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TABLE OF CASES REPORTED

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

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जिससे कि न्यायहानि हुई है – निचले न्यायालय द्वारा पारित निर्णय एवं डिक्री अपास्त – वादी द्वारा आदेश 17 नियम 1 के अंतर्गत प्रस्तुत आवेदन मंजूर एवं वादी को आगे साक्ष्य प्रस्तुत करने की मंजूरी प्रदान की गई – उस प्रक्रम से कार्यवाही करने के लिए मामला विचारण न्यायालय को प्रतिप्रेषित – अपील मंजूर। (आर.के. ट्रेडर्स वि. हांग कांग बैंक) **...522**

***Civil Procedure Code (5 of 1908), Order 32, Rule 4, 5 & 15 – Suit through next friend – Application for – Inquiry* – Suit filed by plaintiff through next friend, daughter – Writ Petition against dismissal of application under Order 32 Rule 15 filed by petitioner/defendant – Held – Order 32 Rule 1 to 14 except Rule 2A as applicable to the case of minor shall also apply to the person of unsound mind, where a suit is instituted by next friend – Qualification prescribed is that person must have attained the age of majority to act as next friend of minor or his guardian provided that the interest of such person is not adverse to that of the minor and the next friend should not be the defendant of a suit – In case, a minor has a guardian appointed or declared by competent authority, then such guardian may proceed in a suit and he shall be the next friend of the minor or of a person of unsound mind unless the Court considers to change the same recording reasons for appointing another person – In the present case, Ms. Rukhsar is daughter of plaintiff Kamrunnisa, and as per certificate of Medical Board, Kamrunnisa is found to be of unsound mind to the extent of 55%, daughter is not having adverse interest in property of mother and being major, she been declared as next friend to institute the suit and to proceed in the matter, appears to be justified – As per Order 32 Rule 1 CPC, it is not mandatory that such appointment must be on an application prior to institution of suit – Further held – It is not incumbent on the Court to hold an enquiry as required by the later part of Rule 15, but it would apply when the power is required to be exercised by Court – Appointment of next friend was in accordance with law – Writ Petition dismissed. [Meharunnisa (Smt.) Vs. Smt. Kamrunnisa through Next Friend Daughter Ku. Rukhsar Begum]** **...501**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 32, नियम 4, 5 व 15 – वादमित्र के द्वारा वाद – हेतु आवेदन – जांच – वादी द्वारा वादमित्र पुत्री के द्वारा वाद प्रस्तुत किया गया – याची/प्रतिवादी द्वारा आदेश 32 नियम 15 के अंतर्गत प्रस्तुत किये गये आवेदन की खारिजी के विरूद्ध रिट याचिका – अभिनिर्धारित – आदेश 32 नियम 1 से 14, नियम 2ए को छोड़कर, जैसा कि अवयस्क के प्रकरण में लागू होता है, विकृत चित्त के व्यक्ति पर भी लागू हेागा जहां वादमित्र द्वारा वाद संस्थित किया गया है – विहित अर्हता यह है कि एक व्यक्ति किसी अवयस्क के वादमित्र या उसके संरक्षक के रूप में कार्य करने के लिए, प्राप्तवय आयु का हो परंतु यह कि उक्त व्यक्ति का हित, अवयस्क के हित के प्रतिकूल न हो और वादमित्र

were assigned to show need of Special Public Prosecutor, merely mentioning that case is treated to be a special case, is not sufficient – Further held – It is settled law that Special Public Prosecutor should ordinarily be paid from funds of State and only in special case, remuneration can be collected from private sources – Impugned order states that remuneration of Special Public Prosecutor will be paid by complainant, cannot be approved – Impugned order not sustainable and set aside – Writ Petition allowed. [Pawan Kumar Saraswat Vs. State of M.P.] **...*19**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 24(8) – विशेष लोक अभियोजक की नियुक्ति – पारिश्रमिक – आधार – अभिनिर्धारित – दं.प्र.सं. की धारा 24(8), राज्य सरकार को विशेष लोक अभियोजक नियुक्त करने के लिए सशक्त करती है – उक्त शक्ति का प्रयोग न्यायसम्मत रूप से एवं विधिमान्य कारणों के लिए किया जाना होता है – राज्य, मस्तिष्क का प्रयोग किये बिना, मात्र एक पक्षकार की इच्छा पर या मात्र शिकायतकर्ता के कहने पर विशेष लोक अभियोजक को नियुक्त नहीं कर सकता एवं सम्यक् रूप से नियुक्त लोक अभियोजक को बदल नहीं सकता – वर्तमान प्रकरण में, विशेष लोक अभियोजक की आवश्यकता दर्शाने के लिए कोई विनिर्दिष्ट कारण नहीं दिये गये, मात्र उल्लिखित किया जाना कि प्रकरण को विशेष प्रकरण माना जाता है, पर्याप्त नहीं है – आगे अभिनिर्धारित – यह सुस्थापित विधि है कि विशेष लोक अभियोजक को साधारणतः राज्य की निधि से भुगतान किया जाना चाहिए और केवल विशेष प्रकरण में, निजी स्त्रोतों से पारिश्रमिक एकत्रित किया जा सकता है – आक्षेपित आदेश कथित करता है कि विशेष लोक अभियोजक के पारिश्रमिक का भुगतान शिकायतकर्ता द्वारा किया जायेगा, अनुमोदित नहीं किया जा सकता – आक्षेपित आदेश कायम रखे जाने योग्य नहीं है एवं अपास्त – रिट याचिका मंजूर। (पवन कुमार सारास्वत वि. म.प्र. राज्य) **...*19**

***Criminal Procedure Code, 1973 (2 of 1974), Section 110 & 122(1)(b) – Forfeiture of Bond – Detention* – SDM u/S 110 CrPC directed petitioner to furnish a bond of Rs. 10,000 for maintaining good behaviour for a period of two years – Subsequently, again an offence was registered against petitioner whereby SDM u/S 122(1)(b) directed to forfeit the bond and to recover an amount of Rs. 10,000 from petitioner and directed to detain him in prison till the expiry of period of bond – Challenge to – Held – Invocation of powers of Magistrate u/S 122(1)(b) CrPC was utterly misconceived because the bond that could have been asked for from petitioner and which was ultimately filed by him was related to maintaining good behaviour and not for keeping peace – Petitioner cannot be arrested and sent to jail for remaining period of bond – Further held – Petitioner has not only been arraigned in aforesaid case but after investigation, police also filed a final report against him and if under such circumstances, Magistrate is satisfied that breach has occurred, he need not wait for either framing of charge or trial or conviction – Directing recovery**

of Rs. 10,000 was rightly made but direction of custody and detention is unsustainable in the eyes of law and that part of order is hereby set aside – Petition partly allowed. [Meenu @ Sachin Jain Vs. State of M.P.] …*17

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 110 व 122(1)(बी) – बंधपत्र का समपहरण – निरोध – उपखंड मजिस्ट्रेट ने दं.प्र.सं. की धारा 110 के अंतर्गत याची को दो वर्ष की अवधि हेतु अच्छा आचरण बनाए रखने के लिए रू. 10,000 का बंधपत्र प्रस्तुत करने का निदेश दिया – तत्पश्चात्, पुनः याची के विरूद्ध एक अपराध पंजीबद्ध किया गया था जिसके द्वारा उपखंड मजिस्ट्रेट ने धारा 122(1)(बी) के अंतर्गत बंधपत्र समपहृत करने एवं याची से रू. 10,000 की रकम वसूलने तथा बंधपत्र की अवधि समाप्त होने तक उसे कारागार में निरूद्ध करने का निदेश दिया – उसे चुनौती – अभिनिर्धारित – धारा 122(1)(बी) दं.प्र. सं. के अंतर्गत मजिस्ट्रेट की शक्तियों का अवलंबन पूर्णतः भ्रामक था क्योंकि बंधपत्र जिसे याची से मांगा जा सकता था और जिसे अंततः उसके द्वारा प्रस्तुत किया गया था वह अच्छे व्यवहार से संबंधित था, न कि परिशांति बनाये रखने के लिए – बंधपत्र की शेष अवधि हेतु याची को गिरफ्तार नहीं किया जा सकता और कारागार नहीं भेजा जा सकता – आगे अभिनिर्धारित – याची को उपरोक्त प्रकरण में न केवल दोषारोपित किया गया है बल्कि अन्वेषण पश्चात् पुलिस ने उसके विरूद्ध एक अंतिम प्रतिवेदन भी प्रस्तुत किया है और यदि उक्त परिस्थितियों में मजिस्ट्रेट संतुष्ट है कि भंग हुआ है, उसे या तो आरोप विरचित किये जाने या विचारण अथवा दोषसिद्धि की प्रतीक्षा करना आवश्यक नहीं – रू. 10,000 की वसूली उचित रूप से निदेशित की गई परंतु अभिरक्षा एवं निरोध का निदेश विधि की दृष्टि में कायम रखने योग्य नहीं तथा एतद्द्वारा आदेश का वह हिस्सा अपास्त किया गया – याचिका अंशतः मंजूर। (मीनू उर्फ सचिन जैन वि. म.प्र. राज्य) …*17

***Criminal Procedure Code, 1973 (2 of 1974), Section 161 – See – Evidence Act, 1872, Section 145* [Bhagwan Singh Vs. State of M.P.] (DB)…564**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161 – देखें – साक्ष्य अधिनियम, 1872, धारा 145 **(भगवान सिंह वि. म.प्र. राज्य) (DB)…564**

***Criminal Procedure Code, 1973 (2 of 1974), Section 197 – Cognizance – Sanction* – Held – If it is apparent to Court that complainant himself has stated that petitioners had exercised their powers with malafide intent, taking of cognizance by the Court in absence of a sanction u/S 197 Cr.P.C. is not proper – Trial Court ought to have directed the complainant to secure sanction from the authority u/S 197 CrPC and thereafter present the complaint – Sanction u/S 197 CrPC was essential as the record shows that petitioners were acting in their official capacity – Complaint does not disclose a single specific allegation against petitioners, same being omnibus in nature – Complaint case quashed – Petition allowed. [V.B. Singh Vs. Rajendra Kumar Gupta] …611**

Criminal Procedure Code, 1973 (2 of 1974), Section 227 – Double Jeopardy **– Revision against the order framing charge against the applicant u/S 420, 467, 468, 471 and 120B IPC and against the dismissal of application of the applicant/accused filed u/S 227 Cr.P.C. – It was alleged that for borrowing money, applicant alongwith an another partner of the firm represented that all partners of the firm have consented for the same but later complainant found that firm was not in existence – Held – Record shows that earlier a prosecution was lodged against another partner u/S 138 of Negotiable Instrument Act, 1881, whereby he was acquitted of the charge but the same does not condone the misdeeds of the present applicant which are *prima facie* visible – Further held – Law relating to double jeopardy is well settled according to which the ingredients of the offences in the earlier case as well as in the latter case must be the same and not different – The test to ascertain whether the two offences are same is not the identity of allegations but the identity of the ingredients of offence – Plea of *autre fois acquit* is not proved unless it is shown that the judgment of acquittal in the previous charge necessarily involves an acquittal of the latter charge – In the instant case, acquittal of other partner in a trial u/S 138 of the Act of 1881 is inconsequential to the facts of the present case – Revision dismissed. [Omprakash Gupta Vs. State of M.P.]** **...603**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 – *दोहरा संकट* – आवेदक के विरूद्ध धारा 420, 467, 468, 471 व 120 बी भा.दं.सं. के अंतर्गत आरोप विरचित करने के आदेश के विरूद्ध तथा आवेदक/अभियुक्त के धारा 227 दं.प्र.सं. के अंतर्गत आवेदन की खारिजी के विरूद्ध पुनरीक्षण – यह अभिकथित किया गया था कि रूपये उधार लेने हेतु आवेदक के साथ फर्म के एक अन्य भागीदार ने प्रतिनिधित्व किया कि फर्म के सभी भागीदारों ने इसके लिए सहमति दी है परंतु बाद में परिवादी को पता चला कि फर्म अस्तित्व में नहीं थी – अभिनिर्धारित – अभिलेख दर्शाता है कि पूर्व में अन्य भागीदार के विरूद्ध परक्राम्य लिखत अधिनियम 1881 की धारा 138 के अंतर्गत अभियोजन दर्ज किया गया था जिसमें उसे आरोप से दोषमुक्त किया गया किंतु उक्त से वर्तमान आवेदक के कुकर्म माफ नहीं होते जो कि प्रथम दृष्ट्या स्पष्ट है – आगे अभिनिर्धारित – दोहरे संकट से संबंधित विधि भली–भांति स्थापित है जिसके अनुसार पूर्वतर प्रकरण के साथ ही बाद वाले प्रकरण में भी अपराधों के घटक समान होने चाहिए और न कि भिन्न – यह सुनिश्चित करने के लिए परीक्षण कि क्या दोनों अपराध समान हैं, अभिकथनों की पहचान नहीं बल्कि अपराध के घटकों की पहचान है – प्राग दोषमुक्ति का अभिवाक् सिद्ध नहीं होता जब तक कि यह दर्शाया नहीं जाता कि पूर्ववर्ती आरोप में दोषमुक्ति का निर्णय आवश्यक रूप से बाद के आरोप की दोषमुक्ति समाविष्ट करता है – वर्तमान प्रकरण में, अन्य भागीदार की अधिनियम 1881 की धारा 138 के अंतर्गत विचारण में दोषमुक्ति, वर्तमान प्रकरण के तथ्यों के लिए अप्रासंगिक है – पुनरीक्षण खारिज। (ओमप्रकाश गुप्ता वि. म.प्र. राज्य) **...603**

***Criminal Procedure Code, 1973 (2 of 1974), Section 357-A and Crime Victim Compensation Scheme (M.P.), 2015, Section 2(j) & 2(k) – Victim – Dependent* – An employee of District Court during his service, committed suicide, for which the then JMFC was prosecuted for offence u/S 306 IPC – Petitioner, wife of deceased alongwith her two daughters and a son filed application for compensation which was dismissed – Challenge to – Held – Under the Compensation Scheme, District Legal Services Authority or State Legal Services Authority upon the recommendation received from the trial Court, Appellate Court, Session Court or the High Court or on receiving an application u/S 357-A(4) Cr.P.C., after holding enquiry through appropriate authority within two months as deemed fit may award adequate compensation – In the present case, wife of the deceased has been granted compassionate appointment, she is receiving family pension and dues of deceased like GPF and Insurance amount has also been paid to her, thus has been adequately compensated and rehabilitated – Two unmarried daughters and a son, who are also the crime victim and lost their father were not granted any compensation – So far as children are concerned, impugned order is set aside – Session Judge was directed to recommend accordingly for grant of compensation to children under the Scheme of 2015 – Revision partly allowed. [Praveen Banoo (Smt.) Vs. State of M.P.] ...*20**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 357–ए एवं अपराध पीड़ित प्रतिकर योजना (म.प्र.), 2015, धारा 2(जे) व 2(के) – पीड़ित – आश्रित – जिला न्यायालय के एक कर्मचारी ने अपने सेवाकाल के दौरान आत्महत्या की जिसके लिए तत्कालीन न्यायिक दण्डाधिकारी प्रथम श्रेणी को भा.दं.सं. की धारा 306 के अंतर्गत अपराध हेतु अभियोजित किया गया था – याची, मृतक की पत्नी ने अपनी दो पुत्रियों एवं एक पुत्र के साथ प्रतिकर हेतु आवेदन प्रस्तुत किया जिसे खारिज किया गया – को चुनौती – अभिनिर्धारित – प्रतिकर योजना के अंतर्गत जिला विधिक सेवा प्राधिकारी या राज्य विधिक सेवा प्राधिकारी, विचारण न्यायालय, अपीली न्यायालय, सत्र न्यायालय अथवा उच्च न्यायालय से प्राप्त अनुशंसा पर या दं.प्र.सं. की धारा 357–ए(4) के अंतर्गत आवेदन प्राप्त होने पर, दो माह के भीतर समुचित प्राधिकारी के जरिए जांच करने के पश्चात् जैसा उचित समझे, पर्याप्त प्रतिकर अवार्ड कर सकते है – वर्तमान प्रकरण में, मृतक की पत्नी को अनुकंपा नियुक्ति प्रदान की गई है, वह परिवार पेंशन प्राप्त कर रही है तथा मृतक के देयक जैसे कि जीपीएफ और बीमा की रकम भी उसे अदा की गई है, अतः पर्याप्त रूप से प्रतिकारित तथा पुनर्वसित किया गया है – दो अविवाहित पुत्रियां एवं एक पुत्र भी जो अपराध पीड़ित है और जिन्होनें अपने पिता को खोया है, उन्हें कोई प्रतिकर प्रदान नहीं किया गया था – जहाँ तक बच्चों का संबंध है, आक्षेपित आदेश अपास्त – सत्र न्यायाधीश को 2015 की योजना के अंतर्गत बच्चों को प्रतिकर प्रदान किये जाने हेतु तद्नुसार अनुशंसा करने के लिए निदेशित किया गया – पुनरीक्षण अंशतः मंजूर। (प्रावीन बानो (श्रीमती) वि. म.प्र. राज्य) ...*20**

01.05.1997 को प्रस्तुत किया गया था अर्थात् दो वर्ष पश्चात्, वह भली–भांति परिसीमा के भीतर है क्योंकि परिसीमा अधिनियम, 1963 के अनुच्छेद 136 के अंतर्गत विहित परिसीमा बारह वर्ष है। (माना उर्फ अशोक वि. बुदाबाई) **...598**

***Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973), Section 19 and Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013) – Bhopal Development Plan 2005, Chapter 3 – Smart City Guidelines* – Adverse Possession Against State – Held – Occupants claiming their title over the government land on the ground of adverse possession – State, being the owner of the land in question will not acquire its own land – Petitioners are unauthorized occupants over such land and therefore cannot claim to be interested persons in the event of acquisition of land – No person is entitled to take a plea of adverse possession as an affirmative action and also can't seek declaration to the effect that such adverse possession has matured into ownership – Hostile possession against the State as an owner cannot be simplicitor on account of long possession – Further held – Respondents are well within jurisdiction to construct the road upto the width of 30 meters, which is in accordance with Bhopal Development Plan 2005 – Petition dismissed. [Munawwar Ali Vs. Union of India]**

(DB)...449

नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23), धारा 19 एवं भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30) – भोपाल विकास योजना 2005, अध्याय 3 – स्मार्ट सिटी दिशानिर्देश – राज्य के विरूद्ध प्रतिकूल कब्जा – अभिनिर्धारित – अधिभोगियों का प्रतिकूल कब्जे के आधार पर सरकारी भूमि पर अपने स्वत्व का दावा किया जाना – राज्य, भूमि का स्वामी होने के नाते, स्वयं की भूमि अर्जित नहीं कर सकता – याचीगण ऐसी भूमि पर अनधिकृत अधिभोगी हैं एवं इसलिए भूमि अधिग्रहण होने की स्थिति में हितबद्ध व्यक्तियों के रूप में दावा नहीं कर सकते – कोई भी व्यक्ति सकारात्मक कार्रवाई के रूप में प्रतिकूल कब्जे का अभिवाक् लेने का हकदार नहीं है एवं इस प्रभाव की घोषणा नहीं चाह सकता कि ऐसे प्रतिकूल कब्जे को स्वामित्व में परिपक्व किया गया है – साधारणतः लम्बे कब्जे के आधार पर स्वामी के रूप में राज्य के विरूद्ध प्रतिकूल कब्जा नहीं ले सकता – आगे अभिनिर्धारित – प्रत्यर्थीगण तीस मीटर तक की चौड़ाई की सड़क निर्माण करने की अधिकारिता के भली–भांति भीतर हैं, जो कि भोपाल विकास योजना 2005 के अनुरूप है – याचिका खारिज। (मुनव्वर अली वि. यूनियन ऑफ इंडिया) **(DB)...449**

***Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 5 – Appointment of Panchayat Karmi – Revision* – Petitioner appointed as Panchayat Karmi on basis of merit – Respondent No.6 approached the authorities claiming that he is a member of Scheduled Caste and should get the preference of**

appointment whereby Collector appointed Respondent No.6 on the said post without there being any order in respect of petitioner – Appeal was filed before Additional Commissioner whereby the same was allowed and order of collector was set aside on the ground that as per the government circular appointment of Panchayat Karmi was to be made strictly on merit basis – Respondent No. 6 filed a revision before the State Minister whereby the same was allowed in a cryptic manner without assigning any reason – Challenge to – Held – Proceedings under Rule 5 of the Rules of 1995 are quasi judicial in nature and authority is bound to record reasons while deciding revision – Order in revision was passed in a cavalier manner which is unsustainable in law – Order passed by Minister is set aside – Matter remanded back to pass a speaking order after giving opportunity of hearing to parties – Petition allowed. [Bharatlal Kurmi Vs. State of M.P.] …*15

पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 5 – पंचायतकर्मी की नियुक्ति – पुनरीक्षण – याची योग्यता के आधार पर पंचायतकर्मी के रूप में नियुक्त किया गया – प्रत्यर्थी क्र. 6 यह दावा करते हुए प्राधिकारीगण के समक्ष गया कि वह अनुसूचित जाति का एक सदस्य है तथा उसे नियुक्ति में प्राथमिकता मिलनी चाहिए जिस पर कलेक्टर ने याची के संबंध में बिना किसी आदेश के, उक्त पद पर प्रत्यर्थी क्र. 6 को नियुक्त किया – अपर आयुक्त के समक्ष अपील प्रस्तुत की गई थी जिसके द्वारा उक्त मंजूर की गई थी एवं कलेक्टर का आदेश इस आधार पर अपास्त किया गया कि सरकारी परिपत्र के अनुसार पंचायतकर्मी की नियुक्ति योग्यता के आधार पर सख्ती से की जानी थी – प्रत्यर्थी क्र. 6 ने राज्य मंत्री के समक्ष एक पुनरीक्षण प्रस्तुत किया, जिसके द्वारा बिना कोई कारण दिये अस्पष्ट ढंग से उक्त को मंजूर किया गया था – को चुनौती – अभिनिर्धारित – 1995 के नियमों के नियम 5 के अंतर्गत कार्यवाहियाँ न्यायिककल्प प्रकृति की हैं एवं प्राधिकारी पुनरीक्षण विनिश्चित करते समय कारणों को अभिलिखित करने हेतु बाध्य है – पुनरीक्षण में आदेश लापरवाह ढंग से पारित किया गया था जो कि विधि में अपोषणीय है – मंत्री द्वारा पारित आदेश अपास्त – पक्षकारों को सुने जाने का अवसर प्रदान करने के पश्चात् मामला सकारण आदेश पारित करने हेतु प्रतिप्रेषित किया गया – याचिका मंजूर। (भरतलाल कुर्मी वि. म.प्र. राज्य) …*15**

***Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rules 3, 4, 7 & 8 – Election Petition – Summary Dismissal* – Held – Election Tribunal can only dismiss the election petition summarily under Rule 8 of Rules of 1995 when the Election Petition is filed without compliance of Rule 3, 4 and Rule 7 and not otherwise – Petition cannot be dismissed summarily on merits without framing issues on disputed questions of facts, recording of evidence and affording opportunity of hearing to the parties – In the present case, Petition was dismissed on general allegations that provisions of Rule 3, 4 and 7 of the Rules of 1995 were not**

complied with but there was no specific findings as to in what manner these rules were not complied – Petition was dismissed on merit without conducting trial by framing issues and recording evidence summarily holding that allegations made in petition does not constitute corrupt practice – Further held – A sacrosanct duty is cast on the Election Tribunal to try and adjudicate election petitions like a trial of a suit – Election Petition cannot be decided in a cavalier manner by adopting casual approach – Order unsustainable and is quashed – Respondent directed to decide the petition in accordance with law – Writ Petition allowed. [Ramesh Patel Madhpura Vs. State of M.P.] ...483

पंचायत (निर्वाचन अर्जियाँ, भ्रटाचार और सदस्यता के लिए निरर्हता) नियम, म.प्र. 1995, नियम 3, 4, 7 व 8 – निर्वाचन याचिका – संक्षिप्त खारिजी – अभिनिर्धारित – निर्वाचन अधिकरण, 1995 के नियमों के नियम 8 के अंतर्गत निर्वाचन याचिका को केवल तब खारिज कर सकता है जब निर्वाचन याचिका को नियम 3, 4 या नियम 7 का अनुपालन किये बिना प्रस्तुत किया गया हो अन्यथा नहीं – याचिका को तथ्यों के विवादित प्रश्नों पर विवाद्यक विरचित किये बिना, साक्ष्य अभिलिखित किये बिना और पक्षकारों को सुनवाई का अवसर प्रदान किये बिना, गुणदोषों पर संक्षिप्त रूप से खारिज नहीं किया जा सकता – वर्तमान प्रकरण में, याचिका को सामान्य अभिकथनों पर खारिज कर दिया गया था कि 1995 के नियमों के नियम 3, 4 व 7 के उपबंधों का अनुपालन नहीं किया गया था, परंतु किस ढंग से इन नियमों का अनुपालन नहीं किया गया था इस बारे में कोई विनिर्दिष्ट निष्कर्ष नहीं था – याचिका को विवाद्यक विरचित कर एवं साक्ष्य अभिलिखित कर विचारण संचालित किये बिना संक्षिप्त रूप से धारणा करते हुए कि याचिका में किये गये अभिकथन, भ्रष्ट आचरण गठित नहीं करते, गुणदोषों पर खारिज किया गया था – आगे अभिनिर्धारित – निर्वाचन अधिकरण पर यह पुनीत कर्तव्य डाला गया है कि निर्वाचन याचिकाओं का विचारण एवं न्यायनिर्णयन, एक वाद के विचारण के समान करें – निर्वाचन याचिका को आकस्मिक दृष्टिकोण अपनाकर स्वाभाविक/लापरवाह ढंग से निर्णीत नहीं किया जा सकता – आदेश कायम रखे जाने योग्य नहीं एवं अभिखंडित किया गया – प्रत्यर्थी को याचिका विधिनुसार निर्णीत करने हेतु निदेशित किया गया – रिट याचिका मंजूर। (रमेश पटेल मधपुरा वि. म.प्र. राज्य) **...483**

***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 36 & 122 – Removal of Sarpanch – Grounds – Jurisdiction – Limitation* – Held – Perusal of complaint reveals that it refers to suppression of certain information regarding number of family members viz. names of daughters who are married and also the land lying in name of petitioner and her family members in the form submitted by petitioner at the time of election – None of these grounds are enumerated in Section 36 of the Adhiniyam – Collector has no jurisdiction to entertain an application purported to be u/S 36 of the Adhiniyam when none of the grounds mentioned in the said section were available to the respondents – Further held – Section 122 itself provides for**

अभियुक्त द्वारा यह स्वीकार करते हुए कि उसने अपनी माँ एवं सौतेली बहन को अनेक चोटें कारित की, स्वयं प्रथम सूचना प्रतिवेदन दर्ज किया गया – अभिनिर्धारित – माँ की मृत्यु, शरीर के उन अंगों पर जिन पर अभियुक्त ने चोटें कारित की थी, संक्रमण एवं गैंग्रीन पनप जाने की वजह से सेप्टीसीमिया के कारण हुई – यह दर्शाने हेतु कोई साक्ष्य नहीं है कि उक्त (सेप्टीसीमिया), शल्यक्रिया के पश्चात् होने वाली जटिलताओं के कारण पनपा है – आगे अभिनिर्धारित – मृत्युकालिक कथन इस आधार पर अमान्य नहीं किया जा सकता कि उक्त को प्रश्न–उत्तर प्रारूप में अभिलिखित नहीं किया गया था – मृतक (अभियुक्त की माँ) का मृत्युकालिक कथन, कार्यपालिक मजिस्ट्रेट द्वारा स्वस्थता का प्रमाण–पत्र अभिप्राप्त करने के पश्चात् अभिलिखित किया गया था, जो कि पर्याप्त है तथा अभियुक्त को दोषसिद्ध करने हेतु एकमात्र आधार हो सकता है – आगे अभिनिर्धारित – जब व्यापक अभेद्य चाक्षुष साक्ष्य हैं तथा उक्त चिकित्सीय साक्ष्य द्वारा संपुष्ट किये गये हैं, हथियार की गैर–बरामदगी अभियोजन प्रकरण को प्रभावित नहीं करती – हथियार की गैर–बरामदगी एवं हेतु की अनुपस्थिति महत्वपूर्ण नहीं होगी जहाँ प्रकरण प्रत्यक्ष साक्ष्य पर आधारित है – अभियुक्त यह साबित करने में विफल रहा कि घटना अचानक और गंभीर प्रकोपन के अधीन घटित हुई – अपीलार्थी ने क्रूर तरीके से कृत्य किया एवं मृतक को घोंपने की अनेक चोटें कारित की फलस्वरूप उसकी मृत्यु हुई – विचारण न्यायालय ने उचित रूप से अपीलार्थी को दोषसिद्ध किया – अपील खारिज। (बबलू उर्फ वीरेन्द्र कुमार वि. म.प्र. राज्य) **(DB)...*14**

***Penal Code (45 of 1860), Section 302/34 – Common Intention* – Held – Evidence shows that accused persons came to the house of deceased and started a fight, went back and brought *gupti* and *ballam* from their house and committed the offence – Facts and circumstances shows that there was pre-concert of mind and accused have acted in furtherance of common intention. [Karun @ Rahman Vs. State of M.P.] (DB)...542**

दण्ड संहिता (1860 का 45), धारा 302/34 – सामान्य आशय – अभिनिर्धारित – साक्ष्य दर्शाता है कि अभियुक्तगण, मृतक के घर आये और लड़ाई आरंभ की, वापस गये और अपने घर से गुप्ति एवं बल्लम ले आये तथा अपराध कारित किया – तथ्य एवं परिस्थितियां दर्शाती है कि यहां मस्तिष्क का पूर्व मिलन था और अभियुक्तगण ने सामान्य आशय के अग्रसरण में कृत्य किया है। (करूण उर्फ रेहमान वि. म.प्र. राज्य) **(DB)...542**

***Penal Code (45 of 1860), Section 302/34 & 324 – Conviction – Testimony of Eye Witnesses – Misnaming the weapon of offence* – Held – Misnaming the weapon by eye witness in moment of fear and anguish is insignificant and cannot be made basis for doubting the prosecution case nor will make the whole testimony of witness unacceptable especially when she is consistent in other material particulars such as identity of accused persons or the time and place of incident – It cannot be expected from a wife, whose husband is beaten to death and son is subjected to grievous injuries, to watch with precision as**

Penal Code (45 of 1860), Section 302 & 304 Part I – Conviction – Testimony of Eye Witness – Intention **– Held – Daughter of deceased was eye witness, who deposed the incident and accordingly Prosecution evidence established that when deceased (wife of accused) was cooking food, there was a quarrel between appellant and deceased and in that event appellant had taken out kerosene from stove and sprinkled the same on the deceased and ablaze her, then appellant tried to save her because he doused the fire – Appellant was also admitted in hospital and he received burn injuries on his hands and chest – In such circumstances, it could not be said that there was an intention of appellant to kill the deceased – Offence committed by appellant would fall u/S 304 Part I IPC – Conviction and sentence for offence u/S 302 set aside – Appellant hereby convicted u/S 304 Part I IPC and is sentenced for 10 years RI – As appellant has completed 11 years of jail sentence, hence directed to be released – Appeal partly allowed. [Khadak Singh @ Khadak Ram Vs. State of M.P.] (DB)…558**

दण्ड संहिता (1860 का 45), धारा 302 व 304 भाग I – दोषसिद्धि – चक्षुदर्शी साक्षी का परिसाक्ष्य – आशय – अभिनिर्धारित – मृतिका की पुत्री चक्षुदर्शी साक्षी थी जिसने घटना का अभिसाक्ष्य दिया और तद्नुसार अभियोजन साक्ष्य ने स्थापित किया कि जब मृतिका (अभियुक्त की पत्नी) खाना पका रही थी, अपीलार्थी और मृतिका के बीच झगड़ा हुआ था तथा इस स्थिति में अपीलार्थी ने स्टोव से केरोसीन निकालकर उसे मृतिका पर छिड़का और उसे आग लगा दी, तब अपीलार्थी ने उसे बचाने का प्रयास किया क्योंकि उसने आग बुझायी थी – अपीलार्थी को भी चिकित्सालय में भर्ती किया गया था तथा उसे हांथों पर एवं सीने पर जलने की चोटें आयी थी – इन परिस्थितियों में, यह नहीं कहा जा सकता कि अपीलार्थी का आशय मृतिका को जान से मार देना था – अपीलार्थी द्वारा कारित अपराध, भा.दं.सं. की धारा 304 भाग I के अंतर्गत आयेगा – धारा 302 के अंतर्गत अपराध हेतु दोषसिद्धि एवं दण्डादेश अपास्त – एतद्द्वारा अपीलार्थी को भा.दं.सं. की धारा 304 भाग I के अंतर्गत दोषसिद्ध किया गया एवं 10 वर्ष सश्रम कारावास से दण्डादिष्ट किया गया – चूंकि अपीलार्थी ने 11 वर्ष का कारावास पूर्ण किया है, अतः छोड़ दिये जाने के लिए निदेशित किया गया – अपील अंशतः मंजूर। (खडक सिंह उर्फ खडक राम वि. म.प्र. राज्य) **(DB)…558**

Penal Code (45 of 1860), Sections 302, 304-B, 498-A & 201 and Dowry Prohibition Act (28 of 1961), Section 4 – Conviction – Appreciation of Evidence **– Wife died due to burn injuries within two years of her marriage – Husband, mother-in-law and two sister-in-law were charged for the said offence – Held – Evidence on record clearly shows that mother-in-law of deceased use to torture her for demand of dowry and use to ill-treat her – It is also established that mother-in-law assaulted her and set her ablaze and murdered her – It is further clear from dying declarations that husband and both sister-in-law were not present with mother-in-law on the spot nor they supported for committing**

the offence – Dying declaration have been corroborated with testimony of brother and mother of deceased – In the police statements as well as in evidence, brother and mother of deceased did not allege anything against husband and both sister-in-laws which creates reasonable doubt in their favour – Husband and both sister-in-law are hereby acquitted from the charges – Conviction and sentence of Mother-in-law upheld – Appeal partly allowed. [Rajesh Kumar Vs. State of M.P.] (DB)…535

दण्ड संहिता (1860 का 45), धाराएँ 302, 304–बी, 498–ए व 201 एवं दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 4 – दोषसिद्धि – साक्ष्य का मूल्यांकन – पत्नी की विवाह के दो वर्ष के भीतर जलने की चोटों के कारण मृत्यु हुई – कथित अपराध के लिए पति, सास एवं दो ननदों को आरोपित किया गया था – अभिनिर्धारित – अभिलेख पर मौजूद साक्ष्य यह स्पष्टतः दर्शाते हैं कि मृतिका की सास उसे दहेज की मांग को लेकर प्रताड़ित एवं बुरा–बर्ताव करती थी – यह भी स्थापित किया गया कि सास ने उस पर हमला किया तथा उसे आग लगा दी एवं उसकी हत्या कर दी – मृत्युकालिक कथनों से आगे यह स्पष्ट है कि पति एवं दोनों ननदें, घटनास्थल पर सास के साथ उपस्थित नहीं थे और न ही उन्होनें अपराध कारित करने हेतु सहयोग किया – मृत्युकालिक कथन की मृतिका के भाई एवं माँ के परिसाक्ष्य के साथ संपुष्टि की गई – पुलिस कथनों में और साथ ही साक्ष्य में, मृतिका के भाई एवं माँ ने पति एवं दोनों ननदों के विरूद्ध कोई अभिकथन नहीं किया, जो कि उनके पक्ष में युक्तियुक्त संदेह उत्पन्न करता है – पति एवं दोनों ननदें एतद्द्वारा आरोपों से दोषमुक्त किये जाते हैं – सास की दोषसिद्धि एवं दण्डादेश कायम – अपील अंशतः मंजूर। (राजेश कुमार वि. म.प्र. राज्य) **(DB)…535**

Penal Code (45 of 1860), Sections 302, 324 & 304 Part I – Conviction – Testimony of Eye Witness – Intention **– Held – In the present case, appellant thought that deceased and eye-witnesses were talking ill about him, he without any premeditation inflicted a single knife injury to the stomach of deceased – Although injury turned out to be fatal due to septicemia and hemorrhage resulting in death, but it is difficult to hold that appellant had any intention to kill the deceased – Appellant not guilty of culpable homicide in fact can be and is convicted u/S 304 Part II i.e. culpable homicide not amounting to murder – Since appellant already suffered jail sentence for more than 10 years, he directed to be released – Appeal partly allowed. [Suryabhan Choudhary Vs. State of M.P.] (DB)…*23**

दण्ड संहिता (1860 का 45), धाराएँ 302, 324 व 304 भाग I – दोषसिद्धि – चक्षुदर्शी साक्षी का परिसाक्ष्य – आशय – अभिनिर्धारित – वर्तमान प्रकरण में, अपीलार्थी ने सोचा कि मृतक एवं चक्षुदर्शी साक्षीगण उसके बारे में बुरा बोल रहे थे, उसने बिना किसी पूर्वचिंतन के मृतक के पेट में चाकू से एक चोट पहुँचाई – यद्यपि, सेप्टिसेमिया एवं रक्तस्त्राव के कारण चोट घातक साबित हुई जिससे उसकी मृत्यु हुई परंतु यह अभिनिर्धारित करना कठिन

he may issue directions to ensure planned distribution of essential commodities and the fair price shop/institution/ body/group/agency are duty bound to comply with the same – Order passed by SDO is not bereft of jurisdiction – Petitioner may avail remedy of appeal before Collector – Petition dismissed. [Rajendra Shrivastava Vs. State of M.P.] …*22

सार्वजनिक वितरण आदेश (म.प्र.), 2015, खंड 16(7) व 18 – विक्रेता को हटाना/प्रतिस्थापित किया जाना – अधिकारिता – उचित मूल्य की दुकान चला रही सोसाईटी को याची विक्रेता को प्रतिस्थापित करने के लिए निदेशित करते हुए उपखंड अधिकारी (दुकान आबंटन प्राधिकारी) के आदेश के विरूद्ध याचिका – अभिनिर्धारित – याची को नियोजन से हटाये जाने हेतु आदेश नहीं किया गया था – यह सत्य है कि विक्रेता को नये विक्रेता से प्रतिस्थापित करने की शक्ति, दुकान आबंटन प्राधिकारी में निहित नहीं है एवं उक्त प्रतिस्थापन निश्चित रूप से 'हटाया जाना' की परिभाषा के भीतर नहीं आता बल्कि खंड 18 के अंतर्गत दुकान आबंटन प्राधिकारी में निहित अविशिष्ट शक्तियों के अंतर्गत है, वह आवश्यक वस्तुओं के सुनियोजित वितरण को सुनिश्चित करने के लिए निदेश जारी कर सकता है तथा उनका अनुपालन करने के लिए उचित मूल्य दुकान/संस्था/ निकाय/ समूह/एजेन्सी कर्तव्यबद्ध है – उपखंड अधिकारी द्वारा पारित आदेश अधिकारिता विहीन नहीं है – याची, कलेक्टर के समक्ष अपील के उपचार का अवलंब ले सकता है – याचिका खारिज। (राजेन्द्र श्रीवास्तव वि. म.प्र. राज्य) …*22

***Public Interest Litigation – Locus – University Grants Commission Act, (3 of 1956), Section 3 & 26 and UGC (Institution Deemed To Be Universities) Regulations, 2010, Article 5 & 25 – Appointment of Vice Chancellor* – Respondent No. 4 was appointed as Vice Chancellor of University – Challenge to Memorandum of Association 2014 and the said appointment made there under – Held – Petitioner in his antecedents has not given any details of work undertaken by him to uplift the education system of this country at school level or at the higher education level – Petitioner seems to be a self proclaimed social worker, a class who are only concerned with themselves and in absence of any disclosure of the nature of social work, he is involved in, cannot claim that present petition is *Pro Bono* – Further held – When validity of statutory provision under which a person is appointed or elected to a public office, has been challenged in a writ petition praying for a writ of *quo warranto*, such petitioner should not be permitted to question the validity of such statutory provisions – Petitioner has no locus to challenge the validity of Memorandum of Association 2014 – Further held – Even otherwise, Memorandum of Association being in consonance with Regulations of 2010 as amended in 2014, appointment of respondent No.4 as Vice Chancellor is justified – Petition dismissed with cost of Rs. 10,000. [Shrikrishna Singh Raghuvanshi Vs. Union of India] (DB)…370**

लोक हित वाद – सुने जाने का अधिकार – विश्वविद्यालय अनुदान आयोग अधिनियम, (1956 का 3), धारा 3 व 26 एवं विश्वविद्यालय अनुदान आयोग (समविश्वविद्यालय बनने वाली संस्थाएं) विनियम, 2010, अनुच्छेद 5 व 25 – कुलपति की नियुक्ति – प्रत्यर्थी क्र. 4 को विश्वविद्यालय के कुलपति के रूप में नियुक्त किया गया था – संगम ज्ञापन 2014 एवं उसके अंतर्गत की गई कथित नियुक्ति को चुनौती – अभिनिर्धारित – याची ने अपने पूर्ववृत्त में स्कूल स्तर पर या उच्च शिक्षा के स्तर पर इस देश की शिक्षा प्रणाली का उत्थान करने के लिए उसके द्वारा किये गये कार्य का कोई विवरण नहीं दिया है – याची स्व उद्घोषित सामाजिक कार्यकर्ता प्रतीत होता है, एक वर्ग जो केवल स्वयं के लिए चिंताशील है और सामाजिक कार्य की प्रकृति के किसी भी प्रकटीकरण की अनुपस्थिति में, जिसमें वह सम्मिलित है, दावा नहीं कर सकते कि वर्तमान याचिका लोक हित में है – आगे अभिनिर्धारित – जब कानूनी उपबंध की विधिमान्यता जिसके अंतर्गत किसी व्यक्ति की लोकपद पर नियुक्ति या चयन किया गया है, को अधिकार पृच्छा की रिट हेतु प्रार्थना करते हुए रिट याचिका को चुनौती दी गई है, ऐसे याची को इस प्रकार के कानूनी उपबंधों की विधिमान्यता पर प्रश्न उठाने की अनुमति नहीं दी जाना चाहिए – याची को संगम ज्ञापन 2014 की विधिमान्यता को चुनौती देने के लिए सुने जाने का कोई अधिकार नहीं है – आगे अभिनिर्धारित – यहाँ तक कि अन्यथा, संगम ज्ञापन के 2014 में संशोधित 2010 के विनियमों के अनुरूप होने के नाते, प्रत्यर्थी क्र. 4 की कुलपति के रूप में नियुक्ति न्यायोचित है – याचिका 10,000/– व्यय के साथ खारिज। (श्रीकृष्ण सिंह रघुवंशी वि. यूनियन ऑफ इंडिया)

(DB)…370

***Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, (54 of 2002), Section 14 & 15 – Jurisdiction – Fact of Tenancy & Possession of Mortgaged Property* – Petitioner availed credit facilities from respondent Bank whereby they mortgaged a property with the bank – Since petitioner failed to repay the said loan, bank initiated action against the petitioner and filed application u/S 14 of the Act to take physical possession of the mortgage property – Challenge to – Held – District Magistrate exercising his powers under the Act has authorized Additional District Magistrate (ADM) to exercise powers u/S 14 of the Act and therefore orders passed under such exercise of powers by ADM is justified and within jurisdiction – Further held – Fact of tenancy in mortgaged property was well within the knowledge of bank but such fact was not disclosed in the application and therefore ADM without considering the fact of tenancy has passed the order of possession – In such circumstances, no action u/S 14 of the Act could be initiated – Further held – As per Section 15 of the Act of 2002, respondent bank can take over the management of company (petitioner) and keep the secured assets in its own custody till the rights of property is transferred in accordance with law – It is also clear that mortgaged property**

was a lease property and possession was taken by the Municipal Corporation and was only given on *supurdginama* to petitioner – Impugned orders passed by Additional District Magistrate are set aside – Bank will be at liberty to file fresh application u/S 14 of the Act of 2002 – Petition allowed. [Prafulla Kumar Maheshwari Vs. Authorized Officer and Chief Manager] ...463

वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) *अधिनियम, (2002 का 54), धारा 14 व 15 – अधिकारिता – किराएदारी का तथ्य एवं बंधक संपत्ति का कब्जा* – याची ने प्रत्यर्थी बैंक से उधार सुविधा का उपभोग किया जिसके द्वारा उन्होनें बैंक के साथ संपत्ति बंधक की – चूंकि याची उक्त ऋण का प्रतिसंदाय करने में विफल रहा, बैंक ने याची के विरूद्ध कार्रवाई आंरभ की और बंधक संपत्ति के भौतिक कब्जे हेतु अधिनियम की धारा 14 के अंतर्गत आवेदन प्रस्तुत किया – को चुनौति – अभिनिर्धारित – जिला मजिस्ट्रेट ने अधिनियम के अंतर्गत अपनी शक्तियों का प्रयोग करते हुए अतिरिक्त जिला मजिस्ट्रेट (ए.डी.एम.) को अधिनियम की धारा 14 के अंतर्गत शक्तियों का प्रयोग करने हेतु प्राधिकृत किया और इसलिए ए.डी.एम. द्वारा शक्तियों के उक्त प्रयोग के अंतर्गत पारित किये गये आदेश न्यायोचित है तथा अधिकारिता के भीतर है – आगे अभिनिर्धारित – बंधक संपत्ति में किराएदारी का तथ्य, बैंक को भली–भाँति ज्ञात था परंतु उक्त तथ्य को आवेदन में प्रकट नहीं किया गया था और इसलिए ए.डी.एम. ने किराएदारी के तथ्य को विचार में लिए बिना कब्जे का आदेश पारित किया है – उक्त परिस्थितियों में, अधिनियम की धारा 14 के अंतर्गत कोई कारवाई आरंभ नहीं की जा सकती – आगे अभिनिर्धारित – 2002 के अधिनियम की धारा 15 के अनुसार प्रत्यर्थी बैंक, कंपनी (याची) का प्रबंधन अपने हाथ में ले सकता है और संपत्ति के अधिकार विधिनुसार अंतरित किये जाने तक प्रतिभूत आस्तियां स्वयं की अभिरक्षा में रख सकता है – यह भी स्पष्ट है कि बंधक संपत्ति एक पट्टे पर दी गई संपत्ति थी और नगरपालिका निगम द्वारा कब्जा लिया गया था तथा याची को केवल सुपुर्दगीनामे पर दी गई थी – अतिरिक्त जिला मजिस्ट्रेट द्वारा पारित किए गए आक्षेपित आदेश अपास्त – बैंक, 2002 के अधिनियम की धारा 14 के अंतर्गत नया आवेदन प्रस्तुत करने के लिए स्वतंत्र होगा – याचिका मंजूर। (प्रफुल्ल कुमार माहेश्वरी वि. अथॉराईज्ड ऑफीसर एण्ड चीफ मेनेजर) ...463

***Service Law – Civil Services (Pension) Rules, M.P. 1976, Rule 23 – Amendment – Applicability* – Counting of suspension period for the purpose of qualifying service – Held – Petitioner remained suspended from 25.07.1992 to 11.06.1996 – Order of punishment was passed on 11.06.1996 – Rule 23 was amended w.e.f. 30.12.1999 – Amendment in Rule 23 will not be applicable retrospectively – Un-amended Rule 23 will apply which was prevailing on the date when suspension period of petitioner was over and order was passed – Respondent directed to count the suspension period for purpose of qualifying service – Writ Petition allowed. [Mohan Pillai Vs. M.P. Housing Board] ...*18**

सेवा विधि – सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 23 – संशोधन – प्रयोज्यता – अर्हकारी सेवा के प्रयोजन हेतु निलंबन अवधि की गणना – अभिनिर्धारित – याची दिनांक 25.07.1992 से 11.06.1996 तक निलंबित रहा – दिनांक 11.06.1996 को दंड का आदेश पारित हुआ था – नियम 23 दिनांक 30.12.1999 से प्रभावी कर संशोधित किया गया था – नियम 23 में संशोधन भूतलक्षी रूप से लागू नहीं होगा – असंशोधित नियम 23 लागू होगा जो कि उस दिनांक को अभिभावी रहा था जब याची की निलंबन अवधि समाप्त हो चुकी थी एवं आदेश पारित हुआ था – प्रत्यर्थी को अर्हकारी सेवा के प्रयोजन हेतु निलंबन की अवधि की गणना करने हेतु निदेशित किया गया – रिट याचिका मंजूर। (मोहन पिल्लई वि. एम.पी. हाउसिंग बोर्ड) ...*18

***Service Law – Disciplinary Proceedings – Dismissal – Interference – Jurisdiction of Writ Court* – Held – Court should not interfere with the administrative decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court in the sense that it was in defiance of logic or moral standards – High Court is not a court of appeal under Article 226 over the decision of authorities holding a departmental enquiry against a public servant – Power of judicial review is not directed against the decision but is confined to the decision making process in exercise of supervisory writ jurisdiction – It is not a requirement that delinquent employee should be given an opportunity to show cause after the finding of guilt as to the quantum of punishment – Delinquent submitted his written reply and also availed the opportunity of hearing – Further held – Unless the delinquent is able to show that non-supply of report of inquiry officer has resulted in prejudice or miscarriage of justice, an order of punishment cannot be held to be vitiated – Single bench of this court has acted as a Court of appeal against the findings recorded by disciplinary and Appellate authority and not only interfered with the order of punishment but also ordered reinstatement – Such interference is unwarranted in law and is beyond the scope of Writ Court – Order passed by Single Bench set aside – Appeal allowed. [State of M.P. Vs. Dr. Ashok Sharma] (DB)...352**

सेवा विधि – अनुशासनिक कार्यवाहियाँ – पदच्युति – हस्तक्षेप – रिट न्यायालय की अधिकारिता – अभिनिर्धारित – न्यायालय को प्रशासनिक निर्णय में हस्तक्षेप नहीं करना चाहिए जब तक कि वह अतार्किक न हो या प्रक्रियात्मक अनौचित्य से ग्रसित न हो या इस अर्थ से न्यायालय की अंतश्चेतना को आघात न पहुँचाता हो कि वह तर्क या नैतिक मानकों की अवज्ञा था – अनुच्छेद 226 के अंतर्गत उच्च न्यायालय, लोक सेवक के विरूद्ध विभागीय जाँच करने वाले प्राधिकारियों के निर्णय पर अपील का न्यायालय नहीं है – न्यायिक पुनर्विलोकन की शक्ति, निर्णय के विरूद्ध निदेशित नहीं है बल्कि पर्यवेक्षण रिट अधिकारिता के प्रयोग में निर्णय करने की प्रक्रिया तक सीमित है – यह अपेक्षा नहीं है कि, अपचारी कर्मचारी को दोषिता के निष्कर्ष के पश्चात्, दंड की मात्रा के संबंध में कारण बताने के लिए

अवसर दिया जाना चाहिए – अपचारी ने उसका लिखित जवाब प्रस्तुत किया है एवं सुनवाई के अवसर का भी उपभोग किया है – आगे अभिनिर्धारित – जब तक कि अपचारी यह नहीं दर्शा पाता कि जांचकर्ता अधिकारी के प्रतिवेदन प्रदाय न किये जाने के फलस्वरूप प्रतिकूल प्रभाव कारित हुआ है या न्यायहानि हुई है, दंड के आदेश का दूषित होना अभिनिर्धारित नहीं किया जा सकता – इस न्यायालय की एकल न्यायपीठ ने अनुशासनिक एवं अपीली प्राधिकारी द्वारा अभिलिखित निष्कर्षों के विरूद्ध अपील के न्यायालय के रूप में कार्यवाही की है और न केवल दंड के आदेश में हस्तक्षेप किया है बल्कि पुनःस्थापना भी आदेशित किया है – ऐसा हस्तक्षेप विधि में आवश्यक नहीं एवं रिट न्यायालय की परिधि से परे है – एकल न्यायपीठ द्वारा पारित आदेश अपास्त – अपील मंजूर। (म.प्र. राज्य वि. डॉ. अशोक शर्मा)

(DB)…352

***Service Law – DPC for Promotion and Annual Confidential Report – Consideration* – Held – For the year 1989-90, as petitioner has worked for less than 90 days in the Beej Nigam on deputation, respondents should not recorded his CR for this year and taking into consideration the CR of the six months, i.e. of the longer period, respondents should have graded him as 'Kha-Good' – Original record of DPC shows that ACR for the year 1990-91 was never communicated to petitioner and thus such un-communicated ACR should not have been taken into consideration while declaring the petitioner unfit for promotion – Impugned orders set aside – Respondents directed to reconsider the case of petitioner for promotion to the post of Joint Director by constituting a review DPC – Writ Petition allowed. [T.P. Sharma Vs. State of M.P.] …443**

सेवा विधि – पदोन्नति हेतु विभागीय पदोन्नति समिति एवं वार्षिक गोपनीय प्रतिवदेन – विचार में लिया जाना – अभिनिर्धारित – वर्ष 1989–90 हेतु, प्रत्यर्थीगण को इस वर्ष का गोपनीय प्रतिवेदन अभिलिखित नहीं करना चाहिए था क्योंकि याची ने बीज निगम में प्रतिनियुक्ति पर 90 दिनों से कम कार्य किया है तथा छः माह का अर्थात् लंबी अवधि का गोपनीय प्रतिवेदन विचार में लेते हुए, प्रत्यर्थीगण को उसे 'ख–अच्छा' श्रेणी दी जानी चाहिए थी – विभागीय पदोन्नति समिति का मूल अभिलेख दर्शाता है कि याची को वर्ष 1990–91 हेतु वार्षिक गोपनीय प्रतिवेदन कभी भी संसूचित नहीं किया गया और इस प्रकार याची को पदोन्नति हेतु अयोग्य घोषित करते समय उक्त असंसूचित वार्षिक गोपनीय प्रतिवेदन को विचार में नहीं लिया जाना चाहिए था – आक्षेपित आदेश अपास्त – प्रत्यर्थीगण को पुनर्विलोकन विभागीय पदोन्नति समिति गठित कर संयुक्त निदेशक के पद पर पदोन्नति हेतु याची के प्रकरण का पुनर्विचार करने के लिए निदेशित किया गया – रिट याचिका मंजूर। (टी. पी. शर्मा वि. म.प्र. राज्य) …443

Service Law – Industrial Disputes Act (14 of 1947), Section 2(k)/10/25-B(2)(a)(ii)/25-F – Retrenchment – Reference – Limitation – Period of Work –

सेवा विधि – शारीरिक रूप से विकलांग हेतु आरक्षण – अभिनिर्धारित – प्रत्यर्थीगण प्रत्येक निःशक्तता हेतु पहचान किये गये पदों में से **(i)** दृष्टिहीनता या अल्प दृष्टि **(ii)** श्रवणबाधा एवं **(iii)** गति की निःशक्तता या मस्तिष्क पक्षाघात से ग्रसित व्यक्तियों हेतु प्रत्येक में 1% के साथ कुल रिक्तियों का 3% निःशक्त व्यक्तियों हेतु आरक्षित रखने के लिए बाध्यताधीन है। (सुशील कनोजिया वि. द ओरिएन्टल इंश्योरेन्स कं. लि.) **...426**

Transit (Forest Produce) Rules, M.P., 2000, Rule 5 – Notification dated 28.05.2001 – Validity **– Held – High Court held that Rule framed by the State u/S 41 of the Act of 1927, i.e. Rule 5 of the Rules of 2000 is valid – High Court has taken an incorrect view that notification dated 28.05.2001 is beyond the power of the State under Rule 5 of the Rules, 2000 – Rule 5 clearly empowers the State to fix the rate of fee, on the basis of quantity/volume of Forest Produce – High Court committed error in setting aside the notification dated 28.05.2001. [State of Uttarakhand Vs. Kumaon Stone Crusher]**
(SC)...263

अभिवहन (वनोपज) नियम, म.प्र., 2000, नियम 5 – अधिसूचना दिनांक 28.05.2001 – विधिमान्यता – अभिनिर्धारित – उच्च न्यायालय ने अभिनिर्धारित किया कि अधिनियम, 1927 की धारा 41 के अंतर्गत राज्य द्वारा विरचित नियम अर्थात् नियम 2000 का नियम 5 विधिमान्य है – उच्च न्यायालय ने गलत दृष्टिकोण अपनाया है कि अधिसूचना दिनांक 28.05.2001, नियम 2000 के नियम 5 के अंतर्गत राज्य की शक्ति से परे है – नियम 5 राज्य को वनोपज की मात्रा/परिमाण के आधार पर, शुल्क की दर निश्चित करने के लिए स्पष्ट रूप से सशक्त बनाता है – उच्च न्यायालय ने अधिसूचना दिनांक 28.05.2001 को अपास्त करने में त्रुटि कारित की है। (उत्तराखण्ड राज्य वि. कुमांउ स्टोन क्रशर) **(SC)...263**

Transit of Timber & Other Forest Produce Rules, U.P., 1978, Rule 3 – Transit Pass – Transit Fee **– Transit pass is necessary as per Rule 3 for moving a forest produce into or from or within the State of U.P. – Any produce, goods entering within or outside the State which is the forest produce having originated in forest requires a transit pass for transiting in the State of U.P. – Any good which did not originate in forest whether situate in the state of U.P. or outside the State but is only passing through a forest area may not be a forest produce – Further held – Transit fee charged under the 1978 Rules is regulatory fee in character and state is not to prove quid pro quo for levy of transit fee. [State of Uttarakhand Vs. Kumaon Stone Crusher] (SC)...263**

इमारती लकड़ी एवं अन्य वनोपज का अभिवहन नियम, उ.प्र., 1978, नियम 3 – अभिवहन पास – अभिवहन शुल्क – नियम 3 के अनुसार किसी वनोपज को उ.प्र. राज्य में या से या के भीतर लाने–ले जाने हेतु अभिवहन पास आवश्यक है – कोई उपज, माल जो राज्य के भीतर या बाहर प्रवेश करता है जो कि एक वनोपज है जिसकी उत्पत्ति वन में हुई है को उ.प्र. राज्य में अभिवहन हेतु, अभिवहन पास अपेक्षित है – कोई माल जिसकी उत्पत्ति

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THE INDIAN LAW REPORTS M.P. SERIES, 2018

(Vol.-1)

JOURNAL SECTION

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

THE INDIAN FOREST (AMENDMENT) ACT, 2017
NO. 5 OF 2018

[Received the assent of the President on the 05th January, 2018 and published in the Gazette of India (Extraordinary), Part II, Section 1 (No.5), dated the 08th January, 2018 page no. 1-2].

An Act further to amend the Indian Forest Act, 1927.

Be it enacted by Parliament in the Sixty-eighth Year of the Republic of India as follows:–

1. Short title extent and commencement.- *(1)* This Act may be called the Indian Forest (Amendment) Act, 2017.

(2) It shall be deemed to have come into force on the 23rd day of November, 2017.

2. Amendment of section 2 of Act. In the Indian Forest Act, 1927, (16 of 1927) in section 2, in clause *(7)*, the word "bamboos" shall be omitted.

3. Repeal and savings. *(1)* The Indian Forest (Amendment) Ordinance, 2017 (Ord. 6 of 2017) is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the Indian Forest Act, 1927, (16 of 1927) as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of the said Act, as amended by this Act.

DR. G. NARAYANA RAJU,
Secretary to the Govt. of India.

[Corrigendum published in the Gazette of India (Extraordinary), Part II, Section 1 (No. 5), dated the 08th January, 2018, page no. 2 in respect of Mental Health Care Act, 2017].

In the MENTAL HEALTHCATE ACT, 2017 (10 OF 2017) as published in the Gazette of India, Extraordinary, Part II, Section 1, Issue No. 10, dated the 7th April, 2017, –

Page No.	Line (s)	*For*	*Read*
2	20	"sub-section *(1)* of section 80"	"sub-section *(1)* of section 73"
4	6	"clause (*x*)"	"clause (*y*)"
6	16	"clause *(a)* of sub-section *(1)* of section 91"	"clause *(a)* of sub-section *(1)* section 82"
6	25	"section 103"	"section 94"
10	15 and 16	"clause *(e)* of sub-section *(4)*"	"clause *(e)* of this sub-section"
20	10	":clause *(q)*"	"clause *(r)*"
30	31	"section 85"	"section 77"
43	4	"sub-section *(5)*"	"sub-section *(6)*"
47	29 and 30	"sub-clause *(ii)* of clause *(f)* of sub-section *(1)* of section 2"	"sub-clause *(ii)* of clause *(g)* of sub-section *(1)* of section 2"
47	31 and 32	"clause *(w)* of sub-section *(1)* of section 2"	"clause (x) of sub-section *(1)* of section 2"
48	14	"manner"	"the manner"
48	15	"a State"	"a State under sub-section *(3)* of section 73"
48	16 and 17	"clause *(e)* of sub-section *(2)* of section 82"	"clause *(e)* of sub-section *(2)* of section 74"
49	16	"confirm under sub-section *(6)* of section 103"	"conform under sub-section *(7)* of section 103"
49	25	"manner"	"the manner"
49	39	"provisions"	"the provisions"
50	1	"manner"	"the manner"
50	3 to 5	–	*Omitted.*
50	6	"clause (*n*)"	"clause (*m*)"
50	8	"clause (*o*)"	"clause (*n*)"
51	5	"14 of 1897."	"14 of 1987."

NOTES OF CASES SECTION

Short Note
****(14)(DB)***
Before Mr. Justice Anand Pathak & Mr. Justice G.S. Ahluwalia
Cr.A. No. 427/2009 (Gwalior) decided on 21 December, 2017

BABLU ALIAS VIRENDRA KUMAR …Appellant
Vs.
STATE OF M.P. …Respondent

***Penal Code (45 of 1860), Section 302 & Exception 4 to Section 300 – Dying Declaration – Recovery of Weapon of Offence – Direct Evidence – Absence of Motive* – FIR by accused himself, admitting that he caused multiple injuries to his mother and step sister – Held – Death of mother due to septicemia, developed due to infection and gangrene on those body parts of the deceased where accused had caused injuries – No record to show that same developed due to post operational complications – Further held – Dying declaration cannot be discarded on the ground that the same was not recorded in question-answer form – Dying declaration of the deceased (*mother of accused*) was recorded by the Executive Magistrate after obtaining certificate of fitness which is sufficient and can be the sole ground for convicting the accused – Further held – When there is ample unimpeachable ocular evidence and the same has been corroborated by medical evidence, non-recovery of weapon does not affect the prosecution case – Non recovery of weapon and absence of motive would not be material where the case is based on direct evidence – Accused failed to prove that the incident occurred under sudden and grave provocation – Appellant acted in a cruel manner and caused multiple stab injuries to the deceased resulting in her death – Trial Court rightly convicted the appellant – Appeal dismissed.**

दण्ड संहिता (1860 का 45), धारा 302 व धारा 300 का अपवाद 4 – मृत्युकालिक कथन – अपराध के हथियार की बरामदगी – प्रत्यक्ष साक्ष्य – हेतु की अनुपस्थिति – अभियुक्त द्वारा यह स्वीकार करते हुए कि उसने अपनी माँ एवं सौतेली बहन को अनेक चोटें कारित की, स्वयं प्रथम सूचना प्रतिवेदन दर्ज किया गया – अभिनिर्धारित – माँ की मृत्यु, शरीर के उन अंगों पर जिन पर अभियुक्त ने चोटें कारित की थी, संक्रमण एवं गैंग्रीन पनप जाने की वजह से सेप्टीसीमिया के कारण हुई – यह दर्शाने हेतु कोई साक्ष्य नहीं है कि उक्त (सेप्टीसीमिया), शल्यक्रिया के पश्चात् होने वाली जटिलताओं के कारण पनपा है – आगे अभिनिर्धारित – मृत्युकालिक कथन इस आधार पर अमान्य नहीं किया जा सकता कि उक्त को प्रश्न–उत्तर प्रारूप में अभिलिखित नहीं किया गया था – मृतक (अभियुक्त की माँ) का मृत्युकालिक कथन, कार्यपालिक मजिस्ट्रेट द्वारा स्वस्थता का प्रमाण–पत्र अभिप्राप्त करने के पश्चात् अभिलिखित किया गया था, जो कि पर्याप्त है तथा अभियुक्त को दोषसिद्ध करने हेतु

एकमात्र आधार हो सकता है – आगे अभिनिर्धारित – जब व्यापक अभेद्य चाक्षुष साक्ष्य हैं तथा उक्त चिकित्सीय साक्ष्य द्वारा संपुष्ट किये गये हैं, हथियार की गैर–बरामदगी अभियोजन प्रकरण को प्रभावित नहीं करती – हथियार की गैर–बरामदगी एवं हेतु की अनुपस्थिति महत्वपूर्ण नहीं होगी जहाँ प्रकरण प्रत्यक्ष साक्ष्य पर आधारित है – अभियुक्त यह साबित करने में विफल रहा कि घटना अचानक और गंभीर प्रकोपन के अधीन घटित हुई – अपीलार्थी ने क्रूर तरीके से कृत्य किया एवं मृतक को घोंपने की अनेक चोटें कारित की फलस्वरूप उसकी मृत्यु हुई – विचारण न्यायालय ने उचित रूप से अपीलार्थी को दोषसिद्ध किया – अपील खारिज।

The judgment of the Court was delivered by : **G.S. Ahluwalia, J.**

Cases referred:

AIR 2000 SC 3395, AIR 2011 SC 3380, (2002) 1 SCC 22, AIR 1966 SC 119, (1994) 2 SCC 467, (2006) 13 SCC 54, (2003) 2 SCC 473, (2017) 1 SCC 529, (2017) 6 SCC 1, (2004) 11 SCC 395, (2012) 8 SCC 289, 1946 AC 588, (2015) 1 SCC 286, (2006) 7 SCC 391, (2001) 6 SCC 145, (2017) 11 SCC 129, (2001) 5 SCC 71, (2017) 11 SCC 195, (2016) 3 SCC 317, (2013) 12 SCC 796, (2015) 11 SCC 366.

Chitra Saxena, for the appellant.
Ravindra Singh, P.P. for the respondent/State.

Short Note
****(15)***
Before Mr. Justice Vijay Kumar Shukla
W.P. No. 7378/2011 (Jabalpur) decided on 5 December, 2017

BHARATLAL KURMI …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 5 – Appointment of Panchayat Karmi – Revision* – Petitioner appointed as Panchayat Karmi on basis of merit – Respondent No.6 approached the authorities claiming that he was a member of Scheduled Caste and should get the preference of appointment whereby Collector appointed Respondent No.6 on the said post without there being any order in respect of petitioner – Appeal was filed before Additional Commissioner whereby the same was allowed and order of collector was set aside on the ground that as per the government circular appointment of Panchayat Karmi was to be made strictly on merit basis – Respondent No. 6 filed a revision before the State Minister whereby the same was allowed in a cryptic manner without assigning any reason – Challenge to – Held – Proceedings under Rule 5**

of the Rules of 1995 are quasi judicial in nature and authority is bound to record reasons while deciding revision – Order in revision was passed in a cavalier manner which is unsustainable in law – Order passed by Minister is set aside – Matter remanded back to pass a speaking order after giving opportunity of hearing to parties – Petition allowed.

पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 5 – पंचायतकर्मी की नियुक्ति – पुनरीक्षण – याची योग्यता के आधार पर पंचायतकर्मी के रूप में नियुक्त किया गया – प्रत्यर्थी क्र. 6 यह दावा करते हुए प्राधिकारीगण के समक्ष गया कि वह अनुसूचित जाति का एक सदस्य था तथा उसे नियुक्ति में प्राथमिकता मिलनी चाहिए जिस पर कलेक्टर ने याची के संबंध में बिना किसी आदेश के, उक्त पद पर प्रत्यर्थी क्र. 6 को नियुक्त किया – अपर आयुक्त के समक्ष अपील प्रस्तुत की गई थी जिसके द्वारा उक्त मंजूर की गई थी एवं कलेक्टर का आदेश इस आधार पर अपास्त किया गया कि सरकारी परिपत्र के अनुसार पंचायतकर्मी की नियुक्ति योग्यता के आधार पर सख्ती से की जानी थी – प्रत्यर्थी क्र. 6 ने राज्य मंत्री के समक्ष एक पुनरीक्षण प्रस्तुत किया, जिसके द्वारा बिना कोई कारण दिये अस्पष्ट ढंग से उक्त को मंजूर किया गया था – को चुनौती – अभिनिर्धारित – 1995 के नियमों के नियम 5 के अंतर्गत कार्यवाहियाँ न्यायिककल्प प्राकृति की हैं एवं प्राधिकारी पुनरीक्षण विनिश्चित करते समय कारणों को अभिलिखित करने हेतु बाध्य है – पुनरीक्षण में आदेश लापरवाह ढंग से पारित किया गया था जो कि विधि में अपोषणीय है – मंत्री द्वारा पारित आदेश अपास्त – पक्षकारों को सुने जाने का अवसर प्रदान करने के पश्चात् मामला सकारण आदेश पारित करने हेतु प्रतिप्रेषित किया गया – याचिका मंजूर।

Case referred:

2008 (4) MPLJ 418.

Sanjay Patel with *Sushil Kumar Sharma*, for the petitioner.
Piyush Dharmadhikari, G.A. for the respondents.

Short Note
****(16) (DB)***
Before Mr. Justice S.C. Sharma & Mr. Justice Alok Verma
C.E.A. No. 25/2017 (Indore) decided on 23 November, 2017

COMMISSIONER, CUSTOMS, CENTRAL
EXCISE & SERVICE TAX, INDORE ...Appellant
Vs.
ALL CARGO GLOBAL LOGISTICS, PITHAMPUR …Respondent

***Central Excise Act (1 of 1944), Section 35(G)(2) and Cenvat Credit Rules, 2004, Rule 12 – Claim of Credit – Registration* – Appellant department held**

that as respondent company was got registered on 17.10.2008 and was not registered during the period when construction service was received and bills were raised, company is not eligible for Cenvat Credit of tax paid on service rendered prior to the date of registration – Company filed an appeal before the Tribunal whereby the same was allowed – Challenge to – Held – Tribunal was justified in holding that registration with the department is not a pre-requisite for claiming the credit – No substantial question of law arises in the instant appeal for interference – Appeal dismissed.

केंद्रीय उत्पाद–शुल्क अधिनियम (1944 का 1), धारा 35(जी)(2) एवं सेनवैट क्रेडिट नियम, 2004, नियम 12 – क्रेडिट का दावा – रजिस्ट्रीकरण – अपीलार्थी विभाग ने यह अभिनिर्धारित किया कि चूंकि प्रत्यर्थी कंपनी दिनांक 17.10.2008 को रजिस्ट्रीकृत की गई थी एवं उस अवधि के दौरान रजिस्ट्रीकृत नहीं की गई थी जब निर्माण सेवा प्राप्त हुई थी तथा बिलों को प्रस्तुत किया गया था, कंपनी रजिस्ट्रीकरण की दिनांक से पूर्व प्रदान की गई सेवा पर भुगतान किये जाने वाले कर के सेनवैट क्रेडिट हेतु पात्र नहीं है – कंपनी ने अधिकरण के समक्ष एक अपील प्रस्तुत की जहाँ पर उक्त को मंजूर किया गया था – को चुनौती – अभिनिर्धारित – अधिकरण द्वारा यह अभिनिर्धारित किया जाना न्यायोचित था कि क्रेडिट का दावा करने हेतु विभाग के साथ रजिस्ट्रीकरण एक पूर्व अपेक्षा नहीं है – वर्तमान अपील में, हस्तक्षेप हेतु विधि का कोई सारवान् प्रश्न उत्पन्न नहीं होता – अपील खारिज।

The order of the Court was delivered by : **S.C. Sharma, J.**

Cases referred:

2012 (27) STR 134 (Kar.), 2016 (43) STR 542 (Kar.), 2015 (40) STR 598 (Tri.-Del.), 2013 (288) ELT 291, 2016 (42) STR 86 (Tri. Del.), 2011 (23) STR 661 (Tri.-Mumbai), 2011 (267) ELT 221 (Tri.-Ahmd.), 1995 (75) ELT 721 (SC), 2013 (288) ELT 161 (SC).

Short Note

****(17)***

Before Mr. Justice C.V. Sirpurkar

M.Cr.C. No. 5182/2016 (Jabalpur) decided on 27 September, 2017

MEENU @ SACHIN JAIN …Applicant

Vs.

STATE OF M.P. & ors. …Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Section 110 & 122(1)(b) – Forfeiture of Bond – Detention* – SDM u/S 110 CrPC directed petitioner**

to furnish a bond of Rs. 10,000 for maintaining good behaviour for a period of two years – Subsequently, again an offence was registered against petitioner whereby SDM u/S 122(1)(b) directed to forfeit the bond and to recover an amount of Rs. 10,000 from petitioner and directed to detain him in prison till the expiry of period of bond – Challenge to – Held – Invocation of powers of Magistrate u/S 122(1)(b) CrPC was utterly misconceived because the bond that could have been asked for from petitioner and which was ultimately filed by him was related to maintaining good behaviour and not for keeping peace – Petitioner cannot be arrested and sent to jail for remaining period of bond – Further held – Petitioner has not only been arraigned in aforesaid case but after investigation, police also filed a final report against him and if under such circumstances, Magistrate is satisfied that breach has occurred, he need not wait for either framing of charge or trial or conviction – Directing recovery of Rs. 10,000 was rightly made but direction of custody and detention is unsustainable in the eyes of law and that part of order is hereby set aside – Petition partly allowed.

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 110 व 122(1)(बी) – बंधपत्र का समपहरण – निरोध – उपखंड मजिस्ट्रेट ने दं.प्र.सं. की धारा 110 के अंतर्गत याची को दो वर्ष की अवधि हेतु अच्छा आचरण बनाए रखने के लिए रू. 10,000 का बंधपत्र प्रस्तुत करने का निदेश दिया – तत्पश्चात्, पुनः याची के विरूद्ध एक अपराध पंजीबद्ध किया गया था जिसके द्वारा उपखंड मजिस्ट्रेट ने धारा 122(1)(बी) के अंतर्गत बंधपत्र समपहृत करने एवं याची से रू. 10,000 की रकम वसूलने तथा बंधपत्र की अवधि समाप्त होने तक उसे कारागार में निरूद्ध करने का निदेश दिया – उसे चुनौती – अभिनिर्धारित – धारा 122(1) (बी) दं.प्र.सं. के अंतर्गत मजिस्ट्रेट की शक्तियों का अवलंबन पूर्णतः भ्रामक था क्योंकि बंधपत्र जिसे याची से मांगा जा सकता था और जिसे अंततः उसके द्वारा प्रस्तुत किया गया था वह अच्छे व्यवहार से संबंधित था, न कि परिशांति बनाये रखने के लिए – बंधपत्र की शेष अवधि हेतु याची को गिरफ्तार नहीं किया जा सकता और कारागार नहीं भेजा जा सकता – आगे अभिनिर्धारित – याची को उपरोक्त प्रकरण में न केवल दोषारोपित किया गया है बल्कि अन्वेषण पश्चात् पुलिस ने उसके विरूद्ध एक अंतिम प्रतिवेदन भी प्रस्तुत किया है और यदि उक्त परिस्थितियों में मजिस्ट्रेट संतुष्ट है कि भंग हुआ है, उसे या तो आरोप विरचित किये जाने या विचारण अथवा दोषसिद्धि की प्रतीक्षा करना आवश्यक नहीं – रू. 10,000 की वसूली उचित रूप से निदेशित की गई परंतु अभिरक्षा एवं निरोध का निदेश विधि की दृष्टि में कायम रखने योग्य नहीं तथा एतद्द्वारा आदेश का वह हिस्सा अपास्त किया गया – याचिका अंशतः मंजूर।

Cases referred:

2015 (3) PLR 346, 1970 (3) SCC 746, 2016 (2) Andh LD (Criminal) 110, Crl.RC. No. 723/2017 order passed on 24.07.2017(Madras High Court).

Sourabh Singh Thakur, for the applicant.
Akhilendra Singh, G.A. for the non-applicants/State.

Short Note
****(18)***
Before Mr. Justice Prakash Shrivastava
W.P. No. 555/2015 (Indore) decided on 8 December, 2017

MOHAN PILLAI …Petitioner

Vs.

M.P. HOUSING BOARD & ors. …Respondents

***Service Law – Civil Services (Pension) Rules, M.P. 1976, Rule 23 – Amendment – Applicability* – Counting of suspension period for the purpose of qualifying service – Held – Petitioner remained suspended from 25.07.1992 to 11.06.1996 – Order of punishment was passed on 11.06.1996 – Rule 23 was amended w.e.f. 30.12.1999 – Amendment in Rule 23 will not be applicable retrospectively – Un-amended Rule 23 will apply which was prevailing on the date when suspension period of petitioner was over and order was passed – Respondent directed to count the suspension period for purpose of qualifying service – Writ Petition allowed.**

सेवा विधि – सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 23 – संशोधन – प्रयोज्यता – अर्हकारी सेवा के प्रयोजन हेतु निलंबन अवधि की गणना – अभिनिर्धारित – याची दिनांक 25.07.1992 से 11.06.1996 तक निलंबित रहा – दिनांक 11.06.1996 को दंड का आदेश पारित हुआ था – नियम 23 दिनांक 30.12.1999 से प्रभावी कर संशोधित किया गया था – नियम 23 में संशोधन भूतलक्षी रूप से लागू नहीं होगा – असंशोधित नियम 23 लागू होगा जो कि उस दिनांक को अभिभावी रहा था जब याची की निलंबन अवधि समाप्त हो चुकी थी एवं आदेश पारित हुआ था – प्रत्यर्थी को अर्हकारी सेवा के प्रयोजन हेतु निलंबन की अवधि की गणना करने हेतु निदेशित किया गया – रिट याचिका मंजूर।

Case referred:

(1989) 3 SCC 448.

Suryapal Singh Chouhan, for the petitioner.
Sunil Jain with *Samiksha Pandey,* for the respondents.

NOTES OF CASES SECTION

Short Note
****(19)***
Before Mr. Justice Prakash Shrivastava
W.P. No. 2122/2017 (Indore) decided on 11 December, 2017

PAWAN KUMAR SARASWAT & anr. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

***Criminal Procedure Code, 1973 (2 of 1974), Section 24(8) – Appointment of Special Public Prosecutor – Remuneration – Grounds* – Held – Section 24(8) Cr.P.C. empowers the State Government to appoint Special Public Prosecutor – Such power is to be exercised judiciously and for valid reasons – State cannot appoint a Special Public Prosecutor and replace the duly appointed public prosecutor without application of mind, merely on a wish of a party, or merely on asking of the complainant – In the present case, no specific reasons were assigned to show need of Special Public Prosecutor, merely mentioning that case is treated to be a special case, is not sufficient – Further held – It is settled law that Special Public Prosecutor should ordinarily be paid from funds of State and only in special case, remuneration can be collected from private sources – Impugned order states that remuneration of Special Public Prosecutor will be paid by complainant, cannot be approved – Impugned order not sustainable and set aside – Writ Petition allowed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 24(8) – विशेष लोक अभियोजक की नियुक्ति – पारिश्रमिक – आधार – अभिनिर्धारित – दं.प्र.सं. की धारा 24(8), राज्य सरकार को विशेष लोक अभियोजक नियुक्त करने के लिए सशक्त करती है – उक्त शक्ति का प्रयोग न्यायसम्मत रूप से एवं विधिमान्य कारणों के लिए किया जाना होता है – राज्य, मस्तिष्क का प्रयोग किये बिना, मात्र एक पक्षकार की इच्छा पर या मात्र शिकायतकर्ता के कहने पर विशेष लोक अभियोजक को नियुक्त नहीं कर सकता एवं सम्यक् रूप से नियुक्त लोक अभियोजक को बदल नहीं सकता – वर्तमान प्रकरण में, विशेष लोक अभियोजक की आवश्यकता दर्शाने के लिए कोई विनिर्दिष्ट कारण नहीं दिये गये, मात्र उल्लिखित किया जाना कि प्रकरण को विशेष प्रकरण माना जाता है, पर्याप्त नहीं है – आगे अभिनिर्धारित – यह सुस्थापित विधि है कि विशेष लोक अभियोजक को साधारणतः राज्य की निधि से भुगतान किया जाना चाहिए और केवल विशेष प्रकरण में, निजी स्त्रोतों से पारिश्रमिक एकत्रित किया जा सकता है – आक्षेपित आदेश कथित करता है कि विशेष लोक अभियोजक के पारिश्रमिक का भुगतान शिकायतकर्ता द्वारा किया जायेगा, अनुमोदित नहीं किया जा सकता – आक्षेपित आदेश कायम रखे जाने योग्य नहीं है एवं अपास्त – रिट याचिका मंजूर।

NOTES OF CASES SECTION

Cases referred:

(1988) 3 SCC 144, 1992 MPLJ 772, 1998 Cri.L.J. 998, 2001 (5) MPHT 579, W.P. No. 6743/2011 order passed on 19.01.2012.

Gagan Parashar, for the petitioners.
Mukesh Parwal, for the respondent/State.
Girish Desai, for the respondent No. 4.

Short Note
****(20)***
Before Mr. Justice Sushil Kumar Palo
Cr.R. No. 2790/2017 (Jabalpur) decided on 21 November, 2017

PRAVEEN BANOO (SMT.) & ors. …Applicants
Vs.
STATE OF M.P. & anr. …Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 357-A and Crime Victim Compensation Scheme (M.P.), 2015, Section 2(j) & 2(k) – Victim – Dependent – **An employee of District Court during his service, committed suicide, for which the then JMFC was prosecuted for offence u/S 306 IPC – Petitioner, wife of deceased alongwith her two daughters and a son filed application for compensation which was dismissed – Challenge to – Held – Under the Compensation Scheme, District Legal Services Authority or State Legal Services Authority upon the recommendation received from the trial Court, Appellate Court, Session Court or the High Court or on receiving an application u/S 357-A(4) Cr.P.C., after holding enquiry through appropriate authority within two months as deemed fit may award adequate compensation – In the present case, wife of the deceased has been granted compassionate appointment, she is receiving family pension and dues of deceased like GPF and Insurance amount has also been paid to her, thus has been adequately compensated and rehabilitated – Two unmarried daughters and a son, who are also the crime victim and lost their father were not granted any compensation – So far as children are concerned, impugned order is set aside – Session Judge was directed to recommend accordingly for grant of compensation to children under the Scheme of 2015 Revision partly allowed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 357–ए एवं अपराध पीड़ित प्रतिकर योजना (म.प्र.), 2015, धारा 2(जे) व 2(के) – पीड़ित – आश्रित – जिला न्यायालय के एक कर्मचारी ने अपने सेवाकाल के दौरान आत्महत्या की जिसके लिए तत्कालीन न्यायिक दण्डाधिकारी प्रथम श्रेणी को भा.दं.सं. की धारा 306 के अंतर्गत अपराध हेतु अभियोजित किया गया था – याची, मृतक की पत्नी ने अपनी दो पुत्रियों एवं एक पुत्र के साथ प्रतिकर

हेतु आवेदन प्रस्तुत किया जिसे खारिज किया गया – को चुनौती – अभिनिर्धारित – प्रतिकर योजना के अंतर्गत जिला विधिक सेवा प्राधिकारी या राज्य विधिक सेवा प्राधिकारी, विचारण न्यायालय, अपीली न्यायालय, सत्र न्यायालय अथवा उच्च न्यायालय से प्राप्त अनुशंसा पर या दं.प्र.सं. की धारा 357–ए(4) के अंतर्गत आवेदन प्राप्त होने पर, दो माह के भीतर समुचित प्राधिकारी के जरिए जांच करने के पश्चात् जैसा उचित समझे, पर्याप्त प्रतिकर अवार्ड कर सकते है – वर्तमान प्रकरण में, मृतक की पत्नी को अनुकंपा नियुक्ति प्रदान की गई है, वह परिवार पेंशन प्राप्त कर रही है तथा मृतक के देयक जैसे कि जीपीएफ और बीमा की रकम भी उसे अदा की गई है, अतः पर्याप्त रूप से प्रतिकारित तथा पुनर्वसित किया गया है – दो अविवाहित पुत्रियां एवं एक पुत्र भी जो अपराध पीड़ित है और जिन्होनें अपने पिता को खोया है, उन्हें कोई प्रतिकर प्रदान नहीं किया गया था – जहाँ तक बच्चों का संबंध है, आक्षेपित आदेश अपास्त – सत्र न्यायाधीश को 2015 की योजना के अंतर्गत बच्चों को प्रतिकर प्रदान किये जाने हेतु तद्नुसार अनुशंसा करने के लिए निदेशित किया गया – पुनरीक्षण अंशतः मंजूर।

Cases referred:

AIR 2015 SC 518, 1983 (4) SCC 141.

Mohd. Hafizullah with *Mohd. Tofiq*, for the applicants.
Ramesh Kushwaha, P.L. for the non-applicant/State.

Short Note
****(21)(DB)***
Before Mr. Justice S.K. Seth & Mr. Justice Anurag Shrivastava
M.Cr.C. No. 27361/2017 (Jabalpur) decided on 16 January, 2018

RADHESHYAM SONI …Applicant

Vs.

STATE OF M.P. …Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Scope – Quashment of FIR* – Offence registered u/S 7 of Prevention of Corruption Act, 1988 – Held – In the instant case, after investigation, challan has been filed and charges have been framed and accordingly trial Court recorded the evidence of prosecution witnesses – It is well settled principle of law that if allegation made in the FIR are taken at their face value and accepted in their entirety, criminal proceedings instituted on the basis of such FIR should not be quashed – Powers u/S 482 are very wide and very plentitude and requires great caution in its exercise – Criminal prosecution cannot be quashed at such mid-session – It is not that rarest of rare case which calls for exercise of inherent powers – Petition dismissed.**

NOTES OF CASES SECTION

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – व्याप्ति – प्रथम सूचना प्रतिवेदन अभिखंडित किया जाना – भ्रष्टाचार निवारण अधिनियम, 1988 की धारा 7 के अंतर्गत अपराध पंजीबद्ध किया गया – अभिनिर्धारित – वर्तमान प्रकरण में, अन्वेषण पश्चात्, चालान प्रस्तुत किया गया है और आरोप विरचित किये गये हैं तथा तद्नुसार विचारण न्यायालय ने अभियोजन साक्षियों का साक्ष्य अभिलिखित किया है – यह विधि का सुस्थापित सिद्धांत है कि यदि प्रथम सूचना प्रतिवेदन में किये गये अभिकथन को प्रत्यक्षतः लिया गया और उनकी संपूर्णता में स्वीकार किया गया, उक्त प्रथम सूचना प्रतिवेदन के आधार पर संस्थित की गई दाण्डिक कार्यवाहियां अभिखंडित नहीं की जानी चाहिए – धारा 482 के अंतर्गत शक्तियां व्यापक है और प्रचुर है तथा इनके प्रयोग में अति सावधानी अपेक्षित है – दाण्डिक अभियोजन को ऐसे सत्र के मध्य में अभिखंडित नहीं किया जा सकता – यह ऐसा विरल से विरलतम प्रकरण नहीं है जिसके लिए अंतर्निहित शक्तियों का प्रयोग किया जाये – याचिका खारिज।

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

Case referred:

AIR 1999 SC 2554.

Narendra Nath Tripathi, for the applicant.
Pankaj Dubey, Standing Counsel for the non-applicant No. 1/Lokayukt.

Short Note
****(22)***
Before Mr. Justice Sheel Nagu
W.P. No. 3521/2017 (Gwalior) decided on 12 June, 2017

RAJENDRA SHRIVASTAVA …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

Public Distribution Order (M.P), 2015, Clause 16(7) & 18 – Removal/ Replacement of Salesman – Jurisdiction **– Petition against order of SDO (Shop Allotment Authority) directing the society running the fair price shop, to replace the petitioner salesman – Held – Order was not made for removal of petitioner from employment – It is true that power of replacing the salesman with a new one is not vested with the Shop Allotment Authority and such replacement certainly does not fall within the definition of 'removal' but under the generic powers vested with Shop Allotment Authority under Clause 18, he may issue directions to ensure planned distribution of essential commodities**

and the fair price shop/institution/ body/group/agency are duty bound to comply with the same – Order passed by SDO is not bereft of jurisdiction – Petitioner may avail remedy of appeal before Collector – Petition dismissed.

सार्वजनिक वितरण आदेश (म.प्र.), 2015, खंड 16(7) व 18 – विक्रेता को हटाना/प्रतिस्थापित किया जाना – अधिकारिता – उचित मूल्य की दुकान चला रही सोसाईटी को याची विक्रेता को प्रतिस्थापित करने के लिए निदेशित करते हुए उपखंड अधिकारी (दुकान आबंटन प्राधिकारी) के आदेश के विरूद्ध याचिका – अभिनिर्धारित – याची को नियोजन से हटाये जाने हेतु आदेश नहीं किया गया था – यह सत्य है कि विक्रेता को नये विक्रेता से प्रतिस्थापित करने की शक्ति, दुकान आबंटन प्राधिकारी में निहित नहीं है एवं उक्त प्रतिस्थापन निश्चित रूप से 'हटाया जाना' की परिभाषा के भीतर नहीं आता बल्कि खंड 18 के अंतर्गत दुकान आबंटन प्राधिकारी में निहित अविशिष्ट शक्तियों के अंतर्गत है, वह आवश्यक वस्तुओं के सुनियोजित वितरण को सुनिश्चित करने के लिए निदेश जारी कर सकता है तथा उनका अनुपालन करने के लिए उचित मूल्य दुकान/संस्था/ निकाय/ समूह/एजेन्सी कर्तव्यबद्ध है – उपखंड अधिकारी द्वारा पारित आदेश अधिकारिता विहीन नहीं है – याची, कलेक्टर के समक्ष अपील के उपचार का अवलंब ले सकता है – याचिका खारिज।

Sanjay Bahirani, for the petitioner.
Praveen Newaskar, G.A. for the respondent/State.

Short Note
****(23)(DB)***
Before Mr. Justice S.K. Seth & Mr. Justice Rajeev Kumar Dubey
Cr.A. No. 2521/2007 (Jabalpur) decided on 13 October, 2017

SURYABHAN CHOUDHARY …Appellant
Vs.
STATE OF M.P. …Respondent

***Penal Code (45 of 1860), Sections 302, 324 & 304 Part I – Conviction – Testimony of Eye Witness – Intention* – Held – In the present case, appellant thought that deceased and eye-witnesses were talking ill about him, he without any premeditation inflicted a single knife injury to the stomach of deceased – Although injury turned out to be fatal due to septicemia and hemorrhage resulting in death, but it is difficult to hold that appellant had any intention to kill the deceased – Appellant not guilty of culpable homicide in fact can be and is convicted u/S 304 Part II i.e. culpable homicide not amounting to murder – Since appellant already suffered jail sentence for more than 10 years, he directed to be released – Appeal partly allowed.**

NOTES OF CASES SECTION

दण्ड संहिता (1860 का 45), धाराएँ 302, 324 व 304 भाग I – *दोषसिद्धि – चक्षुदर्शी साक्षी का परिसाक्ष्य – आशय* – अभिनिर्धारित – वर्तमान प्रकरण में, अपीलार्थी ने सोचा कि मृतक एवं चक्षुदर्शी साक्षीगण उसके बारे में बुरा बोल रहे थे, उसने बिना किसी पूर्वचिंतन के मृतक के पेट में चाकू से एक चोट पहुँचाई – यद्यपि, सेप्टिसेमिया एवं रक्तस्त्राव के कारण चोट घातक साबित हुई जिससे उसकी मृत्यु हुई परंतु यह अभिनिर्धारित करना कठिन है कि अपीलार्थी का मृतक को जान से मारने का कोई आशय था – अपीलार्थी आपराधिक मानववध का दोषी नहीं, वास्तव में उसे धारा 304 भाग **II** अर्थात् हत्या की कोटि में न आने वाले आपराधिक मानववध के अंतर्गत दोषसिद्ध किया जा सकता है – चूंकि अपीलार्थी ने पहले ही 10 वर्ष से अधिक कारावास भुगता है, उसे छोड़ दिये जाने के लिए निदेशित किया गया – अपील अंशतः मंजूर।

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

D.K. Bohrey, for the appellant.
*Akshay Namdeo,*G.A. for the respondent/State.

I.L.R. [2018] M.P. 263 (SC)
SUPREME COURT OF INDIA

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

C.A. No. 14874/2017 decided on 15 September, 2017

STATE OF UTTARAKHAND & ors. …Appellants

Vs.

KUMAON STONE CRUSHER …Respondent

(Alongwith C.A. Nos. 14446/2017, 14448/2017, 14922/2017, 14924/2017, 14923/2017, 14920/2017, 14921/2017, 14452/2017, 14453/2017, 14464/2017, 14465/2017, 14468/2017, 14469-14476/2017, 14485/2017, 14486/2017, 14492/2017, 14493/2017, 14495/2017, 14497-14509/2017, 14510-14523/2017, 13122-13129/2017, 13300/2017, 13301/2017, 13313-13319/2017, 13320/2017, 13346-13358/2017, 13360-13378/2017, 13386-13395/2017, 13405-13408/2017, 13411-13426/2017, 13448-13463/2017, 13488/2017, 13427/2017, 13518/2017, 13542/2017, 13559/2017, 13575/2017, 13578-13580/2017, 13602-13605/2017, 13621/2017, 13430-13446/2017, 13465-13487/2017, 13489-13517/2017, 13627/2017, 13428/2017, 13385/2017, 13397/2017, 13520-13533/2017, 13645/2017, 13675-13699/2017, 13714-13718/2017, 13409/2017, 13536/2017, 13741/2017, 13786/2017, 13787/2017, 13788/2017, 13792-13813/2017, 13816-13828/2017, 13829/2017, 13830/2017, 13745-13759/2017, 13935/2017, 13936/2017, 13537-13541/2017, 13937/2017, 14076-14078/2017, 13760-13770/2017, 14080-14100/2017, 14101-14117/2017, 14118-14132/2017, 14134-14145/2017, 13544/2017, 14146/2017, 13606/2017, 14157-14176/2017, 14178-14190/2017, 14192-14193/2017, 14194-14206/2017, 13545/2017, 14207-14225/2017, 14227-14247/2017, 14249-14264/2017, 14266/2017, 14268/2017, 13622/2017, 13626/2017, 13637/2017, 13646/2017, 13700/2017, 14270-14271/2017, 14274-14275/2017, 14277-14278/2017, 14282/2017, 14147-14148/2017, 14284-14291/2017, 14294-14306/2017, 14307/2017, 14309/2017, 14311/2017, 2797/2008, 14315-14322/2017, 13771-13780/2017, 14328-14339/2017, 14348-14355/2017, 14357-14364/2017, 14368-14374/2017, 14376/2017, 14378/2017, 14381/2017, 14382-14392/2017, 14393-14404/2017, 2821/2008, 14406-14407/2017, 14292/2017, 13558/2017, 14409-14410/2017, 14414-14423/2017, 14425-14444/2017, 14447/2017, 14449-14451/2017, 13574/2017, 14454-14463/2017, 14466-14467/2017, 13576/2017, 14272/2017, 5652/2008, 13781/2017, 14477/2017, 13379/2017, 2739-2762/2008, 14177/2017, 14191/2017, 14248/2017, 14226/2017, 2734/2008, 13535/2017, 13106-13116/2017, 13302-13312/2017, 13546-13557/2017, 13560-13571/2017, 14273/2017, 2737/2008, 2820/2008, 2706/2008, 13577/2017, 13464/2017, 13447/2017, 13321-13344/2017, 13581-13600/2017, 13607-13620/2017, 2862-2863/2008, 13623-13624/2017, 13543/2017, 13628-13636/2017, 13638-13644/2017, 13601/2017, 13647-13674/2017, 13701-13713/2017, 13721-13740/2017, 13359/2017, 2732/2008, 14276/2017, 14279/2017, 13118/2017, 13121/2017, 13938/2017, 2819/2008, 14265/2017, 13939-14074/2017, 14267/2017, 14269/2017, 14079/2017, 14133/2017, 1007/2011, 14478-14484/2017, 1008/

2011, 13130/2017, 14487-14491/2017, 14280/2017, 14494/2017, 14293/2017, 14308/2017, 14496/2017, 14524/2017, 14310/2017, 14075/2017, 14525-14531/2017, 14532/2017, 13719-13720/2017, 13345/2017, 14281/2017, 13105/2017, 14283/2017, 14534-14536/2017, 14537/2017, 13519/2017, 13131/2017, 14538/2017, 13117/2017, 1010/2011(X), 14312-14314/2017, 14323-14326/2017, 13398/2017, 13410/2017, 13429/2017, 14919/2017, 13119/2017, 13380-13384/2017, 14327/2017, 14340-14347/2017, 13396/2017, 14356/2017, 14365-14367/2017, 14375/2017, 14377/2017, 14379/2017, 14380/2017, 14405/2017, 14408/2017, 14411/2017, 14412-14413/2017, 14424-14425/2017, 14445/2017, 13399-13404/2017, 13104/2017, 2047/2006, SLP (C) Nos. 13656/2012 (XI), 15721/2012, T.P. (C) Nos. 76/2012, 77/2012, 18/2012, 44/2012, Conmt. Pet. (C) Nos. 199-201/2014, 585-587/2016, 251/2008(X), W.P. (C) No. 203/2009)

***A. Forest Act (16 of 1927), Section 2(4) and Mines and Minerals (Development and Regulation) Act (67 of 1957), Transit of Timber & Other Forest Produce Rules, U.P., 1978, Rule 3 and Transit (Forest Produce) Rules, M.P., 2000 – Forest Produce* – Held – While considering the definition of Forest Produce, scientific and botanical sense has to be taken into consideration and commercial parlance test may not be adequate in such cases – Nature of different commodities explained.**

(Para 81 & 82)

क. वन अधिनियम (1927 का 16), धारा 2(4), खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), इमारती लकड़ी एवं अन्य वनोपज का अभिवहन नियम, उ.प्र., 1978, नियम 3 एवं अभिवहन (वनोपज) नियम, म.प्र., 2000 – वनोपज – अभिनिर्धारित – वनोपज की परिभाषा पर विचार करते समय वैज्ञानिक एवं वानस्पतिक अर्थ को विचार में लिया जाना चाहिए एवं ऐसे प्रकरणों में वाणिज्यिक बोल–चाल की कसौटी पर्याप्त नहीं हो सकती – विभिन्न वस्तुओं का स्वरूप स्पष्ट किया गया है।

***B. Forest Act (16 of 1927) and Mines and Minerals (Development and Regulation) Act (67 of 1957) – Field of Operation – Validity* – Held – Object and Regulation of the two legislations is different – Forest Act deals with forest and forest wealth with a different object and the 1957 Act deals with mines and minerals – Subjects of 1927 Act and 1957 Act are distinct and separate – There may be an incidental encroachment in respect of small area of operation of two legislation but both the Acts operate in different field – Incidental encroachment of one legislation with another is not forbidden in the Constitutional scheme of distribution of legislative powers – It is the duty of the Court to find out its true intent and purpose and to examine the particular legislation in its pith and substance – Act of 1957 impliedly repeals the Act of 1927 so far as Section 41 and 1978 Rules are concerned, cannot be accepted – Similarly, the submission, that by the Act of 1957, the provisions of 1927 Act and 1978 Rules have become void, inoperative and stand**

repealed, cannot be accepted – Various amendments in 1927 Act were made by the State of U.P. in exercise of its legislative powers conferred.

(Paras 106, 115, 117, 120 & 121)

ख. वन अधिनियम (1927 का 16) एवं खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67) – प्रवर्तन का क्षेत्र – विधिमान्यता – अभिनिर्धारित – दोनों विधानों का उद्देश्य एवं विनियमन भिन्न है – वन अधिनियम, वन एवं वन संपदा से संबंधित है जिसका उद्देश्य भिन्न है तथा 1957 का अधिनियम खान एवं खनिजों से संबंधित है – 1927 के अधिनियम और 1957 के अधिनियम के विषय भिन्न एवं पृथक हैं – इन दोनों विधानों के प्रवर्तन के क्षेत्र के छोटे से भाग के संबंध में आनुषंगिक अधिक्रमण हो सकता है परंतु दोनों अधिनियम भिन्न क्षेत्रों में प्रवर्तित होते हैं – एक विधान का दूसरे विधान के साथ आनुषंगिक अधिक्रमण, विधायी शक्तियों के वितरण की संवैधानिक स्कीम में निषिद्ध नहीं है – न्यायालय का यह कर्तव्य है कि वह किसी विशिष्ट विधान के सही आशय एवं प्रयोजन का पता करे और उसके तत्व और सार का परीक्षण करे – 1957 का अधिनियम, 1927 के अधिनियम को विवक्षित रूप से निरसित करता है, जहाँ तक कि धारा 41 एवं 1978 के नियमों का संबंध है को स्वीकार नहीं किया जा सकता – इसी प्रकार, यह निवेदन कि 1957 के अधिनियम द्वारा 1927 का अधिनियम एवं 1978 के नियमों के उपबंध शून्य, अप्रवर्तनीय बन गये हैं व निरसित हो गये हैं, स्वीकार नहीं किया जा सकता – उ.प्र. राज्य द्वारा, उसे प्रदत्त विधायी शक्तियों के प्रयोग में 1927 के अधिनियम में विभिन्न संशोधन किये गये थे।

***C. Forest Act (16 of 1927), Section 2(4)(b) – Words "brought from" & "found in" – Interpretation* – Word "brought from" is an expression which conveys the idea of the items having their origin in forests and they have been taken out from the forest – Word "found in" means the item which has origin from forests, is found in the forest while "brought from" means that items having origin in forest have moved out from the forest.**

(Para 124)

ग. वन अधिनियम (1927 का 16), धारा 2(4)(बी) – शब्द ''से लाई जावे'' एवं ''में पाई जावे'' – निर्वचन – शब्द ''से लाई जावे'' एक ऐसी अभिव्यक्ति है जो कि उन वस्तुओं की धारणा प्रकट करती है जिनकी उत्पत्ति वनों में है तथा उन्हें वन से निकाला गया है – शब्द ''में पाई जावे'' का अर्थ उस वस्तु से है जिसकी उत्पत्ति वनों से है, वन में पाई जाती है जबकि ''से लाई जावे'' का अर्थ उन वस्तुओं से है जिनकी उत्पत्ति वनों में है तथा उन्हें वनों से बाहर ले जाया गया है।

***D. Transit of Timber & Other Forest Produce Rules, U.P., 1978, Rule 3 – Transit Pass – Transit Fee* – Transit pass is necessary as per Rule 3 for moving a forest produce into or from or within the State of U.P. – Any produce, goods entering within or outside the State which is the forest**

produce having originated in forest requires a transit pass for transiting in the State of U.P. – Any good which did not originate in forest whether situate in the state of U.P. or outside the State but is only passing through a forest area may not be a forest produce – Further held – Transit fee charged under the 1978 Rules is regulatory fee in character and state is not to prove quid pro quo for levy of transit fee.

