioner.
Archana Kher, for the respondent/State.

S.C. Sharma, J.:- The petitioner before this Court, aged about 70 years, aggrieved by non-grant of monetary benefits on account of his retrospective promotion, has approached this Court by filing the present writ petition.

2. Petitioner's case is that he was appointed on 16.08.1967 as Patwari and was promoted to the post of Revenue Inspector on 14.02.1975 and he attained the superannuation on 30.01.2004. The petitioner as he was not assigned seniority, preferred an original application before the M.P. State Administrative Tribunal i.e. O.A. No.938/95, and the same was transferred to the High Court of Madhya Pradesh on abolition of M.P. State Administrative Tribunal, which was registered as W.P. No.4759/03.

3. The writ petition was allowed vide order dated 23.09.2005 directing the State Government to grant proper placement to the petitioner and it was to be done within six months. However, a writ appeal was preferred by the State Government in the matter and the same was also dismissed on 21.08.2014.

4. In spite of dismissal of the writ appeal, the order passed by this Court was not complied with and therefore, Contempt Petition No.529/2006 and Contempt Petition No.679/2013 were preferred and it was only after two contempt petitions were preferred, review DPC took place and after granting seniority, the respondents have promoted the petitioner after realising their mistake w.e.f. 25.02.1992.

5. The petitioner, who is more than 75 years of age, now wants arrears of salary. His claim is that it was the mistake of the department as he was not granted promotion by the department and proper seniority was not assigned and the department has rectified its mistake, therefore, the order granting him promotion to the extent no pay has been granted to him deserves to be quashed.

6. On the other hand, learned government advocate has vehementally argued before this Court that the petitioner is not entitled for back-wages as he has not worked on the higher post and as the respondent/State has granted notional fixation of salary, the question of interference by this Court does not arise. It has also been stated that the principle of "no work no pay" has been made applicable as he has not worked at higher post.

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

8. The facts of the case reveal that the petitioner is fighting for his right from 1995. The first judgment was delivered in his case in W.P. No.4759/2003. Paragraph Nos.10 and 11 of the aforesaid judgment read as under:-

> **"10. This fact is not disputed by learned Government Advocate nor there is any averment to the contrary in the return that the petitioners were promoted on the post of Revenue Inspector on 4/2/1975 and 21/1/1975, respectively. The question is whether the Rules of 1961 are applicable to the petitioners in order to compute their seniority or the provisions of Land Record Manual should be made applicable. No doubt, the M.P. Land Record Manual, Chapter 1 or Part II specifically pertains to appointment of Revenue Inspectors. This Revenue Manual contains the entire procedure of selection and appointment of the Revenue Inspector. But, there is nothing this Land Record Manual in order to show that from the date of**

passing of the requisite examination, the seniority would be computed. In the present case, the petitioners were promoted on the post of Revenue Inspector on 14/2/1975 and 20/1/1975 respectively. Later on they passed the requisite examination in the year 1980. There is nothing in the Land Record Manual about placement of the Revenue Inspectors who are already promoted to the post of Revenue Inspectors and have passed the requisite examination later on. On bare perusal of this Chapter of Land Record Manual it is found that they are only instructions. Thus, the Rules of 1961 will be applicable and according to Rule 12, the seniority is to be computed from the date of appointment. The petitioners were all the time submitting their representations against their wrong placement in the provisional gradation list. It appears that their representations were never decided since there is no averment in that regard int eh return. Even if their representations were decided and rejected, there is nothing in the return in order to show that the rejection order was communicated to the petitioners. The material which has been placed on record is that from the date of passing of the requisite examination, the seniority of Revenue Inspector was kept. Even the instructions of Land Record Manual are silent, in regard to keeping of seniority of the Revenue Inspectors. Thus, in order to ascertain the inter se seniority of the Revenue Inspectors, they only relevant Rule would be Rules of 1961. Otherwise also, it is well settled in law that if the Rules are not otherwise and contrary, the seniority is to be maintained on the basis of the length of service. Since, the final gradation list was published on 4/7/1995 and petition was filed on 31/10/1995, therefore, the petition cannot be said to be hit by delay and laches. Moreover, against the every provisional list the petitioners were submitting objections and representations. Thus, the decision of Supreme Court in the case of R.M. Ramual Vs. State of Himachal Pradesh and others (1989) 9 ATC 308 is squarely applicable in the present case. Similarly, according to the decision of the Constitution Bench of the Supreme Court in the case of Director Recruit Class-

II Engineering Officers' Association and others Vs. State of Maharashtra and others (AIR 1991 SCW 2226), the petitioners are entitled for the seniority from the date they were promoted on the post of Revenue Inspector.

11. Eventually this petition succeeds and is hereby allowed. The respondents are hereby directed to pass necessary orders making placement of petitioners in the final gradation list which was published on 4/7/1995 in accordance to their length of service and not from the date of passing of their examination of Revenue Inspector. The candidature of petitioners may further be considered for promotion after placing them at suitable place in the final gradation list of Revenue Inspector and if they are found fit for promotion, according to the relevant Rules, necessary orders in that regard may be passed. Let this exercise be done within a period of six months from today."

9. The writ appeal preferred by the State Government against the aforesaid judgment was dismissed i.e. W.A. No.534/2006. Two contempt petitions i.e. Contempt Petition No.529/2006 and Contempt Petition No.679/2013 were also disposed of and finally, the respondents have passed an order on 02.08.2014 granting him promotion to the post of Assistant Superintendent Land Record w.e.f. 25.02.1992.

10. A similar controversy has been decided in the case of *Manoharlal Vs. State of M.P.,* reported in 2016 (4) MPLJ. The learned Single Judge in paragraph No.6 and 7 has held as under:-

"6. This court is bolstered in its view by the decision of this court in the case of Ram Siya Sharma Vs. State of M.P. rendered in W.P.No. 538/2010 on 6/7/2015 after considering the law laid down by the Apex court on the point. Relevant extract of this decision is reproduced below:-

"6. In service jurisprudence the concept of no work no pay is normally applied where there is some reason attributed to the employee because of which the promotion could not take place at the due time. If the employee concerned is ready and willing to be subjected to the selection process and discharge the duties and responsibilities of the promoted post and yet his case was not considered or was denied for

unlawful reasons which are not attributed to the employee then principle of 'no work no pay' can not come in the way of employee.

7. This aspect has been dealt with in the cases of Union of India vs. K.V. Jankiraman : AIR 1991 SC 2010, State of A.P. v/s. K.V.L. Narasimha Rao and Others : (1999) 4 SCC 181, State of Kerala and Others v/s. E.K.Bhaskaran Pillai : (2007) 6 SCC 524 and the decisions of this Court following the dictum of K.V.Jankraman's case (supra) in the cases of R.B.Guhe v/s State of M.P. : 2008(5) M.P.H.T. 291, Anand Mohan Saxena v/s State of M.P. and Another : 2009(4) M.P.L.J. 523 and Pushpa Usgaonkar v/s State of M.P. & Ors. : I.L.R. (2010) M.P. 1545, are also worthy of reference. The relevant extract of these verdicts are reproduced below for convenience & ready reference :-

7.1 Union of India vs. K.V. Jankiraman : AIR 1991 SC 2010,

"25. … The normal rule of 'no work no pay' is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. … "

7.2 State of A.P. v/s. K.V.L. Narasimha Rao and Others : (1999) 4 SCC 181,

"5. In normal circumstances when the retrospective promotions are effected all benefits flowing therefrom, including monetary benefits, must be extended to an officer who has been denied promotion earlier. …"

7.3 State of Kerala and Others v/s. E.K.Bhaskaran Pillai : (2007) 6 SCC 524,

"4. … So far as the situation with regard to monetary benefits with retrospective promotion is concerned, that depends upon case to case. There are various facets which have to be considered. Sometimes in a case of departmental enquiry or in criminal case it depends on the authorities to grant full back wages or 50 per cent of back wages looking to the nature of

delinquency involved in the matter or in criminal cases where the incumbent has been acquitted by giving benefit of doubt or full acquittal. Sometimes in the matter when the person is superseded and he has challenged the same before court or tribunal and he succeeds in that and direction is given for reconsideration of his case from the date persons junior to him were appointed, in that case the court may grant sometimes full benefits retrospective effect and sometimes it may not. Particularly when the administration has wrongly denied his due then in that case he should be given full benefits including monetary benefit subject to there being any change in law or some other supervening factors. However, it is very difficult to set down any hard-and-fast rule. The principle 'no work no pay' can not be accepted as a rule of thumb. There are exceptions where courts have granted monetary benefits also."

7.4 R.B.Guhe v/s State of M.P. : 2008(5) M.P.H.T. 291,

"12. The principles of 'no work no pay' shall not apply to a case where the lapses are on the part of the Government is not promoting a particular person.

7.5 Anand Mohan Saxena v/s State of M.P. and Another : 2009(4) M.P.L.J. 523,

"11. Apart from that, in the present case, the State Government could not justify or assign any reason whatsoever why the case of the present appellant was not considered in the year 1999 when the juniors to the petitioner were promoted and why his promotion was delayed by 4 years.

12. If the arrears of pay are denied to the employee by arbitrary action of the higher officers without justifying or assigning any reason whatsoever for delaying in promotion to the employee then that will amount to the arbitrariness of the officers of the State Government which is not permissible in the eyes of law."

7.6 Pushpa Usgaonkar v/s State of M.P. & Ors. : I.L.R. (2010) M.P. 1545,

"9. In the present case, the petitioner was denied promotion in the year 2005 for no fault on her part and it is not the case of the respondent that, at any point of time, the petitioner has stated that she is not willing work on the promotional post. In fact, the petitioner right from the year 2005, has made all the sincere efforts before the respondents claiming promotion to the next higher post as she was illegally superseded and was not at all considered for promotion.

10. Resultantly, the writ petition filed by the petitioner is allowed. This Court is of the considered opinion that the petitioner is entitled for back wages in the matter. The respondents are directed to grant all monetary benefits to the petitioner including back wages. As the petitioner has attained the age of superannuation, she shall also be entitled for enhanced pension and arrears on account of her promotion to the post of Principal. ..."

7. In view of above, this court has no hesitation to hold that in the given facts and circumstances where withholding/delayed promotion of the petitioner to the post of Stenographer Grade-I was not for reason attributed to him and there is otherwise no restriction for grant of arrears of salary to the petitioner in law and on the strength of the executive instructions dated 21- 29/3/1989 and 22/2/1990, this court finds that the claim of the petitioner is justified.

11. The learned single Judge has granted arrears of salary to the petitioner therein in similar circumstances.

12. Shri Manu Maheshwari, learned counsel has argued before this Court that the learned single Judge while deciding the aforesaid case has taken care of judgment delivered in the case of *Union of India Vs. K.V. Jankiraman,* AIR 1991 SC 2010. As the petitioner was not at fault in the matter of grant of promotion and it was the fault of the employer and as he was not promoted and not permitted to work on the promotional post, he is entitled for all consequential benefits.

13. He has also placed heavy reliance upon a judgment delivered in the case of *C.B. Tiwari Vs. State of M.P.,* reported in 2015(2) MPLJ, 285. Paragraph Nos.5 to 8 of the aforesaid judgment read as under:-

"5 : As has been rightly pointed out by learned counsel for the petitioner in the case of Maniram Nagotiya Vs. State of Madhya Pradesh and others (2011 M.P.L.S.R. 18), this Court has again looked into various aspects, the law laid down by the Apex Court and specially in the case of State of Kerala and others Vs. E.K. Bhaskaran Pillai [(2007) 6 SCC 524] and has held thus :

"7. In the case of E.K. Bhaskaran Pillai (supra), relied upon by Shri Anand Nayak, the question has been considered in Para 4 and it has been held by the Supreme Court that when promotion is denied to a person due to no fault of his and because of some mistakes by the Competent Authority, benefit of salary and allowances cannot be denied. The matter has been dealt with in Para 4 as under :-

"So far as the situation with regard to monetary benefits with retrospective promotion is concerned, that depends upon case to case. There are various facets which have to be considered. Sometimes in a case of Departmental Enquiry or in a criminal case it depends upon the authorities to grant full back wages or 50% of back wages looking to the nature of delinquency involved in the matter or in criminal cases where the incumbent has been acquitted by giving benefit of doubt or full acquittal. Sometimes in the matter when the person is superseded and he has challenged the same before Court or Tribunal and he succeeds in that and direction is given for reconsideration of his case from the date persons junior to him were appointed, in that case the Court may grant sometimes full benefits with retrospective effect and sometimes it may not. Particularly when the administration has wrongly denied his due then in that case he should be given full benefits including monetary benefit subject to there being any change in law or some other supervening factors. However, it is very difficult to set down any hard- nd-fast rule. The principle of "No Work No Pay" cannot be accepted as a rule of thumb. There are exceptions where Courts have granted monetary benefits also."

8. A learned Single Judge of this Court has also considered the question in the case of Brij Mohan Dwivedi Vs. State of Madhya Pradesh, 2005 (2) MPJR Page 307, and after taking note of the principles laid down by the Supreme Court in the

case of Union of India Vs. K.V. Jankiraman, AIR 1991 SC Page 2010, Virendra Kumar, General Manager, Northern Railways, New Delhi Vs. Avinash Chandra Chadha and others, (1990) 3 SCC 472, (1990) 3 SCC Page 472, and again in the case of State of Haryana and others vs. O.P. Gupta, (1996) 7 SCC Page 533, has laid down the principle in Para 6 in the following manner :-

"If the ratio of the aforesaid case is understood in proper perspective it is clear that Their Lordships were of the view that the quota and rota rule only became effective from the year 1954 and hence, there was neither equity nor justice in favour of the respondents to award emoluments of the higher posts with retrospective effect. In the case of O.P. Gupta (supra), the higher pay was denied as there was cavil over the factum of seniority and notional promotion was given. In the aforesaid case, the law laid down in the case of Jankiraman (supra) was distinguished on the backdrop that the ratio has no application to the case where the claims for promotion are to be considered in accordance with the rules and the promotions are to be made in pursuant thereof. The law laid down in the case of O.P. Gupta (supra), is distinguishable as there were certain aspects were taken note of and Rule 9 of the rules as that was a condition precedent but in the case at hand the factual scenario is differently depicted and the junior was considered and the case of the senior was deferred solely on the ground that the ACR was not available. In the counter affidavit nothing is perceivable against the petitioner that it was his fault. In view of the aforesaid the concept of "No Work No Pay" would not be attracted. It is definite that the petitioner was deprived to work in the promotional post due to laxity on the part of the respondents and hence, no blame can be put on him. Accordingly, it is directed that the petitioner shall be paid the differential amount from the date of receipt of the order passed today. Keeping in view the financial crunch which has been assiduously put forth by the learned Government Advocate, no interest is granted."

6 : This has remained constant view of this Court as the Division Bench of this Court in the case of R.B. Guhe Vs. State of M.P. [(2008(5) M.P.H.T. 291] and in the case of Anand Mohan Saxena Vs. State of M.P. and another [2009(4) MPLJ 523], has categorically held that if no

justifiable reason is forthcoming from the Government for denying the promotion to a person, then the principle of no work no pay cannot be made applicable. Though here in the case in hand, there is no denial of promotion to the petitioner with retrospective effect, but the monetary benefit is denied and for that no justifiable reason is shown by the respondents except that a departmental enquiry was pending against the petitioner while his case was considered for promotion. Pendency of the departmental enquiry alone specially when the petitioner was exonerated in the said departmental enquiry would not be justifiable reason to withhold the monetary benefit of promotion to the petitioner, which according to respondents was granted with retrospective effect.

7 : In view of the aforesaid discussions, the writ petition is allowed. The order dated 14.8.1996 to the extent it prescribes that the monetary benefit would not be available to the petitioner from the date of promotion stand quashed. The petitioner would be entitled to the salary of the promotional post from the date the said benefit was extended to his immediate junior i.e. from 6.9.1995. The order of rejection of such a claim of the petitioner dated 4.9.2004 also stand quashed.

8 : By now the petitioner would have retired from service. If that is so, let his pay on such promotion with retrospective effect be revised in terms of the aforesaid decision from the date of promotion and all the arrears of salary be paid to the petitioner. Further, revision of pay be done till the date of superannuation of the petitioner in the appropriate pay scale and in case any promotion had taken place in between, on such pay scale applicable to the promotional post. Dues of the petitioner be calculated accordingly and be paid to him within a period of four months from the date of receipt of certified copy of the order passed today."

14. In light of the aforesaid judgment, it can safely be gathered that no justifiable reason is available for the State Government to deny promotion and arrears of salary to the petitioner and, therefore, once the petitioner has been promoted after rectifying the mistake by the State Government, he is certainly entitled for all consequential benefits.

15. Resultantly, the impugned order passed by the State Government granting promotion dated 02.08.2014 is hereby quashed only to the extent the principle of "No Work No Pay" has been applied by the State Government. The writ petition stands allowed. The petitioner shall be entitled for arrears of salary of the promotional post i.e. Assistant Superintendent (Land Records) from the date he has been promoted i.e. w.e.f. 25.02.1992. The exercise of granting salary be concluded within a period of 3 months from the date of receipt of certified copy of this order.

16. The respondents shall also revise pension fixation and fixation of other terminal dues within the aforesaid period and shall also pay arrears of pension and other terminal dues within the aforesaid period failing which, the amount dues shall carry interest @ 12% per annum from the date of entitlement till the amount is actually paid to the petitioner.

With the aforesaid, writ petition stands disposed of. No order as to costs.

Petition allowed.

I.L.R. [2018] M.P. 894
WRIT PETITION

Before Mr. Justice J.K. Maheshwari

W.P. No. 20757/2017 (Jabalpur) decided on 2 February, 2018

NEW BALAJI CHEMIST (M/S) …Petitioner
Vs.
INDIAN RED CROSS SOCIETY …Respondents
(M.P. STATE BRANCH) & anr.

***A. Constitution – Article 226 – Tender* – In respect of tender for medical shop, petitioner was the third highest bidder and respondent no.2 was the fourth highest bidder – Held – It is apparent from record that in case of petitioner, 1½ days time was granted to deposit the rent amount and when request for extension was made, the same was refused whereas in case of respondent no. 2, initially 4 days time was granted and when request of extension was made, 2 days further time was granted to him – No explanation is available in return filed by the respondent no. 1 why the said discrimination was made – Respondent no. 1 has acted arbitrarily in a discriminating manner by not granting extension of time to petitioner to deposit the rent amount and has executed agreement in favour of respondent no. 2 – Agreement executed by Respondent no. 1 in favour of respondent no. 2 is hereby quashed and respondent no. 1 is directed to execute an agreement in favour of petitioner and allow the petitioner to commission the shop – Petition allowed.**

(Paras 12, 13 & 14)

क. संविधान – अनुच्छेद 226 – निविदा – मेडिकल शॉप हेतु निविदा के संबंध में याची तृतीय उच्चतर बोली लगाने वाला था और प्रत्यर्थी क्र. 2 चौथा उच्चतर बोली

लगाने वाला – अभिनिर्धारित – यह अभिलेख से प्रकट है कि याची के मामले में, भाड़े की रकम जमा करने के लिए 1½ दिन का समय प्रदान किया गया था और जब समयावधि बढ़ाये जाने हेतु निवेदन किया गया, उक्त को नामंजूर किया गया जबकि प्रत्यर्थी क्र.2 के मामले में, प्रारंभिक रूप से 4 दिनों का समय प्रदान किया गया था तथा जब समयावधि बढ़ाये जाने का निवेदन किया गया, उसे 2 दिनों का अतिरिक्त समय प्रदान किया गया – प्रत्यर्थी क्र.1 द्वारा प्रस्तुत जवाब में कोई स्पष्टीकरण उपलब्ध नहीं कि उक्त भेदभाव क्यों किया गया था – याची को भाड़े की रकम जमा करने हेतु अतिरिक्त समयावधि प्रदान नहीं करके, प्रत्यर्थी क्र.1 ने भेदभावपूर्ण ढंग से मनमानेपन से कार्य किया और प्रत्यर्थी क्र.2 के पक्ष में करार निष्पादित किया है – प्रत्यर्थी क्र.1 द्वारा प्रत्यर्थी क्र.2 के पक्ष में निष्पादित करार एतद् द्वारा अभिखंडित किया गया तथा प्रत्यर्थी क्र.1 को याची के पक्ष में करार निष्पादित करने एवं याची को दुकान चालू करने की अनुमति देने के लिए निदेशित किया गया – याचिका मंजूर।

***B. Constitution – Article 12 & 226 – Maintainability of Petition – Tender Procedure – Judicial Review* – Held – Though the Indian Red Cross Society do not fall within the definition of 'State' under Article 12 of the Constitution of India but it is amenable to writ jurisdiction of High Court in exercise of powers under Article 226 of the Constitution because such powers are wider enough and scope of judicial review is still open in case they have exercised the power arbitrarily and in discriminatory manner.**

(Para 16)

ख. संविधान – अनुच्छेद 12 व 226 – याचिका की पोषणीयता – निविदा प्रक्रिया – न्यायिक पुनर्विलोकन – अभिनिर्धारित – यद्यपि भारतीय रेड क्रॉस सोसाइटी, भारत के संविधान के अनुच्छेद 12 के अंतर्गत 'राज्य' की परिभाषा के अंतर्गत नहीं आती किंतु वह संविधान के अनुच्छेद 226 के अंतर्गत शक्तियों के प्रयोग में उच्च न्यायालय की रिट अधिकारिता के अधीन है क्योंकि उक्त शक्तियां काफी व्यापक है एवं ऐसे प्रकरण में जहां उन्होनें शक्ति का प्रयोग मनमाने रूप से और भेदभावपूर्ण ढंग से किया है, न्यायिक पुनर्विलोकन का विस्तार तब भी खुला है।

Cases referred :

(1985) LIC 1072, 1995 (1) MPJR 44, (2015) 4 SCC 670, AIR 1999 Madras 111, (2009) 6 SCC 171, (2016) 8 SCC 446, (1998) 8 SCC 450, (2002) 5 SCC 111, 2005 (1) SCC 149, (2015) 3 SCC 251, (2008) 10 SCC 404, (2010) 11 SCC 186, 2010 (2) MPLJ 142.

K.C. Ghildiyal, for the petitioner.
V.S. Shroti assisted by Vikram Johri, for the respondent No. 1.
Atulanand Awasthi and *Ankit Saxena*, for the respondent No. 2.

O R D E R

J.K. Maheshwari, J.:- This petition has been filed by petitioner invoking the jurisdiction under Article 226 of the Constitution of India seeking direction to quash the agreement dated 16.11.2017 entered into by respondent No. 1 Society with respondent No. 2 allotting the shop in question in his favour and further direction to respondent No. 1 Society to execute an agreement in favour of petitioner being the third highest bidder and allow petitioner to commission the shop in question. Prayer has also been made to provide the petitioner all information/documents of clearance from the connected Departments.

2. The facts unfolded to file the present petition are, petitioner is a proprietorship Firm engaged in Pharmaceutical business. Respondent No. 1 is a Society registered under the provisions of *Indian Red Cross Society Act, 1920* (hereinafter referred to as "the Act of 1920") having its Branch office at Shivaji Nagar, Bhopal. An advertisement was published inviting tenders for the purpose of allotment of a Medical shop within the premises of the Society at Bhopal. Petitioner and respondent No. 2 both submitted their tenders. Petitioner was the third highest bidder and respondent No. 2 was the fourth highest bidder. The Tender Committee met on 16.10.2017 at 3:00 PM and opened all the tenders in presence of all twenty tenderers or their representatives. The description of four highest bids as given in the return in Paragraph 8 (a) indicates that first highest bidder was Sandeep Singh Parihar who offered to pay an amount of Rs.30,00,000/- per month as rent, second highest bidder was Mangleshwar Singh Parihar, who offered to pay an amount of Rs.21,52,000/- per month as rent, third highest bidder was petitioner, who offered to pay an amount of Rs.16,52,000/- per month as rent and fourth highest bidder was respondent No. 2, who offered to pay an amount of Rs.12,00,000/- per month as rent. The bids received by the Tender Committee were arranged chronologically in terms of the bid amount and it was decided that in case the highest bidder does not come forward to execute the agreement then in *seriatim* the next bidder would be called to execute the agreement. When the first two bidders did not come forward to execute the agreement, petitioner was called on 8.11.2017 to deposit the rent of six months in advance through Bankers cheque or Demand Draft on or before 10.11.2017. On 9.11.2017, petitioner requested for extension of time upto 13.11.2017 to deposit the amount and requested to Society to remain present on 13.11.2017 in the offfice of the Registrar to execute the agreement. The said request of petitioner was not accepted vide communication dated 9.11.2017 and said that if petitioner is willing to execute the agreement, he has to come in the office of Red Cross Society upto 10.11.2017 to deposit the amount and to execute the agreement. Petitioner again requested on 10.11.2017 specifying the fact that on 11.11.2017 and 12.11.2017 there are holidays, therefore, time to deposit the amount may be extended upto 13.11.2017 but no heed was paid to the said request

of petitioner and on 10.11.2017 itself notice was issued to respondent No. 2, who was the fourth highest bidder, to deposit the amount upto 14.11.2017. Respondent No. 2 also requested for extension of time for two days i.e. upto 16.11.2017 to deposit the amount and to execute the agreement, which was allowed, as apparent from document Annexure R-10, however, similar demand of the petitioner was refused without any rhyme or reason discriminating him with respondent No. 2 though he offered to pay a sum of Rs.16,52,000/- per month, which is Rs.4,52,000/- more than the amount offered by respondent No.2 i.e. Rs.12,00,000/-. On deposit of the amount by respondent No. 2, the claim of petitioner is discriminated by the arbitrary act of the authorities, however, he has knocked the door of this Court asking the reliefs as described above.

3. Respondent No. 1 has filed the return raising preliminary objection that Indian Red Cross Society is neither State nor any instrumentality of State or authority within the meaning of Article 12 of the Constitution of India. It is said, it is merely a voluntary organization. Its financial/administrative control is not under the Government and it is merely a society constituted under the Act of 1920, therefore, this petition is liable to be dismissed on the said ground. The reliance has been placed on the judgment of Delhi High Court in *Sarmukh Singh Versus India Red Cross Society* reported in (1985) LIC 1072. In the judgment of this Court in *Dr. Mradula Sharma Versus State Chief Commissioner, M.P. Bharat Scouts and Guides* reported in 1995 (1) MPJR 44 and the judgment of Supreme Court in *K.K. Saksena Versus International Commission on Irrigation and Drainage and others* reported in (2015) 4 SCC 670, maintainability of the writ under Article 226 of the Constitution of India has been considered. It is further contended that there is no concluded contract in between petitioner and respondent No.1, therefore, also the writ petition is not maintainable. In support of this contention reliance has been placed on the judgment of *Chairman-cum-Managing Director, Tamil Nadu, Tea Plantation Corporation Limited, Coonoor and another Versus M/s Srinivasa Timbers, Salem and another* reported in AIR 1999 Madras 111. It is further urged that merely acceptance of the tender of the other person would not come within the scope of judicial review challenging the said contract by filing the writ petition, therefore, it is not maintainable. Reliance has been placed on the judgments of the Supreme Court in *Meerut Development Authority Versus Association of Management Studies and another* reported in (2009) 6 SCC 171 and *Bakshi Security and Personnel Services Private Limited Versus Devkishan Computed Private Limited and others reported in* (2016) 8 SCC 446. In reply to the said contention, petitioner has placed reliance on the Supreme Court judgment in the case of *Surjit Singh Gandhi Versus Indian Red Cross Society and others* reported in (1998) 8 SCC 450 where the order of dismissal of the writ petition passed by the High Court of Punjab and Haryana was set aside on the ground of maintainability and the case was remitted back for fresh consideration on the question of maintainability.

4. On merit it is submitted that the shop in question was required to be commissioned w.e.f. 1.1.2018 to which the tender was invited in the News Paper *"Dainik Bhaskar"*. As per Clause 4 of the tender, the successful bidder was required to execute the agreement minimum for a period of six months depositing the amount of offer in advance and at the time of return of the said amount, the interest would not be leviable and payable. As the Red Cross Society do not come within the purview of definition of State under Article 12 of the Constitution of India, therefore, not amenable to writ jurisdiction. It is said that having perused the tender, the Committee met on 16.10.2017 and decided that the first highest bidder be offered and intimated to appear in person in the office of the Society and execute the agreement. It was further decided that if the first highest bidder fails to appear and execute the agreement, the second highest bidder be offered and intimated to appear in the office of the Society and execute the agreement. If he too does not come forward to execute the agreement then third highest bidder be offered and intimated to appear in the office of the Society and execute the agreement. In this way, the bidders be offered and intimated in *seriatim* to execute the agreement. The said Scheme was placed before Hon'ble the Governor of the State, who is the Ex-Officio President of the Society, who approved it accordingly. Petitioner was the third highest bidder and respondent No. 2 was the fourth highest bidder. It is undisputed that the difference of the amount offered by petitioner and respondent No. 2 is of Rs.4,52,000/- per month. It is merely said that looking to the response given by petitioner, it do not appear that he was willing to execute the agreement and to run the shop, therefore, the contract was given to respondent No.2 on deposit of the amount by him and the agreement was executed with him on 16.11.2017 to run the shop. There is no malafide or arbitrariness, therefore, the writ petition is liable to be dismissed.

5. Learned counsel appearing for the petitioner in counter to the preliminary objection placed reliance on the judgment of *Pradeep Kumar Biswas Versus Indian Institute of Chemical Biology and others* reported in (2002) 5 SCC 111. It is said that the said judgment was considered in the case of *Virendra Kumar Srivastava Versus U.P. Rajya Karmachari Kalyan Nigam and another* reported in 2005 (1) SCC 149. The Apex Court in the case of *Board Of Control For Cricket In India Versus Cricket Association of Bihar and others* reported in (2015) 3 SCC 251 has laid down that the Cricket Association of Bihar may not fall within the purview of the State or other authority but because they are discharging the functions to develop the sports activities in the State and dealing with the Public, therefore, they are amenable to writ jurisdiction of the Court. However, it is urged that even the Red Cross Society do not come within the purview of the definition of the State or other authority or the instrumentality or Agency to discharge the public functions offering the medical facilities to the needy persons and in the said context the shop is being floated by way

of tender to be opened in the premises, therefore, it is amenable to writ jurisdiction. Further placing reliance on the judgments of Supreme Court in *United India Insurance Company Limited Versus Manubhai Dharmasinhbhai Gajera and others* reported in (2008) 10 SCC 404 and *Zonal Manager, Central Bank of India Versus Devi Ispat Limited and others* reported in (2010) 11 SCC 186, it is submitted that the writ is maintainable in the contractual matter in exercise of power under Article 226 of the Constitution of India. It is further urged that respondent No.1 has forfeited the amount of earnest money of Rs.50,000/- of the petitioner, which is permissible only in the case of concluded contract in view of the decision of this Court in *S.R.S. Infra Project Private Limited, Gwalior Versus Gwalior Development Authority, Gwalior and another* reported in 2010 (2) MPLJ 142. It is further said that the employees of Indian Red Cross Society are not amenable to writ jurisdiction of the High Court after establishment of the Central Administrative Tribunal for the central employees. In this regard, notification under Section 14(2) has been issued, however, it cannot be ignored that the Indian Red Cross Society is discharging public functions, therefore, the action taken by the authority, which is arbitrary and discriminatory, cannot be sustained in law that too causing loss to the society. At last it is urged that in the facts of the present case wherein as per the direction of the Court petitioner has deposited the entire amount of rent of six months in advance, however, in case respondent No.2 is permitted to run the shop, it would a financial loss of more than Rs.25 Lakhs to the Indian Red Cross Society. In such a situation when a public body is getting more amount, they cannot be permitted to oppose this petition particularly when they have acted in arbitrary and discriminatory manner with petitioner, therefore, allowing this petition agreement of respondent No. 2 be set aside and petitioner be permitted to execute the agreement and commission the shop in question.

6. Learned counsel for respondent No. 2 has adopted the argument as advanced by the counsel for respondent No. 1 and submitted that they have deposited the entire amount and also entered into the agreement, therefore, at present the writ petition is not maintainable. Petitioner may avail the remedy before the Civil Court filing a suit for specific performance of the contract, therefore, also the writ do not lie and it is liable to be dismissed.

7. After having heard learned counsel for the parties, first of all the preliminary objection raised by the respondents regarding maintainability of the writ petition is taken into consideration. In this regard, judgment of the Supreme Court in the case of *Pradeep Kumar Biswas* (supra) holds the field. In the said case, as per the majority view, certain observations are relevant, which are as under:-

Per majority

1. The Constitution has to an extent defined the word "State" in Article 12 itself as including "the Government...under the control of the Government of India". That an 'inclusive" definition is generally not exhaustive is a statement of the obvious and as far as Article 12 is concerned, has been so held by the Supreme Court. The words "State" and "authority" used in Article 12 therefore remain among "the great generalities of the Constitution" the content of which has been and continues to be supplied by courts from time to time.

2. The decisions on this pint (sic : point) may be categorized broadly into those which express a narrow and those which express a more liberal view. In the ultimate analysis the difference may perhaps be attributable to different stages in the history of the development of the law by judicial decisions on the subject.

3. In this regard the statement of the law in *Rajasthan SEB v. Mohan Lal, AIR 1967 SC 1857* is affirmed, namely: "The State, as defined in Article 12, is thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people."

4. The significance of Article 12 lies in the fact that it occurs in Part III of the Constitution which deals with fundamental rights. The various articles in Part III have placed responsibilities and obligations on the "State" vis-a-vis the individual to ensure constitutional protection of the individual's right against the State, including the right to equality under Article 14 and equality of opportunity in matter of public employment under Article 16 and most importantly, the right to enforce all or any of these fundamental rights against the "State" as defined in Article 12 either under Article 32 or under Article 226.

5. The range and scope of Article 14 and consequently Article 16 have been widened by a process of judicial interpretation so that the right to equality now not only means the right not to be discriminated against but also protection against any arbitrary or irrational act of the State.

> 6. Keeping pace with this broad approach to the concept of equality under Article 14 and 16, courts have whenever possible, sought to curb an arbitrary exercise of power against individuals by "centres of power", and thre (sic : there) was correspondingly an expansion in the judicial definition of "State" in Article 12.
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> 7. Initially the definition of State was treated as exhaustive and confined to the authorities or those which could be read *ejusdem generis* with the authorities mentioned in the definition of Article 12 itself. The next stage was reached when the definition of "State" came to be understood with reference to the remedies available against it. Thus, a statutory corporation, with regulations framed by such corporation pursuant to statutory powers was considered a State, and the public duty was limited to those which were created by statute.
>
> 8. The picture that emerges from the case-law is that the tests formulated in *Ajay Hasia case, (1981) 1 SCC 722* for determining as to when a corporation can be said to be an instrumentality or agency of the Government are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be- whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

8. Referring the same, it was found that the Indian Institute of Chemical Biology do not fall within the purview of definition of the State but looking to the observations made in Paragraphs 10 and 11, it is apparent that the Courts have whenever possible, sought to curb an arbitrary exercise of power against individuals by "centres of power", and there was correspondingly an expansion in the judicial definition of "State" in Article 12. The Court further observed that initially the definition of State was treated as exhaustive and confined to the authorities or those which could be read *ejusdem generis* with the authorities mentioned in the definition of Article 12 itself. The next

stage was reached when the definition of "State" came to be understood with reference to the remedies available against it. Thus, a statutory corporation, with regulations framed by such corporation pursuant to statutory powers was considered a State, and the public duty was limited to those which were created by statute. In case it is found that the body is financially, functionally and administratively dominated by or under the control of the Government and such control must be particular to the body in question and must be pervasive, then the body is a State within Article 12 of the Constitution of India. The Court by minority view has also clarified that by the judicial interpretation the terms "instrumentality" or "agency" have been brought within the purview of Article 12 of the Constitution of India, therefore, it cannot be ignored. The Apex Court in the case of *K.K. Saksena* (supra) has reiterated the same principle but observed that even respondent International Commission on Irrigation and Drainage do not come within the purview of Article 12 but the Court may enforce any right conferred under Part III of the Constitution. The Apex Court in the case of *Board of Control For Cricket in India* (supra) has observed that the Board Of Control For Cricket In India is discharging the important public functions by holding monopoly over the game of Cricket in India but not being the State within the meaning of Article 12. On the question of amenability of the judicial review, the Court observed that there being *prima facie* material indicating sporting frauds like match fixing and betting arising out of/attributable to conflicts of interest between duties of administrators and their commercial interest in Indian Premier League (for short IPL) cricket matches conducted by the Board Of Control For Cricket In India, in such a case the Board Of Control For Cricket In India, who is having complete monopoly over the game of Cricket in India, the Central and the State Government being fully aware of the public functions and being supportive of said activities, the Government can by law take over the functions of Board Of Control For Cricket In India. Even if the duties and functions which the Board Of Control For Cricket In India discharges are administrative and not quasi-judicial, principles of judicial review will find their application with the same rigour as may be applicable to quasi-judicial functions. The Court further observed that Article 12 of the Constitution of India gives an inclusive definition to the expression "State" but the question whether or not Board Of Control For Cricket In India is "State" within the meaning of Article 12 of the Constitution may not make any material difference to the case at hand in view of the admitted position that respondent Board Of Control For Cricket In India does discharge several important functions, which make it amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution of India.

9. Learned counsel appearing on behalf of the respondents, in addition to the aforesaid has relied upon the judgment of Delhi High Court in the case of *Sarmukh Singh* (supra) wherein it was held that the Red Cross Society do not fall within the definition of "State" or other authorities or instrumentality of the State, which is relied

by this Court in the case of *Dr. Mradula Sharma* (supra). I do agree with the same proposition but in the light of the judgment of *Board of Control For Cricket In India* (supra) the amenability of the writ jurisdiction cannot be denied under the scope of judicial review in exercise of power under Article 226 of the Constitution of India by the High Court merely on this ground also and it is required to be tested with the action of the authority with a touch-stone whether it is arbitrary/discriminatory or not. The judgment of this Court in *Dr. (Smt.) Mradula Sharma* (supra) merely decides the issue that respondent M.P. Bharat Scouts and Guides would fall within the definition of State or not. It do not decide the amenability of writ jurisdiction under Article 226 of the Constitution of India as apparent by the judgment of the Apex Court in the case of *Board of Control For Cricket in India* (supra).

10. In the present case, petitioner has challenged the action of respondents on the ground that it is arbitrary and discriminatory because respondent No.2 had offered lesser amount than petitioner causing loss to the society of Rs.4,52,000/- per month even then the time was extended to them for depositing the amount but when the same request was made by petitioner it was refused arbitrarily without any rhyme or reason. However, the discriminatory act of the Red Cross Society is amenable to writ jurisdiction even in the contract matter when the Society registered under the Central statute shall be put in a disadvantageous situation in case the amenability of the writ jurisdiction has been denied. In view of the aforesaid, referring the judgment of the *Board Of Control For Cricket In India* (supra), it can safely be concluded that the Indian Red Cross Society may not come within the purview of the definition of "State" or other authorities under Article 12 of the Constitution of India but looking to the challenge made in this petition, their action, if discriminatory cause loss to the society, which functions for the needy persons, makes them amenable to writ jurisdiction in view of the language engrafted under Article 226 of the Constitution of India that said writ can be issued against the "State", "authority" or "person", therefore, it is held that in the facts, the writ petition is maintainable.

11. In the undisputed facts of the present case, it is apparent that petitioner and respondent No. 2 both were participants to the tender process invited by respondent No. 1 as per Annexure P-1. Petitioner offered a sum of Rs.16,52,000/- per month towards the rent of the shop while respondent No. 2 offered a sum of Rs.12,00,000/- per month and they were shown to be the third and fourth highest bidders respectively. The Tender Committee took a decision to call the highest bidders to execute the agreement and if he does not come forward then the second highest bidder would be called and thereafter in *seriatim* next highest bidders would be called. It is to be noted here that the Policy was approved by Hon'ble the Governor of the State, who is the ex-officio President of the Society. Accordingly, from the date of decision i.e. 16.10.2017, to call for the first highest bidder and the second highest bidder, the

Society waited for about two weeks but they did not come forward to execute the agreement. Thereafter a communication was sent to petitioner on 8.11.2017, who was the third highest bidder, to deposit the amount of rent of six months in advance by 10.11.2017. On 9.11.2017, petitioner requested for extension of time till 13.11.2017 but the said request of the petitioner was not accepted on 9.11.2017 itself reducing the time to deposit the amount by 1:00 PM of 10.11.2017. Petitioner again requested that because on 11.11.2017 and 12.11.2017, there were holidays, therefore, he will deposit the entire amount of (sic : on) 13.11.2017 and he is ready to execute the agreement but again ignoring the said request of petitioner, the offer was given on 10.11.2017 itself to respondent No. 2, who was the fourth highest bidder, to deposit the amount by 14.11.2017. On making request by respondent No. 2 for extension of time to deposit the amount of rent in advance, the extension of two days was granted upto 16.11.2017. Thus, it is apparent that in case of petitioner, the time was granted only for one and half days to deposit the amount of rent and when the request was made by him for extension of time, it was refused and in case of respondent No. 2 initially four days time was granted and on making the request by him, two days further time was granted. No explanation is available in the return filed by respondent No. 1 why the said discrimination has been made except to say that looking to the tenor of the letter written by petitioner, they presumed that petitioner is not interested in depositing the amount of rent in advance. In this regard, it is to be noted here that after filing the writ petition before this Court on 1.12.2017 direction to maintain the status quo was issued. On 21.12.2017 when the matter came up for hearing, the Court found that if the offer of respondent No. 2 is accepted, it would cause a loss to the Indian Red Cross Society, however, directed to petitioner to deposit the entire amount through Bankers Cheque or Demand Draft on or before 27.12.2017 and produce receipt thereof in the Court on 28.12.2017. The order has been complied by petitioner and receipt of deposit of six months' rent in advance has been produced. The said fact has also not been disputed by the Indian Red Cross Society. In view of the aforesaid, it cannot be held that petitioner was not willing to deposit the amount as per the bid given by him. Clause 4 of the Tender document referred in the return by respondent No. 1 Society reads thus:-

> ''सफल निविदाकार/अनुबंधकर्ता को अनुबंध के निष्पादन के समय न्यूनतम छः माह के किराये के बराबर राशि अग्रिम सुरक्षा राशि के रूप में जमा करनी होगी। वापसी के समय जमा राशि पर कोई ब्याज देय नहीं होगा।''

12. On perusal of the aforesaid it is clear that at the time of execution of the agreement, the successful bidder must deposit the rent equal to six months in advance by way of security deposit which shall be returned to him after completion of the time of the contract without any interest, therefore, the term of tender do not specify that

what should be the time to deposit the amount on issuance of notice by the Red Cross Society. However, the time as given in the notice was extendable upto the date on execution of the agreement if the bidder is ready to deposit the amount, therefore, it was a discretion vested with the Society to be exercised by them. As discussed above, for the said discretion, respondent No. 1 has spent about two weeks' time giving notice to first two highest bidders but remained unsuccessful. In case of petitioner, the time was given only for one and a half day while in the case of respondent No. 2, time was given for total period of six days, which apparently shows the discrimination with petitioner in the matter of extension of time to deposit the amount which was not specified in the tender document.