(Para 128 & 164)

घ. इमारती लकड़ी एवं अन्य वनोपज का अभिवहन नियम, उ.प्र., 1978, नियम 3 – अभिवहन पास – अभिवहन शुल्क – नियम 3 के अनुसार किसी वनोपज को उ.प्र. राज्य में या से या के भीतर लाने–ले जाने हेतु अभिवहन पास आवश्यक है – कोई उपज, माल जो राज्य के भीतर या बाहर प्रवेश करता है जो कि एक वनोपज है जिसकी उत्पत्ति वन में हुई है को उ.प्र. राज्य में अभिवहन हेतु, अभिवहन पास अपेक्षित है – कोई माल जिसकी उत्पत्ति वन में नहीं हुई है, यद्यपि उ.प्र. राज्य में स्थित हो या राज्य के बाहर हो, किंतु केवल वन क्षेत्र से गुजर रहा हो, वनोपज नहीं हो सकता – आगे अभिनिर्धारित – नियम 1978 के अंतर्गत लगाया गया अभिवहन शुल्क, विनियामक शुल्क के स्वरूप में है तथा राज्य को अभिवहन शुल्क के उद्ग्रहण हेतु तत्प्रतीत साबित नहीं करना होगा।

***E. Forest – Explanation* – Definition of forest cannot be confined only to reserved forests, village forests and protected forests as enumerated in Forest Act, 1927 – Forest shall include all statutorily recognized forests, whether designated as reserve, protected or otherwise – Term "forest land" will not only include forest as understood in dictionary sense, but also any area recorded as forest in the government records irrespective of the ownership – Further held – As per the government notification, merely because both sides of roads are declared to be protected forest, the road itself will not fall within the purview of protected forest – Merely passing through the roads, it cannot be held that the goods or forest produce are passing through the protected forest.**

(Paras 130, 131 & 140)

ङ. वन – स्पष्टीकरण – वन की परिभाषा केवल आरक्षित वनों, वनग्रामों एवं संरक्षित वनों तक सीमित नहीं हो सकती जैसा कि वन अधिनियम, 1927 में दिया गया है – वन में सभी कानूनी रूप से मान्य वन शामिल होंगे, यद्यपि उन्हें आरक्षित, संरक्षित या अन्यथा नाम निर्दिष्ट किया गया हो – शब्द ''वन भूमि'' में न केवल वन शामिल होंगे जैसा कि शब्दावली के अर्थ में समझा जाता है परंतु ऐसा कोई भी क्षेत्र जो स्वामित्व पर विचार किये बिना सरकारी अभिलेखों में वन के रूप में अभिलिखित किया गया है – आगे अभिनिर्धारित – सरकारी अधिसूचना के अनुसार, मात्र इसलिए कि सड़कों की दोनों तरफ को संरक्षित वन घोषित किया गया है, सड़क स्वयं संरक्षित वन की परिधि के भीतर नहीं आती – मात्र सड़कों से गुजरना, यह अभिनिर्धारित नहीं किया जा सकता कि माल और वनोपज संरक्षित वन से गुजर रहे हैं।

F. Transit of Timber & Other Forest Produce Rules, U.P., 1978, Rule 5 – Validity of Fourth and Fifth Amendment Rules – Increase in Fee – **Held – Although State is not required to prove any quid pro quo for levy or increase in fee but a broad co-relation has to be established between expenses incurred for regulation of Transit and the fee realized – It is rightly noticed that the expenditure claimed by the State is not only confined to expenditure for regulation of transit but also other expenditures of the forest department as well – Increase in transit fee was excessive and character of fee has changed from simple regulatory fee to a fee which is for raising revenue – High Court rightly strike down the Fourth and Fifth Amendment Rules.**

(Paras 178, 182, 185 & 192)

च. इमारती लकड़ी एवं अन्य वनोपज का अभिवहन नियम, उ.प्र., 1978, नियम 5 – चौथे एवं पांचवे संशोधन नियमों की विधिमान्यता – शुल्क में बढ़ोत्तरी – अभिनिर्धारित – यद्यपि राज्य को शुल्क के उद्ग्रहण या बढ़ोत्तरी हेतु किसी तत्प्रतीत को साबित करना अपेक्षित नहीं परंतु अभिवहन के विनियमन हेतु वहन किये गये खर्चे एवं वसूले गये शुल्क के बीच व्यापक परस्पर संबंध स्थापित करना होगा – यह उचित रूप से पाया गया है कि राज्य द्वारा दावा किया गया व्यय न केवल अभिवहन के विनियमन हेतु व्यय तक सीमित है बल्कि वन विभाग के अन्य व्यय भी है – अभिवहन शुल्क में बढ़ोत्तरी अत्याधिक थी एवं शुल्क का स्वरूप साधारण विनियामक शुल्क से बदलकर ऐसे शुल्क में हुआ है जो कि राजस्व बढ़ाने हेतु किया गया है – उच्च न्यायालय ने उचित रूप से चौथे एवं पांचवे संशोधन नियमों को खंडित किया है।

G. Transit (Forest Produce) Rules, M.P., 2000, Rule 5 – Notification dated 28.05.2001 – Validity – **Held – High Court held that Rule framed by the State u/S 41 of the Act of 1927, i.e. Rule 5 of the Rules of 2000 is valid – High Court has taken an incorrect view that notification dated 28.05.2001 is beyond the power of the State under Rule 5 of the Rules, 2000 – Rule 5 clearly empowers the State to fix the rate of fee, on the basis of quantity/ volume of Forest Produce – High Court committed error in setting aside the notification dated 28.05.2001.**

(Para 210 & 216)

छ. अभिवहन (वनोपज) नियम, म.प्र., 2000, नियम 5 – अधिसूचना दिनांक 28.05.2001 – विधिमान्यता – अभिनिर्धारित – उच्च न्यायालय ने अभिनिर्धारित किया कि अधिनियम, 1927 की धारा 41 के अंतर्गत राज्य द्वारा विरचित नियम अर्थात् नियम 2000 का नियम 5 विधिमान्य है – उच्च न्यायालय ने गलत दृष्टिकोण अपनाया है कि अधिसूचना दिनांक 28.05.2001, नियम 2000 के नियम 5 के अंतर्गत राज्य की शक्ति से परे है – नियम

5 राज्य को वनोपज की मात्रा/परिमाण के आधार पर, शुल्क की दर निश्चित करने के लिए स्पष्ट रूप से सशक्त बनाता है – उच्च न्यायालय ने अधिसूचना दिनांक 28.05.2001 को अपास्त करने में त्रुटि कारित की है।

Cases referred:

2002 (4) SCC 566, 2005 (3) AWC 2177, 1997 (2) SCC 267, (2004) 10 SCC 201, (1990) 1 SCC 109, (2011) 4 SCC 450, 2006 (7) SCC 241, 2016 (1) Scale 1, (1996) 10 SCC 397, (2000) 3 SCC 525, (2003) 3 SCC 122, (1994) 4 SCC 455, (2010) 2 SCC 699, (1990) 2 SCC 203, AIR 1961 SC 459, 1964(4) SCR 461, AIR 1961 SC 272, 2016 (6) SCC 157, (2001) 4 SCC 262, AIR 1963 SC 1561, AIR 1959 SC 648, 2012 (7) SCC 106, 1994 (3) SCC 569, AIR 1957 SC 297, 2002 (8) SCC 228, 1962 CRLJ 832, 2004 (2) SCC 579, AIR 1963 SC 928, AIR 1965 SC 1430, 2011 (5) SCC 305, 2016 (5) SCC 1, AIR 1954 SC 282, AIR 1965 SC 1107, 1997 (3) SCC 665, 1999 (2) SCC 274, (1975) 1 SCC 509, (1983) 4 SCC 353, (2012) 8 SCC 680, 2016 (1) Allahabad Daily Judgment 174, 2005 (4) SCC 245, 1989 Supp (1) SCC 696.

J U D G M E N T

The Judgment of the Court was delivered by : **Ashok Bhushan, J. :-** Delay condoned. Leave granted.

2. This batch of cases relates to levy of transit fee. Transit fee levied by three States, i.e., State of Uttar Pradesh, State of Uttarakhand and State of Madhya Pradesh is in question.

3. In exercise of power under Section 41 of Indian Forest Act , 1927 (hereinafter referred to as "1927 Act) rules have been framed by different States. State of U.P. has framed the Rules, namely, the Uttar Pradesh Transit of Timber & other Forest Produce Rules, 1978 (hereinafter referred to as "1978 Rules"). After formation of the State of Uttarakhand in the year 2000, the above 1978 Rules were also extended by the State of Uttarakhand by 2001 Rules. State of Madhya Pradesh has framed Rules, namely, the Madhya Pradesh Transit (Forest Produce) Rules, 2000(hereinafter referred to as "2000 Rules").

4. Several writ petitions were filed in the Allahabad High Court, Uttarakhand High Court and High Court of Madhya Pradesh challenging the levy of transit fee, validity of transit fee Rules and for other reliefs. The writ petitions filed by the writ petitioners were allowed by the Uttarakhand High Court whereas Allahabad High Court dismissed some writ petitions and allowed others. The Madhya Pradesh High Court has allowed the writ petitions by a common judgment dated 14.05.2007. The State of Uttarakhand and State of Uttar Pradesh has filed SLPs, in which leave has been granted, challenging the judgments of the High Courts in so far as writ petitions

filed by the writ petitioners were allowed. The State of Madhya Pradesh has also filed appeals challenging the common judgment dated 14.05.2007. The writ petitioners whose writ petitions were dismissed by the Allahabad High Court has also filed SLPs against the said judgment in which leave has been granted.

5. The entire bunch of cases before us can be described in four groups. **First group** consists of appeals filed by the State of U.P. as well as State of Uttarakhand challenging various judgments of Uttarakhand High Court by which writ petitions filed by the different writ petitioners for quashing the levy of transit fee were allowed. The **second group** of appeals consists of appeals filed by the State of U.P. challenging the judgment of Allahabad High Court dated 11.11.2011 and few other judgments by which writ petitions filed by the writ petitioners have been allowed. **Third group** of appeals has been filed by the writ petitioners whose writ petitions filed before the High Court either have been dismissed or the reliefs claimed in their writ petitions have not been granted. The **fourth group** of appeals has been filed by the State of Madhya Pradesh against the judgment dated 14.05.2007 by which writ petitions filed by the writ petitioners in the Madhya Pradesh High Court have been allowed quashing the notification fixing the transit fee and directing for refund of the transit fee.

6. For comprehending the issues which have come for consideration in this batch of appeals, we shall first notice the facts in some of the writ petitions which have been decided by three High Courts, i.e., Uttarakhand, Allahabad and Madhya Pradesh.

7. The parties shall be hereinafter referred to as described in the writ petitions filed before the High Court.

FACTS

I. CIVIL APPEALS ARISING OUT OF JUDGMENTS OF UTTARAKHAND HIGH COURT.

8. There are nineteen appeals arising out of judgments rendered by Uttarakhand High Court. There are only three main judgments rendered by Division Bench of the High Court which have been followed in other cases. It is thus necessary to note the facts giving rise to above mentioned three judgments.

(1) Judgment dated 01.07.2004 in Writ Petition No. 1124 (M-B) of 2001, M/s Kumaon Stone Crusher vs. State of U.P. & Ors.

[Giving rise to Civil Appeal (arising out of SLP No. 19445 of 2004, State of Uttaranchal & Ors. vs. State of Kumaon Stone Crusher and Civil Appeal (arising out of SLP No. 26273 of 2004, the State of U.P. & Ors. vs. M/s. Kumaon Stone Crusher.]

9. M/s Kumaon Stone Crusher filed a writ petition praying for quashing the order dated 14.06.1999 issued by Conservator of Forest and order dated 01.06.1999 issued by Divisional Forest Officer directing for making recovery and levy of Transit Fee upon the finished item of stone i.e. stone grits, stone chips etc from the writ petitioner. Petitioners case was that its stone crusher which collects the boulders from the bank of Sharda River, which is a Forest Produce, Transit Fee is charged and paid. After taking the boulders to the crushing centre and involving manufacturing process, boulders are converted into the commercial commodity, namely, stone grits and chips. It is pleaded that after it becomes a commercial commodity, it ceases to be as Forest Produce and no Transit Fee can be charged and recovered thereafter.

10. The Division Bench *vide* its judgment dated 01.07.2004 allowed the writ petition and quashed the orders dated 14.03.1999 and 21.06.1999. Both State of Uttarakhand and State of U. P. aggrieved by aforesaid judgments have filed the above noted several appeals.

(2) JUDGMENT DATED 30.03.2005 IN WRIT PET. NO.310 OF 2005, M/s. Kumaon Pea Gravel Aggregated Manufacturing Company vs. State of Uttarakhand and Ors.

[Giving rise to Civil Appeal (arising out of SLP No. 23547 of 2005 and Civil Appeal (arising out of SLP No. 24106 of 2007)]

11. Writ Petitioners, proprietary firms were carrying on the business of manufacturing & sale of finished produce of washed and single pea gravel and bajri. The Writ Petitioner used to purchase river bed material from the lessee of query on payment of royalty and trade tax on which Transit Fee is charged from the State of Uttarakhand. But when the writ petitioners transport their finished products from their factory to customers, Transit Fee is charged by State of Uttarakhand and further, when it crosses the border of Uttarakhand and enter into the State of U.P., the Transit Pass issued by the State of Uttarakhand is to be surrendered and again Transit Passes are to be taken by making payment of the Transit Fee.

12. High Court allowed the writ petition *vide* its judgment dated 30.03.2005 holding that after river bed material is converted into the Washed & Single Pea Gravel and Bajri after involving manufacturing process, a new commercial commodity comes into existence and same ceases to be a Forest Produce. High Court allowed the writ petition holding that no Transit Fee can be realised. It was further observed that even if, same is treated as Forest Produce, Transit Fee can not be realised twice on the same material under 1978 Rules. Both State of U.P. and Uttarakhand had filed Civil Appeals against the aforesaid judgment.

(3) Judgment dated 26.06.2007 in Writ Petition No. 993 of 2004, M/s Gupta Builders vs. State of Uttaranchal & Ors.

13. The writ petitioner in the writ petition has prayed for issuing a writ of certiorari, quashing 1978 Rules as applicable in State of Uttaranchal (now Uttarakhand) so far the 1978 Rules provides for Transit Pass and Transit Fee for boulders, sand and bajri, further not to enforce 1978 Rules as amended by the State of U.P. *vide* amendment Rules 2004.

14. Writ Petitioner, a Registered Partnership Firm was engaged in the business of purchase & sale of natural stones, boulders, sand & bajri and supplying the same to the various Government Departments including PWD. Writ Petitioner purchased boulders, sand, bajri from the Kol river bed from Uttaranchal Forest Development Corporation which is lessee. Writ Petitioner makes payment of royalty and other charges to the lessee. The Uttar Pradesh Minor Minerals (Concession) Rules, 1963 (hereinafter referred to as 'Rules, 1963') has been adopted by the State of Uttarakhand, as Uttaranchal Minor Minerals (Concession) Rules, 2001(hereinafter referred to as 'Rules, 2001'). Uttaranchal Forest Development Corporation issues Form MM-11 to the writ petitioner.

15. Writ Petitioner pleaded that since royalty and other charges are being paid in accordance with the minor mineral rules framed under the Mines and Minerals (Development & Regulation) Act, 1957 (hereinafter referred to as 'MMDR Act, 1957'), no Transit Fee can be levied on the writ petitioner. The High Court allowed the writ petition holding that Transit Fee under Rules, 1978 can not be applicable on the transit of minor minerals. The levy of Transit Fee was held to be illegal.

16. Following the aforesaid judgment dated 26.06.2007 several other writ petitions were decided giving rise to different other Civil Appeals, which are Civil Appeal No.1010 of 2011, Civil Appeal(arising out of SLP No. 18094 of 2011) and Civil Appeal (arising out of SLP No. 26285 of 2011).

II. CIVIL APPEALS ARISING OUT OF JUDGMENTS OF ALLAHABAD HIGH COURT

17. A large number of Civil Appeals have been filed. Four Transfer Petitions and seven Contempt Petitions have also been filed. Civil appeals have been filed by the aggrieved parties against the various judgments of the Allahabad High Court. All the civil appeals filed by the writ petitioners as well as by the State of U.P. centre around leviability of transit fee on different forest produces as per 1978 Rules.

18. Apart from various other judgments against which appeals have been filed, two judgments delivered by two Division Benches need to be specially noted by which judgments bunch of writ petitions numbering more then (sic : than) 100 have been decided. We shall notice these two judgments first before referring to facts of other cases.

CIVIL APPEAL NOS.2739-2762 OF 2008

(KUMAR STONE WORKS & Ors. VS. STATE OF U.P. & ORS.)

(arising out of judgment dated 27.04.2005 in Writ Petition No.975 of 2004, Kumar Stone Works & Others vs. State of U.P. & Ors.)

19. Several writ petitions were filed challenging the realisation of transit fee on transport of stone chips, stone grit, stone ballast, sand, morrum, coal, lime stone, dolomite etc. The writ petitioners have also challenged the validity of notification dated 14.06.2004 by which 1978 Rules were amended increasing the transit fee from Rs.5/- to Rs.38/- per tonne of lorry load of timber and other forest produce. By judgment dated 27.04.2005 bunch of writ petitions was decided consisting of petitions dealing with different materials. The High Court in its judgment has noticed details of few of the writ petitions facts of only leading petition which need to be briefly referred:

20. Writ Petition No.975 of 2004, which was stated to be leading writ petition:

Petitioners have been granted mining lease by the District Magistrate, Sonebhadra, for excavation of boulders, rocks, sand and morrum in the District of Sonebhadra from the plots situated on the land owned by the State Government which do not come within any forest area. The petitioners' case was that they do not carry any mining operation in the forest area. After excavation they transport the goods from the site to the destination by truck. The petitioners convert the stone and boulder into Gitti. It was further pleaded that while transporting the goods, they do not pass through the forest area and they are not using any forest road for the purpose of transportation of their goods. They pay royalty to the State Government under the provisions of the U.P. Minor Minerals (Concession) Rules, 1963. The State's case was that the petitioners are procuring the grit, boulder etc. from the land of village Billi Markundi notified under Section 4 of the Indian Forest Act, 1927. The petitioners are carrying out mining operations in the forest land. With regard to some of the petitioners it was alleged that they are carrying business in the area which had already been notified as forest area under Section 4 of 1927 Act. It was pleaded by the State that grit, boulder etc. are being procured and transported from the forest which are the forest produce. The Transit Rules, 1978 has already been upheld by this Court.

21. The Division Bench after hearing the parties dismissed all the writ petitions holding the liability of the petitioners to pay transit fee. The High Court held that validity of the Rules have already been upheld by this Court in *State of U.P. vs. Sitapur Packing Wood Suppliers,* 2002 (4) SCC 566. The Court upheld the 2004 Amendment. The High Court also held that the words "brought from forest" as

occurring in Section 2(4)(b) of the 1927 Act, necessarily implies that it passes through the forest. It also held forest must be understood according to its dictionary meaning. This description covers all statutory recognised forest, whether designated as reserve, protected or otherwise. The Court held that all goods are passing through forest, hence, petitioners cannot deny liability to pay transit fee. The increase of transit fee to Rs.38/- can neither be said to be excessive or exorbitant or prohibitive.

22. The several civil appeals have been filed against the above judgment where the appellants reiterate their claim as they raised before the High Court.

Civil Appeal arising out of SLP(C)No.1675 of 2012 ***State of U.P.& Ors. vs. M/s. Ajay Trading (Coal)Co.& Ors.***

(arising out of the judgment dated 11/21.11.2011) in Writ Petition No.963 of 2011-M/s. Ajay Trading (Coal)Co.& Ors. vs. State U.P. & Ors.)

23. By judgment dated 11.11.2011, two batches of writ petitions were decided. First batch consisted of Writ (Tax) No.327 of 2008*(NTPC Limited & another vs. State of U.P. and others)* and other connected matters and second batch consisted of Writ (Tax) No.963 of 2011 *(M/s. Ajay Trading (Coal) Co. and others vs. State of U.P. & Ors.)*.

24. The first group of writ petitions of which Writ (Tax) No.327 of 2008 was treated as leading writ petition, was filed against the imposition of transit fee on the transportation of soil(mitti) and coal. NTPC Limited is a Government of India undertaking engaged in generation of electricity in its various units, one of them being Singrauli Super Thermal Power Station at Shakti Nagar, District Sonebhadra which is a Coal Based Thermal Power Station. For disposal of fly ash, soil is excavated from non-forest areas and it is transported by the route, which does not fall within the forest area. The Divisional Forest Officer has demanded transit fee on transportation of soil. By amendments the petitioners were also permitted to challenge Fourth and Fifth Amendment Rules, 1978.

25. The second group of writ petitions of which Writ (Tax) No.963 of 2011*(M/s. Ajay Trading((Coal) Co. and others vs. State of U.P. & ors.)* was treated as leading petition. That petitioners are incorporated as Public Limited Co./Private Lt. Co./Proprietor Firm Manufacturers and Traders of goods made of forest produce, the miners, as transporters of forest produce who challenged the applicability of Indian Forest Act, 1927 on mines and minerals and other forest produce. The validity of Fourth and Fifth Amendment Rules by which transit fee was increased was also challenged. Both the above batch of writ petitions consisted of a large number of writ petitions dealing with various materials raising various facts and grounds, some common and some different.

26. The Division Bench by its judgment dated 11.11.2011 has set aside the Fourth and Fifth Amendment Rules increasing the transit fee. The Court recorded its conclusion in paragraph 187 of the judgment on various submissions raised by the learned counsel for the parties before it.

27. The claim of various writ petitioners that they are not liable to pay transit fee was, however, not accepted. Aggrieved against the judgment dated 11.11.2011 in so far as it struck down Fourth and Fifth Amendment Rules, the State of U.P. has come up in appeals whereas writ petitioners who were denying the liability to pay transit fee have filed appeals against the judgment dated 11.11.2011 reiterating their claim that they are not liable to pay transit fee on various grounds as raised in their writ petitions. The claims in various writ petitions are different and also founded on different grounds. It is neither necessary nor desirable to notice the facts and claim in each case separately. The writ petitions which have been decided by both the judgments dated 27.04.2005 as well as 11.11.2011 consisted of different nature of writ petitions which can be broadly described in few groups. It shall suffice to notice facts and claims as raised in few cases of each group:

Group(A) This represents petitioners who have obtained mining leases under U.P. Minor Minerals (Concession) Rules, 1963 as well as leases of major minerals for mining of various minerals. Some of the mining lease holders are also transporting the minerals. There are other categories of petitioners who are only transporting the minerals by their factories. Stone crusher, dealers who are crushing the minerals and transporting finished materials, all these petitioners denied their liability to pay transit fee.

Petitioners claim that the stone ballasts and grit, boulders etc. are minerals which are covered under MMDR Act, 1957 and no transit fee can be charged under 1978 Rules. Some of the petitioners say that they are transporting the minerals through State and National Highways by paying toll tax. Petitioners further state that the transit fee is charged twice that is on raw material as well as on finished goods which is not permissible. Check posts have been put on State and National Highways which are illegal.

Group(B) Petitioners in this group deal with coal/ hard coke/coal briquettes / softcoke /cinder (rejected coke). Petitioners claim that coal is not forest produce and it is governed by various Parliamentary Acts which covers the field. Petitioners further pleaded that they are not mining coal from forest area rather they are purchasing from Coal India Ltd. after payment of necessary expenses. They are not using any forest land and rather are using State and National highways and PWD roads. Some petitioners obtained coal from a company or dealer by paying necessary charges. The petitioner is using U.P. roads as a passage only and going out of State of U.P. that is to Delhi and Haryana. Some petitioners also rely on exemption notification dated 29.03.2010.

Group(C) This group consisted of limestone, calcium hydroxide, marble, calcium oxide, dolomite, pawdis, etc. Petitioners claim that the aforesaid items are not forest produce. They further pleaded that they are using State and National highways as well as PWD roads and not using any forest road. They further pleaded that twice transit fee is charged, firstly on raw material and secondly on the finished products by Fourth and Fifth Amendment.

Group(D) This group consists of petitioners who are dealers in plywood, imported timber/wood, bamboo, veneer, waste of plywoods, wood charcoal. Petitioners claim that they are not passing through forest area in U.P. They are not transporting any forest produce rather are transporting finished goods. Petitioners are purchasing timber which is coming out of the country.

Group(E) This group consists of petitioners dealing in fly ash, clinkers and gypsum. Petitioners claim to obtain the aforesaid material by manufacturing process. Petitioners claim that the aforesaid articles are not forest produce since they undergo chemical process.

28. In so far as writ petition included in group 'A' is concerned, we have noticed above the facts of Writ Petition No.26273 of 2004, *M/s. Kumaon Stone Crusher,* decided on 01.07.2004. Group 'B' consisting of petitioners who are dealing in coal/ hard coke/coal briquettes/soft coke/cinder(rejected coke), etc. C.A. No.2706 of 2008 *(M/s. Krishna Kumar Jaiswal vs. State of U.P. & Ors.,* is one of such writ petitions which was dismissed by the High Court on 27.04.2005.

29. In group 'B' reference is made to Civil Appeals arising out of SLP(C)Nos.34909-34916 of 2012 *(M./s. Anand Coal Agency & Ors. etc.etc. vs. State of U.P. & Ors. etc.etc.)*. The writ petitioners-appellants are involved in trading of coal. Petitioners get coal after the acceptance of their bid by the Coal India Limited for the coal field concern. The petitioners imports coal from the outside the State of U.P. by road and do not use forest roads. The coal is transported only by National highways and PWD roads. It was stated that collection of transit fee on coal is illegal and without jurisdiction. Levy on schedule minerals is exclusively subject matter of MMDR Act.

30. Another case in this context is Civil Appeal arising out of SLP(C)No.981 of 2012 *(Lanco Anpara Power Ltd. vs. State of U.P. & Ors.)*. The writ petitioner-appellant is a Company carrying on the business in generation, distribution and sale of electricity in the State of U.P. Transit fee is charged on transportation of coal from the colliery to the thermal power unit of the petitioner at Anpara. The petitioner contends that condition precedent for applicability of transit fee with regard to forest produce as referred to in Section 2(4)(b)(iv) is that genesis of the produce in question must be traceable to forest. In the present, coal brought by the petitioner does not owe its genesis to a forest. The transit fee thus cannot be levied.

31. In group 'C', one of the cases is Civil Appeal arising out of SLP(C)No.36272 of 2011 (*Agra Stone Traders Association & Ors. vs. State of U.P. & Ors.*, the writ petitioners-appellants are engaged in the business of purchasing and selling of marbles, marbles goods, marble chips, stone chips, stone powder, dolomite, limestone chips and pawdis from the State Rajasthan, Madhya Pradesh, Karnataka, Andhra Pradesh, Orissa, etc. from various wholesale shopkeepers, industries/factories situated in the above said States. After purchasing the above said materials/finished goods the same are transported by them within the State of U.P. for sale to the consumers from the shops of the writ petitioners. The above materials are not directly transported from mines nor the same are in original form of mines and minerals. The petitioners have all necessary passes and invoices from different States. However, when petitioners' vehicles enter into the State of U.P. transit fee is being charged under 1978 Rules. The petitioners denied their liability to pay transit fee.

32. One of such cases is Civil Appeal No.1697 of 2012 *(M/s. Aditya Birla Chemicals (India) Limited vs. State of U.P. & Ors.)*. The writ petitioner-appellant is a public limited company who is engaged in the business of manufacture of chemicals and uses calcium hydroxide and calcium oxide. The petitioner pleads that calcium hydroxide is manufactured by treating lime with water at a particular temperature and calcium oxide is made by thermal decomposition of materials such as limestone, that contain calcium carbonate in a lime kiln which is accomplished by heating the material to above 825 degree centigrade. These products were also purchased from registered traders/manufacturers of the State of Rajasthan after obtaining invoices and passes. On such transportation the State of U.P. is levying transit fee. The product manufactured and purchased by the petitioners is not forest produce and no transit fee can be levied.

33. In group 'D', one of the cases is Civil Appeal arising out of SLP(C) No.30185 of 2012 *(Arvind Kumar Singh & Anr. vs. State of U.P. & Ors.)*, the writ petitioner-appellant carries on the business of supplying bamboo, waste of plywood and small twigs/debarked jalawani lakdi of eucalyptus and poplar trees to paper manufacturing units. The paper manufacturing units, to which the petitioner supplies are situate in the State of Haryana, Punjab, Uttar Pradesh and Madhya Pradesh. Waste of plywood is a waste product obtained from the plywood industries, which is processed to obtain chips. The purchases are not made by the petitioner inside any forest of Uttar Pradesh or any other State. The loaded trucks of the petitioner do not pass through any forest road. The waste of plywood and veneer is neither timber nor any kind of forest produce. They are products of human/mechanical effort and labour and a result of a manufacturing process. There is no liability to pay transit fee on the above items.

34. In group 'E', one of the cases is Civil Appeal arising out of SLP(C)No.5760 of 2012 *(Ambuja Cements Limited vs. State of U.P. & Ors.)*. The writ petitioner-

appellant is an ISO Co. for manufacturing of cement. The fly ash (a by product of Thermal Power Plants, purchased by the petitioners); and gypsum (a raw material used in the manufacture of cement and purchased by the petitioner) and clinker is not a forest produce. Clinker/fly ash is an industrial produced and cannot fall in the ambit of forest produce as defined under Section 2(4) of 1927 Act. The manufacture of clinker comprises of two stages. In stage one raw material like lime stone, clay, bauxite, iron ore and sand are mixed in specific proportion and raw mix is obtained and in stage second the raw material is fed into kiln whereby at high temperature, chemical reaction occurs and the product obtained is 'alite' which is commercially sold as clinker. The petitioner though was not a party in the writ petition before the High Court but has filed the SLP with the permission of the Court granted on 10.02.2012.

III. TRANSFER PETITIONS

35. **Transfer Petition No.18 of 2012** has been filed under Article 139A for transferring the Writ Petition No.40 of 2000 pending in the High Court of Judicature at Allahabad. The writ petitioner is engaged in business of manufacturing and dealing in aluminium and semis. Hindalco owns and operates the Aluminium plant at Renukoot and captive thermal power plant is at Renusagar. Hindalco uses both bauxite and coal in the production of aluminium.

36. In December, 1999, the State of U.P. demanded transit fee on transport of minerals (bauxite and coal). Aggrieved thereby Writ Petition(C) No 40 of 2000 was filed. An Interim order was passed on 18.01.2000 restraining forest department from charging transit fee. This interim order continued till 29.10.2013 when this court passed detailed interim order.

37. The petitioner's case is that in SLP(C) No.11367 of 2007, *Kanhaiya Singh & Anr. Versus State of U.P.,* the same question is engaging attention of this Court, hence, the Writ Petition filed by the petitioner be transferred and heard along with the aforesaid Special Leave Petition.

38**.** **Transfer Petition No.44 of 2012** has been filed to transfer Writ petition (tax) No.1629 of 2007 to hear it with SLP(C) No.11367 of 2007. The petitioner has set up coal based thermal power plant at Renusagar for captive generation of power which it supplies continuously to the aluminium manufacturing unit of the petitioner at Renukoot. In the process of generation of power the said thermal power plant produces the fly ash which needs to be disposed of as per the directions of the Central Government.

39. The petitioner has entered into agreement with various cement manufacturers for lifting, disposal of fly ash. From November 2007, the forest department of the State started demanding transit fee from each Truck/Dumper.

Even though the payment of any levy is the responsibility of contractors who are lifting the fly ash. The petitioner filed Writ Petition No.1629 of 2007 challenging the aforesaid demand of transit fee on fly ash in which the interim order was passed by the High Court on 29.11.2007. In the aforesaid background it was prayed that Writ Petition be transferred and heard along with SLP(C) No.11367 of 2007.

40. **Transfer Petition No.76 of 2012** has been filed by *Aditya Birla Chemicals (India) Ltd.* for transfer of Writ Petition no.101 of 2008 pending in the Allahabad High Court. The Petitioner is engaged in the business of manufacturing and sale of chemicals, casting soda, bleaching powder, sodium chloride etc. at its factory situated at Renukoot, District Sonebhadra. For continuous supply of power to the manufacturing unit petitioner has set up coal based thermal power plant at Renusagar. Fly ash is generated from thermal power plant which needs to be disposed of. Petitioner made available the fly ash to seven cement industries free of cost. The petitioner maintained its own roads which is connecting National Highway No. 76E which goes one side to Madhya Pradesh and to Mirzapur on other side. From November 2007, forest department of U.P. started demanded transit fee on supply of fly ash. After filing the Writ petition the various developments took place including decisions of bunch of writ petitions of 11.11.2011.

41. The petitioner case is that similar issues are pending in SLP(C) No.11367 of 2007 and Writ Petition be transferred and heard along with the aforesaid Special Leave Petition. This Court in all the above three Transfer Petitions, on 19.11.2012 passed an order to take up these matters along with the SLP(C) No.11367 of 2007.

IV. CONTEMPT PETITIONS

42. Contempt Petition No.251 of 2008 in I.A.No.7 of 2008 in Civil Appeal No.2797 of 2008, the members of applicants association are plying public transport truck carrying minor minerals like boulders, sand, stone, dust, etc. Trucks do not enter into any forest area or do not uses any forest road. In C.A.No.2797 of 2008 an interim order was passed by this court directing that there shall be stay of demand by way of transit fee in the meantime. Applicants case is that the applicant's association has also been impleaded in C.A. No. 2797 of 2008. It is pleaded that despite the knowledge of interim order of this court the respondent at different check posts are demanding transit fee. Prayer has been made to issue Show Cause Notice and initiate contempt proceedings. No Notice has been issued in the contempt proceeding as yet.

43. Contempt Petition(C) No.199-201 of 2014 in SLP(C) No.31530 of 2011 and other two Special Leave Petitions. Applicants are engaged in the business of transportation of sand, stones, polish stones, rough stones, crushed stones, stone grits, stone marbles etc. Applications claimed that whenever their vehicles entered in the

State of U.P., Transit fee is demanded. It is contended that in SLP(C) filed by the applicants this court on 02.12.2012 stayed the recovery of transit fee. Applicants case is that despite the knowledge of interim order dated 02.12.2012 the same is not being complied with, hence, the Contempt Petition has been filed. In Contempt application, no notice has been issued.

44. **One Writ Petition (C)No.203 of 2009** *(M/s. Pappu Coal Master & Ors. vs. State of U.P. & Anr.)* has also been filed where petitioners have prayed that respondent may be restrained from charging any fee from petitioners under the 1978 Rules as amended by Amendment Rules dated 14.06.2004. This writ petition was directed to be listed along with SLP(C)No.11367 of 2007.

V. CIVIL APPEALS AGAINST THE JUDGMENT DATED 14.05.2007 OF THE MADHYA PRADESH HIGH COURT

45. The State of Madhya Pradesh has filed appeals against a common judgment dated 14.05.2007 of the High Court of Madhya Pradesh. Civil Appeal arising out of SLP(C)No.6956 of 2008 has been filed against the common judgment rendered in six writ petitions which also included Writ Petition No.2309 of 2002 (Northern Coalfields Limited vs. State of Madhya Pradesh and ors.

46. The writ petitioners-Northern Coalfields Limited is engaged in excavation and sale of coal. The State of M.P. framed M.P. Transit (Forest Produce) Rules, 2000 for imposing transit fee. The writ petitioner pleaded in the writ petition that the State of M.P. has no legislative competence for imposing any tax on coal. It was further pleaded that fee can be imposed only if there is any *quid pro quo* between the services rendered and fee charged. Notification dated 28.05.2001 issued by the State of M.P.fixing fee of Rs.7/- per metric tonne was challenged. Following reliefs were sought in the writ petition:

> *"i) Issue on appropriate writ/writs, order/orders, direction/ directions to quash the authorisation of imposing transit passes on movement of coal under M.P. Transit pass (Forest Rule) 2000 ANNEXURE-P/1.*
>
> *ii) To quash the fixation of rates of fees for issuance of transit passes ANNEXURE-P/2.*
>
> *iii) To quash the demand for payment of fees for transit of coal ANNEXURE-P/3*
>
> *iv) To grant such other appropriate relief as deemed and fit and proper in the facts and circumstances of the case."*

47. More or less similar reliefs were claimed in the other writ petitions before the M.P. High Court. In some of the writ petitions prayer was also made for issuing writ

of mandamus declaring Section 2(4)(b)(iv) and Section 41 of the 1927 Act as unconstitutional and *ultra vires t*o the extent it relates to minerals. Prayer was also made to declare M.P. Transit (Forest Produce) Rules, 2000 and notification dated 28.05.2001 as *ultra vires* to the power of the State under 1927 Act.

48. Counter-affidavit was filed by the State contending that as per Section 41 of 1927 Act, the State is conferred with a power to make rules to regulate the transit of all timer (sic : timber) and other forest-produce.

49. The High Court after hearing the parties and considering the submissions by the impugned judgment quashed the notification dated 28.05.2001 by which fee of Rs.7/- was fixed. The High Court also directed refund of the amount in a phased manner with a period of five years. Aggrieved by the judgment dated 14.05.2001 the State of Madhya Pradesh has filed these appeals.

50. We have heard learned counsel appearing for the States as well as learned counsel appearing for various writ petitioners.

51. While referring the respective submissions of the learned counsel, submissions on behalf of the writ petitioners have been referred to as submissions of writ petitioners and the submissions on behalf of the States have been referred to as on behalf of the State.

VI. Submissions with regard to the judgment of Uttarakhand High Court

52. As noted above both the State of Uttarakhand and State of U.P. have challenged the judgment of Uttarakhand High Court. Shri Dinesh Dwivedi, learned senior counsel questioning the judgment dated 01.07.2004 of Uttarakhand High Court in *M/s. Kumaon Stone Crusher vs. State of Uttarakhand*, submits that boulders crushed into grits retain same characteristic that is forest produce. By obtaining grits, stone chips and dust no new material is obtained. Challenging the judgment of Uttarakhand High Court in *M/s. Gupta Builders* dated 26.06.2007, it is submitted that the mere fact that royalty has been paid by the writ petitioners in accordance with the Uttar Pradesh Minor Minerals (Concession) Rules, 1963 as adopted in Uttarakhand by Uttarakhand Minor Minerals (Concession) Rules, 2001 shall have no effect on the entitlement of the State to levy transit fee. The judgment of the High Court that no transit fee can be levied on the minerals is erroneous. It is further submitted that the High Court erred in adopting a very restrictive meaning of word 'forest' whereas the forest has to be understood in a wide sense. It is contended that Forest Act, 1927 and MMDR Act, 1957 operate in different fields. In so far as the case of the writ petitioners is that transit fee is being charged for second transit also. It is submitted that transit pass has its destination and after it reaches its destination, the pass comes to an end, the transit fee can be validly charged.

53. Replying the above submission of State, learned counsel for writ petitioners submits that main challenge in the writ petitions filed by petitioners was that no Transit Fee can be levied on finished products from the stone crusher. It is contended that river bed materials i.e. boulders and bajri by applying mechanical process are converted into small size stone grits, chips and dust which become a commercial commodity and ceases to be a Forest Produce therefore no Transit Fee can be charged. It is further contended that in Section 2(4)(b) of the 1927 Act the words 'found in' and 'brought from' are qualified by word 'when', which denotes the time factor. The word 'when' signifies that the item while leaving the forest is in continuous process of transit from the point where it is said to be found in. But once, the continuous transit of forest produce terminates at any point of place which is not a forest item included in Clause B(4) (2), shall cease to be a Forest Produce and further transit of such material being material not brought from forest shall not attract tax under Section 41 of Act, 1927.

54. The stone or sand which is in its primary or dominantly primary state is subjected to a manufacturing process for making it marketable product, which is not a Forest Produce. Act, 1927 does not provide for any definition of term 'Manufacturing Process'. The term 'Manufacturing Process' is to be given a liberal interpretation. The process of stone crushing have to be held to be Manufacturing Process. It is further contended that levy of Transit Fee on Transit Pass does not have any relationship with the distance of the destination of the transit and the Transit Pass originally issued at the time of First Sale of transit required only on endorsement and the insistence of levy of Transit Fee at the time of second transit is irrational and unreasonable.

55. Learned counsel for the State of U.P, challenging the judgment of High Court of Uttarakhand has also raised the similar submissions as has been raised by the learned counsel for the State of Uttarakhand.

VII. SUBMISSIONS RELATING TO JUDGMENTS OF THE ALLAHABAD HIGH COURT.

56. Following are various submissions on behalf of several writ petitioners and their reply by State:-

(i) (a) The products which are being transited by them or on their behalf are not Forest Produce since they have undergone manufacturing process resulting into a new commodity. All the writ petitioners supported the judgment of Uttarakhand High Court dated 01.07.2004 in *M/s Kumaon Stone Crusher* wherein, the High Court has held that no levy of Transit Fee can be made on the finished items of stone i.e. stone grits, sand grits & chips etc. They submitted that in the stone crusher, factories, boulders and stones obtained from different mining lessees are subjected to a process by which different items are formed thereby losing their character of Forest

Produce. Several other materials like lime stone, fly ash, clinker, calcium hydro-oxide and calcium oxide, cinder, gypsum are also obtained after undergoing a manufacturing process, which are no longer a forest produce. Another group of petitioners who deal with marble stone, stone slabs and tiles also raise similar submission that marble slabs are finished goods which are different from Forest Produce and no Transit Fee can be demanded.

(b) Another group of petitioners who deal with in veneer, plywood also claimed that after undergoing manufacturing process veneer and plywood are no longer a Forest Produce hence, no Transit Fee can be charged. Last category of articles for which non-leviability of transit fee is claimed comprises of coal, hard coke, finished coal, coal briquettes, soft-coke. With regard to coal it is submitted that coal is not a Forest Produce at all, since it is obtained from collieries which are not in forest. It is further submitted that in view of Mines and Minerals (Development & Regulation) Act, 1957 (hereinafter referred to as 'MMDR Act, 1957) and Coal Bearing Areas (Acquisition & Development) Act, 1957, the regulation of coal is outside the Indian Forest Act, 1927 (hereinafter referred to as 'Act, 1927').

(c) The above submissions of writ petitioners have been refuted by learned counsel appearing for State of U.P. and State of Uttarakhand. It is submitted that stone boulders and stone ballasts after being subjected to crushing by which stone grits, sand grits & chips are obtained, does not in any manner change the nature of product. Stone grits, sand grits & chips obtained after crushing are still a Forest Produce on which Transit Fee is charged. Accepting the aforesaid argument will lead to a situation where State shall lose its regulatory power on Forest Produce on mere facial change of the Forest Produce. With regard to other articles the State has refuted the submission and it is submitted that all the articles claimed by the writ petitioners are Forest Produce which are subject to Transit Fee.

(d) With regard to parliamentary enactments relating to coal as claimed by the writ petitioners, it is submitted that parliamentary enactments regarding coal are on different subjects and has no effect on the Act, 1927 and the rules framed therein.

(e) Learned Additional Advocate General of the State of U.P., during his submission has submitted that in so far as, fly ash, clinker and synthetic gypsum are concerned, the State does not claim them to be Forest Produce and no Transit Fee shall be charged on fly ash, clinker and synthetic gypsum. He, however, submitted that gypsum is a naturally mined Forest Produce and what is excluded is only synthetic gypsum.

(f) For veneer and plywood, it is submitted that veneer is small pieces of timber which remains a Forest Produce and plywood is also a kind of timber which retains its natural character of Forest Produce. With other articles, with regard to

which, it is claimed that by manufacturing process and chemical treatment they are transformed to new commercial commodity is refuted by counsel for the State.

(ii) (a) One of the main planks of attack of learned counsel for the writ petitioners to the 1927 Act & 1978 Rules is based on 1957 Act. It is submitted that 1957 Act is enacted by the Parliament in reference to Entry 54 of List I of Seventh Schedule of the Constitution of India. It relates to regulation of mines and the development of minerals to the extent to which such regulation and development under the control of the Union is declared by the Parliament by law. The legislative competency of the State with regard to mines and minerals development is contained in Entry 23 of List II which Entry is subject to provisions of List I with respect of mines and minerals development under the control of the Union of India. It is submitted that in so far as transit fee on minerals is concerned, the entire field is covered by 1957 Act wherein there is a declaration by the Parliament that Union shall take under its control the regulation of mines and the development of minerals to the extent provided therein. The entire regulation of minerals including its transport being covered under 1957 Act, the State is denuded of any jurisdiction to legislate. It is further contended that 1957 Act is a special enactment which shall override the 1927 Act which is a general enactment. It is further contended that provisions of 1978 Rules and the provisions of Section 41 of Forest Act, due to the repugnancy to the provisions of 1957 Act shall stand overridden. The transit and transportation of minerals is an integral part of regulation and development of minerals and the Parliament having unequivocally enacted the law it is to occupy the entire field regarding the transit and transportation of minerals and development of mines. No other law can trench upon occupied field. The provision of Forest Act, 1927 including Section 41 and Transit Fee Rules, 1978 framed thereunder shall stand impliedly repealed after enactment of 1957 Act, especially after insertion of Section 4(1A) and Section 23C by Act 38 of 1999 with effect from 18.12.1999.

(b) Learned counsel for the State refuting the above submissions contends that repugnancy between a parliamentary statute and a statute of State legislature arises when the two laws operate in the same field, they collide with each other. It is submitted that subject matters of 1927 Act and 1957 Act are distinct and different. In 1927 Act provisions relating to transport of forest produce is only incidental and ancillary in nature. The object of two legislations is entirely different. Forest Act, 1927 comprehensively deals with forest and forest wealth whereas 1957 Act deals with mines and minerals wealth. He further submits that 1957 Act does not impliedly overrule the 1927 Act, both the legislations being under different subjects. It is submitted that argument of implied repeal could have arisen only where there is no option. To take a view that 1957 Act shall impliedly overrule 1927 Act regarding transit of forest-produce, the control of the State under Section 41 shall be lost and the very purpose and object of the Forest Act shall be defeated. An activity of mining

held in a forest cannot be regulated and prevented by mining officers in the forest area, they cannot enter into forest area and exercise their powers. The machinery for enforcement of forest laws and the mining laws are different. Their powers are different, officers are different, consequences of breach are different and both provisions operate in different fields. It is thus submitted that the provisions of Indian Forest Act, 1927 in so far as Section 41 of 1927 Act and 1978 Rules are concerned, shall not stand impliedly overruled by Parliamentary enactment of 1957 Act.

(iii) (a) It is submitted that Division Bench of the Allahabad High Court in *Kumar Stone Works and others* by its judgment dated 27.04.2005 has mis-interpreted the words "brought from" as contained in Section 2(4)(b) of 1927 Act. It is submitted that there is no issue with regard to the words "found in". The words "found in" clearly mean found in a forest. The word "when" signifies the physical presence of the item. The word 'when' also qualifies the words "brought from a forest". Thus when a forest produce is brought from a forest, the things mentioned in sub-clause (1) of sub-section (4) of Section 2 will be treated as forest produce. The thrust of the submission is that the words 'brought from forest', mean that the forest produce originated from forest. For any produce to be forest to be brought from forest means it is starting point of transit and not in transit. The Division Bench of the High Court in its judgment dated 27.04.2005 erred in equating the words "brought from forest" as "brought through forest". The High Court has held that even forest produce passes through forest area it shall be liable to payment of transit fee.

(b) It is further submitted by the learned counsel for the writ petitioners that in fact the Division Bench of the Allahabad High Court wide (sic : vide) its order dated 04.03.2008 in *M/s. Nagarjuna Construction Ltd.* has already expressed its disagreement with the Division Bench judgment in *Kumar Stone Works and others v. State of U.P. and others,* 2005 (3) AWC 2177, and referred following two questions for consideration of the larger Bench:

> *(i) Whether the words 'brought from' used in section 2(4)(b) of the Indian Forest Act would cover such items mentioned in sub-clauses (i) to (iv) of Section 2(4) (b) which though did not have origin in the forest but they are transported through a forest?*
>
> *(ii) Whether the interpretation of the words 'brought from' given by Division Bench in Kumar Stones Case(Supra) is correct? Let the papers be placed before the Hon'ble Chief Justice for appropriate orders."*

(c) It is submitted that the Division Bench of Allahabad High Court while delivering the judgment dated 11.11.2011 although noticed that the above questions

have been referred to for consideration of a larger Bench did not await the judgment of larger Bench rather chose to follow the Division Bench judgment in *Kumar Stone Works*.

(d) Learned counsel for the State has refuted the aforesaid submission. It is submitted that the Division Bench of the Allahabad High Court in *Kumar Stone Works* has correctly held that the term 'brought from a forest' must be read to mean 'brought through a forest'. It is submitted that any other interpretation would render the term to be in conflict with the term 'found in a forest'. It is submitted that the High Court has referred to various dictionary meanings of word 'brought' and after relying on said definition the Division Bench held that the words 'brought from' mean 'brought through forest'.

(iv) (a) One more submission which has been raised by the writ petitioners is that the word 'forest' as used in 1927 Act as well as in Transit Fee Rules, 1978 has to be read as 'forest' as enumerated in the 1927 Act, i.e., a reserved forest, a village forest and a protected forest. Thus, transit fee can be charged only when forest produce transit through a reserved forest, a village forest or a protected forest. It is submitted that the Division Bench in its judgment dated 11.11.2011 has adopted a very expensive definition of forest when it held that the forest has to be understood as a large track of land covered with trees and undergrowth usually of considerable extent, on the principles of sound ecological and scientific basis reflecting sociological concerns. Learned counsel for the petitioners submits that the definition of forest as adopted by the Division Bench of Uttarakhand High Court in *M/s. Gupta Builders* in Writ Petition No.993 of 2004 giving rise to C.A.No. 1008 of 2011 *(State of Uttar Pradesh vs. M/s. Gupta Builders & Ors.)* is a correct definition of forest. It is submitted that Uttarakhand High Court has rightly adopted a restrictive meaning of forest in the Forest Act, 1927.

(b) The above submission of learned counsel for the petitioners is opposed by the State of U.P. It is submitted by learned senior counsel that the word 'forest' has to be understood broadly and the definition of forest as given by this Court in *T.N. Godavarman Thirumulkpad vs. Union of India and others,* 1997 (2) SCC 267, is to be followed and the Division Bench in its judgment dated 11.11.2011 has correctly interpreted the word 'forest'.

(v) (a) Some of the writ petitioners have submitted that although they are not passing through any forest but still transit fee is charged by the State on the ground that several State highways, PWD roads and several roads have been declared protected forests by the State of U.P. by issuing notification under the provisions of 1927 Act. It is submitted that passing through National highways and State highways cannot be treated akin to passing from any kind of forest so as to attract leviability of transit fee.

(b) Learned Additional Advocate General for the State of U.P. submits that the roads from which the petitioners claim to have passed are roads which have been declared as protected forests. Hence, forest produces transiting from the above roads are liable to pay transit fee. In support of his submission he refers to notification dated 10.02.1960 issued under proviso to sub-section (3) of Section 29 as well as Section 80A of 1927 Act.

(vi) (a) One of the submissions raised by learned counsel for the petitioner is that Rule 3 read with Schedule A of 1978 Rules is totally independent of Rule 5 and same has no correlation with each other. Rule 3and Schedule A nowhere contemplates or has a column prescribing charging of a fee. It is submitted that transit fee is chargeable on transit pass issued under Rule 4(b) which is required to be checked under Rule 6(4) only. Referring to Rule 5, it is submitted that Rule 5 contemplates charging a fee in those cases in which transit is done on the transit pass issued under Rule 4(1)(b) and checked under Rule 6(4).

(b) It is submitted that fee cannot be charged in any other case. The above submissions have been refuted on behalf of the State. It is contended that on all transit pass issued under the Rule 1978 transit fee is required to be paid.

(vii) The petitioners further submitted that although no final notification has been issued under Section 20 of 1927 Act but still the Forest Department treats several areas in the District of Sonebhadra and other Districts as forest area and transit fee is asked for treating the said areas as forest area. It is submitted that Section 4 notification is only a preliminary notification which cannot be treated as notification declaring the area as reserved forest.

(viii) (a) Learned counsel for the petitioners submitted that the Constitution Bench judgment of this Court in *State of West Bengal vs. Keshoram Industries and ors,* (2004) 10 SCC 201 where Constitution Bench held that Union's power to regulate and control does not result in depriving the States of their power to levy tax or fees within their legislative competence without trenching upon the field of regulation and control of the Union, need not be relied on.

(b) The Constitution Bench also interpreted Seven-Judge Bench decision in *Synthetics and Chemicals Ltd etc vs. State of U. P. and ors.,* (1990) 1 SCC 109. It is submitted that with regard to the interpretation put by the Constitution Bench in *State of West Bengal vs. Keshoram Industries (supra)* a reference has already been made to a Nine Judge Bench by reference order dated 30.03.2011 in *Mineral Area Development Authority vs. Steel Authority and India Ors.,* (2011) 4 SCC 450.

(ix) The State of U.P. cannot realize transit fee as per Third Amendment Rules dated 09.09.2004. Third Amendment Rules having been substituted by Fourth & Fifth

Amendment Rules and Fourth & Fifth Amendment Rules having been struck down by judgment dated 11.11.2011, Third Amendment Rules shall not revive. Third Amendment Rules are not in existence.

VIII. Following are the submissions on behalf of State of U.P. in support of Civil Appeals filed by them and their reply by the writ petitioners thereto:-

57. Shri Ravindra Srivastava, learned senior counsel leading the arguments on behalf of the State of U.P. contends that this Court in *State of U.P. and others vs. Sitapur Packing Wood Suppliers and others,* 2002(4)SCC 566, has upheld the validity of 1978 Rules and has pronounced that transit fee is a regulatory in nature and for regulatory fee *quid pro quo* is not necessary. The High Court for its judgment has relied on *Jindal Stainless Ltd.(2) and Anr. Vs. State of Haryana and Ors.,* 2006 (7) SCC 241, which has been overruled by 9-Judges Constitution Bench in *Jindal Stainless Ltd. & Anr. v. State of Haryana & Ors.,* 2016(1) Scale 1, the very basis of the judgment of the High Court is knocked out. The State being entitled to levy transit fee it can change the basis of levy of transit fee. That option on the basis of *advalorem* is also permissible both for fee and tax and no exception can be taken to the Fifth Amendment on the ground that the Fifth Amendment adopts *advalorem* basis for fixing the fee. The increase in transit fee by Fourth and Fifth Amendments cannot be held to be arbitrary or excessively disproportionate. The finding of the High Court that the State had not provided any data to justify the increase in transit fee is incorrect since the State had in fact by a table which itself has been noted in paragraph 85 of the judgment has mentioned the income and expenditure related to transit fee, a perusal of which could indicate that the expenditure of State Government was much more than collection of transit fee even after Fifth Amendment. The value of timber and other forest-produce has increased manifold. The increase in levy of transit fee had become necessary to meet the ever increasing expenditure incurred by the State. The High Court committed error in striking down Fourth and Fifth Amendments without there being any sufficient and valid ground.

58. Learned counsel for the writ petitioners have vehemently opposed the above submission and supported the judgment of the High Court striking down the Fourth and Fifth Amendment Rules. It is submitted that *Jindal Stainless (2)* overruled by the judgment of 9-Judges constitution Bench does not have much bearing in the facts of the present case. The High Court independent of reliance placed on *Jindal Stainless (2)* has held that transit fee is excessive in nature and the State of U.P. had not produced data for justifying the increase in the transit fee. It is true that for regulatory fee *quid pro quo* is not to be proved but the State was obliged to prove a broad correlation between the levy of transit fee and the expenditure incurred by the State on the transit of forest-produce. The High Court in paragraph 177 to 186 has

considered the issue in detail and has returned findings to support its conclusion that exorbitant increase in transit fee has robbed the regulatory character of the transit fee which has become confiscatory and has partaken character of tax. The figures given in paragraph 85 of the judgment are figures of expenditure of the entire forest department which can have no correlation with the collection of transit fee. The entire expenditure of the forest department cannot be met by collection of transit fee. The State does not give any detail of expenditure which it has actually incurred in regulation of transit of the forest-produce.

59. Learned counsel for the writ petitioners have demonstrated by different charts of the respective increase in the transit fee by Fourth and Fifth Amendment Rules as compared to fee which was being charged under Third Amendment Rules. It is submitted that regulatory fee could not have been charged on *advalorem* basis which is generally adopted for levying a tax and not a fee. The charging of transit fee by Fourth and Fifth Amendment Rules, is for the purposes of augmenting the Revenue of the State and not for regulation of transit which changes the character of transit fee into a tax, which is not permissible under law.

60. After noticing the respective submissions of both parties, we now proceed to consider them in the same seriatum.

IX. Whether by Manufacturing process/chemical Treatment as claimed by the writ petitioners, the forest produce looses its character of forest produce.

61. We first take the case of writ petitioners of stone boulders which are crushed into stone grits, stone chips and stone dust etc. Stone boulders are obtained from riverbed, stone rocks & stone mines. After crushing of the stone boulders, stone grits, stone chips and stone dust are obtained which does not transform into any new commodity, except that the stone in smaller pieces and shapes are obtained. The Allahabad High Court, in its judgment in Kumar Stone Works (Supra) decided on 27.04.2005 has given a detailed reasoning for not accepting stone grits, stone chips and stone dust as a new commodity. It held that the character of Forest Produce is not lost by such crushing of the stone. High Court of Uttarakhand has taken a contrary view in its judgment dated 01.07.2004 in *Kumaon Stone Crusher* (Supra), as noted above.

62. Learned counsel for the writ petitioners have relied on few judgments of this Court which need to be noticed. Reliance is placed on Two Judge Bench in *Suresh Lohiya vs. State of Maharashtra and another,* (1996) 10 SCC 397. In the above case, the question for consideration was, as to whether, the Bamboo mat is a Forest Produce. The definition of 'Timber' and 'tree', given in sub clause 6 and sub clause 7 of Section 2 was noticed which is to the following effect:

"2.(6) 'timber' includes trees when they have fallen or have been felled, and all wood whether cut up or fashioned or hollowed out for any purpose or not; and

2.(7) 'tree' includes palms, bamboos, stumps, brushwood and canes."

63. The above judgment of this court was based on 'consideration of definition of timber and tree' as given in Section 2 (6) & 2 (7). This Court held that definition of timber included tree and all wood whether cut or fashioned or hollowed out for any purposes. This Court held that said definition of timber cannot be read in definition of tree which includes Bamboo hence, fashioned Bamboos are not included in the definition of tree. The Bamboo mat was thus held, not to be a Forest Produce. The above judgment was based on its own facts and does not help the writ petitioner in the present case.

64. In *CST vs. Lal Kunwa Stone Crusher (P) Ltd.,* (2000) 3 SCC 525, the Court was considering liability of Trade Tax on stone chips, gittis and stone ballast. The question raised before the Court was, as to whether, the stone gittis, sand chips and dust continue to be stone grits, chips and dust or after crushing them, they get converted into a new commercial products, so as to attract the tax on their sale. The case of dealer was that at the time of purchase of goods sales tax has been paid hence, goods emerging out of same are not liable to be taxed again. This Court held that the word 'stone' is wide enough to accept various forms of grits, gitti, kankar and ballast hence, no tax was leviable on the sand chips, grits & dust etc. In para 5 following was held:

"5. The view taken by the Tribunal as affirmed by the High Court is that the goods continue to be stone and they are not commercially different goods to be identified differently for the purposes of sales tax. The decision relied on by the minority view in the Tribunal in Reliable Rocks Builders & Suppliers v. State of Karnataka turned on the concept of consumption of goods for the purpose of bringing into existence new goods. In that case the Court was not concerned with an entry of the nature with which we are concerned in the present case. Where the dealer had brought into existence new commercial goods by consuming the boulders to bring out small pieces of stone, it was held that such activity attracted purchase tax. In the present case, however, stone, as such, and gitti and articles of stones are all of similar nature though by size they may be different. Even if gitti, kankar, stone ballast, etc. may all be looked upon as separate in commercial character from stone boulders offered

for sale in the market, yet it cannot be presumed that Entry 40 of the notification is intended to describe the same as not stone at all. In fact the term "stone" is wide enough to include the various forms such as gitti, kankar, stone ballast. In that view of the matter, we think that the view taken by the majority of the Tribunal and affirmed by the High Court stands to reason. We are, therefore, not inclined to interfere with the same."

65. The above judgment held that the nature and character of the stone remains the same, even after, crushing the boulders into small stones, dust etc. Reliance by the writ petitioner is also placed on judgment in (2003) 3 SCC 122, *Tej Bahadur Dube (Dead by Lrs.) vs. Forest Range Officer F. S. (S.W.), Hyderabad.* In the above case, the appellant was charged for violation of Rule 3 to 7 of the A.P. Sandalwood and Red Sanderswood Transit Rules, 1969. The assessee was found transporting finished sandalwood products. He was charged with the violation of aforesaid rules. Assessee's case was that he has obtained permission of the authorities for converting sandalwood purchased by him into various types of handles which are ultimately used in other sandalwood handicrafts. This Court held that sandalwood products which have been converted into such products after obtaining proper permission was not prohibited, in para 6 following was held:

"6. As noticed above, the original appellant was a holder of a licence to deal in and stock sandalwood. From the material on record, it is seen that the said appellant had obtained necessary permit from the competent authorities for converting the sandalwood purchased by him into various types of handles which are ultimately used in other sandalwood handicrafts which permission was valid up to 31-12-1982 period covering the period of seizure. The appellant had contended that it is pursuant to the said permission he had converted the sandalwood pellets into handles to be used in the other sandalwood artefacts and he had informed the authorities concerned about such conversion as per Exts. P-18 to P-27. It is also the case of the appellant that converted sandalwood artefacts or parts thereof do not require any transit permit and it is only sandalwood in its original form or chips and powder of sandalwood which requires a transit permit. The trial court has agreed with this submission of the appellant. We also notice under the Rules and the Act what is prohibited is the transportation of sandalwood as defined in Section 2(o) of the Act and not sandalwood products which have been converted into such products after obtaining proper permission from the authorities. Such converted sandalwood

products under the Rules do not require any transit permit. We say so because the Rules referred to in these proceedings do not contemplate such transit permit and the respondents have not produced any other Rules to show such transit permit is required. On the contrary, the respondent argues that even converted sandalwood products require transit permit because they remained to be sandalwood as contemplated under Section 2(o) of the Act. In the absence of any specific rules or provisions in the Act to this effect, we are unable to agree with this argument. We are of the opinion that once sandalwood is subjected to a certain process from which a sandalwood product is lawfully obtained, then such product ceases to be sandalwood as understood in Section 2(o) of the Act."

66. The above case also does not lend any support to the case of writ petitioners. In the above case, appellant had obtained permission of the competent authority for converting the sandalwood into various types of handles hence, the transportation was not found violative of rules.

67. In this context, it is necessary to refer to a Three Judge Bench Judgment of this court in *Karnataka Forest Development Corporation Ltd. vs. Cantreads Private Limited and others* (1994) 4 SCC 455. This Court had occasion to consider Karnataka Forest Act, 1963. Caoutchouc or latex covers natural covering sheets of various grades or not, was the question under consideration. After noticing the various dictionary meanings of caoutchouc, it was held that since processing does not result in bringing out a new commodity but it preserves the same and rendered it fit for markets, it does not change its character hence, it remained a Forest Produce. Thus rubber sheets converted from caoutchouc continue to be a Forest Produce. In the above case, this court has also held that a 'test of commercial parlance' by considering entries in sales tax is not applicable while considering the definition of Forest Produce.

68. The Court observed that the definition of Forest Produce is in technical or botanical sense. The above judgment fully supported the contention of the State that while considering the definition of the Forest Produce, scientific and botanical sense has to be taken into consideration and commercial parlance test may not be adequate in such cases.

69. We thus are of the view that judgment of Division Bench of the Allahabad High Court dated 27.04.2005 in *Kumar Stone Works* deserved to be approved and judgment of Uttarakhand dated 01.07.2004 in *Kumaon Stone Crusher* deserves to be set aside in so far as above aspect is concerned.

70. Now, we come to the case of marble slabs & tiles, chips etc. Writ Petitioners have placed reliance on Three Judge Bench Judgment in *Income Tax Officer, Udaipur vs. Arihant Tiles and Marbles Private Limited,* (2010) 2 SCC 699. The question of consideration in the above case was that whether conversion of raw marbles blocks into final products or polished marble slabs or tiles in factory constitute 'manufacture or production' so as to entitle the assessee relief under 80-1A(2) (iii). This Court held that process which was applied by the assessee will come in the category of 'manufacture or production'. In para 16 of the judgment following was stated:

> *"16. In the present case, we have extracted in detail the process undertaken by each of the respondents before us. In the present case, we are not concerned only with cutting of marble blocks into slabs. In the present case we are also concerned with the activity of polishing and ultimate conversion of blocks into polished slabs and tiles. What we find from the process indicated hereinabove is that there are various stages through which the blocks have to go through before they become polished slabs and tiles. In the circumstances, we are of the view that on the facts of the cases in hand, there is certainly an activity which will come in the category of "manufacture" or "production" under Section 80-IA of the Income Tax Act."*

71. In the above view, this Court held that assessee was entitled for the benefit of Section 80-1A of the Income Tax Act, 1961. The above case was directly concerned as to what was the 'manufacture or production', which was defined in the Act itself and the marble slabs or tiles were held to be covered by 'manufacture or production'. The case was on its own facts and the Court was not concerned, as to whether, the marble blocks after it became marble slabs or tiles loses its nature or character of Forest Produce. The said judgment does not help in the present case.

72. This Court in *Akbar Badrudin Giwani vs. Collector of Customs, Bombay,* (1990) 2 SCC 203, again reiterated that the general principle of interpretation of tariff entries according to any tax statutes of a commercial nomenclature can be departed from where the application of commercial meaning or trade nomenclature runs counter to the statutory context. In the present case statutory context of Forest Produce as defined in Act, 1927 has to be taken in its botanical and scientific sense.

73. We thus conclude that the Transit Fee on marble slabs and tiles cannot be denied and the State did not commit any error in demanding the Transit Fee on transit of aforesaid goods.

74. It goes without saying that on forest produce which are exempted by notification issued under Proviso to Rule 3 of 1978, no transit fee is leviable. One of such notification dated 29.03.2010 has been brought on record.

X. Whether coal (and its various varieties), lime stone, dolomite, fly ash, clinker, gypsum, veneer and plywood are forest produce ?

75. Coal is formed from plant substances preserved from complete decay in a normal environment and later altered by various chemical and physical agencies. There are four stages in coal formation: peat, lignite, bituminous and anthracite. The stage depends upon the conditions to which the plant remains are subjected after they were buried – the greater the pressure and heat, the higher the rank of coal. Higher-ranking coal is denser and contains less moisture and gases and has a higher heat value than lower-ranking coal.

76. The formation of coal itself is due to large tracts of forest getting buried under the ground due to natural processes such as floods and sedimentation. Further, a major portion of the coal reserves of the country are situated beneath forest lands and clearance for mining of the same from forest lands. Coal, thus, is clearly a forest produce.

77. Hard coke and soft coke are made from coal. Coke can be formed naturally as well as by synthetic method. Hard coke, soft coke, coal briquettes are all different variations of coal which do not shed their natural characteristic and are all forest produce.

78. Limestone is expressly mentioned in definition of forest produce, slake lime/ quick line (sic : lime)/hydrated line (sic : lime) are all produce of limestone. Further, produce known quicklime is produced by heating of limestone, upon which limestone breaks down into Calcium oxide (quicklime) and carbon dioxide. That upon adding water to the same, the quicklime is converted into slaked lime and thereafter, upon being carbonated, the produce will revert to its natural state of being limestone. Hence, the said process does not change the nature of the product, as the basic ingredient is essentially limestone, and merely upon heating and addition of water, the nature of the produce i.e. limestone, does not change. Hence, limestone is a forest produce.

79. Dolomite is a sedimentary rock. Dolomite is formed by the post depositional alteration of lime mud and limestone by magnesium-rich ground water. Dolomite and limestone are very similar stones and are forest produce.

80. Coming to fly ash, clinker and gypsum, learned Additional Advocate General has submitted before us that the State has accepted that fly ash, clinker an synthetic gypsum are not forest produce. Thus, fly ash, clinker and synthetic gypsum are not forest produce. Gypsum is naturally found and obtained in the natural form, hence it is a forest produce.

Veneer and waste plywood

81. The veneer is nothing but thin sheets of wood which are cut from existing logs & planks, which is then again glued upon planks of wood. The essential nature of the product of veneer is merely sliced/cut up wood. Hence, it continues to be a forest produce.

82. The waste plywood that is remains of plywood and veneer are nothing but cut-up logs. The process of manufacturing involves placing logs and wood into a specialized machine, which cuts out thin sheets of wood from the log. That when the logs reaches a certain diameter of thickness, the same can no longer be suitable for extraction by the machines and unutilized wood is left behind in the process of slicing as well. Essential character of the product does not change, hence, it comes within the definition of timber and forest produce.

XI. FOREST ACT 1927 & MMDR ACT, 1957

83. We now proceed to consider the impact of 1957 Act on Forest Act, 1927 and the Transit Fee Rules 1978 framed under Section 41 of 1927 Act. The Indian Forest Act, 1927 is a pre-constitutional legislation enacted by Indian legislature as per Section 63 of Government of India Act, 1915. 1927 Act was the law enforced in the territory of India immediately before the commencement of the Constitution and by virtue of Article 372 of the Constitution of India, 1927 Act continues in force until altered or repealed by a competent legislation. The 1927 Act was enacted to consolidate the law relating to forests, the transit of forest-produce and the duty leviable on timber and other forest-produce. The 1957 Act was enacted for regulation of mines and development of minerals under the control of the Union. The 1957 Act was enacted under Entry 54 of List I of the Constitution which is to the following effect:

> *"Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest."*

84. List II also contains Entry 23 which relates to regulation of mines and mineral development. Entry 23 List II is as follows:

> *"Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union."*

85. Entry 23 of List II has been made subject to provisions of List I. The Parliamentary legislation in reference to Entry 54 to the extent regulation and development of minerals declared under control of the Union of India is extracted from the legislative field of the State.

86. The writ petitioners contend that State is denuded with legislative competence regarding mineral, its regulation or transportation. Learned counsel for the writ petitioners have referred and relied on the various pronouncements of this Court in reference to Parliamentary enactment 1957. It is not necessary to refer to a large number of cases of this Court on the subject, the reference of only few of such cases shall serve the purpose for the present case.

87. The Constitution Bench judgment of this Court in *Hingir-Rampur Coal Co., Ltd. and others vs. The State of Orissa and others,* AIR 1961 SC 459, needs to be noted. The State of Orissa has enacted Orissa Mining Areas Development Fund Act, 1952 by which levy and demand was raised. The appellant challenged the enactment on the ground that legislation covers the same field which was occupied by 1957 Act referable to Entry 54 of List I. Considering the submission of the appellant, the Constitution Bench stated following:

> *"23.....If Parliament by its law has declared that regulation and development of mines should in public interest be under the control of the Union, to the extent of such declaration the jurisdiction of the State Legislature is excluded. In other words, if a Central Act has been passed which contains a declaration by Parliament as required by Entry 54, and if the said declaration covers the field occupied by the impugned Act the impugned Act would be ultra vires, not because of any repugnance between the two statutes but because the State Legislature had no jurisdiction to pass the law. The limitation imposed by the latter part of Entry 23 is a limitation on the legislative competence of the State Legislature itself. This position is not in dispute.*

88. The validity of 1957 Act was considered in the context of Industries (Development and Regulation) Act,1951 and Mines and Minerals(Development and Regulation) Act, 1948. This Court repelled challenge to the 1952 Act on the ground that the declaration under 1948 Act was not referable to Entry 54.

89. The next judgment which needs to be considered is *State of Orissa vs. M.A. Tulloch and Co.,* 1964(4)SCR 461. Orissa Mining Areas Development Fund Act, 1952 came for consideration in reference to Mines and Minerals (Development and Regulation) Act, 1957. This Court held that 1952 Act was enacted by virtue of legislative power under Entry 52 of List II whereas 1957 Act was enacted in reference to Entry 54 of List I. This Court held that Central Act 1957 contained a declaration as contained in Section 2 which is to the following effect:

> *"**Section 2.Declaration as to the expediency of Union control. -** It is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent hereinafter provided."*

90. After noticing the above declaration, this Court laid down following :

> *"It does not need much argument to realise that to the extent to which the Union Government had taken under "its control" the regulation and development of minerals" so much was withdrawn*

> *from the ambit of the power of the State Legislature under Entry 23 and legislation of the State which had rested on the existence of power under that entry would to the extent of that "control" be superseded or be rendered ineffective, for here we have a case not of mere repugnancy between the provisions of the two enactments but of a denudation or deprivation of State legislative power by the declaration which Parliament is empowered to make and has made."*

91. This Court further held that intention of the Parliament was to cover the entire field. The Court held that after enactment of 1957 Act, 1952 Act shall disappear. This Court, thus, upheld the demands which were raised for the period upto June, 1958.

92. There cannot be any dispute to the proposition as laid down in the above noted cases and several other subsequent judgments of this Court reiterating the above proposition. The ratio laid down above, however, is not attracted in the facts of the present case. The present is not a case where the legislation, 1927 Act and Rules 1978 are referable to Entry 23 of List II. The present is a case where we are concerned with a pre-constitutional legislation which is 1927 Act which has been continued as per Article 372 of the Constitution. Article 372 sub-clause (1) is as follows:

> **"*372. Continuance in force of existing laws and their adaptation. -***
> *(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority."*

93. The law which has been continued in force by virtue of Article 372 is to continue until altered or repealed or amended by a competent legislature. Several pre-constitutional laws which have been continued under Article 372 came before this Court for consideration wherein Article 354 was also considered.

94. A Constitution Bench of this Court in *B.V. Patankar and others vs. C.G. Sastry,* AIR 1961 SC 272, had occasion to consider Mysore House Rent and Accommodation Control Order, 1948, which was a pre-constitution law and by Part B States (Laws) Act, 1951 extended the operation of Transfer of Property Act, 1882 in the State of Mysore. In the above case arguments were raised that the House Rent and Accommodation Control Order, 1948 as extended in Mysore from April, 1951 became repugnant and was repealed. It was held that the pre-constitutional law which was saved by Article 372 remained unaffected by Article 254. Following was stated in paragraph 7:

> *"7. ....The argument, therefore, that as from April 1, 1951, as a result of repugnancy the House Rent Control Order of 1948 stood repealed must be repelled as unsound and cannot be sustained, because it was an existing law which was saved by Article 372 of the Constitution and remained unaffected by Article 254...."*

95. In *Pankajakshi (Dead) Through Legal Representatives and others vs. Chandrika and others,* 2016 (6) SCC 157, a Constitution Bench of this Court had occasion to consider a pre-constitutional law, i.e., Travancore-Cochin High Court Act in the context of Code of Civil Procedure(Amendment) Act, 1976. In the above case an earlier judgment of this Court, namely, *Kulwant Kaur and others vs. Gurdial Singh Mann (Dead) by Lrs. And others,* 2001 (4) SCC 262, came to be considered wherein this Court had occasion to consider Section 42 of Punjab Courts Act, 1918. This Court held that Article 254 of the Constitution would have no application to such a law for the simple reason that it is not a law made by the legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. In paragraph 27 following has been held:

> ***"27.*** *Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision in Kulwant Kaur case. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80-A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no*

> *application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force. Shri Viswanathan's reliance upon this authority, therefore, does not lead his argument any further."*

96. Thus, to find out as to whether the 1927 Act and Rules, 1978 framed thereunder survive even after enforcement of 1957 Act, we have not to look into Article 254 but we have to find out as to whether the above pre-constitutional law is **altered or repealed or amended by a competent legislature**. To find out this competent legislation as contemplated by sub-clause (1) of Article 372 in the context of pre-constitutional law the nature and content of pre-constitutional law has to be found out. There cannot be any dispute that Act, 1927 was enacted to consolidate the law relating to forests, the transit of forest-produce and the duty leviable on timber and other forest-produce. Essentially the 1927 Act is related to the forest. In the Constitution initially the forest was in Entry 19 of List II. Thus, it was the State legislature which was competent to alter or repeal or amend the said law. Various amendments in the 1927 Act were made by the State of U.P. in different provisions of 1927 Act in exercise of its legislative power as conferred by List II.

97. By the Constitution (Forty-second Amendment) Act, 1976, with effect from 03.01.1977 Entry 19 was omitted from List II and transferred in List III as Entry 17A. Entry 17A is "Forests". Thus, with effect from 03.01.1977, both the Parliament and the State legislature are competent legislature within the meaning of Article 372 sub-clause (1). The question to be answered thus is as to whether a competent legislature has altered or repealed or amended 1927 Act.

98. Writ Petitioners have also contended that 1927 Act in so far as Section 41 and Transit Fee Rules, 1978 are concerned, stand impliedly repealed by virtue of 1957 Act and in any view of the matter after amendment of 1957 Act by Act 38 of 1999 by which specific provisions regarding transport of minerals were inserted in 1957 Act, Section 4(1A) and Section 23C which were inserted with effect from 18.12.1999.

99. Justice G.P. Singh in Principles of Statutory Interpretation, 14th Edition, explained the implied repeal as follows:

> *"There is a presumption against a repeal by implication; and the reason of this rule is based on the theory that the Legislature while enacting a law has complete knowledge of the existing laws on the same subject-matter, and therefore, when it does not provide a repealing provision, it gives out an intention not to repeal the existing legislation. When the new Act contains a repealing section mentioning the Acts which it expressly repeals,*

the presumption against implied repeal of other laws is further strengthened on the principle expressio unius est exclusio alterius. Further, the presumption will be comparatively strong in case of virtually contemporaneous Acts. The continuance of existing legislation, in the absence of an express provision of repeal, being presumed, the burden to show that there has been a repeal by implication lies on the party asserting the same. The presumption is, however, rebutted and a repeal is inferred by necessary implication when the provisions of the later Act are so inconsistent with or repugnant to the provisions of the earlier Act 'that the two cannot stand together'. But, if the two may be read together and some application may be made of the words in the earlier Act, a repeal will not be inferred…"

100. This Court in *Municipal Council, Palai through the Commissioner of Municipal Council, Palai vs. T.J. Joseph* in AIR 1963 SC 1561, has elaborated the concept of implied repeal in following words:

"9. *It is undoubtedly true that the legislature can exercise the power of repeal by implication. But it is an equally well-settled principle of law that there is a presumption against an implied repeal. Upon the assumption that the legislature enacts laws with a complete knowledge of all existing laws pertaining to the same subject the failure to add a repealing clause indicates that the intent was not to repeal existing legislation. Of course, this presumption will be rebutted if the provisions of the new act are so inconsistent with the old ones that the two cannot stand together. As has been observed by Crawford on Statutory Construction, p. 631, para 311:*

> *"There must be what is often called 'such a positive repugnancy between the two provisions of the old and the new statutes that they cannot be reconciled and made to stand together'. In other words they must be absolutely repugnant or irreconcilable. Otherwise, there can be no implied repeal ... for the intent of the legislature to repeal the old enactment is utterly lacking."*

The reason for the rule that an implied repeal will take place in the event of clear inconsistency or repugnancy, is pointed out in Crosby v. Patch and is as follows:

> *"As laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same*

subject, it is but reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable. Bowen v. Lease (5 Hill 226). It is a rule, says Sedgwick, that a general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. 'The reason and philosophy of the rule,' says the author, 'is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to effect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

For implying a repeal the next thing to be considered is whether the two statutes relate to the same subject-matter and have the same purpose. Crawford has stated at p. 634:

"And, as we have already suggested, it is essential that the new statute cover the entire subject matter of the old; otherwise there is no indication of the intent of the legislature to abrogate the old law. Consequently, the later enactment will be construed as a continuation of the old one."

The third question to be considered is whether the new statute purports to replace the old one in its entirety or only partially. Where replacement of an earlier statute is partial, a question like the one which the court did not choose to answer in the Commissioners of Sewers case would arise for decision.

10. *It must be remembered that at the basis of the doctrine of implied repeal is the presumption that the legislature which must be deemed to know the existing law did not intend to create any confusion in the law by retaining conflicting provisions on the statute book and, therefore, when the court applies this doctrine it does no more than give effect to the intention of the legislature ascertained by it in the usual way i.e. by examining the scope and the object of the two enactments, the earlier and the later."*

101. The question of repeal by implication arises when two statutes become inconsistent to the extent that competence of one is not possible without disobedience to other.

102. The principles for ascertaining the inconsistency/repugnancy between two statutes were laid down by this Court in *Deep Chand vs. State of U.P and others,* AIR 1959 SC 648. K. Subba Rao, J. speaking for the Court stated following in paragraph 29:

> *"29……Repugnancy between two statutes may thus be ascertained on the basis of the following three principles:*
>
> *(1) Whether there is direct conflict between the two provisions;*
>
> *(2) Whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature and*
>
> *(3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field."*

103. The Constitution Bench in *State of Kerala and others vs. Mar Appraem Kuri Company Limited and another,* 2012 (7) SCC 106, had occasion to consider when by a subsequent enactment the case of *pro tanto* repeal can be read. In the above case State of Kerala had enacted Kerala Chitties Act, 1975. The Seventh Schedule of the Constitution, List III Entry 7 pertains to contracts including special forms of contracts. The Parliament enactment, Chit Funds Act, 1982 and State legislature Kerala Chitties Act, 1975, the subject being under concurrent list, in paragraph 27, the Court held that when there is a conflict in respect of a matter in the concurrent list between Parliamentary and the State legislations, Parliamentary legislation will pre-dominate by virtue of *non obstante* clause of Article 254 and by reason of Article 372 sub-clause (1). This Court held that the legislative intent to abrogate or wipe off the former enactment is to be looked into to find out whether it is a case of *pro tanto repeal*. Following was stated in paragraph 19 :

> ***"19.*** *Further, the learned counsel emphasised on the words "to the extent of the repugnancy" in Article 254(1). He submitted that the said words have to be given a meaning. The learned counsel submitted that the said words indicate that the entire State Act is not rendered void under Article 254(1) merely by enactment of a Central law. In this connection, it was submitted that the words "if any provision of a law" and the words "to the extent of the repugnancy" used in Article 254(1) militate against*

> *an interpretation that the entire State Act is rendered void as repugnant merely upon enactment by Parliament of a law on the same subject."*

104. A repeal may be brought about by subsequent legislation without any reference to the legislation intended to be repealed, since, it matters little as to whether repeal is done expressly or inferentially. As noted above, 1957 Act was enacted in reference to Entry 54 of List I to provide for the regulation of mines and the development of minerals whereas the subject of the legislation under the 1927 Act was the forest, transit of forest-produce and the duty leviable on timber and other forest-produce.

105. It is *sine qua non* that both the sets of laws must deal with "**the same subject matter".** In the instant case, under the Forest Act "transit of forest-produce" itself is subject of primary legislation as can be seen from the preamble and the provisions to Section 41 & 42 of the Act. In contrast, the 1957 Act in view of Section 2 thereof, gives control to the Union under its control "Regulation of Mines and Development of Minerals". The detailed provisions as primary legislation, deal with regulation of mines and development of minerals (Section 4 to 17 and Section 18). For the purposes of Regulation of Mines and Development of Minerals, it is provided that no mining operation can be undertaken without the license or permit as per Section 4. Provisions relating to transport or storage are only incidental and ancillary in nature. But the main point of difference is the subject matter of legislation under the 1957 Act is "Regulation of Mines and Development of Minerals".

106. When the minerals are forest-produce by definition under the 1927 Act under Section 2(4), validity of which is not challenged, forest-produce and its transit is altogether a different subject matter than the subject matter governed by 1957 Act. The object of the two legislations is different. The regulation is different. The Forest Act comprehensively deals with forest and forest wealth with a different object and the 1957 Act deals with mines and mineral wealth.

107. Much emphasis has been given by the counsel for the writ petitioners on Section 4(1A) and Section 23C. Section 4(1A) is couched in negative as follows:

> "*No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder."*

108. Section 23C provides power of State Government to make rules for preventing illegal mining, transportation and storage of minerals.

109. The Rules may cover inspection, checking and search of minerals at the place of excavation as well as transit of the minerals. The Rules under Section 23C are only incidence of regulation of minerals which is the subject matter of the 1957 Act.

110. The 1927 Act is a comprehensive statute relating to transit of forestproduce and the duty leviable on timber and other forest-produce.

111. The 1927 Act provides comprehensive provisions with regard to reserved forest, village forest and protected forest. The forests are directly linked with environment and ecological balance but because of large human development, exploitation of forests and other natural resources and deforestation, the international community has been alarmed, several international conventions and treaties were made including Kyoto Protocol and Paris Convention to which India is a signatory.

112. Article 48A also inserted by the Forty-second Amendment Act, 1976 which is to the following effect:

> *"**48A. Protection and improvement of environment and safeguarding of forests and wild life.**- The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."*

113. Article 51A of the Constitution lays down as one of the fundamental duties that every citizen to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

114. As per the National Forest Policy, 1988 issued by the Ministry of Environment & Forests, one of the basic objectives if the State is to 'encourage efficient utilization of forest produce and maximizing substitution of wood' and states that "the principal aim of Forest Policy must be to ensure environmental stability and maintenance of ecological balance including atmospheric equilibrium, which are vital for sustenance of all lifeforms, human, animal and plant. The derivation of direct economic benefit must be subordinated to this principal aim."

115. The subjects of 1927 Act and 1957 Act are thus distinct and separate. The 1957 Act was on development and regulation of mines and minerals. Mines and minerals are also found in forests. The definition of forest-produce as contained in Section 2 sub-section (4) of the Act includes peat, surface oil, rock and minerals (including lime-stone, laterite, mineral oils, and all products of mines or quarries).

116. The State has been empowered to regulate transit of forest-produce under Section 41 of the Act. Regulation of transit of forest-produce is a larger activity covering transit of different kinds of forest-produce including minerals. Both the legislations being on different subject matters the provisions relating to transportation of minerals as contained in 1957 Act can at best be said to be incidentally affecting the 1927 Act, incidental encroachment of one legislation with another is not forbidden in the constitutional scheme of distribution of legislative powers.

117. This Court has time and again emphasised that in the event any overlapping is found in two Entries of Seventh Schedule or two legislations, it is the duty of the Court to find out its true intent and purpose and to examine the particular legislation in its pith and substance. In *Kartar Singh vs. State of Punjab,* 1994 (3) SCC 569, paragraphs 59, 60 and 61 following has been held:

> ***"59....*** *But before we do so we may briefly indicate the principles that are applied for construing the entries in the legislative lists. It has been laid down that the entries must not be construed in a narrow and pedantic sense and that widest amplitude must be given to the language of these entries. Sometimes the entries in different lists or the same list may be found to overlap or to be in direct conflict with each other. In that event it is the duty of the court to find out its true intent and purpose and to examine the particular legislation in its 'pith and substance' to determine whether it fits in one or other of the lists. [See : Synthetics and Chemicals Ltd. v. State of U.P.; India Cement Ltd. v. State of T.N."*
>
> ***60.*** *This doctrine of 'pith and substance' is applied when the legislative competence of a legislature with regard to a particular enactment is challenged with reference to the entries in the various lists i.e. a law dealing with the subject in one list is also touching on a subject in another list. In such a case, what has to be ascertained is the pith and substance of the enactment. On a scrutiny of the Act in question, if found, that the legislation is in substance one on a matter assigned to the legislature enacting that statute, then that Act as a whole must be held to be valid notwithstanding any incidental trenching upon matters beyond its competence i.e. on a matter included in the list belonging to the other legislature. To say differently, incidental encroachment is not altogether forbidden.*

118. In *A.S. Krishna and others vs. State of Madras,* AIR 1957 SC 297 this Court laid down following in paragraph 12:

> *"12. This point arose directly for decision before the Privy Council in Prafulla Kumar Mukherjee v. The Bank of Commerce, Ltd. [1946 74 I.A. 23 There, the question was whether the Bengal Money-Lenders Act, 1940, which limited the amount recoverable by a money-lender for principal and interest on his loans, was valid in so far as it related to promissory notes. Money-lending is within the exclusive competence of the Provincial Legislature*

under Item 27 of List II, but promissory note is a topic reserved for the center, vide List I, Item 28. It was held by the Privy Council that the pith and substance of the impugned legislation begin money-lending, it was valid notwithstanding that it incidentally encroached on a field of legislation reserve for the center under Enter 28. After quoting its approval the observations of Sir Maurice Gwyer C.J. in Subrahmanyan Chettiar v. Muttuswami Goundan, (supra) above quoted, Lord Porter observed :

"Their Lordships agree that this passage correctly describes the grounds on which the rule is founded, and that it applies to Indian as well as to Dominion legislation.

No doubt experience of past difficulties has made the provisions of the Indian Act more exact in some particulars, and the existence of the Concurrent List has made it easier to distinguish between those matters which are essential in determining to which list particular provision should be attributed and those which are merely incidental. But the overlapping of subject-matter is not avoided by substituting three lists for two, or even by arranging for a hierarchy of jurisdictions. Subjects must still overlap, and where they do, the question must be asked what in pith and substance is the effect of the enactment of which complaint is made, and in what list is its true nature and character to be found. If these questions could not be asked, must beneficent legislation would be satisfied at birth, and many of the subjects entrusted to Provincial legislation could never effectively be dealt with."

119. Further in *Union of India and others vs. Shah Govedhan L. Kabra Teachers' College,* 2002 (8) SCC 228 in paragraph 7 following was laid down:

"7. It is further a well-settled principle that entries in the different lists should be read together without giving a narrow meaning to any of them. Power of Parliament as well as the State Legislature are expressed in precise and definite terms. While an entry is to be given its widest meaning but it cannot be so interpreted as to override another entry or make another entry meaningless and in case of an apparent conflict between different entries, it is the duty of the court to reconcile them. When it appears to the court that there is apparent overlapping between the two entries the doctrine of "pith and substance" has to be applied to find out the true nature of a legislation and the

entry within which it would fall. In case of conflict between entries in List I and List II, the same has to be decided by application of the principle of "pith and substance". The doctrine of "pith and substance" means that if an enactment substantially falls within the powers expressly conferred by the Constitution upon the legislature which enacted it, it cannot be held to be invalid, merely because it incidentally encroaches on matters assigned to another legislature. When a law is impugned as being ultra vires of the legislative competence, what is required to be ascertained is the true character of the legislation. If on such an examination it is found that the legislation is in substance one on a matter assigned to the legislature then it must be held to be valid in its entirety even though it might incidentally trench on matters which are beyond its competence. In order to examine the true character of the enactment, the entire Act, its object, scope and effect, is required to be gone into. The question of invasion into the territory of another legislation is to be determined not by degree but by substance. The doctrine of "pith and substance" has to be applied not only in cases of conflict between the powers of two legislatures but in any case where the question arises whether a legislation is covered by particular legislative power in exercise of which it is purported to be made."

120. Thus, even it is assumed that, in working of two legislations which pertain to different subject matters, there is an incidental encroachment in respect of small area of operation of two legislations. Legislation cannot be struck down as being beyond legislative competence nor it can be held that one legislation repeals the other. Thus, when we look into the pith and substance of both the legislations, it is clear that they operate in different field and the submission cannot be accepted that 1957 Act impliedly repeals the 1927 Act in so far as Section 41 and 1978 Rules are concerned.

121. We, thus, conclude that the submission of learned counsel for the writ petitioners that in view of the 1957 Act especially as amended by Act 38 of 1999, the provisions of 1927 Act & 1978 Rules have become void, inoperative and stand repealed, cannot be accepted.

XII. Interpretation of Section 2(4)(b) of 1927 Act

122. The meaning of words 'brought from' as used in Section 2 sub-section (4) sub-clause (b) has become very significant in the present case since it is a case of large number writ petitioners that the goods which they are transiting did not originate

from any forest area rather they have been taken from non-forest area, hence, there is no liability to pay transit fee. Whether forest produce as defined in Section 2 sub-section (4) sub-clause (b) should be forest produce which originated from forest or even the forest produces which are merely passing through a forest area shall attract the liability of transit fee is the question to be answered.

123. The Division Bench judgment of the Allahabad High Court in *Kumar Stone Works,* although has referred to various definitions of meaning of word 'brought' but it did not advert to the fact as to what meaning has to be attributed to word 'from' with which word the word 'brought' is prefixed. The word 'from' has been defined in *Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edition* in following words :

> *"From: As used as a function word, implies a starting point, whether it be of time, place, or condition; and meaning having a starting point of motion, noting the point of departure, origin, withdrawal, etc., as he travelled "from" New York to Chicago. Silva V. MacAuley, 135 Cal App. 249, 26 P.2d 887. One meaning of "from" is "out of." Word "from" or "after" and event or day does not have an absolute and invariable meaning but each should receive an inclusion or exclusion construction according to intention with which such word is used. Acme Life Ins. CO. v. White, Tex. Civ. App. 99 SW 2d 1059, 1060. Words "from" and "to", used in contract, may be given meaning to which reason and sense entitles them, under circumstances of case. Woodruff v. Adams, 134 Cal App.490, 25 P, 2d 529."*

124. The word 'from' is used to denote a point of time, a place or a period. Both the words 'found in or brought from' have been used before word 'forest'. Both the words that is 'found in' and 'brought from', has clear nexus with forest. The true meaning of the words 'brought from' has to be appreciated when read in the context of word 'found in'. The word 'brought from' is an expression which conveys the idea of the items having their origin in the forests and they have been taken out from the forest. The word 'from' refers to the place from which the goods have been moved out that is from the place of their original location. The forest is birth place, the origin of the items mentioned in sub-clauses (1) to (iv) of sub-clause(b) of Section 2(4). The 'found in' means that the item which has origin from the forest, is found in the forest while 'brought from' means that items having origin in forest have moved out from the forest.

125. The 1978 Rules framed under Section 41 of the 1927 Act also reflect that rule making authority has also understood the meaning of word 'brought from' in the above sense. As per Rule 3 no forest produce shall be moved to or from or within the State of U.P. except or without a transit pass in the form in the

Schedule A. The Schedule A of the Rules contains the form. Item No.1 of the form is as follows:

> "1. Locality of origin ;
>
> (a) name and situation of forest,
>
> (b) name of forest owner."

126. The above Item No.1 also thus clearly refers to locality of origin of the produce and form requires name and situation of forest and name of the forest owner. Thus, locality of origin is related to a forest which supports the interpretation as placed by us.

127. Learned counsel for the writ petitioners have also placed reliance on a judgment of the Division Bench of the Karnatka High Court in *Yeshwant Mony Dodamani and Ors.* (1962 CRLJ 832). The Division Bench had occasion to consider the definition of forest produce as contained in sub-section (4) of Section 2 of the Act. In paragraph 6 of the judgment following has been stated :

> *"6. On a plain reading of these expressions 'found in' or 'brought from', there can hardly be any doubt that both of them indicate the forest to be the source or original depository of the forest produce in question. The learned Government Pleader has very strenuously contended that the expression 'found in' a forest merely means 'come across' or 'discovered' in a forest irrespective of the fact whether the article or goods so discovered were originally sourced or deposited or grown in a forest or some other place which is not a forest. All that is necessary, according to the learned Government Pleader, is that somebody (meaning apparently a forest officer or a forest guard or other person acting under the authority of the Act or Rules) finds or discovers these goods within, the area of a forest Same argument, however, is not available nor is it pressed with, reference to other expression 'brought from' a forest. It is conceded that the expression 'brought from' a forest certainly excludes the idea of a thing being brought from outside the forest but taken through it. It is, however, contended that if an article so brought from outside the forest is 'found' i.e., discovered by somebody within a forest, it would come within the definition. We find it difficult to accept this argument which places extreme strain both on the language and upon logic. The expression at the commencement of Clause (b) of Section 2(4)*

should be compared with the expression at the commencement of Clause (a) of Section 2(4). The articles listed under Clause (a) become forest-produce by virtue of their own nature, whether they are found in a "forest or not, or brought from a forest or not. On the other hand, the articles listed under Clause (b) become forest-produce, not by virtue of their nature alone, but by virtue of the fact that they are found in or brought from a forest. The term 'found in' a forest does not necessarily, in our opinion, require an actual discovery of those items by a living person before those items can become forest-produce.

In our opinion, the term 'found in' actually refers to things growing in a forest like timber trees, fuel trees, fruits, flowers etc. or mineral deposits or stones existing in the forest. The distinctive feature is either the existence or the growth or deposit within the area of a forest and not their discovery by some living person. The idea underlying the expression 'brought from' is equally emphatic of the source of the thing so brought being within the area of a forest. The conveyance or transport involved in the idea of a thing being brought undoubtedly has its beginning in the forest by virtue of the use of the expression 'from.'"

128. We are of the view that Gujarat High Court has correctly interpreted the word "brought from" as occurring in clause (b) of Section 2(4). We are, thus, of the view that the word 'brought from' has to be understood in the above manner. We, however, may clarify that the origin of forest produce may be in any forest situate within the State of U.P. or outside the State of U.P. Since, transit pass is necessary as per Rule 3 for moving a forest produce into or from or within the State of U.P. Any produce, goods entering within or the outside the State which is the forest produce having originated in the forest requires a transit pass for transiting in the State of U.P. Conversely, any goods which did not originate in forest whether situate in the State of U.P. or outside the State but is only passing through a forest area may not be forest produce answering the description of forest produce within the meaning of Section 2(4)(b).

XIII. Meaning of 'Forest'

129 Safeguarding of forest has also been recognised by our Constitution under Article 48A which oblige the State to protect and improve the environment and to safeguard the forests and wild life of the country. Article 51A sub-clause (g) enumerates the fundamental duty of every citizen of India to protect and improve the natural environment including the forests, lakes, rivers, wildlife.

130. The Forest Conservation Act, 1980 is another Parliamentary enactment which has been specifically enacted to provide for the conservation of the forest and for matters connected therewith. The definition of forest cannot be confined only to reserved forests, village forests and protected forests as enumerated in 1927 Act. This Court has already held in *T.N. Godavarman Thirumulkpad vs. Union of India and others,* 1997 (2) SCC 267, that the word "forest*"* must be understood according to its dictionary meaning, in paragraph 4 following is stated:

> *"4....The word "forest" must be understood according to its dictionary meaning. This description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purpose of Section 2(i) of the Forest Conservation Act. The term "forest land", occurring in Section 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. This is how it has to be understood for the purpose of Section 2 of the Act. The provisions enacted in the Forest Conservation Act, 1980 for the conservation of forests and the matters connected therewith must apply clearly to all forests so understood irrespective of the ownership or classification thereof..."*

131. Thus, forest shall include all statutorily recognised forests, whether designated as reserve, protected or otherwise. The term "forest land", occurring in Section 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government records irrespective of the ownership. The restrictive meaning of forest as given by the Uttarakhand High Court in M/s Gupta Builders cannot be approved.

132. It is relevant to note that even before this Court's definition in *T.N. Godavarman case* (supra) in expensive manner, the forest was understood by the State legislature in a very wide manner. This is reflected by definition of forest and forest land as given in Section 38A inserted by Uttar Pradesh Amendment Act 5 of 1956 with effect from 3.12.1955. The definitions of 'forest' as given in Section 38A(b) and 'forest land' in 38A(c) of 1927 Act are as follows:

> *"**38A(b)** "forest" means a track of land covered with trees, shrubs, bushes or woody vegetation whether of natural growth or planted by human agency, and existing or being maintained with or without human effort, or such tract of land on which such growth is likely to have an effect on the supply of timber, fuel, forest-produce, or grazing facilities, or on climate, stream-flow, protection of land from erosion, or other such matters and shall include*

(i) land covered with stumps of trees of a forest;

(ii) land which is part of a forest or was lying within a forest on the first day of July, 1962;

(iii) such pasture land, water-logged or non-cultivable land, lying within, or adjacent to, a forest as may be declared to be a forest by the State Government.

38A(c) *"forest land" means a land covered by forest or intended to be utilized as a forest;"*

133. The definition of forest as contained in Section 38A(b), as noticed above, gives very wide definition of forest and giving restrictive meaning of forest in view of the wide definition given by the State legislature cannot be accepted. We, thus, are of the view that the interpretation of forest as given by the Division Bench in its judgment dated 11.11.2011 has to be approved and the restrictive definition as given by the Uttarakhand High Court in its judgment dated 26.6.2007 in M/s. Gupta Builders cannot be approved. We, thus, reject the submission of learned counsel for the petitioners to adopt a restrictive meaning of word 'forest'.

XIV. Whether Notification dated 10.02.1960 declares Roads as Protected Forest

134. Whether passing through the roads as notified by notification dated 10.02.1960 can be treated to be passing through a protected forest is the question to be answered. The notification which has been relied by learned Additional Advocate General is notification dated 10.02.1960. It is useful to extract the contents of the said notification:

"February 10, 1960

No.1115/XIV-331-50,-Whereas the Governor Uttar Pradesh, is of the opinion that the making of enquiry and record contemplated under sub-section(3) of section 29 of the Indian Forest Act 1927(Act no.XVI of 027), will occupy such length of time as in the meantime to endanger the rights of the State Government, now therefore, in exercise of the powers conferred by the proviso to the aforesaid sub-section and by the sub-section(1) of the said section, read with section 80-A of the aforesaid Act, the Governor of Uttar Pradesh is pleased to declare that pending such enquiry and record the provisions of Chapter IV of the said Act to be applicable to the lands specified in the schedule here to : A)

Schedule

District	Serial No.	Name of Road,	Mileage to be declared as Reserved or Protected Forest						Description of boundary
			4			4			
			From			To			
			M	fg.	ft.	M	fg.	ft.	
1. Meerut	1.	Meerut-Baghpat Road	3	0	0	31	2	0	The boundary of the land has been demarcated on the ground by stone pillars
…	…	…	…	…	…	…		…	…

……. ……. ……. …….″

135. A perusal of the schedule indicates that in 48 Districts as they existed in 1960, different roads have been declared to be protected forests from mileage to mileage. A perusal of the schedule which is part of notification issued by the State of U.P. indicates that in the various roads mentioned in the Schedule National highways are also included.

136. For finding the consequences of notification dated 10.02.1960 proviso to the sub-section (3) of Section 29 read with Section 80A, referred in the notification needs to be looked into. Section 29 contained in Chapter IV (deals with protected forests) is quoted below:

> ***"29. Protected Forests.-*** *(1) The [State Government] may, by notification in the [official gazette], declare the provisions of this Chapter applicable to any forest-land or waste-land which is not included in a reserved forest but which is the property of the Government, or over which the Government has proprietary rights, or to the whole or any part of the forest-produce of which the Government is entitle.*
>
> *(2) The forest-land and waste-lands comprised in any such notification shall be called a "protected forest".*
>
> *(3) No such notification shall be made unless the nature and extent of the rights of Government and of private persons in or*

over the forest-land or waste-land comprised therein have been inquired into and recorded at a survey or settlement, or in such other manner as the [State government] thinks sufficient. Every such record shall be presumed to be correct until the contrary is proved.

Provided that, if, in the case of any forest-land or waste land, the [State Government] thinks that such inquiry and record are necessary, but that they will occupy such length of time as in the meantime to endanger the rights of Government, the [State Government] may, pending such inquiry and record, declare such land to be a protected forest, but so as not to abridge or affect any existing rights of individuals or communities."

137. Section 80A which has been referred in the notification is a provision which has been inserted by U.P. Act 18 of 1951 with effect from 06.10.1951. Section 80A is as follows:

"80A. *The State Government may, by notification in the Official Gazette, declare that any of the provisions of or under this Act, shall apply to all or any land on the banks of canals or the sides of roads which are the property of the State Government or a local authority, and thereupon such provisions shall apply accordingly."*

138. Under Section 80A the State Government may, by notification declare that any of the provisions of Act shall apply on the **banks of canals or the sides of roads** which are the property of the State Government or a local authority. Section 80A is included in Chapter XIII which is a miscellaneous Chapter. Section 80A empowers the State to declare any land on the **banks of canals or the sides of roads** as protected forest on which any other provisions of the Act can be applied. Notification dated 10.02.1960 declared that provisions of Chapter IV of the Act shall be applied. Thus land mentioned in the schedule is declared as protected forest.

139. Section 80A delineates the legislative scheme of declaring protected forests of **banks of canals or the sides of roads**. The State while issuing notification under Section 80A can only effectuate, the object and purpose of Section 80A as enacted by the State legislature.

140. The notification dated 10.02.1960 has to be read in the light of the substantive provisions contained under Section 80A. When Section 80A empowers the State to declare any land on the **banks of canals or the sides of roads** as protected forests State can do only which is permitted by the State and no more. Section 80A read with notification dated 10.02.1960 shall only mean that both the sides of the roads which

have been mentioned in the Schedule are now declared protected forests. The purpose for such declaration is not far to seek. Both sides of canals or both sides of the roads can be declared as protected forests for maintenance and management of the same by applying the different provisions of the Act. Maintenance of forests on both sides of canals is with the object and purpose of environment protection. Maintenance of protected forests on both the sides of the road is for the same purpose and object, and also with object to combat the vehicular pollution and to improve the environment and ecology. By notification under Section 80A, it cannot be accepted that road itself has been declared as protected forest. The object is not to declare the road as protected forest so as to apply different provisions of 1927 Act on the roads itself. The interpretation put by the State that roads declared by notification dated 10.02.1960 have become protected forests is not compatible with provisions of Chapter IV. The State cannot exercise its power under Section 30 nor any Rules under Section 32 can be framed by the State for the roads itself. The maintenance and regulation of roads are governed by different statutes and principles of law. We, thus, reject the submissions of learned counsel for the State that merely because both sides of roads are declared protected forests, the roads itself have become protected forests. We, thus, conclude that merely passing through the roads as included in the notification dated 10.02.1960, it cannot be held that the goods or forest produce are passing through the protected forests.

XV. Whether Rule 3 is independent of Rule 5

141. Rule 3 is couched in negative term providing that "……no forest produce shall be moved into or from or within the State of Uttar Pradesh except as hereinafter provided without a transit Pass in the form in Schedule A……". Thus transit of forest produce is permissible only with a transit pass. Rule 4(1) contains provisions regarding officers and persons who issue passes. Rule 4(1) is as follows: -

Officers and Persons to issue passes

"Rule 4.(1):The following officers and persons shall have power to issue passes under these rules:-

(a) For forest produce belongings to Government or not owned by any other person, the Conservator of Forest, the Divisional Forest Officer, the Sub-Divisional Forest Officer or any other officer authorized in this behalf in writing by conservator of Forest or the Divisional Forest Officer;

(b) For forest produce owned by any person, such person or his agent if so authorized in writing by the Divisional Forest Officer -

(i) Provided that any person who desires to obtain a transit pass or authorization to issue passes under clause (b) of sub-rule (1) above shall apply in the form in Schedule 'B' and the Divisional Forest Officer may, before issuing the transit pass or authorization to issue such passes, conduct such inquiry and call for such information as considered necessary;

(ii) Such authorization shall specify the period during which it shall remain in force, and shall also specify the route to be adopted and check Chawki or depot through which to produce must pass; and

(iii Any authorization may at any time be changed (on request or otherwise) or cancelled by the Division Forest Officer or Conservation of Forests."

142. Now we come to Rule (5) which provides for fees payable for different passes. Rule 5 along with its Marginal note (as originally framed) is as follows:

Fees Payable for different classess of passes

5. At the check Chawki or depot established under rule 15 and specified under proviso (ii) to clause(b), sub-rule (1) of rule 4, the forest produce along-with the two copies of the pass (duplicate and triplicate) shall be produced for examination under sub-rule(4) of rule 6 and for payment of transit fee on the forest produce calculated at the following rates; corresponding receipt shall be granted in the form given in Schedule C-

(i)	*per lorry load of timber or other forest produce*	*...Rs.5.00 per tonne of capacity*
(ii)	*per cart load of timber or other forest produce*	*...Rs.2.50*
(iii)	*per camel load of timber or other forest produce*	*...Rs.1.25*
(iv)	*per pony load of timber or other forest produce*	*...Rs.0.50*
(v)	*per head load of timber or other forest produce*	*...Rs. 0.25"*

143. Referring to Chawki or depot established under Rule 15 and specified under proviso (ii) to clause (b), sub-rule (1) of Rule 4, learned counsel contends that transit passes as referred to under proviso (ii) to clause (b) of sub-rule (1) of Rule 4 are only to be charged with transit fees.