13. In the said sequel of facts, it is relevant to say that in case the time to deposit the amount would have been extended upto 13.11.2017 to petitioner, it would be beneficial to respondent No.1 because they would have been receiving the amount of Rs.4,52,000/- per month more than the amount offered by respondent No. 2, however, by not extending the time of two days to petitioner, respondent No. 1 have put themselves in a disadvantageous position and such an act on their part can only be termed as arbitrary.

14. In view of the foregoing discussion, in my considered opinion, respondent No. 1 has acted arbitrarily in a discriminatory manner by not granting extension of time to petitioner to deposit the amount and has executed the agreement in favour of respondent No. 2, therefore, the agreement executed in favour of respondent No. 2 is hereby quashed with a direction that the amount deposited by respondent No. 2 be refunded back and respondent No. 1 is directed to execute the agreement in favour of petitioner within a week from the date of pronouncement of the order and allow petitioner to commission the shop fixing a date within a week's time.

15. At this stage the question raised regarding maintainability of the petition citing some judgments by the counsel appearing for both the parties in a contractual matter, is not required to be referred in detail except to observe that in view of the discussion made hereinabove, it is apparent that action of respondent No. 1 Society is arbitrary and discriminatory and such an action of the Society is always amenable to writ jurisdiction of the High Court.

16. In view of the foregoing discussion, it is held that though the Indian Red Cross Society do not fall within the definition of the State under Article 12 of the Constitution of India but it is amenable to writ jurisdiction of High Court in exercise of power under Article 226 of the Constitution of India because such powers are wider enough and scope of judicial review is still open in case they have exercised the power arbitrarily and in discriminatory manner.

17. Consequently, the irresistible conclusion which can be arrived at in this petition is, this petition succeeds and is hereby allowed. The agreement executed by respondent No. 1 Society in favour of respondent No. 2 is hereby quashed with a direction that the amount deposited by respondent No. 2 be refunded back immediately and in view of the amount deposited by petitioner, respondent No. 1 is directed to execute the agreement in favour of petitioner within a week from the date of pronouncement of the order and allow petitioner to commission the medical shop fixing a date within a week's time. In the facts and circumstances, parties to bear their own costs.

Petition allowed.

I.L.R. [2018] M.P. 906
WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 3377/1997 (Jabalpur) decided on 22 February, 2018

R.K. REKHI …Petitioner

Vs.

M.P.E.B., RAMPUR, JABALPUR …Respondent

***A. Service Law – Disciplinary Proceeding – Dismissal from Service – Second Show Cause Notice – Disproportionate Punishment* – Concluding the disciplinary proceedings, punishment of dismissal from service was inflicted on petitioner – Review petition was also dismissed by Board – Challenge to – Held – This Court cannot act as a *de novo* enquiry officer and cannot re-appreciate the evidence and reach to a different conclusion – If findings recorded are not contrary to evidence, no interference can be made – Further held – After the 42nd amendment in Constitution of India, issuance of second show cause notice proposing punishment is no more a legal requirement – From the material available, it can be held that petitioner was guilty for issuing direction in negligent manner and without an justification but it cannot be said that he is guilty of misappropriation – This Court may itself in exceptional and rare cases impose appropriate punishment on delinquent employee – Since petitioner has rendered 34 years of unblemished service and was due for retirement within a week from the date of dismissal and since misappropriation was not proved, such harsh punishment was not required – Punishment of Dismissal from service modified to Compulsory retirement – Petition allowed to such extent.**

(Paras 15, 20, 21, 23, 26 & 27)

क. सेवा विधि – अनुशासनिक कार्यवाही – सेवा से पदच्युति – द्वितीय कारण बताओ नोटिस – अननुपातिक शास्ति – अनुशासनिक कार्यवाहियों को समाप्त करते हुए याची पर सेवा से पदच्युति की शास्ति अधिरोपित की गई – पुनर्विलोकन याचिका भी बोर्ड द्वारा खारिज की गई – को चुनौती – अभिनिर्धारित – यह न्यायालय नये सिरे से जांचकर्ता अधिकारी के रूप में कार्य नहीं कर सकता एवं साक्ष्य का पुनः मूल्यांकन कर भिन्न निष्कर्ष पर नहीं पहुंच सकता – यदि अभिलिखित निष्कर्ष साक्ष्य के विपरीत नहीं है, कोई हस्तक्षेप नहीं किया जा सकता – आगे अभिनिर्धारित – भारत के संविधान में 42वें संशोधन पश्चात्, शास्ति प्रस्तावित करते हुए द्वितीय कारण बताओ नोटिस अब एक विधिक अपेक्षा नहीं रही है – उपलब्ध सामग्री से यह अभिनिर्धारित किया जा सकता है कि याची, उपेक्षापूर्ण ढंग से एवं बिना किसी न्यायोचित्य के निदेश जारी करने का दोषी था परंतु यह नहीं कहा जा सकता कि वह दुर्विनियोग का दोषी है – यह न्यायालय स्वयं, आपवादिक एवं विरल प्रकरणों में अपचारी कर्मचारी पर समुचित शास्ति अधिरोपित कर सकता है – चूंकि याची ने 34 वर्षों की बेदाग सेवा दी है और पदच्युति की तिथि से एक सप्ताह के भीतर सेवानिवृत्ति निश्चित थी और चूंकि दुर्विनियोग साबित नहीं हुआ था, उक्त कठोर शास्ति अपेक्षित नहीं थी – सेवा से पदच्युति की शास्ति को आवश्यक सेवा निवृत्ति में परिवर्तित किया गया – इस सीमा तक याचिका मंजूर।

***B. Service Law – Disciplinary Proceeding – Judicial Review – Scope of Interference* – Held – Although the scope of interference is limited on a disciplinary proceedings but if decision making process runs contrary to principle of natural justice and such violation causes prejudice to the delinquent employee and if findings of enquiry officer are perverse and not based on material on record, interference can be made – If punishment is shockingly disproportionate, the Court can interfere with the quantum of punishment.**

(Para 14)

ख. सेवा विधि – अनुशासनिक कार्यवाही – न्यायिक पुनर्विलोकन – हस्तक्षेप का विस्तार – अभिनिर्धारित – यद्यपि, अनुशासनिक कार्यवाहियों पर हस्तक्षेप की व्याप्ति सीमित है किंतु यदि निर्णय करने की प्रक्रिया नैसर्गिक न्याय के सिद्धांत के विपरीत जाती है और उक्त उल्लंघन अपचारी कर्मचारी पर प्रतिकूल प्रभाव कारित करता है और यदि जांचकर्ता अधिकारी के निष्कर्ष विपर्यस्त है एवं अभिलेख की सामग्री पर आधारित नहीं है, हस्तक्षेप किया जा सकता है – यदि शास्ति उद्वेगकारी रूप से अननुपातिक है, न्यायालय, शास्ति की मात्रा के साथ हस्तक्षेप कर सकता है।

***C. Service Law – Disciplinary Authority – Appointment & Competency of Inquiry Officer* – Held – Petitioner has not raised any such objection during the course of inquiry – Inquiry Officer was a retired Board Officer and therefore question of equivalence of status with petitioner does**

not arise – Since petitioner submitted to the jurisdiction of Inquiry Officer and participated in the inquiry without any demur, inquiry cannot be declared illegal on the ground of appointment, competency and continuance of Inquiry Officer, especially when no prejudice is shown by the petitioner against it.

(Para 18)

ग. सेवा विधि – अनुशासनिक प्राधिकारी – जांचकर्ता अधिकारी की नियुक्ति एवं सक्षमता – अभिनिर्धारित – जांच चलने के दौरान याची ने ऐसा कोई आक्षेप नहीं उठाया है – जांचकर्ता अधिकारी, एक सेवानिवृत्त बोर्ड अधिकारी था और इसलिए याची के साथ प्रास्थिति की समतुल्यता का प्रश्न उत्पन्न नहीं होता – चूंकि याची ने जांचकर्ता अधिकारी की अधिकारिता मान ली थी एवं बिना किसी आपत्ति के जांच में भाग लिया था, जांच को, जांचकर्ता अधिकारी की नियुक्ति, सक्षमता एवं बने रहने के आधार पर अवैध घोषित नहीं किया जा सकता, विशिष्ट रूप से जब याची द्वारा उसके विरूद्ध कोई प्रतिकूल प्रभाव नहीं दर्शाया गया है।

***D. Service Law – Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 18 – Common Inquiry* – Held – Petitioner has neither raised any such objection/pleaded in the present petition nor before the Board that since many employees were involved in disciplinary proceedings arising out of same incident, a common inquiry should have been conducted – Petitioner has miserably failed to show any prejudice if a joint inquiry was not conducted.**

(Para 18)

घ. सेवा विधि – सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 18 – *सामान्य जांच* – अभिनिर्धारित – याची ने न तो वर्तमान याचिका में न ही बोर्ड के समक्ष ऐसा कोई आक्षेप उठाया/अभिवाक् किया है कि चूंकि समान घटना से उत्पन्न अनुशासनिक कार्यवाहियों में कई कर्मचारी शामिल थे, एक सामान्य जांच संचालित की जानी चाहिए थी – याची दयनीय रूप से किसी प्रतिकूल प्रभाव को दर्शाने में विफल रहा है यदि संयुक्त जांच संचालित नहीं की गई थी।

Cases referred :

(2011) 8 SCC 536, 2002 (4) MPHT 544, (2010) 5 SCC 775, (2009) 15 SCC 620, (2009) 8 SCC 310, (2006) 7 SCC 212, (2005) 3 SCC 254, (2006) 2 SCC 255, 1982 (2) SCC 273, 1984 (Supp) SCC 87, 2010 (13) SCC 494, AIR 1964 SC 364, 2003 (1) MPLJ 387, 2012 (1) MPLJ 102, 2009 (2) SCC 570, 2006 (12) SCC 321, 2011 (6) SCC 376, AIR 1996 SC 484, AIR 1998 SC 948, AIR 2000 SC 1151.

Rajendra Tiwari with *T.K. Khadka,* for the petitioner.
Anoop Nair, for the respondent.

O R D E R

Sajoy Paul, J.:- In this petition filed under Article 226 of the Constitution of India, the petitioner, a former Executive Director of the respondent-Company has called in question the legality, validity and propriety of the disciplinary proceedings, the order dated 25.09.1996, whereby the punishment of dismissal from service was inflicted on him. The order dated 04.07.1997 (Annexure-P/41) is also called in question whereby the petitioner's review petition was dismissed by the Board.

2. Draped in brevity, the relevant facts are that the petitioner was served with a charge-sheet dated 03.04.1996 (Annexure-P/20). The petitioner filed his detailed reply dated 17.04.1996 (Annexure-P/21) and denied the allegations in toto. The department was not satisfied with the reply of the petitioner and therefore one Shri M.J. Mansaramani, retired Chief Engineer was appointed as inquiry officer. The said inquiry officer conducted the inquiry and submitted its inquiry report. The said inquiry report was served on the petitioner with a show cause notice dated 18.09.1996 (Annexure-P/30). In turn, the petitioner filed his reply to the said notice. The disciplinary authority/ Board by impugned order dated 25.09.1996 imposed the punishment of dismissal from service on the petitioner. Petitioner's review petition was also rejected by the Board.

3. Mr. Rajendra Tiwari, learned senior counsel submits that the decision making process of the disciplinary proceedings was not in consonance with the principles of natural justice and M.P. Civil Services (CCA) Rule 1966. The said rules were duly adopted by the respondent-Board. To elaborate, learned senior counsel contended that Shri Mansaramani was holding an inferior post qua the petitioner and therefore as per the executive instruction dated 19.05.1997 (Annexure-P/32) his appointment as Inquiry Officer was bad in law. The petitioner in the body of petition pleaded that the inquiry officer did not conduct the inquiry in a fair manner. During the course of inquiry, the said officer expressed his view that he is going to hold the petitioner as guilty.

4. The presenting officer presented his brief on 16.09.1996. The inquiry officer should have given atleast 15 days' time, as per settled procedure to the petitioner to submit his defence brief. However, the inquiry officer did not permit the petitioner to prepare his defence brief in an effective manner and forced him to submit the brief within two days. Petitioner left with no option submitted his defence brief on 17.09.1996. This shows the undue haste on the part of the inquiry officer in conducting and completing the inquiry. Thereafter, the show cause notice dated 19.09.1996 was issued by giving only three days' time to the petitioner to file his reply which was filed within aforesaid time under compulsion. The inquiry officer's report appears to have been prepared before receiving the defence brief of the petitioner because in the complete typed document at one column the date of submission of defence brief is mentioned in handwriting. This shows that the exercise of preparing the inquiry report

was an empty formality. The inquiry officer has already made up his mind, drawn conclusion and has done empty formality such as mentioning of date on which defence brief was received by him.

5. Learned senior counsel contended that as per the executive instruction dated 19.05.1971, the disciplinary authority should have issued the second show cause notice to the petitioner after obtaining the reply to the inquiry officer's report. He as per Clause 9 (ii) of said instruction was obliged to show cause to the petitioner relating to the proposed penalty. In absence of any such show cause, the punishment order is liable to be axed.

6. The next contention of the petitioner is that the show-cause notice was not issued or directed to be issued by the Board, which is admittedly Disciplinary Authority of the petitioner. The notice was issued by the Joint Secretary, who was not competent to issue the notice. For this reason also, the decision making process adopted by the respondents is vitiated. It is urged that the petitioner, in good faith, and in order to protect the life of subordinate employees desired that the conveyor belt may be utilized. The other officers misutilized the said desire of the petitioner for their personal gain, which is evident from Annexure P/8. It is argued that Annexure P/8 shows that the petitioner desired to utilize one servo valve and two blocks whereas in the requisition (Annexure P/9) the Executive Engineer and one Shri Samuel entered another entry namely "conveyor belt" (scrap). The petitioner is neither signatory of Annexure P/8 nor Annexure P/9 and in absence of any material to show that such an exercise on the part of Shri Samuel and other subordinates employees was on the directions of the petitioner, the petitioner could not have been held to be guilty.

7. The petitioner contended that he has rendered 34 years of clean and unblemished service. During this period, no adverse ACR was ever communicated to him. He was never subjected to any disciplinary proceedings. He was due for retirement on 30-09-1996 and five days before his retirement, he was dismissed from service. It is contended that the findings of Enquiry Officer are perverse in nature and there was no material to establish that the petitioner has done anything with oblique motive. The findings of Enquiry Officer are based on surmises and conjectures. The Enquiry Officer has erred in holding that the petitioner was guilty of "misappropriation". Learned Senior Counsel submits that in view of (2011) 8 SCC 536 *(Surendra Prasad Shukla vs. State of Jharkhand & Ors.)* and a Division Bench judgment of this Court reported in 2002 (4) MPHT 544 *(State of M.P. vs. U.K. Khare),* the punishment is extremely disproportionate and unwarranted. There was no justification in inflicting punishment of dismissal to an employee, who was due for retirement within a week. The last contention of the petitioner is that apart from the petitioner, 13 other subordinate employees were subjected to disciplinary proceeding for similar set of allegations and arising out of same incident. By placing reliance on Para 7 of the reply, it is argued

that the main culprit Shri Rajesh Verma has been exonerated. Lesser punishments are given to certain other employees. Certain employees were merely "warned". Since disciplinary proceeding against the petitioner and all such employees were founded upon the same incident, as mandated in Rule 18 of the CCA Rules, the respondents should have conducted joint enquiry. Since joint enquiry has not been conducted, the impugned disciplinary proceedings are vitiated and are liable to be quashed.

8. *Per contra,* Shri Anoop Nair, learned counsel for the employer supported the disciplinary proceedings, the punishment order and order passed in review. By placing reliance on (2010) 5 SCC 775 *(Administrator, Union Territory of Dadra & Nagar Haveli vs. Gulabhia M. LAD),* (2009) 15 SCC 620 *(Chairman-cum-Managing Director, Coal India Ltd. & Anr. vs. Mukul Kumar Choudhari & Ors.),* (2009) 8 SCC 310 *(State of UP vs. Manmohan Nath Sinha) and* (2006) 7 SCC 212 *(State Bank of India & Ors. vs. Ramesh Dinkar Punde),* Shri Nair contended that the scope of judicial review against a disciplinary proceeding is limited. This Court is not obliged to sit as an Appellate Authority to re appreciate or reweigh the evidence. The only scope of judicial review is relating to decision making process and not on the decision itself. Since principles of natural justice were duly followed, no interference is warranted by this Court. In view of findings of Enquiry Officer wherein all the charges were found to be proved, it is clear that the petitioner got released scrapped conveyor belt and such conduct of the petitioner amounts to willful misappropriation. The allegations, which are found to be proved are very serious and, therefore, it cannot be said that punishment is harsh or disproportionate.

9. In support of the aforesaid contention, Shri Nair, learned counsel relied on (2005) 3 SCC 254 *(Divisional Controller KSRTC (NWKRTC) vs. A.T. Mane) and* (2006) 2 SCC 255 *(T.N.C.S. Corporation Ltd. & Ors. vs. K. Meerabai)*. He submits that this is not a case where a fly is killed by using a sledge hammer. On the contrary, the petitioner was the senior most/superior most officer amongst other delinquent employees who were subjected to disciplinary proceedings, therefore, no fault can be found on the aspect of quantum of punishment also.

10. Shri Nair submitted that petitioner has never raised any objection nor filed any application for change of enquiry officer and he submitted to the jurisdiction of the enquiry officer and participated in the entire disciplinary proceedings. On 13.9.1996, the enquiry officer directed the petitioner to file his written brief positively by 18.9.1996 and petitioner expressed his agreement to do so which is evident from a bare perusal of enquiry proceedings dated 13.9.1996. The petitioner in paragraph 5.10, 5.11 has categorically admitted that he sent a letter to Executive Director, Jabalpur to issue release order for 500 mts discarded conveyor belt to be taken from Korba (West).

11. In view of these categorical pleadings, the petitioner's stand cannot be accepted that he was totally unaware about the issuance of conveyor belt by his subordinate

officers. Shri Nair further contended that petitioner's written brief was duly considered by the enquiry officer. The petitioner has nowhere pleaded that show cause notice was not issued under the direction of disciplinary authority. Similarly, there is no pleading in entire petition regarding violation of Rule 18 of M.P. Civil Services (CCA) Rules. In absence of any pleadings in review petition or in the body of writ petition, such oral arguments cannot be accepted. The stand of the employer is that punishment order is passed by the competent authority and therefore, no interference is warranted.

12. No other point is pressed by counsel for the parties.

13. I have bestowed my anxious consideration on rival contentions and perused the record.

14. The settled legal position is that scope of interference on a disciplinary proceeding is limited. If decision making process runs contrary to the principles of natural justice and such violation causes serious prejudice to the delinquent employee, interference can be made. If findings of enquiry officer are perverse and not based on material on record, interference can be made. If punishment is shockingly disproportionately in rare cases, the court can interfere with the quantum of punishment. In the light of these principles, it is to be seen whether these principles are violated in the present disciplinary proceedings.

15. The petitioner by placing reliance on certain documents contended that the petitioner cannot be held guilty. I am afraid that this Court cannot act as a *de novo* enquiry officer in the present matter. This Court cannot re-appreciate the evidence and reach to a different conclusion. Interference can be made only when it is established that the findings of enquiry officer are perverse or contrary to the record. Thus, I am not inclined to take up the annexed documents to the WP and examine their effect on the findings of enquiry officer. Unless attack is made to the findings and it is shown that findings so recorded are contrary to the evidence, no interference can be made.

16. Apart from this, the pleadings of petition in paragraphs 5.10, 5.11 make it clear that as per petitioner's own saying, he issued a letter dated 5.7.1994 and expressed the need of discarded conveyor belt. Pausing here for a moment, it will be apposite to refer the charges alleged against the petitioner. The article of charge reads as under:

> "Shri R.K. Rekhi, Executive Director (Gen.) while working at Sanjay Gandhi Thermal Power Station, Birsingpur got released 500 M. each Scrap Conveyor Belt from Korba West and Sarni respectively through two different authorities i.e. E.D. (O&M; Gen.) and C.E. (S&P:Gen) without genuine requirement, as also there was no requisition from any user division/circle of the project and thus got issued 1935 M of scrap conveyor belt from stores at Korba West and Sarni

with the help of other subordinates and willfully misappropriated the same. The belts were never got checked to have been received in Area Stores at Birsingpur. Due to aforesaid act of Shri Rekhi, Board has been put to lost of about Rs.25.00 Lakhs.

He has thus violated provisions of rule 3(i) of M.P. Civil Services (conduct) rule 1965 and rendered himself liable for severe disciplinary action."

(Emphasis Supplied)

17. A plain reading of article of charge shows that charge against the petitioner is in two parts. The first part is relating to release of 500 mtrs. scrap conveyor belt from Korba (West) and Sarni to different authority without actual requirement and without there being any requisition from user division/circle of the project. The second part is about alleged 'willful appropriation' on the part of the petitioner. So far the first part is concerned, the petitioner is unable to show that he was totally unconcerned with the release of 500 mtrs. scrap conveyor belt. In absence of establishing any perversity in relation to first part, no interference on the findings of Inquiry Officer can be made. So far the other part is concerned, I deem it appropriate to deal with this part on the later part of this order.

18. The petitioner has raised eyebrows against the appointment, competency and continuance of the Inquiry Officer. The record of inquiry shows that petitioner has not raised any such objection during the course of inquiry. The Inquiry Officer was admittedly a retired Board Officer and; therefore, question of equivalence of status with petitioner does not arise. In any case, since petitioner submitted to the jurisdiction of Inquiry Officer and participated in the inquiry without any demur, I am not inclined to declare the inquiry as illegal on this count. More so when no prejudice is shown by the petitioner against that inquiry officer. Pertinently, petitioner has not raised any objection regarding competency or bias of Inquiry Officer in his statutory review which was considered and decided by the Board. The another argument of petitioner is regarding applicability of Rule 18 of M.P. Civil Services (CCA) Rules, 1966. It is argued that since many employees were involved in disciplinary proceedings arising out of same incident, a common inquiry should have been conducted. Interestingly, petitioner has not raised this ground also in the entire body of petition. No such ground is taken in the review petition also. Rule 18 of MP CS (CCA) Rules, 1966 is an enabling provision which enables the disciplinary authority to conduct a joint inquiry when more than one employees or offices are involved in the disciplinary proceeding. The petitioner has miserably failed to show any prejudice if a joint inquiry was not conducted. In absence of filing the charge-sheets of all the employees, it cannot be safely concluded that allegations against all the delinquent employees were exactly

same and were arising out of same incident. For these cumulative reasons, this argument relating to Rule 18 of the CCA Rules must fail.

19. Petitioner next contended that show cause notice and inquiry report was issued to him by an incompetent authority, namely Joint Secretary whereas Board being the disciplinary authority alone could have issued the said show cause notice. A plain reading of show cause notice shows that the Joint Secretary is signatory to this document. The Board in the punishment order Annexure P/1 recorded that show cause notice was given to the petitioner. In the entire body of petition and review, the petitioner has not taken any ground regarding issuance of show cause notice by incompetent authority. In the considered opinion of this court, it was a mixed question of fact and law whether show cause notice was issued by the competent authority. If this contention/pleading would have been raised, the other side could have met that point by filing reply and producing the relevant record. In absence of pleading in this regard, this objection cannot be entertained. Apart from this, the petitioner has not shown any prejudice if show cause notice was pregnant with any such infirmity.

20. So far question of issuance of second show cause notice is concerned, suffice it to say that the Constitution of India stood amended and requirement of issuance of second show cause notice proposing punishment was done away with. After the 42nd Constitutional Amendment, the Supreme Court in 1982 (2) SCC 273 *(K. Rajendran vs. State of Tamil Nadu),* 1984 (Supp) SCC 87 (*Associated Cement Companies Ltd. vs. T.C. Srivastava*) and 2010 (13) SCC 494 (*Punjab National Bank vs. K.K. Verma*) held that under the Constitution or under the General Law, there is no legal requirement to issue second show cause notice proposing punishment to the delinquent employee. Admittedly, the Board has adopted M.P. Civil Services (CCA) Rules, 1966. In the teeth of these statutory rules, the administrative instructions must pail into insignificance. Thus, I am unable to hold that for not issuing second show cause notice proposing punishment, the departmental enquiry or impugned punishment order is vitiated.

21. The petitioner has taken pains to contend that he had rendered 34 years of unblemished service and was due for retirement on 30.9.1996. Just before five days, he was dismissed from service which was totally unwarranted and uncalled for. This point requires serious consideration. As noticed in the earlier part of this order, the second part of the charge against the petitioner was regarding 'misappropriation'. The word 'misappropriation' has a definite conotation. It shows the moral conduct of an employee and falls within the ambit of 'moral turpitude'. The 'misappropriation' is the act of an employee in which he has illegally pocketed some amount or gained benefit for which he was not legally entitled. In the entire report of departmental enquiry, the Inquiry Officer has not given any iota of finding about the existence of evidence of misappropriation on the part of the petitioner. In other words, the Inquiry

Officer has not given any finding which shows that the petitioner was guilty of misappropriation and embezzlement or indulged in corruption. Even assuming that first part of charge is proved against the petitioner, at best, it can be held that petitioner was guilty of issuing certain directions in a negligent manner and without there being any justification. In absence of proving that such direction was issued with any oblique motive and; in turn, the petitioner has earned some benefit therefrom, it cannot be said that petitioner is guilty of misappropriation.

22. This is trite law that even in the departmental enquiry, employee cannot be held guilty on the basis of surmises and conjectures. The Supreme Court way back in AIR 1964 SC 364 (*Union of India vs. H.C. Goel*) which was followed by this Court in 2003 (1) MPLJ 387 (*Union of India and others vs. V.K. Girdonia and another*) and 2012 (1) MPLJ 102 (*Suresh Chand Upadhyay vs. Union of India*) held that mere suspicion is not sufficient to crucify a delinquent employee. Suspicion, however strong it may be, cannot take the place of proof. The same view is taken in 2009 (2) SCC 570 (*Roop Singh Negi vs. Punjab National Bank and others*).

23. The Apex Court in 2006 (12) SCC 321 (*Retish Chakravarti vs. State of MP*) opined that a grave charge of quasi-criminal nature was required to be proved beyond any shadow of doubt and to the hilt and it cannot be proved on mere probabilities. Similar view is taken in 2011 (6) SCC 376 (*Commissioner of Police, Delhi and others vs. Jai Bhagwan*). In this case, it was poignantly held that it is a case of no evidence. The needle of suspicion may be against the delinquent employee, since suspicion alone is not sufficient, the punishment was interfered with. Thus, I find substance in the argument of learned senior counsel that second part of the charge which relates to 'misappropriation' is not proved and finding of Inquiry Officer is perverse to that extent. In this backdrop, it is to be seen whether punishment imposed is disproportionate. Admittedly, petitioner has rendered 34 years of unblemished service and was due for retirement within a week from the date of dismissal. Since allegations of misappropriation are not proved, in my view, there was no need to dismiss the petitioner from service. The punishment of dismissal is ordinarily inflicted so that the employee does not continue in service for long and is not able to commit similar misconduct again.

24. A Division Bench of this Court in *State of M.P. vs. U.K. Khare,* 2002 (4) MPHT 544 considered the judgment of Supreme Court reported in AIR 1996 SC 484 (*B.C. Chaturvedi vs. Union of India*), AIR 1998 SC 948 (*Colour Chem Ltd. Vs. A.M. Alaspurkar*) and AIR 2000 SC 1151 (*U.P. State Road Transport Corporation vs. Mahesh Kumar Mishra*) and opined that punishment of dismissal particularly when there was nothing against the respondent in his previous service record is extremely harsh punishment. In clear terms, it was held that dismissal of Government servant at the fag end of his career is extremely harsh punishment when his earlier service record was unblemished.

25. In *B.C. Chaturvedi* (supra), the Apex Court 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. If 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."*

This judgment was considered by this Court in *U.K. Khare* (supra). This court opined as under:

> *"10. Another Three Judge Bench of the Supreme Court in Colour Chem Ltd. v. A.M. Alaspurkar, AIR 1998 SC 948, has also laid down the same proposition and held that if the punishment imposed is shockingly disproportionate to the charges held proved against the employee, it will be open to the Court to interfere. These two decisions were further followed by the Supreme Court in U.P. State Road Transport Corporation v. Mahesh Ku. Mishra, AIR 2000 SC 1151, in which the Supreme Court justified the interference by the High Court with the quantum of punishment inflicted by the disciplinary authority. In another recent decision reported in Union of India v. K.S. Kittu and Ors., (2000) 1 SCC 65, the Supreme Court held that the Tribunal while exercising powers of judicial review may examine/consider contrary findings of enquiry officer; finding based on no evidence; and also instances where there are no clear findings. In the said case the Supreme Court held that the Tribunal rightly allowed the application of the employee and rightly set aside the report of the enquiry officer holding*

the employee guilty of permitting felling of high value species of cardamon trees, undervaluing the trees and causing loss to the State Government, more so, because there was no felling during the period of employee's posting and thus no loss of revenue was caused to the Government during that period.

11. This will show that not only this Court but also the Tribunal can interfere with the punishment imposed upon a delinquent employee, if, that definitely shocks the conscience of the Court. The law, therefore, is not as contended by the learned Counsel for the petitioner that the Tribunal can, in no circumstances interfere with the quantum of punishment imposed upon the delinquent employee after disciplinary proceedings."

26. In the light of aforesaid legal position, it is clear that in order to shorten the litigation, this court may itself in exceptional and rare cases impose appropriate punishment on the delinquent employee. As analysed above, at best, petitioners can be said to be responsible for issuing the directions for releasing the conveyance belt but by no stretch of imagination he can be said to be guilty of misappropriation, etc. . In absence of establishing any oblique motive or any other misconduct relating to corruption, punishment of dismissal before seven days of his retirement is totally uncalled for. Thus, I deem it proper to substitute the said punishment of dismissal.

27. Resultantly, the punishment order dated 25.9.1996 is set aside and in lieu thereof, it is directed that petitioner shall be treated to be compulsory retirement with effect from 25.9.1996. All benefits arising out of this substituted punishment shall be given to the petitioner in accordance with law within 90 days from the date of communication of this order. Petition is **allowed** to the extent indicated above.

Petition allowed.

I.L.R. [2018] M.P. 917
WRIT PETITION

Before Mr. Justice S.A. Dharmadhikari

W.P. No. 4651/2014 (Gwalior) decided on 18 April, 2018

RAM SHARAN BAGHEL …Petitioner
Vs.
STATE OF M.P. …Respondent

***Constitution – Article 226 – Habeas Corpus – Investigation by CBI – Jurisdiction of Court* – Held – Whereabout of petitioner's minor daughter aged about 15 years is not known for about four years and particularly when**

allegation of kidnapping has been leveled – Progress reports submitted by police from time to time reveals that proper steps have not been taken to find out the corpus – Police authorities have utterly failed to carry out investigation and search the corpus inspite of possible lead available with them – Since the police as well as SIT constituted for this purpose failed to produce the corpus even after lapse of four years, investigation and inquiry is required to be done by any independent agency which is not influenced in any manner whatsoever either by SIT or the local police authorities – Further held – It is well settled in law that in a given case, if the material indicates *prima facie* irregularity in the matter of investigation, the Supreme Court and High Court have power and jurisdiction to order for investigation by CBI or by any independent agency – Matter handed over to CBI – Petition partly allowed to this extent.

(Paras 10, 14, 15 & 16)

संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – केन्द्रीय अन्वेषण ब्यूरो (CBI) द्वारा अन्वेषण – न्यायालय की अधिकारिता – अभिनिर्धारित – याची की करीब 15 वर्ष आयु की अप्राप्तवय पुत्री कहां है यह करीब चार वर्षों से पता नहीं और विशिष्ट रूप से जब व्यपहरण का आरोप लगाया गया है – पुलिस द्वारा समय–समय पर प्रस्तुत किये गये प्रगति प्रतिवेदन प्रकट करते हैं कि व्यक्ति को खोजने के लिए उचित कदम नहीं उठाये गये – पुलिस प्राधिकारीगण, उनके पास उपलब्ध संभावित सुराग के बावजूद अन्वेषण करने एवं व्यक्ति को ढूंढ़ने में विफल रहे – चूंकि चार वर्ष व्यपगत होने के पश्चात् भी, पुलिस के साथ ही इस हेतु गठित एस.आई.टी., व्यक्ति को प्रस्तुत करने में विफल रहे, अन्वेषण एवं जांच किसी स्वतंत्र एजेंसी द्वारा की जाना अपेक्षित है जो किसी भी ढंग से किसी प्रकार न तो एस.आई.टी. और न ही स्थानीय पुलिस प्राधिकारीगण द्वारा प्रभावित हो – आगे अभिनिर्धारित – यह विधि में सुस्थापित है कि किसी प्रकरण में यदि सामग्री, अन्वेषण के मामले में प्रथम दृष्ट्या अनियमितता दर्शाती है, उच्चतम न्यायालय तथा उच्च न्यायालय को सी.बी.आई. अथवा किसी स्वतंत्र एजेंसी द्वारा अन्वेषण हेतु आदेश देने की शक्ति एवं अधिकारिता है – मामला सी.बी.आई. को सौंपा गया – याचिका इस सीमा तक अंशतः मंजूर।

Cases referred :

2008 (1) MPHT 233, 2012 (II) MPWN 29, (1996) 7 SCC 20, (2016) 4 SCC 160, (2010) 3 SCC 571, AIR 2002 SC 2225, 1994 Supp. (1) SCC 145.

A.S. Bhadoria, for the petitioner.
Yogesh Singhal, G.A. for the respondents/State No. 1 to 3.
None, for the respondents No. 4 to 6.
Vivek Khedkar, Assistant Solicitor General, for the respondent No. 7.

O R D E R

S.A. Dharmadhikari, J.:- With the consent of parties, this petition is disposed of finally.

2. The petitioner who is father of his minor daughter namely Preeti aged about 15 years has filed this writ petition seeking issuance of writ of habeas corpus for producing the daughter who has been kidnapped on 26/07/2014 when she had gone to the school, by respondent No. 4.

3. The grievance of the petitioner is that immediately after receiving the information with regard to kidnapping of his daughter Ms. Preeti on 26/07/2014 alleging therein that the respondent No. 4 had forcefully taken her along with him and has kept her in his illegal confinement. The respondents No. 5 & 6 are also having hand in glove with the respondent No. 4 and are equally involved in the offence. The wife of the petitioner has lodged complaint at police station Morar, District Gwalior after two days of the incident i.e. on 28/07/2014 and FIR was registered bearing crime No. 554/2014 against the respondent No. 4 for the offence punishable under section 363 of IPC. The respondent No. 5 is friend of respondent No. 4 whereas, the respondent No. 6 is the landlord of the house in which the respondent No. 4 lived. Soon after the incident, respondent No. 5 contacted the petitioner's wife and requested her not to lodge a complaint before the police and gave assurance that child shall be returned back within two days. After FIR was lodged against respondent No. 4, respondent No. 5 threatened the petitioner as well as his family members with dire consequences, if report is not taken back immediately. The petitioner informed the police with regard to the connivance of the respondents 5 & 6 with respondent No. 4 and on 02/08/2014 requested them to take immediate action, but no heed was paid to the request and no concrete efforts were made by the police. Considerable time had been lapsed after daughter of the petitioner was kidnapped on 26/07/2014, but the police is not able to trace the corpus or give any clue with regard to her whereabout.

4. Learned counsel for the petitioner has emphasized that in the facts and circumstances of the case, the police authorities have failed miserably and are unable to trace the corpus even after lapse of four years. The entire proceedings go to show that there are various infirmities in the investigation and the status report filed from time to time does not disclose that concrete steps were made by the police authorities to trace the corpus. The investigation and inquiry are not being conducted in the proper manner. In these circumstances, *prima facie* case is made out for investigation and inquiry to be done by Central Bureau of Investigation. In support of his contentions, learned counsel for the petitioner has placed reliance on the judgments in the case of *Kedarnath Sharma vs. Union of India and Ors.* reported in 2008 (1) MPHT 233, *Azija Begum vs. State of Maharashtra* reported in 2012 (II) MPWN 29, *Paramjit*

Kaur (Mrs.) vs. State of Punjab and Ors. reported in (1996) 7 SCC 20, *Dharam Pal vs. State of Haryana & Ors.* reported in (2016) 4 SCC 160.

5. Learned counsel for the petitioner has also pointed out that first progress report was filed on 20/08/2014 and the last was filed on 10/08/2017 (total eight progress report have been filed) but the police authorities are unable to trace out the corpus. He further contended that fundamental rights enshrined in part 3 of Constitution are inherent and cannot be extinguished by any constitutional or statutory provisions. Article 21 of the Constitution in its broad perspective seeks to protect the person's life and personal liberty except according to the procedure established by law. The said Article in its broad application not only take steps for enforcement of rights of the citizen, but also to protect the rights of the victim. The State has a duty to enforce and protect the rights of the citizen and to provide for fair and impartial investigation of a person accused of cognizable offence which may include its own officer. In certain situation, even a witness to the crime may seek for and shall be granted protection by the State.

6. The respondents have filed in all eight progress report from time to time and have submitted that full and effective efforts have been made from time to time to trace the corpus. The respondents have denied the fact of irregularity or illegality in the matter of investigation. It is submitted that investigation is being conducted properly and there is no illegality as alleged by the petitioner.

7. Learned State counsel has argued that no case is made out for transfer of the case to the Central Bureau of Investigation.

8. The respondent No. 7/CBI has also filed a short reply and it is stated that petitioner has sought direction to CBI to liberate the corpus from unlawful confinement and investigate the matter of alleged kidnapping of 15 years old daughter of the petitioner. It is further submitted that Central Bureau of Investigation is a specialized investigation agency of Government of India, dealing with the cases of corruption by public servants of Central Government Department and its Public Sector undertakings, etc. and cases having inter state or international ramifications and the present case is related to the alleged kidnapping and, therefore, there is no need to refer the matter to CBI and the matter may best be dealt with by the local police. Learned counsel for the CBI in support of his contentions has relied upon the judgment of the Apex Court delivered in the case of *State of West Bengal and Ors. vs. Committee of Protection of Democratic Rights, West Bengal and Ors.* reported in (2010) 3 SCC 571, wherein, the Apex Court has held as under :-

> "This extra ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national or international ramifications or where such an order may be

> necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."

9. Heard the learned counsel for the parties.

10. This court initially issued notices to the respondents on 05/08/2014 with direction to the police authority to file status report with regard to missing minor daughter. Thereafter, various progress reports were filed from time to time. On going through the progress report, it reveals that proper steps have not been taken to find out the corpus. This Court vide order dated 28/06/2016 did not find the compliance report dated 27/10/2015 upto the mark since the same did not disclose exact steps taken by the police authorities for recovery of the girl or information regarding her whereabout, therefore, Superintendent of Police was directed to personally supervise the matter and submit exact status report in respect of case in hand. In the light of order dated 28/06/2016 status report was filed which also did not reveal about concrete steps being taken to trace the corpus. The Special Investigation Team (SIT) was constituted vide order dated 05/07/2016, which also failed to trace the corpus. Thereafter, on various occasions progress report was filed, but to no avail. The S.P. Dist. Gwalior was directed to supervise the investigation carried out by the SIT, but again the police has failed to produce the corpus. Thereafter, the Inspector General of Police, Gwalior Range, Gwalior was directed to constitute a Special Investigating Team, which would be headed by an officer not below the rank of Deputy Superintendent of Police and would make all possible efforts to trace the corpus with further direction to Inspector General of Police, Gwalior Range, Gwalior to personally supervise the functioning of the Special Investigating Team. Since the police as well as SIT constituted for this purpose failed to produce the corpus even after lapse of four years, the petitioner has confined his prayer seeking direction to the CBI to take over the investigation in its hand and investigate the matter.

11. On going through the record of the case as well as various status report filed from time to time, this Court is of the considered view that sufficient *prima facie* material is available on record to indicate that inquiry conducted by the State police or by SIT is not convincing enough to hold that they have conducted proper and impartial inquiry into the matter. At this stage, it would be proper to take note of certain observations made by the Supreme Court in the case of *Shakila Abdul Gafar Khan (Smt.) v. Vasant Raghunath Dhoble and Anr.* Speaking for the Bench and writing the judgment, Hon'ble Mr. Justice Arijit Pasayat in the said case started the judgment with a quotation by Abraham Lincoln. The quotation reads as under:

> "If you once forfeit the confidence of your fellow citizens you can never regain their respect and esteem."

12. After reproducing the aforesaid quotation, the Supreme Court has expressed serious concern with regard to custodial violence, torture and abuse of police power which are not peculiar to this country, but is widespread. In Paragraph 3 of the judgment, it is so observed:

> "If it is assuming alarming proportions, nowadays, all around, it is merely on account of the devilish devices adopted by those at the helm of affairs who proclaim from roof tops to be the defenders of democracy and protectors of people's rights and yet do not hesitate to condescend behind the screen to let loose their men in uniform to settle personal scores, feigning ignorance of what happens and pretending to be peace-loving puritans and saviours of citizen's rights."
>
> Thereafter taking note of Article 21 of the Constitution, a sacred and cherished right, i.e., life or personal liberty the human dignity approach is highlighted. In Paragraph 35 after observing the principles laid down by the English Court in the case of Jennison v. Baker All ER P. 106 d, it has been observed by the Supreme Court that the Courts have to ensure that accused persons are punished and if deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the deficiencies, deal with the same appropriately within the framework of law. It has been held by the Court that justice has no favourite, except the truth.

13. Keeping in view the principle laid down by the Supreme Court in the case of *Shakila Abdul Gafar Khan (Smt.)* (supra), and analyzing the manner in which the investigation has progressed in the peculiar facts and circumstances of the present case, this Court is of the considered view that apprehension of the petitioner that justice is not being done to him is not free from doubt, that being so, interest of justice require that part of relief claimed by the petitioner pertaining to transfer of the investigation to the CBI should be allowed.

14. It is well settled in law that in a given case, if the material indicate *prima facie* irregularity in the matter of investigation, the Supreme Court and the High Court have power to order for investigation by CBI or by any independent agency. These principles are enumerated in the judgment of the Supreme Court in the case of *Secretary, Minor Irrigation & Rural Engineering Services, U.P. and Ors. vs. Sahngoo Ram Arya*

and Anr. reported in AIR 2002 SC 2225 and *Mohammed Anis vs. Union of India and Ors.* reported in 1994 Supp. (1) SCC 145. After considering the principles laid down in all these judgments, there cannot be any iota of doubt that in a given case jurisdiction in a writ petition under Article 226 of the Constitution can be exercised by this Court for ordering investigation by CBI or an independent agency.

15. In the present case, *prima facie* the inquiry and investigation being conducted by the police as well as SIT is found to be not in conformity with the requirements of conducting a proper investigation into the matter. Interest of justice requires that the investigation and inquiry should be done by an independent agency. Looking to the fact that whereabout of the minor daughter is not known for about four years and particularly when the allegation of kidnapping has been levelled, the police authorities have utterly failed to carry out investigation and search the corpus inspite of possible lead available with them. Therefore, investigation and inquiry is required to be done by any independent agency which is not influenced in any manner whatsoever either by SIT or the Local Police Authorities.

16. Accordingly, the petition is allowed. The respondent No. 7, Director, Central Bureau of Investigation (CBI) is directed to take over the investigation of the matter and on the basis of the material available on record, proceed to inquire into the matter and bring it to its logical conclusion in accordance with law.

17. The respondent No. 2 is directed to hand over the case diary/other case paper to the respondent No.7 after completing all due formalities. The respondent No.7 is directed to nominate an officer or a team of officers under his control to conduct investigation and proceed to investigate into the matter in accordance with law. It is expected that the State Government and the Local Police Authorities shall co-operate with respondent No. 7.

18. Before parting, it would be appropriate to observe that this Court has not given any conclusive finding with regard to any of the allegations made by the petitioner or refuted by the respondents. The findings recorded and the observations made in this order are only *prima facie* assessment of the material to find out existence of a prima facie case for transfer of the investigation to the CBI. The observations made are only to that extent and shall not be construed to mean that the findings are conclusive finding on any fact or material indicated therein. Needless to emphasis that it is for the Investigating Authority, CBI to investigate and inquire into the matter in accordance with law and come to an independent conclusion uninfluenced by any observation made in this order.

19. Accordingly, this petition is allowed to the extent indicated hereinabove and disposed of without any order so as to cost.

Petition allowed.

I.L.R. [2018] M.P. 924
MISCELLANEOUS PETITION
Before Mr. Justice Vijay Kumar Shukla
M.P. No. 775/2017 (Jabalpur) decided on 23 January, 2018

SANJAY SAHGAL …Petitioner
Vs.
SHRADHA KASHIKAR & ors. …Respondents

Evidence Act (1 of 1872), Section 65 & 65(b) – Secondary Evidence – **Suit for specific performance of contract and permanent injunction filed by petitioner/plaintiff – He filed an application u/S 65 of the Act of 1872 to admit the photocopy of agreement as 'Secondary Evidence' – Application dismissed – Challenge to – Held – Plaintiff in his pleadings has not stated that original copy of the agreement has been destroyed or lost – Suit was filed in 2010 and aforesaid application was filed in 2017 after about 7 years and during this period there is no whisper about the possession of original copy of agreement - In such circumstances, permission to adduce evidence through secondary evidence is not available – Further held – Section 65(b) of the Act of 1872 requires that if the existence and conditions or contents of the original is admitted then only the secondary evidence can be adduced – In the present case, possession of the agreement with respondent is not admitted by the respondent – No interference is warranted – Petition dismissed.**

(Paras 9, 10 & 11)

साक्ष्य अधिनियम (1872 का 1), धारा 65 व 65(बी) – द्वितीयक साक्ष्य – याची/वादी द्वारा संविदा के विनिर्दिष्ट पालन एवं स्थाई व्यादेश हेतु वाद प्रस्तुत किया – उसने करार की छायाप्रति को ''द्वितीयक साक्ष्य'' के रूप में ग्रहण किये जाने हेतु, 1872 के अधिनियम की धारा 65 के अंतर्गत एक आवेदन प्रस्तुत किया – आवेदन खारिज किया गया – को चुनौती – अभिनिर्धारित – वादी ने अपने अभिवचनों में यह कथन नहीं किया है कि करार की मूल प्रति नष्ट हो गई है अथवा गुम हो गई है – वाद, 2010 में प्रस्तुत किया गया था और उपरोक्त आवेदन 2017 में प्रस्तुत किया गया था, करीब 7 वर्ष पश्चात् तथा इस दौरान करार की मूल प्रति के कब्जे के बारे में कोई फुसफुसाहट नहीं – इन परिस्थितियों में, द्वितीयक साक्ष्य के जरिए साक्ष्य पेश करने की अनुमति उपलब्ध नहीं है – आगे अभिनिर्धारित – 1872 के अधिनियम की धारा 65(बी) की अपेक्षा है कि यदि मूल का अस्तित्व एवं शर्तें या अंतर्वस्तु स्वीकार की गई है केवल तब द्वितीयक साक्ष्य पेश किया जा सकता है – वर्तमान प्रकरण में, प्रत्यर्थी के पास करार के कब्जे को प्रत्यर्थी द्वारा स्वीकार नहीं किया गया है – किसी हस्तक्षेप की आवश्यकता नहीं – याचिका खारिज।

Cases referred :

(2011) 4 SCC 240, 2011 (3) MPLJ 575, AIR 2010 SC 965, (2010) 9 SCC 385, (2010) 8 SCC 329, 2004 (2) MPHT 14.

Saurabh Sunder, for the petitioner.
P.S. Chaturvedi, for the caveator/respondent No. 1.

O R D E R

V.K. Shukla, J :- The instant petition filed under Article 227 of the Constitution of India takes an exception to the order dated 24.10.2017 passed by 11th Additional District & Sessions Judge, Bhopal in Civil Suit No. 409-A/2010, whereby the application under Section 65 of the Indian Evidence Act, 1872 (hereinafter referred to as "Act") filed by the petitioner has been rejected.

2. Brief facts of the case succinctly, are that the petitioner entered into an agreement to sale with the respondent no.1 on 30.08.2007 for purchase of total area of land of two khasras ad-measuring 4.68 acres. In pursuance to the same, it is pleaded that the petitioner had deposited a sum of Rs.20,00,000/- with the respondent no.1 through cash and cheque. The petitioner filed a Civil Suit on 13.09.2010 for Declaration, Specific Performance of Contract and Permanent Injunction against the respondents. During the trial, he filed an application under Section 65 of the Act on 16.08.2017 to admit the photo copy of the agreement as 'secondary evidence'. By the impugned order, the said application has been rejected, on the ground that the petitioner has not mentioned in the plaint filed for Specific Performance of Contract about the possession of the document in question i.e. agreement dated 30.08.2007 and it was also not mentioned that the document was lost.

3. Learned counsel for the petitioner submitted that the learned trial Court has failed to appreciate the affidavit dated 13.09.2017 filed by the respondent no.1 wherein, very categorically it has been mentioned that at the time of execution of the agreement dated 30.08.2007, the respondent no.1 was present alongwith her father and in front of her, the said agreement was signed between the respondent no.1 and the present petitioner. He further submits that, thus the execution of the agreement has been admitted, therefore, the petitioner can also prove the conditions of the agreement by adducing 'secondary evidence'.

4. Learned counsel for caveator/respondent no.1 supported the impugned order and submitted that in the entire plaint which is a suit for Specific Performance in pursuant to the agreement dated 30.08.2007, there is no pleading about the possession of the agreement in the plaint that either the agreement is lost or destroyed.

5. To appreciate the rival submission of learned counsel for the parties it is apposite to refer the provisions of Section 65 of the Indian Evidence Act, which is reproduced herein:

"65 Cases in which secondary evidence relating to ocuments may be given.— *Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—*

(a) When the original is shown or appears to be in the possession or power— of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of Section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence;

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

6. During the course of the arguments, learned counsel for the petitioner submitted that his case would fall under sub-clause (b) of Section 65 of the Act. It is contended that the respondents have admitted the existence and the conditions of the original.

7. Learned counsel for the caveator/respondent no.1 relied upon the judgment passed by the Apex Court in the case of *H. Siddiqui Vs A. Ramalingum,* (2011)4 SCC 240 and the judgment passed by this Court in the case of *Rashid Khan Vs State of M.P. & Ors.* 2011(3) MPLJ 575. He further submitted that there is no illegality in the order impugned as the petitioner could not establish the requirements of Section 65 of the Act to adduce the secondary evidence.

8. The relevant part of the affidavit of the respondent relied by the petitioner reads as under:

''मैं श्रीमति श्रद्धा काषीकर, आयु लगभग 44 वर्ष पत्नी श्री मनीष काषीकर निवासी एच. 14 विद्या नगर होषंगाबाद रोड, भोपाल शपथपूर्वक निम्नलिखित कथन करती हूँ कि :–

1. यह कि मेरे या मेरे पिता के अधिपत्य में अनुबंध दिनांक 30.08. 2007, जो मेरे एवं वादी संजय सहगल के मध्य निष्पादित हुआ था, की मूल प्रति विद्यमान नहीं है न ही ऐसी प्रति कभी भी वादी संजय सहगल ने प्रदान की है।

2. यह कि, जिस समय हमारा अनुबंध निष्पादित हुआ था उस समय मेरे पिता श्री विजय वाते भी वहां मौजूद थे। अनुबंध के निष्पादन के बाद संजय सहगल नें उसकी मूल प्रति अपने पास सहेज कर रख ली थी एवं हमें छायाप्रति प्रदान की थी। जिसके द्वारा की गयी अन्य छायाप्रतियां आज मेरे पास मौजूद है लेकिन मूल दस्तावेज कभी भी मेरे या मेरे पिता के अधिपत्य में नहीं रहा।''श

9. From reading the aforesaid affidavit it cannot be construed that the contents of the affidavit has been admitted by the respondents and the possession of the agreement with the respondents has also not been admitted.

10. The suit was filed in the year, 2010. The application for permission to adduce secondary evidence of agreement was filed in the month of August, 2017 after about 7 years. There is no whisper about the possession of the original copy of the agreement. The plaintiff has not stated that the original copy of the agreement has been destroyed or lost. Since from the pleadings it has not been established that the primary evidence is not available as required under Section 64 of the Evidence Act, then the permission

to adduce evidence through secondary evidence is not available. In this context I may profitably placed reliance on the decision of the supreme Court in the case of *Tukaram S. Dighole Vs. Manikrao Shivaji Kokate,* AIR 2010 SC 965. Para-17 of the aforesaid judgment is quoted as under:

> *"17. Chapter V of the Evidence Act deals with documentary evidence. Section 61 thereof lays down that the contents of documents may be proved either by primary or by secondary evidence. As per Section 62 of the Evidence Act, primary evidence means the document itself produced for the inspection of the Court. Section 63 categories five kinds of secondary evidence. Section 64 lays down that documents must be proved by primary evidence except in the cases mentioned in the following Sections. To put the matter briefly, the general rule is that secondary evidence is not admissible until the non-production of primary evidence is satisfactorily proved. However, clause (e) of Section 65, which enumerates the cases in which secondary evidence relating to documents may be given, carves out an exception to the extent that when the original document is a "public document" secondary evidence is admissible even though the original document is still in existence and available. Section 74 of the Evidence Act defines what are known as "public documents". As per Section 75 of the Evidence Act, all documents other than those stated in Section 74 are private documents. There is no dispute that certified copy of a document issued by the Election Commission would be a public document.*

11. Other contention of the petitioner that the existence of the agreement has been admitted by the respondents and his case would fall under Sub-clause (b) of Section 65 of the Act has no merit which requires that if the existence and conditions or contents of the original is admitted then the secondary evidence can be adduced, thus both requirements existence and conditions or contents should be admitted by the other side, then only 'secondary evidence' of that document can be permitted.

12. In the case of *H. Siddiqui* (Supra) it is held that, admitting signatures in photo-copy of the documents does not amounts to admitting the contents of the documents.

13. In the conspection of the above discussion and taking into consideration the law as discussed herein above, I do not find any illegality warranting any interference with the order impugned under Article 227 of the Constitution of India.

14. Even otherwise, it is settled law that jurisdiction under Article 227 of the Constitution of India cannot be exercised to correct all errors of subordinate Courts within its limitation. It can be exercised where the order is passed in grave dereliction of duty and flagrant abuse of the fundamental principle of law and justice [See. *Jai Singh and another Vs. MCD, (2010)9 SCC 385* and *Shalini Shetty Vs.Rajendra S. Patil,* (2010)8SCC 329].

15. Further, a Co-ordinate Bench of this Court in the case of *Ashutosh Dubey and another Vs. Tilak Grih Nirman Sahakari Samiti Maryadit, Bhopal and another,* 2004(2) MPHT 14 held that supervisory jurisdiction under Article 227 of the Constitution of India is exercised for keeping the subordinate Courts within the bounds of their jurisdiction. when a subordinate Court has assumed a jurisdiction which it does not have or the jurisdiction through available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step into exercise its supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied - (i) the error is manifest and apparent on the fact of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law; and (ii) a grave injustice or gross failure of justice has occasioned thereby.

16. In view of the aforesaid enunciation of law, the instant petition is devoid of merit and is hereby **dismissed.** The order impugned in the present writ petition passed by the Court below is upheld.

Petition dismissed.

I.L.R. [2018] M.P. 929 (DB)
APPELLATE CRIMINAL

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

Cr.A. No. 511/2003 (Jabalpur) decided on 31 January, 2018

BHURE SINGH & anr. …Appellants
Vs.
STATE OF M.P. …Respondent

A. Penal Code (45 of 1860), Section 300 (Exception 1), 302/34, 304 Part I – Conviction – Life Imprisonment – Appreciation of Evidence – Motive – **Appellant grazing his ox in the field of deceased and on this issue, sudden quarrel started between appellant and deceased – Appellants inflicted injuries to deceased with lathi and axe, as a result of which deceased died – Held – There was a sudden provocation and in that event appellant inflicted injuries by lathi, hence there was no motive to kill the deceased – Exception 1 to Section 300 IPC postulates that if there is grave and sudden provocation, offence would not be a murder – Offence committed by appellant no.1 would**

fall u/S 304-Part I of IPC – Further held – Deposition of eye witness that appellant no.2 *(wife of appellant no.1)* inflicted injuries by axe is not reliable because the evidence of doctor who performed postmortem shows that there was no incised wounds on the body of deceased – Name of appellant no.2 is also not mentioned in FIR – She cannot be convicted for the said offence – Conviction of Appellant no.1 is altered to one u/S 304- Part I IPC and conviction of Appellant no. 2 is set aside – Appeal of appellant no.2 is allowed.

(Paras 19, 20, 26, 27)

क. दण्ड संहिता (1860 का 45), धारा 300 (अपवाद 1), 302/34, 304 भाग–I – दोषसिद्धि – आजीवन कारावास – साक्ष्य का मूल्यांकन – हेतु – अपीलार्थी मृतक के खेत में अपना बैल चरा रहा था तथा इस विवाद्यक पर, अपीलार्थी और मृतक के बीच अचानक झगड़ा शुरू हुआ – अपीलार्थी ने लाठी एवं कुल्हाड़ी से मृतक को चोटें पहुँचाई, जिसके परिणामस्वरूप मृतक की मृत्यु हुई – अभिनिर्धारित – अचानक प्रकोपन हुआ था तथा उस दशा में अपीलार्थी ने लाठी से चोटें पहुँचाई, अतः मृतक की हत्या करने का कोई हेतु नहीं था – भारतीय दण्ड संहिता की धारा 300 का अपवाद 1 यह परिकल्पित करता है कि यदि गंभीर तथा अचानक प्रकोपन है तो अपराध हत्या नहीं होगी – अपीलार्थी क्र. 1 द्वारा कारित किया गया अपराध भारतीय दण्ड संहिता की धारा 304–भाग I के अंतर्गत आयेगा – आगे अभिनिर्धारित – चक्षुदर्शी साक्षी के कथन कि अपीलार्थी क्र. 2 *(अपीलार्थी क्र.1 की पत्नी)* ने कुल्हाड़ी से चोटें पहुंचाई, विश्वसनीय नहीं है क्योंकि चिकित्सक जिसने शव परीक्षण किया था, का साक्ष्य यह दर्शाता है कि मृतक के शरीर पर कोई छिन्न घाव नहीं थे – अपीलार्थी क्र.2 का नाम भी प्रथम सूचना प्रतिवेदन में उल्लिखित नहीं है – उसे कथित अपराध के लिए दोषसिद्ध नहीं किया जा सकता – अपीलार्थी क्र.1 की दोषसिद्धि भारतीय दण्ड संहिता की धारा 304–भाग I के अंतर्गत एक में परिवर्तित की गई एवं अपीलार्थी क्र.2 की दोषसिद्धि अपास्त की गई – अपीलार्थी क्र.2 की अपील मंजूर।

***B. Penal Code (45 of 1860), Section 34* – Held – Principle of law is that applicability of Section 34 IPC is a question of fact and is to be asserted from the evidence on record – Common intention postulates existence of prearranged plan and that must mean a prior meeting of minds – In the present case, incident took place all of a sudden on the issue of grazing of ox – Name of appellant no.2 has not been mentioned in FIR and in such circumstances, she could not be convicted for commission of offence of murder with aid of section 34 IPC.**

(Para 23 & 24)

ख. दण्ड संहिता (1860 का 45), धारा 34 – अभिनिर्धारित – विधि का सिद्धांत यह है कि भारतीय दण्ड संहिता की धारा 34 की प्रयोज्यता तथ्य का एक प्रश्न है तथा अभिलेख पर उपस्थित साक्ष्य से प्राख्यान किया जाना चाहिए – सामान्य आशय पूर्वव्यवस्थित योजना का अस्तित्व परिकल्पित करता है तथा इसका अर्थ मस्तिष्कों का पूर्व मेल होना

चाहिए – वर्तमान प्रकरण में, घटना बैल चराने के विवाद्यक पर अचानक हुई थी – अपीलार्थी क्र.2 का नाम प्रथम सूचना प्रतिवेदन में उल्लिखित नहीं किया गया है एवं ऐसी परिस्थितियों में, उसे भारतीय दण्ड संहिता की धारा 34 की सहायता से हत्या के अपराध कारित करने के लिए दोषसिद्ध नहीं किया जा सकता।

***C. Criminal Trial – Ocular & Medical Evidence* – Held – Apex Court has held that if there is contradiction between medical and ocular evidence, where medical evidence goes so far that it completely rules out all possibilities of ocular evidence being true, ocular evidence may be disbelieved.**

(Para 20)

ग. आपराधिक विचारण – चाक्षुष एवं चिकित्सीय साक्ष्य – अभिनिर्धारित – सर्वोच्च न्यायालय ने यह अभिनिर्धारित किया है कि यदि चिकित्सीय एवं चाक्षुष साक्ष्य के मध्य विरोधाभास है, जहां चिकित्सीय साक्ष्य इतना अधिक है कि चक्षुदर्शी साक्ष्य के सत्य होने की सारी संभावना को नकार देता है, चाक्षुष साक्ष्य पर अविश्वास किया जा सकता है।

Cases referred:

(2010) 10 SCC 259, (2017) 11 SCC 129, AIR 1963 SC 174, (2015) 1 SCC 286.

None, for the appellant.
Ajay Tamrakar, amicus curiae.
Ajay Shukla, G.A. for the respondent-State.

J U D G M E N T

The Judgment of the court was delivered by:
S.K. Gangele, J.:- Appeal is of the year 2003. Since no one appeared on behalf of the appellant, hence, **Shri Ajay Tamrakar, Advocate,** who is Panel Lawyer of Legal Service committee, is appointed as **amicus-curie** (sic: curiae) to assist the Court. With the assistance of **Shri Ajay Tamrakar, Advocate** appeal is heard finally.

2. Appellants have filed this appeal against the judgment dated 27/01/2003 passed in Sessions Trial No. 334/2000. Both the appellants were prosecuted for commission of offence punishable under Section 302/34 of IPC. The trial court held appellants guilty for commission of offence punishable under Sections 302/34 of IPC and awarded sentence for life and fine amount of Rs. 2,000/- each.

3. Prosecution story in brief is that on 16/08/2000 appellant Bhrue Singh had been grazing his ox in the field of deceased Santu. Deceased prevented the appellant from aforesaid act, thereafter quarrel had taken place between appellant and the deceased. Appellant had beaten the deceased by lathi. Wife of the appellant inflicted injuries by axe and his son Kamchhilal inflicted injuries to Santu by stone. Deceased Santu received injuries on his body. Deceased was died at around 5 O'clock in the evening

thereafter, Ramprasad reached on the spot, he lodged report Ex. P/1 at Police Chouki-Dungariya Police Station Gunnardev. The police conducted investigation and filed charge-sheet. Appellants abjured their guilt during trial and pleaded innocence.

4. Learned counsel for the appellants has submitted that the incident had taken place all of a sudden. There is no evidence that the appellants have caused injuries to the deceased. Trial court has not appreciated the evidence properly. It is further submitted by learned counsel for the appellants that even if the evidence on record be accepted as it is then the alleged offence committed by the appellant Bhure Singh would fall under Section 304 Part I of IPC.

5. Contrary to this, learned Government Advocate for the State has submitted that both the appellants caused injuries to the deceased. There is sufficient evidence to convict the appellants. Trial court has rightly held appellants guilty and awarded proper sentence.

6. **PW/1 Ramprasad** is son of the deceased. He deposed that at around 11 O'clock my sister Somti told me that appellants and his son had been beating the deceased thereafter, I went to the field and noticed that my father was lying in injured condition at the field. He told me that appellant No. 1 Bhure Singh was grazing his ox in our field. Deceased prevented the appellant, thereafter appellant Bhure Singh inflicted injuries at the back side of head of the deceased. Appellant- Chaturo Bai inflicted injuries by axe and Kamchhilal inflicted injuries to the deceased by stone, thereafter, I had taken the deceased to the house of appellant Bhure Singh and went to the police station. I lodged report Ex. P/1 and also I had given axe from the place of the incident.

7. **PW/2 Somtibai** is daughter of the deceased and eye witness. She deposed that my father was in the field. I was grazing my ox at some height. Appellant Bhure Singh is my mausiya (husband of sister of my mother) was grazing his ox in my field. My father prevented him not to do the same and thereafter, he had beaten my father with a stick fitted with sam. Chaturo Bai inflicted injuries by axe to my father. Kamchhilal son of accused inflicted injuries by stone. I went to near my father. Appellant Bhure Singh threatened me, thereafter, I went to my house and told incident to my brother Ramprasad. He came at the field and he had taken the deceased at the house of appellant Bhure Singh. Deceased was died at around 6 O'clock in the evening. In her cross-examination she admitted the fact that at around 8-9 O'clock my father abused appellant thereafter Chaturobai went to the police chowki to lodged report and she returned back. There are omission in the statement of this witness that Bhure Singh was grazing ox in the field and Chaturobai had beaten the deceased by axe and Kamchhilal by stone. She admitted the fact that body of the deceased was kept in Chhapri of appellant-Bhure Singh.

8. **PW/3 Sushila,** is the daughter of the deceased. She deposed that she was grazing goats. At around 10 O'clock she had seen that appellant have beaten the deceased by wooden stick and Kamchhilal had also beaten the deceased by wooden stick, he received injuries. Appellant also caused injuries by stone to the deceased. I reached near my father he was unconscious at that time. In her cross examination she admitted that there was quarrel and it had taken place at the field adjacent to Nala.

9. **PW/5 Kappulal** deposed that at around 7 O'clock there was quarrel between the deceased and appellant. I pacify both of them.

10. **PW/7 Maniram,** turned hostile.

11. **PW/10 Lakhan,** also turned hostile, however, he deposed that Ramprasad told me that appellant Bhure Singh had beaten the deceased and when I went at the spot, deceased was lying in injured condition in the field of appellant- Bhure Singh, thereafter I and Ramprasad had taken the deceased to Chhapri of Bhure Singh.

12. **PW/11 Samoli Bai** turned hostile.

13. **PW/14 Shyamvati** also an eye witness. She deposed that I was grazing goats. At around 10 O'clock appellant- Chaturobai and Kamchhilal had beaten deceased Santu. Incident had taken place at the field of Santu, however, in para 3 of her cross-examination she deposed that Ramprasad told me that she is eye witness of the incident.

14. **PW/15 Kachrobai** deposed that there were a quarrel and Somti told me that appellant Chaturobai and Kamchhilal had beaten the deceased.

15. **PW/8 Dr. Praveen Kumar,** who conducted autopsy of the deceased deposed that I noticed following injuries on the person of the body of the deceased.

1. Both eyelids and face was swollen.
2. Blood mixed from the right angle of the mouth was blooming.
3. There were various blisters at the back side of the deceased.
4. One contusion size 10cmx8cm at right leg.
5. One conclusion (sic: contusion) size 10cm x 8cm at left side of the chest. Fourth and fifth ribs were broken.
6. One hematoma at the occipital region of the head.
7. There were fractures at Occipital bone.

He further deposed that on the internal examination I noticed that ribs were broken. He further deposed that injuries were sufficient to cause death of the deceased. In his cross examination he admitted that he did not notice any incised injuries on the

persons of the body of the deceased. There were contusions on the body and the injuries could be caused by hard and blunt object. He also admitted that he did not notice any scratches on the body and if any weapon is used blood would be found on the weapon.

16. **PW/9 Madan Giri** Patwari deposed that I prepared spot map Ex. P/13 and signed the same. **PW/16 Ambilal**, investigating officer deposed that on 17/08/2000 at around 10 O'clock Ramprasad lodged oral report Ex. P/1 at the police Chowki Dungariya. He affixed his thumb impression. I conducted investigation and prepared Panchanama of dead body Ex. P/2. I signed the same. I prepared spot map Ex. P/3 and signed the same. I seized plain and red earth and gamchha vide seizure memo Ex. P/4 and I signed the same. On 17/08/2000 axe was seized on the instruction of Ramprasad vide seizure memo Ex. P/6, I signed the same. Thereafter, I recorded statements of Sushila, Ku. Shyamwati, Kachrobai, Kuntibai, Ramprasad Somvati, Kappulal, Lakhan, Suklu, Lakhan, Suntabai, Mangli, Samolibai, Itarvatibai, Rusvatibai. On the memorandum of appellant- Bhure Singh Ex. P/7 wooden stick was seized from his house vide seizure memo Ex. P/8. I signed both the documents. A shirt was also seized thereafter, appellants were arrested. In his cross-examination he admitted that appellant-Chaturobai lodged report at police chowki Dungariya. He further admitted in the cross examination that dead body of the deceased was kept at Chhapri of the house of appellant- Bhure Singh. He also admitted that I did not notice any blood on wooden stick seized from appellant- Bhure Singh and stick was not sent to FSL Sagar.

17. In the report Ex. P/1 the time of incident is mentioned 10 O'clock. It is further mentioned that at 11 O'clock Somti informed PW/1 Ramprasad that appellants had been beaten the deceased and thereafter I went to the field and noticed that deceased was lying in injured condition. He told him that appellant had been grazing his ox in the field of the deceased, he prevented the same thereafter, accused persons had beaten him and also inflicted a blow by stick on the back side of the deceased.

18. PW/1 deposed that appellant -Bhure Singh inflicted a blow on the back side of the deceased by wooden stick. Same facts have been mentioned in the FIR. He did not mention that another accused Chaturobai inflicted injuries by axe. PW/2 who is daughter of the deceased deposed that Chaturobai inflicted blow by axe and appellant-Bhure Singh inflicted a blow by lathi and Kamchhilal had beaten the deceased by stone. PW/3 also daughter of the deceased. She deposed that Chaturobai had inflicted a blow by lathi and appellant Bhure Singh by axe. Her statement is reliable because from the possession of appellant -Bhure Singh a lathi was seized. PW/5 deposed that there was quarrel between the appellant and deceased.

19. As per Ex. D/5 which is copy of Rojnamcha. It is mentioned that Ramprasad had given information that at around 10 O'clock there was a quarrel between his father and appellant who is her mausiya on grazing his ox. Appellant- Bhure Singh inflicted a blow by wooden stick. Wife of the appellant also lodged a report it is

mentioned in Ex. D/6 that a quarrel had taken place at around 10 O'clock between appellant and the deceased and deceased slapped her husband Bhure Singh. From the aforesaid, this fact has been proved that there was a quarrel between appellant-Bhure Singh and the deceased on the ground of grazing of ox in the field and in that event appellant Bhure Singh inflicted a blow by lathi. Evidence of eye witnesses that appellant Chaturobai inflicted blow by axe is not reliable because PW/8 who performed postmortem of the deceased deposed that he did not notice any incised injury on the person of body of the deceased.

20. The Apex Court in the case of *Abdul Sayeed Vs. State of Madhya Pradesh* (2010) 10 SCC 259 after considering earlier judgments of Hon'ble Supreme Court has held that if there is contradiction between medical and ocular evidence, where medical evidence goes so far that it completely rules out all possibilities of ocular evidence being true, ocular evidence may be disbelieved. Witnesses are the related witnesses. They are the daughters and wife of the deceased, it is possible that they may roped all the family members. Chaturobai is wife of appellant Bhure Singh. Deceased and accused both were related to each other. There was a dispute between them. Name of the appellant No. 2 Chaturobai has not been mentioned in the FIR neither Rojnamcha Ex. D/5 recorded by the police on the information of Ramprasad. The medical evidence ruled out any possibility of incised injury on the deceased, hence, in our opinion, Chaturobai could not be held liable for causing injuries to the deceased.

21. The next question is that whether appellant Chaturobai could be convicted with the aid of section 34 of the IPC. The Apex Court in the cases of *Vijendra Singh vs State of Uttar Pradesh and Mahendra Singh vs State of Uttar Pradesh,* (2017) 11 SCC 129 after considering previous judgments of the Hon'ble Apex Court has held as under in regard to Section 34 of IPC:

> *"**21.** In the said case, the Court after analyzing the evidence opined that there is no material from the side of the prosecution to show that the appellant therein had any common intention to eliminate the deceased because the only thing against the appellant therein was that he used to associate himself with the accused for smoking ganja. On this factual score, the Court came to hold that the appellant could not be convicted in aid of Section 34 IPC.*
>
> ***22**. In this regard, we may usefully refer to a passage from the authority in Pandurang and Ors. v. State of Hyderabad, AIR 1955 SC 216. The three- Judge Bench in the said case adverted to the applicability and scope of Section 34 IPC and in that context ruled that:-*

"32. ... It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all: Mahbub Shah v. King Emperor, AIR 1945 PC 118. Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: Barendra Kumar Ghosh v. King Emperor, AIR 1925 PC 1 and Mahbub Shah v. King Emperor (supra). As Their Lordships say in the latter case, "the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice".

33. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a prearranged plan however hastily formed and rudely conceived. But pre- arrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to have the same intention independently of each other, e.g., the intention to rescue another and, if necessary, to kill those who oppose."

23. And, again:- (Pandurang case)

"34. ... But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class

of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the timehonoured way, "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis". (Sarkar's Evidence, 8th Edn., p. 30)."

24. *In this context, we may refer with profit to the statement of law as expounded by the Constitution Bench in Mohan Singh (supra). In the said case, the Constitution Bench has held that Section 34 that deals with cases of constructive criminal liability provides that if a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for the act in the same manner as if it were done by him alone. It has been further observed that the essential constituent of the vicarious criminal liability prescribed by Section 34 is the existence of common intention. The common intention in question animates the accused persons and if the said common intention leads to commission of the criminal offence charged, each of the person sharing the common intention is constructively liable for the criminal act done by one of them. The larger Bench dealing with the concept of constructive criminal liability under Sections 149 and 34 IPC, expressed that just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of Section 34. In some ways the two sections are similar and in some cases they may overlap. The common intention which is the basis of Section 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action-in-concert and necessarily postulates the existence of a prearranged plan and that must mean a prior meeting of minds. It would be noticed that cases to which Section 34*

can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different; may vary in their character, but they are all actuated by the same common intention. Thereafter, the Court held:- (Mohan Singh case)

> ***"13. …..*** *It is now well-settled that the common intention required by Section 34 is different from the same intention or similar intention. As has been observed by the Privy Council in Mahbub Shah v. King-Emperor (supra) common intention within the meaning of Section 34 implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan and that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case."*

25. *In Harshadsingh Pahelvansingh Thakore (supra), a three-Judge Bench, while dealing with constructive liability under Section 34 IPC has ruled thus:-*

> *"7..... Section 34 IPC fixing constructive liability conclusively silences such a refined plea of extrication. (See Amir Hussain v. State of U.P., (1975) 4 SCC 247; Maina Singh v. State of Rajasthan, (1976) 2 SCC 827) Lord Sumner's classic legal shorthand for constructive criminal liability, expressed in the Miltonic verse "They also serve who only stand and wait" a fortiori embraces cases of common intent instantly formed, triggering a plurality of persons into an adventure in criminality, some hitting, some missing, some splitting hostile heads, some spilling drops of blood. Guilt goes with community of intent coupled with participatory presence or operation. No finer juristic niceties can be pressed into service to nullify or jettison the plain punitive purpose of the Penal Code."*

26. *In Lallan Rai and Ors. v. State of Bihar, (2003) 1 SCC 268 the Court relying upon the principle laid down in Barendra Kumar Ghosh (supra) has ruled that the essence of Section 34 is simultaneous consensus of the mind of persons participating in the criminal action to bring about a particular result.*

27. *In Goudappa and Ors. v. State of Karnataka, (2013) 3 SCC 675 the Court has reiterated the principle by opining that Section 34 IPC lays down a principle of joint liability in doing a criminal act and the essence of that liability is to be found in the existence of common intention. The Court posed the question how to gather the common intention and answering the same held that the common intention is gathered from the manner in which the crime has been committed, the conduct of the accused soon before and after the occurrence, the determination and concern with which the crime was committed, the weapon carried by the accused and from the nature of the injury caused by one or some of them and for arriving at a conclusion whether the accused had the common intention to commit an offence of which they could be convicted, the totality of circumstances must be taken into consideration.*

28. *The aforesaid authorities make it absolutely clear that each case has to rest on its own facts. Whether the crime is committed in furtherance of common intention or not, will depend upon the material brought on record and the appreciation thereof in proper perspective. Facts of two cases cannot be regarded as similar. Common intention can be gathered from the circumstances that are brought on record by the prosecution. Common intention can be conceived immediately or at the time of offence. Thus, the applicability of Section 34 IPC is a question of fact and is to be ascertained from the evidence brought on record. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the fact of the case and circumstances of the situation. Whether in a proved situation all the individuals concerned therein have developed only simultaneous*

and independent intentions or whether a simultaneous consensus of their minds to bring about a particular result can be said to have been developed and thereby intended by all of them, is a question that has to be determined on the facts. (See : Kirpal and Bhopal v. State of U.P.[16]). In Bharwad Mepa Dana and Anr. v. The State of Bombay [17], it has been held that Section 34 IPC is intended to meet a case in which it may be difficult to distinguish the acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. The principle which the Section embodies is participation in some action with the common intention of committing a crime; once such participation is established, Section 34 is at once attracted."

22. A Constitution Bench of the Hon'ble Apex Court in the case of *Mohan Singh and another vs State of Punjab, AIR 1963 SC 174* has held as under in regard to Section 34 of IPC:

"(13). That inevitably takes us to the question as to whether the appellants can be convicted under s.302/34. Like s.149, section 34 also deals with cases of constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act' in the same manner as if it were done by him alone. The essential constituent of the vicarious criminal liability prescribed by s.34 is the existence of common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the, combination of persons sharing the same common object is one of the features of an unlawful, assembly, so the existence of a combination of persons sharing the same common intention is one of the features of a. 34. In some ways the two sections are similar and in some cases they may overlap. But, nevertheless, the common intention which is the basis of s. 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action-

in-concert and necessarily postulates the existence of a pre-arranged plan and that must mean a prior meeting of minds. It would be noticed that cases to which s. 34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different; may vary in their character, but they are all actuated by the same common intention. It is now well-settled that the common intention required by s.34 is different from the same intention or similar intention. As has been observed by the Privy Council in Mahbub Shah v. Emperor, 72 Ind App 148 : (AIR 1945 PC 118), common intention within' the meaning of s.34 implies a pre-arranged plan, and to convict the accused of an offence applying the, section it should be proved that the criminal act was done in concert pursuant to the pre- arranged plan and that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. What then are the facts and circumstances proved in the present case."

23. The principle of law is that applicability of Section 34 of IPC is a question of fact and is to be asserted from the evidence on record. Common intention postulates the existence of a prearranged plan and that must mean a prior meeting of minds. The acts may be different; may vary in their character, but, they are all actuated by the same common intention. It implies a prearranged plan and it has to be proved that the criminal act was done in concert pursuant to the prearranged plan. The intention can be developed at the place of occurrence also.

24. In the present case, the incident had taken place all of a sudden on the ground of grazing of Ox. The name of the appellant has not been mentioned in the FIR. In such circumstances, in our opinion, the appellant- Chaturobai could not be convicted for commission of offence of murder with the aid of Section 34 of IPC.

25. Now the next question that what offence appellant-Bhure Singh has committed. PW/1 deposed that the deceased told him that present appellant had inflicted a blow of lathi on the back side of the deceased. Doctor who performed postmortem of the deceased deposed that there were fracture of ribs. Investigating officer PW/5 deposed that he did not notice any blood on the wooden stick seized from the appellant.

26. Looking to the evidence on record it could be held that appellant-Bhure caused injury to the deceased by lathi. It is also a fact that there was quarrel between the appellant and the deceased on the ground of grazing of Ox. Dead body of the deceased was found in the Chhapri of appellant-Bhure Singh. Exception 1 of Section 300 of IPC

postulate that if there is grave and sudden provocation, the offence would not be a murder. The Apex Court has considered the aforesaid law in the case of *B.D. Khunte Vs. Union of India and others* reported in (2015) 1 SCC 286 has held as under:-

> *12. What is critical for a case to fall under Exception 1 to Section 300 IPC is that the provocation must not only be grave but sudden as well. It is only where the following ingredients of Exception 1 are satisfied that an accused can claim mitigation of the offence committed by him from murder to culpable homicide not amounting to murder:*
>
> *(1) The deceased must have given provocation to the accused.*
>
> *(2) The provocation so given must have been grave.*
>
> *(3) The provocation given by the deceased must have been sudden.*
>
> *(4) The offender by reason of such grave and sudden provocation must have been deprived of his power of self-control; and*
>
> *(5) The offender must have killed the deceased or any other person by mistake or accident during the continuance of the deprivation of the power of self-control.*

27. In the present case there was a sudden provocation and in that even appellant-Bhure Singh had inflicted injuries by lathi, hence, it could not be said that there was a motive of appellant-Bhure Singh to kill the deceased. In such circumstances, in our opinion, the offence committed by appellant-Bhura Singh would fall under Section 304 Part-I of IPC.

28. On the basis of above discussion, appeal filed by **appellant No. 2- Chaturobai is allowed.** Her conviction and sentence awarded by the trial court is hereby set-aside. She is acquitted from the charges. She is on bail, her bail bonds are discharged.

29. Appeal filed by the appellant No. 1 Bhure Singh is partly allowed. Conviction and sentence awarded by the trial court to appellant No. 1 Bhure Singh is altered. The appellant is convicted for commission of offence punishable under Section 304 Part I of IPC and he is awarded sentence for R.I. 10 years. Appellant-Bhure Singh is in jail since 2000. He must have been released from the jail after completion of jail sentence, however, if he has not been released from jail, he be released forthwith, if he is not required in any other cases.

Order accordingly.