144. Rule 4 as noticed above contains provisions regarding officers and persons who have power to issue passes. Under Rule 4(1)(a) for the forest produce belonging to government or not owned by any other person various officers of the forest department are authorized to issue passes. Rule 4 clause (b) relates to various produce own by any person. Pass can be issued by such persons or his agents if so authorized in writing by the Divisional Forest Officer. Any person who is referred to in Rule 4 (b) has to apply in the form in Schedule B to the Divisional Forest Officer whereon authorization has to be issued by the authorized Divisional officer. The words in Rule 5 namely "…Chawki or depot established under Rule 15 and specified under proviso (ii) to clause (b), sub-rule (1) of Rule 4" are the words qualifying the words chawki or depots. The fee has to be paid for different passes at chawki or depot where it shall be produced for examination and payment of transit fees. All forest produces are to be produced at chawki or depot for payment of transit fee. Reading of Rule 5 does not indicate any intention that only one category of passes as referred to in Rule 4(1) (b) are leviable with transit fee. The words"…specified under proviso (ii) to clause (b), sub-rule(1) of Rule 4 only refer to check Chawki or depot where forest produce is to be produced for examination. The Marginal Note of Rule 5 also clarifies the intent of the Rule. The Marginal note reads as "Fees payable for different classes of passes." Thus Marginal Note clarifies that transit fee is payable at all kinds of passes and submission is incorrect that leviablity of fee is only on one category of passes as referred to in Rule 4(1)(b). Marginal note has been held to be an internal aid to statutory interpretation of a statute. Justice G.P.Singh in Principles of Statutory interpretation 14th Edition regarding marginal note states as follows:

> *"…Marginal notes appended to Articles of the Constitution have been held to constitute part of the Constitution as passed by the Constituent Assembly and therefore they have been made use of in construing the Articles, e.g. Article 286, as furnishing 'prima facie', 'some clue as to the meaning and purpose of the Article'.*
>
> *A note appended to a statutory provision or subordinate legislation is merely explanatory in nature and does not dilute the rigour of the main provision. Notes under the rules cannot control the rules but they can provide an aid for interpretation of those rules. Further, a note which is made contemporaneously with the rules is part of the rule, and is not inconsistent with the rule, but makes explicit what is implicit in the rule."*

145. This Court has also occasion to consider the value of marginal note in several cases. In 2004 (2) SCC 579, *N.C.Dhoundial versus Union of India & Ors.,* It was laid down in paragraph 15 that heading or marginal note can be relied upon to clear any doubt or ambiguity in the interpretation of the provision and to listen the legislative intent. Following was laid down in para 15 :

> *"**15....**The language employed in the marginal heading is another indicator that it is a jurisdictional limitation. It is a settled rule of interpretation that the section heading or marginal note can be relied upon to clear any doubt or ambiguity in the interpretation of the provision and to discern the legislative intent (vide Uttam Das Chela Sunder Das v. Shiromani Gurdwara Parbandhak Committee and Bhinka v. Charan Singh)."*

146. In event the interpretation as put by learned counsel for the petitioner is accepted that fee under Rule 5 is chargeable only on passes obtained under Rule 4(1)(b) only, the easiest manner to avoid payment of transit fee is not to apply in form B for obtaining the booklet for issuance of pass by the person or from its authorized representative, which cannot be the intent of the Rule. Rule 4 is a rule made with regard to the persons and officers who have power to issue passes that has nothing to do with payment of fee which is separately provided in Rule 5 and is applicable to all kinds of passes.

147. Rule 6(4) on which also emphasis has been given by learned counsel for the petitioner only provides that the first copy of the triplicate forms of pass shall form the counterfoil and second and third parts shall be given to the person in-charge of the produce under transit and shall be produced whenever required by any checking officer. Schedule A which is appended to the Rules also use the word counterfoil and all passes are to be issued in form A as required by Rule 3 as well as Rule 6 (1). When all transit passes have to be in same form and in triplicate we fail to see that how it can be read that only on one category of passes fee is leviable and Rule 5 is not applicable and is completely independent of Rule 3.

148. We thus are of the view that the submissions of learned counsel of the petitioner that transit fee is payable only with regard to passes issued under Rule 4(1)(b) which are required to be checked under Rule 6(4), cannot be accepted. Pay ability of transit fee is attached with transit pass issued under form A except in cases where no transit pass is required for the removal of forest produce as enumerated in proviso to Rule 3. We thus do not accept the interpretation of Rule 3, 4, 5 & 6 as contended by learned counsel for the petitioner in respect of pay ability of transit fee on transit passes issued under 1978 Rules.

XVI. Non-issuance of Section 20 Notification after Section 4 Notification of 1927 Act

149. At this juncture, it is also necessary to notice one submission raised by the learned counsel for the petitioners. It is contended that the State of Uttar Pradesh although issued notification under Section 4 of 1927 Act proposing to constitute a land as forest but no final notification having been issued under Section 20 of 1927 Act the land covered by a notification issued under Section 4 cannot be regarded as forest so as to levy transit fee on the forest produce transiting through that area. With reference to above submission, it is sufficient to notice Section 5 as inserted by Uttar Pradesh Act 23 of 1965 with effect from 25.11.1965. By the aforesaid U.P. Act 23 of 1965 Section 5 has been substituted to the following effect:

> "*Section 5. Bar of accrual of forest rights.- After the issue of the notification under section 4 no right shall be acquired in or over the land comprised in such notification, except by succession or under a grant or a contract in writing made or entered into by or on behalf of the Government or some person in whom such right was vested when the notification was issued; and no fresh clearings for cultivation or for any other purpose shall be made in such land, nor any tree therein felled, girdled, lopped, tapped, or burnt, or its bark or leaves stripped off, or the same otherwise damaged, nor any forest-produce removed therefrom, except in accordance with such rules as may be made by the State Government in this behalf."*

150. Section 5 clearly provides that after the issue of the notification under Section 4 no forest produce can be removed therefrom, except in accordance with such rules as may be made by the State Government in this behalf. The regulation by the State thus comes into operation after the issue of notification under Section 4 and thus the submission of the petitioners that since no final notification under Section 20 has been issued they can not be regulated by Rules 1978 cannot be accepted.

151. We, however, make it clear that we have not entered into the issue as to whether actually after Section 4 notification State has taken any further steps including notification under Section 20 or not.

152. In so far as submission of learned counsel for the writ petitioner that Constitution Bench judgment in *State of West Bengal vs. Keshoram Industries* (surpa) having been referred to a Nine Judge Bench which reference having not been answered, the interpretation given by the Five Judge Bench of *Synthetics and Chemicals vs. State of U. P. and ors* cannot be relied, suffice it to say for the purposes of this batch of cases it is not necessary for us to rest our decision on the

preposition as laid down in *Keshoram Industries.* Independent of preposition as laid down by the Constitution Bench in *Keshoram Industries* there are clear pronouncement of this court as noticed above by us for deciding the issues raised in this batch of cases.

153. The writ petitioners have contended that in view of striking down Fourth and Fifth Amendment Rules to 1978 Rules, the Third Amendment dated 09.09.2004 could not have been resorted to for realising the transit fee at the rate of Rs.38/. The petitioners relying on judgments of *Firm A.T.B Mehtab Majid and Co. vs. State of Madras and another,* AIR 1963 SC 928; *B.N. Tiwari vs. Union of India,* AIR 1965 SC 1430 *and State of U.P. and others vs. Hirendera Pal Singh,* 2011 (5) SCC 305**,** have submitted that the earlier Rule does not revive even when substituted Rule is struck down by the Court. Shri D.K. Singh, learned Additional Advocate General has refuted the submission and placed reliance on judgment of this Court in *Supreme Court Advocate-on-record Association vs. Union of India,* 2016(5)SCC 1. This Court in the interim order dated 29.10.2013 has expressly directed that "the State shall be free to recover transit fee for forest produce removed from within the State of U.P. at the rate stipulated in the Third amendment to the Rules mentioned in the earlier part of this order." Further, after noticing the striking down of Fourth and Fifth Amendment Rules by the High Court, this Court in the same interim order permitted the State to recover transit fee in terms of the Third Amendment Rules.

154. It is, further, relevant to note that the High Court in its judgment dated 11.11.2011 has issued following directions in the last paragraph of the judgment which contained operative portion as below:

> *"188. All the writ petitions are consequently allowed. The Notifications dated 20.10.2010, by which the 'U.P. Transport of Timber and Other Forest Produce Rules, 1978', was amended by the 4th Amendment; and the Notification dated 4.6.2011, by which the 'U.P. Transport of Timber and Other Forest Produce Rules, 1978' was amended by the 5th Amendment, are quashed. It will be open to the Respondents to impose and collect the transit fees on such forest produce prevailing on such rates as it was being charged prior to the 4th Amendment to the Rules notified on 20.10.2010, i.e. at the rate of Rs.38/- per tonne of capacity per lorry load of timber or other forest produce; Rs. 19/- per tonne of capacity per cart load of timber or other forest produce; Rs. 1.25 per camel load of timber and other forest produce; Rs.4/- per pony load of timber or other forest produce and Rs.2/- per head load of timber or other forest produce. We also declare*

that the imposition of transit fee on 'Sponge Iron' which is not a forest produce after undergoing the process of manufacture, converting it into a commercially different commodity than forest produce, and 'Tendu Patta', the trade and transportation of which is monopolized by the State Government, is not valid in law, and restrain Respondents from requiring transit passes and transit fees on it. The costs are made easy.
Petitios allowed.

155. The High Court has thus even though had struck down Fourth and Fifth Amendment Rules but has clearly permitted the State to recover transit fee in accordance with the rate as was applicable prior to Fourth Amendment Rules. We, thus, do not find any infirmity in the State's recovery of transit fee at the rate of Third Amendment Rules. There being express order by the High Court on 11.11.2011 as well as interim order by this Court on 29.10.2013 permitting the State to recover transit fee as per the rate as was prevalent by Third Amendment Rules prior to enforcement to Fourth Amendment Rules, we are of the view that the question as to whether by striking down Fourth and Fifth Amendment Rules, Third Amendment Rule does not revive need not be gone into in the present case. In view of the order of the Division Bench of the High dated 11.11.2011, the State was fully competent to recover the transit fee as per Third Amendment Rule, which direction of the High Court we duly affirm.

XVII. VALIDITY OF FOURTH AND FIFTH AMENDMENT RULES

156. We now proceed to consider the respective contentions of the parties on the Fourth and Fifth Amendment Rules. Before we proceed to consider the rival contentions, it is necessary to have broad over-view of the concept of fee and tax. Further, the nature of regulatory fee and its essential characteristic also needs to be looked into.

157. The *locus classicus* on the concept of fee and tax is the judgment of this Court in *The Commissioner, Hindu Religious Endowments, Madras vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt,* AIR 1954 SC 282, B.K. Mukherjea, J. speaking for 7-Judge Bench has elaborately defined the tax and fee in paragraphs 43 and 44 which are quoted below:

> "43. A neat definition of what "tax" means has been given by Latham C.J. of the High Court of Australia in *Matthews v. Chicory Marketing Board* (60 C.L.R. 263, 276.).
>
> *"A tax", according to the learned Chief Justice, "is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered".*

This definition brings out, in our opinion, the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it. It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law (Vide Lower Mainland Dairy v. Orystal Dairy Ltd. 1933 AC 168.).

The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected form part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said, no element of quid pro quo between the taxpayer and the public authority (See Findlay Shirras on "Science of Public Finance", Vol. p. 203.). Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay.

44. Coming now to fees, a 'fee' is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay (Vide Lutz on "Public Finance" p. 215.). These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases."

158. Further, on distinction between tax and fee following was stated in paragraphs 45 and 46 :

"45... The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege. Fees confer a special capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest (Vide Findlay Shirras on

"Science of Public Finance" Vol. I, p. 202.). Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives. As Seligman says, it is the special benefit accruing to the individual which is the reason for payment in the case of fees; in the case of a tax, the particular advantage if it exists at all is an incidental result of State action (Vide Seligman's Essays on Taxation, p. 408.).

46. If, as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should, on the face of the legislative provision, be co-related to the expenses incurred by Government in rendering the services. As indicated in article 110 of the Constitution, ordinarily there are two classes of cases where Government imposes 'fees' upon persons. In the first class of cases, Government simply grants a permission or privilege to a person to do something, which otherwise that person would not be competent to do and extracts fees either heavy or moderate from that person in return for the privilege that is conferred.

A most common illustration of this type of cases is furnished by the licence fees for motor vehicles. Here the costs incurred by the Government in maintaining an office or bureau for the granting of licences may be very small and the amount of imposition that is levied is based really not upon the costs incurred by the Government but upon the benefit that the individual receives. In such cases, according to all the writers on public finance, the tax element is predominant (Vide Seligman's Essays on Taxation, p. 409.), and if the money paid by licence holders goes for the upkeep of roads and other matters of general public utility, the licence fee cannot but be regard as a tax."

159. In another Constitution Bench in *Corporation of Calcutta and Anr. vs. Liberty Cinema,* AIR 1965 SC 1107, following was stated in paragraphs 16 and 17 :

"16. Both these cases discussed other tests besides the requirement of the rendering of services for determining whether a levy is a fee, but with these we are not concerned in the present case. These cases also discussed the correlation of the costs of the services to the levy but with also we are not concerned as it is not sought to uphold the present levy on the ground of such correlation. We have referred to these cases only for showing that to make a levy a fee the services rendered in respect of

it must benefit, or confer advantage on, the person who pays the levy.

20. The other case to which we wish to refer in this connection is The Hingir-Rampur Coal Co., Ltd. v. The State of Orissa and ors., [1961]2SCR537 . There the imposition by a certain statute of a levy on lessees of coal mines in a certain area and the creation of a fund with it, was called in question. It was held that the levy was a fee in return for services and was valid. It was there said at p. 549, "If the special service rendered is distinctly and primarily meant for the benefit of a specified class or area, the fact that in benefiting the specified class or area the State as a whole may ultimately and indirectly be benefited would not detract from the character of the levy as a fee." It may be mentioned that the levy there went to meet expenditure necessary or expedient for providing amenities like communication, water supply and electricity for the better development of the mining area and to meet the welfare of the labour employed and other persons residing or working in the area of the mines. Here again there is no element of control but the services resulted in real benefit specially accruing to the persons on whom the levy was imposed. These decisions of this Court clearly establish that in order to make a levy a fee for services rendered the levy must confer special benefit on the persons on whom it is imposed. No case has been brought to our notice in which it has been held that a mere control exercised on the activities of the persons on whom the levy is imposed so as to make these activities more onerous, is service rendered to them making the levy a fee."

160. The nature of transit fee came for consideration before this Court in *State of Tripura and others vs. Sudhir Ranjan Nath,* 1997 (3) SCC 665. The Tripura Transit Rules levy the transit fee. The High Court has declared Rule 3 which provided for charging of transit fee as unconstitutional. In appeal against the said judgment, referring to the judgment of the *Corporation of Calcutta and Anr. vs. Liberty Cinema* (supra) it was held that expression 'licence fee' does not necessarily mean a fee in lieu of services and that in the case of regulatory fees, no *quid pro quo* need be established. Following was held in paragraph 15 :

"15. *This decision has been followed in several decisions, including the recent decisions of this Court in Vam Organic Chemicals Ltd. v. State of U.P., 1997 (2) SCC 715 and Bihar*

Distillery v. Union of India, 1997 (2) SCC 727. The High Court was, therefore, not right in proceeding on the assumption that every fee must necessarily satisfy the test of quid pro quo and in declaring the fees levied by sub-rules (3) and (4) of Rule 3 as bad on that basis. Since we hold that the fees levied by the said sub-rules is regulatory in nature, the said levy must be held to be valid and competent, being fully warranted by Section 41."

161. This Court held that transit fee is a regulatory fee in nature.

162. In *Secunderabad Hyderabad Hotel Owners' Assn. v. Hyderabad Municipal Corpn.,* 1999 (2) SCC 274, where this Court held that a fee which is charged for regulation for such activity would be validly classified as a fee and not a tax although no service is rendered. In paragraph 9 following was stated:

"9. *It is, by now, well settled that a licence fee may be either regulatory or compensatory. When a fee is charged for rendering specific services, a certain element of quid pro quo must be there between the service rendered and the fee charged so that the licence fee is commensurate with the cost of rendering the service although exact arithmetical equivalence is not expected. However, this is not the only kind of fee which can be charged. Licence fees can also be regulatory when the activities for which a licence is given require to be regulated or controlled. The fee which is charged for regulation for such activity would be validly classifiable as a fee and not a tax although no service is rendered. An element of quid pro quo for the levy of such fees is not required although such fees cannot be excessive."*

163. The Uttar Pradesh Transit of Timber and other Forest Produce Rules, 1978, itself came for consideration before this Court in *State of U.P. vs. Sitapur Packing Wood Suppliers,* 2002 (4) SCC 566. The High Court had held the Rules to be constitutionally valid but levy of transit fee was invalidated. In absence of *quid pro quo*, the High Court did not strike down the Rules and observe that it is open to the State Government to levy transit fee by rendering service as *quid pro quo*. Rules 3 and 5 of 1978 Rules as well as provisions of Section 41 of Forest Act, 1927 were considered by this Court. This Court relying on the judgments of this Court in *State of Tripura* v. *Sudhir Ranjan Nath, Corpn. of Calcutta* v. *Liberty Cinema and Secunderabad Hyderabad Hotel Owners' Assn.* v. *Hyderabad Municipal Corpn.* held transit fee under Rule 5 as clearly regulatory and it was held that it was not necessary for the State to establish *quid pro quo*. Following was held in paragraphs 8,9 and 10:

"8. *The distinction between tax and fee is well settled and need not be restated herein. It is clear from the afore-noticed provisions of the Act and the Rules that the transitory fee is regulatory in nature. The question of quid pro quo is necessary when a fee is compensatory. It is well established that for every fee quid pro quo is not necessary. The transit fee being regulatory, it is not necessary to establish the factum of rendering of service. Thus, there is no question of a levy of transit fee being invalidated on the ground that quid pro quo has not been established.*

9. *In State of Tripura v. Sudhir Ranjan Nath almost similar question came up for consideration in relation to the State of Tripura. It was held that Sections 41 and 76 of the Act vest total control over the forest produce in the State Government and empower it to regulate the transit of all timber or other forest produce for which purpose the State Government is also empowered to make the Rules. The decision of the High Court invalidating the levy of application fee in the said case on the ground that the State had not established that the services were rendered in lieu of the said fee, was reversed by this Court holding that the fee was regulatory and not compensatory. Reference may be made to the decision in the case of Corpn. of Calcutta v. Liberty Cinema wherein it was held that the expression licence fee does not necessarily mean a fee in lieu of services and in case of regulatory fee no quid pro quo need be established. Following Liberty Cinema case[2] similar views have been expressed in Secunderabad Hyderabad Hotel Owners' Assn. v. Hyderabad Municipal Corpn. and P. Kannadasan v. State of T.N.*

10. *The transit fee under Rule 5 is clearly regulatory and, thus, it was not necessary for the State to establish quid pro quo. The High Court was in error in holding that transit fee is invalid in absence of quid pro quo. As a consequence the penalty would also be valid. The penalty was held to be invalid by the High Court in view of its conclusion about the invalidity of the transit fee. The penalty, however, cannot be beyond what is permissible in the Act. That aspect, however, is not under challenge in these appeals as the State Government after the impugned judgment of the High Court realizing its mistake amended the Rule so as to bring the provision of penalty in accord with the provisions of the Act."*

164. In view of the foregoing discussion, it is now well settled that transit fee charged under 1978 Rules is regulatory fee in character and further the State is not to prove *quid pro quo* for levy of transit fee. After having noticed the nature and character of the transit fee as envisaged in 1978 Rules, we now proceed to notice various provisions of 1978 Rules as well as Fourth and Fifth Amendment Rules.

165. Section 41 of the Forest Act, 1927 empowered the State to make Rules to regulate transit of forest produce. The State of Uttar Pradesh by Uttar Pradesh Act 23 of 1965 with effect from 23.11.1965 after sub-section (2) of Section 41 inserted sub-sections (2A) and (2B). Sub-section (2A) is as follows :

> *"(2A) The State Government may by notification in the Gazette delegate, either unconditionally or subject to such conditions as may be specified in the notification, to any Forest-officer, not below the rank of Conservator, the power to prescribe fees under clause (c) of sub-section (2)."*

166. The State of U.P. in exercise of power under Section 41 framed Rules, namely, the Uttar Pradesh Transit of Timber and other Forest Produce Rules, 1978. Rule 3 provided for regulation of transit of forest-produce by means of passes which is to the following effect:

> ***"3. Regulation of transit of forest produce by means of passes.*** *- No forest produce shall be moved into, or from, or within, the State of Uttar Pradesh except as hereinafter provided, without a transit pass in the form in Schedule A to these Rules, from an officer of the Forest Department or a person duly authorised by or under these Rules to issue such pass or otherwise than in accordance with the conditions of such pass or by any route or to any destination other than the route or destination specified in such pass :*
>
> *Provided that no transit pass hall be required for the removal -*
>
> *(iii) of any forest produce which is being removed for bona fide consumption by any person in exercise of a privilege granted in this behalf by the 'State Government' or of a right recognised under this Act, within the limits of a village in which it is produced;*
>
> *(iv) of forest produce by contractor's agency from the forests managed by the Forest Department, in which case the movement shall be regulated by the relevant conditions of sale and terms of the corresponding agreement deed executed by the buyer;*

(v) of such forest produce as may be exempted by the State Government from the operation of these rules by notification in the official Gazette."

167. Rule 5 prescribes for fees payable for different classes of passes. Rule 5(as originally framed) is as below :

"5. Fees payable for different classes of passes. *At the Check Chowki or depot established under Rule 15 and specified under proviso (ii) to clause (b) of sub-rule (1) of Rule 4, the forest produce alongwith the two copies of the pass (duplicate and triplicate) shall be produced for examination under sub-rule (4) of Rule 6 and for payment of transit fee on the forest produce calculated at the following rates; corresponding receipt shall be granted in the form given in Schedule 'C'-*

(i)	per lorry load of timber or other forest produce	.Rs. 5.00 per tonne of capacity
(ii)	per cart load of timber or other forest produce	.Rs. 2.50
(iii)	per camel load of timber or other forest produce	.Rs. 1.25
(iv)	per pony load of timber or other forest produce	.Re. 0.50
(v)	per head load of timber or other forest produce	.Re. 0.25

Note. In respect of resin and resin products, the provisions of the Uttar Pradesh Resin and Other Forest Produce (Regulation of Trade) Act, 1976 and the rules framed thereunder, shall apply."

168. By the Uttar Pradesh Transit of Timber and other Forest Produce (Third Amendment) Rules, 2004 fee prescribed in Rule 5 was increased, for example per lorry load of timber or other forest produce in place of Rs.5/- per tonne of capacity is shown fee of Rs.38/- per tonne of capacity. Now, comes to Fourth Amendment Rules, 2010 dated 20.10.2010, the fee which was Rs.38/- for per tonne per lorry load of timber or other forest produce was increased as Rs.200/- per cubic meter of capacity other than of Khair, Sal and Sagaun (Teak), Shisham, Sandal Wood and Red Sanders. Then comes to Fifth Amendment Rules,2011 dated 04.06.2011. Rule 5 was amended where the basis of levy of fee was changed into *advalorem* at the rate of

5% or minimum Rs.2,000/- for per lorry load of timber or other than of Khair, Sal and Sagaun (Teak), Shisham, Sandal Wood and Red Sanders. Relevant extract of Rule 5 as amended by Fifth Amendment is as follows :

(i)(a) per lorry load of timber other than of Khair, Sal and Sagaun (Teak) Shisham, Sandal Wood and Red Sanders	**Rs.200.00 per cubic Meter of capacity**	**(i)(a) per lorry load or timber of khair, sal and sagaun (Teak) Shisham, Sandal wood and Red Sanders**	**Advalorem at the rate of 5% or minimum Rs. 2000/-**
(b) per lorry load of timber other than of Khair, Sal and Sagaun (Teak), Shisham, Sandal Wood and Red Sanders or other forest produce	**Rs. 75.00 per cubic Meter of capacity**	**(b) per lorry load of timber other than of Khair, Sal and Sagaun (Teak), Shisham, Sandal Wood and Red Sanders or other forest produce except as mentioned in (i) (c)**	**Advalorem at the rate of 5% or minimum Rs. 750/-**
		(c)per lorry load of other forest produce coming from mines, e.g., coal, lime, stone, sand, Bajari, and other minerals.	**Advalorem at the rate of 15% or minimum Rs. 400/-**

169. Before we proceed further with the discussion it is necessary to note the actual impact on Transit Fee of Fourth and Fifth Amendment Rules. We have already noted that initially when Transit Fee Rules were framed in 1978, Transit Fee on per lorry load of timber was Rs. 5 per tonne of capacity. By 3rd amendment with effect from 14.06.2004 Rs. 5/- was increased as Rs. 38 per tonne of capacity. By 4th amendment rules, the Transit Fee was increased as Rs. 200/- per cubic meter with regard to timber, Khair, Sal & Sagaun, Sisham, Sandal wood and Red Sanders and with regard to other timber Rs. 75 per cubic meter.
170. The same amount was leviable on other forest produce. The chart has been given by learned Counsel for the petitioners reflecting the effect of Third, Fourth & Fifth Amendment Rules with regard to a lorry load having different capacities. The chart is as follows:

TRANSIT FEE CHARGED

Vehicles	As per 1978 Rules Rs. 5/- per Ton	As per G.O. Dt. 16.04.2004 Rs. 38/- per Ton	As per G.O. dt. 20.10.2010 (a) Rs. 200/- per Cubic Meter Capacity (b) Rs. 75/- Per Cubic Meter capacity	As per G.O. Dt. 04.06.2011	
6 wheeler	9 Ton x Rs. 5/- = Rs. 45/-	9 Ton x Rs. 38/- = Rs. 342/-	(a) 28.57 Cubic Meter x Rs. 200/- = Rs. 5714/-	(a) Per Lorry load of timber of Khair, Sal and Sagaun (Teek), Shisham, Sandal wood and Red Sanders	Ad-Valorem at the rate of 5% or minimum Rs. 2000/-
10-12 wheeler	15 Ton x Rs. 5/- = Rs. 75/-	15 Ton x Rs. 38/- = Rs. 570/-	36.50 Cubic Meter x Rs. 200/- = Rs. 7300/-	(b) Per lorry load of timber other than of Khair, Sal and Sagaun (Teek), Shisham, Sandal wood and Red Sanders and other forest produce as mentioned in (i)(c)	Ad-Valorem at the rate of 5% or minimum Rs. 750/-
6 wheeler			(b) 28.57 Cubic Meter x Rs. 75/- = Rs. 2142/-	(c) Per lorry load of other forest produce coming from mines i.e. coal, lime, stone, sand, bajri and other minerals	Ad-Valorem at the rate of 15% or minimum Rs. 750/-
10-12 wheeler			36.50 Cubic Meter x Rs. 75/- = Rs. 2737/-		

171. The above chart indicates that by Third Amendment Rules which was enforced from 14.06.2004 that is after 26 years of enforcement of Transit Rule, the Transit Fee was increased 7 times. Whereas by Fourth amendment which was imposed with effect from 20.10.2010. Transit Fee was increased more than 16 times. As per Fifth amendment rules, Transit Fee was based on *ad-valorem* basis and although the minimum amount was fixed but there was no cap on the maximum amount. Thus Transit Fee payable was on the value of all forest produce. Whereas with regard to timber *ad-valorem* was at the rate of 5 per cent but with regard to coal, lime stone, sand, stone, bajri & other minerals ad-valorem is at the rate of 15 per cent.

172. High Court after considering the impact of Fifth Amendment has held that by Fifth Amendment the increase in Transit Fee is more than ten time. The Fifth Amendment Rule was issued in six months of issuance of Fourth Amendment Rule. In the affidavit filed before the High Court the State has pleaded that every year expenditure increases 10% to 20%, When every year expenditure increases only 10 to 20%, what was necessity to increase the transit several time fee by 5th Amendment, remains unexplained.

173. Learned senior counsel *Shri N.K. Kaul* appearing for the respondent, Indian Wood Products Co. has explained the impact of increase of Transit Fee on the basis of *ad-valorem*. According to the chart in so far as the Transit Fee on Khair wood as paid by Indian Wood Products Ltd, the payment was made 96.38 times by 4th amendment and 362.33 times from 3rd amendment on the basis of 5th amendment of the Rules dated 04.06.2011.

174. Before we arrive at any conclusion regarding validity or otherwise of the Fourth and Fifth Amendment Rules following three issues need to be addressed:

(a) Whether there is a broad correlation between increase in the fee and expenses incurred in regulation of forest produce, although the State is not liable to prove any quid pro quo?

(b) Whether the State has satisfactorily justified the increase in Transit Fee by 4th & 5th amendment by producing relevant material?

(c) Whether by adoption of *ad-valorem* basis by 5th amendment Rules the Transit Fee no longer remains a fee and has changed into character of a tax?

175. We have already noticed the pronouncement of this Court that for regulatory fee, State is not to prove any quid pro quo. Regulatory Fee can be charged, even if, no services are rendered by the State in lieu of fee realised. This Court in few more cases had occasion to advert to the aforesaid issue which need to be noted. In *The State of Maharashtra and Others vs. Salvation Army, Western India Territory,* (1975) 1 SCC 509, this Court had occasion to consider the provisions of Bombay Public Trust Act, 1950 wherein, two per cent contribution was required to be paid to

Public Trust Administration Fund. This Court noticed the essential elements to characterise the payment as a fee. In para 14 following was stated:

> *"14... Thus, two elements are essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accept either willingly or unwillingly and in the second place, the amount collected must be earmarked to meet the expenses of rendering these services and must not go to the general revenue of the state to be spent for general public purposes."*

176. Another case which needs to be noted is *Sreenivasa General Traders and Others vs. State of Andhra Pradesh and Others,* (1983) 4 SCC 353. In this case, the Court after referring to earlier judgments of this Court laid down the following in para 31:

> *"31. The traditional view that there must be actual quid pro quo for a fee has undergone a sea change in the subsequent decisions. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary motive of regulation in public interest. If the element of revenue for general purpose of the State predominates, the levy becomes a tax. In regard to fees there is, and must always be, correlation between the fee collected and the service intended to be rendered. In determining whether a levy is a fee, the true test must be whether its primary and essential purpose is to render specific services to a specified area or class; it may be of on consequence that the State may ultimately and indirectly be benefited by it. The power of any legislature to levy a fee is conditioned by the fact that it must be "by and large" a quid pro quo for the services rendered. However, correlationship between the levy and the services rendered (sic or) expected is one of general character and not of mathematical exactitude. All that is necessary is that there should be a "reasonable relationship" between the levy of the fee, and the service rendered..."*

177. In *Delhi Race Club Limited vs. Union of India and Others,* (2012) 8 SCC 680**,** following was laid down in para 39 and 43:

> *"39. Dealing with such regulatory fees, this Curt in Vam Organic Chemicals Ltd. & Anr. Vs. State of U.P. observed that in case of*

a regulatory fee, like the licence fee, no quid pro quo is necessary, but such fee should not be excessive..."

"43...Hence, in our opinion, the licence fee imposed in the present case is a regulatory fee and need not necessarily entail rendition of specific services in return but at the same time should not be excessive. In any case, the appellant has not challenged the amount of the levy as unreasonable and expropriatory or excessive..."

178. Thus the issue (a) as noted above, has to be answered holding that although, the State is not required to prove any quid pro quo for levy or increase in fee but a broad correlation has to be established between expenses incurred for regulation of Transit and the fee realised.

179. The issue (b) that whether State has satisfactorily justified the increase in Transit Fee by Fourth and Fifth Amendment Rules by producing any material has to be answered on the basis of material which has been produced by the State before the High Court and has been adverted to before us by learned senior counsel Shri Ravindra Srivastava. The submission of learned counsel for the State is that the High Court has not adverted to the relevant material produced by the State which was filed before the Court by means of a counter affidavit. The above submission is not correct since in para 85 of the judgment, the High Court has noticed the figures which were placed by the State in its affidavit regarding amount of collection of Transit Fee and the expenses incurred by the State on the establishment and other miscellaneous expenses. The following chart of expenses and Transit Fee and the cost of enforcement by Forest Department has been noticed by the High Court in para 85 which is to the following effect:

वन उपज अभिवहन से प्राप्त राजस्व तथा इससे प्राप्त करने हेतु प्रवर्तन पर किया गया व्यय					
वर्ष	वन उपज अभिवहन से प्राप्त राजस्व (रूपये लाख में)	वन विभाग प्रवर्तन पर किया गया व्यय			
		अधिष्ठान	अन्य	अनुसांगिक व्यय	योग
2	3	4	5	6	7
2004-05	3867.00	10997.33	15.37	201.33	11213.93
2009-10	9086.17	27684.38	15.61	238.73	27938.72
2010-11	11288.2	31786.85	31.09	387.22	32205.16
2011-12 (Upto July 2011	3848.33	11338.75	2.94	41.89	11383.58

180. Learned counsel appearing for the writ petitioners with regard to above collection and expenses has submitted that by collection of Transit Fee State was trying to meet the entire expenses of Forest Department and the expenses of entire establishment and no details were given of expenses incurred for regulation of Transit Fee separately. It is submitted that Transit Fee is not the only source of Forest Department to meet the expenses of entire establishment of the Forest Department.

181. Shri Udit Chandra, learned counsel appearing for some of the petitioners has referred to a Division Bench judgment of Allahabad High Court in Civil Misc.Writ Petition No.72465 of 2011- *M/s. Singh Timber Trader and others vs. State of U.P. and others* (reported in 2016(1) Allahabad Daily Judgment 174). It is submitted that the writ petitioners in the above case, the manufacturers of plywood and veneer prayed for quashing of the notification dated 20.10.2010 by which Rule 11 of the U.P. Establishment and Regulation of Saw Mills Rules, 1978 had been substituted by U.P. Establishment and Regulation of Saw Mills (Fourth Amendment) Rules, 2010. By the said Fourth Amendment, Rules, 2010 licence fee for Saw Mills had been enhanced by 15 times from Rs.5,000/- per year to Rs.75,000/- per year. What is submitted is that the State in the said writ petition for justifying the enhancement of licence fee for Saw Mills has relied on the same figures of expenditure on enforcement/regulation in U.P. Forest Department which has been relied in the High Court in the impugned judgment in support of increase in the transit fee. It is submitted that thus the figures of expenditure which are claimed by the State are not clearly figures of expenditure on regulation of transit but include other expenditures of the forest department also. It is useful to extract the following portion of the above mentioned Division Bench judgment dated 23rd December, 2014 :

> *"The State Government in the counter affidavit has tried to justify the enhancement in the fee in the following manner.*
>
> *(a) Expenditure on enforcement/ regulation in U.P. Forest Department has increased about three times i.e. from Rs.11213.93 lakh in year 2004-05 to 32205.16 lakh in year 2010-11.*

Year	**Expenditure on regulation**			**(Rupees in Lakh)**
	Establishment	**Other**	**Incidental expenditure**	**Total**
2004-05	10997.33	15.37	201.33	11213.93
2009-10	27684.38	15.61	238.73	27938.72
2010-11	31786.85	31.09	387.22	32205.16

> The license fee/renewal of saw mills and veneer/plywood are thus regulatory in nature and the same has been enhanced with a view to balance and meet the enhanced expenditure being incurred on enforcement/regulation of the Forest Department..”

182. From the above it is clear that the submission of learned counsel for writ petitioners is correct that the expenditure which is claimed by the State as noticed in paragraph 85 of the impugned judgment of the High Court is the expenditure not confined to regulation of transit but other expenditures of the forest department as well. Thus, the correlation sought to be established by the State on account of transit fee raised and those expenditures as claimed is unfounded and has rightly not been accepted by the High Court.

183. The High Court after considering the stand of the State has held the following in paragraphs 141 and 142:

> *“141.... The increase of the transit fees by the 4th Amendment on cubic feet basis and thereafter by impugned 5th Amendment on ad valorem basis on movement of forest produce on the ground that the value of the forest produce has increased, has made it unconstitutional on both the counts namely that the cost of forest produce has no co-relation with the objects sought to be achieved by regulation of transit, and secondly the State has not justified the increase on any empirical data based on scientific evaluation of the cost of regulation. The fee has thus changed its character from regulatory fee, and in the absence of any defence on quid pro quo, to a compensatory tax, which has the effect of augmenting the revenue of the State.*
>
> *142. In our opinion, considering the arguments raised and the material placed before us, even if the Rules of 1978 are valid, the notifications dated 13.12.2010, dated 4th June, 2011 under challenge, increasing the transit fees firstly on cubic feet basis and thereafter item wise on ad valorem basis linked to the price by making distinction between the forest produce, and the minor minerals, which are also forest produce, and without providing justification for such increase, converted the regulatory fees into compensatory tax. The State has completely failed to justify, such arbitrary increase, both on the principle of reasonableness and in public interest.”*

184. The aforesaid figures, as noticed in paragraph 85, were expressly considered by the High Court in para 181 of the judgment where following observation has been made:

> "*181.... The collections in 2010-11, before the 4th and 5th Amendments to the Rules of 1978 was 11288. 2 lacs, whereas the expenditure of the establishment and other administrative expenses on the enforcement for the entire year 2010-11 on the collection of transit fees by the department was 32205.16 lacs. It is likely to 128 increase, as admitted by only 10-20% every year. The revenue to be generated by the transit fee, would thus be at least 10 times more than the cost in collection of fees. By any conservative estimate the increase of fees on ad valorem basis, would be far above the entire expenses born by the department for enforcement on collection of the fees, and thus the large amount of the collection of transit fees will go into the coffers of the State to raise its revenues. Even if entire collections are spent on maintenance of staff, vehicles, fuel and other administrative expenses of forest department, it looses its character as regulatory fees, to regulate transit of forest produce, with no benefit or service directly or indirectly to facilitate the trade or transit of forest produce. There is no averment, nor it is argued by learned Counsel appearing for the State that any facility or services are to be provided or are contemplated for the trade."*

185. The High Court thus held, after considering the material brought by the State for increase transit fee, that increase in transit fee was excessive and the character of the fee has changed from simple regulatory fee to a fee which is for raising revenue.

186. The High Court in para 181 has returned the finding that "The revenue to be generated by the transit fee, would thus be at least 10 times more than the cost in collection of fees."

187. A three-judges Bench in *Calcutta Municipal Corpn. And others vs. Shrey Mercantile (P) Ltd. and others,* 2005 (4) SCC 245 had considered provisions of Calcutta Municipal Corporation (Taxation) Regulations, 1989 whether levy was made on *advalorem* basis. The Court examined the issue as to whether such levy is a "fee" or a "tax". The Court held the levy in the nature of tax and also held it arbitrary and discriminatory, violative of Article 14. The following was held in paragraph 16 by the High Court:

> ***"16.*** *Therefore, the main difference between "a fee" and "a tax" is on account of the source of power. Although "police power" is not mentioned in the Constitution, we may rely upon it as a concept to bring out the difference between "a fee" and "a tax". The power to tax must be distinguished from an exercise of the police power. The "police power" is different from the*

"taxing power" in its essential principles. The power to regulate, control and prohibit with the main object of giving some special benefit to a specific class or group of persons is in the exercise of police power and the charge levied on that class to defray the costs of providing benefit to such a class is "a fee". Therefore, in the aforestated judgment in Kesoram case[1] it has been held that where regulation is the primary purpose, its power is referable to the "police power". If the primary purpose in imposing the charge is to regulate, the charge is not a tax even if it produces revenue for the Government. But where the Government intends to raise revenue as the primary object, the imposition is a tax. In the case of Synthetics & Chemicals Ltd. v. State of U.P.[3] it has been held that regulation is a necessary concomitant of the police power of the State and that though the doctrine of police power is an American doctrine, the power to regulate is a part of the sovereign power of the State, exercisable by the competent legislature. However, as held in Kesoram case[1] in the garb of regulation, any fee or levy which has no connection with the cost or expense of administering the regulation cannot be imposed and only such levy can be justified which can be treated as a part of regulatory measure. To that extent, the State's power to regulate as an expression of the sovereign power has its limitations. It is not plenary as in the case of the power of taxation."

188. The Court further held that since the Regulation provides for imposition of fee on *advalorem* basis which is a circumstance to show that the impugned levy is in the nature of tax and not in the nature of a fee. In paragraph 18 following was stated;

"18.. Further, under the Regulations, the Corporation while prescribing fees has levied fees on ad valorem basis which is one more cirumstance to show that the impugned levy is in the nature of tax and not in the nature of a fee. Further, the qunatum of levy indicates that it is a tax and not a fee. The analysis of the various provisions of the Act and the impugned Regulations shows that the impugned levy is in exercise of power of taxation under the said Act to augment the revenues primarily and not as a part of regulatory measure."

189. Shri Ravindra Srivastava, learned senior counsel, appearing for the State has submitted that no exception can be taken to the adoption of *advalorem* basis for imposition of transit fee by means of Fifth Amendment Rules. He submits that when a State is competent to levy fee, what shall be the yardstick of such levy depends on facts of each case and the State can find its own basis for determining the extent of

fee. He has relied on three-Judges Bench judgment in *P.M. Ashwathanarayana Sefty and others vs. State of Karnataka and others,* 1989 Supp.(1) SCC 696. He submits that this Court in the above case was considering the levy of Court fee under Karnataka Court Fee Valuation Act, 1958. The Court fee was leviable on *advalorem* basis and the Court proceeded to examine the issue as to whether Court fee can be levied on *advalorem* basis. This Court in the above case has also held that a fee may shed its complexion as a fee and assume that of a tax. In paragraph 40 of the judgment following was held:

> ***"40.*** *A fee which at the inception is supportable as one might shed its complexion as a fee and assume that of a tax by reason of the accumulation of surpluses or the happening of events which tend to affect and unsettle the requisite degree of correlation."*

190. The Court also addressed the issue as to whether *advalorem* principle which is appropriate to taxation would be inapplicable in the context of an impost which is meant as a contribution towards the of costs of service. The Court held that in view of the inherent complexity of these fiscal adjustments, courts give a larger discretion to the legislature in the matter of its preferences of economic and social policies. The Court further held that the question of the measure of tax or a fee should be *advalorem* or *ad quantum* is again a matter of fiscal policy. The Court ultimately held that although *advalorem* principle which may not be an ideal basis for distribution of a fee but no unconstitutionality or infirmity can be incurred. However, the Court has held that 'fee' meant to defray expenses of services cannot be applied towards objects of general public utility. In paragraph 96 following is stated :

> ***"96.*** *The power to raise funds through the fiscal tool of a fee is not to be confused with a compulsion so to do. While "fee" meant to defray expenses of services cannot be applied towards objects of general public utility as part of general revenues, the converse is not valid. General public revenues can, with justification, be utilised to meet, wholly or in substantial part, the expenses on the administration of civil justice. Many States including Karnataka and Rajasthan had, earlier, statutory upper limits fixed for the court fee. But later legislation has sought to do away with the prescription of an upper limit. The insistence on raising court fees at high rates recalls of what Adam Smith "Wealth of Nations" said:*
>
> > *"There is no art which one government sooner learns of another than that of drawing money from the pockets of the people.""*

191. In the aforesaid case, the Court, however, had struck down Entry 20 in Schedule I of the Bombay Act where *advalorem* Court fee was imposed without the benefit of upper limit of Rs.15,000/- which was prescribed in respect of other suits and proceedings. The Court held the aforesaid imposition as arbitrary and upheld the judgment striking down the above provision. Paragraph 90 to 93 of the judgment are relevant and are extracted below:

> ***"90.*** *In the appeal of the State of Maharashtra arising out of the Bombay Court Fees Act, 1959, the High Court has struck down the impugned provisions on the ground that the levy of court fee on proceedings for grant of probate and letters of administration ad valorem without the upper limit prescribed for all other litigants—the court fee in the present case amounts to Rs 6,14,814 —is discriminatory. The High Court has also held that, there is no intelligible or rational differentia between the two classes of litigation and that having regard to the fact that what is recovered is a fee, the purported classification has no rational nexus to the object. The argument was noticed by the learned Single Judge thus:*
>
> *Petitioners next contend that the impugned clause discriminates as between different types of suitors and that there is no justification for this discrimination. Plaintiffs who go to civil courts claiming decrees are not required to pay court fees in excess of Rs 15,000. This is irrespective of the amounts claimed over and above Rs 15 lakhs. As against this, persons claiming probates have no such relief in the form of an upper limit to fee payable.*
>
> ***91.*** *This contention was accepted by the learned Single Judge who has upheld the appeal. Indeed, where a proceeding for grant of probate and letters of administration becomes a contentious matter, it is registered as a suit and proceeded with accordingly. If in respect of all other suits of whatever nature and complexity an upper limit of Rs 15,000 on the court fee is fixed, there is no logical justification for singling out this proceeding for an ad valorem impost without the benefit of some upper limit prescribed by the same statute respecting all other litigants. Neither before the High Court — nor before us here — was the impost sought to be supported or justified as something other than a mere fee, levy of which is otherwise within the State's power or as separate "fee" from another distinct source. It is purported to be collected and sought to be justified only as court fee and nothing else.*

> **92.** The discrimination brought about by the statute, in our opinion, fails to pass the constitutional muster as rightly pointed out by the High Court. *The High Court, in our opinion rightly, held:*
>
> *"There is no answer to this contention, except that the legislature has not thought it fit to grant relief to the seekers of probates, whereas plaintiffs in civil suits were thought deserving of such an upper limit. The discrimination is a piece of class legislation prohibited by the guarantee of equal protection of laws embodied in Article 14 of the Constitution. On this ground also item 10 cannot be sustained."*
>
> ***93.*** *We approve this reasoning of the High Court and the decision of the High Court is sustained on this ground alone. In view of this any other ground urged against the constitutionality of the levy is unnecessary to be examined."*

192. The Court thus struck down a provision of the Court fee where there was no maximum cap on *advalorem basis.* There was no maximum cap in the Fifth Amendment Rules although minimum fee was prescribed. Even in some of the cases of fee *advalorem principle* may be applied but we are of the considered opinion that in case of transit fee where the object and purpose is regulation of transit of forest produce adoption of *advalorem* principle for levy of transit fee was not appropriate and such levy changed the character of fee into a tax which has rightly been so held by the High Court. We are, thus, of the view that the High Court has given cogent and valid reason for striking down the Fourth and Fifth Amendment Rules which decision was rendered by the High Court after elaborate and proper consideration of material brought before the Court after analysing the purpose and object of the imposition of transit fee. We, thus, affirm the judgment of the High Court striking down Fourth and Fifth Amendment Rules.

Transfer Petitions

193. This Court wide (sic : vide) its order dated 19.11.2012 had already directed the transfer petitions to be heard along with SLP(C)NO.11367 of 2007. The Transfer Petitions, thus, deserve to be decided in terms of the Civil Appeal arising out of SLP(C)No.11367 of 2007.

Contempt Petitions

194. The seven Contempt Petitions have been filed in which notices have not yet been issued. All the Civil Appeals being decided by this order, the contempt petitions deserve to be dismissed.

XVIII. Interim orders passed against the judgment of the Allahabad High Court

195. In this batch of appeals in some appeals interim order were passed. In some of the appeals, no interim order was passed. This Court noticing the divergent orders passed in the batch of appeals, passed a detailed interim order on 29.10.2013 which was to the following effect:

> "*1) The State shall be free to recover transit fee for forest produce removed from within the State of U.P. at the rate stipulated in the 3rd amendment to the Rules mentioned in the earlier part of this order.*
>
> *2) Any such recovery shall remain subject to the ultimate outcome of present petitions pending in this Court.*
>
> *3) In the event of writ petitioners/private parties succeeding in their cases, the amount deposited/recovered from them shall be refunded to them with interest at the rate of 9% p.a. from the date the deposit was made till actual refund.*
>
> *4) The State shall maintain accurate amount of recovery made and the nature and the quantum/quantity of the produce removed by the private parties concerned.*
>
> *5) Even in the 2nd batch of cases arising out of Writ Petition No. 975 of 2004 whereby the High Court has struck down the 4th and 5th amendment to the Rules, the State shall be free to make recoveries in terms of the 3rd amendment in regard to the forest produce removed from within the State of U.P. The operation of the orders passed by the High Court shall to that extent remain stayed.*
>
> *6) This modification shall not apply to exempted goods or industrial by products like Klinker and fly ash."*

196. By a subsequent order dated 26.04.2016, this Court further modified the interim order dated 29.10.2013. The order dated 29.10.2013 was modified on 26.04.2016 to the following effect:

> *"(1) Insofar as forest produce as defined in sub-clause(a) of Clause(4) of Section 2 is concerned, the State shall be free to recover transit fee within the State of U.P. at the rate stipulated in the fifth amendment to Rule 5 as aforesaid;*

(2) Insofar as forest produce originating from State of U.P. and covered by sub-clause (b) of Clause (4) of Section 3 is concerned, the State shall be free recover transit fee at the rate stipulated in the fifth amendment to the aforesaid Rule 5.

(3) Insofar as forest produce covered under sub-clause (b) of Clause(4) of Section 2, which does not originate from State of U.P. but is merely passing through the State, the State shall be free to recover transit fee in respect of such forest produce at the rate stipulated in the fourth amendment to aforesaid Rule 5.

(4) Any such recovery shall remain subject to the ultimate outcome of present petitions pending in this Court.

(5) In the event of writ petitioners/private parties succeeding in their cases, the amount deposited/recovered 27 from them shall be refunded to them with interest @ 9% per annum from the date of deposit till actual refund.

(6) The State shall maintain accurate amount of recovery made and the nature/quantity of the produce removed by the private party is concerned.

(7) These modified directions shall come into effect on and from 1st May 2016.

(8) This modification shall not apply to exempted goods or industrial by-products like Klinker fly ash."

197. This Court directed that State shall be free to recover transit fee within the State of U.P. at the rate stipulated in the Fifth Amendment to Rule 5.

198. The Court also held that such recovery shall remain subject to the ultimate outcome of present cases pending in this Court. With further condition that in the event of writ petitioners/private parties succeeding in their, the amount deposited/ recovered from them be refunded with interest @9%.

199. We having upheld the judgment of the High Court dated 11.11.2011 striking down Fourth and Fifth Amendment Rules further steps needs to be taken as per interim direction dated 26.04.2016 which came into the effect from 01.05.2016. It is made clear that in so far as prior to 01.05.2016 recovery was permitted as per Third Amendment Rules which has been upheld, there is no question of considering any claim of refund of any transit fee prior to 01.05.2016. The transit fee is an indirect tax and the State is entitled to consider the claim of refund provided the Entry Tax has not passed on to the consumer which may result into unjust enrichment. Thus we

permit the State to consider any claim of refund of transit fee on the condition that State shall permit refund only after being satisfied that there is no passing of the transit fee to the ultimate consumer and refund may not result in unjust enrichment.

XIX. CIVIL APPEALS OF STATE OF M.P. FILED AGAINST THE JUDGMENT DATED 14.05.2007

200. The Writ Petitions were filed by the respondents to the Civil Appeals in the High Court of Madhya Pradesh praying for quashing the Notification dated 28.05.2001 issued by the State of Madhya Pradesh fixing the amount of Transit Fee for issuance of Transit Pass in exercise of power under Rule 5 of the M.P. Transit (Forest Produce) Rules, 2000 (hereinafter referred to as 'Rules, 2000'). Writ Petitioners have also prayed for declaring Section 2 (4)(b)(iv) and Section 41 of Indian Forest Act, 1927(hereinafter referred to as 'Act, 1927') as unconstitutional and *ultra vires* to the extent they relate to minerals. Rule 5 of Rules, 2000 as well as Notification dated 28.05.2001 was also sought to be declared as *ultra vires* to the powers of the State Government under Act, 1927. In the Writ Petition the writ petitioners raised the following contentions:

201. The Regulatory Fee with regard to transit fee on minerals is totally illegal and without jurisdiction in as much as the field is covered by the MMDR Act 1957. Regulatory Fee imposed by the State of Madhya Pradesh is a direct encroachment on the regulatory measures which are covered within the Act, 1957. Mineral Concession Rules, 1960 (hereinafter referred to as 'Rules, 1960') read with Mineral Transit Pass Regulations, 1996 (hereinafter referred to as 'Regulations, 1996'), which specifically provides for issue of transit pass and charging of fee covers the field and State Government cannot frame any rule of the present nature effecting the transportation of mineral. Rule 5 of Rules, 2000 as well as Notification dated 28.05.2001 are contrary to Section 41 of Act, 1927. The Act, 1927 being a pre-constitutional statute enacted by the dominion legislature and Act, 1957 being a par-liamentary enactment will have overriding effect over the provisions of the earlier statute. The State Government has put the fee on Transit Pass qua tonnage which makes it colourable piece of exercise of power.

202. The State contested the Writ Petition by filing counter-affidavit and contended that the Act, 1927 has been designed to protect and increase the forest wealth and Notification dated 28.05.2001 has been issued in exercise of power under Rule 5 of Rules, 2000, which were framed under Section 41 of the Act, 1927. The Regulatory Fee is not charged on extraction of mineral and there is no encroachment on the provisions of Act, 1957. The Regulatory Fee is charged only on the transportation of minerals. The method chosen by State Government to levy the fee on the basis of quantity of minerals would not change the nature and character of the levy. The

power of regulation and control under Act, 1957 is totally different from the imposition of Regulatory Fee on Forest Produce by the State.

203. The Division Bench of the High Court by its judgment dated 14.05.2007, although repelled the several arguments of petitioner which we shall shortly notice hereinafter but declared the Notification dated 28.05.2001 as beyond the scope of Section 41 of Act, 1927.

204. Learned senior counsel in support of the appellants contends that the Act, 1927, the Transit Rules, 2000, and Act, 1957 operate in different fields and spheres and the mere incidental trenching or overlapping of the provisions of the State enactment will not render the State enactment unconstitutional. The view of the High Court that Notification dated 28.05.2001 is invalid and beyond the scope of Section 41 of Act, 1927 is erroneous. The Transit Pass is computed on the basis of weight/volume of the Forest Produce so as to maintain the consistency and transparency in computation of transit fees. The computation or measure of levy will never change the nature of the levy which in the present case is regulatory in nature.

205. The High Court having held that the rules framed by the State under Section 41 of the Act, 1927 operates in different fields and spheres from the MMDR Act, 1957 and the State government has the legislative competence to frame the rules, holding that the computation of fee on the basis of weight/volume of the Forest Produce is illegal, cannot he sustained. He further contended that the High Court has issued direction for refund of the fees collected by the State in pursuance of the Notification dated 28.05.2001 and it is submitted that the direction of the High Court to refund the fees is contrary to the law settled by this Court that in indirect taxes the burden is already transferred to the consumers and therefore, direction to refund the tax so collected, the burden of which has already been transferred, will lead to unjust enrichment of assessee.

206. Learned counsel appearing for the writ petitioner have refuted the contention of the State and has reiterated the submissions. Respondent-petitioners have further raised the submissions, which were pressed before the High Court. It is submitted that even though the respondent-petitioners has not filed any Special Leave Petition challenging the judgment of the High Court dated 14.05.2009, they are entitled to urge the grounds which were pressed before the High Court in support of the Writ Petition.

207. It is submitted that petitioner does not mine coal but buys it from Northern Coal Fields Ltd. or from other coal fields. Petitioner also reimburses the royalty etc on the coal purchased from different coal fields as per the provisions of Act, 1957.

The impugned demand is illegal and without jurisdiction as the field is fully occupied by rules made thereunder. The Transit Fee of Rs. 7 per tonne fixed by Notification dated 28.05.2001 is Transit Fee on minerals which is illegal and without jurisdiction.

208. We have considered the submissions raised by learned counsel for the parties and perused the record. Before we proceed to consider the submission, it is necessary to notice the finding given by the Division Bench of the High Court in the impugned judgment on various contentions raised before it. The Division Bench of the High Court considered the submission of learned counsel for the writ petitioners that Act, 1957 occupies the field and the State had no jurisdiction to frame any rules regarding transit of minerals. After noticing the various judgments of this Court, the Division Bench concluded that two enactments i.e. Act, 1927 and Act, 1957 operate in different areas. The Division Bench specifically rejected the argument of writ petitioners that Section 2(4)(b)(iv) and Section 41 of the Act, 1927 be declared *ultra vires*. The Division Bench of the High Court also noticed the judgment of this Court in *Sudhir Ranjan Nath* (supra) *and Sitapur Packing Wood Suppliers* (supra). In para 63 of the judgment following was held:

> *"63... We have referred to two judgments of the Apex Court and we are of the considered opinion on that both the enactments operate in different areas. The operational sphere being different we conclude and hold that the submission that Section 2 (4)(b)(iv) and Section 41 should be declared ultra vires is sans substratum and we repel the same."*

209. The Division Bench of the High Court further rejected the submission of the writ petitioners impugning the Rule 5 of Rules, 2000 framed under Section 41 of the Act, 1927. In para 71 & 72 following has been held:

> *"71. On a perusal of the aforesaid form it is perceptible that there is mention of locality of storage, name and address of the owner, description of produce and quantity, name of place of transportation, route and barrier at which forest produce would be produced for check. On a perusal of the aforesaid form it is manifest that it pertains to forest produce at large. Fee can be levied but the fee must have nexus with the transit for checking in the context of forest goods. Hence, we are not inclined to accept the contention of the learned senior counsel for the petitioners that framing of the said rule under Section 41(2) is not permissible."*

"72....At this juncture we may repeat at the cost of repetition that the purpose of Section 41 of the 1927 Act, and the purpose of the MMDR Act are quite different..."

210. The High Court thus has rejected the submission of the writ petitioners, holding that both 1927 Act and 1957 Act operate into different spheres. The High Court further held that rule framed by the State under Section 41 of the Act, 1927 i.e. Rule 5 of Rules, 2000 is valid. Various submissions of the writ petitioners reiterated before us on the basis of Act, 1957 and rules framed thereunder including Section 4(1A) and Section 23C of Act, 1957 have already been considered by us, while considering the submission raised with regard to Civil Appeals arising from the judgment of the Allahabad High Court. The above submission having already noted and considered, it needs no repetition here. Hence, submission raised by learned counsel for the writ petitioners on the basis of Act, 1957 is thus rejected.

211. Now, we come to the reason on the basis of which Division Bench of the High Court has allowed the Writ Petition by quashing the Notification dated 28.05.2001. The High Court held that the Notification dated 28.05.2001 is contrary to the provisions of Section 41 of the Act, 1927 and the notification transgresses Rule 5 of Rules, 2000 because Rule 5 provides that State Government or an authorised officer by it, from time to time, shall fix the rate of the fee for issue of Transit Pass. The fee is to be issued for issue of Transit Pass and Transit Pass by no stretch of imagination can have any nexus with unit of minerals. Thus in fact, it is a fee pertaining to the minerals and not a fee issued on Transit Pass. In para 74 of the judgment, following has been held by the High Court:

"74... Hence, we have no doubt in holding that the notification issued is contrary to the provisions of Section 41 of the Forest Act and in fact such issuance of notification cannot be said to be in consonance with the said provision. It transgresses Rule 5 because Rule 5 stipulates that the State Government or an officer authorised by it from time to time shall fix the rate of fee for issue of transit pass as per the provisions of Rule 4. Thus the fee is to be fixed for issue of a transit pass and a transit pass by no stretch of imagination can have any nexus with the unit of minerals in fact if we allow ourselves to say, it is said to be a gymnastic in the rule making process to impose a fee on the minerals in the guise of collection of fee on transit pass. In fact it is a fee pertaining to minerals and not a fee on issue of transit pass. As we have scanned the anatomy of the provisions of both

the enactments rules framed there under and analysed the purport and import of the notification, the true nature and character of levy surface something different. The exact nature of levy cannot be marginalised by making a sweeping statement that is a measure of levy and the unit of minerals has been chosen as a rational basis as there is transportation by rope ways by land and by other means. The units chosen really tries to enter into the arena of regulation and control. It may innocuous look to be a measure or standard of fee on transit but in essentiality it is a trespass into the area of regulation and control. As has been stated earlier the 1957 Act is a regulatory Act and meant for minerals and minerals area development but such imposition of fee as we are disposed to think on the basis of foregoing analysis creates a dent and concavity in the regulation and control. That apart the standard or measurement does not have any nexus with the essential character of the levy. Therefore the notification runs counter to the rule because that was not the intendment of the Rule and further that cannot be the intendment of the language in which sections 41 and 76 of the 1927 Act have been couched. Quite apart from the above, once we have held that Section 41 of the 1927 Act and the provisions of 1957 Act operate in different spheres and judged by those parameters, the notification has to be lanceted and accordingly we so hold."

212. Whether the above view of the High Court, holding that State could not have asked for payment of fee on Forest Produce on the basis of quantity/volume of the Forest Produce is correct ? We revert back to provision of Section 41 of the Act, 1927. Section 41 empowers the State to make rules to regulate the transit of Forest Produce. The rules thus can very well regulate the transit of the Forest Produce. Sub section 2 of Section 41 provides that "in particular and without prejudice to the generality of the foregoing provision such rules may,....(c) provide for the issue, production and return of such passes and for the payment of fees therefore." Thus, power given to State is to regulate the transit of all timber and other Forest Produce and the rules may provide for issue of passes and for the payment of fees, therefore, fee for issue of the passes has correlation with the Forest Produce which is clear from the scheme of Rules, 2000. According to Rule 3 no Forest Produce shall move into or outside or within the State of Madhya Pradesh except in the manner as provided without a Transit Pass in Form A, B and C. The Forms of Transit Pass are part of the rules. For example, for ready reference, we extract the Form A of the Rule, which is to the following effect:

FORM A

[See Rule 6(2)]

Book No.	Counter foil Transit Pass	Page No.
1	Locality of Storage:- (a) Range (b) Division	
2	Name and address of owner of forest produce-	
3	Description of produce and quantity-	
4	Property mark etc.-	
5	Name of place to which the produce is to be transported-	
6	Route by which produce is to be transported-	
7	Barrier at which forest produce will be produced for check	
8	Date of expiry of pass-	

Note :- Second foil will be similar to the Counterfoil.

Signature of checking officer

Signature of issuing officer

213. Column three provides for description of produce and quantity.

Rule 5 of Rules, 2000 provides for as follows:

"5. Rates of fee for issue of transitpass:The State Government or an officer authorised by the State Government from time to time, shall fix rates of fee for issue of transit pass as per the provisions of Rule 4."

214. The Rule provides for fixing of rates of fee for issue of Transit Pass. The word 'rate' has been defined in Advanced Law Lexicon by P. Ramanatha Aiyar, in the following words:

"Rate means a rate, cess or assessment the proceeds of which are applicable to public local purposes and leviable on the basis of a valuation of property, and includes any sum which, although obtained in the first instance by a precept, certificate or other instrument requiring payment from some authority or officer, is or can be ultimately raised out of a rate."

215. When the State is empowered to fix rates of fee, it can very well fix the fee on the quantity of Forest Produce. High Court having upheld both Section 41 of the

Act, 1927 as well as Rule 5 of Rules, 2000, we see no reason as to how the notification issued under Rule 5 can be held to be beyond the powers of the State.

216. When the State is empowered to fix the rate of fee, it has latitude under the statute to adopt a basis, for fixation of rates of fee. It cannot be said that under the statute fee can be charged only to meet the expenses which are incurred for printing or preparation of passes. The High Court has taken a incorrect view of the matter while coming to the conclusion that Notification dated 28.5.2001 is beyond the power of the State under Rule 5 of Rules, 2000. Rule 5 clearly empowers the State to fix the rate of fee and the rate of fee can be fixed on the basis of quantity/ volume of the Forest Produce. We thus are of the view that the High Court committed error in setting aside the Notification dated 28.05.2001. This Court in *State of U.P. Vs. Sitapur Packing Wood Supplier* (Supra) which judgment has already been noticed by Division Bench of High Court has considered the rules framed by State of U.P. under Section 41 of 1927 Act. Rule 5 of the U.P. Transit of Timber and Other Forest Produce Rules, 1978, provided for payment of transit fee on the forest produce calculated on the rates as mentioned therein. High Court had upheld the competence of the State in providing fee as set out in Rule 5 which was noticed by this Court in paragraph 7 of the judgment, which is to the following effect:-

> *"7. Having found that the constitutional competence in providing fee as set out in Rule 5 is not lacking, the High Court accepted the challenge to the validity of levy on the ground that the fee is not supported by the principle of quid pro quo. It held that no service is provided in lieu of the fee to any person much less to the person from whom the transit fee is charged. In the view of the High Court, reasonable relationship between the levy of the fee and the services rendered had not been established."*

217. High Court although upheld the competence of the State to provide fee but held that fee is not supported by principles of *quid pro quo*. On that ground transit fee was held to be invalid. The view of the High Court was reversed and this Court held that charging of transit fee was valid. Following was held in paragraph 10 and 11:-

> *10. The transit fee under Rule 5 is clearly regulatory and, thus, it was not necessary for the State to establish quid pro quo. The High Court was in error in holding the transit fee is invalid in absence of quid pro quo....*
>
> *11. For the aforesaid reasons, we allow these appeals and hold that the levy of the transit fee is valid and the judgment of the High Court is accordingly set aside. The parties are, however, left to bear their own costs."*

218. It is also relevant to note that although the High Court in its judgment has held that both 1957 Act and 1927 Act operate in different fields. However, it had also made observations that imposing fee by fixing tonnage and cubic meter as unit had entered into regulation and control, which is in the realm of the MMDR Act. In paragraph 74, following has been observed:-

> *"74.... Though a stance has been taken that it is a regulatory fee and the State has to undertake many works for routes and environment and, therefore, it is to be regarded as regulatory fee but as we perceive, imposing fee by fixing tonnage and cubic meters as unit, it enters into the 'regulation and control' which is in the realm of the MMDR Act, for it has impact on the mining activity and the primary purpose, as is patent, is to regulate the mineral. It is not for the purpose of regulating the transit of minerals but to have a regulatory measure of control of minerals. The difference between issue of transit pass for a fee has been galvanised into a fee on mineral unit which has a controlling effect on the development of minerals."*

219. We have already found that 1927 Act and 1957 Act operate in different fields. State has power to regulate transit of forest produce under section 41 of 1927 Act and the regulation of minerals and effect of transit rules framed by the State is only incidental on the regulatory control on the mineral as exercised under 1957 Act. The above observations of the Division Bench thus cannot be approved.

220. In result, in view of the foregoing discussion, we are of the view that High Court committed error in quashing the order dated 28.05.2001. The Civil Appeals filed by the State of Madhya Pradesh deserves to be allowed.

XX. CONCLUSIONS

221. In view of the foregoing discussion, we arrived at following conclusions :

I. (a) The crushing of stones, stone boulders into stone grits, stone chips and stone dust does not result into a new commodity different from forest produce. The crushed materials continue to be stone and retain their nature of forest produce.

(b) Coal with its various varieties, limestone, hydrated line (sic : lime), quick limestone, slake line (sic : lime), veneer and plywood waste are all forest produce.

(c) Marble blogs, marble slabs, marble chips are all forest produce.

(d) Flay (sic : Fly) ash, clinker, synthetic gypsum are not forest produce. Gypsum, however, is a forest produce.

II. The Indian Forest Act, 1927 and the Rules framed under Section 41 are neither overridden nor impliedly repealed, altered or amended by Mines and Minerals (Development and Regulation) Act, 1957 and the Rules framed thereunder. Both the above legislations operate in different spheres and fields.

III. The words "brought from" as occurring in Section 2(4)(b) of 1927 Act means brought from forest from where forest produce has originated. The words 'brought from forest' cannot be read as "brought through forest". We, however, clarify that for an item to be treated as forest produce, its origin may be in any forest within the State of U.P. or in a forest outside the State of U.P.

IV. The forest has to be understood according to its dictionary meaning which covers the statutory recognised forest and also shall include any area regarded as forest in the Government record irrespective of the ownership. The meaning of forest cannot be restricted only to reserve forests, protected forests and village forests.

V. The roads notified by notification dated 10.02.1960 under Section 80A of 1927 Act cannot be read to mean that such roads have been declared as protected forest. The notification dated 10.2.1960 can only be read to mean that both sides of the road have been declared as protected forest on which Chapter IV of the 1927 Act shall be applicable.

VI. Rule 3 of 1978 Rules is not independent of Rule 5 of 1978 Rules. Transit fee is payable on all kinds of transit passes and cannot be confined only to transit passes as referred to in Rule 4(1)(b) only.

VII. After issuance of notification under Section 4 of 1927 Act, removal of forest produce therefrom shall be governed by the Rules framed by the State in view of U.P. Act 23 of 1965 by which original Section 5 has been substituted in its application in the State of U.P. The fact that no notification under Section 20 has been issued does not mean that restriction put by the State Government by Rules are not applicable.

VIII. The Division Bench of the Allahabad High Court by its judgment dated 11.11.2011 has rightly struck down Fourth and Fifth Amendment Rules to 1978 Rules as being excessive and confiscatory in nature.

IX. The notification dated 28.05.2001 issued by the State of Madhya Pradesh in exercise of power under Rule 5 of 2000 Rules cannot be said to be beyond the scope of Rule 5 of 2000 Rules and Section 41 of 1927 Act. The State of Madhya Pradesh was fully justified in fixing rate of transit fee at the rate of Rs.7/- and Rs.4/- per tonne which was well within the power of the State under Rule 5 of 2000 Rules framed under the 1927 Act.

222. In view of the foregoing discussion, we decide this batch of cases in following manner:

(1) All Civil Appeals filed by the State of U.P. and State of Uttarakhand challenging the judgments of the High Court of Uttarakhand dated 01.7.2004, 20.03.2005, 26.06.2007 and subsequent judgments following the aforesaid three judgments are allowed. The impugned judgments are set aside and the writ petitions stand dismissed.

(2) All the Civil Appeals filed by the State of U.P. against the judgment dated 11.11.2011 and subsequent judgments following judgment dated 11.11.2011 are dismissed.

(3) The Civil Appeals filed by the writ petitioners against the judgment of the Allahabad High Court dated 27.04.2005 and the subsequent judgments following the judgment dated 27.04.2005 as well as the Civil Appeals filed by the writ petitioners against the judgment dated 11.11.2011 and other subsequent judgments following the judgment dated 11.11.2011 are disposed of in terms of our conclusion as recorded in paragraph 221(I to VIII).

(4) The transfer petitions are disposed of in terms of our conclusion as recorded in paragraph 221(I to VIII) and Writ Petition(C) No.203 of 2009 (M/s. Pappu Coal Master & Ors. vs. State of U.P. & Anr.) is also disposed of in terms of our conclusion as recorded in paragraph 221(I to VIII)

(5) The writ petitioners from whom the transit fee was realised with effect from 01.05.2016 in accordance with the Fifth Amendment to 1978 Rules shall be entitled to claim for refund along with interest @ 9% which shall be considered by the State or any officer authorised by the State. The claim of refund shall be allowed only if the assessee alleges and establishes that he has not passed on the burden to any other person, since it is well settled that the power of the Court is not meant to be exercised for unjustly enriching a person.

(6) All the Contempt Petitions are dismissed.

(7) All the Civil Appeals filed by the State of Madhya Pradesh against judgment dated 14.05.2007 are allowed. The judgment of the Division Bench of the High Court dated 14.05.2007 is set aside and the writ petitions stand dismissed.

223. Parties shall bear their own costs.

Order accordingly

I.L.R. [2018] M.P. 352 (DB)
WRIT APPEAL

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

W.A. No. 979/2017 (Jabalpur) decided on 15 November, 2017

STATE OF M.P. & ors. …Appellants
Vs.
DR. ASHOK SHARMA …Respondent

***Service Law – Disciplinary Proceedings – Dismissal – Interference – Jurisdiction of Writ Court* – Held – Court should not interfere with the administrative decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court in the sense that it was in defiance of logic or moral standards – High Court is not a court of appeal under Article 226 over the decision of authorities holding a departmental enquiry against a public servant – Power of judicial review is not directed against the decision but is confined to the decision making process in exercise of supervisory writ jurisdiction – It is not a requirement that delinquent employee should be given an opportunity to show cause after the finding of guilt as to the quantum of punishment – Delinquent submitted his written reply and also availed the opportunity of hearing – Further held – Unless the delinquent is able to show that non-supply of report of inquiry officer has resulted in prejudice or miscarriage of justice, an order of punishment cannot be held to be vitiated – Single bench of this court has acted as a Court of appeal against the findings recorded by disciplinary and Appellate authority and not only interfered with the order of punishment but also ordered reinstatement – Such interference is unwarranted in law and is beyond the scope of Writ Court – Order passed by Single Bench set aside – Appeal allowed.**

(Paras 6, 16, 18, 19, 22, 23, 24)

सेवा विधि – अनुशासनिक कार्यवाहियाँ – पदच्युति – हस्तक्षेप – रिट न्यायालय की अधिकारिता – अभिनिर्धारित – न्यायालय को प्रशासनिक निर्णय में हस्तक्षेप नहीं करना चाहिए जब तक कि वह अतार्किक न हो या प्रक्रियात्मक अनौचित्य से ग्रसित न हो या इस अर्थ से न्यायालय की अंतश्चेतना को आघात न पहुँचाता हो कि वह तर्क या नैतिक मानकों की अवज्ञा था – अनुच्छेद 226 के अंतर्गत उच्च न्यायालय, लोक सेवक के विरूद्ध विभागीय जाँच करने वाले प्राधिकारियों के निर्णय पर अपील का न्यायालय नहीं है – न्यायिक पुनर्विलोकन की शक्ति, निर्णय के विरूद्ध निदेशित नहीं है बल्कि पर्यवेक्षण रिट अधिकारिता के प्रयोग में निर्णय करने की प्रक्रिया तक सीमित है – यह अपेक्षा नहीं है कि, अपचारी

कर्मचारी को दोषिता के निष्कर्ष के पश्चात्, दंड की मात्रा के संबंध में कारण बताने के लिए अवसर दिया जाना चाहिए – अपचारी ने उसका लिखित जवाब प्रस्तुत किया है एवं सुनवाई के अवसर का भी उपभोग किया है – आगे अभिनिर्धारित – जब तक कि अपचारी यह नहीं दर्शा पाता कि जांचकर्ता अधिकारी के प्रतिवेदन प्रदाय न किये जाने के फलस्वरूप प्रतिकूल प्रभाव कारित हुआ है या न्यायहानि हुई है, दंड के आदेश का दूषित होना अभिनिर्धारित नहीं किया जा सकता – इस न्यायालय की एकल न्यायपीठ ने अनुशासनिक एवं अपीली प्राधिकारी द्वारा अभिलिखित निष्कर्षों के विरूद्ध अपील के न्यायालय के रूप में कार्यवाही की है और न केवल दंड के आदेश में हस्तक्षेप किया है बल्कि पुनःस्थापना भी आदेशित किया है – ऐसा हस्तक्षेप विधि में आवश्यक नहीं एवं रिट न्यायालय की परिधि से परे है – एकल न्यायपीठ द्वारा पारित आदेश अपास्त – अपील मंजूर।

Cases referred:

(1998) 7 SCC 84, (1996) 3 SCC 364, (2008) 9 SCC 31, (2001) 2 SCC 386, (1948) 1 KB 223: (1947) 2 All ER 680 (CA), (2005) 7 SCC 597, (1993) 4 SCC 727, (2006) 6 SCC 794, (1995) 6 SCC 749, (1997) 7 SCC 463, (2013) 12 SCC 372, (2017) 2 SCC 528, (1975) 2 SCC 557 : 1975 SCC (L&S) 349, (2009) 8 SCC 310.

R.N. Singh with *Aishwarya Singh*, for the appellants.
Shobhitaditya, for the respondent.

O R D E R

The Order of the Court was delivered by :
Hemant Gupta, C. J. :- Challenge in the present writ appeal is to an order passed by the learned Single Bench on 24.08.2017 in W.P. No.16805/2015 (*Dr. Ashok Sharma vs. State of M.P. and others*) wherein a penalty of dismissal from services and for recovery of an amount of Rs.8,58,42,035/- passed by the Disciplinary Authority on 22.11.2014 and order in appeal dated 24.08.2015 were set aside with a further direction to reinstate the petitioner in services forthwith with back-wages.

2. The respondent herein (for short "the petitioner") was working as Director, Health Services, Madhya Pradesh when a tender was issued on 26.04.2007 for running of mobile units under Deen Dayal Mobile Hospital Project. One M/s Jagran Solutions among others responded to the tender notice. M/s Jagran Solutions was declared to be eligible for the project in a meeting which held on 12.07.2017. In terms of the bids offered by M/s Jagran Solutions, the contracts for providing health services were executed on 29.09.2007, 10.10.2007 and 24.10.2007.

3. A writ petition (W.P. No.8163/2008 -*KGN Welfare Society Betul vs. State of M.P. & others*) was filed before this Court challenging the grant of contract to M/s Jagran Solutions. During the pendency of the said writ petition, an order was passed on 07.01.2009 terminating the contract awarded to M/s Jagran Solutions for

running of mobile health units. M/s Jagran Solutions challenged the termination vide W.P. No.364/2009 (*Jagran Solutions vs. State of M.P. & others*). The said writ petition along with W.P. No.8163/2008 filed by the competing tenderer was decided on 13.11.2009, the operative part of the order read as under :-

> "6. In the present case, the orders of running of mobile health units by Jagran Solutions have been cancelled only on the ground that the said firm was not fulfilling the requisite terms of NIT. It has been demonstrated before us that the petitioner, Jagran Solutions, was affiliated with the Jagran Prakashan Ltd. And it was having the requisite qualification and contract was for a period of three years and the period is going to be over shortly. It is also evident that prior to the issuance of the communication dated 07.01.2009 the contract was already entered into between the petitioner, Jagran Solutions and the State machinery and the contract was never terminated. Be that as it may, since there was a substantial compliance of the tender conditions, the facts and circumstances of the case do not warrant any interference as to the fulfillment of eligibility criteria or the allegations made against the petitioner, Jagran Solutions.
>
> 7. In view of the aforesaid, we are only inclined to observe that since the period of contract granted in favour of petitioner, Jagran Solutions is going to be over shortly it would be in the fitness of things that the present contract continues for its remaining period. Accordingly, the impugned communication dated 07.01.2009 deserves to be and is hereby quashed. However, in case any fresh tenders are invited for the purpose, the eligibility of the petitioner, Jagran Solutions shall be considered in the light of the conditions enumerated in the tender notice. In the result, the present petitions stand disposed of. There shall be no order as to costs."

4. Before the decision of the above writ petition, the petitioner was served with a charge-sheet dated 17.08.2009 (Annexure P-5) in respect of two allegations. Firstly, that as a Chairperson of State Level Committee to shortlist the bids, in the meeting held on 12.07.2007 he recommended in favour of M/s Jagran Solutions for running of mobile health units in 14 Development Blocks against the tender conditions, therefore, the petitioner has made himself liable for disciplinary action. The second charge was that the petitioner was a Member of the Inspection Committee to examine running of mobile health units. In the meeting held on 22.09.2008, Dr. M.K. Joshi, Director, Public Health raised an objection that M/s Jagran Solutions was not a registered society and therefore, was not eligible for grant of contract but the petitioner maintained that grant of contract is as per Rules, which is not correct. Thus, he extended undue

benefit to M/s Jagran Solutions and violated the tender terms and conditions and thereby misled the senior officers.

5. An Inquiry Officer was appointed by the Disciplinary Authority on 03.02.2012. However, on the basis of communication dated 14.05.2012 (Annexure P-8) in the light of the order passed in writ petition filed by M/s Jagran Solutions, the Inquiry Officer closed the inquiry proceedings on 15.05.2012 (Annexure P-9). But the matter was remitted back to the Inquiry Officer, who submitted his report on 10.06.2013 that the charges are not proved against the petitioner. The inquiry report is attached as Annexure P-10 with the writ petition.

6. The petitioner was served with a show cause notice on 07.02.2014 (Annexure P-11) disagreeing with the findings of the Inquiry Officer but without recording any disagreement note. However, on the basis of the advice of Madhya Pradesh Public Service Commission dated 30.05.2014 (Annexure P-15), disagreement note was recorded and communicated to the petitioner on 12.06.2014. In pursuance to such disagreement note, the petitioner submitted his reply on 08.07.2014 (Annexure P-17) and later on, on 24.07.2014 (Annexure P-19). The petitioner was granted an opportunity of personal hearing on 21.08.2014, which he availed but he was granted further time to appear on 03.09.2014 as sought by him from the Disciplinary Authority but the petitioner did not avail that opportunity. Therefore, after considering the reply filed by the petitioner, an order of punishment was passed on 22.11.2014 (Annexure P-25) of dismissal from service and recovery of Rs.8,58,42,035/-. Aggrieved by an order of dismissal from services, the petitioner filed an appeal before the Governor of Madhya Pradesh, which was dismissed on 24.08.2015 (Annexure P-29). It is the order dated 22.11.2014 and the order in appeal dated 24.08.2015, which have been set aside by the learned Single Bench in the writ petition.

7. Before the learned Single Bench, the writ petitioner raised an argument that this Court has upheld the award of contract in favour of M/s Jagran Solutions and quashed the order of cancellation of the contract in writ petition, therefore, there is no illegality in the award of contract to M/s Jagran Solutions. It was argued that he was a Member of the Committee, which has taken a joint decision and that M/s Jagran Solutions is a sister-concern of M/s Jagran Publications and thus, was eligible for award of contract. It was, thus, argued that the findings recorded by the Disciplinary Authority are perverse and without any basis.

8. The learned Single Bench held that if the Disciplinary Authority disagrees with the finding of the Inquiry Officer then it has to issue a show cause notice to the delinquent giving reasons as to why the Disciplinary Authority disagrees to the findings recorded by the Inquiry Officer but no such notice was issued to the petitioner. The notice dated 12.06.2014 (Annexure P-16) proposed the punishment of dismissal from services and imposition of recovery, therefore, such notice is contrary to the judgment

of the Supreme Court reported as (1999) 7 SC 739 *(Yoginath D. Bagde vs. State of Maharashtra and another)* following the judgment reported as (1998) 7 SCC 84 *(Punjab National Bank and others vs. Kunj Behari Misra)*. The learned Single Bench also held that Division Bench in W.P. No.364/2009 quashed the order of cancellation of contract in favour of M/s Jagran Solutions as it was held that the tenderer had requisite qualification, therefore, a decision cannot be taken in departmental proceedings contrary to the decision taken in judicial proceedings. The learned Single Bench examined the report of the Inquiry Officer and the Negotiation Committee, which negotiated the rates with M/s Jagran Solutions and held that since on the recommendation of the Negotiation committee the work order was issued, therefore, it was a cumulative decision and hence, the petitioner could not be held responsible. The learned Single Bench further held that the Disciplinary Authority has not given the ground on which it disagreed with the report of the Inquiry Officer. The learned Single Bench found that Department has not independently reconsidered or re-appreciated the evidence of the witnesses produced before the Inquiry Officer but held that M/s Jagran Solutions was not competent for award of contract. The learned Single bench interfered with the order of punishment as the findings recorded by the Disciplinary Authority were found to be perverse; as it is a case of 'no evidence'. It was also held that there is a violation of Article 311(2) of the Constitution of India; as no show cause notice was issued to the petitioner at the time when the Department disagreed with the findings recorded by the Inquiry Officer.

9. We have heard learned counsel for the parties and find that the learned Single Bench has completely misdirected itself while interfering with the order of punishment and in fact, misread the show cause notice dated 12.06.2014.

10. The Inquiry Officer in his report dated 10.06.2013 found that the charges are not proved against the petitioner. The reasons for disagreement were sent to the petitioner vide forwarding letter dated 18.06.2014 along with the reasons for disagreement dated 12.06.2014. The petitioner did submit written reply and also availed the opportunity of personal hearing on 21.08.2014. It is thereafter, that the order of punishment was passed. The reasons of disagreement are 9 in number. Among other reasons, the first reason of disagreement is that the Inquiry Officer has found that the document dated 12.07.2007 is not the document relied upon but it is a typographical mistake. In fact, the document is dated 10.05.2007, which finds mentions in the list of the documents. It is also mentioned that on 10.05.2007, the Committee found 11 tenders to be technically qualified out of 25, which includes M/s Jagran Solutions. M/s Jagran Solutions was not fulfilling the tender conditions but still the recommendation was made that it is technically qualified. Even the presence of Shri Prakash Jangre, Additional Director was wrongly mentioned in the minutes. It was also mentioned that in the minutes dated 06.08.2007 it was mentioned that M/s Jagran Solutions is a unit of M/s Jagran Prakashan Ltd. But in the audit report of M/s Jagran Prakashan,

the name of Jagran Solutions does not appear as an associate organization. There was no condition in the tender that instead of a tenderer any other associate Firm can also participate.

11. The reasons of disagreement also proposed a punishment as to why his services should not be dismissed and why not the loss of Rs.8,58,42,035/- suffered by the State be not recovered from the petitioner. Therefore, the show cause notice communicated to the petitioner vide forwarding letter dated 18.06.2014 has two components; (1) reason of disagreement and also (2) the proposed punishment. Therefore, the learned Single bench has misread the document to hold that the reasons of disagreement were not recorded or communicated to the petitioner. In fact, the earlier communication dated 07.02.2014 did not record the reasons of disagreement but after the advice of Madhya Pradesh Public Service Commission dated 30.05.2014 the reasons of disagreement were recorded and communicated to the petitioner. Therefore, the finding of the learned Single Bench that the reasons of disagreement were not recorded is not borne out from the record.

12. Another factor which weighed with the learned Single Bench is the order of this Court passed in W.P. No.364/2009 on 13.11.2009 wherein two reason have weighed with this Court while setting aside the order of cancellation of the contract; firstly, that the contract was already entered into between the petitioner and the State and secondly that the contract period was for two years and that it was coming to an end. This Court held that prior to the issuance of the communication dated 07.01.2009 the contract was already entered into between the petitioner, Jagran Solutions and the State machinery and that there was a substantial compliance of the tender conditions. The eligibility of M/s Jagran Solutions in further tender was required to be considered in the light of the conditions enumerated in the tender notice. Therefore, the facts and circumstances of the case do not warrant any interference as to the fulfillment of eligibility criteria. The fact that M/s Jagran Solutions was not having independent financial standing but was an associate of M/s Jagran Prakashan Ltd. was not dealt with. The condition of advertisement was that tenderer has to be an independent unit. Thus, there was no conclusive decision in respect of eligibility of M/s Jagran Solutions for the contract in question but since substantial period had already been passed, this Court held that M/s Jagran Solutions to continue with the contract. Still further, the considerations for interference in the case of successful tenders would be different than the role of the officers in granting contract. A contract validly entered may still be an act of dishonest considerations.

13. The Supreme Court in *Kunj Behari Misra* (supra) held that whenever the Disciplinary Authority disagrees with the findings of the Enquiry Authority on any article of charge, then before recording its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer

an opportunity to represent before it records its findings. The relevant extract of the said decision is reproduced as under:-

> "**19**. The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result thereof whenever the disciplinary authority disagrees with the inquiry authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the inquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favorable conclusion of the inquiry officer. The principles of natural justice, as we have already observed, require the authority, which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer."

The same view was taken by a later Supreme Court judgment rendered in the case of *Yoginath D. Bagde* (supra) when it was held as under:-

> "**31**. In view of the above, a delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the Enquiry Officer into the charges levelled against him but also at the stage at which those findings are considered by the Disciplinary Authority and the latter, namely, the Disciplinary Authority forms a tentative opinion that it does not agree with the findings recorded by the Enquiry Officer. If the findings recorded by the Enquiry Officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the Disciplinary Authority has proposed to disagree with the findings of the Enquiry Officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be

> deemed to be pending. Mere submission of findings to the Disciplinary Authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the Disciplinary Authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or Service Rule including Rules made under Article 309 of the Constitution."

14. Thus, the two reasons given by the learned Single Bench that the reasons for disagreement were not recorded, is factually incorrect and also that there cannot be any decision in the disciplinary proceedings contrary to the decision taken by this Court, is not tenable *inter alia* for the reason that the writ petition was by a successful tenderer and the Court permitted the tenderer to complete the tender period. The completion of the contracted period by the tenderer does not debar the employer to take action of the illegalities in declaring the tenderer to be qualified though in terms of tender conditions such tenderer was not qualified.

15. Still further, the learned Single Bench has returned a finding that it is a case of "no evidence" and then proceeded to appreciate the evidence recorded by the Disciplinary Authority to set aside the order of punishment. The question: to what extent the writ Court can interfere in disciplinary proceedings and the order of punishment is not *res integra*. In a judgment reported as **(1996) 3 SCC 364** (**State Bank of Patiala and others vs. S.K. Sharma**), the Supreme Court held that the scope of judicial review in the matter of disciplinary proceedings is the same whether it is a writ petition filed under Article 226 of the Constitution of India or a suit filed in the civil court. It was held that the principles of natural justice cannot be reduced to any hard and fast formulae. The Court drawn a distinction between violation of principle of natural justice i.e. rule of *audi alteram partem,* as such and violation of a facet of the said principle. It was held that failure to supply Inquiry Officer's report or without affording due opportunity of cross-examination, is, in fact, violation of a facet of the rule of natural justice – in which case, the validity of the order has to be tested on the touchstone of prejudice. The relevant extract of the said judgment reads as under :-

> "**28**. The decisions cited above make one thing clear, viz., principles of natural justice cannot be to reduced to any hard and fast formulae. As said in *Russell v. Duke of Norfolk (1949) 1 All.E.R.109* way back in 1949, these principle cannot be put in a straight-jacket. Their applicability depends upon the context and the facts and circumstances

of each case. (*See Mohinder Singh Gill v. Chief Election Commissioner (1978) 1 SCC 405)*…….. In our respectful opinion, the principles emerging from the decided cases can be stated in the following terms in relation to the disciplinary orders and enquiries: a distinction ought to be made between violation of the principle of natural justice, audi alteram partem, as such and violation of a facet of the said principle. In other words, distinction is between "no notice"/"no hearing" and "no adequate hearing" or to put it in different words, "no opportunity" and "no adequate opportunity". To illustrate - take a case where the person is dismissed from service without hearing him altogether (as in *Ridge v. Baldwin 1964 AC 40)*. It would be a case falling under the first category and the order of dismissal would be invalid or void, if one chooses to use that expression (*Calvin v. Carr 1980 AC 574*). But where the person is dismissed from service, say, without supplying him a copy of the enquiry officer's report (*Managing Director, ECIL v. B. Karunkar (1993) 4 SCC 727)* or without affording him a due opportunity of cross-examining a witness (*K.L. Tripathi v. State Bank of India, (1984) 1 SCC 43)* it would be a case falling in the latter category - violation of a facet of the said rule of natural justice - in which case, the validity of the order has to be tested on the touch-stone of prejudice, i.e., whether, all in all, the person concerned did or did not have a fair hearing. It would not be correct - in the light of the above decisions to say that for any and every violation of a facet of natural justice or of a rule incorporating such facet, the order passed is altogether void and ought to be set aside without further enquiry. In our opinion, the approach and test adopted in *B. Karunkar* should govern all cases where the complaint is not that there was no hearing [no notice, no opportunity and no hearing] but one of not affording a *proper hearing* [i.e., adequate or a full hearing] *or* of violation of a procedural rule or requirement governing the enquiry; the complaint should be examined on the touch-stone of prejudice as aforesaid."

The Court summarised the principles emerging from the discussion in the aforesaid judgment. The summary of the conclusion is as under :-

"**33**. We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.

(2) A substantive provision has *normally* to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/ employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under – 'no notice', 'no opportunity' and 'no hearing' categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/ government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity inspite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can *also* be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4)(a) In the case of a procedural provision which is not of a mandatory characters the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provision which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirements either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of the said violation. If, on the other hand, it is found that the delinquent officer/ employee has not waived it *or* that the provision could no be waived by him, then the Court or Tribunal should make appropriate directions [include the setting aside of the order of punishment], keeping in mind the approach adopted by the Constitution Bench in *B. Karunkar*. The ultimate test is always the same viz., test of prejudice or the test of fair hearing, as it may be called."

16. The Supreme Court in its judgment reported as (2008) 9 SCC 31 *(Haryana Financial Corporation vs. Kailash Chandra Ahuja)* held that it was incumbent upon the delinquent employee to show prejudice. The non-supply of the report of the Inquiry Officer to the delinquent employee would not make the order of punishment null and void. The relevant extract of the said judgment reads as under:-

"25. It is settled law that principles of natural justice have to be complied with. One of the principles of natural justice is audi alteram partem (hear the other side). But it is equally well settled that the concept of "natural justice" is not a fixed one. It has meant many things to many writers, lawyers, jurists and systems of law. It has many colours, shades, shapes and forms. Rules of natural justice are not embodied rules and they cannot be imprisoned within the straitjacket of a rigid formula.

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36. The recent trend, however, is of "prejudice". Even in those cases where procedural requirements have not been complied with, the action has not been held ipso facto illegal, unlawful or void unless it is shown that non-observance had prejudicially affected the applicant.

37. In *Malloch* v. *Aberdeen Corpn. (1971) 1 WLR 1578: (1971) 2 All ER 1278 (HL),* Lord Reid said: (All ER p. 1283*a-b*)

> "… it was argued that to have afforded a hearing to the appellant before dismissing him would have been a useless formality because whatever he might have said could have made no difference. *If that could be clearly demonstrated it might be a good answer*."
>
> (emphasis supplied)

Lord Guest agreed with the above statement, went further and stated : (All ER p. 1291*b-c*)

> "… A great many arguments might have been put forward *but if none of them had any chance of success then I can see no good reason why the respondents should have given the appellant a hearing, nor can I see that he was prejudiced in any way*."
>
> (emphasis supplied)

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39. In *MD, ECIL, Hyderabad and others vs. B. Karunakar and others (1993) 4 SCC 727*, this Court considered several cases and held that it was only if the court/tribunal finds that the furnishing of the report "would have made a difference" to the result in the case that it should set aside the order of punishment. The law laid down in *B. Karunakar* (supra) was reiterated and followed in subsequent cases also (vide *State Bank of Patiala* v. *S.K. Sharma (1996) 3 SCC 364*, *M.C. Mehta* v. *Union of India (1999) 6 SCC 237*).

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44. From the aforesaid decisions, it is clear that though supply of report of the inquiry officer is part and parcel of natural justice and must be furnished to the delinquent employee, failure to do so would not automatically result in quashing or setting aside of the order or the order being declared null and void. For that, the delinquent employee has to show "prejudice". Unless he is able to show that non-supply of report of the inquiry officer has resulted in prejudice or miscarriage of justice, an order of punishment cannot be held to be vitiated. And whether prejudice had been caused to the delinquent employee depends upon the facts and circumstances of each case and no rule of universal application can be laid down."

17. In another judgment reported as (2001) 2 SCC 386 *(Om Kumar and others vs. Union of India)* the Supreme Court held that in an administrative decision relating to punishment in disciplinary cases, the Court is confined to *Wednesbury* principles [see *Associated Provincial Picture Houses v. Wednesbury Coprn. (1948) 1 KB 223: (1947) 2 All ER 680 (CA)]* as a secondary reviewing authority. The Court will not apply proportionality as a primary reviewing court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The relevant extract reads as under:-

> "**71**. Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as 'arbitrary' under Article 14, the Court is confined to *Wednesbury* principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing Court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The Court while reviewing punishment and if it is satisfied that *Wednesbury* principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the Courts, and such extreme or rare cases can the Court substitute its own view as to the quantum of punishment."

18. In a judgment reported as (2005) 7 SCC 597 *(National Fertilizers Ltd. and another vs. P.K. Khanna),* one of the question framed was whether the Disciplinary Authority is bound to issue notice to the delinquent officer before passing the order of punishment. The Supreme Court held that the judgment of the Constitution Bench reported as (1993) 4 SCC 727 *(Managing Director, ECIL, Hyderabad and others vs. B. Karunakar and others)* does not postulate that the delinquent employee should be given an opportunity to show cause after the finding of guilt as to the quantum of punishment. The relevant extract reads as under :-

> "**12**. As far as the second question is concerned, neither the decision in *Karunakar (1993) 4 SCC 727* nor Rule 33 quoted earlier postulate that the delinquent employee should be given an opportunity to show cause after the finding of guilt as to the quantum of the punishment. The Rules envisage the passing of an order by the disciplinary authority not only finding the delinquent guilty, but also imposing punishment after the delinquent has been given a copy of the enquiry report and had an opportunity of challenging the same."

19. In a judgment reported as (2006) 6 SCC 794 *(Union of India and another vs. K.G. Soni)* the Supreme Court quoted the decisions reported as (1995) 6 SCC 749 *(B.C. Chaturvedi vs. Union of India and others)* and (1997) 7 SCC 463 *(Union of India and another vs. G. Ganayutham)* and held that the Court should not interfere with the administrative decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court in the sense that it was in defiance of logic or moral standards. The relevant extract of the judgment in *K.G. Soni* (supra) reads as under :-

> **"14.** The common thread running through in all these decisions is that the court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in *Wednesbury case [Associated Provincial Picture Houses ltd. v. Wednesbury Corpn. (1947) 2 All ER 680 (CA)]* the court would not go into the correctness of the choice made by the administrator open to him and the court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in the decision-making process and not the decision.
>
> **15.** To put it differently, unless the punishment imposed by the disciplinary authority or the Appellate Authority shocks the conscience of the court/tribunal, there is no scope for interference. Further, to shorten litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In the normal course if the punishment imposed is shockingly disproportionate, it would be appropriate to direct the disciplinary authority or the Appellate Authority to reconsider the penalty imposed.
>
> **16.** The above position was recently reiterated in *Damoh Panna Sagar Rural Regional Bank* v. *Munna Lal Jain (2005) 10 SCC 84*.
>
> **17.** The High Court has not kept the correct position in view. It has not even indicated as to why the punishment was considered disproportionate and why it considered the misconduct to be not serious."

20. In another judgment reported as (2013) 12 SCC 372 *(Lucknow Kshetriya Gramin Bank (Now Allahabad, Uttar Pradesh Gramin Bank and another v. Rajendra Singh)*, the Supreme Court examined the scope of judicial review in departmental proceedings and held as under :-

> **"*19.1*.** When charge(s) of misconduct is proved in an enquiry the quantum of punishment to be imposed in a particular case is essentially the domain of the departmental authorities.
>
> ***19.2***. The courts cannot assume the function of disciplinary/ departmental authorities and to decide the quantum of punishment and nature of penalty to be awarded, as this function is exclusively within the jurisdiction of the competent authority.
>
> ***19.3***. Limited judicial review is available to interfere with the punishment imposed by the disciplinary authority, only in cases where such penalty is found to be shocking to the conscience of the court.
>
> ***19.4***. Even in such a case when the punishment is set aside as shockingly disproportionate to the nature of charges framed against the delinquent employee, the appropriate course of action is to remit the matter back to the disciplinary authority or the appellate authority with direction to pass appropriate order of penalty. The court by itself cannot mandate as to what should be the penalty in such a case.
>
> ***19.5***. The only exception to the principle stated in para 19.4 above, would be in those cases where the co-delinquent is awarded lesser punishment by the disciplinary authority even when the charges of misconduct were identical or the co-delinquent was foisted with more serious charges. This would be on the doctrine of equality when it is found that the employee concerned and the co-delinquent are equally placed. However, there has to be a complete parity between the two, not only in respect of nature of charge but subsequent conduct as well after the service of charge-sheet in the two cases. If the co-delinquent accepts the charges, indicating remorse with unqualified apology, lesser punishment to him would be justifiable."

21. In its recent decision reported as (2017) 2 SCC 528 *(Chief Executive Officer, Krishna District Cooperative Central Bank Ltd.* and *another vs. K. Hanumantha Rao and another)*, the finding of the High Court that the accusation was lack of proper supervision which holds good against the top administration as well was found to be without any basis. The Court held as under :-

> **"7.1.** The observation of the High Court that accusation of lack of proper supervision holds good against the top administration as well is without any basis. The High Court did not appreciate that Respondent 1 was the Supervisor and it was his specific duty, in that capacity, to check the accounts, etc. and supervise the work of subordinates.

Respondent 1, in fact, admitted this fact. Also, there is an admission to the effect that his proper supervision would have prevented the persons named from defrauding the Bank. The High Court failed to appreciate that the duties of the Supervisor are not identical and similar to that of the top management of the Bank. No such duty by top management of the Bank is spelled out to show that it was similar to the duty of Respondent 1.

7.2. Even otherwise, the aforesaid reason could not be a valid reason for interfering with the punishment imposed. It is trite that courts, while exercising their power of judicial review over such matters, do not sit as the appellate authority. Decision qua the nature and quantum is the prerogative of the disciplinary authority. It is not the function of the High Court to decide the same. It is only in exceptional circumstances, where it is found that the punishment/ penalty awarded by the disciplinary authority/employer is wholly disproportionate, that too to an extent that it shakes the conscience of the court, that the court steps in and interferes.

7.2.1. No doubt, the award of punishment, which is grossly in excess to the allegations, cannot claim immunity and remains open for interference under limited scope for judicial review. This limited power of judicial review to interfere with the penalty is based on the doctrine of proportionality which is a well-recognised concept of judicial review in our jurisprudence. The punishment should appear to be so disproportionate that it shocks the judicial conscience. (See *State of Jharkhand* v. *Kamal Prasad (2014) 7 SCC 223*) It would also be apt to extract the following observations in this behalf from the judgment of this Court in *Kendriya Vidyalaya Sangthan* v. *J. Hussain (2013) 10 SCC 106*: (SCC pp. 110-12, paras 8-10)..

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7.2.2. No such finding is arrived at by the High Court to the effect that the punishment awarded to Respondent 1 was shockingly disproportionate.

7.2.3. Even otherwise, we do not find it to be so having regard to the fact that Respondent 1 did not perform his duties with due diligence and his negligence in performing the duties as a Supervisor has led to serious frauds in number of accounts by the subordinate staff. It was, therefore, for the disciplinary authority to consider as to whether Respondent 1 was fit to continue in the post of Supervisor.

> **7.3.** The impugned order is also faulted for the reason that it is not the function of the High Court to impose a particular punishment even in those cases where it was found that penalty awarded by the employer is shockingly disproportionate. In such a case, the matter could, at the best, be remanded to the disciplinary authority for imposition of lesser punishment leaving it to such authority to consider as to which lesser penalty needs to be inflicted upon the delinquent employee. No doubt, the administrative authority has to exercise its powers reasonably. However, the doctrine that powers must be exercised reasonably has to be reconciled with the doctrine that the Court must not usurp the discretion of the public authority. The Court must strive to apply an objective standard which leaves to the deciding authority the full range of choice……."

22. Still further, the power of Judicial Review over the decision taken in the disciplinary proceedings is confined to the decision-making process in exercise of supervisory writ jurisdiction under Article 226 of the Constitution. In a judgment reported as (1975) 2 SCC 557 : 1975 SCC (L&S) 349 *(State of Andhra Pradesh and others v. Chitra Venkata Rao)*, it was held that the High Court is not a court of appeal under Article 226 over the decision of the authorities holding a departmental enquiry against a public servant. The relevant extract read as under:-

> **21.** The scope of Article 226 in dealing with departmental inquiries has come up before this Court. Two propositions were laid down by this Court in *State of A.P.* v. *S. Sree Rama Rao (1964) 3 SCR 25: AIR 1963 SC 1723*. First, there is no warrant for the view that in considering whether a public officer is guilty of misconduct charged against him, the rule followed in criminal trials that an offence is not established unless proved by evidence beyond reasonable doubt to the satisfaction of the Court must be applied. If that rule be not applied by a domestic tribunal of inquiry the High Court in a petition under Article 226 of the Constitution is not competent to declare the order of the authorities holding a departmental enquiry invalid. The High Court is not a court of appeal under Article 226 over the decision of the authorities holding a departmental enquiry against a public servant. The Court is concerned to determine whether the enquiry is held by an authority competent in that behalf and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Second, where there is some evidence which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court

to review the evidence and to arrive at an independent finding on the evidence. The High Court may interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion. The departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there is some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226.

22. *** *** ***

23. The jurisdiction to issue a writ of certiorari under Article 226 is a supervisory jurisdiction. The Court exercises it not as an appellate court. The findings of fact reached by an inferior court or tribunal as a result of the appreciation of evidence are not reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by a tribunal, a writ can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Again if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. A finding of fact recorded by the Tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the Tribunal is insufficient or inadequate to sustain a finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal. See *Syed Yakoob* v. *K.S. Radhakrishnan (AIR 1964 SC 477)*."

23. Even recently, such principle was reiterated in a judgement reported as (2009) 8 SCC 310 *(State of Uttar Pradesh and another v. Man Mohan Nath Sinha and another)*, wherein it was held that the power of judicial review is not directed against

the decision but is confined to the decision-making process. The Court does not sit in judgement on merits of the decision. The relevant extract reads as under :-

> **"15.** The legal position is well settled that the power of judicial review is not directed against the decision but is confined to the decision-making process. The court does not sit in judgment on merits of the decision. It is not open to the High Court to reappreciate and reappraise the evidence led before the inquiry officer and examine the findings recorded by the inquiry officer as a court of appeal and reach its own conclusions. In the instant case, the High Court fell into grave error in scanning the evidence as if it was a court of appeal. The approach of the High Court in consideration of the matter suffers from manifest error and, in our thoughtful consideration, the matter requires fresh consideration by the High Court in accordance with law. On this short ground, we send the matter back to the High Court."