I.L.R. [2018] M.P. 943 (DB)
APPELLATE CRIMINAL

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

Cr.A. No. 376/2009 (Jabalpur) decided on 27 February, 2018

RAMNATH PAV …Appellant
Vs.
STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Sections 84, 302 & 324 – Murder – Conviction – Life Imprisonment – Plea of Insanity* – Appellant came to the house armed with *tangi*/axe and inflicted blow on head of his parental aunt / *Bua* as a result she died on spot – Appellant ran away from the spot and when his elder brother tried to stop him, he inflicted injuries to him – Held – Testimony of eye witnesses and other prosecution witnesses is duly supported by medical evidence – Most of the witnesses are not only relative of deceased but they are also relatives of appellant – Independent eye witness also supported the prosecution story – Prosecution story seems to be trustworthy and credible – Further held – All the eye witnesses clearly stated that appellant was insane and mentally unfit at the time of incident – It is also on record that appellant had no intention to kill the deceased – From evidence of prosecution witnesses on record, it is considered and found that at the time of incident, appellant was absolutely insane and of unsound mind – For committing a crime, the intention and act both are taken to be the constituents of crime – Appellant entitled to benefit of Section 84 IPC – Conviction and sentence set aside – Appeal allowed.**

(Paras 13, 16, 17, 22, 30 & 34)

क. दण्ड संहिता (1860 का 45), धाराएँ 84, 302 व 324 – हत्या – दोषसिद्धि – आजीवन कारावास – विक्षिप्तता का अभिवाक् – अपीलार्थी, मकान में टांगी/कुल्हाड़ी से सुसज्जित होकर आया और अपनी बुआ के सिर पर वार किया जिसके परिणामस्वरूप उसकी मौके पर ही मृत्यु हो गई – अपीलार्थी मौके से भाग गया और जब उसके बड़े भाई ने उसे रोकने का प्रयास किया, उसने उसे चोटें पहुंचाई – अभिनिर्धारित – चक्षुदर्शी साक्षीगण एवं अन्य अभियोजन साक्षियों के परिसाक्ष्य चिकित्सीय साक्ष्य द्वारा सम्यक् रूप से समर्थित हैं – अधिकतर साक्षीगण न केवल मृतिका के रिश्तेदार हैं बल्कि वे अपीलार्थी के भी रिश्तेदार हैं – स्वतंत्र चक्षुदर्शी साक्षी ने भी अभियोजन कहानी का समर्थन किया है – अभियोजन कहानी भरोसेमंद एवं विश्वसनीय प्रतीत होती है – आगे अभिनिर्धारित – सभी चक्षुदर्शी साक्षियों ने स्पष्ट रूप से कथन किया है कि अपीलार्थी विक्षिप्त था और घटना के समय मानसिक रूप से अस्वस्थ था – यह भी अभिलेख पर है कि अपीलार्थी का आशय मृतिका को जान से मारने का नहीं था – अभिलेख पर अभियोजन साक्षियों के साक्ष्य से, यह विचार किया गया तथा

पाया गया कि घटना के समय अपीलार्थी पूर्ण रूप से विक्षिप्त था और विकृत चित्त का था – अपराध कारित करने के लिए, आशय एवं कृत्य दोनों को अपराध के घटक माना जाना चाहिए – अपीलार्थी, धारा 84 भा.दं.सं. के लाभ का हकदार – दोषसिद्धि एवं दण्डादेश अपास्त – अपील मंजूर।

***B. Maxims – "Furiosi nulla valuntus est"* means a person who is suffering from mental disorder cannot be said to have committed a crime as he does not know what he is doing.**

(Para 38)

ख. सूत्र – ''फरीयोसी नल्ला वेलंटस एस्ट'' अर्थात् एक व्यक्ति, जो मानसिक अस्वस्थता से ग्रसित है, के द्वारा अपराध कारित किया जाना नहीं कहा जा सकता क्योंकि वह नहीं जानता कि वह क्या कर रहा है।

Cases referred:

2017 (2) MPLJ (Cri) 305, (2011) 7 SCC 110, AIR 1971 SC 778, (2011) 11 SCC 495, 2017 SCC Online Del 11871, AIR 1964 SC 1563.

Shobhna Sharma, Amicus Curiae for the appellant.
Pradeep Singh, G.A. for the respondent/State.

J U D G M E N T

The Judgment of the court was delivered by:
Anjuli Palo, J :- Appellant/accused has filed this appeal challenging the judgment dated 29.12.2008, passed by the Sessions Judge, Shahdol, in Session Trial No. 256/2007, whereby the appellant has been convicted for offence under Section 302 of the Indian Penal Code and sentenced to undergo life imprisonment and fine of Rs. 500/- with default stipulation and under Section 324 of IPC and sentenced to undergo RI for one year.

2. Prosecution story in nutshell is that, appellant Ramnath and deceased Ramune Bai were residing in the same house at Village Jaldi Tola, District Anuppur. Both were close relatives. On 24.08.2007 at about 5:00 pm, the appellant, all of a sudden came to the house armed with *tangi* (axe) in his hand and attacked on the head of Ramune Bai. She died on the spot. Lalita (PW-3) witnessed the incident. She shouted. On hearing her cry, Mayawati (PW-5) came there and saw the appellant running over the *bari* (fence). Appellant straightaway went to his brother Kamta (PW-2) who was grazing buffallow (sic : buffalo) Appellant assaulted him with the same *tangi* (axe). Kamta and other persons snatched *tangi* (axe) from the appellant. They brought the appellant to home and tied him with a rope till the arrival of police. Jagdish (PW-1) / elder brother of the appellant lodged FIR at police station, Anuppur. After investigation, charge-sheet was filed against the appellant for offence under Section 302 of IPC.

3. The trial Court framed charges under Sections 302 and 324 of IPC against the appellant. Appellant abjured guilt and asserted his ignorance about the incident and put forward insanity as his defence.

4. Learned trial Court has not accepted the defence of the appellant about his insanity and held the appellant guilty for committing murder of Ramune Bai and causing simple injuries to Kamta (PW-2). At that time, he was not suffering from unsoundness of mind as provided in Section 84 of IPC. Hence, the appellant has been convicted and sentenced as mentioned in paragraph one of this judgment.

5. The appellant challenged the aforesaid findings on the ground that it was perverse and contrary to law. There are contradictions and omissions in the testimony of prosecution witness. Appellant had no motive to commit the offence. Only one blow was allegedly caused to the deceased Ramune Bai and one single injury was caused to Kamta (PW-2). Appellant Ramnath is suffering from unsoundness of mind. He should have been given benefit of Section 84 of the IPC. Most of the prosecution witnesses have admitted the insanity of the appellant. Therefore, his action cannot be termed to be knowingly or intentional. Learned trial Court, though admitted the medical insanity of the appellant but grossly erred in making difference in medical insanity and legal insanity. Therefore, the impugned judgment is liable to be set aside and appellant is entitled to be acquitted.

6. It is not in dispute that, deceased Ramune Bai was the *bua* (paternal aunt) of the appellant and Kamta (PW-2) is the real brother of the appellant. At the time of the incident at about 4:00 pm, Lalita (PW-3) niece of the appellant aged about 9 years was present at the house of Kamta (PW-2). She deposed that her uncle/appellant came and inflicted blow of *tangi* on the head of the deceased. After witnessing the incident, she ran away towards the street. Pappu (PW-4) deposed that he heard the shouts of Lalita (PW-3). Lalita told him that the appellant/Ramnath had killed her *baba* (Ramune Bai).

7. Kamta Prasad (PW-2) supported the prosecution story. He deposed that, he was grazing buffaloes near the pond. Suddenly, appellant came there and clung to him and inflicted blow by *tangi* (axe). Then he went to his home and saw the injuries on the deceased Ramune Bai. Thereafter, he was taken to the hospital.

8. Mayawati (PW-5) and her husband Jagdish (PW-1) came to know about the incident from Lalita. Then they reached at the spot. They saw that Ramune Bai was lying dead and she sustained injury on the head. Thereafter, they went behind the appellant. They saw the appellant inflicting blow by a *tangi* (axe) on Kamta (PW-2). Jagdish (PW-1), Pappu (PW-4), Samharu (PW-6) and Gautam (PW-7) caught hold of the appellant. They brought him home and tied him with a rope. Pappu (PW-4), Gautam (PW-7) and Samharu (PW-6) have supported the testimony of Mayawati

(PW-5). Jagdish (PW-1) lodged the FIR at police station Anuppur. Thereafter, R.S.Pandey (PW-10), Inspector reached on the spot and prepared panchnama (Ex. P/3) of the body of the deceased and spot map Ex.P/10. Then the body of the deceased was sent to hospital for conducting postmortem.

9. R.S.Pandey (PW-10) Investigation Officer established that FIR was lodged against the appellant on the same day.

10. On the same date, Dr. Virendra Khes conducted autopsy of the deceased Ramune Bai at about 1:15 pm. The deceased had sustained following injuries :

> (i) Incised wound on right parietal region on (sic: of) 4 cm x 2 ½ cm x 7 cm.
>
> (ii) Incised wound on right parietal region of 4 cm x 2½ cm x 7 cm.

11. Both the injuries were caused by sharp object and antemortem in nature. Doctor also opined that deceased died due to excessive bleeding and fatal injury on her head. The injuries were caused within 48 hours of the postmortem.

12. Dr.Virendra Khes (PW-12) examined injured Kamta (PW- 2). He found the following injuries on him :-

> (i) Lacerated wound of 2.5 cm x ¾ cm x ½ cm on the left forearm.
>
> (ii) Lacerated wound of 1 cm x ½ cm x ¾ cm on right forearm.

Dr. Khes opined that the above injuries were caused by hard and blunt object. Injuries were simple in nature and caused within 24 hours of the medical examination.

13. Thus, we find that the testimony of eye-witnesses and Kamta (PW-2) is duly to be supported by the medical evidence. Hence, prosecution story seems to be trustworthy and credible.

14. Learned counsel for the appellant urged that witnesses are near relatives of the deceased. Hence, their testimony is not sufficient to convict the appellant. We are not inclined to accept this contention. The deceased was *bua* (aunt) of the appellant. Jagdish (PW-1) and Kamta (PW-2) are real brothers of the appellant. Lalita (PW-3) is his niece. Mayawati (PW-5) is the sister-in-law of the appellant. Samharu (PW-6) and Pappu (PW-4) are the (distant) brothers of the appellant.

15. In case of *Arjun vs. State of C.G.* [2017 (2) MPLJ (Cri.) 305], the Hon'ble Supreme Court has held as under :

> "Evidence of related witness is of evidentiary value. Court has to scrutinize evidence with case as a rule of prudence and not as a rule of law. Fact of witness being related to victim or deceased does not by itself discredit evidence."
>
> [See also *Chandrasekar & Anr. Vs. State, 2017 SCC Online SC 620; Gangabhavani vs. Rayapali Reddy, AIR 2013 SC 3681; Jodhan Vs. State of MP, (2015) 11 SCC 52 and Kamta Yadav Vs. State of Bihar, (2016) 16 SCC 164*.]

16. In this regard, it is important to mention here that most of the witnesses are not only relatives of the deceased but they are relatives of the appellant also.

17. Gautam (PW-7) is the independent eye-witness. He supported the prosecution story. However, he turned hostile on some point. He has not stated that he witnessed the whole incident but, he heard the hue and cry then he saw the dead body of the deceased and her injuries. He went along with Jagdish to lodge report at police station. Therefore, the testimony of all the witnesses inspire confidence on the prosecution case.

18. R.S.Pandey (PW-10) is the Investigating Officer seized aforesaid *tangi* (axe) from the appellant which was snatched by the witnesses after the incident. He found blood stains on the handle of the *tangi* (axe).

19. Therefore, we have come to the conclusion that the trial Court rightly held the appellant guilty for committing murder of his *bua* (paternal aunt) Ramune Bai and for voluntarily causing injury to his brother Kamta. In our opinion, the close relatives of the appellant and the deceased had no intention or enmity to falsely implicate the appellant for the offence with their relatives.

20. In the instant case, the appellant has asserted his ignorance about the incident and put forward the insanity as his defence under Section 84 of the Indian Penal Code.

21. On the other hand, the learned Trial Court held that the appellant was not suffering from the unsoundness of mind as provided under Section 84 of IPC. Learned Trial Court thoroughly examined it in paragraph 56 to 67 of the impugned judgment. In paragraph 56, the learned Trial Court itself held that, "it is quite clear from the deposition of prosecution witness that the accused was insane." But on the other hand opined that the prosecution witnesses have deposed about the medical insanity and the Court was only concerned about the legal insanity. It was also observed that at the time of incident, the appellant was of unsound mind but not mad enough to beat his own wife.

22. All the eye-witnesses have clearly stated that the appellant was insane at the time of incident.

23. Jagdish (PW-1) brother of the appellant stated in paragraph 9 and 11 that the mental condition of the appellant was unstable. He did not know as to what he was doing. He was absolutely mad. Hence, his wife left him and remarried other person. He had no concern for his family. He did not look after himself. His family members including his brothers had taken care of him and provided food, etc., therefore, the question does not arise about determination of insanity of the appellant towards his wife.

24. The acts of the appellant clearly indicate that at the time of incident, he was insane. He had no sense about his acts. Some medical reports on record also indicate that during trial, the appellant was under treatment at Mental Hospital, Gwalior. Thereafter, he was referred for treatment by psychiatrist at medical college, Rewa. No report from medical college, Rewa is on record. All documents indicate that the mental status of the appellant needed a specific treatment. After treatment in Mental Hospital, Gwalior, the medical officer only opined that he showed improvement. Secondly, he is able to defend himself in the Court of law. This recommendation itself is not sufficient to establish that the appellant was in fit mental condition during the committal of crime.

25. Learned counsel for the State has relied upon the judgment of Hon'ble Supreme Court in case of *Elavarasan vs. State* [(2011) 7 SCC 110] wherein the appellant was working as watchman. There was no history of any complaint as to his mental health from anyone supervising his duties, is significant. His spouse who was living with him under the same roof also did not suggest any ailment afflicting the appellant except sleeplessness which was diagnosed by the doctor to be the effect of excessive drinking. The Hon'ble Supreme Court held that the plea of insanity was rightly not accepted. The spouse of the accused was living with him under the same roof.

26. In the present case, there is an unshaken evidence of Jagdish (PW-1) that the appellant's wife left him and remarried other person. Appellant had no individual house and his family members took care of him. Such type of living conditions is an important circumstance for considering the mental status of the appellant. In the present case, it is true that the defence failed to produce any document with regard to the medical treatment of the appellant.

27. In our opinion, we cannot ignore the practical problem of poor families who cannot bear the medical cost of treatment in mental hospitals.

28. As per the testimony of Jagdish (PW-1), after the incident, Kamta tried to stop the appellant, thereafter, appellant caused simple injuries to him. In case of *Ratan Lal Vs. State of MP* [AIR 1971 SC 778], the Hon'ble Supreme Court has held as under:

> "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 accused. (See State of Madhya Pradesh v. Ahmadullah In D.C. Thakker v. State of Gujarat it was laid down that "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 which rests upon a party to civil proceedings." It was further observed :
>
> The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was circumstances which preceded, attended and followed the mind as to be entitled to the benefit of Section 84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed the crime."
>
> "We are inclined to agree with the conclusion arrived at by the learned Magistrate. We hold that the appellant has discharged the burden. There is no reason why the evidence of Shyam Lal, D.W. 1, and Than Singh, D.W. 2, should not be believed. It is true that they are relations of the appellant, but it is the relations who are likely to remain in intimate contact. The behavior of the appellant on the day of occurrence, failure of the police to lead evidence as to his condition when the appellant was in custody, and the medical evidence indicate that the appellant was insane within the meaning of Section 84, I.P.C."

29. Similarly, in case of *Surendra Mishra vs. State of Jharkhand* [(2011) 11 SCC 495], it was held with regard to unsoundness of mind that accused must prove his conduct prior to offence, at the time or immediately after offence with reference to his medical condition. Whether accused know that what he is doing is either wrong or contrary to law is of great importance and may attract culpability despite mental unsoundness have been established.

30. In the light of the above principle, we consider the mental status of the present appellant and find that at the time of the incident, he was absolutely insane and of unsound mind. His family members Jagdish (PW-1), Kamta (PW-2), Lalita (PW-3),

Samhari (PW-6), Pappu (PW-4) and Gautam (PW-7) consistently deposed that the appellant was not able to understand and know what he was doing or it was wrong or right or it was contrary to law. This version of the prosecution witnesses itself establish the unsoundness of mind of the appellant. These witnesses were not declared hostile towards the unsoundness of the appellant nor the prosecution witnesses were examined at that point. Therefore, in our opinion, their testimony cannot be ruled out or discarded.

31. In case of *Surendra Misha* (sic : *Mishra*) (supra), the expression "unsoundness of mind" was thoroughly examined and it was held as under :

> "Expression 'unsoundness of mind' has not been defined in IPC and it has merely been treated 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 Indian Penal Code."

32. In case of *X vs. State of NCT Delhi* [2017 SCC online Del 11871], it was held as under :

> 41. In *Sidhapal Kamala Yadav v. State of Maharashtra* (2009) 1 SCC 124, the Supreme Court quoted from the judgment of the High Court, under appeal before it where, inter alia, while discussing Section 84 IPC, it was held as under:
>
> "The onus of providing 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." The role of the Court

42. There was an opportunity even during the trial for this angle to be examined. Given that in the testimonies and documents referred to there was sufficient indication of the treatment received by the Appellant in the period immediately preceding the occurrence, the Court had the option of getting the treatment records requisitioned through the IO and calling as court witnesses experts to examine the said treatment records. In fact this is what this court did when the appeal was first heard by it.

43. In *Radhey Shyam v. State* ILR 2010 Supp. (2) Delhi 475, this Court reflected on this aspect by observing as under:

"38. It would be virtually impossible to lead direct evidence of what was the exact mental condition of the accused at the time of the commission of the crime. Thus, law permits evidence to be led where from the trier of the facts can form an opinion regarding the mental status of the accused at the time when the crime was committed. Thus, evidence which can be led can be characterized as of inferential insanity..... This evidence, common sense tells us would be the immediately preceding and immediately succeeding conduct of the accused as also the contemporaneous conduct of the accused.

39. Thus, with reference to the past medical evidence or the medical history of the accused as the backdrop, the duty of the Court is to evaluate the conduct of the accused before, at the time of and soon after the crime and then return a finding of fact, whether the accused was of such unsound mind that by reason of unsoundness he was incapable of knowing the nature of the act done or incapable of knowing that the act was wrong or contrary to law."

xxx

46. Thus, a fair trial would require that if there is available proof before the Judge that the accused was suffering from a psychiatric or psychological disorder i.e. there was a history of insanity, it is the duty of the Court to require the

> investigator to subject the accused to a medical examination and place the evidence before the Court as observed in the decision reported as AIR 2009 SC 97 *Sidhapal Kamala Yadav vs. State of Maharashtra.*"

33. The trial Court was concerned with legal insanity and held that at the time of incident, the appellant was of unsound mind but not mad enough to beat his own wife. Further, the learned trial Court considered the conduct of the appellant while committing the offence. He ran away from the spot immediately. At that time, he was not just walking but was running therefore, it indicates that he knew what he was going to do with *tangi.* All these facts show that he was aware of his act and consequence.

34. In madness or in unsound condition of mind, a person always fears of being caught. It is also on record that the appellant had no motive to kill his own *bua* (aunt) or cause injury to his own brother. Due to insanity and madness, normally it happens that a person becomes furious or dangerous to others. Their behaviour and conduct sometimes become very violent. Therefore, people stay away from them. Hence, we are not inclined to accept the observations of the learned trial Court that the appellant came to the spot with a *tangi* which clearly shows the fact that he was aware of the act.

35. It is pertinent to mention here that the incident took place on 24.08.2007. The statement of the witnesses under Section 161 Cr.P.C. have been recorded by the police on the next day of the incident. In those statements also, witnesses narrated that the appellant was mentally unfit.

36. We do not find that after filing of the charge-sheet, to corroborate the defence of the appellant, his close relatives and prosecution witnesses made out a theory of insanity.

37. The circumstances of the case shows that the appellant was suffering from insanity and was therefore entitled to claim benefit under Section 84 of the IPC. The essential elements of Section 84 are as follows:

> (i) The accused must, at the time of commission of the act be of unsound mind.
>
> (ii) The unsoundness must be such as to make the accused at the time when he is doing the act charged as offence, incapable of knowing the nature of the act or that he is doing what is wrong or contrary to law. Where it is proved that the accused has committed multiple murders while suffering from mental derangement of some sort and it is found that there is (i) absence of any motive, (ii) absence of secrecy,

(iii) want of pre-arrangement, and (iv) want of accomplices, it would be reasonable to hold that the circumstances are sufficient to support the inference that the accused suffered from unsoundness of mind.

38. Section 84 of the IPC lays down the legal test of responsibility in case of unsoundness of mind. To commit a criminal offence *mens rea* is generally taken to be an essential element of crime. It is said in maxim *"Furiosi nulla voluntus est"*. In other words, a person who is suffering from a mental disorder cannot be said to have committed a crime as he does not know what he is doing. For committing a crime, the intention and act both are taken to be the constituents of the crime. *Actus reus non facit reum nisi mens sit rea.* Every normal and sane human being is expected to possess some degree of reason to be responsible for his conduct. In *Dahayabhai Chhaganbhai Thakkar Vs. State of Gujarat* [AIR 1964 SC 1563], it was held that 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.

39. In view of the discussion in the foregoing paragraphs, we find that the appellant is entitled to get benefit of provision under Section 84 of the IPC. He is not liable to be convicted and sentenced under Section 302 of the IPC.

40. Accordingly, this appeal is allowed. The impugned judgment and sentence passed by the Trial Court is hereby set aside. Appellant is in jail. He shall be released forthwith if not required in any other case.

41. Copy of this judgment be sent to the Court below for information and compliance alongwith its record.

Appeal allowed.

I.L.R. [2018] M.P. 953 (DB)
APPELLATE CRIMINAL

Before Mr. Justice Sujoy Paul & Mr. Justice Sushil Kumar Palo

Cr.A. No. 315/2008 (Jabalpur) decided on 5 March, 2018

SANJU …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 302 – Murder – Conviction – Prosecution witness not supporting the prosecution story – Effect of – Dying Declaration – Credibility* – Trial Court held that appellant poured kerosene on his wife and set her ablaze, whereby she died because of the burn injuries**

– Held – It is trite law that if prosecution witness is not supporting the prosecution case and such witness is not declared hostile, the defence can rely on the evidence of such witness which would be binding on the prosecution – In the present case, two prosecution witnesses went against the prosecution story and these witnesses were not cross-examined by the prosecution nor they were declared hostile – In such circumstances, statements of these two witnesses cannot be easily brushed aside, they create serious doubt on the prosecution story and makes it vulnerable – Further held – Dying declaration was not read over and explained to the injured and thus such document cannot be relied and was not safe to convict the accused – Appellant should get the benefit of doubt – Judgment of conviction set aside – Appeal allowed.

(Paras 12, 15, 16 & 17)

क. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – दोषसिद्धि – अभियोजन साक्षी अभियोजन कहानी का समर्थन नहीं करता – का प्रभाव – मृत्युकालिक कथन – विश्वसनीयता – विचारण न्यायालय ने अभिनिर्धारित किया कि अपीलार्थी ने अपनी पत्नी पर केरोसीन उड़ेलकर उसे आग लगा दी, जिससे उसकी जलने की चोटों के कारण मृत्यु हुई – अभिनिर्धारित – यह बार बार दोहराई गई विधि है कि यदि अभियोजन साक्षी, अभियोजन प्रकरण का समर्थन नहीं करता और ऐसे साक्षी को पक्षविरोधी घोषित नहीं किया गया है, उक्त साक्षी के साक्ष्य पर बचाव पक्ष विश्वास कर सकता है जो अभियोजन पर बाध्यकारी होगा – वर्तमान प्रकरण में, दो अभियोजन साक्षीगण, अभियोजन कहानी के विरूद्ध गये थे और इन साक्षियों का प्रतिपरीक्षण अभियोजन द्वारा नहीं किया गया था न ही वे पक्षविरोधी घोषित किये गये थे – ऐसी परिस्थितियों में, इन दोनों साक्षियों के कथनों को आसानी से खारिज नहीं किया जा सकता, वे अभियोजन कहानी पर गंभीर संदेह निर्मित करते है और उसे सहजभेद्य बनाते है – आगे अभिनिर्धारित – मृत्युकालिक कथन, आहत को पढ़कर सुनाया एवं समझाया नहीं गया था और अतः उक्त दस्तावेज पर विश्वास नहीं किया जा सकता तथा अभियुक्त को दोषसिद्ध करना सुरक्षित नहीं था – अपीलार्थी को संदेह का लाभ मिलना चाहिए – दोषसिद्धि का निर्णय अपास्त – अपील मंजूर।

***B. Medical Jurisprudence – MLC Report – Contents* – Doctor in her evidence stated that deceased while narrating the incident to her stated that she herself poured kerosene on and set herself ablaze due to anger – Trial Court held that the Doctor has not recorded such version of deceased in her MLC Report and therefore statement of doctor cannot be believed – Held – In MLC Report, the doctor is not statutorily or otherwise obliged to record such factual version of the deceased – "Modi's" Medical Jurisprudence and Toxicology and "Lyon's" Medical Jurisprudence and Toxicology referred – Mere because doctor has not recorded the stand of the deceased in her MLC report, her deposition cannot be disbelieved.**

(Para 12)

ख. चिकित्सा न्याय–शास्त्र – एम एल सी प्रतिवेदन – अंतर्वस्तु – चिकित्सक ने अपने साक्ष्य में कथन किया कि मृतिका ने उसे घटना बताते समय कहा था कि उसने गुस्से में स्वयं अपने ऊपर केरोसीन उड़ेलकर आग लगा ली – विचारण न्यायालय ने अभिनिर्धारित किया कि चिकित्सक ने अपने एम एल सी प्रतिवेदन में मृतिका का उक्त कथन अभिलिखित नहीं किया है और इसलिए चिकित्सक के कथन पर विश्वास नहीं किया जा सकता – अभिनिर्धारित – चिकित्सक, एम एल सी प्रतिवेदन में, मृतिका के ऐसे तथ्यात्मक कथन को अभिलिखित करने के लिए कानूनी रूप से या अन्यथा बाध्यताधीन नहीं – ''मोदी'' का चिकित्सा न्याय–शास्त्र एवं विष–विज्ञान तथा ''लायन'' का चिकित्सा न्याय–शास्त्र एवं विष–विज्ञान संदर्भित किया गया – मात्र इसलिए कि चिकित्सक ने अपने एम एल सी प्रतिवेदन में मृतिका का कहना अभिलिखित नहीं किया है, उसके अभिसाक्ष्य पर अविश्वास नहीं किया जा सकता।

Cases referred:

2005 (5) SCC 272, 2005 (5) SCC 258, 2012 (4) SCC 327, AIR 1999 SC 3512, 2007 (11) SCC 269, 2009 (12) SCC 498, 2008 SCC Online MP 562, 2010 SCC Online MP 620, 2012 SCC Online MP 4281.

Amolak Singh Makhija, Amicus Curiae for the appellant.
Manish Soni, G.A. for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by:
Sujoy Paul, J.:- This appeal filed under Section 374 (2) of the Code of Criminal Procedure is directed against the judgment of conviction and order of sentence dated 22.01.2008 passed by learned Additional Sessions Judge, Sohagpur, District Hoshangabad in Sessions Trial No.313/2006 whereby the appellant was held guilty for offence punishable under Section 302 of IPC and directed to undergo rigorous imprisonment for life with fine of Rs.500/- with default stipulation.

2. Facts giving rise to the present appeal fall within a very narrow compass and are being stated at the very outset.

3. The case of the prosecution is that on 09.07.2006, at around 12 p.m., the appellant had poured kerosene on his wife Babita and set her ablaze. The *dehati nalishi* (Ex.P.-19) was recorded on the report of Babita on 10.07.2006. Babita stated that her marriage was solemnized with the appellant on 24.06.2006. On 09.07.2006, Babita was unwell and, therefore, she informed her husband that she intends to sleep at a different place. Her husband got annoyed by this and poured kerosene on her and set her ablaze. The family members took her to the Government Hospital, Pipariya. MLC report (Ex.P- 13) was prepared by Dr. Anuradha Dehariya (PW-14). The dying declaration of Babita was recorded by Shri S.N. Solanki, Tahasildar/Executive

Magistrate (PW -18). On the basis of *dehati nalishi* of Police Station Pipariya, FIR (Ex.P-20) was lodged. The dying declaration was recorded by the said Executive Magistrate in presence of Dr. Anuradha Dehariya (PW-14).

4. Since Babita died during treatment, Dr. Sudheer Vijayvargiya (PW-15) sent information to the police, on the basis of which *merg intimation* (Ex.P-16) has been lodged by Police Station Hoshangabad. ASI- Smt. Poornima Mandogade (PW-21) reached the hospital and prepared the *Panchnama* (Ex.P-17) of the deadbody.

5. Shri D.S. Chouhan (PW-10) visited the place of incident and prepared a spot map (Ex.P-5). The Investigating Officer seized the kerosene mixed earth and a burnt saree (Ex.P-6). The seized material was sent to Forensic Science Laboratory by Ex.P-9. The report of said Laboratory is Ex.P-10.

6. Before the trial Court, twenty one witnesses entered the witness box on behalf of the prosecution. The defence did not led any evidence in rebuttal. The Court below on the basis of the statement of Shri S.N. Kourav, SI (PW-20) opined that *dehati nalishi* was recorded on the report of Babita herself. FIR was founded upon the said *dehati nalishi.* Medical witness Dr. Anuradha Dehariya (PW-14) stated that Babita's blood pressure report was not normal. Her pulse was almost not traceable and she was burnt to the extent of 70%. Babita's face, both hands, hair, neck, breasts, both thighs and legs were in burnt condition which is evident from MLC report (Ex.P- 13). The Court below found that the relevant material from the spot was duly collected by the Investigating Officer. The reason of death was burn injuries. *Dehati nalishi*, dying declaration and statement of various prosecution witnesses show that the appellant had set her ablaze on 09.07.2006 by pouring kerosene on her.

7. The argument of the appellant is that he is falsely implicated. His wife Babita herself poured kerosene and set herself ablaze. This was categorically deposed by Maya Bai (PW-4). The said witness was not declared as hostile by the prosecution. Similar statement was made by Dr. Anuradha Dehariya (PW-14). A conjoint reading of these statements makes it clear that the Court below has erred in holding that the charges were found proved beyond reasonable doubt.

8. Learned *amicus curiae* for the appellant contended that in view of aforesaid statements of Maya Bai (PW-4) and Dr. Anuradha Dehariya (PW-14), the Court below ought to have exonerated the appellant. Record shows that another defence of appellant was that in the manner dying declaration was recorded, it is totally unsafe to rely on it.

9. *Per contra,* learned Government Advocate supported the impugned judgment and contended that the Court below has passed a detailed judgment and considered the aforesaid points raised by the appellant. There is no illegality in the findings of the Court below which warrant interference by this Court.

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

11. We have heard learned counsel for the parties at length and perused the record.

12. In the present case, *dehati nalishi* (Ex.P/19) was recorded at the instance of deceased Babita on 10.07.2006 at 8:10 AM, whereas the dying declaration was recorded on the same date at 8:15 AM. Both the documents are written within few minutes. The Court below has given much credence to the dying declaration and chain of events as per the deposition of prosecution witnesses. The statement of Maya Bai (PW-4) was disbelieved on the ground that she is not an eye witness to the incident and she has not seen Babita pouring kerosene and setting herself ablaze. Similarly, the statement of Dr. Anuradha Dehariya (PW-14) was also disbelieved for the reason that she in her MLC report did not mention that Babita informed her that she poured kerosene and set herself ablaze. Dr. Dehariya should have inform this fact to the police and this finding should have been given in MLC report (Ex.P/13). Dr. Dehariya did not inform the Tehsildar (PW-18) about the said statement of deceased-Babita. It is relevant to note here that Maya Bai (PW-4) and Dr. Anuradha Dehariya (PW-14) were prosecution witnesses. Maya Bai in her examination-in-chief specifically deposed that when she reached at the spot, Babita was crying and weeping. She inquired from Babita about the reason of fire and, in turn, Babita informed her that she herself poured kerosene and put herself on fire. She was not willing to marry a villager and her parents compelled her to marry a villager. This witness was not declared hostile by the prosecution and, therefore, the prosecution has not cross-examined this witness. Similarly, Dr. Anuradha Dehariya (PW-14) candidly stated that when she went to see the patient i.e., Babita she informed her about the reason of burn injuries. Babita also informed her that she wanted to live alone and for this reason she had quarrel with her husband and because of anger she put herself ablaze. Dr. Dehariya further deposed that she informed about the said stand of Babita to Tehsildar. Interestingly, this independent witness was also not declared as hostile and was not put to cross-examination. This is trite law that if prosecution witness is not supporting the prosecution case and such witness is not declared hostile, the defence can rely on the evidence of such witness which would be binding on the prosecution. In 2005 (5) SCC 272 [*Raja Ram vs. State of Rajasthan*], the Apex Court held that the testimony of such witness cannot be side lined. This principle is followed in 2005 (5) SCC 258 [*Mukhtiar Ahmed Ansari vs. State (NCT of Delhi*)]. In this case, the Supreme Court opined that statement of PW-1 destroyed the genesis of the prosecution. Thus, the statement of such prosecution witnesses are very important piece of evidence. Maya Bai (PW-4) is neighbour of appellant and if only little credence is given to her statement by treating her to be a known person to the appellant, who can be won over, Dr. Dehariya (PW-14) is totally an independent person. The statement of Tehsildar (PW-18) was recorded after recording the statement of Dr. Anuradha Dehariya. No attempt was made by the prosecution to

examine him on this aspect. The Tehsildar (PW-18) did not depose that Dr. Dehariya did not inform her about the different story narrated to her by deceased- Babita. The prosecution had every opportunity to cross-examine Dr. Dehariya regarding the narration of Babita to her. Thus, the statements of these two witnesses cannot be easily brushed aside and their statements creates serious doubt on the prosecution story. The Court below has disbelieved the statement of Dr. Anuradha Dehariya (PW-14) on yet another ground that she did not narrate the version of Babita in her MLC report. We do not see any force in such reason. In the MLC report, the doctor is not statutorily or otherwise obliged to record such factual version. In "Modi's Medical Jurisprudence and Toxicology" the author opined that the medico legal report consist of three parts, namely, (1) introductory or preliminary data, for example full name, age, address, date, place and time of examination, including identity marks; (2) the facts observed on examination; and (3) the opinion or the inference drawn from the facts. Similar view is taken by another author in "Lyon's Medical Jurisprudence and Toxicology". In this view of the matter, merely because Dr. Anuradha Dehariya (PW-14) has not recorded the stand of deceased- Babita in her MLC report, the same cannot be disbelieved nor her deposition will vanish in thin air.

13. As noticed, the *dehati nalishi* and dying declaration are very crucial piece of evidence on the strength of which the edifice of prosecution is rested. The dying declaration, no doubt is a very important piece of evidence. The admissibility of the dying declaration rests upon the principle of *nemo moriturus praesumitur mentire* (a man will not meet his Maker with a lie in his mouth). The Apex Court in 2012 (4) SCC 327 *(Bhajju @ Karan Singh Vs. State of M.P.)* has held that the "dying declaration" essentially means the statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that the conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful considerations to speak the truth. Once the Court is satisfied that the declaration was true and voluntary, it undoubtedly can base its conviction on the dying declaration, without requiring any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated by other evidence.

14. It is pertinent to note that in the case of *Bhajju @ Karan Singh* (Supra) the Apex Court held that the law is very clear that if dying declaration has been recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of the events, then the dying declaration can certainly be relied upon by

the Court and could form the sole piece of evidence resulting in the conviction of the accused. The Court has clearly stated the principle that Section 32 of the Evidence Act, 1872 is an exception to the general rule against the admissibility of hearsay evidence. Section 32(1) makes the statement of the deceased admissible, which is generally described as a "dying declaration". Hence, the question is whether in the present case, the dying declaration is properly recorded and whether it is safe to rely upon such dying declaration. This point requires serious consideration.

15 During cross-examination, the Tehsildar (PW-18) admitted that he has not mentioned in the dying declaration that the statement of deceased- Babita was read over and explained to her. The dying declaration does not contain any such declaration. This aspect was considered by Supreme Court in the case reported in AIR 1999 SC 3512 *[Jai Karan vs. State of NCT, Delhi]*. Since the dying declaration was not read over and explained to the injured, the said document was disbelieved by the Supreme Court. It was poignantly held that it was not safe to convict the appellant on the basis of such dying declaration. The similar point was against considered in 2007 (11) SCC 269 *[Shaikh Bakshu & others v. State of Maharashtra]*. In this case, in dying declaration, there was no mention that it was read over and explained to deceased, yet trial Court and High Court concluded that even though no such statement was available, it can be presumed that it was read over and explained. The view of trial Court and High Court held to be clearly unacceptable. In 2009 (12) SCC 498 *[Kantilal vs. State of Rajasthan]*, it was held that the fact that the dying declaration did not bear endorsement to the fact that it was read over and explained to the deceased, also creates a doubt on its credibility and truthfulness. The *ratio decidendi* of aforesaid judgments were followed by this Court in cases reported in 2008 SCC Online MP 562 *[State of M.P. vs. Raj Bahadur],* 2010 SCC Online MP 620 *[Ramveer singh vs. State of M.P.]* and 2012 SCC Online MP 4281 *[Smt. Rajabeti W/o Shri Gopal vs. State of M.P.]*. In view of aforesaid principle, it can be safely concluded that dying declaration, in the present case, is also not trustworthy because it does not contain any such endorsement.

16. In view of aforesaid analysis, in our considered opinion the statements of Maya Bai (PW-4) and Dr. Anuradha Dehariya (PW-14) cannot be easily brushed aside. In view of their statements, the story of prosecution has become vulnerable. It is equally not safe to rely on the dying declaration. As noticed in para 12 of this judgment, the *dehati nalishi* was recorded at 8:10 AM, whereas the dying declaration was recorded at 8:15 AM on the same day. Hence, it can be safely concluded that both the statements were recorded at the same place in a gap of five minutes. In view of our elaborated analysis, it is not safe to rely on the dying declaration. Since, the dying declaration and *dehati nalishi* were recorded almost simultaneously, it will be equally unsafe to solely rely upon *dehati nalishi*. For these cumaltive reasons, it is not safe to upheld the conviction of the appellant.

17. In view of aforesaid analysis, in our considered opinion, the appellant should get the benefit of doubt and it will not be proper to give stamp of approval to the judgment of sentencing and convicting the present appellant. Resultantly, the said judgment dated 22.01.2008 is set aside. If appellant is not required in any other criminal case, he shall be set free forthwith. At the end, we record our appreciation to the assistance given by the learned counsel for the parties.

18. **Appeal is allowed.** No cost.

Appeal allowed.

I.L.R. [2018] M.P. 960
APPELLATE CRIMINAL
Before Mr. Justice C.V. Sirpurkar
Cr.A. No. 478/2010 (Jabalpur) decided on 6 March, 2018

MUNNA KHAN …Appellant
Vs.
STATE OF M.P. …Respondent

***A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8/21(b), 42 & 50 – Compliance of Section 42 and 50 – Mandatory/ Substantial Compliance* – Heroin was seized from appellant – Trial concluded and he was convicted for offence u/S 8 and 21(b) of the Act of 1985 – Held – It is clear that provisions of Section 42 and 50 of the Act of 1985 are mandatory in nature, therefore exact and definite compliance and not only substantial compliance, is required – In the present case, mere grant of an option to accused to be searched either by Magistrate or a Gazetted Officer is not enough – He must be informed regarding such rights in clear and unambiguous terms – Evidence shows that such exercise was not conducted by any of the police officials – Evidence shows that accused was only informed about general terms of search and has not been informed about his right to be searched either by Magistrate or by a Gazetted Officer – Provisions of Section 50 was not definitely and exactly complied with – Prosecution failed to prove beyond reasonable doubt that accused was found in possession of heroin – Accused deserves the benefit of doubt – Conviction set aside – Appeal allowed.**

(Paras 13, 15, 16 & 18)

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8/21(बी), 42 व 50 – धारा 42 एवं 50 का अनुपालन – आज्ञापक/सारभूत अनुपालन – अपीलार्थी से हेरोइन जब्त की गई थी – विचारण समाप्त हुआ तथा उसे 1985 के अधिनियम की धारा 8 एवं 21(बी) के अंतर्गत अपराध हेतु दोषसिद्ध किया गया था – अभिनिर्धारित – यह स्पष्ट है कि अधिनियम 1985 की धारा 42 एवं 50 के उपबंध आज्ञापक प्रकृति के हैं,

इसलिए न केवल सारभूत बल्कि सटीक एवं निश्चित अनुपालन अपेक्षित है – वर्तमान प्रकरण में, मात्र मजिस्ट्रेट द्वारा या राजपत्रित अधिकारी द्वारा तलाशी लिये जाने का विकल्प अभियुक्त को प्रदान किया जाना पर्याप्त नहीं है – उसे ऐसे अधिकारों के बारे में, स्पष्ट एवं असंदिग्ध शर्तों में सूचित किया जाना चाहिए – साक्ष्य यह दर्शाते हैं कि इस तरह की कार्रवाई किसी भी पुलिस अधिकारी द्वारा आयोजित नहीं की गई थी – साक्ष्य यह दर्शाते हैं कि अभियुक्त को केवल तलाशी की साधारण शर्तों के बारे में सूचित किया गया था तथा या तो मजिस्ट्रेट या राजपत्रित अधिकारी द्वारा तलाशी लिये जाने के उसके अधिकार के बारे में सूचित नहीं किया गया था – धारा 50 के उपबंधों का निश्चित तथा सटीक रूप से अनुपालन नहीं हुआ था – अभियोजन युक्तियुक्त संदेह से परे यह साबित करने में असफल रहा कि अभियुक्त के कब्जे में हेरोइन पाई गई थी – अभियुक्त संदेह का लाभ पाने का हकदार है – दोषसिद्धि अपास्त – अपील मंजूर।

B. ***Testimony of Police Officer – Credibility*** **– Held – Testimony of the Inspector cannot be viewed with suspicion simply because panch witnesses have turned hostile or because he is a police officer, especially in a case where his testimony is corroborated by other police witnesses.**

(Para 7)

ख. पुलिस अधिकारी का परिसाक्ष्य – विश्वसनीयता – अभिनिर्धारित – निरीक्षक के परिसाक्ष्य को सिर्फ इसलिए संदेह के साथ नहीं देखा जा सकता क्योंकि पंच गवाह पक्षद्रोही हो गये हैं या क्योंकि वह एक पुलिस अधिकारी है, विशेष रूप से एक प्रकरण में जहाँ उसके परिसाक्ष्य की अन्य पुलिस साक्षीगण द्वारा पुष्टि की गई है।

Cases referred:

AIR 2013 SC 357, 1995 (3) SCC 610, 1999 (6) SCC 172.