24. In view of the above, we find that the learned Single Bench has acted as a court of appeal against the findings recorded by the Disciplinary and Appellate Authority and also not only interfered with the order of punishment but also ordered for reinstatement. Such interference is unwarranted in law, patently illegal and beyond the scope of the writ Court. Resultantly, we **allow** the present appeal and set aside the order passed by the learned Single Bench and consequently dismiss the writ petition.

Appeal allowed

I.L.R. [2018] M.P. 370 (DB)
WRIT PETITION

Before Mr. Justice Sanjay Yadav & Mr. Justice S.K. Awasthi

W.P. No. 8535/2015 (Gwalior) decided on 2 August, 2017

SHRIKRISHNA SINGH RAGHUVANSHI …Petitioner

Vs.

UNION OF INDIA & ors. …Respondents

Public Interest Litigation – Locus – University Grants Commission Act, (3 of 1956), Section 3 & 26 and UGC (Institution Deemed To Be Universities) Regulations, 2010, Article 5 & 25 – Appointment of Vice Chancellor – **Respondent No. 4 was appointed as Vice Chancellor of University – Challenge to Memorandum of Association 2014 and the said appointment made there under – Held – Petitioner in his antecedents has not given any details of work undertaken by him to uplift the education system of this country at school level or at the higher education level – Petitioner seems to be a self proclaimed social worker, a class who are only concerned with themselves**

and in absence of any disclosure of the nature of social work, he is involved in, cannot claim that present petition is *Pro Bono* – Further held – When validity of statutory provision under which a person is appointed or elected to a public office, has been challenged in a writ petition praying for a writ of *quo warranto*, such petitioner should not be permitted to question the validity of such statutory provisions – Petitioner has no locus to challenge the validity of Memorandum of Association 2014 – Further held – Even otherwise, Memorandum of Association being in consonance with Regulations of 2010 as amended in 2014, appointment of respondent No.4 as Vice Chancellor is justified – Petition dismissed with cost of Rs. 10,000.

(Paras 17, 25, 34 & 35)

लोक हित वाद – सुने जाने का अधिकार – विश्वविद्यालय अनुदान आयोग अधिनियम, (1956 का 3), धारा 3 व 26 एवं विश्वविद्यालय अनुदान आयोग (समविश्वविद्यालय बनने वाली संस्थाएं) विनियम, 2010, अनुच्छेद 5 व 25 – कुलपति की नियुक्ति – प्रत्यर्थी क्र. 4 को विश्वविद्यालय के कुलपति के रूप में नियुक्त किया गया था – संगम ज्ञापन 2014 एवं उसके अंतर्गत की गई कथित नियुक्ति को चुनौती – अभिनिर्धारित – याची ने अपने पूर्ववृत्त में स्कूल स्तर पर या उच्च शिक्षा के स्तर पर इस देश की शिक्षा प्रणाली का उत्थान करने के लिए उसके द्वारा किये गये कार्य का कोई विवरण नहीं दिया है – याची स्व उद्घोषित सामाजिक कार्यकर्ता प्रतीत होता है, एक वर्ग जो केवल स्वयं के लिए चिंताशील है और सामाजिक कार्य की प्रकृति के किसी भी प्रकटीकरण की अनुपस्थिति में, जिसमें वह सम्मिलित है, दावा नहीं कर सकते कि वर्तमान याचिका लोक हित में है – आगे अभिनिर्धारित – जब कानूनी उपबंध की विधिमान्यता जिसके अंतर्गत किसी व्यक्ति की लोकपद पर नियुक्ति या चयन किया गया है, को अधिकार पृच्छा की रिट हेतु प्रार्थना करते हुए रिट याचिका को चुनौती दी गई है, ऐसे याची को इस प्रकार के कानूनी उपबंधों की विधिमान्यता पर प्रश्न उठाने की अनुमति नहीं दी जाना चाहिए – याची को संगम ज्ञापन 2014 की विधिमान्यता को चुनौती देने के लिए सुने जाने का कोई अधिकार नहीं है – आगे अभिनिर्धारित – यहाँ तक कि अन्यथा, संगम ज्ञापन के 2014 में संशोधित 2010 के विनियमों के अनुरूप होने के नाते, प्रत्यर्थी क्र. 4 की कुलपति के रूप में नियुक्ति न्यायोचित है – याचिका 10,000/– व्यय के साथ खारिज।

Cases referred:

(2007) 10 SCC 614, AIR 2001 SC 1739, (1987) 1 SCC 378, (2012) 7 SCC 683, (2016) 8 SCC 389, AIR 1971 Mysore 84.

M.P.S. Raghuvanshi, for the petitioner.
Vivek Khekdar, Assistant Solicitor General for the respondent No. 1.
Vinod Sharma, for the respondent No. 2.
Deepak Chandna, for the respondent No. 3.
Kanwal Chaudhary, for the respondent No. 4.

O R D E R

The Order of the Court was delivered by :
Sanjay Yadav J. :- Petitioner, *Pro Bono* vide this Writ Petition seeks quashment of memorandum of Association 2014 (referred as MoA 2014) framed under the provisions Mahdya (sic : Madhya) Pradesh Societies Registration Act, 1973 being *ultra vires* Section 26 of the University Grants Commission Act, 1956 and the Regulations framed thereunder, viz, UGC (Institutions Deemed To Be Universities) Regulations, 2010. As a consequence of memorandum of Association being declared *ultra vires* petitioner seeks quashment of appointment of respondent No. 4 as a Vice Chancellor, of respondent No. 3 – University by declaring that the Search Committee constituted under MoA 2014 is invalid. Further relief sought by the petitioner is direction to respondents to follow MoA 2013 which was duly approved by the UGC and Regulations, 2010.

2. Relevant facts, briefly are that, Government of India, Ministry of Human Resources Development (Department of Education) in exercise of the powers conferred by Section 3 of the University Grants Commission Act, 1956, on advice of the commission declared vide Notification No. F.9-14/92-U.3 dated 21.09.1995 the Lakshmibai National Institute of Physical Education as Deemed to be University for the purpose of the Act of 1956 with effect from the date approved Memorandum of Association and Rules come into force. The said University is wholly funded by the Central Government.

3. That in order to regulate, in an orderly manner, the process of declaration of institutions as deemed to be Universities, preventing institutions of dubious quality from being so declared: and, further to maintain equality of higher education imparted by institutions deemed to be Universities consistent with the ideas of the concept of University, the UGC is conferred powers under clauses (f) and (f) of sub-section (1) of Section 26 of 1956 Act to make Regulations. In furtherance whereof, the UGC framed Regulations called as UGC (Institutions Deemed To Be Universities) Regulations, 2010 vide Notification No. F.6-1(II) / 2006 (OPPI) dated 21.05.2010. As per Article 1.2 thereof the Regulation applied to every institutions seeking declaration as an institution deemed to be University under Act as also, prospectively, to an institution which has been declared as an institution deemed to be University under Section 3 of 1956 Act.

4. That, vide communication dated 25.06.2010 these deemed Universities were requested to make necessary changes in the existing MoA/Rules. The alterations, amendments and additions to the MoA/Rules governing the functioning of the institution deemed to be the University were to be as per Article 25 which is in following terms :-

> "25.0 Alteration, Amendments and Additions to the Rules governing the functioning of the institution deemed to be university

No Rule and Bye law governing the functioning of the institution deemed to be university may be altered, amended and added to by the Board of Management or such other competent body to the effect that it is in conflict with or to the detriment of the provisions of these Regulations: and, no alteration, amendment or addition to the Rules and bye laws shall be given effect to without the prior approval of the Commission in accordance with the provision of the Societies Registration Act, 1860 or the relevant Public Trust Act as in force for the time being."

5. Pertinent it is to note at this juncture that Article 5 of the Regulations, 2010 provided for a governance system for an Institution To Be Declared As An Institution Deemed To Be University. It stipulates:

"5.0 GOVERNANCE SYSTEM FOR AN INSTITUTION TO BE DECLARED AS AN INSTITUTION DEEMED TO BE UNIVERSITY

An institution to be declared as a deemed to be university shall adhere to the following criteria :

5.1 The proposed institution deemed to be university shall be registered either as a not-for profit Society under the Societies Registration Act, or as a not-for profit Trust under the Public Trust Act with the Society / Trust strictly in accordance with the following provisions.

5.2 Among the authorities of the deemed to be universities, there shall be a Chancellor who shall be appointed by the sponsoring Society or the sponsoring Trust. He /she shall be an eminent educationist or a distinguished public figure other than the President of the sponsoring Society or his/ her close relatives.

5.3 There shall be no position of Pro-Chancellor(s).

5.4 The highest governing body of the deemed to be university shall be a Board of Management to be headed by the Vice Chancellor or a distinguished academic. This body shall consist of a minimum of ten members and a maximum of twelve members.

5.5 The Board of Management of the institution shall be independent of the Trust (or) Society with full autonomy to perform its academic and administrative responsibilities. The number of representative(s)/ nominee(s) of the trust (or)

society on the Board of Management shall be limited to a maximum of two.

5.6 The Board of Management shall consist of eminent persons capable of contributing to and upholding university ideals and traditions.

5.7 There shall be a Board of Management consisting of the following: -

i) Vice-Chancellor.....Chairperson

ii) Pro Vice-Chancellor (wherever applicable).

iii) Deans of Faculties not exceeding two (by rotation based on seniority)

iv) Three eminent academics as nominated by the Chancellor

v) One eminent academic to be nominated by the Central Government in consultation with UGC

vi) Two teachers (from Professors, Associate Professors) by rotation based on seniority

vii) One nominee of the sponsoring Society

viii) The Registrar, who shall be the Secretary

The term of membership of the Board of Management and its powers are as shown in Annexure I.

5.8 The Vice Chancellor shall be an eminent academic and shall be appointed by the Chancellor on the recommendation of a Search-cum-Selection Committee consisting of a nominee of the Government who shall be nominated in consultation with UGC, a nominee of the Chancellor and that of the Board of Management. The Committee shall be chaired by the nominee of the Board of Management.

5.9 All other statutory bodies of the deemed to be university shall be as described in Annexure 2

6. The University, respondent No. 3 framed MoA in 2013 in consonance with the Regulations, 2010, Clause 7 whereof made provision regarding "governance system" in the following terms:-

"7 GOVERNANCE SYSTEM

a) The Institute shall be registered either as a not-for-profit society under the Societies Registration Act, or as a not-for-profit

Trust under the Public Trust Act with the Society / Trust strictly in accordance with the following provisions:

b) There shall be a Chancellor, who shall be appointed by the sponsoring Society. He/she shall be an eminent educationist or a distinguished public figure other than the President of the sponsoring Society or his/her close relatives.

c) There shall be no position of Pro-Chancellor(s).

d) The highest governing body of the Institute shall be Board of Management to be headed by the Vice Chancellor. The Board of Management shall consist of a minimum of ten members and a maximum of twelve members.

e) The Board of Management of the Institute shall be independent of the Society with full autonomy to perform its academic and administrative responsibilities. The number of representative(s) / nominee (s) of the society on the Board of Management shall be limited to a maximum of two.

f) The Board of Management shall consist of eminent persons capable of contributing to and upholding university ideals and traditions.

g) The Board of Management shall consist of:

i) Vice-Chancellor - Chairperson.

ii) Pro Vice Chancellor (wherever applicable).

iii) Dean of faculty (if any) not exceeding two (by rotation based on seniority).

iv) Three eminent academics as nominated by the Chancellor.

v) One eminent academician to be nominated by the Central Government in consultation with UGC.

vi) Two teachers (from Professors, Associate Professor) by rotation based on seniority.

vii) Two nominees of the sponsoring Society– Member.

viii) Registrar – Secretary.

The terms of membership of the Board of Management and its powers are as shown in the Rules as given out in later part of this MoA.

h) The Vice Chancellor shall be an eminent academician and shall be appointed by the Chancellor with the prior approval of Appointments Committee of Cabinet on the recommendations of a Search-cum- Selection Committee consisting of a nominee of the Government who shall be nominated in consultation with the UGC, a nominee of the Chancellor and that of the Board of Management. The Committee shall be chaired by the nominee of the Board of Management.

i) All other statutory bodies of the Institute shall be as described in Rules."

7. Sub-clause (h) of Clause 7 thus provided that the Vice Chancellor shall be an eminent academician and shall be appointed by the Chancellor with the prior approval of Appointments Committee of Cabinet on the recommendations of a Search-cum-Selection Committee consisting of a nominee of the government who shall be nominated in consultation with the UGC, a nominee of the Chancellor and that of the Board of Management.

8. That in the year 2014, new MoA has been framed by the respondent University which led to supersession of the MoA 2013. In MoA 2014 the governance system also underwent the change. Clause 7 whereof provides for:

"7 GOVERNANCE SYSTEM

a) The Institute shall be registered either as a not-for-profit society under the Societies Registration Act, or as a not-for-profit Trust under the Public Trust Act with the Society / Trust strictly in accordance with the following provisions:

b) The highest governing body of the Institute shall be Board of Management to be headed by the Vice Chancellor. The Board of Management shall consist of a minimum of ten members and a maximum of twelve members.

c) The number of representative(s)/nominee(s) of the society on the Board of Management shall be limited to a maximum of three.

d) The Board of Management shall consist of eminent person capable of contributing to and upholding university ideals and traditions.

e) The Board of Management shall consist of:

i) Vice-Chancellor …….....Chairperson.
ii) Joint Secretary, in charge of LNIPE from MYAS, GOI as nominee of the MYAS.
iii) Deans of Faculties not exceeding two (by rotation based on fitness / suitability cum seniority).
iv) Two eminent sports academicians as nominated by the President of LNIPE.
v) One eminent sports person to be nominated by the President of LNIPE.
vi) Two teachers (from Professors, Associate Professors) by rotation based on fitness/suitability cum seniority.
vii) The Registrar – Secretary.

The terms of membership of the Board of Management and its powers are as shown in the Rules as given out in later part of this MoA.

h) The Vice Chancellor shall be an eminent academician and shall be appointed by the President with the prior approval of Appointments Committee of Cabinet on the recommendations of a Search-cum-Selection Committee.

i) All other statutory bodies of the Institute shall be as described in Rules."

9. Thus, by virtue of sub-clause 7, the procedure for appointment of Vice Chancellor underwent the change stipulating that the Vice Chancellor shall be an eminent academician and shall be appointed by the President with the prior approval of Appointments Committee of Cabinet on the recommendations of a Search-cum-Selection Committee. President as per Clause 5(xxv) of MoA means President of the Society, i.e., Union Minister, Youth Affairs and Sports, Government of India.

10. That respondent No. 4 by virtue of order dated 23.09.2015 was appointed as Vice Chancellor of respondent No. 3 - University by the President.

11. It is this order which has led the petitioner file this petition *Pro Bono* on the contentions that being a social worker he has deep concern about the standard of higher education because the same being the backbone for better India. It is urged that the appointment of respondent No. 4 is illegal as the same is on the basis of the provisions of MoA 2014 which has no legal entity as the same has been framed without prior approval of the UGC as contemplated in Article 25 of the Regulations, 2010.

12. The principal challenge in thus to MoA 2014 and if the petitioner succeeds in establishing that the MoA 2014 is contrary to the terms of Regulations 2010 then the superstructure thereon, i.e., appointment of respondent No. 4 would crumble as a necessary consequence.

13. The issue therefore is whether MoA 2014 has been framed in violation of Regulations 2014.

14. But before dwelling on the said issue, preliminary objection raised on behalf of all respondents as to the locus of the petitioner in filing a petition is taken up first.

15. Contentions are that the petitioner is not an affected person, therefore, under the garb of challenging the vires of the MoA he cannot seek a writ of *quo warranto*. It is further contended that Public Interest Litigation in respect of service matter is not tenable.

16. Countering the contentions as to locus it is urged on behalf of the petitioner that being a vigilant citizen of free country, petitioner has fundamental right to take all such measures and steps to uphold the standard of education and more particularly the higher education.

17. However, the petitioner in his antecedents has not given any details of work undertaken by him to uplift the education system of this country. There is no whisper in the petition nor in the rejoinder there is any averments as to the efforts made by him in past as to his active participation in upliftment of education system, at school level and the higher education. It appears that the petitioner is a self proclaimed social worker, a class which has mushroomed in the system who are only concerned with themselves. Petitioner a permanent resident of Ashok Nagar presently residing at Jagriti Nagar, Laxmiganj, Gwalior without disclosing the nature of social work, he is involved in either at Ashok Nagar or at Gwalior cannot claim that the present petition is *Pro Bono*.

18. In *Neetu V. State of Punjab and others* reported in (2007) 10 SCC 614 it is observed by their Lordships:

> 5. The scope of entertaining a petition styled as a public interest litigation, locus standi of the petitioner particularly in matters involving service of an employee has been examined by this court in various cases.
>
> "14. The Court has to be satisfied about: (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests;

(i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing with imposters and busy bodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect.

15. Courts must do justice by promotion of good faith, and prevent law from crafty invasions. Courts must maintain the social balance by interfering where necessary for the sake of justice and refuse to interfere where it is against the social interest and public good. (See State of Maharashtra v. Prabhu, (1994 (2) SCC 481), and Andhra Pradesh State Financial Corporation v. M/s GAR Re-Rolling Mills and Anr., (AIR 1994 SC 2151). No litigant has a right to unlimited draught on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions. (See Dr. B.K. Subbarao v. Mr. K. Parasaran, (1996 (7) JT 265). Today people rush to Courts to file cases in profusion under this attractive name of public interest. They must inspire confidence in Courts and among the public.

16. As noted supra, a time has come to weed out the petitions, which though titled as public interest litigations are in essence something else. It is shocking to note that Courts are flooded with large number of so called public interest litigations where even a minuscule percentage can legitimately be called as public interest litigations. Though the parameters of public interest litigation have been indicated by this Court in large number of cases, yet unmindful of the real intentions and objectives, High Courts are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases. Though in Dr. Duryodhan Sahu and Ors. v. Jitendra Kumar Mishra and Ors. (AIR 1999 SC 114), this Court held that in service matters PILs should not be entertained, the inflow of so-called PILs involving service matters continues unabated in the Courts and strangely are entertained. The

least the High Courts could do is to throw them out on the basis of the said decision. The other interesting aspect is that in the PILs, official documents are being annexed without even indicating as to how the petitioner came to possess them. In one case, it was noticed that an interesting answer was given as to its possession. It was stated that a packet was lying on the road and when out of curiosity the petitioner opened it, he found copies of the official documents. Whenever such frivolous pleas are taken to explain possession, the Court should do well not only to dismiss the petitions but also to impose exemplary costs. It would be desirable for the Courts to filter out the frivolous petitions and dismiss them with costs as afore-stated so that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the Courts."

The aforesaid position was highlighted in Ashok Kumar Pandey v. State of W.B. (2004 (3) SCC 349).

(19) In *Vinoy Kumar V. State of U.P.* reported in AIR 2001 SC 1739, it is held:

"2. Generally speaking, a person shall have no locus standi to file a writ petition if he is not personally affected by the impugned order or his fundamental rights have neither been directly or substantially invaded nor is there any imminent danger of such rights being invaded or his acquired interests have been violated ignoring the applicable rules. The relief under Article 226 the constitution is based on the existence of a right in favour of the person invoking the jurisdiction. The exception to the general rule is only in cases where the writ applied for is a writ of habeas - corpus or quo warranto or filed in public interest. It is a matter of prudence, that the court confines the exercise of writ jurisdiction to cases where legal wrong or legal injuries caused to a particular person or his fundamental rights are violated, and not to entertain cases of individual wrong or injury at the instance of third party where there is an effective legal aid organisation which can take care of such cases. Even in cases filed in public interest, the court can exercise the writ jurisdiction at the instance of a third party only when it is shown that the legal wrong or legal injury or illegal burden is threatened and such person or determined class of persons is, by reason or poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief."

20. Learned counsel appearing for the petitioner has relied upon the decisions in *D.C. Wadhwa Dr. and others V.State of Bihar and others* reported in (1987) 1

SCC 378, *Union of India and others V. S. Srinivasan* reported in (2012) 7 SCC 683 and *Lok Prahari V. State of Uttar Pradesh and others* reported in (2016) 8 SCC 389 to meet out the challenge as to his locus to file the Public Interest Litigation.

21. The decision in *D.C. Wadhwa* (supra) turns on the fact of said case, wherein the petitioner, a Professor in the Gokhle Institute of Politics and Economics, Pune was deeply interested in preservation and promotion of constitutional functioning of the administration in the country. He carried out thorough and detailed research in the matter of re-promulgation of Ordinances by the Governor of Bihar from time to time and published the result in a book titled "Re-promulgation of Ordinances: Fraud on the Constitution of India". Petitioners No. 2, 3 and 4 who joined petitioner No. 1 were effected by the Re-promulgated Ordinances which were in force when the petition was filed. The question raised was of highest constitutional importance relating to the limitations on the power of the Governor in the matter of re-promulgation of Ordinances. In the case, at hand, the petitioner is nowhere near to the status of the petitioners in *D.C. Wadhwa* (supra). As noted (supra) petitioner for the reasons well known to him has concealed his antecedents.

22. The decision in *Union of India and others V. S. Srinivasan* (supra) is also of no assistance to the petitioner as the *locus standi* of the petitioners' therein was not the issue.

23. One more submission has been put forth on behalf of respondent No. 4 that a person who is not an aspirant and eligible for the post of Vice Chancellor but comes to the Court as a relater asking for the issuance of writ of *quo warranto* can only ask the Court to examine whether the statutory provisions under which the holder of a public office is appointed is complied with and that he cannot question the validity of the law under which such appointment is made.

24. This aspect as pointed out by learned counsel for the respondent No. 4, came up for consideration before Division Bench of Mysore High Court in *D. Rudriah and another V. The Chancellor, University of Agriculture Sciences, Bangalore and others* reported in AIR 1971 Mysore 84, wherein their Lordships were pleased to answer the issue as under:-

> "102. The legal position has been summed up thus in Halsbury's Laws of England, (3rd Edition), Vol. 11, page 48, para 280:
>
> "An information in the nature of a quo warranto would not have been permitted for the purpose of attacking the legality of a charter of incorporation granted to a town through an officer appointed thereunder. Accordingly, an information calling upon the defendant to show by what authority he claimed to be coroner of a borough on the ground that the borough charter had not been properly granted, was refused."

103. The learned Advocate General argued that the same reasoning as in the above cases, should be applied when the validity of the statutory provisions under which a person is appointed or elected to a public office, has been challenged in a petition for a writ in the nature of quo warranto, and that such petitioner should not be permitted to question the validity of such statutory provisions.

104. We think the contention of the learned Advocate General is well founded : The reasoning adopted by the English Courts in the aforesaid two decisions, has equal application when the validity of the statutory provisions under which an appointment or election to a public office, has been made, is questioned in proceedings for quo warranto.

105. However, Mr. Patil contended that in order to assail the constitutionality of the Act under which respondent 5 had been appointed as Vice-Chancellor it is not necessary that the petitioner should be personally aggrieved by such appointment or should have any personal interest in such office. Mr. Patil sought to derive support for his contention from certain observations of the Supreme Court in Venkateshwara Rao v. Government of Andhra Pradesh. There, the appellant had brought a petition before the Andhra Pradesh High Court under Article 226 of the Constitution for quashing the order of the Government shifting the Primary Health Centre from his village to another village. He was the representative of the villagers who had deposited Rs. 10,000/- with the Block Development Committee and had also donated two acres of land for the purpose of locating the said Centre in that village and he had represented the village in the proceedings before the Government. It was contended that he had no locus standi to bring that petition. Repelling that contention, Subba Rao, J. (as he then was) said that ordinarily, the petitions who seeks to file a petition under Article 226 of the Constitution, should be one who has a personal or individual right in the subject matter of the petition, that personal right need not be in respect of a proprietary interest, that it can also relate to an interest of a trustee, and that, that apart, in exceptional cases a person who has been prejudicially affected by an Act or omission of an authority, can file a writ petition even though he has no proprietary or even fiduciary interest in the subject matter thereof."

25. We are in respectful agreement with view taken by their Lordships in *D. Rudriah and another* (supra) that when the validity of the statutory provisions

under which a person is appointed or elected to a public office, has been challenged in a petition for a writ in the nature of *quo warranto*, such petitioner should not be permitted to question the validity of such statutory provisions. We hold that the petitioner has no locus to challenge the validity of MoA 2014.

26. Reliance placed by the petitioner on the decision in *Lok Prahari* (supra) is of no assistance because in said case the issue raised therein by a registered society promoting public welfare represented through its General Secretary, a former officer of All India Services was ventilating the grievances that several former Chief Ministers in the State of Uttar Pradesh had occupied government bungalows of Type VI even after demitting the office of the Chief Minister for several years without any right to retain the same, which is not only immoral and illegal, but it also does not befit persons who were Chief Ministers of the State. It was during the course of hearing of said petition the validity of the provisions of Ex-Chief Ministers Residence Allotment Rules, 1997 on the touchstone of Uttar Pradesh (Salaries, Allowances and Miscellaneous Provisions) Act, 1981 came up for consideration. Thus, it was not a case of *quo warranto* as is the present case.

27. The upshot of above consideration is that the petition is not a genuine Public Interest Litigation. Nor the petitioner has locus to challenge the vires of MoA to bring home the writ of *quo warranto*.

28. Even otherwise, cogent material on record reveals that the Regulations, 2010 was amended on 01.05.2014 vide notification No. F.6-1(ii)/2006(CPP-I/DU) published in Gazette of India (Extraordinary) dated 24th May, 2014 called as the UGC (Institutions Deemed To Be Universities) (Amendments) Regulations, 2014, whereby following amendments were ushered in Article 5 and in Annexure 2.

> "3. In regulation 5 of the principal Regulation –
>
> (a) for clause 5.1, the following shall be substituted, namely:—
>
> "5.1 The proposed institution deemed to be university shall be registered as a not-for-profit Society under the Societies Registration Act, 1860 or as a not-for-profit Trust under the Public Trust Act, or as a not-for-profit company under section 8 of the Companies Act, 2013 (hereinafter referred to as the Managing Society/Trust/Company), which shall be owned by a not-for-profit Society registered under the Societies Registration Act, or a not-for-profit Trust registered under the Public Trust Act, or a not-for-profit company registered under section 8 of the Companies Act, 2013 (hereinafter referred to as the Sponsoring Society/Trust/

Company), or in case of a public funded deemed to be university, by the Government:

Provided that the members/trustees/ promoters of a Managing Society/Trust/Company of a deemed to be a university, not being a public funded deemed to be university, shall not be directly or indirectly connected with the members/ trustees/promoters of the sponsoring Society/Trust/Company."

(b) for clause 5.2 the following shall be substituted, namely :-

"5.2 Among the authorities of the deemed to be universities, there shall be a Chancellor who shall be appointed by the sponsoring Society/Trust/Company and shall be an eminent educationist or a distinguished public figure other than the President/Trustee/promoter of the sponsoring Society/ Trust/Company or his / her close relative."

(c) in clause 5.4, the words 'or a distinguished academic' shall be deleted.

(d) in clause 5.5, for the words 'Trust (or) Society', the words 'sponsoring Society/Trust/Company' shall be substituted.

(e) in clause 5.7, for serial number vii) the following shall be substituted, namely:-

"vii) maximum of two nominees of the sponsoring society/trust/company"

(f) for clause 5.8 the following shall be substituted, namely:

"5.8 The Vice Chancellor shall be an eminent academic and shall be appointed in the manner laid down under clause 6.2 in Annexure 2."

(g) After clause 5.9, the following shall be inserted, namely :-

"5.10 Notwithstanding anything contained in these Regulations, the governance system and management structure of a public funded institution Deemed to be University may be in accordance with the decision of the Central Government or the State Government, as the case may be."

12. In Annexure 2 of the principal Regulation,-

(a) for clause 1.2, the following shall be substituted, namely:-

"1.2 Composition of the Academic Council

The Academic Council shall consist of the following persons, namely:

1. Vice-Chancellor……..Chairperson
2. Pro Vice-Chancellor
3. Dean(s) of Faculties
4. Heads of the Departments
5. All Professors other than the Heads of the Departments (by rotation of seniority)
6. Two Associate Professors from the Departments other than the Heads of the Departments by rotation of seniority
7. Two Assistant Professors from the Departments by rotation of seniority
8. Three persons from amongst educationists of repute or persons from any other field related to the activities of the Institution deemed to be University who are not in the service of the Institution deemed to be University, nominated by the Vice-Chancellor
9. Three persons who are not members of the teaching staff, co-opted by the Academic Council for their specialized knowledge
10. The Registrar, who shall be the Secretary of the Academic Council

Note: The representation of different categories shall be only through rotation and not through election. It may also be ensured that no particular faculty dominates the membership of the Council."

(b) For Clause 5.1 the following shall be substituted, namely:-

"There shall be a Selection Committee for making recommendations to the board of Management for appointment to the post of Professors, Associate Professors, Assistant Professors and such other posts as may be prescribed in accordance with the UGC Regulations on Minimum Qualifications for Appointment of Teachers and Other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education, 2010 as amended from time to time."

(c) For Clause 5.2 the following shall be substituted, namely:-

"Every Selection Committee shall be constituted in accordance with the UGC Regulations on Minimum Qualifications for Appointment of Teachers and Other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education, 2010 as amended from time to time."

(d) For sub-clause (i) of Clause 6.2 the following shall be substituted, namely:-

"(i) The Vice-Chancellor shall be a whole time salaried officer of the Institution deemed to be University and shall be appointed in accordance with the UGC Regulations on Minimum Qualifications for Appointment of Teachers and Other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education, 2010 as amended from time to time: Provided that in case of a public funded deemed to be university, the Vice Chancellor shall be appointed in accordance with the procedure laid down by the Central Government or the State Government, as the case may be."

(e) In Clause 16.0 the words and figures "every 5 year or earlier, if necessary, by a Committee", the words and figures "every 5 year or earlier if necessary, by a Committee" shall be substituted.

(f) In Clause 23.0 the following proviso shall be inserted namely:-

"Provided that in case of a public funded deemed to university, such transfer shall be in favour of the Central Government or the State Government, as the case may be."

29. Thus, with the insertion of Article 5.10 which is non-obstante having overriding effect on Article 25, it is the decision of the Central Government or the State Government as the case may be, will have the overriding effect on the powers of UGC in granting prior approval.

30. It is further borne out from record that the Central Government vide its letter dated 15.07.2014 communicated the prior approval to MoA 2014. The communication speaks for itself:-

"F.No. 70-15/2014-SP-VI
Government of India
Ministry of Youth Affairs and Sports
Department of Sports

Shastri Bhawan, New Delhi
Dated 15th July, 2014

To,

The Registrar,
Lakshmibai National Institute of Physical Education,
Shakti Nagar, Mela Road,
Gwalior 474 002 (MP)

Sub.: Amendments in the Memorandum of Association and Rules of Society of LNIPE as per provisions of para 3 (g) of UGC (Institutions Deemed to be Universities) (Amendments) Regulations, 2014 – regarding.

Sir,

I am directed to invite your attention to the subject captioned and to say that the aforesaid matter has been considered by the Ministry and it has been decided with the approval of competent authority in the Ministry to amend the existing Memorandum of Association and Rules of the Society as per the statement enclosed hereto.

You are, therefore, requested to take appropriate action for registration of amended MoA/Rules accordingly immediately and inform the Ministry accordingly,

This may kindly be given TOP PRIORITY.

Yours faithfully,
Sd/-
(Sunil Garg)
Dy. Secretary to the Govt. of India
Tele:011-23383336"

31. Thereafter, the UGC informed vide its Communication dated 21.07.2014 as to the adoption of resolution to amend MoA of respondent No. 3 which tantamounts to the approval as contemplated under Article 25 of the Regulations, 2010. It was informed:

''लक्ष्मीबाई राष्ट्रीय शारीरिक शिक्षा संस्थान, ग्वालियर
(आईएसओ 9001:2008 प्रमाणित एवं एनएएसी प्रत्यायित सम विश्वविद्यालय)
भारत सरकार, युवा कार्यक्रम एवं खेल मंत्रालय

Lakshmibai National Institute of Physical Education, Gwalior
(ISO 9001:2008 certified and NAAC Accredited
Deemed University)
Government of India, Ministry of Youth and Sports

क्रमांक..... दिनांक.....

ADOPTION OF RESOLUTION BY CIRCULATION

SUB: ADOPTION OF RESOLUTION BY CIRCULATION IN THE MATTER OF AMENDMENTS IN MEMORANDUM OF ASSOCIATION OF SOCIETY OF LNIPE AS PER PROVISIONS OF PARA 3(g) OF UGC (INSTITUTIONS DEEMED TO BE UNIVERSITIES) (AMENDMENTS) REGULATIONS, 2014.

RESOLUTION

Having gone through the back-ground note on the matter of "AMENDMENTS IN MEMORANDUM OF ASSOCIATON OF SOCIETY OF LNIPE AS PER PROVISIONS OF PARA 3(g) OF UGC (INSTITUTIONS DEEMED TO BE UNIVERSITIES) (AMENDMENTS) REGULATIONS, 2014", the AGM resolves to approve the proposed amendments in the existing MoA/Rules of LNIPE Society and directs the Institute for registration of amended MoA/Rules and also authorize the Registrar, LNIPE to submit application and sign documents on behalf of the Board of Management before Registrar, Firms and Societies for this purpose.

Date.: 21/07/2014 Name Dr. J.S. Sandhu

Place.: Delhi

Secretary
University Grants Commission
Min. of Human Resource
Development
Govt. of India
New Delhi 110002"

(32) That Assistant Registrar Firms and Societies approved the amended MoA 2014 on 28.07.2014 and communicated it to respondent No. 3

''कार्यालय सहायक पंजीयक फर्म्स एवं संस्थाएं ग्वालियर चम्बल राजस्व संभाग, ग्वालियर
डी–40 बसंत विहार कॉलोनी ग्वालियर

क्रमांक–संशोधन / 1365 / 14 ग्वालियर, दिनांक– 28 / 07 / 2014

प्रति,

अध्यक्ष / सचिव
लक्ष्मीबाई नेशनल इंस्टीट्यूट ऑफ फिजिकल एज्यूकेशन सोसायटी ग्वालियर
शक्तिनगर मेला रोड, ग्वालियर म.प्र.

विषय– समिति के ज्ञापन–पत्र एवं विधान में संशोधन के संबंध में।

संदर्भ आपका प्रस्ताव प्राप्त दिनांक – 23.07.2014

कृपया उपरोक्त विषय में संदर्भित पत्र के साथ प्राप्त संशोधित ज्ञापन–पत्र एवं विधान के नियमों में किये गये संशोधनों का अनुमोदन किया जाता है।

कृपया संशोधित नियमों का कड़ाई से पालन करना सुनिश्चित कीजिए।

हस्ता. / –
(श्रीमति मंगला पुरकाम)
असिस्टेन्ट रजिस्ट्रार
फर्म्स एवं संस्थाएं ग्वालियर चम्बल
राजस्व संभाग,
ग्वालियर''

33. It is further borne out from the material on record that respondent No. 1 by order dated 08.12.2014 set up the Search Committee for the purpose of selection of vice chancellor of respondent No. 3. The process was to be completed within three months in pursuance of order dated 09.02.2014 passed in Writ Petition No. 3572/2014. On 06.01.2015 vide memorandum F.No.4-10/2013-1D(SP-VI) respondent No. 1 Government of India notified eligibility criteria for appointment of Vice Chancellor in Lakshmibai National Institute of Physical Education, respondent No. 3. And on the recommendations of the Search-cum- Selection Committee and with the approval of the Appointments Committee of the Cabinet (ACC), the Minister of State (i/c) Youth Affairs and Sports in his capacity as the President of the Lakshmibai National Institute of Physical Education, Gwalior appointed respondent No. 4 as its Vice Chancellor.

34. In view whereof besides MoA 2014 being in consonance with Regulations 2010 as amended in 2014; the appointment of respondent No. 4 is also in accordance with stipulation contained in the MoA 2014 as would add any substance to the petitioner's contention that respondent No. 4 has usurped the public office.

35. Having thus considered we do not find any merit in this Public Interest Litigation which is dismissed with costs quantified to Rs.10,000/- (Rupees Ten Thousand only) to be deposited with the High Court of Madhya Pradesh Middle Income Group Legal Aid Society, 2015.

Petition dismissed.

I.L.R. [2018] M.P. 390
WRIT PETITION

Before Mr. Justice Anand Pathak

W.P. No. 7120/2015 (Gwalior) decided on 21 September, 2017

TARABAI (SMT.) …Petitioner

Vs.

SMT. SHANTI BAI & ors. …Respondents

Constitution – Article 226/227 – Election Petition – Reasoned/Speaking Order – Natural Justice **– Petition against dismissal of application filed by petitioner in an Election Petition under Order 14 Rule 2 CPC – Held – Application has been dismissed by the SDO without assigning any reason and conclusion arrived at – In the earlier round of litigation while dealing with the same issue, this Court specifically directed to pass a reasoned order and remanded back the matter, even then the SDO (same person) repeatedly passed the same order, without any alphabetical alteration even, which is arbitrary, illegal and reflects casualness, negligence and/or defiance and is in the nature of disobedience to the orders passed by this Court – It is against the fair play and transparency which is a part of the principle of natural justice – Administrative authorities are duty bound to assign reasons while deciding the case either functioning as quasi judicial authority or as administrative authority – They must record reasons for arriving to a conclusion so that it facilitates the process of judicial review by superior Court or authority – Directions given by this Court are to be complied with by the authorities especially when the order of this Court attains finality – Impugned order set aside – Matter remanded back to authority for decision of application afresh – Further, Principal Secretary, Government of MP is directed to hold enquiry against the SDO regarding such casualness and negligence – Petition allowed.**

(Paras 11, 14, 16, 21, 22)

संविधान – अनुच्छेद 226/227 – निर्वाचन याचिका – तर्कसंगत/सकारण आदेश – नैसर्गिक न्याय – याची द्वारा एक निर्वाचन याचिका में, सिविल प्रक्रिया संहिता के आदेश 14 नियम 2 के अंतर्गत प्रस्तुत आवेदन की खारिजी के विरूद्ध याचिका – अभिनिर्धारित – उपखंड अधिकारी द्वारा बिना कोई कारण दिये एवं बिना किसी निष्कर्ष पर पहुंचे आवेदन खारिज किया गया – पूर्वतर मुकदमे में, समान विवाद्यक का निराकरण करते समय इस न्यायालय ने सकारण आदेश पारित करने के लिए विनिर्दिष्ट रूप से निदेशित किया एवं मामला प्रतिप्रेषित किया, तब भी उपखंड अधिकारी (उसी व्यक्ति) ने बार–बार वही आदेश पारित किया, वो भी बिना किसी वर्णक्रम परिर्वतन के, जो कि मनमाना व अवैध है एवं नैमित्तिकता, उपेक्षा एवं/या अवज्ञा दर्शाता है एवं इस न्यायालय द्वारा पारित आदेशों की अवज्ञा की प्रकृति का है – यह न्यायपूर्ण व्यवहार एवं पारदर्शिता के विरूद्ध है जो कि नैसर्गिक न्याय के सिद्धांत का भाग है – प्रशासनिक प्राधिकारी प्रकरण विनिश्चित करते समय कारण बताने हेतु कर्तव्य बाध्य हैं, चाहे वे न्यायिककल्प प्राधिकारी के रूप में या प्रशासनिक प्राधिकारी के रूप में कार्य कर रहे हों – उन्हें निष्कर्ष पर पहुँचने के कारणों को अभिलिखित करना चाहिए ताकि यह वरिष्ठ न्यायालय या प्राधिकारी द्वारा न्यायिक पुनर्विलोकन की प्रक्रिया में सहायक हो सके – इस न्यायालय द्वारा दिये गये निदेशों का पालन प्राधिकारियों द्वारा किया जाए, विशेष रूप से तब जब कि इस न्यायालय के आदेश अंतिमता प्राप्त कर ले – आक्षेपित आदेश अपास्त – मामले को नये सिरे से, आवेदन के विनिश्चय हेतु प्राधिकारी को प्रतिप्रेषित किया गया – आगे, प्रमुख सचिव, मध्यप्रदेश शासन को उपखंड अधिकारी के विरूद्ध ऐसी नैमित्तिकता एवं उपेक्षा के संबंध में जांच संचालित करने हेतु निदेशित किया गया – याचिका मंजूर।

Cases referred:

(2010) 9 SCC 496, (2008) 8 SCC 725, (1969) 2 SCC 262, (1987) 4 SCC 431, (1990) 4 SCC 594, (1978) 1 SCC 248, (1978) 1 SCC 405.

N.K. Gupta with *Ravi Gupta*, for the petitioner.
Prashant Sharma, for the respondent No. 1.
Anand Singh Sikarwar, for the respondent No. 10.

O R D E R

Anand Pathak, J. :- This is second visit of petitioner being crestfallen by the order dated 23-09-2015 (Annexure P/1) passed by respondent No.10 whereby the application under Order XIV Rule 2 of CPC has been rejected.

2. Precisely stated facts of the case for adjudication are that respondent No.1 - Smt. Shanti Bai filed an election petition under Section 122 of M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 whereby election on the post of Sarpanch, Gram Panchayat, Lachayara, Block Kurwai District Vidisha was challenged. As per

the submissions and pleadings contained in petition memo, election petition carried certain deficiencies as per M.P. Panchayat (Election Petition, Corrupt Practices and Disqualification from Membership) Rules, 1995. It further appears that the Election Tribunal framed the issues and issue No.3 was framed about maintainability of election petition, therefore, petitioner filed an application under Order XIV Rule 2 of CPC that issue No.3 which was framed regarding maintainability of election petition is a legal issue, hence, the same be heard and decided as preliminary issue. The said contention was duly replied by the election petitioner (respondent No.1 herein) admitting the fact that on the date of filing of election petition, security deposit was not made and security deposit was made to Tahsildar on 26-04-2015; after filing the election petition on 24-02-2015. Therefore, according to learned counsel for the petitioner; violation of rule 7 of Rules of 1995 was apparent and being a mandatory condition, the said question ought to have been considered by the authority as preliminary issue. In the case of election of Gram Panchayat specified authority is Sub Divisional Officer (SDO) and as respondent No.10 was holding the said post at the relevant point of time, therefore, arrayed as party respondent (later on; after filing of writ petition). The authority vide order dated 01-07-2015 dismissed the application preferred by the petitioner under Order XIV Rule 2 of CPC in a slipshod manner. Annexure P/6 reveals that no reason has been assigned for dismissal of the application nor any conclusion has been arrived at for such dismissal.

3. Being aggrieved by the said order, petitioner preferred writ petition bearing No.4567/2015 in which vide order dated 21-07-2015, this Court allowed the petition on the ground that the order passed by the SDO lacks any reason or finding whereas reasons are heartbeat of every judicial order. Matter was remanded back to the authority for fresh adjudication of the controversy wherein application under Order XIV Rule 2 of CPC had to be decided afresh. Respondent No.10 again passed the same cryptic order dated 23-09-2015 vide Annexure P/1; which is under challenge in this writ petition.

4. According to learned counsel for the petitioner, when Sub Divisional Officer earlier passed the order dated 01-07-2015 then this Court found the said order bereft of any reason and therefore, while deciding the said petition, remanded the matter back for consideration of application under Order XIV Rule 2 of CPC afresh. Still respondent No.10 showed the same attitude and passed the order in a slipshod manner without assigning any reason. Same is arbitrary, illegal and contemptuous in nature. Quasi judicial authority is duty bound to pass reasoned order so that it can be analyzed by the higher authority objectively when matter goes into appeal or revision. Learned counsel for the petitioner submits that respondent No.10 has not considered spirit of earlier order passed by this Court and repeated the same mistake, therefore, respondent No.10 be suitably punished for the willful disobedience of the order in not adhering to the directions given by this Court in writ petition. Besides the arguments on merits,

learned counsel for the petitioner raised the ground of violation of principle of natural justice also. He referred the judgment rendered by the Hon'ble Apex Court in the matter of *Kranti Associates Private Limited & Anr. Vs. Masood Ahmed Khan & Ors.,* (2010) 9 SCC 496.

5. Learned counsel for respondent No.1/contesting respondent was not in a position to support impugned order. He fairly concedes that the order impugned suffers from arbitrariness and illegality. He fairly admits that the prescribed authority should have passed the impugned order while assigning reason.

6. It appears that during pendency of writ petition, petitioner impleaded authority (i.e. respondent No.10) by name who has passed the order and appropriate application was moved for impleadment of SDO, Kurwai District Vidisha by name. Therefore, respondent No.10 was added in the array of respondents. Respondent No.10 was noticed and was represented through her counsel and reply was filed. In the reply, respondent No.10 submits that maintainability of election petition is mixed question of fact and law, therefore, decision in respect of maintainability of election petition cannot be taken without taking evidence and without ascertaining the facts, therefore, she has rightly passed the impugned order.

7. According to her, the fact regarding security deposit by respondent No.1 at the time of filing of election petition is matter of record and therefore, as preliminary issue it cannot be decided. She prayed for dismissal of writ petition.

8. Heard learned counsel for the parties at length and perused the documents appended thereto.

9. Initially, in the first round of litigation, vide order dated 01-07-2015, respondent No.10 passed the order in which the order over application under Order XIV Rule 2 of CPC has been passed in a slipshod manner. The said one line order contains following remarks "CPC 14/2 का आवेदन विचारोपरांत निरस्त किया जाता है।"

10. Petitioner preferred writ petition No.4567/2015 challenging the said order dated 01-07-2015 and on 21-07-2015, this Court passed a detailed and exhaustive order quoting the judgment rendered by the Hon'ble Apex Court in the matter of *Kranti Associates Private Limited* (supra). The said quote is reproduced for reference as under:

> *"(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.*
>
> *(b) A quasi-judicial authority must record reasons in support of its conclusions.*

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny.

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence.

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".

11. After considering mandate of Hon'ble Apex Court, this Court set aside the order dated 01-07-2015 with a direction to the SDO/Election Tribunal to decide the application under Order XIV Rule 2 of CPC in accordance with law. After remand, the matter was returned back to the SDO (respondent No.10 herein) and respondent No.10 again passed the same order without any alphabetical alteration even. It reads as under :

"CPC 14/2 का आवेदन विचारोपरांत खारिज किया जाता है।"

12. Only change after remand in the impugned order is that earlier the word "निरस्त" has been used for rejection and now in the impugned order the word "खारिज" has been used for rejection, rest of the alphabetical expressions are same.

13. Reiterating the mandate of Hon'ble Apex Court while discussing the importance of "Reason" by the Judicial, Quasi Judicial and Administrative Authorities meandering through the realm of Reason and its Importance in the decision making process, said principles are again reproduced to make these Principles; a 'Reality than a Ritual' by the decision making authorities. These principles are :

"(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decisionmakers less prone to errors but also makes them subject to broader scrutiny.

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence.

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".

14. Repeation (sic : Repetition) of said principles are to bring home the point that reasons are heartbeats of conclusion. Where any authority acting as quasi judicial authority or as administrative authority, must record reason for arriving to a conclusion so that it facilitates the process of judicial review by superior Court or authority. It reduces the subjectivity and promote objectivity and omits arbitrariness. The concept adopted by the administrative authority while deciding the case of an employee under administrative authority or case of a citizen while functioning as quasi-judicial authority needs to be decided by Reason. It is seen repeatedly by this Court that administrative authorities have coined a phrase (in common parlance) while deciding the case of a litigant, employee or citizen by quoting "प्रकरण पूर्ण विचारोपरांत अमान्य किया जाता है". This is an antithesis to the 'Rule of Law' and mandate of Hon'ble Apex Court which repeatedly guided and asserted for giving 'Reasons' in the judicial, quasi-judicial/ administrative orders. What discussion or conclusion was in the mind of decision maker is reflected through Reasons and therefore, administrative authorities which at times perform quasi-judicial functions also; must record Reasons rather than concealing their thoughtful considerations/whims and fencies under the veil of phrase "प्रकरण पूर्ण विचारोपरांत अमान्य किया जाता है" (case is rejected after due consideration). This is against the fair play and transparency, which has been declared as a part of principle of natural justice {See: *Dev Dutt Vs. Union of India and others,* (2008) 8 SCC 725}. Similarly the doctrine (natural justice) is now termed as synonym of fairness in the concept of justice and stands as the most accepted methodology of a governmental action and soul of the natural justice is fair play in action. Thus, natural justice has an expanding content and not stagnant concept.

15. Originally there were said to be only two principles of natural justice: (1) the rule against bias and (2) the right to be heard (audi alteram partem). However, subsequently, as noted in *A.K. Kraipak and Ors. Vs. Union of India & Ors* (1969) 2 SCC 262 and *K.l. Shephard and others Vs. Union of India and others* (1987) 4 SCC 431, some more rule came to be added to the rules of natural justice, e.g. the requirement to give reasons vide *S.N. Mukherjee Vs. Union of India,* (1990) 4 SCC 594. In *Mrs. Maneka Gandhi Vs. Union of India and another,* (1978) 1 SCC 248 (vida (sic : vide) paras 56 to 61) it was held that natural justice is part of Article 14 of the Constitution.

16. The Hon'ble Apex Court in historic decision, *A.K. Kraipak and Ors.* (supra) has pointed out that the concept of quasi-judicial power has been undergoing radical change and such dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Later on, in other celebrated judgment of *Mrs. Maneka Gandhi* (supra) and *Mohinder Singh Gill and another Vs. Chief Election Commissioner, New Delhi and others,* (1978) 1 SCC 405 has expanded and explained the scope of natural justice. Therefore, administrative authorities are duty bound to assign reasons while deciding the case either functioning as quasi-judicial authority or as administrative authority.

17. Here in the present case, perusal of impugned order reflects three omissions on the part of Presiding Officer; one is she appears to be ignorant about the provisions of Civil Procedure Code, 1908 (hereinafter referred as CPC) which she referred in the order. She missed the chance to understand that CPC includes Sections, Orders and Rules. By referring 14/2, she escaped the legal provision that it was in respect of Order XIV Rule 2 of CPC, therefore, administrative/quasi judicial authorities must abreast with basic knowledge of statutes in which they are dealing with. For that, appropriate acclimatization session or refresher course of such administrative/quasi judicial authorities can be conceptualized and implemented so that true import of spirit of natural justice and significance of Reasons may be inculcated in their decision making process.

18. Another omission reflected from the impugned order is ignorance of Presiding Officer about passing of earlier Court order; which (Court order) categorically mandates the Presiding Officer to proceed with the case by affording opportunity of hearing to the parties and to pass a reasoned order. This omission may be attributable to the Presiding Officer and/or to the ministerial staff also which is entrusted with the responsibility of keeping the record updated and make available to the Presiding Officer for ready reference.

19. Another omission occurred in the impugned order (which is the subject matter of discussion itself) is that no Reason has been assigned in passing the said order, specially in election petition in which democratic rights of citizenry are intrinsically involved and therefore, it virtually frustrates the very spirit of Constitutional Amendment by which Article 243 has been amended and local bodies have been given sufficient democratic and electoral authorities.

20. From the pleadings made and submissions advanced by learned counsel for the parties, it appears that respondent No.10 was the same authority who passed the order dated 01-07-2015 and when the matter was challenged in writ petition No.4567/2015 and matter went into remand for fresh adjudication, even then, the second time also, impugned order has been passed by the same authority in same manner. At the time of first order (dated 21-07-2015), respondent No.10 might not be aware of sanctity of Reasons while performing quasi-judicial functions, but when the matter was remanded back by this Court, respondent No.10 must have been enlightened by the direction of this Court as contained in the order dated 21-07-2015 passed in writ petition No.4567/2015. Thereafter repeating the same mistake, not only displays arbitrariness but also reflects casualness, negligence and/or defiance and has trappings of disobedience of the order dated 21-07-2015.

21. Directions given by this Court are to be complied with by the authorities especially when the order of this Court attains finality. Here, the authority (respondent No.10) had to comply the order but as referred above committed the same mistake. What would have weighed in the mind of respondent No.10 or what circumstances persuaded her, were not explained in the return filed by her. She only elaborated the reasons (subsequently in return) for passing the impugned order but elaboration of reasons in the reply to writ petition cannot make good the infirmity from which the impugned order suffers. The Hon'ble Apex Court in the matter of *Mohinder Singh Gill* (supra) has used beautiful expression to sum up while saying:

> *"The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Commissioner of Police, Bombay Vs. Gordhandas Bhanji, AIR 1952 SC 16. Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.*
>
> *Orders are not like old wine becoming better as they grow older."*

22. Therefore, this Court also seeks effective intervention of administrative head of the department i.e. Principal Secretary (Revenue or General Administrative Department as the case may be) to reach to the truth and weed out chaff from the grains. Principal Secretary is advised to give directions for preliminary enquiry to competent authority of respondent No.10 about casualness/negligence of respondent No.10 while performing duty as quasi-judicial authority and lapses of her ministerial staff, if any. In the said preliminary enquiry proper opportunity of hearing be provided to respondent No.10 (Ms. Trapti Shrivastava) who was working as SDO, Kurwai District Vidisha at the relevant point of time when the impugned order dated 23-09-2015 has been passed in the election petition as well as to all other erring persons. After conducting the preliminary enquiry if the case is found to be appropriate one for proceeding for departmental enquiry then the same shall be proceeded with the procedure in accordance with law and if the case involves bonafide lapse then they may be exonerated. It is made clear that the opinion expressed about the lapse of respondent No.10 and her ministerial staff is found prima facie, on the basis of record in hand, therefore, authorities have to arrive to the conclusion about their alleged lapses only through procedure as per law. Anxiety of this Court is not for punishment but for sending a reminder to the authorities and their staff functioning as public servants to match democratic aspirations of public at large.

23. At this stage, this Court also takes opportunity to seek effective intervention of administrative head of the State i.e. Chief Secretary with expectation that suitable orders/suggestions /directions would be issued to the administrative/quasi judicial authorities who are functioning under the aegis of Chief Secretary and his other departmental functionaries, Principal Secretaries etc. who are involved in decision making process to incorporate Reasons as part of their decision making process, instead of deciding the cases in a slipshod manner and/or by making written and mechanical endorsement "पूर्ण विचारोपरांत अमान्य किया जाता है".

24. This would have laudable purpose because it will promote clarity in governance and recipient of the order would be in a position to challenge the same before higher authorities on basis of reasons assigned in the order. This endeavour of Administrative Machinery would drastically reduce pendency of the cases before this Court (including Civil/Criminal Courts) because large number of cases are pending before the Courts due to non assignment of Reasons while deciding the cases of citizenry in general and/or employees of State in particular and after keeping pending for years together cases are ultimately remanded back to the authorities for fresh adjudication on merits. If reasons are assigned then fate of the case would be known to the employee/ litigant/aggrieved person while challenging the order or accepting the said order as fate accomplii.(sic : fait accompli.) Other suggestions issued in preceding paragraphs must also be thoughtfully considered. Steel frame of this State (Madhya Pradesh) must recollect in hindsight about the glorious past it possessed when it had efficient and effective administrators like Mr. R.P. Naronha and Mr. K.F. Rustamji.

25. Time has come when **'Rule of Law'** must be treated as one of the essential components of infrastructure (like Roads, Water, Electricity and Communication), so that development of other components of infrastructure may not be sacrificed at the altar of mis-governance. A sincere thought and endeavour in this direction is need of the hour.

27. *Resultantly*, on the basis of cumulative analysis, impugned order dated 23-09-2015 passed by Sub Divisional Officer, Kurwai District Vidisha is set aside. Parties are directed to appear before the said authority on **25-11-2017**, the date on which they will mark their attendance and take guidance from the Presiding Officer for further hearing on application under Order XIV Rule 2 of CPC as per law.

28. Principal Registrar of this Court is directed to send copy of this order to Chief Secretary, Government of Madhya Pradesh and Principal Secretary, General Administration Department and Revenue Department for information and compliance.

29. Petition stands allowed with the abovementioned directions. No costs.

Petition allowed

I.L.R. [2018] M.P. 401
WRIT PETITION

Before Mr. Justice Subodh Abhyankar

W.P. No. 2202/2016 (Jabalpur) decided on 10 October, 2017

MUNICIPAL CORPORATION, JABALPUR …Petitioner
Vs.
THE PRESIDING OFFICER, LABOUR COURT, JABALPUR & anr. …Respondents

(Alongwith W.P. No. 2203/2016, W.P. No. 2293/2016, W.P. No. 2302/2016 & W.P. No. 9702/2016)

Service Law – Industrial Disputes Act (14 of 1947), Section 2(k)/10/25-B(2)(a)(ii)/25-F – Retrenchment – Reference – Limitation – Period of Work – Burden of Proof **– Against retrenchment, workman filed reference before Labour Court whereby instead of reinstatement, lump sum compensation of Rs. 1,00,000 was awarded to each workman – Challenge to – Held – Labour Court despite holding that there was unexplained delay of four years in filing the application by the workman, has allowed the same simply holding that there is no provision of limitation provided to file an application under the Industrial Dispute Act – Labour Court has not dealt with the inordinate delay in its proper perspective – Further held – In respect of the period of service of workman, although an opportunity to file relevant documents was given to the Corporation and later which was not filed by them but still that would not**

discharge the initial burden casted on the employees to stand on their own legs – Merely filing of affidavit by workman is not sufficient – Labour Court shifting the burden to the Corporation was not justified – Impugned awards are hereby quashed – Petitions allowed.

(Paras 14, 15, 16 & 17)

सेवा विधि – औद्योगिक विवाद अधिनियम (1947 का 14), धारा 2(के)/10/25–*बी* (2)(ए)(ii)/25–*एफ – छंटनी – निर्देश – परिसीमा – कार्य की अवधि* – साबित करने का भार – छंटनी के विरूद्ध, कर्मकार ने श्रम न्यायालय के समक्ष निर्देश प्रस्तुत किया जिससे बहाली करने के बजाय, प्रत्येक कर्मकार को रू. 1,00,000/– का एकमुश्त प्रतिकर अधिनिर्णीत किया गया था – को चुनौती – अभिनिर्धारित – श्रम न्यायालय द्वारा यह अभिनिर्धारित करने के बावजूद कि कर्मकार द्वारा आवेदन प्रस्तुत करने में चार वर्षों का विलंब स्पष्ट नहीं किया गया था, उक्त को साधारण रूप से यह अभिनिर्धारित करते हुए मंजूर किया, कि औद्योगिक विवाद अधिनियम के अंतर्गत आवेदन प्रस्तुत करने के लिए परिसीमा उपबंधित करता हुआ कोई उपबंध नहीं है – श्रम न्यायालय ने अपने उचित परिप्रेक्ष्य में असाधारण विलंब का निपटारा नहीं किया – आगे अभिनिर्धारित – कर्मकार की सेवा की अवधि के संबंध में, यद्यपि निगम को सुसंगत दस्तावेजों को प्रस्तुत करने हेतु अवसर प्रदान किया गया था एवं बाद में जिसे उनके द्वारा प्रस्तुत नहीं किया गया था परंतु फिर भी इससे कर्मचारीगण पर उनके कथनों को साबित करने के लिए उन पर डाला गया प्राथमिक भार उन्मोचित नहीं होगा – कर्मकार द्वारा मात्र शपथपत्र प्रस्तुत किया जाना पर्याप्त नहीं है – श्रम न्यायालय द्वारा भार को निगम पर परिवर्तित किया जाना न्यायोचित नहीं था – आक्षेपित अधिनिर्णय एतद्द्वारा अभिखंडित – याचिकाएँ मंजूर।

Cases referred:

(2015) 15 SCC 1, (2002) 3 SCC 25, 2014 (143) FLR 469, AIR 2015 SC 3473, (2005) 5 SCC 100.

Saurabh Sunder, for the petitioner in W.P. Nos. 2202/2016, 2203/2016, 2293/2016 & 2302/2016 and for the respondent in W.P. No. 9702/2016..

K.N. Pethia, for the petitioner in W.P. No. 9702/2016.

Rajesh Kumar Pandey, for the respondent No. 2 in W.P. No. 2202/2016.

K.N. Pethiya, for the respondent No. 2 in W.P. No. 2203/2016.

None, for the respondents in W.P. Nos. 2302/2016 & 2293/2016.

O R D E R

Subodh Abhyankar, J. :- The order passed in W.P. No.2202/2016 shall also govern the disposal of W.P. Nos. 2203/2016, 2293/2016, 2302/2016 and 9702/2016. Since the issues raised in all the writ petitions are common, hence they are heard analogously.

2. The petitioner before this Court Municipal Corporation, Jabalpur has challenged the award dated 14.8.2015 passed by the Presiding Officer, Labour Court, Jabalpur in a case of retrenchment of workman claiming reinstatement wherein the learned Judge of the Labour Court, instead of reinstatement has awarded a lump sum compensation of Rs.1,00,000/-to each of the private respondents.

3. The petitioner –Municipal Corporation, Jabalpur has filed this petition assailing the award dated 14.8.2015 mainly on two grounds viz. firstly, that the reference by the workman before the Conciliation Officer was submitted after inordinate delay of 4 years and despite holding that there was delay on the part of the workman this aspect of the matter has not been considered by the Labour Court in its proper perspective. Secondly, the other ground which the petitioner-Corporation has raised is that the private respondents have not discharged the initial burden placed upon them to prove their case that they had worked continuously for 240 days in the respondent's establishment and in the absence of the same, the learned Labour Court wrongly shifted the burden on the petitioner –Corporation to prove that the private respondents had continuously worked with the petitioner – Corporation for a period of more than 240 days.

4 Learned counsel for the petitioner Shri Saurabh Sunder has relied upon the decision of the Apex Court in the case of *Prabhakar vs Joint Director, Sericulture Department and another* (2015) 15 SCC 1 (para 5, 8, 9, 22 to 32). The aforesaid judgment has dealt with the issue of delay in raising an industrial dispute. The learned counsel has also relied upon the decision of the Apex Court in the case of *Range Forest Officer vs S.T. Hadimani,* (2002) 3 SCC 25 (para 3) to submit that the initial burden lies on the workman to prove his case and the same cannot be shifted to the employer to his detriment.

5. On the other hand, Shri K.N.Pethia, learned counsel appearing for the petitioner in W.P. No.9702/2016 and for the respondent in W.P. No.2203/2016 and Shri Rajesh Kumar Pandey, learned counsel appearing for respondents in W.P. No.2202/2016 submitted that no illegality has been committed by the Labour Court in passing the impugned award for the reason that the Industrial Dispute Act, 1947 does not provide any limitation to raise the dispute before the Conciliation Officer.

6. Shri Pethia has also relied upon the decision of the Apex Court in the case of *Raghubir Singh vs General Manager, Haryana Roadways, Hissar* reported in 2014 (143) FLR 469 wherein the Apex Court has held that in Industrial Disputes Act, 1947 no limitation is provided and as such the provisions of Limitation Act are not applicable. He has further submitted that the learned Judge of the Labour Court has rightly held that after giving an opportunity to the respondents to lead their evidence, there is no question of delay in filing the reference under the provision of Industrial

Dispute Act. He has further submitted that the objection regarding the limitation has not been raised by the petitioner-Corporation before the Conciliation Officer and that this objection has been raised for the first time. In such circumstances, it may be presumed that they have forgone their right to challenge the proceedings on the ground of limitation.Reference to the judgement of this court in W.P.No.16849/2015 has also been made that it squarely covers the issue at hand.

7. It is further submitted by Shri Pethia, learned counsel appearing for the workman that the employer was given due opportunity to produce the service record of the workman but despite availing the opportunity the employer have not come out with any document to show that the workman has not worked for more than 240 days and the same has also been recorded by the learned Judge of the Labour Court in para 9 of its judgment that the employer was ordered to produce the document but as no document was filed, hence adverse inference is drawn against them and thus the employee has worked in the department for more than 240 days prior to 26.12.2006.

8. Shri Rajesh Kumar Pandey, learned counsel in W.P.No. 2202/2016 has submitted that the award passed by the Labour Court is on lower side and in which only a lump sum amount of Rs.1,00,000/-has been awarded despite the fact the respondent had worked for a period of more than 5 years. Learned counsel has also placed reliance upon the decision of the Apex Court in the case of *Vice-Chancellor, Lucknow University, Lucknow, Uttar Pradesh v. Akhilesh Kumar Khare & another,* AIR 2015 SC 3473 (para 17).

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

10. Before dealing with the questions raised in this petition, it would be expedient to refer to the issues which were framed by the learned judge of the Labour Court :

1 क्या प्रथम पक्ष ने द्वितीय पक्ष के अधीन सेवा समाप्ति के पूर्व 240 दिन कार्य एक वर्ष की अवधि में किया है ?

2 क्या प्रथम पक्ष की सेवा समाप्ति अवैधानिक छंटनी की श्रेणी में आती है ?

3 क्या प्रथम पक्ष ने यह प्रकरण अत्यधिक विलंब से प्रस्तुत किया है ? इस कारण से विचारणीय योग्य नहीं है ?

4 क्या प्रथम पक्ष सेवासमाप्ति के बाद से बेरोजगार है और पुनः स्थापना के साथ पिछला वेतन पाने का अधिकारी है?

5 क्या प्रथम पक्ष को सेवा में पुर्नस्थापना के स्थान पर क्षतिपूर्ति दिलाया जाना न्यायोचित है ?

11. Issue no.1 and 2 are relevant for the purpose of this petition which sufficiently throw light on both the question of burden of proof as well of limitation as raised by the petitioner. Dealing with the question of limitation, the learned Judge of the Labour Court has held in para 11 of the judgement that it is true that the services of the workman were terminated on 26.12.2006 whereas the dispute was referred by the workman to the Conciliation Officer in the year 2010 without assigning any reason for this delay but still under the Industrial Dispute Act, 1947 there is no provision of limitation which may restrain a workman from filing an application raising the industrial dispute on account of delay, thus, in this manner the issue of delay has been decided.

12. Learned counsel for the petitioner has relied upon the decision rendered in the case of *Prabhakar* (supra), para 5, 8, 9, 22 to 24, 27 to 32, 36 to 45reads as under :

> "**5.** The Management had taken a specific plea in the conciliation proceedings as well as before the Labour Court that such a reference was not competent and the petitioner was not entitled to any relief when he had raised the dispute after fourteen years of his termination. On merits it was pleaded that the Management had not terminated the services and, in fact, it is the petitioner who left the services. Various issues were framed by the Labour Court, which included a specific issue as to whether any relief could be given when the dispute was raised after fourteen years of alleged termination. After the evidence was led, the Labour Court passed the award holding that the petitioner had worked for more than 240 days and his services were terminated by the Management without complying with the provisions of Section 25-F of the Act. The termination was, thus, held to be invalid.
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> **8.** From the facts narrated above, it becomes clear that for a period of fourteen years no grievance was made by the petitioner *qua* his alleged termination. Though it was averred that the petitioner had approached the Management time and again and was given assurance that he would be taken back in service, there is nothing on record to substantiate this. No notice was served upon the Management. There is no assurance given in writing by the Management at any point of time. Such assertions are clearly self-serving. Pertinently, even the Labour Court has not accepted the aforesaid explanation anywhere and has gone by the fact that the dispute was raised after a delay of fourteen years. Therefore, keeping in mind the aforesaid facts, we would decide the issue which has arisen, namely, whether reference of such a belated claim was appropriate.

9. It may be stated that the question is of utmost importance as it is seen that many times, as in the instant case, the workers raise dispute after a number of years of the cause of action. Whether the dispute can still be treated as surviving? Or whether it can be said that the dispute does not exist when the workmen concerned after their say termination kept quiet for a number of years and thus acquiesced into the action?

22. As early as in 1959, this Court in*Shalimar Works Ltd* .v. *Workmen* [*Shalimar Works Ltd.* v. *Workmen*, AIR 1959 SC 1217 : (1960) 1 SCR 150] pointed out that there is no limitation prescribed in making a reference of disputes to the Industrial Tribunal under Section 10(1) of the Act. At the same time, the Court also remarked that the dispute should be referred as soon as possible after they have arisen and after conciliation proceedings have failed. In that case, reference was made after four years of dispute having arisen. In these circumstances, this Court held that relief of reinstatement should not be given to the discharged workmen in such a belated and vague reference.

23. Again, in *Western India Match Co. Ltd.* [*Western India Match Co. Ltd.* v. *Workers' Union*, (1970) 1 SCC 225] , though upholding the reference of dispute made nearly six years after the previous refusal to make the reference, the Court observed that in exercising its discretion to make reference, the Government will take into consideration the time which had lapsed between its earlier decision and the date when it decides to reconsider it in the interest of justice and industrial peace. The following observations from this judgment need to be noticed for the purposes of the present case: (SCC pp. 231-32, paras 8 & 13)

> "*8.* From the words used in Section 4 (*k*) of the Act there can be no doubt that the legislature has left the question of making or refusing to make a reference for adjudication to the discretion of the Government. But the discretion is neither unfettered nor arbitrary for the section clearly provides that there must exist an industrial dispute as defined by the Act or such a dispute must be apprehended when the Government decides to refer it for adjudication. No reference thus can be made unless at the time when the Government decides to make it an industrial dispute between the employer and his employees either exists or is apprehended. Therefore, the

expression 'at any time', though seemingly without any limits, is governed by the context in which it appears. Ordinarily, the question of making a reference would arise after conciliation proceedings have been gone through and the conciliation officer has made a failure report. But the Government need not wait until such a procedure has been completed. In an urgent case, it can 'at any time' i.e. even when such proceedings have not begun or are still pending, decide to refer the dispute for adjudication. The expression 'at any time' thus takes in such cases as where the Government decides to make a reference without waiting for conciliation proceedings to begin or to be completed. As already stated, the expression 'at any time' in the context in which it is used postulates that a reference can only be made if an industrial dispute exists or is apprehended. No reference is contemplated by the section when the dispute is not an industrial dispute, or even if it is so, it no longer exists or is not apprehended, for instance, where it is already adjudicated or in respect of which there is an agreement or a settlement between the parties or where the industry in question is no longer in existence.

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13. It is true that where a Government reconsiders its previous decision and decides to make the reference, such a decision might cause inconvenience to the employer because the employer in the meantime might have acted on the belief that there would be no proceedings by way of adjudication of the dispute between him and his workmen. Such a consideration would, we should think, be taken into account by the Government whenever, in exercise of its discretion, it decides to reopen its previous decision as also the time which has lapsed between its earlier decision and the date when it decides to reconsider it. These are matters which the Government would have to take into account while deciding whether it should reopen its former decision in the interest of justice and industrial peace but have nothing to do with its jurisdiction under Section 4(*k*) of theAct. Whether the intervening period may be short or long would necessarily depend upon the facts and circumstances of each case, and therefore, in construing the expression 'at any time' in Section 4(*k*) it would be impossible to lay down any limits to it."

24. Again in *Vazir Sultan Tobacco Co. Ltd.* v. *State of A.P.* [*Vazir Sultan Tobacco Co. Ltd.* v. *State of A.P.*, (1964) 1 LLJ 622 (AP)] the Andhra Pradesh High Court held that reference made nearly six years after the dispute amounted to being inordinate, unreasonable and unjustifiable.

27. In *Raghubir Singh* v. *Haryana Roadways* [*Raghubir Singh* v. *Haryana Roadways*, (2014) 10 SCC 301 : (2015) 1 SCC (L&S) 23] , this Court scanned through most of the available case law on the subject and emphasised that the words "*at any time*" occurring in Section 10 of the Act would imply that law of limitation did not apply. On facts, the Court held that the State Government had rightly exercised its power and referred the dispute to the Labour Court within reasonable time considering the circumstances in which the appellant therein was placed. In fact, the Court accepted the explanation for delay given by the workman in raising the dispute. In that case, it was found that there was a criminal case pending against the workman and further the Management had assured him that he would be reinstated on his acquittal. It was also noticed that even despite delay, there was no loss or unavailability of evidence due to the said delay.

28. The aforesaid case law depicts the following:

28.1. The law of limitation does not apply to the proceedings under the Industrial Disputes Act, 1947.

28.2. The words "*at any time*" used in Section 10 would support that there is no period of limitation in making an order of reference.

28.3. At the same time, the appropriate Government has to keep in mind as to whether the dispute is still existing or live dispute and has not become a stale claim and if that is so, the reference can be refused.

28.4. Whether dispute is alive or it has become stale/non-existent at the time when the workman approaches the appropriate Government is an aspect which would depend upon the facts and circumstances of each case and there cannot be any hard-and-fast rule regarding the time for making the order of reference.

29. If one examines the judgments in the aforesaid perspective, it would be easy to reconcile all the judgments. At the same time, in some cases the Court did not hold the reference to be bad in law and the delay on the part of the workman in raising the dispute became

the cause for moulding the relief only. On the other hand, in some other decisions, this Court specifically held that if the matter raised is belated or stale that would be a relevant consideration on which the reference should be refused. Which parameters are to be kept in mind while taking one or the other approach needs to be discussed with some elaboration, which would include discussion on certain aspects that would be kept in mind by the courts for taking a particular view. We, thus, intend to embark on the said discussion keeping in mind the central aspect which should be the forefront, namely, whether the dispute existed at the time when the appropriate Government had to decide whether to make a reference or not or the Labour Court/ Industrial Tribunal to decide the same issue coming before it.

30. In this process, let us first examine as to what would constitute "industrial dispute" because of the simple reason that the appropriate Government has power to refer what is known as an "industrial dispute" and likewise the Labour Court/Industrial Tribunal has jurisdiction to decide if there is an industrial dispute. We are not going into the entire gamut of what constitutes "industrial dispute" within the meaning of Section2(*k*) of the Act. Our focus is only on the aspect that what can be referred should be the dispute which is existing and in praesenti when the reference is sought. To put it otherwise, if it no longer remains an industrial dispute or industrial dispute "does not exist" at that time, there would not be any question on making reference or adjudicating the matter as it is not an industrial dispute.

31. Section 2(*k*) of the IDA defines "industrial dispute" and it reads as under:

> "**2.**(***k***) '**industrial dispute**' means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person;"

32. As per Section 2-A dispute relating to discharge, dismissal, retrenchment or termination of an individual are also deemed as industrial dispute and, therefore, an individual is given right to raise these disputes.

36. Thus, a dispute or difference arises when demand is made by one side (i.e. workmen) and rejected by the other side (i.e. the

employer) and *vice versa*. Hence an "industrial dispute" cannot be said to exist until and unless the demand is made by the workmen and it has been rejected by the employer. How such demand should be raised and at what stage may also be relevant but we are not concerned with this aspect in the instant case. Therefore, what would happen if no demand is made at all at the time when the cause of action arises? In other words, like in the instant case, what would be the consequence if after the termination of the services of the petitioner on 1-4-1985, the petitioner does not dispute his termination as wrongful and does not make any demand for reinstatement for a number of years? Can it still be said that there is a dispute? Or can it be said that workmen can make such demand after a lapse of several years and on making such demand dispute would come into existence at that time. It can always be pleaded by the employer in such a case that after the termination of the services when the workman did not raise any protest and did not demand his reinstatement, the employer presumed that the workman has accepted his termination and, therefore, he did not raise any dispute about his termination. It can be said that workman, in such a case, acquiesced into the act of the employer in terminating his services and, therefore, accepted his termination. He cannot after a lapse of several years make a demand and then convert it into a "dispute" what had otherwise become a buried issue.

37. Let us examine the matter from another aspect viz. laches and delays and acquiescence.

38. It is now a well-recognised principle of jurisprudence that a right not exercised for a long time is non-existent. Even when there is no limitation period prescribed by any statute relating to certain proceedings, in such cases courts have coined the doctrine of laches and delays as well as doctrine of acquiescence and non-suited the litigants who approached the Court belatedly without any justifiable explanation for bringing the action after unreasonable delay. Doctrine of laches is in fact an application of maxim of equity "delay defeats equities".

39. This principle is applied in those cases where discretionary orders of the court are claimed, such as specific performance, permanent or temporary injunction, appointment of Receiver, etc. These principles are also applied in the writ petitions filed under Articles 32 and 226 of the Constitution of India. In such cases, courts can still refuse relief where the delay on the petitioner's part has

prejudiced the respondent even though the petitioner might have come to court within the period prescribed by the Limitation Act.

40. Likewise, if a party having a right stands by and sees another acting in a manner inconsistent with that right and makes no objection while the act is in progress he cannot afterwards complain. This principle is based on the doctrine of acquiescence implying that in such a case the party who did not make any objection acquiesced into the alleged wrongful act of the other party and, therefore, has no right to complain against that alleged wrong.

41. Thus, in those cases where period of limitation is prescribed within which the action is to be brought before the court, if the action is not brought within that prescribed period the aggrieved party loses remedy and cannot enforce his legal right after the period of limitation is over. Likewise, in other cases even where no limitation is prescribed, but for a long period the aggrieved party does not approach the machinery provided under the law for redressal of his grievance, it can be presumed that relief can be denied on the ground of unexplained delay and laches and/or on the presumption that such person has waived his right or acquiesced into the act of other. As mentioned above, these principles as part of equity are based on principles relatable to sound public policy that if a person does not exercise his right for a long time then such a right is non-existent.

42. On the basis of the aforesaid discussion, we summarise the legal position as under:

42.1. An industrial dispute has to be referred by the appropriate Government for adjudication and the workman cannot approach the Labour Court or Industrial Tribunal directly, except in those cases which are covered by Section 2-A of the Act. Reference is made under Section 10 of the Act in those cases where the appropriate Government forms an opinion that "any industrial dispute exists or is apprehended". The words "industrial dispute exists" are of paramount importance, unless there is an existence of an industrial dispute (or the dispute is apprehended or it is apprehended such a dispute may arise in near future), no reference is to be made. Thus, existence or apprehension of an industrial dispute is a *sine qua non* for making the reference. No doubt, at the time of taking a decision whether a reference is to be made or not, the appropriate Government is not to go into the merits of the dispute. Making of reference is only an

administrative function. At the same time, on the basis of material on record, satisfaction of the existence of the industrial dispute or the apprehension of an industrial dispute is necessary. Such existence/ apprehension of industrial dispute, thus, becomes a condition precedent, though it will be only subjective satisfaction based on material on record. Since, we are not concerned with the satisfaction dealing with cases where there is apprehended industrial dispute, discussion that follows would confine to existence of an industrial dispute.

42.2. Dispute or difference arises when one party makes a demand and the other party rejects the same. It is held by this Court in a number of cases that before raising the industrial dispute making of demand is a necessary precondition. In such a scenario, if the services of a workman are terminated and he does not make the demand and/ or raise the issue alleging wrongful termination immediately thereafter or within reasonable time and raises the same after considerable lapse of period, whether it can be said that industrial dispute still exists.

42.3. Since there is no period of limitation, it gives right to the workman to raise the dispute even belatedly. However, if the dispute is raised after a long period, it has to be seen as to whether such a dispute still exists? Thus, notwithstanding the fact that law of limitation does not apply, it is to be shown by the workman that there is a dispute in praesenti. For this purpose, he has to demonstrate that even if considerable period has lapsed and there are laches and delays, such delay has not resulted into making the industrial dispute cease to exist. Therefore, if the workman is able to give satisfactory explanation for these laches and delays and demonstrate that the circumstances disclose that issue is still alive, delay would not come in his way because of the reason that law of limitation has no application. On the other hand, if because of such delay dispute no longer remains alive and is to be treated as "dead", then it would be non-existent dispute which cannot be referred.

42.4. Take, for example, a case where the workman issues notice after his termination, questioning the termination and demanding reinstatement. He is able to show that there were discussions from time to time and the parties were trying to sort out the matter amicably. Or he is able to show that there were assurances by the Management to the effect that he would be taken back in service and because of these reasons, he did not immediately raise the dispute by approaching the Labour Authorities seeking reference or did not invoke the remedy

under Section 2-A of the Act. In such a scenario, it can be treated that the dispute was live and existing as the workman never abandoned his right. However, in this very example, even if the notice of demand was sent but it did not evoke any positive response or there was specific rejection by the Management of his demand contained in the notice and thereafter he sleeps over the matter for a number of years, it can be treated that he accepted the factum of his termination and rejection thereof by the Management and acquiesced into the said rejection.

42.5. Take another example. A workman approaches the civil court by filing a suit against his termination which was pending for a number of years and was ultimately dismissed on the ground that the civil court did not have jurisdiction to enforce the contract of personal service and does not grant any reinstatement. At that stage, when the suit is dismissed or he withdraws that suit and then involves the machinery under the Act, it can lead to the conclusion that the dispute is still alive as the workman had not accepted the termination but was agitating the same; albeit in a wrong forum.

42.6. In contrast, in those cases where there was no agitation by the workman against his termination and the dispute is raised belatedly and the delay or laches remain unexplained, it would be presumed that he had waived his right or acquiesced into the act of termination and, therefore, at the time when the dispute is raised it had become stale and was not an "existing dispute". In such circumstances, the appropriate Government can refuse to make reference. In the alternative, the Labour Court/Industrial Court can also hold that there is no "industrial dispute" within the meaning of Section 2(*k*) of the Act and, therefore, no relief can be granted.

43. We may hasten to clarify that in those cases where the court finds that dispute still existed, though raised belatedly, it is always permissible for the court to take the aspect of delay into consideration and mould the relief. In such cases, it is still open for the court to either grant reinstatement without back wages or lesser back wages or grant compensation instead of reinstatement. We are of the opinion that the law on this issue has to be applied in the aforesaid perspective in such matters.

44. To summarise, although there is no limitation prescribed under the Act for making a reference under Section 10(1) of the ID Act, yet it is for the "appropriate Government" to consider whether it is

> expedient or not to make the reference. The words "at any time" used in Section 10(1) do not admit of any limitation in making an order of reference and laws of limitation are not applicable to proceedings under the ID Act. However, the policy of industrial adjudication is that very stale claims should not be generally encouraged or allowed inasmuch as unless there is satisfactory explanation for delay as, apart from the obvious risk to industrial peace from the entertainment of claims after long lapse of time, it is necessary also to take into account the unsettling effect which it is likely to have on the employers' financial arrangement and to avoid dislocation of an industry.
>
> **45.** On the application of the aforesaid principle to the facts of the present case, we are of the view that the High Court correctly decided the issue holding that the reference at such a belated stage i.e. after fourteen years of termination without any justifiable explanation for delay, the appropriate Government had no jurisdiction or power to make reference of a non-existing dispute."
>
> *(emphasis supplied)*

13. On the other hand, Shri K. N. Pethia, learned counsel for the respondent/ workman has relied upon the decision of the Apex Court in the case of *Raghubir Singh* (supra)to submit that there is no provision of any limitation provided in the Industrial Disputes Act and an application can be made at any time, but this decision has already been considered by the Apex court in the subsequent judgement in para 27 of *Prabhakar's case* (supra).

14. Thus, in view of the aforesaid dictum laid down by the Apex Court, this court is of the considered opinion that the learned Judge of the Labour Court has not dealt with the issue of delay in its proper perspective and despite holding that there was unexplained delay of four years in filing the application, has still allowed the same simply holding that there is no provision of limitation provided to file an application under the Indusrtrial Disputes Act.

15. So far as the issue of burden of proof is concerned,in present case it appears that the learned Judge of the Labour Court had directed the petitioner Corporation to submit the documents relating to the services of the petitioners but despite many opportunities the Corporation failed to produce the same hence it was held that adverse inference shall be drawn against the petitioners in the light of the affidavits filed by the workmen that they had worked continuously for more than 240 days. In this regard, the learned counsel for the respondent has also relied upon the decision in the case of *Range Forest Officer* (supra), para 3 of the same reads as under :

> "**3**.… It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside."
>
> *(emphasis supplied)*

16. In the case of *Range Forest Officer* (supra) the issue involved is similar to that of present case. In the case of *Range Forest Officer* (supra) the Apex Court has held that merely filing of an affidavit would not suffice and the case of the workman was dismissed and in the present case also although an opportunity to file the document was given to the petitioner-Corporation but still that would not discharge the initial burden casted on the employees to stand on their own legs.

17. In view of the aforesaid, this court is unable to endorse the views expressed by the Labour Court in shifting the burden of proof on the petitioner. Reference may also be made to the decision rendered in the case of *RBI v. S. Mani,* (2005) 5 SCC 100, in which the Hon'ble Apex Court has dealt with the issue of burden of proof in the following manner:-

> ***" Burden of proof***
>
> **28.** The initial burden of proof was on the workmen to show that they had completed 240 days of service. The Tribunal did not consider the question from that angle. It held that the burden of proof was upon the appellant on the premise that they have failed to prove their plea of abandonment of service stating :
>
> "It is admitted case of the parties that all the first parties under the references CRs Nos. 1 to 11 of 1992 have been appointed by the second party as ticca mazdoors. As per the first parties, they had worked continuously from April 1980 to December 1982. But the second party had denied the abovesaid claim of continuous service of the first parties on the ground that the first parties has not been appointed as regular workmen but they were working only as temporary part-time workers as ticca mazdoor and their services were required whenever necessity arose that too on the leave vacancies of

regular employees. But as strongly contended by the counsel for the first party, since the second party had denied the abovesaid claim of continuous period of service, it is for the second party to prove through the records available with them as the relevant records could be available only with the second party."

29. The Tribunal, therefore, accepted that the appellant had denied the respondents' claim as regards their continuous service.

30. In *Range Forest Officer* v. *S.T. Hadimani* it was stated: (SCC p. 26, para 3)

"*3*. …In our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside."

(See also *Essen Deinki* v. *Rajiv Kumar*)

31. In *Siri Niwas* this Court held : (SCC pp. 197-98, para 13)

"*13*. The provisions of the Evidence Act, 1872 per se are not applicable in an industrial adjudication. The general principles of it are, however, applicable. It is also imperative for the Industrial Tribunal to see that the principles of natural justice are complied with. The burden of proof was on the respondent workman herein to show that he had worked for 240 days in the preceding twelve months prior to his alleged retrenchment. In terms of Section 25-F of the Industrial Disputes Act, 1947, an order retrenching a workman would not be effective unless the conditions precedent therefor are satisfied. Section 25-F postulates the following conditions to be fulfilled by an employer for effecting a valid retrenchment :

(*i*) one month's notice in writing indicating the reasons for retrenchment or wages in lieu thereof;

(*ii*) payment of compensation equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months."

It was further observed: (SCC p. 198, para 14)

"*14*. … As noticed hereinbefore, the burden of proof was on the workman. From the award it does not appear that the workman adduced any evidence whatsoever in support of his contention that he complied with the requirements of Section 25-B of the Industrial Disputes Act. Apart from examining himself in support of his contention he did not produce or call for any document from the office of the appellant herein including the muster rolls. It is improbable that a person working in a local authority would not be in possession of any documentary evidence to support his claim before the Tribunal. Apart from muster rolls he could have shown the terms and conditions of his offer of appointment and the remuneration received by him for working during the aforementioned period. He did not even examine any other witness in support of his case."

32. Yet again in *Hariram* it was opined: (SCC p. 250, para 10)

"*10*. … We cannot but bear in mind the fact that the initial burden of establishing the factum of their continuous work for 240 days in a year rests with the respondent applicants."

(emphasis supplied)

18. In the circumstance, this Court finds that the petitioner-Municipal Corporation has been able to make out a case for interference in the order passed by the learned Labour Judge and as a consequence the impugned awards dated 14.8.2015, 27.7.2015, 1.9.2015 and 1.9.2015 passed in W.P. Nos.2202/2016, 2203/2016, 2293/2016 and 2302/2016 respectively are hereby **quashed**.

19. In W.P. No.2202/2016, Shri Rajesh Kumar Pandey, learned counsel for the respondentNo.2-workman has also relied upon the decision of the Apex Court in the case of *Vice-Chancellor, Lucknow University, Lucknow,Uttar Pradesh* (supra), but since the petitions filed by the Corporation against the award of compensation has already been dismissed, the prayer of respondent No.2/workman for enhancement of compensation stands rejected.

20 In the result, Writ petition Nos.2202/2016, 2203/2016, 2293/2016 and 2302/2016 filed by the Municipal Corporation are **allowed**.

21. So far as Writ Petition No.9702/2016 filed by the workman is concerned, for the reasons stated in preceding paragraphs, the same is **dismissed**.

Order accordingly

I.L.R. [2018] M.P. 418
WRIT PETITION

Before Mr. Justice Subodh Abhyankar

W.P. No. 11259/2017 (Jabalpur) decided on 11 October, 2017

BADI BAHU LODHI (SMT.) …Petitioner
Vs.
STATE OF M.P. & ors. …Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 36 & 122 – Removal of Sarpanch – Grounds – Jurisdiction – Limitation **– Held – Perusal of complaint reveals that it refers to suppression of certain information regarding number of family members viz. names of daughters who are married and also the land lying in name of petitioner and her family members in the form submitted by petitioner at the time of election – None of these grounds are enumerated in Section 36 of the Adhiniyam – Collector has no jurisdiction to entertain an application purported to be u/S 36 of the Adhiniyam when none of the grounds mentioned in the said section were available to the respondents – Further held – Section 122 itself provides for limitation for filing of election petition within thirty days from the date when elections are notified – Invoking the provisions of Section 122 in a proceedings u/S 36 of the Adhiniyam is palpably illegal – It is trite law that whatever is prohibited by law to be done directly, cannot be allowed to be done indirectly – Order passed by Collector invoking powers u/S 122 of the Adhiniyam and the order passed by SDO is unsustainable in the eyes of law and is hereby quashed – Petitioner's disqualification is set aside – Writ Petition allowed.**

(Para 10 & 11)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 36 व 122 – सरपंच को हटाया जाना – आधार – अधिकारिता – परिसीमा – अभिनिर्धारित – शिकायत के अवलोकन से प्रकट होता है कि वह निर्वाचन के समय याची द्वारा प्रस्तुत प्रपत्र में परिवार के सदस्यों की संख्या अर्थात् पुत्रियां जो विवाहित है और याची एवं उसके परिवार के सदस्यों के नाम की भूमि के भी संबंध में कतिपय जानकारी के छिपाव के संदर्भ में है – अधिनियम की धारा 36 में इनमें से कोई आधार प्रगणित नहीं है – अधिनियम की धारा 36 के अंतर्गत तथाकथित आवेदन को ग्रहण करने की कलेक्टर को कोई अधिकारिता नहीं जब उक्त धारा में उल्लिखित कोई भी आधार प्रत्यर्थीगण को उपलब्ध नहीं थे – आगे अभिनिर्धारित – धारा 122 स्वयं निर्वाचन अधिसूचित होने की तिथि से तीस दिनों के भीतर निर्वाचन याचिका प्रस्तुत करने हेतु परिसीमा उपबंधित करती है – अधिनियम की धारा 36 के अंतर्गत कार्यवाहियों में धारा 122 के उपबंधों का अवलंब लेना सुस्पष्ट रूप से अवैध है – यह प्रचलित विधि है कि जो कुछ भी प्रत्यक्ष रूप से किया जाना विधि द्वारा प्रतिषिद्ध है,

उसे अप्रत्यक्ष रूप से करने की अनुमति नहीं दी जा सकती – कलेक्टर द्वारा अधिनियम की धारा 122 के अंतर्गत शक्तियों का अवलंब लेकर पारित किया गया आदेश एवं उपखंड अधिकारी द्वारा पारित आदेश, विधि की दृष्टि में कायम रखने योग्य नहीं है और एतद्द्वारा अभिखंडित – याची की निरर्हता अपास्त – रिट याचिका मंजूर।

Saurabh Singh Thakur with *Anjali Shrivastava*, for the petitioner.

Divesh Jain, for the respondents/State.

Mahendra Pateria and *Praveen Dubey,* for the respondent No. 4.

SM Guru, for the intervenor.

O R D E R

Subodh Abhyankar, J. :- This petition has been filed by the petitioner who was elected as a Sarpanch against the order dated 29.6.2017 (Annexure P-9) passed by the respondent No.2/Collector, Damoh, whereby she has been removed from her post. The petition is also filed against the order dated 18.5.2017 (Annexure P-7) passed by the respondent No.3/ SDO, Damoh whereby the SDO has passed the order in respect of the false declaration given by the petitioner and has referred the matter to the Collector for further orders. The petitioner has also challenged the order dated 18.7.2017 (Annexure P-10) again passed by the respondent No.3/SDO, Damoh whereby on the basis of the order passed by the Collector on 29.6.2017 has been further formally announced.

2. In brief the facts of the case are that the petitioner was elected as Sarpanch of Gram Panchayat Adhorta District Damoh in the year 2015 and since then she was discharging her duties as Sarpanch but on 20.7.2016/ 22.7.2016 a complaint was made by the respondent No.4 to the Collector that the returned candidate i.e. the petitioner did not disclose in her declaration in respect of her daughters as also about the land held by her family. The matter was referred to the SDO to conduct an enquiry, who in turn got the enquiry done through the Tehsildar and the Tehsildar, in turn asked the Nayab Tehsildar to conduct a preliminary enquiry and submit the report, this report was submitted by Nayab Tehsildar on 17.08.2016. On the basis of this report submitted by the Nayab Tehsildar the final report was prepared by the Sub Divisional Officer/Prescribed Authority on 18.05.2017.

3. The contention of the petitioner is that the proceedings under Section 36 of the Madhya Pradesh Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 (for brevity **"Adhiniyam, 1993"**) were initiated without conducting any enquiry and without giving any opportunity to the petitioner to lead evidence, the SDO passed the order on 18.5.2017 (Annexure P-7), which is under challenge on the basis of the report submitted by the Tahsildar for incorrect declaration given by the petitioner and subsequently the matter was referred to the Collector for passing an appropriate order, and the Collector,

Damoh under Section 122 of the Adhiniyam, 1993 passed the impugned order dated 29.6.2017 (Annexure P-9) whereby the petitioner has been removed from her post. It is further submitted that for removal of the petitioner and in pursuance of the order passed by the Collector on 29.6.2017, the SDO has formally passed the order on 18.7.2017 (Annexure P-10) for removal of the petitioner from the post of Sarpanch on finding the charges of misconduct against her to be proved. It is contented by the petitioner that the aforesaid orders are contrary to the provisions of Sections 36 and 122 of the Adhiniyam, 1993.

4. It is further submitted by the petitioner that a reply to the application filed by the respondent No.4 was also submitted by the petitioner challenging the maintainability of the same under Section 36 of the Adhiniyam, 1993. It is contended that on the basis of complaint made by the respondent No.4, a "Sthal Panchnama" was also prepared by the Naib Tahsildar in which it is stated that the petitioner's daughters have already got married, hence their names have not been mentioned by the petitioner. On 28.6.2016 a show cause notice was also issued to the petitioner by the respondent No.3 in respect of the report submitted by the Naib Tahsildar and in her reply the petitioner has again raised the same objection that the enquiry under Section 36 of the Adhiniyam, 1993 cannot be entertained under Section 122 of the Adhiniyam, 1993, but without giving any opportunity of hearing to the petitioner, the SDO has passed the order on 18.5.2017 and has referred the matter to the Collector, who as already stated above, passed the impugned order against the petitioner.

5. It is further contended by the petitioner that the application filed by the respondent No.4 could not have been entertained under Section 36 of the Adhiniyam, 1993 and even otherwise the disqualifications, which have been prescribed in Section 36 of the Adhiniyam, 1993 are of removable in nature hence an opportunity of hearing and to remove the disqualification ought to have been given to the petitioner. It is further submitted that under Section 36(1)(a) of the Adhiniyam, 1993 the disqualifications which have been prescribed are different from the ones which have been alleged to have been attributed with regard to submission of incorrect declaration and since it does not find place in the list of disqualification u/s.36, hence no proceeding could have been initiated under Section 36(2) of the Adhiniyam, 1993. It is further submitted that the Collector has passed the order in exercise of powers conferred under Section 122 of the Adhiniyam, 1993 despite the fact that the said powers can only be exercised by the SDO as Prescribed Authority for the purpose of entertaining an election petition under the Adhiniyam, 1993 and that too within a period of one month from the date of notification of the result and on the grounds as defined under the Rules of 1995 thus, it is submitted that the order passed by the Collector is without jurisdiction. It is further submitted that the powers under Sections 40 and 92 of the Adhiniyam, 1993 have been delegated to the Chief Executive Officer of the Jila

Panchayat by the Notification dated 3.5.2017 issued by the State Government, hence the day when the order was passed by the SDO on 18.5.2017, he had no jurisdiction or any authority under law to pass an order and to proceed with the matter and apart from that the Collector, even if he was empowered could not have delegated his powers to the SDO. On the above mentioned grounds the petitioner has challenged the order passed against her.

6. On the other hand, in the reply it is submitted by the respondents that the petitioner has an alternative remedy of appeal under Section 36(3) of the Adhiniyam, 1993 and without availing the same, the petitioner has directly come to this Court, hence the petition is liable to be dismissed on this ground only. It is further submitted by the respondents that after removal of the petitioner, in her place, one Halli Bai wife of Muneem Khan has already been posted as *ad hoc* Sarpanch of Gram Panchayat Adhorta and is also operating the Bank Account of the said Gram Panchayat, and the petitioner, despite knowing this fact has decided not to make Halli Bai, *ad hoc* Sarpanch as a party in this petition and has obtained the ex-parte stay by suppressing material facts. It is further submitted that the SDO has entertained the complaint of the respondent No.4 treating it to be an election petition under Section 122 of the Adhiniyam, 1993, hence it cannot be said that the disqualification of the petitioner has not been decided. It is further stated that no illegality has been committed by the respondents in proceeding under Section 36 of the Adhiniyam, 1993.

7. Shri SM Guru, learned counsel for the intervener has submitted that this petition is liable to be dismissed on the ground that the petitioner has not made the *ad hoc* Sarpanch Halli Bai as party in this petition despite having knowledge of the fact that she is appointed as *ad hoc* Sarpanch in place of the petitioner.

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

9. The issues before this Court are two folds, viz. (1) whether the collector, under the provisions of Section 36 of the Adhiniyam could have proceeded with the complaint made by the respondent no.4 regarding the concealment of certain information by the petitioner while submitting her form for election ?

(2) whether the collector can delegate his powers to enquire into a complaint u/s.36 of the Adhiniyam? and

(3) whether the remedy of appeal is an efficacious remedy u/s.36(4) of the Adhiniyam ?

Coming to the first question, that whether the collector, under the provisions of Section 36 of the Adhiniyam could have proceeded with the complaint made by the respondent no.4 regarding the concealment of certain information by the petitioner while submitting

her form for election is concerned, this court finds that Section 36 of the Adhiniyam is in itself a very exhaustive section providing for the various disqualifications for an office bearer of Panchayat. Section 36 of the Adhiniyam, 1993 reads as under:-

> **"36. Disqualification for being office-bearer of Panchayat.** - (1) No person shall be eligible to be an office-bearer of Panchayat who,-
>
> (a) has, either before or after the commencement of this Act, been convicted,-
>
> (i) of an offense under the Protection of Civil Rights Act, 1955 (No. 22 of 1955) or under any law in connection with the use, consumption or sale of narcotics or any law corresponding thereto in force in any part of the State, unless a period of five years or such lesser period as the State Government may allow in any particular case has elapsed since his conviction; or
>
> (ii) of any other offense and had been sentenced to imprisonment for not less than six months, unless a period of five years or such less period as the State Government may allow in any particular case has elapsed since his release; or
>
> (b) is of unsound mind and stands so declared by a competent Court; or
>
> (c) is an applicant to be adjudged an insolvent or is an undischarged insolvent; or
>
> [[(ca) Omitted]
>
> (cb) has not paid all the dues which are recoverable by Panchayat and has not filed with nomination paper, the declaration of such intention that no money is due to be paid by him on any account payable to the Panchayat; or
>
> (cc) has encroached upon any land or buildings of the Panchayat and Government; or]
>
> (d) hold an office of profit under any Panchayat or is in the service of any other local authority or Co-operative Society or the State Government or Central Government or any Public Sector Undertaking under the control of the Central Government or the State Government :
>
> Provided that no person shall be deemed lo have incurred disqualification under this clause by reason of being appointed as a Patel under the Madhya Pradesh Land Revenue Code, 1959 (No. 20 of 1959); or

[(e) has been dismissed from the service of the State Government or Central Government, or a Panchayat, or any other local authority, or a Co-operative Society, or any Public Sector Undertaking under the control of the Central Government or the State Government for corruption or for disloyally; or]

(f) has directly or indirectly any share or interest in any contract with, by or on behalf of the Panchayat, while owning such share or interest :

Provided that a person shall not be deemed to have incurred disqualification under clause (1) by reason of his,-

(i) having share in any joint stock company or a share or interest in any Association registered under the Madhya Pradesh Society Registrikaran Adhiniyam, 1973 (No. 44 of 1973) or in any Co-operative Society which shall contract with or be employed by or on behalf of the Panchayat; or

(ii) having share or interest in any newspaper in which any advertisement relating to the affairs of the Panchayat is inserted; or

(iii) holding a debenture or being otherwise concerned in any loan raised by or on behalf of the Panchayat;

(g) is employed as paid legal practitioner on behalf of the Panchayat; or

(h) is suffering from a variety of leprosy which is infectious; or

(i) has voluntarily acquired the citizenship of a Foreign State, or is under any acknowledgment of allegiance or adherence to a Foreign State; or

(j) has been disqualified under the Act repealed by Section 130 during the period of five years preceding the date of filing a nomination paper in any election to be held for the first time under this Act and the period of such disqualification has not elapsed or the disqualification has not been removed; or

(k) is disqualified by or under any law for the time being in force for the purpose of election to the State Legislative Assembly :

Provided that no person shall be disqualified on the ground that he is less than 25 years of age if he has attained the age of 21 years;

(l) is so disqualified by or under any law made by the legislature of the State.

(2) If any person having been elected [x x x] as an office-bearer of Panchayat,-

(a) subsequently becomes subject to any of the disqualification mentioned in sub-section (1) and such disqualification is not removable or being removable is not removed [or becomes office-bearer concealing his disqualification for it which has not been questioned and decided by any election petition under Section 122];

(b) accepts employment as legal practitioner against the Panchayat;

(c) absents himself from three consecutive meetings of the Panchayat or its Committee or does not attend half the number of meetings held during the period of six months without the leave of the Panchayat;

he shall, subject to the provisions of sub section (3), cease to be such office-bearer and his office shall become vacant :

Provided that where an application is made by an office-bearer to the Panchayat for leave to absent himself under clause (c) and the Panchayat fails to inform the applicant of its decision on the application within a period of one month from the date of receipt of the application, the leave applied for, shall be deemed to have been granted by the Panchayat.

(3) In every case the authority competent to decide whether a vacancy has occurred under sub-section (2) shall be Collector in respect of Gram Panchayat and Janpad Panchayat and Commissioner in respect of Zila Panchayat who may give his decision either on an application made to him by any person or on his own motion. Until, the Collector or the Commissioner, as the case may be, decides that the vacancy has occurred, the person shall not cease to be an office-bearer :

Provided that no order shall be passed under this sub-section against any office-bearer without giving him a reasonable opportunity of being heard.

(4) Any person aggrieved by the decision of Collector or Commissioner, as the case may be, under sub-section (3), may, within

a period of 30 days from the date of such decision appeal to Commissioner or Board of Revenue respectively whose orders in such appeal shall be final."

Similarly, Section 122 under which the impugned order has been passed by Collector which provides for filing of the election petition, reads as under:-

"122. Election petition. - (1) An election [x x x] under this Act shall be called in question only by a petition presented in the prescribed manner :-

(i) in case of [Panchayat or Gram Sabha] to the Sub- Divisional Officer (Revenue);

(ii) in case of Janpad Panchayat to the Collector; and

(iii) in case of Zila Panchayat to the Divisional Commissioner and not otherwise.

(2) No such petition shall be admitted unless it is presented within thirty days from the date on which the election [x x x] in question was notified.

(3) Such petition shall be enquired into or disposed of according to such procedures as may be prescribed."

(emphasis supplied)

10. From the bare perusal of the complaint Annexure-P/1 filed by the complainant reveals that it refers to the suppression of certain information regarding the number of family members viz. the names of her daughters who are married as also the land lying in the name of the petitioner and her family members in the form submitted by the petitioner at the time of election. But none of these grounds as raised by the respondent no.4 are enumerated in the body of Section 36 of Adhiniyam, 199 (sic : 1993). In these circumstances, without going into the merits of the case, in the considered opinion of this Court, the Collector had no jurisdiction to entertain an application purported to be under Section 36 of the Adhiniyam when none of the grounds available in the said section were available to the respondent. In such situation, the conduct of the Collector in passing the order invoking the powers under Section 122 of Adhiniyam, 1993 also cannot be sustained in the eyes of the law and is liable to be quashed.

11. Section 122 of the Adhiniyam, 1993 which referes to the filing of an election petition itself provides for limitation for filing of the election petition within thirty days from the date when the elections are notified. Thus, to invoke the provisions of Section 122 in a proceedings under Section 36 of the Adhiniyam is palpably illegal and cannot

be sustained hence the impugned orders are also liable to be quashed on this ground also. It is a trite law that whatever is prohibited by law to be done directly, cannot be allowed to be done indirectly.

12. For the forgoing reasons, without going into the other questions raised by the parties which have become academic now, the impugned orders dated 29.6.2017 (Annexure P-9) passed by the Collector and 18.7.2017 (Annexure P-10) passed by the SDO are hereby quashed, as a result the petitioner's disqualification is set aside and the petition stands allowed.

Petition allowed.

I.L.R. [2018] M.P. 426
WRIT PETITION

Before Mr. Justice S.C. Sharma

W.P. No. 5210/2015 (Indore) decided on 2 November, 2017

SUSHIL KANOJIA …Petitioner

Vs.

THE ORIENTAL INSURANCE CO. LTD. & ors. …Respondents

A. Service Law – Reservation for physically handicapped **– Held – Respondents are under an obligation to reserve 3% posts of the total vacancies for persons with disabilities with 1% each for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy, in the posts identified for each disability.**

(Para 24)

क. सेवा विधि – शारीरिक रूप से विकलांग हेतु आरक्षण – अभिनिर्धारित – प्रत्यर्थीगण प्रत्येक निःशक्तता हेतु पहचान किये गये पदों में से **(i)** दृष्टिहीनता या अल्प दृष्टि **(ii)** श्रवणबाधा एवं **(iii)** गति की निःशक्तता या मस्तिष्क पक्षाघात से ग्रसित व्यक्तियों हेतु प्रत्येक में **1%** के साथ कुल रिक्तियों का **3%** निःशक्त व्यक्तियों हेतु आरक्षित रखने के लिए बाध्यताधीन है।

B. Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), Section 2(k) – Definition of 'establishment' **– Term 'establishment' covers a corporation under the Central, Provincial or State Act and also includes an authority or a body owned or controlled by the government or local authority – It also includes a 'Company' as defined u/S 617 of Companies Act, 1956 and all the government departments of India – In the instant case, the respondent no.1 company is an establishment as defined under the Act of 1995.**

(Para 10)

ख. निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 (1996 का 1), धारा 2(के) – 'स्थापना' की परिभाषा – शब्द 'स्थापना' में केंद्रीय, क्षेत्रीय या राज्य अधिनियम के अधीन निगम आच्छादित है और इसमें सरकार अथवा स्थानीय प्राधिकारी के स्वामित्व का या उसके द्वारा नियंत्रित प्राधिकारी या निकाय भी शामिल है – इसमें 'कंपनी' जैसा कि कंपनी अधिनियम 1956 की धारा 617 के अंतर्गत परिभाषित है, और भारत के सभी सरकारी विभाग भी शामिल हैं – वर्तमान प्रकरण में, प्रत्यर्थी क्र. 1, कंपनी एक स्थापना है जैसा कि अधिनियम 1995 के अंतर्गत परिभाषित है।

C. Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996) – Entitlement for Reservation **– Petitioner, a physically challenged person with 50% locomotor disability claiming his entitlement of promotion as per the Act of 1995 and as per the reservation granted under the government circulars/memorandums – Held – perusal of various office memorandums issued from time to time goes to show that in an establishment, employer is under an obligation to reserve 3% post for the persons with disability in respect of Group–A, B, C, and D – Computation of reservation has to be done in an identical manner i.e. computing 3% reservation on total number of vacancies in the cadre strength – In the present case, in the respondent Insurance Company, there is no such reservation in respect of Group A and B category – Respondents directed to reserve vacancies keeping in view the Act of 1995 and instructions issued by Government of India – Respondents shall also consider the issue of promotion with respect to petitioner in respect of reserve vacancy – Writ Petition allowed.**

(Paras 15, 16, 20 & 25)

ग. निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 (1996 का 1) – आरक्षण हेतु पात्रता – याची जो कि 50% गति की निःशक्तता के साथ शारीरिक रूप से विकलांग व्यक्ति है, अधिनियम 1995 एवं सरकारी परिपत्रों/ज्ञापनों के अंतर्गत प्रदत्त आरक्षण के अनुसार, पदोन्नति हेतु अपनी हकदारी का दावा कर रहा है – अभिनिर्धारित – समय–समय पर जारी किये गये विभिन्न कार्यालयीन ज्ञापनों का परिशीलन दर्शाता है कि एक स्थापना में, नियोक्ता, ग्रुप– ए, बी, सी व डी के संबंध में निःशक्त व्यक्तियों हेतु 3% पद आरक्षित रखने के लिए बाध्यताधीन है – आरक्षण की संगणना, समान ढंग से करनी होगी अर्थात्, केडर सामर्थ्य में रिक्तियों की कुल संख्या पर 3% आरक्षण की संगणना करके – वर्तमान प्रकरण में, प्रत्यर्थी बीमा कंपनी में ग्रुप ए व बी श्रेणी के संबंध में ऐसा कोई आरक्षण नहीं है – प्रत्यर्थीगण को अधिनियम 1995 एवं भारत सरकार द्वारा जारी अनुदेशों को दृष्टिगत रखते हुए रिक्तियां आरक्षित करने के लिए निदेशित किया गया – प्रत्यर्थीगण, आरक्षित रिक्ति के संबंध में पदोन्नति के मुद्दे को भी विचार में लेगा – रिट याचिका मंजूर।

Cases referred:

(2013) 10 SCC 772, (2015) 10 SCC 292, W.P. (Civil) No. 521/2008 decided on 30.06.2016 (SC).

Ritu Bhargava, for the petitioner.

Dilip Kshirsagar, for the respondent No. 1.

(Supplied: Paragraph numbers)

O R D E R

S.C. Sharma, J. :- The petitioner before this Court is a Physically Handicapped Person under the employment of Oriental Insurance Co. Ltd. and he is having 50% locomotor disability. He was appointed as Office Assistant on 13/03/1997 and was promoted to the next higher post i.e. Senior Assistant which is again a Group-C post against a single reserved vacancy on 03/01/2011.

2. The petitioner's contention is that he was entitled for promotion under the category meant for Physically Handicapped Person from much earlier date i.e. after he has completed three years as Office Assistant (Group-C) and he was entitled for promotion w.e.f. 01/01/2001. The petitioner has further stated that as per Office Memorandum dated 16/01/1998 issued by Government of India which is applicable in respect of petitioner's organization, the policy of reservation for Schedule Cast, Schedule Tribe and Physically Handicapped Person in promotion is applicable in respect of all groups i.e. Group-A, B, C and D. The petitioner has further stated that earlier Office Memorandum was superseded and the Union of India has issued another Office Memorandum dated 29/12/2005 which also provides for 3% reservation to the post under Group-A, B, C and D category.

3. The petitioner's grievance is that respondents are not at all implementing the Office Memorandum issued by Union of India even though the respondent No.1 is a Public Sector Undertaking. The petitioner before this Court has prayed following reliefs:-

> "(i) Issue a writ, order or direction in the nature of CERTIORARI or other appropriate writ, calling for the records of the case from respondents.
>
> (ii) Issue a writ, order or direction in the nature of CERTIORARI or other appropriate writ, quashing the impugned notice Annexure P-8 and the impugned rejection of his complaint Annexure P-11.

(iii) Issue a writ, order or direction in the nature of MANDAMUS or other appropriate writ, directing the respondents to reissue the impugned notice Annexure P-8 containing promotional vacancies after incorporating the 3% reservation for disabled persons therein.

(iv) Issue a writ order or direction in the nature of MANDAMUS or other appropriate writ, directing respondent No.1 to recalculate the reserved vacancies of the previous years since 1997, and grant the petitioner notional promotion w.e.f. 2001 the year of high eligibility, with all consequential benefits.

(v) Award the costs of the petition, and

(vi) Grant such other relief or reliefs as it deems fit in the facts and circumstances of the petitioner's case."

4. A detailed and exhaustive reply has been filed on behalf of the respondents and the respondents have stated that in respect of Group-A and B posts, there is no vacancy / promotional avenue for disabled employees in the cadre and the Hon'ble Supreme Court in the case of *Union of India Vs. National Federation of the Blind* reported in (2013) 10 SCC 772 has given a direction to the Union of India to modify its earlier Office Memorandum dated 29/12/2005 and because till date no fresh Office Memorandum has been issued, the question of grant of promotion to the petitioner does not arise under the reserved category (Physically Handicapped Category).

5. The respondents have also stated that the respondents have already given benefit of promotion to the petitioner under the reserved category (Physically Handicapped Person) to the post of Senior Assistant in the year 2011 and he cannot claim promotion to the next higher post once he has availed the benefit of promotion to a Class-III post. The respondents have prayed for dismissal of the writ petition.

6. Learned counsel for the respondent has placed reliance upon a judgment delivered by the Hon'ble Supreme Court in the case of *National Federation of the Blind* (supra) as well as upon a judgment delivered in the case of *S.Paneer Selvam and Others Vs. State of Tamil Nadu and Others* reported in (2015) 10 SCC 292, and has prayed for dismissal of the petition.

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

8. Undisputedly, the facts reveal that the petitioner before this Court is a physically challenged person with 50% locomotor disability. He was inducted in the services of Oriental Insurance Company Limited on 13/03/1997. He has been promoted to the next higher post on 03/01/2011, certainly under the single reserved vacancy of that year reserved for Physically Handicapped Person.

9. The Union of India was signatory to the proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region and in light of the proclamation, the Parliament in its 46 years of Republic of India has enacted The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Section 2(a), 2(i), 2(j) and 2(k) of the Act of 1995 reads as under:-

"2(a) **"appropriate Government" means,-**

(i) in relation to the Central Government or any establishment wholly or substantially financed by that Government, or a Cantonment Board constituted under the Cantonment Act, 1924 (2 of 1924), the Central Government;

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

(iii) in respect of the Central Co-ordination Committee and the Central Executive Committee, the Central Government;

(iv) in respect of the State Co-ordination Committee and the State Executive Committee, the State Government;

2(i) **"Disability" means-**

(i) blindness;

(ii) low vision;

(iii) leprosy-cured;

(iv) hearing impairment;

(v) locomotor disability;

(vi) mental retardation;

(vii) mental illness;

2(j) **"employer" means,-**

(i) in relation to a Government, the authority notified by the Head of the Department in this behalf or where no such authority is notified, the Head of the Department; and

(ii) in relation to an establishment, the Chief Executive Officer of that establishment;

> 2(k) "establishment" means a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956) and includes Departments of a Government;"

10. The definition of the 'establishment' as defined under Section 2(k) is an exhaustive definition and covers a Corporation under the Central, Provincial or State Act. It also includes an authority or a body owned or controlled by the government or a local authority. It also includes a 'Company' as defined under Section 617 of the Companies Act, 1956 and certainly all the government departments of India, meaning thereby, by taking into account the meaning 'establishment' under the Act of 1995, the respondent No.1 Company is an 'establishment' as defined under the Act of 1995.

11. Chapter VI of the Act deals with the employment of the persons with disabilities. The relevant sections of the said chapter are as under:-

> **"32. Identification of posts which can be reserved for persons with disabilities.**– Appropriate Governments shall-
>
> (a) identify posts, in the establishments, which can be reserved for the persons with disability;
>
> (b) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.
>
> **33. Reservation of Posts -** Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from-
>
> (i) blindness or low vision;
>
> (ii) hearing impairment;
>
> (iii) locomotor disability or cerebral palsy,
>
> in the posts identified for each disability:
>
> Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

> **36. Vacancies not filled up to be carried forward.-** Where in any recruitment year any vacancy under section 33, cannot be filled up due to non-availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:
>
> Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government."

12. The Central Government in exercise of powers conferred under Section 73, Sub-section (1) and (2) has enacted Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996 and the rules were enacted in order to streamline the procedure in respect of reservation to the disabled persons and finally the Government of India has issued a notification dated 29/12/2005 which is applicable to the respondent No.1 Company providing reservation to Group- A, B, C and D posts.

13. The relevant clause of the Office Memorandum dated 29/12/2005 reads as under:-

> **"2. QUANTUM OF RESERVATION**
>
> (i) Three percent of the vacancies, in case of direct recruitment to Group A, B, C and D posts shall be reserved for persons with disabilities of which one per cent each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the posts identified for each disability;
>
> (ii) Three percent of the vacancies in case of promotion to Group D, and Group C posts in which the element of direct recruitment, if any, does not exceed 75%, shall be reserved for persons with disabilities of which one per cent each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the posts identified for each disability.

3. EXEMPTION FROM RESERVATION:

If any Department/Ministry considers it necessary to exempt any establishment partly or fully from the provisions of reservation for persons with disabilities of which one percent each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the posts identified for each disability, it may make a reference to the Ministry of Social Justice and Employment giving full justification for the proposal. The grant of exemption shall be considered by an Inter-Departmental Committee set up by the Ministry of Social Justice and Empowerment.

4. IDENTIFICATION OF JOBS/POSTS:

The Ministry of Social Justice and Empowerment have identified the jobs/posts suitable to be held by persons with disabilities and the physical requirement for all such jobs/posts vide their notification no. 16-25/99.NII dated 31.5.2001. The jobs/posts given in Annexure II of the said notification as amended from time to time shall be used to give effect to 3 per cent reservation to the persons with disabilities. It may, however, be noted that:

(a) The nomenclature used for any job/post shall mean and include nomenclature used for other comparable jobs/posts having identical functions.

(b) The list of jobs/posts notified by the Ministry of Social Justice & Empowerment is not exhaustive. The concerned Ministries/ Departments shall have the discretion to identify jobs/posts in addition to the jobs/posts already identified by the Ministry of Social Justice & Empowerment. However, no Ministry/Department/Establishment shall exclude any identified job/post from the purview of reservation at its own discretion.

(c) If a job/post identified for persons with disabilities is shifted from one group or grade to another group or grade due to change in the pay-scale or otherwise, the job/post shall remain identified.

13. COMPUTATION OF RESERVATION:

Reservation for persons with disabilities in case of Group C and Group D posts shall be computed on the basis of total number of vacancies occurring in all Group C or Group D posts, as the case may be, in the

establishment, although the recruitment of the persons with disabilities would only be in the posts identified suitable for them. The number of vacancies to be reserved for the persons with disabilities in case of direct recruitment to Group C posts in an establishment shall be computed by taking into account the total number of vacancies arising in Group C posts for being filled by direct recruitment in a recruitment year both in the identified and non-identified posts under the establishment. The same procedure shall apply for Group D posts. Similarly, all vacancies in promotion quota shall be taken into account while computing reservation in promotion in Group C and Group D posts. Since reservation is limited to identified posts only and number of vacancies reserved is computed on the basis of total vacancies (in identified posts as well as unidentified posts), it is possible that number of persons appointed by reservation in an identified posts may exceed 3 percent.

14. Reservation for persons with disabilities in Group A posts shall be computed on the basis of vacancies occurring in direct recruitment quota in all the identified Group A posts in the establishment. The same method of computation applies for Group B posts.

15. EFFECTING RESERVATION - MAINTENANCE OF ROSTERS:

(a) all establishments shall maintain separate 100 point reservation roster registers in the format given in Annexure II for determining/ effecting reservation for the disabled - one each for Group A posts filled by direct recruitment, Group B posts filled by direct recruitment, Group C posts filled by direct recruitment, Group C posts filled by promotion, Group D posts filled by direct recruitment and Group D posts filled by promotion.

(b) Each register shall have cycles of 100 points and each cycle of 100 points shall be divided into three blocks, comprising the following points :

1st Block - point No.1 to point No.33

2nd Block - point No.34 to point No.66

3rd Block - point No.67 to point No.100

(c) Points 1, 34, and 67 of the roster shall be earmarked reserved for persons with disabilities - one point for each of the three categories of disabilities. The head of the establishment shall decide the categories of disabilities for which the points 1, 34 and 67 will be reserved keeping in view all relevant facts.

(d) All the vacancies in Group C posts falling in direct recruitment quota arising in the establishment shall be entered in the relevant roster register. If the post falling at point No.1 is not identified for the disabled or the head of the establishment considers it desirable not to fill up by a disabled person or it is not possible to fill up that post by the disabled for any other person, one of the vacancies falling at any of the points from 2 to 33 shall be treated as reserved for the disabled and filled as such. Likewise a vacancy falling at any of the points from 34 to 66 or from 67 to 100 shall be filled by the disabled. The purpose of keeping points 1, 34 and 67 as reserved is to fill up the first available suitable vacancy from 1 to 33, first available suitable vacancy from 34 to 66 and first available suitable vacancy from 67 to 100 persons with disabilities.

(e) There is a possibility that none of the vacancies from 1 to 33 is suitable for any category of the disabled. In that case two vacancies from 34 to 66 shall be filled as reserved for persons with disabilities. If the vacancies from 34 to 66 are also not suitable for any category, three vacancies shall be filled as reserved from the third block containing points from 67 to 100. This means that if no vacancy can be reserved in a particular block, it shall be carried into the next block.

(f) After all the 100 points of the roster are covered, a fresh cycle of 100 points shall start.

(g) If the number of vacancies in a year is such as to cover only one block or two, discretion as to which category of the disabled should be accommodated first shall vest in the head of the establishment, who shall decide on the basis of the nature of the post, the level of representation of the specific disabled category in the concerned grade/post etc.

(h) A separate roster shall be maintained for Group C posts filled by promotion and procedure as explained above shall be followed for giving reservation to persons with disabilities. Likewise two separate rosters shall be maintained for Group D posts, one for the posts filled by direct recruitment and another for posts filled by promotion.

(i) Reservation in Group A and Group B posts is determined on the basis of vacancies in the identified posts only. Separate rosters for Group A posts and Group B posts in the establishment shall be maintained. In the rosters maintained for Group A and Group B posts,

all vacancies of direct recruitment arising in identified posts shall be entered and reservation shall be effected the same way as explained above.

16. INTER SE EXCHANGE AND CARRY FORWARD OF RESERVATION IN CASE OF DIRECT RECRUITMENT

(a) Reservation for each of the three categories of persons with disabilities shall be made separately. But if the nature of vacancies in an establishment is such that a person of a specific category of disability cannot be employed, the vacancies may be interchanged among the three categories with the approval of the Ministry of Social Justice and Empowerment and reservation may be determined and vacancies filled accordingly.

(b) If any vacancy reserved for any category of disability cannot be filled due to non-availability of a suitable person with that disability or, for any other sufficient reason, such vacancy shall not be filled and shall be carried forward as a 'backlog reserved vacancy' to the subsequent recruitment year.

(c) In the subsequent recruitment year the backlog reserved vacancy shall be treated as reserved for the category of disability for which it was kept reserved in the initial year of recruitment. However, if a suitable person with that disability is not available, it may be filled by interchange among the three categories of disabilities. In case no suitable person with disability is available for filling up the post in the subsequent year also, the employer may fill up the vacancy by appointment of a person other than a person with disability. If the vacancy is filled by a person with disability of the category for which it was reserved or by a person of other category of disability by inter se exchange in the subsequent recruitment year, it will be treated to have been filled by reservation. But if the vacancy is filled by a person other than a person with disability in the subsequent recruitment year, reservation shall be carried forward for a further period upto two recruitment years whereafter the reservation shall lapse. In these two subsequent years, if situation so arises, the procedure for filling up the reserved vacancy shall be the same as followed in the first subsequent recruitment year.

19. HORIZONTALITY OF RESERVATION FOR PERSONS WITH DISABILITIES:

Reservation for backward classes of citizens (SCs, STs and OBCs) is called vertical reservation and the reservation for categories such as persons with disabilities and ex- servicemen is called horizontal

reservation. Horizontal reservation cuts across vertical reservation (in what is called interlocking reservation) and person selected against the quota for persons with disabilities have to be placed in the appropriate category viz. SC/ST/OBC/General candidates depending upon the category to which they belong in the roster meant for reservation of SCs/STs/OBCs. To illustrate, if in a given year there are two vacancies reserved for the persons with disabilities and out of two persons with disabilities appointed, one belongs to a Scheduled Caste and the other to general category then the disabled SC candidate shall be adjusted against the SC point in the reservation roster and the general candidate against unreserved point in the relevant reservation roster. In case none of the vacancies falls on point reserved for the SCs, the disabled candidate belonging to SC shall be adjusted in future against the next available vacancy reserved for SCs.

20. Since the persons with disabilities have to be placed in the appropriate category viz. SC/ST/OBC/ General in the roster meant for reservation of SCs/STs/OBCs, the application form for the post should require the candidates applying under the quota reserved for persons with disabilities to indicate whether they belong to SC/ST/ OBC or General category."

14. The Union of India has again issued another Office Memorandum dated 26/04/2006 and the same reads as under:-

"Dated the 26th April, 2006

OFFICE MEMORANDUM

Sub : Reservation for the Persons with Disabilities

The undersigned is directed to say that the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which came into existence on 01.01.1996 provides for reservation for persons with disability in the posts identified for three categories of disabilities namely (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy. Instructions have also been issued by this Department for providing reservation for such persons. In spite of the Act and the instructions of this Department, vacancies were not earmarked reserved or were not filled by reservation in some establishments.

2. The matter has been considered carefully and it has been decided that reservation for persons with disabilities should be implemented in right earnest and there should be no deviation from

the scheme of reservation, particularly after the Act came into effect. In order to achieve this objective, all the establishments should prepare the reservation roster registers as provided in this Department's O.M. No. 36035/3/2004-Estt (Res) dated 29.12.2005 starting from the year 1996 and reservation for persons with disabilities be earmarked as per instructions contained in that OM. If some or all the vacancies so earmarked had not been filled by reservation and were filled by able bodied persons either for the reason that points of reservation had not been earmarked properly at the appropriate time or persons with disabilities did not become available, such unutilized reservation may be treated as having been carried forward to the first recruitment year occurring after issue of this O.M. and be filled as such. If it is not possible to fill up such reserved vacancies during the said recruitment year, reservation would be carried forward for further two years, whereafter it may be treated as lapsed.

3. It has been observed that some recruiting agencies declare in their advertisements that blind/partially blind candidates need not apply and that separate examinations would be conducted for visually handicapped candidates. Attention is invited to para 7 of this Department's O.M. No. 36035/3/2004-Estt (Res) dated 29.12.2005 which provides that persons with disabilities selected on their own merit will not be adjusted against the reserved share of vacancies. It means that persons with disabilities who are selected on their own merit have to be adjusted against the unreserved vacancies and reservation has to be given in addition. If visually handicapped candidates or any other category of handicapped candidates are debarred from applying on the ground that a separate examination would be conducted for them, chances of handicapped candidates being selected on their own merit would be eliminated. Thus, debarring of any category of handicapped candidates in the above manner is against the provisions contained in the aforesaid O.M. It is, therefore, requested that persons with disabilities should not be debarred from applying for the posts identified suitable for them and should be provided opportunity to compete for the unreserved vacancies as well by holding a common examination.

4. Contents of this O.M. may be brought to the notice of all concerned.

Sd/-
(K.G.Verma)
Deputy Secretary to the Govt. of India"

15. It has also been brought to the notice of this Court that subsequently on 10/12/2008 another Office Memorandum was issued and the same was for filling up "Backlog Vacancies" of the reserved category under the Special Recruitment Drive. Thus, various Office Memorandums issued from time to time establishes that in an establishment, the employer is under an obligation to reserve 3% posts for the persons with disability, meaning thereby, in respect of Group-A, B, C and D, 3% posts are required to be reserved for persons suffering from disability, keeping in view the Act of 1995.

16. Undisputedly, in the present case in the establishment in question, there is no such reservation in respect of the Group-A and B category. The return filed by the respondents also does not establish that there is any reservation in Group-A and B category.

17. Learned counsel for the respondent has placed reliance upon a judgment delivered in the case of *Union of India Vs. National Federation of the Blind & Ors*. (supra) and his contention is that in the aforesaid case Union of India has been directed to issue fresh Office Memorandum, however, no such fresh Office Memorandum has been issued by the Union of India till date.

18. This Court has carefully gone through the judgment delivered by the Hon'ble Supreme Court in the case of *Union of India Vs. National Federation of the Blind & Ors.* (supra) and it was a case relating to computation of vacancies and the Hon'ble Supreme Court after taking into account the posts reserved for Group-A, B, C and D category has directed the Union of India to issue a fresh Office Memorandum and that does not mean that the respondent No.1 establishment is not under an obligation to reserve the posts under Group-A and B. The Hon'ble Supreme Court in the aforesaid judgment has ordered computation of vacancies on the basis of cadre strength.

19. The apex Court in the aforesaid case in paragraphs No.51 to 55 has held as under:-

> **"**51) Thus, after thoughtful consideration, we are of the view that the computation of reservation for persons with disabilities has to be computed in case of Group A, B, C and D posts in an identical manner viz., **"computing 3% reservation on total number of vacancies in the cadre strength"** which is the intention of the legislature. Accordingly, certain clauses in the OM dated 29.12.2005, which are contrary to the above reasoning are struck down and we direct the appropriate Government to issue new Office Memorandum(s) in consistent with the decision rendered by this Court.
>
> 52) Further, the reservation for persons with disabilities has nothing to do with the ceiling of 50% and hence, *Indra Sawhney* (supra) is not applicable with respect to the disabled persons.

53) We also reiterate that the decision in *R.K. Sabharwal* (supra) is not applicable to the reservation for the persons with disabilities because in the above said case, the point for consideration was with regard to the implementation of the scheme of reservation for SC, ST & OBC, which is vertical reservation, whereas reservation in favour of persons with disabilities is horizontal.

Directions:

54) In our opinion, in order to ensure proper implementation of the reservation policy for the disabled and to protect their rights, it is necessary to issue the following directions:

(i) We hereby direct the appellant herein to issue an appropriate order modifying the OM dated 29.12.2005 and the subsequent OMs consistent with this Court's Order within three months from the date of passing of this judgment.

(ii) We hereby direct the "appropriate Government" to compute the number of vacancies available in all the "establishments" and further identify the posts for disabled persons within a period of three months from today and implement the same without default.

(iii) The appellant herein shall issue instructions to all the departments/public sector undertakings/Government companies declaring that the non observance of the scheme of reservation for persons with disabilities should be considered as an act of non- obedience and Nodal Officer in department/ public sector undertakings/Government companies, responsible for the proper strict implementation of reservation for person with disabilities, be departmentally proceeded against for the default.

55) Before parting with the case, we would like to place on record appreciation for Mr. S.K Rungta, learned senior counsel for rendering commendable assistance to the Court. The appeal is disposed of with the above terms.**"**

20. Paragraph No.51 of the aforesaid judgment makes is very clear that computation of reservation for the persons with disability has to be computed with Group-A, B, C and D posts in an identical manner i.e. "computing 3% reservation on total number of vacancies in the cadre strength". The case over which reliance has been placed by learned counsel for the respondent – Insurance Company

S. Paneer Selvam and Others Vs. State of Tamil Nadu and Others reported in (2015) 10 SCC 292 was a case relating to *inter se* seniority of all the persons promoted on the next higher post of general vacancy and persons promoted under reserve category.

21. Issue of "Catch-up Rule" was taken into account by Hon'ble Supreme Court in the aforesaid case and issue in respect of reservation in respect of Physically Handicapped Person or the issue regarding 3% vacancy of Group-A and B was not at all dealt with and therefore, the judgment is of no help to the respondent No.1.

22. The apex court in the case of *Rajeev Kumar Gupta & Others Vs. Union of India & Others* passed in Writ Petition (Civil) No.521/2008 decided on 30/06/2016 in paragraph No.13 and 21 to 25 has held as under:-

> **"**13. For some of these IDENTIFIED POSTS in Group A and Group B, the mode of recruitment is only through promotions. The purpose underlying the statutory exercise of identification under Section 32 of the 1995 Act would be negated if reservation is denied to those IDENTIFIED POSTS by stipulating that either all or some of such posts are to be filled up only through the mode of promotion. It is demonstrated before us that PWD as a class are disentitled to some of the IDENTIFIED POSTS in Groups A and Group B because of the impugned memoranda and the relevant regulations, under which the only mode of appointment to those IDENTIFIED POSTS is through promotion. Once posts are identified under Section 32, the purpose behind such identification cannot be frustrated by prescribing a mode of recruitment which results in denial of statutory reservation. It would be a device to defraud PWD of the statutory benefit under Section 33 of the 1995 Act.
>
> 21. The principle laid down in *Indra Sawhney* is applicable only when the State seeks to give preferential treatment in the matter of employment under State to certain classes of citizens identified to be a backward class. Article 16(4) does not disable the State from providing differential treatment (reservations) to other classes of citizens under Article 16(1) if they otherwise deserve such treatment. However, for creating such preferential treatment under law, consistent with the mandate of Article 16(1), the State cannot choose any one of the factors such as caste, religion etc. mentioned in Article 16(1) as the basis. The basis for providing reservation for PWD is physical disability and not any of the criteria forbidden under Article 16(1). Therefore, the rule of no reservation in promotions as laid down in *Indra Sawhney* has clearly and normatively no application to the PWD.

> 22. The 1995 Act was enacted to fulfill India's obligations under the 'Proclamation on the Full Participation and Equality of the People with Disabilities in the Asia and Pacific Region'. The objective behind the 1995 Act is to integrate PWD into the society and to ensure their economic progress.12 The intent is to turn PWD into 'agents of their own destiny'.13 PWD are not and cannot be equated with backward classes contemplated under Article 16(4). May be, certain factors are common to both backward classes and PWD such as social attitudes and historical neglect etc.
>
> 23. It is disheartening to note that (admittedly) low numbers of PWD (much below three per cent) are in government employment long years after the 1995 Act. Barriers to their entry must, therefore, be scrutinized by rigorous standards within the legal framework of the 1995 Act.
>
> 24. A combined reading of Sections 32 and 33 of the 1995 Act explicates a fine and designed balance between requirements of administration and the imperative to provide greater opportunities to PWD. Therefore, as detailed in the first part of our analysis, the identification exercise under Section 32 is crucial. Once a post is identified, it means that a PWD is fully capable of discharging the functions associated with the identified post. Once found to be so capable, reservation under Section 33 to an extent of not less than three per cent *must* follow. Once the post is identified, it must be reserved for PWD irrespective of the mode of recruitment adopted by the State for filling up of the said post.
>
> 25. In light of the preceding analysis, we declare the impugned memoranda as illegal and inconsistent with the 1995 Act. We further direct the Government to extend three percent reservation to PWD in all IDENTIFIED POSTS in Group A and Group B, irrespective of the mode of filling up of such posts. This writ petition is accordingly allowed."

23. The apex Court in the aforesaid case has again held that the employer is under an obligation to provide reservation on identified posts of Group-A and B.

24. This Court in light of the aforesaid, is of the considered opinion that the respondents are under an obligation to reserve 3% posts of the total vacancies for the persons with disabilities with 1% each for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the posts identified for each disability.

25. Resultantly, the writ petition stands allowed and the respondents are directed to reserve vacancies keeping in view the Act of 1995 and the instructions issued by Government of India, within a period of three months from the date of receipt of

certified copy of this order. The respondents shall thereafter, also consider the petitioner's case for promotion in respect of reserve vacancy, within a further period of three months thereafter.

With the aforesaid, writ petition stands allowed.
Certified Copy as per rules.

Petition allowed

I.L.R. [2018] M.P. 443
WRIT PETITION

Before Ms. Justice Vandana Kasrekar

W.P. No. 4320/2015 (Jabalpur) decided on 6 November, 2017

T.P. SHARMA …Petitioner
Vs.
STATE OF M.P. & ors. …Respondents

***Service Law – DPC for Promotion and Annual Confidential Report – Consideration* – Held – For the year 1989-90, as petitioner has worked for less than 90 days in the Beej Nigam on deputation, respondents should not recorded his CR for this year and taking into consideration the CR of the six months, i.e. of the longer period, respondents should have graded him as 'Kha-Good' – Original record of DPC shows that ACR for the year 1990-91 was never communicated to petitioner and thus such un-communicated ACR should not have been taken into consideration while declaring the petitioner unfit for promotion – Impugned orders set aside – Respondents directed to reconsider the case of petitioner for promotion to the post of Joint Director by constituting a review DPC – Writ Petition allowed.**

(Para 13 & 14)

सेवा विधि – पदोन्नति हेतु विभागीय पदोन्नति समिति एवं वार्षिक गोपनीय प्रतिवदेन – विचार में लिया जाना – अभिनिर्धारित – वर्ष 1989–90 हेतु, प्रत्यर्थीगण को इस वर्ष का गोपनीय प्रतिवेदन अभिलिखित नहीं करना चाहिए था क्योंकि याची ने बीज निगम में प्रतिनियुक्ति पर 90 दिनों से कम कार्य किया है तथा छः माह का अर्थात् लंबी अवधि का गोपनीय प्रतिवेदन विचार में लेते हुए, प्रत्यर्थीगण को उसे 'ख–अच्छा' श्रेणी दी जानी चाहिए थी – विभागीय पदोन्नति समिति का मूल अभिलेख दर्शाता है कि याची को वर्ष 1990–91 हेतु वार्षिक गोपनीय प्रतिवेदन कभी भी संसूचित नहीं किया गया और इस प्रकार याची को पदोन्नति हेतु अयोग्य घोषित करते समय उक्त असंसूचित वार्षिक गोपनीय प्रतिवेदन को विचार में नहीं लिया जाना चाहिए था – आक्षेपित आदेश अपास्त – प्रत्यर्थीगण को पुनर्विलोकन विभागीय पदोन्नति समिति गठित कर संयुक्त निदेशक के पद पर पदोन्नति हेतु याची के प्रकरण का पुनर्विचार करने के लिए निदेशित किया गया – रिट याचिका मंजूर।

Case referred:

(2015) 14 SCC 427.

K.C. Ghildiyal, for the petitioner.
S.M. Lal, G.A. for the respondents No. 1 to 3.
Manas Verma, for the respondent No. 4.

O R D E R

Vandana Kasrekar, J. :- The petitioner has filed the present writ petition challenging the orders dated 14/05/2012 and 04/03/2014 passed by respondent No.1.

2. The petitioner was initially appointed on the post of Dy. Director, Agriculture, through M.P. Public Service Commission in March, 1987. A dispute regarding seniority between the persons directly appointed as Dy. Director and the persons promoted as Dy. Director on adhoc basis arose in the department and the dispute travelled upto the Supreme Court. After the dispute was resolved, the seniority of the Dy. Directors showing seniority position as on 01/04/1989 was published by the department on 04/05/1990. Thereafter DPC was held on 22/01/1993 to consider the cases of the Dy. Directors for promotion to the post of Joint Directors. The review DPC was held on the basis of seniority list on 01/04/1991. The case of the petitioner was also considered in the said DPC. As per the norms of the DPC, promotions were to be made on the basis of the seniority-cum-merit criteria. Five ACRs ranging from 1986-87 to 1990-91 were taken into consideration. To become eligible for promotion, out of five ACRs under consideration, minimum three ACRs including, two ACRs for the last two years were required to have minimum good grading. In case, if the ACR for any year was with poor grading, the same was to become ineffective if there was an ACR with very good or excellent grading.

3. The case of the petitioner was considered by the DPC with the ACRs from 1986-87 to 1990-91. In the ACR for the year 1986-87, the petitioner was given 'Ka' (very good) grading. In the ACR for the year 1987-88 with 'Kha' (Good) grading. For the year 1989-90 two ACRs were initiated on the petitioner. The first ACR was initiated for a period of six months wherein the petitioner was awarded 'Kha' (good) grading and the second ACR was initiated by the M.D., Beej Nigam for a period of 81 days as the petitioner was serving in the Beej Nigam on deputation. As this ACR was for a period of less than three months i.e. for 81 days and it should not have been initiated. It was initiated by the M.D. without submission of the self-appraisal statement by the petitioner. These ACRs were not placed before the DPC in a correct manner. The ACR with 'Kha' grading was shown as second ACR of 1989-90 and the ACR for less than three months was shown as first ACR while placing the ACRs before the DPC. In fact, the ACR for the year 1990-91 was also placed before the DPC which was an adverse ACR without any grading, this ACR was never communicated to the petitioner.

4. On the basis said ACRs, the DPC declared the petitioner unfit for promotion recording a reason that in the ACR for the year 1990-91 though there was no grading, but, the ACR was grading (Gha) (poor). The petitioner submitted that the finding of the DPC was absolutely illegal, therefore, the petitioner submitted number of representations to the respondents to consider his case in accordance with the existing rules and instructions on the subject. However, as no action was taken in the matter, the petitioner, therefore, filed Writ Petition No.9067/2011 before this Court. The said writ petition was disposed of vide order dated 14/03/2012 with a direction to the petitioner to submit a representation before the respondents within a period of 15 days and the respondents were directed to consider the said representation within a period of 60 days. It was further directed by this Court that while deciding the representation, the respondents will look into the fact as to whether or not the adverse ACR was communicated to the petitioner and if not, what would be the effect of such non-communication on the promotion of the petitioner. In pursuance of the directions issued by this Court, the petitioner submitted a representation before respondent No.1 on 24/03/2012. The representations submitted by the petitioner were rejected by respondent No.1 vide order dated 14/05/2012. While rejecting the representations, it is stated by respondent No.1 that the ACR for the year 1989-90 for a period of 81 days could be initiated without submitting the self-appraisal statement. Similarly, as far as ACR for 1990-91 was concerned, it is submitted that the DPC had the power to carry out its own assessment on the basis of the total text. Thus, as the said order was not in accordance with the directions issued by this Court, the petitioner again submitted another representation, but, the said representation was rejected on 04/03/2014 on the same grounds as earlier, however, it has been admitted by respondent No.1 in the order that adverse report for year 1990-91 was erroneously taken into consideration. Being aggrieved by that order, the petitioner has filed the present writ petition.

5. The respondents have filed their reply and in the reply they have taken a ground that the writ petition suffers from delay and latches. It is submitted that in the present case, DPC was held on 09/10/2006. Against the same, the petitioner filed Writ Petition No.9067/2011 which was disposed of vide order dated 14/03/2012. In compliance of the directions issued by this Court, the representation of the petitioner was considered and rejected on 14/05/2012. The petitioner did not challenge the said order and subsequently after a period of one year, he again filed a representation claiming the same relief and the subsequent representation of the petitioner was also rejected vide order dated 14/03/2014 and after rejection of the representation, the present writ petition has been filed after a period of one year, thus, the same suffers from delay and latches. The respondents have further submitted that review DPC was held on 09/10/2006 for considering the cases of Dy. Director, Agriculture for promotion to the post of Joint Director. As per the procedure prescribed by the DPC,

promotions were to be made on the basis of seniority-cum-merit criteria. Five ACRs from 1986-87 to 1990-91 were taken into consideration. To become eligible for promotion, out of five ACRs under consideration, minimum three ACRs including two CRs of last two years were required to have minimum 'Good' grading.

6. The case of the petitioner was considered by the DPC and after assessment of all the ACRs of five years, he was not found fit for promotion. The respondents have further submitted that the adverse CR of the year 1989-90 was duly communicated to the petitioner. Thus, it is incorrect submission on behalf of the petitioner that adverse CR was not communicated and without communicating adverse CR, the same was taken into consideration by the DPC. After submitting second representation, the respondents have considered the case of the petitioner and again vide order dated 04/03/2014 rejected the representation of the petitioner on the ground that consequent upon final assessment of all the five years CRs, he was not found fit for promotion on the post of Joint Director and the CR of the year 1989-90 was duly communicated to the petitioner. The respondents have further submitted that if CR of 1990-91 and 1989-90 was ignored, then also the petitioner could not be promoted because as per final assessment of all the CRs of the preceding years, he was not found fit upto the benchmark fixed by the DPC.

7. The petitioner has filed rejoinder to the said reply and denied that the petition filed by the petitioner suffers from delay and latches. It has been submitted that the order by which the respondents have rejected of his earlier presentation was not in accordance with the directions issued by this Court, therefore, the petitioner again submitted a representation which was rejected vide order dated 04/03/2014 by speaking order and against the said order the petitioner has filed the present writ petition, therefore, the objection raised by the respondents on the ground of delay and latches is liable to be rejected. It has further been submitted in the rejoinder that the respondents have admitted that for the year 1990-91 no grading was given yet, the aforesaid CR was considered and taken as 'Gha' without any justification. The CR for the year 1989-90 was initiated in two parts. The first part which was for the major period of six months with 'Kha' grading was ignored whereas the second part i.e. for 81 days which is below the permissible period of 90 days was taken into consideration and it resulted in rejection of the petitioner for promotion. The DPC should not have considered the uncommunicated CR to the petitioner. It has further been submitted that the first part of CR for the year 1989-90 should have been considered as it was the valid ACR with 'Kha' grading. Ignoring the said ACR had seriously and adversely affected the chances of promotion of the petitioner.

8. Learned counsel for the petitioner argues that the entire action of the respondents in not considering the case of the petitioner for promotion to the post of Joint Director is illegal and arbitrary. He submits that the DPC held on 09/10/2006 had erroneously rejected the claim of the petitioner for considering the ACRs for the

year 1989-90 and 1990-91. He further submits that the ACR for the year 1990-91 was not communicated to the petitioner and the same was liable to be ignored. It has further been submitted that so far as the ACR for the year 1989-90 is concerned, two CRs were initiated on the petitioner. The first ACR was initiated for a period of six months wherein the petitioner was awarded 'Kha' grading and the second ACR was initiated by M.D., Beej Nigam for 81 days as the petitioner was serving in the Beej Nigam on deputation. He also submits that the respondents should have considered the first CR for longer period with 'Kha' grading whereas the second CR which was for a period of 81 days was impermissible under the Rules. He relied on Part-I of the General Book Circular which is published by the State Government for recording ACRs. As per sub-clause (iii) of clause-1 of the said circular, the report shall not be recorded ordinarily on an officer who has worked for less than three months in any charge during a financial year as the reporting officer may not get sufficient opportunity to observe the work of his subordinate during such a short period. In light of the said circular, he submits that as in the present case, the petitioner was worked in the Beej Nigam only for 81 days i.e. less than 90 days, therefore, ACR for the said period should not have been considered by the DPC. He further submits that the ACR of the year 1990-91 was adverse and the same was not communicated to the petitioner. The report was also initiated after one year of the due date of limitation. Such uncommunicated adverse CR in which no grading was given should have not been taken into consideration by the DPC at all. In such circumstances, he submits that the impugned orders may be set aside and the respondents be directed to reconsider the case of the petitioner for promotion. Learned counsel for the petitioner relies upon the judgment passed by the Supreme Court in the case of *Prabhu Dayal Khandelwal Vs. Chairman, Union of India Public Service Commission and others*, reported in (2015) 14 SCC 427.

9. Heard learned counsel and perused the record.

10. From perusal of the record, it reveals that in the year 2006 the respondents have constituted DPC for promotion from the post of Dy. Director to the post of Joint Director. The criteria for promotion fixed by the DPC was seniority-cum-merit. For consideration of the promotion, five years of ACRs are required to be considered i.e. from 1986-87 to 1990-91. As per the said criteria, the ACRs of minimum three years are required to be 'Good' or above that or 'Ordinarily' for last two years and if the ACR in any year is of 'Gha' then that will be considered to be ineffective if the candidate acquires any 'Very Good' and 'Excellent' CR in any of the year of five years. In the present case, the petitioner has given 'Ka' or 'Good' grading for the year 1986-87, 87-88 he was given 'Kha' and in the year 1988-89 with 'Ga' grading and for the year 1989-90 two CRs were initiated to the petitioner. The first CR was initiated for a period of six months wherein the petitioner was awarded 'Kha' grading and the second CR was initiated for a period of 81 days which was adverse. So far as

CR for the year 1990-91 is concerned, the same were adverse and were placed before the DPC.

11. As per the petitioner, the ACR of 1990-91 which was placed before the DPC was not communicated to the petitioner, therefore, these ACRs should not have been taken into consideration by the DPC. From perusal of the DPC record produced by the respondents, it is clear that while considering the case of the petitioner for promotion, the ACRs of the year 1986-87 to 1990-91 were taken into consideration. From perusal of the record also, it reveals that for the year 1990-91 the petitioner was given 'Gha' CR, therefore, there is also remark in the record that these ACRs were not communicated to the petitioner and on the basis of these uncommunicated CRs, the petitioner was declared unfit for promotion by the DPC, the petitioner has, therefore, approached this Court by filing W.P. No.9067/2011. The said writ petition was disposed of vide order dated 14/03/2012 with direction to the petitioner to submit a representation. In compliance of the direction issued by this Court, the petitioner has submitted a representation and that representation was rejected vide order dated 14/03/2012. The representation submitted by the petitioner was not in accordance with the directions issued by this Court. The petitioner again submitted another representation which was rejected vide order dated 04/03/2014 and thereafter the present writ petition has been filed, therefore, the contention of learned counsel for the respondents that the writ petition suffers from delay and latches cannot be accepted. So far as consideration of the case of the petitioner by DPC is concerned, from perusal of the original record produced by the respondents, it reveals that on the basis of CRs of 1989-90 and 1990-91, the respondents have rejected the case of the petitioner for promotion.

12. So far as the CR of the year 1989-90 is concerned, the respondents have recorded CR in two parts. The first is of the period of six months in which the petitioner was graded as 'Kha' while for a period of 81 days on which he has worked on deputation. In the Beej Nigam, he was graded as 'Gha'. As per the General Book Circular issued by the State Government recording of the ACRs, sub-clause-(iii) of Rule-1 of the said circular reads as under :

> "(iii) No report will be recorded ordinarily on an officer who has worked for less than three months in any charge during a financial year as the reporting officer may not get sufficient opportunity to observe the work of his subordinate during such a short period. But in appropriate case it has also to be ensured that an officer's exceptionally good or bad work during the said short period, e.g., exemplary good work in connection with flood relief or bad work in connection with riots, etc., is not ignored. In such exceptional cases it would be the duty of the reporting officer to make a mention of such work in the Annual Confidential Reports."

13. As per the said circular, the report will not be recorded ordinarily in case of an officer who has worked for less than three months in any charge during financial year. In the present case also as the petitioner has worked for less than 90 days in the Beej Nigam, therefore, the respondents should not have recorded his CR for this year and taking into consideration the CR of the six months i.e. of the longer period, the respondents should have graded him as 'Kha'. So far as ACR of the year 1990-91 is concerned, it is already submitted that from perusal of the original record of the DPC, it is clear that ACR of the year 1990-91 was never communicated to the petitioner, therefore, this ACR should not have been taken into consideration while declaring the petitioner unfit for promotion. The Supreme Court in the case of *Prabhu Dayal Khandelwal* (supra) has held that the claim of the appellant could not be ignored by taking into consideration the uncommunicated annual confidential report.

14. Thus, in light of the aforesaid judgment passed by the Supreme Court, the writ petition is allowed. The impugned orders dated 14/05/2012 and 04/03/2014 passed by respondent No.1 are hereby set aside. The respondents are directed to reconsider the case of the petitioner for promotion to the post of Joint Director with effect from the date when similarly situated persons were promoted and he may be further promoted on the next higher post by constituting a review DPC. However, the petitioner would not be entitled to get the monetary benefit of the post on the principle of 'no work no pay' and if the petitioner is otherwise found fit for promotion then the respondents will re-fix his pension and grant him arrears of pension and other retiral dues. The said exercise be carried out within a period of three months. There shall be no order as to cost.

Petition allowed

I.L.R. [2018] M.P. 449 (DB)
WRIT PETITION

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

W.P. No. 8830/2017 (Jabalpur) decided on 13 November, 2017

MUNAWWAR ALI & ors. …Petitioners
Vs.
UNION OF INDIA & ors. …Respondents

A. Constitution – Article 226 – Writ Jurisdiction – Locus – **Held – Merely because a person have a *locus standi* to file writ petition, does not mean that he is entitled to any equitable or legal relief in writ jurisdiction.**

(Para 15)

क. संविधान – अनुच्छेद 226 – रिट अधिकारिता – सुने जाने का अधिकार – अभिनिर्धारित – मात्र इसलिए कि एक व्यक्ति को रिट याचिका प्रस्तुत करने में सुने जाने का अधिकार है, का यह अर्थ नहीं है कि वह रिट अधिकारिता में किसी समानता या विधिक अनुतोष का हकदार होगा।

***B. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973), Section 19 and Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013) – Bhopal Development Plan 2005 – Smart City Guidelines* – Adverse Possession Against State – Held – Occupants claiming their title over the government land on the ground of adverse possession – State, being the owner of the land in question will not acquire its own land – Petitioners are unauthorized occupants over such land and therefore cannot claim to be interested persons in the event of acquisition of land – No person is entitled to take a plea of adverse possession as an affirmative action and also can't seek declaration to the effect that such adverse possession has matured into ownership – Hostile possession against the State as an owner cannot be simplicitor on account of long possession – Further held – Respondents are well within jurisdiction to construct the road upto the width of 30 meters, which is in accordance with Bhopal Development Plan 2005 – Petition dismissed.**

(Paras 17, 20, 24 & 25)

ख. नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23), धारा 19 एवं भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30) – भोपाल विकास योजना 2005 – स्मार्ट सिटी दिशानिर्देश – राज्य के विरूद्ध प्रतिकूल कब्जा – अभिनिर्धारित – अधिभोगियों का प्रतिकूल कब्जे के आधार पर सरकारी भूमि पर अपने स्वत्व का दावा किया जाना – राज्य, भूमि का स्वामी होने के नाते, स्वयं की भूमि अर्जित नहीं कर सकता – याचीगण ऐसी भूमि पर अनधिकृत अधिभोगी हैं एवं इसलिए भूमि अधिग्रहण होने की स्थिति में हितबद्ध व्यक्तियों के रूप में दावा नहीं कर सकते – कोई भी व्यक्ति सकारात्मक कार्रवाई के रूप में प्रतिकूल कब्जे का अभिवाक् लेने का हकदार नहीं है एवं इस प्रभाव की घोषणा नहीं चाह सकता कि ऐसे प्रतिकूल कब्जे को स्वामित्व में परिपक्व किया गया है – साधारणतः लम्बे कब्जे के आधार पर स्वामी के रूप में राज्य के विरूद्ध प्रतिकूल कब्जा नहीं ले सकता – आगे अभिनिर्धारित – प्रत्यर्थीगण तीस मीटर तक की चौड़ाई की सड़क निर्माण करने की अधिकारिता के भली–भांति भीतर हैं, जो कि भोपाल विकास योजना 2005 के अनुरूप है – याचिका खारिज।

Cases referred:

AIR 1974 SC 2177, (2007) 8 SCC 705, (2011) 12 SCC 154, (2015) 10 SCC 400, (2017) 1 SCC 667, (2014) 1 SCC 669, (2000) 5 SCC 652, AIR 1966 SC 828, (1976) 1 SCC 671, (1991) 4 SCC 54, AIR 1968 SC 1165, (2011) 10 SCC 404.

Kishore Shrivastava with *Sushant Ranjan* and *Bhanu Pratap Singh*, for the petitioners.

Sandeep Kumar Shukla, for the respondent No. 1/Union of India.

Pushpendra Yadav, Deputy A.G. for the respondent No. 2/State.

O R D E R

The Order of the Court was delivered by :
Hemant Gupta, Chief Justice :- The petitioners, except the petitioner No.32, have invoked the writ jurisdiction of this Court on the assertion that they are in adverse possession of the land in question and the respondent Nos.2, 3 and 4 have carried out a massive demolition drive of the houses and shops of the petitioners and many others situate in the area of Krishna Nagar, Banganga Nagar, Tantya Tope Nagar (T.T. Nagar) and Ahata of Rustom Khan. The assertion is that the residents are in possession since many years and have perfected their title by virtue of long and uninterrupted possession. Their relevant assertions as contained in the writ petition are as follows:-

> "**5.15** THAT, the Respondent No.2, 3 and 4 carried out a massive demolition drive of houses and shops of Petitioners and many others situated in the areas of Krishna Nagar, Bainganga Nagar, TTI, and Ahata Rustom Khan. This action of the Respondent is arbitrary and illegal. The residents here in possessions since last so many years and had perfected their title by virtue of their long and uninterrupted possession. A copy of the Election Voter List of the year 1982 and 1994 showing the voters living in the areas of Rustam Khan ka Aahata and TTI areas are cumulatively filed herewith and marked as ANNEXURE P/11.
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> **5.41** THAT, it is also important to mention here that the Petitioners herein and other similarly situated persons have been living in the said land occupied by then since long time and hence they cannot be disposed in the way intended by the Respondents. The Respondent State cannot commence any work on the land in question without acquiring the same. Under the *Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013* the emergency provision as provided under Section 17 of the old Land Acquisition Act has been given a go by and hence no work can be carried out unless the land is acquired by the Respondents.
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5.43 THAT, the Petitioners have been living on the land in question since more than 30-40 years and have perfected their title against their true owners and hence they cannot be now dispossessed without acquiring the land in question. To demonstrate that the Petitioners have been living in the land in question since long time the Petitioners are filing herewith Election Voter List of the area where the land in question is situated. The said voter list for the year 1982 and 1994 are already filed as Annexure P/11. The residents of the land in question have been regularly paying Property Tax to the Respondent No.4 and also had the Property ID generated in the records of the Respondent No.4. The Petitioners have obtained a list of such persons paying Property tax on the land in question. A copy of such list is filed herewith and marked as ANNEXURE P/25. The Respondent No.4 Municipal Corporation has ceased the aforesaid Property ID and hence the Petitioners and other similarly situated persons have been deprived from paying their Property Tax now.

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6.6 BECAUSE, the Petitioners have perfected their title due to long uninterrupted and peaceful possession of more than 40 years and the same is also hostile against the true owner hence the Petitioners cannot be just thrown out of their land. Though the Respondents have demolished the structures of the Petitioners but their possession on land is still intact and the same deserves to be protected."

2. The stand of the petitioners is that the respondent No.1 has launched a Smart City Mission project under which 100 cities were shortlisted to be developed as "Smart Cities". Shivaji Nagar, Bhopal was selected for Area Based Development (ABD), which includes redevelopment of 333 Acres of Government land at Shivaji Nagar situated between New Market and M.P. Nagar, Bhopal.

3. The petitioner No.32 has been impleaded in a representative capacity to represent the interest of other similarly situated persons being elected representative of local Municipal Corporation. The assertion is that the respondent Nos.2, 3 and 4 have entirely changed the Smart City Plan, which was to be executed in Shivaji Nagar to Tantya Tope Nagar (TT Nagar). The grievance of the petitioners is against the widening of road from Polytechnic Junction to Bharat Mata Square *inter alia* on the ground that the petitioners have perfected their title over the said land by adverse possession and that as per M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 (in short "the Act of 1973"), the use and development of land is required to conform to

the provisions of the development plan prepared under the aforesaid Act. It is also mentioned that the development, regional, zonal plans are to be published in terms of the provisions of the Act of 1973 and that such Act of 1973 occupies the field of land plan, land use and land development scheme. It is, thus, contended that Smart City Guidelines (Annexure P-1) cannot override the Act of 1973 and cannot be enforced in the State of Madhya Pradesh.

4. It is also contended that in Bhopal Development Plan-2005, the width of the road between Polytechnic Junction to Bharat Mata Square is not specified whereas the project has commenced and massive demolition drive has already been carried out. The Smart City Plan is being carried out *de hors* the Master plan (Bhopal Development Plan-2005). The petitioners have attached Annexure P-16 i.e. a Lay Out Plan of Bhopal Development Plan-2005 whereas Annexure P-17, an information given under the Right to Information Act, 2005 is relied upon to contend that no width is mentioned of road from Polytechnic crossing to Bharat Mata crossing in Bhopal Development Plan-2005 but in respect of Capital development, the road is reflected as 24 meter (80 feet).

5. The respondent No.2 has filed compliance report; firstly on 19.07.2017 along with a Master Plan of Bhopal Development Plan-2005. Annexure R-2/I and R-2/II has been produced wherein road from Polytechnic Square to Bharat Mata Square is shown as "A to A". It is further submitted that in the Master Plan, the width of the road is not mentioned. The same is mentioned in the lay out plan sanctioned by the Town & Country Planning Department as 24 meter motorable road and three meters of both sides is being used for drain-cum-duct under footpath, green verge and cycle track. In a subsequent reply dated 06.09.2017, it is averred that the road in question is not only part of Bhopal Development Plan-2005 but is also part of Bhopal Development Plan-1991 as proposed road, which was prepared in the year 1974-1975. The relevant assertions read as under:-

> "**5**. M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 came into force in the year 1973 and prior to the same, a development plan for capital project township was finalized in 1959 on the basis of which capital project township was developed and new development plan for the whole city was finalized in the year 1962-63. This was followed by land use survey, existing land use map and register was prepared and published in July, 1971 under the M.P. Town Planning (Amendment) Act, 1968. The lay out plan which was filed by the answering respondent as R/2-III was actually prepared under the capital project township on 8/8/1970, which was subsequently retraced on 14/8/1974 and was duly approved by the Director of Town & Country Planning.

6. Bhopal Development Plan 1991 was published in the M.P. Gazette Part II on 14/11/1975. The Bhopal Development Plan 1991 came into force in the year 1975 and road in question was also included and was duly mentioned as a sector road in the map prepared under the Bhopal Development Plan 1991. Copy of the Bhopal Development Plan 1991 is annexed herewith as ANNEXURE R/2-I, wherein road in question has been mentioned from 'A to A' in the map on page no.192(a). The road in question was proposed as a sector road in the Bhopal Development Plan 1991 and the width of said road was proposed between 35 to 40 Meters.

7. The answering respondents submit that the present road in question is already existing road which was included in the Bhopal Development Plan 1991 and width of the said road was mentioned in the Bhopal Development Plan as 35 to 40 M as a sector road. Subsequently Bhopal Development Plan 2005 has come into force and in the said Development Plan, road in question was included. Present road has been mentioned in the Bhopal Development Plan 2005 as an existing road in Chapter III, Table-VI of Bhopal Development Plan 2005. The contention of the petitioner that road in question is not part of Bhopal Development Plan 2005 is totally incorrect and is hereby denied. In the Bhopal Development Plan 2005 itself road in question has been mentioned as existing road. Contention of the petitioner in para 4, 5 & 6 relying on Chapter III of Bhopal Development Plan is concerned, the answering respondents submit that Chapter III is related with proposed road whereas present road is an existing road, that was proposed in Bhopal Development Plan 1991.

8. Contention made by the petitioner in para-8 that lay out map has now been superseded by Bhopal Development Plan, the answering respondents submit that it is correct that lay out plan prepared by the capital project township was superseded by the Bhopal Development Plan 1991 and road has been developed as per width mentioned in the Bhopal Development Plan 1991. In the Bhopal Development Plan, 1991 width of the road is mentioned as 35-40 M but at present answering respondent is constructing road only upto 30 M including central verge/service duct."

6. In the lay out plan, Bhopal Development Plan-1991 has been produced as Annexure R/2-I. Such development plan was approved by the State Government under Section 19 of the Act of 1973 on 25.08.1975 and published in M.P. Gazette on 14.11.1975.

7. Learned counsel for the petitioners has argued that the proposed width of road of Polytechnic to Bharat Mata Square was provided to be 30 meters in the Development Plan 1991 but the said road was not constructed and in the later Bhopal Development Plan-2005, the width of the said road has not been mentioned except it is asserted as the "existing road". The existing road does not include the widening of road as the previous development plans are no longer valid and cannot be relied upon. Since the existing road is not 35 meter wide, therefore, there is no provision in the development plan 2005 for 30 meter wide road from Polytechnic to Bharat Mata Square. Thus, such road cannot be constructed in absence of development plan as approved under the Statute. It is also argued that the Smart City project was in respect of Shivaji Nagar but the same has been changed to T.T. Nagar. It is further argued that such Smart City project is not under any Statute; therefore, in absence of support from any development plan under the Act of 1973, 30 meter wide road cannot be constructed. Learned counsel for the petitioners relies upon the judgments of the Supreme Court reported as AIR 1974 SC 2177 (*K. Ramadas Shenoy vs. The Chief Officers Town Municipal Council Udipi and others*); (2007) 8 SCC 705 (*Chairman, Indore Vikas Pradhikaran vs. Pure Industrial Coke & Chemicals Ltd. and others*); (2011) 12 SCC 154 (*Machavarapu Srinivasa Rao and another vs. Vijayawada, Guntur, Tenali, Mangalagiri Urban Development Authority and others*); (2015) 10 SCC 400 (*Rajendra Shankar Shukla and others vs. State of Chhattisgarh and others*); and (2017) 1 SCC 667 *(Ravindra Ramchandra Waghmare vs. Indore Municipal Corporation and others*), to contend that the local Authorities are bound by the development plans published under the Statute and that there cannot be any deviation from such development plans.

8. Learned counsel for the petitioners also argued that being a person in possession, the petitioners cannot be dispossessed in view of the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, as no works on such land can be commenced without acquiring the same.

9. On the other hand, learned counsel for the respondents-State submitted that all the petitioners except the petitioner No.32 are the rank encroachers on public land and have claimed adverse possession. It is contended that a person in adverse possession cannot take any action in affirmative. The plea of adverse possession is a plea of defence and action cannot be raised on the basis of plea of adverse possession. It is further contended that the petitioners have raised a vague plea of adverse possession as it is not asserted that the petitioners are in open, continuous and hostile possession and that too against the State. It is contended that mere possession however long, will not perfect the title of the petitioners on the public land. Reliance is placed upon the Supreme Court judgments reported as (2014) 1 SCC 669 *(Gurdwara Sahib*

vs. Gram Panchayat Village Sirthala and another) and (2000) 5 SCC 652 *(State of Rajasthan vs. Harphool Singh (dead) Through His LRs)* wherein the Supreme Court examined as to when a plea of adverse possession can be raised against the State. Since the petitioners have come out with a dishonest plea of adverse possession, the petitioners are not entitled to any equitable relief from this Court.

10. Learned counsel for the State also contended that width of the road between Polytechnic Junction to Bharat Mata Square was proposed between 35-40 meters in Bhopal Development Plan-1991. There is existing road but not of width proposed in the said plan. Such road finds mention in Bhopal Development Plan-2005, which has been attached by the petitioners along with the rejoinder as Document-A. At page 50-51 of the said document while discussing the density of traffic in the old city, against serial No.9 it has been found that the width of the road from Polytechnic Junction to Banganga is 30 meters. Banganga is a place said to be beyond Bharat Mata Square. Thus, though the exact width of road of Polytechnic to Bharat Mata Square has not been mentioned in Development Plan-2005 but the fact that such road is described as existing road, means the road, which is proposed in Development Plan-1991. Such road is in existence but not of width of 30 meters though proposed to be 35-40 meters in Development Plan-1991. Therefore, construction of 30 meter wide road is in accordance with development plans published. The land over which the road is to be constructed is land of the State Government; therefore, construction of road on a land owned by the State is being disputed by encroachers on public Land.

11. It is also argued that strategy of Smart City project (Annexure P-1) is about city improvement (retrofitting), city renewal (redevelopment) and city extension (greenfield development) plus a Pan-city initiative, in which, smart solutions are applied covering larger parts of the city. Pan-city development is application of selected smart solutions to the existing citywide infrastructure. It will involve the use of technology, information and data to make infrastructure and services better. It is denied that the Smart City project was only meant for development of Shivaji Nagar. It was only meant for Pan-city development. It is pointed out that Polytechnic to Bharat Mata Square road is neither part of Shivaji Nagar nor part of T.T. Nagar but is a road between the two localities and that such road is mentioned clearly in Development Plan-1991 and as existing road in Development Plan-2005.

12. Learned counsel for the respondents has also argued that in respect of the same land, a civil suit forming subject matter of Civil Suit No.43-A/1997 (*Khursheed Ahamad vs. State of M.P. and others*) was filed before the 5th Additional District Judge, Bhopal claiming title over Khasra No.1413 having area ad-measuring 103.40 Acres. The civil suit was dismissed on 13.05.1997. Against the said judgment and decree dated 13.05.1997, an appeal has been filed bearing First Appeal No.395/1997

(*Khursheed Ahamad (since dead) now by LRs Nahid Bano w/o Late Shri Khursheed Ahmed and others vs. State of M.P. and others*), wherein this Court granted ad-interim injunction on 11.11.1998. On the application of the State, ad-interim injunction has been vacated on 15.05.2017 when the following finding was recorded:-

> **"8.** It is indicated in the present applications that about 103.83 acres of suit land and a small portion of the same adjoining to a public road, is presently required for widening of the road in order to achieve the objects of Smart City. A fund of Rs.300 crores has been provided by the Governments for carrying out various project, including construction and development of four lane smart road from Polytechnic Junction to Bharat Mata Square, having total length of 2.250 km. Prior to 11.11.1998 position of suit land is shown in Chart Annexure-A/4.
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> **9**. The respondents have also endeavored to verify the status of occupation by taking aid of satellite maps. The satellite maps Annexure-A/5 showing the position as on 01.05.2003, which clearly reflects no construction not even road. But in the subsequent satellite map dated 26.02.2016 different position of the land which shows various structures alongwith the road. It clearly indicates that all these structures have been raised after 11.11.1998. It is contended by the respondents that the appellant is trying to mislead the Court. It is settled principle of law that the interim injunction may not be continued to frustrate the public projects.
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> **12**. On 27.3.2017 the learned counsel for the appellant submits that now about 70 shops and 20 residential properties were established there. The amendment application alleged that, there are about 3,000 Jhuggies over the suit land. They claimed Rs.2.70 crores as compensation which indicates that this appeal take a long time to be finalised. It shows the ulterior motive of the appellants. They are now the encroachers of government land. They create obstructions in the legal machinery and the works undertaken for the public interest such as widening of road. The Hon'ble Supreme Court in the case of *Ravindra Ramchandra Waghmare* (2017) 1 SCC 667 has held that "Power of Corporation and statutory mandate to remove building projecting beyond regular line of public street under Section 305. Action on part of Corporation for "removal" or projecting part, not interfered with by High Court upheld."

It is thus argued that soon after the vacation of stay, present writ petition has been filed wherein there is mention of the said civil suit. Thus, it is sought to be inferred that the present proceedings are to circumvent the order passed by this Court in the first appeal.

13. We have heard learned counsel for the parties and find no merit in the present petition.

14. Though the learned counsel for the petitioners has referred to the decisions of the Supreme Court reported as AIR 1966 SC 828 *(Gadde Venkateshwara Rao vs. Government of Andhra Pradesh and others);* (1976) 1 SCC 671 *(Jasbhai Motibhai Desai vs. Roshan Kumar Haji Bashir Ahmed and others)*; and (1991) 4 SCC 54 *(Bangalore Medical Trust vs. B.S. Muddappa and others)* to assert that the petitioners have a right to invoke the writ jurisdiction of this Court but we find that though any citizen of country has a right to invoke the writ jurisdiction of this Court but whether such person would be entitled to any indulgence, is a matter which requires to be examined. In *Bangalore Medical Trust's* case, the Supreme Court held as under:-

> **"35**. Locus standi to approach by way of writ petition and refusal to grant relief in equity jurisdiction are two different aspects, may be with same result. One relates to maintainability of the petition and other to exercise of discretion. Law on the former has marched much ahead. Many milestones have been covered. The restricted meaning of aggrieved person and narrow outlook of specific injury has yielded in favour of broad and wide construction in wake of public interest litigation. Even in private challenge to executive or administrative action having extensive fall out the dividing line between personal injury or loss and injury of a public nature is fast vanishing. Law has veered round from genuine grievance against order affecting prejudicially to sufficient interest in the matter. The rise in exercise of power by the executive and comparative decline in proper and effective administrative guidance is forcing citizens to espouse challenges with public interest flavour. It is too late in the day, therefore, to claim that petition filed by inhabitants of a locality whose park was converted into a nursing home had no cause to invoke equity jurisdiction of the High Court. In fact public spirited citizens having faith in rule of law are rendering great social and legal service by espousing cause of public nature. They cannot be ignored or overlooked on technical or conservative yardstick of the rule of locus standi or absence of personal loss or injury. Present day development of this branch of jurisprudence is towards freer movement both in nature of litigation

> and approach of the courts. Residents of locality seeking protection and maintenance of environment of their locality cannot be said to be busy bodies or interlopers [*S.P. Gupta v. Union of India, 1981 Supp SCC 87:(1982) 2 SCR 365:AIR 1982 SC 149; Akhil Bhartiya Soshit Kararnchari Sangh (Rly.) v. Union of India, (1981) 1 SCC 246: 1981 SCC (L&S)50; AIR 1981 SC 298; Fertilizer Corporation Kamgar Union v. Union of India, (1981) 1 SCC 568: AIR 1981 SC 344]*. Even otherwise physical or personal or economic injury may give rise to civil or criminal action but violation of rule of law either by ignoring or affronting individual or action of the executive in disregard of the provisions of law raises substantial issue of accountability of those entrusted with responsibility of the administration. It furnishes enough cause of action either for individual or community in general to approach by way of writ petition and the authorities cannot be permitted to seek shelter under cover of technicalities of locus standi nor they can be heard to plead for restraint in exercise of discretion as grave issues of public concern outweigh such considerations."
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> [*Emphasis Supplied*]

15. In view of the above, though the petitioners have a *locus standi* to file the writ petition but that does not mean that the petitioners are entitled to any equitable or legal relief in writ jurisdiction.

16. As mentioned above, the petitioners have pleaded adverse possession. The petitioners have relied upon the judgment of the Supreme Court reported as AIR 1968 SC 1165 *(Nair Service Society Ltd. vs. K.C. Alexander & Others)*. We do not find that the said judgment is of any assistance to the argument raised by the learned counsel for the petitioners. In the aforesaid case, the Supreme Court has held that a person in possession of land in assumed character of owner and exercising peacefully the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. It was further held that if the rightful owner does not come forward and assert his title by the process of law, his right is extinguished and the possessory owner acquires an absolute title. In the aforesaid case, the State, against whom the plaintiff was claiming adverse possession was not impleaded, therefore, the suit was found to be of recovery of possession from one, who had trespassed against him. Thus, the said judgment is not applicable to the facts of the present case. The first ingredient of claiming adverse possession is open, continuous and hostile possession to the knowledge of the true owner. The petitioners have not stated as to who the true owner is.

17. The hostile possession against the State as an owner cannot be simplicitor on account of long possession. Such question has been examined in *Harphool Singh's*

case (supra). In the said case, the plaintiffs claimed adverse possession of the property as it was asserted that they have constructed house in the year 1955. The Supreme Court examined the question of perfection of title by adverse possession and that too in respect of public property. The Court held as under:-

> "**12**. So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/title of the State to immovable property and conferring upon a third party encroacher title where he had none. The decision in *P. Lakshmi Reddy vs L. Lakshmi Reddy [AIR 1957 SC 314]* adverted to the ordinary classical requirement – that it should be *nec vi, nec clam, nec precario* – that is the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. It was also observed therein that whatever may be the animus or intention of a person wanting to acquire title by adverse possession, his adverse possession cannot commence until he obtains actual possession with the required animus. In the decision reported in *Secy. of State for India in Council vs Debendra Lal Khan (1933) LR (LXI) I.A. 78 (PC)*, strongly relied on for the respondents, the Court laid down further that it is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running, ought if he exercises due vigilance, to be aware of what is happening and if the rights of the Crown have been openly usurped it cannot be heard to plead that the fact was not brought to its notice. In *Annasaheb Bapusaheb Patil & Others vs Balwant alias Balasaheb Babusaheb Patil (dead) by LRs etc. [1995] 2 SCC 543*, it was observed that a claim of adverse possession being a hostile assertion involving expressly or impliedly in denial of title of the true owner, the burden is always on the person who asserts such a claim to prove by clear and unequivocal evidence that his possession was hostile to the real owner and in deciding such claim, the Courts must have regard to the animus of the person doing those acts."

18. In a converse proposition, in a judgment reported as **(**2011) 10 SCC 404 *(State of Haryana vs. Mukesh Kumar and others),* the Supreme Court was seized of a matter where the State claimed adverse possession. The Court negated it. The Supreme Court held as under:-

> "**31**. A person pleading adverse possession has no equities in his favour since he is trying to defeat the rights of the true owner. It is

for him to clearly plead and establish all facts necessary to establish adverse possession. Though we got this law of adverse possession from the British, it is important to note that these days the English courts are taking a very negative view towards the law of adverse possession. The English law was amended and changed substantially to reflect these changes, particularly in light of the view that property is a human right adopted by the European Commission.

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36. In *Hemaji Waghaji Jat vs. Bhikhabhai Khengarbhai Harijan (2009) 16 SCC 517*, this Court ultimately observed as under (SCC p. 529, paras 32-33:

> "32. Before parting with this case, we deem it appropriate to observe that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.
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> 33. We fail to comprehend why the law should place premium on dishonesty by legitimising possession of a rank trespasser and compelling the owner to lose his possession only because of his inaction in taking back the possession within limitation."

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44. Adverse possession allows a trespasser - a person guilty of a tort, or even a crime, in the eyes of law - to gain legal title to land which he has illegally possessed for 12 years. How 12 years of illegality can suddenly be converted to legal title is, logically and morally speaking, baffling. This outmoded law essentially asks the judiciary to place its stamp of approval upon conduct that the ordinary Indian citizen would find reprehensible. The doctrine of adverse possession has troubled a great many legal minds. We are clearly of the opinion that time has come for change."

19. Thus, the cases where the adverse possession is sought against the State and where the State has sought adverse possession, have been examined in the above mentioned two judgments i.e. *Harphool Singh* (supra) and *Mukesh Kumar* (supra). In view of the law laid down in aforesaid judgments, we find that the claim of the petitioners to protect their possession is wholly untenable and cannot be sustained in law.

20. Still further, no person is entitled to take plea of adverse possession as an affirmative action – it has been so held by the Supreme Court in *Gurdwara Sahib* (supra). It has been further held that a Plaintiff cannot seek a declaration to the effect that such adverse possession has matured into ownership. The relevant extract read as under:-

> **"8.** There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

Thus, we find that the petitioners have approached this Court with a wholly untenable plea, thus they are not entitled to equitable relief on this ground alone.

21. We have examined the other argument in respect of existing road in Development Plan-2005. The sole issue is that in Development Plan-2005, the road is shown as existing road and as per the petitioners; the width of the road cannot be extended than what actually exists on the spot on the date of publication of Development Plan-2005. On the other hand, stand of the State is that in Bhopal Development Plan-1991, published on 14.11.1975, the road of 35-40 meter width as sector road was planned and whereas in Bhopal Development Plan-2005, the proposed width of the roads has been mentioned at para 3.15 in Chapter-3. Clause 3.18 thereof pertains to second level artery road, which measures from 30-45 meters. In the new urban areas the same was proposed to be 45 meters whereas in the existing urban areas the width of the road was mentioned as 30-40 meters. It is the said road, which was mentioned in development plan "as existing road". May be; the actual width of the road was not increased to 35-40 meters but it is a road, planned in Development Plan-1991. Therefore, the width of the road is not a new width, which is being carved out but the width, which was planned and published way back in 1975.

22. A perusal of Bhopal Development Plan-2005 at page Nos.73 and 74 of the response filed by the petitioners to the compliance report filed by respondent No.2 shows the traffic density on the existing roads. Column No.6 is existing width of the road. At Serial No.9 is the road from Polytechnic junction to Banganga. The existing

width is mentioned as 30 meters. It is the said width of the road which the respondents are wanting to construct road. Therefore, it cannot be said that Bhopal Development Plan-2005 does not relate to the width of the road as 30 meters. It is so mentioned at pages 73 and 74 of the development plan produced by the petitioners themselves.

23. Still further, the Smart City project has its components including the Pan-city development, therefore, the development of a road to the width of 30 meters is part of the Development Plan-2005, therefore, it cannot be said that Smart City project is at variance with the development plan published under the Act applicable to the area.

24. The Act of 2013 has no applicability to the present case as the State is the owner of the land in question and as an owner, the State will not acquire its own land. The petitioners are unauthorised occupants over such land and therefore, they cannot claim to be the persons interested in the event of acquisition of the land. Thus, the submission of the learned counsel for the petitioners that they cannot be dispossessed as they are in possession of the land and the same has not been acquired in terms of the Act of 2013, is misconceived and is rejected.

25. So far as the judgments of the Supreme Court rendered in *K. Ramadas Shenoy (supra); Chairman, Indore Vikas Pradhikaran* (supra); *Machavarapu Srinivasa Rao (supra); Rajendra Shankar Shukla* (supra); and *Ravindra Ramchandra Waghmare* (supra) referred to by the learned counsel for the petitioners to contend that there cannot be any variation in the development plan unless such modifications and/or variations are approved in the manner contemplated by law. There is no dispute with the proposition raised but Bhopal Development Plan-2005 itself has given width of the road as 30 meters, therefore, the respondents are well within the jurisdiction to construct road upto the width of 30 meters. Such construction of road upto the width of 30 meters is not contrary to Bhopal Development Plan-2005 but in accordance therewith.

26. In view of the foregoing, we do not find any merit in the present writ petition. The same is **dismissed**.

Petition dismissed

I.L.R. [2018] M.P. 463
WRIT PETITION

Before Ms. Justice Vandana Kasrekar

W.P. No. 10649/2017 (Jabalpur) decided on 22 November, 2017

PRAFULLA KUMAR MAHESHWARI …Petitioner

Vs.

AUTHORIZED OFFICER AND CHIEF MANAGER & ors. …Respondents

A. Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, (54 of 2002), Section 14 &

15 – Jurisdiction – Fact of Tenancy & Possession of Mortgaged Property – **Petitioner availed credit facilities from respondent Bank whereby they mortgaged a property with the bank – Since petitioner failed to repay the said loan, bank initiated action against the petitioner and filed application u/S 14 of the Act to take physical possession of the mortgage property – Challenge to – Held – District Magistrate exercising his powers under the Act has authorized Additional District Magistrate (ADM) to exercise powers u/S 14 of the Act and therefore orders passed under such exercise of powers by ADM is justified and within jurisdiction – Further held – Fact of tenancy in mortgaged property was well within the knowledge of bank but such fact was not disclosed in the application and therefore ADM without considering the fact of tenancy has passed the order of possession – In such circumstances, no action u/S 14 of the Act could be initiated – Further held – As per Section 15 of the Act of 2002, respondent bank can take over the management of company (petitioner) and keep the secured assets in its own custody till the rights of property is transferred in accordance with law – It is also clear that mortgaged property was a lease property and possession was taken by the Municipal Corporation and was only given on *supurdginama* to petitioner – Impugned orders passed by Additional District Magistrate are set aside – Bank will be at liberty to file fresh application u/S 14 of the Act of 2002 – Petition allowed.**

(Paras 22, 25, 26, 27, 30, 31 & 32)

क. वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) *अधिनियम, (2002 का 54), धारा 14 व 15 – अधिकारिता – किराएदारी का तथ्य एवं बंधक संपत्ति का कब्जा* – याची ने प्रत्यर्थी बैंक से उधार सुविधा का उपभोग किया जिसके द्वारा उन्होनें बैंक के साथ संपत्ति बंधक की – चूंकि याची उक्त ऋण का प्रतिसंदाय करने में विफल रहा, बैंक ने याची के विरूद्ध कार्रवाई आंरभ की और बंधक संपत्ति के भौतिक कब्जे हेतु अधिनियम की धारा 14 के अंतर्गत आवेदन प्रस्तुत किया – को चुनौती – अभिनिर्धारित – जिला मजिस्ट्रेट ने अधिनियम के अंतर्गत अपनी शक्तियों का प्रयोग करते हुए अतिरिक्त जिला मजिस्ट्रेट (ए.डी.एम.) को अधिनियम की धारा 14 के अंतर्गत शक्तियों का प्रयोग करने हेतु प्राधिकृत किया और इसलिए ए.डी.एम. द्वारा शक्तियों के उक्त प्रयोग के अंतर्गत पारित किये गये आदेश न्यायोचित है तथा अधिकारिता के भीतर है – आगे अभिनिर्धारित – बंधक संपत्ति में किराएदारी का तथ्य, बैंक को भली–भाँति ज्ञात था परंतु उक्त तथ्य को आवेदन में प्रकट नहीं किया गया था और इसलिए ए.डी.एम. ने किराएदारी के तथ्य को विचार में लिए बिना कब्जे का आदेश पारित किया है – उक्त परिस्थितियों में, अधिनियम की धारा 14 के अंतर्गत कोई कारवाई आरंभ नहीं की जा सकती – आगे अभिनिर्धारित – 2002 के अधिनियम की धारा 15 के अनुसार प्रत्यर्थी बैंक, कंपनी (याची) का प्रबंधन अपने हाथ में ले सकता है और संपत्ति के अधिकार विधिनुसार

अंतरित किये जाने तक प्रतिभूत आस्तियां स्वयं की अभिरक्षा में रख सकता है – यह भी स्पष्ट है कि बंधक संपत्ति एक पट्टे पर दी गई संपत्ति थी और नगरपालिका निगम द्वारा कब्जा लिया गया था तथा याची को केवल सुपुर्दगीनामे पर दी गई थी – अतिरिक्त जिला मजिस्ट्रेट द्वारा पारित किए गए आक्षेपित आदेश अपास्त – बैंक, 2002 के अधिनियम की धारा 14 के अंतर्गत नया आवेदन प्रस्तुत करने के लिए स्वतंत्र होगा – याचिका मंजूर।

***B. Practice and Procedure – Subsequent Application – Maintainability* – Held – As earlier application was not decided on merits and was dismissed for want of prosecution, therefore subsequent application filed by the Bank was rightly entertained by the District Magistrate.**

(Para 28)

ख. पद्धति एवं प्रक्रिया – पश्चात्वर्ती आवेदन – पोषणीयता – अभिनिर्धारित – चूंकि पूर्ववर्ती आवेदन को गुणदोषों पर विनिश्चित नहीं किया गया था और अभियोजन के अभाव में खारिज किया गया था अतः बैंक द्वारा प्रस्तुत किये गये पश्चात्वर्ती आवेदन को जिला मजिस्ट्रेट द्वारा उचित रूप से ग्रहण किया गया था।

Cases referred:

AIR 1969 SC 483, AIR 1965 SC 1619, (2004) 4 SCC 684, (2005) 2 Bom. CR (Cri) 206, (2005) 2 Bom. CR (Cri) 513, (2009) 5 All LJ 748, (1981) CriLJ 1526, (2017) SCC Online Cal 7283, (2017) SCC Online Cal 8053, (2017) SCC Online Cal 7155, (1991) 1 SCC 550, IV (2015) BC 217 (DB) Mad., IV (2013) BC 694 (DB)(Guj), 1 (2014) BC 6 (FB) (Mad.), 1 (2016) BC 279 (Cal.), 1 (2016) BC 3 (Cal.), 2017 (4) MPLJ 214, (2013) 9 SCC 620, (2014) 6 SCC 1, 1985 (3) SCC 398, (2004) 12 SCC 278, (2007) 13 SCC 255, AIR 2009 Cal 160, 2013 (1) MPLJ 117, AIR 2017 All 172, AIR 2016 Hyderabad 125, 2009 (4) Bom LR 1412, 2016 (10) ADJ 192, (2016) 3 SCC 762.

Rajesh Maindiretta, for the petitioner.
A.C. Thakur, for the respondents No. 1 & 2.
Ankit Agrawal, G.A. for the respondents No. 3 & 4.
Wajid Hyder, for the interveners.

O R D E R

Vandana Kasrekar, J. :- The petitioner has filed the present writ petition challenging the orders dated 30/11/2016 and 23/03/2017 passed by respondent No.3.

2. Nav Bharat Press Private Limited had availed certain financial assistance from respondent-bank. For securing the said credit facilities, the immovable property belonging to the petitioner i.e. Plot Nos. 118 to 124, Swami Dayanand Saraswati Marg, Jabalpur having area admeasuring 14035 sq. ft. bearing Survey No.65, Block

No.99 of Nagar Nigam, Jabalpur together with building and structure was mortgaged. Respondent -bank for realization of its outstanding dues initiated action under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the Act of 2002') and the Security Interest (Enforcement) Rules, 2002 (in short 'the Rules of 2002') against the borrower and the petitioner. Notice under Section 13(2) of the Act of 2002 was issued by respondent-bank on 14/02/2007 and thereafter measures under Section 13(4) of the Act of 2002 were taken on 26/04/2007. Thereafter the respondent-bank moved an application under Section 14 of the Act of 2002 for taking physical possession of the aforesaid mortgaged property before respondent No.3. Respondent No.3 vide order dated 04/09/2013 dismissed the said application for want of prosecution as none appeared on behalf of the respondent-bank. Respondent-bank challenged the aforesaid proceeding by filing Writ Petition No.7127/2014. Thereafter an application for withdrawal of the said writ petition was filed by the respondent-bank thereby also seeking liberty to move an application under Section 14 of the Act of 2002 and the rules framed thereunder afresh before respondent No.3. This Court vide order dated 19/02/2016 dismissed the said writ petition as withdrawn. However, instead of granting liberty, this Court categorically ordered that this Court has not expressed any view on tenability of fresh application under Section 14 of the Act of 2002.

3. The respondent-bank thereafter filed Review Petition No.232/2016 before this Court which was too dismissed vide order dated 11/04/2016 by this Court. While dismissing the said review petition, this Court observed that if an application under Section 14 of the Act of 2002 is maintainable, then the respondent-bank can apprise the competent authority about the maintainability and it is for the authority to decide whether the application under Section 14 of the Act of 2002 is maintainable or not. In the said writ petition, the borrower and the petitioner were noticed and reply was filed categorically stating that there are certain tenants in the premises to the knowledge of the respondent-bank prior to creation of mortgage. The petitioner further submits that in fact no liberty was granted by this Court and, therefore, second application seeking same relief was not maintainable before the District Magistrate, however, the respondent-bank yet again filed application under Section 14 of the Act of 2002 before respondent No.3 thereby seeking assistance for taking physical possession of the aforesaid property belonging to the petitioner. In the said application the respondent-bank did not mention the name of the tenants those who are occupying the premises. Respondent No.3 thereafter passed an order dated 30/11/2016 thereby accepting the application filed by the respondent-bank under Section 14 of the Act of 2002 on the ground that the borrower and the petitioner have not repaid the outstanding dues, therefore, the bank is entitled to take physical of the secured assets. Respondent No.3 has not considered the specific objection taken in the proceeding as regards its tenability. It has further been submitted that respondent No.3 while deciding the

application has also not expressed any satisfaction as regards to declaration as is required to be given on affidavit under Section 14 of the Act of 2002. In pursuance of the order passed by respondent No.2, respondent No.4 issued a notice dated 23/12/2016 for handing over the physical possession of the secured assets on or before 03/01/2017 and else the same shall be taken forcibly.

4. Being aggrieved by this order, the petitioner has filed an application before the Debt Recovery Tribunal, Jabalpur (DRT). DRT, Jabalpur initially granted interim relief to the petitioner but subsequently the said application was disposed of by the DRT, Jabalpur holding that the relief with regard to the order under Section 14 of the Act of 2002 is not maintainable before the Tribunal.

5. The petitioner has further submitted that the property in relation to which respondent No.3 has passed the order for taking physical possession is a lease hold property of the Municipal Corporation, Jabalpur. Municipal Corporation, Jabalpur, for realization of its dues, had taken possession of the said property on 01/03/2013, however, the same was given on Supurdnama to the General Manager, Nav Bharat Press on 01/03/2013. Thus, the possession of the said property is with the Municipal Corporation, Jabalpur, therefore, respondent No.3 could not have passed the order directing the Tahsildar to take physical possession of the same. It has also been submitted that the lease deed of the said property was also expired on 22/01/2013 and the same is not renewed thereafter. All these facts were cancealed (sic : concealed) by the respondent-bank in the application filed under Section 14 of the Act of 2002. The petitioner has further submitted that in the part of the said property, Nav Bharat Printing Press is operational wherein 40 employees are working and, therefore, even otherwise the respondent-bank cannot take possession of the running unit under Section 14 of the Act of 2002 and the proper course available to the bank is to take over the management under Section 15 of the Act of 2002. In such circumstances, the petitioner submits that the impugned order deserves to be set aside.

6. The respondents No.1 and have filed their reply and in the said reply they have stated that respondent-bank had moved an application under Section 14 of the Act of 2002 for taking assistance of the Collector/District Magistrate for taking physical possession of the mortgaged property in order to recover the huge amount outstanding dues recoverable from the petitioner. In the said application, the respondent-bank was only required to disclose the information about borrower and the owner/mortgagor of the mortgaged property. The respondent-bank under no compulsion to knowledge the presence of any illegal occupant in the premises of the mortgaged property at the time of moving the application under Section 14 of the Act of 2002 when there is no whisper of any pre-existing tenancy at the time of creation of mortgage in the year 2004. At the time of creation of the charge of mortgage, the petitioner never informed about any existing tenancy on the property in question.

7. The tenants have moved an application under Section 17(1) of the Act of 2002 before the DRT, Jabalpur. The documents which have been furnished by the tenants along with his application can merely be considered enough to prove their tenancy rights. The shops were appeared to have been let out to the alleged tenants some 30 years before. The tenants did not furnish any registered instruments to prove valid tenancy rights. Before inducting any tenant, the petitioner was required to obtain permission from the respondent-bank since the property was mortgaged by the petitioner in favour of the respondent-bank. It has further been submitted that in the present writ petition the petitioner has not challenged the order dated 09/05/2017 passed in S.A. No.01/2017 by learned Presiding Officer, DRT, Jabalpur but has challenged the order dated 30/11/2016 and modified order dated 23/03/2017 passed by District Magistrate, Jabalpur under Section 14 of the Act of 2002, therefore, this writ petition is barred by limitation due to an unexplained and unnecessary delay. The property in question is mortgaged with the respondent-bank in the year 2004 and for that purpose the petitioner had given notarized declaration dated 18/03/2004 and had signed on the memorandum requiring deposit of the title deeds to create additional mortgage dated 12/04/2004. The petitioner never informed the respondent-bank about any tenancy on the mortgaged property and nor in the subsequent years. So far as maintainability of the securitization application under Section 14 of the Act of 2002 is concerned, respondent-bank, in reply, has stated that the petitioner has not demonstrated any prejudice that has been caused to him by the action of the respondent-bank. The respondent-bank has not restrained from moving an application under Section 14 of the Act of 2002 afresh vide order dated 19/02/2016. Under the Act of 2002 there is no bar of filing fresh application under Section 14 of the Act of 2002 if earlier application is dismissed for want of prosecution.

8. The respondent-bank has further stated that the petitioner had availed credit facilities from the respondent-bank against the charge of mortgage created in favour of the respondent-bank on 12/04/2004. The petitioner neglected the repayment of the dues to the respondent-bank and ignored the several verbal and written reminders sent to the petitioner by the respondent-bank. Thus, the respondent-bank has rightly proceeded with recovery of the dues under the Act of 2002 and served the borrowers coming under the definition of Section 2(f) of the Act of 2002 with demand notice issued under Section 13(2) and possession notice issued under Section 13(4) of the Act of 2002. The respondent-bank was intent to realizing the outstanding amount from the mortgaged property, but, it was faced with resistance when the respondent-bank attempted to take physical possession of the mortgaged property, therefore, the respondent-bank has no other option to proceed under Section 14 of the Act of 2002. In view of aforesaid, respondents pray that the writ petition be dismissed.

9. The petitioner has challenged the impugned order dated 30/11/2016 and modified order dated 23/03/2017 mainly on the following grounds :-

a) The orders impugned are passed by the Additional District Magistrate and are wholly without jurisdiction in view of Section 14 of the Act of 2002.

b) There is no mention about the tenancy by the respondent-bank in the application under Section 14 of the Act of 2002 before the District Magistrate.

c) No liberty was given by this Court to the respondent-bank to again file an application under Section 14 of the Act of 2002 before the District Magistrate.

d) The bank cannot take possession of the running unit.

10. So far as first ground is concerned, learned counsel for the petitioner submits that the orders impugned are passed by the Additional District Magistrate who has no jurisdiction to pass order under the Act of 2002. He further submits that Section 14(1) of the Act of 2002 provides that the Chief Metropolitan Magistrate or District Magistrate are required to assist the secured creditor in taking possession of secured assets. By way of amendment, Section 14 of the Act is amended and the first proviso to sub-section provides for filing of an affidavit containing nine declarations by the secured creditor. Second proviso to the said section further provides that suitable orders shall be passed by the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, after satisfying the contents of the affidavit. Section 1 (A) has been inserted by which the District Magistrate or the Chief Metropolitan Magistrate has been conferred power to authorize any officer subordinate to him to take possession of the assets after passing of the order under Section 14(1) of the Act of 2002. He also submits that Section 20 (1) of the Code of Criminal Procedure, 1973 provides that the State Government may appoint as many persons as it thinks fit to be the Executive Magistrate and shall appoint one of them to be the District Magistrate. Further Sub-section (2) of Section 20 of Cr.P.C. Provides that State Government may appoint any Executive Magistrate to be an Additional District Magistrate and such Magistrate shall have such of the powers of a District Magistrate under the Code of Criminal Procedure or under any other law for the time being in force as may be directed by the State Government.

11. Learned counsel argues that the conjoint reading of Section 20(1) and 20(2) of Cr.P.C. clearly provides that the District Magistrate and the Additional District Magistrate are separate and distinct authorities and the Additional District Magistrate is empowered to exercise all powers which are conferred on the District Magistrate under the Code of Criminal Procedure or as directed by the State Government. He further argues that in the present case, there is no authorization by the State Government to the Additional District Magistrate for exercising the powers under Section 14 of the Act of 2002. Section 23 of the Cr.P.C. further provides that all the

Executive Magistrate other than Additional District Magistrate shall be subordinate to the District Magistrate but merely the fact that the Additional District Magistrate is not subordinate to the District Magistrate would not mean that he can exercise the powers specifically conferred on the District Magistrate under Section 14 of the Act of 2002. However, sub-section (2) of the said section provides that the District Magistrate to distribute the business among the Executive Magistrates subordinate to him and also allocate the business to an Additional District Magistrate. This again clearly shows that both the authorities are different, therefore, the Additional District Magistrate cannot exercise powers conferred on the District Magistrate under Section 14 of the Act of 2002. Thus, the orders impugned are absolutely illegal and liable to be set aside. For the said purpose, learned counsel for the petitioner relied upon the following judgments :

a) *Harish Chand Agrawal Vs. The Batala Engineering Co. Ltd and others,* reported in AIR 1969 SC 483;

b) *Ajaib Singh Vs. Gurbachan Singh and others,* reported in AIR 965 SC 1619;

c) *State of Karnataka and another Vs. Dr. Praveen Bhai Thogadia*, reported in (2004) 4 SCC 684;

d) *A.A.R. Malik Vs. A.N. Roy,* reported in **(**2005) 2 Bom. CR (Cri) 206;

e) *Suresh Sham Singh and others Vs. Shri A.N. Roy Commissioner of Police and others,* reported in (2005) 2 Bom CR (Cri) 513;

f) *Imran Shah Khan Vs. State of UP & others,* reported in (2009) 5 All LJ 748;

g) *Vashistha Narain Karvaria Vs. State of Uttar Pradesh and others,* reported in (1981) Cri LJ 1526;

h) *Swadesh Chandra Saha Vs. State of West Bengal,* reported in (2017) SCC Online Cal 7283;

i) *Sri Priolal Sarkar and another Vs. The State of West Bengal and others,* reported in (2017) SCC Online Cal 8053;

j) *Sri Kartick Chandra Dhar Vs. The State of West Bengal and others,* reported in (2017) SCC Online Cal 7155;

k) *State of Maharashtra and others Vs. Mohammed Salim Khan and others,* reported in (1991) 1 SCC 550;

l) *T.C. Ramadoss & another Vs. State Bank of India and others,* reported in IV (2015) BC 217 (DB) Mad.);

m) *Manjudevi R. Somani Vs. Union of India and others* reported in IV (2013) BC 694 (DB) (Guj);

n) *K. Arockiyaraj & others Vs. Chief Judicial Magistrate and another,* reported in 1 (2014) BC 6 (FB) (Mad.);

o) *Arupeswar Chatterjee and others Vs. Bank of Baroda and others,* reported in 1 (2016) BC 279 (Cal.);

q) *Jawahar Singh Vs. United Bank of India,* reported in 1 (2016) BC 3 (Cal.);

r) *Shyam Sunder Vs. Indusind Bank,* reported in 2017 (4) MPLJ 214; and

s) *Standard Chartered Bank Vs. V. Noble Kumar,* reported in (2013) 9 SCC 620.

12. Relating to second ground, learned counsel for the petitioner argues that in the application submitted by the respondent-bank under Section 14 of the Act of 2002, there is no mention about the tenancy. He submits that the Apex Court in the case of *Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited & others,* reported in (2014) 6 SCC 1, has held that the secured creditor is required to disclose tenancy in the affidavit before the District Magistrate. Thus, the respondent-bank, itself, has not approached the District Magistrate with clean hands despite the fact that in the auction notices published earlier, it is categorically mentioned by the respondent-bank that the premises are occupied by the tenants.

13. Regarding third ground, learned counsel for the petitioner submits that earlier the respondent-bank had filed an application before the District Magistrate under Section 14 of the Act of 2002. The said application was dismissed by respondent No.3 for want of prosecution. Against the said order, the petitioner has filed Writ Petition No.7127/2014 before this Court. In the said writ petition and (sic : an) application was filed for withdrawal of the writ petition by the bank with liberty to file another application before the District Magistrate. The said application was allowed by this Court vide order dated 19/02/2016 and the writ petition was dismissed as withdrawn, but, without any liberty. The bank has filed a review application for reviewing the order dated 19/02/2016, however, the said review application was also dismissed by this Court vide order dated 11/04/2016 and, thus, as no liberty was granted by this Court to the bank to file fresh application under Section 14 of the Act of 2002, therefore, fresh application preferred by the respondent-bank before respondent No.3 was not maintainable.

14. In respect of fourth ground, learned counsel for the petitioner submits that Printing Press of the petitioner is still functional and for the said purpose, he has filed some of the photographs demonstrating the same. The respondent-bank has not filed any reply or has denied such averments, thus, when the unit of the petitioner is operational, the respondent-bank cannot take physical possession of the said property and can only take over the management as provided under Section 15 of the Act of 2002 read with Rule 8(3) of the Rules of 2002. For the said purpose, he relies upon the judgment passed by the Chhattisgarh High Court in W.P. (C) No.1686/2017 *(M/s City Mall Vikash Pvt. Ltd. & others Vs. Punjab National Bank and another)*. Learned counsel for the petitioner argues that the application filed by the respondent-bank under Section 14 of the Act is also not maintainable in view of the fact that the possession of the secured assets is already taken by the Municipal Corporation, Jabalpur and the same is handed over on Supurdnama to the petitioner vide Annexure-P/13. Even otherwise the lease of the said premises has also expired. In view of aforesaid, learned counsel for the petitioner argues that the action of the respondent-bank is absolutely illegal and liable to be set aside.

15. In reply to the aforesaid submissions made by learned counsel for the petitioner, learned counsel for the respondents submits that the Additional District Magistrate has jurisdiction to pass the impugned orders. He submits that prior to amendment in Section 14 of the Act of 2002 i.e. before amendment of Section 14(1A) of the Act of 2002, only Chief Metropolitan Magistrate or District Magistrate could pass the order under Section 14 of the Act of 2002. Thereafter vide amendment dated 15/01/2013 in Section 14 of the Act of 2002, the Chief Metropolitan Magistrate or District Magistrate, as the case may be, has been authorized to delegate the powers under Section 14 of the Act of 2002 to any officer subordinate to him. Any officer would not have been mentioned in the amended provision had the intention been otherwise. On perusal of provisions of Section 14(1) and 14(1A) of the Act of 2002, it will be evident that the duty of the Chief Metropolitan Magistrate or District Magistrate, as per Section 14(1) or any subordinate officer authorized by them as per Section 14(1A) of the Act of 2002, is the same i.e. (a) take possession of such assets and documents relating thereto; and (b) forward such assets and documents to the secured creditor. Before amendment on 15/01/2013, the execution of the order passed by the District Magistrate was being done by the Tehsildar/SDM. It confirms that sub-section (1A)was inserted to reduce the load of District Magistrate or Chief Metropolitan Magistrate by allowing them to authorize any officer to pass order under Section 14 of the Act of 2002. However, it is argued that on perusal of Section 23(1) and (2) of Cr.P.C., it will be evident that all the Executive Magistrates other than Additional District Magistrate shall be subordinate to District Magistrate. In terms of the same, passing of the order by Additional District Magistrate cannot be treated as delegation of authority. In terms of Section 17 of the M.P. Land Revenue Code, Additional District Magistrate

shall exercise such powers and discharge such duties conferred and imposed on a District Magistrate. As per Section 35 of the Act of 2002, it is having override effect over the other Acts. The Principal Secretary and OSD-cum-Commissioner, Institutional Finance vide circular dated 03/07/2014 had brought it to the knowledge of the Collectors that in view of amendment, District Magistrate can authorize any officer subordinate to him for the purpose of exercising powers under Section 14 of the Act of 2002. In pursuance of the said circular, the District Magistrate, vide notification dated 25/07/2014 had authorized Shri Chhote Singh, Additional District Magistrate and Shri Shailendra Singh, Additional District Magistrate to pass any order under Section 14 of the Act of 2002. The District Magistrate has distributed the work amongst himself as well as Additional District Magistrates vide work allotment orders dated 19/07/2016, 25/11/2016, 06/01/2017, 13/01/2017, 23/03/2017, 10/07/2017 and 13/07/2017 from which it is evident that Shri Chhote Singh, Additional District Magistrate was allotted the work in connection with the Act of 2002.

16. Regarding tenancy, learned counsel for the respondents argues that at the time of execution of mortgage deed, the petitioner does not disclose about existing tenancy. Thereafter in execution proceeding before the DRT, he tried to take advantage of the pre-existing tenancy, however, the said plea was rejected by the DRT vide order dated 06/05/2015 and the said order has not been challenged before any authority and, thus, attains finality. So far as possession of the running unit is concerned, he submits that the bank cannot take physical possession of the running unit or can take over the management. No one can compel the bank to take over the management of the alleged running unit. So far as attachment of the property by Municipal Corporation for recovery of the rent is concerned, the respondents have admitted the fact that the petitioner has created mortgage on the property to secure the financial assistance of Rs.1417 lakh. After the alleged attachment of the property by the Jabalpur Municipal Corporation and handing over possession of the property to the petitioner, the property was attached by the DRT. In the said attachment, there is no whisper of the alleged attachment of the property by the Municipal Corporation on 01/03/2013. Learned counsel for the respondents placed reliance on the judgments in the cases of *Union of India Vs. Tulsiram Patel,* reported in 1985(3 SCC 398, N. *Mani Vs. Sangeeta Threatre*, reported in (2004) 12 SCC 278, *Ram Sunder Ram Vs. Union of India*, reported in (2007) 13 SCC 255, *Dr. Sujit Kumar Roy Vs. Union of India & others,* reported in AIR 2009 Cal 160, *Ram Singh Vs. State of MP*, reported in 2013 (1) MPLJ 117, *Sachin Patidar Vs. State of M.P.* passed in W.P. No.1828/2016, *M/s Lakshya Concosts Private Limited Vs. Bank of Baroda,* reported in AIR 2017 All 172, *Rich Field Industries Pvt. Ltd. Vs. State Bank of India* passed in Writ-C No.26826/2016 by *Allahabad High Court, T.R. Jewellery Vs. State Bank of India,* reported in AIR 2016 Hyderabad 125, *Puran Maharashtra Automobiles Vs. Sub-Divisional Magistrate,* reported in 2009 (4) Bom LR 1412.

17. The interveners who are tenant in the said premises has also filed an application for intervention (I.A. No.10609/2017) on the ground that they are the tenants in the said premises for last more than 30 years. They have further stated that the interveners have filed objection to the application filed by respondent-bank before the District Magistrate, however, as the said application was dismissed for want of prosecution, therefore, the said objection raised by the interveners could not be decided. The interveners could not get knowledge about the present application which is filed by the respondent-bank before District Magistrate and the order was passed without their knowledge and the respondent/bank has also not disclosed in the application that the interveners are tenants in the said premises, thus, the order has been obtained by respondent-bank by suppressing the fact about tenancy. The interveners have already filed securitization application before the DRT and the said application is pending before DRT in which an interim protection has already been granted in favour of the interveners. Thus, if any adverse order is passed against the petitioner, then, their interest will also be affected. In such circumstances, they have submitted that the interveners are necessary parties in the writ petition.

18. When the instant case came up for hearing before this Court on 24/08/2017, on the said day this Court has directed learned Govt. Advocate to file an appropriate application to demonstrate if there exists an authorization in the name of Additional District Magistrate for exercising the powers under Section 14 of the Act of 2002. In pursuance of the said order passed by this Court, respondent No.3 has filed I.A. No.12989/2017 for taking additional documents on record. In the said application, the respondents have submitted that the Additional District Magistrate is fully authorize to act as the District Magistrate for the provision of Section 14 of the Act of 2002. The above submission is supported by the order dated 25/11/2016 passed by District Magistrate, Jabalpur. By the said order dated 25/11/2016 Shri Chhote Singh, Additional District Magistrate has been authorized to take action and exercise powers under the Act of 2002 within the Municipal limit of Jabalpur. It has further been submitted that Section 23 of Cr.P.C. would clarify that the Additional District Magistrate is not subordinate of District Magistrate for exercising the powers as District Magistrate under the various Acts. Sub-section (2) of Section 23 of Cr.P.C. clarifies that the District Magistrate from time to time may allocate business to Additional District Magistrate which has power to verify without any specific delegation of power. Thus, in light of the provision of Section 23 of Cr.P.C., and the order dated 25/11/2016, Additional District Magistrate is empower to take action under Section 14 of the Act of 2002.

19. The first ground is raised by learned counsel for the petitioner is regarding to the jurisdiction of the Additional District Magistrate in passing the order under Section 14 of the Act of 2002. As per Section 13 of the Act of 2002, if any borrower fails to repay the loan, then the bank can proceed to recover that amount under Section 13 of

the Act of 2002. Sub-section (2) of the said section provides that initially a notice is required to be issued under Section 13(2) of the Act of 2002 directing the borrower to deposit the amount within 60 days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4). Sub-section (4) of Section 13 of the Act of 2002 provides that in case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the methods which includes taking possession of the secured assets of the borrower. For taking possession of the secured assets, provisions have been made under Section 14 of the Act of 2002.