Vijay Bhatnagar, for the appellant.
Manish Soni, G.A. for the respondent-State.

J U D G M E N T

C.V. Sirpurkar, J:- This Criminal Appeal against conviction under section 374 (2) of the Code of Criminal Procedure, 1973, filed on behalf of accused Munna Khan, is directed against the judgment dated 21.12.2009 passed in Special Case No.01/2007 by Special Judge (N.D.P.S. Act) Chhatarpur; whereby accused Munna Khan has been convicted of the offence punishable under Section 8 read with Section 21(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to in the judgment as "the Act") and has been sentenced to undergo rigorous imprisonment for a period of 5 years and to pay a fine in the sum of Rs.10,000/-. In default of payment of fine, he has been directed to undergo rigorous imprisonment for a further period of 6 months.

2(a). As per the prosecution case, at about 04:00 p.m. on 28.01.2007, S.H.O. of P.S. Kotwali, Chhatarpur Arun Dubey, received an information from an informant to the effect that accused Munna Khan consumes and sells heroin/smack; therefore, SHO Arun Dubey called panch witnesses Mohammad Abid and Sanjay Mishra, who were going from in front of the police station and informed them regarding the information. He sent intimation of aforesaid information to C.S.P. Chhatarpur through constable Malkhan. Thereafter, he took the members of police force available in the police station namely constables Rahat Khan, Shiv Kumar and Kishore Kumar and panch witnesses Mohammad Abid and Sanjay Mishra along with the material required for investigation and proceeded to the spot as per information. When they reached the trifurcation in front of Dr. Sood's house, they spotted Munna Khan going towards Sagar. Arun Dubey called him and inquired regarding consumption and sale of heroin by him. He was asked whether he wanted to be searched by Arun Dubey or by any Gazetted officer or Magistrate; whereon, accused Munna Khan consented to his search by Arun Dubey. After that members of the police force allowed the accused to search them in front of panch witnesses. Subsequently, Arun Dubey duly searched the accused; whereon, a small box contained a polythene sack was found inside the underwear of the accused. There was a powder inside, which weighed 14 grams. Arun Dubey tested the powder on and smelt it and detected that the powder was heroin. Thereafter, the powder was duly seized and sealed. The accused was arrested. The spot map was prepared. Arun Dubey brought accused and the seized contraband to the police station. First information report was lodged and Crime No.62/2007 was registered. The contraband seized from the possession of the accused was duly kept in safe custody in the Malkhana. The entries in Malkhana Register were duly made. The matter was entrusted for further investigation to ASI U.S. Mishra, who recorded the statement of constables Rahat Khan, Shiv Kumar Mishra, Kamta Singh, Jairam Tiwari, Rajesh and also the statements of panch witnesses Mohammad Abid and Sanjay Mishra. The contraband was sent to FSL Sagar. As per the report of FSL Sagar, the powder contained 13.75% of diacetylmorphine (heroin/smack).

2(b). A charge under Section 8 read with Section 21(b) of the Act was framed. The accused abjured the guilt and claimed to be tried. In his examination under Section 313 of the Code of Criminal Procedure he claimed that he has been falsely implicated in the case.

3. After the trial, the Court concluded that the prosecution has been able to prove beyond reasonable doubt that on the information received from an informant, regarding possession of heroin by the accused, a written intimation was sent to the City Superintendent of Police by SHO Arun Dubey. He has duly authorized under Section 42 of the Act. He proceeded to the spot and informed accused Munna Khan regarding his right to be searched either by SHO or by a Gazetted Officer or a Magistrate. The accused opted to be searched by SHO Arun Dubey.Thereafter, his person was duly

searched and from his underwear, a small box contained 14 grams of heroin was duly seized in presence of the panch witnesses and other police personnel after observing the lagal (sic : legal) formalities. It was duly deposited in the Malkhana, from where it was properly sent to FSL Sagar. As per the report of FSL Sagar, it contained 13.75% of diacetylmorphine. Consequently, the accused was convicted and sentenced as hereinabove stated.

4. Learned counsel for appellant has challenged the conviction and sentence mainly on the ground that panch witnesses namely Mohammad Abid and Sanjay Mishra have turned hostile. Sanjay Mishra has even denied his signatures upon panchnamas. Constables Kishore Kumar (PW-3) and Shiv Kumar Prajapati (PW-6) have omitted several material particulars in their deposition. It has principally been argued that SHO Arun Dubey (PW-10) has failed to depose that the accused was duly informed about his right to be searched by a Gazetted Officer or a Magistrate. As such, compliance of mandatory provisions of Section 50 of the Act has not been satisfactorily proved. Therefore, appellant Munna Khan deserves to be acquitted. It has further been submitted that he has already undergone 3 years 3 months and 14 days of actual imprisonment. Therefore, it has been prayed that in case his conviction is maintained, his sentence be reduced to the period already undergone by him in custody.

5. Learned Government Advocate for the respondent/State on the other hand has supported the impugned judgment contending that the officer making seizure namely Arun Dubey (PW-10), has withstood the cross-examination well; therefore, his statement should not be disbelieved merely because he is a Police Officer and panch witnesses have turned hostile. It has further been contended that it has been mentioned in panchnama (Ex.P/13) that the accused was given the option of being searched either by a Gazetted Officer or a Magistrate. As such, substantial compliance with the provisions of Section 50 was made. Therefore, it has been prayed that the appeal be dismissed.

6. On perusal of the record and due consideration of rival contentions, the Court is of the view that this appeal must succeed for the reasons hereinafter stated:

7. As per the prosecution case, the police party which allegedly made seizure, was led by SHO Arun Dubey (PW-10). He was accompanied by panch witnesses Mohammad Abid (PW-7) and Sanjay Mishra (PW-5) and constables Kishore Kumar, Shiv Kumar and Rahat. Out of them, Kishore Kumar (PW-3) and Shiv Kumar (PW-6) have been examined by the prosecution. Panch witnesses Sanjay Mishra (PW-5) and Mohammad Abid (PW-7) have turned totally hostile and have not supported the prosecution case at all. Sanjay Mishra (PW- 5) has gone to the extent of claiming that he never witnessed any such seizure and was not even acquainted with accused Munna Khan. None of the panchnamas from Ex.P/8 to Ex.P/19 contained his signatures; whereas, other panch witness Mohammad Abid (PW-7) has claimed that

he never witnessed any seizure from the appellant and the police used to frequently call him to the police station and obtain his signatures on blank papers. However, it is true that the testimony of Inspector cannot be viewed with suspicious simply because panch witnesses have turned hostile or because he is a police officer, especially in the case where his testimony is corroborated by other police witnesses. In such a situation, the Court will have to carefully scrutinize the depositions of police witnesses and ascertain whether they have withstood the test of cross-examination and whether compliance with mandatory provisions of the Act has been proved.

8. The main thrust of the arguments of learned counsel for the appellant is that compliance with mandatory provisions of Section 50 of the Act has not been satisfactorily proved. SHO Arun Kumar Dubey (PW-10) has stated in his examination-in-chief (paragraph no.6) that appellant Munna Khan was informed regarding the conditions of search of the person and was asked by whom he wanted to be searched; whereon, appellant Munna Khan consented to being searched by this witness. In this regard, panchnama (Ex.P/13) was prepared. Constable Kishore Kumar Nayak (PW-3) has stated that SHO Arun Dubey had asked the appellant whether he wanted to be checked by SHO Arun Dubey. Constable Shiv Kumar Prajapati (PW-6) is silent on the point. He has simply stated that appellant Munna Khan was intercepted and was asked his name and address. Thereafter, Town Inspector Arun Dubey searched him and in his search, the contraband was found from the pocket of his Kurta. Though, in the cross-examination, he clarified that the contraband was actually seized from inside the elastic band of his underwear.

9. Thus, it appears from the statement of Shiv Kumar Prajapati (PW-6) that no compliance with the provisions of Section 50 of the Act was made. Kishore Kumar Nayak (PW-3) fleetingly refers to the fact that the appellant was asked as to by whom he wanted to be searched and the officer making seizure namely Arun Dubey (PW-10), simply states that the appellant was informed regarding general conditions of body search and was asked as to by whom he wanted to be searched.

10. In this regard, learned Government Advocate for the respondent/State has contended that Arun Dubey (PW-10) has stated that panchnama (Ex.P/13) was made by him for this purpose. The panchnama has been signed by the appellant. It has been mentioned in the panhnama that the appellant was told whether he wanted to be searched by a Gazetted Officer or by a Magistrate; whereon, appellant Munna Khan consented to be searched by Arun Dubey and he was granted full freedom and opportunity to take a decision. Therefore, substantial compliance with the provisions of Section 50 of the Act was made and no prejudice has been caused to the appellant.

11. In the light of aforesaid evidence, the question that arises for consideration is whether provisions of Section 50 of the Act are mandatory or directory ? Whether absolute compliance with those provisions is necessary or substantial compliance is

sufficient ? and whether question of prejudice is relevant ?

12. Answers to all of aforesaid questions is to be found in the judgment of the Supreme Court in the case of *Kishan Chand vs. State of Haryana,* AIR 2013 SC 357 wherein it has been held that:

> *18. Following the above judgment, a Bench of this Court in the case of Rajinder Singh (supra) took the view that total non-compliance of the provisions of sub-sections (1) and (2) of Section 42 of the Act is impermissible but delayed compliance with a satisfactory explanation for delay can, however, be countenanced.*
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> *19. The provisions like Sections 42 or 50 of the Act are the provisions which require exact and definite compliance as opposed to the principle of substantial compliance. The Constitution Bench in the case of Karnail Singh* (2009 AIR SCW 5265) *(supra) carved out an exception which is not founded on substantial compliance but is based upon delayed compliance duly explained by definite and reliable grounds.*
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> *20. While dealing with the requirement of complying with the provisions of Section 50 of the Act and keeping in mind its mandatory nature, a Bench of this Court held that there is need for exact compliance without any attribute to the element of prejudice, where there is an admitted or apparent non-compliance. The Court in the case of State of Delhi v. Ram Avtar alias Rama* [(2011) 12 SCC 207 : (AIR 2011 SC 2699 : 2011 AIR SCW 4316)], *held as under:-*
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> *26. The High Court while relying upon the judgment of this Court in Baldev Singh* (AIR 1999 SC 2378 : 1999 AIR SCW 2494) *and rejecting the theory of substantial compliance, which had been suggested in Joseph Fernandez* (AIR 2000 SC 3502 : 2000 AIR SCW 2431), *found that the intimation did not satisfy the provisions of Section 50 of the Act. The Court reasoned that the expression "duly" used in Section 50 of the Act connotes not "substantial" but "exact and definite compliance". Vide Ext. PW 6/A, the appellant was informed that a gazetted officer or a Magistrate could be arranged for*

taking his search, if he so required. This intimation could not be treated as communicating to the appellant that he had a right under law, to be searched before the said authorities. As the recovery itself was illegal, the conviction and sentence has to be set aside.

27. It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance therewith should be strictly construed. As already held by the Constitution Bench in Vijaysinh Chandubha Jadeja (AIR 2011 SC 77 : 2010 AIR SCW 6800)*, the theory of "substantial compliance" would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudice against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance therewith must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right. The officer had prior information of the raid; thus, he was expected to be prepared for carrying out his duties of investigation in accordance with the provisions of Section 50 of the Act. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Non-compliance with the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial.*

21. When there is total and definite non-compliance of such statutory provisions, the question of prejudice loses its significance. It will per se amount to prejudice. These are indefeasible, protective rights vested in a suspect and are incapable of being shadowed on the strength of substantial compliance.

22. The purpose of these provisions is to provide due protection to a suspect against false implication and

> *ensure that these provisions are strictly complied with to further the legislative mandate of fair investigation and trial. It will be opposed to the very essence of criminal jurisprudence, if upon apparent and admitted non-compliance of these provisions in their entirety, the Court has to examine the element of prejudice. The element of prejudice is of some significance where provisions are directory or are of the nature admitting substantial compliance. Where the duty is absolute, the element of prejudice would be of least relevancy. Absolute duty coupled with strict compliance would rule out the element of prejudice where there is total non-compliance of the provision.*

13. Thus, it is clear that the provisions like 42 and 50 of the Act are mandatory in nature. The punishment is harsh and certain safe guards have been provided for protection of the accused; therefore, exact and definite compliance, as contra-distinguished from substantial compliance is required in such cases. The element of prejudice would be irrelevant.

14. Now the question that remains for consideration is whether in the present case, exact and definite compliance of provisions of Section 50 has been satisfactorily proved ?

15. It has to be noted at the outset that mere grant of an option to the accused to be searched either by a Magistrate or a Gazetted Officer is not enough. He must be informed regarding his right to be searched by a Magistrate or a Dazetted (sic: Gazetted) Officer in clear and unambiguous terms. As observed above, none of the Police Officials including the officer making seizure namely Arun Dubey, have stated in their depositions that the appellant was informed regard this right. All Arun Dubey states is that he was informed regarding the general terms of search and a panchnama (Ex.P/13) was prepared. It may be noted that several panchnamas were prepared on the spot which contained the signatures of the accused but unless the witness deposes that the appellant was clearly informed regarding his right to be searched by a Magistrate or by a Gazetted Officer, it cannot be said that Section 50 of the Act was definitely and exactly complied with. In this regard, reliance can be placed upon the judgment rendered by a three judge bench of the Supreme Court in the case of *Saiyad Mohd. Saiyad Umar Saiyed and others vs The State of Gujarat,* 1995(3) SCC 610; wherein, it has been held that:

> *7. Having regard to the object for which the provisions of Section 50 have been introduced into the NDPS Act and when the language thereof obliges the officer*

concerned to inform the person to be searched of his right to be searched in the presence of a Gazetted Officer or a Magistrate, there is no room for drawing a presumption under Section 114, Illustration (e) of the Indian Evidence Act, 1872. By reason of Section 114 a court "may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case". It may presume "(e) that judicial and official acts have been regularly performed". There is no room for such presumption because the possession of illicit articles under the NDPS Act has to be satisfactorily established before the court. The fact of seizure thereof after a search has to be proved. When evidence of the search is given all that transpired in its connection must be stated. Very relevant in this behalf is the testimony of the officer conducting the search that he had informed the person to be searched that he was entitled to demand that the search be carried out in the presence of a Gazetted Officer or a Magistrate and that the person had not chosen to so demand. If no evidence to this effect is given the court must assume that the person to be searched was not informed of the protection the law gave him and must find that the possession of illicit articles under the NDPS Act was not established.

8. We are unable to share the High Court's view that in cases under the NDPS Act it is the duty of the court to raise a presumption, when the officer concerned has not deposed that he had followed the procedure mandated by Section 50, that he had in fact done so. When the officer concerned has not deposed that he had followed the procedure mandated by Section 50, the court is duty-bound to conclude that the accused had not had the benefit of the protection that Section 50 affords; that, therefore, his possession of articles which are illicit under the NDPS Act is not established; that the precondition for his having satisfactorily accounted for such possession has not been met; and to acquit the accused.

9. The High Court relied upon the fact that the argument that Section 50 had not been complied with had not been made before the trial court and held that a point of fact could not be taken for the first time in appeal. The protection that Section 50 gives to those accused of being in possession of illicit articles under the NDPS Act is sacrosanct and cannot be disregarded on the technicality that the point was not taken in the court of first instance.

10. Finding a person to be in possession of articles which are illicit under the provisions of the NDPS Act has, as we have said, the consequence of requiring him to prove that he was not in contravention of its provisions and it renders him liable to punishment which can extend to 20 years' rigorous imprisonment and a fine of Rupees two lakhs or more. It is necessary, therefore, that courts dealing with offences under the NDPS Act should be very careful to see that it is established to their satisfaction that the accused has been informed by the officer concerned that he had a right to choose to be searched before a Gazetted Officer or a Magistrate. It need hardly be emphasised that the accused must be made aware of this right or protection granted by the statute and unless cogent evidence is produced to show that he was made aware of such right or protection, there would be no question of presuming that the requirements of Section 50 were complied with. Instructions in this behalf need to be issued so that investigation officers take care to comply with the statutory requirement and drug-pedlars do not go scot-free due to non-compliance thereof. Such instructions would be of great value in the effort to curb drug trafficking. At the same time, those accused of possessing drugs should, however heinous their offence may appear to be, have the safeguard that the law prescribes.

11. For the reasons aforestated, the conviction of the appellants under the NDPS Act and the sentence imposed upon them for the same must be set aside.

(Emphasis supplied)

16. Thus, it is obvious that it has to be proved to the satisfaction of the Court on the basis of the deposition of the officer making seizure that the right available to the accused under Section 50 of the Act, was duly communicated to the accused, which in the case at hand if at all done, was not done in a satisfactory manner.

17. Moreover, the Supreme Court has also observed in the case of *State of Punjab Vs. Baldev Singh,* 1999(6) SCC 172*,* that it is not necessary to give information regarding right under section 50 of the Act to the person to be searched in writing and it is sufficient if such information is communicated to the person concerned orally but compliance of Section 50 should be made as far as possible in the presence of some independent and respectable person. This requirement has also not been fulfilled in the present case.

18. In aforesaid circumstances, the Court is of the view that the prosecution has failed to prove beyond reasonable doubt that the accused was found to be in possession of heroin. Therefore, he deserves the benefit of doubt. The trial Court erred in convicting him under Section 8 read with Section 21(b) of the Act.

19. In the result, this appeal against conviction succeeds. Appellant Munna Khan is acquitted of the charge under Section 8 read with Section 21(b) of the Act.

Appeal allowed.

I.L.R. [2018] M.P. 970 (DB)
APPELLATE CRIMINAL

Before Mr. Justice R.S. Jha & Smt. Justice Nandita Dubey

Cr.A. No. 2398/2007 (Jabalpur) decided on 21 March, 2018

UJYAR SINGH & ors. …Appellants
Vs.
STATE OF M.P. …Respondent

***Penal Code (45 of 1860), Sections 302/149, 148, 324/149 & 97 – Murder – Conviction – Private Defence* – In respect of share in land, previous enmity between Appellant no.1 and deceased – Plea taken by appellants that they attacked in private defence – Held – In order to claim right of private defence, appellants/accused persons have to show necessary material from record, either by themselves adducing positive evidence or by eliciting necessary facts from the witnesses examined for prosecution – Nothing on record to show that there was reasonable ground for appellants to apprehend death or grievous hurt would be caused to them by the deceased – Photographs of deceased clearly established the gruesome and brutal manner in which crime was committed – 18 injuries found on the body of deceased, all grievous in nature whereas injuries found on the body of appellants are old and simple in nature – Further held, right of private defence is not available to a person**

who himself is an aggressor – In the present case, there was a prompt FIR and testimony of the injured eye witness is duly corroborated by the other prosecution witnesses – Appellants rightly convicted – Appeal dismissed.

(Paras 12, 17 & 20)

दण्ड संहिता (1860 का 45), धाराएँ 302/149, 148, 324/149 व 97 – हत्या – दोषसिद्धि – प्राईवेट प्रतिरक्षा – अपीलार्थी क्र.1 व मृतक के बीच भूमि में हिस्से के संबंध में पूर्व वैमनस्यता – अपीलार्थीगण द्वारा लिया गया अभिवाक् कि उन्होंने प्राईवेट प्रतिरक्षा में हमला किया – अभिनिर्धारित – प्राईवेट प्रतिरक्षा के अधिकार का दावा करने के लिए, अपीलार्थीगण/अभियुक्तों को या तो स्वयं द्वारा सकारात्मक साक्ष्य से या अभियोजन हेतु परीक्षित साक्षियों से आवश्यक तथ्यों को निकलवाकर, अभिलेख से आवश्यक सामग्री दर्शाना होती है – यह दर्शाने के लिए अभिलेख पर कुछ नहीं कि अपीलार्थीगण के लिए, मृतक द्वारा उन्हें मृत्यु या घोर उपहति कारित होने की आशंका हेतु पर्याप्त आधार था – मृतक की तस्वीरें स्पष्ट रूप से वीभत्स एवं पाशविक ढंग स्थापित करती है जिससे अपराध कारित किया गया था – मृतक के शरीर पर 18 चोंटें पायी गई, सभी गंभीर स्वरूप की, जबकि अपीलार्थीगण के शरीर पर पायी गई चोटें पुरानी एवं साधारण स्वरूप की है – आगे अभिनिर्धारित – प्राईवेट प्रतिरक्षा का अधिकार उस व्यक्ति को उपलब्ध नहीं है जो स्वयं आक्रमणकारी होता है – वर्तमान प्रकरण में, प्रथम सूचना रिपोर्ट तत्काल की गई थी तथा आहत चक्षुदर्शी साक्षी के परिसाक्ष्य की सम्यक् संपुष्टि, अन्य अभियोजन साक्षीगण से होती है – अपीलार्थीगण को उचित रूप से दोषसिद्ध किया गया – अपील खारिज।

Cases referred:

(2012) 1 SCC 414, (2016) 14 SCC 536, (1971) 3 SCC 275.

Madan Singh, for the appellant.
Sudeep Deb, G.A. for the respondent.

J U D G M E N T

The Judgment of the court was delivered by:
Nandita Dubey, J.:- This appeal has been filed by the appellants, being aggrieved by the judgment dated 22.10.2007, passed by Sessions Judge, Damoh in S.T. No. 147/2002, whereby all appellants have been found guilty for the offence punishable under Sections 302/149, 148 and 324/149 of the Indian Penal Code and have been sentenced to imprisonment for life and fine of Rs.2,000/-, under Section 302/149 of the I.P.C. with a stipulation for four months rigorous imprisonment in case of default, rigorous imprisonment of 3 years and fine of Rs.1,000/- under Section 148 of the I.P.C. with a stipulation for 2 months rigorous imprisonment in case of default, rigorous imprisonment for 3 years and fine of Rs.1,000/- under Section 324/149 of the I.P.C. with a stipulation for 2 months rigorous imprisonment in case of default. Appellant Nos. 3 to 5 have been further found guilty for the offence punishable under Sections

25 and 27 of the Arms Act and have been sentenced to rigorous imprisonment for 1 year and fine of Rs.1,000/- under Section 25 of the Arms Act with a stipulation for 2 months rigorous imprisonment in case of default and rigorous imprisonment for 3 years and fine of Rs.1,000/- under Section 27 of the Arms Act with a stipulation for 2 months rigorous imprisonment in case of default.

2. The prosecution story, in brief, is that, on 03.03.2002 at 5.00 P.M., the accused persons armed with deadly weapons formed an unlawful assembly with common object to commit the murder of deceased Kamal and to cause grievous hurt to Sudama on account of previous enmity due to the land dispute. In pursuance of their common object, they assaulted Kamal with axe, katarna, farsa, ballam and lathi, which resulted in his death.

3. As per prosecution, Gulabrani had no sons, so she gave her 9 acres of land to one of her daughters Kashibai, wife of appellant No.1, Ujyar Singh. Due to this, her other two daughters, Imrati and Rati Bai, raised a dispute and asked for their share. It is alleged that deceased Kamal, who was the nephew of late husband of Gulab bai supported the case of Imrati and Ratibai and on account of the fact, enmity ensued between appellant No.1 Ujyar Singh and Kamal.

4. It is alleged on 03.03.2002, at 5.00 P.M., when Kamal Singh was going towards the field of Kanhai Choudhary, Ujyar Singh, armed with axe, Karan Singh, armed with katarna, Veeran Singh, armed with farsa, Sunder Singh, armed with ballam, Nandu, Budde and Chain Singh, armed with lathies, stopped and attacked the deceased due to the previous land dispute. It is alleged that Ujyar Singh struck a blow with axe on the head of Kamal Singh. Karan Singh also hit with katarna on the head of the deceased, whereas, Veeran and Sunder struck him with farasa and ballam respectively in his chest. Nandu struck a blow with Khabda in the naval region. It is further alleged that hearing the shouts of deceased Kamal Singh, Sudama, who rushed to intervene and save Kamal Singh, was stalled by Gulabrani, Kashibai and Halki Bahu and assaulted by Ujyar Singh on his back side. Thereafter, Ujyar Singh dealt a blow with axe on the neck of deceased, which resulted in partial severance of his neck, as a result, Kamal Singh fell down and died. Thereafter, Ujyar Singh struck a blow on his left arm, as a result, his left arm got severed. Even after the deceased died, the assailants kept striking on the legs and back with axe, farsa and lathi. As per prosecution, the incident was witnessed by Raghuveer Singh, Ghansa Singh, Sone Singh, Ajmer and Rajendra, who came to the spot hearing the shouts for help.

5. Report of the incident was lodged at police station Batiyagarh by Sudama (P.W.-4), on the basis of this report (Ex.P-20), criminal law was set into motion. Sport map was prepared and photographs of the deceased were taken. Rubber slipper, small plastic bag of gram, one 12 bore live catridge, napkin, old broken watch were seized from the spot. The body of the deceased was sent for postmortem. Injured Sudama was also examined by Dr. K.L. Adarsh (P.W.- 19).

6. During the course of investigation, the accused persons were arrested and pursuant to the disclosure made by them, offending weapons were recovered and sent for forensic examination. Ujyar Singh, Sundar Singh and Veeran Singh were also medically examined.

7. Dr. K.L. Adarsh (P.W.-19), who conducted the postmortem, found the following injuries on the body of the deceased:-

(1) Incised wound 15 cm x 2 cm x upto cervical vertebra over front of neck extended both sides, muscles, esophagus, trachea, blood vessels, cervical vertebra cut, horizontal in direction. Clot blood present, margin clear cut.

(2) Incised wound 9 cm x 2 cm x 6 cm over left side of neck oblique in direction. Margin clear cut and regular. Left carotid artery, jugular vein, left sterno mastoid muscle cut. Clot blood present.

(3) Incised wound over lower one third of left forearm with amputation from lower one third at left forearm with clot blood present, margin clear cut and regular, amputated portion is brought with body.

(4) Incised wound 6 cm x 2 cm x muscle deep. Lower stricture with lower portion of right humerus bone cut, clot blood present.

(5) Incised wound 6 cm x 2 cm x muscle deep over lower one third of right vertical, 7th rib is cut clot blood present.

(6) Incised wound 4 cm x 1 cm over anterior aspect of upper one third of left leg, clot blood present, simple.

(7) Incised wound 4 cm x 1 cm x muscle deep over lower one third of left chest, clot blood present.

(8) Incised wound 3 cm x 1 cm x 1/6 cm on lower one third of left chest, 3 cm below injury No.7 clot blood present.

(9) Incised wound 10 cm x 2 cm x muscle deep on upper half of left scapula. Scapula cut, clot blood present.

(10) Incised wound 13 cm x 2 cm x muscle deep on anterior aspect of left knee, bone cut. Clot blood not present.

(11) Incised wound 13 cm x 1/2 cm x muscle deep over left knee, bone cut, below injury No.10. Clot blood not present.

(12) Incised wound 9 cm x 1 cm x 1/4 cm over anterior aspect of upper portion of left leg. Anterior aspect. Blood clot not present.

(13) Incised wound 12 cm x 2 cm x muscle deep over anterior aspect of right knee, bone cut. Horizontal. Blood clot not present.

(14) Incised wound 9 cm x 1 cm over lower portion of right knee anterior aspect, horizontal, no blood clot.

(15) Incised wound 8 cm x 1 cm x muscle deep over lower portion of right knee, horizontal on anterior aspect, no blood clot.

(16) Incised wound 8 cm x 1/2 cm over anterior aspect of upper portion of right leg. Bone cut, no blood clot.

(17) Incised wound 9 cm x 1/2 cm over upper portion of right leg, bone cut, no blood clot.

(18) Incised wound 8 cm x 1/2 cm over anterior aspect of upper one third of right leg. Horizontal., no blood clot.

Injury No. 1 to 9, ante-mortem in nature. Injury No.10 to 18 postmortem in nature. Injury No.1 is sufficient to cause death. All injuries are caused by sharp weapon.

From the postmortem examination, the doctor was of the opinion that the death in this case is due to shock caused by haemorrhage. Time passed since death within 18-24 hours.

On the same day, injured Sudama (P.W.-4) was also examined by Dr. K.L. Adarsh (P.W.-19), who found the following injuries:-

"Incised wound 7 cm x 1/2 cm x muscle deep on right scapular near axilla, margin clearly cut and regular. Clot blood present."

In the opinion of the doctor, the injury was caused by sharp edged weapon with 12 hours of the examination.

Accused Ujyar Singh was medically examined by Dr. K.L. Adarsh (P.W.-19) on 06.03.2002, found the following injuries:-

1. Abrasion 7 cm x 1/2 cm on left side back upper part of scapula, partially healed.

2. Contusion 15 cm x 9 cm left arm bluish black in colour.

3. Contusion 3 cm x 2 1/2 cm upper one third of right arm bluish black.

4. Contusion 18 cm x 6 cm on lower portion of right abdominal region lateral to Iliac region bluish black in colour caused by hard and blunt object. Simple in nature. Duration about three days.

Accused Veeran Singh was medically examined by Dr. L.R. Khisaniya (D.W.-3) on 13.03.2002, found the following injuries:-

1. Contusion 3 cm x 1/2 cm over right occipital region oblique in direction. The colour is fade and tint.

2. Partially healed injury 2 cm x 1/4 cm over right frontal region oblique in direction.

3. Partially healed injury 3 cm x 1/2 cm over left occipital region oblique in direction. All injuries caused by hard and blunt object. All are simple in nature. Duration within 12 to 15 days.

Accused Sundar Singh was medically examined by Dr. L.R. Khisaniya (D.W.-3) on 13.03.2002, found the following injuries:-

1. Contusion 5 cm x 1/2 cm over lateral aspect of middle of left forearm, oblique in direction. The colour is fade and tint.

2. Partially healed injury 5 cm x 1/4 cm over central and frontal region, oblique in position. Both injuries caused by hard and blunt object. Both are simple in nature. Duration with 12 to 15 days.

8. After completion of investigation, charge sheet was submitted against 9 accused persons. To prove his case, prosecution has produced 20 witnesses. The accused persons were examined under Section 313 Cr.P.C. They abjured their guilt and pleaded false implication. Their stand was that they had acted in private defence. According to the accused persons, when they were carrying their gram crops in the bullock cart, Kamal Singh, Sudama, Ajmer, Ghansu Singh and Raghuveer Singh had attacked them on account of the previous land dispute and tried to take away their crop, as a result

of which quarrel ensued. Kamal Singh fired from katta, which missed Ujyar Singh, and to save themselves, they have assaulted Kamal Singh and Sudama in private defence.

9. The trial Court after detailed scrutiny of the evidence of the injured eye witness and documents brought on record, recorded a finding of guilt against Ujyar Singh, Chain Singh, Sunder Singh, Veeran Singh and Karan Singh and convicted and sentenced them as aforesaid, rejecting their plea of self defence, whereas Bhukki Singh, Kashibai, Gulabbai and Halki Bahu were acquitted, due to lack of evidence.

10. We have heard the learned counsel for the parties at length and perused the record.

11. The strained relationship between the deceased and accused persons is admitted. Ujyar Singh, Veeran Singh and Sunder Singh have also admitted their presence at the place of occurrence and assaulting the deceased.

12. P.W.-4 Sudama Singh, who is also an injured witness and whose presence at the place of occurrence cannot be denied, has categorically stated that on the fateful day, he was working in his field and hearing the sound of fight, he reached to the field of Kanhai Choudhary, where he saw Ujyar struck a blow of axe on the head of deceased Kamal Singh. Thereafter Veeran Singh struck a blow with katarna on his neck. Nandu assaulted him with Khabda in stomach. Ujyar also struck with axe on the hand of the deceased which resulted in severing of his left hand. He has further stated that the accused persons repeatedly struck with the deadly weapons and kept on assaulting the deceased till he died. His statement find corroboration from the evidence of P.W.-7 Ghansu, P.W.-10 Ajmer Singh, P.W.-11 Sone Singh , P.W.-12 Rajendra and P.W.-17 Raghuveer Singh, who have all clearly stated that they saw the accused persons assaulting the deceased. The evidence on record establishes that FIR (Ex. P-20) was lodged promptly at 10.50 P.M. on 03.03.2002 by Sudama Singh (P.W.-4).

13. The appellants have come with a case of having acted in private defence. According to the appellants, they were returning from their field, carrying the crops of gram in their bullock cart, when Kamal, Sudama, Ajmer, Ghansu and Raghuveer came suddenly and attacked them on account of the previous land dispute between the parties. It is urged that the deceased alongwith with the above named persons tried to take away the crops, as a result of which a quarrel ensued between them. It is stated that Kamal took out a katta and fired a shot, which missed Ujyar Singh. In order to save themselves, they have assaulted Kamal Singh and Sudama. It is their further contention that Ujyar Singh, Veeran Singh and Sundar Singh have also received injuries in the same incident. It is also contented that a day prior to the incident, there was an altercation between the deceased and Ujyar Singh and a report (Ex.D-7) to that effect had been lodged by him in Police Station, Batiyagarh.

14. The right of private defence is contemplated by Section 97 of the I.P.C., which reads as follows:-

> *"**Section 97.** Right of private defence of the body and of property.— Every person has a right, subject to the restrictions contained in section 99, to defend— First — His own body, and the body of any other person, against any offence affecting the human body;*
>
> *Secondly —The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass."*

In (2012) 1 SCC 414 *Ranjitham Vs. Basavaraj and others,* the Supreme Court has held :-

> *18. In V. Subramani V. State of T.N.* (2005) 10 SCC 358 *this Court examined the nature of this right. This Court held that whether a person legitimately acted in exercise of his right of private defence is a question of fact to be determined on the facts and circumstances of each case. In a given case it is open to the court to consider such a plea even if the accused has not taken it, but the surrounding circumstances establish that it was available to him. The burden is on the accused to establish his plea. The burden is discharged by showing preponderance of probabilities in favour of that plea. The injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and whether the accused had time to have recourse to public authorities are all relevant factors to be considered.*

In (2016) 14 SCC 536, *Extra-judicial Execution victim families Association and another Vs. Union of India and another* the question before the Supreme Court was whether to quell this internal disturbance, has there been use of excessive force by Manipur Police and the Armed Forces in the 1528 cases complied by the petitioners through fake encounters or extra-judicial executions during the period of internal disturbance in Manipur as alleged by the petitioners. Secondly, has the use of force by the Armed Forces been retaliatory to the point of causing death and was the retaliatory force permissible in law on the ground that the victims were "enemy" as defined in Section 3(x) of the Army Act ?, and the Supreme Court has held :-

"200. At the outset, a distinction must be drawn between the right of self-defence or private defence and use of excessive force or retaliation. Very simply put, the right of self-defence or private defence is a right that can be exercised to defend oneself but not to retaliate. This view was reiterated but expressed somewhat differently in Rajesh Kumar Vs. Dharamvir (1997) 4 SCC 496, *when it was said :-*

> *"20.....To put it differently, the right is one of defence and not of requital or reprisal. Such being the nature of right, the High Court could not have exonerated the accused persons of the charges levelled against them by bestowing on them the right to retaliate and attack the complainant party.*

203. Finally, reference may be made to Darshan Singh v. State of Punjab (2010) 2 SCC 333, *wherein this Court held:*

> *"31. When there is real apprehension that the aggressor might cause death or grievous hurt, in that event the right of private defence of the defender could even extend to causing of death. A mere reasonable apprehension is enough to put the right of self-defence into operation, but it is also a settled position of law that a right of self-defence is only a right to defend oneself and not to retaliate. It is not a right to take revenge."*

15. The Supreme Court in *George Dominic Varkey V. The State of Kerala* (1971) 3 SCC 275, has held:

> *"6……Broadly stated, the right of private defence rests on three ideas: first, that there must be no more harm inflicted than is necessary for the purpose of defence; secondly, that there must be reasonable apprehension of danger to the body from the attempt or threat to commit some offence; and, thirdly, the right does not commence until there is a reasonable apprehension. It is entirely a question of fact in the circumstances of a case as to whether there has been excess of private defence within the meaning of the 4th clause of Section 99 of the Indian Penal Code, namely, that no more harm is inflicted than*

is necessary for the purpose of defence. No one can be expected to find any pattern of conduct to meet a particular case. Circumstances must show that the court can find that there was apprehension to life or property or of grievous hurt. If it is found that there was apprehension to life or property or of grievous hurt the right of private defence is in operation. The person exercising right of private defence is entitled to stay and overcome the threat."

16. Whether the appellants assaulted the deceased in the right of private defence will have to be considered in the light of the above principle.

17. The assertion of the appellants that they acted in self defence is further belied by the injuries/postmortem report, which is not challenged by the appellants. It is apparent from postmortem report (Ex. P-20) that the deceased has received 18 injuries, all grievous in nature. From the photographs of deceased clearly established the gruesome and brutal manner in which the crime was committed, whereas the injuries found on the body of the accused persons namely Ujyar Singh, Sundar Singh and Veeran Singh were old and simple in nature and caused by hard and blunt object, as there is no allegation about use of any other weapon than gun/katta by the deceased, it is highly unlikely that these injuries were the result of present incident.

18. The story put up by the appellants that Kamal and Sudama attacked them and tried to take away the gram crops carried by them in their bullock cart, and they retaliated when Kamal fired a shot from katta is incorrect as no katta or bullock cart with crops was found on the spot as is clearly established the crime details form Ex. P-29. Further, there is nothing on record to establish that deceased was carrying a gun/katta and he fired it.

19. With regard to earlier altercation and report Ex.D-7, it is clear that Ujyar Singh on 01.03.2002 had lodged a report to the effect that at 9.30 P.M. in the night, four cattle entered his field. He had caught hold two of them and got them locked in kaji house, whereas the other two ran away. After this Hanmat Singh and Ram Singh had abused him. It is apparent from Ex.D-7 that the same is not connected in any way with the present incident and does not give rise to any cause of action against the deceased.

20. From the aforesaid, it is clear that it was the accused persons, who were the aggressors. Hence, the right of private defence is not available to the appellants. In order to claim right of private defence, the appellants/accused persons have to show necessary material from record, either by themselves adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. There is nothing on record to show that there was reasonable ground for the appellants to

apprehend that either death or grievous hurt would be caused to them by deceased Kamal. It is settled law that right of private defence is not available to a person who himself is an aggressor.

21. From the aforesaid analysis of material on record and the preposition of law laid down by the Apex Court, the commission of the offence by the accused persons has been clearly established and the trial Court has rightly considered the statements of the witnesses and the documents on record, in recording a finding of guilt against the appellants. Therefore, we do not find any illegality or perversity in the finding of guilt recorded by the trial Court.

22. Accordingly, the appeal filed by the appellants, being devoid of merit is accordingly dismissed. The conviction of all the appellants under Sections 302/149, 148 and 324/149 of the I.P.C. and the conviction of appellants No.3 to 5 under Sections 25 and 27 of the Arms Act is affirmed and upheld. **Appellant Nos. 2** and **3** namely, **Chain Singh** and **Sundar Singh,** are on bail. Their bail bonds shall stand cancelled and they are directed to be taken into custody forthwith to undergo the remaining part of their jail sentence. **Appellants No.1, 4** and **5**, namely, **Ujyar Singh, Veeran Singh** and **Karan Singh** are in jail. They shall remain incarcerated to undergo the remaining part of their jail sentence.

Appeal dismissed.

I.L.R. [2018] M.P. 980
ARBITRATION APPEAL

Before Mr. Justice Prakash Shrivastava

Arb.A. No. 12/2007 (Indore) decided on 5 April, 2018

CENTRAL PAINTS CO. PVT. LTD. …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

***A. Arbitration and Conciliation Act (26 of 1996), Section 37 – Scope of appeal against the order deciding objection u/S 34 of Act* – Award of the arbitrator can be subject matter of challenge u/S 34 of the Act only on the limited ground prescribed therein – Scope of appeal cannot be wider than the scope of considering the objection u/S 34 – Unless a ground u/S 34 is made out appellate power cannot go into the findings of the arbitrator or re-appreciate the evidence.**

(Para 6)

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 37 – अधिनियम की धारा 34 के अंतर्गत आक्षेप के विनिश्चय के आदेश के विरूद्ध अपील का विस्तार – मध्यस्थ का अवार्ड, अधिनियम की धारा 34 के अंतर्गत केवल उसमें विहित सीमित आधार पर चुनौती

की विषय वस्तु हो सकता है – अपील का विस्तार, धारा 34 के अंतर्गत आक्षेप पर विचार के विस्तार से अधिक व्यापक नहीं हो सकता – जब तक कि धारा 34 के अंतर्गत आधार नहीं बनता, अपीली शक्ति, मध्यस्थ के निष्कर्षों पर विचार या साक्ष्य का पुनः मुल्यांकन नहीं कर सकती।

***B. Arbitration and Conciliation Act (26 of 1996), Section 34 & 37 – Allegation of bias against arbitrator* – Parties by mutual agreement agreed for named arbitrator – In statement of claim and during the course of proceedings before arbitrator no allegation of bias against arbitrator raised – Appellant raised plea of bias while raising objection u/S 34 – Such a course not open to appellant – Objection of bias on the ground that Commissioner has heard the appeal filed by appellant against eviction order – Held – Appeal was heard by the commissioner in his capacity as an appellate authority whereas the arbitration has been conducted in a different capacity as named arbitrator in arbitration clause – Objection of bias cannot be accepted.**

(Para 17)

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 34 व 37 – मध्यस्थ के विरूद्ध पक्षपात का अभिकथन – पक्षकार आपसी करार द्वारा नामित मध्यस्थ हेतु सहमत हुए – दावे के कथन में एवं मध्यस्थ के समक्ष कार्यवाहियों के समय, मध्यस्थ के विरूद्ध पक्षपात का अभिकथन नहीं उठाया गया था – अपीलार्थी ने धारा 34 के अंतर्गत आक्षेप उठाते समय पक्षपात के अभिवाक् को उठाया है – अपीलार्थी के लिए उक्त मार्ग खुला नहीं – पक्षपात का आक्षेप इस आधार पर कि आयुक्त ने बेदखली के आदेश के विरूद्ध, अपीलार्थी द्वारा प्रस्तुत अपील पर सुनवाई की है – अभिनिर्धारित – आयुक्त द्वारा अपीली प्राधिकारी के रूप में उसकी क्षमता में अपील की सुनवाई की थी जबकि, माध्यस्थम को भिन्न क्षमता में, माध्यस्थम खंड में नामित मध्यस्थ के रूप में संचालित किया गया है – पक्षपात का आक्षेप स्वीकार नहीं किया जा सकता।

***C. Industries (Sheds, Plots and Land allotment) Rules, M.P., 1974 (as amended on 01.04.1999) – Power to renew or cancel the lease* – Jilla Yojna Samiti was given power to renew or cancel the lease which were executed prior to 1974 – Lease deeds in question were executed in 1963 & 1968 therefore Jilla Yojna Samiti was duly authorized to cancel the lease – Appeal dismissed.**

(Para 22)

ग. उद्योग (शेड, प्लाट एवं भूमि आवंटन) नियम, म.प्र., 1974 (01.04.1999 को यथा संशोधित) – पट्टे को नवीकृत या रद्द करने की शक्ति – 1974 से पूर्व निष्पादित किये गये पट्टों को नवीकृत या रद्द करने की शक्ति, जिला योजना समिति को दी गई थी – प्रश्नगत पट्टा विलेखों को 1963 व 1968 में निष्पादित किया गया था, इसलिए, जिला योजना समिति पट्टे को रद्द करने के लिए सम्यक् रूप से प्राधिकृत थी – अपील खारिज।

Cases referred:

2015 (3) SCC 49, (2014) 9 SCC 263, 2011 AIR SCW 4528, 2006 (11) SCC 181, 2012 (1) SCC 594, 2010 (11) SCC 296, (2013) 16 SCC 116, AIR 1993 SC 2155, AIR 1984 Kerala 23, AIR 1987 SC 2386.

Shekhar Bhargava with *Ishita Agrawal,* for the appellant.
Piyush Shrivastava, for the respondents.
A.K. Sethi with *Harish Joshi*, for the proposed intervener in I.A. No. 5838/2012.

O R D E R

Prakash Shrivastava, J.:- This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is directed against the order dated 2/8/2005 passed by the Additional District Judge rejecting the objection under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act of 1996').

2. The facts in nutshell are that the three lease deeds dated 22/11/1963, 23/11/1963 and 29/10/1968 were executed by the respondent-General Manager District Industries Centre in favour of the appellant-M/s Central Paints Company Pvt. Ltd. giving a lease of the plot in industrial estate, Pologround. Since later on it was found that the appellant had committed breach of conditions of lease, therefore, after serving a notice, the lease deeds were cancelled by order dated 7/8/2001 and against this order the appeal was also dismissed by the Commerce and Industries Department vide order dated 28/6/2002. Aggrieved with this, appellant had filed W.P. No.1361/2002 before this Court and this Court vide order dated 17/9/2002 had dismissed the writ petition giving liberty to raise the dispute before the Arbitrator in terms of the arbitration clause in the lease. Accordingly, the parties had approached the named arbitrator and after conducting the proceedings, arbitrator had passed the award dated 10/10/2003 holding that the appellant had committed breach of the conditions of the lease, therefore, after due service of notice, the lease was cancelled and the appellant has no right to continue in possession of the leased land. Against the award, objections preferred by the appellant under Section 34 of the Act have been rejected by the Additional District Judge by order dated 2/8/2005.

3. Learned counsel for the appellant submits that the Arbitrator was also the Appellate Authority against the order of eviction passed against the appellant under Madhya Pradesh Lok Parisar (Bedhakhali) Adhiniyam, 1974 (M.P. Public Premises Eviction Act), therefore, he could not have acted as arbitrator and the award is liable to be set aside on the ground of bias. He has also submitted that the Jilla Yojna Samiti had no right to terminate the lease and there was no change of management and rent was also duly paid, therefore, there was no violation of the lease conditions and the lease could not have been terminated.

4. Learned counsel for the State has supported the impugned orders submitting that within the limited scope of appeal under Section 37, no ground for interference is made out.

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

6. Before examining the grounds raised by counsel for the appellant, it would be worthwhile to consider the scope of this appeal. The award of the arbitrator can be subject matter of challenge under Section 34 of the Act only on the limited ground prescribed therein, therefore, the scope of this appeal cannot be wider then the scope of considering the objection under Section 34. Unless a ground u/S.34 is made out this Court exercising the appellate power cannot go into the findings of the Arbitrator or reappreciate the evidence. This court has a limited appellate role circumscribed by the grounds enumerated u/S.34.

7. The Supreme Court in the matter of *Associate Builders Vs. Delhi Development Authority reported in* 2015 (3) SCC 49 has held that none of the grounds contained in Section 34 (2)(a) of the Act deal with the merits of the decision rendered by an arbitral award and it is only when arbitral award is in conflict with public policy of India as per Section 34(2)(b)(ii), that merits of an arbitral award are to be looked into. In this judgment the Hon'ble Supreme Court has noted the circumstances when the merits of the award can be looked into by holding that :-

> "**17.** It will be seen that none of the grounds contained in sub- clause 2 (a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances."

8. Supreme Court in the matter of *Oil and Natural Gas Corporation Ltd. Vs. Western Geco International Ltd. reported in* (2014) 9 SCC 263 has considered the meaning and scope of "Public Policy of India" and "Fundamental Policy of Indian Law" and has held that the three distinct and fundamental juristic principles that are to be followed in every determination either by court or any authority including an arbitrator, that affects rights and obligations of parties or leads to any civil consequences are: (i) duty to adopt judicial approach, (ii) compliance with principles of natural justice, i.e. application of mind to the attendant facts and circumstances while taking a view one way or the other, (iii) that the decision should be not perverse or so irrational that no reasonable person would have arrived at the same i.e. the *Wednesbury* principles would be applicable. It has further been clarified that having regard to the public policy of India if the award is not in compliance of the fundamental policy of India and the arbitrator fails to draw an inference that ought to have been drawn or the inference drawn is unsustainable on the face of it, cannot be sustained.

9. In the matter of *M/s MSK Projects (I) (JV) Ltd. Vs. State of Rajasthan & another reported in* 2011 AIR SCW 4528, it has been held that the arbitrator award if contrary to provisions of law or against the terms of the contract or the public policy would be patently illegal and could be interfered with under Section 34 (2) of the Act.

10. In the matter of *Mcdermott International Inc. Vs. Burn Standard Co. Ltd. and others* 2006 (11) SCC 181 it has been held that the Act of 1996 makes provision for supervisory role of Courts and for the review of the arbitral award only to ensure fairness and this supervisory role is to be kept at a minimum level and interference is envisaged only in cases of fraud or bias, violation of natural justice etc. it has further been held that interference on the ground of patent illegality is permissible only if the same goes to the root of the matter and a public policy violation should be so unfair and unreasonable as to shock the conscience of the court.

11. In the matter of *P.R. Shah, Shares and Stock Brokers Pvt. Ltd. Vs. B.H.H. Securities Pvt. Ltd. And others* 2012 (1) SCC 594 it has been ruled that court cannot sit in appeal over award of the Arbitrator by reassessing or reappreciating the evidence to find out whether different decision could be arrived at against findings of the arbitral tribunal in the absence of grounds u/S.34.

12. In the matter of *Sumitomo Heavy Industries Ltd. Vs. Oil and Natural Gas Corporation Ltd.* 2010 (11) SCC 296 while considering the scope of interference by the court on the ground of perversity of the arbitrator's view under the provisions of the old Act, the Supreme Court has held that if the conclusion of the Arbitrator is based on a possible view of the matter, the court is not expected to interfere with the award. Hence, if the umpire relies on a plausible interpretation out of the two possible views, then it would not render the award perverse.

13. Having examined the present appeal in the light of the aforesaid scope of interference, it is noticed that the first argument advanced by the learned counsel for the appellant is that the arbitrator was biased, because he had decided the appeal against the order of eviction passed by the authority under the Madhya Pradesh Lok Parisar (Bedhakhali) Adhiniyam, 1974.

14. On the examination of the record, it is noticed that the lease deed contained the following clause as arbitration clause:-

> "24. In the event of any dispute arising between the parties in respect of this deed or on any matter whatsoever connected therewith, except in respect of the matters on which decision of the Director is declared hereunder as final and binding on the lessee, the same shall be referred, to the arbitration of the Commissioner, Indore Division whose decision thereon shall be final and binding on the parties."

15. Hence, the parties by mutual agreement had agreed for the arbitration through the named arbitrator i.e. the Commissioner Indore Division.

16. The record further reflects that on the petitioners writ petition being W.P. No.1361/2002 this Court had passed the order dated 13/09/2002 noting the aforesaid arbitration clause and giving liberty to the petitioner to approach the named Arbitrator by holding that :-

> "5- When the parties have chosen a forum for adjudication of their disputes to be resolved by the named arbitrator then the remedy of petitioner no sooner their lease was determined by an order (Annexure P-12) was to submit themselves to arbitration by invoking the arbitration clause and file its dispute calling upon the named arbitrator to decide the impugned cancellation to be good or bad. Instead they misconceived the remedy by rushing to State, as if it is an appellate forum. Neither the State could exercise the appellate powers, nor there was any appellate forum. Be that as it may, while dismissing the writ, I observe that petitioner will be free to raise their dispute which admittedly relates to and arise out of a lease deed before the named arbitrator in terms of Clause 24 and 25 of the respective lease deeds (Ex. P-2 / P- 3). In case, any such dispute is raised, the same shall be decided by the named arbitrator strictly in accordance with the clauses of lease deed and uninfluenced by the order passed by State, referred supra."

17. The aforesaid order of this Court was not challenged by the appellant and on the contrary in pursuance to the aforesaid order, the appellant had approached the named arbitrator and had submitted the statement of claim. In the statement of claim no objection was raised against the arbitrator and during the course of proceedings before the arbitrator also the appellant had not raised objection making any allegation of bias against the arbitrator or raising doubt to the bona-fides of the arbitrator. The appellant had participated in the proceedings before the arbitrator and when the award is passed against it, the appellant came up with the plea of bias while raising objection under Section 34. Such a course was not open to the appellant. Even otherwise, it is noticed that the appellant is raising objection of bias on the ground that the Commissioner had heard the appeal against the eviction order passed against the appellant under the provisions of Madhya Pradesh Lok Parisar (Bedhakhali) Adhiniyam, 1981. The appeal was heard by the Commissioner in his capacity as an appellate authority under the Act of 1981 whereas the arbitration has been conducted

by the Commissioner in a different capacity as named arbitrator in the arbitration clause. Therefore, unless any material is pointed out that the arbitrator was biased infact in conducting the arbitral proceedings, the objection in this regard cannot be accepted. Learned counsel appearing for the appellant has failed to point out any such material in this appeal.

18. That apart, the order passed by the Additional District Judge also reveals that the objection of bias has been examined by him in detail and it has been found that the arbitrator had given proper opportunity to both the sides and has conducted the arbitration by following the due process and the appellant could not prove that the arbitrator was bias or he has misconducted.

19. The appellant cannot be granted the benefit of the judgment of the Supreme Court in the matter of *Union of India and others Vs. Sanjay Jethi and another reported in* (2013) 16 SCC 116 because even the objection of likelihood of apprehension of bias was not raised by the appellant before the arbitrator. Similarly, the appellant is not entitled to the benefit of the judgment of the Supreme Court in the matter of *Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others reported in* AIR 1993 SC 2155 wherein it has been held that no one can be judge of his own cause because in the present case, the Additional Commissioner has no personal interest in the dispute. Similarly, in the matter of *Koshy Vs. K.S.E. Board reported in* AIR 1984 Kerala 23 it has been held that actual bias of the arbitrator need not be established and existence of the circumstance which is likely to bias the arbitrator is enough but in the present case, even the said circumstances do not exists. Similarly, in the matter of *Ranjit Thakur Vs. Union of India and others* AIR 1987 SC 2386 the decision was found to be tainted with bias because Martial Officer in the proceedings of summary court punishing the delinquent on the previous occasion was found to be sitting at Court Martial but in the present case the proceedings under the Baidakhali Adhiniyam were altogether different proceedings and the petitioner himself had accepted the jurisdiction of named arbitrator.

20. The next objection raised by the learned counsel for the appellant is that the lease has been terminated by Jilla Yojna Samiti whereas in terms of the lease deed, the Director alone was competent to terminate the lease.

21. Having examined the record it is noticed that though under the lease, the Director was competent to terminate the lease but at the same time the lease deed also provides that all Acts, Rules, Regulations in force from time to time will be applicable. The lease was governed by the Madhya Pradesh Industries (Allotment of Shades Plots and Rules, 1974). The said rules were subsequently amended on 1/4/1999 and the Jilla Yojna Samiti was given power to renew or cancel the lease which were executed prior to 1974.

22. In the present case, the lease deeds in question were executed in the year 1963 and 1968, therefore, the Jilla Yojna Samiti was duly authorized to cancel the lease and the communication dated 29/12/2001 sent by the General Manager, District Industries Centre to the appellant reveals that the decision to terminate the lease was taken by the Samiti. Hence, no error can be found in this regard.

23. A further issue has been raised by the appellant that he had paid the entire rent and the management was also not changed, therefore, no violation of terms of lease. Such an issue is a factual issue and the findings of the arbitrator in this regard are not open to challenge unless the appellant demonstrates that such findings are palpably erroneous or perverse which the appellant has failed to demonstrate. The award of the arbitrator reveals that the appellant had deposited the rent on 30/08/2002 whereas the lease of the appellant was already terminated prior to that and intimation of termination of lease was given to the appellant vide communication dated 29/12/2001. On examining the issue of change of management also it has been found that the appellant lease holder without any permission had started the activities under the banner of central insecticides and fertilizer and for this purpose a separate company was got registered.

24. The arbitral award as also the order of the Additional District Judge under Section 34 of the Act reveals that the appellant had committed breach of various clauses of the lease deed specially clauses 2, 3, 4, 6, 7, 9, 23 etc. and the appellant had not conducted any industrial activity and no production was done in the premises for 17 years and after giving show cause notice and due opportunity of hearing the lease was terminated. Hence, in such circumstances, I am of the opinion that no ground is made out to interfere in the arbitral award or the order of the Court below. The arbitrator was neither biased nor he had misconducted while passing the award. On the contrary, the award has been passed by him after fully complying with the principles of natural justice and by following the due process of law.

25. That apart, it has also been pointed out that after cancelling the lease deed of the appellant, the plot in question has been allotted to third party and registered lease deed for 30 years with effect from 2006 to 2036 has been executed in its favour.

26. Since no merit is found in the appeal, therefore, the appeal is dismissed.

Appeal dismissed.

I.L.R. [2018] M.P. 988 (DB)
MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice J.K. Maheshwari & Smt. Justice Nandita Dubey

M.Cr.C. No. 18634/2016 (Jabalpur) decided on 20 January, 2018

BUDDH SINGH KUSHWAHA …Applicant

Vs.

UMED SINGH …Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 203 & 378(4) – Dismissal of Complaint – Appeal against Acquittal – Maintainability – **Petitioner filed a complaint case against respondent whereby the trial Court refused to take cognizance and dismissed the complaint – Petitioner/ Complainant filed this appeal against acquittal – Held – "Inquiry" can be conducted by a Court in a proceeding but it would not come within the purview of "trial" and if complaint case is dismissed u/S 203 Cr.P.C. for want of sufficient ground for proceeding against the accused, it would not come within the purview of "acquittal" and such an order would not to be treated to be an order "after trial" – An appeal would lie in case of acquittal and order of acquittal would be after trial of the case – Dismissal of a complaint cannot be synonym to the order of acquittal – Hence, petition seeking leave to appeal against acquittal is not maintainable – Remedy available with petitioner is to challenge the impugned order by filing a revision or a petition u/S 482 Cr.P.C. – Petition dismissed.**

(Paras 15, 17 & 19)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 203 व 378(4) – परिवाद की खारिजी – दोषमुक्ति के विरूद्ध अपील – पोषणीयता – याची ने प्रत्यर्थी के विरूद्ध एक परिवाद प्रकरण प्रस्तुत किया जिस पर विचारण न्यायालय ने संज्ञान लेने से इन्कार किया और परिवाद को खारिज कर दिया – याची/परिवादी ने दोषमुक्ति के विरूद्ध यह अपील प्रस्तुत की – अभिनिर्धारित – किसी कार्यवाही में न्यायालय द्वारा ''जांच'' संचालित की जा सकती है परंतु यह ''विचारण'' की परिधि के भीतर नहीं आएगा और यदि परिवाद प्रकरण को दं.प्र.सं. की धारा 203 के अंतर्गत अभियुक्त के विरूद्ध कार्यवाही हेतु पर्याप्त आधार के अभाव में खारिज किया गया है, यह ''दोषमुक्ति'' की परिधि के भीतर नहीं आएगा और ऐसे किसी आदेश को ''विचारण पश्चात्'' आदेश नहीं माना जाएगा – दोषमुक्ति के प्रकरण में अपील होगी और दोषमुक्ति का आदेश, प्रकरण के विचारण के पश्चात् होगा – परिवाद की खारिजी, दोषमुक्ति के आदेश का समानार्थी नहीं हो सकता – अतः, दोषमुक्ति के विरूद्ध अपील की अनुमति चाहते हुए याचिका, पोषणीय नहीं है – याची को पुनरीक्षण प्रस्तुत कर अथवा दं.प्र.सं. की धारा 482 के अंतर्गत याचिका प्रस्तुत कर आक्षेपित आदेश को चुनौती देने का उपचार उपलब्ध है – याचिका खारिज।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 2(g) & (h) – Inquiry & Investigation* – Held – "Inquiry" mean every inquiry other than a trial conducted under the Cr.P.C. by a Magistrate or court whereas "investigation' denotes all the proceedings under the Cr.P.C. for collection of evidence conducted by a Police Officer or by any person (other than a Magistrate) authorized by a Magistrate in this behalf – Dismissal of a complaint u/S 203 Cr.P.C. does not contemplate the word "trial" and it merely contemplates the word "inquiry" and "investigation" u/S 202 Cr.P.C.**

(Para 5 & 6)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 2(जी) व (एच) – जांच एवं अन्वेषण – अभिनिर्धारित – ''जांच'' का अर्थ है, मजिस्ट्रेट या न्यायालय द्वारा दं.प्र.सं. के अंतर्गत संचालित विचारण के अलावा प्रत्येक जांच, जबकि ''अन्वेषण'' पुलिस अधिकारी द्वारा अथवा (मजिस्ट्रेट से भिन्न) किसी ऐसे व्यक्ति द्वारा जिसे मजिस्ट्रेट द्वारा इस हेतु प्राधिकृत किया गया है, साक्ष्य एकत्रित करने हेतु संचालित सभी कार्यवाहियों का द्योतक है – दं.प्र.सं. की धारा 203 के अंतर्गत परिवाद की खारिजी, शब्द ''विचारण'' अनुध्यात नहीं करती और वह मात्र दं.प्र.सं. की धारा 202 के अंतर्गत ''जांच'' एवं ''अन्वेषण'' अनुध्यात करती है।

Cases referred:

(1906) 4 Cr.L.J. 329, AIR 1929 Patna 644, (2014) 3 SCC 92, 1996 (2) MWN (Cr) 4, AIR 2010 SC 2261, (2015) 14 SCC 399, (2001) 2 SCC 570, (2012) 10 SCC 517, (2016) 13 SCC 243.

Hemant Kumar Namdeo, for the applicant.
Ashish Giri and *S.K. Sharma,* for the non-applicant.
Girish Kekre, Piyush Dharmadhikari and *Anubhav Jain,* G.As., for the State.

O R D E R

The order of the court was delivered by:
J.K. Mahehwari, J.:- Being aggrieved by the order Annexure A/1 dated 6.9.2016 passed by the Judicial Magistrate First Class, Bhopal in UN-CR/UR/2015 rejecting the complaint under Section 203 of the Code of Criminal Procedure (hereinafter shall be referred to as ''Cr.P.C''), this petition under Section 378(4) of the Cr.P.C seeking leave to appeal has been filed by the applicant/complainant.

2. At the outset, learned counsel representing the respondent has raised a preliminary objection regarding maintainability of this petition *interalia* contending that the impugned order Annexure A/1 dated 6.9.2016 has been passed by the Court below refusing to take cognizance due to not having sufficient ground for proceeding againstc the accused for the offence under Sections 420, 467, 468, 471 of the Indian Penal Code (hereinafter shall be referred to as I.P.C) and it would amounting to

dismissal of the complaint under Section 203 of the Cr.P.C. Section 378(4) of the Cr.P.C deals with the appeal when an order of acquittal is passed in any case instituted upon a complaint. However, the order of dismissal of a complaint is not similar to the order of acquittal, which can be passed after trial, therefore, this petition seeking leave to appeal is not maintainable and liable to be dismissed.

3. On the other hand, learned counsel representing the petitioner contends that after filing the private complaint and examination of the complainant and other witnesses, the Court below has refused to take cognizance on the complaint and it would amounting to discharge/acquittal of the accused, therefore, this petition filed under Section 378(4) of the Cr.P.C by the petitioner/complainant seeking leave to appeal is maintainable.

4. After having heard learned counsel for the parties, it is to be seen that on dismissal of a complaint without issuing summons to the accused would amounting to acquittal/discharge of the accused and the petition filed under Section 378(4) of the Cr.P.C seeking leave to appeal is maintainable or not. Adverting to the argument as advanced by learned counsel for the petitioner, first of all, the provision of Section 203 of the Cr.P.C is relevant, which is reproduced as under:-

> "203. **Dismissal of complaint** – If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under Section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing."

5. Perusal of the language of Section 203 of the Cr.P.C makes it clear that on filing a complaint and on examination of the complainant and his witnesses, if the Magistrate forms an opinion that sufficient ground to proceed in the "inquiry" or "investigation" under Section 202 of the Cr.P.C is made out, he shall issue the summons under Section 204 of the Cr.P.C otherwise dismiss the complaint. The words "inquiry" and "investigation" have been defined in Section 2(g) and 2(h) of the Cr.P.C, which are reproduced as under:-

> "2(g) "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court.
>
> 2(h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf."

6. The "inquiry" would mean every inquiry other than a trial conducted under the Cr.P.C by a Magistrate or Court whereas "investigation" denotes all the proceedings under the Cr.P.C for collection of evidence conducted by a Police Officer or by any person (other than a Magistrate) authorised by a Magistrate in this behalf. Therefore, it can safely be crystallized that dismissal of a complaint under Section 203 of the Cr.P.C does not contemplate the word "trial" and it merely contemplates the words "inquiry" and "investigation" under Section 202 of the Cr.P.C. The word "trial" is not defined in the Cr.P.C but Section 4 of the Cr.P.C deals with the trial of offences under the Indian Penal Code and other laws, which clarifies that all the offences of the I.P.C shall be investigated, inquired into, tried and otherwise dealt with in accordance with the provisions of the Cr.P.C and similar is the provision for trial to the offences other than the I.P.C.

7. The issue regarding distinction of "inquiry" and "trial" came up for consideration before the Bombay High Court In *reference Mukund Bhaskarshet reported in* (1906) 4 Cr.L.J 329 wherein the Bombay High Court observed as under:-

> "3. Again a dismissal of a complaint under Section 203 or a discharge under Section 253 is not an acquittal such as operates to prevent a fresh trial, without the dismissal of discharge being set aside. See 403 Criminal Procedure Code and also see *Queen Empress Versus Shankar* (1888) ILR 13 Bom 384."

8. The similar issue came up for consideration before Patna High Court in the case of *Hema Singh & Another Versus Emperor reported in* AIR 1929 Patna 644 wherein the Court has held as under:-

> "In other words a trial is a judicial proceeding which ends in conviction or acquittal. All other proceedings are mere enquiries. There are enquiries of a restricted kind such as those under Section 202 which end in a decision whether or not to issue process or if process has been issued the enquiry may proceed and may end with the decision to dismiss the complaint without charging the accused. The distinction to be made is that between a trial which must end either in conviction and sentence, or acquittal and enquiries which may have various endings according to circumstances. Section 4(k) defines an enquiry as: "including every enquiry other than a trial conducted under this Code by a Magistrate or Court".

> Therefore, if a Magistrate on receipt of a complaint issues process against the accused and ultimately concludes that an offence triable at Sessions has been committed and commits the accused, the trial does not begin until the accused appears at the Sessions and the proceedings before the Magistrate have constituted an enquiry only."

9. In the case of *Hardeep Singh Versus State of Punjab & Others reported in* (2014) 3 SCC 92, the Apex Court while explaining the meaning of expression "inquiry" has observed that "inquiry" means pretrial inquiry by a Court and the Court can exercise such power under Section 319 of Cr.P.C prior to commencement of trial.

10. The issue of dismissal of a complaint after issuing the process to the accused and its acquittal came up for consideration in the case of *State by Inspector of Factories V Circle, Madras-18 represented by Public Prosecutor Versus Sukir S.Beedi, Occupier M/s.Deepak Industrial Associates & Another reported in 1996 (2) MWN (Cr) 4* wherein the Madras High Court referring the provision of Sections 203 & 204 of the Cr.P.C has observed as under:-

> "Criminal Procedure Code Sections 203 & 204–Dismissal of the complaint and acquittal of the accused after issue of process–Magistrate, after issue of process under Section 204 Cr.P.C dismissed the complaint and acquitted the accused on the ground that the summons were not served and no reason was given by the complainant for the non-production of the accused–Legality and validity–Having taken the complaint on file under Section 190(1)(a) and having issued a process provided in Chapter 16 of Cr.P.C by ensuring the presence of the accused by way of issuance of summons or warrant–Section 203 only contemplates dismissal of the complaint before the issue of process, whereas acquittal would come only after the trial. Admittedly, the process had already been issued, and that being the situation the Magistrate's order invoking Section 203 Cr.P.C to dismiss the complaint and acquit the accused, reflects the very grave illegality–Order liable to be set aside."

11. In the case of *Shivjee Singh Versus Nagendra Tiwary & Others reported in* AIR 2010 SC 2261, the Apex Court has explained the meaning of expression "sufficient ground" and observed that it would mean to record a satisfaction by a Magistrate that a *prima facie* case is made out against the accused but it does not mean that "sufficient ground" for the purpose of conviction is made out.

12. In the case of *Iris Computers Limited Versus Askari Infotech Private Limited & Others reported in* (2015) 14 SCC 399, the Apex Court has observed that on receipt of a private complaint, the Magistrate has to satisfy by conducting the "inquiry" and "investigation" under Sections 200 & 202 of the Cr.P.C that there existed material to proceed against the accused. If the Magistrate is not satisfied, he can dismiss the complaint taking recourse of Section 203 of Cr.P.C otherwise he can issue process under Section 204 of the Cr.P.C. The Apex Court has also observed that if a complaint is dismissed under Section 203 of Cr.P.C, the remedy to approach the High Court lies under Section 482 of Cr.P.C and not to the Magistrate under Section 203 of the Cr.P.C.

13. In the case of *Jatinder Singh & Others Versus Ranjit Kaur reported in* (2001) 2 SCC 570, the Apex Court has dealt with the situation of dismissal of a complaint under Sections 202 & 203 of the Cr.P.C not on merit but on default of complainant to be present in Court and observed that the dismissal of a complaint under Section 203 of the Cr.P.C may be made if there is no sufficient ground for proceeding. The Apex Court further held that there is no provision in the Code or any in other statute which debars a complainant from preferring a second complaint on the same allegations if the first complaint did not result in a conviction or acquittal or even discharge. If the dismissal of the complaint was not on merit but was on default of the complainant to be present in Court then there is no bar in the complainant moving the Magistrate again with a second complaint on the same facts but if the dismissal of the complaint under Section 203 of the Cr.P.C was on merit, the position would be different because when a Magistrate conducts an inquiry under Section 202 of the Cr.P.C and dismisses the complaint on merit, the second complaint would not lie unless there are very exceptional circumstances.

14. The word "acquit" denotes "to set free" or "deliver from the charge of an offence after trial". Meaning thereby the acquittal would be by an order of a Court holding the accused not guilty of the offence. In this context, the provision of Section 378(4) of the Cr.P.C is relevant, which is reproduced as under:-

> "Section 378(4)–If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court."

15. Perusal of the language of Section 378(4) of the Cr.P.C makes it clear that an appeal would lie in case of acquittal. However, the order of acquittal would be after trial of the case and it cannot be based on an "inquiry" or "investigation" therefore, the order of dismissal of the complaint passed by the Magistrate in exercise of the

power under Section 203 of the Cr.P.C would not come within the purview of "acquittal" of the accused and infact it is an order of not proceeding against the accused because sufficient material was not found in inquiry by the Court. Therefore, the order of dismissal of a complaint cannot be synonym to the order of acquittal, which gives a cause to the complainant to file a petition seeking leave to appeal under Section 378(4) of the Cr.P.C.

16. On perusal of the aforesaid, it is apparent that dismissal of a complaint and to try an offence are two distinct situations. Previous deals with sufficiency of the ground for proceeding in a complaint to summon the accused while later deals with the stage after summon of the accused and on framing the charge, the evidence has been brought in a competent Court of law to prove the guilt against the accused and the trial concludes by conviction or acquittal.

17. In view of the law laid down by the Apex Court as well as by the High Courts in various judgments as discussed hereinabove, it can safely be crystallized that "inquiry" can be conducted by a Court in a proceeding but it would not come within the purview of "trial". It is also apparent that when "investigation" is to be conducted, it ought to be done by a Police Officer or by any person authorized by a Court but it would not be done by a Magistrate. If a complaint is dismissed under Section 203 of the Cr.P.C for want of sufficient ground for proceeding against the accused, it would not come within the purview of "acquittal" and such an order would not be treated to be an order "after trial".

18. In the case of *Manharibhai Muljibhai Kakadia & Another Versus Shaileshbhai Mohanbhai Patel & Others reported in* (2012) 10 SCC 517, the Apex Court has observed that if a complaint is dismissed under Section 203 of the Cr.P.C, the revision can be maintained and opportunity of hearing to the accused at a subsequent proceeding is necessary. Similar view of maintaining the revision has been taken by the Apex Court in the case of *V.K.Bhat Versus G.Ravi Kishore & Another reported in* (2016) 13 SCC 243.

19. In view of the foregoing discussion, the question as posed is answered against the petitioner and in favour of the respondent holding that the order dismissing the complaint under Section 203 of the Cr.P.C would not come within the connotation "acquittal" and the petition filed by the petitioner/complainant under Section 378(4) of the Cr.P.C seeking leave to appeal is not maintainable. The remedy is available to the petitioner to challenge the impugned order by filing a revision or a petition under Section 482 of the Cr.P.C. Therefore, upholding the objection filed by the respondent, this petition stands **dismissed**. However, it is observed that the dismissal of this petition would not debar the petitioner to take recourse of law as permissible to him.

20. At this stage, learned counsel for the petitioner prays for return of the certified copy of the impugned order Annexure A/1 dated 6.9.2016 passed by the Judicial Magistrate First Class, Bhopal in UN-CR/ UR/2015. The Registry is directed to return the certified copy of the impugned order on filing a photocopy thereof by the petitioner.

21. At the end, it is our duty to record the words of appreciation in favour of Shri Girish Kekre, Shri Piyush Dharmadhikari, Shri Anubhav Jain, Government Advocates who have rendered their assistance on the legal issue involved in this petition and their assistance is hereby acknowledged.

Application dismissed

I.L.R. [2018] M.P. 995
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.C. Sharma

M.Cr.C. No. 5230/2012 (Indore) decided on 25 January, 2018

VIKRAM DATTA (DR.) …Applicant
Vs.
STATE OF M.P. & anr. …Non-applicants

***Prevention of Insults to National Honour Act (69 of 1971), Section 2 – National Flag – Quashment of Criminal Case* – Petition against registration of criminal case u/S 2 of the Act of 1971 for insult of Indian National Flag, against petitioner/Principal of College and one Ishwarlal, Peon of College – It was alleged that at about 1:30 am (night) National Flag was found on flag post over the college building – Held – It is true that National Flag should have been taken off before sunset – Person who was incharge to do this exercise was certainly the peon who expired during pendency of this petition – No documentary evidence on record to establish that it was duty of petitioner or duty has been assigned to petitioner to hoist the flag every morning and lowering down in evening before sunset – No *mens rea* on the part of petitioner – Further held – Violation of Flag Code cannot amount to offence under the Act of 1971 – Criminal Case including the FIR is quashed – Petition allowed.**

(Para 8 & 14)

राष्ट्र गौरव अपमान निवारण अधिनियम (1971 का 69), धारा 2 – राष्ट्रध्वज – दाण्डिक प्रकरण अभिखंडित किया जाना – भारतीय राष्ट्रध्वज के अपमान हेतु, 1971 के अधिनियम की धारा 2 के अंतर्गत, याची/महाविद्यालय के प्राचार्य एवं एक ईश्वरलाल, महाविद्यालय के भृत्य के विरूद्ध आपराधिक प्रकरण पंजीबद्ध किये जाने के विरूद्ध याचिका – यह अभिकथित किया गया था कि करीब 1.30 बजे (रात) महाविद्यालय के भवन के ऊपर ध्वज स्तंभ पर राष्ट्रध्वज पाया गया था – अभिनिर्धारित – यह सत्य है कि सूर्यास्त के पूर्व राष्ट्रध्वज को उतार लिया जाना चाहिए था – यह कार्य करने हेतु जिस व्यक्ति पर प्रभार

था, निश्चित रूप से वह भृत्य था जिसकी, इस याचिका के लंबित रहने के दौरान मृत्यु हो गई है – यह स्थापित करने के लिए अभिलेख पर कोई दस्तावेजी साक्ष्य नहीं कि ध्वज को प्रत्येक सुबह फहराने एवं सूर्यास्त के पूर्व शाम को उसे नीचे उतारने का कर्तव्य याची का था या याची को कर्तव्य सौंपा गया है – याची की ओर से आपराधिक मनःस्थिति नहीं – आगे अभिनिर्धारित – ध्वज संहिता का उल्लंघन, 1971 के अधिनियम के अंतर्गत अपराध की कोटि में नहीं आ सकता – प्रथम सूचना प्रतिवेदन के साथ आपराधिक प्रकरण अभिखंडित – याचिका मंजूर।

Cases referred:

(2004) 2 SCC 510, 2003 (2) JLJ 296, LAWS (BOM) 2012 1 138, 2012 Cr.L.J. 3142, LAWS (KER) 2016 3 115, LAWS (BOM) 2015 3 324, LAWS (BOM) 2009 4 109.

Vivek Gautam, for the applicant.
Bhakti Vyas, G.A. for the non-applicant/State.

O R D E R

S.C. Sharma, J.:- The present petition has been filed by the petitioner – Dr. Vikram Dutta, a retired Government servant and at the relevant point of time, when a crime was registered against him, he was serving as Principal, Government Commerce College, Ratlam.

2. The facts of the case reveal that on 23.4.2011, at about 1.30 am. (in the night), National Flag was found over the College building of the College. In those circumstances, an offence u/s. 2 of Prevention of Insults to National Honour Act, 1971 (hereinafter, for short, "the Act of 1971") against the petitioner and one Ishwarlal who was the Peon in the College.

3. Learned counsel for the petitioner has argued before this Court that there was no violation of Section 2 of the Act of 1971 and it could have been a shear (sic:sheer) mistake on the part of Peon who was required to take off the flag every day after sunset. He has placed reliance on the judgment of Supreme Court in *Union of India V/s. Naveen Jindal :* (2004) 2 SCC 510. His contention is that the Flag Code is only executive instructions and violation of Flag Code does not amount to any offence under the Act of 1971. Reliance has also been placed on *Ganesh Lal Bathri V/s. State of M.P. :* 2003(2) JLJ 296, again, wherein it has been held that a bonafide mistake will not amount to an offence under the Act of 1971.

4. On the other hand, learned Govt. Advocate submitted that inspite of there being proper instructions in the matter, the petitioner has committed an offence as Flag was not taken off after the sunset. The Flag was very much there on the Flag-post at 1.30 am. (in the night) and the petitioner being Principal of the College, was under the obligation to hoist the Flag in the morning and to unfurl in the evening before sunset and he has committed an offence.

5. Heard the learned counsel for the parties at length and perused the record.

6. The FIR which has been recorded in respect of the crime in question, reads as under :-

> ''मैं थाना औ. क्षेत्र रतलाम पर प्र. आर गस्ती के पद पर पदस्थ हूं। आज जरिये टेलीफोन पर सूचना मिली सूचना को रो. सा. 1670 पर आमद कर व सूचना की जांच व तस्दीक में मय पंचान ईसमाई व राजेष के स्वामी विवेकानंद शासकीय वाणिज्य महाविद्यालय मोहन नगर रतलाम पहुंचकर देखा कि कालेज भवन के उपरी भाग में झंडा जैसा दिखा जिसे टार्च की रोषनी से देखा तो राष्ट्रीय घ्वज लहराता हुआ पाया जिसकी विडियो सूटिंग व फोटो ग्राफी करायी गई व पंचान ईस्माईव व राजेष के समक्ष 1.30 पर ससम्मान राष्ट्रीय घ्वज उतराया गया कालेज का भृत्य ईष्वर पिता भेरूलाल तथा प्राचार्य विक्रम दत्ता द्वारा राष्ट्रीय ध्वज सूर्योदय से सूर्यास्त की अवधि में ससम्मान उतरवाना था तथा इनके द्वारा राष्ट्रीय ध्वज संहिता की निर्धारित कंडीकाओं का निष्ठापूर्वक पालन भी नहीं किया गया। जो आरोपी ईष्वर पिता भेरूलाल तथा विक्रय दत्ता का कृत्य राष्ट्र गौरव अपमान निवारण अधिनियम 1971 की धारा 2 का दण्डनीय अपराध पाया जाने से अपराध पंजीवद्ध कर विवेचना में लिया गया।''

7. The first information report reflects that Station House Officer has received the information about the Flag in existence on the Flag-post in the night at 1.30 am. The Flag was there on the Flag-post. Section 2 of the Act of 1971 reads as under :

> **"2. Insult to Indian National Flag and Constitution of India –** Whoever in any public place or in any other place within public view burns, mutilates, defaces, defiles, disfigures, destroys, tramples upon or otherwise brings into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag or Constitution of India or any part thereof, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both."

8. Undisputedly, the Flag was on the Flag-post at night and it should have been taken off before sunset. The person who was in-charge to do this exercise was certainly the Peon – Ishwarlal, who during pendency of this petition u/s. 482 of Cr.P.C. expired. There is no evidence on record to establish that it was the duty of the petitioner to hoist the Flag every morning and unfurl in the evening before sunset. Even in the High Court, it is not the duty of Hon'ble the Chief Justice or the pusne (sic : puisne) Judge to hoist and unfurl the Flag before sunset. The duty has been assigned to a particular employee who is doing the job. In the present case, there is no documentary

evidence on record to establish that the said duty was assigned to the Principal of the College to hoist the Flag in the morning and to unfurl in the evening before sunset. There is no mens rea on the part of the petitioner.

9. The Bombay High Court in *Amgonda Vithoba Pandhare V/s. Union of India : LAWS (BOM)* 2012 1 138, has dealt with the Act of 1971. Para 6 to 10 of the aforesaid judgment reads as under :-

> "6. We have gone through the averments made in the complaint and we have also perused the Prevention of Insults to National Honour Act, 1971 and the provisions of Flag Code of India, 2002. So far as Section 2 of the said Act of 1971 is concerned, it reads as under :-
>
> 2. Insult to Indian National Flag and Constitution of India. — Whoever in any public place or in any other place within public view burns, mutilates, defaces, defiles, disfigures, destroys, tramples upon or otherwise shows disrespect to or brings into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag or the Constitution of India or any part thereof, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.
>
> Explanation 1:- Comments expressing disapprobation or criticism of the Constitution or of the Indian national Flag or of any measures of the government with a view to obtain an amendment of the Constitution of India or an alteration of the Indian National Flag by lawful means do not constitute an offence under this section.
>
> Explanation 2:- The expression "Indian National Flag" includes any picture, painting, drawing or photograph, or other visible representation of the Indian National Flag, or of any part or parts thereof, made by of any substance or represented on any substance.
>
> Explanation 3:- The expression "public place" means any place intended for use by, or accessible to, the public and includes any public conveyance.
>
> Explanation 4:- The disrespect to the Indian National Flag means and includes -
>
> (a) a gross affront or indignity offered to the Indian National Flag; or

(b) dipping the Indian National Flag in salute to any person or thing;

(c) flying the Indian National Flag at half-mast except on occasions on which the Indian National Flag is flown at half-mast on public buildings in accordance with the instructions issued by the Government; or.