20. Section 14 of the Act of 2002 provides that whenever the possession of any secured asset is to be taken by the secured creditor, then an application is required to be made in writing to the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secure (sic : secured) asset or other documents relating thereto may be situated or found. Upon such request being made, the District Magistrate shall take possession of such asset and documents relating thereto and forward such asset and documents to the secured creditor. Thus, as per this section, for taking possession of the secured asset, application is required to be made to the District Magistrate in the District. Sub-section (1A) has been incorporated by the Act 1 of 2013 which provides that the District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him to take possession of such assets and documents relating thereto and to forward such assets and documents to the secured creditor. Thus, in light of the aforesaid position of law, the question arises whether any Executive Magistrate other than the Chief Metropolitan Magistrate or the District Magistrate would be empower to pass an order under Section 14 of the Act of 2002. Section 20 of the Code of Criminal Procedure provides for appointment of Executive Magistrate. Section 20 of Cr.P.C., reads as under :

> "20. **Executive Magistrates**.
>
> (1) In every district and in every metropolitan area, the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate.
>
> (2) The State Government may appoint any Executive Magistrate to be an Additional District Magistrate, and such Magistrate shall have such of the powers of a District Magistrate under this Code or under any other law for the time being in force [as may be directed by the State Government].
>
> (3) Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the

executive administration of the district, such officer shall, pending the orders of he (sic : the) State Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.

(4) The State Government may place an Executive Magistrate in charge of a sub-division and may relieve him of the charge as occasion requires; and the Magistrate so placed in charge of a sub-division shall be called the Sub-divisional Magistrate.

(4A) The State Government may, by general or special order and subject to such control and directions as it may deem fit to impose, delegate its powers under sub-section (4) to the District Magistrate.

(5) Nothing in this section shall preclude the State Government from conferring under any law for the time being in force, on a Commissioner of Police, all or any of the powers of an Executive Magistrate in relation to a metropolitan area.

As per this section, the State Government may appoint as many persons as it think fit to be Executive Magistrates and shall apoint (sic : appoint) one of them to be the District Magistrate. Further sub-section (2) of Section 20 provides that the State Government may appoint any Executive Magistrate to be an Additional District Magistrate and such Magistrate shall have such of the powers of a District Magistrate under this Code or any other law for the time being in force as may be directed by the State Government. Thus, as per this section, Additional District Magistrate is empowered to exercise all the powers which are conferred over the District Magistrate under the Code of Criminal Procedure as directed by the State Government.

21. Section 23 of the Code of Criminal Procedure reads as under :

"23. Subordination of Executive Magistrates.- (1)All Executive Magistrates, other than the Additional District Magistrate, shall be subordinate to the District Magistrate, and every Executive Magistrate (other than the Sub-divisional Magistrate) exercising powers in a sub-division shall also be subordinate to the Sub-divisional Magistrate, subject, however, to the general control of the District Magistrate.

(2) The District Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the Executive Magistrates subordinate to him and as to the allocation of business to an Additional District Magistrate."

A bare reading of the above section would mean that the Additional District Magistrate is not subordinate to the District Magistrate. In other word all the Executive

Magistrates except Additional District Magistrate are subordinate to the District Magistrate. Sub-section (2) of Section 23 of the Code clarifies that the District Magistrate may, from time to time, allocate the business to the Additional District Magistrate which he empowers to perform. The legislature has specifically used the word 'distribute' for other Executive Magistrate and 'allocate' for the Additional District Magistrate. Once, any specific work is allocated to the Additional District Magistrate, his competence and authority to perform the same cannot be questioned.

22. As per the above legal provisions, the Additional District Magistrate is empowered to exercise the powers under the Act of 2002 if he is authorised to do so by the District Magistrate. In the present case, the District Magistrate by issuing an order dated 7th July, 2016 has authorised Additional District Magistrate to perform the power under the Act of 2002. Thus, there is an authorization in favour of the Additional District Magistrate to exercise the powers given under the Act of 2002. Most of the judgments which are relied upon by learned counsel for the petitioner are prior to Amendment Act of 2013. Prior to amendment only District Magistrate or the Chief Metropolitan Magistrate, as the case may be, is entitled to exercise the powers under Section 14 of the Act of 2002. However, after amendment, sub-section (1A) has been inserted and by the said sub-section District Magistrate or the Chief Metropolitan Magistrate is empowered to authorise any officer subordinate to them. In the present case, by exercising the said power, the District Magistrate has authorise the Additional District Magistrate to exercise the powers under Section 14 of the Act.

23. This Court in the case of *Ram Singh Vs. State of M.P.,* 2013(1) MPLJ 117, has held that the Additional District Judge has power to exercise the jurisdiction under Section 14 of the Act of 2002. The said judgment has been upheld by the Division Bench of this Court. Similar view has also been taken by the Coordinate Bench of this Court in W.P. No.1828/2016 *(Sachin Patidar Vs. State of M.P.)* decided on 15/03/2016.

24. Allahabad High Court in the case of *Lakshya Consosts Private Limited Vs. Bank of Baroda***,** reported in AIR 2017 All 172 in para-11 has held as under :

> "11. Placing reliance upon the use of word 'order' in the proviso to Section 14 of the Act, it has been submitted that authorities specified in Section 14 exercise judicial function while providing assistance to the secured creditor and, thus, the same cannot be entrusted to Additional District Magistrate. In our considered opinion, Section 14 of the Act is procedural in nature and only empowers the authorities to assess the secured creditor in taking over possession of the secured assets as per the procedure contemplated therein. The Section does not empower the authorities specified therein with any power to

> adjudicate in respect of any dispute pertaining to the secured assets. Power exercised by the authorities specified in Section 14, since is only an administrative power, authorising any authority to exercise the same, will not amount to delegation of power."

As per the said judgment, under Section 14 of the Act authorities exercise their administrative power and, therefore, authorising any authority to exercise the same will not amount to delegation of power.

25. Similar view was taken by the Division Bench of Allahabad High Court in the case of *Rich Field Industries Pvt. Ltd. Vs. State Bank of India,* reported in 2016 (10) ADJ 192. Relevant para of the said judgment reads as under :

> "It has been a considered legal position that the power exercised under Section 14 of the SARFAESI Act by the Collector/District Magistrate is only an administrative power and thus authorising any authority to exercise these powers does not amount to the delegation of the power and, in view of the Full Bench decision of the Supreme Court and the Division Bench judgment of Allahabad High Court, referred to above, this Court finds no illegality in the order that has been passed under Section 14 of the SARFAESI Act by the Additional District Magistrate.

Thus, in light of the aforesaid discussion, the powers exercise under Section 14 of the Act of 2002 by the District Magistrate is only an administrative power and not adjudicatory in nature and, thus, authorizing Additional District Magistrate or Executive Magistrate will not amount to any delegation of power and, there exists no illegality in exercise of powers under the said section by an Additional District Magistrate. In view of aforesaid discussion, there is no error of jurisdiction in entertaining the application under Section 14 of the Act of 2002 by Additional District Magistrate and the order passed by him cannot be said illegal or without jurisdiction.

26. Second contention raised by learned counsel for the petitioner is that there are four tenants in the premises and, therefore, no order could be passed under Section 14 of the Act of 2002. In the present case, respondent-bank in the application submitted before the District Magistrate under Section 14 of the Act of 2002 has not disclosed about the tenancy. The Supreme Court in the case of *Harshad Govardhan Sondagar* (supra) in para 25 has held as under:-

> "25.....When, therefore, a secured creditor moves the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset, he must state in the affidavit accompanying the application that the secured asset is not in possession of a lessee under the valid lease made prior to creation of the mortgage

> by the borrower or made in accordance with Section 65-A of the Transfer of Property Act prior to receipt of a notice under sub-section (2) of Section 13 of the SARFAESI Act by the borrower....."

As per the judgment of the Supreme Court, the secured creditor is required to disclose the tenancy in the affidavit before the District Magistrate. Learned counsel for the petitioner argues that in auction notice which was published in the year 2013, the respondent-bank has mentioned that there are four tenants in the premises which shows that respondent-bank was within the knowledge that there are tenants in the premises. In the application filed by the respondent-bank before the District Magistrate, they have not disclosed about the existence of tenancy, therefore, the tenants have raised objections before the District Magistrate. However, as the application submitted by the bank was dismissed in default, therefore, the said objection preferred by the tenants could not be decided. Thereafter a subsequent application has been filed by the bank before the District Magistrate without disclosing the fact about tenancy, therefore, the District Magistrate without adjudicating on this point has passed an order for possession. The tenants have, therefore, filed securitization application before the DRT in which an interim protection has been granted in favour of the tenants.

27. Learned counsel for the respondent-bank has submitted that at the time of execution of mortgage deed in the year 2004 the petitioner does not disclosed the fact about existence of tenancy. He further argues that there is no registered lease deed or any document related to tenancy in favour of the tenants, therefore, the argument raised by learned counsel for the petitioner regarding tenancy could not be accepted. For the said purpose, he relied upon the judgment passed by the Apex Court in the case of *Harshad Goverdhan Sondagar* (supra). On the basis of the said judgment, learned counsel for the respondent-bank submits that as there is no registered lease deed or any tenancy agreement in favour of the tenants, therefore, they are not entitled to get any protection. The judgment passed by the Apex Court in the case of *Harshad Govardhan Sondagar* (supra) has been considered in the latest judgment by the Apex Court in the case of *Vishal N. Kalsaria Vs. Bank of India and others,* reported in (2016) 3 SCC 762. Paras-29 and 30 of the said judgment reads as under :

> "29. When we understand the factual matrix in the backdrop of the objectives of the above two legislations, the controversy in the instant case assumes immense significance. There is an interest of the bank in recovering the Non Performing Asset on the one hand, and protecting the right of the blameless tenant on the other. The Rent Control Act being a social welfare legislation, must be construed as such. A landlord cannot be permitted to do indirectly what he has been barred from doing under the Rent Control Act, more so when the two legislations, that is the SARFAESI Act and the Rent Control

Act operate in completely different fields. While the SARFAESI Act is concerned with Non Performing Assets of the Banks, the Rent Control Act governs the relationship between a tenant and the landlord and specifies the rights and liabilities of each as well as the rules of ejectment with respect to such tenants. The provisions of the SARFAESI Act cannot be used to override the provisions of the Rent Control Act. If the contentions of the learned counsel for the respondent Banks are to be accepted, it would render the entire scheme of all Rent Control Acts operating in the country as useless and nugatory. Tenants would be left wholly to the mercy of their landlords and in the fear that the landlord may use the tenanted premises as a security interest while taking a loan from a bank and subsequently default on it. Conversely, a landlord would simply have to give up the tenanted premises as a security interest to the creditor banks while he is still getting rent for the same. In case of default of the loan, the maximum brunt will be borne by the unsuspecting tenant, who would be evicted from the possession of the tenanted property by the Bank under the provisions of the SARFAESI Act. Under no circumstances can this be permitted, more so in view of the statutory protections to the tenants under the Rent Control Act and also in respect of contractual tenants along with the possession of their properties which shall be obtained with due process of law.

30. The issue of determination of tenancy is also one which is well settled. While Section 106 of the Transfer of Property Act, 1882 does provide for registration of leases which are created on a year to year basis, what needs to be remembered is the effect of non-registration, or the creation of tenancy by way of an oral agreement. According to Section 106 of the Transfer of Property Act, 1882, a monthly tenancy shall be deemed to be a tenancy from month to month and must be registered if it is reduced into writing. The Transfer of Property Act, however, remains silent on the position of law in cases where the agreement is not reduced into writing. If the two parties are executing their rights and liabilities in the nature of a landlord-tenant relationship and if regular rent is being paid and accepted, then the mere factum of non-registration of deed will not make the lease itself nugatory. If no written lease deed exists, then such tenants are required to prove that they have been in occupation of the premises as tenants by producing such evidence in the proceedings under Section 14 of the SARFAESI Act before the learned Magistrate. Further, in terms of Section 55(2) of the special law in the instant case, which is the Rent Control Act, the onus to get such a deed registered is on the

> landlord. In light of the same, neither the landlord nor the banks can be permitted to exploit the fact of non registration of the tenancy deed against the tenant."

As per the said judgment, non-registration of any deed will not make lease, itself, nugatory. If no legal deed is registered, then such tenants is required to prove that they have been in occupation of the premises as tenants by producing such evidence in the proceedings under Section 14 of the SARFAESI Act before the learned Magistrate. In the present case, the tenants have filed the copies of the electricity bills, rent receipts and registration under the Shops and Establishment Act which are sufficient to prove that the tenants are in occupation of the said premises. However, the District Magistrate while deciding the said application has not taken into consideration the fact that there are tenants in the said premises and, therefore, no action under Section 14 of the Act of 2002 could be initiated.

28. The next argument has been raised by learned counsel for the petitioner regarding maintainability of the subsequent application before the District Magistrate. The earlier application filed by the respondent-bank before the District Magistrate was dismissed for want of prosecution. The respondent-bank has challenged the said order by filing Writ Petition No.7127/2014. In the said writ petition an application was filed by the respondent-bank to withdraw the said writ petition with liberty to file another application before the District Magistrate. The said writ petition was dismissed as withdrawn by this Court vide order dated 19/02/2016, however, no such liberty was granted to the respondent-bank to file a fresh application. Thereafter the respondent-bank has filed a review petition and the review petition was disposed of with direction to the District Magistrate to consider the objection regarding maintainability of the subsequent application. The District Magistrate thereafter considering the arguments has entertained the application preferred by the respondent-bank under Section 14 of the Act of 2002. As earlier application was not decided on merit, therefore, subsequent application filed by the respondent-bank has rightly been entertained by the District Magistrate.

29. So far as the next argument raised by learned counsel for the petitioner that the respondent-bank cannot take possession of the running unit is concerned, learned counsel for the petitioner submits that the Printing Press of the petitioner is still operational and has filed some of the photographs demonstrating the same. As per Section 15 of the Act of 2002, the bank cannot take physical possession of a running unit and only management can be taken over. He further relied on the Rules of 2002. Rule 8 provides for sale of immovable secured assets. It says that where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession by delivering a possession notice prepared and in the event of possession of immovable property is actually taken by the authorised officer, then such property

shall be kept in his own custody or in the custody of any person authorised or appointed by him, then the person in whose custody the property is kept, shall take care of the said property. To support the said arguments, he relied upon the judgment passed by the Chhattisgarh High Court in the case of *M/s City Mall Vikash Pvt. Ltd.* (supra). Relevant para-17 of the said judgment reads as under :

> "17. In view of the above-stated discussion and submissions of the parties, I.A. No.1, application for grant of interim relief, is disposed of in following terms :
>
> 1. The respondent Bank/secured creditor may proceed to take actual possession of the secured assets in accordance with law.
>
> 2. The respondent Bank is at liberty to keep the secured assets in its own custody or in the custody of a person authorised or appointed by it/or through the present management with a condition that such person having possession shall take care of the property in custody protecting the rights of the petitioners till such right is transferred in accordance with law.
>
> 3. The respondent Bank is directed to strictly comply with the provisions contained in Section 13 (4) read with Section 15 of the SARFAESI Act and sub-rules (3) and (4) of Rule 8 of the Rules, 2002, without fail and to proceed in accordance with law.
>
> 4. The respondent Bank is further directed to strictly comply with the binding dictum of the Supreme Court laid down in paragraphs 34 and 35 of *Mathew Varghese* (supra), quoted herein above, after taking actual possession of the secured assets and the respondent will take proper care of the property in custody and for that purpose can insure the secured assets until they are sold or otherwise disposed of.
>
> 5. This will be subject to the final outcome of the writ petition."

30. These averments have been incorporated by the petitioner by way of amendment. However, there is no denial on the part of the respondent-bank of the averments made by the petitioner. Thus, in light of the judgment passed by the Chhattisgarh High Court, the respondent-bank can keep the secured assets in its own custody or in the custody of any person authorised or appointed by it or through the present management with a condition that such person having possession shall take

care of the property in custody protecting the rights of the petitioners till such right is transferred in accordance with law. Thus, the said observations made by Chhattisgarh High Court in the case of *M/s City Mall Vikash Pvt. Ltd.* (supra), the respondent-bank can take over the management of the company.

31. Learned counsel for the petitioner has also argued that the application under Section 14 of the Act of 2002 is also not maintainable in view of the fact that the possession of the secured assets is taken by the Municipal Corporation, Jabalpur and the same is handed over on Supurdginama to the petitioner and even otherwise the lease of the said premises has also expired. To this argument, learned counsel for the respondents argues that the petitioner has created mortgage on the secured financial assets of Rs.1417 lakh and they have admitted that after alleged attachment of the property by Jabalpur Municipal Corporation on 01/03/2013, the custody of the said property was handed over to the petitioner. This fact was not disclosed by the Corporation in the letter dated 01/03/2013. From perusal of Annexure-P/12, it reveals that the said notice has been issued for taking possession of the premises on the ground that the petitioner has failed to deposit the property tax. Thereafter the letter (Annexure-P/12) has been filed by the petitioner which shows that the possession of the property has been taken and has been given to the petitioner in Supurdginama. Thus, these documents clearly show that the possession of the property was taken by the Jabalpur Municipal Corporation and given on Supurdginama to the petitioner.

32. Resultantly, in light of the aforesaid discussion, the said writ petition is allowed. The impugned orders dated 30/11/2016 and 23/03/2017 passed by respondent No.3 are hereby set aside. However, the Bank is at liberty to file a fresh application under Section 14 of the Act of 2002 before respondent No. 3.

Petition allowed

I.L.R. [2018] M.P. 483
WRIT PETITION

Before Mr. Justice Vijay Kumar Shukla

W.P. No. 13975/2016 (Jabalpur) decided on 5 December, 2017

RAMESH PATEL MADHPURA …Petitioner
Vs.
STATE OF M.P. & ors. …Respondents

***Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rules 3, 4, 7 & 8 – Election Petition – Summary Dismissal* – Held – Election Tribunal can only dismiss the election petition summarily under Rule 8 of Rules of 1995 when the Election Petition is filed without compliance of Rule 3, 4 and Rule 7 and not otherwise – Petition cannot be dismissed summarily on merits without framing issues on disputed**

questions of facts, recording of evidence and affording opportunity of hearing to the parties – In the present case, Petition was dismissed on general allegations that provisions of Rule 3, 4 and 7 of the Rules of 1995 were not complied with but there was no specific findings as to in what manner these rules were not complied – Petition was dismissed on merit without conducting trial by framing issues and recording evidence summarily holding that allegations made in petition does not constitute corrupt practice – Further held – A sacrosanct duty is cast on the Election Tribunal to try and adjudicate election petitions like a trial of a suit – Election Petition cannot be decided in a cavalier manner by adopting casual approach – Order unsustainable and is quashed – Respondent directed to decide the petition in accordance with law – Writ Petition allowed.

(Paras 7, 9, 10, 12 & 15)

पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता) नियम, म.प्र. 1995, नियम 3, 4, 7 व 8 – निर्वाचन याचिका – संक्षिप्त खारिजी – अभिनिर्धारित – निर्वाचन अधिकरण, 1995 के नियमों के नियम 8 के अंतर्गत निर्वाचन याचिका को केवल तब खारिज कर सकता है जब निर्वाचन याचिका को नियम 3, 4 या नियम 7 का अनुपालन किये बिना प्रस्तुत किया गया हो अन्यथा नहीं – याचिका को तथ्यों के विवादित प्रश्नों पर विवाद्यक विरचित किये बिना, साक्ष्य अभिलिखित किये बिना और पक्षकारों को सुनवाई का अवसर प्रदान किये बिना, गुणदोषों पर संक्षिप्त रूप से खारिज नहीं किया जा सकता – वर्तमान प्रकरण में, याचिका को सामान्य अभिकथनों पर खारिज कर दिया गया था कि 1995 के नियमों के नियम 3, 4 व 7 के उपबंधों का अनुपालन नहीं किया गया था, परंतु किस ढंग से इन नियमों का अनुपालन नहीं किया गया था इस बारे में कोई विनिर्दिष्ट निष्कर्ष नहीं था – याचिका को विवाद्यक विरचित कर एवं साक्ष्य अभिलिखित कर विचारण संचालित किये बिना संक्षिप्त रूप से धारणा करते हुए कि याचिका में किये गये अभिकथन, भ्रष्ट आचरण गठित नहीं करते, गुणदोषों पर खारिज किया गया था – आगे अभिनिर्धारित – निर्वाचन अधिकरण पर यह पुनीत कर्तव्य डाला गया है कि निर्वाचन याचिकाओं का विचारण एवं न्यायनिर्णयन, एक वाद के विचारण के समान करें – निर्वाचन याचिका को आकस्मिक दृष्टिकोण अपनाकर स्वाभाविक/लापरवाह ढंग से निर्णीत नहीं किया जा सकता – आदेश कायम रखे जाने योग्य नहीं एवं अभिखंडित किया गया – प्रत्यर्थी को याचिका विधिनुसार निर्णीत करने हेतु निदेशित किया गया – रिट याचिका मंजूर।

Cases referred:

2017 (2) MPLJ 715, (2001) 2 SCC 652, 2002 (3) MPLJ 121, 1997 (ii) MPWN 3, 1991 (I) JLJ 200.

Samresh Katare, for the petitioner.
B.D. Singh, G.A. for the respondents/State.
Sanjay Kumar Patel, for the respondent No. 3.

O R D E R

VIJAY KUMAR SHUKLA, J. :- In the instant petition filed under Article 226 of the Constitution of India, an exception has been taken to the order dated 27-02-2016, passed by the Commissioner, Sagar Division, Sagar as Election Tribunal, whereby the election petition filed by the petitioner under Section 122 of M.P.Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as ' the Adhiniyam, 1993') has been dismissed summarily without framing any issue and recording the evidence.

2. The petitioner filed an election petition under the provisions of Adhiniyam 1993, challenging the election of respondent no.3, as a member of Ward No.6 of Jila Panchayat, Panna on the various grounds including corrupt practice etc.

3. The respondent no.3 filed an application/objection for dismissal of the election petition on preliminary objections. It was contended on behalf of the contesting respondent that the allegations made in the petition do not make any cause of action for trial of the election petition and the grounds are not covered under Rule 22 of M.P. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership)Rules, 1995 (hereinafter referred to as 'the Rules 1995').

4. On perusal of the order impugned passed by the respondent no.2, it is evident that the Election Tribunal has taken into consideration the merits of the case on the basis of allegations made in the petition and the objections of the respondent no.3. The Election Tribunal decided the petition on merit.

5. Learned counsel for the petitioner submitted that the order passed by the respondent no.2 is illegal, arbitrary and contrary to the provisions of Rules, 1995. It is submitted by him that the election petition can be summarily dismissed under Rule 8 of Rules,1995 on the ground of non compliance of mandatory provisions enshrined in Rules 3, 4 and 7 of Rules, 1995 and not otherwise. It is further submitted by him that the election petition cannot be dismissed in a cavalier and cryptic manner. The authority has to conduct full fledged trial and to decide the election petition after framing the issue and give opportunity to the parties to lead the evidence.

6. Combating the aforesaid submissions, learned counsel for the respondents submitted that there was objection regarding the non compliance of the provisions of Rules 3, 4 and 7 of Rules, 1995. He referred para-15 of the application. Para-15 of the objection is reproduced as under :

> ''15. यह कि प्रस्तुत याचिका में मध्य प्रदेश पंचायत (निर्वाचन अर्जी भ्रष्टाचार सदस्यता के लिये निर्हरता) के नियम 3 एवं 4 एवं 7 के आज्ञापक प्रावधानों उपबंधों का पालन नहीं किया गया है, जो निर्वाचन याचिका को खारिज कर देना। याचिकाकर्ता का उद्देश्य न्यायालय की शक्तियों का दुरूपयोग करते हुये निर्वाचन

को शून्य घोषित करने हेतु सामग्री निकालने. का, जिसकी अनुमति विधान में नहीं है इस प्रकार प्रस्तुत याचिका ग्राह्य योग्य न होने से प्रारम्भिक स्तर पर निरस्त किये जाने योग्य है।''

7. On consideration of said para-15, it is found that there was general allegation that the provisions of Rules 3, 4 and 7 of Rules 1995 were not complied with. There was no specific objection that in what manner the provisions of Rules 3, 4 and 7 of Rules 1995 were not complied with. Further, there is no consideration by the Tribunal in regard to the non compliance of the mandatory provisions of Rules 3, 4 and 7 of Rules, 1995 in the impugned order. The election petition has been dismissed on merit without conducting trial by framing issues and recording evidence.

8. The validity of the order passed by the respondent no.3 has to be examined on the anvil of the facts of the present case and the law governing the field of trial of election petition under the Adhiniyam 1993 and Rules 1995. It is condign to refer certain provisions of Rules:-

> **"3. Presentation of election petition. -** (1) An election Petition shall be presented to the specified Officer during the office hours by the person making the petition, or by a person authorised in writing in this behalf by the person making the petition.
>
> (2) Every election petition shall be accompanied by as many Copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.
>
> **4. Parties to the petition. -** Where the petitioner in addition to claiming a declaration that the election, of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected he shall join as respondents to his petition all the contesting candidates at the election.
>
> **7. Deposit of security. -** At the time of presentation of an election petition, the petitioner shall deposit with the specified officer a sum of Rs. Five Hundred as security. Where the election of more than one candidates is called in question, a separate deposit of an equivalent amount shall be required in respect of each returned candidates.
>
> **8. Procedure on receiving petition. -** If the provisions of rule 3 or rule 4 or rule 7 have not been complied with, the petition, shall be dismissed by the specified officers:

Provided that the petition shall not be dismissed under this rule without giving the petitioner an opportunity of being heard."

9. From perusal of the aforesaid rules and specially Sub-Rule 8, it is clear as noon day, if the provisions of rule 3, Rule 4 and Rule 7 have not been complied with,the election petition shall be dismissed by the Specified Officer. The said provision is further coupled with the proviso that the petition shall not be dismissed under this Rule without giving the petitioner an opportunity of being heard. In the present case, the Election Tribunal decided the election petition on merit considering the disputed questions of facts of corrupt practices and allegations of tampering in ballots etc. The election petition cannot be dismissed summarily on merit without framing issues on disputed questions of facts and recording of evidence.

10. From reading Rule 8 of Rules, it is crystal clear that the Election Tribunal can only dismiss the election petition summarily under Rule 8 of the Rules 1995 when the Election Petition is filed without compliance of rule 3, Rule 4 or Rule 7 and not otherwise.

11. There is no substance in the contention of learned counsel for the respondents that the respondent no.3 is possessed with the jurisdiction to dismiss the Election Petition if the petition was not disclosing any cause of action under the provision of code of Civil Procedure. The Election petition has to be tried strictly in accordance with the provisions of Adhiniyam 1993 and Rules 1995. There is no merit in the contention of the learned counsel for respondent no.4 that the Specified Officer has exercised his power under Rule 11 of Rules 1995 to dismiss the election petition as there was no cause of action. The Rule 11 prescribes the procedure before the Specified Officer and his powers. The Rule 11 makes a provision that every election petition shall be enquired into by the Specified Officer as nearly, as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits. Under Sub-rule 2 of Rule 11, it is provided that Specified Officer, shall have the powers which are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters:-

(a) discovery and inspection;
(b) enforcing the attendance of witnesses and requiring the deposit of their expenses;
(c) compelling the production of document;
(d) examination of witnesses on oath;
(e) reception of evidence taken on affidavit; and
(f) Issuing commission for examination of witnesses and summoning and examining suo moto (sic : motu) any person whose evidence, appears to him to be material.

12. Thus from bare reading of the Rule 11 it is clear that Rule 11 is not a substantive provision but it is a procedural provision which empowers the specified officer to try the election petition as may be as possible in accordance with the procedure of the trial of suit. Rule 11 Sub-rule 2 has further specified from clause (a) to (f) as mentioned above conferring the procedural powers to the Election Tribunal for trial of election petition. Thus the election petition under the Rules can only be dismissed summarily as mentioned under Rule 8 of Rules 1995. Where the election petition is filed without compliance of mandatory provision of Rule 3, 4 and 7 of Rules and not on any other ground. Under the scheme of the Act and the Rules, the election Tribunal is under obligation to decide election petition on merit after examining the grounds mentioned in the election petition after framing issues, recording evidence and affording opportunity to the parties of the petition except under Rule 8, the cases where election petition is filed without compliance of mandatory provisions of Rule 3, Rule 4 and Rule 7. A sacrosanct duty is cast on the Election Tribunal and Courts to try and adjudicate election petitions like a trial of a suit. The election petition can not be decided in a cavalier manner by adopting casual approach.

13. As already discussed, on perusal of the impugned order, it is found that the election petition has been dismissed in cryptic and cavalier manner without framing any issue or giving opportunity to the parties to lead evidence. This court in the case of *Omkar Vs. State of M.P. and others* 2017(2) MPLJ, 715 held that the Election Tribunal can dismiss the election petition summarily under Rule-8 of Rules, 1995 only when the election petition is filed without compliance of the provisions of Rules 3, 4 and 7 of Rules 1995 and not otherwise. It is also settled law that election petition has to be tried in the manner prescribed under Rules, 1995 and therefore, except under Rule-8 Tribunal has to frame issue, to give opportunity to the parties to lead evidence and thereafter to decide the issues of the election petition. This view is fortified by the judgment of the Apex Court in case of *Makhan Lal Bangal Vs Manas Bhunia & Ors*. (2001)2 SCC 652 wherein it has been held that in an election trial, evidence has to be adduced and issues are also to be framed. It has been held by the Supreme Court that the trial of an election petition is like a civil trial and framing of issues and recording of evidence are necessary for proper adjudication and following the said ratio, this Court has also decided the case of *Kalka Prasad Vs Ramjilal* 2002(3) MPLJ 121.

14. This Court has held in number of cases that the Election Petition has to be tried as far as possible like a trial of the Civil Suit. The Court has to frame issues, record evidence and after affording opportunity of hearing to the parties and then to adjudicate the election petition. Even in the cases of election petition claiming relief of recounting, this Court held that an order of recounting can not be passed even with the consent of the parties *Gajanand Vs Ramcharan* 1997(ii)MPWN 3 . In the case

of *Uday Singh Vs Himmat Singh* 1991 (I) JLJ 200 it is held that issue should be framed, evidence should be recorded and thereafter, issues should be decided on going through such evidence.

15. The Election Tribunal dismissed the election petition summarily on the ground that the allegation made in the petition does not constitute the corrupt practices. The said ground is not a ground under Rule 8 to dismiss the election petition summarily.

16. In view of the aforesaid enunciation of law, the impugned order passed by the respondent no.2 is unsustainable being in violation of the provisions of Rule-8 of Rules, 1995 and the law settled by this court regarding trial of an election petition under Adhiniyam, 1993 and the rules framed there under. The impugned order dated 27-02-2016 is quashed and respondent no.2 is directed to decide the election petition in accordance with law.

17. With the aforesaid directions, the writ petition is allowed.

Petition allowed

I.L.R. [2018] M.P. 489
WRIT PETITION

Before Mr. Justice Rohit Arya

W.P. No. 8741/2009 (Indore) decided on 13 December, 2017

MANORAMA SOLANKI …Petitioner

Vs.

INDORE DEVELOPMENT AUTHORITY & ors. …Respondents

Constitution – Article 226 – Allotment of Plot – Cancellation – Grounds **– Held – Plot was allotted to petitioner's husband in the year 1988 agreement was executed, entire consideration amount was deposited and finally possession was delivered – Allotment order was cancelled by the authority on the ground that party failed to pay the revised rates of plots as per the resolution passed in the year 2003 – Held – There was no rational justification as to why petitioner's husband was called upon to pay the revised premium and lease rent – Allotment of plot with concluded contract cannot be reopened after a gap of 18 years under the pretext of revised policy – Authority is stopped from raising such arbitrary demand from petitioner – Once petitioner's husband alongwith other allottees irrespective of the size of their shops, were allotted plots of different dimensions and fixed the premium and lease rent and thereafter singling out the petitioner's husband to revised premium and lease rent, is totally arbitrary and contrary to the concept of *Wednesbury* principles of reasonableness – Action of the authority shall not be discriminatory and must be in conformity with the principles of Article 14**

of Constitution – Impugned communication and subsequent actions of the authority is hereby quashed – Petition allowed.

(Paras 19, 21 & 22)

संविधान – अनुच्छेद 226 – भूखंड का आवंटन – रद्दकरण – आधार – अभिनिर्धारित – याची के पति को वर्ष 1988 में भूखंड आवंटित किया गया था, करार निष्पादित किया गया था, संपूर्ण प्रतिफल राशि जमा की गई थी एवं अंततः कब्जा परिदत्त किया गया था – प्राधिकारी द्वारा इस आधार पर आवंटन आदेश रद्द किया गया था कि पक्षकार वर्ष 2003 में पारित हुए प्रस्ताव के अनुसार भूखंड की पुनरीक्षित दरों का भुगतान करने में विफल रहा – अभिनिर्धारित – ऐसा कोई तर्कसंगत औचित्य नहीं था कि क्यों पुनरीक्षित प्रीमियम एवं पट्टा किराया का भुगतान करने के लिए याची के पति को बुलाया गया था – पुनरीक्षित नीति के बहाने के अधीन 18 वर्षों के अंतराल के पश्चात् अंतिम/समाप्त अनुबंध के साथ भूखंड के आवंटन को फिर से शुरू नहीं किया जा सकता – प्राधिकारी को याची से इस प्रकार की मनमानी मांग बढ़ाने से रोका जाता है – एक बार याची के पति को अन्य आवंटियों के साथ, उनकी दुकानों के आकार पर विचार किये बिना, विभिन्न आयामों के भूखंड आवंटित किये गये थे और प्रीमियम तथा पट्टा किराया तय किया एवं उसके बाद याची के पति को पुनरीक्षित प्रीमियम और पट्टा किराया के लिए अलग करना/चुनना, पूर्णतः वेडनेसबरी के युक्तियुक्तता के सिद्धांत की संकल्पना के विपरीत एवं पूर्णतः मनमाना है – प्राधिकारी की कार्रवाई पक्षपातपूर्ण नहीं होनी चाहिए एवं संविधान के अनुच्छेद 14 के सिद्धांतों के अनुरूप होनी चाहिए – आक्षेपित संसूचना एवं प्राधिकारी की पश्चात्वर्ती कार्रवाई एतद्द्वारा अभिखंडित – याचिका मंजूर।

Cases referred:

AIR 1962 SC 1733, (2005) 1 SCC 625, (2010) 3 SCC 274, (2014) 9 SCC 263.

A.K. Sethi assisted by *Prateek Maheshwari*, for the petitioner.
Vinita Phaye, for the respondents No. 1 & 2.
Pushyamitra Bhargava, for the respondent No. 3.

O R D E R

Rohit Arya, J. :- This writ petition under Article 226 of the Constitution of India is directed against cancellation of allotment of commercial plot No.S/92, Sector 'A" under Scheme 71, Mechanic Nagar, Indore (For short, 'the plot in question') vide order dated 08/05/2008 (Annexure P/20) by the Indore Development Authority, Indore with further direction for allotment of the plot in favour of the petitioner.

2. Facts relevant and necessary for disposal of this writ petition are to the effect that initially one Nandu Singh, husband of the petitioner (died on 30/05/2009) used to carry on business of remolding tyres in the name and style of "Laxmi Tyre Service" since the year 1956 at Rajmohalla, Indore. The Indore Development Authority (for short 'the IDA') framed a scheme No.71 for the purpose of shifting various

businessmen engaged in the business of automobiles at Rajmohalla, Indore. The IDA promised Nandu Singh and all such similarly situated persons for allotment of suitable plots under the said scheme. Plot No.92/S was allotted to Nandu Singh vide order dated 23/03/1988 having an area of 231.90 sq.mtrs., Copy of allotment order is on record as Annexure P/1. In terms of allotment letter, he had deposited an amount of Rs.10,147/- on 12/04/1988 and thereafter further amount of Rs.27,000/- at the rate of Rs.1,156/- per month upto 02/08/1990, the details of payments and copies of receipts are on record as Annexure P/2. Thereafter, an agreement was entered into between Nandu Singh and IDA vide Annexure P/3 containing the reciprocal rights and obligations of the parties. The possession of plot No.S-92 was delivered to Nandu Singh on 08/07/1988 (paragraph 5.6 of the writ petition).

3. It appears that an order dated 05/10/1990 (Annexure P/4) was served upon Nandu Singh giving him to understand that he was not entitled for the plot area of 231.90 sq.mtrs., as per his eligibility and in the alternate, he was called upon to exercise the option for plots of the areas 55 sq.mtrs., 139 sq.mtrs., and 153 sq.mtrs., and also a show cause notice why the allotment of plot in question be not cancelled.

4. Questioning the legality, validity and propriety of the aforesaid order dated 05/10/1990, Nandu Singh had filed M.P.No.1196 of 1993 and this Court by way of interim measure on 03/06/1993 restrained the IDA thereby protected the possession of the petitioner. The said writ petition was finally disposed of by this Court on 18/12/1996 (Annexure P/8). While quashing the impugned order dated 05/10/1990, this Court granted liberty to the IDA to take proper decision afresh after giving reasonable opportunity of hearing to the petitioner. The interim order dated 03/06/1993 was ordered to remain in operation till fresh decision was rendered and further liberty was granted to the petitioner to agitate the matter before the appropriate forum if the order passed by the IDA adversely affects his interest. It appears that for almost three years, no action was taken by the IDA against Nandu Singh and suddenly, on 21/09/1999, a notice (Annexure P/9) was served upon him whereunder he was given to understand that in compliance of the High Court's order (supra), the inspection was done by the Executive Engineer in his presence (Nandu Singh). He was found in possession of 53.32 sq.mtrs., and, therefore, he was held not entitled for the plot of an area of 231.90 sq.mtrs., therefore, again called upon to exercise the option as indicated above. In continuation thereof, vide communication dated 14/01/2000 (Annexure P/11), notice was issued to Nandu Singh to remain present before the Chief Executive Officer on 17/01/2000. He appeared and on 18/01/2000 (Annexure P/12) submitted a detailed reply further reiterating that the plot in question was allotted to him vide allotment order dated 23/03/1988 having an area of 231.90 sq.mtrs., with lease rent of Rs.900/- per year and the price of plot fixed at Rs.44,989/- and thereafter agreement was executed on 12/04/1988 and also delivered the possession vide order dated 08/07/1988 as well as paid the entire consideration amount. Hence, Nandu

Singh contended that he is in possession as lawful lessee having been delivered possession of the plot in question. He further submitted that his lease is neither cancelled nor the agreement is repudiated. Now at a distance of time of 11 years, the proposal for cancellation of the allotment and exercise of option for smaller plots is *ex facie* illegal and unsustainable. While justifying the allotment of the plot in question, he has also explained the nature of business being run, i.e., tyre remolding for which installation of various machines requiring larger area. As such, the offer for allotment of lesser area of the plot looking to the requirement of the business is not viable and to his grave prejudice. With the aforesaid submissions, Nandu Singh sought for recalling the communication dated 21/09/1999. Thereafter, nothing was done for two years by the IDA. The IDA vide communication dated 01/11/2002 (Annexure P/13) sought to return the money deposited by Nandu Singh pursuant to the allotment of plot in question. Nandu Singh refused to accept the amount and returned the cheque back to IDA. Thereafter, on 01/11/2003, the petitioner was called upon to deposit the revised premium purportedly pursuant to the resolution 306 dated 19/08/2003 of the Board of IDA to deposit the total premium amount to the tune of Rs.4,75,890/- by determining the first year lease rate at Rs.9,518/- with further direction that an amount of Rs.2,37,945/- be deposited within thirty days and the remaining 50% within three years in twelve annual installments alongwith 12% interest. In default of payment of the aforesaid amount within thirty days, the proposal/offer shall collapse and no further correspondence shall be entertained.

5. Nandu Singh questioned the legality, validity and propriety of the aforesaid communication dated 01/11/2003 by filing W.P.No.168 of 2004 and this Court on 20/02/2006 disposed of the same, the relevant and operative portion whereof reads as under:

> "3. From perusal of the order Annexure P/13 it appears that after filing up the blanks the demand has been raised. Further, compliance of the earlier order passed by this court has not been made. In Annexure P/9 also it is mentioned that inspection has been made which has been seriously disputed by the petitioner vide Annexure P/10. It is also not clear that how the respondent had come to the conclusion that petitioner is eligible only for 53.32 sp.mts of land and in what circumstances agreement (Annexure P/3) was executed for 231.90 sp. Mts.
>
> 4. In view of this respondents are directed to issue fresh notice to the petitioner clarifying the entitlement of the petitioner and on the basis of his entitlement, if such, notice is given then the petitioner, respondent shall be at liberty to raise the demand by passing a reasoned order. Till then no recovery shall be made on the basis of notice Annexure P/14."

6. Thereafter, nothing was communicated and suddenly, a notice was issued on 14/07/2006 (Annexure P/16) reiterating the same demand and justification for revised premium and the annual lease rent whereunder it was stated the spot inspection of the place of business was conducted in the presence of Nandu Singh on 09/06/1999 and it was found that he was in occupation of the shop admeasuring 55.32 sq.mtrs., Thereafter, spot inspection was conducted on 23/12/2004 and 16/03/2005 and he was not found to be running the business. Hence, he is not entitled for allotment of plot in question. Moreover, he is entitled for plot of an area of 54 sq.mtrs., Since, he has insisted for an area of 231.90 sq.mtrs., of plot No.S/92, therefore, the Board vide resolution No.306 dated 19/08/2003 has taken a policy decision that different rates for different areas of plots, viz., for plots admeasuring 54 sq.mtrs., at the rate of Rs.1,346/- per sq.mtr., and in excess thereof, as per guidelines of the year 2003-04, at the rate of Rs.2,500/- the premium and the lease rent was required to be paid in terms of communication No.13388 dated 04/11/2003 within thirty days but you failed to deposit the said amount. Accordingly, the allotment order has been cancelled.

It is further mentioned that under scheme No.71 with the concurrence of Westzone Automobile Workers Association in the year 1988, the plots were allotted at the rate of Rs.194/- per sq.mtr., But, now under scheme No.71, sector 'A' for mechanic works, the rates as per guidelines in the year 2006-07 are fixed at Rs.4,000/- sq.mtr., and through tender/auction, the plot was allotted at the rate of Rs.5,611/- per sq.mtr., whereas you are demanding the allotment at the rate of Rs.194/- sq.mtr., Now as per the directives of the State Government, no property can be allotted below the guidelines prescribed. Under these circumstances and pursuant to the order passed by the High Court on 20/02/2006, you may submit your reply in the context of revival of your allotment within fifteen days.

7. Nandu Singh filed a detailed reply and submitted that neither there is any criteria or justification to assert that he was not entitled for allotment of the plot in question for the reason that in Rajmohalla, he was doing business in an area of 55 sq.mtrs., as many persons engaged in automobile business in Rajmohalla area having shops of 10 x 10 sq.ft., 10 x 15 sq.feet and 8 x 10 sq.feet have been allotted plots of the area of 1800 sq., feet, 4000 sq.feet and 1600 sq.feet, respectively. The details of names of such persons have also been mentioned. As such, the alleged self-styled standard of the IDA is only to deny the plot already allotted to him for doing his business. That apart, it is also submitted that the shop in Rajmohalla where he ran the business was of the ownership of one Chameli Bai widow of Narayanprasad. In eviction proceedings, the petitioner was required to vacate the same and thereafter, he shifted his business to 6-A, Sirpur – Dhar Road, Indore. This fact was apprised to the authorities during survey on 16/03/2005 and the same was recorded in the note sheet as regards his new place of business.

It is further reiterated that the plot in question was allotted to him on 23/03/1988 at the rate of Rs.194/- per sq.mtr.,and thereafter agreement was entered into between him and the IDA. He has deposited the entire amount and possession of the plot in question was delivered to him in the year 1988. As such, the allotment is final. Under such circumstances, at a distance of about 15 years, the premium and the lease rent cannot be revised as indicated in the communication dated 01/11/2003 (Annexure P/14) and reiterated on 14/07/2006 (Annexure P/16). The action is wholly arbitrary and illegal.

8. It appears that IDA did not respond to the representation of Nandu Singh on merits and reiterated its stand as indicated above while cancelling the allotment by the impugned order dated 08/05/2008 which is the impugned order in this writ petition.

9. Thereafter, on 27/12/2008, an advertisement was issued in the daily news paper, Dainik Bhaskar calling for tender in respect of plot in question. On 06/04/2009, the tender of respondent No.3 was accepted by the IDA.

10. This writ petition has been filed on 25/11/2009 challenging the cancellation order of the plot in question and the impugned advertisement with further direction to allot the plot in favour of the petitioner and to grant such other reliefs this Court deems fit and proper.

11. This Court on 09/12/2009 while issuing notice on admission has granted the interim relief to the following effect:

> "Until further orders status quo with respect to possession of petitioner on land shall be maintained."

12. The respondents/IDA filed counter-affidavit *inter alia* contending that after allotment of the plot in question to Nandu Singh for mechanical business as a measure of resettlement under policy decision to help facilitate traffic movement in Rajmohalla area, complaints were received that businessmen running business in small shops have been allotted large areas and, therefore, spot inspection was conducted and by resolution No.37 dated 15/02/1990, a committee was constituted and upon submission of survey report, the earlier allotments were cancelled and the businessmen earlier doing business in Rajmohalla area have been classified into three categories and accordingly fixed the area for allotment of plots. Vide communication No.351/B/ Sampad/90 dated 05/10/1990, the petitioner was directed to exercise the option for an area, viz., 55 sq.mtrs., 139 sq. mtrs., and 153 sq.mtrs., Thereafter, a show cause notice was issued on 23/03/1993 and the same offer was reiterated on 05/05/1993. Thereafter, two writ petitions were filed by the businessmen of Rajmohalla area, viz., M.P.No.165 of 1991 including the petitioner M.P.No.1196/1993. Pursuant to the order passed by the High Court on 18/12/1996, survey was conducted on 17/12/2004 at Rajmohalla area and Nandu Singh was not found doing business. Accordingly,

panchnama was prepared on 17/12/2004. Thereafter, another extensive survey was conducted on 18/03/2005 and it was found that the petitioner's husband and other allottees had made an incorrect statement as regards their business at Rajmohalla area. Thereafter, some businessmen had filed W.P.No.1218 of 2004 and the same was disposed of by this Court on 13/04/2007 and in compliance of the directions thereof, allottees were again afforded opportunity of hearing before the committee and upon close scrutiny of their claims, the committee had submitted the report with a recommendation that 43 allottees; including Nandu Singh were not found entitled for allotment of plots under scheme No.71 (Annexure R/5) and the said recommendation was placed before the Board which in its meeting on 07/03/2008 vide resolution No.41, accepted the report (Annexure R/7). Pursuant whereof vide communication No.4441 dt.08/05/2008, Nandu Singh was informed of cancellation of the allotment. Thereafter, tenders were invited for allotment of the plot in question. After acceptance of bid vide resolution 3042 dated 28/05/2009, the plot in question was allotted to the respondent No.3 (Annexure R/8). Respondent No.3 was informed for delivery of the possession on 03/11/2009 (Annexure R/9) and accordingly, respondent No.3 took possession on 12/11/2009 (Annexure R/10).

13. Respondent No.3 has also filed counter-affidavit and supported the stand of the IDA.

14. In the rejoinder filed by the petitioner to the counter affidavits filed by the respondents, it has been contended that the plot in question was allotted to her husband in the year 1988, agreement was entered into between her husband and IDA, deposited the entire consideration and also delivered the possession to her husband on 08/07/1988 and he continues to be in possession. It is denied that possession of the plot was taken from him at any point of time. There is no evidence, muchless, documentary evidence in that behalf on record. The alleged document of taking possession is prepared in the office to justify the claim of respondent No.3. It is also submitted that no survey was ever conducted in the years 2004 and 2005 by the IDA in Rajmohalla area in relation to the existence of running business by various allottees. Besides, in the alleged survey conducted on 16/03/2005, the authority of the IDA itself has made an endorsement in Annexure R/5 that the shop is closed for the last 2/3 years and shifted his business to 6-A, Sirpur-Dhar Road, Indore. It is also submitted that now at a distance of more than 21 years, the contention of IDA that the petitioner was not eligible for allotment is an action smacks of arbitrariness and suffers from vice of patent illegality.

15. Heard.

16. Admittedly, Nandu Singh a proprietor of firm "Laxmi Tyre Service" 27/1, North Rajmohalla, Indore was allotted the plot in question, i.e., S/92 sector "A" scheme No.71 vide letter dated 23/03/1988 admeasuring 231.90 sq., mtr., for a consideration

of Rs.44,089/- with lease rent per year Rs.900/- followed by an agreement dated 05/04/1988 pursuant whereto entire consideration amount was paid in terms of allotment letter. The details whereon are on record as Annexures P/1 to P/3 and possession was delivered to him on 08/07/1988 (as pleaded in paragraph 5.6 of the writ petition) and there is no denial of the aforesaid fact in the counter-affidavit filed by the IDA.

17. The communication dated 05/10/1990 alleging ineligibility of Nandu Singh for the plot in question and calling him as to why the said plot be not cancelled with further stipulation to exercise option for a plot of size 55 sq.mtrs., 139 sq.mtrs, and 153 sq.mtrs., with the corresponding prices per sq. mtr., was subject matter of challenge in M.P.No.1196 of 1993 (supra). This Court vide order dated 18/12/1996 has quashed the aforesaid communication in the light of Division Bench order dated 24/11/1992 passed in W.P.No.110 of 1991 with liberty to the concerning respondent to give proper notice to the petitioner and take a proper decision afresh after giving reasonable opportunity of hearing in that regard. Further, the *ad interim* writ issued by this Court on 03/06/1993 as regards maintenance of the *status quo* in relation to the plot in question was kept operative till fresh decision as was permitted to be taken by the respondents. The petitioner therein was also set at liberty to resort to the appropriate remedy in case orders passed by the respondents turns out to be adverse before the appropriate forum.

18. For almost three years thereafter, no action was taken, however, vide communication dated 21/09/1999 (Annexure P/9), the IDA reiterated the contents of communication dated 05/10/1990 (Annexure P/4) with further allegation that during spot inspection conducted by the Executive Engineer, V.K.Gangwal in the presence of Nandu Singh, he was found in possession of 53.32 sq.mtrs., in Rajmohalla area and, therefore, in purported compliance of the High Court's order (supra), he was called upon to avail the opportunity of hearing. Petitioner has specifically denied in his reply, Annexure P/10 that ever any spot inspection was conducted by the so called officer in his presence as neither any notice was given to him nor was given an opportunity to remain present there. As such, the allegation as indicated in the impugned communication was factually incorrect. It appears that thereafter, again there was exchange of correspondence between IDA and Nandu Singh for few years and on 01/11/2002 (Annexure P/13), the IDA sought to refund the amount deposited by Nandu Singh alleging that he was not eligible for allotment of plot in question even without cancelling the allotment and taking the possession from him, however, he returned back the amount to IDA. After a gap one year, in terms of resolution No.306 dated 19/08/2003 (Annexure P/14) called upon Nandu Singh again to deposit the revised rates of premium and lease rent as detailed in the communication to the tune of Rs.4,75,890/- and first year lease rent, Rs.9,518/- with various other stipulations contained thereunder.

19. There is nothing on record to suggest the criteria, if any adopted by the IDA for initial allotment of plots under scheme No.71 to the persons engaged in automobile business in Rajmohalla area as a measure of resettlement to justify the declaration of ineligibility of the plot in question after its allotment,acceptance of the premium, lease rent and payment of full consideration as well as delivery of possession in favour of Nandu Singh. The aforesaid aspect assumes importance in the teeth of the fact that number of persons having their business in Rajmohalla area in small shops of 10 x 10 sq.feet, 10 x 15 and 8 x 10 sq.feet were allotted 2500 sq.feet, 1800 sq. feet, 4000 sq.fet, 1600 sq.feet as sated (sic : stated) with particulars of details by Nandu Singh in his reply dated 18/08/2006 to the notice dated 14/07/2006 and there is no denial of the aforesaid fact in the subsequent communications by the IDA. There is also no rational or justification calling upon Nandu Singh to submit a revised premium and lease rent as indicated in the communication dated 01/11/2003 reopening the concluded contract in the year 1988 with allotment and deposit of premium and lease rent followed by delivery of possession which is not permissible in law. This Court while testing the legality, validity and propriety of the aforesaid communication at the instance of Nandu Singh in W.P.No.168 of 2004 (supra) has rightly observed that there was nothing on record to hold Nandu Singh eligible only for 55 sq.mtrs.

20. The purported compliance of the Court order in its communication dated 14/07/2006 (Annexure P./16), the IDA has reiterated the same facts which were stated in the communications dated 05/10/1990 (Annexure P/4), 21/09/1999 (Annexure P/9) and 01/11/2003 (Annexure P/14) but has not complied with the directions issued by this Court to disclose the criteria to ascertain entitlement of plot in question under scheme No.71 in favour of Nandu Singh. There is no such policy on record providing for criteria that only that much of the area of plot shall be allotted to a person if he has business premises of the same area or in determined proportion/rates, in Rajmohalla for doing his business under scheme No.71. There is also no explanation as to on what basis the allotments were made to various businessmen as specifically stated with instances in the reply dated 18/08/2006 (Annexure P/17) filed by Nandu Singh as regards allotment of large area than they have at Rajmohalla area.

21. That apart, there is also no justification as to why the petitioner/Nandu Singh was called upon to pay the revised premium and lease rent as per the Government policy that too at a distance of time of 18 years (from the year 1988 to 2006). Mere resolution of IDA in that behalf is not in consonance with the concept of principles of reasonableness in the case of Nandu Singh/petitioner. Once, he has been allotted the plot in question, agreement was executed, paid the premium and lease rent and the possession was also delivered, in the opinion of this Court, Nandu Singh could not have been called upon to pay the revised premium and lease rent for want of any authority of law applying Wednesbury principles of reasonableness. As such, IDA is held to be estopped from raising such arbitrary demand from Nandu Singh/petitioner.

22. The IDA; an authority constituted under the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 definitely may lay down the pricing policy for allotment of plots. Nevertheless, it is expected to act fairly, reasonably and upon relevant considerations either while determining the price of the plot or revising the price subject to conditions stipulated in the instrument, be it an agreement to sell or allotment of plots. It cannot play fast and loose with its authority while subjecting the allottees to revised rates of plots. It cannot act discriminatory. It is a well recognized policy underlying the tax law that the State has a wide discretion in selecting the persons or objects and not others. It is only when within the range of its selection that law operates unequally and not qualifying the reasonable test of classification; it may become vulnerable being violative of Article 14 of the Constitution of India (AIR 1962 SC 1733, *East India Tobacco Company Vs. State of A.P.*, referred to**).** Therefore, once Nandu Singh alogwith other allottees irrespective of the size of the shops ran business in Rajmohalla area were allotted plots of different dimensions and fixed the premium and lease rent, singling out Nandu Singh to revised premium and lease rent at a distance of time of 18 years, Article 14 of the Constitution of India frawns upon such action as the same is arbitrary, unreasonable and contrary to the concept of *Wednesbury* principles of reasonableness.

23. The principle underlying legitimate expectation which is based on Article 14 and the rule of fairness has been restated by the Hon'ble Supreme Court in *Bannari Amman Sugars Ltd. v. CTO*, (2005) 1 SCC 625. It was observed in paras 9:

> *"9. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualised than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any*

discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness."

(emphasis supplied)"

24. The Hon'ble Supreme Court in the case of *State of Bihar and others vs. Kalyanpur Cement Limited, (2010) 3 SCC 274,* in paras 79 of its judgment has observed as under :-

"79. We are also unable to accept the submission that the decisions dated 6-1-2001 and 5-3-2001 had been taken due to the change in the national policy. This was sought to be justified by Dr. Dhavan on the basis of the Conferences of Chief Ministers/ Finance Ministers. It is settled law as noticed by Bhagwati, J. in Motilal Padampat Sugar Mills Co. Ltd. v. State of UP, (1979) 2 SCC 409 : 1979 SCC (Tax) 144 that the Government cannot claim to be exempt from the liability to carry out the promise on some indefinite and undisclosed ground of necessity or expediency. The Government is required to place before the Court the entire material on account of which it claims to be exempt from liability. Thereafter, it would be for the Court to decide whether those facts and circumstances are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from liability. It is only when the Court is satisfied that the Court would decline to enforce the promise against the Government. However, the burden would be upon the Government to show that it would be inequitable to hold the Government bound by the promise. The Court would insist a highly rigorous standard of proof in the discharge of this burden.

(Emphasis supplied)

25. The Hon'ble Apex Court while addressing on Fundamental Policy of the Indian Law in the case of *Oil and Natural Gas Corporation Limited vs. Western GECO International Limited, (2014) 9 SCC 263* has laid emphasis upon the safeguards for observance of principle of natural justice by Courts, Tribunals or quashi (sic : quasi) judicial authorities and judicial approach exercising powers that affect rights or obligation of the parties and observance of fair, reasonable and objectivity in decision making process on touchstone of Wednesbury principle and in para 39 of the judgment has observed as under:-

"39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision

which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle, Associated Provincial Picture House Ltd. v. Wednesbury Corpn., (1948) 1 KB 223: (1947) 2 AII ER 680 (CA) of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes whereever the same are available."

26. Further, this Court cannot lose sight of the fact that it is well evident from paragraph 4 of the counter-affidavit in the context of disentitlement of Nand Singh for allotment of plot is justified on the basis of survey conducted on 17/12/2004 in purported compliance of this Court's order dated 18/12/1996 rendered in W.P.No.1196/1993 (after 08 years) alleging that the petitioner's husband was not found to be running his business in Rajmohalla area despite, the IDA having recorded a fact in its proceedings that in the preceding 2/3 years, Nandu Singh has shifted his business premises from Rajmohalla area to 6-A, Sirpur – Dhar Road (Annexure R/4 – page 101) as a result this Court finds cancellation of the allotment by the impugned communication dated 08/05/2008 (Annexure P/20) cannot be sustained in the eyes of law, subsequent action of the IDA inviting applications for allotment again of the plot in question, acceptance of bid of respondent No.3 of the plot in question are held to be of no consequence. Respondent No.3 is always free to take recourse to law against IDA for recovery of the amount paid, if any. It is considered necessary to observe that delivery of possession of the plot in question was given to Nandu Singh in the year 1988, there is no evidence on record that the possession was either handed over by Nandu Singh or the possession was taken by IDA at any point of time, till now. Under such circumstances, the assertion of IDA and respondent No.3 based on Annexures R/9 and R/10 (notice to respondent No.3 for possession and delivery of possession respectively) are mere paper formalities. They do not bear the signature of Nandu Singh as an acknowledgment of delivery of possession. Accordingly, Nandu Singh is found to be in continuous possession till his death on 30/05/2009 and thereafter, his widow, Manorama Solanki.

27. The upshot of the discussion results in success of the writ petition. Accordingly, the impugned communication dated 08/05/2008 (Annexure P/20) and the subsequent action of IDA are hereby quashed. No order as to costs.

Petition allowed

I.L.R. [2018] M.P. 501
WRIT PETITION

Before Mr. Justice J.K. Maheshwari

W.P. No. 5178/2011 (Jabalpur) decided on 10 January, 2018

MEHARUNNISA (SMT.) …Petitioner
Vs.
SMT. KAMRUNNISA THROUGH
NEXT FRIEND DAUGHTER KU. RUKHSAR BEGUM …Respondent

***Civil Procedure Code (5 of 1908), Order 32, Rule 4, 5 & 15 – Suit through next friend – Application for – Inquiry* – Suit filed by plaintiff through next friend, daughter – Writ Petition against dismissal of application under Order 32 Rule 15 filed by petitioner/defendant – Held – Order 32 Rule 1 to 14 except Rule 2A as applicable to the case of minor shall also apply to the person of unsound mind, where a suit is instituted by next friend – Qualification prescribed is that person must have attained the age of majority to act as next friend of minor or his guardian provided that the interest of such person is not adverse to that of the minor and the next friend should not be the defendant of a suit – In case, a minor has a guardian appointed or declared by competent authority, then such guardian may proceed in a suit and he shall be the next friend of the minor or of a person of unsound mind unless the Court considers to change the same recording reasons for appointing another person – In the present case, Ms. Rukhsar is daughter of plaintiff Kamrunnisa, and as per certificate of Medical Board, Kamrunnisa is found to be of unsound mind to the extent of 55%, daughter is not having adverse interest in property of mother and being major, she been declared as next friend to institute the suit and to proceed in the matter, appears to be justified – As per Order 32 Rule 1 CPC, it is not mandatory that such appointment must be on an application prior to institution of suit – Further held – It is not incumbent on the Court to hold an enquiry as required by the later part of Rule 15, but it would apply when the power is required to be exercised by Court – Appointment of next friend was in accordance with law – Writ Petition dismissed.**

(Para 4 & 6)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 32, नियम 4, 5 व 15 – वादमित्र के द्वारा वाद – हेतु आवेदन – जांच – वादी द्वारा वादमित्र पुत्री के द्वारा वाद प्रस्तुत किया गया – याची/प्रतिवादी द्वारा आदेश 32 नियम 15 के अंतर्गत प्रस्तुत किये गये आवेदन की खारिजी के विरूद्ध रिट याचिका – अभिनिर्धारित – आदेश 32 नियम 1 से 14, नियम 2ए को छोड़कर, जैसा कि अवयस्क के प्रकरण में लागू होता है, विकृत चित्त के व्यक्ति पर भी लागू हेागा जहां वादमित्र द्वारा वाद संस्थित किया गया है – विहित अर्हता यह है कि एक व्यक्ति

किसी अवयस्क के वादमित्र या उसके संरक्षक के रूप में कार्य करने के लिए, प्राप्तवय आयु का हो परंतु यह कि उक्त व्यक्ति का हित, अवयस्क के हित के प्रतिकूल न हो और वादमित्र वाद का प्रतिवादी नहीं होना चाहिए – ऐसे प्रकरण में जहां सक्षम प्राधिकारी द्वारा अवयस्क का संरक्षक नियुक्त या घोषित किया गया हो, तब उक्त संरक्षक वाद में कार्यवाही कर सकता है और वह अवयस्क या विकृत चित्त व्यक्ति का वादमित्र होगा जब तक कि न्यायालय किसी अन्य व्यक्ति की नियुक्ति हेतु, कारण अभिलिखित कर उसे बदलने पर विचार न करे – वर्तमान प्रकरण में सुश्री रूखसार, वादी कमरून्निसा की पुत्री है और चिकित्सा बोर्ड के प्रमाणपत्र के अनुसार, कमरून्निसा 55% की सीमा तक विकृत चित्त की पायी गई है, मां की संपत्ति में पुत्री का प्रतिकूल हित नहीं और प्राप्तवय होने के नाते उसे वाद संस्थित करने और मामले में कार्यवाही करने के लिए वादमित्र घोषित किया जाना न्यायोचित प्रतीत होता है – आदेश 32 नियम 1 सि.प्र.सं. के अनुसार यह आज्ञापक नहीं कि ऐसी नियुक्ति, वाद संस्थित किये जाने के पूर्व, आवेदन पर होनी चाहिए – आगे अभिनिर्धारित – यह न्यायालय के लिए आवश्यक नहीं कि जांच कराये जैसा कि नियम 15 के पश्चात्वर्ती भाग द्वारा अपेक्षित है, परंतु यह तब लागू होगा जब शक्ति का प्रयोग न्यायालय द्वारा किया जाना अपेक्षित है – वादमित्र की नियुक्ति विधि के अनुसार थी – रिट याचिका खारिज।

Cases referred:

AIR 1969 AP 362, Civil Appeal No. 22969/2017 decided on 08.01.2018 (SC).

Ashok Lalwani, for the petitioner.
None appears on behalf of the respondent, though served.

O R D E R

J.K. Maheshwari, J. :- Being aggrieved by the order dated 4.3.2011 allowing the application filed by the plaintiff under Order 32 Rule 4 of CPC declaring Ku. Rukhsar Begum, daughter of the plaintiff Smt. Kamrunnisa as next friend and rejecting the application of the defendant under Order 32 Rule 15 of the CPC, this petition has been preferred by the defendant under Article 227 of the Constitution of India.

2. On perusal of the order impugned, it reveals that while allowing the application under Order 32 Rule 4 of CPC, trial Court observed that Ms. Rukhsar Begum is the daughter of plaintiff Smt. Kamrunnisa being the nearest relative and the natural guardian. She is major and of sound mind and good health. Her interest cannot be said to be adverse to the plaintiff, therefore, Ms. Rukhsar Begum be treated the next friend of plaintiff Kamrunnisa and granted permission to sue on her behalf. The application under Order 32 Rule 15 of CPC of defendant has been rejected on the ground that as per the report of the Medical Board, Kamrunnisa is found to be 55% of unsoundness of mind and the denfendant made an attempt to grab the property of the plaintiff. It is observed that due to granting permission to Ms. Rukhsar Begum to sue on behalf of plaintiff as next friend, the prayer made by the defendant/petitioner, is hereby rejected.

3. Shri Ashok Lalwani, learned counsel for the petitioner has strenuously urged that alongwith the suit, an application for appointment of next friend ought to be filed which has not been filed by Ms. Rukhsar Begum, therefore, institution of the suit must be taken off the file allowing the objection filed by the defendant. In addition it is said, when the objection has been raised by the defendant to appoint Ms. Rukhsar Begum as next friend alleging that the plaintiff Kamrunnisa is not of unsound mind, an enquiry must be conducted as contemplated under Order 32 Rule 15 CPC, however, trial Court committed an error to reject such application without any reason or rhyme. Therefore, the order appointing next friend may be set aside allowing the application filed by the defendant/petitioner. In support of the said contention, reliance has been placed on the judgment of Andhra Pradesh High Court in the case of *Duvvuri Papi Reddi and others vs. Duvvuri Rami Reddi* AIR 1969 AP 362.

4. After hearing learned counsel for the petitioner at length and to advert the arguments advanced by him, the scope of Order 32 of CPC is required to be seen. Order 32 prescribes the procedure in a suit by or against minors and persons of unsound mind. Rule 1 thereof contemplates that such suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. The intention of the legislature is clear that the suit itself is required to be instituted by the person who shall be called as next friend of the minor. In case, the institution of the suit has not been made by the next friend, under Rule 2, the defendant may apply that the plaint may be taken off the file, and the cost may be payable by the pleader or by the person by whom the suit was presented. On such objection, the Court may pass an order noticing that person in accordance with law. As per Rule 15, it is apparent that Rule 1 to 14 except Rule 2-A shall apply to the person of unsound mind adjudged before or during pendency of the suit and it shall also apply to the persons who, though not so adjudged are found by the Court on enquiry to be incapable by reason of any mental infirmity to protect the interest of such person. As per Rule 3, guardian may be appointed in case of the minor defendant, by the Court, while Rule 4 prescribes the specifications and qualifications of any person who can be appointed as next friend or the guardian in the suit either of the plaintiff or defendant. On perusal the qualification prescribed is that the person must have attained the age of majority to act as next friend of a minor or his guardian provided that the interest of such person is not adverse to that of the minor and the next friend should not be the defendant of a suit. In case a minor has a guardian appointed or declared by the competent authority then such guardian may proceed in a suit and he shall be the next friend of the minor or of a person of unsound mind unless the Court considers to change the same recording the reason for appointing another person. In the said context, looking to the reasoning assigned by the Court that Ms. Rukhsar is the daughter of plaintiff Kamrunnisa and as per the certificate of the Medical Board, she is found to be unsound of mind to the extent of 55%, the daughter is not having adverse

interest in the property of the mother and being major, has been declared as next friend to institute the suit and to proceed in the matter, appears just. The objection raised by learned counsel for the petitioner is that such appointment must be on an application prior to institution of the suit, do not appear to be justifiable looking to the intention of the legislature reflected by the language of Order 32 Rule 1 of the CPC.

5. Recently, the Apex Court in Civil Appeal No.22969 of 2017 *Nagaiah and another vs. Smt. Chowdamma (dead) by Lrs. and another* decided on 8.1.2018 has considered the scope of Order 32 of CPC and observed as under :-

> " A bare reading of Order XXXII, Rule 1 of the Code makes it amply clear that every suit by a minor shall be instituted in his name by a person who in such suit shall be called the "next friend" of the minor. The next friend need not necessarily be a duly appointed guardian as specified under Sub-Section (b) of Section 4 of Hindu Guardianship Act. "Next friend" acts for the benefit of the "minor" or other person who is unable to look after his or her own interests or manage his or her own law suit (person not *sui juris*) without being a regularly appointed guardian as per Hindu Guardianship Act. He acts as an officer of the Court, especially appearing to look after the interests of a minor or a disabled person whom he represents in a particular matter. The aforesaid provision authorises filing of the suit on behalf of the minor by a next friend. If a suit by minor is instituted without the next friend, the plaint would be taken off the file as per Rule 2 of Order XXXII of the Code. Order XXXII Rules 1 and 3 of the Code together make a distinction between a next friend and a guardian *ad litem*; i.e., (a) where the suit is filed on behalf of a minor and (b) where the suit is filed against a minor. In case, where the suit is filed on behalf of the minor, no permission or leave of the Court is necessary for the next friend to institute the suit, whereas if the suit is filed against a minor, it is obligatory for the plaintiff to get the appropriate guardian *ad litem* appointed by the Court for such minor. A "guardian *ad litem"* is a special guardian appointed by a court in which a particular litigation is pending to represent a minor/infant, etc. in that particular litigation and the status of guardian *ad litem* exists in that specific litigation in which appointment occurs. Various High Courts have also adopted this view. The Madras High Court in *Kaliammal, minor by Guardian, Patta Goundan v. Ramaswamy Goundan,* AIR 1949 Mad. 859 observed that there is no need of sanction of the Court for a next friend to sue, if he is not incapacitated. This was also the view taken by the High Court of Allahabad in *K. Kumar v. Onkar Nath,* AIR 1972 All. 81."

In para-8 of the said judgment, in the later part, the Court held as under :-

> "In the matter on hand, the suit was filed on behalf of the minor and therefore the next friend was competent to represent the minor. Further, admittedly no prejudice was caused to plaintiff no. 2."

Thereafter, in para-16, the scope of Order 32 has been carved out which is as under :-

> "To sum up, instituting a suit on behalf of minor by a next friend or to represent a minor defendant in the suit by a guardian *ad litem* is a time-tested procedure which is in place to protect the interests of the minor in civil litigation. The only practical difference between a "next friend" and a "guardian *ad litem*" is that the next friend is a person who represents a minor who commences a lawsuit; guardian *ad litem* is a person appointed by the Court to represent a minor who has been a defendant in the suit. Before a minor commences suit, a conscious decision is made concerning the deserving adult (next friend) through whom the suit will be instituted. The guardian *ad litem* is appointed by Court and whereas the next friend is not. The next friend and the guardian *ad litem* possess similar powers and responsibilities. Both are subject to control by the Court and may be removed by the Court if the best interest of the minor so requires."

In view of the said judgment, the argument advanced by the learned counsel for the petitioner that without application at the time of institution of the suit and passing an order adjudging the issue to appoint next friend, the suit cannot be proceeded, is devoid of any substance. Therefore, the order of appointment of next friend of Ms. Rukhsar to the plaintiff Kamrunnisa is in accordance with law.

6. Reverting to the next argument regarding holding an enquiry as contemplated in Rule 15 and to allow the application filed by the defendant, spirit of Rule 15 of Order 32 is required to be seen. On perusal of the said Rule, it is apparent that Rule 1 to 14 except Rule 2A as applicable to the case of minor shall also apply to the person of unsound mind. However, it is made clear in the Rule that Rule 1 to 14 except Rule 2-A shall, so far as may be apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind, therefore, the first part of the said Rule apply in a case where suit is instituted by next friend or sought to be instituted during pendency of the suit and the Court on such application, declare a person as next friend on behalf of the plaintiff being of unsound mind. The later part of the Rule 15 shall apply in case the plaintiff, though not so adjudged, found by the Court on

enquiry to be incapable, on account of any mental infirmity, however, to protect their interest, a next friend may be appointed. Therefore, the contemplation of the enquiry as specified in Rule 15 is in a case where the court during pendency of the suit is of the opinion that the person is of unsound mind while in the previous part of Rule 15 following the procedure as contemplated under Rule 1 to 14 except Rule 2-A of Order 32, the person may be adjudged as next friend before or during suit. Therefore, it is not incumbent on the Court to hold an enquiry as required by the later part of Rule 15, but it would apply when the power is required to be exercised by the Court. In view of the foregoing discussion, the argument advanced by learned counsel for the petitioner with respect to rejection of his application by the trial Court without enquiry is of no substance. In view of the foregoing, I respectfully disagree with the view taken by the Andhra Pradesh High Court in the case of *Duvvuri Papi Reddi* (supra).

7. As per discussion made above and looking to the facts, it can safely be observed that in the present case Ms. Rukhsar Begum is the daughter of plaintiff Kamrunnisa who instituted a suit specifically pleading in para 1 of the plaint that the plaintiff is of unsound mind. Therefore, plaintiff Kamrunnisa was adjudged of unsound mind before, and the suit was filed on her behalf by Ms. Rukhsar Begum, who was also declared as next friend being the daughter and natural guardian and not having any adverse interest of her with the mother by the Court. In addition, the facts of this case can be taken note, by which the plaintiff has challenged a Will executed by the father of Kamrunnisa, in favour of the defendant, regarding the suit property, though its registered sale deed is in the name of Kamrunnisa herself. However, when the property was in the name of Kamrunnisa, though purchased as a guardian by the father, he cannot execute a Will of the said property after attaining the age of majority by Kamrunnisa in favour of defendant or otherwise without seeking permission from the Court. Therefore, in such a case, objection raised by the defendant filing an application under Order 32 Rule 15 of CPC has rightly been rejected by the trial Court.

8. In view of the foregoing discussion, in my considered opinion, the order passed by the trial Court is in conformity to the procedure as prescribed under Order 32 Rule 1, 4 and 15 of the CPC rightly declaring Ku. Rukhsar Begum as next friend of the plaintiff Smt. Kamrunnisa, and rightly rejected the application filed by the defendant under Order 32 Rule 15 of CPC. Therefore, the order impugned passed by the trial Court is hereby upheld. The observation came above regarding the facts of the case is only for the purpose of deciding the application under Order 32 Rule 4 and Order 32 Rule 15 of CPC, and it is having nothing to do with the merits of the case. In the facts of the case, parties are directed to bear their own costs.

Order accordingly.

I.L.R. [2018] M.P. 507
MISCELLANEOUS PETITION
Before Mr. Justice Vivek Rusia
M.P. No. 38/2017 (Indore) decided on 23 November, 2017

JYOTI (SMT.) …Petitioner
Vs.
JAINARAYAN …Respondent

***Civil Procedure Code (5 of 1908), Order 41 Rule 27 – Additional Evidence – Hearing of* – Petitioner filed an application under Order 41 Rule 27 CPC and prayed to be disposed of as an preliminary issue – Application was rejected – Challenge to – Held – In the instant case, trial Court has not committed any error while passing the order that application under Order 41 Rule 27 CPC would be decided at the time of final hearing of the appeal – Another application filed under Order 1 Rule 8 CPC by the petitioner which was rejected by the Trial Court is hereby allowed as no objection was forwarded by the counsel for respondents – Petition partly allowed.**

(Para 4 & 9)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 27 – अतिरिक्त साक्ष्य – की सुनवाई – याची ने आदेश 41 नियम 27 सि.प्र.सं. के अंतर्गत एक आवेदन प्रस्तुत किया और एक प्रारंभिक विवाद्यक के रूप में निपटाने की प्रार्थना की – आवेदन खारिज किया गया था – को चुनौती – अभिनिर्धारित – वर्तमान प्रकरण में, विचारण न्यायालय ने आदेश पारित करने में कोई त्रुटि कारित नहीं की कि आदेश 41 नियम 27 सि.प्र.सं. के अंतर्गत आवेदन का विनिश्चय, अपील की अंतिम सुनवाई के समय किया जायेगा – याची द्वारा आदेश 1 नियम 8 सि.प्र.सं. के अंतर्गत अन्य आवेदन प्रस्तुत किया गया जिसे विचारण न्यायालय द्वारा नामंजूर किया गया था, एतद्द्वारा मंजूर किया जाता है क्योंकि प्रत्यर्थीगण के अधिवक्ता द्वारा कोई आक्षेप प्रस्तुत नहीं किया गया था – याचिका अंशतः मंजूर।

Cases referred:

2016 (6) Supreme 138, (2012) 8 SCC 148, (2008) 12 SCC 739, (2009) 2 SCC 654.

Amit Raj, for the petitioner.

V.K. Jain, Sr. Counsel for the respondent No. 1.

A.S. Purohit, for the respondent Nos. 2 to 5.

O R D E R

Vivek Rusia, J. :- The petitioner has filed present writ petition being aggrieved by the order dated 18/09/2017 passed by the Additional District Judge, Neemuch, by which, three applications filed by her have been rejected.

2. The facts of the case are as under :

Jainarayan and Gopal are real brothers and their father Thanmal died in the year 1970. The dispute arose in respect of the plot no. 44, Jawahar Nagar, Neemuch. Then Jainarayan filed the suit against Gopal seeking declaration that he be declared owner of the property and the defendant be directed to hand over the possession. Vide judgment and decree dated 14/03/2016, the suit has been decreed in favour of the Jainarayan and the defendant Gopal was directed to give vacant possession and also directed to pay *mesne profit* @ Rs. 500/- per month.

3. Being aggrieved by the aforesaid judgment and decree, legal heirs of the defendant Gopal filed first appeal before the District Judge, Neemuch. In the said appeal, the present petitioner who is also one of the legal heir of defendant Gopal has been arrayed as respondent. During pendency of the said appeal, the present petitioner filed an application under Order 41 Rule 1 of C.P.C, 94(e), Order 14 Rule 2 of C.P.C. read with the application under Order 7 Rule 11 of C.P.C. She has also filed another application under Order 1 Rule 8 of C.P.C for her transposition from respondent to appellant. She has also filed another application under Order 41 Rule 27 of C.P.C for seeking permission to file certain additional evidence on record. Learned Appellate Court vide order dated 18/09/2017 has rejected the application under Order 7 Rule 11 and directed that the remaining applications would be decided at the time of final hearing, hence the present petition before this Court.

4. At the very outset, Shri V.K. Jain, learned Sr. counsel appearing for respondent no. 1 submits that he is having no objection if the application under Order 1 Rule 8 of C.P.C is allowed and the present petitioner may be transposed as appellant. Accordingly, the application under Order 1 Rule 8 of C.P.C is allowed. The Appellate Court is directed to permit the present petitioner to become appellant no. 5 in the appeal.

5. The petitioner is also aggrieved by the impugned order by which the trial Court has directed that the application under Order 41 Rule 27 of C.P.C would be decided at the time of final argument. Contention of the learned counsel for the petitioner is that learned Appellate Court first ought to have decide the application under Order 41 Rule 27 of C.P.C before final argument. If the petitioner is required to give any additional evidence oral or documentary, she will get full opportunity. In support of his contention, he has placed reliance upon the judgment delivered in the case of *Union of India Vs. K.V. Lakshman and others reported* in 2016(6) Supreme 138.

6. In reply, Shri V.K. Jain, learned Sr. Counsel for the appellant submits that all the pending applications are liable to be decided at the time of final hearing of the appeal and if the Court find that the additional evidence are required to be taken on record, then the Court may proceed further under Order 41 Rule 28 and 29 of C.P.C and if the Court found that if the applications are liable to be rejected, then the Court may reject the application and proceed further to decide the appeal finally. At the time of final hearing, the Court may consider the application whether it is liable to be allowed or not ?. Therefore, the Appellate Court has not committed any error of law while passing the impugned order. In support of his contention, he has placed reliance over the judgment delivered in the case of *Union of India Vs. Ibrahim Uddin and another reported* in (2012) 8 SCC 148 and *Eastern Equipment and sales limited Vs. Ing, Yash Kumar Khanna reported* in (2008) 12 SCC 739 and (2009) 2 SCC 654 reported in *Muzaffar Ali Vs. Dasaram.*

7. In the case of *Union of India Vs. K.V. Lakshman and others* (supra), the first appeal was filed before the High Court in which the appellant filed an application under Order 41 Rule 27 of C.P.C and sought permission to adduce additional evidence in support of his case. Learned Single Judge has dismissed the appeal *in limine* and upheld the judgment and decree of the trial Court. Learned Single Judge has also dismissed the application filed by the appellant under Order 41 Rule 27 of C.P.C, hence the SLP was filed before the Apex Court. The Apex Court has set aside the judgment passed by the High Court and remanded the case to decide afresh. Instead of remanding the case to the High Court, looking to the facts and circumstances of the case, the Apex Court has remanded the suit to Civil Court with the finding that the High Court ought to have allowed the application filed under Order 41 Rule 27 of C.P.C, therefore, in this case also, appeal as well as the application under Order 41 Rule 27 of the C.P.C were decided simultaneously.

8. In the case of *Eastern Equipment and Sales Limited* (supra), the SLP was filed against the order allowing the application under Order 41 Rule 27 of C.P.C independently, therefore, the Apex Court has set aside the order of the High Court remanding the case to the High Court to decide the first appeal along with the application under Order 41 Rule 27 of C.PC.

9. In the case of *Muzaffar Ali vs Dasaram* (supra), the Supreme Court has remanded the case with the direction to the High Court to decide the appeal as well as the application under Order 41 Rule 27 of C.P.C. together on merit, therefore, in the present case, learned trial Court has not committed any error while passing the order that the application under Order 41 Rule 27 of C.P.C would be decided alongwith the first appeal.

In view of the aforesaid, present petition is partly allowed.

C c as per rules.

Petition partly allowed

I.L.R. [2018] M.P. 510
REVIEW PETITION

Before Mr. Justice Sujoy Paul

R.P. No. 655/2017 (Jabalpur) decided on 17 November, 2017

DINESH KUMAR AGRAWAL …Petitioner

Vs.

VYAS KUMAR AGRAWAL & ors. …Respondents

Arbitration and Conciliation Act (26 of 1996), Section 11(6) – Order and Review **– Held – Functions performed by the Chief Justice or his designate u/S 11 is a judicial function and thus orders passed must be treated as a judicial orders – Orders passed u/S 11(6) of the Act is an outcome of a judicial function and therefore it cannot be said that said order is administrative in nature and the same is not passed by a Court – Further held – The expression 'review' is used in two distinct senses namely, (i) a procedural review which is either inherent or implied in a Court or Tribunal for the purpose of setting aside a palpable erroneous order passed under a misapprehension and (ii) a review on merits when the error sought to be corrected is one of law and is apparent on face of the record – Review on merits can be sought for only when there exist an enabling provision expressly or impliedly – In cases, where power of procedural review is invoked, court cannot enter into merits of the order passed – In the instant case, the error pointed out are not related to procedural part but are related to merits of the case and since no express or implied provision for review exists under the Act of 1996, the present review petition cannot be entertained – Review petition dismissed.**

(Paras 17, 20, 23, 24, 25 & 26)

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) – आदेश एवं पुनर्विलोकन – अभिनिर्धारित – धारा 11 के अंतर्गत मुख्य न्यायमूर्ति या उसके द्वारा पदाभिहित किसी व्यक्ति द्वारा संपादित किये गये कार्य, न्यायिक कार्य हैं एवं इस प्रकार पारित आदेशों को न्यायिक आदेशों के रूप में माना जाना चाहिए – धारा 11(6) के अंतर्गत पारित आदेश न्यायिक कार्य का एक परिणाम हैं एवं इसलिए यह नहीं कहा जा सकता कि उक्त आदेश प्रशासनिक प्रकृति का है एवं उसे न्यायालय द्वारा पारित नहीं किया गया है – आगे अभिनिर्धारित – अभिव्यक्ति 'पुनर्विलोकन' को दो भिन्न अर्थों में प्रयुक्त किया गया है अर्थात्, (i) प्रक्रियात्मक पुनर्विलोकन जो कि दुराशंका के अधीन पारित किये गये स्पष्ट रूप से त्रुटिपूर्ण आदेश को अपास्त किये जाने के प्रयोजन से न्यायालय या अधिकरण में या तो अंतर्निहित है या विवक्षित है एवं (ii) गुणदोषों पर पुनर्विलोकन जब वह त्रुटि जिसका सुधार चाहा गया है वह एक विधि है एवं अभिलेख पर प्रकट होती है – गुणदोषों के आधार पर पुनर्विलोकन केवल तभी चाहा जा सकता है जब एक सामर्थ्यकारी उपबंध अभिव्यक्त रूप से या विवक्षित रूप से मौजूद हो – उन प्रकरणों में, जहाँ प्रक्रियात्मक

पुनर्विलोकन की शक्ति का अवलंब लिया गया है, न्यायालय पारित आदेश के गुणदोषों पर नहीं जा सकता – वर्तमान प्रकरण में, निकाली गई त्रुटि प्रक्रियात्मक भाग से संबंधित नहीं है बल्कि प्रकरण के गुणदोषों से संबंधित है एवं चूंकि 1996 के अधिनियम के अंतर्गत पुनर्विलोकन हेतु कोई अभिव्यक्त या विवक्षित उपबंध मौजूद नहीं है, वर्तमान पुनर्विलोकन याचिका ग्रहण नहीं की जा सकती – पुनर्विलोकन याचिका खारिज।

Cases referred:

AIR 1963 SC 1909, (2005) 13 SCC 777, 2017 (1) MPLJ 46, AIR 1970 SC 1273, 1980 (Suppl.) SCC 420, (2007) 10 SCC 742, 2010 SCC online Allahabad 2309, 2012 SCC Online Delhi 5443, (1999) 4 SCC 396, 2012 (2) JLJ 321, (2000) 7 SCC 201, (2005) 8 SCC 618.

A.K. Jain, for the petitioner.
Sanjay Agrawal, for the respondent No. 1.
Ashok Lalwani, for the respondents No. 2 to 15.

O R D E R

Sujoy Paul, J. :- In this petition, the petitioner has prayed to review an order dated 7.9.2017 passed in A.C. No. 29/2015. This court by said order directed to appoint an arbitrator to resolve the dispute between the parties.

2. Shri A.K. Jain learned counsel for the petitioner submits that certain crucial documents were not placed before the court in A.C. No. 29/2015. He placed reliance on an order sheet dated 28.8.2009 wherein the counsel for the arbitrator appeared before the court below and gave an undertaking that during the pendency of the case, the arbitrator will not proceed further. He also relied on an order dated 12.1.2008 wherein the court below opined that even if the original record of arbitrator is summoned , it will not cause any adverse situation for the other side.

3. Shri Jain, Iearned counsel for the petitioner submits that other side filed an application under Section 14 of the Arbitration and Conciliation Act, 1996 (in short, 'the arbitration Act) assailing the appointment of the arbitrator. The said arbitrator, in the fitness of things, gave an undertaking that till decision is taken on validity of his appointment, he will not proceed further.

4. The petitioner contended that any reasonable person will behave in the same manner when his appointment itself is called in question. Learned counsel for the petitioner during the course of arguments contended that although these order sheets were not placed in the main case and no reply was filed by the present petitioner, the fact remains that the arbitrator was not at fault in not proceeding with and concluding the arbitration proceedings. By taking this Court to paragraph 13 of the order passed on 7.9.2017, it is submitted that sole reason for holding that mandate of arbitrator stood terminated is the fact that the arbitrator did not proceed with the matter from 2009 to 2015, the year when

A.C.No.29/2015 was filed. On the strength of this factual backdrop, the first contention of the petitioner is that the aforesaid releavant facts were not placed before this Court which resulted into passing of order dated 7.9.2017.

5. It is further urged that in A.C.No.29/2015, the other side filed I.A.No.5446/2015 wherein it was categorically pleaded that no written agreement exists between the parties. By taking this Court to Section 7 of the Arbitration Act, it is argued that existence of arbitration agreement and arbitration clause is *sine qua non* for exercising the power under Section 11(6) of the Act Putting it differently, it is argued that in absence of any arbitration agreement/clause, this Court had no occasion to appoint an arbitrator. The third contention of Shri Jain, learned counsel for the petitioner is that the power of review can be exercised in two eventualities, firstly, the review can be prayed for seeking correction of an error apparent on the face of the record. Such review must be treated to be a review on merits. For this kind of review, there must be a specific enabling provision and in absence thereof power of review cannot be exercised. The second kind of review is in the realm of procedural review. He submits that the present case falls within the four corners of procedural review and for this purpose, powers are impliedly available to the court. In support of this contention, Shri Jain, learned counsel for the petitioner relied on AIR 1963 SC 1909 [*Shivdeo Singh Vs. State of Punjab*], (2005) 13 SCC 777 [*Birla Cotton Spinning and Weaving Mills Ltd. And another Vs. Kapra Mazdoor Ekta Union*]. He also placed relience on the judgment of the Supreme Court reported in 2017 (1) MPLJ 46 [*Vimal Kishor Shah Vs. Jayesh Dinesh Shah*].

6. Learned counsel for the petitioner submits that whether or not, a reply is filed, the fact remains that basic ingredients on which power under Section 11(6) can be exercised, were not available. This argument is based on twin reasons as noticed, firstly that an arbitrator was not at fault in not proceeding with the dispute and secondly, there exists no arbitration agreement between the parties on the strength of which, arbitrator can be appointed.

7. *Per contra*, Shri Sanjay Agrawal, learned counsel for the respondent no.1 opposed the said contention by placing reliance on the order sheets dated 14.9.2008 and 29.11.2008 of the arbitrator. It is argued that the present petitioner appeared before the arbitrator, participated in the proceedings, prayed for time and in turn, filed his written statement. It is urged that at no point of time, the present petitioner raised any objection before the arbitrator that no arbitration agreement exists and therefore, arbitration proceedings cannot be continued.

8. Shri Agrawal argued that interestingly, while filing an application under Order 7 Rule 11 of the Code of Civil Procedure by the other side, he did not raise any objection about non existence of any arbitration clause etc. Shri Agrawal submits that in absence of filing any reply in main case A.C. No. 29/2015, the present petitioner cannot be permitted to say that there existed no arbitration agreement/clause. He submits that in addition to written agreement, Section 7 recognizes other mode of

agreements. As per Section 7(4)(b) and (c), the arbitration agreement can be inferred if ingredients mentioned therein are satisfied. He submits that all these aspects are beyond the scope of judicial review in a review petition. In support of the said contention, Shri Agrawal relied on AIR 1970 SC 1273 *[Patel Narshi Thakershi and othes Vs. Shri Pradyuman Singhji Arjunsingji]* 1980 (suppl.) SCC 420 *[Grindlays Bank Ltd. Vs. CGIT],* (2007) 10 SCC 742 *[State of Arunachal Pradesh Vs. Damani Construction Co.]*, 2010 SCC online Allahabad 2309, *[Ms. Shivare Builders Vs. E.E.]*, 2012 SCC Online Delhi 5443 *[Awasthi Construction Co. Vs. Govt. of NCT of Delhi and another]* and (1999) 4 SCC 396 *Budhia Swain an Ors. Vs. Gopinath Deb and Others.*

9. Shri Ashok Lalwani, learned counsel while appearing for remaining respondents contended that **(i)** by order dated 7.9.2017, this Court decided two writ petitions, one miscellaneous appeal and one application filed under the Arbitration Act. The petitioner has filed a review only against order passed in A.C.No.29/2015. Unless the review is filed in all the four cases, the present review is not maintainable. **(ii)** The petitioner has not raised any objection regarding non-existence of arbitration agreement before the arbitrator and the court below. He did not file any reply in the main case filed under Section 11(6) of the Act. Thus, in the light of 2012(2) JLJ 321 [*Ramjilal Kulshrestha Vs. State of M.P. And Ors.*], he cannot be permitted to raise an issue which was not pleaded in the main case. **(iii)** Shri Lalwani submits that power exercised by the Chief Justice or his designate under Section 11(6) may be treated as judicial power but the said authorities namely; the Chief Justice or his designate cannot be treated as "court" or "tribunal". He relied on the statutory definition of the "court" mentioned in the Arbitration Act. He placed reliance on various judgments of Supreme Court to content that the review on merits is tenable only when there exists a specific or implied power of review with the court concerned. Since the present proceedings are not arising out of any order of court or tribunal. The question of exercising power of review does not arise.

10. The next contention of Shri Lalwani is that the grievance of other side is relating to for a period prior to filing of section 14 proceedings. In other words, inaction of arbitrator before the commencement of proceeding under Section 14 was the main reason for filing an application under Section 11(6) of the Arbitration Act. It is submitted that in the present case, no error apparent on the face of the record exists which requires review.

11. The contention of learned counsel for the respondents is that this Court has merely directed for appointment of arbitrator. This will facilitate the parties to resolve their disputes amicably. This will not cause any prejudice to other side. In absence of establishing the prejudice, this petition is even otherwise not maintainable.

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

13. I have heard counsel for the parties and perused the record.

14. At the outset, I deem it proper to deal with the objection/argument of Shri Lawani that the order passed under section 11(6) of the Arbitration Act by Chief Justice or his designate, cannot be treated to be an order passed by the "Court" or "Tribunal". Since this objection goes to the root of the matter, I deem it apposite to decide it as a first issue.

15. A question cropped-up before the Supreme Court, namely, what is the nature or function of Chief Justice or his designate under section 11 of the Act. Pertinently, a three judge bench in *Konkan Railway Corporation Ltd. & …* vs *Rani Construction Pvt. Ltd* – (2000) 7 SCC-201 had taken the view that it is purely an administrative function. It is further held that it is neither judicial nor quasi judicial function performed by the Chief Justice or his nominee. The correctness of said view was considered by seven judge bench of Supreme Court in *S.B.P. & Company Vs. Patel Engineering Ltd. And another*-(2005) 8 SCC- 618. Shri Lalwani, during the course of argument relied on para-142 of this judgment. I am afraid that Shri Lalwani relied on minority view of Thakker J. In the majority view, the Apex Court held as under :-

> "43. In this context, it has also to be noticed that there is an ocean of difference between an institution which has no judicial functions and an authority or person who is already exercising judicial power in his capacity as a judicial authority. Therefore, only a judge of the Supreme Court or a judge of the High Court could respectively be equated with the Chief Justice of India or the Chief Justice of the High Court while exercising power under Section 11(6) of the Act as designated by the Chief Justice. A non-judicial body or institution cannot be equated with a Judge of the High Court or a Judge of the Supreme Court and it has to be held that the designation contemplated by Section 11(6) of the Act is not a designation to an institution that is incompetent to perform judicial functions. Under our dispensation a non-judicial authority cannot exercise judicial powers.
>
> 44. Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application under Section 11(6) of the Act is adjudicatory, then obviously, the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach to the Supreme Court under Article 136 of the Constitution.
>
> *(emphasis supplied)*

16. The relevant conclusions drawn in para-47 reads as under :-

> "(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.
>
> (ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court.
>
> (iii) In case of designation of a judge of the High Court or of the Supreme Court, the power that is exercised by the designated, judge would be that of the Chief Justice as conferred by the statute.
>
> (iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the judge designate.
>
> (vii) Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court.
>
> (xii) The decision in *Konkan Railway Corporation Ltd. And Anr. v. Rani Construction Pvt. Ltd.* is overruled.

17. A conjoint reading of para-43,44 and 47 makes it clear like noon day that the functions performed by the Chief Justice or his designate under section 11 is a judicial function. In exercise of such function, the orders passed must be treated as judicial orders. In other words a combine reading of these paragraphs makes it clear that the order passed in section 11(6) of the Act is outcome of a judicial function and, therefore, it cannot be said that the said order is administrative in nature. Once the order passed under section 11 is held to be based on judicial function, it cannot be said that the said order is not passed by a court. Thus, I am unable to persuade myself with the contention that the order passed under section 11(6) cannot be treated as an order passed by the

court. Thus, this objection being devoid of substance, is rejected. Since, Shri Lalwani, Learned counsel for the respondents has relied on seven judge bench judgment of the Supreme Court in the case of *S.B.P. & Company Vs. Patel Engineering Ltd. And another,* 2005 (8) SCC 618, I am not inclined to deal with the other judgments of lessor strength cited by Shri Lalwani on the similar point.

18. In *Kapra Mazdoor Ekta Union Vs. Birla Cotton SPG and Weaving Mills Ltd.*-(2005) 13 SCC-777, it was held thus :-

> "19. Applying these principles it is apparent that where at Court or quasi judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the Court or the quasi judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the Court or quasi judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits a procedural illegality which goes to the root of the matter and invalidates the proceedings itself, and consequently the order passed therein. Cases where a decision is rendered by the Court or quasi judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the Court or the quasi judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein, inasmuch the opposite party concerned was not heard for no fault of his, or that the matter was heard and decided on a date other than the one fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be re-heard in accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding. In *Grindlays Banks Ltd. Vs. Central Government Industrial Tribunal and others* (supra), it was held that once it is established that the respondents were prevented

from appearing at the hearing due to sufficient cause, it followed that the matter must be re-heard and decided again."

(Emphasis supplied)

19. Shri Sanjay Agarwal, relied on the judgment of Supreme Court in the case of *Grindlays Bank Ltd. Vs. Central Govt. Industrial Tribunal and others*-1980 (supp) SCC-420 and judgment of Allahabad High Court in *Shivhare Builders Vs. Executive Engineer, Provincial Division, P.W.D. and ors*-2010 SCC online All 2309.

20. Interestingly, the common string in these judgments cited by Shri Jain and Shri Agarwal is that review on merits is impermissible unless there exists an enabling provision in the statute or the said power is impliedly available to the court. However, the procedural review is dealt with in a different manner. In *Grindlay Bank* (supra), it was held that the expression "review" is used in two distinct senses, namely, (i) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (ii) a review on merits when the error sought to be corrected is one of law and is apparent on the fact of the record. As noticed, in the said judgments cited by both the parties, the principle laid down are common which are based on the judgment of *Grindlays Bank* (supra).

21. In view of said principle, it is clear that if error is relating to procedural review, the power of court can be treated to be inherent. It is important to note here that in *Damani Construction* (supra), the Apex Court did not deal with the aspect of procedural review. Thus, the judgments of *Damani Construction and Budhia Swain* (supra) are of no help to the other side.

22. The interesting conundrum on the basis of aforesaid factual backdrop is whether the present review can be treated as a procedural review ? This aspect requires serious consideration.

23. In the present case, this is not in dispute that the annexures filed with the review petition were not filed by the parties in the main case. The review petitioner has not pointed out any manifest procedural error while passing the order under review. The whole argument of Shri A.K. Jain, learned counsel for the petitioner is based on para 19 of the judgment of the Supreme Court in the case of *Kapra Mazdoor Ekta Union* (supra). A plain reading of the said para makes it crystal clear that procedural review and review on merits are two different facets. Review on merits is permissible only if court or quasi judicial authority is vested with the power of review by expressed provision or by necessary implication.

24. In the present case, the argument of Shri Jain is that the petitioner is not claiming review on merits and, therefore, question of existence of enabling provision for review by express provision or by necessary implication does not arise, It is condign to see whether the grounds raised by the petitioner fall within the ambit of "procedural review".

25. In the case of *Kapra Mazdoor Ekta Union* (supra), in no uncertain terms it was made clear that power of procedural review may be invoked in a case where party seeking review does not have to substantiate the ground that the order suffers from any error apparent on the face of the record. He is also not required to justify a review on the basis of other grounds. In such review, petitioner must establish that procedure adopted by the Court suffered from an illegality which vitiated the proceeding or invalidated the order. The Apex Court gave illustrations in this regard in para 19. Further more, it was clarified that where there are procedural flaws like the other side was not put to notice, matter was heard before the date for which notice was issued etc, review is permissible *without going into the merits of the order passed.* The Words of Caution were inserted in para 19 that such order is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which itself was vitiated by an error of procedure which went to the root of the matter. If the petitioner's case is tested on the anvil of this judgment of *Kapra Mazdoor Ekta Union* (supra), it will be clear that the error pointed out are not related to the procedural part but the same are related to the merits of the case.

26. In view of principles laid down in *Kapra Mazdoor Ekta Union* (supra), this court is unable to hold that the review prayed for is in the nature of procedural review. Since no express or implied provision for review exists under Arbitration and Conciliation Act, 1996, the present review petition cannot be entertained. Consequently, review petition is **dismissed**.

Petition dismissed.

I.L.R. [2018] M.P. 518
APPELLATE CIVIL

Before Mr. Justice Ashok Kumar Joshi

S.A. No. 431/2016 (Gwalior) decided on 18 July, 2017

VIRENDRA PRAJAPATI …Appellant

Vs.

SHRI K.B. AGARWAL …Respondent

***A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(a), 13(1) & 13(2)* – Appeal against concurrent decree of eviction u/S 12(1)(a) against Appellant/defendant (tenant) – Held – Where the rate of rent and quantum of arrears of rent are disputed, whole of section 13(1) of the Act becomes inoperative till provisional fixation of monthly rent is done by the Court u/S 13(2) of the Act – Further held – U/S 13(2) of the Act, Court is duty bound only to fix provisional rent and in the instant case, Trial Court fixed the provisional rent but as per the observation made by lower appellate court, tenant has not deposited the rent in accordance with the provisions of Section 13(1) of the Act – It is evident that appellant/tenant has not complied with**

provisions of Section 13(1) of the Act as he was not regularly depositing the rent on monthly basis – Records further shows that tenant has not even made any application before the Courts below for condonation of defaults committed by him in depositing the rent – Courts below rightly decreed the suit of plaintiff u/S 12(1)(a) of the Act – Second Appeal dismissed.

(Para 8 & 9)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए), 13(1) व 13(2) – अपीलार्थी/प्रतिवादी (किरायेदार) के विरूद्ध धारा 12(1)(ए) के अंतर्गत बेदखली की समवर्ती डिक्री के विरूद्ध अपील – अभिनिर्धारित – जहाँ किराये की दर एवं किराये की बकाया राशि की मात्रा विवादित है, अधिनियम की धारा 13(2) के अंतर्गत न्यायालय द्वारा मासिक किराये का अनंतिम नियतन होने तक, अधिनियम की धारा 13(1) संपूर्ण रूप से अप्रवर्तनीय हो जाती है – आगे अभिनिर्धारित – अधिनियम की धारा 13(2) के अंतर्गत, न्यायालय केवल अनंतिम किराया नियत करने हेतु कर्तव्यबद्ध है एवं वर्तमान प्रकरण में, विचारण न्यायालय ने अनंतिम किराया नियत किया परंतु निचले अपीली न्यायालय द्वारा किये गये संप्रेक्षण के अनुसार, किरायेदार ने अधिनियम की धारा 13(1) के उपबंधों के अनुसार किराया जमा नहीं किया – यह सुस्पष्ट है कि अपीलार्थी/किरायेदार ने अधिनियम की धारा 13(1) के उपबंधों का अनुपालन नहीं किया क्योंकि वह नियमित रूप से मासिक आधार पर किराया जमा नहीं कर रहा था – अभिलेख आगे यह दर्शाते हैं कि किरायेदार ने किराया जमा करने में उसके द्वारा कारित व्यतिक्रम की माफी हेतु, निचले न्यायालयों के समक्ष कोई आवेदन तक प्रस्तुत नहीं किया है – निचले न्यायालयों ने अधिनियम की धारा 12(1)(ए) के अंतर्गत वादी का वाद उचित रूप से डिक्रीत किया – द्वितीय अपील खारिज।

***B. Civil Procedure Code (5 of 1908), Section 100 – Second Appeal – Maintainability* – Appeal does not involve substantial question of law and is not maintainable nor the judgments of the courts below suffers from any illegality on merits and even otherwise, it has become infructuous as plaintiff/ landlord has obtained the possession of the suit accommodation in execution proceedings – Appeal dismissed in *limine*.**

(Para 11 & 12)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – पोषणीयता – अपील विधि का कोई सारवान प्रश्न अंतर्ग्रस्त नहीं करती एवं पोषणीय नहीं है, न ही निचले न्यायालयों के निर्णय गुणदोषों पर किसी अवैधता से ग्रसित है एवं अन्यथा भी, वह निष्फल बन चुके हैं क्योंकि वादी/भू–स्वामी ने निष्पादन कार्यवाहियों में वाद स्थान का कब्जा अभिप्राप्त कर लिया है – अपील आरंभ में ही खारिज।

Case referred:

(2000) 4 SCC 380.

Chetan Kanungo, for the appellant.
None, for the respondent

O R D E R

Ashok Kumar Joshi, J. :- This second appeal under Section 100 of C.P.C. has been preferred by the appellant-defendant against decree for eviction granted by the learned courts below, in concurrent manner on the ground under section 12(1)(a) of the M.P. Accommodation Control Act, 1961 (for short "the Act").

2. Short facts, relevant for the purpose of this appeal, are that the plaintiff/respondent instituted a suit on grounds under Sections 12(1)(a), 12(1)(c) and 12(1)(d) of the Act for eviction of defendant/present appellant from suit accommodation (shop) and recovery of arrears of rent as well as mesne profits mainly with the allegations that the defendant had obtained the suit shop from the plaintiff @ Rs.600 p.m. on rent. It is averred in the plaint that the above said rent was paid up to the period of 31/8/2011 but thereafter same was due and not paid from 1/9/2011 till 30/11/2014 despite raising demand at several times and receiving registered notice sent by the plaintiff on 10/9/2014 prior to filing of the suit. In view of the above facts, the vacant possession of the suit shop with arrears of rent and mesne profit was prayed for by passing a decree for eviction against the defendant-tenant.

3. The defendant/tenant contested the suit. In his written statement it was contended by the defendant that the rate of rent was Rs. 250 per month which was paid at the same rate up to August, 2014 but the plaintiff did not issue any receipt to him. It is further submitted that the suit accommodation was not required *bona fide* but was instituted with an alternative motive of enhancement of rent.

4. On pleading of the parties, issues were framed by the learned trial court and after recording the evidence and hearing the parties, the learned trial court decreed the suit on all the above mentioned grounds in favour of the plaintiff vide impugned judgment and decree dated 21/1/2016 in C.S.No.53-A/16.