(d) using the Indian National Flag as a drapery in any form whatsoever except in State funerals or armed forces or other paramilitary forces funerals; or

(e) using the Indian National Flag as a portion of costume or uniform of any description or embroidering or printing it on cushions, handkerchiefs, napkins or any dress material; or

(f) putting any kind of inscription upon the Indian National Flag; or

(g) using the Indian National Flag as a receptacle for receiving, delivering or carrying anything except flower petals before the Indian National Flag is unfurled as part of celebrations on special occasions including the Republic Day or the Independence Day; or

(h) using the Indian National Flag as covering for a statue or a monument or a speaker's desk or a speaker's platform; or

(i) allowing the Indian National Flag to touch the ground or the floor or trail in water intentionally; or

(j) draping the Indian National Flag over the hood, top and sides or back or on a vehicle, train, boat or an aircraft or any other similar object; or

(k) using the Indian National Flag as a covering for a building; or

(l) intentionally displaying the Indian National Flag with the "saffron" down."

7. Explanation 4 mentions various acts of dishonour in clauses (a) to (l). Perusal of the said section clearly reveals that one of the essential ingredients of the said offence is that disrespect, contempt of the flag should be intentional. Similarly, Explanation 4 gives various instances of disrespect to the Indian National Flag. The offence of not lowering down

the flag after sunset does not fall either in the various instances which are mentioned in Explanation 4 or in Section 2 of the said Act. The averments in the complaint, therefore, even if they are accepted at its face value, does not constitute an offence within the meaning of Section 2 of the said Act.

8 . So far as the Flag Code is concerned, the said Flag Code is not an Act nor is it issued under any of the statutory provisions of the said Act and, therefore, it is not a statutory law enacted by the competent legislature.

9. The Apex Court had occasion to consider whether the Flag Code has any statutory course and in the case of Union of India v/s Navin Jindal & anr., decided on 23.1.2004 in Civil Appeal No. 453 of 2004, after going through various sections and parts of the Flag Code, the Apex Court came to the conclusion that the Flag Code contains executive instructions of the Central Government and, therefore, it is not a law within the meaning of Article 13(3)(a) of the Constitution of India. In view of the ratio of the judgment of the Apex Court, therefore, it cannot be said that violation of the instructions which are given in the Flag Code would amount to an offence which is punishable under Section 2 of the said Act.

10. Another factor which also needs to be taken into consideration in the present case is that the petitioner was Head Master of the school and was proceeding to go to his school for lowering down the flag. However, while going to the school, on the way, he collapsed and had to be admitted in the hospital and he had instructed the other person to lower down the flag properly. This is not disputed by the respondent prosecution. This being the position, it cannot be said that the petitioner intentionally wanted to insult the honour of the flag and lastly, complaint appears to have been filed by respondent No. 5, a person who was a political opponent of the petitioner and obviously it appears to have been filed with an malafide intention to harass the petitioner. In either case, therefore, the petitioner has made out a good case for quashing the complaint."

10. In the aforesaid case also, the Flag was not brought down before the sunset and the Bombay High Court has held that it cannot be said that the petitioner intentionally

wanted to insult the honour of the Flag. On the contrary, the person who was the political opponent lodged the complaint in the matter. In those circumstances, a case was made out to quash the complaint.

11. In another case decided by the Bombay High Court in *Umesh Kishanrao Chopde V/s. State of Maharashtra :* 2012 Cr.L.J. 3142, the Head Master of the school failed to remove the Flag before sunset. The Bombay High Court in Para 7 and 8 of the aforesaid judgment, held as under :-

> "7. This issue has been decided by the Hon'ble Supreme Court in 2004(1) SCALE 677, Union of India vs. Naveen Jindal and another in Civil Appeal No. 453/2004. The Hon'ble Supreme Court in Paragraphs 28 & 29 held as under:-
>
> "**28.** Before we proceed further, it is necessary to deal with the question, whether Flag Code is "law'? Flag Code concededly contains the executive instructions of the Central Government. It is stated that the Ministry of Home Affairs, which is competent to issue the instructions contained in the Flag Code and all matters relating thereto are one of the items of business allocated to the said Ministry by the President under the Government of India (Allocation of Business) Rules, 1961 framed in terms of Article 77 of the Constitution of India. The question, however, is as to whether the said executive instruction is "law" within the meaning of Article 13 of the Constitution of India. Article 13(3)(a) of the Constitution of India reads thus:
>
> "13. (3)(a) "Law" includes any Ordinance, order byelaw, rule, regulation, notification, custom or usage having in the territory of Indian the force of law.
>
> **29.** A bare perusal of the said provision would clearly go to show that executive instructions would not fall within the aforementioned category. Such executive instructions may have the force of law for some other purposes; as for example those instructions which are issued as a supplement to the legislative power in terms of clause (1) of Article 77 of the Constitution of India. The necessity as regard determination of the said question has arisen as the Parliament has not chosen to enact a statute which would confer at least a statutory right upon a citizen of India to fly a National Flag. An executive instruction issued by the appellant herein can any time by replaced by another set of

executive instructions and thus deprive Indian citizens from flying National Flag. Furthermore, such a question will also arise in the event if it be held that right to fly the National Flag is a fundamental or a natural right within the meaning of Article 19 of the Constitution of India; as for the purpose of regulating the exercise of right of freedom guaranteed under Article 19(1)(a) to (e) and (g) a law must be made."

8. In the present case also, even if it is assumed for the sake of arguments that the applicant did not remove the flag before sunset, it could not amount to an offence. The department can take suitable action against the applicant for not following the flag code. Since it does not amount to an offence punishable under Section 2 of the Prevention of Insult to National Honours Act, 1971, the First Information Report needs to be quashed. Hence, I pass the following order."

12. The High Court of Kerala has also dealt with a similar situation in the case of *Satheesh Babu P.K. V/s. State of Kerala :* LAWS (KER) 2016 3 115 and held as under : -

"2. The learned counsel for the petitioner has invited the attention of this Court to the decision rendered by the Division Bench of the Bombay High Court in Amgonda Vithoba Pandhare v. Union of India and Others : 2012 (4) Bom. CR(Cri)219, wherein it was held that:

"Explanation 4 gives various instances of disrespect to the Indian National Flag. The offence of not lowering down the flag after sunset does not fall either in the various instances which are mentioned in Explanation 4 or in Section 2 of the said Act. The averments in the complaint, therefore, even if they are accepted at its face value, does not constitute an offence within the meaning of Section 2 of the said Act."

3. Their Lordships had relied on the decision of the Apex Court in Union of India v. Navin Jindal and Another rendered in Civil Appeal No. 453 of 2004, wherein it was held that the Flag Code contains executive instructions of the Central Government and, therefore, it is not a law within the meaning of Article 13(3)(a) of the Constitution of India. It is a model code of conduct to be followed compulsorily by all the citizens of India. Apart from that, penal consequences cannot be

> invited unless there is a statutory provision for the same. Going by the decisions noted supra, it seems that the prosecution in this case is quite unnecessary. Apart from that, it seems that there was no intention on the part of the petitioner to dishonour the National Flag. True that it was an omission on his part in lowering the National Flag at or before sunset. The prosecution seems to be quite unnecessary and, therefore, the same can be quashed."

13. Similar view has been taken again by the Bombay High Court in *Kalimoddin V/s. State of Maharashtra :* LAWS (BOM) 2015 3 324. Our own High Court in *J.P. Dutta V/s. Ravi Antrolia :* LAWS(BOM) 2009 4 109 has dealt with Section 2 of the Act of 1971. It was a case where a private complaint was filed against the film-producer, wherein the allegation was that the National Flag has been used to cover the coffins of soldiers. This Court has quashed the complaint. It is very unfortunate that such frivolous complaint was filed for showing the Flag over the coffins of brave hearts who died for the nation. Learned Single Judge after taking into account all the facts has quashed the complaint in the matter.

14. In the case of *Naveen Jindal* (supra), it has been held that violation of the Flag Code cannot amount to an offence under the Act of 1971. In the considered opinion of this Court as there was no mens rea on the part of the petitioner, he has not committed any act within the meaning of Section 2 of the Act of 1971.

15. In view of the foregoing discussion, the entire proceedings including the FIR deserve to be quashed. Resultantly, this petition is allowed and the entire proceedings in Cr. Case No.1105/2011 including the FIR registered at Crime No.171/2011 registered at Police Station Industrial Area, Ratlam are hereby quashed.

No order as to costs.

Application allowed.

I.L.R. [2018] M.P. 1003
MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Sushil Kumar Palo

M.Cr.C. No. 3831/2017 (Jabalpur) decided on 31 January, 2018

RICHA GUPTA (SMT.) …Applicant

Vs.

GAJANAND AGRAWAL …Non-applicant

A. Penal Code (45 of 1860), Section 499 & 500 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Quashment of Proceeding – **Husband filed criminal complaint against wife u/S 500 IPC whereby cognizance**

was taken by Court – Husband submitted that wife has alleged that he is earning Rs. 6 lacs as gratification by wrongly opening the tender and also remained in jail for 3 days, and such false allegations being defamatory, complaint has been made – Wife submitted that she filed cases against husband u/S 498-A IPC, u/S 125 Cr.P.C. and u/S 12 Domestic Violence Act, 2005 and to counter above cases, husband filed the present criminal case against her – Held – Allegations made in the written complaint are defamatory or not, has to be seen after production of evidence by wife in respect of her allegations – Proceedings cannot be quashed at this stage – Petition dismissed.

(Paras 2, 9 & 14)

क. दण्ड संहिता (1860 का 45), धारा 499 व 500 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – कार्यवाही का अभिखंडन – पति ने पत्नी के विरूद्ध भारतीय दण्ड संहिता की धारा 500 के अंतर्गत आपराधिक परिवाद प्रस्तुत किया जिस पर न्यायालय द्वारा संज्ञान लिया गया था – पति ने प्रस्तुत किया कि पत्नी ने यह अभिकथन किया है कि वह गलत तरीके से निविदा खोलकर पारितोषण के रूप में 6 लाख रू. की कमाई कर रहा है तथा 3 दिनों के लिए कारागृह में भी रहा है एवं इस तरह के मिथ्या अभिकथनों के मानहानिकारक होने के कारण, परिवाद प्रस्तुत किया गया है – पत्नी ने प्रस्तुत किया कि उसने पति के विरूद्ध भारतीय दण्ड संहिता की धारा 498–ए, दण्ड प्रक्रिया संहिता की धारा 125 तथा घरेलू हिंसा अधिनियम, 2005 की धारा 12 के अंतर्गत प्रकरण प्रस्तुत किये हैं एवं उक्त प्रकरणों का विरोध करने के लिए पति ने उसके विरूद्ध वर्तमान दाण्डिक प्रकरण प्रस्तुत किया – अभिनिर्धारित – लिखित परिवाद में किये गये अभिकथन मानहानिकारक हैं या नहीं, पत्नी द्वारा उसके अभिकथनों के संबंध में साक्ष्य प्रस्तुत किये जाने के पश्चात् देखा जाना है – इस प्रक्रम पर कार्यवाहियां अभिखंडित नहीं की जा सकती – याचिका खारिज।

***B. Penal Code (45 of 1860), Section 499 & 500 – Defamation – Kinds* – Held – The wrong of defamation is of two kinds namely, "libel" and "slander" – In "libel" defamatory statement is made in some permanent and visible form such as printing, pictures or effigies and in "slander" it is made in spoken words or in some other transitory form, whether visible or audible.**

(Para 8)

ख. दण्ड संहिता (1860 का 45), धारा 499 व 500 – मानहानि – प्रकार – अभिनिर्धारित – मानहानि के दोष दो प्रकार के हैं, नामतः ''अपमान लेख'' तथा ''अपमान वचन'' – ''अपमान लेख'' में कथन कुछ स्थायी और दृश्यमान रूप में जैसे कि मुद्रण, चित्रों या प्रतिकृति में किया जाता है तथा ''अपमान वचन'' में, यह बोले गये शब्दों में या किसी अन्य अस्थायी रूप में, चाहे दृश्यमान या श्रव्य, में किया जाता है।

Radhelal Gupta and *Ramakant Awasthi,* for the applicant.
K.N. Fakhruddin, for the non-applicant.

O R D E R

S.K. Palo, J.:- This petition under section 482 of the Code of Criminal Procedure has been filed to invoke the extraordinary jurisdiction of this Court to quash the criminal proceeding of Criminal Case RCT NO.817/2016 filed by the respondent against the petitioner pending before Judicial Magistrate First Class, Baihar, District Balaghat under section 500 of the Indian Penal Code.

2. The petitioner-wife has filed this petition to quash the criminal proceeding instituted by the respondent-husband on the ground that there has been several proceedings pending between them. On the report of the petitioner-wife a criminal case for offence under section 498-A of the Indian Penal Code is pending. The petitioner has filed an application under section 125 of the Code of Criminal Procedure against the respondent/husband before the Family Court, Bhopal. Several disputes are pending between the husband and wife. A complaint under section 12 of the Protection of Women from (Domestic Violence) Act, 2005 has also been filed by the petitioner-wife. The respondent-husband, to counter the above cases, has filed a criminal complaint under section 500 of the Indian Penal Code. Vide order dated 21.11.2016 a crime under section 500 of I.P.C. has been registered. Learned Judicial Magistrate First Class has taken cognizance of the offence.

3. It is stated that the criminal case for cruelty is also pending against the respondent. It does not mean that offence under section 500 of I.P.C. has been committed by the petitioner-wife. Therefore, this petition be allowed and the criminal complaint case instituted under section 500 of the Indian Penal Code be quashed.

4. Per contra, learned counsel for the respondent-husband opposed the contentions and submitted that the petitioner-wife has instituted several cases against the respondent/husband, and the respondent/husband had to file this complaint, for the petitioner-wife had falsely lodged complaint against the respondent/husband stating facts which are false *ab initio* and which are defamatory.

5. He claims that the petitioner has filed a complaint against the respondent/husband to initiate against him, in which, she alleged that the respondent/husband remained in jail for 3 days. He is facing trial under section 498-A of the Indian Penal Code and proceeding under section 9 of Hindu Marriage Act. It is also alleged in the complaint that the husband is earning Rs.6 lacs as gratification besides his salary by wrongly opening the tenders. An enquiry was conducted by his employer, the Hindustan Copper Limited, Malajhkhand and intimation to the police was given on 15.3.2016 that the husband is serving with Hindustan Copper Limited. But, he is not in charge of any project or Tender Evaluation Committee. The tenders are being opened in presence of the bidders and the representatives of the bidders by the officers of the Hindustan Copper Limited.

6. On her complaint the Sub Divisional Officer (Police) has made an enquiry and submitted the report on 18.3.2011 to the S.P.Balaghat. In this report it has been submitted that Station House Officer, Malajkhand has submitted that report. The Hindustan Copper Limited, Malajkhand has given report and the document filed by the respondent show that the petitioner-wife has instituted several complaint against the respondent/husband. A divorce case is also pending between them. Therefore, the petitioner-wife has exaggerated things and has made the complaint. It is also contended that because of the complaint made by her, the respondent/husband defamed and his respect in the office has been damaged. She made this complaint to harass him mentally and she somehow wants to harm him to the extent that he should lose his job.

7. On behalf of the petitioner wife it is claimed that she being aggrieved by the behaviour and harassment by the respondent/husband made a complaint before the Jan Shikayat Nivaran Bibhag. If an enquiry is made, it may be due to the procedure, but she did not mean any defamation to be caused to the respondent.

8. Heard the counsel and perused the record. The essence of the offence of defamation consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his associates or family members and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed. The wrong of defamation is of two kinds,namely, "libel" and "slander". In "libel" defamatory statement is made in some permanent and visible form, such as writing, printing, pictures or effigies. In "slander" it is made in spoken words or in some other transitory form, whether visible or audible. The present is a complaint made in writing alleging false complaint of taking Rs.6 lacs as gratification and unauthorizedly opening the tender. It also alleges that the respondent/husband was sent to jail for 3 days.

9. The petitioner's allegations made in the complaint before Jan Shikayat Nivaran Bibhag, whether defamatory or not, has to be seen after the petitioner produces the evidence stating the allegations to be true.

10. At this stage, it cannot be held that the allegations levelled by the petitioner-wife is true or not. At this stage, the complaint cannot be quashed without going into the merits of the allegations levelled. As it is difficult to say that the material for alleged offence was available. In the complaint there is direct allegation or imputation, the matter become simple. But, when it is based on innuendo defamation, the trial Magistrate has to give sufficient scope to exercise his rightful jurisdiction and discretion. Therefore, this Court is cautious in interfering and deem it not to interfere.

11. Parties are daggers drawn and have estranged relations. The respondent/husband is facing certain trials under section 498-A of I.P.C. as also a case under section 125 of the Code of Criminal Procedure are the admitted facts. So far as other

allegations levelled in the complaint, in which, imputations of keeping in jail custody for 3 days and earning Rs.6 lacs by way of gratification seems to be "libel".

12. Imputation means accusation against a person and it implies an allegation of fact and not merely an abuse. Because of this "imputation" enquiry was made and because of inquiries, according to the respondent, his "reputation" has been adversely affected. The "reputation" is the people's opinion about a person, which is synonymously used as a "character" of the person. The character depends on attributes possessed and the "reputation" on attributes which others believe one to possess. The former signifies realty and latter merely what is accepted to be realty at present. The reputation, therefore, what is generally said or believed about the persons character.

13. The imputation made in the complaint by the petitioner is in good faith for the protection of her interest or not, as has been provided under the ninth exception to section 499 of the Indian Penal Code, has to be considered after evidence is adduced.

14. It has also been seen that whether the petitioner has intention to hurt knowingly or having reason to believe that such imputation will harm the reputation of the respondent/husband. Therefore, this Court is not in a position to form an opinion, at this stage, that it would be not proper to form an opinion without embarking upon an enquiry. The job of the trial Court is to enquire into the matter and which can be examined only by the trial Court, if the entire material is brought before it and on thorough investigation after the evidence is led.

15. Therefore, at this stage, truthfulness of the allegations made in the complaint or its veracity cannot be gone into. Nor it is proper for this Court to analyze the case of the complainant in the light of all probabilities in order to determine whether conviction would be sustainable and on such premises arrive at conclusion that the proceedings are to be quashed.

16. On the above analysis it is deemed fit not to exercise the provisions of section 482 of the Code of Criminal Procedure. Accordingly, the petition is dismissed.

Application dismissed.

I.L.R. [2018] M.P. 1007
MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Vivek Agarwal

M.Cr.C. No. 5258/2018 (Gwalior) decided on 9 February, 2018

HARIOM SINGH …Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), Sections 2(23), 9(1) & 9(3) – Jurisdiction of Court* – Petition against**

order passed by Addl. Sessions Judge whereby petitioner/accused was treated to be a major rejecting his application to treat him as a juvenile – Held – As per Section 2(23) of the Act of 2015, Court includes District Court and District Court includes Sessions Court, therefore contention of petitioner that Sessions Court is not a Court as per Section 2(23) of the Act is rejected – No interference is called for – Petition dismissed.

(Para 5)

क. किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धाराएँ 2(23), 9(1) व 9(3) – न्यायालय की अधिकारिता – अतिरिक्त सत्र न्यायाधीश द्वारा पारित आदेश के विरूद्ध याचिका, जिससे याची/अभियुक्त को किशोर के रूप में माने जाने हेतु उसके आवेदन को अस्वीकार करते हुए, उसे प्राप्तवय माना गया था – अभिनिर्धारित – 2015 के अधिनियम की धारा 2(23) के अनुसार, न्यायालय में, जिला न्यायालय शामिल है और जिला न्यायालय में सत्र न्यायालय शामिल होते हैं इसलिए याची का तर्क कि अधिनियम की धारा 2(23) के अनुसार सत्र न्यायालय, एक न्यायालय नहीं है, अस्वीकार किया गया – किसी हस्तक्षेप की आवश्यकता नहीं – याचिका खारिज।

***B. Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), Section 9(1) & 9(3) – Assessment of Age by Sessions Court* – Held – In respect of jurisdiction of Sessions Court regarding assessment and determination of age of accused, as per Section 9(1) of the Act of 2015, Court has to have a satisfaction first before forwarding the child to the Juvenile Justice Board – Court has to form an opinion that offender was a child for which Court is not precluded from seeking evidence – Section 9 clearly bestows authority on Court to record a finding that whether a person brought before him is a child on the date of commission of offence or not and this exercise is not to be carried out in a mechanical manner without there being any objective assessment and subjective satisfaction – In the present case, Sessions Court has not exceeded its jurisdiction in passing the order.**

(Para 6 & 9)

ख. किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 9(1) व 9(3) – सत्र न्यायालय द्वारा आयु का निर्धारण – अभिनिर्धारित – अभियुक्त की आयु के निर्धारण एवं अवधारण से संबंधित सत्र न्यायालय की अधिकारिता के संबंध में, 2015 के अधिनियम की धारा 9(1) के अनुसार, बालक को किशोर न्याय बोर्ड को अग्रेषित करने से पूर्व, न्यायालय को पहले संतुष्ट होना चाहिए – न्यायालय को राय निर्मित करनी होगी कि अपराधी एक बालक था जिसके लिए न्यायालय, साक्ष्य चाहने से प्रवारित नहीं है – धारा 9 स्पष्ट रूप से न्यायालय पर यह निष्कर्ष अभिलिखित करने का प्राधिकार प्रदान करती है कि क्या उसके समक्ष लाया गया व्यक्ति, अपराध कारित करने की दिनांक को एक बालक है या नहीं तथा इसका प्रयोग बिना किसी वस्तुनिष्ठ निर्धारण एवं व्यक्तिपरक संतुष्टि

के यांत्रिक ढंग से नहीं किया जाना चाहिए – वर्तमान प्रकरण में, सत्र न्यायालय, आदेश पारित करने में उसकी अधिकारिता के बाहर नहीं गया है।

C. Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), Section 94(2) – Presumption and Determination of Age – Proof of Age **– Held – Admission register of two schools showing date of birth as 08.11.1998 whereas matriculation certificate showing as 10.08.2001 – Supreme Court held that where different date of births are recorded in different classes, then date of birth recorded in first school shall be deemed to be the effective date – Sessions Court rightly discarded the matriculation certificate and held the date of birth to be 08.11.1998.**

(Para 7 & 8)

ग. किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 94(2) – उपधारणा एवं आयु का अवधारण – आयु का सबूत – अभिनिर्धारित – दो शालाओं की प्रवेश पंजी, जन्मतिथि 08.11.1998 दर्शाती है जबकि मैट्रिक प्रमाणपत्र 10.08.2001 के रूप में दर्शाता है – उच्चतम न्यायालय ने अभिनिर्धारित किया कि जहाँ भिन्न कक्षाओं में, भिन्न जन्मतिथियां अभिलिखित हैं, तब प्रथम शाला में अभिलिखित जन्मतिथि को प्रभावकारी तिथि माना जाएगा – सत्र न्यायालय ने उचित रूप से मैट्रिक प्रमाणपत्र को अस्वीकार किया तथा जन्मतिथि, 08.11.1998 होना अभिनिर्धारित किया।

Case referred:

AIR 2017 SC 3866.

R.K. Sharma, for the applicant.
G.S. Chauhan, P.P. for the non-applicant/State.

O R D E R

Vivek Agarwal, J.:- This petition under Section 482 of the Code of Criminal Procedure, 1973 has been filed seeking quashment of the order dated 17.1.18 passed by the 5th ASJ, Bhind, in Misc. Cr. Case No. 275/17, whereby the learned ASJ has treated petitioner Hariom to be a major rejecting his application to treat him as a juvenile.

2. Learned counsel for the petitioner submits that learned ASJ has no jurisdiction to decide the aspect that whether the petitioner is a juvenile or not, and therefore, learned ASJ has acted beyond the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (in short "the Act of 2015"). Learned counsel has drawn attention of this Court to the provisions contained in Section 2(23) of the Act of 2015 to submit that Court means civil Court, which has jurisdiction in matters of adoption and guardianship and may include the District Court, Family Court and City Civil Courts, therefore, Sessions Court is not included in the definition of Court. Learned counsel for the petitioner has drawn attention of this Court to the provisions contained

in Section 9 of the Act of 2015 wherein in sub-section 1 of Section 9 it has been mentioned that when a Magistrate, not empowered to exercise the powers of the Board under this Act is of the opinion that the person alleged to have committed the offence and brought before him is a child, he shall, without any delay, record such opinion and forward the child immediately alongwith the record of such proceedings to the Board having jurisdiction. Placing reliance on Section 9 (1) of the Act of 2015, it is submitted that Magistrate was having no option but to forward the matter to the Juvenile Justice Board having jurisdiction to determine the age and that authority could not have been exercised by the learned Sessions Judge. Further reliance has been placed on the provisions of Section 94(2) of the Act of 2015 which deals with presumption and determination of age and provides that in case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining -

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided that such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

Placing reliance on such provisions of Section 94 (2), it is submitted that since petitioner had produced his 8th class and matriculation mark-sheet so also mark-sheet of 5th class showing his date of birth to be 10.08.2001, then there was no occasion for the learned ASJ to have conducted an enquiry to determine the age of the petitioner and that has also resulted in bias to the petitioner, besides violation of statutory provisions of the Act of 2015.

3. Learned counsel for the petitioner has also placed reliance on the provisions contained in Section 101(2) of the Act of 2015 and submitted that his valuable right of appeal has been curtailed inasmuch as the appeal against the order of the Board is to be filed before the Court of Sessions and there is no provision for any second appeal against the order of the Court of Sessions passed in appeal under the provisions of Section 101 (4), therefore, remedy of appeal has been curtailed by the indulgence of the Sessions Court venturing out to determine the age of the petitioner on its own.

4. On the basis of above submission, learned counsel for the petitioner prayed for allowing the petition and setting aside the order dated 17.1.2018 passed by 5th ASJ, Bhind, as without jurisdiction.

5. As far as Section 2(23) of the Act of 2015 is concerned, Court includes District Court and District Court includes the Sessions Court, therefore, the first contention of the petitioner that Sessions Court is not a Court within the meaning of Section 2(23) of the Act of 2015 is liable to be rejected and is rejected.

6. Section 9 of the Act of 2015 clearly provides that when a Magistrate, not empowered to exercise the powers of the Board under this Act is of the opinion that person alleged to have committed the offence and brought before him is a juvenile, he shall forward the child to the Board having jurisdiction. Thus, the Magistrate has not been deprived of his authority to form an opinion as to whether a person brought before him is a juvenile or not. Therefore, language of sub-section 1 of Section 9 is so couched that Court has to have a satisfaction first before forwarding the child to the JJ Board. Similarly, sub-section 3 of Section 9 provides that if the Court finds that a person has committed an offence and was a child on the date of commission of such offence, it shall forward the child to the Board for passing appropriate orders and the sentence. Thus, Court has to form an opinion that the offender was a child for which Court is not precluded from seeking evidence.

7. Section 94 of the Act of 2015 again talks of presumption and it though provides that how age shall be determined, but in the case of *Loknath Pandey vs. State of UP and others* as reported in AIR 2017 SC 3866, it has been held that where different date of births are recorded in different classes, then the date of birth recorded in the first school shall be deemed to be the effective date.

8. In the present case, evidence has come on record and has been discussed by the learned Sessions Judge that Shishupal Singh Kushwaha (DW-1) posted as In-charge Teacher in Government Primary School, Basanta Ka Pura, had produced admission register from 7.7.1995 starting from serial No.1 to 19.6.17 bearing serial No. 370 in which name of the petitioner Hariom Singh son of Sarvesh Singh is mentioned at serial No. 203 dated 29.06.2004. This record depicts date of birth of the petitioner as 8.11.1998. Similarly, it has come on record that Mewaram (DW-2), In-charge Head Master of Government Middle School, Pandari, had produced admission register starting from 14.7.1993 serial No. 1 to 2.8.2010 serial No. 1158 in which name of petitioner Hariom is mentioned at serial No. 1043. His name is mentioned as son of Sarvesh and mothers name is mentioned as Smt. Munnidevi. Petitioner had taken admission in class 6th and at the time of admission, his date of birth was shown as 8.11.1998, copy of original register was marked as Ex. D/5. In view of such evidence on record, petitioner's contention that his matriculation certificate should have been accepted as a conclusive proof of his date of birth in terms of the provisions contained in Section 94 (2)(i) and also in the light of sub-clause (iii) of Section 94 (2) is not

sustainable in the light of the law laid down by Supreme Court in the case of *Loknath Pandey* (supra).

9. Right to appeal is though a valuable right, but merely a remedy has been provided in the Act of 2015, it does not mean that whether a person is a child or not as defined in Section 2 (12) of the Act of 2015 he should be necessarily referred to the Juvenile Justice Board for determination of age by following the provisions contained in Section 15 of the Act of 2015. The provisions contained in Section 9 clearly bestows authority on the Court to record a finding that whether a person brought before him is a child on the date of commission of such offence or not. It is on the satisfaction of the Court a child is to be forwarded to the Board for passing appropriate orders and the sentence and this exercise is not to be carried out in a mechanical manner without there being any objective assessment and subjective satisfaction.

10. Thus, in the opinion of this Court, the learned Sessions Judge has not exceeded his jurisdiction and has acted within the four corners of the provisions of the Act of 2015 and the Rules and has rightly discarded matriculation certificate in the light of the law laid down in the case of *Loknath Pandey* (supra) and there is no reason to interfere in the impugned judgment. Petition fails and is dismissed.

Application dismissed.

I.L.R. [2018] M.P. 1012
MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Atul Sreedharan

M.Cr.C. No. 28740/2017 (Jabalpur) decided on 14 February, 2018

T.V.S. MAHESHWARA RAO …Applicant

Vs.

STATE OF M.P. …Non-applicant

(Alongwith M.Cr.C. No. 627/2018)

***A. Penal Code (45 of 1860), Section 420/34 and Criminal Procedure Code, 1973 (2 of 1974), Section 439 – Bail* – Offence registered against the applicants in respect of a sale transaction whereby it was alleged that applicants herein did not paid the total amount of purchase and cheated the seller – Held – Applicants are in judicial custody for almost two months and no justification has been placed either by the State or counsel for objectors as to how the continued incarceration of applicants is expedient in the interest of justice – Further held – Present case shows the elements of a Civil/ Commercial transaction, in which substantial amount has already been paid by the applicants – Bail granted – Application allowed.**

(Para 9 & 10)

क. दण्ड संहिता (1860 का 45), धारा 420/34 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 – जमानत – विक्रय संव्यवहार के संबंध में आवेदकगण के विरूद्ध अपराध पंजीबद्ध किया गया था जिसमें यह अभिकथन किया गया था कि आवेदकगण ने क्रय की कुल राशि का भुगतान नहीं किया तथा विक्रेता से छल किया – अभिनिर्धारित – आवेदकगण लगभग दो माह के लिए न्यायिक अभिरक्षा में हैं तथा राज्य द्वारा या आपत्तिकर्ता के काउंसेल द्वारा कोई न्यायोचित्य नहीं रखा गया है कि आवेदकगण को निरंतर कैद में रखना न्याय के हित में कैसे समीचीन है – आगे अभिनिर्धारित – वर्तमान प्रकरण सिविल/वाणिज्यिक संव्यवहार के तत्वों को दर्शाता है, जिसमें आवेदकगण द्वारा पहले ही पर्याप्त राशि का भुगतान किया जा चुका है – जमानत प्रदान की गई – आवेदन मंजूर।

***B. Criminal Procedure Code, 1973 (2 of 1974), Sections 437, 438 & 439 – Grant/Denial of Bail – Guidelines* – Held – Supreme Court held that an important facet of criminal justice administration in the country is the grant of bail being the general rule and the incarceration of a person in prison or a correction home as an exception – Unfortunately, some of these basic principles appears to have lost sight because of which more and more persons are being incarcerated for longer periods – This does not do any good to our criminal jurisprudence or to our society – Humane attitude is required to be adopted by a Judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody.**

(Para 7)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 437, 438 व 439 – जमानत प्रदान/अस्वीकार की जाना – दिशानिर्देश – अभिनिर्धारित – सर्वोच्च न्यायालय ने यह अभिनिर्धारित किया कि देश में आपराधिक न्याय प्रशासन का एक महत्वपूर्ण पहलू सामान्य नियम होने के नाते जमानत प्रदान की जाना है तथा अपवाद के रूप में कारागृह या सुधारगृह में किसी व्यक्ति को कैद किया जाना है – दुर्भाग्यवश, इनमें से कुछ मूलभूत सिद्धांतों का उद्देश्य खो जाना प्रतीत होता है जिसकी वजह से अधिक से अधिक व्यक्तियों को लंबी अवधि के लिए कैद किया जा रहा है – यह हमारे आपराधिक विधिशास्त्र या हमारे समाज के लिए कुछ अच्छा नहीं करता है – एक संदिग्ध या अभियुक्त व्यक्ति को पुलिस अभिरक्षा या न्यायिक अभिरक्षा हेतु प्रतिप्रेषण के आवेदन पर विचार करते समय न्यायाधीश द्वारा मानवीय रवैया अपनाया जाना अपेक्षित है।

Case referred:

SLP (Criminal) No. 151/2018 decided on 06.02.2018 (SC).

Manish Datt with *Swati Aseem George*, for the applicant in M.Cr.C. No. 28740/2017 and with *Anuj Agrawal*, for the applicant in M.Cr.C. No. 627/2018.

Ashutosh Tiwari, G.A. for the non-applicant-State.

Vasant Daniel, Aakash Singhai and *Sanjay Verma*, for the objectors in both M.Cr.Cs.

ATUL SREEDHARAN, J.:- As both the above mentioned bail applications arise out of the same crime number of the same police station, they are being heard analogously and disposed of by a common order.

1. The applicants T. V. S. Maheshwara Rao and Nitin Rai are in judicial custody since 16.12.2017 and 12.12.2017 respectively in the aforesaid cases. According to the case of the prosecution, three sellers, Tula Food Products Pvt. Ltd., Singhai Trading Company and Badri Prasad Shankar Lal Nema, were approached by the applicant Nitin Rai and the co-accused Vijay Rai, who is stated to be absconding, and they are stated to have told the three sellers that they have a party in Andhra Pradesh, which is the applicant T. V. S. Maheshwara Rao, who is a prospective purchaser of pulses. Thereafter consignments of various kinds of pulses were sent through the applicant Nitin Rai and the co-accused Vijay Rai to three entities, Salasar Traders Nalgonda, Surya Mitra Traders Guntur and Maruti Impex at Chennai. The allegation against the applicant T. V. S. Maheshwara Rao is that he has not paid the full amount for the material dispatched by the sellers and received by the applicant T. V. S. Maheshwara Rao.

2. Learned counsel for the objectors have stated that about Rs.52,00,000/- is still pending payment out of a total of over rupees one crore of Tula Food Products Pvt. Ltd. In all, Rs.76,24,389/- is pending payment from the applicant T. V. S. Maheshwara Rao to the three sellers, which are Tula Food Products Pvt. Ltd., Singhai Trading Company and Badri Prasad Shankar Lal Nema. It is undisputed that over Rupees 40,00,000/- has been paid to Tula Food Products Pvt. Ltd. and likewise out of Rs.19,65,000/- worth of merchandise sold by the seller Badri Prasad Shankar Lal Nema, he has received approximately Rs.12,00,000/- and a little more Rs.7,00,000/- is still pending payment.

3. The undisputed facts which appear from the FIR and the statements of witnesses is that the three sellers, never directly interacted with the purchaser T.V.S. Maheshwara Rao. The consignments were always sent through the applicant Nitin Rai and the co-accused Vijay Rai to Salasar Traders, Surya Mitra Traders and Maruti Impex. It is also undisputed that there is no written contract in this case. *Prima facie*, the existence of a contract between the three sellers and the purchaser/applicant T. V. S. Maheshwara Rao, also appears suspect as they have never met the applicant T. V. S. Maheshwara Rao as per the records of the case. The element of consensus *ad idem* between the sellers the applicant T. V. S. Maheshwara Rao is missing. Both, the sellers and the buyer, have dealt with the middle-men/ applicant Nitin Rai and the co-accused Vijay Rai.

4. Learned counsels for the applicants submit that as and when informed by the applicant Nitin Rai and the co-accused Vijay Rai, the applicant T.V.S. Maheshwara Rao would transfer money into the accounts of the sellers through RTGS. It is also undisputed that there has never been any cash payments in this case.

5. Mr. Vasant Daniel, learned counsel, who appears on behalf of the sellers Tula Food Products Pvt. Ltd. and Badri Prasad Shankar Lal Nema, has argued with great vehemence that Maruti Impex, which the learned counsels appearing on behalf of the applicants states, does not belong to the applicant T. V. S. Maheshwara Rao, is actually run and managed by the applicant T. V. S. Maheshwara Rao. In support of this contention, the learned counsel for the objectors have submitted and also drawn the attention of this court to the documents like the ledger maintained by the seller Tula Food Products Pvt. Ltd. and Badri Prasad Shankar Lal Nema, which show the sales being made by them to Maruti Impex. The corresponding payments received by the complainants from the consignee is reflected in the bank accounts of the sellers Tula Food Products Pvt. Ltd. and Badri Prasad Shankar Lal Nema as having been paid by Surya Mitra Traders, a firm owned and managed by the applicant T.V.S. Maheshwara Rao. The issue raised by the learned counsels for the objectors is, that if the applicant T. V. S. Maheshwara Rao was not the Proprietor of Maruti Impex, then why did his firm Surya Mitra Traders make payments on behalf of Maruti Impex? To the said query posed by the Ld. Counsel for the objectors, the learned counsel for the applicants has submitted that the purchaser never dealt with the sellers directly and that the amounts were transferred from his (applicant T.V.S. Maheshwara Rao's) account in the name of Surya Mitra Traders as and when the middle-men/ applicant Nitin Rai and the co-accused Vijay Rai asked him to do so and into such accounts as he was directed to by the applicant Nitin Rai and the co-accused Vijay Rai.

6. Learned counsel for the applicants have also submitted that if it was the intention of the applicants to hoodwink/cheat the sellers by making them believe that he was the Proprietor of Maruti Impex, he would never have made payments through RTGS from the account of Surya Mitra Traders, which undisputedly belongs to him, as the same would be reflected while being credited into the account of the sellers. He has further submitted that in such a situation, the applicant would have made the payments through a demand draft so that the same cannot be traced to him. Under the circumstances, he submits that the reason why the name of Surya Mitra Traders is reflected in the bank accounts of the sellers is on account of genuine payments being made by the applicants herein under the instructions of the middle-men/applicant Nitin Rai and the co-accused Vijay Rai.

7. Learned counsel for the applicants have also placed before this court a very recent judgment of the Supreme Court in *Dataram Singh Vs. State of Uttar Pradesh and another* [arising out of SLP (Criminal) No.151/2018 delivered on 6.2.2018]. The said judgment is an enunciation on the principles governing grant of bail. The Hon'ble Supreme Court has observed categorically that an important facet of criminal justice administration in the country is the grant of bail being the general rule and the incarceration of a person in prison or a correction home as an exception. It has further observed that **"unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated for longer periods. This does not do any good to our criminal jurisprudence or to our society"**. In paragraph 5, the Hon'ble Supreme Court has held **"to put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this, including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in Re- Inhuman Conditions in 1382 Prisons".** In paragraph 7, the Hon'ble Supreme Court has clarified that it should not be understood to mean that bail should be granted in every case and that its grant or refusal is entirely within the discretion of the judge hearing the matter and though the said discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately. In paragraph 8, the Hon'ble Supreme Court observes that it has been constrained to make these observations in the said appeal in which the grant of bail has not been opposed by the State, but there is vehement opposition by the complainant. The contents of paragraph 9 reflect that the facts in that case were quite similar to the present case where again the allegations against the appellant Dataram Singh, in the case before the Supreme Court, was of having cheated the complainant of an amount of Rs.37,00,000/- and thereby having committed an offence punishable under sections 419, 420, 406 and 506 IPC.

8. The hallowed and humane view of the Supreme Court, strongly in favour of liberty of the individual in matters relating to the grant or denial of bail, are not merely a guiding principle for this Court but also extends to the District Judiciary which also exercises the same power of grant or denial of bail u/s. 437, 438 and 439 Cr.P.C, as the High Court. The denial of bail by any Court, must be an exception exercised only in those cases where the material on record reveals a strong prima facie case, supported by direct evidence or by way of strong and credible circumstantial evidence of the accused having

committed an offence that is *"malum in se"* or offences which are of such nature which are inherently evil and shocks the human conscience and a more liberal view must be taken in offences which are *"malum prohibitum"* or acts which are offences on account of legislative sanctions alone.

9. In this case also, there is no justification that has been placed before this court by either the State or the learned counsels for the objectors as to how the continued incarceration of the applicants herein is expedient in the interest of justice. The applicants herein are in judicial custody for almost two months. The case, if at all sustainable, would be a case based upon documentary evidence.

10. Thus, the continued incarceration of the applicants herein, in a case which *prima facie* glows with elements of a civil/commercial transaction, in which substantial moneys have been paid by the applicant T. V. S. Maheshwara Rao, which has not been denied by the sellers, this Court is inclined to allow the applications and direct that the applicants **T. V. S. Maheshwara Rao and Nitin Rai** be enlarged on bail upon their furnishing personal bond in the sum of **Rs.50,000/- (Rupees Fifty Thousand only)** each with one solvent surety each in the like amount to the satisfaction of the Trial Court.

Certified copy as per rules.

Application allowed.

I.L.R. [2018] M.P. 1017
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Sheel Nagu
M.Cr.C. No. 2436/2017 (Gwalior) decided on 9 March, 2018

MEGHA SINGH SINDHE (SMT.) …Applicant
Vs.
STATE OF M.P. & anr. …Non-applicants

***A. Penal Code (45 of 1860), Section 304-B & 498-A and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Ingredients of Offence – Quashment of prosecution* – Wife died by hanging herself within three years of marriage – Offence registered against husband, mother-in-law and sister-in-law u/S 304-B and 498-A IPC – Sister-in-law filed this petition for quashment of proceedings against her – Held – Petitioner since her marriage in the year 2009 (before marriage of deceased) was living separately and was either resided at Agra or at Shirdi which is far away from Gwalior – So far as FIR and statements of relatives of deceased are concerned, it contains omnibus allegations against petitioner of subjecting the deceased to harassment and cruelty for dowry demands – Allegations in FIR does not contain the nature of allegations, the time and date of occurrence of any incident of cruelty or**

the kind of cruelty committed soon before the death of deceased – For the offence of dowry death u/S 304-B IPC, such vague, non-specific allegations do not satisfy the pre-requisite of the offence and fall short of basic ingredients – Prosecution of petitioner clearly appears to be malicious – Prosecution of petitioner u/S 304-B IPC is quashed and for the remainder charge, trial shall continue – Petition partly allowed.

(Paras 8.1, 8.3, 11)

क. दण्ड संहिता (1860 का 45), धारा 304–बी व 498–ए एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अपराध के घटक – अभियोजन अभिखंडित किया जाना – विवाह के तीन वर्ष के भीतर पत्नी द्वारा स्वयं को फांसी लगाने से मृत्यु हुई – पति, सास व ननद के विरूद्ध धारा 304–बी व 498–ए भा.दं.सं. के अंतर्गत अपराध पंजीबद्ध – ननद ने उसके विरूद्ध कार्यवाहियां अभिखंडित किये जाने हेतु यह याचिका प्रस्तुत की – अभिनिर्धारित – याची, वर्ष 2009 में अपने विवाह के पश्चात् (मृतिका के विवाह के पूर्व) से पृथक रूप से निवासरत थी और या तो आगरा या शिरडी में रही जो कि ग्वालियर से बहुत दूर है – जहां प्रथम सूचना प्रतिवेदन एवं मृतिका के रिश्तेदारों के कथनों का संबंध है, इनमें याची के विरूद्ध मृतिका के साथ दहेज की मांगों हेतु उत्पीड़न एवं क्रूरता का व्यवहार करने के बहुप्रयोजनीय अभिकथन अंतर्विष्ट है – प्रथम सूचना प्रतिवदेन के अभिकथनों में अभिकथनों का स्वरूप, मृतिका की मृत्यु से तुरंत पूर्व कारित किसी प्रकार की क्रूरता या क्रूरता की कोई घटना घटित होने का समय व तिथि अंतर्विष्ट नहीं है – धारा 304–बी भा.दं.सं. के अंतर्गत दहेज मृत्यु के अपराध हेतु उक्त अस्पष्ट, अविनिर्दिष्ट अभिकथन, अपराध की पूर्व–अपेक्षा को संतुष्ट नहीं करते तथा मूल घटकों से कम पड़ते हैं – याची का अभियोजन स्पष्ट रूप से दुर्भावनापूर्ण प्रतीत होता है – धारा 304 बी भा.दं.सं. के अंतर्गत याची का अभियोजन अभिखंडित किया गया तथा शेष आरोप हेतु विचारण जारी रहेगा – याचिका अंशतः मंजूर।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Maintainability – Stage of Trial* – Present petition was filed after the trial has commenced, charges had been framed and even testimony of two eye witnesses were recorded – Held – Power u/S 482 Cr.P.C. is inherent and plenary in nature which can be exercised at any stage of the criminal prosecution, i.e. right from stage of grievance of non-filing of FIR till any time during pendency of trial in cases where manifest injustice is palpable.**

(Para 5)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – पोषणीयता – विचारण का प्रक्रम – वर्तमान याचिका को विचारण प्रारंभ होने के पश्चात् प्रस्तुत किया गया था, आरोप विरचित किये जा चुके थे और यहां तक कि दो चक्षुदर्शी साक्षियों के परिसाक्ष्य भी अभिलिखित किये जा चुके थे – अभिनिर्धारित – धारा 482 दं.प्र.सं. के अंतर्गत शक्ति, अंतनिर्हित एवं परिपूर्ण स्वरूप की है, जिसका प्रयोग, दाण्डिक अभियोजन के किसी भी प्रक्रम

पर किया जा सकता है अर्थात्, प्रथम सूचना प्रतिवेदन प्रस्तुत नहीं किये जाने से व्यथित होने के प्रक्रम से लेकर प्रकरण में विचारण लंबित रहने के दौरान किसी समय तक, जहां प्रकट अन्याय सुस्पष्ट है।

***C. Evidence Act (1 of 1872), Section 113-B and Penal Code (45 of 1860), Section 304-B – Presumption* – Held – It is now well settled and is also evident from bare reading of Section 113-B of Evidence Act, that the statutory presumption u/S 113-B arises only when basic three ingredients of Section 304-B IPC are *prima facie* made out and not otherwise.**

(Para 10)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 113–बी एवं दण्ड संहिता (1860 का 45), धारा 304–बी – उपधारणा – अभिनिर्धारित – यह अब सुस्थापित है एवं साक्ष्य अधिनियम की धारा 113–बी के पठन मात्र से भी प्रकट है कि धारा 113–बी के अंतर्गत कानूनी उपधारणा केवल तब उत्पन्न होगी जब धारा 304–बी भा.दं.सं. के मूलभूत तीन घटक, प्रथम दृष्ट्या बनते हो और अन्यथा नहीं।

Cases referred:

AIR 2013 SC 506, (2014) 1 Cr.L.J. 551, AIR 1992 SC 604.

J.P. Mishra, for the applicant.
Shiraz Quraishi, P.P. for the non-applicant No. 1/State.
Rajesh Shukla, for the complainant.

J U D G M E N T

Sheel Nagu, J.:- 1. The inherent powers of this court are invoked u/S. 482 Cr.P.C. to assail the FIR dated 5/10/16 registered at Police Station Maharajpur District Gwalior inter alia against the petitioner who happens to be sister-in-law (Nanad) of the deceased who died due to hanging.

2. Learned counsel for the petitioner and respondent are heard on the question of admission and final disposal.

3. The prosecution story unfolded is that on 9/7/13, the deceased got married to accused Gaurav Bhatt. The father of the deceased gave dowry comprising of about 80 grams of gold and cash of Rs. 1,55,000/- to Gaurav Bhatt. The mother-in-law and the husband of the deceased after about 23 months of marriage started taunting the deceased that in case Gaurav had been married with someone else than the deceased, then much larger quantum of dowry would have been received. While doing so, the in-laws started imposing unnecessary restrictions on the movements of the deceased and subjecting her to cruelty. It is alleged that on 13/12/14, the deceased lodged a written complaint against her husband and mother-in-law at police station Maharajpur,

Gwalior which led to registration of Crime No. 230/14 alleging offences punishable u/S. 498 A, 342, 323 and 34 of IPC. It is further alleged in the FIR that after lodging of the said report, the petitioner (Nanad) Smt. Megha Santosh Shinde joined the husband and mother-in-law of the deceased in the process of inflicting cruelty. The FIR further alleges that the deceased got fed up with the persistent infliction of mental and physical cruelty and therefore, on 7/6/16 at about 12 Noon ended her life by hanging herself leaving behind a two year old son. The impugned FIR was lodged based upon the inquest commenced vide information provided by mother-in-law on 7/8/16. The statement of the father, mother, sister and brother of the deceased namely Ravi, Savitri, Seema and Kuldeep respectively were recorded on three occasions i.e. the first during the inquest, the second u/S. 160 Cr.P.C. and the third u/S. 164 Cr.P.C.

4. After completion of investigation, charge-sheet was filed whereafter cognizance was taken, the trial Court framed charges against the three accused Smt. Meena (mother-in-law), Gaurav (husband) and the petitioner (Nanad) of the deceased u/Ss. 498 A, 304 B and 34 of IPC whereafter trial commenced where statements of two eye-witnesses have already been recorded.

5. At this juncture, learned counsel for the respondent has raised the question of maintainability on the ground that at this late stage when the trial has begun and testimony is being recorded, it would not be appropriate to interfere u/S. 482 Cr.P.C.. For this purpose, this court may revert to decision of the Apex Court in the case of *Sathish Mehra Vs. State of N.C.T. of Delhi and Anr.* reported in AIR 2013 SC 506 where it was held that the power u/S. 482 Cr.P.C. is inherent and plenary in nature which can be exercised at any stage of the criminal prosecution i.e. right from the earlier stage of grievance of non filing of the FIR till any time during pendency of trial in cases where manifest injustice is palpable. The relevant portion of the said Apex Court decision is reproduced below:-

> *"15.The power to interdict a proceeding either at the threshold or at an intermediate stage of the trial is inherent in a High Court on the broad principle that in case the allegations made in the FIR or the criminal complaint, as may be, prima facie do not disclose a triable offence there can be reason as to why the accused should be made to suffer the agony of a legal proceeding that more often than not gets protracted. A prosecution which is bound to become lame or a sham ought to interdicted in the interest of justice as continuance thereof will amount to an abuse of the process of the law. This is the core basis on which the power to interfere with a pending criminal proceeding has been recognized to be inherent*

> *in every High Court. The power, though available, being extra ordinary in nature has to be exercised sparingly and only if the attending facts and circumstances satisfies the narrow test indicated above, namely, that even accepting all the allegations levelled by the prosecution, no offence is disclosed. However, if so warranted, such power would be available for exercise not only at the threshold of a criminal proceeding but also at a relatively advanced stage thereof, namely, after framing of the charge against the accused....."*

6. In view of above law laid down by the Apex Court, this court rejects the primarily objection of the State and the victim and proceeds to decide the matter on merits.

7. Learned counsel for the petitioner, sister-in-law of the deceased has primarily raised two grounds in support of challenge to the prosecution. First being that a bare reading of the allegations contained in the charge-sheet do not constitute the offence of dowry death and the second being that of malice that the petitioner being sister-in-law and despite staying away from Gwalior since her marriage in the year 2009 has been wrongly arrayed as an accused merely to wreck vengeance and to give vent to the feelings of hatred and animosity in the mind of the parents and relatives of the deceased arising out of the unfortunate incident in which the petitioner has no role to play.

8. After hearing learned counsel for the rival parties, this court is of the considered view that there is sufficient ground in the present case calling for interference in the prosecution against the petitioner so far as it relates to the offence punishable u/S. 304 B of IPC for the reasons infra.

8.1. The FIR and the statement recorded u/S. 161 Cr.P.C. of the relatives of the deceased merely allege omnibus allegations against the petitioner of subjecting the deceased to harassment and cruelty for dowry demand. As regards the FIR, the only allegation against the petitioner is that the petitioner alongwith her mother (mother-in-law of the deceased) used to subject the deceased to dowry demand related cruelty, physical and mental in nature and therefore, the petitioner deserves to be criminally prosecuted. The nature of allegations, the time and date of occurrence of any incident of cruelty, or the bare minimum details of the kind of cruelty inflicted, are totally missing from the allegations in the FIR. Vague, non-specific and omnibus allegations are made in the FIR which do not satisfy the pre-requisites of the offence of dowry death as defined u/S. 304 B of IPC, which for ready reference and convenience is reproduced below:-

> *"304B. Dowry death.—*
> *(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal*

circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation.—For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

8.2. A plain reading of the above provision reveals the following pre-requisites which are necessary to be cumulatively satisfied to enable launching of a valid criminal prosecution u/S. 304 B of IPC:-

(1) Death of a woman due to burn or bodily injuries otherwise than in the normal circumstances.

(2) Death having occurred within seven years of marriage.

(3) Soon before death she was subjected to cruelty or harassment by husband or any relative of her husband for or in connection with demand for dowry.

8.3. Taking up the first ingredient, it is seen that the same appears to be prima facie satisfied as deceased died an unnatural death due to hanging. As regards the second ingredient, the same also prima facie appears to be satisfied as marriage took place on 9/7/13, whereas death occurred on 7/8/16 which was well within seven years of the marriage. However, as regards the third ingredient of allegations against the petitioner of dowry demand related cruelty (mental of physical) inflicted soon before death, the same appears to be totally absent for the reasons infra:-

(i) The FIR, the inquest statements, the statements recorded u/S. 161 and 164 Cr.P.C. contain allegations which are of omnibus nature with non specification of time, nature, details of cruelty inflicted on the part of the petitioner against the deceased mentioned therein. A general sweeping statement has been made that petitioner alongwith husband and mother-in-law inflicted cruelty.

(ii) More so, the factor which weighs heavily in favour of the petitioner is that since her marriage in 2009, she was either resided at Agra or at Shirdi her matrimonial home which is far away from Gwalior. It is obvious that petitioner must be visiting

her parents place at Gwalior and if she inflicted any mental and/or physical cruelty, then the least that was required by the parents and the relatives of the deceased while recording the statements was to disclose the time, place and nature of cruelty inflicted by the petitioner upon the deceased. Not having done so, in any of the material collected by the prosecution in the charge-sheet, the presumption that can very well be drawn in favour of the petitioner is that having married in 2009, having left her parental house at Gwalior since then she was not residing at Gwalior and therefore, the allegations made against petitioner in the FIR and in the statements recorded by the prosecution do not reflect the reality and have been made with malafide intention to falsely implicate the petitioner only because she is related to the main accused i.e. the husband and the mother-in-law of the deceased.

(iii) Another factor which persuades this court to take a view in favour of the petitioner is that the first complaint made by the deceased regarding cruelty in the year 2014, was made on 18/6/14 (Annexure P/3) where the allegations of mental and physical cruelty were only against the husband Gaurav and the mother in law. The said complaint has not even named the petitioner much less making any allegation against her.

(iv) More so, it is surprising to note that if the deceased could make a written complaint to the police on 18/6/14 within one year of marriage against her husband and mother-in-law which led to registration of offence bearing crime No. 230/14 alleging offence punishable u/Ss. 498 A, 342, 323 and 34 of IPC, then what prevented the deceased from making another complaint against the petitioner. If the deceased was being subjected to cruelty by the petitioner between the period from (June-2014 to October-2016) and yet no complaint was made either to the police or to the court, it is a clear indicator that in actuality, the grievance of the deceased was only against her husband and mother-in-law. However to give vent to their pent up feelings against the husband and her mother-in-law, the relatives of the deceased appear to have falsely implicated the petitioner without any supportive allegation. Thus the prosecution of the petitioner clearly appears to be malicious rather than truthful.

9. From the above, it is crystal clear that one of the ingredients of infliction of dowry demand related cruelty soon before death is not made out against the petitioner (sister-in-law of the deceased).

10. A feeble attempt was made by the learned Public Prosecutor by contending that the prosecution against the petitioner can not be quashed in the face of the statutory presumption u/S. 113 B of the Evidence Act. It is now well settled and it is also evident from bare reading of Section 113 B of Evidence Act that the statutory presumption prescribed therein arises only when the basic three aforesaid ingredients of Section 304 B of IPC are prima facie made out, and not otherwise. If any of the said basic three ingredients are missing as is the case herein where there is no evidence

whatsoever about the petitioner having inflicted dowry demand related cruelty soon before death, the said statutory presumption can not be resorted to by the prosecution. In this respect the decision of Apex Court in the case of *Suresh Kumar Vs. State of Haryana* reported in (2014) 1 Cr.L.J 551 is worthy of reference and relevant portion of which is reproduced below:-

> *"48. We are, of course, bound by the decision of a larger Bench of this Court in Multtani (AIR 2001 SC 921 : 2001 AIR SCW 532). Following that decision, we must hold that the initial burden of proving the death of a woman within seven years of her marriage in circumstances that are not normal is on the prosecution; such death should be in connection with or for a demand of dowry which is accompanied by such cruelty or harassment that eventually leads to the woman's death in circumstances that are not normal. After the initial burden of a deemed dowry death is discharged by the prosecution, a reverse onus is put on the accused to prove his innocence by showing, inter alia, that the death was accidental."*

11. From the above conspectus of factual and legal assertion, this court is of the firm view that the prosecution launched against the petitioner is hit by the vice of malice and the bare reading of the allegations in the charge-sheet desperately falling short of the minimum prima facie requirement of satisfying the basic ingredients of dowry demand contained in section 304 B of IPC. The celebrated decision of Apex Court in the case of *State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors.* reported in AIR 1992 SC 604 comes to the rescue of the petitioner, the relevant portion of which is reproduced below:-

> ***"108. (1) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;***
>
> *(2) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code;*

(3) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code;

(5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

(Emphasis Supplied)

12. Consequently, this court has no hesitation to invoke it's inherent powers u/S. 482 Cr.P.C. and quashes the prosecution launched against the petitioner u/S. 304 B of IPC. However, the prosecution of the petitioner for the remainder charge punishable u/S. 498 A and 34 of IPC shall continue and the trial court shall proceed against petitioner in accordance with law.

Order accordingly.

I.L.R. [2018] M.P. 1026
MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Rohit Arya

M.Cr.C. No. 5952/2018 (Indore) decided on 26 March, 2018

ABHAY KUMAR KATARE …Applicant

Vs.

STATE OF M.P. …Non-applicant

***Penal Code (45 of 1860), Section 306 & 107 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Abetment to Suicide – Quashment of Proceeding* – Deceased, who was a section officer worked under the supervision of Manager/Applicant, committed suicide – In the suicide note and email, he blamed applicant responsible for it – Offence registered against the applicant – Challenge to – Held – To constitute the commission of offence u/S 306, an element of *mens rea* is an essential ingredient as the abetment involves a mental preparedness with an intention to instigate, provoke insight or encourage to do an act or a thing – Such process of instigation must have close proximity with the act of commission of suicide – In the instant case, in the emails dated 25.05.97 and 11.09.97, deceased had not made allegation of harassment, cruelty or incitement tantamounting to provocation by the applicant to take the extreme step of committing suicide – In the challan also, there is no material to suggest or attributable positive act on the part of applicant that he had an intention to push the deceased to commit suicide – Magistrate has not applied his mind and passed cognizance order in a mechanical manner – Proceeding against applicant is quashed – Application allowed.**

(Para 14 & 15)

दण्ड संहिता (1860 का 45), धारा 306 व 107 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – आत्महत्या के लिए दुष्प्रेरण – कार्यवाही अभिखंडित की जाना – मृतक, जो कि एक अनुभाग अधिकारी था, प्रबंधक/आवेदक के पर्यवेक्षण के अधीन कार्यरत था, ने आत्महत्या की – आत्महत्या लेख एवं ई–मेल में उसने आवेदक को इसका जिम्मेदार होने का दोष लगाया – आवेदक के विरूद्ध अपराध पंजीबद्ध – को चुनौती – अभिनिर्धारित – धारा 306 के अंतर्गत अपराध कारित किया जाना गठित होने के लिए, आपराधिक मनःशक्ति का तत्व एक आवश्यक घटक है क्योंकि दुष्प्रेरण में, किसी कृत्य या कार्य को करने के लिए उकसाने, उत्प्रेरित करने, उत्तेजित करने एवं प्रवृत्त करने के आशय के साथ मानसिक तैयारी शामिल है – उक्त उकसाने की प्रक्रिया का, आत्महत्या कारित करने के कृत्य के साथ निकट संबंध होना चाहिए – वर्तमान प्रकरण में, मृतक ने ई–मेल दिनांक 25.05.97 व 11.09.97 में, आत्महत्या कारित करने का आत्यंतिक कदम उठाने के लिए आवेदक द्वारा उत्प्रेरण की कोटि में आने वाले उत्पीड़न, क्रूरता अथवा उत्तेजन का अभिकथन नहीं किया

था – चालान में भी आवेदक की ओर से सकारात्मक कृत्य किया गया माना जा सकने या सुझाने हेतु कोई सामग्री नहीं है कि आवेदक का मृतक को आत्महत्या करने के लिए दबाव डालने का कोई आशय था – मजिस्ट्रेट ने अपने मस्तिष्क का प्रयोग नहीं किया और यांत्रिक ढंग से संज्ञान आदेश पारित किया – आवेदक के विरूद्ध कार्यवाही अभिखंडित की गई – आवेदन मंजूर।

Cases referred:

AIR 1960 SC 866, AIR 1976 SC 1947, AIR 1992 SC 604, AIR 2005 SC 9, (2009) 7 SCC 495, AIR 2001 SC 3837, AIR 1994 SC 1418, 2009 (16) SCC 605, AIR 2011 SC 1238, AIR 2002 SC 1998, (2010) 8 SCC 628.

Surendra Singh assisted by *Raghavendra Singh Raghuvanshi, Mayhank Datta, Vivek Suri, Harshit Sharma* and *Nidhi Vaidya*, for the applicant.

Virendra Khadav, G.A. for the non-applicant/State.

O R D E R

Rohit Arya, J.:- This application under section 482 Cr.P.C., is presented seeking quashment of the challan (Annexure P/1 colly.), cognizance order (Annexure P/2) and the consequent entire criminal proceedings arising out of RCT No.97/2018 for the offence punishable under section 306 IPC pending before the Court of Judicial Magistrate, First Class, Indore.

2. Petitioner is working as a Manager with DCM Shriram Limited (hereinafter referred to as "the Company") and posted at its Indore office. Sumit Vyas, the deceased; had joined the Company at Indore office in the year 2011 on the post of Accounts Officer and worked under the supervision of the petitioner. He was promoted to the post of Section Officer. Though he worked with the Company for about six years but, he tendered resignation on number of times and thereafter withdrew the same. On 03/11/2012, the deceased sent an email and sought to be relieved of his duties for personal reasons and likewise in September, 2014 with a similar request but, at a later stage, he withdrew the same. In early 2017 since the petitioner noticed lapses and negligence in the discharge of duties by the deceased and another co-worker J.P.Yadav posing problems with the accounting system of the Company, the petitioner made a communication to the superior, S.K.Grover as regards account related issues with a copy to the deceased and co-worker J.P.Yadav by an email dated 28/04/2017 bringing to his notice the deficiencies and shortcomings to the effect that he is unable to control the accounting system due to negligence of the account staff and with a request to take some hard action or in the alternative the deceased and J.P.Yadav may be transferred to different department. S.K.Grover vide email dated 29/04/2017 called upon the deceased and Yadav for explanation.

As such, it was a pure official communication by the petitioner in the routine manner updating the superior officer about the work in the establishment.

The deceased instead of offering explanation in response to the email dated 29/04/2017 sent by S.K.Grover had made a request for termination of his service or transfer to some other place with immediate effect through email dated 03/05/2017. Nevertheless, the deceased did not make any allegations of cruelty, harassment or abuse of authority by the petitioner. Thereafter, the deceased continued to work in the same office. On 25/05/2017, the deceased sent an email titled as "Good Bye" to S.K.Grover wherein he once again disclosed his intention to leave the Company with a note of thanks to the superiors and co-workers for their support in discharge of his duties in the Company and wishing them as well, which reads as under:

> "From: Sumit vyas [smo.ssp@gmail.com]
> Sent: 25 May 2017 02.18
> To : SKGrover
> Subject: Good Bye
> Dear Sir,
> After more than 5-10 years of worked with Demshriram I have a lots of memories with Demshirram Ltd., I now bid adieu to the wonderful team and people I met here.
> The organization has not only helped med to learn lots & grow as a professional, but has also helped me to build bonds that will always hold a special place in my heart.
> I would like to take a moment and thank everyone for their support, patience, and friendship over the past five year. It was wonderful to work with each one of you.
> Thanks to Mr. Sandeep Jain Sir & All My Team Members for their guidance.
> At Last but not least I am thank full to my Mentor Mr. SK Grover sahab who always wish to grow in my personal & professional career. Also thanks to all team members Zo-Indore.
> Lastly one thing I would like to say sorry if I hurted some one during the professional/personal talk."

The superior officer, S.K.Grover responded to the email on 25/05/2017 itself giving the deceased to understand that he will be relieved after completion of all the pending work and cautioned that it was not the way to leave the Company. By another email of the same date, S.K.Grover further informed the deceased that he will be relieved by 15th June, 2017 by which time, his replacement in the Company is available.

On the same date, i.e., on 25/07/2017 by yet another email, the deceased communicated to S.K.Grover that he has handed over the office key, laptop and data

cord to his colleague Yadav with a request for grant of seven days leave to go for training in Mumbai. After training, he would come back and complete the remaining outstanding work.

On 02/09/2017, the deceased again wrote email giving reference of email dated 28/04/2017 by the applicant (Abhay Kumar Katare) to S.K.Grover regarding his transfer or to take hard action with allegations of arrogant behaviour alleging personal abuses against the applicant. He further expressed his anguish for not being given promotion and even the increment granted which according to him was less than what was given in the last year. Thereafter, the deceased expressed his regrets to continue at the Regional Office and tendered his resignation on 02/09/2017 and sought to be relieved by 10th September, 2017.

The resignation of the deceased was accepted by the Executive Director and Business Head, DCM SHRIRAM on 11/09/2017 with effect from 11/09/2017.

The deceased collected the email acceptance letter of resignation from the Delhi office and thereafter, he has circulated the following email dated 11/09/2017:

> "From: Sumit vyas [sumitvyas@dcmshriram.com]
> Sent: 11 September 2017 19:18
> To : Abhya Kumar Katare
> Cc : All Kirtimahal Users; sk grover, Farm Solutions, ZO & RO Indore, Farm Solutions – RO Bhopal; Nitin Bachchavat
>
> Subject: Good BYE
>
> After more than 5-10 years of worked with Demshriram I have a lots of memories with Demshirram Ltd., I now bid adieu to the wonderful team and people I met here.
>
> The organization has not only helped med to learn lots & grow as a professional, but has also helped me to build bonds that will always hold a special place in my heart.
>
> I would like to take a moment and thank everyone for their support, patience, and friendship over the past five year. It was wonderful to work with each one of you.
>
> Thanks to Mr. Sandeep Jain Sir & All My Team Members for their guidance.
>
> At Last but not least I am thank full to my Mentor Mr. SK Grover sahab who always wish to grow in my personal & professional career. Also thanks to all team members Zo-Indore.

> Lastly one thing I would like to say sorry if I hurted some one during the professional/personal talk."

As such, in this email as well, the deceased has not made any allegations of harassment, instigation or cruelty against any of the superiors and the co-workers, especially the present applicant.

Thereafter, the deceased ceased to be employee in the Company and was not in contact with any of the Company officers or employees.

On 15/09/2017, the deceased sent another email with a copy to the local police, etc., with reference to the email dated 28/04/2017 (supra) written by the applicant to his superior; Mr. Grover, stating that he is undergoing depression and intended to commit suicide. In the said email the deceased hurled abuses against the applicant, on the premise that he is responsible for the alleged act of committing suicide by consuming sulphas tablets.

In the aforesaid factual backdrop, due to death of the deceased on 17/09/2017, initially *merg* No.76/2017 under section 174 Cr.P.C., was registered.

During the course of investigation, the statements of Narayan Vyas s/o Kaluram (father) on 25/09/2017, Shyam Vyas s/o Narayan Vyas (brother) on 02/10/2017, Ram Vyas s/o Narayan Vyas (brother) on 02/10/2017, Smt. Sunita Vyas (mother) on 04/10/2017, Rani Vyas (wife of the deceased) on 04/10/2017 and other witnesses; Ashuthosh s/o Omprakash Sharma on 04/11/2017 and Abhishek s/o Ghanshyam Sharma on 04/11/2017 were recorded under section 161 Cr.P.C.,

Thereafter after about two months, FIR No.0777 has been registered on 04/11/2017 at 17.48 hours by Police Station Lasudia, Indore against the applicant for the offence punishable under section 306 IPC with the prosecution story, briefly stated as under:

> The deceased under his own signature has written a suicide note wherein it was alleged that Abhay Katare working in the Company of the deceased was responsible for his death by consuming poisonous substance as Abhaby Katare used to harass and humiliate him.
>
> The brother of the deceased Ram Vyas has produced the copies of official e-mails of the deceased prior to his death by consuming the poisonous substance in the police station. On 15/09/2017 the poisonous substance was consumed by the deceased at his residence, therefore, he was taken to the hospital for treatment by his brother's son and died on 17/09/2017 at 06.30 pm during treatment.

On the basis of the statements of the witnesses, suicide note and the emails of the deceased, offence was made out under section 306 IPC against the accused/applicant.

The applicant was arrested on 05/11/2017.

Thereafter, challan was filed on 31/12/2017 and the Court below took cognizance under section 306 IPC against the applicant by an order dated 04/01/2018.

3. This Court has enlarged the applicant on bail while disposing of Mis. Cr. Case No.22167/2017 vide order dated 15/11/2017.

4. Learned senior counsel while questioning the challan (Annexure P/1 colly.) and the cognizance order (Annexure P/2) arising out of RCT No.97/2018 for the offence punishable under section 306 IPC has made the following the submissions:

(i) Even if allegations made in the FIR referable to contents of emails detailed above or the statements of witnesses recorded under section 161 Cr.P.C., are taken by their face value make out absolutely no case against the accused/applicant, muchless; the alleged act of abetment as the material collected does not disclose the essential ingredients of the offence of abetment of suicide alleged against the applicant;

(ii) To constitute the commission of offence of abetment and to convict a person under section 306 IPC, there has to be a clear *mens rea* to commit the offence; an active act or direct act having close proximity with the act of commission which led the deceased to commit suicide seeing no option. The alleged act beyond any reasonable doubt must have been intended to push the deceased into such a situation to commit suicide;

(iii) a careful perusal of the email exchanges from 28/04/2107 to 11/09/2017, amongst the applicant, S.K.Grover and the deceased on their uncontroverted face value do suggests the communications primarily and predominantly were in the realm of office administration, official duties/responsibilities in the interest of the Company; as such could not be said to have been intended to instigate, incite or encourage with reasonable certainty suggestive of the consequences for commission of the suicide; and

(iv) that apart, there existed an official relationship between the applicant and the deceased. The email dated 28/04/2017 written by the applicant was in the realm of administrative functions (referred to in the alleged email suicide note dated

15/09/2017) and there was no nexus between the commission of suicide and the communication with superior official.

(v) apart from that, there is no proximate link of the email dated 28/04/2017 with the alleged act of email suicide note dated 15/09/2017. It is absurd to even think that a superior officer like the applicant would intend to bring about suicide of an employee of the Company and there is no other material to the contrary;

(vi) baseless and irrelevant allegations could not be used as a basis for prosecution of a serious offence under section 306 IPC;

(vii) under the circumstances, where the FIR does not have any material capable of being viewed as having relevance for an offence under section 306 IPC, in the light of the settled law by the Hon'ble Supreme Court in the case of *Madan Mohan Singh Vs. State of Gujarat and another,* (2010) 8 SCC 628, it shall be in the fitness of things to quash the FIR and the further proceedings based thereupon.

5. *Per contra,* learned Public Prosecutor appearing for the respondent/State contends that the email dated 15/09/2017 addressed to one Pooja Mahndiratta and others, in fact, is a suicide note, sent by the deceased. The contents of the email do suggests that the applicant had instigated the deceased facilitating commission of suicide within the meaning of section 306 IPC. Hence, the named FIR lodged in the context thereof clearly discloses the act of abetment on the part of the applicant for commission of suicide by the deceased, as supported by the statements of the witnesses recorded under section 161 Cr.P.C., viz., Narayan Vyas (father) Shyam Vyas s/o Narayan Vyas (brother), Ram Vyas s/o Narayan Vyas (brother) Smt. Sunita Vyas (mother), Rani Vyas (wife of the deceased) and other witnesses as well. With the aforesaid prayed for dismissal of the instant application under section 482 Cr. P.C.,

6. Before adverting to the rival contentions, it shall be useful to reiterate the law as laid down by the Hon'ble Supreme Court on the jurisdictional issues, firstly; the scope of jurisdiction of this Court under section 482 Cr.P.C., in the matter of quashment of the criminal proceedings and secondly; the meaning, concept and dimension of abetment as defined under section 107 IPC with reference to the offence of the abetment of suicide defined under section 306 IPC.

In *R.P.Kapur Vs. State of Punjab,* AIR 1960 SC 866, the Hon'ble Supreme Court summarized categories of cases where the High Court can and should exercise its inherent powers to quash the proceedings and amongst them is a case; where the

allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged.

In *Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and others,* AIR 1976 SC 1947*;* the Hon'ble Supreme Court has held that the proceedings against the accused can be quashed; where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused.

In *State of Haryana & others Vs. Bhajan Lal & others,* AIR 1992 SC 604*,* the Hon'ble Supreme Court while exhaustively reviewing the entire case law on the scope of jurisdiction of the High Court has given exhaustive guidelines as regards the scope of jurisdiction under section 482 Cr.P.C., and one of the circumstance is; where the uncontroverted allegations made in the FIR or the complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

In *Zandu Pharmaceutical Works Ltd., & others Vs. Mohd. Sharaful Haque & Another,* AIR 2005 SC 9, the Hon'ble Supreme Court has observed as under:

> "It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceeding if it finds that intimation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

Similar view has been reiterated by the Hon'ble Supreme Court in *Devendra and Others Vs. State of Uttar Pradesh and Another* (2009) 7 SCC 495:

> "There is no dispute with regard to the aforementioned propositions of law. However, it is now well-settled that the High Court ordinarily would exercise its jurisdiction under Section 482 of the Code of Criminal Procedure if the allegations made in the First Information Report, even if given face value and taken to be correct in their entirety, do not make out any offence. When the allegations made in the First Information Report or the evidences collected during

> investigation do not satisfy the ingredients of an offence, the superior courts would not encourage harassment of a person in a criminal court for nothing."

7. Section 306 IPC defined "Abetment of suicide - If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extent to ten years, and shall also be liable to fine."

8. The word 'suicide' is not defined in IPC. However, its literal meaning is well known. *'Sui'* means 'self' and *'cide'* means *'killing'*, i.e., *"self-killing"*. The suicide by itself is not an offence under the Penal Code. However, attempt to suicide is an offence under section 309 IPC as the successful offender committing suicide is beyond the reach of law.

9. Section 107 IPC defined 'Abetment' and reads as under:

> "107. Abetment of a thing - A person abets the doing of a thing, who -
>
> First - Instigates any person to do that thing; or
>
> Secondly.- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes places in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> Thirdly. - Intentionally aides, by any act or illegal omission, the doing of that thing.
>
> Explanation 2 which has been inserted along with Section 107 reads as under:
>
> > "Explanation 2 - 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, and thereby facilitate the commission thereof, is said to aid the doing of that act."

10. In *Ramesh Kumar Vs. State of Chhattisgarh* AIR 2001 SC 3837, the Hon'ble Supreme Court has lucidly examined the dimensions of meaning 'instigation'. Para 20 reads as under:

> "20. Instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect. or what constitutes instigation must necessarily and specifically be suggestive of the

> consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. the present one is not a case where the accused had by his acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation."

11. In *State of West Bengal Vs. Orilal Jaiswal & Another* AIR 1994 SC 1418, it has been held by the Hon'ble Supreme Court that if it appears to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and difference in domestic life, quite common to the society, to which the victim belonged and such petulance, discord and difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

12. In *Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi)* 2009 (16) SCC 605, the Hon'ble Supreme Court dealt with the dictionary meaning of the word "instigation" and "goading". The court opined that there should be intention to provoke, incite or encourage the doing of an act by the accused.

13. In *M. Mohan Vs. State Represented by the Deputy Superintendent of Police,* AIR 2011 SC 1238, the Hon'ble Supreme Court while reviewing almost the entire case law with reference to section 306 IPC has laid down the meaning and concept of the word 'abetment". Paragraphs 45 and 46 reads as under:

> "45. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.
>
> 46. The intention of the Legislature and the ratio of the cases decided by this court are clear that in order to convict a person under section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he/she committed suicide."

14. Therefore, to constitute the commission of an offence of abetment of suicide, an element of *mens rea* is an essential ingredient as the abetment involves a mental preparedness with an intention to instigation, provoke, insight or encourage to do an act or

a thing. Besides, such process of instigation etc., must have close proximity with the act of commission of suicide. Therefore, a person cannot be accused or punished for an offence of abetment of suicide under section 306 IPC, unless; the aforesaid requirement of law is satisfied as laid down by the Hon'ble Supreme Court in the cases of *Sanju alias Sanjay Singh Sengar Vs. State of Madhya Pradesh,* AIR 2002 SC 1998 and *Madan Mohan Singh Vs. State of Gujarat and another* (2010) 8 SCC 628.

15. In the backdrop of the factual matrix of the case in hand detailed in the preceding paragraphs, it is apparent that the deceased joined the Company in the year 2011 and continued for a period of six years. During this period, on many occasions, he sought to be relieved of his duties for personal reasons. In email dated 03/11/2012 (Annexure P/4) while intending to resign, he has also expressed his gratitude to the Management for giving him opportunities and support during his service tenure. The request was accepted by S.K.Grover on the same day by an email dated 03/11/2012 assuring him to be relieved on 10/12/2012, however, he continued to work. Thereafter, on 12/09/2014, he sent another email addressed to the applicant with a copy to S.K.Grover expressing his intention for resignation as Section Officer wherein also he has expressed his gratitude for working in the Company. As such, he dropped the idea of leaving the Company and further continued as evident from the email of September, 2014. As a matter of fact, the deceased himself withdrew the resignation twice on the premise that his personal problem was solved and continued to discharge his duties. As such, the communication referred above do not contain allegations of the nature the applicant is accused of in the FIR.

The communication dated 28/04/2017 was made by the applicant through email to the superior officer, S.K.Grover bringing to his notice the shortcomings in the day to day working of the accounting system with a copy to the deceased and another co-worker J.P.Yadav wherein, he has pointed out the lapses and negligence in the discharge of duties by both of them with a request to take some hard action or in the alternative they may be transferred to a different department.

This email finds reference in the alleged email suicide note dated 15/05/2017 while the deceased accused the applicant of causing him harm which led to commission of suicide.

S.K.Grover vide email dated 29/04/2017 called upon the deceased and Yadav for explanation.

The deceased appeared to have taken strong exception and instead of offering explanation had taken extreme stand seeking termination from service or transfer to some other place with immediate effect by an email dated 03/05/2017.

That apart, if the subsequent email exchanges of the deceased, viz., 25/05/1997 and 11/09/2017 are perused, the deceased had not made allegations of harassment, cruelty or incitement tantamounting to provocation by the applicant to take the extreme

step of committing suicide. In fact, while tendering resignation by email dated 02/09/2017, the deceased sought to be relieved at the earliest (by 10th September) and expressed his gratitude and appreciation for all the members of the staff while discharging the duties. However, for the first time the deceased made allegations of discontentment in the day to day working, sarcastic comments, arrogant behaviour and induction of a new accounts officer, etc., against the applicant.

After acceptance of resignation of the deceased by the Executive Director & Business Head, DCM Shriram with effect from 11/09/2017, he sent an email on 11/09/2017 addressed to the applicant and other officers recording his appreciation to the staff members during his service tenure but, there was no allegation of any kind against the applicant.

There is no allegation in the suicide note/email dated 15/09/2017 or in the challan that the deceased and the applicant either communicated or met with each other between 11/09/2017 and 15/09/2017. As such, neither with reference to the email of the applicant addressed to S.K.Grover dated 28/04/2017 nor that of the deceased email dated 02/09/2017 could be said to be having nexus or proximity with the alleged act of committing suicide on 15/09/2017.

Facts and circumstances do not suggest mental preparedness of the applicant with an intention to provoke, incite or instigate the deceased to commit suicide. As a matter of fact, the deceased committed suicide after four days of cessation from employment with the Company.

A careful reading of the record also suggests that the deceased was rushed to the Bombay Hospital, Indore on 15/09/2017 by dialing number 100. The family members of the deceased were also present during his treatment and thereafter he died on 17/09/2017. The police did not record the statement of any members of the family on the said date. Thereafter, the suicide note is reportedly presented before the police by the brother of the deceased on 19/09/2017. The statement of Rani wife of the deceased was recorded on 04/10/2017, i.e., after unexplained delay of about 17 days from the date of death of the deceased and that of other family members; wherein she allegedly said that the deceased had told her that the applicant used to harass, insult and threatened. It is a queer fact that none of the family members of the deceased including his wife despite, having the alleged knowledge ever lodged any complaint in the Police Station or made any complaint to the police in the hospital where the deceased was admitted.

The police has also not recorded the statement of the deceased during the period 15/09/2017 to 17/09/2017, when he died.

It appears that there was noticeable improvement in the statements of the same witnesses recorded on 04/10/2017 and 07/11/2017, i.e., wife, Rani and mother, Smt. Sunita Vyas of the deceased.

There is no reason forthcoming why the prosecution has not recorded the statement of J.P.Yadav who was also admonished alongwith the deceased in the matter of negligence and dereliction of duties by the applicant in his email dated 28/04/2017 to the superior officer, S.K.Grover.

In the challan papers, there is no material to suggest or attributable positive act on the part of the applicant that he had an intention to push the deceased to commit suicide.

The Magistrate has not applied the mind while taking the cognizance and appears to have passed the impugned cognizance order (Annexure P/2) in a mechanical manner.

In the considered opinion of this Court, the material on record do not suggest mental preparedness of the applicant with an intention to provoke, incite or instigate the deceased to commit suicide attributable to his official duties or otherwise to fulfill the ingredients of abetment for constituting an offence under section 306 IPC in the light of the law laid down by the Hon'ble Supreme Court in the abovementioned cases.

16. In view of the foregoing facts and circumstances, the application is allowed. The criminal case No.RCT No.97/2018, cognizance order (Annexure P/2) and the consequential proceedings against the applicant are quashed and he stands discharged.

Application allowed.