5. Aggrieved by the aforesaid, the defendant preferred Civil Appeal No.17-A/2016, which was partly allowed by the first lower appellate court to the extent of granting decree for eviction on ground enumerated under Section 12(1)(a) of the Act with further reliefs of arrears of rent and mense profit. In this manner, the present appeal has been preferred by the appellant/defendant.

6. Learned counsel for the appellant contended that the findings recorded by both the lowers court are against the settled principles of law. He placed reliance on the decision of the Apex Court in the case of *Jamnalal & others Vs. Radheshyam reported* in (2000) 4 SCC 380 to contend that the rate of rent and quantum of arrears of rent were disputed and the learned trial court vide its interim order dated 12/2/2015 fixed the provisional rent rather deciding quantum of arrears of rent and therefore in that view of the matter, the provisions of Section 13(1) of the Act shall not come into play and the decree passed by both the lower courts under Section 12(1)(a) of the Act being not sustainable in law deserves to be set aside.

7. After hearing the arguments of the counsel for the appellant at length and perusing the findings recorded by both the lower courts, it has come on record that the defendant-appellant Virendra Prajapati who examined himself as DW-1 clearly admitted in para 10 of his cross-examination that vide receipt Ex.P/8 he had paid rent to the plaintiff-landlord up to 31/8/2011 at the rate of Rs. 600/- per month. Moreover, the said document also bears the signature of the appellant-tenant. Admittedly, the defendant failed to produce any receipt regarding payment of rent after above mentioned period though plaintiff was giving receipts with regard to receiving of rent. Hence, both the courts have not erred in passing eviction decree and for arrears of rent from 1/9/2011.

8. It has been clearly held by the Apex Court in the case of *Jamnalal & others* (supra) that where the rate of rent and the quantum of arrears of rent are disputed, whole of Section 13(1) of the Act becomes inoperative till provisional fixation of monthly rent by the court under sub-section (2) of Section 13 of the Act, which will govern compliance of Section 13(1) of the Act. Thus, it is clear that under Section 13(2) of the Act the court is duty bound only to fix provisionally rent and the learned trial court vide its interim order dated 12/2/2015 fixed the provisional rent at the rate of Rs. 600/- per month though the trial court also directed the tenant to deposit the arrears of rent from August, 2014. It appears that actually the citation relied upon by the learned counsel for the appellant does not support his contention as it has been observed by the Apex Court in last lines of para No. 15 as follows:-

> "Therefore, the obligation to pay/deposit the rent for the second and the third period aforementioned, referred to in Section 13(1), namely, to deposit rent for the period subsequent to the notice of demand and for the period in which the suit/proceedings will be pending (that is future rent) does not become inoperative for the simple reason that Section 13(2) does not contemplate provisional determination of amount of rent payable by the tenant. As resolution of that category of dispute does not fall under Section 13(2) the tenant has to take the consequence of non payment/deposit of rents for the said periods. If he fails in his plea that no arrears are due and the Court finds that the arrears of rent for the period in question were not paid, it has to pass an order of eviction against the tenant as no provision of Section 13 of the Act protects him."

9. Both the lower courts have recorded findings that the tenant has not complied with the provisions of Section 13(1) of the Act. The lower appellate court has clearly observed in para 41 that the tenant has not deposited the rent in accordance with the interim order passed by the trial court on 12/2/2015 and in accordance with the provision of Section 13(1) of the Act. Thus, the observation made by the lower appellate court in last lines of para 39 appears to be based on typing error only because in preceding lines of para 39, the lower appellate court has specifically mentioned that the appellant

had deposited the rent of three months, i.e. April, 2015 to June, 2015 before the court on 23/6/2015 and thereafter on 2/4/2016 the tenant deposited rent of six months ranging from October, 2015 to March, 2016. Thus, it is evident that the tenant/defendant has not complied with the provisions of Section 13(1) of the Act as he was not thereafter regularly depositing the rent on monthly basis. It further transpires from the record that no any application was filed by the tenant/appellant before the Trial Court or lower Appellate Court for condonation of defaults committed by him in depositing the rent. Thus, it is clear that both the lower courts have not committed any error in decreeing the plaintiff's suit on the ground envisaged under Section 12(1) (a) of the Act.

10. In view of the above discussions, I am of the considered view that this appeal does not involve question of law rather than a substantial question of law.

11. Moreover, learned counsel for the respondent has informed this court on 17/2/2017 that the respondent-landlord/ plaintiff has obtained the possession of the suit accommodation from the tenant/appellant in execution proceedings. Under these circumstances, even otherwise now nothing survives in the present appeal.

12. Thus, looking from any angle neither this second appeal is maintainable in law nor it suffers from illegality on merits. Even otherwise, it has become infructuous and therefore is dismissed *in limine*. A copy of the order along with record of both the lower courts be sent back for information.

Appeal dismissed.

I.L.R. [2018] M.P. 522
APPELLATE CIVIL

Before Mr. Justice S.A. Dharmadhikari

F.A. No. 146/2003 (Gwalior) decided on 24 July, 2017

R.K. TRADERS & ors. …Appellants
Vs.
HONG KONG BANK & anr. …Respondents

***Civil Procedure Code (5 of 1908), Order 17 Rule 1 – Adjournment – Grounds* – Held – It is true that proviso to Order 17 Rule 1 provides that no adjournments can be granted after three opportunities but in the instant case, the trial court without considering the reasons mentioned in the application and without considering that proviso is directory in nature, dismissed the application – Trial Court is not precluded from taking into consideration the reasons for non-production of witness – Court below ought to have exercised inherent jurisdiction to grant opportunity to party for production of further evidence – In the instant case, case was concluded by the trial Court without**

recording evidence of the plaintiffs which amounts to miscarriage of justice – Judgment and decree passed by the court below is set aside – Application filed by plaintiff under Order 17 Rule 1 is allowed and plaintiff is allowed to lead further evidence – Matter remanded to trial Court to proceed from that stage – Appeal allowed.

(Para 12 & 13)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 17 नियम 1 – स्थगन – आधार – अभिनिर्धारित – यह सत्य है कि आदेश 17 नियम 1 का परंतुक यह उपबंधित करता है कि तीन अवसरों के पश्चात् कोई स्थगन प्रदान नहीं किया जा सकता परंतु वर्तमान प्रकरण में, विचारण न्यायालय ने आवेदन में उल्लिखित कारणों को विचार में लिये बिना एवं यह विचार किये बिना कि परंतुक निदेशात्मक प्रकृति का है, आवेदन खारिज कर दिया – विचारण न्यायालय साक्षी को प्रस्तुत नहीं किये जाने के कारणों को विचार में लेने से प्रवरित नहीं है – निचले न्यायालय को, पक्षकार को आगे साक्ष्य प्रस्तुत करने हेतु अवसर प्रदान करने के लिए, अंतर्निहित अधिकारिता का प्रयोग करना चाहिए था – वर्तमान प्रकरण में, वादीगण के साक्ष्य अभिलिखित किये बिना विचारण न्यायालय द्वारा प्रकरण समाप्त किया गया था जिससे कि न्यायहानि हुई है – निचले न्यायालय द्वारा पारित निर्णय एवं डिक्री अपास्त – वादी द्वारा आदेश 17 नियम 1 के अंतर्गत प्रस्तुत आवेदन मंजूर एवं वादी को आगे साक्ष्य प्रस्तुत करने की मंजूरी प्रदान की गई – उस प्रक्रम से कार्यवाही करने के लिए मामला विचारण न्यायालय को प्रतिप्रेषित – अपील मंजूर।

Case referred:

2004 (1) MPHT 5 (NOC).

Anil Kumar Jain, for the appellants.
Sunil Kumar Jain, for the respondents.

J U D G M E N T

S.A. Dharmadhikari, J. :- This appeal by the plaintiffs under Section 96 of the C.P.C. is directed against the judgment and decree dated 31.01.2003 passed in Civil Suit No.29-A/88 by the III Additional District Judge, Gwalior.

2. Facts relevant and necessary for decision in the appeal are that the plaintiffs/appellants filed a Civil Suit against the respondents alleging that the plaintiff No.1 was registered as partnership firm engaged in wholesale trade of cloth and was also stockist of D.C.M. Silk Mills, Delhi for the purpose.

3. The defendant/respondent No.1 was formerly known as Mercantile Bank, Ltd. The said bank had sanctioned a credit limit of Rs.7,00,000/- in favour of plaintiff/appellant firm. As a security to the aforesaid credit limit, the plaintiff No.1 pledged with the respondent No.1 bank a Fixed Deposit receipt for Rs.70,000/- which was

issued by the defendant/respondent No.2 in the name of the plaintiffs No.1 and 2. The D.C.M. Silk Mills stood surety for the aforesaid limit.

4. After running the business for over a period of time, the plaintiff/appellant firm closed its business with the D.C.M. Silk Mills and the defendant/respondent No.1 adjusted the proceedings of Fixed Deposit receipt for Rs.70,000/- and the four Life Insurance Policies towards liquidation of balance amount outstanding in the loan account. The remaining amount was paid to defendant No.1 by the D.C.M. Silk Mills and the reminder by plaintiff No.1. It was also alleged that the account with defendant No.1 thus was settled and nothing remained due to defendant No.1 by plaintiff No.1.

5. Since the alleged outstanding amount was settled, the plaintiff/appellant demanded that the four Life Insurance Polices lying unutilized with defendant/ respondent No.1 be returned to the plaintiff/appellant which was subsequently refused by the defendant-bank. It was further alleged that the defendant-bank tried to get the policies encashed from defendant No.2. The plaintiff informed the defendant No.2 all the facts and situation with a request not to make the payment of policies to the defendant No.1.

6. Since the defendant No.2 was bent upon to make the payment of the policies to the defendant No.1, the plaintiff had no option but to file the suit for declaration to the effect that the defendant No.1 was not entitled to encash the policies and that the plaintiffs were entitled to receive the amount from defendant No.2. A mandatory injunction was also prayed for to the effect that the defendant No.1 should deliver the policies to the plaintiffs and the defendant No.2 should not make any payment towards those policies to defendant No.1 instead of the plaintiff.

7. The defendants appeared in the case but the defendant No.1 choose not to contest the suit and as such no written statement was filed, also did not cross examine the prosecution witness and led no evidence while defendant No.2 contested the suit on the sole ground that since the policies have been assigned willfully by the plaintiffs in favour of the defendant No.1 and the assignment was got registered with defendant No.2, hence the plaintiffs were not entitled to receive the policies from defendant No.1 or the proceeds of the policies from defendant No.2.

8. In the meanwhile, the D.C.M. Silk Mills Ltd filed an application before the trial Court under Order 1 Rule 10 CPC for being impleaded in the Suit on the ground that the instant suit has been filed by the plaintiffs in order to frustrate the decree that applicant was likely to secure in another suit filed by it against the plaintiff No.1. Since the said application reveal nothing whatsoever to connect the subject matter, therefore, the application was rejected.

9. The trial Court framed the following issues on 1.11.2002.

"वाद प्रश्न	निष्कर्ष
(1) क्या वादीगण ने प्रतिवादी क01 का समस्त ऋण अदा कर दिया है?	नहीं
(2) क्या प्रतिवादी क्रं. 1 ने अवैध रूप से वादी की भा0 जीवन बीमा निगम की पालिसियों को रोक रखा है?	अप्रमाणित
(3) क्या प्रतिवादीगण 5,000 रूपये विशेष हर्जे के रूप में पाने के अधिकारी हैं?	अप्रमाणित
(4) सहायता एवं व्यय?	वादी का वाद निर्णय कंडिका क्र. 18 के अनुसार " सव्यय निरस्त किया गया।

Thereafter, on the settling date i.e. 11.11.2002, the case was fixed for evidence of both the parties on 26.11.2002. The plaintiffs sought for adjournment on 26.11.2002 which was granted and the case was fixed for evidence on 04.12.2002. On the said date also adjournment was sought by the plaintiffs which was allowed and the case was fixed on 03.01.2003 for evidence of both the parties. On 03.01.2003, the plaintiffs did not seek any adjournment and began to lead their evidence in accordance with order passed by the trial Court earlier and submitted an affidavit of plaintiff No.2 (PW-1) under Order 18 Rule 4 of the C.P.C which was taken on record. The plaintiffs simultaneously filed an application under Order 7 Rule 14 (3)of the C.P.C. Thereafter, case was adjourned on the request of the defendant No.2 for 16.01.2003 for filing reply and arguments on the aforesaid applications and also for cross examination of P.W-1. At this stage, the plaintiffs' right to produce further evidence was also closed. The plaintiffs produced P.W-1 for cross examination on 16.01.2003 and submitted another evidence of one Smt. Ashu Rani Vaishya, the plaintiff No.1(B) (PW-2) alongwith an application under Section 151 of C.P.C.duly supported by an affidavit and the medical certificate explaining the absence on 03.01.2003. The plaintiffs further prayed to take on record the affidavit filed under Order 18 Rule 4 C.P.C. The plaintiffs, at this stage, filed an application under Order 26 Rule 1 C.P.C. Thereafter, PW-1 was cross examined and was discharged. But the trial Court rejected the plaintiffs' application filed under Section 151 of C.P.C. holding that under Order 17 Rule 1 of the C.P.C. more than three opportunities could not be given and their right of evidence has already been closed on 03.01.2003 and declined to take the affidavits under Order 18 Rule 4 C.P.C. As a consequence the application under Order 26 Rule 1 C.P.C. was also rejected. But the affidavit filed by defendant No.2 under Order 18 Rule 4 C.P.C. was taken on record and the case was adjourned for cross examination.

10. Shri Anil Kumar Jain, learned counsel for the appellants made following submissions:-

(1) That the trial Court fell in error in considering and implementing the provisions of Order 17 Rule 1 C.P.C. The proviso to the aforesaid rule prohibits more than three adjournments but the learned appellate Court misread it as three opportunities in all on the one hand and on the other hand when the plaintiff answered the query made by the trial Court on 03.01.2003 that they would produce more witnesses soon after the examination of PW-1 was over, the trial Court has considered the same as if the plaintiffs were seeking another adjournment and as such right to lead further evidence was closed. More over on perusal of the order-sheet dated 03.01.2003 it can be seen that the adjournment was for the third time and the trial Court could have very well granted one more opportunity to the plaintiffs to lead further evidence. The trial Court has fallen into errer by closing the right to lead further evidence.

(2) The learned trial Judge failed to appreciate the fact that the plaintiffs have proved that the entire money due to the defendant No.1 has already been settled in view of the oral evidence of the PW-1 and the documentary evidence Exhibit P-2 and Exibit P-3, the learned trial Court has ignored all these evidence and did not consider the same at all. The findings recorded are totally perverse as such deserves to be set-aside.

(3) The trial Court ought to have granted one more opportunity to lead further evidence in as much as this Court in the judgment reported in 2004(1) MPHT (5) (NOC) *Chaitya alias Chaitram and another Vs. Smt. Yamona Bai and another* has held that *"the provisions of Order 17 Rule 1 CPC is directory in nature and the Courts are precluded from taking into consideration the reasons explained for non production of witnesses. The Courts below further are not precluded from exercising inherent jurisdiction to grant opportunity to the party for production of further evidence. It is contended that in the light of the aforesaid view taken by this Court, the matter needs to be remanded before the trial Court to proceed further from that stage i.e. recording of further evidence of the plaintiffs' witnesses."*

11. Per contra, Shri Sunil Kumar Jain, the learned counsel appearing for the respondent No.2 contended that the judgment and decree passed by the trial Court is just and proper in as much as the insurance policies has been assigned to the defendant

No.1 and they are free to encash them. In these circumstances, no relief can be granted to the appellant and present appeal deserves to be dismissed.

12. Having considered the submissions made by the learned counsel for the parties, the following question emerges for consideration in this appeal.

> (1) Whether, the trial Court erred in closing the evidence of plaintiffs by rejecting the application under Order 17 Rule 1 CPC on the ground that more than three opportunities could not been granted to the plaintiffs to record the evidence?
>
> (2) Whether, on the facts and circumstances of the case, the trial Court was right in dismissing the Suit?

As regards question No.1

Order 17 Rule 1 C.P.C. reads as under:-

> **"1 Court may grant *Time and adjourn hearing :-*** *[(1) The Court may, if sufficient cause is shown, at any stage of the suit, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit for reasons to be recorded in writing.*
>
> *Provided that no such adjournment shall be granted more than three times to a party during hearing of the suits.]"*

Proviso to Order 17 Rule 1 CPC provides that no adjournment shall be granted more than three times to a party during hearing of the Suit. In the instant case, adjournments were granted on 11.11.2002, 26.11.2002, 04.12.2002 and the matter was fixed on 03.01.2003. On which date the application under Order 17 Rule 1 C.P.C. was filed duly supported by an affidavit. The trial Court without considering the reasons assigned in the application, rejected the application on the ground that no opportunity of leading further evidence can be granted since three adjournments have already been granted. It is well settled that the grounds raised in the application are required to be taken into consideration before passing the order rejecting the application. True, it is that the proviso to the Order 17 Rule 1 provides that no adjournment can be granted after three opportunities but the learned trial Court without considering the reasons mentioned in the application as well as taking into account the proviso of Order 17 Rule 1 CPC is directory in nature. The trial Court is not precluded from taking into consideration the reasons for non-production of witness. The Court below ought to have exercised the inherent jurisdiction to grant opportunity to the party for production of further evidence.

As regards question No.2:-

Now turning to the aforesaid question, there is no doubt that opportunity of producing evidence to the plaintiffs has been refused and the case has been concluded without recording evidence of the plaintiffs which amounts to miscarriage of justice, the present appeal needs to be allowed.

13. Accordingly, impugned judgment and decree passed by the trial Court dated 31.01.2003 passed in Civil Suit No.29-A/1988 is hereby set-aside. The application filed by the plaintiffs under Order 17 Rule 1 stands allowed and plaintiffs are allowed to lead further evidence. The matter is remanded back to the trial Court to proceed from that stage. Parties are directed to appear before the trial Court on **8th August, 2017.** Since the Suit is of the year 1988, it is expected that the parties shall cooperate in the proceedings before the trial Court and the trial Court shall make every endeavour to decide the Suit as expeditiously as possible preferably within a period of six months.

With the aforesaid, the appeal stands allowed and disposed of.

Appeal allowed.

I.L.R. [2018] M.P. 528
APPELLATE CIVIL

Before Mr. Justice Sujoy Paul

M.A. No. 1963/2010 (Jabalpur) decided on 9 November, 2017

GOOHA & ors. …Appellants

Vs.

SMT. UMA DEVI & ors. …Respondents

***Civil Procedure Code (5 of 1908), Section 100, Order 43 Rule 1(u) & Order 41 Rule 25 – Substantial Question of Law – Additional Evidence* – Suit of plaintiff dismissed by Trial Court – Appellate Court remitted the matter back to record additional evidence on the question of encroachment – Challenge to – Held – In miscellaneous appeal filed under Order 43 Rule 1(u) CPC, there is no need for proposing and framing of substantial question of law which is a requirement in a second appeal u/S 100 CPC – Miscellaneous appeal can be entertained if there exists any substantial question of law – As per the provisions of Order 41 Rule 25, if trial Court has not determined any question of fact, appellate Court may direct the Court below to take additional evidence as required and return the case to appellate court after recording of evidence, where the appellate Court will pronounce its judgment – In the present case, appellate Court committed an error in remitting the matter in wholesale manner – Appellate Court should have exercised powers under**

Order 41 Rule 25 CPC – Impugned order set aside – Matter remitted back to appellate Court for necessary orders as per Order 41 Rule 25 CPC – Appeal allowed.

(Paras 11, 13, 14, 18 & 20)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100, आदेश 43 नियम 1(यू) व आदेश 41 नियम 25 – विधि का सारवान् प्रश्न – अतिरिक्त साक्ष्य – विचारण न्यायालय द्वारा वादी का वाद खारिज किया गया – अपीली न्यायालय ने अतिक्रमण के प्रश्न पर अतिरिक्त साक्ष्य अभिलिखित करने हेतु मामला प्रतिप्रेषित किया – को चुनौती – अभिनिर्धारित – आदेश 43 नियम 1(यू) सि.प्र.सं. के अंतर्गत प्रस्तुत की गई प्रकीर्ण अपील में विधि के सारवान् प्रश्न को प्रस्तावित एवं विरचित करने की आवश्यकता नहीं जो कि धारा 100 सि.प्र.सं. के अंतर्गत द्वितीय अपील में अपेक्षित है – प्रकीर्ण अपील ग्रहण की जा सकती है यदि विधि का कोई सारवान् प्रश्न विद्यमान है – आदेश 41 नियम 25 के उपबंधों के अनुसार यदि विचारण न्यायालय ने तथ्य के किसी प्रश्न का निर्धारण नहीं किया है, अपीली न्यायालय निचले न्यायालय को यथा अपेक्षित अतिरिक्त साक्ष्य लेने के लिए और साक्ष्य अभिलिखित करने के पश्चात् अपीली न्यायालय को वापस करने के लिए निदेशित कर सकता है, जहाँ अपीली न्यायालय अपना निर्णय घोषित करेगा – वर्तमान प्रकरण में, अपीली न्यायालय ने मामले को थोक ढंग से प्रतिप्रेषित करने में त्रुटि कारित की – अपीली न्यायालय को आदेश 41 नियम 25 सि.प्र.सं. के अंतर्गत शक्तियों का प्रयोग करना चाहिए था – आक्षेपित आदेश अपास्त – आदेश 41 नियम 25 सि.प्र.सं. के अनुसार आवश्यक आदेश हेतु अपीली न्यायालय को मामला प्रतिप्रेषित किया गया – अपील मंजूर।

Cases referred:

AIR 1996 SC 761, 2006 (5) SCC 353, 2012 (3) SCC 540, 2004 (4) SCC 26, 2012 (5) SCC 540, (2003) 11 SCC 584, (2003) 2 SCC 111, (2007) 11 SCC 92, 2010 MPLJ (1) 321, (2011) 5 SCC 708, (2015) 10 SCC 161, (2016) 3 SCC 762.

Akshat Shukla, Amicus Curiae for the appellants.
Anoop Sonkar, Amicus Curiae for the respondent.

J U D G M E N T

Sujoy Paul, J. :- This appeal filed under Order 43 Rule 1 (u) of Code of Civil Procedure is directed against the order dated 29.01.2010 passed in Regular Civil Appeal No.50-A/2009 by the 1st Additional District Judge, Mandla whereby the appellate Court remitted the matter back to the trial Court to record additional evidence on the question of encroachment and then decide the matter afresh.

2. Briefly stated, the admitted facts are that the plaintiffs filed a civil suit for declaration, possession and permanent injunction. The civil suit was registered as Civil Suit No.20-A/2007. The trial Court dismissed the suit by judgment and decree

dated 30.01.2009. Accordingly, the respondents/plaintiffs filed Civil Appeal No.50-A/2009 before the appellate Court. The appellate Court in its judgment dated 29.01.2010 opined that the plaintiffs have successfully established the title before the Court below. By placing reliance on a judgment of Supreme Court reported in AIR 1996 SC 761 (*Smt. Hans Raj Vs. Yasodanand*), the appellate Court opined that for the purpose of proving a sale deed, the witnesses of sale deed are not required to be examined. Shri Akshat Shukla fairly submits that the findings given in Para 12 of the impugned judgment is in accordance with law. Reliance in this regard is placed on 2006 (5) SCC 353 (*Prem Singh and others Vs. Birbal and others*).

3. Shri Shukla, learned amicus curiae contends that in para 13 of the impugned judgment, the appellate Court opined that certain revenue records, notice, map, field book, report etc. were filed by the plaintiffs before the trial Court but the maker of those documents or Revenue Inspector was not produced to substantiate those documents. Since plaintiffs are rustic women and villagers, in the fitness of things, additional evidence is required to be recorded, moreso, when plaintiffs are tribal women. Accordingly, on the question of encroachment only, the appellate Court has remitted the matter back to the trial Court to record evidence and to hear the parties on the said limited question and decide it afresh. Shri Shukla submits that the impugned order is passed in consonance with Order 41 Rule 23-A of CPC.

4. *Per contra*, Shri Sonkar, learned amicus curiae for the plaintiffs contended that in the facts and circumstances of the present case, Order 41 Rule 25 of CPC was applicable and in the fitness of things, the appellate Court should have directed the trial Court to record evidence on the question of encroachment and provide its findings to the appellate Court. After receiving such evidence and findings, the appellate Court should have delivered the judgment rather remitting the matter back to the trial Court. Reliance is placed on 2012 (3) SCC 540 (*Jagannathan Vs. Raju Sigamani and another*).

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

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

7. During the course of hearing, in view of the judgment of Supreme Court reported in 2004 (4) SCC 26 (*Narayanan Vs. Kumaran*) and 2012 (5) SCC 540 (*Jagannath Vs. Raju Sigamani & Anr.*), a question cropped up whether this miscellaneous appeal filed under Order 43 Rule 1 (u) of CPC needs to be heard by applying the same yardstick on which a second appeal filed under Section 100 of CPC is required to be heard. In the light of these judgments, a question cropped up whether while entertaining and deciding a miscellaneous appeal under Order 43 Rule 1 (u) of CPC, the appellant is required to propose the substantial question of law and

whether this Court is required to formulate such question as mandated in Section 100 of CPC.

8. A comparative reading of Section 100 of CPC and Order 43 Rule 1(u) of CPC makes it crystal clear that Section 100 of CPC in no uncertain terms makes it clear that a second appeal would lie to the High Court from an appeal and decree, if the High Court is satisfied that the case *involves a substantial question of law.* Sub-section 3 mandates the memorandum of appeal must precisely state such substantial question of law involved in the appeal. As per Sub-section 4, High Court is enjoined to satisfy itself that a substantial question of law is involved. The High Court is required to formulate that question.

9. Order 43 Rule 1(u) of CPC is silent on the question of existence and formulation of substantial question of law. In the case of *Narayanan* (supra), the respondent challenged the order of trial Court in miscellaneous appeal. During the course of hearing, both the parties agreed before the High Court that the remand was unnecessary. Hence, the High Court decided to go into questions of facts and allowed the appeals setting aside the judgment of District Court and restoring that of Munsif Court.

10. In Para 14 of this judgment, it was held that the High Court should not have gone into minute details of facts and could not have appreciated evidence, which is not warranted under Section 100 of CPC. A careful reading of Para 14 of this judgment shows that the findings are given on the anvil of Section 100 of CPC. Para 15 contains the contention of learned counsel for the appellant whereas Para 16 is the stand taken by learned Senior Counsel for the respondent. In Para 17, the Apex Court opined as under :-

> "*It is obvious from the above rule that an appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree if the Appellate Court instead of making an order of remand had passed a decree on the strength of the adjudication on which the order of remand was passed. The test is whether in the circumstances an appeal would lie if the order of remand were to be treated as a decree and not a mere order. In these circumstances, it is quite safe to adopt that appeal under order 43 Rule (1) clause (u) should be heard only on the ground enumerated in Section 100. We, therefore, accept the contention of Mr. T.L.V.Iyer and hold that the appellant under an appeal under order 43 Rule (1) clause (u) is not entitled to agitate questions of facts. We, therefore, hold that in an appeal against an order of remand under this clause.*"
>
> *(Emphasis supplied)*

11. A microscopic reading of Para 17 shows that the Apex Court considered that an appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree, if the Appellate Court instead of making an order of remand had passed a decree by adjudicating the matter on which the remand order was passed. Thus, the litmus test laid down was "whether in the circumstances, an appeal would lie if the order of remand was to be treated as a decree and not a mere order." In these circumstances, it was opined that it is quite safe to adopt that appeal under Order 43 Rule 1(u) of CPC should be heard only on the ground enumerated in Section 100 of CPC. If this judgment of Narayanan is read with the judgment of Jagannathan, it will be clear like noonday that Supreme Court has nowhere held that while filing a miscellaneous appeal, the appellant is required to propose substantial question of law and in turn, the Court is required to frame such substantial questions. What can be safely culled out as *ratio decidendi* of the judgments of *Narayanan and Jagannathan* (supra) is that the High Court can and should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot canvass all the findings of facts arrived at by the Lower Appellate Court. "The constrains of Section 100 of CPC" mentioned in *Jagannathan* (supra), in my view, must be considered as existence of substantial question of law and not about proposing and framing of such questions in a miscellaneous appeal.

12. This is trite law that the judgment of Supreme Court should not be construed as a statute. Blind reliance on a judgment without considering facts situation is bad. [See (2003) 11 SCC 584 *(Ashwani Kumar Singh vs. UPSC & Ors.,* (2003) 2 SCC 111 *(Bhavnagar University v. Palitana Sugar Mill (P) Ltd.),* (2007) 11 SCC 92 *(U.P. State Electricity Board Vs. Pooran Chandra Pandey & Ors.),* 2010 MPLJ (1) 321 *(Bihar School Examination Board vs. Suresh Prasad Singh),* (2011) 5 SCC 708 *(Sushil Suri vs. CBI & Anr.),* (2015) 10 SCC 161 *(Indian Performing Rights Society vs. Sanjay Dalia & Anr.)* and (2016) 3 SCC 762 *(Vishal N. Kalsaria vs. Bank of India)].*

13. In the light of aforesaid analysis, in my view, in the present miscellaneous appeal there is no need for proposing and formulating substantial questions of law. The question of existence of substantial question of law in this case will be considered at the time of hearing. Accordingly, the question cropped up is answered.

14. In view of aforesaid analysis, this miscellaneous appeal is required to be entertained and heard if there exists a substantial question of law.

15. Thus, before dealing with the contentions of learned counsel for the parties, it is apposite to examine whether there exists any substantial question of law which needs to be decided in this miscellaneous appeal.

16. In view of the rival contentions, it is clear that a substantial question exists in this case i.e. (i) whether the Court below was justified in remitting the matter back for recording of evidence to the trial Court ? (ii) The ancillary question is : whether the appellate Court should have exercised the power under Order 41 Rule 23-A or under Order 41 Rule 25 of CPC ?

17. As noticed, the appellate Court gave a specific finding in Para 12 of the order by holding that the plaintiffs have successfully proved their title. The Court below was not satisfied on an important finding of fact relating to possession of the plaintiffs. Order 41 Rule 25 reads as under:

> **"25. Where Appellate Court may frame issues and refer them for trial to court whose decree appealed from.-** Where the court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the court from whose decree the appeal is preferred and in such case shall direct such court to take the additional evidence required;
>
> and such court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor [within such time as may be fixed by the Appellate Court or extended by it from time to time]."
>
> [Emphasis Supplied]

18. A plain reading of this provision makes it clear that if the Court below has not determined any question of fact or has failed to determine the fact in accordance with law, the appellate Court may direct the Court below to take additional evidence as required. Trial Court shall proceed to record evidence and return the evidence to the appellate Court together with the findings thereon and reasons therefor. On the strength of these findings, the appellate Court will pronounce its judgment.

19. In the present case, the appellate Court remitted the matter in wholesale manner. In the case of *Jagannathan* (Supra), the Apex Court has held as under:

> "8. Insofar as Order 41 Rule 25 of the Code is concerned, the appellate Court continues to be in seisin of the matter; it calls upon the trial Court to record the finding on some issue or issues and send that finding to the appellate Court. The power under Order 41 Rule 25 is invoked by the appellate Court where it holds that the trial Court that passed the decree omitted to frame or try any issue or determine

any question of fact essential to decide the matter finally. The appellate Court while remitting some issue or issues, may direct the trial Court to take additional evidence on such issue/s.

9. Insofar as the present case is concerned, the trial Court had disposed of the suit on merits and not on a preliminary issue. The first appellate Court set aside the judgment and decree of the trial Court and directed the trial Court to decide the suit afresh after giving parties an opportunity to lead evidence by oral as well as documentary. The nature of the order passed by the appellate Court leaves no manner of doubt that such order has been passed by the appellate Court in exercise of its power under Order 41 Rule 23A of the Code."

12. In the present case, since the decree was not passed by the trial court on preliminary point/ issue, Rule 23 is clearly inapplicable. Rule 25 aforesaid, in no uncertain terms provides that in order to determine any question of fact which appears to the appellate court essential for right decision of the suit upon the merits, the appellate court may frame necessary issues and refer the same for trial to the trial court. The additional evidence may be required to be examined. The trial court, in turn, shall return the evidence to the appellate court together with its findings and reasons. Thereupon, the appellate court can pass its judgment."

[Emphasis Supplied]

20. In the light of aforesaid, it is clear that in the present case, the appellate Court found that it is necessary to determine a question of fact, namely, regarding encroachment and possession of plaintiffs. Hence, the Court below should have exercised the powers envisaged in Rule 25 of Order 41 of CPC.

21. In view of aforesaid analysis, the substantial question of law is answered accordingly and it is held that the Court below has committed an error in remitting the matter on wholesale basis to the trial Court.

22. Resultantly, the impugned order dated 29.01.2010 is set aside. The matter is remitted back to the lower Appellate Court to pass necessary orders as per Rule 25 of Order 41 CPC. Since the fate of rustic villagers/tribal women is involved in the present matter, the appellate Court shall fix time limit within which the trial Court shall take necessary steps, record evidence and findings etc. In turn, the findings shall be produced before the appellate Court and the appellate Court shall decide the matter in accordance with law expeditiously.

23. The appeal is allowed to the extent indicated above.

Appeal allowed.

I.L.R. [2018] M.P. 535 (DB)
APPELLATE CRIMINAL

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

Cr.A. No. 1083/1994 (Jabalpur) decided on 7 November, 2017

RAJESH KUMAR & ors. …Appellants

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Sections 302, 304-B, 498-A & 201 and Dowry Prohibition Act (28 of 1961), Section 4 – Conviction – Appreciation of Evidence* – Wife died due to burn injuries within two years of her marriage – Husband, mother-in-law and two sister-in-law were charged for the said offence – Held – Evidence on record clearly shows that mother-in-law of deceased use to torture her for demand of dowry and use to ill-treat her – It is also established that mother-in-law assaulted her and set her ablaze and murdered her – It is further clear from dying declarations that husband and both sister-in-law were not present with mother-in-law on the spot nor they supported for committing the offence – Dying declaration have been corroborated with testimony of brother and mother of deceased – In the police statements as well as in evidence, brother and mother of deceased did not allege anything against husband and both sister-in-laws which creates reasonable doubt in their favour – Husband and both sister-in-law are hereby acquitted from the charges – Conviction and sentence of Mother-in-law upheld – Appeal partly allowed. (Paras 10, 13, 20 & 23)**

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 304–बी, 498–ए व 201 एवं दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 4 – दोषसिद्धि – साक्ष्य का मूल्यांकन – पत्नी की विवाह के दो वर्ष के भीतर जलने की चोटों के कारण मृत्यु हुई – कथित अपराध के लिए पति, सास एवं दो ननदों को आरोपित किया गया था – अभिनिर्धारित – अभिलेख पर मौजूद साक्ष्य यह स्पष्टतः दर्शाते हैं कि मृतिका की सास उसे दहेज की मांग को लेकर प्रताड़ित एवं बुरा–बर्ताव करती थी – यह भी स्थापित किया गया कि सास ने उस पर हमला किया तथा उसे आग लगा दी एवं उसकी हत्या कर दी – मृत्युकालिक कथनों से आगे यह स्पष्ट है कि पति एवं दोनों ननदें, घटनास्थल पर सास के साथ उपस्थित नहीं थे और न ही उन्होनें अपराध कारित करने हेतु सहयोग किया – मृत्युकालिक कथन की मृतिका के भाई एवं माँ के परिसाक्ष्य के साथ संपुष्टि की गई – पुलिस कथनों में और साथ ही साक्ष्य में, मृतिका के भाई एवं माँ ने पति एवं दोनों ननदों के विरूद्ध कोई अभिकथन नहीं किया, जो कि उनके पक्ष में युक्तियुक्त संदेह उत्पन्न करता है – पति एवं दोनों ननदें एतद् द्वारा आरोपों से दोषमुक्त किये जाते हैं – सास की दोषसिद्धि एवं दण्डादेश कायम – अपील अंशतः मंजूर।

***B. Evidence Act (1 to 1872), Section 32 and Penal Code (45 of 1860), Section 304-B & 498-A – Dying Declaration – Credibility* – In the instant case, there were two dying declarations – Contents of the dying declaration are duly supported by the evidence of brother and mother of the deceased –**

There is no allegation against husband that he threatened and beaten the deceased – Both dying declarations are found reliable with respect to cruelty and ill treatment by mother-in-law – It shows that husband and both sister-in-law did not actively participated in the crime.

(Paras 13, 14 & 15)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 32 एवं दण्ड संहिता (1860 का 45), धारा 304–बी एवं 498–ए – मृत्युकालिक कथन – विश्वसनीयता – वर्तमान प्रकरण में, दो मृत्युकालिक कथन थे – मृत्युकालिक कथन की अंतर्वस्तु, मृतिका के भाई एवं माँ के साक्ष्य द्वारा सम्यक् रूप से समर्थित है – पति के विरूद्ध ऐसा कोई अभिकथन नहीं है कि उसने मृतिका को धमकाया और मारा पीटा है – दोनों मृत्युकालिक कथन, सास द्वारा प्रताड़ना एवं बुरे बर्ताव के संबंध में भरोसेमंद पाये गये – यह दर्शाता है कि पति एवं दोनों ननदों ने अपराध में सक्रिय रूप से भाग नहीं लिया।

C. Evidence Act (1 to 1872), Section 3 and Penal Code (45 of 1860), Section 304-B & 498-A –Testimony of Close Relatives – Interested witnesses – Consideration **– Held – Close relatives of deceased are interested witnesses but their testimony cannot be disbelieved on this ground alone – In cases of demand of dowry, domestic violence or bride burning, offence takes place within four walls of the matrimonial house and it is quite obvious that deceased would have told about the conduct and behaviour of her in-laws to her parents and close relatives not to any outsiders – Testimony of near/close relatives of the deceased cannot be brushed aside.**

(Paras 16, 18 & 19)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 3 एवं दण्ड संहिता (1860 का 45), धारा 304–बी एवं 498–ए – करीबी रिश्तेदारों का परिसाक्ष्य – हितबद्ध साक्षीगण – विचार – अभिनिर्धारित – मृतिका के करीबी रिश्तेदार हितबद्ध साक्षीगण है परंतु केवल इस आधार पर उनके परिसाक्ष्य पर अविश्वास नहीं किया जा सकता – दहेज की मांग के प्रकरणों में, घरेलू हिंसा या दुल्हन को जलाने के अपराध ससुराल की चार दीवारों के भीतर होते हैं एवं यह पूर्णतया स्पष्ट है कि मृतिका ने अपने माता–पिता एवं करीबी रिश्तेदारों को अपने ससुराल वालों के आचरण एवं व्यवहार के बारे में बताया होगा, न कि किसी बाहर वालों को – मृतिका के निकट/करीबी रिश्तेदारों के परिसाक्ष्य को नजरअंदाज नहीं किया जा सकता।

D. Penal Code (45 of 1860), Section 34, 304-B & 498-A – Common Intention **– Held – Although husband and both sister-in-law did not rescue the deceased from mother-in-law, but that does not mean that they had any common intention to harass her or to kill her.**

(Para 21)

घ. *दण्ड संहिता (1860 का 45), धारा 34, 304–बी एवं 498–ए – सामान्य आशय* – अभिनिर्धारित – भले ही पति एवं दोनों ननदों ने मृतिका का सास से बचाव नहीं किया, परंतु उसका यह अर्थ नहीं कि उनका उसे प्रताड़ित करने का या मारने का कोई सामान्य आशय था।

Cases referred:

(2014) 11 SCC 516, 2016 (4) SCC 358, 2014 (4) SCC 129, 2007 Cri.L.J. 20, (2009) 11 SCC 647, (2013) 2 SCC 224, (2015) 11 SCC 154.

Jagat Sher Singh, for the appellants.
Akshay Namdeo, G.A. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by :
Smt. Anjuli Palo, J. :- This appeal has been filed by the accused-appellants being aggrieved by the judgment dated 30.8.1994 passed by Additional Sessions Judge, Khurai, District Sagar in Session Trial No.14/93, holding appellants guilty of offences and sentenced as under :-

Appellant	Offence u/s	Sentence	Fine	Default of fine
Appellant No.1	4 of Dowry Prohibition, 1961	RI for 2 years	Rs.10,000/-	S.I. for three months
Appellant No.1	201 of IPC	RI for 7 years	Rs.5000/-	S.I. for three months
Appellant No.1	498-A of IPC	RI for 2 years	Rs.3000/-	S.I. for three months
Appellants No. 2 to 4	4 of Dowry Prohibition	RI for 2 years	-	-
Appellants No. 2 to 4	302 of IPC	RI for life	-	-
Appellants No. 2 to 4	304-B and 498-A of IPC	No separate sentence awarded	-	-

2. It is not in dispute that Asha (since deceased) was wife of appellant No.1 and appellant No.4 is the mother-in-law of the deceased and mother of other appellants. The marriage between appellant No.1 and the deceased was solemnized in the year 1991. Asha died on 12.11.1992 within 1 ½ year of marriage due to burn injuries at her matrimonial home.

3. In brief the prosecution case is that appellant No.1 was married to Asha on 7.1.1991. Appellant Nos. 2 and 3 are the sister-in-law. It is alleged that some time after the marriage, Asha was not treated well and was harassed for dowry by her in-laws/appellants. The appellants demanded Rs.10,000/- for setting up a shop for appellant No.1 and a gas burner. The demand was not met. On 8.11.1992 at about 8.30 am the appellant No.4 poured kerosene on her and ignited the fire. Asha sustained burn injuries. Thereafter appellant Nos. 2 and 3 came there and did not do anything to

save her. She was immediately brought to the hospital by the neighbours. Asha was examined by Dr. R.K.Damle (PW11). Her three dying declarations were recorded by the Doctor, Naib Tehsildar and Police. Initially, police registered FIR against the appellants under sections 307, 120-B, 201, 498-A of IPC and section 4 of Dowry Prohibition Act. On 14.11.1992 Asha died due to severe burn injuries. After completion of investigation, a charge sheet has been filed against the appellants under Sections 302, 120-B, 201, 498-A of IPC and section 4 of Dowry Prohibition Act.

4 After committal of the case, the trial Court conducted trial and convicted the appellants and sentenced them as mentioned above.

5. The appellants challenged the impugned judgment on the ground that they are innocent. The learned trial Court has wrongly convicted them on the aforesaid charges on the basis of dying declaration of the deceased Ex.P-21 by ignoring earlier dying declaration of the deceased Ex.P-13, in which Asha stated that accidentally due to burst of stove she sustained burn injuries. On the initiatives taken by her husband-appellant No.1, she was under treatment from 8.11.1992 to 14.11.1992. Prosecution story is not corroborated by any independent witnesses. Hence the appellants pray to set aside the impugned judgment and acquitted from the charges.

6. Learned Government Advocate for the State opposed the above submissions.

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

8. The point for consideration is that :

(i) Whether the deceased was ill-treated or harassed by the appellants for non-fulfillment of dowry demand of the appellants ?

(ii) Whether the appellants have wrongly been convicted by the trial Court ?

9. Deceased was the wife of appellant No.1. Their marriage was solemnized in the year 1991. It is alleged by her brother-Pradeep (PW13) and Mother/Lalita (PW14) that after some time of marriage, the appellants tortured the deceased for demand of dowry. The appellant No.4 demanded Rs.10,000/- for extension of shop of appellant No.1. Appellant No.4 further demanded amount for purchasing a cooking gas burner. The brother of the deceased gave Rs.2000/- to the appellant No.4 for purchasing the same. Deceased-Asha was harassed by appellant No.4. Thus, on earlier occasion the deceased left her matrimonial home. As per the statement of Pradeep (PW13) and Lalitabai (PW14) to maintain relations with the appellants, they avoided to lodge FIR against the appellants with the police. They brought Asha to her parental house and she resided with them.

10. Pradeep (PW13) and Lalitabai (PW14) also deposed that on 24.10.1992, the deceased went back to her matrimonial home at Bina. On 8.11.1992, they received information about burning of Asha. They immediately went to Hamidia Hospital, Bhopal, at that time Asha was alive. Asha narrated whole incident to them. She has

stated that appellant No.4 assaulted her and set her ablaze. Due to fear of her husband, she did not say anything against the appellants before the doctor in Ex.P13.

11. Thereafter, on 9.11.1992 her dying declaration (Ex.21) was recorded by Nisar Ahmad Rizvi-Naib Tehsildar (PW24). He proved that at the time of recording of dying declaration, Asha was mentally fit and was able to give dying declaration. Nisar Ahmad recorded the statement of Asha according to the prescribed procedure. Therefore, we rely on Ex.P/21 (2nd Dying Declaration) which is only against the appellant No.4.

12. Another Dying Declaration (Ex.22) was recorded on 11.11.1992 by SDOP, Rakesh Gurjar (PW20) as statement under Section 161 of Cr.P.C. wherein we find so many improvements and so many omissions with the police statements of brother Pradeep (PW13) and mother Lalita (PW14). I.O., B.D.Pant (PW20) deposed that Pradeep and Lalita have not stated against appellant Nos. 1 to 3 in their police statements. There are substantial contradiction and omission. Thus, we do not find the Ex.P22 reliable against the appellants No. 1 to 3.

13. We find that the testimony of Pradeep (PW13) and Lalita (PW14) are fully reliable. The deceased also told them against appellant No.4 about the incident. They also stated about the cruel behaviour and demand of dowry by appellant No.4, which has been corroborated by the letters Exs.P/15, P/16, P/18 and P/20 written by Asha (since deceased). These letters also indicate that the appellant No.4 was annoyed with the deceased and ill-treated her. Earlier the deceased had informed to her brother Pradeep (PW13), Lalita (PW14) and Chotelal (PW17), Rajkumar (PW19) and Rajendra (PW15) about the threat of burning by her mother-in law/appellant No.4. All these witnesses corroborate this fact in their testimony. In such circumstances, dying declarations Ex.P/21 and Ex.P/22 are found reliable against appellant No.4 only. It reveals that at the time of incident the appellants No.1 to 3 were not present with appellant No.4 on the spot. Nor they supported appellant No.4 for committing the offence.

14. As per the dying declaration (Ex.P/21) prior to the incident appellant No.4 tried to ablaze her. Contents of dying declaration (Ex.P21) are duly supported by Pradeep Kumar (PW13) (brother of the deceased), Lalita Bai mother of the deceased (PW14) and other relatives Rajendra (PW15), Chhotelal (PW17) and Rajkumari (PW19). They supported the prosecution story with regard to cruelty and demand of dowry made by the appellant No.4.

15. As per Ex.P.21, at the time of incident appellant No.2 and 3 came to the spot after some time and saw Asha is in burnt condition, but they did not try to save her. Appellant No.1 also came there later. As per Ex.P22 he brought Asha to Bina Hospital and then to Hamidia Hospital, Bhopal for treatment. In Ex.P21, we do not find any allegation against appellant No.1 that he threatened and beaten Asha, for she did not to state any thing against them. It shows that appellant No.1 to 3 did not actively participate in the crime with their mother/appellant No.4.

16. Learned counsel for the appellants submits that Ghanshyam (PW1), Gopal (PW2), Phoolchand (PW3), Ravindra (PW4), Chhota Aslam (PW5) are the independent witnesses. They are neighbour of the appellants and they did not support the prosecution story. Close relatives of the deceased are interested witnesses. Hence, prosecution case has become suspicious. The contention of the counsel for the appellants cannot be accepted, because in cases of demand of dowry, domestic violence or Bride burning, offences takes place within the four walls of the matrimonial house. Hence, in those cases evidence of interested witnesses cannot be disbelieved.

17. Some time independent eye witnesses may not be available or some time they turn hostile. As considered in case of *Ramesh Vithal Patil Vs. State of Karnataka* (2014) 11 SCC 516 and in the case of *Sadhu Sharan Singh Vs. State of UP and Ors.* [2016 (4) SCC 358] it was held that

> "in present days, civilised people are generally insensitive to come forward to give any statement in respect of any criminal offence – Unless it is inevitable, people normally keep away from court, as they find it distressing and stressful – Though such kind of human behaviour is indeed unfortunate, but it is a normal phenomena – Such handicap of investigating agency cannot be ignored in discharging their duty. Prosecution case cannot be doubted on such ground alone – Entire case cannot be derailed on mere ground of absence of independent witness as long as evidence of eyewitness, though interested, is trustworthy."
>
> *[See also Appabahi and Anr. Vs. State of Gujrat* AIR 1988 SC 696].

18. It is also noted here that the deceased was married to appellant No.1 on 17.2.1991 and the incident happened within one and a half year (i.e. on 8.11.1992) of marriage. It is quite obvious that Asha would have told about the conduct and behaviour of her-in-laws to her parents and close relatives not to any outsiders. In the case of *Surinder Singh Vs. State of Haryana reported* in 2014(4) SCC 129 it was held by the Supreme Court that:

> **"**Harassment of a married woman in an Indian household is a peculiar phenomenon-In most cases it is seen that husband or members of his family are never satisfied with what they get as dowry-Wife's family is expected to keep fulfilling this insatiable demand in some form or the other for some period of time after marriage-Such demands are also fulfilled by parents of wife for fear of their daughter being illtreated-Courts of law cannot lose sight of these realities-Presumption under S. 113-B, Evidence Act, and presumption under S. 304-B IPC, have a purpose-These are beneficent provisions aimed at giving relief to a woman subjected to cruelty routinely in an Indian household in respect of dowry- The meaning to be applied to each word of these provisions, has to be in accord with legislative intent-Even while

construing these provisions strictly, care will have to be taken to see that their object is not frustrated"

The Supreme Court further held that :-

"Harassment and cruelty is meted out to a woman within four wall of matrimonial house, it is difficult to get independent witnesses to depose about it –Only inmates of house and relatives of husband, who cause cruelty, witness it – Their servants, being under their obligation, would never depose against them – Proverbially, neighbours are slippery witnesses- Moreover, witnesses have a tendency to stay away from courts – This is more so with neighbours – In bride burning cases, who else will, therefore, depose about misery of deceased bride, except her parents or her ralatives- It is time to accept this reality- Therefore, the aforesaid submission is rejected."

In the case of *Trimukh Maroti Kirkany Vs. State of Maharashtra* [2007 Cri. L.J.20] the Supreme Court has held that :-

"Such crimes are general committed in complete secrecy inside house – Nature and amount of evidence required to establish charge cannot be of same degree as required in other cases of circumstantial evidence – Silence of inmates of house about cause of death- Would become additional link in chain of circumstances."

19. Thus the testimony of near/close relative of the deceased cannot be brushed aside. The learned trial Court duly appreciated the evidence in the impugned judgment. Hence after considering the evidence on record, we find that the dying declaration Ex.P13 which is in favour of the appellant, is not reliable.

20. Another Dying declaration (Ex.P21) was recorded by the Executive Magistrate. Police recorded the statement of the deceased under Section 161 of Cr.P.C. which is Ex.P22, wherein similar allegations have been made against the appellant No.4. Both the dying declarations have been corroborated with the testimony of brother and mother of the deceased against the appellant No.4. I.O. Shri B.D. Pant (PW21) clearly deposed that in police statement Ex.P5 and Ex.P7 Pradeep (PW13) and Lalita (PW6) have not alleged against the appellants No. 1 to 3. Hence such omissions are very important, which create reasonable doubt in their favour.

21. Although appellants No.1 to 3 did not rescue the deceased from appellant No.4, but it does not mean that they had any common intention to harass her or to kill her. Another evidence on the basis of the dying declaration of the deceased Ex.P21, presumption under Section 113-B of Evidence Act may be drawn only against appellant No.4. Appellant No.4 treated the deceased with cruelty soon before the incident for demand of dowry. She ablazed the deceased and committed her murder.

22. In case of *Jaishree Anant Khandekar Vs. State of Maharashtra* [(2009) 11 SCC 647] it was held that if the deceased is making several dying declaration at different hours to different persons on the basis of which Courts below primarily rely to sustain conviction. Though some deviation in narration of facts in these dying declarations was discernible but they were consistent in material particulars. Moreover, evidence of some witnesses in substantial part corroborated dying declaration. Declarant lived for more than 15 days, and hence was in a position to give declaration. Doctor had also opined that declarant was conscious enough to make the statement and all judicially evolved rules of caution were duly followed. Hence, such dying declaration found voluntary and trustworthy. [See (2013) 2 SCC 224 *Asha Vs. State of Maharashtra,* (2015) 11 SCC 154 *Sandeep Vs. Haryana*].

23. On the above discussions and after going through the judgment of Court below and having considered the entire evidence available on record, we are constrained to observe that the trial Court has not made a correct approach to convict the appellants No.1 to 3 in this case. Hence, we find that there is no evidence on record to prove the guilt of appellants No. 2 and 3 for committing offence under Section 498-A, 304-B, 302 of IPC and Section 4 of the Dowry Prohibition Act. Hence, the appeal is partly allowed in favour of appellants No. 1 to 3. Appellants No. 2 and 3 are acquitted from the charges under Sections 498-A, 304-B, 302 of IPC and Section 4 of the Dowry Prohibition Act and appellant No.1 is acquitted from the charges under Section 201, 498-A of IPC and Section 4 of the Dowry Prohibition Act respectively. Fine amount, if any, deposited by the appellants No. 1 to 3 be returned to them. The prosecution has proved the guilt of appellant No.4 by adducing cogent evidence. Hence, the appeal with regard to appellant No.4 is dismissed.

24. Appellant No.4 Vimla Dai is on bail, her bail bond is cancelled and she is directed to surrender immediately before the trial Court to undergo the remaining sentence, failing which the trial Court shall take appropriate action under intimation to the Registry.

25. A copy of this judgment be sent to the trial Court for information and compliance alongwith its record immediately.

Order accordingly.

I.L.R. [2018] M.P. 542 (DB)
APPELLATE CRIMINAL

Before Mr. Justice R.S. Jha & Mrs. Justice Nandita Dubey

Cr.A. No. 03/2006 (Jabalpur) decided on 20 November, 2017

KARUN @ RAHMAN & anr. …Appellants

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 302/34 & 324 – Conviction – Testimony of Eye Witnesses – Misnaming the weapon of offence* – Held – Misnaming**

the weapon by eye witness in moment of fear and anguish is insignificant and cannot be made basis for doubting the prosecution case nor will make the whole testimony of witness unacceptable especially when she is consistent in other material particulars such as identity of accused persons or the time and place of incident – It cannot be expected from a wife, whose husband is beaten to death and son is subjected to grievous injuries, to watch with precision as to which of the accused was causing which injury and by what weapon – FIR was lodged within an hour, disclosing the name of accused persons – Weapon of offence was recovered on the direction of accused persons – Commission of offence by accused persons is clearly established by prosecution beyond reasonable doubt – Conviction affirmed and upheld – Appeal dismissed.

(Paras 15, 21, 22 & 32)

क. दण्ड संहिता (1860 का 45), धारा 302/34 व 324 – दोषसिद्धि – चक्षुदर्शी साक्षियों का परिसाक्ष्य – अपराध के शस्त्र का गलत नाम बताया जाना – अभिनिर्धारित – चक्षुदर्शी साक्षी द्वारा भय एवं पीड़ा के क्षण में शस्त्र का गलत नाम बताया जाना महत्वहीन है और अभियोजन प्रकरण पर संदेह करने हेतु आधार नहीं बनाया जा सकता, न ही साक्षी के संपूर्ण परिसाक्ष्य को अस्वीकार्य बनायेगा, विशेषतः तब जब वह अन्य तात्विक विशिष्टियों में अविचल है जैसे कि अभियुक्तगण की पहचान या घटना का स्थान एवं समय – यह उस पत्नी से अपेक्षा नहीं की जा सकती जिसके पति को मरने तक पीटा गया है और जिसके पुत्र को घोर क्षतियां पहुँचायी गई है कि वह सूक्ष्मता से देखे कि अभियुक्तों में से कौन, कौनसी चोट कारित कर रहा है और किस शस्त्र से – प्रथम सूचना प्रतिवेदन एक घंटे के भीतर अभियुक्तगण के नाम प्रकट करते हुए दर्ज करायी गई थी – अभियुक्तगण के निदेश पर अपराध का शस्त्र बरामद किया गया था – अभियुक्तगण द्वारा अपराध कारित किया जाना, अभियोजन द्वारा युक्तियुक्त संदेह से परे स्पष्ट रूप से स्थापित किया गया है – दोषसिद्धि अभिपुष्ट एवं मान्य – अपील खारिज।

***B. Penal Code (45 of 1860), Section 302/34 – Common Intention* – Held – Evidence shows that accused persons came to the house of deceased and started a fight, went back and brought *gupti* and *ballam* from their house and committed the offence – Facts and circumstances shows that there was pre-concert of mind and accused have acted in furtherance of common intention.**

(Para 26 & 27)

ख. दण्ड संहिता (1860 का 45), धारा 302/34 – सामान्य आशय – अभिनिर्धारित – साक्ष्य दर्शाता है कि अभियुक्तगण, मृतक के घर आये और लड़ाई आरंभ की, वापस गये और अपने घर से गुप्ति एवं बल्लम ले आये तथा अपराध कारित किया – तथ्य एवं परिस्थितियां दर्शाती है कि यहां मस्तिष्क का पूर्व मिलन था और अभियुक्तगण ने सामान्य आशय के अग्रसरण में कृत्य किया है।

***C. Practice & Procedure – Evidence of Hostile Witness – Delay in recording case diary statements – Credibility* – Held – Evidence of hostile**

witnesses can be relied upon to the extent to which it supports the prosecution version – In the present case, PW-2 (hostile witness) supported the prosecution case consistently in his examination in chief but on the next day, during cross-examination, he resiled from his previous statement with regard to identity of accused persons, however his evidence establishes the prosecution case with regard to time, place, manner and weapon of the offence – Further held – Victims were resident of Seoni malwa, after the incident, injured were referred to district hospital Hoshangabad, where after two days, one of injured succumbed to injuries – Statements were recorded after they came back from Hoshangabad – Under these circumstances, delay in recording case diary statements would not after the credibility of the prosecution case.

(Paras 16, 17, 20 & 24)

ग. पद्धति एवं प्रक्रिया – पक्षद्रोही साक्षी का साक्ष्य – केस डायरी कथन अभिलिखित किये जाने में विलंब – विश्वसनीयता – अभिनिर्धारित – पक्षद्रोही साक्षीगण के साक्ष्य पर उस सीमा तक विश्वास किया जा सकता है जहां तक वह अभियोजन कथा का समर्थन करता है – वर्तमान प्रकरण में, **PW-2** (पक्षद्रोही साक्षी) ने अपने मुख्य परीक्षण में अविचल रूप से अभियोजन प्रकरण का समर्थन किया है, परंतु अगले दिन, प्रतिपरीक्षण के दौरान, वह अभियुक्तगण की पहचान के संबंध में अपने पूर्ववर्ती कथन से पीछे हटा, अपितु अपराध का समय, स्थान, ढंग और शस्त्र के संबंध में उसका साक्ष्य अभियोजन प्रकरण को स्थापित करता है –आगे अभिनिर्धारित – पीड़ित व्यक्ति सिवनी मालवा के निवासी थे, घटना के पश्चात्, आहत व्यक्तियों को जिला चिकित्सालय होशंगाबाद निदेशित किया गया था जहां दो दिन पश्चात् आहत व्यक्तियों में से एक की क्षतियों से मृत्यु हुई –उनके होशंगाबाद से लौटने के पश्चात् कथन अभिलिखित किये गये थे –इन परिस्थितियों में, केस डायरी कथन अभिलिखित करने में विलंब, अभियोजन के प्रकरण की विश्वसनीयता को प्रभावित नहीं करेगा।

Cases referred:

(2008) 17 SCC 587, (2012) 10 SCC 433, (1980) 1 SCC 30, (2012) 8 SCC 450, (2016) 15 SCC 471. (2016) 3 SCC 26, (2004) 11 SCC 305.

S.C. Datt with T.P. Jaiswal, for the appellants.
Ajay Shukla, G.A. for the respondent/State.

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 23.12.2005, passed by Third Additional Sessions Judge, Hoshandbad (sic : Hoshangabad), District Hoshangabad in S.T. No. 375/2003, whereby appellant No.1 Karun @ Rahman has been found guilty for the offence punishable under Sections 302 and 324/34 of the Indian Penal Code and has been

sentenced to life imprisonment and fine of Rs.500/- and rigorous imprisonment for one year and fine of Rs.500/- respectively and appellant No.2 Jallu @ Sheikh Jalil has been found guilty for the offence punishable under Sections 302/34 and 324 of the Indian Penal Code and has been sentenced to life imprisonment and fine of Rs.500/- and rigorous imprisonment for one year and fine of Rs.500/- respectively, in default of fine, they have to suffer rigorous imprisonment for two months for each offence.

2. Initially this present appeal was filed by both the appellants. However, in view of the withdrawal of the appeal by appellant No.1 Karun @ Rahman, this appeal is heard only for appellant No. 2 Jallu @ Sheikh Jalil.

3. The prosecution story, in brief is that on 09.05.2003 at about 8.30 P.M., the accused persons namely Karun @ Rehman and Jallu @ Sheikh Jalil attacked Rammohan (deceased) and Shanu (P.W.-2) with *ballam* and *gupti* respectively, who sustained grievous injuries due to it.

4. A report to that effect (Ex.P-1) was lodged by P.W.-1 Gayatribai at 9.45 P.M. at Police Station, Seoni Malwa.

5. According to P.W.-1 Gayatribai, 3-4 days prior to the incident, Shanu (P.W.-2) had a fight with the accused persons. On 09.05.2003, a quarrel ensued between appellant Jallu and P.W.-2 Shanu, who then stabbed P.W.-2 Shanu with *gupti* in the chest stating P.W.-2 Shanu will not go alive today. Rammohan (deceased), P.W.-1 Gayatribai and P.W.-3 Rekha rushed to intervene and save P.W.-2 Shanu, whereupon, Karun stabbed Rammohan with *Ballam* in his stomach, who sustained a cut in his stomach and his intestine got spilled out. Hearing the shouts of P.W.-1 Gayatribai and P.W.-3 Rekha, neighbors came to the spot and the accused persons ran away. According to the prosecution, the incident was witnessed by P.W.-1 Gayatribai, P.W.-2 Shanu, P.W.-3 Rekha and P.W.-4 Shivnarayan.

6. Based on the complaint lodged by P.W.-1 Gayatribai, a case was registered against the accused persons in Crime No.137/03 under Section 307 read with Section 34 of the Indian Penal Code. Rammohan and P.W.-2 Shanu were examined by Dr. G.R. Karode (P.W.-7) in P.H.C., Seoni Malwa and thereafter referred to District Hospital, Hoshangabad. On 11.05.2003, Rammohan succumbed to the injuries and the case was altered to Section 302 of the Indian Penal Code. The accused persons were arrested on the same day and on the direction of Jallu and Karun, *gupti* and *ballam* were recovered from them respectively.

7. After completion of the investigation, accused Karun @ Rahman was charged for committing the offence punishable under Sections 302 and 307/34 of the I.P.C. and appellant Jallu @ Sheikh Jalil was charged under Sections 307, 302/34 of the I.P.C.

8. To substantiate the charges, on behalf of the prosecution, 12 witnesses were examined. The accused persons abjured their guilt and pleaded false implication.

9. The learned trial Court vide impugned judgment dated 13.12.2005, convicted the accused persons relying on the testimony of the eye witnesses P.W.-1 Gayatribai, P.W.-2 Shanu (injured) and P.W.-3 Rekha and held that the prosecution has established the guilt of accused persons beyond reasonable doubt and convicted them as aforesaid.

10. Shri S.C. Datt, learned Sr. Counsel appearing for the appellant Jallu has assailed the evidence of P.W.-1 Gayatribai and P.W.-3 Rekha, contending that there are material contradictions in the FIR, case diary statement and the court statement, which render their evidence untrustworthy. Learned Sr. Counsel further submits that the case diary statements of the eye witnesses were recorded after considerable delay which casts serious doubt on the credibility of the prosecution case. It is submitted that the injured eye witness, P.W.-2 Shanu has not supported the prosecution story and was declared hostile. He further submits that there is no allegation in the FIR that the accused/appellant Jallu assaulted the deceased and under these circumstances, accused/appellant Jallu could not have been convicted under Section 302 with the aid of Section 34 of the I.P.C.

11. Shri Ajay Shukla, learned Govt. Advocate appearing for the respondent/State, on the other hand, has disputed the stand of appellant as regard to the discrepancies in the statements of P.W.-1 Gayatribai and P.W.-3 Rekha. According to him, the trial Court after appreciating the facts and circumstances in its entirety has arrived to the conclusion of guilt of the appellant.

12. We have heard the learned counsel for the parties at length and meticulously perused the record.

13. In *State Vs. Sarvanan & anr.* (2008) 17 SCC 587, while dealing with the issue of material contradictions/omissions, the Supreme Court has held:

> *"While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The Trial Court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate Court in normal course would not be justified in reviewing the same again without justifiable reasons."*

14. In the case of *Kuriya & anr Vs. State of Rajasthan* (2012) 10 SCC 433, the Supreme Court has held :

> *30. This Court has repeatedly taken the view that the discrepancies or improvements which do not materially affect the case of the prosecution and are insignificant cannot be made the*

basis for doubting the case of the prosecution. The courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even in law render credential to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged improvements and variations must be shown with respect to material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. The credibility of a definite circumstance of the prosecution case cannot be weakened with reference to such minor or insignificant improvements. Reference in this regard can be made to the judgments of this Court in Kathi Bharat Vajsur and Another v. State of Gujarat [(2012) 5 SCC 724], Narayan Chetanram Chaudhary and Another v. State of Maharashtra [(2000) 8 SCC 457], Gura Singh Vs. State of Rajasthan [(2001) 2 SCC 205], Sukhchain Singh v. State of Haryana and Others [(2002) 5 SCC 100].

32. These are variations which would not amount to any serious consequences. The Court has to accept the normal conduct of a person. The witness who is watching the murder of a person being brutally beaten by 15 persons can hardly be expected to a state minute by minute description of the event. Everybody, and more particularly a person who is known to or is related to the deceased, would give all his attention to take steps to prevent the assault on the victim and then to make every effort to provide him with the medical aid and inform the police. The statements which are recorded immediately upon the incident would have to be given a little leeway with regard to the statements being made and recorded with utmost exactitude. It is a settled principle of law that every improvement or variation cannot be treated as an attempt to falsely implicate the accused by the witness. The approach of the court has to be reasonable and practicable. Reference in this regard can be made to Ashok Kumar Vs. State of Haryana [(2010) 12 SCC 350] and Shivlal and Another v. State of Chhattisgarh [(2011) 9 SCC 561].

15. P.W.-1 Gayatribai in her case diary statement has stated that accused Jallu inflicted injury with *gupti* and accused Karun with *ballam*, whereas in the statement before Court, she has named Jallu and Karun, both inflicting injuries with *ballam*. The evidence of P.W.-1 Gayatribai, when considered in view of the aforesaid legal position, makes it clear that misnaming the weapon in moment of fear and anguish is insignificant and cannot be made basis for doubting the case of prosecution. It will be unfair to expect a wife, whose husband is beaten to death and son is subjected to grievous injuries to watch with precision as to which of the accused was causing which injury and by what weapon. Nor this will make the whole testimony of the witness unacceptable especially when she is consistent in other material particulars, as there is no inconsistency with regard to identity of the accused persons or the time and the place of occurrence nor can her presence be doubted at the place of occurrence. P.W.-1 Gayatribai has clearly stated that there was previous enmity between the accused persons and P.W.-2 Shanu. According to her, an argument had ensued between the family members, when the accused persons came and asked them to stop abusing, appellant Jallu then started fighting with her son P.W.-2 Shanu. During the fight, accused Jallu brought *gupti* from his house and stabbed Shanu (P.W.-2) in the chest. Karun also got a *ballam* and stabbed Rammohan (deceased), when he tried to intervene and save P.W.-2 Shanu, was also attacked by Karun with *ballam* and sustained stab wounds in his stomach, due to it his stomach got cut and his intestine spilled out. Then appellant Jallu attacked him with *gupti* and inflicted injuries on his arms. She has been corroborated in material particulars by P.W.-2 Shanu, the injured witness and P.W.-3 Rekha.

16. P.W.-2 Shanu, in conformity with his case diary statement, has deposed in his chief examination that an argumentative quarrel was going on between his family members outside their house. At that time, the accused persons came, armed with *gupti* and *ballam*. Jallu asked him to refrain from using abusive language, to which P.W.-2 Shanu replied that it was their family matter. Hearing this, accused/appellant Jallu stabbed him with *gupti* which resulted into injury on his chest. When his father, deceased Rammohan tried to save him, he was also assaulted by both the accused persons. According to P.W.-2 Shanu, accused Karun stabbed the deceased in stomach with *ballam* and appellant Jallu inflicted injuries on the shoulder and head with *gupti*. However, in his cross-examination on the next day, he did a complete summersault and resiled from his previous statement and was declared hostile. He has stated that there was an argument going on between his father and mother and to avoid the same, his father came out of the house and was assaulted by some unknown persons. When P.W.-2 Shanu came out, he was also assaulted, but he could not see the assailants and has taken the name of accused persons due to suspicion on account of the previous enmity between them.

17. It is settled law that evidence of hostile witnesses can be relied upon to the extent to which it supports the prosecution version.

18. In (1980) 1 SCC 30 *Syad Akbar Vs. State of Karnataka* the Supreme Court has held:

> *"As a legal proposition, it is now settled by the decisions of this Court, that the evidence of a prosecution witness cannot be rejected wholesale, merely on the ground that the prosecution had dubbed him 'hostile' and had cross- examined him. We need say no more than reiterate what this Court said on this point in Sat Paul v. Delhi Administration (1):*
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> > *"Even in a criminal prosecution when a witness is cross- examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be credit worthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto."*

19. In (2012) 8 SCC 450 *State Vs. Sanjeev Nanda* the Supreme Court has observed:

> *"99. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law thereby, eroding people's faith in the system.*
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> *100. This court in State of U.P. v. Ramesh Mishra and Anr. [AIR 1996 SC 2766] held that it is equally settled law that the*

evidence of hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. In K. Anbazhagan v. Superintendent of Police and Anr., (AIR 2004 SC 524), this Court held that if a court finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court and they found the accused guilty.

101. We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1 and in Zahira Habibullah Shaikh v. State of Gujarat, AIR 2006 SC 1367, had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the retraction of the statements by the prosecution witness due to intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the Courts shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 of the IPC imposes punishment for giving false evidence but is seldom invoked."

20. In the instant case, the injuries found on the person of P.W.-2 Shanu and the fact that he was injured lends credibility to his testimony that he was present at the time of the incident. He has supported the prosecution case consistently in his chief examination, which was held on 11.11.2003. He was cross-examined by the defence, on the next day, i.e., on 12.11.2003, on which day, he turned hostile and resiled from his previous statement. It clearly appears that he was won over by the accused/defence. He has resiled from the previous statement with regard to the identity of the accused persons only. However, his evidence establishes the prosecution case with regard to the time, place, manner and weapon of the offence being knife and *ballam*.

21. Apart from the evidence of P.W.-2 Shanu, the prosecution version that appellant Jallu inflicted injury to P.W.-2 Shanu with knife and accused Karun with *Ballam* to deceased Rammohan gets corroboration from the evidence of P.W.-3 Rekha, who also witnessed the occurrence and went to report the incident with her mother P.W.-1 Gayatribai and the FIR Ex.P-1 was lodged within an hour, disclosing the name of the accused persons. According to P.W.-3 Rekha, due to previous enmity, the accused persons had killed her father. According to her, Jallu inflicted injuries with knife to P.W.-2 Shanu and Karun and Jallu both to the deceased. The fact that she went alongwith her mother to lodge the FIR was also corroborated by the statement of Investigating Officer P.W.-8 R.C. Thakur.

22. The prosecution version gets further corroboration from the discovery of knife on the direction of accused Jallu and *Ballam* on the disclosure of accused Karun

23. P.W.-7 Dr. G.R. Karode, who initially examined the deceased Rammohan, found two deep stab wounds on left side of stomach, below ribs, two incised wounds on right arm and shoulder. P.W.-7 Dr. G.R. Karode found two incised wounds on the right and left arms of injured P.W.-2 Shanu and a stab wound on the right side of his chest extending from clavicular region upto lower abdomen. As per P.W.-7 Dr. G.R. Karode, the injuries were caused by hard and sharp object and the injury to chest was dangerous in nature.

24. The contention of learned Sr. Counsel assailing the evidence of eye witnesses on account of delay in recording their statements does not merit acceptance. It is evident from the record that deceased Rammohan and injured Shanu (P.W.-2) were referred to the district hospital, Hoshangabad, where after two days, Rammohan succumbed to the injuries. However, Shanu (P.W.-2) was discharged on 20.05.2003. Statement of P.W.-1 Gayatribai, P.W.-2 Shanu and P.W.-3 Rekha were recorded on 18.06.2003, after they had returned from Hoshangabad. Moreover, the fact that the named FIR was lodged promptly within an hour of the incident by P.W.-1 Gayatribai alongwith P.W.-3 Rekha is also corroborated by I.O. P.W.-8 R.C. Thakur. Under the circumstances, delay in recording the case diary statements would not affect the credibility of the prosecution case.

25. The contention of learned Senior counsel appearing for the appellant Jallu that the provisions of Section 34 of the I.P.C. are not attracted in present case as the accused persons had no common intention to kill the deceased , deserves to be rejected.

26. Evidence on record clearly established that accused Jallu and Karun came to the house of deceased and started a fight with P.W.-2 Shanu. Deceased Rammohan when tried to intervene to save P.W.-2 Shanu, both the accused went their house. Accused Jallu brought *gupti* and accused Karun brought *ballam* from their house and in furtherance of their common intention, committed the offence.

27. In the instant case, the facts and circumstances of the case show that there was preconcert of mind and the accused persons have acted in furtherance of common intention. As seen from the evidence of P.W.-1 Gayatribai, P.W.-2 Shanu and P.W.-3 Rekha, 5-6 days prior to the date of occurrence, a fight ensued between the accused persons and P.W.-2 Shanu and the deceased. On 09.05.2003, when P.W.-1 Gayatribai, P.W.-2 Shanu and the deceased were quarreling, infront of their house, the accused persons came and asked them not to abuse. P.W.-2 Shanu told them to mind their own business, on this a fight ensued between the accused persons and P.W.-2 Shanu. Appellant Jallu exhorted that he would not let P.W.-2 Shanu go alive. Deceased Rammohan, when intervened to save P.W.-2 Shanu, appellant Jallu went to his house and brought *gupti* and attacked P.W.-2 Shanu, who sustained grievous injuries on his chest. Accused Karun also brought *ballam* from his house and assaulted deceased Ram Mohan, who sustained a cut in left side of his stomach, due to which his intestine spilled out. It is apparent from the evidence of P.W.-1 Gayatribai and P.W.-3 Rekha that after Rammohan fell down, appellant Jallu also inflicted injuries on his shoulder and arms, which makes it evident that the accused persons have participated in concert with preintent in committing the crime.

28. In *Balu @ Bala Subramanium and Anr. Vs. State (UT of Pondicherry)* (2016) 15 SCC 471, the Supreme Court has observed :-

> *"14. Common intention is seldom capable of direct proof, it is almost invariably to be inferred from proved circumstances relating to the entire conduct of all the persons and not only from the individual act actually performed. The inference to be drawn from the manner of the origin of the occurrence, the manner in which the accused arrived at the scene and the concert with which attack was made and from the injuries caused by one or some of them. The criminal act actually committed would certainly be one of the important factor to be taken into consideration but should not be taken to be the sole factor.*
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> *15. Under Section 34 IPC, a pre-concert in the sense of a distinct previous plan is not necessary to be proved. 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 facts of the case and circumstances of the situation. The question whether there was any common intention or not depends upon the inference to be drawn from the proving facts and circumstances of each case. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted."*

29. Similarly in the case of *Sudip Kr. Sen @ Biltu and others vs State Of W.B. & Ors.* (2016) 3 SCC 26, the Supreme Court has held:-

> *"14.* Section 34 *IPC embodies the principle of joint liability in the doing of a criminal act and essence of that liability is the existence of common intention. Common intention implies acting in concert and existence of a pre-arranged plan which is to be proved/inferred either from the conduct of the accused persons or from attendant circumstances. To invoke* Section 34 *IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be proved that:-*
>
> > *(i) there was common intention on the part of several persons to commit a particular crime and*
> >
> > *(ii) the crime was actually committed by them in furtherance of that common intention.*
>
> *Common intention implies pre-arranged plan. Under* Section 34 IPC*, a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The essence of liability under* Section 34 *IPC is conscious mind of persons participating in the criminal action to bring about a particular result. The question whether there was any common intention or not depends upon inference to be drawn from the proved facts and circumstances of each case. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted."*

30. In *Ramesh Singh Vs. State of A.P.* (2004) 11 SCC 305, the Supreme Court has held :

> *"To appreciate the arguments advanced on behalf of the appellants it is necessary to understand the object of incorporating* Section 34 *in* the Indian Penal Code*. As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held guilty. By introducing* Section 34 *in the penal code the Legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal*

act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 *IPC embodies the principles of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered from the manner in which the accused arrived at the scene and mounted the attack, the determination and concert with which the attack was made, and from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted. (See Noor Mohammad Yusuf Momin Vs. State of Maharashtra AIR 1971 SC 885)."*

31. In the present case, from the totality of the circumstances and the way the occurrence took place and in view of the fact that appellant No.1 Karun, who was convicted on the basis of same set of fact, act/omission has withdrawn his appeal, it cannot be said that the appellant Jallu was not in concert with the other accused in committing the offence under which he was convicted.

32. From the aforesaid analysis of the material on record, it is apparent that the commission of the offence by the accused persons is clearly established beyond reasonable doubt and the trial Court has rightly analyzed and considered the statements of the eye witnesses and other factors to record a finding of guilt against the accused - appellant.

33. In the circumstances, the conviction of appellant under Sections 302/34 and 324 of the I.P.C. on account of having committed the murder of Rammohan and causing grievous hurt to P.W.-2 Shanu is affirmed and upheld and the sentence imposed upon appellant Jallu by the trial Court is also confirmed.

34. In view of the aforesaid, the appeal filed by appellant Jallu, being devoid of merit is accordingly dismissed.

35. It is informed that appellant Jallu is on bail. His bail bonds shall stand cancelled and he is directed to surrender forthwith to undergo the remaining part of jail sentence.

Order accordingly.

I.L.R. [2018] M.P. 555
APPELLATE CRIMINAL

Before Mr. Justice Sushil Kumar Palo

Cr.A. No. 2988/1999 (Jabalpur) decided on 21 November, 2017

NITIN SHARMA …Appellant
Vs.
STATE OF M.P. … Respondent

Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Sections 2(k), 2(l), 7 (a) & 20 and Essential Commodities Act (10 of 1955), Section 3 & 7 – Amendment of 2006 – Age of Juvenile – **Appellant convicted and sentenced u/S 3/7 of Act of 1955 – Held – Date of birth of appellant is 29.05.1979 as verified by the Board of Secondary Education – Alleged offence was committed on 12.03.1997 and on that date accused/appellant was 17 years, 9 months and 13 days old – Appellant would be entitled to get benefit of Act of 2000 and according to which he was a juvenile as he had not completed the age of 18 years on the date of incident – Appellant has suffered a rigor for almost 20 years, would not be proper to remit the case back to Juvenile Justice Board – Conviction sustained but sentence liable to be quashed – Appeal allowed to the said extent.**

(Paras 4, 12 & 13)

किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम (2000 का 56), धाराएँ 2 (के), 2 (एल), 7 (ए), व 20 एवं आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3 व 7 – 2006 का संशोधन – किशोर की आयु – अपीलार्थी को 1955 के अधिनियम की धारा 3/7 के अंतर्गत दोषसिद्ध एवं दण्डादिष्ट किया गया – अभिनिर्धारित – अपीलार्थी की जन्मतिथि 29.05.1979 है जैसा कि माध्यमिक शिक्षा बोर्ड द्वारा सत्यापित किया गया है – अभिकथित अपराध 12.03.1997 को कारित किया गया था और उस दिनांक को अभियुक्त/अपीलार्थी 17 वर्ष, 9 माह और 13 दिन का था – अपीलार्थी, 2000 के अधिनियम का लाभ प्राप्त करने के लिए हकदार होगा, जिसके अनुसार वह किशोर था क्योंकि घटना दिनांक को उसने 18 वर्ष की आयु पूर्ण नहीं की थी – अपीलार्थी ने लगभग 20 वर्ष तक कठिनाई सहन की है, किशोर न्याय बोर्ड को प्रकरण प्रतिप्रेषित करना उचित नहीं होगा – दोषसिद्धि कायम परंतु दण्डादेश अभिखंडित किये जाने योग्य – उक्त सीमा तक अपील मंजूर।

Cases referred:

2015 Cr.L.R. (SC) 395, 2009 Cr.L.R. (SC) 4451, 2008 Cr.L.J. 4009.

Atul Anand Awasthy with *R.S. Thakur,* for the appellant.
Vivek Lakhera, G.A. for the respondent/State.

O R D E R

S.K. Palo, J :-This appeal has been preferred under Section 374 of Cr.P.C. challenging the judgment dated 21/10/1999 passed by Special Judge (Essential Commodities Act, 1945), Bhopal in Special Case No.62/1997, wherein the trial Court has convicted the appellant/Nitin Sharma under Section 3/7 of the Essential Commodities Act, 1945 and sentenced to 3 months rigorous imprisonment with fine of Rs.500/- and in lieu of fine, he has to undergo rigorous imprisonment for 7 days.

2. Counsel for the petitioner has argued on the technical ground that the appellant was a juvenile as per the Juvenile Justice Act, 2006.

3. Perused the record.

4. The appellant/Nitin's date of birth is 29/05/1979, which has been verified by the Board of Secondary Education, Bhopal through its letter dated 09/03/2010 issued on the request of the office of Advocate General. The Board have also supplied photocopy of the marksheet of High School Certificate Examination, 1955, wherein the date of birth of Nitin Sharma S/o Pramil Sharma has been shown as 09/05/1979. The alleged offence was committed on 12/03/1997. Therefore, on the date of offence, the appellant was 17 years, 9 months and 13 days old. Arguments advanced on behalf of the appellant is that, no doubt earlier the Juvenile Justice Act, 1986 was enforced till the Juvenile Justice Act, 2000 came into force. In the present case, the learned trial Court pronounced judgment on 21/10/1999. This appeal was filed on 01/11/1999. Therefore, this appeal was considered to be pending on the date Juvenile Justice (Care and Protection) Act, 2000 came into force.

5. Counsel for the petitioner submits placed reliance in the case of *Abdul Razzaq Vs. State of U.P. reported as 2015 Cr.L.R. (SC) 395, wherein it is held that the Hon'ble Apex Court has held that, if a person was not entitled to the benefit of juvenility under the Act of 1986 or the present Act 2000 prior to amendments in 2006, such benefit is available to a person undergoing sentence if he was below 18 years of age on the date of incident- Benefit can be claimed even after decision of the case*.

6. Learned GA for the respondent/State submits that the Juvenile Justice (Care and Protection) Act, 2000 (for brevity Act, 2010) is not applicable in the present case. The Juvenile Justice Act, 1986 would only be applicable.

7. Considered the same, it has been made clear earlier that the appellant was 17 years 9 months 13 days old when the offence was committed and subsequently, the learned trial Court has convicted him for offence under Section 3/6 of the Essential Commodities Act vide judgment dated 21/10/1999. This appeal has been preferred on 01/11/1999. The Juvenile Justice (Care and Protection) Act, 2000 came into force on 30/12/2000.

8. It would be appropriate to consider the provision of Section 20 of the Act, wherein it has been amended that, *"provided that the Board may, for any adequate and special reason to be mentioned in the order review the case and pass appropriate order in the interest of such juvenile.*

9. In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any Court, the determination of juvenility of such a juvenile shall be in terms of clause (1) of Section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed".

10. This provision has been inserted in Section 20 of the Juvenile Justice Act, 2000 by amendment dated 22/08/2006.

11. Hon'ble the Supreme Court in the case of ***Hariram Vs. State of Rajasthan & another*** reported as 2009 Cr.L.R. (SC) 4451 had occasioned to consider the similar case in which *"the appellant/Hariram was arrested on 30/11/1998 for the alleged commission of offences under Sections 148, 302, 149 read with Section 325 of IPC. The Additional Sessions Judge filed an order dated 03/04/2000, determined his age to be below 16 years on the date of commission of the offence and after declaring him to be a juvenile, directed that he be tried by the Juvenile Justice Board, Ajmer, Rajasthan. The Jodhpur Bench of the Rajasthan High Court in Criminal Revision No.165/2000, filed by the respondent No.2 challenging the framing of charges was dismissed. The High Court held that the appellant is not a juvenile and the provision of the Act is therefore not applicable to him. The Hon'ble Apex Court after discussing all the provisions and the proviso of Section 20 had opined there is no controversy that the appellant is above 16 years of age on the date of commission of alleged offence and had not completed 18 years of age when the Juvenile Justice Act, 2000 came into force. In view of Sections 2(k), 2(l) and 7(a) read with Section 20 of the Act, 2000, the provision thereof would apply to the appellant's case and on the date of the alleged incident it has to be held that he was a juvenile. The Apex Court allowed the appeal on the ground that notwithstanding the definition of "Juvenile" under the Act, 1986, the appellant is covered by the definition of "juvenile" in Section 2(k) and the definition of "juvenile in conflict with law" in Section 2(l) of the Juvenile Justice Act, 2000 as amended. The Hon'ble Supreme Court remitted the matter to the Juvenile Justice Board, Ajmer in accordance with law within 3 months from the date of receipt of copy of this order".*

12. In this background, it would be safely said that the appellant was a juvenile on the date of incident, on the above interpretation as he was not completed the age of 18 years on the date of incident and would be entitled to get benefit of the "Act, 2000".

13. It is appropriate to mention here that the alleged offence was committed on 12/03/1997. The offence is with regard to not maintaining the stock and not displaying the rate list, therefore, it was found to be violation of Liquid Petroleum Gas Supply and Distribution Order, 1993. Therefore, violation of Essential Commodities Display of Rates and Control Order, 1977. The appellant has been sentenced for 3 months rigorous imprisonment with fine of Rs.500/- under Section 3/7 of Essential Commodities Act. The appellant has suffered the rigor of the trial and of this appeal since 13/11/1997 till today, which is almost 20 years. In the light of the same, it would not be appropriate to remit the case back to the Juvenile Justice Board after about 20 years. Thus, the conviction of accused is sustained but the sentence is liable to be quashed. In this regard, reference can be made to *Gaurav Pradip Verma Vs. State of Gujrat reported as 2008 Cr.L.J. 4009.*

14. In the above premises, it is deemed fit to sustain the conviction of the appellant for the offences for which he has found guilty by the Additional Sessions Judge and at the same time, the sentence awarded to the appellant is quashed. The appeal is, therefore, **allowed,** to that extend.

Appeal allowed.

I.L.R. [2018] M.P. 558 (DB)
APPELLATE CRIMINAL

Before Mr. Justice S.K. Gangele & Mr. Justice Anurag Shrivastava

Cr.A. No. 758/2007 (Jabalpur) decided on 14 December, 2017

KHADAK SINGH @ KHADAK RAM …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 302 & 304 Part I – Conviction – Testimony of Eye Witness – Intention* – Held – Daughter of deceased was eye witness, who deposed the incident and accordingly Prosecution evidence established that when deceased (wife of accused) was cooking food, there was a quarrel between appellant and deceased and in that event appellant had taken out kerosene from stove and sprinkled the same on the deceased and ablaze her, then appellant tried to save her because he doused the fire – Appellant was also admitted in hospital and he received burn injuries on his hands and chest – In such circumstances, it could not be said that there was an intention of appellant to kill the deceased – Offence committed by appellant would fall u/S 304 Part I IPC – Conviction and sentence for offence u/S 302**

set aside – Appellant hereby convicted u/S 304 Part I IPC and is sentenced for 10 years RI – As appellant has completed 11 years of jail sentence, hence directed to be released – Appeal partly allowed.

(Para 16 & 17)

क. दण्ड संहिता (1860 का 45), धारा 302 व 304 भाग I – दोषसिद्धि – चक्षुदर्शी साक्षी का परिसाक्ष्य – आशय – अभिनिर्धारित – मृतिका की पुत्री चक्षुदर्शी साक्षी थी जिसने घटना का अभिसाक्ष्य दिया और तद्नुसार अभियोजन साक्ष्य ने स्थापित किया कि जब मृतिका (अभियुक्त की पत्नी) खाना पका रही थी, अपीलार्थी और मृतिका के बीच झगड़ा हुआ था तथा इस स्थिति में अपीलार्थी ने स्टोव से केरोसीन निकालकर उसे मृतिका पर छिड़का और उसे आग लगा दी, तब अपीलार्थी ने उसे बचाने का प्रयास किया क्योंकि उसने आग बुझायी थी – अपीलार्थी को भी चिकित्सालय में भर्ती किया गया था तथा उसे हाथों पर एवं सीने पर जलने की चोटें आयी थी – इन परिस्थितियों में, यह नहीं कहा जा सकता कि अपीलार्थी का आशय मृतिका को जान से मार देना था – अपीलार्थी द्वारा कारित अपराध, भा.दं.सं. की धारा 304 भाग I के अंतर्गत आयेगा – धारा 302 के अंतर्गत अपराध हेतु दोषसिद्धि एवं दण्डादेश अपास्त – एतद् द्वारा अपीलार्थी को भा.दं.सं. की धारा 304 भाग I के अंतर्गत दोषसिद्ध किया गया एवं 10 वर्ष सश्रम कारावास से दण्डादिष्ट किया गया – चूंकि अपीलार्थी ने 11 वर्ष का कारावास पूर्ण किया है, अतः छोड़ दिये जाने के लिए निदेशित किया गया – अपील अंशतः मंजूर।

B. Interpretation of Statues – 'Knowledge' & 'Intention' **– The Apex Court held that "as compared to 'knowledge' the intention requires something more than the mere foresight of the consequences, namely, the purposeful doing of a thing to achieve a particular end".**

(Para 16)

ख. कानूनों का निर्वचन – 'ज्ञान' एवं 'आशय' – सर्वोच्च न्यायालय ने अभिनिर्धारित किया कि'' 'ज्ञान' की तुलना में आशय मात्र परिणामों के पूर्व ज्ञान से कुछ अधिक अपेक्षा करता है, नामतः किसी विशिष्ट परिणाम को प्राप्त करने हेतु किसी कृत्य को प्रयोजनपूर्वक करना''।

Cases referred:

AIR 1956 SC 116, (2016) 3 SCC 317.

Arti Vishwakarma, Amicus Curiae for the appellant.
Ajay Tamrakar, P.L. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by:
S.K. Gangele, J :- Appellant has filed this appeal against the judgment dated 20.01.2007 passed in Sessions Trial No. 249/2006. The trial Court held the appellant guilty for commission of offence punishable under Section 302 of Indian Penal Code and awarded a sentence of life alongwith fine of Rs. 10,000/-.

2. Prosecution case in brief is that the appellant was living with the deceased. Both were working as labourers. On 30.07.2006, at around 9 O'clock in the evening when the deceased was cooking food, there was a quarrel between the appellant and the deceased. It is alleged that the appellant had taken out kerosene from the stove and sprinkled the same on the deceased. Thereafter, the appellant set her ablaze by igniting fire from a matchbox. The appellant tried to save the deceased and in that event, he himself received burn injuries. The incident was reported to the police. The deceased was admitted in Hamidiya Hospital, Bhopal. She died on 4th August, 2006 in the hospital. Police conducted investigation and filed charge-sheet against the appellant. The appellant abjured the guilt and pleaded innocence. The trial Court, after trial, held the appellant guilty for commission of offence and awarded sentence as mentioned above in the judgment.

3. Learned Amicus Curiae for the appellant has contended that even if the evidence produced by the prosecution is accepted, then also, looking to the fact that the appellant himself received burn injuries, the offence alleged to committed by the appellant would fall under Section 304 Part I of IPC. The appellant may have knowledge about the act, however, he had no intention to kill the deceased. In support of her contention, learned counsel relied on following judgment of the Hon'ble Apex Court :

A. *Willie (William) Slaney vs. State of Madhya Pradesh,* AIR 1956 Sc 116 and

B. *Nankaunoo vs. State of Uttar Pradesh,* (2016) 3 SCC 317.

4. Learned Panel Lawyer has submitted that the appellant had ablaze the deceased and she died due to the burn injuries. Hence, it has been proved that there was an intention and knowledge to the appellant to kill the deceased. In such circumstances, the trial Court has rightly convicted the appellant for commission of offence punishable under Section 302 of IPC. The appeal is liable to be dismissed.

5. **PW-1 Reena**, is the daughter of the deceased. She is an eye witness. She deposed that the deceased was living with the appellant. Both were working as labourers. On the date of incident, at around 9 O'clock in the evening, the deceased was cooking food. The appellant was sitting on a bed. There was a quarrel between the appellant and the deceased. In that event, the appellant had taken out kerosene from the stove and sprinkled the same on the deceased and ablaze her. Deceased received burn injuries. Thereafter, neighbours had come to the place. They had poured water on the deceased and they had taken the deceased to the hospital. In her cross-examination, she admitted the fact that the appellant had also gone to the hospital and he admitted in the hospital.

6. Another eye witness is **PW-8 Nirmala Devi.** She deposed that in one room of her house, the appellant and the deceased had been living on rent. At around 9 O'clock,

her son called her and when she came below, she had seen that the deceased was weeping and her daughters were also crying. Thereafter, her son Sumit Kumar and one Narmadi Bai had taken the deceased to the hospital. She was declared hostile.

7. **PW-9 Sumit Kumar** is also an eye witness. He was landlord of the deceased and the appellant. He deposed that the deceased and the appellant were living in his house in a rented room. He had heard the sound of quarrel of Vimla Bai and Khadak Singh. Thereafter, he came below. He had seen that Vimla Bai was in burnt condition. She was crying. No one other than Vimla Bai and the appellant were there. He and other persons had taken the deceased to the hospital.

8. **PW-10 Naramadi Dabi** is also an eye witness. She was the neighbour of the deceased. She deposed that she was standing outside of her house and she had seen that the appellant was dousing the fire. Vimla Bai had received burn injuries.

9. **PW-6 S.C. Ahirwar,** who was posted as CMO on 30.07.2006 at Hamidiya Hospital, Bhopal deposed that the appellant was brought to him by Sumit Kumar son of Heeralal Kushwaha. He told me that the appellant burnt his wife and he also received burn injuries. He had examined the appellant. There were burn injuries on his both hands and chest. I referred him for treatment to burn ward. In his cross-examination, he stated that he could not say that there was 24% burn injury on the right hand of the appellant.

10. There are no other eye witness, except the aforesaid witnesses.

11. **PW-3 Dr. Mukesh Goyal** performed autopsy of the deceased. He deposed that he was posted, on 05.08.2006, at Gandhi Medical College and he performed postmortem of the deceased on the aforesaid date. Deceased received 70% burn injuries. He opined that the deceased died due to the burn injuries.

12. **PW-5 Satish Kumar Verma** (Investigating Officer) deposed that he had recorded statement of the deceased when she was admitted in burn ward. He prepared spot map Ex.P8 and signed the same. Clothes of the deceased were seized vide seizure memo Ex.P9 and he signed the same. On the same date, he recorded statement of Nirmala Devi, Narmadi Bai, Sumit Kumar, Km. Reena and Km. Suneeta. The appellant was arrested vide arrest memo Ex.P10 and he signed the same.

13. From the evidence of PW-1, PW-8, PW-9 and PW-10, this fact has been proved that the appellant had sprinkled kerosene on the deceased and ablaze her. The next question is that what is the offence commited by the appellant? PW-1, who is the daughter of the deceased, specifically deposed that there was quarrel between the appellant and the deceased when the deceased was cooking food. In that event, the appellant had taken out kerosene from the stove and sprinkled the same on the deceased and ablaze her. She in her cross-examination admitted that the appellant was also admitted in the hospital. Doctor (PW-6) deposed that the appellant received

burn injuries on his hands and chest. He was referred for treatment at burn ward. He deposed that he could not say that whether there was 24% burn injury to the appellant. PW-10 deposed that the appellant was dousing the fire. ''खड़गसिंह विमला बाई को आग लगने के बाद जलने से बचा रहा था।" The incident is of 30.07.2006 and the deceased was died on 05.08.2006 at the hospital.

14. The Apex Court in the case of *Willie (William) Slaney vs. State of Madhya Pradesh,* AIR 1956 SC 116 has held as under about the intention of the accused:

> *"Where the accused causing the death of another had no intention to kill, then the offence would be murder only if (I) the accused knew that the injury inflicted would be likely to cause death or (2) that it would be sufficient in the ordinary course of nature to cause death or (3) that the accused knew that the act must in all probability cause death."*

15. The Hon'ble Apex Court further in the case of *Nankaunoo vs. State of Uttar Pradesh,* (2016) 3 SCC 317 has held as under in regard to difference between intention and motive:

> *"11. Intention is different from motive. It is the intention with which the act is done that makes a difference in arriving at a conclusion whether the offence is culpable homicide or murder. The third clause of* Section 300 *IPC consists of two it parts. Under the first part in must be proved that there was on intention to inflict the injury that is present and under the second part it must be proved that the injury was sufficient in the ordinary course of nature to cause death. Considering the clause thirdly of* Section 300 *IPC and reiterating the principles in Virsa Singh's case, in* Jai Prakash v. State (Delhi Administration) *(1991) 2 SCC 32, para (12), this Court held as under :-*
>
> > *"12. Referring to these observations, Division Bench of this Court in Jagrup Singh case, (1981) 3 SCC 616 observed thus: (SCC p. 620, para 7)*
> >
> > *'7. ... These observations of Vivian Bose, J. have become locus classicus. The test laid down in* **Virsa Singh case, AIR 1958 SC 465** *for the applicability of Clause Thirdly is now ingrained in our legal system and has become part of the rule of law.'*
>
> *The Division Bench also further held that the decision in Virsa Singh case AIR 1958 SC 465 has throughout been followed*

as laying down the guiding principles. In both these cases it is clearly laid down that the prosecution must prove (1) that the body injury is present, (2) that the injury is sufficient in the ordinary course of nature to cause death, (3) that the accused intended to inflict that particular injury that is to say it was not accidental or unintentional or that some other kind of injury was intended. In other words Clause Thirdly consists of two parts. The first part is that there was an intention to inflict the injury that is found to be present and the second part that the said injury is sufficient to cause death in the ordinary course of nature. Under the first part the prosecution has to prove from the given facts and circumstances that the intention of the accused was to cause that particular injury. Whereas the second part whether it was sufficient to cause death is an objective enquiry and it is a matter of inference or deduction from the particulars of the injury. The language of Clause Thirdly of Section 300 speaks of intention at two places and in each the sequence is to be established by the prosecution before the case can fall in that clause. The 'intention' and 'knowledge' of the accused are subjective and invisible states of mind and their existence has to be gathered from the circumstances, such as the weapon used, the ferocity of attack, multiplicity of injuries and all other surrounding circumstances. The framers of the Code designedly used the words 'intention' and 'knowledge' and it is accepted that the knowledge of the consequences which may result in doing an act is not the same thing as the intention that such consequences should ensue. Firstly, when an act is done by a person, it is presumed that he must have been aware that certain specified harmful consequences would or could follow. But that knwoledge is bare awareness and not the same thing as intention that such consequences should ensue. As compared to 'knowledge', 'intention' requires somthing more than the mere foresight of the consequences, namely the purposeful doing of a thing to achieve a particular end."

12. *The emphasis in clause three of Section 300 IPC is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary course of nature. When the sufficiency exists and death follows, causing of such injury is intended and causing of such offence is murder. For ascertaining the*

sufficiency of the injury, sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused and sometimes both are relevant. Depending on the nature of weapon used and situs of the injury, in some cases, the sufficiency of injury to cause death in the ordinary course of nature must be proved and cannot be inferred from the fact that death has, in fact, taken place."

16. In view of the aforesaid principle of law laid down by the Hon'ble Apex Court, it is to be considered that whether there was an intention of the appellant to cause death of the deceased. The Apex Court has held that 'as compared to 'knowledge', the intention requires something more than the mere foresight of the consequences, namely, the purposeful doing of a thing to achieve a particular end." In the present case, from the prosecution evidence, it is established that when the deceased was cooking food, there was a quarrel between the appellant and the deceased and in that event, the appellant had taken out kerosene from the stove and sprinkled the same on the deceased and ablaze her. The appellant tired to save the deceased because he doused the fire. He was also admitted in the hospital and he received burn injuries on his hands and chest. In such circumstances, in our opinion, it could not be said that there was an intenton of the appellant to kill the deceased. Hence, the offence committed by the appellant would fall under Section 304 part 1 of IPC.

17. Consequently, the appeal filed by the appellant is **partly allowed**. The conviction and sentenced of the appellant under Section 302 of IPC, as awarded by the trial Court, is set aside. The appellant is convicted for commission of offence punishable under Section 304 part 1 of IPC and he is awarded a sentence of RI 10 years. The appellant is in jail since 31.07.2006. He has completed more than 11 years of jail sentence. Hence, he released forthwith, if not required in any other case.

Appeal partly allowed.

I.L.R. [2018] M.P. 564 (DB)
APPELLATE CRIMINAL

Before Mr. Justice Anand Pathak & Mr. Justice G.S. Ahluwalia

Cr.A. No. 491/2010 (Gwalior) decided on 21 December, 2017

BHAGWAN SINGH …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Sections 302, 300 & 201 – Murder Case – Circumstantial Evidence* – Held – Circumstances proved against appellant lead to only one conclusion that appellant committed murder – Appellant/Accused made extra-judicial confession – Nothing on record to**

show that there was no premeditation or incident took place because of any sudden or grave provocation, in a heat of passion – Manner in which offence committed, would certainly fall within Section 300 IPC – By burning the dead body, appellant has caused disappearance of evidence of offence – Judgment and sentence affirmed – Appeal dismissed.

(Paras 33 to 38, 57 & 59)

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 300 व 201 – हत्या का प्रकरण – परिस्थितिजन्य साक्ष्य – अभिनिर्धारित – अपीलार्थी के विरूद्ध साबित की गई परिस्थितियों से केवल एक ही निष्कर्ष निकलता है कि अपीलार्थी ने हत्या कारित की – अपीलार्थी/अभियुक्त ने न्यायिकेत्तर संस्वीकृति की – अभिलेख पर यह दर्शाने के लिए कुछ नहीं कि पूर्वचिंतन नहीं था अथवा घटना, अचानक या गंभीर प्रकोपन के कारण, भावावेश में घटित हुई – जिस ढंग से अपराध कारित किया गया वह निश्चित रूप से भा.दं.सं. की धारा 300 के भीतर आएगा – शव जलाकर अपीलार्थी ने अपराध के साक्ष्य का विलोपन कारित किया है – निर्णय एवं दण्डादेश अभिपुष्ट – अपील खारिज।

***B. Evidence Act (1 of 1872), Section 145 and Criminal Procedure Code, 1973 (2 of 1974), Section 161* – To take advantage of omission in previous statement, attention of witness has to be drawn to it, giving opportunity to explain omission – Witness was not confronted with omission with regard to last seen together – Evidence cannot be discarded.**

(Para 31)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 145 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161 – पूर्वतर कथन में लोप का लाभ लेने के लिए, लोप को स्पष्ट करने का अवसर देते हुए साक्षी का ध्यान उस ओर आकर्षित करना होता है – साक्षी का सामना, अंतिम बार साथ देखे जाने के संबंध में लोप के साथ नहीं कराया गया था – साक्ष्य को अमान्य नहीं किया जा सकता।

***C. Criminal Practice – Absconsion of Accused* – Mere absconsion may not be indicative of guilty mind, but in light of surrounding circumstances, absconsion immediately after incident would assume importance – Motive – Motive attributed to the appellant for committing offence may not be very strong, however, even assuming that prosecution failed to prove, even then on the basis of circumstantial evidence, accused can be convicted.**

(Paras 39, 42 & 50)

ग. दाण्डिक पद्धति – अभियुक्त की फरारी – मात्र फरारी, दोषी मस्तिष्क होने का बोधक नहीं हो सकती, परंतु आस–पास की परिस्थितियों के आलोक में, घटना के तुरंत पश्चात् फरारी, महत्वपूर्ण मानी जाएगी – हेतु – अपीलार्थी द्वारा अपराध कारित करने के लिए माना गया हेतु अति प्रबल नहीं हो सकता, तथापि, यदि यह धारणा भी की जाए कि अभियोजन

साबित करने में असफल रहा, तब भी परिस्थितिजन्य साक्ष्य के आधार पर अभियुक्त को दोषसिद्ध किया जा सकता है।

***D. Penal Code (45 of 1860), Section 302 – Dead body not recovered* – Held – Prosecution proves beyond reasonable doubt that victim has been done to death – Accused can be held guilty of committing murder of deceased.**

(Para 55)

घ. दण्ड संहिता (1860 का 45), धारा 302 – शव बरामद नहीं किया गया – अभिनिर्धारित – अभियोजन युक्तियुक्त संदेह से परे यह साबित करता है कि पीड़ित की हत्या की गई – अभियुक्त को मृतक की हत्या कारित करने का दोषी ठहराया जा सकता है।

Cases referred:

(2014) 5 SCC 509, (2012) 11 SCC 205, (2012) 11 SCC 196, (2017) 8 SCC 497, 1962 Supp (2) SCR 203, (2013) 9 SCC 778, (2015) 12 SCC 644, (2003) 12 SCC 587, (2000) 4 SCC 298, (1993) 2 SCC 684, (1997) 7 SCC 507, (2016) 12 SCC 783, (2014) 12 SCC 439, (2013) 3 SCC 52, (2014) 5 SCC (Cri) 573, (2002) 6 SCC 81, (2013) 12 SCC 551.

Sushil Goswami, for the appellant
Girdhari Singh Chauhan, P.P. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by:
G. S. Ahluwalia, J :- This Criminal Appeal under Section 374 of Cr.P.C. has been filed against the judgment and sentence dated 18-5-2010 passed by Additional Sessions Judge, Sevada, Distt. Datia in Sessions Trial No.67/2006, by which the appellant has been convicted under Sections 302, 201 of I.P.C. and has been sentenced to undergo the Life Imprisonment and a fine of Rs. 10,000/- and rigorous imprisonment of 2 years and a fine of Rs.1,000/- with default imprisonment respectively.

2. The necessary facts for the disposal of the present appeal in short are that on 26-3-2006, an information was given by Kamal Kishore to police that his younger brother, aged about 20 years, is residing along his maternal aunt Kishori in village Ramdeva. At about 7 in the morning, Charan Singh, his cousin brother came to his village Ramgada and enquired that whether Ramkumar has come or not? When he replied that Ramkumar has not come, then he insisted that he should come to village Ramdeva. He came to Ramdeva, where he was informed by Kishori, that the whereabouts of Ramkumar are not known. Yesterday at about 8 P.M., the son of Bhagwan Singh had taken him with him and from thereafter, he has not come back.

Then he, his uncle Badam Singh, Ram Singh, Lakhan, Ramdas all went to the house of Bhagwan Singh and found that no body was there in the house of Bhagwan Singh. Fire was burning near his house. Blood was lying on the roof of the house of Bhagwan Singh, therefore, he got suspicious. He found a bone in the fire therefore, it appears that the dead body of his brother is burning. Therefore, he lodged the report. On the basis of the report, the police started inquest enquiry. During enquiry, it was found that it is a case of murder, therefore, F.I.R. was registered under Section 302,201 of I.P.C. During investigation, spot map was prepared, blood stained and plain earth was seized, remains of burnt bones and ash were seized, a calculator from the spot was seized, broken piece of bangles were seized. Senior Scientific Officer, scene of crime, inspected the spot and prepared a report. Blood stained underwear and baniyan of the accused were seized. The statements of witnesses were recorded and after completing the investigation, the police filed a charge sheet against the appellant and Kallu, Chandra Prakash, Siyasharan, and Sheela for offence under Sections 302,201 of I.P.C.

3. The Trial Court by order dated 8-8-2006, framed charges under Sections 302,201 of I.P.C.

4. The accused persons, abjured their guilt and pleaded not guilty.

5. The prosecution, in order to prove its case, examined Ratiram (P.W.1), Sukhlal (P.W.2), Kamal Kishor (P.W.3), Komal Singh (P.W.4), Mukesh (P.W.5), Smt. Kishori (P.W.6), Ram Singh (P.W.7), Ramadhar (P.W.8), Dr.K.K. Asthana (P.W.9), Rajesh Kumar (P.W.10), V.K. Parashar (P.W.11), Chandan Singh (P.W.12), Malkhan Singh (P.W.13) and Dr. R.P. Soni (P.W.14). The accused persons, and the appellant did not examine any witness.

6. The Trial Court by judgment and sentence dated 18-5-2010, passed in S.T. No.67/2006, acquitted co-accused Kallu, Chandra Prakash, Siyasharan, and Sheela and convicted the appellant for offence under Sections 302,201 of I.P.C. and sentenced to undergo the Life Imprisonment and a fine of Rs. 10,000/- and rigorous imprisonment of 2 years and a fine of Rs.1,000/- with default imprisonment respectively.

7. The State has not filed an appeal against the acquittal of co-accused Kallu, Chandra Prakash, Siyasharan and Sheela.

8. Challenging the conviction recorded by the Trial Court, the Counsel for the appellant submitted that on the basis of the same evidence, the Trial Court has acquitted the co-accused persons, thus, it is clear that the evidence of the witnesses was not found reliable. There is no admissible evidence available on record. The case is based on circumstantial evidence and the chain of circumstances is not complete. The dead body of the deceased could not be identified, therefore, it cannot be said that Ramkumar

has been killed. The prosecution has not proved any motive in the present case. In the alternative, it is submitted by the Counsel for the appellant, that conviction of the appellant may be converted into Section 304 Part I of I.P.C.

9. Per contra, it is submitted by the Counsel for the State that the State has proved the chain of circumstances beyond reasonable doubt. The Trial Court, after removing the grain from chaff, has convicted the appellant, thus, it cannot be said that the evidence of the witnesses is not reliable.

10. Heard the learned Counsel for the parties.

11. The prosecution case is based on circumstantial evidence, and the prosecution has relied upon the following circumstances :

''(a) Extra Judicial Confession of the appellant.

(b) Last seen together.

(c) A human dead body was found burning near the house of the appellant.

(d) The appellant was seen for the last time, sitting by the side of the burning pyre.

(e) A Pool of Human Blood was found on the roof of the house of the appellant.

(f) Three broken pieces of flagstone with blood stains were found on the roof of the house of Bhagwan Singh and on joining, it was found that the broken pieces were of single flagstone.

(g) Two broken legs of a bed with blood stains were found on the roof of the house of the appellant.

(h) On the boundary wall of the roof of the house of the appellant, blood stains were found which were going downwards, indicating that the dead body was thrown from the said place.

(i) Blood was found on the ground, which indicates the place, where the dead body must have fallen.''

(j) The trails of blood were found and the marks of dragging the dead body, going upto the pyre, were found on the ground,.

(k) Cow-dung cake were found burning and burnt human bones were found in the pyre.

(l) The serology report, shows that the burnt bones were of a boy aged about 20-22 years.

(m) A buckle of belt and Kada were found from the ashes.

(n) After the incident, the appellant had absconded

(o) Motive for committing offence.

12. Before considering the circumstances, sought to be proved by the prosecution against the appellant, it would be apposite to consider the law relating to proving the case on the basis of circumstantial evidence.

13. The Supreme Court in the case of *Dharamdeo Yadav Vs. State of U.P.,* reported in *(2014)5 SCC 509* has held as under :-

> **''15.** We have no eyewitness version in the instant case and the entire case rests upon the circumstantial evidence. Circumstantial evidence is evidence of relevant facts from which, one can, by process of reasoning, infer about the existence of facts in issue or factum probandum. In *Hanumant Govind Nargundkar v. State of M.P. [AIR 1952 SC 343]*, this Court held as follows: (AIR pp. 345-46, para 10)
>
> > "*10.* … It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."
>
> Each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. Even when there is no eyewitness to support the criminal charge, but prosecution has been able to establish the chain of circumstances which is complete leading to inference of guilt of accused and circumstances taken collectively are incapable of explanation on any reasonable hypothesis save of guilt sought to be proved, the accused may be convicted on the basis of such circumstantial evidence.

14. The Supreme Court in the case of *Sunil Clifford Daniel Vs. State of Punjab* reported in (2012) 11 SCC 205 has held as under :-

> "**29.** In *Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116]* it was held by this Court that the onus is on the prosecution to prove that the chain is complete and that falsity or untenability of the defence set up by the accused cannot be made the basis for ignoring any serious infirmity or lacuna in the case of the prosecution. The Court then proceeded to indicate the conditions which must be fully established before a conviction can be made on the basis of circumstantial evidence. These are: (SCC p. 185, para 153)
>
> > "*(1)* the circumstances from which the conclusion of guilt is to be drawn should be fully established.
> >
> > … the circumstances concerned 'must' or 'should' and not 'may be' established. …
> >
> > *(2)* the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
> >
> > *(3)* the circumstances should be of a conclusive nature and tendency,
> >
> > *(4)* they should exclude every possible hypothesis except the one to be proved, and
> >
> > *(5)* there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."
>
> Thus, in a case of circumstantial evidence, the prosecution must establish each instance of incriminating circumstance, by way of reliable and clinching evidence, and the circumstances so proved must form a complete chain of events, on the basis of which, no conclusion other than one of guilt of the accused can be reached. Undoubtedly, suspicion however grave it may be, can never be treated as a substitute for proof. While dealing with a case of circumstantial evidence, the court must take utmost precaution whilst finding an accused guilty, solely on the basis of the circumstances proved before it."

15. The Supreme Court in the case of *Pudhu Raju v. State* reported in (2012) 11 SCC 196 has held as under :-

> **"15.** In a case of circumstantial evidence, the prosecution must establish each instance of incriminating circumstance by way of reliable and clinching evidence, and the circumstances so proved, must form a complete chain of events, on the basis of which, no conclusion other than one of guilt of the accused can be reached. Undoubtedly, suspicion, however grave it may be, can never be treated as a substitute for proof. While dealing with a case of circumstantial evidence, the court must take utmost precaution whilst finding an accused guilty solely on the basis of the circumstances proved before it.''

16. The Supreme Court in the case of *Satish Nirankari v. State of Rajasthan* reported in (2017) 8 SCC 497 has held as under : -

> "**29**. It is now well established, by a catena of judgments of this Court, that circumstantial evidence of the following character needs to be fully established:
>
> *(i)* Circumstances should be fully proved.
>
> *(ii)* Circumstances should be conclusive in nature.
>
> *(iii)* All the facts established should be consistent only with the hypothesis of guilt.
>
> *(iv)* The circumstances should, to a moral certainty, exclude the possibility of guilt of any person other than the accused (see *State of U.P. v. Ravindra Prakash Mittal; Chandrakant Chimanlal Desai v. State of Gujarat*). It also needs to be emphasised that what is required is not the quantitative, but qualitative, reliable and probable circumstances to complete the claim connecting the accused with the crime. Suspicion, however grave, cannot take place of legal proof. In the case of circumstantial evidence, the influence of guilt can be justified only when all the incriminating facts and circumstances are found to be not compatible with the innocence of the accused or the guilt of any other person.
>
> **30.** The following tests laid down in *Padala Veera Reddy v. State of A.P.* also need to be kept in mind: (SCC pp. 710-11, para 10)

> "*10. (1)* the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> *(2)* those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> *(3)* the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
>
> *(4)* the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

31. Sir Alfred Wills in his book *Wills' Circumstantial Evidence* (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence:

> "*(1)* the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;
>
> *(2)* the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;
>
> *(3)* in all cases, whether of direct or circumstantial evidence, the best evidence must be adduced which the nature of the case admits;
>
> *(4)* in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and
>
> *(5)* if there by any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted."

17. We shall now consider each and every circumstance against the appellant, to find out that whether the prosecution has succeeded in establishing the guilt of the appellant or not?

18. The important question for determination is that whether any human dead body was burnt ?

19. Burnt bones were seized from the pyre by seizure memo Ex. P.7. Kamal Kishore (P.W.3) and V.K. Parashar (P.W.11) have stated that the burnt bones of human being, were seized from the pyre vide seizure memo Ex. P.7.

20. The burnt bones were sent to F.S.L. Gwalior for obtaining serology report. The serology report, Ex. P. 17 has been proved by V.K. Parashar (P.W.11). According to this witness, the burnt bones were sent to the F.S.L. Gwalior and the Serology report is Ex. P.17. According to this report, "Bones appeared to be of human being and burn in abundant amount of air on high temperature. The bones were referred to Medicological Department for histological examination of long bones.

21. Dr. R.P.Soni (P.W.14), the Senior Forensic Specialist, Medico-legal Institute, Gandhi Medical College, Bhopal, has stated that on opening the packet, it contained 300 gms. of bones and after examining the same, gave his following report:-

Opinion

(a) Bones are of human in origin

(b) Bones belongs to same individual

(c) Sex is male

(d) Age 20 to 25 years

(e) Cause of death remains open as no injury found on the available bones.

Note : Bones are not suitable for Histopathological examination as the bones are brittle.

The report is Ex.P.18. In cross-examination, it was admitted by this witness that the entire skull bones were not available.

22. Thus, it is clear that the dead body of a human being who was male and in between the age of 20-25 years was burnt near the house of the appellant Bhagwan Singh. It is not out of place to mention here that the place where pyre was found is not a cremation ground and it is an agricultural field, situated adjoining to the house of the appellant Bhagwan Singh.

23. Extra Judicial Confession.

24. Ratiram (P.W.1) has stated that he and Komal Singh were coming back to their house from Sitapur. They met with the appellant Bhagwan Singh near the village Chhekuri. It was about 11-12 P.M. The appellant Bhagwan Singh, made an Extra Judicial Confession to the effect, that he has killed Ramkumar Jatav. He also informed that as Ramkumar, used to create problems in his house, therefore, he has killed him. This witness was cross-examined in detail. In cross-examination, this witness, denied

that he had informed the police that the appellant had informed that since, Ramkumar had illicit relations with his wife, and he had seen them in a compromising position, therefore, he has killed him. The case diary statement of this witness was recorded on 2-4-2006, whereas the appellant was arrested on 4-4-2006. Thus, it is clear that the appellant Bhagwan Singh had voluntarily made an Extra Judicial Confession before Ratiram (P.W.1).

25. The Supreme Court in the case of *Ram Singh Vs. State of U.P.* Reported in 1962 Supp (2) SCR 203 has held as under :

> ''**14.** ..... Extra judicial confessions are not usually considered with favour but that does not mean that such a confession coming from a person who has no reason to state falsely and to whom it is made in circumstances which tend to support his statement, should not be believed.''

26. The Supreme Court in the case of *Sahib Hussain Vs. State of Rajasthan* reported in (2013) 9 SCC 778 has held as under :-

> **''15.** The prosecution heavily relied on the extra-judicial confession. The extra-judicial confession, though a weak type of evidence, can form the basis for conviction if the confession made by the accused is voluntary, true and trustworthy. In other words, if it inspires the confidence, it can be acted upon.....''

27. The Supreme Court in the case of *Vijay Shankar Vs. State of Haryana* reported in (2015) 12 SCC 644 has held as under:-

> ''**18.** Principles in respect of evidentiary value and reliability of extra-judicial confession have been summarised by this Court in *Sahadevan v. State of T.N.,* which reads as under: (SCC pp. 412-13, para 16)
>
> "*(i)* The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.
>
> *(ii)* It should be made voluntarily and should be truthful.
>
> *(iii)* It should inspire confidence.
>
> *(iv)* An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.
>
> *(v)* For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law."

19. Extra-judicial confession is a weak piece of evidence and the courts are to view it with greater care and caution. For an extra-judicial confession to form the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities....."

28. Last seen together

29. Kishori (P.W.6) has stated in her Court evidence, that Ramkumar was staying with her. Bhagwan Singh came to her house, and took the deceased Ramkumar with him, on the pretext of harvesting the crop. However, in the case diary statement, Kishori (P.W.6) had stated that Pushpendra, the son of Bhagwan Singh had come to call the deceased. A specific suggestion was given in cross-examination, that whether Pushpendra had come to call the deceased or not, then it was denied by this witness. An attention of this witness was drawn towards her case diary statement, and she replied that She cannot say as to how it is mentioned in her case diary statement that Pushpendra, son of the appellant had come to call the deceased on the pretext that the appellant is calling. Further, in cross-examination, this witness once again re-iterated that in fact, it was the appellant who had taken the deceased with him, on the pretext of cutting the crop. However, the attention of the witness, towards this omission in her case diary statement was not drawn. The Supreme Court in the case of *Karan Singh Vs. State of M.P.* Reported in (2003) 12 SCC 587 has held as under :-

''**5.** When a previous statement is to be proved as an admission, the statement as such should be put to the witness and if the witness denies having given such a statement it does not amount to any admission and if it is proved that he had given such a statement the attention of the witness must be drawn to that statement. Section 145 of the Evidence Act is clear on this aspect. The object is to give the witness a chance of explaining the discrepancy or inconsistency and to clear up the particular point of ambiguity or dispute. ....."

30. The Supreme Court in the case *Rajendra Singh Vs. State of Bihar* reported in (2000) 4 SCC 298 has held as under :-

''**6.** So far as the second contention of Mr Mishra is concerned, it is no doubt true that on 4-7-1977 Satyanarain who has been examined as PW 8 in the course of trial had been examined by a Magistrate as he had been seriously injured and that statement has been exhibited as Exhibit B and in fact the Magistrate who

had recorded the statement has been examined by the defence as DW 1. This statement of Satyanarain recorded by the Magistrate may be a former statement by Satyanarain relating to the same fact at about a time when the fight took place and when the said Satyanarain was examined as PW 8 during trial it would be open for a party to make use of the former statement for such purpose as the law provides. But if the witness during trial is intended to be contradicted by his former statement then his attention has to be drawn to those parts of the statement which are required to be used for the purpose of contradicting him before the said statement in question can be proved as provided under Section 145 of the Evidence Act. Mr Mishra, learned Senior Counsel appearing for the appellant relying upon the decision of this Court in *Bhagwan Singh v. State of Punjab* contended before us that if there has been substantial compliance with Section 145 of the Evidence Act and if the necessary particulars of the former statement has been put to the witness in cross-examination then notwithstanding the fact that the provisions of Section 145 of the Evidence Act is not complied with in letter i.e. by not drawing the attention of the witness to that part of the former statement yet the statement could be utilised and the veracity of the witness could be impeached. According to Mr Mishra the former statement of PW 8 which has been exhibited as Exhibit B was to the effect that Kameshwar was assaulted with a bhala by Rajender and Surender and he did not see whether any other person had been assaulted or not, whereas in the course of trial the substantive evidence of the witness is that it is Rajender and Triloki who assaulted the deceased and, therefore, it belies the entire prosecution case. The question of contradicting evidence and the requirements of compliance with Section 145 of the Evidence Act has been considered by this Court in the Constitution Bench decision in the case of *Tahsildar Singh v. State of U.P.* The Court in the aforesaid case was examining the question as to when an omission in the former statement can be held to be a contradiction and it has also been indicated as to how a witness can be contradicted in respect of his former statement by drawing particular attention to that portion of the former statement. This question has been recently considered in the case of *Binay Kumar Singh v. State of Bihar* and the Court has taken note of the earlier decision in *Bhagwan Singh* and explained away the same with the observation that on the facts of that case there cannot be a dispute with the proposition laid down

therein. But in elaborating the second limb of Section 145 of the Evidence Act it was held that if it is intended to contradict him by the writing his attention must be called to those parts of it which are to be used for the purpose for contradicting him. It has been further held that if the witness disowns to have made any statement which is inconsistent with his present stand, his testimony in court on that score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second limb of Section 145 of the Evidence Act. Bearing in mind the aforesaid proposition and on scrutinising the evidence of DW 1, we find that the Magistrate who is supposed to have exhibited the document in his cross-examination categorically admitted that there was neither any signature nor seal of either the Chief Judicial Magistrate or his office on the statement, Exhibit B. If according to the Magistrate on recording the statement of Satyanarain he had sent the same to the Chief Judicial Magistrate, it is inconceivable as to how the document would not bear the signature or seal of either the Chief Judicial Magistrate or his office. The Magistrate in his examination-in-chief also does not state as to who identified Satyanarain in the hospital before recording his statement. It is under these circumstances that it is difficult to hold that Exhibit B has been legally proved to be the former statement of Satyanarain who has been examined as PW 8. Then again on a scrutiny of the evidence PW 8 it is crystal clear that the witness has not been confronted with that part of his alleged former statement by which the defence wants him to be contradicted. The witness has merely been asked as to whether he stated before the Magistrate that accused Surender had assaulted Kameshwar to which he had replied he does not recall as to what he stated before the Magistrate. In this state of affairs it is difficult for us to hold that the provisions of Section 145 of the Evidence Act have been complied with in the case in hand. Then again, so far as accused Rajender is concerned, there has been no variance in his so-called former statement, Exhibit B and his statement in the Court when he was examined as PW 8 clearly asserting that Rajender assaulted the deceased Kameshwar by means of a bhala. In the aforesaid premises, we are unable to accept the second submission of Mr Mishra and the same accordingly stands rejected.''

31. Thus, it is clear that in order to take advantage of omission in the previous statement, the attention of the witness has to be drawn to the said part of the previous statement, thereby giving an opportunity to the witness, to explain the omission. The

submission made by the Counsel for the appellant that by drawing the attention of the witness, to her previous statement where she had stated, "that it was Pushpendra who had come to call Ramkumar", the appellant has substantially complied with the provisions of Section 145 of Evidence Act, and therefore, the evidence of Kishori (P.W.6) with regard to Last Seen Together should be discarded in the light of omission, cannot be accepted for the simple reason, that the witness was not confronted with omission in her previous statement in the form of case diary statement recorded under Section 161 of Cr.P.C. The attention of the witness, to the omission in her case diary statement, that the appellant Bhagwan Singh had come to her house and had taken the deceased with him, on the pretext of cutting crops, was not drawn. Thus, the evidence of Kishori (P.W.6) with regard to Last Seen Together cannot be ignored.

32. A human dead body was found burning near the house of the appellant.

33. Mukesh (P.W.5), Kishori (P.W.6), Ram Singh (P.W.7), have specifically stated that a funeral pyre was found near the house of the appellant and a dead body was burning. A spot map Ex. P.6 was prepared by V.K. Parashar (P.W.11) in the presence of Kamal Kishor (P.W.3) and the pyre was found quite nearer to the house of the appellant Bhagwan Singh. Panchnama of Pyre, Ex. P.8 was prepared by V.K. Parashar (P.W.11) in the presence of Ram Singh (P.W.4). The ashes were checked and bones were found which were seized vide seizure memo Ex. P.7. Kamal Kishore (P.W.3) is the seizure witness, who has proved the seizure of bones from the pyre. As already mentioned in the previous paragraph that as per report, Ex. P.18 given by Dr. R.P.. Soni (P.W.14), the Senior Forensic Specialist, the burnt bones were of a human being and were of one individual and the age of the deceased was in between 20-25 years. Thus, it is clear that a human dead body was burnt, quite nearer to the house of appellant Bhagwan Singh.

34. **The appellant was seen for the last time, standing by the side of the burning pyre.**

35. Ram Singh (P.W.7) has stated that in the morning, while he was going to answer the call of the nature, he had seen the appellant standing by the side of the place, where fire was burning. He returned back around 5:30 in the morning and at that time, the appellant was not there. This witness was cross examined in detail, however, nothing could be elicited from the evidence, which may make his above mentioned evidence, unreliable. Thus, it is clear that in the morning, the appellant was standing by the side of the Pyre and thereafter, he went missing.

36. A Pool of Human Blood was found on the roof of the house of the appellant.

Three broken pieces of flagstone with blood stains were found on the roof of the house of Bhagwan Singh and on

joining, it was found that the broken pieces were of single flagstone.

Two broken legs of a bed with blood stains were found on the roof of the house of the appellant.

On the boundary wall of the roof of the house of the appellant, blood stains were found which were going downwards, indicating that the dead body was thrown, on the ground, from the said place.

Blood was found on the ground, which indicates the place, where the dead body had fallen.

The trails of blood were found and the marks of dragging the dead body were found on the ground, going upto the pyre.

Cow-dung cake were found burning and burnt human bones were found in the pyre.

The serology report, shows that the burnt bones were of a boy aged about 20-22 years.

A buckle of belt and Kada were found from the ashes.

37. Since, all the above mentioned circumstances are inter connected, therefore, they shall be considered jointly. Dr. K.K. Asthana (P.W.9), had inspected the spot and had given his report which is Ex. 12. On spot inspection, following situation/ articles were found :-

''(a) Two beds were found on the roof of the house of the appellant and both the planks of a bed were found broken.

(b) A pool of blood was found on the roof and blood showers were found. One calculator was also found and a broken piece of flagstone was found near the pool of blood.

(c) Broken pieces of flagstone were found and on joining the same, they were found to be a part of one flagstone. Two broken bricks were also found.

(d) From the roof of the house of the appellant, the blood showers were found in front of the door.

(e) Loose bricks were found on the window situated on the right side of the room and broken pieces of bangles were found in the room.

(f) On the other side of the roof, the blood showers were found which were caused due to throwing of the dead body on the ground.

Similarly, blood was found on the ground and marks of dragging the dead body upto the place of pyre were found.

(g) Funeral pyre of about 15 ft.s was found.

(h) The remains of burnt bones were taken out from the pyre and one Kada and buckle of belt were also found in the pyre.''

After conducting the spot inspection, this witness came to a conclusion that some one was killed on the roof of the house of the appellant after some struggle and his dead body was thrown from the roof on the ground and thereafter it was burnt. The photographs of the place were also taken which are the part of the police case diary. In cross examination, it was stated by this witness that the kada and the buckle of the belt were identified by the relatives of the deceased.

38. After the incident, the appellant had absconded.

39. It is clear from the record that Bhagwan Singh left the place of occurrence immediately after the incident. Ram Singh (P.W.7) has stated that when he was going to answer the call of the nature, he had seen the appellant standing near the burning pyre, but when he came back at around 5:30 in the morning, the appellant Bhagwan Singh was not there. Thus, it is clear that after noticing that the villagers have started going to answer the call of the nature, the appellant left the place of occurrence. Merely because a person has absconded, may not be a sufficient circumstance, to hold a person guilty, but if the conduct of the appellant is considered in the light of the surrounding circumstance, then absconsion of the appellant, immediately after the incident, would assume importance.

40. The Supreme Court in the case of *Kundula Bala Subrahmanyam Vs. State of A.P.* Reported in (1993) 2 SCC 684 has held as under :-

''**23.** A closer link with the conduct of the appellants both at the time of the occurrence and immediately thereafter is also the circumstance relating to their absconding. Md. Baduruddin PW 15, the investigating officer, deposed that he had taken up the investigation of the case and having examined PWs 1-4 had caused search to be made for the accused but they were not found in the village and despite search, they could not be traced. Appellant 1 surrendered before the court on November 10, 1981 while appellant 2 surrendered in the court on December 7, 1981. No explanation, worth the name, much less a satisfactory explanation has been furnished by the appellants about their absence from the village till they surrendered in the court in the face of such a gruesome 'tragedy'. Indeed, absconding by itself may not be a positive circumstance consistent only with the hypothesis of guilt of the

accused because it is not unknown that even innocent persons may run away for fear of being falsely involved in a criminal case and arrested by the police, but coupled with the other circumstances which we have discussed above, the absconding of the appellants assumes importance and significance. The prosecution has successfully established this circumstance also to connect the appellants with the crime."

41. The Supreme Court in the case of *Mangat Rai Vs. State of Punjab* reported in (1997) 7 SCC 507 has held as under :-

"**8.** On the other hand learned counsel for the respondent submitted that both the courts below have concurrently held on appreciation of relevant evidence that it was the appellant and no one else who could commit the murder of his wife. That she had died at his own residence. That he was having his other clinic only one kilometre away from his residence and it was very easy for him to go to his clinic at the relevant time after liquidating the deceased. That the theory of suicide by the deceased was patently false as the ligature mark was found to be post-mortem by the doctors and it is impossible to even allege that a dead person would hang herself and, therefore, it was a false case tried to be made to mislead the investigating agency and precisely for that reason the appellant rushed to the police authorities and gave a wrong version about the incident. That as the appellant resided with the deceased at the relevant time in his residential house where his wife met her untimely death, the inference drawn by both the courts below against the appellant that it was he and no one else who had committed the murder of his wife, can be said to be well justified on record of the case. That his earlier conduct of harassing the deceased and nagging her in connection with the dowry demand, his conduct of not even visiting his in-laws' house when he was blessed with a son and his subsequent conduct of giving false version of the incident before the police and not intimating his in-laws on the date of the incident itself and subsequently his absconding from the place of occurrence are all pointers to his guilty mind and, therefore, his appeal deserves to be dismissed."

42. Thus, merely a person has absconded after the incident, may not be indicative of his guilty mind, but when this circumstance is considered in the light of the surrounding circumstances, then the absconsion of the appellant, immediately after the incident, would assume importance and would be a strong circumstance, indicating the guilty mind.

43. Recovery of blood stained baniyan and underwear from the body of the appellant.

44. Ratiram (P.W.1) and V.K. Parashar (P.W.11) have stated that a blood stained baniyan and underwear was seized from the possession of the appellant by seizure memo Ex. P.2. As per the report of the F.S.L.Gwalior, Ex. P.15, blood was found on the underwear of the appellant.

45. Motive

46. It is submitted by the Counsel for the appellant that the prosecution has failed to prove any motive on the part of the appellant to commit the offence. Where the case is based on circumstantial evidence, motive plays and important role, therefore, in absence of any motive, the chain of circumstance is not complete.

47. The submission made by the Counsel for the appellant cannot be accepted and hence, rejected. Absence of motive, by itself cannot be a ground to reject the prosecution case, although the presence of motive would assume importance in a case, which is based on circumstantial evidence. The Supreme Court in the case of *Praful Sudhakar Parab Vs. State of Maharashtra* reported in (2016) 12 SCC 783 has held as under :-

> "**25.** One of the submissions which has been raised by the learned Amicus Curiae is that the prosecution failed to prove any motive. It is contended that the evidence which was led including the recovery of bunch of keys from guardroom was with a view to point out that he wanted to commit theft of the cash lying in the office but no evidence was led by the prosecution to prove that how much cash was there in the pay office.
>
> **26.** Motive for committing a crime is something which is hidden in the mind of the accused and it has been held by this Court that it is an impossible task for the prosecution to prove what precisely have impelled the murderer to kill a particular person. This Court in *Ravinder Kumar v. State of Punjab,* has laid down following in para 18: (SCC pp. 697-98)
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> > "*18***.** … It is generally an impossible task for the prosecution to prove what precisely would have impelled the murderers to kill a particular person. All that prosecution in many cases could point to is the possible mental element which could have been the cause for the murder. In this connection we deem it useful to refer to the observations of this Court in *State of H.P. v. Jeet Singh:* (SCC p. 380, para 33)
> >
> > "*33*. No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not

that no criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended.'"

27. Further in *Paramjeet Singh v. State of Uttarakhand,* this Court held that if motive is proved that would supply a link in the chain of circumstantial evidence but the absence thereof cannot be a ground to reject the prosecution case. Following was stated in para 54: (SCC p. 457)

"*54.* So far as the issue of motive is concerned, the case is squarely covered by the judgment of this Court in *Suresh Chandra Bahri*. Therefore, it does not require any further elaborate discussion. More so, if motive is proved that would supply a link in the chain of circumstantial evidence but the absence thereof cannot be a ground to reject the prosecution case. (Vide: *State of Gujarat v. Anirudhsing*)"

(emphasis in original)

28. The High Court while considering the motive has made following observations at p. 46: (*Praful Sudhakar case,* SCC OnLine Bom para 70)

"*70.* Although prosecution is not very certain about the motive, upon taking into consideration the evidence of PW 4 and PW 6, a faint probability is created, regarding intentions of the accused to lay hands on the cash which could have been in possession of the victim, as against the initial story that the accused was enraged against the victim, because the victim used to tease him on the point of his marriage with a bar girl Helen Fernandes. Motive is a mental state, which is always locked in the inner compartment of the brain of the accused and inability of the prosecution to establish the motive need not necessarily cause entire failure of prosecution.

We fully endorse the above view taken by the High Court and do not find any substance in the above ground.''

48. The Supreme Court in the case of *Vivek Kara Vs. State of Rajasthan* reported in (2014) 12 SCC 439 has held as under :-

"**6.** We have considered the submissions of the learned counsel for the parties and we agree with the learned counsel for the appellant that from the evidence of PW 11 one could not hold that the appellant had committed the murder of the deceased to take revenge on his uncle (PW 11), who had not given him Rs 80,000 kept in the fixed deposit. We are, however, of the opinion that where prosecution relies on circumstantial evidence only, motive is a relevant fact and can be taken into consideration under Section 8 of the Evidence Act, 1872 but where the chain of other circumstances establishes beyond reasonable doubt that it is the accused and the accused alone who has committed the offence, and this is one such case, the Court cannot hold that in the absence of motive of the accused being established by the prosecution, the accused cannot be held guilty of the offence. In *Ujjagar Singh v. State of Punjab* this Court observed: (SCC p. 99, para 17)

"*17.* … It is true that in a case relating to circumstantial evidence motive does assume great importance but to say that the absence of motive would dislodge the entire prosecution story is perhaps giving this one factor an importance which is not due and (to use the cliché) the motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy."

49. The Supreme Court in the case of *Sanaullah Khan Vs. State of Bihar,* reported in (2013) 3 SCC 52 has held as under :-

''18.....Where other circumstances lead to the only hypothesis that the accused has committed the offence, the Court cannot acquit the accused of the offence merely because the motive for committing the offence has not been established in the case''

50. In the present case, Ratiram (P.W.1) has stated that the appellant had made an Extra Judicial Confession and had stated that as the deceased used to create problems in his house, therefore, he has killed him. What type of problems were being created by the appellant, have not been proved by the prosecution. Thus, the motive attributed to the appellant for committing offence, may not be very strong, however, even assuming that the prosecution has failed to prove, even then on the basis of the other circumstances, the appellant can be convicted.

51. It is submitted by the Counsel for the appellant, that since, the witnesses have been disbelieved for the remaining accused persons and therefore, they have been acquitted, thus, it is clear that the evidence of the witnesses is not trustworthy and therefore, they be disbelieved in toto. The submissions made by the Counsel for the appellant, cannot be accepted and hence, rejected.

52. The Supreme Court in the case of *Paulmeli Vs. State of T.N.* reported in (2014) 5 SCC (Cri) 573 has held as under :-

> ''**23.** The learned counsel for the appellants submits that in case, on the basis of the same evidence, 15 accused persons had been acquitted, the appellants could not have been convicted. We do not find any force in such a submission for the reason that there may be some exaggeration in depositions of the prosecution witnesses. The courts below had not accepted the evidence to that extent and have given benefit of doubt.
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> **24**. In *Balaka Singh v. State of Punjab,* this Court considered a similar issue, placing reliance upon its earlier judgment in *Zwinglee Ariel v. State of M.P.* and held as under: (*Balaka Singh case,* SCC p. 517, para 8)
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> > "*8*. … the Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply."
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> **25.** In *Sukhdev Yadav v. State of Bihar,* this Court held as under: (SCC p. 90, para 3)
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> > "*3*. It is indeed necessary, however, to note that there would hardly be a witness whose evidence does not contain some amount of exaggeration or embellishment—sometimes there would be a deliberate attempt to offer the same and sometimes the witnesses in their over anxiety to do better from the witness box detail out an exaggerated account."

26. A similar view has been reiterated in *Appabhai v. State of Gujarat,* wherein this Court has cautioned the courts below not to give undue importance to minor discrepancies which do not shake the basic version of the prosecution case. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness for the reason that witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. However, the courts should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.

27. In *Sucha Singh v. State of Punjab,* this Court had taken note of its various earlier judgments and held that even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from the chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno, falsus in omnibus (false in one thing, false in everything) has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that the administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, truth is the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well."

53. The Supreme Court in the case of *Krishna Mochi Vs. State of Bihar* reported in (2002) 6 SCC 81 has held as under :-

''**51.** Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence, prayer is to apply the principle of *falsus in uno*, *falsus in omnibus*. This plea is clearly untenable. Even if a major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where

the chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove the guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim *falsus in uno, falsus in omnibus* has no application in India and the witnesses cannot be branded as liars. The maxim *falsus in uno, falsus in omnibus* (false in one thing, false in everything) has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to is, that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". (See *Nisar Ali v. State of U.P.*) Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted. (See *Gurcharan Singh v. State of Punjab.*) The doctrine is a dangerous one, specially in India, for if a whole body of the testimony were to be rejected, because the witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See *Sohrab v. State of M.P.* and *Ugar Ahir v. State of Bihar.*) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because the grain and the chaff are inextricably mixed up, and in the process of separation, an absolutely new case

> has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See *Zwinglee Ariel v. State of M.P.* and *Balaka Singh v. State of Punjab.*) As observed by this Court in *State of Rajasthan v. Kalki* normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. Accusations have been established against the accused-appellants in the case at hand.''

54. Since the maxim *falsus in uno, falsus in omnibus* has no application, therefore, the Courts must try to remove the chaff from the grain and therefore, the submission made by the Counsel for the appellant that since, the evidence of the witnesses in respect of some of the accused persons has been disbelieved, therefore their evidence should be discarded in toto, cannot be accepted.

55. It is next contended by the Counsel for the appellant that the prosecution has failed to prove that Ramkumar has been killed because his dead body could not be recovered, and the prosecution has not produced the D.N.A. Report to show that the blood or the bones were that of the deceased Ram Kumar. In nutshell, the contention of the Counsel for the appellant is that since, the prosecution has failed to prove that Ramkumar was killed and burnt, therefore, the appellant cannot be held guilty of committing murder of Ramkumar. The submission made by the Counsel for the appellant cannot be accepted and hence, rejected. Even if the dead body of the deceased is not recovered, but if the prosecution proves beyond reasonable doubt, that the victim has been done to death, then the accused can be held guilty of committing murder of the deceased. The Supreme Court in the case of *Rishipal Vs. State of Uttarakhand* reported in (2013) 12 SCC 551 has held as under :-

> "**10.** Coming next to the question whether the prosecution has brought home the charge of murder levelled against the appellant, we must at the outset point out that the case is entirely based on circumstantial evidence. No direct evidence has been adduced to prove that Abdul Mabood, whose *corpus delicti* has not been recovered, was done to death, nor any evidence adduced to show

where and when the same was disposed of by the appellant assuming that he had committed the crime alleged against him. The legal position regarding production of *corpus delicti* is well settled by a long line of decisions of this Court. We may briefly refer to some of those cases.

11. In *Rama Nand v. State of H.P.* this Court summed up the legal position on the subject as: (SCC pp. 522-23, paras 27-28)

> "**27.** … In other words, we would take it that the *corpus delicti* i.e. the dead body of the victim was not found in this case. But even on that assumption, the question remains whether the other circumstances established on record were sufficient to lead to the conclusion that within all human probability, she had been murdered by Rama Nand, appellant? It is true that one of the essential ingredients of the offence of culpable homicide required to be proved by the prosecution is that the accused 'caused the death'* of the person alleged to have been killed.
>
> 28. This means that before seeking to prove that the accused is the perpetrator of the murder, it must be established that homicidal death has been caused. Ordinarily, the recovery of the dead body of the victim or a vital part of it, bearing marks of violence, is sufficient proof of homicidal death of the victim. There was a time when under the old English Law, the finding of the body of the deceased was held to be essential before a person was convicted of committing his culpable homicide. 'I would never convict', said Sir Mathew Hale, 'a person of murder or manslaughter unless the fact were proved to be done, or at least the body was found dead'. This was merely a rule of caution, and not of law. But in those times when execution was the only punishment for murder, the need for adhering to this cautionary rule was greater. *Discovery of the dead body of the victim bearing physical evidence of violence, has never been considered as the only mode of proving the corpus delicti in murder. Indeed, very many cases are of such a nature where the discovery of the dead body is impossible. A blind adherence to this old 'body' doctrine would open the door wide open for many a heinous murderer to escape with impunity simply because they were cunning and clever enough to destroy the body of their victim. In the*

> *context of our law, Sir Hale's enunciation has to be interpreted no more than emphasising that where the dead body of the victim in a murder case is not found, other cogent and satisfactory proof of the homicidal death of the victim must be adduced by the prosecution. Such proof may be by the direct ocular account of an eyewitness, or by circumstantial evidence, or by both. But where the fact of corpus delicti i.e. 'homicidal death' is sought to be established by circumstantial evidence alone, the circumstances must be of a clinching and definitive character unerringly leading to the inference that the victim concerned has met a homicidal death. Even so, this principle of caution cannot be pushed too far as requiring absolute proof. Perfect proof is seldom to be had in this imperfect world, and absolute certainty is a myth.* That is why under Section 3, Evidence Act, a fact is said to be 'proved', if the court considering the matters before it, considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. *The corpus delicti or the fact of homicidal death, therefore, can be proved by telling and inculpating circumstances which definitely lead to the conclusion that within all human probability, the victim has been murdered by the accused concerned."*
>
> (emphasis supplied)

To the same effect is the decision in *Ram Chandra v. State of U.P.* where this Court said: (AIR p. 387, para 6)

> "*6.* … It is true that in law a conviction for an offence does not necessarily depend upon the *corpus delicti* being found. There may be reliable evidence, direct or circumstantial, of the commission of the murder though the *corpus delicti* are not traceable."

56. In the present case, it has been proved beyond reasonable doubt, that Ramkumar has been killed and his dead body has been burnt.

57. Considering the circumstances, which have been proved by the prosecution against the appellant, this Court is of the considered opinion that the cumulative effect circumstances, proved against the appellant, leads to only one conclusion that the appellant has committed murder of Ramkumar. The appellant has made an Extra Judicial Confession and was seen for the last time in the company of the deceased as

the deceased was called from the house of Kishori (P.W.6) and after some struggle on the roof of the house of the appellant, the deceased Ramkumar was killed and his dead body was thrown on the ground from the roof and the dead body was burnt near the house of the appellant itself.

58. It is submitted by the Counsel for the appellant that even if the entire allegations are accepted, then it would be clear that the act of the appellant would come within the scope of Exception 4 to Section 300 of I.P.C. and his conviction may be converted to Section 304 Part I of I.P.C. The submission made by the Counsel for the appellant cannot be accepted, for the simple reason, that there is nothing on record to show that there was no premeditation or the incident took place because of any sudden or grave provocation and in a heat of passion and the accused has not taken undue advantage of the situation. The manner in which the offence has been committed, would certainly fall within Section 300 of I.P.C. and accordingly, the appellant is held guilty of offence under Section 302 of I.P.C. for committing murder of Ramkumar and by burning the dead body of Ramkumar, the appellant has caused the disappearance of evidence of offence and thus committed offence under Section 201 of I.P.C.

59. Accordingly, the judgment and sentence dated 18-5-2010 passed by Additional Sessions Judge, Sevada, Distt. Datia in Sessions Trial No. 67/2006 is hereby affirmed.

60. The appellant is in jail.

61. The appeal fails and is hereby dismissed.

Appeal dismissed.

I.L.R. [2018] M.P. 591
APPELLATE CRIMINAL

Before Mr. Justice C.V. Sirpurkar

Cr.A. No. 2262/2009 (Jabalpur) decided on 31 January, 2018

RAJESH …Appellant

Vs.

STATE OF M.P. …Respondent

***Penal Code (45 of 1860), Section 304-B & 498-A – Conviction – Appreciation of Evidence* – Wife committed suicide by consuming poison within 2 years of marriage – Husband, father-in-law, mother-in-law and brother-in-law were charged for an offence u/S 304-B IPC – All accused persons were acquitted of the offence u/S 304-B IPC but husband/appellant was convicted and sentenced for an offence u/S 498-A IPC – Challenge to – Held – As husband was acquitted for offence u/S 304-B IPC, the cause of death of**

deceased is no longer in question and therefore whatever was told by deceased to her relatives regarding maltreatment at her matrimonial home would fall under the category of hearsay evidence and cannot be admissible – Mother of deceased categorically admitted that if accused persons has returned the articles given in dowry there would have been no dispute and in fact separate case was instituted for the sole object of recovering the said articles – Fact goes to show that no sooner the articles were returned, the case instituted for recovering the articles was withdrawn by the complainants and a compromise was entered into in the present case – Further held – There is no allegation that cruelty was inflicted upon deceased for extracting money – Appellant deserves benefit of doubt – Conviction set aside – Appeal allowed.

(Paras 10, 12, 13 & 14)

दण्ड संहिता (1860 का 45), धारा 304–बी व 498–ए – दोषसिद्धि – साक्ष्य का मूल्यांकन – पत्नी ने विवाह के 2 वर्षों के भीतर जहर खाकर आत्महत्या की – पति, ससुर, सास एवं पति के भाई को भारतीय दंड संहिता की धारा 304–बी के अंतर्गत आरोपित किया गया था – सभी अभियुक्तगण भा.दं.सं. की धारा 304–बी के अंतर्गत अपराध हेतु दोषमुक्त किये गये परंतु पति/अपीलार्थी को भा.दं.सं. की धारा 498–ए के अंतर्गत अपराध के लिए दोषसिद्ध एवं दण्डादिष्ट किया गया था – को चुनौती – अभिनिर्धारित – चूंकि, पति को भा.दं.सं. की धारा 304–बी के अंतर्गत अपराध के लिए दोषमुक्त किया गया था, मृतिका की मृत्यु का कारण अब प्रश्न में नहीं है एवं इसलिए मृतिका ने उसके ससुराल में हुए बुरे बर्ताव के बारे में अपने रिश्तेदारों से जो भी कहा था, वह अनुश्रुत साक्ष्य की श्रेणी में आयेगा एवं ग्राह्य नहीं हो सकता – मृतिका की मां ने स्पष्ट रूप से यह स्वीकार किया कि यदि अभियुक्तगण ने दहेज में दी गई वस्तुएं लौटा दीं तो कोई विवाद नहीं रहेगा तथा वास्तव में कथित वस्तुओं को वापस पाने के एकमात्र उद्देश्य से एक पृथक वाद संस्थित किया गया था – तथ्य यह दर्शाते हैं कि जैसे ही वस्तुएं लौटाई गई थी, परिवादीगण द्वारा वस्तुओं की वापसी हेतु संस्थित वाद वापस ले लिया गया था एवं वर्तमान प्रकरण में समझौता किया गया था – आगे अभिनिर्धारित – ऐसा कोई अभिकथन नहीं है कि पैसे निकलवाने हेतु मृतिका के साथ क्रूरता का व्यवहार किया गया – अपीलार्थी संदेह का लाभ पाने का हकदार है – दोषसिद्धि अपास्त – अपील मंजूर।

Cases referred:

(2001) 10 SCC 736, AIR 2009 SUPREME COURT 2603.

H.S. Dubey with *Abhinav Dubey,* for the appellant.
Aseem Dixit, 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 Cr.P.C. filed on behalf of appellant accused Rajesh is directed against the judgment dated 24.11.2009 passed by the Court of 4th ASJ, Sagar in Session Trial No.242/2005, whereby the accused appellant Rajesh was convicted under Section

498-A of the IPC and was sentenced to under rigorous imprisonment for a period of 2 years and fine in the sum of Rs.10,000/-. In default of payment of fine, he was directed to undergo rigorous imprisonment for a further period of 6 months.

2. The prosecution case before the trial Court may be summarized as hereunder. Accused Rajesh Tiwari had married deceased Sapna Tiwari on 24.06.2002. A sum of Rs.1,25,000/- in cash, a motorcycle and other house hold items were settled between the parties as dowry. Pursuant to aforesaid settlement, Rs. 1,40,000/- in cash were given at the time of marriage. Out of aforesaid amount Rs. 40,000/- was for purchasing motor cycle. Other house hold items were also given at the time of marriage. 10 days later, Sapna's brother Jitendra had gone to matrimonial home of Sapna at Sagar to bring her back. At that time, accused Rajesh and Sapna's father-in-law Premnarayan, mother-in-law, Prabha and brother-in-law, Yogesh had reminded him that Rs.14,000/- in cash and a sofa-set had not been given; whereon, Jitendra promised to make arrangement for the same. Sapna stayed at her maternal home at Chachoda till Rakshabandhan. Thereafter, relatives of Rajesh had gone to bring her back to her matrimonial home again reminding her brother regarding remaining dowry. Sapna stayed at her matrimonial home for about 3-4 months. Thereafter, when Jitendra had gone to her matrimonial home to bring her back, aforesaid accused persons told him that Sapna would be sent back to her maternal home only if remaining dowry was paid; whereon, Jitendra arranged for Rs.30,000/- and went back to Sagar and paid remaining amount. Only then he was allowed to take his sister home. Sapna complained that her in-laws harassed her excessively. Her father-in-law abused her, brother-in-law fought with her and husband beat her on number of occasions. Her husband had consumed liquor and had poured kerosene upon her; therefore, Jitendra had kept his sister with him. When Rajesh had gone to bring her back, Jitendra refused to sent her. The relatives tried to make Rajesh see reason; whereon, he promised that henceforth, they would not harass her. Consequently, Sapna was sent to her matrimonial home with Rajesh. However, her matrimonial relatives lapsed back into old ways and started to persecute the deceased again. They would not allow Sapna to speak to her relatives on telephone. Sapna used to privately complain to her relatives about the behaviour of her in-laws. She used to tell her relatives that if she were not taken back to her maternal home, her in-laws would kill her. Ultimately, she committed suicide by consuming poison on 24.01.2004.

3. After investigation, final report under Section 173 of the Cr.P.C. was filed and a charge under Section 304-B of the IPC was framed against father-in-law Premnarayan, mother-in-law Prabha, brother-in-law Yogesh and husband Rajesh. After the trial, the trial Court recorded a finding to the effect that the prosecution had failed to prove any offence against Premnarayan, Prabha and Yogesh. The prosecution had also failed to prove the offence under Section 304-B of the IPC against accused/appellant Rajesh because it was not proved that the deceased was subjected to cruelty

or harassment by her husband or any of his relatives in connection with any demand for dowry made soon before her death. Therefore, offence under Section 304-B of the IPC was not made out against appellant Rajesh. Consequently, all four accused persons were acquitted of the offence under Section 304-B of the IPC; however, it was held to be proved beyond reasonable doubt that after marriage, appellant Rajesh had persecuted the deceased by beating her and had inflicted cruelty upon her by pouring kerosene upon her. Likewise, it was also proved beyond reasonable doubt that Rajesh had demanded Rs.30,000/- in cash and he had inflicted physical cruelty upon her. Consequently, he was convicted for the offence punishable under Section 498-A of the IPC.

4. Learned counsel for appellant Rajesh has challenged the findings recorded by the trial Court mainly on the grounds that the trial Court failed to properly appreciate the prosecution evidence. It failed to take note of the fact that it had held that there was no live link between the demand for dowry and the suicide of the deceased because demand for dowry was made in November, 2002. Thereafter, no demand was made for a period of about a year and a quarter and the suicide was committed in January, 2004. Therefore, appellant Rajesh was acquitted of the offence punishable under Section 304-B of the Indian Penal Code and was convicted only under Section 498-A of the Indian Penal Code. Thus, the cause of death of deceased Sapna Tiwari was not in question any more. Therefore, whatever was told by deceased Sapna regarding harrassment to her relatives, would not amount to oral dying declaration but would fall under the category of hearsay evidence and; therefore, would not be admissible. As such, the conviction of appellant Rajesh under Section 498-A of the Indian Penal Code, was principally based upon inadmissible hearsay evidence. It has also been contended that the trial Court has recorded the finding in paragraph no.30 of the judgment that the prosecution witnesses had resorted to exaggerations in respect of travails of the deceased in her matrimonial home; therefore, their evidence was not reliable. It has not been disputed that deceased was suffering from tuberculosis of both lungs, since before her marriage and she was treated for the same. In these circumstances, it appears that the deceased had committed suicide not because she had been subjected to any demand for dowry or cruelty but because she was suffering from tuberculosis. It has also been urged that after conviction of appellant Rajesh under Section 498-A of the Indian Penal Code, the parties had entered into a compromise outside the Court and an application in this regard, was filed in the High Court; however, since, Section 498-A is non-compoundable, the application was dismissed on 01.08.2011 and it was observed that the factum of compromise shall be taken into consideration at the time of final hearing of the case. In aforesaid circumstances, it has been prayed that the appeal be allowed, conviction be set aside and appellant Rajesh be acquitted of the offence under Section 498-A of the Indian Penal Code.

5. Learned Government Advocate for the respondent/State on the other hand has supported the impugned judgment.

6. On perusal of record and due consideration of rival contentions, the Court is of the view that this appeal against conviction must succeed for the reasons hereinafter stated:

7. It is an admitted fact that deceased Sapna had lost her father before her marriage. In these circumstances, her brother Jitendra Sharma (PW-5) and mother Saroj (PW-7) are the most important witnesses. They have stated that at the time of her marriage on 24.06.2002 with appellant Rajesh, they had given television, fridge, cooler, dressing table, double bed, Almirah, gold chain, gold ring, utensils, clothes and other articles in dowry. They had also given Rs.1,11,000/- in cash and in addition thereto Rs.40,000/- for purchasing a vehicle. Ten days after the marriage, when Jitendra (PW-15) had gone along with his cousin Amit to bring his sister back, Rajesh's father accused Prem Narayan had reminded him that Rs.14000/- out of amount of dowry settled, remained to be given and a sum of Rs.16000/- for buying sofa set was also due. On that occasion, Jitendra (PW-15) had promised to pay the amount after making arrangement and had gone back taking his sister with him. On that occasion, Sapna stayed in her maternal home till Raksha Bandhan. After that, relatives of Rajesh had taken Sapna back to her matrimonial home, where she stayed for a period of about 3-4 months. When Jitendra again went to Sapna's matrimonial home to bring her back, accused persons had told him that unless he paid remaining Rs.30,000/- they would not send Sapna with him. Therefore, he had returned and went back after making arrangement of Rs.30,000/-. He had given that amount to appellant Rajesh.

8. Jitendra (PW-15) has further stated that his sister had told him that her father-in-law used to abuse her and brother-in-law used to fight with her. Her husband used to beat her and once had poured kerosene upon her after consuming liquor. Therefore, his sister had stayed with them at Chanchoda. After that, at the time of house warming ceremony of Jitendra's uncle Ramesh, appellant Rajesh had gone. All relatives of Sapna had tried to make him see reason; whereon, he had assured that henceforth, there would be no complaint. After that, he had taken Sapna to Sagar but Sapna had complained to her brother that her in-laws did not allow her to speak on telephone. She also implored her relatives to take her back. She warned that otherwise, her in-laws would kill her. Thereafter on 3-4 occasions, Jitendra had gone to Sapna's matrimonial home to bring her back but the accused persons declined to send her on one pretext or the other. Jitendra had further stated that on 24.01.2004, they had learnt that Sapna had died.

9. Saroj (PW-7), mother of the deceased, has stated that Sapna suffered from tuberculosis and they had got her treated at Rajgarh and Guna. She further stated that if they had known before her marriage that Sapna was suffering from tuberculosis, they would not have married her. She admits that the marriage was performed in good atmosphere and at that time there was no dispute. Sapna's brother-in-law used to

taunt that Saroj had passed off a sick girl to them. She has further admitted that after the death of the deceased, the accused persons had declined to return the articles given in dowry; therefore, they had filed a separate case against the accused persons. She has clearly admitted that if the accused persons had returned the dowry, there would have been no dispute. She has categorically stated that in fact they had filed this case against the accused persons for the purpose of recovering the articles given in dowry.

10. It may be noted in this regard that all accused persons including present appellant Rajesh had been acquitted of the offence punishable under Section 304-B of the Indian Penal Code. Appellant Rajesh had been convicted only under Section 498-A of the Indian Penal Code. As such, the cause of death of deceased Sapna is no longer in question in the case. The Supreme Court has held in the case of *Inderpal v. State of M.P.,* (2001) 10 SCC 736 that:

> *7. Unless the Statement of a dead person would fall within the purview of Section 32 (1) of the Indian Evidence Act, there is no other provision under which the same can be admitted in evidence. In order to make the statement of a dead person admissible in law (written or verbal) the statement must be as to the cause of her death or as to any of the circumstance of the transactions which resulted in her death, in cases in which the cause of death comes into question. By no stretch of imagination can the Statements of Damyanti contained in Exhibit P-7 or Exhibit P-8 and those quoted by the witnesses be connected with any circumstance of the transaction which resulted in her death. Even that apart, when we are dealing with an offence under Section 498-A IPC disjuncted from the offence under Section 306 IPC the question of her death is not an issue for consideration and on that premise also Section 32(1) of the Evidence Act will stand at bay so far as these materials are concerned.*

11. Likewise in the case of *Bhairon Singh v. State of M. P.,* AIR 2009 SUPREME COURT 2603 it has been held that:

> *11. The moot question is: whether the statements attributed to the deceased could be used as evidence for entering upon a finding that the accused subjected Ranjana Rani @ Raj Kumari to cruelty as contemplated under Section 498-A, IPC. In our considered view, the evidence of PW-4 and PW-5 about what the deceased Ranjana Rani @ Raj Kumari had told them against the accused about the torture and harassment is inadmissible under Section 32(1) of the Evidence Act and such*

evidence cannot be looked into for any purpose. Except Section 32(1) of the Indian Evidence Act, there is no other provision under which the statement of a dead person can be looked into in evidence. The statement of a dead person is admissible in law if the statement is as to the cause of death or as to any of the circumstance of the transactions which resulted in her death, in a case in which the cause of death comes into question. What has been deposed by PW-4 and PW-5 has no connection with any circumstance of transaction which resulted in her death. The death of Smt. Ranjana Rani @ Raj Kumari was neither homicidal nor suicidal; it was accidental. Since for an offence under Section 498-A simpliciter, the question of death is not and cannot be an issue for consideration, we are afraid the evidence of PW-4 and PW-5 is hardly an evidence in law to establish such offence. In that situation Section 32(1) of the Evidence Act does not get attracted.

12. In view of aforesaid authoritative pronouncements of the Supreme Court, it is clear that whatever was told by Sapna to her relatives regarding maltreatment at her matrimonial home would fall under the category of hearsay evidence and would; therefore, not be admissible. Thus, the statement of Jitendra (PW-5) to the effect that his sister had told him that her father-in-law used to abuse her, brother-in-law used to fight with her and husband used to beat her and on one occasion, had poured kerosene upon her after consuming liquor, would not amount to oral dying declaration but would fall under the category of hearsay evidence. Likewise, the allegation that his sister had told him that appellant and her in-laws did not allow her to speak on telephone and they would kill her if she was not taken to her maternal home, would also not be admissible and these allegations cannot be considered for the purpose of offence punishable under Section 498-A of the Indian Penal Code.

13. In aforesaid circumstances, only admissible evidence against appellant Rajesh is that television, cooler, fridge, dressing table, double bed, Almirah, gold chain, gold ring, clothes and Rs.1,51,000/- were given in cash in dowry and Prem Narayan demanded remaining amount of Rs.30,000/-. There is an omnibus allegation that the accused persons had demanded Rs.30,000/- and had told Jitendra that unless that amount was paid they would not let Jitendra take his sister to her maternal home. Therefore, he had given Rs.30,000/- to Rajesh. It may be noted that there is no allegation that any cruelty was inflicted upon the deceased for extracting Rs.30,000/- from her brother. Moreover, aforesaid allegation cannot be taken at its face value in view of categorical admission of Saroj (PW-7), mother of deceased, to the effect that if the accused persons had returned the articles given in dowry there would have been no dispute and in fact the present case was instituted for the sole object of

recovering the articles given in dowry. The theory that the present case has been instituted for the sole purpose of recovering articles given in dowry, is fortified by the fact that no sooner the articles were returned, the case instituted for recovering the articles given in dowry was withdrawn by the complainants and a compromise was entered into in the present case.

14. In aforesaid circumstances, in the opinion of this Court, bulk of evidence on which the trial Court had based the conviction was inadmissible for the purpose of offence punishable under Section 498-A of the Indian Penal Code and remaining evidence does not appear to be reliable. Therefore, in the opinion of this Court, appellant Rajesh deserves the benefit of doubt so far as offence punishable under Section 498-A of the Indian Penal Code is concerned. As such, the trial Court erred in placing reliance upon the evidence of Jitendra (PW-5) and Saroj (PW-7) and convicting appellant Rajesh under Section 498-A of the Indian Penal Code.

15. Accordingly, the conviction of appellant Rajesh under Section 498-A of the Indian Penal Code is liable to be set aside.

16. Consequently, this appeal against conviction **succeeds.** The conviction of appellant Rajesh under Section 498-A of the Indian Penal Code and the sentence imposed upon him is set aside. He is acquitted of the offence punishable under Section 498-A of the Indian Penal Code.

Appeal allowed.

I.L.R. [2018] M.P. 598
CIVIL REVISION
Before Mr. Justice Rohit Arya

C.R. No. 95/2017 (Indore) decided on 14 December, 2017

MANA @ ASHOK & ors. …Applicants
Vs.
BUDABAI & ors. …Non-applicants

A. Civil Procedure Code (5 of 1908), Section 144 – Restitution of Possession **– Suit for declaration, recovery of possession and mesne profit was decreed in favour of petitioner – Accordingly possession was delivered to petitioner – Meanwhile appeal filed by respondent/defendant was allowed and matter was remanded for fresh trial – Petitioner filed a miscellaneous appeal before High Court whereby the same was also dismissed – Defendant filed an application u/S 144 for restitution of possession and *mesne* profit which was allowed by the trial Court – Appellate Court also confirmed the trial Court's order – Instant revision by the petitioner/plaintiff against order of restitution of possession and to pay *mesne* profit – Held – Principle of law enunciated u/S 144 CPC is founded on equitable principle that one who has**

taken advantage of a decree of court should not be permitted to retain it, if the decree is reversed or modified – As per Section 144(1) CPC 'restitution' means restoring to a party on the modification, variation or reversal of a decree what has been lost to him in execution of decree or in direct consequence of decree – Party seeking such restitution is not required to satisfy the Court about its title or right to property except showing its deprivation under a decree and the reversal or variation of decree – Revision dismissed.

(Para 5)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 144 – कब्जे का प्रत्यास्थापन – घोषणा, कब्जे की वापसी एवं अंतःकालीन लाभ हेतु वाद, याची के पक्ष में डिक्रीत किया गया था – तद्नुसार याची को कब्जा सौंपा गया था – इस दौरान प्रत्यर्थी/प्रतिवादी द्वारा प्रस्तुत अपील मंजूर की गई तथा मामले को नये सिरे से विचारण हेतु प्रतिप्रेषित किया गया था – याची ने उच्च न्यायालय के समक्ष विविध अपील प्रस्तुत की जिसके द्वारा उक्त को भी खारिज किया गया था – प्रतिवादी ने कब्जे के प्रत्यास्थापन एवं अंतःकालीन लाभ हेतु धारा 144 के अंतर्गत आवेदन प्रस्तुत किया जिसे विचारण न्यायालय द्वारा मंजूर किया गया – अपीली न्यायालय ने भी विचारण न्यायालय के आदेश को पुष्ट किया – कब्जे के प्रत्यास्थापन एवं अंतःकालीन लाभ अदा करने के आदेश के विरूद्ध याची/वादी द्वारा वर्तमान पुनरीक्षण – अभिनिर्धारित – सि.प्र.सं. की धारा 144 के अंतर्गत प्रतिपादित विधि का सिद्धांत, साम्यापूर्ण सिद्धांत पर आधारित है कि जिसने न्यायालय की किसी डिक्री का लाभ लिया है, उसे वह प्रतिधारित करने की अनुमति नहीं दी जानी चाहिए यदि डिक्री उलट दी जाती है अथवा उपांतरित की जाती है – धारा 144 (1) सि.प्र.सं. के अनुसार 'प्रत्यास्थापन' का अर्थ है, एक पक्षकार को डिक्री के उपांतरण, परिवर्तन या उलटाव पर वह प्रत्यावर्तित करना है जो उसने डिक्री के निष्पादन में या डिक्री के प्रत्यक्ष परिणाम में खोया है – ऐसा प्रत्यास्थापन चाहने वाले पक्षकार द्वारा डिक्री के अंतर्गत उसके वंचन एवं डिक्री का उलटाव या परिवर्तन दर्शाये जाने के सिवाय, संपत्ति पर उसके हक या अधिकार के बारे में न्यायालय को संतुष्ट किया जाना अपेक्षित नहीं है – पुनरीक्षण खारिज।

***B. Civil Procedure Code (5 of 1908), Section 144 & Order 20 Rule 12 – Mesne Profit* – Held – When a decree under which possession has been taken is reversed, *mesne* profit should be awarded in restitution from the date of dispossession and not merely from the date of decree of reversal and in such case, *mesne* profit is not what the party excluded would have made but what the party in possession has or might reasonably have made.**

(Para 5)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 144 एवं आदेश 20 नियम 12– अंतःकालीन लाभ – अभिनिर्धारित – जब डिक्री जिसके अंतर्गत कब्जा लिया गया है, उलटा दी जाती है, तब प्रत्यास्थापन में बेकब्जा होने की तिथि से अंतःकालीन लाभ प्रदान किया जाना चाहिए और न केवल डिक्री के उलटाव की तिथि से तथा ऐसे प्रकरण में, अंतःकालीन लाभ वह नहीं है जो बेकब्जा पक्षकार को मिल सकता था बल्कि वह है जो कब्जाधारक पक्षकार को मिला है या युक्तियुक्त रूप से मिल सकता था।

***C. Limitation Act (36 of 1963), Article 136 – Limitation* – Trial Court rightly reckoning the period of limitation from date of dismissal of miscellaneous appeal by High Court i.e. from 01.03.1995 – Since application for restitution of possession was filed on 01.05.1997 i.e. after two years, it is well within limitation as the limitation prescribed under Article 136 of Limitation Act, 1963 is twelve years.**

(Para 6)

ग. परिसीमा अधिनियम, (1963 का 36), अनुच्छेद 136 – परिसीमा – विचारण न्यायालय ने उचित रूप से परिसीमा की अवधि की गणना, उच्च न्यायालय द्वारा विविध अपील की खारिजी की तिथि अर्थात् 01.03.1995 से की – चूंकि कब्जे के प्रत्यास्थापन हेतु आवेदन 01.05.1997 को प्रस्तुत किया गया था अर्थात् दो वर्ष पश्चात्, वह भली–भांति परिसीमा के भीतर है क्योंकि परिसीमा अधिनियम, 1963 के अनुच्छेद 136 के अंतर्गत विहित परिसीमा बारह वर्ष है।

Cases referred:

1984 (Supp) SCC 505, AIR 1935 PC 12, AIR 1953 SC 136, AIR 1966 SC 948, AIR 162 Ori. 11, AIR 2003 SC 4482, AIR 1951 TC 14, 1972 MPLJ 955.

D.S. Kale, for the applicants.
Swati Sharma, for the non-applicant Nos. 1 to 7.

O R D E R

Rohit Arya, J. :- This Civil Revision under section 115 CPC is directed against the order dated 19/05/2017 passed by Additional District Judge, West Nimar Camp Bhikangaon in Civil Misc. Appeal No.18/2016 confirming the order dated 08/09/2016 passed by Civil Judge, Class-I, Bhikangaon in Civil Case No.2/16 (Raju Vs. Budabai and others) allowing the application under section 144 CPC.

2. Facts relevant and necessary for disposal of this revision petition in nutshell are to the effect that a suit for declaration, recovery of possession and *mesne* profits was decreed on 04/08/1981 in relation to an agricultural land admeasuring 5.57 acres falling in khasra No.20/1 and 20/2 situated in village Awaliya, Tahsil Bhaikangaon (For short, 'the suit land'). An appeal arising therefrom was allowed on 10/10/1984 setting aside the judgment and decree passed by the trial Court with an order of remand for fresh trial.

Being aggrieved thereby, the applicants/plaintiffs have filed Miscellaneous Appeal No.302 of 1984 and the same was dismissed by this Court vide order dated 01/03/1995 upholding the order passed by the appellate Court dated 10/10/1984.

During this period, the possession of the suit land was delivered to the plaintiffs and defendant No.1 through execution proceedings.

3. In the backdrop of the aforesaid facts and circumstances of the case, the non-applicants/defendants have filed an application under section 144 CPC on 01/05/1997

for restitution of possession and *mesne* profits before the trial Court. The application was contested. However, the trial Court by its order dated 08/09/2016 allowed the application directing restitution of possession in favour of the non-applicants/defendants and to pay *mesne* profits at the rate of 2,00,000/- in eight equal installments within three months, delivery of possession and *mesne* profits at the rate of Rs.10,000/- per year till delivery of possession.

4. The appellate Court has confirmed the aforesaid order by the impugned order.

5. Before adverting to the orders passed by the Courts below, it is considered apposite to reiterate the law in the context of section 144 CPC;

The principle of law enunciated under section 144 CPC is founded on equitable principle that one who has taken advantage of a decree of a court should not be permitted to retain it, if the decree is reversed or modified. The word 'restitution' in the marginal note of Section 144(1) in its etymological sense means restoring to a party on the modification, variation or reversal of a decree what has been lost to him in execution of the decree or in direct consequence of the decree. In such a proceeding, the party seeking restitution is not required to satisfy the court about its title or right to the property save and except showing its deprivation under a decree and the reversal or variation of the decree [1984 (Supp) SCC 505 *Zafar Khan and others Vs. Board of Revenue, U.P.,* and others; referred to].

The duty of the court, when awarding restitution under section 144 CPC, is imperative. It shall place the applicant in the position in which he would have been if the order had not been made and for this purpose, the court is armed with powers as to mesne profits, interest and so forth (*Guran Ditta Vs. T R Ditta,* AIR 1935 PC 12).

In *Lala Bhagwandas Vs. Lala Kishen Das,* AIR 1953 SC 136 has explained the principle underlying section 144 and observed that on the reversal of a judgment, the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that it is the duty of the Court to enforce that obligation unless it is shown that restitution wold (sic : would) be clearly contrary to the real justice of the case'.

In *Binayak Vs. Ramesh Chandra,* AIR 1966 SC 948, the Hon'ble Supreme Court reversed the judgment of the Orissa High Court in *Ramesh Chandra Vs. Binayak,* AIR 162 Ori. 11 where the High Court had refused restitution on the ground that though the decree was reversed in appeal, the suit was remanded and on remand, the same decree was confirmed. The Supreme Court held that the subsequent passing of the same decree did not validate the execution of the decree which was reversed in appeal.

The Hon'ble Supreme Court in the case of *South Eastern Coalfields Ltd., Vs. State of Madhya Pradesh,* AIR 2003 SC 4482 has observed that 'to make restitution for what a party has lost, it is the duty of the court to do so, unless it feels

that in the facts and on the circumstances of the case, the restitution would far from meeting the ends of justice, would rather defeat the same.

Further, the authority and jurisdiction vested upon the Court for restitution is not discretionary but upon satisfaction of the following three conditions, namely;

> (i) the restitution sought must be in respect of the decree or order which had been varied or reversed;
>
> (ii) the party applying for restitution must be entitled to a benefit under a reversing decree or order; and
>
> (iii) the relief claimed must be properly consequential on the reversal or variation of the decree or order.

As regards *mesne* profits, the Courts have laid down test to the effect that it is not what the party excluded would have made but what the party in possession has or might reasonably have made. Further, when a decree under which possession has been taken is reversed, mesne profits should be awarded in restitution from the date of dispossession and not merely from the date of decree of reversal [*Madhavan Pothi Vs. Subramaniam,* AIR 1951 TC 14, referred to].

6. The Courts below bearing in mind the aforesaid principles of law have ordered for restitution of possession and also *mesne* profits in favour of the non-applicants/ defendants. The objection as against maintainability of the application under section 144 CPC on the ground of limitation has rightly been rejected holding the same maintainable reckoning the period of limitation from the date of dismissal of Miscellaneous Appeal No.302/1984 on 01/03/1995 (supra) filed by plaintiffs before the High Court since the application was filed on 01/05/1997, i.e., after two years whereas the limitation prescribed under Article 136 of the Limitation Act, 1963 is twelve years.

7. The Courts below have also well discussed the justification of possession even though the decree passed by the appellate Court was not on merits while reversing and setting aside the judgment and decree passed by the trial Court and ordering for remand. The aforesaid justification finds full support from the judgment of the Hon'ble Supreme Court in the case of *Binayak* (Supra).

8. As regards the issue of *mense* profits, the same is well discussed in paragraph 23 of the order by the appellate Court justifying the *mesne* profits as ordered by the trial Court, i.e., Rs.2,00,000/- and Rs.10,000/- per year till delivery of possession with default clause.

9. The judgments cited by the learned counsel for the applicants by the Hon'ble Supreme Court in the case of *Lal Bhagwant Singh Vs. Sri Kishen Das,* AIR 1953 SC 136 and this Court in the case of *Karanm Chand (Plaintiff) Vs. Smt.Kamlesh Kumari and another (Defendants),* 1972 MPLJ 955 in the facts and circumstances

of the case do not have any bearing to support the case of the applicants and are distinguishable on facts though the principles underlying are beyond cavil of any doubt.

10. This revision petition fails and is hereby dismissed.

Revision dismissed.

I.L.R. [2018] M.P. 603
CRIMINAL REVISION

Before Mr. Justice S.K. Awasthi

Cr.R. No. 1015/2015 (Gwalior) decided on 24 October, 2017

OMPRAKASH GUPTA …Applicant

Vs.

STATE OF M.P. & anr. …Non-applicants

(Alongwith Cr.R. No. 1052/2015)

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 227 – Double Jeopardy* – Revision against the order framing charge against the applicant u/S 420, 467, 468, 471 and 120B IPC and against the dismissal of application of the applicant/accused filed u/S 227 Cr.P.C. – It was alleged that for borrowing money, applicant alongwith an another partner of the firm represented that all partners of the firm have consented for the same but later complainant found that firm was not in existence – Held – Record shows that earlier a prosecution was lodged against another partner u/S 138 of Negotiable Instrument Act, 1881, whereby he was acquitted of the charge but the same does not condone the misdeeds of the present applicant which are *prima facie* visible – Further held – Law relating to double jeopardy is well settled according to which the ingredients of the offences in the earlier case as well as in the latter case must be the same and not different – The test to ascertain whether the two offences are same is not the identity of allegations but the identity of the ingredients of offence – Plea of *autre fois acquit* is not proved unless it is shown that the judgment of acquittal in the previous charge necessarily involves an acquittal of the latter charge – In the instant case, acquittal of other partner in a trial u/S 138 of the Act of 1881 is inconsequential to the facts of the present case – Revision dismissed.**

(Para 7 & 8)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 – दोहरा संकट – आवेदक के विरूद्ध धारा 420, 467, 468, 471 व 120 बी भा.दं.सं. के अंतर्गत आरोप विरचित करने के आदेश के विरूद्ध तथा आवेदक/अभियुक्त के धारा 227 दं.प्र.सं. के अंतर्गत आवेदन की खारिजी के विरूद्ध पुनरीक्षण – यह अभिकथित किया गया था कि रूपये उधार लेने हेतु आवेदक के साथ फर्म के एक अन्य भागीदार ने प्रतिनिधित्व किया कि फर्म के सभी भागीदारों ने इसके लिए सहमति दी है परंतु बाद में परिवादी को पता चला कि फर्म अस्तित्व में नहीं थी

– अभिनिर्धारित – अभिलेख दर्शाता है कि पूर्व में अन्य भागीदार के विरूद्ध परक्राम्य लिखत अधिनियम 1881 की धारा 138 के अंतर्गत अभियोजन दर्ज किया गया था जिसमें उसे आरोप से दोषमुक्त किया गया किंतु उक्त से वर्तमान आवेदक के कुकर्म माफ नहीं होते जो कि *प्रथम दृष्ट्या* स्पष्ट है – आगे अभिनिर्धारित – दोहरे संकट से संबंधित विधि भली–भांति स्थापित है जिसके अनुसार पूर्वतर प्रकरण के साथ ही बाद वाले प्रकरण में भी अपराधों के घटक समान होने चाहिए और न कि भिन्न – यह सुनिश्चित करने के लिए परीक्षण कि क्या दोनों अपराध समान हैं, अभिकथनों की पहचान नहीं बल्कि अपराध के घटकों की पहचान है – प्राग दोषमुक्ति का अभिवाक् सिद्ध नहीं होता जब तक कि यह दर्शाया नहीं जाता कि पूर्ववर्ती आरोप में दोषमुक्ति का निर्णय आवश्यक रूप से बाद के आरोप की दोषमुक्ति समाविष्ट करता है – वर्तमान प्रकरण में, अन्य भागीदार की अधिनियम 1881 की धारा 138 के अंतर्गत विचारण में दोषमुक्ति, वर्तमान प्रकरण के तथ्यों के लिए अप्रासंगिक है – पुनरीक्षण खारिज।

***B. Partnership Act (9 of 1932), Section 42(c) – Applicability* – Provisions of Section 42(c) does not confer any immunity from criminal prosecution where for legal purposes, the firm is dissolved but for deriving any unlawful benefit, the firm is shown to be in existence.**

(Para 9)

ख. भागीदारी अधिनियम (1932 का 9), धारा 42(सी) – प्रयोज्यता – धारा 42 (सी) के उपबंध, दाण्डिक अभियोजन से कोई उन्मुक्ति प्रदत्त नहीं करते जहां विधिक प्रयोजनों हेतु फर्म विघटित है किंतु किसी विधि विरूद्ध लाभ व्युत्पन्न करने हेतु फर्म को अस्तित्व में दर्शाया गया है।

***C. Practice and Procedure – Revisional Jurisdiction – Scope* – Held – Marshalling of evidence is beyond the scope of revisional jurisdiction of this Court, which is inherently limited to the enquiry into material available against the accused persons to see that ingredients of offences charged against them are made out or not.**

(Para 10)

ग. पद्धति एवं प्रक्रिया – पुनरीक्षण अधिकारिता – परिधि – अभिनिर्धारित – साक्ष्य का क्रमबंधन इस न्यायालय की पुनरीक्षण अधिकारिता की परिधि से परे है जो कि अंतर्निहित रूप से अभियुक्तगण के विरूद्ध उपलब्ध सामग्री की जांच तक सीमित है यह देखने के लिए कि उनके विरूद्ध आरोपित अपराधों के घटक बनते है अथवा नहीं।

Cases referred:

(2012) 7 SCC 621, (2009) 16 SCC 605.

S.K. Tiwari, for the applicant in Cr.R. No. 1015/2015.
Omprakash Singhal, for the applicant in Cr.R. No. 1052/2015.
S.S. Dhakad, Addl. P.P. for the non-applicant No. 1/State.
Mukesh Sharma, for the non-applicant No. 2/Complainant.

O R D E R

S.K. Awasthi, J.:- This Order shall govern the outcome of Criminal Revision 1015/2015 and Criminal Revision No. 1052/2015, as both the matters are arising out of common facts and impugned Order.

2. For the sake of convenience, the facts in **Criminal Revision No. 1015/2015** are discussed herein below.

This Revision application preferred under Section 397 read with Section 401 of Cr.P.C. takes exception to the order dated 22.09.2015 passed by VIII Additional Sessions Judge, Gwalior, whereby the charges under Sections 420, 467, 468, 471 and Section 120B of IPC have been framed against the present applicant. Vide the same order, the application preferred by the present applicant under Section 227 of Cr.P.C has also been rejected.

3. The facts in brief are that the complainant submitted a written grievance to the Police Station Kotwali, District Gwalior, on 27.05.2011, that the present applicant who is one of the partners in the firm, Gangaram Bhagwandas, along with Yogesh Gupta, who is the another partner, have represented that the said firm is in existence and that, all the partners have consented for borrowing money from the complainant. However, it was later on discovered by the complainant that one of the partners to the said firm, Gomti Bai, expired on 06.09.2004, even though this fact was never revealed by the remaining partners of the firm although the credit facility from the respondent No. 2 was secured by posturing that the said firm legally exists.

4. The learned counsel for the applicant submitted that the Trial Court committed error in framing of charges against the present applicant because the present applicant had no involvement in the business transaction of the said firm and the same were solely carried out by Yogesh Gupta. Apart from it, it was submitted that there is no iota of evidence available against the present applicant that may even remotely hint towards any involvement. While advancing these arguments, the learned counsel for the applicant has also placed reliance on provisions of the Indian Partnership Act, 1932 (in short, 'Act of 1932); more particularly, Section 42 (c) of the Act of 1932, to submit that statutorily a partnership firm gets dissolved upon death of a partner and therefore, upon death of Gomti Bai on 06.09.2004, the partnership firm stood dissolved and no penalty can be fastened against the present applicant as a partner of the said firm. It was also argued that the present complainant had also filed a complaint under Section 138 of the Negotiable Instruments Act, 1882 (for short, the 'Act of 1882'), in which the order of acquittal was passed on 23.05.2011. The complainant has not preferred any appeal against the said order of acquittal and therefore, it would be a travesty of justice if on the same facts, a second bout of litigation is permitted to be initiated against the present applicant.

5. *Per Contra,* learned counsel for the respondents submitted that there is sufficient material available against the present applicant and no one can be permitted to take advantage of their own wrongs. The applicant having complete knowledge about the borrowings made by the said firm cannot simply shirk away from his responsibility by citing a bare provision of the statute. Therefore, the application filed by the applicant deserves to be rejected.

6. Having considered the rival contentions of the parties and having carefully examined the record, this Court is of the considered view that the instant revision application is misconceived.

7. It is borne out from the record that the complainant had filed a complaint under Section 138 of the Act of 1882; however, it is pertinent to point out that the said prosecution was lodged against Yogesh Gupta and the same does not condone the misdeeds of the present applicant which are *prima facie* visible. In any case, the law relating to Double Jeopardy is well settled and it would be relevant to reproduce the observations of the Hon'ble Apex Court in the case of *Sangeetaben Mahendrabhai Patel v. State of Gujarat,* (2012) 7 SCC 621, wherein it was held as under: -

> *"33. In view of the above, the law is well settled that in order to attract the provisions of Article 20(2) of the Constitution i.e. doctrine of autrefois acquit or Section 300 CrPC or Section 71 IPC or Section 26 of the General Clauses Act, the ingredients of the offences in the earlier case as well as in the latter case must be the same and not different. The test to ascertain whether the two offences are the same is not the identity of the allegations but the identity of the ingredients of the offence. Motive for committing the offence cannot be termed as the ingredients of offences to determine the issue. The plea of autrefois acquit is not proved unless it is shown that the judgment of acquittal in the previous charge necessarily involves an acquittal of the latter charge."*

8. It is clear from the above that the contention regarding decision in earlier trial with respect to offence punishable under Section 138 of the Act of 1882, is inconsequential to the facts of the present case.

9. Now, adverting to the submission of applicability of Section 42 (c) of the Act of 1932, suffice it to observe that the said provision does not confer any immunity from criminal prosecution where for legal purposes; the firm is dissolved, but for deriving any unlawful benefit, the firm is shown to be in existence. In any case, the prosecution is not proceeding on the path that a partner is vicariously liable for the deeds of the partnership firm whereas the prosecution has discussed about the individual conduct of each Accused Person for filing of the charge sheet. Thus, on the strength of Section 42 (c) of the Act of 1932, no indulgence can be shown by this Court.

10. The contention of the learned counsel for the applicant is that there is no iota of evidence available against the present applicant. It is observed that marshalling of evidence is beyond the scope of revisional jurisdiction of this Court, which is inherently limited to the enquiry into material available against the accused persons to see that the ingredients of the offences charged against them are made out or not. In order to further fortify this observation, the judgment of the Hon'ble Supreme Court in the case of *Chitresh Kumar v. State,* (2009) 16 SCC 605, is pertinent, the relevant portion of which is reproduced hereinbelow: -

> *"25. It is trite that at the stage of framing of charge, the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclose the existence of all the ingredients constituting the alleged offence or offences. For this limited purpose, the court may sift the evidence as it cannot be expected even at the initial stage to accept as gospel truth all that the prosecution states. At this stage, the court has to consider the material only with a view to find out if there is ground for "presuming" that the accused has committed an offence and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction. (See Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya [(1990) 4 SCC 76 : 1991 SCC (Cri) 47] .)*
>
> *26. In Som Nath Thapa [(1996) 4 SCC 659 : 1996 SCC (Cri) 820] a three-Judge Bench of this Court explained the meaning of the word "presume". Referring to dictionary meanings of the said word, the Court observed thus: (SCC p. 671, para 32)*
>
> *"32. ... if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have [Ed.: The words "might have" were emphasised in the original.] committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has [Ed.: Emphasis in original.] committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage.*
>
> *(emphasis supplied)"*

11. Taking this view of the matter, both the revision applications (Criminal Revisions No.1015/2015 and 1052/2015) are hereby dismissed.

Revision dismissed

I.L.R. [2018] M.P. 608
CRIMINAL REVISION

Before Mr. Justice Anurag Shrivastava

Cr.R. No. 2345/2017 (Jabalpur) decided on 5 January, 2018

MANOHAR RAJGOND & ors. …Applicants
Vs.
STATE OF M.P. …Non-applicant

Penal Code (45 of 1860), Section 304-B & 498-A and Dowry Prohibition Act (28 of 1961), Section 3 & 4 – Quashing of Charge – Dying Declaration – **Wife died due to burn injuries within seven years of marriage – Offence registered against husband, mother-in-law and Jeth – Held – In dying declaration, wife although stated that she caught fire accidentally while she was cooking food but later on, when her parents arrived at hospital, she informed them that the applicants set her ablaze and she has given earlier dying declaration under the influence and threat of applicants – Parents of deceased and other witnesses have also stated that deceased was subjected to cruelty by applicants for demand of dowry – Probative value of earlier dying declaration would be considered on merits after completion of trial – Further held – At the stage of framing of charge, Trial Court is not expected to consider and scrutinize the material on record meticulously – If Judge forms an opinion that there is ground for presuming that accused has committed the offence, he may frame the charge – In the instant case, *prima facie* case is made out against the applicants – No illegality committed by trial Court – Revision dismissed.**

(Para 7 & 9)

दण्ड संहिता (1860 का 45), धारा 304–बी व 498–ए एवं दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 3 व 4 – आरोप अभिखंडित किया जाना – मृत्युकालिक कथन – विवाह के सात वर्षों के भीतर जलने की क्षतियों के कारण पत्नी की मृत्यु हुई – पति, सास एवं जेठ के विरूद्ध अपराध पंजीबद्ध किया गया – अभिनिर्धारित – मृत्युकालिक कथन में यद्यपि पत्नी ने कथन किया है कि उसे खाना पकाते समय दुर्घटनापूर्वक आग लगी परंतु बाद में, जब उसके माता–पिता चिकित्सालय पहुँचे, उसने उन्हें सूचित किया कि आवेदकगण ने उसे आग लगायी और उसने अपना पूर्वतर मृत्युकालिक कथन आवेदकगण के असर एवं धमकी के अधीन दिया है – मृतिका के माता–पिता एवं अन्य साक्षियों ने भी कथन किया है कि आवेदकगण द्वारा मृतिका के साथ दहेज की मांग हेतु क्रूरता का व्यवहार किया गया था – पूर्वतर मृत्युकालिक कथन के प्रमाणक मूल्य का गुणदोषों पर विचार, विचारण पूर्ण होने के पश्चात् किया जायेगा –

आगे अभिनिर्धारित – आरोप विरचित किये जाने के प्रक्रम पर, विचारण न्यायालय से अभिलेख की सामग्री पर विचार तथा बारीकी से छानबीन की अपेक्षा नहीं है – यदि न्यायाधीश राय बनाता है कि यह उपधारणा करने के लिए आधार है कि अभियुक्त ने अपराध कारित किया है, वह आरोप विरचित कर सकता है – वर्तमान प्रकरण में, आवेदकगण के विरूद्ध प्रथम दृष्ट्या प्रकरण बनता है – विचारण न्यायालय द्वारा कोई अवैधता कारित नहीं की गई – पुनरीक्षण खारिज।

Case referred:

(2012) 9 SCC 460.

Vikash Mishra and *Durgesh Pandey,* for the applicants.
Aditya Pyasi, G.A. for the non-applicant/State.

O R D E R

Anurag Shrivastava, J. :- The present revision under Section 397/401 of Cr.P.C preferred by applicants against the order dated 31.07.2017 passed by First Additional Sessions Judge, Narsinghpur (M.P.) in S.T. No.163/2017 whereby the learned Judge has framed the charge of offences punishable under Sections 304-B, 498-A of IPC and Section 3 & 4 of Dowry Prohibition Act, against the applicants.

2. The case of the prosecution in brief is that the applicant No.3 is husband of deceased Smt.Jayshree, applicant No.2 is her mother-in-law and applicant No.1 is elder brother of applicant No.3. The marriage of deceased was solemnized on 06.06.2010 and after marriage the deceased was living with applicants in her marital home at village Bandhi Pithehara. It is alleged that deceased was subjected to cruelty by the applicants in connection with demand of dowry. On 24.03.2017 deceased sustained burn injuries at her marital home, she was brought to the hospital for treatment where her dying declaration was got recorded and subsequently during treatment she succumbed to her injuries on 31.03.2017. The police registered an offence against the applicants and after usual investigation submitted charge-sheet for the offences punishable under Sections 304-B, 498-A of IPC and Section 3 & 4 of Dowry Prohibition Act.

3. The trial Court by passing impugned order dated 31.07.2017 framed the charge of offence punishable under Sections 304-B, 498-A of IPC and Section 3 & 4 of Dowry Prohibition Act against the applicants and proceeded for trial. Against this order the applicants have preferred present revision.

4. It is submitted by learned counsel for the applicants that the applicants have been falsely implicated in this offence. They have never made any demand of dowry or practiced cruelty with the deceased. In her dying declaration the deceased has categorically stated that she had sustained burn injuries accidentally while she was cooking food. She has not alleged anything against the applicants regarding demand of dowry or cruel treatment meted out by her. Later on, under influence of the parents

the police has registered the offence against the applicants. There is substantial delay in lodging the report of offence. The delay is not explained. The applicants No.1 and 2 are living separately from the deceased. The trial Court has committed error in framing the charge of alleged offence against the applicants. No prima facie, case is made out against them.

5. Learned counsel for the State has opposed the prayer and submitted that there is ample evidence available on record to show the involvement of the applicants in commission of crime. The trial Court has rightly framed the charge against the present applicants.

6. Heard rival submission of learned counsel for the parties and perused the copy of challan filed in M.Cr.C. No.13466/2017.

7. It is not denied that the deceased was wife of applicant No.3. Applicant No.2 is her mother-in-law and applicant No.1 is her Jeth. They are husband and relatives of husband. It is also not disputed that the death of deceased was caused by burn injuries within seven years of marriage. After the incident the deceased was brought to the hospital by her husband and applicants. In her dying declaration although, she had stated that she caught fire accidentally while she was cooking food, but later on, when her parents arrived at the hospital she had informed them that the applicants had set her ablaze. She had given earlier dying declaration under the influence and threat of applicants. The parents and other witnesses have also stated that the deceased was subjected to cruelty by applicants in connection with demand of dowry. Thus, there is sufficient evidence to give rise a strong suspicion against the applicants for commission of alleged offence. The probative value of earlier dying declaration of deceased could be considered on merits after completion of trial. This is settled law that at the stage of framing of charge the trial Court is not expected to consider and scrutinize the material on record meticulously. If the judge forms an opinion that there is ground for presuming that the accused has committed the offence the judge may frame the charge.

8. Hon'ble Apex Court in case law *Amit Kapoor Vs. Ramesh Chander* (2012) 9 SCC 460 *in para 17* observed as under:-

> "Framing of a charge is an exercise of jurisdiction by the trial Court in terms of Section 228 Cr.P.C, unless the accused is discharged under Section 227 Cr.P.C. Under both Sections 227 and 228 Cr.P.C, the Court is required to consider the "record of the case" and the documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the Court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section concerned exists, then the Court would be right in presuming that there is ground to proceed against the accused

> and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the Court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction, It may even be weaker than a prima facie case."

Later on, in para 19 Hon'ble Apex Court further observed as under:-

> "at the initial stage of framing of a charge, the Court is concerned not with proof but with strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the Court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage".

9. In view of the evidence and material collected during investigation against the applicants, the prima facie, case of offence punishable under Sections 304-B, 498-A of IPC and Section 3 & 4 of Dowry Prohibition Act is made out against the applicants. The trial Court has committed no illegality in framing of charges of alleged offence against the applicants by passing the impugned order.

10. Thus, I do not find any merits in present revision and is hereby dismissed.

Revision dismissed.

I.L.R. [2018] M.P. 611
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Atul Sreedharan

M.Cr.C. No. 3669/2009 (Jabalpur) decided on 26 October, 2017

V.B. SINGH & ors. …Applicants
Vs.
RAJENDRA KUMAR GUPTA & anr. …Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 197 – Cognizance – Sanction **– Held – If it is apparent to Court that complainant himself has stated that petitioners had exercised their powers with malafide intent, taking of cognizance by the Court in absence of a sanction u/S 197 Cr.P.C. is not proper – Trial Court ought to have directed the complainant to secure sanction from the authority u/S 197 CrPC and thereafter present the complaint – Sanction u/S 197 CrPC was essential as the record shows that petitioners were acting in their official capacity – Complaint does not disclose a single specific allegation against petitioners, same being omnibus in nature – Complaint case quashed – Petition allowed.**

(Para 7 & 11)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 197 – संज्ञान – मंजूरी – अभिनिर्धारित – यदि न्यायालय को यह स्पष्ट है कि परिवादी ने स्वयं कथन किया है कि याचीगण ने कदाशय के साथ अपनी शक्तियों का प्रयोग किया था, दण्ड प्रक्रिया संहिता की धारा 197 के अंतर्गत मंजूरी की अनुपस्थिति में न्यायालय द्वारा संज्ञान लिया जाना उचित नहीं है – विचारण न्यायालय को परिवादी को दण्ड प्रक्रिया संहिता की धारा 197 के अंतर्गत प्राधिकारी से मंजूरी प्राप्त करने हेतु निदेशित करना चाहिए था एवं तत्पश्चात् परिवाद प्रस्तुत करना था – दण्ड प्रक्रिया संहिता की धारा 197 के अंतर्गत मंजूरी आवश्यक थी क्योंकि अभिलेख यह दर्शाता है कि याचीगण अपनी शासकीय हैसियत में कार्य कर रहे थे – परिवाद, बहुप्रयोजनीय प्रकृति का होने के कारण, याचीगण के विरूद्ध कोई एक विनिर्दिष्ट अभिकथन प्रकट नहीं करता – परिवाद प्रकरण अभिखंडित – याचिका मंजूर।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 204 – Warrant Case – Issue of Non-Bailable Warrant* – Held – Merely because the offense for which, presence of accused is required is triable as a warrant case, issuance of non-bailable warrant at the first instance is not justified – There was no pressing or compelling reasons before the Trial Court to secure presence of the accused by way of a non-bailable warrant – Not a single line has been written by the lower Court justifying the issuance of non-bailable warrant at the first instance, reflecting an application of mind – All accused persons are public servants occupying posts of responsibility and dignity – Even if a *prima facie* case is apparent on records, the Court ought to have issued summons u/S 61 CrPC instead of exposing them to threat of an arrest – It is completely unjustified in the eyes of law.**

(Para 8 & 9)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 204 – वारंट प्रकरण – गैर–जमानतीय वारंट का जारी किया जाना – अभिनिर्धारित – मात्र इसलिए कि वह अपराध जिसके लिए अभियुक्त की उपस्थिति अपेक्षित है, वारंट प्रकरण के रूप में विचारणीय है, प्रथम बार में गैर–जमानतीय वारंट जारी किया जाना न्यायोचित नहीं है – विचारण न्यायालय के समक्ष गैर–जमानतीय वारंट के माध्यम से अभियुक्त की उपस्थिति सुनिश्चित करने हेतु कोई दबाव बनाने वाले या बाध्यकारी कारण नहीं थे – मस्तिष्क का प्रयोग दर्शाते हुए प्रथम बार में गैर–जमानतीय वांरट जारी करने को न्यायोचित ठहराते हुए विचारण न्यायालय द्वारा एक पंक्ति भी लिखित नहीं की गई है – सभी अभियुक्तगण लोक सेवक हैं जो कि जिम्मेदारी एवं गरिमा के पदों को धारण किये हुये हैं – यद्यपि अभिलेखों पर प्रथम दृष्ट्या प्रकरण स्पष्ट है, न्यायालय को उन्हें गिरफ्तारी की आशंका प्रकट करने की बजाय दण्ड प्रक्रिया संहिता की धारा 61 के अंतर्गत समन जारी करना चाहिए था – विधि की दृष्टि में यह पूर्णतः अनुचित है।

Prakash Gupta, for the applicants.
Umesh Shrivastava, for the non-applicant No. 1.

O R D E R

Atul Sreedharan, J:- The present petition has been filed by the petitioners herein aggrieved by the order dated 26.6.2006 passed in Complaint Case No.2862/2006 by virtue of which cognizance has been taken against the petitioners herein for having committed offences under sections 417, 418, 427/120-B, 451, 468 and 471 of IPC. Thereafter, the learned Court of the Judicial Magistrate First Class, Rewa, has straight away issued non-bailable warrants against the petitioners and two others at the very first instance without resorting to procedure under section 204 read with section 61 Cr.P.C and without giving any reasons as provided under section 87 Cr.P.C.

2. The brief facts which need to be referred to in this case are that the Respondent No.1 is a resident of a house bearing no. 17/17, situated on Kothi Road, Tahsil Huzur, Police Station Civil Lines, Rewa, and the said house is on land bearing Arazi No.416 admeasuring 2639 sq.ft. The house is stated to have been constructed by the father of Respondent No.1 after having purchased the same from the previous land lord Shanti Prasad Pradhan and along with the said land, land being Arazi No.206 was purchased from Major Shiv Prasad Singh in the year 1957 on which a house was constructed. It is further contended by the Ld. Counsel for Respondent No.1 that all the maps were approved by the appropriate authorities and thereafter the house was constructed upon it. Ld. Counsel for Respondent No.1 has further stated that on 2.8.2005, he received a notice from the Court of the Tahsildar, Rewa, to the effect that 75 sq.m. of land had been encroached upon by the Respondent No.1. The Respondent No.1 has alleged that the said notice was prepared and sent to him upon a false report given by the then Revenue Inspector Mr. B. P. Dwivedi who is petitioner no.5 in the instant petition. The notice required the Respondent No.1 to appear in the Court of the Tahsildar on 3.8.2005 to which the Respondent No.1 states that he had given his reply to the said notice on 4.8.2005.

3. The Respondent No.1, who is the original complainant in this case upon whose complaint the proceedings were initiated against the petitioners herein and the quash of which is sought by the petitioners in this petition, filed a writ petition before this court being Writ Petition No.8032/2005 which was disposed of vide order dated 8.8.2005 by which this court had directed the respondent no.2 in that case i.e. the Commissioner, Municipal Corporation, Rewa, to afford an opportunity of hearing to the Respondent No.1 herein and pass a cogent and germane reasoned order. Thereafter the order to remove the encroachment was passed by the Court of Tahsildar Nazul, Rewa in Case no.34/A-68/04-05 by which the Respondent No.1 was fined with Rs.500/- for having encroached upon 75 sq.m. of municipal land and was directed to remove the encroachment from the said land within 24 hours voluntarily, else the same would be removed by the State Authorities.

4. On 28.8.2005 the complainant states that poclain machines were brought to the area and were demolishing constructions of others, but he was not unduly concerned on account of the order that was passed by the High Court as mentioned herein above and also the fact that the Respondent No.1 had preferred a civil suit for permanent injunction against the Municipal Corporation to injunct it from interfering with his peaceful possession of the property in question. The aforesaid notwithstanding, the Respondent No.1 alleges that the petitioners herein had colluded with each other and out of angst against the Respondent No.1 for having taken recourse to legal redress, demolished parts of this house and a flour mill run by his son thereby causing loss of about Rs.4.5 lacs. The statements under section 200 Cr.P.C. of respondent nos. 1 and 2 other witnesses, one of whom is his own son and the other a friend were recorded by the trial court on 30.12.2005 and 27.1.2006. The Respondent No.1 has reiterated all the allegations he has levelled in his complaint in his statement under Section 200 Cr.P.C. It is relevant to state here that the complaint and the statements under section 200 Cr.P.C. only levelled omnibus allegations against all the petitioners herein that they out of malice, misused their powers and destroyed the house of the Respondent No.1. There is no specific allegation against each of the accused persons/petitioners as to how they acted in a manner which could be said to have fulfilled the ingredients of the offences of which the learned court below had taken cognizance of.

5. Heard the Ld. Counsel for the parties and perused the documents filed along with the petition including the complaint filed by the Respondent No.1. The Ld. Counsel for the petitioners has submitted that the very initiation of proceedings against the petitioners is in gross violation of the law and an abject abuse of process. He has attacked the impugned order on the ground that the learned Judicial Magistrate First Class has passed the order taking cognizance and issuing non-bailable warrants in the most cavalier and casual manner without any adherence to the law of land as enunciated by the various judgments of the Supreme Court and this Court wherein it has always been stated that cognizance of offences against persons and issuance of process must not be resorted to lightly by the Trial Court and the same should be resorted to only upon the subjective satisfaction of the Trial Court that the allegations in the complaint and the evidence adduced under sections 200 and 201 Cr.P.C. make out a triable issue warranting issuance of process under section 204 Cr.P.C. The Ld. Counsel for the Petitioners has taken this court through the entire complaint as filed by the Respondent No.1 and has submitted that there are no specific allegations against any of the petitioners herein. The allegations are extremely generalized, vague and omnibus in nature and even if the same is taken to be true and correct for the sake of an argument, they do not constitute an offence under the sections in which the learned court below has taken cognizance of.

6. The Ld. Counsel for Respondent No.1, on the other hand, has submitted that at the time of removal of the encroachment the Petitioner No.1 was present at the scene of occurrence without any authority. Secondly, he has argued that the protection

under section 197 Cr.P.C. is only available when the petitioners prove that they were on duty and had acted under the colour of law and lastly in all fairness, it must be stated that Ld. Counsel for Respondent No.1 after having gone through the record of the case intently including the complaint and the statements under sections 200 and 201 Cr.P.C, has admitted that there are no specific allegations with regard to particular roles played by the petitioners herein which would have constituted the aforementioned offences.

7. In this case, it is glaring that the learned court below has taken cognizance of the offences in the absence of a sanction under section 197 Cr.P.C, notwithstanding an admission by the Respondent No.1 himself in the complaint filed by him that the petitioners herein were guilty of a malafide exercise of their powers which resulted in the destruction of his house. Once it became apparent to the learned court below that the complainant himself has stated that the petitioners had acted in the exercise of their powers, the allegedly malafide intent with which the same was exercised does not legitimize the taking of cognizance in the absence of a sanction under section 197 Cr.P.C. Once it becomes apparent that the *actus reus* attributable to the petitioners was on account of the powers vested upon them under the law and by authority of the State and upon a nexus between their actions and their official duties becoming apparent ex facie, the learned Magistrate ought not to have proceeded any further without the appropriate sanction from the sanctioning authority. Since it was not disputed by the complainant himself that the petitioners were acting in discharge of their official powers, the learned trial court ought to have directed the complainant to secure sanction under section 197 Cr.P.C. and thereafter present the complaint.

8. The act of the learned trial court of having issued warrants at the very first instance in a case like this cannot be approved of by this court. Section 204 Cr.P.C permits the issuance of a warrant in a case which is a warrant's case as a discretion to be exercised by the Magistrate and not as a statutory mandate. Merely because the offences for which the presence of the accused is required are offences which are triable as a warrant's case does not justify the issuance of non-bailable warrants at the first instance. The reason why section 204 sub section (1) clause (b) Cr.P.C gives the discretion of issuing a warrant in a warrant's case to the Magistrate can be understood in its true perspective when the same is read in conjunction with section 87 of the Cr.P.C whereby, the Magistrate is empowered to issue a warrant in lieu of, or in addition to, summons. The said section empowers the court with a discretion to issue a warrant of arrest in a case where such a court is empowered to issue summons for the appearance of any person, after recording its reasons in writing in two situations: **(a)** either before the issuance of such summons or after its issuance but before the time fixed for the appearance of such person, the court sees reasons to believe that such person has absconded or will not obey summons or **(b)** where the person so summoned fails to appear and it is established that the summons have been duly served upon him/her in time and no reasonable excuse is offered to such failure to

appear, pursuant to the issuance of summons. Section 87 applies equally to both an accused and a witness or to secure the presence of any person whose appearance is required by the trial court in any capacity. The learned trial court must always bear in mind that the personal liberty of a person must never be trifled with without compelling reasons, based upon circumstances and situations which would justify such curtailment of personal liberty. In a complaint case such as the present one, in which the presence of the accused person is required after taking cognizance and having appreciated the statement of the complainant and the witnesses, there was no pressing or compelling reasons before the Trial Court to secure the presence of the accused by way of a non-bailable warrant. Not a single line has been written by the learned court justifying the issuance of a non-bailable warrant at the first instance reflecting an application of mind o its part which disclosed an apprehension, doubt or an opinion that without the issuance of the non-bailable warrant, the presence of the accused person to stand trial was not possible.

9. In the instant case, all the accused persons were public servants occupying posts of responsibility and dignity. Even if prima facie it appeared to the learned trial court that there was enough material on record to hold a *prima facie* view that they had committed the offence, it ought to have issued summons under section 61 Cr.P.C instead of exposing them to the threat of an arrest by issuing a non-bailable warrant, which in the facts and circumstances of this case appears completely unjustified in the eyes of the law.

10. As regards the civil suit that was filed by Respondent No.1, the same was dismissed, against which the Respondent No.1 preferred an appeal and the same was also dismissed vide order dated 6.10.2016 in First Appeal No.30-A/15 passed by the court of the learned First Additional District Judge Rewa, which upheld the dismissal of the civil suit filed by the Respondent No.1 seeking a permanent injunction against the Municipal Corporation from removing the encroachment of the Respondent No.1.

11. Thus, on the basis of what has been argued herein above, and the fair admission by the Ld. Counsel for Respondent No.1 that the complaint as a whole does not level a single allegation which is specific to the petitioners, the same being omnibus in nature and the fact that sanction under section 197 Cr.P.C. was essential in this case as the preponderant material on record discloses that the Petitioners were acting in their official capacity and lastly, the entire complaint and the evidence under sections 200 and 201 Cr.P.C having grossly failed to disclose the commission of any offence by the petitioners herein, compliant case no.2862/2006 pending before the court of learned JMFC Rewa against the petitioners is quashed.

Application allowed.